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ARTICLES

NOTE

ARTICLES

NEURO-EXCLUSION AND THE FUTURE OF INCLUSION

DR. ANGÉLICA GUEVARA*

Abstract

As evidenced by record-breaking suicide rates and increased diagnoses of depression and anxiety, America is grappling with an ongoing mental health crisis that is having a disproportionately devastating effect on workforce stability. Through an examination of the pervasive yet often overlooked phenomenon that I coin neuro-exclusion—the systemic marginalization of individuals with non-apparent disabilities rooted in altered brain function— this Article highlights how conditions such as depression and anxiety are frequently trivialized and hierarchized within societal and workplace contexts, leading to employment discrimination. Despite the neurobiological basis of these conditions and their profound impacts on functioning, they are not as commonly associated with neurodiversity as autism and intellectual disabilities. If left untreated, non-apparent conditions like depression and anxiety can become disabling and contribute to a broader disability hierarchy that fosters neuro-exclusion in the workforce by segregating individuals based on the perceived severity and appearance of their disabilities.

Through a social model lens, this Article emphasizes that societal structures, rather than individual impairments, often impose limitations, arguing that dismantling stereotypes and ability hierarchies is essential for genuine inclusion. Laws and policies can be used to jumpstart this paradigm shift marked by the normalization of accommodations such as job coaches, flexible work arrangements, and inclusive hiring practices, as well as increased use of community-based services and neurodiversity workforce intermediaries. This comprehensive approach not only advances social justice and dignity but also offers tangible business benefits: enhanced innovation, greater productivity, employee loyalty, and competitive advantage. Ultimately, normalizing mental health accommodations and challenging neuro-exclusion will forge a more equitable, resilient workforce that fully harnesses the diverse potential of human abilities.

While legal frameworks like the Americans with Disabilities Act (ADA) provide some measure of protection, they have not been enough; real change depends on proactive employer engagement, education, and the redesign of workplace norms to celebrate human variation. Laws and policies that promote the integration of universal design, inclusive interviewing, and collaborative support networks enable organizations to foster environments where all forms of neurodiversity—apparent and non-apparent—are valued equally.

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I. INTRODUCTION

The brain of an individual who is neurodiverse functions differently from that of an individual with a typical brain. Examples of neurodiverse individuals include, but are not limited to, people with learning disabilities, autism, Down syndrome, attention-deficit/hyperactivity disorder (ADHD), depression, anxiety, schizophrenia, and post-traumatic stress disorder (PTSD). As non-apparent (i.e., not readily observable) disabilities associated with brain function, however, depression and anxiety are not always recognized as disabilities. Individuals with these mental health conditions are subject to what this Article terms *neuro-exclusion*—i.e., the systemic marginalization of individuals with non-apparent disabilities rooted in altered brain function. Neuro-exclusion operates to the detriment of neurodiverse individuals by creating a hierarchy among individuals with disabilities. This hierarchy seeps into the workforce, often preventing neurodivergent individuals from leading flourishing lives.

In the pursuit of true workplace equity, this Article is intended to reach employers, legal academics, and the legislature, as it explores an understudied form of employment discrimination—the exclusion of individuals with non-apparent disabilities from the workplace—and advances a business case to create laws and policies that will help in hiring and retaining people with disabilities in the workforce as part of the future of disability law.[1] Ultimately, employment in terms of dignity for people with disabilities means providing them with opportunities to participate in the workforce in a respectful and inclusive manner. It affirms their value as individuals, supports their independence, and allows them to contribute to society, thereby enhancing their self-esteem and social integration. Employment that recognizes and accommodates their abilities promotes equality, reduces stigma, and affirms their right to be treated with respect and dignity, which creates a positive self-identity.[2]

In a more practical sense, neuro-exclusion operates to the detriment of employers, and there are prudential, business-oriented reasons for

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[1] The author is providing a current practical but acknowledges that:

> The antidiscrimination approach exemplified by the ADA has not come close to achieving full employment and community integration for people with disabilities, and there is no reason to expect that it ever will. Although the ADA remains exceptionally important, social welfare interventions will also be necessary to achieve those goals. The important tasks for the disability rights movement in the twenty-first century will be, first, to confront honestly the promise and limitations of an antidiscrimination approach and, second, to craft social welfare laws and policies that address the movement's own critique of social welfare responses to disability.

Samuel R. Bagenstos, The Future of Disability Law, 114 YALE L.J. 1, 83 (2004).

[2] David Baldridge, Joy Beatty, Alison Konrad & Mark Moore, *People with Disabilities: Identity, Stigmatization, Accommodation, and Intersection with Gender and Ageing in Effects on Employment Outcomes*, in *THE OXFORD HANDBOOK OF DIVERSITY IN ORGANIZATIONS* 1 (Regine Bendl et al. eds., 2016) (explaining that exclusion and stigmatization create barriers to developing a positive disability identity).

employers to make their workplaces suitable for neurodivergent individuals. A talented and motivated workforce provides a competitive advantage, enabling organizations to adapt quickly to market changes and stay ahead of competitors. Fully engaged and motivated employees tend to perform better and contribute more effectively to company goals,[3] leading to increased productivity for the organization as a whole. Harnessing diverse talents and perspectives also encourages innovation and creative problem-solving, driving the organization forward. In particular, neurodiverse employees enhance a company's potential for success [4] by contributing unique perspectives that foster a diverse mindset and drive innovative solutions. Because they have had to navigate an ableist society, people with neurodiverse minds often have finely-tuned problem-solving abilities that are an asset in an employment setting. For example, in one instance, a company saved up to forty million dollars due to a neurodiverse employee's problem-solving abilities, which allowed them to resolve a technical issue.[5] This indicates that hiring a neurodiverse teammate can also lead to significant productivity gains by as much as thirty percent.[6]

Investing in and maximizing human potential helps the individual's actualization, promotes organizational success, and also contributes to a more positive and equitable workplace. Furthermore, it is a good business practice for employers to highlight and incorporate social support.[7] Supporting employee growth not only boosts job satisfaction—reducing turnover and associated costs—but also contributes to building a positive workplace culture characterized by inclusivity, dynamism, and resilience. In sum, companies that focus on creating positive social impact and enhancing the quality of life for their employees reduce turnover rates,

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[3] Alan M. Saks, *Antecedents and Consequences of Employee Engagement* 21 J. MANAGERIAL PSYCH. 600, 600–19 (2006) (finding that job and organizational engagement mediate the relationships between antecedents and job satisfaction, organizational commitment, intentions to quit, and organizational citizenship behavior).

[4] *See* AMANDA KIRBY AND THEO SMITH, *NEURODIVERSITY AT WORK: DRIVE INNOVATION, PERFORMANCE AND PRODUCTIVITY WITH A NEURODIVERSE WORKFORCE* (Kogan Page Publ'rs 2021); *see also* WORLD ECON. F.: Jobs and the Future of Work, *How Neurodiversity in The Workplace Can Drive Business Success*, (Oct. 8, 2024), https://www.weforum.org/stories/2024/10/neurodiversity-neuroinclusion-workplace-business, [https://perma.cc/GKM2-U4JW].

[5] *See* Robert D. Austin & Gary P. Pisano, *Neurodiversity as a Competitive Advantage*, 95 HARV. BUS. REV., 96 (2017) [https://perma.cc/7WEA-LP6R]; *see also* Emily R. Russo, Dana L. Ott, & Miriam Moeller, *Helping Neurodivergent Employees Succeed: Neuroinclusion Will Remain Elusive if Managers Don't Embed Support Activities Throughout the Employee Journey*, MIT SLOAN MGMT. REV., (Summer 2023) ("SAP's neurodiversity program has improved its employer reputation, innovation capabilities, and employee engagement.").

[6] *See* Deb Muller, *Neurodiversity in the Workplace: Rethinking Investigations Processes*, Corp. Compliance Insights (Aug. 30, 2023).

[7] Alan M. Saks, *Antecedents and Consequences of Employee Engagement* 21 J. MANAGERIAL PSYCH. 605 (2006).

increase employee loyalty,[8] and contribute to a positive public perception and reputation of the company.[9]

Building on this understanding, it is key for employers to recognize that supporting neurodiverse employees extends beyond general awareness; it involves actively addressing specific mental health challenges.[10] By doing so, organizations not only promote a more inclusive and compassionate workplace but also reinforce their commitment to social responsibility, ultimately benefiting their workforce, their shareholders, and their broader community.[11]

Part II of this Article explains the laws that govern employers and employees with disabilities. These laws reinforce ableism in society, also known as *exclusionary ableism*.[12] This section also discusses fair employment practices and resources that states have been known to offer employees. Part III describes the phenomenon of *neuro-exclusion*. It provides an overview of the current mental health crisis in the United States and explains the pathophysiology of depression and anxiety to solidify further how depression and anxiety fall into the umbrella term of neurodiversity. In addition, it addresses the "othering" effect that occurs when depression and anxiety are trivialized, leading to *neuro-exclusion* in the workplace. Part IV sets forth the business case for neurodiversity in the workforce, emphasizing the importance of recognizing disability as part of diversity. Part V offers normative recommendations for employers working

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[8] Karen Danna & Ricky W. Griffin, *Health and Well-Being in the Workplace: A Review and Synthesis of the Literature*, 25 J. MGMT. 357, 357–84 (1999).

[9] Chitra Bhanu Bhattacharya, Daniel Korschun & Sankar Sen, *Strengthening Stakeholder–Company Relationships Through Mutually Beneficial Corporate Social Responsibility Initiatives*, 85 J. Bus. Ethics S257, S257–72 (2009).

[10] (There is an interconnectedness of the mind and body. Acknowledging and valuing neurodiversity in the workplace is essential because mental processes directly impact physical well-being and functioning. This Article acknowledges the human dignity of people with disabilities, whether or not they "produce" in the traditional understanding of production seen and accepted in capitalist societies.) *See*, e.g., Louis Ariotti, *Social Construction of Anangu Disability*, 7 AUSTL. J. RURAL HEALTH 216, 219–22 (1999); George S. Gotto IV, *Persons and Nonpersons: Intellectual Disability, Personhood, and Social Capital Among the Mixes of Southern Mexico*, in 1 Disabilities: Insights from Across Fields and Around the World 193, 193–207 (Catherine A. Marshall et al. eds., 2009) (discussing how the Anangu people in Australia and the Mixe people in southern Mexico embrace human variation because they value what any member of their community contributes). (Given the capitalist society established in the United States, this piece describes how the employment sector can create more opportunities and inclusive spaces for people with non-apparent disabilities. Although the Americans with Disabilities Act (ADA) covers temporary disabilities, this article focuses on long-term disabilities rather than temporary conditions.) *See Shields v. Credit One Bank*, N.A., 32 F.4th 1218 (9th Cir. 2022) (holding that a disability need not be permanent for coverage under the ADA).

[11] See Bhattacharya et al., *supra* note 9.

[12] Angélica Guevara & Tania Valdez, *Exclusionary Ableism,* 39 GEORGETOWN IMMIGR. LAW J. 1 (2024) (combining expertise on disability and immigration to coin the term "exclusionary ableism" to describe how people with ableist ideologies create laws that construct the exclusion of people with disabilities while simultaneously perpetuating ableist ideologies).

with prospective and current neurodivergent employees with depression and anxiety. Finally, Part VI presents a select number of employment initiatives in corporate America that highlight the value that neurodiverse individuals bring to the workplace.

II. THE LAW

To fully grasp the employment sector landscape that excludes many people with disabilities, it is essential to understand how disability was constructed and the legal history that accompanies their journey. Beginning with the law, due to the way society has constructed disability, people with disabilities have had to fight to obtain even a modicum of equity in the United States. This fight is made all the more difficult by the persistent view that people with disabilities are inferior under the socially constructed able-bodied standard, a view that continues to be perpetuated and solidified by disability anti-discrimination laws and policies. These laws and policies operate as a stronghold in keeping people with disabilities within a perpetual state of second-class citizenship, beholden to the decision makers known as the gatekeepers[13] who may or may not perform *exclusionary ableism.*[14]

The following brief history of disability anti-discrimination law demonstrates the importance of moving away from an erroneous foundational base that tries to provide reasonable accommodations to employees so they can measure up to an able-bodied standard.[15] Instead, accommodations should be designed to maximize human potential. Time and again, individuals with disabilities have had to identify themselves as disabled in order to be protected by the law and receive accommodations that allow them to participate equally with able-bodied individuals. This is an inescapable reality when operating within a legal framework structured around a single-axis framework,[16] triggered by categorization for a law to apply. Since this categorization will not go away any time soon, the most

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[13] Angélica Guevara, *The Need to Reimagine Disability Rights Law Because the Medical Model of Disability Fails Us All*, 2021 WIS. L. REV. 269, 274 [hereinafter *Guevara, Disability Rights*] (describing how disability antidiscrimination law focused on "reasonable accommodations" centers non-disabled people as the standard and treats people with disabilities as unworthy, a stereotype that fails to maximize their human potential); *id.* at 279 (defining the concept of "gatekeepers" as those who open or close doors to people with disabilities in deciding whether to provide accommodations).

[14] Guevara & Valdez, *supra* note 12.

[15] *See generally* Rosemarie Garland-Thomson, *Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature* (20th anniversary ed. 2017).

[16] Alexander M. Nourafshan, *The New Employment Discrimination: Intra-LGBT Intersectional Invisibility and the Marginalization of Minority Subclasses in Antidiscrimination Law*, 24 Duke J. Gender L. & Pol'y 107, 111, 113 (2017) (explaining that the single-axis framework reflects an unwritten expectation that a plaintiff frame a discrimination claim as based on one protected trait rather than on the intersection of multiple traits).

practical approach would be for those deemed disabled to utilize state and community resources, which is why increasing federal funding for state programs that provide job accommodations is important.

1. The Beginnings of Disability

The need to self-identify as disabled has coincided with major societal events, especially the return of wounded soldiers from wars and conflicts, increasing the visibility and awareness of disabilities among the American public.[17] For instance, veteran benefits started with insurance and vocational training.[18] Vocational training equips veterans with practical skills and helps them find suitable jobs, reducing unemployment rates.[19] A notable advancement for people with disabilities occurred when the federal government enacted laws to honor and support veterans, acknowledging the importance of caring for those who fought for freedom.[20] For example, the Soldiers Rehabilitation Act of 1918, also known as the Smith-Sears Act,[21] helped disabled veterans overcome their disabilities and pursue competitive employment.[22] Later, in 1920, President Woodrow Wilson signed the first federal civil vocational rehabilitation act for individuals with disabilities, known as the Smith-Fess Act (Civilian Rehabilitation Act).[23] Under this Act, the federal government matched state funding for services for people with disabilities on a 50-50 basis,[24] demonstrating that its commitment to citizens with disabilities was on par with that of their state governments.

2. Fair Employment Practices

The Fair Labor Standards Act of 1938 (FLSA),[25] signed by Franklin D. Roosevelt, established the minimum wage, overtime pay, and child labor provisions. However, pursuant to Section 14(c) of the FLSA,[26] employers are allowed to pay an employee with an established disability below the

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[17] David A. Blum, *American War and Military Operations Casualties: Lists and Statistics* (2020) (reporting that 204,002 soldiers were wounded in World War I, 670,846 in World War II, 103,284 in the Korean War, 153,303 in the Vietnam Conflict, and 457 in the Persian Gulf War).
[18] Veterans Benefits Admin., U.S. Dep't of Veterans Affs., https://perma.cc/2Q82-SPKW.
[19] Vocational training programs equip veterans with specific skills, improving their employment prospects and decreasing unemployment levels.
[20] Veteran Benefits Administration, U.S. Dep't of Veterans Affs., https://department.va.gov/history/history-overview/ [https://perma.cc/2Q82- SPKW] (last visited August 7, 2025).
[21] Vocational Rehabilitation Act, Pub. L. No. 178, § 701, 40 Stat. 617 (1918) (amended 1919).
[22] Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1364 (1993).
[23] Rehabilitation Act of 1973, Pub. L. No. 93–112, §§ 731–741, 87 Stat. 355.
[24] *Id.*
[25] *See*, *e.g.*, Fair Labor Standards Act, 29 U.S.C. § 214(c)(1); *see also* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. Dep't Labor, https://www.dol.gov/general/aboutdol/history/flsa1938 [https://perma.cc/ZZX7-PLPZ] (last visited May 8, 2025) (outlining the Act's origins and key provisions, including child-labor prohibition and minimum-wage/maximum-hour requirements).
[26] Fair Labor Standards Act, 29 U.S.C. § 214(c)(1).

minimum wage, resulting in the exploitation of some people with disabilities.[27] As a result, many organized to pass the Raise the Wage Act of 2021,[28] an attempt to eliminate Section 14(c) and combat such *exclusionary ableism,*[29] which is still being fought as of 2024.[30]

In the 1950s, veterans demanding access to equal opportunities for education and employment organized a "barrier-free" movement.[31] Later, people with disabilities protested and fought for laws and policies that would provide equal opportunities. These efforts led to the Vocational Rehabilitation Act of 1973 (the Rehab Act), which protected people with disabilities from discrimination in federally funded spaces and programs.[32] Under Section 504 of the Rehab Act, an employer must provide reasonable accommodations to a qualified individual with a disability.[33] The term "qualified individual" means an individual who, with or without reasonable accommodations, can perform the essential functions of the employment position that such individual holds or desires.[34] However, due consideration is given to the employer's judgment as to which functions of a job are essential,[35] and if an employer has prepared a written job description for the position as part of its recruitment or interviewing process, this description shall be considered evidence of the essential functions of the job.[36]

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[27] See, *e.g.*, Fair Labor Standards Act, 29 U.S.C. § 214(c)(1) (authoring the Secretary of Labor to issue certificates to businesses to employ handicapped workers at wages a maximum of 50% lower than the minimum wage).

[28] Raise the Wage Act of 2021, H.R. Res. 603, 117th Cong. (2021).

[29] *See* Guevara & Valdez, *supra* note 12.

[30] Raise the Wage Act of 2023, H.R. Res. 4889, 118th Cong. (2023).

[31] *Access! Everyone! Everywhere!*, NAT'L MUSUEM AM. HIST. (Mar. 23, 2017) https://americanhistory.si.edu/explore/exhibitions/access-everyone-everywhere [https://perma.cc/YB3D- GY9N] (last visited May 8, 2025).

[32] Vocational Rehabilitation Act of 1973 Section 504, 29 U.S.C. § 794; 42 U.S.C. § 12111(8) ("The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."); *see also* RUTH COLKER & PAUL D. GROSSMAN, THE LAW OF DISABILITY DISCRIMINATION FOR HIGHER EDUCATION PROFESSIONALS 77–78 (2014) (discussing the requirement that employers provide reasonable accommodations to qualified individuals with disabilities).

[33] Vocational Rehabilitation Act of 1973 Section 504, 29 U.S.C. § 794; 42 U.S.C. § 12111(8).

[34] 42 U.S.C. § 12111(8) ("qualified individual with a disability" is defined as a person "with a disability who, with or without reasonable accommodation, can perform the *essential functions* of the employment position that such individual holds or desires.").

[35] *See* Tardie v. Rehab. Hosp. of Rhode Island, 168 F.3d 538, 545 (1st Cir. 1999) (The court emphasized that defining essential functions is primarily the employer's responsibility, based on factors such as: 1) the reason the position exists (the purpose or function of the position); 2) the number of employees available to perform the same function; 3) the amount of time spent performing the function; 4) the consequences of not requiring the employee to perform the function; 5) the terms of a collective bargaining agreement, if any; 6) the job description.).

[36] 42 U.S.C. § 12111(8) (defining qualified individual).

If an individual with a disability recognized under the law is deemed to be a *qualified individual,* then the employer is only required to provide *reasonable accommodations* to the employee as long as it does not present an *undue hardship.*[37] Under the Rehab Act, "*undue hardship*" is defined as an action requiring significant difficulty or expense when considering 1) the nature and cost of the accommodation needed under this chapter, 2) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, 3) the number of persons employed at such facility, 4) the effect on expenses and resources, or 5) the impact otherwise of such accommodation upon the operation of the facility.[38] The employers beholden to these laws are those with 15 or more employees, whether full-time or part-time.[39] In addition, according to Section 504, a reasonable accommodation is any "change, adaptation or modification to a policy, program, service, . . . or workplace which will allow a qualified person with a disability to participate fully in a program, take advantage of a service, . . . or perform a job."[40]

As the Rehab Act did not protect people with disabilities in places of public accommodation,[41] the Americans with Disabilities Act of 1990 (ADA) was passed and enacted to provide protection in public spaces.[42] Under the ADA, a *disability* is defined as a (1) physical or mental impairment that substantially limits one or more major life activities, (2) a record of such an impairment, or (3) being regarded as having such an impairment.[43] In 2008, Congress amended the ADA to broaden the definition of "disability."[44]

Building on this legal framework, the Rehabilitation Services Administration (RSA) was established to distribute funding to state

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[37] 42 U.S.C. § 12112(b)(5)(A); Williams v. Toyota Motor Mfg., Ky., Inc., 224 F.3d 840, 842 (6th Cir. 2000), *rev'd*, 534 U.S. 184 (2002), superseded by statute, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (amendment broadened the definition of disability in favor of more coverage).
[38] 42 U.S.C § 12111(10) (defining undue hardship).
[39] *The ADA: Your Responsibilities as an Employer*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/publications/ada-your-responsibilities-employer [https://perma.cc/W6Y2-XPUN] (last visited May 8, 2025).
[40] *Id.*; *see generally* Donald Jay Olenick, *Accommodating the Handicapped: Rehabilitating Section 504 After "Southeastern*," 80 COLUM. L. REV. 171, 172–76 (1980) (providing an overview of Section 504's reasonable-accommodation framework and critiquing restrictive interpretations of the statute).
[41] 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").
[42] 42 U.S.C. § 12101(a)(7).
[43] 42 U.S.C. § 12101-12102.
[44] 42 U.S.C. § 12102(4)(E)(i) (West) ("The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures………...").

agencies to assist individuals with disabilities.[45] The RSA, an agency within the Department of Education, plays a crucial role in supporting individuals with disabilities. Through its programs, it ensures that individuals receive the necessary services, training, and advocacy to maximize their employment opportunities, independence, and integration into the community and the competitive labor market.[46] The RSA administers programs to "develop and implement comprehensive and coordinated programs of vocational rehabilitation and supported employment for individuals with disabilities through services, training, and advocacy, to maximize their employment, independence, and integration into the community and the competitive labor market."[47] According to Section 110(d) of the RSA, states must allot fifteen percent of the funds to pre-employment transition services.[48] In addition, Vocational Rehabilitation State Grants assist states in operating statewide vocational rehabilitation programs that impact their workforce development,[49] enabling them to customize the support their constituents receive.

In addition to these laws and programs, the Workforce Innovation Opportunity Act (WIOA) was passed in 2014.[50] The WIOA is a U.S. federal law that aims to improve workforce development and employment services.[51] It focuses on helping job seekers, including individuals with disabilities, gain skills needed for meaningful employment, and enhances coordination among various workforce, education, and training programs to better serve the needs of employers and workers.[52]

3. THE STATES

Building on this federal law framework, the states also play a crucial role in implementing disability employment initiatives. Under the *Supremacy Clause,* states are permitted to make laws as long as they do not contradict or interfere with federal law.[53] The RSA provides support to the

[45] OSERS Functional Statements—Rehabilitation Services Administration (EHR), U.S. DEP'T EDUC., https://www.ed.gov/about/ed-organization/functional-statements/osers/osers-functional-statements--rehabilitation-services-administration-ehr [https://perma.cc/D4HB-XR83] (last updated Jan. 14, 2025).
[46] *Id.*
[47] *Id.*
[48] Vocational Rehabilitation Act of 1973, 34 C.F.R. § 361.65 (2024).
[49] *Vocational Rehabilitation State Grants*, REHAB. SERVS. ADMIN., https://rsa.ed.gov/about/programs/supported-employment-services-for-individuals-with-the-most-significant-disabilities [https://perma.cc/M7ZZ-KTSE] (last visited Aug. 7, 2025). https://perma.cc/ESN3-WV4Y.
[50] Workforce Innovation and Opportunity Act of 2014, Pub. L. No. 113-128
[51] *Id.*
[52] *Id.*
[53] McCulloch v. Maryland, 17 US 316, 406 (1819) (This case firmly established the supremacy clause holding that "the laws of the United States—made in pursuance of the Constitution—are supreme" and that states cannot interfere with or tax those valid federal laws).

states through grants to Vocational Rehabilitation (VR) agencies.[54] VR agencies connect people with qualifying disabilities, as defined by federal law,[55] with assistance in acquiring employment-related skills and obtaining employment. These agencies administer VR Supported Employment, Independent Living, and Older Individuals who are Blind (IL-OIB) in all 50 states, the District of Columbia, Puerto Rico, and four territories.[56] Supported Employment (SE) programs, for example, can provide ongoing support for people with disabilities to thrive in integrated employment settings.[57] Today, thirty-four states and territories have a VR agency that serves people with disabilities.[58] Twenty-two states have more than one agency to assist people with disabilities.[59]

Through VR agencies, Medicaid, and education agencies, most states offer publicly funded employment and day programs for eligible people with disabilities.[60] The services provided through these programs are administered in sheltered workshops,[61] small group or enclave employment,[62] facility-based day programs,[63] day treatment, adult day

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[54] *State Supported Employment Services Programs*, REHAB. SERVS. ADMIN., https://rsa.ed.gov/about/programs/supported-employment-services-for-individuals-with-the-most-significant-disabilities [https://perma.cc/M7ZZ-KTSE] (last visited Aug. 7, 2025).
[55] *Id.*
[56] *State Vocational Rehabilitation Agencies*, REHAB. SERVS. ADMIN., https://rsa.ed.gov/about/states [https://perma.cc/V5RJ-2MPL] (last visited May 8, 2025).
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] ADA, *Questions and Answers on the Application of the ADA's Integration Mandate and* Olmstead v. L.C. *to Employment and Day Services for People with Disabilities* (Oct. 31, 2023), https://www.ada.gov/assets/pdfs/olmstead-employment-qa.pdf [https://perma.cc/5KMF] (last visited August 7, 2025).
[61] *See, e.g.*, NATIONAL COUNCIL ON DISABILITY, National Disability Employment Policy: From the New Deal to
The Real Deal 12 (2018), https://perma.cc/5LXH-2CPA (observing that "there remain approximately 321,131 Americans with disabilities who, even while living in the community, still earn subminimum wages in segregated sheltered workshops under Section 14(c) of the Fair Labor Standards Act"); *Questions and Answers on the Application of the ADA's Integration Mandate and* Olmstead v. L.C. *to Employment and Day Services for People with Disabilities*, ADA, Oct. 31, 2023 [https://perma.cc/W7RU-MS6G] ("'Sheltered workshops' are segregated facilities that primarily or exclusively employ people with disabilities. Sheltered workshops are usually large, institutional facilities in which people with disabilities have little or no contact with non-disabled people besides paid staff. Often, wages in sheltered workshops are extremely low compared to wages paid to people with disabilities in integrated employment, resulting in stigmatization and a lack of economic independence.
Sometimes, these workshops pay wages well below the minimum wage.").
[62] ADA, *supra* note 60 (explaining that "small group or enclave employment refers to work performed in regular business, industry, and community settings by small groups of individuals with disabilities (typically two to eight) under the supervision of an instructor or service provider").
[63] *Id.* ("Facility-based day programs are programs in which people with disabilities participate in segregated non-work activities during the day, designed to habilitate or rehabilitate individuals with disabilities. They can include psychosocial rehabilitation programs that serve people with mental illness.").

centers, and integrated workplaces working alongside people without disabilities. In addition, supported employment services are typically provided for employees with disabilities in mainstream employment to help them obtain and sustain competitive employment.[64] That said, integrated services are preferred because they allow people with disabilities to work alongside people without disabilities, which creates inclusion, enhances their social skills, and improves employment outcomes.[65]

Overall, most states generally exhibit goodwill and are willing to support both apparent and non-apparent disabilities, providing access to necessary resources as evidenced through their various state websites. Unfortunately, many employers are unaware of community and state-supported services, which could greatly supplement resources in the workplace, foster a sense of inclusion, and enhance overall productivity. Hopefully, this Article will raise awareness about the resources that employees and employers can access.

Furthermore, a state's employment policies can greatly influence the general practices of employers as they learn about the benefits of hiring people with disabilities.[66] Building on this, the ongoing work of these state agencies has resulted in a proliferation of helpful resources for businesses. In efforts to promote inclusive employment practices, some states met with the Council of State Governments (CSG) to share how the states can become a model employer for people with disabilities, resulting in the publication of *Work Matters: A Framework of States on Workforce Development for People with Disabilities*.[67] The CSG, in partnership with the National Conference of State Legislatures (NCSL), formed a National Task Force on Workforce Development for People with Disabilities. The CSG and NCSL, both of which represent state policymakers, are well-positioned to call attention to the various disability-related employment

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[64] *Id.* ("Supported employment services allow people with disabilities to work in typical employment settings where they can interact with non-disabled coworkers, customers, and peers. Such services include job coaching, job training, vocational assessment, job discovery, person-centered employment planning, job development, negotiation with prospective employers, benefits counseling, and other services that enable people with disabilities to succeed in securing and maintaining employment. These services help individuals with disabilities find meaningful jobs in the community and receive ongoing support from a team of professionals.").
[65] Joshua P. Taylor, Lauren Avellone, Paul Wehman & Valerie Brooke, The Efficacy of Competitive Integrated Employment Versus Segregated Employment for Persons with Disabilities: A Systematic Review, 58 J. VOC. REHAB. 63, 63-78 (2023).
[66] JOSEPH GASPER, MARTHA PALAN & BENJAMIN MUZ, SURVEY OF EMPLOYER POLICIES ON THE EMPLOYMENT OF PEOPLE WITH DISABILITIES (Westat ed., 2020) https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/EmployerSurveyFinalReport.pdf [https://perma.cc/V2LE-FYHG].
[67] THE COUNCIL OF STATE GOVERNMENTS, THE STATE AS A MODEL EMPLOYER OF PEOPLE WITH DISABILITIES 10 (2016) https://seed.csg.org/wp-content/uploads/2022/07/Accessible-Final_SAME_SEED_Report.pdf [https://perma.cc/5XKP-CY5E] (last visited May 16, 2025).

issues at the state level.[68] These organizations work closely with the U.S. Department of Labor (DOL) to create a more inclusive workforce for people with disabilities.[69] In addition to governmental and interorganizational efforts, non-profit organizations across various states also play a vital role in assisting individuals with disabilities in obtaining employment.[70]

Additional resources include the Job Accommodation Network (JAN), Easterseals, Computer/Electronic Accommodations Program (CAP), and NeuroTalent Works. For instance, JAN is a free service sponsored by the DOL's Office of Disability Policy, which provides technical assistance on job accommodations.[71] JAN's services are available to private and federal employers seeking information regarding accommodations, as well as to educational professionals and people with disabilities. Similarly, Easterseals helps people with all types of disabilities build confidence in applying for jobs and navigating how to perform the necessary job functions.[72] CAP, a federally funded program established by the Department of Defense, supports individuals with visual, hearing, dexterity, and cognitive disabilities.[73] Finally, NeuroTalent Works is a non-profit organization that helps people with disabilities with job training and placement.[74]

As the foregoing examples demonstrate, there are structures in the United States to support employers in recruiting talented people with disabilities and helping them access the resources they need to succeed. However, the effectiveness of these resources is contingent upon social and employer perceptions of disability. For example, many employers do not consider depression and anxiety debilitating enough to warrant an accommodation, even employees with the courage to seek accommodations for depression and anxiety may experience resistance. In contrast, accommodations for individuals with autism, such as a job coach, are more

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[68] ELIZABETH WHITEHOUSE ET AL., WORK MATTERS: A FRAMEWORK OF STATES ON WORKFORCE DEVELOPMENT FOR PEOPLE WITH DISABILITIES (2016), https://seed.csg.org/wp-content/uploads/2020/06/SEED_Report_2016_WEB.pdf [https://perma.cc/98ZG-YPEH] (last visited May 16, 2025).
[69] *Id.*
[70] *About Us*, EASTERSEALS, https://www.easterseals.com/about-us [https://perma.cc/WU9X-G49U] (last visited Feb. 15, 2024) (Easterseals is an example of a nonprofit organization that helps people with disabilities with disability and community services which may include the end goal of obtaining employment.).
[71] *Accommodations for Employees with Mental Health Conditions*, OFF. DISABILITY EMP. POL'Y, U.S. DEP'T LABOR, https://www.dol.gov/agencies/odep/program-areas/mental-health/maximizing-productivity-accommodations-for-employees-with-psychiatric-disabilities [https://perma.cc/6GJA-KQ4T] (last visited May 8, 2025).
[72] EASTERSEALS, *infra* note 216.
[73] *Computer/Electronic Accommodations Program*, MILITARY ONESOURCE, https://www.militaryonesource.mil/resources/millife-guides/wounded-warrior-recovery/ [https://perma.cc/X7MF-CHKS] (last visited May 8, 2025).
[74] NEUROTALENT WORKS, https://www.neurotalentworks.org/ [https://perma.cc/67R4-9QBY] (last visited May 8, 2025).

often accepted as necessary, though not always welcomed, as illustrated in *EEOC v. Party City*,[75] discussed in Part V. Beyond employer perceptions, individuals with non-apparent disabilities face additional hurdles, such as convincing VR administrators they need support. It can be challenging for them to demonstrate their needs, as they often must advocate not only with their employers but also with state agencies that hold the power to provide services. This dual advocacy requirement means that individuals face additional challenges beyond their core work, often needing to put in extra effort to obtain *success enablers*.

While significant legal and institutional frameworks have been established to promote the rights and inclusion of people with disabilities, these laws often operate within a limited understanding rooted in the outdated able-bodied (non-disabled[76]) standard. The history highlights the progress made through legislation, yet also underscores persistent challenges, particularly for individuals with non-apparent disabilities who face additional barriers in securing accommodations and recognition.

4. THE FUTURE OF DISABILITY LAW

Looking ahead, scholars like Samuel R. Bagenstos in his 2004 Yale Law Journal article "*The Future of Disability Law,"* have critically examined these limitations. In the article, he explores the evolution of the U.S. Disability Law, focusing on the shift from welfare-based models to antidiscrimination approaches embodied in the ADA. He argues that, although the ADA marked a significant civil rights milestone, its effectiveness in improving employment opportunities for people with disabilities has been limited.[77] He contends this is due to the structural barriers—such as inadequate health insurance,[78] inaccessible transportation,[79] and assistive technologies[80]—that law's anti-discrimination and accommodation provisions fail to address sufficiently.

[75] Equal Employment Opportunity Commission v. Party City Corp., No. 1:18-cv-00838 (D.N.H. 2022); *see also* Press Release, U.S. EQUAL EMP. OPPORTUNITY COMM'N, Party City to Pay $155,000 to Settle EEOC Disability Discrimination Lawsuit, (Apr. 22, 2019), https://www.eeoc.gov/newsroom/party-city-pay-155000-settle-eeoc-disability-discrimination-lawsuit [https://perma.cc/8RCX-JK8C] (describing the EEOC's settlement of a disability-discrimination claim involving an applicant with autism and the employer's agreement to pay $155,000 and modify hiring practices).
[76] The term "able-bodied" is used here for readability, although the author agrees that "non-disabled" is a preferable term. *See* LABIB RAHMAN, DISABILITY LANGUAGE GUIDE (Stan. Disability Initiative Bd. ed., 2019), https://disability2022.sites.stanford.edu/sites/g/files/sbiybj26391/files/media/file/disability-language-guide-stanford_1.pdf [https://perma.cc/LSV5-523A].
[77] Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L. J. 1, 23 (2004).
[78] *Id.* at 27 ("And public insurance is saddled with requirements that lock people with disabilities out of the workforce.").
[79] *Id.* at 26.
[80] *Id.* at 25.

Building on this critique, the author explains the shift that occurred in the 1970s and 1980s, where activism aimed to replace welfare models with civil rights protections,[81] expecting laws like the ADA to facilitate employment and integration. However, employment rates have stagnated or declined despite the ADA, revealing its limited scope.[82]

Bagenstos outlines the limitations of the antidiscrimination approach by explaining how laws focused on prohibiting discrimination and requiring reasonable accommodations are insufficient. They are insufficient because they target employer conduct rather than addressing broad social and structural barriers.[83] Court doctrines (like the "job-related" rule and the access/content distinction)[84] effectively narrow the scope of accommodations, excluding measures like health insurance, transportation, and personal assistance, which are crucial to employment for many with disabilities.[85]

Some of the structural barriers discussed in Bagenstos' article address the health insurance system— private exclusions, caps, and the structure of public programs—that seriously restrict access to essential services, creating barriers before job discrimination even occurs.[86] Given these limitations, Bagenstos advocates for a renewed emphasis on social welfare law—specifically government funding and provision of services such as in-home assistance, community-based care, and broader health insurance coverage—to overcome some of these structural obstacles.[87]

However, concerns about embracing social welfare strategies include the potential fragmentation of the movement, reinforcement of paternalistic views, and the challenge of implementing targeted versus universal programs. Bagenstos does underscore the importance of balancing civil rights with comprehensive social supports, emphasizing that solely anti-discrimination measures cannot uproot the deep-rooted barriers faced by people with disabilities, advocating for a hybrid approach—combining civil rights protections with strong social welfare policies—to more effectively promote employment and community integration for people with disabilities in the future.

Bagenstos is reasonable in being uneasy to propose anything resembling social-welfare because disability rights advocates indeed

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[81] *Id.* at 10–19.
[82] *Id.* at 19–23.
[83] *Id.* at 51.
[84] *Id.* at 35.
[85] *Id.* at 23.
[86] *Id.* at 25–26.
[87] *Id* at 4–5 (Addressing the legal academic community he discusses legal and legislative efforts to enforce Medicaid, expand health coverage, and reform systems like MiCASSA and Ticket to Work that would help to eliminate institutional bias).

resisted the paternalism of welfare-based programs,[88] as I too am uneasy to propose utilizing state or community resources to help people with disabilities be employed in a capitalist system, potentially reducing people with disabilities to production or economic contribution, as cautioned by disability scholar Tom Shakespeare.

Shakespeare emphasized the importance of recognizing the dignity and full humanity of individuals with disabilities beyond their economic productivity. For example, in his book *Disability Rights and Wrongs* (2006), he discusses the dangers of viewing people with disabilities only through the lens of their utility or productivity and advocates for respecting their rights as complete persons.[89] While keeping in mind this perspective, this Article will not address the structural obstacles in the health insurance system. However, it will attempt to address the integration of people with disabilities in the workforce through state and community resources and advocate for legislation that would promote more of these resources.

III. THE PHENOMENON OF NEURO-EXCLUSION

However, before discussing resources, let us first address the neuro-exclusion phenomenon that prevents some people with non-apparent disabilities from accessing certain resources. To understand the barriers faced by some individuals, it is important to recognize that disability is ultimately shaped by social, legal, and political structures rather than just individual impairments.[90] This broader context reveals that individuals are further marginalized in an employment sector that follows an able-bodied standard,[91] where differences in genetics, biology, and physiology are too often dismissed because human variation is not embraced.[92] Moreover, this binary perspective is perpetuated by current disability antidiscrimination law, which classifies individuals as either disabled or not, failing to account for the fluid and nuanced realities of human diversity.

In actuality, disability is pervasive, fluid, and not susceptible to binary characterization; instead, it is an inescapable element of human existence. "Although [disability] is rarely acknowledged as such, it is also a

[88] TOM SHAKESPEARE, DISABILITY RIGHTS AND WRONGS 42 (Routledge 2006).
[89] *See generally* Shakespeare, *supra* note 88.
[90] *See generally* CRITICAL DISABILITY THEORY: ESSAYS IN PHILOSOPHY, POLITICS, POLICY, AND LAW (Richard Francis Devlin & Dianne Pothier eds., 2006).
[91] Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It or an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 409 (2011).
[92] Kanter, *supra* note 91, at 408-409 (citing David Pfeiffer, *The Philosophical Foundations of Disability Studies*, 22 DISABILITY STUD. Q., Apr. 15, 2002, and Richard Scotch & Kay Schriner, *Disability as Human Variation: Implications for Policy*, 549 ANNALS AM. ACAD. POL. & SOC. SCI.148-60 (1997)); *see generally* LENNARD J. DAVIS, THE DISABILITY STUDIES READER (Routledge 2016) (hereinafter The Philosophical Foundations of Disability Studies).

fundamental aspect of human diversity."[93] Building off of this understanding of human variation,[94] this Article uses the *social model of disability*,[95] rather than the *medical model of disability*.[96] The latter model, which is cemented in the medical field, calls upon doctors to determine whether an individual has an impairment or loss of function to qualify for disability benefits.[97] The medical model treats disability as a "personal tragedy, which suggests that a disability is some terrible chance event that occurs at random to unfortunate individuals," like a disabled veteran.[98] Accordingly, the medical model fixates the "problem" within the individual while simultaneously absolving society from further consideration. Consequently, it also ultimately perpetuates stereotypes of people with disabilities as incomplete or damaged.[99] This model views the individual with pity, as defective, or as having an impairment that must be eliminated, treated, or cured.[100] Building on this perspective, any difference in an individual's body highlighted by the medical model further marginalizes

[93] G. Thomas Couser, *Disability, Life Narrative, and Representation*, 120 PUBL'N OF THE MOD. LANGUAGE ASS'N OF AM. 602, 602–06 (2005).
[94] *Id.*
[95] Dimitris Anastasiou & James M. Kauffman, *The Social Model of Disability: Dichotomy Between Impairment and Disability*, 38 J. MED. & PHIL. 441, 442 (2013).
[96] SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 11–12 (1998) (describing the difference between definitions of "disability": its medical definition, which has a negative connotation, and its definition as a social/political category, which relates to the identity of "a group bound by common social and political experience").
[97] DEBORAH A. STONE, THE DISABLED STATE 108 (1984) (emphasis omitted). *See also* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 4 (2009) ("Some activists come close to seeking an end to the disability welfare state that is the locus of much paternalism, while others seek expanded disability welfare benefits under a system that gives people with disabilities more choice and control.").
[98] Angélica Guevara, *The Need to Reimagine Disability Rights Law Because the Medical Model of Disability Fails Us All*, 2021 WISC. L. REV. 269, 277–79 (explaining the medical model's failings as a framework for disability antidiscrimination law). The root of the problem is that the medical model perpetuates "othering," affecting us all. *See, e.g.*, Tom Shakespeare, *Disability, Identity, and Difference*, *in* EXPLORING THE DIVIDE: ILLNESS AND DISABILITY 94, 94–113 (Colin Barnes & Geof Mercer eds., 1996) (explaining that an illness is separate from the disability).
[99] *See* MICHAEL OLIVER, THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH 4–6 (1990); *see also* Mike Oliver, *The Politics of Disability*, 4 CRITICAL SOC. POL'Y 21, 22–23 (1984); Deborah Marks, *Models of Disability*, 19 DISABILITY & REHAB. 85, 87–89 (1997) (explaining that, in contrast to the capital "D," the lowercase "d" signifies an impairment); Mairian Corker, *Disability Discourse in a Postmodern World*, *in* THE DISABILITY READER: SOCIAL SCIENCE PERSPECTIVES 221, 225–31 (Tom Shakespeare ed., 1998) (discussing how the concept of upper case "D" and lowercase "d" arose from the distinction made in the deaf community where uppercase "D" is meant to signify an identity); JANE CAMPBELL & MIKE OLIVER, DISABILITY POLITICS: UNDERSTANDING OUR PAST, CHANGING OUR FUTURE 19–20 (1996) (describing the shift to the social model and subsequent positive change in the political mobility of organizations founded by disabled individuals.).
[100] *See* Oliver, *supra* note 99, at 11. *See also* Stone, *supra* note 97, at 107–117 (1984) (discussing the medical evaluation of impairment). *See generally* DAN GOODLEY, DIS/ABILITY STUDIES: THEORISING DISABLISM AND ABLEISM 16 (2014) ("Disability is established in the *World Report* as a problematic dynamic phenomenon requiring the immediate response of nations states, their governments and their citizens.").

the individual and, by focusing on the illness and not on the disability, perpetuates a view that people with disabilities are less than others.

1. OVERCOMING MISCONCEPTIONS AND STEREOTYPES

In light of this critique of the medical model, it becomes even more crucial to address the misconceptions and stereotypes that continue to influence employer attitudes and practices regarding individuals with disabilities. Employers with outdated beliefs, such as the idea that employees with mental health conditions are less capable or reliable, are too often reluctant to offer accommodations or hire these individuals altogether. Such misconceptions are often compounded by stigma, where the fear of negative perceptions or misunderstandings leads to hesitation to discuss mental health openly or provide targeted support. Resource constraints also present a practical challenge—small to medium-sized businesses may worry about the costs associated with *success enablers*, training, or support programs. They might assume that implementing flexible schedules, sensory-friendly environments, or mental health workshops will be financially burdensome or logistically complex.

Addressing these challenges requires targeted solutions. First, education and awareness campaigns can help dispel myths by providing clear, evidence-based information about the capabilities of neurodiverse individuals and the benefits of inclusive hiring. For example, showcasing success stories of neurodiverse employees can challenge stereotypes and demonstrate tangible business advantages, such as increased innovation and loyalty. In addition to changing perceptions through education, organizations can also make practical use of available resources—many non-profits, government programs, and community organizations offer free or subsidized workplace accommodations, training, and support services. Firms can partner with Neurodiversity Workforce Intermediaries (discussed below) or organizations such as JAN to access expert guidance without significant expense. Beyond external resources, cultivating an inclusive environment within the organization requires commitment from leadership. Companies can reduce stigma and encourage open dialogue by establishing policies that prioritize mental health and diversity training for managers to recognize and address unconscious bias. Finally, many accommodations and cultural shifts can be adopted gradually, with small but meaningful changes such as flexible scheduling, quiet work zones, and mental health days that can be implemented incrementally, demonstrating that accommodations that do not necessarily require major financial investments can have profound positive impacts on morale and productivity.

Workplace accommodations are often minor and manageable, with the potential benefits to the employer outweighing the cost. In fact, according to the U.S. Department of Labor, 58% of accommodations have no financial cost,[101]such as adjusted work schedules. Those with a financial impact often cost less than $500.[102] For instance, headphones to prevent auditory overstimulation can help employees with disabilities to activate or maximally leverage their abilities.[103] In addition, employers can also receive tax incentives to help cover the costs of accommodations and modifications required to make their businesses accessible to persons with disabilities.[104]

2. Disability Models

While accommodations illustrate one way society can support individuals with disabilities, it is important to consider how societal perceptions of disability—shaped by prevailing models—affect the way accommodations are viewed and implemented. For instance, take the medical model of disability as an example of a perspective that has seeped into the general psyche of the public. While the American Medical Association understands that the "medical judgment of impairment is separa[te] from the more subjective and value-laden judgment of disability,"[105] the public remains unaware of the difference between impairment and disability.[106] Illness, however, is separate from disability. Having an impairment means treatment is needed; disability is how a person is socially treated.[107] Despite the fact that "[t]he medical profession takes the position that impairment is a purely medical phenomenon…disability is a medical-administrative-legal phenomenon."[108] The public fails to understand that the disability is separate from the illness or impairment and

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[101] *US Department of Labor Announces Report Finding Nearly Half of Accommodations for Disabled Workers Have No Cost,* U.S. DEP'T OF LAB., (May 4, 2023) https://www.dol.gov/newsroom/releases/odep/odep20230504 [https://perma.cc/MSF9-AUGA] (last visited May 8, 2025).

[102] *Employers and the ADA: Myths and Facts*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/odep/ada/MythsandFacts [https://perma.cc/4RQF-8SFM] (last visited May 8, 2025); *Cost and Benefits of Accommodation*, JOB ACCOMMODATION NETWORK (JAN), https://askjan.org/topics/costs.cfm? [https://perma.cc/9P55-EZKL] (JAN found that typically, accommodations will be a one-time cost of $300; however, most employers reported paying less or paying nothing at all for the accommodations they provided to their employees. In fact, JAN reports that 56% of job accommodations cost absolutely nothing.) (last visited May 8, 2025).

[103] *See* Austin & Pisano, *supra* note 5.

[104] Emma Irvin et al., *Financial Incentives to Promote Employment of Persons with Disabilities: A Scoping Review of When and How They Work Best*, 45 DISABILITY & REHAB. 21, 3595-3609 (2023).

[105] Stone, *supra* note 97, at 110.

[106] *See* Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 J. SOC. ISSUES 39, 39 (1988) ("Although a 'minority-group' model has emerged to challenge the traditional dominance of the 'functional-limitations' paradigm for the study of disability, research on attitudes toward disabled people has not produced a theoretical orientation that reflects these developments.").

[107] *Id.*

[108] Stone, *supra* note 97, at 108. (Stone is referencing that the distinction originated in the American Medical Association Guide.).

to recognize that the social oppression of people with disabilities persists because of how society at large treats them.[109]

In contrast, *the social model of disability* empowers people with disabilities. Developed and brought forth into academia in *The Politics of Disablement* by Michael Oliver,[110] the social model of disability suggests that society and its structures create disabilities. The model holds that individuals with disabilities are not inherently deficient[111]; rather, there are diverse ways of existing in the world.[112] The social model maximizes an individual's potential by challenging the view of normalcy attached to an able-bodied standard, forcing an examination of subconscious bias and assumptions about any given disability, and ideally leading to embracing universalism.[113]

Building on the conceptual foundation of the social model of disability, it is important to recognize that not all disabilities are immediately apparent or easily understood. While the social model identifies societal structures as the source of disability, the lived experiences of individuals with non-apparent disabilities reveal complex layers of challenges that are often overlooked. This leads to the phenomenon of *neuro-exclusion*, where the struggles faced by those with non-apparent disabilities are minimized or ignored. This societal tendency to dismiss or downplay non-apparent disabilities is further reinforced and compounded through media representations that trivialize the experiences of individuals with disabilities.[114] Employers are not immune to this social conditioning[115] found within the general public. The mind gravitates toward the readily observable, and so employers may not believe that an employee does, in fact, have a non-apparent disability or treat it as an afterthought. Because

[109] *See* Hahn, *supra* note 105, at 41 ("Minority groups have been subjected to various forms of exploitation and oppression, and the sources of their treatment may be traced to pervasive social values of the dominant majority."). *See also* Guevara, *supra* note 13.
[110] Oliver, *supra* note 99, at 11.
[111] *See id.* at 32–37; Anne Louise Chappell, *Still Out in the Cold: People with Learning Difficulties and the Social Model of Disability*, *in* THE DISABILITY READER: SOCIAL SCIENCE PERSPECTIVES 211, 214–19 (Tom Shakespeare ed., 1998); TOM SHAKESPEARE, DISABILITY RIGHTS AND WRONGS REVISITED 106 (2013) ("What divides disabled from non-disabled people, in [the social model] formulation, is the imposition of social oppression and social exclusion.").
[112] *See, e.g.*, Tom Shakespeare, *Disability, Identity, and Difference*, *in* EXPLORING THE DIVIDE: ILLNESS AND DISABILITY 94, 94–113 (Colin Barnes & Geof Mercer eds., 1996); Chappell, *supra* note 110; Shakespeare, *supra* note 98.
[113] *See* Jerome E. Bickenbach et al., *Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps*, 48 SOC. SCI. & MED. 1173, 1173–84 (1999).
[114] Rachelle L. Pavelko & Jessica Gall Myrick, *That's so OCD: The Effects of Disease Trivialization via Social Media on User Perceptions and Impression Formation*, 49 COMPUTS. HUM. BEHAV. 251 (2015) (explaining the trivialization in other non-apparent disabilities like OCD).
[115] *Id.*

the struggles of those with non-apparent disabilities are hard to see, employers often trivialize, overlook, dismiss, and/or fail to accommodate.

The end result is that neurodiverse individuals experience marginalization, giving rise to the phenomenon of *neuro-exclusion* that this Article aims to illuminate. Therefore, a shift from the traditional, medicalized view of disability towards an inclusive, social understanding is essential to combat *neuro-exclusion*. Recognizing that disability is a natural and diverse aspect of human life, rather than a personal tragedy or defect, enables society—particularly in workplace environments—to dismantle harmful stereotypes and structural barriers. This shift in understanding is crucial because, unless a company's employers or leaders are aware and informed enough to include the neurodiverse and understand the competitive advantage of having neurodivergent employees,[116] the full potential of all individuals will not be realized. The widespread nature of this phenomenon underscores the persistent need for greater awareness and inclusive accommodations, which are also referred to as *success enablers*.[117] Hereafter, in this paper, the terms *success enablers* and *accommodations* will be used interchangeably.

Consider this: just because a person with a wheelchair manages to make it to the top of the steps by crawling up, it does not mean they no longer need the wheelchair. Similarly, those who manage to succeed despite their non-apparent disability may still need *success enablers*.[118] This example underscores that normalizing the inclusion of the neurodiverse becomes essential not only to foster a more equitable workplace but also to unlock the potential benefits that diverse cognitive perspectives can bring. It allows neurodiverse employees who identify as such to feel more comfortable openly addressing their needs with employers and, in turn, obtain *success enablers* to improve job performance. In this way, only through ongoing education, societal change, and intentional efforts to normalize neurodiversity can we move toward a more equitable and dynamic environment that benefits everyone.

3. DEPRESSION AND ANXIETY AS ESPECIALLY TROUBLING GROUNDS OF NEURO-EXCLUSION

Although depression and anxiety are often trivialized in the workforce and excluded from the neurodiverse population, scholars in various fields agree that neurodiversity "refers to variations in an

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[116] *See* Austin & Pisano, *supra* note 5.
[117] Stacy Thomas, *3 Key Ways to Improve Neurodiversity in the Workplace*, HUMAN RESOURCES DIRECTOR, https://www.hcamag.com/us/specialization/diversity-inclusion/3-key-ways-to-improve-neurodiversity-in-the-workplace/454781 [https://perma.cc/R55Y-KTWL] (last visited May 16, 2025). (Instead of saying accommodations, Dr. Hala Annabi used the term *success enablers*).
[118] Paul Ikutegbe et. al, *Enablers of Successful Employment Outcomes for People With Disabilities*, 31 J. OF MGMT. & ORG. 1, 73-89 (2025).

individual's brain and cognition."[119] Despite this, the exclusion of depression and anxiety from the neurodiverse population remains unwarranted. However, because anxiety and depression may not be apparent as those with physical disabilities, those who disclose that they have one or both conditions frequently face skepticism. This skepticism is sometimes amplified for individuals who are successful, leading to the question, "How disabled are they truly if they have been able to navigate the social terrain and sustain employment?" Moreover, because there is often stigma and shame around depression and anxiety in the workplace, many choose not to talk openly about their individual journeys with these conditions. This results in *constructed exclusion*, whereby an employee does not admit to having a disability to their employer or others in the disability community. They have internalized the idea that their depression and anxiety are somehow less valid than other disabilities because they can still see, talk, and walk. Furthermore, the fact that people experience varying levels of severity in symptoms of depression and anxiety, may contribute to the trivialization of their disability.[120] Business law scholars, such as Stacy Hickox and Angela Hall acknowledge that "[e]mployers may be resistant to behavioral modifications to the workplace, despite the inexpensive nature of many such changes, as compared to physical changes that improve accessibility."[121] This resistance adds to the trivialization of depression and anxiety, discouraging neurodivergent employees from seeking help for their conditions and obtaining necessary resources to succeed in their employment. As a result, "the current process of obtaining accommodations presents a significant bottleneck to the inclusion and success of people with disabilities in the workforce."[122] Building on this understanding of the challenges faced by individuals with depression and anxiety, it is clear that conditions like these remain underrecognized and often trivialized within employment contexts. Despite their neurobiological basis, these non-apparent mental health conditions continue to be frequently excluded from the broader neurodiverse discourse, contributing to a persistent hierarchy that prioritizes apparent or physically manifested

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[119] Patrick Dwyer, *The Neurodiversity Approach(es): What Are They and What Do They Mean for Researchers?*, 66 HUM. DEV. 73 (2022); Linda Henman, *How Beliefs Affect Mindsets*, CORP. COMPLIANCE INSIGHTS (Apr. 2, 2020), https://perma.cc/SCY6-QMCL. *See generally* Nancy Doyle, *Neurodiversity at Work: A Biopsychosocial Model and the Impact on Working Adults*, 135 BRIT. MED. BULL. 108 (2020) ("A 'neurotypical' is thus someone whose cognitive scores fall within one or two standard deviations of each other, forming a relatively 'flat' profile, be those scores average, above or below. Neurotypical is numerically distinct from those whose abilities and skills cross two or more standard deviations within the normal distribution.").

[120] *See* Scott Parrott & Nicholas Eckhart, *Stigma in the News: The Representation and Trivialization of Stigma in U.S. News Publications*, 36 HEALTH COMMC'N 440 (2021).

[121] Stacy A. Hickox & Angela Hall, *Atypical Accommodations for Employees with Psychiatric Disabilities: Atypical Accommodations for Employees*, 55 AM. BUS. L. J. 537, 581 (2018).

[122] Stacy A. Hickox & Keenan Case, *Risking Stigmatization to Gain Accommodation*, 22 U. PA. J. BUS. L.
533, 537 (2020), https://scholarship.law.upenn.edu/jbl/vol22/iss3/2/ [https://perma.cc/LB68-M62R].

disabilities. Neurodivergence presents unique challenges to inclusion, often compounded by societal stigmas, misconceptions, and the tendency to 'other' those with less apparent conditions. Recognizing these dynamics, this section highlights the urgent need to reevaluate how mental health conditions are understood and accommodated, thus fostering a more comprehensive and equitable approach to neurodiversity in employment.

Many Americans understand that mental health is just as essential to maintain as physical health because the mind controls the body and vice versa. Notwithstanding this awareness, prior to the COVID-19 pandemic, there was already a mental health crisis in the United States, leading to an increase in the suicide rate. From 2000 - 2022, there was a thirty-six percent increase in suicide deaths, according to the Centers for Disease Control and Prevention (CDC).[123]

Building on this ongoing crisis, the COVID-19 pandemic significantly exacerbated mental health issues in the United States, leading to increased reliance on therapy and medication, and prompting national efforts to improve workplace support and access to mental health care. As a result, depression rates tripled[124] in the aftermath of the COVID-19 pandemic. Many people saw their loved ones perish or become debilitated; others were affected by the isolation, unable to leave their homes and socially interact; many suffered devastating financial losses from the shutdowns.

According to the *Wall Street Journal*, there was a record-breaking number of suicides in 2022[125] and this troubling trend continued the following year, with 49,316 suicide deaths reported in 2023, averaging one death every eleven minutes.[126] Alongside this disturbing trend, the surge in mental health challenges was accompanied by a rise in substance abuse and addiction, with the National Institutes of Health reporting an addiction epidemic during the COVID-19 pandemic.[127] This widespread crisis prompted urgent calls for action, and the then-Surgeon General, Dr. Vivek

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[123] *Facts About Suicide*, CTR. DISEASE CONTROL & PREVENTION (Mar. 26, 2025) https://www.cdc.gov/suicide/facts/index.html [https://perma.cc/RA7M-3393].

[124] Salma M. Abdalla et al., *Prevalence of Depression Symptoms in US Adults Before and During the COVID-19 Pandemic*, 3 JAMA NETWORK OPEN 1 (2020), https://pubmed.ncbi.nlm.nih.gov/32876685/ [https://perma.cc/NPS4-64RT]; *see also* Elisabet Alzueta et al., *Risk for Depression Tripled During the COVID-19 Pandemic in Emerging Adults Followed for the Last 8 Years,* 53 PSYCHOL. MED. 2156 (2023) (analyzing the impact of the COVID-19 pandemic on depression rates in young adults).

[125] Julie Wernau, *U.S. Suicides Reached a Record High Last Year*, WALL ST. J. (last visited May 3, 2025) https://perma.cc/HL6S-F679 (last updated Nov. 29, 2023,10:52 AM).

[126] *Id.*

[127] Ariadna Capasso et al., *Increased Alcohol Use During the Covid-19 Pandemic: The Effect of Mental Health and Age in a Cross-Sectional Sample of Social Media Users in the U.S*, 145 PREVENTATIVE MED. 1, 5 (2021), https://pmc.ncbi.nlm.nih.gov/articles/PMC9063034/ [https://perma.cc/7EVN-SUYC].

Murthy, issued an alert to the nation, advocating in particular for the prioritization of youth mental health.[128] The Surgeon General advised employers to provide affordable health insurance that covers mental health needs, promote a work-life balance, and encourage a positive work culture to reduce family stress.[129] In light of these alarming trends, understanding non-apparent disabilities, in particular depression and anxiety, becomes more critical given the nation's current mental health crisis, characterized by an increasing number of Americans being diagnosed with both of these conditions.[130] The impact on the workforce is significant, as there is a higher prevalence of depression and anxiety amongst young adults 18-39 years of age.[131]

Reflecting on this recent surge in mental health challenges, it is important to consider how perceptions of conditions like depression and anxiety have changed over time and how their prevalence has shifted. In the 1950s and 1960s, "anxiety was at the forefront of medical… attention, with depression considered a rarity."[132] Today, depression--posited as a possible disease of modernity[133]–is more common than anxiety.[134] Meanwhile, anxiety remains one of the most common mental illnesses in the United States, affecting about nineteen percent of the population each year, according to the National Institute of Mental Health.[135]

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[128] *See generally*, OFF. SURGEON GEN., PROTECTING YOUTH MENTAL HEALTH: THE US SURGEON GENERAL'S ADVISORY (2021), https://www.ncbi.nlm.nih.gov/books/NBK575984/ [https://perma.cc/8K2J-DRL9].
[129] *See id.* at 33.
[130] *See* Jean M. Twenge, Cooper McAllister & Thomas E. Joiner, *Anxiety and Depressive Symptoms in U.S. Census Bureau Assessments of Adults: Trends from 2019 to Fall 2020 Across Demographic Groups*, 83 J. ANXIETY DISORDERS 1 (2021); *see* Emily P. Terlizzi & Tina Norris, *Mental Health Treatment Among Adults: United States, 2020*, 419 NCHS DATA BRIEF 1 (2021); *see also* Renee D. Goodwin, Lisa C. Dierker, Melody Wu, Sandro Galea, Christina W. Hoven & Andrea H. Weinberger, *Trends in U.S. Depression Prevalence from 2015 to 2020: The Widening Treatment Gap*, 63 AM. J. PREVENTIVE MED. 726 (2022) (noting broad increases in rates of depression across varying ages of Americans from 2015-2020)*; see generally* William V. Bobo et al., *Association of Depression and Anxiety with the Accumulation of Chronic Conditions*, 5 JAMA NETWORK OPEN 1 (2022), https://pmc.ncbi.nlm.nih.gov/articles/PMC9062691/ [https://perma.cc/2LZV-T74X] (analyzing the frequency with which depression and anxiety correlate with the acquisition of chronic afflictions in recent years); s*ee generally* Sarah Collier Villaume, Shanting Chen & Emma K. Adam, *Age Disparities in Prevalence of Anxiety and Depression Among US Adults During the COVID-19 Pandemic*, 6 JAMA NETWORK OPEN 1 (2023), https://pubmed.ncbi.nlm.nih.gov/38032641/ [https://perma.cc/P6V4-S87R] (reporting high amounts of anxiety and depression in young adults from 2020—2022).
[131] Villaume et al., *supra* note 130.
[132] Allan V. Horwitz, *How an Age of Anxiety Became an Age of Depression*, 88 MILBANK Q. 112, 113 (2010).
[133] Brandon H. Hidaka, *Depression as a Disease of Modernity: Explanations for Increasing Prevalence*, 140 J. AFFECT. DISORD. 205, 205–14 (2012).
[134] *Id.*
[135] *Any Anxiety Disorder*, NAT'L INST. MENTAL HEALTH, https://www.nimh.nih.gov/health/statistics/any-anxiety-disorder [https://perma.cc/DRR8-GY4J] (last visited November 22, 2025).

To better understand the profound impact of depression, it is important to delve into its neurological underpinnings and understand how it influences individuals' thoughts, feelings, and behaviors that then impact the workforce. Depression, a mood disorder that causes sadness and loss of interest,[136] impacts the brain's limbic system, composed of the amygdala, hippocampus, and dorsomedial prefrontal cortex. People with depression have been found to have structural and functional abnormalities in these three areas of the brain,[137] further evidence of their neurodiversity. Practically speaking, depression affects how an individual thinks, feels, and behaves, affecting their ability to do day-to-day activities, including work. When depression hits, it can cause someone to have a hopeless view of the world that can be dire enough to want to end the emotional pain by committing suicide.

Extending our discussion of the neurological effects, similar to depression, generalized anxiety disorder (GAD) also affects emotional processing in the amygdala,[138] hippocampus,[139] and dorsomedial thalamus,[140] impacting the day-to-day activities of individuals with this condition. Building on the neurological effects, such as those on emotional processing, anxiety disorders manifest through various symptoms. Anxiety disorders may result in repeated episodes of intense fear or terror that reach a peak, potentially leading to panic attacks that interfere with daily life. As a coping mechanism, individuals may also begin to avoid places and situations (such as social functions) to manage their anxiety. Additionally, those with anxiety are at an increased risk of developing major depression,[141] and most anxiety disorders substantially increase the risk of secondary depression.[142] In fact, the two conditions are so closely interrelated that it is at times challenging to distinguish their symptoms. Given their close relationship, in both depression and anxiety, cognitive function is altered in the brain when a person has chronic depression or anxiety. These cognitive changes further affect cognitive function, sociability, learning ability, attention, mood, and other mental functions. Those encountering clinical depression and GAD have a hard time

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[136] Suma P. Chand & Hasan Arif, *Depression*, STATPEARLS, https://www.ncbi.nlm.nih.gov/books/NBK430847/ [https://perma.cc/D63H-V7DZ] (July 17, 2023).
[137] Mayur Pandya et al., *Where in the Brain is Depression?,* 14 CURR. PSYCHIATRY REP. 634, 635 (2012), https://pmc.ncbi.nlm.nih.gov/articles/PMC3619732/ [https://perma.cc/9V9D-B78K].
[138] Elizabeth I. Martin et al., *The Neurobiology of Anxiety Disorders: Brain Imaging, Genetics, and Psychoneuroendocrinology*, 32 PSYCHIATRIC CLINICS N. AM. 549 (2009).
[139] Tara P. Cominski et al., *The Role of the Hippocampus in Avoidance Learning and Anxiety Vulnerability*, 8 FRONT. BEHAV. NEUROSCI., Aug. 2014, at 1.
[140] Katherine E. Vytal et al., *Sustained Anxiety Increases Amygdala-Dorsomedial Prefrontal Coupling: A Mechanism for Maintaining an Anxious State in Healthy Adults*, 39 J. PSYCHIATRY & NEUROSCI. 321 (2014).
[141] H. U. Wittchen et al., *Why Do People with Anxiety Disorders Become Depressed? A Prospective- Longitudinal Community Study*, 102 ACTA PSYCHIATRICA SCANDINAVICA (SUPPLEMENT 406) 14 (2000).
[142] *Id.*

concentrating and paying attention, which can impact an employee's productivity and, in turn, affect their self-confidence. Lack of self-confidence is debilitating for some, resulting in higher levels of anxiety. Consequently, untreated anxiety leads to a vicious cycle where a person is depressed because they have anxiety, and they have anxiety because they have depression.

Given their comorbidity and the reality that their symptoms are not so easily separable,[143] depression and anxiety are often discussed together. Although it is possible to have one without the other, they are treated the same in this Article because both conditions would require similar *success enablers* in the workforce. Additionally, there seems to be evidence suggesting that these disabilities are moderately heritable (approximately forty percent) with shared genetic risk factors.[144] This finding is significant given the rise in the number of people diagnosed with depression and anxiety – today's health crisis has the potential to have an even greater impact on the next generation's workforce and working environments. The causes of depression and anxiety, however, are complex.[145] Some say it is a chemical imbalance, while others believe it is a combination of circumstances and the chemicals in the brain. Both schools of thought are important to recognize. However, it is significant to acknowledge that this Article does not favor one school of thought over another; instead, the focus is on the human variation[146] that results from these conditions.

Regardless of the causes of anxiety and depression, employers need to navigate this new reality that lies in the American workforce. Employees encounter an adjustment period when exploring the sea of possible medications to address debilitating depression and anxiety, and finding the right one can be challenging. Many medications have significant side

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[143] Ned H. Kalin, *The Critical Relationship Between Anxiety and Depression*, 177 AM. J. PSYCHIATRY 365, 365 (2020).

[144] John M. Hettema, *What Is the Genetic Relationship Between Anxiety and Depression?*, 148 AM. J. MED. GENETICS PART C 140, 142 (2008); *see also Depression (Major Depressive Disorder)*, MAYO CLINIC (Oct. 14, 2022), https://www.mayoclinic.org/diseases-conditions/depression [https://perma.cc/ZW82-7RFX] (noting that symptoms of depression "occur most of the day, nearly every day, and may include: feelings of sadness, tearfulness, emptiness, or hopelessness"; "angry outbursts, irritability or frustration, even over small matters"; "loss of interest or pleasure in most or all normal activities, such as sex, hobbies or sports"; "tiredness and lack of energy, so even small tasks take extra effort"; "reduced appetite and weight loss or increased cravings for food and weight gain"; "anxiety, agitation, or restlessness"; "slowed thinking, speaking or body movements"; "feelings of worthlessness or guilt, fixating on past failures or self-blame"; "trouble thinking, concentrating, making decisions and remembering things"; "frequent or recurrent thoughts of death, suicidal thoughts, suicide attempts or suicide"; "unexplained physical problems, such as back pain or headaches.").

[145] *What Causes Depression?*, HARV. HEALTH PUBL'G (Jan. 10, 2022), https://www.health.harvard.edu/mind-and-mood/what-causes-depression [https://perma.cc/7NLK-PDXL].

[146] David Pfieffer, *The Philosophical Foundations of Disability Studies*, DISABILITY STUD. Q., Apr. 15, 2002.

effects,[147] impacting an employee's daily activities. These challenges may lead employees to self- medicate,[148] resorting to illegal drugs or alcohol to help them cope. In addition to understanding the laws that govern employees with non-apparent disabilities (discussed in Part IV), employers also need to keep an open mind about providing *success enablers*. In this context, they can and should provide support systems, exercise, mindfulness,[149] and other resources to assist an employee struggling with the additional barriers created by mental health issues to succeed in their job, rather than perpetuating the "othering."

4. OTHERING EFFECT

Maintained by the disability hierarchy, *neuro-exclusion* continually feeds into the trivialization of depression and anxiety, leading to the "othering" effect.[150] Defining "othering" as the process by which individuals or groups are marginalized or labeled as different from the perceived societal norm,[151] building on this concept, Erving Goffman explores how this process affects individuals' identities and interactions, creating "spoiled identities" that carry negative connotations and impact how they are perceived and treated within society. This can result in the stigmatization of those considered "other," leading to their exclusion or discrimination based on physical, mental, or social characteristics. As noted by Nev Jones & Patrick W. Corrigan, the "problem of stigma […] does not lie within the individual with the mark, but rather in the stigmatizing communities in which individuals find themselves."[152]

Depression and anxiety exemplify the profound challenges of neuro-exclusion rooted in societal misconceptions and hierarchy. Framing these conditions as either neurotypical or neurodivergent is an

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[147] *See* Sarah Turner et al., *Self-Medication with Alcohol or Drugs for Mood and Anxiety Disorders: A Narrative Review of the Epidemiological Literature*, 35 DEPRESSION & ANXIETY 851, 851–60 (2018).
[148] *See* Sarah Turner et al., *Self-Medication with Alcohol or Drugs for Mood and Anxiety Disorders: A Narrative Review of the Epidemiological Literature*, 35 DEPRESSION & ANXIETY 851 (2018).
[149] *See generally* Leodoro J. Labrague & Janet Alexis A. De Los Santos, *COVID-19 Anxiety Among Front- Line Nurses: Predictive Role of Organisational Support, Personal Resilience and Social Support*, 28 J. NURSING MGMT. 1 (2020) (discussing reduction in anxiety in frontline nurses during COVID-19 through support systems); Madeleine Connor, Elaine A. Hargreaves, Orla K. Scanlon & Olivia K. Harrison, *The Effect of Acute Exercise on State Anxiety: A Systematic Review*, 11 SPORTS 1 (2023), https://www.mdpi.com/2075-4663/11/8/145 [https://perma.cc/E3VP-K9W9]; Stefan G. Hofmann & Angelina F. Gómez, *Mindfulness-Based Interventions for Anxiety and Depression*, 40 PSYCHIATRIC CLINICS N. AM. 739 (2017).
[150] *See generally* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 5 (1963).
[151] *Id.*
[152] NEV JONES & PATRICK CORRIGAN, *Understanding Stigma, in* THE STIGMA OF DISEASE AND DISABILITY: UNDERSTANDING CAUSES AND OVERCOMING INJUSTICES 9 (Patrick W. Corrigan ed., 2014).

oversimplification that creates a stark divide that fosters an "us" versus "them" mentality.[153] This binary framing reduces the nuanced experiences of individuals, which leads to stigma and othering.[154] Perhaps because individuals with anxiety and depression are perceived as more able-bodied, these conditions are not often included in the neurodivergent definition.[155] The tendency to trivialize, stigmatize, and relegate them to the "other" category perpetuates harmful stereotypes and hinders genuine inclusion in the workplace. Consequently, they may be discouraged from seeking necessary accommodations, as they may feel alienated or invalidated within the workforce. The way in which these identity politics define who qualifies as neurodivergent has been criticized for excluding some individuals with disabilities from being considered as neurodivergent.[156] Furthermore, they are not only excluded from the neurodiverse conversation with little mention, but they are also excluded from obtaining the resources that could assist them in the workplace. To move in the direction of inclusivity, the "othering" effect needs to be addressed, and the belief that people with non-apparent disabilities, like depression and anxiety, are not as deserving of *success enablers* must be rejected. Recognizing these conditions as integral aspects of neurodiversity is essential for fostering an environment where all individuals are valued for their human variation.[157]

Moving forward, employers and society must challenge the biases that undermine the legitimacy of non-apparent disabilities, promote awareness, and implement inclusive strategies that acknowledge the full spectrum of human experience—thereby unlocking the diverse potential that a truly inclusive workforce can offer. Despite debates about the extent of employer involvement in addressing social issues, there is no doubt that a healthy work environment benefits both the employer and employees.

III. THE BUSINESS ENVIRONMENT

Nearly 50 million people have disabilities in the United States, representing the nation's largest minority.[158] In general, people with

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[153] S*ee* Pavelko & Myrick, *supra* note 114.
[154] *See* Goffman, *supra* note 150.
[155] *See generally* Angélica Guevara, *Not Able Enough, Not Disabled Enough*, 29 TEX. J.C.L. & C.R. 147 (2024).
[156] GINNY RUSSELL, *Critiques of the Neurodiversity Movement*, *in* AUTISTIC COMMUNITY AND THE NEURODIVERSITY MOVEMENT 287, 288–91 (Steven K. Kapp ed., 2020).
[157] *See* Pfeiffer, *supra* note 146.
[158] OFF. DISABILITY EMP. POL'Y, *Diverse Perspectives: People With Disabilities Fulfilling Your Business Goals*, U.S. DEP'T LAB., https://perma.cc/R4JC-43VR (last visited May 16, 2025) ("As the nation's largest minority — comprising almost 50 million individuals — people with disabilities contribute to diversity, and businesses can enhance their competitive edge by taking steps to ensure they are integrated into their workforce and customer base.").

disabilities have low employment rates across the United States, with even lower rates in states where prejudice against people with disabilities and prevalence of disability stereotypes are high.[159] In addition, employees with disabilities make sixty-six cents for every dollar compared to those without disabilities.[160] These statistics highlight the prevailing tendency to undervalue the contributions of people with disabilities in the workplace. This Part challenges this tendency, arguing that employers should view hiring disabled people as being good for business.

Given these concerning statistics, businesses are influenced by a variety of external factors, including social, economic, technological, and cultural changes. As a result, for a business to remain competitive and successful, it must adapt its practices and strategies to align with current trends and the needs of the workforce and society. Failing to do so may hinder its ability to succeed, as it risks becoming irrelevant in a rapidly changing environment. In essence, businesses must be responsive and flexible to meet the evolving demands of their markets and stakeholders.

Recognizing this, employers have an opportunity to gain a competitive advantage by attracting people with disabilities in the labor market.[161] People with disabilities are an untapped human resource,[162] one that is consistently overlooked for its contributions to a diverse workforce. A company that values inclusion enhances its public image, which can be financially beneficial. Many modern businesses are concerned not only about profits but also about their social impact on the future business environment, which can assist in their viability.

In this context, successful companies must maintain a good image to protect their reputation and keep the public's goodwill. Capitalism has been used to create a social change that takes governments decades to accomplish. The public prefers that businesses be socially conscious[163] of subject matters impacting historically marginalized communities, like people with disabilities. When employers embrace this neurodiverse

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[159] Carli Friedman, *The Relationship Between Disability Prejudice and Disability Employment Rates*, 65 WORK 591 (2020).

[160] Jennifer Cheeseman Day & Danielle Taylor, *Do People With Disabilities Earn Equal Pay?*, U.S. CENSUS BUREAU (Mar. 21, 2019), https://www.census.gov/library/stories/2019/03/do-people-with-disabilities-earn-equal-pay.html [https://perma.cc/9A6G-ZJWN].

[161] *Id.*

[162] *See* Mark L. Lengnick-Hall, Philip M. Gaunt & Mukta Kukarni, *Overlooked and Underutilized: People with Disabilities Are an Untapped Human Resource,* 47 HUM. RES. MGMT. 255 (2008).

[163] *See* Heather Wilde, *The Business Benefits of Being Socially Conscious*, INC.COM (May 12, 2024), https://www.inc.com/heather-wilde/the-business-benefits-of-being-socially-conscious.html [https://perma.cc/2NFV- H2NQ]; *see also* Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121,174 (2016) (The public was becoming aware and corporations were gravitating towards establishing Benefits Corporations. "Benefit Corporation statutes enhance the ability of Benefit Corporations to pursue social missions by clarifying the scope of permissible activity.").

population and start planning to maximize human potential, they foster employee loyalty (lower turnover rates) while also earning the public's goodwill.

1. DIVERSITY AND DISABILITY

In 2025, diversity, equity, inclusion, and accessibility (DEIA) are buzzwords that almost every business owner has heard. This Article embraces the federal government's 2023 definitions of these terms. Diversity is defined as "[t]he practice of including the many communities, identities, races, ethnicities, backgrounds, abilities, cultures, and beliefs of the American people, including underserved communities."[164] According to the government, accessibility is "[t]he provision of accommodations and modifications to ensure equal access to employment and participation in activities for people with disabilities, and the reduction of elimination of physical and attitudinal barriers to equitable opportunities."[165] However, disability is not always part of the conversation of diversity. Therefore, employers must understand that diversity is much more than a "physical manifestation,"[166] and embrace mental health disabilities as part of the diversity component.[167]

Building on the importance of inclusivity, businesses need to understand the role disabilities play in a diverse workforce. Prior to the current attacks on topics that fall under the DEIA umbrella, Executive Order 14035 (issued on June 25, 2021)[168] called upon the federal government to "cultivate a workforce that draws from the full diversity of the nation."[169] In a 2023 report, the U.S. Government Accountability Office identified nine practices that agencies should adopt to advance (DEIA), namely: commitment to diversity in top leadership, inclusion of diversity as part of an organization's strategic plan, linkage of diversity to performance, use of quantitative and qualitative measures to record the impact of diversity programs, leadership accountability, succession planning, recruitment of diverse applicants, employee involvement, and diversity training.[170]

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[164] Exec. Order No. 14035, 86 Fed. Reg. 34593 (Jun. 25, 2021) [https://perma.cc/E3GD-WQMU].
[165] *Id.*
[166] *Neurodivergence at a Glance,* JOHNS HOPKINS UNIV. INTEGRATIVE LEARNING & LIFE DESIGN, (Oct. 5, 2022), https://imagine.jhu.edu/blog/2022/10/05/neurodivergence-at-a-glance/ [https://perma.cc/M7BH-MGFT].
[167] Taylor Adams & Theresa Nguyen, *Mind the Workplace 2022 Report: Employer Responsibility to Employee Mental Health*, MENTAL HEALTH AM. (Feb. 2022), https://perma.cc/2A2F- TGCP; *see generally* PHYLLIS GABRIEL, MENTAL HEALTH IN THE WORKPLACE: SITUATION ANALYSIS UNITED STATES (Int'l Lab. Off. Geneva, 2000).
[168] Exec. Order No. 14035, *supra* note 164.
[169] U.S. GOV'T ACCOUNTABILITY OFF. GAO-23-106254, FEDERAL WORKFORCE: STRENGTHENING DIVERSITY, EQUITY, INCLUSION, AND ACCESSIBILITY (2023).
[170] *Id.*

Businesses must also understand that their current DEIA practices may contribute to *neuro-exclusion*. For instance, employer guidebooks often prioritize services such as the Autistic Job Club[171] over services and resources focused on depression and anxiety. Organizations like the Autistic Job Club, a community-based organization, serve as a networking platform to connect autistic job seekers with employers, mentors, and peers, fostering an environment tailored to meet the needs of autistic workers. The Autistic Job Club promotes inclusive hiring practices and creates job opportunities that align with the strengths and talents of autistic individuals. While providing this type of support for individuals with a particular disability is valuable, the prioritization of one disability over others inadvertently perpetuates *neuro-exclusion* in the neurodivergent conversation of accommodations and accessibility. To address *neuro-exclusion* more broadly, including depression and anxiety in diversity training, for example, is a great opportunity to lessen the trivialization of these conditions. Employers need not view these trainings as a liability,[172] but rather as a way to prevent liability. Ultimately, normalizing *success enablers* for people with depression and anxiety fosters inclusion. These accommodations typically include flexible work schedules, minor work adjustments, or the use of a job coach (support professional).

2. NEURODIVERSITY IN THE WORKFORCE

About 15 to 20 percent of the world's population is neurodiverse.[173] Neurodiverse individuals often have a unique set of skills due to their altered brain function. The altered brain functions and accompanying increased sensibilities may prevent neurodiverse individuals from exhibiting reasonable social responses, but they also have unique abilities useful in the workforce. For example, people with autism are often known to have higher levels of concentration, more attention to detail, and good memory. This may explain why neurodiverse individuals are seen as an asset and represented in STEM fields.[174] In the case of people with mental health conditions, they tend to have resilience, deep-level thought, adaptability, and sensory awareness.

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[171] *See, e.g.*, MICHAEL BERNICK & RICHARD HOLDEN, THE AUTISM JOB CLUB: THE NEURODIVERSE WORKFORCE IN THE NEW NORMAL OF EMPLOYMENT (2018).

[172] Brian L. McGowan, et al., *Navigating the Backlash and Reimagining Diversity, Equity, and Inclusion in a Changing Sociopolitical and Legal Landscape*, 26 J. COLL. & CHARACTER 1, 1-11 (2025).

[173] Nancy Doyle, *Neurodiversity at Work: A Biopsychosocial Model and the Impact on Working Adults*, 135 BR. MED. BULL.108, 112 (2020), https://doi.org/10.1093/bmb/ldaa021 [https://perma.cc/UR59-9Q6W] (last visited May 8, 2025) (15-20% of the world's population is neurodiverse).

[174] *Why Do Students With Autism Gravitate Towards STEM Majors?,* ARMEN CLINICS (May 24, 2021), https://www.amenclinics.com/blog/why-do-students-with-autism-gravitate-toward-stem-majors/ [https://perma.cc/G6EN- 2EE6] (noting how students with autism gravitate towards STEM majors).

The following is a visual of how different disabilities overlap and create particular skills useful in the employment sector, which bolsters the argument that it is beneficial for employers to include neurodiverse employees. This overlap of traits demonstrates that diverse disabilities can foster unique strengths. For instance, the dominant traits of a person with ADHD include creativity, energy, and passion, with some hyperfocus and authenticity. Similarly, someone with dyscalculia often has good verbal skills and innovative thinking, which means they have a sense of creativity. Moreover, those with acquired neurodiversity, as is the case with some people with depression and anxiety, learn to adapt through innovative thinking, which makes them all the more resilient.

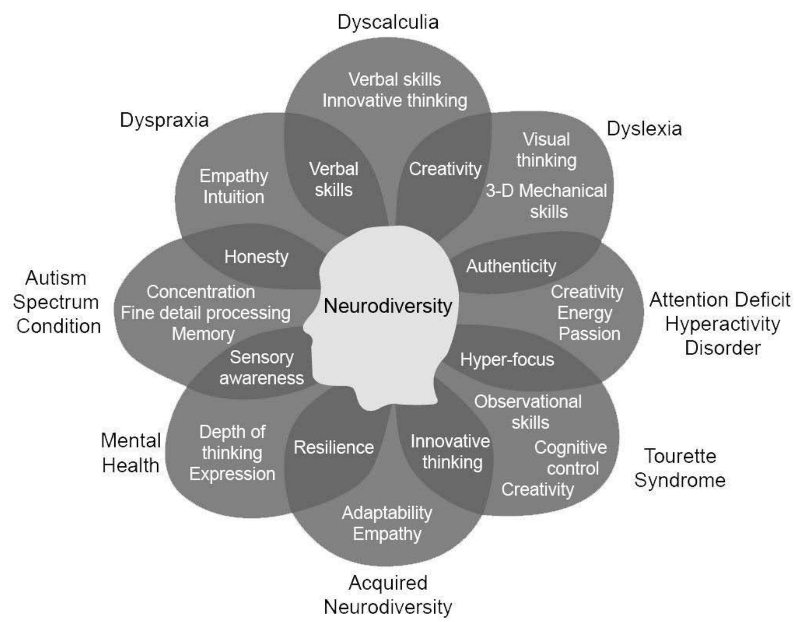

Image Credit: The Overlapping Skills and Strengths of Neurodiversity by Nancy Doyle, based on work by Mary Colley.[175]

Recognizing the prevalence of neurodiversity underscores the importance for employers to adapt and support a diverse range of mental health needs within the workforce. So, why should employers find solutions and care about the mental health crisis aside from humanitarian reasons? Simply put, the American workforce will continue to be impacted by mental health issues. According to the Employer Assistance and Resource Network on Disability Inclusion (EARN), a free organization that helps employers

[175] *The Overlapping Skills and Strengths of Neurodiversity* (illustration), *in Neurodivergence at a Glance*, *supra* note 166.

recruit, hire, retain, and advance people with disabilities,[176] employers should expect more employees to ask for accommodations related to mental health.

IV. WHAT CAN EMPLOYERS DO?

To truly advance equity, society must move beyond the mere existence of policies and toward fostering a deeper awareness and acceptance of human diversity in all its forms. Only by transforming perceptions, improving education about disability resources, and encouraging inclusive practices can we evolve toward a workplace—and a society—where every individual's potential is recognized and valued. Specifically, by proactively addressing misconceptions, leveraging available resources, and cultivating a culture of understanding and support, employers can overcome many of the barriers that hinder neurodiverse inclusion. Together, these targeted solutions are not only practical but also pave the way for a more equitable workplace where diversity of thought and human variation are truly valued and harnessed for organizational success.

1. STOP TRIVIALIZING

To make meaningful progress, employers must stop trivializing and instead solidify the seriousness of these disabilities, employers must embrace and address non-apparent disabilities. While it is evident that the employment sector is just one point of contact for an employee among many others (e.g., community, family, friends), it is where many individuals spend a large portion of their time. By addressing mental health disabilities, employers can create a significant impact on the overall environment, culture, and conditions of the American workplace. They have the opportunity to shape a more positive, supportive, and inclusive work climate for the future, promoting greater employee well-being and productivity.

Furthermore, the trivialization of depression and anxiety in the workplace not only perpetuates stigma but also leads to constructive exclusion of neurodivergent individuals who may fear disclosing their conditions. This dynamic creates a barrier for employees seeking necessary support and accommodations that could enhance their productivity and well-being. Therefore, by normalizing accommodations and fostering an inclusive environment, organizations can dismantle the ingrained biases that contribute to the marginalization of neurodiverse populations. Ultimately, cultivating a supportive workplace culture will not only benefit individual employees but also enhance the overall effectiveness and

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[176] *Cf. Neurodiversity in the Workplace*, *supra* note 173 ("Increasingly, many people in the U.S. and around the world identify as neurodivergent.").

adaptability of the workforce, paving the way for a healthier and more equitable future.

The hope is that employers will see the value of incorporating various talents and lived experiences in the workforce as they become educated about the different resources available to assist employees with non-apparent disabilities. Employers today can help a current employee utilize community-based services and normalize the use of job coaches. For future hires, employers can use neurodiversity workforce intermediaries and institute inclusive hiring practices.

2. Normalize Community-based Services

In *Olmstead v. L.C.*, the Supreme Court ruled that Title II of the Americans with Disabilities Act requires public agencies to provide community-based services to persons with disabilities when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment, and (c) community-based services can be reasonably accommodated.[177] The Court emphasized that unnecessary segregation of individuals with disabilities into institutional settings violates their rights under the ADA. Building on the court's ruling employers should be encouraged to integrate people with disabilities into the workforce, not just because it is the law, but also because accommodation resources create a positive social impact by maximizing human potential.

Public entities can also provide a positive social impact by providing community-based services to persons with disabilities. Specifically, community-based services are support and care services that aim to help individuals live more independently and participate more fully in community life. Examples include personal care assistance, housing supports, employment services, day programs, and medical or therapeutic services delivered in community settings. These services aim to promote integration, independence, and inclusion for people with disabilities. In practice, as community-based services are provided to people with disabilities, employers should use these services to supplement the accommodation resources offered to their employees with disabilities. One of these services is providing a job coach.

3. Normalize the Use of Job Coaches

Many states and non-profit organizations offer a job coach for people with qualifying disabilities.[178] According to the Equal Employment

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[177] Olmstead v. L.C., 527 U.S. 581, 607 (1999).
[178] *See Michigan Rehabilitative Services*, LAB. & ECON. OPPORTUNITY (last visited April 11, 2024) https://www.michigan.gov/leo/bureaus-agencies/mrs [https://perma.cc/3HSF-XMZQ] (providing an example of a state program that provides job coaches); *see also Job Coaches as Accommodations: A Guide for Employment Service Professionals,* NATIONAL NETWORK: INFORMATION, GUIDANCE, AND TRAINING ON THE AMERICANS WITH DISABILITIES ACT (last

Opportunity Commission (EEOC), an employee may request a job coach as an accommodation, which can be paid by a public or private social service agency to accompany the employee to the job site.[179] In the past, people often thought having a job coach for disabilities was a "pie-in-the-sky dream."

To illustrate the importance and potential of such support, let us think about Hellen Keller, a remarkable woman who was both deaf and blind. Helen Keller might have faced an insurmountable world of silence and darkness without the help of her dedicated teacher, Anne Sullivan, who provided assistance throughout her childhood, college, and later in her career as an author and professor.[180] When Helen was just a young girl, she struggled to communicate and often acted out in frustration, unable to find her voice or understand the world around her. Enter Anne Sullivan, a compassionate and determined educator who believed in Helen's potential.

Anne used a simple but powerful method: she took Helen's hand and fingers, and every time she spelled out words on her palm, like "water," as Helen felt water flowing over her hand from a water pump. Thanks to Sullivan's patience and innovative teaching, Helen associate the sensation of the water with the word spelled out in her hand, opening a whole new world of language and understanding. Over time, Anne taught Helen to read and write in Braille, to speak, and to explore the world beyond her limitations. Her unwavering support and innovative approach unlocked Helen's incredible intellect and ability to communicate, transforming her from a girl lost in silence into a woman who became an author, speaker, and advocate. Ultimately, Sullivan's dedication and inventive approach empowered Helen Keller to break free from the barriers imposed by her disabilities, to realize her full human potential, and to contribute to society with a valuable and diverse perspective only she could offer.

Similar to Sullivan, a job coach, also known as an employment specialist or vocational trainer,[181] provides personalized support to individuals with disabilities or other barriers to employment. Employers normalizing the use of job coaches is beneficial for other disabilities, too.[182] A job coach helps their clients find and prepare for jobs, develop job skills, and understand workplace expectations. In addition to providing on-the-job support, they can also assist with resume writing, interview preparation, and communication with employers. During employment, a job coach can offer

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visited May 3, 2025) https://adata.org/factsheet/job-coaches-as-accommodations [https://perma.cc/HJ7K-G44V] (discussing the role of job coaches).

[179] *See* Press Release, *EEOC*, EEOC Sues Comfort Suites for Disability Discrimination, (Sept. 16, 2010) [https://perma.cc/6RU8-VGKJ].

[180] *Anne Sullivan*, BRITANNICA, https://www.britannica.com/biography/Anne-Sullivan [https://perma.cc/H2R4-PUQ8] (last updated July 24, 2024).

[181] *Cf.* Muller, *supra* note 6 (defining emotional support companion).

[182] KAROLA DILLENBURGER ET AL., JOB COACHES FOR ADULTS WITH DISABILITIES (2019).

guidance, troubleshoot issues, and help ensure the individual successfully maintains their job and adjusts to the work environment. As a result, the employee's productivity and job satisfaction tend to increase. Furthermore, the job coach helps an employee with disabilities become a *qualified individual* under existing disability rights law, discussed in the previous section.[183]

While all U.S. states and territories generally have some form of job coaching or employment support services available, often through state vocational rehabilitation agencies or other organizations, there are wide variations in terms of availability, scope, and funding. This disparity, in turn, leads some states or non-profits with limited resources to inadvertently prioritize certain disabilities over others. In turn, this results in creating a disability hierarchy, perpetuating a *neuro-exclusion*. In other words, organizations providing job coaches for some but not all disabilities signify that one disability is more worthy than another or that one disability needs it more than another. This belief needs to be eradicated, and job coaches for employees with non-apparent disabilities need to be assimilated, accepted, and normalized by employers.

Moreover, since the job coach is present, employers may perceive them negatively, viewing their presence as invasive. However, even if an employer disagrees with job coaches, the employer cannot discriminate against someone with a mental health condition that requires one.[184] Per the laws described earlier in this Paper, neurodiverse individuals are a protected class. It is illegal for an employer to discriminate against a person with a mental health condition, and thus, they cannot fire, deny a job promotion, or force an employee to take a leave of absence because of this condition.[185] Nonetheless, while employers are not required to hire or keep an individual who cannot perform the job necessities or who is a threat to safety,[186] they certainly cannot rely on stereotypes or assumptions related to mental health.[187]

Under the law, employers are required to provide reasonable accommodations to individuals deemed to have a disability as defined by

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[183] *See* Linton, *supra* note 96; 42 U.S.C. § 12111(8) (defining qualified individual).
[184] *Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Dec. 12, 2016), https://www.eeoc.gov/laws/guidance/depression-ptsd-other-mental-health-conditions-workplace-your-legal-rights [https://perma.cc/RG7D-GSR9].
[185] *Id.*
[186] 42 U.S.C. §12111(8); 29 C.F.R. §1630.2(m) (2011); *see also* Stephen F. Befort, *Direct Threat and Business Necessity: Understanding and Untangling Two ADA Defenses*, 39 BERKELY J. EMP. & LAB. L. 377, 380 (2018) (explaining that employers have a direct threat defense when they do not extend jobs to or retain disabled individuals that pose a danger to others' health that cannot be reduced with a reasonable accommodation; these employees are not protected by the ADA).
[187] *See* 42 U.S.C. §12112.

the ADA[188] as long as the individuals can perform the business necessity with or without reasonable accommodations.[189] However, there are some people with disabilities who are not able to perform the essential job functions without a job coach. An employer who does not want to hire a person with a disability may attempt to refuse any accommodation (and deny them an employment opportunity) by arguing that the individual is not qualified. Importantly, the law should view a *qualified individual* as one who is able to perform the essential job functions *with* accommodations, instead of requiring the individual to perform the job functions without an accommodation.

By law, however, the employer does not have to provide the accommodation if they deem it unreasonable[190] and so the question becomes whether a job coach is a reasonable accommodation. Specifically, what is considered reasonable is defined by the law, as interpreted by courts on a case-by-case basis.[191] Additionally, the interpretation is largely influenced by the dominant ideology in society, in this case, how the general populace (including lawyers and judges) views people with disabilities. Ultimately, a reasonable accommodation is in the eye of the beholder, the goodwill of the company, and the resources available. Recent cases illustrate the challenges that individuals may face when trying to obtain a job coach as a reasonable accommodation.

a. EEOC vs. Party City (2018)

In 2018, the EEOC filed suit against Party City for disability discrimination against a high school student with disabilities in Boston, Massachusetts. The student, who was on the autism spectrum and suffered from severe anxiety, was a qualified high school senior interviewing for the sales associate position during Party City's busiest season.[192] Proactively seeking support she took the initiative to find the necessary resources to

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[188] 42 U.S.C.A. § 12102(1) (definition of disability under the ADA).
[189] Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(b)(6); *U.S. Equal Emp. Opportunity Comm'n v. T&T Subsea, LLC,* 457 F. Supp. 3d 565, 576 (E.D. La. 2020) (To show a business necessity defense under the ADA, a defendant must prove by a preponderance of the evidence that its qualification standards are: (1) uniformly applied, (2) job-related for the position in question, (3) consistent with business necessity, and (4) cannot be met by a person with plaintiff's disability even with a reasonable accommodation.); see also 42 U.S.C.A. § 12112(d) (discussing prohibitions against medical examinations and inquiries).
[190] *Id.*
[191] *See* Americans with Disabilities Act of 1990 § 102; 42 U.S.C. § 12112(d)(4)(A); Port Auth. Police Benevolent Ass'n, Inc. v. Port Auth. of N.Y. & N.J., 283 F. Supp. 3d 72 (S.D.N.Y. 2017) (noting that what constitutes a business necessity under the ADA's prohibition on disability-related inquiries varies across workplaces).
[192] Equal Employment Opportunity Commission v. Party City Corp., No. 1:18-cv-00838 (D.N.H. 2022); *see also* Party City to Pay $155,000 to Settle EEOC Disability Discrimination Lawsuit, *supra* note 75.

succeed in the employment sector and thus received services from Easterseals in New Hampshire.

On the day of the interview, an Easterseals employee accompanied her. Once the hiring manager realized that the Easterseals employee was a job coach and not the applicant's mother, this prejudice became evident.[193] The hiring manager mentioned that, based on a bad experience with a previous job coach assisting an employee, he assumed that all individuals using job coaches would waste the company's time and resources. Such bias resulted in discrimination, which the court ultimately found to be a violation of the ADA. This case underscored the prevalent stigma surrounding job coaches for a disability, perhaps due to an employer's lack of knowledge regarding how a job coach works and what this type of accommodation means for the bottom line of the employer.

The following cases reveal how biases against people with disabilities influence employer decisions:

b. Equal Employment Opportunity Commission v. Wal-Mart Stores, Inc. (2022)

In Equal Employment Opportunity Commission v. Wal-Mart Stores, Inc. (2022), this case provides an example of an employer violating the ADA by its refusal to allow an employee to have a full-time job coach paid for by a third party.[194] In this case, Paul Reina, a deaf and legally blind individual with a non-apparent disability (anxiety), worked for Walmart as a cart attendant since 1998. According to Walmart, the essential functions of the job entail that the employee:

> "Maintains availability of and organizes carts/flatbeds, assists customers with transporting items, loads merchandise into customer vehicles, and properly and safely utilizes cart retrieval equipment. Provides customer service by acknowledging the customer, identifying customer needs, assisting with purchasing decisions, locating merchandise, resolving customer issues and concerns, and promoting products and services, while maintaining a safe shopping environment."[195]

At trial, the jury was tasked with answering whether "Walmart violated the ADA by failing to provide Reina with a reasonable

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[193] Party City to Pay $155,000 to Settle EEOC Disability Discrimination Lawsuit, *supra* note 75.
[194] *Full-Time Job Coach A Reasonable* Accommodation, 30 No. 9 DISABILITY L. COMPLIANCE REP., no. 9, Sept. 2022.
[195] *Id.*

accommodation."[196]Following the trial, the jury delivered a verdict in the EEOC's favor. Reina was awarded $200,000 in compensatory damages and $5,000,000 in punitive damages, although the district court reduced the punitive damages award to $100,000 to satisfy the statutory damages cap.[197]

Most telling about the ideology invoked in this case was Walmart's attempt to argue that a permanent full-time job coach was not a reasonable accommodation under the ADA. The Court struck down this argument by reasoning that the court had only deemed an accommodation per se unreasonable when the accommodation itself creates "an inability to do the job's essential tasks."[198] According to the court, an accommodation does not render an employee unable to do a job's essential functions, in essence, returning to the default fact-based case-by-case approach to ADA claims.[199] The employer need not pay twice for the same work, which Walmart did not do because neither Reina nor the EEOC asked Walmart to pay for Reina's job coaches.[200] In the end, the court concluded that Reina having a job coach was a reasonable accommodation.

Ultimately, the determination of whether a job coach is a reasonable accommodation will come down to the will of the employer, which has the potential of influencing the will of the public, and in turn changing the way people with disabilities are perceived by the larger populace. For instance, in certain social spaces, active military are revered and respected, giving them priority to board planes[201] and readily accommodating them in business venues that have prioritized their treatment. The EEOC has established a guide for employers to help them hire veterans with disabilities[202] as well as resources to help hire and retain people with disabilities, whether they were in the military or not.[203]

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[196] *Id.* (The following were the other four questions before the jury: (2) whether Walmart violated the ADA by ending Reina's employment because of his disability; (3) compensatory damages; (4) whether Walmart acted with malice or reckless disregard of Reina's rights under the ADA; and (5) punitive damages).

[197] *Id.*

[198] *See* Severson v. Heartland Woodcraft, Inc., 872 F.3d 476, 481 (7th Cir. 2017); McAllister v. Innovation Ventures, LLC, 983 F.3d 963 (7th Cir. 2020) (holding that a long-term leave of absence was not a reasonable accommodation because "not working is not a means to perform the job's essential functions").

[199] DISABILITY L. COMPLIANCE REP., *supra* note 194.

[200] *Id.*

[201] AMERICAN AIRLINES, *Military Benefits*, https://perma.cc/YS4W-RPRL (last visited May 8, 2025); DELTA AIRLINES, *Military Travel Benefits*, https://perma.cc/FVG3-FC72 (last visited May 8, 2025); UNITED AIRLINES, *Military Benefits and Discounts*, https://perma.cc/9549-TSYG (last visited May 8, 2025).

[202] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Veterans and the Americans with Disabilities Act: A Guide for Employers*, https://perma.cc/FL8P-3H47 (last visited May 8, 2025).

[203] U.S. EQUAL EMP. OPPORTUNITY COMM'N, Disability-Related Resources for Employers, [https://perma.cc/KQL8-5GN9] (last visited May 8, 2025).

Both *Party City* and *Walmart* are examples of individuals accessing a job coach as an employment accommodation in what has traditionally been considered remedial and low-wage employment. Building on this, the concept of an employee's ability is limited to whether an individual can physically carry out the job's essential functions. However, there are jobs where a job coach is needed, even if their constant physical presence may not be necessary to perform the job's essential functions.

Furthermore, the reality is that more job coaches will be needed as the mental health crisis persists with the rise in diagnoses. Job coaches can benefit employees by offering personalized support to help them develop strategies for managing their mental health challenges at work, resulting in increased confidence and job satisfaction. Additionally, a job coach can help the employee build essential skills, such as communication, time management, and coping strategies, which can contribute to their professional growth and a more cohesive and collaborative team environment. This added skill set can make the employee a more valuable asset to the organization, positively impacting team morale and productivity.

The employer would benefit from improved employee performance, as working with a job coach allows the employee to better manage their symptoms, thereby enhancing their focus, productivity, and overall job performance. Moreover, when employees receive the necessary accommodations and support, they are more likely to feel valued and satisfied in their roles, which can lead to lower turnover rates. Reducing turnover saves the employer time and resources needed for recruiting and training new staff. And, by providing *success enablers* such as a job coach, the employer demonstrates a commitment to inclusivity and support for mental health. This move can enhance the company's reputation and attract diverse talent, creating a more supportive workplace culture.

In addition, employees and employers are often unaware that many state programs provide job coaches for qualified neurodivergent employees.[204] At the systemic level the following states have supported employment programs that offer job coaches to a qualified neurodivergent

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[204] CAL. DEP'T OF REHAB., Employment, Indep. & Equal., Supported Employment Program, [https://perma.cc/CX7M-9W4E] (last visited Aug. 7, 2025).

employee: California, New York,[205] Texas,[206] Florida,[207] Illinois,[208] Ohio,[209] Michigan,[210] Pennsylvania,[211] Georgia,[212] North Carolina,[213] Washington,[214] Oregon,[215] Colorado,[216] and Massachusetts.[217] Other states have various forms of support. While this is promising, the current ideology of the employment sector prioritizes able bodies, and it remains difficult for anyone with a disability to gain employment with a job coach, especially someone who has a socially trivialized disability. As discussed above, large companies like Walmart may attempt to argue that a job coach is not a reasonable accommodation. Such companies, however, often have more resources to help improve the lives of people with disabilities by taking accommodations more seriously and have the power to change the ideology behind how people with non-apparent disabilities are viewed. Microsoft and

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[205] N.Y. STATE OFF. MENTAL HEALTH SUPPORTED EMP. SERVS., https://omh.ny.gov/omhweb/adults/supported-employment-services/ [https://perma.cc/2BD5-X86H] (last visited Aug. 7, 2025).

[206] MISSION ROAD, *Community Employment and Job Coaching*, https://www.missionroadministries.org/programs/unicorncenters/community-employment-job-coaching/ [https://perma.cc/ZM2Y-42SS] (last visited Aug. 7, 2025); TEXAS WORKFORCE COMM'N, *Find Disability Employment Services*, https://www.twc.texas.gov/services/vocational-rehabilitation-services [https://perma.cc/5Y9R- DDPT] (last visited August 7, 2025).

[207] VOCATIONAL REHAB., *Find, Keep or Get a Better Job*, FLA. DEP'T EDUC., https://www.rehabworks.org/adult-programs/supported-employment.html [https://perma.cc/LCV4-Z9AK] (last visited Aug. 7, 2025).

[208] DIV. REHAB. SERVS., DRS Success: Employers, ILL. DEP'T HUMAN SERVS. https://www.dhs.state.il.us/page.aspx?item=52224 [https://perma.cc/8ME6- V782] (last visited Aug. 7, 2025).

[209] *New Supported Employment Services & Pre-ETS Subcategories*, OPPORTUNITIES FOR OHIOANS WITH DISABILITIES [https://perma.cc/2JPW-XWES] (last visited Aug. 7, 2025).

[210] *Supported Employment Services*, MICH. DEP'T HEALTH AND HUMAN SERVS., https://www.michigan.gov/mdhhs/keep-mi-healthy/mentalhealth/mentalhealth/ebip/ebsc/suppemp [https://perma.cc/6QU6-ZA4Z] (last visited Aug. 7, 2025).

[211] *Supportive Employment*, PA. DEP'T HEALTH AND HUMAN SERVS. [https://perma.cc/TDC4-QZKE] (last visited Aug 7, 2025); *Supported Employment for Adults*, BARBER NAT'L INST. https://www.barberinstitute.org/adults/employment/supported-employment [https://perma.cc/XY23-YH94] (last visited Aug. 7, 2025).

[212] *Supported Employment*, GA. DEP'T BEHAV. HEALTH & DEV. DISABILITIES, https://dbhdd.georgia.gov/supported-employment [https://perma.cc/CV8F-9J7N] (last visited Aug. 7, 2025).

[213] *Supported Employment*, EASTERSEALS PORT HEALTH, https://eastersealsport.com/supported-employment/[https://perma.cc/P9WG-3L53] (last visited August 7, 2025).

[214] *Supported Employment*, WASH. STATE DEP'T SOCIAL & HEALTH SERVS., https://www.dshs.wa.gov/dvr/supported-employment [https://perma.cc/VGM2-9UEF] (last visited Aug. 7, 2025).

[215] *Employment Services*, OR. DEP'T HUMAN SERVS., EMPLOYMENT SERVICES, https://www.oregon.gov/odhs/idd/pages/supported-employment.aspx [https://perma.cc/NLH9-MAUE] (last visited Aug. 7, 2025).

[216] *Supported Employment Program*, COLO. DEP'T HEALTH CARE POL'Y & FIN., https://hcpf.colorado.gov/supported-employment-program [https://perma.cc/KX3L-U66M] (last visited Aug. 7, 2025).

[217] Job Development & Placement Services, EASTERSEALS MASS., https://massachusetts.easterseals.com/get-support/areas-of-support/employment-transition-services/job-development-placement-services [https://perma.cc/EW34-SKVW] (last visited Aug. 7, 2025).

Ford, who are implementing programs keeping employees with disabilities in mind without straining their resources, are using their power in this way. These initiatives will be discussed in greater detail in Part VI.

Finally, struggling small companies, which must make difficult decisions on how and where to invest their limited resources, may be concerned about the cost of a job coach. To address this, these companies can allow job coaches to be paid by a third party. State and local organizations, such as the Department of Rehabilitation and Easterseals, can provide financial support for job coaches. Regardless of the size of the company, the hope is that work colleagues will eventually acclimate to seeing a job coach next to the neurodivergent employee, similar to how they acclimated to seeing wheelchairs being used by wheelchair users in the workplace. Employers can begin to normalize the employment accommodations for people with depression and anxiety, which will help change the narrative and eradicate the *neuro-exclusion* in the job market and eventually in the disability community. In turn, this would encourage employers and government services to begin viewing these disabilities more seriously and as deserving of job coaches.

4. USE NEURODIVERSITY WORKFORCE INTERMEDIARIES

For companies that are hesitant to directly implement hiring initiatives focused on neurodiverse individuals, Neurodiversity Workforce Intermediaries (NWIs) offer a valuable bridge to foster inclusive employment.[218] These intermediaries are specialized organizations or agencies that serve as connectors, matching neurodivergent workers with companies seeking to diversify their workforce. For example, a firm like Zavikon functions as an NWI, partnering with large corporations to identify qualified neurodiverse candidates, including those on the autism spectrum, with strengths in data analysis or detail-oriented tasks. NWIs help candidates prepare for interviews through tailored coaching while also helping employers understand how to make interview processes, which might be unfamiliar or challenging for some neurodiverse candidates, more accessible by offering flexible timing and sensory-friendly environments and using clear communication. As an example, a tech company might work with an intermediary to find a candidate with autism who excels at systems troubleshooting. The intermediary helps both parties align expectations and ensures that the candidate's strengths and accommodation needs are understood beforehand. Over time, as companies see the benefits of employing neurodiverse workers—like increased innovation, attention to detail, and loyalty they bring to the organization—they may become more open to creating their own internal neurodiversity programs. Many neurodiverse employees are eager for opportunities and simply need the

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[218] *See* Muller, *supra* note 6.

right connection and support to succeed.[219] Ultimately, NWIs act as brokers and advocates, assessing which employer and employee would work best together, helping to foster mutually beneficial relationships and gradually building a more inclusive workforce.[220]

5. ADOPT A NEW APPROACH TO INTERVIEWING

From the start of the hiring process–the initial job interview–employers can accommodate a neurodivergent candidate. In fact, conducting interviews using universal design[221] can make the process more inclusive of people from different backgrounds and abilities. Universal design is a theoretical framework geared towards creating an environment to allow for increased accessibility to as many individuals as possible in the workforce.[222] Examples of universal design include adjustable workstations for those with physical disabilities, curb cuts to provide easier street access to wheelchair users and those with strollers, or large print for those with visual impairments. By designing spaces with a universal mindset that fosters inclusion for the broadest range of candidates, employers not only open their doors to diverse talent but also create a desirable work environment that attracts more applicants.

Businesses are also broadening their recruitment strategies by emphasizing the use of inclusive language throughout the interview process. Inclusive language is a communication style that focuses on the person rather than their disability, such as "person with a disability" instead of "disabled person." The following is an interview scenario with inclusive language:

*Interviewer: "*Thank you for coming in today. I want to ensure that you feel comfortable during our conversation. If there are any accommodations you need, such as specific seating arrangements or assistance with any materials, please let me know. We're here to focus on your skills and experiences."

Candidate: "I appreciate that. I would prefer a chair with arm support due to my condition."

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[219] Scott E. Branton, Astrid M. Villamil & Joel L. Read, *Branding Neurodiversity: A Critical Discourse Analysis of Communicative Capitalism and Change Empowerment Among Neurodiversity Workforce Intermediaries*, 35 J. PUB. RELS. RSCH., 357 (2023).
[220] *Workforce Intermediaries and Collaboratives*, URB. INST., https://workforce.urban.org/taxonomy/term/30.html [https://perma.cc/QM8F-4G6R] (last visited May 1, 2025).
[221] JAY TIMOTHY DOLMAGE, ACADEMIC ABLEISM: DISABILITY AND HIGHER EDUCATION 86 (2017) (explaining how the curb cuts to accommodate wheelchair users benefit others); N.C. State Univ. Librs., Ronald L. Mace Papers 1974-1998 [https://perma.cc/YRN5-9XVE] (describing how Mace contracted polio as a child and quickly realized the challenges people with disabilities face, leading him to pioneer the concept of universal design and creating aesthetically pleasing buildings with an inclusive design that most people could use regardless of ability).
[222] Claire Doussard et al., *Universal Design for the Workplace: Ethical Considerations Regarding the Inclusion of Workers with Disabilities*, 194 J. BUS. ETHICS 285, 285–96 (2024).

Interviewer: "Of course! We can arrange that. Let's discuss your experience and how your skills can contribute to our team. Can you share how you've successfully handled challenges in your previous roles?"

In this example, the interviewer uses inclusive language by proactively offering accommodations and emphasizing the candidate's skills and experiences rather than their disability. The interviewer uses a respectful communication style rather than framing them by their disability. Additionally, providing advance notice of the interview process can help the interviewee prepare and manage expectations, which can be easily overlooked when viewing the process with an able-bodied mind. The interviewer can check in with the interviewee throughout the interview to see if they have any questions, demonstrating empathy and humanity towards the interviewee. To help the interviewee manage expectations, the employer can provide an outline of the interview and remove potential environmental distractions during the interview process. For longer interviews, a built-in break can be added to the interview schedule to ensure full attention.[223] Finally, an often overlooked but highly beneficial step is post-interview support, which benefits all candidates, not just those with disabilities (e.g., checking in with the applicant after the interview).[224]

To effectively foster true inclusion, transforming workplace norms and laws to embrace human diversity in all its forms is essential. Instead of relying on outdated frameworks that artificially separate the "disabled" from the "non-disabled," the focus should shift towards recognizing the value of accommodating individual needs and promoting accessibility for all employees. By adopting innovative initiatives—such as community-based services, job coaching, workforce intermediaries, inclusive interviewing practices, and universal design— employers can create environments where neurodiversity is not just accepted but celebrated. These proactive changes benefit neurodiverse individuals by providing equitable opportunities but also strengthen organizations through increased innovation, productivity, and morale. Ultimately, cultivating a workplace culture rooted in respect, understanding, and proactive adaptation paves the way for a more equitable and dynamic future—one in which every person's human potential is recognized and maximized.

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223 Kirsten Weir, *Give Me a Break: Psychologists Explore the Type and Frequency of Breaks We Need to Refuel Our Energy of Breaks We Need to Refuel Our Energy and Enhance Our Well-being*, 50 AM. PSYCHOL. ASS'N 1 (2019) (discussing how short breaks help people perform at their best); *see also* Emily M. Hunter & Cindy Wu, *Give Me a Better Break: Choosing Workday Break Activities to Maximize Resource Recovery*, 101 J. APPLIED PSYCHOL. 2, 302 (2016).

224 Mark A. Herschberg, *Why Companies Ghost Candidates and What To Do About it*, MEDIUM (Nov. 8 2023) [https://perma.cc/R8CY-RUEE] (last visited May 16, 2025); Alison Doyle & Jen Luckwaldt, *The Job Hopper, Why Employers Do Not Give Interview Feedback*, THE BALANCE (Jun. 24, 2024) [https://perma.cc/MUX7-VYZL] (last visited May 16, 2025).

V. NEURODIVERSE EMPLOYMENT INITIATIVES AND CASE STUDIES

At the 2023 Disability:IN National Conference,[225] one of the largest disability employment events in the United States,[226] the topic of the "neurodiverse employee" and strategies for assisting such employees were front and center and remain so in 2025.[227] Building on this focus the conference highlighted the need to prioritize recruitment and pipeline programs. As emphasized at the conference, recruitment and pipeline programs for people with disabilities are important because they help to integrate individuals with disabilities into the organization. Moreover, employers need to redefine and, at times, broaden the definition of an employee's ability[228] to better support and employ more people with disabilities. Ability under a *qualified individual* definition should entail the use of an accommodation. Currently, as previously stated, under the law, a *qualified individual* is one who can perform the essential job functions with or without reasonable accommodations.[229]

In previous decades, people with disabilities were often relegated to remedial or non-trade professions. While progress is evident, moving toward skilled work,[230] the employment rates of neurodiverse individuals remain low. Nonetheless, when a person with a disability participates in either of these programs, it can foster loyalty toward the company and make them feel seen and considered during the hiring process. Encouragingly, many companies—such as SAP, Microsoft, EY, JPMorgan Chase, and Ford

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225 NAT'L ORG. ON DISABILITY, *Disability in the Workforce: 2023 Insights*, https://nod.org/wp-content/uploads/Disability-in-the-Workplace-2023-Insights-Report.pdf [https://perma.cc/E2NP-U4BC] (last visited May 16, 2025).

226 Jeffrey Howard, *Disability:IN 2023 Annual Conference Highlights the Importance of Inclusive Language*, INCLUSIONHUB (Aug. 29, 2023), https://www.inclusionhub.com/articles/disabilityin-2023-annual-conference-highlights-the-importance-of-inclusive-language [https://perma.cc/TQ9Z-FRYT] (last visited May 16, 2025).

227 *Id.*

228 *Id.*

229 *See* 42 U.S.C. § 12111(8) (defining qualified individual).

230 Stephanie Patterson, *A Historical Overview of Disability and Employment in the United States 1600 to 1950*, 7 REV. DISABILITY STUD.: INT'L J., Oct. 26, 2014, 717 [https://perma.cc/C3JA-A5WP]; Diane Winiarski, *Forecasts Over the Next 10 Years Suggest More Opportunity For Workers with Disabilities*, FORBES (Aug. 02, 2023), https://www.forbes.com/sites/dianewiniarski/2023/08/02/forecasts-over-the-next-10-years-suggest-more-opportunity-for-workers-with-disabilities [https://perma.cc/9KYT-GZKB] (last visited May 16, 2025); *see generally* Andrew Purlang, *Why is the Employment Gap for People With Disabilities So Consistantly Wide?*, AAPD, https://www.aapd.com/why-is-the-employment-gap-for-people-with-disabilities-so-consistently-wide [https://perma.cc/2MF3-2P68] (last visited May 16, 2025); *see generally* U.S. DEP'T OF LAB., *U.S. Department of Labor Announces Proposed Rule To Phase Out Certificates Allowing Payment of Less Than Minimum Wage to Workers With Disabilities* (2024), https://www.dol.gov/newsroom/releases/whd/whd20241203 [https://perma.cc/4Q73-TVAD] (last visited May 16, 2025).

Motor Company–recognize the greater potential in neurodiverse employees and have implemented neurodiverse employment initiatives.[231]

Microsoft, for instance, has been a pioneer in promoting neurodiversity through its dedicated Neurodiversity Hiring Program. This initiative focuses on recruiting individuals with autism and other cognitive differences, recognizing the unique strengths these employees often bring to the workplace, such as resilience, remarkable attention to detail, and innovative problem-solving skills. The program emphasizes a supportive environment through tailored onboarding, mentorship, and structured support systems, including the use of job coaches to help new employees succeed. Importantly, Microsoft acknowledges that, while neurodivergent individuals—particularly those with anxiety or depression—may face additional challenges, they also possess valuable qualities that benefit the organization. To support this diversity of needs, they provide accommodations such as flexible work schedules and quiet workspaces, as well as access to mental health resources, Employee Assistance Programs (EAPs), and peer support networks.

As a result of these efforts, Microsoft reports having over 1,000 neurodivergent employees, with positive feedback highlighting a more inclusive and welcoming environment. Building on this success, their initiative has expanded beyond traditional technology roles, broadening opportunities for a diverse range of abilities and demonstrating a successful model of corporate inclusivity.[232] Currently, Microsoft offers various positions at multiple levels through its Neurodiversity Hiring Program. This range of roles indicates that the company remains committed to offering opportunities to the neurodiverse. For example, positions in their neurodiversity hiring program include Consulting, Content Writer, Customer Engineering, Data Analytics Manager, Data Scientist, Fiancé Analyst, IT Service Operations, Product Marketing, Program Manager, Service Engineer, Software Engineer, and Support Engineer.[233]

It is clear that Microsoft recognizes how creating diverse teams with neurodivergent employees positively impacts the company culture, working environment, and how they serve their customers.[234] As a result,

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[231] *The Neurodiversity @ Work Employer Roundtable and Nonprofit Disability:IN Are Launching the Neurodiversity Career Connector, a Job Search Portal for Neurodivergent Candidates,* MICROSOFT (Apr. 27, 2022), https://news.microsoft.com/source/2022/04/27/the-neurodiversity-work-employer-roundtable-and-nonprofit-disabilityin-are-launching-the-neurodiversity-career-connector-a-job-search-portal-for-neurodivergent-candidates [https://perma.cc/GM9B-DAQA] (last visited May 8, 2025).

[232] *Microsoft Neurodiversity Hiring Program & FAQ*, MICROSOFT, https://www.microsoft.com/en-us/diversity/inside-microsoft/cross-disability/neurodiversityhiring [https://perma.cc/J8AD-2QMM] (last visited May. 8, 2025).

[233] *Id.*

[234] *Id.*

Microsoft will continue to attract talented neurodivergent candidates by providing training and support for their career growth and success.[235] In addition, their Neurodiversity Hiring Program provides an alternative pathway into Microsoft while upholding the same rigorous hiring standards applicable to other candidates.[236] The team's goal is to ensure that every candidate, regardless of their cognitive processing style, has the chance to demonstrate their abilities and contribute to Microsoft's success.[237]

Ernst & Young (EY) has also taken significant steps toward fostering an inclusive workplace through their Neurodiversity Initiative.[238] Recognizing the unique talents and perspectives that neurodiverse individuals can bring, EY actively recruits professionals with conditions such as autism and other cognitive differences, placing them in vital roles in auditing, data analysis, and coding. These employees often possess exceptional attention to detail, problem-solving abilities, and innovative thinking, which EY aims to harness for the benefit of their clients and the organization as a whole. However, EY's commitment goes beyond just recruitment. They understand that supporting neurodiverse employees requires ongoing effort and a supportive environment.[239] To this end, the company offers mental health workshops designed to help employees manage anxiety, depression, and other challenges that may accompany neurodiversity. Additionally, peer mentoring programs create a sense of community and understanding, allowing neurodivergent professionals to connect, share experiences, and build resilience. Through these comprehensive efforts, EY demonstrates that neurodiverse talent, with proper support and inclusion, can thrive and make meaningful contributions in highly specialized and essential roles.

Similarly, Zavikon, a consulting and staffing firm dedicated to promoting neurodiversity, has developed a unique approach to helping organizations build inclusive workforces. They partner with large corporations to create specialized recruitment and onboarding pipelines specifically designed for neurodiverse candidates, with particular attention to those managing mental health conditions like anxiety and depression. Zavikon's approach goes beyond simply placing talent; they emphasize the importance of a supportive environment, advocating for tailored onboarding processes that meet each individual's needs. The firm also organizes mental health workshops aimed at educating both employees and managers about common challenges and coping strategies, fostering understanding and

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[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] Leah Carroll, *How EY Is Focusing on Neurodiverse Talent and How This Benefits Everyone*, BBC, (Mar. 21, 2024), https://www.bbc.com/worklife/article/20240320-ey-karyn-twaronite-neurodiversity-bbc-executive-interview [https://perma.cc/KKL9-ZYAT] (last visited May 16, 2025).
[239] *Id.*

empathy. As discussed earlier in this paper, Zavikon also provides ongoing support through NWIs.

These efforts have led to tangible results: Zavikon reports increased employee retention, more innovation within teams, and a broader acceptance of mental health accommodations across organizations. The firm's CEO has underscored this success, emphasizing that creating a psychologically safe environment is essential for truly harnessing the potential of neurodiverse employees and cultivating an inclusive organizational culture.[240] Likewise, in 2016, Ford Motor Company took a bold step toward inclusivity by partnering with Autism Alliance Michigan to create the FordInclusiveWorks pilot program.[241] Recognizing the unique strengths of individuals with autism—such as exceptional attention to detail, precision, and reliability—they designed specialized roles that leverage these talents, including positions in quality assurance and other detail-oriented tasks. But Ford's commitment extended beyond just creating suitable job roles; they aimed to foster a supportive and accommodating workplace environment.[242] The company emphasized workplace flexibility, implementing sensory-friendly environments to help employees manage sensory sensitivities, and provided comprehensive mental health support through their EAPs.

The results have been inspiring. Participants in the program report newfound confidence, with many successfully transitioning into mainstream roles within Ford and other parts of the organization. They also note improvements in their mental health outlooks, expressing gratitude for the supportive leadership that values their contributions and the structured work environments tailored to their strengths. Furthermore, Ford's initiative demonstrates how intentional accommodations and understanding can unlock the potential of neurodiverse employees, leading to not only improved individual well-being but also benefiting the company's culture and productivity. The company has created five new roles within its product development team, specifically designed to align with the skills and strengths commonly associated with autism. Highlighting this commitment, Ford's Executive Vice President, Raj Nair, stated, "We are committed to making people's lives better, and this pilot program has the potential to not

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[240] *Id.*

[241] *FordInclusiveWorks: Individuals with Autism Can Get Work Experience at Ford Through New FordInclusiveWorks Pilot Program*, LIBERTYFORD BRUNSWICK (May 26, 2016), https://www.libertyfordbrunswick.com/blog/2016/may/26/fordinclusiveworks-ford-introduces-pilot-program-to-provide-work-experience-opportunities-to-individuals-with-autism.htm [https://perma.cc/KA2D-Y863] (last visited May 1, 2025).

[242] *Ford Expands Autism Hiring Program*, 22 ASHAWIRE LEADER 2, 12 (2019), https://leader.pubs.asha.org/doi/10.1044/leader.NIB6.22022017.13 [https://perma.cc/3YRQ-5YSY].

only make the participants' lives better but also help Ford be an even more diverse and inclusive workforce."[243]

This statement highlights an important point: employers must establish a safe space from the top down, accompanied by actions and behaviors that encourage such openness.[244] This may mean having community resources readily available to help accommodate all employees or providing internal resources for *any* employee to obtain. Inclusive environments help all employees, regardless of whether individuals have diagnosed disabilities. This is why raising awareness among future employers about the assets a neurodiverse individual brings to a company is crucial to increasing the opportunities afforded to the neurodiverse population. In sum, employing people with disabilities is not just a moral imperative but also a strategic business opportunity.

VI. CONCLUSION

Addressing neuro-exclusion requires a fundamental shift in how workplaces perceive and support neurodiversity, especially the often-overlooked non-apparent disabilities. Building on this, recognizing these conditions as integral parts of human variation and implementing inclusive policies to support them, companies can unlock the immense potential of neurodiverse individuals, fostering innovation and productivity. While Legal frameworks, such as the ADA, provide a foundation for protections, this foundation is ultimately inadequate to fully embrace human diversity. Therefore, rather than solely focusing on improving existing disability anti-discrimination laws, efforts should be directed toward replacing them with new laws that prioritize embracing human variation, maximizing human potential, and increasing federal funding for state programs that assist with accommodations.

What would these laws entail? To begin with, they would remove the distinction between disabled and non-disabled individuals, reducing the stigma and discrimination currently faced by people with disabilities. Instead, each person's needs would be addressed individually in the workplace. For example, a more tailored approach might include accommodations like shorter workdays for parents of young children or treadmill desks for those who have difficulty staying sedentary. The possibilities are endless, and such adaptations would benefit everyone, regardless of whether they have a disability.

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[243] *Id.*
[244] *Id.*

Rather than being borne solely by an employer, new laws would promote a more equitable sharing of the costs of accommodations, thereby embracing the hybrid approach that Bagenstos discussed. Currently, employers may view providing accommodations under current disability anti-discrimination laws as burdensome, which contributes to ongoing discrimination against people with disabilities. To address this, the new laws and policies would focus on spreading the cost of accommodations to all stakeholders, such as American workers and employers. The hybrid approach means that accommodations can be funded through a combination of social programs and employer interest groups working towards the common goal of maximizing human potential while sustaining business profits that can be partly reinvested in this social objective.

In the meantime, as the law changes, there is great hope in educating employers on the value of human variation and convincing the legislature to invest in such accommodation efforts. This education may influence employer hiring practices and help policymakers pass laws that embrace human variation, strengthening the workforce through greater inclusion, and shifting the social status of people with disabilities. To meaningfully employ and support neurodiverse workers, employers must lead the way rather than wait for change to happen. Employers can engage and accommodate by utilizing job coaches, community services, and adaptable interview processes that normalize and destigmatize mental health conditions. By doing so, embracing neurodiversity not only aligns with principles of human dignity and social justice but also offers tangible business advantages in a competitive, ever-evolving landscape. Ultimately, fostering an inclusive environment where all disabilities are valued equally will pave the way for a more equitable, innovative, and resilient workforce—one that truly reflects the diversity of human experience.

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DEI AND THE PRIVATE WORKPLACE

MICHAEL SELMI*

Abstract

In 2023, the Supreme Court invalidated the use of race in the admissions practices of Harvard University and the University of North Carolina in a case known as Students for Fair Admissions v. Harvard. Immediately following that decision, dozens of cases and inquiries were filed challenging the employment practices of private employers under the notion that the Supreme Court's decision had effectively prohibited any efforts to diversify a workforce. But these recent challenges ignore the long history of workplace affirmative action which differs significantly from the educational setting where a diverse student body was seen as essential to creating an intellectual community. Private employers have long had substantial leeway to engage in practices to create and maintain a diverse workforce, now done primarily under the rubric of Diversity, Equity and Inclusion better known as DEI as opposed to affirmative action. This Essay will explore the older Supreme Court cases, how those cases have been interpreted over the years by lower courts, the move from affirmative action to DEI, and the limited effect the recent Supreme Court case should have on workplace diversity. Finally, I will discuss recent cases and show that most of the cases resemble older cases alleging reverse discrimination and that most of the challenges to date have failed, leaving private employers with freedom to continue with their DEI practices.

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* Foundation Professor of Law, Arizona State College of Law. An earlier version of this Article was presented at the Annual Colloquium on Scholarship in Employment and Labor Law held at the University San Diego Law School in September 2024 and at the Legal Theory Workshop at Yale Law School in March 2025. I am grateful to Professor Vicki Schultz and her students for engaging with my paper and for comments I received from Colloquium participants as well as helpful comments from Michael Yelnosky.

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I. INTRODUCTION

Affirmative action has always been part of the antidiscrimination landscape, and it has always been controversial. Even during the debates over the passage of the Civil Rights Act of 1964, there were concerns that white men would be passed over by unqualified Blacks or other minorities, a view that was later reflected on by the Supreme Court in some of the early cases.[1] Opposition to affirmative action was seen almost immediately after it was created - the first challenge to an affirmative action policy (involving the admissions program at the University of Washington Law School) was filed in 1971, only six years after the Civil Rights Act went into effect.[2] As a result of these early challenges, affirmative action has always been on the defensive. Despite affirmative action arising from a statute designed to counter decades of discrimination against African Americans, women, Latinos, and others, the view that it causes discrimination against White males has continued to be pervasive, and supporters of affirmative action have been on the defensive since the earliest challenges.

An important but neglected part of the affirmative action story is that private employers have largely been immune from challenges to their practices. From 1979 to the late 1980s, the Supreme Court issued a series of decisions on workplace affirmative action policies. Several involved private employers, but there have been few other challenges, particularly in lower courts.[3] For a variety of reasons, most challenges to employer affirmative action practices have involved public employers, most notably because the challenges were often filed under the Equal Protection Clause, which does not apply to private employers. To be sure, non-public actors such as private employers have long engaged in affirmative action, but their practices have largely escaped scrutiny.[4]

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[1] *See, e.g.,* Melvin I. Urofsky, THE AFFIRMATIVE ACTION PUZZLE: A COMPREHENSIVE AND HONEST EXPLORATION OF ONE OF THE MOST CONTROVERSIAL LEGAL AND SOCIAL ISSUES IN US HISTORY 48-52 (2020) (discussing the role affirmative action played in congressional debates). In one of its first opinions interpreting Title VII of the Civil Rights Act, the Court went out of its ways to note that "Congress has not commanded the less qualified be preferred over the better qualified simply because of minority origins." Griggs v. Duke Power, 401 U.S. 424, 436 (1971).

[2] *See* DeFunis v. Odegaard, 416 U.S. 312 (1974) (per curiam). The Supreme Court ruled that the DeFunis case was moot because the plaintiff was about to graduate from law school. The Civil Rights Act of 1964 became effective in 1965. For an influential early book critical of affirmative action, *see* Nathan Glazer, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975).

[3] The employment cases were: United Steelworkers v. Weber, 443 U.S. 193 (1979); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Loc. 28 of the Sheet Metal Workers' Int'l v. EEOC, 478 U.S. 421 (1986); Loc. No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986); Johnson v. Transp. Agency, 480 U.S. 616 (1987); United States v. Paradise, 480 U.S. 149 (1987); Martin v. Wilks, 490 U.S. 755 (1989).

[4] Jennifer Delton has documented that many employers engaged in efforts to diversify their workforces well before the 1964 Civil Rights Act was passed. *See* JENNIFER DELTON, RACIAL INTEGRATION IN CORPORATE AMERICA, 1940-90 (2009).

That is, until now. In 2023, the Supreme Court invalidated the admission practices of Harvard University and the University of North Carolina in a way that may end the use of racial preferences in admissions for both public and private institutions.[5] Although the Court did not overrule its prior decisions, the case *Students for Fair Admissions v. Harvard* (*SFFA*) was seen as a significant departure from its past cases involving affirmative action in the education setting.[6] Immediately following that decision, several groups filed lawsuits and inquiries challenging private employers' practices that are now commonly defined as involving Diversity, Equity, and Inclusion, or DEI.[7] These challenges are often without specific allegations, instead using broad attacks on practices designed to diversify the workforce. There have been challenges to diversity fellowships, both at law firms and in other areas, and many of these programs have now been opened up to broader groups as a result.[8] There has also been a high-profile lawsuit challenging the hiring practices at Northwestern University's law school.[9]

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[5] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA*), 600 U.S. 181 (2023).

[6] There have been a significant number of articles on the Court's opinion. *See*, *e.g.*, Ofra Bloch, *SFFA and the Memory Wars*, 27 U. PA. J. CONST. L. 350 (2025); Davon W. Carbado & Russell K. Robinson*, SFFA: Bakke's Chickens Coming Home to Roost,* 113 CALIF. L. REV. 1036 (2025); Issa Kohler-Hausmann, *What Did SFFA Ban? Acting on the Basis of Race and Treating People as Equals*, 66 ARIZ. L. REV. 305 (2024); Angela Onwuachi-Willig, *Roberts' Revisions: A Narratological Reading of Affirmative Action Cases*, 137 HARV. L. REV. 192 (2023).

[7] There have been upwards of one hundred cases filed. Here is a sampling: Hadriana Lowenkron, *Trump Pressures Apple to End DEI After Investors Reject Measure*, BLOOMBERG LAW (Feb. 26, 2025); Rachel Scharf, *Former Marvel Exec Sues Disney for 'Old White Guy' Bias*, LAW360 (Feb. 11, 2025); Rebecca Klar, *Merck DEI Program Targeted by Edward Blum Group for EEOC Review*, BLOOMBERG LAW (Oct. 7, 2024) (EEOC charge filed challenging the company's diverse leadership program); Patrick Dorrian, *Blackrock Beats Equity Trader's Bias Suit Over ESG, DEI Policies*, BLOOMBERG LAW (Oct. 1, 2024) (individual challenge to Blackrock's move to ESG investing dismissed); Rae Ann Varona, *IBM Incentivizes Biased Hiring, Ousted White Male Worker Says*, LAW360 (Aug. 21, 2024) (alleges termination because of diversity priorities); Sam Skolnik, *King & Spalding Sued Over Diverse Law Student Hiring Program*, BLOOMBERG LAW (May 10, 2024) (former law student sued over summer associate program); Riddhi Setty, *Stephen Miller Group Sues IBM's Red Hat for White Male Bias,* BLOOMBERG LAW (May 8, 2024) (challenging hiring goals); Mike Vilensky, *Nonprofit Hit With Bias Suit Over Texas Minority- Based Grants*, BLOOMBERG LAW (Apr. 16, 2024) (nonprofit distributing grants to women and minorities); Clara Hudson, *Stephen Miller's Legal Group Targets Disney Board on Diversity*, BLOOMBERG LAW (Mar. 27, 2024) (letter sent to Disney and EEOC charge regarding Board of Directors Diversity); Susan Harmeling, *Balancing Diversity and Meritocracy: The Gannett DEI Lawsuit*, FORBES (Nov. 6, 2023) (class action lawsuit challenging DEI practices); Marco Poggio, *Conservative Group Sues BigLaw Firms over DEI Fellowships*, LAW360, (Aug. 22, 2023) (lawsuits against Perkins Coie and Morrison Foerster).

[8] In some of the cases, companies moved to make their fellowships less exclusive by changing the eligibility requirements. *See* Dee-Ann Durbin, *McDonald's Settles Lawsuit Over Latino Fellowship Program by Opening Door to Non-Latino Applicants,* AP NEWS (Jan. 31, 2025); Nate Raymond, *Second Major U.S. Law Firm Changes Diversity Fellowship After Lawsuit*, REUTERS (Oct. 6, 2023). Lawsuits challenging Diversity Fellowships continue. *See* Karen Sloan, *ABA Sued Over Diversity Scholarship by Conservative Group*, REUTERS (Apr. 14, 2025).

[9] *See* Anemona Hartocollis, *Northwestern Law School Accused of Bias Against White Men in Hiring*, N.Y. TIMES (July 2, 2024). The case was recently dismissed primarily on standing grounds given that the plaintiffs had neither applied nor demonstrated they were qualified. *See*

The question this essay addresses is whether the Supreme Court's *SFFA* decision altered the law regarding workplace DEI practices, or more specifically, what the existing law is with respect to workplace affirmative action under the new guise of DEI. The primary Supreme Court cases on affirmative action are certainly old, but as we will see, lower courts have consistently relied on them over the last thirty to forty years. The question we now confront is whether those earlier set of cases will retain their vitality in light of the recent Supreme Court decision and other trends, and if not, what that might mean for private affirmative action efforts.

The Supreme Court has not addressed workplace affirmative action since the 1980s, but based on that case law, employers were generally free to engage in affirmative action to address past discrimination or imbalances in their workforce.[10] Lower courts likewise upheld many affirmative action policies against various legal challenges, with the only consistent rule being that layoffs were to be treated differently from hiring or promotions.

The recent decision in *SFFA* will likely not affect the private workplace or alter the existing case law regarding employment affirmative action. One reason is that affirmative action case law has always developed within discrete subsets with little crossover, so that the education cases rarely, if ever, influence employment cases. The same is true in the other direction. The *SFFA* case also involved the Equal Protection Clause and Title VI, neither of which are typically implicated in private employment. Indeed, most private employment is governed either by Title VII of the Civil Rights Act of 1964 or the statute colloquially known as Section 1981, both of which differ in material ways from the provisions at issue in the education cases. One indication of the limited effect of the *SFFA* decision on private employment is seen when reviewing the developing case law from the various challenges to DEI practices. The review will show that, to date, the few cases that have succeeded did not turn on the *SFFA* decision, and the vast majority of cases that have been decided have rejected challenges to DEI practices.[11] In other words, the argument that DEI is necessarily discriminatory has been largely rejected by courts. Finally, the employment practices of private employers tend to be less rigid and less transparent than those of public employers, which makes challenging their practices more difficult.

At this point, I should note that I do not intend to engage in a discussion of the merits of affirmative action other than some comments towards the end of the Essay. Nor do I intend to critique or analyze the Supreme Court's *SFFA* decision. My interest is in how that decision affects

Karen Sloan, *Northwestern Law School Defeats Lawsuit Alleging Anti-White Faculty Hiring*, REUTERS (Jan. 22, 2026).

[10] *See* section II.A., *infra*.

[11] These cases are discussed in section III.B., *infra*.

private efforts to diversify a workforce and what legal guidance there is about those efforts, keeping in mind that the Supreme Court doctrine for private workplaces arose before the move to DEI. I also will not address or discuss the insidious political rhetoric that has emerged that treats any person of color or woman in a position of power as a "DEI hire," a position that reeks of white supremacy.[12] Rather, my focus will be on the legal restrictions that apply to efforts of private employers to diversify their workforces and work to create an inclusive environment.

This Essay will begin with an exploration of the Supreme Court's workplace affirmative action cases, mostly decided nearly four decades ago. I will also demonstrate how lower courts have interpreted those cases, including within the last ten years, to show that private employers have substantial leeway to diversify their workforces. The following section begins with a discussion of the move from affirmative action to DEI, including the business case for diversity that drives many private employers. From there, I will discuss *SFFA* and why it is not likely to have any immediate influence on private workplace issues, followed by a discussion of recent cases involving challenges to DEI practices. Finally, I will discuss what I think the future of workplace affirmative action or DEI will likely be and how employers are to respond to the recent challenges.

II. THE EMPLOYMENT AFFIRMATIVE ACTION CASES 1979-87

There is no universal definition of what constitutes affirmative action. The common perception seems to be that affirmative action involves a preference, generally with respect to race, though other factors, particularly gender, have been used over the years. The term affirmative action entered the legal lexicon as a result of the recently rescinded Executive Order 11246. Originally enacted in 1965, the Executive Order required entities with federal contracts over $10,000 to have an affirmative action plan.[13] Even though the Department of Labor's enforcement of the Executive Order was always modest, studies demonstrated that it significantly improved the employment opportunities of African Americans.[14] A few years later, the Rehabilitation Act required federal

[12] For one example of such rhetoric see Steve Holland and Trevor Hunnicutt, *Trump Takes Aim, Without Evidence, at Diversity Policies Over Midair Collision*, REUTERS (Jan. 30, 2025).
[13] Exec. Order No. 11,246 3 C.F.R. §339 (1964-1965). The Executive Order was extended to women in 1967. *See* Exec. Order No. 11,375, 3 C.F.R.§684 (1966-1970). In January 2025, President Trump rescinded the Order. Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025).
[14] *See, e.g.*, Jonathan S. Leonard, *The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment*, 4 J. OF ECON. PERSP. 47, 54 (1990) (reviewing literature and concluding that the EO produced meaningful benefits even though threat of enforcement was small); Fidan Ana Kurtulus, *Affirmative Action and the Occupational Advancement of Minorities and Women During 1973-2003*, 51 INDUS. REL. 213 (2012) (finding

contractors to take affirmative action to employ individuals with disabilities, a provision that appears to have been rarely enforced.[15]

As previously noted, the Supreme Court has been considering affirmative action or affirmative-action-related cases at least since the landmark civil rights legislation in the 1960s, though some might suggest even longer. The cases can be broadly broken down into various categories: (1) education admissions, both at college and lower levels; (2) employment; (3) contract set-asides; and, in a slightly different context, (4) voting rights.[16] Although there is clearly overlap in the cases, they have developed separately with distinct elements, a fact that will be particularly important when we consider the effects of the Supreme Court's recent education decision on private employment. For example, ever since *Regents of the University of California v. Bakke* was decided in 1978, the education cases have focused on the diversity rationale, namely that educational institutions were permitted to take race into account as one factor in their quest to create a diverse student body essential to their educational missions.[17] Diversity as an essential part of creating a desirable academic environment does not readily translate to other areas like the workplace or contract set-asides, where discrimination provides the predicate for action rather than a desire for diversity. Increasingly, employers are seeing economic benefits from diversity, an issue that likewise does not have a ready parallel with either the education or the set-aside cases.[18]

Following *Bakke*, the focus of the Court's affirmative action decisions have largely gone in waves. After *Bakke*, the Court did not return to education cases until the early 1990s and when it did, it modified but did not overhaul the law.[19] Instead, employment cases were the Court's primary

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more women and minorities in high-paying skilled jobs among federal contractors than non-contractors).

[15] 29 U.S.C § 793 (1973). Regulations relating to the requirement were upheld, but there does not seem to have been much activity under the Rehabilitation Act provision. *See* Assoc. Builders & Contractors, Inc. v. Shin, 773 F.3d 257 (D.C. Cir. 2014).

[16] The employment cases will be discussed in the next section. The education cases are Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); Fisher v. University of Texas, 570 U.S. 297 (2013) (Fisher I); Fisher v. University of Texas, 579 U.S. 365 (2016). The contract set-aside cases are Fullilove v. Klutznick, 448 U.S. 448 (1980); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Metro Broad. v. FCC, 497 U.S. 547 (1990); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). The Voting Rights cases, which in many respects resemble affirmative action cases, were different in that the requirements imposed by courts were to comply with the Voting Rights Act of 1965. *See, e.g.*, Shaw v. Reno, 509 U.S. 630 (1993); Miller v. Johnson, 515 U.S. 900 (1995).

[17] 438 U.S. 265, 312-13.

[18] This issue is discussed further in section III., *infra*. In an interesting case involving an affirmative action plan for a fire department, the City of Newark sought to establish the benefits of having an integrated fire department, but the court ultimately rejected its claim. *See* Lomack v. City of Newark, 463 F.3d 303, 309-10 (3rd Cir. 2006).

[19] In the University of Michigan cases, the Supreme Court struck down the undergraduate admissions process while upholding the law school's more holistic process. *See* Gratz, 539 U.S.

focus in the 1980s, with contract set-asides coming along in the late 1980s-90s.[20] Many of the early employment cases involved police departments, which were particular targets following the Kerner Commission Report's highlighting of the lack of diversity within police departments as a factor in fueling the race riots of the late 1960s.[21] The Reagan Administration later mounted a campaign to upend affirmative action with a primary focus on employment, but that campaign ultimately failed.[22]

The cases involving workplace affirmative action can be divided into several categories. First are cases in which employers have been adjudicated to have committed discrimination, usually in the context of a class action, and the court orders relief for class members. Although these cases arguably do not directly involve affirmative action because they are designed to remedy identified discrimination, they fall within the broad umbrella given that the victims of discrimination will often be afforded a preference for a future job.[23] Several related Supreme Court cases will be discussed shortly, but the only real contested issue in these cases was who could benefit from the judicially ordered relief.[24]

The next category involves cases where litigation was ongoing, but the parties voluntarily agreed to resolve the matter through a consent decree.[25] Some of these cases arose after judicial findings of discrimination, while others were settled before any such findings were issued. These

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at 2430 (undergraduate program) and Grutter v. Bollinger, 539 U.S.at 334 (law school), and later upheld the policy of the University of Texas. *See* Fisher v, Texas, 579 U.S. at 387-88.

[20] See cases cited in notes 3 and 16.

[21] The Kerner Commission was formed following the riots that erupted in the Summer of 1967, issuing its report in 1968 and calling for race-conscious hiring n to diversify police departments. *See* Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the Significance of Race in America*, 36 CONN. L. REV. 677, 683 (2004). Many police departments later adopted affirmative action plans, many of which were challenged in court. *See, e.g.*, Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979); United States v. City of Buffalo, 633 F.2d 643 (2d Cir. 1980); Talbert v. Richmond, 648 F.2d 925 (4th Cir. 1981); Williams v. City of New Orleans, 694 F.2d 987 (5th Cir. 1982); Ledoux v. District of Columbia, 820 F.2d 1293 (D.C. Cir. 1987); Cotter v. City of Boston, 323 F.3d 160 (1st Cir. 2003).

[22] For discussions of the Reagan Administration's assault on affirmative action see Drew S. Days III, *The Court's Response to the Reagan Civil Rights Agenda*, 42 VAND. L. REV. 1003 (1989); John Dumbrell, *Affirmative Action During the Reagan Presidency*, 8 POLITICS 30 (1988).

[23] As Judge Posner once noted: "If the plaintiff was a victim of discrimination by the defendant and merely seeks a decree that would put him where he would have been but for the discrimination, he is not seeking preferential treatment at all; he is asking merely to be put where he would be in a world that had no discrimination . . ." Wittmer v. Peters, 87 F.3d 916, 919 (7th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997).

[24] *See* discussion *infra* section II.A.3.

[25] *See, e.g.*, United States v. Paradise, 480 U.S. 149 (1987) (court ordered relief); Local 28 of Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986) (bench trial determined liability); Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985) (litigation prompted consent decree); Williams v. City of New Orleans, 694 F.2d 987 (5th Cir. 1982) (consent decree prompted by litigation); United States v. Buffalo, 633 F.2d 643 (2d Cir. 1980) (court ordered relief including 50% requirement that Blacks receive entry-level positions).

consent decrees typically required employers to hire or promote a certain number of African Americans (as most but not all of the early cases involved race). Various issues arose in these remedial claims, which differ from the first category in that the parties in this second category of cases voluntarily reached agreement rather than operating under a judicially imposed remedy.[26]

The third and final category of cases involves employers voluntarily enacting affirmative action policies. Many of the employers in these cases had a history of discrimination, but the cases were not remedial in nature because the policies were voluntarily enacted outside of any formal litigation. The question in these cases – which will likely have the greatest contemporary significance – was whether the employers' actions violated existing law. For private employers, the existing law is most commonly Title VII of the Civil Rights Act of 1964.[27]

In addition to these cases, employers relied on a number of practices that were often considered affirmative action but rarely generated litigation, at least in the early years. These practices were often defined as "soft affirmative action" and typically involved expanding applicant pools through increased recruitment or creating mentorship programs designed to retain employees or enhance their promotional opportunities.[28] These practices are now under attack through the DEI challenges but in the early days of affirmative action they were largely uncontroversial. With these broad categories in mind, I will move to discuss the early cases.

A. THE SUPREME COURT CASES

1. United Steelworkers v. Weber

Although many Supreme Court cases have involved public employers, the first employment-related affirmative action case involved a private employer and a union. This case has received inordinate attention, given its unusual factual setting – *United Steelworkers v. Weber* (generally referred to as *Weber*) began at a Louisiana Kaiser Aluminum plant in 1974.[29] Prior to that time, Kaiser had only hired individuals with previous craft experience for certain positions, and the union had historically excluded African Americans from craft positions, so there were effectively very few African Americans eligible for the positions. Of the 273 craft

[26] The *Paradise* and *Sheet Metal Workers* cases are discussed further in Section II *infra*. In both cases, the court overseeing implementation of the consent decree adjusted the goals and requirements in light of the parties' failure to meet the goals.

[27] *See, e.g.*, Johnson v. Santa Clara County, 480 U.S. 616 (1987); United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

[28] *See* Faye J. Crosby, Aarti Iyer, Sirinda Sincharoen, *Understanding Affirmative Action*, 57 ANN. REV. PSYCH. 585, 595 (2006) (defining "soft affirmative action" to include outreach programs and noting such programs generally not controversial).

[29] 443 U.S. 193, 198 (1979).

workers, only 5 (1.83%) were Black, even though Black people comprised 39% of the local workforce.[30] In 1974, the United Steelworkers and Kaiser Aluminum entered into a new collective bargaining agreement that covered 15 plants, and part of the agreement included an affirmative action plan designed to open up the craft positions to Black workers. The agreement called for each plant to hire Black workers consistent with their representation in the local labor market, and to do so by creating an on-the-job training program to teach skills to those without prior experience.[31] As the Court later explained, "The plan reserved for [B]lack employees 50% of the openings in the newly created in-plant training programs."[32]

At the Kaiser plant located in Gramercy, Louisiana, there were thirteen openings in the first year. Seven were filled by Black employees, while six went to white employees.[33] The most senior Black accepted into the program had less plant seniority than several white individuals who were not selected for the program, and one of those white individuals sued, resulting in a class action.[34] In unionized workplaces, seniority at the plant was the most common means for determining placement or promotion. The case was brought solely under Title VII and, similar to many recent cases, the plaintiff Weber argued "that Congress intended in Title VII to prohibit all race-conscious affirmative action plans."[35] According to the Court, the question was whether "an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation" was consistent with Title VII's mandates.[36]

To put the *Weber* case in perspective, note that these early cases, including the famed *Griggs v. Duke Power*,[37] were at least in part about how to break away from the past practices so as to enable African Americans to have the opportunities promised by the Civil Rights Acts.[38] As I have discussed in previous works, a primary reason the Supreme Court established the disparate impact theory was to break the old patterns under the notion that if employers could just use tests that had a disparate impact without justifying the need for the test, the now-unlawful segregation of the

[30] *Id.* at 198-99. According to Justice Blackmun's concurring opinion, "Kaiser denie[d] prior discrimination but concedes that its past hiring practices may be subject to question." The plurality, on the other hand, emphasized discrimination among the craft unions, noting in a footnote (1) that "Judicial findings of exclusion from crafts on racial grounds are so numerous as to . . . [be] a proper subject for judicial notice."
[31] Craft jobs in question included carpenter, electrician, general repairman, insulator, machinist, and painter. *Id.* at 212.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* at 201.
[36] *Id.*
[37] 401 U.S. 424 (1971).
[38] *See generally* Michael Selmi, *From Disparate Impact to Protecting White Men and Their Interests: The Early Development of Title VII*, 65 ARIZ. L. REV. 1009 (2023).

past would simply be perpetuated.[39] The same was true in *Weber* and in other similar cases that arose at the time: if seniority was the deciding factor for admission to the program, it would have been difficult to create new patterns of employment, as was the intention of the legislation.[40] Another important factor in this case (and many of the other cases) was that no court had ever held that Title VII required affirmative action outside of specific findings of discrimination. Rather, in *Weber*, the question was whether it was permissible for private parties voluntarily to agree to break down old segregation patterns instead of waiting until they were sued or allowing the old patterns to persist. Importantly, the Supreme Court had noted the importance of deferring to business judgment about what was best for the company in *Furnco v. Waters*, a case decided around the same time as *Weber*, stating that "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress, they should not attempt it."[41] The Supreme Court and lower courts have repeated this language many times over the years.[42]

In a 4-1-2 decision, the Supreme Court upheld the plan at issue in *Weber* with a decision based primarily on a parsing of the legislative history, something the dissent also delved into. The legislative basis of the decision was the primary legacy of the case until recently, and it was studied primarily as a vehicle for statutory interpretation rather than for its effect on affirmative action.[43] Although the Court stated that it did not intend to create a definitive standard for voluntary plans, the case created a three-part Title VII test to aid in determining whether a voluntary plan would be acceptable. A plan will be upheld to the extent it (1) seeks to address a traditionally segregated job classification, (2) is temporary, and (3) does not unnecessarily trammel the rights of white individuals.[44] The Court concluded that the plan at issue in *Weber* fell within "the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."[45]

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[39] *See id.* at 1019-20 (discussing the need to dismantle barriers to equality).
[40] Nevertheless, the Court chose to protect seniority systems by treating any seniority system, even one established in a way that ensured African Americans remained at the bottom, through a textual reading of the statute.
[41] 438 U.S. 567, 574 (1978).
[42] *See, e.g.,* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 999 (1988) (citing language from *Furnco*); Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 661 (1989) (same).
[43] *Id.* at 208. Professor William Eskridge featured the *Weber* case as a paradigmatic example of what he called dynamic interpretation, and the case quickly became a staple in legislation classes. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994). *See also* Phillip P. Firckey and William N. Eskridge, Jr., *The Story of Steelworkers v. Weber (1979): Statutory Text, Spirit, and Practical Reasoning* in STATUTORY INTERPRETATION STORIES 93 (2011) (W. Eskridge, Jr., P. Frickey & E. Garrett eds.).
[44] *Weber*, 433 U.S. at 208 (establishing a three-part test).
[45] *Id.* at 209. In an interesting recent paper Professor Gali Racabi seizes on the emphasis on employer discretion to suggest that employers have the power, or discretion, to implement affirmative action plans without substantial judicial scrutiny, a claim that seems to read too

A key interpretive question raised by the case was whether it should be seen as remedial in nature; in other words, whether the plan was designed to remedy past discrimination by a particular employer. As the law developed, so too did a broader understanding of remedial efforts, but as was an issue in many affirmative action cases, determining when efforts were remedial was not always easy. In *Weber,* there was no judicial finding of discrimination, but it seems clear that the plan was designed to address the discriminatory history of the union that supplied the labor (which might be considered a joint employer). That discrimination continued well past the passage of the Civil Rights Act, as demonstrated by the fact that that the plan was adopted a decade later in 1974.[46] Regardless of how one views the case, it is clear that the Court did not require a finding of discrimination to justify the adoption of an affirmative action plan, which could prove significant in connection with contemporary cases.[47] Additionally, it is significant that none of the rulings in *Weber* relied on the Court's education decision in *Bakke* – the case was only cited occasionally without analysis.[48] This is one indication that the doctrine with respect to education and employment have developed separately.

2. Johnson v. Santa Clara County

Although *Weber* receives the most attention in current affirmative action discussions, the most significant case for contemporary analysis of employers and Title VII was a case decided several years later in 1987 involving a public employer. In *Johnson v. Transportation Agency*, the Court considered a voluntarily adopted plan designed to address another traditionally segregated job category, with the focus being on gender rather than race.[49] The plan, which was adopted by the Santa Clara County Transportation District in 1978 without litigation, authorized the Agency to consider a qualified applicant's sex as one factor when seeking to fill

much into the Court's brief reference to discretion, but if he were correct, it would certainly open up space for private employers to pursue diversity through affirmative action plans. *See* Gali Racabi, *DEI: Son of Deference*, 46 BERKELEY J. EMP. & LAB. L 235 (2025), https://lawcat.berkeley.edu/record/1317464 [https://perma.cc/U3GK-GSA5].

[46] The plan was originally adopted in 1974. *Weber*, 443 U.S. at 198.

[47] Throughout the opinion, the Court emphasized the voluntary nature of the agreement, which arose independent of any lawsuit. *See, e.g.*, *id.* at 206-08. In his concurring opinion, in a kind of what might have been scenario, Justice Blackmun proposed permitted employers to proceed on an "arguable violation," one where the employer could proceed without having to confess discrimination or wait for a judicial adjudication. *Id.* at 211 (Blackmun, J. concurring). This theory, which originated with Judge Wisdom in the Fifth Circuit, never gained legs but would have removed the question of the role of past discrimination in supporting affirmative action plans. *See* Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting).

[48] In the majority opinion, the case was only in a footnote that discussed Title VI, which was at issue in the *Bakke* case, and contrasted it with Title VII. 443 at 206 n.6.

[49] 480 U.S. 616 (1987).

positions in traditionally segregated job classifications.[50] The Agency analyzed its positions and found that although women constituted 36.4% of the area's labor market, they were only 22.4% of the Agency's employees, and these female employees were heavily concentrated in jobs defined by the EEOC as being traditionally held by women (such as clerical and office work).[51] None of the 238 Skilled Craft Worker positions, the category at issue in the case, was held by a woman.[52]

A year after the plan was adopted, the Agency announced a vacancy for the promotional position of road dispatcher, a position that required a minimum of four years of dispatch or road maintenance experience for the County. Twelve county employees applied for the position, including Paul Johnson, a male employee, and Diane Joyce, a female employee. The position ultimately went to Joyce, and Johnson subsequently sued.[53] The candidates had similar experience: Johnson began his employment with the County in 1967, and Joyce began hers in 1970.[54] Both candidates applied for but failed to obtain the road dispatcher position in 1974. Joyce failed to obtain the position in 1974 because she had not worked as a road maintenance worker, so the following year she transferred to that position, becoming the first woman to fill such a job.[55] This was a common theme in the early cases: if seniority was the primary or sole criterion for advancement, women, who had been locked out of positions just like the African American workers in *Weber*, would never obtain promotions.

Initially, candidates for the dispatcher position were interviewed by a two-member board. Nothing in the case specified how the interviews were conducted, but it appeared to be a subjective interview process where the interviewers asked a series of unscripted questions and then assigned the candidate a score. A score of 70 was passing, presumably indicating that a candidate was qualified for the position, and seven applicants obtained scores of 70 or higher.[56] Johnson was tied for second with a score of 75, and Joyce was third with a score of 73.[57] After a second round of interviews, this one conducted by Agency Supervisors, Johnson was recommended to the Director of the Agency, James Graebner for the promotion.[58] Before this second round of interviews, however, Joyce had reached out to the Santa Clara County affirmative action officer because she was concerned

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[50] *Id.* at 619, 621 (noting that the plan was adopted in 1978 and "in making promotions to positions within a traditionally segregated job classification . . . the Agency is authorized to consider as one factor the sex of a qualified applicant.").
[51] *Id.* at 621.
[52] *Id.*
[53] *Id* at 619.
[54] *Id.* at 623.
[55] *Id.*
[56] *Id.*
[57] *Id.* at 623-24.

that her application would not be reviewed fairly.[59] As the Court noted, "At the time, the Agency employed no women in any Skilled Craft position, and had never employed a woman as a road dispatcher."[60] The affirmative action officer contacted the Agency's affirmative action coordinator, who recommended Joyce for promotion to Director Graebner.[61]

Director Graebner had the final say and was authorized to hire any of the seven candidates who had earned passing scores in the initial interview.[62] He ultimately decided to promote Joyce, noting in his deposition that he had taken into account many factors: "I tried to look at the whole picture, the combination of her qualifications and Mr. Johnson's qualifications, their test scores, their expertise, their background, affirmative action matters, things like that … I believe it was a combination of all those."[63] Graebner further noted that he did not regard the difference between Johnson's and Joyce's scores (75 vs 73) from the initial interview as significant and thought that Joyce had more experience as a road maintenance worker, the position that was a prerequisite for the promotion.[64]

I have provided this detailed look at the process to highlight some of the myths surrounding these cases and affirmative action more generally. Based on the entire process, there was simply no basis for concluding that Johnson was more qualified than Joyce – the difference in scores from a subjective interview process was negligible, and the differences in experience favored Joyce, if anything.[65] It also seems worth noting that the person with the highest score, who is never named in the opinion, was not chosen. It may have been interesting to know whether Johnson would have staked a claim to the position in the event a man had been hired.[66] I mention this simply to note that when the process labels a group of individuals as qualified for a position, there is no requirement that the top scorer be chosen; if there were, there would not have been any need for anything other than the initial interview.[67]

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[59] *Id.*
[60] *Id.*
[61] *See id.*
[62] *See id.*
[63] *Id.* at 625.
[64] *Id.*
[65] In an earlier article, I discussed the statistically insignificant difference between the two scores. *See* Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251 (1995).
[66] One can also wonder how Johnson would have reacted if the District Court found in his favor on the discrimination claim but then appointed the top scorer to the open position, under the assumption that the subjective interview scores were the indicator of the most qualified.
[67] In her concurring opinion, Justice O'Connor described the qualifications of the applicants in this way: "[T]he question posed is whether a public employer violates Title VII by promoting a qualified woman rather than a marginally better qualified man when there is a statistical imbalance sufficient to support a claim of a pattern or practice of discrimination against women under Title VII." *Id.* at 648 (O'Connor, J., concurring).

As the Court moved into the legal analysis for *Johnson*, the question was whether the affirmative action plan was valid under existing law. The district court made a factual determination that Johnson was more qualified than Joyce and that the decision to promote Joyce was made pursuant to the affirmative action plan.[68] However, the Supreme Court noted that the existence of a valid affirmative action plan provides a nondiscriminatory rationale for an employer's employment decision that took the applicants' sex into account.[69] The Court, relying on its decision in *Weber*, emphasized that there was no requirement that an agency "point to its own prior discriminatory practices" to justify an affirmative action plan but instead only needed to point to a "conspicuous . . . imbalance in traditionally segregated job categories."[70] The gender imbalance in the Agency's Skilled Craft Worker category made the affirmative action plan satisfy this requirement, and the Court noted that the Agency's established goal of hiring "3 women for the 55 expected openings" constituted "a modest goal of 6%."[71] This also largely resolved another element – whether the plan trammeled the rights of male employees – as it is difficult to see how a goal of 6% female hires could interfere with the rights of men, particularly when the goal of 50% African American hires in *Weber* was found not to trammel the rights of white employees.[72] Even though Johnson had scored higher than Joyce on the subjective interview, he had no right to the position. Finally, as to the third requirement, the plan was temporary: "the Agency's plan was intended to attain a balanced work force, not to maintain one."[73] And in a passing reference to *Bakke*, the Court noted that the Plan "thus resembles the 'Harvard Plan'" in that sex was one factor among many that were taken into account and did not involve any particular set-asides for women.[74]

Justice Stevens, who had a surprisingly complicated position on affirmative action, emphasized the importance of leaving "'breathing room' for employment initiatives to benefit members of minority groups."[75] As

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[68] *Id.* at 625.
[69] *Id.* at 626 ("The existence of an affirmative action plan provides a nondiscriminatory rationale for its decision.").
[70] *Id.* at 630.
[71] *Id.* at 636.
[72] *Id.* at 638 ("In contrast to the plan in *Weber*, which provided that 50% of the positions in the craft training program were exclusively for blacks . . . the Plan sets aside no positions for women.").
[73] *Id.* at 639.
[74] *Id.* at 640. The cite to *Bakke* was indirect, as the Court cited to its decision in *Wygant* that quoted *Bakke*. *Id.*
[75] *Id.* at 645 (Stevens, J., concurring). In his concurring opinion, Justice Stevens cites *Bakke*, along with *Weber*, for the proposition, "since 1978, the Court has unambiguously interpreted [Title VII] *to permit* the voluntary adoption of special programs to benefit members of the minority groups for whose protection the statute was enacted." *Id.* In a number of affirmative action cases, including *Bakke*, Justice Stevens voted with the conservative members of the Court though he later became a core among the liberal Justices. For an interesting exploration of his complicated affirmative action jurisprudence see Christopher L. Eisgruber, *How the Maverick*

noted previously, this is a consistent theme in both the Supreme Court's and lower courts' decisions - that courts should defer to employers' business prerogatives and should not second-guess employers' decisions. There are surely limits to this deference, as employers cannot pursue illegitimate or discriminatory ends under the guise of business judgment or judicial deference. But it does highlight an aspect of the affirmative action debate that is easily overlooked: employers generally know what is in their best interests, and that may include having a diverse workforce - an issue that will be explored further later in this essay.[76] Additionally, taking steps to address a manifest imbalance in the workforce, whether that imbalance arose from the employer's own actions or other factors, was not seen as inherently discriminatory and never has been.

In his first discussion of affirmative action, Justice Scalia, who had recently joined the Court, wrote a spirited dissent. It is always difficult to know how to interpret dissenting opinions or whether they provide any reasonable interpretation of the majority's opinion, but Justice Scalia emphasized that the plan was not designed "to remedy prior sex discrimination by the Agency."[77] He even suggested that the opinion permitted employers to take actions to address societal discrimination or what he described as "societal attitudes that have limited the entry of certain races, or of a particular sex, into certain jobs."[78] He also made it clear that he opposed the Court's decision in *Weber,* suggesting that it should be "overruled."[79]

Weber and *Johnson* provided the Court's definitive analysis of how affirmative action plans should be analyzed under Title VII. In fact, *Johnson* represents the Court's last foray into employment affirmative action.[80] From these cases, two facts seem particularly important. First, there is no requirement that an employer's plan be designed to address its own discrimination or identifiable discrimination at all. It certainly may be that past discrimination is responsible for whatever imbalance the plan is

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Became a Lion: Affirmative Action in the Jurisprudence of John Paul Stevens, 99 GEO. L.J. 1279 (2011).

[76] *See* Section IV *infra*.

[77] *Id.* at 659 (Scalia, J., dissenting) ("Most importantly, the plan's purpose was assuredly not to remedy prior sex discrimination by the Agency. It could not have been, because there was no prior sex discrimination to remedy.").

[78] *Id.* at 664.

[79] *Id.* at 673.

[80] The Supreme Court granted *certiorari* in a public employee case involving layoffs in the mid-1990s but fearing that the Court might severely restrict or eliminate affirmative action, civil rights groups paid the plaintiff to settle the case and the Court ultimately dismissed its *certiorari* grant prior to oral arguments. *See* Piscataway Sch. Bd. v. Taxman, 91 F.3d 1547 (3d Cir. 1996), *cert. dismissed*, 522 U.S. 1010 (1997). For a discussion of the case and the settlement see Michael J. Zimmer, *Taxman: Affirmative Action Dodges Five Bullets*, 1 U. PA. J. LAB. & EMP. LAW 229 (1998). Some might associate the more recent case of *Ricci v. DeStefano*, 557 U.S. 557 (2009) with affirmative action but as I discuss shortly, however defined, the case has had a very limited impact.

seeking to remedy, but it turns out to be irrelevant as to whether the employer's actions will be upheld. Second - and this will prove important to showing the current relevance of the cases -the education cases were of minimal importance to the Court's analysis of employment. Neither *Weber* nor *Johnson* placed significant reliance on the *Bakke* decision.

3. Other Employment-Related Supreme Court Affirmative Action Cases

The handful of other cases decided by the Supreme Court around the same time as *Johnson* also did not rely on *Bakke*. These other cases were all part of the Reagan Administration's failed assault on employment-related affirmative action, but they differed from *Weber* and *Johnson* in a number of ways. First, none of these other cases involved the validity of a voluntary affirmative action plan, instead addressing affirmative action plans arising out of consent decrees.[81] Additionally, several of these cases turned on procedural issues that were considered important at the time but would likely have little to no significance today. For example, *Martin v. Wilks*, a 1989 case that attracted a lot of attention, involved the question of whether white employees had a right to collaterally challenge a race-based affirmative action plan established by a consent decree arising from prior litigation, despite not being parties to the previous litigation.[82] In *Martin*, the initial litigation occurred in the 1970s, when a class of African American firefighters sued the Birmingham fire department, alleging racial discrimination in hiring and promotions.[83] The parties ultimately entered into consent decrees that provided goals for the hiring and promotion of African Americans.[84] Many years later, a group of white firefighters sought to challenge the consent decrees, and while the district court held that the white claimants were precluded from challenging the consent decree, the Eleventh Circuit permitted non-parties to challenge consent decrees under the rules of joinder, a decision that was affirmed by the Supreme Court.[85] This decision was later modified by the Civil Rights Act of 1991.[86]

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[81] The cases, several of which are discussed below, are *Martin v. Wilks*, 490 U.S. 755 (1989); *United States v. Paradise*, 480 U.S. 149 (1987); *Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986); *Wygant v. Jackson Bd. of Educ*., 476 U.S. 267 (1986); *Firefighters Local No. 1784 v. Stotts*, 467 US. 561 (1984).

[82] 490 U.S. 755 (1989).

[83] *Id.* at 759.

[84] *Id.* at 760. There were two consent decrees because there were two distinctive defendants. The case had a complicated procedural posture that at one time involved the firefighter union as well as individual firefighters.

[85] *Id.* at 766-69.

[86] The case was superseded by Section 108 of the Civil Rights Act, which prohibits collateral challenges to employment discrimination consent decrees for non-parties who had notice and opportunity to object, or whose interests were adequately represented. *See* 42 U.S.C. § 2000e-2(n) (1991).

Firefighters Local Union No. 174 v. Stotts was another 1980s case involving a fire department and a consent decree.[87] In *Stotts,* the city of Memphis had entered into a consent decree that created an affirmative action plan to increase the number of hirings and promotions of African Americans, but several years after the consent decree was entered into, the city needed to make layoffs, which traditionally would have been decided through seniority.[88] The district court in *Stotts* enjoined the city from making layoffs based on seniority because it would disproportionately impact African American firefighters and go against the purpose of the consent decree. White firefighters and their union sued to reverse the injunction and allow for the seniority-driven layoffs to continue. In a plurality opinion, Justice White (who did not cite affirmative action cases) held that the injunction exceeded the court's authority to enforce the consent decree because the issue fell outside the scope of the decree.[89] Because the case turned on facts unique to the litigation and unrelated to Title VII, it has had little lasting significance.[90]

Two additional Supreme Court cases addressed whether a court could order relief to non-identified victims of discrimination in order to remedy past discrimination. This is a recurring issue in class actions, because in contrast to individual cases with only one identifiable victim, class actions involve a class of individuals in differing roles, so remedial decisions in class actions often require compromises necessary to serve the entire class. The case of *Sheet Metal Workers v. EEOC* was originally filed pursuant to Title VII in the early 1970s and resulted in a finding that a union had engaged in a pattern and practice of racial discrimination after a bench trial, and the union was required to implement an affirmative action program to remedy the historical discrimination.[91] In the early 1980s, it was clear the union had not worked in good faith to satisfy the previously ordered goals, so the court held the union in contempt and adjusted the goals to include additional remedies, which would benefit new victims previously not addressed in the original lawsuit.[92] The union appealed, but the Supreme Court ultimately concluded that race-conscious relief to non-identified victims of discrimination was permissible "where an employer or

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[87] 467 U.S. 561 (1984).
[88] 467 U.S. 561 (1984).
[89] *Id.* at 576-83.
[90] In his concurring opinion, Justice Stevens noted, "These cases involve no issue under Title VII; they involve only the administration of a consent decree." *Id.* at 590 (Stevens, J., concurring). *See also* David Keith Fram, *False Alarm of Firefighters Local Union No. 1784 v. Stotts*, 70 CORN. L. REV. 991 (1984) (discussing the Supreme Court's narrow approach).
[91] Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC (*Sheet Metal Workers*), 478 U.S. 421 (1986). The case produced an array of decisions, with some Justices joining only parts of the majority opinion authored by Justice Brennan, but the short summary here focuses on what the majority agreed on.
[92] *Id.* at 434-35. The union was held in contempt twice, once in 1981 and then again in 1983. The union challenged both contempt findings, but the challenged goals arose in the 1983 proceeding.

a labor union engaged in persistent or egregious discrimination or where necessary to dissipate the lingering effects of pervasive discrimination."[93] *Sheet Metal Workers* was unusual in that the union had been found liable for violating Title VII after a trial. When it comes to affirmative action, trials are rare, and judicial findings of discrimination are even rarer. As a result, the *Sheet Metal Workers* case has had relatively minor significance, other than to reaffirm the ability to award remedies to individuals without requiring them to prove they were the victims of discrimination.[94]

Two other cases decided around the same time arose under the Equal Protection Clause and resulted in fractured but important decisions. In *Wygant v. Jackson Board of Education*, the Court considered a provision in a 1972 collective bargaining agreement that allowed the school district to retain minority teachers with less seniority than non-minority teachers, contrary to the established norm of seniority-based layoffs.[95] The school district had never been found to have discriminatory practices, but instead sought to retain a certain percentage of minority teachers in order to address societal discrimination and to provide role models to minority students.[96] A plurality of the Court rejected the justifications of providing role models or remedying societal discrimination because they were too "amorphous" to warrant a racially-classified remedy and placed an unfair burden on nonminority teachers.[97] Applying strict scrutiny to the constitutional claim, a majority also held that layoff policies designed to preserve progress made in racially equitable hiring were not narrowly tailored enough to promote a compelling governmental interest, making it unconstitutional to ignore the traditional seniority-basis for determining who should be laid off in this case.[98] The *Wygant* case stands for the proposition that layoffs are treated

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[93] *Id.* at 445. Oddly enough, the EEOC joined the union in opposing awarding relief to individuals "who are not the identified victims of unlawful discrimination." *Id.* The Court acknowledged the irony of the EEOC challenging goals it had previously sought during the litigation. *Id.* at 444 n. 24. This position was consistent with Clarence Thomas' emphasis on providing relief only to identified victims of discrimination during his tenure as Chair of the EEOC. *See* Douglas Frantz, Thomas *Seems Sure to Face Criticism of EEOC Policies*, L.A. TIMES (Jul. 3, 1991), https://www.latimes.com/archives/la-xpm-1991-07-03-mn-1550-story.html [https://perma.cc/PL4Y-QULB].

[94] Towards the end of the majority opinion, the Court discussed the differences between class actions and individual cases noting that in class actions, "The purpose of affirmative action is not to make individual victims whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future. Such relief is provided to the class as a whole ... and beneficiaries need not show themselves victims of discrimination." *Id.* at 474. During the same Term that the *Sheet Metal Workers* case was decided, the Court upheld race-conscious relief to non-identified victims of discrimination that was embodied in a consent decree. *See* Firefighters v. City of Cleveland, 478 U.S. 501 (1986).

[95] Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

[96] *Id.* at 274.

[97] *Id.* at 276.

[98] *Id.* at 282 ("Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose.").

differently from hiring and promotions, presumably because an employee has a greater right to their current job than a future position.

Finally, in the 1987 case *United States v. Paradise*, the Supreme Court addressed a "one-black-for-one white" temporary hiring quota that a district court had imposed on the Alabama Department of Public Safety after it failed to comply with an affirmative action plan established in 1972 following a finding of systemic racial discrimination against Black employees.[99] Similar to the *Sheet Metal Workers* case noted above, the district court ordered the hiring quota after it was clear that the Department of Public Safety failed to implement several procedures designed to eradicate the racial imbalance in its workforce.[100] The Supreme Court affirmed the district court's order as a narrowly tailored and effective measure for an employer actively resisting remedial measures after being found to have discriminatory practices.[101]

These were the last times the Supreme Court spoke on workplace affirmative action. Before this essay moves to the lower court cases, several important aspects of the cases discussed above should be highlighted. First, even though *Bakke* predated all of the employment cases, none of the cases turned on that decision, or even explored it in any depth, demonstrating that employment cases have also been treated as a distinctive category rather than part of a broader group of affirmative action cases. Second, despite the Reagan Administration's assault on affirmative action, race and sex-conscious relief survived. Indeed, the Administration's effort was almost entirely unsuccessful, with the possible exception of layoffs.[102]

Two questions also went unanswered amid this barrage of decisions: first, whether there was any meaningful difference between Title VII and the Equal Protection Clause; and second, what factors exactly could support race or sex-conscious relief. Clearly-identified past discrimination of employers and unions has been shown to justify relief, and in *Johnson* and *Weber*, the Court noted that it was also permissible to take race or sex into account to address a manifest imbalance in the workforce, seemingly regardless of the origins of that imbalance.

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[99] United States v. Paradise, 480 U.S. 149 (1987). Justice Brennan began his opinion: "In 1972, the United States District Court for the Middle District of Alabama held that the Department had systematically excluded blacks from employment in violation of the Fourteenth Amendment. Some 11 years later, confronted with the Department's failure to develop promotion procedures that did not have an adverse impact on blacks, the District Court ordered the promotion of one black trooper for each white trooper elevated in rank, as long as qualified black candidates were available, until the Department implemented an acceptable promotion procedure." *Id.*

[100] *Id.* at 176 ("By 1984, the District Court was plainly justified in imposing the remedy chosen. Any order allowing further delay by the Department was entirely unacceptable.")

[101] *Id.* at 185-86.

[102] *See* Benton Williams, "*You Were the Best Qualified": Business Beyond the Backlash Against Affirmative Action*, 27 J. OF POL'Y HIST. 61, 75 (2014) ("Despite public commitments to see the practice ended, affirmative action in all its forms survived the Reagan Presidency.").

B. LOWER COURT DECISIONS INTERPRETING SUPREME COURT RULINGS

Legal scholarship often focuses exclusively on Supreme Court decisions, and there were clearly a rash of employment-related affirmative action cases in the mid-1980s. But perhaps the best indication of what those decisions mean can be found in how the lower courts have interpreted the cases, and while there were many cases in the 1980s, lower courts have been interpreting the cases for many years after the Supreme Court stepped out of the lane.

Importantly for the focus of this essay, there are very few lower court cases involving private parties that do not involve judicial decrees entered after findings of discrimination. In one such case, a claimant challenged his rejection from a General Motors apprentice program because the company provided pre-apprentice training to female and minority applicants, but without a discrimination finding or an affirmative action plan that specifically targeted the apprentice selection process, the claim was dismissed for lack of standing.[103] Additionally, an early Eighth Circuit decision applied *Weber* to uphold a trucking company's affirmative action plan that provided race-conscious relief "designed to remedy racial imbalance in a private employer's work force."[104] Notwithstanding these cases, the vast majority of cases addressed by lower courts involved public rather than private employers, as was true of the Supreme Court decisions.

In many of these cases, the courts simply reiterated principles from Supreme Court cases. For example, the Eleventh Circuit noted that, "The Supreme Court has never required that, before implementing affirmative action, the employer must have already proved it had discriminated."[105] Similarly, a decade after *Johnson* was decided, the Third Circuit relied on it to find that although an affirmative action plan was required to have a remedial purpose, that purpose could be satisfied where the employer is seeking to correct "a manifest imbalance in traditionally segregated job categories."[106] The Seventh Circuit likewise noted employer policies "of the type that expand the pool of persons under consideration ... is permitted."[107] Courts also continued to uphold the constitutionality of consent decrees that

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[103] Yeager v. General Motors Corp., 265 F.3d 389 (6th Cir. 2001). *See also* Hunter v. St. Louis-San Francisco Ry. Co., 639 F.2d 424 (8th Cir. 1981) (upholding affirmative action plan as legitimate non-discriminatory reason).

[104] Setser v. Novack Inv. Co., 657 F.2d 962 (8th Cir. 1981) (en banc). The case involved a white individual who had been rejected for two positions in 1973 because of an affirmative action plan.

[105] Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548, 1565 (11th Cir. 1994).

[106] Schurr v. Resorts Int'l Hotel, Inc., 196 F.3d 486, 497 (3rd Cir. 1999). The court ultimately concluded that the plan at issue was not a bona fide affirmative action plan.

[107] Mlynczak v. Bodman, 442 F.3d 1050 (7th Cir. 2005).

included specific quotas, such as a 50% quota for Black entry-level employees in place until 2001 for the City of St. Louis.[108]

Moreover, courts have continued to apply *Johnson* and *Weber* to uphold affirmative action plans well into the 2000s. In 2015, the D.C. Circuit considered a reverse discrimination challenge to a State Department affirmative action plan where the plaintiff argued that the law from the 1980s had been "displaced" by the more recent case of *Ricci v. DeStefano*, a 2009 Supreme Court decision issued pursuant to the Equal Protection Clause where the City of New Haven sought to take race conscious actions to address the disparate impact of their promotional examinations.[109] The D.C. Circuit rejected the idea that the law had changed either over time or indirectly through *Ricci*, noting instead that "*Johnson* and *Weber* are directly applicable to this case."[110] The court ultimately upheld the State Department's affirmative action program as consistent with Supreme Court precedent.[111]

Even when *Johnson* and *Weber* are not applied, lower courts have still upheld affirmative action plans. The Second Circuit applied the *Ricci* case to *United States v. Brennan*, which challenged the granting of retroactive seniority that was part of an affirmative action plan.[112] The Court used *Ricci* to assess what it labelled as "make-whole relief" as opposed to the Weber-Johnson line of thinking, but importantly, the court never suggested that the holding in *Ricci* had altered the applicability of those cases.[113] Additionally, the Fifth Circuit upheld an affirmative action plan instituted by a private employer where race was considered a "plus" factor in the process and granted summary judgment for the employer in a reverse discrimination claim. In an unpublished opinion issued in 2008, the court explained, "[B]ecause the subject AAP [affirmative action plan] was a legitimate, nondiscriminatory rationale for [the employer's] decision to hire an otherwise qualified African American applicant, we conclude that summary judgment was appropriate as to [the] reverse discrimination claim under Title VII."[114]

Some might categorize the Supreme Court's decision in *Ricci* as an affirmative action case, but the case seems easily distinguishable. In *Ricci*, the City of New Haven administered two tests for promotional positions in

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[108] Martinez v. City of St. Louis, 539 F.3d 857 (8th Cir. 2008). Not all quotas were upheld. *See, e.g.*, Middleton v. City of Flint, 92 F.3d 396 (6th Cir. 1996) (invalidating 50% quota for police department hires implemented in 1985).

[109] Shea v. Kerry, 796 F.3d 42 (D.C. Cir. 2015). Judge Williams, often considered conservative in his approach, concurred in the opinion.

[110] *Id.* at 51.

[111] *Id.* at 53.

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

[113] *See* Maraschiello v. City of Buffalo, 709 F.3d 87 (2d Cir.), *cert. denied*, 517 U.S. 824 (2013).

[114] Sharkey v. Dixie Elec. Membership Corp., 262 Fed. Appx. 598 (5th Cir. 2008).

its fire department, and those tests had adverse impacts. Rather than promote based on those tests, the City elected to abandon the test results and intended to create or use a different test. Twenty firefighters, nineteen White and one Hispanic, sued arguing that abandoning the test constituted discrimination under the Equal Protection Clause, an argument the Supreme Court adopted. The Court held that a governmental employer could only discard test results based on their adverse impact if there was a strong basis in evidence that they might be held liable for using the test results.[115] If this were an affirmative action case, the employer likely would have gone out of order to promote a minority firefighter or perhaps would have altered scores, but the City did neither and the case has rarely been cited other than in a case where the City of Buffalo successfully sought to avoid using tests that had an adverse impact.[116]

Relatedly, there have always been reverse discrimination cases, which most commonly involve white individuals alleging that they were victims of discrimination.[117] These cases have historically been difficult to win, in part because several lower courts required such plaintiffs to demonstrate "background circumstances" of discrimination in order to establish a disparate treatment claim.[118] This was a difficult burden to meet, but the Supreme Court recently invalidated that requirement in *Ames v. Ohio Department of Youth Services*, holding that so-called reverse discrimination cases should be treated the same as any other case brought under Title VII.[119] This will likely make it easier for reverse discrimination plaintiffs to pursue claims, but discrimination claims of any type are notoriously difficult to succeed on, and plaintiffs challenging DEI practices will need to prove they were the victims of intentional discrimination rather than broadly affected by an employer's practices.[120] But the point here is that reverse discrimination claims have existed since the early years of Title VII, and many of the current challenges to DEI programs closely resemble these early cases.

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[115] *See* Ricci v. DeStefano, 557 U.S. 557, 582-83 (2009).
[116] *See* Maraschiello v. City of Boston, 709 F.3d 87 (2d Cir.), *cert. denied*, 517 U.S. 824 (2013).
[117] *See, e.g.*, Lehman v. Yellow Freight Sys., Inc., 651 F.2d 520 (7th Cir. 1981); Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981); Marquez v. Omaha Dist. Sales Office, Ford, 440 F.2d 1157 (8th Cir. 1971); Germann v. Kipp, 429 F. Supp. 1323 (W.D. Mo. 1977).
[118] A handful of circuits had required proof of background circumstances. *See* Arendale v. City of Memphis, 519 F.3d 587, 603 (6th Cir. 2008); Mills v. Health Care Serv. Corp., 171 F.3d 450 (7th Cir. 1999); Hammer v. Ashcroft, 383 F.3d 722 (8th Cir. 2004); Notari v. Denver Water Dept., 971 F.2d 585 (10th Cir. 1992).
[119] Ames v. Ohio Dep't of Youth Servs., 605 U.S. 303 (2025).
[120] The state argued that the plaintiff's claim would have failed without the background circumstances requirement an issue the Supreme Court left to be resolved by the lower courts. *See id.* at 312. Employment discrimination cases are notoriously difficult to win and historically, reverse discrimination cases have not proved any easier. For discussions of the data on plaintiff win rates see Theodore Eisenberg, *Four Decades of Civil Rights Litigation*, 12 J. EMPIR. LEG. STUD. 4 (2015); Kevin Clermont and Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103 (2009); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001).

To put these lower court cases in context, let me just summarize where the law is (or perhaps was) prior to the recent onslaught of cases. As noted previously, affirmative action plans involving both public and private employers have been consistently upheld under the framework developed by *Weber* and *Johnson*. No specific findings of past discrimination were required, and employers were empowered to take action to address traditionally segregated job categories, regardless of the underlying cause of why the category was segregated. Title VII seems to provide more leeway to private employers than the Constitution provides for public employers, but as a number of courts have noted, the demarcation between permissible and impermissible action or between the Constitution and Title VII are not well delineated.[121] I think it is also important to note that outside of federal contractors through a now rescinded Executive Order, there has been no requirement that private employers engage in affirmative action; rather, outside of court orders, private employers have voluntarily taken such steps, and courts have often deferred to those business judgments in evaluating whether the plans or actions are permissible.

One other aspect of these cases is worth highlighting. In all of the relevant cases where an African American or a woman was afforded a preference in the process, courts consistently noted that the person was qualified; in no case did an "unqualified" person receive a preference, and while many of those challenging affirmative action plans or decisions made outside of a plan considered themselves to be more qualified, there was rarely any evidence to support that claim, which is one of the reasons the cases rarely succeeded. And, as we saw in *Johnson*, even when someone might have a higher score than another person, that is not necessarily an indication that they are more qualified. Research has consistently demonstrated that affirmative action does not lead to lower productivity, even when individuals with lower qualifications may be chosen.[122]

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[121] As one court noted long ago: "There is no bright line distinction between permissible and impermissible affirmative action plans." Setser v. Novack Inv. Co., 657 F.2d 962, 970 (8th Cir. 1981) (en banc).

[122] For example, Professors Harry Holzer and David Neumark found that affirmative action policies led to the hiring of African Americans and to a lesser extent women with lower educational qualifications but that there was no evidence of weaker performance among those groups. *See* Harry Holzer & David Neumark, *Are Affirmative Action Hires Less Qualified? Evidence from Employer-Employee Data on New Hires*, 17 J. LAB. ECON. 534 (1999). Several years later the authors sought to explain why affirmative action did not lead to lower productivity noting, "[T]hese firms tend to cast a wider net with regard to job applicants, gather more information that might help uncover candidates whose productivity is not fully predicted by their educational credentials and then invest more heavily in the productivity of those whom they have hired." Harry J. Holzer & David Neumark, *Affirmative Action: What Do We Know?* 25 J. POL'Y ANALYSIS & MGMT. 463, 484 (2006). *See also* Jonathan S. Leonard, *Antidiscrimination or Reverse Discrimination: The Impact of Changing Demographics, Title VII, and Affirmative Action on Productivity*, 19 J. HUM. RES. 145 (1984) (early study finding no substantial decrease in productivity). The economic benefits from what is now typically referred to as diversity is discussed in the next section.

But the above case law was all issued prior to the Supreme Court's decision in *Students for Fair Admission* and the recent spate of lawsuits challenging DEI practices. Whether the affirmative action law discussed above will hold is the subject of the next section.

III. FROM AFFIRMATIVE ACTION TO DEI

At some point in the 1990s, we moved from a focus on affirmative action to a focus on diversity, and then, more recently, to Diversity, Equity, and Inclusion ("DEI").[123] As was true with affirmative action, there is no universal definition of what constitutes DEI. Some seem to see affirmative action and DEI as coextensive, while others see the move to diversity as a weakened form of affirmative action.[124] Although affirmative action would likely fall within the DEI umbrella, the new term is much broader. The core concept of DEI is not just to diversify a workforce, but to diversify while also ensuring that a diverse workplace is welcoming and inclusive. The "inclusion" part is likely what sets DEI apart from affirmative action or diversity alone. It is one thing to hire an individual to increase diversity in the workplace, but it is another to create a workplace where that individual wants to stay. Oddly enough, the "equity" part of DEI probably turns out to be the least significant, though it may be what is drawing the attention of those opposed to the practices that fall under the DEI umbrella.[125]

To be sure, the recent challenges to DEI practices abjure any of the subtle differences with affirmative action and instead assume that any and all DEI practices are invariably race-conscious and therefore unlawful.[126] As will be discussed in more detail shortly, the recent spate of lawsuits has challenged a wide array of practices, and have likewise sought to inquire about employers' DEI practices without providing any specifics as to what might constitute such practices, presumably leaving employers to define or

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[123] For a discussion, see Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law*, 1961-1996, 41 AM. BEHAV. SCI. 960 (1998).

[124] Compare Cho Hyun Park, Sunyoung Park & Bora Kwon, *Forty-Five Years of Research on Diversity, Equity & Inclusion in Management*, 63 MGT. DECISION 66 (2025) (associating DEI with the Civil Rights Act and early forms of affirmative action) with Shannon Harper & Barbara Reskin, *Affirmative Action at School and On the Job*, 31 ANN. REV. SOCIO. 357, 374 (2005) ("Declining support for affirmative action has led employers and universities to pursue the more innocuous goal of diversity.").

[125] For a comprehensive overview of DEI and the workplace, see GEORGE B. CUNNINGHAM, DIVERSITY, EQUITY, AND INCLUSION AT WORK (2024).

[126] The cases typically sweep with a broad brush. For example, in a recent case filed against IBM, the complaint simply states, "IBM has implemented a policy requiring illegal quotas for race and sex in the hiring of employees." Loeffler v. IBM, Complaint at 116, Loeffler v. IBM, No. 2:25-cv-05765 (C.D. Cal. Jun. 25, 2025) https://aflegal.org/litigation/loeffler-v-ibm/ [https://perma.cc/9ER9-QXGQ].

interpret their own practices.[127] The letters provided in the EEOC's March 2025 press release provide a glimpse into the broad sweep of what the EEOC is defining as DEI, including things such as Resource Groups (also referred to as affinity groups), even though under the rubric of Title VII, it would be difficult to identify how those programs would relate to a term and condition of employment. It is not my intention here to criticize the efforts of the EEOC, but rather to show the expansive approach they are taking to defining DEI.

Three additional thoughts based on the above. First, you can see how broad the anti-DEI stance swings - challenging training, fellowships, and unspecified practices, and demonstrating an increased reliance on DEI practices to challenge employee terminations or failures to hire or promote.[128] Second, standing will continue to be an issue in the cases, as many of those challenging the practices will likely have difficulty establishing the requisite injury to move forward or struggle to point to the actual policies they are challenging. Third, from the brief list above, which (along with the cases below) includes all of the litigated cases I have found to date, significantly more of the cases have failed than have been successful, even though several employers have altered practices either to ward off or settle litigation.[129]

Lost in the attacks are the reasons why employers choose to engage in DEI practices. There are certainly many reasons, but there are two that are particularly noteworthy and likely relevant to the validity of the practices. In the transition from affirmative action to diversity and then to DEI, an argument was developed that diversity was good for business because it can lead to a more productive workplace, enhance recruitment efforts, and potentially have market effects that can increase profitability.[130] Relevant here is that outside of federal contractors, there has never been a mandate to engage in affirmative action or DEI practices,

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[127] This includes inquiries sent to many law firms by the head of the EEOC. The letters, all of which are substantively the same, can be found in a press release from the EEOC. Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Acting Chair Andrea Lucas Sends Letters to 20 Law Firms Requesting Information About DEI-Related Employment Practices (Mar. 17, 2025) (https://www.eeoc.gov/newsroom/eeoc-acting-chair-andrea-lucas-sends-letters-20-law-firms-requesting-information-about-dei) [https://perma.cc/X4NN-9YYU]. Following a series of legal challenges, the EEOC closed the investigations. *See* Tatyana Mannay, *Big Law's Diversity Reckoning Fizzles as EEOC Ends Investigation*, BLOOMBERG LAW (Feb. 9, 2026).

[128] *See supra* notes 6 and 7.

[129] *See, e.g.*, Julian Mark & Taylor Telford, *McDonald's Ending Some DEI Practices, Joining Growing List of Companies*, WASH. POST (Jan. 7, 2025), https://www.washingtonpost.com/business/2025/01/07/mcdonalds-dei-affirmative-action/ [https://perma.cc/S7PQ-H4A8].

[130] The literature is now vast. For a sampling, including early work, see KATHRYN A. GRANT & HARRIS SUNDAK, OPPORTUNITIES AND CHALLENGES OF WORKPLACE DIVERSITY: THEORY, CASES AND EXERCISES (2010); Cedric Herring, *Does Diversity Pay? Race, Gender, and the Business Case for Diversity*, 74 AM. SOCIO. REV. 208 (2009); Gail Robinson & Kathleen Dechant, *Building a Business Case for Diversity*, 11 ACAD. MGT. PERSP. 21 (1997).

which means that companies have voluntarily adopted such practices, presumably because they see some benefit in them. Employers approach these practices with varying degrees of commitment, but a substantial number of companies have clearly identified value in DEI efforts.

This is true even though evidence on whether diversity is truly good for business is decidedly inconclusive. Although affirmative action does not typically lead to lower productivity, as previously discussed, it is unclear whether a diverse workforce leads to greater productivity. It is often argued that more diverse groups will produce more creative solutions, and there is some limited evidence to support that claim.[131] However, studies have also demonstrated that more diversity can produce more group conflict, which in turn can effectively counteract that increased creativity, although there may still be some workplace benefits.[132] Other researchers have concluded that diversity by itself does not offer inherent benefits, but it is instead how an organization embraces diversity that matters, which is where the inclusion part of DEI becomes so important.[133] Relatedly, a clear benefit to diversity is to increase the applicant pool, and more diverse workforces not only tend to attract a qualitatively more diverse pool, but also produce a quantitative increase in applicants.[134] At the end of the day, regardless of the empirical evidence on the benefits of diversity, companies are voluntarily adopting such practices and see them as consistent with their business objectives.

A. THE EFFECT OF SFFA ON THE PRIVATE WORKPLACE

The recent legal challenges to DEI practices were sparked by the Supreme Court's decision in *Students for Fair Admission v. Harvard* (*SFFA*), in which the Court invalidated the admissions practices of Harvard

[131] A common statement is along the lines of, "With access to a larger and varied pool of informal resources, it is assumed that heterogeneous groups are more likely to generate better quality solutions to problems." Quinetta M. Robinson, *Diversity in the Workplace: A Review, Synthesis, and Future Research Agenda*, ANN. REV. ORG. PSYCH. & ORG. BEHAV. 69, 73 (2019).

[132] The authors of a recent literature review summarized the findings by noting that diversity can be a "double-edged sword . . . Diversity can be a source of friction and conflict – and hence an obstacle to effective team functioning. But it can also be a source of synergy and learning – a powerful seed for something new." Gunter K. Stahl & Martha L. Maznevski, *Unraveling the Effects of Cultural Diversity in Teams: A Retrospective of Research on Multicultural Work Groups and An Agenda for Future Research,* 52 J. INT'L BUS. STUD. 4, 6 (2021). The authors did conclude that diversity offers indirect benefits, adding that research often focuses too much on the negatives, while businesses tend to focus on the positive aspects of diversity. *Id.* at 19.

[133] Robin J. Ely & David A. Thomas, *Getting Serious About Diversity: Enough Already With the Business Case*, HARV. BUS. REV., Nov-Dec. 2020, p. 115, 122 ("Companies will not reap benefits from diversity unless they build a culture that insists on equality."). The authors suggest that companies can harness the benefits of diversity by active learning, addressing subordination, encouraging diverse voices and challenging existing norms. *Id.* at 119.

[134] *See* Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 43 (2022) ("Industry surveys consistently show that workplace diversity ranks high on job seekers' list of priorities when looking for a job . . .").

University and the University of North Carolina.[135] Whether and to what extent that decision might affect the private workplace is the subject of this section.

According to the Court, the University of North Carolina's admission practices ran afoul of the Equal Protection Clause by incorporating race into its policies, while the admission policies at Harvard University, a private entity, violated Title VI of the Civil Rights Act of 1964, which prohibits race discrimination among federal contractors. [136] Importantly, the Court noted that the prohibitions in Title VI were coextensive with those contained in the Equal Protection Clause.[137]

Whether the Court did anything more than invalidate the admissions practices of those two particular universities has been the subject of extensive debate. The recent spate of cases is premised on the notion that the Court prohibited the use of race in any public or private space, while supporters of affirmative action emphasize the Court's language in a short paragraph towards the end of Chief Justice Robert's opinion stating that Universities are free to take into account "how race affected [an applicant's] life . . ."[138] Only time will tell, but it is worth noting that over the years, the Court has generally been reluctant to invalidate any use of race, and has even been hesitant to enter the debate.[139]

But for the purposes of this essay, the main issue is how the Court's decision in *SFFA* may affect DEI practices in the private workplace. On this question, there are substantial reasons to believe it should have little to no effect. The most obvious reason is that the Court was not interpreting Title VII. Although the Court did render its decision under Title VI, the statutes are meaningfully different. Perhaps most crucial for this discussion is that Title VII has long encompassed discrimination that arises from a practice's disparate impact. Most commonly, the practice in question is a written test, but the prohibition extends to any practice that has a statistically significant disparate impact.[140] Even though the theory has largely fallen into disuse,

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[135] 600 U.S. 181 (2023).
[136] *Id.* at 230.
[137] *See SFFA*, 600 U.S. at 198 n.2.
[138] *Id.* at 230 ("At the same time, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."). The Court went on to add: "But, despite, the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today . . . [W]hat cannot be done directly cannot be done indirectly." *Id.* The import of this language is beyond the scope of this article. For one discussion, see Sonja Starr, *Admissions Essays After SFFA*, 100 IND. L.J. 847 (2025).
[139] This hesitation is reflected in the fact that the Court has not issued an opinion on employment affirmative action in more than thirty years and took several decades before altering educational affirmative action in the *SFFA* case.
[140] The Supreme Court made this determination in one of its first decisions interpreting Title VII. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

it has long been considered a core component of Title VII and has allowed challenges to employment practices without the need to prove an intent to discriminate.[141] In contrast, it has never been clear whether the disparate impact theory is available under Title VI; indeed, in one of the more recent decisions under the statute, the Supreme Court held that the statute only reaches intentional discrimination.[142] The statutory remedies also differ: the Supreme Court treats Title VI as in the nature of a contract and therefore neither punitive nor emotional distress damages are available in private actions, whereas both remedies are available under Title VII for claims of intentional discrimination.[143] Relatedly, even though the statutes were passed at the same time as part of the comprehensive Civil Rights Act of 1964, the case law under Title VI has always been modest, particularly in contrast to the extensive law developed under Title VII.[144]

In addition to the difference in statutory reach, the Court did not cite any of its employment affirmative action cases in the lengthy *SFFA* case.[145] As noted previously, over the years, the Court's affirmative action doctrine has developed through distinctive categories, in large part because the rationales underlying race or gender conscious actions differ depending on

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[141] One indication of the importance of the disparate impact theory is that it was the impetus for the Civil Rights Act of 1991 and President George Bush's veto of the Civil Rights Act of 1990. *See* Ann Devroy, *Bush Vetoes Civil Rights Bill: Measure Said to Encourage Job Quotas Women, Minorities Sharply Critical*, WASH. POST (Oct. 23, 1990), https://www.washingtonpost.com/archive/politics/1990/10/23/bush-vetoes-civil-rights-bill/cd68a6c4-8529-471a-b4f7-08c26cf65ac0/ [https://perma.cc/YVV2-G7AD] (noting that "[t]he dispute has centered largely on the defenses available in the legislation to employers sued for so-called 'unintentional' discrimination.").

[142] *See* Alexander v. Sandoval, 532 U.S. 275, 280 (2001) (noting that the statute only "prohibits intentional discrimination."). The issue has long been confusing and contested. As the Court noted in *Sandoval*, Section 601 – which is the primary statutory section prohibiting discrimination based on race, national origin and color – only reaches intentional discrimination. However, section 602 authorizes federal agencies to "effectuate [§601] . . . by issuing rules, regulations or orders of general applicability." 42 U.S.C. §2000d-1. In a complicated early case, five Justices accepted the legitimacy of those regulations, and the *Sandoval* case did not reconsider that consensus. *See* 532 U.S. at 282. As a result, although the statute only prohibits intentional discrimination, the regulations may proscribe disparate impact. Nevertheless, in *Sandoval*, while noting the tension between these two provisions, the Court held that Title VI does not include a private right of action to enforce the regulations. *Id.* at 293.

[143] *See* Barnes v. Gorman, 536 U.S. 181, 189 (2002) ("punitive damages may not be awarded in private suits brought under Title VI"); Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212 (2022) (Title VI does not permit recovery of emotional distress damages). The damage provisions that permit punitive and compensatory damages – the latter of which includes emotional distress – were added by the Civil Rights Act of 1991. *See* 42 U.S.C. §1981a. Those damages are capped at $300,000 and are not available for claims based on the disparate impact theory. *Id.*

[144] In addition to the disparity in the sheer volume of case law, the federal government has rarely used its ultimate weapon of cutting off federal funds. For a comprehensive review of the history of Title VI enforcement see JOHN D. SKRENTNY, THE MINORITY RIGHTS REVOLUTION (2002).

[145] This includes the Majority and the concurrences by Justice Thomas, Gorsuch and Kavanaugh. The majority did cite the case of Franks v. Bowman, 424 U.S. 747 (1976), but effectively distinguished the case based on its remedial purpose. *See SFFA*, 600 U.S. at 215. In contrast, the Court cited cases from its voting rights, school desegregation, and contract set-asides jurisprudence, leaving only the employment cases out of the discussion.

the context. In the university admissions space, the primary rationale promoted by the Supreme Court was that a diverse student body was important to the educational mission. Over time, the Court became skeptical of this rationale and, in recent cases, has finally rejected diversity as a compelling educational interest.[146]

In the employment cases, however, the Supreme Court has never accepted having a diverse workforce as a compelling interest, largely because the cases never required such a declaration. Rather, the workplace affirmative action cases were primarily about remedying past discrimination, either directly or indirectly. The Court has not rendered a decision on employment-based affirmative action since diversity became a business interest as opposed to a remedial interest. Employers today seek diversity in their workforce to increase their applicant pool, attract customers, and encourage more creative or productive work exchanges.[147] Typically, these are the kinds of interests that courts, including the Supreme Court, have deferred to businesses on. This deference to business interests has manifested in various ways, but perhaps most significantly in the current Court's widespread support for business, particularly big business.[148] The business judgment rule, a common fixture in corporate law, provides another means of deferring to businesses by allowing them to choose their own vision for what is good for the company.[149]

In the context of the education cases, the Supreme Court has held that schools are not due deference to the compelling nature of diversity as

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[146] *See SFFA*, 600 U.S. at 214 (concluding that the diversity rationale advanced by the colleges was "not sufficiently coherent for purposes of strict scrutiny.").

[147] Relying on a diverse workforce to attract customers can run afoul of Title VII, particularly if the company assigns Black workers to work with Black clients. *See* Ferrill v. Parker Group, Inc., 168 F.3d 468, 473 (11th Cir. 1999) (impermissible to assign African Americans employees to service African American clients only); Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908 (7tth Cir. 2010) (racial preference policy allowing nursing home residents to request white nurses violates Title VII). For a discussion of issues that can arise under Title VII, see Michael J. Yelnosky, *Racial Preferences in Employment After Students for Fair Admissions v. Harvard*, GEO. L.J. 74, 80-81 (2023).

[148] The Roberts Court has been described, often empirically, as the most pro-business Court in modern history. *See, e.g.*, Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 226-47 (2021) (noting that Roberts Court has been pro-business through the expansion of corporate rights and narrowing liability); Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Cour*t, 97 MINN. L. REV. 1431, 1472 (2013) (based on empirical analysis concluding that the Roberts Court is more pro-business than Courts led by Chief Justices Rehnquist and Burger); Adam Feldman, *The Big Business Court*, EMPIRICAL SCOTUS (Aug. 8, 2018), https://empiricalscotus.com/2018/08/08/big-business/ [https://perma.cc/E2NT-THZ8] (documenting Court's support for big business).

[149] *See* Brummer & Strine Jr., *supra* note 131, at 32 (noting that the business judgment rule exists so as not to second-guess management decisions through litigation); Stephan A. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 87 (2004) ("The business judgment rule commonly is understood today as a standard of liability by which courts review the decision of the board of directors.").

an academic value.[150] Whether the Supreme Court will continue to defer to businesses when it comes to diversity-enhancing practices is a matter for speculation, but it is clear that the interests in diversity at stake with businesses are significantly different from diversity within academic institutions. Indeed, it seems unlikely, even impractical, for the Court to contest a company's determination that having a diverse workforce is in its economic interests. Perhaps the Court would require proof, but most companies would surely be able to establish a connection between diversity and economic benefits far easier than colleges are able to establish the more abstract benefits of having a diverse student body. Additionally, the Court's refusal to defer to universities on the benefits of diversity came in the context of strict scrutiny, a standard the Court has never applied to a private business under any statute.[151]

There are two additional reasons that the Court's decision in *SFFA* is unlikely to affect private workplaces. First, the decision-making within private businesses often departs significantly from that involved in college admissions, or even within government employment. In the Harvard and UNC cases, there were detailed records and evaluations of candidates, complete with test scores, high school grades, application scores, and detailed notes from the admissions officers.[152] Similarly, it is no accident that all of the affirmative action cases considered by the Supreme Court involved public employers or collective bargaining agreements that typically dictate how hiring or promotions are made.[153] Private employers are unlikely to have such detailed records or test scores, nor will they typically be bound by the rule of three that governs many civil service systems. Private employers generally have far more leeway to make hiring and promotion decisions, subject only to anti-discrimination laws. This is one reason why, until recently, private employers have generally been immune to challenges to their affirmative action or diversity policies.[154]

Finally, the *SFFA* decision involved race-conscious admissions programs, at least in the eyes of the Supreme Court, whereas race-neutral means of achieving diversity are subject to less exacting scrutiny. Two

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[150] *See* Fisher v. University of Texas (Fisher 1), 570 U.S. 297 (2013). This holding was reaffirmed in SFFA. *See SFFA*, 600 U.S. 181, 217 (2023).

[151] *See* Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 470 F.3d 827, 839 (9th Cir. 2006) (en banc) ("The Supreme Court has never applied strict scrutiny to the actions of a purely private entity.").

[152] In *SFFA*, the Court spent four pages detailing the admissions process at Harvard and UNC. 600 U.S. at 194-97.

[153] Cases previously discussed that address public employers and/or collective bargaining agreements include Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (voluntary agreement); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (public employee seniority); United States v. Paradise, 480 U.S. 149 (1987).

[154] *See* JOHN D. SKRENTNY, AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE (2013) (discussing ways that private employers use affirmative action in a way that does not lead to lawsuits).

recent education admissions cases support the notion that it is constitutionally permissible for schools, and presumably government employers, to seek diversity by race-neutral means. Both cases involved competitive public schools that altered their admissions programs with the intent to ensure that their student body was representative of their communities.[155] And in both cases, the courts found that pursuing diversity through race-neutral means was permissible even after the Supreme Court decision in *SFFA*.[156] Similarly, two decades earlier, Texas adopted a program that granted the top 10% of high school graduates automatic admission to any Texas public university after the Court of Appeals struck down the school's race-conscious admissions program.[157] Importantly, when a white student who was denied admission sued, she did not challenge the top 10% program.[158] Many colleges have moved to test-optional admissions to increase the amount of underrepresented students in their population, and no one has ever sued over these decisions.[159]

In other words, and contrary to the recent lawsuits and excessive governmental rhetoric, there is nothing impermissible about seeking to diversify a workforce or preserve the gains in diversity that are made. As

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[155] *See* Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864 (4th Cir. 2023), *cert. denied*, 144 S. Ct. 1048 (2024): Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for the City of Bos., 89 F.4th 46 (1st Cir. 2023).

[156] In the Boston case, the Court noted, "[W]e find no reason to conclude that Students for Fair Admissions changed the law governing the constitutionality of facially neutral, valid secondary education admissions policies under equal protection principles." *Id.* at 61. For a discussion of these cases and other race- neutral means see Deborah Hellman, *Diversity By Faciallly Neutral Means*, 110 VA. L. REV. 1901 (2024).

[157] The top 10% plan was implemented following the court's decision in Hopwood v. Univ. of Tex. Law Sch., 78 F.3d 932 (5th Cir. 1996). The plan was designed to essentially replace the race-conscious practices the court struck down with a plan that relied on the state's housing segregation. *See* Maria Tienda & Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality, College Admissions and the Texas Top 10% Law*, 8 AM. L. & ECON. REV. 292 (2006).

[158] *See* Fisher v. Univ. of Tex., 579 U.S. 365, 378 (2016) ("Despite the Top Ten Percent Plan's outsized effect on petitioner's chances of admission, she has not challenged it."). The plaintiff in *Fisher* challenged a different part of the admission process for those who were not top-ten students.

[159] Test-optional schools have been around for decades, but the movement gained ground in the 2010s and expanded in light of the COVID pandemic. For a history, see Jared Furuta, *Rationalization and Student/School Personhood in U.S. College Admissions: The Rise of Test-Optional Policies, 1987-2015*, 90 SOCIO. EDUC. 236 (2017). Many if not most schools adopted test-optional policies to address perceived bias in standardized tests and to increase student diversity. *See id.* at 240. *See also* Andrew S. Belasco, Kelly O. Rosinger & James C. Hearn, *The Test- Optional Movement at America's Colleges: A Boon for Equity or Something Else?* 37 EDUC. EVALUATION & POL'Y ANALYSIS 206 (2015) (noting that test-optional movement began out of concern that tests were biased on race and income); Brian Shanley, *Test Optional Admission at a Liberal Arts College: A Founding Mission Affirmed*, 77 HARV. EDUC. REV. 429 (2007) (discussing how Providence College's program was designed to increase the presence of underrepresented students). For a variety of reasons, some schools have recently moved away from test-optional policies, even though a number of studies have found that the programs increased student diversity without affecting academic performance. *See, e.g.,* Brianna Feiegi, *Examining Key Impacts of Test-Optional Movement for Early Adopters*, 116 AM. ECON. ASS'N PAPERS & PROC. 682 (2025).

Fourth Circuit Judge and former law professor Toby Heytens stated in a high school admissions case, "Having spent decades telling school officials they must consider race-neutral methods for ensuring a diverse student body before turning to race-conscious ones, it would be quite the judicial bait-and-switch to say such race-neutral efforts were also presumptively unconstitutional."[160] Most practices that fall under the DEI umbrella, such as expanding recruitment outlets, changing hiring procedures, or seeking to ensure that their practices do not have a disparate impact, are in fact race-neutral and presumptively valid. The only way a claimant can show a cognizable injury would be by demonstrating that they were harmed by an intentionally discriminatory practice, which, as discussed previously, has always been a substantial burden. Indeed, as one judge noted many years ago while discussing enhanced recruitment practices, "The only harm to white males is that they must compete against a larger pool of qualified applicants."[161] In other words, there is nothing that is constitutionally suspect about pursuing diversity as a goal, and this has even more resonance among private employers who should be free to pursue a diverse workforce through various race-neutral practices.

B. RECENT CASES CHALLENGING DEI PRACTICES

As noted earlier, one of the best ways to determine what the existing law might be is to review how lower courts have interpreted the law and what cases they look to when evaluating claims that involve workplace issues. To date, such cases remain few in number, though there are more than most would realize, as these cases have mostly escaped analysis in the media attention devoted to the recent rash of lawsuits. These new lawsuits have clearly received substantial media attention, but the ensuing case law has not. In this section, I will review the existing cases and show that, to date, most of the challenges to DEI practices have failed, and to the extent they have succeeded, it is not because of a change in law brought about by the *SFFA* decision, but rather because of case law that predated that decision.

1. American Alliance for Equal Rights v. Fearless Fund

To date, there have been a handful of decisions, but one case in particular that arose shortly after the Supreme Court's *SFFA* decision has received widespread attention. *American Alliance for Equal Rights v. Fearless Fund* was brought by a group that has been filing multiple claims challenging DEI practices, and in this case, it sued to enjoin a venture capital fund that provided small grants to businesses owned by Black women.[162] The grants were for $20,000, and in return for the grant, the Fund required

[160] Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864 at 891 (Heytens, J., concurring).
[161] Duffy v. Wolle, 123 F.3d 1026, 1032 (5th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998). *See also* Mlynczak v. Bodman, 442 F.3d 1050, 1059 (7th Cir. 2006) (noting that the contested affirmative action policies "were of the type that expand the pool of persons under consideration, which is permitted.").
[162] Am. All. for Equal Rights v. Fearless Fund Mgmt., LLC, 103 F.4th 765 (11th Cir. 2024).

the grantees to agree to Name, Image and Likeness (NIL) rights for the Fund and some other minor conditions, which the court concluded, meant that the grants were a contract subject to the restrictions of 42 U.S.C. 1981, which prohibits race and national origin discrimination in contracting.[163] The grants were specifically restricted to businesses that were owned by Black women, and the Fund stated that it was seeking to address the historic lack of venture funds available for companies founded by Black women.[164]

There were two issues in the case, but only the standing issue was particularly complicated. A question that has arisen in many of these cases is whether the plaintiff (in this instance, a fund dedicated to eradicating DEI) has standing to sue. The standing of the plaintiff in *Fearless Fund* was unclear because it was not a party that had unsuccessfully applied for funds, which is a traditional basis for bringing a claim.[165] Courts have recently differed on this particular issue – in fact, in a challenge to Pfizer's diversity fellowship, the Second Circuit concluded that the plaintiffs did not have standing.[166] Yet, in *Fearless Fund*, the Eleventh Circuit found that there was standing based on declarations from several non-black owners of companies who stated they were ready and willing to apply for the funds but for the racial restrictions preventing them from doing so.[167] The standing issue is procedural in nature and not necessarily related to race, but it is likely to affect a number of anti-DEI cases where the plaintiffs are seeking to challenge procedures without identifying any person who has been affected by the practices or even identifying which practices they are challenging.[168]

Once the standing issue was resolved, the rest of the lawsuit readily fell into place. There was not really a question of whether it was permissible to only contract with African American women under 42 U.S.C. 1981.[169]

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[163] The fund awarded four grants of $20,000 to black-women owned businesses through a competitive grant process. *Id.* at 770. The original grant application indicated that the winning businesses were entering into a contract and that the fund retained rights of what were defined as name, image or likeness (NIL) and to discuss the businesses. *Id.* This language made it clear that a contract was at issue so that the program fell within the strictures of section 1981. The Fund later changed the language.

[164] *Id.* at 769. (the Fund's stated mission was to "bridge the gap in venture capital funding for women of color founders building scalable, growth aggressive companies.").

[165] *Id.* at 772. (organization must show members were "able and ready" to participate in contest).

[166] *See* Do No Harm v. Pfizer, Inc., 96 F.4th 106 (2d Cir. 2024). The *Pfizer* case turned primarily on issues of associational standing, where the court required the association to "identify by name at least one injured member" for purposes of standing. Upon rehearing, the Second Circuit subsequently vacated the original decision and issued a new opinion affirming its standing decision as it relates to securing a preliminary injunction (same analysis as before), but reversing the decision to dismiss the claims. *See id.* at 109.

[167] *See Am. All. For Equal Rights*, 103 F.4th at 774. One judge dissented on the standing issue. *See id.* at 780 (Rosenbaum, J., dissenting).

[168] In what seems to be a fairly typical case, the plaintiffs challenging private DEI practices sought documents involving "any evidence" or "any treatment" that was "relating to race, sex, age, gender in any what whatever," a request the district court rejected as overbroad. *See* Keathley v. Spire Inc., 348 F.R.D. 344 (E.D. Mo. 2024).

[169] *See Am. All. For Equal Rights*, 103 F.4th at 776.

Rather, the only real issue was whether the grants amounted to a contractual relationship, which in this case was easy to resolve given the reciprocal benefits the fund required.[170] But in future cases, it would be relatively easy to change the terms so as not to create a contract, or alternatively to open the program to others, including economically disadvantaged businesses, which some entities have already adopted to resolve several other recent cases.[171] There is also a potentially interesting First Amendment issue, given that these were charitable donations and that individuals are free to donate money to any cause they want, but here the contract took the case out of the First Amendment.[172] Under the existing affirmative action law, the Fund presented an absolute bar to non-black business owners and was not intended to remedy any identified discrimination. Notably, the primary case the court relied on was *Johnson v. Santa Clara County*, indicating that the Eleventh Circuit still considered the case good law even after *SFFA*.[173]

2. A Reverse Discrimination Case

The other case that appears to be a successful challenge to private DEI practices more closely resembles an age-old reverse discrimination case with a minor change in terminology. David Duvall, a white man, was fired by the private company Novant Health, and as was described by the court, "Immediately after firing Duvall, Novant Health elevated two of Duvall's deputies, a white woman and a black woman, to take over his duties. It then later hired another black woman to permanently replace Duvall."[174] Duvall believed the company had acted pursuant to its "diversity targets" and challenged his termination under Title VII.

The company had what it called a "Diversity and Inclusion" plan that established three- to five-year goals to diversify its executive and senior-level teams.[175] In 2018, the company expressed concern that "while 82 percent of Novant Health's workforce was female, only 4 percent of the female workforce comprised Novant Health's leadership."[176] The company also documented that African American representation in the leadership

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[170] *See id.*

[171] This is the step taken by some employers who find their internship or scholarship programs under attack, including McDonalds. *See* Nate Raymond, *McDonald's Settles Lawsuit Challenging Latino Scholarship Program*, REUTERS, (Feb. 3, 2025) (McDonald's revised its program "to eliminate any eligibility requirement based on applicants' race or ethnicity.").

[172] The Court discussed, and rejected, the Fund's First Amendment argument in the context of a contractual claim. *See Am. All. For Equal Rights*, 103 F.4th at 777-79. The more interesting and likely more common claim would be whether the Fund had the right to award grants solely to black female-owned businesses without the reciprocal contractual commitments. In any event, this issue is not likely to come up in the context of private employment practices designed to diversify or preserve a diverse workplace.

[173] *Id.* at 777. The court noted, "Fearless's contest flunks the *Johnson* test because it unquestionably 'create[s] an absolute bar' to the advancement of non-black business owners." *Id.* (quoting *Johnson v. Transp. Agency*, 480 U.S. 616, 626.)

[174] Duvall v. Novant Health, Inc., 95 F.4th 778 (4th Cir. 2024).

[175] *Id.* at 783.

[176] *Id.* at 784.

roles had decreased and, through meeting minutes, made clear that the company had no "quotas" but instead wanted "to reach our targets."[177] At the time Duvall was fired, he had no negative performance evaluations; indeed, at the outset of its opinion, the court noted, "Novant Health, a multibillion-dollar company with ample employee-relation resources, could not produce *any* contemporaneous evidence documenting these supposed deficiencies in Duvall's performance—or indeed, any deficiencies at all."[178]

The case reached the court of appeals after a substantial jury verdict, including $10 million in punitive damages (which the court subsequently vacated).[179] But as to the verdict, the question was only whether the plaintiff had presented sufficient evidence that a reasonable jury could conclude that discrimination was the cause of his termination.[180] A significant part of that evidence involved details about the company's Diversity and Inclusion plan, including parts that were adopted after Duvall's termination, which the court concluded was appropriately presented to the jury.[181] The timing of the various actions, as well as testimony indicating that another white male who had been performing successfully was terminated around the same time and replaced by a black male, suggested that "[a] jury would be entitled to consider this evidence as suggestive of calculated moves to increase diversity among Novant Health's senior leadership by removing white men."[182] The company's shifting explanation for its actions – something that arises frequently in discrimination cases – likewise supported the jury's decision. In other words, this was about as strong a case as required to proceed to a jury verdict these days, regardless of whether the plaintiff is a white male or a member of a protected category.

One additional fact distinguishes the *Duvall* case from the older affirmative action cases. Here, the employer did not seek to justify its actions based on its Diversity and Inclusion plan. Instead, as is common in many discrimination cases, the employer offered a different, unconvincing explanation (poor performance) that was ultimately determined to be a pretext for discrimination. Throughout the twenty-plus pages of discussion relating to the jury's decision, the court did not cite any of the affirmative action cases, nor did it refer to *SFFA,* which had been decided a year earlier. This was, in other words, a fairly typical reverse discrimination case that turned on proving the employer's explanation of poor performance was

[177] *Id.*
[178] *Id.* at 790. Additionally, Duvall obtained a new job but was fired shortly after he filed his lawsuit against Novant, facts the jury heard and likely weighed in their determination. *Id.* at 784.
[179] *Id.* at 793. As the court explained, having a strong case and one that entitles the individual to recover punitive damages are two different standards.
[180] *Id.* at 788.
[181] *Id.* at 789 n.7.
[182] *Id.* at 790.

pretextual rather than any indictment of DEI policies.[183] It would have been a different and more significant case if the employer had acknowledged that Duvall's termination was related to its Diversity and Inclusion policies - although, given that it was a termination, they may have had a difficult time justifying their action.

3. Cases Challenging DEI Training

DEI training has been the subject of many claims, all of which have failed to date, though several have survived dismissal motions. The claims vary, but all allege harm arising from diversity training or, in some cases, a refusal to complete diversity training. The claims involving a right not to participate in the training are the easiest to dismiss. Absent some unusual circumstances, it seems unlikely that a court would permit employees to opt out of employer-provided training, regardless of the subject matter. Indeed, although none of the claims seem to involve sexual harassment training, the Supreme Court created incentives for employers to offer such training nearly thirty years ago.[184] It would be ironic, to say the least, if the Supreme Court created an incentive with respect to Title VII liability that then violated Title VII. In this regard, there is no meaningful difference between race-based diversity training and sexual harassment training, or even something like cybersecurity training. Employees are not typically allowed to choose what training they will undertake.

To give one example: in *Vavra v. Honeywell International*, a private employer was sued after firing an employee for refusing to complete mandatory unconscious bias training. The claim was brought under Title VII, but the Seventh Circuit concluded that his refusal to complete the training was not a statutorily protected activity, and even if it had been, he had failed adequately to establish that his refusal of the training was the cause of his termination.[185]

The more interesting cases involve challenges to the content of the training, which a number of plaintiffs have alleged creates a hostile working environment. In *DiPiero*, a case in which a Penn State professor objected to a series of training sessions where he alleged that the training condemned

[183] In this case, the court did not discuss the background circumstances issue, presumably because it was not one of the courts that required such proof to move forward on a reverse discrimination claim.

[184] In a pair of cases decided on the same day involving employer liability for sexual harassment, the Supreme Court established an affirmative defense available when no tangible employment action, such as a termination or change in employment conditions, occurred. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) and Farragher v. City of Boca Raton, 524 U.S. 775 (1998). Although the affirmative defense does not require employers to providesexual harassment training, many employers opted to do so with an eye towards limiting their liability. *Se*e Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3 (2003) (discussing employers' response to affirmative defense).

[185] Vavra v. Honeywell Int'l Inc., 106 F.4th 702 (7th Cir. 2024).

white people, the District Court originally allowed the case to move forward but later granted summary judgment to the defendant employer.[186] The court concluded that even if the plaintiff was subjectively offended by the training, it was neither sufficiently severe nor pervasive enough to rise to the level of a hostile working environment.[187] The plaintiff also failed to establish that the training interfered with his working conditions: as has always been required under harassment law; being subjectively offended is not sufficient to establish a claim.[188]

Harassment claims tied to diversity training like the one in *DiPiero* are likely to fail for a variety of reasons. First, there is broad discretion afforded to employers to institute training. Beyond that, a plaintiff must establish that the harassment was sufficiently severe or pervasive enough to alter working conditions. Most diversity training occurs in a single session, and it is always difficult to succeed on a claim involving a single incident of harassment.[189] Finally, while it is possible to establish a claim based on non-targeted harassment, the fact that these sessions are likely not directed at any one individual further complicates the inquiry.[190]

In a minor twist on the cases discussed above, a number of individuals have sued and argued that their criticisms of diversity training or other initiatives led to retaliatory action by their employer.[191] As is true

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[186] *See* DiPiero v. Penn State, 711 F. Supp.3d 410 (E.D. Pa. 2024) (allowing case to move forward), *summary judgment granted for employer,* 769 F. Supp.3d 329 (E.D. Pa. 2025). At the time this article went to press, the case was pending on appeal before the Third Circuit.

[187] *DiPiero*, 769 F. Supp.3d at 354.

[188] *Id.* In a similar claim with a similar result a Colorado Corrections Officer sought to prove, but failed, that the Department's mandatory DEI training created a Hostile Working Environment due to the content of the training. *See* Young v. Dept. of Corrections, 94 F.4th 1242 (10th Cir. 2024).

[189] *See, e.g.,* Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 278-81 (4th Cir. 2015) (en banc) (noting that an isolated incident can lead to liability if it is "extremely serious"); Brooks v. City of San Mateo, 229 F.3d 917 (9th Cir. 2000) (single incident did not rise to level of hostile working environment).

[190] Although non-targeted cases are relatively rare, the Ninth Circuit Court of Appeals recently vacated a district court's dismissal in a case where a group of former employees alleged that they were forced to work in a hostile working environment as a result of sexually graphic and violently misogynistic music. Sharp v. S&S Activewear, LLC., 69 F.4th 974 (9th Cir. 2023). In allowing the case to move forward, the Court noted that the workplace was "saturated" with derogatory music that was played "throughout the warehouse" and was persistent. *Id.* at 981. It is difficult to imagine a workplace where training had a similar effect.

[191] For example, a North Carolina State Professor who complained about training and circulated articles that were critical about taking diversity into account in hiring, failed to establish that he had suffered an adverse employment action. *See* Porter v. Bd. of Trs. of N.C. State Univ., 72 F.4th 573 (4th Cir. 2023), *cert. denied*, 144 S. Ct. 693 (2024). Similarly, a number of cases have arisen where employees complained that they were disciplined for criticizing school curricula, and those cases have also uniformly failed. *See, e.g.*, Stannard v. State Ctr Cmty. Coll. Dist., 733 F. Supp.3d 946 (E.D. Ca. 2024) (plaintiff was disciplined for comments he made during a training session); Flynn v. Forrest, 605 F. Supp. 3d 319 (D. Mass. 2022) (football coach's contract not renewed after he criticized daughter's school curriculum as too woke); Barr v. Tucker, 662 F. Supp. 3d 1353 (S.D. Ga. 2023) (substitute teacher lost her position after criticizing daughter's curriculum with respect to same-sex marriage). These cases, all of which involved public

with refusals to participate in training, employees of private employers have no inherent right to criticize their employers' practices, and the fact that the training involves race-related issues does not by itself lead to a Title VII violation. In order to establish a retaliation claim, an employee would have to engage in protected activity and then suffer a materially adverse consequence as a result. [192] Protected activity includes opposing discrimination, but it is not enough to simply call something discriminatory; rather, the employee must have a good-faith belief that the practice they are complaining about violates Title VII.[193] As one court explained, "D.E.I. programs aimed at addressing racial inequalities against Black people and other minorities are not by their very nature discriminatory against whites."[194] It is possible that an employee who opposes employer practices would be able to assert a retaliation claim, but so far, such claims have failed, and broad claims that DEI programs are inherently discriminatory are likely to fail regardless of the underlying claim.

4. Potential Disparate Impact Claims

Although to date there have been no disparate impact challenges to DEI practices, they are likely to arise, assuming various plaintiffs continue to pursue claims. Disparate impact claims do not require proof of intent to discriminate but instead are based on identifying a practice that has a disparate impact on a protected group. If such an adverse effect is identified, the employer has an opportunity to establish that its practice is justified.[195] DEI practices that are designed to increase the number of minority and female employees are likely to have the effect of adversely affecting white men.[196]

But this by itself is not enough to establish a disparate impact claim, and in fact any such claim would be unlikely to satisfy the first step of the

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schools, generally involved 1st Amendment challenges. The Florida statutory ban on DEI training has been enjoined as a likely violation of the First Amendment. *See* Honeyfund.com Inc. v. Governor, 94 F.4th 1272 (11th Cir. 2024).

[192] *See* Burlington N. & Santa Fe Ry. Co. v. White, 543 U.S. 53 (2006) (discussing and establishing retaliation standard).

[193] *See, e.g.*, Kwan v. Andalex Grp., Inc., 737 F.3d 834, 843 (2d Cir. 2013) (requiring plaintiffs to show they were "motivated by a 'good faith reasonable belief that the underlying employment practice was unlawful.'") (citation omitted)); Fine v. Ryan Int'l. Airlines, 305 F.3d 746, 753 (7th Cir. 2002) (must have a good faith objectively reasonable belief that employer was engaging in discrimination); Sumner v. U.S. Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990) (plaintiff "must be acting under a good faith, reasonable belief that a violation existed.").

[194] Diement v. City of Seattle, 776 F. Supp. 3d 922, 930 (W.D. Wash. 2025).

[195] The disparate impact cause of action was established by a pair of early Title VII cases. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The cause of action was later codified as part of the Civil Rights Act of 1991 and is now part of Title VII. *See* 42 U.S.C. § 2000e- 2(k)(1)(A).

[196] The primary reason for the decline of the disparate impact cases appears to be related to damages, which are not available for such claims but are available for claims based on intentional discrimination. There are still disparate impact cases filed, typically challenging tests for police and fire departments, as has been true for many years. *See, e.g.*, Erdman v. City of Madison, 91 F.4th 465 (7th Cir. 2024).

analysis - establishing that a practice has a substantial disparate effect on a group. Two problems are likely to arise. First, the plaintiff has to identify a specific practice, and it would not be sufficient to say that an employer's affirmative action or DEI policies generally have an adverse effect - instead, a court would likely require the plaintiff to identify a specific practice within the DEI realm of practices that caused a disparity.[197] Even though disparate impact claims do not require proof of intent, they do require causation, and in most circumstances, plaintiffs are unlikely to be able to point to a specific practice that is causing disparate impact. Indeed, none of the affirmative action cases from the 1970s and 1980s raised disparate impact claims, even though that was when the theory was at its apex.[198]

Another problem would be how to define disparate impact. This is an issue that arose in a recent high school admissions case where new policies reduced the number of Asian students.[199] The court held that this reduction by itself was not sufficient to establish disparate impact because the baseline was not the current student population but rather the effect of the particular practice, taking into account the applicant pool.[200] While the number of Asian students declined, there was no disparity when it came to the applicant pool.[201] It is neither proof of adverse impact nor an intent to discriminate that a policy results in fewer Asian students, nor in the context of the workplace, fewer white men.

IV. THE FUTURE OF DEI IN THE PRIVATE WORKPLACE

So there is the legal landscape with regard to affirmative action, DEI, and the room private employers have to take steps to diversify their workforce. The general conclusion is that private employers continue to have substantial leeway to employ DEI practices that are designed to diversify their workplace, conduct trainings related to various aspects of diversity and discrimination, and ensure their workplace is an inclusive space for all employees, an important feature of any workplace but one that can help retain a diverse workplace.

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[197] The requirement for identifying a specific practice is in the statutory language. *See* 42 U.S.C. §2000e-2(k)(1)(A)(i) ("a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."). There is an exception for a practice that is "not capable of separation" but that is not likely to apply to challenges to DEI practices.

[198] *See* cases in Section II *supra*.

[199] *See* Coal. for TJ v. Fairfax Cnty Sch. Bd., 68 F. 4th 864, 879 (4th Cir. 2023), *cert. denied*, 601 U.S. __ (2024).

[200] *Id.* at 880-81 (concluding that the standard for disparate impact is how the group fares in the policy not how it fared compared to prior policy).

[201] *Id.*

Although formal affirmative action seems less common today and, in the private workplace, would rarely match the explicit preferences provided by public employers in the early years, there is no question that, under existing law, private employers retain the power to engage in affirmative action to address a manifest imbalance in their workforce. There is, to be sure, a substantial question of whether the Supreme Court would allow such actions if it were to review them, keeping in mind that the Court has shown a reluctance to enter the fray even with respect to public employment. Moreover, the Supreme Court has stated that lower courts should not seek to predict how it might rule on future cases, thus leaving the case law intact for now.[202]

But there is, I think, a legitimate question that is rarely addressed in the work supporting affirmative action, and that is how long it should continue. In *Grutter v. Bollinger*, Justice O'Connor suggested that educational affirmative action should end twenty-five years after the Court's decision was issued, and based on that notion the Supreme Court effectively ended the use of racial preferences a year early.[203] Scholar Orlando Patterson once made a similar suggestion, but specific dates always feel arbitrary, and it would seem we should have some other metric to determine when affirmative action should cease.[204] Presumably, one reasonable answer is that affirmative action should end when it is no longer necessary, but that largely begs the question of how we determine when it is no longer necessary. One approach might be to state that affirmative action should end when systemic discrimination ends, but we are never likely to reach agreement on such a state, given that we cannot even reach a consensus on what constitutes systemic discrimination or how much it affects our society.[205]

This is, I believe, the central problem we have never adequately confronted: why racial and gender disparities continue and what accounts for continuing states of inequality that have been endlessly documented for decades. Affirmative action has always been an easier solution than seeking to address continuing inequality and persistent discrimination. But because it has always been under attack and on the defensive, affirmative action has

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[202] *See* Agostini v. Felton, 521 U.S. 203, 237 (1997) (lower courts should not assume "the more recent cases have, by implication, overruled an earlier precedent.").

[203] *See* Grutter v. Bollinger, 539 U.S. at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.).

[204] Professor Patterson proposed continuing affirmative action for fifteen years and then moving to class-based affirmative action. *See* ORLANDO PATTERSON, THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S RACIAL CRISIS 193–94 (1998).

[205] Two scholars have made such a claim: "Generally speaking, when should 'affirmative action' end? We offer the following terminus: Fair measures that are race-or-gender conscious will become presumptively unnecessary when the nation's implicit bias against those social categories goes to zero or its negligible behavioral equivalent." Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"* 94 CALIF. L. REV. 1063, 1116 (2006).

produced limited but important gains, and we continue to rely on it rather than address the entrenched issues of inequality. The move to DEI is, in some ways, a modernization of affirmative action that goes beyond bringing diverse individuals into the workplace to ensure their path to success.

And my sense is we are likely to continue in much the same way we have. Many companies are committed to having and maintaining a diverse workforce, and will continue in their efforts, which should include changing practices in ways likely to reduce discrimination, particularly in the hiring process, where discriminatory impulses often seep through the process. The messaging service Slack recently changed its interview process to reduce its subjective component and found an increase in the number of women in technical roles.[206] A move towards incorporating algorithmic decision-making may also reduce subjectivity and discrimination in the employment process.[207]

There is no doubt that the broad assault on DEI will cause some employers to retreat from their practices, though it is quite likely that such employers had a weak commitment to diversity to begin with. Those with a stronger commitment are likely to change some practices, such as opening up fellowship programs, but may, in the end, reach the same or similar results as their prior practices, and it will be interesting to see if the various legal groups that filed the original spate of challenges will also challenge what appear to be race-neutral practices designed to diversify the workplace. Indeed, a number of colleges increased the diversity of their classes after the Supreme Court's *SFFA* decision, and those increases have yet to produce any new legal challenges.[208] Whether that will be true in the employment setting remains to be seen, but one message that comes through - and this has always been true of affirmative action - that less transparency is likely to be an important legal shield. This will likely be particularly important in the hiring process where, for a variety of reasons, claims are far less common than those involving existing employees.[209]

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[206] Ella F. Washington, *The Five Stages of DEI Maturity*, HARV. BUS. REV., Nov.-Dec. 2022.
[207] *See* Michael Selmi, *Algorithms, Discrimination and the Law*, 82 OHIO ST. L.J. 611, 628 (2021) ("[A]lgorithms are unlikely to be more discriminatory than humans, and there is good reason to believe they will be less.").

[208] Data shows that while some elite colleges experienced a significant decrease in diversity, several schools actually increased their minority student population. *See* Aatish Bhatia et al., *What Happened to Enrollment at Top Colleges After Affirmative Action Ended*, N.Y. TIMES (Jan. 15, 2025) https://www.nytimes.com/interactive/2025/01/15/upshot/college-enrollment-race.html [https://perma.cc/LG98-6V6W]. It is too early to know any long-term trends, but it seems that colleges committed to diversity have found ways to limit the damage caused by the Supreme Court decision. For an additional analysis, see Brian J. Cook, *Unpacking Early Trends in the Racial Diversity of Elite College Admissions Following the Supreme Court Ruling on Affirmative Action*, URB. INST. RSCH. REP. (Sept. 19, 2024), https://www.urban.org/urban-wire/unpacking-early-trends-racial-diversity-elite-college-admissions-following-supreme-court.
[209] This has long been documented – upwards of two-thirds of lawsuits and EEOC charges involve terminations or layoffs, while only about 10% of EEOC charges involve hiring claims. *See* Peter Siegelman & John J. Donohue III, *Law and Macroeconomics: Employment*

One modest upside is that there remains public support for DEI practices, particularly for what might be described as soft affirmative action practices, such as expanded recruiting and ensuring fair process. This recently played out in public based on the different choices Costco and Target made after the initial assault on DEI. Costco effectively doubled down on its commitment to DEI - in fact, its shareholders overwhelmingly voted down a proposal submitted by a conservative think tank to study the ramifications and risks of its DEI practices.[210] Target, on the other hand, dismantled many of its DEI practices, including removing products provided by local minority vendors from its shelves. The public results were clear: sales at Costco increased over the prior year, while Target faced a boycott and declining sales.[211] If nothing else, the assault on DEI may provide better empirical evidence for the business case for diversity, and may lead those who have abandoned efforts to reconsider their strategy if it turns out that a diverse workforce leads to greater profits.

In any event, the law is not likely to play a significant role in the future of DEI, unless the existing law is altered in some significant way. Rather, most of the current challenges are likely to mimic the reverse discrimination cases that have been around for decades, only now with a slightly more favorable legal standard, and the influence of the *SFFA* decision is likely to be minimal. There may be other successes, but it is likely that employers will react more to the cost of litigation and potential loss of federal contracts from the Trump Administration than to any legal losses in court.

V. CONCLUSION

The Supreme Court's decision to end racial preferences in admissions at Harvard and the University of North Carolina spawned a spate of lawsuits challenging DEI practices in various areas. But the *SFFA*

Discrimination Litigation Over the Business Cycle, 66 S. CALIF. L. REV. 709, 725 (1993). One reason for this is that most employment discrimination claims turn on comparisons to other employees, and most applicants will not have access to other applicants. For a more recent discussion of the nature of charges and filings, see Blair D. Bullock, *Frivolous Floodgate Fears*, 98 IND. L.J. 1135, 1160-65 (2023).

[210] *See Costco Shareholders Reject an Anti-DEI Measure, After Walmart and Others End Diversity Programs*, CBS NEWS, (Jan. 24, 2025), https://www.cbsnews.com/news/costco-dei-policy-board-statement-shareholder-meeting-vote/ [https://perma.cc/898Z-Q4EN] (98% of shareholders voted against the proposal).

[211] See Nancy Marshall-Genzer, *Costco Doubles Down on DEI—and Benefits,* MARKETPLACE (May 22, 2025), https://www.marketplace.org/story/2025/05/22/costco-doubles-down-on-dei-and-benefits [https://perma.cc/U7QR-FSGJ] (April sales increased 4.7% over prior year); Michael Hiltzik, *Target Learns That Bowing to Anti-DEI Backers Can Be Costly, A Lesson for Those Bowing to Trump*, L.A. TIMES (May 28, 2025) https://www.latimes.com/business/story/2025-05-28/target-learns-that-bowing-to-the-anti-dei-gang-can-be-costly-a-lesson-for-those-bowing-to-trump [https://perma.cc/5A94-UAAB] (noting that Target's sales declined 5.7% over prior year).

decision is not likely to affect private employers, in large part because education cases have never strongly affected workplace affirmative action, and the goals of diversity in education compared to the workplace differ in meaningful ways. Those private employers that want to take steps to diversify their workplace and enhance that diversity continue to have the legal leeway to do so, particularly if those efforts are in the form of what once was deemed soft affirmative action - programs designed to enrich the workplace without relying on race- or gender-conscious preferences.

NOTE

THE TIGHTENING OF THE FIRST STEP ACT'S "SAFETY VALVE" IN *PULSIFER V. UNITED STATES*

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I. INTRODUCTION

In 2018, the First Step Act was passed by Congress and signed into law by President Donald Trump.[1] The Act was considered "groundbreaking," "the first major reduction to federal drug sentences," and "the most significant criminal justice reform legislation in years."[2] It attempts to reform the criminal justice system by shortening unnecessarily long federal prison sentences and improving the conditions in federal prisons.[3] In an effort to shorten sentences, the Act expands on a "safety valve" concept first introduced by the Violent Crime Control and Law Enforcement Act of 1994.[4] The 1994 Act included a much more modest version of the "safety valve," instructing a court to apply individualized sentencing only if the defendant did not have more than **one** criminal history point.[5] The 2018 Act loosened the standards needed for the safety valve to apply, making more people eligible for individualized sentencing.[6] The U.S. Sentencing Commission (USSC) predicted that around 2,600 federal inmates would immediately become eligible for individualized sentencing under the new "safety valve" provision.[7] However, in March 2024, the U.S. Supreme Court decided *Pulsifer v. United States*, in which the Court answered whether § 402 of the First Step Act, titled "Broadening of Existing Safety Valve," (which lists requirements of the new safety valve) should be interpreted to mean that a court should deny individualized sentencing only if **all** three of the following conditions are met, or if it should deny individualized sentencing if **any** of the three conditions are met.[8] The amended safety valve provision of the First Step Act of 2018, which instructs courts on whether it is appropriate to provide a defendant with individualized sentencing, is as follows:

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[1] Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law — and What Happens Next*, BRENNAN CTR. FOR JUST., (Jan. 4, 2019), https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next [https://perma.cc/FVZ7-WAE9].

[2] Nicholas Fandos & Maggie Haberman, *Bipartisan Sentencing Overhaul Moves Forward, but Rests on Trump*, N. Y. TIMES, Nov. 12, 2018, https://www.nytimes.com/2018/11/12/us/politics/prison-sentencing-criminal-justice-reform.html; Grawert & Lau *supra* note 1; German Lopez, *The First Step Act, explained*, VOX, Feb. 5, 2019, https://www.vox.com/future-perfect/2018/12/18/18140973/state-of-the-union-trump-first-step-act-criminal-justice-reform [https://perma.cc/7E4F-33B2].

[3] Grawert & Lau, *supra* note 1.

[4] Pulsifer v. United States, 601 U.S. 124, 158 (2024) (Gorsuch, J., dissenting).

[5] *Id.*; Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 3553(f) (1994).

[6] *See Pulsifer*, 601 U.S. at 160-61 (Gorsuch, J., dissenting).

[7] Alan Blinder & Jennifer Medina, *He Was Sentenced to Life for Selling Crack. Now Congress Wants to Reconsider*, N. Y. TIMES, Dec. 20, 2018, https://www.nytimes.com/2018/12/20/us/sentencing-reform-crack.html; U.S. SENT'G COMM'N, PRISON AND SENT'G IMPACT MODEL USING FY2017 DATA, SENTENCE AND PRISON IMPACT ESTIMATE SUMMARY (2018) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/January_2019_Impact_Analysis.pdf [https://perma.cc/K2DE-NEA3].

[8] First Step Act of 2018, PUB. L. No. 115-391, § 402, 132 Stat. 5221.

(1) [T]he defendant does not have:
  (A) [M]ore than four criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
  (B) [A] prior 3-point offense, as determined under the sentencing guidelines; **<u>and</u>**
  (C) [A] prior 2-point violent offense, as determined under the sentencing guidelines.[9]

The purpose of the amended safety valve provision of the First Step Act of 2018 is to instruct the judge on whether it is appropriate to provide a defendant with individualized sentencing.[10]

The debate over the meaning of the First Step Act's safety valve provision centers on one single word: "and." Mark E. Pulsifer, the petitioner, argued that § 402 sets out a conjunctive list, requiring every single item to be satisfied before the provision applies, while the Government argued that it is a disjunctive list, requiring only one item to be satisfied.[11] Ultimately, the Supreme Court agreed with the Government's narrow interpretation, and in a 6-3 decision, decided to deny defendants the opportunity to receive individualized sentencing if their criminal histories match **<u>any</u>** of the Act's three categories.[12] This note will examine how the *Pulsifer* decision will stifle the First Step Act's potential for criminal justice reform, especially the Act's ability to alleviate pressure from overcrowding in prisons.[13] It will also discuss how the decision reflects a broader trend of the Supreme Court contributing to mass incarceration and blocking attempts to reform the American criminal justice system. Finally, this note will consider how focusing on the ways that in which mass incarceration contradicts ideals of individual freedom and uses substantial financial resources may be the solution to finding support for criminal justice reform across America and beyond party lines moving forward.

II. BACKGROUND ON THE FIRST STEP ACT OF 2018

A. WHAT EXACTLY DOES THE FIRST STEP ACT ATTEMPT TO ADDRESS?

The First Step Act attempts to deal with issues within the federal prison system from several directions. The Act is broken up into six titles. Title IV of the Act outlines sentencing reforms, including Section 402, which expands the safety valve provision. The prior version of the safety valve, enacted by the Violent Crime Control and Law Enforcement Act of

[9] *Id.*
[10] *Id.*
[11] *See Pulsifer*, 601 U.S. at 127.
[12] *Id*. at 153.
[13] *Id.* at 160-161.

1994, was much more modest.[14] Previously, only defendants with one "criminal history point" could receive sentences below the mandatory minimums. Points are assigned to each conviction based on the severity of the crime and recency of the offense.[15] However, under the First Step Act, defendants with up to four points may qualify for individualized sentencing.[16] The revised safety valve was meant to promote fairness in sentencing, reduce overcrowding, and offer second chances to low-level offenders.[17] However, ever since the Act's conception, it was met with mixed feelings and concern from both those in favor of harsher punishment and criminal justice reformers.

B. THE PERSISTENT PROBLEM OF MASS INCARCERATION

The term "mass imprisonment" was first used by scholar David Garland to refer to the boom in prison populations between 1975 and the late 1990s.[18] In the past 40 years, the U.S. prison population has grown by 500%.[19] Between 1988 and 2012, the average length of time served by federal prisoners more than doubled.[20] However, sociological research consistently shows that longer prison sentences do not deter individuals from committing crimes.[21] In fact, longer prison sentences may even be counterproductive for public safety. Individuals will often "age out" of crime, long sentences do little to deter, and keeping people in prison for long periods uses resources that could be poured into high-crime communities or

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[14] *Pulsifer v. United States*, 601 U.S. at 158 (Gorsuch, J., dissenting).

[15] U.S. SENT'G COMM'N, GUIDELINES MANUAL ch. 4 (U.S. SENT'G COMM'N 2023) [https://perma.cc/AGN6-ZU33].

[16] First Step Act of 2018, *supra* note 8.

[17] Ames Grawert, What Is the First Step Act – And What's Happening With It? BRENNAN CENTER FOR JUSTICE (June 23, 2020), https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it.

[18] Vincent Schiraldi, *New York City Success Story: Leaving 'Mass Imprisonment' Behind*, THE CRIME REPORT (Feb. 20, 2020), https://thecrimereport.org/2020/02/20/new-york-city-success-story-leaving-mass-imprisonment-behind/ [on file with the Southern California Review of Law and Social Justice].

[19] *Mass Incarceration: What's at Stake*, ACLU (2024), https://www.aclu.org/issues/smart-justice/mass-incarceration [https://perma.cc/MD8L-FAAJ].

[20] *Prison Time Surges for Federal Inmates*, THE PEW CHARITABLE TRUSTS (Nov. 18, 2015), https://www.pewtrusts.org/~/media/assets/2015/11/prison_time_surges_for_federal_inmates.pdf [https://perma.cc/H99A-NDAM].

[21] John M. Darley, O*n the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 BROOK. J. L. & POL'Y 189 (2005); *Five Things About Deterrence*, NAT'L INST. OF JUST. (Jun. 5, 2016) https://nij.ojp.gov/topics/articles/five-things-about-deterrence [https://perma.cc/4NEF-TP9Z]; Nicholas Turner, *Research Shows that Long Prison Sentences Don't Actually Improve Safety*, VERA INST. OF JUST. (Feb. 13, 2023), https://www.vera.org/news/research-shows-that-long-prison-sentences-dont-actually-improve-safety; Press Release, Alexi Jones, *Reforms Without Results: Why States Should Stop Excluding Violent Offenses From Criminal Justice Reforms*, PRISON POL'Y INITIATIVE (April 2020), https://www.prisonpolicy.org/reports/violence.html [https://perma.cc/2HGE-AF53]; *Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures*, CAN. DEP'T OF JUST. (Aug. 16, 2022), https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr02_1/p4_1.html [https://perma.cc/99C2-R5HY].

used to prevent crime in other, more effective ways.[22] Longer sentences are particularly ineffective at preventing drug crimes, because incarcerated drug sellers are quickly replaced by other sellers in their communities. Recently, more and more people have begun to recognize that mass incarceration in the United States is a major problem.

C. LEGISLATIVE HISTORY OF THE FIRST STEP ACT

The First Step Act was born out of a longstanding bipartisan concern over the escalating costs of mass incarceration.[23] Lawmakers began to reconsider the existing criminal justice system in the 1990s and early 2000s after growing evidence started to show the reality of overcrowded prisons, disproportionate sentencing for drug offenses, and the financial toll this took on state and federal budgets.[24] As a result of this pressure, Democrats and Republicans alike began to consider ways they could use lawmaking to ease the burden of mass incarceration on the U.S.

Before 2018, when the First Step Act was passed, several studies showed that the United States had one of the highest incarceration rates in the world.[25] Mass incarceration is not only a strain on prison facilities but is also extremely expensive. Each year, the United States spends $80 billion on corrections; however, this number does not account for governmental costs associated with supporting the families, children, and communities of incarcerated individuals.[26] This concern and a mutual acknowledgement of the system's inefficiency have bridged ideological divides and helped create the idea that reducing sentences for minor offenses could free up resources for rehabilitation and/or community-based education programs, while also lowering costs for taxpayers and the government. The First Step Act of 2018 offered a path to achieve this goal.

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[22] Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 121 (2018).

[23] Liz Komar, The First Step Act: Ending Mass Incarceration in Federal Prisons, THE SENTENCING PROJECT, (Aug. 22, 2023) https://www.sentencingproject.org/policy-brief/the-first-step-act-ending-mass-incarceration-in-federal-prisons/

[24] Michael Mitchell & Michael Leachman, *Changing Priorities: State Criminal Justice Reforms and Investments in Education*, CENTER ON BUDGET AND POLICY PRIORITIES, (Oct. 28, 2014), https://www.cbpp.org/research/changing-priorities-state-criminal-justice-reforms-and-investments-in-education; see also Adam Gelb, John Gramlich & Phillip Stevenson, *State Reforms Reverse Decades of Incarceration Growth*, PEW CHARITABLE TRUSTS (Mar. 21, 2017), https://www.pew.org/en/research-and-analysis/issue-briefs/2017/03/state-reforms-reverse-decades-of-incarceration-growth.

[25] SANETA DEVUONO-POWELL, CHRIS SCHWEIDLER, ALICIA WALTERS, & AZADEH ZOHRABI, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES (2015) https://ellabakercenter.org/wp-content/uploads/2022/09/Who-Pays-exec-summary.pdf [https://perma.cc/SHY2-7YVE].

[26] Michael McLaughlin et al., *The Economic Burden of Incarceration in the United States* (Fla. State Univ. Inst. Just. Rsch. & Dev., Working Paper No. IJRD-072016) https://www.prisonpolicy.org/scans/iajre/the_economic_burden_of_incarceration_in_the_us.pdf [https://perma.cc/6UBA-H3WR].

In addition to the economic considerations, the social implications of mass incarceration also played a key role in the Act's legislative history. U.S. Senator Michael Bennet, a moderate Democrat, credited a diverse coalition of stakeholders, including "the Trump administration, law enforcement groups, 172 former federal prosecutors, including a former director of the FBI, the National Governors' Association, and a broad coalition of progressive, conservative, and faith groups" for the bill's success.[27] Having support from all of these groups and organizations helped reframe criminal justice reform as a bipartisan issue rather than a solely liberal issue.

The First Step Act was not the first time Congress had seen a bipartisan effort to pass criminal justice reform legislation. In 2015, Senators Chuck Grassley (a Republican from Iowa) and Dick Durbin (a Democrat from Illinois) introduced the Sentencing Reform and Corrections Act ("SRCA").[28] Though this bill failed to pass, their collaboration was instrumental in the passage of the First Step Act. Although the Act initially stalled in the Senate, bipartisan pressure from Senator Grassley, Senator Durbin, and others led Senate Majority Leader Mitch McConnell to announce that the bill would be voted on by the end of the year.[29] When Senator Grassley spoke to the Senate as Senate Judiciary Committee Chairman, he emphasized the need to "reduce crime, save taxpayer dollars and strengthen faith and fairness in our criminal justice system."[30] He also cited the collaboration of a wide range of stakeholders and law enforcement organizations on the creation of the Bill.[31] In his Floor Statement following the passage of the Act, Grassley called the Act "a team effort years in the making," as he thanked senators from both parties and "a diverse and broad coalition of other groups from the ACLU to the American Conservative Union," showing that it took collaboration from groups across the spectrum of political ideology for the bill to pass.[32]

Similarly, Senator Durbin, who has long advocated for sentencing reform to address inequities in mandatory minimum sentencing, was an

[27] Press Release, Michael Bennet, *Bennet Cosponsors First Step Act to Reform Criminal Justice System* (Dec. 7, 2018) https://www.bennet.senate.gov/2018/12/07/press-releases-id-0347fba4-2f0c-41ec-a3d6-5edd1f1318e9/ [https://perma.cc/44D6-KV5S].
[28] Grawert & Lau, *supra* note 1 at 1.
[29] *Id.* at 3.
[30] Press Release, U.S. S. Comm. on the Judiciary, *Senate Passes Landmark Criminal Justice Reform* (Dec. 18, 2018), https://www.judiciary.senate.gov/press/rep/releases/senate-passes-landmark-criminal-justice-reform [https://perma.cc/3VSY-7TG6].
[31] *Id.*
[32] *First Step Act: A Team Effort Years in the Making: Hearing Before the S. Comm. on the Judiciary*, *115th Cong. 2* (2018) (Statement of Senator Chuck Grassley, Chairman, S. Comm. on the Judiciary), https://www.judiciary.senate.gov/first-step-act-a-team-effort-years-in-the-making [https://perma.cc/YLC8-PZS6].

outspoken supporter of the bill.[33] In his address, Senator Durbin emphasized the joint effort between Democrats and Republicans.[34] He said that thanks to "an amazing coalition of unlikely partners . . . we will now begin to relieve our overcrowded prisons, redirect funding to our most pressing crime prevention efforts, make our communities safer, and ensure the integrity of our justice system."[35]

As described in the Senate Judiciary Committee Hearings, the passage of the First Step Act in 2018 seemed to promise a solution, or at least a "first step."[36] However, many critiqued the Act for not doing enough. The goal of the First Step Act was to cut long prison sentences and improve prison conditions, but early studies suggested that the Act would exacerbate racial disparities[37] and encourage prison privatization.[38] The 2024 Supreme Court decision, *Pulsifer v. United States*, limits the First Step Act's potential to decrease prison populations and reflects a broader trend of the Supreme Court contributing to mass incarceration in the United States.

D. CRITIQUES REGARDING THE FIRST STEP ACT PRE-*PULSIFER*

Before the *Pulsifer* decision, criminal justice reformers were divided on whether the First Step Act was a good thing. Supporters believe that the Act "fulfilled its promise to improve public safety while reducing unnecessary incarceration."[39] Reports from the Department of Justice ("DOJ") show that among the nearly 30,000 people who had been granted individualized sentencing, only 12% have been re-arrested or returned to federal custody—a number far lower than the typical recidivism rate for federal prisoners, which is 45%.[40] However, even before *Pulsifer* was decided, people were concerned that the Act's potential would be hampered by strict eligibility requirements and worried about the unfairness due to inconsistent application among the circuits.[41] The most common critique of

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[33] Press Release, Office of Sen. Dick Durbin, *Durbin Celebrates Sixth Anniversary of the First Step Act on Senate Floor* (Dec. 17, 2024), https://www.durbin.senate.gov/newsroom/press-releases/durbin-celebrates-sixth-anniversary-of-the-first-step-act-on-senate-floor [https://perma.cc/96FD-2E9Z].
[34] *See Senate Passes Landmark Criminal Justice Reform*, *supra* note 27.
[35] *Id.*
[36] *Id.*
[37] *The Problem With The "First Step Act,*" AM. FRIENDS SERV. COMM. (Dec. 14, 2018), https://afsc.org/news/problem-first-step-act [https://perma.cc/UB2V-YKVU].
[38] *Id.*
[39] Kevin Ring, *The First Step Act Wasn't A Mistake—But Criminal Justice Reformers Dropped The Ball*, THE HILL (Dec. 12, 2023), https://thehill.com/opinion/criminal-justice/4356127-the-first-step-act-wasnt-a-mistake-but-criminal-justice-reformers-dropped-the-ball/ [https://perma.cc/UMZ8-93ED].
[40] U.S. DEP'T OF JUST., OFFICE OF THE ATT'Y GEN., FIRST STEP ACT ANNUAL REPORT, 52 (Apr. 2023).
[41] *See generally* Adriana E. Morquecho, *First Step Act of 2018: How Its Statutory Interpretation Limits Criminal Justice Reform*, 29 AM. UNIV. J. GENDER & SOC. POL'Y & L. 225, 226 (2021).

the First Step Act's safety valve provision before *Pulsifer* was its inconsistency in the lower courts. Before the *Pulsifer* decision, Adriana E. Morquecho argued that the "disconnect in how courts are interpreting the First Step Act" meant that many people of color sentenced under harsh drug-related laws were still not receiving adequate relief.[42] After the *Pulsifer* decision, with the Supreme Court's adoption of the Fifth, Sixth, Seventh, and Eighth Circuit's narrower approach, even fewer people will benefit from the First Step Act.[43] Beyond paragraph (f)(1), which lists requirements needed to qualify for individualized sentencing, the First Step Act's revised safety valve includes a compassionate release provision.[44] Many criminal justice reform activists and scholars found hope in compassionate release. However, like the application of the new safety valve requirements, the application of the compassionate release provision in the First Step Act has been inconsistent and underutilized.[45]

Data analysis by the Sentencing Commission attempts to estimate the number of prisoners now eligible for relief due to the revision.[46] According to data collected from records of drug-trafficking offenders three years after the First Step Act went into effect in 2018, 5,768 drug-trafficking offenders met the requirements for relief under the old safety valve, by having no more than one criminal history point.[47] Though the inconsistent application of the new safety valve made it hard to estimate nationwide prisoner eligibility, the Sentencing Commission estimated the number of eligible prisoners under both disjunctive and conjunctive readings of the law.[48] Researchers predicted that around 1,987 drug-trafficking offenders would become eligible for individualized sentencing if the Supreme Court decided to adopt the disjunctive reading of the Fifth, Sixth, Seventh, and Eighth Circuits.[49] That predicted number of eligible offenders went up to 5,778 if the Court instead adopted the conjunctive reading of the Fourth, Ninth, and Eleventh Circuits.[50]

In addition to data estimating the number of prisoners now eligible for individualized sentencing, looking at how the average length of imprisonment for federal offenses has changed since the First Step Act was passed can illustrate its effects. While the average length for most drug-

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[42] *Id.* at 249; *see generally* Emily Muenster, *The First Step Act Took One Step Forward and Two Steps Back*, 60 HOUS. L. REV. 135 (Nov. 9, 2022); Michael T. Hamilton, *Opening the Safety Valve: A Second Look at Compassionate Release Under the First Step Act*, 90 FORDHAM L. REV. 1743 (2022).
[43] Pulsifer v. United States, 601 U.S. 124, 153, 160 n.1 (Gorsuch, J., dissenting).
[44] *See id* at 153.
[45] Hamilton, *supra* note 39, at 1753, 1778.
[46] *See* Sentencing Guidelines for United States Courts, 88 Fed. Reg. 7180, 7186 (Feb. 2, 2023) [https://perma.cc/E6QG-KYZH].
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*

related offenses has increased, the average length of imprisonment for all federal offenses has slightly decreased, including the average length for crack cocaine offenses.[51]

III. JUDICIAL INTERPRETATIONS OF THE SAFETY VALUE

A. LOWER COURT INTERPRETATIONS

Nearly five years after the First Step Act was signed into law, the Supreme Court was tasked with interpreting the meaning of the new safety valve provision in *Pulsifer v. United States*. This case is the third time the Supreme Court has had to interpret a provision of the First Step Act.[52] Before *Pulsifer*, lower courts were divided on the meaning of the revised safety valve as outlined in § 402 of the First Step Act. In *United States v. Garcon*, the Eleventh Circuit held that the safety valve criteria were to be read conjunctively, and thus a defendant should only be disqualified from relief if they met all the disqualifying factors.[53] The Fourth and Ninth Circuits also took the Eleventh Circuit's approach.[54] In contrast, the Fifth, Sixth, Seventh, and Eighth Circuits adopted a disjunctive approach to interpreting the criteria, finding that a defendant should be disqualified from relief if they meet any one of the factors.[55] Inconsistency in the lower courts led the Supreme Court to agree to hear *Pulsifer,* and they granted certiorari in October 2023.[56]

B. *PULSIFER V. UNITED STATES* MAJORITY

In a 6-3 decision, the Supreme Court agreed with the narrower approach and determined that the "and" in § 402 of the First Step Act made the safety valve criteria a disjunctive list, limiting the scope of the safety valve, and thereby denying many inmates the possibility of individualized sentencing.[57] Justice Kagan authored the majority opinion and was joined by Justices Roberts, Thomas, Alito, Kavanaugh, and Barrett. The facts of the case were simple—the petitioner, Mark Pulsifer, pleaded guilty to distribution of methamphetamine and asked for a sentence lower than the

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[51] U.S. SENT'G COMM'N, GUIDELINES MANUAL (U.S. SENT'G COMM'N 2023) [https://perma.cc/AGN6-ZU33].
[52] Stephanie Wylie, *Supreme Court Considers the First Step Act's Lenient Sentencing Provision*, BRENNAN CTR. FOR JUST. (Oct. 24, 2023), https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-considers-first-step-acts-lenient-sentencing-provision [https://perma.cc/A9UB-ETRM].
[53] 54 F.4th 1274, 1285 (11th Cir. 2022) (holding that the sentencing court must find that a defendant satisfied each of 18 U.S.C.S. § 3553(f)(1) through (5) before it may depart from a statutory minimum).
[54] United States v. Jones, 60 F.4th 230, 239 (4th Cir. 2023); United States v. Lopez, 998 F.3d 431, 443-44 (9th Cir. 2021).
[55] United States v. Palomares, 52 F.4th 640, 647 (5th Cir. 2022); United States v. Haynes, 55 F.4th 1075, 1079 (6th Cir. 2022); United States v. Pace, 48 F.4th 741, 755–56 (7th Cir. 2022); 39 F. 4th 1018, 1023 (8th Cir. 2022).
[56] Pulsifer v. United States, 601 U.S. 124, 132.
[57] *Id.* at 153.

mandatory minimum, relying on the safety valve provision.[58] Pulsifer failed to satisfy the criteria for individualized sentencing under subsections (A) and (B). He did not satisfy subsection (A) because he had more than four criminal history points and did not satisfy subsection (B) because he also had a prior three-point offense. Pulsifer argued that because he did not additionally have a 2-point violent offense, as listed in subsection (C), he was eligible for individualized sentencing.[59] The Government disagreed and deemed Pulsifer ineligible.[60]

The majority's reasoning for holding that a defendant must individually satisfy each of the three conditions of the "safety valve" provision of 18 U.S.C. § 3553(f)(1) to be eligible for sentencing relief was based on the text and context of the paragraph. Kagan acknowledged that both readings were grammatically permissible, but ultimately determined that Pulsifer's reading was legally incorrect because it would make subsection (A) superfluous, since a subsection (B) 3-point offense and a subsection (C) 2-point offense would always equal a total of more than 4 points.[61] The majority also pointed out potential unfairness in adopting Pulsifer's reading; if a defendant must meet all three categories to be ineligible, relief could be granted to someone with multiple 4-point offenses, but not someone with one 4-point offense, one 3-point offense, and one 2-point offense.[62]

C. *PULSIFER V. UNITED STATES* DISSENT

Justices Ketanji Brown-Jackson and Sandra Sotomayor joined Conservative Neil Gorsuch in his dissent. Throughout the dissent, Gorsuch focused on the context of mass incarceration and said that for thousands of people, the majority opinion means that the First Step Act offers no hope.[63] He started his dissent by addressing the issue of mass incarceration in the United States, writing, "through the 1980s and 1990s, Congress adopted an ever-increasing number of ever-longer mandatory minimum prison sentences," and that due in part to these policies, the federal prison population grew by more than 100% in less than a decade.[64] He stated that in lower courts the Government has admitted that the provision is "most natural[ly]" read to mean that "a defendant may be eligible for individualized sentencing unless he possesses all three listed traits—A, B, *and* C."[65] He also emphasized the weight of this decision and the power that the Justices held in their hands, saying that "adopting the government's preferred interpretation guarantees that thousands more people in the

[58] *Id.* at 130.
[59] *Id.* at 124.
[60] *Id.*
[61] *Id.* at 141.
[62] *Id.* at 125-26.
[63] *Pulsifer*, 601 U.S. at 156 (Gorsuch, J., dissenting).
[64] *Id.* at 155.
[65] *Id.*

federal criminal justice system will be denied a chance—just a chance—at an individualized sentence."[66] Gorsuch emphasizes the seriousness of the Court's decision using data from the Sentencing Commission to predict the practical effects of adopting Pulsifer's understanding versus adopting the Government's understanding of the law. According to a Sentencing Commission analysis based on 2021 data, about 33% of drug offenders were eligible for safety-valve relief under the law's old terms (citation omitted). Under Mr. Pulsifer's understanding of the First Step Act, about 66% would become eligible for individualized sentencing. By contrast, under the government's reading of the Act, that number would shrink to around 44%.[67]

Lastly, Gorsuch argued that it is the Supreme Court's job to interpret the law as an ordinary reader would, unless some feature of the law suggests the terms have a specialized meaning. He wrote that we must pay attention to the fact that Congress chose to use "and" instead of "or", in this Act, especially since Congress has used "or" in other places.[68] Instead, he argued, the Government's reading requires the reader to deconstruct and rearrange the provision. The dissent argued that if Congress intended it to be a conjunctive list, it should have deleted the "does not have" before the colon and inserted it in each subsection. Below is a reconstruction of the safety valve provision according to the Government's perspective:

(1) The defendant ~~does not have~~:
- (A) **Does not have** more than four criminal history points, excluding any criminal history points resulting from a m1-point offense, as determined under the sentencing guidelines;
- (B) **Does not have** a prior 3-point offense, as determined under the sentencing guidelines; and
- (C) **Does not have** a prior 2-point violent offense, as determined under the sentencing guidelines.

Gorsuch argues that making the reader perform "gymnastics" to understand the true meaning of the text is "not how statutory interpretation usually works."[69] Ultimately, he writes that the majority chose not to "hedge its doubts in favor of liberty," instead ignoring the "most natural construction" in favor of an interpretation that requires the reader to reconstruct the sentences.[70]

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[66] *Id.* at 156.
[67] *Id.* at 160-61.
[68] *Id.*
[69] *Pulsifer*, 601 U.S. at 164 (Gorsuch, J., dissenting).
[70] *Id.* at 165.

D. EFFECTS OF THE *PULSIFER V. UNITED STATES* DECISION

Since *Pulsifer v. United States* was only recently decided on March 15, 2024, the exact effects of the decision are not yet known. However, some scholars and political scientists have attempted to predict how the *Pulsifer* decision will affect the U.S. prison population. As noted in Gorsuch's dissent, under the old law, about 33% of drug offenders were eligible for safety-valve relief, while under the Government's reading of the new law, 44% would be eligible, and under Pulsifer's reading of the new law 66% would be eligible.[71] The Court's decision in Pulsifer has made significantly fewer defendants eligible by determining that "and" means "or" in the context of this provision.[72] It is important to remember that the First Step Act does not automatically give defendants shorter sentences, it only gave judges more flexibility when sentencing.[73] In deciding to adopt a narrower reading of the safety valve provision, the Supreme Court missed an opportunity to alleviate some of the pressure in an already overcrowded and mismanaged prison system and denied some defendants a chance to receive shorter sentences.

IV. THE SUPREME COURT'S ROLE IN MASS INCARCERATION

A. JUDICIAL POLICYMAKING BY THE SUPREME COURT

In our three-branch system of government, the Supreme Court is the final arbiter of the law and is charged with interpreting legislation. Traditionally, the Supreme Court has been considered a nonpartisan branch of federal government; however, a recent survey from the Associated Press-NORC Center for Public Affairs Research found that 70% of Americans think that the Supreme Court Justices are more likely to be influenced by ideology than to be fair and impartial.[74] Scholars who are proponents of the judicial policymaking theory believe that Justices can—and do—use their power to influence politics. *Pulsifer v. United States* is not the first time the conservative-leaning Court has used its power to block attempts to end mass incarceration.

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[71] *Id*. at 160-61.
[72] Mark H. Allenbaugh & Alan Ellis, *Does Pulsifer Pulverize Sentencing Reform?* REUTERS (Mar. 26, 2024). https://www.reuters.com/legal/legalindustry/does-pulsifer-pulverize-sentencing-reform-2024-03-26/ [https://perma.cc/8425-9F9F].
[73] Wylie, *supra* note 49.
[74] Joshua Zeitz, *The Supreme Court Has Never Been Apolitical*, POLITICO (Apr. 3, 2022), https://www.politico.com/news/magazine/2022/04/03/the-supreme-court-has-never-been-apolitical-00022482; Thomas Beaumont & Linley Sanders, *7 In 10 Americans Think Supreme Court Justices Put Ideology Over Impartiality: AP-NORC Poll*, AP NEWS (Jun. 26, 2024), https://apnews.com/article/supreme-court-trump-presidential-immunity-abortion-gun-2918d3af5e37e44bbad9c3526506c66d [https://perma.cc/9HUP-9MQD].

B. STOP-AND-FRISK

Before the 1960s, the U.S. Supreme Court played a limited role in criminal justice reform because states had significant control when it came to their own sentencing policies. However, starting in the 1960s, there start to be early signs of the federal government adopting the tough-on-crime ideology. For example, in *Terry v. Ohio* (1968), the U.S. Supreme Court held that police officers can perform stop and frisks, meaning they can conduct limited searches without a warrant or probable cause as long as they have a reasonable suspicion of criminal activity.[75] This ruling significantly expanded police powers and disproportionately affected Black and Latino communities in large cities. The expansion of the "stop-and-frisk" doctrine has been tied to increased arrests and has contributed to mass incarceration.[76] Several studies also show that police target Black and Latino people for stop-and-frisks because of their personal biases.[77] For example, one study out of Boston showed that Black people were targeted for stop-and-frisks more than white people, even after controlling for gang membership and criminal history.[78]

C. THE CRIMINAL PROCEDURE REVOLUTION

As one of the nation's most influential institutions, the Supreme Court has undoubtedly contributed to the nearly 500% increase in the nation's prisons and jails in the past 40 years.[79] Professor Emeritus at the University of Colorado Law School Bill Pizzi argues that the influence the Supreme Court has had on mass incarceration has been overlooked.[80] He points to the Supreme Court's "criminal procedure revolution" as the impetus of its influence and says that mid-twentieth century cases like *Anders v. California* and *Baldwin v. New York* play a big role in the story of how incarceration rates began to quintuple in the late 1970s.[81] The *Anders v. California* decision has contributed to mass incarceration by establishing a procedure for appointed counsel to withdraw from representing an indigent client on appeal if the lawyer believed the appeal lacked merit. *Anders v. California* only requires that an attorney file "a brief referring to

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[75] Terry v. Ohio, 392 U.S. 1 (1968).

[76] Fred O. Smith Jr., *Policing Mass Incarceration*, 135 HARV. L. REV. 7.

[77] P. Butler, *Stop And Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57 (2014); RL Jones. *Stop-and-Frisk: Its Effect on African American Communities-A Tale of Three Cities*, 45 U. DAYTON L. REV. (2020); Decio Coviello & Nicola Persico, *An Economic Analysis of Black-White Disparities in the New York Police Department's Stop-And-Frisk Program*, 44 J. LEGAL STUD., 315, 315-360 (2015).

[78] Anthony Vito et al., *Police Stop and Frisk and the Impact of Race: A Focal Concerns Theory Approach*. 10 SOC. SCI. 230, 232 (2021).

[79] *Growth in Mass Incarceration*, THE SENTENCING PROJECT, https://www.sentencingproject.org/research/ [https://perma.cc/J86L-LYFJ] (last visited Apr. 4, 2024).

[80] *See* WILLIAM T. PIZZI, THE SUPREME COURT'S ROLE IN MASS INCARCERATION 9 (Routledge 1st ed. 2020).

[81] *Id*. at 43, 53.

anything in the record that might arguably support the appeal."[82] *Baldwin v. New York* is another mid-twentieth century case part of the Supreme Court's "criminal procedure revolution," which has likely contributed to the explosion of the prison population beginning in the 1970s since it held that jury trials are not required for offenses with sentences under six months, which allows courts to process misdemeanor cases more quickly and try more cases.[83]

D. The War on Drugs & Increased Police Powers

Several key Supreme Court cases of the 1990s fueled mass incarceration. In *Florida v. Bostick*, the Supreme Court expanded police power to conduct random bus searches for drugs without probable cause.[84] *Florida v. Bostick* legitimized the practice of "bus sweeps," in which police get on buses to search passengers, was extended to other settings like public housing, which led to more arrests for minor infractions or drug possession offenses.[85] Racial profiling means that "bus sweeps" and the like disproportionately target Black and Latino folks, adding to racial disparities in the criminal justice system. Critics of the decision argue that letting police consensually search people without indicating that they could refuse the searches is a violation of Fourth Amendment Protections.[86] The dissent specified that the ruling left police conduct unchecked and warned of the dangers this posed to society.[87] The dissent focused on the fact that compliance with a "consensual" bus search is coerced due to a lack of alternatives and a power imbalance.[88] They argued that people are not "free to leave" on a crowded bus, meaning that a bus passenger has no realistic alternative to compliance because passengers are given the choice of either cooperating or of exiting their buses and possibly being stranded in unfamiliar locations."[89] The dissent goes even farther asserting that "It is exactly because this 'choice' is no 'choice' at all that police engage this technique."[90] Also, the dissent argued that a reasonable person would not refuse to comply when officers, who hold a position of power, block the exit, or ask to search luggage.[91] Additionally, the dissent noted that the ruling of *Bostick* would disproportionately impact low-income people who need public transportation.[92] Overall, *Florida v. Bostick* approved of police

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[82] Anders v. California, 386 U.S. 738, 746 (1967).
[83] *See* Baldwin v. New York, 399 U.S. 66 (1970).
[84] Florida v. Bostick, 501 U.S. 429, 437 (1991) (authorizing "bus sweeps" by holding that "the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.").
[85] *Id.*
[86] Matthew I. Farmer, *Go Greyhound and Leave the Fourth Amendment to Us: Florida v. Bostick*, 23 LOY. U. L J., 533, 554 (1992).
[87] Florida v. Bostick, 501 U.S. 429, 440 (1991) (Marshall, J., dissenting).
[88] *Id.*
[89] *Id. at* 449.
[90] *Id*. at 450.
[91] *Id*. at 448
[92] *Id.* at 450.

doing more intrusive searches, which led to the escalation of mass incarceration especially among Black and Brown populations, under an "illusion of consent."[93]

A second Supreme Court case of the 1990s that contributed to mass incarceration was *Whren v. United States* (1996), which permitted pretextual traffic stops and led to more arrests for drug-related offenses.[94] While *Bostick* focuses on "bus sweeps" and *Whren* focused on traffic stops, both expanded police discretion, allowing for the personal prejudices of police officers to determine who will be subjected to searches.[95] According to *Whren*, a traffic stop is lawful if the police officer had an objective reason, like if they observed a traffic violation, even if the officer's true motive was catching someone for a drug-related charge.[96] Aside from increased arrests, *Whren* also allows for de facto racial profiling because it lets officers selectively choose who to stop for minor infractions, permitting them to hide their subjective intent behind who they choose to stop as long as they can cite an objective reason for pulling someone over.[97]

E. THE RISE OF PLEA BARGAINING

Rachel Barkow, the Charles Seligson Professor of Law at NYU School of Law and director of the Zimroth Center on the Administration of Criminal Law, calls the Supreme Court "one of the architects of mass incarceration."[98] Barkow says that the Supreme Court's actions are inconsistent with the Framer's intention to prevent the state from "abus[ing] its coercive criminal powers" and "state overreach in criminal matters."[99] She argues that the Supreme Court has contributed to mass incarceration in two ways: by "opening floodgates for admissions and in permitting lengthy sentences."[100] In terms of increased admissions, the Court officially recognized the rise of plea bargaining and praised it in *Santobello v. New York* (1971). The increased use of plea bargaining has led to a quicker judicial process, allowing for more case proceedings, which has in turn led to more imprisonment.[101] On the other hand, plea bargaining could help

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[93] *Id.*
[94] Whren v. United States, 517 U.S. 806, 813 (1996).
[95] William R. O'Shields, *The Exodus of Minorities' Fourth Amendment Rights into Oblivion: Florida v. Bostick and the Merits of Adopting a Per Se Rule against Random, Suspicionless Bus Searches in the Minority Community*, 77 IOWA L. REV. 1875 (July 1992).
[96] *See* Terry v. Ohio, 392 U.S. 1 (1968).
[97] Clark Neily, *Race, Traffic Stops, and Whren vs. United States*, CATO UNBOUND (Apr. 10, 2019), https://www.cato-unbound.org/issues/april-2019/cars-police-american-freedom/ [https://perma.cc/3MVX-RLC4].
[98] Rachel E. Barkow, *Supreme Injustice: How the Court Has Enabled Mass Incarceration*, CATO POL'Y REP., Nov.-Dec. 2021, at 13, 13 https://www.cato.org/policy-report/november/december-2021/supreme-injustice-how-court-has-enabled-mass-incarceration [https://perma.cc/NU87-WFWP].
[99] *Id.* at 14.
[100] *Id.* at 15.
[101] *See* Premal Dharia & Chris Kemmitt, Opinion, *Plea Bargaining and Mass Incarceration Go Hand in Hand. We Need To End Both.,* USA Today, (Nov. 3, 2022)

reduce average sentence length if prosecutors would exercise their discretion, considering the context of the crime and the overcrowded jails.[102] However, most research indicates that increased use of plea bargaining has contributed to prison growth and overcrowding.[103]

F. MANDATORY SENTENCES

Second, Barkow states that the Supreme Court has supported lengthy prison sentences. Three of the current Supreme Court Justices believe no sentence can be disproportionate, but the majority holds the view that the Constitution prohibits excessively long sentences.[104] Overall, Barkow argues that the Supreme Court fails to do its job of "checking" the state and prohibiting it from giving out excessively long sentences. In *Rummel v. Estelle*, the Supreme Court allowed a defendant to be given a mandatory life sentence for committing three low-level theft offenses that were all nonviolent and totaled less than $230.[105] Similarly, in *Harmelin v. Michigan,* a mandatory life sentence without parole was imposed on a defendant with no prior record, who had just been convicted of his first ever offense for possessing over 650 grams of cocaine.[106] In *Ewing v. California*, the Court approved a 25-years-to-life sentence under California's three-strike laws for someone who stole three golf clubs because prior offenses included other burglaries.[107] These three cases illustrate instances in which the Supreme Court failed to enforce the Eight Amendment, which protects "cruel and unusual punishments," instead setting a precedent that has mandated judges to impose excessively long sentences and contributing to the rising levels of incarcerated individuals in the United States.

G. RE-INCARCERATION: THE REVOLVING DOOR

Another, more indirect, way that the Supreme Court has contributed to mass incarceration is the cycle of re-incarceration. Due to high rates of recidivism, the United States criminal justice system is commonly referred to as a "revolving door."[108] The "revolving door" works in several different ways. According to economist Richard B. Freeman, a lack of proper

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https://www.usatoday.com/story/opinion/policing/2022/11/03/plea-bargaining-leads-mass-incarceration-little-oversight/9950184002/ [https://perma.cc/L7MV-MYF9]; Albert W. Alschuler, *Plea Bargaining and Mass Incarceration*, 76 N.Y.U. ANN. SURV. AM. L. 205 (2021).

[102] *See* Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L. J., Spring 2008, at 47 [https://perma.cc/KA2L-B3QN].

[103] *See* Douglas Savisky*, Is Plea Bargaining a Rational Choice? Plea Bargaining as an Engine for Racial Stratification and Overcrowding in the United States Prison System*, 24 RATIONALITY & SOC'Y 131, 133 (2012).

[104] *See* Barkow, *supra* note 95.

[105] *See id.*; Rummel v. Estelle, 445 U.S. 363 (1980).

[106]*See* Barkow *supra* note 95; Harmelin v. Michigan, 501 U.S. 957 (1991).

[107] *See* Barkow, *supra* note 95; Ewing v. California, 538 U.S. 11 (2003).

[108] John Eric Humphries et al., *Understanding the Revolving Door of Conviction, Incarceration, and Recidivism*, CATO INST. RSCH. BRIEFS ECON. POL'Y NO. 407 (Oct. 30, 2024) https://www.cato.org/research-briefs-economic-policy/understanding-revolving-door-conviction-incarceration-recidivism.

treatment for physical and mental health problems in prison, limited education, poor literacy, and the stigma carried forever by those with a criminal record make finding a job after prison especially hard.[109]

1. Upholding Post-Conviction Consequences

The U.S. Supreme Court has generally upheld state laws that punish those with criminal records after they have served their sentence. The government continues to punish people after they have served their sentence in prison by banning them from working in the public sector, requiring them to disclose past convictions when applying, barring them from participating in public housing programs, denying them full voting rights, pushing them into deep debt from court-imposed fees and fines, and even taking away professional licenses. Given these factors, a criminal conviction in the United States is truly a never-ending sentence. A criminal conviction gives people a lifelong "sentence" as a second-class citizen with a restricted right to vote and ineligibility for employment, housing, education, and public benefits. It is common for employers to use criminal background checks to predict job performance, unfairly discriminating against formerly incarcerated individuals. One example is the story of Gerald Smith, who despite having a strong resume, could not be hired due to past convictions.[110] Criminal background checks disproportionality affect people of color.[111] Therefore, using background checks to screen out applicants without business necessity, could be considered a violation of Title VII of the Civil Rights Act, in accordance with the disparate impact theory of discrimination.[112]

Secondly, having a criminal record excludes someone from being eligible for public housing programs. Research suggests that formerly incarcerated people are almost 10 times more likely to be homeless.[113] The likelihood of homelessness goes up for formerly incarcerated women and

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[109] Richard Freeman, *Can We Close the Revolving Door?: Recidivism vs. Employment of Ex-Offenders in the U.S.?,* URBAN INSTITUTE (May 19, 2003) https://www.urban.org/sites/default/files/publication/59426/410857-Can-We-Close-the-Revolving-Door-.PDF [https://perma.cc/J36N-93HJ].

[110] Rachel Kleinman & Sandhya Kajeepeta, *Barred from Work: The Discriminatory Impacts of Criminal Background Checks in Employment*, THURGOOD MARSHALL INST., Feb. 15, 2024, https://tminstituteldf.org/criminal-background-checks-employment/ [https://perma.cc/XWW6-4QBH].

[111] *Id.*

[112] *See* Jonathan J. Smith, *Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV., 197, 199 (2014) (discussing how racial disparities in criminal background checks used by employers may show that collateral consequences such as this one may violate Title VII of the Civil Rights Act of 1964's disparate impact provision which says an employer's facially neutral policy is invalid if it has a disproportionate impact on a protected group, and is not related to the job or necessary to the business).

[113] Lucius Coloute, *Nowhere To Go: Homelessness Among Formerly Incarcerated People*, PRISON POLICY INITIATIVE, Aug. 2018, https://www.prisonpolicy.org/reports/housing.html [https://perma.cc/M9BA-UM24].

people of color.[114] Several things are to blame, from employment barriers to blatant discrimination. Being homeless makes formerly incarcerated people more likely to be re-incarcerated because of the criminalization of homelessness.[115] This is one instance, perhaps, in which the revolving door is so obvious. People who are unable to find housing because of a criminal conviction are forced to sleep outside and risk going back to jail. The systemic exclusion from housing, education, and jobs, means people may make survival-based decisions, causing them to reoffend and risk going to jail once again. Though formerly incarcerated people across the United States have typically been disqualified from participating in public and affordable housing programs, in October 2024, California announced that the state would be using $16 million in federal funds to create long-term supportive housing for people leaving prison.[116] In February 2025, the California Department of Housing and Community Development (HCD) and the Department of Corrections and Rehabilitation (CDCR), distributed the $16 million to various organizations so they can develop and operate transitional housing and permanent affordable housing for people reentering society at risk of homelessness.[117] Since this program is still in its early stages, there is limited publicly available information its impact on homelessness and recidivism rates among formerly incarcerated individuals. However, a draft of California's 2026-2027 Annual Action Plan emphasizes continued coordination between HCD and CDCR to assist formerly incarcerated individuals.[118] Formerly incarcerated people already face stigma, shame, and ostracization. Adding more barriers on top of that makes reintegration into society more difficult and increases the likelihood of recidivism.

2. Giving States Discretion to Impose Fines & Fees

Although the Supreme Court held that it is unconstitutional to imprison someone solely because they are unable to pay a fine in *Bearden v. Georgia* (1983), it has allowed states broad discretion to enforce fines and fees on prisoners.[119] Hefty prison fines can cause people to leave prison with a large amount of debt. If they are unable to pay off their debt

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[114] *Id.*
[115] *Id.*
[116] CAL. DEP'T HOUS. AND CMTY. DEV., *California Launches New Program To Improve Public Safety By Reducing Homelessness And Recidivism* (Oct. 31, 2024) https://www.hcd.ca.gov/about-hcd/newsroom/reentry-housing-pilot-project-nofa [https://perma.cc/2E4C-Z47X].
[117] California Department of Housing and community Development, *Annual Action Plan: One Year Use of Funds, Fiscal Year 2026-2027,* at 108 (draft Feb. 10, 2026), https://www.hcd.ca.gov/sites/default/files/docs/policy-and-research/plan-report/2026-27-aap-draft.pdf
[118] *Id.* at 12.
[119] Bearden v. Georgia, 461 U.S. 660, 672 (1983) (holding that it is unconstitutional to automatically revoke probation and imprison a person solely because they cannot afford to pay a fine or restitution, without first determining whether the nonpayment was willful and whether alternative measures are adequate to meet the state's interests in punishment and deterrence).

it can lead to probation violations and ultimately keep people trapped in a poverty-to-prison pipeline.[120] Some prisons even have "pay-to-stay" charges, requiring prisoners to pay for what it costs to keep them housed in the prison.[121] While there is no Supreme Court case that explicitly establishes or authorizes "pay-to-stay" programs, it has indirectly enabled these policies by declining to intervene when lower-courts uphold them.[122] Supporters of "pay-to-stay" laws like that it shifts the financial burden of mass incarceration from taxpayers onto incarcerated individuals. However, this approach amplifies the harms of the American criminal justice system much more than it alleviates the financial burden of taxes funding mass incarceration. "Pay-to-stay" policies are counter-productive. These policies leave people deep in debt when they rejoin society deep, which increases the chances of recidivism and the possibility of falling into the poverty-to-prison pipeline.[123] Corporations that own private prisons, like GEO Group and CoreCivic, are invested in mass incarceration.[124] Prison owners hope America remains highly punitive and contributes to the cause by "predatorily siphoning funds from the poor and creating perverse incentives for for-profit prisons to promote further incarceration."[125] "Pay-to-stay" policies disproportionately effect Black and Brown communities by extracting financial resources from these vulnerable populations and giving them to private prison owners, which in turn leads to higher levels of incarceration in those communities.[126] Legal scholar Brittany L. Deitch argues that in addition to the ways "pay-to-stay" policies contribute to recidivism and racial inequity, requiring prisoners to reimburse the state for their imprisonment costs instead of funding prisoners through taxpayer dollars "undermin[es] the democratic component of the criminal system" and neglects the public's role in

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[120] *See* Gina Feliz, *The Lasting Criminalization of Poverty: Court Fees, Fines, and Implicit Sentence Enhancements*, 18 COLUM. UNDERGRADUATE L. REV. 163, (2021) [https://perma.cc/DR56-E8FG].
[121] Lauren-Brooke Eisen, *America's Dystopian Incarceration System of Pay to Stay Behind Bars*, BRENNEN CENTER FOR JUSTICE, (April 19, 2023) https://www.brennancenter.org/our-work/analysis-opinion/americas-dystopian-incarceration-system-pay-stay-behind-bars.
[122] *See, e.g.,* Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410, 423 (3d Cir. 2000) (upholding a $10.00 per day housing fee as rationally related to a legitimate state interest since it was meant to teach inmates fiscal responsibility and reimburse the state for prison costs); Slade v. Hampton Roads Reg'l Jail, 303 F. Supp. 2d 779 (4th Cir. 2005) (upholding a jail's policy of charging pretrial detainees $1.00 per day to help cover housing costs does not violate the detainee's due process rights).
[123] *See id.*
[124] *See* Demarquin Johnson, *Why the Congressional Black Caucus Must Reject Private Prison Money*, 35 HARV. B.L. LAW J. 65 (2019); Austin Nielsen-Reagan, *The Profitability of Inhumanity*, 1 SYSTEMIC JUST. J. (CRITICAL CORP. THEORY COLLECTION) 1 (2021) https://systemicjustice.org/article/the-profitability-of-inhumanity/ [https://perma.cc/N57X-CS3C].
[125] Brittany L. Deitch, *Pay-to-Stay Laws and Private Prisons*, 28 U. PA. J.L. & SOC. CHANGE 1, 15 (2025).
[126] *Id.* at 5; Glenn H. Reynolds & Penny J. White, *The New Due Process: Fairness in a Fee-Driven State*, 88 TENN. L. REV. 1011 (2021).

punishment.[127] Overall, the motives behind private prison owners requiring that prisoners pay for their stay in prisons are questionable at best. This undermines the legitimacy of the American criminal justice system and makes it harder to end the persistent problem of mass incarceration in the United States.

B. RECENT EXAMPLES OF THE SUPREME COURT'S CONTRIBUTIONS TO MASS INCARCERATION

Although the Supreme Court has long played a role in mass incarceration the results of the recent election promise additional challenges for ending mass incarceration.[128] In November 2024, Republicans won 218 US House seats.[129] This Republican victory in Congress, in addition to the already conservative-leaning Supreme Court, has given President Trump much control. Though Donald Trump was the one to pass the First Step Act, several articles report that he regretted passing criminal justice reform and is unlikely to continue to do so in his second term.[130]

Many justices currently serving on the Supreme Court have signed majority opinions blocking attempts to end mass incarceration. In 2021, the Supreme Court ruled that a sentencing authority does not need to find a juvenile permanently incorrigible before imposing a life sentence without the possibility of parole in *Jones v. Mississippi*.[131] This decision means that judges can give life sentences without parole to minors even in the absence of findings regarding the defendant's potential for rehabilitation.[132] *Jones* parted from earlier rulings like *Miller v. Alabama* (2012), which held that the Eighth Amendment prohibited the mandatory sentences of life in prison without the possibility of parole for juvenile homicide offenders, and the decision is viewed as a setback by criminal justice reformers and those who feel judges should consider the unique circumstances of juvenile

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[127] Gabriela Kirk, April Fernandes & Brittany Friedman, *Who Pays for the Welfare State? Austerity Politics and the Origin of Pay-to-Stay Fees as Revenue Generation*, 63 SOCIO. PERSPS. 921, 921-938 (2020).

[128] *See Trump Promises to Militarize Police, Reincarcerate Thousands, and Expand Death Penalty*, ACLU, Jul. 19, 2024, https://www.aclu.org/news/criminal-law-reform/trump-promises-to-militarize-police-reincarcerate-thousands-and-expand-death-penalty [https://perma.cc/4UGG-DVET].

[129] *See* Barkow, *supra* note 95.

[130] *See* Meredith McGraw, *Trump's Criminal Justice Reform Bill Becomes Persona Non Grata Among GOPers*, POLITICO, May 1, 2022, https://www.politico.com/news/2022/05/01/trump-republicans-first-step-act-00029104 (on file with the Southern California Review of Law and Social Justice); Jonathan Swan, *Scoop: Trump Regrets Kushner Advice on Prison Reform*, AXIOS, Jul. 1, 2020, https://www.axios.com/2020/07/01/trump-kushner-second-thoughts (on file with the Southern California Review of Law and Social Justice); David Weigel, *Donald Trump Used To Brag About The First Step Act. Not Anymore*, SEMAFOR, Jul. 20, 2023 https://www.semafor.com/article/06/20/2023/donald-trump-used-to-brag-about-the-first-step-act-not-any-more [https://perma.cc/6YHV-RS5T].

[131] *See Jones v. Mississippi*, 135 HARV. L. REV. 381 (2021).

[132] *See id.*

offenders.[133] Critics of the *Jones* decision say it creates potential for racial bias in determining which children should be given a second chance and "reflects a fundamental disregard for the ways in which our criminal justice system is broken and a callous indifference to the individuals who suffer at the hands of that system."[134] A year earlier, in *Shular v. United States*, the Supreme Court ruled that employing a mandatory minimum sentence under the Armed Career Criminal Act does not require "a generic-offense matching exercise" between the elements of the offenses listed in the federal statute and the elements of the defendant's prior state drug offenses.[135] Both *Jones v. Mississippi* and *Shular v. United States* are examples of Supreme Court cases decided in the past five years that have contributed to mass incarceration.

V. PROPOSAL FOR GAINING BIPARTISAN SUPPORT BY SHIFTING THE NARRATIVE

Many believe that with the incoming judicial, legislative, and executive branch all leaning conservative, passing laws that effectively promote more lenient sentencing will be difficult. Additionally, social conservatism in the United States is the highest it has been in about a decade.[136] Despite this rightward trend, individualized sentencing may find support from pro-individual freedom and anti-government overreach conservatives. The Democratic party has typically been the party in favor of shorter sentences and banning mandatory minimum sentences.[137] Although the Republican party is known as the party of "law and order," it has recently started supporting some reforms.[138] Lastly, highlighting the cost of keeping people in prison might lead conservatives to support individualized sentencing efforts. Framing incarceration reduction reforms as necessary to restore human dignity, prevent government overreach, and reduce government spending can help build a broad coalition across party lines.

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[133] Cara H. Drinan, *Jones v. Mississippi and the Court's Quiet Burial of the Miller Trilogy*, 19 OHIO ST. J. CRIM. L. 181 (2021).
[134] Drinan, *supra* note 129; *see* Mimi Koenig, *Disparate Racial Sentencing In Lieu Of Jones V. Mississippi*, HARV. UNDERGRADUATE L. REV., Fall 2021, https://hulr.org/fall-2021/disparate-racial-sentencing-in-lieu-of-jones-v-mississippi [https://perma.cc/P9YV-GQAH].
[135] Shular v. United States, 589 U.S. 154, 160 (2020).
[136] Jeffrey M. Jones*, Social Conservatives in the U.S. Highest in About a Decade,* GALLUP, Jun. 8, 2023 https://news.gallup.com/poll/506765/social-conservatism-highest-decade.aspx [https://perma.cc/W2GA-EW96].
[137] *See* Meghan J. Ryan, *Framing Individualized Sentencing for Politics and the Constitution.* 58 AM. CRIM. L. REV. 1747, 1751 (2020).
[138] *Id. See also* Patrick Mair, Thomas Rusch & Kurt Hornik, *The Grand Old Party – A Party Of Values?* SPRINGERPLUS, Dec. 2014 https://link.springer.com/article/10.1186/2193-1801-3-697 [https://perma.cc/PM82-WAFZ].

A. MORAL ARGUMENTS

1. Individual Freedom and Government Overreach

The conservative party has historically promoted individual freedom and a limited government. In fact, freedom and limited government were counted as two of the most common ideals among conservatives in a study by Harvard statisticians Patrick Mair Thomas Rusch and Kurt Hornik.[139] These concepts can be leveraged to gain bipartisan support for criminal justice reform. Unnecessarily long prison sentences can be seen as examples of government overreach and infringements on individual freedom. However, this reasoning will be balanced against public safety concerns. Studies show that conservatives are more punitive, and much of this has to do with the belief that harsh punishment is needed to ensure the public will be kept safe from crime.[140] However, since studies show that long sentences do not effectively deter people from committing crimes, resources spent to keep people in prison may be better spent elsewhere.[141]

2. Human Dignity and the Christian Faith

The relationship between religious beliefs and punitiveness is complex, as studies have revealed that Christian fundamentalists, for example, engage in religious beliefs that both increase and decrease punitiveness.[142] On one hand, the idea of protecting human dignity in sentencing may appeal to Christian conservatives and lead them to support more lenient policies, including individualized sentencing. The concept of protecting human dignity in sentencing can be traced back to *Trop v. Dulles*, a 1958 case in which the Supreme Court held that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[143] Legal Scholar Meghan J. Ryan finds examples of the importance of dignity in the Bible's description of man and Pope Francis' 2020 letter "Fratelli Tutti," which calls on Christians to "work for the improvement of prison conditions, out of respect for the human dignity of persons deprived of their freedom."[144] She suggests that framing individualized sentencing as a way to ensure the protection of dignity in sentencing could "bolster the appeal of mandating individualized sentencing."[145] Given that around 85% of conservatives identify as Christian, the power of aligning individualized sentencing with values that can be tied to Christianity, like dignity, should not be overlooked.[146] Though some may believe that Christian

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[139] *See* Mair, Rusch & Hornik, *supra* note 132.
[140] *See* Jason R. Silver, Eric Silver, & Margaret Bull Kovera, *Why Are Conservatives More Punitive Than Liberals? A Moral Foundations Approach*. 41 L. & HUM. BEHAV. 258 (2017).
[141] *See* Darley, *supra* note 19.
[142] *See* James D. Unnever & Francis T. Cullen, *Christian Fundamentalism and Support for Capital Punishment*, 43 J. RSCH. CRIME & DELINQ. 169 (2006).
[143] Trop v. Dulles, 356 U.S. 86, 100 (1958).
[144] Ryan, *supra* note 131, at 1767 (citing Pope Francis, "Fratelli Tutti" Encyclical Letter of the Holy Father on Fraternity and Social Friendship, *The Holy See* (Oct. 3, 2020) [https://perma.cc/EL69-XJG7]).
[145] Ryan, *supra* note 131, at 1747.
[146] *2023-24 U.S. Religious Landscape Study Interactive Database – Conservatives*, PEW

fundamentalists, who typically view God as more punitive than members of other denominations, may be more likely to support capital punishment, James D. Unnever and Francis T. Cullen found that Christian fundamentalists were not more likely to support capital punishment.[147] Additionally, studies found that people who attend church more frequently are typically less punitive.[148]

On the other hand, some scholars believe that people with Christian fundamentalist beliefs are typically more punitive.[149] Marc Morjé Howard points out that the timing of the rise of the evangelical movement in American politics directly aligns with the explosion of mass incarceration, and believes "there is an unmistakable connection between evangelicals and harsh views on criminal punishment."[150] One of the most important facets of religious belief as it relates to punitiveness is the image of God. Several studies show that people who view God as angry or harsh are more likely to support harsher punishment, whereas people who see God as forgiving and gracious are less punitive.[151] Additionally, there is research supporting the conclusion that Christian fundamentalists often "view crime as an outcome of weak or sinful character rather than of unfortunate or unjust situations," and thus support harsher punishment for criminals.[152] Another study analyzed the correlation between religion and punitiveness by comparing levels of Christianity to levels of incarceration in Pennsylvania counties, finding that more heavily Christian counties had higher incarceration rates.[153] Although many assume that Christians are more punitive, more recent studies suggest that the relationship between religion and punitiveness is more nuanced than that, and that Christian fundamentalist beliefs can justify both support and opposition for harsh punishments like the death penalty, for example.[154]

RESEARCH CENTER (2025) https://www.pewresearch.org/religious-landscape-study/database/political-ideology/conservative [https://perma.cc/3R36-UVW5].

147 Unnever & Cullen, *supra* note 136, at 190.

148 *See* Christopher D. Bader et al., *Divine Justice: The Relationship Between Images of God and Attitudes Toward Criminal Punishment,* 35 CRIM. JUST. REV. 90 (2010); Steven F. Messner, Eric P. Baumer & Richard Rosenfeld, *Distrust Of Government, The Vigilante Tradition, and Support For Capital Punishment,* 40 LAW & SOC'Y REV. 559 (2006); Lynne D. Roberts & David Indermaur, *Predicting Punitive Attitudes in Australia*, 14 PSYCHIATRY PSYCH. & L. 56 (2007); Kevin H. Wozniak & Andrew R. Lewis, *Reexamining the Effect of Christian Denominational Affiliation on Death Penalty Support*, 38 J. CRIM. JUST. 1082 (2010).

149 *See* Harold G. Grasmick & Anne L. McGill, *Religion, Attribution Style, and Punitiveness Toward Juvenile Offenders*, 32 CRIMINOLOGY 23 (1994).

150 MARC MORJÉ HOWARD, UNUSUALLY CRUEL: PRISONS, PUNISHMENT, AND THE REAL AMERICAN EXCEPTIONALISM 162 (2017).

151 *See*, *e.g.*, Bader et al., *supra* note 142; Wozniak & Lewis *supra* note 142, Unnever & Cullen, *supra* note 136.

152 Grasmick & McGill, *supra* note 143.

153 Jeffery T. Ulmer, Christopher Bader & Martha Gault, *Do Moral Communities Play a Role in Criminal Sentencing? Evidence from Pennsylvania*, 49 SOCIO. Q. 737 (2008).

154 *See* Unnever & Cullen, *supra* note 136.

B. ECONOMIC ARGUMENTS

Given that another common goal of conservatives is low taxes,[155] perhaps presenting mass incarceration as a major source of government spending would get conservatives to support criminal justice reform. In her article "Framing Individualized Sentencing for Politics and the Constitution," Ryan suggests that the recent bipartisan criminal justice reform effort coincided with the last recession saying, "the economic crisis brought to light the significant resources that were being spent on incarcerating millions of people in the United States, which continues to have an incarceration rate higher than any other country in the world."[156] During Biden's presidency, Congressional Republicans said they would insist on large cuts to federal spending,[157] and keeping over 150,000 inmates in federal prison certainly costs a lot of money.[158] Perhaps the recent bipartisan efforts are correlated with the "intensification of budget pressures stemming from the Great Recession"[159] in combination with the fact that the federal government spends an exorbitant amount of money to keep so many people in prison. According to the Bureau of Justice Statistics, around $80 billion is spent on corrections every year; however, the true cost of mass incarceration is far greater.[160] This number does not account for social costs for the families and communities of incarcerated individuals.[161] A Florida State University study estimates that every $1 in corrections costs generates an additional $10 in social costs, meaning that the burden of mass incarceration is closer to $500 billion per year.[162] Since conservatives often talk about wanting tax cuts, approaching mass incarceration from an economic angle might bring their attention to this issue, and by highlighting the economic inefficiencies of the current carceral system—like the unnecessary cost of long-term incarceration, fees, and other practices that lead to recidivism—criminal justice reformers can appeal to fiscal conservatives.

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[155] *See* Mair, Rusch & Hornik, *supra* note 149.
[156] Ryan, *supra* note 131, at 1747.
[157] David Leonhardt, *A Republican Spending Problem*, N.Y. TIMES (Mar. 27, 2023) https://www.nytimes.com/2023/03/27/briefing/gop-republican-spending-cuts.html [https://perma.cc/L5ZJ-H2CN].
[158] *Population Statistics*, FED. BUREAU OF PRISONS https://www.bop.gov/about/statistics/population_statistics.jsp [https://perma.cc/6VVB-MKZW] (last visited April 5, 2025).
[159] Katherine Beckett, *The Politics, Promise, and Peril of Criminal Justice Reform in the Context of Mass Incarceration*, 1 ANN. REV. CRIMINOLOGY 235, 239 (2018). *See* Ryan *supra* note 7.
[160] *See* Beatrix Lockwood & Nicole Lewis, *The Hidden Cost of Incarceration*, THE MARSHALL PROJECT (Dec. 17, 2019) https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration [https://perma.cc/EH6S-MHCY].
[161] *See* McLaughlin et al., *supra* note 23.
[162] *Id.*

VI. EXAMPLES OF SUCCESSFUL INCARCERATION REDUCTION MEASURES ACROSS THE WORLD

As shown by Senator Durbin in his Senate Address, many thought of the passage of the First Step Act as "the most significant change to our system of criminal justice in decades"—at least on the federal level.[163] It was certainly a remarkable attempt to reverse the trends of mass incarceration through federal legislation. However, there are several other models on the state-level throughout the United States, and abroad, showing methods to reduce incarceration levels.

A. STATE-LEVEL REFORMS: NEW YORK

Many states have successfully implemented criminal justice reforms aimed at reducing incarceration on their own. One example is New York, which started to dismantle the Rockefeller Drug Laws, introducing alternatives to incarceration for certain offenses and granting judges greater discretion in sentencing. In 2009, New York reduced minimum sentences for some drug offenses and completely got rid of mandatory sentences for others.[164] New York reforms also provided opportunities for offenders to go to treatment programs instead of prisons.

Researchers from the John Jay College of Criminal Justice and Rutgers University worked with the Vera Institute of Justice to study the effects of these reforms.[165] The study found that the reforms brought a 35% increase in the number of drug offenders eligible for treatment programs instead of prison.[166] Not only did these reform reduce the number of people sent to prison, but it will likely reduce the number of people who will reoffend.[167] Providing alternatives to prison in the form of rehabilitative treatment programs cuts racial disparities in half and is associated with

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[163] Press Release, Office of Sen. Dick Durbin, *Durbin Celebrates Sixth Anniversary of the First Step Act on Senate Floor* (Dec. 17, 2024), https://www.durbin.senate.gov/newsroom/press-releases/durbin-celebrates-sixth-anniversary-of-the-first-step-act-on-senate-floor [https://perma.cc/96FD-2E9Z].

[164] OLIVER ROEDER, LAUREN-BROOKE EISEN & JULIA BOWLING, WHAT CAUSED THE CRIME DECLINE? 36 (Brennan Ctr. For Just. ed., 2015) https://www.brennancenter.org/sites/default/files/analysis/Crime_rate_report_web.pdf [https://perma.cc/W7SD-QUH7].

[165] JIM PARSONS ET AL., END OF AN ERA? THE IMPACT OF DRUG LAW REFORM IN NEW YORK CITY (2015) [https://perma.cc/F52T-C5Z5].

[166] *Id.* at 8.

[167] *See* Ojmarrh Mitchell, David B. Wilson & Doris L. MacKenzie, *Does Incarceration-Based Drug Treatment Reduce Recidivism? A Meta-Analytic Synthesis of the Research,* 3 J. EXPERIMENTAL CRIMINOLOGY 353 (2007); Ojmarrh Mitchell et al., *The Effectiveness of Prison for Reducing Drug Offender Recidivism: A Regression Discontinuity Analysis,* 13 J. EXPERIMENTAL CRIMINOLOGY 1 (2017); Vera Tomaz, Diana Moreira & Olga Souza Cruz, *Criminal reactions to drug-using offenders: A systematic review of the effect of treatment and/or punishment on reduction of drug use and/or criminal recidivism*, Front. Psychiatry, Feb. 15, 2023 [https://perma.cc/NPC6-W4BK].

lower rates of recidivism.[168] Therefore, New York's strategy led to more drug offenders receiving the treatment they need to rehabilitate, likely reducing recidivism rates, and helping make the criminal justice system a little more equitable.

B. STATE-LEVEL REFORMS: CALIFORNIA

California has also recently adopted a few propositions centered on prison reform. An example of this is Proposition 47, passed in 2014, which retroactively reclassified six felony theft and drug possession offenses as misdemeanors.[169] The reclassification of these offenses led to a decreased prison population and allowed California to use its budget to invest in community programs, education, and treatment for those suffering from substance abuse. In addition to Proposition 47, California passed Proposition 57 in 2016, which created a pathway for nonviolent offenders in state prisons to be eligible for early parole. Since these propositions were passed and implemented around a decade ago, recidivism rates in California have dropped significantly.[170] A report by the California Department of Corrections and Rehabilitation show that recidivism rates are significantly lower and an analysis by the Public Policy Institute of California agreed, as "the felony reconviction rate dropped markedly from 30 percent to 22 percent" and may be linked to Proposition 47.[171] The most recent report published by the California Department of Corrections and Rehabilitation in April 2025 tracked inmates who were released in 2019 and 2020 and found the lowest recidivism rate in over a decade.[172] California's steps towards criminal justice reform have proven successful and serve as a great example for others.

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[168] *CDCR Recidivism Report Finds Recidivism Rates Drop*, CAL. DEP'T CORR. & REHAB., Feb. 13, 2024, https://www.cdcr.ca.gov/news/2024/02/13/cdcr-recidivism-report-finds-recidivism-rates-drop-2/ [https://perma.cc/3CR6-H7A].

[169] CALIFORNIA CRIMINAL JUSTICE REFORM REPORT (Nat'l Inst. for Crim. Just. Reform ed., 2021) [https://perma.cc/PP9Y-3S6W].

[170] *See* Magnus Lofstrom, Brandon Martin & Steven Raphael, *Effect of Sentencing Reform on Racial and Ethnic Disparities in Involvement with the Criminal Justice System: The Case of California's Proposition 47,* 19 CRIMINOLOGY & PUB. POL'Y 1165 (2020); Jennifer Crodelle et al., *Impacts of California Proposition 47 on Crime in Santa Monica, California*, PLOS ONE, May 19, 2021 [https://perma.cc/QJF9-FW8X]; MIA BIRD ET AL., HOW HAS PROPOSITION 47 AFFECTED CALIFORNIA'S JAIL POPULATION*?* (Pub. Pol'y Inst. Cal. ed., 2016) [https://perma.cc/AV6T-KEUM].

[171] MIA BIRD, JUSTIN GROSS & VIET NGUYEN, RECIDIVISM OF FELONY OFFENDERS IN CALIFORNIA 3 (Pub. Pol'y Inst. Cal. ed., 2019) https://www.ppic.org/publication/recidivism-of-felony-offenders-in-california/ [https://perma.cc/94V8-N3QR]. *See* CDCR, *Recidivism Report Finds Recidivism Rates Drop*, *supra* note 162.

[172] CAL. DEP'T CORR. & REHAB. OFF. RSCH., STATEWIDE RECIDIVISM REPORT FOR INDIVIDUALS RELEASED FROM THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION IN FISCAL YEAR 2019-2020 (2025) https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2025/04/Statewide-Recidivism-Report-for-Individuals-Released-in-Fiscal-Year-2019-20.pdf [https://perma.cc/4B6F-EDWQ].

C. INTERNATIONAL APPROACHES: NORWAY

Beyond the United States, there are a few notable examples of successful incarceration reduction measures. One example is Norway, which is known for having the goal of prioritizing human dignity, rehabilitation, and normalization in its prisons.[173] Norwegian judges also have a high degree of discretion in sentencing, like the goal of the First Step Act's safety valve provision.[174] As a result of Norway's more humane carceral philosophy, the country boasts some of the lowest incarceration and recidivism rates in the entire world.[175] However, similar to criticisms of the First Step Act in the United States, there have been criticisms of Norway's judicial discretion for exacerbating inequity. For example, a Norwegian study found that "amongst defendants convicted for driving under the influence with a BAC above 1.2, higher income defendants were more likely to receive a probationary sentence than lower income defendants."[176] Therefore, the dangers that arise with the inconsistent application of judicial discretion persist, which can mean inequitable outcomes for people of color or other groups that a judge may be prejudiced against.

D. INTERNATIONAL APPROACHES: GERMANY

Germany is another country that has been steadily working to reduce the number of people in its prisons. Like the United States, Germany's punitive system historically relied on mass imprisonment and custodial sentences.[177] However, overcrowding in prisons led the country to reexamine its criminal justice system.[178] Starting in the late 1960s, German policymakers started to create laws with the purpose of decreasing incarceration levels.[179] These laws included measures that decriminalized petty offenses and eliminated short prison sentences altogether, in favor of fines, probation, and other forms of criminal punishment.[180] These changes helped Germany control its incarceration rates. Today, Germany imposes significantly more non-custodial sentences than it used to, and reserves prison sentences for only the most serious crimes.[181]

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173 *See* Meagan Denny, *Norway's Prison System: Investigating Recidivism and Reintegration*, 10 BRIDGES: J. STUDENT RSCH. 21 (2016); Jill van de Rijt, Esther van Ginneken & Miranda Boone, *Lost In Translation: The Principle of Normalization in Prison Policy in Norway and the Netherlands*, 25, PUNISHMENT & SOC'Y 766 (2022).
174 Synøve N. Andersen et al., Exploring the unintended consequences of implementing electronic monitoring on sentencing in Norway, 21 Nordic J. Criminology 129 (2020).
175 Denny, *supra* note 167.
176 JUSTIN-CASIMIR BRAUN ET AL., HOW WE INVESTIGATED SENTENCING BIAS IN NORWAY'S CRIMINAL JUSTICE SYSTEM, (Lighthouse Reps. ed., 2025) https://www.lighthousereports.com/methodology/norway-criminal-justice/ [https://perma.cc/3TST-S2DK].
177 Douglas B. Weiss & Doris L. MacKenzie, *A Global Perspective on Incarceration: How an International Focus Can Help the United States Reconsider Its Incarceration Rates*, 5 VICTIMS & OFFENDERS 268 (2010).
178 *Id.*
179 *Id.*
180 *Id.*
181 *Id.*

E. INTERNATIONAL APPROACHES: FINLAND

Another example of a country that has successfully reduced incarceration levels is Finland. Today, the Nordic countries are known for their unique approach to prisons and low incarceration levels, but in the early 1950s, Finland stood out amongst Nordic countries with its relatively high incarceration rate.[182] In fact, "Finland's incarceration rate in 1950 was three to four times greater than that of other Nordic nations."[183] That was when Finland decided to take action and began to implement a series of legislative reforms to reduce these numbers.

One of the major reasons that Finland was able to successfully decarcerate is that there was an ideological shift in the government regarding the criminal justice system. New laws moved away from punitive measures and towards more humane alternatives. Like Germany, Finland lowered minimum penalties for some offenses, decriminalized certain crimes, and introduced noncustodial punishments like community service.[184] As a result, Finland was able to able to reduce its high incarceration levels. One thing about Finland's model that is especially promising is that even after instituting more "lenient" policies on crime and punishment, Finland's crime rates did not drastically differ from neighboring countries, which "suggests that it is possible for a nation to reduce its incarceration rate without placing public safety at an elevated risk."[185]

VII. CONCLUSION

Mass incarceration did not happen overnight, and it will not be fixed overnight with a single piece of legislation. The First Step Act of 2018 was initially celebrated for its potential to stop the excessive use of incarceration by expanding the safety valve and offering individualized sentencing for low-level offenders. However, the Supreme Court's decision in *Pulsifer v. United States* has significantly hindered this potential by adopting a narrow interpretation of the Act. It also serves as an example of how the Court has consistently reinforced the status quo of mass incarceration.

The legislative history of the First Step Act is a testament to bipartisan effort. It was borne out of mounting economic and social pressures and the recognition that the current state of the American carceral system was unsustainable. Despite the promise of the Act, its full potential was undermined by judicial interpretations, like the one in *Pulsifer*, which

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[182] *Id.*
[183] *Id.*
[184] *See id.;* TAPIO LAPPI-SEPPÄLÄ, *FINLAND: A MODEL OF TOLERANCE, IN COMPARATIVE YOUTH JUSTICE* 177-195 (John Muncie & Barry Goldson eds., 2006); Tapio Lappi-Seppälä, *Imprisonment and Penal Policy in Finland*, 54 SCANDINAVIAN STUD. L. 333 (2009).
[185] Weiss & MacKenzie, *supra* note 171.

prioritized a conservative reading of its language, stifling a critical "first step" toward broader reform.

Some states have adopted initiatives to reduce prison populations. California and New York have shown that it is possible to achieve meaningful reductions in incarceration through policies that promote alternatives and divert funding to community-based programs. Internationally, Norway, Finland, and Germany provide successful models of decarceration. These examples show that alternative approaches to punishment when paired with a commitment to rehabilitation and an emphasis on human dignity, lead to successful decarceration.

Ultimately, addressing mass incarceration in the United States will require us to learn lessons from legislative history, acknowledge the Supreme Court's influential role, look to successful state-level reforms international best practices. Some worry about the future of criminal justice reform now that the United States federal government leans conservative, but by shifting the narrative to be one that focuses on individual freedom, human dignity, and the economic costs, we can build a broad, bipartisan coalition in favor of reform. Real progress will require collaboration across partisan lines and a commitment to finding alternatives that work for us. This will be a challenge, but is possible, as shown by the "first step" we took together in 2018.

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