WORKPLACE DIGNITY

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ABSTRACT

There is a fundamental lack of respect for workers and work. The evisceration of the dignity of work has infected all industries. Anecdotally, workers have been forced to urinate in bottles. Employees have been killed while working through a tornado. A well-known employer allegedly subjected women to jokes of "sex, defecation, masturbation, rape, and torture." Empirically, studies demonstrate the persistence of gender harassment in employment, the mistreatment of workers with long COVID, and a wide range of child labor and safety violations. No group is immune from the abuse that has been devastating to minority workers and vulnerable populations.

This Article provides a framework to help restore workplace dignity. It proposes the adoption of the "immutable workplace norms" doctrine. Through corporate action, criminalization of employer misconduct, and judicial intervention, this doctrine provides a path to address workplace abuse. The proposal offered here, situated within the existing academic scholarship, will help to restore the much-needed dignity of work.

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INTRODUCTION

> *[O]ur workers with hand and brain deserve more than respect for their labor. They deserve practical protection in the opportunity to use their labor at a return adequate to support them at a decent and constantly rising standard of living, and to accumulate a margin of security against the inevitable vicissitudes of life.*
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> —President Franklin D. Roosevelt[1]

There is an existing lack of respect for workers that has eroded the basic dignity of work. This evisceration of employment dignity has manifested itself in workplaces across geography and industry. While there has been an increase in more localized unionization efforts and well-publicized strikes, current labor organization rates remain at historically low levels.[2]

These erosions are demonstrable both empirically and anecdotally, and they impact employees in all aspects of their jobs. For example, recent studies show pervasive harassment at work.[3] The COVID-19 pandemic has resulted in further widespread misconduct,[4] and long COVID has created additional problems, as congressional inquiries have already begun on the willful ignorance of employers in failing to accommodate this very real illness.[5]

Anecdotal reports are voluminous and overwhelming in their egregiousness. At both Amazon and UPS, drivers describe urinating in bottles as a result of inadequate restroom facilities.[6] In the fast-food industry, workers report being asked to treat burn injuries with

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1. *Fireside Chat 8: On Farmers and Laborers*, MILLER CTR., at 22:11-22:37 (Sept. 6, 1936), https://millercenter.org/the-presidency/presidential-speeches/september-6-1936-fireside-chat-8-farmers-and-laborers [https://perma.cc/VK3K-BRNQ].

2. *See* Joseph A. Seiner, *Workplace Power*, 65 B.C. L. REV. 55, 94 (2024) [hereinafter Seiner, *Workplace Power*].

3. *See infra* Part II.A (outlining current research on sexual harassment in the workplace).

4. *See infra* Part II.B (describing employer abuses during and after the pandemic as well as the congressional response to such abuses).

5. *See infra* Part II.B.

6. *See infra* Part II.D.2 (describing research on workplace abuse in the transportation sector).

condiments, and ten-year-old children have been observed working until two in the morning.[7] The low-end retail industry has experienced widespread abuse as well, with employees clocking in eighty-hour-a-week shifts while being denied overtime pay and working around snakes in stockrooms.[8]

The technology sector has also experienced problems. In perhaps the most high-profile incident, a class action claim detailed the "bro culture" of Riot Games, Inc.[9] The reported behavior alleged that women were subjected to "crude male humor" including jokes related to "sex, defecation, masturbation, rape, and torture."[10] The alleged behavior reached all levels of the company, resulting in a nine-figure settlement.[11] In the same industry, a case alleging widespread gender and pay discrimination, as well as unfair business practices, was settled with Google, Inc. for $118 million.[12] And in a race discrimination claim brought against the same company, Black employees were allegedly told that they were not "googly" enough to advance at the company.[13]

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7. *See infra* Section II.D.1 (describing workplace violations in the food service sector).

8. Jack Newsham & Peter Coutu, *The Human Cost of Family Dollar's Low Prices: Its Workers Describe 80-Hour Weeks, Sleeping in Chairs, and Snakes in the Stockroom*, BUS. INSIDER INDIA (Jan. 24, 2022, 11:04 AM), https://www.businessinsider.in/policy/news/the-human-cost-of-family-dollars-low-prices-its-workers-describe-80-hour-weeks-sleeping-in-chairs-and-snakes-in-the-stockroom/articleshow/89099233.cms [https://perma.cc/GT3F-22U9]. Viral TikTok videos revealed some of the unsafe conduct. Dave Jamieson, *Senator Hammers Dollar General, Dollar Tree Over 'Shameful Labor Practices,'* HUFFPOST (Apr. 22, 2022, 4:34 PM), https://www.huffpost.com/entry/senator-hammers-dollar-general-dollar-tree-over-working-conditions_n_626301a0e4b0197ae3f5a14e [https://perma.cc/S3N6-4EWN].

9. Complaint for Damages at 4, McCracken v. Riot Games, Inc., No. 18STCV03957, 2023 WL 11053298 (Cal. Super. June 15, 2023).

10. *Id.* at 5. Women at Riot Games were also objectified and rated based on their perceived "hotness" by male workers over email, were sent unsolicited photography of male genitalia from other co-workers and supervisors, and observed the "[p]unching, grabbing, and touching" of genitalia. *Id.* at 5-7.

11. *See infra* note 149 and accompanying text (describing worker abuse in the technology sector).

12. Alexandra Garrett, *Google to Pay $118 Million to Settle Gender Discrimination Lawsuit*, CNET (June 13, 2022, 8:28 AM), https://www.cnet.com/news/google-to-pay-118-million-to-settle-gender-discrimination-lawsuit/ [https://perma.cc/3BA2-D96J]; *Google Employees Champion Equal Pay, Challenge Gender-Based Discrimination on Behalf of 17,000 Class Members*, IMPACT FUND, https://www.impactfund.org/social-justice-blog/ellis-v-google [https://perma.cc/6J7X-7B3X].

13. Delia Goncalves, *'Time to Hold Google Accountable': Former Diversity Recruiter Sues Tech Giant Over Systemic Race Discrimination*, WUSA9 (Apr. 28, 2022, 7:24 PM), https://www.wusa9.com/article/news/local/former-diversity-recruiter-sues-tech-giant-over-systemic-

Wage theft also remains a common problem, despite federal law that has been in place for close to a century preventing this conduct. This corporate theft includes hundreds of millions of dollars stolen from employees, according to the Department of Labor.[14] And, researchers have found the alleged improper payment of wages "across every industry—from Staples to JP Morgan, to Facebook, to Walmart, to Verizon, to Avis, to Lowes," finding that these companies "engag[ed] in this activity even up through the present day, with full knowledge of potential litigation."[15]

Child labor also remains a pervasive problem that can no longer be ignored. A recent *New York Times* analysis revealed the extent of the issue.[16] The problem has "exploded since 2021" in the face of "economic desperation that was worsened by the pandemic."[17] The report found that "[i]n town after town, children scrub dishes late at night. They run milking machines in Vermont and deliver meals in New York City. They harvest coffee and build lava rock walls around vacation homes in Hawaii. Girls as young as 13 wash hotel sheets in Virginia."[18]

Taken together, this evidence suggests the need for immediate change. At the root of this problem are two distinct but interwoven factors. First, the United States operates under the doctrine of employment-at-will, where employers may terminate workers without cause.[19] Second, this country has gone from a workforce that

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race-discrimination/65-99b8868e-1219-41d2-b316-9c9c778ec548 [https://perma.cc/PP6Z-YF8Y].

14. *See infra* Part II.D.2 (outlining Department of Labor findings and the impact of corporate theft on workers).

15. Lauren Cohen, Umit Gurun & N. Bugra Ozel, *Too Many Managers: The Strategic Use of Titles to Avoid Overtime Payments* 17 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30826, 2023), https://www.nber.org/system/files/working_papers/w30826/w30826.pdf [https://perma.cc/AUX9-F6Z4].

16. *See* Hannah Dreier, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, N.Y. TIMES (Feb. 28, 2023), https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html [https://perma.cc/5M9J-L3T2].

17. *Id.*

18. *Id.*

19. *See* Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 65 (2000) ("The United States, unlike almost every other industrialized country and many developing countries, has neither adopted through the common law or by statute a general protection against unfair dismissal or discharge without just cause, nor even any period of notice."); *see, e.g.*, Joseph A. Seiner, *Sensible Just Cause*, 103 B.U. L. REV. 1295, 1300-11 (2023) [hereinafter Seiner, *Sensible Just Cause*] (describing

was highly unionized in the 1950s to a society that is only 10 percent unionized as of 2023.[20] Without the ability to bargain collectively, and with the possibility of being terminated for no reason under employment-at-will, most employees are left quite vulnerable, and employers have often abused this vulnerability.[21] This is not the first time we have seen the need for widespread workplace reform,[22] and as detailed in this Article, the need for federal protection for workers has arisen several times.[23]

This Article provides one avenue to resolving the identified problems through the proposed doctrine of *immutable workplace norms*. This doctrine seeks to correct the problem of worker abuse through three different but interrelated mechanisms: corporate intervention, enhanced criminalization of worker abuse, and judicial oversight to intervene in correcting the problem.

First, corporate intervention is critical to this proposal.[24] Education, training, and reporting, combined with a swift and effective corporate response where problems are identified, are the best ways to resolve the problem and to endorse existing immutable workplace norms.

Second, corporate intervention must be combined with the criminalization of certain abusive conduct to effectively address this

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employment-at-will and resulting consequences); Seiner, *Workplace Power*, *supra* note 2, at 60-62 (describing employment-at-will and its associated shortcomings).

20. *See* Jack Stieber & Mark D. Baines, *The Michigan Experience with Employment-at-Will*, 67 NEB. L. REV. 140, 140 (1988) ("The United States stands alone among industrialized nations in its insistent espousal of the employment-at-will doctrine for employees not protected by statutes or collective bargaining agreements."); News Release, Bureau of Lab. Stats., U.S. Dep't of Lab., Union Members—2023 (Jan. 19, 2023), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/N3SP-3QVC] ("The union membership rate—the percent of wage and salary workers who were members of unions—was 10.0 percent in 2023, little changed from the previous year, the U.S. Bureau of Labor Statistics reported today.").

21. *See* Seiner, *Workplace Power*, *supra* note 2, at 77.

22. *See, e.g.*, 29 U.S.C. §§ 212, 216. *See generally* Elizabeth Wilkins, *Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act*, 34 BERKELEY J. EMP. & LAB. L. 109, 113-15 (2013) ("The Fair Labor Standards Act, passed in 1938 to set minimum wages and maximum hours for the country's workers, was the product of numerous complimentary policy goals.").

23. *See* Leonard S. Rubinowitz & Ismail Alsheik, *A Missing Piece: Fair Housing and the 1964 Civil Rights Act*, 48 HOW. L.J. 841, 844 (2005) (addressing the enactment of the Civil Rights Act of 1964, which included a prohibition on employment discrimination).

24. *See infra* Part III.A.1 (describing the proposal of immutable workplace norms and the role of corporate intervention).

problem.[25] In the past, we have largely (though not exclusively) relied upon civil law to address the discriminatory and improper treatment of workers.[26] Employment discrimination protections and family leave provisions carry with them civil law consequences for failure to comply.[27] The result of a failure to abide by these laws is thus typically monetary in nature.[28] While these monetary damages can be quite consequential, they are often limited and difficult for most workers to access.[29] A reasonable approach to criminalizing abusive workplace conduct would define the basic dignity of work, making it unlawful for employers to intrude upon these protections.

Third, through proper judicial intervention, the courts can play an equally important role in identifying and remedying workplace abuses where they occur. As detailed in the proposal, by more strictly requiring good faith on the part of companies during the initial employment contract, broadening the scope of existing public policy exceptions, and strictly enforcing wrongful discharge claims, the courts could rebalance the disparities that we see in the workplace.

The proposed doctrine of immutable workplace norms seeks, through the involvement of businesses, legislatures, and the courts, to restore basic worker dignities that have eroded over time. I have previously written on the need for the federal legislature to intervene to correct employer abuses,[30] and I have suggested different ways that the power disparity between workers and corporations can be rebalanced.[31] This Article takes the next step to identifying how widespread worker mistreatment and employer misconduct can be effectively addressed and workplace dignity effectively restored.

This Article proceeds in four parts. In Part I, this Article outlines the basic principles of workplace law in this country, explaining the

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25. *See infra* Part III.A.2 (outlining the importance of criminalizing certain employer conduct as part of this proposal).

26. *See* Seiner, *Workplace Power*, *supra* note 2, at 95-97.

27. *See infra* note 203 and accompanying text.

28. *See infra* note 182 and accompanying text.

29. *See infra* note 183 and accompanying text (outlining the difficulty of access to courts for many workers facing workplace abuse).

30. *See* Seiner, *Sensible Just Cause*, *supra* note 19, at 1308.

31. *See* Seiner, *Workplace Power*, *supra* note 2, at 58-59.

evolution of employment-at-will, as well as the intervening role of collective bargaining. In Part II, this Article explores the increasing levels of workplace abuse and harm that have been identified by researchers. This section examines both the empirical studies of misconduct as well as the more anecdotal reports of egregious abuse in the fast-food, retail, and technology sectors. Part III of this Article proposes reform in this area through the doctrine of immutable workplace norms. Part IV of this Article explores the implications of this new doctrine and explains how the doctrine fits within the existing academic literature. The final section of this Article offers some concluding thoughts with respect to workplace law and the reform needed in this area, and the need to restore basic workplace dignity.

I. PRINCIPLES OF U.S. EMPLOYMENT LAW

This section identifies how the historical foundations of employment law have led to increasing levels of improper treatment of workers. Most notably, it examines the basic principle of employment-at-will and how failed union efforts have negatively impacted workers in this country.

A. Employment-at-Will: Historical Foundations

Employment-at-will in the United States was developed over time.[32] Prior to the inception of this country, the basic principles of employment law were formed during the time of the Black Plague

32. *See, e.g.*, Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 118-19 (1976) ("American law originally adopted the rules of English law on duration of service contracts.... The duration of service relationships was a concern in early stages of English law." (first citing *Statute of Labourers*, 23 Edw. III, c.1 (1349); and then citing *Statute of Labourers*, 5 Eliz. I, c.4 (1562))); Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1424 n.102 (1967) ("The source of common law protection of the employment relationship appears to be the Ordinance and Statute of Labourers [in 1349 and 1350] which were enacted after the Black Death had reduced the labor force in England." (citing 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 459-60 (3d ed. 1923))). *See generally* Seiner, *Sensible Just Cause*, *supra* note 19, at 1300-03 (describing employment-at-will); Seiner, *Workplace Power*, *supra* note 2, at 60-62 (same); STEVEN L. WILLBORN, STEWART J. SCHWAB & GILLIAN L.L. LESTER, EMPLOYMENT LAW: CASES AND MATERIALS 75-79 (7th ed. 2022) (describing the evolution of employment law and its connection to medieval England).

which swept across England and most of Europe.[33] This plague wiped out a large portion of the workforce on the entire continent, and basic rules of supply and demand gave workers greater leverage at this time as a result of the worker shortage.[34] Employment laws were first established at the time to criminalize employee efforts at maximizing this leverage.[35] Laws were therefore established in an attempt to limit employee mobility.[36]

These basic laws evolved over the centuries. The principle of employment-at-will is most often associated with the writings of Horace Gay Wood.[37] How we define work was interpreted in the United States to coincide with the perceived ideals of individualism

33. *See* DAVID CABRELLI, EMPLOYMENT LAW: A VERY SHORT INTRODUCTION 1 (2022) (explaining that after leaving "millions dead in its wake, the 'Black Death' finally arrived in England ... la[ying] waste to half the population ... [resulting in] a chronic shortage of labour").

34. *See* Samuel Cohn, *After the Black Death: Labour Legislation and Attitudes Towards Labour in Late-Medieval Western Europe*, 60 ECON. HIST. REV. 457, 481-82 (2007) ("A great variety of post-plague labour and price laws suddenly shot across wide swathes of Europe, but they splintered in a multitude of directions .... In yet another sphere of human endeavour—that of law and attitudes toward labour—the Black Death stamped its mark."). *See generally* WILLBORN ET AL., *supra* note 32 (discussing the Black Plague and employment).

35. *See* Feinman, *supra* note 32, at 121 ("The Master and Servant Act of 1824 made breach of a service contract by an employee a criminal offense, while breach by an employer was still only a civil wrong."); Peter Karsten, *"Bottomed on Justice": A Reappraisal of Critical Legal Studies Scholarship Concerning Breaches of Labor Contracts by Quitting or Firing in Britain and the U.S., 1630-1880*, 34 AM. J. LEGAL HIST. 213, 218 (1990) ("Until 1875 about 2,000 agricultural laborers were still being convicted and imprisoned each year for leaving or threatening to leave their employers or for 'surly behavior' at work."). *See generally* WILLBORN ET AL., *supra* note 32 (addressing early employment laws).

36. *See* Karsten, *supra* note 35, at 219-20 ("In Scotland and the north-east of England, where mixed farming required attention for a longer season, the 'long hire,' with most of the salary held back until the end of the term, was deemed 'well suited' as a means of disciplining the sparser labor market.... [W]orkers who left voluntarily (that is, 'quit') before the completion date (or other condition) of the 'entire' contract were not allowed to recover any apportioning of the contract in the nature of a *quantum meruit* for the value of their rendered services." (footnote omitted)); Cohn, *supra* note 34, at 476 ("[N]ew English labour laws in 1360-1, 1388, and 1406 increased its regulations with stiffer penalties on rural labourers and curtailed their social and geographic mobility with harsher controls."). *See generally* Karsten, *supra* note 35, at 217-21.

37. Summers, *supra* note 19, at 67 ("In 1877, a treatise writer, Horace Wood, sought to distinguish the English decisions and resolve the contradictions in American law with a dogmatic declaration which is considered to be the source of the American employment at will rule."); Note, *Employer Opportunism and the Need for a Just Cause Standard*, 103 HARV. L. REV. 510, 510 n.1 (1989) ("With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof." (quoting H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877))).

and capitalism.[38] Pursuant to those principles, employers could maximize their own flexibility by terminating workers without cause where economic or other conditions demanded it.[39] Similarly, employees were free to leave their employment at any time (without a reason) to seek other employment opportunities.[40] Most workers in industrialized countries outside of the United States are given some protections from discharge where there is no cause or good reason established.[41] While there is debate over the issue, some see employment-at-will as resulting in lower unemployment rates in this country than in Western Europe.[42] The ability to terminate at will gives employers more flexibility and potentially a willingness

38. *See* Feinman, *supra* note 32, at 132-33 ("Employment at will is the ultimate guarantor of the capitalist's authority over the worker. The rule transformed long-term and semi-permanent relationships into non-binding agreements terminable at will.... Wood's rule was an integral part of the development of an advanced capitalist economy in America." (footnote omitted)). *See generally* Seiner, *Sensible Just Cause*, *supra* note 19, at 1300-03 (describing the role of capitalism in employment-at-will); Seiner, *Workplace Power*, *supra* note 2, at 60-64 (same); WILLBORN ET AL., *supra* note 32 (describing capitalism and employment-at-will).

39. *See* Seiner, *Workplace Power*, *supra* note 2, at 62-63.

40. *See, e.g.*, Note, *supra* note 37, at 510 ("In the past twenty years, the doctrine of 'employment-at-will' has undergone significant change. This doctrine rests on the freedom of contract principle that, absent an agreement otherwise, both employers and employees should be able to terminate the employment relationship at any time. Under the doctrine, an employer may therefore discharge workers for good cause, bad cause, or no cause at all, just as an employee may quit, strike, or otherwise cease work." (footnote omitted)).

41. *See* Summers, *supra* note 19, at 65 ("The United States, unlike almost every other industrialized country and many developing countries, has neither adopted through the common law or by statute a general protection against unfair dismissal or discharge without just cause, nor even any period of notice.... It is this assumption which gives American labor law much of its distinctive character."); Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343, 347 (2014) ("This 'at-will' default puts the United States in a singular position among most other developed countries, which usually require 'cause' for non-economic dismissals." (footnotes omitted)).

42. *See, e.g.*, Estreicher & Hirsch, *supra* note 41, at 348-49 ("The argument that frequently flows from th[e] exceptionalism characterization posits that the United States should reconsider a rule—the at-will default—that differs so substantially from the approach taken by most other countries. The counterargument suggests that the at-will rule permits greater labor-market flexibility." (footnote omitted)); *cf.* Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73, 96 (2007) ("A recent ... study observes that employee protection legislation has contributed to high unemployment levels in France. Under the Labor Code regulations that ensure that employment contracts are not terminable at will, firing an employee, even an unproductive employee, is extremely costly for the employer." (footnote omitted)). *See generally* Seiner, *Workplace Power*, *supra* note 2, at 62-66 (describing the shortcomings of and power imbalance caused by employment-at-will).

(and greater ability) to hire.[43] Additionally, some highly valued workers may be able to contract around employment-at-will by establishing specific contractual terms in writing.[44] Nonetheless, under this doctrine employees often have little individual power, and any employer is able to terminate them for no reason.[45] It can be quite difficult for workers to find recourse in this situation, even where they have been wrongfully discharged.[46] Individual damages are often small, and employees are commonly reluctant to bring suit against an employer for numerous reasons, including fear of reputational damage.[47]

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43. *See* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 982 (1984) ("The strength of the contract at will should not be judged by the occasional cases in which it is said to produce unfortunate results, but rather by the vast run of cases where it provides a sensible private response to the many and varied problems in labor contracting.").

44. *See* Summers, *supra* note 19, at 68-69 ("Wood's Rule, as stated, was only a rule of contract interpretation, a presumption to be applied in interpreting the employment contract. It was not to be applied if, 'from the language of the contract itself it is evident that the intent of the parties was that it should at all events continue for a certain period or until the happening of a contingency.'"). *See generally* WILLBORN ET AL., *supra* note 32 (discussing Horace G. Wood's writings and their employment law implications).

45. *See* Cynthia Estlund, *Wrongful Discharge Law in the Land of Employment-at-Will: A US Perspective on Unjust Dismissal*, 33 KING'S L.J. 298, 299 (2022) ("The US law of wrongful discharge, and what remains of EAW, leaves much to be desired, and legions of US labor law scholars, advocates, policymakers, and judges have criticised its inadequacy."); Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, at 3, 6 ("Rejecting this 'mutuality theory,' the court pointed to the rising number of large corporations that conduct increasingly specialized operations, leading their employees' skills to become more specialized in turn and, hence, less marketable. These changes made it apparent to the court that employer and employee are not on equal footing in terms of bargaining power.").

46. *See* Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1657 (1996) ("To the extent that wrongful discharge law provides an undependable escape from the oblivion of the at-will presumption, it provides inadequate security against employer retaliation and leaves in place powerful incentives for employee compliance and silence; we should therefore expect to see less of the voluntary employee speech and conduct that the antiretaliation laws purport to protect.").

47. *See id.*; David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523, 524 (2009) ("Despite the seeming abundance of potential legal protections for many American workers, effectuating one's employment-related rights can be a lengthy, expensive, and stressful undertaking."); Ehud Guttel, Alon Harel & Shay Lavie, *Torts for Nonvictims: The Case for Third-Party Litigation*, 2018 U. ILL. L. REV. 1049, 1052 (noting that some workplace victims may "refrain from taking their employers to court due to fears of retaliation by the latter or because going to court would harm the employee's reputation in the job market").

Over the decades, several exceptions have been built into the concept of employment-at-will. During the Great Depression, for example, child labor provisions restricted children under the age of sixteen from engaging in a number of different working relationships.[48] Further, the Fair Labor Standards Act (FLSA) also established the forty-hour workweek, which required time and a half overtime pay for any labor performed over forty hours for most workers.[49] And, federal minimum wage protections were established under this same federal law, which is currently set at $7.25 an hour.[50]

Additional protections were established during the Civil Rights Era of the 1960s. The employment discrimination provisions of Title VII of the Civil Rights Act of 1964 prohibit employment discrimination on the basis of race, color, sex, national origin, and religion.[51] The Age Discrimination in Employment Act prohibits employment discrimination against workers who are forty years of age or older.[52]

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48. *See Child Labor*, HISTORY (Aug. 24, 2022) [hereinafter *Child Labor*], https://www.history.com/topics/industrial-revolution/child-labor [https://perma.cc/PUG3-TM2R] ("The [FLSA] set a national minimum wage for the first time, a maximum number of hours for workers in interstate commerce—and placed limitations on child labor. In effect, the employment of children under sixteen years of age was prohibited in manufacturing and mining."); Michael Schuman, *History of Child Labor in the United States—Part 2: The Reform Movement*, MONTHLY LAB. REV., Jan. 2017, at 15 ("It was not until 1938 that Congress finally passed a child labor law [which] ... outlawed children under 16 from engaging in industrial homework."). *See generally* Seiner, *Sensible Just Cause*, *supra* note 19, at 1302-04 (describing exceptions to employment-at-will); Seiner, *Workplace Power*, *supra* note 2, at 61-62 (same); WILLBORN ET AL., *supra* note 32 (addressing employment law exceptions).

49. 29 U.S.C. § 207(a)(1); *see Overtime Pay*, U.S. DEP'T LAB., https://www.dol.gov/agencies/whd/overtime [https://perma.cc/K2GD-VTDS] ("The federal overtime provisions are contained in the Fair Labor Standards Act (FLSA). Unless exempt, employees covered by the Act must receive overtime pay for hours worked over 40 in a workweek at a rate not less than time and one-half their regular rates of pay.").

50. 29 U.S.C. § 206(a)(1)(C); *see* Schuman, *supra* note 48 ("FLSA ... established the first federal minimum wage ($0.25 per hour)."); *Minimum Wage*, U.S. DEP'T LAB., https://www.dol.gov/agencies/whd/minimum-wage [https://perma.cc/9W9K-DQPW] ("The federal minimum wage provisions are contained in the Fair Labor Standards Act (FLSA). The federal minimum wage is $7.25 per hour effective July 24, 2009.").

51. 42 U.S.C. § 2000e-2 (detailing prohibited labor employment practices). *See generally History of the EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/history [https://perma.cc/AT2V-UJY4] (outlining the history and prohibitions of Title VII); Seiner, *Sensible Just Cause*, *supra* note 19, at 1302, 1307 (describing Title VII and other exceptions to employment-at-will); Seiner, *Workplace Power*, *supra* note 2, at 74, 84 (same); WILLBORN ET AL., *supra* note 32 (addressing employment law exceptions).

52. 29 U.S.C. § 631(a); *see Age Discrimination*, U.S. DEP'T LAB., https://www.dol.gov/

The Americans with Disabilities Act prohibits employment discrimination on the basis of an individual's disability.[53] Other federal and local laws have supplemented these basic protections.[54] Despite these laws, this country still operates through the basic principle of employment-at-will. Companies and employers are free to terminate workers, even without cause. To have a viable claim of employment discrimination or abuse, workers must find an exception that has been carved into federal or state law, such as the FLSA or Title VII. The burden remains on the worker to identify the law, and the default rule is one of employment-at-will.[55]

Employment-at-will remains controversial. Much has been written on its shortcomings.[56] At the same time, and as discussed above, some see this doctrine as providing flexibility to workers and companies, which may help the broader economy.[57] There can be

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general/topic/discrimination/agedisc [https://perma.cc/L3MU-46AH] ("The [ADEA] protects certain applicants and employees 40 years of age and older from discrimination on the basis of age in hiring, promotion, discharge, compensation, or terms, conditions or privileges of employment ... [and] is enforced by the Equal Employment Opportunity Commission.").

53. 42 U.S.C. § 12112.

54. William R. Corbett, *"You're Fired!": The Common Law Should Respond with the Refashioned Tort of Abusive Discharge*, 41 BERKELEY J. EMP. & LAB. L. 63, 67 (2020) ("Among the exceptions, there are a multitude of federal, state, and local statutes or ordinances that prohibit terminations for certain reasons or under certain circumstances."). *See generally Summary of the Major Laws of the Department of Labor*, U.S. DEP'T LAB., https://www.dol.gov/general/aboutdol/majorlaws [https://perma.cc/7K9B-CWQP].

55. *See* Matthew T. Bodie, *The Best Way Out is Always Through: Changing the Employment at-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223, 223 ("Employment at-will is the default rule of termination for the vast majority of American employment relationships. The rule creates a presumption—a strong one—that the contract for employment allows either party to terminate the contract at any point in time."); *At-Will Employment—Overview*, NAT'L CONF. STATE LEGISLATURES (Apr. 15, 2008), https://www.ncsl.org/labor-and-employment/at-will-employment-overview [https://perma.cc/3B2Z-KDNX] ("Employment relationships are presumed to be 'at-will' in all U.S. states except Montana.").

56. *See, e.g.*, Bodie, *supra* note 55; Summers, *supra* note 19, at 65; Feinman, *supra* note 32, at 118-19; Estlund, *supra* note 46, at 1657; Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 8-10, 13-14 (2010); Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89, 94, 97-98, 113 (2008).

57. *See* Epstein, *supra* note 43, at 951 ("[T]here are two ways in which the contract at will should be respected: one deals with entitlements against regulation and the other with presumptions in the event of contractual silence."); *see also* Jesse Rudy, *What They Don't Know Won't Hurt Them: Defending Employment-at-Will in Light of Findings that Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307, 316 (2002); *cf.* Suk, *supra* note 42, at 73, 80-81, 90, 97, 99 (discussing the impact of just cause protections).

little doubt, however, that employment-at-will greatly limits the rights and protections offered to individual workers.

B. Union Efforts in the United States: The NLRA

Perhaps one of the most important exceptions to employment-at-will was carved into public policy and established during the Great Depression Era. The National Labor Relations Act (NLRA) protects workers and offers them the right to join in collective, concerted activity.[58] Thus, under federal law, employers cannot discriminate or take any adverse action against workers who try to organize collectively or because of their union membership.[59] The NLRA provided powerful protections for workers to act collectively. Individual suits, which are much more difficult to bring, do not provide employees with the same leverage when workers organize and act in a collective manner. In the wake of the NLRA, workers gained substantial protection during a period of great economic turmoil in the country.[60] Indeed, collective activity and unionization became so powerful that Congress acted in subsequent years to limit some of these protections through the enactment of the Labor Management Relations Act (LMRA).[61] Unionization likely saw its height during the 1950s when approximately 35 percent of the

58. National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169. *See generally* Seiner, *Sensible Just Cause*, *supra* note 19, at 1302-04 (describing the NLRA and other exceptions to employment-at-will); Seiner, *Workplace Power*, *supra* note 2, at 71 (same); WILLBORN ET AL., *supra* note 32 (addressing employment law exceptions).

59. 29 U.S.C. §§ 151-169.

60. *See* Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 388 (1984) ("[T]he NLRA affirmatively protects [workers'] right to strike, free of any disciplinary action, no matter how disorganized and foolish a work stoppage might appear to an outsider."); Darrell Parker & Debra Burke, *From Hot to Lukewarm: Union Strength and Worker Rights*, 44 W. ST. L. REV. 29, 31 (2016) ("The Wagner Act of 1935 and the Taft-Hartley Act of 1947 (together the National Labor Relations Act (NLRA)) gave American workers the basic right of association and self-organization, while prohibiting certain enumerated unfair labor practices by management." (footnote omitted)).

61. *See* Labor Management Relations Act, 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified at 29 U.S.C. §§ 141-144).

workforce in this country was unionized.[62] However, those numbers would change dramatically over the coming decades.

As the political environment grew increasingly conservative and hostile towards workers in the 1980s, union avoidance campaigns became more popular and collective activity dramatically decreased during this time, though still high by today's standards.[63] Indeed, approximately 20 percent of the U.S. workforce was organized during this decade.[64] This decreasing trend would continue to the present day, and hostility toward unions still persists.[65] Corporations regularly spend millions of dollars each year in an effort to prevent unions from entering the workspace.[66] The political

62. *See* Parker & Burke, *supra* note 60, at 29 ("As of 2014 the percentage of wage and salary workers who are union members constitutes 11.1 percent of the U.S. workforce. In contrast, one-third of the workforce was unionized in 1945, and membership peaked at 34.7% in the non-agricultural sector in 1954." (footnotes omitted)); Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1, 12, 104 ("In 1953, average union density (including public and private sector unions) among non-agricultural wage and salary workers was 33%" and "union density in the United States has declined without interruption since the early 1950s, while other countries have experienced increases in density, and ebbs and flows, since that time"); Seiner, *Workplace Power*, *supra* note 2, at 76-77, 94 (describing the NLRA and its impact on unionization rates over time).

63. *See* Dan Clawson & Mary Ann Clawson, *What Has Happened to the US Labor Movement? Union Decline and Renewal*, 25 ANN. REV. SOCIO. 95, 97 (1999) (noting the impact of "events of the late 1970s and early 1980s, when corporate forces assumed a far more confrontational stance, and unions found themselves under relentless attack"); Michael L. Wachter, *The Striking Success of the National Labor Relations Act*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 427, 452 (Cynthia Estlund & Michael L. Wachter eds., 2012) (providing data on union density over decades); Parker & Burke, *supra* note 60, at 30 ("The decline in union membership since the 1980s could be attributed to the shift from manufacturing to service, global expansion and industry consolidation, or to the change from a corporatist-regulated economy to one based on free competition." (footnote omitted)).

64. *See* Wachter, *supra* note 63; Abigail Johnson Hess, *Union Enrollment Has Declined for Decades, but Union Workers Still Earn 19% More*, CNBC (Feb. 5, 2021, 10:13 AM), https://www.cnbc.com/2021/02/05/union-enrollment-declined-for-decades-but-union-workers-still-earn-more.html [https://perma.cc/UG9A-C439] ("Bureau of Labor Statistics data indicates that in 1983, 20.1% of employed Americans were members of a union. By 2019, that share had decreased by roughly half to 10.3%. But in 2020, that share ticked up slightly to 10.8%.").

65. Hess, *supra* note 64. *See generally* Lawrence Mishel, Lynn Rhinehart & Lane Windham, *Explaining the Erosion of Private-Sector Unions: How Corporate Practices and Legal Changes Have Undercut the Ability of Workers to Organize and Bargain*, ECON. POL'Y INST. 9 fig.A (Nov. 18, 2020), epi.org/215908 [https://perma.cc/Q7TC-W88D] (showing that union membership reached as high as 34.7 percent in 1956).

66. *See* Celine McNicholas, Margaret Poydock, Samantha Sanders & Ben Zipperer, *Employers Spend More Than $400 Million Per Year on 'Union Avoidance' Consultants to*

landscape has also been particularly difficult for unions in the past several years, as legislation and court decisions have made it more difficult for unions to operate.[67] Combined, these union avoidance efforts have been highly successful, and current national unionization rates stand at about 10 percent.[68] This represents over a two-fold decrease in collective activity from the 1950s.[69] Indeed, these efforts have been so successful that some companies have found themselves struggling with identifying worker concerns in the absence of a union, resulting in creative and alternative approaches to unionization.[70]

Bolster Their Union Busting Efforts, ECON. POL'Y INST. 1 (Mar. 29, 2023), https://www.epi.org/publication/union-avoidance/ [https://perma.cc/5ZV3-LHSL] ("Employers spend a lot of money trying to derail union organizing campaigns. EPI estimates employers spend $433 million per year on union-avoidance consultants."); E. Tammy Kim, *Do Today's Unions Have a Fighting Chance Against Corporate America?*, N.Y. TIMES (Feb. 17, 2022), https://www.nytimes.com/2022/02/17/magazine/unions-amazon.html [https://perma.cc/B443-6V45] ("Companies are willing and able to pay for union-busting consultants and lobbyists pushing favorable changes to laws and regulations."). *See generally* Seiner, *Workplace Power*, *supra* note 2, at 77 (describing corporate anti-unionization efforts).

67. *See, e.g.*, Noam Scheiber, *Supreme Court Backs Employer in Suit Over Strike Losses*, N.Y. TIMES (June 1, 2023), https://www.nytimes.com/2023/06/01/business/economy/supreme-court-strikes-teamsters.html [https://perma.cc/YC8B-QF7C] ("The Supreme Court ruled ... that federal labor law did not protect a union from potential liability for damage that arose during a strike .... Some legal experts had said a union setback in the case would discourage workers from striking by making the union potentially liable for losses that an employer incurred during a work stoppage."); Lori Ann LaRocco, *New Senate Legislation Seeks to Revise National Labor Law, Targeting Port Union Workers*, CNBC (June 22, 2023, 9:52 AM), https://www.cnbc.com/2023/06/22/new-senate-bill-targets-national-labor-law-and-port-union-workers.html [https://perma.cc/22CK-UE83] ("Idaho Republican Senator Jim Risch is introducing legislation to revise the National Labor Relations Act and Labor Management Relations Act in ways that would limit the power of unions.").

68. *See* U.S. Bureau of Lab. Stats., *supra* note 20 ("The union membership rate—the percent of wage and salary workers who were members of unions—was 10.0 percent in 2023, little changed from the previous year, the U.S. Bureau of Labor Statistics reported today."); Hess, *supra* note 64 (providing Bureau of Labor Statistics data on labor involvement over decades).

69. *See* Hess, *supra* note 64; Wachter, *supra* note 63 (providing union density comparisons).

70. *See, e.g.*, Lydia DePillis, *The Strange Case of the Anti-Union Union at Volkswagen's Plant in Tennessee*, WASH. POST (Nov. 19, 2014, 11:27 AM), https://www.washingtonpost.com/news/storyline/wp/2014/11/19/the-strange-case-of-the-anti-union-union-at-volkswagens-plant-in-tennessee/ [https://perma.cc/2Z7U-6UGM] ("Volkswagen announced a Plan B—a novel policy outlining a tiered system of recognition for groups within the plant.... The meetings are not action-forcing; without a union contract, the company is not required to negotiate with the workers."); Noam Scheiber & Mike Isaac, *Uber Recognizes New York Drivers' Group, Short of a Union*, N.Y. TIMES (May 10, 2016), https://www.nytimes.com/2016/05/11/technology/uber-

Right-to-work laws have also created hurdles for unions. Even in traditional, heavily unionized states, such as Wisconsin, legislation has gained support on the state level.[71] Under right-to-work laws, individual workers can opt out of paying union dues, even where a union has been formally recognized in the workplace.[72] This creates additional difficulties and challenges for unions when trying to organize their workers and creates fewer dollars, resources, and leverage for these groups when sitting down at the bargaining table with corporations.[73]

This overall anti-union sentiment has played itself out in several different ways in the U.S. economy. While this Article cannot capture all of the ramifications of this trend, one result is unmistakable. When acting individually, rather than collectively, employees are at a severe power disadvantage.[74] With very limited exceptions,

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agrees-to-union-deal-in-new-york.html [https://perma.cc/J6VT-UMCV] ("Uber announced an agreement on Tuesday with a prominent union to create an association for drivers in New York that would establish a forum for regular dialogue and afford them some limited benefits and protections—but that would stop short of unionization.").

71. *Right to Work State*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/right_to_work_state [https://perma.cc/4BLQ-8J7E] ("A state that has a law prohibiting union security agreements is a so-called 'Right to Work' state. In these states, employees in unionized workplaces cannot negotiate employment contracts which require that all benefitting members contribute to the costs of the representation in negotiation."); *see, e.g.*, Parker & Burke, *supra* note 60, at 31 ("In March of 2015 Wisconsin became the twenty-fifth state to enact a right to work law.").

72. *Right-To-Work Resources*, NAT'L CONF. STATE LEGISLATURES (Dec. 19, 2023), https://www.ncsl.org/labor-and-employment/right-to-work-resources [https://perma.cc/HY5Z-GRTG] ("Currently, 26 states and Guam have enacted right-to-work laws. Labor unions still operate in those states, but workers cannot be compelled to become members as a requirement of their job.").

73. Lucy E. Page, *Impacts of Right-to-Work Laws on Unionization and Wages*, NAT'L BUREAU ECON. RSCH. DIG. (Aug. 1, 2022), https://www.nber.org/digest/202208/impacts-right-work-laws-unionization-and-wages [https://perma.cc/4HM8-L4UT] ("These laws can create a 'free-rider' problem in union membership, undermining unions' financing and ability to organize workers."); Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857, 860 (2014) ("Current law ... requires unions to negotiate collective bargaining agreements on behalf of *all* of the employees in a particular bargaining unit. This implies that whatever benefits the union secures through the collective agreement will accrue to every employee in the unit. This in turn presents a classic threat of free riding." (footnote omitted)); *see* Mancur Olson, *The Labor Union and Economic Freedom*, *in* THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 88 (1971) ("A rational worker will not voluntarily contribute to a (large) union providing a collective benefit since he alone would not perceptibly strengthen the union, and since he would get the benefits of any union achievements whether or not he supported the union.").

74. *See* Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651, 666 (2021) ("In

individual workers have far less power than those employees that are organized and are able to negotiate through unions.[75] From its historical high decades ago, worker power has crept slowly downward as business groups and legislators have chipped away at workplace protections.[76]

Both empirical and anecdotal data reveal that corporations have, in very recent years, taken advantage of workers and engaged in corporate misconduct toward employees. This has resulted in numerous instances of successful litigation against businesses, including wrongful death suits, sexual harassment litigation, and other workplace-related claims.[77] As discussed in more detail below, this has manifested itself through the improper and often illegal acts of many businesses. While not exhaustive, this Article takes a look at a number of the different ways in which corporate abuse can be called into question.

II. WORKPLACE ABUSE AND HARM

This Article closely examines the many recent instances of employer misconduct. While this analysis cannot be exhaustive, it reveals the many eye-opening, alarming instances of employer oppression and misconduct. These examples extend beyond incidents of employment discrimination, which still persist as well. Indeed, these empirical and anecdotal examples give one pause,

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presenting the bill, Senator George Norris emphasized individual workers' helplessness relative to 'the combination of large corporations in a particular line of business.'" (quoting 75 CONG. REC. 4504 (1932)) (discussing the passage of the Norris-LaGuardia Act)).

75. *See* Seiner, *Workplace Power*, *supra* note 2, at 65-66; *see also* Hafiz, *supra* note 74, at 654 (discussing unequal bargaining power between employers and workers).

76. *See* Teresa Ghilarducci, *Worker Power is Weakening, Indicators Show*, FORBES (Sept. 14, 2022, 9:00 AM), https://www.forbes.com/sites/teresaghilarducci/2022/09/14/worker-power-is-weakening-indicators-show/ [https://perma.cc/G8JL-BF35] ("[W]orker bargaining power is slipping more than it's rising. On a year-over-year basis, examining 11 key indicators, my research finds seven pointing downward, three indicators with mixed results, and just one aspect of worker bargaining power increasing."); Hafiz, *supra* note 74, at 653 ("Workers' collective power against increasingly dominant employers has disintegrated. With union density at an abysmal 6.2 percent in the private sector—a level unequaled since the Great Depression—the vast majority of workers depend only on individual negotiations." (footnote omitted)).

77. *See infra* Part II (addressing the many harms and abuses occurring in the workplace).

directly raising the question as to whether too much authority is given to employers in the working relationship.

A. Harassment: Empirically Shown

Despite a public perception that the #MeToo movement has largely resolved the problem of harassment in the workplace, the issue continues to be serious and pervasive.[78] The egregious behavior exhibited by employers in this context is more about an exercise of power than it is about sexual desire.[79] And widespread studies on the issue reveal continued sexual harassment in the workplace.[80] As I have written previously, harassment persists and depending upon the study, anywhere from half to two-thirds of

78. *See* Matt Gonzales, *Five Years of #MeToo: Sexual Harassment Still Common in Workplaces*, SOC'Y FOR HUM. RES. MGMT. (Oct. 17, 2022), https://www.shrm.org/topics-tools/news/inclusion-diversity/five-years-metoo-sexual-harassment-still-common-workplaces [https://perma.cc/CQ3H-FBH9] ("While sexual harassment continues to plague workplaces, most people in the U.S. believe workplaces are less tolerant of harassment and abuse and more supportive of those who report these incidents than they were five years ago, according to a recent study by the Pew Research Center."); Spencer Bokat-Lindell, *Is the #MeToo Movement Dying?*, N.Y. TIMES (June 8, 2022), https://www.nytimes.com/2022/06/08/opinion/depp-heard-me-too.html [https://perma.cc/5X2V-BGDX] ("A 2019 survey from the Harvard Business Review found that while blatant sexual harassment in the workplace appeared to decline after the advent of #MeToo, hostility toward female employees appeared to increase, suggestive of a backlash.").

79. *See* Daniel Goleman, *Sexual Harassment: It's About Power, Not Lust*, N.Y. TIMES (Oct. 22, 1991), https://www.nytimes.com/1991/10/22/science/sexual-harassment-it-s-about-power-not-lust.html [https://perma.cc/JPZ4-APZ5] ("[Harassment] has less to do with sex than with power. It is a way to keep women in their place; through harassment men devalue a woman's role in the work place by calling attention to her sexuality."); Caroline Sinegar, Note, *Severe or Pervasive Meet Petty or Trivial: Lowering the Standard for Establishing a Hostile Work Environment Sexual Harassment Claim Under Title VII*, 91 GEO. WASH. L. REV. 755, 762-63 (2023) ("[T]he central idea behind 'boys' club' culture creates work environments where sexual harassment can survive. The central idea that the workplace is the working man's domain leads to the exclusion and ridicule of women." (footnote omitted)); Suzanne B. Goldberg, *Harassment, Workplace Culture, and the Power and Limits of Law*, 70 AM. U. L. REV. 419, 429 (2020) ("[S]exual harassment involves the exercise of power and is best understood in the context of broader inequities related to sex and gender in the workplace and surrounding society."); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1692 (1998) ("Sometimes, his motivation is sexual desire: He wants [the victim], and he uses his organizational position to get her. Sometimes, it is a desire to subordinate: He wants to make sure she remains below him in the workplace hierarchy, and he uses sexuality to reinforce his position. Either way, his actions are an abuse of his power and an abuse of her sex.").

80. *See* Seiner, *Sensible Just Cause*, *supra* note 19, at 1308-09.

women still report this type of unwelcome behavior.[81] Sexual harassment can manifest itself in a number of different ways, and a recent study revealed that "53 percent of nearly 1,700 respondents had dealt with sexual harassment in the past 12 months," "[a]bout 36 percent of [workers] received requests for sexual favors," and 46 percent of those who had been harassed had experienced "unwelcome sexual advances."[82] But the behavior extends beyond the reports of those being harassed, and one study by *The New York Times* revealed that many men even *admitted* to engaging in this type of behavior.[83] This included men who conceded to having told sexual jokes and even engaged in sexually coercing activity.[84]

The laws that exist for sexual harassment have been in place for years. The Supreme Court has repeatedly defined what harassment means and when liability can attach to employers, specifically

81. *See id.* at 1307-11 (describing recent studies on harassment); Seiner, *Workplace Power*, *supra* note 2, at 78-80 (same); *see also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC DATA HIGHLIGHT: SEXUAL HARASSMENT IN OUR NATION'S WORKPLACES 1 (Apr. 2022) [hereinafter SEXUAL HARASSMENT IN OUR NATION'S WORKPLACES], https://www.eeoc.gov/data/sexual-harassment-our-nations-work places [https://perma.cc/Y94B-FB4Q] ("Between FY 2018 and FY 2021, the EEOC received a total of 98,411 charges alleging harassment under any basis and 27,291 charges alleging sexual harassment."); Pooja Jain-Link, Trudy Bourgeois & Julia Taylor Kennedy, *Ending Harassment at Work Requires an Intersectional Approach*, HARV. BUS. REV. (Apr. 23, 2019), https://hbr.org/2019/04/ending-harassment-at-work-requires-an-intersectional-approach [https://perma.cc/JF7X-K3CD] ("Overall, we found that 34% of female employees have been sexually harassed by a colleague."); DELOITTE, WOMEN@WORK 2023: A GLOBAL OUTLOOK 5 (2023), https://www.deloitte.com/global/en/issues/work/content/women-at-work-global-outlook-2023.html [https://perma.cc/GR98-QTQ6] ("Forty-four percent of respondents reported experiencing harassment and/or microaggressions in the workplace over the past year. While this is a significant decrease from the 59% who reported this in 2022 (and 52% in 2021), it remains that nearly half of women have experienced this behavior."); Laura Santhanam, *Poll: A Third of Women Say They've Been Sexually Harassed or Abused at Work*, PBS (Nov. 21, 2017, 5:00 AM), https://www.pbs.org/newshour/nation/poll-a-third-of-women-say-theyve-been-sexually-harassed-or-abused-at-work [https://perma.cc/X3MF-NDQC] ("Among women, 35 percent said they've been sexually harassed or abused at work, the poll by PBS NewsHour, NPR and Marist found."); *Statistics*, NAT'L SEXUAL VIOLENCE RES. CTR., https://www. nsvrc.org/statistics [https://perma.cc/R6FT-GQJR] ("Nationwide, 81% of women and 43% of men reported experiencing some form of sexual harassment and/or assault in their lifetime.").

82. Gonzales, *supra* note 78.

83. Jugal K. Patel, Troy Griggs & Claire Cain Miller, *We Asked 615 Men About How They Conduct Themselves at Work*, N.Y. TIMES (Dec. 28, 2017), https://www.nytimes.com/interactive/2017/12/28/upshot/sexual-harassment-survey-600-men.html [https://perma.cc/9DRV-7AAL]; *see* Seiner, *Sensible Just Cause*, *supra* note 19, at 1309-10 (describing the New York Times study and analysis); Seiner, *Workplace Power*, *supra* note 2, at 80 n.167 (same).

84. *See* Patel et al., *supra* note 83; Seiner, *Sensible Just Cause*, *supra* note 19, at 1309.

addressing how companies can avoid liability through robust anti-harassment policies.[85] The federal government has further defined sexual harassment through regulations and guidance and pursued numerous claims in this area.[86] And the public has shined a light on the grotesque nature of some of the conduct.[87] Yet this behavior continues at a remarkable level, and I have previously highlighted the inability of our current employment law structure in the United States to effectively address sexual harassment.[88]

This pervasiveness is a clear sign that the laws on sexual harassment are not capturing the entire problem. While effective, these laws are not enough. If over half of female workers still experience this abuse, more must be done. A broader approach to employer misconduct must be more fully considered.

B. The COVID-19 Pandemic and Long COVID Epidemic

The COVID-19 pandemic has also clearly revealed worker mistreatment, workplace inequities, and abuse of workers.[89] Individual

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85. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 780, 808 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

86. *See* 29 C.F.R. § 1604.11 (1999); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2024-1, ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE (1999); *see also* Case Summaries, U.S. DEP'T OF JUST. CIV. RTS. DIV., https://www.justice.gov/crt/case-summaries [https://perma.cc/9WDU-AYWL].

87. *See, e.g.*, Bokat-Lindell, *supra* note 78.

88. *See generally* SEXUAL HARASSMENT IN OUR NATION'S WORKPLACES, *supra* note 81, at 2 ("In FY 2018, the EEOC received 7,609 sexual harassment charges compared to 6,696 in FY 2017—an increase of 13.6%. Additionally, sexual harassment charges as a percentage of all harassment charges began increasing in FY 2018. Between FY 2018 and FY 2021, sexual harassment charges accounted for 27.7% of all harassment charges compared to 24.7% of all harassment charges between FY 2014 and FY 2017. Sexual harassment charges also accounted for a greater percentage of the total charges under all statutes received by the EEOC between FY 2018 and FY 2021 (9.8%) compared to between FY 2014 and FY 2017 (7.7%). Also, between FY 2018 and FY 2021, harassment charges made up 35.4% of the total charges (277,872) received by the EEOC."); Seiner, *Sensible Just Cause*, *supra* note 19, at 1307-11 (describing the existence of pervasive workplace harassment); Seiner, *Workplace Power*, *supra* note 2, at 78-80 (same).

89. *See, e.g.*, Vanessa Romo, *Tyson Managers Suspended After Allegedly Betting If Workers Would Contract COVID*, NPR (Nov. 19, 2020, 10:20 PM), https://www.npr.org/2020/11/19/936905707/tyson-managers-suspended-after-allegedly-betting-if-workers-would-contract-covid [https://perma.cc/LTM5-E7G5].

acts of mistreatment during this time were abundant,[90] and reports have shown how employers engaged in misconduct and disregard toward workers,[91] even requiring immediate governmental response.[92]

This mistreatment continues and has extended well beyond the early days of the pandemic. Indeed, the impact of long COVID in the workplace, combined with widespread corporate ignorance and improper treatment of this serious condition, continues to demonstrate that the health and workplace challenges of the pandemic continue.[93] While employers have now had sufficient opportunity to adjust and respond to these health-related challenges, the response

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90. *Id.*

91. Michael Grabell, Claire Perlman & Bernice Young, *Emails Reveal Chaos as Meatpacking Companies Fought Health Agencies Over COVID-19 Outbreaks in Their Plants*, PROPUBLICA (June 12, 2020, 2:04 PM), https://www.propublica.org/article/emails-reveal-chaos-as-meatpacking-companies-fought-health-agencies-over-covid-19-outbreaks-in-their-plants [https://perma.cc/8FXF-7S2B].

92. *Id.* I have previously written on the misconduct of employers toward workers during the pandemic, highlighting the above examples. *See generally* Seiner, *Sensible Just Cause*, *supra* note 19, at 1312-14 (describing employer abuses of workers during COVID-19); Seiner, *Workplace Power*, *supra* note 2, at 80-83 (same).

93. *See* Vincent White, *For Covid Long-Haulers, Is Getting Reasonable Accommodation Under the ADA the Next Issue?*, NBC NEWS (Mar. 31, 2021, 4:30 AM), https://www.nbcnews.com/think/opinion/covid-long-haulers-getting-reasonable-accommodation-under-ada-next-issue-ncna1262371 [https://perma.cc/6RYB-26ME]; Gus Alexiou, *How Employers Can Tackle Uncertainties Around Long Covid in the Workplace*, FORBES (Dec. 18, 2022, 3:00 AM), https://www.forbes.com/sites/gusalexiou/2022/12/18/how-employers-can-tackle-uncertainties-around-long-covid-in-the-workplace/ [https://perma.cc/9ADW-YA2Z]; *New Study of Employees With Long COVID Demonstrates Need for More Workplace Accommodations*, BERKE-WEISS LAW (Jan. 12, 2023), https://www.berkeweisslaw.com/post/new-study-of-employees-with-long-covid-demonstrates-need-for-more-workplace-accommodations?962be703_page=2 [https://perma.cc/SAS7-G5JK] ("Respondents reported lack of workplace flexibility, poor communication, and a more general fear of broaching the subject with employers., [sic] all of which were more acutely felt among respondents of color."); Laura Casey, *Long Covid Is a Disability. Here's How to Ask for Workplace Accommodations*, WALL ST. J. (Feb. 20, 2023, 10:00 AM), https://www.wsj.com/articles/long-covid-is-a-disability-heres-how-to-ask-for-workplace-accommodations-9b63fd90 [https://perma.cc/X32S-63Q8] ("A 2022 survey of nearly 3,800 managers found that 40% of them had employees with lasting physical or mental effects of a Covid-19 infection, and that 58% of those managers said the employees had received workplace accommodations, according to the Kessler Foundation, a nonprofit supporting people with disabilities, and the University of New Hampshire's Institute on Disability."); Megan Leonhardt, *Nearly Half of Workers Say Employers Don't Adequately Address Long COVID in the Workplace*, FORTUNE (July 1, 2022, 8:00 AM), https://fortune.com/well/2022/07/01/nearly-half-of-workers-say-employers-dont-adequately-support-long-covid-in-the-workplace/ [https://perma.cc/W3C3-JXMJ].

has still been one of exerting undue, unethical consequences on workers suffering from these conditions.[94] Recent congressional hearings have revealed that long COVID symptoms can extend from "mild to debilitating," and "employers have refused to make accommodations for employees who are disabled" as a result of this condition.[95] Accommodating this sometimes disabling condition should include "allowing [employees] to work from home, making schedules more flexible, adjusting dress codes, and giving people the option to sit or stand."[96] Too often employers are ignoring these basic, reasonable worker requests.[97]

C. Abuses After Incarceration

Much has been written on the mistreatment of individuals after leaving prison based on their prior incarceration. This mistreatment includes issues related to credit, voter suppression, and other forms of oppressive societal treatment.[98] This mistreatment is often reflected in race discrimination as well.[99] Workplace mistreatment following incarceration is also quite common and has been well studied.[100] The negative economic impact of having a criminal record

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94. *See* Casey, *supra* note 93.

95. *See* Joseph Choi, *Employers Are Not Accommodating People Disabled by Long COVID, Activists Tell House Panel*, THE HILL (May 24, 2022, 4:37 PM), https://thehill.com/policy/healthcare/3499938-employers-are-not-accomodating-people-disabled-by-long-covid-activists-tell-house-panel/ [https://perma.cc/GV96-PULD].

96. *Id.*

97. *Id.*

98. *See* William Darity, Jr., Sarah Elizabeth Gaither & Monica Garcia-Perez, *The Never-Ending Cycle: Incarceration, Credit Scores, and Wealth Accumulation in the United States*, WASH. CTR. FOR EQUITABLE GROWTH (Mar. 4, 2020), https://equitablegrowth.org/the-never-ending-cycle-incarceration-credit-scores-and-wealth-accumulation-in-the-united-states/ [https://perma.cc/NZF2-9ZQV]; Terry-Ann Craigie, Ames Grawert, Cameron Kimble & Joseph E. Stiglitz, *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, BRENNAN CTR. FOR JUST. (Sept. 15, 2020), https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal [https://perma.cc/L9D2-W925] ("Mass incarceration has been a key instrument in voter suppression.").

99. *See* Craigie et al., *supra* note 98 ("[A] nationwide reckoning over deep-rooted racial injustice is forcing our country to come to terms with the ways in which these injustices have been perpetuated in the century and a half since the end of slavery. For the past four decades, mass incarceration—with the deprivation of political voice and economic opportunity that is so often associated with it—has been at the center.").

100. *See id.*

can be quite devastating to individuals and communities.[101] Indeed, one well-publicized study revealed that "[p]eople who have spent time in prison suffer the greatest losses, with their subsequent annual earnings reduced by an average of 52 percent."[102] These earnings losses disproportionately impact minority communities.[103]

This economic impact of incarceration has existed for years and is well-known. It is undeniable that those with criminal records have lower earning potential than those with no criminal history.[104] Beyond this certainty, there is often unseen workplace oppression. This manifests itself in two common ways. First, employers have often been found to have subjected workers with a criminal history to positions paying below minimum wage.[105] These oppressive conditions are the direct result of the disadvantaged position in which prior convicts find themselves.[106] Initially, it can be extremely

101. *Id.*

102. *Id.*

103. *Id.*

104. *See generally id.*; Colleen Chien, Alexandra George, Srihari Shekhar & Robert Apel, *Estimating the Earnings Loss Associated with a Criminal Record and Suspended Driver's License*, 64 ARIZ. L. REV. 675 (2022); Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014, 11:30 PM), https://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402 [https://perma.cc/8SFZ-RJQY] ("[A]nalysis by the University of South Carolina team, performed at the request of The Wall Street Journal, suggests that men with arrest records—even absent a formal charge or conviction—go on to earn lower salaries. They are also less likely to own a home compared with people who have never been arrested. The same holds true for graduation rates and whether a person will live below the poverty line.").

105. *See* Dallas Augustine, *Coerced Work During Parole: Prevalence, Mechanisms, and Characteristics*, 61 CRIMINOLOGY 546, 562 (2023) ("123 of 518 participants (23.8 percent) reported being paid less than minimum wage for a job worked while on parole; EPP calculations suggest that nearly one quarter of workers on parole in LA County have been paid less than minimum wage (24.2 percent EPP). Relatedly, 90 survey-takers (17.4 percent of the sample) stated that they had not been paid for overtime work they had performed, resulting in an EPP of 19.6 percent of parolee workers in LA County who performed overtime work and were not compensated."); Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (July 2018), https://www.prisonpolicy.org/reports/outofwork.html [https://perma.cc/6YJ5-C5PJ] ("When formerly incarcerated people do land jobs, they are often the most insecure and lowest-paying positions. According to an analysis of IRS data by the Brookings Institution, the majority of employed people recently released from prison receive an income that puts them well below the poverty line." (footnotes omitted)).

106. *See* Couloute & Kopf, *supra* note 105.

difficult to find current employment with this background.[107] Additionally, workers may need to report to a parole officer or other law-enforcement agency and therefore may have fears of identifying those businesses that are mistreating them.[108]

Second, workplace mistreatment can also be seen with intervening third-party placement agencies. These types of "day labor" organizations have "become big business, rationally orchestrated and brokered by a distinct kind of firm that occupies the bottom-most segment of the broad and variegated, multibillion dollar temporary staffing industry."[109] As one analysis reported, these businesses operate within the confines of the law, and often "under the radar."[110] Third-party firms have been described as literally "rent[ing] people [rather than] appliances," thereby siphoning off pay from workers.[111] "Characterized by asymmetrical uncertainty and structural ambiguity, the triangular employment relationship not only renders temporary workers subject to a kind of 'dualistic control' but also mystifies lines of accountability, enabling ... employers to abdicate responsibility for workers."[112] And this

107. *See* DALLAS AUGUSTINE, NOAH ZATZ & NAOMI SUGLE, WHY DO EMPLOYERS DISCRIMINATE AGAINST PEOPLE WITH RECORDS? STIGMA AND THE CASE FOR BAN THE BOX 1 (2020), https://irle.ucla.edu/wp-content/uploads/2020/07/Criminal-Records-Final-6.pdf [https://perma.cc/5APJ-LDZD] ("People with criminal records face high barriers to employment, and people with incarceration histories are four to six times more likely to be unemployed than peers without a record .... Employers' aversion to hiring applicants with a [criminal] record is one such barrier."); Cara Tabachnick, *Employment for Some Americans with Criminal Records Is "Nearly Impossible," Survey Says*, CBS NEWS (May 26, 2023, 9:01 AM), https://www.cbsnews.com/news/employment-difficulties-americans-criminal-records/ [https://perma.cc/E3Y3-HLSM] ("[L]aws nationwide limit access to licenses or employment opportunities for those with criminal records.... [O]ne in two people with old convictions cited difficulties in finding a job, maintaining employment or making a living.... The employment rate for Black men saw a decline of between 4.7% to 5.4% when they tried to get jobs after leaving prison.").

108. *See, e.g.*, Augustine, *supra* note 105, at 571 ("To insulate themselves from the risk of violation, parolees may accept exploitative work conditions if they deem the harms experienced on the job to be more tolerable than the risk of parole sanctions for unemployment. Workers remaining in these positions may also feel as though they cannot advocate for themselves and other workers on the job out of fear of employer retaliation.").

109. Gretchen Purser, *"Still Doin' Time:" Clamoring for Work in the Day Labor Industry*, 15 J. LAB. & SOC'Y 397, 401-02 (2012).

110. *Id.* at 402.

111. *Id.* at 402, 409.

112. *Id.* at 402 (quoting Heidi Gottfried, *Mechanisms of Control in the Temporary Help Service Industry*, 6 SOCIO. F. 699, 704 (1991)). "With no criminal background check, no drug test, no reported work history, no interview, and no skills, references or transportation

arrangement "not only fuels the day labor agency with a ready supply of bodies, but ... it also guarantees that those bodies will be consistent and compliant, given their subjection to the ongoing supervision of, and the agency's ability to outsource discipline to, the organization's caseworkers."[113] This frequently places workers in positions that are "precarious, perilous, and poorly paid."[114]

These two examples only scratch the surface, and there are numerous other ways in which workers with prior convictions have been abused and oppressed. And there have been some efforts at reform in this field with varying levels of success. Most notably, ban-the-box movements across the country have made efforts to restrict the use of a worker's criminal history in the application portion of the hiring process.[115] Initial questions about a potential worker's arrests or convictions are often discriminatory and disproportionately affect minority groups.[116] While these efforts have been effective at raising awareness of the issue and do help prevent discrimination in locales across the country, they have been limited in nature.[117] More sweeping reform is necessary to intervene in this area.

D. Anecdotal Reports: Working Through Tornadoes and Urinating in Bottles

Numerous studies and analyses well support instances of employer abuse toward workers through harassment, sexual abuse, mistreatment during and following the pandemic, and problematic

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required, day labor agencies operate as employers of last resort for employees of last resort." *Id.* at 404 (emphasis omitted).

113. *Id.* at 405.

114. *Id.* at 406.

115. *See, e.g.*, Roy Maurer, *Ban-the-Box Movement Goes Viral*, SOC'Y FOR HUM. RES. MGMT. (Mar. 10, 2016), https://www.shrm.org/ResourcesAndTools/hr-topics/risk-management/Pages/Ban-the-Box-Movement-Viral.aspx [https://perma.cc/G8AF-5GGS].

116. *See* RACHEL M. KLEINMAN & SANDHYA KAJEEPETA, THURGOOD MARSHALL INST., BARRED FROM WORK: THE DISCRIMINATORY IMPACTS OF CRIMINAL BACKGROUND CHECKS IN EMPLOYMENT 4 (2023), https://tminstituteldf.org/wp-content/uploads/2023/07/Barred-from-Work.pdf [https://perma.cc/Z2SV-EQEG].

117. *Cf.* Casey Leins, *More Data Needed to Determine Whether 'Ban the Box' Laws Work*, U.S. NEWS & WORLD REP. (Sept. 10, 2019, 12:20 AM), https://www.usnews.com/news/best-states/articles/2019-09-10/ban-the-box-laws-could-negatively-impact-minorities [https://perma.cc/N3PU-948T].

working conditions imposed on employees with past convictions.[118] More anecdotal reports and individualized instances of abuse are widespread. Taken individually, these actions may only suggest the improper acts of more sporadic errant employers or supervisors. Taken as a whole—given the number and credibility of these accounts—it is impossible to ignore the volume of reports of employer abuse, which point toward a much more systemic problem.

Some of the more egregious examples of employer abuse of employees are noteworthy. In recent years, Amazon, for example, has made headlines through its alleged failure to provide workers with proper restroom breaks, resulting in these employees being forced to "urinate in water bottles."[119] UPS drivers weighed in with similar alleged experiences with the basic lack of access to lavatorial services.[120] Amazon similarly made news when it purportedly denied workers the opportunity to leave during a tornado and six workers were killed.[121] An OSHA investigation and a wrongful death suit quickly followed.[122] Other examples abound.

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118. *See supra* Part II.A (discussing widespread employer abuse of workers in different areas). It is worth noting at the outset of this discussion involving anecdotal reports of worker mistreatment that in many instances the conduct has not been fully adjudicated in a court decision, and that the purported actions have only been alleged. And, many of these employers may ultimately show that the allegations that have been brought are untrue or that there is an available defense. Nonetheless, the widespread nature and pervasive allegations of misconduct across geography and industry help make the broader point that mistreatment continues to persist against workers.

119. *See* Kerry J. Byrne, *Amazon Finally Acknowledges Delivery Driver Bathroom Problem*, N.Y. POST (May 26, 2021, 10:39 AM), https://nypost.com/2021/04/03/amazon-acknowledges-massive-delivery-driver-bathroom-problem/ [https://perma.cc/P3XQ-QAWX] ("The web giant fessed up that its delivery drivers have limited access to bathrooms, meaning that accusations of them urinating in bottles or elsewhere in public are likely to be true.").

120. *See* Audrey Conklin, *Ex-UPS Driver Says Amazon's Pee-in-Water-Bottles Problem Isn't Unique*, FOX BUS. (Apr. 1, 2021, 3:13 PM), https://www.foxbusiness.com/lifestyle/ups-driver-pee-watter-bottles-amazon [https://perma.cc/6RUU-KSU5].

121. Celina Tebor, *Feds Have 'Concerns,' but No Punishment, for Amazon After Deadly Warehouse Collapse in Tornado*, USA TODAY (Apr. 26, 2022, 8:00 PM), https://www.usatoday.com/story/news/nation/2022/04/26/amazon-illinois-warehouse-collapse-osha-punishment/9545707002/ [https://perma.cc/JZV4-MWVA] ("One Amazon employee who died in the warehouse collapse texted his girlfriend, 'Amazon won't let us leave.'").

122. *Id.*; *see* Olafimihan Oshin, *Amazon Sued Over Fatal Warehouse Collapse During Tornado*, THE HILL (Jan. 17, 2022, 8:54 PM), https://thehill.com/homenews/state-watch/590105-amazon-sued-over-fatal-warehouse-collapse-during-tornado/ [https://perma.cc/76HP-W8VZ].

1. Food Industry and Low-End Retail

In the fast-food industry—which is notorious for worker mistreatment[123]—there have been recent complaints of "burn injuries" for which there is a "lack [of] basic first aid and protective gear ... floors that are greasy or wet, first-aid kits that are missing or empty[,] and pressure to clean the fryer while its oil is hot."[124] Instructions to injured workers have included employees being told by supervisors to "treat burns with condiments rather than burn cream."[125] The poultry food production industry is also well known for worker violations. In a recent report, "workers [were] routinely denied basic needs such as bathroom breaks to the point of being forced to wear diapers while on the line," which can cause employees to dangerously restrict their fluid intake and result in "conditions [that] are particularly trying for women who are menstruating or pregnant."[126]

And, despite the existence of child labor laws, violations are still quite common. McDonald's Corporation (as well as the entire fast-food industry) has seen many of these alleged violations. Some recent examples border on the unimaginable. "In one case, investigators found two 10-year-olds were working unpaid and until as late as 2 a.m. at one McDonald's restaurant in Louisville [Kentucky]."[127] Across that state, the Labor Department reported over 300 such

123. *See generally* Mary Meisenzahl, *The Fast-Food Industry Had a Uniquely Tumultuous 2021, from Staff Shortages to Supply Chain Issues*, BUS. INSIDER (Dec. 31, 2021, 9:51 PM), https://www.businessinsider.com/the-fast-food-industry-had-a-tumultuous-2021-staff-shortages-supply-chain-issues-2021-12 [https://perma.cc/BY4M-2TWV] (describing challenges in the fast-food industry and workplace issues).

124. Katie Little, *McDonald's Conditions Are Hazardous, Workers Claim*, CNBC (Mar. 16, 2015, 12:00 PM), https://www.cnbc.com/2015/03/16/mcdonalds-conditions-are-hazardous-workers-claim.html [https://perma.cc/D5NC-Y459].

125. *Id.*

126. Elizabeth Chuck, *Poultry Workers, Denied Bathroom Breaks, Wear Diapers: Oxfam Report*, NBC NEWS (May 12, 2016, 4:18 PM), https://www.nbcnews.com/business/business-news/poultry-workers-denied-bathroom-breaks-wear-diapers-oxfam-report-n572806 [https://perma.cc/GB4U-MZGT]. Indeed, employees requesting restroom breaks were "mocked or ignored by supervisors." *Id.*

127. Chantal Da Silva, *10-Year-Olds Among Hundreds of Children Found Working at McDonald's Restaurants*, NBC NEWS (May 3, 2023, 10:47 AM), https://www.nbcnews.com/news/us-news/10-year-olds-hundreds-children-found-working-mcdonalds-rcna82583 [https://perma.cc/L3PR-2DGC].

violations involving children working at the chain.[128] Other examples of abuse in this industry are quite common.[129]

The low-end retail industry is also well known for its workplace abuses. At Family Dollar, workers claimed they were improperly characterized as management, denied overtime, required to work "80-hour weeks, slept in chairs, and found snakes in stockrooms."[130] Working conditions were reported as "unsafe and unsanitary," resulting in medical complications requiring subsequent surgeries.[131] This involved far more than isolated complaints, and there were over 3,900 violations of meal break violations at Family Dollar stores in one state alone.[132] Not surprisingly, this improper conduct has been well publicized, and viral TikTok videos even helped expose some of the unsafe conduct.[133] OSHA has further intervened against Dollar General for health violations that included leaks to HVAC systems, and employees were allegedly forced to work in both freezing temperatures in the winter and close to 115 degrees during warmer months.[134] Federal government investigators also discovered "blocked emergency exits, fire hazards and boxes stacked to the point that they could collapse onto workers."[135]

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128. *Id.*

129. *See, e.g.*, *Female McDonald's Employees Accuse Fast-Food Chain of Abuse, Harassment in Workplace*, CBS NEWS (Feb. 28, 2021, 10:10 AM), https://www.cbsnews.com/news/female-mcdonalds-employees-accuse-fast-food-chain-of-abuse-harassment-in-workplace/ [https://perma.cc/5L2P-CC6Y].

130. Newsham & Coutu, *supra* note 8.

131. *Id.*

132. Isabel Sami, *Family Dollar Denies Workers Meal Breaks, Cited $1.5M in Penalties*, TELEGRAM & GAZETTE (Feb. 3, 2022, 3:26 PM), https://www.telegram.com/story/business/2022/02/03/ag-sending-message-employers-why-family-dollar-hit-1-5-m-penalties-labor-laws-maura-healey/6649674001/ [https://perma.cc/4GMZ-UUG2].

133. Jamieson, *supra* note 8.

134. Brendan Case, *Dollar General Targeted by US for Systemic Workplace Hazards*, BLOOMBERG LAW (Mar. 28, 2023, 3:05 PM), https://news.bloomberglaw.com/daily-labor-report/dollar-general-targeted-by-us-for-systemic-workplace-hazards [https://perma.cc/TE4J-FN9B]. Not surprisingly, "Dollar Tree has been cited for 90 violations and fined $14 million, while Family Dollar has been cited 54 times and fined $5 million." Michael Corkery, *Dollar General Is Deemed a 'Severe Violator' by the Labor Dept.*, N.Y. TIMES (Mar. 28, 2023), https://www.nytimes.com/2023/03/28/business/dollar-general-osha-fines.html [https://perma.cc/5AGS-YKJP].

135. Case, *supra* note 134.

2. Recent Pay Abuses and Illegal Anti-Union Efforts

Pay abuse is also common, particularly during times of economic turmoil. "When a recession hits, U.S. companies are more likely to stiff their lowest-wage workers ... pay[ing] less than the minimum wage, mak[ing] employees work off the clock, or refus[ing] to pay overtime rates."[136] The industries most affected by these pay inequities include "child care workers, gas station clerks, restaurant servers and security guards."[137] This has affected thousands of workers and resulted in hundreds of millions of dollars stolen from employees, according to the Department of Labor.[138] Indeed, researchers have found the improper payment of wages allegedly "across every industry—from Staples to JP Morgan, to Facebook, to Walmart, to Verizon, to Avis, to Lowes" with companies "engaging in this activity even up through the present day, with full knowledge of potential litigation."[139]

Equally common are anti-union efforts, which extend beyond the legal limits of traditional and lawful union avoidance activities. Recent years have seen employers cross these legal thresholds, with Starbucks, for example, accused by the federal government of "29 unfair labor practice charges that included over 200 violations."[140] This purported conduct included "threaten[ing] and intimidat[ing] workers by closing down stores in the area, reduc[ing] workers' compensation, enforc[ing] policies against union supporters in a discriminatory way, engag[ing] in surveillance and fir[ing] workers."[141] Given new digital capabilities, these unlawful surveillance tactics and privacy invasions have extended into other areas as

136. Alexia Fernández Campbell & Joe Yerardi, *Ripping Off Workers Without Consequences*, CTR. FOR PUB. INTEGRITY (May 4, 2021), https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/cheated-at-work/ripping-off-workers-with-no-consequences/ [https://perma.cc/JF32-4SKN].

137. *Id.*

138. *Id.*

139. Cohen et al., *supra* note 15.

140. Kate Rogers, *Starbucks Hit With Sweeping Labor Complaint Including Over 200 Alleged Violations*, CNBC (May 6, 2022, 7:46 PM), https://www.cnbc.com/2022/05/06/starbucks-accused-of-more-than-200-labor-violations-in-nlrb-complaint.html [https://perma.cc/SD34-4SLK].

141. *Id.*

well.[142] The National Labor Relations Board (NLRB) has seen widespread instances in recent years of illegal employer abuses on the organizing front,[143] as employers flex their muscles and demonstrate their power.

3. Technology Sector Abuse

Discrimination and abuse of workers in the technology sector also remain well documented and pervasive. This abuse is frequently gender-related, in what is often perceived as a male-dominated field.[144] Overt harassment, assault, and abuse have been pervasive in this area, and the claims extend beyond gender into race and other groups.[145] In perhaps the most high-profile incident of abuse, a class-action claim (settled by the parties for $100 million) alleged the "bro culture" of Riot Games, Inc.[146] The behavior was first detailed on a gaming blog, and later as part of a class action complaint which included claims that women were purportedly subjected to and required to "tolerate crude male humor" including jokes related to "sex, defecation, masturbation, rape, and torture."[147] Women at the company were allegedly objectified and rated based on their perceived "hotness" by male workers over email, were sent unsolicited photography of male genitalia from other co-workers and

142. *See* Ryan Gallagher, *Google Accused of Creating Spy Tool to Squelch Worker Dissent*, BLOOMBERG LAW (Oct. 23, 2019, 6:02 PM), https://www.bloomberg.com/news/articles/2019-10-23/google-accused-of-creating-spy-tool-to-squelch-worker-dissent [https://perma.cc/2H2J-PGVM].

143. *See* Off. Pub. Affs., *Unfair Labor Practices Charge Filings Up 16%, Union Petitions Remain Up in Fiscal Year 2023*, NLRB (Apr. 7, 2023), https://www.nlrb.gov/news-outreach/news-story/unfair-labor-practices-charge-filings-up-16-union-petitions-remain-up-in [https://perma.cc/S44Y-SAXH].

144. *See* Vandana Singh, *The Retention Problem: Women Are Going into Tech but Are Also Being Driven Out*, THE CONVERSATION (Mar. 3, 2023, 8:24 AM), https://theconversation.com/the-retention-problem-women-are-going-into-tech-but-are-also-being-driven-out-200625 [https://perma.cc/ZR45-9S2X] ("[O]ur research found that women's negative experiences range from minor to severe harassment, sexism, discrimination and misogyny to explicit death threats.").

145. *See, e.g.*, Diaz v. Tesla, Inc., 598 F. Supp. 3d 809, 819 (N.D. Cal. 2022); Austin v. Tesla Motors, Inc., No. 23-cv-00067, 2023 WL 4240143, at *1 (N.D. Cal. June 27, 2023) (outlining race discrimination claims in violation of federal law).

146. Complaint for Damages at 4, McCracken v. Riot Games, Inc., No. 18STCV03957, 2023 WL 11053298 (Cal. Super. June 15, 2023).

147. *Id.* at 5.

supervisors, and observed the "[p]unching, grabbing, and touching" of genitalia.[148] The purported behavior reached all levels of the company, resulting in the nine-figure settlement.[149]

Similarly, in a case involving gender and pay discrimination and unfair business practices, Google settled with a large group of female employees for $118 million.[150] In another nine-figure tech sector settlement, about 15,500 women workers of the same company alleged violations including that Google "underpaid female workers, placed them in lower-level jobs and denied them promotions and transitions to other teams."[151] And in yet another suit against the same company based on race, a class action claim alleges that "Black employees at Google were told they didn't fit the company's culture or weren't 'googly' enough and when hired they were often 'pigeon-holed into dead-end jobs, with less visibility, lower pay and no advancement opportunities.'"[152]

Other high-profile, newsworthy cases involve allegations of the "frat house" culture of Activision Blizzard, which included harassment allegations and a suit by the EEOC.[153] And the well-known tech giant Zendesk was also the subject of recent high-profile class-action litigation, with one worker claiming "she was told by a supervisor in a video conference that the company would lose over a million dollars because of her choice to have a baby."[154] Purported abuse claims against Tesla, Amazon Web Services, Lab Zero, and others show the rampant nature of abusive employer conduct in this

148. *Id.* at 5-7.

149. *Riot Games to Pay $100 Million to Settle Gender Discrimination Suit*, TIMES OF MALTA (Dec. 28, 2021), https://timesofmalta.com/articles/view/riot-games-to-pay-100-million-to-settle-gender-discrimination-suit.924202 [https://perma.cc/QE9F-V3ML].

150. Settlement Agreement and [Proposed] Order at 20, Ellis v. Google, LLC, No. CGC-17-561299 (Cal. Super. Sept. 14, 2017).

151. Garrett, *supra* note 12.

152. Goncalves, *supra* note 13.

153. Civil Rights and Equal Pay Act Complaint for Injunctive and Monetary Relief and Damages at 4, Dep't of Fair Emp. & Housing v. Activision Blizzard, Inc., No. 21STCV26571 (Cal. Super. July 20, 2021); Title VII Complaint at 1-2, U.S. EEOC v. Activision Blizzard, Inc., No. 2:21-cv-07682 (C.D. Cal. Sept. 27, 2021).

154. *See* Amy Graff, *'The Position Went to a Less Experienced Male': SF Tech Company Accused of Favoring Men Over Women*, SFGATE (June 9, 2022), https://www.sfgate.com/bayarea/article/SF-tech-company-accused-of-bias-toward-men-17228679.php [https://perma.cc/T5CA-C4NX].

industry.[155] The alleged behavior and brazenness of abuse even extends to a tech sector employer taking "biometric identifiers [including fingerprints] collected without first signing a written consent," showing that nothing is outside of employer bounds in this area.[156] Improper employee surveillance is thus also becoming a tremendous problem. At Google, management allegedly

> ordered a team to develop a Chrome browser extension that would be installed on all employee machines and used primarily to monitor internal employee activity.... [T]he tool reports anyone who creates a calendar invite and sends it to more than 100 others ... [in] an attempt to crackdown on organizing and employee activism.[157]

4. Illegal Child Labor

In addition to the unlawful child labor noted in the fast-food industry, and taking a more general look at this problem, a *New York Times* piece weighed in on those younger employees that are now "part of a new economy of exploitation: Migrant children, who have been coming into the United States without their parents in record numbers [have] end[ed] up in some of the most punishing jobs in the country."[158] This investigation found (and coined) this "new economy of exploitation" involving "industries in every state."[159] Corporations across the country feel free to "flout[ ] child labor laws that have been in place for nearly a century. Twelve-year-old roofers in Florida and Tennessee. Underage slaughterhouse

155. *See* Diaz v. Tesla, Inc., 598 F. Supp. 3d 809, 819, 827 (N.D. Cal. 2022); Austin v. Tesla Motors, Inc., No. 23-cv-00067, 2023 WL 4240143, at *1 (N.D. Cal. June 27, 2023); Compl. Seeking Decl. Relief and Damages, Warner v. Amazon.com, Inc., No. 5:21-CV-00866, 2022 WL 22672225 (C.D. Cal. July 5, 2022); Lab Zero, Inc. v. Cartwright, No. B319561, 2023 Cal. App. LEXIS 1979, at *1 (Cal. Ct. App. Apr. 4, 2023).

156. *Indeck Power Employee Biometric Privacy $66K Class Action Settlement*, TOP CLASS ACTIONS (Apr. 4, 2023), https://topclassactions.com/lawsuit-settlements/open-lawsuit-settlements/indeck-power-employee-biometric-privacy-66k-class-action-settlement/ [https://perma.cc/N3XT-5MHY].

157. Nick Statt, *Google Accused of Spying with New Tool that Flags Large Employee Meetings*, THE VERGE (Oct. 23, 2019, 7:18 PM), https://www.theverge.com/2019/10/23/20929524/google-surveillance-tool-accused-employee-activism-protests-union-organizing [https://perma.cc/E8Z5-RWW5].

158. Dreier, *supra* note 16.

159. *Id.*

workers in Delaware, Mississippi and North Carolina. Children sawing planks of wood on overnight shifts in South Dakota."[160] The problem has "exploded since 2021" in the face of "economic desperation that was worsened by the pandemic."[161] The report found that "[i]n town after town, children scrub dishes late at night. They run milking machines in Vermont and deliver meals in New York City. They harvest coffee and build lava rock walls around vacation homes in Hawaii. Girls as young as 13 wash hotel sheets in Virginia."[162]

At one meat processing facility in Minnesota, reporters identified "baby-faced workers who chased and teased one another as they came off their shifts ... [who] had scratched their assumed names off company badges to hide evidence that they were working under false identities. Some said they had suffered chemical burns from the corrosive cleaners they used."[163] Other research found similar results, with "children as young as 13 working dangerous jobs in 13 locations in eight states," being permitted to use fake identification because "[t]here's no one else who wants to do [the work]."[164]

While anecdotal, all of the above examples demonstrate improper treatment of employees in the working relationship. From jokes about rape,[165] to abusing the most vulnerable children in our country,[166] companies have shown repeatedly that there must be additional checks on their conduct. Given existing worker mistreatment, we are at an inflection point where a new approach must be considered.

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160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* The alleged violations extended across industries and employers. "In Los Angeles, children stitch 'Made in America' tags into J. Crew shirts. They bake dinner rolls sold at Walmart and Target, process milk used in Ben & Jerry's ice cream and help debone chicken sold at Whole Foods. As recently as the fall, middle-schoolers made Fruit of the Loom socks in Alabama. In Michigan, children make auto parts used by Ford and General Motors." *Id.*

164. Laura Strickler, Didi Martinez & Julia Ainsley, *Workers for Slaughterhouse Cleaning Firm that Hired Children Repeatedly Used Stolen Identities to Get Jobs*, NBC NEWS (Apr. 13, 2023, 6:30 PM) (second alteration in original), https://www.nbcnews.com/news/us-news/workers-slaughterhouse-cleaning-company-pssi-used-stolen-identities-rcna77154 [https://perma.cc/NH8W-WLST].

165. *See, e.g.*, Complaint for Damages at 5, McCracken v. Riot Games, Inc., No. 18STCV03957, 2023 WL 11053298 (Cal. Super. June 15, 2023).

166. *See, e.g.*, Strickler et al., *supra* note 164.

III. IMMUTABLE WORKPLACE NORMS: A MULTI-FACTORED SOLUTION

The mistreatment of workers has grown too substantially in recent years. As shown above, employers have oppressed workers in countless different ways. This has resulted in harassment,[167] wrongful death litigation,[168] and numerous other examples of improper conduct.[169] This type of workplace abuse can no longer be tolerated, and we are at an inflection point where new rules must be considered to address this growing problem.

This Article identifies one such approach aimed at getting to the heart of the issue. Through the doctrine of *immutable workplace norms*, a multi-factored approach to addressing workplace abuse and harm will yield a more balanced and healthy workplace dynamic.

A. Immutable Workplace Norms

Only through a combination of corporate intervention, enhanced criminalization of worker abuse, and judicial oversight can the problem of employer misconduct be properly addressed. Through the identification of certain immutable workplace norms in the treatment of workers, it becomes possible to address the problem. This Article suggests a three-part approach to resolving the existing issues.

1. Corporate Intervention

Perhaps the most straightforward approach to resolving the problem of corporate abuse and harm is by starting with the corporations themselves. The businesses that are causing the problem are certainly in the best position to correct the mistreatment that is occurring. As these physical and emotional abuses vary

167. *See supra* Part II.A.

168. *See* Oshin, *supra* note 122.

169. *See supra* Part II.B (describing employers' improper treatment of employees who suffered from long COVID).

widely between companies and industries, a corporate-level solution is by far the most preferable resolution to this issue. As discussed above, the #MeToo era has not completely identified the widespread nature of abuse in the workplace.[170] Nonetheless, there are numerous company-specific examples where the problem was properly recognized and much was done to eradicate the hostile work environment.[171] While it will thus be unrealistic to completely rely on corporations to address the existing workplace abuses, it is certainly an important starting point in efforts to fix the problem.

Corporate intervention must begin with education of both corporate-level and lower-level workers of the specific types of abuses and harms occurring in a particular industry. This education should come through a variety of different training programs targeted at informing corporate officials and workers of the problem. There is often a simple lack of understanding that the workplace abuses are occurring at all, or where the abuse originates.[172] While basic EEOC anti-discrimination training and procedures can serve as a template, more must be done to educate companies about the extent to which physical and emotional abuse are occurring.[173]

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170. *See supra* Part II.A (addressing the corporate response to the #MeToo movement).

171. *See* Mark C. Perna, *Workplace Discrimination and Abuse Far More Common Than We Might Think*, FORBES (May 26, 2021, 8:42 AM), https://www.forbes.com/sites/markcperna/2021/05/26/workplace-discrimination-and-abuse-far-more-common-than-we-might-think/?sh=30e159cd46f7 [https://perma.cc/M5ZD-7UXX] ("Despite the bleak picture of negative employee experiences, it seems many companies are doing something right. Seventy-six percent of respondents indicated that that the company they currently work for is a safe place for all employees."); *cf.* Joseph Menn & Heather Somerville, *Uber Fires 20 Employees After Harassment Probe*, REUTERS (June 7, 2017, 1:39 AM), https://www.reuters.com/article/world/uk/uber-fires-20-employees-after-harassment-probe-idUSKBN18X2H4/ [https://perma.cc/YN9R-MCSC] ("Uber Technologies Inc said on Tuesday it fired 20 employees and was improving management training following an investigation by a law firm into sexual harassment allegations and other claims at the ride-hailing company.").

172. *See generally Emotional Abuse in the Workplace*, ADR TIMES (Feb. 5, 2024), https://www.adrtimes.com/emotional-abuse-in-the-workplace/ [https://perma.cc/G5NK-Z8YG] ("Many employees may not recognize [emotional abuse] or may not know how to report it."); Perna, *supra* note 171 ("This goes beyond sexual harassment and DEI initiatives and into the realm of general workplace behavior training. 'Such training should be developed and presented to ensure people are communicating with each other effectively,' says Courtright. 'For example, some people might genuinely not know that their comments can come across as hurtful or offensive.'").

173. *See generally Best Practices for Employers and Human Resources / EEO Professionals*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/initiatives/e-race/best-practices-employers-and-human-resourceseeo-professionals [https://perma.cc/M3JE-WXGJ] (discussing

Similarly, a reporting mechanism will be critical to effective corporate intervention. Just as the Supreme Court's decisions in *Faragher* and *Ellerth* helped pave the way for a policy-based approach to creating avenues for reporting harassment, a properly crafted and implemented complaint procedure can help companies to avoid liability through basic agency principles where they are acting to eradicate issues caused by specific workers or supervisors.[174] If the corporation is active in ferreting out and preventing these types of physical and emotional abuses from occurring, liability should be less likely to attach.[175] And at a minimum, punitive damages should not be available where good faith efforts have been shown by the company to prevent abusive employee conduct from occurring or continuing. In the anti-discrimination context, the Supreme Court has made it clear that employers may avail themselves of an affirmative defense to punitive damages where such good faith efforts are established.[176] Companies should similarly be rewarded for exerting their best efforts to prevent worker abuse.

Taken a step further, employers must be encouraged and incentivized to adopt such training and reporting mechanisms through both judicial and legislative measures. Just as businesses are required to comply with state health, safety, and discrimination laws,[177] compliance should be required for employers to educate their workforce on conduct that results in physical or emotional abuse, establish reporting policies where such conduct occurs, and outline basic responses to verified complaints. At its core, where we

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best practices for employers in the workplace).

174. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 803 (1998) (providing an incentive for employers to implement effective anti-harassment policies); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (same). *See generally* Seiner, *Sensible Just Cause*, *supra* note 19, at 1307-08 (addressing *Faragher* and *Ellerth* decisions).

175. *See generally Faragher*, 524 U.S. at 780; *Ellerth*, 524 U.S. at 765-66 (providing an affirmative defense in certain situations for employers that adopt anti-harassment policies that are effectively implemented).

176. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544 (1999) (describing how good faith efforts of employers can provide an affirmative defense to punitive damages in employment discrimination cases). *See generally* Seiner, *Workplace Power*, *supra* note 2, at 95-97 (addressing damages in employment cases).

177. *See, e.g.*, S.C. CODE ANN. § 41-15-80 (2024) (South Carolina's Occupational Health and Safety Laws); CAL. GOV'T CODE § 12940 (West 2023) (California law on prohibited discriminatory acts by employers).

see corporate abuse occurring, these actions must be construed as workplace health and safety violations and should be treated in a similar way under state law.

Even absent state law, however, employers should act on their own through fundamental corporate ethics principles to do what they can to prevent physical and emotional worker abuse.[178] Beyond basic morality, this proactive corporate approach often makes good economic sense. As we saw in the technology industry, many companies, caving to public and worker pressure, did away with mandatory arbitration clauses for sexual harassment, as well as nondisclosure agreements in the same setting.[179] Corporations must act more broadly to capture an even more widely sweeping worker mistreatment that we now see throughout the economy.

At the end of the day, corporate intervention will not be enough, just as it was not sufficient in responding to the problems identified at the onset of the #MeToo movement.[180] Nonetheless, corporate involvement is a highly effective tool, and should be the initial first response to addressing the employer misconduct and the abusive treatment of workers. Education, training, and reporting, combined with a swift and effective corporate response where problems are identified, is the best way to resolve the problem of workplace abuse and to endorse existing immutable workplace norms. Businesses are simply in the best position to identify misconduct that is occurring and understand how best to resolve it. Unfortunately, it is unlikely that companies can be relied upon to completely eradicate the

178. *See* Manuela Priesemuth, *Time's Up for Toxic Workplaces*, HARV. BUS. REV. (June 19, 2020), https://hbr.org/2020/06/times-up-for-toxic-workplaces [https://perma.cc/4Q3B-5FDX] ("We found that organizational norms were essential in guiding observers to address the wrongdoing. When employees felt that their organization overall valued and emphasized fairness ... observers were much more likely to help a victimized colleague.").

179. *See, e.g.*, Kurt Wagner, *Google's CEO Has No Problem Releasing Employees from Nondisclosure Agreements So Women Can Speak Out*, VOX (Jan. 19, 2018, 6:54 PM), https://www.vox.com/2018/1/19/16911564/google-sundar-pichai-susan-wojcicki-nda-sexual-harassment-kara-swisher# [https://perma.cc/Z6US-WUFN] (describing pressure on Google to change NDA policies). *See generally* Michelle L. Price, *Biden Signs Law Curbing Nondisclosure Agreements that Block Victims of Sexual Harassment from Speaking Out*, PBS NEWS (Dec. 7, 2022, 3:03 PM), https://www.pbs.org/newshour/politics/biden-signs-law-curbing-nondisclosure-agreements-that-block-victims-of-sexual-harassment-from-speaking-out [https://perma.cc/2VM9-XEJS] (describing the legislative response to NDAs); Seiner, *Workplace Power*, *supra* note 2, at 98-102 (discussing nondisclosure agreements).

180. *See supra* Part II.A (addressing the corporate response to the #MeToo movement).

problems that we see pervading the workplace. As addressed below, corporate intervention must be combined with the criminalization of certain conduct—and more localized solutions—to effectively address this problem.

2. Criminalizing Employment Laws & Dignity of Work Legislation

Corporate intervention is an important start. But beyond relying on businesses and the economy to resolve the issue, legislation is needed to intervene. In the past, we have largely (though not exclusively) relied upon civil law to address the discriminatory and improper treatment of workers. Employment discrimination and family leave laws carry with them civil law consequences for failure to comply.[181] The result of a failure to abide by these laws is thus often monetary in nature.[182] While these monetary damages can be quite consequential, they are often limited and difficult for the majority of workers to access, even where these workers have been clearly wronged.[183]

These civil laws are inadequate. We are now at an inflection point where the criminalization of certain abusive conduct must be contemplated. Establishing criminal laws to address widespread employer misconduct is a necessary, but not a novel, approach. Indeed, there have been numerous instances where the United States has adopted such an approach to address immediate harms and to enforce basic immutable workplace norms.[184] The Great Depression era provides the clearest example. During this period,

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181. *See* Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2614 (adopting family leave protections); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (prohibiting employment discrimination).

182. *See* 29 U.S.C. § 2617 (providing monetary relief for violations of FMLA); 42 U.S.C. § 2000e-5(g) (providing monetary damages for workplace discrimination based on protected status).

183. *See generally* Joseph Seiner, *Women Frequently Experience Sexual Harassment at Work, yet Few Claims Ever Reach a Courtroom*, THE CONVERSATION (Mar. 30, 2021, 7:38 AM), https://theconversation.com/women-frequently-experience-sexual-harassment-at-work-yet-few-claims-ever-reach-a-courtroom-157551 [https://perma.cc/47ZW-DQZG] (discussing the difficulty of prevailing in harassment cases).

184. *See, e.g.*, *Fair Labor Standards Act Advisor*, U.S. DEP'T LAB., https://webapps.dol.gov/elaws/whd/flsa/screen74.asp [https://perma.cc/967N-Y4JD].

enormous employer power, limited work, and widespread poverty led many parents to the decision that allowing their children to work full-time rather than to attend school and receive a basic education was in the best interests of the family.[185] This resulted in injury to society as a whole, as well as the substantial physical and emotional injury of a highly vulnerable population.[186] When President Franklin D. Roosevelt was re-elected with popular support for his New Deal reforms, legislation was passed that placed strict limits on child labor.[187] The penalty for violating this legislation became criminal in nature and could result in jail time for corporate offenders.[188]

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185. *See Agricultural Labour—The Secret Jobs Done by Children—A Look Into the Secretive World of Hiring Children as Child Labourers During the Great Depression*, HIST. ENGINE, https://web.archive.org/web/20200222100239/http://historyengine.richmond.edu/episodes/view/5667 [https://perma.cc/GMQ5-DPRK] ("Especially during the Great Depression, children were, 'willing to work long hours, as a way of cutting costs,' and compete with adult workers until the 1940s. Working children took on the role of adults and were a main source of income for their families." (citations omitted)); Katharine F. Lenroot, *Children of the Depression: A Study of 259 Families in Selected Areas of Five Cities*, 9 SOC. SERV. REV. 212, 220 (1935) ("In 22 families the chief wage-earner had either regained his old job or secured another paying as much, or, after a period of lower income, younger members of the family had become workers and their wages were augmenting the father's income."). *See generally* Jeffrey Mirel & David Angus, *Youth, Work, and Schooling in the Great Depression*, 5 J. EARLY ADOLESCENCE 489 (1985).

186. *See* Gertrude Folks Zimand, *Children Hurt at Work*, *in* 68 THE SURVEY 326, 326 (1932) ("The study ... presents a disheartening picture; children injured, often needlessly, permanently handicapped for work at the outset of their industrial careers; ignorant of their rights under the compensation law; sometimes at the mercy of unscrupulous employers; left without advice or counsel in planning for their future."); *Child Labor*, *supra* note 48 ("Children could be paid less and were less likely to organize into unions.... [and] were typically unable to attend school.").

187. *See generally 1936: FDR's Second Presidential Campaign*, ROOSEVELT HOUSE PUB. POL'Y INST. AT HUNTER COLL., http://www.roosevelthouse.hunter.cuny.edu/seehowtheyran/portfolios/1936-fdrs-second-presidential-campaign-the-new-deal/ [https://perma.cc/85RE-EMKP]; Ellen Terrell, *Fair Labor Standards Act Signed*, LIBR. OF CONG. (May 2024), https://guides.loc.gov/this-month-in-business-history/june/fair-labor-standards-act-signed [https://perma.cc/SUC4-5L2S] ("The [FLSA] was signed in June 1938.... [and] includes provisions on several labor related provisions including the creation the right [sic] to a minimum wage, overtime pay for working more than forty hours a week, and provisions related to child labor."); 29 U.S.C. § 212.

188. *See Fair Labor Standards Act Advisor*, *supra* note 184 ("Willful violations of the FLSA may result in criminal prosecution and the violator fined up to $10,000. A second conviction may result in imprisonment."). *See generally* Seiner, *Sensible Just Cause*, *supra* note 19, at 1302 (discussing the governmental response to the Great Depression); Seiner, *Workplace Power*, *supra* note 2, at 71-72 (same).

Similarly, employer abuse reached another height during the Enron and WorldCom scandals. During this era, workers saw their retirement savings and benefits disappear in the face of intentional corporate greed.[189] Efforts by employees inside the corporations to prevent this abuse were swiftly met with a retaliatory response.[190] Given societal outrage and concern at the time, federal law, in the form of the Sarbanes-Oxley Act, was passed to prevent these types of situations from reoccurring.[191] Pursuant to this federal statute, employers of publicly traded companies that retaliate against workers reporting financial fraud are subject to criminal prosecution.[192] Congress was clear that protecting retirement savings was important enough—in light of existing corporate abuses—to

189. *See generally* Stanford GSB Staff, *What Led to Enron, WorldCom and the Like?*, STAN. BUS. INSIGHTS (Oct. 15, 2003), https://www.gsb.stanford.edu/insights/what-led-enron-worldcom [https://perma.cc/95VU-88VY] (addressing corporate governance violations); Rick Bragg, *ENRON's Collapse: Workers; Workers Feel Pain of Layoffs and Added Sting of Betrayal*, N.Y. TIMES (Jan. 20, 2002), https://www.nytimes.com/2002/01/20/us/enron-s-collapse-workers-workers-feel-pain-layoffs-added-sting-betrayal.html [https://perma.cc/Q86B-SJLB].

190. *See* Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 363 (2003) (noting that after whistleblowing at the company, "Watkins remained an Enron Vice-President. But she was reassigned from her executive suite to a starkly furnished office 33 floors below and relegated to performing make-work tasks."); Michael Orey, *'Whistle-Blowers' to Still Face Retribution, Despite New Law*, WALL ST. J. (Oct. 1, 2002, 12:01 AM), https://www.wsj.com/articles/SB1033422837411305793 [https://perma.cc/X7NK-YT5S] (describing retaliatory acts in response to whistleblowing); *see also* Jonathan Krim, *Fast and Loose at WorldCom*, WASH. POST (Aug. 28, 2002, 8:00 PM), https://www.washingtonpost.com/archive/politics/2002/08/29/fast-and-loose-at-worldcom/1989a19e-6384-4e7d-a72c-d407f693e0cd/ [https://perma.cc/PT7G-828T]; Sherron Watkins, Comment Letter on Proposed Amendments to Exchange Act Rule 21F-6 and 21F-9(e) (Aug. 15, 2019), https://www.sec.gov/comments/s7-16-18/s71618-190087.htm [https://perma.cc/JFW2-T5BQ] ("It is a lonely road to become a whistleblower. Enron tried to fire me, I lost longtime friends, I've been ostracized and will never work in my chosen field again.").

191. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

192. *See* Gretchen Morgenson, *Whistle-Blowers Spur Companies to Change Their Ways*, N.Y. TIMES (Dec. 16, 2016), https://www.nytimes.com/2016/12/16/business/whistle-blowers-corporate.html [https://perma.cc/M2UL-43K5] ("Enacted in 2002, that law was a response to the stunning accounting frauds at Enron, WorldCom and other companies, and it gave new protections to employees providing evidence of fraud at a company by assigning criminal penalties for retaliation against them."); Rachel Beller, Note, *Whistleblower Protection Legislation of the East and West: Can it Really Reduce Corporate Fraud and Improve Corporate Governance? A Study of the Successes and Failures of Whistleblower Protection Legislation in the US and China*, 7 N.Y.U. J.L. & BUS. 873, 876 n.2 (2011) ("[Sarbanes-Oxley Act of 2002] also makes it a criminal offense to retaliate against whistleblowing employees, carrying penalties of up to ten years imprisonment and/or fines." (citing 18 U.S.C. § 1513(e) (2002))).

establish federal law criminalizing unlawful conduct in this area.[193] It is also quite common for other industrialized countries to criminalize discriminatory behavior, addressing the issue much more directly than it is done in the United States. For example, in France, employers found guilty of employment discrimination can face criminal penalties and jail time for their egregious behavior.[194]

a. Workplace Criminal Law Survey in the States

This proposal would also not be unique in the states. Indeed, all fifty states have criminalized certain discrimination and abuse in various forms; however, these laws tend to be very narrowly focused and address certain aspects of employer misbehavior that can arise. The laws are extraordinary in their breadth and include criminalization of retaliation for political expression in South Carolina.[195] In Arkansas, it is criminal behavior to ask an applicant or employee for information to gain access to their social media account, or to require a worker to change the privacy settings of such an existing account.[196] Montana criminalizes employer activity that allows excessive employment hours for workers in "any carnival, circus, derby show, walkathon, marathon dance, marathon race, marathon walk, or other endurance contest."[197] In Nebraska, employers can face a misdemeanor violation for failing to provide their employees with at least a thirty-minute lunch break during a full day of work.[198] Nevada has established misdemeanor penalties for certain businesses which fail to create separately marked restrooms for men and women.[199] New Hampshire makes it a criminal act for employers to "wilfully fail[ ] or grossly neglect[ ] to pay [pension and health] contributions or payments."[200] North Dakota criminalized employers requiring their individual workers

193. *See* Morgenson, *supra* note 192; Beller, *supra* note 192.

194. *See generally* Joseph Seiner, *Understanding the Unrest of France's Younger Workers: The Price of American Ambivalence*, 38 ARIZ. ST. L.J. 1053 (2006) (outlining employment laws in France).

195. S.C. CODE ANN. § 16-17-560 (2024).

196. ARK. CODE ANN. § 11-2-124 (2024).

197. MONT. CODE ANN. § 39-4-112 (2023).

198. NEB. REV. STAT. § 48-212 (2004).

199. NEV. REV. STAT. § 618.720 (2024).

200. N.H. REV. STAT. ANN. § 275:52a (2024).

to "work seven consecutive days in a business that sells merchandise at retail."[201] Numerous other examples abound of state laws providing criminal penalties for workplace misconduct.[202]

Given the breadth and volume of these state laws, it would not be unique to criminalize certain abusive employer conduct where it is properly identified and outlined. We are now at another point where criminalization of certain workplace conduct that results in extensive mistreatment must be fully considered. At its core, this type of legislation must address and define the dignity of work. As demonstrated above, too many employers are treating workers in an improper, oppressive, and frequently inhumane way. While discrimination laws help curb this conduct, it is simply not enough, and until more serious consequences are established, this employer conduct will likely continue. A civil approach to misconduct is insufficient and has not provided the deterrent effect initially intended by these laws.

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201. N.D. CENT. CODE § 34-06-05.1 (2024).

202. *See, e.g.*, IND. CODE § 22-4-34-3 (2024) ("It is a Class C misdemeanor for an employing unit or other person to recklessly encourage or induce any individual to waive or forego any accrued or potential benefit rights under this article [of unemployment compensation]."); CONN. GEN. STAT. § 31-48a (2024) ("No ... corporation ... shall recruit, procure, supply or refer any professional strikebreaker for employment in place of an employee involved in a strike or lockout in which such ... corporation is not directly interested."); OHIO REV. CODE ANN. § 4113.18 (LexisNexis 2024) ("No person shall compel, seek to compel, or attempt to coerce an employee of himself or another to purchase goods or supplies from a particular person, firm, or corporation."); COLO. REV. STAT. § 8-2-108 (2022) ("It is unlawful for any corporation ... to make, adopt, or enforce any rule, regulation, or policy forbidding or preventing any of his or her employees from engaging or participating in politics or from becoming a candidate for public office."); OR. REV. STAT. § 659.840 (2023) ("No person, or agent or representative of such person, shall require, as a condition for employment or continuation of employment, any person or employee to take a breathalyzer test."); S.D. CODIFIED LAWS § 60-12-9 (2024) ("[A]ny mercantile or manufacturing establishment, hotel, or restaurant where children are employed, suitable seats shall be maintained in the room where such employees work and such use thereof permitted as may be necessary for preservation of the health of such employees."); UTAH CODE ANN. § 34-33-1 (LexisNexis 2024) ("It shall be unlawful for any person, firm, corporation or partnership to charge any person a medical fee for the physical examination of any applicant for employment."); W. VA. CODE § 21-3-20 (2024) ("It is unlawful for any employer ... to operate any electronic surveillance device or system ... in areas designed for the health or personal comfort of the employees or for safeguarding of their possessions."); ARIZ. REV. STAT. ANN. § 23-202 (2024) ("It is unlawful for a person charged ... with the employment or continuance in employment of any workmen or laborers to demand or receive, either directly or indirectly ... a fee, commission or gratuity of any kind as the price or condition of the employment of the workman.").

b. A Criminal Law Proposal

A reasonable approach to criminalizing abusive workplace conduct would thus clearly define the inclusion of basic respect for an employee's work, making it unlawful for an employer to intrude upon these basic dignities. It would address the following factors, and could be simple and straightforward to adopt:

> All workers will maintain the statutory right to: 1) work in an environment free from discrimination and harassment on the basis of race, color, gender, sex, sexual orientation, transgender status, physical appearance, age, disability, family leave, genetic information, military status, national origin, political opinion, religion, or engagement in collective or political activity; 2) work in an emotionally and physically safe environment; and 3) maintain protections from retaliation for exercising any of these outlined protections.
>
> Any person, corporation, or entity violating any of these rights shall be subject to prosecution and any applicable criminal penalties [as outlined by the particular jurisdiction].

Certainly, the specific details of such provisions would need to be negotiated and outlined in greater detail, and thorough regulations would be necessary as part of any enforcement mechanism. However, the heart of this proposal would simply criminalize many of the same civil protections individuals currently enjoy under Title VII, the FMLA, and other state and federal laws.[203] The basic dignity of work demands freedom from discrimination and provides guarantees for a safe and healthy environment—those intruding upon these basic dignities would face criminal repercussions.

The specific criminal consequences of engaging in this behavior and violating these provisions could certainly be debated. But at the end of the day, the serious and real threat of jail time is necessary to discourage employer misconduct and to prevent mistreatment in this working relationship. Just as we saw with financial fraud and

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203. *See generally* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (providing monetary damages where violations occur); Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2617 (same).

child labor, other basic civil protections must finally be criminalized, or the workplace misconduct and employee abuse will only continue.[204]

Obviously, a criminal component to workplace legislation would carry with it a more rigorous burden of proof. Employees and prosecutors would be required to demonstrate that the illegal conduct was willful beyond a reasonable doubt, just like in any other criminal case.[205] Given the difficulty of proving even civil claims of workplace wrongs, this would likely provide only a limited number of convictions. Such convictions, however, with accompanying jail time would send an important message to employers on the risks of engaging in this conduct.

This Article cannot detail all the possible statutory provisions and regulatory enforcement associated with the proposed criminalization of employer workplace misconduct. Such a discussion is beyond the scope and purpose of this Article. Rather, what is critical from this discussion and analysis is that civil penalties have been widely ineffective in getting at the root of the problem. Indeed, in the employment discrimination field alone, the statutory caps for punitive damages have remained static for over three decades, making civil relief in this area far less effective than when the statute was originally enacted and amended to include this form of relief.[206] Only through the fear of criminal penalties will employers begin to change their conduct, thereby restoring the dignity to the American worker which has been disappearing in recent years.

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204. *See supra* Part III.A.2 (addressing the criminalization of unlawful child labor under FLSA).

205. *See generally Criminal Cases*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases [https://perma.cc/Q69N-ALA2] ("The defendant must be found guilty 'beyond a reasonable doubt,' which means the evidence must be so strong that there is no reasonable doubt that the defendant committed the crime.").

206. *See* 42 U.S.C. § 1981a(b)(3) (revealing no changes to the limitations on punitive damages since this provision was passed into law on November 21, 1991); Lynn Ridgeway Zehrt, *Twenty Years of Compromise: How the Caps on Damages in the Civil Rights Act of 1991 Codified Sex Discrimination*, 25 YALE J.L. & FEMINISM 249, 250-51 (2014) ("In the more than twenty years since Congress enacted the [CRA], the caps on compensatory and punitive damages remain.... Congress has not once increased the caps for inflation." (footnote omitted)); *CPI Inflation Calculator*, BUREAU LAB. STAT., https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=664%2C000&year1=202401&year2=199108 [https://perma.cc/J9MB-R6JC] (type in $679,000 in top field; then select "2024" for first year and "1991" for second year) (showing that $679,000 in 2024 has about the same buying power as $300,000 in 1991).

c. A Note About Retaliation

A strong anti-retaliation provision is further essential to the doctrine of immutable workplace norms. Too often, employers lash out where workers avail themselves of different civil protections. Indeed, retaliation is the single most frequently filed charge with the EEOC of any of the statutes that the agency enforces.[207] Without a strong anti-retaliation provision, the law would be meaningless, and employers could easily chill employees from acting. Employers must therefore face stiff criminal penalties when they act to punish those in the workplace that have availed themselves of the protections offered by this proposed legislation. Such penalties for retaliation should be at least as substantial as those imposed for violating other provisions of the statute.[208]

Legislation of these issues is primarily for state and local legislators but should also be contemplated at the federal level. This Article provides a clarion call for the need to address workplace abuse more fully on a criminal level. The details of implementing such a proposal are admittedly tricky and would not be without opposition. This does not make such a proposal any less important or appropriate, and society has acted in the past to criminalize workplace misconduct when necessary.[209]

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207. Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Releases Fiscal Year 2020 Enforcement and Litigation Data (Feb. 26, 2021), https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2020-enforcement-and-litigation-data [https://perma.cc/2CQC-PPZW] ("The FY 2020 data show that retaliation remained the most frequently cited claim in charges filed with the agency—accounting for a staggering 55.8 percent of all charges filed."); *Retaliation-Based Charges (Charges Filed with EEOC) FY 1997—FY 2022*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/data/retaliation-based-charges-filed-eeoc-fy-1997-fy-2022 [https://perma.cc/Z47F-LEKA].

208. *See* Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005) ("[T]he effectiveness and very legitimacy of discrimination law turns on people's ability to raise concerns about discrimination without fear of retaliation."). *See generally* Alex B. Long & Sandra F. Sperino, *Diminishing Retaliation Liability*, 88 N.Y.U. L. REV. ONLINE 7, 16 (2013), https://nyulawreview.org/online-features/diminishing-retaliation-liability/ [https://perma.cc/NXU6-FAJL].

209. *See* Immigration Act of 1907, Pub. L. No. 59-96, § 4, 34 Stat. 898 (1907) (criminalizing the encouragement or aid of unlawful immigration for the purpose of contract labor).

3. Judicial Intervention

While corporate action and criminalization of employment discrimination would go a long way toward resolving the work abuses that we currently see in this area, another possible, often overlooked way of curtailing corporate misconduct is through judicial intervention. Courts maintain enormous power in overseeing workplace disputes and should take a front-line role in addressing these issues when appropriate. While the equitable relief that state and federal courts retain is tremendous,[210] there are three specific areas where intervention could easily be adopted by the judiciary.

First, the contractual principles surrounding the doctrine of employment-at-will—which governs over one hundred million workers in this country[211]—must be more strictly enforced. More specifically, state courts often refuse to accept or apply the principles of employment-at-will in a way that recognizes a symmetrical agreement between the parties. Indeed, because employees can be fired at any time for any reason (or for no reason), courts often view employment-at-will as not establishing a typical contractual relationship.[212] A minority of state courts, however, do apply the

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210. *See* Owen W. Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. 1213, 1217-19 (2023) ("Over the past thirty years, the Supreme Court has handed down nearly two dozen opinions shaping access to equitable relief."); Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 273 (2018) ("[T]hrough statutes and judicial opinions, each state has developed its own, somewhat different body of equitable principles."); Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 541 (2016) ("The equitable remedies still used regularly in the United States are the injunction, specific performance, reformation, quiet title, and a cluster of restitutionary remedies."); John Harrison, *Federal Judicial Power and Federal Equity Without Federal Equity Powers*, 97 NOTRE DAME L. REV. 1911, 1911 (2022) ("[T]he federal courts have the power and obligation to give remedies pursuant to equitable principles.").

211. *See* Garth Coulson, *At-Will Employment*, BETTERTEAM (May 7, 2024), https://www.betterteam.com/at-will-employment [https://perma.cc/H9JN-HRSY] ("About 74% of U.S. workers are considered at-will employees."); *Economic News Release: Table A-1. Employment Status of Civilian Population by Sex and Age*, U.S. BUREAU LAB. STAT., https://www.bls.gov/news.release/empsit.t01.htm [https://perma.cc/77XQ-JVH3] (reporting that in June 2024 the civilian labor force was 168,009,000 and 74% of 168,009,000 is 124,326,660); *see, e.g.*, Seiner, *Workplace Power*, *supra* note 2, at 90 ("Perhaps the easiest way to implement a just cause requirement for discipline would be for the courts to read this reasonableness requirement into the employment contract at issue.").

212. *See, e.g.*, Gali Racabi, *At Will as Taking*, 133 YALE L.J. 2257, 2260 (2024) ("[A]t-will rules allow employers to terminate workers for good reason, bad reason, or no reason at all.").

basic principles of the covenant of good faith and fair dealing to this relationship.[213]

Given the widespread mistreatment of workers by employers, there can be little doubt that employees themselves view the arrangement as one that is contractual in nature, with terms with which they must comply.[214] The covenant of good faith and fair dealing has been applied in a limited manner by state courts when there is opportunistic timing on the part of employers attempting to take advantage of workers, or where workers are fired for simply doing their job.[215] This covenant could be extended further, however, to recognize the basic fairness in the working relationship that must exist on both sides. Just like any other contractual arrangement, principles of good faith and fair dealing must exist in the workplace space. An employer's offer to work does itself present a basic covenant to employees that should be identified as a promise to provide a discrimination-free environment that allows workers to "*accumulate a margin of security against the inevitable vicissitudes of life*."[216]

Second, the courts maintain broad discretion in adopting public policy exceptions to employment-at-will, and they must expand upon

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213. *See* Thomas J. Miles, *Common Law Exceptions to Employment at Will and U.S. Labor Markets*, 16 J.L. ECON. & ORG. 74, 78 (2000) ("Under the covenant of good faith exception, if an employer terminates a worker in order to prevent the employee from enjoying the benefits of his employment, the dismissal is considered wrongful."); Muhl, *supra* note 45, at 10 ("Recognized by only 11 States ... the exception for a covenant of good faith and fair dealing represents the most significant departure from the traditional employment-at-will doctrine."). *See generally* WILLBORN ET AL., *supra* note 32 (discussing different court approaches to the doctrine of good faith and fair dealing in the workplace).

214. *See* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110 (1997) ("[R]espondents overwhelmingly misunderstand the background legal rules governing the employment relationship. More specifically, they consistently *overestimate* the degree of job protection afforded by law, believing that employees have far greater rights not to be fired without good cause than they in fact have."); David H. Autor, John J. Donohue III & Stewart J. Schwab, *The Costs of Wrongful-Discharge Laws*, 88 REV. ECON. & STAT. 211, 227 (2006) ("Alternatively, workers might not perceive a benefit from such judicial decisions because, as considerable evidence suggests, they tend to believe that they already are protected against unjust dismissal, even when they clearly are not.").

215. *See generally* Miles, *supra* note 213; Muhl, *supra* note 45; WILLBORN ET AL., *supra* note 32 (addressing approaches to the covenant of good faith and fair dealing in the workplace).

216. *Fireside Chat 8: On Farmers and Laborers*, *supra* note 1, at 22:32-22:37 (emphasis added).

these exceptions.[217] Existing exceptions typically take the form of workers who refuse to engage in illegal acts, those that are fulfilling a public obligation, and those that are engaging in legitimate whistleblowing activities.[218] This basic framework is applied in varying ways by the state courts.[219] Given the inflection point we find ourselves at with respect to worker abuse, there must be a deeper recognition of the need to apply public policy exceptions which benefit society by preventing further worker oppression. There are numerous examples of the courts stepping in to adopt public policy exceptions,[220] and the current workplace environment presents a setting where such public policy intervention is again necessary. Public policy intervention can occur at a state level, where the courts have already exercised their muscle in establishing

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217. *See* Richard J. Kohlman, *Wrongful Discharge of At-Will Employee*, *in* 31 AM. JUR. TRIALS 317 § 6, Westlaw (database updated October 2024) ("The ground upon which most courts are willing to impose a restriction on the employer's right to discharge an at-will employee without cause, however, is public policy considerations." (footnote omitted)); Miles, *supra* note 213, at 78 ("Under the public policy exception, dismissal is an inappropriate employer response to an employee's refusal to violate a well-established public policy. By banning such retaliatory discharges, this exception addresses an employer's motivation or cause for dismissal.").

218. *See* Miles, *supra* note 213, at 78 ("These sources of public policy may be applied to four circumstances of employer reprisal: an employee's refusal to commit an illegal act ... missing work to perform a legal duty ... an employee's exercise of a legal right ... and an employee's 'blowing the whistle,' or disclosing wrongdoing by the employer or fellow employees."). *See generally* WILLBORN ET AL., *supra* note 32 (discussing four different public policy exception categories).

219. *See* Miles, *supra* note 213, at 78 ("The definition of what is public policy may be narrowly interpreted as statutes or may be broadly interpreted to include regulations, administrative rules, judicial decisions, and even professional codes of ethics."); Michael A. Katz, *Still Crazy After All These Years: The Employment At-Will Doctrine and Public Policy Exceptions*, 10 ATL. L.J. 1, 1 (2007) ("Over the years, various [public policy] exceptions to the doctrine have been established by courts and legislatures. However, these exceptions vary greatly from state to state."). *See generally* WILLBORN ET AL., *supra* note 32 (addressing public policy exceptions and different state approaches).

220. *See, e.g.*, Gould v. Md. Sound Indus., Inc., 37 Cal. Rptr. 2d 718, 724 (Cal. Ct. App. 1995) (finding that firing an employee to avoid paying commission and vacation pay is a violation of public policy); Apicella v. Driver Logistic Servs., Inc., No. CV010450101S, 2002 WL 31125606, at *5 (Conn. Super. Ct. Aug. 19, 2002) (finding that firing an employee by reason of a false drug test violates public policy); Washington v. Guest Servs., Inc., 718 A.2d 1071, 1080 (D.C. 1998) (finding that firing an employee for attempting to persuade employers to follow health and food regulation violates public policy). *See generally* 19 WILLISTON ON CONTRACTS § 54:41 (4th ed.), Westlaw (database updated May 2024) ("Most jurisdictions recognize, at least under certain circumstances, a cause of action for termination of an at-will employee in violation of public policy.").

public policy exceptions when appropriate.[221] Broadening this exception could be easily accomplished, and the courts would be acting well within their authority to do so. And if specific legislatures disagreed with this approach, they would be free to step in to limit the courts' actions in this area.

Third, state courts are often reluctant to recognize the doctrine of wrongful discharge as a viable cause of action.[222] The courts typically view this approach as a way of circumventing employment-at-will.[223] Again, however, state courts maintain wide discretion in determining how wrongful discharge law is applied, and the circumstances in which it arises.[224] Given the numerous egregious circumstances under which employees have been treated and terminated in recent years, as well as the broadening awareness of hostile work environments and sexual harassment, it is now appropriate to revisit the meaning of what is "wrongful." The courts can act quickly and consistently through existing law in this area and should use their authority to push back on employers that are acting in an oppressive and wrongful manner. Once again, legislatures could intervene where necessary, and the courts have largely

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221. *See, e.g.*, *Gould*, 31 Cal. Rptr. 2d at 724; *Apicella*, 2002 WL 31125606, at *5; *Washington*, 718 A.2d at 1080; 19 WILLISTON ON CONTRACTS, *supra* note 220, § 54:41. *See generally* Kevin P. Harrison, *You Can't Fire Me! State Common Law Exceptions to Employment-at-Will*, 13 WAKE FOREST J. BUS. & INTELL. PROP. L. 229, 237 tbl.3.1 (2013) (depicting the number of states recognizing tort and contract damages under the public policy exception).

222. *See* Kohlman, *supra* note 217, § 3 ("The first and most important consideration in a wrongful discharge case is the acceptance of the cause of action in the forum jurisdiction or by the state whose law the forum will apply."); Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1818-19 (1980) ("Courts have generally been reluctant to interfere with the parties' 'freedom to contract'; if an employee fails to bargain for an express contractual protection against wrongful discharge, the court will not intervene."); Estlund, *supra* note 45, at 299-300 ("[W]rongful discharge claims of all kinds are notoriously difficult to win, even if they are much-feared by employers."). *See generally* WILLBORN ET AL., *supra* note 32 (discussing state court approaches to wrongful discharge claims).

223. *See* Kohlman, *supra* note 217, § 3; Estlund, *supra* note 45, at 299-300. *See generally* WILLBORN ET AL., *supra* note 32 (discussing state court wrongful discharge claims).

224. *See, e.g.*, Sandra S. Park, *Working Towards Freedom from Abuse: Recognizing a "Public Policy" Exception to Employment-at-Will for Domestic Violence Victims*, 59 N.Y.U. ANN. SURV. AM. L. 121, 138 (2003) ("As the discussion above suggests, courts have great discretion in deciding whether an asserted public policy is sufficient to justify a wrongful discharge claim.").

been reluctant to limit employer abuse in this area.[225] If state courts were to intervene more aggressively, it would quickly send a signal to all corporations that they must treat their workers in a manner that is fair, consistent, and proper. The courts need not reach too far in broadening the scope of this cause of action, though swift decisions in this area would send an effective message that wrongful discharge will not be tolerated.

With respect to all of these proposed areas of judicial intervention—strengthening the covenant of good faith and fair dealing, broadening public policy exceptions, and further adopting and enhancing wrongful discharge claims—the courts are well within their discretion to handle individual worker abuses when they arise.[226] In many instances, this is simply a signaling function, and courts could, in very limited ways, cause employers to intervene on their own to prevent potential liability. With respect to all of these areas, the courts also maintain broad injunctive authority, and such equitable intervention would be particularly effective in crafting an effective response to abuses and worker oppression.[227]

In the employment discrimination context, the courts widely use equitable relief in various ways. Employer training, posting of worker rights, and review of discriminatory practices are all forms

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225. *See* Autor et al., *supra* note 214, at 213 ("[C]ourts typically limit public policy cases to clear violations of express legislative commands rather than violations of a vaguer sense of public obligation. Accordingly, some legal scholars have argued that the public policy doctrine is of minor legal and economic significance.... [L]ike the public policy exception, the good-faith doctrine has found relatively narrow application."); *see, e.g.*, Hunter v. Kaufman Enters., Inc., No. CV 09-5540, 2011 WL 3555809, at *6 (E.D.N.Y. Aug. 8, 2011) ("American courts have proved [wary] of creating common-law exceptions to the rule and reluctant to expand any exceptions once fashioned." (quoting Horn v. New York Times, 790 N.E.2d 753, 755 (N.Y. 2003))).

226. *See* Kohlman, *supra* note 217, § 3; Note, *supra* note 222, at 1838 ("Courts possess the legitimate heritage of common law innovation that develops new principles to accommodate changing values, and are therefore an appropriate forum for the creation of job security rights. Because courts have considerable experience with similar employment relations problems, they possess sufficient expertise to resolve wrongful discharge disputes. Thus, courts need not await legislative initiative to effect doctrinal change in the employment at will area." (footnotes omitted)).

227. *See, e.g.*, Bouman v. Block, 940 F.2d 1211, 1233 (9th Cir. 1991) ("District courts have broad equitable powers to fashion relief for violations of Title VII that will eliminate the effects of past discrimination. A court may order injunctive relief where there are not sufficient assurances that the employer is unlikely to repeat its discriminatory actions." (citation omitted)).

of equitable relief that the courts have adopted under Title VII of the Civil Rights Act of 1964.[228] Indeed, when enforcing the statute, the EEOC often seeks injunctive relief to send a broader message on correcting specific wrongs and protecting against further worker discrimination.[229] A similar approach could be used here by the state courts when considering employer wrongs and lack of basic fair dealing. Crafting specific equitable remedies to prevent further abuses at a particular company (and in society generally) would help to better tackle the problem of employer misconduct more directly. While monetary damages are often important and appropriate, establishing specific injunctive relief and reform is likely even more desirable in this area. Employer training, the adoption of equitable policies, and employer oversight will all help workers in this area.[230] Nonetheless, when available, monetary damages should certainly be assessed to further help compensate workplace victims and deter future corporate abuse.

Just like the importance of corporate intervention and criminal law in helping to address worker mistreatment in our society, the courts play an equally important role in identifying and remedying workplace abuses where they occur. As part of a recognition of the basic immutable workplace norms identified in this Article, the courts should take a more active role in ferreting out employer abuse. Strictly requiring good faith on the part of employers, broadening the scope of public policy exceptions, and rigidly

228. *See* 42 U.S.C. § 2000e-5(g)(1) (listing "reinstatement" and "other equitable relief as the court deems appropriate" as possible remedies); Harry T. Edwards & Barry L. Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1, 8 (1975) ("[C]ourts have ordered employers to disseminate job information specifically aimed at the discriminated-against group, keep detailed records to ensure nondiscriminatory hiring, hire and provide back pay for individuals who have been the victims of discrimination, provide pre-test tutoring for job applicants, expand apprenticeship and training programs, and pay punitive damages." (footnotes omitted)).

229. *See generally* Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 479, 482-83 (1992) ("Enforcement of employment rights under Title VII combines procedures through the Equal Employment Opportunity Commission (EEOC) and private litigation.").

230. *See, e.g.*, Halczenko v. Ascension Health, Inc., 37 F.4th 1321, 1325 (7th Cir. 2022) ("Title VII itself provides courts with substantial equitable authority to craft remedial measures, including ordering training programs."); Patzer v. Bd. of Regents of Univ. of Wis. Sys., 763 F.2d 851, 854 n.2 (7th Cir. 1985) ("Title VII authorizes any equitable remedies the court deems appropriate."). *See generally* Seiner, *Workplace Power*, *supra* note 2, at 95-97 (addressing damages in employment cases).

enforcing wrongful discharge claims would help rebalance the disparity that we see in the workplace.

4. "Other Considerations"

Beyond corporate intervention, criminalizing employer abuse, and judicial intervention, there are other approaches to restoring worker dignity that should be considered. Indeed, the solutions offered by this Article are not meant to be exhaustive in nature. Rather, they identify the three primary ways of restoring worker dignity currently offered by the existing legal landscape. Other possible considerations exist. For example, more rigorous local community-based solutions are worth exploring.[231] Where worker victimization impacts small communities and specific geographical pockets of workers, local leaders could step in to call attention to the abuses. If this were performed as part of a coordinated effort in localized jurisdictions across the country, corporations and employer groups would quickly take notice and corrective action would likely follow.

Beyond calling employers out for misconduct, worker groups could offer to provide constructive guidance to employers. As noted, unionization is at an all-time low, and aggressive union avoidance campaigns will likely prevent any substantive growth in this area.[232] However, employers would likely be open to more informal employee groups that could raise issues when they occur, helping employers to avoid litigation and other legal headaches, to the extent such groups could be established within the confines of existing state and federal law.[233]

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231. *See, e.g.*, TERRI GERSTEIN & LIJIA GONG, ECON. POL'Y INST., THE ROLE OF LOCAL GOVERNMENT IN PROTECTING WORKERS' RIGHTS 1, https://files.epi.org/uploads/251489.pdf [https://perma.cc/MR65-XV6B] ("[W]ays in which localities have taken action on behalf of working people in recent years include ... establishing ongoing worker boards or councils[;] ... actively enforcing local worker protection laws[;] setting job quality standards for contractors with the municipal government[;] establishing legal consequences for labor violations among applicants for municipal permits or licenses[;] ... [and] championing worker issues through public leadership.").

232. *See supra* Part I.A (discussing the current status of labor law in the United States).

233. *See, e.g.*, Seiner, *Workplace Power*, *supra* note 2, at 90-95 (setting forth one possible "moderated union" approach and the benefits of such approach). *See generally* Jeffrey M. Hirsch & Joseph A. Seiner, *A Modern Union for the Modern Economy*, 86 FORDHAM L. REV. 1727 (2018) (outlining alt/quasi unions in the workplace); Douglas MacMillan, *Uber Agrees to Work With a Guild for Its Drivers in New York City*, WALL ST. J. (May 10, 2016, 4:54 PM),

Finally, providing additional resources to enforcing the laws already on the books would be extremely helpful in correcting this problem. Existing child labor, wage/hour, and safety laws are difficult to enforce across the tens of millions of workers in this country.[234] In the employment discrimination context, it is well known that few cases ever find their way to trial.[235] Re-committing resources toward enforcing all workplace laws would help remedy the problem. Where (as now) the potential punishment for violating workplace protections is civil in nature, and where these laws are only occasionally identified and enforced, employers are more likely to act inappropriately. Greater resources could be directed toward preventing this misconduct.

IV. IMPLICATIONS OF PROPOSAL

Enhanced corporate involvement, criminalization of employer misconduct, and judicial intervention will do much in making strides to resolve the existing worker mistreatment in the workplace. These three different components of the proposal will help to

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https://www.wsj.com/articles/uber-agrees-to-work-with-a-guild-for-its-drivers-in-new-york-city-1462913669 [https://perma.cc/3954-7Q59]; Noam Scheiber, *Uber Has a Union of Sorts, but Faces Doubts on Its Autonomy*, N.Y. TIMES (May 12, 2017), https://www.nytimes.com/2017/05/12/business/economy/uber-drivers-union.html [https://perma.cc/DM4Y-8UD3].

234. *See* Charlotte Garden, Feller Lecture, *Enforcement-Proofing Work Law*, 44 BERKELEY J. EMP. & LAB. L. 191, 198 (2022) (providing "a substantial list of barriers to effective enforcement of work law"); Marianne Levine, *Behind the Minimum Wage Fight, a Sweeping Failure to Enforce the Law*, POLITICO (Feb. 18, 2018, 10:40 AM), https://www. politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644 [https://perma.cc/JU5Q-LEK8] ("Wage laws are poorly enforced, with workers often unable to recover back pay even after the government rules in their favor."); Rebecca Rainey & Chris Marr, *State Child Labor Rollbacks Pose Enforcement Nightmare for DOL*, BLOOMBERG LAW (June 16, 2023, 5:25 AM), https://news.bloomberglaw.com/daily-labor-report/dol-hamstrung-in-response-to-state-child-labor-law-rollbacks [https://perma.cc/E4FA-YNDT] ("The federal government says it's struggling to keep up with an uptick in child labor violations already because of funding constraints and attrition among investigative staff.").

235. *See generally* Eric Bachman, *Summary Judgment Explained: The Critical Juncture in Employment Law Cases*, FORBES (Dec. 20, 2021, 9:48 AM), https://www.forbes.com/sites/ericbachman/2021/12/20/summary-judgment-explained-the-critical-juncture-in-employment-law-cases/ [https://perma.cc/29ZB-MBWL] ("[I]n civil rights cases (of which approximately half are employment discrimination) 'the number of trials has declined dramatically: from 19.7% of civil rights dispositions in 1970 to 3.8% in 2000.'" (quoting Vivian Berger, Michael O. Finkelstein & Kenneth Cheung, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 49 (2005))).

restore basic immutable workplace norms—the violation of which must no longer be tolerated.

The proposal identified here has numerous implications.[236] Perhaps the most significant benefit of the proposal is that it would help to restore basic worker dignity. This is a substantial benefit, as workers have seen their rights eroded in recent years. From widespread reports of harassment, egregious abuses during and after the pandemic, to extensive child labor and wage violations, employers have abused the trust given to them by improperly governing the employment relationship.[237] As collective activity has waned over the years, a different approach is needed for workers to establish essential protections. This proposal seeks to restore these basic worker dignities.

Additionally, the proposal offered here allows for (and contemplates) versatility and adaptability in its application. It is not intended as a rigid approach, and specific industries and jurisdictions would need to examine the problem differently. In some instances, such as unlawful child labor and health care violations, a greater reliance on criminalizing misconduct would be necessary. In other areas, the corporations themselves could remedy the problem where it is properly identified. And in yet other instances, the courts could simply reset the playing field. Through this combined approach to the problem, the versatility of the proposal would allow more individualized solutions where misconduct is identified. No two workplaces are identical, and any successful solution must be adapted to the specific working environment. As the nature of work is constantly evolving, the flexibility of the proposal also allows it to adjust to changing circumstances. From the emerging issues related to the pandemic, to the nature of platform-based and virtual work, a constantly evolving workplace requires a flexible solution to the problem of worker abuse.[238]

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236. *See generally*, *e.g.*, Seiner, *Sensible Just Cause*, *supra* note 19, at 1340-46 (discussing implications of suggested federal legislation); Seiner, *Workplace Power*, *supra* note 2, at 108-11 (discussing implications of proposed solution to employer power abuses, including flexibility, simplicity, and tailor-ability).

237. *See supra* Part II (discussing instances of employee harassment and abuse by employers).

238. *See* JOSEPH A. SEINER, THE VIRTUAL WORKPLACE: PUBLIC HEALTH, EFFICIENCY, AND OPPORTUNITY 1-4 (2021) (identifying the role of virtual work in employment and examining

Moreover, the proposal offered here helps identify the problem itself. This is an important aspect of the proposed doctrine, as it helps connect the dots to present an accurate picture of the abuses that are occurring across the country. While each of the violations described in this Article are themselves alarming, only by examining them collectively can we properly grasp the extent of the problem. By taking a broader view of the problem, we are also better situated to help fix the issue. The doctrine of immutable workplace norms thus grapples with identifying the true extent of worker abuse in this country, threading together much of the important research that has already taken place in this field.

Finally, the proposal offered here is not complicated to apply. Given the inherent difficulties and bureaucracies of any workplace, an overly complicated solution to this important problem would face insurmountable hurdles. This proposal offers an appropriate corporate response to the problem and a realistic legislative model for criminalizing abuses, and it identifies direct ways the judiciary can intervene to resolve the problem. By establishing basic guidelines in this manner, the doctrine of immutable workplace norms could be quickly and easily adopted to address the growing and important problem of eroding worker dignity. A basic approach to this problem is the most effective, given the complex nature of work itself.

There are obvious criticisms of the doctrine suggested here.[239] Most notably, some would argue that the proposal could lead to enhanced criminal workplace litigation in the courts, overwhelming our already over-burdened courts[240] with a backlog of criminal

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a pandemic and platform-based economy).

239. *See generally*, *e.g.*, Seiner, *Sensible Just Cause*, *supra* note 19, at 1340-46 (discussing possible critiques of suggested federal legislation); Seiner, *Workplace Power*, *supra* note 2, at 109-11 (discussing potential criticisms of proposed solution to employer power abuses and concerns over additional litigation).

240. *See* Sandra F. Sperino & Suja A. Thomas, *Fakers and Floodgates*, 10 STAN. J. C.R. & C.L. 223, 227 (2014) ("[T]he Court stated that it chose the more employer-friendly causation standard because to do otherwise would be to 'contribute to the filing of frivolous claims, which would siphon resources from efforts by employer[s], administrative agencies, and courts to combat workplace harassment.' Employees who become aware of a pending negative employment action may be tempted to raise unfounded discrimination claims to create a false retaliation claim." (alteration in original) (footnote omitted) (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 340 (2013))); *cf.* Amy Corral, Stephen Stock & Jose Sanchez, *Growing Backlog of Court Cases Delays Justice for Crime Victims and the Accused*, CBS NEWS

employment cases. Such a critique is valid but likely not realistic. As demonstrated throughout this Article, even civil claims are difficult to establish in workplace cases.[241] Successful criminal law claims—with their higher burden of proof—would therefore be even less frequent. Nonetheless, the deterrent effect of criminalizing these types of abuses of workers would be substantial. In the same way that the Sarbanes-Oxley Act helped strongly deter workplace financial fraud,[242] the doctrine argued for here would send a strong signal that employee abuse is no longer acceptable in our society. If additional resources are needed to help balance out these additional criminal claims, it would be an important and well-placed investment in our workers.

An additional concern might be that the doctrine of immutable workplace norms is simply unrealistic, and it would be unlikely that corporations, the courts, or the legislature would intervene to help resolve these problems. Where the extent of the problem is properly identified, however, the need for reform is certain. And where other workplace issues have arisen in recent years, corporations and the legislature have responded in important ways.[243] It is therefore not unrealistic to expect similar reform where the problem of eroding worker dignity is properly framed and communicated to these groups.

No solution to the problem of eroding worker dignity is perfect. But the many headlines that we see of employee abuse can no longer be permitted to continue. Only through corporate intervention, criminalizing specific abuses, and judicial intervention can we begin to chip away at the problem. The doctrine proposed here is only a starting point, but we must begin the discussion of worker dignity if there is to be any hope of a realistic and timely solution.

(Dec. 20, 2022, 9:31 AM), https://www.cbsnews.com/news/growing-backlog-of-court-cases-delays-justice-for-crime-victims-and-the-accused/ [https://perma.cc/MJP3-DRWY] ("The backlog has resulted in delayed justice for crime victims and their families and threatens to deny the constitutional right to a speedy trial.").

241. *See supra* Parts II-IV (outlining the difficulty of pursuing civil employment claims).

242. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

243. *See, e.g.*, Wagner, *supra* note 179 (describing corporate changes to NDA policies). *See generally* Price, *supra* note 179 (describing the legislative response to non-disclosure agreements).

Others have previously examined some of the problems discussed here in varying ways. Perhaps most notably, Professor David Yamada explored the culture of bullying in the workplace, and has offered substantial analyses on reform of this issue.[244] Bullying captures much of the widespread nature of the lack of respect for workers, as employees are often ridiculed and undermined without any true recourse.[245] Professor Yamada's identification of this issue provides an excellent example of how beginning a dialogue on workplace abuse can help resolve the problem and the importance of acknowledging basic respect in the workplace.[246] The problem that we see in today's environment is part bullying in nature, but it is a more widespread and sweeping issue.[247] This Article takes the logical next step of framing the problem more broadly, examining the prevalent criminal and civil violations and proposing necessary reform to reinstate respect and dignity for the everyday worker.

Similarly, in their exceptional piece, *Workplace Violence and Harassment of Low-Wage Workers*, the authors, who have represented many low-wage workers, examine the abuses and difficulties faced by this subset of the workforce.[248] They note that "[l]ow-wage workers often cannot complain about workplace violations due to geography, culture and language, personal finances, and slow or burdensome administrative and court remedies."[249] Their paper takes a wide-ranging approach to offering a possible solution, identifying as a strategy the broad-based involvement of "nonprofits, government agencies, private attorneys, and other actors."[250] In a similar way, the doctrine of immutable workplace norms offered here provides a multi-faceted approach to helping resolve an even broader problem, the erosion of workplace dignity. The problem we see in today's workforce is more comprehensive and faces workers

244. *See* David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 480-82 (2000).

245. *Id.* at 484-85 ("[T]he emerging literature demonstrates that workplace bullying is a significant problem and that abusive supervision is particularly common.").

246. *Cf. id.* at 485 ("[W]orkplace bullying is a pervasive and disturbing phenomenon with significant costs to both its targets and to the rest of our society.").

247. *Id.*

248. *See generally* Elizabeth Kristen, Blanca Banuelos & Daniela Urban, *Workplace Violence and Harassment of Low-Wage Workers*, 36 BERKELEY J. EMP. & LAB. L. 169 (2015).

249. *Id.* at 171.

250. *Id.*

at all income levels, even executives at high level technology companies.[251] Even greater flexibility is needed to take on this broader issue, and the proposal set forth here seeks to provide just such an approach.

Finally, in his article *"Discriminalization": Sexuality, Human Rights, and the Carceral Turn in Antidiscrimination Law*, Professor Ryan Thoreson looks at various international approaches to criminalizing human rights and discrimination violations.[252] Professor Thoreson concludes that a "proportionality framework is best suited to account for the various rights at stake," and he "urg[es] human rights advocates to recognize the limitations of carceral responses and to think creatively about holistic approaches to preventing and addressing stigmatic harm."[253] Professor Thoreson's well-crafted argument is important for taking a global approach to these issues and to acknowledging that this type of violation of basic individual dignities extends beyond our borders and beyond the workplace itself. It can be extremely helpful to look to the various approaches used by other countries, and this Article tackles the specific problem of declining worker dignity and the best way to re-instate that dignity under our existing laws.

Many other scholars have looked at the problem of widespread workplace erosions.[254] The doctrine offered here has many synergies with this prior research and takes head on the emerging problems that we see for today's workers. The erosion of workplace dignity

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251. *See, e.g.*, Kristin Houser, *The Tech Industry's Gender Problem Isn't Just Hurting Women*, FUTURISM (Feb. 1, 2018, 12:09 PM), https://futurism.com/tech-industrys-gender-problem-hurting-women [https://perma.cc/FT54-QBR9].

252. Ryan Thoreson, *"Discrimination": Sexuality, Human Rights, and the Carceral Turn in Antidiscrimination Law*, 110 CALIF. L. REV. 431, 432-33 (2022).

253. *Id.* at 431.

254. *See, e.g.*, Sergio Gamonal C. & César F. Rosado Marzán, *Protecting Workers as a Matter Principle: A Latin American View of U.S. Work Law*, 13 WASH. U. GLOB. STUD. L. REV. 605, 610 n.12 (2014); ELLEN DANNIN, TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS 58-59 (2006); Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 102 (2010); Michael J. Zimmer, Wal-Mart v. Dukes*: Taking the Protection Out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409, 411-12 (2012); *cf.* Benjamin Thomas & Kristen Lucas, *Development and Validation of the Workplace Dignity Scale*, 44 GRP. & ORG. MGMT. 72, 73 (2019) ("In recent years, organizational behavior and management scholars have been critically attuned to quality of worklife issues—especially those phenomena that impede human flourishing.").

affects all geographies and industries in this country. Only through a well-balanced mix of corporate reform, criminalization of employer misconduct, and judicial intervention can we, as a society, begin to address our failure to provide the workplace with the basic dignity it deserves.

CONCLUSION

As Maya Angelou once wrote, "[i]f we lose love and self-respect for each other, this is how we finally die."[255] As demonstrated throughout this Article, there is a fundamental lack of respect for workers across the country that has been bolstered by historically low levels of union activity, leaving workers particularly vulnerable. Companies have abused their position of trust, resulting in the erosion of workplace dignity. This evisceration of the dignity of work has manifested itself in workplaces across geographies and industries. The widespread physical and emotional abuse of workers must be quickly addressed. Through a much-needed dialogue on workplace reform, this Article begins a discussion on how to restore worker dignity. We find ourselves at a point where the corporations themselves, the legislature, and the judiciary must intervene to restore the respect of the everyday worker.

255. POCKET MAYA ANGELOU WISDOM: INSPIRATIONAL QUOTES AND WISE WORDS FROM A LEGENDARY ICON 26 (2019).