

April 2014

TJLP (2009) Volume 6 Number 1

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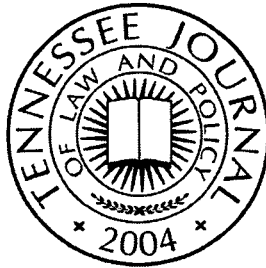
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(2014) "TJLP (2009) Volume 6 Number 1," *Tennessee Journal of Law and Policy*. Vol. 6 : Iss. 1 , Article 1.

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6:1 Tennessee Journal of Law and Policy 1



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ISSN 1940-4131

<http://www.law.utk.edu/publications/tjlp.shtml>

ESSAYS

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TRANSCRIPT

IN DEFENSE OF LIBERTY

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Tennessee Journal of Law and Policy

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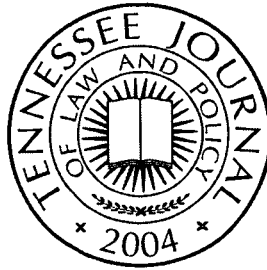
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ESSAY

**MORE THAN A SECOND CHANCE:
AN ALTERNATIVE EMPLOYMENT APPROACH TO
REDUCE RECIDIVISM AMONG CRIMINAL EX-
OFFENDERS**

*Rose M. Burt*¹

I. Introduction

Since the mid-1970s, the United States has engaged in a “race to incarcerate” that has resulted in a prison population expanded to a level previously unknown in any democratic society.² This rise in imprisonment came about primarily because of “tough on crime” policies that were intended to enhance public safety and respond to the demands of an increasingly conservative population.³ This record three-decade increase in imprisonment has resulted in an average annual prison population rate of more than 2,000,000 people behind bars in United States jails and prisons, and that figure increases exponentially each year.⁴ During this thirty-year period, the number of prison inmates has

¹ J.D., Florida Coastal School of Law; Assistant Public Defender, Division 1, First Judicial Circuit, Milton, Florida. Many thanks to Susan Harthill for her guidance and encouragement.

² Marc Mauer, Thinking about Prison and its Impact in the Twenty-First Century, 2 OHIO ST. J. CRIM. L. 607 (2005).

³ *Id.* Other factors analysts say are relative to the origin of this mass incarceration include political leaders’ electoral concerns, a means of social control over the population of African-Americans after gaining freedoms mid-twentieth century, and a move to control a serious social problem in a post-modern state. *Id.*

⁴ *Id.*

increased over 600%.⁵ In 2002, over 7,000,000 people were incarcerated in federal, state, or local jails or prisons nationwide.⁶ One in every thirty-seven adults, nearly six million people, has spent time in prison.⁷

The problems of mass incarceration are prevalent across the social spectrum but are especially acute in certain segments of society. In 2000, the incarceration rate for young African-American men was nearly 10%, compared to just over 1% for Caucasian men in the same age group.⁸ Young African-American high school dropouts have a 60% chance of being imprisoned during their lifetimes.⁹ When asked what he would do about inner-city youth and violence, a 2008 presidential candidate remarked: “We cannot build enough prisons to solve this problem. And the idea that we can keep incarcerating and keep incarcerating—pretty soon we’re not going to have a young African-American male population in America. They’re all going to be in prison or dead. One of the two.”¹⁰ His comments undeniably reflect the broader social imperative to take steps to stop re-incarcerating individuals, regardless of their race, and aid in the successful reentry efforts of those recently released from prison.

⁵ Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617, 618 (2005). Imprisonment has changed from a punishment primarily for the worst offenders to one covering a greater range of crimes for a much larger segment of the population. *Id.*

⁶ Recidivism Reduction and Second Chance Act of 2007, H.R. 1593, 110th Cong. § 3(1) (2007).

⁷ Christopher Stafford, Note, *Finding Work: How to Approach the Intersection of Prisoner Reentry, Employment, and Recidivism*, 13 GEO. J. ON POVERTY L. & POL’Y 261 (2006).

⁸ Pager, *supra* note 5, at 619.

⁹ *Id.* at 619-20.

¹⁰ Remarks made by Sen. John Edwards, 2008 presidential contender, during MTV/MySpace Presidential Dialogue Forum (Sept. 27, 2007), <http://think.mtv.com/044FDFFF0098989A001700989F55/> (last visited Dec. 11, 2009).

The problems with mass incarceration addressed in this paper are those that begin to surface when an inmate steps outside the prison gate and re-enters the community. Once a prison term is completed, the transitory reentry period is almost always filled with difficulties for the ex-offender.¹¹ With few exceptions, all of the people currently behind bars in the United States will eventually leave jail or prison and face the challenges of reintegration.¹² Each year approximately 630,000 individuals are released from prisons, juvenile detention facilities, or jails back into the community.¹³ Unfortunately, approximately two-thirds of those released will be rearrested within three years of release,¹⁴ leading to a disturbingly large and ever-growing number of individuals entering and leaving society through the jailhouse doors.

More precisely, two out of every three formerly incarcerated individuals will cycle in and out of prison on a fairly regular basis. They become recidivist offenders. When the unacceptably high rate of recidivism is significantly lowered, society's best interests are served.¹⁵ Averting the perpetuation of increasing recidivist levels, such as those existing today, is undeniably beneficial to all citizens regardless of their political alliances or social reckonings.

¹¹ Mauer, *supra* note 2, at 609.

¹² Stafford, *supra* note 7, at 261.

¹³ Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry Into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1083 (2004).

¹⁴ Stafford, *supra* note 7, at 261.

¹⁵ Mauer, *supra* note 2, at 613-14. Mauer suggests that imprisonment dehumanizes persons convicted of crime and poses financial strains, psychological burdens, and social stigma on those family members they leave behind. Additionally, public safety is negatively affected and "neighborhoods become more destabilized as people cycle in and out of prison on a regular basis." *Id.*

An inmate recently released from prison needs employment to attain self-sufficiency and to be better able to avoid future involvement in criminal activity. Ex-offenders consistently voice that finding suitable employment is their primary concern and is even more important than staying off drugs or maintaining good physical health.¹⁶ Case studies and case law show that maintaining stable employment can lead to successful reentry.¹⁷ Without income and earning potential from a job, an ex-offender is likely to return to crime as a means of support.¹⁸ Employment is one of the strongest predictors that an ex-offender will be successful after release and not backslide into crime.¹⁹

Employment services provided after release, such as those available at the Safer Foundation in Chicago, have been shown to successfully reduce recidivism by over 60%.²⁰ Legislation passed in 2007 will make available a plethora of services to a recently released ex-offender—especially relevant are job training, mentoring, and monitoring programs—that should assist him in his often

¹⁶ Marta Nelson, *The First Month Out: Post-Incarceration Experiences in New York City*, 13 (1999), available at http://www.vera.org/publication_pdf/first_month_out.pdf.

¹⁷ See Jennifer Leavitt, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281 (2002) (author case study during an internship at a mental health counseling center where ex-felon was able to live a meaningful, productive life because of his job in a truck yard and the help from a loyal boss); see also *Haddock v. City of New York*, 553 N.E.2d 987, 992 (N.Y. 1990) (noting that an opportunity for stable employment may mean the difference between recidivism and rehabilitation).

¹⁸ George W. Bush, State of the Union Address (Jan. 20, 2004), available at <http://www.americanrhetoric.com/speeches/stateoftheunion2004.htm>. In his 2004 State of the Union address, George W. Bush recognized the recidivism crisis when he stated that if the thousands of inmates released into the community in 2004 were unable to find work, they would more than likely re-commit and be returned to prison. *Id.*

¹⁹ Pager, *supra* note 5, at 619.

²⁰ Stafford, *supra* note 7, at 261.

insurmountable task of looking for a job.²¹ The purpose of this paper is to examine the creation of federal employment for released offenders under certain circumstances so as to reduce elevated recidivism rates until appropriate federal legislation providing active and adequate protection for ex-offenders seeking employment can be enacted.²²

In Part II, this paper defines the impacts of recidivism, the costs to society, and employment as a way to lower recidivism. Part III explores a new generation of collateral sanctions imposed after a prison term is completed, which create serious obstacles to employment for recently released prisoners. Part IV focuses on statutory schemes, enacted and proposed, designed to prevent discrimination in hiring ex-offenders and to provide employment assistance and transition services to ex-offenders. Part V looks at federally mandated public employment schemes from historical and present perspectives, their use and purpose, and the general effectiveness of each. Part VI discusses a proposed solution of public employment for ex-offenders in limited circumstances to lower unacceptably high recidivism levels as an interim measure prior to implementation of proposed federal legislation that will adequately and effectively deal with recidivism.

II. The Impacts of Recidivism and Ex-Offender Employment

To fully understand the relationship of employment to an ex-offender, one must explore the nature of recidivism and its impacts on individuals and the community.

²¹ Second Chance Act of 2007, 42 U.S.C. § 17501 (2007).

²² This writer recognizes that recidivism is a complex problem caused by several factors. The purpose of this paper is to focus on employment as one factor influencing the overall rate of recidivism. In sum, by facilitating the employment of ex-offenders, the number of recidivist offenders will be reduced and the overall prison population will be correspondingly lessened.

Recidivism is defined as a “tendency to relapse into a habit of criminal activity or behavior,” and a recidivist is defined as an individual “who has been convicted of multiple criminal offenses . . . a repeat offender.”²³ When society denies an ex-offender nearly any chance at successful reintegration into the community, too often he will give up trying to succeed through legitimate efforts and will return to crime as a means of support. He becomes a recidivist. A recent study reported that 46% of state inmates and 27% of federal inmates were either on parole or on probation at the time of their most recent arrest.²⁴ Given that massive numbers of persons are arrested, incarcerated, released, and then re-arrested in the pernicious cycle of recidivism, the unavoidable costs of recidivism to families and communities are decidedly difficult, if not impossible, to quantify.

Imprisonment imposes strains and burdens, including financial, psychological, and social, on an inmate’s friends and family.²⁵ It is estimated that 1.5 million children have a parent in prison.²⁶ When the incarcerated parent is the mother of a child, the child’s primary caregiver is removed. Sometimes the child will be lucky and a relative will assume caregiving responsibilities, but others are not so lucky and will be placed in foster care.²⁷ Additionally, children in low-income communities of color are much more likely to face future incarceration.²⁸ When there is little around them demonstrating success in the traditional sense, it is reasonable to assume that children will, in

²³ BLACK’S LAW DICTIONARY 1297 (8th ed. 2004).

²⁴ U.S. Government Accountability Office, *State and Federal Prisoners: Profiles of Inmate Characteristics in 1991 and 1997*, available at <http://www.gao.gov/docsearch/abstract.php?rptno=GGD-00-117>.

²⁵ Mauer, *supra* note 2, at 611.

²⁶ *Id.*

²⁷ *Id.* at 612.

²⁸ *Id.*

certain instances, learn that working hard is not always a guaranteed road to success. Children are the building blocks of families and communities. When mass incarceration of parents causes children to be denied adequate care and support, the overall structural damage to families and the resulting deterioration and destabilization of communities has an undeniably strong negative impact on public safety.

The effects of mass incarceration on public safety have been widely debated and are highly complex. The recent “war on drugs” is recognized as one of the most significant contributors to the increase in prison population.²⁹ A recent study showed that 62% of federal inmates were in prison on convictions related to drug possession.³⁰ When a local drug dealer is sent away to prison, no vacuum in the drug-dealer trade is created in a community. As long as there is a market for drugs in a community, there is almost always a potential dealer ready to step into the shoes of a dealer sent to prison. The point at which mass incarceration of drug dealers becomes an unacceptable cost instead of a benefit to society is when the constant source of replacement drug dealers and the recycling of drug dealers in and out of prison combine to negate any short-term effects of increased criminal prosecutions, which are otherwise meant to ensure public safety. In short, the high concentration of inmates with drug possession convictions and the elevated recidivism trends do not positively promote, but instead negatively impact, public safety.

Recidivism trends have an impact that can be measured in economic terms. Costs vary widely among jurisdictions, but it is estimated that the average cost of incarcerating one

²⁹ *Id.* at 613.

³⁰ Government Accounting Office, *Prisoner Releases: Trends and Information on Reintegration*, available at <http://www.gao.gov/docsearch/abstract.php?rptno=GAO-01-483>.

individual for one year is \$40,000.³¹ Research has shown that in Brooklyn, New York, the yearly cost to taxpayers for imprisonment of individuals in one certain, densely populated city block area is approximately \$1 million.³² National expenditures on corrections alone, not including costs of arrest and prosecution, increased from \$9 billion in 1982 to \$59.6 billion in 2002.³³ If levels of offenders and re-offenders are reduced when full employment is used as a starting point in rehabilitation, the resulting savings in actual dollar costs to taxpayers is not difficult to discern.

Recidivism is impacted when ex-offenders achieve full employment. An inmate returning to the community needs a job to pay for daily living expenses and to begin rebuilding his sense of identity and self-worth outside the prison environment. If he finds a stable job, an ex-offender will not likely need to return to crime as a means of support. However, for an ex-offender the task of locating employment that will sustain and promote a functional daily life is extraordinarily difficult. Finding and maintaining gainful employment is a dismal prospect for ex-offenders even when the national economy is healthy. The national unemployment rate in 1999 was 4.2% with low-wage sector earners other than ex-offenders having an unemployment rate of 26%.³⁴ The unemployment rate for ex-offenders was approximately 33%.³⁵ Following release from incarceration, lifetime earnings are expected to decrease between 10% and 20%.³⁶ For recently released

³¹ 153 CONG. REC. H5691 (daily ed. May 23, 2007) (statement of Rep. Davis).

³² Mauer, *supra* note 2, at 617.

³³ Recidivism Reduction and Second Chance Act of 2007, S. 1060, 110th Cong. § 3(4) (2007) (as introduced to the U.S. Senate, March 29, 2007).

³⁴ Stafford, *supra* note 7, at 263.

³⁵ *Id.*

³⁶ *Id.* at 264.

prisoners, imprisonment is a substantial handicap to finding employment and achieving successful reintegration.

Proponents of mass incarceration may suggest that it is an unfortunate but necessary consequence of a policy to control crime. However, as recidivism continues to increase, it is becoming more apparent that any gains realized by mass incarceration will be more than offset by the negative impacts of recidivism. When society takes steps to remove obstacles confronting ex-offenders seeking employment, recidivism will be reduced and its negative impact and attendant costs will inevitably be diminished.

III. Obstacles to Employment for Ex-Offenders

Life outside prison walls for a recently released prisoner is filled with a myriad of indirect and direct barriers to employment resulting from his imprisonment. Collectively known as “collateral consequences” of conviction,³⁷ such obstacles make it clear why a criminal conviction is a substantial hindrance to an ex-offender’s success in outside life. These obstacles are often referred to as “invisible punishments” because they are rarely reviewed in the courtroom when they are meted out and equally rarely discussed in public policy dialogue.³⁸ Barriers to employment take various forms and can lead to an ex-offender’s reduced expectation of employment or an outright denial of the opportunity to apply for a job.³⁹ Consequently, an ex-offender is effectively punished twice—first behind bars for the crime for which he was convicted and then by the collateral consequences of that

³⁷ Stafford, *supra* note 7, at 266. Collateral consequences are civil sanctions placed on ex-offenders that take many forms and may directly and intentionally limit employment options. *Id.*

³⁸ Mauer, *supra* note 2, at 608.

³⁹ Pinard, *supra* note 13, at 1075. Collateral consequences include sanctions prohibiting various forms of employment, employment-related licensing, and deportation for non-citizens. *Id.*

conviction, which act to deny him employment and a chance to succeed in life outside the prison walls.

A. Civil Barriers to Ex-Offender Employment

From the moment a defendant is found guilty of a felony, his legal status is automatically and essentially permanently changed.⁴⁰ The civil collateral consequences that flow from his criminal conviction are sanctions that may exist at the federal or state level.⁴¹ The most basic and common civil consequence of conviction is the inability of a felon to vote.⁴² Additionally, collateral sanctions going beyond sentencing enhancements create serious barriers to recovery long after an ex-offender has completed his sentence.⁴³ Depending on the state in which one lives, an 18 year-old, first-time offender convicted of felony drug possession may be permanently denied public housing and other federal welfare benefits, including medical treatment under Medicaid.⁴⁴

Under federal law, he will be denied eligibility for educational loans because of his drug offense, regardless of whether the conviction was for a felony or misdemeanor.⁴⁵ Denial of a handgun license and, in some states, deportation for non-citizens are examples of other collateral consequences of conviction.⁴⁶ The collateral consequences of a conviction combine and leave an ex-offender with few chances at success because he is denied access to housing,

⁴⁰ Stafford, *supra* note 7, at 265.

⁴¹ Pinard, *supra* note 13, at 1073.

⁴² Stafford, *supra* note 7, at 266. For a majority of the civil disabilities, the only hope of removing the obstacle is a pardon or official sealing of a criminal record. *Id.*

⁴³ Mauer, *supra* note 2, at 608-09.

⁴⁴ *Id.* at 610.

⁴⁵ Pinard, *supra* note 13, at 1077.

⁴⁶ *Id.* at 1074.

cannot improve his education level, and cannot get adequate medical care to remain healthy. These collateral consequences have an economic impact and effect on his ability to successfully reintegrate into society through employment that is impossible to ignore.

B. Social Barriers to Ex-Offender Employment

The social consequences of conviction are those the ex-offender encounters through daily interactions with others, especially when dealing with prospective employers. An ex-offender most likely leaves prison with precious few resources. Not having proper identification documents, transportation, or professional attire⁴⁷ makes his presentation to a prospective employer all the more difficult. Employers may be reluctant to hire an ex-offender for a variety of reasons.⁴⁸ Employers can be held liable for negligent hiring and retention liability due to wrongful employee conduct.⁴⁹ Additionally, workplace violence⁵⁰ increasingly puts employers, as the “deeper

⁴⁷ See Stafford, *supra* note 7, at 269. The reluctance of employers to hire applicants with criminal records has been addressed in some states. *Id.* Those states that have acted to limit criminal records in hiring decisions are addressed in more detail in Part III.

⁴⁸ Leavitt, *supra* note 17, at 1286. Employers may attempt to use criminal records to deny employment due to negligent hiring and retention liability or out of fear that possible conduct on the part of ex-offenders might subject them to liability. *Id.*

⁴⁹ *Id.* at 1286.

⁵⁰ A detailed discussion of all factors leading to negligent hiring and retention liability for employers is beyond the scope of this paper. For a more comprehensive analysis of this topic, see William C. Smith, *Victims of Omission: Employers Can Face Liability for Negligent Hiring Practices When Workers Commit Acts of Violence*, 85 A.B.A. J. 32 (1999).

pockets defendants,” at risk of financial liability that can sometimes lead to business bankruptcy.⁵¹

Possibly as a result of fear of liability on the part of an employer, a recent survey of employers in four major metropolitan areas reflects that hiring preferences for most employers are for those without criminal records: only 12.5% of employers said they would *definitely* accept an application from an ex-offender.⁵² In the same survey, a slightly higher percentage (25.9%) was marginally less fearful and said they *probably* would look at an application from an ex-offender.⁵³ When an employer, fearing liability for hiring an ex-offender, is presented with an ex-offender applicant who likely is not professionally dressed or well-credentialed, the employer may relegate the ex-offender to a lesser footing than non-offender applicants.

C. Statutory Barriers to Ex-Offender Employment

The collateral consequences that most directly affect an ex-offender’s ability to find employment are those statutory schemes barring felons from obtaining an occupational or professional license.⁵⁴ Quite often licenses are required by states and municipalities for an individual seeking to enter a regulated trade, business, or occupation, thus making the ability to obtain a license in any of those areas vital to employment. Lack of a valid occupation or professional license can prevent work opportunities in fields as diverse as becoming a bartender, a beautician, a plumber, an

⁵¹ Leavitt, *supra* note 17, at 1301.

⁵² Jocelyn Simonson, *Rethinking “Rational Discrimination” Against Ex-Offenders*, 13 GEO. J. ON POVERTY L. & POL’Y 283, 284 (2006) (emphasis added).

⁵³ *Id.*

⁵⁴ Stafford, *supra* note 7, at 266.

ambulance driver, a health care worker, a real estate appraiser, a telemarketer, and others.⁵⁵

Additionally, if an ex-offender wants to go into business with another ex-offender, for example, he may be prevented from doing so by licensing restrictions affecting the scope of a business, especially in a partnership, where a character component may be used.⁵⁶ In some states, an ex-offender is precluded from public employment for crimes of “moral turpitude” or crimes related to the employment sought.⁵⁷ Once an individual has paid his debt to society, it makes little sense to punish him again with licensing and other restrictions to full employment after his release.

IV. Federal Legislation Affecting Ex-Offender Employment

The federal government has weighed in on the question of criminal record discrimination in an employment setting through disparate impact analysis under Title VII of the Civil Rights Act of 1964.⁵⁸ The federal civil rights law specifically prohibits employers from classifying, limiting, or segregating applicants or employees in such a way that would actually deprive or tend to deprive any individual of employment opportunities because of race, color, religion,

⁵⁵ *Id.* at 267.

⁵⁶ Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities* 71 N.D. L. REV. 187, 193 (1995).

⁵⁷ Stafford, *supra* note 7, at 267.

⁵⁸ 42 U.S.C. §§2000a-2000e (1994 & Supp. V 1999). It is not the intent of this writer to provide a full, detailed analysis of the exceedingly complex area encompassed by Title VII. For in-depth analysis of the treatment of criminal records in the employment context under Title VII, see *Consideration of Arrest Record as Unlawful Employment Practice Violative of Title VII of Civil Rights Act of 1964*, 33 A.L.R. FED. 263.

sex, or national origin.⁵⁹ Under this federal law, a “disparate impact test” is used to proscribe any employment category, tool, or test with an impact or practice of overt discrimination against anyone in those protected classes of people.⁶⁰

For example, African-Americans as a class are arrested and convicted substantially more often than Caucasians.⁶¹ Federal civil rights law will protect an African-American from an employer policy excluding from employment persons who have suffered a number of arrests if that policy has the foreseeable adverse impact of depriving a disproportionate number of African-Americans of employment opportunities.⁶² This is true even if the employer policy is applied equally to all classes or categories of individuals.⁶³ An exception exists when employers are able to defend their use of exclusionary policies for reasons of “business necessity,” where the exclusion is significantly related to job performance.⁶⁴ For

⁵⁹ Leavitt, *supra* note 17, at 1298. The federal government has not included those with a criminal record as a protected class of persons in discrimination legislation. *Id.*

⁶⁰ *Id.*

⁶¹ *Consideration of Arrest Record as Unlawful Employment Practice Violative of Title VII of Civil Rights Act of 1964*, 33 A.L.R. FED. 263 §2[a].

⁶² *Id.* Case law supports the notion that an employer inquiry into arrest records will likely discourage African-Americans from considering a job or submitting an application. *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290, 1298-99 (8th Cir. 1975). Further, the mere request for an arrest record tends to discourage applications by those with arrest records and may induce African-Americans to give false or incomplete answers on an application that would subject them to possible future termination for not answering questions truthfully. Equal Employment Opportunity Comm’n, Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000E et. Seq. at *8 n.8 (1990), available at 1990 WL 1104708.

⁶³ 33 A.L.R. FED. 263§2[a].

⁶⁴ *Id.*

instance, a hotel may properly dismiss a bellman after finding out that he had prior convictions for theft and receiving stolen goods where the hotel required that employees who have access to valuable property belonging to guests also have a record free from convictions for serious property-related crimes.⁶⁵

The disparate impact analysis was established by the United States Supreme Court in *Griggs v. Duke Power Co.*, where a group of African-Americans were denied promotions because they lacked high school diplomas and could not pass written aptitude tests.⁶⁶ The Court held those requirements unlawful even though African-American and Caucasian employees were subject to the same requirements and the tests were fair in form.⁶⁷ The Court determined that the tests were not related to job performance but instead operated to exclude African-Americans from employment promotions.⁶⁸

Other federal cases prohibit all facially neutral practices that disparately impact minority job applicants. The case of *Gregory v. Litton Systems, Inc.* found unlawful an employer practice of requiring all job applicants to disclose their number of arrests because such a requirement had a disparate impact on African-Americans.⁶⁹ The court relied on substantial evidence indicating that African-Americans are disproportionately arrested more often than Caucasians.⁷⁰ The *Litton* decision is the leading interpretation of the disparate impact analysis that prohibits employer requests for criminal histories from potential job applicants.⁷¹

⁶⁵ *Richardson v. Hotel Corp.*, 332 F. Supp. 519, 521 (E.D. La. 1971) (finding that hotel policy was not discriminatory).

⁶⁶ 401 U.S. 424, 430 (1971).

⁶⁷ *Id.* at 429.

⁶⁸ *Id.*

⁶⁹ 316 F. Supp. 401, 403 (C.D. Cal. 1970).

⁷⁰ *Id.*

⁷¹ *Id.*

The Equal Employment Opportunity Commission (“EEOC”) has set forth guidelines⁷² as to when an employer may use criminal records in hiring decisions under Title VII of the Civil Rights Act.⁷³ An employer must show a compelling “business justification” for using arrest records.⁷⁴ Employers are made aware that they should not seek to use arrest records for employment decisions because information they obtain from records is more likely than not going to be used, regardless of whether a business justification exists.⁷⁵ The EEOC guidelines then require employers to investigate and determine whether the alleged conduct actually occurred.⁷⁶ Quite possibly in acknowledgment of the complexity of the guidelines, the EEOC guidelines then go one step further and provide explanatory examples of situations where it is appropriate for an employer to use knowledge of an applicant’s criminal history in an employment setting.⁷⁷

An ex-offender who applies for a job has to be aware of employer requirements that seek information about his criminal past. Such requirements can be facially neutral and apply to all applicants equally, even those in minority classes. However, if those requirements tend to have a disproportionate impact on minority applicants and, further, do not seem to fully meet or exceed the EEOC guidelines,

⁷² See Equal Employment Opportunity Comm’n, Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000E et. seq. (1990) (hereinafter, E.E.O.C. Guidance), *available at* 1990 WL 1104708.

⁷³ 42 U.S.C. §§ 2000a-2000e (1994 & Supp. V 1999).

⁷⁴ See E.E.O.C. Guidance at *2.

⁷⁵ *Id.* at *3.

⁷⁶ *Id.* at *5.

⁷⁷ *Id.* at *6. For example, an employer would be justified in denying employment to a black male applicant for a police officer position where he admitted he had been accused but acquitted of burglary. He could be denied the position because his credibility as a witness in future court actions would likely be compromised. *Id.*

then a job applicant denied employment because of his criminal history can challenge the requirement. Successful disparate impact challenges are exceedingly rare today; there has not been one upheld by a Federal Appeals Court since 1975.⁷⁸ Given the complexity of the government rules and guidelines and the likelihood of losing an appeal of a disparate impact challenge, applicants with a criminal history who have endured a violation of their civil rights may just accept the job loss or denial of employment and move on, likely falling yet again into the recidivism trap.

V. State Statutory Schemes Affecting Ex-Offender Employment

A. Eight States Have Anti-Discrimination Laws Affecting Ex-Offender Employment

State legislatures have begun enacting statutes that prohibit the discriminatory use of an ex-offender's criminal record in an employer's hiring decisions. In the vast majority of states, the prohibitions found in Title VII of the federal Civil Rights Act⁷⁹ are the only restrictions as to when an employer may use an applicant's criminal record in an employment setting.⁸⁰ An eight-state minority has statutorily dealt with employment discrimination against

⁷⁸ *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290, 1298-99 (8th Cir. 1975). The Eighth Circuit upheld a disparate impact claim against Missouri Pacific, which followed a policy of denying employment to all applicants who had ever been convicted of a crime other than a traffic offense. The court held that such a policy was too broad to justify its effects on African-American applicants who were rejected at a rate 2.5 times that of white applicants. *Id.*

⁷⁹ 42 U.S.C. §§ 2000a-2000e (1994 & Supp. V. 1999).

⁸⁰ Jocelyn Simonson, *Rethinking "Rational Discrimination" Against Ex-Offenders*, 13 GEO. J. ON POVERTY L. & POL'Y 283, 286 (2006).

ex-offenders; forty-two states still allow employers to use criminal records in hiring decisions.⁸¹

One state in the eight-state minority, Wisconsin, has explicit provisions barring all discrimination in an employment setting based on criminal records. Under Wisconsin state law, any “employer, labor organization, employment agency, [or] licensing agency” is prohibited from using criminal records to discriminate against an applicant in employment settings.⁸² In *Wal-Mart Stores, Inc. v. Labor and Industry Review Commission (“LIRC”)*⁸³ the Wisconsin appellate court found that an employee may be fired or denied employment based on his criminal record only if the crime of which he was accused or convicted is “substantially related” to the duties he would perform at the employment.⁸⁴ In *Wal-Mart v. LIRC*, Wal-Mart learned that an employee stock clerk had pending drug possession charges and subsequently fired her.⁸⁵ Wal-Mart defended its action by arguing that because the employee’s job as a stock clerk entailed access to many members of the general public, she could use that access to not only use but distribute drugs.⁸⁶ The court, however, found no evidence that the defendant had any substantial opportunity to

⁸¹ The eight states are Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New York, Pennsylvania, and Wisconsin. See CONN. GEN. STAT. § 46a-80 (2005); HAW. REV. STAT. § 378-2, -2.5 (2003); 775 ILL. COMP. STAT. 5/2-103 (2005); MASS. GEN. LAWS ch. 151B, § 4(9) (2005); MINN. STAT. § 364.03 (2005); N.Y. CORRECT. LAW §§ 750-755 (McKinney 2005); 18 PA. CONS. STAT. § 9125 (2005); WIS. STAT. § 111.335 (2005).

⁸² WIS. STAT. § 111.321. Hawaii has a similar statute, at HAW. REV. STAT. § 378-2.5, providing that employers can request criminal conviction records if the conviction is reasonably related to the employment description.

⁸³ *Wal-Mart Stores, Inc., v. Labor and Indus. Review Comm’n*, 220 Wis. 2d 716 (Wis. Ct. App. 1998).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 717.

distribute or use drugs in the workplace.⁸⁷ Evidence showed that since Wal-Mart had policies of continuing drug testing and daily security checks of employees, in addition to highly structured workday requirements, the defendant had no particular opportunity for repeat criminal behavior.⁸⁸ The court succinctly noted that if an individual cannot stock shelves at Wal-Mart because of her criminal past, then large groups of people with criminal pasts would be prevented from working at large numbers of employment opportunities.⁸⁹ Simply put, if an ex-offender cannot find work at Wal-Mart doing menial labor, where can she work?

Massachusetts state law prohibits an employer from seeking criminal histories for an arrest that did not result in a conviction,⁹⁰ a first misdemeanor conviction for “drunkenness, simple assault, speeding, minor traffic violation, affray, or disturbance of the peace;”⁹¹ or any misdemeanor conviction that occurred five years or more before the date of employment application.⁹² Noteworthy in the Massachusetts statute is the distinction between arrest records and conviction records.⁹³ Depending on the type of record, an employer may be provided with very different types of information regarding an applicant.

Massachusetts courts have narrowly construed the state anti-discrimination statute. In *Bynes v. School Committee of Boston*,⁹⁴ the Massachusetts Supreme Court found that

⁸⁷ *Id.*

⁸⁸ *Id.* at 718.

⁸⁹ *Id.*

⁹⁰ MASS. GEN. LAWS ANN. ch. 151B, § 4(9)(i) (West 1996 & Supp. 2002).

⁹¹ *Id.* at ch. 151B, § 4(9)(ii).

⁹² *Id.* at ch. 151B, § 4(9)(iii).

⁹³ *Id.* at ch. 151B, § 4(9)(i).

⁹⁴ 581 N.E.2d 1019, 1021 (Mass. 1991). Plaintiffs filed an action against the School Committee of Boston, who had requested their criminal records from the Commonwealth of Massachusetts Criminal History Board, an agency independent of the Boston School Committee. The Court held that statutory prohibitions against release

the school district could use criminal records where the prior conviction had occurred more than five years earlier.⁹⁵ The school district employment application had not asked directly for criminal records, but the district had employed a third party to investigate its employees.⁹⁶ The defendants in *Bynes* were fired school bus drivers.⁹⁷ The Court seems to add a layer of protection to schoolchildren from bus drivers with criminal pasts even if their convictions were prior to the statutory limitation.⁹⁸ The unregulated use of third-party investigators in Massachusetts arguably weakens the statute and provides only narrow protection for ex-offenders seeking to maintain gainful employment.

Other states have enacted civil rights legislation similar to that found in Massachusetts. In Illinois, for example, an employer may not use a sealed or expunged criminal record as a basis for hiring decisions.⁹⁹ Rhode Island does not allow an employer to inquire whether an applicant has even been accused or charged with a crime but does allow an employer to ask whether an applicant has ever been convicted of a crime.¹⁰⁰ Michigan law specifically allows an employer to seek information from an applicant about any felony charges even if a conviction has not resulted, but prohibits requesting information about any

of records of convictions more than five years earlier and of arrests without convictions applied only to protect employees from requests from their employers and did not prevent employers from seeking the same information from other sources. *Id.*

⁹⁵ *Id.* at 1022.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1020.

⁹⁸ *Id.* at 1023. Finding the Commonwealth of Massachusetts Criminal History Board was responsible for unauthorized disclosure of criminal records and finding no fault on the part of the Boston School Committee. *Id.*

⁹⁹ 775 ILL. COMP. STAT. ANN. § 5/2-103 (West 2001). Like Massachusetts, the Illinois statute provides an exception for criminal history use by a state agency.

¹⁰⁰ R.I. GEN. LAWS § 28-5-7(7) (2000).

misdemeanor charges not resulting in conviction.¹⁰¹ In brief, when an ex-offender explores state statutes to find that some forbid considering all types of criminal histories¹⁰² and others only prohibit considering arrest records or discrimination in licensing,¹⁰³ he is likely to realize some protection against discrimination from state statutes even though consistency among states is not uniform.

B. New York's Progressive Statute Stands Alone as the Strongest State Enactment

The state of New York has a strong public policy of rehabilitation for ex-offenders through employment.¹⁰⁴ Evidence of this policy can be found in New York anti-discrimination legislation that is precisely and effectively tailored to deal with the civil rights of ex-offenders in an employment setting. New York has three separate statutes that speak to all factors affecting ex-offender employment opportunities, the public policy of the state, and governing guidelines for civil rights in the ex-offender employment setting.¹⁰⁵ Under these state laws, an employer may not discriminate against an applicant because of his criminal history nor any other classification such as race, religion, creed, and sex.¹⁰⁶ Neither may an employer deny employment or licenses to any individual because of his

¹⁰¹ MICH. COMP. LAWS § 37.2205a (2000).

¹⁰² See, e.g., HAW. REV. STAT. §378-2 (1993 & Supp. 2000); WIS. STAT. ANN. § 111.321 (West 1997 & Supp. 2001).

¹⁰³ See, e.g., 775 ILL. COMP. STAT. ANN. §5/2-103 (West 2001); COLO. REV. STAT. §24-5-101 (2001).

¹⁰⁴ Leavitt, *supra* note 17, at 1295; see N.Y. CORRECT. LAW § 752 (McKinney 1987 & Supp. 2001-2002).

¹⁰⁵ N.Y. CORRECT. LAW §§ 752-54 (McKinney 1987 & Supp. 2001-2002); N.Y. CRIM. PROC. LAW § 160.60 (McKinney 1992 & Supp. 2001-2002); N.Y. EXEC. LAW § 296(15)-(16) (McKinney 2001).

¹⁰⁶ N.Y. EXEC. LAW § 296 (McKinney 2001).

criminal record, regardless of whether he was convicted or acquitted.¹⁰⁷ The statutes, however, do allow law enforcement agencies or employers whose employees must possess a gun in the scope of their employment to request criminal records when hiring.¹⁰⁸ Such statutes are likely to assuage public concern over allowing ex-offenders to be hired as police officers.

New York law expressly states when an employer may deny an employment opportunity as a result of a criminal conviction. Before considering the criminal records of an applicant, an employer must find a “direct relationship” between a prior offense and the employment or license sought.¹⁰⁹ In making this determination, an employer is required to look at a list of factors, including the duties and responsibilities of the job that the applicant seeks, the time elapsed since the crime, the person’s age at the time of the crime’s occurrence, the seriousness of the crime, and any evidence of the ex-offender’s rehabilitation.¹¹⁰ An employer may deny employment where the applicant’s criminal history indicates that employing him would constitute an “unreasonable risk” to public safety.¹¹¹ New York has a strong public policy of full employment opportunities for ex-offenders as a rehabilitative measure, and that interest is clearly spelled out in the state’s legislation.¹¹²

The judiciary of the state has underscored the public policy of New York in the rehabilitation of ex-offenders through employment opportunities. In *Ford v. Gildin*, the court refused to hold an employer liable for negligent hiring when an employee who had been convicted twenty-

¹⁰⁷ *Id.*

¹⁰⁸ N.Y. EXEC. LAW § 296(16) (McKinney 2001).

¹⁰⁹ N.Y. CORRECT. LAW § 752 (McKinney 1987 & Supp. 2001-2002).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

seven years earlier for manslaughter molested a child.¹¹³ The court held that it was not foreseeable that an individual who had committed manslaughter over two decades earlier would molest a child so many years later,¹¹⁴ thus affirming the public policy of New York for encouraging employment for ex-offenders.

In *Soto-Lopez v. New York City Civil Service Commission*, a New York district court held even more strongly in support of the public policy of ex-offender employment.¹¹⁵ An ex-offender convicted of manslaughter and drug offenses in *Soto-Lopez* had been denied employment by the city as a caretaker in a housing complex.¹¹⁶ The court found that the denial was a violation of the expressed public policy of the state to encourage ex-offender employment and that the duties of a caretaker were unrelated to the crime underlying the ex-offender's conviction.¹¹⁷

Some New York state courts, however, have been less deferential to the ex-offender's employment plight. The Court of Appeals in *Al Turi Landfill, Inc. v. New York State Department of Environmental Conservation* found no error when state officials denied a landfill expansion permit to individuals who had records of convictions for federal tax-related crimes.¹¹⁸ The court found that dishonesty, lack of integrity in conducting business, and a willingness to mislead the government bore a direct relationship to the duties and responsibilities inherent in operating a landfill for the state.¹¹⁹ *Al Turi* suggests that where a nexus exists—in this case cheating the government out of tax dollars correlated with operating a landfill for the

¹¹³ 200 A.D.2d 224 (N.Y. App. Div. 1994).

¹¹⁴ *Id.* at 229.

¹¹⁵ 713 F. Supp. 677 (S.D.N.Y. 1989).

¹¹⁶ *Id.* at 678.

¹¹⁷ *Id.*

¹¹⁸ 98 N.Y.2d 758, 760 (N.Y. 2002).

¹¹⁹ *Id.*

government—there is a direct and substantial relationship, and thus the state policy imperative to keep ex-offenders employed is overridden.

New York legislation also takes into account public safety concerns, allowing an employer to reject an applicant when his criminal record indicates that he would present an “unreasonable” public safety risk.¹²⁰ In *Arrocha v. Board of Education*, an individual with a felony conviction for selling cocaine nine years earlier was denied a permit to teach in high schools in New York City.¹²¹ In making its determination, the court considered several factors, including high school teachers serving as role models, the seriousness of the offense, and the state’s specific concern in protecting children from drug dealers, to find the applicant an “unreasonable risk” to public safety.¹²² The court spoke to the state’s strong public policy of encouraging employment of ex-offenders but found the policy was outweighed by the enumerated factors intimating a threat to public safety.¹²³ Thus, New York anti-discrimination laws forbid employers from imposing blanket restrictions of individuals with criminal records but allow some leeway in hiring decisions on a case-by-case basis. Such a policy can be applied evenhandedly so long as courts are not given unfettered discretion in determining what constitutes a reasonable risk.

The statutory scheme in New York recognizes that the growing numbers of ex-offenders entering their communities each year need the support of society and of its laws in order to succeed. In turn, this support leads to safer and more inclusive communities. If this realization is to occur on a national level, a concerted emphasis must be placed on the notion that similarly encouraging the

¹²⁰ N.Y. CORRECT. LAW §752 (McKinney 1987 & Supp. 2001-2002).

¹²¹ 93 N.Y.2d 361, 365 (N.Y. 1999).

¹²² *Id.* at 365.

¹²³ *Id.* at 366.

employment of ex-offenders is the best policy for the country.

VI. Federal Legislation to Aid in Prisoner Reentry

B. The Second Chance Act of 2007 Programs for Ex-Offender Reentry

Federal legislators have begun to realize that a job is pivotal to ex-offender rehabilitation. The Second Chance Act of 2007: Community Safety Through Recidivism Prevention ("Second Chance Act"),¹²⁴ is a Congressional attempt to provide transition services that will increase the chances that ex-offenders find work after release from prison. In his speech during the Congressional debate on the Second Chance Act, Representative Charles Rangel stated:

[F]inding work after release is not only critical to the ex-offender, his family and the community who relies on him for support, but to the potential victims of crime who never become victims, and the taxpayers who have to pay less in prison and prosecution expenses because one less person is not going back to prison.¹²⁵

The goal of the Second Chance Act is to lower recidivism rates by providing a more normal setting for ex-offenders after release from prison while protecting the public safety and reducing overall costs of incarceration.¹²⁶ Through

¹²⁴ Second Chance Act of 2007, 42 U.S.C. § 17501 (2007).

¹²⁵ 153 CONG. REC. E1644 (daily ed. July 27, 2007) (statement of Rep. Rangel). Representative Rangel brought home the cost to taxpayers in his remarks that "billions of dollars," spent mostly on prosecuting repeat offenders, are being wasted. *Id.*

¹²⁶ 153 CONG. REC. H8281 (daily ed. July 23, 2007) (statement of Rep. Scott). The number of inmates has increased tenfold since 1980,

grants to state and local governments, the Second Chance Act will provide transitional services to develop comprehensive plans that promote successful prisoner reentry into communities and reduce recidivism.¹²⁷

In its resolution presented during Congressional debates on the Second Chance Act, the Senate recognized that the transition from incarceration to community reentry is risky for recently released prisoners and that unsuccessful transition has led to “alarmingly high recidivism” rates for ex-offenders.¹²⁸ Importantly, the resolution speaks to the need for effective reentry programs that would reduce recidivism rates,¹²⁹ thus affirming that a successful transition into the community means an ex-offender likely will not re-offend and return to prison. The Senate agreed to help ex-offender reentry through funding for reentry programs and research.¹³⁰

As enacted, the Second Chance Act will allocate funding to provide a broad array of programs and services that would make the transition for ex-offenders easier, in turn reducing recidivism.¹³¹ Nearly \$360 million will be allocated for programs that deliver transitional services, such as job training, education assistance, substance abuse counseling and treatment, and mentoring programs,¹³² to

resulting in increases for annual expenses for corrections from \$9 billion in 1982 to more than \$65 billion today. This cost does not take into account the cost of arrest and prosecution, or the cost to victims.

Id.

¹²⁷ 153 CONG. REC. H8283 (daily ed. July 23, 2007) (statement of Rep. Jones). This first-of-a-kind legislation allocates \$360 million to fund projects that provide ex-offenders with a “coordinated continuum” of “housing, education, health, employment, and mentoring services,” making the transition back into society easier. *Id.*

¹²⁸ S. Res. 45, 110th Cong. (2007) (enacted).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ 153 CONG. REC. H8283 (daily ed. July 23, 2007) (statement of Rep. Jones).

¹³² *Id.*

help ex-offenders adjust to their new environment upon release from prison. The Second Chance Act funds programs that provide ex-offenders a “coordinated continuum” of employment, housing, health, and other essential services.¹³³

Some ex-offenders will actually be employed under provisions in the proposed Second Chance Act. In her remarks to Congress during debates over the proposed Second Chance Act, Representative Jones stated that Community Reentry is an ex-offender reentry program in her home state of Ohio.¹³⁴ Community Reentry will likely receive funding under the Second Chance Act.¹³⁵ Community Reentry employs ex-offenders as Care Team members, a group that serves elderly people and those with disabilities living in the Cleveland, Ohio, area; Care Team members are paid salaries with full benefits, including vacation, health insurance, and fully vested pension after one year.¹³⁶ The recidivism rate among Care Team members is less than five percent.¹³⁷ Even though jobs created under the Second Chance Act would be few in number, they would nonetheless serve the important objective of keeping ex-offenders employed as a means to reduce recidivism.

The transition services and programs provided under the Second Chance Act go a long way toward providing opportunities for an ex-offender to re-establish himself as a contributing and productive member of the community. One can argue, however, that the Second Chance Act does not provide a wholly complete second chance at life outside prison walls. More than temporary transition services are

¹³³ 153 CONG. REC. H8283 (daily ed. July 23, 2007) (statement of Rep. Jones).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

needed if an ex-offender is to truly succeed in reintegrating. An ex-offender needs a job to succeed. Where private employers are either unwilling or unable to help an ex-offender through private employment, and states provide only varying levels of protection against employment discrimination, the federal government should consider public employment as a way to fully assist an ex-offender in his reentry efforts.

VII. Federal Creation of Employment Opportunities

A. A Historical Perspective: Government-Created Employment During the Great Depression

Job creation by the federal government is not a new phenomenon. In the autumn of 1929 the stock market crashed, triggering a severe economic crisis known as “The Great Depression.” Most analysts at that time compared the early years of the depression with economic downturns around the turn of the twentieth century that were short-lived and not too severe; few were able to predict the unprecedented length and severity of the Great Depression.¹³⁸ Statistical predictors of employment showed mounting job losses in late 1931, resulting from the sharp economic downturn, which fueled an interest in radical change to prevent further decline.¹³⁹ In response, the federal government created job programs deemed by its social welfare planners as necessary to close the economic gap and provide employment relief during the economic crisis.¹⁴⁰

¹³⁸ WILLIAM R. BROCK, WELFARE, DEMOCRACY, AND THE NEW DEAL 84-85(1988).

¹³⁹ *Id.* at 85-87.

¹⁴⁰ Philip Harvey, *The Right to Work and Basic Income Guarantees: Competing or Complementary Goals?* 2 RUTGERS J. L. & URB. POL’Y 8, 11, 25 (2005).

In the early spring of 1935, the Emergency Relief Appropriations Act¹⁴¹ granted the president's request for \$4 billion to general relief programs, including \$1.36 million to fund the Works Progress Administration ("WPA").¹⁴² The aim of the relief program was to provide employment for 3,500,000 persons of the 11,000,000 to 12,000,000 unemployed.¹⁴³ WPA projects were primarily geared toward relieving the plight of the long-term employed but were also designed to encourage employment on a wider scale.¹⁴⁴ The stated purpose of the WPA was to provide useful employment to specific groups of people with particular skills and not to provide employment on federal projects for all the unemployed.¹⁴⁵

The WPA was the federal government's most significant attempt at providing employment for the jobless.¹⁴⁶ As part of the WPA, the federal government allocated funds for diverse programs, such as the expansion of day care for children, which supplied jobs for workers in those programs and included unemployed teachers and nurses, all the way to cooks and janitors.¹⁴⁷ The WPA provided jobs mostly in the construction industry, but it also gave work to unemployed artists and assisted communities in expanding community efforts, such as education, library, health, and related projects.¹⁴⁸ Professional and white-collar workers found employment under the WPA through Federal One Projects, which included the Federal Art Project, Federal Music Project,

¹⁴¹ 15 U.S.C. §712a.

¹⁴² Brock, *supra* note 138, at 271.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 270.

¹⁴⁶ Margaret Bing, *A Brief Overview of the WPA*, <http://www.broward.org/library/bienes/lii10204.htm> (last visited Nov. 8, 2009).

¹⁴⁷ Peter Pitegoff, *Child Care Enterprise, Community Development and Work*, 81 GEO. L.J. 1897, 1911 (1993).

¹⁴⁸ Bing, *supra* note 146.

Federal Theatre Project, Federal Writers' Project, and the Historical Records Survey.¹⁴⁹

As a short-term program, the WPA restored the morale of large numbers of workers and gave an opportunity to thrive to a significant number of talented people in the arts, entertainment, and scholarship. Supporters of the WPA at the time expressed their view that governments have an obligation to provide work to the unemployed if private employers cannot do so.¹⁵⁰ Most government programs have critics, and those who disliked the WPA included businessmen who feared that the WPA workforce competed unfairly with private industry and organized labor and felt prevailing wages would be undercut.¹⁵¹ In spite of their fears, the WPA was generally considered a success.¹⁵² The WPA and its agencies were disbanded in the early 1940s when World War II wartime production had absorbed most of the unemployed.¹⁵³ The WPA should be regarded as a model for other government efforts to provide employment for individuals such as ex-offenders, who are typically unable to find employment elsewhere.

B. A Present-Day Perspective: Government Employment in the U.S Military

Many readers will be surprised to learn that each year the United States Armed Forces recruits and enlists a significant number of service members with criminal histories.¹⁵⁴ This enlistment of ex-offenders is

¹⁴⁹ *Id.*

¹⁵⁰ Brock, *supra* note 138, at 353.

¹⁵¹ Bing, *supra* note 146.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Michael Boucai, "Balancing Your Strengths Against Your Felonies": Considerations for Military Recruitment of Ex-Offenders, 61 U. MIAMI L. REV. 997, 1000 (2007).

accomplished through a moral waiver system.¹⁵⁵ In order to enlist in the military, an individual must meet the military's two requirements: voluntariness and capacity.¹⁵⁶ Capacity includes a moral element that generally eliminates people who have a significant criminal history, persons who exhibit behavior or antisocial problems, and prior service members who have received a dishonorable discharge from the military.¹⁵⁷ Ex-felons are a class of people who are statutorily excluded from enlistment.¹⁵⁸ However, the same statute that precludes an ex-felon from enlisting in the military also provides that an ex-felon can enlist in the military.¹⁵⁹ The statute permits the Secretary of Defense to make exceptions for enlistment in "meritorious cases,"¹⁶⁰ the so-called "moral waiver."¹⁶¹

In 2003, branches of the military granted moral waivers to enlistees in the following percentages: Army—4,918 (7.1%), Air Force—2,632 (7.3%), Navy—4,207 (10.4%), and Marines—19,195 (49.6%).¹⁶² Looking at the large number of military recruits and the relatively high percentage with criminal histories, studies have shown that those who enter the military with a criminal past are suitable for military service¹⁶³ and are successfully integrated into the Armed Forces. Ex-offenders must overcome tremendous obstacles to finding and maintaining a job. Many find the option of military service through the

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1001.

¹⁵⁷ *Id.* at 1001-02.

¹⁵⁸ 10 U.S.C. § 504(a) (2006).

¹⁵⁹ Boucai, *supra* note 154, at 1002.

¹⁶⁰ 10 U.S.C. § 504(a) (2006).

¹⁶¹ Boucai, *supra* note 154, at 1002.

¹⁶² *Id.* at 1032 (citing waiver grant figures at U.S. Accounting Office, available at <http://www.gao.gov> (last visited Nov. 6, 2009)).

¹⁶³ *Id.* at 1018.

moral waiver system a means to finding and securing worthwhile employment in spite of those barriers.¹⁶⁴

Finding gainful employment is critical to successful ex-offender reintegration. Society's interest in reducing recidivism could be positively impacted by military recruitment.¹⁶⁵ The military atmosphere removes the chance to commit crime and military training teaches discipline,¹⁶⁶ two factors that may reasonably act to deter future crime. The benefits to society of ex-offender military service are many and should be encouraged as a viable way to reduce rates of recidivism.

Given the extraordinary number of persons with criminal histories seeking jobs, military service necessarily provides employment solutions for a limited number of individuals. In order to serve the dual purpose of lowering the large number of unemployed ex-offenders, which would in turn lower recidivism levels, greater numbers of jobs than those provided by the military must be created.

VIII. Proposed Solutions

A. A Permanent Solution

No single solution will address all the problems inherent in rehabilitating ex-offenders, but it is clear that employment is critical to successful rehabilitation and reintegration.¹⁶⁷ Too often ex-offenders give up their search for legal employment after being subjected to constant employment rejection. Too often, they return to illegal work as their only means of survival. The vast

¹⁶⁴ *Id.* at 1025.

¹⁶⁵ *Id.* at 1027.

¹⁶⁶ *Id.*

¹⁶⁷ May, *supra* note 56, at 188. Facilitating employment opportunities to ex-felons may help lower the recidivism rate. Research indicates that the availability of employment and involvement in crime are inversely related. *Id.*

majority of states do little to encourage an ex-offender to continue in his quest for gainful employment. New York has taken the lead as the only state to go beyond simply encouraging private employers to hire ex-offenders by expressly prohibiting discrimination based on criminal history without further explanation. The Second Chance Act will go a long way toward providing relief during the critical transitional period immediately after release from incarceration. A successful societal effort to decrease recidivism must couple transitional programs, such as those provided under the Second Chance Act, with a stronger, more definitive federal statutory scheme similar to successful state models, specifically the New York anti-discrimination model, to underscore the need to provide employment assistance for ex-offenders.

B. A Temporary Solution

Until stronger federal anti-discrimination legislation is enacted and combines with the Second Chance Act to act concurrently, the federal government should take action to deal with elevated recidivism levels in a manner similar, but not identical to, the measures that are historically and presently used to address national employment needs in other situations. The recidivism problems created by thirty years of mass incarceration are critical to this nation's future and security, and they need to be addressed with the same fervor and response afforded the severe unemployment crisis during the Great Depression and military recruitment efforts to maintain a strong defensive, albeit voluntary, force.¹⁶⁸ The federal government created jobs for millions of workers hardest hit during the Great Depression by implementing the WPA. The federal

¹⁶⁸ Boucai, *supra* note 154, at 1026 (quoting Rep. Davis that "rehabilitating and reintegrating prisoners" is of primary importance in this country).

government is currently employing ex-offenders, even ex-felons, in the military. The federal government should enact legislation that would initiate a temporary jobs creation program for ex-offenders in certain circumstances and under certain conditions until future federal legislation can be enacted to adequately and actively prohibit discrimination against a job applicant based on his criminal record.

C. Solution Limitations

This solution of proposed employment for ex-offenders would necessarily have certain limitations. First, work created as a rehabilitative measure should be at-will. An employment contract at-will provides the government as employer and ex-offender as employee a simple solution against future wrongful activities—one can quit and the other can fire.¹⁶⁹ The possibility of losing employment created specifically in his best interests is a powerful incentive for an ex-offender to walk the straight and narrow line toward keeping his job and achieving successful rehabilitation. The inherent freedom found in employment at-will is a fairness presumption and defeats an argument that a just cause must exist. Self-sufficiency and self-reliance are end goals of ex-offender employment, and the freedom of an at-will contract goes a long way toward ensuring that an ex-offender will achieve those twin goals.

Second, an ex-offender should be required to enroll in programs offered under the Second Chance Act. Mentoring programs offered under the Second Chance Act would be particularly important to an ex-offender. When an ex-offender needs someone to talk to or needs advice from a trusted individual, he would likely find someone in a Second Chance Act program to fill that critical need.

¹⁶⁹ Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 979 (1984).

Further, the Second Chance Act monitoring programs would help an enrolled ex-offender fulfill stringent requirements, such as attending regular drug counseling sessions and showing up for work on time. If an ex-offender as a public employee fails to meet the requirements of the Second Chance Act programs, he would be terminated from his at-will employment under the proposed solution. Enrolling in Second Chance Act programs would provide an ex-offender more than adequate support for his reentry attempts and must be a part of any proposed solution to recidivism problems.

Finally, this public job creation program should be temporary. Temporary employment in the private setting can and often does lead to permanent employment. An ex-offender who has proven his credentials to future employers because of his success at his temporary government job should not be precluded from being hired outside the public employment realm.

D. Possible Reactions to Proposed Temporary Solution

No one condones criminal activity. Some would argue that providing public employment to ex-offenders is like turning a blind eye to crime and will take jobs away from non-offending, law-abiding citizens. Public employment programs are most necessary when severe economic times exist,¹⁷⁰ but the need here is not strictly economic, as was the case during the Great Depression. A law-abiding citizen has an undoubtedly far greater chance of being successful in his job search than does an ex-offender. Furthermore, when jobs are created for ex-offenders, the negligible effect on the availability of jobs for law-abiding

¹⁷⁰ Harvey, *supra* note 140, at 26. During times of depression, public employment “should be regarded as a principal line of defense.”

citizens pales in comparison to the societal good that occurs when ex-offenders are employed.

There are those who would argue that a work creation program would be too costly and would strain the federal budget. As noted herein, the cost of doing nothing to lower mass incarceration rates and prevent recidivism from spiraling out of control is far greater than any impact that temporary jobs would have on the public coffers. The upfront cost of incarceration of one individual can be as much as \$40,000 per year,¹⁷¹ while the social and economic costs of crime to the community are nearly immeasurable. Most likely an ex-offender would not earn anywhere near \$40,000 per year in a temporary, government-created employment position. Lowering the costs to the community due to a reduction in crime should stand alone as worthy of the cost of a job creation program for ex-offenders. The good to society evidenced by an active, involved, and productive ex-offender on a stable path to recovery is invaluable and should be promoted.

IX. Conclusion

Men and women leaving prison and returning to the community deserve a second chance to turn their lives around, to support a family, to pay taxes, and to be self-sufficient. Records of Congressional proceedings show that “[t]ransitional jobs programs have proven to help people with criminal records to successfully return to the workplace and to the community, and therefore can reduce recidivism.”¹⁷² During a Congressional debate on the Second Chance Act, Representative Davis of Illinois, a co-sponsor of the bill, said that Congress should be prepared to

¹⁷¹ 153 CONG. REC. H8280 (daily ed. July 23, 2007) (statement of Rep. Davis).

¹⁷² 153 CONG. REC. H13566 (daily ed. Nov. 13, 2007) (reading of H.R. 1593 sec.3(19)).

do two things to assist individuals recently released from prison in their efforts to re-enter the community they had left behind.¹⁷³ First, Congress should provide necessary funds for ex-offender drug treatment if needed.¹⁷⁴ Representative Davis then clearly and unequivocally stated that Congress needs to “find work for ex-offenders.”¹⁷⁵ The Second Chance Act will undeniably provide a plethora of programs that will ease the transition from incarceration into civilian life for a significant number of people each year. Transition programs by their very nature, however, can only go so far in ensuring a successful reintegration for ex-offenders. As Representative Davis succinctly stated, “Programs don’t supply jobs.”¹⁷⁶

America can fight crime and reduce recidivism rates. To be effective at both, the federal government should create temporary jobs for ex-offenders until stronger and more precise federal anti-discrimination legislation can be enacted that will ensure greater employment chances for ex-offenders. Our society should make a concerted effort to ensure that employment opportunities make an ex-offender’s road to reentry as smooth as possible. When society paves a path to employment for ex-offenders, public policy objectives are met and, importantly, individual needs are underscored. Ex-offenders deserve to have society look “not at their past, but at their potential.”¹⁷⁷

¹⁷³ 153 CONG. REC. H5691 (daily ed. May 23, 2007) (statement of Rep. Davis).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Posting of Ezekiel Edwards to DMI blog: *The Rough Road to Reentry*, http://www.dmiblog.com/archives/2006/04/the_rough_road_to_reentry_html.

ESSAY

**LEGITIMIZING DISCRIMINATION AGAINST TRANS
EMPLOYEES**

*Natalie Hrubos*¹

I. Introduction

Trans² employees can experience subtle forms of workplace discrimination. Seemingly neutral or natural policies and practices sometimes reflect discriminatory attitudes and create unwelcoming or even hostile work environments for trans employees. Fortunately, courts have recently begun to recognize that discrimination against trans employees constitutes discrimination based on sex in violation of Title VII of the Civil Rights Act of 1984.³ Yet, despite increased protections for trans workers, subtle forms of discrimination, if not acknowledged by courts or addressed by employers, may erode employment opportunities for trans communities.

The way in which federal courts have interpreted the word “sex” in Title VII has changed significantly since Congress passed the anti-discrimination statute. Initially, federal courts limited “sex discrimination” to discrimination based on “biological sex.”⁴ In 1989,

¹ J.D. 2009, Temple University Beasley School of Law. The author would like to thank Nancy Knauer, Katrina C. Rose, and Dean Spade for reviewing earlier drafts.

² Trans people are people who identify or express their gender in a way that is different from that associated with their assigned sex at birth. See Julia Serano, Whipping Girl FAQ on Cissexual, Cisgender, and Cis Privilege (May 2009), <http://juliaserano.livejournal.com/14700.html> (last visited Dec. 11, 2009).

³ 42 U.S.C. § 2000 (2006).

⁴ See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984) (construing “sex” in Title VII to refer to “biological sex”).

however, the United States Supreme Court held in *Price Waterhouse v. Hopkins*⁵ that “sex discrimination” includes discrimination based on sex stereotypes or gender non-conformity.⁶

In the last decade, federal courts—relying primarily on the *Price Waterhouse* decision—have held that trans employees who experience discrimination based on gender identity or gender non-conformity can establish the prima facie case of sex discrimination under Title VII.⁷ In Part II of this article, I briefly discuss the federal cases in which trans plaintiffs successfully asserted sex discrimination claims. Though trans employees lack trans-specific workplace protections in many, if not most, jurisdictions, federal courts increasingly find that trans employees can establish the prima facie case of sex discrimination under Title VII.

Nonetheless, a trans employee’s ability to establish the prima facie case does not guarantee the employee relief under Title VII, even where the evidence strongly suggests that the employee experienced discrimination because he or she is trans. Once an employee establishes the prima facie case, the court gives the employer an opportunity to articulate a legitimate, non-discriminatory reason for its decision to take adverse employment action against the employee. For example, the employer might assert that it discharged a female employee not because she is a woman, but because she talked on the phone too much during the workday.

Interestingly, in Title VII cases with trans plaintiffs, the employer often asserts a “legitimate, non-

⁵ 490 U.S. 228 (1989).

⁶ See *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (discussing sex stereotyping theory described in *Price Waterhouse*).

⁷ See, e.g., *Smith v. City of Salem*, 378 F.3d 566, 578 (6th Cir. 2004); *Barnes v. City of Cincinnati*, 401 F.3d 729, 742 (6th Cir. 2005); *Schroer v. Billington*, 577 F. Supp. 2d 293, 307 (D.D.C. 2008).

discriminatory” reason related to gender, the plaintiff’s protected characteristic. For example, in *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, the defendant employer stated that it discharged the plaintiff, a trans woman, because she “misrepresented” herself as female during her interview.⁸ In Part III of this article, I examine three so-called “legitimate, non-discriminatory” reasons that employers have asserted in Title VII cases with trans plaintiffs, including gender misrepresentation, inappropriate conversations related to gender, and potential liability for bathroom usage. I argue that the defendants in these cases seek to undermine well-established employment law principles to continue to lawfully discriminate against trans people and that judicial acceptance of their asserted reasons as legitimate and non-discriminatory would significantly erode employment opportunities for trans people.

In Part IV of this article, I further argue that the reasons asserted by the employers actually constitute direct evidence of discrimination because the reasons reflect the employers’ discriminatory attitudes toward trans people. Finally, in Part V of this article, I encourage employers to acknowledge that existing workplace practices and policies may actually support bias and discrimination against trans employees, and I suggest that employers use frameworks applied in other anti-discrimination contexts to erase discriminatory attitudes toward trans people and avoid future liability.

II. The Prima Facie Case

Before the United States Supreme Court decided *Price Waterhouse v. Hopkins*,⁹ the federal courts of appeals

⁸ *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653, 658 (S.D. Tex. 2008).

⁹ 490 U.S. 228 (1989).

that considered the issue agreed: Title VII's sex discrimination provision does not protect trans individuals who experience employment discrimination based on gender non-conformity or transsexual background.¹⁰ For example, in 1984, the Court of Appeals for the Seventh Circuit held, in *Ulane v. Eastern Airlines, Inc.*, that courts should narrowly construe the term "sex" in Title VII to mean biological sex rather than gender or sexual identity.¹¹ In *Ulane*, the plaintiff, a trans woman, was employed by the defendant airline as a pilot for nearly ten years before she began her gender transition from male to female.¹² She was terminated after she returned to work dressed in female attire following her sex reassignment surgery.¹³ The court held that the plaintiff in *Ulane* could not state a claim under Title VII because she had not experienced discrimination based on sex.¹⁴ Her "biological sex" was male, and she had not experienced discrimination based on her status as a "biological" male.¹⁵

Five years later, the way in which the federal courts interpreted Title VII's sex discrimination provision changed significantly when the Supreme Court decided *Price Waterhouse*.¹⁶ The Court held that discrimination based on gender non-conformity constitutes discrimination based on sex in violation of Title VII.¹⁷ The plaintiff in *Price Waterhouse*, a cis woman,¹⁸ filed a Title VII claim after she

¹⁰ See *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984).

¹¹ *Ulane*, 742 F.2d at 1084.

¹² *Id.* at 1082-83.

¹³ *Id.* at 1083.

¹⁴ *Id.* at 1085.

¹⁵ *Id.*

¹⁶ 490 U.S. 228 (1989).

¹⁷ *Id.*

¹⁸ Cis people are people who identify or express their gender in a way that is similar to that which is traditionally associated with their

was denied partnership at an accounting firm.¹⁹ She argued that the partners reacted negatively to her aggressive personality only because she is a woman and that they therefore based their decision to deny her partnership on sex stereotypes.²⁰ One partner described her as “macho,” and another stated that she “overcompensated for being a woman.”²¹

After the firm’s policy board reached its decision, the plaintiff in *Price Waterhouse* discussed her candidacy with the head partner, who advised her “to walk more femininely, talk more femininely, dress more femininely, have her hair styled, and wear jewelry.”²² The Court held that the defendant employer had violated Title VII’s sex discrimination prohibition.²³ It stated:

We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for . . . in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.²⁴

Since the Supreme Court decided *Price Waterhouse* nearly twenty years ago, a handful of trans individuals who experienced employment discrimination successfully used

assigned sex at birth. See Julia Serano, Whipping Girl FAQ on Cissexual, Cisgender, and Cis Privilege (May 2009), <http://juliaserano.livejournal.com/14700.html> (last visited Dec. 11, 2009).

¹⁹ *Price Waterhouse*, 490 U.S. at 232-33.

²⁰ *Id.* at 235.

²¹ *Id.*

²² *Id.*

²³ *Price Waterhouse*, 490 U.S. at 237.

²⁴ *Id.* at 251 (internal citations omitted).

the sex stereotyping theory to argue that Title VII's sex discrimination provision prohibits discrimination against trans employees because they are trans.²⁵ For example, the plaintiff in *Smith v. City of Salem*, a trans woman, argued that her employer discriminated against her because she was a "biological male" who failed to conform to her employer's sex stereotypes regarding men.²⁶

The plaintiff, J. Smith, was employed by the City of Salem as a lieutenant in the fire department.²⁷ Smith had been employed by the fire department for nearly seven years when she began changing her appearance to reflect her female gender identity.²⁸ Several co-workers questioned Smith about her appearance, so she met with her immediate supervisor to discuss her gender transition.²⁹ Smith's immediate supervisor then met with superiors to discuss Smith's gender transition and to determine whether the fire department could terminate her employment.³⁰ Smith was ultimately suspended and later filed suit under Title VII, arguing that her employer discriminated against her based on her gender non-conformity.³¹

The Court of Appeals for the Sixth Circuit held that the fire department had violated Title VII by discriminating against Smith based on her failure to conform to the sex stereotypes associated with males.³² The court stated that "sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim

²⁵ See, e.g., *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schroer v. Billington*, 577 F. Supp. 2d 293, 307 (D.D.C. 2008).

²⁶ *Smith*, 378 F.3d at 571-72.

²⁷ *Id.* at 568.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 571.

³² *Id.* at 575.

where the victim has suffered discrimination because of his or her gender non-conformity.”³³

Similarly, the Court of Appeals for the Ninth Circuit held that the term “sex” in Title VII “encompasses both sex—that is, the biological differences between men and women—and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.”³⁴ The plaintiff in *Schwenk v. Hartford*, a trans woman, filed a suit under the Gender Motivated Violence Act after a prison guard in an all-male Washington state prison raped her.³⁵ The court in *Schwenk* noted that the Gender Motivated Violence Act parallels Title VII and thus examined Title VII cases to determine whether the plaintiff had experienced violence motivated by gender.³⁶ The court held that the violence Schwenk experienced was motivated by her assumption of a feminine appearance and thus was motivated by gender in violation of the Gender Motivated Violence Act.³⁷

In the most recent trans-positive interpretation of Title VII by a federal court, the United States District Court for the District of Columbia held that Title VII’s sex discrimination provision prohibits discrimination against

³³ *Id.*

³⁴ *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (italics in original).

³⁵ *Id.* at 1193-94.

³⁶ *Id.* at 1202.

³⁷ *Id.* Similarly, when interpreting the sex discrimination provision of the Equal Credit Opportunity Act in *Rosa v. Park West Park & Trust Co.*, the First Circuit considered Title VII case law. 214 F.3d 213, 215-16 (1st Cir. 2000). The court determined that under *Price Waterhouse*, “stereotyped remarks [including statements about dressing more ‘femininely’] can certainly be evidence that gender played a part” in the defendant’s decision. *Id.* at 216. The plaintiff in *Rosa*, a “biological male,” tried to apply for a bank loan wearing “traditionally feminine attire,” but a bank employee told him that he could not apply for the loan until he changed clothes. *Id.* at 214.

trans employees.³⁸ The plaintiff in *Schroer v. Billington*, a trans woman named Diane Schroer, applied for a position as a terrorism specialist with the Congressional Research Service at the Library of Congress.³⁹ During her interview, she presented as male, as she had not yet started the phase of her gender transition where she would present as female.⁴⁰ She was well-qualified for the position with more than twenty-five years of military experience,⁴¹ and she received an offer.⁴² After she accepted, she asked the hiring official to lunch to discuss her gender transition.⁴³ Following the lunch, the hiring official discussed Schroer's transition with other hiring officials, and ultimately, the Library of Congress decided not to hire her for the position.⁴⁴ Schroer filed a sex discrimination claim under Title VII.⁴⁵

Schroer argued that the Library of Congress discriminated against her because she failed to conform to its gender stereotypes.⁴⁶ In other words, she argued that the Library of Congress failed to hire her because its hiring officials viewed her as a man who failed to conform to sex stereotypes associated with men.⁴⁷ Alternatively, Schroer argued that the Library of Congress may have discriminated against her because its hiring officials viewed her as a woman who failed to conform to the stereotypes associated with women.⁴⁸ In other words, she may have appeared too masculine for her employer to view her as a

³⁸ *Schroer*, 577 F. Supp. 2d at 308.

³⁹ *Id.* at 295.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 296.

⁴³ *Id.*

⁴⁴ *Id.* at 297-99.

⁴⁵ *Id.*

⁴⁶ *Id.* at 303-06.

⁴⁷ *Id.* at 305.

⁴⁸ *Id.*

“proper” female. Finally, Schroer also argued that the Library of Congress discriminated against her because she is a trans individual and that discrimination based on trans history constitutes discrimination based on sex *per se*.⁴⁹ The United States District Court for the District of Columbia held that whether the plaintiff relied on a sex stereotyping theory or a “sex discrimination *per se*” theory, she had stated a claim in violation of Title VII.⁵⁰

The *Schroer* court compared a change of sex to a change of religion, noting that “[d]iscrimination ‘because of religion’ easily encompasses discrimination because of a change of religion.”⁵¹ The court stated:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only to “converts.” . . . No court would take seriously the notion that ‘converts’ are not covered by the statute.⁵²

Though trans workers are certainly not protected in all jurisdictions, federal courts increasingly find that Title VII does protect trans employees because the sex discrimination provision encompasses gender identity or expression discrimination. In this unsettled, yet increasingly trans-inclusive, legal landscape, a trans plaintiff who experiences employment discrimination because she is trans can successfully establish a *prima facie* case of sex discrimination in several jurisdictions.

⁴⁹ *Id.* at 306. Schroer argued that gender identity is a component of sex; thus, gender identity discrimination is sex discrimination. *Id.*

⁵⁰ *Id.* at 308.

⁵¹ *Id.* at 306 (*italics in original*).

⁵² *Id.*

III. “Legitimate, Non-Discriminatory” Reasons

Once the plaintiff establishes the prima facie case, the court offers the employer an opportunity to articulate a “legitimate, non-discriminatory reason” for the adverse employment action taken against the plaintiff.⁵³ However, legitimate, non-discriminatory reasons asserted by employers in cases with trans plaintiffs typically relate to the plaintiffs’ gender identities or expressions. Judicial acceptance of these reasons would erode employment opportunities for trans people. Furthermore, employers that assert these reasons in Title VII cases undermine well-established employment law principles.

A. “Gender Misrepresentation”

In *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*,⁵⁴ after the trans plaintiff established a prima facie case of sex discrimination, the defendant employer stated that the company rescinded its previous job offer to the plaintiff because she “lied to the company when she failed to disclose that she is biologically male, both to her interviewers and on her resume and job application.”⁵⁵ The plaintiff in *Lopez*, a trans woman named Izza Lopez, applied for a scheduler position with the defendant medical clinic.⁵⁶ The defendant interviewed her for the position and later offered her the job, subject to her successful completion of a background check.⁵⁷ However, the defendant rescinded the job offer when Lopez’s background check results noted that she was, or had been

⁵³ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (establishing the burden-shifting framework for Title VII cases).

⁵⁴ 542 F. Supp. 2d 653 (S.D. Tex. 2008).

⁵⁵ *Id.* at 658.

⁵⁶ *Id.* at 655.

⁵⁷ *Id.* at 656.

previously, classified as male.⁵⁸ The company's hiring official sent Lopez a letter to confirm its decision to rescind the offer.⁵⁹ The letter stated: "As we previously explained to you, our offer was rescinded because we believe you misrepresented yourself to us during the interview process. You presented yourself as a female and we later learned you are a male."⁶⁰

Lopez filed a sex discrimination suit under Title VII and, according to the District Court for the Southern District of Texas, established a *prima facie* case of employment discrimination based on the *Price Waterhouse* sex stereotyping theory.⁶¹ Thus, the burden of production shifted to the defendant to articulate a legitimate, non-discriminatory reason for its decision.⁶² However, the defendant in *Lopez* argued that the company did not base its decision to rescind Lopez's job offer on the plaintiff's sex or her gender non-conformity.⁶³ Rather, the defendant argued that the company based its decision solely on its belief that she had misrepresented herself during the interview process.⁶⁴ The court held that it could not grant summary judgment in either party's favor because it remained unclear whether the company based its decision on sex or sex stereotypes or whether the company based its decision on its purportedly legitimate belief that Lopez affirmatively misrepresented her sex during the hiring process.⁶⁵

The defendant in *Lopez* seemed to argue that it based its adverse employment decision on the plaintiff's actual, individual misrepresentation rather than on a general

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 660-61.

⁶² *Id.* at 661.

⁶³ *Id.* at 667.

⁶⁴ *Id.*

⁶⁵ *Id.*

belief that trans individuals are necessarily deceptive. However, the defendant's inability to explain the relevance of the information and the significance of a "misrepresentation" suggests that the defendant's asserted reason is pretextual. Despite its assertion to the contrary, the defendant in *Lopez* may have rescinded the plaintiff's job offer based on a general view that trans people are fraudulent or untrustworthy.⁶⁶ Similarly, the defendant's conduct in the recent *Schroer* case was at least partially motivated by the employer's belief that trans individuals are deceptive and thus untrustworthy.⁶⁷ The defendant employer in *Schroer*, the Library of Congress, argued that it failed to hire the plaintiff, a trans woman, because, among other things, it was concerned about her trustworthiness given that she had not mentioned her gender transition at the start of the interview process.⁶⁸

The District Court for the District of Columbia held that the defendant's concerns regarding the plaintiff's trustworthiness were "pretextual."⁶⁹ The court stated that the hiring official's "concern with Schroer's trustworthiness

⁶⁶ Trans people have been accused of gender fraud in various contexts. See, e.g., *Transgender Politician Faces Fraud Lawsuit*, Associated Press, N.Y. TIMES, Nov. 23, 2007, at A35 (discussing lawsuit filed against a trans city council member by an unsuccessful political opponent who claimed the trans woman misled voters by running for office as a woman); Abigail Van Buren, *Transsexual Owes Boyfriend Truth*, THE INTELLIGENCER, Jan. 7, 2007, at D7 (noting that failure to discuss trans history with future husband could constitute fraud); *Husband's Sex-Change Subject of Appeal, Wife Says Marriage Was Never Valid*, Associated Press, LEXINGTON-HERALD LEADER, June 28, 2004, at B1 (discussing cis woman's effort to annul her marriage after her spouse transitioned from male to female based on the fact that "her husband represented himself as a man when psychologically, he knew all along he was a woman" and noting her argument that her spouse's "failure to disclose his gender identity before the wedding constitutes 'a fraud involving the essentials of marriage'").

⁶⁷ *Schroer*, 577 F. Supp. 2d at 302.

⁶⁸ *Id.*

⁶⁹ *Id.*

was belied by the fact that she thanked Schroer for her honesty in the course of rescinding the job offer.”⁷⁰ The *Schroer* court correctly determined that the defendant’s concerns regarding the plaintiff’s trustworthiness were “pretextual” in light of the particular factual circumstances of the *Schroer* case.⁷¹ Unfortunately, the court failed to hold that concerns about a trans individual’s trustworthiness due to a so-called misrepresentation regarding his or her gender or due to a failure to disclose trans background, gender identity, assigned sex, intent to transition, or some combination of the aforementioned, are *facially* discriminatory.

The *Lopez* court, however, went a little further than the *Schroer* court, stating that “to the extent [the defendant argues] that any person who dresses in a manner inconsistent with traditional gender stereotypes is necessarily deceptive, such a position is rejected.”⁷² Still, the *Lopez* court’s opinion left unresolved the question of whether an affirmative “gender misrepresentation” on an employment application or job interview *could* constitute a legitimate, non-discriminatory reason to take adverse employment action against a trans employee or applicant. In fact, the court’s opinion suggested that if the evidence in the case proved that the plaintiff had affirmatively lied to the company regarding her assigned sex, then the defendant would not have violated Title VII when it rescinded the plaintiff’s job offer after it discovered her assigned sex.⁷³ The *Lopez* court’s opinion largely ignores the reality that any acceptance of gender misrepresentation as a legitimate, non-discriminatory reason would not only severely cripple a trans employee’s ability to prevail under Title VII, but

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Lopez*, 542 F. Supp. 2d at 663.

⁷³ *Id.*

would also have more immediate, practical consequences for trans individuals seeking employment.

By recognizing so-called affirmative gender misrepresentation as employee misconduct and thus accepting it as a legitimate reason to take adverse action against an employee, courts would effectively compel (trans) applicants to reveal their assigned sex on employment applications and to discuss their assigned sex (and probably much more) in job interviews. To avoid termination due to dishonesty or misrepresentation, trans individuals would have to initiate irrelevant discussions about their bodies and in some cases their medical histories. Furthermore, where a trans applicant discloses or discusses his or her assigned sex or gender presentation during the hiring stage of the employment process, the applicant risks the very real possibility that the employer's hiring official will allow his or her prejudices to affect or undercut the trans individual's employment opportunities.

Trans people who fail to disclose their assigned sex on applications or during interviews, however, would severely undermine any future employment discrimination claims they might otherwise assert under Title VII. First, upon discovering that an employee is trans, an employer could lawfully discharge the employee even in a jurisdiction in which a trans plaintiff can establish a prima facie case of sex discrimination. Second, an employer who discharges an employee based on the employee's failure to conform to sex stereotypes might argue that even though the employer did not base its decision on the affirmative gender misrepresentation, after-acquired evidence of misconduct allows the employer to evade liability for its discriminatory conduct.⁷⁴ This places trans workers in an

⁷⁴ See *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362 (1995):

The object of compensation is to restore the employee to the position he or she would have been in absent the

intolerable and impermissible Catch 22: immediate exposure to discriminatory attitudes or erasure of Title VII protection against future discriminatory attitudes.⁷⁵

In essence, judicial acceptance of gender misrepresentation as a legitimate, non-discriminatory reason to take adverse employment action against a trans person totally erases Title VII protection for trans employees in jurisdictions where the judiciary has explicitly determined that Title VII protects trans people against discrimination. In other words, trans people are in the same unprotected position they were in prior to the trans-positive Title VII decisions. Once an employer discovers that an employee is trans, the employer may lawfully opt to discharge the employee based on the “misrepresentation,” or the employer may opt to retain the trans employee despite the “misrepresentation.” Because employers in jurisdictions that do not protect trans people against discrimination possess the very same options, the trans-positive rulings are rendered utterly meaningless.⁷⁶

discrimination . . . but that principle is difficult to apply with precision where there is after-acquired evidence of wrongdoing that would have led to termination on legitimate grounds had the employer known about it. Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit.

Id. (citations omitted).

⁷⁵ See *Price Waterhouse*, 490 U.S. at 251 (“An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.”).

⁷⁶ Similarly, in applying anti-discrimination laws that expressly protect trans employees, courts have determined that an employer *may allow* a trans employee to use the restroom that reflects the employee’s gender identity and/or presentation; however, the employer is *not legally required* to, for example, allow a trans woman to use the female-

In addition to diminishing employment opportunities for trans people, the assertion that gender misrepresentation constitutes a legitimate, non-discriminatory reason to take adverse employment action against a trans individual undercuts well-established employment law principles regarding misrepresentations on employment applications. In general, an employee's misrepresentation constitutes misconduct only where *material* to the duties of the positions sought. For example, an individual's misrepresentation regarding alcoholism is not material where the individual applies for a position as a chef.⁷⁷ Does an individual's "misrepresentation" regarding gender constitute a *material* misrepresentation where the individual, like the plaintiff in *Lopez*, applies for a position as a scheduler? Is gender ever material to the duties of a job in a society that has outlawed gender discrimination in the workplace?

Title VII does permit discrimination based on gender—and other protected characteristics—in very limited circumstances. Section 703 of Title VII states that "it shall *not* be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business. . . ."⁷⁸ One might therefore argue that a misrepresentation regarding

designated restroom at work. Katrina C. Rose points out that anti-discrimination laws are ineffective where the employer ultimately retains sole discretion as to whether to permit a trans worker to use the restroom that reflects his or her gender presentation. Katrina C. Rose, *Toilets, Transgendered People and the Law: The Minnesota Microcosm and Beyond* at 9 (2007) (unpublished manuscript, on file with author).

⁷⁷ *Indep. Sch. Dist. No. 709 v. Hansen*, 412 N.W.2d 320, 322-23 (Minn. Ct. App. 1987).

⁷⁸ 42 U.S.C. §2000e-2(e)(1) (2006) (emphasis added).

assigned sex is material only where assigned sex is a bona fide occupational qualification. Courts have held that sex is a bona fide occupational qualification in rare cases where the employment of members of one sex would jeopardize the safety of third parties⁷⁹ and where it would undermine the essence of the business's operation.⁸⁰ Given that Title VII limits the exception to these rare instances, sex or gender certainly would not qualify as a bona fide occupational qualification for the appointment scheduler job; thus, a misrepresentation regarding assigned sex could not be material to the duties of the job.

Furthermore, in *Lopez*, the defendant, as well as the court, failed to distinguish between assigned sex and "legal" sex (or sex as it is reflected on an individual's legal identity documents). In the defendant's letter to Lopez, the defendant stated: "As we previously explained to you, our offer was rescinded because we believe you misrepresented yourself to us during the interview process. You presented yourself as a female and we later learned [through a background check] you are a male."⁸¹ The court's opinion does not discuss whether the background check revealed that Lopez's assigned sex was male or that Lopez's legal identity documents classified her as male.⁸² Certainly, the gender markers on the plaintiff's legal identity documents *may* have matched her assigned sex. However, because

⁷⁹ *Dothard v. Rawlinson*, 433 U.S. 321, 336-37 (1977) (holding that hiring exclusively male "correctional counselors in a 'contact' position in an Alabama male maximum security penitentiary" was legal discrimination pursuant to the "bona fide occupational qualification" exception).

⁸⁰ *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971) (hiring only female stewardesses is not legal discrimination pursuant to the bona fide occupational qualification exception where the essence or primary function of the business is the safe transportation of passengers).

⁸¹ *Lopez*, 542 F. Supp. 2d at 656 (internal citations omitted).

⁸² See generally *id.*

many state agencies permit gender reclassification, an individual's legal identity documents need not reflect the individual's assigned birth sex.⁸³

In the United States, various agencies issue identity documents with gender markers, including state departments of health that issue birth certificates, state departments of motor vehicles that issue drivers' licenses, and the Social Security Administration ("SSA") that issues social security cards.⁸⁴ Many, though not all, state agencies, as well as the SSA, permit individuals to change the gender marker on their identity documents from male to female or from female to male.⁸⁵ However, the gender reclassification procedures vary widely among agencies with some requiring proof of sex reassignment surgery.⁸⁶ As a result, an individual could, for example, change the gender marker on his or her driver's license as well as the gender marker associated with his or her social security card, but maintain the original gender marker on his or her birth certificate. In such a scenario, the person's "legal gender" would remain unclear.⁸⁷

⁸³ Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 750-51 (2008).

⁸⁴ *Id.* at 760-74.

⁸⁵ *Id.* at 767-70:

Forty-seven states and New York City allow gender reclassification on birth certificates. Idaho, Ohio, and Tennessee will not change gender on a birth certificate. Twenty-eight states plus the District of Columbia and New York City specifically authorize gender reclassification by statute or administrative ruling, while the other nineteen have no written rule stating that they allow sex designation change, but in practice do provide sex designation change upon application.

Id. at 767-68 (citations omitted).

⁸⁶ *Id.* at 768-70. For example, New York requires that the applicant has undergone penectomy or hysterectomy and mastectomy. *Id.* at 769.

⁸⁷ *Id.* at 734:

Many people are under the impression that everyone has a clear 'legal gender' on record with the government, and that

Thus, the plaintiff in *Lopez* might have changed her gender marker from male to female on all of her identity documents, including her birth certificate, driver's license, and social security card. If that were the case, would the defendant still have considered her female presentation a misrepresentation given that her assigned sex was male? Alternatively, the plaintiff in *Lopez* might have changed her gender marker from male to female on some, but not all, of her identity documents. If that were the case, might the defendant have considered her gender presentation a misrepresentation regardless of whether her presentation was stereotypically male or female?

Even if the plaintiff in *Lopez* had changed the gender markers on her identity documents from male to female, neither the defendant nor the court discussed whether the plaintiff should have disclosed her assigned sex or the sex that appeared on her identity documents (or perhaps on the majority of her identity documents in the event that they contained different gender markers). In light of the various gender reclassification policies in the United States, the *Lopez* defendant's statement regarding the plaintiff's status as a male seems oversimplified and its characterization of her female presentation as a misrepresentation somewhat illogical.⁸⁸

B. "Inappropriate Conversations"

Like the defendant in *Lopez*, the defendant in *Sturchio v. Ridge* asserted a similarly suspect legitimate, nondiscriminatory reason for the adverse action it took

changing 'legal gender' involves presenting some kind of evidence to a specific agency or institution in order to make a decisive and clear change to the new category. . . . As it turns out, the reality of the rules that govern gender reclassification in the United States is far more complex.

Id.

⁸⁸ See *Lopez*, 542 F. Supp. 2d at 656.

against a trans employee.⁸⁹ The plaintiff in *Sturchio*, a trans woman named Tracy Nicole Sturchio, had worked for the United States Border Patrol as a telecommunications specialist for about eleven years before she transitioned to female.⁹⁰ As she began changing her appearance, Sturchio occasionally discussed her gender presentation with co-workers.⁹¹

Some of her co-workers felt uncomfortable discussing gender matters with Sturchio and complained to management.⁹² United States Border Patrol supervisors took various disciplinary actions against Sturchio and instructed her not to discuss her appearance or any gender-related issues with her co-workers.⁹³ Sturchio may not have been an exemplary employee. In fact, some evidence suggests that Sturchio talked too much while working and that she repeatedly told co-workers a seemingly outlandish, and likely false, story about how a government doctor said she would “turn into a woman” because she had accidentally been exposed to “military estrogen.”⁹⁴

Regardless, the defendant’s trial brief and the court’s opinion in *Sturchio* strongly suggest that the United States Border Patrol ultimately took adverse employment action against the plaintiff, not because she talked too much or told falsehoods, but because she initiated so-called “inappropriate conversations” regarding her gender and subsequently caused discomfort among her co-workers.⁹⁵

⁸⁹ *Sturchio v. Ridge*, No. CV-03-0025-RHW, 2005 WL 1502899 at *6, 16 (E.D. Wash. June 23, 2005).

⁹⁰ *Id.* at *1, 3-4.

⁹¹ *Id.* at *3.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See id.*

⁹⁵ *See Sturchio*, 2005 WL 1502899, at *3, 15-16; *see also* KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US 10 (1994) (noting that “gender identity seems to be an unspeakable thing in our culture”). Bornstein further explains: “In this culture, the

For example, Sturchio asked one female co-worker for hair and makeup advice.⁹⁶ On another occasion, Sturchio told a co-worker about an instance where Sturchio had visited a waterslide park with her family and did not know which restroom to use to change into her bathing suit.⁹⁷

Additionally, the defendant's trial brief stated that another employee would testify that "[a]ll of a sudden with no prompting and apropos of nothing, Sturchio started talking about how he wears a dress, that people call him a woman's name, and that people sometimes mistake him for a woman, talking for about five minutes."⁹⁸ The defendant's trial brief also indicated that another co-worker would testify that "Sturchio made unsolicited comments about . . . his accident [with military estrogen], his bra size, having certain body parts cut off, that his estrogen patch was not working and his hormones are not right."⁹⁹

Most of the employees who said that they felt uncomfortable during conversations with Sturchio seemed primarily uncomfortable with Sturchio's gender transition as a general matter, rather than with any specific comments that an employer might consider inappropriate or offensive independent of an employee's gender transition.¹⁰⁰ The defendant's trial brief states that one United States Border Patrol employee "was very religious, and Sturchio's comments made him uncomfortable."¹⁰¹ Another employee

only two sanctioned gender clubs are 'men' and 'women.' If you don't belong to one or the other, you're told in no uncertain terms to sign up fast." *Id.* at 24. "Then there's gender attribution, whereby we look at somebody and say, 'that's a man,' or 'that's a woman.' And this is important because the way we perceive another's gender affects the way we relate to that person." *Id.* at 26.

⁹⁶ Defendant's Trial Brief at 6, *Sturchio v. Ridge*, No. CV-03-0025-RHW, 2005 WL 1502899 (E.D. Wash. June 23, 2005).

⁹⁷ *Id.* at 9.

⁹⁸ *Id.* at 11.

⁹⁹ *Id.* at 21.

¹⁰⁰ *See id.* at 6, 9, 11, 15, 19.

¹⁰¹ *Id.* at 19.

noted that “he could have a problem if he had to work with Sturchio on a regular basis, because Sturchio’s appearance would take some getting used to.”¹⁰² Others expressed concern regarding whether the defendant employer would permit Sturchio to use the women’s restroom.¹⁰³ These comments illustrate that many employees who complained about the conversations they had with Sturchio were simply uncomfortable with her new gender presentation.

The *Sturchio* court’s opinion further demonstrated that the United States Border Patrol employees who felt uncomfortable during conversations with Sturchio were simply uncomfortable with Sturchio’s gender transition and perhaps trans individuals in general.¹⁰⁴ For example, the court stated: “Understandably, the discomfort was caused because the subject was too intimate for the type of relationship between [Sturchio] and the coworker, or it was interpreted as inappropriate because of the coworker’s belief system.”¹⁰⁵ The court further stated: “Testimony revealed that many of *his* coworkers were uncomfortable in discussing Plaintiff’s appearance with *him*. In our society, most people relate to others under the assumption that they are who they appear to be, *i.e.*, male or female, and content to be so.”¹⁰⁶ The court said that the employees’ “discomfort was understandable, given the topic of discussion, the environment in which it was being spoken, and the fact that the coworkers were receiving mixed signals regarding [Sturchio’s] gender identity.”¹⁰⁷

The court’s statements regarding Sturchio’s gender, and gender in general, suggest that the defendant took adverse action against Sturchio because she is trans or

¹⁰² *Id.* at 21.

¹⁰³ *See id.* at 6.

¹⁰⁴ *See Sturchio*, 2005 WL 1502899, at *3.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (emphasis added).

¹⁰⁷ *Id.*

otherwise because she failed to conform to its gender norms. Yet, the court in *Sturchio* held that the adverse action taken by the defendant against Sturchio was not based on Sturchio's "failure to act or look in the way expected of a man."¹⁰⁸ The court's conclusion is incomprehensible given the court's poignant discussion of appropriate gender behavior and the statements of Sturchio's co-workers regarding their discomfort surrounding Sturchio's diverse gender presentation.

For the most part, the "inappropriate conversations" in *Sturchio* merely involved non-sexual aspects of Sturchio's gender transition or otherwise related to Sturchio's new gender expression.¹⁰⁹ The court's acceptance of these so-called inappropriate conversations as a legitimate, non-discriminatory reason to take adverse employment action against a trans worker¹¹⁰ places significant burdens on trans people in violation of Title VII. Gender is an integral part of every person's identity.¹¹¹ For a trans individual, gender can have even more significance.¹¹²

¹⁰⁸ *Id.* at *13.

¹⁰⁹ *See id.* at *15.

¹¹⁰ *See id.*

¹¹¹ "Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom." THE YOGYAKARTA PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY 11 (2007), http://www.yogyakartaprinciples.org/principles_en.pdf.

¹¹² *See* SUSAN STRYKER, *TRANSGENDER HISTORY* 1 (2004):

I use [transgender] in this book to refer to people who move away from the gender they were assigned at birth, people who cross over (*trans*-) the boundaries constructed by their culture to define and contain that gender. Some people move away from their birth-assigned gender because they feel strongly that they properly belong to another gender in which it would be better for them to live; others want to strike out toward some new location, some space not yet clearly defined or concretely occupied; still others simply feel the need to get

Stifling conversations related to gender for a trans individual, but not for a cis individual, is discriminatory and doing so creates an unwelcome or even hostile environment for gender-variant people and people who transition from one gender to another. In this type of environment, trans people lose employment opportunities while cis people who engage in gender-appropriate conversations do not. Furthermore, state and federal employers, like the United States Border Patrol, may violate their employees' First Amendment right of free speech when they prohibit workplace conversations.¹¹³

C. "Potential Liability"

In *Etsitty v. Utah Transit Authority*, the United States Court of Appeals for the Tenth Circuit assumed, without deciding, that the plaintiff could establish a prima facie case of sex discrimination under the *Price Waterhouse* sex stereotyping theory.¹¹⁴ When the plaintiff in *Etsitty*, Krystal Etsitty, was hired by the defendant, Utah Transit Authority, as a bus driver, she presented as male and used male restrooms on her bus route.¹¹⁵ Utah Transit Authority terminated Etsitty shortly after she began presenting as female and using female restrooms.¹¹⁶ Etsitty filed a Title VII sex discrimination claim.¹¹⁷ Because the court assumed that the plaintiff could establish a prima facie case of sex discrimination, the burden shifted to the defendant

away from the conventional expectations bound up with the gender that was initially put on them.

¹¹³ See U.S. CONST. amend. I.

¹¹⁴ *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1223-24 (10th Cir. 2007).

¹¹⁵ *Id.* at 1218-19.

¹¹⁶ *Id.* at 1219

¹¹⁷ *Id.*

“to articulate a legitimate, nondiscriminatory reason” for its decision to discharge the plaintiff.¹¹⁸

The defendant, Utah Transit Authority, stated that it terminated Etsitty’s employment solely because she planned to use female restrooms along her bus route even though she was a biological male.¹¹⁹ The defendant said it was concerned that a biological male’s use of a female restroom would result in liability for the defendant.¹²⁰ The court agreed that the defendant’s articulated reason for Etsitty’s termination constituted a legitimate and nondiscriminatory reason for purposes of Title VII.¹²¹

The court’s unfortunate decision in *Etsitty* conflicts with well-established employment discrimination law principles. The Supreme Court has already determined that an employer cannot discriminate against an employee in violation of Title VII simply because the employer fears the remote possibility of liability.¹²² In *Automobile Workers v. Johnson Controls, Inc.*, the defendant employer, a battery manufacturer, barred all fertile women from jobs involving lead exposure in an effort to avoid liability for harm caused to unborn children whose mothers were exposed to lead.¹²³ The Court held that the employer’s policy violated Title VII.¹²⁴ First, the Court noted that the bases suggested for holding the employer liable for harm caused to unborn children were weak.¹²⁵ The Court stated that the

¹¹⁸ *Id.* at 1224.

¹¹⁹ *Id.* at 1224-25.

¹²⁰ *Id.* at 1224.

¹²¹ *Id.* at 1227.

¹²² *See* *Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 192 (1991); *see also* *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681 (2009) (holding that an employer must have a “strong basis in evidence” to believe that it will be subject to disparate impact liability before it can “engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact”).

¹²³ 499 U.S. 187, 192 (1991).

¹²⁴ *Id.* at 206.

¹²⁵ *Id.* at 208.

defendant's "speculation [regarding liability] appears unfounded as well as premature."¹²⁶

Second, and most importantly, the Court stated that the employer in *Johnson Controls* "attempt[ed] to solve the problem of reproductive health hazards by resorting to an exclusionary policy."¹²⁷ As the Court stated, "Title VII plainly forbids illegal sex discrimination as a method of diverting attention from an employer's obligation to police the workplace."¹²⁸ In other words, employers cannot evade their Title VII obligations by arguing that it is simply too difficult or costly to avoid discriminating against female workers.

As in *Johnson Controls*, no real basis for liability exists in the *Etsitty* case. As an initial matter, it is generally lawful for trans women to use female-designated restrooms. In fact, some cities have guidelines or regulations that require or strongly encourage public entities, including employers, not to discriminate against trans people by denying them access to restrooms that reflect their gender identities or expressions.¹²⁹ Furthermore, courts that have addressed the issue of restroom discrimination have held that because employers need not fear liability when trans

¹²⁶ *Id.* at 210.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See District of Columbia Regulations, Compliance Rules and Regulations Regarding Gender Identity or Expression, § 801(a), (c), available at http://newsroom.dc.gov/file.aspx/release/10121/Final_Transgender_Regulations.pdf. The D.C. regulations state that unlawful discriminatory practices shall include denying access to restrooms and other gender-specific facilities that are consistent with the employee's gender identity or expression in both the employment and public accommodations contexts. See also New York City Guidelines, Guidelines Regarding "Gender Identity" Discrimination, A Form of Discrimination Prohibited by the New York City Human Rights Law; San Francisco Regulations, San Francisco Compliance Rules and Regulations Regarding Gender Identity Discrimination.

women use female-designated restrooms,¹³⁰ it follows that all public entities need not fear liability when trans people use restrooms that match their gender identities or expressions.

In *Cruzan v. Special School District, No. 1*, the plaintiff, a cis woman and teacher, filed sex and religious discrimination claims against her employer based on the school's policy to allow trans women to use the female-designated restrooms.¹³¹ The Court of Appeals for the Eighth Circuit held that the school's policy did not create a hostile work environment for cis women.¹³² The *Cruzan* court stated that "no case law supports [the plaintiff's] assertion" that "reasonable [cis] women could . . . find their working environment is abusive or hostile when they must share bathroom facilities with a coworker who self-identifies as female, but who may be biologically male."¹³³ The court's discussion in *Cruzan* reveals the defects in Utah Transit Authority's argument that it feared liability based on the plaintiff's use of female-designated restrooms.

Most importantly, the court's acceptance of the defendant's dubious liability theory as a legitimate reason to take adverse action against a trans worker will drastically erode employment opportunities for trans people. The *Etsitty* court seemed to rely heavily on the defendant's distinction between the plaintiff's use of public, off-site restrooms, which the defendant argued it could not accommodate, and the plaintiff's use of on-site restrooms, which presumably the defendant may have been able to

¹³⁰ *Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 984 (8th Cir. 2002). "We agree with the district court that Cruzan [the plaintiff] failed to show the school district's policy allowing [the trans school teacher] to use the women's faculty restroom created a working environment that rose to this level." *Id.*

¹³¹ *Id.* at 982-83.

¹³² *Id.* at 984.

¹³³ *Id.*

accommodate.¹³⁴ The defendant and the court were concerned about liability that may result from “public complaints.”¹³⁵

Though one could argue that the *Etsitty* court limited its decision to off-site public restrooms, a future defendant employer could certainly argue that it may lawfully discharge a trans woman where she plans to use an on-site restroom either open to the public or used by customers and clients. The same potential for complaints exists in both cases. Contrary to the purpose of Title VII, the *Etsitty* decision encourages employers to wholly exclude trans people from their workplaces.¹³⁶ As the Court stated in *Johnson Controls*, exclusionary policies stand in direct opposition to the anti-discrimination laws.¹³⁷

IV. “Legitimate” Reasons to Discriminate?

The so-called “legitimate, non-discriminatory reasons” asserted against the trans plaintiffs in *Lopez*, *Sturchio*, and *Etsitty* are actually quite discriminatory and therefore not legitimate reasons to take adverse employment action against trans applicants and workers. In fact, the reasons proffered by the defendants in these cases constitute *direct* evidence of employment discrimination. Direct evidence includes “evidence of

¹³⁴ *Etsitty*, 502 F.3d at 1219.

¹³⁵ *Id.* at 1227.

¹³⁶ *Id.* at 1225. “The record also reveals UTA believed, and *Etsitty* has not demonstrated otherwise, that it was not possible to accommodate her bathroom usage” *Id.* at 1224. See also BORNSTEIN, *supra* note 95, at 102 (describing “either/or” as a control mechanism).

‘Ladies’ are the kind of people who won’t let my girlfriend use the public ladies’ room, thinking she’s not a woman. Oh, but they’re not going to let her use the men’s room either—they’re not going to let her be a man either. If she’s not a man, and she’s not a woman, then what is she?”

Id. (quoting Holly Hughes, *Clit Notes*, 1993).

¹³⁷ *Johnson Controls*, 499 U.S. at 210.

conduct or statements by persons involved in the decision making process that may be viewed as directly reflecting the alleged discriminatory attitude.”¹³⁸ The reasons proffered by the defendants in these cases strongly reflect their “discriminatory attitude[s]” toward trans people.

A discussion of direct evidence cited in other types of employment discrimination cases may shed some light on the proposition that the “legitimate, non-discriminatory” reasons articulated by the defendants merely reflect their discriminatory attitudes toward trans people rather than their legitimate exercises of employer discretion. “Direct evidence” of discrimination typically consists of statements that reveal a belief on the part of the employer that a particular type of person is generally not viable as an employee.¹³⁹ In an age discrimination case, for example, the direct evidence presented will likely reflect the employer’s belief that older individuals are not viable employees.

In *Ostrowski v. Atlantic Mutual Insurance Cos.*, an age discrimination case, the defendant’s agent, a senior regional vice president for the company, stated that the defendant should not have hired two older individuals because “they should have been, or should have remained, retired.”¹⁴⁰ The vice president further stated that a 64-year-old employee “can’t . . . be superior” and that “there is no

¹³⁸ *Morgan v. A.G. Edwards & Sons, Inc.*, 486 F.3d 1034, 1043 (8th Cir. 2007) (quoting *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 449 (8th Cir. 1993)).

¹³⁹ *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 174 (2d Cir. 1992) (discussing employer’s discriminatory statements, including: “[Plaintiff is] not the type of person that we want to hire. . . . [T]hat guy should have retired years ago.”); *Jerge v. City of Hemphill, Texas*, 80 F. App’x 347, 350 n.4 (5th Cir. 2003) (discussing statements by plaintiff’s supervisor that she “lacked the ‘nuts’ for the job” and that “the community would never accept a woman as City Manager”).

¹⁴⁰ *Ostrowski*, 968 F.2d at 183.

way [a 60-year-old employee] can contribute.”¹⁴¹ The Court of Appeals for the Second Circuit held that the vice president’s statements, which reflected his “discriminatory attitude” toward older individuals, constituted direct evidence of age discrimination.¹⁴² The evidence presented reflected the vice president’s belief that the older individuals were not viable employees due to their age.

Similarly, in *Jerge v. City of Hemphill*, a sex discrimination case, the Court of Appeals for the Fifth Circuit held that the plaintiff presented direct evidence of sex discrimination where the evidence reflected the defendant’s discriminatory attitude toward women and more specifically the defendant’s belief that women are not viable employees.¹⁴³ The plaintiff in *Jerge* filed a sex discrimination suit after the city’s mayor and councilmen failed to appoint her City Manager.¹⁴⁴ The evidence showed that the mayor told the plaintiff that the councilmen would not support her candidacy for City Manager because they “don’t think a woman can do the job.”¹⁴⁵ The evidence further showed that one councilman “expressed reservation as to whether the two women applicants could handle the ‘outside parts’ of the job.”¹⁴⁶ Another councilman stated that he was “concerned about a woman being called out to work at night—one of the requirements of the job of City Manager.”¹⁴⁷ The court in *Jerge* held that the evidence presented constituted direct evidence of discrimination.¹⁴⁸ The mayor and councilmen’s statements reflected their belief that a woman is not viable as a City Manager.

¹⁴¹ *Id.* at 174.

¹⁴² *Id.* at 182-83.

¹⁴³ *Jerge*, 80 F. App’x at 350.

¹⁴⁴ *Id.* at 349-50.

¹⁴⁵ *Id.* at 349.

¹⁴⁶ *Id.* at 351.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 350-51.

Like the statements in *Ostrowski* and *Jerge*, the “legitimate, non-discriminatory” reasons asserted by the defendants in *Lopez*, *Sturchio*, and *Etsitty* constitute direct evidence of discrimination because the reasons asserted reflect the employers’ discriminatory attitudes toward trans people. Unlike the evidence in *Ostrowski* and *Jerge*, however, the direct evidence in these cases more than simply reflects the employers’ belief that trans people are not viable employees, although that particular belief is implicit in the evidence presented. More significantly, the statements strongly reflect the defendants’ belief that trans people are not viable as individuals in our society and thus cannot possibly function appropriately within the workplace.¹⁴⁹

For example, in *Lopez*, the defendant’s articulation of “gender misrepresentation” as the “legitimate, non-discriminatory” reason for its failure to hire the plaintiff reflects, at a minimum, the decision maker’s belief that a person who transitions from one gender to the other affirmatively lies when he or she presents as his or her affirmed gender. This suggests that the trans individual’s identity is fraudulent. The employer in *Lopez* essentially suggests that the plaintiff does not exist as a woman and thus cannot function properly in a workplace where the employer must, among other things, “note [its] employees’ sex on healthcare benefits forms.”¹⁵⁰ The employer’s belief

¹⁴⁹ See STRYKER, *supra* note 105, at 6 (2004) (“Because most people have great difficulty recognizing the humanity of another person if they cannot recognize that person’s gender, the gender-changing person can evoke in others a primordial fear of monstrosity, or loss of humaneness.”).

¹⁵⁰ *Lopez*, 542 F. Supp. 2d at 664 n.15. See also Dean Spade, *Trans Formation*, LOS ANGELES LAWYER, at 36 (Oct. 9, 2008) (describing the myth that trans people do not exist and stating:

[t]his belief that transgender people’s gender identities are fraudulent or false and that legal obstacles to articulating such an identity publicly should be upheld by judges is based in a

regarding the plaintiff's viability as a female employee strongly reflects its "discriminatory attitude" toward trans people.

Similarly, in *Sturchio*, the defendant's articulation of "inappropriate conversations" regarding gender as the "legitimate, non-discriminatory" reason for the adverse employment action taken against the plaintiff reflects the defendant's beliefs that a trans woman is essentially a man and that it is "inappropriate" for men to discuss certain topics, such as makeup and hair styles.¹⁵¹ The employer's statements in *Sturchio* also show the employer's general discomfort with gender transitions. The employer's discomfort reflects the employer's belief that gender transitions are objectionable and perhaps incompatible with a healthy workplace. These beliefs strongly reflect the employer's "discriminatory attitude" toward trans people and thus constitute direct evidence of discrimination.

Finally, in *Etsitty*, the employer's articulation of potential liability for the plaintiff's restroom usage as a "legitimate, non-discriminatory" reason for its decision to discharge the plaintiff strongly reflects the employer's belief that it is inappropriate for trans women to use the women's restroom because trans women are essentially men or because trans women are unnaturally non-gendered.¹⁵² One of the plaintiff's supervisors stated in her

fundamental notion that birth-assigned gender is the only "true" gender an individual can have and that transgender identity is not recognizable or legitimate.

¹⁵¹ See STRYKER, *supra* note 111, at 10 ("Secondary sex characteristics constitute perhaps the most socially significant part of morphology—taken together, they are the bodily "signs" that others read to guess at our sex, attribute gender to us, and assign us to the social category they understand to be most appropriate for us.").

¹⁵² Diana Elkind, Comment, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 921 (2007) ("As the discrimination faced by the transgendered is often intrinsically tied to

deposition testimony that she and another supervisor “both felt that there was an image issue out there for us, that we could have a problem with having someone who, even though *his* appearance may look female, *he’s* still a male because *he* still had a penis.”¹⁵³ The court then stated that “[i]mmediately after [the supervisor] mention[ed] Etsitty’s appearance, she explain[ed] the problem with this appearance is that [Etsitty] may not be able to find a unisex bathroom on the route and that liability may arise if Etsitty was using female restrooms.”¹⁵⁴

The supervisor’s statements in *Etsitty* reveal the employer’s belief that trans individuals are abnormally gendered and that it is impractical, if not impossible, to integrate trans people into a workplace—or a society—where bathrooms, among other things, are gendered.¹⁵⁵ This belief on the part of the employer in *Etsitty* reflects its view that trans people are not viable as individuals and thus cannot function properly in society, let alone the workplace. This belief strongly reflects the employer’s “discriminatory attitude” toward trans people and thus constitutes direct evidence of discrimination.

In the typical employment discrimination case, the “legitimate, non-discriminatory” reason asserted by the

their gender, which bathroom to use is a fundamental and unnecessarily complicated choice that highlights the discord between the transgender individual’s personal identity and society’s label of what is acceptable.”).

¹⁵³ *Etsitty*, 502 F.3d at 1225 (emphasis added).

¹⁵⁴ *Id.* at 1225-26.

¹⁵⁵ See BORNSTEIN, *supra* note 95, at 45-52 (describing the rules of gender, including there are two, and only two, genders; one’s gender is invariant; genitals are the essential sign of gender; any exceptions to two genders are not to be taken seriously; there are no transfers from one gender to another except ceremonial ones; everyone must be classified as a member of one gender or another; the male/female dichotomy is a “natural” one; and membership in one gender or another is “natural”) (citing HAROLD GARFINKLE, *STUDIES IN ETHNOMETHODOLOGY* (1967)).

employer for the adverse employment action taken against the plaintiff is generally unrelated to the plaintiff's protected characteristic. For example, the defendant in an age discrimination case might assert that it discharged the plaintiff because he or she was repeatedly late for work or stole from the company. The employer in such a case would probably not assert that it discharged the plaintiff, an older individual, because his or her gray hair was unprofessional or because he or she inappropriately discussed dentures with other employees.

Yet, in discrimination cases with trans plaintiffs, the so-called legitimate, non-discriminatory reasons asserted by the defendants often relate directly to the plaintiff's gender—his or her (claimed) protected characteristic.¹⁵⁶ When the “legitimate, non-discriminatory” reason asserted by the defendant relates directly to the plaintiff's protected characteristic, the defendant's reason often reflects the defendant's “discriminatory attitude” toward people with the claimed protected characteristic. Most importantly, the asserted reason often signals an employer's belief that a person with the protected characteristic is not viable as an employee or even as an individual (as is, sadly, often the case in discrimination cases with trans plaintiffs). If the employer asserts a so-called non-discriminatory reason that essentially reflects its discriminatory attitude, the employer may face legal consequences because the asserted non-discriminatory reason constitutes direct evidence of discrimination.

¹⁵⁶ See, e.g., *Lopez*, 542 F. Supp. 2d at 656 (asserting gender misrepresentation as a legitimate, non-discriminatory reason to rescind job offer to a trans employee); *Schroer*, 577 F. Supp. 2d at 302 (asserting trustworthiness as a legitimate, non-discriminatory reason to rescind job offer to trans applicant); *Sturchio*, 2005 WL 1502899 at *3 (asserting inappropriate conversations related to gender as a legitimate, non-discriminatory reason for its decision to take adverse employment action against a trans employee).

V. Recycled Frameworks

In most jurisdictions, trans plaintiffs struggle to establish the *prima facie* case of sex discrimination under Title VII.¹⁵⁷ Subsequently, the employer need not articulate a legitimate, non-discriminatory reason for the adverse employment action taken against the trans individual. Instead, the court quickly determines that the law simply fails to protect the trans employee.¹⁵⁸ Nonetheless, the law is changing. Courts have recently held that discrimination against a trans individual constitutes discrimination based on sex in violation of Title VII.¹⁵⁹ In this legal environment, employers that fail to address their discriminatory attitudes and practices toward trans people risk serious legal consequences under Title VII.

Fortunately, employers seeking to avoid liability for gender discrimination by creating trans-inclusive work environments need not wait for the courts to hand down trans-positive rulings or for the Equal Employment Opportunity Commission (EEOC) to issue trans-focused guidelines. Rather, state and federal case law, along with the regulations issued by the EEOC in other contexts, already offers some guidance for employers seeking to

¹⁵⁷ Dawson v. Bumble & Bumble, 398 F.3d 211, 223 (2d Cir. 2005) (holding that trans plaintiff's Title VII claim based on gender stereotyping must fail).

¹⁵⁸ *Id.*

¹⁵⁹ See, e.g., Smith v. City of Salem, 378 F.3d 566, 578 (6th Cir. 2004); Schroer v. Billington, 577 F. Supp. 2d 293, 307 (D.D.C. 2008). In addition to the increased protection for trans employees under Title VII, anti-discrimination statutes in twelve states and 103 localities expressly prohibit employment discrimination against trans people. National Gay and Lesbian Task Force, *Scope of Explicitly Transgender-Inclusive Anti-discrimination Laws*, http://www.thetaskforce.org/downloads/reports/fact_sheets/TI_antidisc_laws_7_08.pdf (last visited December 15, 2008). The twelve states are California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

comply with anti-discrimination laws. For example, the EEOC has issued guidelines for employers to use during the interviewing process.¹⁶⁰ The guidelines assist hiring officials in their efforts to avoid asking discriminatory interview questions that may later serve as the basis for a discrimination suit. In the face of legal uncertainty and legislative inaction, employers that apply well-established anti-discrimination frameworks to emerging trans workplace issues can create trans-friendly workspaces and better avoid the legal consequences of discriminatory attitudes.

A. “Gender Misrepresentation”

The hiring part of the employment process offers the employer unique opportunities to discriminate. Interview questions or application materials that reflect the employer’s discriminatory attitude toward trans people could serve as direct evidence of discrimination in a subsequent Title VII suit.¹⁶¹ As a general rule, employers should not ask questions that relate to protected characteristics, including sex. When an employer does not try to ascertain information about a protected characteristic, an applicant need not “misrepresent” in terms of the protected characteristic. Massachusetts case law, coupled with EEOC guidelines, on pregnancy-related inquiries provides a useful framework.

In *Lysak v. Seiler*, the Massachusetts Supreme Court established a useful framework for pre-employment

¹⁶⁰ *EEOC Guide to Pre-Employment Inquiries*, 8A FAIR EMPL. PRAC. MAN. (BNA) 443:65 (1993); *Enforcement Guidance on Pre-Employment Inquiries Under the Americans with Disabilities Act*, 8 FAIR EMPL. PRAC. MAN. (BNA) 405:7191 (1995).

¹⁶¹ *Barbano v. Madison County*, 922 F.2d 139, 144-45 (2d Cir. 1990) (discussing case where interviewer asked female applicant about her childbearing plans and whether her husband would approve of her transporting male veterans as part of her job duties).

inquiries based on protected characteristics.¹⁶² The plaintiff was pregnant when she interviewed for the defendant company's marketing director position.¹⁶³ During her interview, she told the company's president "without any solicitation . . . that her husband stayed home and took care of their two children with the help of an au pair and that 'she was not planning on having any more kids.'"¹⁶⁴ After she was hired, the plaintiff told the company's president that she was pregnant; she knew at the time of her interview that she was pregnant.¹⁶⁵ The defendant demoted the plaintiff because she had affirmatively lied during the interview, and the plaintiff filed suit under the state anti-discrimination law.¹⁶⁶

The *Lysak* court held that an employer could not take adverse employment action against an employee because of the employee's false responses to the employer's unlawful inquiries.¹⁶⁷ Thus, if the employer had asked the plaintiff whether she was pregnant, and she said that she was not pregnant, then the employer could not take adverse action against her if the employer later discovered that she was pregnant at the time of the interview. However, an employer can take adverse action against an employee where the employee or applicant volunteers false statements without solicitation by the employer.¹⁶⁸ Thus, because the plaintiff volunteered the false statements regarding her plans for children *without solicitation* by the employer, the *Lysak* court held that the plaintiff had affirmatively lied to the defendant and that the

¹⁶² *Lysak v. Seiler Corp.*, 614 N.E.2d 991 (Mass. 1993).

¹⁶³ *Id.* at 992.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 991.

¹⁶⁶ *Id.* at 993. Though the framework developed in *Lysak* is useful, whether the *Lysak* plaintiff's statement actually constitutes a lie is arguable.

¹⁶⁷ *Lysak*, 614 N.E.2d at 993.

¹⁶⁸ *Id.*

defendant could therefore take adverse employment action against her based on the misrepresentation.¹⁶⁹

The *Lysak* court's framework for misrepresentations regarding pregnancy provides some guidance to employers for so-called misrepresentations regarding sex. EEOC guidelines state that "[b]ecause Title VII prohibits discrimination based on pregnancy, employers should not make pregnancy-related inquiries."¹⁷⁰ In fact, "[t]he EEOC will generally regard a pregnancy-related inquiry as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker."¹⁷¹ Similarly, because Title VII prohibits discrimination based on sex and gender, employers should not make sex- or gender-related inquiries, including inquiries regarding whether the applicant or employee is trans.

Thus, where the employer asks during an interview whether the plaintiff is male or female, the employer cannot take adverse action against the employee if the employer later discovers that the employee provided affirmed sex rather than assigned sex. Yet, if the applicant affirmatively states, *without solicitation*, that the applicant's assigned sex is male where the applicant's assigned sex is female, then applying the *Lysak* framework, the employer may take adverse action against the employee for the misrepresentation. Employer assumptions regarding assigned or legal gender based on an applicant's gender presentation are not misrepresentations on the part of the applicant, just as assumptions regarding pregnancy based on whether an applicant appears pregnant are not misrepresentations on the part of the applicant.

¹⁶⁹ *Id.*

¹⁷⁰ EEOC, Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, *available at* <http://www.eeoc.gov/policy/docs/caregiving.html>.

¹⁷¹ *Id.*

Accordingly, the employer in *Lopez* should not have taken adverse employment action against the plaintiff when it discovered that she was or had once been classified as male. The plaintiff had not engaged in any misconduct when she identified herself as female on an employment application that unlawfully solicited the information. An employer has “no authority to discharge [an employee] for giving false answers to questions that the [employer] under law had no right to ask.”¹⁷² The *Lopez* employer’s argument that the trans plaintiff affirmatively misrepresented her sex because she presented as female and used a female name during the interview process equates to an argument that a pregnant applicant affirmatively misrepresents her pregnancy where she fails to appear pregnant.

To summarize, an employer should not make sex-related inquiries during the hiring process. More importantly, where the employer solicits gender-related information during the hiring process, the employer should not take adverse employment action against an employee after the employer discovers that the employee provided his or her affirmed sex rather than assigned sex.

B. “Inappropriate Conversations”

Employers also permit discriminatory attitudes throughout the workday. Prohibitions against particular workplace speech, for example, may constitute discrimination in violation of Title VII where the speech at issue relates directly to a worker’s protected characteristic.

¹⁷² *Lysak*, 614 N.E.2d at 993 (quoting *Kraft v. Police Comm’r of Boston*, 571 N.E.2d 380 (1991)). This is not to say that a trans individual provides a false answer where he or she provides his or her affirmed sex rather than assigned sex on an employment application. Rather, the phrase “false answer” should be interpreted as “legally inaccurate” or “answer at odds with the employer’s definition of sex or gender.”

Courts have held that English-only workplace policies violate Title VII's prohibition against discrimination based on national origin because a close relationship exists between language and national origin.¹⁷³ The EEOC Guidelines on English-only policies provide:

Speaking English-only rules.

(a) When applied at all times. A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. *It may also create an atmosphere of inferiority, isolation, and intimidation based on national origin which could result in a discriminatory working environment.* Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it.

(b) When applied only at certain times. An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.¹⁷⁴

Naturally, significant differences exist between English-only policies and policies that prohibit trans

¹⁷³ EEOC v. Premier Operator Servs., 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000).

¹⁷⁴ 29 C.F.R. § 1606.7(a)-(b) (2008) (emphasis added).

people's gender-related conversations.¹⁷⁵ However, both policies operate to suppress the identities of the individuals silenced by the policies. The English-only policies subjugate the cultural or ethnic identities of employees whose ethnic identities are disfavored by the employer.¹⁷⁶ Similarly, the restrictions on gender-related conversations suppress the gender identities of trans employees, whose gender identities the employer presumably disfavors.

In the average English-only policy case, the employer typically defends its policy on the grounds that non-English speakers create an uncomfortable working environment for those who speak English only and thus cannot comprehend the non-English speakers.¹⁷⁷ Similarly, the employer in *Sturchio* argued that the trans employee's gender-related conversations created an uncomfortable work environment for other cis employees.¹⁷⁸ Given the similarities between the English-only policy cases and the *Sturchio* case, employers might adopt the EEOC Guidelines

¹⁷⁵ *Premier Operator Services*, 113 F. Supp. 2d at 1070 (describing "code-switching," where a bilingual person unconsciously switches from one language to another, as impossible to restrain).

¹⁷⁶ See *Garcia v. Spun Steak*, 13 F.3d 296 (9th Cir. 2003).

Language is intimately tied to national origin and cultural identity: its discriminatory suppression cannot be dismissed as "inconvenience" to the affected employees. [. . .] Even when an individual learns English and becomes assimilated into American society, his native language remains an important manifestation of his ethnic identity and a means of affirming links to his original culture. English-only rules not only symbolize a rejection of the excluded language and the culture it embodies, but also a denial of that side of an individual's personality.

Id. at 298 (Reinhardt, J., dissenting).

¹⁷⁷ *Long v. First Union Corp. of Virginia*, 894 F. Supp. 933, 942 (E.D. Va. 1995) (noting that defendant implemented English-only policy after employees and supervisors complained that plaintiffs were making fun of them in Spanish, which made them feel uncomfortable).

¹⁷⁸ *Sturchio*, 2005 WL 1502899, at *3.

on English-only rules as guidelines for gender identity-related conversations as well.

Blanket prohibitions on conversations related to gender transitions, gender identities, or gender presentations and expressions place significant burdens on trans workers especially when the prohibitions do not apply to the gender-related conversations of cis workers. Most importantly, the prohibitions “may also create an atmosphere of inferiority, isolation, and intimidation” based on gender identity or expression, “which could result in a discriminatory working environment.”¹⁷⁹ Though blanket prohibitions are typically unnecessary and discriminatory, employers can certainly prohibit gender-related conversations “at certain times where the employer can show the rule is justified by business necessity.” Thus, in *Lopez*, the employer should have prohibited the gender-related conversations only “at certain times” when such a prohibition was “justified by business necessity.”¹⁸⁰

The blanket prohibition, however, served only to isolate the plaintiff from her cis co-workers and to create the impression that the plaintiff’s gender expression was inferior to her cis co-workers’ expressions. Before employers silence trans employees in this manner, they should consider whether business necessity justifies such speech restrictions. Otherwise, a blanket prohibition on gender-related conversations may reflect the employer’s discriminatory attitude toward trans people and thus constitute direct evidence of discrimination.

C. Potential Liability

When creating a non-discriminatory workplace for trans employees, employers seem to view the issue of appropriate restroom access as the most difficult to address.

¹⁷⁹ 29 C.F.R. § 1606.7(a) (2008).

¹⁸⁰ *Id.* § 1606.7(b).

In the workplace and in the public sphere, bathrooms are typically labeled either male or female. For whatever reason, people often feel uncomfortable or alarmed when, for example, an individual they perceive as male enters the restroom labeled female. Creating a non-discriminatory work environment for trans people may require more than policy changes to an employee handbook. Rather, anti-discrimination initiatives may require more significant structural changes. Workplace reforms pursuant to the Americans with Disabilities Act may provide some useful guidance.

The Americans with Disabilities Act requires employers to make “reasonable accommodations” for employees with disabilities.¹⁸¹ Courts have held that the ADA requires employers to install handicap bathrooms, build ramps, and lower sinks in the restrooms.¹⁸² Though the Americans with Disabilities Act specifically excludes trans people from its coverage,¹⁸³ employers who want to prepare for an increasingly trans-inclusive legal environment might consider preemptive structural changes to restrooms to increase opportunities for trans people and ultimately avoid liability for gender discrimination.

In “Integrating Accommodation,” Professor Elizabeth Emens posits that integrating people with

¹⁸¹ 42 U.S.C. § 12111(8)-(9) (2000).

¹⁸² *See, e.g.,* *Dopico v. Goldschmidt*, 687 F.2d 644, 652 (2d Cir.1982).

In the context of public transportation and the handicapped, denial of access cannot be lessened simply by eliminating discriminatory selection criteria; because the barriers to equal participation are physical rather than abstract, some sort of action must be taken to remove them, if only in the area of new construction or purchasing. As plaintiffs pointedly observe, “It is not enough to open the door for the handicapped . . . ; a ramp must be built so the door can be reached.”

Id.

¹⁸³ 42 U.S.C. § 12211(b)(1) (2000).

disabilities into the workplace also means integrating accommodations.¹⁸⁴ She argues that workplace accommodations for disabled people provide third-party usage benefits and attitudinal benefits, in addition to the individual benefits to the disabled person or to the people who sought the accommodation.¹⁸⁵ To illustrate the potential for third-party usage benefits, Professor Emens states:

Design matters. An employee whose disability requires her to work from home for periods of time could be accommodated by periodically reassigning her tasks to a coworker, creating added burdens for the coworker. Or, alternatively, her accommodation request could lead her employer to create a broad-based telecommuting initiative that benefits multiple employees who wish to work from home.¹⁸⁶

Interestingly, structural changes in the form of restroom accommodations intended to benefit trans employees could provide similar third-party usage benefits for cis employees *and* customers. For example, gender-neutral bathrooms would likely provide usage benefits to a wheelchair user who requires the assistance of his or her opposite-sex partner in a restroom, a woman standing in a long line outside the female-designated restroom while no line exists outside the male-designated restroom, and a parent tending an opposite-sex child when the parent or the child suddenly needs to use a restroom in a movie theater.¹⁸⁷

¹⁸⁴ Elizabeth Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 843 (2008).

¹⁸⁵ *Id.* at 848.

¹⁸⁶ *Id.* at 841-42.

¹⁸⁷ Terry Kogan, *Sex Separation in Public Restrooms: Law,*

Professor Emens also discusses the attitudinal benefits that flow from workplace accommodations for disabled people. Attitudinal benefits in the disability context involve benefits that change attitudes about disabled people.¹⁸⁸ Similarly, structural changes to restrooms in the workplace could produce attitudinal benefits, including improvements in co-worker and supervisor attitudes toward trans employees. Where an employer integrates accommodations, the employer may discover that cis employees no longer perceive trans employees as “mysterious others” who do not belong in either male- or female-designated bathrooms. Thus, the attitudinal benefits of integrating accommodations for trans employees include improving or eliminating the discriminatory attitudes that often lead to costly litigation.

VI. Conclusion

Both employers, as potential defendants, *and* judges, as potential decision-makers, should recognize that purportedly legitimate employer policies and practices may actually discriminate against trans employees in violation of Title VII. In this article, I examined three “legitimate, non-discriminatory” reasons that employers have asserted for their decisions to take adverse employment action

Architecture, and Gender, 14 MICH. J. GENDER & L. 1, 3-4 (2007) (using these examples to illustrate situations where a gendered bathroom is not the obvious choice).

¹⁸⁸ See Emens, *supra* note 183, at 885:

[I]ntegrating not only people with disabilities, but also disability accommodations, can change the culture in ways that are consistent with the inclusionary purposes of the ADA. In particular, designing accommodations with an eye to their benefits for third parties may help improve attitudes toward disability and the ADA. These attitudinal benefits may arise through three routes: (1) improved “contact,” (2) positive associations, and (3) increased uptake of the social model.

Id.

against trans employees, including gender misrepresentation, inappropriate conversations related to gender, and potential liability for bathroom usage. I argued that judicial acceptance of these reasons as legitimate and non-discriminatory would severely limit employment opportunities for trans people and would undercut well-established employment law principles.

Furthermore, the reasons asserted by the employers suggest that trans people are not viable as employees and therefore reflect the discriminatory attitudes of the decision-makers toward trans people. Where the asserted reasons reflect the discriminatory attitudes of the employers, the reasons constitute direct evidence of discrimination. Finally, in light of recent trans-positive federal case law, employers should consider the ways in which they can create trans-inclusive workplaces. Employers that try to avoid liability by pandering to the biases and discriminatory attitudes of the decision-makers rather than by actually preventing discrimination risk the very real possibility that the decision-makers will discern the true nature of their assertions and refuse to accept them as legitimate and non-discriminatory.

TRANSCRIPT

IN DEFENSE OF LIBERTY¹

Bobby Lee Cook²

Dean Blaze, distinguished members of the faculty, members of the student body, guests, ladies and gentlemen: I consider it an honor to have been invited to speak here today, and I congratulate the distinguished faculty for its great contribution in producing lawyers and judges of superior talent that have served with distinction and courage in the preservation of liberty, justice, and civil rights.

As law students, we studied the branches of the common law system: contracts, torts, civil practice, constitutional law, and whatever else our law schools required. “What branches of the law did you learn at Harvard?” Emerson asked Thoreau, who replied: “All of the branches and none of the roots.”³

I have had time to study the roots, but even so I must confess that I feel like C. S. Lewis, who wrote: “On a mountain road in the cold black night, we would give far

¹ This address was the Wyc and Lyn Orr Lecture at the University of Tennessee College of Law on September 11, 2009.

² Bobby Lee Cook is a founding partner of Cook & Connelly in Summerville, Georgia. He has practiced criminal defense law for over sixty years and is widely believed to have inspired the television character of Ben Matlock. Among his famous cases is the 1986 defense of Tennessee banker, C.H. Butcher Jr., who faced twenty-five counts of fraud and was acquitted on all counts, and the 1988 defense of former Auburn University All-American football star Bobby Hoppe, who was charged with murder in a 1957 shooting and then set free after a deadlocked jury voted ten-two for acquittal. Mark Curriden, *Lions of the Trial Bar: 7 over 70—Bobby Lee Cook*, 95 A.B.A.J. 44, 47 (Mar. 2009).

³ MICHAEL E. TIGAR, *FIGHTING INJUSTICE* 25 (2002).

more for a glimpse of a few feet ahead than for a vision of some distant horizon.”⁴

When my generation came to the bar, the growth of criminal law, constitutional and civil rights had been on a veritable holiday for a century or more—a Rip van Winkle syndrome had consumed much of the bar, bench, and the entire populace. We were then in the throes of recovering from a loss of blood and treasure following World War II and before that, from a devastating depression that had swept across the entire country, rendering many without hope.

The doctrine of *Plessey v. Ferguson*⁵ had deprived millions of American citizens of most all the advantages of normal citizenship and relegated them to a role of being mere non-participants in most of our democratic institutions.

Let me give you a brief view of this period in Georgia, Alabama, and much, if not all, of the South. When you entered into any courthouse, there were separate drinking fountains for whites and colored. There was a balcony where the blacks were required to sit. Blacks were prohibited from serving as jurors, and so were all women in Georgia until 1954. Where blacks had been fortunate enough to pass the rigid and unfair tests for voting requirements, the polling precincts of blacks and whites were separate. Segregation in its most vile form was rampant and extended to public transportation, schools, playgrounds, parks, and in every other conceivable manner. There were no black judges—no U. W. Clemons, Horace Ward, or Clarence Cooper.

In the late forties and fifties, one could read the Bill of Rights, as Hugo Black often did; in fact, he carried a small copy of the Constitution in his coat pocket. It, in all of its simple yet eloquent rhetoric, bestowed upon us a

⁴ *Id.* at 9.

⁵ 163 U.S. 537 (1896).

panoply of rights—in name only—as they were in large measure inapplicable to the states. We were in what appeared to be a sea of constitutional rights but yet totally impoverished.

During this period in Georgia, an accused was often arrested on mere suspicion without probable cause and held without bond. His house or person could be searched without probable cause and without a warrant.

The Fourth Amendment did not apply to state searches. *Mapp v. Ohio*⁶ had not yet been decided, and *Connally v. Georgia*⁷ came even later. Coerced confessions were the order of the day, and I can tell you with absolute certainty and personal knowledge that police brutality was rampant.

The clarion call of Gideon⁸ was yet to be heeded. There were no warnings of Fifth Amendment rights and no advice to the right of counsel. Oftentimes counsel would be appointed in a major felony case and given no more than thirty minutes to prepare, and I have participated in many. There was an all-male, white jury. Women and African-Americans were systematically excluded from all jury panels—so there were no *Batson* challenges.⁹

In addition to these serious problems, Georgia was the only jurisdiction in the United States and the English-speaking world where a criminal defendant could not be sworn as a witness in his own behalf. In fact, the defendant could only make an unsworn statement to the jury in which he was not subject to the penalties of perjury and in which he could not be cross-examined by the prosecution. Likewise, the defendant could not be asked any questions

⁶ 367 U.S. 643 (1961).

⁷ 429 U.S. 245 (1977).

⁸ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁹ See *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that a prosecutor cannot exercise preliminary challenges to eliminate members of the defendant's race from the jury solely because of their race).

by his own lawyer. This was changed in the late fifties in *Ferguson v. Georgia*¹⁰ when the U.S. Supreme Court held the unsworn statement law to be unconstitutional.

Slowly, gradually, but with predictable constancy, the tide began to turn. Although the urging of Hugo Black that the Bill of Rights be applied *in toto*, by virtue of the Due Process Clause in the Fourteenth Amendment, was not heeded, yet it was done by a selective incorporation on a case-by-case basis.

We saw cases such as *Mapp v. Ohio*¹¹ restoring the Fourth Amendment to all of the states; *Davis v. Alaska*,¹² enshrining the valuable right of cross-examination; *Gideon v. Wainwright*,¹³ *Brady v. Maryland*,¹⁴ *Miranda*,¹⁵ and a host of others. The Court finally recognized the truth of Lincoln—that a nation half-free and half-slave could not long survive.¹⁶

To many who had fought in the trenches during this period, it was thought that we were finally witnessing a renaissance in the restoration of vital civil and individual rights, but to many others the selective incorporation doctrine was viewed as a legal abomination.

At present, it is fashionable opinion in the highest political circle of Washington that any understanding of the Constitution is wrong if it deviates from that which the framers held. For reasons of logic, philosophy, and practical law, that opinion won't work. But it wouldn't matter if that opinion were right, for the entire course of

¹⁰ 365 U.S. 570 (1961).

¹¹ 367 U.S. 643 (1961).

¹² 415 U.S. 308 (1974).

¹³ 372 U.S. 335 (1963).

¹⁴ 373 U.S. 83 (1963).

¹⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁶ ABRAHAM LINCOLN, A HOUSE DIVIDED: SPEECH DELIVERED AT SPRINGFIELD, ILLINOIS, AT THE CLOSE OF THE REPUBLICAN STATE CONVENTION, JUNE 16, 1858, *reprinted in* THE NORTON ANTHOLOGY OF AMERICAN LITERATURE, 1820-1865 (6th ed.), at 1609.

American history shows that regardless of how passionately the “original intention” view is held, the Constitution is a living document. We adopt it even as we adapt to it, and it will be interpreted to fit the times.¹⁷

For the past thirty years or so we have been witnesses to the aftermath of the criminal law and civil rights revolution. For instance, the great writ of habeas corpus, as envisioned by the founders and memorialized in American and English jurisprudence, has been mortally wounded. Some believe, including former President George W. Bush, that it can be suspended at will by using talismanic and buzz words such as “enemy combatants” or “terrorism.”

For the first time FBI agents are now visiting the public libraries and book sellers to keep tabs on the reading habits of people the government considers dangerous—as authorized by an obscure provision of the USA Patriot Act.¹⁸ The Act passed the U.S. Senate by a vote of ninety-eight to one without hearings or debate in the world’s most deliberative body. It provides for a variety of surveillance measures, including clandestine searches of homes and expanded monitoring of telephones and the Internet.

Nearly everything about the procedure is secret. The search warrant carried by the agents cannot mention the underlying investigation, and librarians and booksellers are prohibited under threat of prosecution from revealing an FBI visit to anyone, including the patron whose records were seized.¹⁹

I vividly remember that in the sixties and seventies, FBI agents attended meetings of women’s liberation groups, noting in the groups’ file the names of every person attending. They infiltrated the NAACP and spied on the Rev. Dr. Martin Luther King Jr., whom its domestic

¹⁷ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹⁸ Pub. L. 107-56.

¹⁹ *Id.*

intelligence division considered to be “the most dangerous and effective Negro leader in the country.”²⁰

In 1970, the FBI ordered investigations on every member of “every black student union [and similar groups], regardless of their past or present involvement in any disorder or illegal conduct.”²¹

I am reminded of a time in the sixties when the Preventive Detention Act was introduced in the U.S. Senate and was defeated by a significant vote. This bill would have denied bail to any person found to be dangerous to the community, even one not charged with a specific crime. In the ensuing debate, Senator Sam Ervin stated: “In a free society you have to take some risks. If you lock everybody up, or even if you lock everybody up you think might commit a crime, you’ll be pretty safe. But you won’t be free.”²²

There came a time in our recent past when even freedom of speech was inhibited by the Vietnam conflict. Those who protested the war were viewed as either traitors or dissident members of society. Sometimes perfectly normal crowds of ordinary citizens were hauled off to jail and charged with criminal offenses for exercising their First Amendment rights.

Sadly, we have reached a stage in this country where people speak of the Fourth, Fifth, and Sixth Amendments as mere legal loopholes through which

²⁰ Jen Christensen, *FBI Tracked King’s Every Move*, CNN.COM, Dec. 29, 2008, <http://www.cnn.com/2008/US/03/31/mlk.fbi.conspiracy/index.html> (last visited Nov. 29, 2009).

²¹ David Berry, *The First Amendment and Law Enforcement Infiltration of Political Groups*, 56 S. Cal. L. Rev. 207, 208 (1982).

²² *Preventive Detention: Hearings on H.R. 16196 Before the Subcomm. on Constitutional Rights, Committee on the Judiciary* 91st, Cong., 2nd Sess. 292-374, 384-95 1970. See also Sam J. Ervin, Jr., Foreword: Preventive Detention—A Step Backward for Criminal Justice. 6 HARV.C.R.-C.L.L.REV. 291 (1970-71).

criminals parade and then are disgorged back into the public.

We have reached a stage in this country when a lawyer who represents a disrespectable racketeer, smuggler, or alleged murderer must all too frequently move to protect his reputation. This is sheer nonsense. He is doing his duty. He is being criticized for doing the same duty that Lord Erskine noted when he described the censure he experienced for defending Thomas Paine's publication of the *Rights of Man* in 1792: "[O]nly for not having shrunk from the discharge of a duty which no personal advantage recommended, and which a thousand difficulties repelled."²³

It may even be that our forefathers understood more of some of our constitutional heritage than our present generation. They had full knowledge of the rack and screw, the lack of confrontation as enshrined in the Sixth Amendment, the wall between church and state, the lack of free speech, and searches of their houses and persons without legal precept—they all came here seeking something different from what they had left in their native lands.

By and large, they were the poor, the oppressed, the risk takers possessed of a new pioneer spirit. They did not want to bow to kings or curtsy to queens. They came in droves from all over—from England, Ireland, Scandinavia, Asia, Germany, Italy, the ghettos of central Europe and Russia, and from the highlands of Scotland. They came and still come to stem the hemorrhage of oppression, to help sow the seeds of a new freedom, which had either been nonexistent in their native lands or which had shriveled up from thirst or fallen upon the hard ground of tyranny.

²³ THOMAS LORD ERSKINE, THE SPEECHES OF THOMAS LORD ERSKINE 231, 233 (James Ridgeway & Edward Walford, eds.) (1880).

The habit of freedom is perhaps the hardest habit to break. There seems to emerge, when we need it, a conspiracy of ordinary people who say they have had enough. During and after each of these episodes of repression, there has been a resurgence of belief in individual freedom. While perhaps excessive in some instances, the response to repression has been daring. But we have governed ourselves, and most of the time we have done so with the law and the courts.

Necessity has frequently been the plea for every infringement of human freedom. As Justice Brandeis so eloquently penned in his dissent in *Olmstead*:

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, but without understanding.²⁴

As we gather here today, our civil and criminal justice system is in a death struggle for survival. Trial lawyers are especially being assaulted in the media. We are often singled out in the state legislature and Congress as callous, uncaring, greedy sharks just waiting to sue innocent people for profit or to represent some horrible criminal in an atrocious crime.

Some politicians and others with a vested interest would have the American public believe that the judicial system is out of control. They often say judges let the guilty go free while the innocent are made prisoners in their own homes. The popular view is that judges make ridiculous decisions based upon legal technicalities.

²⁴ *Olmstead v. United States*, 277 U.S. 438, 479-80 (1928).

The media and the U.S. Chamber of Commerce tell us about our low standing in the eyes of the public on a daily basis.

The public needs to be told that the right to a jury trial and the preservation of the Bill of Rights has evolved over 200 years and that serves as the bedrock foundation of freedom. As the Georgia Supreme Court has said, “These are the sacred jewels that have come down to us from an ancient ancestry, hallowed by the blood of a thousand struggles and stored away in the casket of the Constitution. It is infidelity to forget them.”²⁵

In 1787, thirty-three of the eighty-seven members of the Constitutional Convention were lawyers. Their efforts produced one of the greatest documents in the history of the civilized world.

The public needs to be told that our legal system, as it presently exists, is the foundation of a civilized people and with all of its imperfections, the best that has ever been devised. In Nazi Germany and former communist countries, there was and is no litigation crisis or delay of legal procedure. In fact, there is no real trial, as we know it, no jury, and no justice.

It is not our heritage to preside over a liquidation of the Bill of Rights. A little temporary safety may be obtained, but a whole lot of liberty is given in exchange. It seems that all too frequently bad ideas that have died seem to rise up again. And it is incumbent upon some of us to wade into battle and to kill them. So it is with the idea, as some people suggest, that there is too much freedom. So it is with the idea that the Bill of Rights is full of mere loopholes. And so it is with the notion that adherence to doctrine is a test for loyalty to country or fitness to hold office.

We cannot allow our institutions or body politic to become infested with superficial ideologies. We don’t need

²⁵ Underwood v. State, 78 S.E. 1103, 1106 (Ga. Ct. App 1913).

to do away with freedom. We need to take responsibility for it. We need to defend it, and more importantly, we need to exercise it.

This great nation was born in an age of rebellion and innocence, when it was believed possible for the people to create a government strong enough to assure them safety from foreign enemies and not strong enough to threaten their liberties. Over two centuries have passed, and with some exceptions the constitutional balance that was struck between liberty and safety has served us reasonably well.

This liberty of which I speak is the liberty of conscience, of labor, the right to a fair trial, and with all of the attributes of due process and the right to be left alone. This liberty of which I speak makes the heart beat faster and shakes the world.

France has given the world a lot; not the least is the skepticism of Montaigne and Voltaire. Skepticism is what is needed today, skepticism of easy solutions, of ideology of the left or right. Skepticism does not equate with cynicism; it is not inconsistent with the fiercest patriotism or the firmest belief in basic values. But it can be the anchor to windward when our basic institutions seem to be adrift with the tides.

It is true, as Santayana said, that those who cannot remember the past are doomed to repeat it.²⁶

Yet it is equally true that those who do remember the past may not know when it is over.

That is a deep truth.

Whether one is a liberal or a conservative, our duties and responsibilities are the same. Our fundamental character declares that all men are created equal. Our basic religion declares us to be our brother's keeper. But the demand for justice and fairness rests not alone on legal precept or theological tenet. It is a demand that spans creed

²⁶ 1 GEORGE SANTAYANA, *Reason in Common Sense*, in *THE LIFE OF REASON* (1905).

and clan, age and continent; it speaks now as it has to the prophet, saint, and patriot—and to unnumbered millions of men and women throughout all time. It wells up from the heart as a plain truth.

ESSAY

Beginning with this volume, the TENNESSEE JOURNAL OF LAW AND POLICY will publish one opinion essay with an invitation to readers to submit informed responses on the topic for publication consideration. In this volume, Ted Goodman proposes a prescription drug buy-back program as a partial remedy for the problem of prescription drug abuse in Tennessee. Responses of comparable length should be submitted to:

AMANDA JORDAN, ARTICLES EDITOR
TENNESSEE JOURNAL OF LAW AND POLICY
1505 West Cumberland Avenue
Knoxville, TN 37996-1810

**THE NEED FOR PRESCRIPTION DRUG BUY-BACK
PROGRAMS**

*Ted Goodman*¹

I. Executive Summary

The use of prescription medications by those who have not been prescribed the medication is a growing problem in the United States and particularly in Tennessee. A leading cause of this problem is an excess supply of prescription drugs. This essay proposes that governments consider providing financial incentives for patients to “turn in” unneeded medications to the proper authorities. Such a

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program could be funded largely—if not entirely—by private sources, government grants, and savings in healthcare and the criminal justice system.

II. America's Growing Problem Concerning the Abuse of Prescription Drugs

According to the National Institute on Drug Abuse ("NIDA"), "The non-medical use of prescription drugs is a serious and growing public health problem" in the United States.² While the elderly are most at risk for "abuse or misuse," due to the fact that the elderly tend to require more prescription medication than younger members of society,³ this problem is far from confined to senior citizens. In fact, NIDA estimates that approximately 20% of Americans over the age of twelve have consumed prescription medication "for non-medical reasons."⁴

Perhaps most alarming is the usage of prescription medication for non-medical reasons by teenagers. The only illegal street drug abused by teens more frequently than prescription medications is marijuana.⁵ With 2,000 children trying a prescription medication for the first time each day, the problem of teenage prescription abuse is growing.⁶ While the abuse of many illegal street drugs is declining, the abuse of prescription medication is on the rise.⁷ College-age students are also falling prey to this

² Nora D. Volkow, *From the Director*, NAT'L INS'T ON DRUG ABUSE RESEARCH REPORT SERIES, Pub. No. 05-4881 (2005), available at <http://www.nida.nih.gov/pdf/rprescription.pdf>.

³ *Id.*

⁴ *Id.*

⁵ Office of National Drug Control, Advertisement, *When Teens Want to Get High is Your Prescription Available for Pickup?* (citing 2007 National Survey on Drug Use and Health, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION (2008)).

⁶ *Id.*

⁷ Richard A. Friedman, *The Changing Face of Teenage Drug Abuse—*

growing trend. NIDA's 2004 *Monitoring the Future Survey* found that in the prior year, 7.4% of American college students had used Vicodin without a prescription.⁸ This number does not take into account the number of students who had consumed other medications without a prescription. Abuse of medications has serious health implications and, along with illegal drugs, the abuse of prescription medication is a leading cause of unintentional poisoning deaths.⁹

Tennessee's problems with drug abuse are particularly acute. According to the former president of the Tennessee Medical Association, Dr. Robert Kirkpatrick, "It's unfortunate, but Tennessee has a serious drug problem."¹⁰ Tennessee's drug problem is so serious that the State ranks second in the United States for the abuse of

The Trend Towards Prescription Drugs, NEW ENG. J. MED. 1448, 1448 (2006).

⁸ Lori Whitten, *Studies Identify Factors Surrounding Rise in Abuse of Prescription Drugs by College Students*, 20 NIDA NOTES (March 2006), available at http://www.nida.nih.gov/NIDA_notes/NNvol20N4/Studies.html. Whitten discusses *The Monitoring the Future Survey*, which has been conducted annually since 1975. It surveys approximately 50,000 students in the eighth, tenth, and twelfth grades. Questions for the survey are answered by students on self-completed, standardized forms. In addition to the students at these approximately 420 schools nationwide, the survey continues to follow a "randomly selected" group of participants after high school every two years via forms mailed to the participants' homes. See *Design of Monitoring the Future, The Monitoring the Future Survey*, available at <http://monitoringthefuture.org/purpose.html>.

⁹ L. Paulozzi & J. Annett, *Unintentional Poisoning Deaths—United States, 1999–2004*, MORBIDITY & MORTALITY WEEKLY REPORT, Feb. 9, 2007, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5605a1.htm> (last visited Dec. 7, 2009).

¹⁰ Cindy Sanders, *Targeting Tennessee's Drug Utilization Rates: New Program Focuses on Schedule II Narcotics*, EAST TENNESSEE MEDICAL NEWS (July 2007), available at <http://easttennessee.medicalnewsinc.com/news.php?viewStory=1045>.

prescription drugs.¹¹ In fact, research by the Tennessee Medical Association predicts that the abuse of prescription drugs in Tennessee will surpass the use of illegal drugs in the near future.¹² Tennessee's status as the second-most medicated state in the nation¹³ likely provides excess medications, thus contributing to Tennessee's drug problem.¹⁴

The large supply of prescription medication in Tennessee's medicine cabinets and streets should not be confused with a high quality of health in the State. Quite to the contrary, a 2008 study by the United Health Foundation concluded that, with more than 30% of its population suffering from obesity,¹⁵ Tennessee ranks forty-seventh in the United States in the health of its citizens.¹⁶

III. Source of the Medications

A contributing factor to America's growing abuse of prescription medication is the overabundance of these medications in America's medicine cabinets and subsequently her streets.¹⁷ Many teen prescription drug

¹¹ Toby Sells, *Foundation Seeks to Curtail Prescription Drug Abuse by Tennesseans, 'Duped' Doctors* *Memphis Business Journal*, QUARTERLY DOSE OF GOOD SENSE, FROM THE TENNESSEE PRESCRIPTION SAFETY PROGRAM (2009), http://www.tnrxsafety.org/index.php?option=com_content&view=article&id=56:foundation-seeks-to-curtail-perscription-drug-abuse-by-Tennesseans-duped-doctors-memphis-business-journal&catid=19:psp-media&itemid=38 (last visited Dec. 7, 2009).

¹² Sanders, *supra* note 10.

¹³ *Id.*

¹⁴ See NIDA, *Topics in Brief: Prescription Drug Abuse* (March 2008), available at <http://www.drugabuse.gov/pdf/tib/prescription.pdf>.

¹⁵ UNITED HEALTH FOUNDATION, *AMERICA'S HEALTH RANKINGS 25* (2008), available at <http://www.americashealthrankings.org/2008/pdfs/2008.pdf>. The United States population has an overall obesity rate of 26.3%. *Id.* at 15.

¹⁶ *Id.* at 7.

¹⁷ NIDA, *Topics in Brief*, *supra* note 14.

abusers admit that they get the drugs from their parents, friends, or relatives who have excess medication.¹⁸ In many cases, teens find prescription medication easier to obtain than illegal street drugs.¹⁹ One study found that as many as 70% of teen prescription painkiller abusers obtained the medications from a friend or relative.²⁰

The Office of National Drug Control Policy suggests that parents can prevent such abuse by “properly dispos[ing] of old or unneeded medicines.”²¹ The difficulty in proper disposal—and the lengths to which abusers will go to obtain such medications—is illustrated by the Office of National Drug Control Policy’s suggestion that persons disposing of unneeded medications should “properly conceal and dispose of them by putting them in a bag or container, and mixing them with something unappealing, like kitty litter or coffee grounds.”²² A prescription drug buy-back program would ensure that drugs are disposed of in a responsible manner.

Disposal using a method sufficient to prevent salvaging of the medication is important. One national survey found that 56.5% of those twelve and over who had abused prescription drugs in the past year obtained the drugs from a known person without paying for them; what percentage of these transactions were gifts or thefts is unclear.²³ However, since 10% of *teens* (not just teen drug abusers, but 10% of *all* teens) admit to stealing drugs from a friend or relative, it is safe to assume that most of those

¹⁸ Friedman, *supra* note 7, at 1448, 1450.

¹⁹ Friedman, *supra* note 7, at 1449.

²⁰ Office of National Drug Control, *supra* note 5.

²¹ *Id.*

²² The Anti-Drug.com, Rx Danger Zones: The Search Starts at Home, http://www.theantidrug.com/drug_info/transcript-house-tour.html (last visited Dec. 7, 2009).

²³ NIDA, PRESCRIPTION AND OVER-THE-COUNTER MEDICATIONS, INFOFACTS 8 (2009), available at <http://www.nida.nih.gov/infofacts/PainMed.html>.

56.5% of drug abusers did not obtain the medications with the consent of the intended recipient of the medications.²⁴ Only 4.1% of those persons had obtained the medication “from a drug dealer or other stranger,” and only 0.5% of abusers had obtained the drugs from the Internet.²⁵ Because such a small percentage of drug abusers obtain their medications from “drug dealers,” a drug buy-back program, which provides an incentive for patients to “turn in” their unneeded medications, should significantly curtail the supply of medications available for abuse.

IV. Governments Should Introduce Programs to Purchase Unneeded Prescription Drug Medication from Patients

While the problem of prescription drug abuse is distressing, the fact that such small percentages of users obtain their medications from drug dealers and the Internet is encouraging. The numbers indicate that the vast majority of the abusers’ supply could be cut off by providing incentives for patients to turn in unneeded medications to designated depositories. The numbers suggest that the vast majority of abusers obtain their supplies not through the direct efforts of drug dealers, but rather through the carelessness of the patients. Because such a small percentage of prescription drug abusers obtain their medications from drug dealers,²⁶ a sufficient incentive could likely be provided at significantly below the street value of the drugs. While it is unlikely that many “drug dealers” would participate in such a program, nevertheless,

²⁴ The Anti-Drug.com, Where Teens Find Prescription Drugs, http://www.theantidrug.com/drug_information/otc-prescription-drug-abuse/prescription-drug-dangers/where-teens-find-prescription-drugs.aspx (citing Substance Abuse & Mental Health Servs. Admin. Nat’l Survey on Drug Use & Health) (last visited Dec. 7, 2009).

²⁵ NIDA, INFOFACTS, *supra* note 23, at 8.

²⁶ *Id.*

“buy-back” programs would likely find their greatest success if they were offered on a no-questions-asked basis. The financial incentives could be provided in many forms, preferably gift cards that could be exchanged for needed items such as groceries and clothing.

Not only would such a program benefit the human population by reducing the supply of drugs available for abuse, but also such a program would benefit the environment by ensuring that the drugs are disposed of in an environmentally responsible manner. In years past, many people were advised to simply flush unwanted drugs into the sewer system. While some drugs, including Oxycodone, may be safely flushed into the sewer system,²⁷ the flushing of other drugs can adversely affect the environment, aquatic life, and our own water supplies.²⁸ In addition, the flushing of antibiotics could foster the development of resistant bacteria, thereby decreasing the effectiveness of these medications.²⁹ Thus, a prescription drug buy-back program could benefit society by preventing these medications from falling into the hands of abusers, and it would benefit the environment by ensuring that the medications are disposed of in an environmentally responsible manner.

While the author is not aware of any existing prescription drug buy-back programs or any pending legislation proposing such a program, there are many programs that collect unwanted medications without offering incentives for participation. These programs have found encouraging success. In an initiative unrelated to

²⁷ Office of Nat’l Drug Control Policy, Proper Disposal of Prescription Drugs (Feb. 2007), <http://www.tnrxsafety.org/media/PDF/disposal.pdf> (last visited Dec. 7, 2009).

²⁸ N.Y. Dep’t of Env’tl. Conservation, Proper Disposal of Household Prescriptions and Over-the-Counter Drugs, <http://www.dec.ny.gov/chemical/45083.html> (last visited Sept. 17, 2009).

²⁹ *Id.*

this proposal, a drug collection program in Murfreesboro, Tennessee on September 9, 2009, collected fifty-seven pounds of prescription and over-the-counter pills over the course of just four hours.³⁰ A similar, unrelated program in Kalamazoo, Michigan in June 2008 collected 580 pounds of pills in four hours.³¹ The medications in both programs were incinerated, thus preventing them from adversely affecting the water supplies.³² Although the collection and destruction of the pills in Kalamazoo were funded by a grant from the Environmental Protection Agency, participants did not receive any financial incentive to turn in their pills.³³ The success of these programs suggests that a program offering even minimal financial incentive would enjoy even greater success.

V. Potential Sources of Funding

Funding for a prescription drug buy-back program could come from many sources. One potential source would be private businesses that sell prescription medications. The socially responsible image that participation in such a program would convey would make participation appealing. Participation would be particularly enticing if coupled with the media attention that such a program would attract. Participating businesses could rightly claim that not only do they distribute medications to people who need them, but they also take steps to ensure that those medications do not fall into the wrong hands. As

³⁰ Mark Bell, *Drive Collects Thousands of Unwanted Pills*, RUTHERFORD A.M., Sept. 10, 2009, available at <http://pqasb.pqarchiver.com/dnj/access>.

³¹ John Liberty, *County Collects 580 Pounds of Unwanted Pills*, KALAMAZOO GAZETTE, June 21, 2008, available at http://blog.mlive.com/kzgazette/2008/06/county_collects_580_pounds_of.html.

³² Bell, *supra* note 30; Liberty, *supra* note 31.

³³ Liberty, *supra* note 31.

well as enhancing their corporate images, companies may also increase their store traffic as program participants redeem their gift cards.

In addition to corporate funding, certain charities, action committees, and the federal government would likely be willing to participate in such a program. As Nora D. Volkow, M.D., the Director of NIDA, has stated, “accessibility is likely a contributing factor” to America’s growing prescription drug abuse problem.³⁴ Because it is known that such large percentages of these drugs are available through carelessness,³⁵ such organizations should be eager to experiment with methods that hold the potential to curtail this supply. By at least one measure, Tennessee has the second highest *per capita* number of prescriptions in the United States,³⁶ so the state is the ideal place to experiment with reducing the excess supply of medications.

Society already expends staggering resources on the problem of prescription drug abuse. In 2001, the abuse of prescription opioids cost the United States an estimated \$1.8 billion in its criminal justice systems and \$2.8 billion of its healthcare resources.³⁷ Therefore, as well as receiving direct funding, the savings could defray the total costs to society of such a program in the criminal justice system and health care costs. Because the program would curtail the supply of and access to these medications, it would decrease the potential for health complications

³⁴ Nora D. Volkow, Prescription Drugs, Abuse and Addiction—From the Director, <http://www.nida.nih.gov/ResearchReports/Prescription/prescription.html> (last visited Dec. 7, 2009).

³⁵ See NIDA, INFOFACTS, *supra* note 23, at 8.

³⁶ Sells, *supra* note 11.

³⁷ BLUECROSS BLUESHIELD OF TENN., INSIDE TENNESSEE’S MEDICINE CABINET: HOW MUCH IS ENOUGH? 15 (2007), available at www.bcbst.com/about/news/reports-issues/2007/06-1937 (citing Analysis Group, Costs of Prescription Opioid Analgesic Abuse In the United States In 2001: A Societal Perspective, <http://www.thci.org/opioid/documents/birnbaum.pdf>).

caused by prescription drug abuse, which prove costly to our health care system.³⁸ Furthermore, the decreased supply of medications would also reduce the opportunity to commit related crimes, such as theft of medication. This diminished opportunity for drug crime would also decrease the number of companion crimes, such as Driving Under the Influence.³⁹ Because a prescription drug buy-back program would decrease the overall number of crimes committed and the supply of drugs available for abuse, the program would recover some, if not all, of its costs in savings realized in the criminal justice and health care systems.

³⁸ *See Id.*

³⁹ *See* Tenn. Code Ann. § 55-10-401 (“Driving under the influence of intoxicant, *drug or drug producing stimulant* prohibited”) (emphasis added).

STUDENT ESSAY

THE JOHNNIA BERRY ACT OF 2007: DNA
FINGERPRINTING

*Meredith Rambo*¹

I. Introduction

On December 6, 2004, at age twenty-one, Johnia Hope Berry was brutally slain in her Knoxville, Tennessee apartment.² She had come to the University of Tennessee at Knoxville to pursue her master's degree after receiving a bachelor's degree at East Tennessee State University.³ The night of her death, Johnia was sorting toys she bought for children in need—a charitable habit she engaged in every year.⁴ Johnia was deeply loved by two sets of parents: Joan and Mike Berry (adoptive father), and Donna and John Tiller (biological father).⁵

Joan and Mike Berry were very active in the search for anyone responsible for Johnia's murder and in seeking

¹ J.D., pending May 2010, University of Tennessee School of Law. Prior to law school, Ms. Rambo worked for twenty years in the legal field as a legal secretary and paralegal.

² Hank Hayes, *Johnia Berry Act Awaiting Governor's Signature* (May 9, 2007), available at [www.http://johniaberry.org](http://johniaberry.org); J.J. Stambaugh, *More details on suspect in Berry death; 'It was an accident'* (Sept. 24, 2007), available at <http://www.knoxnews.com/news/2007/sep/24/kcso-spokeswoman-announces-break-berry-slaying/?printer=1/>; Liz Tedone, *Celebrating Johnia Berry's Legacy Three Years After Her Death* (Dec. 6, 2007), available at <http://www.volunteertv.com/home/headlines/12236141.html>.

³ Hayes, *supra*, note 2.

⁴ Tedone, *supra*, note 2.

⁵ Hayes, *supra*, note 2; WVLT Channel 8, *Trial Date Set for Johnia Berry Murder Suspect* (Sept. 25, 2007), available at <http://www.volunteertv.com/home/headlines/9979256>.

legislation to require DNA⁶ testing of arrestees for violent crimes.⁷ Joan Berry, in an effort to handle the brutality and senselessness of Johnia's murder, even kept a journal of questions she wanted to ask Johnia's killer.⁸ In the end, the questions went unanswered as, after three long years, the suspect committed suicide in his jail cell. Joan Berry commented bitterly to the press that "'It makes me angry. My daughter didn't get to leave a note. She didn't get to say goodbye.'"⁹

⁶ A human's deoxyribonucleic acid ("DNA") contains a unique alphanumeric identifier, much like a social security number, that is being used to identify missing persons, crime victims, and suspected crime perpetrators. While originally it was believed that the DNA being tested contained only information necessary for identification, scientists are now discovering that the so-called "junk DNA" may contain information about genetic predispositions as well as ethnic and gender identifiers. *See*, *United States v. Weikert*, 504 F.3d 1, 3-4 (1st Cir. 2007); *Nicholas v. Goord*, 430 F.3d 652, 670 (2d Cir. 2005); *State v. Martin*, Nos. 2006-119 & 2006-205, 2008 WL 1914658, at *10, *23 (Vt. May 2, 2008) (Johnson, J. dissenting); *State v. Surge*, 156 P.3d 208, 216 (Wash. 2007) (Chambers, J., dissenting) (noting "individual DNA can provide much more than [a picture or a fingerprint] including information about our ancestry, our medical future, and even information about our biological family members."); *Doles v. State*, 994 P.2d 315, 318 (Wyo. 1999) (noting "DNA is the material that determines the genetic characteristics of all living things . . . [and] . . . with the exception of identical twins, no two individuals have identical DNA.").

⁷ *See, e.g.*, Telephone Interview with Representative Jason Mumford, Tennessee House of Representatives, in Chattanooga (Jul. 3, 2008); Hayes, *supra*, note 2; Amy Hunter, *A second possible suspect surfaces in Johnia Berry 2004 Slaying* (Nov. 16, 2007), available at http://www.tricity.com/tri/news/local/article/TRI_2007_11_17_0006/3983/; TriCities.com, *Johnia Berry's parents to meet with Prosecutors* (Nov. 18, 2007), available at http://www.tricity.com/tri/news/local/article/TRI_2007_11_18_0028/4022/.

⁸ Amy Hunter, *Slain Student's Mother 'Very Upset' Over Suspect's Suicide* (Mar. 24, 2008), available at http://www.tricity.com/tri/news/local/article/-TRI_2008_03_25_0005/7719/.

⁹ Hunter, *supra*, note 8.

John and Donna Tiller were equally devastated. Even though John allowed Mike Berry to adopt Johnia at age 5, “it doesn’t lessen his pain or emotion over what has happened.”¹⁰ John Tiller is thankful that he has a voice mail message received from Johnia just six hours before her murder, saying, “Dad, I love you.”¹¹ Out of this deep sense of sadness and loss emerged a family’s crusade to ensure that no other family would suffer as they did for as long as they did.¹²

Two and one-half years after the tragic stabbing death of Johnia, twenty-two-year-old Taylor Lee Olson was indicted for first-degree murder.¹³ Other than petty crimes, Olson had no significant criminal history through 2004 and was never required by law to provide a DNA sample to police.¹⁴ In 2005, Olson was charged with credit card theft and forgery, but this escalation was still not enough to require a DNA sample under Tennessee law.¹⁵ In early 2007, Olson became a person of interest in the criminal investigation of Johnia’s murder, but the police still had no sample to compare against DNA found at the murder scene.¹⁶ It was not until late July, 2007, after Olsen had been arrested for a probation violation, that the police obtained a voluntary DNA sample from Olsen.¹⁷ Afterward, Olsen was released, only to be arrested again in late August 2007 for burglary and theft, not Johnia’s murder.¹⁸

¹⁰ WVLT Channel 8, *supra*, note 5.

¹¹ *Id.*

¹² Telephone Interview with Representative Jason Mumford, *supra*, note 7.

¹³ Stambaugh, *supra*, note 2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

This paper will discuss the ever-widening scope of federal and state DNA collection legislation that has largely gone unnoticed by the general American populace. This DNA legislation has continuously and systematically eroded our Constitutional rights and has, to date, been unanimously upheld by courts from the lowest state courts to the United States Supreme Court. The checks and balances of our democracy are failing in the never-ending struggle against rising crime rates.

II. Legislative History of DNA Collection

It is important to review the legislative history of DNA collection statutes in order to see how federal and state legislatures have continuously, systematically, and quickly been eroding our constitutional rights. While federal legislation took the lead, state collection acts have kept pace in both scope and time, despite concerns over the cost of and personal information contained in DNA sampling. Legislation has kept pace with the advances in technology that continue to make it possible to obtain, analyze, and store DNA more effectively.¹⁹ DNA analysis was first used in missing person investigations and overturning wrongful convictions before finally being recognized as a viable evidentiary tool in criminal prosecutions.²⁰

In 1990, fourteen states participated in a pilot program to capture DNA samples for a national indexing system called the Combined DNA Index System

¹⁹ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994); DNA-Sample Collection Proposed Rule, 73 Fed. Reg. 21083, 21085 (Apr. 18, 2008) (to be codified at 28 C.F.R. § 28.12).

²⁰ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994); DNA-Sample Collection Proposed Rule, 73 Fed. Reg. 21083, 21084 (Apr. 18, 2008) (to be codified at 28 C.F.R. § 28.12).

(“CODIS”).²¹ In four short years, CODIS was expanded across the nation.²² It took only six more years before Congress systematically began expanding compulsory DNA testing.²³ In less than twenty years, Congress

²¹ *United States v. Kincade*, 379 F.3d 813, 845 (9th Cir. 2004) (Reinhardt, Pregerson, Kozinski, & Wardlaw, J.J., dissenting). CODIS was initially created to store “DNA samples from individuals convicted of crimes, from crime scenes, and from unidentified human remains,” and later legislation allowed for “samples voluntarily contributed from relatives of missing persons.” Department of Justice Appropriations Act of 2000, Pub. L. 106-113, 113 Stat. 1501A-23 (1999). CODIS makes it possible for “[s]tate and local forensics laboratories to exchange and compare DNA profiles electronically in an attempt to link evidence from crime scenes for which there are no suspects to DNA samples of convicted offenders on file in the system.” *United States v. Sczubelek*, 402 F.3d 175, 181 (3d Cir. 2005) (citing H.R. Rep. 106-900(I), at 8 (2000)).

²² *Kincade*, 379 F.3d at 845 (Reinhardt, Pregerson, Kozinski & Wardlaw, J.J., dissenting) (noting passage of the Violent Crime Control act of 1994); *see also* *United States v. Amerson*, 483 F.3d 73, 76 (2d Cir. 2007); *United States v. Sczubelek*, 402 F.3d 175, 181 (3d Cir. 2005) (citing Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. §§ 13701-14223)).

²³ DNA Analysis Backlog Elimination Act of 2000, Pub.L. No. 106-546, 114 Stat. 2729, 2729, 2732 (2000) (codified as amended at 42 U.S.C. § 14135a (2000)) (including “individuals convicted of a qualifying Federal offense,” District of Columbia criminal offenders for specified offenses, and military personnel convicted of specified military offenses); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub.L. No. 107-56 § 503, 115 Stat. 364 (2001) (including “terrorists and other violent offenders” convicted of violating 18 U.S.C. § 2332b(g)(5)(B), any violent crime defined in 18 U.S.C. § 16, or attempting or conspiring to commit such offenses); Justice for All Act of 2004, Pub. L. No. 108-405, § 203, 118 Stat. 2269 (2004) (amending 42 U.S.C. §§ 14132, 14135, 14135(a)) (including “persons who have been charged in an indictment or information with a crime,” which covers all felonies, all 18 U.S.C. § 109A offenses, all crimes of violence defined in 18 U.S.C. § 16, as well as any attempt or conspiracy to commit these felonies and crimes); DNA Fingerprint Act of 2005, Pub. L. No. 109-162, 119 Stat. 3084, 3085 (2006) (buried in the voluminous Violence Against Women and Department of Justice

expanded a narrowly defined authority to obtain DNA samples from specific federally convicted felons to any “individuals who are *arrested, facing charges, or convicted* or [] non-United States persons who are *detained* under the authority of the United States.”²⁴ Despite the fact that legislative expansions are coming so quickly and the Attorney General cannot implement final rules fast enough, the United States Senate proposed a further expansion in June 2008.²⁵ If implemented, this latest expansion of federal law will require compulsory DNA samples from any individual *convicted of any felony under state law*, thereby preempting all or part of most state DNA collection statutes.²⁶

Following in Uncle Sam’s footsteps, the various states began to enact DNA collection statutes. In fact, “all 50 States authorize the collection and analysis of DNA samples from *convicted* state offenders . . . and several states authorize the collection of DNA samples from individuals they *arrest*.”²⁷ However, the states’ authorized use of the profiles varies widely from identification to detection or exclusion of potential suspects to the

Reauthorization Act of 2005, and including any United States citizen *arrested* or non-citizen *detained* under authority of the federal government); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 155, 120 Stat. 611 (amending 42 U.S.C. § 14135(a)) (including persons facing charges, which presumably does not require arrest or detention). *See also Amerson*, 483 F.3d at 75, 77; *United States v. Weikert*, 504 F.3d 1, 3 (1st Cir. 2007).

²⁴ 73 Fed. Reg. 21083, 21087 (Apr. 18, 2008) (to be codified at 28 C.F.R. § 28.12) (emphasis added).

²⁵ 73 Fed. Reg. 21083, 21083-84 (Apr. 18, 2008) (to be codified at 28 C.F.R. § 28.12).

²⁶ DNA Felony Collection Act of 2008, S. 3104, 110th Cong. (2008).

²⁷ *See, e.g., Polston v. State*, 201 S.W.3d 406, 412 n.3 (Ark. 2005) (citations omitted) (emphasis added); *State v. Maass*, 64 P.3d 382, 386 (Kan. 2003); *State v. Raines*, 857 A.2d 19, 23 (Md. 2004); *Landry v. Attorney General*, 709 N.E.2d 1085, 1087, 1090 n.8 (Mass. 1999); *State v. O’Hagen*, 914 A.2d 267, 271 (N.J. 2007).

prosecution of violent crimes.²⁸ While the states also vary widely as to the individuals subject to compulsory DNA sampling, most states generally include individuals convicted of violent felonies.²⁹ Tennessee joined the DNA collection bandwagon in 1991³⁰ and recently expanded its reach to arrestees of specific violent felonies in 2007.³¹ Similarly, in 2008 a substantial increase of arrestee DNA collection legislation was proposed in various states.³²

It took ten years after the first DNA legislation for the federal government to require states to remove from the database any DNA samples for persons with overturned convictions.³³ It took four more years before Congress prohibited arrestee or voluntary DNA profiles from being included in CODIS and created a right to voluntary DNA testing for convicted individuals who assert their innocence.³⁴ In essence, in the same time it took to erode

²⁸ *Landry*, 709 N.E.2d at 1090 n.8.

²⁹ CAL. CODE REGS. Title 9, § 296 (2008) (including any felony arrestees effective 2009); LA. REV. STAT. ANN. § 15:609 (2005) (including any felony arrestees); TENN. CODE ANN. § 40-35-321(e)(3) (Suppl. 2007) (including specific violent felony arrestees); TEX. PUBLIC SAFETY CODE ANN. § 411.1471 (Vernon 2005) (an arrestee previously convicted for specific statutory crimes); VA. CODE ANN. § 19.2-310.2 (2004) (including any felony arrestees). *See also Landry*, 709 N.E.2d at 1090 n.8 (including all persons arrested).

³⁰ TENN. CODE ANN. § 40-35-321 (2006).

³¹ TENN. CODE ANN. § 40-35-321(e)(3) (Suppl. 2007).

³² Gordon Thomas Honeywell, *2008 DNA Database Expansion Litigation* (May 14, 2008), available at <http://www.dnaresource.com/documents/2008DNAExpansionLegislation.pdf>.

³³ DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, 114 Stat. 2733 (2000) (codified as amended at 42 U.S.C. § 14135a (2000)).

³⁴ Justice for All Act of 2004, Pub. L. No. 108-405, § 203, 118 Stat. 2269 (amending 42 U.S.C. §§ 14132, 14135, 14135(a)) (noting that if arrestee was charged with a separate crime requiring inclusion in the database, then DNA sample from arresting offense could be placed into database); 118 Stat. 2278-84 (2004) (adding Chapter 228A—Post-Conviction DNA Testing, 18 U.S.C. § 3600-3600(a)) (noting that

constitutional rights by requiring compulsory DNA testing, Congress has provided compulsory removal only for overturned convictions. Meanwhile, the United States Congress is compelling local and state authorities to upload DNA profiles to CODIS as a prerequisite to its access.³⁵

III. Historical Challenges to DNA Collection

As could be expected, with the increasing reach of compulsory DNA testing, there was a corresponding increase in legal challenges to its constitutionality. Alternative theories for attacking DNA collection legislation include equal protection claims, illegal search and seizure, self-incrimination, and cruel and unusual punishment under the Eighth Amendment, as well as ex post facto violations and even a violation of the right to the free exercise of religion.³⁶ Federal and state courts have responded by applying a totality-of-the-circumstances approach, a special-needs approach, or both to justify the

convicted individuals seeking post-conviction DNA testing must assert innocence, must have preserved right to testing, and must meet specific statutory requirements.).

³⁵ 42 U.S.C. § 14132(b)(3) (2008).

³⁶ *Quarterman v. State*, 651 S.E.2d 32, 34, 35 (Ga. 2007); *Schreiber v. State*, 666 N.W.2d 127, 128 (Iowa 2003); *Raines*, 857 A.2d at 21. In addressing the self-incrimination and the cruel-and-unusual claims, Georgia upheld the DNA collection statute and specifically noted that it was not “penal and that means used to enforce the statute [were] not . . . malicious or grossly disproportionate to the refusal to comply with the statutory mandate.” *Quarterman*, 651 S.E.2d at 35-36. With respect to the ex post facto claim, Iowa rejected the idea that the intent of DNA collection legislation “is to punish for past activity and not merely to impose a restriction on someone ‘as a relevant incident to a regulation of a present situation.’” *Schreiber*, 666 N.W.2d at 129, 130 (quoting *State v. Pickens*, 558 N.W.2d 396, 398 (Iowa 1997)); see also *People v. Espana*, 40 Cal.Rptr.3d 258, 260 (Cal. Ct. App. 2006) (citing *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995) (overruled on other grounds)); *Raines*, 857 A.2d at 43.

so-called constitutionality of DNA collection statutes.³⁷ The prevailing standard for judicial scrutiny appears to be the rational basis standard.³⁸

When applying a totality-of-the-circumstances approach, a court is supposed to weigh the privacy interest

³⁷ Cf. *Weikert*, 504 F.3d at 3, 8, 9 (citing *Samson v. California*, 547 U.S. 843 (2006)) (supporting use of special needs analysis but noting that the Third, Fourth, Fifth, Eighth, Ninth, Eleventh and D.C. Circuits use the totality-of-the-circumstances analysis); *United States v. Conley*, 453 F.3d 674, 679-81 (6th Cir. 2006) (supporting analysis under both standards); *Maass*, 64 P.3d at 387 (two approaches: (1) balancing test and (2) “special needs” doctrine); *Landry*, 709 N.E.2d at 1092; *O’Hagen*, 914 A.2d at 273 (United States Supreme Court applies the totality of circumstances test, not the “special needs” test); *State v. Martin*, Nos. 2006-119 & 2006-205, 2008 WL 1914658, at *4 (Vt. May 2, 2008) (providing citations to many cases for both the balancing test and the “special needs” test); *State v. Surge*, 156 P.3d 208 (Wash. 2007) (noting concern that “special needs analysis is no longer valid under federal law” is without merit).

³⁸ *State v. Leppert*, 656 N.W.2d 718, 723 (N.D. 2003) (citing *Roe v. Marcotte*, 193 F.3d 72, 82 (2d Cir. 1999)); *Boling v. Romer*, 101 F.3d 1336, 1341 (10th Cir. 1996); *L.S. v. State*, 805 So. 2d 1004, 1007-08 (Fla. Ct. App. 2002); *Quarterman*, 651 S.E.2d at 34 n. 4, 35 (applying rational relationship test as “neither a suspect class nor a fundamental right [] affected by the challenged statute,” and presuming legislation valid with burden on individual to prove others similarly situated were treated differently without a rational basis); *Murphy v. Dept. of Correction*, 711 N.E.2d 149, 152-54 (Mass. 1999) (holding “some amount of underinclusiveness or overinclusiveness is permissible” in classifications and “[i]n the absence of evidence that the Legislature harbored an illegitimate motive or had no rational reason to draw the distinction as it did, the court must defer to the Legislature’s classification”); *Gaines v. Nevada*, 998 P.2d 166, 173-74 (2000); *State v. Olivas*, 856 P.2d 1076, 1087 (Wash. 1993); *Schreiber*, 666 N.W.2d at 128 (citing *Roe v. Marcotte*, 193 F.3d 72, 82 (2d Cir. 1999)). There are “three levels of judicial scrutiny for reviewing equal protection claims”: strict scrutiny for “inherently suspect classification or infringement of a fundamental right,” intermediate standard when an “‘important substantial right’ is involved,” and rational basis for all other equal protection claims. *Leppert*, 656 N.W.2d at 722; *Olivas*, 856 P.2d at 1087.

of the individual against the government's purpose for conducting the search.³⁹ The Supreme Court analogized the individual's privacy interest with that of a physical intrusion to justify giving the individual's privacy interest less weight on the constitutional scale than the government interest.⁴⁰ This in no way addresses the fact that legally recognized privacy rights of individuals include more than the physical. To add further weight to the government's side on the constitutional scale, some federal circuits apply the "special needs" analysis to justify warrantless searches.⁴¹ The special need is allegedly subject to the

³⁹ *Weikert*, 504 F.3d at 11. Following the federal majority, Arkansas, Kansas, Massachusetts and Maryland, also applied a totality-of-the-circumstances approach when faced with a challenge to their DNA collection legislation concerning qualified convicted felons. *Polston*, 201 S.W.3d at 408, 410; *see also Maass*, 64 P.3d at 387; *Raines*, 857 A.2d at 31, 43; *Landry*, 709 N.E.2d at 1092. Governmental interests included reducing recidivism; promoting reintegration; identifying, monitoring, and maintaining records of likelihood of recidivism; enhancing efficient and accurate crime solving; exonerating innocent individuals wrongfully convicted; and protecting innocent individuals from becoming suspects in the first place. *Weikert*, 504 F.3d at 13-14. Arkansas and Kansas hold that a convicted individual's "privacy rights [were] diminished by virtue of [his] conviction and the intrusion of the blood test [was] not significant . . ." and thus, "the collection and maintenance of DNA samples pursuant to the DNA Act is reasonable in light of the substantial interests of the State . . ." which includes "detering and detecting all recidivist acts, not just those considered to be violent . . . [and] . . . may indeed be useful in helping to solve future drug crimes." *Polston*, 201 S.W.3d at 411, 412; *Maass*, 64 P.3d at 389.

⁴⁰ *Weikert*, 504 F.3d at 12.

⁴¹ *Amerson*, 483 F.3d at 81-83 (noting "special needs" are beyond the need for normal law enforcement and make the warrant and probable-cause requirement impracticable or are needed to achieve important purposes not achievable by standard law enforcement methods"). *See also* A.A. ex rel. B.A. v. Attorney General, 914 A.2d 260, 264 (N.J. 2007); *O'Hagen*, 914 A.2d at 273-75; *State v. Martin*, Nos. 2006-119 & 2006-205, 2008 WL 1914658, at *4 (Vt. May 2, 2008) (providing citations to many cases for both the balancing test and the "special needs" test).

same balancing test of the relevant interests of the individual and the government.⁴²

In reality, courts have been failing to exercise the checks-and-balances power afforded each branch of government and justifying the erosion of constitutional rights. Finding that DNA legislation, containing no discretionary component, removes any risk of “dignitary harms” or possibility of abuse, courts are justifying their failure to “provide a check on the arbitrary use of government power.”⁴³ As courts analogize privacy rights with only physical privacy, they also seem to infer that abuse of situational discretion is the only reason to apply the governmental system of checks and balances instituted by the founders of our country.⁴⁴ However, it has been recognized that advances in DNA sampling technology, which provide genetic information beyond identification, may require a reconsideration of the reasonableness of DNA legislation.⁴⁵

⁴² The court must balance the special need against an individual’s privacy interest by examining three factors: “(1) the nature of the privacy interest involved; (2) the character and degree of the governmental intrusion; and (3) the nature and immediacy of the government’s needs, and the efficacy of its policy in addressing those needs.” *Amerson*, 483 F.3d at 83-84 (quoting *Cassidy v. Chertoff*, 471 F.3d 67, 75 (2d Cir. 2006)). Several states agree that, “[a]lthough the enumerated purposes may involve law enforcement to some degree, the central purposes of the DNA testing are not intended to subject the donor to criminal charges”; a need beyond “ordinary law enforcement” must exist to justify DNA sampling without individualized suspicion; the “long-range special need [] does not have the *immediate* objective of gathering evidence against the offender. . . . [and] was not to assist in the immediate detection of a crime charged” *A. ex rel. B.A.*, 914 A.2d at 264; *O’Hagen*, 914 A.2d at 277, 278, 279; *accord Martin*, 2008 WL 1914658, at *6-7.

⁴³ *Weikert*, 504 F.3d at 14-15 (citations omitted); *Amerson*, 483 F.3d at 82.

⁴⁴ *Amerson*, 483 F.3d at 82.

⁴⁵ *Weikert*, 504 F.3d at 13.

IV. Reconsideration of Constitutionality of DNA Collection Legislation

Reconsideration begins by determining the characteristics of individuals subject to DNA collection laws: (1) prisoners, (2) conditional releasees, (3) felons with expired terms, and (4) individuals never convicted of a felony.⁴⁶ Acknowledging that convicted persons who have paid their debt to society may have a “substantial privacy issue at stake,” some federal courts allow that a separate balancing of retention against individual privacy rights may be needed.⁴⁷ Enlarging that theme, “it may be time to reexamine the proposition that an individual no longer has any expectation of privacy in information seized by the government so long as the government has obtained that information lawfully,” especially “[w]here a right as central to our liberty as the freedom from unreasonable searches and seizures is at stake.”⁴⁸ While courts have unanimously held DNA collection acts constitutional with respect to convicted felons, the courts continue to vehemently debate the constitutionality of legislation targeting individuals who are merely arrested.⁴⁹

The outcry against DNA collection may stem from the inherent belief that individuals are “presumed innocent until proved guilty,”⁵⁰ as alluded to in various cases holding

⁴⁶ *Green v. Berge*, 354 F.3d 675, 679-80 (7th Cir. 2004).

⁴⁷ *Weikert*, 504 F.3d at 12 (citing *Kincade*, 379 F.3d at 841-42 (holding that “once a conditional releasee has completed his term,” the privacy interests differ from those he had while under supervision)).

⁴⁸ *Weikert*, 504 F.3d at 16, 18 (Stahl, J., dissenting).

⁴⁹ South Carolina’s Governor Mark Sanford vetoed arrestee legislation proposed by its legislature not only in 2007, but again on July 2, 2008. Letter from Mark Sanford, Governor of South Carolina, to Robert W. Harrell, Jr., Speaker of the House of Representatives of South Carolina (Jun. 18, 2007); available at <http://governor.sc.gov/NR/rdonlyres/8DECDAD3-C95E-4871-8C02-52FBA8F8F69D/0/H3304.pdf>.

⁵⁰ *In re C.T.L.*, 722 N.W.2d 484, 492 (Minn. Ct. App. 2006).

that there is a significant difference in expectation of privacy rights between convicted felons, probationers, parolees, pretrial detainees, prisoners, and “ordinary citizens” or arrestees.⁵¹ To allow arrestee DNA testing “would snuff out probable cause—the oxygen for the Fourth Amendment,” resulting in arrestees being searched “without requiring law enforcement to show any nexus between the arrestee and the crime for which his or her DNA is sought.”⁵² Despite judicial warnings that obtaining DNA from “free persons,” which includes arrestees, should be constrained by the Fourth Amendment,⁵³ the federal legislature passed the Justice for All Act of 2004, allowing for DNA testing of arrestees.⁵⁴

Unfortunately, the majority of rightfully outraged protest is found in dissenting opinions, which express concern that “[t]he privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps.”⁵⁵ This whittling is occurring in spite of “our nation’s history provid[ing] stringent warnings against unabashedly entrusting [the] government with sensitive information

⁵¹ *Raines*, 857 A.2d at 31; *see also Polston*, 201 S.W.3d at 410; *Quarterman*, 651 S.E.2d at 34; *State v. McKinney*, 730 N.W.2d 74, 84 (Neb. 2007) (noting critical distinction from Nebraska’s other jurisdictions’ DNA collection statutes in that statute at issue “does not limit the offenders to whom it applies”); *Martin*, 2008 WL 1914658, at *8; *Surge*, 156 P.3d at 212-13. Minnesota’s Court of Appeals found “no basis for concluding that before being convicted, a charged person’s privacy expectation is different from the privacy expectation of a person who was charged but the charge was dismissed or the person was found not guilty”; therefore, an arrestee’s expectation of privacy was “not outweighed by the state’s interest in collecting and analyzing a DNA sample.” *In re C.T.L.*, 722 N.W.2d at 489 n.2, 492.

⁵² *McKinney*, 730 N.W.2d at 84.

⁵³ *Doles v. State*, 994 P.2d 315, 318 (Wyo. 1999).

⁵⁴ Justice for All Act of 2004, Pub. L. No. 108-405, § 203, 118 Stat. 2269 (2004).

⁵⁵ *Martin*, 2008 WL 1914658, at *13 (Johnson, J. dissenting) (quoting *Osborn v. United States*, 385 U.S. 323, 343 (1966)).

about our citizenry.”⁵⁶ This whittling continues despite the fact that historically inadequate protection of sensitive information is less than reassuring,⁵⁷ and there is doubt that the government is immune to the temptation to use DNA sampling for purposes beyond identification.⁵⁸

V. The Johnia Berry Act of 2007

A. Tennessee’s Speedy Legislative Process

Like the few states before it, Tennessee amended its DNA collection legislation to include DNA samples from arrestees for violent felonies.⁵⁹ Johnia’s family told the Tennessee legislators of the suffering they endured upon her death and the frustration resulting from almost three years with no justice.⁶⁰ Both the Senate and the House of Representatives supported the passage of the Johnia Berry Act of 2007 after hearing the tragic tale of young Johnia Berry’s slashed hopes and dreams.⁶¹ Shockingly, from proposal to approval, the Tennessee legislative process took less than six months to enact the Johnia Berry Act of 2007. Furthermore, Tennessee took only one year more than the federal government to go from authorizing DNA collection

⁵⁶ *Martin*, 2008 WL 1914658, at *24 (Johnson, J. dissenting).

⁵⁷ *Id.*

⁵⁸ *Surge*, 156 P.3d at 216 (Chambers, J., dissenting).

⁵⁹ TENN. CODE ANN. §40-35-321 (Supp. 2007).

⁶⁰ Mumford, *supra*, note 7.

⁶¹ *Id.* Minority Leader Jason Mumford proposed House Bill 0867 while Senate Speaker Ron Ramsey proposed Senate Bill 1196. S. 1196, 105th Leg. 1st Sess. (Tenn. 2007); H.R. 0867, 105th Leg. 1st Sess. (Tenn. 2007). The Johnia Berry Act of 2007 was unanimously adopted by the Tennessee Senate on April 23, 2007, unanimously adopted by the Tennessee House of Representatives on May 9, 2007, signed into law by Governor Phil Bredesen on May 24, 2007, and amended title 40, chapter 35, section 321 of the Tennessee Code first enacted in 1991. 2007 Tenn. Pub. Acts Ch. 225; Senate Journal, 105th Gen. Assembly, 1st Sess., at 988-91, 1369 (Tenn. 2007).

for specific convicted felons to authorizing it for all convicted felons and specific violent crime arrestees.⁶²

B. Tennessee's DNA Collection Process

The Johnia Berry Act of 2007 specifically requires that all persons arrested for certain violent crimes have a DNA sample taken via buccal (cheek) swab.⁶³ All DNA samples are forwarded to the Tennessee Bureau of Investigation ("TBI") until a resolution of a criminal trial.⁶⁴ If the individual charged with the felony is convicted of the indicted crime, or is convicted of a different felony before the sample is expunged, the DNA sample will remain with the TBI to be used for comparison to DNA received from new crime scenes.⁶⁵ Should the individual be found not guilty or exonerated, or if the charges are dropped, the court of record is supposed to notify the TBI, who is supposed to destroy and expunge the DNA sample from the system.⁶⁶

Over 400 DNA samples were processed, and over 1000 people were interviewed during the criminal investigation of Johnia's murder.⁶⁷ TBI Director Mark Gwyn stated, "It was the most expensive case in the TBI's history, having cost several hundred thousand dollars."⁶⁸ Now, with the passage of the Johnia Berry Act of 2007, an additional one million dollars (at a minimum) will be needed to process the estimated 21,000 additional, legislatively required DNA samples.⁶⁹ While funding was

⁶² TENN. CODE ANN. § 40-35-321(e)(3) (Supp. 2007), as amended by 2007 Tenn. Pub. Acts Ch. 225.

⁶³ TENN. CODE ANN. § 40-35-321(e)(1) & (3) (Supp. 2007).

⁶⁴ TENN. CODE ANN. § 40-35-321(e)(1) (Supp. 2007).

⁶⁵ *Id.*

⁶⁶ TENN. CODE ANN. § 40-35-321(e)(2) (Supp. 2007).

⁶⁷ Stambaugh, *supra*, note 2.

⁶⁸ *Id.*

⁶⁹ The Associated Press, *TBI Chief: No Funds to Implement New*

received in June 2008, allowing the hiring of five more forensic scientists, July saw a backlog of over 5,000 DNA test kits.⁷⁰ In fact, between January and July 2008, only 1,000 samples were processed, and only three cases were solved out of DNA test results: a murder, a burglary, and a sexual assault.⁷¹

C. Unforeseen Negative Impact of the Johnia Berry Act

Analogizing DNA profiles to medical records or fingerprint retention, courts are holding that comparing profiles in the DNA databases does not violate the Fourth Amendment, as ownership of the profiles (as opposed to the actual DNA sample) belongs to the testing laboratories, not the individual providing the sample.⁷² This results in the allegedly constitutional use of a profile given in one matter to be used in another, even unrelated, matter.⁷³ So

Johnia Berry Act (Dec. 3, 2007), available at <http://www.volunteertv.com/home/headlines/12091011.html>.

⁷⁰ Catharyn Campbell, *New DNA Law Already Proving Valuable: DNA Samples Now Required From All Violent Crime Suspects* (Jul. 2, 2008), available at <http://www.wsmv.com/news/16773599/detail.html#>.

⁷¹ *Id.*

⁷² *Smith v. State*, 744 N.E.2d 437, 439-40 (citing *Bickley v. State*, 489 S.E.2d 167, 170 (Ga. Ct. App. 1997)); *Wilson v. State*, 752 A.2d 1250, 1272 (Md. Ct. App. 2000); *People v. King*, 232 A.D.2d 111, 663 N.Y.S.2d 60, 614-15 (1997); *State v. Notti*, 71 P.3d 1233, 1238 (Mont. 2003).

⁷³ TENN. CODE ANN. § 40-35-321(e)(1) (Supp. 2007); *Smith*, 744 N.E.2d at 438 (holding constitutional the use of a DNA sample from one criminal matter in a separate, unrelated criminal matter); *State v. Notti*, 71 P.3d 1233, 1237-38 (Mont. 2003) (holding “that a defendant’s privacy interest in blood samples or blood profiles is lost when the defendant consents to a blood draw or where it has been obtained [lawfully]”) (citing *People v. Baylor*, 118 Ca.Rptr.2d 518, 521 (Ca. Ct. App. 2002); *Wilson v. State*, 752 A.2d 1250, 1272 (Md. Ct. App. 2000); *Bickley v. State*, 489 S.E.2d 167, 170 (Ga. Ct. App. 1997); *State v. King*, 232 A.D.2d 111, 117-18, 663 N.Y.S.2d 610 (1997); Washington

long as the DNA profile and sample are in the database, even if later events require removal from the database, there appears to be no restriction on the use for comparisons. Even though federal law may prohibit uploading of DNA samples from arrestees to CODIS, there is no similar requirement in Tennessee law prohibiting local and Tennessee database uploading. Therefore, any arrestee required to provide a DNA sample in Tennessee is subject to continuous, systematic comparisons in the local and Tennessee databases absent a legally required expungement.

D. Arrestees' Expectations of Privacy the Issue for Judicial Scrutiny

It remains to be seen whether Tennessee courts will find the Johnia Berry Act of 2007 constitutional. Prior to the Act's passage, the Tennessee Supreme Court upheld Tennessee's DNA collection statutes, applying a totality-of-the-circumstances approach.⁷⁴ Constitutionality was supported in part by the fact that Tennessee's DNA statute was limited to identification purposes, which "serve[d] to protect our citizenry from the potential abuses of unlimited discretion by law enforcement agents and officers."⁷⁵ The Tennessee Supreme Court also concluded that "the risk of arbitrary or capricious searches [was] . . . eliminated" because the statute "unambiguously specifi[e]d who [was] subject to the searches," and the primary purpose was to identify individuals with lessened expectations of privacy."⁷⁶ While Tennessee's new legislation unambiguously specifies that arrestees of specific violent

v. State, 653 So. 2d 362, 364 (Fla. 1994); *Smith v. State*, 744 N.E.2d 437)).

⁷⁴ *State v. Scarborough*, 201 S.W.3d 607, 611, 618 (Tenn. 2006).

⁷⁵ *Id.* at 619.

⁷⁶ *Id.* at 621.

crimes are required to provide a DNA sample, the Tennessee courts will need to address whether arrestees are still considered free persons with the heightened expectations of privacy afforded by the Fourth Amendment. If the courts find arrestees to have a lessened expectation of privacy, Tennesseans should demand an explanation of how a person not convicted of a crime is now a person who is presumed guilty until proven innocent and what, if any, checks and balances remain to protect individual freedom from government intrusion.

VI. The Future of DNA Collection Legislation

In June 2008, the United States House of Representatives fired the latest volley to further expand the scope of CODIS to require all state officials to obtain DNA samples “from all felons who are imprisoned in a prison of such State or unit.”⁷⁷ The Senate also proposed expanding CODIS’s scope to include any individuals convicted of felonies under state laws but did not explicitly contain the “retroactive” language contained in House Bill 5981.⁷⁸ The passage of either of these proposed bills would essentially remove the need for state legislation requiring DNA samples from any individual convicted of any felony under state law, bringing such legislation under the purview of federal law.⁷⁹ The next step is not hard to predict—all state officials will be required to obtain DNA samples from arrestees under state law and upload them to CODIS, despite the current federal statutory prohibition. Perhaps Congress will simply bypass this step and go straight to DNA sampling of any person facing charges (i.e., person of interest) for state law violations.

⁷⁷ United States House Bill 5981 (May 6, 2008).

⁷⁸ United States Senate Bill 3104 (Jun. 10, 2008).

⁷⁹ United States House Bill 5981 (May 6, 2008); United States Senate Bill 3104 (Jun. 10, 2008).

The forecast for state and national DNA database use is grand. Within three to five years, it is anticipated that all DNA searches will occur through the CODIS database,⁸⁰ suggesting that perhaps local and state databases will be obsolete. In five to ten years, the CODIS database may allow for “real time and immediate search capabilities,” and DNA samples may be routinely run on a weekly basis through both the state and national systems.⁸¹ Expanding the scope of DNA databases to include samples given as an employment requirement (i.e., police officers’ DNA samples for use in crime scene comparisons to eliminate contamination prints) is also being contemplated.⁸² Further, if the goal of “familial DNA searching” to obtain leads to suspects or family members of suspects is realized, no American will be safe from systematic and continuous DNA profile comparisons.⁸³

VII. Conclusion

Stephen Saloom, Policy Director at the Innocence Project, applauds the use of DNA collection databases for solving approximately 10% of all crimes, which is primarily comprised of the “more serious felonies: sexual assaults, violent assaults, murders, and the like.”⁸⁴ However, Mr. Saloom also recognizes that filling DNA databases with samples and profiles of anyone not at least convicted of a felony results in “diminishing returns.”⁸⁵ Tania Simoncelli, Science Director of the Technology

⁸⁰ Symposium, *A Perfect Match? DNA in Law Enforcement*, Genetics and Public Policy Center at Johns Hopkins University, at *5-6 (Oct. 1, 2007), available at http://www.dnapolicy.org/news.release.php?action=detail&pressrelease_id=84.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at *12.

⁸⁵ *Id.* at *13.

Liberty Program at the American Civil Liberties Union, agrees, noting further that, with the rise in DNA analysis errors resulting from overburdening lab technicians with “insurmountable backlogs[,] . . . it would be absolutely tragic if in our enthusiasm for DNA, we ended up creating a whole new round of wrongful convictions, the very sorts of miscarriages of justice that we’re aiming to set right with DNA.”⁸⁶

“We have been on an incredible slippery slope as the databanks have expanded to evermore categories of convicted individuals and [are] learning that we’re in for an even bigger slippery slope down the line.”⁸⁷ Will the ride be worth it? Will the criminal investigation tool be worth the “life-long genetic surveillance”⁸⁸ of innocent United States citizens, given the potential for diminished returns due to inadequate collection processes, administrative and laboratory logjams, and lack of follow-up by law enforcement or prosecutors?⁸⁹

It is obvious that there are many questions still unanswered by our legislatures and many questions unknowingly left unasked by the American people. In Tennessee and across the United States, American citizens need to become informed about DNA legislation, sampling, storage, and searches. The increase in knowledge from a belief in “junk DNA,” with no biological significance to the more informed understanding that “junk DNA” contains significant medical and familial lineage implications,⁹⁰

⁸⁶ *Id.* at *11.

⁸⁷ *Id.* at *8-9.

⁸⁸ *Id.* at *10.

⁸⁹ *Id.* at *13-14 (quoting Dr. Frederick Bieber, Journal of Law, the American Society of Law, Medicine, and Ethics (2006)). Dr. Bieber “serves on the advisory boards of the Armed Forces DNA Identification Laboratory of the U.S. Department of Defense, the Department of Forensic Science of the Commonwealth of Virginia, and the National DNA Database of Canada . . . [and] is a database proponent.” *Id.*

⁹⁰ *Id.* at *6, 9.

indicates that a vast change needs to be made in how DNA sampling is approached and applied. There are many implications, both positive and negative, that need to be explored before legislators and the judiciary continue to support the erosion of Americans' rights to privacy, bodily integrity, life, and liberty for the ordinary purpose of criminal investigation.

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