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Unvested: How Equity and the Deferred Payment Gamble in Startups Shortchange Employees Targeted by Discrimination

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The new American Dream is not limited to Silicon Valley. Startups span the nation. They exist in a vast array of sizes and ideologies. Nonetheless, by their very nature, startups are boundary-pushing enterprises. For all the world-altering good they can do, sometimes, that crashing-into-walls mentality comes at the price of pushing human and legal boundaries as well. While the entity tries to grow and create, almost hydraulically using what little human and financial capital it may have to build the once-impossible, startup employees can be left to bear the cost when it is their boundaries that are broken. Discrimination is one such cost. Current federal and state antidiscrimination law frameworks reflect a legal landscape perilously out of sync with the reality that startups are now entirely commonplace. While startups may sometimes literally be small businesses, they can have far outsized economic and human effects. This Note will analyze how current antidiscrimination law frameworks too often inherently fail employees suffering discrimination at smaller startups—irrespective of that startup's

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age, purpose, or capitalization. Further, this Note will address the necessity of reforming Title VII and other antidiscrimination laws to catch them up with the speed at which startups have brushed them aside. In short, ready or not, the law must adapt.

The phrase, "done is better than perfect," has long become a somewhat dogmatic maxim taught to most programmers—myself included. This ideology holds some merit when it comes to productivity sprints, hackathons, and getting a product to market. However, the danger of this credo arises when it is applied to people and the relationships among them—when the uncompromising push to "done," and the culture it entails, comes at the expense of those who get it there.

INTRODUCTION

"We have a saying: 'Move fast and break things.' The idea is that if you never break anything, you're probably not moving fast enough."[1] This creed, articulated over a decade ago[2] by Mark Zuckerberg, may no longer be Facebook's rallying cry,[3] but the sentiment has long since left an indelible scar.

Breaking things is not necessarily bad. Often, we need a good shake-up to draw us from our reverie and propel us forward in the spirit of innovation and inspiration. Such a jolt is sometimes one of the only forces that can jar loose new ideas and businesses that will, as phrased in the iconic 1997 Apple commercial, "push the human race forward."[4] Whether society believes them to be fools or heroes—or potentially even villains—entrepreneurs and the businesses they build are unquestionably critical to the economy.[5] Startup companies, in particular, are known for their innovative and disruptive impact on the economy—perfectly adaptable to established tech centers or war-torn nations, and workable whether bootstrapped from nothing or well-funded by venture capitalists.[6]

The innovation of entrepreneurship itself is relatively incalculable by most normal economic standards, which preserve quantifiable ideals such as "perfect information" and "perfect competition."[7] This is because entrepreneurship requires corresponding inventive

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[1] *Mark Zuckerberg's Letter to Investors: 'The Hacker Way'*, WIRED (Feb. 1, 2012, 6:35 PM), https://wired.com/2012/02/zuck-letter/.

[2] *See* Henry Blodget, *Mark Zuckerberg on Innovation*, BUS. INSIDER (Oct. 1, 2009, 4:36 PM), https://businessinsider.com/mark-zuckerberg-innovation-2009-10.

[3] *See* Nick Statt, *Zuckerberg: 'Move fast and break things' isn't how Facebook operates anymore*, CNET (Apr. 30, 2014, 10:30 AM), https://cnet.com/news/zuckerberg-move-fast-and-break-things-isnt-how-we-operate-anymore/.

[4] Apple, *The Crazy Ones*, YOUTUBE (Apr. 16, 2018), https://www.youtube.com/watch?v=OmqH1cWIMVY (uploaded by HistoryvsHollywood titled "Apple Steve Jobs The Crazy Ones Commercial – 1997").

[5] STEPHEN F. REED & ESTHER S. BARRON, ENTREPRENEURSHIP LAW: CASES AND MATERIALS 1–2 (13th ed. 2013).

[6] *See* Ahmad Fahim Didar, *Role of Startups in Economic Prosperity*, STARTUP GRIND, https://startupgrind.com/blog/role-of-startups-in-economic-prosperity/ (last visited Nov. 18, 2020).

[7] David E. Pozen, *We Are All Entrepreneurs Now*, 43 WAKE FOREST L. REV. 283, 288–89 (2008).

ways of creating change, building markets, and bringing people together to ensure the success of a venture in an environment built on the tantalizing uncertainty of solving seemingly unconquerable problems.[8] That is to say, nothing about building an entrepreneurial venture is "perfect"—the unquantifiable nature of the impossible is part of the fun. However difficult to fathom, the sheer socioeconomic importance of entrepreneurship and its culture of innovation leads to a societal reimagining of laws and legal relationships to help these new inventions come to life.[9]

In this reimagining of laws, practices, and relationships, "new" sometimes means neither better, nor worse. Often this interpretation depends on the vantage point and data that factors into the analysis. For instance, Airbnb's website displays an entire analysis of its economic impact on the communities in which it operates—touting, among other things, that fifty-three percent of its hosts, of which fifty-two percent reported being low-income, indicated that the revenue they earned from Airbnb enabled them to stay in their homes.[10] For Airbnb and stakeholders who view Airbnb's mission as aligned with theirs, this reimagining of the status quo within the hotel and travel industries impacts communities for the better by providing homeowners with a new revenue stream.[11] Yet, there are genuine pitfalls to this reimagining for those very same homeowners—such as the negative effects of short-term rentals on long-term housing

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[8] *See id.* at 290–91 (discussing advancing theories by economists like Joseph Schumpeter on entrepreneurship as "developing the idea of the entrepreneur as innovator, forcing major structural changes across markets and industries in a process of 'creative destruction' vital for sustaining a dynamic economy and long-run economic growth."); *see* ERIC RIES, THE LEAN STARTUP 27 (2011) (defining a startup as "a human institution designed to create a new product or service under conditions of extreme uncertainty" and noting that this definition "says nothing about the size of the company, the industry, or the sector of the economy."); *see also id.* at 22 ("Startups also have a true north, a destination in mind: creating a thriving and world-changing business.").

[9] Steven H. Hobbs, *Entrepreneurship and Law: Accessing the Power of the Creative Impulse*, 4 ENTREPRENEURSHIP BUS. L.J. 1, 1 (2009).

[10] *The Economic Impacts of Home Sharing in Cities Around the World*, AIRBNB [hereinafter *Airbnb Impacts*], https://airbnb.com/economic-impact [https://web.archive.org/web/20191214143743/https://www.airbnb.ca/economic-impact?locale=en] (last visited Nov. 18, 2020).

[11] *See id.*

availability, decreasing the supply and increasing the costs of long-term housing.[12]

In other cases, however, rapid and unchecked creative destruction[13] of laws and norms can be unquestionably harmful—if not altogether dangerous—to society in general and, frequently, to start-up employees. Take, for example, the case study of gaming company Zynga's initial public offering ("IPO"), wherein management, wanting to regain some of the stock options promised to employees, clawed back already-allocated, albeit not entirely-vested,[14] grants of equity.[15] Despite its legality under at-will employment and contract

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[12] JOSH BIVENS, THE ECONOMIC COSTS AND BENEFITS OF AIRBNB: NO REASON FOR LOCAL POLICYMAKERS TO LET AIRBNB BYPASS TAX OR REGULATORY OBLIGATIONS 4, https://www.epi.org/publication/the-economic-costs-and-benefits-of-airbnb-no-reason-for-local-policymakers-to-let-airbnb-bypass-tax-or-regulatory-obligations/ (last updated Mar. 26, 2019) ("The single biggest potential cost imposed by Airbnb comes in the form of higher housing costs for city residents if enough properties are converted from long-term housing to short-term accommodations.").

[13] Vijay Raju, *Creative destruction or destructive creation?*, WORLD ECON. F. (May 5, 2016), https://www.weforum.org/agenda/2016/05/creative-destruction-or-destructive-creation/ (describing economist Joseph Schumpeter's invention of phrase "'creative destruction'" as "the premise in which new innovations destroy established enterprises and create new markets."); *see* Sharon Reier, *Half a Century Later, Economist's 'Creative Destruction' Theory is Apt for the Internet Age: Schumpeter: The Prophet of Bust and Boom*, N.Y. TIMES (June 10, 2000), https://nytimes.com/2000/06/10/your-money/IHT-half-a-century-later-economists-creative-destruction-theory-is.html (describing applicability and actualization of Schumpeter's theory to current age of startups, including that "Schumpeter saw the entrepreneur as the cornerstone of capitalism.").

[14] *See* REED & BARRON, *supra* note 5, at 228 ("Stock options typically are 'granted' (given) to the worker but cannot be exercised right away. Instead, they 'vest' (become exercisable) over time or upon the achievement of certain goals."); *see* James Linfield, *Founder Basics: Founder's Stock, Vesting and Founder Departures*, COOLEYGO, https://www.cooleygo.com/founder-basics-founders-stock/ (last visited Nov. 18, 2020) (describing vesting in that "[u]nder a typical vesting schedule, the stock vests in monthly or quarterly increments over four years," including that "[t]here is often a one year 'cliff', meaning that the individual must be with the company for a year to vest the first increment.").

[15] Justin Scheck & Shayndi Raice, *Zynga Leans on Some Workers to Surrender Pre-IPO Shares*, WALL ST. J. (Nov. 10, 2011), https://www.wsj.com/articles/SB10001424052970204621904577018373223480802.

doctrines,[16] this bad-faith practice "erode[s] a central pillar of Silicon Valley culture, in which start-ups with limited cash and a risk of failure dangle the possibility of stock riches in order to lure talent."[17] An even more jarring example of dangerous creative destruction has been Facebook's decision to hire third-party moderators to screen videos and other posts for content that violate its community standards.[18] This practice exposed many of these moderators to posts containing, among other things, murder, other heinous crimes, and radicalizing extremism, which caused many moderators to suffer symptoms identical to post-traumatic stress disorder[19] or the even more pervasive[20] reality of rampant discrimination, which is of particular concern in this Note.

As Eric Ries describes in his bestselling book, *The Lean Startup*,

> Entrepreneurs are rightly wary of implementing traditional management practices early on in a startup, afraid that they will invite bureaucracy or stifle

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[16] Thomas A. Smith, *The Zynga Clawback: Shoring Up the Central Pillar of Innovation*, 53 SANTA CLARA L. REV. 577, 580 (2013).

[17] Scheck & Raice, *supra* note 15.

[18] *See* Casey Newton, *The Trauma Floor: The Secret Lives of Facebook Moderators in America*, VERGE (Feb. 25, 2019, 8:00 AM), https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona; *see* Scott Simon & Emma Bowman, *Propaganda, Hate Speech, Violence: The Working Lives of Facebook's Content Moderators*, NPR (Mar. 2, 2019, 8:23 AM), https://www.npr.org/2019/03/02/699663284/the-working-lives-of-facebooks-content-moderators.

[19] Newton, *supra* note 18; *see* Simon & Bowman, *supra* note 18.

[20] Ina Fried, *Silicon Valley's Quieter Discrimination Fight*, AXIOS (May 29, 2018), https://www.axios.com/ageism-tech-industry-silicon-valley-intel-00be0045-c52a-4485-a64b-0c6238fee40c.html (describing an EEOC investigation into Intel as a proxy for "Silicon Valley [having] a love affair with young founders."); Lydia Dishman, *60% of Women in Silicon Valley Have Been Sexually Harassed*, FASTCOMPANY (Jan. 13, 2016), https://www.fastcompany.com/3055395/60-of-women-in-silicon-valley-have-been-sexually-harassed (describing statistics on and specific incidences of sexual harassment in Silicon Valley); *see* Jordyn Holman, *Silicon Valley is Using Trade Secrets to Hide Its Race Problem*, BLOOMBERG, https://www.bloomberg.com/news/articles/2019-02-13/silicon-valley-is-using-trade-secrets-to-hide-its-race-problem (last updated Feb. 15, 2019, 2:58 AM) (analyzing how companies hide required reporting on hiring of people of color and women and avoid providing statistics to EEOC, which would likely show a lack of diversity in their workforce).

> creativity. . . . As a result, many entrepreneurs take a "just do it" attitude, avoiding all forms of management, process, and discipline. Unfortunately, this approach leads to chaos more often than it does to success.[21]

Startups eschewing traditional roles like human resources or management oversight[22] culminates time and again in rampant discrimination on the basis of race,[23] age,[24] and sex.[25] This does not mean that startups inherently intend to engage in discrimination, but instead, it is a repeated consequence of a general lack of care for traditional business and legal norms that exist for a reason. These traditional norms are guided by protections that have long been codified in federal antidiscrimination laws like Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act ("ADEA").[26]

The United States Equal Employment Opportunity Commission ("EEOC"), the agency that enforces these laws, has stated that no agreement—not even a severance agreement containing a waiver or release of all claims—can preclude an employee from seeking protection from discrimination under federal antidiscrimination laws.[27]

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21 RIES, *supra* note 8, at 15.

22 Julianne Teveten, *HR Comes Last at Startups and Women Pay the Price*, VICE (Apr. 21, 2016, 1:00 PM), https://vice.com/en_us/article/z43wdx/hr-comes-last-at-startups-and-women-pay-the-price (describing how employees at a company felt that HR issues caused employees to take themselves "too seriously," and how rapid and uneven growth that is characteristic of startups often leaves employees without organization, which can "[blur] the boundaries between professional life and social life."); Cale Guthrie Weissman, *The Future of HR and Why Startups Shouldn't Reject It*, FASTCOMPANY (May 10, 2016), https://www.fastcompany.com/3059673/the-future-of-hr-and-why-startups-shouldnt-reject-it (commenting on startups' belief that "'HR is dead'" and decline in belief in startup circles that HR is required).

23 *See* Holman, *supra* note 20.

24 *See* Fried, *supra* note 20.

25 *See* Dishman, *supra* note 20.

26 *See Laws Enforced by EEOC*, U.S. EQUAL OPPORTUNITY COMM'N, https://www.eeoc.gov/statutes/laws-enforced-eeoc (last visited Nov. 18, 2020).

27 *Q&A-Understanding Waivers of Discrimination Claims in Employee Severance Agreements*, EEOC (Apr. 15, 2009), https://www.eeoc.gov/policy/docs/qanda_severance-agreements.html.

But these laws apply only under specific circumstances. Title VII, for instance, applies only if a company has over fifteen people, and the ADEA only applies if there are over twenty.[28] While some states have passed separate and stronger antidiscrimination protections for workers,[29] the scope of federal antidiscrimination protection is not ubiquitous.

While this leaves several issues to explore, this Note will primarily analyze the following: closing the gap in federal antidiscrimination law and the way startups are uniquely reshaping the traditional legal landscape, specifically within employment law. Moreover, this Note will explore the impact on employee compensation, namely equity, when employees are forced to resign due to discrimination in companies that are not under the purview of federal antidiscrimination law. This Note places specific focus on discrimination and recovery recourse under Title VII, as well as what legal recourse startup employees can seek outside of its protections. But, to understand the full effect of this inquiry, it is necessary to first understand the elements of startup culture that are vulnerable to violations of federal antidiscrimination laws like Title VII. Part I provides a brief primer on the uniqueness of both working in and being paid by a startup. Subsequently, Part II discusses the backdrop against which discrimination occurs in more detail, along with its contemporaneous and future relevancy to the legal community. Part III will then analyze federal antidiscrimination law in detail and illustrate how employees can seek recovery when protected under these laws in accordance with the agreements and payment structure outlined in Part I. Further, Part IV will provide an inquiry into what can be done in the absence of codified recourse: that is, when federal antidiscrimination laws do not apply and employees encounter far more difficulty attempting to state a claim. Finally, the Conclusion will provide suggestions as to how to solve these emerging problems within employment law.

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[28] *Small Business Requirements*, EEOC [hereinafter *EEOC Small Business Requirements*], https://www.eeoc.gov/employers/smallbusiness/requirements.cfm (last visited Nov. 18, 2020).

[29] *Id.*

A wall at Facebook's headquarters used to be painted with the phrase "[d]one is better than perfect."[30] It has long become a somewhat dogmatic maxim taught to most programmers—myself included. This ideology holds some merit when it comes to productivity sprints, hackathons, and getting a product to market. However, the danger of this ideology arises when it is applied to people and the relationships among them—when the dogmatic push to "done," and the culture it entails, comes at the expense of those who get it there.

That being said, however, purely describing startup culture in this Note will only ever be so effective. To better tell this startup story, I want to introduce a narrative element in the form of a hypothetical. With everything that has so far been described in mind, imagine for a moment that Alex is a software engineer at a small startup of eleven people. Alex is twenty-two and has worked for the startup for ten months. Over the past several months, Alex has been stalked and otherwise harassed by a coworker, including repeated incidents at work, and no longer feels safe working at the company. Although Alex's employer was informed, nothing has substantially changed, and Alex feels there is no other recourse but to resign in the interest of safety.

I. THE BACKGROUND: A DAY-IN-THE-LIFE OF GETTING PAID BY AND WORKING IN A STARTUP

A. *Equity and the Pervasive Deferred Payment Gamble*

Funding innovation is expensive. With cash at a premium, startups often look to equity compensation[31] to conserve liquidity

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[30] Martin Lindstrom, *The Truth About Being "Done" Versus Being "Perfect"*, FASTCOMPANY (Sept. 25, 2012), https://www.fastcompany.com/3001533/truth-about-being-done-versus-being-perfect.

[31] *See* Erik Lie & Tingting Que, *On the Use of Option Grants as a Retention Tool* 1, 4 (2019), https://ssrn.com/abstract=3504794 ("[T]he inclination to use options is more prominent among firms with employees who are at high risk of transferring proprietary intellectual capital."); Erik Lie & Tingting Que, *On the Use of Option Grants as a Retention Tool*, COLUM. L. SCH.: CLS BLUE SKY BLOG (Jan. 16, 2020), https://clsbluesky.law.columbia.edu/2020/01/16/on-the-use-of-

while still attracting talent.[32] Offering equity in the company in lieu of cash, or the opportunity to purchase equity in the future in lieu of cash in the present, are, therefore, commonly-used tools in startup employment contracts.[33] Although there is no "one-size-fits-all" model[34] for how startups compensate their employees with equity,[35] pervasive in startup ideology is the belief that they should attract and hire those employees who want equity compensation[36] because such employees will "sacrifice the higher cash salary and security of more established companies."[37]

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option-grants-as-a-retention-tool/; Amelia Friedman, *7 Compensation Strategies for Cash-Strapped Startups*, HARV. BUS. REV. (July 12, 2018), https://hbr.org/2018/07/7-compensation-strategies-for-cash-strapped-startups.

[32] Richard A. Booth, *Give Me Equity or Give Me Death – The Role of Competition and Compensation in Silicon Valley*, 1 ENTREPRENEURIAL BUS. L.J. 265, 274 (2006); *see* REED & BARRON, *supra* note 5, at 228 ("New ventures need to be creative in recruitment strategies in order to attract and retain top talent while reserving as much cash as possible to build and grow the business."); Meghan Casserly, *Understanding Employee Equity: Every Startup's Secret Weapon*, FORBES (Mar. 8, 2013, 5:30 PM), https://www.forbes.com/sites/meghancasserly/2013/03/08/understanding-employee-equity-bill-harris-sxsw/ (commenting on an interview at SXSW with former CEO of PayPal, Bill Harris, that stock options are "every early stage startup's very best friend" in that they require no cash expenditure).

[33] *See* Booth, *supra* note 32, at 273.

[34] David S. Rose, *How Much Equity Should You Offer Your Startup's Team Members?*, GUST LAUNCH (Aug. 31, 2018), https://gust.com/launch/blog/how-much-equity-should-you-offer-your-startup-team-members ("Because each startup is different, and each person joins a different situation, there are no one-size-fits-all rules.").

[35] Professor Booth explains as follows:

> [E]quity compensation may take several different forms, ranging from outright grants of stock to grants of stock options at the current market price. . . . Or [the company] might pay the employee with an option whose strike price is equal to the market price (or value) of the stock on the date of the grant. . . . Or it may grant stock that vests only after some delay. . . .

Booth, *supra* note 32, at 271.

[36] Casserly, *supra* note 32 ("'The people you want to attract to your business are the people who want equity,' [Bill Harris, former CEO of PayPal,] says. 'You need people who are willing to take risks.'").

[37] Joseph Bankman, *The Structure of Silicon Valley Start-Ups*, 41 UCLA L. REV. 1737, 1750 (1994); *see* Smith, *supra* note 16, at 607 ("Startups compensate

Despite the lack of a one-size-fits-all method for giving out equity, it commonly fits two general forms, either "outright grants of stock" or "grants of stock options at the current market price."[38] This equity, however granted, has value upon transference to the employee.[39] For an outright grant, the value of the equity is measured by its market value at the time of issuance.[40] For an option, which provides the employee with the ability to purchase equity in the company at a later time, its inherent value is relative to the time of purchase by or transference to the employee.[41] Stock options manifest as the ability to purchase shares of the company at a later date for its current price; this means that, if the value of the shares increase, employees can purchase higher market-valued shares at a lower price.[42] The most common of these forms is the stock option grant.[43] It is important to note that, for startups, giving equity is more than just a method of supplementary payment; it is, perhaps most importantly, an effective litmus test to attract and hire employees who are interested in investing themselves in the company and in advancing the startup's vision and core values.[44] In short, equity payments are symbolic of the glue that holds a startup together. As Eric Ries states in *The Lean Startup*, "We often lose sight of the fact that a startup is not just about a product, a technological

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employees by combining lower salaries than they could get at more established companies with substantial stock option grants. These stock options must be valuable to employees because they accept them as reasons to turn down larger cash offers."); REED & BARRON, *supra* note 5, at 228 ("[O]ffering equity compensation is an attractive way of supplementing leaner salaries.").

38 Booth, *supra* note 32, at 271.

39 *Id.*

40 *See id.*

41 *See id.* at 271–72.

42 REED & BARRON, *supra* note 5, at 228; *see* Booth, *supra* note 32, at 272 ("The value of a stock option depends on the value of the underlying equity."); *see* Fischer Black & Myron Scholes, *The Pricing of Options and Corporate Liabilities*, 81 J. POL. ECON. 637, 638 (1973) ("In general, it seems clear that the higher the price of the stock, the greater the value of the option.").

43 *See* REED & BARRON, *supra* note 5, at 228.

44 Kyrstal Barghelame, *Here's How Startup Founders Should Offer Employee Equity*, GUSTO (Aug. 29, 2017), https://www.gusto.com/blog/hiring/startup-founders-employee-equity ("The stock options you offer to employees aren't just a bunch of percentages and numbers; They're a reflection of your company's values and philosophies.").

breakthrough, or even a brilliant idea. A startup is greater than the sum of its parts; it is an acutely human enterprise."[45]

This cash sacrifice for equity inherently creates a deferred payoff gamble—often literally referred to as a "lottery ticket."[46] One of the reasons that entrepreneurship is so economically incalculable or inestimable[47] is because its fundamental principles, such as the decision to invest in this lottery ticket-equity gamble, are entirely contrary to the common economic ideology that people are risk averse at their core.[48] Nevertheless, startups and the entrepreneurs that create them thrive on the edge of uncertainty in the throes of creative destruction and innovation.[49] It comes as no surprise, then, that in keeping with this culture of uncertainty, entrepreneurs hire entrepreneurs—those willing to take the lottery ticket gamble along with the founders.[50]

Equity compensation is a commitment to the "long-term view" of the company.[51] It is considered a lottery ticket because it may or may not pay off in the long-term. Employees must make, as Professor Thomas Smith of the University of San Diego Law School estimates, an "entrepreneurial judgment" that their labor and personal investment in the company has a chance (even if remote) that the payoff will be worth the investment.[52] Smith also notes that this investment creates an opportunity cost of "the difference between the

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45 RIES, *supra* note 8, at 28.

46 Smith, *supra* note 16, at 607; *see* Casserly, *supra* note 32.

47 Pozen, *supra* note 7, at 288–89.

48 Smith, *supra* note 16, at 607–08; Ted O'Donoghue & Jason Somerville, *Modeling Risk Aversion in Economics*, 32 J. ECON. PERSP. 91, 91 (2018).

49 *See* Smith, *supra* note 16, at 600; *see also* RIES, *supra* note 8, at ix.

50 *See* Smith, *supra* note 16, at 609–11; *see also* Martin Zwilling, *A Growing Startup Should Only Hire Entrepreneurs*, FORBES (Feb. 23, 2011, 11:08 PM), https://www.forbes.com/sites/martinzwilling/2011/02/23/a-growing-startup-should-only-hire-entrepreneurs/ ("This commitment to hire people who think like entrepreneurs, or install an 'owners mindset' in every employee, should be a high priority in every business.").

51 Booth, *supra* note 32, at 276–77; *see* Lie & Que, *supra* note 31, at 4. "Stock option grants might serve to reduce turnovers . . . . [T]hey are effectively deferred payments, such that employees who leave might forego substantial value, either because they exercise the options early thereby giving up time value, or forfeit unvested options, thereby giving up their entire value." *Id.* at 1.

52 Smith, *supra* note 16, at 609–11.

present value of [an employee's] total compensation at the startup and the present value of whatever [their] total compensation would have been at [their] best available alternative."[53] Moreover, Smith describes this "willingness of a startup employee to accept stock options in lieu of greater cash compensation" as "send[ing] a powerful signal to the employer that the prospective employee shares the founders' entrepreneurial perception regarding the startup's significant opportunity for success, and that the candidate is willing to join [their] economic fate to that of the new company."[54] Importantly, this gambit aligns employees' goals with those of the founders and the enterprise as a whole[55]: The very compensation structure itself demands that employees take risks and dedicate themselves to the company's success.[56]

To further cement this commitment, employees can often only attain the equity startups promise in stock option plans through vesting—a schedule by which employees are only able to purchase stock in the company once they reach specific contractual timing or milestone factors.[57] Importantly, the vesting schedule creates an incentive to keep employees not only working towards the company's success,[58] but also from leaving to go to another venture;[59] employees' equity opportunities will not vest (be exercisable) if they do not reach the timing or valuation milestones.[60] Vesting schedules often

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53 *Id.* at 610.

54 *Id.* at 595.

55 *Id.* at 592; *see* Lie & Que, *supra* note 31, at 1 ("An obvious motivation for awarding such securities is to align incentives of employees with those of shareholders.").

56 *See id.*

57 REED & BARRON, *supra* note 5, at 228 ("Stock options . . . 'vest' (become exercisable) over time or upon the achievement of certain goals . . . ."); Smith, *supra* note 16, at 586 ("The option-vesting schedule is the timetable by which the employee may actually exercise her stock options to buy company stock. When the company first grants the employee options, they are typically not exercisable immediately to buy stock."); *see* Linfield, *supra* note 14 ("Founder's Stock is often subject to a vesting schedule.").

58 Smith, *supra* note 16, at 586.

59 Booth, *supra* note 32, at 276–77 (commenting that equity compensation structures can encourage employees to invest their time and energy in a company with a "long-term view").

60 *See* REED & BARRON, *supra* note 5, at 228.

take place over four years,[61] meaning that the equity purchase opportunities promised to the employee would vest in increments and normally take a full four years to be complete. Some scholars have interpreted this schedule to have a more sinister meaning, noting that the schedule often represents a "rough guess of how long an employee should stay at the startup in order for the firm to get the most value out of the employee."[62]

To further tie equity compensation to dedication and longevity at the venture, startups often subject vesting to a cliff, a period of time (often one year) that the employee must be at the company before they can actualize their first equity purchase opportunity.[63] Meaning that, if the employee resigns any time before the cliff, they forgo their ability to receive or purchase any stock[64]—irrespective of how valuable that equity purchase may have been in their decision to join the company in the first place or how much of their overall compensation package was supplemented with equity.

In a startup, culture is everything—compensation included. This inherent equity gambit requires long-term dedication for any sort of payoff, and with it comes the blurring of lines between the work product and the people who make it.

B. *Startup Culture as Told by Soylent and Uber*

Employees' willingness to make the lottery ticket[65] gambit is a trait that often goes hand-in-hand with other entrepreneurial, and sometimes aberrant or even eccentric, behaviors. This eccentricity is exemplified in the media through commentaries on Twitter CEO Jack Dorsey's fasting, infamous Theranos founder Elizabeth

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61 Linfield, *supra* note 14; *see also* Lie & Que, *supra* note 31, at 4 (noting that employee turnover after option grants is lower until time of vesting, at which point retention value as an impetus for providing option grants is minimal).

62 Smith, *supra* note 16, at 600.

63 Linfield, *supra* note 14.

64 *See* Smith, *supra* note 16, at 586.

65 Smith, *supra* note 16, at 607–09.

Holmes' adherence to green juice,[66] or the widespread use of the meal replacement drink, Soylent, in lieu of taking time to eat.[67]

Noted technology author and programmer Clive Thompson wrote that the popularity of Soylent in startup culture is part of an "obsession with efficiency."[68] But, the idea of trading meals for protein drinks in the interest of getting back to work quicker—or not taking a break at all[69]—serves as a dark commentary on startup culture as a whole. David Heinemeier Hansson, the creator of the Ruby on Rails programming framework and co-founder of Basecamp, along with co-author, CEO, and co-founder of Basecamp, Jason Fried, express this sentiment in their book, *It Doesn't Have to Be Crazy at Work*:

> Whenever executives talk about how their company is really like a big ol' family, beware. They're usually not referring to how the company is going to protect you no matter what or love you unconditionally. You know, like healthy families would. Their motive is rather more likely to be a unidirectional form of sacrifice: yours. . . . You're not just working long nights or skipping a vacation to further the bottom line; no, no, you're doing this *for the family*. Such a blunt emotional appeal is only needed if someone is

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[66] Nicole Lyn Pesce, *Most of Twitter CEO Jack Dorsey's Intense Wellness Habits Actually Make Sense*, MARKETWATCH (Apr. 15, 2019, 9:20 AM), https://marketwatch.com/story/most-of-twitter-ceo-jack-dorseys-intense-wellness-habits-actually-make-sense-2019-04-15.

[67] *See* CLIVE THOMPSON, CODERS: THE MAKING OF A NEW TRIBE AND THE REMAKING OF THE WORLD 139–41 (2019); *see also* Brian X. Chen, *In Busy Silicon Valley, Protein Powder Is in Demand*, N.Y. TIMES (May 24, 2015), https://nytimes.com/2015/05/25/technology/in-busy-silicon-valley-protein-powder-is-in-demand.html?_r=0.

[68] THOMPSON, *supra* note 67, at 141.

[69] *See id.* at 140–41 ("Several start-up programmers told me they kept their pantries stocked with it. It was perfect for the nonstop workload endemic in Silicon Valley, the 14-hour-long jags of coding . . . .").

> trying to make you forget about your rational self-interest.[70]

This adherence to the success of the work product—and, thereby, the company—can be interpreted as a variation on a theme of the same deferred-payoff, all-for-one and one-for-all ideology required upon signing up to work at a startup in the first place. In other words, if founders can sacrifice for the sake of success, other startup employees can (or *should*), too.

Still, regardless of how one might view the advent of Soylent or the culture that it may foster, its popularity is undeniable, as it has broken free from the confines of Silicon Valley and been recently introduced into thousands of "brick-and-mortar retail locations," such as Walmart, since April 2019.[71] In the spirit of innovation, Clive Thompson notes that "[t]his fetish for efficiency is what has driven the delirious explosion of 'on demand' services" such as quicker Amazon deliveries, or entire companies designed to do laundry, clean apartments, or shop for groceries.[72] A more positive interpretation of this phenomenon is that products like Soylent illustrate the creation of entirely new subsets of industries that are based on innovation, efficiency, and problem-solving.[73] Like with Airbnb and its impact on the world,[74] the benefit or detriment of startup culture's characteristics often lie in the eye of the beholder. And, much like Airbnb itself, it can sometimes become a seemingly unstoppable

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[70] JASON FRIED & DAVID H. HANSSON, IT DOESN'T HAVE TO BE CRAZY AT WORK 77–78 (2018). Netflix notably presents a rare challenge to this ideology, treating its employees as a "team" instead of a "family" as a foundational predicate of its business model. Vivian Giang, *She Created Netflix's Culture and It Ultimately Got Her Fired*, FASTCOMPANY (Feb. 17, 2016), https://www.fastcompany.com/3056662/she-created-netflixs-culture-and-it-ultimately-got-her-fired. The reality that this is touted as an effective competitive edge for Netflix and is viewed as somewhat unusual by employees illustrates the uniqueness of this approach. Land of the Giants, *"Netflix is a team, not a family"*, VOX, (June 23, 2020), https://www.vox.com/land-of-the-giants-podcast.

[71] Marry Ellen Shoup, *Soylent Rolls out to 4,378 Walmart Stores, Targets 20,000 Retail Locations Nationwide*, FOODNAVIGATOR-USA (Apr. 8, 2019, 4:56 PM), https://www.foodnavigator-usa.com/Article/2019/04/08/Soylent-goes-nationwide-with-Walmart.

[72] THOMPSON, *supra* note 67, at 141.

[73] *See id.* at 139–41.

[74] *See Airbnb Impacts*, *supra* note 10; BIVENS, *supra* note 12, at 4.

force once set in motion—irrespective of the socioeconomic or legal ramifications that ensue.[75]

However, sometimes the effects of eschewing social, business, and legal norms are objectively negative. For instance, using trade secret laws like the Defend Trade Secrets Act to shield diversity statistics under the auspice of trade secret protection provides companies with a mechanism to shield themselves from criticism in addition to heightening the diversity disparity for people of color, in particular. [76] Also, venture capital firms that prototypically fund companies like startups are notorious for placing far fewer investments with women and people of color—just nine percent of 10,000 investor-backed ventures polled were run by women, under two percent were run by Latinx founders, and only one percent were led by Black founders.[77] On the other side of the table, even when venture capital firms themselves are run by people of color, a recent Stanford study has shown that those firms incur more bias from investors, including that investors "were unable to distinguish between the stronger and weaker black-led teams."[78] Further, bias and scrutiny extend to age as well; this issue was epitomized in a 2007 statement by Mark Zuckerberg that "young people are just smarter."[79]

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[75] *See* Paris Martineau, *Inside Airbnb's 'Guerrilla War' Against Local Governments*, WIRED (Mar. 20, 2019, 7:00 AM), https://www.wired.com/story/inside-airbnbs-guerrilla-war-against-local-governments/ (reporting on conflicts between Airbnb and cities around country as cities try to enforce laws surrounding short-term rentals, including collecting taxes).

[76] *See*, Holman, *supra* note 20.

[77] Mary Ann Azevedo, *Untapped Opportunity: Minority Founders Still Being Overlooked*, CRUNCHBASE NEWS (Feb. 27, 2019), https://news.crunchbase.com/news/untapped-opportunity-minority-founders-still-being-overlooked/.

[78] Melissa De Witte, *Venture Capital Funds Led by People of Color Face More Bias the Better They Perform, Stanford Researchers Find*, STAN. NEWS SERV. (Aug. 12, 2019), https://news.stanford.edu/2019/08/12/race-influences-professional-investors-judgments/ (finding that investors analyzing venture capital teams encountered more difficulty distinguishing between strengths and weaknesses of racially diverse teams relative to white-male led teams).

[79] Margaret Kane, *Say What? 'Young People Are Just Smarter'*, CNET (Mar. 28, 2007, 7:57 AM), https://cnet.com/news/say-what-young-people-are-just-smarter/ ("'I want to stress the importance of being young and technical,' [Zuckerberg] stated, adding that successful startups should only employ young people with technical expertise."); *see also* Fried, *supra* note 20.

Harassment, particularly sexual harassment, is another prevalent facet of discriminatory behavior in the startup world. While fighting an ongoing employment law battle with rideshare drivers over their status as independent contractors or employees,[80] 2017 was the year that Uber's culture caught up with the company in another way: sexual harassment.[81] In 2017, former Uber employee Susan Fowler published an essay online that detailed the extensive sexual harassment that both she and her fellow female engineers endured:

> Uber was a pretty good-sized company at that time, and I had pretty standard expectations of how they would handle situations like this. . . . [U]nfortunately, things played out quite a bit differently. When I reported the situation, I was told by both HR and upper management that even though this was clearly sexual harassment and he was propositioning me, it was this man's first offense, and that they wouldn't feel comfortable giving him anything other than a warning and a stern talking-to. Upper management told me that "he was a high performer" (i.e. had stellar performance reviews from his superiors) and they wouldn't feel comfortable punishing him for what was probably just an innocent mistake on his part. . . . Once I had finished up my projects and saw that things weren't going to change, I . . . requested a transfer. I met all of the qualifications for transferring – I had managers who wanted me on their teams, and

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80 *See* Omri Ben-Shahar, *Are Uber Drivers Employees? The Answer Will Shape The Sharing Economy*, FORBES (Nov. 15, 2017, 11:24 AM), https://forbes.com/sites/omribenshahar/2017/11/15/are-uber-drivers-employees-the-answer-will-shape-the-sharing-economy/; *see also* Shu-Yi Oei, *The Trouble With Gig Talk: Choice of Narrative that Worker Classification Fights*, 81 L. & CONTEMP. PROBLEMS 107, 107–09 (2018) (arguing that "gig" economy narrative constructed and furthered by companies behooves them at their workers' expense, in that narrative absolves companies from being responsible for their workers in traditional ways by minimizing the connection between the company and its workers).

81 Johana Bhuiyan, *With Just Her Words, Susan Fowler Brought Uber to Its Knees*, VOX (Dec. 6, 2017, 5:16 PM), https://vox.com/2017/12/6/16680602/susan-fowler-uber-engineer-recode-100-diversity-sexual-harassment.

> I had a perfect performance score – so I didn't see how anything could go wrong. And then my transfer was blocked. According to my manager, his manager, and the director, my transfer was being blocked because I had undocumented performance problems.[82]

Susan Fowler's account brought about several internal investigations within Uber, including one conducted by the former Attorney General of the United States, Eric Holder.[83] Those investigations contributed to, among other things, the resignation of then-CEO Travis Kalanick.[84] Fowler's decision to speak out catalyzed an outpouring of similar accounts from other women working at startups, and forced a reckoning in the spirit of the #MeToo movement.[85] Importantly, this facet of startup culture and the behavior that feeds it are not exclusive to Uber, and this brand of harassment translates to deficiencies in employee or investment diversity.[86]

The aim of this Note is not to criticize the equity compensation regularly employed by startups or their unique culture. Instead, the aim is to illustrate that startups are often boundary-pushing by nature in how they contract with and regard employees. These traits, while beneficial in some respects, can culminate to form a pervasive culture[87] that can erode or violate the rights of their employees. Moreover, this Note identifies discrimination as a key reason that a startup employee would walk away from their equity, an integral and coveted part of their compensation. Subsequently, this Note analyzes how both a misunderstanding of young startups and associated gaps in federal antidiscrimination laws deprive employees targeted by

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[82] Susan J. Fowler, *Reflecting on One Very, Very Strange Year At Uber* (Feb. 19, 2017), https://susanjfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber.

[83] Bhuiyan, *supra* note 81.

[84] *Id.*

[85] *Id.*

[86] *See also* Laila Alawa, *Sexual Harassment in The Startup Industry Really Isn't Going Away Anytime Soon*, FORBES (Feb. 9, 2018, 4:48 PM), https://forbes.com/sites/payout/2018/02/09/sexual-harassment-in-the-startup-industry-really-isnt-going-away-anytime-soon/.

[87] *See* JASON FRIED & DAVID H. HANSSON, REWORK 249 (2010) ("Culture is the byproduct of consistent behavior.").

discrimination of their rights relative to these equity agreements. Currently, employees who are the victims of discrimination have little to no recourse to recover when resignation feels like their only choice.

Harkening back for a moment to the hypothetical about Alex—the twenty-two-year old software engineer at a startup of eleven people who, for the past several months, has been harassed at work—we can now add a few more critical, compounding pieces to Alex's story. Alex's compensation is comprised of a $40,000 per year salary that includes the option to purchase up to 2,000 shares on a four-year vesting schedule with a one-year cliff. Alex specifically sought equity compensation as a condition of taking a lower cash salary and agreeing to work at the company. Having only worked for the startup for ten months, Alex has not yet reached the twelve-month (one-year) cliff at which the opportunity to purchase 500 shares, or twenty-five percent of the total over four years, would vest. Nonetheless, because the stalking and in-office harassment have yet to cease, Alex still feels that there is no other recourse but to resign in the interest of safety.

II. THE NEW BLUE-COLLAR AND WHY IT MATTERS

Startups are not going anywhere—they are as inevitable as the entrepreneurs that dream of them. And there is nothing wrong with that. But, with that understanding, the reader should acknowledge that startups do, in fact, push and change the legal landscape,[88] whether or not the law is ready for such alterations or aberrations in its use.[89]

In *The Lean Startup*, Eric Ries notes that "huge productivity increases made possible by modern management and technology have created more productive capacity than firms know what to do with."[90] By increasing productivity, firms can manufacture the necessary output without as much human power, inevitably creating a

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[88] Hobbs, *supra* note 9, at 1.

[89] *See* BIVENS, *supra* note 12, at 4; Martineau, *supra* note 75; Ben-Shahar, *supra* note 80.

[90] RIES, *supra* note 8, at 16.

dearth of traditional manufacturing positions[91] in regions most affected by declines in traditional labor positions, such as the coal mining industry of Kentucky, which saw the number of coal miners in the state decrease by over half between 2008 to 2016.[92] In the midst of watching his livelihood, heritage, and town collapse as jobs disappeared, former coalminer Rusty Justice decided to leave behind his coal-shipping and land-formation business and pivot to the creation of a new startup: a computer programming boot camp called Bit Source.[93]

Nine hundred fifty people applied for the first cohort.[94] Of the only eleven spaces available, Bit Source selected "a mine safety inspector, an underground miner, and a college-educated mechanic who'd fixed conveyer belts in the mines."[95] After grueling days learning programming languages like JavaScript and creating apps that taught skills such as how to store and retrieve information from a database, the now-programmers were able to compile their lessons into jobs creating sites and applications.[96] More importantly, they were able to again contribute to the commerce and growth of their community—not only by receiving "tent-pole salaries"[97] that could support other industries, but also in becoming activists for their own communities by creating an application to address opioid addiction.[98] In his book *Coders*, Clive Thompson notes of this coding revolution by stating that "[i]t's become more of a ticket to the middle class; something that the great mass of people can see as a route to reasonably stable, enjoyable employment. It's like, in other words,

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[91] *Id.* (citing Hale Stewart, *US Manufacturing Is Not Dead*, FIVETHIRTYEIGHT (Feb. 28, 2010, 1:48 PM), https://fivethirtyeight.com/features/us-manufacturing-is-not-dead/); *see also* James Manyika, et. al, *Harnessing Automation for a Future That Works*, MCKINSEY & COMPANY (Jan. 2017), https://mckinsey.com/featured-insights/digital-disruption/harnessing-automation-for-a-future-that-works (finding that almost half of all current labor jobs could be automated, representing approximately fifteen trillion dollars in wages to workers).

[92] THOMPSON, *supra* note 67, at 343.

[93] *Id.* at 344.

[94] *Id.* at 345.

[95] *Id.* at 345–46.

[96] *Id.* at 346–47.

[97] *Id.* at 344.

[98] *Id.* at 347.

pretty much what mining used to be around Kentucky."[99] For Rusty Justice, "These are blue-collar workers . . . [a]nd this is blue-collar work."[100]

Moreover, this inquiry matters because the number of startups like Bit Source and other associated coding jobs is only growing, bringing with it the "rise of 'mid-tech.'"[101] Despite its eponymous hold over the perceived quintessence of the software engineer, Silicon Valley only accounts for about eight percent,[102] or approximately one-tenth[103] of programming jobs in the United States. Yet, when lawmakers want a brief on startups—particularly those heavily involved in tech, they turn directly to Silicon Valley—they haul before them various tech CEOs at the helm of billion-dollar corporations.[104]

While Mark Zuckerberg is able to testify about the workings of Facebook, that does not necessarily make him (or other like heads of large startups) specifically able to inform lawmakers about the needs of startups like Bit Source that are geographically, culturally, or proportionally distinct from the prototypical Silicon Valley model. If Bit Source in Eastern Kentucky is taken as a microcosm for the growing mid-tech movement across the country, and there

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99 *Id.* at 348.

100 *Id.*

101 Michael J. Coren*, The American Midwest is Quickly Becoming a Blue-Collar Version of Silicon Valley*, QUARTZ (Feb. 25, 2018), https://qz.com/1212875/the-american-midwest-is-quickly-becoming-a-blue-collar-version-of-silicon-valley/ (describing "mid-tech" as programming or engineering positions that do not require traditional computer science or engineering degrees—or even a degree at all.).

102 Clive Thompson, *The Next Big Blue-Collar Job Is Coding*, WIRED (Feb. 08, 2017, 12:38 PM) [hereinafter *The Next Big Blue-Collar Job Is Coding*], https://wired.com/2017/02/programming-is-the-new-blue-collar-job/.

103 THOMPSON, *supra* note 67, at 349.

104 *See* Clive Thompson, *Why Congress Needs to Revive its Tech Support Team*, WIRED (July. 15, 2010, 7:00 AM) [hereinafter *Why Congress Needs to Revive its Tech Support Team*], https://wired.com/story/why-congress-needs-to-revive-its-tech-support-team/; Makena Kelly, *Congress Isn't Buying Mark Zuckerberg's Pitch for Libra*, The VERGE (Oct. 23, 2019, 5:37 PM), https://www.theverge.com/2019/10/23/20929313/mark-zuckerberg-hearing-congress-libra-calibra-facebook-maxine-waters.

are far more programming jobs[105] (and, presumably, startup-related businesses or positions) scattered across the United States, then it is concerning that Silicon Valley is still the point representative for this movement. This is because Silicon Valley *is not* representative of the entirety of startup culture.[106] With Congress having long-disbanded the Office of Technology Assessment ("OTA"),[107] lawmakers can easily have a very skewed understanding of startups by primarily, or only, targeting inquiries at the now-massive technology companies that have since outgrown their status as startups, despite once setting the tone for startup culture.[108]

Federal Communications Commissioner Jessica Rosenworcel, in an appeal to lawmakers to bring back the OTA, emphasized that,

> As technology becomes ingrained in our everyday lives, we may not always know just how it all works. . . . The digital age is so complex that old laws do not neatly capture how we interact with new technologies, and understandable facts about how the online world works are in short supply. . . . It's especially difficult for legislators and regulators to develop this baseline of understanding when innovation can invert much of what we think we know so quickly.[109]

Taking this more broadly, as was the edict of the OTA, this would not only apply to advancing technology, but also to the

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105 *See* THOMPSON, *supra* note 67, at 349; *The Next Big Blue-Collar Job Is Coding*, *supra* note 102.

106 *See The Next Big Blue-Collar Job Is Coding*, *supra* note 102.

107 *See Technology Assessment and the Work of Congress*, PRINCETON [hereinafter *OTA and the Work of Congress*], https://www.princeton.edu/~ota/ns20/cong_f.html (last visited Nov. 18, 2020). OTA was a Congressional advisory group in service from 1972 until 1995 and provided a policy-focused analytical approach to technology, science, and business that produced arguably invaluable resources for lawmakers. *See id*.

108 *See Why Congress Needs to Revive its Tech Support Team*, *supra* note 104.

109 Jessica Rosenworcel, *The Facebook Hearings Demonstrate the Need for Technology Policy Experts in Congress*, NBC NEWS (Apr. 13, 2018, 3:44 AM), https://nbcnews.com/think/opinion/facebook-hearings-demonstrate-need-technology-policy-experts-congress-ncna865611.

startups that utilize, engage in, and produce that technology. Moreover, without an in-depth picture of what is occurring across the startup landscape, such a myopic analysis of startups could easily lead lawmakers to overlook more obscure issues that affect only startups of a certain region, culture, or—and critical to the inquiry in this Note—*size*.

Although many issues may fall under this description, the one of principal concern in this paper is that of size, due to its effect on the disparate application of federal antidiscrimination laws. If you ask a startup founder for their definition of a startup, the answer often contains the elements of risk, sacrifice, and innovation.[110] The Merriam-Webster dictionary defines it, among other things, as "a fledgling business enterprise."[111] Here, too, there is no one-size-fits-all answer.[112] Startups can have over 80 employees, or very few, and are of varying ages and stages of investment.[113] Crunchbase's metrics reflect that there were 4,032 startups founded in 2019 alone.[114] As of June 2020, out of the ten top-trending 2019-founded startups reflected on Crunchbase's Leaderboard tool, three were listed as having only one-to-ten employees.[115] The capitalization of those three startups alone ranges from $2.8 million to $7 million dollars.[116] Going back further to Crunchbase's Leaderboard metrics for startups founded in 2017, as of June 2020, the top trending startup[117] with a

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[110] *See* Natalie Robehmed, *What Is A Startup?*, FORBES (Dec. 16, 2013, 8:42 AM), https://forbes.com/sites/natalierobehmed/2013/12/16/what-is-a-startup/.

[111] *Id.*

[112] *See id.*

[113] *Id.*

[114] *Startups Founded in 2019*, CRUNCHBASE, https://crunchbase.com/hub/startups-founded-in-2019#section-overview (last visited June 23, 2020).

[115] *Startups Founded in 2019: Leaderboard*, CRUNCHBASE, https://crunchbase.com/hub/startups-founded-in-2019/top/org_top_rank_delta_d30_list#section-recent-news-activity (last visited June 23, 2020); *see Jupiter*, CRUNCHBASE, https://crunchbase.com/organization/talar#section-overview last visited June 23, 2020), *Cabana*, CRUNCHBASE https://crunchbase.com/organization/cabana-7453 (last visited June 23, 2020), *Opora*, CRUNCHBASE, https://crunchbase.com/organization/opora-technologies (last visited June 23, 2020).

[116] *See Jupiter*, *supra* note 115, *Opora*, *supra* note 115.

[117] *Startups Founded in 2017: Leaderboard*, CRUNCHBASE, https://crunchbase.com/hub/startups-founded-in-2017/top/org_top_rank_delta_d30_list#section-leaderboard (last visited June 23, 2020).

capitalization of $2.6 million dollars is still indicated as having only one-to-ten employees.[118] Importantly, this is to say nothing about these specific entities or their individual business practices. It is simply a legal reality that, irrespective of the years in business or level of investment, with fewer than fifteen employees, neither Title VII nor the ADEA apply to any of them or to startups like them.[119] In the age of what Eric Ries refers to as the "entrepreneurial renaissance,"[120] society's lack of understanding of startups and startup culture is more dire than ever. Ready or not, the law must adapt.

While this Note provides no one definite solution, the subsequent inquiry into antidiscrimination and employment law illuminates how the confluence of a company culture that is vulnerable to elements of discrimination,[121] a pay structure that binds employees' compensation and future to the company itself,[122] and a gap in federal antidiscrimination law depending on the company's size culminate to leave some employees with little recourse to recover when they feel forced to resign from a startup due to discriminatory behavior.

III. Above the Threshold: Title VII and Other Federal Antidiscrimination Laws as They Were Designed to Work

A. *The Laws and Their History*

It is necessary to first analyze the laws at play to understand how damaging the deficiency of antidiscrimination protections in the United States can be for startup employees attempting to recover for equity compensation employment contracts. Chief among these, for its breadth and applicability to the vulnerabilities of startup culture, is Title VII.

As it was passed in 1964, Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of "race, color, religion,

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118 *Advekit*, CRUNCHBASE, https://crunchbase.com/organization/advekit (last visited Nov. 18, 2020).

119 *EEOC Small Business Requirements*, *supra* note 28.

120 RIES, *supra* note 8, at 16.

121 *See* Part I, Section B.

122 *See* Part I, Section A.

sex, or national origin."[123] The Civil Rights Act of 1991 and the Lily Ledbetter Fair Pay Act of 2009 further amended Title VII[124] to include "discrimination based on pregnancy, childbirth or related medical conditions, and marriage status for women."[125] Moreover, Stephanie Bornstein expands on this in saying that "Title VII . . . prohibits discrimination in hiring, firing, pay, and other 'terms, conditions, or privileges' of work, as well as the adoption of policies or practices that 'deprive any individual of employment opportunities' 'because of' a protected classification . . . ."[126] Applying to companies with fifteen or more employees,[127] Title VII created the EEOC with the purpose of "enforc[ing] [its] statutory provisions against discrimination . . . ."[128]

Claims under Title VII take three forms: "disparate treatment, disparate impact, and harassment,"[129] though "harassment, stereotyping, and, for the protected classes of religion and pregnancy, failure to accommodate" are arguably sub-classifications of disparate treatment.[130] To make a claim of disparate treatment under Title VII, an employee must claim that their employer intentionally discriminated against them.[131] Key elements of this claim lie in the finding that the employee was a member of a protected class and that they were qualified for the employment or benefits thereof but were otherwise denied due to discrimination.[132] Further, employee-claimants can illustrate disparate impact by showing that their employer's

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123 42 U.S.C. § 2000e-2(a).

124 *Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, https://www1.eeoc.gov//laws/statutes/titlevii.cfm?renderforprint=1 (last visited Nov. 18, 2020) (describing, in editor's note prepended, further amendment history of Title VII).

125 REED & BARRON, *supra* note 5, at 215.

126 Stephanie Bornstein, *Reckless Discrimination*, 105 CAL. L. REV. 1055, 1061 (2017).

127 *EEOC Small Business Requirements*, *supra* note 28.

128 Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 663 (2012) (citing 42 U.S.C. § 2000e-4(a)).

129 REED & BARRON, *supra* note 5, at 215.

130 Bornstein, *supra* note 126, at 1061.

131 REED & BARRON, *supra* note 5, at 215.

132 *Id.*; Jennifer Issacs, *Proving Title VII Discrimination in 2019*, ABA, https://www.americanbar.org/groups/young_lawyers/projects/no-limits/proving-title-vii-discrimination-in-2019/ (last visited Nov. 18, 2020).

seemingly-neutral employment policy or systematized workplace practice effectively discriminated against members of a Title VII protected class.[133] For disparate impact, employee-claimants need not prove employer intentionality, unlike with disparate treatment.[134]

The most common form of Title VII claims, however, is harassment.[135] A harassment claim could appear in the form of "denial of an employment benefit for refusal to submit to sexual advances by a supervisor."[136] For this "quid pro quo" harassment, courts may hold employers responsible even if they were not aware of the harassment and had specific policies prohibiting harassment.[137] Further, an employee can assert a harassment claim under Title VII by showing that the workplace fostered a hostile environment for the employee.[138] "Hostile work environment" claims are those that allege that an employee, as a member of a protected class under Title VII, was subjected by his or her employer to "unwelcome comments or conduct" based on that protected status and that the comments or conduct were substantial enough to "unreasonably [interfere] with [the] employee's ability to work effectively" because the comments or conduct "created an intimidating, hostile, or offensive work environment."[139]

Regarding hostile work environment harassment claims, Professor Mary Anne Franks from the University of Miami School of Law notes that "EEOC guidelines state that employers are liable when they have actual knowledge of the harassment and fail to act promptly and effectively."[140] However, Professor Franks also points

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133 Bornstein, *supra* note 126, at 1061.

134 REED & BARRON, *supra* note 5, at 215; *see* Issacs, *supra* note 132.

135 *Id.*

136 *Id.*

137 Franks, *supra* note 128, at 664 (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998)); *see* Crystal L. Norrick, *Eliminating the Intent Requirement in Constructive Discharge Cases: Pennsylvania State Police v. Suders*, 47 WM. & MARY L. REV. 1813, 1818 (2006) (explaining that Supreme Court in *Ellerth* found that harassment created a "tangible employment action" and "reasoned that, in making tangible employment decisions, a supervisor uses her authority 'to make economic decisions affecting other employers under . . . her control.'").

138 REED & BARRON, *supra* note 5, at 215.

139 *Id.*

140 Franks, *supra* note 128, at 664.

out that, when harassment does not correspond to a "tangible loss of employment benefits," employers are able to skirt liability by insisting that the plaintiff did not take "preventative or corrective" action, and that the employer themselves "took reasonable care" to ameliorate the harassment.[141] Further, in all three typical classes of Title VII claims—disparate treatment, disparate impact, and harassment—the law allows employers to mount an affirmative defense if they can demonstrate that the alleged discrimination against a protected class is a "bona fide occupational qualification," and is necessary for the normal functioning of the business.[142] In *Pennsylvania State Police v. Suders*, the Supreme Court further "delineate[d] two categories of hostile work environment claims: (1) harassment that 'culminates in tangible employment action,' for which employers are strictly liable, and (2) harassment that takes place in the absence of a tangible employment action, to which employers may assert an affirmative defense."[143]

Pursuant to the EEOC's guidelines on federal laws that prohibit workplace discrimination, "Title VII prohibits not only intentional discrimination, but also practices that have the effect of discriminating against individuals because of their race, color, national origin, religion, or sex."[144] Professor Chuck Henson from the University of Missouri School of Law notes that the aims of Title VII bring about a cognitive dissonance between the idea that Title VII is supposed to eradicate employment discrimination and the jurisprudential reality that Title VII is a delicate balancing act between preserving business and managerial autonomy while also preventing the most

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141 *Id.* (citing Faragher v. City of Boca Raton, 542 U.S. 775, 807-08 (1998)).

142 REED & BARRON, *supra* note 5, at 215; *see* Abermarle Paper Co. v. Moody, 422 U.S. 405, 406 (1975) (citing Griggs v. Duke Power Co., 401 U.S. 424, 439 n.9 (1971)) (explaining that "[a]s is clear from *Griggs*, . . . and the Equal Employment Opportunity Commission's Guidelines for employers seeking to determine through professional validation studies whether employment tests are job related, such test are impermissible unless shown . . . to be 'predictive of or significantly correlated with important elements of work behavior which compromise or are relevant to the job . . . .'").

143 Norrick, *supra* note 137, at 1818 (quoting Pa. State Police v. Suders, 542 U.S. 129, 143 (2004), to illustrate when an affirmative defense to alleged discrimination may be raised relative to Supreme Court's analysis in *Suders*).

144 *Federal Laws Prohibiting Job Discrimination Questions and Answers*, https://eeoc.gov/facts/qanda.html (last visited Nov. 18, 2020).

insidious and obvious forms of discrimination.[145] Professor Henson further dissects the background of the legislation that eventually became Title VII, noting that prior drafts contained the specific purpose "that it is the national policy to protect the right of the individual to be free from [employment] discrimination."[146] This underlying purpose, albeit not written into the language of the law, nonetheless has bearing on the remedial outcomes of Title VII cases: For example, in *Abermarle Paper Co. v. Moody*, the Supreme Court further expanded upon a court's duty to remedy as outlined by the principles of both the "prophylactic" intent of Title VII to prohibit employment discrimination as well as the corrective purpose served by Title VII to help "make whole" the victims of employment discrimination.[147] Moreover, in *Ford Motor Co. v. Equal Employment Opportunity Commission*, Justice O'Connor delved further into this fundamental Title VII duty in quoting the *Abermarle Paper* opinion: "[t]he 'primary objective' of Title VII is to bring employment discrimination to an end . . . by 'achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group . . . over other employees.'"[148] As outlined by the above cases, as deficient as Title VII may be regarding its limited aims as described by Professor Henson,[149] it nevertheless does attempt to make whole again those wronged by discrimination under Title VII.

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[145] *See* Chuck Henson, *Title VII Works — That's Why We Don't Like It*, 2 U. MIA. RACE & SOC. JUST. L. REV. 41, 43, 96 (2012).

[146] *Id*. at 52 (citing H.R. REP. NO. 88-914, pt. 1, at 18 (1963)).

[147] Sheila Finnegan, Comment, *Constructive Discharge Under Title VII and the ADEA*, 53 U. CHI. L. REV. 561, 573 (1986) (citing Abermarle Paper Co. v. Moody, 422 U.S. 405, 405, 417–18); Mark S. Kende, *Deconstructing Constructive Discharge: The Misapplication of Constructive Discharge Standards in Employment Discrimination Remedies*, 71 NOTRE DAME L. REV. 39, 45 n. 27 (1995) (citing *Abermarle Paper Co.*, 422 U.S. at 419 to explain that the purpose of the "make whole" language, "evident by the legislative history," was intended to provide relief designed to put the victim back into "the position that [the victim] would have been in but for the discrimination.").

[148] Ford Motor Co. v. Equal Emp. Opportunity Comm'n, 458 U.S. 219, 228 (1982) (first citing *Abermarle Paper Co.*, 422 U.S. at 417; and then quoting *Griggs*, 401 U.S. at 429–30).

[149] *See* Henson, *supra* note 145, at 43, 96.

Although this inquiry primarily focuses on Title VII, startup culture's many problems with age discrimination also merit a brief analysis of the ADEA. The Age Discrimination in Employment Act of 1967 applies to companies of twenty or more employees[150] and is designed to prevent employers from discriminating against employees aged forty or older.[151] Further, the ADEA is substantially similar to Title VII, as Sheila Finnegan notes, citing to *Lorillard v. Pons*, that "[t]he Supreme Court has observed, 'the prohibitions of the ADEA were derived *in haec verba* from Title VII.'"[152]

The primary difference between these two laws lies in the ADEA's adoption of the remedial methods of the Fair Labor Standard Act ("FLSA")[153] in that a violation of the ADEA is considered tantamount to a violation of the FLSA.[154] Moreover, under FLSA standards, employer violations of the ADEA merit backpay.[155] Finally, the ADEA does not empower courts with the discretion to waiver on remedial standards, which they have under Title VII, and the law does not require employees to reasonably mitigate damages or have such an amount deducted from a backpay award.[156]

B. *Recourse and Recovery Available under Title VII and the ADEA*

For the purposes of this Note, what is perhaps most important about laws like Title VII and the ADEA is their ability to provide legal credibility to the claims of those who have been provably discriminated against. In short, under antidiscrimination laws like Title VII, employees can bring claims that have the ability to make them

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150 *EEOC Small Business Requirements*, *supra* note 28.

151 29 U.S.C. § 631(a).

152 Finnegan, *supra* note 147, at 578, 578 n.92 (citing Lorillard v. Pons, 434 U.S. 575, 584 (1978)).

153 Albert B. Gerber & S. Harry Galfand, *Employees' Suits Under the Fair Labor Standards Act*, 95 U. PA. L. REV. 505, 505 (1947). The Fair Labor Standards Act went into effect on October 24, 1938. *Id.* Per Gerber and Galfand, "The Act provides that any employer who violates its minimum wage or overtime provisions shall be liable to the employees affected for (1) the total amount which was underpaid, (2) an addition equal amount as liquidated damages, (2) a reasonable attorney's fee, and (4) costs of the action." *Id.*

154 Finnegan, *supra* note 147, at 578.

155 *Id.* at 578–79.

156 *Id.*

whole again, to the extent backpay and other damages can remedy the wrong done to them.

The efficacy of these remedies are complicated, however, by the manner in which the employer terminates the employee. For example, when an employee resigns due to, for instance, sexual harassment discrimination, their best, and likely only, recourse is to recover via constructive discharge due to a hostile workplace environment[157]—treatment "so [intolerable] that any reasonable person would [feel] compelled to quit."[158] Were the employee, instead, directly fired, and exhibited reasonable efforts to mitigate the damage caused by lost wages,[159] that employee would "presumptively" be entitled to backpay[160] if their employer violated Title VII in firing them.[161] Importantly, Title VII and the ADEA allow courts to factor in the value of stock options as other forms of compensation in determining backpay, frontpay, or other damages to award an employee.[162] Under *Abermarle Paper*, both current and former employees can recover backpay for violations of Title VII.[163] However, if the employee *resigns* due to a hostile and discriminatory environment in the workplace, they must first prove that they were constructively discharged in order to have the ability to recover backpay or

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157 *Id.* at 561–62.

158 Kende, *supra* note 147, at 40.

159 *See id.* at 41 (noting that there is a "freedom" that stems from direct discharge as opposed to resignations, as reasonable effort to mitigate is a fairly low standard under *Ford Motor Co.*).

160 Backpay is defined as "[t]he wages or salary that an employee should have received but did not because of an employer's unlawful action in setting or paying the wages or salary." *Backpay*, BLACK'S LAW DICTIONARY (11th ed. 2019). Further, recovery could also include frontpay, or other associated damages as is found necessary by the court. Scarfo v. Cabletron Sys., Inc., 54 F.3d 931, 954–56 (1st Cir. 1995) (upholding award of front pay, back pay, and stock options value); *see* Pa. State Police v. Suders, 542 U.S. 129, 147 n.8. (2004).

161 Finnegan, *supra* note 147, at 561–62 (citing Abermarle Paper Co. v. Moody, 422 U.S. 405, 421–22 (1975)); *see* Kende, *supra* note 147, at 41 n.13 (citing Ford Motor Co. v. Equal Emp. Opportunity Comm'n, 458 U.S. 219, 231–32 (1982)) ("Employees who are discriminatorily discharged are therefore presumptively entitled to a remedy.").

162 *Scarfo*, 54 F.3d at 954–56 (affirming an award of benefits including stock options as result of a discriminatory termination).

163 *Abermarle Paper Co.*, 422 U.S. at 408, 422, 424.

other damages.[164] In other words, employees who resign cannot presumptively recover under Title VII or like antidiscrimination laws, as they might have been able to had they been fired outright.[165]

The Supreme Court declared in its landmark constructive discharge case, *Suders*, that "Title VII encompasses employer liability for a constructive discharge."[166] In finding that a former Pennsylvania State Police employee was discriminated against sufficient to bring a constructive discharge claim under Title VII,[167] the Supreme Court then defined constructive discharge for this purpose to mean "[a]n employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. . . . The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?"[168] Or, as the Court noted, "essentially, [the plaintiff] presents a 'worse case' harassment scenario, harassment ratcheted up to the breaking point."[169] The Court further stated that "a prevailing constructive discharge plaintiff is entitled to all damages available for formal discharge," which includes, depending on the circumstances, damages resulting from the resignation, backpay, and frontpay.[170] The Court went further to acknowledge the "'universal recognition'" of constructive discharge in lower courts as a remedial route in discrimination cases,[171] and referred to *NLRB v. Saxe-Glassman Shoe Corp.*[172] as the first circuit court that allowed for backpay as a financial remedy.

In terms of constructive discharge as historically addressed in circuit courts, Finnegan notes that early Title VII and constructive discharge cases, such as *Young v. Southwest Savings & Loan Association* in the Fifth Circuit, provided the foundation for the use of

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164 Finnegan, *supra* note 147, at 561–62.

165 *Id.*

166 Pa. State Police v. Suders, 542 U.S. 129, 143 (2004).

167 *Id.* at 147–48, 152.

168 *Id.* at 141.

169 *Id.* at 147–48.

170 *Id.* at 147 n.8.

171 *Id.* at 142.

172 *Id.* at 141 (citing NLRB v. Saxe-Glassman Shoe Corp., 201 F.2d 238, 243 (1st Cir. 1953) ("[T]he first Circuit case to allow backpay award for constructive discharge.")).

constructive discharge as a remedy to instances of employment discrimination in violation of federal law.[173] However, lower courts have not yet agreed on one single test for constructive discharge, with circuits split on requirements of employer intent.[174] Given variable interpretations of the employer intent requirement, even in the wake of *Suders*, it is yet inconclusive whether *Suders* definitively codified the majority view of constructive discharge as not requiring intent, although it is arguable that it has done just that, given Justice Thomas's dissent in the case.[175] Accordingly, the majority view is based on the understanding that an employee is constructively discharged from their place of employment if the discrimination results in a hostile workplace to the end that any reasonable person in the same position would feel they must resign.[176] This differs from the contrasting minority application of constructive discharge, which, in addition to the reasonable person requirement, requires the employee to show their former employer had the specific intent to create those intolerable conditions in an effort to force the employee to resign.[177] Should *Suders* not hold conclusively on this matter, it merits a brief explanation into the circuit split due to its effect on an employee's ability to even begin to bring a constructive discharge action under the Title VII framework.

In the Fifth Circuit wage discrimination and constructive discharge case *Bourque v. Powell Electrical Manufacturing Co.*, the court held that the plaintiff was not required to prove that her employer intended for her to resign in order to put forth a constructive discharge claim.[178] This was the foundation for several variations of tests requiring, at least, lesser showings of employer intent adopted by circuits beyond the Fifth, including the First, Second, Third,

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173 Finnegan, *supra* note 147, at 563 (citing Young v. Sw. Sav. & Loan Ass'n, 509 F.2d 140, 145 (5th Cir. 1975)).

174 *Id.* at 562.

175 Norrick, *supra* note 137, at 1830 ("Although the *Grief Brothers* court rejected reading *Suders* as eliminating the need for an employee alleging constructive discharge to demonstrate deliberate action on the part of the employer, Justice Thomas thought that the *Suders* majority opinion did just that.").

176 Finnegan, *supra* note 147, at 563.

177 *Id.* at 566.

178 Bourque v. Powell Elec. Mfg, Co., 617 F.2d 61, 65 (5th Cir. 1980); Kende, *supra* note 147, at 50–51;

Sixth, Ninth, Eleventh, and District of Columbia.[179] Conversely, the minority requirement is epitomized in the Tenth Circuit case *Muller v. United States Steel Corp.*, where the court found a violation of Title VII, but would not award damages in the form of backpay to the plaintiff because the court did not find enough evidence to show that the employer intended to force the plaintiff to resign, and thereby could not find that the plaintiff was constructively discharged.[180]

Although the compensatory effect of a finding of constructive discharge differs for Title VII and the ADEA—with the ADEA viewing constructive discharge as a violation of the FLSA, thereby avoiding the court discretion and damage mitigation standards that Title VII requires[181]—both courses of federal antidiscrimination law use constructive discharge in order to allow employee-plaintiffs who resigned from their positions to recover backpay.[182] And, as the Court reiterated in *Suders*, even under Title VII, where constructive discharge is an equitable remedy subject to court discretion, victims are nonetheless entitled to the same remedies as are victims under the ADEA, including backpay and damages due to their resignation.[183] In summary, both Title VII and the ADEA provide constructive discharge remedies to allow employees who resigned as a result of discrimination to be made whole by holding their employer liable for backpay.[184] Put another way, constructive discharge under both laws essentially puts an employee who resigned due to discrimination in the same shoes as one who was terminated on the basis of discrimination, allowing them to recover the same measure of damages.[185]

Professor Mark Kende notes that the heightened requirements of a showing of constructive discharge, as opposed to a case where an

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179 *Id.* at 52–53; *see also* Finnegan, *supra* note 147, at 564 n.15.

180 Finnegan, *supra* note 147, at 566 (citing Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975)). This further illustrates that a violation of Title VII is not alone sufficient to constitute a constructive discharge claim. *Id.*

181 *See id.* at 578–80.

182 *See id.* at 563–80.

183 Pa. State Police v. Suders, 542 U.S. 129, 147 n. 8. (2004).

184 *See* Finnegan, *supra* note 147, at 561–63.

185 *See id.* at 573–74.

employee was fired, results in subjecting employees to continued discrimination.[186] He further examines the public policy directives—somewhat similarly to Professor Henson's assessment of cognitive dissonance with Title VII's aims[187]—that cause courts to utilize these heightened standards of recovery because courts place emphasis on allowing employers and employees to remedy disagreements within the company such that they never enter into court.[188] Kende's rationale is that public policy directives emphasize both retaining the integrity of a business' internal resolution mechanisms, reducing court intervention, as well as on limiting the potential windfall for employees in the event of "the smallest sign of discrimination."[189]

Nevertheless, however questionable a court's application of Title VII may be or however successful an employee's efforts to recover backpay are thereunder, employees that have been provably wronged by discrimination still have codified pathways for recovery. The pathways are only further emboldened by *Suders* if one construes the holding as definitively supporting the majority view, which is in favor of affording discrimination victims easier access to recourse without the intentionality requirement.[190]

Put plainly, a judgment indicating a violation of Title VII or the ADEA is, by the sheer nature of the offense, a showing of discrimination having occurred. An employer may argue, as an affirmative defense, that their discriminatory scheme is permissible under Title VII, therefore leaving the employee unable to take any remedial action.[191] But the affirmative defense only allows the discriminatory behavior, it does not erase the fact that it occurred. For many employees who have a cause of action, showing a Title VII violation is

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[186] Kende, *supra* note 147, at 44 n.25, 45.

[187] *See* Henson, *supra* note 145, at 42 n.2, 44–48.

[188] Kende, *supra* note 147, at 40–41, 53, 53 n.78.

[189] *Id.* at 40-41. Here, there is also a similar refrain to Henson's analysis of the duality of Title VII, with many court cases (often in dicta) heralding Title VII's protective aims, while also tempering recovery under and application of Title VII protections in an effort to not overstep the boundaries of the businesses to which it applies. *See* Henson, *supra* note 145, at 43.

[190] *See* Norrick, *supra* note 137, at 1826–30.

[191] *See id.* at 1818–19 (citing Pa. State Police v. Suders, 542 U.S. 129, 143 (2004)).

not, by itself, sufficient to prove a successful constructive discharge claim.[192] However, even in the case where an employee resigns, and cannot presumptively recover backpay,[193] the validity of a court finding that the employee was discriminated against by their former employer can bolster the employee's constructive discharge argument.[194] Such a finding lends both clarity and credibility to a plaintiff-employee's cause in stating a claim that is, by definition, "harassment ratcheted up to the breaking point" such that any reasonable person would also resign.[195] Put another way, once an employee resigns due to discrimination, they are no longer presumptively due damages.[196] However, it is easier for that employee to prove they are due damages when they can illustrate that their employer tangibly violated Title VII or the ADEA.[197]

Harkening back to the hypo from the end of Part III, were Alex to have worked at a company of fifteen people instead of eleven, Alex would be employed at a company to which Title VII applied.[198] As such, Alex could bring a claim of constructive discharge as having been harassed, and therefore discriminated against, in an arguably hostile workplace where Alex's employer was presumptively in violation of Title VII. Given *Suders*, Alex's claim may or may not be subject to the employer intent requirement in addition to the reasonable person standard of constructive discharge.[199] But, and of the utmost importance, Alex would have the ability to bring forth a claim of discrimination under the protection of Title VII. This would

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192 Finnegan, *supra* note 147, at 566 (citing Muller v. United States Steel Corp., 509 F.2d 923, 926–30 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975)).

193 Finnegan, *supra* note 147, at 561–62 (citing Abermarle Paper Co. v. Moody, 422 U.S. 405, 421–22 (1975)); *see* Kende, *supra* note 147, at 41 n.13 (Ford Motor Co. v. Equal Emp. Opportunity Comm'n, 458 U.S. 219, 231–32 (1982)) ("Employees who are discriminatorily discharged are therefore presumptively entitled to a remedy.").

194 *Suders*, 542 U.S. at 143, 146–52.

195 *Id.* at 147–48.

196 Kende, *supra* note 147, at 41 n.13 (*Ford Motor Co.*, 458 U.S. at 231–32).

197 *See id.*; Finnegan, *supra* note 147, at 561–62.

198 *See Coverage of Business/Private Employers*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, https://www.eeoc.gov/employers/coverage-businessprivate-employers (last visited Nov. 18, 2020).

199 *See* Norrick, *supra* note 137, at 1830; Pa. State Police v. Suders, 542 U.S. 129, 141 (2004).

allow Alex's claim of constructive discharge to be predicated upon the Title VII violation and potentially allow Alex to recover the damages that resulted from the harassment and resultant resignation. While it will never erase the discrimination, Alex has the potential to be made legally and financially whole to the extent possible by the discretion of the court under, as Justice O'Connor stated in *Ford Motor Co.*, the ideology that Title VII's "primary objective" is to eradicate employment discrimination.[200]

However, Alex, in working at a startup of eleven people to which Title VII does not apply,[201] is deprived of that protection. Hinging on the fifteen-employee mark, what is illegal under Title VII at a company with just four more employees, is not illegal where Alex worked. Because Title VII, or any federal antidiscrimination law that has a minimum floor, does not protect employees like Alex that fall under that floor. Put another way, any startup that has fewer than fifteen employees—irrespective of the capital that startup has raised, the level of commerce it does, or the work culture it promotes—is not under the purview of Title VII, the ADEA, or associated federal antidiscrimination laws that have a minimum floor. Given the rise of startups of every shape and size across the nation,[202] this is an unsustainable and overtly concerning model.

IV. BELOW THE THRESHOLD: WHEN FEDERAL ANTIDISCRIMINATION LAWS DO NOT APPLY

Even under the protection of federal antidiscrimination laws like Title VII and the ADEA, employees' presumptive ability to receive damages for wrongs done to them shifts to a structure of constructive discharge, forcing employees to prove that their resignation was one of last resort.[203] It is the very fact of their resignation—or, rather, that they were not directly fired as a tangible offense under

200 *Ford Motor Co.*, 458 U.S. at 228.

201 *EEOC Small Business Requirements*, *supra* note 28.

202 *See* THOMPSON, *supra* note 67, at 349; *The Next Big Blue-Collar Job Is Coding*, *supra* note 102.

203 Finnegan, *supra* note 147, at 561–62.

these laws—that fundamentally shifts the inquiry.[204] Nonetheless, employees still have a designated pathway to recovery.

Yet, this is not necessarily the case where an employer does not fall under the purview of these laws. While employees may still have potential avenues of recourse—such as more restrictive state laws, theories of unjust enrichment or breach of contract, the FLSA, and its subsidiary Equal Pay Act—there are none as targeted and powerful as the protection given under Title VII, further solidified in resounding cases such as *Suders*.[205]

A. *When State Laws are Not Enough*

The EEOC acknowledges that, even beyond the antidiscrimination laws under its enforcement power, like Title VII and the ADEA, there may be different or more restrictive state laws that still apply.[206] Similar to section 633 of the ADEA,[207] Title VII Section 2000(e)-7 stipulates:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require the doing of any act which would be an unlawful employment practice under this subchapter.[208]

State antidiscrimination laws, however, are not universally more protective to employees than Title VII, as states range from extending certain antidiscrimination protections to companies of one

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204 *See id.*

205 *See infra* Part IV, Section A; *see also* Norrick, *supra* note 137, at 1830 (commenting on Justice Thomas' belief that *Suders* removed employer intent requirement, which would effectively be a lower bar for employee plaintiffs to show to have a successful Title VII constructive discharge claim); *Suders*, 542 U.S. at 141.

206 *See EEOC Small Business Requirements*, *supra* note 28.

207 29 U.S.C. § 633(a)–(b).

208 42 U.S.C. § 2000(e)-7.

employee to the Title VII limit of fifteen employees.[209] Furthermore, states do not always guarantee that these protections mirror those Title VII protected classes such as race, national origin, or sex.[210] Alabama, for instance, has no policy on sexual harassment,[211] with the Alabama Supreme Court formally declaring in *Stevenson v. Precision Standard, Inc.* that "[i]t is well settled that Alabama does not recognize an independent cause of action of sexual harassment. Instead, claims of sexual harassment are maintained under common-law tort theories . . . ."[212] Georgia is similar in that, while it does have a Fair Employment Practices Act that extends discrimination protections to those protected classes that mirror Title VII, its equivalent law only applies to public agencies' officers and employees, not private employers.[213]

B. *A Last Resort: Courts' Reluctance to Use Equitable Principles to Remedy Discriminatory Wrongs*

As suggested by Alabama's deference to other legal remedies in lieu of direct antidiscrimination statutes, there are also tort and contract remedies under which employees can attempt to recover financially.[214] However, such methods may prove inadequate as they do not directly address financial loss as the result of discriminatory treatment.[215] Nonetheless, some scholars have put forward novel ideas on how an employee could recover under these less codified legal theories. For example, in her assessment of the forfeiture of employee stock options in the case of involuntary termination, Karen Madsen presents remedies that may prove useful when applied

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209 *See Discrimination — Employment Laws*, NAT'L CONF. STATE LEGISLATURES (Jul. 27, 2015), https://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx.

210 *See Discrimination and Harassment in the Workplace*, NAT'L CONF. STATE LEGISLATURE (Mar. 18, 2019), https://www.ncsl.org/research/labor-and-employment/employment-discrimination.aspx.

211 *See* Ally Windsor Howell, *2 Ala. Pers. Inj. & Torts* § 11:12 (2019 ed.).

212 Stevenson v. Precision Standard, Inc., 762 So.2d 820, 825 n.6 (Ala. 1999).

213 GA. CODE ANN. § 45-19-21 (West 2019).

214 *See Stevenson*, 762 So.2d at 825 n.6.

215 *See* Karen A. Madsen, *Employee Stock Options: Is Complete Forfeiture of Non-Vested Stock Options Fair and Equitable When an Employee is Involuntarily Terminated Without Cause*, 33 SANTA CLARA L. REV. 213, 226–27, 330–35 (1993).

to employees who resign under exceptional circumstances, like, for instance, pervasive discrimination.[216] Madsen, in her inquiry, questions the fairness of allowing companies to contractually promise employees equity and thereby reap the benefits of doing so, only to terminate the employee before their equity has vested.[217] While Madsen's analysis only addresses employees who were terminated for legitimate, nondiscriminatory purposes,[218] it can also apply to employees who were discriminatorily terminated or resigned due to pervasive discrimination. Indeed, Madsen's analysis is particularly relevant in those cases given that her aim is to highlight the inequity of equity compensation schemes[219] and illustrate the necessity of other forms of payment, such as pro rata vesting.[220]

In assessing further equitable remedies beyond contractual interpretation, Madsen proposes recourse such as unjust enrichment, substantial performance, and promissory estoppel.[221] However, not all will apply in discrimination cases. Remedies such as promissory estoppel,[222] for example, traditionally require consideration in the form of the employee not terminating their employment.[223] Unjust enrichment, however, may apply, given that it arises in situations where one party retains a benefit conferred by another party in a legally-unjustifiable manner, and is, therefore, liable to make whole the party that conferred the benefit, as the receiving party was unjustly enriched by that benefit.[224] In support, Madsen points to *Lucas v. Segrave Corp.* where the court held that employees wrongfully

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216 *See id.* at 217–19, 226–27, 330–35.

217 *See id.* at 214.

218 *See id.* at 213–14, 224.

219 *See id.* at 224. ("This problem is particularly disturbing in the case of an unsophisticated employee who, without the advice of a lawyer, may not foresee the potential forfeiture problems associated with the vesting/termination provisions of a stock option grant before signing it.").

220 *See* Madsen, *supra* note 215, at 214, 224–35.

221 *See id.* at 230–34.

222 *Estoppel*, BLACK'S LAW DICTIONARY (11th ed. 2019). Promissory estoppel is, essentially, a remedy to detrimental reliance wherein the party that perpetrated the injustice (or breaking of the promise) can be required to uphold the promise to prevent the injustice or inequity. *Id.*

223 Madsen, *supra* note 215, at 234.

224 *See id.* at 232–33; *Unjust Enrichment*, BLACK'S LAW DICTIONARY (11th ed. 2019).

terminated before the onset of their pension were, in fact, due their pension benefits, as their employer was unjustly enriched by their work.[225] In reference to stock options, Madsen notes that "the company has reaped the benefits of an employee's hard work, creative ideas, and commitment. In return, the employee loses valuable stock options and does not get his or her part of the bargain."[226] Yet, *Lucas* is nevertheless predicated upon a breach of contract,[227] which constitutes a tangible wrong done by the company to the employees and is recognized by the court as requiring an equitable remedy for the company's unjust enrichment.[228] Moreover, although courts recognize unjust enrichment among several other equitable remedies, there is also a longstanding predisposition to limit contractual interpretation to the terms of the contract already agreed-upon by the parties.[229] This is to say, unless specifically made illegal, as under federal antidiscrimination law, discriminatory firing and constructive discharge are not, in and of themselves, tangible, actionable legal wrongs.

Regarding the integrity of contracts and how courts have historically held on issues related to stock options and other fringe employment benefits, Madsen highlights several cases where courts considered, in exceptional circumstances, the contracts granting equity or stock options to employees.[230] One case in particular, *Langer v. Iowa Beef Packers, Inc.*, could prove helpful to victims of discrimination. In that case, the Eighth Circuit held that circumstances not contemplated within the bounds of the contract were not grounds

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[225] Madsen, *supra* note 215, at 232–33 (citing Lucas v. Segrave Corp., 277 F. Supp. 338, 338, 342 (D. Minn. 1967)).
[226] *See id.* at 233.
[227] *Lucas*, 277 F. Supp. at 344–45.
[228] Madsen, *supra* note 215, at 232–33 (citing *Lucas*, 277 F. Supp. at 338, 342).
[229] *See* Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. REV. 647, 672 n.143, 675–76 (2009) (citing Rowe v. Great Atl. & Pac. Tea Co., 385 N.E.2d 566, 569 (N.Y. 1978)) ("There exists an unavoidable tension between the concept of freedom of contract, which has long been basic to our socioeconomic system, and the equally fundamental belief that an enlightened society must to some extent protect its members from the potentially harsh effects of an unchecked free market system.").
[230] Madsen, *supra* note 215, at 217–21.

for depriving the employee of their contractual right to stock options.[231] In *Langer*, the court held the sale of the employer's business to be an extraordinary circumstance not considered in the contract that granted options to the employee.[232] Therefore, the plaintiff's options were not "invalid," as suggested by the defendant-employer upon the sale of their business.[233] The case was reversed and remanded to lower courts for discernment of the damages due to the plaintiff in light of the Eighth Circuit's findings.[234] However, *Oracle Corp. v. Falotti* does note in an analysis of *Langer* that the Eighth Circuit, despite finding that the "plaintiff's working for the defendant for two years was 'full consideration' for his right to exercise his stock options", limited *Langer* to already-vested options in a situation of termination without cause.[235] While *Oracle Corp.* does subsequently carve out instances of ADEA[236] and Title VII[237] antidiscrimination as situations in which similar limitations to damages recovery, as in *Langer*, on "incrementally-vesting stock-option plan[s]" or the implementation of them do not apply, that analysis solely addresses federal antidiscrimination recourse.[238] Citing *Langer*, among other cases, *Williamson v. Moltech Corp.* is potentially helpful in interpreting stock option rights under wrongful termination more generally by stating that, "if the plaintiff's employment had been wrongfully terminated, his stock option rights would not be terminated."[239]

Further, if a plaintiff-employee were able to successfully argue that, even if not covered by either federal or state antidiscrimination statutes, the extenuating circumstances of the pervasive

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231 Langer v. Iowa Beef Packers, Inc., 420 F.2d 365, 369 (1970); Madsen, *supra* note 215, at 221.

232 *Langer*, 420 F.2d at 369; Madsen, *supra* note 215, at 221.

233 *Langer*, 420 F.2d at 367.

234 *Id.* at 369–70.

235 Oracle Corp. v. Falotti, 187 F. Supp. 2d 1184, 1202 (N.D. Cal. 2001), *aff'd*, 319 F.3d 1106 (9th Cir. 2003).

236 *See* Greene v. Safeway Stores, Inc., 210 F.3d 1237, 1243–44, 1247 (10th Cir. 2000) (damages for potential unrealized gains on stock were granted where defendant forced plaintiff to exercise his stock options upon termination in violation of the ADEA).

237 *See* Scarfo v. Cabletron Sys., Inc., 54 F.3d 931, 954–56 (1st Cir. 1995).

238 *See Oracle Corp.*, 187 F. Supp. 2d at 1202.

239 Williamson v. Moltech Corp., 261 A.D.2d 538, 539 (1999).

discrimination that effectively caused their resignation were beyond the circumstances contemplated in the option contract, it is possible they could nevertheless have the contract terms construed in their favor. Madsen notes that "[i]n cases where the terms of the contract may be ambiguous, a court will consider the circumstances of the termination."[240]

This is, however, in steep contrast with *Fredericks v. Georgia-Pacific Corp.*, where the court held that an end to the plaintiff's employment also terminated the employee's stock option rights, even if the termination was a resignation "induced . . . by humiliations and harassment."[241] There, the court distinguished *Langer*: "the plaintiff's termination of employment . . . was neither unusual nor unforeseeable" in finding the contract unambiguous.[242] Although the court readily acknowledged that a forced resignation is neither a traditional discharge nor a voluntary termination, the district court nonetheless found that the plaintiff could not recover damages for stock options unexercised as a result of the forced termination given that the defendant-employer had the "absolute right" per plaintiff's employment contract to discharge the plaintiff-employee.[243] The court went further to distinguish the harassment-forced resignation from a finding of bad-faith, as there had been in *Gaines v. Monroe Calculating Machine Co.*, by noting that in *Fredericks* there was no unfounded breach of the employment contract.[244] In short, not even

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[240] Madsen, *supra* note 215, at 221 (citing Fredericks v. Georgia-Pacific Corp., 331 F. Supp. 422, 423 (E.D. Pa. 1971)).

[241] *Fredericks*, 331 F. Supp. at 422, 427–28.

[242] *Id.* at 426.

[243] *See id.* at 427 n.2, 28–31 (while court denied plaintiff's first claim regarding damages following defendant's refusal to allow plaintiff to exercise stock options, plaintiff was permitted to explore damages to a trust that resulted from plaintiff's firing.); *see also* Smith, *supra* note 16 ("Under the at-will doctrine, an employer may terminate an employee at any time, for any reason or for no reason. Precedents in California and Delaware, as well as other states, make it reasonably clear that it is permissible under the at-will employment doctrine to fire an employee because she became too expensive given the terms of her stock option plan.").

[244] *See Fredericks*, 311 F. Supp. at 426.

a resignation forced by harassment[245] constituted bad faith such that it would implicate a breach of the employment contract sufficient to allow recovery for an employee with damages for stock options not exercisable as a result of that harassment-induced resignation.[246]

The *Fredericks* holding illustrates a core tenet of contract law in that courts have a long-standing aversion to interfering with the "sanctity of the bargain," or the terms of a mutually-agreed-upon contract, even if it erodes the equitable recompense due to victims of injustice.[247] Equitable or other contract remedies such as promissory estoppel, unconscionability, and the finding of a contract of adhesion have fallen out of favor in courts in deference to protecting the "unfettered freedom of contract."[248] With specific reference to the bad faith distinguished in *Fredericks*, courts have a predilection for finding no erosion of good faith where the contract can be construed as allowing such actions[249]—even if those actions are as severe as effectively inducing a resignation.[250] Professor Carolyn Edwards of Marquette University Law School references *Centerre Bank of Kansas City, N.A. v. Distrib's, Inc.*:

> The imposition of a good faith defense to the call for payment . . . transcends the performance or enforcement of a contract and in fact adds a term to the agreement which the parties had not included . . . . This court is not willing to rewrite the agreement . . . .[251]

As with the equitable remedies referenced in Madsen's analysis, some remedies may necessitate that a court find a breach of

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[245] *See id.* It is important to note that the harassment in *Fredericks* in no way suggests it was of a nature targeted towards any Title VII or otherwise federally or state-protected class.

[246] *See Fredericks*, 311 F. Supp. at 427–31.

[247] Edwards, *supra* note 229, at 675–76.

[248] *Id.* at 652, 671–78.

[249] *Id.* at 680.

[250] *See Fredericks*, 311 F. Supp. at 427.

[251] Edwards, *supra* note 229, at 680 n.181 (citing Centerre Bank of Kan. City, N.A. v. Distrib's, Inc., 705 S.W.2d 42, 48 (Mo. Ct. App. 1985)).

contract[252] or bad faith on behalf of the employer[253]—tangible offenses for which courts are not then responsible for construing as an equitable remedy, often seen as "rewrit[ing] the agreement."[254]

However, this freedom and integrity of the contract is by itself questionable with contracts that contain an inordinate amount of equity compensation, as is typical in startups due to the notable lack of liquidity that is quintessential to the business model.[255] Madsen alludes to the concerning reality that many mid-level or legally-unsophisticated employees may not understand or contemplate the reality of the potential forfeiture of this compensation in that they may not understand the increased complexities of equity-heavy compensation agreements relative to cash.[256] In suggesting that some equity compensation agreements may even be contracts of adhesion, wherein employees were proffered the contract in a manner that gave them no true bargaining power or choice, Madsen further questions the equity of courts applying wide stock option termination provisions when employees may not have had the sophistication or bargaining power to fully enter into such an agreement.[257]

In short, avenues for recovery post-resignation under state and federal common law are constrained by rigid contract law frameworks and a general lack of continuity in antidiscrimination laws that could protect employees in the absence of federal laws like Title VII and the ADEA. This can leave employees in a precarious position: In the absence of federal laws, state laws, or common law breach of contract claims, employees lack the grounds to state a claim that is not purely seeking an equitable remedy at the discretion

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252 Madsen, *supra* note 215, at 232 (citing Lucas v. Segrave Corp., 277 F. Supp. 338, 344–45 (D. Minn. 1967)). In *Lucas*, the plaintiffs' allegation that their firing deprived them of their pension benefits and resulted in unjust enrichment to the employer was sufficient to state a claim. *See Lucas*, 277 F. Supp. at 344–45, 350.

253 Madsen, *supra* note 215, at 227 (citing Gaines v. Monroe Calculating Mach. Co., 188 A.2d 179 (N.J. Super. Ct. App. Div. 1963)) In *Gaines*, employee-plaintiff was permitted to recover damages based on option contract where plaintiff's termination was in "bad faith for the purpose of destroying the option." *Gaines*, 188 A.2d at 185, 186–88.

254 *Centerre Bank*, 705 S.W.2d at 48.

255 *See* Smith, *supra* note 16, at 586, 589–93.

256 *See* Madsen, *supra* note 215, at 224, 234–35.

257 *Id.* at 234–35.

of the courts. Moreover, given courts' reluctance to award equitable remedies in such situations, these employees are even further harmed.

C. *State Law and Equitable Remedy in a Hypothetical Approach*

With reference to the Alex hypothetical, Alex potentially has far fewer avenues of recourse at a company of eleven employees than at a company of fifteen—and, regarding state antidiscrimination laws, their recourse would change geographically. Were Alex to work at a startup in California, for instance, Alex would be under the purview of California's Fair Employment and Housing Act, which prevents discrimination on the basis of "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military or veteran status of any person . . . ."[258] This law further requires that even employers with five or more employees provide sexual harassment training.[259] In California, Alex could, therefore, follow a similar procedure to the recourse available under Title VII, bringing suit for constructive discharge on the basis of discrimination and their employer's creation of a hostile workplace.[260] However, given that the substantial majority of startup and related positions are outside of Silicon Valley,[261] Alex could just as well be working at a startup anywhere in the nation and, therefore, be subject to the potentially lesser protection of a different state's laws.

Were Alex to work at a startup in Florida, for instance, Alex would not be able to successfully bring such a suit, as Florida's Civil Rights Act of 1992 only extends antidiscrimination protection to workers at a place of employment with fifteen or more

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[258] CAL. GOV'T. CODE § 12940 (West 2019).

[259] CAL. GOV'T. CODE § 12950.1(h)(1) (West 2019).

[260] *See* Thompson v. Tracor Flight Sys., Inc., 104 Cal. Rptr. 2d 95, 102–108 (Ct. App. 2001) (noting that California state law cases on constructive discharge rest on the California Supreme Court's interpretation of federal law on the issue and upholding a successful constructive discharge claim in the midst of untenable working conditions).

[261] *See* THOMPSON, *supra* note 67, at 349; *The Next Big Blue-Collar Job Is Coding*, *supra* note 102.

employees.[262] This is functionally no more protective than Title VII itself, and in fact, it requires dual filing with both Florida and the EEOC, which further complicates recourse with differing claim and deadline requirements.[263] This would leave Alex to resort to civil equitable remedies, such as unjust enrichment, promissory estoppel, or a finding of a contract of adhesion. However, as with *Fredericks*, given the reality that Alex was not fired but, instead, resigned, courts would likely be reluctant to find against the terms of the contract[264]—even in the case of a harassment-induced resignation.[265] The tacit inability to bring a claim of discrimination, i.e., to pinpoint a tangible offense upon which Alex could predicate a claim in order to recover damages, results in an effective lack of recourse for employees in such situations. Put another way, it is easier for employees to prove that they have been wronged when a law is broken and damages can be proven outside of an equitable remedy at the discretion of the court. For, as with *Fredericks*, under an equitable remedy theory, employees may not be entitled to recovery at all, no matter the gravity of their employers' actions and the resulting injustice.[266]

In summary, with cases of discrimination, a company with fewer than fifteen employees may not be held liable for discriminatory conduct that would be illegal at a company with fifteen or more employees.[267] Failing federal law, state law, like California's Fair

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[262] FLA. STAT. § 760.01–02(7)(2019); *see EEOC Small Business Requirements*, *supra* note 28.

[263] *Fair Employment Practices Agencies (FEPAs) and Dual Filing*, U.S. EQUAL OPPORTUNITY EMPLOYMENT COMM'N (last visited Nov. 18, 2020), https://eeoc.gov/employees/fepa.cfm. Often, even if the charge is eligible for review from the EEOC due to Title VII eligibility, the claim must nonetheless be dually filed within the state at a Fair Employment Practice Agency ("FEPA"). *See id.* Filing and claim requirements, as well as deadlines, may differ between these agencies despite the dual filing requirement. *See id*. Florida is one such dual-filing state, with several local FEPA offices. *State and Local Agencies: Miami District Office*, U.S. EQUAL OPPORTUNITY EMPLOYMENT COMM'N https://eeoc.gov/field/miami/fepa.cfm; *see State and Local Agencies*, U.S. EQUAL OPPORTUNITY EMPLOYMENT COMM'N, https://www.eeoc.gov/field-office/miami/fepa.

[264] *See* Centerre Bank of Kan. City, N.A. v. Distrib's, Inc., 705 S.W.2d 42, 48 (Mo. Ct. App. 1985).

[265] *See* Fredericks v. Georgia-Pacific Corp., 331 F. Supp. 422, 427 (E.D. Pa. 1971).

[266] *See id.*

[267] *See EEOC Small Business Requirements*, *supra* note 28.

Employment and Housing Act,[268] may be more protective than Title VII and the ADEA. In this case, employees are more protected than they would be under federal law alone. However, this protection is only as ironclad as each state's own civil rights statues, and there is no universal grant of greater protection than that given by federal law.[269] In states like Alabama[270] and Georgia,[271] for instance, there is no such enhanced protection. Protection may be, in fact, severely deficient relative to discriminatory offenses, given that Alabama entirely lacks a state civil rights statute save that for prohibiting age discrimination.[272] When an employee cannot find recourse under federal or state antidiscrimination law, they may find recourse in equitable remedies.[273] However, as discussed in *Fredericks*,[274] courts may not positively construe such arguments in the event of a harassment-induced resignation. In short, without a ubiquitous, federally imposed grant of recourse, as available under Title VII, the ADEA or other federal antidiscrimination laws, employees in companies with fewer than fifteen employees may have little legal recourse if they resign due to a discriminatory work environment. While such employees may still be able to recover damages, that

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[268] CAL. GOV'T. CODE § 12940(a) (West 2019).

[269] There is a notable and prescient corollary to this with the *Bostock* decision recently announced by the Supreme Court. *See* Bostock v. Clayton Cnty., Nos. 17-1618, 17-1623, 18-107 (U.S. June 15, 2020). By bringing LGBTQIA+ status under Title VII as a protected class, the Supreme Court ruled that employment discrimination on the basis of sexual orientation and gender identity is illegal under federal antidiscrimination law. *See id.* at 2. As Julia Reinstein and Amber Jamieson note, prior to *Bostock*, only twenty-one states had heightened employment protections for queer folx, and "roughly half of the more than 8 million LGBTQ people in the US lived in states without explicit protections if they experienced discrimination at work." Julia Reinstein & Amber Jamieson, *The Supreme Court's LGBTQ Decision Will Have Huge Impacts for Those in States With No Prior Protections*, BUZZFEED NEWS (Jun. 15, 2020, 6:50 PM), https://www.buzzfeednews.com/article/juliareinstein/supreme-court-lgbtq-gay-transgender-lesbian-decision.

[270] Howell, *supra* note 200; Stevenson v. Precision Standard, Inc., 762 So.2d 820, 825 n.6 (Ala. 1999).

[271] GA. CODE ANN. § 45-19-20.

[272] Howell, *supra* note 200.

[273] *See Madsen*, *supra* note 215, 225–27, 230–35.

[274] *See* Fredericks v. Georgia-Pacific Corp., 311 F. Supp. 422, 422 427–28 (E.D. Pa. 1971).

ability is, at best, confounded by unequal state civil rights statutes and the somewhat mercurial discretion of the courts in granting equitable remedies. At worst, should protective state laws not apply and no equitable remedy be suitable, employees may not be able to recover whatsoever for their discrimination-induced termination and resultant economic injustice.

CONCLUSION

Startups span the nation[275] as companies of varying shapes, sizes, and valuations.[276] They are, by their very nature, boundary-pushing, risk-taking, adolescent enterprises.[277] And often, they are small. Or, at the very least, they begin that way.

Every company has to start somewhere. Employees with an entrepreneurial spirit and a willingness to bind their fate to the company in the hopes of success make the deferred-payoff investment gamble. In doing so, they also bind themselves up in startup culture—a culture that is defined as much by hackathons and ping-pong as it is by a payment structure that seeks only those who are willing to sacrifice for the sake of the company's future. As Professor Abraham Cable from the University of California Hastings College of Law notes, "[E]mployee investors are both a cause of the mature startup and a significant risk-barer of the phenomenon."[278] And so, the iterative, boundary-breaking rush to "done" begins.

But "done" is not perfect. Nor is it better when a startup becomes so entrenched in its own success that many employees suffer from the hostile workplace cultures that develop as a result.[279] The United States has laws like Title VII, the ADEA, and the FLSA to hold employers accountable for the culture they create, perpetuate, or allow to exist. Except, to those startups under fifteen employees,[280] these laws do not always apply—leaving in the balance state laws that

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[275] *See* Coren, *supra* note 101; THOMPSON, *supra* note 67, at 349; *see also The Next Big Blue-Collar Job Is Coding*, *supra* note 102.

[276] *See* Robehmed, *supra* note 110.

[277] *Id.*

[278] Abraham J. B. Cable, *Fool's Gold: Equity Compensation & the Mature Startup*, 11 VA. L. & BUS. REV. 613, 618 (2017).

[279] *See* Bhuiyan, *supra* note 81.

[280] *See EEOC Small Business Requirements*, *supra* note 28.

may or may not protect employees depending on the state's civil rights statutes and equitable remedies that may or may not afford recovery if a court exercises its discretion to disallow damages.

Antidiscrimination laws provide credibility to claims of harassment or discriminatory behavior that effectively induce an employee to resign. Although the laws themselves, particularly federal, but also state, are critically important, what is perhaps more important in effect is the legal credibility afforded to victims. Moreover, when protected by these laws, victims of discrimination have a way of being legally heard. In other words, robust antidiscrimination laws give victims pathways to public recognition of the wrong and to a recovery of damages that are otherwise far more difficult, if not impossible, to obtain. Legal recognition of discrimination, even if by resignation and not termination,[281] can provide a road to economic justice for victims in a calculable reckoning for what they lost as a result of workplace discrimination.

That recognition, however, is not always available to victims. Even if the very same discriminatory behavior is perpetrated at different companies—one falling above and one below this fifteen-employee mark—only if the startup is at or above the minimum floor of fifteen employees will such ubiquitous, guaranteed protections against that discrimination apply to its employees.[282] That is to say, it is not the discriminatory behavior itself that catalyzes protection for employees, but instead, the application of an antiquated and arbitrary numeric cutoff does so.[283] This current legal reality is untenable with most startups and related jobs spreading across the nation,[284] far from the prototypical and now-incomparable Silicon Valley model lawmakers have come to recognize as the status quo.[285] Startups are as unique and variable[286] as the problems their products and services aim to solve. Lawmakers must properly understand their unique practices in order to both help them innovate and protect those who foster that innovation. In short, "done" can never

281 *See* Finnegan, *supra* note 147, at 561–62.

282 *See EEOC Small Business Requirements*, *supra* note 28.

283 *See id.*

284 *See* THOMPSON, *supra* note 67, at 349; *The Next Big Blue-Collar Job Is Coding*, *supra* note 102.

285 *See Why Congress Needs to Revive its Tech Support Team*, *supra* note 104.

286 *See* Bhuiyan, *supra* note 81.

become "perfect" if we forget those most vulnerable in and necessary to getting it there.

Law, like software, is not immutable. The framework of federal antidiscrimination law, state civil rights statutes, and discretionary equitable remedy is not, at present, entirely adaptable for the current "entrepreneurial renaissance."[287] Of several potential ways to remedy this gap, one of the most critical and broad-spectrum solutions is the reimplementation of the OTA.

Although Congress did not inherently task the OTA with addressing the issue of economic inequity resulting from discriminatory cultural practices and equity compensation agreements, the OTA explored science, technology, and business with the end goal of creating well-informed policy on innovation.[288] It was not limited to well-publicized inquiries of tech CEOs hauled before Congress,[289] and had a much broader spectrum of analysis to provide lawmakers with the information they needed to make knowledgeable policy judgments.[290] It follows that the OTA, while not directly tasked with analyzing issues of labor law, had far more potential than the current hearing-based model to provide lawmakers with a broad-spectrum assessment of issues spanning the fields of science, technology, and business. By focusing on enlightened policy, the OTA could provide far more comprehensive detail on the issues *actually* affecting the startups engaging in and driving innovation—importantly including those beyond the size, location, and reach of Silicon Valley. The harassment described in this Note is just one of the issues at the crux of startup culture and the breaking or redefining of legal norms relative to their practices. Reestablishing the OTA's advisory role in Congress could promote more sustainable and better-informed policy objectives simply because it has the potential and the influence to shed light on issues that few, if anyone, think to analyze.[291] The OTA, or an advisory office like it, would play a critical role in the iterative policymaking process necessary to address this ever-changing startup nation.

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[287] RIES, *supra* note 8, at 16.

[288] *See OTA and the Work of Congress*, *supra* note 107.

[289] *See Why Congress Needs to Revive its Tech Support Team*, *supra* note 104.

[290] *See OTA and the Work of Congress*, *supra* note 107.

[291] *See* Rosenworcel, *supra* note 109.

Further, and more specifically regarding federal antidiscrimination law, another potential solution is a legislative redefinition of the terms under which Title VII, the ADEA, and other like federal laws apply. As noted in Part III, unlike with Title VII, an employer's violation of the ADEA is effectively seen as a violation of the FLSA in terms of damages.[292] For victims of discrimination, this discrepancy lies in an employee's requirement to attempt to mitigate damages and court discretion over whether to award damages.[293] Under Title VII, employees seeking recourse must attempt to mitigate and, subsequently, be awarded damages at the discretion of the court.[294] Under the ADEA, neither apply, in that a finding of an ADEA violation outright warrants damages tantamount to a violation of the FLSA.[295] In terms of recovery for victims of discrimination, the FLSA standard could prove even more useful beyond merely providing more robust recovery standards under the ADEA.

Moreover, being a law eponymously involving fair labor standards, and therefore wages, the FLSA governs companies under commerce-based standards,[296] as opposed to the employee number requirement standards for Title VII, the ADEA, and like federal antidiscrimination laws.[297] Under FLSA standards, companies of more than two employees that are engaged in at least $500,000 in sales per annum are under the purview of the FLSA.[298] Importantly, even if the company itself does not meet these requirements, individuals are extended the protection of the FLSA if they are involved in or produce goods for interstate commerce.[299]

There is no escaping the reality that startups are unique among businesses. They seek exponential growth and, in a sense, have an almost hydraulic effect—taking minimal cash, time, and human capital to produce something that, whether by hype or function, can be

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292 Finnegan, *supra* note 147, at 578.
293 *See id.* at 578–79.
294 *See id.*
295 *Id.*
296 29 U.S.C. § 203(s)(1)(A)(ii).
297 *See EEOC Small Business Requirements*, *supra* note 28.
298 *Id.*
299 29 U.S.C. § 203(s)(1)(A)(i).

orders of magnitude larger than the sum of its parts.[300] The startup model is not one that is conducive to laws that govern any and every small business because a startup, even if small or young, can have a massively outsized effect on its people, product, market, and environment. That is, in fact, somewhat the point. It follows that laws that do not contemplate the hydraulic nature of startups are not well-suited for their culture or practices. Put another way, Title VII, the ADEA, and any like antidiscrimination law that has a minimum floor of applicability predicated upon a set number of employees may not be well-suited for companies, like startups, that, by their very nature, work to get the most output out of the least possible input in an effort to conserve already-scarce resources like human capital.[301]

Were antidiscrimination protections under Title VII, the ADEA, and others to be applied on an FLSA-type commerce scale, however, that would likely be far more fitting to the hydraulic nature and exponential growth aims of startups. Given that a violation of the ADEA is, in terms of damages, already tantamount to a violation of the FLSA,[302] there is an existing basis for likening, at least, certain elements of discrimination (here, that of discrimination based on age) to violations of wage and fair labor standards. Although undoubtedly not a perfect solution, as it would require situation-specific and drastic changes to the applicability of Title VII, the ADEA,

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[300] Facebook is an example: Mark Zuckerberg and a handful of employees had made it to Palo Alto within a few months of its launch in February of 2004. Andrew Greiner, et al., *Facebook at 15: How a College Experiment Changed the World*, CNN (Feb. 1, 2019), https://cnn.com/interactive/2019/02/business/facebook-history-timeline/index.html. Not long after, and under the guidance of the founder of Napster, Sean Parker, Zuckerberg received a $500,000 investment from Peter Thiel. *Id.* By December 2005, Facebook had upwards of six million users. Anne Sraders, *History of Facebook: Facts and What's Happening in 2018*, THE Street, https://www.thestreet.com/technology/history-of-facebook-14740346 (last updated Feb. 18, 2020, 9:06 AM). By October 2012, Facebook had exceeded a billion users. *Id.*

[301] *See supra* Part II, Section A. This section notes that equity agreements are used because cash is scarce, which leads to hiring those who will tie their fate to the company's by taking less cash in exchange for a deferred equity gamble. It follows that both human capital and cash are scarce resources because the company cannot hire without limit.

[302] Finnegan, *supra* note 147, at 578.

and other federal civil rights laws, it is, at least, closer to approximating antidiscrimination laws suitable for the startup business model.

The issue of this effective vacuum space between federal antidiscrimination laws, state civil rights laws, and equitable remedies is, inherently, one that arises out of a fundamental misunderstanding of how startups work. Issues that affect small or young startups may never see the light of a Congressional hearing with a CEO of a billion-dollar technology company. And lawmakers, in failing to have proper systems in place like the OTA to ensure that they are well-informed on a broad spectrum of issues affecting science, technology, and business, are prone to myopic focus on the Silicon Valley giants that produce such scandal and intrigue. This, combined with a startup culture that, by its contracts, hiring practices, and social morays, has proven to be vulnerable to abuses and erosions of employees' rights, creates a situation in which an employee like Alex may never recover.

Had Alex worked at the company for two more months, or one full year, Alex would be eligible to receive twenty-five percent of the stock options in the equity contract—the ability to purchase 500 shares of the equity that Alex specifically sought in the hiring process. Except, Alex worked there for ten months, or just over eighty percent of the year. Given the one-year cliff in the equity contract, it does not matter that Alex, by pro rata standards, worked to earn approximately 400 of the 500 shares. By resigning ten months into employment, Alex was due to receive nothing beyond a prorated cash salary. Again, had Alex worked at the startup for two more months, the ability to exercise the option to purchase 500 shares, or twenty-five percent of the equity promised, would have vested. However, for Alex, that would equate to two more months of harassment, stalking, and feeling unsafe at work every single day. Alex's choice was, therefore, to suffer that discrimination, or to lose the equity compensation in its entirety, despite the ten months of work and hostile work environment that compelled Alex's resignation.

Extending the ubiquitous, nationwide protection of federal civil rights laws like Title VII and the ADEA to circumstances previously uncontemplated, such as this, would provide an avenue of recourse to the growing base of employees in the ever-expanding startup industry. Startup-driven innovation will not and should not stop. It is a critical economic force that scholars, lawmakers, and other professionals alike must properly understand in order to create well-informed policy that will promote such innovation without conveying untenable risk to the employees that are so critical in taking those innovative products and services to market. The law must come to acknowledge that the legal system has already been changed by these unique businesses, and it must quickly adapt to prevent further injustice. In short, the law must lead in striving for "perfect"—especially when most employers merely settle for "done."