

LAVENDER LABOR: THE DEVELOPMENT OF QUEER WORK AND ENTREPRENEURISM

CARLOS A. FIGUEROA[†]

The LGBTQ+ community's uncertain place in the workforce must be addressed, as the type of labor in the United States diversifies into the digital entrepreneurial space. This Article both reviews the history of employment law and developments in the United States affecting the queer community while addressing the opportunities and limitations entrepreneurship may provide it as well.

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[†] J.D., 2021, Tulane University Law School; A.B., 2016, Brown University. Thank you to Professor Elizabeth Townsend Gard for her mentorship and assistance developing this topic. Finally, thank you to my family—Yubey, Carmen, Ismael and Monika—for their continual support.

INTRODUCTION

For most people in the United States, work defines their life to an obsessive and almost subconscious degree,¹ even when working more does not necessarily equate to more money and productivity for the average person.² Yet, average is not queer. Historically, the workforce has been significantly more complicated and inequitable for the LGBTQ+ community than those who can afford to be labeled as average.³ Despite the recent landmark ruling in *Bostock v. Clayton County* where the U.S. Supreme Court ratified discrimination protections in the workplace to the LGBTQ+ community, more must be done before queer employees⁴ and entrepreneurs⁵ can feel welcome and average.

This Article proceeds in five parts that examine current developments affecting the LGBTQ+ community in the U.S. workplace as employees and as entrepreneurs emerging in the digital landscape. Part II focuses on the history of LGBTQ+ workers and entrepreneurs from their first significant visibility in the mid-twentieth century through today where their legal status has been both enhanced and complicated. Part III discusses the ways in which the digital entrepreneurial space has transformed since the early 2000s and how certain queer entrepreneurs have successfully taken advantage of the online medium for their success in various online industries. Part IV scrutinizes the current ways in which queer entrepreneurs may efficiently obtain funding or exposure in the United States. Part V reviews specific legal developments and

1. See Derek Thompson, *Workism Is Making Americans Miserable*, THE ATLANTIC (Feb. 24, 2019), <http://www.theatlantic.com/ideas/archive/2019/02/religion-workism-making-americans-miserable/583441/> [https://perma.cc/T6HJ-M2X8].

2. See Corinne Purtill, *Companies Can't Stop Overworking*, N.Y. TIMES (Apr. 10, 2021), <http://www.nytimes.com/2021/04/10/business/dealbook/overwork-health.html> (commenting on the burn-out issues illuminated during the COVID-19 Pandemic).

3. See Crosby Burns, *The Gay and Transgender Wage Gap*, AM. PROGRESS (Apr. 16, 2012), <http://www.americanprogress.org/issues/lgbtq-rights/news/2012/04/16/11494/the-gay-and-transgender-wage-gap/> [https://perma.cc/6UB2-4ZGV] (describing not only wage gaps between heterosexual and queer populations, but those exacerbated by those intersectionally identifying as queer and nonwhite).

4. See Chris Johnson, *Is the LGBTQ fight finished after Bostock ruling? Not so Fast, advocates say*, WASH. BLADE (June 24, 2020, 2:20 PM), <http://www.washingtonblade.com/2020/06/24/is-the-lgbtq-fight-finished-after-bostock-ruling-not-so-fast-advocates-say> [https://perma.cc/K6F7-3EE5] (indicating the need for federal legislation addressing the queer community's rights in the workplace moving forward despite the seemingly protective nature of the *Bostock* decision).

5. See Susan Marlow et al., *Advancing Gendered Analyses of Entrepreneurship: A Critical Exploration of Entrepreneurial Activity Among Gay Men and Lesbian Women*, 29 BRIT. J. MGMT. 118, 118–35 (2018) (studying whether those in the heterosexual or queer community are more active with entrepreneurial endeavors).

theories that affect how queer digital entrepreneurs operate. Part VI compares sociolegal developments involving queer entrepreneurs in Europe and provides recommendations for better supporting digital entrepreneurs domestically. Throughout, this Article invokes both hypotheticals and real-life examples of queer entrepreneurs to enhance the larger discussion.

I. TERMINOLOGY

Although contentious to many in the LGBTQ+ community because of its varying meanings,⁶ the word “queer” is used in this Article as an “umbrella” term for individuals who identify as “Lesbian, Gay, Bisexual, Transgender, Queer (also sometimes called ‘questioning’), intersex, and or asexual.”⁷ It may also be expansively applied to any individuals part of “alternative relationship communities” such as “polyamory, kink, or non-monogamy.”⁸ The term “LGBTQ+” is used interchangeably in this Article with the word “queer.”⁹

II. HISTORY OF LGBTQ+ WORKERS AND ENTREPRENEURS IN THE WORKPLACE

A. *Early Twentieth Century Progress Through World War II*

Since the early 1900s, documentation of queer people in the workplace has existed, but their safety and success had been tied to “passing” for a certain sex in the blue-collar, patriarchal community around them.¹⁰ The moment a queer person revealed their queerness or did not adhere to a “footing of masculine equality,” they were then relegated to the “garments of womanhood” with less

6. See Alexander Cheves, *9 LGBTQ+ People Explain How They Love, Hate, and Understand the Word “Queer”*, THEM (June 4, 2019), <http://www.them.us/story/what-does-queer-mean> [<https://perma.cc/A6FR-E99P>] (reviewing various personal experiences in the queer community involving the use of “queer” to identify segments of the LGBTQ+ community).

7. Sophie Saint Thomas & Carina Hsieh, *What Does It Really Mean to Be Queer?*, COSMOPOLITAN (Sept. 21, 2020), <http://www.cosmopolitan.com/sex-love/a25243218/queer-meaning-definition/> [<https://perma.cc/M4K9-WBDS>].

8. *Id.*

9. See *ACRONYMS EXPLAINED*, OUTRIGHT ACTION INT’L (Sept. 20, 2021), <http://outrightinternational.org/content/acronyms-explained> [<https://perma.cc/Z2UF-RFBY>].

10. See MIRIAM FRANK, *OUT IN THE UNION: A LABOR HISTORY OF QUEER AMERICA* 1–2 (Temple Univ. Press, 2014) (describing the political-legal developments in employment law affecting U.S. employees during the late twentieth century).

economic certainty.¹¹ Although the male-female dichotomy persisted in the workplace throughout the twentieth century, World War II's need for workers created one of the first opportunities for queer people to access "cross-gender" jobs and feel less forced into predetermined stereotypical roles.¹² Men were suddenly able to take interests in "clerical, medical and chaplain" work while women were offered positions with the "motor vehicle corps."¹³

In the commercial aviation industry, male stewardesses similarly integrated into employment positions with Pan American Airways ("Pan Am") and Eastern Air Lines that historically belonged to the "well-established female realm."¹⁴ Because of the "service-related" role that stewardesses took on while exhibiting "softness" and "fashionable dress" to the largely high-end clientele, flight attendants became inherently sexualized.¹⁵ The "core customer base" was predominantly male and the use of male flight attendants provided a sense of "homoeroticism," and encouraged homosexual activities between the "fairy[-like]" male staff and the curious married men flying alone.¹⁶ This insulated gay culture remained privileged to those on the flights—a safe space.¹⁷

B. *The Post-War Lavender Scare*

By the mid-twentieth century, various industries had integrated the two extremes of the gender binary to where queer workers could remain both productive and safe without fitting into stereotypes.¹⁸ Queer folk began moving to larger urban centers from their smaller towns because they could maintain "anonymity" socially and professionally.¹⁹ After World War II, U.S. Senator Joseph McCarthy's ushering of the Red Scare, a hysteria-based movement targeting alleged communists, destroyed any safety the

11. *Id.*

12. *See id.* at 4.

13. *Id.*

14. PHIL TIEMEYER, PLANE QUEER: LABOR, SEXUALITY, AND AIDS IN THE HISTORY OF MALE FLIGHT ATTENDANTS 15–16 (Univ. of Cal. Press, 2013) (examining the commonly queer male workforce in the flight attendant industry contemporaneous to social developments affecting the LGBTQ+ community).

15. *Id.* at 28–29.

16. *See id.* at 26–29.

17. *See id.* at 29.

18. *See generally*, James Gleason, *LGBT History: The Lavender Scare*, NAT'L LGBT CHAMBER OF COM. (Oct. 3, 2017, 2:08 PM), <http://www.nglcc.org/blog/lgbt-history-lavender-scare> [<https://perma.cc/EB2G-S2UX>].

19. *See id.*

LGBTQ+ community had earned in the workplace.²⁰ This “McCarthyism” led to “primarily economic” impacts that “punish[ed] . . . men and women identified as politically undesirable” in the community or in the workplace.²¹ Because this period fixated on “ideas of morality,” the LGBTQ+ population as a whole was equally targeted for its “sinful and perverted” perception.²²

Throughout the 1950s, the Lavender Scare persisted and led to the termination of several suspected queer government employees amidst perpetuated rhetoric that “homosexuality [was] a mental illness” and signaled “emotional instability” beyond their obvious, perverse-seeming behavior.²³ This hysteria also spread to previously accepting industries like commercial aviation “eradicate[ing] homosexuality” altogether by terminating male flight attendants.²⁴ In *Kameny v. Brucker*, a particular terminated employee—Dr. Franklin Kameny—argued for his reinstatement as a government astronomer in the Armed Forces,²⁵ because his homosexual identity came to light in 1957.²⁶ Although Dr. Kameny attempted to prove his sufficient fitness for the professional position despite identifying as a homosexual through supporting “character affidavits and a statement from a psychiatrist,” both the federal district and appellate courts found the government’s decision valid.²⁷ The U.S. Supreme Court denied certiorari.²⁸

Dr. Kameny’s story was not the last of its kind, as these stigmatized attitudes towards queer people in the workplace persisted unevenly.²⁹ While “bans on homosexuals” for federal employment positions were eventually overturned by President Bill

20. *See id.*

21. ELLEN SCHRECKER, *THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH DOCUMENTS* 86 (Boston: St. Martin’s Press, 1994).

22. *See* Gleason, *supra* note 18.

23. *See id.*; *see also* Marie-Amélie George, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*, 36 *YALE L. & POL’Y REV.* 83, 111 (2017).

24. TIEMEYER, *supra* note 14, at 70–72.

25. *Kameny v. Brucker*, 282 F.2d 823, 823 (1960).

26. *See* Michael S. Rosenwald, *The Gay Rights Pioneer Who Demanded Justice from the Supreme Court in 1960*, *WASH. POST* (June 9, 2018, 7:00 AM), <http://www.washingtonpost.com/news/retropolis/wp/2018/06/09/the-gay-pride-pioneer-who-demanded-justice-from-the-supreme-court-in-1960/> [<https://perma.cc/Q8TS-39RJ>].

27. *Kameny*, 282 F.2d at 824.

28. *Kameny v. Brucker*, 365 U.S. 843, 843 (1961).

29. *See* Marc Stein, *Gay Rights and the Supreme Court: The Early Years*, *UNIV. N.C. PRESS* (Oct. 4, 2010 11:24 AM) <https://uncpressblog.com/2010/10/04/gay-rights-and-the-supreme-court/> [<https://perma.cc/G7GC-WETM>].

Clinton in 1995,³⁰ the same government (and President) still threatened queer employees' livelihood through 2011 with the "Don't Ask, Don't Tell" policy's mandate for soldiers to "remain closeted or face a discharge."³¹

C. Post-Millennial Employment Developments

By 2000, certain private companies began providing benefits to queer employees that legitimized their identities, including the Chrysler Corporation and over three thousand other business and state government entities providing domestic partner benefits regardless of sexual orientation.³² Various states, including New York, Maine, Maryland, Minnesota and Washington gradually legalized same-sex marriage³³ before the Supreme Court did so federally in 2015's *Obergefell v. Hodges*.³⁴ This decision bolstered the idea that employment discrimination protections would be the next step for the LGBTQ+ community, as twenty-eight states still allowed employers to "fire or refuse to hire" someone based on their sexuality.³⁵ Finally, in *Bostock v. Clayton County, Georgia*, the Supreme Court held that Title VII of the Civil Rights Act of 1964 protects queer employees on the basis of sex discrimination—sex being inclusive of a person's sexual orientation and transgender identity.³⁶

Despite legal milestones for queer workers like *Bostock*,³⁷ employers maintain certain loopholes excusing them from adhering to antidiscrimination statutes.³⁸ For example, *Our Lady of Guadalupe School v. Morrissey-Berru* highlights how employers can potentially justify discriminatory employment decisions under the

30. Gleason, *supra* note 18.

31. Jin Niu, *Who is an American Soldier? Military Service and Membership in the Polity*, 95 N.Y.U. L. REV. 1475, 1515 (2020).

32. See FRANK, *supra* note 10, at 11–13; See *Companies Offering Gay Benefits Increase*, ABC NEWS (Jan. 6, 2006, 6:52 AM), <https://abcnews.go.com/Health/story?id=117942&page=1> [<https://perma.cc/69TJ-TTH4>].

33. FRANK, *supra* note 10, at 11.

34. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2585 (2015).

35. Allie Bohm, *The Equality Act is the Next Step After Marriage Equality*, NAT'L WOMEN'S L. CTR. (July 24, 2015), <http://nwlc.org/blog/equality-act-next-step-after-marriage-equality/>; see Jennifer Calfas, *Employment Discrimination: The Next Frontier for LGBT Community*, USA TODAY (July 31, 2015, 7:13 PM), <http://www.usatoday.com/story/news/nation/2015/07/31/employment-discrimination-lgbt-community-next-frontier/29635379/> [<https://perma.cc/HJM3-WYS2>].

36. See *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1754 (2020).

37. See *generally id.* at 1731.

38. See *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2071–72 (2020) (Sotomayor, J., dissenting).

“ministerial exception” as recently as last year.³⁹ The Court explained that employees “holding certain important positions with churches and other religious institutions” who are tasked with “significant religious responsibilities” are precluded from instituting “employment disputes” in court.⁴⁰ These “responsibilities” are broadly interpreted by the Court given that the teacher-plaintiffs had minimal training in religion, no ministerial title, and taught secular courses.⁴¹ In her dissent, Associate Justice Sonia Sotomayor noted that the overly broad applicability to the ministerial exception in future cases could lead to people being “fired for any reason, whether religious or nonreligious.”⁴²

The implications of a broad ministerial exception are more than significant, as religious organizations own a substantial amount of large entities across varying industries with millions of employees.⁴³ AdventHealth, for example, is sponsored by the Seventh-day Adventist Church⁴⁴ and has over seventy thousand employees in nearly fifty hospitals.⁴⁵ Moreover, roughly sixteen percent of U.S. patients are seen at Catholic-sponsored hospitals.⁴⁶ Beyond healthcare, religious entities are involved in over \$430 billion elsewhere, such as “Halal and Kosher food industries” and recognizable brands like Tyson’s Foods.⁴⁷ Queer people will inevitably be treated at hospitals and perhaps work in factories belonging to one of these many affiliated companies, which makes the ministerial exception particularly damaging to the discrimination protections recently earned by the LGBTQ+ community.

Moreover, recent legal efforts addressing the disadvantages faced by all minorities in the entrepreneurial space—including the LGBTQ+ population—through the form of “preferential business . . . programs” may seem useful for these communities’ long-term success, yet will likely face imminent constitutional threats with a

39. *Id.* at 2052.

40. *Id.* at 2058, 2060.

41. *Id.* at 2066.

42. *Id.* at 2071–72 (Sotomayor, J., dissenting).

43. Brian J. Grim, *Religion May Be Bigger Business Than We Thought. Here’s Why*, WORLD ECON. F. (Jan. 5, 2017), <http://www.weforum.org/agenda/2017/01/religion-bigger-business-than-we-thought/> [<https://perma.cc/Y8RQ-J5QK>].

44. *See Mission and History*, ADVENTHEALTH, <http://www.adventhealth.com/mission-and-history> [<https://perma.cc/H5U6-6A3N>] (last visited Mar. 8, 2022).

45. Grim, *supra* note 43.

46. *Id.*

47. *Id.*

conservative majority taking hold in the Supreme Court.⁴⁸ Many minority-focused “preferential contracting programs” that involve bridging access between marginalized communities to lucrative business opportunities in both the private and public sector have been contested in various Supreme Court cases under the Fourteenth Amendment’s Equal Protection Clause,⁴⁹ including *Fullilove v. Klutznick*,⁵⁰ *Adarand Constructors, Inc. v. Pena*,⁵¹ and *City of Richmond v. Croson*.⁵² In *Fullilove*, the Court upheld the “minority business enterprise provision of the Public Works Employment Act of 1977” after conducting “a most searching [constitutional] examination,” which necessitated ten percent of public project funding received from the federal government to be allocated for work exclusively with minority-owned businesses.⁵³

However, subsequent cases reviewed by the Court instituted a less forgiving strict scrutiny approach than *Fullilove* for state-created classifications involving minority status—such as race—which meant that addressing social inequalities like those in the entrepreneurial space would be less feasible given the “narrowly tailored” rationale now required for minority-friendly legislation.⁵⁴ Additionally, groups that are not categorized strictly by race are equally met with constitutional challenges in situations where the state attempts to provide their sub-community targeted economic or entrepreneurial benefits, as the Court is still required to

48. George R. La Noue, *Defining Social and Economic Disadvantage: Are Government Preferential Business Certification Programs Narrowly Tailored?*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 274 (describing the history and complications of “[r]ace and gender preferential contracting programs” throughout the twentieth and twenty-first centuries). Notably, the absence of a clear discussion on the queer community’s qualification as a minority in the legal precedent mentioned by La Noue does not explicitly indicate these programs are not designed for the LGBTQ+ community, but rather that they may be involved under the “gender” umbrella more generally as many entities have done historically. Margaret I. White, *Conflating Sexual Orientation and Gender Identity*, 211 BRIT. J. PSYCHIATRY 398–99 (2017) (explaining the common yet detrimental implications of referring to gender and sexuality issues as a “monolithic entity”); Leah Litman & Melissa Murray, *Shifting From a 5-4 to a 6-3 Supreme Court Majority Could Be Seismic*, WASH. POST (Sept. 25, 2020, 12:13 PM), https://www.washingtonpost.com/outlook/trump-ginsburg-conservative-supreme-court-majority/2020/09/25/17920cd4-fe85-11ea-b555-4d71a9254f4b_story.html [https://perma.cc/2554-UL82] (discussing Associate Justice Amy Coney Barrett’s recent appointment creating a conservative shift on the Court that could negatively impact racial and queer minorities); *See id.*

49. La Noue, *supra* note 48, at 278.

50. *Fullilove v. Klutznick*, 448 U.S. 448, 492 (1980) (plurality opinion).

51. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 201 (1995).

52. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 469 (1989).

53. *Fullilove*, 448 U.S. at 491-92.

54. *See Adarand Constructors*, 515 U.S. at 201.

“consider evidence about various forms of discrimination [they’re subjected to] in education, employment and business history” through a “totality of circumstances” approach to determine whether the beneficial state classification is constitutional or not.⁵⁵ Certainly, the presence of a more conservative set of justices on the Court implies that such a review in “totality” that considers how marginalized communities have been historically excluded from business industries will lead to an unfavorable outcome striking down the beneficial legislation or state action. Thus, the protections obtained after *Bostock* may be superficially useful once the current Court declines to consider the queer community in a separate, equally impactful context.

For example, a transgender person of color would likely be inhibited from branching out as an individual entrepreneur since the queer community’s historic subjugation makes assimilation in largely heterosexual and white business industries inherently difficult. If a federal government-instituted program were to exist as a pipeline for queer entrepreneurs to obtain government contracts for various products and services, the current Court may find in its subjective “totality” assessment⁵⁶ that such a state classification is unconstitutional; preventing the transgender person from gaining that vital momentum entrepreneurs often need to get their business off the ground and stand out in the community. Cases like *Bostock* highlight the unevenness of this success for legal queer issues: an employer may not be able to explicitly discriminate against the transgender employee,⁵⁷ yet that same transgender employee is unable to successfully transition from employee to entrepreneur when judicial mechanisms carelessly leave queer issues unfinished. Moreover, the superficial Title VII protections of the Civil Rights Act of 1964 have largely been untested for transgender employees,⁵⁸ are completely inapplicable in small businesses with less than fifteen employees and, historically, these claims are never easy to prove in favor of the marginalized employee.⁵⁹ The harmed transgender employee will simply always

55. La Noue, *supra* note 48, at 300.

56. *Id.* at 299–300.

57. *See Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1754 (2020).

58. This is, assuredly, due to the recency of the *Bostock* decision rather than the nonexistence of discrimination against transgender employees or even an unwillingness on employees’ part to jeopardize their livelihood. *See id.* at 1734.

59. *See* Keith Cunningham-Parmeter, *The Sexual Harassment Loophole*, 78 WASH. & LEE L. REV. 155, 226–28 (2021) (reviewing the limitations to Title VII employer liability both in the sexual harassment context and more generally).

be the employee and never obtain the institutionally necessary encouragement to make the transition to employer or entrepreneur.

III. THE INTERNET & DIGITAL ENTREPRENEURSHIP'S ROLE IN QUEER COMMUNITIES

Because of the continued stigmatization and potential for discrimination post-*Bostock* in the workplace, queer people can utilize the digital entrepreneurship space as a means for economic security—especially if they are from a low-income background.⁶⁰ Although prevalence of high-speed internet access and email usage has been on the rise generally, distinctions in availability exist between privileged, white communities and poorer communities with people of color⁶¹—the latter including a disproportionately high amount of queer people.⁶² Over the last decade, the creation of entities like Micro-Mentor, which “connect struggling business owners with business mentors across the country” and the Digital Connectors Program which provide youth with tech training, have emerged online.⁶³ The internet has been vital in providing poorer, non-white and queer communities better access to worldwide communities in the hopes that they may use digital entrepreneurship for social and financial support.⁶⁴

Of course, the queer community has certainly proven that living and communicating online can be effortless. By the mid-2000s, the queer community's presence on the internet was widespread and served as a safe haven for sharing individual experiences of “identity and sexual discovery” or chatting with other queer millennials amidst feelings of closeted or even alone in rural cities.⁶⁵ MSN chat groups,⁶⁶ the online Neopets community,⁶⁷

60. See generally Janet Thompson Jackson, *Capitalizing on Digital Entrepreneurship for Low-Income Residents and Communities*, 112 W.VA. L. REV. 187, 190 (2009).

61. See *id.* at 190–91.

62. See Reuters, *LGBTQ Adults Are Younger, Poorer Than General U.S. Population, Study Finds*, NBC NEWS (Mar. 5, 2019, 8:05 PM), <http://www.nbcnews.com/feature/nbc-out/lgbtq-adults-are-younger-poorer-general-u-s-population-study-n979741> [<https://perma.cc/4KQ3-H2B2>].

63. Jackson, *supra* note 60, at 197–98.

64. See *id.*

65. Sofia Barrett-Ibarria, *Remembering the Golden Age of the Queer Internet*, VICE (Aug. 3, 2018, 6:18 AM), http://i-d.vice.com/en_uk/article/qvmz9x/remembering-the-golden-age-of-the-queer-internet [<https://perma.cc/7J5T-H4GZ>].

66. *Id.*

67. See Teresa Navarro, *Getting Gay in the Guild: The LGBT Experience on Neopets in the Early 2000s*, MEDIUM (Jan. 10, 2017), <http://medium.com/mammon-machine-zeal/getting-gay-in-the-guild-the-lgbt-experience-on-neopets-in-the-early-2000s-6427f10f04e4> [<https://perma.cc/88BE-A287>].

LiveJournal and Tumblr housed the “golden age of early aughts queer internet,” that maintained its understated, niche reputation, rather than the “receipts or screenshots”-prone social media era of today.⁶⁸ Similarly, many forum communities in the 2000s focused on sexual exploration by providing queer men, for example, better access to knowledge concerning the risks of HIV and STIs and learning to live with these diagnoses in less isolated ways.⁶⁹

Some of the earliest transitions from the queer community’s mere presence on the internet to utilizing the digital entrepreneurial space occurred with the advent of viral videos and vlogging on YouTube in 2005,⁷⁰ which became one of the most popular websites within a year.⁷¹ Vastly circulated movements like the 2010’s “It Gets Better Project”, aimed at supporting the queer youth community’s struggle with bullying, led to thousands of popular videos being uploaded by both queer people and more mainstream figures, including U.S. President Barack Obama.⁷² The Project’s success paved way for its growth into a small nonprofit working with nearly twenty countries to provide hope and other resources to queer adolescents.⁷³

Individual queer vloggers similarly utilized the YouTube platform to develop their personal identities while creating online businesses—sometimes unintentionally.⁷⁴ For example, Patrick Simondac (known as Patrick Starr) accumulated more than four million YouTube subscribers since 2013 on his channel, where he discusses his experience as an “openly gay, Filipino” while conducting makeup tutorials.⁷⁵ Starr’s success subsequently led to various sponsorship deals with coveted companies, like Sephora

68. Barrett-Ibarria, *supra* note 65.

69. Christian Grov et al., *Gay and Bisexual Men’s Use of the Internet: Research from the 1990s Through 2013*, 51 J. SEX. RSCH. 390, 394–96 (2014).

70. See Zoe M. Simpson, *Queering by Example: Sex Education in the Age of Vlogging*, iv (June 2016) (M.A. thesis, City University of New York) (CUNY Academic Works).

71. Michelle Maslanka, *The Vlog Blog: History of Vlogging*, MOTION SOURCE (July 28, 2017), <http://www.motionsource.com/blog/the-vlog-blog-history-of-vlogging> [<https://perma.cc/T8CU-PA5E>].

72. See Grov, *supra* note 69, at 402.

73. *What is the It Gets Better Project?*, IT GETS BETTER PROJECT, <http://itgetsbetter.org/about-it-gets-better-project/> [<https://perma.cc/HCE6-U3RW>] (last visited Mar. 8, 2022); See Julie Compton, *‘It Gets Better’: How a Viral Video Fueled a Movement for LGBT Youth*, NBC NEWS (Sept. 21, 2020, 12:03 PM), <http://www.nbcnews.com/feature/nbc-out/it-gets-better-how-viral-video-fueled-movement-lgbtq-youth-n1240608> [<https://perma.cc/GTY6-UB6Z>].

74. See Ellie Homant & Katherine Sender, *Queer Immaterial Labor in Beauty Videos by LGBTQ-identified YouTubers*, 13 INT’L J. COMM’N 5386, 5386 (2019).

75. *Id.*

and MAC Cosmetics,⁷⁶ before he launched his own international cosmetics brand titled “One/Size” that received ten million dollars from Luxury Brand Partners.⁷⁷ Patrick Starr’s story of converting his YouTube vlogging into a full-fledged entrepreneurial endeavor is just one of many similar stories featuring queer people of color⁷⁸—many of which are now occurring on other social media platforms like Twitter and TikTok.⁷⁹ Queer people on these mediums are also likely to use their entrepreneurial success altruistically as a “space of action,” where proceeds the creator earns are directly returned to organizations like Black Lives Matter.⁸⁰ Moreover, the content creators willingly share their successful spaces to provide visibility for queer causes in non-monetary ways, such as promoting fundraisers for gender confirmation surgeries in the queer community.⁸¹

Additionally, the queer community’s attempt at digital entrepreneurship has also taken the form of “disruptive innovation,” in e-commerce where sellers introduce “a weak substitute for an existing product” at a lower price on the market.⁸² Queer entrepreneurs are technically already “disrupting”⁸³ in this fashion through individual digital stores on Etsy for couture-like face masks, clothing, and lower-priced crochet items⁸⁴ that may compete with larger companies offering more expensive alternatives. Certain queer entrepreneurs are even able to offer *equally* expensive alternatives by attracting customers with more “inclusive fashion” choices that only nonbinary-minded designers

76. *Id.*

77. Jessica Schiffer, *Patrick Starr’s One/Size Expands to Southeast Asia*, VOGUE BUS. (Nov. 9, 2020), <http://www.voguebusiness.com/beauty/patrick-starrs-onesize-expands-to-southeast-asia> [<https://perma.cc/9VBF-2XRF>].

78. See Homant & Sender, *supra* note 74.

79. See Abby Ohlheiser, *TikTok Has Become the Soul of the LGBTQ Internet*, WASH. POST (Jan. 28, 2020), <http://www.washingtonpost.com/technology/2020/01/28/tiktok-has-become-soul-lgbtq-internet/> [<https://perma.cc/ART4-SA2C>].

80. See *id.*; *Our Mission*, PLAY OUT APPAREL, <https://www.playoutapparel.com/pages/our-mission> [<https://perma.cc/WH3R-7EJ8>] (last visited Mar. 07, 2022).

81. See Ohleiser, *supra* 81 (“The LGBTQ Internet is often a space of action: promoting GoFundMe campaigns.”).

82. See Steven Si et al., *Business, Entrepreneurship and Innovation Toward Poverty Reduction*, 32 ENTREPRENEURSHIP & REG’L DEV. 1, 8–9 (2019) (explaining the concept of “disruptive innovation” generally).

83. See *id.*

84. See Samantha Wieder, *16 Queer-Owned Businesses You Should Bookmark Immediately*, BUZZFEED (June 30, 2020), <http://www.buzzfeed.com/samanthawieder/queer-owned-businesses> [<https://perma.cc/B8GA-JPDC>].

would think to create.⁸⁵ Play Out Apparel’s niche in fashion grew from Abby Sugar and E Leifer’s “skill sets [in] Ecommerce marketing and business” and developed into an inclusive “underwear and athleisure brand.”⁸⁶ The company’s wide range in sizing, use of “gender-affirming apparel,” and diverse models make the clothing source worth it to interested customers.⁸⁷ Fluide, a Brooklyn-based makeup brand run by a compact team of millennials, utilizes a similar marketing style, where the cosmetics are modeled in a gender-neutral manner.⁸⁸ Ultimately, queer success in the entrepreneurial space has shown that inventing new, dynamic products may be less important to success than simply using “inclusive language” and donating business proceeds to queer-catering organizations just as Play Out Apparel and Fluide have demonstrated.⁸⁹

IV. QUEER ENTREPRENEURSHIP TODAY

While the queer community has historically been erased and harmed by cisnormative and heteronormative society,⁹⁰ this has not kept the LGBTQ+ community from creating start-up companies in industries historically dominated by white, cisgender, heterosexual men.⁹¹ Three quarters of existing queer entrepreneurs are already located in the digital space.⁹² Yet many of them “remain closeted while [trying] to rais[e] capital” for their companies⁹³ and the majority of them were starting up only “small

85. See, e.g., Abby & Liz, PLAY OUT APPAREL, <http://www.playoutapparel.com/pages/abby-liz> [https://perma.cc/GYR5-796F] (last visited Mar. 8, 2022).

86. *Id.*

87. *Id.*; Jeanna Kadlec, 7 *Super-Inclusive LGBTQ+ Owned Brands You Need to Know*, NYLON (June 23, 2017), <http://www.nylon.com/articles/lgbtq-owned-brands-to-know> [https://perma.cc/8SFM-QHQD].

88. *About Us*, FLUIDE, <https://www.fluide.us/pages/about-us> [https://perma.cc/5H3V-CXD8] (last visited Mar. 8, 2022).

89. See Rachel Lubitz, *Is “Gender-Neutral” Just a Beauty Buzzword – Or Something Greater?*, REFINERY 29 (Aug. 22, 2018, 2:00 PM), <http://www.refinery29.com/en-us/gender-neutral-makeup-beauty-brands> [https://perma.cc/B378-UNAF].

90. See, e.g., Jojanneke van der Toorn et al., *Not Quite Over the Rainbow: The Unrelenting and Insidious Nature of Heteronormative Ideology*, 34 CURRENT OP. BEHAV. SCI. 160–65 (2020) (discussing the “pervasive, persistent, and . . . negative consequences” of heteronormative and cis-hetero ideologies); *Heteronormativity & Cisnormativity*, LGBTQ+ PRIMARY HUB, <http://www.lgbtprimaryhub.com/heteronormativity-cisnormativity> [https://perma.cc/XC2H-H69B] (last visited Mar. 8, 2022).

91. See generally H. WAVERLY DEUTSCH ET AL., STARTOUT, THE STATE OF LGBTQ ENTREPRENEURSHIP IN THE U.S., 2–3 (2016).

92. *Id.* at 2.

93. *Id.* at 3.

companies” with revenue up to \$100,000—making up only two to three percent of large companies with revenue exceeding \$20 million.⁹⁴

Many of them “remain closeted while raising capital” for their endeavors due to potential financial loss⁹⁵ despite total contributions into the economy exceeding one trillion dollars.⁹⁶ Moreover, roughly 35% of queer-involving entrepreneurial projects have been developed in the last five years, which indicates a willingness and level of acceptance unseen historically.⁹⁷ Each locale presents unique barriers to LGBTQ+ entrepreneurs, though, and certain cities may be more encouraging than others—serving as a model for cities on how to integrate queer business owners into society.

For example, New York City now categorizes queer businesses as “minority-owned businesses,” which provide them various forms of city-wide resources and government contract opportunities less accessible to business owners not a part of the pipeline.⁹⁸ With Mayor Bill de Blasio’s commitment to the project, the City has set a goal to provide \$25 billion in contracts to minority and/or women-owned businesses by 2025 and has already partnered with ten thousand businesses as part of it.⁹⁹ These efforts have enhanced those already present in other large states including California, Massachusetts, and Pennsylvania along with various larger cities like Chicago and Nashville.¹⁰⁰ These programs are largely regulated through the guidance of the National LGBT Chamber of Commerce (“NGLCC”), which began these efforts in the 2000s to ensure the survival of various small to large-scale queer businesses.¹⁰¹ Obtaining certification as a “LGBT Business Enterprise (LGBTBE) Certification” to access the network is rather

94. *Id.* at 6.

95. *Id.* at 3.

96. NAT’L GAY & LESBIAN CHAMBER COM., AMERICA’S LGBT ECONOMY: THE PREMIERE REPORT ON THE IMPACT OF LGBT-OWNED BUS. 10 (2016).

97. *See id.* at 5.

98. Dan Avery, *N.Y.C. Now Largest U.S. City to Grant LGBTQ Businesses Access to Minority Contracts*, NBC NEWS (Jan. 19, 2021, 5:45 PM), <http://www.nbcnews.com/feature/nbc-out/n-y-c-now-largest-u-s-city-grant-lgbtq-n1254782> [<https://perma.cc/HU3U-QRPQ>].

99. *De Blasio Administration Reaches 10,000 City-Certified M/WBEs*, CITY OF N.Y. (Aug. 13, 2020), <http://www1.nyc.gov/office-of-the-mayor/news/587-20/de-blasio-administration-reaches-10-000-city-certified-m-wbes> [<https://perma.cc/LR47-6FVZ>].

100. Avery, *supra* note 98.

101. *See generally LGBT-Owned Business Enterprise Certification*, NAT’L GAY & LESBIAN CHAMBER COM., <http://www.nglcc.org/get-certified> [<https://perma.cc/WCJ4-BAHL>] (last visited Mar. 07, 2022).

streamlined as well through its online submission form, which requires interested queer entrepreneurs to describe their business in detail, upload documentation supporting the business' existence, coordinate a site-visit so that an LGLCC worker better understands the business' process, and finally has them undergo a review process before the NGLCC's Committee certifies each business.¹⁰²

Success with the certification may vary, but even individuals like Tasha Reid in the smaller business context have been able to market their LGBTBE-Certified businesses with favorable outcomes.¹⁰³ Reid's business stemmed from her experience on a radio talk show that resulted in a construction and facilities-oriented company with online support features.¹⁰⁴ After obtaining certification through procedures and meetings carried out by the NGLCC along with the National Black Justice Coalition, various private and public entities began to trust Reid's brand.¹⁰⁵ Reid was even able to land a government contract for her company worth several million dollars.¹⁰⁶ On the other hand, even larger digital businesses, like Q.Digital that own smaller media companies such as Queerty, GayCities and LGBTQ Nation, have benefitted from marketing itself as certified through the NGLCC,¹⁰⁷ as evidence indicates LGBTQ+ customers are willing to switch brands or utilize a larger service once its affiliation with the queer community becomes known.¹⁰⁸

102. See *Get Certified in Four Easy Steps!*, NAT'L GAY & LESBIAN CHAMBER COM., <https://nglcc.org/steps-lgbtbe-certification> [<https://perma.cc/GMR6-Y68D>] (last visited Mar. 8, 2022).

103. See Santana Moreno, *Certified LGBTBE Reflects on Importance of Federal Contracting Opportunities*, NAT'L LGBT CHAMBER OF COM. (Feb. 23, 2015, 10:07 AM), <http://www.nglcc.org/blog/certified-lgbtbe@-reflects-importance-federal-contracting-opportunities> [<https://perma.cc/NQ3K-L4F2>].

104. *Leadership: Tasha Reid*, VISIONARY SERVS., INC., <http://www.visionaryservices.net/leadership> [<https://perma.cc/9N9G-CG6V>] (last visited Mar. 8, 2022); *Stars Align for Small Business Owner*, AFFINITY (July 24, 2014), <http://affinityincmagazine.com/stars-align-for-atlanta-small-business-owner/> [<https://perma.cc/YB82-QZWJ>].

105. See *Stars Align for Small Business Owner*, AFFINITY (July 24, 2014), <http://affinityincmagazine.com/stars-align-for-atlanta-small-business-owner/> [<https://perma.cc/YB82-QZWJ>].

106. See *id.*

107. See *We Are Certifiably Proud to Be an LGBTQ Owned Network*, Q.DIGITAL (Apr. 15, 2019), <https://www.q.digital/lgbt-nglcc-certified/> [<https://perma.cc/F9LN-4CZ8>].

108. See *LGBT Adults Strongly Prefer Brands That Support Causes Important to Them and That Also Offer Equal Workplace Benefits*, CISION PR NEWSWIRE (July 18, 2011, 10:02 AM) <https://www.prnewswire.com/news-releases/lgbt-adults-strongly-prefer-brands-that-support-causes-important-to-them-and-that-also-offer-equal-workplace-benefits-125742178.html> [<https://perma.cc/GNT6-QZWT>]; See generally *Press Room*, NAT'L GAY & LESBIAN CHAMBER COM., <http://www.nglcc.org/press> [<https://perma.cc/TLB3-4GCQ>] (last visited Mar. 8, 2022).

Importantly, the NGLCC's focus on assisting queer entrepreneurs has adjusted with current events, and is now addressing the disparity in support particularly for transgender entrepreneurs¹⁰⁹ and business complications following the COVID-19 Pandemic.¹¹⁰ The NGLCC's Transgender & Gender Non-Conform Task Force ("TGNC"), for example, promotes the business endeavors of its queer entrepreneurs by allowing them to build partnerships and contracts with companies in a wide variety of industries much like the umbrella LGBTBE certification does, including American Airlines, Bank of America, Johnson & Johnson and Marriott International among others.¹¹¹ Braxton Fleming, a transgender entrepreneur, utilized TGNC's exposure to advance a product line for "Hormone Replacement Dopp Kits" through his company Stealth Bros & Co.¹¹² A logo identifying his company as "Certified LGBTBE" by the NGLCC is prominently displayed on the website's homepage; signaling the impact and importance of identifying with the organization to the greater community.¹¹³ Similar efforts using the NGLCC's exposure in the podcast realm have led to visibility for the E3 Radio Show, a Black and Brown queer-focused podcast sharing "queer and independent music,"¹¹⁴ along with "The Out Entrepreneur with Rhodes Perry" podcast illuminating the contributions of other entrepreneurs who have online retail businesses, consulting firms,¹¹⁵ and online psychotherapy services particularly aware of the queer clientele's interests and problems.¹¹⁶

109. See *NGLCC Transgender & Gender Expansive (TGX) Initiative*, NAT'L GAY & LESBIAN CHAMBER COM., <http://nglcc.org/transresources> [<https://perma.cc/DCD8-4KLD>] (last visited Feb. 13, 2022) [hereinafter *Trans Resources*].

110. *Supporting Yourself and Others During COVID-19*, NAT'L GAY & LESBIAN CHAMBER COM., <https://www.nglcc.org/blog/supporting-yourself-and-others-during-covid-19> [<https://perma.cc/YWQ5-D6NY>] (last visited Feb. 13, 2022) [hereinafter *COVID-19 Resource Hub*].

111. *Trans Resources*, *supra* note 109.

112. *Member Spotlight: Braxton Fleming (He/Him/His)*, INDEP. BUS. ALL. (May 1, 2020), <http://www.thinkiba.com/member-spotlight-braxton-fleming/> [<https://perma.cc/P6HK-TQ46>].

113. See STEALTH BROS & CO., <https://www.stealthbrosco.com/> [<https://perma.cc/WK33-63HQ>] (last visited Mar. 8, 2022).

114. *About Us*, E3 RADIO, <http://e3radio.fm/about-us/> [<https://perma.cc/QS49-LHSV>] (last visited Feb. 5, 2022).

115. See *Episodes*, RHODES PERRY CONSULTING, <http://www.rhodesperry.com/episodes> [<https://perma.cc/6RRT-2JSC>] (last visited Mar. 8, 2022).

116. See Rhodes Perry, *173: Find Brilliant Sanity and Unleash your Innate Wisdom with Sasha Strong, Founder of Brilliancy Counseling*, RHODES PERRY CONSULTING (Sept. 22, 2020), <http://www.rhodesperry.com/episodes/173> [<https://perma.cc/TAF3-PWT8>]; See

Although limited, queer entrepreneurs also received some assistance for the COVID-19 Pandemic as a result of NGLCC's pooled resources—emphasizing the importance of being affiliated with the organization and obtaining certification for economic success. For example, throughout 2021 different programs sponsored by larger companies like Dell, UPS and Facebook provided small business grants, free workplace health consultation[s] and even emergency assistance funds for queer-focused businesses in the service industry.¹¹⁷

On a macro scale, the NGLCC's widespread support of queer entrepreneurs sends a powerful message of acceptance within the larger business community and illustrates how vital it is to receive support of some kind for a business to succeed. Yet the NGLCC's procedures at the state and local level show that the organization's assistance can be significantly limited to socioeconomically underprivileged business owners, or those merely starting out. For example, the Miami-Dade Gay & Lesbian Chamber of Commerce—feeding off from the larger NGLCC organization—explains the LGBTQ+ community's incredible economic impact totaling approximately eight billion dollars in South Florida alone.¹¹⁸ Benefits of being a queer entrepreneur with the local organization includes considerable advertising for participating businesses on social media, inclusion in diversity consortiums visited by well-funded sponsors and discounts.¹¹⁹ Yet, merely being able to participate in Miami-Dade requires a minimum commitment of three hundred dollars to receive minimal benefits from the organization while the premium benefits—involving “branding presence at local events” and prominent positions in e-newsletters—are only made available to queer business owners contributing at least seven thousand, five hundred dollars.¹²⁰

About Me, BRILLIANCY: MINDFUL EMBODIED COUNSELING, <http://www.brilliancecounseling.com/about/> [<https://perma.cc/R72W-UEK6>] (last visited Mar. 8, 2022).

117. See, e.g., *Community Impact Grant Program*, NAT'L GAY & LESBIAN CHAMBER COM. <https://www.nglcc.org/ghgrant> [<https://perma.cc/VKQ9-S83E>] (last visited Feb. 13, 2022); See *COVID-19 Resource Hub*, *supra* note 110; See generally *Partnership with the NGLCC Powers the LGBT Business Community and Your Company*, NAT'L GAY & LESBIAN CHAMBER COM., <https://www.nglcc.org/corporate-partners> [<https://perma.cc/EF3Y-LZVX>] (last visited Feb. 13, 2022).

118. MIAMI-DADE GAY & LESBIAN CHAMBER COM., <http://www.gaybizmiami.com/> [<https://perma.cc/EJ92-U37G>] (last visited Feb. 13, 2022).

119. *Member Levels and Pricing*, MIAMI-DADE GAY & LESBIAN CHAMBER COM., <http://www.gaybizmiami.com/member-levels> [<https://perma.cc/BE4V-LBCC>] (last visited Feb. 13, 2022).

120. *Id.*; *Membership Benefits*, L.A. LGBTQ CHAMBER OF COM., <http://www.lag-cc.org/membership-benefits> [<https://perma.cc/D3G3-RE3M>] (last visited Feb. 13, 2022)

The disparity in benefits for queer business owners that have capital to expend for organizations like these is problematic given the fact that a significantly higher percentage of businesses owned by minorities fail in comparison to those owned by non-minorities in the United States.¹²¹ Just as importantly, the focus on propelling already well-funded queer entrepreneurial endeavors to even bigger success through the NGLCC fails to address a large segment of the LGBTQ+ population: those who would like help *starting* a new business from scratch. This means none of these entrepreneurs would even have cash to front for inclusion in the organization. This gap in endorsement and funding for queer entrepreneurs is likely even starker for queer minorities that identify as Black or Brown due to these populations' businesses mostly starting up in the same minority neighborhoods they grew up in and, thus, inherently become excluded from larger mainstream markets they must fight to break into.¹²² Absent the NGLCC's local branch taking a chance on a queer minority's start-up that is unable to pay its membership fees, these businesses may be set up to fail.

V. CURRENT DIGITAL ENTREPRENEURSHIP DEVELOPMENTS IMPACTING QUEER FOLK

As newer technologies develop and a willingness to use them continues to grow, entrepreneurial content marketed and/or released digitally will not cease to be created—especially within the LGBTQ+ community that comfortably relies on these spaces.¹²³ This is partially because of the affordability and level of independence entrepreneurs have over their content that may otherwise be more constrained in a physical space both literally and financially.¹²⁴ Beyond products and services in more traditional retail spaces, artistic content—such as music or even vlogs—are having their legal protections reconsidered. Rather than releasing a sole piece of art on its own and having that art purchased by a

(showing certain metropolitan areas with local NGLCC branches, such as Los Angeles, notably have more affordable options for joining that do not exceed one thousand, five hundred dollars for even the most premium benefits).

121. Rafael Efrat, *Minority Entrepreneurs in Bankruptcy*, 15 GEO. J. POVERTY L. & POL'Y 95, 100 (2008) (discussing the roles minorities have in the entrepreneurial bankruptcy more generally based on both empirical data and legal precedent).

122. *See id.* at 100–01 (explaining the “ethnic enclave theory” along with its relationship to competition amongst entrepreneurial efforts in minority communities).

123. *See generally* Lateef Mtima, *Digital Tools and Copyright Clay: Restoring the Artist/Audience Symbiosis*, 38 WHITTIER L. REV. 104, 108–09 (2018) (reviewing digital entrepreneurial developments both in the music industry and generally).

124. *See id.* at 109.

larger distributor, legal scholars are navigating the concept of having multiple digital entrepreneurs pool their artistic contributions together in the forms of art collectives. In turns, these collectives can secure more lucrative agreements independently and with distributors, enhance visibility to targeted demographics, and encourage “social utility objectives of copyright.”¹²⁵ This approach could prove fruitful for queer artists, too, who have undergone historic pressures to avoid identifying as LGBTQ+ when releasing music due to underlying commercial risk of being rejected by mainstream media.¹²⁶

For example, an individual queer artist seeking distribution for their work may be faced with unwillingness from a more traditional company. By pooling their work together as a team with other queer artists in the form of a collective, the group of artists have strength in numbers to become a more viable sell for the mainstream distributor. Multiple talented queer artists could be an objectively better sell than just one. Absent the desire to work with a distributor, the collective’s ability to combine so many pieces of art from varying artists means that releasing the work digitally could be similarly viable and more impactful than only releasing one artist’s work online. This could enhance the artists’ commercial success collectively because new content would be released online more regularly than if one artist were doing so.¹²⁷

Likewise, the potential for copyright infringement on the queer art could be more significant if the individual artist remained alone, as they would be unattached to mainstream distributors capable of better protecting them from copyright issues. If the artist were to pool their work together with that of other artists and obtain notoriety that way instead, it would be possible for them to rely on the “social utility benefits” that come more easily to collectives instead.¹²⁸ The part of the collective dedicated to a larger community of creatives would be able to feasibly “encourage non-commercial use of their material” and effectively police any “unauthorized digital use” of their work.¹²⁹ Finally, instituting widespread changes like these would inevitably lead to a shift in

125. *Id.* at 106.

126. See Martin Aston, *The Industry Closet: Queer Pop from Little Richard to Frank Ocean*, GUARDIAN (Oct. 11, 2016, 9:55 AM), <http://www.theguardian.com/music/2016/oct/11/industry-queer-gay-pop-artists-frank-ocean-little-richard> [<https://perma.cc/W7MT-6CX9>].

127. Mtima, *supra* note 123, at 110.

128. See *id.* at 128–29.

129. *Id.*

digital artists relying upon themselves as entrepreneurs, instead of on mainstream distributors or producers that minimize the artists' take-home revenue and creative control.¹³⁰

Separate queer legal issues exist in the digital entrepreneurial space that, instead, stem from limitations of free speech under the First Amendment. Since 2018, various digital content creators have been gradually finding themselves “demonetized” on YouTube when the company subjectively feels that certain uploaded content benefitting from advertisements inappropriately goes beyond the confines of protected speech.¹³¹ Although this internal shift occurred as a result of terrorist-related content on the platform, the “demonetization” efforts expanded into other areas of free speech that were less abhorrent—including mere expressions of being queer.¹³² In filmmaker Sal Bardo's case, various videos on his channel were put into “restricted mode,” which “screens potentially mature content,” and demonetized entirely.¹³³ The incident was not isolated, as several queer content creators repeatedly faced the same restriction problems for their videos throughout 2018 and 2019—one of which even had their non-sexual, LGBTQ+ videos “demonetized” because they were flagged as inappropriate “sexual gratification” content.¹³⁴

Due to the widespread impact on LGBTQ+ content creators on YouTube, a class-action lawsuit was filed against YouTube and Google in the U.S. District Court for the Northern District of California on the basis of free speech violations and the plaintiffs' economic losses as a result of demonetization.¹³⁵ Yet, predictably, the district court dismissed the lawsuit because YouTube—a private actor—could not technically infringe on First Amendment rights because only government actors create such First Amendment violations against citizens.¹³⁶ Yet, legal commentators

130. *See id.* at 128.

131. *See* Brett Gossett, *Scrolling, Trolling, and Uploading: YouTube's Impact on Modern Public Discourse, Internet Regulation, and Free Speech*, 38 CARDOZO ARTS & ENT. L.J. 505, 510 (2020).

132. *Id.* at 510–11.

133. EJ Dickson, *Inside LGBTQ Vloggers' Class-Action 'Censorship' Suit Against YouTube*, ROLLING STONE (Nov. 14, 2019, 1:54 PM), <http://www.rollingstone.com/culture/culture-features/lgbtq-youtube-lawsuit-censorship-877919/> [https://perma.cc/4TRM-3GFW]; *See* Janko Roettgers, *LGBTQ Creators Sue YouTube Over Alleged Discrimination*, VARIETY (Aug. 14, 2019, 10:10 AM), <http://variety.com/2019/digital/news/lgbtq-youtube-lawsuit-1203302184/> [https://perma.cc/HR96-MA2Z].

134. Dickson, *supra* note 133.

135. *Id.*

136. Rachel Badham, *Court discontinues YouTube LGBTQ+ discrimination lawsuit*, GSCENE MAG. (Jan. 10, 2021), <http://www.gscene.com/news/court-discontinues-youtube->

contend that arguments against large entities, like YouTube, that are not obligated to allow any specific content may still be liable to digital content creators in future cases if they are approached as “contractual violation[s]” stemming the restricted content rather than as First Amendment claims.¹³⁷ Since the private company technically operates from a “neutral” perspective, then the arbitrary restrictions being applied to queer content, unlike other forms of content, serve as a violation in that regard rather than as a “suppression of free speech.”¹³⁸ Even outside of YouTube specifically, Google’s algorithm for LGBTQ+ news stories signals a similarly devastating problem, as almost half of queer stories promoted on Google News derived from “conservative Christian sources” while less than five percent of them came from “progressive outlets” that spoke more favorably about the queer community.¹³⁹ Evidently, until these arguments successfully surface in the courtroom, queer entrepreneurs may continue to have their livelihood and identities diminished online.

VI. COMPARATIVE DEVELOPMENTS & RECOMMENDATION

To benefit the queer community’s rights and abilities within the digital entrepreneurial space, various adjustments in both the private and public sectors must occur. Because of the judicial restraint that will potentially occur with a more conservative court and their hesitance to further clarify or extend protections to the LGBTQ+ community, the majority of these changes must occur largely at the federal and state legislative levels without much dependence on the judicial or executive branches of government. First, the gap in funding and exposure for queer entrepreneurs who are seeking assistance to start their companies rather than advance already existing ones must occur. Rather than having the NGLCC focus its efforts on flourishing queer businesses in local communities, it should reallocate some of its resources into providing loans or even grants to queer individuals in the start-up phase. Federal and state governments should similarly allocate

lgbtq-discrimination-lawsuit/ [https://perma.cc/N7T5-85AY]; see David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1638 (2006) (discussing the differences between First Amendment protections in private and government contexts).

137. See Dickson, *supra* note 133.

138. *Id.*

139. April Anderson & Andy Lee Roth, *Queer Erasure: Internet Browsing Can Be Biased Against LGBTQ People*, *New Exclusive Research Shows*, 49 INDEX ON CENSORSHIP: A VOICE FOR THE PERSECUTED 75, 75 (2020).

some of their funding into supporting the organization so that larger amounts of funding can be raised for the early-stage entrepreneurs.

The United Kingdom's approach to assisting the LGBTQ+ community within the workplace may serve as a model moving forward now that less stigma is expressly allowed against queer workers following *Bostock*. For example, the U.K. provided nearly five million dollars as part a national action plan to fund various government and private entities involving the LGBTQ+ community through 2020.¹⁴⁰ Moreover, just as the U.K.'s Government Equalities Office does with its employers and employees, a "training package" could be offered¹⁴¹ in participating states to chamber of commerce localities that assist local businesses. This way, organizations that do not necessarily have an LGBTQ+ affiliation are also trained in and encouraged on integrating and promoting queer business owners in the community. Moreover, efforts to expand the quantity of queer entrepreneurs can be done affordably through the use of the internet much like the Netherlands and Philippines governments have been doing recently.¹⁴² As of 2020, for example, both nations have instituted a "SPARK!" program hosted online that teaches "aspiring" queer entrepreneurs how to manage a digital business over the course of more than ten online modules during a particularly timely moment in history when businesses must learn to thrive in the COVID-19 pandemic.¹⁴³ Participants in the program did not have to pay tuition; instead, screened based on financial need and personal goals with the program.¹⁴⁴

The United States could run a similar online program through various states' departments of education as a streamlined way for low-income queer entrepreneurs to gain the necessary tools for beginning a digital entrepreneurial endeavor; this allows some to even avoid often expensive four-year degrees or graduate level education. With the advent and successful adoption of new technologies for online learning resulting from the COVID-19 pandemic, departments of education in each state would not be

140. Government Equalities Office, *LGBT Action Plan*, at 7 (July 2018), http://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721367/GEO-LGBT-Action-Plan.pdf [<https://perma.cc/F4XA-M7BV>].

141. *See id.* at 20.

142. Cara Balleras, *Dutch Embassy supports LGBTQ+ entrepreneurs*, DAILY TRIB. (Sept. 20, 2020, 12:40 AM), <http://tribune.net.ph/index.php/2020/09/20/dutch-embassy-supports-lgbtq-entrepreneurs/> [<https://perma.cc/4MPC-5AL7>].

143. *Id.*

144. *Id.*

entirely unfamiliar with attempting to formalize a program across each jurisdiction online.¹⁴⁵

Tools within the U.S. government's enactment of the Tax Cuts and Jobs Act of 2017 ("Act") could be carried over in a way to benefit queer entrepreneurship as well. Because the Act added the Employer Credit for Paid Family and Medical Leave section into the federal tax code, qualifying employers became incentivized to provide paid leave to employees since the employers would, in turn, be able to claim a tax credit at the end of the year to potentially minimize the upfront costs of providing leave in the first place.¹⁴⁶ Here, a similar tax credit could be provided to employers, business entities or organizations—like the NGLCC among others—that specifically donate money to local queer-owned businesses in their respective states or those that host digital entrepreneurial training events for interested community members. Instead of merely promoting the smaller businesses, these places would actually be given money to succeed, and the larger entities would be incentivized to do so, just like the paid leave scenario.

CONCLUSION

As the twenty-first century progresses, the queer community's historic inability to blend with the mainstream will continue to blur. Rather than miss out on being included, queer entrepreneurs are taking full advantage of emerging technologies to forcefully make their own profitable spaces in the digital world. Yet both private and government entities in the United States must realize that passively observing the digital labor put out by queer creators is not enough. This is merely exploiting queer labor, as has occurred in this country. Rather than expecting the LGBTQ+ community to force its way into entrepreneurial spaces, the remaining community must voluntarily make room for them – a reparation of sorts. Only then will that allow queer creators and workers the ability to feel safe and empowered in their labor.

145. See Natasha Singer, *Learning Apps Have Boomed in the Pandemic. Now Comes the Real Test.*, N.Y. TIMES (Mar. 17, 2021) <https://www.nytimes.com/2021/03/17/technology/learning-apps-students.html> [<https://perma.cc/X8PM-QMCQ>] (highlighting the widespread adoption of educational technology resulting from the COVID-19 pandemic).

146. I.R.C. § 45S. (2017).

