

# **BERKELEY JOURNAL OF GENDER, LAW & JUSTICE**

The *Berkeley Journal of Gender, Law & Justice* (ISSN 1933-1045) is edited by the students of University of California, Berkeley, School of Law and published annually by the University of California. All content copyright © 2021 by the Regents of the University of California except when expressly indicated.

**CORRESPONDENCE:** Address all correspondence regarding requests for permission to reproduce material from the Journal to: Journal Publications, University of California, Berkeley, Berkeley Law Library, LL123 Law Building, South Addition, Berkeley, CA 94720-7210, [journalpublications@law.berkeley.edu](mailto:journalpublications@law.berkeley.edu).

**MANUSCRIPTS:** We invite you to submit your original, unpublished work to the *Berkeley Journal of Gender, Law & Justice*. We accept electronic submissions through Scholastica or in Microsoft Word format sent to [bjlj.submissions@berkeley.edu](mailto:bjlj.submissions@berkeley.edu).

**FORM:** Citations generally follow *The Bluebook: A Uniform System of Citation* (21st ed. 2020) and *The Chicago Manual of Style* (17th ed. 2017). This issue should be cited as 36 BERKELEY J. GENDER L. & JUST. 1 (2021).

© 2021 The Regents of the University of California  
University of California, Berkeley  
School of Law  
38 Law Building  
University of California  
Berkeley, CA 94720-7200

Published annually by the University of California  
Printed by Joe Christensen, Inc.

Cover designed by Emily Wright. Logo designed by Chandra Williams.

## Dedication

The *Berkeley Journal of Gender, Law & Justice* dedicates this volume to those lost to ongoing twin pandemics: racism and COVID-19. Founded as a journal for individuals and communities pushed to the margins, we are proud to present scholarship that critiques the systems that embolden police violence, medical racism, and White supremacy. We mourn each person lost this past year, whether protestors shout their name or loved ones carry it quietly. *BGLJ* will continue to resist and call out oppression, and we will do so in their name.

## From the Membership

The *Berkeley Journal of Gender, Law & Justice* is guided by an editorial policy that distinguishes us from other law reviews and feminist journals. Our mandate is to publish feminist legal scholarship that critically examines the intersection of gender with one or more other axes of subordination, including, but not limited to race, class, sexual orientation, and disability. Therefore, discussions of “women’s issues” that treat women as a monolithic group do not fall within our mandate. Because conditions of inequality are continually changing, our mandate also is continually evolving. Articles may come within the mandate because of their subject matter or because of their analytical attention to differences in social location among women. The broad scope of this mandate, and the diversity of scholarship it supports, is reflected in this volume of the *Berkeley Journal of Gender, Law & Justice*.

The majority of pieces submitted to this journal, however, do not fall within the mandate. There are far too few of us in legal education and practice committed to advocating for women, let alone focusing on those women least served by the legal system. Rather than abandon or modify our mandate in response to the limited pool of available scholarship, we hope to cultivate and support such scholarship by recommitting ourselves to the vision our mandate reflects. We need your help. This forum can only exist with the vigorous participation of thinkers and writers nationwide who share our vision and our commitment. We urge you, our readers and friends, to consider the issues raised in the *Berkeley Journal of Gender, Law & Justice* as you pursue your own work. Share your work-in-progress with us. Publish with us. Tell your colleagues, students, and teachers about us. If you read an unpublished paper or hear a speech at conference that addresses the mandate of the *Berkeley Journal of Gender, Law & Justice*, refer it to us. Join us in nurturing and critically engaging the legal research, theories, and strategies required to serve the interest we share in social justice.

## From the Editors

It is with great pride that we present Volume 36 of the *Berkeley Journal of Gender, Law & Justice*. We begin by thanking the membership and board of the Journal who managed to keep production on track while still getting out the vote, protesting in support of Black lives, and surviving a pandemic. We are, of course, grateful to you, dear readers, for your ongoing support of the Journal and our community. This past year has shown the true power and importance of community. This Journal and the work we do has always been about the people we are able to unite.

The articles in Volume 36 are about failed systems and shine light on regimes, both domestic and international, that subjugate through laws and language. They highlight legal systems and social regulations that perpetuate marginalization and minoritization. None of this will be new to our audiences, and we present this volume with the firm belief that radical change is possible and, in every instance, necessary.

We began work on Volume 36 at the same time we established a land acknowledgment and recurring payment of the Shuumi Land Tax. These are small steps towards recognizing the deep, irrepayable debt we as Berkeley Law students owe to the Chochenyo speaking Ohlone people, the successors of the sovereign Verona Band of Alameda County. The University of California, Berkeley occupies land that remains of great importance to the Muwekma Ohlone Tribe and other familial descendants of the Verona Band. We are responsible for continuing to respect the land and its original stewards who remain a vibrant community.

The Journal will continue to publish scholarship in the hopes that it will empower readers, from practitioner to layperson, and bring us closer to a more humane and just world. We are humbled to publish academic scholarship in service of that vision. Our home institution, the University of California, Berkeley, School of Law, hosts all of our past issues in the online repository where every article we have published is available for free at <https://www.law.berkeley.edu/library/ir/bglj>. They are also available on our website, [genderlawjustice.org](http://genderlawjustice.org), where we regularly publish intersectional feminist takes on our blog *Under Deconstruction*.



Volume 36 opens on a first-of-its-kind empirical analysis of how sexual orientation and gender intersect to shape custody disputes. *The Moral Sex: How*

*Policing the Moral Development of Daughters Harms Gay Parents in Custody Disputes* reveals how courts use judicial proceedings to police the moral development of young girls. Mark A. Leinauer examines quantitative and qualitative data from 128 custody disputes between a heterosexual and gay parent. A multistage analysis reveals not only the historic impact of sexual-orientation bias on custody adjudications but the impact of the child's gender in these contests. Leinauer takes his analysis a step further by categorizing which judicial rationales are advanced against gay parental fitness when daughters, as opposed to sons, are at issue.

In *The Legal Limbo of Menstrual Regulation: Implications of Expanding Reproductive Health Options in the United States*, Samantha Gogol Lint pushes for reproductive justice centered on the needs of those who may become pregnant. The piece argues that the time is ripe for a reconsideration of menstrual regulation, which provides a safe and distinct alternative to abortion. Lint argues that menstrual regulation is unique because it offers a solution tailored to the concerns of people with missed periods while simultaneously eliding attempts to restrict access to contraception and abortion. The article lays the groundwork for additional research as well as legal battles to secure access to menstrual regulation, which is already common in many other countries.

Continuing in the vein of comparative studies, in *The Elimination of "Patriarchy" Under the Convention on the Elimination of All Forms of Discrimination Against Women*, Cassandra Mudgway analyzes over thirty years of documents from the United Nations' Committee on the Elimination of Discrimination Against Women to identify biases embedded within the organization and our own conceptualizations of patriarchy. By compiling these documents, Mudgway draws out the Committee's pattern of deepening the constructed chasm between the West and non-West through language, specifically through reference to the patriarchy. The piece ends with a warning of the implications of such a lens: such an Otherizing perspective undermines the Committee's efforts to end the subordination of women.

These conceptualizations of patriarchy and oppression affect Black Muslim women in the United States, as well, and this experience is the starting point for Vanita Saleema Snow's *Veiling and Inverted Masking*. Drawing on performance theory, the arts, and Title VII jurisprudence, Snow presents a new theory of inverted masking, which analyzes religious performance of identity as a coping mechanism in a post-9/11 world as well as employers' and legislators' responses to it. Snow argues that various cultural stereotypes—some at odds with each other—have pushed Black Muslim women to the margins and that, in their intersectionally marginalized position, they provide a model of how to remove the inverted masks from society.

Once a year, the Journal awards the Albiston Prize to a piece of exemplary student scholarship focused on recent developments in gender and the law. This year's recipient, Kathryn Evans, focused on the high rates of sexual assault and harassment amongst workfare participants. While Title VII and analogous state and local laws exist, they require workers to file complaints and lose time to lengthy investigations and litigation. This is far from a perfect solution, so Evans offers other options. *Making Workfare More Fair: Protecting Workers in Welfare Programs from Sexual Harassment* explains how to create express legal protections for welfare workers and establish better procedures within the welfare system for reporting, investigating, and remedying harassment.

Turning from the workplace to schools, Haley C. Carter examines the impact of Trump's Title IX regulations on women students of color in *Under the Guise of "Due Process."* Carter's piece demonstrates how the new regulations will likely discourage survivors from reporting under Title IX, lead to disparate representation between parties in such claims, and result in higher rates of dismissal. These consequences will fall disproportionately on women students of color who experience sexual harassment and assault at higher rates than White students. As the Biden Administration begins dismantling Trump-era regulations, the close of Carter's piece is especially relevant. The article closes by urging that future administrations look at prevention under Title IX through an intersectional lens. Specifically, Carter recommends ending the criminalization of sexual harassment claims, returning to the preponderance of the evidence standard, and reinvigorating the role and responsibilities of the Title IX Coordinator.



On behalf of the Journal's membership and Editorial Board, we thank you for sharing our ongoing commitment to critical intersectional feminist legal scholarship. We hope the ideas put forth in this volume will forge paths towards access and accountability and spark insight and action within the legal field that extends beyond. It is our strongest desire that, in amplifying our collective voices, change will come.

# Board of Editors 2020-2021

## *Editors in Chief*

Virginia Lyon  
Jessica Williams

## *Managing Editor*

Amy Reavis

## *Article Editors*

Nicole Conrad  
Maggie Woods

## *Executive Editors*

Jenna Forster  
Maddy Pilgrim

## *Submissions Editors*

Dylan Colbert  
Jennifer Sherman

## *Events Editors*

Hannah Feldman  
Simone Lieban Levine

## *Marketing Editor*

Tara Branine

## *Recent Developments &*

## *Commentary Editors*

Karnik Hajjar  
Carly Shortell

## *Production Editors*

Julia Choi  
Alyssa Crooke

## *Online Editor*

Julia Choi

## *Secretarial Editors*

Sarah Dupree  
Elana Muroff

## *First Year Representative*

Elissa Gray

## *Associate Article Editors*

Tara Branine  
Ella Cady  
Nicole Conrad

Alyssa Crooke  
Karnik Hajjar  
Victoria Scordato

## *Associate Editors*

Rachel Appel  
Jenna Archer  
Emma Atuire  
Julia Bennett  
Ella Cady  
Sara Caplan

Anna Katz  
Kat King  
Marian Lee  
Natasha Mangham  
Liat Marks  
Anna Martinez



Amanda Chang  
Jacqueline Crispino  
Aneil Dhillon  
Mae Donald  
Summer Elliot  
Taylor Evans  
Rhiana Everest  
Brianna Felsher  
Isaac Flegel-Mishlove  
Sarah Garrett  
Lizzi Gorman  
Danielle Hilborn  
Jennifer Holloway  
Anna Jeun

Amelia Mazarella  
Kaya McRuer  
Michaela Park  
Kelsey Peden  
Kelsey Reid  
Aida Rogers  
Victoria Scordato  
Schuyler Standley  
Ximena Velazquez-Arenas  
Paige Wahoff  
Hannah Warntjes  
Claire Weintraub  
Myka Yamasaki

## **Sponsors & Friends**

Thank you so much to all our sponsors and friends for your generous and continuing support. We could not continue publishing intersectional feminist scholarship without you.

Laura Cindy Beckeman

Barbara Jean Flagg

Hannah Callie Haksgaard

Sue Carolyn Hansen

Becca Lynne Rausch

# BERKELEY JOURNAL OF GENDER, LAW & JUSTICE

---

2021

Volume 36:1

---

## ARTICLES

---

*The Moral Sex: How Policing the  
Moral Development of Daughters  
Harms Gay Parents in Custody  
Disputes* 1  
Mark A. Leinauer

*The Legal Limbo of Menstrual  
Regulation: Implications of  
Expanding Reproductive Health  
Options in the United States* 43  
Samantha Gogol Lint

*The Elimination of “Patriarchy”  
Under the Convention on the  
Elimination of All Forms of  
Discrimination Against Women* 79  
Cassandra Mudgway

*Veiling and Inverted Masking* 115  
Vanita Saleema Snow

*Making Workfare More Fair:  
Protecting Workers in Welfare  
Programs from Sexual Harassment* 150  
Kathryn Evans

*Under the Guise of “Due Process”:  
Sexual Harassment and the Impact of  
Trump’s Title IX Regulations on  
Women Students of Color* 180  
Haley C. Carter

---

*It is the policy of the Berkeley Journal of Gender, Law & Justice not to draw a distinction between student pieces and the work of scholars, practitioners, and community workers. This policy reflects our belief that in a struggle for equality all efforts are of equal value and importance.*

---

# The Moral Sex: How Policing the Moral Development of Daughters Harms Gay Parents in Custody Disputes

Mark A. Leinauer<sup>†</sup>

## ABSTRACT

*When gay parents fight for the custody of their children against a heterosexual parent, they sit at the intersection of two well-known regimes of bias: sexual orientation and gender. Legal scholars have thoroughly discussed the impact of sexual orientation bias on custody outcomes, but the issue has not been analyzed empirically. The intersectional impact of gender in these cases is even less clear. How do courts treat gay fathers differently than gay mothers in these contests? And how do judicial conceptions of “the daughter” or “the son” impact their treatment? These questions have received scant attention in the literature.*

*This Article examines the impact of the child’s gender on these adjudications. I compile all published decisions that allocate custody between a gay parent and a heterosexual parent through 2017 (n = 128; 1951-2017) and then apply a three-part process. First, I quantify the historical impact of sexual orientation bias on custody adjudications. Second, I explore the impact of the child’s gender on these contests by comparing custody outcomes for gay parents*

---

DOI: <https://doi.org/10.15779/Z38PZ51M9D>

<sup>†</sup> I owe thanks to many for assistance with this Article. I am greatly indebted to my dissertation committee: Professors Catherine Albiston, Victoria Plaut, Jack Glaser, and Kathryn Abrams. I am also greatly indebted to the Philip Brett LGBT Studies Fellowship, the University of California’s Dissertation Year Fellowship and the Berkeley Empirical Legal Studies Center for funding this project. Numerous thanks and acknowledgements are likewise owed for the creation of dataset one; Professor Clifford Rosky’s work in “Like Father, Like Son” aided the construction of the set for cases through 2007. Professor Rosky also assisted via correspondence, as did Shannon Minter, Kate Kendell, and Cathy Sakimura of the National Center for Lesbian Rights. Thanks are also owed to Professor Susan Appleton (Washington University in St. Louis) and A. J. Bockelman (former director of P.R.O.M.O. St. Louis). Professor Joan Hollinger (University of California, Berkeley) was also instrumental in acquiring respondents for interviews; it is doubtful the interview portion of the project could have been completed absent Professor Hollinger’s generous assistance. The University of Michigan Law School’s “Junior Scholars Conference” provided invaluable feedback. And finally, I must thank the Data Lab (“D-Lab”) and the Culture, Diversity and Intergroup Relations Lab (CDIRL), both at the University of California, Berkeley, for providing invaluable insight and criticism during the entire coding process.

across the gender of the child. Third, I place these results into context by comparing judicial rationales advanced against gay parental fitness when daughters, as opposed to sons, are at issue.

*I find that courts have historically denied gay parents custody at a rate of 64% when they contest custody against a heterosexual opponent. I likewise find that the gender of the child at issue matters. When a daughter is at issue, it is significantly more likely that courts will deny custody to gay parents (74% denial rate versus a 49% denial rate respectively, a statistically significant difference [ $p > |z| = 0.014^{**}$ ]). Furthermore, judicial rationales stressing the alleged harms of immoral exposure, damage to societal morality, and the illegality of same-sex sex (prior to Lawrence) or same-sex marriage (prior to Obergefell) spike when daughters are at stake.*

*Based on these data and an analysis of the case law, I argue that a judicial impulse to police the moral development of young women, especially as it relates to the development of heterosexual norms, has created a unique burden for gay parents in the custody process. It has rendered courts less willing to place daughters into their custody. It has likewise prompted courts to stress the outside control of sexuality and intimacy, the strictures of traditional morality, and the legal prohibitions barring same-sex intimacy to a greater degree when daughters are at issue. I conclude by placing these findings within the broader feminist tradition and discussing implications for the burdens gay custody litigants face more generally.*

INTRODUCTION .....	3
I. AN EXPLORATION OF THE RELEVANT LITERATURE .....	6
A. Relevant Ambiguities Regarding Gender, Orientation, and Identity..	6
B. Gender Bias, Orientation Bias, and the Adjudication of Custody .....	8
1. The Impact of Anti-Gay Bias on Custody Adjudications.....	9
2. The Impact of Gender Bias on Custody Adjudications .....	11
3. Bias Related to the Gender of the Parent .....	11
4. Bias Related to the Gender of the Judge.....	14
5. Bias Related to the Gender of the Child .....	15
II. STUDIES AND RESULTS .....	16
A. Data and Methods .....	16
1. Study One: Analyzing Custody Outcomes .....	16
2. Study Two: Analyzing Judicial Arguments Against Gay Parental Fitness .....	18
3. Methodological Caveats .....	18
B. Results.....	19
1. Custody Outcomes and the Gender of the Child .....	19
2. Categorizing Judicial Rationales Against Gay Parental Fitness..	22
a. Immoral Exposure.....	22
b. Societal Morality.....	23
c. Unspecified Future Harms .....	24
d. Illegality .....	24

e. The Stigma Argument (Also Known as “The <i>Palmore</i> Argument”) .....	25
f. Orientation Modeling .....	26
g. Gender Modeling .....	27
h. Sexual Abuse Fears.....	29
i. Fear of Disease.....	29
C. Ranking Judicial Rationales Against Gay Parental Fitness by Gender of the Child .....	31
III. DISCUSSION .....	34
A. Interpreting the Raw Custody Allocation Data.....	35
B. Placing these Data Alongside Previous Scholarship .....	36
C. Policing the Moral Development of Young Women .....	37
D. Highlighting the Outside Enforcement of Heteronormativity .....	39
E. Placing These Results within the Broader Currents of Feminist Scholarship.....	40
CONCLUSION .....	42

## INTRODUCTION

When gay parents fight for custody of their children against a heterosexual parent, they sit at the intersection of two well-known regimes of bias: sexual orientation and gender. Legal scholars have thoroughly discussed the impact of sexual orientation bias on custody outcomes, but the issue has not been analyzed empirically. The intersectional impact of gender on these cases is even less clear. How do courts treat gay fathers differently than gay mothers in these contests? And how do judicial conceptions of masculinity and femininity impact court decisions regarding daughters versus sons? I examine the impact of a child’s gender on custody disputes between gay parents and their heterosexual counterparts.

The inspiration for this Article stems from a survey conducted in 2018. That survey aimed to capture the experience of fighting for custody as a gay parent and, accordingly, featured interviews of gay parents, their attorneys, and judges with firsthand experience in those matters.<sup>1</sup> These interviews recounted the expected instances of anti-gay bias, strategies for their mitigation, and opinions regarding their roots.<sup>2</sup> They also routinely circled back to a more classic regime of bias: gender.<sup>3</sup> And while this was not unexpected (I predicted that gay fathers and mothers would face different burdens), the degree of this bias was surprising.

Thirty-seven percent of survey respondents reported that the gender of the

---

1. Mark A. Leinauer, Mapping the Headwinds: An Empirical Assessment of Hurdles Facing Gay Male and Lesbian Parents in Custody Determinations (Jan. 22, 2020) (unpublished dissertation, University of California, Berkeley) (on file with the *Berkeley Journal of Gender, Law & Justice*).

2. *Id.*

3. *Id.*

non-heterosexual parent had a profound impact upon their treatment in court.<sup>4</sup> Respondents reported either prejudices and arguments that were specific to a particular gender<sup>5</sup> or a general belief that gay fathers and mothers faced different burdens.<sup>6</sup> As one gay father put it, “[I]t wasn’t that I was gay, it’s that I was a gay *and a man*.”<sup>7</sup> Or as this gay mother explained:

They had their hang-ups about queers—sure, but they also had the hang-up about lesbians, just lesbians. And women too you know. That mattered.<sup>8</sup>

Another sizable fraction of respondents, 17%, believed that the contested child’s gender shaped the biases they confronted.<sup>9</sup> Many respondents mentioned biases that arose only in the context of a particular gender pairing. For example, several respondents highlighted role modeling concerns that arose only when a gay mother fought for custody of a daughter or when a gay father fought for custody of a son.<sup>10</sup> Respondents also noted biases specific to the gender of the child itself, biases based on judicial conceptions of “the daughter” or “the son.” They noted that judges assumed sons would be more unaccepting and combative,<sup>11</sup> while daughters would be more fragile.<sup>12</sup>

Anti-gay bias within custody matters has received extensive study. Scholars have detailed how gay parents are routinely confronted with arguments that they will lure their children into non-heterosexual behavior, sexually abuse their children, or infect their children with disease.<sup>13</sup> Scholars have likewise highlighted that courts frequently express anti-gay bias openly, either in the form of anti-gay statements or in more subtle turns of phrase.<sup>14</sup>

Likewise, many scholars have examined the impact of gender bias on custody, from legal rules that specifically hinge on parental gender to extra-legal

4. Leinauer, *supra* note 1, at 7.

5. For example, one parent reported a judicial fear that only applied to gay male fathers: “[W]e were predatory and [they had] an image of child molesters that’s been used against gay males.” *Id.* at 19.

6. *Id.* at 7.

7. *Id.* at 19 n.8 (emphasis in original).

8. *Id.*

9. *Id.* at 7.

10. *Id.* at 24–25.

11. One attorney who has handled many of these cases noted, “[Y]ou could say they expected more acting out from the boys.” *Id.* at 24.

12. An attorney with experience in these matters noted, “It’s hard to say. Sometimes I just think they see the girls as delicate. You know, fragile. Especially the young ones.” *Id.*

13. See Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257 (2009); Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer’s Guide to Social Science Research*, 1 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 133, 152–56 (1991); William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1360, 1363–65 (2000); Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607 (2013); Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623 (1996).

14. See generally Amy D. Ronner, *Bottoms v. Bottoms: The Lesbian Mother and the Judicial Perpetuation of Damaging Stereotypes*, 7 YALE J.L. & FEMINISM 341 (1995); Rosky, *Like Father, Like Son*, *supra* note 13, at 257.

biases that skew custody along gendered lines.<sup>15</sup> But there has been little focus on the intersectional impact of both gender *and* sexual orientation bias on these parents.<sup>16</sup> And the danger of single-axis analysis is well known: it can obscure real insight and marginalize real experience.<sup>17</sup>

This project addresses holes in the existing scholarship by examining the impact of the child's gender on the adjudication of custody disputes when one of the parents is gay. I ask, how do judicial conceptions of "the daughter" or "the son" impact the judicial treatment of gay parents who seek their custody? To answer this question, I conduct three analyses of all published decisions through 2017 that allocate custody between a gay parent and a heterosexual parent ( $n = 128$ ; 1951-2017). The first analysis quantifies the historic impact of sexual orientation bias on custody allocation. The second examines the impact of the child's gender on these outcomes. And the third examines the impact of the child's gender on judicial rationales advanced against the parental fitness of gay parents.

I find that courts are nearly twice as likely to deny custody to gay parents when the opposing parent is heterosexual.<sup>18</sup> In addition, the gender of the child at issue matters greatly. Courts have been significantly more reluctant to award daughters to gay parents than sons, with a 74% denial rate when daughters are at issue compared to a 49% denial rate for sons.<sup>19</sup> In addition, certain judicial concerns regarding gay parents spike when daughters are at issue. When the custody dispute is about a daughter, courts have been more concerned with the alleged harms of immoral exposure, damage to societal morality, and the illegality of same-sex marriage and same-sex sex (prior to *Obergefell v. Hodges* and *Lawrence v. Texas*, respectively).<sup>20</sup>

- 
15. These impacts range from legal rules that hinge on parental gender (paternal preference, the tender years doctrine, etc.) to extralegal biases that skew custody along gendered lines, such as the belief that the mother is inherently more nurturing, and the father is the natural breadwinner. See Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235 (1982); Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court Comment*, 25 FLA. ST. U. L. REV. 891 (1998); Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168 (1984); Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721 (2012); Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule,"* 41 U. BALT. L. REV. 83 (2011); Julie E. Artis, *Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine*, 38 LAW & SOC'Y REV. 769 (2004).
  16. Clifford Rosky's work is a notable exception, though he also notes that the area needs more analysis: "In the legal academy's responses to stereotypes about gay and lesbian parents, scholars have been blind to the influence of gender." Rosky, *Like Father, Like Son*, *supra* note 13, at 258.
  17. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242-45 (1991); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL F. 139, 139-40 (1989); Rosky, *Like Father, Like Son*, *supra* note 13, at 260-62.
  18. In the published record, when gay parents have contested custody against a heterosexual parent, their custody requests are denied 64% of the time. See *infra*, Part II.
  19. This is a statistically significant difference ( $p > |z| = 0.014^{**}$ ).
  20. See *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003).



Based on these data and an analysis of the case law, this Article argues that a judicial impulse to police the moral development of young women, especially as it relates to the development of heterosexual norms, has created a unique burden for gay parents seeking custody. It has likewise prompted courts to stress the outside control of sexuality and intimacy—both the strictures of traditional morality and the legal prohibitions against same-sex intimacy—to a greater degree when daughters are at issue.

Part I will frame this project within the relevant literature. Part II will describe the methodology employed and report the results of two studies. The first will quantify the historic impact of sexual orientation bias on custody outcomes and then show how those results differ based on the gender of the child at issue. The second will catalogue and quantify the rationales advanced by courts against gay parental fitness and then determine the arguments that predominate when daughters are at issue as opposed to sons. Finally, Part III will look to case law and relevant feminist scholarship to both contextualize and explain the results.

## I. AN EXPLORATION OF THE RELEVANT LITERATURE

### A. Relevant Ambiguities Regarding Gender, Orientation, and Identity

Before this Article can begin in earnest, it should be noted that it relies on suspect terms and classifications. It analyzes custody cases that feature “gay” fathers, “lesbian” mothers, and “homosexual” parents.<sup>21</sup> But it is not altogether clear what courts mean when they label a parent “gay,” “lesbian,” or “homosexual.” Must these parents engage in same-sex sex? Must they *only* engage in same-sex sex? Must they engage in same-sex sex more than once? Is same-sex sexual attraction sufficient? Is non-traditional gender expression sufficient? Does a parent’s self-identification matter?

While modern scholars tend to treat biological sex, sexual orientation, and gender identity as distinct concepts, U.S. courts have by and large ignored this separation. Instead, they tend to collapse all those who are “non-cis” or “non-straight” into the category of “homosexual.”<sup>22</sup> Consider the following persons who have been labeled or treated as “homosexuals” by American courts:<sup>23</sup>

- 
21. This Article uses the term “homosexual” at times because it is a word employed by the courts and there is, unfortunately, no accurate substitute when talking about judicial rhetoric. I acknowledge, however, that the word has a clinical history and was often used to argue that persons expressing a non-heterosexual orientation are somehow diseased or psychologically/emotionally disordered—notions discredited by the American Psychological Association and the American Psychiatric Association in the 1970s. See *GLAAD Media Reference Guide - Terms to Avoid*, GLAAD (May 15, 2020, 10:00 AM), <https://www.glaad.org/reference/offensive> [<https://perma.cc/9MVD-T47Q>].
  22. Courts are not alone in this regard. Blurring orientation, gender, and identity is an old habit across many disciplines. See generally Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of Sex, Gender, and Sexual Orientation in Euro-American Law and Society*, 83 CALIF. L. REV. 3 (1995).
  23. Credit should be given to Rhonda Rivera for uncovering the first five examples listed here.

- A father in a heterosexual marriage who experimented with same-sex sex in his late teens;<sup>24</sup>
- A man who claimed to be “homosexual” but never admitted to any same-sex sexual activity;<sup>25</sup>
- A woman who dressed in “mannish attire;”<sup>26</sup>
- Men and women who displayed “homosexual propensities;”<sup>27</sup>
- A man with one conviction for soliciting same-sex sex;<sup>28</sup>
- A man who denied same-sex attraction but once sent a valentine to his male friend;<sup>29</sup>
- A mother who denied she was a lesbian but admitted to a single sexual encounter with her female friend;<sup>30</sup> and
- A woman who denied same-sex attraction and same-sex sexual activity but shared a bedroom with another woman.<sup>31</sup>

United States courts have also demonstrated difficulty understanding any of these categories (biological sex, sexual orientation, and gender identity) as continuums, despite growing acceptance that all three express as a spectrum.<sup>32</sup> Instead, courts collapse all three into a single binary: homosexual or

---

Her 1979 article, *Our Straight-Laced Judges*, also provides an excellent, though early, discussion of the ambiguities discussed above. Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1978). The analysis in these several paragraphs greatly reflects her insight.

24. *Dew v. Halaby*, 317 F.2d 582 (D.C. Cir. 1963). In this case an air traffic controller employed by the Air Force was dismissed (partially) for homosexual acts that occurred in his teens. Mr. Dew was thus treated as a homosexual employee, but there is some dispute as to whether the court labeled him as such. The dissent noted that the Air Force’s own psychological exam determined that Mr. Dew did *not* manifest a “homosexual personality disorder” at the time of his discharge, indicating that the dissent, at least, did not view Mr. Dew as a homosexual at the time of trial. It is unclear if the majority shared the dissent’s assessment. *Id.* at 583.
25. *Gaylord v. Tacoma Sch. Dist.*, 535 P.2d 804, 805 (Wash. 1975).
26. *Nickola v. Munro*, 328 P.2d 271 (Cal. Dist. Ct. App. 1958). There is some ambiguity here; it is possible that the court meant to label the woman wearing “mannish attire” as a “sexual deviate” rather than a “homosexual.” *Id.* at 273. This ambiguity is typical for the early post-war period as the popular understanding of “homosexual” had only recently been separated from (alleged) “sexual deviants” and (alleged) “perverts” of all varieties. See Martin Bauml Duberman, *Reclaiming the Gay Past*, 16 REVS. AM. HIST. 515 (1988); MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* (2011).
27. *Kerma Rest. Corp. v. State Liquor Auth.*, 278 N.Y.S.2d 951, 952 (N.Y. App. Div. 1967). See also *Nickola v. Munro*, 328 P.2d 271 452 at 273.
28. *United States v. Flores-Rodriquez*, 237 F.2d 405, 412 (2d Cir. 1956).
29. *Pennington v. Pennington*, 596 N.E.2d 305, 306 (Ind. Ct. App. 1992). The man alleged that he sent the valentine in jest. *Id.*
30. *T.C.H. v. K.M.H.*, 784 S.W.2d 281, 283 (Mo. Ct. App. 1989).
31. *Boucher v. Boucher*, No. L-89-646, 1990 WL 751138, \*2 (Va. Cir. Ct. Apr. 30, 1990).
32. See Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 3 DUKE MINIER AWARDS: BEST SEXUAL ORIENTATION L. REV. 1 (2005); Rosky, *Like Father, Like Son*, *supra* note 13; Rivera, *supra* note 23. The continuous nature of sexual orientation has been professionally accepted since at least the Kinsey Report (1948), which measured sexual orientation on a six-point scale ranging from “exclusively heterosexual” (0) to “exclusively homosexual” (6). ALFRED C. KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 636–59 (1948).

heterosexual.<sup>33</sup>

In short, U.S. courts appear to have adopted a simplistic “one-drop” logic in custody matters of this kind. Exclusive heterosexuality serves as the default norm, but any instance of same-sex intimacy, attraction, or non-heterosexual identification places one into the category of “homosexual.” Vagaries, distinctions, and spectrums are ignored.<sup>34</sup>

This Article examines all custody cases featuring one parent labeled by a court as “homosexual,” “gay,” or “lesbian.” It also considers cases that avoid these labels altogether but consider same-sex attraction or same-sex sex while evaluating one of the parents. As noted above, these labels may misrepresent reality, but the terms have traction for this analysis. Courts proceed as if they are accurate, and this is an analysis of judicial tendencies.

### B. Gender Bias, Orientation Bias, and the Adjudication of Custody

Increasingly, scholars recognize that an analysis of human relations should avoid the “single-axis” approach when possible. An analysis of the Black woman’s experience is incomplete if it focuses only on racism or sexism.<sup>35</sup> Similarly, an analysis of motherhood is less sound if it fails to take into account the unique experiences of Black<sup>36</sup> or Hispanic women.<sup>37</sup> While no scholar can probe the infinite layers of identity and bias behind every issue, some issues demand an intersectional approach more than others. At a minimum, that set of issues includes human interactions that sit at the intersection of multiple “regimes of bias”—well-known biases that have been shown to greatly impact societal outcomes, including biases related to gender, race, ethnicity, and, of course, sexual orientation.

Gay custody litigants sit at the intersection of two well-studied regimes of

- 
33. This “forced binary” is perhaps best demonstrated by the well-studied case, *Rowland v. Mad River Local School District*, wherein the plaintiff (Ms. Rowland) repeatedly defined herself as a bisexual only to be repeatedly defined as a “homosexual” by both the trial and appellate courts. *Rowland v. Mad River Local School District*, 730 F.2d 444, 447 (6th Cir. 1984). But *Rowland* is by no means the only example. The data for this study contains nine examples of similar bisexual erasure; see *Commonwealth ex rel. Bachman v. Bradley*, 91 A.2d 379 (Pa. Super. Ct. 1952); *In re Marriage of Teepe*, 271 N.W.2d 740 (Iowa 1978); *Maradie v. Maradie*, 680 So. 2d 538 (Fla. Dist. Ct. App. 1996); *Conkel v. Conkel*, 509 N.E.2d 983 (Ohio Ct. App. 1987); *S.B. v. L.W.*, 793 So. 2d 656 (Miss. Ct. App. 2001); *In re Marriage of Cabalquinto*, 669 P.2d 886 (Wash. 1983); *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865 (Mo. Ct. App. 1982); *Large v. Large*, No. 93AP-735, 1993 WL 498127 (Ohio Ct. App. Dec. 2, 1993); *In re Marriage of Dorworth*, 33 P.3d 1260 (Colo. App. 2001).
34. In many ways this can also be seen as a rough analogue to the “heterosexual metanarrative” noted by Fineman, wherein the law appears to understand the family in only cis-gendered, heterosexual terms. See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 145–50 (1995).
35. See Crenshaw, *Mapping*, *supra* note 17.
36. See MARY ANN MASON, *FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* (1996); Julia McQuillan, Arthur L. Greil, Karina M. Shreffler & Veronica Tichenor, *The Importance of Motherhood Among Women in the Contemporary United States*, 22 GENDER & SOC’Y 477 (2008).
37. See McQuillan, *supra* note 36.

bias: gender and sexual orientation. When these parents fight for custody of their children, they encounter not only sexual orientation bias, but also the interaction of that bias with biases related to their gender, the gender of the children, and, on occasion, the gender of the judge overseeing the case. Previous analyses of gay parental custody adjudications have too often focused on one of these axes and ignored the others.<sup>38</sup> They have focused on the burdens facing gay fathers or mothers individually,<sup>39</sup> or they have studied their burdens as a single unit.<sup>40</sup> Very few have considered the implications of the child's or judge's gender.

### 1. The Impact of Anti-Gay Bias on Custody Adjudications

Unlike other traditional bias regimes (e.g., racism or sexism), anti-gay bias was not an identifiable variable in the published custody record until recently. The first published custody matter discussing a gay parent (known to this author) dates back to only 1951.<sup>41</sup> And published custody cases featuring a gay parent were relatively rare until the early 1980s.<sup>42</sup>

Initially, anti-gay bias was baked into the rules themselves. Prior to the 1970s, most jurisdictions allowed an inference of parental unfitness based solely on a parent's non-heterosexual orientation.<sup>43</sup> Known as the *per se* rule, courts were allowed to assume, "*per se*," that a gay parent was less parentally fit than an opposing heterosexual parent, *ceteris paribus*.<sup>44</sup>

- 
38. Though there have been notable exceptions. Clifford Rosky's work on the incidence of homophobic stereotypes during the custody process stands out as an analysis that aims to deal with the intersectional dimensions of this issue. See Rosky, *Like Father, Like Son*, *supra* note 13. See also Kristina Watkins, *Defining Legal Parenthood: The Intersection of Gender and Sexual Identity in U.S. Child Custody Decisions, 2003–2009*, OPEN ACCESS DISSERTATIONS 496 (2011) (Ph.D. dissertation, University of Massachusetts, Amherst), [https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1493&context=open\\_access\\_dissertations](https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1493&context=open_access_dissertations) [https://perma.cc/PL6V-XFVY].
39. See Susan E. Dalton & Denise D. Bielby, "*THAT'S OUR KIND OF CONSTELLATION*": *Lesbian Mothers Negotiate Institutionalized Understandings of Gender within the Family*, 14 GENDER & SOC'Y 36 (2000).
40. See Kimberly D. Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36 LAW & SOC'Y REV. 285 (2002); KIMBERLY D. RICHMAN, *COURTING CHANGE: QUEER PARENTS, JUDGES, AND THE TRANSFORMATION OF AMERICAN FAMILY LAW* 88 (2010); Catherine Connolly, *An Analysis of Judicial Opinions in Same-Sex Visitation and Adoption Cases*, 14 BEHAV. SCI. & L. 187 (1996); Catherine Connolly, *The Description of Gay and Lesbian Families in Second-Parent Adoption Cases*, 16 BEHAV. SCI. & L. 225 (1998); Susan E. Dalton, *We Are Family: Understanding the Structural Barriers to the Legal Formation of Lesbian and Gay Families in California* (June 18, 1999) (unpublished dissertation, University of California, Santa Barbara).
41. *Luley v. Luley*, 48 N.W.2d 328 (Minn. 1951). Gay parents surely existed prior to the case, but *Luley* is the first published custody case to openly discuss a parent's homosexual orientation. *Id.*
42. Only twenty-one pre-1980 decisions featuring a gay parent are known to the author.
43. Shapiro, *supra* note 13, at 637–39.
44. There is some dispute on the precise parameters of this rule or inference. Some have implied that the *per se* rule mandates, as a matter of law, a finding that gay parents are less parentally fit than heterosexual parents. See Shapiro, *supra* note 13, at 633. Others have implied that the *per se* rule merely creates a presumption that gay parents are less fit, *ceteris paribus*, than heterosexual parents. See WILLIAM N. ESKRIDGE, JR., *SEXUALITY, GENDER AND THE LAW*

The nexus test replaced the per se rule in the 1970s, instructing courts to *weigh*—rather than assume—the impact of all alleged immorality (not just non-heterosexuality) on the evaluation of parental fitness.<sup>45</sup> The nexus test afforded gay parents some protection in theory because it required a demonstrated nexus between a parent’s sexuality and harm to the child before their sexuality could be deemed relevant to the evaluation of their parental fitness.<sup>46</sup> While this appeared to be progress, in practice, courts were still free to find that sexual orientation rendered gay parents less fit than their heterosexual counterparts. They now simply had to justify their conclusions rather than assert them.

Even after the per se rule fell out of use, most scholars agree that gay parents continued to receive custody less often and see their visitation restricted more frequently than comparably situated heterosexual parents.<sup>47</sup> And it is not hard to see why. In addition to the numerous accounts from lawyers, activists, and academics attesting to the bias they experienced, the opinions themselves openly revealed bias. Consider this quotation from *Chicoine v. Chicoine*:

There appears to be a transitory phenomenon on the American scene that homosexuality is okay. Not so. The Bible decries it. Even the pagan “Egyptian Book of the Dead” bespoke against it. Kings could not become heavenly beings if they had lain with men. In other words, even the pagans, centuries ago, before the birth of Jesus Christ, looked upon it as total defilement.<sup>48</sup>

Or this exposition from *Ex parte H.H.* (2002):

Homosexual behavior is a ground for divorce, an act of sexual misconduct punishable as a crime in Alabama, a crime against nature, an inherent evil, and an act so heinous that it defies one’s ability to describe it. That is enough under the law to allow a court to consider such activity harmful to a child. To declare that homosexuality is harmful is not to make new law but to reaffirm the old; to

---

787–88 (3d ed. 2011). The reality is slightly more complicated. In truth, nearly all courts during this period were *allowed* to presume the parental unfitness of gay parents, but very few of them were actually *required* to do so. In short, the presumption that a gay parent was less fit to obtain custody was not so much a rule as it was a permissible inference. Shapiro, *supra* note 13, at 639.

45. The genesis of the nexus test is widely attributed to *Whaley v. Whaley*, a 1978 Ohio decision that refused to assume that a mother’s adulterous affair impacted her parental fitness. *Whaley v. Whaley*, 399 N.E.2d 1270, 1273 (Ohio Ct. App. 1978). But other courts arguably applied it earlier. The *Whaley* court itself noted that an earlier case, *Beamer v. Beamer*, 244 N.E.2d 775 (Ohio Ct. App. 1969), presaged its holding. *Whaley*, 299 N.E.2d at 1273. The nexus test was first used to consider the relevance of a parent’s homosexual behavior in the 1978 case *Schuster v. Schuster*, 585 P.2d 130 (Wash. 1978).

46. Shapiro, *supra* note 13, at 635–36.

47. Rivera, *supra* note 18, at 904 (“justice for the homosexual parent does not come cheaply or often”); Shapiro, *supra* note 13, at 625 (“individual lesbians and gay men routinely lose custody and instead receive restricted visitation simply because they are lesbian or gay”); Richman, *Lovers*, *supra* note 40; J.L.P. v. D.J.P., 643 S.W.2d 865, 871 (Mo. Ct. App. 1982) (“In the majority of cases involving the award of custody where one parent is a homosexual, the courts have awarded custody to the non-homosexual parent.”).

48. *Chicoine v. Chicoine*, 479 N.W.2d 891, 897 (S.D. 1992) (internal citations omitted).

say that it is not harmful is to experiment with people's lives, particularly the lives of children.<sup>49</sup>

The case law is replete with less verbose indications of anti-gay bias: descriptions of same-sex sex as “despicable,”<sup>50</sup> “repugnant,”<sup>51</sup> or “detestable;”<sup>52</sup> a recurrent need to place quotation marks around a parent's same-sex “life partner;”<sup>53</sup> and the obvious slight of describing an individual as an “admitted”<sup>54</sup> or “avowed”<sup>55</sup> gay. The presence of anti-gay sentiment in the published record has been explicit, not subtle.

## 2. The Impact of Gender Bias on Custody Adjudications

Gender biases have skewed custody adjudications in a number of complex ways. Mothers and fathers face different sets of biases<sup>56</sup> and cases featuring sons often elicit different biases than those featuring daughters.<sup>57</sup> The gender of the judge may also color the process.<sup>58</sup> Matters become even more complicated when these biases interact.<sup>59</sup>

Most scholarship discussing the impact of gender on custody focuses solely on the gender of the parent. Very little scholarship explores the impact of the child's or the judge's gender on the custody process, and even less considers the interaction of these biases. This is especially true of scholarship that examines custody issues faced by gay parents, which is limited and largely focused on the gender of the parents, if it considers the impact of gender at all. That said, the existing literature does provide some insight into how gender bias impacts the adjudication of gay parental custody.

## 3. Bias Related to the Gender of the Parent

Gendered views of the mother and father have always impacted custody outcomes. In fact, for much of U.S. legal history, gendered biases were included in the rules themselves. During the pre-industrial era, courts explicitly preferred to give fathers custody, reflecting an early common law tradition that viewed

---

49. Ex Parte H.H., 830 So. 2d 21, 37 (Ala. 2002) (internal citations omitted).

50. Lewis v. Lewis, C.A. No. 626, 1976 Ohio App. LEXIS 6024, at \*5 (Ohio Ct. App. July 1, 1976).

51. Weigand v. Houghton, 730 So. 2d 581, 590 (Miss. 1999).

52. *Id.*

53. *Id.*

54. Black v. Black, No. 7, 1988 WL 22823, at \*2 (Tenn. Ct. App. Mar. 10, 1988).

55. DeLong v. DeLong, No. WD 52726, 1998 WL 15536, at \*8 (Mo. Ct. App. Jan. 20, 1998).

56. See Dara E. Purvis, *The Sexual Orientation of Fatherhood*, 2013 MICH. ST. L. REV. 983 (2013); Amy D. Ronner, *Women Who Dance on the Professional Track: Custody and the Red Shoes Recent Development*, 23 HARV. WOMEN'S L.J. 173 (2000).

57. Rosky, *Like Father, Like Son*, *supra* note 13, at 294–97; E. Kosofsky Sedgwick, *How to Bring Your Kids Up Gay: The War on Effeminate Boys*, in FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 69 (Michael Warner, ed. 1993).

58. Rosky, *Like Father, Like Son*, *supra* note 13, at 311–13; Artis, *supra* note 15.

59. See generally Rosky, *Like Father, Like Son*, *supra* note 13.

custody as a paternal right.<sup>60</sup> As the industrial era dawned, courts gradually shifted to the tender years doctrine, which favored the mother when the child was of “tender years.”<sup>61</sup> In the mid-twentieth century, many courts adopted a preference for the “primary caretaker,” a rule that did not explicitly favor mothers but did favor the parent who filled the traditional role of the mother—that of caretaker.<sup>62</sup>

All of these rules reflect gendered assumptions and biases. Paternal preference reflects a mixture of patriarchal bias and the economic reality of the time. Children were a valuable source of labor in the agrarian era and fathers, accordingly, received priority to keep them.<sup>63</sup> The tender years doctrine reflected the increasingly widespread assumption that mothers were inherently more nurturing than fathers, and thus better suited for caregiving.<sup>64</sup> The primary caretaker doctrine, while gender neutral on its face, cemented a historically gendered division of parental labor: mothers were caretakers while fathers were breadwinners.<sup>65</sup>

Even after the introduction of facially gender-neutral doctrines in the early 1970s, essentialized views of the mother and the father persisted.<sup>66</sup> Scholars have noted persistent societal assumptions that mothers are more nurturing than fathers,<sup>67</sup> that mothers are more family focused,<sup>68</sup> and that mothers place a lower emphasis on sexual satisfaction.<sup>69</sup> Fathers, on the other hand, are still viewed as

60. Warshak, *supra* note 15; Polikoff, *supra* note 15.

61. Polikoff, *supra* note 15. *See also* McNeely, *supra* note 15; Neely, *supra* note 15; Widiss, *supra* note 15; Warshak, *supra* note 15; Artis, *supra* note 15.

62. Neely, *supra* note 15; Dan O’Hanlon & Margaret Workman, *Beyond the Best Interest of the Child: The Primary Caretaker Doctrine in West Virginia*, 92 W. VA. L. REV. 355 (1989); Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291 (1992).

63. *See* John D’Emilio, *Capitalism and Gay Identity*, in THE GENDER/SEXUALITY READER: CULTURE, HISTORY, POLITICAL ECONOMY 169 (Roger N. Lancaster & Micaela di Leonardo, eds., 1997); Polikoff, *supra* note 15, at 235.

64. *See* Polikoff, *supra* note 15, at 235; Samantha Williams & Lior Haas, *Child Custody, Visitation & Termination of Parental Rights*, 15 GEO. J. GENDER & L. 365, 368 (2014); Artis, *supra* note 15, at 770.

65. *See generally* Neely, *supra* note 15; O’Hanlon, *supra* note 62; *see also* Williams & Haas, *supra* note 64, at 369.

66. Such gender-neutral rules include the best interest of the child standard and joint custody presumption. *See generally* Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interest Standard*, 77 LAW & CONTEMP. PROBS. 69 (2014).

67. *See* Mary Blair-Loy, *Cultural Constructions of Family Schemas: The Case of Women Finance Executives*, 15 GENDER & SOC’Y 687, 688 (2001); Dawn Marie Dow, *Integrated Motherhood: Beyond Hegemonic Ideologies of Motherhood*, 78 J. MARRIAGE & F. 180 (2016); Nancy J. Chodorow & Susan Contratto, *The Fantasy of the Perfect Mother*, in RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS (Barrie Thorne & Marilyn Yalom, eds. 1992); McNeely, *supra* note 15.

68. *See generally* Dow, *supra* note 67; *see also* Kathleen Gerson, *HARD CHOICES: HOW WOMEN DECIDE ABOUT WORK, CAREER, AND MOTHERHOOD* (1986); Ronner, *supra* note 56, at 184; Chodorow & Contratto, *supra* note 67; Watkins, *supra* note 38.

69. *See generally* Suzanne A. Kim, *The Neutered Parent*, 24 YALE J.L. & FEMINISM 1 (2012); *see also* Julie Marie Thompson, *MOMMY QUEEREST: CONTEMPORARY RHETORICS OF LESBIAN MATERNAL IDENTITY* (2002).

protectors and providers.<sup>70</sup> Some scholars have even argued that judges apply these gendered assumptions consciously.<sup>71</sup>

Considerable scholarship has been devoted to the impact of these assumptions. While scholars generally agree that gender biases continue to impact custody outcomes, they strongly disagree on the degree of that impact.<sup>72</sup> Some argue that courts continue to strongly prefer giving mothers custody because they assume that mothers are more nurturing than fathers.<sup>73</sup> In support of this view, these scholars point to numerous studies and surveys that conclude that mothers receive custody at higher rates than fathers.<sup>74</sup> But others say that these numbers fail to capture the true dynamic at play.<sup>75</sup> While they do not necessarily disagree that mothers continue to receive custody more often than fathers, they do argue that courts tend to award custody to fathers at higher rates when fathers actually fight for it.<sup>76</sup> They argue that the lower percentage of custody allocations to fathers is merely a reflection of male disinterest in child rearing.<sup>77</sup>

There is far less scholarship dissecting the impact of gender bias on the judicial perception of *gay* custody litigants. Still, from the few studies available, some conclusions can be drawn. For one, evidence suggests that gay fathers are more likely to be perceived as potential child molesters than gay mothers. A 2008 study found that gay fathers were stereotyped as potential child molesters in 22%

---

70. See Artis, *supra* note 15, at 784; Williams & Haas, *supra* note 64, at 369.

71. See Artis, *supra* note 15; see generally Carol R. Lowery, *Child Custody Decisions in Divorce Proceedings: A Survey of Judges*, 12 PROF. PSYCH. 492 (1981); see also Robert D. Felner, Lisa Terre, Stephanie S. Farber, Judith Primavera & T. A. Bishop, *Child Custody: Practices and Perspectives of Legal Professionals*, 14 J. CLINICAL CHILD PSYCH. 27 (1985); Leighton E. Stamps, *Age Differences Among Judges Regarding Maternal Preference in Child Custody Decisions*, 38 COURT REV.: J. AM. JUDGES ASS'N 18, 21 (2002); Jessica Pearson & Maria A. Luchesi Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703, 716 (1982).

72. For an excellent summary of this dispute, see Warshak, *supra* note 15, at 92–93, particularly footnotes 34–35.

73. See, e.g., Artis, *supra* note 15, at 784–85; Lowery, *supra* note 71; Felner, *supra* note 71.

74. See Nancy K. Lemon, *Joint Custody as a Statutory Presumption: California's New Civil Code Sections 4600 and 4600.5*, 11 GOLDEN GATE U. L. REV. 485, 486 (1981); see also Matthew S. Bahr, Stephen J. Bahr, Jerry D. Howe & Meggin Morrill Mann, *Trends in Child Custody Awards: Has the Removal of Maternal Preference Made a Difference*, 28 FAM. L.Q. 247, 255 (1994); Craig Nickerson, *Gender Bias in a Florida Court: Mr. Mom v. the Poster Girl for Working Mothers Comment*, 37 CAL. W. L. REV. 185, 197 (2000); Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1, 61 (1996).

75. Scholars have interpreted some studies to imply that fathers were just as likely to receive custody as mothers in the decades following the demise of the tender years doctrine. See Phyllis Chesler, *Mothers on Trial: The Custodial Vulnerability of Women*, 1 FEMINISM & PSYCH. 409 (1991); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 216–17 (1985).

76. See Polikoff, *supra* note 15; see generally, Lenore J. Weitzman & Ruth B. Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation after Divorce*, 12 U.C.D. L. REV. 471 (1979).

77. See Polikoff, *supra* note 15; see generally, Weitzman & Dixon, *supra* note 76.



of cases, while gay mothers suffered the slur at a rate of 9%.<sup>78</sup> The same study reported that gay fathers were also more likely to be perceived as vectors of disease than gay mothers. The fear of disease transfer was raised in 12% of cases involving gay fathers, but in none of the cases involving gay mothers.<sup>79</sup>

Finally, a handful of scholars have examined the intersection of sexual orientation bias with judicial conceptions of the mother and the father. Kristina Watkins, for example, concluded that if mothers adopted a norm-aligning caretaker role, courts were more prone to forgive their non-traditional sexual orientation.<sup>80</sup> A related study found that courts were particularly punitive towards gay fathers who engaged in caregiving because they viewed these fathers to be doubly transgressive.<sup>81</sup> Those fathers both expressed a nontraditional sexual orientation and practiced a nontraditional division of parental labor.<sup>82</sup>

#### 4. Bias Related to the Gender of the Judge

Research suggests that male and female judges tend to decide cases differently in at least a handful of legal domains. For example, there is evidence that men are about 10% less likely to side with plaintiffs in sex discrimination cases.<sup>83</sup> In addition, there is evidence that men who sit on panels with women are more likely to side with the plaintiffs in sex discrimination cases than men who sit on all-male panels.<sup>84</sup> There is some evidence that women tend to vote more leniently in obscenity and death penalty cases than their male counterparts.<sup>85</sup> But, perhaps counterintuitively, there is also evidence that women are more punitive than men when sentencing everyday criminal defendants.<sup>86</sup>

On the surface, one might assume that a judge's gender would affect the outcome of custody cases as well. Custody decisions allow for wide judicial discretion and call upon deep, likely unconscious, assumptions regarding the ideal mother, the ideal father, and the proper division of parental labor.

Unfortunately, only two studies currently address this question and neither yields satisfying results, due, in part, to the limitations of their methods.<sup>87</sup> The first

78. Rosky, *Like Father, Like Son*, *supra* note 13, at 286. *See also* Watkins, *supra* note 38, at 119–20 (noting the stereotype that gay fathers were more likely to be categorized as potential child molesters).

79. *Id.* at 279.

80. *Id.*

81. *See* Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 27–44 (2005).

82. *Id.*

83. Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 401 (2010).

84. *Id.* at 402–06.

85. *See* Donald R. Songer & Kelley A. Crews-Meyer, *Does Judge Gender Matter? Decision Making in State Supreme Courts*, 81 SOC. SCI. Q. 750, 756–58 (2000); *but see* Donald R. Songer, Sue Davis & Susan Haire, *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POLITICS 425, 432–36 (1994).

86. John Gruhl, Cassia Spohn & Susan Welch, *Women as Policy-Makers: The Case of Trial Judges*, 25 AM. J. POL. SCI. 308, 314–19 (1981).

87. Some studies on judicial decision-making in custody matters focus solely on male judges. *See*

study concluded that female judges favor gender-neutral custody rules while male judges prefer the tender years doctrine.<sup>88</sup> But the study was limited by its small sample size ( $n = 25$ ) and the strong possibility of a confound: the women in the sample were considerably younger than the men.<sup>89</sup> The second study found that male participants were more willing to award custody to a mother accused of child abuse than female participants.<sup>90</sup> But this study was based on an experimental analysis of lay people rather than judges.<sup>91</sup>

Only one analysis has addressed juridical gender difference impacting custody adjudications for gay parents. That analysis found that male judges were more likely than female judges to accept homophobic stereotypes. Specifically, homophobic stereotypes were accepted by the court in 39% of the cases overseen by men, but in only 5% of the cases overseen by women.<sup>92</sup>

### 5. Bias Related to the Gender of the Child

There is little analysis on the impact of the child's gender in custody cases with gay parents. The one empirical study addressing this topic engaged in a very narrow inquiry: how does a child's gender impact the incidence of homophobic stereotypes within custody decisions for gay parents?<sup>93</sup> The study catalogued the incidence of homophobic stereotypes within the published custody record across parental sexual orientation, parental gender, and the gender of the child. It found that the gender of the child impacts the application of two common homophobic stereotypes: the "recruiting" stereotype and the "role modeling" stereotype.<sup>94</sup>

These stereotypes are closely related. The "recruiting" stereotype depicts gay parents as individuals who actively recruit their children away from heterosexuality. The "role modeling" stereotype alleges that gay parents merely influence the sexual orientation of their children by passive example.<sup>95</sup> This study found that both stereotypes are applied more often when sons are at issue and are rare in cases featuring a gay father and a daughter.<sup>96</sup> It argues that this pattern

---

Lowery, *supra* note 71; Felner et al., *supra* note 71. Other studies do not specify the gender composition of their sample. See Pearson, *supra* note 71; Stamps, *supra* note 71; Thomas J. Reidy, Richard M. Silver & Alan Carlson, *Child Custody Decisions: A Survey of Judges*, 23 FAM. L.Q. 75 (1989).

88. Artis, *supra* note 15, at 778, 793.

89. *Id.* The study was conducted via a survey as well as interviews. This is not meant to imply that the study's author oversold her findings; she labeled these findings "exploratory" for the very reasons listed above.

90. See EMILY DENNE, THE INFLUENCE OF DECISION-MAKER GENDER ON CHILD CUSTODY DECISIONS 10–11 (2015).

91. *Id.*

92. Rosky, *Like Father, Like Son*, *supra* note 13, at 56.

93. It should be noted that Rosky's study focused on stereotypes from all parties to the case, the litigants, their experts, the lower courts, and the presiding judge(s). See generally Rosky, *Like Father, Like Son*, *supra* note 13. This study is interested in the judicial view of sons and daughters in these cases, so it only analyzes rationales and arguments set forth by a judge.

94. *Id.* at 298–99.

95. *Id.*

96. *Id.* at 298–310.

evidences a concern for the production of “masculine” young men when courts adjudicate the custody rights of gay parents.<sup>97</sup>

While important, the aforementioned study was narrowly focused. It did not analyze the impact of the child’s gender on the outcomes of the cases. And while concern for the development of masculine men could well be a driving force, concerns related to the development of young women may also be in play. The study also lacked a clear picture of the *judicial view* in these cases because it conflated stereotypes applied by litigants, their experts, and the court. In addition, it combined cases that present very different judicial concerns—cases that allocate custody and those that solely concern visitation restrictions—that may have skewed the results.<sup>98</sup>

## II. STUDIES AND RESULTS

### A. Data and Methods

In this Article, I conduct two studies designed to measure the influence of sexual orientation bias and the child’s gender on custody adjudications featuring one gay parent and one heterosexual parent. The first study quantifies the historic impact of sexual orientation bias on custody outcomes and then quantifies the impact of the child’s gender on those outcomes. The second study examines the impact of the child’s gender on the judicial rationales advanced to discredit gay parental fitness.

#### 1. Study One: Analyzing Custody Outcomes

Study One is based on every published custody case through 2017 featuring a gay parent. This dataset was compiled using Westlaw and LEXIS legal research software. Search queries were run on both sites using the key words “custody,” “visitation,” “divorce[d],” “homosexual[ity],” “gay,” “bisexual,” “bi-sexual,” and “lesbian.” Related studies were also consulted to identify cases that may have eluded the text-based search.<sup>99</sup>

---

97. Rosky, *Like Father, Like Son*, *supra* note 13, at 298-310.

98. The study noted that its findings echoed Eve Sedgwick’s critique of the early psychoanalytic literature concerning the development of homosexuality and gender identity disorders. Rosky, *Like Father, Like Son*, *supra* note 13, at 301–05. Sedgwick argued that this literature demonstrated an outsized concern for the development of masculine young men. Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay*, 29 SOC. TEXT 18, 19–20. She then noted that lesbians were almost entirely absent from these discussions and that early diagnoses of gender identity disorder were easier to obtain if the child was male. *Id.* In the DSM-III, first published in 1980, young boys merely had to assert that they would *prefer* a female anatomy or display a “preoccupation with female stereotypical activities” to earn the diagnosis of gender identity disorder. *Id.* Young girls, on the other hand, had to assert an actual belief that they were anatomically male to earn the same, a much higher bar. *Id.* The study claimed that the judiciary appears to share this imbalanced concern for the development of heteronormative, masculine men. Rosky, *Like Father, Like Son*, *supra* note 13, at 305–06.

99. *See generally*, Rivera, *supra* note 23; Shapiro, *supra* note 13; Rosky, *Like Father, Like Son*, *supra* note 13; Richman, *Lovers*, *supra* note 40.

Because the allocation of custody is at issue here, cases that did not rule on custody were excluded.<sup>100</sup> Cases involving two gay parents were also excluded, since the impact of orientation bias on outcome cannot be isolated when both parents are gay, as were cases involving more than two parents.<sup>101</sup> This set also excluded cases concerning non-parental claimants (grandmothers, other relatives, the state, etc.) as those cases could not be cleanly compared to cases involving two legal parents.<sup>102</sup>

This selection criteria resulted in a population of 128 cases spanning a temporal period from 1952 to 2017. Gay mothers ( $n_{lesbian} = 103$ ) greatly outnumbered gay fathers ( $n_{gay} = 25$ ), but the gender distribution of the children fell nearly even ( $n_{boys} = 71$ ,  $n_{girls} = 69$ ).<sup>103</sup> When cases including both sons and daughters and cases that did not identify the gender of the child were dropped, eighty-eight cases remained, spanning a time period from 1962 to 2017. Gay mothers still outnumbered gay fathers ( $n_{lesbian} = 67$ ,  $n_{gay} = 21$ ) and the gender distribution of the children remained nearly even ( $n_{boys} = 45$ ,  $n_{girls} = 43$ ).

Once assembled, this dataset was loaded into a qualitative data analysis program (Atlas-Ti) for case-specific coding. Qualitative coding was conducted in three rounds, with the second and third rounds serving as a check for errors. Subsequent data analysis was conducted in STATA.

Background Codes recorded the gender of the non-heterosexual parent and the gender of the child(ren) at issue while Outcome Codes recorded the custody allocation. Decisions that increased or affirmed the physical custody rights of the gay parent were coded as grants of custody and decisions that lessened or affirmed the denial of the gay parent's physical custody rights were coded as denials. Trial level decisions that awarded joint custody were coded as joint awards, but none of those decisions were present in this set.<sup>104</sup> In addition, a motion to modify custody that resulted in a custody gain for the gay parent was coded as a custody grant while those that resulted in a custody loss were coded as a custody denial.

These data were then analyzed in STATA. A two-sample t-test for proportions was used to calculate the "gay parent custody denial rate" for cases involving a daughter and cases involving a son. This same test determined if the

---

100. Such exclusions include cases focused solely on visitation, the division of marital property, alimony, maintenance, unrelated legal errors or standing issues, and cases that remanded the issue of custody to a lower court. *See, e.g.*, *Blew v. Verta*, 617 A.2d 31 (Pa. Super. Ct. 1992); *Boswell v. Boswell*, 721 A.2d 662 (Md. 1998); *In re J.S. & C.*, 324 A.2d 90 (N.J. Super. Ct. 1974).

101. While rare, this has happened. *See, e.g.*, *Dawn M. v. Michael M.*, 47 N.Y.S.3d 898 (N.Y. Sup. Ct. 2017).

102. For the purpose of this analysis, "parent" is defined as one with the legal status of parent. Thus "parent" includes not just biological parents but also adoptive parents and parents by other legal means (parenthood by estoppel, de facto parenthood, etc.). It does not, however, include claimants who do not have the legal status of parent but are seeking it (grandmothers, grandfathers, other relatives, the state, etc.).

103. There are, of course, cases with more than one child at issue, and some of those cases have both a son and a daughter. In this dataset there are twenty-six such cases. *See, e.g.*, *Bamburg v. Bamburg*, 386 S.W.3d 31 (Ark. Ct. App. 2011); *D.H. v. J.H.*, 418 N.E.2d 286 (Ind. Ct. App. 1981); *Hall v. Hall*, 134 So. 3d 822 (Miss. Ct. App. 2014).

104. This is not surprising given the very small number of trial level decisions in this set (5%).

difference between the two denial rates was statistically significant. Subsequent analyses tested for the impact of parental gender and time on those data.<sup>105</sup>

## 2. Study Two: Analyzing Judicial Arguments Against Gay Parental Fitness

An analysis of judicial arguments against gay parental fitness is based on the same dataset described above. This comparison also dropped all cases involving two gay parents, cases involving more than two legal parents, and cases involving non-parental claimants, creating a dataset of 128 cases, spanning a temporal period from 1952 to 2017. Gay mothers ( $n_{lesbian} = 103$ ) greatly outnumbered gay fathers ( $n_{gay} = 25$ ), and the gender distribution of the children fell nearly even ( $n_{boys} = 71$ ,  $n_{girls} = 57$ ).

The study coded the cases in three rounds for arguments against gay parental fitness advanced from the bench. Arguments advanced by litigants or others that were not endorsed by the majority, the concurrence, or the dissent were not coded. Tabulation allowed the creation of a ranked list of judicial rationales against gay parental fitness.

To compare the incidence of these arguments across the gender of the child, the study dropped cases concerning both a son and daughter and the argument incidence for each gender was tabulated in STATA. As before, this resulted in a set of eighty-eight cases with gay mothers outnumbering gay fathers ( $n_{lesbian} = 67$ ,  $n_{gay} = 21$ ) and a near even gender distribution of the children ( $n_{boys} = 45$ ,  $n_{girls} = 43$ ).

## 3. Methodological Caveats

There are at least three caveats that apply to the design of these studies. First and foremost is the issue of population inference. While this study technically examines only published custody decisions, its import lies in a larger inference to the treatment of gay custody litigants as a whole. Published custody decisions, however, are not a perfect sample of that population. For one, nearly all appellate decisions are published but most trial court decisions are not. Thus, there are many trial-level custody matters with gay parents that do not appear in the published record. In addition, litigants who appeal their trial court rulings are likely different than those who do not. It is possible, for example, that those who appeal possess greater than average wealth (litigation is expensive) or greater than average familiarity with the workings of the judicial system. In short, there are good reasons to believe that appellate decisions are not a perfect sample of custody cases in general.

Moreover, it is likely that some courts purposely avoided mentioning parental sexual orientation in their opinions when faced with a gay parent. Individuals can face serious repercussions for being outed, a reality that was even

---

105. This process utilized the same process described above, though it also looked at the results for gay fathers and mothers separately.

graver during the middle of the twentieth century. It stands to reason that some courts would keep such details private, especially if they thought their inclusion unnecessary.<sup>106</sup>

Second, this study does not distinguish between a motion to modify an existing order and an initial appeal. Parents typically face a different legal bar when attempting to modify an existing order than they do in the appeal of that order. In an appeal, courts will overturn a decision if the lower court made a legal error or abused its discretion. In a motion to modify, courts will change the terms of an order without evidence of a legal error or an abuse of discretion, but they generally want evidence of a substantial change in circumstances before revisiting the matter. Both, therefore, have a *status quo* bias. But that bias differs, making a comparison across the two slightly inaccurate.

And third, there is a small loss of fidelity attributable to the inclusion of trial court decisions. Trial court decisions are, of course, *de novo* decisions. The trial court will make decisions of both law and fact and issue an opinion. In an appeal, as stated above, courts will overturn a decision only if the lower court made a legal error or abused its discretion. This is a high bar; thus, appellate decisions have a strong *status quo* bias that trial court decisions do not. Comparisons between the two are therefore slightly off center. This bias is mitigated in this study by the small number of trial court decisions in the dataset: just 5% of a total 128 cases.

## B. Results

### 1. Custody Outcomes and the Gender of the Child

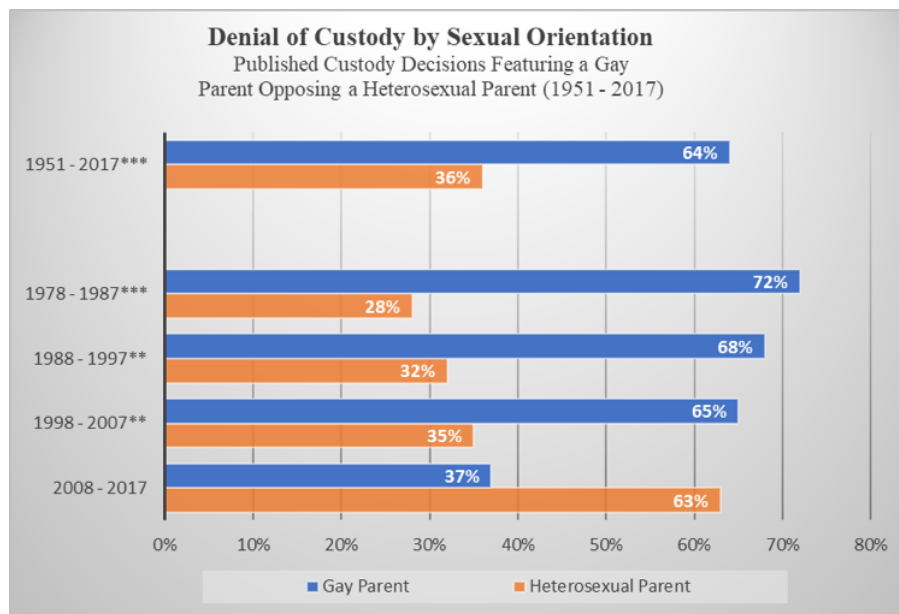
As expected, custody outcomes indicate that gay parents have faced severe bias over the last several decades. From 1951 to 2017, gay parents lost custody contests to heterosexual parents at a rate of 64%, a difference in outcomes that is significant well beyond conventional measures ( $p > |z| = 0.000***$ ).<sup>107</sup>

---

106. The late professor Herma Hill Kay noted the reluctance of California courts to publish such information in the mid-seventies. See HERMA HILL KAY, TEXT, CASES, AND MATERIALS ON SEX-BASED DISCRIMINATION (2d ed. 1981). Benna Armanno reported a similar reluctance when investigating the topic in the early 1970s. Benna F. Armanno, *The Lesbian Mother: Her Right to Child Custody*, 4 GOLDEN GATE U. L. REV. 1 (1973) (“[T]he issue is rarely mentioned above the level of a whisper, and the few cases that reach the appellate level are almost always ordered excluded from official and unofficial reports.”).

107. This statistic was generated by conducting a two-sample t-test for proportions. Thus, the null hypothesis is that gay male or lesbian parents and heterosexual parents faced the same denial rate (50% each).

As one might expect, bias against gay parents lessened over time. But gay custody litigants did not obtain relative parity to their heterosexual opponents—at least in terms of custody allocation within the published record—until the decade following 2008. In fact, the data suggest that they obtained more than simple parity in the decade following 2008. They appear to have obtained an advantage over their heterosexual opponents. But the post-2008 data should be viewed with some skepticism. It is based on a small sample ( $n = 19$ ) and the differential is not statistically significant. Custody allocation is also not the sum total of possible bias in these cases, so one should not conclude that anti-gay bias is no longer a concern in these matters. These data are discussed in greater detail in the Discussion Section below.<sup>108</sup>

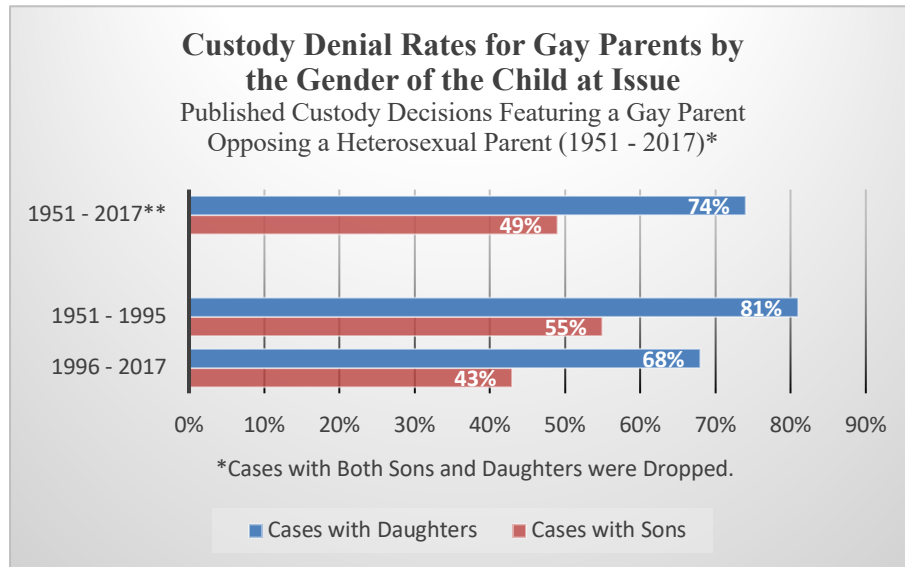


Study One also demonstrates that the gender of the child mattered greatly in these contests. It appears courts have been far less willing to place daughters into gay parental custody than sons. When daughters were at issue, gay parents found themselves on the losing end of custody contests 74% of the time while they failed to secure the custody of their sons at a rate of 49%. This difference in denial rates is statistically significant beyond conventional measures ( $p > |z| = 0.014^{**}$ ).

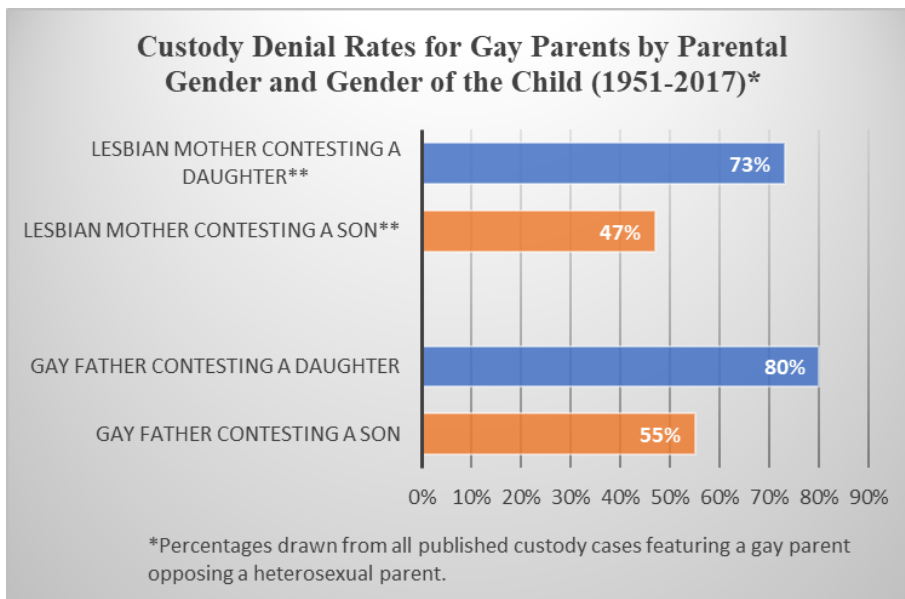
In addition, this disparity does not appear to be the byproduct of older social norms regarding gender. Courts were substantially less likely to place daughters than sons into gay parental custody both before and after 1995. In fact, the data indicate that the reluctance to award daughters to gay parents, relative to sons, has

108. The differential denial rates for the first four periods depicted in Figure One are statistically significant (1951 – 2017,  $p > |z| = 0.000^{***}$ ,  $n = 128$ ; 1978 – 1987,  $p > |z| = 0.001^{***}$ ,  $n = 29$ ; 1988–1997,  $p > |z| = 0.004^{**}$ ,  $n = 34$ ; 1998 – 2007,  $p > |z| = 0.007^{**}$ ,  $n = 40$ ). There is evidence that anti-homosexual bias has either lessened or disappeared in the ten years following 2007 (2008–2017), but the results are not statistically significant ( $p > |z| = 0.105$ ,  $n = 19$ ) so a firm conclusion cannot be drawn.

remained remarkably constant.<sup>109</sup>



The second potential confound is parental gender. This dataset contains substantially more gay mothers than fathers ( $n_{lesbian} = 67$ ,  $n_{gay} = 21$ ), and it may well be that courts have simply been reluctant to place daughters with gay mothers. However, when this analysis is run again across the gender of the parent, we find that *both* gay mothers and gay fathers were denied the custody of daughters at a



109. The differential denial rates for the periods depicted in Figure Two are (1951–2017,  $p > |z| = 0.014^{**}$ ,  $n = 88$ ; 1951–1995,  $p > |z| = 0.065$ ,  $n = 43$ ; 1996–2017,  $p > |z| = 0.095$ ,  $n = 45$ ).



substantially higher rate than sons. While the data below concerning the fathers must be viewed with some skepticism (the *n* is small and the results are not significant by conventional measures), they do indicate a likely bias against awarding daughters to both gay fathers and gay mothers.

## 2. Categorizing Judicial Rationales Against Gay Parental Fitness

Study Two categorized judicial arguments against gay parental fitness. These arguments are varied, but this study determined that they can be meaningfully grouped into nine recurring arguments: fear of immoral exposure, concern for societal morality, fear of some unidentified future harm, illegality, potential for stigma, fear of orientation modeling, fear of gender modeling, fear of sexual abuse, and fear of disease transfer. These arguments are described below in order of their prevalence within the case set analyzed for this Article.<sup>110</sup> The discussion of Study Two will then examine how the prevalence of these arguments differs according to the gender of the child at issue, thus granting insight into the judicial view of sons and daughters in gay custody cases.

### a. Immoral Exposure

The most common “harm” that American courts consistently link to gay parental custody is the claim that their presence or behavior will endanger the moral development of their children. This argument can be maddeningly vague. What does “proper” moral development look like and how do non-heterosexual parents threaten it? What evidence is there that the children of gay parents are less morally fit than the children of heterosexual parents? Rarely, if ever, are these questions addressed.<sup>111</sup>

The most common form of this argument is the most basic: gay parents are themselves immoral and thus will impart bad morals to their children. This argument contains the base assertion that non-heterosexuality is immoral and the subsequent assertion that exposure to this immorality will damage the child’s moral compass.<sup>112</sup> However, courts making this argument rarely introduce evidence that the parent’s behavior has harmed their child or explain how the parent’s sexual orientation will harm their child’s moral development in the future.

This argument does, however, have a more sophisticated—though equally

---

110. This Article analyzes all published custody cases that feature a gay parent opposing a heterosexual parent (*n* = 212; 1951–2017). See *infra*, Data and Methods, for a more detailed description of this set.

111. See, e.g., *Commonwealth ex rel. Bachman v. Bradley*, 91 A.2d 379, 382 (Pa. Super. Ct. 1952) (justifying denying custody to a gay father, in part because his lifestyle was deemed an “undesirable influence[.]” but not defining the imagined moral damage); *G.A. v. D.A.*, 745 S.W.2d 726, 728 (Mo. Ct. App. 1987) (denying custody to a lesbian mother in part because her sexual conduct “may have a [detrimental effect] on a child’s moral development” (emphasis added)).

112. *Hertzler v. Hertzler*, 908 P.2d 946, 953 (Wyo. 1995) (Golden, C.J., dissenting) (“[Exposing the child to his mother’s open homosexuality] is likely to negatively affect the development of the children’s moral values”) (quoting the district court).

troublesome—variant concerning the illegality, prior to *Obergefell*, of same-sex marriage.<sup>113</sup> For some gay parents, the post-divorce presence of a newly found same-sex partner frequently presented courts with an easy out. Courts could rely on their jurisdiction’s cohabitation rule to justify restricting the custody rights of the gay parent. A cohabitation rule, loosely stated, allows a court to deny or restrict custody to any parent cohabitating with a sexual partner outside of marriage. The catch being, of course, that gay parents lacked the ability to sanctify their relationship through marriage while their heterosexual counterparts did not.<sup>114</sup>

This argument was occasionally taken to absurd lengths. In *Henry v. Henry*, a South Carolina trial court denied custody to a lesbian mother because she lived with her same-sex partner, despite the fact that their relationship was committed, long-term, and they owned a house together.<sup>115</sup> The court justified this order by noting that the father was also barred from cohabitating with an unmarried partner, but seemingly ignored the fact that the heterosexual father had the opportunity to marry his partners while the lesbian mother did not.<sup>116</sup> On appeal, the mother correctly argued that the court made her custody rights contingent upon one member of the couple moving out of their own house, a building they lawfully owned in common.<sup>117</sup>

#### b. Societal Morality

Second only to the concern of immoral exposure is a concern for the moral cohesion of society as a whole. Courts have routinely limited the custody rights of gay parents because their orientation or behavior is said to threaten societal morality.<sup>118</sup> While this line of argument may seem similar to others on this list, there is a crucial difference: these arguments are not limiting custody because the parent’s alleged immorality will harm the child, rather they are limiting custody because granting it, in the court’s mind, would challenge societal morality itself.

Consider this line of reasoning from *Collins v. Collins*:

The courts of this state have a duty to perpetuate the values and morals associated with the family and conventional marriage, inasmuch as homosexuality is and should be treated as errant and deviant social behavior. I would have this Court declare under this or a similar set of facts that a practicing homosexual parent be disqualified from obtaining legal custody of one’s minor

---

113. *Obergefell v. Hodges* held that the fundamental right to marriage includes same-sex marriages. 576 U.S. 644, 665–66 (2015).

114. See, e.g., *Henry v. Henry*, 296 S.E.2d 285 (S.C. Ct. App. 1988); see also *Barker v. Chandler*, 2010 WL 2593810 (Tenn. Ct. App. June 29, 2010); *Bamburg v. Bamburg*, 386 S.W.3d 31 (Ark. Ct. App. 2011).

115. *Henry*, 296 S.E.2d at 285.

116. *Id.* (“We’re not going to make a distinction between paramours of one sex or the other.”).

117. *Henry*, 296 S.E.2d at 285.

118. See, e.g., *Chicoine v. Chicoine*, 479 N.W.2d 891, 89–98 (S.D. 1992) (Henderson, J., concurring specially in part and dissenting in part); *Collins v. Collins*, 1988 WL 30173 at \*4 (Tenn. Ct. App. Mar. 30, 1988) (Tomlin, J., concurring); *Ex Parte H.H.*, 830 So. 2d 21 (Ala. 2002).

child or children.<sup>119</sup>

This argument should trouble the legal scholar because it seems beyond the court's mandate to protect society's moral norms in the context of a custody dispute. Typically, courts are instructed to make the child's interest paramount in such matters, not the state's.<sup>120</sup>

### c. Unspecified Future Harms

The third most common justification for denying gay parental custody is the fear that some unspecified, future harm will result if custody is granted. These arguments are usually prefaced by an assertion that the court need not wait for an identifiable harm to surface before taking measures to protect the child:

Admittedly, Cynthia has been examined and found to be normal, well adjusted, and unaffected as yet by the fact that her mother is a lesbian. However, we agree with the court in *L. v. D.*, 630 S.W.2d 240, 245 (Mo. App. 1982), when it stated the following: 'The Court does not need to wait, though, till the damage is done...'<sup>121</sup>

These arguments put non-heterosexual parents in a near unwinnable situation. It is hard to argue against an unidentified harm that has not yet occurred. They also tread uncomfortably close to what the nexus test was designed to eliminate: removing custody from a parent merely because the court finds the parent's unrelated conduct objectionable.<sup>122</sup>

### d. Illegality

The illegality argument hinges on the fact that same-sex sex was illegal in many states prior to *Lawrence* and that same-sex marriage was illegal in many states prior to *Obergefell*.<sup>123</sup> In this argument, courts point to the illegality of the parent's sexual behavior or the legally unrecognized status of their relationship as a legitimizing ground for the court's own moral condemnation of same-sex relationships. While it may not have seemed judicial to enforce the court's own moral opinion, it seemed more so when the authority of the state appeared to agree:

Homosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of

---

119. *Collins v. Collins*, 1988 WL 30173 (Tenn. Ct. App. Mar. 30, 1988) (Tomlin, J., concurring).

120. See Steven N. Peskind, *Determining the Undeterminable: The Best Interest of the Child Standard as an Imperfect but Necessary Guidepost to Determine Child Custody*, 25 N. ILL. U. L. REV. 449 (2005).

121. *Bennett v. O'Rourke*, 1985 WL 3464, 3 (Tenn. Ct. App. Nov. 5, 1985).

122. Legal scholars will note that this argument appears to fail the "nexus" requirement that governs the relevance of parental morality in the adjudication of custody disputes. The nexus test requires some demonstrable link between harm to the child and the moral failing at issue. But in this argument, courts have failed to even identify the harm.

123. *Obergefell v. Hodges*, 576 U.S. 644, 662 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003).

nature’s God upon which this Nation and our laws are predicated. Such conduct violates both the criminal and civil laws of this State and is destructive to a basic building block of society—the family. The law of Alabama is not only clear in its condemning such conduct, but the courts of this State have consistently held that exposing a child to such behavior has a destructive and seriously detrimental effect on the children. It is an inherent evil against which children must be protected.<sup>124</sup>

Courts have even equated same-sex sex to other, more traditional criminal activities in an effort to further justify this line of reasoning:

Where [sic] a bank robber is allowed full visitation rights, as defendant has hypothesized, surely the exercise of these rights whether expressed or implicit is restricted to exclude his exposing the child to any aspects of this most unacceptable line of endeavor. Similarly, a homosexual who openly advocates violations of the New Jersey statutes forbidding sodomy, N.J.S.A. 2A:143-1 and related statutes, may also be restricted.<sup>125</sup>

**e. The Stigma Argument (Also Known as “The *Palmore* Argument”)**

Courts frequently argue that gay parents will harm their children by exposing them to social ridicule. The logic goes that because gay people are scorned by society, children left in their care will suffer as well, either through direct antagonism or by proxy. Numerous courts have relied on this logic to deny or restrict the custody rights of gay parents.<sup>126</sup>

The Supreme Court addressed a parallel argument in *Palmore v. Sidoti*, which held that a mixed-race couple cannot be denied custody merely because the novelty of their interracial relationship might subject the child to ridicule.<sup>127</sup> But the two arguments are not completely analogous. At the time of the *Palmore* decision, race was a protected class—demanding strict review on constitutional

---

124. In re D.H. v. H.H., 830 So. 2d 21, 26 (Ala. 2002).

125. In the Matter of J.S. & C., 324 A.2d 90, 97 (N.J. Super. Ct. 1974).

126. See, e.g., *Berry v. Berry*, 2005 WL 1277847, at \*2 (Tenn. Ct. App. 2005) (“[u]ndoubtedly [sic] he will have to deal with his mother’s sexuality and the controversy associated with that sexuality as he matures”) (internal citation and quotation omitted); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (“active lesbianism practiced in the home may impose a burden upon a child by reason of the ‘social condemnation’ attached to such an arrangement, which will inevitably afflict the child’s relationships with its ‘peers and with the community at large’”) (internal citation omitted); *Collins v. Collins*, 1988 WL 30173, at \*3 (Tenn. Ct. App. 1988) (“if the child remains with her mother, she faces a life that requires her to keep the secret of her mother’s lifestyle, or face possible social ostracism and contempt. This adds tremendous pressure to a young child’s life”); *Jacobson v. Jacobson*, 314 N.W.2d 78, 81 (N.D. 1981) (“Furthermore, we cannot lightly dismiss the fact that living in the same house with their mother and her lover may well cause the children to suffer from the slings and arrows of a disapproving society.”) (internal quotation omitted).

127. 466 U.S. 429 (1984).

grounds—but sexual orientation never clearly obtained that status.<sup>128</sup> Numerous courts justified stigma arguments in the context of gay parents, even after *Palmore*, by noting this distinction. Consider Missouri’s curt dismissal of *Palmore* in *S.E.G. v R.A.G.*:

*Palmore* involved an interracial marriage where the mother was seeking custody of her child in her own interracial home. We do not agree that *Palmore* applies to the situation at hand. Homosexuals are not offered the constitutional protection that race .... [has] been afforded.<sup>129</sup>

Recently, courts have begun to push back on these arguments, and—while they rarely cite *Palmore* as a binding precedent—they often follow *Palmore*’s logic:

Of greater concern is the trial court’s rationale relating to the mother’s lesbianism. The trial judge is appropriately sensitive to the fact that Nicholas is embarrassed, confused and angry over other people’s reactions to his mother and Sandy E.’s relationship. However, the merits of a custody arrangement ought not to depend upon *other people’s* reactions. Would a court restrict a handicapped parent’s custody because *other people* made remarks about the handicapped parent which embarrassed, confused and angered the child? We think not.<sup>130</sup>

#### f. Orientation Modeling

The fear that gay parents might recruit or model their children into a non-heterosexual orientation was expressed openly in custody opinions well into the 2000s.<sup>131</sup> The argument implies that one’s sexual orientation can be swayed by

---

128. The status of sexual orientation is currently unsettled in this regard. In short, sexual orientation appears to now be a suspect class in the Ninth Circuit, at least in certain contexts. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014) (holding that classifications based on sexual orientation are subject to heightened scrutiny review). There is reason to believe that the Supreme Court decisions have held likewise; *Windsor*, *Hollingsworth* and *Obergefell* certainly contained language hinting at heightened review; the Ninth Circuit famously noted in *SmithKline Beecham* that “*Windsor*, of course, did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case, but an express declaration is not necessary .... [we consider] what the Court actually did.” *Id.* at 480 (internal quotations and citation omitted).

129. 735 S.W.2d 164, 166 (Mo. Ct. App. 1987).

130. *Blew v. Verta*, 617 A.2d 31, 35 (Pa. Super. Ct. 1992). But the stigma argument has not entirely disappeared. It was used as recently as 2017 by the trial court in *In Re the Marriage of Black* to limit the custody rights of a lesbian mother. 392 P.3d 1041 (Wash. 2017) (rejecting the argument that a parent’s sexual orientation can be harmful to the child because it invites bullying).

131. *See, e.g.*, *Collins v. Collins*, 51 P.3d 691, 692 (Or. Ct. App. 2002) (noting the trial court’s finding that “[o]f significance to the court, was the evidence at hearing that [daughter] has, on several occasions, participated in intimate sexual-like contact with one of her 9-year-old female friends, which the court finds to have been [daughter’s] effort to mimic conduct [daughter] observed between her mother and another adult.”).

persuasion or environmental influence.<sup>132</sup> The argument also implies that a non-heterosexual orientation is an outcome to be avoided.

This concern often takes one of two forms: the gay parent will push the child towards non-heterosexuality through modeling and normative influence or the parent will seduce the child into non-heterosexuality through direct invitation. The latter, of course, blends into the fear of sexual abuse which makes the two fears hard to distinguish when confronted in the case law.

The “modeling and normative influence” argument is common in the case law and hard to miss. Note the clear “orientation through example” assertion from the appellate court in *Black v. Black*:

We feel it is unacceptable to subject children to any course of conduct that might influence them to develop homosexual traits, and the facts of this case indicate that there is a strong possibility, because of the living arrangements of Mother and her lover, the children would be subjected to such influences.<sup>133</sup>

The “seduction” argument is typically less explicit. For example, in the Missouri case of *J.L.P. v. D.J.P.*, the court described a gay father’s open advocacy for LGBT rights and his membership in a gay friendly church as “seductive in nature.”<sup>134</sup> Later, in that same opinion, the court blended its argument with an insinuation of actual sexual invitation, darkly noting that the father had already taken his son “out of state” with “another homosexual and his juvenile nephew.”<sup>135</sup> While not explicit, the implication of sexual invitation, placed alongside orientation concerns, appears to imply a more sinister means of recruitment.<sup>136</sup>

### **g. Gender Modeling**

The recruitment fear can also take a more subtle tack: the fear of gender recruitment. This stance assumes that gay parents will fail to impart traditional

132. There is an active debate on this claim that is beyond the scope of this Article. Put briefly, there is some evidence that children raised by gay parents are slightly more likely to engage in same-sex sex than children raised by heterosexual parents. Many other scholars, however, vehemently disagree with this assertion. See, e.g., Judith Stacey & Timothy J. Biblarz, (*How Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159 (2001); Ball, *supra* note 32; Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (1997). Of course, even if true, the correlation would not prove the claim that one’s sexual orientation can be influenced. There is also the very real possibility that familial acceptance simply lowers the child’s inhibition against expressing an inborn sexual orientation.

133. *Black v. Black*, 1988 WL 22823, 3 (Tenn. Ct. App. Mar. 10, 1988).

134. 643 S.W.2d 865, 868 (1982).

135. *Id.* at 866–67.

136. Of course, this argument also creates a host of constitutional concerns. It arguably violates the child’s First Amendment right to free expression. It likewise may violate the Equal Protection Clause in that the state has no rational basis to prefer heterosexuality. For a discussion of these theories generally, see Clifford J. Rosky, *No Promo Hetero: Children’s Right to Be Queer*, 35 CARDOZO L. REV. 425 (2013).

gender norms to their children.<sup>137</sup> While the first flavor of this argument (orientation modeling) concerns sexual orientation, this version concerns the understanding and performance of gender roles, namely, a fear that the children of non-heterosexual parents will fail to act like traditional boys and girls or fail to understand the societal role of either in a traditional way.<sup>138</sup>

These arguments are also explicit and hard to miss. Consider *Lundin v. Lundin*<sup>139</sup> in which an expert witness for the heterosexual husband of a lesbian mother offered testimony concerning his fears of gender recruitment (1990):

A two-year-old child is at a stage of development where they are forming a gender identity and learning sex appropriate roles for their own sex, whatever, masculine and female rolls. [sic] It's preferable that they have good roll (sic) models in a stable environment always. I would be concerned if the role models were confused so that a child would not understand or know that this was not typical or usual or to be expected.<sup>140</sup>

The *Lundin* court accepted this argument, and reversed the trial court partially on these concerns:

[I]n this case where the sexual preference is known and openly admitted, where there have been open, indiscreet displays of affection beyond mere friendship and where the child is of an age where gender identity is being formed, the joint custody arrangement should award greater custodial time to the father.<sup>141</sup>

Or consider the trial court's opinion in *Pleasant v. Pleasant*, which found—after declaring the mother “a defiant and hostile admitted lesbian”—that “having [her son] in the presence of gays and lesbians was endangering his gender identity and morals and not in his best interests.”<sup>142</sup>

---

137. Just as there is a debate concerning the tendency of gay parents to raise gay children, there is also a debate concerning the tendency of gay parents to raise gender nonconforming children. Once again, there is some evidence that the children of gay parents are more likely to engage in gender nonconforming behavior, though this conclusion is also hotly debated. See Stacey & Biblarz, *supra* note 132, at 168–71; Ball, *supra* note 32 *passim*; Wardle, *supra* note 132, at 852, 860–61; Rosky, *Like Father, Like Son*, *supra* note 13, at 301–05.

138. This argument creates the same constitutional issues mentioned in note 126 and at least one other: it may run afoul of the constitutional prohibition against the promotion of gender roles. See Christina M. Tenuta, Note, *Can You Really Be a Good Role Model to Your Child if You Can't Braid Her Hair—The Unconstitutionality of Factoring Gender and Sexuality into Custody Determinations*, 14 CUNY L. REV. 351, 380–82 (2011); see also Craig v. Boren, 429 U.S. 190, 192–93 (1976).

139. *Lundin v. Lundin*, 563 So. 2d 1273 (La. Ct. App. 1990).

140. *Lundin*, 563 So. 2d. at 1275.

141. *Id.* at 1277.

142. *Pleasant v. Pleasant*, 628 N.E.2d 633, 638–39 (Ill. App. Ct. 1993). The trial court's obsession with traditional gender performance was on clear display during its examination of a (lesbian) mother and her decision to bring her son to the local gay pride parade: “the judge asked if there were men who are not masculine in the parade. When respondent answered that there were no unmasculine men in the parents' group with which she walked, the judge argued with her about the presence of so-called ‘unmasculine’ men.” *Id.* at 637.

### h. Sexual Abuse Fears

A once-common argument raised by opponents of non-heterosexual parenting is the charge that gay parents are more likely than heterosexual parents to sexually abuse their children.<sup>143</sup> This charge is empirically false. Current research indicates that gay men are no more likely to sexually abuse children than heterosexual men, and instances of sexual abuse by gay women are exceedingly rare.<sup>144</sup>

Despite the factual evidence, courts occasionally cited this concern well into the late 1990s.<sup>145</sup> But more common than the explicit mentions are the numerous opinions that allude to the threat. Take *Woodruff v. Woodruff*, wherein the court darkly noted that a gay father was seen “[taking the] parties’ son on a walk in a secluded area near their home.”<sup>146</sup> The *Woodruff* court did not recount actual evidence of sexual abuse by the non-heterosexual parent, but the court arguably insinuated that the fear of such abuse was reasonable.

### i. Fear of Disease

A frequent argument against the parental fitness of gay people, especially during the HIV scare of the 1980s, has been that they will expose their children to disease. This fear was undoubtedly exacerbated by early notions that HIV was a “gay disease” and the popular misconception that it could be spread through ordinary contact.<sup>147</sup>

Heterosexual parents contesting custody against gay parents raised this argument frequently well into the mid-2000s,<sup>148</sup> but this study uncovered only one instance where the argument was explicitly accepted by a judge. In *Stewart v.*

---

143. This has been an oft-repeated argument. Anita Bryant deployed it frequently during her successful 1977 campaign to overturn Dade County Florida’s anti-gay discrimination ordinance (“a particularly deviant-minded [gay] teacher could sexually molest children”) and it regularly surfaced in the public relations battles surrounding same-sex marriage. See ANITA BRYANT, *THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION’S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY* 114 (1977); MARTHA CRAVEN NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* (2010). The argument appears to have grown less common in recent years, though it has not disappeared.

144. Herek, *supra* note 13, at 156. See also Carole Jenny, Thomas A. Roesler & Kimberly L. Poyer, *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 *PEDIATRICS* 41, 42 (1994).

145. See *Hertzler v. Hertzler*, 908 P.2d 946 (Wyo. 1995) (Golden, C.J., dissenting).

146. *Woodruff v. Woodruff*, 44 N.C. App. 350, 351 (N.C. Ct. App. 1979).

147. Surveys from 1999 and 2000 indicate that over 40% of Americans still believed HIV could be transmitted by coughing, sneezing, or sharing the same glass. See D. A. Lentine, J. C. Hersey, V. G. Iannacchione, G. H. Laird, K. McClamroch & L. Thalji, *HIV-related Knowledge and Stigma—United States, 2000*, 49 *MORBIDITY & MORTALITY WKLY. REP.* 1062 (2000).

148. The last mention of this argument appears to have occurred in the case of *Soteriou v. Soteriou*, No. FA030733243S, 2005 WL 3471472 (Conn. Super. Ct. Nov. 23, 2005). For examples of litigants raising this fear, see *Conkel v. Conkel*, 31 Ohio App. 3d 169, 173 (Ohio Ct. App. 1987) (“[A]ppellant mother also indicates being ‘petrified’ that the children will contract AIDS.”); *J.P. v. P.W.*, 772 S.W.2d 786, 788 (Mo. Ct. App. 1989) (“She is also concerned with the exposure of the child to AIDS.”); and *Soteriou*, 2005 WL 3471472, at \*3 (“While at home on maternity leave with their second child, the plaintiff learned that the defendant was engaged in extramarital homosexual activities and ‘spreading disease.’”).

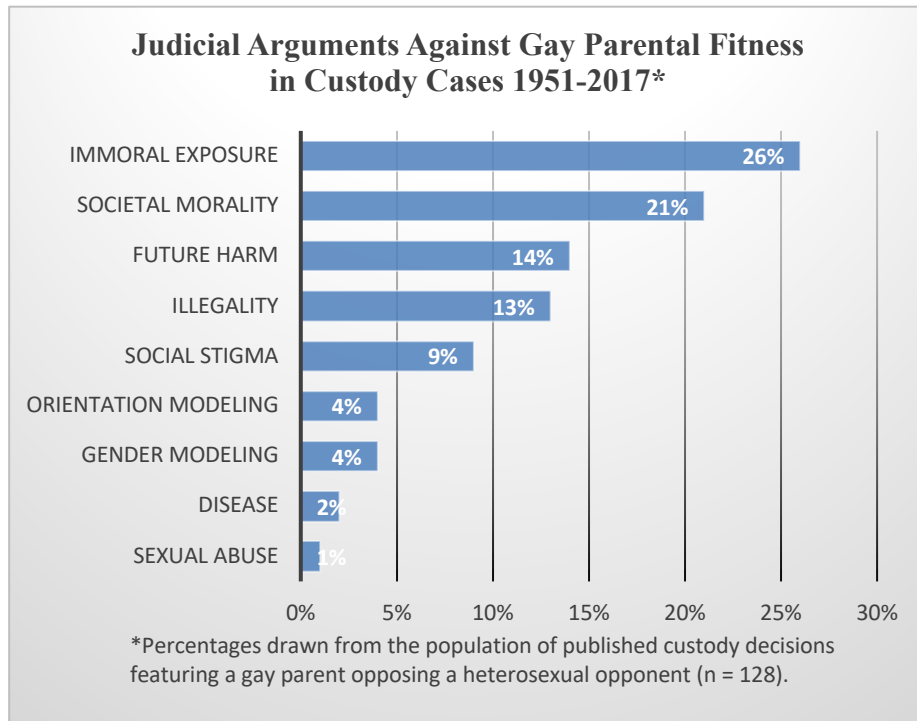


*Stewart*, a dissenting judge for an Indiana appellate court supported a trial court's denial of custody based primarily on the argument that HIV *could* be transferred by extracting the child's tooth:

[I]t is theoretically possible for a parent to infect a child with the AIDS virus while extracting a child's tooth. Under these circumstances, a parent "might" infect his child with AIDS. Because the statute clearly invests the trial court with a broad discretion in this area, I believe the trial court did not manifestly abuse its discretion by denying appellant his visitation rights under these circumstances.<sup>149</sup>

\*\*\*

These nine recurring arguments are homophobic, inaccurate, or both. It is false to assert that being gay makes it more likely that someone will sexually abuse a child.<sup>150</sup> It is legally inaccurate to consider the fate of societal morality in an analysis that is meant to hinge on harm to the child, not the state. And while there is some heavily debated literature suggesting that the children of gay parents might be more likely to become gender nonconforming or gay themselves, these arguments betray a clear bias by assuming that these outcomes are harms to be avoided.



149. *Stewart v. Stewart*, 521 N.E.2d 956, 967 (Ind. Ct. App. 1988) (Conover, J., dissenting).

150. Herek, *supra* note 13, at 156; Rosky, *Like Father, Like Son*, *supra* note 13, at 286.

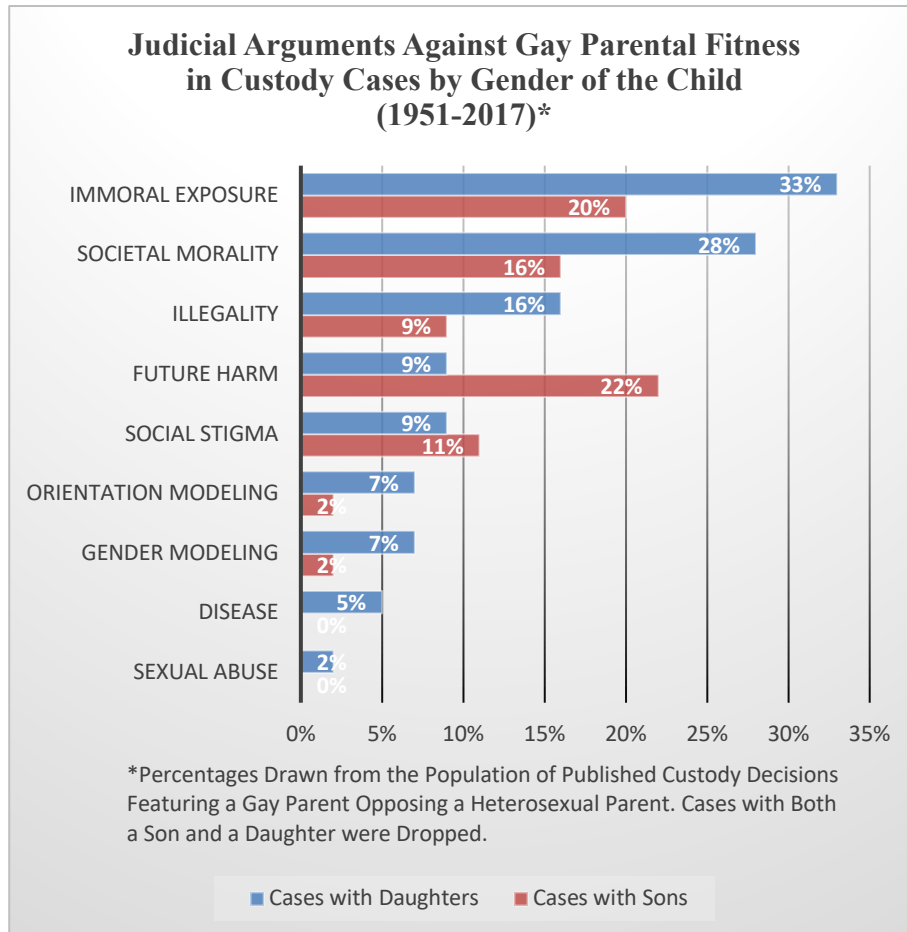
### C. Ranking Judicial Rationales Against Gay Parental Fitness by Gender of the Child

Study Two examined common judicial arguments against gay parental fitness and found that some concerns clearly trump others.<sup>151</sup> Of primary importance are the morality arguments. Courts stress the need to protect childhood moral development (immoral exposure) and the preservation of traditional moral norms (societal morality) the most. The fear of sexual abuse and disease appear to trouble courts the least, while all other concerns fall somewhere in the middle.

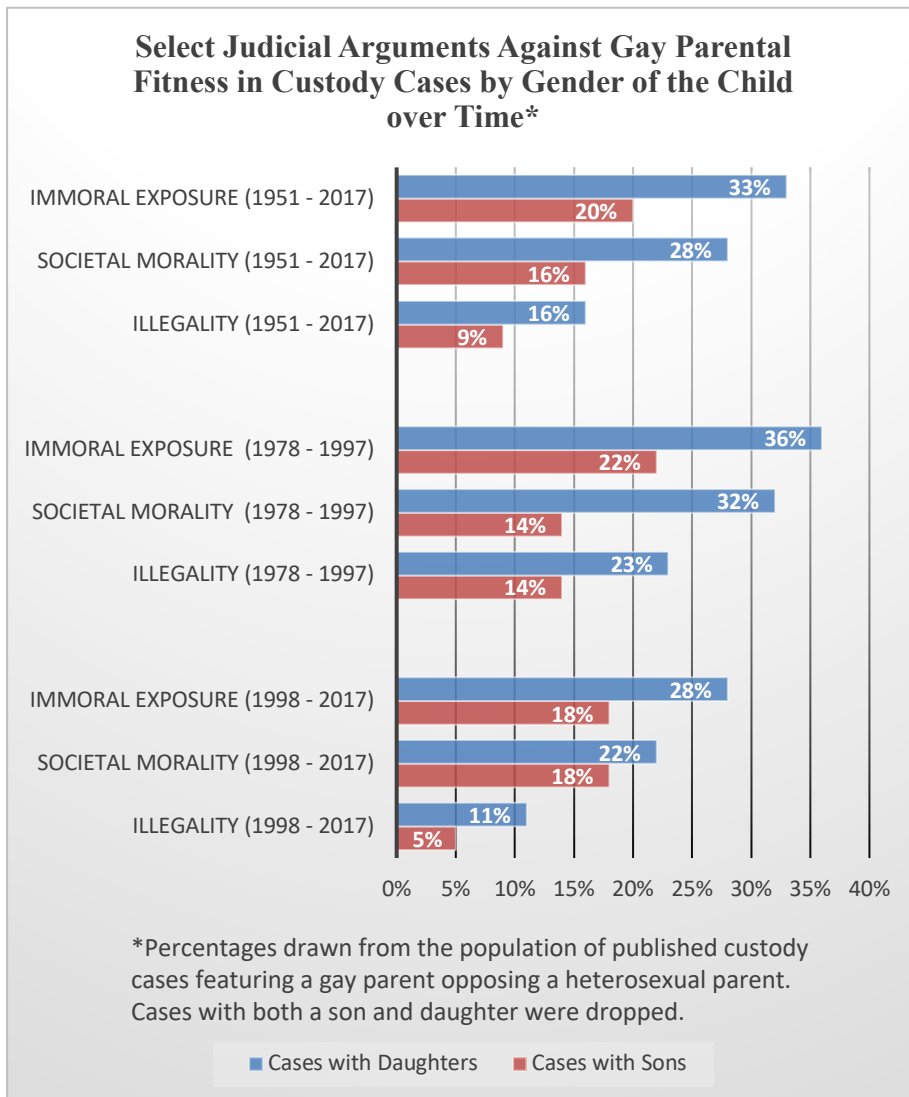
But once again, the gender of the child at issue clearly matters. Courts express notably different concerns when gay parents seek the custody of a daughter as opposed to a son. When daughters are at issue, courts are dramatically more concerned with immoral exposure, societal morality, and the historic illegality of same-sex intimacy. When sons are at issue, courts demonstrate less concern in almost every category, with the notable exception being concern for “unidentified future harms.” This vague concern spikes dramatically when sons are at issue.

---

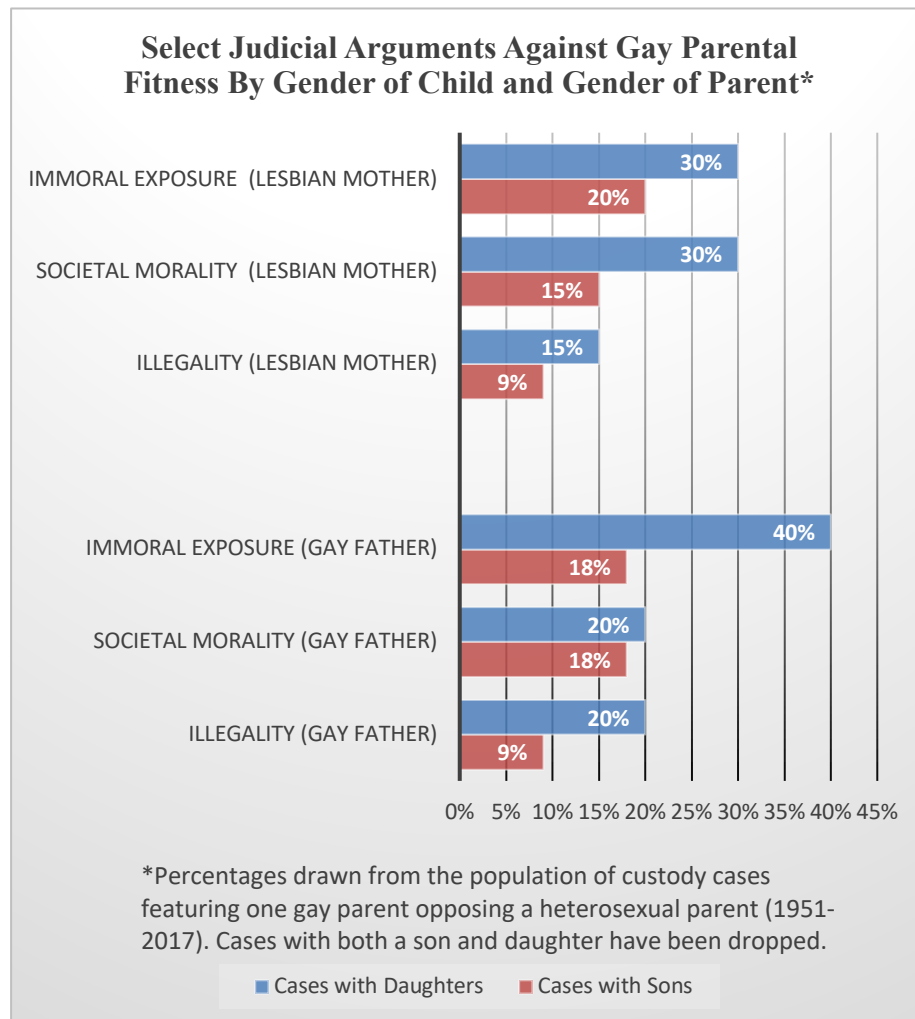
151. The differential denial rates for Figure Three are (Gay Mothers,  $p > |z| = 0.032^*$ ,  $n = 67$ ; Gay Fathers,  $p > |z| = 0.217$ ,  $n = 21$ ).



These disparities do not appear to be an artifact of time or changing norms. While societal attitudes and judicial precedent have shifted dramatically over the last several decades, judicial concerns related to the placement of daughters into gay parental custody have remained stable. When the last forty years of these data are broken into twenty-year blocks, one still sees an elevated concern for immoral exposure, societal morality, and the illegality of same-sex intimacy when daughters are at issue.



These results likewise do not seem to be the product of parental gender. While small sample sizes require caution with this analysis, these data indicate that courts have expressed concern more frequently for immoral exposure, the dictates of societal morality, and the illegality of same-sex intimacy (sex and marriage) when daughters are at issue, regardless of the gay parent's gender.



### III. DISCUSSION

Data from the published custody record documents strong anti-gay bias in custody allocation over the last several decades. These data also document that the gender of the child at issue mattered: courts have been significantly less willing to place daughters into gay parental custody than sons. Moreover, this trend does not seem to be an artifact of changing social norms or the gender of the gay parent at issue.

These data also demonstrate that courts have particular concerns when

daughters are at issue. They are more concerned with the child's exposure to immorality and they place a greater emphasis on the legal and moral prohibitions against same-sex sex and same-sex marriage when the custody of a daughter is at stake.

While these data are informative, they do not fully explain the inner workings of the phenomena uncovered. What do the raw custody allocation data really tell us? What is it about the judicial view of young women that has rendered these courts less willing to place them into gay parental custody? Why is it that courts are more concerned with immoral exposure and prohibitions against same-sex intimacy when daughters are at issue? And how are these data in conversation with previous scholarship that highlighted a judicial impulse to protect the development of masculine sons in these cases? This Section answers these questions by placing the results of Studies One and Two alongside existing scholarship, case law, and the broader universe of feminist thought.

### A. Interpreting the Raw Custody Allocation Data

Data from the custody record suggest that anti-gay bias presented a major hurdle for gay parents until the mid-2000s. This is not surprising given the social mores of the time, but the extent of the bias may be surprising. Within the published record, when gay parents challenged heterosexual parents for custody, they found themselves on the losing side of that contest 64% of the time. Moreover, this denial rate remained at 65% or higher throughout the thirty years preceding 2008.

Of note is the apparent turnaround of this bias in the mid-2000s. During the ten years following 2008, gay parents found themselves on the winning side of these cases 63% of the time, a dramatic shift. On one level this makes sense: in addition to rapidly changing social norms, the decade following 2008 witnessed numerous legal decisions that improved the legal footing for gay parents. In 2009, a Northern California District Court declared California's ban on same-sex marriage unconstitutional.<sup>152</sup> In 2013, the Supreme Court declared the Defense of Marriage Act unconstitutional.<sup>153</sup> In 2014, the Ninth Circuit applied heightened scrutiny to alleged discrimination on sexual orientation grounds,<sup>154</sup> and in 2015, *Obergefell* declared all prohibitions of same-sex marriage unconstitutional.<sup>155</sup> While these holdings did not directly address gay custody cases, they still signaled a changing judicial attitude towards non-heterosexuality and gay families in general. It is not surprising that lower courts shifted their views accordingly.<sup>156</sup>

---

152. Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

153. United States v. Windsor, 570 U.S. 744 (2013).

154. SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014).

155. Obergefell v. Hodges, 576 U.S. 644 (2015).

156. This statement, of course, belies a debate of considerable complexity: the degree to which public opinion and even judicial precedent can shape judicial decision-making. While that discussion is beyond the scope of this Article, see Jonathan P. Kastellec, *Empirically Evaluating the Countermajoritarian Difficulty: Public Opinion, State Policy, and Judicial*

While this is positive news, one should also view these data warily. For one, the *n* for this last decade is small (nineteen cases) and the results are not statistically significant. Further, custody allocation is not the sole measure of success in a custody case. Courts can restrict visitation rights and, when gay parents are involved, they frequently do.<sup>157</sup> They can prohibit the non-custodial parent from visiting overnight and they can prohibit the presence of a parent's significant other during visitation periods.<sup>158</sup> They can even demand the presence of a supervisor during visitation.<sup>159</sup> So, it should not be assumed that anti-gay bias is no longer a problem in custody matters merely because the recent allocation data appears promising.

### B. Placing these Data Alongside Previous Scholarship

It is useful to place these data alongside previous literature on the topic. As noted earlier, a previous study suggested a judicial tendency to prioritize the masculine development of sons in these cases. That study noted an uptick in the presence of two homophobic stereotypes when the custody of sons was before the court: the “recruiting” stereotype and the “role modeling” stereotype.<sup>160</sup> This finding meshes with an overall perception that society demonstrates a patriarchal bias. Given society's assumed prioritization of men over women, it makes sense that society in general (including courts) would protect the development of traditional, masculine men by keeping them away from the non-traditional parent.

Data from this project may appear to contradict the conclusions of the aforementioned paper regarding the treatment of sons in family court decisions, but, on closer inspection, they do not. While it is true that Study One reveals a greater aversion towards placing daughters into gay parental custody than sons, that does not mean that courts are not also averse to placing sons into gay parental care. Indeed, Study One indicates that gay parents failed to secure the custody of their sons (when contesting against a heterosexual opponent) at a rate of 55% through the year 1995.<sup>161</sup> And, as previously noted, there are other measures of loss in custody cases. It could well be that courts are more likely to restrict the visitation rights of gay parents when a son is at issue than those of a comparably situated heterosexual parent.

Ultimately, these data do not disprove a judicial tendency to protect the masculine development of young sons in custody cases. Rather these data reveal

---

*Review before Roe v. Wade*, 4 J.L. & CTS. 1 (2016) (noting that state and lower federal courts tended to strike down anti-abortion statutes when there was broad public support to change policy, and vice versa) and Thomas R. Marshall, *The Supreme Court as an Opinion Leader: Court Decisions and the Mass Public*, 15 AM. POL. RES. 147 (1987) (examining public responses to Supreme Court cases between the 1930s and 1980s).

157. Shapiro, *supra* note 13, at 625–27; Rivera, *supra* note 23, at 890–92.

158. *See, e.g.*, *A.O.V. v. J.R.V.*, 2007 WL 581871, at \*6 (Va. Ct. App. 2007); *Ex Parte D.W.W.*, 717 So. 2d 793, 797 (Ala. 1998).

159. *See, e.g.*, *A. v. A.*, 15 Or. App. 353, 361 (Or. Ct. App. 1973).

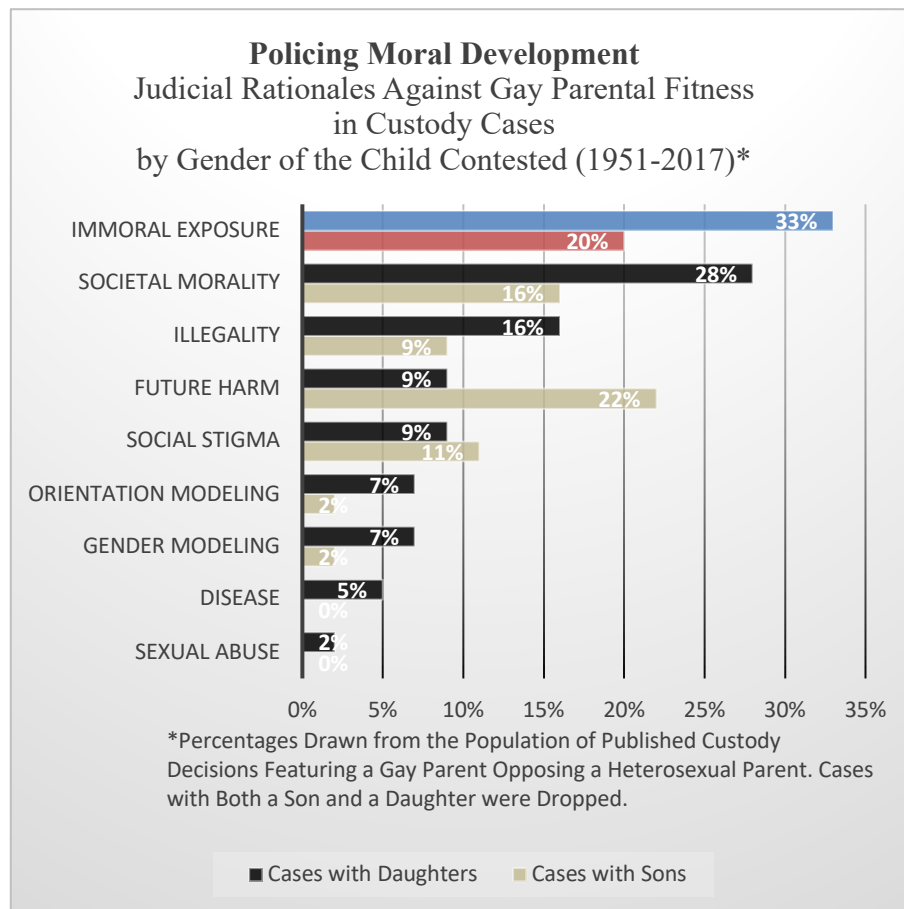
160. Rosky, *Like Father, Like Son*, *supra* note 13.

161. *See supra* Part II.

a separate, perhaps deeper, tendency to police the moral development of young women. Both can be true simultaneously and the data generated here argue that they are.

**C. Policing the Moral Development of Young Women**

The data from Study Two reveal that one judicial concern routinely trumps others when a gay parent seeks the custody of a daughter: exposure to immorality. Courts voiced this concern in 33% of all cases featuring just a daughter, and the primacy of this concern remained constant across time and the gender of the non-heterosexual parent. Of further note, courts have been far more concerned about exposing daughters to immorality than sons. Again, this finding holds constant across time and across the gender of the non-heterosexual parent.



A close reading of the case law reveals even finer detail. It shows that courts were frequently concerned with shielding young women from one type of “immorality” in particular: the rejection of heteronormativity. Numerous cases



make this fixation quite clear. Consider this opinion from the Alabama Supreme Court in 1998:

Both the mother and G.S. have testified that they would not discourage the child from adopting a homosexual lifestyle. In short, the mother and G.S. have established a two-parent home environment where their homosexual relationship is openly practiced and presented to the child as the social and moral equivalent of a heterosexual marriage.<sup>162</sup>

The daughter's subsequent acceptance of this moral equivalency particularly irked the court. They noted several times that the daughter believed same-sex marriage to be the equivalent of heterosexual marriage.<sup>163</sup>

Consider also the Missouri Court of Appeals in *J.P. v. P.W.*, which took issue with a gay father for stating that he thought it would be beneficial to expose his daughter to "homosexual people" as well as "heterosexual people," because the daughter could then recognize both as part of a "broad spectrum . . . of human interaction":

He believes it would be a healthy and broadening influence upon the child's upbringing and development to be exposed to the alternate lifestyle of he and Reed. He added, "It would allow her to see a broad spectrum, perhaps, of human interaction not just between heterosexual people, but also homosexual people."<sup>164</sup>

Or consider the Missouri Court of Appeals in *N.K.M. v. L.E.M.*, which chastised a lesbian mother's lover for "broach[ing] the idea of homosexuality" with the mother's young daughter and for instructing her "that homosexuality is a permissible life style—an 'alternate life style' . . ."<sup>165</sup> The court subsequently expressed concern that this same lover was overheard saying, "If Julie is going to turn out to be a homosexual, that is her life, it's up to her."<sup>166</sup>

Examples of this moral concern are plentiful, but, as can be seen above, they all contain the same basic fear. The fear that a young daughter will be swayed into believing that non-heterosexuality is the moral equivalent to heterosexuality or, put another way, the fear that a young daughter will reject heteronormativity.

---

162. *Ex Parte J.M.F.*, 730 So. 2d 1190, 1195 (Ala. 1998).

163. *Id.* at 1192 ("The record contains evidence indicating that the child has remarked several times that girls may marry girls and that boys may marry boys.").

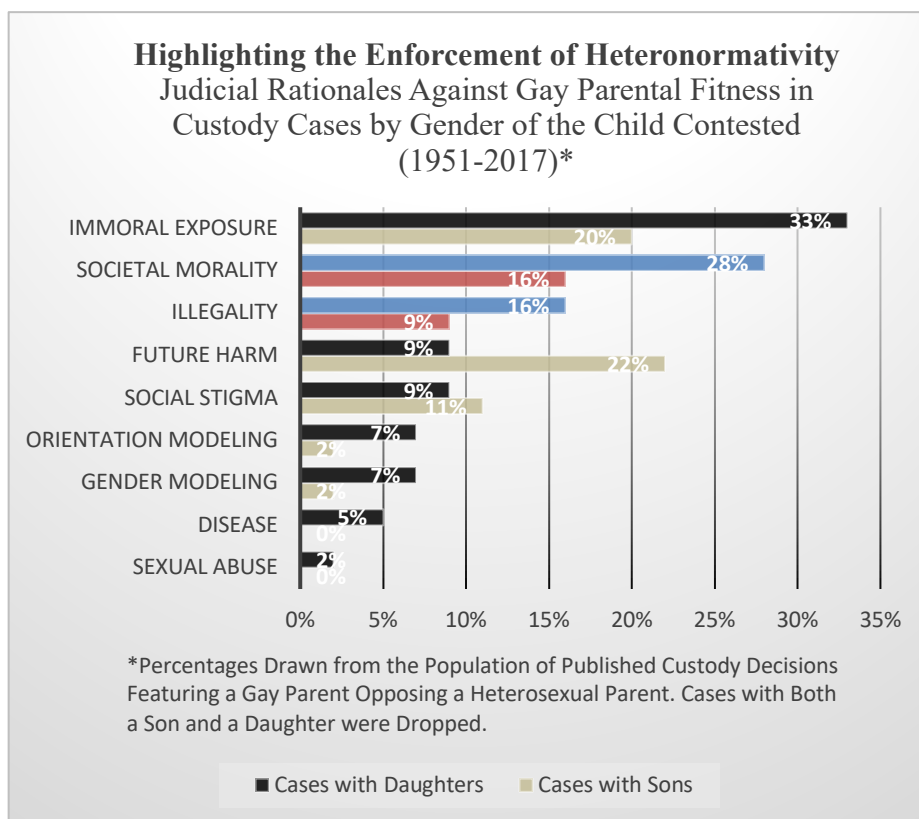
164. *J.P. v. P.W.*, 772 S.W.2d 786, 788 (Mo. Ct. App. 1989).

165. *N.K.M. v. L.E.M.*, 606 S.W.2d 179, 186 (Mo. Ct. App. 1980).

166. *Id.* at 185.

**D. Highlighting the Outside Enforcement of Heteronormativity**

Study Two also demonstrates that courts cite societal morality and the (then) illegality of same-sex sex and same-sex marriage more often when the custody of daughters is at issue. Once again, a careful reading of the case law shines a brighter light on these tendencies. It reveals that both of these concerns are often an expression of the same impulse: the need to stress outside prohibitions against same-sex intimacy to a greater degree when the custody of daughters is before the court.



When a court highlights the fact that same-sex sex or same-sex marriage is illegal, the court is clearly noting that the state both condemns and refuses to recognize the intimate lives of the gay parents before the court. When a court highlights the fact that traditional morality condemns same-sex sex, the court is asserting the same point on behalf of society rather than the state. But reading the case law reveals the depth of this impulse. Often, the courts making these arguments do not simply mention them in passing, rather they present them as a quasi-lecture that extends several pages.

The Mississippi appellate decision *S.B. v. L.W.* offers a good example.<sup>167</sup> In *S.B.*, the court did not simply mention the state's prohibition against same-sex marriage; it also mentioned the state's prohibitions against same-sex adoption, bestiality, and same-sex sex.<sup>168</sup> It then discussed, at length, similar prohibitions from Florida, New Hampshire, Colorado, Pennsylvania, and Wisconsin.<sup>169</sup>

Or consider the 2002 Alabama opinion *Ex Parte H.H.*, where the concurrence, in the process of deciding a lesbian mother's custody rights, went beyond reference to the state's prohibition against same-sex sex and same-sex marriage.<sup>170</sup> It also mentioned the state's anti-gay educational curriculum, condemnations from William Blackstone, treatises on slander from the 1890s, the Bible's Genesis and Leviticus, Roman law, parliamentary edicts from the sixteenth century, natural law, Thomas Aquinas, and the writings of Sir Edward Coke, all in order to reinforce the point that influential sources have condemned same-sex intimacy, both legally and socially, for the majority of recent history.<sup>171</sup> The concurrence's lecture on this point ran for over ten pages.<sup>172</sup>

Expositions like these are common in the dataset for this Article, and—as the excerpts above make clear—are not designed to merely cite authority for the court's disapproval of same-sex intimacy. They are designed to drive home a point—that the law and societal morality have condemned same-sex intimacy for several centuries. These expositions are an assertion of authority in support of heteronormativity. What is interesting for the purposes of this Article is that they occur more frequently when daughters are before the bench.

### E. Placing These Results within the Broader Currents of Feminist Scholarship

In her canonical essay “Deconstructing Gender,” Joan Williams aptly describes the pre-modern conception of women as the “weaker vessel”:<sup>173</sup>

Before the mid-eighteenth century, women were viewed not only as physically weaker than men; their intellectual and moral frailty meant they needed men's guidance to protect them from the human propensity for evil. Women's intense sexuality and their fundamental irrationality meant they were in need of outside control, because women in their weakness could be easily tempted. The darkest expression of the traditional view that women unsupervised quickly slipped into collusion with evil was the persecution (during some periods, massive in scale)

---

167. *S.B. v. L.W.*, 793 So. 2d 656, 662 (Miss. Ct. App. 2001).

168. *Id.* at 662 (Payne, J., concurring).

169. *Id.* at 663.

170. *Ex Parte H.H.*, 830 So. 2d 21, 26–38 (Ala. 2002) (Moore, C.J., concurring specially).

171. *Id.*

172. *Id.*

173. For greater insight into the pre-modern stereotype of women as the “weaker vessel,” see Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989); ANTONIA FRASER, *THE WEAKER VESSEL* (1984); NANCY F. COTT & JONATHAN TRUMBULL, *THE BONDS OF WOMANHOOD: “WOMAN’S SPHERE” IN NEW ENGLAND, 1780–1835* (1997).

of women as witches.<sup>174</sup>

Note the complexity of this stereotype. It purports that women are not just physically frail, but intellectually frail as well. Compared to men, women were deemed irrational and easily overcome by emotion. Thus, women were thought to lack the intellect and self-restraint to resist the siren song of evil. In this view, women needed guidance and “outside control” if they were to lead morally upright lives.<sup>175</sup>

Williams argues that this conception of women changed in the modern era.<sup>176</sup> The rise of political liberalism and its tenet that all “men” are created equal clashed with the notion of the inferior woman.<sup>177</sup> Accordingly, the ideology of domesticity took hold. In this new schema, women remained physically and intellectually weaker than men but were newly heralded as inherently virtuous—“the moral sex.”<sup>178</sup> Thus, they were no longer inferior, just differently abled and their inherent morality made them ideal for the domestic sphere of life.<sup>179</sup> They were also less well-situated for the coarse, and often ethically suspect, public sphere.<sup>180</sup>

The “separate spheres” ideology was, of course, a primary target of feminism’s second wave. Feminists and activists from Betty Friedan to Ruth Bader Ginsburg built careers attempting to dismantle it.<sup>181</sup> But in the data analyzed in the present study, we see a judicial impulse—perhaps an unconscious one—to cement this ideology into our legal system. If women are to remain in their sphere, if they are to fulfill the domestic role, then their moral character must be preserved. Operating under this premise, courts have been averse to placing daughters into environments that challenge society’s traditional moral norms. It makes sense that they express especial outrage when gay parents teach their daughters to break or question those norms. And it makes sense that courts felt a greater need to stress the legal and cultural dictates undergirding those norms when daughters were before the court.

Given the prevailing societal norm that the woman’s place was in the domestic realm, it is unsurprising that the judiciary reflected a similar view. Our legal system has repeatedly demonstrated its tendency to disproportionately police the moral behavior of women,<sup>182</sup> and it is similarly true that society perceives it as

174. Williams, *supra* note 173, at 804.

175. *Id.*

176. *Id.* at 804–09.

177. *Id.* at 806–07.

178. *Id.* at 807.

179. *Id.*

180. *Id.*; Paula Baker, *The Domestication of Politics: Women and American Political Society, 1780–1920*, 89 AM. HIST. REV. 620, 620 (1984); Barbara Welter, *The Cult of True Womanhood: 1820–1860*, 18 AM. Q. 151, 153 (1966).

181. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963); Joan C. Williams, *Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism*, 63 HASTINGS L.J. 1267, 1286–96 (2011).

182. See Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817 (2000).

a serious threat to social norms when women challenge heteronormativity.<sup>183</sup> Liberal feminists may recognize this as yet another impulse to confine women to traditionally heterosexual domestic roles.<sup>184</sup> Dominance feminists may see the data as evidence of judicial reinforcement of the patriarchy by channeling women towards traditional heterosexual norms.<sup>185</sup> And critical and post-modern feminists may view this policing and channeling as yet another constraint on the rational agency of young women.<sup>186</sup>

### CONCLUSION

In some respects, the findings of this Article are counterintuitive in the face of the research upon which it builds. For instance, it will likely surprise many that the data uncovered evidence of a greater judicial reluctance to place daughters into gay parental custody than sons. But in other respects, the findings are not at all surprising. Courts, the law, and society in general have always policed women more than men. It follows that, because courts reflect prevailing social norms, their impulse when presented with a perceived challenge to heterosexual norms—at least when the custody of a daughter is before the court—is to channel that daughter towards heteronormativity.

Hopefully, this Article also serves as clarion call for more extensive intersectional research. The data suggest that a full accounting of the gay experience requires the consideration of multiple regimes of bias. In more specific terms, this Article argues that a judicial impulse to police the moral development of young women, especially as it relates to the development of heterosexual norms, has created a unique burden for gay parents in the custody process. This impulse has rendered courts averse to placing daughters into gay parental custody. It has likewise prompted courts to stress the outside control of sexuality and intimacy, the strictures of traditional morality, and the legal prohibitions barring same-sex intimacy to a greater degree when daughters are at issue.

---

183. See RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* (1992).

184. FRIEDAN, *supra* note 181.

185. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

186. Kathryn R. Abrams, *Fighting Fire with Fire: Rethinking the Role of Disgust in Hate Crimes*, 90 CALIF. L. REV. 1423 (2002).

# The Legal Limbo of Menstrual Regulation: Implications of Expanding Reproductive Health Options in the United States

Samantha Gogol Lint<sup>†</sup>

## ABSTRACT

*Inspired by the broader movement to expand access and autonomy in reproductive health and rights, this Paper analyzes the legal implications of re-introducing menstrual regulation in the United States. “Menstrual regulation” (MR) is the process of inducing uterine bleeding following delayed menses without confirming pregnancy status. MR is distinct from abortion because there is no confirmation of pregnancy—a critical element in the medical and legal definitions of abortion, its regulation, and its practice. MR has been used in abortion-restrictive contexts, including in the United States prior to Roe v. Wade, and internationally, such as in Bangladesh. This therapy is most readily and safely accomplished through medication (specifically, misoprostol and mifepristone or misoprostol alone). Though these medications are used for medical abortion in the United States today, they are not currently used for MR, which is rarely, if ever, offered as an alternative. Similarly, while there are many laws and regulations governing abortion and contraception, there are none that address MR specifically. This begs the question, if MR were to be offered as a distinct therapy, what laws would apply for patients and providers?*

*This Paper aims to increase awareness of what MR is, why it is not currently an option in the fertility control spectrum, why it should be, and what the legal implications would be if MR were introduced under the existing U.S. legal framework for reproductive health and rights. Part I sets the stage with more detailed information on how MR works. Part II explores how MR fits in the existing legal frameworks for contraception and abortion. Given that MR is used after intercourse but without confirming pregnancy, this process lies somewhere*

---

DOI: <https://doi.org/10.15779/Z38SB3X024>

<sup>†</sup> I am deeply grateful for the support, guidance, and inspiration for this Paper from Professor Jeannie Suk Gersen, JD, DPhil; Cari Sietstra, JD; Wendy Sheldon, PhD, MPH, MSW; and Breanna Carozza, CNM.

between pregnancy prevention (contraception<sup>1</sup>) and pregnancy termination (abortion<sup>2</sup>). The analysis of how MR may be categorized legally is informed by a review of the intrauterine device (IUD) and emergency contraception (EC), for which there were similar categorization debates that are now resolved. Part III assesses the specific legal implications of MR for user and provider if it were to be introduced today, including issues such as off-label prescriptions and insurance coverage. Finally, Part IV offers concluding remarks and initial recommendations.

Through my analysis, I demonstrate that MR does not fit neatly into the existing legal dichotomy of contraception or abortion, and a third legal regime may best accommodate this therapy. Absent such a third option, contraception is the more appropriate category. In the few instances courts have considered MR, however, some dicta has categorized MR as an abortion. That there are very few cases on the subject, and the lack of consensus suggests the debate can and should be revisited. Currently, several studies are underway to explore interest in a “missed period pill”—another framing of MR—and thus this Paper seeks to update existing literature<sup>3</sup> and contribute to the discussion among reproductive health advocates and lawyers exploring this topic.

INTRODUCTION .....	45
I. BACKGROUND ON MENSTRUAL REGULATION .....	49
A. History of Menstrual Regulation in the United States .....	51
B. Potential Benefits of Re-Introducing Menstrual Regulation in the United States .....	54
II. HOW DOES MR FIT IN THE EXISTING LEGAL FRAMEWORK? MR OCCUPIES A LEGAL LIMBO BETWEEN ABORTION AND CONTRACEPTION.....	58

- 
1. Taber’s Cyclopedic Medical Dictionary defines contraception as “the prevention of conception” and “contraceptive” as “any process, device, or method that prevents conception. Categories of contraceptives include steroids; chemical; physical or barrier; combinations of physical or barrier and chemical; ‘natural’; abstinence; and permanent surgical procedures.” TABER’S CYCLOPEDIC MEDICAL DICTIONARY 435–36 (Clayton L. Thomas et al. eds., 18th ed. 1997) [hereinafter TABER’S].
  2. Taber’s Cyclopedic Medical Dictionary defines abortion as “[t]he termination of pregnancy before the fetus reaches the stage of viability.” *Id.* at 6. Merriam-Webster’s medical dictionary defines abortion as “1: the termination of a pregnancy after, accompanied by, resulting in, or closely followed by the death of the embryo or fetus: a: spontaneous expulsion of a human fetus during the first 12 weeks of gestations—compare miscarriage b: induced expulsion of a human fetus.” *Abortion*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://c.merriam-webster.com/medlineplus/abortion> (last visited Feb. 25, 2021) [<https://perma.cc/DF4V-5B2B>]. For the purpose of surveillance data, the Centers for Disease Control and Prevention (CDC) defines a legal induced abortion as “as an intervention performed by a licensed clinician (e.g., a physician, nurse-midwife, nurse practitioner, physician assistant) within the limits of state regulations that is intended to terminate a suspected or known ongoing intrauterine pregnancy and that does not result in a live birth.” *CDCs Abortion Surveillance System FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 25, 2019), [https://www.cdc.gov/reproductivehealth/data\\_stats/abortion.htm](https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm) [<https://perma.cc/5J6P-RQ3T>].
  3. There is little legal analysis literature on MR in the United States, and the few articles that do tackle this subject were written between the 1970s and the 1990s.

A. Lessons from IUDs and Emergency Contraception .....	59
B. Menstrual Regulation: Between Contraception and Abortion.....	62
III. THE CURRENT LEGAL FRAMEWORK CAN ACCOMMODATE MR AS ANOTHER	
FERTILITY CONTROL OPTION.....	67
A. Legal Implications for Users.....	67
B. Legal Implications for Providers .....	72
CONCLUSION .....	76

## INTRODUCTION

In the United States, a woman or person who menstruates<sup>4</sup> who has missed their period and suspects, but does not desire, pregnancy may expect they have two choices: to seek an abortion or to continue the pregnancy. Confirmation of the pregnancy will occur at some point for either option.<sup>5</sup> What if a third option

- 
- Gender-nonconforming and non-binary people, trans men, and girls (adolescents) also require reproductive health care and could benefit from the option of MR. See Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 954 (2019) (“People of all gender identities can be pregnant”). There is a live debate in the reproductive health and women’s rights fields about the use of gender-neutral terminology, such as “pregnant person” or “menstruators.” See *Position Statement on Gender Inclusive Language*, Midwives Alliance North America, <https://mana.org/healthcare-policy/position-statement-on-gender-inclusive-language> (last visited Feb. 26, 2021) [<https://perma.cc/TDT2-G8W5>] (adopting gender-neutral language in pregnancy, birth, and breastfeeding); compare NAT’L WOMEN’S L. CTR., *Pregnancy and Parenting*, <https://nwlc.org/issue/pregnancy-parenting/> (last visited Feb. 26, 2021) [<https://perma.cc/CEE3-ZL5D>] (using the term “women” in advocating for pregnancy-related rights and abortion access). Advocates of gender-neutral terminology argue that it separates gender from sex—a core feminist value—and provides inclusivity for all persons who become pregnant, menstruate, etc., without excluding people who do identify as “women.” See, e.g., Adrienne Saya, *The Push for “Pregnant Person”: Using Gender Inclusive Language in Reproductive Rights*, NARAL PRO-CHOICE MD (May 22, 2019), <https://prochoicecmd.medium.com/the-push-for-pregnant-person-using-gender-inclusive-language-in-reproductive-rights-54e7ed69e27c> [<https://perma.cc/Q88Y-QK9G>] (adopting gender-neutral language). Advocates of maintaining the gendered term “women” assert that reproductive health and rights cannot be divorced from gender identity, and that gender-neutral terms fail to capture reproductive health as an issue linked to the broader oppression of women as such. See, e.g., Our Readers & Katha Pollitt, *Does Talking About ‘Women’ Exclude Transgender People From the Fight for Abortion Rights?*, NATION (Apr. 22, 2015) (debating the use of “women” and gender-neutral terms in abortion). See also *Doe v. Maher*, 515 A.2d 134, 159 (Conn. Super. Ct. 1986) (“Since time immemorial, women’s biology and ability to bear children have been used as a basis for discrimination against them. . . . This discrimination has had a devastating effect upon women.”); Gloria Steinem, *If Men Could Menstruate*, 6 WOMEN’S REPROD. HEALTH 151, 151 (July 30, 2019). This Paper uses the term “women” as well as “people who menstruate/can get pregnant” to address both the link to broader gender oppression and the need to ensure inclusivity in reproductive health and rights.
  - People in the United States who suspect they may be pregnant typically use an at-home pregnancy test around twenty-eight days since their last menstrual period (LMP), or when they miss their period, followed by confirmation by a health care provider. See *Home Pregnancy Tests*, KAISER PERMANENTE (Feb. 11, 2020), <https://healthy.kaiserpermanente.org/health-wellness/health-encyclopedia/he.home-pregnancy-tests.hw227606> [<https://perma.cc/W45M-STGK>] (noting that “[w]hile a few home pregnancy tests may be sensitive enough to show a pregnancy on the first day of a woman’s missed period, most test kits are more accurate about



existed?<sup>6</sup> Specifically, initiating uterine bleeding to ensure non-pregnancy without first confirming pregnancy status. This process, known as “menstrual regulation” (MR),<sup>7</sup> was practiced in the United States prior to the legalization of abortion.<sup>8</sup> MR fell out of use, however, largely due to the liberalization of access to abortion

---

a week after a missed period.”); *Pregnancy*, FOOD & DRUG ADMIN. (Apr. 29, 2019), <https://www.fda.gov/medical-devices/home-use-tests/pregnancy> [https://perma.cc/B564-W72Y]; *Getting Pregnant*, MAYO CLINIC (Jan. 12, 2019), <https://www.mayoclinic.org/healthy-lifestyle/getting-pregnant/in-depth/home-pregnancy-tests/art-20047940> [https://perma.cc/U54J-MDQR]; Lawrence B. Finer, Lori F. Frohwrith, Lindsay A. Dauphinee, Susheela Singh & Ann M. Moore, *Timing of Steps and Reasons for Delays in Obtaining Abortions in the United States*, 74 *CONTRACEPTION* 334, 338 (2006) (“Many . . . respondents described a process of confirming the pregnancy at a doctor’s office or clinic, rather than (or in addition to) at home”). People who do not wish to be pregnant may delay confirming pregnancy in the hope that their period arrives or that they naturally miscarry. SARAH S. BROWN & LEON EISENBERG, *THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES* 66 (1995) (“Women who have mistimed or unwanted conceptions tend to initiate prenatal care later in pregnancy and to receive less adequate care. . . than women who have intended the pregnancy.”); Marianne Kjelsvik, Ragnhild J. Tveit Sekse, Asgjerd Litleré Moi, Elin M. Aasen, Catherine A. Chesla & Eva Gjengedal, *Women’s Experiences When Unsure about Whether or Not to Have an Abortion in the First Trimester*, 39 *HEALTH CARE FOR WOMEN INT’L* 784, 791 (2018) (“Even if they had verified the pregnancy by a test and the bodily signs reminded them, this new reality might feel unreal and hard to take in. Some described how they tried to keep the thoughts away, even if they were there all the time. They found thinking about the pregnancy was exhausting.”); Finer et al., *supra*, at 334, 338 (noting that minors took longer to suspect pregnancy and that minors, women below the poverty level, and women with two or more children took longer than higher educated and higher income women to confirm pregnancy). Confirming pregnancy before abortion is also standard practice. *Safe Abortion: Technical and Policy Guidance for Health Systems*, WORLD HEALTH ORG. 32 (2012), <https://www.ncbi.nlm.nih.gov/books/NBK138188/> [https://perma.cc/F4SF-WC3U] (“The first steps in providing abortion care are to establish that the woman is indeed pregnant and, if so, to estimate the duration of the pregnancy and confirm that the pregnancy is intrauterine.”).

6. “What is a woman to do if neither her plan A (birth control) nor her plan B (the morning-after pill) worked? Wouldn’t it be great if she had a plan C—a medicine similar to these other pills that would start her period and end her anxieties? Such a thing exists, and it should be available to all women.” Francine Coeytaux & Victoria Nichols, *Plan C: The Safe Strategy for a Missed Period When You Don’t Want to Be Pregnant*, REWIRE NEWS (Feb. 7, 2014, 4:23 PM), <https://rewire.news/article/2014/02/07/plan-c-safe-strategy-missed-period-dont-want-pregnant/> [https://perma.cc/8MZ4-FXCW].
7. Claudia Pap Mangel, *Legal Abortion: The Impending Obsolescence of the Trimester Framework*, 14 *AM. J. L. & MED.* 69, 79 (1988). Taber’s *Cyclopedic Medical Dictionary* defines menstrual regulation as “vacuum or suction curettage of the uterus done within the first two weeks following the expected date of the onset of menstruation. If amenorrhea was due to pregnancy, the procedure is classed as a form of fertility control.” TABER’S, *supra* note 1 at 1193. *See also* Wendy R. Sheldon, Meighan Mary, Lisa Harris, Katherine Starr & Beverly Winikoff, *Exploring Potential Interest in Missed Period Pills in Two U.S. States*, *CONTRACEPTION* 1, 1 (2020), [https://www.contraceptionjournal.org/article/S0010-7824\(20\)30337-1/fulltext](https://www.contraceptionjournal.org/article/S0010-7824(20)30337-1/fulltext) [https://perma.cc/WGV4-KEAN] (explaining that missed period pills, a method of MR, “are uterine evacuation medications used for treatment of delayed menses without prior pregnancy confirmation”).
8. *Medicine: Unofficial Abortion*, *TIME* (Sept. 11, 1972) (referring to menstrual regulation as “menstrual extraction” and describing its use); Laurie Johnston, *Abortion Clinics in City Face Rising Competition*, *N.Y. TIMES*, Mar. 19, 1973, at 4; William E. Brenner, David A. Edelman & Elton Kessel, *Menstrual Regulation in the United States: A Preliminary Report*, 26 *FERTILITY AND STERILITY* 289, 289 (1975); Diane Curtis, *Doctored Rights: Menstrual Extraction, Self-Help Gynecological Care, and the Law*, 20 *N.Y.U. REV. L. & SOC. CHANGE* 427, 435 (1994) (“In the United States, ‘bringing it down’ and ‘removing a menstrual obstruction’ have been common practices since the colonies were first established.”).

and advancements in testing that permitted pregnancy to be confirmed sooner and even at home, reducing the window in which pregnancy may be suspected but impossible to confirm. Elsewhere in the world, MR is still in use and has adapted from aspiration methods to modern medical options. “Bringing down” one’s period to ensure non-pregnancy is documented in Mexico and Cuba.<sup>9</sup> MR is permitted and occurs formally in Bangladesh, where abortion is illegal except to save the life of the mother.<sup>10</sup> While MR uses the same methods as an abortion—vacuum aspiration or curettage or, modernly, medication—it is distinct from abortion because pregnancy status is not first confirmed. MR induces bleeding that may or may not terminate a pregnancy, depending on the reason for their delayed menses. Abortion, by definition and practice, requires confirmation of pregnancy. MR is not an abortion because pregnancy is never confirmed, though the result would be the same if the MR user was pregnant.

Reviving MR in the United States could offer an appealing additional opportunity for women and people who menstruate to control their fertility. In a survey by Gynuity Health Projects, 42 percent of women who presented for a pregnancy test at a clinic said they would be interested in a “missed period pill,” including 70 percent of those who “would be unhappy if pregnant.”<sup>11</sup> It is easy to see the appeal. Imagine the scenario where someone is a few days late for their period. Instead of continuing to wait anxiously for it to begin or going out to buy a pregnancy test, they take a pill to induce bleeding and cramping. After a few days, as usual, their bleeding subsides and they can be confident they are not pregnant. It’s a simple, safe intervention at home that allows them to take control of the situation.

Beyond interest, MR could fill a critical gap in fertility control by adding an additional point along the reproductive health timeline for people to act. They may engage in MR immediately after a missed period, before pregnancy can be confirmed, and possibly before an abortion could be procured. For women in states with limited health facilities, especially limited abortion clinics, such an option could be a game changer. It would reduce the time and expense of obtaining an abortion later and avoid more degrading requirements, such as forced ultrasounds, while allowing people to control their reproductive health outcomes.<sup>12</sup> Because

---

9. Coeytaux & Nichols, *supra* note 6 (“Currently, in Cuba, where abortion is legal, a woman whose period is two weeks late is offered menstrual extraction without a pregnancy test . . . [I]n Mexico, women often purchase misoprostol from pharmacies to effectively ‘bring down their periods’ (bajar la regla).”).

10. Fauzia Akhter Huda, Hassan Rushekh Mahmood, Anadil Alam, Faisal Ahmmed, Farzana Karim, Bidhan Krishna Sarker, Nafis Al Haque & Anisuddin Ahmed, *Provision of Menstrual Regulation with Medication among Pharmacies in Three Municipal Districts of Bangladesh: A Situation Analysis*, 97 *CONTRACEPTION* 144, 144 (2018) (In Bangladesh, where abortion is illegal, “a medical doctor can provide MR up to 12 weeks from the first day of the last menstrual period (LMP), and midlevel providers, such as family welfare visitors (FWVs), can provide MR up to 10 weeks from LMP.”).

11. Sheldon et al., *supra* note 7, at 4.

12. *Requirements for Ultrasound*, GUTTMACHER INST., (Sept. 1, 2020),

MR is no longer commonplace in the United States, and many people lack awareness of MR, this is an opportune moment to consider the legal implications of reviving MR and its benefits.

This Paper identifies the legal implications of MR in the United States for user and provider, with a particular emphasis on criminal law in light of recent attempts to use criminal statutes to punish women for their reproductive choices.<sup>13</sup> The purpose of this review is to inform decision-making in the reproductive health and policy community on the feasibility and advisability of re-introducing MR from a legal perspective.

Part I sets the stage with more detailed information on how MR works. Part II explores how MR fits in the existing legal framework of contraception and abortion. Given that MR ensures non-pregnancy without first confirming pregnancy, this process lies somewhere between pregnancy prevention (contraception<sup>14</sup>) and pregnancy termination (abortion<sup>15</sup>). The analysis of how MR may be categorized legally is informed by a review of the intrauterine device (IUD) and emergency contraception (EC), for which there were similar categorization debates that are now resolved. Part III assesses the specific legal implications of MR, for user and provider, if it were to be introduced today. Finally, Part IV offers concluding remarks and initial recommendations.

This Paper does not seek to answer medical or normative questions about whether MR is a good or bad therapy for patients or for the reproductive health movement generally. The aim is to outline the legal implications should this additional reproductive option become available again. Reproductive health and rights advocates must consider multiple approaches to expand fertility control access and options in an increasingly restrictive environment. This Paper hopes to contribute to one element of what will undoubtedly be a complex discussion that also considers the social and political implications of MR, which are beyond the scope of this Paper.

---

<https://www.guttmacher.org/state-policy/explore/requirements-ultrasound>  
[<https://perma.cc/JTL8-7VMU>].

13. For example, in Arkansas, Anne Bynum was charged with “concealing birth” after delivering a thirty-plus-week fetus at home after allegedly taking misoprostol. She was sentenced by a jury to six years in prison, and served fifty-nine days before the conviction was reversed and remanded by the Court of Appeals of Arkansas. The court found that the trial court abused its discretion by allowing the prosecutor to introduce evidence of Bynum’s abortion history and evidence that she ingested medicine prior to giving birth. *Bynum v. State*, 546 S.W.3d 533, 536 (Ark. Ct. App. 2018). See also The Editorial Board, *How My Still Birth Became a Crime*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-pregnancy-pro-life.html> [<https://perma.cc/97TS-8ENA>]; *Patel v. State*, 60 N.E.3d 1041, 1044 (Ind. Ct. App. 2016) (vacating a feticide conviction on the grounds that the state legislature did not intend feticide laws to apply to illegal abortions or to prosecute women for their own abortions).
14. Taber’s Cyclopedic Medical Dictionary defines contraception as “the prevention of conception” and “contraceptive” as “any process, device, or method that prevents conception. Categories of contraceptives include steroids; chemical; physical or barrier; combinations of physical or barrier and chemical; ‘natural’; abstinence; and permanent surgical procedures.” TABER’S, *supra* note 1, at 435–436.
15. Taber’s Cyclopedic Medical Dictionary defines abortion as “[t]he termination of pregnancy before the fetus reaches the stage of viability.” TABER’S, *supra* note 1, at 6.

### I. BACKGROUND ON MENSTRUAL REGULATION

MR is the process of inducing uterine bleeding without confirming pregnancy status for people with delayed menses.<sup>16</sup> It is colloquially known as “bringing down” or “bringing on” a period. The concept of MR has ancient roots<sup>17</sup> and a fifty-year history in modern reproductive care.<sup>18</sup> Since the 1970s, MR has evolved from primarily a vacuum aspiration procedure<sup>19</sup> to contemporary medication methods.<sup>20</sup> Though the vacuum methods most commonly used in the 1970s enjoyed high success and safety rates, modern medical methods have made MR even safer and simpler.<sup>21</sup>

This Paper focuses on the possibility of *medical* MR. Medical MR can be achieved through the use of misoprostol in conjunction with mifepristone at sixty-three days or less after last menstrual period (nine weeks since LMP), with a dosage of 200 mg of mifepristone followed by 800 µg of buccal (placed inside the cheek to dissolve) misoprostol twenty-four hours later.<sup>22</sup> Misoprostol may also be

- 
16. WORLD HEALTH ORG., *supra* note 5, at 66 (“uterine evacuation without laboratory or ultrasound confirmation of pregnancy for women who report recent delayed menses”); *Menstrual Extraction*, MERRIAM-WEBSTER MEDICAL DICTIONARY, <https://www.merriam-webster.com/medical/menstrual%20extraction> (last visited Feb. 26, 2021) [<https://perma.cc/L45H-RW96>] (“a procedure for early termination of pregnancy by withdrawing the uterine lining and a fertilized egg if present by means of suction”); Leonard E. Laufe, *The Menstrual Regulation Procedure*, 8 STUDIES IN FAMILY PLANNING 253, 253 (Oct. 1977) (“Menstrual regulation is the induction of uterine bleeding that has been delayed up to 14 days from its anticipated date of onset”); Elton Kessel, William E. Brenner & George H. Stathes, *Menstrual Regulation in Family Planning Services*, 65 AM. J. OF PUB. HEALTH 731, 731 (July 1975) (“Menstrual regulation (MR) is the term applied to any treatment which is administered within 14 days of a missed menstrual period to ensure that a woman either is not pregnant or does not remain pregnant”).
  17. Hippocrates, BCE 460–377, taught “herbal recipes to induce menstruation.” *A History of Birth Control Methods*, PLANNED PARENTHOOD FED’N OF AM. 11 (Jan. 2012). Thesaurus Pauperum (Treasure of the Poor), written by Peter of Spain (later Pope John XXI) in the 13<sup>th</sup> century “offered advice on birth control and how to provoke menstruation.” *Id.* at 8.
  18. *See, e.g.*, Laufe, *supra* note 16.
  19. *See, e.g.*, Laufe, *supra* note 16, at 253 (“By far the most common method of performing menstrual regulation is by mini-vacuum aspiration.”).
  20. Medical MR may be accomplished through combination mifepristone-misoprostol. *See* Cui-Lan Li, Dun-Jin Chen, Yi-Fan Deng, Li-Ping Song, Xue-Tang Mo & Kai-Jie Liu, *Feasibility and Effectiveness of Unintended Pregnancy Prevention with Low-Dose Mifepristone Combined with Misoprostol before Expected Menstruation*, 30 HUM. REPROD. 2794, 2795 (2015). It may also be accomplished through misoprostol alone. Huda et al., *supra* note 10, at 146–47.
  21. Medical MR is accomplished through the use of mifepristone and misoprostol or misoprostol alone. Both regimens enjoy high safety rates. *See* Li et al., *supra* note 20, at 2794 (“Low-dose mifepristone and misoprostol administered at the time of expected menstruation was effective and safe in maintaining or restoring non-pregnant status, with no obvious menstrual disturbance.”).
  22. Anadil Alam, Hillary Bracken, Heidi Bart Johnston, Sheila Raghavan, Noushin Islam, Beverly Winikoff & Laura Reichenbach, *Acceptability and Feasibility of Mifepristone-Misoprostol for Menstrual Regulation in Bangladesh*, 39 INT’L PERSPECTIVES ON SEXUAL & REPROD. HEALTH 80 (2013); *see also* M-L. Swahn, M. Bygdeman, Chen Jun-kang, K. Gemzell-Danielsson, Song Si, Yang Qiu-ying, Yang Pei-juan, Qian Mei-ling & Chang Wei-fang, *Once-a-Month Treatment with a Combination of Mifepristone and the Prostaglandin Analogue*

used alone for medical MR.<sup>23</sup> Misoprostol is an inexpensive prescription medication used both for ulcer treatment and prevention<sup>24</sup> and a range of gynecological purposes,<sup>25</sup> available by prescription. The mifepristone-misoprostol combination is also available by prescription, but subject to particular restrictions, as it is currently used for medical abortion.<sup>26</sup> Both the misoprostol alone and the mifepristone-misoprostol combination part of a cocktail are acceptable for medical MR, though the World Health Organization considers mifepristone-misoprostol the gold standard.<sup>27</sup>

---

*Misoprostol*, 14 HUM. REPROD. 485–488 (1999) (exploring appropriate dosages for medical MR).

23. A study in Bangladesh found 86 percent of pharmacy workers mentioned misoprostol (as opposed to 78 percent who mentioned mifepristone-misoprostol combo) for MR, though “mystery client visits found that the mifepristone-misoprostol combination (69 percent) was suggested over misoprostol (51 percent) by the pharmacy workers.” Huda et al., *supra* note 10, at 144.
24. See *Cytotec (misoprostol)*, FOOD & DRUG ADMIN. 1, 6 [https://www.accessdata.fda.gov/drugsatfda\\_docs/label/2002/19268slr037.pdf](https://www.accessdata.fda.gov/drugsatfda_docs/label/2002/19268slr037.pdf) (last visited Sept. 8, 2020) [<https://perma.cc/Y485-6RKF>].
25. A common gynecological off-label use of misoprostol is to soften the cervix, also called “cervical ripening.” These purposes include: to induce contractions for at-term labor, Rebecca Allen & Barbara M. O’Brien, *Uses of Misoprostol in Obstetrics and Gynecology*, 2 REVIEWS IN OBSTETRICS & GYNECOLOGY 159, 165 (2009), to prepare for a surgical procedure including surgical abortion, WORLD HEALTH ORG., *supra* note 5, at 5, and to prepare for insertion of an IUD, Allen & O’Brien, *supra*, at 163. Finally, misoprostol is used to prevent or treat postpartum hemorrhage. Jennifer Templeton Dunn, Jennifer Mraz, Erin Cassard Schultz, Eleanor A. Drey & Karen R. Meckstroth; *Abortion in California: A Medical-Legal Handbook* 30 (2012), <https://californiaabortionlaw.com/wp/wp-content/uploads/2012/03/AIC-Handbook1.pdf> [<https://perma.cc/88PN-XHTX>]. *But see Misoprostol (marked as Cytotec) Information*, FOOD & DRUG ADMIN. (July 2015), <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/misoprostol-marketed-cytotec-information> [<https://perma.cc/NZ3G-FMB5>] (“Misoprostol is sometimes used to decrease blood loss after delivery of a baby. These uses are not approved by the FDA. No company has sent the FDA scientific proof that misoprostol is safe and effective for these uses.”).
26. See *Mifeprex (mifepristone) tablet label*, FOOD & DRUG ADMIN. 6 (2016), [https://www.accessdata.fda.gov/drugsatfda\\_docs/label/2016/020687s020lbl.pdf](https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/020687s020lbl.pdf) [<https://perma.cc/XP97-3J5C>] (requiring that prescribers be certified with the Mifeprex Risk Evaluation and Mitigation Strategy program; that patients sign a Patient Agreement Form; and that Mifeprex be dispensed only in certain healthcare settings, specifically in clinics, medical offices, and hospitals by or under the supervision of a certified healthcare providers, rather than a pharmacy); Luisa Torres, *Restrictions on Abortion Medication Deserve a Second Look, Says a Former FDA Head*, NAT’L PUB. RADIO (Aug. 20, 2019, 11:04 AM), <https://www.npr.org/sections/health-shots/2019/08/20/740809772/restrictions-on-abortion-medication-deserve-a-second-look-says-a-former-fda-head> [<https://perma.cc/Y8ZN-QSL7>] (Dr. Jane Henney, who was FDA commissioner when the Mifeprex restrictions were imposed, explaining that “[t]he current restrictions impose a lot of burden [sic] on women who have to go to a clinic and [on] the certified physician. If some of those restrictions were lifted, you could possibly go to your own physician who might write a prescription that you could get filled in your pharmacy and take this medication at home right now. Women, particularly in rural areas and suburbs, have to travel long distances for this, and it’s just a real burden on them to do that. It’s also a burden on the physicians, who have to register and keep extensive records.”) (alteration in original).
27. As explained above, MR is accomplished using the same methods as medical abortion. The WHO recommends mifepristone followed by misoprostol for medical abortion, as “safe and effective up to 9 weeks (63) days of pregnancy” and notes that “limited evidence also suggests the safety and effectiveness of a regimen with repeated doses of misoprostol between 9 and 12

### A. History of Menstrual Regulation in the United States

Prior to *Roe v. Wade*, medical providers offered MR, also known at the time as menstrual evacuation, to treat unwanted and unconfirmed pregnancies, but the procedure slowly fell out of practice after abortion was decriminalized.<sup>28</sup> Small “self-help” clinics, organized by then-called “Militant Women’s Liberationists,” also performed menstrual extractions outside of the formal health sector.<sup>29</sup> Since the medications for medical MR were not available, the most common method of MR in the 1970s was vacuum aspiration.<sup>30</sup> In the medical field, the procedure was seen as both a simple and effective therapy and a workaround to the criminalization of abortion. A *TIME* article in 1972 summarized, “[menstrual regulation] is becoming medically respectable; more and more physicians are studying it as a possibly practical method of avoiding the legal and physical hardships of abortions done later in pregnancy.”<sup>31</sup> In 1975, an article in the *Journal of Family Law* predicted “the development of menstrual regulation may make restrictive abortion laws obsolete.”<sup>32</sup>

---

weeks of gestation.” WORLD HEALTH ORG., *supra* note 5, at 38; see Kelly Cleland and Nicole Smith, *Aligning Mifepristone Regulation with Evidence: Driving Policy Change Using 15 Years of Excellent Safety Data*, 92 *CONTRACEPTION* 179, 179 (2015) (“Currently, the most common evidence-based protocols involve 200 mg mifepristone and 800 mcg misoprostol, and allow for use up to at least 63 days of gestation; these regimens are recommended by the World Health Organization, the American College of Obstetricians and Gynecologists and the Society of Family Planning and the Planned Parenthood Federation of America”). Misoprostol, though less effective than when used in combination with mifepristone, may also be used safely alone. See Elizabeth G. Raymond, Margo S. Harrison & Mark A. Weaver, *Efficacy of Misoprostol Alone for First-Trimester Medical Abortion: A Systematic Review*, 133 *OBSTETRICS & GYNECOLOGY* 137, 137 (2019) (“Misoprostol alone is effective and safe and is a reasonable option for women seeking abortion in the first trimester”).

28. Cindy Pearson, *Self Help Clinic Celebrates 25 Years*, NAT’L WOMEN’S HEALTH NETWORK (Mar./Apr. 1996), <https://www.fwhc.org/selfhelp.htm> [<https://perma.cc/72H9-BWDF>] (describing how menstrual extraction self-help groups shifted to in-clinic abortion provision after *Roe v. Wade*); Coeytaux & Nichols, *supra* note 6 (explaining that menstrual regulation “did not take hold in the United States,” though it did in Bangladesh, where abortion remains strictly regulated).
29. *TIME*, *supra* note 8; Coeytaux & Nichols, *supra* note 6 (MR “began in California in 1971, when a group of self-help feminists developed a technique that allowed women to safely suction out menstrual blood and tissue. Referring to it as ME (menstrual extraction), these early self-helpers advocated that women join self-help groups and practice extracting each others’ menses around the time of their expected periods”); Pearson, *supra* note 28 (“The techniques eventually developed by Rothman and Downer were entitled menstrual extraction, to differentiate them from abortion in the medical setting. Menstrual Extraction, or ME, was never envisioned as a service that lay women practitioners would provide to other women who needed an abortion. Rather, the early self helpers advocated that women join self help groups and practice extracting each other’s menses around the time of their expected periods. If a pregnancy happened to be present, it would be extracted along with the contents of the uterus. The self helpers believed that their experience with each other, the modified nature of the equipment they were using, and the fact that they were ending pregnancies far earlier than was typical during an abortion would make menstrual extraction safe.”).
30. *TIME*, *supra* note 8 (noting that vacuum aspiration had “remarkably few complications in some 2,500 doctor-performed procedures”).
31. *Id.*
32. Luke T. Lee & John M. Paxman, *Legal Aspects of Menstrual Regulation: Some Preliminary Observations*, 14 *J. FAM. L.* 181, 191 (1975).

The procedure was seen as a legal workaround precisely because pregnancy was not first confirmed, creating a situation where “an abortion in fact is not an abortion officially.”<sup>33</sup> However, MR prior to *Roe* did not always, in fact, terminate a pregnancy. Reports of tissue examinations from the era showed that only “between 50% and 85% of the women who elect[ed] to have extractions [we]re pregnant.”<sup>34</sup> Though MR acceptance increased in the United States in the early 1970s, the context quickly shifted with the legalization of abortion.

After *Roe*,<sup>35</sup> MR became gradually less relevant, in part due to the liberalization of abortion laws, which meant the legal benefit of the grey space provided by MR was no longer necessary.<sup>36</sup> As scholars at the time explained, “[b]efore the US Supreme Court decision which legalized abortion on Jan. 22, 1973, the performing of uterine evacuations before pregnancy could be diagnosed was suggested as a way of avoiding abortion laws.”<sup>37</sup> Once abortion was legalized, MR was no longer the only legal post-conception fertility control method. Even so, the framework of MR was not immediately seen as irrelevant. A 1973 journal hypothesized that MR in a post-*Roe* world might “return[] us to the rule in effect until the nineteenth century; namely, the legal definition of abortion did not apply until the ‘quickening’ of the fetus.”<sup>38</sup> In the mid-1970s, it thus seemed possible that MR might continue as a method for post-coital fertility control early in a pregnancy and not “count” as abortion.<sup>39</sup> Ultimately, the liberalization of abortion laws contributed to a general abandonment of MR in the formal medical framework in the United States.<sup>40</sup>

---

33. TIME, *supra* note 8.

34. *Id.*

35. The Supreme Court has recognized the constitutional right to an abortion since *Roe v. Wade* in 1973, confining state abortion bans to post-viability and holding that regulations before viability must be to protect the life and health of the mother. *Roe v. Wade*, 410 U.S. 113, 163 (1973). In 1992, in *Planned Parenthood v. Casey*, the court did away with the *Roe* trimester framework, and set out the undue burden standard, which prevents states from placing a significant obstacle before a woman seeking an abortion. 505 U.S. 833, 874 (1992). *Whole Woman’s Health v. Hellerstedt* clarified this standard and outlined that courts must review the tangible benefits as compared to the restrictions caused by a challenged regulation in an undue burden analysis. 136 S. Ct. 2292, 2309 (2016).

36. Curtis, *supra* note 8, at 441 (“After *Roe v. Wade* was decided, the interest in menstrual extraction waned as women turned more consistently to the newly legal and available clinical abortion providers, almost always physicians”).

37. Jane E. Hodgson, Roxanne Smith & Daniella Milstein, *Menstrual Extraction: Putting It and All Its Synonyms into Proper Perspective as Pseudonyms*, 228 JAMA 849, 849 (1974).

38. Anne-Marie Dourlen-Rollier, *Legal Problems Related to Abortion and Menstrual Regulation*, 7 COLUM. HUM. RTS. L. REV. 120, 134–35 (1975).

39. Lee & Paxman, *supra* note 32, at 183 (outlining that prostaglandins—the category in which misoprostol falls—“may be used to remedy a menstrual delay of not more than ten days or as a menstrual regulator when administered between the 25th to 28th day of the cycle. If fertilization has taken place, the prostaglandins will bring about the elimination of the ovum. There is also the possibility that the prostaglandins can be used in mid-cycle as an implantation inhibitor and a post-coital contraceptive.”).

40. Self-help MR appears to have continued on a small scale, with a revival in the 1980s as abortion restrictions began to crop up. See Pearson, *supra* note 28. However, there is generally little data on MR in the United States, so the extent to which MR continued to exist either in

Another contributing factor for the gradual movement away from MR was the improved accuracy of early pregnancy tests. One feature of MR that was a particular benefit when it first came into practice was that it is “performed without a positive pregnancy test during the interval before conventional pregnancy testing is reliable.”<sup>41</sup> Because abortions require a confirmed pregnancy, MR fills the gap between missing a period and being able to obtain a pregnancy test. This allows a woman to ensure she is not pregnant before confirming her status and begin the process to obtain an abortion.<sup>42</sup> Over time, pregnancy tests have become increasingly reliable at earlier stages in the pregnancy.<sup>43</sup> Today, even at-home tests claim to be able to provide a diagnosis the first day after a missed period; accuracy increases with time, however, and, generally, tests are the most accurate a week after a missed period.<sup>44</sup> Even so, as late as 1977, when tests were becoming more advanced, MR was still seen as having a place in the reproductive options spectrum. One journal hailed MR as a “simple technique, which has already gained international acceptance as an appropriate treatment of amenorrhea [the absence of menstruation], especially when unwanted pregnancy is the suspected

---

the formal medical sector or informally in the period after *Roe* is unclear. Given the lack of studies, scholarly literature, or medical association attention, the practice at the very least likely faded from the general reproductive health and rights sphere.

41. Laufe, *supra* note 16, at 253; TIME, *supra* note 8 (“Vacuum-aspiration abortions are generally performed between the eighth and twelfth weeks of pregnancy, when tests can establish whether a woman is in fact pregnant. Menstrual extraction is designed to be done no later than six weeks after the woman’s last menstrual period, when proof of pregnancy by ordinary tests is sometimes difficult to establish”); Lee & Paxman, *supra* note 32, at 183–84 (“[M]any proponents are now urging that menstrual regulation be used during this so-called “gray area”—five to six weeks from LMP—when it cannot be medically determined, whether embryonic development has begun”).
42. Laufe, *supra* note 16, at 253 (noting pregnancy tests are most accurate two weeks after a missed period). See also *The Thin Blue Line: The History of the Pregnancy Test*, NAT’L INST. HEALTH, <https://history.nih.gov/display/history/Pregnancy+Test+Timeline> (last visited Feb. 26, 2021) [<https://perma.cc/EZ5L-N64W>] (noting that in the 1970s tests performed by doctors could be done “as early as four days after a missed period,” but also that tests were most accurate two weeks after a missed period. The first at-home pregnancy test became available in 1977.).
43. *Id.*
44. *Home Pregnancy Tests: Can You Trust the Results?*, MAYO CLINIC (Jan. 12, 2019), <https://www.mayoclinic.org/healthy-lifestyle/getting-pregnant/in-depth/home-pregnancy-tests/art-20047940> [<https://perma.cc/W6W3-J2QV>] (“The earlier after a missed period that you take a home pregnancy test, the harder it is for the test to detect hCG. For the most accurate results, repeat the test one week after a missed period. If you can’t wait that long, ask your health care provider for a blood test”). See also *Pregnancy*, FOOD & DRUG ADMIN. (Dec. 28, 2017), <https://www.fda.gov/medicaldevices/productsandmedicalprocedures/invitro-diagnostics/homeusetests/ucm126067.html> [<https://perma.cc/AS82-9BFV>] (“Most pregnancy tests have about the same ability to detect hCG, but their ability to show whether or not you are pregnant depends on how much hCG you are producing. If you test too early in your cycle or too close to the time you became pregnant, your placenta may *not* have had enough time to produce hCG.”) (emphasis in original); *Pregnancy Tests*, PLANNED PARENTHOOD (last visited Apr. 22, 2019), <https://www.plannedparenthood.org/learn/pregnancy/pregnancy-tests> [<https://perma.cc/KCE8-RJNG>] (“You can take a pregnancy test anytime after your period is late—that’s when they work the best . . . [i]f your periods are very irregular, or you don’t get periods at all for one reason or another, your best bet for accurate results is to take a pregnancy test 3 weeks after sex”).



cause.”<sup>45</sup> However, starting in the 1980s, the procedure declined due, in part, to the legalization of abortion<sup>46</sup> and increasingly accurate early pregnancy tests. The latter reduced the time needed to confirm pregnancy, thereby making it possible to obtain an abortion sooner.

In considering the decline of MR, it is important to keep in mind that medical MR was not even possible until the late 1990s. The only methods available were curettage—scraping of the uterus, which required someone to perform the procedure—or vacuum aspiration, which self-help groups argued a woman could safely perform at home but required some equipment and training. The mifepristone-misoprostol combination for medical abortion did not become available in the United States until 2000.<sup>47</sup> In 2015, medical MR began in Bangladesh, where vacuum MR had been in use for several decades.<sup>48</sup> Now, with decades of data on the safety and efficacy of misoprostol-mifepristone and misoprostol alone for medical abortion, and lessons from contexts like Bangladesh, the possibility of a simple and safe at-home medical MR experience is clear.<sup>49</sup>

### B. Potential Benefits of Re-Introducing Menstrual Regulation in the United States

There are many potential benefits of re-introducing MR in the contemporary spectrum of fertility control options in the United States. First, “[p]erhaps the most cogent argument for use of menstrual regulation is its safety and simplicity.”<sup>50</sup> Generally, the earlier an intervention for a potential pregnancy, the safer it is for the patient. “In contrast to first-trimester abortions performed by vacuum aspiration after seven menstrual weeks’ gestation, the complications associated with menstrual regulation among pregnant women appeared to be less frequent and less severe.”<sup>51</sup> Safety and simplicity are benefits not only in terms of health outcomes, but also because they may increase access as lower-level health providers,<sup>52</sup> or pregnant people themselves, might be able to successfully and

---

45. Laufe, *supra* note 16, at 255.

46. The “raison d’être” of MR ended with *Roe*, though it still continued for some time after among women’s groups. Hodgson et al., *supra* note 37, at 849.

47. Luran Neergaard, *FDA Approves Abortion Pill*, WASH. POST (Sept. 28, 2000, 11:57 AM) [<https://perma.cc/JVY3-QX7G>].

48. Huda et al., *supra* note 10, at 145.

49. Mary Gatter, Kelly Cleland & Deborah L. Nucatola, *Efficacy and Safety of Medical Abortion Using Mifepristone and Buccal Misoprostol Through 63 Days*, 91 *CONTRACEPTION* 269, 269 (2015) (“An evidence-based regimen of 200 mg of mifepristone orally followed by home use of 800 mcg of buccal misoprostol 24–48 h later is safe and effective through 63 days estimated gestational age. Further, the need for aspiration for any reason was low, and hospitalization was rare”); Raymond et al., *supra* note 27, at 143 (analyzing forty-two studies of thirteen-thousand women who used misoprostol alone for first trimester abortion and concluding the method “can be effective and safe for inducing abortion in the first trimester”).

50. Laufe, *supra* note 16, at 255.

51. Brenner et al., *supra* note 8, at 293.

52. Laufe, *supra* note 16, at 255.

safely manage MR.<sup>53</sup>

Second, the concept of regulating menstruation remains relevant in the modern era and could resonate with potential users. There is evidence that some populations in the United States already use a framework of “bringing down one’s period.”<sup>54</sup> Many women are familiar with the concept of regulating menses through oral contraceptives, which are frequently prescribed for that purpose or offer regular periods as a positive side effect. Post-coital fertility control, generally, is also not a new idea. “Throughout the world many women rely on postconception fertility control methods either because their preconception method has failed or because they do not use a preconception method. This will probably continue to be the case for the foreseeable future.”<sup>55</sup> Whether through Plan B or abortions, the fertility control spectrum already includes post-coital options; MR could be added to provide further choice and opportunity for intervention.

Third, and perhaps most significantly, MR provides a new opportunity window to control reproduction. Proceeding with MR before confirming pregnancy allows people who can become pregnant to take action after the window for emergency contraception has passed—up to three days after unprotected sex for over the counter emergency contraceptive pills (ECPs)<sup>56</sup> and up to five days for prescription ECPs or Paragard<sup>57</sup>—but sooner than they might be able to obtain an abortion, which providers may delay until five to six weeks LMP (last

- 
53. Katharine Footman, Rachel Scott, Fahmida Taleb, Sally Djikerman, Sadid Nuremowla, Kate Reiss & Kathryn Church, *Feasibility of Assessing the Safety and Effectiveness of Menstrual Regulation Medications Purchased from Pharmacies in Bangladesh: a Prospective Cohort Study*, 97 *CONTRACEPTION* 152, 152 (“This paper assesses the outcomes of women who self-manage menstrual regulation medications purchased from pharmacies. The methodology requires further development, but our study provides preliminary positive evidence on the safety and effectiveness of self-management despite low information provision from pharmacy workers”); Megan K. Donovan, *Self-Managed Medication Abortion: Expanding the Available Options for U.S. Abortion Care*, 21 *GUTTMACHER POL’Y REV.* (Oct. 17, 2018), <https://www.guttmacher.org/gpr/2018/10/self-managed-medication-abortion-expanding-available-options-us-abortion-care> [https://perma.cc/H68R-JNSD].
54. The concept of bringing down one’s period appears tied to the practices of some populations, particularly in the state of Texas. See Liza Fuentes, Sarah Baum, Brianna Keefe-Oates, Kari White, Kristine Hopkins, Joseph Potter & Daniel Grossman, *Texas Women’s Decisions and Experiences Regarding Self-Managed Abortion*, 20 *BMC WOMEN’S HEALTH* 1, 2 (2020) (“In a 2014 national survey of abortion patients, 2.2% had ever tried to end a pregnancy or bring back their period on their own”); John Burnett, *Legal Medical Abortions Are Up in Texas, But So Are DIY Pills from Mexico*, *NAT’L PUB. RADIO* (June 9, 2016, 4:46 AM), <https://www.npr.org/sections/health-shots/2016/06/09/481269789/legal-medical-abortions-are-up-in-texas-but-so-are-diy-pills-from-mexico> [https://perma.cc/4ZFN-7PL7].
55. Laufe, *supra* note 16, at 255–56.
56. Coeytaux & Nichols, *supra* note 6 (“Plan B emergency contraceptive only provides a short window of opportunity—it is most effective if taken no later than 72 hours after unprotected sex”).
57. *Emergency Contraception*, KAISER FAMILY FOUND. (Sept. 6, 2018), <https://www.kff.org/womens-health-policy/fact-sheet/emergency-contraception/> [https://perma.cc/D4EP-EGGH].

menstrual period)<sup>58</sup> or which may be further delayed by state-mandated waiting periods.<sup>59</sup> Obtaining an abortion generally requires in-clinic pregnancy confirmation through methods typically available at thirty-five to forty-two days LMP (e.g. urine tests, bloodwork, or ultrasound) or roughly one to two weeks following a missed period. To illustrate the window in which MR could function, imagine a person who seeks fertility control four days after a missed period. This person is seeking care two and a half to three weeks after unprotected sex and roughly a week (or longer) before they could obtain an abortion.<sup>60</sup> They take medication which safely induces bleeding and cramps similar to a period, and thereafter can be assured they are not pregnant. For the patient who is past the point for EC (three to five days after unprotected sex) but does not want further delay, MR offers the opportunity to control fertility in a window that is currently overlooked in available reproductive methods.

Fourth, there is evidence that demand for MR would be substantial.<sup>61</sup> In a recent study of women presenting at health clinics for pregnancy tests, a sizeable portion said they would be interested in a “missed period pill.” This includes 70 percent of women who said they would be unhappy if they were pregnant, and 12 percent of women who said they would be happy if they were pregnant.<sup>62</sup> Some women may feel more comfortable pursuing early MR but not a later abortion. Others may prefer the option of taking action without confirming pregnancy for personal reasons. A participant in the “missed period pill” study commented, “[i]t would be easier on my emotional wellbeing to not know I was actually pregnant but to alleviate the issue which is my missed period.”<sup>63</sup>

The psychological benefits, though potentially great, should not be pursued at the cost of providing clear, informed consent. A patient obtaining MR must

58. *How Early in a Pregnancy Can You Get an Abortion?*, PLANNED PARENTHOOD (Dec. 1, 2010, 9:51 PM), <https://www.plannedparenthood.org/learn/teens/ask-experts/2572> [<https://perma.cc/47UN-L3LK>].

59. Twenty-six states impose a waiting period between state-mandated counseling and obtaining an abortion. Most waiting periods are twenty-four hours, such as those in Arizona, Georgia, and Ohio, but can be as long as seventy-two hours, as in South Dakota, Utah, Oklahoma, Missouri, North Carolina, and Arkansas. These waiting periods require patients to make multiple visits to a health care provider to obtain an abortion, which poses particular challenges in states where patients must often travel far distances to reach a provider, such as in Texas and Mississippi. *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (Sept. 1, 2020), <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion> [<https://perma.cc/SE7M-LR5S>].

60. Emily Bazelon, *The Dawn of the Post-Clinic Abortion*, N.Y. TIMES MAG. (Aug. 28, 2014), <https://www.nytimes.com/2014/08/31/magazine/the-dawn-of-the-post-clinic-abortion.html> [<https://perma.cc/7ZLN-BZDF>] (“A medical abortion in the United States usually involves two office visits. At the first, a woman often has an ultrasound, to date the pregnancy. She is given mifepristone in the office and misoprostol to take at home 24 hours later. Then, at a follow-up visit, the woman has an examination to make sure the abortion is complete. (The F.D.A. protocol, however, calls for three visits and recommends that the misoprostol be taken under medical supervision; Texas requires four visits.)”).

61. Sheldon et al., *supra* note 7, at 6.

62. *Id.* at 4.

63. *Id.* at 5. *See also* Laufe, *supra* note 16, at 255 (“For many women, not knowing whether amenorrhea is a result of conception may be of great psychological value and may permit them to avoid confronting the issue of abortion”).

understand that in the case that they are pregnant, the therapy would terminate the pregnancy. Additionally, earlier literature on the psychological benefits of MR sometimes contains undertones of sexism around what information and decisions women are able to cope with, which both assumes the decision is emotional or difficult and reflects a paternalism that should remain in the pre-*Roe* era.<sup>64</sup> Finally, while MR may be acceptable to women who would object to abortion, or whose communities would object,<sup>65</sup> the reproductive health community should interrogate whether this framing will come at a cost of further stigmatizing abortion or simply serve as another option to increase access to reproductive healthcare. MR's psychological elements may provide an additional space for autonomy in controlling fertility and providers should ensure patients are fully informed so that they are empowered in the active choice to not confirm pregnancy before pursuing fertility control.

Finally, with *Roe* increasingly under attack, exploring MR as an additional fertility control method is important to potentially increase access to care and choice in restrictive states. It's possible that MR could again serve as a workaround in a legally restrictive environment. For example, MR could allow providers and patients to avoid hoops such as waiting periods, ultrasound requirements, and forced speech that accompany some abortion statutes. This could allow providers to provide MR sooner than they would be able to provide an abortion, or might make fertility control possible for people who otherwise would not be able to navigate restrictive requirements. The potential for MR to increase one's ability to control their fertility in restrictive states could be especially beneficial to women in rural areas, women of color, poor women, gender non-binary people, and trans men who face additional challenges to accessing reproductive care in general and abortion care in particular.<sup>66</sup> MR could even expand access for those who receive health care through Medicaid, whose coverage of post-coital fertility control at this point only goes through emergency contraception and does not cover abortion as a result of restrictions imposed by the Hyde amendment. However, it's unclear how courts would interpret MR. Thus, the benefits outlined in this paragraph could be temporary should courts categorize MR as an abortion, a categorization that would, I argue in Part III, be inaccurate.

There could also be negative consequences to reviving MR. Providers may

---

64. TIME, *supra* note 8 (“Since we have no real, definitive knowledge of pregnancy, a woman does not have to face all the conflicting emotions that go into that situation”) (internal quotations omitted).

65. Sheldon et al., *supra* note 7, at 5–6.

66. The American College of Obstetricians and Gynecologists, *Health Disparities in Rural Women*, 586 COMM. OP. 1, 2 (2014), <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2014/02/health-disparities-in-rural-women.pdf> [<https://perma.cc/3K33-RHQS>]; Christine Dehlendorf, Maria Isabel Rodriguez, Kira Levy, Sonya Borrero & Jody Steinauer, *Disparities in Family Planning*, 202 AM. J. OBSTETRICS & GYNECOLOGY 214, 215–17 (2010); Laura Nixon, *The Right to (Trans) Parent: A Reproductive Justice Approach to Reproductive Rights, Fertility, and Family-Building Issues Facing Transgender People*, 20 WM. & MARY J. WOMEN & L. 73, 76–78 (2013).

raise concerns, such as disagreeing with providing a potentially unnecessary procedure<sup>67</sup> if a patient is not pregnant. This concern, however, should be balanced against the benefits of ensuring people have autonomy over their bodies and clashes with trends in the reproductive movement to put power over reproductive health into the hands of people who can become pregnant. Providers may also be unwilling to provide a therapy that is in a legal grey zone or has similarities to abortion due to the potential increased costs for doing so. These costs could range from fear that state actors may seek to penalize providers of MR to increased malpractice insurance costs if insurance companies treat MR similarly to abortion, for which there are often (unnecessary) premium increases.<sup>68</sup> Finally, formally re-introducing MR could bring scrutiny to the practice and lead to regulation of the medications used for MR that would ultimately decrease access. While we lack data on how often people currently obtain misoprostol and then use it for MR purposes, such self-help could become unavailable should the process formally revive and likely elicit responsive regulation in states hostile to reproductive rights. These issues need further analysis, particularly by the medical field.

## II. HOW DOES MR FIT IN THE EXISTING LEGAL FRAMEWORK?<sup>69</sup> MR OCCUPIES A LEGAL LIMBO BETWEEN ABORTION AND CONTRACEPTION.

MR does not fit neatly into the current U.S. framing of fertility control as a dichotomy of contraception and abortion. At the outset, it is unclear which category is appropriate for MR. This therapy occurs later along the reproductive timeline than existing contraceptives but explicitly does not confirm pregnancy which is part of the standard “abortion” process. However, whether and how MR would fit in the existing categories of abortion and contraception is the first step required to analyze which laws might be implicated by the re-introduction of MR. Looking to other reproductive therapies, the IUD (intrauterine device) and EC (emergency contraception), helps inform how MR may not be classified as an abortion. At the same time, MR also has elements that distinguish it from existing contraceptives. Case law is little help in this area, as few courts have confronted MR let alone its legal classification, and the decisions that have touched on MR

---

67. Hodgson et al., *supra* note 37, at 850 (arguing that the medical field should interrogate whether unnecessary procedures should be encouraged: “When a patient is fully informed of her options and risks, she can usually be guided toward making the proper medical choice, but in helping her to arrive at that choice, should we lower our standards of medical care, or indulge in semantics? Let us eliminate such inaccurate terminology as ‘menstrual extraction,’ ‘menstrual planning,’ ‘endometrial aspiration,’ ‘menstrual induction,’ or ‘menstrual regulation.’”).

68. Already, medical malpractice insurers sometimes increase costs for off-label therapies or prohibit some off-label uses altogether. Additionally, insurers may attach disproportionate-to-risk “abortion riders” costing \$10,000–\$15,000. Christine E. Dehlendorf & Kevin Grumbach, *Medical Liability Insurance as a Barrier to the Provision of Abortion Services in Family Medicine*, 98 AM. J. PUB. HEALTH 1770, 1770 (2008).

69. This analysis will use California law where state law is necessary.

are inconsistent.<sup>70</sup> If MR were to be revived today, it should, at the very least, not be categorized legally as an abortion and may be best addressed in a category of its own.

### A. Lessons from IUDs and Emergency Contraception

Two types of contraceptives—the IUD and EC—provide insight into how reproductive therapies are classified. There are two types of IUDs, a non-hormonal copper IUD (Paragard)<sup>71</sup> and hormonal IUDs (Mirena, Skyla, Kyleena, and Liletta).<sup>72</sup> When IUDs first came to market there was some debate as to whether they should be classified as contraceptives.<sup>73</sup> A fringe argument posited that IUDs should be classified as abortifacients as an egg could theoretically be fertilized but fail to implant due to the IUD creating a thinner uterine lining.<sup>74</sup> Current scientific

- 
70. There are only a handful of court decisions that address MR, and the cases that do exist are generally several decades old and predate many important modern reproductive health and abortion cases. The Supreme Court briefly mentioned MR in *Roe v. Wade*, 410 U.S. 113, 161 (1973) (“Substantial problems for precise definition of [when life begins] are posed, however, by new embryological data that purport to indicate that conception is a ‘process’ over time, rather than an event, and by new medical techniques such as menstrual extraction, the ‘morning-after’ pill, implantation of embryos, artificial insemination, and even artificial wombs”). See also *Planned Parenthood Ass’n v. Ashcroft*, 483 F. Supp. 679, 697–698 (W.D. Mo. 1980), *aff’d* 665 F.2d 848 (8th Cir. 1980) (state statutory requirement that physicians inform a patient both that she is pregnant and how long she has been pregnant prior to performing an abortion fails to pass rational basis review because it has the effect of outlawing menstrual extraction); *Planned Parenthood Ass’n v. Fitzpatrick*, 401 F. Supp. 554, 573–574 (E.D. Penn. 1975), *vacated* 428 U.S. 901, *modified* 1977 U.S. Dist. LEXIS 13980, *aff’d* 439 U.S. 379 (1975) (finding constitutional a state statute requiring determination of pregnancy prior to abortion, and that such a requirement would bar menstrual regulation); *Planned Parenthood of the Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1032 (D. Nev. 2010) (enjoining enforcement of amendment to Nebraska statute to define “self-induced abortion means any abortion or menstrual extraction attempted or completed by a pregnant woman on her own body”).
71. *Copper IUD (ParaGard)*, MAYO CLINIC (Feb. 11, 2020), <https://www.mayoclinic.org/tests-procedures/paragard/about/pac-20391270> [<https://perma.cc/WD4V-3WX8>].
72. *Levonorgestrel (Intrauterine Route)*, MAYO CLINIC (Aug. 1, 2020), <https://www.mayoclinic.org/drugs-supplements/levonorgestrel-intrauterine-route/description/drg-20073437> [<https://perma.cc/DB2E-DRE2>].
73. Lee & Paxman, *supra* note 32, at 184–86 (“Much discussion was devoted to the question whether the IUD was an abortifacient or a contraceptive . . . [and] [s]everal authors have argued that both the IUD and the ‘morning after’ pill violate the criminal abortion statutes. There is, however, no literature suggesting that any successful criminal abortion prosecutions have ever been brought on that theory”); *Copper IUD (ParaGard)*, *supra* note 71 (“Copper wire coiled around the [IUD] produces an inflammatory reaction that is toxic to sperm and eggs (ova), preventing pregnancy.”); Irving Sivin, *IUDs are Contraceptives, Not Abortifacients: A Comment on Research and Belief*, 20 *STUD. FAM. PLAN.* 355, 357 (1989) (“Today, however, the weight of scientific evidence indicates that IUDs act as contraceptives. They prevent fertilization, diminishing the number of sperm that reach the oviduct and incapacitating them. IUDs, particularly copper devices, decrease the likelihood that ova can be found in the Fallopian tube shortly after ovulation.”).
74. Dr. John C. Wilke, former president of the National Right to Life Committee, championed the IUD-as-abortifacient argument, arguing that contraceptives such as IUDs and morning-after pills produce “micro-abortions.” See John C. Wilke, *American College of OB/GYN Changes*

literature, however, emphasizes that IUDs primarily work by preventing fertilization,<sup>75</sup> not by preventing implantation. Though the IUD-as-abortifacient argument has been revived in recent years,<sup>76</sup> since the initial classification and through today the medical field is clear that IUDs are contraceptives and not abortifacients.

The legal regime has followed suit, and IUDs are squarely in the “contraceptive” bucket of regulations. This remains true even as IUDs have also come to be used for EC.<sup>77</sup> The copper IUD, for example, is effective *as an EC* when inserted up to five days following intercourse. The American College of Obstetricians and Gynecologists still classifies copper IUDs as contraceptives, writing that because copper IUDs “prevent rather than disrupt pregnancy, they too are properly classified as contraceptives, not abortifacients.”<sup>78</sup> The classification of IUDs as contraception suggests that the fact that a method could in theory expel a fertilized egg is not sufficient to categorize it as an abortion.

Emergency contraception pills (ECPs) have also generated categorization debates, but have come to be classified as contraceptives.<sup>79</sup> EC is birth control

---

*Definition*, LIFE ISSUES INST. (last visited July 31, 2020), <https://www.lifeissues.org/2000/11/american-college-obgyn-changes-definition/> [<https://perma.cc/TP58-FSL7>]. This argument was advanced by Hobby Lobby before the Supreme Court in 2014 as well. See Brief for Respondent at 4–5 n.2, 14–15, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (No. 13-354) (arguing that the Affordable Care Act’s requirement of coverage of IUDs and morning-after pill violates the Religious Freedom Restoration Act of 1993 because petitioners believe providing this coverage would violate their religious beliefs, which prohibits them from facilitating abortion).

75. Beverly Anderson & Mishka Terplan, *Understanding the IUD*, NAT’L CTR. FOR HEALTH RSCH. (last visited Sept. 13, 2020), <http://www.center4research.org/understanding-the-iud/> [<https://perma.cc/T9YT-G3GD>]; *Intrauterine Device (IUD)*, DEPT. OF HEALTH & HUM. SERVS. (last visited Aug. 3, 2020), <https://opa.hhs.gov/reproductive-health?pregnancy-prevention/birth-control-methods/iud/index.html> [<https://perma.cc/QAZ2-HMSM>]; Joerg Dreweke, *Contraception is Not Abortion: The Strategic Campaign of Antiabortion Groups to Persuade the Public Otherwise*, 17 GUTTMACHER POL’Y REV. 14, 15 (2014) (“Both the hormonal and copper IUDs work primarily by preventing sperm from reaching and fertilizing an egg. Of all these methods, only the copper IUD, when used as an emergency contraceptive, appears capable of preventing implantation of a fertilized egg. However, even then it would not be considered an abortion under standard medical and legal definitions”); Irving Sivin, *supra* note 73, at 357 (“Today, however, the weight of scientific evidence indicates that IUDs act as contraceptives. They prevent fertilization, diminishing the number of sperm that reach the oviduct and incapacitating them. IUDs, particularly copper devices, decrease the likelihood that ova can be found in the Fallopian tube shortly after ovulation”).

76. See generally Dreweke, *supra* note 75; Olga Khazan, *Here’s Why Hobby Lobby Thinks IUDs Are Like Abortions*, ATLANTIC (Mar. 12, 2014), <https://www.theatlantic.com/health/archive/2014/03/heres-why-hobby-lobby-thinks-iuds-are-like-abortions/284382/> [<https://perma.cc/3ESV-4CCS>].

77. *Copper IUD (ParaGard)*, *supra* note 71; Sivin, *supra* note 73.

78. *Id.*

79. *Emergency Contraception*, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS (Aug. 2019), <https://www.acog.org/womens-health/faqs/emergency-contraception> [<https://perma.cc/T335-87XH>] (“Using EC does not cause an abortion. An abortion ends an existing pregnancy. EC prevents pregnancy from occurring”); Dreweke, *supra* note 75 (“A contraceptive method, by definition, prevents pregnancy by interfering with ovulation, fertilization or implantation. Abortion ends an established pregnancy, after implantation. This scientific definition of pregnancy—which reflects the fact that most fertilized eggs naturally

used within three to five days after unprotected sex to prevent pregnancy.<sup>80</sup> ECPs in the United States include levonorgestrel (for example, Plan B One-Step), ulipristal acetate (ella), and combined regimens.<sup>81</sup> Objections to ECPs often relate to a misconception that EC causes an abortion.<sup>82</sup> However, ECPs prevent ovulation and may prevent implantation but do not affect an established pregnancy.<sup>83</sup> Therefore, ECPs have been classified as a contraceptive.

Though ECPs have come to be classified as contraception,<sup>84</sup> there are regulatory hurdles that reflect the perception of EC as closer to an abortion—terminating pregnancy—than simply preventing pregnancy. Common legal barriers include refusal and conscience clauses allowing pharmacists to refuse to dispense EC if they object on religious grounds,<sup>85</sup> and “excluding emergency contraception from state Medicaid family planning eligibility expansions or contraceptive coverage mandates.”<sup>86</sup> While levonorgestrel ECPs are available over the counter and may be used up to three days after unprotected sex, ulipristal ECPs, which may be used up to five days after unprotected sex, require a prescription.<sup>87</sup> Since the Hobby Lobby decision in 2015, some employers may also

---

fail to implant in the uterus—is also the legal definition, and has long been accepted by federal agencies (during administrations both supportive of and opposed to abortion rights), and by U.S. and international medical associations . . . both Plan B and ella work primarily by preventing ovulation; they can work for up to five days after sex, because sperm can survive in a woman’s body for that long”).

80. *Emergency Contraception*, HEALTH & HUM. SERVS. (Feb. 9, 2017), <https://opa.hhs.gov/reproductive-health?pregnancy-prevention/birth-control-methods/emergency-contraception/index.html> [<https://perma.cc/Q427-YZWR>].

81. *Id.*

82. *Legal & Opposition Issues*, INT’L CONSORTIUM FOR EMERGENCY CONTRACEPTION (last visited Aug. 15, 2018), <https://www.cecinfo.org/ec-issues/legal-opposition-issues/#national> [<https://perma.cc/P2BP-KPGQ>].

83. *Emergency Contraception: An Affirmative Agenda to Improve Access*, CTR. FOR REPROD. RTS. (2003), [https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/pdf\\_adv\\_ec\\_I\\_0.pdf](https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/pdf_adv_ec_I_0.pdf) [<https://perma.cc/8627-3KDW>] (“According to both medical science and legal convention, pregnancy begins only after implantation of a fertilized egg in the uterus. EC therefore acts to prevent a pregnancy. Studies show that EC has no effect on established pregnancies”); *Emergency Contraception*, WORLD HEALTH ORG. (Feb. 2, 2018) <https://www.who.int/news-room/fact-sheets/detail/emergency-contraception> [<https://perma.cc/VB2K-9D3Z>] (“Emergency contraceptive pills prevent pregnancy by preventing or delaying ovulation and they do not induce an abortion. The copper-bearing IUD prevents fertilization by causing a chemical change in sperm and egg before they meet. Emergency contraception cannot interrupt an established pregnancy or harm a developing embryo.”).

84. Courts in California classify EC as contraception. See Heather M. Field, *Increasing Access to Emergency Contraceptive Pills Through State Law Enabled Dependent Pharmacist Prescribers*, 11 UCLA WOMEN’S L.J. 141, 150-51 (2000). See also, e.g., *Brownfield v. Daniel Freeman Marina Hosp.*, 208 Cal. App. 3d 405, 412–13 (1989) (finding that EC is not an abortifacient).

85. Claire A. Smearman, *Drawing the Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists*, 48 ARIZ. L. REV. 469, 473 (2006); *Emergency Contraception*, GUTTMACHER INST. (Sept. 1, 2020), <https://www.guttmacher.org/state-policy/explore/emergency-contraception> [<https://perma.cc/6SVF-QPUQ>].

86. WORLD HEALTH ORG., *supra* note 83.

87. *Id.*



refuse to include ECPs (and IUDs) in their employee insurance benefits for contraception if they believe doing so would conflict with their religious beliefs against abortion. The Supreme Court, however, did not itself agree with the assertion that ECPs or IUDs in fact cause abortions.<sup>88</sup> The categorization of ECPs as contraception, and not abortion, further elongates the timeline for fertility methods to count as contraceptives but also demonstrates that lawmakers are more willing to regulate methods the farther they extend on the reproductive timeline.

### B. Menstrual Regulation: Between Contraception and Abortion

How does MR fit within the U.S. legal system's dichotomy of contraceptive or abortion? At first glance, MR does not fit neatly into either category. In the 1970s, commentators already noted that in light of MR, "the distinction between contraception and abortion is becoming more and more tenuous."<sup>89</sup> The legal question of categorizing MR may have seemed unnecessary in the new regime of decriminalized abortion in the late 70s. One author noted, categorization "is not of great interest in those countries which have adopted liberal legislation on abortion, but it is of capital importance in those countries where repressive laws still exist."<sup>90</sup> Compared to the post-*Roe* 1970s, MR categorization could be "of capital importance" in the current, increasingly restrictive, environment in the United States.<sup>91</sup>

MR does not fit neatly into the legal category of abortion. While the medical definition of abortion is not contested, it generally constitutes a termination of a pregnancy before fetal viability,<sup>92</sup> and some definitions do not distinguish between induced and spontaneous termination (miscarriage). Based on this type of definition, MR could result in an abortion if a user is in fact pregnant. In practice, and in legal definitions, the critical element, however, is knowledge of pregnancy status. The Planned Parenthood consent form states that "'abortion' means the use of any means to terminate the pregnancy of a female *known by the*

---

88. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691 (2014) ("Since RFRA applies in these cases, we must decide whether the challenged HHS regulations substantially burden the exercise of religion, and we hold that they do. The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as \$1.3 million per day, or about \$475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would.").

89. Dourlen-Rollier, *supra* note 38, at 132.

90. *Id.*

91. T.J. Raphael & Amber Hall, *In the 45 Years Since Roe v. Wade, States Have Passed 1,193 Abortion Restrictions*, PUB. RADIO INT'L (Jan. 22, 2018, 4:30 PM), <https://www.pri.org/stories/2018-01-22/45-years-roe-v-wade-states-have-passed-1193-abortion-restrictions> [<https://perma.cc/KT4P-PT8Y>]; Colleen Shalby & Priya Krishnakumar, *For Many Women Across the U.S., It's Already a Post-Roe vs. Wade Reality*, L.A. TIMES (Sept. 4, 2018), <https://www.latimes.com/projects/la-na-abortion-laws-roe-wade/> [<https://perma.cc/7WV9-DBDG>].

92. Taber's Medical Dictionary defines abortion as "[t]he termination of pregnancy before the fetus reaches the stage of viability." TABER'S, *supra* note 1, at 6.

*attending physician to be pregnant.*”<sup>93</sup> As a medical journal noted in 1974: “[a] positive pregnancy test thus converts the procedure into an early abortion . . . in that case, it is no longer a menstrual extraction.”<sup>94</sup> The confirmation—or lack thereof—of pregnancy becomes the critical element in determining whether a procedure is MR or an abortion.

Legally, the definition of abortion in the United States varies at the state level. The proposed Uniform Abortion Act outlined in *Roe* defined abortion as “the termination of human pregnancy *with an intention* other than to produce a live birth or to remove a dead fetus.”<sup>95</sup> For an example of a state definition, in California, the Reproductive Privacy Act<sup>96</sup> defines “abortion” as “any medical treatment *intended* to induce the termination of a pregnancy except for the purpose of producing a live birth.”<sup>97</sup> The Center for Disease Control and Prevention defines “a legal induced abortion” for surveillance purposes as “an intervention performed by a licensed clinician (e.g., a physician, nurse-midwife, nurse practitioner, or physician assistant) within the limits of state regulations that is *intended* to terminate a suspected or known ongoing intrauterine pregnancy and that does not result in a live birth.”<sup>98</sup> Intent to terminate a pregnancy is a key part of the legal definition.

Because MR by definition includes no confirmation of pregnancy, see *supra* Part I, it seems that there could be no knowledge with respect to terminating a pregnancy and thus it would not meet the definition of an abortion.<sup>99</sup> It is possible that the mens rea, the intent, of a provider would be closer to recklessness as to the possibility of pregnancy, rather than knowledge or purpose. Some commentators have argued that if MR is “employed with the intention of bringing about an abortion, it is likely” that it constitutes abortion.<sup>100</sup> Even in this case, “the difficulty, of course, lies in the definition of the offense and in the proof of the intention.”<sup>101</sup> Methods of MR have uses besides ensuring non-pregnancy.<sup>102</sup> If the

---

93. *DISCLOSURE AND CONSENT FORM for MEDICAL, SURGICAL, AND DIAGNOSTIC PROCEDURES*, PLANNED PARENTHOOD TEX., [https://www.plannedparenthood.org/files/6114/0168/3065/C107e\\_Disclosure\\_and\\_Consent\\_for\\_Medical\\_Surgical\\_Diagnostic\\_ProcedureTexas.pdf](https://www.plannedparenthood.org/files/6114/0168/3065/C107e_Disclosure_and_Consent_for_Medical_Surgical_Diagnostic_ProcedureTexas.pdf) [<https://perma.cc/G6QP-DUC9>] (emphasis added).

94. Hodgson et al., *supra* note 37, at 849.

95. *Roe v. Wade*, 410 U.S. 113, 146 (1973) (emphasis added).

96. CAL. HEALTH & SAFETY CODE §§ 123460–68 (Deering 2018).

97. 1 CAL. FORMS OF PLEADING AND PRACTICE—ANNOTATED § 4.10 (2018); CAL. HEALTH & SAFETY CODE § 123464(a) (Deering 2018) (emphasis added).

98. *CDCs Abortion Surveillance System FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 25, 2019), [https://www.cdc.gov/reproductivehealth/data\\_stats/abortion.htm](https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm) [<https://perma.cc/Ry2R-6AT9>] (emphasis added).

99. In 1975, authors Luke T. Lee and John M. Paxman recognized this definitional issue when they asked, “Can medical intervention be classified as abortion in the absence of proof of a pre-existing pregnancy?” See Lee & Paxman, *supra* note 32, at 185.

100. Dourlen-Rollier, *supra* note 38, at 133.

101. *Id.*

102. *Id.* (“Prostaglandins, as well as the technique of uterine aspiration, also offer a duality of uses. They may be used for diagnostic purposes or therapeutic purposes, as well as for the regulation

intent is to regulate menses, then a secondary outcome of pregnancy elimination would not constitute knowledge or purpose.<sup>103</sup> For example, condoms similarly have dual uses—disease prevention and pregnancy prevention.<sup>104</sup> In light of the lack of knowledge due to unknown pregnancy status and difficulties proving intent, MR does not fit easily in the legal definition for abortion.

Few courts have looked at the element of confirmation of pregnancy and intent with respect to abortion. In *Planned Parenthood Association v. Fitzpatrick*, since vacated, a district court upheld a statute requiring positive determination of pregnancy prior to abortion with criminal enforcement, banning MR.<sup>105</sup> The court, persuaded by “possible risks to the health of the female patient from infection and hemorrhage,” upheld the ban.<sup>106</sup> The court explained, “[w]e do not believe that *Roe* precludes the state from requiring a positive determination of pregnancy prior to the performance of an abortion procedure in furtherance of its interest in protecting nonpregnant females from undergoing unneeded abortion procedures.”<sup>107</sup> With more evidence now on the safety of MR, it’s possible a similar case today would be resolved differently. Regardless of how the safety evaluation would proceed today, this case is interesting because it demonstrates that a court considered MR without confirmed pregnancy to not constitute an abortion per se, but understood the goal of MR to be similar to abortion such that a state may have a reasonable interest in regulating it.

In *Planned Parenthood Association v. Ashcroft*, the Eighth Circuit more directly addressed the categorization of MR. The case concerned a statute mandating that a “woman must sign a consent form to acknowledge that she has been informed by the attending physician of the following: (1) That according to the best medical judgment of her attending physician she is pregnant . . . .”<sup>108</sup> The District Court found that because of the informed consent requirement, the statute “could cause a woman seeking an early abortion [by menstrual extraction] to wait until such time as current technology enabled her physician to determine that she is in fact pregnant. A regulation which has the effect of outlawing a safe abortion technique utilized in the very early stages of pregnancy” is unconstitutional for lack of rational basis.<sup>109</sup>

On appeal, Ashcroft argued that the “statute does not affect menstrual extraction because a menstrual extraction is not an abortion.”<sup>110</sup> Thus, in seeking to limit reproductive rights access (the statute imposed barriers to obtaining and

---

of the menstrual cycle. Thus, one has good grounds to argue that their use does not, in itself, constitute the proof of an intention to commit an abortion.”).

103. Lee & Paxman, *supra* note 32, at 197 (“where the menstrual regulators are used for therapeutic reasons linked strictly to the induction of the menses, or for other medical reasons, no violation of the statute can occur.”).

104. Dourlen-Rollier, *supra* note 38, at 133.

105. *Planned Parenthood Ass’n v. Fitzpatrick*, 401 F. Supp. 554, 574 (E.D. Pa. 1975).

106. *Id.*

107. *Id.*

108. *Planned Parenthood Ass’n v. Ashcroft*, 483 F. Supp. 679, 694 (W.D. Mo. 1980).

109. *Id.* at 697–98.

110. *Planned Parenthood Ass’n v. Ashcroft*, 655 F.2d 848, 868 (8th Cir. 1981).

providing abortions), Ashcroft sought to place MR outside the abortion regulatory scheme. The court, however, rejected Ashcroft's argument, stating "it is a reasonable medical certainty that 85% of women with a menstrual period 10 days late are pregnant" and therefore "it is entirely possible that a physician would perform the procedure with intent to terminate a pregnancy."<sup>111</sup> This reasoning suggests that a court could find intent for an abortion to be met by a showing of the likelihood of pregnancy in general and not the specific intent of a provider in a given instance.

In *Ashcroft*, the Court of Appeals ultimately affirmed the District Court's finding that the statute was unconstitutional, agreeing that MR was indeed an abortion, and as such the statute unconstitutionally prohibited abortion.<sup>112</sup> Thus, in classifying MR as an abortion, the court expanded reproductive rights. This case is now nearly forty years old, but it provides some interesting hints as to how courts may grapple with the ambiguities of MR. First, although abortion requires confirmed pregnancy, courts may find constructive or implied knowledge in the case of MR. Second, a court may interpret MR as an abortion when striking down restrictive statutes, and it is possible today a court would find that MR is not an abortion in order to similarly protect abortion rights. Of course, the inverse is also true. Because there are so few cases addressing MR, it is difficult to say whether courts—especially the current Supreme Court and increasingly conservative District and Circuit Courts—would continue to classify MR as an abortion today, and to what effect in terms of increasing or restricting access.

MR may fit better, but still not perfectly, in the contraception category. Contraception is "[a] product or medical procedure that interferes with reproduction from acts of sexual intercourse."<sup>113</sup> Contraceptives include barrier methods, hormonal methods, permanent methods, intrauterine devices, and fertility awareness methods.<sup>114</sup> The placement of IUDs and ECs in this category suggests that MR too could fall in this zone. Though modern science demonstrates both IUDs and ECs function primarily by preventing fertilization, it is possible they may lead to the expulsion of a fertilized but not implanted egg. It is also worth noting that fertilized eggs are frequently expelled naturally.<sup>115</sup> MR allows "a

111. *Id.* at 868.

112. *Id.* at 868–69 (affirming District Court holding that the informed consent requirement including pregnancy confirmation is unconstitutional because it would in effect prohibit menstrual regulation, and the court found "no justification for such a prohibition").

113. David Hubacher & James Trussell, *A Definition of Modern Contraceptive Methods*, 92 *CONTRACEPTION* 420 (2015), <http://www.track20.org/download/pdf/Article%20-%20Hubacher%20and%20Trussell%20Contraception%202015.pdf> [https://perma.cc/9DN3-2GZ5]; *Contraception*, MERRIAM-WEBSTER MED. DICTIONARY (last visited Apr. 22, 2019), <https://www.merriam-webster.com/dictionary/contraception> [https://perma.cc/5WPG-Z6PR] ("deliberate prevention of conception or impregnation").

114. *Contraception*, *CTRS. FOR DISEASE CONTROL & PREVENTION* (Aug. 13, 2020), <https://www.cdc.gov/reproductivehealth/contraception/index.htm> [https://perma.cc/XZ8A-2THR].

115. *Conception: How It Works*, UNIV. CAL. S.F. (last visited Jul 31, 2020),

woman to eliminate an ovum and to regulate her menstrual cycle before she herself is certain whether that ovum has been fertilized.”<sup>116</sup> The parallels between IUDs, ECs, and MR suggest that MR is close to falling in the contraceptive category.<sup>117</sup>

However, MR is able to function later in a pregnancy, and thus it is not exactly parallel to IUDs and ECs. If an IUD or EC expelled a fertilized egg, it would occur before implantation, which occurs five to six days after an egg is fertilized.<sup>118</sup> MR, by contrast, occurs after a missed period, roughly fourteen or more days after fertilization. Notwithstanding the later time frame for use, because MR does not meet the abortion definition, in the dichotomy it would seem to be a contraceptive by default, and the similarities to IUDs and ECs further support this classification.<sup>119</sup> Thus, though imperfect, MR as a post-coital method of fertility control may be “classified as having a contraceptive function, unless a special intermediate category is created between contraception and abortion.”<sup>120</sup>

An intermediary category may indeed be most appropriate. MR could be classified as a “Plan C”<sup>121</sup> or “missed period pill,”<sup>122</sup> acknowledging it is beyond existing contraceptive options, but also does not fit in the abortion framework. Alternatively, it could simply be used as a method of pregnancy prevention “without specifying whether it is a matter of contraception or abortion.”<sup>123</sup> MR could also fall in a category “referred to merely as ‘post-conceptive’ methods for regulating fertility.”<sup>124</sup> In sum, MR highlights how fertility control occurs on a continuum and challenges the black and white boxes of our existing legal framework.

Courts have acknowledged that reproductive therapies often have multiple purposes or effects and may not fit neatly into the dichotomy. In *Gurski v. Wyeth-Ayerst*, a medical malpractice suit, the court acknowledged that the dual uses of OCPs for contraception and “the regulation of menstrual cycles,” here, to relieve cramping and bleeding associated with menstruation, “might blur any legal

---

<https://www.ucsfhealth.org/education/conception-how-it-works> [https://perma.cc/2CDD-FJCH] (“In nature, 50 percent of all fertilized eggs are lost before a woman’s missed menses.”).

116. Dourlen-Rollier, *supra* note 38, at 132.

117. Lee & Paxman, *supra* note 32, at 218 (“an argument may be made that the menstrual regulators fall within the definition of typical contraceptive functions, like the IUD and the ‘morning after pill’”).

118. Dreweke, *supra* note 75, at 15 (“Of all these methods, only the copper IUD, when used as an emergency contraceptive, appears capable of preventing implantation of a fertilized egg.”); *Conception: How It Works*, *supra* note 115 (“Once the embryo reaches the blastocyst stage, approximately five to six days after fertilization, it hatches out of its zona pellucida and begins the process of implantation in the uterus.”).

119. Lee & Paxman, *supra* note 32, at 218.

120. Dourlen-Rollier, *supra* note 38, at 132; Lee & Paxman, *supra* note 32, at 185 (“It is not improbable, then, that the menstrual regulators will either be looked on as ‘contraceptives’ or placed in a special category somewhere between contraceptives and abortifacients and referred to simply as post-conceptive fertility control devices.”)

121. Coeytaux & Nichols, *supra* note 6.

122. Sheldon et al., *supra* note 7.

123. Dourlen-Rollier, *supra* note 38, at 134.

124. Lee & Paxman, *supra* note 32, at 218–19.

distinction” between such uses.<sup>125</sup> In *Roe*, the Court also acknowledged that MR challenges the dichotomy. In considering how to define viability, the Court commented on how blurry the lines can be, noting definitional problems posed by “new embryological data that purport to indicate that conception is a ‘process’ over time, rather than an event, and by new medical techniques such as menstrual extraction, the ‘morning-after’ pill, implantation of embryos, artificial insemination, and even artificial wombs.”<sup>126</sup> Accepting a more fluid conception of fertility control could best accommodate MR, by not asking (nor wanting) the law to wade into a medical and personal part of life. If MR does become an option in the near future, however, it will likely be legally categorized as abortion, contraception, or a Plan C. How MR is categorized will impact what laws apply for patients and providers, the issue we turn to next.

### III. THE CURRENT LEGAL FRAMEWORK CAN ACCOMMODATE MR AS ANOTHER FERTILITY CONTROL OPTION.

Were MR to be reintroduced in the United States today, this therapy could implicate a range of laws for both users and providers. Prior to *Roe*, when MR was more commonplace, the legality of the therapy went largely untested.<sup>127</sup> Though the above analysis finds that MR could be classified, at the very least, as *not* an abortion, this Paper analyzes the legal implications were MR to be, for whatever reason, classified as an abortion. The below analysis uses California as a sample for state law purposes, as California has a generally progressive legal environment for reproductive rights and could be envisioned as an early adopter of MR. As such, this analysis may not be comprehensive for states with very different or especially restrictive laws.

#### A. Legal Implications for Users

Criminal sanctions would likely not apply to MR users. If MR is *not* categorized as an abortion and the medication is obtained legally from a health care provider, there would be little criminal risk for patients. One potential risk could be through enforcement of statutes that mandate certain disposal methods for fetuses.<sup>128</sup> However, these statutes generally apply to a fetus over twenty-

---

125. The court ultimately did not reach a decision (“It is unnecessary, however, to make such fine distinctions at this stage of the proceedings”) on any legal distinction between oral contraceptives used for birth control versus for a therapeutic purpose but found the manufacturer did have a duty to warn patients of risks directly. *See Gurski v. Wyeth-Ayerst Div. of Am. Home Prods. Corp.*, 953 F. Supp. 412, 416 (D. Mass. 1996).

126. *Roe v. Wade*, 410 U.S. 113, 160 (1973).

127. *TIME*, *supra* note 8 (“The legality of the procedure has yet to be tested in any court.”).

128. CAL. HEALTH & SAFETY CODE § 7054.3 (Deering 2018) mandates that a fetus of under twenty weeks be disposed of by interment or incineration (“Notwithstanding any other provision of law, a recognizable dead human fetus of less than 20 weeks uterogestation not disposed of by interment shall be disposed of by incineration.”). In fact, improper disposal at any stage of a

weeks LMP,<sup>129</sup> and MR would be used much earlier in a pregnancy (likely four-to-twelve-weeks LMP). Additionally, there have been very few prosecutions<sup>130</sup> for improper fetal disposal, with the notable example of Purvi Patel, who was charged with abuse of a corpse for improper disposal of a fetus that was beyond twenty weeks.<sup>131</sup>

The second potential type of sanction that could apply to MR users even if MR is not categorized as an abortion is that related to purchases from unlicensed online pharmacies. Some medications that can be used for MR, such as misoprostol, can be easily purchased over the internet from unregistered online pharmacies. Such a purchase would technically violate drug import laws,<sup>132</sup> but Food and Drug Administration<sup>133</sup> and Drug Enforcement Administration<sup>134</sup> enforcement guidelines reflect that individual consumer purchases are generally not targeted. A Pennsylvania woman, however, was prosecuted for ordering mifepristone-misoprostol pills online that her sixteen-year-old daughter took to induce a miscarriage of an unplanned pregnancy.<sup>135</sup> Thus there is low, but potential, criminal liability for MR users who obtain their medication through

---

pregnancy could be prosecuted as a misdemeanor under California Penal Code § 643 (Deering 2018), which states “No person knowingly shall dispose of fetal remains in a public or private dump, refuse, or disposal site or place open to public view. For the purposes of this section, ‘fetal remains’ means the lifeless product of conception regardless of the duration of the pregnancy.” The only case found that implicated § 7054.3 is *Feminist Women’s Health Ctr. v. Philibosian*, 157 Cal. App. 3d 1076 (1984), in which a district attorney and Catholic organization sought to obtain fetal material from an abortion clinic that was incorrectly following this statute. The court found this unconstitutional, holding for the health center.

129. Ashley Collette, *Concern or Calculation: An Examination of State Law Mandating the Burial or Cremation of a Fetus*, 9 WAKE FOREST L. REV. ONLINE 1, 1 (“Traditionally, states have refrained from intervening in the disposition of a fetus under 20 weeks uterogestation.”).
130. In Arkansas, Anne Bynum was charged with concealing a birth after delivering a roughly thirty-week stillborn at home. The case has been reversed and remanded. *See Bynum v. State*, 546 S.W.3d 533, 536 (Ark. Ct. App. 2018). In Virginia, a woman was charged with a felony for improperly concealing a dead body when she disposed of her stillborn fetus (30-32 weeks). *See Christina Cauterucci, Virginia Woman Given a Jail Sentence for “Concealing a Dead Body” After Her Stillbirth*, SLATE (May 10, 2018), <https://slate.com/news-and-politics/2018/05/virginia-woman-given-a-jail-sentence-for-concealing-a-dead-body-after-her-stillbirth.html> [<https://perma.cc/R25E-YW8Z>].
131. *Patel v. State*, 60 N.E.3d 1041 (Ind. Ct. App. 2016).
132. The United States Federal Food, Drug, and Cosmetic Act (Act) (21 U.S.C. § 331) prohibits the interstate shipment (which includes importation) of unapproved new drugs (last updated Aug. 25, 2015) [<https://perma.cc/BUX9-DGQU>]; *See also* Phil Ayers, *Comment: Prescribing a Cure for Online Pharmacies*, 72 TENN. L. REV. 949, 962–63 (2005) (citing Yoo; *see* 21 U.S.C. § 331 (2000) (“If the patient does not have a valid prescription, then the drug is considered misbranded” and the “introduction or distribution of misbranded drugs into interstate commerce violates the FDCA.”)).
133. Marvin A. Blumberg, *Information on Importation of Drugs Prepared by the Division of Import Operations and Policy*, FOOD & DRUG ADMIN. (last updated Aug. 25, 2015), [<https://perma.cc/BUX9-DGQU>].
134. *Id.* *See also* *People v. Duke*, No. A134692, 2012 LEXIS 7453, 5–6 (Cal. Ct. App. Oct. 16, 2012) (discussing a defendant who ordered large quantity of valium online from Thailand. This quantity is not comparable to a woman ordering four to eight misoprostol tablets for personal use.).
135. Bazelon, *supra* note 60 (Whalen was charged “with a felony for offering medical consultation about abortion without a medical license and with three misdemeanors: for endangering the welfare of a child, dispensing drugs without being a pharmacist and assault.”).

illicit online pharmacies. For users who obtain the medication through a provider and properly dispose of any fetal remains, there would be no criminal liability.

Were MR to be classified as an abortion, there could potentially be more criminal liability for users. Criminal statutes regulating abortion distinguish between legal and illegal abortion with legal abortions requiring an authorized provider.<sup>136</sup> If a physician or other approved provider, such as a nurse practitioner, physician’s assistant, or certified nurse-midwife (depending on the state), prescribes the MR treatment in compliance with abortion laws, criminal sanctions would not apply.

If a woman herself induces MR, classified as abortion, outside of the formal healthcare setting, however, she would technically not be an “authorized” provider.<sup>137</sup> Criminal prosecution of non-physicians who perform abortions has been held constitutional in light of a state’s interest in protecting maternal health.<sup>138</sup> However, no U.S. Supreme Court precedent suggests third-party criminal liability would extend to a pregnant woman herself who obtains an abortion in a manner inconsistent with state abortion statutes.<sup>139</sup> The Ninth Circuit, for example, overturned the conviction of a woman who self-induced an abortion in violation of a statute which required abortions be performed by physicians.<sup>140</sup>

Additionally, laws penalizing improper provision of abortion would require an *actus reus*—the abortion—that would be difficult to prove in the case of MR. By definition, MR does not confirm pregnancy, so there would be no positive pregnancy test and thus it would be difficult to “prove the actual existence of the pregnancy.”<sup>141</sup> It is difficult to imagine that police or prosecutors would obtain the product of the MR—which in many cases would look no different than heavy bleeding—in order to conduct further analysis. MR outside the health sector would also likely occur in the home. Were a woman to present for care following complications, there would be no proof she had used MR as treatment since the

---

136. *Id.* (“In 39 states, it’s against the law to perform an abortion if you’re not a doctor.”) *See, e.g.*, 1 CAL. FORMS OF PLEADING AND PRACTICE—ANNOTATED § 4.12 (2018); CAL. HEALTH & SAFETY CODE § 123405; CAL. BUS. & PROF. CODE § 2253(b)(1) (Deering 2018). *See also* *People v. Barksdale*, 8 Cal. 3d 320, 335 (1972) (holding it is constitutional to limit authority to perform abortions to physicians and surgeons).

137. Curtis, *supra* note 8, at 432, 445 (“[M]enstrual extraction arguably violates both physician-only abortion requirements and state medical practice acts.”). *But see id.* at 446–48 (arguing that MR may not constitute “the practice of medicine” when the user self-administers the process depending on the state statutes governing medical practice).

138. *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975); 1 CAL. FORMS OF PLEADING AND PRACTICE—ANNOTATED § 4.12 (2018).

139. 1 CAL. FORMS OF PLEADING AND PRACTICE—ANNOTATED § 4.12 (2018). *See, e.g.*, Ashcroft, 483 F. Supp. at 684 (“This Court is unaware of any case in which the prohibition on abortion by nonphysicians was ever applied to the pregnant woman herself.”) The court, however, under the theory of constitutional avoidance, declined to reach a conclusion on whether it would be unconstitutional for the statutes to do so, opting instead to interpret the statute as not applying to the woman self-inducing an abortion.

140. *McCormack v. Hiedeman*, 694 F.3d 1004 (9th Cir. 2012).

141. Dourlen-Rollier, *supra* note 38, at 133.



result “is the same as it would be for a spontaneous miscarriage.”<sup>142</sup> Because treatment is the same “there is no medical reason for women to tell a health care provider that they’ve taken the pills,”<sup>143</sup> and if a patient did, HIPAA would prevent the doctor from reporting them.<sup>144</sup>

Finally, it’s possible that the mens rea for unauthorized abortions would be lacking for MR specifically. A person inducing MR, and thus not confirming pregnancy, would not necessarily have the intent to terminate a pregnancy.<sup>145</sup> In *Patel*, the court discussed the issue of intent, in relation to whether Patel knew the fetus was born alive. The relevant abortion statute included a twenty-week mark, and progress of pregnancy was used in discussion of Patel’s knowledge.<sup>146</sup> In the trial court, Patel was charged with class B felony feticide, alleging that she “knowingly terminated her pregnancy with the intention other than to produce a live birth or to remove a dead fetus.”<sup>147</sup> Though this charge was vacated because the court found “the legislature did not intend for the feticide statute to apply to illegal abortions,”<sup>148</sup> a charge for neglect of a dependent was upheld, based on Patel being “subjectively aware that the baby was born alive and that she knowingly endangered the baby by failing to provide medical care.”<sup>149</sup> Though the facts from *Patel* are extremely far from a “textbook” MR case, it suggests that a court could analyze a woman’s intent with respect to the progress of her pregnancy, which would be difficult to do in the case of MR where pregnancy is merely suspected. In summary, while criminal sanctions are theoretically possible if MR is categorized as an abortion, there would be significant enforcement barriers.

Beyond criminal law, another notable implication for MR users is insurance coverage. For misoprostol alone or the mifepristone-misoprostol combination, MR would be an off-label use. Off-label prescriptions require a further step of analysis by private insurance before they are reimbursed, though, for the most part, they will be covered. Insurers, including Medicaid, will typically determine whether to cover an off-label use by looking to medical compendia, which outline drug uses beyond those approved by the FDA.<sup>150</sup> These compendia often include abortion as a use of misoprostol, either directly under “indications” or in an “off-

---

142. Bazelon, *supra* note 60.

143. *Id.*

144. 45 C.F.R. § 164.512.

145. Lee & Paxman, *supra* note 32, at 194–95. This 1975 article reviewed foreign court decisions and noted that in jurisdictions where intent to end a pregnancy was an element of criminalized abortion, menstrual regulation completed after delayed menses without confirmed pregnancy was not prosecutable: “the lack of proof of the certainty of pregnancy, at the moment that the operation was performed, precluded any possibility of a violation of the statute.”

146. *Patel v. State*, 60 N.E.3d 1041, 1045–46 (Ind. Ct. App. 2016).

147. *Id.* at 1048.

148. *Id.* at 1056.

149. *Id.* at 1044.

150. William S. Comanor & Jack S. Needleman, *The Law, Economics, and Medicine of Off-Label Prescribing*, 91 WASH. L. REV. 119, 138 (2016).

label” use category, but do not include “menstrual regulation,” as yet.<sup>151</sup> However, an inclusion of a drug and its off-label uses (or failure to warn against off-label uses) in an insurance company formulary does not necessarily reflect coverage or benefits.<sup>152</sup> As an off-label use in general, there is no barrier to MR coverage,<sup>153</sup> but until MR is added to more medical compendia, there could be coverage denial. Additionally, insurers are able to deny coverage for off-label uses that are experimental or investigational. Being off-label, however, does not itself connote the use is experimental or investigational.<sup>154</sup>

For women insured by Medicaid, which covers one in five women of reproductive age,<sup>155</sup> the categorization of MR will be particularly important. The Hyde Amendment<sup>156</sup> limits reimbursements for abortion medication to cases of

- 
151. See, e.g., Misoprostol, DRUG CENT., <https://drugcentral.org/drugcard/1817?q=misoprostol> (last visited Oct. 2, 2020) [<https://perma.cc/ACY9-CPCU>] (Indications: postpartum hemorrhage, prevention of NSAID-induced gastric ulcers, prevention of CMV disease after organ transplant, osteoarthritis in patients at high ulcer risk, rheumatoid arthritis in patient at high ulcer risk. Off-label uses include: cervical ripening procedure, pregnancy with abortive outcome); ChEBI:63610 - misoprostol, CHEBI (Feb. 22, 2017), <https://www.ebi.ac.uk/chebi/searchId.do?chebiId=CHEBI:63610> [<https://perma.cc/3J38-2KVP>] (Indications: anti-ulcer, oxytocic (“Oxytocics are used to induce labour, obstetric at term, to prevent or control postpartum or postabortion hemorrhage, and to assess foetal status in high risk pregnancies. They may also be used alone or with other drugs to induce abortions (abortifacients)”), and abortifacient); AHFS Monograph, <https://www.drugs.com/monograph/misoprostol.html> (last visited Oct. 2, 2020) [<https://perma.cc/5MUY-B4BN>] (Uses: prevention of NSAIA-induced ulcers, gastric ulcer, duodenal ulcer, termination of pregnancy (but notes “use as an adjunct to mifepristone”), labor induction, postpartum hemorrhage (prevention or treatment). Other compendia include: US Pharmacopeia, National Formulary, WHO, and Drugdex.
  152. See, e.g., *Borreani v. Kaiser Found. Hosps.*, 875 F. Supp. 2d 1050, 1058 (N.D. Cal. 2012). Relatives of deceased patient filed suit against Kaiser for withholding information on the safety of prescription drugs Neurontin and gabapentin in its formulary. The court stated that “Kaiser will pay for off-formulary prescriptions and, therefore, the list does not implicate benefits decisions. Kaiser’s decision to provide these formularies presumably stems from its desire to provide medical care not from its need to regulate coverage or administer benefits under the plan.”
  153. See, e.g., *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128, 1137 (D. Idaho 2013) (describing how off-label uses of mifepristone and misoprostol for medical abortion pose no legal issue simply by being “off-label: “After the FDA approves a drug for use, and absent any state regulation to the contrary, doctors may prescribe that drug for indications, in dosages, and following treatment protocols different than those expressly approved by the FDA. This practice is commonly known as “off-label” use. The off-label use of drugs approved by the FDA does not violate federal law or federal regulations, because the FDA regulates the marketing and distribution of drugs, not the practice of medicine. . . . The medical community recognizes off-label, non-FDA-approved alternatives to mifepristone-misoprostol regimens, two of which include combining methotrexate and misoprostol, or simply taking misoprostol alone” (internal citations omitted)).
  154. James M. Beck & Elizabeth D. Azari, *FDA, Off-Label Use, and Informed Consent: Debunking Myths and Misconceptions*, 53 FOOD DRUG L.J. 71, 72 (1998).
  155. Medicaid and Reproductive Health, PLANNED PARENTHOOD ACTION FUND, <https://www.plannedparenthoodaction.org/issues/health-care-equity/medicaid-and-reproductive-health> (last visited Jul. 31, 2020) [<https://perma.cc/DPF2-ARFM>].
  156. The Hyde Amendment prohibits federal funding for abortion except in cases of rape, incest, or danger to the life of the woman. It applies to programs including Medicaid, Peace Corps,

rape, incest, or threat to the life of the woman. Thus, were MR to be categorized as abortion, it could be excluded from Medicaid coverage. However, where that occurs, state-funded programs may step in to cover medical abortion, as is the case in California.<sup>157</sup> Conversely, were MR to be categorized as *not* an abortion and thus not subject to Hyde, it could increase reproductive health options, autonomy, and improve outcomes for Medicaid recipients. Given that women of color are more likely to have coverage through Medicaid, and face disproportionate barriers to reproductive health care in general,<sup>158</sup> MR could be a step towards providing equitable access to care.

Finally, beyond looking to compendia or whether a use is investigational, private insurers may have special rules regarding reimbursement for abortion. Some insurers may not cover medical abortion (off-label or not). California requires most private insurers to cover abortions, though this does not apply to Marketplace multi-state plans or employers that self-fund their plans.<sup>159</sup>

In sum, if MR is reintroduced in the United States, the legal implications for users will depend on how it is classified, whether they obtain the medication legally, and their insurance coverage. Assuming MR is not classified as abortion, many of the restrictive implications outlined above would not apply, and users would not face sanctions.

## B. Legal Implications for Providers

Legal implications for providers of MR are slightly more complex. If MR is classified in a way that does not implicate abortion, then legal implications would largely be the same as any medical practice liability. If MR is classified as an abortion, then more restrictions would apply.

In the case that MR is not classified as an abortion, there are still legal implications for providers. First, in order to prescribe the mifepristone-misoprostol combination for MR, providers would need to ensure they follow the specific requirements for this medication. Some states require that providers use the FDA protocol,<sup>160</sup> as opposed to the alternate protocol that is often preferred. The

---

the military, prisons, disability services, and Indian Health Services. See Alyssa Engstrom, *Note: The Hyde Amendment: Perpetuating Injustice and Discrimination After Thirty-Nine Years*, 25 S. CAL. INTERDIS. L.J. 451 (2016).

157. *California Abortion Coverage in Medi-Cal and Private Insurance*, ACCESS WOMEN'S HEALTH JUST. (last visited Oct. 3, 2020) [<https://perma.cc/7UKY-WD4U>].

158. Medicaid and Reproductive Health, *supra* note 155.

159. *California Abortion Coverage in Medi-Cal and Private Insurance*, *supra* note 157.

160. Ohio, Texas, and North Dakota have passed laws mandating the use of the FDA protocols for inducing abortion with Mifeprex. See Laura Britton & Amy Bryant, *When Off-Label is Illegal: Implications of Mandating the FDA-Approved Protocol for Mifepristone-induced Abortions*, 25 WOMEN'S HEALTH ISSUES 433 (2015). See also *Medication Abortion*, GUTTMACHER INST. (Aug. 1, 2020), <https://www.guttmacher.org/state-policy/explore/medication-abortion> [<https://perma.cc/Q8GH-LB72>]. The Mifeprex protocol, approved for up to 70 days LMP, is 200 mg of Mifeprex taken by mouth; 24 to 48 hours after taking Mifeprex: 800 mcg of misoprostol taken buccally (in the cheek pouch), at a location appropriate for the patient; About seven to fourteen days after taking Mifeprex: follow-up with the healthcare provider.

Supreme Court of Oklahoma upheld a law that confined misoprostol with mifepristone use to the on-label regimen outlined by the FDA, finding it did not violate the state constitution on legislative authority or special laws.<sup>161</sup> Other states have similar restrictions, including Texas and North Dakota,<sup>162</sup> and the issue has not been addressed by the Supreme Court of the United States.<sup>163</sup>

A significant area of law that would be implicated by MR is medical malpractice. For both the mifepristone-misoprostol and misoprostol<sup>164</sup> alone methods, MR will be an off-label use. However, this does not incur special liability. Physicians have wide discretion to write prescriptions for off-label uses and are not limited to approved uses.<sup>165</sup> In fact, “40 percent to 60 percent of prescription drugs [are] dispensed for unapproved uses.”<sup>166</sup> The term “off-label” simply connotes the FDA “regulatory status” of the use, and does not reflect risk or suggest that the use is experimental or investigational.<sup>167</sup>

As with any prescription, the ability to sue over an off-label prescription is governed by medical malpractice and state medical practice statutes.<sup>168</sup> Off-label status alone does not show negligence or create liability<sup>169</sup> that would lead to a

---

*Mifeprex (mifepristone) Information*, FOOD & DRUG ADMIN. (Feb. 5, 2018), <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepristone-information> [<https://perma.cc/5FFA-VYT9>].

161. Okla. Coal. for Reprod. Just. v. Cline, 368 P.3d 1278, 1289 (2016).

162. Britton & Bryant, *supra* note 160, at 433.

163. Humble v. Planned Parenthood Ariz., Inc., 574 U.S. 1060 (2014) (denying cert); Cline v. Okla. Coal. for Reprod. Just., 571 U.S. 985 (2013) (dismissing cert on constitutional questions previously granted in Cline v. Okla. Coal. for Reprod. Just., 570 U.S. 930 (2013)).

164. See, e.g., *Cytotec (misoprostol)*, FOOD & DRUG ADMIN., [https://www.accessdata.fda.gov/drugsatfda\\_docs/label/2002/19268slr037.pdf](https://www.accessdata.fda.gov/drugsatfda_docs/label/2002/19268slr037.pdf) (last visited Oct. 3, 2020) [<https://perma.cc/9QH6-NVP7>].

165. Areta Kupchyk, Paul W. Radensky & Michael W. Ryan, *Potential Liability for Drug Companies, Health Care Providers, and Insurers: Off-Label Prescribing and Internet Advertising*, in PHARMACEUTICAL AND MEDICAL DEVICE LAW REGULATION OF RESEARCH, DEVELOPMENT, AND MARKETING 1–2 (Bloomberg BNA, 2d ed.). See also *id.* at 10 (“Since 1982, the FDA has acknowledged that physicians may prescribe a drug to serve any legitimate medical purpose, regardless of whether the agency has approved the drug for that use”); Britton & Bryant, *supra* note 160, at 434 (“FDA has the authority to regulate the entry of prescription drugs into the market but the FDA cannot regulate the practice of medicine, which is how off-label drug prescribing is categorized.”); Benjamin A. Hooper, *The Negative Effects of Cumulative Abortion Regulations: Why the 5th Circuit Was Wrong in Upholding Regulations on Medication Abortions (Planned Parenthood of Greater Texas Surgical Health Services v. Abbott)*, 83 U. CIN. L. REV. 1489, 1495 (2015) (“Though the FDA approves only the on-label use of drugs, it is commonly expected that many drugs will be used off-label at the discretion of medical doctors”); *Use of Approved Drugs for Unlabeled Indications*, 12 FDA DRUG BULLETIN 4 (Apr. 1982); David Kessler, *Regulating the Prescribing of Human Drugs for Nonapproved Uses Under the Food, Drug and Cosmetic Act*, 15 HARV. J. LEGIS. 693, 698 (1978); William S. Comanor & Jack Needleman, *The Law, Economics, and Medicine of Off-Label Prescribing*, 91 WASH. L. REV. 119 (2016).

166. See Areta Kupchyk et al., *supra* note 165, at 9.

167. Beck & Azari, *supra* note 154.

168. Areta Kupchyk et al., *supra* note 165, at 66 n.5.

169. See e.g., *Watson v. Gish*, 2011 U.S. Dist. LEXIS 58317, at \*6–7 (N.D. Cal. May 31, 2011) (“Novartis argues that “[a]n off label use allegation does not provide a basis for a medical

malpractice claim. Courts use a reasonable physician standard to determine negligence,<sup>170</sup> and a plaintiff must establish “that a physician’s off-label prescription deviated from an acceptable and prevailing standard of practice.”<sup>171</sup>

In assessing the reasonableness of the provider’s prescription of an off-label use, a court will look to the doctor’s medical judgment, scientific literature, and common medical practice.<sup>172</sup> This negligence assessment drives at whether the provider met the standard of care.<sup>173</sup> “Whether a given off-label prescription meets the standard of care will depend on the level of evidence available to support the use and how the clinician used the available evidence. In general, the more scientific evidence there is to support a given off-label use, the more likely that use is to meet the standard of care.”<sup>174</sup> If a provider is aware of danger or risk associated with an off-label use, they could be liable, as was the case in *Watson v. Gish* where a physician prescribed an off-label use of Zometa despite knowing warnings that it could lead to osteonecrosis.<sup>175</sup>

Because MR is relatively unusual right now, the standard of care<sup>176</sup> against which to compare providers’ treatment may be unclear. Standards of care are established by statute,<sup>177</sup> common practice, or medical research.<sup>178</sup> While MR may not be common practice in the United States, its use, efficacy, and safety are documented in scientific literature and thus a provider would be able to point to

---

malpractice claims because a drug can be prescribed non-negligently for off label indications.’ Def.’s Opp’n at 10 (citing Compl. ¶ 52). The flaw in this contention is that Plaintiff’s malpractice claim is not limited to the act of prescribing medication for off label use. Rather, the Complaint also alleges that despite Novartis’ warnings to physicians regarding the risk of osteonecrosis resulting from the use of Zometa, the Healthcare Defendants nonetheless prescribed and administered the medication to Plaintiff, who then suffered osteonecrosis as a result... Dr. Gish’s decision to prescribe Zometa, notwithstanding his alleged awareness of its dangers, potentially could give rise to a claim for medical negligence.”)

170. See, e.g., *Mero v. Sadoff*, 31 Cal. App. 4th 1466 (1995); *Avivi v. Centro Medico Urgente Med. Ctr.*, 159 Cal. App. 4th 463 (2008); *Huffman v. Lindquist*, 37 Cal. 2d 465 (1951).
171. James B. Riley, Jr. & P. Aaron Basilius, *Physicians’ Liability for Off-Label Prescriptions*, HEMATOLOGY & ONCOLOGY NEWS & ISSUES 24, 27 (May/June 2007), [https://www.mcguirewoods.com/news-resources/publications/health\\_care/off\\_label.pdf](https://www.mcguirewoods.com/news-resources/publications/health_care/off_label.pdf) [<https://perma.cc/U4P7-NFTE>].
172. *Id.*
173. *Flowers v. Torrance Mem’l Hosp. Med. Ctr.*, 8 Cal. 4th 992, 997 (1994) (holding that negligence is conduct that falls below the standard of care).
174. *Liability and Off-Label Prescriptions*, 6 PSYCHIATRY (EDGMONT) 43 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2719453/> [<https://perma.cc/NM32-AF2R>].
175. *Watson v. Gish*, 2011 U.S. Dist. LEXIS 58317, at \*6–7 (N.D. Cal. May 31, 2011). See also *Crone v. Pfizer, Inc.*, WL 1946386, at \*5 (N.D. Cal. Sept. 1, 2004) (holding that a physician was not fraudulently joined in suit against pharmaceutical company for prescribing an off-label use despite his awareness it was “risky”).
176. Judicial Council of California Civil Jury Instructions (CACI) No. 501. *Standard of Care for Health Care Professionals* (2017).
177. See, e.g., *Galvez v. Fields*, 88 Cal. App. 4th 1410, 1413–15 (2001) (using a civil statute requiring physicians to advise women on prenatal testing for birth defects as the standard of care to evaluate the possible negligence per se of a physician). If the standard of care is not set by statute or regulation, a court will refer to instructions on negligence per se. Judicial Council of California Civil Jury Instructions, CACI Nos. 418–421 (2017).
178. Eleanor D. Kinney, *The Brave New World of Medical Standards of Care*, 29 J.L. MED. & ETHICS 323, 325 (stating that courts look to expert testimony on community standards and professional literature to determine the standard of care).

such studies in liability suits. Prior emphasis on local standards of care have largely given way to a more global understanding of medical practice. Thus, international studies could provide further support for establishing a standard of care. The ability to look to international research is important in the case of MR as most studies come from other countries, such as Bangladesh, where the practice is current.

Providers will be held liable for an off-label prescription that results in adverse effects if they are indeed negligent, fail to meet the standard of care, ignore warnings, or pursue an unestablished or risky therapy. However, the low rate of complications from misoprostol for MR suggests that rampant negligence claims are unlikely. Providers reasonably prescribing an off-label use that is backed up by their judgment of the patient's situation and medical practice are also not more liable for an adverse outcome simply because the use is off-label.<sup>179</sup> As long as physicians are not negligent in their prescription of off-label uses, there is no heightened malpractice liability.

Another important factor for providers offering MR to consider is informed consent.<sup>180</sup> In the case of MR as an off-label therapy, it is worth noting that the standard for informed consent is not heightened simply by the regulatory status of being "off-label."<sup>181</sup> Common law informed consent focuses on health benefits, serious risks, nature of the treatment, and the condition the treatment seeks to remedy.<sup>182</sup> The California jury instruction, for example, details that informed consent requires the physician to explain the treatment, serious risks, and other information a skilled provider would convey in a way the patient understands.<sup>183</sup> Courts have rejected arguments that off-label status requires more detailed informed consent and have refused to require physicians to relay to patients the regulatory and legal implications of an FDA-approved medication they have judged is a safe treatment option in its off-label use.<sup>184</sup> In a recent study, researchers provided a detailed description of MR that explained, "The pills would be offered instead of a pregnancy test and would serve to bring on bleeding similar to your period. If you were pregnant, they would terminate the pregnancy in almost

---

179. *See, e.g., Carson v. Depuy Spine, Inc.*, 365 Fed. Appx. 812 (9th Cir. 2010) (no liability for physician who prescribed off-label use of spine device where there was no evidence of causation). Note this decision is unpublished.

180. Riley & Basilius, *supra* note 171, at 26–27.

181. *Id.* at 27.

182. Beck & Azari, *supra* note 154, at 86.

183. Judicial Council of California Civil Jury Instructions (CACI) No. 532. Informed Consent—Definition (2017).

184. *See, e.g., Klein v. Biscup*, 673 N.E.2d 225, 231 (1996) ("[T]he off-label use of a medical device is also a matter of medical judgment, and, as such, subjects a physician to professional liability for exercising professional medical judgment. Off-label use of a medical device is not a material risk inherently involved in a proposed therapy which a physician should have disclosed to a patient prior to the therapy [citation omitted]. Therefore, since Biscup engaged in off-label use of this medical device he could be subject to professional liability for medical negligence, but in this case those claims have been litigated and are not before us. Accordingly, we conclude failure to disclose FDA status does not raise a material issue of fact as to informed consent.").

all women.”<sup>185</sup> Informed consent for MR, as illustrated by this example, would need to be clear about the possibility of terminating pregnancy in the case that the user is pregnant.

In the case that MR is classified as an abortion, the FDA and malpractice issues raised above would still apply, as well as abortion-specific regulations. For example, MR could only be carried out by an “authorized provider,” which in California includes physicians and surgeons<sup>186</sup> as well as Advanced Practice Clinicians for medical and aspiration abortion in the first trimester.<sup>187</sup> If MR is categorized as abortion, a non-authorized provider providing MR would face criminal liability. Providers would also need to follow state restrictions requiring, for example, ultrasounds, parental consent, or waiting periods.<sup>188</sup> Because abortion regulations require a confirmed pregnancy, providers would seemingly bypass these statutes in carrying out MR (which does not confirm pregnancy). Even if abortion laws do apply, difficulty in proving that they apply, due to lack of intent where pregnancy is unconfirmed, to a given MR procedure would be a barrier to enforcement.<sup>189</sup> This dissonance further underlines how MR does not fit well within the abortion regulatory framework, and thus should not be categorized as such.

### CONCLUSION

MR has the potential to be a valuable addition to the spectrum of fertility control methods in the United States. Imagine a range of options including: “plan A (contraception), plan B (the morning-after pill), plan C (misoprostol to bring down a missed period), and access to safe abortion.”<sup>190</sup> As a third point of intervention, MR could increase access and choice, offering an additional simple, safe, and early option to ensure non-pregnancy. Through telemedicine, now more

---

185. Sheldon et al., *supra* note 7, at 2 (“Suppose there were “missed period pills” that could be taken if you had missed your period and did not want to know if you were actually pregnant. The pills would be offered instead of a pregnancy test and would serve to bring on bleeding similar to your period. If you were pregnant, they would terminate the pregnancy in almost all women. The pills would be safe to take but could cause side effects such as bleeding, cramping, shivering and nausea. The side effects would be similar to those experienced by many women during menstruation.”).

186. 1 CAL. FORMS OF PLEADING AND PRACTICE—ANNOTATED § 4.12 (2018); CAL. HEALTH & SAFETY CODE § 123405; CAL. BUS. & PROF. CODE § 2253(b)(1) (Deering 2018). *See also* *People v. Barksdale*, 8 Cal. 3d 320, 338 (1972) (finding it is constitutional to limit authority to perform abortions to physicians and surgeons).

187. Nurse practitioners (NPs), certified nurse-midwives (CNMs), and physician assistants (PAs) are authorized to perform “nonsurgical abortion,” including the “termination of pregnancy through the use of pharmacological agents” (medication abortion). CAL. BUS. & PROF. CODE § 2253(b)(2), (c) (West 2012); CAL. BUS. & PROF. CODE § 2052 (Deering 2018). Section 3.b goes into more detail on the role and authority of APCs in abortion provision in California.

188. *An Overview of Abortion Laws*, GUTTMACHER INST. (Oct. 1, 2020), <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> [<https://perma.cc/R5TM-YGF6>].

189. Lee & Paxman, *supra* note 32, at 196–97 (“[I]f the same rules are applied to menstrual regulation that are applied to abortion, i.e., that pre-existing pregnancy must be shown, it will be virtually impossible for the prosecutor to prove the illegality of the procedure.”).

190. Coeytaux & Nichols, *supra* note 6.

common and accepted in light of the COVID-19 pandemic, it could be particularly transformative for rural women. In an increasingly restrictive environment, MR could provide even more critical benefits, especially for poor women and women of color who are disproportionately burdened by barriers to reproductive health care access. MR would be a safe alternative to other self-help methods women may try to disrupt a pregnancy.

Were MR to be reintroduced in the United States, it would not fit neatly within the current regulatory dichotomy of contraception and abortion. While a third category may be most appropriate, at the very least it is clear the abortion category is not appropriate because MR lacks the basic elements of intent to abort and the underlying fact of confirmed pregnancy. The legal implications depend largely on this categorization. So long as MR is not categorized as an abortion, implications for patients and providers would be largely the same as for any medical therapy. If MR is classified as an abortion, there would be more complex implications, but even so, users would likely be relatively shielded from sanctions. A third, stand-alone category may be most appropriate for MR, but whether drawing additional, hard to define lines governing women's reproductive health and autonomy is wise is another question. This analysis of how MR would be regulated shows the limits of the law and its struggle to adapt to grey spaces and suggests that reproductive health would be better left to people who can become pregnant and the medical field, rather than lawmakers and courts.

A strong starting point to create a supportive legal framework would be to develop a standard of care that distinguishes MR from abortion. This would not only clarify to providers how to best offer MR, but would also provide protection against litigation that attempts to criminalize MR. More broadly, advocates should keep an eye on ensuring women are not prosecuted for self-induced MR. Challenging fetal disposal and other statutes that can be creatively stretched to punish women for self-induced abortion or MR would also create a more supportive context. Finally, advocates should work to protect provider autonomy to recommend the best options for their patients and challenge statutes that mandate on-label prescriptions.

This Paper is a preliminary wide-lens analysis of how MR would be received in the current reproductive health legal regime. Further research is needed to understand how MR would interact with abortion and contraception jurisprudence, particularly at the state level. Reactive legislation to limit MR in states hostile to reproductive rights should be expected, and additional analysis is warranted to prepare counter arguments to restricting MR access.

MR reveals the grey space in both the personal experience and legal framework of fertility control. Adding another point along the fertility control spectrum could be a real resource to women and other people who can become pregnant, while challenging the rigid reproductive health framework of contraception and abortion to better reflect the lived reality of fertility experiences and choices. Reproductive health advocates and medical providers should continue to debate the potential benefits and drawbacks of reviving MR in light of



the diverse and contingent legal implications.

# The Elimination of “Patriarchy” Under the Convention on the Elimination of All Forms of Discrimination Against Women

Dr. Cassandra Mudgway†

## ABSTRACT

*The aim of this Paper is to determine whether the Committee on the Elimination of Discrimination against Women (CEDAW Committee) is using the concept of “patriarchy” when interpreting obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This Paper explores a textual analysis of CEDAW Committee concluding observations that use the terms “patriarchy” and “patriarchal.” Three key points came out of this analysis. Firstly, although the CEDAW Committee has seldom used the word “patriarchy” itself, it has consistently and purposefully used the term “patriarchal” in its concluding observations since 2006. Secondly, the CEDAW Committee uses the word “patriarchal” almost exclusively in connection with Article 5(a) of CEDAW. Further, the CEDAW Committee uses “patriarchal” alongside the phrase “harmful traditional practices”; the terms are jointly used disproportionately against non-Western/non-European states, replicating the problematic dichotomy of non-Western/non-European states versus Western/European states in the international legal system. Thirdly, as a result of conflating “patriarchal” with “harmful traditional practices,” the CEDAW Committee uses “patriarchy” as synonymous with specific examples of direct subordination of women. Because of this narrow implementation and interpretation, the CEDAW Committee appears to be limiting “patriarchy” to mean cultural norms and “harmful traditional practices”; this not only limits the transformative potential of Article 5 but also risks othering and exotifying the notion of “patriarchy” itself.*

INTRODUCTION .....	79
I. WHAT IS “PATRIARCHY”? .....	82

---

DOI: <https://doi.org/10.15779/Z38319S35H>

† Senior Lecturer in Law, Auckland University of Technology Law School. The author wishes to thank her incredibly helpful research assistant, Charlene Cooper.

II. THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN.....	85
III. METHODOLOGY.....	87
IV. FINDINGS: “PATRIARCHY” AND “PATRIARCHAL” IN CONCLUDING OBSERVATIONS.....	89
A. Context of “Patriarchy” or “Patriarchal”: Article 5(a).....	89
B. States with the Most Mentions of “Patriarchy” and “Patriarchal”....	94
C. States with Zero Mentions of “Patriarchy” or “Patriarchal”.....	95
D. An Increase of Usage Over Time .....	96
V. IMPLICATIONS OF CONFLATING “PATRIARCHAL ATTITUDES” AND “HARMFUL TRADITIONAL PRACTICES” .....	98
A. Critiques of the CEDAW Committee’s Understanding of Culture and “Harmful Traditional Practices” in Article 5(a) .....	99
B. Comparing “Harmful Traditional Practices” Where “Patriarchal” Is Mentioned and Not Mentioned.....	102
C. Summary: The CEDAW Committee’s Concept of “Patriarchy” Through its Use in Concluding Observations.....	104
VI. RECONCILING FEMINIST UNDERSTANDINGS OF “PATRIARCHY” WITH THE JURISPRUDENCE OF THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN.....	105
CONCLUSION .....	106
APPENDIX .....	107

## INTRODUCTION

In 1981, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), an international treaty wherein states parties have agreed to protect women’s human rights and endeavor to take reasonable steps towards gender equality, came into force.<sup>1</sup> Additionally, these states agreed to dismantle social, religious, and cultural structures that foster the subordination of women by men.<sup>2</sup> This suggests that CEDAW requires states to dismantle patriarchal structures and attitudes, from the government to the private sphere. However, the treaty itself does not mention the word “patriarchy.” It was only in 2006 that the word “patriarchy” was first used in relation to women’s rights in an official human rights document.<sup>3</sup> This Paper seeks to determine whether the Committee on the Elimination of Discrimination against Women (CEDAW Committee) uses the concept of patriarchy when applying CEDAW to state practices and to explore the meaning of “patriarchy” as utilized by the CEDAW Committee.

---

1. Convention on the Elimination of All Forms of Discrimination against Women, arts. 1–3, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

2. *Id.* at art. 5.

3. U.N. Secretary-General, *In-Depth Study on All Forms of Violence against Women*, ¶¶ 69–77, U.N. Doc. A/61/122/Add.1. (July 6, 2006).

This Paper is a small piece of a larger project investigating the extent to which states are obligated to take positive steps to dismantle “patriarchy.” However, it is not possible to answer this question without first considering whether the concept of “patriarchy” exists in international human rights law or in relation to states’ obligations under international human rights law. If it does exist, research must also consider whether that concept of “patriarchy” is appropriate in light of the global women’s rights movement. In order to explore these questions, it is helpful to begin with the core United Nations (UN) treaty addressing women’s human rights: CEDAW.<sup>4</sup>

This study undertook a textual analysis of CEDAW Committee concluding observations, searching for the terms “patriarchy” and “patriarchal.” Concluding observations are a method through which the CEDAW Committee monitors and scrutinizes states’ progress in implementing treaty provisions across domestic legislation, policy, and practice.<sup>5</sup> Every four years, each state party must submit a report to the CEDAW Committee regarding domestic implementation of CEDAW.<sup>6</sup> These reports may also be accompanied by “shadow reports” written by non-governmental organizations (NGOs), which assess the state government’s progress.<sup>7</sup> The state party and the CEDAW Committee hold meetings where committee members ask questions related to the government and shadow reports.<sup>8</sup> At the end of the process, the CEDAW Committee publishes a concluding observation with recommendations to the state party. Although they are non-binding, these documents are important indicators of how the CEDAW Committee has interpreted state obligations under CEDAW and how states parties can appropriately discharge them. Therefore, notwithstanding the absence of the word “patriarchy” in CEDAW itself, the CEDAW Committee may still utilize the concept for purposes of interpreting obligations under CEDAW.

Three key points emerged from this research. First, the CEDAW Committee has seldom used the word “patriarchy” itself, but has, since 2006, consistently used

---

4. This Paper uses the term “women” consistent with the CEDAW Committee’s usage: thus, “women” includes cis-gendered women, trans women, and intersex people who identify as women. These groups have been explicitly identified by the CEDAW Committee as especially disadvantaged by discrimination against women. *See, e.g.*, Comm. on the Elimination of Discrimination against Women, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2, ¶ 18, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010); Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of Germany, ¶¶ 45–46, U.N. Doc. CEDAW/C/DEU/CO/7-8 (Mar. 9, 2017); Comm. on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of New Zealand, ¶ 23(a), 25(a), U.N. Doc. CEDAW/C/NZL/CO/8 (July 20, 2018). However, CEDAW Committee jurisprudence has not yet mentioned discrimination against non-binary or other gender diverse people. *See generally*, Rikki Holtmaat & Paul Post, *Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?*, 33 *NORDIC J. HUM. RTS.* 319 (2015).

5. CEDAW, *supra* note 1, arts. 20–22.

6. *Id.* at art. 18(b).

7. Comm. on the Elimination of Discrimination against Women on its Forty-Fifth Session, Statement by the Committee on the Elimination of Discrimination against Women on its relationship with non-governmental organizations, ¶ 7.

8. *Id.* at ¶ 10.

the term “patriarchal” in its concluding observations. Second, the CEDAW Committee has used the word “patriarchal” almost exclusively in connection with Article 5(a), which obligates states to eliminate gender stereotypes that foster discrimination against women. Additionally, “patriarchal” is used alongside “harmful traditional practices.” These two phrases are used in the concluding observations of some state parties. The distinction replicates the problematic dichotomy of non-Western and non-European states versus Western and European states. Third, as a result of conflating patriarchy with harmful traditional practices, “patriarchy” is seen as synonymous with specific examples of overt subordination of women including: female genital mutilation (FGM), so-called “honor killings,” sexual initiation practices, abduction of girls, child marriage, forced marriage, polygamy, widow inheritance, subordination of women to their husbands and other male relatives, son preference, and violence against women generally. Overall, this Paper argues that the CEDAW Committee appears to limit patriarchy to mean culture and “harmful traditional practices,” which not only limits the transformative potential of Article 5, but also risks “othering” and “exotifying” the notion of “patriarchy” itself.

This Paper is structured in the following way. Section I provides a cursory overview of the various concepts of “patriarchy” that exist within feminist literature in order to frame the discussion of “patriarchy” in CEDAW concluding observations. Similarly, Section II outlines the creation and promise of CEDAW. Section III explores the methodology of this study. This section also discusses the different representations of collected data, which are attached in the Appendix. Section IV explores the findings of this study. For the purposes of analysis, the findings are categorized into groups, which include (a) the location of the terms “patriarchy” or “patriarchal” within the concluding observations completed between 1985 and 2018; (b) the concluding observations of states parties with which the terms were used the most and those in which the term was never mentioned; and (c) the usage of “patriarchy” or “patriarchal” in concluding observations over time. The threads of these data are pulled together in the overarching analysis provided in Section V, which examines the implications of conflating “patriarchal attitudes” with “harmful traditional practices” under Article 5. Section VI illustrates that the concept of “patriarchy” the CEDAW Committee uses in its interpretation of CEDAW aligns with a traditional feminist understanding of “patriarchy.” The Conclusion provides a summary of the study’s findings and its implications for future interpretation of obligations under CEDAW.

### **I. WHAT IS “PATRIARCHY”?**

It is not the purpose of this Paper to search for a particular meaning of “patriarchy” or hold up a singular understanding of patriarchy as the objective and true definition. The purpose of this Paper is to investigate how the term has been interpreted and used by the CEDAW Committee in its concluding observations. Only once this is understood can the question be asked: Is the concept of patriarchy

used by the CEDAW Committee appropriate for the implementation of CEDAW itself? As such, it is not necessary to provide an in-depth overview of the lengthy history of “patriarchy” as a feminist concept; this has been done elsewhere.<sup>9</sup> Instead, this section will provide a summary of the interpretations of “patriarchy” only to the extent that is necessary to argue that “patriarchy” as a term does not have a set meaning in feminist theory. This will allow for a later discussion about the CEDAW Committee’s use of the word relative to its various meanings.

Patriarchy is an ancient word. Its origin is Greek, *patriarkhēs*, translating literally to “a man who rules a family.”<sup>10</sup> Today, the concept of patriarchy is an analytical tool for feminist understandings of the world for women and, at the same time, a call to action within the global women’s rights movement. As an academic term, “patriarchy” has, over the past seventy years, been challenged, re-defined, re-examined, rejected, and rediscovered. The concept of patriarchy has proven to be elastic and has earned a central place within feminist scholarship.

The traditional use of “patriarchy” refers to the overt subordination of women by men.<sup>11</sup> This subordination is illustrated by legal and social structures that place men at head of the household and women under the control of male relatives for their entire lives. Even where legal frameworks are removed, “psychological patriarchy” may remain where male domination and power are fostered and reinforced within a strict family structure.<sup>12</sup> Male dominance is often enforced through violence, both physical and psychological.<sup>13</sup>

This traditional understanding of patriarchy was modified during the 1980s and 1990s, when feminist scholars argued that patriarchy was not confined to the family structure but in fact permeated every facet of society.<sup>14</sup> Thus, patriarchy was redefined as a system of power where male interests dominated female interests and were reinforced through media, legal frameworks, education, employment, religion, family structure and institutions (such as marriage), and cultural practices.<sup>15</sup> Male power is maintained through reproducing and institutionally reinforcing gender stereotypes of men and women’s roles in society and the home.<sup>16</sup>

Marxist-feminists, such as Zillah Eisenstein, opted for a “dual-system” approach with the understanding that patriarchy does not operate alone and is

---

9. See, e.g., Bonnie J. Fox, *Conceptualizing ‘Patriarchy’*, 25 CAN. REV. SOC. & ANTH. 163 (1988); Vrushali Patil, *From Patriarchy to Intersectionality: A Transnational Feminist Assessment of How Far We’ve Really Come*, 38 SIGNS: J. WOMEN CULTURE & SOC’Y 847 (2013).

10. See *Patriarch*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 2016).

11. See, e.g., Sylvia Walby, *Theorising Patriarchy*, 23 SOC. 213 (1989); KATE MILLETT, *SEXUAL POLITICS* 25 (2000).

12. BELL HOOKS, *Understanding Patriarchy*, in *THE WILL TO CHANGE: MEN, MASCULINITY, AND LOVE* 23 (2004).

13. *Id.*

14. PAM MORRIS, *LITERATURE AND FEMINISM* 4 (1993).

15. See generally *id.*

16. CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 218 (1989).

mutually dependent on capitalism.<sup>17</sup> Eisenstein described this dual-system as “capitalist patriarchy,” arguing that male power and the oppression of women is the basis of both sex and class:

If I were to state this as simply as possible I could say that patriarchy (as male supremacy) provides the sexual hierarchical ordering of society for political control, and as a political system cannot be reduced to its economic structure; while capitalism, as an economic class system driven by the pursuit of profit, feeds off the patriarchal ordering. Together they form the political economy of the society; not merely one or another, but a particular blend of the two.<sup>18</sup>

Similarly, Black feminist bell hooks used the term “imperialist white-supremacist capitalist patriarchy” to widen the understanding of patriarchy as operating as part of multiple systems of oppression which are political, social, cultural, and economic in nature.<sup>19</sup> hooks explained that:

Patriarchy is a political-social system that insists that males are inherently dominating, superior to everything and everyone deemed weak, especially females, and endowed with the right to dominate and rule over the weak and to maintain that dominance through various forms of psychological terrorism and violence.<sup>20</sup>

The concept of “patriarchy” underwent reevaluation once more under the lens of anti-essentialist feminist critique. Commentators such as Chandra Mohanty, Audre Lorde, and Kimberlé Crenshaw challenged the dominant view of “patriarchy” (and gender inequality generally) as solely representing the experience of middle-class, White, Western women.<sup>21</sup> In particular, Mohanty argued that patriarchy as a concept was being applied the same way across cultures, and that a particular “binary” was emerging in feminist scholarship between “third world” and “first world” women.<sup>22</sup> First world women were treated as political agents while third world women were the homogenous victimized “other.” She further argued that liberal feminism failed to acknowledge that patriarchy looks and operates differently across the world.<sup>23</sup> According to an intersectional feminist lens, “patriarchy” varies widely between states and communities, and women within those same systems will experience patriarchy

---

17. Zillah Eisenstein, *Constructing a Theory of Capitalist Patriarchy and Socialist Feminism*, 25 CRITICAL SOC. 196 (1999).

18. *Id.* at 208.

19. HOOKS, *supra* note 12, at 17.

20. *Id.* at 17–18.

21. Chandra Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, 30 FEMINIST REV. 61, 62 (1988); AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in SISTER OUTSIDER 110, 110 (1984); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1242–43 (1991).

22. Mohanty, *supra* note 21, at 65.

23. *Id.* at 70.

differently depending on other distinctions such as wealth, class, race, gender identity, or sexual orientation. An anti-essentialist and intersectional understanding of patriarchy acknowledges that women experience male oppression differently depending on the shape of social and political hierarchy and where individual women operate within that structure.

The above signifies two general interpretations of “patriarchy.” The first interpretation is patriarchy as the overt subordination of women by men. This oppression is conceived as an obvious feature of society and culturally constructed.<sup>24</sup> The second interpretation is patriarchy as a system of power which is hierarchical and autonomous.<sup>25</sup> As a system of power, patriarchy is both visible and invisible, permeating all levels of society. Institutionally, patriarchy is politically and economically reinforced.<sup>26</sup> It is also important to note that some scholars have rejected the concept of “patriarchy” altogether as an oversimplification of complex social and economic systems that are interrelated and constantly changing.<sup>27</sup> Despite these strong criticisms of the concept, “patriarchy” remains an important theoretical tool with which feminists conceptualize male domination over women. However, there is no single concrete meaning.

## II. THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

This Paper is the product of a wider study investigating the use and conceptual understanding of “patriarchy” in international law. As the core international treaty specifically addressing women’s rights and interests, CEDAW was the natural place to begin such a project. Before exploring the findings of this study, it is necessary to scrutinize the creation and promise of CEDAW itself.

Although the Universal Declaration of Human Rights guaranteed non-discrimination on the basis of sex in 1945, a women-centered Convention was not on the table alongside the post-World War II International Covenants.<sup>28</sup> However, the UN established the Commission on the Status of Women (CSW) in 1946 as a companion to the Commission on Human Rights, recognizing that global women’s

---

24. MORRIS, *supra* note 14, at 4.

25. See Fox, *supra* note 9, at 163.

26. MACKINNON, *supra* note 16, at 99–100; Eisenstein, *supra* note 17, at 211; HOOKS, *supra* note 12, at 18, 23.

27. See generally Joan Acker, *The Problem with Patriarchy*, 23 SOC. 235 (1989) (discussing various issues with the history and construction of patriarchy as a concept); see also Charlotte Higgins, *The Age of Patriarchy: How an Unfashionable Idea Became a Rallying Cry for Feminism Today*, GUARDIAN (June 22, 2018), <https://www.theguardian.com/news/2018/jun/22/the-age-of-patriarchy-how-an-unfashionable-idea-became-a-rallying-cry-for-feminism-today> [https://perma.cc/Q2SE-25UD] (discussing the history of the popularity of the term “patriarchy”).

28. See MARSHA FREEMAN, CHRISTINE CHINKIN & BEATE RUDOLF, THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY 4 (2012) (describing the early history of the 1945 Universal Declaration of Human Rights and subsequent, women-specific steps).



interests would be best served by a specific, dedicated body.<sup>29</sup> During the 1950s, the CSW worked towards putting women's issues on the international agenda: for example, by engaging in significant research on the status of women's rights and drafting a number of related international treaties.<sup>30</sup> Such treaties included the Convention on the Nationality of Married Women<sup>31</sup> and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.<sup>32</sup> By the 1960s, awareness of discrimination against women as a global concern highlighted the need for a general international treaty.<sup>33</sup> In 1967, the CSW drafted a non-binding document, the UN Declaration on the Elimination of Discrimination against Women, which preceded CEDAW. In 1975, the UN General Assembly authorized the first world Conference on Women in Mexico, which is where the CSW began drafting CEDAW.<sup>34</sup>

CEDAW drew from a number of existing international treaties, including, inter alia, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Universal Declaration of Human Rights.<sup>35</sup> However, unlike these previous treaties, which focused primarily on domestic legal frameworks, CEDAW obligated states parties to go beyond merely changing laws.

CEDAW is divided into six parts. Part I comprises articles 1–6, which are general obligations on states parties. These are not limited just to realizing formal and substantive equality for women. For example, Article 3 stipulates that “States Parties shall take in all fields . . . to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights . . .”<sup>36</sup> Part II includes articles 7–9 and focuses on rights necessary for women to operate equally in public life, such as civil and political rights. Part III (articles 10–14) encompasses women's economic and social rights. Part IV (articles 15–16) contains rights related to legal and family status. Part V (articles 17–22) covers the membership and function of the CEDAW Committee. Finally, Part VI (articles 23–30) includes provisions relating to the administration of CEDAW and its effect on states parties.

Overall, CEDAW calls upon states to modify political, economic, and cultural patterns that discriminate against women in both their public and private

---

29. Ruth Halperin-Kaddari & Marsha A. Freeman, *Backlash Goes Global: Men's Groups, Patriarchal Family Policy, and the False Promise of Gender-Neutral Laws*, 28 CAN. J. WOMEN & L. 182, 187 (2016).

30. For more information on the work of the CSW, see generally UN WOMEN, A SHORT HISTORY OF THE COMMISSION ON THE STATUS OF WOMEN (2019).

31. Convention on the Nationality of Married Women, Aug. 11, 1958, 309 U.N.T.S. 65.

32. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Dec. 23, 1964, 521 U.N.T.S. 231.

33. UN WOMEN, *supra* note 30, at 7.

34. FREEMAN ET AL., *supra* note 28, at 6–7.

35. *Id.* at 7.

36. CEDAW, *supra* note 1, at art. 3.

lives.<sup>37</sup> Some scholars assert CEDAW’s “transformative” value in that by recognizing the systemic and structural nature of discrimination against women, CEDAW gives the global women’s rights movement the tools to fundamentally change women’s lives.<sup>38</sup> The fact that 189 states have ratified CEDAW certainly underlies the potential of global realization of women’s human rights.<sup>39</sup>

However, states parties generally fail to protect and ensure women’s human rights under CEDAW. Multiple issues have led to lackluster implementation. These include extensive reservations by states parties, most notably from Islamic states seeking to modify their obligations as not to conflict with Sharia law, and recent threats of global backlash driven by extremism and economic austerity.<sup>40</sup> Moreover, CEDAW has been criticized for representing the experiences of only certain kinds of women (middle-class, White, Western women) and ignoring the experience of others.<sup>41</sup>

Despite the half-hearted global implementation of the Convention, CEDAW is now considered among the “core” international human rights treaties, alongside the ICCPR, ICESCR, and the Convention on the Rights of the Child. Additionally, women’s human rights have grown more prominent after several World Conferences on Women during the 1990s, leading other human rights bodies to comment on women’s rights when making concluding observations.<sup>42</sup> However, CEDAW is still the only legally binding international document that specifically addresses women’s interests and gender equality. Therefore, CEDAW and the work of the CEDAW Committee remain crucial for the future of women’s human rights globally.

### III. METHODOLOGY

This study used a textual analysis of the concluding observations of CEDAW. Although “patriarchy” is absent from CEDAW itself, the CEDAW Committee may still be utilizing the concept when interpreting state obligations. The primary documents in which the CEDAW Committee expresses their interpretation of CEDAW are General Recommendations and concluding

---

37. Rikki Holtmaat, *The CEDAW: A Holistic Approach to Women’s Equality and Freedom*, in *WOMEN’S HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL, AND NATIONAL LAW* 95, 110 (Anne Hellum & Henriette Sinding Aasen eds., 2013).

38. See, e.g., Feride Acar, *Why CEDAW Shows the Way Forward for the Women’s Movement* (paper presented to Women’s Worlds 2005: 9th International Interdisciplinary Congress on Women Seoul, Korea) (June 19–24, 2005); Holtmaat, *supra* note 37, at 102–05.

39. For current states parties, see *Convention on the Elimination of All Forms of Discrimination against Women*, UN TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) (last visited Jan. 1, 2021) [<https://perma.cc/B6CH-2Z4C>] (listing current states parties to the convention).

40. Christine Chinkin, *The Convention on the Elimination of All Forms of Discrimination against Women*, in *HANDBOOK ON GENDER IN WORLD POLITICS* 145, 147, 151 (Jill Steans & Daniela Tepe-Belfrage eds., 2016).

41. *Id.* at 148.

42. Hanna Beate Schöpp-Schilling, *Treaty Body Reform: The Case of the Committee on the Elimination of Discrimination against Women*, 7 *HUM. RTS. L. REV.* 201, 215–16 (2007).

observations. The latter documents were chosen for this research because they are more numerous and are frequently published. Therefore, concluding observations are more likely to illustrate trends over time. As the purpose of this study is to capture and examine the CEDAW Committee's use of patriarchy as a term, the primary method of data collection was searching documents for selected terms.<sup>43</sup> A total of 673 documents containing CEDAW concluding observations dating from 1985 to 2018 were searched.<sup>44</sup> This date-range was chosen because it includes all concluding observations from the conception of CEDAW until the end of 2018, thus making it the most comprehensive dataset available.

Two words were searched within the observations: "patriarchy" and "patriarchal." These words were selected to maximize the coverage of how the concept of patriarchy is utilized by the CEDAW Committee. Each instance of either "patriarchy" or "patriarchal" was recorded, alongside (i) the year of the concluding observation, (ii) the number of times the term(s) were mentioned within the observation, (iii) the article(s) under CEDAW being discussed when the term was mentioned, and (iv) the state party being observed.

Out of the 673 documents containing concluding observations searched, the words "patriarchy" and "patriarchal" were collectively located in 301 of them.<sup>45</sup> Within these documents, the word "patriarchy" was found only three times whereas the word "patriarchal" was found 330 times. It should be noted that "patriarchy" is a noun and "patriarchal" is an adjective. As such, the concept of patriarchy is overwhelmingly being used by the CEDAW Committee as a descriptor. This may have implications for an analysis of what "patriarchy" means to the CEDAW Committee within the interpretation of CEDAW itself (discussed further below). Furthermore, by only searching for key terms, there may be instances where the CEDAW Committee has drawn on the concept of patriarchy without explicit reference (in ways other than using "patriarchal"), which these searches would have missed.

The Appendix includes representations of this collected data. Table 1 represents the number of mentions of "patriarchy" and "patriarchal" in observations alongside the state party being observed; the list is in descending order from most mentions to least (averaged across the total number of completed observations of each state party from 1985 to 2018). Table 2 isolates the top ten states parties that have the most mentions (averaged) in their concluding observations. Table 3 isolates the states parties that have never had the term "patriarchy" or "patriarchal" mentioned in their concluding observations; the list is in descending order according to the total number of completed observations between 1985 and 2018. Figure 1 represents the context of mentions within the concluding observations. Figure 2 is a line graph detailing the number of

---

43. No specific software was used to perform these searches. The author and research assistant used the search functions available in PDF or Word documents.

44. These were all of the concluding observations available to search at the time of writing this Paper.

45. No additional software was used by the author to calculate the mentions other than Excel.

“patriarchy” and “patriarchal” mentions according to the year of each concluding observation.

#### **IV. FINDINGS: “PATRIARCHY” AND “PATRIARCHAL” IN CONCLUDING OBSERVATIONS**

The following discussion explores this study’s findings according to the breakdown of data as represented in the tables and figures in the Appendix.

##### **A. Context of “Patriarchy” or “Patriarchal”: Article 5(a)**

The CEDAW Committee’s concluding observations are organized thematically and in order of the provisions in the Convention they address. The CEDAW Committee’s use of the words “patriarchy” or “patriarchal” in observations can offer insight into how the CEDAW Committee defines the words. Figure 1 in the Appendix illustrates this. The chart shows the categories in which the CEDAW Committee uses these terms, from most to least common. According to Figure 1, the context in which the CEDAW Committee mentions “patriarchy” or “patriarchal” the most is in reference to “stereotypes and harmful practices.” This context concerns Article 5 of the Convention (75.2%).

The terms are also used to a much lesser extent in the following categories: Article 7 “participation in political and public life” (9.2%); General Recommendations 19 and 35<sup>46</sup> “Violence against Women” (4.9%); Article 10 “education” (3.9%); Article 16 “marriage and family relations” (1.3%); Article 14 “rural women” (2%); Article 12 “health” (1.6%); Article 13 “economic and social benefits” (0.7%); “indigenous women” (0.7%); Article 1 “definition of discrimination against women” (0.3%); and Article 15 “legislative framework” (0.3%). In many of these categories where “patriarchal” was used, so too was the term “stereotypes” and the phrase “harmful traditional practices,” again signaling back to Article 5 of the Convention.

Article 5 is one of the thematic pillars of CEDAW and, along with Article 2, permeates the remainder of CEDAW’s provisions. Article 5 states that:

States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common

---

46. Comm. on the Elimination of Discrimination against Women, General Recommendation No. 19: Violence against Women, U.N. Doc. A/47/38 (1992); Comm. on the Elimination of Discrimination against Women, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, U.N. Doc. CEDAW/C/GC/35 (July 26, 2017).

responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.<sup>47</sup>

Article 5 has two parts; subparagraph (a) is about eliminating harmful gender stereotypes generally. It concerns the modification of social and cultural practices that reinforce negative gender stereotypes about the roles of women in public and private spaces.<sup>48</sup> The CEDAW Committee considers “social and cultural patterns of conduct” to include religious, traditional and customary beliefs, ideas, rules, and practices.<sup>49</sup> Subparagraph (b) targets gender roles in the family, particularly parental roles. Article 5(b) is concerned with challenging the idea that women are the primary caregivers of children and have the sole responsibility of housework. States parties are obligated to educate and encourage men and women to equally take on these roles.<sup>50</sup>

Within the overall scheme of CEDAW, Article 5 is an important provision. The elimination of gender-based stereotypes is one of three underlying obligations and permeates the specific provisions.<sup>51</sup> It is in Article 5 where CEDAW steps beyond general obligations to change laws and demands modifications to social and cultural norms that foster discrimination against women.<sup>52</sup> As an example, the CEDAW Committee, through General Recommendation 19, utilized Article 5 as an interpretative tool to incorporate gendered violence against women into the text of the Convention.<sup>53</sup> Read in conjunction with Article 2(f) of the convention, Article 5 is essential in challenging the systematic and structural oppression of women.<sup>54</sup> As Rikki Holtmaat, professor of international law, argued, Article 5 is a “vehicle for cultural change.”<sup>55</sup>

Despite a few instances, mentions of “patriarchy” or “patriarchal” are primarily associated with Article 5(a).<sup>56</sup> The CEDAW Committee has used the

47. CEDAW, *supra* note 1, art. 5.

48. *Id.* at art. 5(a).

49. *See, e.g.*, General Recommendation No. 28, *supra* note 4, at ¶ 5; Comm. on the Elimination of Discrimination against Women, Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices, U.N. Doc. CEDAW/C/GC/31 (Nov. 14, 2014).

50. *See, e.g.*, Comm. on the Elimination of Discrimination against Women, Concluding Comments of the Committee on the Elimination of Discrimination against Women: The Former Yugoslav Republic of Macedonia, ¶ 20, U.N. Doc. CEDAW/C/MKD/CO/3 (Feb. 3, 2006).

51. *See* Comm. on the Elimination of Discrimination against Women, General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 282–290, U.N. Doc. HRI/GEN/1/Rev.7 (2004) (detailing the other two obligations: to improve the current status of women and ensure full equality of women before the law).

52. *See* Holtmaat *supra* note 37, at 106–07; Elizabeth Sepper, *Confronting the Sacred and Unchangeable: The Obligation to Modify Cultural Patterns under the Women’s Discrimination Treaty*, 30 U. PA. J. INT’L L. 585, 595 (2008).

53. *See* General Recommendation No. 19, *supra* note 46, at ¶ 11–12.

54. *See* Holtmaat, *supra* note 37, at 107.

55. *See id.* at 111.

56. As Figure 1 illustrates, the few rare instances of “patriarchal” outside of the context of article

word “patriarchal” in some of the following ways:

The Committee is concerned about the persistence of *patriarchal attitudes* and deeply-rooted stereotypes concerning women’s roles and responsibilities that discriminate against women and perpetuate their subordination within the family and society . . .<sup>57</sup>

Additionally:

The Committee is concerned about the entrenched *patriarchal attitudes* and the persistence of discriminatory stereotypes concerning the roles and responsibilities of women and men in the family and in society.<sup>58</sup>

In response to the persistence of such negative stereotypes, the CEDAW Committee has used the term “patriarchal” when making recommendations to states parties under Article 5:

[States parties should] [a]dopt, without delay, a comprehensive strategy to modify or eliminate *patriarchal attitudes* and stereotypes that discriminate against women . . .<sup>59</sup>

In two of the three occurrences where the word “patriarchy” was mentioned in concluding observations, the CEDAW Committee has similarly used the word within the context of Article 5(a). For example, the CEDAW Committee

---

5(a) (or without reference to gender stereotypes or harmful traditional practices) include one mention in reference to Article 1 “definition of discrimination against women” and one mention in reference to Article 15 “legislative framework.”

57. See Comm. on the Elimination of Discrimination against Women, Concluding observations on the fourth periodic report of Pakistan, ¶ 21 U.N. Doc CEDAW/C/PAK/CO/4 (Mar. 27, 2013) (emphasis added). See also Committee on the Elimination of Discrimination against Women, Concluding observations on the second periodic report of Syria, ¶ 21, U.N. Doc CEDAW/C/SYR/CO/2 (July 24, 2014); Comm. on the Elimination of Discrimination against Women, Concluding observations on the fourth periodic report of Kyrgyzstan, ¶ 15, U.N. Doc CEDAW/C/KGZ/CO/4 (Mar. 11, 2015); Comm. on the Elimination of Discrimination against Women, Consideration of reports submitted by States parties under article 18 of the Convention: Uganda, ¶ 19, U.N. Doc CEDAW/C/UGA/CO/7 (Nov. 5, 2010); Comm. on the Elimination of Discrimination against Women, Concluding observations of the Committee on the Elimination of Discrimination against Women: Cameroon, ¶ 24, U.N. Doc CEDAW/C/CMR/CO/3 (Feb. 10, 2009).
58. Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined initial to third periodic reports of the Marshall Islands, ¶ 22, U.N. Doc. CEDAW/C/MHL/CO/1-3 (Mar. 14, 2018) (emphasis added).
59. Comm. on the Elimination of Discrimination against Women, Concluding observations on the seventh periodic report of Greece adopted by the Committee at its fifty fourth session, ¶ 19(a), U.N. Doc. CEDAW/C/GRC/CO/7 (Mar 26, 2013)(emphasis added); see also Comm. on the Elimination of Discrimination against Women, Concluding observations of the Committee on the Elimination of Discrimination against Women Nepal, ¶ 18(a), U.N. Doc. CEDAW/C/NPL/CO/4-5 (Aug. 11, 2011); Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined fourth and fifth periodic reports of Bosnia and Herzegovina, ¶ 20(c), U.N. Doc CEDAW/C/BIH/CO/4-5 (July 30, 2013); Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of France, ¶ 19(a), U.N. Doc. CEDAW/C/FRA/CO/7-8 (July 25, 2016).

expressed:

concern that the prevalence of *patriarchy* and the subordination of women in society are root causes of violence against women.<sup>60</sup>

The third mention of “patriarchy” was found in the context of state party submissions to the CEDAW Committee and therefore represents the views of the state party and not the views of the CEDAW Committee itself.<sup>61</sup>

Where the CEDAW Committee has used the phrase “patriarchal attitudes,” it refers to specific examples of certain practices that are manifestations of persistent negative gender stereotypes. These examples are commonly referred to as “harmful traditional practices,” rooted in tradition, religion, or culture. Although examples of such practices differ depending on the state under observation, they have included: FGM,<sup>62</sup> so-called “honor killings,”<sup>63</sup> sexual initiation practices,<sup>64</sup> abduction of girls,<sup>65</sup> early and forced marriage,<sup>66</sup>

60. Comm. on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of Belarus, ¶ 20, U.N. Doc. CEDAW/C/BLR/8 (Oct. 28, 2016) (emphasis added); *see also* Comm. on the Elimination of Discrimination against Women, Concluding observations of the Committee on the Elimination of Discrimination against Women United Arab Emirates, ¶ 24, U.N. Doc. CEDAW/C/ARE/CO/1 (Feb. 5, 2010).

61. Comm. on the Elimination of Discrimination against Women, Third periodic report of States parties: Ecuador, ¶ 97, U.N. Doc. CEDAW/C/ECU/3 (Jan. 10, 1991).

62. *See, e.g.*, Comm. on the Elimination of Discrimination against Women, Concluding comments of the Committee on the Elimination of Discrimination against Women: Ghana, ¶ 21, U.N. Doc. CEDAW/C/GHA/CO/5 (Aug. 25, 2006); Comm. on the Elimination of Discrimination against Women, Concluding observations on the seventh periodic report of Malawi, ¶ 20, U.N. Doc. CEDAW/C/MWI/CO/7 (Nov. 24, 2015); Comm. on the Elimination of Discrimination against Women, Concluding observations on the fourth and fifth periodic reports of Eritrea, ¶ 18, U.N. Doc. CEDAW/C/ERI/CO/5 (Mar. 12, 2015); Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined initial and second periodic reports of Brunei Darussalam, ¶ 20 U.N. Doc. CEDAW/C/BRN/CO/1-2 (Nov. 14, 2014).

63. *See, e.g.*, Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined fourth and fifth periodic reports of India, ¶ 20, U.N. Doc. CEDAW/C/IND/CO/4-5 (July 24, 2014); Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined fourth to sixth periodic reports of Iraq, ¶ 25(a), U.N. Doc. CEDAW/C/QAT/CO/1 (Mar. 10, 2014).

64. *See, e.g.*, Joint General Recommendation No. 31, *supra* note 49, at ¶ 8. Comm. on the Elimination of Discrimination against Women, Concluding Observations on the fourth and fifth periodic reports of Namibia, 18, U.N. Doc. CEDAW/C/NAM/4-5 (July 16, 2015); Comm. on the Elimination of Discrimination against Women, Concluding Observations on the seventh periodic report of Malawi, 20, U.N. Doc. CEDAW/C/MWI/7 (November 6, 2015).

65. *See, e.g.*, Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined initial and second periodic reports of Swaziland, ¶ 18 U.N. Doc. CEDAW/C/SWZ/CO/1-2 (July 24, 2014); Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of Liberia, ¶ 21, U.N. Doc. CEDAW/C/LBR/CO/7-8 (Nov. 24, 2015).

66. *See, e.g.*, Comm. on the Elimination of Discrimination against Women, Concluding comments of the Committee on the Elimination of Discrimination against Women: Mali, ¶ 17, U.N. Doc. CEDAW/C/MLI/CO/5 (Feb. 3, 2006); Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined initial to third periodic reports of Solomon Islands, ¶ 22, U.N. Doc. CEDAW/C/SLB/CO/1-3 (Nov. 14, 2014); Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined fourth and fifth periodic reports of Georgia, ¶ 18, U.N. Doc. CEDAW/C/GEO/CO/4-5 (July 24, 2014).

polygamy,<sup>67</sup> widow inheritance,<sup>68</sup> son preference,<sup>69</sup> and violence against women generally.<sup>70</sup>

The use of the phrase “patriarchal attitudes” as connected to Article 5(a) is further supported by cross-referencing those uses with other uses of the phrase elsewhere in concluding observations. Where mentioned within the context of “participation in political and public life” (Article 7), the CEDAW Committee has used the phrase in the following way:

[the state party is urged to] [c]onduct awareness-raising activities for politicians and community leaders, in particular men, as well as the general public, on the importance of the full and equal participation of women in leadership and decision-making *with a view to eliminating social and patriarchal attitudes*.<sup>71</sup>

When the CEDAW Committee mentioned the term “patriarchal” in the context of “gendered-violence against women,” (General Recommendations 19 and 35) it stated:

The Committee is concerned, however, that violence against women is highly prevalent in the State party and that domestic violence is perceived as normal *owing to deep-rooted patriarchal attitudes*.<sup>72</sup>

- 
67. *See, e.g.*, Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined fourth and fifth periodic reports of the Gambia, ¶ 18, U.N. Doc. CEDAW/C/GMB/CO/4-5 (July 28, 2015); Concluding observations on the combined initial and second periodic reports of Swaziland, *supra* note 65, at ¶ 18.
68. *See, e.g.*, Comm. on the Elimination of Discrimination against Women, Concluding comments of the Committee on the Elimination of Discrimination against Women: Mali, ¶¶ 17–18, U.N. Doc. CEDAW/C/MLI/CO/5 (Feb. 3, 2006); Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined fourth and fifth periodic reports of Namibia, ¶ 20, U.N. Doc. CEDAW/C/NAM/CO/4-5 (July 28, 2015).
69. *See, e.g.*, Comm. on the Elimination of Discrimination against Women, Concluding observations on the fifth periodic report of Azerbaijan, ¶ 20, U.N. Doc. CEDAW/C/AZE/CO/5 (Mar. 12, 2015); Concluding observations on the combined fourth and fifth periodic reports of India, *supra* note 63, at ¶ 20.
70. *See, e.g.*, Comm. on the Elimination of Discrimination against Women, Concluding comments of the Committee on the Elimination of Discrimination against Women: Cuba, ¶ 17 U.N. Doc. CEDAW/C/CUB/CO/6 (Aug. 25, 2006); Concluding comments of the Committee on the Elimination of Discrimination against Women: Ghana, *supra* note 62, at ¶ 22.
71. Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined fourth and fifth periodic reports of Maldives, ¶ 29(a), U.N. Doc. CEDAW/C/MDV/CO/4-5 (Mar. 11, 2015) (emphasis added). *See also* Comm. on the Elimination of Discrimination against Women, Concluding observations on the initial report of Qatar ¶ 27, U.N. Doc. CEDAW/C/QAT/CO/1 (Mar. 10, 2014) (calling upon the State party to eliminate patriarchal attitudes that deter women’s participation in politics by raising awareness of the importance of their participation).
72. Concluding observations on the combined fourth to sixth periodic reports of Iraq, *supra* note 63, at ¶ 28 (emphasis added). *See also* Comm. on the Elimination of Discrimination against Women, Concluding observations of the Committee on the Elimination of Discrimination against Women: Mexico, ¶ 11, U.N. Doc. CEDAW/C/MEX/CO/7-8 (Aug. 7, 2012) (rooting widespread discrimination and violence against women in patriarchal attitudes in the State party); Comm. on the Elimination of Discrimination against Women, Concluding comments



Similarly, where mentioned in the context of “education” (Article 10):

the committee is concerned at the persistence of negative *and patriarchal stereotypes* in school curricula and textbooks.<sup>73</sup>

The Committee further urges states parties to:

modify or introduce, educational curricula and teaching methods that promote women’s human rights and *address the structural and cultural causes of discrimination against women*.<sup>74</sup>

In sum, this Paper argues that the CEDAW Committee uses the terms “patriarchy” and “patriarchal” almost exclusively in connection with Article 5 of the Convention, particularly Article 5(a). Because the terms are being used with such consistency in both phrasing and context, this suggests that the CEDAW Committee is using these words intentionally. Moreover, the phrase “patriarchal attitudes” is usually used alongside “harmful traditional practices” or, generally, “cultural practices.” The implications of this usage will be discussed further below in Section V.

### **B. States with the Most Mentions of “Patriarchy” and “Patriarchal”**

Having determined that the CEDAW Committee is intentionally and consistently using the terms “patriarchy” and “patriarchal,” it is appropriate to now turn to the second category of data collected by this study: the frequency of mentions of each term in the concluding observations state party in question. Just as the context of the use of “patriarchy” or “patriarchal” in concluding observations may offer insight into whether the CEDAW Committee has ascribed a particular meaning to “patriarchy,” so too might the identities of the state parties in whose observations those mentions occur. Tables 1, 2, and 3 record the states parties that have had either of these terms mentioned in their concluding observations (and those that have not). In analyzing such data, this study asks: Are

---

of the Committee on the Elimination of Discrimination against Women: Jamaica, ¶ 15, U.N. Doc. CEDAW/C/JAM/CO/5 (Aug. 25, 2006) (noting the Committee’s concern that patriarchal culture in the State party may contribute to the high levels of violence against women).

73. Comm. on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of Ukraine, ¶ 34, U.N. Doc. CEDAW/C/UKR/CO/8 (Mar. 9, 2017) (emphasis added); *see also* Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined fourth and fifth periodic reports of Croatia, ¶ 26(a), U.N. Doc. CEDAW/C/HRV/CO/4-5 (July 28, 2015); Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined eighth and ninth periodic reports of Portugal, ¶ 32, U.N. Doc. CEDAW/C/PRT/CO/8-9 (Nov. 24, 2015).
74. Comm. on the Elimination of Discrimination against Women, Consideration of reports submitted by States parties under article 18 of the Convention: Cook Islands, ¶ 46, U.N. Doc. A/62/38 (2007) (emphasis added). *See also* Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined fourth and fifth periodic reports of Lebanon, ¶ 34, U.N. Doc. CEDAW/C/LBN/CO/4-5 (Nov. 24, 2015); Comm. on the Elimination of Discrimination against Women, Concluding observations on the second periodic report of Montenegro, ¶ 31(b), U.N. Doc. CEDAW/C/MNE/CO/2 (July 24, 2017).

there states or groups of states that the CEDAW Committee finds more “patriarchal” than others? If so, to what extent does this difference clarify any particular meaning of “patriarchy” the CEDAW Committee is using?

Table 1 illustrates that, of those states parties that have completed concluding observations, “patriarchy” or “patriarchal” are mentioned in approximately 84% of them, meaning that the majority of states parties have had the term used in their observations. This leaves only a minority of states parties who have never had the term mentioned in their observations (16%), which are discussed below. As the majority of states parties have had the terms mentioned in their concluding observations, it is difficult to suggest comparative trends between states which may indicate a particular meaning of “patriarchy” (at least not when considered in isolation from the other data in this study). For example, taken as a whole, the list does not represent any particular regional grouping of states, nor does it represent states that are more developed or less developed. The states listed are represented all across the UN Human Development Index ranging from “very high human development” to “low human development.”<sup>75</sup> However, Table 2 may illustrate a different picture.

Table 2 separates the data in Table 1 and only represents the top ten states parties with the most mentions of “patriarchy” and “patriarchal” in their concluding observations. These are Montenegro, Qatar, Syria, Afghanistan, Uzbekistan, Brunei, Kyrgyzstan, Iraq, Nepal, and Algeria. There are some comparative links to be made between these states: 30% are Middle Eastern countries, 20% are Central Asian countries, 40% are Arab states; and 60% are Islamic countries. However, as these numbers indicate, the comparative links are tenuous at best and only suggestive of some slight trends. As such, these data, considered in isolation, are not indicative of any particular meaning that might be ascribed to “patriarchy” by the CEDAW Committee. Rather, Table 2 must be considered alongside the context of usage, discussed further below in Section V.

### C. States with Zero Mentions of “Patriarchy” or “Patriarchal”

Although it is difficult to draw any concrete comparative links between those states which have had “patriarchy” or “patriarchal” mentioned in their concluding observations, there are stronger comparisons to be made when considering those states parties which have never had either term mentioned in any of their observations. Table 3 lists thirty states parties that have zero mentions in their observations. Of those states listed, 50% are Western or European states (i.e. states that are in Europe and states whose current population is predominately derived from Europe during the era of European colonialism). Western and European states are overrepresented in this list and especially in light of the total number of completed observations made on those states between 1985 and 2018. Of those

---

75. See generally U.N. Development Programme, Human Development Index, <http://hdr.undp.org/en/content/human-development-index-hdi> (last visited Feb. 3, 2020) [<https://perma.cc/SAA6-9Q3K>].

states that have had six or more<sup>76</sup> completed concluding observations and yet have never had the term “patriarchy” or “patriarchal” used, 71% are Western or European countries (these include Norway, Australia, Austria, Bulgaria, Denmark, Germany, Iceland, New Zealand, Poland, United Kingdom, Finland, Ireland, Luxembourg, Slovakia, and Slovenia). Of those states that have had eight or more completed observations, 82% are Western or European countries.

There are further comparative links regarding the states parties in Table 3. On the UN Human Development Index, 95% of the states with zero mentions rank as “very high development” or “high development.” Of those states that have had six or more completed concluding observations and yet have never had the term “patriarchy” or “patriarchal” used, 76% are ranked as “very high development.” Of those states that have had eight or more completed observations with no mentions of “patriarchy” or “patriarchal,” 81% are ranked as “very high development.” Of those same states, 90% have been members of the United Nations since 1945 and have consistently been active members in international lawmaking (although, so have many of those states that have had mentions of “patriarchy” and “patriarchal,” as in Table 1).<sup>77</sup>

These data on their own may indicate a number of different understandings of how the CEDAW Committee is using the concept of patriarchy with regards to implementation of CEDAW. It is possible that the lack of mentions in the observations of these states is a mere oversight on behalf of the CEDAW Committee. Equally, it is possible that the CEDAW Committee does not consider the states listed in Table 3 as “patriarchal” at all. Moreover, it could be argued that the CEDAW Committee is equating “high level development” (high life expediency and high levels of education) with post-patriarchy (or lesser patriarchy). Alternatively, the CEDAW Committee could be reserving the terms “patriarchy” and “patriarchal” for particular *indicators* of patriarchy, which 84% of states parties present and 16% of states parties do not. Such indicators may exclude high-level development, or at least the impacts of such development. For example, higher levels of education may be indicative of greater gender equality. However, it is impossible to make such arguments drawing from Tables 1, 2, and 3 alone. This set of data must be considered alongside the context of such mentions (described above in A) in order to gain a clearer understanding of how the CEDAW Committee is using these terms (discussed further in Section V).

#### D. An Increase of Usage Over Time

The CEDAW Committee has used the terms “patriarchy” and “patriarchal” since it began completing concluding observations in 1985. There were a few instances of usage during the 1990s and early 2000s, a dramatic increase in usage in 2006, and a continued upward trend in usage since 2006. This increase over

---

76. As the average number of concluding observations completed by all states parties.

77. See generally U.N., Member States, <https://www.un.org/en/member-states/> (last visited June 28, 2019) [<https://perma.cc/E3JY-R73C>].

time indicates that the terms are being used intentionally. The spike in the use of “patriarchal” in 2006 suggests that the particular composition of the CEDAW Committee at that time encouraged the use of the word in concluding observations.

CEDAW Committee members during 2006 included one man and twenty women—Cornelis Flinterman (the Netherlands), Magalys Arocha Domínguez (Cuba), Meriem Belmihoub-Zerdani (Vice-Chairperson, Algeria), Dorcas Coker-Appiah (Ghana), Mary Shanthi Dairiam (Malaysia), Françoise Gaspard (France), Salma Khan (Bangladesh), Huguette Bokpe Gnacadja (Benin), Tiziana Maiolo (Italy), Rosario Manalo (Chairperson, Philippines), Krisztina Morvai (Hungary), Pramila Patten (Mauritius), Silvia Pimentel (Vice-Chairperson, Brazil), Victoria Popescu Sandru (Romania), Hanna Beate Schöpp-Schilling (Vice-Chairperson, Germany), Glenda P. Simms (Jamaica), Heisoo Shin (Republic of Korea), Dubravka Šimonović (Rapporteur, Croatia), Anamah Tan (Singapore), Maria Regina Tavares da Silva (Portugal), and Xiaoqiao Zou (China).<sup>78</sup>

CEDAW Committee members are chosen to represent equitable geographical distribution, but they act independently to state interests.<sup>79</sup> Members come from different backgrounds and bring different experiences to their roles. For example, in 2006, six members were lawyers, eight were academics, five were involved with politics, and six were involved with NGOs. Out of the CEDAW Committee’s twenty-one members in 2006, 62% had studied in Western or European universities.<sup>80</sup> These different professional and educational backgrounds

---

78. The Committee on the Elimination of Discrimination against Women, Members of the Committee 1982 – present (2007), <https://www.un.org/womenwatch/daw/cedaw/members.PDF> [<https://perma.cc/M3WB-C6VB>].

79. *Contra* Elizabeth Evatt, *Finding a Voice for Women’s Rights: the Early Days of CEDAW*, 34 GEO. WASH. INT’L L. REV. 515 (2002) (critiquing CEDAW during the Cold War years and the issue of Committee members allegedly advancing state interests).

80. Members of the Committee 1982 – present, *supra* note 78. Cornelis Flinterman studied at universities in the Netherlands and the United States. CEDAW Members Curriculum Vitae: Cornelis Flinterman (Netherlands), OHCHR, <https://www2.ohchr.org/english/bodies/cedaw/docs/memberscv/Flinternman.pdf> (last visited May 13, 2020) [<https://perma.cc/L6TY-KV8L>]. Meriem Belmihoub-Zerdani studied at universities in Paris and Geneva. CEDAW Elections 2010: Meriem Belmihoub-Zerdani (Algeria), OHCHR, <https://www.ohchr.org/Documents/HRBodies/CEDAW/Elections2010/Elected/BelmihoubZerdani.pdf> (last visited May 13, 2020) [<https://perma.cc/XM5F-7SNY>]. Françoise Gaspard studied at universities in France. CEDAW Members Curriculum Vitae: Françoise Gaspard, OHCHR, <https://www2.ohchr.org/english/bodies/cedaw/docs/memberscv/Gaspard.pdf> (last visited May 13, 2020) [<https://perma.cc/F7WA-37NA>]. Mary Shanthi Dairiam studied at a university in the United Kingdom. CEDAW Members Curriculum Vitae: Mary Shanthi Dairiam, OHCHR, <https://www2.ohchr.org/english/bodies/cedaw/docs/memberscv/MaryShanthiDairiam.pdf> (last visited May 13, 2020) [<https://perma.cc/P8SS-9QGX>]. Salma Khan studied at universities in the United States and England. Profile: Salma Khan, COMMONWEALTH FOUND. (Apr. 26, 2013), <https://commonwealthfoundation.com/profile-salma-khan/> [<https://perma.cc/XS7Y-FDZ6>]. Pramila Patten studied at universities in the United Kingdom. CEDAW Elections 2010: Pramila Patten, OHCHR, <https://www.ohchr.org/Documents/HRBodies/CEDAW/Elections2010/PATTEN.pdf> (last visited May 13, 2020) [<https://perma.cc/E5K4-WLUH>]. Rosario Manalo partially studied in

may impact the way in which CEDAW Committee members analyze and apply the provisions of CEDAW or interpret the concept of patriarchy.<sup>81</sup>

Language used in human rights documents is often the product of compromises between states and other interest groups.<sup>82</sup> Any changes or preferences for certain kinds of language over others are rarely justified in official (or unofficial) documents.<sup>83</sup> Without further research, such as interviews with some or all of these CEDAW Committee members, it is impossible to conclude whether “patriarchal” was introduced by one member or if its inclusion was a product of wider discussion.

#### V. IMPLICATIONS OF CONFLATING “PATRIARCHAL ATTITUDES” AND “HARMFUL TRADITIONAL PRACTICES”

Pulling together these threads of data, there are arguments to be made about the meaning the CEDAW Committee has ascribed to “patriarchy” through its use of “patriarchal” in concluding observations. These assumptions are both insightful and concerning.

Since 2006, CEDAW Committee members have consistently used “patriarchal” in their observations. This indicates purposeful use of the word. Considering both the context of mentions and the states parties that have—and have not—mentioned “patriarchy” in their observations, there is an upward trend in the CEDAW Committee’s use of the concept of “patriarchy.” “Patriarchal,”

---

the United States. CEDAW Elections 2010: Rosario Manalo, OHCHR, [https://www.ohchr.org/Documents/HRBodies/CEDAW/Elections2016/CV\\_RosarioManalo.pdf](https://www.ohchr.org/Documents/HRBodies/CEDAW/Elections2016/CV_RosarioManalo.pdf) (last visited May 13, 2020) [<https://perma.cc/QCV7-HAEG>]. Dubravka Šimonović studied at a university in Croatia. Dubravka Šimonović, Special Rapporteur on Violence against Women, its causes and consequences – Biographical Note, OHCHR, <https://www.ohchr.org/en/issues/women/srwomen/pages/dubravkasimonovic.aspx> (last visited May 13, 2020) [<https://perma.cc/D4DW-83KG>]. Hanna Beate Schöpp-Schilling studied at universities in Germany and the United States. CEDAW Members Curriculum Vitae: Dr. Hanna Beate Schöpp-Schilling (Germany), OHCHR, <https://www2.ohchr.org/english/bodies/cedaw/docs/memberscv/Sch%C3%B6ppSchilling.pdf> (last visited May 13, 2020) [<https://perma.cc/E5Z9-4CJV>]. Glenda Simms studied at a university in Canada. Glenda Simms, UNIVERSITY OF MANITOBA, <https://umanitoba.ca/governance/honours/honorary-degrees> (last visited May 13, 2020) [<https://perma.cc/ME7H-676G>]. Heisoo Shin studied at university in the United States. CEDAW Elections 2010: Curriculum Vitae of Heisoo Shin, OHCHR, [https://www.ohchr.org/Documents/HRBodies/CESCR/Elections2010/CV-REPUBLICOFKOREA\\_HeisooSHIN-ENG.pdf](https://www.ohchr.org/Documents/HRBodies/CESCR/Elections2010/CV-REPUBLICOFKOREA_HeisooSHIN-ENG.pdf) (last visited May 13, 2020) [<https://perma.cc/XM5U-BAYB>]. Anamah Tan studied at a university in the United States. Biography, DR. ANAMAH TAN, [http://www.anamahtan.com/bio\\_edu.html](http://www.anamahtan.com/bio_edu.html) (last visited May 13, 2020) [<https://perma.cc/QN4N-BUXQ>]. Xiaoqiao Zou studied at a university in Australia and in the United States. CEDAW Members Curriculum Vitae: Xiaoqiao Zou, OHCHR, <https://www2.ohchr.org/english/bodies/cedaw/docs/memberscv/Xiaoqiao.pdf> (last visited May 13, 2020) [<https://perma.cc/M3LB-VJZZ>].

81. ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 127–128, 267ff (2017) (discussing how different regions of the world interpret “international law” very differently and that this is reflective (or caused) by regional tertiary education).
82. Sally Engle Merry, *Human Rights Law and the Demonization of Culture (and Anthropology Along the Way)*, 26 POL. & LEGAL ANTHROPOLOGY REV. 55, 59 (2003).
83. *Id.*

used in connection with Article 5(a), almost exclusively refers to particular “harmful traditional practices” which are singled out in some states’ parties but not others. These practices may be seen by the CEDAW Committee as clear indicators of “patriarchy” (hence why some states’ parties do not have the term mentioned while others have multiple mentions in their concluding observations). If this interpretation is correct, however, the CEDAW Committee’s use of the term may be open to serious criticism. Such criticism is not new; it is related to how the CEDAW Committee has historically interpreted and used the concepts of culture and “harmful traditional practices” under Article 5(a) (discussed further below).<sup>84</sup> The implication of conflating certain “harmful traditional practices” with “patriarchy” renders patriarchy synonymous with those practices, which replicates the problematic dichotomy between non-Western/non-European states and Western/European states.

#### A. Critiques of the CEDAW Committee’s Understanding of Culture and “Harmful Traditional Practices” in Article 5(a)

The CEDAW Committee’s understanding of “culture” under Article 5(a) has been the subject of ongoing criticism by feminist scholars, particularly anthropologists.<sup>85</sup> Sally Engle Merry asserted that CEDAW Committee instruments, including both observations and general recommendations, position “culture as a barrier to progress.”<sup>86</sup> In 2003, Merry argued that a conflict between culture and the human rights of women was increasingly a feature of many human rights treaty documents, including those of the CEDAW Committee.<sup>87</sup> “Culture” is often portrayed as a fixed set of beliefs and practices, as opposed to fluid and ever-changing.<sup>88</sup> It is often confined to customs, traditions, or religious practices which are based on beliefs and values of the “past.”<sup>89</sup> Thus, according to the concluding observations, the underlying message of Article 5 is that by suppressing or eliminating old practices and beliefs (“culture”), gender discrimination will be solved.<sup>90</sup> These old (“traditional”) practices and beliefs would be replaced by “modern” practices and beliefs. This, according to Merry, is based on an incorrect interpretation of what “culture” actually is.<sup>91</sup> The distinction between “tradition” on the one hand and “modernity” on the other risks “othering” or “exotifying” culture as something some parts of the world experience and others

---

84. See e.g., *id.*; Lauren Bock Mullins, *CEDAW: The Challenges of Enshrining Women’s Equality in International Law*, 20 PUB. INTEGRITY 257 (2018); Bronwyn Winter, Denise Thompson & Sheila Jeffreys, *The UN Approach to Harmful Traditional Practices*, 4 INT’L FEMINIST J. POL. 72 (2002); RIKKI HOLTMAAT & JONNEKE NABER, WOMEN’S HUMAN RIGHTS AND CULTURE: FROM DEADLOCK TO DIALOGUE (2010).

85. See HOLTMAAT & NABER, *supra* note 84.

86. Merry, *supra* note 82, at 60.

87. *Id.* at 60–61; see also Winter *et al.*, *supra* note 84.

88. See Mullins, *supra* note 84, at 262; Merry, *supra* note 82.

89. See Merry, *supra* note 82, at 62.

90. *Id.*

91. *Id.* at 67.

do not.<sup>92</sup> This distinction is further emphasized by the CEDAW Committee expressly commenting on cultural practices that create negative gender stereotypes with respect to non-European and non-Western states in Article 5(a), while commenting mostly on stereotypes regarding parental roles with respect to Western and European countries in Article 5(b).<sup>93</sup>

Some contemporary scholarly understandings of culture contradict that of the CEDAW Committee. The CEDAW Committee has interpreted culture as fixed and based on old beliefs, rules, and practices which can simply be eliminated to promote gender equality for women. However, Merry argues that culture is instead “unbounded,” and it is often contested internally and externally by the relevant society.<sup>94</sup> “Culture” can be understood as connected to power relations, and its meaning is influenced by the society’s institutional arrangements and political economy.<sup>95</sup> As a consequence, culture cannot be isolated from its social, legal, economic, and political contexts. As each of these structures changes, so too does culture.<sup>96</sup> Some concluding observations that mention “patriarchal attitudes” root responsibility for widespread violence against women within traditional cultural practices, and not, for example, in the state’s lack of adequate housing, healthcare, or pay equity for women.<sup>97</sup> Therefore, there is a disconnect between the purpose of Article 5(a), which is about structural change, and its interpretative application by the CEDAW Committee.

The use of “harmful traditional practices” has similarly been the subject of critique by feminist scholars.<sup>98</sup> The phrase has its origins within a global (predominately Western ex-colonial powers) condemnation of the practice of FGM occurring in the Global South.<sup>99</sup> In 1995, the UN Office of the High Commissioner of Human Rights published *Fact Sheet 23: Harmful Traditional Practices Affecting the Health of Women and Children*, which outlined the various traditional practices of concern.<sup>100</sup> These “harmful traditional practices” are the same as those the CEDAW Committee refers to in its concluding observations that also appear alongside mentions of “patriarchal attitudes.” Although the Fact Sheet acknowledges that some of the traditional practices are present all across the

92. See generally Maleiha Malik, *Feminism and its “Other”: Female Autonomy in an Age of “Difference”*, 30 CARDOZO L. REV. 2613 (2009).

93. Rikki Holtmaat, THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY 141, 156 (Marsha A. Freeman, Christine Chinkin & Beate Rudolf eds., 2012); see also HOLTMAAT & NABER, *supra* note 84; *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences*, ¶¶ 16–72 U.N. Doc A/HRC/4/34 (Jan. 17, 2007).

94. Merry, *supra* note 82, at 67.

95. *Id.*

96. *Id.* at 69.

97. See Sally Engle Merry, *Constructing a Global Law-Violence against Women and the Human Rights System*, 28 L. & SOC. INQUIRY 941, 961 (2003).

98. See CHIA LONGMAN & TAMSIN BRADLEY, INTERROGATING THE CONCEPT OF HARMFUL CULTURAL PRACTICES: GENDER, CULTURE AND COERCION (2015).

99. Winter et al., *supra* note 84, at 73.

100. U.N. Office of the High Commissioner of Human Rights, *Fact Sheet 23: Harmful Traditional Practices Affecting the Health of Women and Children* (Aug. 1995).

world, many of the examples relate to specific parts of the world, namely the Global South.<sup>101</sup> Moreover, the Fact Sheet ends with the assertion that “most women in developing countries are unaware of their basic human rights.”<sup>102</sup> This not only positions “culture” as a barrier to human rights, but it also positions “third world” women as inherent victims of their own culture.<sup>103</sup>

“Harmful traditional practices” has since been used by the CEDAW Committee (and the Committee on the Rights of the Child) as a catchall phrase to refer to very specific practices and, more often than not, in relation to countries in the Global South.<sup>104</sup> Again, emphasizing “harmful traditional practices” in relation to some states and not others further risks “exotifying” culture. Defining culture in terms of harmful traditional practices can reinforce racist stereotypes against certain populations. For example, consistently singling out African states for polygamy or widow inheritance can reinforce colonial stereotyping of African women as sexually primitive and promiscuous (and thus, dangerous to the realization of their own human rights).<sup>105</sup>

According to the data collected in this study, the term “patriarchal” seems to be closely aligned with the CEDAW Committee’s narrowly interpreted notion of culture under Article 5(a). Mentions of “patriarchal” appearing alongside “harmful traditional practices” support this alignment. Therefore, many of the same criticisms may be applicable to CEDAW’s conception of “patriarchy” itself. The CEDAW Committee connects specific harmful traditional practices to deeply rooted “patriarchal attitudes.” These are overwhelmingly referenced in concluding observations of non-Western and non-European countries and almost entirely absent from observations of Western and European countries. Even where practices commonly referred to as “harmful traditional practices,” such as FGM, are mentioned in Western or European states’ observations, they are not referred to as “harmful traditional practices” (or as arising out of “patriarchal attitudes”) at all.<sup>106</sup> If mentioned, they are merely referred to as “practices,” or, at most, “harmful practices.”<sup>107</sup> If culture is “othered” or “exotified” in this way, so too is “patriarchy.” Placing some regional groupings beyond the label of “patriarchal” creates the implication that European and Western states are somehow non-patriarchal or post-patriarchal, or they do not have harmful traditional practices based upon patriarchal attitudes of their own. This disparity also supports the

---

101. *Id.* (including examples of certain countries in the Asian region, South Asia, the Middle East, and parts of Africa.)

102. *Id.*

103. See Mohanty, *supra* note 21, at 66–67.

104. Joint General Recommendation No. 31, *supra* note 49.

105. Sylvia Tamale, *The Right to Culture and the Culture of Rights: A Critical Perspective on Women’s Sexual Rights in Africa*, 16 FEMINIST LEGAL STUD. 47, 52–53 (2008).

106. See, e.g., Comm. on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland, ¶¶ 31–32, U.N. Doc. CEDAW/C/GBR/CO/8 (Mar. 14, 2019).

107. See, e.g., Comm. on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of Australia, ¶ 25, U.N. Doc. CEDAW/C/AUS/CO/8 (July 25, 2018).



implication that the CEDAW Committee believes that highly developed states (overrepresented in Table 3 as having “zero mentions” of “patriarchal”) do not experience culture or patriarchy.

### B. Comparing “Harmful Traditional Practices” Where “Patriarchal” Is Mentioned and Not Mentioned

In those concluding observations where “patriarchal” is mentioned, particular harmful traditional practices are specifically called out as stemming from deeply rooted patriarchal attitudes. However, in concluding observations where “patriarchal” is not mentioned, those same practices are not named as “harmful traditional practices.” This section will use violence against women to illustrate the seemingly differential treatment.

Violence against women is a significant problem across all states; for example, one-third of women in the world will be a victim of sexual violence during their lifetime.<sup>108</sup> In New Zealand, Australia, and the United Kingdom (UK), the percentage of women who are likely to be victims of sexual violence is comparable to the world average.<sup>109</sup> When commenting on the persistence of such violence in regards to these states, the CEDAW Committee uses generic phrases such as “behaviors and attitudes” that lead to violence against women.<sup>110</sup> Alternatively, some concluding observations state that the CEDAW Committee “notes with concern” the high levels of violence in such states.<sup>111</sup> For example, in regards to Norway:

[The CEDAW Committee] *expresses its concern* at the high prevalence of violence against women in the State party ... It is also *concerned* at the apparent lack of awareness among women that marital rape is criminalized in the State party. The Committee reiterates its previous *concerns* at the lack of a

---

108. World Health Organization, Violence against Women (Nov. 17, 2017), <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> [<https://perma.cc/2H66-XJDM>].

109. *See e.g.*, one in four women in Australia experience sexual violence, *see* Comm. on the Elimination of Discrimination against Women, Concluding Observations on the eighth periodic report of Australia, ¶ 27(a), U.N. Doc. CEDAW/C/AUS/CO/8 (July 25, 2018); one in three women in New Zealand, *see* Concluding Observations on the eighth periodic report of New Zealand, *supra* note 4, at ¶ 25(a); one in four women in the UK, *see* Rape Crisis England and Wales, About sexual violence (Mar. 2017), <https://rapecrisis.org.uk/get-informed/about-sexual-violence/statistics-sexual-violence/> [<https://perma.cc/HZF6-UCBU>].

110. *See* Comm. on the Elimination of Discrimination against Women, Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, ¶ 34, U.N. Doc. CEDAW/C/GBR/CO/7 (July 30, 2013).

111. *See e.g.*, Concluding observations on the eighth periodic report of New Zealand, *supra* note 4, at ¶ 25; Concluding observations on the eighth periodic report of Australia, *supra* note 109, at ¶ 27; Comm. on the Elimination of Discrimination against Women, Concluding observations of the Committee on the Elimination of Discrimination against Women: Australia, ¶ 28, U.N. Doc. CEDAW/C/AUL/CO/7 (July 30, 2010).

comprehensive law on prevention of violence against women.<sup>112</sup>

This can be contrasted to how the CEDAW Committee comments on such violence in observations of other states including, *inter alia*, Cuba, Egypt, Ghana, Kyrgyzstan, Montenegro, Pakistan, and Uzbekistan.<sup>113</sup> In those observations, the CEDAW Committee not only uses the phrases “harmful traditional practices” and “patriarchal attitudes,” but also generally employs stronger language.<sup>114</sup> For example, in Ghana’s case:

The Committee is *deeply concerned*, however, about the persistence of *adverse cultural norms, practices and traditions*, in addition to *patriarchal attitudes and deep-rooted stereotypes* regarding the roles and responsibilities of women and men in the family and in society, *which contribute to the persistence of violence against women and harmful practices*.<sup>115</sup>

Similar language is used in the case of Kyrgyzstan:

The Committee remains concerned about the persistence of *deep-rooted patriarchal attitudes and stereotypes* concerning the roles and responsibilities of women and men in the family and society, which discriminate against women and perpetuate their subordination within the family and society . . . *such stereotypes are root causes of violence against women . . .*<sup>116</sup>

To insinuate that violence against women in the UK, Australia, or New Zealand is

---

112. Comm. on the Elimination of Discrimination against Women, Concluding observations of the Committee on the Elimination of Discrimination against Women: Norway, ¶ 23, U.N. Doc. CEDAW/C/NOR/CO/8 (Mar. 23, 2012) (emphasis added).

113. *See e.g.*, Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined sixth and seventh periodic reports of Ghana, U.N. Doc. CEDAW/C/GHA/CO/6-7 (Nov. 7, 2014); Comm. on the Elimination of Discrimination against Women, Concluding observations of the Committee on the Elimination of Discrimination against Women: Egypt, U.N. Doc. CEDAW/C/EGY/CO/7 (Feb. 5, 2010); Concluding comments of the Committee on the Elimination of Discrimination against Women: Cuba, *supra* note 70; Comm. on the Elimination of Discrimination against Women, Concluding comments of the Committee on the Elimination of Discrimination against Women: Pakistan, U.N. Doc. CEDAW/C/PAK/CO/3 (June 11, 2004); Comm. on the Elimination of Discrimination against Women, Concluding observations on the second periodic report of Montenegro, U.N. Doc. CEDAW/C/MNE/CO/2 (July 24, 2017); Comm. on the Elimination of Discrimination against Women, Concluding observations on the fifth periodic report of Uzbekistan, U.N. Doc. CEDAW/C/UZB/CO/5 (Nov. 24, 2015); Comm. on the Elimination of Discrimination against Women, Concluding observations on the fourth periodic report of Kyrgyzstan, U.N. Doc. CEDAW/C/KGZ/CO/4 (Mar. 11, 2015).

114. *See id.*

115. Concluding observations on the combined sixth and seventh periodic reports of Ghana, *supra* note 113, at ¶ 22 (emphasis added); *see also* Concluding observations of the Committee on the Elimination of Discrimination against Women: Egypt, *supra* note 113, at ¶ 21; Concluding observations on the second periodic report of Montenegro, *supra* note 113, at ¶ 18; Concluding observations on the fifth periodic report of Uzbekistan, *supra* note 113, at ¶ 15.

116. Concluding observations on the fourth periodic report of Kyrgyzstan, *supra* note 113, at ¶ 15.

not based on patriarchal attitudes is more than disingenuous—it is incorrect.<sup>117</sup> However, the CEDAW Committee appears to imply this by refraining from using “patriarchal attitudes” in regard to these states while consistently using those terms when commenting on the same practices in other (mostly non-Western or non-European) states.

### C. Summary: The CEDAW Committee’s Concept of “Patriarchy” Through its Use in Concluding Observations

The CEDAW Committee uses “patriarchal” as an adjective to describe prevailing cultural practices and attitudes that foster ongoing discrimination against women. There is no doubt that the CEDAW Committee believes the elimination of these “patriarchal attitudes” forms part of the obligations on states under Article 5 of the Convention. It is consistently mentioned in the concluding observations of 84% of states parties that completed the reporting process at least once. How the CEDAW Committee uses the term “patriarchal” also illuminates their conceptualization of “patriarchy,” which seemingly influences their use of the adjective itself.

Conflating “patriarchal attitudes” with “harmful traditional practices” means that patriarchy is interpreted in a specific way. According to the CEDAW Committee, patriarchy is associated with traditional beliefs or practices including, inter alia, FGM, sexual initiation practices, early and forced marriage, polygamy, son preference, and violence against women. Perhaps the CEDAW Committee is using these practices as direct indicators of patriarchy. After all, these practices are incredibly harmful to women and are overt examples of oppression. Those states that harbor such practices have been referred to by one scholar as the “world’s most repressive nations.”<sup>118</sup> However, just because there is a general absence of these more direct or coercive manifestations of oppression in a particular state does not render “patriarchal attitudes” absent.<sup>119</sup> In fact, by avoiding the phrase “patriarchal attitudes” in some concluding observations but not in others, the CEDAW Committee paints a limiting picture of what a

---

117. See, e.g., Sarah Marsh, *Domestic Abuse Offences in London Rise 63% in Seven Years*, GUARDIAN (Feb. 27, 2019), <https://www.theguardian.com/society/2019/feb/27/domestic-violence-london-rise> [<https://perma.cc/BEF4-BDGK>]; Siobhan Fenton, *You Can’t Fix Domestic Violence if You Refuse to Believe It’s the Product of a Male-Dominated Society*, INDEPENDENT (Dec. 15, 2015), <https://www.theguardian.com/society/2019/feb/27/domestic-violence-london-rise> [<https://perma.cc/G6X9-5MJA>]; Katie Kenny & Blair Ensor, *Warped Masculinity Is Fueling NZ’s Fatal Family Violence Problem*, STUFF (May 15, 2019), <https://www.stuff.co.nz/national/crime/112594136/the-homicide-report-lays-bare-new-zealands-problem-with-family-violence> [<https://perma.cc/CE5E-LWXU>]; Serafin Dillon, *Violence Against Women: Men Aren’t the Problem or the Solution*, STUFF (Jan. 9, 2019), <https://www.stuff.co.nz/stuff-nation/109792758/violence-against-women-men-arent-the-problem-or-the-solution> [<https://perma.cc/BKA5-YGE9>]; Kristin Diemer, *To Change Attitudes to Family Violence, We Need a Shift in Gender Views*, CONVERSATION (July 22, 2015), <https://theconversation.com/to-change-attitudes-to-family-violence-we-need-a-shift-in-gender-views-44718> [<https://perma.cc/8PWG-P4XX>].

118. Christina Hoff Sommers, *Feminism by Treaty*, POL’Y REV. 37, 48 (2011).

119. See Winter et al., *supra* note 84, at 77.

“patriarchal” state looks like. Thus, according to the CEDAW Committee’s use of the term in concluding observations, “patriarchal” states are Middle Eastern, Asian, and South American states. Their cultural “traditions,” or religious practices, stand as a barrier to women’s human rights. A “patriarchal” state is not a modern (or “civilized”) state that has moved beyond historic, and thus archaic, cultural values. Once again, limiting patriarchy to mean culture and “harmful traditional practices” in this way risks “othering” and “exotifying” patriarchy itself.

The limited use of “patriarchal” in concluding observations also highlights the wasted potential of Article 5. As previously explained, Article 5 is an important provision and underlies the Conventions’ specific obligations. It is potentially transformative. Article 5 requires states parties to make structural changes, to modify their legal, economic, social, and cultural frameworks to help eliminate discrimination against women. However, consistently framing culture as “harmful traditional practices” rooted in “patriarchal attitudes” limits the ongoing dialogue between the CEDAW Committee and states parties to individual practices that, if removed, would satisfy a state party’s obligations under Article 5(a). Alternatively, it could be argued that because of the generally poor implementation of CEDAW among states parties, the CEDAW Committee is calling for the elimination of specific practices as small steps towards greater implementation across states in later years. Notwithstanding this possibility, reserving any reference to patriarchy for only a small number of practices sends a regressive message to states parties regarding their obligations under Article 5(a).

#### **VI. RECONCILING FEMINIST UNDERSTANDINGS OF “PATRIARCHY” WITH THE JURISPRUDENCE OF THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN**

That “patriarchy” was left out of CEDAW itself is noteworthy because the 1980s was a period of time where the concept enjoyed much discussion in feminist literature.<sup>120</sup> Nevertheless, this study has shown that the CEDAW Committee draws upon the concept of patriarchy to interpret the Convention for purposes of concluding observations. However, the CEDAW Committee has utilized “patriarchy” in a specific way. According to the CEDAW Committee, the concept of patriarchy is limited to certain indicators. These are represented by “harmful traditional practices” and almost exclusively concern state obligations under Article 5(a). Therefore, the CEDAW Committee’s conception of patriarchy aligns itself with the traditional understanding of patriarchy as the overt subordination of women by men.<sup>121</sup>

To interpret obligations under the Convention, the CEDAW Committee does not appear to consider “patriarchy” as a system of power. Additionally, the CEDAW Committee is not using the dual-system understanding of patriarchy,

---

120. See Higgins, *supra* note 27, at 7–8.

121. See Walby, *supra* note 11, at 214; MILLET, *supra* note 11, at 25.

where patriarchy is understood as a social and political structure that operates alongside (or intertwined with) capitalism.<sup>122</sup> It does not appear that the CEDAW Committee employs an intersectional and anti-essentialist approach either, as “patriarchal” is used in a specific context, not as an elastic term encompassing different experiences of “patriarchy.”<sup>123</sup> Once again, it appears that the meaning ascribed to “patriarchy” in concluding observations does not align with the potentially transformative provision of Article 5, which requires sweeping structural change beyond specific cultural practices.

A transformative interpretation of Article 5(a) that applies the concept of patriarchy necessitates an understanding of patriarchy as a system of power. Article 5(a) requires states parties to eliminate negative gender stereotypes that foster discrimination against women in both private and public spaces.<sup>124</sup> Acknowledging patriarchy as a system of power (that is, hierarchical and autonomous, permeating every facet of society) would require states parties, per Article 5(a), to dismantle patriarchal structures and attitudes, from the government to the family home.<sup>125</sup> This is not limited to certain practices, traditions, or beliefs. As Merry explains, “culture” cannot be separated from its legal, social, economic, or political context.<sup>126</sup> In order to eliminate patriarchy (patriarchal attitudes and stereotypes), *all* states parties are required to engage in legal, social, economic, and political transformation.

### CONCLUSION

There are three conclusions to be drawn from this study. First, despite the fact that the word “patriarchy” does not appear once in the Convention, the CEDAW Committee has, since 2006, used “patriarchal” consistently in their concluding observations. The context of those mentions, which are overwhelmingly made in relation to Article 5, indicates that members use the word purposefully. Second, “patriarchal” is used in connection with particular “harmful traditional practices” that are singled out in some state parties but not others. The distinction resembles the dichotomy of non-Western/non-European states versus Western/European states. Third, the use of the term implies that “patriarchy,” according to the CEDAW Committee, is synonymous with specific examples of the direct subordination of women.

Considering “patriarchy” in a way that limits the transformative potential of Article 5 is unfortunate because it is one of the most essential provisions in CEDAW and obliges states to undergo meaningful structural change to eliminate discrimination against women. Moreover, this very limited interpretation of “patriarchy” fails to recognize the less overt ways in which women are structurally

---

122. See Eisenstein, *supra* note 17, at 208; HOOKS, *supra* note 12, at 17.

123. See Mohanty, *supra* note 21, at 65; LORDE, *supra* note 21, at 110; Crenshaw, *supra* note 21, at 1241.

124. See CEDAW, *supra* note 1, art. 5(a).

125. See HOOKS, *supra* note 12, at 17.

126. Merry, *supra* note 82, at 69.

oppressed across the world. It portrays “patriarchy” as existing in most of the world but not existing in a select part of the world. This apparent “exotification” of patriarchy will only create further barriers to the implementation of CEDAW, as it risks representing the Convention as imperialistic and not a significant and transformative framework for global gender equality.

#### APPENDIX

Table 1. List of states in order of “patriarchy” or “patriarchal” mentions in CEDAW Committee concluding observations (averaged across total number of completed observations of each state party from 1985-2018, represented here in descending order from most to least).

State Party	Average mentions of “patriarchy” and “patriarchal” across total number of completed concluding observations
Montenegro	3.0
Qatar	3.0
Syria	3.0
Afghanistan	2.5
Uzbekistan	1.6
Brunei	1.5
Kyrgyzstan	1.5
Iraq	1.3
Nepal	1.2
Greece	1.1
Algeria	1.0
Andorra	1.0
Jordan	1.0
Pakistan	1.0
Burkina Faso	0.9
Azerbaijan	0.8
Lebanon	0.8
Moldova	0.8
Rwanda	0.8
Singapore	0.8
Tajikistan	0.8
Turkey	0.8
Tuvalu	0.8

Ukraine	0.8
Bolivia	0.7
Burundi	0.7
Mauritania	0.7
Monaco	0.7
Oman	0.7
Samoa	0.7
Serbia	0.7
United Arab Emirates	0.7
Zambia	0.7
Bosnia and Herzegovina	0.6
Fiji	0.6
Georgia	0.6
Ghana	0.6
Guyana	0.6
Italy	0.6
Malawi	0.6
Malaysia	0.6
Myanmar	0.6
Russian Federation (Russia)	0.6
Republic of Korea (South Korea)	0.6
Turkmenistan	0.6
Uruguay	0.6
Vanuatu	0.6
Venezuela	0.6
Viet Nam	0.6
Albania	0.5
Bahamas	0.5
Bangladesh	0.5
Barbados	0.5
Benin	0.5
Chad	0.5
Democratic People's Republic of Korea (North Korea)	0.5
Eswatini	0.5
Equatorial Guinea	0.5

Honduras	0.5
Kazakhstan	0.5
Lesotho	0.5
Mongolia	0.5
Mozambique	0.5
Nauru	0.5
Saudi Arabia	0.5
South Africa	0.5
Argentina	0.4
Brazil	0.4
Central African Republic	0.4
Colombia	0.4
Cuba	0.4
Cyprus	0.4
Egypt	0.4
Eritrea	0.4
France	0.4
Gambia	0.4
India	0.4
Japan	0.4
Kuwait	0.4
Liberia	0.4
Liechtenstein	0.4
Lithuania	0.4
Maldives	0.4
Mauritius	0.4
Namibia	0.4
Seychelles	0.4
Trinidad and Tobago	0.4
Uganda	0.4
Zimbabwe	0.4
Armenia	0.3
Botswana	0.3
Belarus	0.3
Cabo Verde	0.3
Canada	0.3



Comoros	0.3
Cook Islands	0.3
Cote d'Ivoire	0.3
Czech Republic	0.3
Democratic Republic of Congo	0.3
Djibouti	0.3
Ecuador	0.3
El Salvador	0.3
Guatemala	0.3
Guinea	0.3
Guinea-Bissau	0.3
Indonesia	0.3
Jamaica	0.3
Kenya	0.3
Latvia	0.3
Loa People's Democratic Republic (Laos)	0.3
Macedonia	0.3
Madagascar	0.3
Mali	0.3
Malta	0.3
Marshall Islands	0.3
Micronesia	0.3
Niger	0.3
Papua New Guinea	0.3
Saint Vincent and the Grenadines	0.3
Sierra Leone	0.3
Solomon Islands	0.3
Tanzania	0.3
Timor-Leste	0.3
Togo	0.3
Tunisia	0.3
Angola	0.2
Cambodia	0.2
Cameroon	0.2
Croatia	0.2
Estonia	0.2

Gabon	0.2
Libya	0.2
Mexico	0.2
Netherlands	0.2
Nicaragua	0.2
Nigeria	0.2
Philippines	0.2
Sri Lanka	0.2
Suriname	0.2
Switzerland	0.2
Yemen	0.2
Belgium	0.1
Bhutan	0.1
Chile	0.1
Congo	0.1
Dominican Republic	0.1
Ethiopia	0.1
Haiti	0.1
Hungary	0.1
Paraguay	0.1
Portugal	0.1
Romania	0.1
Senegal	0.1
Spain	0.1
Sweden	0.1
Thailand	0.1
Antigua and Barbuda	0
Australia	0
Austria	0
Bahrain	0
Belize	0
Bulgaria	0
China	0
Costa Rica	0
Denmark	0
Dominica	0

Finland	0
Germany	0
Grenada	0
Iceland	0
Ireland	0
Israel	0
Luxembourg	0
Morocco	0
New Zealand	0
Norway	0
Palestine	0
Panama	0
Peru	0
Poland	0
Saint Kitts and Nevis	0
Saint Lucia	0
Slovakia	0
Slovenia	0
United Kingdom	0

Table 2. States that have zero “patriarchy” or “patriarchal” mentions in CEDAW Committee concluding observations (descending order from highest total number of concluding observations completed to the least).

<b>State Party</b>	<b>Total number of completed concluding observations</b>
Norway	9
Australia	8
Austria	8
China	8
Denmark	8
Germany	8
Iceland	8
New Zealand	8
Peru	8
Poland	8
Bulgaria	7

United Kingdom	7
Costa Rica	7
Finland	7
Ireland	7
Luxembourg	7
Panama	7
Israel	6
Saint Lucia	6
Slovakia	6
Slovenia	6
Grenada	5
Belize	4
Morocco	4
Saint Kitts and Nevis	4
Antigua and Barbuda	3
Bahrain	3
Palestine	1

Table 3. The top ten states that have the most “patriarchy” or “patriarchal” mentions in CEDAW Committee Concluding observations (average across total number of concluding observations completed).

<b>State Party</b>	<b>Average mentions of “patriarchy” and “patriarchal” across total number of completed concluding observations</b>
Montenegro	3.0
Qatar	3.0
Syria	3.0
Afghanistan	2.5
Uzbekistan	1.6
Brunei	1.5
Kyrgyzstan	1.3
Iraq	1.3
Nepal	1.2
Algeria	1.0

Figure 1. Context of mentions of “patriarchy” or “patriarchal” within CEDAW Committee Concluding Observations.

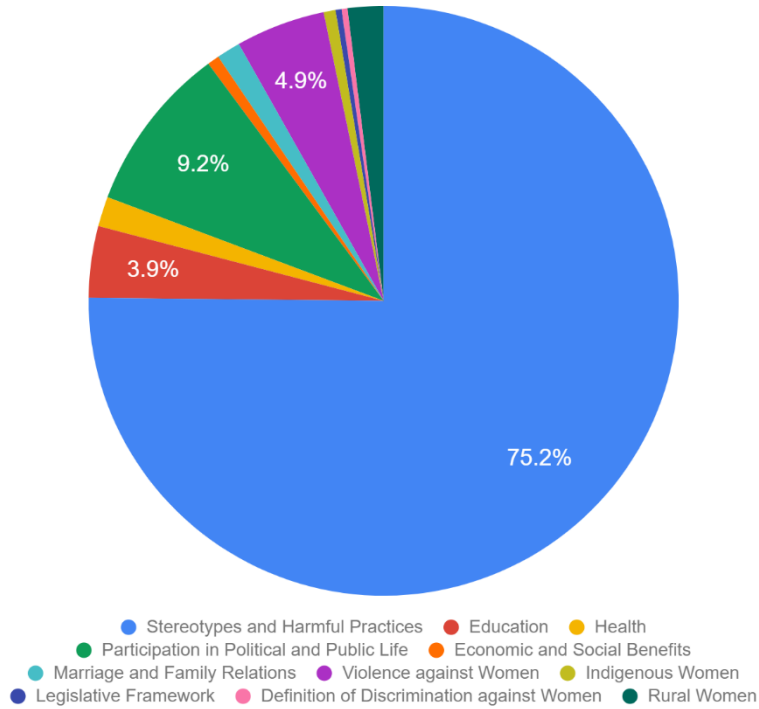
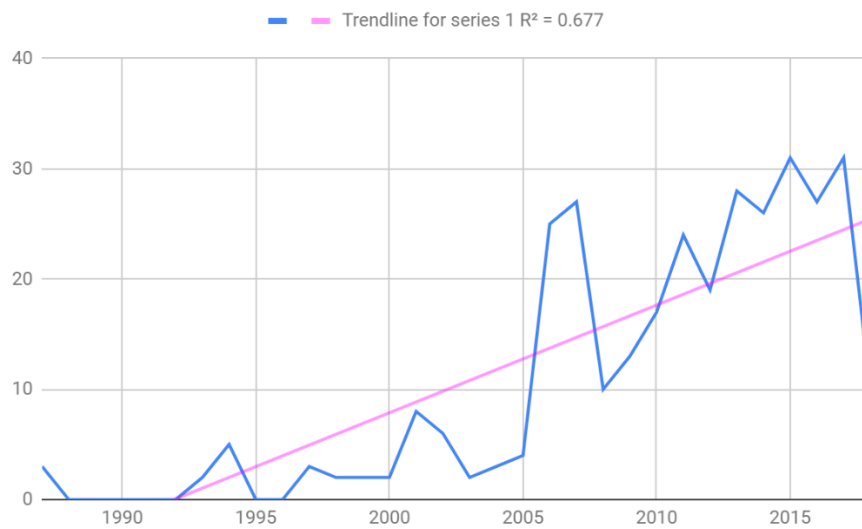


Figure 2. “patriarchy” or “patriarchal” mentions in CEDAW Committee Concluding observations over time.



# Veiling and Inverted Masking

Vanita Saleema Snow†

INTRODUCTION .....	115
I. THE IDENTITY DICHOTOMY .....	120
A. Binary Gender Identity .....	122
B. Black and African-American Women: Race Intersects with Gender 128	
C. Muslim Women: Religious Identity Intersects with Gender .....	130
D. African-American Muslim Women: The Challenges of Identity Convergence .....	134
II. MASKING IDENTITY .....	135
A. Masking to Assimilate .....	137
B. Legislated Masking .....	140
III. INVERTED MASKING.....	143
A. Establishing a Sincerely Held Belief: Legal Standard.....	143
B. Religious Visibility and Norms .....	144
C. Removing the Mask .....	148
CONCLUSION .....	149

## INTRODUCTION

“Good morning, Your Honor, AA, here on behalf of the United States government.”<sup>1</sup> AA recounted her proudest moment: appearing in federal district court as an attorney for the Department of Justice (DOJ) in a religious accommodation case under Title VII of the Civil Rights Act of 1964.<sup>2</sup> There she

---

DOI: <https://doi.org/10.15779/Z38PC2T93K>.

†. Professor of Law, University of the District of Columbia David A. Clarke School of Law. For comments and suggestions on earlier drafts, thanks go to Kenneth Dean Chestek, Maureen Johnson, and Brian Larson. I also thank participants at American University Washington College of Law Mid-Atlantic People of Color Conference, the University of the District of Columbia David A. Clarke School of Law Scholarship series, and the Legal Writing Institute’s Sirico Scholars workshop. Brent W. Drummond, Kalani Brown, and Keilah Roberts provided valuable research assistance. Special thanks to the *Berkeley Journal of Gender, Law & Justice* editors for their extremely helpful suggestions, particularly Maggie Woods. Finally, I acknowledge Gregory Fields for upholding and protecting the rights of Muslim Women.

1. AA and I presented at the National Muslim Law Students Association annual conference at Yale Law School on November 3, 2018. I attentively listened to her story and visualized her proudly appearing in federal court in full hijab.

2. *Id.* See also Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2006 & Supp. IV 2011)).

stood, an Ivy League graduate and the granddaughter of sharecroppers. She appeared before the court as an African-American Muslim woman in hijab representing the government to uphold the constitutional rights of another Muslim woman.<sup>3</sup> The complainant, Safoorah Khan, was employed as a teacher in a small Illinois school district and had requested a religious accommodation to make the annual Islamic pilgrimage to Mecca (hajj).<sup>4</sup> The school district denied Ms. Khan's request.<sup>5</sup>

Although the employer raised economic hardship as its legal defense, trends suggest that the school district may have denied Khan's request because her secular practices, in its view, did not align with her claim that she had a religious obligation to make hajj.<sup>6</sup> AA successfully settled Khan's case against her employer and secured \$75,000 for Khan in lost wages.<sup>7</sup> I argue that because Khan did not perform her religion as the employer expected, such as by wearing hijab, the employer challenged the sincerity of her religious belief.<sup>8</sup> Specifically, I argue that Khan experienced the effects of what I refer to as *inverted masking* when the school district denied her request. In the inverted masking paradigm, employers are more prone to challenge employees' religious accommodation requests when the employee is inconsistent in religious practices or fails to perform a religious identity as the employer would expect. An array of large-scale employment litigation over discrimination against specifically Muslim employees provides evidence of the inverted masking paradigm in action.<sup>9</sup>

Muslims, especially Muslim women, face special difficulties in a post-*Trump v. Hawaii* America.<sup>10</sup> Since the election of Donald Trump, assaults against Muslims are higher even than they were immediately after the September 11,

3. Safoorah Khan filed a complaint with the Equal Employment Opportunity Commission (EEOC), which later referred the case to the Department of Justice (DOJ). Complaint at 13, *United States v. Bd. of Educ.*, 1:10-CV-07900 (N.D. Ill. Dec. 13, 2010).
4. Press Release, Dep't of Just., Justice Department Files Religious Discrimination Lawsuit Against Berkeley School District in Illinois (Dec. 13, 2010), <https://www.justice.gov/opa/pr/justice-department-files-religious-discrimination-lawsuit-against-berkeley-school-district> [<https://perma.cc/3TL7-4G7U>]; Complaint, *supra* note 3, at 1.
5. *Id.*
6. *Cf. Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679, 682 (9th Cir. 1998) (requiring that the plaintiff show more than a "lone unilateral statement" as evidence of sincere religious belief). In *Tiano*, the plaintiff failed to prove a bona fide religious belief that she was called to go on a pilgrimage to Yugoslavia because she "felt [she] was called to go." *Id.*
7. Press Release, Dep't of Just., Justice Department Settles Religious Discrimination Lawsuit Against Berkeley School District in Illinois (Oct. 13, 2011), <https://www.justice.gov/opa/pr/justice-department-settles-religious-discrimination-lawsuit-against-berkeley-school-district> [<https://perma.cc/9GEP-J82Y>].
8. *See* Complaint, *supra* note 3, at 1.
9. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 135 S.Ct. 2028, 2031 (2015); Consent Decree, EEOC v. Swift Aviation Grp., No. CV-12-01867-PHX-NVW (D. Ariz., July 23, 2013); *see generally* U.S. EQUAL EMP. OPPORTUNITY COMM'N, WHAT YOU SHOULD KNOW ABOUT THE EEOC AND RELIGIOUS AND NATIONAL ORIGIN DISCRIMINATION INVOLVING THE MUSLIM, SIKH, ARAB, MIDDLE EASTERN AND SOUTH ASIAN COMMUNITIES, <https://www.eeoc.gov/wysk/what-you-should-know-about-eeoc-and-religious-and-national-origin-discrimination-involving> (last visited Sept. 21, 2019) [<https://perma.cc/VP9Q-ZJJ9>].
10. *Trump v. Hawaii*, 138 S.Ct. 2392 (2018) (holding entry restrictions from Muslim-majority foreign states is a valid exercise of presidential power).

2001, attacks,<sup>11</sup> and 50 percent of Muslims have experienced discrimination.<sup>12</sup> Donald Trump has perpetuated negative stereotypes about Muslim women,<sup>13</sup> and some argue that Muslim women are particularly susceptible to hate crimes because of the intersection of their gender and Muslim identities.<sup>14</sup>

As a safeguard against mounting employment discrimination, rising anti-Islamic sentiments, and new anti-Islamic policies in the United States, Muslims increasingly engage in the tradition of masking their identity. On airplanes, many Muslims hesitate to speak Arabic or to carry books on the Middle East, for fear doing so might trigger the Transportation Security Administration (TSA) to perform extra screenings or prompt airline personnel to remove them from the plane for additional vetting.<sup>15</sup> Some Muslim women stop wearing their headscarves (hijab) by choice, while others stop as a disguise mechanism.<sup>16</sup> Undoubtedly, wearing hijab or the veil has become a visible signal of defiance to assimilation,<sup>17</sup> and their involuntary removal an attempt to mask aspects of an outsider religious identity.<sup>18</sup>

In his seminal article *Covering*, Professor Kenji Yoshino analyzed the covering of identity in the context of race, sexual orientation, and gender.<sup>19</sup> He also questioned the benefits of assimilation for those who experience identity-

- 
11. Katayoun Kishi, *Assaults Against Muslims in U.S. Surpass 2001 Level*, PEW RSCH. CTR. (Nov. 15, 2017), <https://www.pewresearch.org/fact-tank/2017/11/15/assaults-against-muslims-in-u-s-surpass-2001-level/> [<https://perma.cc/P9YA-82UF>].
  12. *U.S. Muslims Concerned About Their Place in Society, but Continue to Believe in the American Dream: Findings from Pew Research Center's 2017 Survey of U.S. Muslims*, PEW RSCH. CTR. (July 26, 2017), <https://www.pewforum.org/2017/07/26/findings-from-pew-research-centers-2017-survey-of-us-muslims/> [<https://perma.cc/D68Q-PC6C>].
  13. See Creede Newton, *Hate Crimes Rose by Nearly 5 Percent in 2016: FBI*, AL JAZEERA (Nov. 14, 2017), <https://www.aljazeera.com/news/2017/11/14/hate-crimes-rose-by-nearly-5-percent-in-2016-fbi> [<https://perma.cc/C4R7-K2SS>]; see also Karsten Müller & Carlo Schwarz, *From Hashtag to Hate Crime: Twitter and Anti-Minority Sentiment* (July 24, 2020), <https://ssrn.com/abstract=3149103>.
  14. See Michelle D. Byng, *Mediating Discrimination: Resisting Oppression Among African-American Muslim Women*, 45 SOC. PROBS. 473, 474 (1998).
  15. See Neil Vigdor, *Delta Fined for Discriminating Against Muslim Passenger*, N.Y. TIMES (Jan. 27, 2020), <https://www.nytimes.com/2020/01/27/business/delta-airlines-muslim-passengers.html> [<https://perma.cc/JK2H-QN42>]; see also Michael T. Luongo, *Traveling While Muslim Complicates Air Travel*, N.Y. TIMES (Nov. 7, 2016), <https://www.nytimes.com/2016/11/08/business/traveling-while-muslim-complicates-air-travel.html> [<https://perma.cc/7VKV-6R2B>]; WE WEAR THE MASK: 15 TRUE STORIES OF PASSING IN AMERICA 190–91 (Brando Skyhorse & Lisa Page eds., 2017).
  16. See, e.g., Asma Khalid, *Lifting the Veil: Muslim Women Explain Their Choice*, NAT'L PUB. RADIO (April 21, 2011, 12:01 AM), <https://www.npr.org/2011/04/21/135523680/lifting-the-veil-muslim-women-explain-their-choice> [<https://perma.cc/U535-8XZS>] (discussing women's reasons to unveil or veil themselves).
  17. See *id.*
  18. See *id.*
  19. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 875–79 (2002).



based discrimination.<sup>20</sup> Meanwhile, other scholars, particularly Sara Ahmed,<sup>21</sup> Sahar Aziz,<sup>22</sup> and Khaled Beydoun,<sup>23</sup> have examined assimilation and specifically Muslim identity markers, including what it means to “act[] Muslim.”<sup>24</sup> I build upon and link these two strains of scholarship by introducing the new theoretical framework of inverted masking.

Inverted masking is a legal consequence of masking identity, whether through covering, passing, or converting. Inverted masking’s legal ramifications emerge when a group masks or misperforms its identity to shield against discrimination. While most attempts at masking are protective, inverted masking creates legal barriers when claimants attempt to challenge identity-based discrimination. I argue that employees, particularly Muslims, who mask their religious identity or fail to perform their religious identity as employers expect are more likely to have employers deny their religious accommodation requests under Title VII of the Civil Rights Act of 1964.<sup>25</sup> The scant judicial record suggests that an employer is more likely to grant a religious accommodation if the request aligns with their expectations of the religion and the claimant is consistent with her religious practices.<sup>26</sup>

Significantly, Title VII provides that an employer may not “discriminate against any individual with respect to h[er] compensation, terms, conditions, or privileges of employment” because of her religion.<sup>27</sup> The term “religion” is broadly defined.<sup>28</sup> The Supreme Court has interpreted religion to create an affirmative duty on employers to accommodate an employee or applicant’s

20. Yoshino, *supra* note 19, at 876–87. When Kenji Yoshino examined the correlation between covering of identity and equal protection jurisprudence, he determined that mutable traits, such as sexual orientation, are offered less stringent protections than immutable identities like race (strict scrutiny) and gender (intermediate scrutiny). However, Yoshino argued that assimilation is a form of covering identity that racial minorities, women, and gay people all experience—a covering of identity that antidiscrimination statutes fail to fully address.
21. See Sara Ahmed, *Affective Economies*, 22 SOC. TEXT 117, 130–32 (2004).
22. See Sahar F. Aziz, *Coercive Assimilationism: The Perils of Muslim Women’s Identity Performance in the Workplace*, 20 MICH. J. RACE & L. 1 (2014) [hereinafter Aziz, *Coercive Assimilationism*]; Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim American Women in the Crosshairs of Intersectionality*, 9 HASTINGS RACE & POVERTY L.J. 191, 216–17 (2012) [hereinafter Aziz, *From the Oppressed*].
23. See generally Khaled Beydoun, *Acting Muslim*, 53 HARV. C.R.-C.L. L. REV. 1 (2018).
24. See *id.*
25. See, e.g., *Tiano v. Dillard Dep’t Stores, Inc.*, 139 F.3d 679, 681–83 (9th Cir. 1998); *Jiglov v. Hotel Peabody, G.P.*, 719 F. Supp. 2d 918, 927–34 (W.D. Tenn. 2010) (finding that the plaintiff’s leave request for a day of religious service did not create an undue hardship on the employer and was a protected religious observance, not a personal preference); Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2012) (prohibiting employment discrimination based on race, color, sex, religion, or national origin).
26. Conceivably, the gap between litigation in this area and the denial of employees’ religious accommodations is partially attributable to the justice gap that prevents many low- and middle-income employees from challenging employer actions. Significantly, both EEOC and DOJ have been subjected to backlash for challenging public employers for failing to accommodate Muslim employees. Under the Trump administration, these cases were likely more prone to both political backlash and anti-Islam rhetoric.
27. 42 U.S.C. § 2000e-2(a)(1).
28. See 42 U.S.C. § 2000e(j); see also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693–96 (2014).

sincerely held religious beliefs unless it creates an undue hardship on the employer's business.<sup>29</sup> Yet, it is this broad definition of religion, which in essence amounts to no definition, that has increasingly led employers to scrutinize the sincerity of an employee's beliefs.<sup>30</sup> The trend suggests that employers are assessing claimants' religiosity and consistent application of religious doctrine.<sup>31</sup>

Since the framing of identity narratives shape policies and judicial decisions, I examine the different theories of what makes identity and which theory American law more closely embraces in Part I of this Article. The rest of Part I focuses on the correlation between ascribed gender identities and the legal barriers associated with binary classifications of gender, race, and religion. Policies that align with the binaries of gender (male/female), race (white/non-white), and religion (Christian/non-Christian) tend to conflict with each other when nondominant identities converge in individuals—particularly African-American Muslim women.

Part II surveys forms of identity masking. This survey includes Muslims who mask to assimilate into society and escape potential discrimination. This Part provides additional background for the inverted masking thesis. This background includes contemporary examples of legislated masking, a paradigm in which individuals mask their identity to benefit from fundamental civil rights in employment,<sup>32</sup> military service,<sup>33</sup> and religious practices.<sup>34</sup> Part II also discusses legislation that requires Muslim women to remove visible symbols of religious

---

29. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 76–85 (1977).

30. *See United States v. Quaintance*, 608 F.3d 717, 722–23 (10th Cir. 2010) (finding that a church's marijuana possession and distribution were business transactions rather than sincerely held religious beliefs); *cf. Braunfeld v. Brown*, 366 U.S. 599, 608–09 (2019) (holding that a facially neutral statute prohibiting retail businesses from operating on Sundays did not violate equal protection or the freedom of religion of Orthodox Jewish storeowners whose day of rest is on Saturday because the statute affected only Orthodox Jewish storeowners who believed that it is necessary to work on Sunday).

31. *See Hobby Lobby Stores*, 573 U.S. at 703; *see also Trans World Airlines*, 432 U.S. at 67–69, 79–85.

32. *E.g., Webb v. City of Philadelphia*, 562 F.3d 256, 259–62 (3d Cir. 2009); *see also Hobby Lobby Stores*, 573 U.S. at 728–36; *see also Seval Yildirim, Freeman v. Dep't of Highway Safety & Motor Vehicles and Webb v. City of Philadelphia – Accommodation Tangles in the Laws Over Hair*, in *LAW & RELIGION: CASES IN CONTEXT* 293, 297–300 (Leslie C. Griffin, ed., 2010); *see also Separation of Church and Cubicle: Religion in the Workplace*, KNOWLEDGE @ WHARTON (Apr. 30, 2015), <https://knowledge.wharton.upenn.edu/article/separation-of-church-and-cubicle-religion-in-the-modern-workplace/> [https://perma.cc/UPD5-72FV].

33. *E.g., Woodward v. United States*, 871 F.2d 1068, 1068 (Fed. Cir. 1989) (holding that the Navy's policy of discharging gay service members did not violate the right to privacy); *Dronenburg v. Zech*, 741 F.2d 1388, 1388 (D.C. Cir. 1984) (holding discharge based on "homosexual conduct" does not violate the equal protection clause or the right to privacy).

34. *E.g., Freeman v. Dep't of Highway Safety & Motor Vehicles*, 924 So. 2d 48, 52–57 (Fla. Dist. Ct. App. 2006); *see also Yildirim, supra* note 32; *see generally Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2014-4, RELIGIOUS GARB AND GROOMING IN THE WORKPLACE: RIGHTS AND RESPONSIBILITIES (2014), <https://www.eeoc.gov/laws/guidance/religious-garb-and-grooming-workplace-rights-and-responsibilities> (last visited Sept. 27, 2019) [https://perma.cc/2AF4-VK3J] (explaining exceptions to religious accommodation requirements).

identity, such as the hijab and other forms of veiling.

In Part III, I fully introduce the inverted masking paradigm. In this Article, I limit my focus to inverted masking in religious accommodation claims in the Title VII context. Nevertheless, it is worth noting that inverted masking can also occur under the Equal Protection Clause,<sup>35</sup> Religious Freedom Restoration Act,<sup>36</sup> and other identity-based protections. This Part includes a survey of courts' scrutiny of sincerity in religious accommodation cases under Title VII where inverted masking was at play. I show the nexus between claimants' masked identity and the courts' query of the sincerity of claimants' religious beliefs. Finally, I prescribe centering African-American<sup>37</sup> Muslim women in religious accommodation litigation as one strategy to break down adverse stereotypes and fight the legal consequence of inverted masking.

### I. THE IDENTITY DICHOTOMY

The relationship between identity and the law is often explored through various theoretical frameworks, including critical race theory,<sup>38</sup> queer theory,<sup>39</sup> feminist legal theory,<sup>40</sup> and covering theory.<sup>41</sup> These frameworks, and many others, offer both different perspectives on identity formation and performance and oppositional accounts of how the law addresses marginalized identities. Aristotle's law of identity provides a foundation for the concept of identity in logic and metaphysics.<sup>42</sup> His theory suggests that everything has an identity, or it is nonexistent.<sup>43</sup> That identity will remain constant and not change.<sup>44</sup> Thus, a "rose is a rose is a rose."<sup>45</sup> The rose has specific characteristics and traits that help define

---

35. U.S. CONST. amend. XIV, § 1.

36. 42 U.S.C. § 2000bb (2012).

37. In this article, the term "African American" is used for Black people whose ancestors were brought to the Americas as slaves. The word "Black" is used to include Black people who have a different country of origin.

38. *E.g.*, Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 323-30 (1987) (examining the importance of critical legal scholarship, presently called critical race theory, to oppressed communities, particularly regarding the topic of reparations).

39. *E.g.*, Marc R. Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 WASH. & LEE J.C.R. & SOC. JUST. 3, 9-16 (2008); *see generally* Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of 'Sex,' 'Gender' and 'Sexual Orientation' in Euro-American Law and Society*, 83 CALIF. L. REV. 3, 344-377 (1995) (explaining queer theory and offering strategic goals to achieve sexual equality).

40. *E.g.* Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 43 (1990) (arguing that feminist theory should not be preoccupied with an individual's differences but should focus on unity and common ground against male tyranny).

41. *See generally* Yoshino, *supra* note 19.

42. M.A.R. HABIB, *HEGEL AND THE FOUNDATIONS OF LITERARY THEORY* 72-73 (2019).

43. *See* ARISTOTLE, *CATEGORIES. ON INTERPRETATION. PRIOR ANALYTICS*. 3a 10-13; 3b 34; 8a 19 (Jeffrey Henderson, ed., H. P. Cooke & Hugh Tredennick trans., 1973).

44. *Id.*

45. GERTRUDE STEIN, *GEOGRAPHY AND PLAY*, 187 (Univ. of Wis. Press 1993) (1922).

its existence.<sup>46</sup>

Social scientists, such as Erving Goffman, offer other relevant paradigms that have influenced how legal scholars consider the correlation between identity and the law.<sup>47</sup> Specifically, Goffman's scholarship analogizes identity formation to the interaction an actor has with an audience.<sup>48</sup> In the theatrical realm, performers develop their characters and mold the delivery to meet audience expectations. Thus, unlike the Aristotelian law of identity, Goffman proffered that established social norms may shift how an audience interprets a fixed situation.<sup>49</sup> Additionally, because audiences anticipate that narratives will meet existing expectations, an audience may interpret a performance differently from how the performer intended.<sup>50</sup> The actor may similarly give the audience what it wants, meeting performance expectations, even when those expectations deviate from the performer's authentic self.<sup>51</sup>

Though Goffman's concept of identity performance reflects the real-life nuances of identity, the law more closely adopts Aristotle's law of identity. Like the Aristotelian law of identity, the law seeks to determine the characteristics of whatever is at issue.<sup>52</sup> It then groups parties, causes of actions, or fact patterns based on unifying characteristics that then determine that claims or groups of people are somehow the same.<sup>53</sup> Foundationally, the law operates on this sameness principle. For example, the concept of *stare decisis* is what keeps the wheels of justice turning: similar facts lead to the same legal result.<sup>54</sup> Even though one defendant may have stolen an apple and, in a subsequent case, another defendant stole an orange, the stolen objects' sameness as fruits makes the cases analogous and justifies a court following precedent.<sup>55</sup> At trial, to authenticate a document under Federal Rules of Evidence 901, the attorney must prove the document is what it purports to be by demonstrating sameness between what is presented at trial and the original document.<sup>56</sup> Patent law similarly requires the patent owner to demonstrate a sameness to show a violation of a patent.<sup>57</sup>

The sameness principle is also how the Title VII paradigm promotes equality by protecting individuals who are similarly situated with immutable traits, such as

---

46. See Monica Beyer, *Characteristics of the Rose Flower*, HUNKER (March 21, 2018), <https://www.hunker.com/13427234/characteristics-of-the-rose-flower> [<https://perma.cc/7YR4-X7C7>].

47. See, e.g., Paul Campos, *Lawyers and Spoiled Identity*, 28 GEO. J. LEGAL ETHICS 73 (2015).

48. See generally ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

49. *Id.* at 17–22.

50. *Id.* at 34–42.

51. Olivier Klein, Russell Spears & Stephen Reicher, *Social Identity Performance: Extending the Strategic Side of SIDE*, 11 PERSONALITY & PSYCH. REV. 28, 33 (2007).

52. See Lindsay Head, *Standing (Near)by Things Decided*, 15 LEGAL COMM'N. & RHETORIC: JALWD 189, 202–04 (2018).

53. See *Identity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

54. See Head, *supra* note 52, at 203.

55. See *id.* at 204.

56. FED. R. EVID. 901.

57. See *Gorham Co. v. White*, 81 U.S. 511, 526–27 (1871).

race, gender, and religion.<sup>58</sup> However, categories grounded in group sameness are limiting and overlook individuals who uniquely self-identify differently than their societal group identity or have intersectional identities.<sup>59</sup> Additionally, group sameness is embedded with stereotypes and delineates based on whether an individual is a member of the dominant group or not: male or female; white or non-white; and, to a lesser degree, Christian or non-Christian. Below, I focus on the ascribed binary classifications in gender and the intersectional identity of being a Black Muslim woman.

### A. Binary Gender Identity<sup>60</sup>

A challenge with binary gender construction is that it ascribes characteristics to men and women that do not reflect social realities.<sup>61</sup> Both the law and broader society are slowly recognizing gender nonbinary, gender neutral, gender nonconforming, and other self-defining gender identities.<sup>62</sup> For those whom the law classifies as women, the classification is supposedly supported by biological differences that align men as eminent and women as their subset. Beyond the female binary biological categorization, women's gender identity is also

- 
58. In this article, I do not address immutability in equal protection cases as distinguished from Title VII. In the constitutional law context, courts and scholars have extensively challenged the application of the immutability doctrine in equal protection jurisprudence, but the inferential immutability standard is frequently used in the Title VII context. For discussion on the issues, see, e.g., Debbie N. Kaminer, *Religious Conduct and the Immutability Requirement: Title VII's Failure to Protect Religious Employees in the Workplace*, 17 VA. J. SOC. POL'Y & L. 453, 457–58 (2010); Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2 (2015); Sandi Farrell, *Toward Getting Beyond the Blame Game: A Critique of the Ideology of Voluntarism in Title VII Jurisprudence*, 92 KY. L.J. 483, 515 (2004).
59. See *Bostock v. Clayton County*, 590 U.S. \_\_\_, 8–9 (2020) (unpacking Title VII's focus on individuals distinct from groups they may identify with); see also W. James Booth, *Communities of Memory: On Identity, Memory, and Debt*, 93 AM. POL. SCI. REV. 249, 250–51 (1999) (discussing facets of identity and identity evolution across time); Lauren Sudeall Lucas, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, CALIF. L. REV. 1243, 1266–67 (2014) (discussing the intersectional identity of multiracial individuals).
60. I recognize the depth of identity within a gender context, including gender nonbinary and gender nonconforming identities. However, I do not fully explore these issues in this Article because, as a Critical Race Theorist, I believe in speaking to one's experiences. Indeed, I center myself in this article as a cisgender Black Muslim woman. I reference other genders as not to render them invisible.
61. See Adam R. Chang and Stephanie M. Wildman, *Gender In/Sight: Examining Culture and Constructions of Gender*, 18 GEO. J. GENDER & L. 43, 57–58 (2017); see, e.g., Casey Parks, *Gresham-Barlow School District Agrees to Pay Transgender Teacher, Add Gender-Neutral Bathrooms after Complaint*, OR. LIVE (Jan. 9, 2019), [https://www.oregonlive.com/education/2016/05/gresham\\_barlow\\_transgender\\_tea.html](https://www.oregonlive.com/education/2016/05/gresham_barlow_transgender_tea.html) [<https://perma.cc/TB7V-XA4M>]; *A Map of Gender-Diverse Cultures*, PUB. BROAD. SYS. (Aug. 11, 2015), [https://www.pbs.org/independentlens/content/two-spirits\\_map-html/](https://www.pbs.org/independentlens/content/two-spirits_map-html/) [<https://perma.cc/5JU5-JH23>] (describing, with an interactive map, various societies around the world that include more than two genders as a part of their language, culture, or religion).
62. See, e.g., 65 D.C. Reg 11402 (Oct. 9, 2018) (allowing applicants for a license, permit, or identification card to choose nonbinary as a gender marker); S.B. 179 S., Reg. Sess. (Cal. 2017) (allowing nonbinary as a gender marker option for California birth certificates, driver's licenses, or identification cards); *Zzyym v. Kerry*, 220 F. Supp. 3d 1106 (2016) (holding that the U.S. State Department's passport denial of an intersex individual was arbitrary and capricious).

embedded in other restrictive stereotypes, including defining women as nurturing, fragile, emotionally unstable, helpless, and vulnerable.<sup>63</sup> These identity stereotypes have adversely affected women's educational opportunities,<sup>64</sup> legal outcomes,<sup>65</sup> and employment practices.<sup>66</sup> Yet, nonconformity to binary gender stereotypes has likewise disadvantaged women and others who do not fit the binary classification system.

In employment situations, when women violated gendered stereotypes and acted too "manly" or attempted to do "man's work," they jeopardized their career opportunities.<sup>67</sup> *Price Waterhouse v. Hopkins*<sup>68</sup> laid the foundation for challenging the use of gendered interpersonal skills as the basis for making partner in an accounting firm, but overgeneralized identities continue to affect women adversely in the labor market.<sup>69</sup> Employers silence women in meetings, do not accept women's professional judgment, and do not credit women for their work.<sup>70</sup> Consequently, women are slower to assume leadership positions in the workplace

- 
63. Vulnerability in feminist legal theory is extensive, and my reference is not comprehensive of the depth of analysis required to cover the topic fully. Instead, I argue that vulnerability remains a critical aspect of women's identity in the law. *See generally* Maritza I. Reyes, *Professional Women Silenced by Men-Made Norms*, 47 AKRON L. REV. 897, 900, 922 n.221 (2015) (explaining a woman's invisibility and analyzing law professor Anita Hill's story as an example of a woman's vulnerability and "place" in man's society).
64. In the 1870s, the first women were being admitted to law school. *See generally* D. Kelly Weisberg, *Barred from the Bar: Women and Legal Education in the United States 1870–1890*, 28 J. LEGAL EDUC. 485, 484–94 (1976). However, in 1873, with *Bradwell v. Illinois*, 83 U.S. 130 (1873), the U.S. Supreme Court held that a state did not have to admit a married woman to the bar. While attending law school, women experienced enduring discrimination in the classroom. *See, e.g.*, Nancy S. Erickson, *Legal Education: The Last Academic Bastion of Sex Bias?*, 10 NOVA L. REV. 457 (1986); JILL ABRAMSON & BARBARA FRANKLIN, WHERE THEY ARE NOW: THE STORY OF THE WOMEN OF HARVARD LAW 1974 10–11 (1986); CYNTHIA EPSTEIN, WOMEN IN LAW 50, 60–61 (1981).
65. *See* Andrea L. Miller, *Expertise Fails to Attenuate Gendered Biases in Judicial Decision-Making*, 10 SOC. PSYCH. & PERSONALITY SCI. 228, 228–29 (2018).
66. *See* Kathleen Brown, 'Changed... into the Fashion of a Man': *The Politics of Sexual Difference in a Seventeenth-Century Anglo-American Settlement*, 6 J. HIST. SEXUALITY 171, 191–92 (1995) (recounting how changing symbols of identity, such as hair and dress, allowed women to enter more lucrative fields).
67. Binary gender identity classification has been reflected in employment practices that supported feminine identity in dress, hair, makeup, vocal tone, and other gendered labels. Partners at Price Waterhouse criticized Ann Hopkins for her aggressive behavior and told her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.C. 1985), *rev'd*, 490 U.S. 228 (1989); *see, e.g.*, *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1209 (8th Cir. 1985) (claimant argued that employer removed her as co-anchor because she was "too old, too unattractive, and not deferential enough to men").
68. *Price Waterhouse*, 618 F. Supp. at 1117.
69. *See generally* Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1165–66 (1991). *But see* Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 54 (2010).
70. *See* Sheryl Sandberg & Adam Grant, *Speaking While Female*, N.Y. TIMES (Jan. 12, 2015), <https://www.nytimes.com/2015/01/11/opinion/sunday/speaking-while-female.html> [<https://perma.cc/TUS5-KSKL>]; Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1, 54–55 (1996).

and often feel invisible at work.<sup>71</sup> Both situations enhance the gender wage gap.<sup>72</sup>

Historically, gender-based identity stereotypes have also supported laws denying women opportunities to serve on juries<sup>73</sup> and in the military,<sup>74</sup> limiting the number of hours women could work,<sup>75</sup> and restricting the type of work they could perform.<sup>76</sup> The nurturer stereotype continues to influence courts in child custody matters and employers' hiring practices, leading employers to refrain from hiring women with young children<sup>77</sup> and to deny paternity leave to fathers. This stereotype assumes that mothers care for their children during the infants' formative months.<sup>78</sup> Analogously, judges have relied on this nurturer stereotype to presume mothers would have physical custody, limiting women's economic stability.<sup>79</sup>

The gendered identity marker of vulnerability also created a body of law that endorsed women needing permission to marry,<sup>80</sup> own property,<sup>81</sup> and seek a

- 
71. See Nikki Waller, *How Men & Women See the Workplace Differently*, WALL ST. J. (Sept. 27, 2016), <http://graphics.wsj.com/how-men-and-women-see-the-workplace-differently/> [<https://perma.cc/H3HY-DTGM>].
72. See Nikki Graf, Anna Brown & Eileen Patten, *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RSCH. CTR. (Mar. 22, 2019), <https://www.pewresearch.org/fact-tank/2019/03/22/gender-pay-gap-facts/> [<https://perma.cc/N9F3-A564>].
73. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522 (1975) (holding Louisiana's systemic pattern of excluding women from jury duty violated the Sixth Amendment).
74. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding national security interests to exclude women from the military).
75. See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908) (ruling that restricting women's work hours was constitutional); See also *Miller v. Wilson*, 236 U.S. 373 (1915).
76. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding state law that prohibited women from being licensed bartenders in certain cities); *W.C. Ritchie & Co. v. Wayman*, 91 N.E. 695 (Ill. 1910) (upholding state law that regulated the employment of women in mechanical establishments or factories to limited hours).
77. See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (holding under Title VII an employer could not refuse to hire women with young children but agree to hire men with young children).
78. Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1077–79 (1994).
79. Child support payments do not adequately consider the lost wages women experience when they are pregnant. Shari Motro, *Preglimony*, 63 STAN. L. REV. 647, 651–52; see, e.g., *Taylor v. Finck*, 211 S.W.3d 532, 537 (Ark. 2005) (explaining Arkansas law requiring that, when calculating expenses due to a mother from the father, lost wages normally would not be included). Hourly workers are often unable to work overtime or evening shifts with higher pay because of their childcare needs. See Sandra Alcaide & Lynne Marie Kohm, *Obergefell: A Game-Changer for Women*, 14 AVE MARIA L. REV. 99, 106 (2016) (describing the “motherhood wage penalty” as “lost wages due to costs and time of childcare and household chores”).
80. See JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 48 (1987); see also Jane E. Larson, “*Women Understand So Little, They Call My Good Nature ‘Deceit’*”: A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374, 382 n.25 (1993) (clarifying Roman law's definition of rape to mean marriage without a father's consent).
81. See Jill Elaine Hasday, *Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality*, 84 N.Y.U. L. REV. 1464, 1497 (2009).

divorce.<sup>82</sup> Some states continue to require fault for divorce,<sup>83</sup> a standard that romanticizes paternalism and often leaves women with limited options and legal protections.<sup>84</sup> In fact, fault divorces have largely equated to men needing to grant women permission for the divorce.<sup>85</sup>

Although the identity marker of vulnerability has largely failed women and created glass ceilings in board rooms, vulnerability has paradoxically protected white women and uplifted them.<sup>86</sup> In claims of intimate partner violence where white women allege men abused them, courts are more likely to believe complainants because of their perceived vulnerability.<sup>87</sup> Significantly, intimate partner violence often revolves around issues of power and control, with women largely being the subject of another's control.<sup>88</sup> The control may manifest through

- 
82. See, e.g., Joseph A. Ranney, *Anglicans, Merchants, and Feminists: A Comparative Study of the Evolution of Married Women's Rights in Virginia, New York, and Wisconsin*, 6 WM. & MARY J. OF RACE, GENDER & SOC. JUST. 493, 495 (2000) (describing the evolution of property rights for women in Virginia, New York, and Wisconsin).
83. See generally DEMIE KURZ, FOR RICHER, FOR POORER: MOTHERS CONFRONT DIVORCE 24 (1995) (providing a thorough examination of the costs and consequences of divorce for women); see also Marion Crain, "Where Have All the Cowboys Gone?" *Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1886–87 n.48 (1999) (explaining that divorce was allowed if one spouse was at fault for having committed specified violations).
84. Justice Brennan argued that romanticizing the idea that society needs to protect women has resulted, "in practical effect, [to] put women, not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); see Pamela J. Smith, *Part I—Romantic Paternalism – The Ties That Bind Also Free: Revealing the Contours of Judicial Affinity for White Women*, 3 J. GENDER, RACE & JUST. 107, 113–16 (1999) (describing the restrictions of romantic paternalism).
85. See NORMA BASCH, *FRAMING AMERICAN DIVORCE: FROM THE REVOLUTIONARY GENERATION TO THE VICTORIANS* 61 (The Regents of the University of California eds., 1999) (arguing that fault divorce "invested wives with a measure of legal independence and then rhetorically obscured it or degraded it"); see, e.g., Alison D. Morantz, *There's No Place Like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth-Century America*, 24 L. & HIST. REV. 245, 266–67 (2006) (describing *Byers v. Byers*, 21 Iowa 268 (1866), where a woman fought to receive the remainder of her allotted \$2,000 for "ceas[ing] to be a member of [her former husband's] family," but national sentiment was that divorce should be allowed for more than a short list of reasons); but see Allen M. Parkman, *The Contractual Alternative to Marriage*, 32 N. KY. L. REV. 125, 127 (2005) (arguing that fault divorces encouraged couples to make their marriage work, rather than abandoning marriage quickly with a no-fault divorce).
86. Vulnerability has also led to white women prevailing when they raised charges of rape against Black men. However, race is likely a more dominant factor. See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1250–51 (1991).
87. See Venessa Garcia & Patrick McManimon, *Intersectionality and Intimate Partner Violence: Barriers Women Face*, TIKKUN (Feb. 8, 2016), <https://www.tikkun.org/blog/2016/02/08/intersectionality-and-intimate-partner-violence-barriers-women-face/> [<https://perma.cc/598W-XJRA>] (describing how different groups experience intimate partner violence differently).
88. U.S. COMM'N ON C.R., *BATTERED WOMEN: ISSUES OF PUBLIC POLICY* 3–4, 128–30 (1978) (describing accounts where people testified that "women have always been subordinated to men and their brutalization is a direct byproduct of that subordination" and that the "power relationship between husband and wife" results in intimate partner violence). Certainly, men are also survivors of intimate partner violence. Judges more frequently denied men protective orders based on assumptions about male identity that determine men are neither vulnerable nor



physical, emotional, verbal, psychological, or financial abuse.<sup>89</sup>

Support for legal protections began when the domestic violence movement identified women as vulnerable and in need of protection.<sup>90</sup> However, these same paternalistic stereotypes led judges to advise women to return to their abusers and work things out.<sup>91</sup> Systemic reform and the development of community responses to intimate partner violence improved judges' understanding of the power and control factors embedded in intimate partner violence.<sup>92</sup> These shifts in attitudes, largely about women's identity, increased the number of protective orders courts now grant.<sup>93</sup> However, because vulnerability is associated with women's identity, men and those who are gender nonconforming or gender nonbinary are less likely to prevail when filing protective orders against women or other men.<sup>94</sup>

In the Title VII context, courts continue to assess claims through a binary lens of whether employers treat men and women differently.<sup>95</sup> As a solution to

powerless. Cf. ELLEN PENCE & MICHAEL PAYMAR, EDUCATION GROUPS FOR MEN WHO BATTER: THE DULUTH MODEL 6 (1993) (explaining that under the Duluth model, battered males are believed to have a better ability to leave relationships safely).

89. See PENCE & PAYMAR, *supra* note 88, at 3.

90. A. Rachel Camp, *Pursuing Accountability for Perpetrators of Intimate Partner Violence: The Peril (and Utility?) of Shame*, 98 B. U. L. REV. 1677, 1724–26 (2018) (describing common explanations for and stereotypes about people affected by intimate partner violence).

91. See, e.g., Dana Harrington Conner, *To Protect or to Serve: Confidentiality, Client Protection, and Domestic Violence*, 79 TEMP. L. REV. 877, 888, n.36 (2006); see also Judith E. Koons, *Gunsmoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines*, 14 J.L. & POL'Y 617, 662–665 (2006) (providing an explanation of some reasons why a person may remain in an abusive relationship); see also JESSICA L. GOLDMAN, VIOLENCE AGAINST WOMEN 94–101 (Karin L. Swisher & Carol Wekesser eds., 1994) (explaining how a judge who does not understand intimate partner violence could “fall into the old trap of blaming the victim and impos[ing] lenient sentences”).

92. See, e.g., Melissa L. Breger, *Reforming by Re-Norming: How the Legal System Has the Potential to Change a Toxic Culture of Domestic Violence*, 4 J. LEGIS. 170, 193–98 (2017) (detailing how New York, New Jersey, and federal laws have changed to combat domestic partner violence); Remla Parthasarathy, *Identifying and Depicting Culture in Intimate Partner Violence*, 22 BUFF. J. GENDER L. & SOC. POL'Y 71, 92–93 (2014) (explaining how the Wheel has changed the evaluation of intimate partner violence in civil and criminal trials).

93. See, e.g., JAKE FAWCETT, KELLY STARR & ANKITA PATEL, NOW THAT WE KNOW: FINDINGS AND RECOMMENDATIONS FROM THE WASHINGTON STATE DOMESTIC VIOLENCE FATALITY REVIEW 21 n.24 (2008) (reporting a 53 percent increase in a county in Washington State in petitions requested and temporary protection orders granted when using trained advocates).

94. See, e.g., Eric Stiles, Ivonne Ortiz & Casey Keene, *Serving Male-Identified Survivors of Intimate Partner Violence*, NAT'L RES. CTR. ON DOMESTIC VIOLENCE, 3–4, 8 (July 2017), [https://vawnet.org/sites/default/files/assets/files/2017-07/NRC DV\\_TAG-ServingMaleSurvivors-July2017.pdf](https://vawnet.org/sites/default/files/assets/files/2017-07/NRC DV_TAG-ServingMaleSurvivors-July2017.pdf) [<https://perma.cc/84KQ-2BGG>] (providing an explanation of how providers can address the experiences of intimate partner violence for people who do not identify as women). It is worth noting that these conceptions of gender also make it hard for members of same-sex couples to receive protective orders. Jacquie Andreano, *The Disproportionate Effect of Mutual Restraining Orders on Same-Sex Domestic Violence Victims*, 108 CALIF. L. REV. 1047, 1053 (2020).

95. See Michael L. Vasu & Ellen Storey Vasu, *Gender Stereotypes and Discriminatory Behaviors Toward Female Attorneys: The North Carolina Case*, 13 CAMPBELL L. REV. 183, 185 (1991) (“Many of the barriers to equal participation by women are embedded in the history of women and the law”). Dicta in the Supreme Court's new decision in *Bostock v. Clayton County* acknowledges the historical binary nature of Title VII: “[W]e proceed on the assumption that ‘sex’ signified what the employers suggest, referring only to biological distinctions between male and female.” *Bostock v. Clayton County*, 590 U.S. \_\_\_\_ (2020).

binary identity stereotypes, such as vulnerability, some second-wave feminists promoted a sameness theory to support equality for women.<sup>96</sup> However, feminists have largely disagreed on whether to promote women as being the same, and having the same rights, as men.<sup>97</sup> The sameness versus difference paradigm continues to plague the women's movement.<sup>98</sup>

In the law, the sameness paradigm overlooks employment policies that disproportionately affect women. For example, cases challenging the exclusion of pregnancy from health care initially failed under a sameness framework.<sup>99</sup> Height and weight requirements in employment that discriminate against women also initially failed.<sup>100</sup> Sex-differentiated pension contributions failed too, despite employers' arguments that women live longer.<sup>101</sup> The sameness model also ignores the need for equity to address the ramifications of systemic gender-based discrimination and the ongoing harm of past discrimination.<sup>102</sup> Thus, while defining women as the same as men in employment may narrow employment disparities, it will never allow women to "catch up."<sup>103</sup> Instead, the sameness paradigm continues to promote a flawed gender identity equality model that overlooks the principles of equity.<sup>104</sup> Accordingly, inherent systemic disparities have supported male-dominated power systems in employment contexts, including coercing women to remain silent to uphold men's power in sexual

---

96. RUTH ROSEN, *THE WORLD SPLIT OPEN: HOW THE MODERN WOMEN'S MOVEMENT CHANGED AMERICA* 111 (2000).

97. See generally DEBORAH L. RHODE, *JUSTICE AND GENDER* (1989) (discussing challenges for treating women similarly to men in the reproductive context); Keith Cunningham-Parmeter, *(Un)Equal Protection: Why Gender Equality Depends on Discrimination*, 109 NW. U. L. REV. 1, 22–26 (2015).

98. Abby Vesoulis, *Women First Marched to Challenge Trump. Now They Are Challenging Each Other*, TIME (Jan. 19, 2019), <https://time.com/5505787/womens-march-washington-controversy/> [<https://perma.cc/ST6B-K3F4>].

99. See, e.g., *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974) (overturned by statute); Walter L. Stiehm, *Poverty Law: Access to Healthcare and Barriers to the Poor*, 4 QUINNIPIAC HEALTH L.J. 279, 301–03 (2001); Shilpa Phadke, Jamila Taylor, & Anusha Ravi, *How Trump's FY 2019 Budget Hurts Women*, CTR. FOR AM. PROGRESS (Feb. 16, 2018), <https://cdn.americanprogress.org/content/uploads/2018/02/15121832/fy19Budget-Women-factsheet.pdf> [<https://perma.cc/2TLQ-2WHA>]; see also *Fact Sheet: New Trump Rule Would Take Away Women's Health Care and Reproductive Rights*, HEALTH CARE FOR AM. NOW! (May 23, 2018), <http://healthcareforamericanow.org/resources/factsheets/fact-sheet-new-trump-rule-take-away-womens-health-care-reproductive-rights> [<https://perma.cc/7UE6-7WRN>]; see generally 42 C.F.R. § 59 (2018).

100. See generally *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (upholding a district court decision ruling that statutory minimum height and weight requirements for positions in the Alabama prison system discriminated based on sex under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1983).

101. See, e.g., *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).

102. See Cunningham-Parmeter, *supra* note 97, at 1–8 (arguing overcoming gender-based stereotypes and providing incentives for fathers to share childcare will enhance women's economic position).

103. See, e.g., Graf et al., *supra* note 72.

104. See Cunningham-Parmeter, *supra* note 97, at 20–26 (highlighting the judicial and legislative evolution of sameness model and its effect on gender equity).

harassment and sexual assault cases.<sup>105</sup>

### B. Black and African-American Women: Race Intersects with Gender

Before “intersectionality” was a common term in critical race theory,<sup>106</sup> Nina Simone sang of “Four Women”: Peaches, Sweet Thing, Aunt Sarah, and Saffronia.<sup>107</sup> Each woman represented a Black woman stereotype: the angry Black woman, the Jezebel, the mammy, and the beautiful mulatto.<sup>108</sup> “Four Women” reflected the inimitable identity-based challenges African-American women experience based on their joint gender and racial identity. Nina Simone’s women are tough, not vulnerable like white women.<sup>109</sup>

The absence of this vulnerability narrative has important legal significance for Black women.<sup>110</sup> In intimate partner violence cases, Black women are less likely to secure a protective order and consistently have less favorable results than white women.<sup>111</sup> In the criminal justice system, Black women are eight times more likely to be incarcerated than white women.<sup>112</sup> Perceptions that Black women are, as Simone put it, “strong enough to take the pain inflicted again and again”<sup>113</sup> have also led to poor medical treatment and denial of pain medication in life-threatening circumstances.<sup>114</sup> Medical practitioners question Black women when they

105. See generally ELYSE SHAW, ARIANE HEGEWISCH & CYNTHIA HESS, *SEXUAL HARASSMENT AND ASSAULT AT WORK: UNDERSTANDING THE COSTS* (2018) (explaining the disproportionate weight on women when establishing workplace sexual harassment).

106. See, e.g., Crenshaw, *supra* note 86, at 1242. But see Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 15–17 (1991).

107. NINA SIMONE, *Four Women*, on WILD IS THE WIND (Philip Records 1966).

108. *Id.*

109. See, e.g., Pamela J. Smith, *Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority*, 6 WM. & MARY J. WOMEN & L. 53 (1999); see also Mari J. Matsuda, *supra* note 38 (discussing “the similar perspectives and goals of people of color and critical legal scholars”).

110. Professor Kimberlé Crenshaw’s seminal article, *Mapping the Margins*, explains how white feminists often overlook the racial hierarchy of oppression. Crenshaw, *supra* note 86, at 1244, n.8; see also Smith, *supra* note 109, at 164–66 (analyzing the microaggressions surrounding Black women in academia, who are criticized for their normative behavior. For example, when exercising authority, white professors are viewed as confident, vocal, and assertive while Black professors are characterized as aggressive, arrogant, and combative).

111. See Njeri Mathis Rutledge, *Employers Know Best? The Application of Workplace Restraining Orders to Domestic Violence Cases*, 48 LOY. L.A. L. REV. 175, 206–07 (2014); *c.f.* Symposium, *Employers Know Best? The Application of Workplace Restraining Orders to Domestic Violence Cases*, 48 LOY. L.A. L. REV. 175, 204–07 (2014) (referencing a Black woman’s intimate partner violence experience where a judge failed to extend her protective order and three weeks later her batterer set her on fire); see also, Adele M. Morrison, *Deconstructing the Image Repertoire of Women of Color: Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1082–83 (2006) (stating that to most people, a “‘battered woman’ is white,” because a stereotypical woman of color “‘like[s] to fight,” is “‘hot blooded,” or is “‘trained for this”).

112. Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1251 (2012).

113. SIMONE, *supra* note 107.

114. Kelly M. Hoffman, Sophia Trawalter, Jordan R. Axt & M. Norman Oliver, *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs about Biological Differences between Blacks and Whites*, 113 PROC. NAT’L ACAD. SCI. U.S.A. 4296, 4296 (Apr. 4, 2019).

describe their pain, provide flawed pain assessment and treatment plans, deny medical services, and believe Black women have a higher pain threshold than white women.<sup>115</sup>

This same perceived absence of vulnerability affects Black women in sexual assault and rape cases, where they are also less likely to be believed than white women.<sup>116</sup> For example, Anita Hill's grueling experience during Justice Clarence Thomas's Supreme Court confirmation hearing<sup>117</sup> received renewed examination along racial and gendered lines when Christine Blasey Ford testified during Justice Brett Kavanaugh's confirmation hearing.<sup>118</sup> Both hearings reinforced the gender biases in Congress and in Supreme Court appointments.<sup>119</sup> They also triggered wounds for many women who similarly violated the expectation to remain silent in sexual harassment and assault cases. Anita Hill's testimony also reinforced the heightened scrutiny Black women face in sexual harassment and assault cases—more skepticism, more questions about credibility, and less compassion.<sup>120</sup>

The impacts of the intersection of gender and race also allow white women to advance further in their legal careers than Black women.<sup>121</sup> While white women are fighting for a seat at the table, qualified Black women never even receive an invitation to the meeting.<sup>122</sup> At large law firms, once Black women make partner,

115. *See id.* at 4299–300.

116. *See generally* Crenshaw, *supra* note 86, at 1269–71.

117. For context of the intersectional issues at play during the Anita Hill hearings, *see generally* Kimberlé Crenshaw, *Whose Story Is It, Anyway?*, in *RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF REALITY* 402 (Toni Morrison ed., 1992).

118. The Republicans who questioned both Hill and Ford were all white men. Sabrina Siddiqui, *Kavanaugh Hearing Recalls Clarence Thomas Case: Will History Repeat Itself?*, *GUARDIAN* (Sept. 27, 2018), <https://www.theguardian.com/us-news/2018/sep/27/brett-kavanaugh-clarence-thomas-anita-hill-hearings> [<https://perma.cc/UX6J-NN55>] (writing “Republicans on the panel are all white men – again”); *see also* Jill Filipovic, *How Far Have We Really Come Since Anita Hill?*, *VANITY FAIR* (Sept. 20, 2018), <https://www.vanityfair.com/style/2018/09/christine-blasey-ford-anita-hill> [<https://perma.cc/6955-5DJZ>]; *see generally* Kimberlé Crenshaw, *We Still Haven't Learned From Anita Hill's Testimony*, *N.Y. TIMES* (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/opinion/anita-hill-clarence-thomas-brett-kavanaugh-christine-ford.html> [<https://perma.cc/MJ8U-6H3W>].

119. *See Americans Divided on Kavanaugh's Nomination to the Supreme Court*, *PEW RSCH. CTR.* (July 17, 2018), <https://www.pewresearch.org/politics/2018/07/17/americans-divided-on-kavanaughs-nomination-to-the-supreme-court/> [<https://perma.cc/32F6-AMX9>] (finding that 32 percent of men opposed the nomination compared with 40 percent of women who opposed the nomination).

120. *See* Peter Baker & Carl Hulse, *Echoes of Anita Hill, but in a Different Era for Women*, *N.Y. TIMES* (Sept. 17, 2018), <https://www.nytimes.com/2018/09/17/us/politics/anita-hill-clarence-thomas-brett-kavanaugh-christine-blasey-ford.html> [<https://perma.cc/YLP6-6LKG>]; Crenshaw, *supra* note 118 (analyzing the intersectional component of the Clarence Thomas hearing, including Hill being disbelieved and scrutinized); PBS NewsHour, *Demonstrators Chant, 'We Believe Anita Hill! We Believe Dr. Blasey!'*, *YOUTUBE* (Sept. 20, 2018), <https://www.youtube.com/watch?v=AUXfruZEsG0> [<https://perma.cc/5RK6-T8TH>].

121. *See generally* Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 *DUKE L.J.* 365 (1991).

122. Social stratification by gender and race shows white women still represent less than 19 percent of attorneys serving on executive and management committees at law firms, compared to

they report that other partners regularly alienate them from firm decisions, new client meetings, and other opportunities that would advance their economic position.<sup>123</sup> This antagonistic work environment forces many Black women to leave law firms.<sup>124</sup> Disparity in employment opportunities for Black women is not limited to the legal field. Overall, Black women earn 11.7 percent less than white women.<sup>125</sup> This convergence of gender and race is yet another source of discrimination based on identity stereotypes.<sup>126</sup>

### C. Muslim Women: Religious Identity Intersects with Gender

The Constitution defines a national identity that limits government intrusion in religious liberty.<sup>127</sup> However, the Founding Fathers created this national identity when religious freedom for *everyone*, including Muslims, Jews, and Catholics, was never fully contemplated.<sup>128</sup> Despite a proffered narrative about individual rights and pluralism, both scholars and courts have explored whether the United States is, in fact, a Christian nation.<sup>129</sup> The Trump Administration's ban preventing visa holders and refugees from Muslim-majority countries from entering the United States forced scholars and civil rights advocates to reconsider this

---

women of color who represented less than 3 percent of law firms' leadership positions. Tracy Jan, *The Legal Profession Is Diversifying. But Not at the Top*, WASH. POST (Nov. 7, 2017, 5:08 AM), <https://www.washingtonpost.com/news/wonk/wp/2017/11/27/the-legal-profession-is-diversifying-but-not-at-the-top/?noredirect=on> [<https://perma.cc/TT4N-ABDZ>].

123. Liane Jackson, *Minority Women Are Disappearing from BigLaw—and Here's Why*, ABA JOURNAL (Mar. 1, 2016, 12:15 AM), [https://www.abajournal.com/magazine/article/minority\\_women\\_are\\_disappearing\\_from\\_biglaw\\_and\\_heres\\_why](https://www.abajournal.com/magazine/article/minority_women_are_disappearing_from_biglaw_and_heres_why) [<https://perma.cc/P4FG-MC4M>].
124. *See id.* Black women only represent 0.7 percent of law firm partners at top firms. INSTITUTE FOR INCLUSION IN THE LEGAL PROFESSION (IILP) REVIEW: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION, 14 (2019–2020). Black women in academia have historically experienced similar discriminatory challenges, including resistance among law schools to hiring Black women and fewer opportunities for tenure. *See* Derrick Bell, *The Chronicle of the DeVine Gift*, 99 HARV. L. REV. 4 (1985); Derrick Bell, *Application of the "Tipping Point" Principle to Law Faculty Hiring Policies*, 10 NOVA L.J. 319 (1986).
125. Valerie Wilson & William M. Rodgers III, *Black-White Wage Gaps Expand with Rising Wage Inequality*, ECON. POL'Y INST., 1 (Sept. 19, 2016), <https://files.epi.org/pdf/101972.pdf> [<https://perma.cc/UU8V-F6P4>]. Additionally, 21.4 percent of Black women are living in poverty, compared to 9.7 percent of white women. Kayla Patrick, *National Snapshot: Poverty Among Women & Families, 2016*, NAT'L WOMEN'S L. CTR. (Sept. 2017), <https://nwlc.org/wp-content/uploads/2017/09/Poverty-Snapshot-Factsheet-2017.pdf> [<https://perma.cc/3PAW-3RGR>]. In December 2018, unemployment rates for Black women twenty years old and over was at 5.3 percent, compared to white women's unemployment rate of 2.8 percent. BUREAU OF LABOR STATISTICS: THE EMPLOYMENT SITUATION, U.S. DEPT. OF LABOR (Dec. 2018), [https://www.bls.gov/news.release/archives/empsit\\_01042019.pdf](https://www.bls.gov/news.release/archives/empsit_01042019.pdf) [<https://perma.cc/RHP5-DBNH>].
126. *See generally* Caldwell, *supra* note 121, at 381–83.
127. Symposium, *The Future of Religious Pluralism: Justice O'Connor and the Establishment Clause*, 39 ARIZ. ST. L.J. 895 (2007).
128. *Id.* at 897–911.
129. Jared Goldstein effectively explores the various debates over whether the United States is a Christian nation. Jared A. Goldstein, *How the Constitution Became Christian*, 68 HASTINGS L.J. 259 (2017); *see also* Rector *etc.* of Holy Trinity Church v. United States, 143 U.S. 457, 471 (1982).

question.<sup>130</sup>

Christianity remains the dominant religious identity in the United States.<sup>131</sup> Thus, defining monotheist traditions of Christianity, Judaism, and Islam frequently centers on examining how those modes of religious practices align with Christian norms.<sup>132</sup> It is increasingly common for Christians not to wear crosses or other visible signs of faith, but Muslim and Jewish religious identities are frequently associated with visible markers that establish someone is a believer of the faith. The visible markers for Muslims are many, including having an Arab-sounding name, wearing hijab (for women), having a beard (for men), or wearing a kufi (for men). Similarly, wearing tzitzit and kippah are often recognizable signifiers for Jewish men. Islam and Judaism both prescribe ways to live life.<sup>133</sup> It is more than attending a weekly service. Muslims are instructed to pray five times a day,<sup>134</sup> give zakat,<sup>135</sup> perform hajj,<sup>136</sup> not eat pork,<sup>137</sup> etc. But what about people who do not openly practice their faith in this way? Some Muslims do not exclusively eat halal or practice their faith so outwardly.<sup>138</sup> In the same way many

- 
130. Seven days after entering office, Trump issued Executive Order 13769, Protecting the Nation from Foreign Terrorist Entry into the United States. The notorious order temporarily barred entry of refugees and nationals from seven Muslim-majority countries—Iraq, Libya, Syria, Somalia, Sudan, and Yemen—with an indefinite ban on refugees from Syria. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan 27, 2017); Michael D. Shear & Helen Cooper, *Trump Bars Refugees and Citizens of 7 Muslim Countries*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/politics/trump-syrian-refugees.html> [https://perma.cc/GXD2-6TA8].
131. PEW RSCH. CTR., AMERICA'S CHANGING RELIGIOUS LANDSCAPE 3 (May 12, 2015), <https://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/> [https://perma.cc/6BTL-ZTS4].
132. I primarily focus on monotheist religions because accommodation issues differ when the claimant has a less established religious identity.
133. Both Islam and Judaism have rules of conduct. See generally Sayyid Muhammed Syeed & Mark J. Pelavin, *Children of Abraham: Jews and Muslims in Conversation*, UNION FOR REFORM JUDAISM & ISLAMIC SOC'Y OF N. AM., <http://www.rac.org/sites/default/files/Children-of-Abraham-Muslim-Jewish-Guide.pdf> (last visited Sept. 21, 2020) [https://perma.cc/578D-SBD5].
134. Prayer is the second pillar of Islam. See Qur'an, *Sura* 2:2–5, 2:43, 2:238–239, <https://quranyusufali.com/2/?hilite=%272%3A238%27> (last visited Oct. 29, 2020) [https://perma.cc/3WHW-Y55A]; *Id.* at 11:114, <https://quranyusufali.com/11/> (last visited Sept. 23, 2020) [https://perma.cc/G35W-ZWN2]; *Id.* at 17:78–79, 17:110, <https://quranyusufali.com/17/> (last visited Sept. 23, 2020) [https://perma.cc/HW33-DXF3].
135. Zakat is the third pillar of Islam. Muslims are required to give charitably, as discussed in the Qur'an. E.g. Qur'an, *Al A'raf* 7:156, <https://quranyusufali.com/7/> (last visited Sept. 23, 2020) [https://perma.cc/ET6W-6F88]; Qur'an, *Maryam* 19:31, 19:55, <https://quranyusufali.com/19/> (last visited Sept. 23, 2020) [https://perma.cc/3FZH-QWA9]. Qur'an, *Al Anbiya* 21:73 (Yusel Ali), <https://quranyusufali.com/21/> (last visited Sept. 23, 2020) [https://perma.cc/YTJ3-JUK8].
136. Qur'an, *Al-Baqara* 2:173 (Yusel Ali), <https://quranyusufali.com/2/> (last visited Sept. 23, 2020) [https://perma.cc/P6XF-7V7H].
137. *Id.*
138. See Shuja Haider, *Culturally Muslim*, JEWISH CURRENTS (Aug. 16, 2018), <https://jewishcurrents.org/culturally-muslim/> [https://perma.cc/QCP5-52H5]. See also David Shariatmadari, *Time for Cultural Muslims to Come Out*, GUARDIAN (Mar. 26, 2009), <https://www.theguardian.com/commentisfree/belief/2009/mar/25/religion-muslims-community-identity> [https://perma.cc/75QE-BTFS].

American Jews might only attend synagogue during the High Holy Days,<sup>139</sup> there are Muslims who consider themselves fully Muslim, but they are only visibly *seen* as such during Ramadan.<sup>140</sup>

Despite their diversity, Muslims are depicted as a monolithic group that has been positioned as foreign intruder and terrorist in the post-9/11 world.<sup>141</sup> Merging the religious identity with terrorism allowed the *Trump v. Hawaii* Court to support the Administration's national security interest and apply a rational basis level of review.<sup>142</sup> Ultimately, these religious identity markers create a binary religious identity for those who are devoutly religious and those who are culturally Jewish or culturally Muslim. The identity delineation still results in a classification of those who are—Christians and non-Christians.

The intersectional identity of Muslim women especially suffers from binary classification. The head scarf has become both an intrafaith and interfaith identifier. As such, in Muslim communities, women are frequently described as hijabeesees or nonhijabeesees.<sup>143</sup> Those with an aversion to Islam have manipulated the head scarf identity marker to portray Muslim women as invisible, silenced, meek, and veiled.<sup>144</sup>

Although the Trump administration was often transparent in its attitudes and policies toward Muslims, one clandestine strategy was to disempower Muslims further by framing Islam as oppressing women. When Donald Trump proselytized that Islam oppresses women, the language enabled his administration to gain additional allies against Muslims and supporters for the war on terrorism.<sup>145</sup> As a presidential candidate, Donald Trump used this strategy when he assailed Ghazala Khan for silently standing next to her husband when her husband spoke at the Democratic National Convention about the bravery of their deceased son, U.S. Army Captain Humayun Khan.<sup>146</sup> Donald Trump attributed Ghazala Khan's silence to Islamic principles that prohibited her from speaking. But in fact, she was a mother mourning the loss of her only son.<sup>147</sup>

The incident sparked the #CanYouHearUsNow campaign, a social media strategy advocates used to ensure Muslim women's voices were not only heard,

139. See Haider, *supra* note 138 (discussing the idea of being culturally Muslim and culturally Jewish).

140. *EEOC v. Alamo Rent-A-Car, LLC*, 432 F. Supp. 2d 1007, 1011 (D. Ariz. 2006).

141. Under the Bush administration, Congress swiftly amended the Foreign Intelligence Surveillance Act (FISA) and enacted the *United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, commonly referenced as the USA PATRIOT Act.

142. *Trump v. Hawaii*, 138 S.Ct. 2392 (2018).

143. Within the Muslim community, Muslim women are often defined by whether or not they wear a head scarf (hijab).

144. Aziz, *From the Oppressed*, *supra* note 22, at 192.

145. Rafia Zakaria, *Why Donald Trump Needs Muslim Women*, NATION (Aug. 11, 2017), <https://www.thenation.com/article/archive/why-donald-trump-needs-muslim-women/> [<https://perma.cc/326T-R6E9>].

146. *Fury as Trump Mocks Muslim Soldier's Mother Ghazala Khan*, BBC NEWS (July 31, 2016), <https://www.bbc.com/news/election-us-2016-36935175> [<https://perma.cc/2J6J-7DJG>].

147. *Id.*

but amplified.<sup>148</sup> With social media posts, media interviews, and opinion editorials, Muslim women shared their experiences as women united across class, race, and ethnicity.<sup>149</sup> However, the movement did little to dismantle the framework of the oppressed Muslim woman. Instead, Western society continues to portray Muslim women as not only oppressed but also in need of being saved.<sup>150</sup>

As part of the narrative of needing to be saved, there is an underlying message that Muslim women are forced to wear hijab and, in some instances, full-face or body coverings.<sup>151</sup> Even well-intentioned activists promote the Muslim women oppression framework and use the veil as the symbol of oppression.<sup>152</sup> When Muslim students and allies at Spelman College promoted World Hijab Day,<sup>153</sup> Spelman faculty drafted a letter opposing the event.<sup>154</sup> The professors highlighted the plight of Iraqi women forced to wear hijab, not the American Muslim women who face harassment and attacks because they choose to wear the identifying head covering.<sup>155</sup> Despite their good intentions, the professors overlooked the political dimension of their statement and the agency principles embedded in feminist thought, which support women defining themselves in empowering ways.<sup>156</sup> They also overlooked the gender equity principles

- 
148. Simra Marjiam, *Can You Hear Us Now: An Ongoing Movement to Raise the Voices of Muslim Women*, HUFF. POST (Aug. 1, 2017, 7:05pm), [https://www.huffpost.com/entry/can-you-hear-us-now-an-ongoing-movement-to-raise-the\\_b\\_59810888e4b0b35d274c5e82](https://www.huffpost.com/entry/can-you-hear-us-now-an-ongoing-movement-to-raise-the_b_59810888e4b0b35d274c5e82) [https://perma.cc/2CDD-22SS].
149. Dana Liebelson, *Muslim American Fire Back at Trump: 'Can You Hear Us Now?'*, HUFF. POST (Aug. 1, 2016, 2:59pm), [https://www.huffpost.com/entry/muslim-women-trump-can-you-hear-us-now\\_n\\_579f8ad3e4b0e2e15eb69922](https://www.huffpost.com/entry/muslim-women-trump-can-you-hear-us-now_n_579f8ad3e4b0e2e15eb69922) [https://perma.cc/3WKW-XRK2].
150. Lila Abu-Lughod, *Do Muslim Women Really Need Saving?*, 104 AM. ANTHROPOLOGICAL ASS'N 783, 785 (Sep. 2002) (describing the full body veil as a liberating invention and the war on terrorism a misconceived attempt to free Muslim women from bondage).
151. Amara S. Chaudhry-Kravitz, *The New Facially Neutral "Anti-Shariah" Bills: A Constitutional Analysis*, 20 WASH. & LEE J. C.R. & SOC. JUST. 25, 33 (2013); Anissa Helie & Marie Ashe, *Multiculturalist Liberalism and Harms to Women: Looking Through the Issue of "The Veil"*, 19 U.C. DAVIS J. INT'L L. & POL'Y 1, 23 (2012).
152. Islamic jurisprudence supports that Muslim women do not need saving. Historically, Muslim women have had more legal and social rights than women in most Western societies. For example, it is Islamic tradition for Muslim women to retain their last name upon marriage to reinforce that they are not their husband's property. Despite the gender equity principles embedded in Islamic jurisprudence, oppression of Muslim women is incorrectly attributed to the Islamic religion. Abed Awad, *A Muslim American Reflects on the 100th Anniversary of the 19th Amendment to the U.S. Constitution*, MEDIUM: ABED AWAD BLOG (July 4, 2020), <https://medium.com/@awadabed2000/a-muslim-american-reflects-on-the-100th-anniversary-of-the-19th-amendment-to-the-u-s-constitution-33a516a4fe08> [https://perma.cc/KCF9-SL8B]. For those who misunderstand Islamic jurisprudence, the veil is a symbol of gender oppression. See generally Aziz, *From the Oppressed*, supra note 22, at 191.
153. WORLD HIJAB DAY, <https://worldhijabday.com/> (last visited May 17, 2018) [https://perma.cc/Y597-AT69].
154. Nisa Muhammad, *Hijab and the Policing of Black Women and Girls: Black Muslims Respond*, SAPELO SQUARE (Mar. 7, 2018), <https://sapelosquare.com/2018/03/07/the-policing-of-black-muslim-women-and-girls-with-their-hijab-black-muslims-respond/> [https://perma.cc/R749-MR7L].
155. See *id.*
156. See Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805 (1999).



embedded in Islamic jurisprudence.<sup>157</sup>

Assigning the hijab as the dominant Muslim women's identity marker helps reinforce the notion that Muslim women are outsiders. Muslim women who choose to veil their face completely are even further down the Muslim women oppression spectrum.<sup>158</sup> The veil has been systematically attacked on both domestic and international fronts, and it remains a common symbol associated with the oppression of Muslim women.

#### D. African-American Muslim Women: The Challenges of Identity Convergence

To be African-American, Muslim, and a woman has additional challenges.<sup>159</sup> While patriarchy affects all women, white Muslim women are usually adored and welcomed in American Muslim communities.<sup>160</sup> Conversely, because of pervasive anti-Blackness norms, African-American Muslim women find themselves ostracized in both Christian and Muslim societies: non-African-American Muslim communities degrade them because of their African-American heritage and non-Muslim communities discriminate against them because of their religion.<sup>161</sup>

Isolating these intersectional identities pushes African-American women to the margins<sup>162</sup> and further destroys their psychological, economic, and constitutional safeguards of religious freedom in a pluralistic society.<sup>163</sup> The risk of losing these safeguards seems to coerce these women into masking their layered

157. See generally Aziz, *From the Oppressed*, *supra* note 22, at 219–20 (describing how some Western multiculturalists and “Muslim feminists” believe that the headscarf is not anti-feminist or a tool of oppression).

158. See Faegheh Shirazi & Smeeta Mishra, *Young Muslim Women on the Face Veil (Niqab): A Tool of Resistance in Europe but Rejected in the United States*, 13 INT'L J. CULTURAL STUD. 43, 44–47 (2010).

159. In discussing demarginalizing women of color who are often silenced, Professor Wing stated, “we must analyze the holistic identities, rather than examining them from a black perspective today and from a woman's perspective tomorrow.” Adrien Katherine Wing, *Global Critical Race Feminism Post 9-11: Afghanistan*, 10 WASH. U. J.L. & POL'Y 19, 30 (2002).

160. See generally Yasmine Flodin-Ali, *What Malcolm X Taught Me About Muslim America*, RELIGION & POL. (May 22, 2018), <https://religionandpolitics.org/2018/05/22/what-malcolm-x-taught-me-about-muslim-america/> [<https://perma.cc/8D3R-KMGS>] (comparing the author's experience as a half-Swedish, half-Pakistani woman in the Muslim community in Brooklyn with the experience of a West African Muslim international student at an undergraduate university's Muslim Student Association); cf. Aina Khan, *Britain's Black Muslims: Ignored, Discriminated and Resisting*, AL JAZEERA (June 22, 2018), <https://www.aljazeera.com/features/2018/6/22/britains-black-muslims-ignored-discriminated-and-resisting> [<https://perma.cc/9GKF-UUV7>] (explaining the tenth-century practice of differentiating slaves based on the color of their skin: the Arabic word “abd” (slave) described both enslaved and free Black people, and the Arabic word “mamluk” described enslaved white people. Even when Arabic-speaking Muslim countries enslaved them both, mamluk were considered superior to abd).

161. See KHALED BEYDOUN, *AMERICAN ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR*, 162–70 (2018).

162. See Wing, *supra* note 159, at 30.

163. See Aziz, *From the Oppressed* *supra* note 22, at 223–224; Byng, *supra* note 14, at 474–75.

identities.

Professor Yoshino defined the spectrum of identity muting as converting, passing, and covering.<sup>164</sup> Converting is the most extreme, with the individual totally abandoning an identity trait and fully assimilating to the status quo.<sup>165</sup> For an extreme example, gay people may use conversion “therapy” to fully change their sexual orientation to straight.<sup>166</sup> As an example of passing, fair-skinned African Americans have often passed as white to benefit from the privileges associated with whiteness, including freedom from slavery and other societal benefits of housing, employment, and travel.<sup>167</sup> Covering is the lowest level of identity muting, but it has various nuances. It may include shifting from ethnic dress to traditional business suits, changing natural hairstyles to straightened hair, or shifting ethnic dialect.<sup>168</sup> Many of these shifts help their wearers assimilate and allow white people to feel more comfortable with behaviors associated with otherness. Coerced masking may happen at any level on Professor Yoshino’s spectrum of identity muting. Implicit in coerced masking is the Hobson’s choice of masking or being one’s authentic self and losing essential societal benefits, such as protection from police brutality or access to employment and other economic opportunities. The next section examines the masking of identity in its various forms and reveals how Black Muslim women experience unique challenges when masking identity to gain legal protections.

## II. MASKING IDENTITY

The African-American poet Paul Laurence Dunbar wistfully addressed masking one’s authentic self in “We Wear the Mask”:

We wear the mask that grins and lies,  
It hides our cheeks and shades our eyes,—  
This debt we pay to human guile;  
With torn and bleeding hearts we smile,  
And mouth with myriad subtleties.<sup>169</sup>

Dunbar used the phrase “wear the mask” as both a metaphor for the pain associated with muting racial identity and as a literary description of the features and purpose of being “mask[ed].” Other literary artists have addressed masking, including the white poet John Marston who wrote, “Her mask so hinders me, I cannot see her beauty’s dignity.”<sup>170</sup> Whereas Marston depicted a literal mask that covered the beauty of its (white) wearer, Dunbar wrote of the figurative mask that

---

164. *See generally* Yoshino, *supra* note 19.

165. *See id.* at 785–86.

166. *See id.* at 784–85.

167. *See id.* at 925–27.

168. *See id.* at 811–12.

169. PAUL LAURENCE DUNBAR, *THE COLLECTED POETRY OF PAUL LAURENCE DUNBAR* 71 (Joanne Braxton ed., 1993) (1913).

170. KATHERINE LESTER & BESS VIOLA OERKE, *ACCESSORIES OF DRESS: AN ILLUSTRATED ENCYCLOPEDIA* 101 (2004).

Black people feel they must wear to hide their identity—and the suffering that is bound up in that identity—from the rest of the world.

A mask performs both literal and figurative acts of protection for its wearer. A physical mask can protect against chemical hazards, serving as a safety mechanism to purify air and prevent other intrusions into the body.<sup>171</sup> A physical mask can also allow wearers to have dual identities: the person underneath the mask and the new *masked* persona that allows them to perform actions that wearers could not or would not perform otherwise,<sup>172</sup> such as hiding their face to rob a bank, terrify or amuse others during Halloween, or participate in an *Eyes Wide Shut*<sup>173</sup> level of debauchery. In other areas of society, such as the law, wearing a figurative mask can protect against discrimination, hate crimes,<sup>174</sup> or emotional harm.<sup>175</sup>

Indeed, the symbolism of the mask is multidimensional and deeply rooted in various cultures and societies. To illustrate, throughout the African diaspora, the mask has had various purposes and diverse meanings depending on the country and ethnic group.<sup>176</sup> In some instances, traditional masking has been part of special gatherings, rituals, and religious ceremonies, with dancers wearing the mask to transcend human form and assume godlike characteristics.<sup>177</sup> Soldiers from both ancient Greece and ancient Rome used Gorgon masks or masks of Athena, goddess of war, to terrify their enemies.<sup>178</sup> In ancient Greece, the tragic mask was also used to conceal human nature, while the comedic mask represented the possibility of human nature.<sup>179</sup> In Black oral folklore, masks were used to depict the trickster character—one who works to destroy someone with oppressive power over them.<sup>180</sup> Dunbar and other Black writers used the trickster persona to describe

---

171. I refer to discrimination as an intrusion because, beyond the economic harm, discrimination has the capacity to create psychological trauma.

172. The classic example would be Batman, who wears a mask to conceal his true identity as the billionaire Bruce Wayne, an action that transforms him into a crime-fighting superhero. BATMAN, DC COMICS, <https://www.dccomics.com/characters/batman> (last visited on Oct. 29, 2020) [<https://perma.cc/3JZS-53HR>].

173. *Eyes Wide Shut* is a film that was notable for its sexually explicit scenes. The film centers a masked orgy and, in popular culture, has become synonymous with anonymous sexual depravity. EYES WIDE SHUT (Stanley Kubrick Productions 1999).

174. See James G. Bell & Barbara Perry, *Outside Looking In: The Community Impacts of Anti-Lesbian, Gay, and Bisexual Hate Crime*, 62 J. OF HOMOSEXUALITY 98, 112–115 (2015) (finding that masking sexual orientation can protect against potential hate crimes but causes psychological harm).

175. See *id.*

176. CAROL FINLEY, THE ART OF AFRICAN MASKS: EXPLORING CULTURAL TRADITIONS 9–10 (1999).

177. Ladislav Segy, *Mask in African Dance*, 16 NEGRO HIST. BULL. 99, 99 (Feb. 1953).

178. *Id.*

179. Thalia was depicted in a comedic mask, and her sister Melpomene wore the mask of tragedy. DAVID WEST, SOME CULTS OF GREEK GODDESSES AND FEMALE DAEMONS OF ORIENTAL ORIGIN 155 (Kevelaer et al. eds., 1995).

180. Trudier Harris writes, “By definition, tricksters are animals or characters who, while ostensibly disadvantaged and weak in a contest of wills, power, and/or resources, succeed in getting the best of their larger, more powerful adversaries. Tricksters achieve their objectives through

enslaved Africans covering their abolitionist message with one that made white people feel comfortable.<sup>181</sup> Masks can serve many purposes within their given geographical, historical, and social context.

For the inverted masking paradigm, I adopt the word *masking* as both a literal and figurative reference to what has been so embedded in Black traditions: hiding one's identity or adopting a new one as a survival strategy.<sup>182</sup> The word's deep roots have seeds planted in African ceremonial dances that subsequently sprung forth in various literary devices, including Paul Laurence Dunbar's poetry. The term is also rich with nuanced meaning that exists in the law.<sup>183</sup> Although masking may exist on a spectrum, it often remains an attempt to assimilate into society to gain full citizenship and avoid societal backlash and economic harm.<sup>184</sup> As examined below, the levels of masking have both social and legal functions and consequences.

### A. Masking to Assimilate

Social integration is often measured by political ideologies, group association, entertainment preference, dress, neighborhood selection, vehicle choice, friends, and vocal expression.<sup>185</sup> These seemingly superficial measurements are identity benchmarks; masking these culturally identifiable preferences is one way to remove "otherness" associated with a perceived marginalized identity.<sup>186</sup> Social integration includes both conscious and unconscious displays or performance of relevant norms that support dominant group identity.<sup>187</sup> These performance demands often lead an individual to reveal the traits she anticipates are most acceptable and mask those traits considered socially undesirable before a particular audience.<sup>188</sup>

The lowest level of masking usually includes toning down one's identity to better assimilate. One African-American Muslim woman described her quest to

---

indirection and mask-wearing . . . ." Trudier Harris, *The Trickster in African American Literature*, NAT'L HUMAN. CTR. (Sept. 26, 2019), <http://nationalhumanitiescenter.org/tserve/freedom/1865-1917/essays/trickster.htm> [<https://perma.cc/UU2P-FT6Q>].

181. Viktor Osinubi, *Privileging the African Metaphysics of Presence in American Slave Culture: The Example of Charles W. Chesnut's "The Passing of Grandison,"* 43 *STUD. LITERARY IMAGINATION* 47, 47 (Fall 2010).

182. *See id.* at 48–50.

183. *See generally* WE WEAR THE MASK, *supra* note 15 (providing accounts of various incidents of people passing to gain acceptance).

184. *See* Bell & Perry, *supra* note 174, at 98–120 (finding that masking sexual orientation is used to protect against potential hate crimes but causes psychological harm).

185. Klein et al., *supra* note 51, at 30–31.

186. *See id.* at 32–33.

187. *Id.* at 31; Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 *N.Y.U. L. Rev.* 425, 459–61 (2014).

188. *See* GOFFMAN, *supra* note 48, at 43, 51. This identity metamorphose encapsulates Goffman's performance of identity and the spectrum of identity assimilation Professor Yoshino explored in *Covering*. *See* Yoshino, *supra* note 19, at 769.

make people feel comfortable at her big law firm.<sup>189</sup> She recognized the implicit dress codes that served as a proxy for judgment, and she changed the color scheme of her headscarf to dark tones to reduce its visibility.<sup>190</sup> Although a small level of masking, she still attempted to shift to what she perceived as the group norm by toning down her Muslim identity—what Professor Yoshino would describe as “covering” her authentic self.<sup>191</sup> For other Muslim women, covering may mean tying their hijab in a nonthreatening style, such as an African galee or fashion turban. She may decide to wear modest Western clothing instead of overgarments—a full-length cover coat that goes over street clothes.<sup>192</sup>

The motivations behind masking vary just as the levels of masking do. I have seen some Muslims minimize their religious identity to assimilate into white Christian society but remain actively engaged in Muslim advocacy issues, like the trickster character of folklore who uses a mask to achieve their end in an oppressive society. By contrast, I have seen others behave more like the Uncle Tom persona and simply believe that they have been fully accepted into mainstream society by masking their Islamic identity.<sup>193</sup> Masking at this level can aptly be termed “acting white,” where individuals assimilate by adopting white culture, leading white people to feel a bit more comfortable with their otherness.<sup>194</sup> Yet an online comment responding to Candace Owens’s statement that racism is over reminds readers how ineffective masking may be:

I see you, leaning hard into whiteness as if it’ll save you. We’ve tried it for generations; it won’t. Like Candace, you ain’t ever gonna be one of them, no matter what. Look after your own . . . instead of lowering yourself to be the non-white pet of people who don’t really want you in their house.<sup>195</sup>

The comment highlights that when traces of the marginalized identity exist, assimilation is never fully effective in removing the otherness. Perhaps the September 11 attacks were the reckoning moment when Muslims recognized that they were the “pet of people who don’t really want [them] in their house.”<sup>196</sup> Muslims were no longer exotics from a foreign land, but foreign terrorists. The

---

189. Christine Hauser, *How Professionals of Color Say They Counter Bias at Work*, N.Y. TIMES (Dec. 12, 2018), <https://www.nytimes.com/2018/12/12/us/racial-bias-work.html> [<https://perma.cc/S7RU-84SQ>].

190. *See id.*

191. *Id.*; see Yoshino, *supra* note 19, at 811–12.

192. See Aziz, *From the Oppressed*, *supra* note 22, at 229.

193. See generally Adena Spingarn, *When ‘Uncle Tom’ Became an Insult*, ROOT (May 17, 2010), <https://www.theroot.com/when-uncle-tom-became-an-insult-1790879561> [<https://perma.cc/RLB2-N892>].

194. See PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (2000).

195. Dildoswaggins, Comment to Monique Judge, *Candace Owens Thinks Racism Is ‘Over’ Because She Has ‘Never Been a Slave.’*, ROOT (Mar. 4, 2019), <https://www.theroot.com/candace-owens-thinks-racism-is-over-because-she-has-1833034080> [<https://perma.cc/B4WM-2U3H>].

196. *Id.*; see Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day After September 11*, 20 SOC. TEXT 101, 110 (2002).

Supreme Court's decision in *Trump v. Hawaii* implicitly endorsed this position.<sup>197</sup>

African-American Muslim women may engage in this lower level of masking, allowing them to assimilate into white Christian society more easily. On the other hand, intersectional identities and intracommunity racism coerce some African-American Muslim women to tone down their African-American heritage to prove that they are Muslim enough to non-Black Muslims.<sup>198</sup> They may attend a non-Black mosque, wear hijab or overgarments in the style of Arab Muslims, and use Arabic phrases. Intracommunity racism remains a barrier to full assimilation. Regardless of their dress, their African-American heritage is a barrier to being perceived as having an authentic Islamic identity.<sup>199</sup>

Ironically, stereotypes about Muslim women being foreign intruders often allow African-American Muslim women to assimilate into non-Muslim communities more easily.<sup>200</sup> Perhaps this dichotomy exists because others perceive African-American Muslims as less of outsiders to the American mainstream.<sup>201</sup> However, the role of race remains a determinant in who is really Muslim. For instance, despite his anti-Muslim sentiments, Trump stated during his presidential election that he would consider not banning all Muslims from entering the country, such as Scottish Muslims.<sup>202</sup> Trump's statement highlights the intersection between race and religion, an intersection that reinforces the power of whiteness—even in subrogated classes.<sup>203</sup>

Trump's statement also highlights the assimilation myth. It is a myth that suggests all Americans have a shared identity.<sup>204</sup> That identity is not based on patriotism but on ethnocentric values that seek to alienate those who refuse to assimilate into the proverbial melting pot of North American society.<sup>205</sup> Such assimilation often requires people who are not white, Christian, or cisgender men to dissolve traces of their race, religion, or gender to belong.<sup>206</sup>

Although contrary to contemporary constitutional thought, policies and laws

197. See generally *Trump v. Hawaii*, 138 S. Ct. at 2434.

198. See BEYDOUN, *supra* note 161, at 162–70.

199. See *id.*

200. See Karen Fraser Wyche, *African American Muslim Woman: An Invisible Group*, 51 SEX ROLES 319, 323 (2004).

201. See BEYDOUN, *supra* note 161, at 162–70.

202. See Jenna Johnson, *Trump Now Proposes Only Muslims from Terrorism-Heavy Countries Would Be Banned from U.S.*, WASH. POST (June 26, 2016, 10:05 AM), <https://www.washingtonpost.com/news/post-politics/wp/2016/06/25/trump-now-says-muslim-ban-only-applies-to-those-from-terrorism-heavy-countries/> [https://perma.cc/E5Y2-77JQ].

203. See Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 (1993) (examining the social construct of race, including the intersection of race, power, and property ownership).

204. See Elaine S. Sylvester, *Belonging: Race or Categories*, 50 CREIGHTON L. REV. 737, 739–40 (2017); Booth, *supra* note 59, at 250.

205. See Ahmed, *supra* note 21, at 130–132; *Trump v. Hawaii*, 138 S. Ct. at 2434–36 (Sotomayor, J., dissenting).

206. See Peter G. Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 YALE J. INT'L L. 1, 22, 31–32 (1998); see generally Harris, *supra* note 203 (describing a theory of “passing and trespassing” that supports the notion that “others” are not worthy of the rights embedded in the Constitution).

continue to uphold the melting pot ideology and encourage identity masking.<sup>207</sup> The highest level of masking eliminates one's identity to assimilate fully into white Christian society—a level of assimilation Professor Yoshino refers to as converting.<sup>208</sup> On the same level as converting is coerced masking, such as legislation mandating Muslim women remove hijab, face veils, and burqas.<sup>209</sup> In the Title VII context, coerced masking occurs when employers require a Muslim woman to remove her hijab<sup>210</sup> or a Muslim man to shave his beard.<sup>211</sup>

### B. Legislated Masking<sup>212</sup>

Legislated masking occurs when individuals feel coerced to mask their identity in response to legislation. The masking can occur to gain legal rights and protections or by specific legislative demand.<sup>213</sup> People from marginalized communities have masked to protect themselves from discrimination.<sup>214</sup> For example, African Americans sometimes passed as white to escape slavery,<sup>215</sup> Jim Crow laws, and other vestiges of racism.<sup>216</sup> During World War II, people of Japanese descent masked their Japanese ancestry to avoid internment and other consequences of ethnic bias.<sup>217</sup> Many in the LGBTQ community have also masked to avoid prosecution under sodomy laws, serve in the military, and maintain employment.<sup>218</sup> This level of coerced masking allows marginalized groups to skirt the law or gain protections under the law.

Specific legislation has also explicitly forced many marginalized groups, including Muslim women, to mask aspects of their identity to gain legal rights and

- 
207. See Julia Higgins, *The Rise and Fall of the Melting Pot*, THE WILSON Q. (Dec. 5, 2015), <https://www.wilsonquarterly.com/stories/the-rise-and-fall-of-the-american-melting-pot/> [https://perma.cc/WDA8-KD3D]; cf. Rebecca Tsosie, *Climate Change and Indigenous Peoples: Comparative Models of Sovereignty*, 26 TUL. ENVTL. L.J. 239, 249 (2013).
208. See Yoshino, *supra* note 19, at 785.
209. See generally Shaira Nanwani, *The Burqa Ban: An Unreasonable Limitation on Religious Freedom or Justifiable Restriction?*, 25 EMORY INT'L L. REV. 1431 (2011).
210. See *Abercrombie*, 135 S. Ct. at 2030.
211. See *Hussein v. Waldorf-Astoria*, 134 F. Supp. 2d 591, 597 (S.D.N.Y. 2001).
212. I use the term “legislated masking” to reference policies that openly coerce or require groups to mute their identity to participate in and benefit from basic societal programs.
213. See *Hussein*, 134 F. Supp. 2d at 591.
214. Paul Horwitz, *Uncovering Identity*, 105 MICH. L. REV. 1283, 1285–86 (2007). See, e.g., Dirk Johnson, *Are Homosexuals the New Enemy?*, N.Y. TIMES, Jan. 28, 1993, at A16 (documenting the level of discrimination against gay men in the military).
215. See *Dred Scott v. Sandford*, 60 U.S. 393, 423 (1857).
216. There is also a history of African Americans who refused to pass and mask their identity, which also had consequences. See JAMES WELDON JOHNSON, *THE AUTOBIOGRAPHY OF AN EX-COLORED MAN* (1912) (documenting the trauma associated with living a white life with a Black consciousness). It stands to reason that Muslims forced to mask their identity would experience similar trauma.
217. See Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942) (authorizing the imprisonment of Japanese Americans).
218. See generally Yoshino, *supra* note 19 (detailing the layers of masking in the LGBTQ community); Brown, *supra* note 66. The landmark case *Bostock* has recently interpreted Title VII to protect employees from discrimination based on their sexual orientation. 590 U.S. \_\_\_\_ (2020).

protections.<sup>219</sup> The military’s “Don’t Ask, Don’t Tell” policy, which required “gay[s] and lesbians” to mute their identity to serve in the military, is likely the most widely known contemporary legislated masking example in America.<sup>220</sup> However, Muslim women have also been a persistent target of legislated masking. In twentieth-century Muslim Uzbekistan, the Soviet “modernization” campaign sought to liberate Uzbek women by having them remove their full-body veils.<sup>221</sup> Although Soviet propaganda promoted these veil-removal policies (*hujum*) as a movement for gender equity, some Muslim women perceived the *hujum* as removing an Islamic identity marker and undermining the hold of Islam (and its religious leaders).<sup>222</sup> This flawed campaign operated on the premise that Islam, not cultural appropriation of the religion, oppressed women.<sup>223</sup> It also overlooked that in the seventh century, Muslim women had many legal rights that not even American women had until the nineteenth century—capacity to contract, marry, and own and inherit property.<sup>224</sup> Yet the veil remained a symbol of both oppression and resistance against assimilation.<sup>225</sup>

The twenty-first century has not been much better. Europe has legislated various iterations of banning full face and body coverings (colloquially known as the “burqa ban”).<sup>226</sup> The underlying message of these bans frames Muslim women as outsiders who needed to assimilate by removing their identity-based clothing.<sup>227</sup> After Austria successfully banned the burqa,<sup>228</sup> Quebec also barred public workers from wearing the burqa and required women to remove their face veils when riding public transit or receiving government services.<sup>229</sup>

Legislators in the United States have attempted similar strategies to legislate Muslim women’s masking.<sup>230</sup> In 2016, Georgia State Representative Jason

- 
219. See Higgins, *supra* note 207; cf. Tsosie, *supra* note 207 (describing how the melting-pot ideology does not resonate with Indigenous people because their cultures are not lived in “private”).
220. 10 U.S.C. § 654 (2010) (repealed).
221. DOUGLAS NORTHROP, *VEILED EMPIRE: GENDER AND POWER IN STALINIST CENTRAL ASIA* 199 (2016).
222. *Id.*
223. *See id.*
224. Awad, *supra* note 152.
225. NORTHROP, *supra* note 221, at 185–86.
226. *The Islamic Veil Across Europe*, BBC NEWS (May 31, 2018), <https://www.bbc.com/news/world-europe-13038095> [<https://perma.cc/5BU5-PZG2>]; See *S.A.S. v. France*, App. No. 43835/11, Eur. Ct. H.R. (2014).
227. Nanwani, *supra* note 209.
228. Rick Noack, *Austria’s New Anti-Burqa Law Isn’t Quite Working as Intended*, WASH. POST (Oct. 9, 2017), <https://www.washingtonpost.com/news/worldviews/wp/2017/10/09/austria-wanted-to-ban-burqas-now-it-also-fines-mascots-and-stops-cyclists-who-wear-scarves/> [<https://perma.cc/L234-TYZT>].
229. Dan Levin, *Quebec Bars People in Face Coverings from Receiving Public Services*, N.Y. TIMES (Oct. 18, 2017), <https://www.nytimes.com/2017/10/18/world/canada/quebec-face-coverings-ban.html> [<https://perma.cc/C986-SEMH>].
230. See, e.g., Sharon Schmickle, *Bill in Legislature Prompts Dispute Over Muslim Women’s Headscarves*, MINN. POST (Mar. 4, 2009), <https://www.minnpost.com/politics-policy/2009/03/bill-legislature-prompts-dispute-over-muslim-womens-headscarves/> [<https://perma.cc/7G9C-XLNR>].



Spencer introduced a bill that would have banned Muslim women from wearing a burqa and any face coverings.<sup>231</sup> Spencer's bill reflected a desire to preserve American society as white and Christian: "This bill is simply a response to constituents that do have concerns of the rise of Islamic terrorism, and we in the State of Georgia do not want our laws used against us."<sup>232</sup> However, when opponents challenged the constitutionality of the proposed legislation, Spencer rescinded the bill and explained that it was intended to address threats from "masked terrorists," but not any specific group.<sup>233</sup>

Legislated masking to gain access to legal protections also occurs in the broader Muslim community. Some Muslim refugees convert to Christianity—thus masking their prior religious identities—to strengthen asylum applications to Canada, the United States, and Germany.<sup>234</sup> Since an asylee may base an application on a well-founded fear of persecution, converting to Christianity may help to create the perception of such a fear.<sup>235</sup> Although Christians are generally not persecuted in Muslim-majority countries, some Islamic scholars consider it a crime punishable by death when Muslims convert to Christianity.<sup>236</sup> Although advocates advise refugees that converting is not necessary to strengthen their applications,<sup>237</sup> immigration policies—such as the Muslim Ban—seem to suggest otherwise.<sup>238</sup>

Masking one's identity, whether to avoid punishment or to access protections, has consequences. In addition to the potential psychological

231. The original version of the statute provided: "A person is guilty of a misdemeanor when he or she wears a mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as the conceal the identity of the wearer and is upon any public way or public property or upon the private property of another without the written permission of the owner or occupier of the property to do so." Ga. Code Ann. § 16-11-38 (West 2019); Spencer sought to change the gender to he or she, so that the bill would include women wearing niqab. H.B. 3, 2016 Leg., Reg. Sess. (Ga. 2016).

232. Associated Press, *Georgia Lawmaker Drops No-Mask Proposal after Muslim Backlash*, FOX NEWS (Nov. 17, 2016), <https://www.foxnews.com/politics/georgia-lawmaker-drops-no-mask-proposal-after-muslim-backlash> [<https://perma.cc/J97G-W626>].

233. *Id.*; Aaron Diamant, *Lawmaker Withdraws Bill Banning Women from Wearing Burqas in Public*, WSB-TV (Nov. 17, 2016), <https://www.wsbtv.com/news/local/new-bill-would-ban-women-from-wearing-burqas-for-drivers-license-photos/467901403/> [<https://perma.cc/8E6M-56XD>].

234. See, e.g., Josie Ensor, *The Muslim Refugees Converting to Christianity 'to Find Safety'*, TELEGRAPH (Jan. 30, 2017), <https://www.telegraph.co.uk/news/2017/01/30/muslim-refugees-converting-christianity-find-safety/> [<https://perma.cc/NL6S-4URM>]; Lizzie Dearden, *Muslim Refugees Are Converting to Christianity in Germany*, INDEPENDENT (Dec. 9, 2016), <https://www.independent.co.uk/news/world/europe/muslim-refugees-converting-christianity-germany-crisis-asylum-seekers-migrants-iran-afghanistan-syria-eritrea-a7466611.html> [<https://perma.cc/35C4-REWP>]. Khaled Beydoun and Erika Wilson explore this veiling of identity in racial identity as "reverse passing." Khaled Beydoun & Erika Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 309 (2017).

235. See Ensor, *supra* note 234.

236. JOHN ESPOSITO, WHAT EVERYONE NEEDS TO KNOW ABOUT ISLAM, 73–75 (2nd ed. 2011). The issue of apostasy is nuanced and this sentence is not intended to explain the schools of Islamic law on the topic or jurist in-depth analysis of the issue.

237. See Dearden, *supra* note 234.

238. See Holger Sonntag, *Testing Religion: Adjudicating Claims of Religious Prosecution Brought by Iranians in the U.S. and Germany*, 68 CASE W. RES. L. REV. 975, 986–88 (2018).

trauma,<sup>239</sup> masking religious identity has legal implications in the Title VII context. As explained in the next section, Muslims who mask to safeguard against discrimination often find that masking is used against them to deny religious accommodation requests—particularly requests by Muslim women who remove the veil or fail to perform their religious identity.

### III. INVERTED MASKING

Although Safoorah Khan made a successful Title VII claim against her employer, employers are still inclined to question religious accommodations when their employees' performance of their religious identity is inconsistent with what the employer knows about the religious practice.<sup>240</sup> It is this binary framework of religious identity that often leads employers to challenge accommodation requests when the requesting employee's religious practices deviate from what the employer observes from other employees of the same religion.<sup>241</sup> This "deviation factor" also suggests employers are less familiar with minority religions and require training.<sup>242</sup> Consequently, employers largely rely on uninformed understandings of Islamic practices to assess their Muslim employees' religious practices.

#### A. Establishing a Sincerely Held Belief: Legal Standard

To establish a *prima facie* case of religious discrimination under Title VII, a plaintiff must demonstrate that she has "a bona fide religious belief that conflicts with an employment requirement."<sup>243</sup> She must also establish that the accommodation was a motivating factor in the adverse action.<sup>244</sup> If an employee establishes these elements, the burden shifts to the employer to establish a good faith effort to reasonably accommodate the religious belief or to prove that the accommodation would cause undue hardship to the employer's business.<sup>245</sup>

However, the analytical framework to determine whether an employee's religious belief is "truly held" is becoming increasingly contentious because the standard is unclear and inconsistent.<sup>246</sup> Although assessing sincerely held religious beliefs is factually driven and handled on a case-by-case basis,<sup>247</sup> expert witnesses

---

239. See generally WE WEAR THE MASK, *supra* note 15.

240. See, e.g., Compl. at 3, *Sardeye v. Walmart Stores E., LP*, No. 3-18-CV-01261, 2019 U.S. Dist. LEXIS 154118 (M.D. Tenn. Sept. 10, 2019).

241. See, e.g., *id.*

242. See Dina Gerdeman, *Religion in the Workplace: What Managers Need to Know*, WORKING KNOWLEDGE (Sept. 27, 2018), <https://hbswk.hbs.edu/item/religion-in-the-workplace-what-managers-need-to-know> [<https://perma.cc/8M8U-9KXU>].

243. *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2nd Cir. 1985).

244. Circuit courts have been unclear about how explicit employees must be in their requests for religious accommodations. The Supreme Court provided minimal guidance in *EEOC v. Abercrombie & Fitch Stores Inc.*, 135 S.Ct. 2028 (2015).

245. *Trans World Airlines, Inc.*, 432 U.S. at 74.

246. *See United States v. Seeger*, 380 U.S. 163, 185–186 (1965).

247. *Philbrook*, 757 F.2d at 481.

are frequently used to determine the validity of an employee's belief.<sup>248</sup> The expert approach is problematic because lived religion is often specific to that individual, their family unit, or their community, rather than a standardized adherence to textual doctrine. For example, although there are various schools of thought<sup>249</sup> on whether Muslim women are required to wear hijab (head covering), veil (face covering), a burqa (full body covering), or no head covering at all,<sup>250</sup> a Muslim woman who subscribes to any of these four approaches sincerely believes that she is practicing in accordance with her beliefs. Furthermore, Muslim women also have different perspectives on when one is required to obey a religious mandate and when one may disobey.<sup>251</sup> As a result, should an expert testify that a Muslim woman's choice to wear any of the above coverings is not a requirement of the religion, courts could overlook the subjectivity of religious interpretation and practice.

Employees should not have to demonstrate sincerity by practicing an objectively correct interpretation of a religion, but merely by observing what they believe is part of their faith.<sup>252</sup> This approach is especially compelling considering that Title VII broadly defines religion as "all aspects of religious observance and practice, as well as belief."<sup>253</sup> As such, courts should apply a similarly broad definition of what constitutes a "truly held" or sincerely held belief.<sup>254</sup> Furthermore, experts also tend to endorse as legitimate religious experience the very identity markers that lead to the identity-based discrimination that Title VII was designed to protect against. As explained below, assessing religious sincerity through visible markers abrogates First Amendment protections and undermines one of the purposes of Title VII—to prohibit discrimination on the basis of religion.

### B. Religious Visibility and Norms

The Supreme Court's broad definition of religion is by design. The Court does not want to judge religiosity.<sup>255</sup> However, this does not stop an employer from arguing that an employee's requested religious accommodation is actually a secularly motivated personal preference because the employer finds she is visibly

---

248. See Jared A. Goldstein, *Is There a Religious Question Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 502–03 (2005).

249. See Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 6–9 (1997) (explaining the five schools of Islamic thought and traditional jurisprudence).

250. Shirazi & Mishra, *supra* note 158, at 44–47.

251. Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil? Muslim Women, France and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 750–52 (2006).

252. See *id.* (reasoning that "the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held'"); see also *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981) (holding "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection").

253. 42 U.S.C. § 2000e(j) (2012).

254. See *Seeger*, 380 U.S. at 185.

255. See *id.* at 184 (providing religion is "intensely personal" and courts must give "great weight" to claimants' portrayals of their beliefs).

inconsistent in her religious practice.<sup>256</sup> For example, Kimberly Bloom, a born-again Christian, requested an accommodation not to work on Sundays.<sup>257</sup> Her employer, Aldi Inc., denied her religious accommodation request, framed the request as a personal preference, and used Bloom's lack of strict religious adherence as a basis for its argument:

Bloom . . . does not attend church; and, in fact, she has only attended on a single occasion, since the late 1990s . . . . On Sundays, Bloom spends time with family, reads the Bible, and watches a preacher on television . . . . She makes her own distinctions as to what is or is not permitted on Sundays—for example, she will play board games with her grown children but will not go to the movies, and will go for a ride or walk but will not mow the lawn. She does not point to any Bible passage or religious materials that make her rather self-serving distinctions.<sup>258</sup>

The Equal Employment Opportunity Commission (EEOC) challenged the employer's characterization of the request as a personal preference.<sup>259</sup> The court ultimately found for Bloom, reasoning that her decision not to attend church on the Sabbath was immaterial to whether her beliefs qualify as religious for purposes of Title VII.<sup>260</sup> Although Bloom was ultimately successful in establishing the sincerity of her belief, it was her antinormative Christian behavior that led the employer to challenge the sincerity of her religious accommodation.<sup>261</sup>

In another matter, Alamo Rent-A-Car denied Bilan Nur's request to wear hijab during Ramadan, contending that Nur's religious accommodation request was not based on a sincerely held religious belief.<sup>262</sup> In support of its position, Alamo referenced in its brief Nur's inconsistency in wearing a "veil" during Ramadan the prior year: "Alamo points to evidence that during Ramadan in 2000 (the year prior to the Ramadan at issue), Alamo's management asked Nur to remove her head covering, and she complied, and did not assert a religious need to object to the request."<sup>263</sup> Alamo's argument relied on the ease with which Nur willingly masked her religious identity at its request.<sup>264</sup> The court ultimately ruled for Nur on summary judgment, acknowledging that the employer forcing her to

---

256. See *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569 (7th Cir. 1997) (employer argued that Jewish employee never requested leave for Yom Kippur in her eight-year work history and thus her religious belief was not sincerely held).

257. *EEOC v. Aldi, Inc.*, No. 06-01210, 2009 WL 3183077, at \*3 (W.D. Pa. Sept. 30, 2009).

258. Defendant Aldi's Memorandum in Support of Its Motion for Summary Judgment at 12, *EEOC v. Aldi, Inc.*, No. 06-01210, 2009 WL 3183077 at \*12 (W.D. Pa. Sept. 30, 2009).

259. *Id.* at \*11.

260. *Id.* at \*12; see also *Williams v. Harvey*, 2006 WL 2456406 (Aug. 21, 2006) (denying employee's claim because the employee knew about the Sunday schedule, accepted the job with knowledge of the rotating Sunday schedule, and later refused to work on Sunday after ignoring reasonable accommodations offered by the employer).

261. See Defendant Aldi's Memorandum in Support of Its Motion for Summary Judgment at 12, *EEOC v. Aldi, Inc.*, 2009 WL 3183077 at \*9.

262. *Alamo Rent-A-Car*, 432 F. Supp. 2d at 1011.

263. *Id.* at 1009, 1011.

264. *Alamo Rent-A-Car*, 432 F. Supp. 2d at 1012.

hide in the back room when she wore hijab was not a reasonable accommodation.<sup>265</sup>

Levels of inverted masking were at play in both cases. For Bloom, Christian norms guided her employer's analysis of the sincerity of her religious belief. For Bloom's employer, the most important of these norms was the plaintiff's lack of adherence to what her employer determined devout Christians must do on Sundays—go to church.<sup>266</sup> Thus, it was not enough for Bloom's employer that Bloom profess that her religious beliefs prevented her from working on Sundays; Bloom also had to perform her Christian identity according to her employer's expectations. The more her behavior adhered to Christian norms, the easier it was for her employer to believe her sincerity.<sup>267</sup> For Nur, her willingness to remove her hijab to serve customers and assimilate at her employer's request made her employer question the sincerity of her religious practice.<sup>268</sup> The temporary masking before customers prevented Nur from securing an accommodation during the most important month in the Islamic calendar—Ramadan. Though the court ruled for Nur, it was her perceived lack of religious consistency that gave fodder to the employer's initial challenge to her sincerely held religious belief.<sup>269</sup> Such conduct suggests that employers believe that employees waive their right to religious accommodation if there has been any inconsistency in their religious practices.

In addition to religious consistency, a lack of visible religious markers, such as a hijab or beard, also influences employers' inclinations to challenge employees' sincerity.<sup>270</sup> For example, Hilton Hotels questioned employee Mamdouh Hussein's claim that he needed to wear a beard for religious reasons.<sup>271</sup> Hilton observed that Hussein had never worn a beard in the fourteen years of his employment.<sup>272</sup> Hussein's employer also professed that they never knew Hussein was Muslim until he requested the accommodation.<sup>273</sup> In this case, the court agreed with the employer. The court granted Hilton Hotels summary judgment, reasoning,

Hussein has made no effort to explain why, if his religion prevented him from

---

265. *Id.* at 1017.

266. *See* Defendant Aldi's Memorandum, *supra* note 258, at \*\*9, 12.

267. *See* *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1088 (6th Cir. 1987) (finding it reasonable for an employee to find Sunday replacement as part of an accommodation); *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1031 (8th Cir. 2008) (holding UPS failed to reasonably accommodate an employee's religious beliefs when it terminated an employee who could not find a replacement driver to complete his route that extended past sundown on a Friday).

268. *See* *Alamo Rent-A-Car*, 432 F. Supp. 2d at 1011.

269. *See id.*; *see also* *EEOC v. IBP, Inc.*, 824 F. Supp. 147, 151 (C.D. Ill. 1993) (holding subsequent absence of faith did not establish previous religious beliefs were insincere when the employee refused to work on his Sabbath).

270. *See Hussein*, 134 F. Supp. at 594 (detailing an employer that doubted the sincerity of an employee's religion when he failed to inform the company of his religious beliefs surrounding facial hair until fourteen years into his employment).

271. *Id.*

272. *Id.* at 596.

273. *Id.*

shaving, he had never worn a beard before. He does not contend, for example, that he had just converted to his religion. Finally, within three months, he shaved his beard, an undisputed fact that also undercuts his claim of religious necessity.<sup>274</sup>

Hussein's challenge against Hilton Hotels presents another inverted masking model—one that relies on a lack of identity performance measured by visibility. The court's reliance on Hilton's assertion that it did not know Hussein was Muslim, and therefore lacked notice,<sup>275</sup> established a dangerous precedent in Title VII proceedings. The court used this lack of knowledge to bolster the employer's position that Hussein's belief was not sincere.<sup>276</sup> Such an approach suggests that the employer expected some outward performance of Hussein's Islamic religious identity. Had that performance of identity existed to verify his sincerely held belief, the employer may have hesitated to challenge Hussein's level of sincerity. Without visible identity markers, an employer has no reason to know an employee's religion, unless the employee seeks an accommodation. Furthermore, the court's reasoning that Hussein's shaving his beard undercut the religious necessity of keeping the beard overlooked that religiosity is often fluid. Thus, Hussein's decision to shave his beard should have no bearing on whether a belief is sincerely held.

Measuring employees' sincerity against other employees' religious performance creates similar barriers to employees securing a religious accommodation. Walmart denied Fadumo Sardeye, a Somali Muslim woman, an exemption from shelving alcohol and pork products.<sup>277</sup> Sardeye believed that, as a Muslim, she was prohibited from touching the products, and she stressed that another Walmart store had accommodated her request for fifteen years.<sup>278</sup> Other employees, however, complained about Sardeye's exemption, pointing to other Muslim employees who had regularly shelved alcohol during their employment.<sup>279</sup> To accommodate her request, her new manager required that Sardeye provide Qur'anic proof that she was prohibited from touching pork and alcohol products.<sup>280</sup> Reliance on the Qur'an as the sole source of religious guidance is a misunderstanding of Islamic jurisprudence and religious practice.<sup>281</sup> Walmart also

---

274. *See Hussein*, 134 F. Supp. at 596–97.

275. *See id.* (recognizing the undisputed fact that Hussein never mentioned the conflict between the employer's policy and his religion until he was questioned about his beard; asserting Hussein failed to give his employer notice to make an arrangement for any accommodations and without this notice, there was no prima facie case).

276. *Id.*

277. Compl. at 3–4, *Walmart Stores*, No. 3-18-CV-01261.

278. *Id.* at 2–3.

279. *Id.* at 5; Holly Meyer, *Muslim Woman Sues Walmart for Religious Discrimination After Being Fired from Knoxville Store*, TENNESSEAN (Nov. 8, 2018), <https://www.tennessean.com/story/news/religion/2018/11/08/knoxville-muslim-woman-sues-walmart-religious-discrimination-lawsuit/1928776002/> [<https://perma.cc/7BW8-78MR>].

280. Compl. at 5, *Walmart Stores*, No. 3-18-CV-01261.

281. Mamoud Munes Tomeh, *Persuasion and Authority in Islamic Law*, 3 BERKELEY J. MIDDLE E. & ISLAMIC L. 141, 143 (2010).

incorrectly used the religiosity of other Muslim employees as an implicit barometer to measure Sardeye's sincerity.<sup>282</sup> Walmart should have measured Sardeye's sincerity using a subjective standard, not status quo behavior or whether a Qur'anic mandate exists.<sup>283</sup>

In assessing the consistency of religious practices, employers discount masking marginalized identities for personal protection.<sup>284</sup> Attitudes toward Muslims after the September 11 attacks highlighted the importance of occasionally masking for personal protection.<sup>285</sup> Conceivably, the 9/11 backlash explains why Alamo Rent-A-Car denied Nur's request to wear hijab during Ramadan in 2001 but allegedly granted the same request in 1999 and 2000.<sup>286</sup> Thus, it should not be surprising that Muslims mask their religious identity to assimilate and avoid discrimination. After 9/11, it was also not uncommon for Muslims to underperform their religious identity in response to religious animosity by showing they were like others in their community and equally American.<sup>287</sup> This divergence of responses reinforces that religious performance takes many forms, including shifting religiosity and visibility of religious identity. Employers' assumptions that these shifts undermine sincerely held religious beliefs invert equal protections, creating the inverted masking paradigm.

### C. Removing the Mask

We must eliminate binary narratives around religious and gender identities to combat inverted masking in religious accommodation employment settings. Black Muslim women offer us a glimpse at how this might be possible. While normative assumptions of Muslim women as oppressed and meek prevail,<sup>288</sup> Black women are stereotyped as being angry, aggressive, loud, and sassy.<sup>289</sup> The contrast makes a Black Muslim woman's identity incongruent. Such incongruous stereotypes can contradict one another when discussed theoretically. AA's representation of Khan demonstrates how such binary assumptions might be challenged in court.

AA's presence on the litigation team for Khan allowed the DOJ to disrupt various Muslim identity stereotypes. Arguably, as one of the lead attorneys, AA

282. Compl. at 5, *Walmart Stores*, No. 3-18-CV-01261.

283. *Peterson v. Wilmur Commc'ns, Inc.*, 205 F. Supp. 2d 1014, 1018 (E.D. Wis. 2002).

284. *See generally* WE WEAR THE MASK, *supra* note 15.

285. Faiza Patel & Meghan Koushik, COUNTERING VIOLENT EXTREMISM, BRENNAN CTR. FOR JUST., 1 (2017).

286. *Alamo Rent-A-Car*, 432 F. Supp. 2d at 1011–12.

287. Cyra Akila Choudhury, *Terrorists & Muslims: The Construction, Performance, and Regulation of Muslim Identities in the Post-9/11 United States*, 7 RUTGERS J.L. & RELIGION 1, 3 (2006).

288. Susan Carland, *If You Want to Know About Muslim Women's Rights, Ask Muslim Women*, GUARDIAN (May 6, 2017), <https://www.theguardian.com/world/2017/may/07/if-you-want-to-know-about-muslim-womens-rights-ask-muslim-women> [https://perma.cc/ZAR6-D3BU].

289. *See generally* Patricia Luckoo, *Deconstructing Negative Stereotypes, Myth and Microaggressions About Black Women: Reconstructing Black Women's Narrative, Identity and The Empowering Nature of Ethnic Identity* (2018) (Ph.D. dissertation, National Louis University) (on file with Digital Commons at National Louis University).

had the potential to dispel the notion of a binary Muslim identity before a jury—a factor that may have led the school district to settle the case. Self-defining moments, such as this example, are how I prescribe that Black Muslim women continue to dismantle the effects of inverted masking.

### CONCLUSION

It is difficult to believe that which we cannot see. Yet faith is just that—belief in the unseen.<sup>290</sup> Identity is also often complicated, multilayered, and invisible to employers. It is the coerced covering of identity—our ethnicity, religion, and culture—that Title VII and other anti-discrimination laws seek to protect, a protection grounded in the belief that the American fabric is woven with multiple threads.

Well-intentioned employers must overcome identity stereotypes to recognize that religiosity is as diverse as societal fiber. Even if courts do not want to measure religiosity, society and employers do.<sup>291</sup> And Muslim women are acutely aware of the need to mask religious identity to make others feel comfortable. Intracommunity and intercommunity racism, gender inequity, Islamophobia, and binary identity markers have pushed Muslim women to the margins.

Thus, when employers inappropriately use identity markers as a barometer to assess religious sincerity in the Title VII framework, they should remember Billie Holiday's words: "If I go to church on Sunday / then cabaret all day Monday / ain't nobody's business if I do."<sup>292</sup>

---

290. *The Holy Qur'an: Arabic Text and English Translation*, Islam Int'l Publications Ltd. 1, 2 (Maulawi Sher 'Ali trans., 2015), <https://www.alislam.org/quran/Holy-Quran-English.pdf> [<https://perma.cc/U3ZA-XXS8>].

291. See Debbie N. Kaminer, *Religious Conduct and the Immutability Requirement: Title VII's Failure to Protect Religious Employees in the Workplace*, 17 VA. J. SOC. POL'Y & L. 453, 455–57 (2010); e.g., Eman Quotah, *I'm Muslim but Don't Wear a Headscarf. Stop Using Hijabs as a Tool for 'Solidarity'* USA TODAY (Apr. 24, 2019, 6:00 AM), <https://www.usatoday.com/story/opinion/voices/2019/04/24/muslim-women-islam-headscarves-hijab-saudi-arabia-column/3540144002/> [<https://perma.cc/5J65-27L6>]; but see, e.g., John Blake, *Muslim Women Uncover Myths About the Hijab*, CNN (Aug. 12, 2009, 7:54 AM), <http://www.cnn.com/2009/US/08/12/generation.islam.hijab/index.html> [<https://perma.cc/8AP4-CEVA>]; Aziz, *Coercive Assimilationism*, *supra* note 22, at 17.

292. Billie Holiday, *Ain't Nobody's Business If I Do*, on THE LADY SINGS (UMG Recordings, Inc. 1956).



# Making Workfare More Fair: Protecting Workers in Welfare Programs from Sexual Harassment

Kathryn Evans<sup>†</sup>

## ABSTRACT

*Every year, hundreds of thousands of adults in the United States work full-time jobs through programs known as “workfare” as a requirement to collecting public benefits. Although these individuals work full time, their legal status as “employees” is not as clear as it should be. That fact, along with other factors such as their status as temporary workers and the public stigma against those who collect public benefits, make these workers particularly vulnerable to abuse in the workplace. This Article analyzes the issue of sexual harassment and assault in the workplace and the factors that place workfare participants at risk. It then discusses current legal protections and how to use the law and administrative processes to better protect these workers.*

INTRODUCTION .....	151
I. SEXUAL HARASSMENT IN THE WORKPLACE.....	153
A. The Universal Issue .....	153
B. Complications Particular to the Workfare Workforce .....	157
1. Low Power Means High Risk of Harassment.....	158
2. Barriers to Reporting .....	161
3. Perceived Lack of Credibility .....	165
II. FEDERAL PROTECTIONS IN PLACE .....	167
A. Title VII .....	167
B. Continuation of Welfare Benefits .....	172
III. SUGGESTIONS FOR IMPROVEMENT .....	173
A. Litigation and Legislation.....	173

---

DOI: <https://doi.org/10.15779/Z38D21RK0D>

<sup>†</sup> Kathryn Evans is a Litigation Fellow at Katz, Marshall & Banks LLP, working on employment and whistleblower cases. She obtained a J.D. from NYU Law in 2020, and a B.A. from Union College in 2017. The author would like to thank the editors of the *Berkeley Journal of Gender, Law & Justice*, especially Karnik Hajjar and Carly Shortell, for their editorial assistance with this Article.

B. Administrative Recommendations..... 175  
 C. Grassroots Organizing ..... 178  
 CONCLUSION ..... 178

**INTRODUCTION**

The system of public assistance in the United States is a complex web of programs run by different government agencies and different levels of government within the federal system. They all have different qualification thresholds, depending on whom they are designed to help, and different requirements that recipients must meet in order to keep receiving benefits. Some programs are only available to those who have a job: for example, one must earn income to receive the Earned Income Tax Credit, and one must be injured on the job to receive worker’s compensation. But other federal programs are designed to aid people who are unemployed. These programs, namely Temporary Assistance for Needy Families (TANF) and the Supplemental Nutritional Assistance Program (SNAP or food stamps), require at least a majority of adult recipients to complete work activities in order to receive benefits.

Congress created TANF through the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).<sup>1</sup> The statute established the basic requirements, which the Department of Health and Human Services (HHS) expanded on in subsequent regulations.<sup>2</sup> The federal government, however, only grants money to states, which add in their own funds and administer TANF programs to their citizens. TANF funding is available only to children and to adults who are caring for minor children or are pregnant<sup>3</sup> because Congress designed the program to provide for “needy families” and to ensure that children can stay with relatives.<sup>4</sup>

As the name of the bill—Personal Responsibility and Work Opportunity—suggests, the redesigned<sup>5</sup> welfare program was intended to put people to work so that they could become self-sufficient and would no longer need government assistance.<sup>6</sup> Thus, benefits come with a work requirement. Within each state’s population of TANF recipients, at least half of all families and 90 percent of all two-parent families must have an adult, or two, participating in work activities.<sup>7</sup> The statute lists twelve activities that qualify as “work activities” for the purposes

---

1. Pub. L. No. 104-193, 110 Stat. 2105 (codified at 42 U.S.C. §§ 601–619 (2018)).  
 2. 45 C.F.R. §§ 260.10–270.13 (2019).  
 3. 42 U.S.C. § 608(a)(1) (2018).  
 4. *Id.* § 601(a)(1).  
 5. TANF replaced an earlier general assistance program known as Aid to Families with Dependent Children. *See, e.g.* DAVID SUPER, PUBLIC WELFARE LAW 29 (2016).  
 6. *See* 42 U.S.C. § 601(a)(2) (2018).  
 7. *Id.* § 607(a). A single parent or caretaker relative must perform at least thirty hours of work activities per week, while two-parent households must perform at least thirty-five hours per week, or at least fifty-five hours per week if they receive federal funding for childcare and neither parent is disabled or caring for a severely disabled child. *Id.* § 607(e)(1)(A)–(B).

of TANF, including subsidized or unsubsidized private or public sector employment, work experience such as refurbishing public housing, community service, job search and readiness activities, providing child care to someone doing community service, and various vocational training and educational activities.<sup>8</sup> Anyone who fails to meet their work requirements will see their family's benefits reduced at least pro rata according to the number of hours they missed, or eliminated altogether.<sup>9</sup> TANF also has a provision for welfare-to-work grants, through which private industry councils and similar entities receive federal funds to create new jobs, training, and educational provisions designed to move unemployed welfare recipients into permanent private-sector jobs.<sup>10</sup>

Similarly, the Supplemental Nutrition Assistance Program requires all "physically and mentally fit" recipients ages sixteen to fifty-nine to register for employment and accept any work or training assignment they are given for as long as they are in the program.<sup>11</sup> States may create workfare programs for SNAP recipients to meet the required work hours.<sup>12</sup> States administer SNAP benefits to households as a unit, and if any head of household does not meet their work requirements, the entire household is cut off food stamps, at least temporarily.<sup>13</sup>

But what protections do individuals have while performing their workfare jobs? What duty does the government have to the people it places into work assignments as a requirement for obtaining their basic subsistence needs? More specifically, what happens when a welfare recipient is sexually harassed at their government-mandated, and often government-run, job?

Workfare participants are not well protected from workplace sexual harassment and assault, but there are ways for government entities, the legal community, and grassroots organizations to improve on that grim reality. Section I of this Article will discuss the issue of sexual harassment<sup>14</sup> in the workplace and

8. 42 U.S.C. § 607(d)(1)–(12).

9. *Id.* § 607(e)(1)(A)–(B).

10. *Id.* § 603(5).

11. 7 U.S.C. § 2015(d)(1)(A) (2018). A person may refuse a work assignment for good cause, as determined by the State agency that administers SNAP, which may include sex discrimination by the employer. *Id.* §§ 2015(d)(1)(A), (d)(1)(D)(i) (allowing the Secretary of Agriculture to define "good cause"); 7 C.F.R. 273.7(i) (providing guidelines for State agencies to determine whether a participant has good cause for refusing a work assignment).

12. *Id.* § 2029(a).

13. *Id.* § 2015(d)(1)(B). If an individual who is not the head of a household fails to meet work requirements, they forfeit only their individual share of the funding.

14. For purposes of this Article, "sex discrimination" or "gender discrimination" means treating someone worse because of their sex or gender and includes a wide range of actions such as giving someone different training or work assignments, refusing to hire, or paying less based on sex or gender. *See Sex-Based Discrimination*, EEOC, <https://www.eeoc.gov/sex-based-discrimination> (last visited Sept. 7, 2020) [<https://perma.cc/SW26-MNDM>]; *see also Discrimination*, BLACK'S LAW DICTIONARY (11th ed. 2019) (using sex discrimination and gender discrimination interchangeably but noting medical and scientific trends to differentiate sex and gender). "Sexual harassment" is a type of sex or gender discrimination, and it consists of conduct that is sexual in nature or motivated by a person's sex, such as "unwelcome sexual advances" or "making offensive comments about women in general." *Sex-Based Discrimination*, *supra*; *see also, Sexual Harassment*, BLACK'S LAW DICTIONARY (11th ed.

why it is a particular issue for people who are placed in a job through a welfare program. Then, in Section II, I will examine the legal protections that are available to workfare workers through federal law. Finally, in Section III, I will discuss some suggestions for improving on those protections already in place, so that workfare participants can be less vulnerable as they earn a living.

## I. SEXUAL HARASSMENT IN THE WORKPLACE

### A. The Universal Issue

In recent years, the Me Too movement has brought discussions on sexual assault to the forefront of popular culture. Activist Tarana Burke founded the movement in 2006 as a way to support and empower young women of color who had experienced sexual abuse, assault, or exploitation.<sup>15</sup> Between October 15, 2017, and September 30, 2018, “#MeToo” was used over nineteen million times on Twitter as people all over the world used the hashtag to indicate that they had been sexually harassed or assaulted.<sup>16</sup> When Bill Cosby was convicted of aggravated indecent assault on April 26, 2018, it was considered “one of the first major courtroom victories for the #MeToo movement,”<sup>17</sup> even though courtroom convictions were not a goal Burke articulated for the movement.<sup>18</sup> A similarly high-profile conviction came in early 2020, when movie mogul Harvey Weinstein was convicted of sexual assault and rape against his production assistant, Mimi Haley, and actress Jessica Mann.<sup>19</sup> Several women have also filed civil suits against him, his companies, and various company executives. They allege that

---

2019). “Sexual assault” is any non-consensual, sexual touching. *Sexual Assault*, RAPE ABUSE & INCEST NAT’L NETWORK, <https://www.rainn.org/articles/sexual-assault> (last visited Sept. 7, 2020) [https://perma.cc/7Y47-ZD8U]. “Rape” is sexual assault that involves any sort of penetration. *Id.* For a more in-depth discussion of the difference between sexual harassment, assault, and rape, see Sarah L. Cook, Lilia M. Cortina & Mary P. Koss, *What’s the Difference Between Sexual Abuse, Sexual Assault, Sexual Harassment, and Rape?*, CONVERSATION (Feb. 7, 2018), <https://theconversation.com/whats-the-difference-between-sexual-abuse-sexual-assault-sexual-harassment-and-rape-88218> [https://perma.cc/KSC5-PWWU].

15. *The Movement*, JUST BE INC. <https://justbeinc.wixsite.com/justbeinc/the-me-too-movement-c7cf> (last visited Feb. 23, 2021) [https://perma.cc/HT2V-9GMS]; Abby Ohlheiser, *The Woman Behind ‘Me Too’ Knew the Power of the Phrase When She Created it – 10 Years Ago*, WASH. POST (Oct. 19, 2017) <https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/> [https://perma.cc/8CPD-TLW3].
16. Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RSCH. CTR. (Oct. 11, 2018), <https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/> [https://perma.cc/68XM-6Z7X].
17. Meredith Mandell, Adam Reiss & Daniella Silva, *Bill Cosby Found Guilty of Sexual Assault in Retrial*, NBC NEWS (Apr. 26, 2018, 5:33 PM), <https://www.nbcnews.com/storyline/bill-cosby-scandal/bill-cosby-found-guilty-sexual-assault-retrial-n869121> [https://perma.cc/KJW2-8G3K].
18. See *The Movement*, *supra* note 15 (explaining Burke’s goals in founding the Me Too movement as educating the public and empowering and connecting survivors).
19. *Harvey Weinstein Timeline: How the Scandal Unfolded*, BBC (Feb. 24, 2020), <https://www.bbc.com/news/entertainment-arts-41594672> [https://perma.cc/67FT-Q5GW].

Weinstein committed sexual misconduct and that his company and fellow executives were negligent in allowing the misconduct.<sup>20</sup> As the Time's Up movement spread throughout Hollywood,<sup>21</sup> more and more women have come forward with allegations of sexual misconduct against powerful men in the industry, from TV personalities like Matt Lauer and Tom Brokaw, to musicians like R. Kelly and Chris Brown, to executives like CBS's Les Moonves.<sup>22</sup>

But what about sexual harassment and assault that people without a national audience face? In fiscal year 2019, the U.S. Equal Employment Opportunity Commission (EEOC) received 7,514 allegations of sexual harassment, which is relatively average for the past ten years.<sup>23</sup> However, this number represents less than one third of the nationwide reports of workplace sexual assault—in 2013, there were 7,256 charges filed with the EEOC<sup>24</sup> and over thirty thousand charges filed with federal, state, and local agencies throughout the country.<sup>25</sup>

The actual problem is much larger than those numbers suggest, as various studies have shown that sexual harassment and assault are massively underreported, both in and out of the workplace. For example, a YouGov and Huffington Post poll from 2013 found that 13 percent of respondents had been sexually harassed by a boss or superior, 19 percent had been sexually harassed by a coworker, and only 27 percent of those individuals reported the harassment.<sup>26</sup>

- 
20. See *David v. Weinstein Co. LLC*, 431 F. Supp. 3d 290 (S.D.N.Y. 2019) (alleging violations of Trafficking Victims Protections Act (TVPA) and negligence); *Geiss v. Weinstein Co. Holdings LLC*, 383 F. Supp. 3d 156 (S.D.N.Y. 2019) (alleging TVPA and RICO violations, plus negligence and intentional tort); *Noble v. Weinstein*, 335 F. Supp. 3d 504 (S.D.N.Y. 2018) (alleging violations of TVPA); *Huett v. Weinstein Co. LLC*, No 2:18-cv-6012-SVW-MRW, 2019 WL 2902494 (C.D. Cal. Feb. 2019) (alleging sex trafficking and negligence); *Canosa v. Ziff*, No. 18 Civ. 4115 (PAE), 2019 WL 498865 (S.D.N.Y. Jan. 28, 2019) (alleging rape, sexual assault, intimidation, and harassment).
  21. Note that the Time's Up organization fights sexual assault and gender discrimination outside of Hollywood as well, but celebrity accusations are the ones that get the most popular attention. See *2019 Year in Review*, TIME'S UP (Dec. 15, 2019), <https://timesupnow.org/2019-year-in-review/> [<https://perma.cc/YPY3-H6AY>] (listing the organization's achievements, such as ending pregnancy discrimination at Nike, suing McDonalds and triggering company policy change over harassment, and connecting nearly four thousand workers who were sexually harassed to attorneys).
  22. *Post-Weinstein, These Are the Powerful Men Facing Sexual Harassment Allegations*, GLAMOUR (May 18, 2019), <https://www.glamour.com/gallery/post-weinstein-these-are-the-powerful-men-facing-sexual-harassment-allegations> [<https://perma.cc/92YZ-GXWJ>].
  23. *Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010 - FY 2019*, EEOC, [https://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment\\_new.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm) (last visited Nov. 29, 2020) [<https://perma.cc/ELV4-DLZU>] (reporting that there have been between 6,696 and 7,944 sexual harassment claims filed with the EEOC each year from 2010 to 2019).
  24. *Id.*
  25. Testimony of Fatima Goss Graves, Vice President for Education and Employment at the National Women's Law Center, before the EEOC (Jan. 14, 2015), <https://www.eeoc.gov/eeoc/meetings/1-14-15/graves.cfm> [<https://perma.cc/DZ4W-8DCT>].
  26. Jillian Berman & Emily Swanson, *Workplace Sexual Harassment Poll finds Large Share of Workers Suffer, Don't Report*, HUFFINGTON POST (Dec. 6, 2017), [https://www.huffpost.com/entry/workplace-sexual-harassment-poll\\_n\\_3823671](https://www.huffpost.com/entry/workplace-sexual-harassment-poll_n_3823671) [<https://perma.cc/3XUZ-29ZJ>]; Results from 1000 Adult Interviews by Huffington Post & YouGov (Aug. 2013), [http://big.assets.huffingtonpost.com/toplines\\_harassment\\_0819202013.pdf](http://big.assets.huffingtonpost.com/toplines_harassment_0819202013.pdf) [<https://perma.cc/AKR4-SCYR>].

And some of those reports may have been made internally to managers, as opposed to filed with the EEOC or another government agency. Other research suggests that as few as 10 percent of women who experience harassment formally report it.<sup>27</sup> And reporting rates for the most egregious sexual assault, rape, are even lower.<sup>28</sup>

More recent polls have found a high incidence of sexual misconduct in the employment context and in general, although studies vary widely in their exact estimates.<sup>29</sup> In 2018, over 40 percent of women and nearly 17 percent of men polled told the Pew Research Center that they had “received unwanted sexual advances or verbal or physical harassment of a sexual nature” at work.<sup>30</sup> That same year, 50 percent of women and 18 percent of men polled by Ipsos and National Public Radio said that they had been sexually harassed,<sup>31</sup> and 48 percent of women polled by Gallup reported the same.<sup>32</sup> The Centers for Disease Control and Prevention (CDC) similarly estimate that 44 percent of women and 25 percent of men have experienced sexual violence, and that 21 percent of women and 3 percent of men have survived a completed or attempted rape.<sup>33</sup> The CDC

- 
27. Elyse Shaw, Ariane Hegewisch & Cynthia Hess, *Sexual Harassment and Assault at Work: Understanding the Costs 2* (Inst. for Women’s Pol’y Rsch., Briefing Paper No. B376, 2018), [https://iwpr.org/wp-content/uploads/2020/09/TWPR-sexual-harassment-brief\\_FINAL.pdf](https://iwpr.org/wp-content/uploads/2020/09/TWPR-sexual-harassment-brief_FINAL.pdf) [<https://perma.cc/B6X4-7XEZ>].
  28. *Understanding Pregnancy Resulting from Rape in the United States*, CDC (Feb. 27, 2019), <https://www.cdc.gov/violenceprevention/datasources/nisvs/understanding-RRP-inUS.html> [<https://perma.cc/YX9S-ESZR>] (reporting that only 5.2 percent of individuals raped by an acquaintance report it to authorities); Anthony Lathrop, *Pregnancy Resulting from Rape*, 27 J. OBSTETRIC, GYNECOLOGIC & NEONATAL NURSING 25, 25 (1998) (estimating that 18 percent of all rape survivors report it).
  29. See Shaw et al., *supra* note 27, at 1 (citing studies estimating that 25 to 80 percent of women experience workplace sexual harassment); Rebecca C. Thurston, Yuefang Chang, Karen Matthews, Roland von Känel & Karestan Koenen, *Association of Sexual Harassment and Sexual Assault with Midlife Women’s Mental and Physical Health*, 179 JAMA INTERNAL MED. 48, 49 (2018) (“In the United States, an estimated 40% to 75% of women have experienced workplace sexual harassment, and over 1 in 3 women (36%) have experienced sexual assault.”).
  30. See Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, PEW RSCH. CTR. (Apr. 4, 2018), <https://www.pewsocialtrends.org/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo/> [<https://perma.cc/D6C7-D6D8>].
  31. IPSOS, IPSOS/NPR EXAMINE HOW VIEWS ON SEXUAL HARASSMENT HAVE CHANGED IN THE PAST YEAR 9 (Oct. 31, 2018), [https://www.ipsos.com/sites/default/files/ct/news/documents/2018-10/ipsos\\_npr\\_sexual\\_harassment\\_topline\\_103118\\_final.pdf](https://www.ipsos.com/sites/default/files/ct/news/documents/2018-10/ipsos_npr_sexual_harassment_topline_103118_final.pdf) [<https://perma.cc/PUT6-UVGZ>] [hereinafter IPSOS & NPR SEXUAL HARASSMENT POLL]; see also IPSOS, SEXUAL ASSAULT: A NEW DIVIDED ERA OF UNDERSTANDING 7 (Oct. 31, 2018) available at [https://www.ipsos.com/sites/default/files/2018-10/ipsos\\_npr\\_sexual\\_assault\\_topline\\_103118\\_final.pdf](https://www.ipsos.com/sites/default/files/2018-10/ipsos_npr_sexual_assault_topline_103118_final.pdf) [<https://perma.cc/2FFG-Z4FW>] [hereinafter IPSOS SEXUAL ASSAULT POLL] (reporting that 43 percent of female respondents and 13 percent of male respondents said they had been sexually assaulted).
  32. Megan Brenan, *U.S. Men Less Concerned than in 2017 About Sexual Harassment*, GALLUP (Mar. 18, 2019), <https://news.gallup.com/poll/247823/men-less-concerned-2017-sexual-harassment.aspx> [<https://perma.cc/TNW8-9EQM>].
  33. Sharon G. Smith, Xinjian Zhang, Kathleen C. Basile, Melissa T. Merrick, Jing Wang, Marciejo Kresnow & Jieru Chen, *National Intimate Partner and Sexual Violence Survey: 2015 Data Brief – Updated Release 2–3* (Centers for Disease Control and Prevention, 2018), <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf> [<https://perma.cc/K3KB-S5UV>].

additionally reports that 16 percent of women and 6 percent of men in the United States have been stalked.<sup>34</sup>

While these statistics are gruesome, this problem is not just about numbers, but about the human impact. Sexual harassment, whether verbal, physical, or both, is a great indignity to the target. It can cause lasting psychological harm such as depression, anxiety, and post-traumatic stress disorder (PTSD).<sup>35</sup> These psychological impacts may be even greater in the workfare population, as minority women have “societal trauma” which compounds the pain of sexual harassment.<sup>36</sup> Sexual harassment is also associated with other long-term health consequences, such as high blood pressure and insomnia.<sup>37</sup> Where physical violence is involved, there may be physical injuries, and rape puts women at risk of becoming pregnant.<sup>38</sup> The negative impacts of sexual harassment reverberate beyond the survivor’s health, straining interpersonal relationships with the perpetrator as well as other people in the survivor’s life.<sup>39</sup>

Sexual harassment also interferes with the target’s ability to do her job and advance in the workplace so it directly interferes with the stated goal of workfare to lead participants into permanent jobs. Negative health consequences such as anxiety and depression make it more difficult for anyone to perform their job well (or at all) and be recommended for advancement.<sup>40</sup> Lower job satisfaction due to

34. Smith et al., *supra* note 33, at 2–3.

35. See Kathleen M. Rospenda, Judith A. Richman, Jennifer L.Z. Ehmke & Kenneth W. Zlatoper, *Is Workplace Harassment Hazardous to Your Health?*, 20 J. BUS. & PSYCH. 95, 99 (2005) (reporting psychological impacts of sexual harassment were still present two years later); Shaw et al., *supra* note 27, at 4 (reporting that depression and PTSD can be effects of sexual harassment); Thurston et al., *supra* note 29, at 50–51 (finding that women with a history of sexual harassment at work were more likely to have “clinically elevated depressive symptoms” and anxiety in mid-life).

36. See generally, Thema Bryant-Davis, Heewoon Chung & Shaquita Tillman, *From the Margins to the Center: Ethnic Minority Women and the Mental Health Effects of Sexual Assault*, 10 TRAUMA, VIOLENCE & ABUSE 330 (2009). Societal trauma includes “intergenerational trauma, race-based trauma, sexism, racism, classism, heterosexism, historical trauma, insidious trauma, cultural violence, political and racial terror, and oppression.” *Id.* at 331.

37. Thurston et al., *supra* note 29, at 50–52.

38. Kate Clancy, *Here is Some Legitimate Science on Pregnancy and Rape*, SCI. AM. (Aug. 20, 2012), <https://blogs.scientificamerican.com/context-and-variation/here-is-some-legitimate-science-on-pregnancy-and-rape/#> [<https://perma.cc/DD6A-Q5PB>] (arguing that the incidence of pregnancy from rape is the same as pregnancy from consensual heterosexual sex, at 3 to 5 percent); Lathrop, *supra* note 28 (estimating that the likelihood that a given rape will result in pregnancy is between 4 to 10 percent); *Understanding Pregnancy Resulting from Rape*, *supra* note 28 (estimating that 17 percent of female rape survivors become pregnant as a result).

39. See generally Vicki Connop & Jenny Petrak, *The Impact of Sexual Assault on Heterosexual Couples*, 19 SEXUAL & RELATIONSHIP THERAPY 29 (2004) (discussing issues reported by heterosexual couples when the female partner is sexually assaulted by someone else, including sexual dysfunction, aversion to touching, communication errors, and increased rates of breaking up).

40. See, e.g., *Depression: A Costly Condition for Businesses*, AM. PSYCHIATRIC ASS’N FOUND. CTR. FOR WORKPLACE MENTAL HEALTH, <http://workplacementalhealth.org/Mental-Health-Topics/Depression> (last visited Sept. 7, 2020) [<https://perma.cc/LZ64-JUPV>] (discussing depression’s negative impacts on job performance). The American Psychiatric Association estimates that U.S. employers lose \$44 billion in lost productivity due to depression every year. *Id.*

harassment makes workers less productive and more likely to quit.<sup>41</sup> Harassment increases distractions in the workplace, which can decrease productivity and increase accidents.<sup>42</sup> It ruins relationships with potential mentors and supervisors and makes it more difficult to build beneficial business relationships.<sup>43</sup> Even bystanders to sexual harassment in the workplace are less likely to be happy, healthy, and productive employees and are more likely to quit.<sup>44</sup>

### B. Complications Particular to the Workfare Workforce

Millions of Americans depend on the federal government for temporary assistance at any given time. In 2018, just under half a million adults and over one million families received TANF assistance.<sup>45</sup> And in fiscal year 2019, an average of eighteen million households with over thirty-five million members received SNAP benefits each month.<sup>46</sup> Even with government assistance, these participants remain in deep poverty—in 2018, New Hampshire was the only state whose maximum TANF grant was over 50 percent of the federal poverty line based on family size.<sup>47</sup> Thus, it is no surprise that 90 percent of TANF recipients also receive medical assistance, 82 percent also receive SNAP benefits, 11 percent have subsidized housing, and 6 percent rely on subsidized childcare.<sup>48</sup>

TANF is designed to aid impoverished families with children,<sup>49</sup> and its adult recipients are primarily young, single mothers. In 2018, 72 percent of adult TANF recipients were single and never married, an additional 15 percent were separated, divorced, or widowed, and only 13 percent were married.<sup>50</sup> Eighty-six percent of

---

41. See M. Sandy Hershcovis, Sharon K. Parker & Tara C. Reich, *The Moderating Effect of Equal Opportunity Support and Confidence in Grievance Procedures on Sexual Harassment from Different Perpetrators*, 92 J. BUS. ETHICS 415, 423 (2010).

42. Shaw et al., *supra* note 27, at 4.

43. *Id.* at 5. See also Elizabeth R. Langton, *Workplace Discrimination as a Public Health Issue: The Necessity of Title VII Protections for Volunteers*, 83 FORDHAM L. REV. 1455, 1484–86 (2014) (discussing how sexual harassment limits the target's participation in the workplace as a public forum for civic discourse).

44. Langton, *supra* note 43, at 1479–81, 1487; See also Heather Antecol & Deborah Cobb-Clark, *Does Sexual Harassment Training Change Attitudes? A View from the Federal Level*, 84 SOC. SCI. Q. 826, 828 (2003) (“[T]here is mounting evidence that employment-related sexual harassment imposes large costs on workers and firms through increased job turnover, higher absenteeism, reduced job satisfaction, lower productivity, and adverse health outcomes”).

45. U.S. DEP'T OF HEALTH & HUM. SERVS., OFFICE OF FAMILY ASSISTANCE, CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES OF TANF RECIPIENTS FISCAL YEAR (FY) 2018 4, 20 (2019) [hereinafter HHS 2018 TANF Report].

46. U.S. DEP'T OF AGRIC., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM PARTICIPATION AND COSTS (Dec. 11, 2020), <https://fns-prod.azureedge.net/sites/default/files/resource-files/34SNAPmonthly-1a.pdf> [<https://perma.cc/UMS5-U8G3>].

47. GENE FALK & PATRICK A. LANDERS, THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: RESPONSES TO FREQUENTLY ASKED QUESTIONS 7–8 (2019). The federal poverty guidelines are set yearly by HHS and are used for administrative purposes such as determining eligibility for certain federal aid programs. See *Poverty Guidelines*, HHS OFFICE OF ASSISTANT SEC'Y FOR PLANNING & EVALUATION (Jan. 8, 2020), <https://aspe.hhs.gov/poverty-guidelines> [<https://perma.cc/M5DE-6Q3L>].

48. HHS 2018 TANF Report, *supra* note 45, at T11.

49. 42 U.S.C. § 601(a).

50. HHS 2018 TANF Report, *supra* note 45, at T22.



adult recipients were women, nearly half of whom were in their twenties, and another third of whom were in their thirties.<sup>51</sup> All of these adults were parents or guardians of minor children, and just over half reported that their youngest child was under the age of six.<sup>52</sup> Over half of all adult TANF recipients have completed high school but few have any education beyond that.<sup>53</sup> This is in stark contrast to the overall U.S. adult population, in which 11 percent do not finish high school, 29 percent only finish high school, and 60 percent receive some higher education.<sup>54</sup> The racial and ethnic composition of the TANF population is also disproportionate to the country as a whole: it is 38 percent Hispanic, 29 percent Black, 27 percent White, and 2 percent Asian.<sup>55</sup> The general U.S. population is 18 percent Hispanic or Latino, 13 percent Black or African American, 60 percent White, and 6 percent Asian,<sup>56</sup> meaning Black and Latine people are hugely overrepresented in the TANF population, while White and Asian people are underrepresented.

### 1. Low Power Means High Risk of Harassment

Various factors add up to place welfare workers at a relatively high risk of sexual harassment and assault in the workplace. One of those factors is low economic power. Low-wage workers in general are at a high risk of being sexually harassed at work.<sup>57</sup> In 2018, about two thirds of the people who contacted the Times Up Legal Defense Fund requesting legal assistance with their sexual harassment claims were low-wage workers.<sup>58</sup> Low-wage workers, especially those

---

51. HHS 2018 TANF Report, *supra* note 45, at T18.

52. *Id.* at T9.

53. *Id.* at T20 (showing that 35.9 percent of adult TANF recipients have not completed high school, 55.3 percent are high school graduates, and 8.8 percent have more than a high school education).

54. *See Educational Attainment in the United States: 2018: Table 1*, U.S. CENSUS BUREAU (Feb. 21, 2019), <https://www.census.gov/data/tables/2018/demo/education-attainment/cps-detailed-tables.html> [<https://perma.cc/9JMZ-8JU6>].

55. HHS 2018 TANF Report, *supra* note 45, at T10. The adult-only population is slightly different but still highly disproportionate at 31.8 percent Hispanic, 31.2 percent Black, 30.5 percent White, and 2.9 percent Asian. *Id.* at T19.

56. *QuickFacts: United States*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/fact/table/US/PST045218#qf-headnote-b>. Note that both HHS and the Census Bureau state “Hispanics may be of any race.” *Id.*; HHS 2018 TANF Report, *supra* note 45, at T10.

57. *See* Bryant-Davis et al., *supra* note 36, at 333 (stating that low-wage workers and those receiving public assistance are more likely to suffer sexual assault); GWENDOLYN MINK, *HOSTILE ENVIRONMENT: THE POLITICAL BETRAYAL OF SEXUALLY HARASSED WOMEN* 139 (2000) (noting vulnerability of low-wage workers to sexual harassment); Jocelyn Frye, *Not Just the Rich and Famous: The Pervasiveness of Sexual Harassment Across Industries Affects All Workers*, Ctr. for Am. Progress (Nov. 20, 2017), <https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/> [<https://perma.cc/CRK8-Q5KM>] (same); Testimony of Fatima Goss Graves, *supra* note 25 (same).

58. Alex Press, *Women are Filing More Harassment Claims in the #MeToo Era. They're Also Facing More Retaliation*, VOX (May 9, 2019), <https://www.vox.com/the-big-idea/2019/5/9/18541982/sexual-harassment-me-too-eoec-complaints> [<https://perma.cc/3ETZ-QVZF>].

on welfare, face high risks if they lose their jobs and may be more willing to bear harassment at work rather than report it and possibly lose their income.<sup>59</sup> Welfare workers, whose income is calculated by the government to cover only their basic necessities, do not have the extra income to hire a lawyer to bring legal action against their harassers. Moreover, even if they are lucky enough to locate pro bono legal services, these workers must find the time to meet with their lawyer and go through the steps to bring a claim between their work activities, daily check-ins with the welfare office, and childcare responsibilities—which, by definition, all TANF recipients have.

Even more so than other low-wage workers, workfare participants may be perceived as expendable to employers. Although workfare participants are a source of very cheap labor—they are generally paid the minimum wage, which may be subsidized by the government—employers are not supposed to displace any hired employees with welfare workers.<sup>60</sup> So while cheap labor is valuable to any business, welfare workers are often seen as surplus employees who can be dominated and abused, rather than valuable members of the team.<sup>61</sup> Since businesses put few resources into hiring and training welfare workers, and many are brought on only as temporary workers, employers have less incentive to keep them than permanent workers—including the supervisors who may be engaging in harassment. Further, if one welfare worker quits or is reassigned, there is likely to be a new welfare recipient to fill their position.

In addition to being seen as expendable, workfare participants may be particular targets for sexual harassment because it is unclear what legal protections apply to them. As will be discussed later, it is not clear that federal law protects TANF recipients from gender discrimination in the workplace, the category under which sexual harassment falls.<sup>62</sup> If hired employees are protected by nondiscrimination law but those sent by the welfare office are not, the latter become targets as harassing them carries less risk.<sup>63</sup> Lack of clear protection under

---

59. See Ginger Adams Otis, *Female Parks Department Workers Stripped for Permanent Jobs, More Work at Raunchy Holiday Parties: Sources*, N.Y. DAILY NEWS (May 29, 2013), <https://www.nydailynews.com/new-york/women-parks-dept-stripped-better-jobs-sources-article-1.1357067> [<https://perma.cc/WW3G-KRSE>] (“Many of the women [forced to pole dance at a holiday party] are low-income single mothers, some of whom came into the job through the welfare system and are desperate to keep the seasonal positions that can run anywhere from four to six months at a time.”); MINK, *supra* note 57, at 139–40 (“[T]he cost of harassment is uniquely high for women who risk destitution if they complain about it. Low-wage women workers, including mothers on welfare, are particularly vulnerable in this way . . . [t]hose who need welfare would do best to suffer their sexual harassment if their only alternative is to quit their required work activity, deplete their time limits, and lose their families’ benefits.”); Shaw et. al. *supra* note 27, at 4 (noting that low-wage workers are at heightened risk for sexual harassment because they lose more from retaliation and job loss); Thurston et al., *supra* note 29, at 51 (“[F]inancially stressed women can lack the financial security to leave abusive work situations.”).

60. 7 U.S.C. § 2029(d)(1) (2018); 42 U.S.C. § 607(f) (2018).

61. ERIN HATTON, COERCED: WORK UNDER THREAT OF PUNISHMENT 103 (2020).

62. See *infra* section II.A. (discussing Title VII protection of workfare participants).

63. Nicola Kean, *The Unprotected Workforce: Why Title VII Must Apply to Workfare Participants*, 9 TEX. J. C.L. & C.R. 159, 194 (2004).

federal law also sends a message that these workers *can* be harassed.<sup>64</sup> This contributes to societal stigma of welfare recipients and workplace culture that dehumanizes them.<sup>65</sup> This environment then makes it more socially acceptable to abuse welfare workers.<sup>66</sup>

Welfare workers have limited power in other ways as well. As people filling temporary and entry-level positions, welfare workers are always at the bottom of the business hierarchy. This means supervisors can leverage their power to coerce welfare workers. Researchers have found that significant power differentials put lower-level workers at an increased risk of being sexually harassed.<sup>67</sup> For example, supervisors may put a welfare recipient's benefits at risk by hiding their time cards or threatening to have their work placement terminated.<sup>68</sup> Or supervisors may use their role in giving assignments to order a worker into a vulnerable place where she is easier to assault. For example, asking her to help with something in a supply room and then trapping her inside and raping her.<sup>69</sup>

Demographic factors add to the power dynamic. Impoverished women of color—the predominant TANF-recipient population—lack political and social power with which to defend themselves or leverage government aid. Studies and polls universally show that women are more often targets of sexual harassment than men.<sup>70</sup> A YouGov and Huffington Post poll found that Hispanic and Black women suffered workplace sexual harassment at higher rates than White workers,<sup>71</sup> a result that is backed up by other research.<sup>72</sup> The relative youth of

64. Kean, *supra* note 63.

65. *E.g.*, HATTON, *supra* note 61, at 114–15 (stating that welfare recipients report “pervasive verbal abuse” by supervisors).

66. *See* Matthew Diller, *Working Without a Job: The Social Messages of the New Workfare*, 9 STAN. L. & POL'Y REV. 19, 28–29 (1998) (arguing that social stigma and creation of a “welfare caste” is designed to discourage people from using welfare and allow harsher work conditions); HATTON, *supra* note 61, at 102–03 (arguing that degrading treatment of welfare workers makes them seem lesser, which justifies further subjugating them).

67. Shaw et al., *supra* note 27, at 4.

68. This happened to two women on workfare in New York City, who were forced out of their work assignments by sexual harassment and eventually filed discrimination claims against the City. *United States v. City of New York*, 359 F.3d 83, 88, 89 (2d Cir. 2004).

69. *See* *Ellis v. Washington*, 409 F. Supp. 3d 148, 152 (W.D.N.Y. 2019).

70. *E.g.* Berman & Swanson, *supra* note 26 (reporting that 20 percent of female and 6 percent of male respondents had been sexually harassed by a supervisor); *Charges Alleging Sex-Based Harassment*, *supra* note 23 (reporting that only 16–18 percent of sexual harassment complaints filed with the EEOC are made by men); Smith et al., *supra* note 33, at 2–3 (reporting that 44 percent of women and 25 percent of men were targets of sexual violence, while 21 percent of women and 3 percent of men were targets of rape).

71. Huffington Post & YouGov Poll Results (Aug. 19–20, 2013) [http://big.assets.huffingtonpost.com/tabs\\_harassment\\_0819202013.pdf](http://big.assets.huffingtonpost.com/tabs_harassment_0819202013.pdf) [<https://perma.cc/C4B5-VJBN>] (reporting that 18 percent of Hispanic respondents, 17 percent of Black respondents, and 12 percent of White respondents were sexually harassed by a supervisor and 29 percent of Black respondents, 18 percent of Hispanic respondents, and 17 percent of White respondents were harassed by a coworker). *See* Berman & Swanson, *supra* note 26, for a full discussion of the poll results.

72. Tanya Katerí Hernández, *The Racism of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 479, 481 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (“What the data suggests is that sexual harassers may target White women as victims at

TANF workers<sup>73</sup> also puts them at a disadvantage since “women who are younger or are in more precarious employment situations are more likely to be harassed” at work.<sup>74</sup>

Researchers John Krinsky and Maud Simonet found many of these factors at play when they studied sexual harassment in the New York City Parks Department. In interviews with 130 Parks Department workers over four years, they found that sexual harassment was prevalent, and that “[e]veryone understood job training participants in the [welfare-to-work program] to be the main targets of harassment.”<sup>75</sup> Interviewees attributed this in part to the fact that welfare-to-work participants were only given six-month assignments and were rarely hired into permanent positions at the end—in other words, they were expendable.<sup>76</sup> The authors added another dimension to the power dynamics: while 68 percent of permanent Parks Department employees were men, 74 percent of the welfare workers were women, and 90 percent of them were Black or Latine individuals.<sup>77</sup> As Krinsky and Simonet put it, “When the department created a stratum of workers who were both overwhelmingly women and very poor, in precarious positions, it should have been obvious things would go wrong.”<sup>78</sup> And in 2013, pictures and text messages from a city Parks Department holiday party led to reporting that supervisors in the department used their power over hiring decisions to make temporary female workers, who were “desperate to keep the[ir] seasonal positions,” dance on stripper poles in hopes of having their time at the department extended.<sup>79</sup>

## 2. Barriers to Reporting

As stated above, only a small percentage of all sexual assaults and harassment incidents in the United States are reported.<sup>80</sup> The reasons behind the vast underreporting that are discussed above apply to welfare workers, and some disproportionately impact welfare workers.

One reason that many employees do not report sexual harassment is fear of retaliation.<sup>81</sup> In one 2018 Ipsos poll, three quarters of respondents said that there

---

disproportionately lower rates than women of color. This conclusion is consistent with some of the few empirical studies to specifically focus on the influence of race on sexual harassment.”).

73. See HHS 2018 TANF Report, *supra* note 45, at T16 (about 80 percent of TANF recipients are in their twenties and thirties).

74. Thurston et al., *supra* note 29, at 51.

75. John Krinsky & Maud Simonet, *Playgrounds for Sexual Harassers: Our Parks Department has a Workplace Climate Rife for Misconduct*, N.Y. DAILY NEWS (Dec. 18, 2017), <https://www.nydailynews.com/opinion/playgrounds-sexual-harassers-article-1.3702100> [<https://perma.cc/5ZAY-L5N8>].

76. *Id.*

77. *Id.*

78. *Id.*

79. Otis, *supra* note 59.

80. See *supra* notes 26–29 and accompanying text.

81. Frye, *supra* note 57 (“[W]omen—particularly women of color—are more likely to work lower-

are “significant personal and professional costs for women who report being sexually assaulted.”<sup>82</sup> This polling number is backed by statistics. Just under three quarters of the sexual harassment claims filed with the EEOC include allegations of retaliation.<sup>83</sup> In Erin Hatton’s interviews with workfare participants, most reported they felt that they could not push back against any kind of verbal abuse from supervisors without being sanctioned.<sup>84</sup> Moreover, welfare workers may fear retaliation not only from their worksite supervisors, but also from their government caseworkers. Austin Sarat found that some welfare recipients worried that going to lawyers and making complaints about reduced benefits or other issues with their welfare would cause them to “be labelled ‘troublemakers’ or ‘bad actors’ by welfare officials, who might then use some minor violation of an unknown rule as an excuse to get revenge.”<sup>85</sup> While each state system and its rules are different, caseworkers generally have great discretion to determine what counts as a sanctionable violation of the work requirement.<sup>86</sup> In addition, upsetting a caseworker can be particularly dangerous, since they may have influence over a range of benefits that a recipient receives, from wages (TANF) and food supply (SNAP), to healthcare (Medicaid) and housing assistance.<sup>87</sup> Further, welfare recipients have little protection from such retaliation because many Administrative Law Judges (ALJs), who decide whether benefits were wrongfully terminated, apply rules strictly without inquiring into the reasons behind violations.<sup>88</sup> Thus, a workfare participant who misses work the day after being sexually harassed by a supervisor because she has reported the abuse and is waiting for a new assignment may be sanctioned for missing work and may have that sanction upheld by an ALJ despite her very good reason to miss a shift.

Whether the retaliation comes from a supervisor who can jeopardize a person’s workfare placement or a social worker who can directly terminate the individual’s benefits, these forms of retaliation are uniquely dangerous to workers on welfare. Many people who face retaliation at work have the option of seeking

---

wage jobs, where power imbalances are often more pronounced and where fears of reprisals or losing their jobs can deter victims from coming forward.”); Shaw et al., *supra* note 27, at 2, 4 (citing fear of retaliation as a reason that 10 percent of sexual harassment is reported and noting that low-wage workers face particularly serious consequences).

82. IPSOS & NPR SEXUAL ASSAULT POLL, *supra* note 31, at 7.

83. Press, *supra* note 58.

84. HATTON, *supra* note 61, at 115–16.

85. Austin Sarat, “...*The Law Is All Over*”: *Power, Resistance, and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 361 (1990). See also Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 34 (1990) (“And [the welfare recipient] knew that the rules of welfare would give the county plenty of ways to make her life hard if she became known as a troublemaker.”).

86. Vicki Lens, *Bureaucratic Disentitlement After Welfare Reform: Are Fair Hearings the Cure?*, 12 GEO. J. POVERTY L. & POL’Y 13, 27–28, 51 (2005).

87. See White, *supra* note 85 (noting a welfare recipient’s fear of angering social workers because she could lose her general assistance and housing); HHS 2018 TANF Report, *supra* note 45, at T11 (showing other government programs used by TANF recipients).

88. Vicki Lens, *Revisiting the Promise of Kelly v. Goldberg in the Era of Welfare Reform*, 21 GEO. J. POVERTY L. & POL’Y 43, 62–63, 78 (2013).

new employment (albeit with questionable feasibility). While welfare workers too can look for a new job, the reason they are on welfare in the first place is that they have not been able to find employment outside the welfare system.<sup>89</sup> Moreover, when someone outside of the workfare system loses their job, they can look for government assistance through programs like TANF, SNAP, and unemployment insurance. But someone who loses their TANF or SNAP benefits due to retaliation from their workfare supervisor or welfare caseworker has been kicked out of the social safety net. They may be able to claim unemployment insurance<sup>90</sup> but do not have any other programs to fall back on.<sup>91</sup>

Fear of retaliation is often accompanied by a lack of faith that those in power will bring about justice. Polls in 2018 found that half of Americans think men getting away with sexual harassment is a major issue,<sup>92</sup> and 30 percent said that reports of sexual assault are “generally ignored.”<sup>93</sup> Welfare recipients deal with an additional level of bureaucracy when making sexual harassment complaints. Many of the welfare recipients Sarat interviewed expressed feelings that legal services attorneys, judges, and social workers were all part of the same government bureaucracy ultimately working for the government that signed their paychecks as opposed to the welfare recipients seeking assistance.<sup>94</sup> As one welfare recipient said succinctly, “Welfare, legal services, it’s all the Man.”<sup>95</sup> Many believed that since the lawyers, judges, and social workers tended to be repeat players within the same system, they played politics and did political favors for each other with little regard for the individual welfare recipients they served.<sup>96</sup> Some felt that these institutional players, such as lawyers and judges, were racist and prejudiced against poor people and would treat welfare recipients badly based on those biases.<sup>97</sup> This distrust of the legal and administrative system that handles complaints makes putting life-sustaining benefits at risk by reporting sexual harassment even less attractive.

Sarat’s interviewees were not entirely wrong, either. While many of the lawyers, social workers, and administrative judges want to help welfare recipients get their life-sustaining benefits, there are flaws in the system. Every state has its

---

89. See, e.g., HATTON, *supra* note 61, at 131 (quoting workfare participant as saying, “I don’t want to be here as much as you don’t want me here. . . . If I could find a regular job and work, I would.”).

90. See 45 C.F.R. § 260.35(b) (2019) (stating that unemployment insurance applies to TANF beneficiaries as it does to other workers).

91. HATTON, *supra* note 61, at 137 (noting difference between economic coercion in the average job and “status coercion” where “workfare workers may lose access to the social safety net,” which is a more “punitive and far-reaching consequence.”).

92. Graf, *supra* note 30.

93. IPSOS SEXUAL ASSAULT POLL, *supra* note 31, at 7.

94. Sarat, *supra* note 85, at 351–55. See also Lens, *Revisiting the Promise*, *supra* note 88, at 74–76 (“Skepticism, not fear, keeps them from appealing; they believe the fair hearing system is indistinguishable from the welfare agency, which they view as inflexible, intractable, and arbitrary.”).

95. Sarat, *supra* note 85, at 351.

96. *Id.* at 356–57.

97. *Id.* at 357–58.

own system for deciding welfare disputes, but generally hearings to determine whether a person's benefits were rightfully terminated or reduced are run by administrative agencies within the executive branch, not by courts. As Lisa Brodoff explains, "In the federal system and in almost half of all state hearing systems, the ALJ is directly employed by the very agency whose decision is being challenged by the low-income appellant."<sup>98</sup> This means that the supposedly neutral decision-maker depends on one of the parties for their income, advancement, supervision, office resources, and more.<sup>99</sup>

The ALJ's entrenchment within the agency also leads some of the judges to take on the biases of the agency that recipients are irresponsible and to ignore agency shortcomings such as failure to answer the phone or to schedule appointments around a recipient's workfare schedule.<sup>100</sup> The first appeal is generally still within the agency itself, and welfare recipients must exhaust their administrative options before judicial review is available. But the judicial branch is limited in its ability to change the outcome of the case, given the deference judges must give to administrative officials who are supposedly experts in their fields and therefore more suited to make the correct decision than generalist judges.<sup>101</sup>

Finally, workers have to know their rights and how to enforce them in order to act on those rights. In 2018, 46 percent of American respondents told Ipsos that it is sometimes hard to know what is sexual assault.<sup>102</sup> Vox similarly reported that many women do not know what conduct is unlawful sexual harassment so they do not report what happens to them.<sup>103</sup> A common question to the Rape, Abuse, and Incest National Network telephone hotline is, "Was I raped?"<sup>104</sup> Confusion even amongst the legal community as to who is responsible for sexual harassment against workfare participants<sup>105</sup> makes it even harder for individuals to know when their legal rights have been violated. And the largely undereducated workfare population may also struggle with the formalities of a bureaucratic system for making complaints.<sup>106</sup>

---

98. Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 32 N.Y.U. REV. L. & SOC. CHANGE 131, 157–58 (2008).

99. Brodoff, *supra* note 98, at 157–159.

100. Lens, *Revisiting the Promise*, *supra* note 88, at 59–62.

101. See Brodoff, *supra* note 98, at 145–46 (noting that federal judges must uphold ALJ decisions that are supported by *some* evidence rather than a preponderance of evidence).

102. IPSOS SEXUAL ASSAULT POLL, *supra* note 31, at 3.

103. Press, *supra* note 58.

104. Shaila Dewan, *She Didn't Fight Back: 5 (Misguided) Reasons People Doubt Sexual Misconduct Victims*, N.Y. TIMES (Nov. 30, 2017), <https://www.nytimes.com/2017/11/30/us/sexual-harassment-weinstein-women.html> [https://perma.cc/8JFN-9NER].

105. See Section II.A., *infra* for a discussion of whether Title VII applies to workfare participants.

106. On a similar note, Vicki Lens posits that many welfare workers do not take advantage of the Fair Hearing process in part because it requires public speaking on one's behalf and navigating evidentiary rules. Lens, *Bureaucratic Disentitlement*, *supra* note 86, at 53.

### 3. Perceived Lack of Credibility

While all people who accuse another of wrongdoing must prove it before they will be compensated, people who claim that another person sexually harassed or assaulted them face especially burdensome challenges. As Gwendolyn Mink puts it, “What stands between sexual harassment law and women’s vindication is that the law operates within a regime of disbelief.”<sup>107</sup> Although only 5 to 7 percent of sexual assault reports are false,<sup>108</sup> Americans tend to think that false reports are common. Almost one third of respondents told the Pew Research Center that false claims of harassment or assault are a major issue,<sup>109</sup> but over half told Ipsos that false sexual assault allegations against men are “very common.”<sup>110</sup> While 77 percent said that accusers should be given the benefit of the doubt until proven otherwise, 79 percent said the same of the accused,<sup>111</sup> and unless the accused admits their wrongdoing, only one can be believed. Similarly, while police officers say that they begin with a presumption that accusers are telling the truth, those who are more veteran in the field also claim that they can intuit who is lying based on the speaker’s display of emotion,<sup>112</sup> a completely unreliable indicator.<sup>113</sup> As Deborah Tuerkheimer explains, “Although false reports of rape are uncommon, law enforcement officers often default to incredulity when women allege sexual assault, resulting in curtailed investigations and infrequent arrests.”<sup>114</sup>

There are various reasons we tend not to believe sexual misconduct accusers. Psychologists explain that we do not want to believe that sexual assault is as prevalent as it is so we discount accusations.<sup>115</sup> Additionally, we tend to think of sexual assault as perpetrated by strangers in dangerous situations as opposed to by acquaintances in the workplace.<sup>116</sup> Further, we all have ideas of how we think sexual assault survivors would behave. We might believe that they would

---

107. MINK, *supra* note 57, at 136.

108. Dewan, *supra* note 104; Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PENN. L. REV. 1, 18–20 (2017) (citing studies which found that 4.5 to 6.8 percent of police reports alleging sexual assault were false, and 5.9 percent of similar reports to a university).

109. Graf, *supra* note 30.

110. IPSOS SEXUAL ASSAULT POLL, *supra* note 31, at 2.

111. *Id.*

112. Melissa S. Morabito, Linda M. Williams & April Pattavina, *Decision Making in Sexual Assault Cases: Replication Research on Sexual Violence Case Attrition in the U.S.* 52–53, 59–60 (National Criminal Justice Reference Service, 2019), <https://www.ncjrs.gov/pdffiles1/nij/grants/252689.pdf> [<https://perma.cc/JUK9-SVTM>]; see also Regina A. Schuller, Blake M. McKimmie, Barbara M. Masser & Marc A. Klippenstine, *Judgements of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender, and Victim Stereotypes*, 13 NEW CRIM. L. REV. 759, 766–68, 779 (2010) (stating that judges, jurors, and police investigators are more likely to believe women who are visibly upset about their harassment as opposed to emotionally restrained).

113. See Dewan, *supra* note 104 (explaining that survivors react in different ways to sexual assault); Schuller et al., *supra* note 112, at 768–69 (noting that both sadness and numbness are common demeanors for sexual assault survivors describing their assault).

114. Tuerkheimer, *supra* note 108, at 28.

115. Dewan, *supra* note 104.

116. *Id.*



physically fight back, be enraged afterward, shun their attacker, report it immediately, and remember every detail of such a large event.<sup>117</sup> But every individual responds to traumatic events differently. Some may blame themselves for what happened, while others may need to remain on good terms with an attacker, especially if that person controls the survivor's paycheck.<sup>118</sup>

Additionally, perpetrators, their lawyers, and their supporters put considerable energy into destroying the credibility of the survivors who try to expose wrongdoing. For example, Weinstein's lawyer, Donna Rotunno, argued to both the jury and the media that the actresses who accused Weinstein of sexual misconduct had used him to get a leg up in the entertainment industry, that they could not have been raped because they voluntarily communicated with Weinstein after the alleged assaults, and that they actually just regretted having sex with him and were now turning that into legal action.<sup>119</sup> Those accused also claim that their accusers only want money and attention or to destroy the lives and reputations of the accused. Credibility issues are compounded for welfare recipients. The stigma of welfare recipients as fraudulent makes some recipients afraid to speak out.<sup>120</sup> For those who do speak out, the stigma weakens their credibility. The name of the bill that created TANF, the Personal Responsibility and Work Opportunity Reconciliation Act, reflects the popular belief that welfare recipients are lazy and must be forced into work. When a workfare participant claims that her supervisor assaulted her, the person receiving the report might believe that the participant is trying to get out of work or be transferred to an easier position. And if she brings a civil claim against a harasser, there is even more reason to say that the welfare recipient, who is just getting by on government benefits, is in it only for the money. Defense attorneys in Illinois claimed a woman who filed a rape claim against her workfare supervisor was trying to get out of her work assignment and still make the money.<sup>121</sup> The prosecutor in the criminal case responded that it would have been easier to "clean some bathrooms" than to lie about sexual assault to police,

---

117. Dewan, *supra* note 104; Schuller et al., *supra* note 112, at 763–64 (“[R]esearch has consistently demonstrated that women are more likely to be evaluated as genuine victims of rape if they are chaste and respectable, are unknown to their assailant, are sober, have fought back (with injuries to prove it), and report the incident immediately to the police.”).

118. Dewan, *supra* note 104.

119. See Christina Cauterucci, *What Kind of Woman Defends Harvey Weinstein?*, SLATE (Feb. 14, 2020), <https://slate.com/news-and-politics/2020/02/harvey-weinstein-lady-lawyer-donna-rotunno-not-worse.html> [<https://perma.cc/U9B9-PDHH>] (quoting Rotunno as saying “Regret sex is not rape.”); Ed Pilkington, *Donna Rotunno: The Legal Rottweiler Leading Harvey Weinstein’s Defense*, GUARDIAN (Feb. 9, 2020), <https://www.theguardian.com/film/2020/feb/09/donna-rotunno-lawyer-leading-harvey-weinsteins-defense> [<https://perma.cc/DB4D-Z2S7>] (describing defense arguments that accusers used Weinstein to get money, party invitations, and career advancements); The Daily Podcast, *The Woman Defending Harvey Weinstein*, N.Y. TIMES (Feb. 7, 2020), <https://www.nytimes.com/2020/02/07/podcasts/the-daily/weinstein-trial.html> [<https://perma.cc/P5ZT-WUAJ>] (stating that contact between the accusers and Weinstein after the alleged sexual assaults proved it had been consensual).

120. White, *supra* note 85, at 37–38.

121. Mary Schenk, *Jury Acquits Man in Sexual Assault Case*, NEWS-GAZETTE (Apr. 10, 2013), [https://www.news-gazette.com/news/jury-acquits-man-in-sexual-assault-case/article\\_285d67c4-5afe-51a0-a221-c155edee8de4.html](https://www.news-gazette.com/news/jury-acquits-man-in-sexual-assault-case/article_285d67c4-5afe-51a0-a221-c155edee8de4.html) [<https://perma.cc/S3EX-U56T>].

nurses, lawyers, and the court for her \$243 in benefits.<sup>122</sup>

Demographics again play a role here. Researchers in Australia investigating sexual harassment cases found “that credibility is more likely to correlate with being Anglo, very young, a rational (masculine) demeanor/presentation in giving evidence, corroborative witnesses and legal representation.”<sup>123</sup> While here the relative youth of the TANF population might be to the participants’ benefit, race and gender will not. Nor will socioeconomic status, which makes TANF recipients unlikely to have legal representation at any step in the process. Workfare participants likely have a hard time collecting evidence that is already difficult to obtain in sexual harassment cases. Listeners who see the speaker as being part of a “suspect social group” (such as women on welfare) are more likely to distrust the speaker and amplify any signs that what they are saying is false.<sup>124</sup> On top of that, women alleging sexual misconduct are more likely to be believed if they are seen as “respectable” and “chaste.”<sup>125</sup> Given that the vast majority of TANF adult recipients are single mothers who never married,<sup>126</sup> they will likely not be seen as “chaste” by whoever is responsible for evaluating their credibility.

The issue of credibility is especially a problem for women of color who are “stereotyped as oversexed and wanton and thus the quintessential prostitute, in contrast to the depiction of White women as inherently respectable and pure.”<sup>127</sup> As Marilyn Yarbrough and Crystal Bennett explain, “[b]ecause of society’s image of African American women as highly sexual beings, there is a lingering myth that they cannot really be raped.”<sup>128</sup> These negative stereotypes also make Black women less likely to report sexual harassment than White women.<sup>129</sup>

## II. FEDERAL PROTECTIONS IN PLACE

### A. Title VII

What legal protections did Congress provide for the welfare recipients it required to go to work when it passed the PRWORA? It added a provision to the law which explicitly incorporated the Age Discrimination Act of 1975, 29 U.S.C. § 794 (Nondiscrimination under Federal grants and programs), the Americans with

---

122. *Id.*

123. Patricia Easteal & Keziah Judd, ‘*She Said, He Said*’: *Credibility and Sexual Harassment Cases in Australia*, 31 *WOMEN’S STUD. INT’L FORUM* 336, 336 (2008).

124. Tuerkheimer, *supra* note 108, at 14.

125. Kateri Hernández, *supra* note 72, at 484; CARINE M. MARDOROSSIAN, *FRAMING THE RAPE VICTIM: GENDER AND AGENCY RECONSIDERED* 28 (2014) (recording statements by politicians that true rape survivors are chaste).

126. *See supra* notes 50–52 and accompanying text.

127. Kateri Hernández, *supra* note 72, at 485; *see also* Frye, *supra* note 57 (“Women of color, in particular, often must confront the combined impact of racial, ethnic, and gender prejudice that can result in degrading stereotypes about their sexual mores or availability and increase their risk of being harassed.”).

128. Marilyn Yarbrough & Crystal Bennett, *Cassandra and the “Sistahs”*: *The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 *J. GENDER, RACE & JUST.* 625, 650 (2000).

129. Bryant-Davis et al., *supra* note 36, at 335.

Disabilities Act of 1990, and Title VI of the Civil Rights Act of 1964.<sup>130</sup> Workfare participants are thus protected from discrimination on the basis of age, disability, race, color, and national origin.

Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of sex,<sup>131</sup> is conspicuously missing from the list. If we were to follow “[o]ne of the most frequently invoked, and frequently criticized, semantic canons of construction,” *expressio unius*,<sup>132</sup> we would say that the fact that Congress explicitly included four nondiscrimination laws in the PRWORA means it implicitly excluded Title VII. Further, Congress explicitly added a prohibition on gender discrimination to the welfare-to-work grant section of the PRWORA.<sup>133</sup> This addition suggests Congress did not think gender discrimination was prohibited in the rest of TANF. If gender discrimination was already forbidden by section 608(d) of the law, why did Congress need to *add* a prohibition on gender discrimination—and only gender discrimination—to section 603(5), the welfare-to-work section?

There is a bright side for those who would like to be protected from sexual harassment while on government-assigned work. First, HHS, which implements the PRWORA, has stated that federal nondiscrimination laws apply to TANF workers, writing:

The limitation on Federal regulatory and enforcement authority at section 417 of the Act does not limit the effect of other Federal laws [aside from the four listed in section 608(d)], including Federal employment laws (such as the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA) and unemployment insurance (UI)) and nondiscrimination laws. These laws apply to TANF beneficiaries in the same manner as they apply to other workers.<sup>134</sup>

While HHS specifically lists the examples of OSHA, FLSA, and UI, without explicitly including Title VII, the words “Federal laws, including . . . nondiscrimination laws” must encompass Title VII. As Title VII is a major federal statute passed more than three decades before the PRWORA, HHS must have been aware of Title VII’s existence when it implemented PRWORA in the late 1990s. Further, the HHS website explicitly states that Title VII applies to “public and private entities that administer, operate or participate in employment programs

---

130. 42 U.S.C. § 608(d) (2018).

131. 42 U.S.C. § 2000e-2(a)(1) (2018).

132. JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 279 (3d ed. 2017) (defining *expressio unius* as “the principle that when a statutory provision explicitly expresses or includes particular things, other things are implicitly excluded.”).

133. 42 U.S.C. § 603(a)(5)(I)(iii) (“In addition to the protections provided under the provisions of law specified in section 608(c) of this title, an individual may not be discriminated against by reason of gender with respect to participation in work activities engaged in under a program operated with funds provided under this paragraph.”).

134. 45 C.F.R. § 260.35(b) (2019).

under TANF even if these entities do not receive Federal assistance.”<sup>135</sup> In addition, both the U.S. Department of Labor (DOL) and the EEOC have expressed the official opinion that Title VII covers workfare workers.<sup>136</sup> While these agencies are not tasked with implementing the PRWORA, and therefore not entitled to *Chevron* deference in their interpretations of the statute,<sup>137</sup> the EEOC does implement Title VII, and guidance from both agencies can be persuasive.<sup>138</sup>

Applying Title VII’s ban on sex discrimination to workfare workers is also consistent with the stated purposes of the PRWORA, which include increasing economic independence “by promoting job preparation, work, and marriage,” preventing out-of-wedlock pregnancies, and encouraging “the formation and maintenance of two-parent families.”<sup>139</sup> As discussed above, sexual harassment in the workplace hinders all of these goals. It interferes with an employee’s ability to do her job and to advance in the workplace.<sup>140</sup> It can directly cause out-of-wedlock pregnancies.<sup>141</sup> Additionally, even when perpetrated by a third party who is not an intimate partner, sexual assault can ruin romantic relationships and marriages, as the survivor deals with emotional injuries and their partner experiences guilt and anger at the situation.<sup>142</sup>

- 
135. U.S. DEP’T OF HEALTH & HUM. SERVS., OFFICE FOR CIVIL RIGHTS, LAWS AND WELFARE REFORM OVERVIEW (July 26, 2013), <https://www.hhs.gov/civil-rights/for-individuals/special-topics/needy-families/laws-welfare-reform-overview/index.html> [<https://perma.cc/R3RM-3BYX>]; *see also* U.S. DEPARTMENT OF HEALTH & HUM. SERVS., CIVIL RIGHTS REQUIREMENTS – E. FEDERAL EMPLOYMENT DISCRIMINATION LAWS (July 26, 2013) <https://www.hhs.gov/civil-rights/for-individuals/special-topics/needy-families/federal-employment-discrimination%20laws/index.html> [<https://perma.cc/R3RM-3BYX>] (explaining ways in which welfare agencies and employers may violate Title VII by discriminating against workfare participants).
136. U.S. DEP’T OF LABOR, LABOR PROTECTIONS AND WELFARE REFORM 2 (1997), <https://nclj.org/wp-content/uploads/2015/11/LaborProtectionsAndWelfareReform.pdf> [<https://perma.cc/K8FA-ZJUE>] (stating that antidiscrimination laws, including Title VI and Title VII, “apply to welfare recipients as they apply to other workers.”); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WHO IS AN “EMPLOYEE” UNDER FEDERAL UNEMPLOYMENT DISCRIMINATION LAWS?, [https://www.eeoc.gov/employers/smallbusiness/faq/who\\_is\\_an\\_employee.cfm](https://www.eeoc.gov/employers/smallbusiness/faq/who_is_an_employee.cfm) [<https://perma.cc/SVK4-9JQT>] (last visited Apr. 20, 2020) (stating that “[i]ndividuals assigned to your business under a work program (for example, a program that provides placements for welfare recipients)” are “employees” under federal employment discrimination laws).
137. *Cf. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (explaining that the agency Congress has tasked with carrying out a law is given deference in interpreting that law).
138. For example, the Second Circuit cited to the EEOC guidance when it determined whether Title VII protected workfare workers. *United States v. City of New York (CONY)*, 359 F.3d 83, 93 (2d Cir. 2004). The New York Court of Appeals cited to the DOL guidance that public assistance workers are covered by federal employment laws when deciding whether they must receive the minimum wage. *Carver v. New York*, 44 N.E.3d 154, 158 (N.Y. 2015).
139. 42 U.S.C. § 601(a) (2018).
140. *See supra* note 41 and accompanying text.
141. *See supra* note 38 and accompanying text.
142. Research on heterosexual couples after the female partner was sexually assaulted found that both partners were more likely to experience sexual dysfunction; that the female was more likely to be averse to touching, have anxiety, and experience flashbacks to the assault; that the male partner experienced “anger, a desire to protect the partner, anxiety, depression, guilt, and sexual difficulties;” and that arguments and break-ups were more common. Connop & Petrak, *supra* note 39, at 30–35.

The Second Circuit—the only federal appeals court to address the issue—agreed that workfare participants are “employees” covered by Title VII.<sup>143</sup> In the late 1990s, several New York City TANF recipients who were placed with city agencies to fulfill their work requirements filed claims with the EEOC alleging that they were sexually harassed in those positions.<sup>144</sup> The EEOC found probable cause that the city was liable for sexual harassment against its welfare workers,<sup>145</sup> so the cases were consolidated as *United States v. City of New York (CONY)* and appealed up to the Second Circuit.

The plaintiffs were five women who participated in the city’s Work Experience Program (WEP). Tammy Auer alleged that her supervisor at the city’s sanitation department made “sexually charged comments” to her, asked her to move in with him, touched her inappropriately, threatened to terminate her WEP assignment, showed up at her new workplace after she complained twice and was reassigned, and told her new supervisor not to give her any assignments.<sup>146</sup> Tonja McGhee had a brief, consensual relationship with her WEP supervisor at the city’s housing authority. After she broke it off, he called and threatened her, told his supervisor that she was not working, and called her into his office and told her to take off her pants.<sup>147</sup> She quit after making several complaints that went unanswered. Maria Gonzales’s supervisor touched her inappropriately, called her names, hid her time cards, and—after she complained about his harassment—threatened to have her killed.<sup>148</sup> Norma Colon’s supervisor at the Office of Employment Services asked her if she had her period, talked about women’s breasts, offered to fix her problems if she would sleep with him, and—after she rejected his advances—refused to help her get childcare.<sup>149</sup> The fifth plaintiff, Theresa Caldwell-Benjamin, faced racism in the form of a noose and racist caricature at her worksite.<sup>150</sup>

The Second Circuit rejected the City’s *expressio unius* argument that Congress’s inclusion of some nondiscrimination statutes in the PRWORA excluded Title VII.<sup>151</sup> The Second Circuit instead applied the Supreme Court’s two-part test for deciding who is an employee under Title VII, a statute with a completely circular definition of “employee” as “an individual employed by an employer.”<sup>152</sup> First, the plaintiffs had to prove that they were “hired” in that they received some substantial benefit in exchange for their work, a requirement that was met by the food stamps and cash benefits they received.<sup>153</sup> Second, the court

---

143. See *CONY*, 359 F.3d at 86.

144. Nina Bernstein, *City Must Shield Workfare Force on Harassment*, N.Y. TIMES, Oct. 1, 1999, at A1.

145. Bernstein, *supra* note 144.

146. *CONY*, 359 F.3d at 88.

147. *Id.* at 88–89.

148. *Id.* at 89.

149. *Id.* at 90.

150. *Id.* at 89.

151. *Id.* at 97–98.

152. 42 U.S.C. § 2000e(f) (2018).

153. *CONY*, 359 F.3d at 91–92.

looked at the thirteen-factor test from *Community for Creative Non-Violence v. Reid*,<sup>154</sup> most importantly how much control the employer has over the worker's means and manner of work.<sup>155</sup> Since city agencies had complete control over plaintiffs' work, the plaintiffs were "employees" under Title VII.<sup>156</sup>

Workfare participants who are assigned to work for non-government employers may have a harder time getting Title VII coverage since the supervising entity (where the discrimination occurs) and the paying entity (the government) are separate. In *O'Connor v. Davis*, the Second Circuit found that a university student who fulfilled her work-study requirements by serving at a local hospital that was not affiliated with the school was not an employee of the hospital.<sup>157</sup> The court reasoned that the hospital had never "hired" her since it gave her no remuneration for her work.<sup>158</sup> It did not matter that the plaintiff was receiving compensation for her work because the paying entity—plaintiff's university, using federal financial aid money—was not affiliated with the hospital and was not a party to the lawsuit.<sup>159</sup> The hospital apparently did not even know that the plaintiff was being compensated through the work-study program. It thought she was strictly a volunteer and treated her accordingly.<sup>160</sup>

In *CONY*, the Second Circuit distinguished the facts from *O'Connor* on the basis that, in the latter, the City of New York both paid the plaintiffs their benefits and received their work—it "hired" them and offered remuneration in the fashion of a typical employment relationship.<sup>161</sup> Thus, a situation in which the municipal or state government pays a workfare participant to work for a non-government employer would be distinguishable from the situations presented in *CONY*.<sup>162</sup> Furthermore, as long as the workfare participant sued both the government and the private employer, it would also be distinguishable from *O'Connor*, in which the payor was not a party to the lawsuit and the facility accepting plaintiff's services was unaware that the plaintiff was being compensated.<sup>163</sup> In the workfare context, private employers would be aware that workers are being paid for their work, so the government could be held accountable for not ensuring the safety of its welfare

154. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989).

155. *Id.* at 751–52 (stating that other factors include the amount of skill involved in the work, who provides tools, where the work is completed, how long the employment relationship lasts, how the worker is paid and files taxes, and what benefits they receive).

156. *CONY*, 359 F.3d at 91–92. Since this was a ruling on a motion to dismiss, the court held that the plaintiffs were employees under Title VII *if* all of their allegations were true, but the facts about compensation and control were not disputed. *Id.* at 97.

157. *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997), *cert. denied* 522 U.S. 1114 (1998).

158. *Id.* at 116 ("We believe that the preliminary question of remuneration is dispositive in this case. It is uncontested that O'Connor received from Rockland no salary or other wages, and no employee benefits such as health insurance, vacation, or sick pay, nor was she promised any such compensation.").

159. *Id.* at 116 n.2.

160. Brief for Defendants-Appellees at 3–5, *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997) (No. 96-7769), 1996 WL 33661719.

161. *CONY*, 359 F.3d at 95.

162. *See supra*, note 144 and accompanying text.

163. *See O'Connor*, 126 F.3d at 116 n.2 (explaining that the non-party payor was the employer, and not the location where services were performed).

recipients when it forces them to work somewhere. Indeed, the Second Circuit in *CONY* treated as persuasive EEOC guidance that states “welfare recipients would likely be considered employees in most of the work activities described in the new welfare law, including unsubsidized and subsidized public and private sector employment, work experience, and on-the-job training programs.”<sup>164</sup>

### B. Continuation of Welfare Benefits

Title VII, and analogous state and local laws, can play an important function in changing workplace culture, deterring potential harassers, and offering workers a civil cause of action if they are mistreated in the workplace. But in order to get a remedy, a harassed worker must file a complaint with the EEOC or a state or local civil rights agency and undergo a lengthy investigation and litigation process. Harassed workfare participants have much more immediate needs that must be addressed, namely getting out of a dangerous or hostile work environment while still receiving their life-sustaining benefits.

The PRWORA creates penalties for failing to complete work requirements “subject to such good cause and other exceptions as the State may establish.”<sup>165</sup> Therefore, if a state determines that being sexually harassed on the job is good cause to stop working, a worker should be able to remove themselves from a dangerous work environment without losing their benefits. Of course, this requires a method of reporting sexual harassment and assault to social workers. Social workers can then ensure that the individual’s benefits will not be cut off while the allegations are investigated and a new work assignment is arranged for the beneficiary while also providing appropriate medical and psychological treatment as needed.

The PRWORA explicitly allows states to waive any program requirements for survivors of domestic violence when those requirements would make it more difficult to escape the violence or would unfairly penalize survivors.<sup>166</sup> States can also permit survivors of domestic violence to receive TANF funds beyond the five-year cut-off that applies to most recipients.<sup>167</sup> Under the statute, a survivor of domestic violence is someone who has been “battered or subjected to extreme cruelty,” which includes being subject to sexual abuse.<sup>168</sup> This exception shows that Congress wanted to protect TANF recipients from sexual abuse. If states may ease work requirements and time limits to help recipients avoid sexual violence at home, why should the same protections not apply to sexual violence in their government-assigned job placements?

---

164. *O’Connor*, 126 F.3d. at 93 (quoting EEOC Notice No. 915.003 § 5.a (Dec. 3, 1997)).

165. 42 U.S.C. § 607(e)(1)(B) (2018).

166. *Id.* § 602(a)(7)(A).

167. *Id.* § 608(a)(7)(C).

168. *Id.* §§ 602(a)(7)(B), 608(a)(7)(C)(iii). Notably, neither the statute nor HHS regulations, 45 C.F.R. §§ 260.51–55 (2019), specify that there must be a familiar or intimate relationship between the abuser and their target, suggesting that workplace abuse may be included. But given the common meaning of “domestic violence,” this would be a difficult argument to make in court.

States may also offer grievance procedures so that workfare participants have a means of informing the government that their assignment has become unsafe or otherwise untenable, thereby minimizing the risk of sanctions if the participant misses work shifts. States that receive welfare-to-work grants are required to establish grievance procedures for discrimination complaints, and those procedures must allow for a hearing, remedies such as back pay and not being placed with the offending employer, and an appeal to a state agency.<sup>169</sup> There is no analogous requirement for the regular TANF work programs, but some states have grievance procedures anyway. For example, New York has a system where workfare participants can file a complaint, within thirty days of which there must be at least a meeting between the complainant, someone from the social services agency, and an independent mediator who has no control over the complainant's welfare benefits.<sup>170</sup> The worker cannot be sanctioned for failing to fulfill requirements relating to the dispute while it is being decided and may request a fair hearing after the mediation process, but "shall be required to participate in work activities as assigned . . . during the adjudication process."<sup>171</sup> It is unclear whether a person complaining about their supervisor would be transferred to a new worksite to fulfill the work requirement while the adjudication plays out.

### III. SUGGESTIONS FOR IMPROVEMENT

The widespread problem of workplace sexual harassment—and the particular vulnerability of workfare participants—is a large issue with numerous contributing factors and no easy solution. Nonetheless, there are ways to improve the situation, such as creating express legal protections for welfare workers and establishing better procedures within the welfare system for reporting, investigating, and remedying harassment. Stronger legal protections, increased enforcement of those protections, and improved workplace trainings can help deter potential harassers and change the culture at workfare sites to make all forms of sexual harassment unacceptable. Ultimately, stopping the harassment before it starts will save both the government and workers time, money, and emotional wellbeing. Grassroots organizers, who are well-positioned to communicate with and rally welfare recipients, can play an important role in bringing about these changes.

#### A. Litigation and Legislation

When those of us in the legal field identify problems in the world, we often look for solutions through litigation or legislative reform. Title VII is one mechanism for this. Like the WEP workers who sued the City of New York two

---

169. 42 U.S.C. § 603(a)(5)(I)(iv) (2018).

170. N.Y. COMP. CODES R. & REGS. tit. 18, §§ 385.11(c)(1)–(4) (2019).

171. *Id.* §§ 385.11(c)(5), (6).



decades ago when they were subjected to sexual and racial harassment,<sup>172</sup> individuals who suffer harassment at workfare sites today can seek free legal assistance to file Title VII claims against the government provider of their benefits and anyone at the worksite responsible for the harassment. Individuals may also file complaints directly with the EEOC—or with state or local human rights agencies—as the *CONY* plaintiffs did.<sup>173</sup> Attorneys can then ask courts outside of the Second Circuit to extend Title VII coverage to workfare participants and seek protection for workers assigned to non-governmental worksites. The discussion of Title VII coverage above<sup>174</sup> offers several arguments for why welfare workers should be covered by Title VII, based on the purpose of the PRWORA, HHS regulations, and EEOC and DOL interpretations. Plaintiffs may also be able to bring state law claims, which may offer even stronger protections for workers. Making it clear that the law protects workfare participants from harassment, and that those laws will actually be enforced, can change a potential harasser's attitude about what constitutes sexual harassment and whether it is something they can do.<sup>175</sup> Letting the conduct go unpunished, on the other hand, can lead people to believe that the conduct was not sexual harassment in the first place.<sup>176</sup>

However, litigating sexual harassment cases—with their credibility issues, lack of concrete evidence, and heavy emotions—is hard enough, even where the law explicitly protects workers. Litigating a case under the current laws, where Title VII is not explicitly incorporated into the PRWORA, is even more challenging. Of course, there is a straightforward solution: Congress could add Title VII to the list of non-discrimination laws that apply to TANF workers or amend the definition of “employee” in Title VII to explicitly include those workers. Congress could also add a provision to the PRWORA requiring states to set up grievance procedures for workers to report harassment at their job sites and be promptly relocated.

State legislatures can similarly make sure that their civil rights laws explicitly protect individuals who are working to receive welfare benefits. They can provide for simpler complaint procedures under state law so that fewer people need lawyers to enforce their rights. States can also make explicit in the rules implementing their TANF programs that being sexually harassed at work is good cause for non-compliance with work requirements. This would help ensure that workers who are harassed can avoid having to choose between a dangerous work

---

172. *CONY*, 359 F.3d 83.

173. *Id.*, at 88–90. This is an imperfect solution given that the majority of people who file sexual harassment complaints with the EEOC are given “right to sue” letters to bring litigation on their own, as opposed to the EEOC pursuing litigation on the complainant’s behalf. *Charges Alleging Sex-Based Harassment*, *supra* note 23.

174. *See supra* section II.A. *See also* Benjamin F. Burry, *Testing Economic Reality: FLSA and Title VII Protection for Workfare Participants*, 1 U. CHI. LEGAL F. 561 (2009); Langton, *supra* note 43 (arguing for Title VII coverage for volunteers); Nicola Kean, *The Unprotected Workforce: Why Title VII Must Apply to Workfare Participants*, 9 TEX. J. ON C.L. & C.R. 159 (2004).

175. Anna-Maria Marshall, *Idle Rights: Employees’ Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 LAW & SOC’Y REV. 83, 88–89 (2005).

176. *Id.* at 99–105, 115.

environment and being sanctioned for not fulfilling their work requirement.

Some may argue that these policies will incentivize workfare participants to claim that they were sexually harassed in order to get out of work. But complainants can be given some time to recover and attain medical treatment if needed, and then be transferred to a safer worksite. Such temporary reprieve would hardly be an incentive to go through the personal and strenuous process of reporting sexual harassment. Further, the societal stigma surrounding people who have been sexually harassed will continue to prevent false allegations, as it already stops many who have truly been harassed or assaulted from reporting what they have been through.<sup>177</sup> Most importantly, the issue of *not reporting* sexual misconduct is already many times greater than the issue of false reporting,<sup>178</sup> and the consequences of unchecked sexual harassment<sup>179</sup> are worse than the consequences of a false report.

### B. Administrative Recommendations

Administrative agencies can also provide more direct solutions to the problem. At the federal level this would come mainly in the form of agency guidance. For example, HHS could issue suggested grievance procedures for states to implement in their TANF and SNAP programs. The EEOC has issued helpful guidelines to employers for preventing sexual harassment in the workplace,<sup>180</sup> but it could tailor those recommendations to the workfare context and send guidance to state social services agencies. Federal agencies like HHS and the EEOC can also use their national reach and resources to study the issue of sexual harassment in workfare so that legislators and regulators have a better idea of how prevalent the issue is and how to remedy it.

State agencies that are responsible for administering welfare programs can address the problem more directly. Regardless of whether they are legally required to do so, state social services agencies could set up easily accessible procedures for workfare participants to report abuse on their work sites. While welfare recipients have frequent contact with their caseworkers, state and local agencies must recognize that many welfare recipients are afraid they will suffer negative consequences if they make a complaint to their caseworkers and might rather

---

177. Shaw et al., *supra* note 27, at 2 (citing embarrassment as one reason only 10 percent of sexual harassment is reported); *see also* MARDOROSSIAN, *supra* note 125, at 25–26 (explaining that “victim” is a gendered term evoking sexual assault targets as weak, negligent, powerless, dependent, and easy to manipulate), MINK, *supra* note 57, at 119–25 (discussing ways in which sexual assault accusers are discredited); Tuerkheimer, *supra* note 108, at 21–25 (discussing ways in which rape laws were written based on the assumption that women who allege rape are liars).

178. *See supra* notes 26–28 and accompanying text (discussing underreporting of sexual harassment); notes 108–14 and accompanying text (discussing false reports of sexual harassment).

179. *See supra* notes 35–44 and accompanying text.

180. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PROMISING PRACTICES FOR PREVENTING HARASSMENT, OLC Control No. EEOC-NVTA-2017-2 (Nov. 21, 2017) <https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment> [<https://perma.cc/65UL-XPBB>].

suffer harassment than risk having their benefits terminated. Thus, there must be an available means of reporting harassment that does not involve caseworkers. And since welfare workers worry that complaints to legal services attorneys (1) may get back to their caseworkers and lead to retaliation, and (2) may go unanswered because those attorneys are also just part of the government bureaucracy,<sup>181</sup> it must be made very clear that the person who receives sexual harassment complaints is independent from the caseworker and required to take affirmative steps in response to complaints, such as securing the complainant a new worksite and investigating their complaint.

State governments could also set up free, confidential hotlines for workfare participants. Individuals would then be able to call into the hotline to ask questions, anonymously report harassment at their worksites, or find out how to file an official grievance. This would help with the issue of workers not knowing what their rights are and what qualifies as sexual harassment. Anyone who is unsure about their situation could call the hotline, describe how they are treated at work, and get preliminary advice as to whether they have any recourse. People who fear retaliation or bystanders who witness harassment could call in and request an investigation of the worksite as a whole. Even if the agency is not able to investigate every anonymous claim it receives, it could keep track of complaints, look for trends over time, and investigate worksites that look most problematic. A hotline number would be easy to distribute on pens, posters, stickers, business cards, and other small trinkets, and welfare recipients who have cell phones can save the number. Noting that not everyone has a phone or feels comfortable directly discussing harassment with someone over the phone, an online chat function could also be available. This is an imperfect solution since those without phones likely only have internet access via public libraries, but it is an additional option that would be easy to implement.

People who are hired to staff hotlines and receive complaints must be specially trained to work with survivors of sexual harassment. Reporting sexual misconduct is a difficult experience, especially for those who are constantly mistrusted and discredited by the government. If they feel that the person to whom they are trying to report an intimate injury is just another cog in a wheel that will not help, harassed workers may give up before fully reporting what has happened. If word spreads that the system set up for reporting is just another dead end, it will go unutilized like fair hearings currently do.<sup>182</sup>

These staff members could also run know-your-rights trainings and in-person legal clinics for the workfare population. This would allow them to build rapport with the community and make them familiar faces among workers who need to report harassment. Trainings tailored specifically to the workfare context would also help ensure more workers know their rights. Trainings should not just

---

181. Sarat, *supra* note 85.

182. See Lens, *Bureaucratic Disentitlement*, *supra* note 86, at 42 (finding that 0.29 percent of TANF recipients in Texas, 0.46 percent in Wisconsin, and 4.6 percent in New York request fair hearings when there is an adverse change in their benefits).

be for workers who are vulnerable to harassment. Training supervisors and permanent coworkers about what conduct is prohibited makes them more likely to identify certain behaviors as sexual harassment and can reduce harassment in the workplace.<sup>183</sup> Even when the entire workforce does not go through sexual harassment training, the impact of such trainings on workplace culture can reduce incidents of sexual harassment extend beyond the portion of the workforce that is trained.<sup>184</sup>

Agencies that administer welfare could also do anonymous surveys to learn more about the prevalence of sexual harassment against their workfare participants. Welfare recipients already have regular meetings with caseworkers, and agencies already collect data to fulfill federal reporting requirements.<sup>185</sup> Welfare agencies could set up stations in their offices where recipients could anonymously fill out surveys. That way, caseworkers could encourage workers to fill out the surveys without being responsible for collecting the responses. This could ensure participants' anonymity and protection from retaliation.

Finally, agencies could make their hearing processes fairer to recipients whose benefits are reduced or terminated after reporting harassment to ensure no one loses their income because they are harassed at work. First, the decisionmaker should not be employed by the same agency that grants and revokes benefits.<sup>186</sup> Second, the process should be easy to navigate for someone without formal education and without legal representation.<sup>187</sup> The process could also be made less adversarial if agency officials and judges took on more investigatory than prosecutorial roles.<sup>188</sup>

All of these solutions will cost some amount of money to implement. I will note here that at the end of fiscal year 2018, states had a combined total of \$3.7 billion in TANF funds that were not set aside for any particular purpose.<sup>189</sup> While much of that must go to paying for benefits, surely some of it could be used to protect recipients from sexual harassment. Further, the federal government provides grants for states to do assessments of their own programs.<sup>190</sup> Given the personal and professional impacts sexual harassment can have on workfare

---

183. Antecol & Cobb-Clark, *supra* note 44, at 831–38; Grant E. Buckner, Hugh D. Hindman, Timothy J. Huelsman & Jacqueline Z. Bergman, *Managing Workplace Sexual Harassment: The Role of Manager Training*, 26 EMP. RESP. & RTS. J. 257, 272–73 (2014) (stating that sexual harassment training made people more likely to label certain conduct as sexual harassment, although not necessarily more accurately).

184. Antecol & Cobb-Clark, *supra* note 44, at 839–41.

185. See 42 U.S.C. § 611 (2018) (requiring quarterly reports from states with extensive disaggregated case information).

186. See generally Brodoff, *supra* note 98, at 143–44, for a discussion of central panel systems, “in which the judges who hear welfare agency appeals are employed by a separate and independent agency.”

187. For example, the judge or arbitrator can take the time to fully explain the hearing process to the welfare recipient and encourage them to provide any documentation and relevant evidence they have. Lens, *Revisiting the Promise*, *supra* note 88, at 72–74.

188. *Id.* at 84–87.

189. FALK & LANDERS, *supra* note 47, at 3.

190. 42 U.S.C. § 613(d) (2018).

participants, it would be highly relevant to the program for states to assess how well they are protecting TANF workers from sexual harassment.

### C. Grassroots Organizing

Grassroots organizations can play a significant role in bringing about these changes. Welfare recipients may generally distrust the government but be more receptive to organizers who are more like them and want to help. Therefore, local organizations can more effectively communicate with welfare workers to both gather and disperse information. Local organizations can collect information about sexual harassment in workfare, and may get higher response rates than government offices.<sup>191</sup> Non-governmental organizations can also run their own hotlines and know-your-rights trainings to empower workfare participants.<sup>192</sup> They can also encourage individuals to make complaints and help walk them through the process, so that it seems less intimidating. Vicki Lens suggests that advocacy groups such as Make the Road by Walking helped increase the use of fair hearings in New York City by setting up stations in welfare centers and running “complaint campaigns” to normalize fair hearing requests.<sup>193</sup> Organizers can also *organize* welfare recipients to advocate for legislative changes. For example, Association of Community Organizations for Reform Now (ACORN) gathered WEP workers in New York City and convinced the city council to create a new grievance procedure, despite Mayor Giuliani’s veto.<sup>194</sup> ACORN also won numerous victories in Los Angeles by mobilizing workfare participants. These victories include everything from securing uniforms and tools for workfare participants to the creation of new non-TANF welfare programs.<sup>195</sup>

### CONCLUSION

The workfare workforce is comprised of people whose socioeconomic status, gender, race, and age put them at a higher risk of being sexually harassed at work—an ugly phenomenon that is already a large issue for the U.S. population as a whole. This harassment not only causes damage to the mental and physical health of its targets, it undermines the goals of the very workfare program that put the target in a situation to be harassed. Members at every level of government—

---

191. See *A DAY’S WORK, A DAY’S PAY* (New Day Films 2001) (showing organizers interviewing WEP workers in parks and on the streets of NYC and getting honest complaints about lack of uniforms, fair pay, etc.).

192. For example, ACORN in Los Angeles runs a hotline that welfare recipients can call into and obtain assistance in challenging negative welfare agency decisions. Fred Brooks, *Innovative Organizing Practices: ACORN’s Campaign in Los Angeles Organizing Workfare Workers*, 9 J. CMTY. PRAC. 65, 80 (2001).

193. Lens, *Bureaucratic Disentitlement*, *supra* note 86, at 52 n.198.

194. *A DAY’S WORK, A DAY’S PAY*, *supra* note 191; see also Lens, *Bureaucratic Disentitlement*, *supra* note 86, at 52 (crediting New York City’s mass organizing campaigns for welfare reform).

195. Brooks, *supra* note 192, at 77–78.

all three branches and all three levels—can and should do something to address this issue. With non-governmental organizations leading the charge, we can change the culture around workfare and protect workers.

# Under the Guise of “Due Process”: Sexual Harassment and the Impact of Trump’s Title IX Regulations on Women Students of Color

Haley C. Carter†

INTRODUCTION .....	181
I. WOMEN STUDENTS OF COLOR AND SEXUAL VIOLENCE IN SCHOOLS .....	184
A. Reporting at Disproportionately High Rates .....	184
B. Contributing Factors to Heightened Vulnerability .....	186
II. OBAMA-ERA TITLE IX GUIDANCE ON SEXUAL VIOLENCE.....	187
A. Dear Colleague Letter: Sexual Violence .....	188
B. Questions and Answers on Title IX and Sexual Violence.....	190
III. THE TRUMP ADMINISTRATION ON SEXUAL HARASSMENT UNDER TITLE IX.....	193
A. Deliberate Indifference .....	194
B. Narrowing the Definition.....	196
C. “Actual Knowledge”.....	196
D. Clear and Convincing Evidence .....	198
IV. IMPLICATIONS FOR WOMEN STUDENTS OF COLOR .....	200
A. Hesitancy to Report .....	200
B. Disparate Representation of the Parties .....	202
C. Increased Dismissal of Claims.....	204
V. RECOMMENDATIONS FOR ALLEVIATING THE NEGATIVE IMPACT ON WOMEN OF COLOR.....	205
A. Distinguishing the Educational Adjudication Process from a Criminal Court of Law.....	205
B. Preponderance of the Evidence for all Harassment Claims.....	206
C. Emphasis on the Role and Necessity of the Title IX Coordinator..	207
CONCLUSION .....	208

---

DOI: <https://doi.org/10.15779/Z38JM23G9Z>

†. University of Houston Law Center Class of 2020

### INTRODUCTION

Betsy DeVos, the Trump administration’s Secretary of Education, vowed in 2017 to replace the “failed system” of adjudicating campus sexual harassment<sup>1</sup> claims under Title IX of the Education Amendments of 1972 (Title IX).<sup>2</sup> In a speech announcing her proposed changes, DeVos lamented allegedly insufficient rights for the accused and university bias in favor of survivors.<sup>3</sup> She argued that any perceived slight might lead to a full Title IX investigation under the existing system and exclaimed that “if everything is harassment, then nothing is.”<sup>4</sup> DeVos’s remarks made the Trump administration’s goals for addressing campus sexual harassment claims at institutions of higher learning clear: narrowed investigatory requirements, heightened evidentiary standards, and expanded rights for the accused. Accordingly, under the guise of “due process,” DeVos has spent the past two years crafting the narrative that universities have “reacted [to Title IX requirements] with panicked overcompliance” and are failing their students.<sup>5</sup>

Supporters of DeVos’s plans suggest her changes are necessary to mitigate the disproportionate number of school expulsions and scholarship losses for Black male students under the Obama administration’s guidance for addressing campus sexual harassment.<sup>6</sup> This professed concern for racial justice may have little foundation in reality as the claim lacks statistical support and relies heavily on evidence that is anecdotal at best.<sup>7</sup> Furthermore, while DeVos advocated for changes to campus sexual assault adjudication, she also quietly oversaw the

- 
1. This Article will generally use the term “sexual harassment” to refer to any form of sexual conduct that is considered unwelcome by the target of the conduct. Throughout the Article, however, I specifically reference “sexual assault” when making points relevant to those incidents. When discussing another author’s work, I try to use the same terms used in their research.
  2. Susan Svrluga, *Transcript: Betsy DeVos’s Remarks on Campus Sexual Assault*, WASH. POST (Sept. 7, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devos-remarks-on-campus-sexual-assault/> [<https://perma.cc/5MJS-CTMS>].
  3. *Id.*
  4. *Id.*
  5. Jeannie Suk Gersen, *Assessing Betsy DeVos’s Proposed Rules on Title IX and Sexual Assault*, NEW YORKER (Feb. 1, 2019), <https://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school> [<https://perma.cc/QQP9-6BPR>].
  6. Erika Sanzi, *Black Men, Title IX, and the Disparate Impact of Discipline Policies*, REAL CLEAR EDUC. (Jan. 21, 2019), [https://www.realcleareducation.com/articles/2019/01/21/black\\_men\\_title\\_nine\\_and\\_the\\_disparate\\_impact\\_of\\_discipline\\_policies\\_110308.html](https://www.realcleareducation.com/articles/2019/01/21/black_men_title_nine_and_the_disparate_impact_of_discipline_policies_110308.html) [<https://perma.cc/BLW9-322F>].
  7. See Emily Yoffee, *The Question of Race in Campus Sexual Assault Cases: Is the System Biased Against Men of Color?*, ATLANTIC (Sept. 11, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361/> [<https://perma.cc/RAS8-2D7Z>] (“Since there are no national statistics on how many young men of any given race are the subject of campus-sexual-assault complaints, we are left with anecdotes about men of color being accused and punished.”); see also Jeannie Suk Gersen, *Shutting Down Conversations About Rape at Harvard Law*, NEW YORKER (Dec. 11, 2015), <https://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school> [<https://perma.cc/UQ8S-RF5F>] (“The dynamics of racially disproportionate impact affect minority men in the pattern of campus sexual-misconduct accusations, which schools, conveniently, do not track . . .”).



rescission of Obama-era guidance that specifically targeted school disciplinary bias against male students of color.<sup>8</sup> DeVos has called for a “fair grievance process” on one hand while dismantling protections against racial discrimination on the other.<sup>9</sup> Although a full examination of the contradiction of DeVos’s actions is beyond the scope of this Article, the Trump administration’s changes to the treatment of sexual harassment claims under Title IX will indeed have racial implications.

The Trump administration’s new Title IX regulations will undermine the rights of survivors. Specifically, the changes will likely discourage survivors from reporting sexual violence<sup>10</sup> under Title IX, lead to disparate representation between parties to such claims, and result in higher rates of claim dismissal.<sup>11</sup> These negative consequences will particularly harm women students of color,<sup>12</sup> who experience sexual harassment and sexual assault at higher rates than their White counterparts. Evidence indicates, for instance, that women students of color have historically comprised between 26.2 and 45.2 percent of plaintiffs in college and university sexual assault cases while representing only 19.6 percent of students enrolled in college and university programs.<sup>13</sup> This statistic strongly

- 
8. Lydia Wheeler, *DeVos Review of Racial Bias Guidance Stirs Controversy*, HILL (Apr. 11, 2018), <https://thehill.com/regulation/382574-devos-review-of-racial-bias-guidance-stirs-controversy> [<https://perma.cc/HDP9-JBV3>].
  9. See Helen Salita, *DeVos’ Campus Sexual Assault Changes Give More Rights to the Accused*, SOJOURNERS MAG. (Nov. 21, 2018), <https://sojo.net/articles/devos-campus-sexual-assault-changes-give-more-rights-accused> [<https://perma.cc/9HBL-FVDP>]. As of February 2019, DeVos had rescinded over twenty Obama-era policy guidelines on anti-discrimination laws. Gersen, *supra* note 5.
  10. “Sexual violence” is an umbrella term including both sexual assault and sexual harassment. This Article will use the term to broadly describe offenses covered under Title IX. Specific references to sexual assault and sexual harassment are made where appropriate and where the Article discusses these offenses in particular. Sexual assault includes acts or attempted acts of a sexual nature carried out against a person’s will through the use of physical force, intimidation, or coercion. Within the scope of this Article, sexual harassment includes unwanted sexual advances, requests for sexual favors, or other verbal and physical harassment of a sexual nature. See Nicola Henry, *Rape, Sexual Assault and Sexual Harassment: What’s the Difference?*, CONVERSATION (Mar. 26, 2018), <https://theconversation.com/rape-sexual-assault-and-sexual-harassment-whats-the-difference-93411> [<https://perma.cc/48PE-HRQD>]; see also U.S. EQUAL EMP’T OPPORTUNITY COMM’N, SEXUAL HARASSMENT, <https://www.eeoc.gov/sexual-harassment> [<https://perma.cc/PBY4-CATP>].
  11. See KATHARINE K. BAKER, DEBORAH L. BRAKE & NANCY CHI CANTALUPO, TITLE IX & THE PREPONDERANCE OF THE EVIDENCE: A WHITE PAPER (2016), <http://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-10.3.16.pdf> [<https://perma.cc/A5HV-MYJE>]; see also Nat’l Women’s L. Ctr., Comment Letter on Proposed Rule: Nondiscrimination on the Bases of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Jan. 30, 2019), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/02/NWLC-Title-IX-NPRM-Comment.pdf> [<https://perma.cc/RU5H-BQAT>].
  12. “Women students of color” refers to individuals who are students and identify as women and as non-White. The term thus includes both cisgender and transgender women, as well as individuals whose racial identity is in whole or in part African, Asian, Latine, Pacific Islander, Middle Eastern, or Native American.
  13. Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1, 44–45 (2019) (summarizing a study of forty-two campus sexual assault cases ranging between 1998–2015).

suggests that women students of color are targeted at higher rates than their White colleagues.<sup>14</sup> Therefore, the Trump administration’s regulations concerning sexual assault claims under Title IX will disproportionately affect women students of color.

Mitigating the negative impact of these regulatory changes on women students of color requires adopting policies that would benefit all survivors of campus sexual harassment. This Article offers recommendations for such policies. It explores the Trump administration’s Title IX regulations and the resulting implications for women students of color. It then suggests recommendations for reform that could enable educational institutions to better protect women students of color.

Part I initiates the discussion with an overview of the historical intersection of race and gender under Title IX. It then narrows the context to women students of color, who report sexual harassment at disproportionately high rates, and sexual harassment in schools.<sup>15</sup> The Part concludes with a brief overview of factors that contribute to the heightened vulnerability of women students of color and the reasons it is vital for any Title IX reforms to account for these considerations.

Parts II and III review the Obama and Trump administrations’ different policies on adjudicating sexual harassment claims under Title IX. Part II describes the Obama-era guidance concerning sexual harassment on campus, its recognition of and advocacy for survivors, and its strengths in accounting for the intersection of race and gender. Part III provides insight into the Trump administration’s reversal of strides made by the Obama-era Office of Civil Rights (OCR) and discusses its changes in greater detail. Namely, Part III addresses the Trump administration’s decision to narrow the operative definition of sexual harassment, raise the standard of notice required to trigger a mandatory institutional investigation, raise the evidentiary standard required to succeed in a Title IX proceeding, and afford colleges and universities substantial discretion in addressing Title IX claims.

Part IV then provides a summary of the regulatory changes’ implications for women students of color and the educational institutions they attend. It offers insight into how women students of color who experience sexual harassment will likely proceed under the new regulations and how the regulations could impact the success of Title IX claims.

Part V closes with recommendations for regulatory reform under Title IX that could mitigate the negative consequences discussed in Part IV and achieve greater justice for all survivors of campus sexual harassment. To better understand these implications and recommendations, it is appropriate first to explore the intersection of race and gender and how it influences women students of color and their experiences pursuing sexual harassment claims under Title IX.

---

14. *Id.* at 45.

15. *Id.*

## I. WOMEN STUDENTS OF COLOR AND SEXUAL VIOLENCE IN SCHOOLS

The intersection of race and gender has been discussed for decades by legal and social scholars who often advocate for legislation that recognizes the challenges faced by women of color attempting to “function at the junction” of these identities.<sup>16</sup> However, this intersection has yet to be addressed in the law surrounding campus sexual assault. In the context of Title IX specifically, the intersection of race and gender has led to conflict and confusion about how to manage claims. For example, legal conflicts occur when a woman student of color is targeted for sexual harassment based on her gender and race simultaneously.<sup>17</sup> In such cases, questions arise as to the legal remedies available to her and whether she should pursue relief under Title IX or under a different remedy, such as the Civil Rights Act of 1964. This decision matrix creates unnecessary complexity for women survivors of color and demonstrates the challenges women of color face in pursuing claims against perpetrators.

This complexity, combined with the increased vulnerability of women of color to sexual harassment, stresses the necessity for legislative and regulatory reform that accounts for the interplay between race and gender. The following discussion provides further insight into the experiences of women students of color and lays out factors legal scholars have identified as contributing to their heightened vulnerability to sexual harassment. This discussion provides the foundation from which this Article evaluates both the Obama and Trump administrations’ Title IX policies and their respective impacts on women students of color.

### A. Reporting at Disproportionately High Rates

Despite increasingly popular campus climate surveys and mandatory reporting requirements for sexual harassment claims, statistical data on sexual misconduct published by educational institutions is limited.<sup>18</sup> That said, several scholars have conducted original research and reviews of campus sexual harassment cases in attempts to capture the experiences of women survivors of color.<sup>19</sup> Of these scholars, law professors Nancy Chi Cantalupo and William

---

16. Alfred Dennis Mathewson, *Black Women, Gender Equity, and the Function at the Junction*, 6 MARQ. SPORTS L.J. 239, 240 (1996); see also Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) (“Because of their intersectional identity as both women and of color within discourses that are shaped to respond to one or the other, women of color are marginalized within both.”).

17. See Cantalupo, *And Even More of Us*, *supra* note 13, at 6 (asking “[w]hat standard will be used if she experiences racialized sexual harassment or sexualized racial harassment?”).

18. See WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE 7–8 (2014), <https://www.justice.gov/archives/ovw/page/file/905942/download> [<https://perma.cc/TT89-5AY3>] (recommending universities conduct “campus climate surveys” to obtain information regarding peer sexual harassment among students).

19. See Lilia M. Cortina, Suzanne Swan, Louise F. Fitzgerald & Craig Waldo, *Sexual Harassment and Assault: Chilling the Climate for Women in Academia*, 22 PSYCH. WOMEN Q. 419, 428

Kidder conducted the most recent study, published in the *Utah Law Review* in 2018.<sup>20</sup>

Professors Cantalupo and Kidder systematically reviewed a random selection of forty-two university sexual harassment cases decided between 1998 and 2015.<sup>21</sup> According to their research, 45.2 percent of the plaintiffs were women of African American, Asian Pacific Islander, Latine, or Middle Eastern descent.<sup>22</sup> Women students of color accounted for only 19.6 percent of students enrolled in college and university degree programs during that period.<sup>23</sup> Although this sample is somewhat limited, it suggests that women students of color report campus sexual harassment at disproportionately higher rates than their White colleagues. This is consistent with several studies on the reporting rates of women of color in the workplace.<sup>24</sup>

Empirical evidence gathered on the experiences of women of color in the workplace indicates that women employees of color report sexual harassment at rates disproportionate to their representation in the workforce and at higher rates than their White colleagues. Tanya Hernandez, a Fordham law professor, found in her original study of workplace sexual harassment complaints made between 1964 and 2000 that “women of color were consistently overrepresented as complaining parties” whereas “white women were underrepresented despite their larger presence in the female labor force.”<sup>25</sup> Hernandez also found that among women who said they had been sexually assaulted, more women of color (91.8 percent) filed complaints than their White counterparts (77 percent).<sup>26</sup>

A better understanding of sexual harassment in schools would require universities and other institutions of higher learning to improve data gathering and generate clearer statistics. However, the overall message is clear: women of color are targeted by sexual harassers in workplaces and on school campuses at disproportionately higher rates than their White counterparts. Educational institutions have an obligation to care about these statistics. Student survivors, particularly young women of color, face educational harms, health consequences, and economic costs that can negatively impact their continued presence on campus and pursuit of higher learning opportunities.

---

(1998) (finding that African American women and Latina women reported higher incidences of sexual harassment by educational faculty at one major university); *see also* MICHELE A. PALUDI & RICHARD A. BARICKMAN, *SEXUAL HARASSMENT, WORK, AND EDUCATION: A RESOURCE MANUAL FOR PREVENTION* 70 (1998) (citing 1992 and 1996 studies finding that “women of color, especially those with ‘token’ status” and “ethnic minority women,” experience higher rates of academic sexual harassment).

20. Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 *UTAH L. REV.* 671 (2018).

21. Cantalupo, *And Even More of Us*, *supra* note 13, at 44–45.

22. *Id.*

23. *Id.* at 44.

24. *See, e.g.*, Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 *U.C. DAVIS L. REV.* 1235 (2005).

25. *Id.* at 1239.

26. *Id.* at 1254.

### B. Contributing Factors to Heightened Vulnerability

Empirical evidence indicates that racial stereotyping, cultural stigma, and perceived economic disparity contribute to the higher rates at which sexual harassers target women of color.<sup>27</sup> Sexual harassment and sex discrimination scholars have long documented sexualized racial stereotypes surrounding women of color.<sup>28</sup> These sexualized racial stereotypes contribute to beliefs commonly held by harassers that women of color are sexually available or promiscuous and will welcome any sexual attention or conduct directed at them.<sup>29</sup> Scholars have found that, as a result of these stereotypes, the group of harassers that target women of color is likely larger and more racially diverse than the group of those who target White women.<sup>30</sup> Racial power dynamics likely deter most harassers of color from targeting White women.<sup>31</sup> Racial and cultural perceptions influence how women of color are engaged by potential harassers and their interplay increases vulnerability to harassment and unwanted sexual advances.

Perceived economic disparity is another factor that contributes to the increased sexual harassment faced by women of color. On college campuses, women who have difficulty paying for necessities or who rely substantially on Pell Grants (need-based grants for low-income students) have an increased risk of experiencing sexual harassment.<sup>32</sup> This risk is likely associated with socioeconomic power dynamics and privilege, including the limited ability of these survivors to obtain representation in sexual harassment proceedings.<sup>33</sup> Harassers often presume that women of color experience economic precarity and that they are thus easier to assert and enjoy control over than White women.<sup>34</sup> As a result of this presumption, potential harassers are likely to view women students of color as more vulnerable targets than their White colleagues.<sup>35</sup>

The intersection of race and gender also poses an elevated level of complexity for women students of color pursuing sexual harassment claims. This complexity compounds their vulnerability to sexual harassment as a result of sexualized racial stereotypes, cultural stigma, and perceived economic disparity. Accordingly, federal legislation and regulations should be constructed to respond to sexual harassment claims in a manner that sufficiently accounts for the dynamics facing women students of color. The following review of the Obama-era Title IX guidance on campus sexual harassment assesses the Obama

---

27. Hernández, *supra* note 24, at 1244 n.39.

28. Cantalupo, *And Even More of Us*, *supra* note 13, at 46.

29. *Id.*

30. Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 818 (1993).

31. *Id.*

32. Claude A. Mellins, Kate Walsh, Aaron L. Sarvet, Melanie Wall, Louisa Gilbert, John S. Santelli, Martie Thompson, Patrick A. Wilson, Shamus Khan, Stephanie Benson, Karimata Bah, Kathy A. Kaufman, Leigh Reardon & Jennifer S. Hirsch, *Sexual Assault Incidents Among College Undergraduates: Prevalence and Factors Associated with Risk*, PLOS ONE 14 (2017).

33. *See id.*

34. Cantalupo, *And Even More of Us*, *supra* note 13, at 49.

35. *Id.* at 26.

administration’s policies within this context and provides a foundation against which to evaluate the Trump administration’s regulatory changes.

## II. OBAMA-ERA TITLE IX GUIDANCE ON SEXUAL VIOLENCE

In order to qualify for federal funding, colleges and universities must comply with both the statutory parameters of Title IX and the Department of Education’s directives, including Title IX regulations,<sup>36</sup> policy guidance, and “Dear Colleague Letter” documents.<sup>37</sup> Federal courts have held that educational institutions violate Title IX when they exhibit “deliberate indifference” when confronted with sexual harassment actions toward their students.<sup>38</sup> In order for a student to establish a Title IX sexual harassment case against a college or university, they must prove that the school is an institution that receives federal funding, that the student was discriminated against on the basis of sex, that they were deprived in whole or in part of access to or receipt of educational programs or activities, and that the university had an official policy of sexual harassment or acted with deliberate indifference after being placed on notice of the harassment.<sup>39</sup> So what constitutes deliberate indifference?

After the Supreme Court determined that Title IX covers sexual harassment,<sup>40</sup> the Obama Department of Education’s OCR, the entity responsible for enforcing Title IX, issued policy guidance reflecting that determination and outlining the expectations for educational institutions in managing sexual harassment claims.<sup>41</sup> Specifically, the guidance warned that “if a school otherwise knows or reasonably should know of a hostile environment and fails to take prompt and effective corrective action, a school has violated Title IX even if the student has failed to use the school’s existing grievance procedures or otherwise inform the school of the harassment.”<sup>42</sup> This policy compelled educational institutions to immediately and appropriately investigate sexual harassment claims

---

36. See 34 C.F.R. pt. 106 (2019).

37. See U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE, BACKGROUND, SUMMARY, AND FAST FACTS (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.pdf> [<https://perma.cc/8TK9-H6D7>] [hereinafter DCL FAST FACTS 2011]; see also U.S. DEP’T OF EDUC., OFFICE OF CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/8LSX-2QDP>] [hereinafter OCR Q&A 2014].

38. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998); see also *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999); Diane Heckman, *The Role of Title IX in Combatting Sexual Violence on College Campuses*, 325 EDUC. L. REP. 1, 7 (2016).

39. *Gebser*, 524 U.S. at 290–91.

40. *Id.*

41. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (Jan. 19, 2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/HCB2-PJX2>].

42. *Id.* at 14.

and take prompt and practical steps to end sexual harassment.<sup>43</sup>

The Obama administration, inspired by the growing student-led movement to end campus sexual harassment, attempted to improve protections for sexual harassment survivors by filling gaps in the policy's implementation and releasing additional guidance during President Obama's second term.<sup>44</sup> The Dear Colleague Letter and subsequent Question & Answer document released by the Obama administration standardized the evidentiary burden of proof across all Title IX adjudications, expanded the definition of "sexual harassment" to include sexual violence, and offered a more precise explanation of institutional responsibilities for adjudicating alleged sexual misconduct.<sup>45</sup> The OCR, under the guidance of then-Vice President Joe Biden, intended for this policy guidance to "strengthen enforcement of Title IX after a period of relative inaction."<sup>46</sup> An explanation of each of these policy documents and their role in developing more fair and equitable processes for educational institutions to resolve Title IX sexual harassment cases follows.

### A. Dear Colleague Letter: Sexual Violence

The Obama-era OCR's Dear Colleague Letter (DCL) on Sexual Violence was released in April 2011.<sup>47</sup> The document reiterated previous OCR policy guidance and defined sexual harassment as "unwelcome conduct of a sexual nature" which creates a hostile environment where "the conduct is sufficiently serious that it interferes with or limits a student's ability" to obtain an education.<sup>48</sup> The DCL also expanded the definition of sexual harassment to include sexual violence, which it defined as rape, sexual assault, sexual battery, and sexual coercion.<sup>49</sup> The letter also required that schools respond to incidents of sexual harassment and violence regardless of whether they occur on campus, at a school facility, or in any other location, including off-campus.<sup>50</sup> It required schools to take "prompt and effective steps" to end sexual violence, prevent its recurrence,

43. Beccah Golubock Watson, *Know Your Rights: Sexual Violence on Campus*, YWCA (Oct. 18, 2013), <https://nwlc.org/blog/know-your-rights-sexual-violence-campus/> [<https://perma.cc/6HS5-PML5>].

44. See Janet Napolitano, "Only Yes Means Yes": *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POL'Y REV. 387, 387–401 (2014) (noting that even prior to 2010, student activists "played a pivotal role in raising awareness of sexual violence and sexual assault on campuses").

45. NAT'L ASS'N OF STUDENT PERS. ADM'RS, BACKGROUND BRIEF: TITLE IX & SEXUAL ASSAULT PREVENTION AND RESPONSE 2–3, [https://www.naspa.org/images/uploads/main/Title\\_IX\\_Sexual\\_Assault\\_Background\\_Brief\\_FINAL.pdf](https://www.naspa.org/images/uploads/main/Title_IX_Sexual_Assault_Background_Brief_FINAL.pdf) [<https://perma.cc/9D3P-3W75>].

46. Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 144 (2013).

47. Letter from Russlynn Ali, Assistant Sec. for Civ. Rts., U.S. Dep't of Educ., Off. for Civ. Rts. 10 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/YKV6-KR6L>] [hereinafter DCL 2011].

48. *Id.*

49. DCL FAST FACTS 2011, *supra* note 37.

50. Gaines West, Meg Penrose & Amy Klam, *Title IX: The Difficulties in Protecting an Accused's Rights*, 80 TEX. B.J. 510, 510 (2017).

and address its effects, regardless of whether the sexual violence was or became the subject of a criminal investigation.<sup>51</sup> Along these lines, the DCL created the Title IX Coordinator position and required all educational institutions receiving federal funding to designate or assign one employee to oversee all Title IX complaints. The Title IX Coordinator had to be sufficiently trained on the behaviors that constitute sexual misconduct and the respective institution’s grievance procedures.<sup>52</sup>

Perhaps most notably, the DCL reiterated that the correct evidentiary standard to use in resolving complaints of sexual harassment was a “preponderance of the evidence” standard (i.e., it is more likely than not that the sexual harassment occurred).<sup>53</sup> This is particularly relevant for women students of color because race-based discrimination claims are adjudicated under this standard. The use of any other standard presents a challenge to women students of color who then must decide whether to frame a sexual harassment claim in terms of their gender or their race. Recognizing this challenge, the OCR noted that “the Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act,” another statute prohibiting discrimination on the basis of sex, as well as Title VI, a statute prohibiting discrimination on the basis of race in educational institutions.<sup>54</sup> As a result, the Obama administration reasoned that educational institutions should consistently use the same evidentiary standard to adjudicate claims under Title IX.<sup>55</sup>

The decision to homogenize the evidentiary standards for complaints made under Title IX and complaints made under other civil rights statutes was met with mixed responses. Some scholars believe that because sexual violence is often a criminal offense, all complaints regarding sexual violence made under Title IX should be held to the criminal legal evidentiary standard (i.e., beyond a reasonable doubt) instead of a less burdensome civil standard.<sup>56</sup> Several Harvard Law professors, including Alan Dershowitz, published a piece in the *Boston Globe* objecting to the preponderance of the evidence standard, arguing that procedures under the DCL “lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation.”<sup>57</sup>

---

51. DCL 2011, *supra* note 47, at 16.

52. Sidney E. McCoy, *The Safe Campus Act: Safe for Whom? An Analysis of Title IX and Conservative Efforts to Roll Back Progressive Campus Sexual Assault Reform*, 122 PENN ST. L. REV. 763, 777–78 (2018).

53. DCL 2011, *supra* note 47, at 10.

54. *Id.* at 11.

55. *Id.*

56. See West et al., *supra* note 50, at 511; Audrey Wolfson Latourette, *Title IX Office of Civil Rights Directives: An Assault Against Due Process and First Amendment Rights*, 23 J.L. BUS. & ETH. 1 (2017).

57. Twenty-Eight Members of the Harvard Law School Faculty, *Rethink Harvard’s Sexual Harassment Policy*, THE BOSTON GLOBE (Oct. 15, 2014, 4:00 AM), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> [https://perma.cc/9XG2-K6WA].



Critics of the preponderance of the evidence standard fail to recognize the relationship between school adjudicatory and disciplinary procedures and Title IX—a federal *civil rights* statute. If campus sexual assault and an educational institution’s response to it are to be governed by Title IX and its associated regulations, as held by the Supreme Court,<sup>58</sup> then they must accordingly be viewed as civil rights issues. Furthermore, conflating an educational institution’s investigation and adjudication process with a criminal proceeding is simply incorrect. Educational adjudications do not carry the same weight as criminal proceedings, nor do they present a similar potential loss of liberty.

For women students of color, standardizing the burden of proof offers a practical solution to the dilemma of pursuing sexual harassment complaints under either racial or gender discrimination statutes. According to the Leadership Conference of Civil and Human Rights, the use of the preponderance of evidence standard provides equity for Black women and girls by ensuring fair and consistent treatment when reporting sexual harassment and violence on both race and sex bases.<sup>59</sup> Departure from this standard would “exacerbate inequities against survivors by mandating unfair processes that favor named harassers.”<sup>60</sup> Applying any higher standard under Title IX makes it significantly more challenging for women students of color to successfully prove their cases—benefiting named harassers—when claims are made under sex-based protections rather than under the umbrella of other civil rights laws.<sup>61</sup> Women students of color who experience sexual harassment in higher education should not have to choose how they frame their argument in order to receive equitable opportunity and due process in pursuing claims against their perpetrators.

### B. Questions and Answers on Title IX and Sexual Violence

The Obama Administration’s second policy document addressing sexual harassment claims made under Title IX was published on April 29, 2014, the same day the White House released the first report of the Task Force to Protect Students from Sexual Assault. The document, entitled Questions and Answers on Title IX and Sexual Violence (Q&A), reiterated the policies outlined in the 2011 DCL. It further prescribed training and preventative measures that educational institutions should take to curtail sexual violence, as well as the “immediate and appropriate steps” those institutions must take after a complaint is filed.<sup>62</sup> The guidance reflected the message of the Task Force’s initial report that prevention plays an equally important role to post-incident procedures in protecting students from

---

58. See Gebser and Davis, *supra* note 38.

59. The Leadership Conf. on Civ. and Hum. Rts. et al., Comment Letter on Proposed Rule: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance 8 (Jan. 30, 2019), <http://civilrightsdocs.info/pdf/policy/letters/2019/Joint-Comment-Title-IX-NPRM-01302019-Final.pdf> [<https://perma.cc/AQ49-TBLF>].

60. *Id.* at 8–9.

61. *Id.* at 8.

62. OCR Q&A 2014, *supra* note 37, at 15.

sexual harassment.<sup>63</sup>

The Q&A reiterated the three procedural measures schools must have in place to prevent sexual violence under Title IX. Specifically, the document elaborated on the requirements that schools disseminate a notice of non-discrimination, designate at least one employee to fill the Title IX Coordinator role, and adopt and publish grievance procedures for the “prompt and equitable” resolution of complaints.<sup>64</sup> The Q&A also outlined training requirements for school employees and the types of training schools should offer students on grievance procedures, what constitutes sexual harassment under the schools’ policies, and strategies and skills for preventing sexual violence.<sup>65</sup>

Under the Q&A, once an incident of sexual harassment occurred, schools were deemed to have notice “if a responsible employee knew, or *in the exercise of reasonable care should have known*,” about the incident.<sup>66</sup> The Q&A defined a “responsible employee” as an employee who “has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX Coordinator . . . or whom a student could reasonably believe has this authority or duty.”<sup>67</sup> Further, once a responsible employee was given notice, they had to report the incident to the school’s Title IX coordinator or other appropriate designee.<sup>68</sup>

The Q&A also elaborated on the many direct and indirect ways in which an educational institution, or a responsible employee of an institution, might receive notice about an incident of sexual violence, including sexual harassment and sexual assault. Examples of direct notice included a student filing a grievance or otherwise informing the institution’s Title IX Coordinator; an individual (including a student, parent, or friend) reporting an incident to a teacher, principal, campus police, the Office of Student Affairs, or other responsible employee; or a teacher or dean witnessing the incident.<sup>69</sup> Indirect sources of notice included social networking sites, members of the local community, and the media. Indirect sources are notable because under the Q&A, a school’s failure to take “prompt and effective corrective action” would violate Title IX even if the student survivor did not use the school’s formal grievance procedure or otherwise inform the school directly of the incident.<sup>70</sup>

Per the Q&A, “prompt and effective corrective action” required that educational institutions protect the complainant and ensure their safety as necessary.<sup>71</sup> It also required investigatory fact-finding and evidence-gathering in order to determine whether the conduct occurred and, if so, what actions the school

---

63. See DCL 2011, *supra* note 47, at 14–15.

64. *Id.* at 6.

65. OCR Q&A 2014, *supra* note 37, at 41.

66. *Id.* at 2 (emphasis added).

67. *Id.* at 15.

68. *Id.* at 14.

69. *Id.* at 2.

70. *Id.*

71. *Id.* at 3.

would take to address it and prevent its recurrence.<sup>72</sup> Corrective actions might include imposing sanctions against the perpetrator and providing remedies for the complainant, such as changing academic and extracurricular schedules or living, transportation, and dining arrangements as appropriate.<sup>73</sup> The investigation, according to the Q&A, had to be “adequate, reliable, impartial, and prompt” and could include a hearing but did not necessarily require one under Title IX.<sup>74</sup>

Critics of the Q&A, primarily conservative lobbyists and lawmakers, claimed that the document “created a system that lacked basic elements of due process and failed to ensure fundamental fairness.”<sup>75</sup> According to one attorney who represented accused students in Title IX cases, Obama’s policy guidance was an affront to “common sense and sanity.”<sup>76</sup> Some critics have even suggested that campus proceedings are the wrong forum entirely for sexual harassment claims and that campuses should be prohibited from investigating a sexual assault claim unless the survivor reported the assault to the police.<sup>77</sup>

In reality, whether a reported incident results in criminal charges or not, universities must address campus sexual harassment to maintain a safe and equitable learning environment. To send all incidents to the criminal justice system could deprive survivors of equal educational opportunities and would violate the very essence of student civil rights under Title IX.<sup>78</sup> Criminal investigations aim to punish, and perhaps imprison, perpetrators of sexual violence.<sup>79</sup> Conversely, civil rights investigations, including those conducted under Title IX, intend to ensure complainant survivors receive equal access to educational opportunities that may become inaccessible due to sexual harassment or sex discrimination.<sup>80</sup> Furthermore, nearly 95 percent of campus sexual assault survivors never report their experiences to law enforcement, likely due in part to the long-standing history of bias against survivors of sexual assault.<sup>81</sup>

For women students of color in particular, linking access to campus

72. OCR Q&A 2014, *supra* note 37, at 24–25.

73. *Id.* at 32.

74. *Id.*

75. Press Release, U.S. Department of Education, Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct> [<https://perma.cc/EFF9-FQNU>].

76. Justin Dillon, *New Title IX Proposal Would Restore Fairness in Sexual-Misconduct Cases*, CHRON. OF HIGHER EDUC. (Nov. 19, 2018), <https://www.chronicle.com/article/New-Title-IX-Proposal-Would/245131> [<https://perma.cc/3URY-BVZ9>].

77. See Tyler Kingkade, *28 Groups that Work with Rape Survivors Think the Safe Campus Act is Terrible*, HUFFINGTON POST (Sept. 17, 2015), [https://www.huffpost.com/entry/rape-survivors-safe-campus-act\\_n\\_55f300cce4b063ecbfa4150b](https://www.huffpost.com/entry/rape-survivors-safe-campus-act_n_55f300cce4b063ecbfa4150b) [<https://perma.cc/9LRD-EF6F>]; see also Safe Campus Act, H.R. 3403, 114th Cong. (2015).

78. The Leadership Conference on Civil and Human Rights, *supra* note 59, at 8.

79. *Id.*

80. *Id.*

81. See Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1961 n.97 (2016) (“Akin to the [survivor]-blaming attitudes of some modern-day law enforcement officials, courts in the 1800s in England linked a woman’s lack of chastity to a lack of credibility in rape proceedings.”).

procedures to the criminal justice system can further deter reporting. Evidence indicates that women of color are less likely to report experiences of sexual violence to law enforcement because they do not trust that officials will take their claims seriously.<sup>82</sup> Bolstering their suspicions are studies demonstrating that prosecutors are 4.5 times more likely to file charges if a survivor is White than if a survivor is Black.<sup>83</sup> A 2001 study indicated that over half of all sexual violence cases involving Black women survivors saw prosecutions denied and cases dismissed, compared to less than one third of cases involving a White woman survivor.<sup>84</sup>

In an effort to increase reporting, the Obama-era Q&A policy guidance provided students with numerous ways to notify their schools about acts of sexual violence and placed no obligation or imposition on survivors to report such acts to law enforcement.<sup>85</sup> By separating campus adjudications from criminal procedures, the Q&A helped alleviate the risk that criminal reporting requirements would deter women students of color from reporting sexual harassment to their educational institutions. Unfortunately, the Trump administration’s regulations departed significantly from the concern for survivors’ rights that characterized the Obama administration’s approach to Title IX.

### III. THE TRUMP ADMINISTRATION ON SEXUAL HARASSMENT UNDER TITLE IX

As previously mentioned, Obama’s DCL and Q&A elicited staunch resistance from conservative politicians. In that vein, the Trump administration rescinded both the DCL and Q&A on September 22, 2017, replaced the policies with interim guidance under the direction of Betsy DeVos, and then promulgated new regulations, effective August 14, 2020. The administration executed this rescission of Obama-era policies despite overwhelming public support for Obama’s Title IX guidance.<sup>86</sup> DeVos justified the action by claiming that the Obama-era guidance on campus sexual misconduct “lacked basic elements of fairness” and that the procedures implemented under the guidance treated accused students unfairly.<sup>87</sup>

---

82. Michelle S. Jacobs, *The Violent State: Black Women’s Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39, 76 (2017).

83. *Id.* at 77.

84. *Id.* at 78.

85. See OCR Q&A 2014, *supra* note 37, at 27.

86. See Amanda Orlando, Mariko Cool, Nancy Chi Cantalupo & Tiffany Buffkin, *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education’s Executive Order 13777 Comment Call*, 9 CALIF. L. REV. ONLINE 71, 72 (Mar. 2019) <https://www.californialawreview.org/widely-welcomed-and-supported-by-the-public/> [<https://perma.cc/H9P4-SLT6>] (“Of the 12,035 public comments addressing Title IX, 99 percent . . . of the commenters filed a comment in support of Title IX, with 97 percent . . . of Title IX supporters specifically urging [the Department of Education] to uphold the 2011 Dear Colleague Letter.”).

87. Stephanie Saul & Kate Taylor, *Betsy DeVos Reverses Obama-Era Policy on Campus Sexual Assault Investigations*, N.Y. TIMES (Sept. 22, 2017),

The new guidance immediately drew overwhelming criticism, and multiple survivor advocacy groups filed suit against the Department of Education seeking declaratory and injunctive relief from the guidance.<sup>88</sup> As a means of bolstering their standing in court, the Department of Education drafted regulatory changes to codify the guidance and published the proposed rules in the Federal Register for public comment on November 29, 2018.<sup>89</sup> The Department of Education then issued a Final Rule on May 6, 2020.<sup>90</sup> Although the regulatory changes implemented by the Trump administration diverge from Obama-era policy guidance in many ways, this Article focuses on four significant changes that will have far-reaching consequences for all survivors of campus sexual harassment and will disproportionately impact women students of color.<sup>91</sup>

Under the regulations, an educational institution violates Title IX only if it is (1) “deliberately indifferent” to (2) sexual harassment that is “so severe, pervasive, *and* objectively offensive that it effectively *denies* a person equal access to the recipient’s education program or activity,” and (3) a school employee with “the authority to institute corrective measures” had “actual knowledge” of the harassment.<sup>92</sup> The new regulations also provide schools with (4) the discretion to choose between two evidentiary standards—preponderance of evidence or clear and convincing—in adjudicating sexual harassment claims under Title IX.<sup>93</sup> Thus, the Trump Administration’s Title IX regulations regarding the handling of sexual harassment allegations on college campuses will negatively impact survivors in four fundamental ways by (1) narrowing the definition of sexual harassment, (2) increasing the threshold for institutional notice, (3) heightening the evidentiary standard required to prove harassment, and (4) permitting a less rigorous institutional response. A detailed explanation of each of these policy modifications follows and provides a foundation upon which to discuss the impact of the regulatory changes on women students of color.

### A. Deliberate Indifference

The Trump administration’s Title IX regulations require educational institutions to respond to sexual harassment<sup>94</sup> claims “in a manner that is not

---

<https://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html>  
[<https://perma.cc/H6GY-UQUM>].

88. FORDHARRISON, *U.S. Department of Education Faces Lawsuit Challenging Recent Guidance Concerning Campus Sexual Misconduct* (Nov. 1, 2017), <https://www.fordharrison.com/us-department-of-education-faces-lawsuit-challenging-recent-guidance-concerning-campus-sexual-misconduct> [<https://perma.cc/CU7L-T3AP>].

89. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

90. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020).

91. Nat’l Women’s L. Ctr., *supra* note 11, at 7.

92. 83 Fed. Reg. at 61,466 (emphasis added).

93. *Id.* at 61,477.

94. Including sexual assault, as defined in 34 § C.F.R. 668.46(a) (Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act).

deliberately indifferent.”<sup>95</sup> Unlike the Obama-era policy guidance that required schools to respond “reasonably” and with “prompt and effective” corrective action, the new regulations require only that a school’s response not be “*clearly unreasonable* in light of the circumstances.”<sup>96</sup> The new regulations further state that an educational institution should only be held liable for Title IX violations if it “makes an intentional decision not to respond” to sexual harassment claims.<sup>97</sup>

The Trump administration reasons that the deliberate indifference standard—the standard in “private actions for monetary damages”<sup>98</sup> under Title IX—should also apply to “administrative enforcement of Title IX” instead of the Obama Administration’s reasonableness standard.<sup>99</sup> However, this contradicts established understandings of the appropriate standard for administrative enforcement. The Solicitor General of the United States informed the Supreme Court that the deliberate indifference standard identified in *Gebser* does not apply to a federal agency enforcing Title IX administratively,<sup>100</sup> and the Department of Justice published the same determination in its Title IX Legal Manual.<sup>101</sup>

The proposed regulatory modifications allow schools to evade a finding of deliberate indifference by merely (1) responding to a formal complaint in accordance with the school’s outlined grievance procedures or (2), in the case that no formal complaint is filed, offering “supportive measures” to the complainant or the respondent.<sup>102</sup> This weakens the regulatory scheme for ensuring Title IX compliance and affords educational institutions significant leeway in their responses, or lack thereof, to sexual harassment claims. This lower standard for measuring an educational institution’s response to sexual harassment will practically “shield schools from any accountability under Title IX.”<sup>103</sup>

---

95. Susan D. Friedfel & Crystal L. Tyler, *Department of Education Amended Title IX Regulations*, JACKSON LEWIS (June 11, 2020), <https://www.jacksonlewis.com/publication/department-education-amended-title-ix-regulations> [<https://perma.cc/Q3C2-BHUT>].

96. 83 Fed. Reg. at 61,466.

97. *Id.* at 61,467.

98. See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (“We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”).

99. Jared P. Cole & Christine J. Back, *Title IX and Sexual Harassment: Private Rights of Action, Administrative Enforcement, and Proposed Regulations*, CONG. RSCH. SERV., 43 (Apr. 12, 2019), <https://fas.org/sgp/crs/misc/R45685.pdf> [<https://perma.cc/6L73-KQJR>].

100. Brief for the United States as Amicus Curiae Supporting Petitioner, *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (No. 97-843).

101. U.S. DEP’T OF JUST., CIVIL RIGHTS DIVISION, TITLE IX LEGAL MANUAL 100 (Jan. 11, 2001) [<https://perma.cc/PM4G-BEN3>] (“[F]or purposes of administrative enforcement of Title IX and as a condition of receipt of federal financial assistance—as well as in private actions for injunctive relief—if a recipient is aware, or should be aware, of sexual harassment, it must take reasonable steps to eliminate the harassment, prevent its recurrence and, where appropriate, remedy the effects.”).

102. 83 Fed. Reg. at 61,469–70.

103. Nat’l Women’s L. Ctr., *supra* note 11, at 21.

### B. Narrowing the Definition

The Trump administration's regulations define sexual harassment under Title IX as "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively *denies* a person equal access to the [school's] education *program or activity*."<sup>104</sup> This definition is significantly narrower than that established in Obama-era policy guidance,<sup>105</sup> which identified sexual harassment as conduct that *limited* a student's ability to participate in or benefit from a school's programming.<sup>106</sup> In contrast, the new regulatory definition requires that for conduct to be actionable under Title IX, it must be so severe that it *completely denies* a person access to education.<sup>107</sup>

This new definition is also inconsistent with the Supreme Court's liability standard for holding schools accountable for sexual harassment. The Supreme Court has held that a school is liable for sexual harassment if the institution "effectively *denie[s]*" a student equal access to its "*resources and opportunities*."<sup>108</sup> Denial of "equal access to a school's 'program' or 'activity' is a more burdensome threshold" to prove than "denial of equal access to a school's 'resources' [and] 'opportunities.'"<sup>109</sup> The National Women's Law Center (NWLC) argues that "students are not equipped to understand the complexities of [the Trump administration's new] definition," as its drafting contemplates "trained lawyers and judges carefully weighing whether conduct meets each element of the standard."<sup>110</sup> To ask students to "measure and parse their complaints" per this definition when they simply want a safe learning environment is inappropriate and inconsistent with the goals of protecting survivors.<sup>111</sup>

For women students of color, the specific and heightened threshold for harassment under the new definition creates an additional layer of complexity when considering potential claims. Women students of color who survive sexual harassment must now not only consider whether the conduct meets the threshold required for schools to act but also whether their case would be more successful if adjudicated under race- or gender-based protections. Narrowly construing which conduct suffices to trigger institutional action will further discourage women students of color from reporting incidents of sexual violence and make their decisions to report more complicated.<sup>112</sup>

### C. "Actual Knowledge"

The Trump administration's third significant departure from Obama-era

---

104. 83 Fed. Reg. at 61,466 (emphasis added).

105. See DCL 2011, *supra* note 47, at 3.

106. 83 Fed. Reg. at 61,462, 61,468–69.

107. See Cole & Back, *supra* note 99, at 43 (emphasis added).

108. Davis, 526 U.S. at 651 (emphasis added).

109. Nat'l Women's L. Ctr., *supra* note 11, at 13.

110. *Id.*

111. *Id.* at 13–14.

112. See *id.* at 14.

guidance seeks to further align the adjudicatory procedures and due process standards of Title IX to those of the criminal justice system—a harmonization which Professor Cantalupo has aptly termed “criminalizing” Title IX.<sup>113</sup> The new regulations also dramatically increase the threshold for what constitutes notice to an educational institution when a sexual harassment incident has occurred. To trigger a mandatory institutional response, the regulations require that an educational institution have “actual knowledge” of an incident, defined as “notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official . . . who has authority to institute corrective measures on behalf of the [institution].”<sup>114</sup> This regulation diverges from previous Title IX policy guidance in two major ways.

First, the Trump administration’s regulations require “actual knowledge” of an incident and clearly state that the “imputation of knowledge based solely on *respondeat superior* or constructive notice is insufficient” to hold a school liable under Title IX.<sup>115</sup> This significantly increases the previous threshold for notice, which required only that an educational institution “knew or, in the exercise of reasonable care, should have known” about an incident of sexual harassment to be liable under Title IX.<sup>116</sup> DeVos’s Department of Education reasoned that Obama-era policy guidance, which relied on the standard of notice established nearly twenty years ago in the 2001 guidance,<sup>117</sup> did not give sufficient clarity to educational institutions regarding when they would be held liable for their conduct.<sup>118</sup>

Second, the requirement reduces the number of school officials to whom students may report an incident to establish effective and proper notice. The Trump administration’s regulations note that “the mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the recipient” school.<sup>119</sup> The Department of Education believes that this requirement ensures that an educational institution “is liable only for its misconduct.”<sup>120</sup>

Unlike the Obama-era “responsible employee” standard, the new regulation fails to account for the reality that students who seek help often turn to “whatever

---

113. See Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence, and Student Discipline in Education*, 54 WAKE FOREST L. REV. 303, 325 (2019) (“Criminalization impedes civil rights laws’ functions because equality is not a goal. The criminal justice system is focused on keeping the abstract, general community safe from violence, and primarily relies on incarceration of criminal actors to protect that community. The system will not—because it structurally *cannot*—protect [survivors’] rights to equal treatment and protection.”).

114. 83 Fed. Reg. at 61,466.

115. *Id.*

116. OCR Q&A 2014, *supra* note 37, at 2.

117. DCL 2011, *supra* note 47, at 2.

118. 83 Fed. Reg. at 61,466.

119. *Id.*

120. *Id.* at 61,467.



adult they trust the most.”<sup>121</sup> This reduction in the number and type of employees who can receive proper notice is particularly likely to impact women students of color who typically do not see themselves represented in school administrations. Furthermore, students are likely uninformed about which employees have the authority required under the new regulations to address harassment and therefore receive proper notice.<sup>122</sup> Consequently, the notice requirement “unjustifiably limits the set of school employees” who can receive the actual notice that triggers a school’s required response and accountability under Title IX.<sup>123</sup> In practice, the Department of Education’s implementation of this requirement fails survivors by reducing the likelihood that a school will be held liable for failing to respond to an incident.

#### D. Clear and Convincing Evidence

The Trump administration’s final regulatory change suggests that schools use a clear and convincing evidence standard in Title IX proceedings as opposed to the Obama administration’s preponderance of the evidence standard. The clear and convincing standard requires “[e]vidence indicating that the thing to be proved is highly probable or *reasonably certain*.”<sup>124</sup> Conversely, the preponderance of the evidence standard requires only that facts indicate it is *more likely than not*, or there is a greater than 50 percent chance, that the perpetrator committed the alleged acts.<sup>125</sup> The suggestion of the higher threshold of the clear and convincing standard is allegedly intended to increase due process rights for the accused.<sup>126</sup> Still, the regulations provide schools the option to apply either the former preponderance of the evidence standard or the stricter clear and convincing evidence standard.<sup>127</sup>

A school’s discretion to choose which evidentiary burden of proof they apply comes with two stipulations. First, a school may apply the preponderance of the evidence standard “only if the [school] uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction.”<sup>128</sup> Second, the school “must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.”<sup>129</sup>

These stipulations create additional barriers to preventing sexual harassment and effectively responding to sexual harassment claims. The first stipulation makes students contemplating Title IX proceedings responsible for knowing which standard their educational institution applies and breeds inconsistency in campus adjudications across the country. Complainants at schools that apply the

---

121. Nat’l Women’s L. Ctr., *supra* note 11, at 15.

122. *Id.*

123. *Id.*

124. *Evidence*, BLACK’S LAW DICTIONARY (11th ed. 2019) (emphasis added).

125. *See Preponderance of the Evidence*, BLACK’S LAW DICTIONARY (8th ed. 2004).

126. *See* 83 Fed. Reg. at 61,477.

127. *Id.*

128. *Id.*

129. *Id.*

clear and convincing standard will have more difficulty proving their claims than their counterparts at schools that apply the preponderance of evidence standard.

Furthermore, the second stipulation raises a significant complication for schools with previously negotiated standards of proof for proceedings involving employees. Many educational institutions have collective bargaining agreements (CBAs) in place with labor organizations that explicitly require the use of the clear and convincing standard during employee adjudication hearings.<sup>130</sup> For example, the American Association of University Professors Collective Bargaining Congress, a major labor organization that negotiates CBAs at institutions of higher education in the United States, has successfully pursued a clear and convincing standard for faculty discipline in multiple CBAs they have negotiated.<sup>131</sup> The American Council on Education contends that it is impractical to expect institutions to renegotiate these CBAs in order to apply the preponderance of the evidence standard across all Title IX proceedings.<sup>132</sup> The Trump administration has therefore made clear and convincing evidence the “*de facto* federally prescribed standard” through these stipulations.<sup>133</sup>

The new regulations clearly depart from Obama-era policy guidance and the practice under other civil rights protections. As Professor Cantalupo explains, departure from the preponderance of the evidence standard creates “an immediately obvious intersectional legal conflict.”<sup>134</sup> The new standard singles out sexual harassment survivors for less protection than survivors of racial or other discriminatory harassment.<sup>135</sup> The use of inconsistent evidentiary standards thus presents conflicting thresholds for women students of color, who identify and may pursue remedies both as women and as people of color.<sup>136</sup> Under the new Title IX regulations, women students of color who experience sexual harassment and pursue gender-based remedies will quite possibly experience different and unequal treatment than if they framed their experiences as primarily racial harassment.<sup>137</sup>

Increasing the evidentiary burden, along with other deviations from prior policy guidance, indicates that the Trump administration sought to, according to Professor Cantalupo, criminalize Title IX.<sup>138</sup> By making Title IX investigation and adjudication procedures more like those of the criminal justice system, the

---

130. See Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018), <https://verdict.justia.com/2018/11/29/a-sharp-backward-turn-department-of-education-proposes-to-protect-schools-not-students-in-cases-of-sexual-violence> [<https://perma.cc/KT7H-Y2K3>].

131. See *id.*

132. Ted Mitchell, Am. Council on Educ., Comment Letter on Proposed Rule Amending Title IX Regulations 18 (Jan. 30, 2019), <https://www.acenet.edu/Documents/Comments-to-Education-Department-on-Proposed-Rule-Amending-Title-IX-Regulations.pdf> [<https://perma.cc/G9EY-SAZX>].

133. *Id.*

134. Cantalupo, *And Even More of Us*, *supra* note 13, at 7.

135. *Id.* at 8.

136. *Id.*

137. *Id.*

138. Cantalupo, *Dog Whistles*, *supra* note 113, at 325–26.

Department of Education will fail to “protect victims’ rights to equal treatment and protection” and make it more difficult for educational institutions to provide a safe learning environment.<sup>139</sup> Implications for women students of color, who experience sexual harassment at higher rates and must navigate the complexity of intersecting identities, will be extensive.

#### IV. IMPLICATIONS FOR WOMEN STUDENTS OF COLOR

The Trump administration’s regulations will impact all students engaged in Title IX proceedings but will have a disproportionately negative impact on women students of color. Sexual harassers target women students of color at higher rates than other populations, and the Trump administration’s Title IX regulations present particular challenges for these women and the schools they attend. The regulations will make it more difficult for institutions of higher education to prevent sexual harassment against women students of color and for student survivors to file and pursue successful claims against perpetrators. The regulations will discourage women students of color from reporting sexual harassment, lead to disparate representation of parties in educational adjudications, and likely increase the rate at which claims are dismissed.

##### A. Hesitancy to Report

While studies show that women students of color are more likely to report incidents of sexual harassment than their White colleagues, reporting rates under prior policy guidance were still relatively low.<sup>140</sup> Historical surveys indicate that incidents of sexual harassment and misconduct on college campuses are “widely underreported.”<sup>141</sup> One study conducted by the National Institute of Justice found that, on average, only 16 percent of survivors who were physically forced into sexual acts against their will, and 8 percent of those who experienced sexual assault through incapacitation contacted a survivor’s, crisis, or health care facility after the incident.<sup>142</sup> Another study estimated that over 95 percent of campus sexual assault survivors do not report incidents to campus authorities,<sup>143</sup> and a 2015 study of twenty-seven universities found that 28 percent or less of “even the most serious incidents are reported.”<sup>144</sup>

---

139. Cantalupo, *Dog Whistles*, *supra* note 113, at 325.

140. Hernández, *supra* note 24, at 1239–1241.

141. See Brian A. Pappas, *Dear Colleague: Title IX Coordinators and Inconsistent Compliance with the Laws Governing Campus Sexual Misconduct*, 52 TULSA L. REV. 121, 124 (2016).

142. Christopher P. Krebs, Christine Lindquist, Tara D. Warner, Bonnie S. Fisher & Sandra L. Martin, NAT’L INST. OF JUST., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY xvii (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> [<https://perma.cc/U42A-FCKR>].

143. Bonnie S. Fisher, Francis T. Cullen & Michael G. Turner, NAT’L INST. OF JUST. & BUREAU OF JUST. STAT., THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN: RESEARCH REPORT, 31–33 (2000), <https://files.eric.ed.gov/fulltext/ED449712.pdf> [<https://perma.cc/N85F-AS5S>].

144. David Cantor, Bonnie Fisher, Susan Chibnall, Reanne Townsend, Hyunshik Lee, Carol Bruce & Gail Thomas, WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL

The new official definition of sexual harassment is lengthy and complicated. Asking students to carefully weigh their complaints in accordance with a definition drafted for lawyers and judges may further impact reporting rates. The most commonly cited reason for students not reporting sexual harassment is fear that the incident was “insufficiently severe” to yield a response.<sup>145</sup> Further, a student may believe they endured severe and pervasive harassment but not know whether it was “objectively offensive” or “effectively denied [them] equal access” to a “program or activity.”<sup>146</sup> Women students of color, in particular, are now left to weigh whether their complaints meet the updated definition of sexual harassment and navigate the complicated analysis of whether they should frame their complaint in terms of racial or gender-based discrimination in order to obtain relief.

Furthermore, should a student experience an incident of sexual harassment that meets the Trump administration’s definition, the difficulty of identifying an “appropriate” official to whom they can formally report an incident may further discourage survivors from reporting their experiences. As the NWLC has observed, “even when students find the courage to talk to . . . school employees they trust, schools [will] frequently have no obligation to respond”<sup>147</sup> if those employees do not have the “authority to institute corrective measures” under the regulations.<sup>148</sup> Colleges and university administrations are historically and overwhelmingly White, so it may be more challenging for women students of color to identify officials to whom they feel comfortable reporting an incident and who also have the authority to take action.<sup>149</sup>

Moreover, as previously discussed, evidence indicates that women students of color worry that sexualized racial stereotypes cast doubt on the truth of their claims. That concern is not without empirical support.<sup>150</sup> Studies have shown that the sexualized racial stereotypes described in Part I of this Article “perpetuate the notion that African American women are willing participants in their own victimization.”<sup>151</sup> One survey also found that White college students perceive

---

ASSAULT AND SEXUAL MISCONDUCT iv (2015), [https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU\\_Campus\\_Climate\\_Survey\\_12\\_14\\_15.pdf](https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf) [https://perma.cc/3ZNV-T3P9].

145. See Kathryn J. Holland & Lilia M. Cortina, “*It Happens to Girls All the Time*”: Examining Sexual Assault Survivors’ Reasons for Not Using Campus Supports, 59 AM. J. CMTY. PSYCH. 50, 61 (2017).

146. See Nat’l Women’s L. Ctr., *supra* note 11, at 13–14.

147. *Id.* at 16.

148. 83 Fed. Reg. at 61,466.

149. See Lorelle L. Espinosa, Jonathan M. Turk, Morgan Taylor & Hollie M. Chesman, AM. COUNCIL ON EDUC., RACE AND ETHNICITY IN HIGHER EDUCATION: A STATUS REPORT, 247–48 (2019), <https://1xfsu31b52d33idlp13twtos-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/Race-and-Ethnicity-in-Higher-Education.pdf> [https://perma.cc/Y2E6-HSPH].

150. See Jacobs, *supra* note 82, at 46 (noting that the stereotype of Black women as “promiscuous” contributes to the underreporting, under-investigation, and under-prosecution of sexual assaults of Black women compared to those of White women).

151. See CAMPUS ADVOC. RES. & EDUC., *Sexual Violence Resources for Students Who Identify as*

Black women survivors of sexual assault as less believable and more responsible for their assault than White women survivors.<sup>152</sup> As a result, the Title IX regulations will ultimately discourage women students of color in particular from reporting sexual harassment.

### B. Disparate Representation of the Parties

Under the Trump administration's regulations, when a student reports an incident of sexual harassment, the narrowed definition, the de facto requirement of a stricter evidentiary standard, and the mandate for a live hearing will create a trial-like proceeding.<sup>153</sup> As the American Council on Education points out, "a courtroom-like 'trial' atmosphere will develop, with both students represented by counsel."<sup>154</sup> Under the Obama administration's policy guidance, educational institutions had to appoint advisers to support claimants and respondents throughout the investigation and adjudication and to present evidence to similarly situated campus officials.<sup>155</sup> The regulations no longer require universities to appoint such representation, leaving the parties to fend for themselves.<sup>156</sup> As a result, if the accused independently hires an experienced litigator, schools may struggle to ensure the survivor's representation is comparable without offering some form of financial assistance.<sup>157</sup> For women students of color in particular, the prospect of disparate representation in sexual harassment cases will acutely increase due to possible financial constraints and limited access to counsel.

The financial resources available for women students of color to pursue claims of sexual harassment, particularly in undergraduate education, are significantly limited compared to similar resources available to White women students. A study conducted by the American Council of Education found that 84.4 percent of Black students completed the Free Application for Federal Student Aid (FAFSA) to finance their undergraduate study for the 2015-2016 school year.<sup>158</sup> The study also found that, more than any other racial group, Black students

---

*Women of Color*, UC MERCED 2, [https://care.ucmerced.edu/sites/care.ucmerced.edu/files/page/documents/sexual\\_violence\\_and\\_women\\_of\\_color\\_1.pdf](https://care.ucmerced.edu/sites/care.ucmerced.edu/files/page/documents/sexual_violence_and_women_of_color_1.pdf) [<https://perma.cc/U9P4-XA4M>].

152. Roxanne A. Donovan, *To Blame or Not to Blame: Influences of Target Race and Observer Sex on Rape Blame Attribution*, 22 J. INTERPERSONAL VIOLENCE 722, 723 (2007).

153. 83 Fed. Reg. at 61,474.

154. Mitchell, *supra* note 132, at 10.

155. See OCR Q&A 2014, *supra* note 37, at 26 (noting that the OCR did not require schools to permit parties to have lawyers in addition to any appointed advisers and that if lawyers were allowed in proceedings, schools were required to allow lawyers equally for both parties).

156. See *Choosing an Adviser: Frequently Asked Questions Regarding Title IX/Sexual Misconduct Advisers*, PRINCETON UNIV. (Aug. 3, 2020), <https://sexualmisconductinvestigations.princeton.edu/information-parties/choosing-adviser> [<https://perma.cc/9PWX-7B9A>] ("Parties are responsible for identifying and choosing an adviser for themselves, as well as reaching out to that adviser regarding their availability to serve as an adviser.").

157. See *id.* (stating that Princeton University, for instance, will provide certain financial resources to assist a party if they choose to engage an attorney as their adviser but that the process and details regarding such arrangement are forthcoming).

158. Espinosa et al., *supra* note 149, at 157.

reported zero expected family contribution towards their education.<sup>159</sup> The same study noted that Black recipients of both associate’s and bachelor’s degrees graduated with higher average debt than students from any other racial and ethnic groups.<sup>160</sup> Women students of color, especially Black women students, rely more consistently on federal financial aid, grants, and scholarships to finance their education than their White colleagues. Accordingly, they likely have fewer financial resources readily available to them to vigorously pursue sexual harassment claims.

The costs associated with Title IX adjudications are extensive. The costs of legal counsel for Title IX proceedings could rise to as much as \$100,000 under the Trump administration’s regulations.<sup>161</sup> In addition to the cost of legal counsel, student survivors of sexual harassment often incur medical and counseling expenses and may experience lost scholarships and defaults on student loans as a result of the mental and emotional toll.<sup>162</sup> For women students of color, who often rely significantly on financial aid to pursue their education, the expense of experienced legal counsel may be particularly cost-prohibitive.<sup>163</sup> Although the OCR has often required that educational institutions reimburse survivors for some expenses, the increased financial burden of pursuing a sexual harassment claim with legal counsel presents an immediate barrier for survivors.<sup>164</sup>

State legislatures and survivor advocacy groups have proposed solutions for this issue, but none have meaningfully mitigated the constraints facing women students of color. For example, in 2018, the Maryland state legislature passed a bill that required the Maryland Higher Education Commission (MHEC) to provide access to and pay for attorneys for students at public institutions pursuing Title IX sexual harassment claims.<sup>165</sup> According to Democratic Delegate Brooke Lierman, the state legislature sought to “make sure that students have access to an attorney so that if they decide to bring [Title IX claims], the cost is not a barrier.”<sup>166</sup>

---

159. Espinosa et al., *supra* note 149, at xiv.

160. *Id.*

161. Ariel Kaminer, *New Factor in Campus Sexual Assault Cases: Counsel for the Accused*, N.Y. TIMES (Nov. 19, 2014), <https://www.nytimes.com/2014/11/20/nyregion/new-factor-in-campus-sexual-assault-cases-counsel-for-the-accused.html> [<https://perma.cc/4GW5-R62A>].

162. See KNOW YOUR IX: STATISTICS (last visited Aug. 9, 2020), <https://www.knowyourix.org/issues/statistics/> [<https://perma.cc/335Z-4QH7>] (stating that the costs of rape can range from \$87,000 to \$240,770 per rape and include medical treatment, counseling, and harder to quantify impacts on quality of life).

163. See WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 2, 15 (2014), [https://obamawhitehouse.archives.gov/sites/default/files/docs/sexual\\_assault\\_report\\_1-21-14.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf) [<https://perma.cc/6H3Z-UUGK>] (noting that a rape can cost a survivor between \$87,000 and \$240,776 over the span of their lifetime).

164. Dana Bolger, *Gender Violence Costs: Schools’ Financial Obligations Under Title IX*, 125 YALE L. J. 2106, 2112 (2016).

165. See H.B. 913, FISCAL AND POLICY NOTE, 3D READER REV. (Md. Gen. Assembly, 2018 Session), [http://mgaleg.maryland.gov/2018RS/fnotes/bil\\_0003/hb0913.pdf](http://mgaleg.maryland.gov/2018RS/fnotes/bil_0003/hb0913.pdf) [<https://perma.cc/EF56-S9D2>].

166. Brad Dress, *This Maryland Bill Would Budget for the State to Pay Students’ Title IX Legal Fees*, DIAMONDBACK (Feb. 27, 2019), <https://dbknews.com/2019/02/27/maryland-title-ix-legal-fund-students-sexual-misconduct-budget-commission-attorneys/> [<https://perma.cc/G9X4-SQ3G>].

However, the state budget failed to allocate the necessary funds to MHEC, so no students benefitted.<sup>167</sup> Further, legislation of this nature fails to address how students at private institutions that receive federal funding can obtain sufficient and equitable access to legal counsel.

The American Council on Education has proposed that absent any other solution, as part of their Title IX compliance, educational institutions themselves should be forced to pay for students' access to sufficient legal counsel.<sup>168</sup> The increased procedural and evidentiary requirements of the new regulations will require sophisticated legal representation and would therefore increase costs for schools.<sup>169</sup> While the solution to disparate representation remains unclear, the issue is a legitimate and obvious concern for student survivor advocates, and it will likely present a considerable obstacle for women students of color under the new regulations.

### C. Increased Dismissal of Claims

Assuming a woman student of color reports sexual harassment and participates in the campus investigation and adjudication with sufficient and equitable representation, the Trump administration's regulations still increase the probability that her educational institution will dismiss the claim. Despite purportedly basing recommendations on creating due process, the Department of Education must anticipate the coming rise in dismissal rates of sexual harassment claims. In fact, the very essence of the regulatory modifications is to elevate the difficulty of reporting and proving sexual harassment for survivors.<sup>170</sup>

Admittedly, an increase in the dismissal rates of campus sexual harassment claims will affect far more than just women students of color—it will negatively affect all complainants. The degree to which a dismissal of one's claim may specifically affect women students of color, however, is significant. According to the NWLC, the dismissal of a woman student of color's sexual harassment claim is often accompanied by disciplinary action against the survivor.<sup>171</sup> Shiwali Patel,

---

167. Dress, *supra* note 166.

168. See Mitchell, *supra* note 132, at 10.

169. *Id.*

170. Erica L. Green, *Sexual Assault Rules Under DeVos Bolster Defendants' Rights and Ease College Liability*, N.Y. TIMES (Nov. 16, 2018), <https://www.nytimes.com/2018/11/16/us/politics/betsy-devos-title-ix.html> [<https://perma.cc/L2TE-ALQ5>] (noting that many believed “the rules were meant to decrease the number of Title IX investigations on campus and chill sexual assault and harassment reporting”); see also Ruth Lawlor, *How the Trump Administration's Title IX Proposals Threaten to Undo #MeToo*, WASH. POST (Feb. 4, 2019), <https://www.washingtonpost.com/outlook/2019/02/04/how-trump-administrations-title-ix-proposals-threaten-undo-metoo/> [<https://perma.cc/F9TV-X2N3>] (“By undermining the ability of [survivors] to come forward, pared-back Title IX provisions will reinscribe the racist status quo by limiting the kinds of cases that can be heard.”).

171. Tyler Kingkade, *Schools Keep Punishing Girls—Especially Students of Color—Who Report Sexual Assaults, and the Trump Administration's Title IX Reforms Won't Stop It*, THE74MILLION (Aug. 6, 2019), <https://www.the74million.org/article/schools-keep-punishing-girls-especially-students-of-color-who-report-sexual-assaults-and-the-trump-administrations-title-ix-reforms-wont-stop-it/> [<https://perma.cc/BR6N-394S>].

an attorney at NWLC, claims, “These discriminatory responses from schools are far too common, particularly towards girls of color and especially Black girls, who—because of harmful race and sex stereotypes—are too often disbelieved.”<sup>172</sup> Exacerbating the issue, DeVos’s regulations fail to explicitly outline any prohibition of retaliation against either complainants or witnesses or any notice of the parties’ right to be free from retaliation, whether or not the claims are dismissed.<sup>173</sup>

Nevertheless, the disincentives and obstacles that DeVos’s regulations present to women students of color are not insurmountable. In providing comments on the regulations, survivor advocacy groups have made it resoundingly clear that options for fair reform do exist. The following section presents recommendations for some such options.

## V. RECOMMENDATIONS FOR ALLEVIATING THE NEGATIVE IMPACT ON WOMEN OF COLOR

Alleviating the negative impact of the Trump Administration’s Title IX regulations on women students of color requires recognizing and embracing the intersection of race and gender and adopting a holistic approach to addressing and preventing sexual harassment under Title IX. It also requires developing policies that embrace intersectionality to pragmatically solve the dilemmas present under existing civil rights statutes. Three recommendations that promote such an approach to Title IX enforcement include (1) an end to the “criminalization”<sup>174</sup> of sexual harassment claims made under the statute, (2) a return to the preponderance of the evidence standard, and (3) a reinvigoration of and a new emphasis on the role and responsibilities of the Title IX Coordinator. If implemented, these recommendations will better equip educational institutions to prevent and address sexual harassment.

### A. Distinguishing the Educational Adjudication Process from a Criminal Court of Law

The first step towards facilitating a more equitable process for enforcing Title IX is to distinguish educational adjudications of claims made under the civil rights statute from criminal courts of law. Title IX is unquestionably a civil rights statute and exists principally to prevent discrimination based on gender. Its implementation and enforcement should fall in line uniformly with the administrative enforcement of other civil rights statutes like Title VI, which prohibits schools from discriminating based on race or national origin.<sup>175</sup> The

---

172. *Id.*

173. *See* 83 Fed. Reg. at 61,472–74.

174. Cantalupo & Kidder, *supra* note 20, at 325–26.

175. *See* U.S. DEP’T OF JUST., TITLE VI LEGAL MANUAL 1, <https://www.justice.gov/crt/fcs/T6Manual6> [<https://perma.cc/T9Q7-QLG6>] (last visited Oct. 30, 2019) (providing guidance on the enforcement of Title VI and practical tips for adjudicating claims made under the statute).



Trump administration's policies regarding campus sexual harassment and new regulations, however, will dramatically alter how educational institutions enforce Title IX. The requirements for investigating and adjudicating sexual harassment claims in the new regulations depart significantly from the standards under other civil rights statutes and the policies of previous administrations, while conflating campus disciplinary proceedings with criminal courts of law. One need only review historical case law to know this is wrong.

In *Gorman v. University of Rhode Island*, the First Circuit held that a fair disciplinary proceeding in a campus setting is not “one that necessarily must follow the traditional common law adversarial method.”<sup>176</sup> The Supreme Court expressed similar sentiments in *Goss v. Lopez*, holding that “escalating [an educational adjudication’s] formality and adversar[ial] nature may not only make it too costly...but also destroy its effectiveness as part of the teaching process.”<sup>177</sup> Accordingly, significant differences should exist between Title IX investigations and adjudications in the campus setting and legal proceedings in a court of law.<sup>178</sup> The “due process” required in educational proceedings should focus solely on adequate notice and opportunity to be heard. Anything beyond that, such as cross-examination requirements or restrictions on confidentiality, unnecessarily treats educational proceedings as mini-trials, discourages survivors from coming forward, and differentiates sexual harassment claims made under Title IX from the treatment of claims made under other civil rights statutes.<sup>179</sup>

### B. Preponderance of the Evidence for all Harassment Claims

In the same vein, the Department of Education should promulgate a modification to the regulations that requires that all Title IX claims be adjudicated under the same evidentiary standard as claims adjudicated under other civil rights statutes: preponderance of the evidence. Returning to the singular preponderance of the evidence standard provides clarity for educational institutions and makes it easier for students to come forward with their complaints. A uniform burden of proof eliminates the dilemma for women students of color of determining whether they should file claims under Title VI (as sexualized racial harassment) or under Title IX (as racialized sexual harassment), based on the burden of proof. The commonalities between Title VI and Title IX support harmonizing the standard of proof between the two, as inconsistency not only hurts women students of color but is also an “[u]nwarranted [d]eparture from the [c]onventional [r]ules of [c]ivil

---

176. *Gorman v. Univ. of R.I.*, 837 F.2d 7, 14 (1st Cir. 1988).

177. *Goss v. Lopez*, 419 U.S. 565, 583 (1975).

178. See Gino Maisto Smith & Leslie M. Gomez, *The Regional Center for Investigation and Adjudication: A Proposed Solution to the Challenges of Title IX Investigations in Higher Education*, 120 PENN ST. L. REV. 977, 992 (2016) (explaining current differences between educational adjudications and legal proceedings).

179. See *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 603 (S.D. Ohio 2016) (denying a due process challenge in a sexual harassment case where the accused students were not permitted to cross-examine witnesses directly but were permitted to submit written questions to a panel chair rather than directly to the complainant); see also *Doe v. Ohio State Univ.*, 219 F. Supp. 3d 645, 658–59 (S.D. Ohio 2016) (rejecting a due process claim on similar grounds).

[I]tigation.”<sup>180</sup>

Under the Trump Administration’s regulations, schools with existing CBAs or other contractual documents requiring the clear and convincing evidentiary standard for employee adjudications may be liable for sex discrimination under Title IX if they retain the preponderance of the evidence standard.<sup>181</sup> Schools may not be able to defend using the preponderance of the evidence standard for student-on-student harassment while using the higher clear and convincing standard for employees. Federal law would thus require that these educational institutions renegotiate their CBAs, which they should do as a necessary step in ensuring the uniform and equitable administration of Title IX and other civil rights statutes. In the interest of protecting women students of color, schools “should feel compelled to adopt the preponderance of the evidence standard.”<sup>182</sup>

### C. Emphasis on the Role and Necessity of the Title IX Coordinator

While the preceding recommendations focus on the process of adjudicating sexual harassment claims under Title IX, the third recommendation focuses on perhaps the most critical staff position for effectuating enforcement of Title IX and fostering a safe learning environment—the Title IX Coordinator. Title IX Coordinators, whose position was created under the Obama administration and maintained in the new regulations, are responsible for coordinating investigations, providing information and consultation to complainants, scheduling and overseeing grievance hearings, and notifying parties of the decisions and procedures for appeal.<sup>183</sup>

The Association for Title IX Administrators reports that there are approximately 25,000 Coordinators who ensure Title IX compliance within schools, colleges, and universities.<sup>184</sup> These individuals and their staffs have the authority, per the OCR, to conduct proceedings to determine whether an educational institution has violated federal law. Considering the weight of the position and the importance of these responsibilities, improving the Coordinator position will likely alleviate some of the difficulties facing women students of color.

According to a 2018 study, educational institutions face four challenges in meeting current requirements regarding Title IX Coordinators and their role.<sup>185</sup>

---

180. Ramya Sekaran, *The Preponderance of the Evidence Standard and Realizing Title IX’s Promise: An Educational Environment Free from Sexual Violence*, 19 GEO. J. GENDER & L. 643, 655 (2018).

181. See 34 C.F.R. § 106.51(a)(3) (“A [school] shall not enter into a contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination . . .”).

182. Cantalupo, *And Even More of Us*, *supra* note 13, at 72.

183. See 83 Fed. Reg., *supra* note 89 at 61,469–70.

184. Ass’n of Title IX Adm’rs, *About ATIXA and Title IX*, ATIXA, <https://atixa.org/about/> [<https://perma.cc/8PLE-JCX3>].

185. Elizabeth J. Meyer & Andrea Somoza-Norton, *Addressing Sex Discrimination with Title IX Coordinators in the #MeToo Era*, PHI DELTA KAPPAN (Sept. 24, 2018),

Respondents reported that Title IX Coordinators are hard to find, have ambiguous or overly broad job descriptions, have insufficient training and education for the role, and struggle to understand how their role supports students with marginalized identities, like transgender students.<sup>186</sup> Of particular concern is the fact that the Title IX Coordinators who participated in the study noted that less than 1 percent of their work pertained to Title IX, and some of them did not learn that Title IX responsibilities were part of their position until several months after beginning their employment.<sup>187</sup> This study indicates the strong need for a renewed emphasis on the Title IX Coordinator role.

Survivor advocacy groups should push institutions of higher education for full-time employment and increased training requirements for Title IX Coordinators. According to a 2018 survey of 692 Title IX Coordinators, most were in part-time positions and possessed less than three years of experience.<sup>188</sup> Given the challenges of the new regulations, human resource teams should hire Title IX Coordinators to be dedicated exclusively to the role and its responsibilities on a full-time basis. Doing so will ensure that Title IX Coordinators have the time and resources to not only respond to complaints but also to “design and lead prevention and education activities to address the issue of sex-based discrimination.”<sup>189</sup> Further, Title IX Coordinators should receive training about other titled federal civil rights programs in order to better understand how to support students who may have viable complaints under various statutes. Educational institutions should budget for the role and its training requirements and fill the position effectively in order to maintain Title IX compliance and eligibility for federal funding. Ultimately, schools will fail to protect and support women students of color without adequately trained staff who are fully committed to managing the increased complexity of sexual harassment complaints under the Trump administration’s Title IX regulations.

### CONCLUSION

Campus sexual harassment is a highly politicized issue. As Anne McClintock, A. Barton Hepburn Professor of Gender and Sexuality Studies at Princeton University, describes, it has become a “right-wing ‘beachhead’” from which conservatives can “infiltrate academia, push back Obama-era policies, undermine collective civil rights, and impose large-scale federal deregulation.”<sup>190</sup>

---

<https://www.kapponline.org/meyer-somoza-norton-sex-discrimination-title-ix-coordinators-metoo-schools/> [<https://perma.cc/J7N5-XB54>].

186. *Id.*

187. *Id.*

188. Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAV. SCI. 38, 45 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5946097/pdf/behavsci-08-00038.pdf> [<https://perma.cc/9K76-RWF8>].

189. Meyer & Somoza-Norton, *supra* note 185.

190. Anne McClintock, *Who’s Afraid of Title IX?*, JACOBIN (Oct. 24, 2017), <https://www.jacobinmag.com/2017/10/title-ix-betsy-devos-doe-colleges-assault-dear-colleague> [<https://perma.cc/B8L5-E8JJ>].

The Trump administration’s Title IX regulations concerning sexual harassment are a clear departure from past policy guidance on the matter and present a particularly dangerous dilemma for women students of color. While claiming that the general goal of the administration’s rules is to ensure that the accused receive “due process,” DeVos has essentially conflated campus investigations and adjudicatory procedures with criminal courts of law and made the process much more difficult for survivors to navigate.

The observations and recommendations made throughout this article seek to establish the protection of complainants while maintaining fair proceedings for respondents. This article also seeks to identify solutions for mitigating the unique dilemmas facing women students of color who experience sexual harassment and violence. The recommendations made here, however, are insufficient on their own to support women survivors of color. Other interventions are needed. Perhaps the most critical need is improved research regarding women students of color and their experiences of sexual harassment. The lack of data available on women students of color and their experiences with sexual violence at institutions of higher learning makes it difficult for advocacy organizations, educational institutions, and government officials to shape policies that effectively support survivors.

The lack of demographic and racial information reported regarding campus sexual harassment incidents must be a future area of focus for legal and social scholars alike. Data and metrics around sexual harassment in schools, and particularly the experiences of students of color, can assist policy makers in promulgating future regulations on the matter. The Clery Act, initially passed in 1990, aimed to compel colleges and universities to collect crime reporting data and to disclose those statistics to the public.<sup>191</sup> However, the Act’s effectiveness in obtaining and disseminating information about gender-based sexual violence has been limited. Schools face disincentives to report sexual harassment incidents under the Clery Act for fear that their campuses will appear less safe.<sup>192</sup> In order to create a robust set of data upon which to build policy, the Act should be amended to compel schools to disclose additional relevant data, including demographic information of the complainant and respondent, the results of investigations, and any disciplinary actions taken.<sup>193</sup>

Without capturing and disclosing sufficient information about the experiences of students of color, on both the complainant and respondent sides of Title IX adjudications, developing policies and regulations that account for their experiences remains difficult. Educational institutions, survivor advocacy groups, and lawmakers need to continue their work to obtain relevant and sufficient data points on campus sexual harassment. Only then can truly evidence-based best practices be developed—practices that account for diverse student bodies, support

---

191. See *Summary of the Jeanne Clery Act: A Compliance and Reporting Overview*, CLERY CTR., <https://clerycenter.org/policy-resources/the-clery-act/> [<https://perma.cc/AGD9-M62C>].

192. Cantalupo, *And Even More of Us*, *supra* note 13, at 75.

193. See 20 U.S.C. § 1092.

survivors of sexual harassment, and facilitate a fair process that protects the rights of all parties.