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SYMPOSIUM ISSUE
AFTER MISOGYNY: HOW THE LAW FAILS WOMEN AND WHAT TO DO ABOUT IT

Our Historical Commitment to Women's Excellence

Kathryn Bassey[*]

This past fall, the *New England Law Review* had the privilege and honor to host a symposium to explore and discuss an integral topic to New England Law | Boston: women's fundamental and constitutional rights. New England Law | Boston, formerly known as Portia Law School, was founded in 1908 as the only law school in the country that exclusively taught women, at a time when most other legal institutions would not entertain such a concept.[1] As many students know, our school's namesake is derived from Shakespeare's play *The Merchant of Venice*. *The Merchant of Venice*, in short, depicts one of the main characters of the play, Portia, who dresses up as a man and impersonates a lawyer in order to save her male friend. This play was written as a *comedy*, maybe for the laughability of the notion of a woman doing a man's job, maybe just for the Shakespearean jokes sprinkled throughout lines—both can be argued.

Yet New England Law | Boston's dedication to the legal education of women has crucially contributed to women's presence in the law. Blanche Braxton, the first African-American woman to be admitted to the Massachusetts Bar, graduated in 1921.[2] For several decades, the majority of women who passed the Massachusetts bar exam were graduates of Portia Law School.[3] Despite becoming coeducational in 1938,[4] we have continued to support the development of excellent female attorneys. This year, we are proud to say Amy Lyn Blake, class of 1992, has been named the first female

[*] J.D. Candidate, New England Law | Boston (2025); Editor-in-Chief, *New England Law Review*, Vol. 59.

[1] *Our History*, NEW ENGLAND LAW | BOSTON, https://perma.cc/7L6Z-NSBX (last visited Mar. 20, 2025).

[2] *Id*.

[3] *Id*.

[4] *Id*.

Chief Justice of the Massachusetts Appeals Court.[5] Regardless of the changes in the world since 1908, New England Law | Boston has always stayed true to one core value: a commitment to offering an excellent foundation for a career in law to all those who *work* for it. Regardless of gender, women are entitled to equal treatment under and to practice the law.

We were honored to center Julie Suk's Book *After Misogyny: How the Law Fails Women and What to Do About It* as the forefront of our discussion. Professor Suk's work and forthcoming postscript invites us to reckon with the deeply embedded structures of inequality in the legal system, arguing that, despite decades of progress in women's rights, misogyny still shapes our legal frameworks in ways that perpetuate gender-based discrimination.[6] This work is not merely an analysis of where the law has gone wrong; it is a call to action, offering practical, bold, and forward-thinking solutions for reform.

The *New England Law Review* will always strive to facilitate the publication of scholarship of our brilliant and hard-working Associates, regardless of their gender. Furthermore, we will continue to serve as a platform for ideas regarding constitutional law development from the fantastic legal scholars of our community. Vol. 59-1 exemplifies the dedication, and we hope that the following pieces will inspire us all to act, reflect, and question how we can all contribute to a legal system that truly serves the interests of all people, regardless of gender.

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[5] *Governor Administers Ceremonial Oath of Office Swearing in Honorable Amy Lyn Blake as Chief Justice of the Massachusetts Appeals Court*, MASS.GOV (Jan. 28, 2025), https://perma.cc/RKD6-5RPL.

[6] *See* JULIE C. SUK, AFTER MISOGYNY: HOW THE LAW FAILS WOMEN AND WHAT TO DO ABOUT IT (2023).

New Challenges and Milestones for Feminist Constitutionalism: A Postscript to *After Misogyny*

JULIE C. SUK*

I. Introduction: Misogyny After *Dobbs v. Jackson Women's Health*

After Misogyny argued that a significant legal manifestation of misogyny is found in the laws that ban or restrict abortion.[1] Abortion bans enforce patriarchy after the primary legal structures of patriarchy have been outlawed. As a legal system, patriarchy excluded women from full legal personhood and the rights of citizenship. Since the 20th century, constitutional democracies have recognized women as full voting citizens entitled to equal rights and protections under the law, casting patriarchy as fundamentally incompatible with democracy. Yet, when a majoritarian democracy bans abortion by law, *After Misogyny* shows how the law enforces the overentitlement of society to women's reproductive labor for the society's enrichment, and the overempowerment of those who held power under patriarchy and have managed to entrench and abuse it. Misogyny is the continuation of patriarchy through legal means other than formal legal inequality and exclusion, and abortion bans are a core engine of misogyny.[2]

After Misogyny was published in April 2023, less than a year after the Supreme Court overruled the abortion protections of *Roe v. Wade* in the name

* Professor of Law & The Honorable Deborah A. Batts Distinguished Research Scholar, Fordham University School of Law.

[1] *See* Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—And Some Pathways for Resistance*, 101 TEX. L. REV. 1127 (2023) (offering a thorough critique of Dobbs' democracy-based reasoning); Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728 (2024). *See generally* JULIE C. SUK, AFTER MISOGYNY: HOW THE LAW FAILS WOMEN AND WHAT TO DO ABOUT IT 21, 113–20, 215–21 (2023).

[2] SUK, *supra* note 1, at 3–4.

of democracy.[3] *Dobbs v. Jackson Women's Health* triggered new challenges and opportunities for feminist constitutionalism. With the green light from *Dobbs* to ban abortion, legislatures in about a third of the states have enacted criminal statutes prohibiting nearly all abortions, whether from the moment of conception or upon detection of fetal cardiac activity.[4] By legalizing these abortion bans, *Dobbs* ushered in a brave new world in which the law could impose forced pregnancy and motherhood upon millions of American women. The experiences of women denied abortion in medical emergencies since *Dobbs* illustrate how the law severely undervalues women's control over their lives, as well as women's long-term health. That undervaluing, more so than outright woman-hatred, is what gives misogyny a structure in law and policy. Governments largely controlled by men expect women to sacrifice their long-term health through abortion bans and risk their own lives to increase the likelihood that the unborn fetus will live to become a living child.

Feminist movements in the United States and around the world are deploying new strategies of democratic constitutionalism to curb the resurgence of patriarchal overentitlement and overempowerment. The post-*Dobbs* era has seen an unprecedented adoption of constitutional reproductive freedom amendments explicitly protecting abortion access. This postscript evaluates the new challenges and milestones of feminist constitutionalism in this era of misogynous abortion bans.

II. The Resurgence of Abortion Restrictions

A. *New Threats to American Women's Lives and Health*

Dobbs v. Jackson Women's Health upheld a Mississippi law prohibiting the termination of pregnancy beyond 15-weeks' gestation, thereby explicitly overruling *Roe v. Wade's* protection of a constitutional right against state

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[3] Dobbs v. Jackson Women's Health, 597 U.S. 215, 232 (2022) ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.").

[4] *See generally State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST., https://perma.cc/9NUA-BWWZ (last updated Jan. 2, 2025) (including Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia as states instituting bans on abortion from moment of conception with few exceptions); ALA. CODE § 26-23B-5 (2023); ARK. CODE ANN. § 5-61-304 (2023); IDAHO CODE § 18-622 (2023); IND. CODE § 16-34-2-1 (2022); KY. REV. STAT. ANN. § 311.772 (West 2019); LA. STAT. ANN. § 40:1061 (2022); OKLA. STAT. TIT. 21 § 861 (2023); S.D. CODIFIED LAWS § 22-17-5.1 (2022); TENN. CODE ANN. § 39-15-213 (2021); TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (2023); W. VA. CODE § 16-2R-3 (2022).

interference with abortion prior to fetal viability.[5] The Supreme Court majority repudiated *Roe* as an "egregiously wrong" precedent, by which "raw judicial power" had enforced a constitutional right that was never mentioned in the Constitution.[6] Finding no basis in "history and tradition" for the right to abortion in light of the liberties most meaningful to the Fourteenth Amendment's ratifiers, the Court concluded that the Fourteenth Amendment's Due Process Clause could not serve as a barrier to state laws that banned or restricted abortion.[7] The Supreme Court characterized the judicial enforcement of constitutional abortion rights as a threat to democracy, concluding that the question of whether to permit or ban abortion should be decided by the people through their elected representatives in state legislatures and Congress.[8]

In deploying this logic to overrule *Roe*, *Dobbs* did more than simply uphold the 15-week abortion ban in Mississippi; it removed the legal barrier to the enforcement of state laws that banned abortion at much earlier stages of pregnancy, including from the moment of conception. In the years leading up to *Dobbs*, a number of state legislatures had adopted such "trigger" laws banning abortion before viability on the understanding that they would only become enforceable if the Supreme Court overruled *Roe v. Wade*.[9] In the months following *Dobbs*, doctors began to comply with these state abortion bans, understanding that they were now enforceable. In addition, several state legislatures acted between July 2022 and 2024 to ban or restrict abortion, adopting laws imposing harsh criminal punishment on doctors for performing abortions from either the moment of conception or upon the detection of a fetal heartbeat (around 6-weeks' gestation). These statutes made exceptions to allow legal abortions to prevent the death of the mother, but the exceptions did not permit abortions to prevent harm to the pregnant

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[5] *Dobbs*, 597 U.S. at 231–32.

[6] *Id.* at 228 (quoting Justice White's dissent in Roe v. Wade, 410 U.S. 179, 222 (1973)).

[7] *Id.* at 240–50.

[8] *Id.* at 232.

[9] GUTTMACHER INST., *supra* note 4; *see, e.g.*, ARK. CODE ANN. § 5-61-304 (2023); IDAHO CODE § 18-622 (2020); KY. REV. STAT. ANN. § 311.772 (West 2024); LA. STAT. ANN. § 14:87.7 (2022); MISS. CODE ANN. § 41-41-45 (2023); MO. REV. STAT. § 188.017 (2024); N.D. CENT. CODE § 14-02.3-04 (2023); OKLA. STAT. TIT. 63, § 1-731.4 (2022); S.D. CODIFIED LAWS § 22-17-5.1 (2005); TENN. CODE ANN. § 39-15-213 (2019); 2021 Tex. Sess. Law Serv. Ch. 62 (S.B. 8) (West) (also known as "Texas Heartbeat Act"); UTAH CODE ANN. § 76-7a-201 (LexisNexis 2023); and WYO. STAT. ANN. § 35-6-102 (2022) (repealed 2023).

woman's health.[10] Some, but not all, abortion-ban states permitted abortions to terminate pregnancies resulting from rape or incest.[11]

The legal regimes of these abortion bans led to predictably challenging situations for the management of some pregnancies. In Idaho, for instance, doctors attempting to comply with the criminal abortion statute refrained from performing abortions to protect the health of the pregnant woman, understanding that Idaho's exception to criminal liability only authorized abortions to prevent the pregnant woman's death.[12] The federal government sued the state of Idaho to enforce the federal Emergency Medical Treatment and Labor Act (EMTALA), which requires hospitals receiving Medicare funds to provide medical care necessary to stabilize patients in emergency rooms, including abortions when indicated to prevent serious harms to the pregnant patient's health. The federal district court issued a preliminary injunction enjoining the enforcement of Idaho's abortion ban when it conflicted with the requirements of EMTALA, finding that EMTALA pre-empted the Idaho law.[13] While a panel of the Ninth Circuit reversed, allowing the Idaho abortion ban to be fully enforced,[14] the Ninth Circuit reinstated the injunction while pending review en banc.[15] Idaho then sought emergency relief from the Supreme Court, which initially allowed the Idaho law to go into effect again while granting certiorari before judgment.[16] In

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[10] *E.g.*, IDAHO CODE § 18-622(2)(a) (imposing criminal penalties on doctors who perform abortions with an exception for abortions necessary to prevent the death of the pregnant woman).

[11] *See, e.g.*, IDAHO CODE § 18-622(2)(b) (making an exception to permit abortions for pregnancies resulting from rape through the first trimester). *See generally* Mabel Felix, et. al., *A Closer Look at Rape and Incest Exceptions in States with Abortion Bans and Early Gestational Restrictions*, KAISER FAMILY FOUND. (Aug. 7, 2024), https://perma.cc/CQ8E-PW3Y (describing abortion-ban exceptions as being slightly later in the case of rape or incest in other states with total or 6-week abortion bans such as Florida, Georgia, Indiana, Iowa, Mississippi, North Dakota, South Carolina, and West Virginia; the Arkansas, Kentucky, Louisiana, Missouri, and South Dakota statutes recognize no such exception).

[12] *See* Planned Parenthood Great Northwest v. State of Idaho, 171 Idaho 374, 394–95 (2023) (detailing that shortly after Idaho's total abortion ban went into effect, Planned Parenthood challenged the statute on state constitutional grounds in state court, alleging, inter alia, that doctors feared criminal penalties for removing ectopic and nonviable pregnancies; the Idaho Supreme Court construed the definition of abortion in the statute as not including the removal of ectopic and nonviable pregnancies).

[13] United States v. Idaho, 623 F. Supp. 3d 1096, 1102 (D. Idaho 2022).

[14] United States v. Idaho, 83 F.4th 1130, 1135–39 (9th Cir. 2023).

[15] United States v. Idaho, 82 F.4th 1296 (9th Cir. 2023).

[16] Idaho v. United States, 144 S. Ct. 541 (2024) (granting a writ of certiorari before judgment).

June 2024, after hearing argument on the merits, the Supreme Court dismissed the petition as improvidently granted, which had the effect of reinstating the injunction against the Idaho law while the case was pending en banc review by the Ninth Circuit.[17] Thus, the question of whether any federal laws can stop a state abortion ban from exposing pregnant women to serious long-term health risks remains unresolved. A non-misogynous legal regime—one that is committed to stopping society's overentitlement to women's sacrifices for the common good—would resolve this question in a way that properly values women's health.

Other cases have left this question unresolved through a different legal theory. In Texas, women who were denied health-saving abortions by doctors trying to comply with the abortion ban sued Texas, urging that the abortion ban violated the state constitution's equal protection and due process guarantees.[18] Trying to follow the narrow exception to allowing life-saving abortions, doctors waited until a pregnant patient was experiencing an imminent and high risk of death before performing the life-saving abortion. In *Zurawski v. Texas*, women who had experienced medical emergencies arising from pregnancy complications asked a Texas court to declare the exception met when a doctor deems a pregnancy to be unsafe. But the Texas Supreme Court declined to read the state constitutional guarantees to require such a generous construction of the exception.[19] Such a reading would "open the door to permit abortion to address any pregnancy risk."[20] The Texas Supreme Court's decision held that women's rights to equal protection and due process were perfectly compatible with laws limiting abortions to situations where the mother had a "life-threatening physical condition," imposing a risk of "death or serious physical impairment."[21]

The Texas Supreme Court neglects the murkiness of the line between health- and life-saving abortions in real medical emergency situations. The history of abortion law in Ireland in Chapter 3 of *After Misogyny* shows how an infection that causes a pregnant person's death can begin as a minor risk to short-term health and present as a probable cause of death or serious

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[17] Moyle v. United States, 603 U.S. 324, 325 (2024).

[18] *See* Zurawski v. State of Texas, No. D-1-GN-23-000968, 2023 WL 11815888 (Tex. Dist. Ct. Aug. 4, 2023).

[19] State v. Zurawski, 690 S.W.3d 644, 665 (Tex. 2024).

[20] *Id.*

[21] *Id.* at 671.

physical impairment only after it is too late to avert the tragedy.[22] A law that bans abortion without immunizing doctors' good-faith medical judgments about when an abortion is necessary to protect the pregnant patient's health or life forces women to make substantial sacrifices and endure excessive risks to promote the collective interest in unborn life.

B. *Antiabortion Backlash in the Chilean Constitutional Process*

The scene of feminist protest that opens *After Misogyny*[23] triggered a process of constitutional renewal, but it did not lead to the triumph of feminist constitutionalism or abortion rights in Chile. The first constituent process, with strong representation by women from progressive and feminist groups, had managed to include reproductive freedom in the constitution that was proposed and rejected by Chilean voters in September 2022.[24] After that attempt failed, there was a second constituent process that still preserved gender parity as an electoral rule, and produced a more moderate constituent assembly with greater representation of established political parties.[25] The second constituent process created an Expert Commission of constitutional scholars and other experts chosen by political parties on the Left and the Right to draft a new constitution.[26] In its draft, the Expert Commission did not explicitly protect a right to abortion or reproductive freedom, but it included the right to privacy in the family and the home, as well as the right to the protection of health in its physical, mental, and social dimensions.[27] Rights to abortion in some circumstances could be inferred from such provisions, even if they don't necessarily follow from them. The combination of implication and indecision on the question of abortion likely reflects the compromises negotiated by the Right and the

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[22] *See* SUK, *supra* note 1, at 108–12.

[23] SUK, *supra* note 1, at 1 (*After Misogyny* begins with the anthem chanted by women in protests in Chile, which spread globally: "Patriarchy is our judge/That imprisons us at birth/And our punishment/Is the violence you DON'T see.").

[24] SUK, *supra* note 1, at 178; *see* POL. CONST. OF THE REPUBLIC OF CHILE, art. 61 (as proposed by the Constitutional Convention of Chile, July 4, 2022).

[25] *See* Catherine Reyes-Housholder, Julieta Suárez-Cao & Javiera Arce-Riffo, *The Puzzle of Chile's Resilient Support for Gender Parity*, 57 POL. SCI. & POL. 263, 263 (2024).

[26] *See* Sergio Verdugo, *Chile's New Constitutional Proposal: A Balance Between Change and Continuity?*, CONSTITUTIONNET (June 30, 2023), https://perma.cc/TA3T-48ND.

[27] *See* Expert Comm'n, *Preliminary Draft of the Political Constitution of the Republic of Chile*, EUR. COMM'N FOR DEMOCRACY THROUGH L. art. XVI, § 11, art. XVI, § 21 (Sept. 20, 2023), https://perma.cc/LJ58-7LGD.

Left to achieve consensus on the Expert Commission draft.[28]

However, the Expert Commission draft was not the one that was sent to the voters to approve or reject. The second constitutional process was designed to authorize an elected Constitutional Council to revise the Expert Commission's draft constitution before putting the proposed new constitution up for referendum by the voters. Right-wing parties won significant electoral victories that led to supermajority representation on the Constitutional Council.[29] That Council revised the Expert Commission draft, reversing many compromises in favor of provisions championed by the Right.[30] This led to the inclusion of a clause recognizing the right to life of the unborn and declaring that the law shall protect it,[31] like Ireland's Eighth Amendment that existed until its repeal in 2018.[32]

Nonetheless, under conditions of mandatory voting, the Chilean electorate rejected the Constitutional Council's proposed constitution in December 2023.[33] This conservative proposal met the same fate as the 2022 proposed constitution, which had been labeled the most progressive constitution ever written in the world: Both were rejected by wide margins of 2–1. While abortion is only one of many issues on which the Chilean Right and Left are polarized, the failure of both the effort to constitutionalize a right to abortion in 2022 and the effort to constitutionalize the right to life of the unborn in 2023 is telling. It suggests that a consensus might lie somewhere in the middle. Rebalancing society's overentitlement to women's sacrifices to protect unborn life may not require abortion on demand. Irish citizens' assembly processes pushed towards repealing the protection of unborn life, while indicating a lack of popular support for constitutionalizing the right to elective abortion in the 2018 referendum.[34] To get past the misogyny of banning abortion, the law must robustly protect

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[28] *See* Francisco Soto Barrientos & Benjamin Alemparte, *The Audacity of the Expert Commission in Chile*, I-CONNECT (May 31, 2023), https://perma.cc/RHQ2-NWQR.

[29] Catherine Osborn, *Chile's Constitutional Whiplash*, FOREIGN POL'Y (May 12, 2023, 8:00 A.M.), https://perma.cc/V8XF-73VF.

[30] *See* Samantha Schmidt, *Why Chile's Draft Constitution Reads Like a U.S. Conservative Wish List*, WASH. POST (Dec. 16, 2023, 8:00 A.M EST), https://perma.cc/5DXG-CYXE.

[31] *See* Matthew Martin & Guillermo Perez, *Chile's Draft Constitution of 2023*, CONSTITUTE (Apr. 13, 2024), https://perma.cc/X8WL-6AHG.

[32] *See* SUK, *supra* note 1, at 105–20 (discussing the adoption, evolution, and repeal of the Irish protection for unborn life).

[33] Jack Nicas, *Chile's Voters Reject a New, Conservative Constitution*, N.Y. TIMES (Dec. 17, 2023), https://perma.cc/HBD8-TVMZ.

[34] *See* SUK, *supra* note 1, at 110–12.

life- and health-saving abortions in a charitable and workable way. The American and Chilean developments of the past year underscore the lessons of the Irish experience. Recognizing the misogyny in abortion bans—namely the overentitlement of society to women's sacrifices for the admittedly worthwhile goal of protecting unborn life—may be critical to reshaping abortion law after *Dobbs*. Legal access to abortion should be grounded in the law's commitment to superseding patriarchy and misogyny, rather than a revival of *Roe*'s logic of privacy.

III. The Constitutionalization of Abortion Rights

A. *States*

While many state legislatures restricted abortion access after *Dobbs* empowered them to decide the abortion question, voters in some of those states mobilized to fight back. An important channel of popular mobilization against antiabortion legislation is found in state constitutional processes that empower the people themselves to initiate and vote on proposed laws. Twenty-four states have some form of initiative and referendum process that enables the people to make or repeal laws independently of their elected representatives.[35] State constitutional provisions empower citizens to propose laws that are then voted upon directly by the electorate in a referendum. Pursuant to such procedures, citizens can amend the state constitution, in an act of constituent power.

In the immediate aftermath of *Dobbs*, Michigan citizens deployed the state constitution's initiative and referendum process[36] to propose a state constitutional amendment protecting reproductive freedom, which the voters approved by 55% in a November 2022 referendum.[37] A 1931 Michigan statute banning most abortions had been invalidated by *Roe*, and *Dobbs*' overruling of *Roe* made it possible for either state officials to resume enforcement of that ban, or the state legislature to enact a new abortion ban.[38] Michigan became the first state to utilize the citizens' initiative and

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[35] *Initiative and Referendum Processes*, NCSL, https://perma.cc/6E93-GB44 (last updated Sept. 23, 2024).

[36] MICH. CONST. art. II, § 9.

[37] Rick Pluta, *Michigan Voters Approve Amendment Adding Reproductive Rights to State Constitution*, NPR (Nov. 9, 2022, 3:59 AM ET), https://perma.cc/ZY6G-DQ7L.

[38] *See* Kate Wells, *What Counts as a "Life Saving" Abortion Under Michigan's Law? Experts Say It's Not Clear*, MICH. PUB. (May 3, 2022, 9:20 PM EDT), https://perma.cc/XZR2-ANPK.

referendum process to constitutionalize a right to abortion,[39] protecting abortion without the need for elected representatives to weigh in.

Michigan's referendum affirming reproductive rights occurred on the same day as referendums constitutionalizing the right to abortion in California and Vermont.[40] In California and Vermont, voters approved reproductive rights amendments proposed by a legislature that had been inclined to protect rather than prohibit abortion.[41] Neither of these states had trigger bans passed by legislatures. The 2022 state constitutional amendments were written to prevent future legislation banning abortion,[42] not to strike down actual antiabortion legislation.

But since 2023, citizens in abortion-ban states have deployed state initiative and referendum processes to propose state constitutional amendments to override antiabortion legislation enacted by their legislatures. This activity points to significant gaps in some states between voters and their elected representatives on the abortion question, with elected representatives failing to represent the will of the voters.

In November 2023, Ohio voters invalidated their legislature's abortion ban through a citizen-initiated constitutional amendment.[43] In 2019, the Ohio legislature adopted a trigger law criminalizing abortion upon detection of a fetal heartbeat (around 6 weeks), which became enforceable after *Dobbs*.[44] Reproductive health care clinics challenged that ban in federal court, resulting in a preliminary injunction based upon a straightforward application of *Roe* and *Casey*.[45] That injunction was terminated when the Supreme Court decided *Dobbs*.[46] The clinics then challenged the heartbeat ban in state court, invoking state constitutional law, and procured a temporary restraining order, with a trial court opinion recognizing a right to

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[39] *See* MICH. CONST. art. I, § 28.

[40] Mitch Smith & Ava Sasani, *Michigan, California and Vermont Affirm Abortion Rights in Ballot Proposals*, N.Y. TIMES (Nov. 9, 2022), https://perma.cc/FPE2-28CY.

[41] *See* Reproductive Freedom, 2022 Cal. Stat. Sen. Const. Amend. 10, Ch. 97; Reproductive Liberty Amendment, 2022 Vt. Acts & Resolves Proposal 5.

[42] *See e.g.*, CAL. CONST. art. I, § 1.1; VT. CONST. art. 22.

[43] *See* OHIO CONST. art. I, § 22.

[44] S.B. 23, 133rd Gen. Assemb. (Ohio 2019) (codified at Ohio Rev. Code § 2919.195).

[45] Preterm-Cleveland v. Yost, 394 F. Supp. 3d 796, 804 (S.D. Ohio. 2019).

[46] Preterm-Cleveland v. Yost, No. 1:19–cv–00360, 2022 WL 2290526 at *1, *5–6 (S.D. Ohio. 2022).

abortion under the Ohio constitution's "due course of law" clause.[47] But with no guarantee that abortion would continue to be protected by Ohio courts on appeal, abortion advocates began the process of collecting citizens' signatures to propose a constitutional amendment clearly protecting reproductive freedom with an explicit mention of abortion.[48]

In response to this abortion amendment campaign, the Republican-controlled legislature swiftly adopted another constitutional amendment to make it more difficult to propose and ratify future constitutional amendments by initiative and referendum.[49] The legislature arranged for its proposed change to the constitutional amendment process to be approved or rejected by voters in a referendum before the abortion amendment referendum.[50] This measure would have changed the initiative process to require citizens' signatures from every county in the state of Ohio, rather than from only half the counties of the state. In addition, the legislature proposed that future constitutional amendments be approved by a 60% supermajority of the vote in a referendum, rather than a simple majority exceeding 50%. Voters rejected this change to Ohio's state constitutional amendment process in August 2023.[51] As a result, the proposed state constitutional amendment enshrining reproductive freedom moved forward to a referendum in November 2023. Had the procedural change been approved, the Ohio abortion amendment would not have become law in November 2023, having received 56.6% of the vote in the referendum.[52] However, the voters' defeat of the legislature's proposed procedural change that August allowed them to override the legislature's abortion ban using Ohio's longstanding constitutional amendment process. The Ohio Constitution now provides:

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[47] Preterm-Cleveland v. Yost, No. A2203203, 2022 WL 16137799, at *15, *21 (Ohio Ct. C.P. Oct. 12, 2022) (citing OHIO CONST., art. I, § 16).

[48] Julie Carr Smyth, *Ohio Abortion Rights Ballot Measure Receives Nearly Double the Needed Signatures*, PBS NEWS (July 5, 2023), https://perma.cc/F5L9-34P6.

[49] *See generally* S.J. Res. 2, 135th Ohio Gen. Assemb. (2023).

[50] *See* State ex rel. One Person One Vote v. LaRose, 243 N.E.3d 1, 4–5 (Ohio 2023) (The details of the legislature's proposal are laid out in the Ohio Supreme Court's opinion upholding the validity of the August 2023 referendum on the legislature's proposed constitutional amendment).

[51] Jo Ingles & Karen Kasler, *Ohio Voters Reject Measures that Would Have Made It Harder to Change Constitution*, NPR, (Aug. 8, 2023), https://perma.cc/M2G7-DNGM.

[52] Jo Ingles, *Ohio Votes in Favor of Amending the State Constitution to Enshrine Abortion Rights*, NPR, (Nov. 7, 2023), https://perma.cc/FL85-9JC7.

> A. Every individual has a right to make and carry out one's own reproductive decisions, including but not limited to decisions on:
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> 1. contraception;
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> 2. fertility treatment;
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> 3. continuing one's own pregnancy;
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> 4. miscarriage care; and
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> 5. abortion.
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> B. The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either:
>
> 1. An individual's voluntary exercise of this right or
>
> 2. A person or entity that assists an individual exercising this right,
>
> unless the State demonstrates that it is using the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care.
>
> However, abortion may be prohibited after fetal viability. But in no case may such an abortion be prohibited if in the professional judgment of the pregnant patient's treating physician it is necessary to protect the pregnant patient's life or health.[53]

Since the amendment took effect in December 2023, it has become the basis for court injunctions not only against the 6-week ban, but against a range of Ohio laws that constrain access to abortion, including regulations that prevent advanced healthcare professionals who are not medical doctors from providing medication abortions.[54]

In November 2024, referendums in ten states asked voters to decide whether to protect access to abortion in their state constitutions.[55] In Maryland, Missouri, Arizona, Colorado, Montana, and Nevada, voters elected to inscribe the right to abortion into their state constitutions, in

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[53] OHIO CONST. art. I, § 22.

[54] *See* Decision and Order Granting Plaintiffs' Second Motion for a Preliminary Injunction at *2–3, 8, *Planned Parenthood Southwest Ohio Region v. Ohio Dep't of Health*, No. A 2101148 (Ohio Ct. C.P. Aug. 29, 2024).

[55] *See* Allison McCann & Amy Schoenfeld Walker, *Where Voters Will Decide on Abortion in November*, N.Y. TIMES (Sept. 13, 2024), https://perma.cc/8SZW-MPSG.

varying forms. In New York, voters approved a state constitutional amendment that extended the existing guarantee of equal protection to include many additional grounds of non-discrimination, including sex, gender, pregnancy, sexual orientation, gender identity or expression, and reproductive healthcare and autonomy.[56] Proposals to add the right to abortion to state constitutions failed in Florida, Nebraska, and South Dakota. In Florida, the measure failed even though it garnered 57% of the vote, which would have been sufficient in any of the other states that held abortion referendums in 2024.[57] But the Florida state constitution requires a 60% supermajority at referendum to approve a constitutional amendment proposed by voter initiative.[58]

Despite the failure of the right to abortion amendments in three states, after the 2024 election, there are now twelve states that protect abortion in state constitutions. That is one state away from the number required to block the ratification of any proposed federal constitutional amendment banning abortion by protecting the sanctity of unborn life.[59] Of the abortion amendments that were added to state constitutions in 2024, Missouri's is perhaps the most impactful. Missouri's abortion amendment is the first to invalidate a total abortion ban from the moment of conception, adopted by the legislature. Ohio's amendment invalidated a fetal heartbeat ban, Missouri's invalidates an even more restrictive state abortion law.

When the fundamental law of the state prohibits that state from imposing burdens or penalties on a woman's decision not to take on the sacrifices that only she can make to turn the unborn fetus into a live child, it truly resets the patriarchal overentitlement of society to that sacrifice by all women. Explicitly preventing the state from banning abortion even after fetal viability in circumstances that a woman's doctor has deemed unsafe for her health and life also rebalances that overentitlement.

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[56] N.Y. CONST. art. I, § 11.

[57] For results of the referendums, see *Abortion on the Ballot*, N.Y. TIMES, https://perma.cc/QLN7-W88V (last updated Mar. 2, 2025).

[58] FLA. CONST. art. XI, § 5(e).

[59] Under Article V of the Constitution, amendments must be ratified by three-fourths of the states, whether by state legislatures or state conventions. Therefore, with 38 out of 50 states required to ratify an amendment, any 13 states can block the amendment by failing to ratify it, even if adopted by Congress or an Article V convention. *See* U.S. CONST. art. V.

B. *France*

Meanwhile, France became the first country to inscribe an explicit guarantee of abortion rights into a national constitution in March 2024.[60] It took less than 2 years for legislators to deploy the French constitutional amendment process to add the following provision to the French Constitution: "Statutes shall lay down the conditions under which the woman's guaranteed freedom to have a voluntary interruption of pregnancy is exercised."[61] The French term "voluntary interruption of pregnancy" refers to elective abortions, and is broader than "medical interruption of pregnancy" which only includes abortions medically induced to protect the pregnant woman's health. The provision therefore sweeps beyond protecting life- and health-saving abortions by referring to voluntary interruption of pregnancy.

The amendment was a reaction to *Dobbs*; legislators proposed it within a week of the decision, pointing explicitly to *Dobbs* as an impetus for an amendment that would make it impossible in the future to deprive a person of the right to elective abortion.[62] Initially, the National Assembly adopted stronger wording—"The law guarantees effectiveness and equal access to the right to voluntary interruption of pregnancy,"[63]—that was intended to be placed in Article 66 of the Constitution, alongside judicially enforceable provisions against arbitrary detention and a clause banning the death penalty.[64]

But the Senate adopted a weaker version: "The law determines the conditions by the liberty of the woman to end her pregnancy is exercised," and the provision would be placed in Article 34, which enumerates the legislative powers of the Parliament. Critics of the Senate's wording noted that the text did not prevent the legislature from determining that the liberty to terminate a pregnancy is limited to life-saving abortions in the interest of

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60 *See* Loi nº 24-200 du 8 mars 2024 relative à la liberté de recourir à l'interruption volontaire de grossesse, J.O. du 9 mars 2024, p. 1. *See generally* Julie Suk, *L'avortement comme question constitutionnelle, Intersections: Revue semestrielle genre et droit*, nº 1, 7 juin 2024, https://perma.cc/UY9Z-QFMW.

61 CONST., Art. 34 (official English translation available at https://perma.cc/X4GY-ZRN8).

62 Assemblée Nationale n° 8, Proposition de loi constitutionnelle visant à garantir le droit à l'interruption de grossesse, 30 juin 2022, p. 3.

63 L. const. n° 293 du 7 oct 2022.

64 CONST., Art. 66-1.

protecting unborn life.[65] In the absence of agreement between the two chambers of Parliament, the proposal cannot advance to a referendum for approval under the French Article 89 process for amending the Constitution.

However, Article 89 provides another route to amendment: The President can propose an amendment, which, if agreed to by a majority of each chamber independently, then goes up for a vote by the joint session of both chambers, in which three-fifths of the members of this aggregate body must approve the amendment. In Fall 2023, President Macron proposed adding text to Article 34 that compromised between the two chambers: "Statutes shall lay down the conditions under which the woman's guaranteed freedom to have a voluntary interruption of pregnancy is exercised."[66] It was an enumeration of legislative power, not a judicially enforced right. It was a freedom, not a right, but that freedom was "guaranteed." What was guaranteed was elective abortion ("voluntary interruption of pregnancy"), not whatever conditions the legislature selects by which pregnancy can be freely terminated. Ultimately, this compromise text surpassed the three-fifths threshold in the joint session of Parliament by a landslide, 780 votes for, 72 against, with 50 abstentions.[67] With some women legislators dressed in white as an homage to American suffragists of over a century ago, the historic vote to inscribe the guarantee of elective abortion in a national constitutional text occurred on March 4, 2024.[68]

The French abortion amendment works differently than the state constitutional amendment in Ohio, the latter having become the basis for litigation to enjoin the abortion-restrictive acts of the legislature. The French abortion amendment does not create a judicially enforceable right to abortion but grants a power to the legislature and imposes a duty upon it to enact statutes that implement a woman's guaranteed liberty to have an elective abortion. In France, the existing abortion law in the public health code enjoys a popular and parliamentary consensus. It provides unrestricted access to elective abortions in the first 14 weeks of pregnancy (including public health insurance coverage), after which abortion is legal only when

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[65] *See* Juliet Bénabent, Incorporation of Abortion into our Constitution Only Makes Sense if It Prevents Setbacks, Télérama, (Mar. 10, 2023), https://perma.cc/F762-EMXK.

[66] Loi nº 24-200 du 8 mars 2024 relative à la liberté de recourir à l'interruption volontaire de grossesse, JORF no. 0058 du 9 mars 2024.

[67] *Analyse du scrutiny no. 1 - Congrès*, Assemblée Nationale (Mar. 4, 2024) https://perma.cc/9BFU-SM7J.

[68] Sylvain Maillard, *Congrès de Versailles - IVG - 4 mars 2024*, YOUTUBE (Apr. 2, 2024), https://perma.cc/8QJR-9K97.

medically indicated to protect the pregnant woman's life or health (including mental health), or when the pregnancy results from a criminal act, or in the case of severe fetal abnormalities. The 2024 constitutional amendment, the legislative debates make clear, was adopted to instruct the legislature not to slide back from these existing statutory abortion entitlements.

IV. Confronting Challenges for the Constitutionalism of Care

Chapter 6 of *After Misogyny* took up another important path by which democratic societies can replace the legal structure of patriarchal overentitlement: the constitutionalism of care. *After Misogyny* identified one of the most interesting efforts in this constitutional trajectory to be the debate over Article 41.2 of the Irish constitution, which states that "by her life within the home, woman gives to the State a support without which the common good cannot be achieved," and "[t]he State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home." This "woman in the home" clause, as Article 41.2 is known, enforces patriarchy by entitling the state to women's unpaid work within the home of caring for families. But the second part suggests that the overentitlement could be rebalanced by measures the state must "endeavor" to take to alleviate the economic burdens that result from the need to engage in market work while caring for one's family. Recognizing that this model is becoming antiquated in the 21st century, a Citizen's Assembly convened in 2021 to explore attempts at modernization and recommended replacing the "woman in the home" clause with a gender-neutral commitment to supporting the care that contributes to the common good.

As *After Misogyny* went to press, the Irish parliamentary committee on gender equality tasked with reviewing and acting on the Citizens' Assembly recommendations issued its report "Unfinished Democracy" to propose constitutional amendment wording to go up for referendum. It proposed to: (1) add sex as a prohibited distinction; (2) remove language about law recognizing differences in capacity, replacing with language requiring law to respect principles of equality and non-discrimination; (3) replace "woman in the home" clause with the following language: "The State recognises that care within and outside the home and Family gives to the State a support without which the common good cannot be achieved," and "The State shall, therefore, take reasonable measures to support care within and outside the home and Family"; and (4) replace constitutional language pledging the state to protect "[m]arriage, on which the Family is founded" with language

protecting the "[f]amily, including but not limited to the marital family."[69]

However, this proposed language was not the language adopted in Parliament and sent to the voters in referendum. First, the proposal to inject explicit language prohibiting sex discrimination and committing the legislature to furthering principles of equality and non-discrimination was discarded. Second, the family to be protected by the state would be defined as founded on "marriage and other durable relationships." Third, the proposal to replace the "woman in the home" clause was limited to include only family care and to weaken the state's duty to support it. The revised language presented to voters on the ballot was: "The State recognises that the provision of care, by members of a family to one another by reason of the bonds that exist among them, gives to Society a support without which the common good cannot be achieved, and shall strive to support such provision."[70]

Both proposed constitutional amendments were rejected by the Irish voters on March 8, 2024. The care provision in particular was overwhelmingly opposed, with 74% of the voters rejecting it.[71] Although the proposed amendment provided an opportunity to strike the antiquated language on a woman's role in the home from the Constitution, even some progressive groups organized against the amendment, contending it was too limited in recognizing and supporting care only within the family. Disability rights advocates opposed the proposed wording on the grounds that it imposed duties to care for them on their family members instead of requiring the state to support care in furtherance of their independence.[72] In addition, some feminists criticized the proposal that the state "strive" to support care, rather than "take reasonable steps" to do so as proposed by the gender equality parliamentary committee.[73] "Strive," like "endeavor" in the existing Constitution, risked being too vague by comparison to "take reasonable steps," which imposes a concrete judicially enforceable duty on

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69 Joint Committee on Gender Equality, *Unfinished Democracy: Achieving Gender Equality Final Report*, HOUSES OF THE OIREACHTAS, 38–40 (Dec. 2022), https://perma.cc/SY3W-DUS7.

70 Univ. Coll. Dublin Ctr. for Const. Stud. & Univ. Coll. Dublin Sutherland Sch. of L., *A Guide to the Referendums on the Thirty-Ninth and Fortieth Amendments to the Constitution*, U. COLL. DUBLIN, 6 (2024) https://perma.cc/W23K-HLKZ.

71 Rory Carroll, *Irish Voters Overwhelmingly Reject Proposed Changes to the Constitution*, THE GUARDIAN, (Mar. 9, 2024, 4:46 PM EST), https://perma.cc/UJ78-4MRN.

72 Jade Wilson, *Proposed Amendment to Constitution Would Deny Disabled People's Autonomy, Says Lobby Group*, THE IRISH TIMES (Feb. 21, 2024), https://perma.cc/4NU5-J7HA.

73 *See* Katherine O'Donnell, et al., *Justice for Magdalenes Group Will Be Voting No in the Care Referendum. Here's Why*, IRISH EXAM'R (Mar. 4, 2024), https://perma.cc/32KH-FFHJ.

government actors.

With all these criticisms, the opportunity to reset the patriarchal ideology that society is entitled to women's unpaid work within the home was foregone. Ireland could have taken a step, albeit an incomplete one, towards a new constitutionalism of care, resetting the patriarchal entitlement of society to women's unpaid reproductive care work in favor of recognizing the shared responsibility of family caregivers of all genders as well as the state. But the failure to build coalitions concerning the wording highlights the important and difficult work of democratic consensus-building for the future of feminist constitutional change.

V. Conclusion: The Future of Feminist Constitutionalism

In the short period following the publication of *After Misogyny*, the world has seen unprecedented triumphs for feminist democracy in the form of constitutional amendments explicitly entrenching the legality of elective abortion. These amendments protect women's control over reproductive decisions that disproportionately affect their bodies and lives as a precondition for women's full participation as equal citizens of the polity and equal contributors to the economy. Ohio's experience of achieving an abortion amendment demonstrates the importance of democratic mobilization outside of the existing political institutions—such as state legislatures—that have become sites of overempowerment. Consistent with the evolution of Irish abortion law detailed in *After Misogyny*, the failures to adopt progressive or conservative constitutions in Chile and the success of the moderate reproductive freedom amendment in France illustrate that the work of overcoming misogyny requires patient democratic engagement to build coalitions and consensus. And the failure of the care amendment in Ireland illustrates the risks of alienating potential allies through incrementalist approaches to establishing feminist infrastructures. Therefore, paving new paths of democratic change will be critical to resetting entitlements and rebalancing legal and political power to overcome misogyny.

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Whither Liberalism *After Misogyny*?

DEBORAH DINNER*

Julie Suk begins her provocative and erudite book with an accounting of how misogyny persists after patriarchy. The rise of sex equality under law in the late twentieth century eroded coverture, extended the franchise to women, limited state action on the basis of sex, and guaranteed equal opportunity in employment, education, and other market and civic spheres. Yet men continue to commit violence against women in the home and workplace, often with impunity. Society continues to extract women's unpaid social reproductive labor, without either compensation or adequate welfare state supports. Suk argues convincingly that we should understand this regime as an example of what Reva Siegel calls "preservation through transformation."[1] The law continues to tolerate and, in some instances, facilitate women's subordination, exploitation, disadvantage, injury, and even death, after the rise of formal sex equality. To this point, the critique is a familiar one to students, scholars, and practitioners of feminist legal theory. Yet Suk quickly takes us to a theoretical account and constructive vision that is strikingly original.

In a creative and incredibly interesting chapter, Suk examines the doctrines of unjust enrichment and abuse of right. Tracing these doctrines from Roman law through their elaboration in European civil law, Suk sheds new light on why several forms of misogyny, from abortion restrictions to sexual harassment, constitute injuries and are normatively wrong. In reformulating how to think about both gender injustice and gender justice, *After Misogyny* upends several principles taken for granted in U.S. liberal

* Dorothea S. Clark Professor of Law, Cornell Law School. This essay was originally published in *Balkinization* as part of an online symposium on Julie Suk's *After Misogyny* and it is reprinted with permission.

[1] Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996).

legal theory. In this article, I focus on two of the most significant: reproductive privacy and sex equality.

Building on the scholarship of Robin West, Dorothy Roberts, and Khiara Bridges, Suk argues that privacy provides neither a desirable political nor sound legal foundation for abortion.[2] Democracies must guarantee abortion access precisely because of the public, rather than the private, dimension of childbearing. By transforming fetuses into born children, pregnant persons perform the biological reproduction of the next generation. To extract the value of gestation and childbirth, without supporting the people who perform this labor, unjustly enriches the broader society. This service generates a set of duties on the part of the state toward pregnant women—obligations that begin but do not end with allowing abortion.

I am deeply sympathetic to Suk's argument for the public nature of reproduction. As West argued nearly fifteen years ago and, more recently, the historian Sara Matthiesen has elucidated, the privacy framework for abortion legitimated minimal state support for children, parents, and care workers.[3] Suk draws lessons from Germany's and Ireland's constitutional trajectories, which both affirmed a state interest in protecting the fetus and provided public funding for first-trimester abortions. In addition, we might also consider the Latin American movement for reproductive rights, named for the color of the handkerchiefs symbolizing abortion which women waved in mass protests. As Verónica Gago explains, the green tide connects the struggles for sovereignties over individual bodies and over land.[4] This highlights the class dimensions of clandestine abortion and the experiences, especially, of indigenous women in Latin America. By contesting the ideological boundaries between production and reproduction, public and private, abortion rights activists expose the political economy that yields both neoliberal fiscal policies and neofascist regulation of sexuality and pregnancy.

Suk reaches a position in her conclusion that I think is somewhat at odds

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[2] *See generally* Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394 (2009); Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (1998); Khiara M. Bridges, *The Poverty of Privacy Rights* (2017).

[3] West *supra* note 2, at 1394. *See generally* Sara Matthiesen, *Reproduction Reconceived: Family Making and the Limits of Choice After* Roe v. Wade (2021).

[4] *See generally* Verónica Gago, *Feminist International: How to Change Everything* (Liz Mason-Deese trans., 2020).

with her analysis. She argues that the pregnant woman provides "rent-free housing" to the fetus who, under safe haven laws, belongs to the state.[5] As a consequence, "the Takings Clause obligates the state to compensate [the pregnant woman] for the public use of her womb."[6] I found this discussion jarring because anti-egalitarian opponents have long mobilized private property rights to suppress Black and socialist feminism as well as labor organizing. The takings doctrine may undermine the labor theory that is core to Suk's understanding of both biological and social reproduction. Recasting pregnancy in a property framework threatens to reinforce the individual rights and privatization that *After Misogyny* interrogates. Certainly, the turn to takings doctrine might have reflected Suk's effort to proffer a constitutional theory that had legs in the courts, given the political constraints the abortion rights movement faces in state legislatures and Congress. In my view, however, Suk's broader account better supports Andrew Koppelman's Thirteenth Amendment theory, which she also references.[7] The argument that abortion restrictions impose involuntary servitude recognizes childbearing as a form of socially and economically valuable labor.

The second liberal value that Suk interrogates is that of legal equality, adjudicated in courts. Suk's analysis echoes an older insight of Peter Westen that the ideal of equality has malleable substantive content.[8] Suk observes the emptiness of equal protection for male intoxication, suggesting that it might have had more sinister than banal consequences for toxic masculinity on college campuses. Equal protection on the basis of sex doctrine, Suk shows, may be used to advance misogynistic goals: men's rights suits alleging "paternity fraud"[9] and seeking to dismantle single-sex institutions, including domestic violence shelters, that help women. In addition, as I write about elsewhere, remedies for unequal treatment might either extend or vitiate protective standards.[10] Equality requires a prior determination of

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[5] JULIE C. SUK, AFTER MISOGYNY: HOW THE LAW FAILS WOMEN AND WHAT TO DO ABOUT IT 218 (2023).

[6] *Id.* at 221.

[7] *See generally* Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990).

[8] Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 578–80 (1982).

[9] SUK, *supra* note 5, at 47–49.

[10] *See generally* Deborah Dinner, *Equal by What Measure?: The Lost Struggle for Universal State*

the baseline for comparison. Suk offers the example of selective service registration. A legal remedy here would turn on whether the privilege sought is male eligibility for the draft or female exemption from it.

Instead of equality as a narrow legal goal, Suk argues that eradicating misogyny will require a focus on structural constitutional change. Suk's book and, indeed her scholarship and advocacy more broadly, demonstrates an inspiring faith in democracy and commitment to the hard work of advancing it. As a historical model, Suk offers a revisionist account of the temperance movement's successful struggle for the Eighteenth Amendment. Notwithstanding historians' account of Prohibition's multiple failures, Suk argues persuasively that we should also understand as the successful culmination of feminist mobilization for constitutional change. Temperance activists targeted the liquor manufacturers, distributors, and sellers that contribute to men's abuse of women and deepened the vulnerability of economically dependent wives and mothers. Suk's point is not to valorize temperance, itself, but rather to show that substantive feminist goals require attention to constitutional procedure. I am also convinced by her historical argument that the movement for Prohibition nurtured women's political organization.

Suk set her sights on women's empowerment, today. She suggests this goal must entail collective entitlements and institutional transformation, rather than solely individual rights and adjudicated remedies. Suk advocates, for example, gender parity on corporate boards, discussing the litigation that threatens a California law establishing modest representation rules. She argues for a constitutionalism of care, building on the comparative example of the Citizen's Assembly in Ireland. The Assembly produced constitutional and legislative recommendations to support gender egalitarian care within families—expansively defined to include non-marital households. I have to admit to some lingering skepticism about whether constitutionalism is the best site for gender justice, given the risks of "constitutional veneration" that Aziz Rana outlines.[11] In Suk's hands, however, the Constitution is what Dirk Hartog calls a "constitution of aspiration."[12] It is not a set of doctrines, manipulated by experts, but a site of

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Protective Labor Standards (2017).

[11] Aziz Rana, *Why Americans Worship the Constitution*, PUB. SEMINAR (Oct. 11, 2021) https://publicseminar.org/essays/why-americans-worship-the-constitution/.

[12] Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All,"* 74 J.

political imagination. Furthermore, Suk's proposals begin with a transformation of the Constitution to make it more democratic, beginning with changes to the amendment process itself.

I read Suk's book as a legal historian. In this capacity, I have to emphasize that U.S. feminists have long been fighting for a welfare state supportive of care. This is an alternate feminist legal history to the one most often told in standard law casebooks. To sketch a few examples: In 1970, marking the fiftieth anniversary of the ratification of the Nineteenth Amendment and the distance yet to travel to equal citizenship, feminists organized a Women's Strike for Peace and Equality.[13] The demands included universal childcare, as well as abortion on demand and equal employment opportunity. In public schools, labor feminists used the EEOC guidelines interpreting Title VII as an organizing tool to advocate goals beyond mere nondiscrimination, including paid parental leave.[14] National Organization for Women activists argued for Social Security credits for homemakers, as a means to realize economic citizenship.[15] I point this out to suggest that there might be lessons to be learned from the history of why these goals did not come to fruition—lessons that might inform how to arrive at the vision Suk articulates. The history of why misogyny persisted is one about the transitions from liberalism to neoliberalism.[16] After reading Suk's book, I am left still pondering the question posed by feminist scholars and in the title of this article.[17] The current crises in care, constitutionalism, and politics have the potential to be productive. These ruptures open up new ways of thinking and doing, and Suk's voice is one that offers considerable guidance.

AM. HIST. 1013, 1016 (1987).

[13] Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1988–89 (2003).

[14] Deborah Dinner, *Recovering the* LaFleur *Doctrine*, 22 YALE JOURNAL OF LAW AND FEMINISM 343, 347 (2010).

[15] Deborah Dinner, *On Justice Ginsburg and the Political Economy of the Family*, L. POL. ECON. PROJECT (Oct. 29, 2020) https://lpeproject.org/blog/on-justice-ginsburg-and-the-political-economy-of-the-family/. *See generally* Suzanne Kahn, *Divorce, American Style: Fighting for Women's Economic Citizenship in the Neoliberal Era* (2021).

[16] *See generally* Deborah Dinner, *Beyond "Best Practices": Employment-Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059 (2017).

[17] *See generally* Carole Pateman, The Sexual Contract (2018).

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Pushing Boundaries

PAULA MONOPOLI*

Julie Suk is one of the most interesting feminist constitutional scholars writing today. It's a pleasure to engage with her new book, *After Misogyny: How the Law Fails Women and What to Do About It*. Feminist legal scholars have been considering their intellectual options in the wake of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.[1] In *After Misogyny*, Professor Suk offers us a conceptual path forward in a post-*Dobbs* world. I agree with Suk's trenchant analysis of the failure of law to render substantive gender equality and her proposals to remedy that failure. My question is whether we have the constitutional conditions under which those proposals could come to fruition.

After Misogyny is framed in two parts. Part I, *How the Law Fails Women, Misogyny Beyond Misogynists*, reminds us about the limits of constitutional gender equality as it has developed in the United States. Chapter 1 reviews the jurisprudential expansion of the Equal Protection clause to embrace sex-based differential treatment by the state, and the U.S. Supreme Court's eventual adoption of intermediate scrutiny. It highlights the narrow nondiscrimination norm that emerged from that jurisprudence. That kind of formal equality fell far short of eliminating what Suk conceptualizes in Chapter 2 as the residual overentitlement and overempowerment of men. Those two concepts distinguish Suk's more capacious definition of misogyny in the book, differentiating it from the traditional definition which requires animus toward women. It was sometimes challenging to see the conceptual boundary between the two since they can overlap. Suk links this theory of overentitlement and overempowerment to two doctrinal bases—unjust enrichment and abuse of right. While Suk's description of

* Sol & Carlyn Hubert Professor of Law, University of Maryland Carey School of Law. This essay was originally published in *Balkinization* as part of an online symposium on Julie Suk's *After Misogyny* and it is reprinted with permission.

[1] Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

overentitlement as grounded in unjust enrichment resonates, her description of overempowerment as grounded in abuse of right—a doctrine she notes is less well-known in American law—is more opaque.[2]

In Chapter 3, Suk sheds light on alternative constitutional regimes around abortion. She describes German and Irish judicial decisions which give weight to the rights of the fetus and impose restrictions on the rights of the pregnant person. Suk argues that despite what might appear to be regressive views about women as mothers, there is value to be had in judicial language suggesting the state owes social and economic duties to women and families. That kind of maternalism recognizes as a legal matter that women suffer undue burdens as a result of pregnancy, burdens which confer significant benefit on society. Suk notes that "these ideas are not alien to the United States," but that women's sacrifices in biological and social reproduction are only lightly referenced in U.S. Supreme Court decisions around abortion.[3] She argues that recognition of those sacrifices "which have tangible collective benefits for the nation" is an essential step in building a state-sponsored infrastructure of care in the United States.[4] While I agree with Suk, there is also a real risk that such maternalism reifies an essentialist view of women and poses potential pitfalls for equality. Because much of Suk's theory is grounded in this embrace of maternalism by other liberal democracies, it would have been helpful to address this risk more directly.

Part II, *What to Do About It, Remaking Constitutions and Democracy*, begins with Suk's framing of Prohibition as a constitutional movement by women to reset and rebalance male entitlements and empowerment. In Chapter 4, she reminds us that the ratification of a federal constitutional amendment prohibiting the manufacture and sale of liquor grew out of the nineteenth-century women's temperance movement. But rather than the conventional characterization of that social movement as the product of a group of abstinent church ladies, Suk tells a different story. She describes women lawyers using law and constitutional theory to protect women from domestic violence in the private sphere, and to dismantle the legal regime of coverture underpinning the legal, social, and physical subordination of women. In a post-*Dobbs* world, where "history and tradition" is the jurisprudential touchstone for finding an unenumerated right in the U.S.

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[2] JULIE C. SUK, AFTER MISOGYNY: HOW THE LAW FAILS WOMEN AND WHAT TO DO ABOUT IT 75 (2023).

[3] *Id.* at 118.

[4] *Id.*

Constitution, this recovery of feminist constitutional history provides significant support for Suk's theory.

In Chapter 5, Suk turns to her deep expertise in comparative constitutionalism to teach us about three countries that have made explicit constitutional moves toward gender parity. She uses France, Germany, and Iceland as case studies in how women's disempowerment and lack of entitlement can be the impetus for the development of legal rules which address such disadvantage as a constitutional and legislative matter. Suk describes moves by constitutional courts and parliaments to use theories of interpretation, gender quotas, and popular constitutionalist methods, like citizens' assemblies, to develop those rules. And in Chapter 6, Suk offers a blueprint for an infrastructure of care built around such rules. She makes the case to "value care as a constitutional project," and she argues that building a "constitutionalism of care" requires us to develop "infrastructures that are responsive and inclusive" to women's lived experiences, and that assign value to the full range of their contributions as citizens.[5] This chapter again uses comparable liberal democracies—especially Ireland—as models for a post-*Dobbs* path in the United States.

In her Conclusion, Suk anticipates the argument that the United States doesn't have a constitutional culture that would allow these paths to take hold here. She asks whether, "the global innovations of feminist lawmaking [can] direct the law to realize and value the contributions of women in the United States?"[6] Suk draws on comparative scholars who suggest that "creative translation" and "constitutional engagement" rather than wholesale "transplantation" are the preferred ways to implement comparative legal analysis.[7] From that perspective, Suk offers the possibility that her comparative proposals could gain traction in the United States.

While I find Suk's underlying theory persuasive, I do question whether the proposals she sets out can take root in our shallow constitutional soil. Suk's invocation of Prohibition is instructive. It is not a coincidence that the only time an amendment to the U.S. Constitution was repealed, it was an amendment originally enacted as the result of a movement led by women. And if we had been paying attention to that feminist constitutional history—instead of what Reva Siegel describes as "constitutional memory"[8]—we

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[5] *Id.* at 181.

[6] *Id.* at 211.

[7] *Id.* at 214.

[8] Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19 (2022).

would not have been so surprised that the first time the U.S. Supreme Court reversed a previously recognized constitutional right, it was the right to abortion. Suk is right on target when she argues that the explanation for these constitutional moves is misogyny, as she broadly defines it. Achieving equality means ending the extraction of unpaid labor from women that has been the hallmark of societies from time immemorial. But in a constitutional culture where rights are conceived of as negative, any suggestion of socialism is assiduously avoided by all but the most progressive politicians, and gender quotas used to rebalance legislative power face a hostile legal landscape, can we really build a constitutionalism of care?

Our constitutional culture remains stubbornly masculine. In 1873, Justice Bradley suffered no apparent cognitive dissonance in arguing vehemently in his dissent in the *Slaughter-House Cases*[9] that the right of male butchers to engage in their profession was a privilege of national citizenship. But on the very same day, in his concurrence in *Bradwell v. Illinois*, Bradley had no problem dismissing out-of-hand Myra Bradwell's argument that her right to practice the profession of law was similarly protected.[10] He presumably rationalized these inconsistent positions purely on the basis of sex. Women were members of a separate class of citizens. Their rights could be differently defined under such a separate spheres view of the world. And today, in a post-*Dobbs* world, our constitutional culture displays a similar comfort with differential norms around equal citizenship. The freedom to be left alone by the state and the concomitant right to bodily autonomy means one thing for men and another for women.

Masculine norms are deeply embedded in our constitutional design.[11] And that design is virtually unamendable, given the nature of Article V and our polarized politics.[12] Suk describes how the maternity clauses in several twentieth-century European constitutions have been linked to their equality clauses in ways that support recognition of a constitutional basis for women's unique contribution to biological and social reproduction.[13] Yet we have not been able to get a sex equality amendment into our constitution for the past one-hundred years. And the only amendment we do have that

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[9] The Slaughter-House Cases, 83 U.S. 36, 113–114 (1873).

[10] Bradwell v. State, 83 U.S. 130, 139–42 (1873).

[11] *See* Paula A. Monopoli, *Gender and Constitutional Design*, 115 YALE L.J. 2643 (2006).

[12] SUK, *supra* note 2, at 222.

[13] SUK, *supra* note 2, at 183.

comes close—the Nineteenth Amendment—has been narrowly construed.[14] So, constitutionalizing the right of women as mothers to the support of the community seems far out of reach. In fact, the U.S. Supreme Court's recent expansion of free exercise and its erosion of establishment clause jurisprudence may actually amplify the patriarchal norms embedded in organized religion. In essence, personal religious beliefs that should remain in the private sphere will increasingly be ushered into the public sphere and law itself through the back door.

Because our constitution is virtually unamendable, building a constitutionalism of care in this country would require a legislative strategy. Such a strategy requires a foundational shift in who exercises institutional power—a shift most efficiently achieved by embracing electoral quotas.[15] Suk acknowledges that American law has generally rejected quotas, despite some recent signs otherwise.[16] So, such a shift in the gender balance of power in Congress and state legislatures seems unlikely. She suggests the pandemic's disparate impact on women could trigger a groundswell of support for such a strategy.[17] But the child tax credit enacted by Congress was allowed to lapse, the President has declared the emergency at an official end, and the nation just wants to move on.

Still, *Dobbs* leaves us no choice but to seek new paths. So, we shouldn't let existing conditions deter us from carefully considering Suk's compelling theory and proposals. As her title *After Misogyny* signals, Suk is writing as much for the future as she is for today. Our immediate task is to restore a constitutional right to reproductive self-determination, the cornerstone of women's full citizenship and substantive equality under any theory. *After Misogyny* offers us a thick conceptual basis to ground that right. And it also offers us a foundation upon which to build—for the first time—an anti-subordination constitutionalism of care. It is a theory that feminist legal scholars should clearly consider—one that illuminates a potential path forward in these otherwise dark times.

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[14] *See generally* Paula A. Monopoli, CONSTITUTIONAL ORPHAN: GENDER EQUALITY AND THE NINETEENTH AMENDMENT (2020).

[15] SUK, *supra* note 2, at 222.

[16] SUK, *supra* note 2, at 167, 223, 290 n.45.

[17] SUK, *supra* note 2, at 180.

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The GrAI Area: How Artificial Intelligence Colors Publicity Rights in Copyright Law

Gracie Castle[*]

INTRODUCTION

In April 2023, a song called "Heart on My Sleeve," featuring the voices of Drake and The Weeknd, dominated social media and streaming platforms.[1] The song went viral, hitting eleven million views just one week after its initial TikTok debut.[2] Since then, the original TikTok video has been removed, and the song has been taken down from YouTube, Spotify, and Apple Music.[3] Why? Because the song's catchy lyrics and creative production had nothing to do with Drake or The Weeknd.[4] Artificial Intelligence ("AI") was owed credit for this one.[5]

AI is a major topic of discussion as it propels technological improvements in nearly every corner of the digital world.[6] AI allows for efficiencies in corporate businesses, assists in medical developments, and helps employees and students succeed in their personal endeavors.[7] Predicted to have a "'transformational impact' on almost every aspect of

[*] J.D. Candidate, New England Law | Boston (2025).

[1] Samantha Murphy Kelly, *The Viral New 'Drake' and 'Weeknd' Song Is Not What It Seems*, CNN, https://perma.cc/5K3T-RNDL (last updated Apr. 19, 2023, 9:14 AM EDT).

[2] *Id*.

[3] *Id*.

[4] Larisha Paul & Ethan Millman, *Viral Drake and The Weeknd AI Collaboration Pulled from Apple, Spotify*, ROLLING STONE (Apr. 17, 2023), https://perma.cc/BG9J-BXLS.

[5] *Id*.

[6] *See, e.g.*, Trevor F. Ward, *DABUS, an Artificial Intelligence Machine, Invented Something New and Useful, but the USPTO Is Not Buying It*, 75 ME. L. REV. 71, 72 (2023).

[7] *See id.*; Adam Uzialko, *How Artificial Intelligence Will Transform Businesses*, BUS. NEWS DAILY, https://perma.cc/5KW7-PJNN (last updated Aug. 27, 2024).

human activity," the new machine is generating an output that supersedes the cooperative tasks it was initially trained to do.[8] Alongside capturing the public's interest, AI is causing concerns among public figures, authors of creative works, and even the individuals who intended to use AI for the aforementioned benefits.[9] Not only does AI have the ability to threaten an individual's livelihood and reputation, but the nature of its use can lead to copyright infringement and violate publicity rights, which are already vulnerable and under-protected.[10] "Heart on My Sleeve" is just one example of such exploitation.[11]

This Note will discuss the use of generative AI and its lawless ability to infringe on copyrighted works and violate publicity rights. It will argue that the absence of federal legislation around the right of publicity ("ROP") inevitably allows AI users to manipulate the Copyright Act and avoid liability by taking advantage of the complexities around authorship, fair use, and the Digital Millennium Copyright Act ("DMCA"). Parts I and II will analyze the background of ROP and copyright law, revealing the significance of modern technology's effect on each area's legal development and public policy. This Note will further argue that the use of AI permeates a gray area, creating a serious risk to publicity rights in the context of AI-generated works, which accelerates under the guise of the Copyright Act. Part III will review the scope of the Copyright Act and the various bills that attempt to combat the surge of these issues. Further, Part IV will suggest that the Copyright Act must be amended to include provisions addressing the use of AI and safeguards against acts of publicity violations for all individuals.

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[8] Jane C. Ginsburg & Luke A. Budiardjo, *Authors and Machines*, 34 BERKELEY TECH. L. J. 343, 393 (2019).

[9] *See* Kristin Robinson, *NMPA Writes to Senate Majority Leader: 'AI Platforms Should Not Be Given a Free Pass,'* BILLBOARD (Apr. 24, 2023), https://perma.cc/F6AW-T67F.

[10] *See* Ginsburg & Budiardjo, *supra* note 8, at 395; Rashi Shrivastava, *'Keep Your Paws Off My Voice': Voice Actors Worry Generative AI Will Steal Their Livelihoods*, FORBES, https://perma.cc/2ZTW-B8J3 (last updated Oct. 11, 2023, 11:12 AM EDT); *Infra* Part II (exploring the rights that the rise of AI may threaten).

[11] Riddhi Setty, *AI Imitating Artist 'Style' Drives Call to Rethink Copyright Law*, BLOOMBERG L. (May 31, 2023, 5:15 AM EDT), https://perma.cc/4LKT-C3LP.

I. Background

A. *The Scope of Copyright Protection and Infringement*

1. Defining Authorship

The Copyright Act of 1976 ("Act") provides protections for original works of authorship that are fixed in a tangible medium of expression.[12] Works of authorship include: "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works."[13] Although not explicitly defined in Section 102 of the Act, courts have interpreted "originality" of a work to mean an independent creation that reflects some degree of creativity.[14] Additionally, neither the Act nor the Constitution defines the term "authorship."[15] As such, the burden of identifying authors and their potential copyright protections falls on the courts.[16] In 1884, the Supreme Court held that an author, in a constitutional sense, is one "to whom anything owes its origin; originator; maker."[17] Over the years, courts have adopted an "effective cause-based" construction as an imperative element in determining authorship.[18] When challenged by modern technology, the causation element has failed to produce the triumphant remedy that the '84 Supreme Court had hoped for.[19]

David Slater, a wildlife photographer, lost a battle over his ownership rights to a photograph which was arguably caused by him, but evidently not authored by him.[20] After installing a camera in an Indonesian jungle with the

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[12] 17 U.S.C. § 102(a).

[13] *Id*.

[14] 2 PETER S. MENELL ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2023 at 530 (2023).

[15] *Id*. at 550; *see* U.S. CONST. art. I, § 8, cl. 8. MENELL ET AL., *supra* note 14, at 550.

[16] MENELL ET AL., *supra* note 14, at 550.

[17] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).

[18] *Id*. at 61; *See* Aalmuhammed v. Lee, 202 F.3d 1227, 1234 (9th Cir. 2000); Shyamkrishna Balganesh, *Causing Copyright*, 117 COLUM. L. REV. 1, 21 (2017).

[19] *See, e.g*., Balganesh, *supra* note 18, at 3–4 ("[W]hile Slater played some role in the creation of the photograph, that role was insufficient to make him its author, since the real creator of the work was the monkey.").

[20] *See* JESSICA SILBEY, AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE 1–2 (2022).

intention of luring curious monkeys to the equipment for close-ups, the monkeys ended up taking dozens of "selfies."[21] Even though Slater invested his own work and skill in facilitating the photograph, he was denied copyright protection because the true maker of the self-photograph was the monkey.[22] Seemingly in direct response, the U.S. Copyright Office issued an opinion requiring that a work of authorship must be created by a human being.[23] Thus, to qualify for copyright protection, there must be a human causal connection to the work.[24]

Enter AI-generated works.[25] The human causation of AI-generated works could be reasonably attributed to the user who enters data into the AI machine.[26] For "Heart on My Sleeve," one might think Ghostwriter977, the anonymous TikTok user who formulated the faux collaboration, would be considered the song's author.[27] Some suggest the machine serves as a tool, just as an author uses pen and paper or a music producer uses audio interfaces.[28] Others may argue that an AI machine breaks the causal connection, just as Slater's failure to press the shutter button broke his causal connection to the photograph.[29] Perpetuating the anomaly, the Supreme Court remains silent on machine authors.[30] As a result, AI infringement liability remains unresolved, and the protection of publicity rights has

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[21] *Id*. at 1.

[22] Balganesh, *supra* note 18, at 3–4.

[23] U.S. COPY. OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.2, 22 (3d ed. 2021) [hereinafter COMPENDIUM]; *see* SILBEY, *supra* note 20, at 2.

[24] Balganesh, *supra* note 18, at 4. S*ee* COMPENDIUM, *supra* note 23, § 313.2.

[25] *See generally* Gil Press, *A Very Short History of Artificial Intelligence (AI)*, FORBES, https://perma.cc/E5S3-94GR (last updated Apr. 14, 2022 2:04 PM EDT) (explaining the history of AI).

[26] *See* Daniel J. Gervais, *AI Derivatives: The Application to the Derivative Work Right to Literary and Artistic Productions of AI Machines*, 52 SETON HALL L. REV. 1111, 1124 (2022).

[27] *See* Paul & Millman, *supra* note 4.

[28] Andres Guadamuz, *Artificial Intelligence and Copyright*, WIPO MAG. (Oct. 2017), https://perma.cc/9E3L-JXLL.

[29] *See* Balganesh, *supra* note 18, at 4.

[30] *See generally* Thaler v. Vidal, 43 F.4th 1207 (Fed. Cir. 2022), *cert. denied*, 143 S. Ct. 1783 (2023) (denying certiorari of the Federal Circuit's ruling that production of visual art would not receive copyright protection because it was authored by an AI system).

diminished within copyright law.[31]

2. Paralleling Patent Law: Copyright Infringement

Otherwise known as the "bundle of rights," copyright owners have the exclusive rights of "reproduction, adaptation, publication, performance, and display" of their copyrighted work.[32] Under Chapter 5 of the Act, anyone who violates these rights is liable for copyright infringement.[33] Infringement may arise in two scenarios: (1) when one "directly infringe[s] on the rights of copyright holders" or (2) when one "encourage[s] or assist[s] a third party to infringe" on such rights.[34] Proving direct infringement requires showing that someone copied another's copyrighted work, *and* the copying "went so far as to constitute improper appropriation."[35] Thus, even when copying occurs, a claim of direct infringement will fail unless the defendant copied the protected expression to a sufficient degree to show improper appropriation.[36]

Perhaps more aligned with the contours of technological advancements, a person who "contribute[s] to, induce[s], or profit[s] from infringing on the acts of [another]" may be liable for indirect infringement.[37] The Act does not provide specific provisions for indirect copyright infringement.[38] Section 501 of the Act serves only as a blanket prohibition on infringement, stating that any person "who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright or right of the author."[39] However, courts have pieced together a basis for indirect violations by extracting common law principles and statutory standards set forth by the Patent Act.[40] Parallel

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[31] Gervais, *supra* note 26, at 1128-29 (arguing that AI lacks human originality); s*ee* CHRISTOPHER T. ZIRPOLI & CONG. RESEARCH SERV., LSB10922: GENERATIVE ARTIFICIAL INTELLIGENCE AND COPYRIGHT LAW 5 (2023), https://perma.cc/MK5J-6JHZ [hereinafter GENERATIVE ARTIFICIAL INTELLIGENCE] (explaining the disagreements and concerns over AI generated works and infringement liability).

[32] 17 U.S.C. § 106; H.R. REP. NO. 94-1476, at 61 (1976).

[33] 17 U.S.C. § 501(a).

[34] MENELL ET AL., *supra* note 14, at 663.

[35] Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

[36] *See id*. at 469.

[37] MENELL ET AL., *supra* note 14, at 772.

[38] MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 434–35 (1984).

[39] 17 U.S.C. § 501(a).

[40] *See* 35 U.S.C. §§ 271(b)–(c); *Sony*, 464 U.S. at 434–35.

to the Patent Act, indirect violators may be liable as vicarious or contributory infringers.[41]

In *MGM Studios Inc v. Grokster*, the Supreme Court explained that contributory infringement occurs when one intentionally induces or encourages direct infringement, whereas vicarious infringement happens when one profits from direct infringement but refrains from stopping or limiting it.[42] In this case, the defendants distributed a free software that allowed users to share and download files—most of which were copyrighted music and video files.[43] Neither Grokster nor its users had permission to do so.[44] In addition to their business models, the defendants promoted, marketed, and intended to continue promoting their software with the objective of generating income from selling advertising space.[45] The defendants cited *Sony Corp. of Am. v. Universal City Studios, Inc.*, a case holding that secondary liability would not be imposed because the product was "capable of commercially significant non-infringing uses."[46] They argued that because their software was also capable of non-infringing uses, they should similarly not be held liable for indirect infringement.[47] However, the Court rejected this argument and reiterated that infringement "premises liability on purposeful, culpable expression and conduct," rather than the possibility of its substantial non-infringing use as referenced in *Sony*.[48] The Court found it was evident the defendants' intent was to use the software to infringe on copyrighted works and, as a result, held them vicariously liable for copyright infringement.[49]

AI machines certainly have the ability to be used for non-infringing purposes; therefore, liability may depend on the user's intent.[50] However, because such systems may reflect unexpected results, precedent like *Sony* and *Grokster* may lead to disagreements in determining whether machine-

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[41] *Sony*, 464 U.S. at 434–35.

[42] *Grokster*, 545 U.S. at 930.

[43] *Id*. at 919–20.

[44] *Id*. at 920.

[45] *Id*. at 926.

[46] *Sony*, 464 U.S. at 442.

[47] *Grokster*, 545 U.S. at 933.

[48] *Compare id*. at 937, *with Sony*, 464 U.S. at 442.

[49] *Grokster*, 545 U.S. at 926.

[50] Francesca Paris & Larry Buchanan, *35 Ways Real People Are Using A.I. Right Now*, N.Y. TIMES (Apr. 14, 2023), https://perma.cc/Y7LM-MZV6; *see Grokster*, 545 U.S. at 937; *Sony*, 464 U.S. at 442.

assisted infringement meets the threshold intent.[51]

3. The Fair Use Doctrine

Courts quickly found that copyright, while necessary to protect the owners of creative work, was often applied too rigidly and prevented creativity across the board.[52] There was tension between preserving copyrighted work and allowing others to use it as inspiration and build upon it.[53] Although originally a judicially created doctrine, Congress codified the fair use defense in Section 107 of the Act.[54] The purpose of the doctrine is to promote "freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances."[55]

The statute sets forth the parameters for determining fair use and six categorical limitations on exclusive rights where users are not liable for infringement: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[56] Courts have expanded these limitations to preserve works that have transformed an original work by adding a new purpose or character and giving it a new expression or meaning.[57] When copyrighted material is utilized in these capacities, the court deems the use to be fair and excuses infringement under the Act.[58]

4. Congress's Attempt to Mitigate Internet Infringement

The introduction of the World Wide Web and other technological advancements have provoked abnormalities in standards for copyright infringement.[59] In 1998, Congress amended the Copyright Act to clarify the contours of liability for internet service providers ("ISPs") who were at risk

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[51] *See* Ginsburg & Budiardjo; *supra* note 8, at 398.

[52] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994).

[53] *Id*.

[54] *See id*. at 576 (explaining that "fair use remained exclusively judge-made doctrine until the passage of the 1976 Copyright Act").

[55] *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFF., https://perma.cc/G9JG-DNJG (last updated Nov. 2023).

[56] 17 U.S.C. § 107.

[57] *Campbell*, 510 U.S. at 579.

[58] *See* 17 U.S.C. § 107.

[59] Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1835–36 (2009).

of infringing copyrighted material over the internet.[60] The DMCA was enacted to combat unauthorized distribution of copyrighted works in the new digital age.[61]

Section 512 provides four safe harbors for ISPs that limit infringement liability: "transitory digital network communications," "system caching," "information residing on systems or networks at [the] direction of users," and "information location tools."[62]

The most commonly used safe harbor is found in § 512(c): "information residing on systems or networks at [the] direction of users."[63] In order to use it, an ISP must show that it had no actual or constructive knowledge that its platform was hosting infringing material.[64] This requirement considers "willful blindness" as evidence that an ISP had knowledge or awareness of infringement.[65] Additionally, the safe harbor provision is only advantageous for ISPs as long as they do not receive financial gain directly linked to the infringing activity and lack the authority to control such activity.[66] Analogous to the reasoning in *Grokster*, having substantial control over or influence on its users' activities disqualifies the ISP from protection.[67] Finally, upon notification, the ISP must "respond[] expeditiously to remove, or disable access to, the [infringing] material."[68] The notice and takedown provision incorporates considerations like the fair use defense before finding a user liable for infringing a copyrighted work.[69]

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[60] Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 27 (2d Cir. 2012).

[61] *See The Digital Millennium Copyright Act*, U.S. COPYRIGHT OFF., https://perma.cc/X9MT-PCYY (last visited Jan. 27, 2025) (explaining how Congress passed the Digital Millennium Copyright Act to "address important parts of the relationship between copyright and the internet").

[62] 17 U.S.C. § 512; *Viacom*, 676 F.3d at 27.

[63] KEVIN J. HICKEY & CONG. RESEARCH SERV., IF11478: DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA) SAFE HARBOR PROVISIONS FOR ONLINE SERVICE PROVIDERS: A LEGAL OVERVIEW 2 (2020), https://perma.cc/D74H-KSTQ.

[64] 17 U.S.C. § 512(c)(1)(A).

[65] *Viacom*, 676 F.3d at 35.

[66] 17 U.S.C. § 512(c)(1)(B).

[67] *See* MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 925–26 (2005) (stating that "internal communication indicates [the defendants] aimed to have a larger number of copyrighted songs available on their networks than other file-sharing networks" and that the point was "to attract users . . . to infringe, just as it would be with their promotional materials developed showing copyrighted songs as examples of the kinds of files available").

[68] 17 U.S.C. § 512(c)(1)(C).

[69] HICKEY, *supra* note 63, at 2.

B. *The Right of Publicity*

1. Origin and Scope of Publicity Rights

In general, digital media has propelled issues within publicity and privacy rights.[70] The freedom of privacy is considered to fall within the penumbra of First Amendment rights and affords individuals the right to be left alone.[71] The right allows individuals to decide whether to share their thoughts, decisions, and emotions with others, and even after exposing such information, the person still "generally retains the power to fix the limits of the publicity which shall be given them."[72] Yet, this power has diminished in light of the internet—and now, AI.[73]

Stemming from a privacy right, the ROP is defined as "the right to prevent unauthorized uses of one's name, image, or likeness (NIL) or other aspects of one's identity."[74] Importantly, it protects against others using their likeness for commercial gain.[75] Although similar to the right to privacy, the ROP protects a person's economic interests rather than their non-economic interests.[76] Without federal codification, the ROP is subject to state legislation, which increases the risk of violations and creates inconsistencies between states regarding *who* may assert the claim.[77]

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[70] *See generally* 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 1:36 (2d ed. 2024).

[71] *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965); MCCARTHY & SCHECHTER, *supra* note 70, § 1:3.

[72] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890).

[73] Liz Mineo, *On Internet Privacy, Be Very Afraid*, HARV. GAZETTE (Aug. 24, 2017), https://perma.cc/GF99-HGSY (explaining that "[i]n the internet era, consumers seem increasingly resigned to giving up fundamental aspects of their privacy for convenience in using their phones and computers"). *See generally* Gai Sher & Ariela Benchlouch, *The Privacy Paradox with AI*, REUTERS, https://perma.cc/5L8H-2334 (last updated Oct. 31, 2023 1:15 PM EDT).

[74] CHRISTOPHER T. ZIRPOLI & CONG. RESEARCH SERV., LSB11052: ARTIFICIAL INTELLIGENCE PROMPTS RENEWED CONSIDERATION OF A FEDERAL RIGHT OF PUBLICITY 1, https://perma.cc/7KPA-26C7 (last updated Jan. 29, 2024) [hereinafter ARTIFICIAL INTELLIGENCE].

[75] MCCARTHY & SCHECHTER, *supra* note 70, § 1:3.

[76] Groucho Marx Prods. v. Day & Night Co., 523 F. Supp. 485, 487 (S.D.N.Y. 1981).

[77] ARTIFICIAL INTELLIGENCE, supra note 74, at 2; *see* MCCARTHY & SCHECTER, *supra* note 70, § 1:2.

2. The ROP's Transformative Use Defense

Similar to the fair use defense, the ROP incorporates a "transformative use" to combat incredulous ROP claims.[78] *Comedy III Productions, Inc. v. Gary Saderup, Inc.* presents an informative illustration of the intersection between the ROP and copyright violations in the context of fair use.[79] There, the defendant created and sold lithographs and T-shirts based on a drawing he made of The Three Stooges.[80] The plaintiff brought suit for infringement of the deceased comedians' rights, and argued that the unlicensed sale of that work amounted to a misappropriation of his ownership in the publicity rights.[81] The Court acknowledged the tension between publicity rights and the First Amendment and formulated a balancing test to determine "whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation."[82] Although a similar test, the Court rejected the wholesale importation of copyright's fair use defense.[83] The Court therefore found in favor of the plaintiff because the defendant's work did not contribute significant transformative or creative value.[84] The work amounted to nothing more than an exploitation of celebrities' rights for profit, and thus, was not protected by the First Amendment.[85]

Importantly, the Court stated "entertainment that is merely a copy or imitation, even if skillfully and accurately carried out, does not really have its own creative component and does not have a significant value as pure entertainment."[86] Therefore, to qualify for fair use protection, artistic expression must predominate the original work.[87] Under this analysis, AI companies argue that their programs' objectives are not typically utilized for

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[78] *See* Andersen v. Stability AI Ltd., 700 F. Supp. 3d. 853, 854 (N.D. Cal. 2023) (noting that "well-established law acknowledges 'transformative use' as a defense to a right of publicity claim").

[79] *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d. 797 (Cal. 2001).

[80] *Id*. at 393.

[81] *Id*. at 393–94.

[82] *Id*. at 391.

[83] *Id*. at 404.

[84] *Id*. at 409.

[85] *Comedy III Prods., Inc.*, 21 P.3d at 409.

[86] *Id*. at 402.

[87] *See* Jennifer M. Karrels, *Just Short of the Green: Sixth Circuit and the Right of Publicity*, 1 DEPAUL J. SPORTS L. 111, 114 (2003).

commercial gain and that their outputs supersede the original work.[88]

C. *The Dichotomy Between Publicity Rights and Copyright Law*

The relationship between copyright law and publicity rights must be acknowledged; failure to do so results in confusion and conflicting laws.[89] The intersection occurs where the subject matter of a copyrighted work features a person's likeness.[90] The creator of such work is the owner of the copyright and has an interest in its rights, such as the right to create derivative works.[91] The subject matter of the work is not the owner of the copyrighted work, but it does have an interest in how their likeness is used.[92] When a copyright owner displays photographs in a manner that commercially exploits the NIL of people depicted in the photographs, it can lead to conflicts concerning these rights.[93]

What permeates this uncertainty and conflict may be related to Section 301 of the Copyright Act.[94] The statute provides that "no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State."[95] As this is a federal statute, it preempts any state laws that may conflict with it.[96] Without a clear and concise statute, AI users can take advantage of conflicting provisions and case law to accelerate misuse.[97]

Midler v. Ford Motor Co. demonstrates the overlap between copyright law and the ROP.[98] There, the defendants aired a commercial utilizing a nationally known singer's voice by means of a "sound-alike."[99] Although the

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[88] *See* Comment Regarding Request for Comments on Intellectual Property Protection for Artificial Intelligence Innovation, 84 Fed. Reg. 58,141 (Oct. 23, 2019), https://perma.cc/KP9X-YSP9.

[89] *See* Emilia David, *No Fakes Act Wants to Protect Actors and Singers from Unauthorized AI Replicas*, VERGE (Oct. 12, 2023, 5:12 PM EDT), https://perma.cc/Q8U9-FFLM.

[90] ARTIFICIAL INTELLIGENCE, *supra* note 74, at 3.

[91] ARTIFICIAL INTELLIGENCE, *supra* note 74, at 3.

[92] ARTIFICIAL INTELLIGENCE, *supra* note 74, at 3.

[93] ARTIFICIAL INTELLIGENCE, *supra* note 74, at 3.

[94] *See* 17 U.S.C. § 301(a).

[95] *Id*.

[96] Brittany Lee-Richardson, *Multiple Identities: Why the Right of Publicity Should Be a Federal Law*, 20 UCLA ENT. L. REV. 189, 209 (2013).

[97] *See id*. at 204–05.

[98] *See generally* Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

[99] *Id*. at 461.

defendants had permission from the song's copyright owners, they did not obtain permission from the celebrity to recreate her sound.[100] The Court found that the defendants misappropriated the singer's identity, noting that "[a] voice is as distinctive and personal as a face . . . [t]he human voice is one of the most palpable ways identity is manifested."[101] However, the Court held that not every imitation of an individual's voice is actionable, which indicates that California's ROP is not afforded to those who are unable to meet this undefined standard.[102] *Midler* exemplifies the clash between the ROP and copyright law.[103] Imitations of sound recordings are allowed under Section 114 of the Copyright Act, and because of Section 301's provision that the Act preempts state law, the holding of this case drives greater disparities between state and federal law.[104]

The rise of AI and its popular use in mimicking a real person's voice and image has heightened the need for ROP protections.[105] Although this need has been recognized, as some Members of Congress have called for federal legislation around the ROP, the urgency around legislation for AI itself remains stagnant.[106] As seen with "Heart on My Sleeve," the conflict between states' ROP laws and federal copyright law creates easier ways for AI users to avoid liability.[107]

II. Importance

A. *The Absence of AI Legislation Violates Public Policy*

Like other areas of technological developments, the public's use of AI has outpaced the current law.[108] This technology has already begun disseminating misinformation about elections and wars, violating privacy

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[100] *Id.* at 462.

[101] *Id*. at 463.

[102] *Id*.

[103] *See id*. at 461.

[104] *See* Lee-Richardson, *supra* note 96, at 215; *see* 17 U.S.C. §§ 114(b), 301(a).

[105] *See* ARTIFICIAL INTELLIGENCE, *supra* note 74, at 1.

[106] ARTIFICIAL INTELLIGENCE, *supra* note 74, at 1.

[107] *See* Setty, *supra* note 11.

[108] *See* In re Vital Pharm., 652 B.R. 392, 398 (Bankr. S.D. Fla. 2023) ("[I]t is time for Congress or state legislatures to adopt a statutory framework to regulate social media, including determination of ownership rights.").

rights, and infringing on copyrighted works.[109] Because the public is negatively affected by this technology as well, it is necessary to implement federal regulation or otherwise promulgate laws that protect individuals' rights.[110] Even leaders in this industry recognize the need for its limitations: Sam Altman, CEO of OpenAI, explained to Congress that regulation "will be critical to mitigat[e] the risks of increasingly powerful AI systems."[111]

1. AI's Capacity to Manipulate Vulnerable Individuals

Similarly to AI, the ROP lacks a clear federal statute.[112] Without having these rights federally protected, the absence of law around AI presents a greater threat of invasion and abuse towards not only those who are able to achieve celebrity status, but to the general public as well.[113]

In connection with ROP issues, AI has the ability to implement sophisticated, large-scale scams through use of their language models and image generation systems.[114] The Federal Trade Commission is on alert as to AI's misuse and fraudulent capabilities, noting that the technology has made it more difficult to distinguish between humans and machines.[115] Unfortunately, AI scammers have become a greater threat to the public, especially to elderly people.[116] In November 2023, a Philadelphia attorney, Gary Schildhorn, testified in front of the Senate about how an AI user nearly

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109 *See* Matt O'Brien, *ChatGPT Chief Says Artificial Intelligence Should be Regulated by a US or Global Agency*, AP (May 16, 2023, 5:53 PM EST), https://perma.cc/5729-S6QR; Pranshu Verma, *The Rise of AI Fake News is Creating a 'Misinformation Superspreader'*, WASH. POST (Dec. 17, 2023, 6:00 AM EST), https://perma.cc/AFD2-YYZ3.

110 *See* Verma, *supra* note 109.

111 O'Brien, *supra* note 109.

112 ARTIFICIAL INTELLIGENCE, *supra* note 74, at 1.

113 *See* Estate of Elvis Presley v. Russen, 513 F. Supp. 1339, 1353 (D.N.J. 1981); ARTIFICIAL INTELLIGENCE, *supra* note 74, at 1 (explaining that the "'right of publicity' has since come to signify the right of an individual, especially a public figure or a celebrity…").

114 *See* Simon Fondrie-Teitler & Amritha Jayanti, *Consumers Are Voicing Concerns About AI*, FED. TRADE COMM'N (Oct. 3, 2023), https://perma.cc/KW9Q-MDJF; Fallon Jones, *Tune in or Tune Out: AI Developments Urge Federal Proposal for Voice Protection in Right of Publicity* 56 TEX. TECH L. REV. 1, 11 (2023) (explaining that "GAI operates through software called 'foundation models,' which is a machine learning program trained on data…[w]ith user-provided input, a foundation model can generate outputs like sounds and visual works imitating real human beings").

115 Fondrie-Teitler & Jayanti, *supra* note 114.

116 Jamie Joseph, *Scams Targeting Older Americans, Many Using AI, Caused Over $1 Billion in Losses in 2022*, FOX NEWS (Nov. 19, 2023, 4:00 AM EST), https://perma.cc/LMP5-UG4Y.

scammed him out of $9,000 by generating his son's exact voice.[117] Schildhorn received a phone call from his son stating that he got into an accident, injured a pregnant woman, and was arrested.[118] Following conversations between Schildhorn's fake lawyer and the courthouse, which indicated that Schildorn needed to post bond immediately, Schildorn reached out to his daughter-in-law intending to inform her of what had happened.[119] Instead, Schildorn found that his son was safe at home.[120] At the hearing, he testified that "there was no doubt in his mind that it was his [son's] voice on the phone" and that "it was the exact cadence with which he speaks."[121] He concluded that the scammers used AI to clone his son's voice, and that it is imperative for the Senate to promulgate protections around these issues.[122]

If the ROP protects against the use of an individual's NIL for commercial gain, it may follow that scammers who impersonate voices to defraud others would be violating their ROP.[123] However, commercial gain typically involves "'advertising products, merchandise, goods or services, or for purposes of solicitation of' such purchases," which likely would not extend to AI-produced financial scams.[124] And since the ROP varies between states, this protection may not be afforded to everyone.[125] Pennsylvania has a law similar to the ROP, however it only protects a person's name or likeness if it was used for a commercial or advertising purpose.[126] These laws did not adequately protect Schildorn or his family because the scammer's use of Schildorn's son's voice did not qualify as a commercial purpose.[127]

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117 *Senate Special Aging Hearing on Artificial Intelligence and Fraud*, at 16:50–20:22 C-SPAN (Nov. 16, 2023), https://perma.cc/BW4Z-NF3B [hereinafter *Senate Special Aging Hearing*].

118 *Id*.

119 *Id*.

120 *Id*.

121 *Id*.

122 *Id*. at 1:10:25.

123 *Cf.* Comedy III Prods., Inc. v. Gary Saderup, Inc. 21 P.3d 797, 806 (2001) (analogizing that scammers who use the voice of an individual are comparable to artists who improperly use an individual's "NIL" so that an individual's voice could be protected in the same way).

124 *Id.* at 801.

125 *See generally* ARTIFICIAL INTELLIGENCE, *supra* note 74, at 1.

126 *See* 42 PA. CONSOL. STAT. § 8316(a).

127 *Senate Special Aging Hearing*, *supra* note 117, at 21:47–22:11 ("[I] know that [AI fraud] causes substantial harm to society and financial harm. It's fundamental if we are harmed by somebody, there's a remedy either through the legal system or through law enforcement, [but] in this case there is no remedy, and that fundamental basis is broken.").

2. Deepfakes and the Reverberation of Revenge-Porn

Another issue caused by the rise of AI is the creation of "deepfakes."[128] Deepfakes take the form of overwhelmingly realistic images or videos.[129] An individual's likeness may be overlaid on footage of someone else in a deepfake, or the content may be completely original, featuring one appearing to do or say something they never actually did or said.[130] Even more concerning, these deepfakes are utilized in the context of pornography.[131]

AI users can steal images off of the internet and social media sites to generate sexually explicit works.[132] This capability is arguably more dangerous than exposing or furnishing "real" explicit photos because it is often incredibly difficult for viewers of these images to decipher between what is real and what is fake.[133] In January 2024, Taylor Swift became the subject matter of such explicit AI generated work.[134] After being up for seventeen hours and attracting over forty-five million views on X, the pornographic images were removed.[135] Many believe the superstar's fanbase deserves credit for the expedited takedown.[136]

However, this phenomenon does not only happen to celebrities, who have the advantage of existing ROP protection in many states and substantial followings that rally behind them.[137] Deepfake revenge-porn victims range from the most prominent figures of society to young high

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[128] *See* JUDICIARY CHAIR RICHARD J. DURBIN & RANKING MEMBER LINDSEY GRAHAM, THE DEFIANCE ACT OF 2024 (One Pager 2024), https://perma.cc/N3TC-82WT [hereinafter *DEFIANCE* One Pager].

[129] *Id*.

[130] *Id*.

[131] Donie O'Sullivan, *Nonconsensual Deepfake Porn Puts AI in Spotlight*, CNN (Feb. 16, 2023 6:27 PM EST), https://perma.cc/9FJF-33W2.

[132] *Id*.; Karen Hao, *Deepfake Porn is Ruining Women's Lives. Now the Law May Finally Ban It*, MIT TECH. REV. (Feb. 12, 2021), https://perma.cc/RWR3-QJED.

[133] *See DEFIANCE* One Pager, *supra* note 128.

[134] Jess Weatherbed, *Trolls Have Flooded X with Graphic Taylor Swift AI Fakes*, VERGE (Jan. 25, 2024, 11:04 AM EST), https://perma.cc/N622-ZHBG.

[135] *Id*.

[136] *See, e.g.*, Diet Prada (@diet_prada), INSTAGRAM (Jan. 30, 2024), https://perma.cc/5Y5U-CHDS (speculating that the explicit deepfakes were taken down "largely in part to [avoid] starting 'bad blood' with her massive fanbase").

[137] *See* CAL. CIV. CODE § 3344; Diet Prada, *supra* note 136.

school students.[138] Young women have been targeted and are often victims of this abuse.[139] By simply following the social norm of posting photos on social media, these young women have had their photos manipulated through the use of AI for the purposes of bullying and harassment.[140]

This attack on women in particular is evidenced by research. One research company began tracking online deepfake videos in late 2018[141] and found that between 90% and 95% of the videos were nonconsensual porn and "[a]bout 90% of that [was] nonconsensual porn of women."[142] Although some sites have image generator tools that set up safeguards to avert this conduct, users have been able to avoid these prevention tactics.[143] Cristina López G., a senior analyst at a research firm that studies disinformation, noted that "[t]hese images originated from a community of people motivated by the 'challenge' of circumventing the safeguards of generative [AI] products, and new restrictions are seen as just another obstacle to 'defeat.'"[144]

Section 1201 of the DMCA prohibits the evasion of protective measures, however, it only applies when such measures are being used by owners of copyrighted works to deter infringement.[145] Thus, this section would only apply to owners of a work that is registered with the Copyright Office.[146] In most cases, individuals do not register their personal photos, "selfies," or

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[138] Danielle Wallace, *Bipartisan House Bill on AI Fraud Aims to Set Safeguards on Americans' 'Digital Personas,' Rights to Likeness*, FOX BUS. (Jan. 10, 2024, 10:00 AM EST), https://perma.cc/7XND-PYXC.

[139] *See, e.g.*, Kristine Parks, *New Jersey High School Girls 'Humiliated' After Classmates Use AI to Generate Fake Nude Images: Report*, FOX NEWS (Nov. 2, 2023, 8:00 PM EDT), https://perma.cc/27GH-P3VD.

[140] *Id*.

[141] Hao, *supra* note 132.

[142] Hao, *supra* note 132.

[143] *See* Tiffany Hsu, *Fake and Explicit Images of Taylor Swift Started on 4chan, Study Says*, N.Y. TIMES (Feb. 5, 2024), https://perma.cc/4KNU-45YX (noting that users who intended to generate explicit photos "were instructed to share 'tips and tricks to find new ways to bypass filters' and were told, 'Good luck, be creative.'").

[144] *Id*.

[145] 17 U.S.C. § 1201 (stating that the "anti-circumvention" provision prohibits users from bypassing technological protection measures intended to protect and control copyrighted work).

[146] *See* Talavera v. Glob. Payments, Inc., 670 F. Supp. 3d 1074, 1102 (S.D. Cal. 2023) ("Although copyright protection can be afforded once a work is fixed in a tangible medium, to qualify as a 'protected work' under Section 1201 a work must first be copyrighted.").

vacation pictures since the registration process can be timely, costly, and unnecessary where they are produced for private enjoyment.[147] These images are often fixed on private social media accounts or kept in their camera roll, which deems them as "unpublished" by the Copyright Office.[148] Although a work is protected by copyright when it is fixed, the work must be registered with the Copyright Office before filing for infringement or invoking section 1201.[149] Thus, victims of revenge-porn may not find resolution under the Copyright Act.[150]

Similarly, many states base ROP violations on the fact that an individual's likeness has been misappropriated for commercial gain.[151] This requires a likeness that has commercial value.[152] It may be difficult for individuals whose likeness does not rise to the commercially valuable standard, and as a result, cannot invoke this protection.[153] And, because explicit deepfakes are created with the goal of humiliating individuals rather than obtaining a profit, the ROP may not extend to the nature of these AI generated images.[154] Regardless, the damage is already done.

AI has brought an alarming new context to the old adage: Don't believe everything you see on the internet—today, every*thing* endures some speculation.[155] For victims of fraud and pornographic deepfakes, such advice

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[147] *See generally Fees*, U.S. COPYRIGHT OFF., https://perma.cc/VE3F-5KKK (last visited Jan. 27, 2025); *Registration Processing Times*, U.S. COPYRIGHT OFF., https://perma.cc/66L2-3UGR (last visited Jan. 27, 2025) (showing the average processing time for copyright applications); U.S. Copyright Office, *Standard Application: Tutorial (2018)*, YOUTUBE (Sept. 11, 2018), https://perma.cc/C7Y2-F97D (reviewing the application process).

[148] *What Photographers Should Know About Copyright*, U.S. COPYRIGHT OFF., https://perma.cc/6H58-24R7 (last visited Jan. 27, 2025) (stating that the "public display of a photograph, in and of itself, does not constitute publication").

[149] *Id.*; *see Talavera*, 670 F.Supp. 3d at 1103.

[150] *See Talavera*, 670 F.Supp. 3d at 1103 ("Although copyright protection can be afforded once a work is fixed in a tangible medium, to qualify as a 'protected work' under Section 1201 a work must first be copyrighted.").

[151] *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 402–05 (2001).

[152] *See* ARTIFICIAL INTELLIGENCE, *supra* note 74, at 1 (explaining that each state has different law around publicity and privacy rights, and that some states only afford publicity rights to those who are celebrities or have commercially valuable name, image, and likeness).

[153] *See Comedy III*, 25 Cal. 4th at 402–05; Jones, *supra* note 114, at 18 (defining "commercial value" and its statutory history).

[154] *See Comedy III*, 25 Cal. 4th at 402–05; Hao, *supra* note 132.

[155] *See* Tiffany Hsu & Steven Lee Myers, *Can We No Longer Believe Anything We See?*, N.Y. TIMES (Apr. 8, 2023), https://perma.cc/LH2G-W7E6.

is not enough.[156] Individuals, whether public or private, face a threat to their livelihood, reputation, and general well-being.[157] AI's limitless abilities pervade throughout society, escalating the need for the federal government to protect the human, rather than the machine.

ANALYSIS

III. The Emergence of AI Increases the Need for Federal Legislation Regarding Publicity Rights

A. *The Protections Around Publicity Rights are Inconsistent and Inadequate*

Because there is no federal law that protects the ROP, states have the authority to decide who may assert ROP claims and when.[158] The fragmentation of publicity rights between states makes it difficult to maintain protection for celebrities and ordinary individuals.[159] Similar to Schildhorn's testimony and the issues around pornographic deepfakes, having inconsistencies between the states does nothing to minimize the threat of AI on privacy and publicity rights.[160] After all, "[a] voice is as distinctive and personal as a face," and legislators should strive to afford this protection for all voices.[161]

1. No Fakes, No Fraud, and Defiance

Since the emergence of AI, lawmakers have recognized the need for individuals' protection against deepfakes, financial scams, and general misinformation.[162] In turn, several bills have been proposed to prevent AI

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[156] *See Senate Special Aging Hearing*, *supra* note 117, at 21:47–22:11 (noting that "[AI fraud] causes substantial harm to society and financial harm [and that] it's fundamental if we are harmed by somebody, there's a remedy either through the legal system or through law enforcement [but] in this case there is no remedy, and that fundamental basis is broken").

[157] *See* Tina Brooks et al., *Increasing Threat of Deepfake Identities,* DEP'T HOMELAND SEC., https://perma.cc/9ULW-6AC6 (last visited Jan. 27, 2025).

[158] ARTIFICIAL INTELLIGENCE, *supra* note 74, at 1.

[159] *See* David, *supra* note 89.

[160] *See supra* Part II(A)(i).

[161] Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).

[162] *See* Verma, *supra* note 109; Kristin Robinson, *Tennessee State Bill to Protect Artists' Voices from AI Impersonation Unveiled By Governor,* BILLBOARD (Jan. 10, 2024), https://perma.cc/V8GH-7N9A.

users from abusing an individual's identity.[163]

In October 2023, legislators drafted the Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2023 (hereinafter "NO FAKES Act").[164] The purpose of this act parallels the purpose of the ROP.[165] The NO FAKES Act is intended to "protect the voice and visual likeness of all individuals from unauthorized recreations from generative artificial intelligence."[166] Like the ROP, the bill seeks to prevent AI users from exploiting individuals' likeness without permission.[167] The distinction—and perhaps an opportunity for broader protection—is that the bill does not require the individual to have a "commercially valuable" nature.[168] The NO FAKES Act also parallels aspects of the DMCA as it intends to impose liability on "platforms. . . for hosting an unauthorized digital replica if the platform has *knowledge* of the fact that the replica was not authorized by the individual depicted."[169] Under the DMCA, Section 512(c)'s safe harbor protection only applies when an ISP has no actual knowledge or awareness of infringing activity, or immediately removes infringing material once it learns of its existence.[170] Knowledge is clearly a determining factor in showing liability under the NO FAKES Act; however, proving this culpability is an obstacle because it requires extensive discovery and analysis through an objective, and sometimes subjective, standard.[171]

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[163] *See*, *e.g.*, *DEFIANCE* One Pager, *supra* note 128; No AI FRAUD Act, H.R. 6943, 118th Cong. § 2 (2024); SENS. CHRIS COONS ET AL., NURTURE ORIGINALS, FOSTER ART, AND KEEP ENTERTAINMENT SAFE (NO FAKES) ACT (One Pager 2023), https://perma.cc/5Y9X-46K3 [hereinafter *NO FAKES ACT* One Pager].

[164] David, *supra* note 89.

[165] *See* Jones, *supra* note 114, at 15.

[166] *NO FAKES ACT* One Pager, *supra* note 163.

[167] *NO FAKES ACT* One Pager, *supra* note 163.

[168] Letter from Am. Civ. Liberties Union et al., to Darrell Issa & Hank Johnson, Representatives, U.S. House of Representatives, NO AI Fraud Act / NO FAKES Act 1–2 (Feb. 1, 2024), https://perma.cc/RC5G-X7A2 [hereinafter Letter from Am. Civ. Liberties Union].

[169] *NO FAKES ACT* One Pager, *supra* note 163 (emphasis added).

[170] 17 U.S.C. § 512(c)(1)(A).

[171] *See* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 31 (2d Cir. 2012) ("In other words, the actual knowledge provision turns on whether the provider actually or 'subjectively' knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement 'objectively' obvious to a reasonable person. The red flag provision, because it incorporates an objective standard, is not swallowed up by the actual knowledge provision under our construction of the § 512(c) safe harbor.").

Other strains arise within the scope of the bill and its objectives' practical effects on existing laws.[172] The NO FAKES Act proposes the exclusion of "certain digital replicas from coverage based on recognized First Amendment protections."[173] Like the DMCA and its criticized implications on fair use, the NO FAKES Act intends to limit the transformative use defense as well.[174] At first glance, this seems like a beneficial protection for celebrities like Taylor Swift, however, it is unclear regarding the type of exclusions that will be set forth—and for who.[175] Because many states base ROP violations on the misappropriation of an individual's likeness for commercial gain, it may be difficult for individuals who do not have a commercially-valuable likeness to invoke this protection.[176] If the bill only provides exclusions for figures whose likeness is valuable, "ordinary" individuals will be neglected. However, if exclusion of certain digital replicas applies to anyone, it could "risk a flood of litigation" and raise a storm of First Amendment issues.[177] In addition, the bill fails to offer any "protections beyond [already established] copyright [and] ROP law."[178] Passing bills like these may present complex issues and conflicts among the existing laws.[179]

Similar disapproval followed the No Artificial Intelligence Fake Replicas And Unauthorized Duplications Act (hereinafter "No AI FRAUD Act"), which was proposed in companion to the NO FAKES Act in January 2024.[180] "Heart on My Sleeve" was one of the driving factors that encouraged lawmakers to draft the bill, as well as a report by the Department of Homeland Security regarding non-consensual, sexually explicit images

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172 *See* David, *supra* note 89.

173 *NO FAKES ACT* One Pager, *supra* note 163.

174 *See* David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 726 (2000); *NO FAKES ACT* One Pager, *supra* note 163.

175 *See NO FAKES ACT* One Pager, *supra* note 163.

176 *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 402–05 (2001); Jones, *supra* note 114, at 18 (defining "commercial value" and its statutory history).

177 Jones, *supra* note 114, at 18.

178 David, *supra* note 89.

179 *See* David, *supra* note 89.

180 Corynne McSherry, *The No AI Fraud Act Creates Way More Problems Than It Solves*, ELEC. FRONTIER FOUND. (Jan. 19, 2024), https://perma.cc/F6H4-WAJN; *Salazar Introduces The NO AI FRAUD Act*, SALAZAR.HOUSE.GOV (Jan. 10, 2024), https://perma.cc/Q7CK-LGSV.

generated by AI.[181] With these recent events as the backdrop, the lawmakers proposed an extremely broad prohibition on using AI to imitate an individual without their permission.[182] Similar to the NO FAKES Act, this blanket legislation could raise major issues around the freedom of expression and may not afford protection for ordinary individuals in practice.[183] This bill could also implicate ISPs that were unaware AI was involved in the production of a particular work and may not have the resources to fight potentially meritless claims.[184] Importantly, the bill does not provide any equivalent safeguards for ISPs, which are granted by Section 512 of the DMCA.[185] As a result, these platforms may refuse to support any user-generated content altogether, which could harm hundreds of companies' beneficial operations and disincentivize creativity across the board.[186]

Soon after Taylor Swift's explicit deepfakes circulated, lawmakers realized the "'exponentially' growing volume of digitally manipulated explicit AI images" and subsequently proposed The Disrupt Explicit Forged Images and Non-Consensual Edits Act ("DEFIANCE Act").[187] This legislation would impose accountability on users who proliferate nonconsensual pornographic deepfake images and videos.[188] Importantly, the DEFIANCE Act proposes that the federal civil remedy would be available to ordinary individuals, which revises some states' ROP requirement that the subject must be a celebrity.[189] Although this legislation would serve as a tool for monetary relief, it only protects victims of

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[181] No AI FRAUD Act, H.R. 6943, 118th Cong. § 2 (2024) (reporting that over "100,000 computer-generated fake nude images of women [were] created without their consent or knowledge").

[182] Adi Roberston, *Lawmakers Propose Anti-Nonconsensual AI Porn Bill After Taylor Swift Controversy*, VERGE (Jan. 30, 2024, 9:44 PM EST), https://perma.cc/WW45-ZJ7X.

[183] *See* McSherry, *supra* note 180; Janus Rose, *Congress Is Trying to Stop AI Nudes and Deepfake Scams Because Celebrities Are Mad*, VICE (Jan. 16, 2024), https://perma.cc/9LFG-7M27.

[184] *See* McSherry, *supra* note 180.

[185] *Compare* 17 U.S.C. § 512, *with* No AI FRAUD Act, H.R. 6943, 118th Cong. § 2 (2024).

[186] *See* McSherry, *supra* note 180.

[187] Roberston, *supra* note 182.

[188] *Durbin, Graham, Klobuchar, Hawley Introduce DEFIANCE Act to Hold Accountable Those Responsible for the Proliferation of Nonconsensual, Sexually-Explicit "Deepfake" Images and Videos*, U.S. S. COMM. ON JUDICIARY (Jan. 30, 2024), https://perma.cc/QR25-3KH8.

[189] *Id*. (quoting Senator Josh Hawley stating "[n]obody—neither celebrities nor ordinary Americans—should ever have to find themselves featured in AI pornography . . . [i]nnocent people have a right to defend their reputations and hold perpetrators accountable in court").

pornographic deepfakes.[190] Therefore, the DEFIANCE Act would not provide the necessary overlap for individuals who become the subject of deepfakes in other situations, and whether they can assert their ROP is still a rampant concern.

B. *Current Conflict Among the ROP and Copyright Law Necessitates the Incorporation of Publicity Rights into Existing Law*

Executing the aforementioned bills threaten the underlying principles of ROP and copyright law.[191] For one, they risk being overly broad, raising widespread First Amendment issues, specifically with freedom of expression and the deterioration of the fair use doctrine.[192] Conversely, they toe the line of being too narrow by excluding victims who have historically been deprived of ROP claims due to their status.[193] Lastly, they unequivocally dilute the scope of liability by leaving terms like *users*, *authors*, and *platforms* undefined.[194]

As evidenced by the numerous acts discussed above and the overarching threat to public policy and existing law, the need for federal action around detrimental uses of AI is critical.[195] However, steps to enact widespread protections have fallen short.[196] There is a need for a more creative approach to implementing publicity rights into federal law. Proposed bills that address substantially the same issue ultimately become subtle variants of one another, presenting more complexities and concerns around the comprehensive goal. Because AI's capabilities are extensive and not always utilized in malicious ways, lawmakers should begin by amending specific provisions under the Copyright Act that support publicity rights in the context of AI.[197]

Critics of the NO AI FRAUD Act warn that executing such legislation would create widespread First Amendment problems, specifically with

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190 *See id*.

191 *See* David, *supra* note 89.

192 *See* McSherry, *supra* note 180.

193 *See generally* Hao, *supra* note 132.

194 *See* Jones, *supra* note 114, at 18–19 (arguing that the NO FAKES Act should provide clearer definitions of the terms).

195 *See, e.g.,* The DEFIANCE Act of 2024, S. 3696, 118th Cong. (2023-2024); No AI FRAUD Act, H.R. 6943, 118th Cong. § 2 (2024); NO FAKES Act of 2024, S. 4875, 118th Cong. (2024).

196 *See* David, *supra* note 89.

197 *See infra* Part IV(B).

freedom of expression.[198] Unironically, this concern emulates the frequently used transformative defense against ROP claims.[199] In application, AI-generated works straddle the boundary between copyright infringement on derivative works and violating publicity rights.[200] Additionally, if there is a debate about whether a machine can be an author, there is surely a debate about whether this AI author can have "originality" or alternatively, liability.[201] Because there is no clear solution to the earlier-named issues, whether AI users may vindicate themselves from such liability will continue to permeate a gray area of what can truly be protected from AI.[202] Without a lawful prescription, this area will remain nondescript and overlooked until Spotify charts are drenched in AI-authored songs, and discerning between what's real and what's (deep)fake will be an applauded skill.

IV. The Copyright Act Must Be Amended to Protect Against the Dangers of AI

The substance of copyright law derives from other intellectual property rights, making the ROP's incorporation into the Act a smooth transition.[203] This is apparent where courts adopted and applied the Patent Act's indirect infringement liability to copyright, and in the parallel between the ROP and copyright's transformative fair use doctrines.[204] Where the majority of intellectual property rights are federally protected, the ROP is not.[205] Since the age of technology has expanded opportunities for invading individuals' privacy, the need for these rights in advertisement, invention, and recognition have become increasingly important.[206] Because these forms of intellectual property overlap at times, a natural and streamlined way of protecting publicity rights is to incorporate them into an existing, well

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198 Letter from Am. Civ. Liberties Union, *supra* note 168, at 2.

199 *See* Andersen v. Stability AI Ltd., 700 F.Supp.3d 853, 874 (N.D. Cal. 2023) ("Well-established law acknowledges 'transformative use' as a defense to a right of publicity claim.").

200 GENERATIVE ARTIFICIAL INTELLIGENCE, *supra* note 31, at 3.

201 *See generally* MENELL, ET AL., *supra* note 14, at 530.

202 *See* Ward, *supra* note 6, at 93.

203 *See* 35 U.S.C. § 271(b)–(c); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 434–35 (1984).

204 *See supra* text accompanying notes 81–83.

205 *See generally* ARTIFICIAL INTELLIGENCE, *supra* note 74, at 1.

206 *See* The DEFIANCE Act of 2024, S. 3696, 118th Cong. (2023–2024); No AI FRAUD Act, H.R. 6943, 118th Cong. § 2 (2024); NO FAKES Act of 2024, S. 4875, 118th Cong. (2024).

respected statute—the Copyright Act.[207]

A. *Congress Should Expand the DMCA to Include ROP Takedowns*

In enacting the DMCA, Congress intended to establish a balance between the continued development of the internet and the protection of copyrighted works from online infringement.[208] Since then, the DMCA's notice and takedown requirement has encountered adverse perspectives on its operation.[209] From a distance, it offers relatively simple solutions for a copyright owner to remove infringing material from an ISP.[210] Many ISPs consider Section 512 to be a success, allowing them to grow their services while avoiding enervating lawsuits.[211] Conversely, copyright owners report concerns about their ability to utilize Section 512 sufficiently, and the "'whack-a-mole' problem of infringing content reappearing after being taken down."[212] As such, these conflicting views and the proliferation of online infringement indicate that this balance has tilted within modern day technology.[213] These observations caused the Copyright Office to issue a report with numerous recommendations for Congress to consider in order to restore this balance.[214] Notably, the report states that "internet policy in the 21st century cannot be one-size-fits-all."[215]

The agency's recommendations suggest the need for Congress to reassess provisions of the DMCA in light of technological advancements.[216] This rationale applies the same to the issues presented by generative AI.[217] Thus, Congress should also consider extending Section 512 to encapsulate publicity rights.[218]

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[207] *See* Jones, *supra* note 114, at 30.

[208] Section 512 of Title 17, R. of the Reg. of Copyrights No. 824 at 197 (U.S. Copyright Off. May 21, 2020), https://perma.cc/QN78-5NXK [hereinafter SECTION 512].

[209] *Id*. at 1.

[210] *See* Mia Sato, *Drake's AI Clone is Here—And Drake Might Not Be Able to Stop Him*, VERGE (May 1, 2023, 10:35 AM EDT), https://perma.cc/R2HY-UVJ3.

[211] SECTION 512, *supra* note 208, at 1.

[212] SECTION 512, *supra* note 208, at 1.

[213] *See* SECTION 512, *supra* note 208, at 197.

[214] *See generally* SECTION 512, *supra* note 208, at 1–3.

[215] SECTION 512, *supra* note 208, at 2.

[216] *See* SECTION 512, *supra* note 208, at 1–3.

[217] *See* Mathew Ingram, *An AI Engine Scans a Book. Is That Copyright Infringement or Fair Use?*, COLUM. JOURNALISM REV. (Oct. 26, 2023), https://perma.cc/X7QJ-J4C8.

[218] *Cf.* 17 U.S.C. § 512.

Currently, the DMCA's takedown provision is not available to ROP violations, as the subject matters under this act are not copyrighted works and are therefore not at risk for infringement.[219] Yet, the unauthorized use of an individual's identity has become dramatically dangerous and necessitates a process in which ISPs monitor misuse.[220] For example, pornographic deepfakes are arguably not copyrightable, as they are not created by human beings.[221] However, the images are often derived from stolen photos that *would* be eligible for copyright protection, whether published or not.[222] And, these images violate the subject matter's privacy and publicity rights by misappropriating their NIL for a number of incentives.[223] Deepfake porn has become so common that Google has created a takedown system similar to the DMCA, allowing victims to issue removal requests when they discover personally damaging content.[224] The DMCA should follow suit and impose this responsibility on ISPs that host content in violation of the ROP.[225]

Not only are stolen images subject to misuse, but individuals' voices and artistic styles are threatened by generative AI.[226] These images are often derived from existing copyrighted material, such as songs, literary works, or performances.[227] But they can also be stolen from non-copyrighted works.[228] Proving that a work usurps an original's "commercial value" is essential for

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[219] *See* 17 U.S.C. § 102 (listing the subject matter of copyrightable works eligible for protection).

[220] *See* Jones, *supra* note 114, at 14 (arguing that "AI-generated content using a person's voice without their consent directly interferes with a person's identity, not just copyright…").

[221] *See* COMPENDIUM, *supra* note 23, § 313.2 (stating that works will not be registered where they are "produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author").

[222] *See Group Registration for Unpublished Works (GRUW)*, U.S. COPYRIGHT OFF., https://perma.cc/6FJ4-5N96 (last visited Jan. 27, 2025).

[223] *See supra* text accompanying notes 114–23.

[224] *Remove Explicit Non-Consensual Fake Imagery from Google*, GOOGLE, https://perma.cc/AK8Q-WME5 (last visited Jan. 27, 2025).

[225] *Cf. id.*

[226] *See* Tim Friedlander, President, Nat'l Ass'n of Voice Actors, Creative Economy and Generative AI Discussion 16–17 (Oct. 4, 2023) (transcript at https://perma.cc/U7D8-J3WV).

[227] *See* Jones, *supra* note 114, at 11.

[228] *See* Rashi Shrivastava, *'Keep Your Paws Off My Voice': Voice Actors Worry Generative AI Will Steal Their Livelihoods*, FORBES (Oct. 9, 2023, 6:30 AM EDT), https://perma.cc/VWN9-2M7B (explaining how voice actors have recordings that are explicitly copyrighted, but preventing AI from cloning the voice in different mediums falls short of copyright protection).

defending a fair use claim in both copyright law and the ROP.[229] Users who post their AI-generated content on TikTok may receive monetary rewards depending on how many views and how much engagement their video attracts.[230] Ghostwriter977, the "author" of "Heart on My Sleeve," had the potential to cash in over $500 on TikTok, and likely more after calculating compensation from other streaming platforms.[231] ISPs aware of this form of infringement have policies prohibiting such content, yet these policies almost entirely rely on the inclusion of copyrighted work in the content.[232] Misappropriating an individual's voice or style is harder to identify and condemn, particularly when ISPs face potential First Amendment violations.[233] Unsurprisingly, voices are often stolen from existing online content and are used to "create whole works for sale or non-commercial distribution."[234] In turn, removing content that merely copies or imitates another's NIL is overwhelmingly arduous—especially if the copied individual is not a prominent public figure.[235] Therefore, Congress should expand the DMCA to address ROP violations.[236]

Section 512(m) provides that ISPs do not owe an affirmative duty to monitor user content.[237] This creates tension with section 512(c)'s knowledge requirement, and should be amended to impose a greater responsibility on ISPs that host user generated content.[238] Specifically, Section 512(m) should mandate that ISPs and their agents have a duty to mitigate harmful AI-

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[229] *See supra* Part I(A)(3); *supra* Part I(B)(2).

[230] *See* Jessica Martel, *16 Ways to Make Money on TikTok in 2024*, TIME, https://perma.cc/Y9HX-SQML (last updated Feb. 22, 2024).

[231] Baidhurya Mani, *How Much Money Does TikTok Pay For 1 Million Views in 2024?*, SELLCOURSES ONLINE (May 25, 2023), https://perma.cc/75BC-66TV.

[232] *See, e.g.*, *Enforcing Copyright*, YOUTUBE, https://perma.cc/SP25-LTSF (last visited Jan. 27, 2025); *Intellectual Property Policy*, TIKTOK, https://perma.cc/7QFD-SANX (last updated June 7, 2021).

[233] *See* HICKEY, *supra* note 63, at 2.

[234] Friedlander, *supra* note 226, at 17.

[235] *See* Friedlander, *supra* note 226, at 16–17 (explaining that "not all voice actors are celebrities or well-known voices").

[236] *Cf.* SECTION 512, *supra* note 208, at 197 (explaining that "[w]hile the Office is mindful of [] creators who have been able to leverage new technologies to their benefit, their economic success does not provide comfort to the many other creators who have seen their livelihoods impacted drastically by ongoing infringement of their works online and for which they can achieve no relief").

[237] 17 U.S.C. § 512(m); SECTION 512, *supra* note 208, at 121.

[238] *See* SECTION 512, *supra* note 208, at 123.

generated works.[239] For the purposes of this amendment, designated ISP agents should focus on AI-generated content that risks infringing on copyrighted works *and* misappropriating the subject matter's name, image, and likeness.[240] By providing the platform in which AI-generated content can be created and hosted, ISPs ought to retain a degree of responsibility for the damages caused by users of the platform, such as the manipulation of another's photograph to create explicit images.[241] This is cognate to the well-established principles of vicarious liability and the "right to control" test.[242] Although this may impose further responsibility onto ISPs, they have the "technological expertise to address infringement on a large scale."[243] Moreover, the dangerous nature of AI necessitates close monitoring until the ROP receives federal legislation.[244]

Federal legislation is essential to protect individuals' NIL from AI-generated works and would indirectly extend ISPs' existing limitations on infringement liability if and when federal protection is afforded to publicity rights.[245] This would allow protection for Taylor, Gary, and Drake without having to promulgate a series of inconsistent legislation.[246]

B. *In Lieu of Amending the DMCA, Congress Should Revise Chapters 1 and 5 of the Copyright Act to Provide Additional Protections for Publicity Rights in the Context of AI*

Copyright law is developed and well respected by U.S. courts.[247] Similar to the intent behind extending Title XVII to enact the DMCA, legislators should adapt to the dynamic complexities of AI and implement additional

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[239] *Contra* 17 U.S.C. § 512(m).

[240] *Cf.* 17 U.S.C. § 512(c)(2) (listing the requirements for ISPs' designated agents).

[241] *See DEFIANCE* One Pager, *supra* note 128.

[242] *Cf.* Exxon Mobil Corp. v. Attorney General, 94 N.E.3d 786, 794 (Mass. 2018) (explaining that a "'franchisor is vicariously liable for the conduct of its franchisee only where the franchisor controls or has a right to control the specific policy or practice resulting in harm to the plaintiff'") (quoting Depianti v. Jan-Pro Franchising Int'l, Inc., 990 N.E.2d 1054 (2013)).

[243] HICKEY, *supra* note 63, at 2.

[244] *See* HICKEY, *supra* note 63, at 2.

[245] Ashley R. Yeargan, *Addressing the Limitations of the Right of Publicity in the World of AI*, DAILY J. (Oct. 23, 2023), https://perma.cc/RW2V-MJZH.

[246] *See supra* Part II.

[247] *See* COMPENDIUM, *supra* note 23, § 102.1.

sections under this Title.[248] Not only would this clear the confusion around AI authorship and infringement liability, but it would help mitigate conflict between the ROP and copyright law, and directly address the issues various bills have tried to solve.[249] Options to combat this looming crisis fall under Chapter 1 and Chapter 5 of the Copyright Act.[250]

1. Chapter 1 Should Provide Protection for NIL

Section 102 of the Act describes the types of works afforded protection in copyright law.[251] Under this section, "sound recordings" and "pictorial, graphic, and sculptural works" are entitled to protection.[252] Publicity rights of an individual's NIL should be included in these works of authorship.[253] Unregistered, personal photographs should maintain similar protections to those that are registered, only for the purposes of AI misappropriation.[254] The analysis should also include voices that are stolen from videos or sound recordings.[255] Not only would extending the scope of §102 provide protection for *all* individuals, but it would create a cause of action for those who fall victim to the nefarious intentions of AI users.[256] Further, including a requirement that these protections only apply in the context of AI misuse preserves the intent behind transformative fair use defense as well as freedom of speech.

Additionally, Congress should reinforce the Copyright Office's opinion that a copyrightable work must be created by a human, rather than a machine.[257] Congress should articulate that an "original work of authorship" excludes AI machines because these machines reach beyond the mere use of a "tool" and break the human causal connection, which would render all AI-

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[248] *Cf. The Digital Millennium Copyright Act*, U.S. COPYRIGHT OFF., https://perma.cc/L6Q5-YDHP (last visited Jan. 27, 2025) (explaining how Congress passed the DMCA to "address important parts of the relationship between copyright and the internet").

[249] *See supra* Part III(A)(1).

[250] *See generally* 17 U.S.C. §§ 102, 501.

[251] *Id*. § 102.

[252] *Id*. §§ 102(a)(5), (a)(7).

[253] *See generally id.*

[254] *See generally* Mary W.S. Wong, *"Transformative" User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?*, 11 VAND. J. ENT. & TECH. L. 1075, 1077 (2021).

[255] *See* Shrivastava, *supra* note 228.

[256] *See supra* Part II.

[257] COMPENDIUM, *supra* note 23, § 313.2 (stating that "to qualify as a work of 'authorship' a work must be created by a human being").

generated works unprotectable under the Act.[258] However, Congress should clarify that although the individual who used AI to create the work is not its author for copyright protection purposes, they could still be held accountable as the work's *originator*.[259] Thus, an individual who creates AI-generated work that misappropriates another's name, image, or likeness, or infringes copyrighted material, could face liability.[260] This distinction also protects companies who develop and distribute AI technology, as it would impliedly restrict their responsibility from traditional product liability law.[261] With this definition, the humans responsible for generating the harmful AI content will not be able to hide behind the AI machine to bypass liability.[262] Nevertheless, the longstanding fair use defense should still apply, which will be discussed further in the following section.[263]

Incorporating the ROP into Chapter 1 would be inclusive of all individuals, regardless of social status. This is imperative, as the detrimental effects of AI have become overwhelmingly apparent.[264] Personal autonomy is equally as important as a copyright owner's bundle of rights; individuals should be afforded a similar level of protection over how their likenesses are represented.[265]

2. Chapter 5 Should Hold AI Users Accountable for Exceptionally Damaging ROP Abuse

Chapter 5 should be amended to encompass the misappropriation of publicity rights; this would provide remedies for victims and protective measures against AI misuse.[266] In an attempt to avoid diluting the purpose

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[258] *See supra* text accompanying notes 26–29; COMPENDIUM, *supra* note 23, § 313.2 (asserting that "the Office will not register works produced by a machine . . . without any creative input or intervention from a human author").

[259] *But see* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (explaining that an author is "he to whom anything owes its origin; originator; maker").

[260] *See infra* text accompanying notes 277–78.

[261] *See* Catherine Sharkey, *Products Liability for Artificial Intelligence*, LAWFARE (Sept. 25, 2024, 8:01 AM), https://perma.cc/CN8P-BE7V.

[262] *See* Wong, *supra* note 254, at 1090. *See generally* COMPENDIUM, *supra* note 23, § 313.2.

[263] *See infra* text accompanying notes 273–76.

[264] *See supra* Part II.

[265] *See* Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1715 (1992) (stating "there is a natural, inalienable right to be treated as a person, as one whose individual autonomy is respected").

[266] *See generally* 17 U.S.C. § 501.

behind the fair use defense and issues with First Amendment violations, users who infringe on another's publicity rights should only be held accountable in certain scenarios.[267] The economic-focused analysis of the doctrine should be broadened to encapsulate irreversible risks that AI "fair use" attempts to manipulate.[268] Rather than driving the heaviest preservation towards the copyright owner's monetary interests, AI's employment of the defense signals a recalibration to prioritize privacy—and publicity—based rights.[269]

First, Congress should uphold the requirement that the use of NIL was intended for obtaining a commercial gain.[270] This would continue to serve state legislators' original intent for enacting such laws and would protect celebrities and small creators from commercial exploitation.[271] However, Congress should implement an additional requirement, disjunctive of the monetary gain element. The supplementary element would require a showing that the AI-generated content was created with the objective intent to humiliate another or damage another's reputation.[272] This element would imitate principles of tort law's intentional infliction of emotional distress.[273] Adding this requirement would protect those who share their unregistered photos and videos on social media accounts from users who intend to exploit this material for misuse, such as pornographic deepfakes or scamming objectives.[274]

Additionally, Chapter 5 should impose liability on users who generate

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[267] *See U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFF., https://perma.cc/4723-N3FD (last visited Jan. 27, 2025) (explaining the purpose of the fair use doctrine is to promote the "freedom of expression").

[268] *See* Wong, *supra* note 254, at 1081–82.

[269] *See* Benjamin Ely Marks, *Copyright Protection, Privacy Rights, and the Fair Use Doctrine: The Post-Salinger Decade Reconsidered*, 72 N.Y.U. L. REV. 1376, 1378 (1997); Wong, *supra* note 254, at 1081–82.

[270] *See generally* MCCARTHY & SCHECHTER, *supra* note 70, § 2:7.

[271] *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 811 (Cal. 2001).

[272] *See DEFIANCE* One Pager, *supra* note 128 (noting "the harm to the victims from the distribution of sexually explicit deepfakes is very real" and that "victims have lost their jobs, and may suffer ongoing depression or anxiety").

[273] *See* Snyder v. Phelps, 562 U.S. 443, 451 (2011) (explaining the requirements to succeed on a claim for intentional infliction of emotional distress).

[274] *See, e.g.*, *DEFIANCE* One Pager, *supra* note 128; *Senate Special Aging Hearing*, *supra* note 117.

the AI-manipulated material, not necessarily AI programs or ISPs.[275] To do so, the provision should state that *only* for the purposes of liability and in the context of AI generated work, users who input specific data and prompts, *and* publish the work are responsible for the misappropriation of another's publicity rights.[276] This is essential for two reasons: first, AI users should still have the ability to create AI-generated work for non-infringing purposes, mirroring *Sony*'s reasoning; and second, individuals' NIL needs to be protected from AI abuse.[277] Delineating between users who create AI-generated work for non-infringing purposes and users who create content for the main purpose of hurting others is necessary to effectively impose liability for ROP violations and deter harmful "unauthorized digital replications."[278]

Although a federal right of publicity could effectively address the exploitation of an individual's name, image and likeness, amending the Act would provide necessary protections for individuals and copyright owners in the context of generative AI more efficiently.[279] Enacting the aforementioned changes to Chapter 1 and Chapter 5 of the Act would ameliorate nationwide publicity concerns and establish consistent jurisprudence throughout the states.[280]

CONCLUSION

During the 1990s, the rapid expansion of the Internet evoked many concerns for copyright owners.[281] Today, AI gives rise to similar concerns, but the parties who are threatened encapsulate more than those in the copyright community. AI is here to stay, but like the guardrails and

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[275] *Cf.* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984) (holding that video tape recorders have noninfringing uses and thus, selling them does not constitute indirect infringement).

[276] *Cf.* Jones, *supra* note 114, at 21 (summarizing the NO FAKES Act liability limitations).

[277] Sony Corp. of Am., 464 U.S. at 442; *see* Jason Foodman, *Artificial Intelligence is Changing the World and Your Business*, FORBES (Jul. 24, 2023, 7:30 AM EDT), https://perma.cc/DUR6-6QK6 (outlining the benefits of AI).

[278] Jones, *supra* note 114, at 24.

[279] *See* Katherine Klosek, *A Federal Right of Publicity May Address AI-Generated Deepfakes While Protecting Free Expression*, ASS'N RSCH. LIBR., https://perma.cc/75U2-MNJJ (last visited Jan. 27, 2025).

[280] *See* Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute is Necessary*, 28 COMMC'NS LAW. 14, 15 (2011).

[281] SECTION 512, *supra* note 208, at 13.

legislation put up around the birth of the internet, AI must be contained in similar respects. AI's capabilities present a myriad of potential misuses, threatening the well-being of just about anyone who has an internet presence. Without federal legislation around the ROP, implementing NIL protections into the Copyright Act are essential to promoting creativity and safety within society. Congress has the opportunity to erase the various gray areas that machines can manipulate by amending the Copyright Act to illustrate colorful and inclusive remedies that favor human beings.

The Constitutional Crisis of the Unwitting, Underage Breadwinner: The Child Vlogger

Grace Royle[*]

INTRODUCTION

In 2001, the year of camera phones and the first drafts of the human genome, Kofi Annan reminded the world that its most precious treasure—and resource—remains its children:

> There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want[,] and that they can grow up in peace. [This] is a rallying call to us all . . . . [A] child in danger is a child who cannot wait.[1]

Children are priceless.[2] Therefore, they require proactive, steadfast protection from governments, communities, and families alike.[3] The American judiciary has assumed this sacred duty for decades particularly by safeguarding the family unit.[4] The courts determined that family autonomy and parental rights are protected by the "supreme law of the

[*] J.D. Candidate, New England Law | Boston (2025). I'd like to thank the members of *New England Law Review* and my fellow classmates for their inspiring hard work and support. Most especially, I want to mention and thank my loving father, whose perpetual encouragement and values in life helped me to where I stand today—as a person, a professional, and a writer.

[1] KOFI A. ANNAN, THE STATE OF THE WORLD'S CHILDREN 2000 at 4 (2000). *See generally John F. Kennedy Quotations*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, https://perma.cc/8MBA-JLR2 (quoting President Kennedy when he said "[c]hildren are the world's most valuable resource and its best hope for the future").

[2] *See John F. Kennedy Quotations*, *supra* note 1.

[3] ANNAN, *supra* note 1.

[4] *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (holding "the Constitution protects the sanctity of the family"); Sabatini v. Wigh, 98 So.3d 244, 246 (Fla. Dist. Ct. App. 2012) (ruling a child's best interest should be the top priority in family law cases).

land" itself—the United States Constitution.[5] Modern science concurred, finding that children possess an "innate need" for a family setting, as they experience the world best when bonding with a parent or guardian.[6] However, the law will, and must, still occasionally intrude on family autonomy and privacy when it is in the best interests of the child.[7] Child labor laws are a clear example of this.[8] Long gone are the feudal days when children were mere props or property for their guardians; instead, they are now recognized as a vulnerable population deserving of legal prioritization and protection.[9]

Or at least, that had been the hope.[10] Unfortunately, an increasing number of children are currently being exposed to a new and precarious profession: family vlogging.[11] TIME Magazine described family vlogging as the ultimate family business, one where "you literally get paid for raising your kids."[12] Parents film their everyday lives with their children, edit the footage into video diaries called "vlogs," and upload those videos to social media platforms.[13] Popular vlogs can generate substantial income through monetization, sponsorships, advertising revenue, and similar means.[14] It is a new form of media entertainment that has taken the internet by storm, and children are at the center of it.[15] The children of family vloggers ("child vloggers") are cast members of a reality show and employees of an unregulated business operated out of their own homes.[16] As a result, a

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[5] *Moore*, 431 U.S. at 503; *The Constitution*, WHITE HOUSE, https://perma.cc/23YB-M9CL (last visited Mar. 19, 2025) [hereinafter *The Constitution*].

[6] Maniza Zaman, *Why Children Should Be Living with Families*, UNICEF (Nov. 10, 2019), https://perma.cc/9G24-XKMH; NAT'L CTR. FOR INJ. PREVENTION AND CONTROL, ESSENTIALS FOR CHILDHOOD: CREATING SAFE, STABLE, NURTURING RELATIONSHIPS AND ENVIRONMENTS FOR ALL CHILDREN 6 (2019), https://perma.cc/Q5ZG-5KX2.

[7] *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944).

[8] *See* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 212(a), (c) (1938).

[9] *See generally* Michael Schuman, *History of Child Labor in the United States—Part 1: Little Children Working*, U.S. BUREAU LAB. STAT. (Jan. 2017), https://perma.cc/CK3L-TTGC.

[10] *See id.*

[11] *See* Belinda Luscombe, *The YouTube Parents Who Are Turning Family Moments into Big Bucks*, TIME (May 18, 2017, 6:00 AM EDT), https://perma.cc/7TEV-4S74.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Jenna Bartkovsky, *The Evils of Family Vlogging: Exploiting Childhood for Clicks*, ROWDY MAG. (Oct. 10, 2023), https://perma.cc/6V5S-GS75; Taylor Lorenz, *There Are Almost No Legal Protections*

child's most private moments—from being half-naked at a doctor's appointment, to learning to shave their legs for the first time—are published online, often without their consent.[17] Cam Barrett, who had grown up a child vlogger, publicly spoke to how damaging the experience was.[18] She was nine when her mother shared intimate details of her first period online, and fifteen when her mother shoved a recording camera in her face immediately after being struck by a drunk driver.[19] Furthermore, child vloggers are not legally entitled to the revenue their vlogs generate, even though they are often the focal point of these videos.[20] Legislators and the courts have been concerningly silent on these issues so far,[21] but it is time for a change.

This Note will explain how the dangers and unique circumstances of family vlogging necessitate a change in the law's approach to family autonomy and privacy. Part I will summarize the history of family autonomy as a fundamental right, child protection laws in the United States, and family vlogging. Part II will argue that family vlogging requires regulation because it inflicts exploitation, extreme privacy violations, and other harms on the children involved. Part III will analyze existing U.S. laws and children's rights, explaining that they do not, and could not, adequately protect child vloggers primarily because of constitutional barriers. Finally, Part IV will suggest a new approach to the issue by conceptualizing a test similar to those used for certain Fourth Amendment violations. This approach, one of many possible solutions, could allow the government to more intrusively regulate family vloggers when the risky and public nature of their work lessens their reasonable expectation of autonomy and privacy.

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for the Internet's Child Stars, WASH. POST, https://perma.cc/LE2H-T2T5 (last updated Sept. 1, 2023, 11:37 AM EDT).

[17] Aphrodite Stamboulos, *Family Channels: Violators of Child Privacy*, FORDHAM UNDERGRADUATE L. REV., https://perma.cc/BC8Q-ENSX (last visited Mar. 19, 2025).

[18] Lorenz, *supra* note 16.

[19] Lorenz, *supra* note 16.

[20] Marina A. Masterson, Comment, *When Play Becomes Work: Child Labor Laws in the Era of "Kidfluencers"*, 169 U. PA. L. REV. 577, 579 (2021); *see* Manuela López Restrepo, *A New Illinois Law Wants to Ensure Child Influencers Get a Share of Their Earnings*, NPR (Aug. 23, 2023, 5:06 PM ET), https://perma.cc/45JC-VNDB (reporting that as of 2023, Illinois was the only state to regulate child vloggers' financial earnings).

[21] *See* Restrepo, *supra* note 20.

I. Background

A. *The Sanctity of the Family—Family Autonomy*

According to the U.S. Constitution, some rights are so fundamental to American society that any law intruding on them must pass a rigorous "strict scrutiny test": the law must be "narrowly tailored" to "further a compelling government interest."[22] Some constitutional rights can also be waived or limited under certain circumstances; for example, the Fourth Amendment affords greater protection from unreasonable searches and seizures when one is enjoying the privacy of their home versus driving a car in public.[23] However, unless such qualifying circumstances are met, a law infringing on fundamental rights is generally considered unconstitutional and unlawful.[24]

Certain parental rights are considered fundamental because they stem from the parent's liberty interest in the custody and control of their children.[25] These rights are predominantly upheld through the judiciary's acknowledgment and protection of family autonomy.[26] Family autonomy was first recognized in *Meyer v. Nebraska*, where the Supreme Court declared parents had a constitutional right to control their children's education.[27] The *Meyer* Court ruled it was unconstitutional for a state to prohibit parents from teaching their children foreign languages until they passed the eighth grade.[28] Several subsequent cases reaffirmed a parent's right to make decisions for their children without government interference.[29]

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[22] *The Constitution*, *supra* note 5; *Fundamental Rights*, LEGAL INFO. INST., https://perma.cc/2XQ7-ENDM (last updated Mar. 2023); *Strict Scrutiny*, LEGAL INFO. INST., https://perma.cc/6BGB-PBJS (last updated Sept. 2024).

[23] Simona Grossi, *The Waiver of Constitutional Rights*, 60 HOUS. L. REV. 1021, 1024 (2023); RIC SIMMONS & RENÉE MCDONALD HUTCHINS, LEARNING CRIMINAL PROCEDURE: INVESTIGATIONS 61–64 (2d ed. 2019).

[24] *Fundamental Rights*, *supra* note 22.

[25] Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).

[26] *See id*.

[27] Meyer v. Nebraska, 262 U.S. 390, 399–403 (1923).

[28] *Id.*

[29] *E.g.*, Troxel v. Granville, 530 U.S. 57, 75 (2000) (holding state law could not mandate parents to grant more visitation time, against their will, to their child's grandparents); Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (finding an Amish father had a right to homeschool his child and control her religious upbringing); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534–35 (1925) (finding parents had the right to choose whether their children attended public or private school).

The protection of family autonomy expanded further in *Moore v. East Cleveland*, where the Supreme Court ruled that the government was prohibited from narrowly defining "family."[30] In *Moore*, the Court held a city ordinance unconstitutional because it considered a group of people a family only if its members fit into specific categories.[31] The ordinance so narrowly defined "family" that it did not include a grandmother-grandson relationship.[32] In reaching its decision, the Court found there was a "private realm of family life which the state cannot enter."[33] Although its existence was implied in earlier cases, the *Moore* Court was the first to expressly introduce the concept of "sanctity of the family" and make clear that it was constitutionally protected.[34]

Legal scholars have since defined family autonomy as the fundamental right of parents, or other adult family members, to make decisions for their children without government interference.[35] This reflects an enduring societal presumption that parents are best suited to make decisions regarding their children.[36] Importantly, this does not mean that the government may *never* intrude upon private family matters.[37] In fact, it has done so repeatedly over the past several decades when the best interests of the child are at stake.[38]

B. *Child Protection Laws: Lawful Intrusions on Family Autonomy*

The Constitution's protection of familial autonomy and parental rights is steadfast, but not invincible.[39] So long as a law serves a compelling

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[30] 431 U.S. 494, 496 (1977).

[31] *Id.*

[32] *Id.* at 496–97.

[33] *Id.* at 511.

[34] *Id.* at 503–04 ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.") (footnotes omitted). *See generally* Meyer v. Nebraska, 262 U.S. 390 (1923) (implying there are constitutionally protected parental rights and family autonomy without using those terms).

[35] Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569, 570 (1992).

[36] *Id.* at 572.

[37] *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[38] *See generally, e.g.*, *id.* at 158 (finding courts can interfere with parental decision making when the child's health and wellbeing are at stake); 29 U.S.C. § 213(c)(3) (regulating child labor).

[39] *See, e.g.*, *Prince*, 321 U.S. at 166.

government interest in a narrowly-intrusive way,[40] even family privacy can be compromised for the greater good.[41] Child labor laws are one of the oldest examples of such lawful government interference.[42] During the 18th century, children as young as five years old were vital labor resources for farmers, miners, mill owners, and other—typically family-owned—businesses.[43] These children were considered the legal property of their fathers.[44] This changed in 1885 when states began adding a minimum age limit to their labor laws.[45] In 1944, the Supreme Court officially confirmed that parental rights are highly protected but not entirely beyond regulation.[46] In *Prince v. Massachusetts*, the Court ruled that states could constitutionally interfere with private parental decision-making when child labor laws were violated, or when children were exposed to risks of physical injury or death.[47] The Court held that Massachusetts's legitimate interest in protecting the welfare of its children outweighed the sanctity of parental rights, family autonomy, and even the freedom to exercise religion.[48]

C. *Children's Rights Under the Law*

The Constitution affords protection to both children and adults, but the degree of protection for each group differs.[49] Courts and legislatures have ruled children have no rights in certain areas.[50] When children *are* afforded rights, they are often substantially limited in scope, or children lack the standing required to assert and defend them.[51] "The importance of parents'

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[40] *Strict Scrutiny*, *supra* note 22.

[41] *E.g.*, *Prince*, 321 U.S. at 166.

[42] Schuman, *supra* note 9.

[43] Schuman, *supra* note 9.

[44] Schuman, *supra* note 9.

[45] Schuman, *supra* note 9.

[46] *Prince,* 321 U.S. at 166.

[47] *Id.* at 166–67.

[48] *Id.* at 161, 164–65, 170 (finding it was lawful for the government to stop a nine-year-old girl from handing out Jehovah's Witnesses pamphlets at an intersection for several hours with her aunt).

[49] Bellotti v. Baird, 443 U.S. 622, 633–34 (1979) (holding that although children are not beyond constitutional protection due to age alone, "the constitutional rights of children cannot be equated with those of adults").

[50] Devon A. Corneal, *On the Way to Grandmother's House: Is U.S. Immigration Policy More Dangerous than the Big Bad Wolf for Unaccompanied Juvenile Aliens?*, 109 PENN ST. L. REV. 609, 621–22 (2004).

[51] *Id.*

rights has been a consistent thread in constitutional jurisprudence, and those rights often explicitly or implicitly trump children's rights and interests."[52] The rationale for restricting children's rights is the general notion that children require not rights but protection from their families and the law.[53] The Supreme Court explained, "[t]he law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."[54] Courts also consider the biological and economic differences between children and adults.[55] Nevertheless, many criticize the limitation of children's rights and argue minors are left inadequately protected.[56] For example, *Fulton v. Philadelphia* was a recent case involving the placement of foster children that was criticized for focusing entirely on the "adult litigants' desires, [while letting] the children's needs disappear into the ether."[57] Such reproaches are especially prominent in discussions concerning child actors—an industry that once slipped through the cracks of both child protection laws and children's rights.[58]

D. *Child Entertainers in the Law*

Child actors and performers in film, television, radio, and theater are exempt from federal labor laws.[59] Therefore, these children rely entirely on state laws for legal protection—laws that did not even offer such protection until 1938.[60] This was the year former child actor Jackie Coogan sued his parents for spending almost the entirety of his $3–4 million fortune.[61] Despite being a global sensation, he was not entitled to any of the earnings from his

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[52] *Id.* at 623 n.60.

[53] *Id.* at 622.

[54] Parham v. J.R., 442 U.S. 584, 602 (1979).

[55] Corneal, *supra* note 50, at 622.

[56] *See, e.g.*, Corneal, *supra* note 5, at 656; Marci A. Hamilton, *The Supreme Court's Hits and Misses on Children's Civil Rights During the 2020 Term*, VERDICT (July 8, 2021), https://perma.cc/D6J8-RKNZ; Frank D. LoMonte, *The Worst of Both Worlds: Youth's Eroding Right to Self-Determination and the "Parents' Rights" Revolution*, A.B.A. (Aug. 8, 2023), https://perma.cc/Q624-AUFM.

[57] Hamilton, *supra* note 56. *See generally* Fulton v. City of Phila., 593 U.S. 522 (2021).

[58] *E.g.*, Tabetha Bennett, Note, *Child Entertainers and Their Limited Protections: A Call for an Interstate Compact*, 9 CHILD. & FAM. L.J. 131, 153–154 (2021).

[59] Fair Labor Standards Act of 1938, 29 U.S.C. § 213(c)(3).

[60] Jennifer González, *More than Pocket Money: A History of Child Actor Laws*, LIBR. CONG. BLOGS (June 1, 2022), https://perma.cc/SR33-BM6B.

[61] *Id.*

acting career.[62] Coogan was left financially destitute; and even after winning his lawsuit, legal fees left him with only $126,000.[63] In response, California passed the Coogan Act.[64] The Act granted judges the discretion to decide whether a child actor's earnings should be set aside in a trust fund or savings account for the child to access upon adulthood.[65] California made these saved earnings mandatory in 2000, requiring parents to deposit fifteen percent of a child actor's earnings into Coogan Accounts.[66] Other states swiftly followed suit.[67]

As of 2023, thirty-three out of fifty states (including California and New York) regulate the child entertainment industry.[68] These regulations vary but usually mandate Coogan Accounts, work permits, parental consent, on-set working hour limitations, or minimum age provisions.[69] Child actors in the remaining seventeen states are left legally unprotected.[70] Additionally, existing child entertainment regulations do not protect children in reality television, as they are not considered employees but instead participants in documentary-style media.[71] Child entertainers remain concerningly unprotected by the law, and it is an even graver situation for child vloggers.[72]

E. *Family Vlogging: The New "Ultimate," and Precarious, Family Business*

1. A Brief Overview of Family Vlogging

Family vlogging is a relatively new form of entertainment that has grown in popularity, and profitability, since 2008.[73] A successful vlogging business involves people filming their everyday lives, posting the vlogs to social media, and generating income through sources like sponsorship deals

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[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] González, *supra* note 60; Masterson, *supra* note 20, at 589.

[67] González, *supra* note 60.

[68] *Child Entertainment Laws as of January 1, 2023*, U.S. DEP'T. OF LAB., https://perma.cc/A8Z7-8BTN (last visited Mar. 19, 2025) [hereinafter *2023 Child Entertainment Laws*].

[69] *Id.*

[70] *Id.*

[71] Ariel Tacher, Note, *The Real World: Child Labor and Reality Television*, 20 CARDOZO J.L. & GENDER 489, 499 (2014).

[72] Masterson, *supra* note 20, at 602; *2023 Child Entertainment Laws*, supra note 68.

[73] Amelia Tait, *Their Lives Were Documented Online from Birth. Now, They're Coming of Age*, ROLLINGSTONE UK (2022), https://perma.cc/G6SD-QG9R.

and advertisement revenue.[74] Family vlogs focus primarily on the children they feature.[75] For example, the Ace family uploads YouTube videos with titles like *Our 2 Year Old Goes on His First Date!!! **Guess With Who**** and *Surprising Our Daughters with a New Room Makeover Reveal!!! **Adorable**.*[76] In 2017, YouTube reported audience interest in family vlogs increased ninety percent that year—a number that has only continued to grow.[77] It can be a highly lucrative industry.[78] The Butler family, one of, if not the first, family vloggers on YouTube, earned an estimated $2,000–$38,000 monthly through advertising revenue alone.[79] They currently have approximately 4.7 million subscribers on their YouTube channel, and their most popular video generated 23 million views.[80] The Hobson family, with nearly 800,000 subscribers, did a series of family vlogs in 2018 and earned an estimated $300,000.[81] There are thousands of family vloggers actively posting today.[82]

Because family vlogging primarily features children, it appears incredibly similar to another industry known as "kidfluencing," where children are independent social media stars.[83] Ryan Kaji is one of the most well-known kidfluencers in the world, having amassed over 48 billion views on YouTube by the age of ten.[84] He was the highest-paid YouTuber on the

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[74] Luscombe, *supra* note 11; Indeed Editorial Team, *What Is a Vlog? Definition and 6 Reasons to Start Vlogging*, INDEED, https://perma.cc/G3CT-CRUK (last updated Sept. 29, 2023). *See generally* Alisha McDonal (@AlishaMarieVlogs), YOUTUBE, https://perma.cc/9N8S-2SUQ (last visited Mar. 19, 2025) (showcasing the YouTube channel of a popular and successful YouTube vlogger).

[75] Amanda G. Riggio, Comment, *The Small-er Screen: YouTube Vlogging and the Unequipped Child Entertainment Labor Laws*, 44 SEATTLE U. L. REV. 493, 495 (2021); *see* Luscombe, *supra* note 11 ("[F]amily vlogging is the ultimate family business: you literally get paid for raising your kids.").

[76] The Ace Family, *Our 2-Year-Old Goes on His First Date!!! **Guess With Who**,* YOUTUBE (Nov. 15, 2022), https://perma.cc/5ZVX-5RCW; The Ace Family, *Surprising Our Daughters with a New Room Makeover Reveal!!! **Adorable**,* YOUTUBE (Oct. 29, 2022), https://perma.cc/246R-ZPQR.

[77] Luscombe, *supra* note 11.

[78] Luscombe, *supra* note 11.

[79] Luscombe, *supra* note 11.

[80] Luscombe, *supra* note 11.

[81] Madeline Holcombe, *What Happens When Parents Abuse and Exploit Children for Internet Fame?*, CNN, https://perma.cc/V9VQ-FLFJ (last updated Mar. 22, 2019); Masterson, *supra* note 20, at 578.

[82] Luscombe, *supra* note 11.

[83] Masterson, *supra* note 20, at 579.

[84] Belinda Luscombe, *How Ryan Kaji Became the Most Popular 10-Year-Old in the World*, TIME (Nov. 12, 2021, 7:00 AM EST), https://perma.cc/8KY9-K48Y.

platform for three years in a row, and earned an estimated $30 million in revenue in 2020.[85] Kidfluencing is an approximately $8 billion industry.[86] However, kidfluencers in many ways seem more comparable to child *actors* than child *vloggers* because of their role in the content creation process.[87] Instead of sitting down and filming toy unboxings or sponsorship videos, child vloggers are filmed even when they are not expecting, nor wanting, to be on camera.[88] While kidfluencers like Ryan Kaji are at risk for similar privacy violations, family vloggers are infamous for controversially filming their children during uncomfortably private moments.[89] For example, family vlogger Nika Diwa was criticized for posting a discussion with her toddler about "boundaries [and] private parts," with the footage showing Diwa stretching one of the child's legs upwards.[90] CJ SO COOL's YouTube channel was temporarily suspended after the father spiked his children's food with laxatives as a prank and vlogged the entire experience, including the children crying on the toilet with their pants down.[91] The Tannerite family also received backlash for vlogging their daughters announcing they had started their first periods.[92] The girls were shown crying, although one daughter claimed this type of disclosure on the internet was normal because they were an "open" family.[93] These consistent privacy violations are just a few of many different legal, ethical, and societal issues grounded in family vlogging that have yet to be properly recognized by law.

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[85] *Id.*

[86] Masterson, *supra* note 20, at 579.

[87] *Compare* Luscombe, *supra* note 84, *and* Sapna Maheshwari, *Online and Earnings Thousands, at Age 4: Meet the Kidfluencers*, N.Y. TIMES (Mar. 1, 2019), https://perma.cc/K7LA-LQQD, *with* Riggio, *supra* note 75, at 495–96, *and* Stamboulos, *supra* note 17 (comparing Ryan Kaji and Samia Ali's personal social media platforms—where they film sponsorship videos, unbox toys, post on Instagram, and other performance-like activities—to family vlog channels where parents film their children doing every day, sometimes private, activities).

[88] Stamboulos, *supra* note 17.

[89] Stamboulos, *supra* note 17.

[90] Rachel Victoria (@.rachel.victoria), TIKTOK (Feb. 11, 2024), https://perma.cc/3J5W-HKFF (criticizing Diwa's now-deleted TikTok vlog).

[91] Sonja Haller, *YouTube Dad's Video Yanked After He Feeds Kids Laxative-Laced Ice Cream in Brutal Prank*, USA TODAY (Aug. 5, 2018, 6:57 PM EST), https://perma.cc/M8VH-XXLJ.

[92] @the_internet_is_forever, TIKTOK (Nov. 6, 2023), https://perma.cc/YU2M-FMCT (criticizing the Tannerite family for vlogging what the user considered to be private moments for teenaged girls).

[93] *Id.*

2. Laws Protecting Child Vloggers

There are currently no laws regulating the work of a child vlogger, and until recently, there were also no laws entitling children to any of the income generated from the vlogs they starred in.[94] Under a recent amendment to Illinois's child labor law, child vloggers will soon be entitled to a percentage of the earnings they help generate, depending on how frequently they are featured in the vlogs.[95] The money must be deposited into a trust similar to a Coogan Account, which the child can access once he or she turns eighteen.[96] Illinois remains the first, and only, state in 2024 to afford child vloggers any type of specific legal protection.[97]

II. Child Vloggers Are in Immediate Need of Adequate Legal Protection

A. *Labor Exploitation*

Kofi Annan said "a child in danger is a child who cannot wait," and there are currently serious risks posed to child vloggers that require hasty legal action.[98] Financial exploitation, for example, remains a major issue because as of 2023, only one U.S. state entitles child vloggers to any of the substantial revenue their vlogs are known to generate—despite children often making up to ninety percent of the vlog content.[99] Additionally, these children's likenesses have been used to generate income through merchandise, which they are also not entitled to.[100] The Ingham Family sells lifelike baby dolls made in their children's likenesses online for over $100.[101] Labor exploitation is an additional threat because federal child labor laws do not apply to kidfluencers or child vloggers in the same way they do not apply to child actors.[102] State laws for child entertainers also do not apply because family vlogging involves video diaries on social media, unlike films

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[94] *See* Restrepo, *supra* note 20.

[95] Child Labor Law of 2024, 820 ILL. COMP. STAT. ANN. 206/95, 100 (West 2024).

[96] *Id.*

[97] Restrepo, *supra* note 20.

[98] ANNAN, *supra* note 1, at 4.

[99] Masterson, *supra* note 20, at 593; Restrepo, *supra* note 20.

[100] *E.g.*, *The Ingham Family*, MARY SHORTLE, https://perma.cc/8JR4-Y3ZC (last visited Mar. 19, 2025); *see* Restrepo, *supra* note 20.

[101] *The Ingham Family*, *supra* note 101.

[102] Amber Edney, Note, *"I Don't Work for Free": The Unpaid Labor of Child Social Media Stars*, 32 U. FLA. J.L. & PUB. POL'Y 547, 565 (2022).

on Netflix or Broadway musicals.[103] Child vloggers are more akin to documentary participants or minors in reality television, which are forms of media exempted from protective child entertainment laws.[104]

Regardless, participation in family vlogs undeniably involves labor and work.[105] Children often engage in scripted skits (like child actors) or advertisements (like other kidfluencers).[106] They frequently interact with the camera and often follow instructions on what to do or what to say for the perfect footage.[107] Jordan Cheyenne, who vlogs her life as a single mom, received backlash for instructing her son to pose for the camera and act like he was crying after their dog died—even though the boy was already in tears and argued that he *was* crying.[108] In an extreme case, Machelle Hobson was arrested for not only taking her seven adopted children out of school regularly to film family vlogs, but also beating, molesting, starving, and pepper-spraying the children if they "forgot their lines or were difficult during production."[109] These vlogs earned Hobson nearly $300,000.[110]

B. *Nonconsensual Privacy Violations*

Extreme privacy violations might be the most critical issue presented by family vlogging.[111] Child vloggers are exposed to global online fame at extremely young ages in the privacy of their own homes, often without informed or legitimate consent.[112] They are subjected to heightened risks of stalking, humiliation, and online harassment.[113] Child psychologists say children are resilient and can adapt to circumstances like fame, but family

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[103] Melanie N. Fineman, Note, *Honey, I Monetized the Kids: Commercial Sharenting and Protecting the Rights of Consumers and the Internet's Child Stars*, 111 GEO. L.J. 847, 879–80 (2022).

[104] *See* Tacher, *supra* note 71, at 499 (explaining children in documentaries are exempt from child entertainment regulations because they are not meant to follow a script or be directed—this is logic that easily applies to child vloggers too).

[105] *See* Riggio, *supra* note 75, at 511.

[106] Riggio, *supra* note 75, at 511.

[107] Riggio, *supra* note 75, at 511.

[108] Gerrard Kaonga, *Video of YouTuber Jordan Cheyenne Forcing Her Son to Cry Resurfaces, Sparks Fresh Backlash*, NEWSWEEK (Jan. 18, 2022), https://perma.cc/XNU3-LL8T.

[109] Masterson, *supra* note 20, at 578.

[110] Masterson, *supra* note 20, at 578.

[111] *See* Riggio, *supra* note 75, at 506.

[112] Riggio, *supra* note 75, at 515 (explaining babies cannot say no to having their birth videos posted online).

[113] Masterson, *supra* note 20, at 596.

vlogging poses unique dangers because "[a]ll children want to please their parents."[114] The parent-child relationship creates an intense power imbalance that allows parents to vlog their children before they can advocate for themselves, and even when they are reasonably old enough to do so, there is a high risk of coercion and manipulation.[115] Non-consensual privacy invasions have been identified in countless vlogs, such as when the Ace family filmed their daughter crying at a doctor's appointment while partially undressed; when Yawi Vlogs filmed their tween daughter learning to shave; and when the father of the Shaytards channel chased his daughter with a camera trying to talk about her crush despite her asking for him to "cut that part out."[116]

These repeated, non-consensual invasions of privacy may inflict psychological harm on the child involved.[117] Psychologists have determined even young children need and possess a certain degree of privacy and autonomy that parents should not excessively control.[118] Former family vlogger Shyla Walker quit vlogging because she realized "the filming was 'affecting [her daughter]' and making her uncomfortable."[119] Walker also spoke about the significant safety issues family vlogging poses.[120] Digital kidnapping occurs when a child's photograph is manipulated and used without their consent, an issue that advances in conjunction with technology.[121] Digital kidnapping can be used for child pornography and other pedophilic actions.[122] A UK newspaper uncovered dozens of social media accounts posting pictures of underaged girls dancing and modeling, with sexualized comments attached, and most of the pictures were taken from the parents' or guardians' social media platforms.[123] The New York Times published its own study as well, examining 5,000 kidfluencer

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[114] Luscombe, *supra* note 11 (quoting Harold Koplewicz).

[115] *See* Luscombe, *supra* note 11; Stamboulos, *supra* note 17.

[116] Stamboulos, *supra* note 17 (using these vlogs as examples of the concerning privacy violations that occur in family vlogs).

[117] Masterson, *supra* note 20, at 595.

[118] Stamboulos, *supra* note 17.

[119] Charissa Cheong, *A Star is Born*, BUS. INSIDER (July 12, 2023, 8:00 AM EDT), https://perma.cc/26QX-TLUM.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] Connie Dimsdale, *Instagram and Twitter Failing to Crack Down on Paedophiles Stealing Photos of Child Influencers*, I NEWS (Nov. 6, 2022, 3:22 PM), https://perma.cc/8BN6-388N.

Instagram accounts and finding connections to 32 million adult male followers among them.[124] Male followers would flatter or bully young girls and their parents into posting suggestive images, which typically generated the most audience engagement.[125] The study also revealed men would fantasize about sexually assaulting kidfluencers when conversing on the app Telegram.[126] "[These men] extoll[ed] the platform for making the images so readily available. 'It's like a candy store . . . ' one of them wrote. 'God bless instamoms . . . ' wrote another."[127]

There is mounting evidence that child vloggers are threatened by numerous, alarming harms ranging from exploitation to digital kidnapping.[128] All of these dangers begin the moment family vloggers post a video online, and remain indefinitely since users can save someone's kidnapping.[129] There is a desperate need for legal intervention and protection, and the U.S. justice system has a duty to remedy the situation as quickly as possible—for there are children in danger, and they cannot wait.[130]

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[124] Jennifer Valentino-DeVries & Michael H. Keller, *Five Takeaways from the Times's Investigation Into Child Influencers*, N.Y. TIMES (Feb. 22, 2024), https://perma.cc/5K2Q-ZJ5Y.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *E.g.*, Masterson, *supra* note 20, at 578–79; Riggio, *supra* note 75, at 512–514; Cheong, *supra* note 120.

[129] *E.g.*, Masterson, *supra* note 20, at 578–79; Riggio, *supra* note 75, at 512–514; Cheong, *supra* note 120.

[130] *See* ANNAN, *supra* note 1, at 4; Cheong, *supra* note 120.

ANALYSIS

III. Legislation Based on Existing Laws and Rights Cannot Effectively Regulate Family Vloggers

A. *Children Do Not Currently Possess Rights That Adequately Protect Them From Family Vlogging*

1. The Common Law Right for Minors to Disaffirm Contracts Does Not Apply to Family Vloggers

Children's rights are incredibly limited under U.S. law.[131] However, some states allow children to enter into contracts with the caveat that they can disaffirm and void that contract at any time with few repercussions.[132] This is seen as a minor's common law right to disaffirm contracts.[133] For example, California has "infancy doctrines" that allow children of any age to enter into, and break, contracts with no legal consequences.[134] However, such a right does not apply to family vloggers because the profession differs so greatly from similar ones in media entertainment, given that vlogs consist of allegedly organic video diaries. The crux of the business is in publishing a family's home videos, rather than crafting an official production with a budget, director, and paid actors.[135] As a result, child vloggers do not enter any sort of legal contract for their work.[136] Without any official employment agreement, parents can dictate exhaustively: when child vloggers are on camera; what they do for content; how they should act and what they should say for the desired footage; and when their likeness can be used for merchandising.[137] Although vlogs focus primarily on the children, it is the parents who enter into contracts with third parties for revenue (i.e., sponsorship brand deals).[138] A child vlogger cannot disaffirm a contract they never entered into.

Further, even if employment contracts were used, a common law right

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[131] Corneal, *supra* note 50, at 621–22.

[132] *Recent Cases: Limitation on Minors' Common Law Power to Disaffirm Contract*, 16 U. CHI. L. REV. 183, 185 (1948) [hereinafter *Recent Cases*].

[133] *Id.* at 184–85.

[134] González, *supra* note 60.

[135] *See generally* Indeed Editorial Team, *supra* note 74.

[136] *See generally* Fineman, *supra* note 104, at 878–79.

[137] *See, e.g.*, Fineman, *supra* note 104, at 878–79; Kaonga, *supra* note 109.

[138] Fineman, *supra* note 104, at 881.

to disaffirm still would not sufficiently protect a child vlogger because of how limited the right has become in many states.[139] For example, California changed its infancy doctrine in 1927 and removed a minor's right to disaffirm contracts if the local magistrate approved.[140] This was in response to pressure from Hollywood's film industry, which wanted to hire child actors without worrying about the children abruptly quitting.[141] The contracts were not required to meet a certain standard to be approved, so the right of California's children to disaffirm their employment contracts was essentially erased.[142] Several other states have limited a minor's right to disaffirm by allowing children to partially or entirely enter into fully binding contracts.[143] Therefore, the dying right for a child to disaffirm cannot be expected to protect child vloggers.

2. Parental Rights to Control Outweigh Their Children's Right to Privacy

A right to privacy is implied in the U.S. Constitution and afforded to children.[144] For example, children have a limited expectation of privacy in the home they live in, even if they do not pay rent.[145] In 2023, sixteen states proposed twenty-seven different bills calling for increased privacy regulations that would further protect minors and their information online.[146] However, a child's right to privacy is greatly limited, especially when balanced against the conflicting rights of their parents.[147] For example, when a sixteen-year-old student was suspended from school for "engaging in inappropriate public displays of affection," the school was allowed to give the student's mother the details of the suspension; even though it would

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[139] *See Recent Cases*, *supra* note 132, at 186.

[140] González, *supra* note 60.

[141] González, *supra* note 60.

[142] González, *supra* note 60.

[143] *See Recent Cases*, *supra* note 132, at 185.

[144] *Privacy: An Interpretation of the Library Bill of Rights*, AM. LIBR. ASS'N, https://perma.cc/27W7-KWGB (last visited Mar. 19, 2025); *Parental Authority and Children's Right to Privacy: Where Is the Line Drawn?*, MEVORAH & GIGLIO L. OFF. (May 17, 2023), https://perma.cc/K88G-WTYJ [hereinafter *Parental Authority and Children's Privacy Rights*].

[145] *See Parental Authority and Children's Privacy Rights*, *supra* note 144.

[146] Alfred Ng, *Where Parental Snooping Is Becoming the Law*, POLITICO (Apr. 11, 2023, 1:36 PM EDT), https://perma.cc/6TBH-99G5.

[147] *Parental Authority and Children's Privacy Rights*, *supra* note 144; *see* Corneal, *supra* note 50, at 621–22.

reveal the daughter's sexual orientation against her will.[148] The law frequently prioritizes parental rights over a child's right to privacy.[149] Parents often have the authority to consent to a police search of their child's bedroom even though the child has a limited expectation of privacy there.[150] Furthermore, several of the privacy regulations proposed in 2023 have clauses that would allow parents to access all of the content and interactions on their children's online accounts until they are eighteen years old.[151] These proposed laws would effectively eliminate a child's expectation of privacy in their social media accounts.[152]

This is not an entirely negative concept.[153] The American Psychological Association has advised parents to monitor and reasonably limit their children's social media use to foster healthy psychological development.[154] Allowing parents to partially encroach on a child's expectation of privacy online could help protect them from some of the dangers discussed earlier, like digital kidnapping and cyberbullying.[155] The Children's Online Privacy Protection Act already "give[s] parents control over their children's online experiences" as well.[156] After all, is it not a parent's most sacred duty to protect their children?

Many might say it is. However, laws like those proposed in 2023 become less protective and more problematic when it is the parents themselves that pose a threat to, and create risks for, their children.[157] Vlogging parents would be expected to regulate and restrict their children's online activity while simultaneously profiting off of that activity, thus creating a biased form of self-regulation that does not adequately protect the children involved.[158] Any law that expressly allows parents to further control their

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[148] Nguon v. Wolf, 517 F. Supp. 2d 1177, 1179–82 (C.D. Cal. 2007).

[149] *Parental Authority and Children's Privacy Rights*, *supra* note 144.

[150] *See Parental Authority and Children's Privacy Rights*, *supra* note 144.

[151] Ng, *supra* note 146.

[152] Ng, *supra* note 146.

[153] *See Keeping Teens Safe on Social Media: What Parents Should Know to Protect Their Kids*, AM. PSYCH. ASS'N (May 9, 2023), https://perma.cc/97YJ-Q88Q.

[154] *Id.*

[155] *Compare id.*, *with* Cheong, *supra* note 119 (listing ways parents can monitor their children's social media use to protect them and combat the dangers children face online such as digital kidnapping).

[156] Olivia Levinson, Note, *Embedded Deception: How the FTC's Recent Interpretation of the Children's Online Privacy Protection Act Missed the Mark*, 105 MINN. L. REV. 2007, 2053 (2021).

[157] Ng, *supra* note 146.

[158] *See* Stamboulos, *supra* note 17 (explaining when "parents control privacy under the legal

children's social media accounts, including their private messages, would simply grant vlogging parents more dominance in an already alarming power dynamic.[159] A fifteen-year-old child vlogger once claimed her parents threatened to force a nondisclosure agreement on her if she spoke out against the incredibly successful vlogs.[160] Instances of labor exploitation further speak to the impact of these power dynamics, as illustrated by an anonymous child vlogger who told Teen Vogue it was unfair she was forced to support her entire family by sacrificing her childhood to the camera.[161] The New York Times found parents were the driving force behind many of the said kidfluencer accounts subjected to inappropriate audience engagement, with some parents even offering to sell photos and exclusive chat sessions to willing buyers.[162] Protecting child vloggers will require prioritizing the child's right to privacy over their parent's right to control—an approach that, unfortunately, mostly contradicts the state of child protection laws today.

B. *Technical and Constitutional Issues Prevent Existing Regulations from Sufficiently Protecting Child Vloggers*

1. Regulations Based Off Coogan Laws Only Address Financial Exploitation and Are Ill-Equipped to Regulate Family Vlogging

Illinois is the first state to officially enact a law similar to Coogan Laws on family vloggers.[163] As of January 2025, Illinois updated its child labor laws to define when a child is entitled to compensation for vlogging, mandate that the child receive reports and records of their work, and require parents to deposit a portion of the earnings into a trust fund for the child to access once they are a legal adult.[164] Qualified children meeting certain criteria will be entitled to a percentage of revenue from any family vlogs that include a

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scope of family vlogging," harm to child vloggers will be overlooked because of the presumption that parents are acting in their best interest).

[159] *See* Ng, *supra* note 146.

[160] Lorenz, *supra* note 16.

[161] Foretesa Latifi, *Influencer Parents and the Kids Who Had Their Childhood Made Into Content*, TEEN VOGUE (Mar. 10, 2023), https://perma.cc/G6J7-S2AB; *see also* Stamboulos, *supra* note 17 (finding "danger is exemplified in family vlogging, as parents have the ability to violate children's privacy for a higher income").

[162] Valentino-DeVries & Keller, *supra* note 124.

[163] Restrepo, *supra* note 20.

[164] Child Labor Law of 2024, 820 ILL. COMP. STAT. ANN. 206/95, 100 (West 2024).

certain proportion of their likeness, image, or name.[165] Child vloggers can sue parents who violate this law and may be awarded both compensatory and punitive damages.[166] This is an incredibly fortunate development in family vlog regulation. However, just like Coogan Laws, this type of regulation only addresses risks of financial exploitation.[167] It does not address issues of labor exploitation, online safety, or invasions of privacy.[168]

Additionally, regulations based off Coogan laws will still not ensure a child vloggers is fairly compensated. For example, Illinois' legislation entitles children to a percentage of earnings that are, at minimum, equal to half the percentage of vlog content that includes the child.[169] Content including the child is defined as content using the child's likeness, featuring the child directly in the vlog, or making the child the focal point of the vlog.[170] Unfortunately, this definition does not compensate children for the work they put into a vlog behind the scenes that is not featured in the final, published video.[171] Tiana Haneline, who vlogs her life with her young daughter on TikTok, posted a now-deleted video featuring behind-the-scenes footage of when she and her daughter built furniture together.[172] This footage was most unintentionally included in the vlog, since there were clips of Haneline aggressively shouting at her daughter, "You haven't even done your side yet. Come on man, do your side!" while the child asked her mother not to yell.[173] Under Illinois law, and others like it, the work her daughter put into building the cabinets in front of a recording camera would go uncompensated if the footage were not included in the final vlog.[174] Cam Barrett, a former child vlogger, also said she would have to retake pictures over and over again if her expressions were not what her mother wanted.[175]

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[165] *Id.*

[166] *Id.*

[167] *See* 820 ILL. COMP. STAT. ANN. 206/95, 100.

[168] *See id.*

[169] 820 ILL. COMP. STAT. ANN. 206/95, 100.

[170] *Id.*

[171] *See id.*

[172] @n1ca28, TIKTOK (Dec. 5, 2023), https://perma.cc/XJL4-VRM7 (commenting on Haneline's controversial and now-deleted video).

[173] *Id.*

[174] *See* 820 ILL. COMP. STAT. ANN. 206/95, 100 (calculating a child vlogger's entitled earnings based on how often they appear in content without consideration for behind-the-scenes work).

[175] Lorenz, *supra* note 16.

These reshoots would similarly go uncompensated.[176]

Barrett's story illustrates just how multifaceted family vlogging is.[177] Family vloggers often have multiple social media platforms that are active simultaneously, which may feature non-videographic content.[178] These accounts are inextricably linked to the vlogging, but it is unclear whether the Illinois law would compensate children for work like, for example, posing for a sponsored Instagram photo.[179] Compensation for vlog-adjacent media like Instagram posts admittedly would be complicated because the platforms are used for a mixture of work and personal use.[180] Children could be compensated for posts that include brand deals or other clearly transactional agreements, but this would neglect posts that are both a personal upload and promotional material for the vlogs.[181] Furthermore, Illinois' legislation does not explain how it would measure the percentage of a child's involvement in non-video media like professional pictures.[182] These complications make it difficult for Illinois and others' laws inspired by Coogan Laws to proportionately compensate child vloggers for their work.[183] Therefore, while regulations based on Coogan Laws are an important step forward to protect children in family vlogs, they alone will not be enough to adequately do so.[184]

2. Current Regulations in Similar Industries Do Not Effectively Regulate Family Vloggers Because of the U.S. Constitution

Thirty-three states have laws regulating child actors, and not just by mandating Coogan Accounts.[185] Hawaii allows children between the ages of six and sixteen to work in theater productions but only after 7:00 PM or 9:00 PM, depending on the month to account for school schedules, and only until

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[176] *See* 820 ILL. COMP. STAT. ANN. 206/95, 100.

[177] *See* Masterson, *supra* note 20, at 602.

[178] Masterson, *supra* note 20, at 602; *e.g.*, @theacefamily, INSTAGRAM, https://perma.cc/487L-FJH9 (last visited Mar. 19, 2025) (showcasing the official Instagram account of a popular vlogging family).

[179] *See* 820 ILL. COMP. STAT. ANN. 206/95, 100 (West 2024).

[180] Masterson, *supra* note 20, at 600.

[181] *See* Masterson, *supra* note 20, at 600 ("[S]ocial media accounts can be used both for profit and as a personal hobby.").

[182] 820 ILL. COMP. STAT. ANN. 206/95, 100.

[183] *See* Masterson, *supra* note 20, at 600–02.

[184] *See* Masterson, *supra* note 20, at 603.

[185] *2023 Child Entertainment Laws*, *supra* note 68.

10:30 PM or 11:30 PM, depending on the child's age.[186] Overall, children cannot exceed ten hours of work and school in one day.[187] The law also includes learning, practicing, or rehearsing any art in connection with the theater as work during the approved work periods.[188] Another example comes from Alaska, which regulates working hours and working conditions for child performers.[189] California and New York have similar regulations.[190] In both states, a six-year-old child actor can be on set for eight hours in one day, but only work four to eight hours per day depending on whether school is in session.[191]

Unfortunately, such laws also do not adequately regulate kidfluencers or family vloggers.[192] In 2018 for instance, California, home to many prominent family vloggers, attempted but failed to include kidfluencers in its Child Actor's Bill.[193] Although it was never able to attempt protecting California's kidfluencers, it most likely would have been difficult for the government to control a child's time on "set" when that set was their own home. Additionally, a child vlogger's work is substantially different from that of a child actor's.[194] Instead of acting out scenes for a film, child vloggers are meant to go about living their everyday lives while being filmed.[195] Although there is most certainly a degree of performance, rehearsal, and production in family vlogging, the line between when child vloggers are working or not is incredibly fine in comparison to child actors. Some have argued that statutorily-mandated working hours for kidfluencers are practically impossible.[196]

Further, even if the law managed to define working hours for kidfluencers, enforcement of these limited hours would be extremely

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186 HAW. CODE R. § 12-25-23(2)(A) (LexisNexis 1981).

187 *Id.* §12-25-23(3).

188 *Id.* §12-25-23(5)(D)(b).

189 *2023 Child Entertainment Laws*, *supra* note 68.

190 Joey Guerra, *Child Actor Labor Laws, Explained*, BACKSTAGE (Jan. 9, 2024), https://perma.cc/4ZCJ-6V7H.

191 *Id.*

192 *See* Edney, *supra* note 102, at 564.

193 Edney, *supra* note 102, at 564.

194 Julianne Culey, *Are You Kidfluencing Me?*, REYNOLDS CTR. BUS. JOURNALISM (Oct. 10, 2023), https://perma.cc/J2T6-RUL3.

195 Endey, *supra* note 102, at 564.

196 *See* Edney, *supra* note 102, at 564.

difficult in a family vlogger setting.[197] States could try ensuring compliance by requiring work permits and routine reports from the parents—strategies already used for child entertainers.[198] However, a self-regulation approach inherently risks subpar enforcement since the law's success would depend on parents being truthful in their permit applications and reports.[199]

State legislatures or administrative agencies could try enforcement methods modeled after the union protections afforded to child actors in some states—union representatives will occasionally visit production sets to ensure compliance with applicable state laws.[200] These representatives not only monitor the set but also speak directly with the child actors to confirm they are not partaking in hazardous work, are not working overtime, and are receiving an adequate education.[201] However, this approach would require enforcement officials to visit a child vlogger's personal home and intrude upon the sanctity of the family.[202] These officials would not be monitoring professional actors on a set. They would be monitoring a family's daily lives and critiquing parental decision making, the crux of the family vlogging profession. Even the private decision to *start* a family through adoption has been characterized as a business decision for some family vloggers, further enmeshing the constitutional rights to family autonomy and privacy with businesses in need of regulation.[203] The current state of the law simply does not allow these fundamental rights to intrude on these intimate aspects of family life, regardless of whether they are being vlogged or not.[204] Parents have the freedom to "choose what religious and moral ideas their child is exposed to, who their child interacts with, and what extracurricular activities they are involved in," decisions that are not regulated by courts or administrative agencies except in custody disputes or when there is "serious harm to the child."[205] The child entertainment

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[197] Masterson, *supra* note 20, at 605.

[198] *See 2023 Child Entertainment Laws*, *supra* note 68.

[199] Masterson, *supra* note 20, at 605–06.

[200] Tacher, *supra* note 71, at 508.

[201] Tacher, *supra* note 71, at 508.

[202] Masterson, *supra* note 20, at 605.

[203] *See* Cheong, *supra* note 119 (discussing the criticism a couple received after canceling their adoption of a Taiwanese child because they would not be able to post information about the child online until the adoption process was completed); Lorenz, *supra* note 16 (discussing the backlash a family vlogger received for giving away her adopted son after vlogging the entire adoption process and "creating a slew of content about his medical problems").

[204] *See* Masterson, *supra* note 20, at 605.

[205] Masterson, *supra* note 20, at 597.

industry in general is not legally considered oppressive or particularly dangerous, and there is not enough significant research on the dangers of family vlogging to warrant an exception to longstanding, fundamental rights.[206] As a result, states have not recognized a compelling enough government interest to allow for regulatory intrusions into family vlogging homes.[207]

Likewise, reality television ("reality TV") regulations do not protect child vloggers because they already inadequately protect children in general.[208] Children starring in reality TV are exempt not only from federal labor laws but also from child acting regulations.[209] They are not considered performers, actors, or employees, and are not entitled to compensation or other employee benefits because they are merely "participants in documentary style programs."[210] This framing of reality TV applies to family vlogging as well, given that children are supposedly 'participating' instead of acting in videos that document their real lives.[211] In both reality TV and family vlogs, drama is "loosely scripted. Things are planted. Things are salted into the environment so things seem more shocking."[212] In actual reality, child stars in reality TV are performers who require better legal protection, just as child vloggers do.

Unfortunately, even if reality TV regulations were reformed, the state of the law today would still prevent it from effectively protecting child vloggers.[213] The Constitution would still inhibit the regulation of a child vlogger's working hours because enforcement would invade the family home.[214] Another issue is that a child's right to privacy could be legally overridden by their parent's authority to control their child's online presence and participation in any documentaries or vlogs.[215] Therefore, child vloggers will continue to remain inadequately protected even if they are included in

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[206] Masterson, *supra* note 20, at 587, 595.

[207] *See* Masterson, *supra* note 20, at 605.

[208] *See* Tacher, *supra* note 71, at 499.

[209] Tacher, *supra* note 71, at 493.

[210] Tacher, *supra* note 71, at 499.

[211] *Compare* Tacher, *supra* note 71, at 508, *with* Lorenz, *supra* note 16 (comparing reality TV to the testimony of a child vlogger who explains how she had her entire life documented on social media).

[212] Lorenz, *supra* note 16; Tacher, *supra* note 71, at 500.

[213] *See* Tacher, *supra* note 71, at 501–02.

[214] Masterson, *supra* note 20, at 605.

[215] *See Parental Authority and Children's Privacy Rights*, supra note 148.

pre-existing child entertainment and reality TV regulations.[216] There are many constitutional barriers, and too few children's rights, for these regulations to be effective in family vlogging's unique circumstances—for now.[217]

IV. A Reasonable Expectation Test Could Find the Right to Family Autonomy Diminished for Certain Family Vloggers, Thus Allowing Intrusive Regulations

Constitutionally protected parental rights and right to family autonomy remain some of the greatest obstacles to effectively regulating family vlogging.[218] While a state's interest in its children's welfare can justify certain intrusions, these exceptions are reserved mostly for when there are risks of substantial harm or when parental rights conflict during custody disputes.[219] Family vlogging is not an exception because the child entertainment industry is not considered an oppressive industry federally, and information on its harmful effects is predominantly implicit or anecdotal instead of scientifically supported.[220] However, there are other available means through which the government can justify an intrusion on, or limitation of, fundamental rights.[221] For example, some constitutional rights are limited in scope, such as those contained in the Fourth Amendment.[222] The Fourth Amendment only provides a right to protection against unreasonable searches when an individual has a reasonable expectation of privacy.[223] An individual does not have a reasonable expectation of privacy in public, or in

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[216] *Cf.* Masterson, *supra* note 20, at 591 n.92, 606 (explaining both kidfluencers and child reality television stars are similarly left unprotected by federal labor laws, and that family vloggers cannot be monitored in their homes like child actors are on set because of the Constitution).

[217] *Cf.* Masterson, *supra* note 20, at 605.

[218] *See* Masterson, *supra* note 20, at 605.

[219] *E.g.*, Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944); *see* Masterson, *supra* note 20, at 598.

[220] *See* Masterson, *supra* note 20, at 587, 595.

[221] *See* Hester v. United States, 265 U.S. 57, 59 (1924) (finding that Fourth Amendment protections from unreasonable searches is limited to where individuals have a reasonable expectation of privacy, and there is no such expectation in an open field); Grossi, *supra* note 23, at 1024 (discussing how people can waive certain constitutional rights).

[222] *See* United States v. Bucci, 582 F.3d 108, 116 (1st Cir. 2009) (finding a defendant's Fourth Amendment rights were not violated because he did not have a reasonable expectation of privacy beyond where he is exposed to the public).

[223] *Id.*

places and items exposed to the public.[224] Illustratively, a person has a diminished expectation of privacy when driving a car because it is exposed to public scrutiny, and both the car and its contents are clearly visible.[225]

This reasonable expectation of privacy test is currently limited to the context of unconstitutional searches under the Fourth Amendment.[226] However, the logic behind it may provide a new means of addressing the conflict between family autonomy and the need for regulating family vloggers. Where there is greater exposure to the public, there is a lesser expectation of privacy, and thus more room to allow for government intrusion on constitutional rights.[227] The question of "is there a reasonable expectation of privacy here?" opens the door for fundamental right exceptions. Could it not also open the door to a family vlogger's home—the same home that functions as a business? Do family vloggers have a reasonable enough expectation of privacy to remain absolutely protected from state regulation, even when the best interests of a child are at stake?

Family vloggers expose the private and intimate details of their daily lives by posting them online.[228] Although this is not a Fourth Amendment issue, a similar test could be used to determine whether certain family vloggers have a lesser expectation of family autonomy and privacy once they turn their family unit and home into a small business, due to their pronounced online presence. This approach has no precedent in family vlog cases, and legislation had not even officially addressed family vloggers until 2023.[229] However, a court could *create* novel but necessary precedent by acknowledging this "reasonable expectation" argument in a case between constitutional rights and intrusive family vlogging legislation.[230] The court could then develop a test that determines whether a vlogging family still retains the full protection of the right to family autonomy based on whether they have a reasonable expectation of it. A fact-based analysis under such a

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[224] *Id.* at 117.

[225] Cardwell v. Lewis, 417 U.S. 583, 590 (1974).

[226] *Expectation of Privacy*, LEGAL INFO. INST., https://perma.cc/HZT2-MEMQ (last updated Dec. 2022).

[227] *See* SIMMONS & HUTCHINS, *supra* note 23, at 63–68.

[228] *See* Stamboulos, *supra* note 17.

[229] *See* Restrepo, *supra* note 20.

[230] *Cf., e.g.*, Carpenter v. United States, 484 U.S. 19 (1987) (establishing that the Fourth Amendment protects individuals from a newly emerging form of surveillance: constant cellphone tracking); Santosky v. Kramer, 455 U.S. 745 (1982) (establishing that states could not take custody of children by meeting only a low, preponderance of the evidence standard because parents were constitutionally entitled to a higher standard).

test could result in some family vloggers having a lesser expectation of privacy and autonomy, not only because they expose private details of their lives to the public, but also because they transformed their family structure into a business riddled with threats of exploitation.[231] The test could require that courts consider different factors like those used in Fourth Amendment analyses.[232] Such factors could include asking what steps the family took to protect their privacy in spite of their online presence, how often the children are featured in their vlogs, whether the children are the focal point of the videos or if they are collateral to generic parenting content, and whether vlogs are filmed primarily in the home.

Once state legislatures find exemptions to the constitutional barriers to regulation, child vloggers can be monitored within their homes to a greater extent.[233] For example, legislatures could delegate appropriate officials from either governmental or private agencies to perform routine checks on a child vlogger's home life, just as union workers do for child actors on set in some states.[234] Legislation could allow a fact-based spectrum of enforcement as well. Not all family vloggers risk the same degree of harm to their children. Some may take more substantial steps to protect their children's privacy than others, as certain vlogers may take greater steps to protect their children's privacy than others. Additionally, a fact-based analysis could differentiate between children who are the focal point of a vlog, to the point they are child vloggers, from children who may just occasionally exist in the background of their parents' content. Parents could potentially be granted less monitoring, at the discretion of an agency, if they show evidence of minimized risks to the children in their household.

In this fashion, a reasonable expectation test would allow for constitutional government intrusions in specific situations with family vloggers without abolishing certain fundamental rights in the entirety. While a compelling interest may be difficult to prove due to the lack of scientific research on the ramifications of family vlogging, a reasonable

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231 *Cf.* SIMMONS & HUTCHINS, *supra* note 23, at 133 (explaining individuals knowingly expose information to the public, and lose some protection from the Fourth Amendment, when they share information with a third party).

232 *See generally* United States v. Dunn, 480 U.S. 294, 301 (1987) (using different factors to determine whether property is an open field rather than curtilage, which would then be afforded lesser Fourth Amendment protections).

233 *See* Masterson, *supra* note 20, at 605 (finding constitutional barriers are preventing effective regulation of family vlogging).

234 *See generally* Tacher, *supra* note 71, at 508–09.

expectation test has a strong foundation in existing ideas of privacy, the implicit "waivability" of certain rights, and evaluating the degree family vloggers have exposed their lives to the public.[235] This would not equate to an outright waiver of the right to family autonomy, because waivers are intentional relinquishments or abandonments and must be made knowingly, intelligently, and voluntarily.[236] Rather, such a test would limit the right's protective scope in the same way that the Fourth Amendment's protections are limited only to those who have a reasonable expectation of privacy.[237] Although this type of test in the family vlogging context is entirely conceptual, courts have changed and created new precedent, tests, and standards numerous times before, when it was deemed necessary.[238] *Stare decisis*, the doctrine that requires courts to follow past decisions, is not absolute.[239] It "is not an inexorable command; rather, it is a principle of policy" and courts can overrule or amend past decisions and interpretations of the law "if changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective."[240] Family vlogging is a unique type of business necessitating a unique constitutional framework to effectively regulate it. A reasonable expectation of autonomy or privacy argument may be rudimentary and theoretical, but the threats to child vloggers that call out for such an argument certainly are not, and must be

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[235] *See generally* Grossi, *supra* note 23, at 1024 (reporting almost all constitutional rights waivable); Stamboulos, *supra* note 17 (illustrating how family vlogging violates privacy rights); *Right to Privacy*, LEGAL INFO. INST., https://perma.cc/53AF-9QBA (last visited Mar. 19, 2025) (summarizing the right to privacy as something fundamental but neither all-encompassing nor without limitations).

[236] Grossi, *supra* note 23, at 1024.

[237] *See generally* SIMMONS & HUTCHINS, *supra* note 23, at 61–64 (highlighting different tests that determine when the Fourth Amendment has been violated, since not all searches and seizures are unconstitutional).

[238] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (overruling its earlier finding that a woman has a constitutional right to access abortion); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (replacing the Court's earlier trimester test with a new viability and undue burden test it created for constitutional challenges to abortion regulations); Illinois v. Gates, 462 U.S. 213 (1983) (replacing the Court's earlier *Aguilar-Spinelli* test with a totality-of-the-circumstances test for analyzing Fourth Amendment violations); Katz v. United States, 389 U.S. 347 (1967) (replacing the trespass test for analyzing Fourth Amendment violations with the reasonable expectation of privacy test, acknowledging that Fourth Amendment rights are attached to people and not places for the first time).

[239] *See generally Miscellaneous Matters: Judicial Review: Stare Decisis*, U.S. CT. APP. ARMED FORCES, https://perma.cc/7WR9-DUXB (last visited Mar. 19, 2025).

[240] *Id.*

addressed.

CONCLUSION

The world is in the heart of a new era that pushes the innovative boundaries of technology and business. More recently, the rising popularity of family vlogging has even reconstructed the foundational concepts of family and privacy. It is a new type of entertainment business that employs, and often exploits, children in their own homes—sometimes from the moment they are born. Child vloggers and kidfluencers, too young to work normally or even possess legal rights in certain areas, make up the core of an eight billion dollar industry infested with numerous risks and harms posed to the children involved.[241] The New York Times, for instance, found social media was referred to as a "candy store" by men with pedophilic fantasies because of kidfluencers.[242] Yet as of 2023, only one state offers legal protection and relief to child vloggers.[243] The Constitution and existing laws have not allowed for expanded protections because of fundamental rights to family autonomy and privacy.[244] This approach, or lack thereof, from courts and legislation is no longer sustainable. The dangers of family vlogging have become increasingly evident, and "a child in danger is a child who cannot wait."[245]

Courts have introduced new tests, standards, and precedents repeatedly in the past when needed. They must do so here. A reasonable expectation of family autonomy test, inspired by tests used in Fourth Amendment analyses, could find some family vloggers are not afforded the full protection of certain privacy rights when they have made a business of exposing their private lives to the public. This would allow legislation to monitor a child vlogger's working hours and well-being more effectively, similar to how child actors are sometimes monitored on set.[246] This conceptual approach is just one demonstrative illustration of how family vlog regulations can be both constitutional and effective. Family vlogging is

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[241] *See, e.g.*, Edney, *supra* note 102; Masterson, *supra* note 20; Riggio, *supra* note 75, at 594–95; Stamboulos, *supra* note 17; Valentino-DeVries & Keller, *supra* note 124.

[242] Valentino-DeVries & Keller, *supra* note 124.

[243] Restrepo, *supra* note 20.

[244] *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494 (1977).

[245] ANNAN, *supra* note 1, at 4.

[246] *See* Tacher, *supra* note 71, at 508–09 (finding unions in some states will frequently monitor child actors on set to ensure they are in a safe working environment free of exploitation).

a relatively new industry that is operating under unique circumstances. Thus, it will require an equally unique approach from both legislation and the courts if it is to be adequately regulated—and it must be. For the sake of the world's children, it's most precious resource,[247] it must be regulated.

[247] *John F. Kennedy Quotations*, *supra* note 1.

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Victims or Sex Offenders?: How Massachusetts Leaves Women Behind in the Anti-Trafficking Movement

Morgan Wise[*]

INTRODUCTION

Human trafficking is a global epidemic with an estimated 27.6 million victims worldwide.[1] The number of victims decreased in 2020 for the first time by eleven percent, but the decrease was attributed to institutional restrictions during the COVID-19 pandemic, not because trafficking occurred any less.[2] Because of its global importance, perceptions of human trafficking fill up social media feeds on a regular basis with fact and fiction, often creating harmful narratives of what human trafficking looks like.[3] Trafficking usually focuses on the perpetrator as male, but a less understood group consists of the women convicted under sex trafficking laws.[4] These women fall on a spectrum from being skillful

[*] J.D. Candidate, New England Law | Boston (2025). I want to thank Elizabeth, Nicolas, and my family for supporting me through the writing process, my editor and the *New England Law Review* staff for their diligent work, and special thanks to the women whose stories inspired me to write about this topic.

[1] *About Human Trafficking*, U.S. DEP'T. STATE, https://perma.cc/S6DW-VN5D (last visited Jan. 13, 2025).

[2] UNODC 'Global Report on Trafficking in Persons 2022' (Jan. 2023) United Nations publication, Sales no. E.23.IV.I, https://perma.cc/YDV2-STBN [hereinafter UNODC Global Report on Trafficking].

[3] *Human Trafficking Rumors*, POLARIS PROJECT, https://perma.cc/V4ME-DUNL (last visited Mar. 15, 2025).

[4] *See* Miriam Wijkman & Edward Kleemans, *Female Offenders of Human Trafficking and Sexual Exploitation*, 72 CRIME, L. & SOC. CHANGE 53, 53 (2019).

traffickers to being victims themselves.[5]

On one end of the spectrum are perpetrators like Ghislaine Maxwell.[6] Maxwell, a New York socialite, was charged in 2020 for sex crimes she committed alongside Jeffrey Epstein.[7] She was convicted of sex trafficking in 2021, and sentenced to twenty years of imprisonment in 2022.[8] Before her convictions and her involvement with Epstein, she was described as coming from "old money;" she attended Oxford, wore designer clothes, and came from an upper-class family.[9] Maxwell recruited other women for Epstein through promises of bright futures and used the couple's social power and connections to coerce women into complying with their advances, which ultimately led to abuse.[10]

Megan Loyd's story falls on the opposite end of the spectrum.[11] She was only a sophomore in high school when she was sold to her first trafficker.[12] While being trafficked, she was subjected to egregious forms of physical abuse and endured psychological manipulation to keep her isolated and compliant with her trafficker.[13] To survive, she began to recruit other women for her trafficker, becoming "second-in-command."[14] Like Ghislaine, Megan was also criminally charged, but unlike Ghislaine, her "crimes" were a direct result of her trafficker subjecting her to abuse.[15]

The differences between the two illustrate that assumptions about sex trafficking are not straightforward, and addressing the issue of women aiding in trafficking others—whether they have been victims of the same

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[5] See Franca Cortoni et al., *Women Convicted of Promoting Prostitution of a Minor Are Different from Women Convicted of Traditional Sexual Offenses: A Brief Research Report*, 27 SEXUAL ABUSE: J. RSCH. & TREATMENT 324, 325 (2014).

[6] *See* Luc Cohen & Brendan Pierson, *Ghislaine Maxwell Sentenced to 20 Years for 'Horrific' Sex Trafficking*, REUTERS (June 28, 2022, 10:18 PM EDT), https://perma.cc/QAK6-8GRB.

[7] *A Timeline of the Jeffrey Epstein, Ghislaine Maxwell Scandal*, AP NEWS (June 28, 2022, 3:05 PM EDT), https://perma.cc/PUS9-UCJN.

[8] Cohen & Pierson, *supra* note 6.

[9] GHISLAINE MAXWELL: FILTHY RICH, at 1:15:29–1:15:43 (Netflix 2022).

[10] *See id.* at 57:04–55:16.

[11] See Emma J. Staats, *Innocent All Along: An Argument for Improving Vacatur Laws in Tenth Circuit States for Victims of Human Trafficking*, 62 WASHBURN L.J. 345, 346 (2023).

[12] *Id.*

[13] *Id.* at 347.

[14] *Id.* at 350–51.

[15] *See id.* at 346.

crime or not—is complex.[16] Past trauma often contributes to women's involvement in the legal system, and creates unique challenges as they simultaneously navigate the roles of victim and defendant.[17] The phenomenon of women conspiring with men to commit violent crimes against other women is surprisingly under-researched—specifically, women who participate in the sexual exploitation or trafficking of other women.[18] Despite there being a large body of law that punishes and monitors sex offenders, less is understood about the women who further these crimes, including the rehabilitation needed for those with a history of abuse themselves.[19]

Women survivors convicted of sex trafficking can be analyzed to examine how anti-trafficking statutory reform can consider previous victimization as more than just a mitigating factor and balance appropriate punishments. In this Note, the terms "victim" and "survivor" are used interchangeably to reflect not only the gravity of sexual violence but also an individual's ability to "thrive beyond traumatic events."[20] The terms "sex work" or "sex worker" are preferred terms for discussing consensual sex work, but "prostitute" or "prostitution" may be used to reflect statutory language.[21] Additionally, the type of defendants focused on is narrow: adult women convicted of sexually exploiting others, and who were victims of abuse themselves before their conviction as a result of their own experience in trafficking.[22]

This Note argues why the Massachusetts trafficking statute leads to the criminalization of victims of sex trafficking, proposes statutory reform to be adopted federally, and suggests appropriate punishments and protections for women convicted of sex trafficking. Part I will provide background information about sex offenses generally, the current statutory scheme

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[16] *Id.* at 351.

[17] *See* Amelia Vorpahl, I*mproving Outcomes for Women in the Criminal Justice System*, CSG JUST. CTR. (Mar. 29, 2022), https://perma.cc/8293-843L.

[18] *See* Wijkman & Kleemans, *supra* note 4, at 56.

[19] *See* Cortoni et al., *supra* note 5, at 331.

[20] Charnell Covert, *Survivor, Victim, Victim-Survivor*, FORCE, https://perma.cc/L9F3-8SEK (last visited Mar. 15, 2025).

[21] *See generally* Chris Bruckert et al., *Language Matters: Talking About Sex Work*, STELLA (Apr. 2013), https://perma.cc/5EBD-H9NF (noting the generally negative connotation associated with the term "prostitute" and listing other terms related to the sex industry).

[22] *See, e.g.*, Alexandra F. Levy, *Innocent Traffickers, Guilty Victims: The Case for Prosecuting So-Called 'Bottom Girls' in the United States*, 2016 ANTI-TRAFFICKING REV. 130, 131 (2016).

criminalizing sex trafficking, women charged with trafficking or "pimping" crimes, and sex offender sentencing. Part II will address the relevance of the topic and why it is important not to overlook women that aid in perpetuating sex trafficking at the hands of a third party. Part III will suggest changes necessary to the Massachusetts trafficking statute, Safe Harbor laws, and suggest preventative approaches. Part IV will argue for a federalized standard to protect victimized women convicted of trafficking and argue that when punishment is appropriate, these women should not be required to register as sex offenders.

I. Background

A. *Federal and State Statutory Sex Offenses*

1. Sex Trafficking and "Pimping" Statutes

A sex offense is broadly defined as a criminal act with a "sexual component" that involves physical, emotional, or mental harm to a victim.[23] In Massachusetts, a sex offense is defined by the state's registry laws or a "like violation of the laws of another state."[24] Massachusetts statutorily requires offender registration for thirty sex offenses, including any attempt to commit one of those offenses.[25] A "like violation" is an out-of-state crime with nearly the same elements as a Massachusetts crime that requires registration.[26] Each state has different definitions of sex offenses, and varying laws on who may, or may not, be required to register as a sex offender.[27]

Under Massachusetts law, trafficking and some "pimping" laws require sex offender registration because they are considered sex offenses.[28] Sex trafficking and "pimping" are two different crimes in Massachusetts, but a

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[23] *Sex-Related Offenses*, NIJ, https://perma.cc/ZUP7-UYZW (last visited Mar. 15, 2025).

[24] MASS. GEN. LAWS ANN. ch. 6, § 178C (West 2018); 30B ELSPETH B. CYPHER, MASS PRAC., CRIMINAL PRACTICE & PROCEDURE at § 67:3 (4th ed. 2024).

[25] MASS. GEN. LAWS ANN. CH. 6, § 178C (West 2018).

[26] Doe v. Sex Offender Registry Board, 925 N.E.2d 533, 538 (Mass. 2010) ("A 'like violation' is a conviction in another jurisdiction of an offense of which the elements are the same or nearly the same as an offense requiring registration in Massachusetts.").

[27] Madelyn Amos, *Have Sex Offender Laws Gone Too Far?*, PUB. PURPOSE (Mar. 5, 2023), https://perma.cc/9RZE-GG9Q.

[28] MASS. GEN. LAWS ANN. CH. 6, § 178C.

trafficker's behavior is hard to distinguish from that of a pimp.[29] A pimp is "a criminal who is associated with, usually exerts control over, and lives off the earnings of one or more prostitutes."[30] Sex traffickers "employ force, fraud, or coercion to victimize others in their desire to profit from the existing demand."[31]

Generally, sex trafficking requires an element of force or coercion, while "pimping" focuses on causing a person "to engage in a commercial sex act by means less than force, fraud, or coercion," and its punishment is usually left to local law enforcement.[32] Sex trafficking is considered a more exploitative crime, however pimps often act as more than a person procuring customers for an individual and taking a part of the proceeds—they also use coercive techniques to manipulate the women that work for them.[33] Pimps can be charged under trafficking statutes as much as they can be prosecuted under so-called pimping laws.[34] In other words, pimping can also be thought of as a means to traffic others despite the two different statutes.[35] Therefore, the term "trafficker" is used as an all-encompassing term to include the numerous types of perpetrators, not just pimps.[36]

Each crime is also treated differently in terms of sex offender registration and sentencing.[37] Some "pimping" crimes are not a part of the sex offenses defined in Massachusetts laws.[38] The Massachusetts statute "directed at so-called 'pimping'" is titled "support from, or sharing, earnings of prostitute[s]" and does not require registration as a sex offender.[39] It carries

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[29] John Elrod, Filling the Gap: *Refining Sex Trafficking Legislation to Address the Problem of Pimping*, 68 VAND. L. REV. 961, 978–80 (2019).

[30] *Pimp*, MERRIAM-WEBSTER, https://perma.cc/P9ZP-GC7B (last visited Mar. 15, 2025).

[31] *Human Trafficking*, NAT'L HUMAN TRAFFICKING HOTLINE, https://perma.cc/68ZZ-B8ZF (last visited Mar. 15, 2025).

[32] *See* 18 U.S.C. § 1591; Elrod, *supra* note 29, at 979.

[33] Elrod, *supra* note 29, at 978.

[34] *E.g.*, MASS. GEN. LAWS ANN. CH. 272, § 7 (West 2023); MASS. GEN. LAWS ANN. CH. 265, § 50 (West 2012).

[35] *See* Emma Coreno, *Finding the Line Between Choice and Coercion: An Analysis of Massachusetts's Attempt to Define Sex Trafficking*, 13 NE. U.L. REV. 125, 162 (2021).

[36] *See* Bruckert, *supra* note 21.

[37] MASS. GEN. LAWS ANN. CH. 6, § 178C (West 2018).

[38] *See id.* (excluding the statute that criminalizes living off of the proceeds of a prostitute but including the same crime if the prostitute is a minor).

[39] MASS. GEN. LAWS ANN. CH. 272, § 7 (West 1980); Commonwealth v. Brown, 112 N.E.3d 264, 267 (Mass. 2018).

a punishment of five years imprisonment which may be reduced to as little as two years.[40] In contrast, Massachusetts defines "sex trafficking" as a sex offense and is categorized as a "sexually violent offense."[41] It carries a punishment of no less than five years imprisonment.[42]

2. Massachusetts Sex Trafficking Statute and Victim Relief

Massachusetts's sex trafficking statute is titled: "Trafficking of persons for sexual servitude; trafficking of persons under 18 years for sexual servitude; trafficking by business entities"[43] In full, the statute reads:

> Whoever *knowingly*: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport provide or obtain by any means, another person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of chapter 272, or causes a person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of said chapter 272; or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i), shall be guilty of the crime of trafficking of persons for sexual servitude and shall be punished by imprisonment in the state prison for not less than 5 years but not more than 20 years and by a fine of not more than $25,000.[44]

To be convicted of sex trafficking, the prosecution must show that a person "(1) knowingly (2) 'enabled or caused,' by one of the statutorily enumerated means, (3) another person (4) to engage in commercial sexual activity."[45] The statute is modeled after the "action-means-purpose model" that other legislation commonly follows when criminalizing acts of

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[40] MASS. GEN. LAWS ANN. CH. 272, § 7.

[41] MASS. GEN. LAWS ANN. CH. 6, § 178C.

[42] MASS. GEN. LAWS ANN. CH. 265, § 50(a) (West 2012).

[43] *Id.*

[44] *Id.* (emphasis added).

[45] Commonwealth v. Fan, 191 N.E.3d 1027, 1041 (Mass. 2022).

trafficking.[46]

Notably, the statute does not require an element of force or coercion.[47] This is somewhat unique to Massachusetts, because many other states' sex trafficking statutes require proof of one or the other.[48] A minority of states, like Massachusetts, have moved away from requiring force or coercion as an element, because a broader statute does not require victim testimony and is easier to prosecute.[49] The legislative intent behind broadening the Massachusetts statute was to provide local law enforcement with the necessary tools to investigate human trafficking, without relying on federal prosecution, and to focus criminal liability on the buyers of sex (otherwise known as "Johns") and traffickers instead of women selling sex.[50]

The lack of a requisite element of force or coercion was first challenged as unconstitutionally vague in the seminal case *Commonwealth v. McGhee*.[51] The Supreme Judicial Court ("SJC") upheld the statute as constitutional because its words "[had] commonly accepted and readily understood meanings in the English language," which was adequate to put the defendants on notice that their conduct was illegal.[52] The Court focused on the notion that the mens rea requirement of "knowingly" was enough to be convicted of the crime.[53] Since *McGhee*, the Court has maintained that the statute is not overly broad and does not require an element of force or coercion.[54] Additionally, the statute survived another interpretation challenge in regards to its language of "another person" in *Commonwealth v.*

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[46] *See generally Understanding Human Trafficking*, POLARIS PROJECT, https://perma.cc/W56P-M8DV (last visited Mar. 15, 2025).

[47] MASS. GEN. LAWS ANN. CH. 265, § 50(a).

[48] *See* 18 U.S.C. § 1591; Julie Dahlstrom, *The Elastic Meaning(s) of Human Trafficking*, 108 CALIF. L. REV. 379, 415–16 (2020).

[49] *See generally* Dahlstrom, *supra* note 48, at 415–16 (explaining that nine states have adopted "'any means' language," including Massachusetts).

[50] Commonwealth v. Dabney, 90 N.E.3d 750, 762 (Mass. 2018) (citing legislative history of Massachusetts's sex trafficking statute); *John*, MERRIAM-WEBSTER, https://perma.cc/D2ZW-57TR (last visited Mar. 15, 2025).

[51] Commonwealth v. McGhee, 35 N.E.3d 329, 337 (Mass. 2015).

[52] *Id.* at 339.

[53] *Id.* at 339–40 (describing the knowledge required as "prospective"); *see also* Commonwealth v. Martins Maint., Inc., 190 N.E.3d 1099, 1108 (Mass. App. Ct. 2022) (describing that corporate defendants can also be held criminally liable by establishing "collective corporate knowledge" or vicarious liability).

[54] *See, e.g.*, *Dabney*, 90 N.E.3d at 763.

Fan, where the SJC held that the statute does not require "proof of a victim's identity," only that another human being was trafficked.[55]

For victims of sex trafficking, thirty-eight states provide statutory protection against criminal charges for acts committed while being trafficked.[56] These protections are known as "safe harbor laws" and aim to direct victims of trafficking away from the criminal justice system.[57] Safe harbor laws are needed because the majority of survivors often accrue a criminal record.[58] In Massachusetts, the legislature provided victims with an affirmative defense, post-conviction relief, a vehicle to bring civil actions against traffickers, and access to the Victims of Human Trafficking Trust Fund.[59]

The affirmative defense may be raised against prostitution charges if the crime was committed while being trafficked.[60] Post-conviction relief is available to those convicted of prostitution, kidnapping, organ trafficking, or simple drug possession during the time they were trafficked.[61] The trafficking statute allows a victim to bring a tort action against the trafficker if the statute has been violated.[62] The Victims of Human Trafficking Trust Fund, in theory, takes fines from pimps, traffickers, and Johns, and gives the money to sex workers seeking to leave the industry.[63] Sex trafficking laws and victim remedies vary from state to state but many have modeled their

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[55] Commonwealth v. Fan, 191 N.E.3d 1027, 1041 (Mass. 2022); Brief for Amicus Curiae Ian Stone, Esquire at 7–9, Commonwealth v. Fan, 191 N.E.3d 1027 (Mass. 2022) (No. SJC-13207), 2022 WL 598224 (explaining how the Legislature has shown intent to protect victims and arguing against adding an element of identity to the Massachusetts trafficking statute).

[56] Alaina Richert, *Failed Interventions: Domestic Violence, Human Trafficking, and the Criminalization of Survival*, 120 MICH. L. REV. 315, 327 (2021). *See generally* Ashleigh Pelto, *Criminal Record Relief for Human Trafficking Survivors: Analysis of Current State Statutes and the Need for a Federal Model Statute*, 27 MICH. J. GENDER & L. 473, 473 (2021).

[57] *See Safe Harbor Laws: Changing the Legal Response to Minors Involved in Commercial Sex*, NCJRS 4 (Sept. 2019), https://perma.cc/LAH7-NB3H (explaining that safe harbor laws usually include immunity, diversion, specialized services, or vacating convictions).

[58] *Punishing the Victim*, POLARIS PROJECT (2023), https://perma.cc/NU8E-5F62.

[59] MASS. GEN. LAWS ANN. CH. 10, § 66A (West 2018).

[60] MASS. GEN. LAWS ANN. CH. 265, § 57 (West 2018) (requiring that human trafficking victims are "under duress or coerced into committing the offenses").

[61] *Id.* § 59(a).

[62] *Id.* § 50(d).

[63] Sean Cotter, *A Mass. Fund Was Meant to Help Human Trafficking Victims. Over a Decade Later, There's Little Money Coming In*, BOS. GLOBE, https://perma.cc/TVL3-BNB4 (last updated Mar. 11, 2024 8:07 AM).

own statutes after federal legislation.[64]

3. Federal Sex Trafficking Legislation

The Trafficking Victims Protection Act ("TVPA"), the Mann Act, and the Allow States and Victims to Fight Online Sex Trafficking Act ("FOSTA") are three federal statutes that address sex trafficking.[65] Prior to this legislation, prosecutors had fewer options, with less stringent standards, to charge traffickers—resulting in few convictions.[66] Before the TVPA, evidence of force and coercion were limited to acts of physical force; statutes related to sex trafficking, such as those governing involuntary servitude, did not consider psychological coercion.[67] The Supreme Court limited the meaning of "involuntary servitude" to only consider threats of or actual physical coercion because of precedent, the language used in the Thirteenth Amendment, and its meaning at the time it was enacted.[68]

Prior to the TVPA, the Mann Act criminalized the transportation of a person for the purpose of prostitution and like the Massachusetts statute, does not require force or coercion as an element.[69] Congress passed FOSTA in 2018 with the specific purpose of curbing online sex trafficking by holding websites liable for content their users post.[70] Since being passed, FOSTA's harmful effects on consensual sex workers working through online

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[64] Amber Horning & Loretta J. Stalans, *Oblivious 'Sex Traffickers': Challenging Stereotypes and the Fairness of US Trafficking Laws*, ANTI-TRAFFICKING REV. 67, 69 (Apr. 2019).

[65] Trafficking Victims Protection Act, 22 U.S.C. §§ 7102–15; The Mann Act, 18 U.S.C. § 2421; 18 U.S.C. § 2421A.

[66] Jennifer A.L. Sheldon-Sherman, *The Missing "P": Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 PENN ST. L. REV. 443, 451 (2012); e.g., 18 U.S.C. §§ 1581–84.

[67] U.S. v. Kozminski, 487 U.S. 931, 947 (1988).

[68] U.S. CONST. AMEND. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."); 18 U.S.C. § 1584; *Kozminski*, 487 U.S. at 951.

[69] 18 U.S.C. § 2421; Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1247, 1251 (2011).

[70] Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115–164, § 2, 132 Stat. 1253, 1253 (2018); Danielle Blunt & Ariel Wolf, *Erased: The Impact of FOSTA-SESTA and the Removal of Backpage on Sex Workers*, ANTI-TRAFFICKING REV. 117, 117 (Apr. 2020).

platforms has faced scrutiny.[71] Currently, the TVPA is the most relevant in the context of women federally convicted of trafficking.[72]

The TVPA is an extensive statutory scheme focusing on what are known as the three "Ps"—prosecution of traffickers, prevention of future trafficking, and protection of trafficking survivors.[73] The TVPA was the first to comprehensively address human trafficking and has undergone multiple reauthorizations since 2000.[74] Generally, the TVPA offers victim services through government agencies, authorizes funding for the prevention of trafficking, and creates a task force responsible for fighting against trafficking, among numerous other initiatives.[75] Each reauthorization of the Act added new bills to strengthen anti-trafficking legislation.[76] The 2019 reauthorization was the biggest expansion and incorporated elements of survivor partnership as part of four new bills.[77]

Under the TVPA, trafficking of an adult occurs when a person "recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits" another person by means of force or coercion, for the purpose of commercial sex.[78] It is always trafficking if a child is induced into commercial sex acts, regardless of the means.[79] Additionally, Congress specifically intended to expand the meaning of force and coercion to include psychological methods that modern-day traffickers use.[80] Because of the complexities of human trafficking, the individuals prosecuted under the TVPA are often also victims of the crime they are charged with, many of

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[71] *See, e.g.*, Kendra Albert et al., *Fosta in Legal Context*, 52 COLUM. HUM. RTS. L. REV. 1084, 1088 (2021); Danielle Keats Citron & Quinta Jurecic, *Fosta's Mess*, 26 VA. J.L. & TECH. 1, 10 (2023); *What is SESTA/FOSTA?*, DECRIMINALIZE SEX WORK, https://perma.cc/5TS5-XMBA (last visited Mar. 15, 2025).

[72] *See* Trafficking Victims Protection Act, 22 U.S.C. §§ 7102–15 (2000).

[73] *See* Trafficking in Persons Report, TIP Report 10 (Dept. of State 2023); Sheldon-Sherman, *supra* note 66, at 452.

[74] Mattar, *supra* note 69, at 1250.

[75] *The 2019 Trafficking Victims Protection Reauthorization Act: A Topical Summary and Analysis of Four Bills*, POLARIS PROJECT, https://perma.cc/C7CR-NRUT (last visited Mar. 15, 2025) [hereinafter *TVPRA Summary*].

[76] *Key Legislation*, U.S. DEP'T. JUST., https://perma.cc/G6NL-KXD9 (last visited Mar. 15, 2025).

[77] *TVPRA Summary*, supra note 75.

[78] 18 U.S.C. § 1591.

[79] *Id.*

[80] H.R. REP. NO. 106–939, at 4 (2000); Stephen C. Parker & Jonathan T. Skrmetti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. MEM. L. REV. 1013, 1035–37 (2013).

them being women.[81]

B. *Women Convicted of Sex Trafficking*

The "feminist pathways theory" suggests that women's pathways into criminal lifestyles are different from men's.[82] The theory is premised on how the lived experiences of women lead to incarceration.[83] Many studies on women who commit crimes use this theory as a way to understand what leads to their criminality, and what treatment would help achieve their successful reentry into society.[84] Most studies under this theory address whether convicted women have a history of trauma or abuse, but the feminist pathways theory has not expressly been used to study women convicted under trafficking or pimping laws.[85]

While the research on female sex offenders ("FSO" or "FSOs") has increased in the last few years, it remains an under-researched topic.[86] The largest impact from the lack of research is society's misconception that women cannot sexually abuse others, however between 15–20% of sexual abusers are women, excluding those without a conviction.[87] Research about FSOs has limitations, because it relies on data derived from the male sex offender perspective.[88] For example, instruments typically used in studies for male sex offenders are often used for female offenders without knowing whether it will yield a valid result.[89] Another limitation of research is the nature of self-reporting; because there is a "social taboo associated with

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[81] Alexandra Baxter, *Sex Trafficking's Tragic Paradox: When Victims Become Perpetrators*, CONVERSATION (May 21, 2019, 10:20 PM EDT), https://perma.cc/89C4-3UFB.

[82] *See generally* Cathy McDaniels-Wilson & Judson L. Jeffries, *Women Behind Bars: An Illuminating Portrait*, 2011 J. INST. JUST. INT'L. STUD., 129, 140 (2011).

[83] *Id.*

[84] *See generally* Dana D. Dehart, *Women's Pathways to Crime*, 45 CRIM. JUST. & BEHAV. 1461, 1462 (2018).

[85] *See id.* at 1469 (applying feminist pathways perspective to various types of crimes); *see, e.g.*, Mauro Paulino et al., *Behavioral Evidences of Female Sex Offenders: Victim or Co-Author?*, 1 CURRENT RSCH. PSYCH. & BEHAV. SCI. 1, 2 (2020).

[86] Paulino et al., *supra* note 85, at 2.

[87] David McLeod & Michal Dodd, *Modernized Female Sex Offender Typologies: Intrapsychic, Behavioral, and Trauma Related Domains*, 8 COGENT SOC. SCI., June 2022 at 1, 2.

[88] *Id.* at 10.

[89] Erin B. Comartin et al., *Factors Related to Co-Offending and Coerced Offending Among Female Sex Offenders: The Role of Childhood and Adult Trauma Histories*, 33 VIOLENCE & VICTIMS 53, 59 (2018).

sexual offending," it is possible that women who participate in studies have falsified or minimized self-reported answers.[90] Lastly, there is only a small pool of FSOs to draw research from, making it difficult to construct general assumptions about FSOs in the United States.[91]

FSO research usually separates women into different typologies to understand their behavioral traits, trauma history, and reasons for offending.[92] Studies consistently find that the majority of women who sexually offend have a more extensive trauma history than their male counterparts.[93] Two of the most prevalent types of FSOs are women who commit the abuse alone, and women who commit crimes with a co-offender.[94] It is a myth that women only abuse others with a co-defendant,[95] whether coerced or not, but there is a larger population of women who sexually abuse with a partner compared to solo offenders.[96] These categories help with the understanding of FSOs and their involvement in sex trafficking crimes, as their experiences and roles vary widely.[97]

There is no difference in trauma histories between women who offend solo or with a co-defendant, but the way trauma manifests into sexually abusive behavior varies.[98] One study focuses on three types of FSOs: Relational, Predatory, and Chaotic.[99] The Relational group is the least likely to think that their actions are wrong and often commit other types of crimes; they typically suffered adolescent trauma as opposed to early childhood trauma.[100] The Predatory group is the closest to some male sex offenders—their childhood trauma manifested into a desire for power and control, and they tend to lack empathy for their victims.[101] The Chaotic group is the type

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[90] *Id.*

[91] *See id.* at 54.

[92] *See, e.g.*, McLeod & Dodd, *supra* note 87, at 2.

[93] Comartin et al., *supra* note 89, at 55.

[94] Comartin et al., *supra* note 89, at 55–56 (explaining that there are two types of women who co-offend, those who are coerced and those who are not).

[95] *See* Sarah Young, *Female Sex Offenders are More Common than You Think, Reveals Study*, INDEP. (July 20, 2017 08:32 BST), https://perma.cc/CSB8-ZPCD.

[96] McLeod & Dodd, *supra* note 87, at 3.

[97] *See generally* McLeod & Dodd, *supra* note 87, at 8.

[98] McLeod & Dodd, *supra* note 87, at 2.

[99] McLeod & Dodd, *supra* note 87, at 1.

[100] *See generally* McLeod & Dodd, *supra* note 87, at 7.

[101] McLeod & Dodd, *supra* note 87, at 8–9.

of FSO most likely to have a co-defendant.[102] Chaotic FSOs tend to have childhood trauma that resulted in feelings of powerlessness, and they tend to have a higher rate of general criminality.[103] They also see themselves as victims due to their trauma, and justify their actions through "cognitive distortions" to confront any "moral conflict" they might feel about perpetuating sexual abuse.[104] Another term used to describe the "Chaotic" typology is "Directed-Avoidant."[105] The Directed-Avoidant typology most closely describes women convicted of pimping or trafficking, with or without co-defendants.[106]

There are differences between women who commit sex trafficking or pimping crimes and contact sex offenses, and also between such women and their male counterparts.[107] Women whose sole sex offense is pimping or trafficking generally have vast criminal histories, as opposed to women who commit contact sex offenses.[108] In comparison to male offenders, women convicted of compelling a minor into prostitution are usually not simultaneously charged with sexual assault, because women do not become sexually involved with victims the way men do.[109] The main incentives of the Directed-Avoidant archetype in perpetuating trafficking are criminal or financial motives, not sexual deviance.[110] Sometimes, these women have their own experience and history with prostitution.[111] Additionally, the women convicted of trafficking are often the victims of such crimes who begin to participate in the criminal enterprise to avoid further victimization.[112]

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[102] McLeod & Dodd, *supra* note 87, at 8.

[103] McLeod & Dodd, *supra* note 87, at 9.

[104] McLeod & Dodd, *supra* note 87, at 8–9.

[105] *See* Cortoni et al., *supra* note 5 at 325.

[106] *See* Cortoni et al., *supra* note 5 at 325.

[107] *See* Cortoni et al., *supra* note 5 at 325.

[108] Cortoni et al., *supra* note 5, at 331.

[109] Cortoni et al., *supra* note 5, at 325.

[110] Wijkman & Kleemans, *supra* note 4, at 56.

[111] *See* Doe v. Sex Offender Registry Board, 999 N.E.2d 478, 480–82 (Mass. 2013); Cortoni et al., *supra* note 5, at 331.

[112] Cortoni et al., *supra* note 5, at 331; Wijkman & Kleemans, *supra* note 4, at 56.

1. Sex Work, Sex Trafficking, and the "Bottom Girl"

It is challenging to discuss sex trafficking without considering its impact on consensual sex workers.[113] Sex trafficking and consensual sex work are not the same, and it is important for the laws to not conflate the two to avoid infringing on the labor rights of sex workers.[114] Many women choose to work in the sex industry and do not consider themselves to be victims or criminals.[115] To be clear, sex work is the consensual participation in the selling of sex as a means of income (with the exception of children),[116] while sex trafficking causes another person to unwillingly commit commercial sex acts.[117] Survival sex work might be seen as a consensual grey area, because it involves engaging in sex work due to social or economic barriers.[118] There are also important distinctions between third party traffickers (such as pimps), and third parties participating in the sex work industry (such as legal brothel owners).[119]

Typologies of the female "pimp" emerge in the context of both illegal sex trafficking and consensual sex work.[120] One study identified five types of female pimps: the Madam/Business Partner, the Handler, the Bottom, the Girilla, and Family.[121] Each category includes different types of women but the "Bottom" girl, or the "Handler", are usually being trafficked while assisting someone else to commit sex trafficking crimes.[122]

The pimp's Bottom, or "wife-in-law," is "a trusted and experienced prostitute or female associate" that helps supervise other women working

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[113] *See* Kelly Allen, *Prostitution and Human Trafficking: Know the Difference*, THE EXODUS ROAD (Mar. 5, 2021), https://perma.cc/EJY7-U5V5.

[114] *Human Trafficking and Sex Work*, DECRIMINALIZE SEX WORK, https://perma.cc/E7CX-KP96 (last visited Mar. 15, 2025).

[115] *Sex Work as Work*, NSWP, https://perma.cc/VD59-ABWD (last visited Mar. 15, 2025).

[116] Allen, *supra* note 113.

[117] 18 U.S.C. § 1591; *Human Trafficking and Sex Work*, *supra* note 114.

[118] Jordan N. DeLoach, *Decriminalizing Sex Work Is a Matter of Survival*, TRUTHOUT (Mar. 2, 2019), https://perma.cc/YP29-T47J.

[119] *Compare* Parker & Skrmetti, *supra* note 80, at 1025–29, *with* Nick Thompson, *An Interview with the Longest-Serving Brothel Madam in America*, VICE (Nov. 17, 2023, 10:28 AM), https://perma.cc/NA6B-8VPB.

[120] *See* Wijkman & Kleemans, *supra* note 4, at 56–57.

[121] Dominique Eve Roe-Sepowitz et al., *The Sexual Exploitation of Girls in the United States: The Role of Female Pimps,* 30 J. INTERPERSONAL VIOLENCE 2814, 2819 (2015).

[122] *See* Staats, *supra* note 11, at 350.

for the pimp.[123] The phenomenon of the Bottom is that while she may have "higher status" in the chain of command, her relationship to her trafficker is just as abusive, if not more so, than the women below her.[124] Despite her status, she remains psychologically and financially dependent on the trafficker, which makes it difficult to leave.[125] Bottoms participate in the trafficking operation by collecting money, posting advertisements, arranging and providing transportation, recruiting other women, or by punishing others and using violent and coercive tactics to maintain a "culture of fear."[126]

Under many trafficking laws, these acts are enough to criminally charge Bottoms.[127] The Bottom is not protected by safe harbor laws, and is at risk of being criminalized as a trafficker instead of being treated as a victim.[128] A Bottom is considered a sex offender in the eyes of the law because their actions are criminalized under the Massachusetts sex trafficking statute's language.[129] If convicted, these women will face the Sex Offender Registry Board and the process of classification.[130]

C. *Federal and State Sex Offender Registration*

There are two distinct features of sex offender sentencing: (1) the sentence of imprisonment, and (2) the requirement to register under the Sex Offender Registration Notification Act ("SORNA").[131] SORNA established the national system for monitoring sex offenders to "protect the public from sex offenders and offenders against children," and requires that offenders

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[123] United States v. Pipkins, 378 F.3d 1281, 1285 (11th Cir. 2004) (defining common terms used by traffickers).

[124] *See* Levy, *supra* note 22, at 131–32.

[125] *See* Staats, *supra* note 11, at 347.

[126] Sarah Crocker, *Stripping Agency from Top to Bottom: The Need for a Sentencing Guideline Safety Valve for Bottoms Prosecuted Under the Federal Sex Trafficking Statutes*, 111 NW. U. L. REV. 753, 772, 774 (2017).

[127] *E.g.*, MASS. GEN. LAWS ANN. CH. 265, § 50(a) (West 2012).

[128] Allison L. Cross, *Slipping Through the Cracks: The Dual Victimization of Human-Trafficking Survivors*, 44 MCGEORGE L. REV. 395, 408–09 (2013).

[129] MASS. GEN. LAWS ANN. CH. 6, § 178C (West 2018); Commonwealth v. Garafalo, 234 N.E.3d 987, 994 (Mass. App. Ct. 2024).

[130] *See Sex Offender Classification Process*, MASS. GOV., https://perma.cc/E7HQ-75G8 (last visited Mar. 15, 2025).

[131] 803 MASS. CODE REGS. 1.04 (2024); 34 U.S.C. § 20913(a) (2017).

register in the jurisdiction where they reside, work, or attend school.[132] In addition to the national registry, all states have a registry governed by state law which decides what offenses trigger registration, creating some inconsistencies at the federal and state level.[133] When the crime of conviction requires sex offender registration, offenders must appear before the national or state-specific Sex Offender Registration Board ("SORB") to be classified according to their level of dangerousness.[134]

The Massachusetts SORB is an administrative body created by statute and charged with "promulgat[ing] guidelines for determining the level of risk of re-offense and the degree of dangerousness posed to the public."[135] Guided by considerations identified in the statute, the SORB creates a list of risk factors "that serve as a guide in assessing the current danger and risk of reoffense presented by each offender."[136] After evaluating which risk factors are present or absent, the SORB determines what kind of monitoring is required for the individual by assigning them to a tier.[137] There are three tiers; level one, which represents the lowest risk of reoffending and considered the least dangerous; level two, which encompasses a moderate risk and danger of reoffending; and level three, representing the highest risk of reoffending and considered the most dangerous.[138]

The SORB considers adult women separately when promulgating regulations, which is evident in the list of risk factors to consider during classification.[139] The risk factors distinguish men, women, and juveniles and specify whether or not a factor applies to each group.[140] For the majority of factors, the application is the same for women and men but some factors do

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[132] 34 U.S.C. § 20901.

[133] *See, e.g.*, Dawn R. Wolfe, *Sex Offender Registry Requirements Leave Some Facing Stark Choices as Coronavirus Risks Grow*, APPEAL (Apr. 3, 2020), https://perma.cc/HS6D-DMZT (describing the United States' approach to sex offender registries as "patchwork").

[134] 803 MASS. CODE REGS. 1.04 (2024).

[135] MASS. GEN. LAWS CH. 6, § 178K(2) (West 2024) (listing factors such as criminal history, "mental abnormality," age, and violence of the crime as factors to consider in determining dangerousness).

[136] *Id.*; 803 MASS. CODE REGS. 1.33 (West 2024); *Sex Offender Classification Process, supra* note 130.

[137] MASS. GEN. LAWS CH. 6, § 178K(2); *Sex Offender Classification Process*, *supra* note 130.

[138] Mass. Gen. Laws ch. 6, § 178K(2).

[139] *See* 803 MASS. CODE REGS. 1.33 (2024).

[140] *Id.*

not apply in the same way.[141] For example, factor 26 calls for the SORB to consider a history of abusing children as a factor that heightens the risk of reoffending for adult women, but does not apply the same factor to adult men.[142]

II. The Importance of Understanding Women Convicted of Sex Trafficking

Women convicted of pimping or sex trafficking, with or without a male co-defendant, are often from vulnerable demographics due to histories of trauma, drug abuse, or poverty.[143] The less research completed, the more likely this subgroup of women is to be overlooked.[144] This is neither helpful for the survivors nor for the women charged with the crime.[145] Broad sex trafficking statutes, like those in Massachusetts, increase the likelihood that the victim becomes criminalized, which undermines efforts to effectively combat trafficking.[146] Understanding the women that aid in trafficking completes a necessary piece of the puzzle to end sex trafficking, de-criminalize sex work, and address survivors' needs.[147] The problem is that once victims are criminalized, the narrative shifts from how they can be helped to how they must be punished.[148]

When women are convicted of a sex crime, they are typically sentenced

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[141] *Id.*

[142] *Id.* 1.33(26)(a)–(b).

[143] *See* Dehart, *supra* note 84, at 1462; Roe-Sepowitz, *supra* note 121 (recognizing that some female pimps are more likely than others to get involved in sex trafficking due to poverty, race, or drug abuse).

[144] See Norma Hamilton, *Redefining Sex Offenders: The Fight to Break the Bias of Female Sex Offenders*, 10 J. RACE, GENDER, & ETHNICITY 88, 88 (2021).

[145] *See* Julia Hislop, *Female Sex Offenders Are Often Overlooked*, N.Y. TIMES (Feb. 21, 2013), https://perma.cc/A42U-EZNX.

[146] Dahlstrom, *supra* note 48, at 417–18.

[147] *See Survivor Engagement in the Anti-Trafficking Field: History, Lessons Learned, and Looking Forward*, DEP'T. STATE (Apr. 18, 2023), https://perma.cc/2FW4-U5HL.

[148] *See generally* Tracy Renee McCarter & Samah Sisay, *Prosecutors Must Use Their Immense Discretion to End the Criminalization of Survivors of Gender-Based Violence Who Act in Self-Defense*, 26 CUNY L. REV. 206, 216–20 (2023) (using example of domestic violence victim and self-defense to explain the consequences of criminalizing victims).

more leniently than male sex offenders.[149] Part of the reasoning for shorter sentences is society's reluctance to view women the same way as men—reinforcing the idea that women are "weak" and should be protected by the criminal justice system—ultimately resulting in their exclusion from statutes, research, and treatment options when they are convicted of trafficking.[150] The more that is known about the female traffickers, the less likely their experience will be overlooked or villainized.[151] Research suggests that victims of sex trafficking by female perpetrators typically experience "a more damaging impact, causing identity questions and feelings of betrayal" because women appear more trustworthy and nurturing.[152] Thus, to achieve justice for victims and rehabilitation for women convicted of trafficking, it is important to understand women's roles in trafficking operations.[153]

ANALYSIS

III. Massachusetts's Sex Trafficking and Safe Harbor Laws Need to be Revised

Neither the Massachusetts trafficking statute nor the safe harbor laws sufficiently protect the defendant or the victim. While well-intentioned, the statute is misguided because there is a disconnect between what the statute aims to punish and the type of defendant actually being punished.[154] There are generally three types of women convicted of trafficking: (1) women who are victims of trafficking themselves;[155] (2) women committing the "crime"

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[149] Deborah Goodwin, *"Anything You Can Do, I Can Do Shorter": An Analysis of Lenient Sentencing for Female Sex Offenders in the United States*, 25 WM. & MARY J. RACE GENDER & SOC. JUST. 433, 437 (2019).

[150] *Female Sex Offenders Protected by the Criminal Justice System*, PHYS ORG (May 30, 2012), https://perma.cc/E8WH-R477.

[151] Jen Lloyd, *Female Sex Offenders and Trauma*, BOS. UNIV. (Aug. 16, 2022), https://perma.cc/J74Z-FCGM.

[152] *Id.*; Mellissa Withers, *Sex Traffickers: The Hidden Role of Women*, PSYCH. TODAY (Mar. 13, 2023), https://perma.cc/H9HF-NL23.

[153] See *Survivor Engagement in the Anti-Trafficking Field*, supra note 147.

[154] Dahlstrom, *supra* note 48, at 415–16; Horning & Stalans, *supra* note 64, at 69.

[155] *See* Levy, *supra* note 22, at 131.

to provide a safer environment for consensual sex workers;[156] or (3) women coercing other women into sex work either by themselves or with a co-defendant.[157] The law does not recognize these distinctions—but it should—by reforming sex trafficking statutes, the sentences that come with them, and safe harbor laws.[158] There are ultimately three approaches the state could take to reform this issue: (1) revise the sex trafficking statute to target specific offenders; (2) provide broader protection through affirmative defenses and post-conviction relief; or (3) adopt anti-carceral approaches towards the anti-trafficking movement.[159]

A. *Including a Statutory Element of Force or Coercion*

The image "sex trafficking" invokes is usually a man of color victimizing a young white woman, partially due to media coverage that portrays traffickers, particularly Black men, as coercive and predatory.[160] In reality, when investigated, women are more likely to be convicted of sex trafficking crimes than men.[161] This can be attributed to the fact that women traffickers and Bottoms remain closer to the victims, a tactic used by traffickers to easily gain the trust of and recruit new women, while keeping the men in charge

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[156] *See generally* Daria Snadowsky, *The Best Little Whorehouse Is Not in Texas: How Nevada's Prostitution Laws Serve Public Policy, and How Those Laws May Be Improved*, 6 NEV. L.J. 217 (2005) (providing information about Nevada's regulation of brothels where women aiding in sex work would not be convicted under a sex trafficking statute).

[157] Roe-Sepowitz et al., *supra* note 121. *See generally* Sarah Bendtsen Diedhiou et al., *Trauma, Coercion, and the Tools of Trafficking Exploitation: Examining the Consequences for Children and Youth in the Justice System*, 109 KY. L.J. 719 (2021).

[158] *See* Baxter, *supra* note 81.

[159] See Danielle Augustson, Note, *Protecting Human-Trafficking Victims from Criminal Liability–A Legislative Approach*, 17 GEO. J. GENDER & L. 625, 627 (2016); The University of Utah College of Social Work, *Rethinking Criminal Justice Approaches to Sex Trafficking and the Sex Trades*, YOUTUBE, at 31:39 (Jan. 17, 2024), https://perma.cc/ECP4-L56X.

[160] Horning & Stalans, *supra* note 64, at 70; Kate Mogulescu & Leigh Goodmark, *Clemency for War Criminals but Not Survivors of Trafficking and Violence?*, GENDER POL'Y REPORT (May 30, 2019), https://perma.cc/T8K3-YJPA.

[161] Mogulescu & Goodmark, *supra* note 160; UNODC Global Report on Trafficking, *supra* note 2.

out of law enforcement's reach.[162] When a statute is overly broad, women coerced into facilitating the trafficker's operations meet the legal definition of sex trafficking despite their status as a victim.[163]

Massachusetts has one of the toughest sex trafficking statutes because it does not require force or coercion.[164] Instead, the statute only requires the individual to know that the action commissioned is for the purpose of a commercial sex act.[165] Therefore, anyone who "enables" commercial sexual activity could be held liable, significantly widening the legal definition of a trafficker. While the low burden allows for easier prosecution of true traffickers, it is also just as easy to prosecute women who are victims of trafficking themselves, like the Bottom, because their actions coincide with the legal definition needed for conviction.[166]

Commonwealth v. McGhee challenged the potential consequence of the low burden needed to prove sex trafficking.[167] The Court rejected the argument that the statute was too broad and emphasized that force and coercion were "immaterial" to whether a crime had been committed.[168] On its face, the Court rightly decided that the statute was not ambiguous and the intent of the legislature was to omit force as an element.[169] Recently, the Massachusetts Appeals Court interpreted the statute to include "some level of controlling or changing the victim's will or intent" but expressly stated this reading did not import an element of coercion, remaining consistent with prior holdings.[170]

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[162] Kieran Guilbert, *Number of Women Convicted for Human Trafficking "Exceptionally High" - UN*, THOMSON REUTERS FOUND. (Nov. 24, 2014 4:40 PM GMT), https://perma.cc/2RLH-QNNU; *see, e.g.*, Shamere McKenzie, *The Bottom Girl Phenomenon*, VIMEO, at 13:20–13:50, https://perma.cc/7AC2-ZR3S (last visited Mar. 15, 2025) (demonstrating that pimps and traffickers require the women under them to neither hand them money nor interact with them in public or on the street) [hereinafter *The Bottom Girl Phenomenon*].

[163] *See* Mogulescu & Goodmark, *supra* note 160.

[164] Coreno, *supra* note 35, at 164–65.

[165] Commonwealth v. McGhee, 35 N.E.3d 329, 416 (Mass. 2015).

[166] Coreno, *supra* note 35, at 164–65; Horning & Stalans, *supra* note 64, at 69 (explaining how the expansion of the definition of a sex trafficker creates a wider net of individuals who may be oblivious to their legal status as a trafficker).

[167] 35 N.E.3d at 339–40.

[168] *Id.* at 339.

[169] *Id.* at 340.

[170] Commonwealth v. Garafalo, 234 N.E.3d 987, 995 (Mass. App. Ct. 2024); Commonwealth v. Dabney, 90 N.E.3d 750, 763 (Mass. 2018); *McGhee*, 35 N.E.3d at 339.

Unfortunately, the legislature did not consider the statute's practical implications for women trafficking victims who become perpetrators.[171] The lived experiences of women convicted of trafficking, victims of trafficking, and consensual sex workers provide a more nuanced view of their circumstances than what is reflected in Massachusetts's trafficking statute.[172] One woman, days after her eighteenth birthday, was convicted of sex trafficking and required to register as a sex offender because she engaged in sex work with two women younger than her.[173] Another woman, forced to drive girls she did not know were underage to engage in prostitution, was also charged with sex trafficking crimes.[174] In efforts to target trafficking operations, police will pose as sex buyers to gain access to prostitution rings.[175] Because other women working for the trafficker are providing transportation to and from locations, they are more likely to be arrested as the "trafficker" when they may be under the control of someone above them.[176] These examples meet the Massachusetts definition of "subject[ing]…recruit[ing], entic[ing], harbor[ing], transport[ing]…or obtain[ing] by any means"[177] and show that the law is not always targeting the intended perpetrator, but may instead target the victim committing acts as a means for survival.[178]

The counterargument to including force or coercion as an element of the crime is that the additional elements would make trafficking charges harder to convict, leaving prosecutors to resort to bargaining plea deals with lesser

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[171] *See* Jeffrey H. Zeeman & Karen Stauss, *Criminal Conduct of Victims: Policy Considerations*, 65 U.S. ATT'YS BULL. 139, 143 (2017).

[172] *See* U.S. v. Brooks, 610 F.3d 1186, 1195–96 (9th Cir. 2010); Staats, *supra* note 11, at 351.

[173] Mogulescu & Goodmark, *supra* note 160.

[174] Mogulescu & Goodmark, *supra* note 160.

[175] See Abigail Swenstein & Kate Mogulescu, *Resisting the Carceral: The Need to Align Anti-Trafficking Efforts with Movements for Criminal Justice Reform*, 6 ANTI-TRAFFICKING REV. 118, 118 (2016).

[176] See Matthew Myatt, *The "Victim-Perpetrator" Dilemma: The Role of State Safe Harbor Laws in Creating a Presumption of Coercion for Human Trafficking Victims*, 25 WM. & MARY J. RACE GENDER & SOC. JUST. 555, 573 (2019).

[177] MASS. GEN. LAWS ANN. CH. 265, § 50 (West 2012); Commonwealth v. Dabney, 90 N.E.3d 750, 763 (Mass. 2018); Commonwealth v. Garafalo, 234 N.E.3d 987, 995–96 (Mass. App. Ct. 2024).

[178] *See* Sheldon-Sherman, *supra* note 66, at 461–62.

charges.[179] To establish a case against a trafficker, prosecutors rely heavily on victim testimony from women.[180] But the relationship between a Bottom and the trafficker is one that is often based in fear and manipulation; sometimes, the Bottom is in love with their trafficker: Either way, the Bottom is compelled to protect their trafficker and is groomed to trust them over law enforcement.[181] As a result, prosecutors find it difficult to gain cooperation from these women.[182] Removing the element of fraud or coercion seemed like a reasonable effort to easily prosecute traffickers without the need for testimony.[183] But in reality, catch-all statutes used against victims cause more unintended harm and are no more effective in holding the true perpetrators accountable.[184]

With an overly broad statute, prosecutors can use the weight of a heavier charge, such as sex trafficking, to leverage cooperation instead of treating these women as victims of the same crime.[185] Often, this tactic puts women in dangerous situations, such as testifying against their abusers just to avoid criminalization.[186] Changing the legislative language to narrow the statute would avoid convictions against women who assisted in the operation as a means of survival and hold true perpetrators accountable.[187]

Changing the legislation could be as simple as replacing the mens rea of "knowingly" with the federal definition of force or coercion. The federal definition of coercion is defined as "threats of serious harm to or physical restraint against any person," "any scheme, plan or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person," or "the abuse or threatened abuse of the legal process."[188] Adding this element to the statute

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[179] *See* Crocker, *supra* note 126 at 776. *See generally* Tess Berkowitz, *Breaking Up with the American Adversarial Approach in Criminal Domestic Violence Adjudication*, 20 RUTGERS J.L. & PUB. POL'Y 1, 14 (2023).

[180] Crocker, *supra* note 126, at 761–62, 774, 777–78.

[181] Crocker, *supra* note 126, at 772; *see, e.g.*, Parker & Skrmetti, *supra* note 80, at 1028.

[182] Crocker, *supra* note 126, at 762.

[183] Crocker, *supra* note 126, at 763.

[184] Dahlstrom, *supra* note 48, at 392–93.

[185] Crocker, *supra* note 126, at 775–76.

[186] Crocker, *supra* note 126, at 778–80.

[187] *See* Commonwealth v. Chen, 193 N.E.3d 470 (Mass. App. Ct. 2022) (affirming sex trafficking convictions after the defendant attempted to use her history of prostitution as a defense).

[188] 22 U.S.C. § 7102.

would have two effects: (1) it would not reach those engaging in consensual sex work;[189] and (2) it would target the actual traffickers, not the women they scapegoat.[190] When a woman is convicted of sex trafficking, she may be in charge of recruiting others, taking money, booking hotel rooms, or generally helping the trafficker carry out the trafficking operation; but she is also the most manipulated and abused person under the trafficker.[191] It is more likely that the true trafficker is using coercive techniques, not the women under their control. [192] Adding an element of force or coercion would reflect that, thereby excluding women who were participating to survive, not for their own gain.

Alternatively, the unintended consequences of broad legislation could be resolved with a more comprehensive framework for victim protection.[193] Massachusetts provides an affirmative defense and post-conviction relief for victims of sex trafficking, but individuals convicted under the sex trafficking statute are not eligible for either.[194] With the statutory language as is, Massachusetts's Safe Harbor laws need to be enhanced to include women convicted of trafficking as a result of their victimization.

B. *Expanding Statutory Protection and Proactive Approaches*

The majority of women involved in sex trafficking are convicted of crimes other than trafficking, many of which were committed during their time of being trafficked.[195] Some states provide affirmative defenses or post-conviction relief (safe harbor laws), but relief is typically not extended to

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189 *See* Carly Bell, *Working Together Makes Sex Workers Safer. Here is Why*, EACH OTHER (Aug. 1, 2019), https://perma.cc/4E7H-Z7QZ (noting that women who work together for safety fear legal repercussions); *Safer Sex Work*, NCHRC, https://perma.cc/75MQ-VAEW (last visited Mar. 15, 2025).

190 Crocker, *supra* note 126, at 760; *see The Bottom Girl Phenomenon*, *supra* note 162, at 12:15–12:50.

191 Shamere McKenzie, *Unavoidable Destiny | The Reality of the "Bottom Girl" Part I*, SHARED HOPE INTL. (Mar. 23, 2012), https://perma.cc/5LBU-M9LM.

192 *See Love and Trafficking: How Traffickers Groom & Control Their Victims*, POLARIS PROJECT (Feb. 11, 2021), https://perma.cc/KS69-U4QF (explaining different coercive techniques used by pimps to introduce women into the sex trade).

193 Cross, *supra* note 128, at 414.

194 *See* MASS. GEN. LAWS ANN. CH. 265, § 59 (West 2018).

195 *Criminalizing Victims: Trafficking Survivors with Criminal Records Deserve Relief*, POLARIS PROJECT (Aug. 15, 2022), https://perma.cc/DD8S-E6P7 [hereinafter *Criminalizing Victims*].

women who have committed trafficking crimes.[196] Once a woman is charged under a trafficking statute, it becomes increasingly difficult to defend herself against the crime through available remedies. First, a defense based on being a victim does not typically resonate with a judge or a jury during a trial.[197] Second, the appeals process in the United States is a notoriously high burden to overcome.[198] Third, she has to overcome the social stigma and biases that accompany a sex crime charge and establish herself as credible at trial.[199] Another way to prevail over the appeals process is to petition for clemency, but it is difficult to achieve because of the inherent discretion in granting it.[200]

When the statute is broad enough to include all survivors, an affirmative defense to charges of trafficking is an effective way to protect women convicted of these offenses.[201] Raising an affirmative defense does not guarantee total absolution, but can prevent a charge from turning into a conviction.[202] Generally, states limit the crimes eligible for raising an affirmative defense or impose a nexus requirement, which is "an 'element of the defense that would connect the victim's alleged criminal act to the human trafficking.'"[203]

The biggest pitfall of the Massachusetts affirmative defense is that it

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[196] Meghan Hillborn, *How Oklahoma's Human Trafficking Victim Defense Is Poised to Be the Boldest Stand Against Human Trafficking in the Country*, 54 TULSA L. REV. 457, 467 (2019).

[197] *See, e.g.*, Jill Filipovic, *Ghislaine Maxwell's Defense is to Blame the Victims*, CNN (Dec. 7, 2021, 6:35 PM EST), https://perma.cc/QM4X-NV26.

[198] *Cf.* Daniel S. Medwed, *Ineffective Assistance of Case Law: The Supreme Court's Deficient Habeas Jurisprudence*, 17 HARV. L. & POL'Y REV. 345, 346 (2023) (providing information on the difficulties of appeals in the context of wrongful convictions).

[199] Crocker, *supra* note 126, at 762; Emma Bykerk, Note, *Gender Bias from Judges and Prosecutors: Shaping Who Can and Cannot Be a Victim or Offender*, 45 J. LEGAL PRO. 297, 308 (2021) ("Similar to males who do not fit within the traditional mold of masculinity, when a female does not conform to the traditional mold of femininity, such as promiscuity instead of purity, they too are not seen as 'real' victims of rape.").

[200] Mogulescu & Goodmark, *supra* note 160; *Sex Trafficking Survivor Rebekah Charleston Granted Full Pardon*, VILLANOVA (Jan. 19, 2021), https://perma.cc/XMW4-DDRM.

[201] *See, e.g.*, COLO. REV. STAT. ANN. § 18-3-504 (West 2024); N.J. STAT. ANN. § 2C:13-8 (West 2013); OKLA. STAT. ANN. tit. 21, § 748 (West 2022) (giving affirmative defenses to survivors convicted of trafficking).

[202] Francisco Zornosa, *Protecting Human Trafficking Victims from Punishment and Promoting Their Rehabilitation: The Need for an Affirmative Defense*, 22 WASH. & LEE J. C.R. & SOC. JUST. 177, 186 (2016).

[203] Stephen R. Galoob & Erin Sheley, *Reconceiving Coercion-Based Criminal Defenses*, 112 J. CRIM. L. & CRIMINOLOGY 265, 285 (2022).

does not apply to trafficking crimes, thus excluding women coerced into becoming perpetrators. The affirmative defense only applies to prostitution charges incurred while being trafficked,[204] and a "human trafficking victim" is constrained to mean anyone who is "subjected to conduct prohibited by [Massachusetts's trafficking laws]."[205] Additionally, the defense imposes two nexus requirements, "while a human trafficking victim" and "under duress," which require the victim to not only show that the criminal acts occurred during the time they were a victim, but also that they were under duress.[206] Bottoms meet the legal definition of a victim if they are still forced to engage in prostitution, but are limited to asserting a defense against prostitution charges.[207] Even then, proving she was "under duress" is easier said than done if the victim is manipulated into committing an act, since manipulation does not rise to the threat of serious bodily harm as "duress" requires.[208]

Without recognizing women charged with trafficking as potential victims, Massachusetts law ignores the fact that many of them are "Bottom girls."[209] A statutory affirmative defense for Bottoms is paramount, because they are typically compelled to commit illegal acts on behalf of their trafficker but do not meet the requirements to raise the common law defense of duress.[210] Providing an affirmative defense is not the perfect solution, but broadening an existing defense to include crimes of trafficking prevents victims from "slip[ping] through the cracks" and provides a remedy to avoid criminalization.[211]

If a woman convicted of trafficking is unable to succeed by asserting an affirmative defense, being able to utilize Massachusetts's post-conviction statute is critical to clearing their criminal record. However, Massachusetts also bars women convicted of trafficking to vacate their convictions.[212] The

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[204] *Id.* (including defense for "common night walking or common streetwalking").

[205] MASS. GEN. LAWS ANN. CH. 265, § 59(a) (West 2018); MASS. GEN. LAWS ANN. CH. 233, § 20M(a) (West 2012).

[206] MASS. GEN. LAWS ANN. CH. 265, § 57 (West 2018).

[207] *Id.*

[208] *See* Galoob & Sheley, *supra* note 203, at 286.

[209] *See* Zornosa, *supra* note 202, at 190.

[210] *See* Zornosa, *supra* note 202, at 188–90.

[211] Cross, *supra* note 128, at 419 (explaining that affirmative defenses are available too late in the criminal justice process but are an important mechanism in providing relief).

[212] MASS. GEN. LAWS ANN. CH. 265, § 59 (West 2018).

statute provides relief against prostitution, kidnapping, and organ trafficking convictions, and includes a rebuttable presumption that if the defendant is a minor they have been a victim of trafficking.[213] However, the burden is put onto the victim to prove they were a victim of trafficking to have their charges vacated or to withdraw a guilty plea.[214] For adults, there is only a rebuttable presumption for victim status if the individual has been declared a victim by a local state or federal agency.[215]

The declaration of victimhood by the state is an issue, as it suggests that victims are only victims once the government has "rescued" them and deemed them a victim.[216] Contrary to public perception, women who are being trafficked find their own way out of the situation rather than through a raid or sting by law enforcement.[217] Additionally, women involved in trafficking may not see themselves as victims, making it difficult for them to go through the process of being "certified" and therefore petition to get their convictions vacated.[218] Even if a survivor is able to overcome these barriers, if they were convicted under the trafficking statute, post-conviction relief is not available to them.[219] If safe harbor laws expanded the types of crimes included, more women involved in coercive trafficking relationships would be able to escape criminal liability for acts they were coerced into.

Deciding how to prosecute women who commit crimes against other victims in furtherance of a sex trafficking operation poses one of the most challenging balances.[220] It requires a "careful balancing of the non-offending victims' rights, public safety, and a trauma-informed understanding of the victim-offender's actions."[221] Most of the time, the balancing includes weighing the totality of the circumstances and analyzing specific facts to

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[213] *Id.*

[214] *Id.*

[215] *Id.* (noting that the certification is not required, but without it there is no rebuttable presumption, making it more difficult to succeed on this motion).

[216] Dina Francesca Haynes, *(Not) Found Chained to A Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 350 (2007).

[217] *See id.* at 352 (regarding victims that "rescue themselves…they then have to prove that they are really victims, worthy of the time and attention of law enforcement").

[218] *See* Alexia Tomlinson, *Supporting Sex Trafficking Survivors: Legal Needs in "the Life"*, VICTIM RTS. L. CTR., https://perma.cc/K8S8-22D5 (last visited Mar. 15, 2025).

[219] MASS. GEN. LAWS ANN. CH. 265, § 59.

[220] Bendtsen Diedhiou et al., *supra* note 157, at 759.

[221] Bendtsen Diedhiou et al., *supra* note 157, at 759.

determine whether a woman is a victim of trafficking and was coerced into doing so; or is purely a perpetrator who should be held criminally liable.[222] The line can seem blurry, but providing affirmative defenses and post-conviction relief allows the adversarial system to filter through who is a victim and who is a perpetrator.

The expansion of safe harbor laws should include women convicted of sex trafficking because their role in trafficking stems from victimization.[223] These women's actions, on the surface, are sometimes deceptively convincing that she is a co-conspirator with her trafficker, not a victim.[224] But the totality of experiences and trauma suffered by a "Bottom" may take a longer time to recover from, purely because of their length of time in the lifestyle and the severity of how their trafficker treated them.[225] In sex trafficking operations, the "Bottom" is still under control of their abuser, even while they commit other crimes that meet the elements of trafficking, like recruiting other women.[226]

Navigating the criminal justice system as a survivor can be a daunting task and does not provide victims with the services needed when they are treated as criminals.[227] Criminal records are barriers to employment, housing, maintaining custody of children, and other vital services needed for successful integration into the community.[228] When women are convicted of trafficking after being victimized, they experience "dual-victimization" meaning the individual first experiences trauma through trafficking and is then subjected to arrest leading to conviction.[229] This criminal-victim status in some cities could be as high as 40%.[230] While expanding safe harbor relief

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[222] *See* Zeeman & Stauss, *supra* note 171, at 140.

[223] *See* McKenzie, *supra* note 191.

[224] *The Bottom Girl Phenomenon*, *supra* note 162, at 11:01–11:45 (describing the Bottom girl phenomenon as an "iceberg").

[225] Mitzi Perdue, *In the Sex Trafficking World, the "Bottom" Is in the Middle*, PSYCH. TODAY (June 20, 2021), https://perma.cc/3YBE-RAUW; *The Bottom Girl Phenomenon*, *supra* note 162, at 11:01–11:45.

[226] See Cheryl Nelson Butler, *Bridge over Troubled Water: Safe Harbor Laws for Sexually Exploited Minors*, 93 N.C. L. REV. 1281, 1289–90 (2015).

[227] Punishing the Victim, *supra* note 58.

[228] *See, e.g.*, Cara Tabachnick, *Employment for Some Americans with Criminal Records is "Nearly Impossible," Survey Says*, CBS NEWS (May 26, 2023, 9:01 AM EDT), https://perma.cc/ETP3-7WSH.

[229] *See* Cross, *supra* note 128, at 397.

[230] *Rethinking Criminal Justice Approaches to Sex Trafficking and the Sex Trades*, *supra* note 159, at 24:53–25:00.

is an important tool to avoid re-traumatization and provide an exit from the criminal justice system, this path does not always consider other deep-rooted factors of a woman's life that led her to trafficking, including drug addiction, trauma, lack of employment, and socio-economic status.[231]

C. *Addressing Root Causes of Women's Victimization*

Victims of sex trafficking cannot be stereotyped because they may not always look the way the government has decided they do.[232] For many women, being vulnerable to sex trafficking is a result of lack of resources, racism, poverty, or lack of education.[233] Because of this, an anti-carceral, or human rights, approach to protecting survivors that directs resources away from prosecution is an important factor in meeting survivors' needs.[234] In other words, if the government were to "take responsibility" for conditions that lead to sex trafficking, the harmful practice of criminalizing victims would decline.[235] This approach should be considered in Massachusetts because: (1) "Bottoms" are less likely to engage with the criminal justice system for services; (2) involvement in the criminal justice system, as victim or offender, is re-traumatizing; and (3) proactivity lowers the chance of victimization in the first instance.[236]

"Bottoms" are coached to avoid law enforcement and do not feel comfortable coming forward to police in search of help.[237] When a survivor

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[231] *See* Bendtsen Diedhiou et al., *supra* note 157; Swenstein & Mogulescu, *supra* note 175, at 119 (explaining that the root cause of trafficking should be addressed rather than focusing on more prosecutions).

[232] *See* 22 U.S.C. § 7105(b)(1)(E); MASS. GEN. LAWS ANN. CH. 265, § 59(a)(3) (West 2018) (creating a rebuttable presumption against victim status if victim obtains official documentation).

[233] *See* Elrod, *supra* note 29, at 978 (explaining how some women are introduced to sex work and describing the spectrum of consent); Yasmin Vafa & Rebecca Epstein, *Criminalized Survivors: Today's Abuse to Prison Pipeline for Girls*, GEO. CTR. GENDER JUST. & OPPORTUNITY, 1, 8 (2023), https://perma.cc/7R8L-LMBV [hereinafter *Criminalized Survivors*].

[234] *See* Danielle Malangone, *Understanding the Needs of Criminalized Survivors*, Ctr. for Ct. Innovation, https://perma.cc/PFH5-5VE2 (last visited Mar. 15, 2025); Jennifer Suchland, *What's Wrong with the U.S. Federal Response to "Sex Trafficking"?*, GENDER POL'Y REPORT (Jan. 11, 2023) https://perma.cc/XV7L-36H6.

[235] Swenstein & Mogulescu, *supra* note 175, at 119.

[236] *See Criminalized Survivors*, *supra* note 233.

[237] *See Relationship Between Law Enforcement & Survivors of Trafficking*, SAFE HOUSE PROJECT, https://perma.cc/M2UD-W429 (last visited Mar. 15, 2025).

does come forward to police, involvement with the system can re-traumatize them by: testifying against their abuser; risking incarceration; being treated as the perpetrator; or not being believed.[238] The anti-trafficking movement is guided by punishing the offender, rather than protecting the victim, in an effort to get to the root cause of trafficking.[239] In practice, this generally leads to the arrest of lower-level offenders instead of larger-scale traffickers, such as the Bottom girl.[240] By resisting carceral approaches, the focus becomes less about punishment and more about protection.[241] Poverty and homelessness leave women, particularly women of color, vulnerable to becoming participants of sex trafficking against their will or as a perpetrator for survival—instead of punishing them, advocating for affordable housing and livable wages directs the focus to the root cause.[242] While this approach requires an overhaul of policy and legislation, in the long term, it is the most effective way to uproot sex trafficking rings.

IV. Federalizing Sex Trafficking Statutes and Protections for Women

One of the main criticisms of the TVPA's and SESTA/FOSTA's protections is that they are not utilized by survivors or prosecutors, suggesting that protection of victims is a concept rather than reality.[243] Survivors must overcome bureaucratic hurdles before they can receive the TVPA's benefits.[244] Even if an affirmative defense was provided to women convicted of sex trafficking, they are sometimes in love with the trafficker, making it difficult to use the offer of an affirmative defense to convince her

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238 *See id.*; *Criminalized Survivors*, *supra* note 233; Mel Langness et al., *Prisons are Traumatizing, but it is Possible to Reduce Some of Their Harm*, URBAN INST. (Oct. 26, 2020), https://perma.cc/TL9E-NSMD.

239 Saba Demeke, *A Human Rights-Based Approach for Effective Criminal Justice Response to Human Trafficking*, 9 J. INT'L HUMANITARIAN ACTION 1, 1, 2 (2024).

240 *See* Swenstein & Mogulescu, *supra* note 175.

241 Demeke, *supra* note 239.

242 *A Human Rights-Based Approach to Address Human Trafficking*, FREEDOM NETWORK USA, https://perma.cc/TY2B-284K (last visited Mar. 15, 2025).

243 *See* GRETTA L. GOODWIN, SEX TRAFFICKING: ONLINE PLATFORMS AND FEDERAL PROSECUTIONS, GAO. REP. NO. 21-385, at 45–49 (2021) (finding that only a small portion of victims were able to receive services).

244 April Riegler, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 HARV. J.L. & GENDER 231, 233 (2007).

to cooperate with law enforcement.[245] Another issue with the current protections is that they are inconsistent between states and the federal legislation.[246]

A. *Federalizing Protections for Women Convicted of Sex Trafficking*

At the federal level, there is no statutory relief mechanism for clearing criminal records.[247] The Trafficking Survivors Relief Act of 2022 was introduced to expand federal protections for criminal record relief, but has yet to pass.[248] When federal lawmakers contemplate the expansion of relief for sex trafficking victims, they should include women who are convicted of sex trafficking, as explained above. While some states provide protection against the state's trafficking statutes that include these women, federally convicted women have no remedy for expungement or vacatur (removing criminal charges from one's record or setting aside a judgment against them).[249] By including women convicted of sex trafficking in federal safe harbor laws, it would not matter which state a woman is convicted in, she would have access to a statutory remedy to defend her case.[250]

Adopting protections for victims at a federal level is not without counterargument—at first glance, "the idea of not prosecuting individuals for the 'crimes' they commit is fairly controversial."[251] Admittedly, not all women involved in sex trafficking are innocent, and some commit egregious acts against others.[252] It would be hypocritical to address one woman's victimhood (the "Bottom" for example) while ignoring the reality that,

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[245] Isabella Blizard, *Chapter 636: Catching Those Who Fall, an Affirmative Defense for Human Trafficking Victims*, 48 U. PAC. L. REV 631, 644 (2017).

[246] *See* Sarah Dohoney Byrne & Jules Carter, *It's Time to Rectify the Unconscionable Burden Placed on Sex-Trafficked Girls*, JD SUPRA (Oct. 17, 2022), https://perma.cc/S2RG-FUCD.

[247] *Id.*

[248] *Prioritizing Survivor Voices at the Federal Level: Criminal Records Relief*, POLARIS PROJECT (Oct. 27, 2023), https://perma.cc/RCP4-M7VS.

[249] COLO. REV. STAT. ANN. § 18-3-504 (West 2024); N.J. STAT. ANN. § 2C:13-8 (West 2013); OKLA. STAT. ANN. tit. 21, § 748 (West 2022); *Prioritizing Survivor Voices at the Federal Level: Criminal Records Relief*, *supra* note 248.

[250] *See, e.g.*, *Prioritizing Survivor Voices at the Federal Level: Criminal Records Relief*, supra note 248.

[251] Myatt, *supra* note 176, at 600.

[252] *E.g.*, Emalie Gainey, *Medford Woman Found Guilty, Sentenced to Prison for Running Extensive Human Trafficking and Money Laundering Operation*, MASS. GOV. (Dec. 20, 2018), https://perma.cc/TU6T-PLUN.

despite their victimhood, they caused harm to others.[253] These "true perpetrators" come with their own complexities, but if punishment under a sex trafficking law is warranted, sex offender registration is not the best rehabilitation tool.[254] In addition to federal standards addressing human trafficking, the punishment for the crime as applied to women traffickers should be consistent between states.

B. *Eliminating the Requirement to Register as a Sex Offender*

Ultimately, not all women convicted of pimping or sex trafficking crimes are victims forced to commit the crime, and their actions may warrant appropriate punishment.[255] However, requiring registration as a sex offender should not be a part of that punishment because (1) these women do not fit the typical profile of a traditional sex offender, and (2) sex offender treatment, required with sex offender registration, does not serve a rehabilitative purpose for these types of women. To address this, the requirement to register should be federally excluded for women convicted of sex trafficking to better address their rehabilitation needs.[256]

Women convicted of sex trafficking are not usually appropriate candidates for sex offender registration.[257] Media outlets (and most recently QAnon conspiracy theories) have contributed to inaccurate portrayals of what a sex trafficker is—while women convicted of trafficking may use force or threats of force to gain compliance from victims, they are usually not sexually deviant.[258] These women tend to be closer to the victim because they "handle" them in the trafficker's absence, but are less likely to be physically

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[253] Joint Sent'g Mem. 22–23, No. 16-cr-00150 (suggesting a lower sentence for a woman convicted of sex trafficking of a child but arguing against absolving her of liability under a duress offense).

[254] See Meghann Cuniff, *Pimp Sentenced to Federal Prison for Sex Trafficking Three Teen Girls; 'Bottom Girl,' Once Considered a Victim, Gets Time, Too*, LAW & CRIME (Oct. 1, 2022, 9:12 AM), https://perma.cc/W8KL-ND9Q.

[255] *See, e.g.*, *Woman Guilty of Trafficking Women in Cantina Backroom*, DEP'T. JUST. (Jan. 30, 2023), https://perma.cc/NF7S-UPMC.

[256] See Kate Mogulescu & Leigh Goodmark, *Surveillance and Entanglement: How Mandatory Sex Offender Registration Impacts Criminalised Survivors of Human Trafficking*, ANTI-TRAFFICKING REV., Apr. 2020, at 125, 127 [hereinafter Mogulescu, *Surveillance*].

[257] *See* Zornosa, *supra* note 202, at 189–91.

[258] *Compare* Kevin Roose, *QAnon Followers Are Hijacking the #SaveTheChildren Movement*, N.Y. TIMES (Aug. 12, 2020), https://perma.cc/G29D-SN64, *with* Commonwealth v. Fan, 191 N.E.3d 1027, 1032 (Mass. 2022) *and* McKenzie, *supra* note 191.

or sexually abusive.[259]

Because of this, women convicted of sex trafficking typically do not fit the stereotype of a traditional sex offender—they recidivate more frequently, are motivated primarily by money or drugs, and their everyday lifestyle may include "violence, drug dependence, criminalization, and exploitation."[260] Additionally, women involved in trafficking operations may view sexual services as a "commodity for power, income, and even street survival."[261] In contrast, the traditional contact female sex offender is motivated by sexual deviance, rendering sex offender registration appropriate.[262] Because not all women sexually abuse the victims of their trafficking crimes, registering as a sex offender does not further the goal of reducing sexual violence in America.[263] Instead, these women face more barriers to successful community re-entry, including lack of employment options, denial of housing, and technology restrictions.[264]

Sex offender treatment is focused on sexually abusive or deviant behavior, which may not be an appropriate rehabilitation effort for women whose involvement in trafficking was answering phones or collecting money.[265] Treatment also requires these women to take accountability for their crime to progress in the program.[266] This poses a problem for "Bottom girls" who may not acknowledge their victimhood at all—either way, complying with the requirements of treatment may be ingenuine and ineffective at encouraging these women to stop participating in trafficking.[267] Nevertheless, women convicted under sex trafficking statutes at the federal or state level may be required to register as a sex offender.[268] To achieve uniformity, sex offender registry laws should be reformed federally to avoid

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[259] *Fan*, 191 N.E.3d at 1032; McKenzie, *supra* note 191.

[260] Cortoni et al., *supra* note 5, at 331.

[261] Cortoni et al., *supra* note 5, at 331.

[262] Cortoni et al., *supra* note 5, at 331.

[263] Kristen M. Budd, *Responding to Crimes of a Sexual Nature: What We Really Want is No More Victims*, SENT'G PROJECT (Jan. 30, 2024), https://perma.cc/Z655-XCC8.

[264] Mogulescu, *Surveillance*, *supra* note 256, at 128.

[265] *See* Mogulescu, Surveillance, supra note 256, at 127; *Chapter 3: Sex Offense-Specific Assessment, Treatment, and Physiological Testing (Probation and Supervised Release Conditions)*, U.S. CTS., https://perma.cc/TPH6-NX3Z (last visited Mar. 15, 2025) [hereinafter *Sex Offense-Specific Assessment*].

[266] *Sex Offense-Specific Assessment*, *supra* note 265.

[267] *See* Haynes, *supra* note 216, at 350.

[268] *See Criminalizing Victims*, *supra* note 195.

conflict between state and federal requirements.[269]

Some states might not require a person to register, but at the federal level, the individual could be required to register anyway.[270] This means an offender could be required to register at the federal level but have no mechanism to do so in the state they live in. Because SORNA includes sex trafficking as a crime that requires registration, women convicted of the crime are required to register as a sex offender at the federal level.[271]

One way to eliminate the requirement to register for women traffickers is amending the factors considered by the Sex Offense Registration Board ("SORB")—the board in charge of deciding whether someone is required to register—to include gender differences.[272] For example, the Massachusetts SORB already considers gender when classifying the dangerousness of offenders by accounting for the fact that recidivism rates (the likelihood an offender commits another crime) for female sex offenders who commit a contact offense are generally lower than men's.[273] Additionally, the SORB recognizes that these women may have different treatment needs than adult men, and participation in alternate treatment programs should be assessed as a mitigating factor.[274] Lastly, because the SORB already recognizes the need for different treatment, the Board should choose to promulgate new regulations tailored to women convicted of trafficking that do not require registration.[275]

Contrary to popular belief, sex offender registries do little to help protect the public because most sexual abuse is perpetuated by family members or someone the victim knows, not by a stranger.[276] Putting women on the registry who have not committed a contact sex offense takes away from its

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[269] *See* Jacob Sullum, *A Federal Judge Says the DOJ's Sex Offender Registration Rules Violate Due Process by Requiring the Impossible*, REASON (Jan. 19, 2023, 3:45 PM), https://perma.cc/23NR-MVUH.

[270] 18 U.S.C. § 2250.

[271] 34 U.S.C. § 20911; 18 U.S.C. § 1591.

[272] *See generally* Lianne E. Henderson, *Gender as a Factor When Calculating a Sex Offender's Dangerousness*, 41 NEW ENG. J. CRIM. & CIV. CONFINEMENT 209, 219 (2015) (arguing for gender to be an important factor in SORB classifications).

[273] *See* Doe v. Sex Offender Registry Bd., 999 N.E.2d 478, 489 (Mass. 2013).

[274] 803 MASS. CODE REGS. 1.33 (2024).

[275] *See id.*

[276] Elizabeth L. Jeglic, *Fighting the "Stranger Danger" Myth*, PSYCH. TODAY (Sept. 3, 2022), https://perma.cc/6LXA-J959; Wendy Sawyer, *BJS Fuels Myths About Sex Offense Recidivism, Contradicting Its Own New Data*, PRISON POL'Y (June 6, 2019), https://perma.cc/E2V4-AB8A.

purpose and causes more obstacles to re-building a life outside of trafficking.[277] Further, sex offender treatment for women charged with sex trafficking crimes is less applicable, because they likely do not represent the "typical" sex offender—forcing it on them anyway takes away the opportunity to meet their needs and does not result in fewer victims of sexual assault.[278]

CONCLUSION

Sex trafficking is a layered topic, especially when managing the complexities of victims, perpetrators, and the victim-perpetrator. In Massachusetts, the human trafficking statute is too broad, while the protections for victims are too narrow. This results in victims falling through the cracks and being charged for acts committed while a victim of trafficking. Both Massachusetts and the federal government should provide comprehensive frameworks to avoid this result. Criminal justice involvement is unavoidable, but the ultimate goal should be to move away from criminalization as a solution and towards broader societal issues that leave women open to traffickers' tactics. Addressing the root causes of sex trafficking becomes more than an aspiration when the country provides more social resources to eliminate poverty, homelessness, discrimination, drug addiction, and more. But as trafficking persists, the questions on how to appropriately punish or protect women participating in trafficking regimes for different reasons than men remain. Through statutory reform, appropriating resources differently, and acknowledging treatment needs of women offenders, the anti-trafficking movement's dreams of eradicating victims can move one step closer to being realized.

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[277] *See* Mogulescu, *Surveillance*, *supra* note 256, at 127.

[278] *See* Cortoni et al., *supra* note 5, at 331.

From Hurt to Harm: Protecting Survivor-Parricide Defendants

Rachel Modi[*]

INTRODUCTION

Gypsy Rose Blanchard was born on July 27, 1991.[1] At 3 months old, Gypsy battled asthma and sleep apnea—a disorder that compromised her breathing during sleep.[2] As she aged, her health continually declined.[3] By 8 years old, doctors diagnosed Gypsy with brain damage, leukemia, and muscular dystrophy—a condition characterized by muscle weakness and limited mobility due to a genetic mutation.[4] These ailments left Gypsy confined to a wheelchair and dependent on a feeding tube.[5] On top of grappling with epileptic seizures and visual and hearing impairments, her numerous chronic medical conditions demanded a constant regimen of life-saving medications and numerous invasive surgeries, including the removal of her salivary glands.[6] The impact of Gypsy's chemotherapy manifested in hair loss, and the side effects of her anti-seizure medication resulted in her teeth rotting.[7]

[*] J.D. Candidate, New England Law | Boston (2025).

[1] Sara Kettler, *The Story of Gypsy Rose Blanchard and Her Mother*, BIOGRAPHY, https://perma.cc/65TS-Q7VZ (last updated Jul. 9, 2024, 5:13 PM).

[2] *Id.*; Mayo Clinic Staff, *Sleep Apnea*, MAYO CLINIC (Apr. 6, 2023), https://perma.cc/ZS9L-VZEY.

[3] *See* Kettler, *supra* note 1.

[4] Kettler, *supra* note 1; *Muscular Dystrophy*, MAYO CLINIC (Feb. 11, 2022), https://perma.cc/4D88-Q22B.

[5] Kettler, *supra* note 1.

[6] Kettler, *supra* note 1.

[7] *See* Kettler, *supra* note 1; Cory Stieg, *All the Health Conditions Dee Dee Blanchard Claimed Gypsy Had*, REFINERY29 (Mar. 27, 2019, 2:35 PM), https://perma.cc/NRB6-DEJM.

Gypsy's mother, Clauddine "Dee Dee" Blanchard (hereinafter "Dee Dee"), dedicated her life to caring for her daughter; as her sole caregiver, Dee Dee took Gypsy to her medical appointments and tried her best to provide her with the best quality of life despite Gypsy's overwhelming health challenges.[8] Tragically, Hurricane Katrina wreaked havoc on Dee Dee and Gypsy's Louisiana home; the flood left them with no choice but to be airlifted to St. John's Hospital, where they sought refuge and began searching for a new place to call home.[9] With the outpour of community support and donations, St. John's turned a house the hospital owned into a home for the Blanchards.[10]

At 19 years old, Gypsy's life took a sudden, heartbreaking turn.[11] On June 14, 2015, Dee Dee was found brutally stabbed to death in her bed in Springfield, Missouri.[12] She was stabbed seventeen times.[13] Legal authorities suspected that Dee Dee's murderer abducted Gypsy because she was missing and her wheelchair was found in the bathroom.[14] The investigation led police to Nicholas Godejohn's family home in Wisconsin, where they found both Gypsy and Nicholas (hereinafter "Nick").[15] Amidst the unfolding events, an even more astonishing discovery emerged: Gypsy could effortlessly walk *without* a wheelchair.[16] Following these shocking revelations, they were both arrested.[17]

Contrary to the perceptions of her friends, family, neighbors, medical

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[8] *See, e.g.*, Kettler, *supra* note 1 (noting charities would sponsor Gypsy and Dee Dee to concerts and Disney World trips).

[9] KY3 News - Springfield, Mo., *KY3 Flashback: Gypsy Blanchard, Mother Dee Dee Move to the Ozarks from Louisiana*, YOUTUBE (Dec. 27, 2023), https://perma.cc/9VKQ-R3QD.

[10] *Id*.

[11] *The Prison Confessions of Gypsy Rose Blanchard: Only Way Out*, at 22:50–25:00 (Lifetime television broadcast Jan. 7, 2024) [hereinafter *Only Way Out*].

[12] Kelsie Gibson, *A Timeline of Gypsy Rose Blanchard's Murder Case and Release from Prison*, PEOPLE (Jan. 2, 2024, 05:43 PM EST), https://perma.cc/QC3B-UWLD; Gina Tron, *The Different Murder Methods Gypsy Rose Blanchard, Nick Godejohn Considered: "Once We Do This, We Are Not Going to Be Able to Go Back"*, OXYGEN, https://perma.cc/CLU4-XFPS (last updated Jan. 4, 2024, 2:54 PM ET).

[13] Gibson, *supra* note 12; Tron, *supra* note 12.

[14] *Only Way Out*, *supra* note 11, at 34:19–34:35.

[15] *The Prison Confessions of Gypsy Rose Blanchard: Secret Engagement*, at 9:29-10:19 (Lifetime television broadcast Jan. 7, 2024) [hereinafter *Secret Engagement*].

[16] *Id*. at 13:56–14:10.

[17] *Id.* at 13:36–13:45.

professionals, and other members of the public—as well as Gypsy's own perception—Gypsy had none of the previously diagnosed conditions and was seen *walking* into the courtroom.[18] In reality, Gypsy was fully capable of walking, did not require a feeding tube, and had no trace of cancer.[19] Her baldness was not the result of any medical condition, but rather a deliberate choice by her own mother to imitate the appearance of chemotherapy.[20] Dee Dee frequently relocated to different states with Gypsy to prevent Gypsy from receiving consistent medical care from a single doctor who may eventually recognize her mother's intentional harm and child abuse.[21] In fact, Dee Dee administered to Gypsy "medications to mimic the symptoms of the diseases she claimed Gypsy had."[22] Despite knowing she could walk and did not need a feeding tube, Gypsy wholeheartedly believed her mother's claims that she suffered from leukemia, asthma, vision and hearing impairments, muscular dystrophy, and seizures.[23] Her young age and assumption that her mother knew best influenced Gypsy to obey Dee Dee's orders to remain bound to her wheelchair; in Gypsy's own words, "I didn't question it."[24] Furthermore, despite Gypsy being 23 years old, Dee Dee convinced Gypsy and the public that she was 19 years old by forging her birth certificate.[25]

When Gypsy dared to escape the abusive and toxic environment orchestrated by her mother, she faced severe consequences.[26] She was chained, like a dog, to her bed for 2 weeks, her mother placed bells on doors to monitor her movements, and she endured food deprivation as punishment.[27] In a calculated move, Dee Dee kept a knife on her bedside

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[18] *Id.* at 24:27–25:26; GYPSY-ROSE BLANCHARD ET AL., RELEASED: CONVERSATIONS ON THE EVE OF FREEDOM loc. 8 (Kindle ed. 2024) (e-book).

[19] Kettler, *supra* note 1.

[20] Kettler, *supra* note 1.

[21] Kettler, *supra* note 1.

[22] Harriet Sokmensuer, *How Murdered Missouri Mom Scammed the World and Controlled Daughter by Faking Girl's Health Problems*, PEOPLE (May 10, 2017, 1:00 PM EDT), https://perma.cc/FLZ3-CAU9.

[23] ABC News, *Gypsy Rose Part 4: Woman Once Praised for Battle with Illness Revealed to Have Never Been Sick*, YOUTUBE (Mar. 13, 2019), https://perma.cc/86BJ-U85U.

[24] *Id.*

[25] BLANCHARD ET AL., *supra* note 18, at 27.

[26] *Only Way Out*, *supra* note 11.

[27] *Only Way Out*, *supra* note 11.

table to deter Gypsy from running away again.[28] The situation escalated as Dee Dee resorted to physical abuse by pinching Gypsy's thighs and legs and beating her with a coat hanger.[29] As Dee Dee methodically isolated Gypsy from friends and relatives throughout her life, she rendered Gypsy completely dependent on her mercy, despite Gypsy's efforts to break free.[30] Unable to perform basic tasks like cooking and cleaning, Gypsy felt utterly helpless, as her mother had taken care of everything for her entire life.[31] Dee Dee left Gypsy with both physical and emotional scars.[32] Eventually, law enforcement investigations revealed that Dee Dee suffered from Munchausen Syndrome by Proxy; Munchausen Syndrome by Proxy is "a form of abuse in which a guardian may seek attention or sympathy by making their child ill or exaggerating their illness."[33] Dee Dee sought public attention and sympathy by subjecting her daughter to her abuse and control to help her fraudulently garner "hundreds of thousands of dollars in gifts—from free trips to medical treatments to their Habitat for Humanity home . . . ."[34]

As Gypsy grew older, she circumvented her mother's strict control by creating multiple secret social media accounts, where she eventually met Nick.[35] Unbeknownst to Gypsy, her relationship with Nick was yet another cycle of abuse and manipulation; however, Gypsy planned to finally escape her mother's grasp with Nick's help.[36] On June 14, 2015, once Dee Dee was asleep, Gypsy coordinated Nick's entry into her home.[37] Passing him a knife, Gypsy hid in the bathroom and covered her ears to shield herself from her mother's impending screams.[38] Meanwhile, Nick entered Dee Dee's

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[28] *Only Way Out*, *supra* note 11.

[29] *Only Way Out*, *supra* note 11.

[30] BLANCHARD ET AL., *supra* note 18, at 36 (stating "Dee Dee would build a family of just two," by moving away from all family, and would limit her interactions with others); *Only Way Out*, *supra* note 11.

[31] *Only Way Out*, *supra* note 11.

[32] BLANCHARD ET AL., *supra* note 18, at 12.

[33] Gibson, *supra* note 12.

[34] BLANCHARD ET AL., *supra* note 18, at 10.

[35] BLANCHARD ET AL., *supra* note 18, at 10.

[36] *See* BLANCHARD ET AL., *supra* note 18, at 10 (explaining that Nick forced Gypsy into BDSM and sexual acts with a threat to take away his "love" if she did not comply).

[37] BLANCHARD ET AL., *supra* note 18, at 10.

[38] BLANCHARD ET AL., *supra* note 18, at 10.

bedroom and stabbed her seventeen times.[39]

Ultimately, Gypsy was charged with first-degree murder.[40] After negotiations, she pled guilty to second-degree murder and received a 10-year sentence, without the possibility of probation, at the Chillicothe Correctional Center in Missouri.[41] Nick is "serving life without parole for first-degree murder."[42] In Missouri, inmates typically become eligible for parole after serving 85% of their sentence.[43] After serving over eight years behind bars, the board granted Gypsy parole, and she was released on December 28, 2023.[44] Contrary to expectations, Gypsy was not sent to a mental health facility but instead to prison, with little to no access to mental health treatment after suffering decades of physical, emotional, and medical abuse by her mother.[45] Tragically, Gypsy's situation is not unique; she is one of many adolescents who have resorted to violence against their parents after enduring decades of abuse.[46]

Part I of this Note delves into the pervasive issue of child abuse in the U.S., investigating characteristics of parricide offenders, and examining cases where survivor-parricide defendants face legal repercussions for taking the lives of their abusers. Part II emphasizes the significance of the law acknowledging cognitive adolescent development and prioritizing rehabilitation as a more cost-effective policy. Part III inspects the various theories of self-defense, including perfect and imperfect self-defense claims,

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[39] Tron, *supra* note 12; Gibson, *supra* note 12.

[40] *See* Kettler, *supra* note 1.

[41] Dan Patterson, *Gypsy Blanchard Pleads Guilty to Murder of her Mother*, GREENE COUNTY MISSOURI (July 5, 2016), https://perma.cc/PKJ8-DAMW (claiming her sentence considered the "nearly two decades of systematic and purposeful abuse . . . by her mother. . .").

[42] BLANCHARD ET AL., *supra* note 18, at 10.

[43] *See* Patterson, *supra* note 41.

[44] *See* Kettler, *supra* note 1 (stating her sentence of ten years was 85% served).

[45] BLANCHARD ET AL., *supra* note 18 (illuminating the challenges of obtaining adequate mental health treatment for conditions stemming from abuse and trauma while incarcerated, stating that "[a]ccording to the penal system, [she] doesn't qualify for therapy [because she is] too 'well.'" Gypsy identified struggling with "codependency, PTSD, insecurity, abandonment, personality disorders, addiction, [and] trust [issues]. . .," among other conditions); *The Prison Confessions of Gypsy Rose Blanchard: Born a Prisoner* (Lifetime television broadcast Jan. 7, 2024).

[46] Julie Rowe, *Escaping a Life of Abuse: Children Who Kill Their Batterers and the Proper Role of "Battered Child Syndrome" in Their Defense*, 2 AM. U. CRIM. L. BR. 26, 26 (2006) (stating 90% of all parricide offenders have endured combinations of severe physical, emotional, or sexual abuse prior to the homicide).

fear-based provocation, and others. This section also advocates for the inclusion of the fear-based provocation defense and expert testimony of battered child syndrome as a national legislative mandate to establish consistency in sentencing.

Finally, Part IV will argue that courts and legislatures must reduce sentences to prevent further criminalization of abused survivor-parricide defendants, and efficiently allocate resources to innovative rehabilitation programs to treat their prolonged exposure to physical, emotional, and sexual abuse at the hands of parents. The measures discussed throughout this Note are essential for addressing the unique needs of these adolescent survivor-parricide defendants and ultimately benefiting society. The fundamental principle guiding this Note—the equal worth of every human life—emphasizes the importance of recognizing abused defendants as *victims* first.[47] Without condoning violence or advocating for acquittals, this Note aims to establish a foundation to reduce charges and sentences and increase rehabilitative alternatives for adolescent survivor-parricide defendants.[48]

I. Background

A. *An Overview of Child Abuse in the United States*

At least one in seven children have faced child abuse or neglect.[49] In 2022, approximately 560,000 children suffered from abuse and neglect—the exact number is likely higher due to underreporting.[50] Nationwide, approximately 2,000 children died due to abuse and neglect.[51] Adding to the grim reality, the infamous COVID-19 pandemic rapidly increased rates of child maltreatment.[52] Defined by the World Health Organization as "all forms of physical and emotional ill-treatment, sexual abuse, neglect, and

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[47] Michal Buchhandler-Raphael, *Fear-Based Provocation,* 67 AM. U. L. REV. 1719, 1740 (2018).

[48] *Id.* at 1727.

[49] *About Child Abuse and Neglect*, CDC (May 16, 2024), https://perma.cc/N5QE-TYUT.

[50] Children's Bureau, *Child Maltreatment 2022*, DEP'T HEALTH & HUM. SERVS. (Jan. 29, 2024), https://perma.cc/7NNQ-NS8L (uncovering that "74.3% of victims experience neglect, 17% are physically abused, 10.6% are sexually abused, and 6.8% are psychologically maltreated").

[51] *Child Maltreatment Statistics*, AM. SPCC, https://perma.cc/CW9Z-5GC8 (last visited Mar. 28, 2024).

[52] *See generally* Divya Mehta et al., *Child Maltreatment and Long-Term Physical and Mental Health Outcomes: An Exploration of Biopsychosocial Determinants and Implications for Prevention*, 54 CHILD PSYCHIATRY & HUM. DEV. 421, 421 (2021).

exploitation that results in actual or potential harm to the child's health, development or dignity," child abuse overwhelmingly occurs at the hands of parents.[53] Its repercussions extend far beyond immediate physical injuries, but encompass severe long-term consequences such as anxiety, post-traumatic stress, delayed brain development, substance abuse, and more.[54] The most common types of abuse are physical, sexual, emotional, and psychological.[55] Physical abuse includes "intentional acts of physical force by a parent or caregiver . . . excluding lawful corporal punishment," while sexual abuse involves sexual acts imposed upon a child without the capacity to consent by exercising power over the victim to derive both physical and mental satisfaction.[56]

In the early 1960s, the issue of child abuse garnered significant attention because technological advancements in X-rays made it easier to uncover injuries that were not visible to the naked eye.[57] This heightened awareness marked a pivotal societal change that challenged the deep-rooted presumption that physical force was an inherent parental right that furthered the best interests of the child.[58] Despite this progress, society remains reluctant to fully confront the pervasive reality of child abuse.[59] Families frequently withdraw into isolation, distancing themselves from outsiders who may potentially detect abuse.[60] Even if other family members or outsiders are aware of the abuse, many often hesitate to intervene.[61] For the abused children, this commonly creates a feeling of helplessness and a "'concentration camp' mentality where they feel they have no options and cannot leave home."[62] While victims of abuse may attempt to run away, many tragically resort to suicide.[63] Within this group of abused children,

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[53] Dulce Gonzalez et al., *Child Abuse and Neglect*, NAT'L LIBR. MED., https://perma.cc/PEJ6-NENF (last updated July 4, 2023); Children's Bureau, *supra* note 50, at 23 (stating that in 2022, "89% of victims are maltreated by one or both parents").

[54] CDC, *supra* note 49.

[55] CDC, *supra* note 49; Gonzalez et al., *supra* note 53.

[56] Mehta et al., *supra* note 52, at 422.

[57] Jamie Heather Sacks, *A New Age of Understanding: Allowing Self-Defense Claims for Battered Children Who Kill Their Abusers*, 10 J. CONTEMP. HEALTH L. & POL'Y 349, 353 (1994).

[58] *Id.* at 353–54.

[59] *Id.* at 354.

[60] *Id.* at 355.

[61] *Id.*

[62] *Id.* at 355–56.

[63] Sacks, *supra* note 57, at 355 n.46.

parricide offenders represent a less common yet deeply concerning response to parental abuse.[64] Understanding the circumstances surrounding these individuals is crucial in grasping how they transition from being the victims of hurt to the perpetrators of harm.

B. *Parricide: Understanding the Act of Killing One's Parent(s)*

Parricide is the general term for the unlawful killing of one's mother, father, or another close relative.[65] If the mother is killed, the crime is classified as matricide; a father's murder is classified as patricide.[66] Internationally, parricide accounts for approximately 2% to 4% of all homicides.[67] In the United States, according to the Federal Bureau of Investigation, as many as 300 parents are killed annually by their children.[68] Biological parents are frequently the victims, but stepparents and adoptive parents are also targeted.[69] Sons perpetuate nearly 90% of these cases, while the least likely scenario is daughters killing their mothers.[70]

A common framework for analyzing different parricide offenders divides them into three categories: "the severely abused child who kills to end the abuse, the severely mentally ill child, and the dangerously antisocial child."[71] The severely abused child is the most common type of parricide offender among adolescents and will be the only type referenced throughout this Note.[72] The nature of parricide often presents itself in a seemingly methodical way, as it frequently unfolds during non-confrontational settings when the parent is asleep, watching TV, or otherwise distracted.[73] Therefore, because parricide scarcely occurs during violent confrontations, prosecutors

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[64] Susan Hatters Friedman et al., *Honor Thy Parents? Understanding Parricide and Associated Spree Killings*, 21 CURRENT PSYCH. 33, 33–34 (2022), https://perma.cc/W7ES-WU5N.

[65] Jordan Gray & Erica Hutton, *Parricide Definition, Factors & Cases*, STUDY.COM, https://perma.cc/YC2E-NELV (last updated Nov. 21, 2023).

[66] *Id.*

[67] Friedman et al., *supra* note 64, at 34.

[68] KATHLEEN M. HEIDE, UNDERSTANDING PARRICIDE: WHEN SONS AND DAUGHTERS KILL PARENTS 8 (2012).

[69] HEIDE, *supra* note 68, at 5.

[70] Rowe, *supra* note 46, at 26.

[71] HEIDE, *supra* note 68, at 8.

[72] HEIDE, *supra* note 68, at 9.

[73] Rowe, *supra* note 46, at 26.

tend to pursue first-degree murder charges.[74] Society impulsively categorizes parricide defendants as lacking "morals or conscience."[75] Many people are reluctant to accept that a child could be capable of such an act.[76] However, a closer, more empathetic look unveils a stark reality: 90% of all parricide offenders frequently do not react until they have endured severe physical, emotional, and or sexual abuse for years.[77] They often reach a breaking point when they can no longer tolerate the physical or psychological suffering.[78] These children frequently view killing their parents as the only way to shatter the chains of relentless abuse.[79]

These children "often suffer[] from long-standing depression and post-traumatic stress disorder" ("PTSD").[80] PTSD is a psychiatric disorder that occurs in those who have "experienced or witnessed a traumatic event, series of events or a set of circumstances."[81] These individuals continually relive the traumatic event through intrusive thoughts, vivid images, flashbacks, or haunting nightmares while existing in a constant state of hypervigilance for any potential danger.[82] In approximately 90% of parricide cases, the child is not only a perpetrator, but also the victim of extensive physical, emotional, and potentially sexual abuse.[83] Many of these children appear to have close relationships with their parents and are often described as obedient adolescents.[84] Psychologists observe that these types of parents typically view children as objects or possessions solely existing to fulfill their needs.[85] Escaping their abusive homes is not always a feasible option, as

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[74] Rowe, *supra* note 46, at 26.

[75] Rowe, *supra* note 46, at 26.

[76] Elizabeth L. Turk, *Abuses and Syndromes: Excuses or Justifications?*, 18 WHITTIER L. REV. 901, 924 (1997).

[77] Rowe, *supra* note 46, at 26.

[78] Turk, *supra* note 76, at 924; HEIDE, *supra* note 68, at 9.

[79] Turk, *supra* note 76, at 924; HEIDE, *supra* note 68, at 9.

[80] HEIDE, *supra* note 68, at 9.

[81] *What is Posttraumatic Stress Disorder (PTSD)?*, AM. PSYCHIATRIC ASS'N, https://perma.cc/GBY5-G4L5 (last visited Nov. 2022).

[82] HEIDE, *supra* note 68, at 9.

[83] Jennifer R. James, *Turning the Tables: Redefining Self-Defense Theory for Children Who Kill Abusive Parents*, 18 LAW & PSYCH. REV. 393, 393 (1994); Rowe, *supra* note 46, at 26.

[84] Susan C. Smith, Comment, *Abused Children Who Kill Abusive Parents: Moving Toward an Appropriate Legal Response*, 42 CATH. U. L. REV. 141, 154 (1992).

[85] *Id.* at 154.

many adolescent victims do not have a location in which to seek refuge.[86] Those who manage to run away are commonly caught and returned home, or they voluntarily return due to a lack of financial resources, inadequate job skills, and an incomplete education.[87] In some states, persons harboring a runaway juvenile without the parent's consent are guilty of a crime.[88] Ultimately, many parricide defendants demonstrate substantial remorse for their actions, yet trade one instance of imprisonment at home for another in prison.[89]

C. *Notable Examples of Parricide Trials in the Courtroom*

Similar to Gypsy's case, the Menendez brothers' story is another controversial parricide case.[90] On August 20, 1989, Lyle and Erik Menendez—21 and 18 years old respectively—shot and killed their parents.[91] Following three trials spanning seven years, both brothers were convicted and sentenced to life without the possibility of parole.[92] The prosecution argued that the brothers were influenced by the potential inheritance of their parents' wealth.[93] From the outside, the Menendez family appeared to embody the American Dream with their prosperous lifestyle.[94] However, unbeknownst to the public eye, the brothers suffered from years of physical, sexual, and psychological abuse at the hands of their parents.[95] Although their father bound each child to secrecy, Erik confided in Lyle about the years of sexual abuse, and Lyle confronted his father.[96] After they carried out the killing, they attempted to establish alibis and pin the murders on Mafia-related motives.[97]

Initially, the brothers were charged with two counts of first-degree

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[86] HEIDE, *supra* note 68, at 7.

[87] HEIDE, *supra* note 68, at 7.

[88] HEIDE, *supra* note 68, at 7.

[89] HEIDE, *supra* note 68, at 10.

[90] Turk, *supra* note 76, at 941.

[91] Turk, *supra* note 76, at 941.

[92] Jordan Zakarin, *Why the Menendez Brothers Killed Their Parents*, BIOGRAPHY, https://perma.cc/V7FQ-XR9W (last updated May. 2, 2023).

[93] Menendez v. Tehrune, 422 F.3d 1012, 1017 (9th Cir. 2005).

[94] Zakarin, *supra* note 92.

[95] *Menendez*, 422 F.3d at 1017.

[96] *Id.*

[97] *Id.* at 1019.

murder and one count of conspiracy to commit murder and faced the possibility of the death penalty.[98] During the first trial, they were jointly tried by two separate juries, and the brothers conceded to the killings through the "imperfect self-defense" theory.[99] California made the imperfect self-defense claim available for "defendants who have a genuine, albeit unreasonable, fear of imminent death or great bodily injury . . . [and] can be found guilty of no more than manslaughter."[100] Consequently, the brothers testified that they experienced prolonged abuse and fear of their parents.[101] Lyle testified that, until the age of 13, his father forced him to perform oral sex on him and sodomized Lyle with a toothbrush while his mother instructed him to touch her "everywhere."[102] Erik testified that his father sexually abused him up until the killing.[103] The jurors heard from numerous witnesses, including friends, family members, coaches, and teachers who saw the physical and mental abuse the brothers endured, and who recounted the physical assault, public humiliation, and mockery inflicted on the boys by their parents.[104] During the first trial, expert testimony indicated that the sexual and emotional abuse was so severe that it contributed to both brothers being significantly emotionally immature compared to their peers.[105] Although the judge permitted jury instructions on the imperfect self-defense claim, the first trial ended in two hung juries because of their inability to agree on the homicide degree.[106]

The second trial was before a single jury, and though Lyle did not "testify in his own defense," Erik testified about his and Lyle's abuse and fear of their parents.[107] As a result, the court held that Lyle "failed to lay a foundation" to introduce testimony from the first trial in support of his theory of self-defense.[108] The judge also did not allow the jury to consider the

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[98] *Id.* at 1023.

[99] *Id.* (citation omitted).

[100] *Id.* (citation omitted).

[101] *Menendez*, 422 F.3d at 1024.

[102] Turk, *supra* note 76, at 941.

[103] Turk, *supra* note 76, at 941.

[104] Erik Menendez and Lyle Menendez's Pet. for Writ of Habeas Corpus at 2–3, No. BA068880 (Cal. App. Dep't. Super. Ct. May 3, 2023).

[105] Turk, *supra* note 76, at 942.

[106] *Menendez*, 422 F.3d at 1024.

[107] *Id.*

[108] *Id.*

imperfect self-defense theory or admit evidence of emotional abuse, which prevented jurors from convicting for manslaughter.[109] The jury found the brothers guilty of murder in the first-degree and sentenced them to life without the chance of parole.[110]

Another example of parricide reaching the courtroom is the case of John Bradshaw, Jr. ("Bradshaw") in 1994.[111] At 20 years old, after suffering through a life filled with physical and sexual abuse, Bradshaw killed his father with a .22-caliber rifle.[112] During the trial, Bradshaw revealed that when he was 11 years old, his father's actions toward him ranged from beatings to molestation.[113] The sexual abuse began after his mother left to escape the repeated violent assaults from Bradshaw's father, which included putting a weapon to her head.[114] Bradshaw spoke concerning his father: "He'd tell me it was my fault that mom had left. He said I said I had to do everything he asked. He grabbed my head and pulled it down on his privates."[115] Before the killing, Bradshaw and his father had an altercation that resulted in his father threatening to kill him while pointing a 16-gauge shotgun at Bradshaw's forehead.[116] With the introduction of sexual and emotional abuse evidence to aid in Bradshaw's self-defense claim, the jury returned a guilty verdict on the charge of voluntary manslaughter.[117]

Richard Jahnke ("Jahnke") is another parricide case that caught national attention.[118] At 16 years old, Jahnke shot and killed his father through the garage door after state social services failed to investigate a child abuse report filed six months earlier; he was charged with first-degree

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[109] Turk, *supra* note 76, at 943.

[110] *Menendez*, 422 F.3d at 1025; Stephanie Slifer, *Menendez Brothers Await a Decision They Hope Will Free Them*, CBS NEWS, https://perma.cc/RK9P-FGM9 (last updated Mar. 3, 2024, 2:12 AM EST) (discussing new evidence, not submitted at either trial, that could vacate their convictions; including both a letter written by Erik to Erik's cousin, Andy Cano, months before the crime describing his fear of abuse, and Roy Rossello's sworn affidavit claiming he was also sexually abused by the Menendez brothers' father as a minor).

[111] James, *supra* note 83, at 405.

[112] James, *supra* note 83, at 405; Dennis J. Opatrny, *Son Says He Killed Father to End Abuse*, S.F EXAM'R, Mar. 18, 1994, at A-3.

[113] Opatrny, *supra* note 112, at A-3.

[114] Opatrny, *supra* note 112, at A-3.

[115] Opatrny, *supra* note 112, at A-3 (internal quotations omitted).

[116] Opatrny, *supra* note 112, at A-3.

[117] *See* Opatrny, *supra* note 112, at A-3.

[118] Turk, *supra* note 76, at 938.

murder and conspiracy to commit murder.[119] Similar to countless cases of parricide, Jahnke and other witnesses relayed the years of mental, physical, and sexual abuse at the hands of his father to aid in his self-defense claim.[120] Jahnke attempted to introduce a forensic psychiatrist's expert testimony regarding his prolonged abuse to demonstrate the reasonableness of his actions, but the judge ultimately excluded the evidence—because the incident occurred during a non-confrontational period—and Jahnke appealed to the Wyoming Supreme Court.[121] The court ruled that, unless there was evidence of imminent harm by the deceased, the reasonableness of Jahnke's actions was not relevant in the case, and the lower court properly excluded the expert testimony.[122] Dissenting judges argued that expert testimony was vital for a jury to accurately understand a battered person's perception of imminent danger based on years of abuse.[123] Nevertheless, amidst a fury of public outrage over Jahnke's incarceration, the governor substituted his sentence; Jahnke was directed to undergo psychiatric evaluation, followed by a month of intensive psychiatric intervention, and then placed in a juvenile facility until the age of 21.[124]

Lastly, in 2006, after 14 year old Cody Posey ("Posey") killed his father, stepmother, and young stepsister, he was charged with three counts of first-degree murder.[125] His defense attorneys revealed the years of abuse Posey suffered at the hands of his father and stepmother and argued his actions were in self-defense.[126] Other than Posey's own testimony, over 30 teachers, relatives, and friends corroborated the abuse through numerous pieces of evidence—such as pictures of physical marks inflicted by his father.[127] Even up until the killing, "his father burned him with a welding rod and a blowtorch after [Posey] refused to have sex with his stepmother [which resulted in] burn marks on his arms, and large amounts of pornography

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[119] HEIDE, *supra* note 68, at 21; Turk, *supra* note 76, at 938.

[120] Turk, *supra* note 76, at 938.

[121] Turk, *supra* note 76, at 938.

[122] Turk, *supra* note 76, at 938.

[123] Turk, *supra* note 76, at 939.

[124] Turk, *supra* note 76, at 938–39; *see also* HEIDE, *supra* note 68, at 21–22 (revealing public sympathy, more than 1,000 letters were written to the *60 Minutes* television broadcast covering the story in support of Jahnke receiving sympathetic treatment).

[125] HEIDE, *supra* note 68, at 23.

[126] HEIDE, *supra* note 68, at 23.

[127] HEIDE, *supra* note 68, at 23.

labeled 'incest' . . . on Cody's father's computer."[128] Two psychologists testified that the overwhelming amount of physical and sexual abuse had severe adverse impacts on his decision-making choices and ultimately led him to his breaking point.[129] Convicted of voluntary manslaughter of his father, the judge refused to place him in prison, but instead placed him under state supervision to receive necessary treatment for his trauma.[130]

II. The Case for Compassion: Why Prioritizing Rehabilitation for Adolescent Survivor-Parricide Defendants Benefits Society

Mass incarceration is a pressing problem in the U.S.[131] Although the U.S. accounts for only 5% of the world's population, the U.S. houses nearly 25% of the world's incarcerated population, with 2.2 million people behind bars.[132] The $87 billion budget prioritizes warehousing offenders over providing sustainable long-term resources that would ultimately reduce crime.[133] As discussed later in this Note, higher rates of incarceration do not equate to safer communities.[134] More than 95% of people sent to prison—including many young killers—are released back into society, but they are unequipped with coping mechanisms due to the absence of adequate mental health treatment while incarcerated.[135] This inevitability prompts a question to society: "What kind of neighbor do we really want? Because they could move into my neighborhood, and they could move into your neighborhood."[136] The response could either further harm society or steer the nation toward prioritizing rehabilitation.[137]

Countless studies explain that the human brain does not fully develop

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[128] HEIDE, *supra* note 68, at 23–24.

[129] HEIDE, *supra* note 68, at 24.

[130] HEIDE, *supra* note 68, at 24.

[131] *Criminal Justice Reform*, EQUAL JUST. INITIATIVE, https://perma.cc/NY2J-BHES (last visited Mar. 29, 2024).

[132] *Id.*

[133] *Id.*; *see* RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 61–62 (2019) (detailing how extensive studies have shown a significant 50% reduction in recidivism rates with cognitive-behavioral treatment).

[134] Colette Wilcox, *Rehabilitation is a Humanitarian Mandate*, LINCOLN MEM'L U.L. REV. (Oct. 20, 2023), https://perma.cc/YLP6-8MGM.

[135] BARKOW, *supra* note 133, at 46; HEIDE, *supra* note 68, at 320.

[136] NowThis, *How Norway's Prisons Are Different from America's | NowThis*, YOUTUBE, at 0:19–0:25 (Aug. 6, 2020), https://perma.cc/WDV9-QXN9.

[137] *See id.*

until the age of 25, and enduring severe trauma, including abuse, can further hinder this fundamental development.[138] Neurological research confirms that the brain undergoes significant "rewiring" until approximately age 25 to develop an imperative area of the brain: the prefrontal cortex.[139] The prefrontal cortex is responsible for exercising good judgment and reasoning, impulse control, regulating emotions, applying appropriate behavior, restraining inappropriate behavior, and other important key functions.[140] Despite the medical community defining adolescence as biologically spanning from ages 10 to 24 years, the U.S. criminal justice system punishes these adolescents as fully developed adults at age 18.[141] A handful of states even allow juveniles to be prosecuted as adults as early as age 12.[142]

In the context of adolescent parricide offenders, their limited life experience leaves them less equipped to navigate an abusive environment compared to developed adults.[143] Adolescents often lack the capacity to consider alternatives due to their ongoing cognitive development while adults, arguably, possess greater resources and maturity to leave intolerable familial circumstances.[144] It is essential to recognize that "[a]dolescent parricide offenders . . . might shoot the same gun or wield the same knife as their adult counterparts, but equivalent weapon usage does not make the slayers equivalent . . . ."[145]

The criminal justice system is long overdue for alignment with the overwhelming medical evidence that recognizes the progressive nature of brain development from adolescence to adulthood. Acknowledging this evidence is not only crucial for the well-being of emerging adults who still

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138 See Nancy Wolff & Jing Shi, *Childhood and Adult Trauma Experiences of Incarcerated Persons and Their Relationship to Adult Behavioral Health Problems and Treatment*, 9 INT'L J. ENV'T RSCH. & PUB. HEALTH 1908, 1909 (2012).

139 Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 DOVE PRESS J: NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 451–53 (2013).

140 *Id.* at 453.

141 *Id.* at 452; *Age Matrix*, INTERSTATE COMM'N. FOR JUV., https://perma.cc/VX3C-BH6A (last updated Jan. 16, 2024) (indicating states such as Missouri, Montana, and Washington transfer juvenile cases to adult court at age 12, while states including New York and North Carolina set the minimum age to be transferred to adult court to age 13. Notably, other states, such as Maine, do not have a minimum age limit to transfer any juvenile case to adult court).

142 INTERSTATE COMM'N. FOR JUV., *supra* note 141.

143 HEIDE, *supra* note 68, at 8.

144 HEIDE, *supra* note 68, at 8.

145 HEIDE, *supra* note 68, at 7.

with capacity to positively rectify their behavior, but also indispensable for cultivating safer communities overall.[146] Gypsy Rose Blanchard was charged at 23 years old; Lyle and Erik Menendez at 21 and 18 respectively; John Bradshaw, Jr. at 23; Richard Jahnke at 16; Cody Posey at 14.[147] There is a common thread among these adolescents: a history of severe parental abuse overlooked by society.[148]

ANALYSIS

III. To Achieve a Just and Equitable Outcome, Courts Must Admit a Partial Legal Defense and Expert Testimony Regarding Battered Child Syndrome in Cases Involving Adolescent Survivor-Parricide Defendants

A. *Replace the Classic Self-Defense's Imminence Requirement with Fear-Based Provocation*

Parricide cases frequently diverge from textbook cases of self-defense.[149] The classic self-defense situation involves taking lethal action when immediately confronted with life-threatening circumstances.[150] It is framed as an "all or nothing" self-defense claim where the defendant is either acquitted based on justification for using deadly force or convicted of murder if found unjustified.[151] Specifically, the elements of self-defense include that the defendant: (1) was in a place the individual had the right to be; (2) acted without fault; (3) reasonably feared imminent death or great bodily harm that necessitated the use of force to save their life; and (4) did not violate a duty to retreat or avoid danger to prevent lethal harm to another if possible.[152] The last element may vary depending on jurisdiction, but many require that the defendant not be the first aggressor.[153]

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[146] *See* Arain et al., *supra* note 139, at 451–53.

[147] BLANCHARD ET AL., *supra* note 18, at 10; HEIDE, *supra* note 68, at 23; James, *supra* note 83, at 405; Opatrny, *supra* note 112, at A-3; Turk, *supra* note 76, at 938–41.

[148] *See* BLANCHARD ET AL., *supra* note 18, at 13; HEIDE, *supra* note 68, at 23; James, *supra* note 83, at 405; Opatrny, *supra* note 112, at A-1, A-3; Turk, *supra* note 76, at 938–41.

[149] *See* Sacks, *supra* note 57, at 350.

[150] Sacks, *supra* note 57, at 350.

[151] Buchhandler-Raphael, *supra* note 47, at 1764 (internal quotations omitted).

[152] 40 AM. JUR. 2D *Homicide* § 126 (2024).

[153] *See* Buchhandler-Raphael, *supra* note 47, at 1756.

In cases of homicide, the "perfect" self-defense claim requires the defendant to show their use of deadly force was justified; this involves demonstrating that they had an honest and reasonable belief of imminent deadly harm and that using lethal force was necessary to defend themselves.[154] A successful claim will result in an acquittal.[155] Conversely, the "imperfect" self-defense claim may be applicable when a defendant has an honest but mistaken belief that their own life is in danger.[156] It may also be applicable if the defendant utilized excessive force, or was the initial aggressor, and reasonably believed it was necessary to kill the deceased to save themselves from death or great bodily harm.[157] Alternatively stated, the imperfect self-defense claim "is the killing of another human being under the actual but unreasonable belief that the killer was [in] imminent danger of death or great bodily injury."[158] An imperfect self-defense claim will often return a lesser charge than homicide, such as involuntary manslaughter.[159] The central difference between perfect and imperfect claims rests on "reasonableness: whether the [individual] reasonably believed he or she was in imminent danger and whether he or she believed deadly force was necessary."[160] The imperfect self-defense claim, in effect, only acknowledges that the defendant reacted excessively to a perceived threat that others may view as unreasonable and unnecessary.[161] Unlike the perfect self-defense claim, which requires an objectively reasonable personal belief of bodily harm, an imperfect self-defense claim only requires a subjectively honest and reasonable belief.[162] While numerous jurisdictions exclusively acknowledge perfect self-defense claims, the Model Penal Code has influenced a considerable number of jurisdictions to recognize the imperfect self-defense claim.[163]

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[154] Buchhandler-Raphael, *supra* note 47, at 1756–57; 40 AM. JUR. 2D *Homicide*, *supra* note 152, § 127.

[155] Buchhandler-Raphael, *supra* note 47, at 1756; 40 AM. JUR. 2D *Homicide*, *supra* note 152, § 127.

[156] 40 AM. JUR. 2D *Homicide*, *supra* note 152, § 127.

[157] 40 AM. JUR. 2D *Homicide*, *supra* note 152, § 127.

[158] 40 AM. JUR. 2D *Homicide*, *supra* note 152, § 127.

[159] 40 AM. JUR. 2D *Homicide*, *supra* note 152, § 127.

[160] Marvis J. Van Sambeek, *Parricide as Self-Defense*, 7 MINN. J. L. & INEQ. 87, 92 (1989); 40 AM. JUR. 2D *Homicide*, *supra* note 152, § 127.

[161] Buchhandler-Raphael, *supra* note 47, at 1766; Sacks, *supra* note 57, at 359.

[162] 40 AM. JUR. 2D *Homicide*, *supra* note 152, § 127.

[163] Buchhandler-Raphael, *supra* note 47, at 1764–65.

Survivor-parricide defendants often only have four legal routes: "plead guilty, plead not guilty by reason of insanity, offer an excuse to mitigate the degree of the homicide verdict, or argue that the act was justifiable as self-defense."[164] The problem with both perfect and imperfect self-defense claims is that a threat to the defendant's life must still be "imminent" to justify lethal force, which ultimately remains a substantial barrier to adolescents who kill their parents after years of physical, psychological, and even sexual abuse.[165] The threat to a defendant's life in most parricide cases does not appear imminent to an uninformed eye, but rather appears like the murder was premeditated because these children predictably carry it out in a non-confrontational setting to avoid being abused again.[166] The deceased parent is often sleeping or is otherwise objectively not presenting an imminent threat.[167] For instance, in Gypsy's case, her mother was sleeping when Nick stabbed her to death.[168] Courts may refuse to apply the imperfect self-defense claim because of the judge's belief that self-defense cannot be grounded in anticipation of future fear, which was the case for the Menendez brothers, who killed their parents while they were watching TV.[169]

Lastly, some scholars advocate applying the provocation doctrine.[170] In exercising this doctrine, the defendant must demonstrate that their act was under a "'sudden heat of passion' resulting from 'adequate provocation'" almost immediately after an abrupt triggering incident, but before the defendant had time to calm down.[171] The provocation doctrine results in a voluntary manslaughter conviction, rather than first- or second-degree murder.[172] However, while some courts acknowledge that "passion" encompasses an array of emotions, a minority of courts recognize *fear* under the provocation doctrine.[173] Courts tend to recognize *anger*-based

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[164] Carl P. Malmquist, *Adolescent Parricide as a Clinical and Legal Problem*, 38 J. AM. ACAD. PSYCHIATRY & L. 73, 76 (2010).

[165] Buchhandler-Raphael, *supra* note 47, at 1766–67 (explaining that imminence requires the threat of violence to occur very soon and a response to its threat be urgent); Sacks, *supra* note 57, at 360.

[166] Buchhandler-Raphael, *supra* note 47, at 1767; Sacks, *supra* note 57, at 360.

[167] Buchhandler-Raphael, *supra* note 47, at 1767.

[168] BLANCHARD ET AL., *supra* note 18, at 9.

[169] Buchhandler-Raphael, *supra* note 47, at 1769.

[170] *See* Buchhandler-Raphael, *supra* note 47, at 1719.

[171] *See* Buchhandler-Raphael, *supra* note 47, at 1719–22.

[172] Buchhandler-Raphael, *supra* note 47, at 1719–22.

[173] Buchhandler-Raphael, *supra* note 47, at 1724–25.

provocation while *fear* is only acknowledged to satisfy self-defense claims, which has its own host of issues, as discussed above.[174] Professor Michal Buchhandler-Raphael advocates to mitigate this divergence by adding "fear" as a basis for the provocation defense for a defendant subjected to prolonged abuse.[175] Specifically, she proposes a two-pronged approach: one subjective, where defendants must demonstrate they acted out of fear of violence from the deceased which impaired their rational judgment; and another objective approach, comparing the defendant's reaction to that of an ordinary person in the same situation.[176]

Research indicates that emotions, including both fear and anger, can significantly impact decision-making and outweigh reason and judgment.[177] It is vital to recognize that "anger is not the only intense emotion that might lead to fatal aggression."[178] Fear can be equally powerful. When individuals experience extreme fear, their decision-making process is disrupted at various stages, including the perception of risk, beliefs about the situation, and choice of action.[179] Fear, and its accompanying reactions, are almost involuntary and challenging to "cognitively override."[180] Therefore, if both fear and anger can impair an individual's rational judgment, there is no reason for the law to favor one emotion over another. Both emotions a defendant faces must equally mitigate murder charges to voluntary manslaughter.[181] Therefore, Professor Buchhandler-Raphael's modification

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174 Buchhandler-Raphael, *supra* note 47, at 1724–25 ("Cases involving defendants who kill due to genuine fear of violence, albeit falling short of self-defense, therefore call for developing a theoretical basis for recognizing such fear as an alternative basis for triggering the provocation defense.").

175 Buchhandler-Raphael, *supra* note 47, at 1726.

176 Buchhandler-Raphael, *supra* note 47, at 1783, 1786.

177 Buchhandler-Raphael, *supra* note 47, at 1772.

178 Buchhandler-Raphael, *supra* note 47, at 1721.

179 Buchhandler-Raphael, *supra* note 47, at 1772.

180 Buchhandler-Raphael, *supra* note 47, at 1772 (quoting Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1407 (2006)).

181 Buchhandler-Raphael, *supra* note 47, at 1779; *see* Elizabeth D. Lauzon, Annotation, *Propriety of Lesser-Included-Offense Charge of Voluntary Manslaughter to Jury in State Murder Prosecution -- Twenty-First Century Cases*, 3 A.L.R.6th 543, § 2 (2005) (explaining that voluntary manslaughter, as defined by common law and various state statutes, encompasses the intentional, unlawful killing resulting from "an honest but unreasonable belief in the need" for imperfect or unreasonable self-defense or the intentional unlawful killing "in a sudden heat of passion" provoked by serious provocation).

would address a survivor-parricide defendant's reaction during a non-confrontational period when the threat of abuse is not imminent but is rooted in the defendant's subjective fear and history of abuse.[182] As a result of prior violence, evidence of the defendant's perpetual state of fear and uncertainty about renewed violence from the deceased could help render the killing as a subjectively reasonable act.[183] Effectively, defendants who were provoked by fear would not need to prove that deadly force was imminent.[184]

It is vital that evidence of the defendant's subjective state of mind, based on a "cumulative effect of several provoking incidents, rather than a single provocative event" of the abuse, be uniformly recognized to satisfy a fear-based provocation defense and avoid broad, unequal outcomes.[185] The fear aspect would be further substantiated by admitting expert testimony of battered child syndrome ("BCS").[186] Therefore, "[r]ecognizing fear-based provocation means that the law acknowledges that fearful killers ought to be partially excused, given their impaired judgment, even if the killing is not partially justified."[187] While courts uphold the narrow doctrine of self-defense, they equally bear critical responsibility to shield children from parental abuse. Statutorily introducing a fear-based provocation defense would effectively fulfill the interests of both the state and the survivor-parricide offender.

B. *Expert Testimony Corroborating BCS and Evidence of Abuse by the Deceased Must Be Compulsory to Ensure Fact-Finders Gain a Comprehensive Understanding of the Cycle of Child Abuse*

The inconsistent acceptance of a partial defense for adolescent survivor-parricide defendants suffering from prolonged child abuse has significantly affected the admission of expert testimony about BCS to illustrate the

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182 Buchhandler-Raphael, *supra* note 47, at 1726.

183 *See* Buchhandler-Raphael, *supra* note 47, at 1726.

184 Buchhandler-Raphael, *supra* note 47, at 1769.

185 Buchhandler-Raphael, *supra* note 47, at 1726.

186 Sacks, *supra* note 57, at 354.

187 Buchhandler-Raphael, *supra* note 47, at 1770.

defendant's mental state and behavior at the time of the killing.[188] The term "battered child syndrome" was introduced in 1962 by Dr. C. Henry Kempe ("Dr. Kempe") to describe a clinical condition in young children who had suffered serious physical abuse, typically from a parent or foster parent.[189] Dr. Kempe's article captivated national attention to child abuse, prompting the creation of mandatory child abuse reporting laws.[190] In contrast to BCS, which focuses on physical injuries of abuse, battered women syndrome ("BWS") examines the psychological impacts of abuse on women.[191] Thus, courts were reluctant to perceive these two syndromes as equivalent, resulting in disparities in admitting evidence of child abuse for parricide offenders compared to battered women.[192]

The term "battered person syndrome" ("BPS") gained recognition as some state legislatures acknowledged the detrimental effects of abuse on victims irrespective of gender.[193] This recognition helped address the disparities in admitting evidence of abuse for BWS and BCS by generally allowing victims to present expert testimony to argue that their actions were reasonable due to their perception of an immediate threat, even if the threat was not objectively present.[194] Despite this progress, there remain drawbacks for most parricide offenders: admitting evidence of BPS requires the defendant to establish a prima facie case of self-defense that adheres to the

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188 *See, e.g.*, Lauren E. Goldman, Note, *Nonconfrontational Killings and the Appropriate Use of Battered Child Syndrome Testimony: The Hazards of Subjective Self-Defense and the Merits of Partial Excuse*, 45 CASE W. RSRV. L. REV., 185, 195–96 (1994) (explaining that in Jahnke v. State, 682 P.2d 991 (Wyo. 1984), the Court rejected admission of psychiatric testimony about battered child syndrome because there was no evidence of imminent harm by the defendant's father before the killing).

189 Sacks, *supra* note 57, at 354.

190 Amanda Mahoney, Note, *How Failure to Protect Laws Punish the Vulnerable*, 29 HEALTH MATRIX 429, 433–34 (2019) (illustrating the increased national attention through the Child Abuse Prevention and Treatment Act (1974), which granted federal funding to prevent, identify, and treat child abuse and neglect).

191 Sacks, *supra* note 57, at 351.

192 *See* Sacks, *supra* note 57, at 379–81.

193 *See, e.g.*, Sacks, *supra* note 57, at 351–52 (demonstrating that in 1991, the Texas legislature became the first state "to pass a gender-neutral statute allowing evidence of family violence to be admitted when a woman or a child kills," and that in State v. Janes, 850 P.2d 495 (Wash. 1993), the Washington Supreme Court became the first state supreme court to hold that battered child syndrome "is the functional and legal equivalent of the battered woman syndrome").

194 Sara Weskalnies, Comment, *Abuse Victims Who Kill and the New Rehabilitation Model*, 2018 MICH. ST. L. REV. 451, 460–61.

traditional imminent threat requirement during a confrontational setting.[195] While evidence of BPS is more likely to be admitted in cases involving confrontational settings, there remains variation among states regarding the admissibility of expert testimony in non-confrontational homicide cases.[196] Courts may even exclude testimony that alludes to prior acts of the deceased's abusive conduct by deeming it as irrelevant and a potential distraction for the jury.[197] While an overwhelming majority of states consider expert testimony as relevant to clarify the defendant's state of mind and explain the history of abuse inflicted by the deceased, lawmakers are yet to enact proper legislation nationwide.[198]

A limited number of states, such as Texas and Louisiana, have enacted legislation addressing the admissibility of BCS in parricide cases, allowing evidence of abuse when self-defense is at issue.[199] Georgia enacted legislation permitting courts to consider the broader effects of BPS.[200] States like Massachusetts have taken a broader approach by statutorily permitting the admissibility of abuse and its effects, including expert testimony on patterns of abusive relationships and "whether the defendant displayed characteristics common to victims of abuse" where self-defense is at issue.[201] Additionally, states like Ohio have incorporated statutes to admit evidence of BCS through court rulings; for example, Ohio Evidence Rule 702's case notes outline that expert testimony on BCS must be admitted when deemed relevant, beyond the "knowledge of the ordinary person, and reliable."[202] Despite these progressive strides made by a handful of states, the overwhelming majority of legislatures have yet to follow suit, highlighting a notable gap in our criminal justice system's recognition of the extensive history of abuse suffered by most adolescent survivor-parricide offenders.[203]

To obtain a fair trial, it is paramount that a "jury of one's peers"

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[195] *See* Kathleen M. Heide et al., *Battered Child Syndrome: An Overview of Case Law and Legislation*, 41 CRIM. L. BULL. 218, 232 (2005).

[196] HEIDE, *supra* note 68, at 147.

[197] Weskalnies, *supra* note 194, at 466–67.

[198] HEIDE, *supra* note 68, at 147; Weskalnies, *supra* note 194, at 467.

[199] Rowe, *supra* note 46, at 30; s*ee, e.g.*, HEIDE, *supra* note 68, at 148–49 (displaying specific state statutes allowing evidence and expert testimony in cases involving abuse).

[200] Heide et al., *supra* note 195, at 230.

[201] MASS. ANN. LAWS ch. 233 § 23F (LexisNexis 2024).

[202] Rowe, *supra* note 46, at 30; HEIDE, *supra* note 68, at 148.

[203] HEIDE, *supra* note 68, at 148; Rowe, *supra* note 46, at 30.

thoroughly comprehend the perspective and rationale of a survivor-parricide defendant who endured years of child abuse.[204] Additionally, utilizing the fear-based provocation defense requires both subjective and objective elements that hinge on understanding BCS.[205] To reiterate, the subjective prong requires defendants to show that they acted out of fear of violence from the deceased, and the objective prong compares their reaction to that of an ordinary person in the same situation.[206] In other words, the test considers whether a reasonably prudent battered child would also believe that lethal force used by the defendant was necessary.[207] Given that most jurors have not personally experienced such abuse, expert testimony on BCS presented through a scientific lens becomes indispensable as a means to provide necessary insight.

The average juror may not fully grasp the nuanced indicators of imminent danger by the deceased, which are often discernible only by the abused child.[208] Here, an expert witness can testify about a child's PTSD manifesting through profound "anxiety, hyperactivity, episodes of terror, nightmares, and fatigue."[209] Particularly, hypervigilance, defined as being "acutely aware of [one's] environment and [remaining] on the alert for any signs of danger," becomes a critical element.[210] Victims of child abuse, gripped by hypervigilance, are compelled to scrutinize their parents' behavior and mannerisms to assess whether the parent is entering a pre-aggressive state and will soon become violent.[211] Far too often, children face the reality of being threatened with death or severe harm by their own parents if they dare disclose or report the abuse.[212] As in Gypsy's case, abusive parents may isolate the child from friends and family to prevent

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[204] Turk, *supra* note 76, at 946.

[205] Buchhandler-Raphael, *supra* note 47, at 1783, 1786.

[206] Buchhandler-Raphael, *supra* note 47, at 1783, 1786.

[207] Smith v. State, 486 S.E.2d 819, 822–23 (Ga. 1997) (explaining that evidence a defendant was suffering from battered person syndrome could authorize "finding that a reasonable person, who had experienced prior physical abuse [like] by the defendant, would reasonably believe that the use of force against the victim was necessary, even though that belief may have been, in fact, erroneous").

[208] Sacks, *supra* note 57, at 92, 350.

[209] Rowe, *supra* note 46, at 27.

[210] Rowe, *supra* note 46, at 27.

[211] Rowe, *supra* note 46, at 27.

[212] Rowe, *supra* note 46, at 27.

such disclosures.[213] Even when these victims attempt to reach out, they may encounter a lack of support from schools, relatives, and social agencies (as in Jahnke's case)—often because most do not want to interfere with immediate family relations.[214] Many social agencies hesitate to investigate allegations of child abuse unless the child can present immediate physical evidence, like bruises.[215]

Prolonged abuse inflicts profound defects in the child's sense of self, causing them to internalize blame for the maltreatment and strive even harder to appease the abusive parent.[216] Numerous studies indicate that the prefrontal cortex—responsible for exercising good judgment and reasoning, impulse control, and regulating emotions—does not fully develop until the age of 25.[217] Severe trauma further impedes this development, perpetuating this insidious cycle that fosters helplessness and convinces the adolescent that there is no alternative for survival but to kill their abusive parent.[218] If evidence of BCS is admitted but fails to sufficiently sway the jury, either the court's omission of expert testimony or its neglect in furnishing the jury with clear instructions on its application is the culprit.[219] Imperative expert testimony about BCS will illuminate how an adolescent survivor-parricide defendant perceived the situation when deciding to kill their parents in a non-confrontational setting, enabling jurors to step into the shoes of the defendant.

The justice system bears the responsibility of protecting children from parental abuse. Therefore, especially for indigent defendants, the state must provide expert witnesses who can educate fact-finders about abuse survivors' behavior and mental state without extensive barriers.[220] The system's failure to recognize the parricide offender as an abuse survivor first is outrageous. Leniency in admitting expert testimony about BCS is an act of

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[213] *Only Way Out*, *supra* note 11; BLANCHARD ET AL., *supra* note 18, at 293 (explaining that Gypsy's mother brainwashed Gypsy into believing her father was a "deadbeat," which perpetuated isolation from her family; Dee Dee also purposely moved away from her family and Gypsy's father's family).

[214] Rowe, *supra* note 46, at 27.

[215] Rowe, *supra* note 46, at 27.

[216] Rowe, *supra* note 46, at 27.

[217] Arain et al., *supra* note 139, at 451.

[218] Arain et al., *supra* note 139, at 451; Rowe, *supra* note 46, at 27; *see* Wolff & Shi, *supra* note 138, at 1909.

[219] HEIDE, *supra* note 68, at 232.

[220] Rowe, *supra* note 46, at 31.

mercy and is necessary for a survivor-parricide defendant to achieve the justice and equity they deserve. Unlike BWS, BCS lacks widespread recognition in case law and state statutes; however, given that these abused adolescents are often more vulnerable, and arguably less culpable, legislators and judges must enact laws and establish precedent that offer them protection and justice.[221] Admission of expert testimony must be nationally codified to facilitate uniform treatment to complement the fear-based provocation defense.

IV. The Criminal Justice System Must Favor Rehabilitation Over Incarceration for Survivor-Parricide Defendants

Society is confronted with a moral dilemma: how can the criminal justice system and society address abused children who are left to fend for themselves and are compelled to resort to the unthinkable act of murder?[222] In other words, how can the judicial system adhere to traditional principles of retribution, but also reconcile the pressing need for rehabilitation for these psychologically traumatized and deeply damaged adolescents? Courts must meticulously weigh the psychological conditions and prolonged trauma involved when confronted with the challenging task of adjudicating an adolescent who has killed their parent.[223] In the pursuit of fairness and progress, a voluntary manslaughter conviction or a lesser charge, along with rehabilitative measures, must be considered. This approach acknowledges that punitive measures are notably ineffective when applied to survivor-parricide defendants because their actions stem from isolated incidents rendered by extensive physical, emotional, and or sexual abuse.[224]

In reality, "more than 95% of people sent to prison" are released back into society, including many young homicide offenders, but few receive any form of mental health treatment following the homicide.[225] Most correctional facilities serve as warehouses for offenders until their release date, and often fail to provide them adequate tools to cope with the trauma that led to their

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[221] HEIDE, *supra* note 68, at 154.

[222] Rowe, *supra* note 46, at 26.

[223] Rowe, *supra* note 46, at 27.

[224] *See* Rowe, *supra* note 46, at 31.

[225] BARKOW, *supra* note 133, at 46, 66; HEIDE, *supra* note 68, at 320.

imprisonment in the first place.[226] Therefore, "[j]ails and prisons must be more than warehouses."[227] When these individuals are released and reintegrate into our neighborhoods, society must be ready to answer a serious question: "what kind of neighbor do we really want?"[228] Survivors of abuse who kill their abusers often do not receive the justice they deserve; at the very least, the criminal justice system must recognize the hurt that drove them to harm and ensure guaranteed treatment.

A. *Mitigate Harsh Sentences to Prevent Further Criminalization of Abused Survivors*

Since the "tough on crime" period in the 1980s, the U.S. criminal justice system has systematically imposed harsh and unnecessary sentences without regard to their true impact on the offender.[229] From rigorous mandatory minimum sentencing laws to three-strike rules, incarceration rates have skyrocketed; almost two million people are in prisons, correctional facilities, and local jails across the country.[230] Legislators and prosecutors seem to believe that the harsher the punishment, the better.[231] They argue that longer sentences incapacitate offenders, thereby serving the public.[232] Yet policies aimed at deterring crime by implementing harsher sentences, unsurprisingly, have not demonstrated conclusive effectiveness in crime prevention.[233] In fact, studies suggest that the effects are even counterproductive.[234]

The two theories at the forefront of both criminal law and the Federal Sentencing Guidelines are retribution and utilitarianism.[235] The former

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[226] *See* BARKOW, *supra* note 133, at 18, 66 (asserting that correctional facilities neglect to provide adequate victim services, despite nearly 20% of all incarcerated people and over 50% of incarcerated women having experienced physical and sexual abuse before prison).

[227] BARKOW, *supra* note 133, at 184.

[228] NowThis, *supra* note 136, at 0:19–0:25.

[229] *See* Lucía Martínez-Garay, *Evidence-Based Sentencing and Scientific Evidence*, 14 FRONTIERS PSYCH. 1, 1 (2023), https://perma.cc/H8CS-3ENU.

[230] *Id.*; Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), https://perma.cc/3AV6-JHBZ.

[231] BARKOW, *supra* note 133, at 38.

[232] BARKOW, *supra* note 133, at 42.

[233] Martínez-Garay, *supra* note 229, at 2.

[234] Martínez-Garay, *supra* note 229, at 2.

[235] Weskalnies, *supra* note 194, at 469–70.

justifies punishment because the individual committed a wrongful act and is deserving of punishment that is proportionate to the wrong committed.[236] For example, minor crimes deserve minor punishments, while serious crimes call for more severe consequences.[237] Retribution theorists argue that human beings are all rational thinkers capable of informed decision-making; thus, humans consciously and deliberately choose to break rules.[238] On the other hand, the latter endorses the theory of deterrence, where severe punishment is a means to both dissuade individuals with a history of offenses from repeating their actions and to generally discourage potential offenders.[239] Nevertheless, the utilitarian form of deterrence faces criticism for its ineffectiveness and moral objections, particularly due to its tendency to impose punishment disproportionate to the harms committed.[240]

Prison can incapacitate offenders, but research indicates that longer prison sentences are "unlikely to deter future crimes"; instead, longer sentences repeatedly generate more societal and economic costs than benefits.[241] The fear of being caught and sentenced to punishment is a more effective deterrent than the length of the sentencing.[242] In reality, longer sentences can actually pose a threat to public safety.[243] Without effective rehabilitation programs, studies reveal that incarceration can be criminogenic because longer sentences make it more challenging for individuals to successfully reenter society; the transition from a highly controlled environment diminishes their decision-making skills and social

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[236] *Topic Two–Justifying Punishment in the Community*, UNITED NATIONS OFF. DRUGS & CRIME, https://perma.cc/EA4U-YTQ9 (last visited Mar. 29, 2025).

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id.*

[241] Nat'l Inst. of Just., *Five Things About Deterrence*, U.S. DEPT. JUST. (June 5, 2016), https://perma.cc/YF7Q-PEW5 (explaining that incarceration as incapacitation refers to putting individuals physically behind bars to prevent additional crime, while incarceration as deterrence is creating fear in being incarcerated to refrain an individual from committing future crime).

[242] *Id.*

[243] BARKOW, *supra* note 133, at 44.

abilities.[244] In fact, "[t]ime spent in prison may [even] desensitize many to the threat of future imprisonment."[245]

Additionally, longer sentences tend to place a harmful burden on the limited prison resources, reducing the availability of rehabilitative programs such as GED courses, vocational training, and treatment for sex offenders.[246] As demonstrated by a handful of states that lowered prison sentences and experienced reduced recidivism and crime rates, it is more cost-effective to shorten sentences without compromising public safety.[247] For example, between 2006 and 2012, California cut its prison population by 23%, and violent crime fell by 21%.[248]

Moreover, age significantly influences deterrence.[249] Research indicates a sharp decline in criminal behavior around age 35.[250] Thus, longer prison sentences incapacitating offenders beyond the age they may naturally age out of crime is unnecessarily costly and lacks proportionate benefits.[251] The aging population incurs higher incarceration costs due to increased health care needs, which are exacerbated by the stressful prison environment.[252] Annually, incarcerating one inmate costs approximately $30,000—which doubles as they age.[253] Locking individuals behind bars for the primary purpose of incapacitation yields diminishing returns for public safety with each additional year, even though incarceration can be appropriate to

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[244] BARKOW, *supra* note 133, at 44 (indicating a study in Texas found that each extra year of a prison sentence resulted in a 4–7% increase in the individual's recidivism rate once released, and a study in Chicago found recidivism rates for juveniles increased by 22–26% when detained).

[245] Nat'l Inst. of Just., *supra* note 241.

[246] *See* BARKOW, *supra* note 133, at 44, 62–63 (explaining that vocational training programs are essential for formerly incarcerated people because employed individuals are less likely to reoffend; for example, UNICOR, a vocational program run by the Federal Bureau of Prisons, reduces recidivism by 24%, yet faces a 25,000-person waiting list).

[247] BARKOW, *supra* note 133, at 43 (including "California, Maryland, Nevada, New Jersey, South Carolina, Texas, and New York").

[248] BARKOW, *supra* note 133, at 43.

[249] Nat'l Inst. of Just., *supra* note 241.

[250] Nat'l Inst. of Just., *supra* note 241.

[251] BARKOW, *supra* note 133, at 46; Nat'l Inst. of Just., *supra* note 241.

[252] Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 122 (2018).

[253] *Id.* at 122–23.

acknowledge the seriousness of a crime.[254] Needed funds are diverted from rehabilitative programs that are more likely to reduce crime when millions are spent to construct prisons.[255]

It is important to note that this discussion does not diminish the importance of individualized risk assessments, which are essential considerations for reduced sentences.[256] Risk assessment data reveals that unnecessarily grouping low-risk defendants with medium and high-risk offenders can escalate the likelihood of recidivism.[257] The likelihood of recidivism for severely abused adolescent parricide offenders is often lower than other killers, as the homicide was an isolated incident driven by a desperate need to stop perpetual abuse.[258] When a significant portion of society deems these individuals' actions justifiable, the deterrence value of harsh punishment becomes increasingly questionable.[259] The common parricide offender, contrary to what many believe, does not pose a threat to society, and thus these survivors must be treated for the trauma endured rather than subjecting them to a perpetual cycle of fear and violence in a dangerous prison environment.[260]

Despite the criminal justice system aiming to protect victims of crime, survivors of abuse are criminalized when they are forced to protect themselves. Among a rising number of jurisdictions, New York State responded by enacting the Domestic Violence Survivors Justice Act ("DVSJA") to equip survivors of domestic violence with the ability to seek lower sentences that are "fair, just, and more accurately reflect [their] actual culpability."[261] The DVSJA offers judges a pathway to deviate from

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[254] *Id.* at 113.

[255] *Id.* at 118–19.

[256] Kevin S. Burke, *Evidence-Based Sentencing*, NAT'L JUD. COLL. 277, 278, https://perma.cc/LY9E-SXHP (last visited Sep. 19, 2024).

[257] *Id.* at 279.

[258] *See* Weskalnies, *supra* note 194, at 498.

[259] Weskalnies, *supra* note 194, at 498; *see, e.g.*, IBTimes UK, *What's the Public Opinion on the Gypsy Rose Blanchard Case? || IBT UK Investigates*, YOUTUBE (Jan. 9, 2024), https://perma.cc/7RVB-N3KR (discovering that others, even in the UK, are supportive of Gypsy being released because she suffered from prolonged abuse by her mother).

[260] Rowe, *supra* note 46, at 27.

[261] Liz Komar et al., *Sentencing Reform for Criminalized Survivors: Learning from New York's Domestic Violence Survivors Justice Act*, SENT'G PROJECT 1, 8 (Apr. 19, 2023), https://perma.cc/8UBY-BN22 (mentioning Louisiana, Oklahoma, and Oregon have also taken the initiative to advocate for survivors).

mandatory minimums, enabling them to impose significantly shorter prison terms or alternative community-based sentences for survivors at the preliminary sentencing stage.[262] Notably, the DVSJA offers retroactive relief for sentences imposed before the law came into effect.[263] To receive relief, a survivor must demonstrate that: (1) at the time of the offense, "the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household"; (2) this abuse significantly contributed to the "defendant's criminal behavior"; and (3) considering the circumstances and history, a sentence without DVSJA mitigation would be "unduly harsh."[264] However, those convicted of "aggravated murder, first-degree murder, [and] second-degree murder [while] committing rape, terrorism, any offense requiring the individual to register as a sex offender, or conspiracy to commit any of those crimes," are not eligible for relief.[265] If all conditions are met, the judge has discretion to impose substantially lower sentences by treating the minimum sentence for the offense as the maximum penalty.[266] Additionally, alternative sentences, such as conditional release or supervised probation, become viable options.[267]

Legislation similar to DVSJA must be adopted nationwide to balance the societal interest of retribution against compassion for one of society's most vulnerable populations: severely abused adolescents. Sentences in parricide cases frequently "range [between] no punishment . . . to life in prison, but the average sentence is approximately fifteen to twenty years imprisonment."[268] Even if a charge is mitigated down to voluntary manslaughter through the fear-based provocation defense, the maximum penalty can still be immensely high.[269] For example, in Florida, voluntary

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[262] *Id.* at 3.

[263] *Id.*

[264] N.Y. PENAL L. § 60.12 (McKinney 2019); *id.*

[265] William C. Donnino, Practice Commentary, *Authorized Disposition; Alternative Sentence; Domestic Violence Cases*, N.Y. PENAL L. § 60.12 (McKinney 2019); Komar et al., *supra* note 261, at 8.

[266] N.Y. PENAL L. § 60.12; Komar et al., *supra* note 265, at 3.

[267] N.Y. PENAL L. § 60.12(2); Komar et al., *supra* note 265, at 3.

[268] Smith, *supra* note 84, at 169.

[269] Buchhandler-Raphael, *supra* note 46, at 1779; *see* Lyle Therese A. Hilotin-Lee, *Voluntary Manslaughter Sentencing and Penalties*, FINDLAW, https://perma.cc/984L-76LG (last updated Sept. 1, 2023).

manslaughter can carry a sentence of fifteen years in prison.[270] However, programs like DVSJA offer an effective remedy.[271] By categorizing the offense as voluntary manslaughter and enabling eligibility for programs like DVSJA, the criminal justice system can acknowledge the survivor-parricide offender's extenuating circumstances while also reducing the overall cost of unnecessarily long sentences.[272] This approach may still impose meaningful consequences for taking another's life while simultaneously offering compassion to a survivor of physical, emotional, and or sexual abuse.

B. *Evolving Rehabilitation: Addressing Underlying Trauma in Innovative Correctional Settings for a More Effective and Humane Solution*

It is vital to remember that parricide offenders are victims first. Although the source of continuous abuse is now removed from their life, thorough treatment is necessary to recover from their traumatic experiences.[273] Society must reframe its perspective of criminal behavior by shifting the question from "'what's wrong with you?' to 'what happened to you?'"[274] Society has already failed these victims once. It is the criminal justice system's job to ensure that abuse survivors receive the care essential for them to move on and learn appropriate coping mechanisms. Dr. Kathleen M. Heide ("Dr. Heide") emphasizes two aspects of treatment for adolescent parricide offenders: first, addressing the immediate crisis following the homicide and its impact on the offender and others; and second, focusing on equipping these adolescents with essential skills to effectively cope with current events.[275]

When an adolescent offender is initially charged, the individual is typically held at a juvenile detention center or in an adult facility without necessary intervention.[276] Hospitalization is more commonly applied to

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[270] Hilotin-Lee, *supra* note 269.

[271] *See, e.g.*, Smith, *supra* note 84, at 159.

[272] Smith, *supra* note 84, at 160–61.

[273] *See* Sharyn Adams et al., *Trauma-Informed and Evidence-Based Practices and Programs to Address Trauma in Correctional Settings*, ILL. CRIM. JUST. INFO. AUTH. (July 25, 2017), https://perma.cc/GNM8-NRZE.

[274] Jill S. Levenson & Gwenda M. Willis, *Implementing Trauma-Informed Care in Correctional Treatment and Supervision*, 28 J. AGGRESSION, MALTREATMENT & TRAUMA 1, 11 (2018).

[275] HEIDE, *supra* note 68, at 325.

[276] HEIDE, *supra* note 68, at 325.

child parricide offenders viewed as "psychologically disturbed," whereas adolescent offenders are less frequently hospitalized.[277] However, Dr. Heide emphasizes that immediate therapeutic treatment is crucial following the homicide, given the lengthy legal process to determine guilt or innocence.[278] Inpatient treatment is effective for redirecting homicidal impulses and evaluating the potential for continued violent behavior.[279]

Once an adolescent survivor parricide defendant is convicted with a mitigated charge of voluntary manslaughter using the fear-based provocation defense, sentencing options, like DVSJA, allow judges to treat the minimum sentence for the offense as the maximum penalty for an abuse survivor.[280] While accountability for murder should not be evaded, justice requires considering their circumstances and embracing innovative and rehabilitative alternatives to incarceration. However, the choice of alternative environments matters.

Traditional prisons are not designed for survivor-victims; these facilities subject inmates to harsh conditions—shackled arrivals, overcrowded units, constant noise, and severely limited privacy—and inadvertently contribute to an environment full of triggers.[281] Prison overcrowding itself leads to significant behavioral problems among inmates.[282] Currently, many American prisons are not well-equipped to treat inmate trauma before reintegration into society.[283] Parricide offenders receive very little treatment, even when judges mandate treatment.[284] Trauma fundamentally transforms an individual's health and self-esteem yet traditional approaches fail to

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[277] HEIDE, *supra* note 68, at 320.

[278] HEIDE, *supra* note 68, at 325.

[279] HEIDE, *supra* note 68, at 320.

[280] Komar et al., *supra* note 265, at 3; *see, e.g.*, N.Y. PENAL LAW § 60.12.

[281] Niki A. Miller & Lisa M. Najavits, *Creating Trauma-Informed Correctional Care: A Balance of Goals and Environment*, 3 EUR. J. PSYCHOTRAUMATOLOGY 1, 1 (2012), https://perma.cc/AR5Q-UPR5.

[282] BARKOW, *supra* note 133, at 44.

[283] *See, e.g.*, Chelsea Duff, *Gypsy Rose Blanchard's Family is Petitioning for Her Release from Prison: 'Gypsy's Not a Threat to Society'*, IN TOUCH (Apr. 12, 2019, 5:24 PM), https://perma.cc/A5LU-9K5H (sharing that despite undergoing anger management courses, including writing a letter from her mother's perspective, Gypsy's stepmother insists she still needs intensive counseling).

[284] HEIDE, *supra* note 68, at 334.

address these underlying concerns.[285] Fortunately, Norway has pioneered an innovative approach that fosters a positive rehabilitative experience within prison walls to address these concerns.[286]

The maximum security Norwegian Halden Prison's cells resemble a dorm room with a bed, desk, bathroom, mini-fridge, and even a window; the prison has a communal kitchen for inmates to cook and eat meals together.[287] Guards—who are also social workers with training in ethics, psychology, human rights, self-defense, and other subjects—are expected to socially interact with inmates and develop a "future plan" on their first day.[288] Inmates are provided with conditions resembling a more normal life, aiming to reduce prison-like environments and prepare them for productive reintegration into society by maintaining connections with the outside world as much as possible.[289] This Norwegian system treats these incarcerated individuals as human beings.[290] Meanwhile, inmates in the U.S. are reduced to being treated like animals: surrounded by three walls of cement and a toilet with a striking lack of privacy—designed to be inhumane and degrading.[291] Prison staff in the Norwegian system are also legally obligated to provide inmates with proper medical care, including mental health services.[292]

Not only must mental health services be available for inmates twenty-four hours a day, seven days a week, but present-focused and cognitive-behavior interventions ("CBI") can also help stabilize PTSD.[293] Utilizing

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[285] Cynthia Feathers, *Domestic Violence Survivor Defendants: New Hope for Humane and Just Outcomes*, 92 N.Y. ST. BAR ASS'N J. 15, 16 (2020).

[286] Meagan Denny, *Norway's Prison System: Investigating Recidivism and Reintegration*, 10 BRIDGES: A J. STUDENT RSCH. 22, 25 (2016).

[287] Theresa Curry Almuti, *Documentary Review: "Breaking the Cycle" Dares Us to Think Differently About Prisons*, CASCADIA ADVOC. (Apr. 20, 2018, 9:54 P.M.), https://perma.cc/MKW5-SFLK.

[288] NowThis, *supra* note 136, at 04:34–05:22.

[289] Almuti, *supra* note 287 (stating that one inmate said, "[i]n Norway, we want to rehabilitate, not oppress people. I don't think it's too lenient, it creates opportunities. It reduces criminality. People realize that they are able to do other things than what they used to").

[290] NowThis, *supra* note 136, at 00:48–00:57.

[291] Almuti, *supra* note 287.

[292] Line Elisabeth Solbakken et al., *Breaking Down Barriers to Mental Healthcare Access in Prison: A Qualitative Interview Study with Incarcerated Males in Norway*, 24 BMC PSYCHIATRY 1, 4 (2024).

[293] *Mental Health Treatment in Correctional Facilities*, MENTAL HEALTH AM., https://perma.cc/6SYK-NCFS (last visited Mar. 29, 2025); Miller & Najavits, *supra* note 281, at 5.

"[t]he acronym SHARE (safety, hope, autonomy, respect, empathy)" serves as a practical tool for correctional facilities to implement trauma-informed care.[294] Aggressive confrontational approaches—such as restraints—can re-traumatize inmates and exacerbate defensive behavior patterns.[295] Instead, while prioritizing guards' safety, rehabilitation can be achieved through de-escalation strategies that foster self-regulation skills.[296] Communication and conflict-solving skills are integral aspects of treatment to prevent recidivism.[297] Establishing a sense of safety through consistency, predictability, and a lack of judgment is paramount.[298]

Moreover, different rehabilitation techniques in the U.S. are equally influential.[299] For example, the Capital and Serious Violent Offender Treatment Program ("C&SVOTP") at Giddings State Home and School in Texas has demonstrated promise in treating serious violent offenders.[300] Established in 1988, this intensive residential treatment program spans 24 weeks or more and focuses on emotional, social, and cognitive development while addressing psychological concerns.[301] The program's group process includes three main components: participants narrate their life stories, recount their crimes, and learn about relapse prevention.[302] Juveniles are required to re-enact their crimes from both the perpetrator's and victim's perspectives to foster empathy.[303] Role-playing helps them break through emotional barriers to "develop remorse and personal accountability."[304] Participation in C&SVOTP has decreased recidivism "for any offense by 55%

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[294] Levenson & Willis, *supra* note 274, at 12–13 (emphasizing that "rehabilitative services should feel *safe*," fostering *hope* through the "belief that change is possible, reducing despondence and learned helplessness," promoting *autonomy* to encourage meaningful life goals, developing *respect* to "restore a sense of value and worth," and nurturing *empathy* to "appreciate the perspective of others").

[295] Levenson & Willis, *supra* note 274, at 13.

[296] *See* Levenson & Willis, *supra* note 274, at 11.

[297] Levenson & Willis, *supra* note 274, at 13.

[298] Levenson & Willis, *supra* note 274, at 15.

[299] HEIDE, *supra* note 68, at 329.

[300] HEIDE, *supra* note 68, at 329; S. Matthews, *Juvenile Capital Offenders on Empathy*, U.S. DEP'T. JUST., https://perma.cc/F6KB-LKZS (last visited Mar. 29, 2025).

[301] HEIDE, *supra* note 68, at 329.

[302] HEIDE, *supra* note 68, at 329.

[303] HEIDE, *supra* note 68, at 329; Matthews, *supra* note 300.

[304] HEIDE, *supra* note 68, at 329.

and a felony offense by 43%."[305] While this program is promising for juveniles, it can also be effectively adapted for adolescents between 18 and 25 years of age.

As previously mentioned, empirical studies highlight that children subjected to neglect or repeated abuse experience compromised brain development.[306] Traumatic stress disrupts the formation of neural circuits essential for "normal physiological, cognitive, psychological, emotional, and social development," rendering them ill-equipped to manage emotional responses independently—further exacerbated by the absence of a positive parental role model.[307] Prioritizing the development of effective programs, like C&SVOTP, can enable adolescent survivor-parricide offenders to reintegrate into society and lead productive lives. Therefore, society is best served by reallocating resources toward adapting Norwegian-style rehabilitation in prison conditions and expanding programs like C&SVOTP for adolescent survivor-parricide defendants.

CONCLUSION

Society must take decisive action to acknowledge its failure to protect vulnerable adolescents. While a state undeniably has a legitimate interest in prosecuting perpetrators of homicide, it is imperative that courts meticulously weigh the interests of both the state and the survivors of severe child abuse. The layers beneath a survivor-parricide defendant's exterior reveal haunting remnants of prolonged and unpredictable violence inflicted by the very figure a child should trust the most: a parent. These physical and emotional scars run deep, leaving lasting imprints on the psyche of shame, perpetual fear, self-blame, depression, isolation, and diminished self-esteem.[308]

These abuse survivors were forced to walk on eggshells and adapt to their environment for the overwhelming majority of their lifetimes to avoid situations that may trigger abuse from their parents.[309] Even when survivors retaliate against their abusers, society must disrupt the cycle of perpetual injustice. The criminal justice system must cease further criminalization of

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[305] HEIDE, *supra* note 68, at 329.

[306] HEIDE, *supra* note 68, at 324.

[307] HEIDE, *supra* note 68, at 324–25.

[308] Rowe, *supra* note 46, at 27.

[309] Rowe, *supra* note 46, at 27.

survivors and instead prioritize a rehabilitative approach that recognizes survivor-parricide offenders as *victims* first who are deserving of support and compassion.

Looking at Anti-Transgender Laws Through Post-Structuralism: The Threat of Eugenics and Biological Essentialism

Agripino Kennedy[*]

INTRODUCTION

Transgender people have recently been aggressively targeted by bills and laws aimed at limiting their access to healthcare, sports participation, and even legal recognition.[1] Many of these laws use language that aims to specifically define male and female in a constrictive way.[2] The limiting nature of the language often fails to consider those whom it leaves out—not just transgender people but perhaps cisgender people or intersex people too.[3] The use of constrictive language has allowed politicians and others to misgender transgender people in a "justified" way.[4] Much of this vitriolic attack on transgender people is based on false or disproven science that has permeated mainstream media.[5] Often, these flawed scientific

[*] J.D. Candidate, New England Law | Boston (2025). Thank you to Alejandra Caraballo for her interview, and my partner, friends, and family who have supported me as a transgender person, law student, and writer.

[1] *See 2023 Anti-Trans Legislation*, TRANS LEGIS. TRACKER, https://perma.cc/4GVK-P976 (last visited Mar. 19, 2025) [hereinafter *2023 Tracker*]; *2022 Anti-Trans Legislation*, TRANS LEGIS. TRACKER, https://perma.cc/LZP6-XV8Z (last visited Mar. 19, 2025) [hereinafter *2022 Tracker*].

[2] Virtual Video Interview with Alejandra Caraballo, J.D., Clinical Professor, Harvard L. Sch., on Zoom (Jan. 16, 2024).

[3] *Id.*

[4] *Id.* ("So they were able to then start saying biological male, biological male, biological female, biological male. And what that allowed them to do was kind of get away with misgendering trans people.").

[5] *Compare* Meredithe McNamara, *This is How to Fight the Disinformation That Fuels Gender-Affirming Care Bans*, THEM (Nov. 28, 2023), https://perma.cc/UC33-JMGY (debunking the myths that gender affirming care is experimental and unsafe), *and* Erin Reed, *Debunked: Misleading NYT Anti-Trans Article By Pamela Paul Relies On Pseudoscience*, ERIN IN THE MORNING (Feb. 2, 2024), https://perma.cc/A2GU-SE6Y, *with Protecting Minors from Gender Ideology*, DO NO HARM,

theories are so deeply entrenched in media and culture that their later debunking is disregarded because of the support for biased viewpoints.[6]

The 2022 U.S. Transgender Survey received over 92,000 responses from people over sixteen years of age, with about 84,000 of those responses being adults aged eighteen or older.[7] Over half of all respondents resided in the South or Midwest, where some of the heaviest concentration of anti-transgender legislation was proposed in 2023.[8] While over 80% of respondents reported a significant increase in life satisfaction after medically transitioning, nearly half of respondents reported a negative healthcare experience in the last twelve months.[9] Further, almost half of respondents considered moving from their current state because of proposed or recently passed anti-transgender policies.[10]

This Note will analyze bills and laws targeting transgender people in the United States by utilizing a post-structuralist lens to assess the language used in the legislation by following the post-structuralist tradition of deconstructing systems and the language they use. Part I will provide a background of anti-transgender legislation within recent years. Part II will provide a background on post-structuralist thought on gender and explore historical eugenicist legislation. In doing so, Part II will address the concept of biological essentialism as it pertains to legislation around gender as well as the critiques of such language by two post-structuralist philosophers—Michel Foucault and Judith Butler—who have written extensively about queer identities. Part III will explain the relevance of those critiques when applied to current anti-transgender legislation and the important impacts that biological essentialist language has on the lives of individuals when it is adopted as law.

Part IV will begin the analysis of anti-transgender legislation and argue

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https://donoharmmedicine.org/gender-ideology/ (last visited Mar. 19, 2025), *and* Pamela Paul, *As Kids, They Thought They Were Trans. They No Longer Do.*, N.Y. TIMES (Feb. 2, 2024), https://perma.cc/D95W-KSV9.

[6] *See* NANCY ORDOVER, AMERICAN EUGENICS: RACE, QUEER ANATOMY, AND THE SCIENCE OF NATIONALISM 60, 64 (Univ. of Minn. Press 2003), https://perma.cc/U7GK-BZ5B.

[7] Sandy E. James et al., *Early Insights: A Report of the 2022 U.S. Transgender Survey*, NAT'L CTR FOR TRANSGENDER EQUAL., 6 (2024), https://perma.cc/74YN-6EP4 [hereinafter *USTS Early Insights*].

[8] *Id.* at 15; 2023 Tracker, *supra* note 1.

[9] USTS Early Insights, *supra* note 7, at 17.

[10] USTS Early Insights, *supra* note 7, at 23.

that reliance upon biological essentialist language poses a threat to transgender individuals by inviting a potential eugenicist response. Part IV will explicitly draw comparisons between historical and contemporary legislation. Part V will conclude with an argument for alternative advocacy strategies for transgender rights that rely on bodily autonomy rather than biological essentialism by deconstructing the binary language of gender from a post-structuralist perspective. This Note will end with a conclusion arguing for more resilient advocacy strategies as both a response to eugenic ideology and a preventative measure to protect against future threats.

BACKGROUND

I. Anti-Transgender Legislation

In 2023, state legislatures proposed a record number of anti-transgender and anti-LGBTQ+ bills,[11] with some organizations estimating as many as 591 bills in forty-nine of the fifty states.[12] Compared to 2022, that is approximately a 338.5% increase in anti-transgender bills proposed in sixteen additional states.[13] Though many failed, a significant portion of those bills passed.[14] As early as May of 2023, record-breaking numbers of anti-LGBTQ+ bills—mostly anti-transgender bills—were already introduced, and numbers continued to climb throughout the year.[15] In early 2024, several bills "rolled over" from the previous year, and still legislators introduced many more.[16] About two weeks into January 2024, one legislative tracker found 229 anti-transgender bills introduced with 168 expected to roll over.[17]

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[11] Kiara Alfonseca, *Record Number of Anti-LGBTQ Legislation Filed in 2023*, ABC NEWS (Dec. 28, 2023, 5:59 AM), https://perma.cc/MD9U-648R.

[12] 2023 Tracker, *supra* note 1.

[13] *See* 2023 Tracker, *supra* note 1.

[14] *See* Jo Yurcaba, *From Drag Bans to Sports Restrictions, 75 Anti-LGBTQ Bills Have Become Law in 2023*, NBC NEWS (Dec. 17, 2023, 7:00 AM EST), https://perma.cc/U7NY-XSJC.

[15] *See* Cullen Peele, *Roundup of Anti-LGBTQ+ Legislation Advancing in States Across the Country*, HRC (May 23, 2023), https://perma.cc/FU9E-WRNB.

[16] *See 2024 Anti-Trans Bills Tracker*, TRANS LEGIS. TRACKER, https://perma.cc/Y92U-YUZH (last visited Mar. 19, 2025) (showing active bills both carried over and introduced in 2024) [hereinafter *2024 Tracker*].

[17] Virtual Video Interview with Alejandra Caraballo, *supra* note 2; *LGBTQ+ Legislative Tracking 2024*, GOOGLE SHEETS, https://perma.cc/4TC4-6LN4 (last visited Mar. 19, 2025).

A. *Highlights of Bills Proposed in the Last Three Years*

Bills proposed across the country targeted many aspects of transgender people's lives, including bans on Gender Affirming Care (GAC), participation in sports, bathroom use, and birth certificate amendments.[18] Many bills targeted youth specifically, including some states banning discussions or materials related to sexual orientation or gender identity in schools,[19] even at the high school level.[20] Often, bills introduced definitions of sex or gender to solidify a biological basis for identity and reinforce a constructed cisgender norm of what a man or woman is.[21]

Arkansas was the first state to ban GAC in 2021, utilizing the language "in the context of reproductive potential or capacity" to define what biological sex means.[22] Many proposed bills in other states have utilized similar language, often reflecting the language from the Model Legislation (a drafted example of legislation produced for distribution and use), dispersed by Do No Harm who recommends phrasing identical to the Arkansas law.[23] Do No Harm is a conservative advocacy organization that

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[18] Virtual Video Interview with Alejandra Caraballo, *supra* note 2; *LGBTQ+ Legislative Tracking 2024*, GOOGLE SHEETS, https://perma.cc/4TC4-6LN4 (last visited Mar. 19, 2025).

[19] *See LGBTQ Curricular Laws*, MOVEMENT ADVANCEMENT PROJECT, https://perma.cc/6XD6-3LKH (last updated Nov. 6, 2024); *see also* Samantha Laine Perfas, *Who's Getting Hurt Most by Soaring LGBTQ Book Bans? Librarians Say Kids*, THE HARVARD GAZETTE (June 28, 2023), https://perma.cc/6VUE-DYUB; Kasey Meehan & Jonathan Friedman, *Banned in the USA: State Laws Supercharge Book Suppression in Schools*, PEN AMERICA (Apr. 20, 2023), https://perma.cc/TKY5-BEFS.

[20] Eesha Pendharkar, *Florida Just Expanded the 'Don't Say Gay' Law: Here's What You Need to Know*, EDUCATIONWEEK (Apr. 19, 2023), https://perma.cc/L75L-7GR7.

[21] *See, e.g.*, FLA. STAT. ANN. § 553.865 (2023) (defining male as "a person belonging, at birth, to the biological sex which has the specific reproductive role of producing sperm" and female as "a person belonging, at birth, to the biological sex which has the specific reproductive role of producing eggs"); KAN. STAT. ANN. § 77-207 (2023) (defining male as "an individual whose biological reproductive system is developed to fertilize the ova of a female" and female as "an individual whose biological reproductive system is developed to produce ova"); H.R. 3883, 88th Leg., 1st Sess. §§ 16, 18 (Tex. 2023) (defining male and female using identical language to the Kansas bill); *Model Legislation: The JUST FACTs Act*, DO NO HARM 9, https://perma.cc/VE4C-7R5P (last visited Mar. 19, 2025) (recommending Model Legislation including definitions of male and female) [hereinafter *Model Legislation*].

[22] ARK. CODE ANN. § 20-9-1501 (2023).

[23] Model Legislation, *supra* note 21, at 9.

spreads misinformation about the safety of GAC.[24] Beyond bans on GAC, numerous bills target bathroom use, sports participation, and educational materials.[25] Many of these bills create private rights of action, empowering the average person to enforce them through lawsuits.[26]

B. *Notable Laws That Passed*

A far-reaching example of a 2023 law targeting transgender people is Florida's Safety in Private Spaces Act.[27] The Act seeks to limit the use of gendered restrooms and changing facilities to people belonging to the sex assigned to those facilities.[28] The language used in this act, mirroring the Do No Harm model legislation,[29] relies on reproductive roles (either producing sperm or eggs) to distinguish between male and female.[30] The Act affects correctional and detention facilities, educational institutions, and public buildings.[31]

Florida also created the opportunity for courts to have emergency jurisdiction over minors to "protect" them from "sex-reassignment prescriptions or procedures."[32] Some legal experts exhibited concerns about the overbroad language of § 61.517 as purporting to allow Florida to manipulate the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to modify or vacate custody orders from other jurisdictions unjustly.[33] Further concerns with § 61.517 are that it protects Florida courts

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[24] *See* McNamara, *supra* note 5 (debunking the myth that GAC is experimental and unsafe); *contra Protecting Minors from Gender Ideology*, DO NO HARM, https://perma.cc/ET4K-N7Y4 (last visited Mar. 19, 2025) (describing the myth that GAC is unsafe).

[25] *See What Anti-Trans Bills Passed in 2023?*, TRANS LEGIS. TRACKER, https://perma.cc/3WRD-U4SE (last visited Mar. 19, 2025) (listing 87 bills that passed, broken into categories of education, sports, bathroom, healthcare, and other).

[26] Virtual Video Interview with Alejandra Caraballo, *supra* note 2, at 4:27 ("[I]t's supposed to be neutral on its face, but in reality . . . it's discriminatory . . . like a lot of the book bans, the don't say gay bill, all of those things were mostly [sic] the enforcement mechanism is private rights of action.").

[27] FLA. STAT. ANN. § 553.865 (2023).

[28] *Id.* § 553.865(2).

[29] Model Legislation, supra note 21, at 9.

[30] §§ 553.865(3)(f), (h).

[31] *Id.* § 553.865.

[32] FLA. STAT. ANN. § 61.517(1) (2023).

[33] *WBASNY Opposes Florida Law That Gives Temporary Emergency Jurisdiction Over Transgender Children*, WOMEN'S BAR ASS'N. OF THE STATE OF N.Y. (May 30, 2023), https://perma.cc/4ZTX-HFZG (opposing § 61.517 because it usurps the UCCJEA).

against orders ruling such a taking as unjustifiable, as well as its ability to be utilized against a minor present in Florida receiving GAC *even if the child and parents are not residents of the state*.[34]

Georgia, among other states,[35] has instituted a policy of banning GAC of all types for minors—including both hormone replacement therapy (HRT) and any surgical procedures.[36] Notably, the seventh edition of the standards of care for transgender genital surgery options by the World Professional Association for Transgender Health (WPATH) requires patients to have attained the age of majority[37] prior to the surgery being performed; the eighth edition specifically holds the same true for a phalloplasty (construction of a phallus).[38] Further, out of 330 million patients surveyed by Reuters in 2022, only fifty-six minors received genital surgery, and only 776 received mastectomies (removal of breast tissue to masculinize the chest).[39] All of the minors granted surgeries in that study were teenagers, and overall statistics show surgeries performed at a young age to be relatively uncommon—much to the contrary of Conservative scare tactics.[40]

Kansas, also following the same trend in legislation language described previously, enacted a ban on transgender students participating in sports consistent with their gender identities.[41] This law designates transgender

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[34] Joseph G. Milizio, *New Florida Law Gives Emergency Jurisdiction Over Transgender Minors*, VISHNICK MCGOVERN MILIZIO LLP (June 8, 2023), https://perma.cc/45DN-98WC.

[35] *Map: Attacks on Gender Affirming Care by State*, HUM. RTS. CAMPAIGN, https://perma.cc/BHR7-8FJ6 (last updated Nov. 13, 2023) (showing a map of all states in the U.S. banning GAC for minors).

[36] GA. CODE ANN. § 31-7-3.5 (2023).

[37] *Age of Majority*, CTR. FOR PARENT INFO. & RES., https://perma.cc/SXU5-6NJD (last visited Mar. 19, 2025) ("The age of majority is 18 in most areas, except three states. Alabama and Nebraska set the age of majority to 19 and Mississippi sets it at 21.").

[38] THE WORLD P.A. FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE at 27 (7th ed. 2012), https://perma.cc/AE76-WUPE [hereinafter *SOC 7th*]; E. COLEMAN ET AL., STANDARDS OF CARE FOR THE HEALTH OF TRANSGENDER AND GENDER DIVERSE PEOPLE VERSION 8 at 23 (Int'l J. of Transgender Health 2022), https://perma.cc/AZ5B-KRS6 [hereinafter *SOC 8th*].

[39] Robin Respaut & Chad Terhune, *Putting Numbers on the Rise in Children Seeking Gender Care*, REUTERS (Oct. 6, 2022), https://perma.cc/C3JW-5UD6.

[40] *Compare Id., with Judge Says DeSantis Spread False Information While Pushing Trans Health Care Restrictions*, PBS (Dec. 21, 2023), https://perma.cc/THP8-JK9J ("Republican Florida Gov. Ron DeSantis repeatedly spread false information about doctors mutilating children's genitals even though there's been no such documented cases.").

[41] KAN. STAT. ANN. § 60-5602 (2023) (defining biological sex using the exact language of the Do No Harm Model Legislation).

women and girls as members of the male sex which prohibits them from participating on sports teams consistent with their gender identity.[42] Since the law only considers reproductive capacity and genitalia at birth, it makes no consideration of children too young to have developed different physical capacities or those on puberty blockers preventing such changes.[43] With dozens of anti-transgender bills passed in 2023, it would be redundant to continue to list them—especially considering the striking resemblance they show toward each other and the Do No Harm model legislation.[44]

II. Post-Structuralism[45] as it Applies to Biological Essentialism and the Sex/Gender Binary

The development of a biological essentialist understanding of sex differences has been credited as a response to the emergence of a feminist movement in the second half of the nineteenth century.[46] Traditionally, many Western cultures have adopted the binary view of sex and gender,[47] and there has been intense and constant pushback on those who defy the binary.[48] Justifications offered for this binary understanding have ranged from Darwinism-based understandings of sexual evolution to "ancient differences in the sperm and egg" themselves.[49]

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[42] *Id.* at §§ 60-5602–5603.

[43] *Id.* at § 60-5602.

[44] *See, e.g.*, *Model Legislation*, *supra* note 21; Jenny Porter Tilley & Kayla Dwyer, *Cut and Paste? This Anti-Trans Indiana Bill Uses Nearly Identical Wording as Other States*, INDYSTAR (Mar. 15, 2023), https://perma.cc/PM7G-GE6U.

[45] Nathan A. Crick, *Post-Structuralism*, OXFORD RSCH. ENCYCLOPEDIAS (Oct. 26, 2016) https://perma.cc/BGK9-K5KT (describing post-structuralism as "a set of attitudes . . . calling established meanings into question, revealing the points of ambiguity and indeterminacy inherent in any system . . . showing how discourses are carriers of power capable of turning us into subjects, and placing upon us the burden of ethical responsibility that accompanies the acceptance of freedom").

[46] Sandra Lipsitz Bem, The Lenses of Gender: Transforming the Debate on Sexual Inequality, at 9 (1993).

[47] Thekla Morgenroth et al., *Defending the Sex/Gender Binary: The Role of Gender Identification and Need for Closure*, GENDER ACTION PORTAL (July 2021), https://perma.cc/5Y9C-6CW6.

[48] *See, e.g.,* Deborah A. Miranda, *Extermination of the Joyas: Gendercide in Spanish California*, 16 GLQ: A J. OF LESBIAN & GAY STUDIES 256–57 (2010) (describing the persecution of *joyas*, who defy binary gender conceptions, in Spanish colonial California); María Lugones, *Heterosexualism and the Colonial/Modern Gender System*, 22 HYPATIA 186, 194–95 (2007) (describing intersex children being forced to fit into binary understandings of sex).

[49] Bem, *supra* note 46, at 12–13.

Contemporarily, reliance on this biological essentialist framework of the sex binary has allowed the development of a legal rhetoric that focuses on sex assigned at birth to abstract the conversation away from reality.[50] By using a phrase like "biological male" to refer to a transgender woman, conservative politicians are able to fearmonger about "biological males in women's restrooms," when in reality, a transgender woman may have none of the physical secondary sex traits associated with men.[51] Yet the transgender and gay communities have not been immune to reliance on biological essentialist rhetoric and often reproduce it by arguing they were "born this way."[52]

A. *The "Born This Way" and "Born in the Wrong Body" Argument*

Transgender patients have often utilized the "born in the wrong body" argument to gain recognition and treatment in the medical context.[53] However, there has been pushback to that model in recent years from within the community—often different transgender people will have differing opinions on whether the phrase is accurate.[54] Despite being linked to troublesome ideologies like eugenics, the argument persists.[55] While the argument was only recently (and tenuously) adopted by the legal field in the

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[50] Virtual Video Interview with Alejandra Caraballo, *supra* note 2, at 35:15–37:30.

[51] Virtual Video Interview with Alejandra Caraballo, *supra* note 2, at 35:15–37:30.

[52] Lisa Diamond, *Why the "Born this Way" Argument Doesn't Advance LGBT Equality*, TEDX TALKS (Dec. 18, 2018), https://perma.cc/X3GT-DJLZ.

[53] *See, e.g.*, In re Anonymous, 293 N.Y.S.2d 834, 837 (Civ. Ct. 1968) ("Absent surgical intervention, there is no question that his [sic] social sex must conform with his anatomical sex."); United States v. Skrmetti, *cert. granted*, No. 23–477 (Nov. 6, 2023); SUSAN STRYKER, TRANSGENDER HISTORY 94 (2008) ("Access to transsexual medical services thus became entangled with a socially conservative attempt to maintain traditional gender."); *See* Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 BERKLEY WOMEN'S L. J. 15, 15–18 (2003) (describing a reliance upon medical interventions for legal recognition of transgender people).

[54] *E.g., Do You Use the Phrase: 'Born in the Wrong Body'?*, MERMAIDS (Sept. 25, 2020), https://perma.cc/HQM9-TCJM (quoting different transgender people on whether they identify with the phrase "born in the wrong body").

[55] *See* Ordover, *supra* note 6, at 60 (stating, "[o]f all the groups targeted by biological determinism, queers seem to be the only ones who have looked to eugenics to deliver us from marginalization"); *Eugenics: Its Origin and Development (1883 – Present)*, NAT'L HUM. GENOME RSCH. INST., https://perma.cc/WV48-S5L3 (last updated Nov. 30, 2021) (stating "[i]n their quest for a perfect society, eugenicists labeled many people as "unfit," including ethnic and religious minorities, people with disabilities, the urban poor and LGBTQ individuals").

late twentieth century,[56] early campaigns for gay rights can be traced to advocacy by Karl Heinrich Ulrichs making the same assertion in the mid-nineteenth century.[57] Ulrichs argued that gay people could not be criminally prosecuted for an identity which they could not control; a choice may imply guilt, but natural behavior should not.[58] The long line of reliance on such a narrative for queer people has created an understanding in the law that sexual orientation and gender identity are innate and immutable characteristics deserving of protection.[59] This theory of immutability over choice places a judgment value on being transgender—if it was a choice it would be wrong, but because it is not a choice, it is acceptable.[60] Further, scholars have considered whether binary notions impact the availability of rights for people who do not fit squarely into the framework.[61]

B. *Conservative Endorsement and "Cures"*

The endorsement of biological essentialism by conservative activists and politicians has allowed for the approach of pushing for "curative" instead of inclusive policies for transgender people.[62] Conservatives have attempted to incorporate "curative" measures by advocating for conversion therapy in

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[56] *Compare* MT v. JT, 335 A.2d 204, 205 (N.J. Super. Ct. App. Div. 1976) (stating "[T]he transsexual is one who has a conflict between physical anatomy and psychological identity or psychological sex"), *with* High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (stating "[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes").

[57] ORDOVER, *supra* note 6, at 61.

[58] ORDOVER, *supra* note 6, at 61.

[59] *See, e.g.*, *Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, https://perma.cc/BJZ5-7VLR (last visited Mar. 19, 2025); Ruth Graham, *About 20 States Have Anti-Discrimination Laws Specifically Protecting L.G.B.T.Q. People*, N.Y. TIMES (June 30, 2023), https://perma.cc/8Q9H-Z37M.

[60] Silver Flight, *Gender: The Issue of Immutability*, U. CIN. L. REV. https://perma.cc/HP85-6MCQ (last visited Mar. 19, 2025).

[61] *Compare* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 400 (2000) ("[I]t is an investment in the retention of the immutability defense and one in the ability to form an effective political movement."), *with* Eliot T. Tracz, *The Inscrutable Bisexual: An Essay on Bisexuality and Immutability*, 21 SEATTLE J. FOR SOC. JUST. 917, 918 (2023) ("[B]isexuality, like monosexuality, is itself immutable under any definition of the term.").

[62] ORDOVER, *supra* note 6, at 67 (noting that responses from conservatives aim to "[offer] up the promise of eventual eradication not of marginalization, but of the marginalized").

the "treatment" of transgender people.[63] While many conservative politicians and healthcare providers claim that these attempts at changing identities work, they rely on the improper pathologizing of queerness.[64] Many states have banned such practices as they have been discredited by major psychology, psychiatry, and social work organizations.[65]

The American Psychiatric Association removed homosexuality from the Diagnostic and Statistical Manual of Mental Disorders ("DSM") in 1973 and gender identity disorder in 2013 on the basis that neither is a mental disorder in need of a cure.[66] Studies on conversion therapy show that it has adverse effects on the mental health of queer individuals, and even in states where it is not banned outright, it may be banned for youth.[67] Regardless of the negative consequences and lack of evidence of conversion therapy's effectiveness, a desire to eradicate the existence of queer people leads to conservatives adhering to faulty science.[68]

1. Historical Eugenics Targeting Queer Communities

In the early 1900s, compulsory sterilization laws arose in the United States.[69] The impact of these laws on the lives of affected individuals is still being dealt with today.[70] In 1909, California became the first state to pass such a law in the United States and an Iowa statute followed in 1911—both targeting individuals for "sexual perversion."[71] Oregon, Nebraska, and Utah followed, all aiming to "cure" or eradicate those they designated as "sexual

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[63] *APA Dictionary of Psychology: Conversion Therapy*, AM. PSYCH. ASS'N., https://perma.cc/JC2Z-HU3F (last updated Nov. 15, 2023) [hereinafter *Conversion Therapy Defined*]; *see also* Shishira Sreenivas, *What is Conversion Therapy?*, WEBMD (Dec. 3, 2021), https://perma.cc/TQJ8-NM6L (recognizing language used to describe conversion therapy as falsely curative).

[64] *E.g.*, *Conversion Therapy*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, https://perma.cc/TZM6-NPHA (last visited Mar. 19, 2025).

[65] Conversion Therapy Defined, *supra* note 63.

[66] *Banning Sexual Orientation and Gender Identity Change Efforts*, AM. PSYCH. ASS'N., https://perma.cc/UV27-CDFQ (last visited Mar. 19, 2025).

[67] *Id.*; *Conversion Therapy*, *supra* note 64, Conversion "Therapy" Laws, MOVEMENT ADVANCEMENT PROJECT, https://perma.cc/9V6T-C8M7 (last updated Nov. 06, 2024).

[68] ORDOVER, *supra* note 6, at 62–63.

[69] ORDOVER, *supra* note 6, at 79.

[70] *California Launches Program to Compensate Survivors of State-Sponsored Sterilization*, GOVERNOR GAVIN NEWSOM, https://perma.cc/2WHV-B6SY (last visited Mar. 19, 2025).

[71] ORDOVER, *supra* note 6, at 79; *Eugenics Timeline*, EUGENICS ARCHIVE, https://perma.cc/5FQY-Z2GN (last visited Mar. 19, 2025).

perverts."[72] In 1925, the Supreme Court upheld a statute in Virginia that allowed for the sterilization of a woman who was deemed "feeble-minded," holding that it did not violate the Constitution.[73] The sister of the Plaintiff in that case was also later sterilized at sixteen to "cure" her promiscuity.[74] In 1929, the Utah Supreme Court questioned the Utah statute's applicability as to Esau Walton, who allegedly attempted to convince a fellow inmate to engage in "sodomy."[75] The Court admitted the law was eugenic and ultimately ruled sterilization inappropriate in this case because the State failed to show that it would benefit Mr. Walton—but remanded the case to the State Board of Corrections, requiring it to be more particular in its sterilization order.[76]

Outside of the United States, in Germany, Magnus Hirschfield was running the Institut für Sexualwissenschaft ("Institute of Sexology"), which quickly became the top center for queer and transgender clinical practice and research in the world.[77] However, once the Nazis took power, the Institute was destroyed.[78] Under Nazi rule, police obtained lists of actively homosexual men.[79] Most of them served prison sentences where they were subjected to inhumane treatment and often experimented on.[80] Still, many were deported to concentration camps.[81] Prior to the rise of Nazism, it was possible for transgender people (then referred to as "transvestites") to acquire passes from police to protect them from criminal prosecution, though the effectiveness has been questioned.[82] The passes were revoked when Nazis took power and previous pass holders who continued "cross-dressing" faced arrest or potential deportation to concentration camps.[83]

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[72] ORDOVER, *supra* note 6, at 80.

[73] Buck v. Bell, 130 S.E. 516, 520 (Va. 1925).

[74] Cori Brosnahan, *Finding Carrie Buck*, PBS (Nov. 2, 2018), https://perma.cc/FCD4-LR38.

[75] Davis v. Walton, 276 P. 921, 924 (Utah 1929).

[76] *Id.* at 925.

[77] G. Samantha Rosenthal & The Conversation US, *Pseudoscience Has Long Been Used to Oppress Transgender People*, SCI. AM. (Feb. 12, 2024), https://perma.cc/6UYW-MLQS.

[78] *Id.*

[79] *Gay People*, HOLOCAUST MEM'L DAY TR., https://perma.cc/4HY2-TTND (last visited Mar. 19, 2025).

[80] *Id.*

[81] *Id.*

[82] Natasha Frost, *The Early 20th-Century Id Cards That Kept Trans People Safe from Harassment*, ATLAS OBSCURA (Nov. 2, 2017), https://perma.cc/97HB-7NZ6.

[83] *See* Jane Caplan, The Administration of Gender Identity in Nazi Germany, 72 HIST. WORKSHOP J. 171, 172 (2011).

As late as 1972 in Germany, surgical interventions were being used to "cure" gay men, while the judicial system was complicit.[84] German neurologists convinced judges to offer gay men serving prison sentences an opportunity for early release if they submitted to brain surgery to "cure" their homosexuality.[85]

At the same time, in the United States, homosexuality was identified as a disorder in the DSM for twenty years and would not be removed for another two years.[86] The DSM has gone through many versions over the years, with transgender status being pathologized in the DSM-III as "gender identity disorder."[87] This designation of transness as a mental illness comes with stigma and a desire to "cure" it like previous attempts to cure homosexuality.[88] The most current version of the DSM, the DSM-V, has replaced gender identity disorder with a non-mental disorder diagnosis of "gender dysphoria" to allow the prescribing of medication to treat distress caused by the misalignment of gender identity and expression.[89] However, the stigma persists.[90]

C. *Pathologizing of Sexual Deviance and the Norm of Heterosexuality and Cisgenderness*

In his book *Discipline and Punish*, Michel Foucault discusses what he deems "power-knowledge relations," meaning the ways in which power produces knowledge and knowledge in turn reinforces power.[91] Foucault describes the power-knowledge relations affecting the realm of queer identities in his discussion of sexual deviancy and the implementation of legal sanctions against perversions.[92] Moves to pathologize sexual deviancy

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[84] ORDOVER, *supra* note 6, at 65.

[85] ORDOVER, *supra* note 6, at 65.

[86] Robert Paul Cabaj, *Working With LGBTQ Patients*, AM. PSYCHIATRIC ASS'N., https://perma.cc/8UC2-5S6D (last visited Mar. 19, 2025).

[87] *Id.*

[88] Virtual Video Interview with Alejandra Caraballo, *supra* note 2, at 23:50–24:10.

[89] *See* Cabaj, *supra* note 86.

[90] NewsNation, Ramaswamy: 'Transgenderism is a Mental Health Disorder' | NewsNation GOP Debate, YOUTUBE (Dec. 6, 2023), https://perma.cc/J685-Z3HU; Brittney McNamara, Trump's Army Secretary Nominee Said Being Transgender is a Disease, TEEN VOGUE (Apr. 11, 2017), https://perma.cc/RLF6-GMUW.

[91] MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 27–28 (Alan Sheridan trans., Vintage Books 2d ed. 1995) [hereinafter *Discipline*].

[92] 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 36 (Robert Hurley trans., Pantheon Books 1st Am. ed. 1978) [hereinafter *History of Sexuality Vol. 1*].

created and reinforced a norm of heterosexuality, thus further ostracizing those falling outside that norm.[93] This production of norms, the discourse around them, and the subsequent reinforcement of power systems explains why those systems of power, such as heteronormativity or cisnormativity that enforce binary concepts of gender, are so widely accepted.[94] In the nineteenth century, sexual perversion was seen as including both gender variances and homosexuality, making the history of the pathologizing of homosexuality closely entwined with the pathologizing of transgender identities.[95]

Toward the end of the nineteenth century, the fight against sexual perversions began to escalate into the realm of law and public opinion.[96] Michel Foucault notes that this escalation was to serve the existing powers of order and was grounded in a sense of knowledge that did not meet the requirements of truth.[97] Once knowledge (even flawed knowledge) enters the public discourse, it has the potential to become entrenched—especially when it supports a biased political view.[98] The current patriarchal system relies on the formation of knowledge and production of discourse around binary systems of sex and gender to reinforce itself as a productive force rather than a repressive one.[99] In the current political sphere, governments in more conservative states often hire anti-transgender academics to produce biased research affirming their beliefs that transgender identities should not be supported medically.[100] This type of knowledge production then allows them to justify anti-transgender legislation through their biased science, regardless of proof to the contrary.[101]

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[93] ORDOVER, *supra* note 6, at 70.

[94] MICHEL FOUCAULT, *Truth and Power*, *in* POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 109, 119 (Colin Gordon ed. & Colin Gordon et al. trans., Pantheon Books 1980) [hereinafter *Truth and Power*].

[95] *See* Marc-Antoine Crocq, *How Gender Dysphoria and Incongruence Became Medical Diagnoses—A Historical Review*, 23 DIALOGUES CLINICAL NEUROSCIENCE 44, 45 (2021), https://perma.cc/4V2F-3V2K.

[96] History of Sexuality Vol. 1, *supra* note 92, at 54.

[97] History of Sexuality Vol. 1, *supra* note 92, at 54 (explaining how medical practice was "more servile with respect to the powers of order than amenable to the requirements of truth").

[98] ORDOVER, *supra* note 6, at 64.

[99] *See* Truth and Power, *supra* note 94, at 131.

[100] McNamara, *supra* note 5.

[101] ORDOVER, *supra* note 6, at 64 ("If [studies] support rampant bias, they become entrenched, regardless of later de-bunking.").

D. *Deconstructing the Gender Binary*

Judith Butler, well-known for their philosophical musings on gender, has described the body as a "social phenomenon in the public sphere," at once owned by the person and by society's views.[102] Entangled by social meanings, the inscription of cultural norms impacts the way gender is expressed and understood.[103] It is only through sameness and collective compliance with a set standard—whether it be adherence to a norm or deviance from it—that people are allowed to advocate against discrimination toward their community.[104] However, Butler questions whether legal definitions that allocate protections to people are sufficient to do justice to the entirety of a person's being.[105]

While Butler may see legal definitions of gender as an insufficient means of recognition, some argue that the removal of such an essentialist notion of gender would not effectively remove gender polarization in society.[106] While we can change the language regarding gender, we must also address the extant gender polarization in our society that describes deviance as problematic.[107] Butler themself already recognized this conundrum, noting that several philosophers—including Foucault—suggest that any potential deviance from the norm must operate within the containment of that norm.[108] Indeed, even those who contemporarily attempt to identify beyond the gender binary must necessarily relate their identity to the existence of the binary in the first instance.[109] To be "non-binary" or to be

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[102] JUDITH BUTLER, *Beside Oneself: On the Limits of Sexual Autonomy*, *in* UNDOING GENDER 17, 21 (2004) [hereinafter *Beside Oneself*].

[103] *Id.* at 20.

[104] *Id.* ("... we have to present ourselves as bounded beings, distinct, recognizable, delineated, subjects before the law, a community defined by sameness.").

[105] *Id.*

[106] BEM, *supra* note 46, at 80 ("In fact, what would remain is gender polarization, the ubiquitous organization of social life around the distinction between male and female.").

[107] BEM, *supra* note 46, at 81.

[108] JUDITH BUTLER, *Gender Regulations*, *in* UNDOING GENDER 40, 51 (2004) [hereinafter *Gender Regulations*].

[109] *Id.* at 42 ("To be not quite masculine or not quite feminine is still to be understood exclusively in terms of one's relationship to the "quite masculine" and the "quite feminine."); Lindsey Curtis, *What is Non-Binary?*, VERYWELL HEALTH (Dec. 29, 2023), https://perma.cc/AN9E-SSFP (defining non-binary as "people who do not identify exclusively as male or female"); Yoshino, *supra* note 61, at 2 ("To possess 'bi'-sexual desire implies the existence of two sexes--male and female.").

"transgender"—where "trans" here derives from the Latin term for "across"—is to acknowledge the instance of a binary notion of gender one has transgressed.

III. Relevance and Importance of Analyzing Contemporary Anti-Transgender Laws

Classic sex discrimination jurisprudence holds discrimination laws about gender at bay.[110] The understanding that sex (as a biological difference) is more "real" than notions of gender can limit protections for individuals whose gender identity differs from their sex.[111] While some states have adopted anti-discrimination policies specifically protecting gender identity, others have disaggregated sex from gender in a way that allows for the persecution of transgender individuals.[112] The reliance on biological essentialist notions of binary sex, and reinforcement of that as the norm, leaves transgender individuals vulnerable to being left out of sex discrimination protections.[113] With the ever-growing amount of anti-transgender legislation in the United States, now more than ever, the reliance on biological essentialist language describing sex has left those who deviate from the binary without protection.[114]

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[110] Katherin M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, 144 U. PA. L. REV. 1, 1–2 (1995).

[111] *See id.* at 2.

[112] Lindsey Dawson & Jennifer Kates, *Youth Access to Gender Affirming Care: The Federal and State Policy Landscape*, KFF (June 1, 2022), https://perma.cc/LEE4-XB8H.

[113] *Compare* Bostock v. Clayton Cnty., 590 U.S. 644, 651–52 (2020) ("An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex."), *with* Vroegh v. Iowa Dep't of Corr., 972 N.W.2d 686, 702 (Iowa 2022) ("Discrimination based on an individual's gender identity does not equate to discrimination based on the individual's male or female anatomical characteristics at the time of birth (the definition of 'sex').").

[114] *See 2024 Tracker*, *supra* note 16 (showing active bills both carried over and introduced in 2024).

ANALYSIS

IV. Biological Essentialism: The Invitation for Eugenics

Biological essentialism is closely tied to eugenics.[115] Even when attempting to utilize biological essentialism to justify the existence of queer identities as natural, there grows a great risk of inviting a eugenicist curative approach to the existence of queerness.[116] Sexology, originally developed to study human sexuality in Europe, produced research in the 19th century showing that animals could undergo sex changes.[117] This led to the development of the term "transvestite" and its placement within a hierarchy of sexual classifications.[118] While some advocates saw these biological classifications of sexual identities as justifications for protection in the legal sphere, eugenicists adopted the idea as a justification to eradicate deviancy from the norm.[119]

Today, this risk is still present.[120] The foundation of queer rights is heavily reliant upon the acceptance of queerness as a natural, immutable part of people's identities.[121] Many who advocate for queer rights thus rely on biological essentialist arguments to assert the immutable nature of queerness.[122] This tactic of arguing biological essentialist origins of queerness, while semi-effective to win some ground of protection for gays and lesbians, has been historically utilized against the queer community.[123]

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[115] KAMDEN K. STRUNK, *Biological Essentialism*, *in* ENCYCLOPEDIA OF QUEER STUDIES IN EDUCATION 55, 55 (K.K. Strunk & S. A. Shelton eds., Brill 2021).

[116] *See generally* ORDOVER, *supra* note 6, at 83–87.

[117] Rosenthal, *supra* note 77.

[118] Rosenthal, *supra* note 77.

[119] Rosenthal, *supra* note 77.

[120] *See, e.g.*, S. 697, 86th Leg., Reg. Sess. § 16-2S-3 (W. Va. 2023) (requiring curative therapy for transgender youth); Peter Wade & Patrick Reis, *CPAC Speaker Calls for Eradication of 'Transgenderism' — and Somehow Claims He's Not Calling for Elimination of Transgender People*, ROLLING STONE (Mar. 6, 2023), https://perma.cc/34LW-VNUH ("For the good of society . . . transgenderism must be eradicated from public life entirely—the whole preposterous ideology, at every level.").

[121] *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 658 (2015) ("[T]heir immutable nature dictates that same-sex marriage is their only real path to this profound commitment.").

[122] Heron Greenesmith, *What If We Weren't Born That Way?*, XTRA (May 26, 2021, 9:58 AM EDT), https://perma.cc/AGX7-4458 ("[W]hen gay, lesbian and . . . bisexual people began to seek legal protection from discrimination on the basis of sexual orientation in the U.S . . . they picked up the "born this way" baton to attempt to prove that sexual orientation is an immutable trait.").

[123] ORDOVER, *supra* note 6, at 61.

Even so, advocates for queer rights seem to continue to hope that biological essentialism will designate them as within the norm and "deliver [them] from marginalization" rather than into the hands of eugenicists.[124]

A. *Contemporary Comparisons*

1. Identifying Eugenic Ideology

The definition of what is eugenics in nature is debatable; with some definitions including only medical procedures and genocide while others include social policies and laws or cultural norms.[125] Consequently, some laws are more easily identified as based on eugenic ideology, such as those that require transgender people to be "incapable of procreation" to acquire new identification documents.[126] Other laws push cultural norms and social policies that make it difficult, if not impossible, for transgender people to participate equally in social life.[127]

2. Bills and Laws Attempting to "Cure" or Eradicate Transness Now

Clearly in line with eugenic ideology, West Virginia's Senate Bill 697 attempts to require the counseling of transgender minors to be curative in nature.[128] The bill provides in pertinent part that counseling must not "induce or exacerbate gender dysphoria…with no intent of cure or cure-pursuing recovery."[129] Conversion therapy is not a new practice, but legislators are pushing forward bills that encourage it.[130] It is actively practiced in 49 of the 50 states even though it is banned in over 20 states.[131]

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[124] ORDOVER, *supra* note 6, at 60.

[125] Mary B. Mahowald, Aren't We All Eugenicists? Commentary on Paul Lombardo's "Taking Eugenics Seriously", 30 FLA. ST. U. L. REV. 219, 224–25 (2003).

[126] Blas Radi, *Reproductive Injustice, Trans Rights, and Eugenics*, 28 SEXUAL & REPRODUCTIVE HEALTH MATTERS 396, 398 (2020).

[127] *See, e.g.*, *Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://perma.cc/296N-Z86D (last visited Mar. 19, 2025) (showing nine states requiring "surgery, court order, or amended birth certificate" and two states banning the change of identity documents altogether).

[128] S. 697, 86th Leg., Reg. Sess. §16-2S-3 (W. Va. 2023).

[129] *Id.*

[130] Jackie Llanos, *FL House Republicans Want to Require Health Insurers to Cover Anti-Trans Conversion Therapy*, FL. PHX. (Jan. 22, 2024, 7:58 PM), https://perma.cc/8Y9B-CPZF.

[131] Jamie Ducharme, *Exclusive: Conversion Therapy is Still Happening in Almost Every U.S. State*, TIME (Dec. 12, 2023, 9:00 AM EST), https://perma.cc/DL6T-YVSW.

This idea that transness can be "cured" (and must be) is directly related to the biological essentialist idea that sex is binary and innate, and the eugenic idea that nonadherence to norms must be fixed.[132]

Biological essentialist views on sex and gender pushed by faulty science coincide with a rise in anti-queer political initiatives historically.[133] In the last few years, the United States has experienced a similar trend, with the origins of the biological essentialist influence being strongly demonstrated by the first sports ban passed in Idaho.[134] The debate around sports participation allowed for the discussion of transgender women as "boys who identify as girls," opening the opportunity to misgender them in the political sphere.[135] Conservative lawmakers quickly recognized the legal designation of "male" and "female" definitions that exclude transgender people, allowing them the opportunity to restrict transgender rights legislatively.[136] These designations, however, have little scientific support as sex is defined in a much more complex way in the fields of genetics and endocrinology than in the legislature.[137]

Beyond exclusion from sports, lawmakers have attempted to limit transgender people's ability to participate in society by regulating bathroom use.[138] A Florida law, titled the Safety in Private Spaces Act, defines biological sex utilizing essentialist notions of reproductive capacity and creates criminal liability for transgender people who use a bathroom not

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132 *See* ORDOVER, *supra* note 6, at 60 ("Genetic promises have been embraced without interrogation by a community and a larger society eager to accept any quick-fix explanations (and consequent solutions) that modern science had to offer.").

133 ORDOVER, *supra* note 6, at 66 (describing rise in antigay initiatives coinciding with popularity of flawed scientific studies).

134 *See* IDAHO CODE § 33-6203 (2020).

135 *See, e.g.*, Bianca Stanescu, *Transgender Athletes Don't Belong in Girls' Sports. Let My Daughter Compete Fairly*, USA TODAY, https://perma.cc/F6YE-7XZV (last updated June 19, 2020, 9:32 AM EST); *Policy Allowing Transgender Athletes to Compete as Girls Found to Violate US Law*, THE GUARDIAN (May 28, 2020, 4:07 PM EDT), https://perma.cc/MXW6-FVLP.

136 *See* Wyatt Ronan, *Breaking: 2021 Becomes Record Year for Anti-Transgender Legislation*, HUM. RTS. CAMPAIGN (Mar. 13, 2021), https://perma.cc/6K8D-XEWP.

137 *See* Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. TIMES (June 28, 2016), https://perma.cc/2M6Q-DYHF ("Relying on science to arbitrate the male-female divide in sports is fruitless, they said, because science could not draw a line that nature itself refused to draw.").

138 James Factora, *Florida's New Bathroom Law Has Gone Into Effect. What Does That Mean for Trans People?*, THEM (July 5, 2023), https://perma.cc/Z8MN-3DDG.

aligned with the Act's definition of their sex.[139] A fully transitioned transgender person will still be in violation of this law when using a bathroom that aligns with their gender identity.[140] This creates a dilemma; for example, does a transgender man with a beard (clearly identifiable as male) have to use a women's restroom to avoid committing a crime? The Act purports to protect women and ensure their comfort and safety, but instead forces transgender people to feel unsafe when, for example, a masculine-presenting transgender person is compelled to choose between entering a women's bathroom or no bathroom at all by law.[141]

How Florida will enforce such a bathroom ban has recently been answered by the state's Department of Highway Safety and Motor Vehicles; the Department has released regulations that will ban the changing of gender markers and invalidate licenses that are inconsistent with someone's biological sex at birth.[142] Florida lawmakers further intend to codify such practice into law through H.B. 1639, which would require the signing of "biological sex affidavits" to acquire and renew licenses and identification cards in the state.[143] The concern with this efficient way to "enforce its laws" is that the state of Florida is effectively eradicating transgender people from the public sphere by threat of criminal liability.[144]

V. Deconstructing the Binary: Bodily Autonomy as a Right

Bills, laws, and regulations such as those discussed above have the impact of othering transgender people in the public spotlight.[145] This othering even goes so far as portraying transgender people as "monsters" or

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139 FLA. STAT. ANN. § 553.865 (2023).

140 *See id.*

141 *See* Libbey Dean, *New Florida Law Restricts Transgender Bathroom Access*, NEWS CHANNEL 8, https://perma.cc/UGH5-YHF6 (last updated June 30, 2023, 6:21 PM EDT) (suggesting the purpose of the bill is for safety of Floridians); Finch Walker et al., *'Felt Like Prey': Bathrooms More Unsafe Under New Florida Law, Trans People Say*, TALLAHASSEE DEMOCRAT, https://perma.cc/EU53-XNVN (last updated Oct. 18, 2023, 1:51 PM EST) (describing the experience of a 16 year old nonbinary person who was made to feel uncomfortable for presenting masculine in female designated bathrooms).

142 Erin Reed, *Florida: "Misrepresenting" Gender On Drivers Licenses is Fraud, Changes Now Banned*, ERIN IN THE MORNING (Jan. 30, 2024), https://perma.cc/K9NT-5A57.

143 H.R. 1639, 2024 Leg., Reg. Sess. (Fla. 2024).

144 *See* Reed, *supra* note 142.

145 *See* Alex Hinton, *Two Myths Fueling the Conservative Right's Dangerous Transphobia*, SAPIENS (Apr. 19, 2023), https://perma.cc/H964-XR86 (describing the myth "that gender is natural and so, by extension transgender people are unnatural" which many conservatives push).

"mutants," once again enforcing the idea that they must be cured or eradicated.[146] This trend is familiar to those whose bodies call into question the law's categorical structure and render legal questions uncertain.[147] The combination of a "transgression of natural limits" and a challenging of core legal distinctions (such as male and female) has often led people to define a particular individual or group as monstrous.[148] Many monster myths themselves were based on a fear of what the "social majority deems abnormal" and were utilized to demonize those who fell into the category of "other."[149] Today, the notion that transgender people are "monsters" is weaponized to justify legislative action against the transgender community and pushes for "curing" their monstrous condition.[150]

A. *Power's Hold Over the Body: Post-Structuralism's Power/Knowledge Cycle and Anti-Trans Legislation*

"[I]t was the taking charge of life, more than the threat of death, that gave power its access even to the body."

— Michel Foucault, The History of Sexuality Vol. 1

Michel Foucault writes that "power is an action upon an action," it is the regulation of behavior by constraining or encouraging certain acts.[151] Power, he states, is also productive: it creates knowledge and discourse.[152] Through the creation of knowledge (and truth), power can reinforce itself with the

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146 *See, e.g.*, D'Anne Witkowski, *Conservatives Are Lying About Transgender People and Think You're Dumb*, PRIDE SOURCE (Nov. 2, 2022), https://perma.cc/Z89F-7U33 ("[T]ransgender people . . . are portrayed as monsters intent on destroying everything we hold dear."); Brooke Migdon, *Florida GOP Legislator Calls Transgender People 'Mutants' and 'Demons' During Hearing*, THE HILL (Apr. 11, 2023, 1:34 PM EST), https://perma.cc/G5F2-W7Y3 (describing State Rep. Webster Barnaby (R-FL) calling transgender people "mutants" and "demons").

147 Andrew N. Sharpe, *Structured Like a Monster: Understanding Human Difference Through a Legal Category*, *in* FOUCAULT AND LAW 212, 213 (Ben Golder & Peter Fitzpatrick eds., Routledge 2016).

148 *Id.* at 212–13.

149 Curious Archive, *Sympathy for the Monster*, YOUTUBE, 6:33–6:44 (Nov. 17, 2023), https://perma.cc/7X9M-Q843.

150 *See* Witkowski, *supra* note 146.

151 Lewis Waller, *Foucault: Bipower, Governmentality, and the Subject*, THEN & NOW, https://perma.cc/QYN8-PG6N (last visited Mar. 19, 2025).

152 Truth and Power, *supra* note 94, at 119.

knowledge it creates.[153] Foucault notes that this has previously occurred with the creation of the *identity* of being homosexual.[154] Through "studying, analyzing, and schematizing" sexuality, what was once viewed (and disciplined) as an *act* of sodomy became a governable *identity* of homosexuality.[155] It is easy to see how this cycle works today with the created Western idea of the sex binary and its continued reinforcement of regulations affecting it.[156] As those in power continue to reinforce the binary system of sex/gender as the ideal, they can justify their hold of power as necessary to maintain the norm against the threat of its destruction.[157] Yet, the constant reinforcement of the binary system, at the extremes it has reached in anti-transgender legislation, is nonsensical.[158] In an effort to maintain the cisgender norms, and thus the power of the patriarchy, conservative lawmakers make themselves tongue-tied to define what a "male" or "female" is—with no consideration of who is left out of those definitions besides transgender people.[159]

B. *Gendered Language*

1. Butler's Argument for the Deconstruction of the Binary

The existence of the binary model for sex and gender, and the

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[153] MICHEL FOUCAULT, *Prison Talk*, *in* POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 37, 51–52 (Colin Gordon ed. & Colin Gordon et al., trans., Pantheon Books 1980).

[154] Carlos A. Ball, *Martha Nussbaum, Essentialism, and Human Sexuality*, 19 COLUM. J. GENDER & L. 3, 7 (2010).

[155] *Id.*

[156] *Compare* OYÈRÓNKẸ́ OYĚWÙMÍ, THE INVENTION OF WOMEN: MAKING AN AFRICAN SENSE OF WESTERN GENDER DISCOURSES, 121–22 (1997) (showing an early creation of four categories of difference between white men, white women, native men, and native women during colonization), *with* Jared Eckert, *Don't Be Fooled: Gender Identity Policies Don't Follow the Science*, THE HERITAGE FOUND. (June 16, 2021), https://perma.cc/693X-3QCM (arguing that science supports binary sex and it should be enforced on those who do not identify with their sex assigned at birth, rather than a protected status for gender identity).

[157] *See e.g.*, Grant Atkinson, *Why Male Athletes Who Identify as Transgender Should Not Compete in Women's Sports*, ALLIANCE DEFENDING FREEDOM, https://perma.cc/KP5D-X7TR (last updated Aug. 21, 2024) (containing a section titled "The end of women's sports?").

[158] *See* Virtual Video Interview with Alejandra Caraballo, *supra* note 2, at 7:58–9:30.

[159] David S. Cohen, *Keeping Men "Men" and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 HARV. J.L. & GENDER 509, 519–20 (2010) ("[S]ex and gender hierarchies are created, perpetuated, and normalized. These essentialist conceptions of gender tend to reinforce power differentials between men and women."); Virtual Video Interview with Alejandra Caraballo, *supra* note 2, at 9:47.

assumption that the binary is natural, categorizes transgender people into otherness.[160] Whether the binary existed prior to its regulation and is therefore natural is debatable, as some cultures had more diverse understandings of gender prior to European colonization.[161] Judith Butler argues that gender is not something you have, but rather the apparatus by which society and governing bodies produce and normalize the categories of masculine and feminine.[162] Butler argues the idealization of this norm of binary gender can be questioned, potentially de-idealized, and divested from, if society stops reinstituting it.[163]

2. Bodily Autonomy as an Alternative for Policymakers

Rather than fight to fit into the binary and thus maintain it, Judith Butler notes that transgender people should claim the right to bodily autonomy.[164] The confinement of people into the biological essentialist categories of male and female in the law leaves identities constrained and freedoms limited.[165] Generally, autonomy can be defined as the right of an individual to exercise control over their lives and make choices.[166] The right to bodily autonomy, however, has been debated heavily in the courts—especially in the context of reproductive rights[167]—and decisions made by the courts on contentious issues have historically resulted in greater polarization of public opinion.[168] A better arena for establishing the right to bodily autonomy would be in the

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[160] *See, e.g.*, Migdon, *supra* note 146 ("This is the planet Earth, where God created men, male and women, female.").

[161] Lawrence La Fountain-Stokes, *Third Gender: Past, Present, and Future*, UNIV. OF MICH. NEWS (June 30, 2023), https://perma.cc/Y3YS-A5KF (noting the existence of people living outside the binary prior to "the arrival of Europeans in the Americas"); *see also Gender Regulations*, *supra* note 108, at 41 (questioning whether the regulation of gender came prior to its existence).

[162] Gender Regulations, *supra* note 108, at 42–43.

[163] Gender Regulations, *supra* note 108, at 48.

[164] *Beside Oneself*, *supra* note 102, at 20–21 ("[W]e must claim rights of autonomy. This is true for the claims made by . . . transexual and transgender claims to self-determination.").

[165] Cohen, *supra* note 160, at 519.

[166] Abigail A. Matthews & Rebecca J. Kreitzer, *How Personal Beliefs and Identity Affect Bodily Autonomy Attitudes*, 99 U. DET. MERCY L. REV. 373, 375 (2022).

[167] *Compare* Roe v. Wade, 410 U.S. 113 (1973), *with* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[168] Matthews & Kreitzer, *supra* note 166, at 380–81.

realm of policymaking.[169]

Decisional autonomy around choices that concern the integrity and autonomy of an individual's body has been found within the bounds of the Constitution under certain circumstances.[170] For example, the First Circuit has held that forcing a person to disclose their transgender status violated the right to decisional privacy under the Fourteenth Amendment.[171] Comparatively, the Sixth Circuit held the opposite.[172] Additionally, the District of Columbia Circuit found no constitutional protection for voluntarily deciding to undergo gender reassignment surgery.[173] Some argue that the inability to find a right to bodily autonomy in the Constitution is a failure of the reader to properly interpret it.[174] However, relying upon the approach of "reading between the lines" of the Constitution for purposes of guaranteeing a right is dubious at best. [175]

In the absence of a reliable constitutional provision to point to, coupled with the contentious nature of transgender issues in the courts, advocacy efforts should focus on the right to bodily autonomy as a legislative goal.[176] A 2022 study surveying the public opinion on bodily autonomy issues over the last 50 years found a heavy correlation between Catholic and Evangelical Protestant membership and lower support for bodily autonomy.[177] The study noted a trend in recent years of decreasing membership in a religious center (such as a church or synagogue), as well as an almost three times increase in Americans that identify as unaffiliated with religion.[178] With these strong predictors of support for bodily autonomy moving toward a more favorable public opinion,[179] now may be the time to push for such a

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[169] Matthews & Kreitzer, *supra* note 166, at 379 ("Policies reflect 'who we are, what we stand for, and what we expect of one another' and thus, have legitimizing or stigmatizing effects.").

[170] Fern L. Kletter, Annotation, *Decisional Autonomy as Constitutional Right—Non-Abortion Cases*, 83 A.L.R. Fed. 3d 5, § 2 (Westlaw through Oct. 10, 2024).

[171] *Id.* at § 30.

[172] *Id.* at § 31.

[173] *Id.* at § 33.

[174] *See generally If We Aren't Finding the Right to Bodily Autonomy in the Constitution, We're Reading it Incorrectly*, CONN. L. TRIBUNE (July 14, 2022, 09:03 AM EDT), https://perma.cc/Y5Z4-9ZA6.

[175] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (overturning *Roe v. Wade* by finding there is no right to abortion within the text of the Constitution).

[176] Virtual Video Interview with Alejandra Caraballo, *supra* note 2, at 16:04.

[177] Matthews & Kreitzer, *supra* note 166, at 408.

[178] Matthews & Kreitzer, *supra* note 166, at 408.

[179] *See* Matthews & Kreitzer, *supra* note 166, at 407.

policy initiative—and doing so could potentially shift public opinion even further.[180]

This type of policy advocacy is a battlefield with many fronts.[181] If one understands that policy shapes public opinion and vice versa,[182] then advocating for such a substantial right to be enshrined in policy requires "a radical shift in the terms of reference that predominate" the legal field.[183] In the realm of transgender rights, that shift means moving away from reliance on biological essentialist language and instead advocating for legislation that establishes the right to bodily autonomy.[184]

Judith Butler warns that the pathologizing of transness undercuts transgender people's autonomy by assuming norms have not been upheld—specifically, they note that it requires the assumption of "language of correction, adaptation, and normalization."[185] While Butler wrote about the pathologizing of transness prior to the DSM's change from using "Gender Identity Disorder" to "Gender Dysphoria,"[186] the reliance upon biological essentialist norms of gender/sex still plagues transgender people attempting to receive care today.[187] To begin to deconstruct the language used in debating transgender rights, and truly advocate for bodily autonomy for transgender people, advocacy should focus on un-diagnosing being transgender.[188] While it is true for some transgender people that transition care is lifesaving treatment,[189] not every transgender person experiences the

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[180] Matthews & Kreitzer, *supra* note 166, at 379 (discussing the "feedback" effect of policy).

[181] *History of Sexuality Vol. 1*, *supra* note 92, at 94 ("[P]ower is exercised from innumerable points, in the interplay of nonegalitarian and mobile relations.").

[182] Matthews & Kreitzer, *supra* note 166, at 378.

[183] Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1480–81 (1992).

[184] Virtual Video Interview with Alejandra Caraballo, *supra* note 2, at 15:08.

[185] JUDITH BUTLER, UNDOING GENDER 76–77 (2004) [hereinafter UNDOING GENDER].

[186] *Compare* UNDOING GENDER, *supra* note 185, at 75–76 (discussing the DSM-IV), *with* Robert Paul Cabaj, *Working With LGBTQ Patients*, AM. PSYCHIATRIC ASS'N., https://perma.cc/MP2H-AAWW (last visited Mar. 19, 2025) (explaining the changes between the DSM versions).

[187] *See, e.g.*, United States v. Skrmetti, cert. granted, No. 23-477, 1, 10 (Nov. 6, 2023) (noting one plaintiff felt "trapped in the wrong body" and the other stated "everything felt wrong about living in [his] body" as justifications for transition care).

[188] UNDOING GENDER, *supra* note 185, at 88 ("[T]he various obstacles [to transition care] posed by the psychological and psychiatric professions are paternalistic forms of power by which a basic human freedom is being suppressed.").

[189] *See* Heather Boerner, *What the Science on Gender-Affirming Care for Transgender Kids Really Shows*, SCI. AM. (May 12, 2022), https://perma.cc/8AEA-GMYJ ("[A]ccess to gender-affirming

gender dysphoria required to obtain a diagnosis and thus receive transition care.[190] If access to care were based on bodily autonomy instead of a diagnosis based on biological essentialist ideas about gender, it would not be restricted to only those who *need* GAC to normalize to cisgender standards; instead, it would be more like cisgender people's choices to have breast or penile enhancement surgeries.[191] Gender dysphoria can still exist as a diagnosis—it has utility value for those who *medically need* the care.[192] But the reliance upon a diagnosis as the only means to access care leaves those who do not fit squarely within the DSM-V's definition of gender dysphoria restricted from accessing the transition care they *socially need* to validate their identity.[193] The WPATH's seventh edition Standards of Care offers a section on the ethical considerations of surgery, which states:

> Genital and breast/chest surgical treatments for gender dysphoria are not merely another set of elective procedures…Genital and breast/chest surgeries *as medically necessary treatments* for gender dysphoria *are to be undertaken only after assessment of the patient by qualified mental health professionals*…These surgeries may be performed once there is written documentation that this assessment has occurred and that the person has met the criteria for a specific surgical treatment. By following this procedure, mental health professionals, surgeons, and of course patients, *share responsibility for the decision* to make irreversible changes to the body.[194]

The language in this statement from WPATH demonstrates the reliance upon fitting within a medical diagnosis to acquire transition care, and the diminishment of autonomy that accompanies that level of third-party

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care is associated with better mental health outcomes—and that lack of access to such care is associated with higher rates of suicidality, depression and self-harming behavior."); Helen Santoro, *Gender-Affirming Care for Trans Youth: Separating Medical Facts from Misinformation*, CBS, https://perma.cc/Y4UT-BB4D (last updated June 28, 2023, 6:09 PM EDT) (discussing the mental health benefits of gender-affirming care).

190 *See* Jack Drescher et al., *Expert Q&A: Gender Dysphoria*, AM. PSYCHIATRIC ASS'N., https://perma.cc/62FM-3SFU (last visited Mar. 19, 2025).

191 UNDOING GENDER, *supra* note 185, at 76–77, 87.

192 UNDOING GENDER, *supra* note 185, at 76 (noting that a diagnosis can facilitate insurance benefits for medical treatment and protective legal status); *see, e.g.*, O'Donnabhain v. Commissioner, 134 T.C. 34, 59 (2010) (concluding gender identity disorder is a disease for the purpose of tax deduction).

193 *See SOC 7th*, *supra* note 38.

194 *SOC 7th*, *supra* note 38 (emphasis added).

involvement.

C. *Embracing the Absurdity of Vague Language: Define a Woman*

One of the infamous stories of human attempts to define a man is about Plato, who claimed man to be any featherless biped.[195] The philosopher Diogenes then plucked a chicken clean and brought it into Plato's school, stating, "This is Plato's man."[196] While laughable in retrospect, the debate today around defining language used in law (and its vagueness) is rife with similar issues.[197] The issue of vague definitions is especially present in laws seeking to define "man" and "woman."[198]

In *The Transsexual Empire*, a foundational text for trans-exclusionary radical feminist theory, Janice Raymond argues that transgender women perform masculinity in their behavior—making them not women.[199] Trans-exclusionary radical feminist theory, often called "TERF" ideology, is centered around the idea that transgender women are merely men masquerading as women to invade women's spaces.[200] TERF ideology is structured around biological essentialism and the idea that men and women are two opposite identities, where one cannot become the other.[201] Today, decades after Raymond made these arguments, politicians rely on similar biological essentialist definitions of women to exclude transgender people

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195 DIOGENES LAËRTIUS, THE LIVES AND OPINIONS OF EMINENT PHILOSOPHERS at 231 (C. D. Yonge trans., G. Bell and Sons, LTD 1915) (e-book).

196 *Id.*

197 *See, e.g.*, Erin Reed, *Republicans Are Redefining the Word 'Equal' in an Iowa Anti-Trans Bill*, THE GUARDIAN (Feb. 8, 2024, 6:10 EST), https://perma.cc/2TY8-JT2X (quoting a legislator in support of a bill that says "equal" does not mean "same" who is unable to define what equal means in the context of the bill).

198 *See* Virtual Video Interview with Alejandra Caraballo, *supra* note 2, at 8:49.

199 JANICE G. RAYMOND, THE TRANSSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE at 102 (Gloria Bowles et al. ed., Teachers College Press 1994) ("One specific example of this is the way a transsexual walked into a women's restaurant with [her] arms around two women…with the possessive encompassing that is characteristically masculine.").

200 *See generally id.* at 38.

201 *See id.* at xix.

from society.[202] But these definitions of women often leave people, transgender and not, as outliers relegated to an "othered" category.[203]

When faced with such essentialist definitions focused on the possession of a biological reproductive system "developed to produce ova,"[204] the question remaining is whether that sufficiently defines a woman.[205] The reality is that there is no sufficient way to define a woman biologically.[206] When facing these questions in litigation around these types of definitive biological assertions, it is useful to embrace the absurdity to reveal it for its nonsensical nature.[207] For example, West Virginia's S.B. 697 defines sex as "the biological state of being female or male" with a laundry list of factors excluding a "subjective experience of gender."[208] When arguing the bill is too vague to be applied, one might point to this list of requirements not only as exclusionary to transgender people but to even conservative understandings of "woman," such as intersex people with mosaic genetics or ambiguous genitalia at birth who lived as women their whole lives.[209] Even bills that only require a singular biological trait to be defined as a woman run the risk of excluding intersex individuals from the definition.[210]

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[202] *See, e.g.*, FLA. STAT. ANN. § 553.865 (2023) ("'Female' means a person belonging, at birth, to the biological sex which has the specific reproductive role of producing eggs."); Rachel Mipro, *'What is a Woman?' Here's How a New Kansas Anti-Trans Law Skews the Meaning of Gender and Sex*, KAN. REFLECTOR (July 5, 2023, 2:17 PM), https://perma.cc/T7E6-C6RV (describing flaws in the definition of a woman or man under a Kansas law).

[203] Mipro, *supra* note 202 ("Anyone who doesn't fit into these classifications is shuffled into the 'disabled' category.").

[204] KAN. STAT. ANN. § 77-207(a)(2) (2023).

[205] *See* Virtual Video Interview with Alejandra Caraballo, *supra* note 2, at 5:42 (pointing out the complications of trying to define a person biologically, especially regarding intersex people).

[206] Alia E. Dastagir, *Marsha Blackburn Asked Ketanji Brown Jackson to Define 'Woman.' Science Says There's No Simple Answer*, USA TODAY, https://perma.cc/A3FE-G7QA (last updated Mar. 27, 2022, 9:13 PM ET) ("Scientists agree there is no sufficient way to clearly define what makes someone a woman, and with billions of women on the planet, there is much variation.").

[207] Virtual Video Interview with Alejandra Caraballo, *supra* note 2 at 13:47 ("So you literally take them at their literal word and hold them to it, and it's a [sic] expectation that is impossible to meet.").

[208] S. 697, 86th Leg., Reg. Sess. § 16-2S-1 (W. Va. 2023).

[209] *What is Intersex?*, INTERSEX SOC'Y OF N. AM., https://perma.cc/8Q52-JULJ (last visited Mar. 19, 2025).

[210] Jenna Barackman, *'Caught in the Crossfire:' How Anti-Transgender Legislation Affects Intersex Kansans*, KAN. CITY STAR, https://perma.cc/P3NU-JF22 (last updated May 5, 2023, 11:55 AM).

When the definition leaves out more than just transgender women, the question of whether the justification of "safety" for cisgender women in women's spaces is "exceedingly persuasive" becomes an issue.[211] The myth that transgender women pose a threat to women's spaces,[212] or the claim of a need for accuracy, fall apart as justifications for these exclusionary definitions when they start to exclude other groups of people that do not fit that narrative.[213]

CONCLUSION

It is in the interests of advocates for queer rights to disconnect from the reliance upon biological essentialism and deconstruct the gender binary when proposing or advocating for new laws to protect the rights of queer people. Whether in policymaking or demonstrating the absurdity of existing policies, advocates should take a firm stance against the biological essentialist language being used to define sex and gender. To continue to rely on a biological essentialist notion of gender (and being transgender) leaves open the possibility for conservatives to pathologize queerness and argue for "cures" rather than social inclusion. At the extreme end of following a biological essentialist approach to securing rights exists the danger of inviting a eugenicist approach to the existence of queer communities. In the past, eugenicists have not shied away from the challenge of curing deviant sexuality, and they will not shy away from the challenge of curing deviance in gender either.

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211 United States v. Virginia, 518 U.S. 515, 531 (1996).

212 Katy Steinmetz, *Why LGBT Advocates Say Bathroom 'Predators' Argument Is a Red Herring*, TIME (May 2, 2016, 4:29 PM EDT), https://perma.cc/33T8-YJ9Y (stating when asking "law enforcement and school officials in places with these protections whether they've seen any increase in sexual assault or rape after passing [trans-inclusive bathroom laws]…they have repeatedly said that they have not").

213 *See* Virtual Video Interview with Alejandra Caraballo, *supra* note 2, at 13:59.

The Judge, the Jury, and the Influencer: A Look at True Crime Influencers and Their Effect on the Justice System

Damien Wilson[*]

INTRODUCTION

Thousands of tips poured into the FBI in mid-November 2022[1] as the public wished to help solve the murder of four University of Idaho students.[2] As police continued investigating this complex case, the University sent an alert asking all to stay away from the campus as there was no known suspect.[3] Seemingly, no one knew who could have committed the crime, yet there was one woman who took to an unlikely place to spread the "truth" surrounding the murders.[4]

[*] J.D. Candidate, New England Law | Boston (2025). I would like to say a special thank you to my parents, Bryan and Liana, whose love, support, and guidance have been invaluable and instrumental through the writing process and years of schooling. Additionally, thank you to the members of *New England Law Review* for their hard work and dedication.

[1] Erik Ortiz, *Idaho College Student Killings: A Summary and Timeline*, NBC NEWS (Dec. 31, 2022, 1:12 PM EST), https://perma.cc/5QL2-9ESE.

[2] Dennis Romero & Erik Ortiz, *Four University of Idaho Students Found Dead Near Campus Have Been Identified*, NBC NEWS (Nov. 13, 2022, 10:01 PM EST), https://perma.cc/L3GS-TD2H.

[3] *Id.*

[4] Carson McCullough, *The Pitfalls of the Armchair Detective*, COURTHOUSE NEWS SERV. (Sept. 8, 2023), https://perma.cc/KTM4-3GVV ("In November 2022, the murders of four University of Idaho students in their home shocked the small town . . . Social-media star Ashley Guillard was sure she'd cracked the case."); Ortiz, *supra* note 1 ("The killings of four University of Idaho students in mid-November at an off-campus residence stunned the small community of Moscow, where investigators grappled with what the town's police chief would later describe as a 'very complex' case.").

Assuming the TikTok usernames @ashleyisinthebookoflife[5] and @ashisgodintheflesh,[6] Ashley Guillard wove a story reaching more than one hundred and fifteen thousand followers[7] about the "true" motive behind the killings and who the murderer was.[8] Guillard investigated using her "psychic abilities,"[9] tarot card readings, and other "spiritual investigation"[10] techniques, leading to the conclusion that the mastermind behind the killings was Rebecca Scofield, a professor at the University of Idaho.[11] Guillard posted over a hundred videos on her TikTok explaining that Scofield had ordered the killings to cover up an alleged affair between her and one of the victims.[12] On her YouTube channel, Guillard discussed everything that happened that night, the motive, and where the alleged evidence may be found.[13] However, Guillard could not provide evidence because she did not have the "infrastructure" to do so unless "God made it possible."[14] Although comments on her videos told her to stop, she continued, with others commenting that they believed Guillard's story, including one stating, "*Don't. Let. Them. Silence. You*."[15]

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[5] Solcyrè Burga, *The University of Idaho Murders Show the Hidden Cost of America's True Crime Addiction*, TIME (Jan. 25, 2023, 10:08 AM EST), https://perma.cc/4YUB-SSL6 (referring directly to the account @ashleyisinthebookoflife, which since has been banned on TikTok with a new account created under @ashleyiisinthebookoflife).

[6] Ashley Solves Mysteries (@ashleyisinthebookoflife4), TIKTOK, https://perma.cc/3FQT-WGZV (last visited Mar. 23, 2025) (referencing the backup account that is also banned on TikTok).

[7] Burga, *supra* note 5.

[8] Ashley Guillard, *Full Synopsis of the Plot to Kill the 4 University of Idaho Students/Ashley Guillards Testimony*, YOUTUBE (Feb. 9, 2023), https://perma.cc/3SNG-62HD.

[9] Scofield v. Guillard, No. 22-cv-00521, 2023 U.S. Dist. LEXIS 204822, at *8 (D. Idaho Nov. 13, 2023).

[10] Drusilla Moorhouse, *A TikTok Psychic and a Professor are Facing Off Over an 'Outrageous' True Crime Conspiracy*, HUFFPOST (Aug. 15, 2023, 8:00 AM EDT), https://perma.cc/X5CD-PHQN.

[11] *Scofield*, 2023 U.S. Dist. LEXIS 204822 at *1–2.

[12] *Id.* at *2.

[13] Guillard, *supra* note 8.

[14] Ashley Solves Mysteries, *supra* note 6.

[15] Ashley Solves Mysteries (@ashleyisinthebookoflife4), TIKTOK (Jan. 28, 2023), https://perma.cc/DJ9L-Q4GS (referring to the comment made by user Naomi Lover, also known as @gacha_frog_hater, on Jan. 10, 2024).

However, this is far from the first time in the last two years that TikTok influencers have risen to "crack the case" of different mysteries.[16] On March 9, 2023, another such influencer, Ken Waks, posted what would turn out to be the first of his investigative series on TikTok, claiming that a stranger had tried to pick him up by offering a ride at night in downtown Chicago.[17] Two days later, Ken posted that he knew what was happening with recently missing people in Chicago and claimed they were related to the people who had approached him a few nights earlier.[18] Ken then posted an entire series of TikTok "investigations" that included news footage of a body being recovered from the river,[19] using true missing persons information to link his theories,[20] and created a map of different cities where this group allegedly targeted individuals.[21] Ken told his over one million followers that he had begun working with a private investigator[22] to expose what he claimed was a group of serial killers named the "Smiley Face Gang."[23]

Guillard's and Waks's rise as investigators and Sherlock-esque detective skills were invalidated when new information and facts going against their claims began surfacing.[24] Guillard's claims failed when an arrest was made in connection with the Idaho student murders,[25] with police officially clearing Scofield of any involvement.[26] Although Scofield was cleared of any suspicion, Guillard continued her TikTok series, and Scofield filed a

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[16] Daysia Tolentino, *A TikTok 'Investigator' Faces Fallout After Claiming to Crack a Serial Killer Case*, NBC NEWS, https://perma.cc/XRG3-6ZWC (last updated May 8, 2023, 6:55 PM EDT); *see generally* Ken Waks (@ken), TIKTOK, https://perma.cc/F6N6-2QQZ (last visited Mar. 23, 2025); Ken Waks, LINKEDIN, https://perma.cc/U6RG-4CLH (last visited Mar. 23, 2025).

[17] Ken Waks (@ken), TIKTOK (Mar. 9, 2023), https://perma.cc/8WYZ-UCXE.

[18] Ken Waks (@ken), TIKTOK (Mar. 11, 2023), https://perma.cc/PE59-2N2F; Ken Waks (@ken), TIKTOK (Apr. 14, 2023), https://perma.cc/G268-NCTP.

[19] Ken Waks (@ken), TIKTOK (Mar. 20, 2023), https://perma.cc/Z4DE-HTX5.

[20] *See* Ken Waks (@ken), TIKTOK (Mar. 30, 2023), https://perma.cc/63J7-ZGEM; Ken Waks (@ken), TIKTOK (Apr. 20, 2023), https://perma.cc/J235-83UM.

[21] Ken Waks (@ken), TIKTOK (Apr. 29, 2023), https://perma.cc/MMS5-ABLA.

[22] Ken Waks (@ken), TIKTOK (Apr. 23, 2023), https://perma.cc/8NBM-DM87.

[23] Ken Waks (@ken), TIKTOK (Apr. 24, 2023), https://perma.cc/GRG5-WCS3; Ken Waks (@ken), TIKTOK (Apr. 29, 2023), https://perma.cc/8V3E-D8W6.

[24] *See* Burga, *supra* note 5; Tolentino, *supra* note 16.

[25] *See* Sasha Pezenik & Emily Shapiro, *University of Idaho Murders 1 Year Later: Where the Case Stands*, ABC NEWS (Nov. 13, 2023, 9:10 AM), https://perma.cc/X5Q4-4UHB.

[26] Ryan Chatelain, *Police Clear Professor Accused in Idaho Killings, Call for More Tips from Public*, SPECTRUM NEWS (Dec. 28, 2022, 1:22 PM ET), https://perma.cc/HH5U-5AFP.

defamation suit against the psychic TikTok influencer.[27] Meanwhile, former investigators criticized Waks, claiming that Waks had been lying about some of the partnerships with the FBI and private detectives, the entire series being nothing more than a marketing ploy to help promote Waks' new startup app, "Forsythe."[28]

Although some were shocked at Guillard's and Waks's downfall, others took to the internet to focus on these creators; large-scale YouTube commentators such as Atozy, Ray William Johnson, and Oompaville reported the entire situation to the online world while calling out the lies, crazy notions, and potential nefarious motives they may have had.[29] Through these videos, news reports, and other miscellaneous coverage, millions learned about Guillard and Waks with an X post exclaiming, "my current biggest flex is that [I] never believed Ken Waks."[30]

This Note argues that although true crime influencers can positively affect the justice system by aiding investigations with evidence, providing helpful tips, and highlighting otherwise ignored cases, the negative consequences outweigh the positives because misinformation is rampant, with unofficial sleuths being more concerned with fame and money. As the digital world and influencer era grow, the need for novel solutions in the true-crime-influencer era must be discovered to help balance potentially devastating consequences to the public.

Part I explores the changes in culture as society moves from traditional media to online platforms, the journalistic code of ethics, the rise of true crime content and its domination of media platforms, and TikTok's history.

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[27] Drusilla Moorhouse, *A TikTok Psychic and a Professor are Facing Off Over an 'Outrageous' True Crime Conspiracy*, HUFFPOST (Aug. 15, 2023, 8:00 AM EDT), https://perma.cc/Q3MV-D8BN.

[28] Atozy, *This TikTok True Crime Scammer Lost Everything*, YOUTUBE (May 10, 2023), https://perma.cc/2H2F-3TPC (covering multiple different TikTok videos alleging Waks lied about certain aspects of his story and when his startup was introduced, which at this time, the original video could not be located).

[29] Atozy, *How a TikTok "Psychic" Turned Her Life Into a Nightmare*, YOUTUBE (Nov. 23, 2023), https://perma.cc/2Q8B-9W7M; Ray William Johnson, *The Internet Destroyed Him*, YOUTUBE (Nov. 10, 2023), https://perma.cc/8B52-D5UE; Oompaville, *TikToks Most Disturbing Liar. . .*, YOUTUBE (May 12, 2023), https://perma.cc/5TEH-Z5QM.

[30] @lilyjohnsonxo, X (May 6, 2023, 5:49 PM), https://perma.cc/JC5J-L4DP. *See generally* Ryan Nuamann, *TikToker Who Falsely Accused University of Idaho Professor of Murdering Four Students Shut Down in Court*, RADAR (Nov. 20, 2023, 3:30 PM ET), https://perma.cc/XMY2-GUH4; Tolentino, *supra* note 16.

Part II establishes the importance of social media and how it is changing our culture while reflecting on influencers and the power social media platforms have. Part III argues that although social media has had positive effects in helping solve crime, inevitable and negative consequences must be considered, such as the hidden dangers of TikTok detectives and how both the public and courts are affected. Part IV reflects on potential solutions that the legal field can adopt to catch up to an ever-expanding digital age while reflecting on the ethical and moral considerations of influencers reporting true crime for fame and money.

I. Background

A. *Prime Time to Online*

"Traditional television is no longer the heart of the living room."[31]

Television was a mainstay of American homes in the 1990s, as 98% of homes had one or more televisions, which were turned on for an average of seven or more hours a day.[32] This was a notable change from the radio programming that had previously dominated and resulted in the creation of networks that made a wide variety of content for families to enjoy, such as *The Tonight Show*, *The Mickey Mouse Club*, and *Twelve Angry Men*.[33] Through television programming, people could learn more about society, the good and bad, and connect with other cultures worldwide for the first time.[34]

As television grew, the internet slowly developed, starting as a way for government researchers to communicate and share information.[35] Computers evolved from the room-filling machines of the 1940s into more

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[31] Chris Morris, *For the First Time Ever, Americans Are Spending Less Than Half of Their Viewing Time Watching TV*, FORTUNE (Aug. 15, 2023, 10:39 AM EDT), https://perma.cc/58CC-GJGU.

[32] Mitchell Stephens, *History of Television*, GROLIER MULTIMEDIA ENCYCLOPEDIA, https://stephens.hosting.nyu.edu/History%20of%20Television%20page.html (last visited Mar. 23, 2025).

[33] *Id.*

[34] Television in Am. Soc'y Reference Libr., *Television's Impact on American Society and Culture*, ENCYCLOPEDIA.COM, https://perma.cc/29RQ-FV64 (last visited Mar. 23, 2025).

[35] *A Brief History of the Internet*, UNIV. SYS. GA 2, https://perma.cc/QX2C-VMDF (last visited Mar. 23, 2025).

portable desktop versions by the 1970s–80s.[36] However, it was not until the late 90s, when computers became more affordable and internet access more obtainable,[37] that internet usage exploded exponentially in the 21st century.[38] Having an online presence became more accessible with the introduction of smartphones—moving from small devices with high prices for internet connection[39] to handheld computers that could do everything, cementing their place as an integral part of everyday life.[40] The internet and digital world became more accessible with these technological changes and the creation of social media sites such as MySpace,[41] X (once Twitter),[42] Facebook,[43] YouTube,[44] and TikTok.[45]

Social media revolutionized communication by creating instantaneous networking and large digital communities where information is shared

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[36] *See Timeline of Computer History: Computers*, COMPUT. HIST. MUSEUM https://perma.cc/K25G-8YPN (last visited Mar. 23, 2025).

[37] Tyler Perry, *How Did Computers Change During the 1990s?*, INTO THE 90S (Jan. 18, 2023), https://perma.cc/7TAC-UQHT.

[38] Max Roser, *The Internet's History Has Just Begun*, OUR WORLD IN DATA (Oct. 3, 2018), https://perma.cc/MDK6-TVCV (referring to the chart "Share of the population using the Internet," with internet usage starting at roughly 2% for North America in 1993 to over 70% in 2007).

[39] Meghan Tocci, *Smartphone History and Evolution*, SIMPLE TEXTING, https://perma.cc/UKG6-MPM9 (last updated June 27, 2024).

[40] Hillary Harter, *Cell Phone Usage – How Much is Too Much?*, UNIV. ROCHESTER MED. CTR. (July 1, 2023), https://perma.cc/EMT4-UXVG ("Cell phones are integral to everyday tasks such as obtaining directions, accessing news and entertainment, communication with family, friends and coworkers, and managing schedules/meetings.").

[41] *E.g.*, *MySpace*, BRITANNICA, https://perma.cc/X5HL-ZYRG (last updated Aug. 28, 2024).

[42] *E.g.*, Jonathan Vanian, *Twitter is Now Owned by Elon Musk – Here's a Brief History from the App's Founding in 2006 to the Present*, CNBC (Oct. 29, 2022, 8:00 AM EDT), https://perma.cc/2JFN-Z6RS.

[43] *E.g.*, Amanda Onion et al., *Facebook Launches*, HIST., https://perma.cc/6JBB-FX9W (last updated Feb. 2, 2024).

[44] *E.g.*, Rahul Rana, *History of YouTube – How it All Began & Its Rise*, VDOCIPHER (May 24, 2024), https://perma.cc/E5GJ-MQSA.

[45] *E.g.*, Deborah D'Souza, *TikTok: What It Is, How It Works, and Why It's Popular*, INVESTOPEDIA, https://perma.cc/4W9A-YVS7 (last updated May 23, 2024).

freely around the globe.[46] In this modern era, television has lost its reign—studies have found that the average internet user spends two and a half hours or more on social media, thirty percent more time than watching television.[47]

As social media use has increased, so has its monetization and business opportunities.[48] Monetization allows individuals to generate revenue using various strategies on social media platforms such as: advertising, brand partnerships, and subscription purchases.[49] Most of the time, monetizing a social media platform comes in the form of being an "influencer," which refers to people with social media channels that amass a following of users interested in a creator's specific niche.[50] One poll found that one in four Generation Z youth (Americans born between the late 1990s and early 2000s)[51] plan to become social media influencers.[52]

B. *The Integrity of the Newsroom*

Professional journalists research, prepare, and present stories through media such as television, newspapers, and the like.[53] Such journalists, such as newscasters, adhere to a code of journalistic ethics.[54] However, there is no

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[46] Lydon Seitz, *History of Social Media (It's Younger Than You Think)*, BROADBAND SEARCH, https://perma.cc/89AG-BD4M (last modified Apr. 18, 2024) ("Social media is online communication designed to create networks and communities where information, ideas, messages, photos, etc., can be freely shared.").

[47] Bob McKay, *TV Marketing's Reign Is Over; Now Social Media Has Taken Its Place*, FORBES (Dec. 1, 2023, 7:00 AM EST), https://perma.cc/ZKA8-RQKK.

[48] The Social Space, *The Business of Influence: Unleashing the Power of Social Media Monetization*, MEDIUM (May 19, 2023), https://perma.cc/5AHV-BYYT.

[49] *Id.*

[50] *What Is an Influencer?—Social Media Influencers Defined*, INFLUENCER MKTG. HUB, https://perma.cc/4FK9-BDBH (last updated Aug. 30, 2024).

[51] Alison Eldridge, *Generation Z*, BRITANNICA, https://perma.cc/C2SQ-8MX2 (last updated Oct. 21, 2024).

[52] Darian Woods & Robert Smith, *Gen Z's Dream Job in the Influencer Industry*, NPR at 00:25–00:31 (Apr. 26, 2023, 5:01 PM ET), https://perma.cc/UZU9-N3FM (podcast).

[53] *What Does a Professional Journalist Do?*, LEARN.ORG, https://perma.cc/87QY-VRYM (last visited Mar. 23, 2025).

[54] Lynn Walsh, *People Don't Assume Journalists Have Ethics. Here's How You Can Highlight Yours*, MEDIUM (Dec. 7, 2021), https://perma.cc/AB8S-GDKQ.

strict universal set of rules with each newsroom having its own directives.[55] Most base their codes on the Society of Professional Journalists Code of Ethics (hereinafter "SPJ").[56] Adherence to the SPJ is entirely voluntary, but the SPJ is designed to put pressure on news organizations to establish rules based on the SPJ's four recommended high-level guiding principles.[57] These principles are: "Seek Truth and Report It," "Minimize Harm," "Act Independently," and "Be Accountable and Transparent."[58]

As much as one may think there are no ethics in journalism, there are forms of all four prongs in trusted news sources, with the SPJ being "one of the most widely used" ethical resources, "taught in schools, referenced by journalists," and the base for many ethical codes and standards.[59] Although adopting ethical rules in journalism is voluntary, violating journalistic ethics can cross the line from an ethical responsibility to legal liability.[60] For instance, federal law prohibits the use of federal money for purposes of "publicity and propaganda."[61] For example, the Department of Health and Human Services violated this law "when it used taxpayer money for promoting its prescription drug plan through a video *disguised* as news . . . [that] featured 'reporter' Karen Ryan, leading viewers in the 33 markets where it aired to believe it was news."[62]

Nevertheless, this is not to say that the public perceives that there is journalistic integrity in the news.[63] Some sources indicate that most individuals believe that there is nothing holding journalists back from saying what they would like.[64] Fake news reports, deception, plagiarism,

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[55] Kelly McBride, *The Rules of Journalism*, NPR (Jan. 27, 2023, 10:54 AM ET), https://perma.cc/AEW6-7CNP.

[56] *See SPJ Code of Ethics*, SOC'Y PRO. JOURNALISTS (Sept. 6, 2014, 4:49 PM CT), https://perma.cc/C7K6-6X2N [hereinafter *Code of Ethics*].

[57] *Ethics Answers: Frequently Asked Questions*, SOC'Y PRO. JOURNALISTS, https://perma.cc/GS7H-VFVT (last visited Mar. 23, 2025).

[58] *Code of Ethics*, *supra* note 56.

[59] Walsh, *supra* note 54.

[60] Kirsten B. Mitchell, *Violating Journalism Ethics . . . and Possibly the Law*, REP. COMM. FREEDOM PRESS, https://perma.cc/3CM3-Q8GZ (last visited Mar. 23, 2025).

[61] *Id.*

[62] *Id.* (emphasis added).

[63] Walsh, *supra* note 54.

[64] *See* Walsh, *supra* note 54.

and other unethical acts are all things the public expects from news.[65] Mistrust is at an all-time high, with many experts emphasizing regaining the public's trust.[66] However, the ever-expanding digital world has changed how we receive our news.[67] Around half of Americans get their news from digital platforms, using search engines to find specific news.[68] Alarmingly, those under the age of 29 get their news predominantly from social media.[69]

The question is whether social media influencers must follow the same ethics as professional journalists.[70] The answer is no.[71] Influencers must deal with specific regulations and terms dictated by the platform; however, these terms are relatively limited and primarily geared toward blatant scams.[72]

While journalistic ideals are meant to promote objectivity and facilitate the presentation of quality news to the public, influencers often act differently by presenting their opinions on whatever is happening.[73] Influencers play on viewers' emotions by presenting topics that drive emotional engagement.[74] If an influencer violates an ethical concern, there is no natural consequence unless the public takes the stand to "cancel" that influencer.[75] "Canceling" means that the public stops supporting an influencer who says or does something that is deemed socially unacceptable.[76] However, canceled influencers do not always lose their

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[65] *See* Mitchell, *supra* note 60.

[66] *In the Wake of Ethical Violations, SPJ Calls for Public Dialogue*, SOC'Y PRO. JOURNALISTS (May 13, 2003), https://perma.cc/7TBD-J2R6.

[67] Elisa Shearer, *More than Eight-in-Ten Americans Get News from Digital Devices*, PEW RSCH. CTR. (Jan. 12, 2021), https://perma.cc/FCV4-QF5S.

[68] *Id.*

[69] *Id.*

[70] *See generally* Caroline Sharpless, *The Ethical Dilemma of Influencers as Journalists*, PFEIFFER L. (Mar. 20, 2020), https://perma.cc/4AVK-5Q55.

[71] *Id.* ("Regardless of their age, YouTubers are not held to the same standards as trained journalists. They do not follow a set Code of Ethics and are not held accountable in the same way that reporters for traditional news sources are.").

[72] *Id.*

[73] *See* Stephen J.A. Ward, *Digital Media Ethics,* CTR. JOURNALISM ETHICS, https://perma.cc/RPW4-C86H (last visited Mar. 23, 2025).

[74] Aidan Wiess, *Social Media and Journalistic Ethics in the Age of Disinformation*, W. WASH. UNIV. NEWS (Feb. 24, 2021), https://perma.cc/BL27-HKST.

[75] *See* Alexandra Lewis, *Social Media Influencers and Cancel Culture*, MEDIUM (Jan. 21, 2023), https://perma.cc/VD6D-J3FU.

[76] *Id.*

influence, as is evidenced by "canceled stars" such as Jeffree Star and Shane Dawson.[77] Both influencers were canceled for different reasons; however, they have maintained millions of followers on their platforms and are worth an estimated two hundred million[78] and twelve million dollars, respectively.[79] Until recently, both stars were earning over a million dollars each year from their YouTube channels.[80]

C. *The Beginning of #TrueCrime*

MrBeast is one of the top-ranking YouTubers,[81] starting his influencer journey in 2012, amassing over 343 million subscribers and over 69 billion total channel views in the time since his debut.[82] It is hard to believe any influencer-type media would come close to MrBeast in views, yet simply searching #truecrime on TikTok returns a staggering 54.4 billion views.[83] For more perspective, TikTok has been around for only eight years,[84] with #truecrime viewed almost seven times more than the current world population.[85]

Interestingly, this is not the first time that society has shown its love for true crime content; a 2022 poll showcased that half of Americans enjoy the

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[77] *See generally* Jessica Taylor, *Life After Being Cancelled: What Happened to the Influencers Who Fell from Grace After Scandals Such as Blackface and Jokes About Pedophilia—From Running a Yak Farm to Joining an Ethiopian Tribal Group*, DAILY MAIL (May 13, 2023, 8:26 EST) https://perma.cc/5RWD-2E39.

[78] SK Desk, *Jeffree Star's Net Worth 2023*, SK POP, https://perma.cc/CKB8-CY6Q (last modified Apr. 27, 2023, 8:48 GMT).

[79] *Shane Dawson's Net Worth*, SK WIKI, https://perma.cc/ZF2J-G2JJ (last visited Mar. 23, 2025).

[80] SK Desk, *supra* note 78 (reporting earnings between 15–20 million per year); SK WIKI, *supra* note 79 (reporting earnings on his main channel as 1.8 million per year prior to June, 2020).

[81] Abram Brown & Abigail Freeman, *The Highest-Paid YouTube Stars: MrBeast, Jake Paul, and Markiplier Score Massive Paydays*, FORBES, https://perma.cc/2AVU-Y6G7 (last updated May 11, 2022, 11:10 PM EDT).

[82] MrBeast (@MrBeast), YOUTUBE, https://perma.cc/4XHW-LDEV (last visited Mar. 23, 2025) (referring to his current subscribers and views under "Channel Details").

[83] *#truecrime*, TIKTOK, https://perma.cc/K8JA-YPQ5 (last visited Mar. 23, 2025) (referring to view count as of Jan. 17, 2024, at 54.6 billion, which has since been updated to total posts).

[84] *See* D'Souza, *supra* note 45.

[85] *Current World Population*, WORLDOMETER, https://perma.cc/ZZR5-FA8Z (last visited Mar. 23, 2025) (counting the current world population at over 8.1 billion as of Jan. 14, 2025).

genre, with 30% saying it is their favorite.[86] True crime content brings people into the hidden lives of serial killers, multitudes of different crimes, law enforcement perspectives, and sometimes even putting viewers in the shoes of the victim.[87] Professor Stacey Nye attributes this popularity to our innate curiosity, stating, "[e]vil tends to fascinate us, you know, we really want to read all about it. We want to know what drives someone to do these evil thinkable [sic] acts because it's so outside of our own realm—for most of us."[88]

Although popular, the legality of airing stories of crimes adjudicated in a court of law or still awaiting trial is complex.[89] Presenting misinformation about a potential case may subject one to a defamation action.[90] Massachusetts defines defamation as "the act of unjustifiably injuring the good reputation of a party via misleading or untrue malicious statements."[91] Multiple chapters of the Massachusetts General Laws cover defamation, defining the scope and where claims may be brought.[92]

However, the issue is that defamation in civil cases must have evidence of adverse effects on the person's reputation, and defamation in criminal cases requires proof of malice.[93] A court may find a person who is a party to a case of great public interest to have voluntarily drawn attention to themselves, causing public discussion that negates a claim of defamation.[94] Cases such as these create limited-purpose public figures—"individuals who make the conscious decision to enter the public sphere and engage in a

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[86] Mallory Cheng & Cait Flynn, *The Double-edged Sword of True Crime Stories' Popularity, a UWM Professor Explains*, WUWM 89.7 FM (Jan. 20, 2023, 10:05 PM CST), https://perma.cc/9YTH-NX82.

[87] *Id.*

[88] *Id.*

[89] Maria Fischer, *When "True" Crime Podcasts Air False Information About Real People*, BROOK. SPORTS & ENT. L. BLOG (Feb. 28, 2022), https://perma.cc/5XMT-EX79.

[90] *Id.*

[91] RM Warner Law, *Massachusetts Defamation Laws & Standards*, KELLY WARNER L., https://perma.cc/RWN8-WRHF (last visited Mar. 23, 2025); *see* Noonan v. Staples, Inc., 556 F.3d 20, 28 (1st Cir. 2009).

[92] *Massachusetts Law About Defamation*, MASS.GOV, https://perma.cc/9AZJ-N2CQ (last updated Apr. 2, 2024).

[93] *Defamation in Massachusetts Family Law Cases*, PORCELLO L. OFF., https://perma.cc/DK38-KCWZ (last visited Mar. 23, 2024).

[94] *Id.*

'public controversy,'" and "have thrust themselves to the forefront of particular public controversies to influence the resolution of the issues involved."[95] For instance, in cases such as *Hibdon v. Grabowski*[96] and *McCafferty v. Newsweek Media Group, Ltd.*, the courts found the defendants to be "limited-purpose public figures" because they had greater access to communication channels and had placed themselves at the center of the controversy.[97]

D. *TikTok's Tumultuous Past*

TikTok was launched in 2016 by ByteDance, a Chinese company.[98] Users can create, share, and watch short videos ranging from cute dances to exciting stories and creative art, to name a few topics.[99] The virality of TikTok and the content users create is due to the alleged entertainment value, the algorithm showcasing viral content and trends in bite-sized content that can be easily consumed in small amounts of time.[100] TikTok continues to grow in popularity and is one of the fastest-growing apps ever created, with 23% out of 5.3 billion internet users worldwide using TikTok and over one billion monthly active users.[101]

It is fair to say that TikTok has taken over the world, becoming a staple in most internet users' lives; however, it is not without its controversies.[102] The United States, Europe, and Canada have all taken steps to restrict access to TikTok, citing security threats.[103] Concerns result from the potential sharing of users' sensitive data, including location and personal details, with the Chinese government.[104] Although the US government fears potential

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[95] Derigan Silver & Loryn Rumsey, *Going Viral: Limited-Purpose Public Figures, Involuntary Public Figures, and Viral Media Content*, 27 COMM. L. & POL'Y 1, 7 (2022).

[96] Hibdon v. Grabowski, 195 S.W.3d 48, 62 (Tenn. Ct. App. 2005).

[97] Silver & Rumsey, *supra* note 95, at 21.

[98] D'Souza, *supra* note 45.

[99] D'Souza, *supra* note 45.

[100] Flytant, *Why Has TikTok Become so Popular in the USA and What Are The Critical Factors of TikTok's Popularity?*, LINKEDIN (July 25, 2023), https://perma.cc/3H2D-GKD7.

[101] Backlinko Team, *TikTok Statistics You Need to Know*, BACKLINKO, https://perma.cc/2AQE-SQWU (last updated July 1, 2024).

[102] D'Souza, *supra* note 45.

[103] Sapna Maheshwari & Amanda Holpuch, *Why the U.S. Is Forcing TikTok to be Sold or Banned*, N.Y. TIMES (June 20, 2024), https://perma.cc/H5V4-XPPV.

[104] *Id.*

security risks, there are fewer and fewer people who support banning TikTok as it only continues to grow.[105]

II. Importance

A. *Social Media and Culture*

Although social media started small, it has undoubtedly changed the culture globally as it entwines itself into our everyday lives—including our political and legal systems.[106] Information is now at our fingertips, and we no longer need to wait for daily news reports and other forms of traditional media.[107] There are positive changes, such as allowing communication and socialization between people, sharing knowledge, and learning about different cultures and experiences.[108] The problem, however, lies in the cases where people present any information they desire, not caring if it is wrong, sexist, homophobic, or overall intolerant and repulsive.[109]

Social media outlets utilize complex algorithms that show users the things they love or have previously interacted with, causing people to become stuck seeing information that garners the most views and may go viral without a human knowing the algorithm exists.[110] Users end up trapped in an echo chamber and only see the information that solidifies their opinion or knowledge, thus aiding the spread of misinformation.[111] Senior Instructor Joan Connell from Western Washington University sums this up by saying, "[E]motion drives engagement, and online content is designed to get an emotional response [further polarizing] people. We no longer have

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[105] Colleen McClain, *A Declining Share of Adults, and Few Teens, Support a U.S. TikTok Ban*, PEW RSCH. CTR. (Dec. 11, 2023), https://perma.cc/8N5U-RTKV.

[106] Beau Peters, *How Social Media is Changing Our World*, FAIR OBSERVER (June 17, 2020, 8:42 EDT), https://perma.cc/JCB2-LQV7.

[107] *Id.*

[108] *Impact of Social Media on Our Culture*, KOLAHAL THEATRE WORKSHOP (Nov. 7, 2020), https://perma.cc/TQX3-YZE3.

[109] *Id.*

[110] Dorcas Adisa, *Everything You Need to Know About Social Media Algorithms*, SPROUT SOC. (Oct. 30, 2023), https://perma.cc/ZY6A-KCY5.

[111] *What is an Echo Chamber?*, GCF GLOB., https://www.freedomforum.org/free-speech-on-social-media/ (last visited Mar. 23, 2025).

that shared public square. We have . . . bubbles of ['like-mindedness'] where we get our news."[112]

B. *Influencers and Monetization*

The First Amendment protects free speech; however, as social media platforms are private entities, they are not bound by the Constitution.[113] Each platform can moderate as it sees fit, establishing different terms and conditions users must follow while deciding who does and does not violate those rules.[114] A prime example is when a large-scale YouTube creator recently "doxed" another creator.[115] YouTube content-creator Jacksfilms was an outspoken individual against a longstanding YouTube content-creator, Sssniperwolf, stating that she was stealing others' content with unoriginal reaction videos.[116] The situation reached a breaking point when Sssniperwolf posted a now-deleted video to her almost 6 million Instagram followers, asking if she should go to Jacksfilms house before making the trip, livestreaming the outside of his home, revealing where he and his family live to her online audience

Although many called for Sssniperwolf to be banned, YouTube refused to comment during the controversy, instead posting seemingly taunting tweets to Jacksfilms' content.[117] After a week of silence, YouTube responded that Sssniperwolf had received a temporary monetization suspension, further demonetizing both actors for their actions.[118] YouTube's response

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[112] Wiess, *supra* note 74.

[113] Lata Nott, *Free Speech on Social Media: The Complete Guide*, FREEDOM F., https://perma.cc/4WQX-K7MS (last updated Oct. 2, 2023).

[114] *See id.*

[115] Dani Di Placido, *SSSniperwolf vs. Jacksfilms: YouTube Doxxing Controversy, Explained*, FORBES (last updated Oct. 20, 2023, 01:37 PM EDT), https://perma.cc/BL6B-3C78 (referring to doxxing as the act of revealing personal information about someone online without consent, such as their real name, home address, workplace, etc.).

[116] *Id.*

[117] Paul Tassi, *Creators Say YouTube's SSSniperwolf Doxxing Punishment Is a Double Standard*, FORBES (Oct. 22, 2023, 8:17 AM EDT), https://perma.cc/3P5K-PUTH; @TheActMan_YT, X (Oct. 19, 2023, 3:16 PM), https://perma.cc/XM2E-MWGE (tweeting sarcastically "You know what would be really meta is if I made a reaction video to all the Community Guidelines you don't actually enforce. Oh wait…," referring to Jacksfilms secondary channel criticizing and reviewing Sssniperwolfs videos).

[118] @TeamYouTube, X (Oct. 20, 2023, 12:37 PM), https://perma.cc/QU23-X9G7.

was seen by all (aside from Sssniperwolf fans) as a mere slap on the wrist, as small creators were demonetized for months and even banned for minor offenses while Sssniperwolf exceeded those minor events in revealing someone's personal information.[119] Nevertheless, this controversy showcases the double standard where the more money a content-creator brings in, the more a social media platform allows them to operate without repercussions.[120]

ANALYSIS

III. The World of True Crime, Influencers, and Law are Inevitably Connected and Must Adapt to Control the Good and Bad

> "This is the perfect 'Dateline' story . . . It's a story with a twist, it grabs people's attention. . . . Right now murder is hot, that's what everyone wants, that's what the competition wants, and we're trying to beat out the other networks to get that perfect murder story."[121]

The above comment perfectly reflects the drive one can have when going into the true crime influencer sphere, hoping to rake in the views and the money that comes with it.[122] Influencers may sometimes act as detectives, trying to be the next "Sherlock Holmes of Gen Z."[123] However, there is no telling what this can do in the current post-truth era filled with fake news, misinformation, and influencers at the forefront.[124] Aside from conspiracy theorists and "psychic" detectives, such as Ken Waks and Ashley Guillard,

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119 Tassi, *supra* note 117.

120 Tassi, *supra* note 117.

121 Kathryn Schulz, *Dead Certainty*, NEW YORKER (Jan. 17, 2016), https://perma.cc/G2WT-XZ2C.

122 I, Napoleon B., *Alex Murdaugh and His Crimes: The Cash Cow of True Crime Influencers*, MEDIUM (Mar. 4, 2023), https://perma.cc/N2P2-7C8M [hereinafter *The Cash Cow of True Crime*].

123 *See* James Greig, *Nicola Bulley: How TikTok Detectives Finally Went Too Far*, DAZED (Feb. 21, 2023), https://jmc.ilmauniversity.edu.pk/arc/Vol3/3.1/2.pdf.

124 Fouzia Jamil & Muhammad Nadeem Jamil, *Citizen Journalism and Media Laws and Ethics in Post Truth Era: An Analytical Survey*, 3 J. MEDIA & COMMC'N 20, 21, 31, https://perma.cc/R9QF-2FTV ("Post-Truth Era" means the period after the truth in which it is very difficult and logical process to identify the true lie. The Oxford Dictionary defines it as an adjective "relating to or identifying situations in which objective facts have little effect, while instead forming public opinion of emotions and personal beliefs.").

these detectives can push boundaries by trespassing, spreading hysteria, and casting false allegations.[125] However, this does not mean that nothing good can come out of internet sleuthing, as demonstrated by high-profile cases solved with the help of such individuals.[126]

Netflix premiered what is arguably the first extensive insight into internet sleuths and their participation in a high-profile murder investigation in their 2019 crime documentary, titled, *Don't F**k With Cats: Hunting an Internet Killer*.[127] The documentary followed internet detectives who helped uncover the location of Luka Magnotta, who posted videos of himself first killing kittens in 2010 before escalating and posting himself murdering Jun Lin leading to his eventual arrest in 2012.[128] The techniques used to locate him were unique and new during the young days of social media; they used internet forums, eBay transactions, photo metadata, and correlating images with Google Maps street views.[129] Today, people know how to use these, but they also have the added advantage of virality and being able to showcase theories and evidence while bringing attention to cases that may have otherwise been forgotten.[130]

A. *The Positives of Social Media Sleuths and #TrueCrime*

Through social media, people can disseminate information at breakneck speed, and it is considered a vital tool in the fight against injustice.[131]

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125 Greig, *supra* note 123; McCullough, *supra* note 4; Tolentino, *supra* note 16.

126 Gabrielle Bruney, *Netflix's Don't F**k with Cats Tells the True Story of One of Canada's Most Infamous Murderers*, ESQUIRE (Dec. 22, 2019), https://perma.cc/4ESQ-9C9V/.

127 *See Don't F**k with Cats: Hunting an Internet Killer*, IMDB, https://perma.cc/SJ4E-GCDY (last visited Mar. 23, 2025).

128 Bill Jensen, *Animal Instinct: How Cat-loving Sleuths Found an Accused Killer Sadist*, ROLLINGSTONE (Mar. 19, 2014), https://perma.cc/2SJB-EVJS; *Luka Rocco Magnotta Arrested in Germany*, CBC, https://perma.cc/MM6Y-VZ4F (last updated June 4, 2012); Netflix, *Don't F**k with Cats: Hunting an Internet Killer | Official Trailer | Netflix*, YOUTUBE (Dec. 4, 2019), https://perma.cc/4P48-ATUC.

129 Still Watching Netflix, *The Tricks the Internet Detectives Used to Find the Cat Killer | Don't F**k with Cats*, YOUTUBE (Jan. 22, 2020), https://perma.cc/XS7B-CNZZ.

130 Aarzoo Kalyan, *From Gabby Petito to Claire Miller Case: 5 Times TikTok Users Assisted in Crime Investigations*, MEAWW (May 22, 2023, 1:13 PST), https://perma.cc/KZS4-6J8Z.

131 Mary-Kathryn Appanaitis, Social Media and Wrongful Convictions 2 (Apr. 8, 2022) (unpublished Senior Honors Thesis, The University of North Carolina at Chapel Hill), https://perma.cc/7WRK-Q6UL.

Everyone worldwide can gather and present evidence to overcome barriers that keep powerful people hidden from justice.[132] Many are convinced that the Murdaugh case, in which a well-known lawyer killed his wife and son in 2021, found justice only due to its massive coverage, believing that the family's power could have allowed them to get away with anything.[133] Successful use of social media virality is apparent with movements such as #metoo, where collective voices of many gather to hold powerful men accountable—men who may have otherwise been able to fly under the radar face the consequences of their actions.[134] In the mindset of crime, the thought is that the more attention brought to the case, the more tips there are, and the better the chance of solving the mystery.[135]

Most of the positives come from influencers bringing new eyes onto the case and finding pieces of evidence.[136] Outside the courtroom, people can find things that can break down the walls of a case,[137] highlight cases that need public assistance,[138] and turn investigations into large-scale crowdsourcing initiatives with nearly unlimited resources.[139] There is almost no way to hide the dark sides of the past when millions of eyes are examining every piece of information, and when it comes to the internet, once something is posted, it is there forever.[140] Unfortunately, there is no natural

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132 *See The Cash Cow of True Crime*, *supra* note 122; *see generally* Brittany Stern, *Social Media's Influence on the Outcome of Trials: State v. Casey Anthony & Depp v. Heard – How Florida Can Prevent a Breakdown in the Adversarial Process*, 47 NOVA L. REV. 111, 113 (2022).

133 *The Cash Cow of True Crime*, *supra* note 122.

134 JoAnne Sweeny, *Social Media Vigilantism*, 88 BROOK. L. REV. 1175, 1179 (2023).

135 Sarah Horbacewicz, *A Look at True Crime Stories | Do They Help Solve the Case?*, THV11 (May 24, 2023, 10:38 PM CDT), https://perma.cc/JKL9-62QK.

136 *See* Jessica Guynn et al., *TikTok Is on the Gabby Petito Case. Are These True Crime Sleuths Helping Solve It?*, USA TODAY (Sept. 20, 2021, 7:33 PM EST), https://perma.cc/TBX8-CEZ4.

137 Gabrielle Aguliar et al., *True Crime TikTok: Affording Criminal Investigation and Media Visibility in the Gabby Petitio Case*, MASTERS OF MEDIA (Oct. 29, 2021), https://perma.cc/K8UZ-RDNR.

138 *E.g.*, Shayla Davis (@journalistShay), X (Sept. 19, 2021, 11:15 PM), https://perma.cc/87H5-F48K.

139 Sorcha Bradley, *Nicola Bulley: Are Armchair Detectives and TikTok Sleuths a Help or Hindrance?*, WEEK (Feb. 15, 2023), https://perma.cc/VYU8-2FNU.

140 I, Napoleon B., *Guilty: How Alex Murdaugh Concealed His Dark Side but He Can't Hide from Snapchat*, MEDIUM (Mar. 2, 2023), https://perma.cc/HV5A-QZK; *see* Dave Moore, *Once on the Internet, Always on the Internet*, NORMAN TRANSCRIPT (Mar. 18, 2021), https://perma.cc/NAB6-PMAP.

way to help grow these positives; for all they do to help, such as interacting with cases differently than officers and court officials, inherent consequences come from such outspoken material that cannot be disregarded.[141]

B. *The Inevitable Consequences of #TrueCrime*

How does one control the visibility and coverage of a case spread to millions of people, and how does one ensure that information is correct?[142] This question strikes at many of the concerns people have, especially law enforcement officers who must take their attention away from investigations to combat false information and speculations aired by TikTok detectives.[143] TikTok detectives focus not on finding the missing person, discovering the killer, or why something is "sus,"[144] but instead on garnering as much "clout"[145] as possible.[146] More clout means more views, which results in more monetization and the chance to become famous on the internet.[147]

People are increasingly creating true crime content, attempting to monopolize lucrative platforms and positioning themselves to talk of situations about which they know nothing.[148] Because views are crucial to growing a platform, influencers are disincentivized from deleting posts that perpetuate misinformation, even after issuing an apology or correction.[149] Maximizing profits is typical for true crime media; it is always in the

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141 *See* Bradley, *supra* note 139.

142 *See* Horbacewicz, *supra* note 135.

143 Bradley, *supra* note 139 ("In a press conference today, officers expressed 'frustration at speculation and rumor' surrounding the case . . . Detectives have been forced to 'combat disinformation about her disappearance' and said they had been 'inundated' with false information and theories, said the paper.").

144 Aguliar et al., *supra* note 137 (referencing "sus" as Gen Z slang for suspicious).

145 *Clout*, LATER, https://perma.cc/3RBM-BHNQ (last visited Mar. 23, 2025) ("'Clout' is a slang term referring to a person's influence, reputation, or popularity, especially in online spaces.").

146 *See* Bradley, *supra* note 139.

147 *See* Madison Malone Kircher & Rachelle Hampton, *Did True Crime Influencers Really Help Solve the Death of Gabby Petito?*, SLATE (Sept. 22, 2021, 3:25 PM), https://perma.cc/YU23-RLMW.

148 *See* Horbacewicz, *supra* note 135; Kate Hudson, *The Monetization of Murder is Gross*, MARY SUE (Oct. 10, 2023, 5:13 PM EDT), https://perma.cc/6V4B-TBKW.

149 *See* Kircher & Hampton, *supra* note 147 (asking the question why not take down the video with misinformation, and providing no true answers other than to keep it live for the public and that the influencer had done "everything" aside from deleting the video in question).

business to do whatever is necessary to keep the money flowing.[150] Undeniably, humans are driven by the need for money and the allure of power, influence, security, and freedom that money brings.[151]

There are also situations where influencers take their investigations from the online world to the real world.[152] To "help solve the case" of a missing woman, influencers took to the ground, live-streaming attempts to break into homes near where the woman had gone missing.[153] These are no longer just stories being thrown around online; instead, this consists of influencers dragging unrelated people into situations that have no reason to be there.[154] These acts also affect investigations, as they disrupt and potentially destroy crime scenes that contain crucial evidence.[155] Society expects police to act with integrity, not commit crimes to solve crimes, be held accountable for their actions, and uphold the law to serve all of America.[156] In that case, it is unlikely that TikTok detectives should be allowed free reign.[157]

Amongst the sea of negative consequences, one stands out: the effects of true crime influencers on those involved in the case and others unwillingly pulled into the fray through public speculation.[158] For instance, although the killer was brought to justice in the Luka Magnotta case, there was an overlooked travesty: despite eventually finding the real killer, the internet sleuths falsely accused a man named Edward Jordan of being the "kitten

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[150] Kayla Moshayedi, *Hollywood is Blinded by Money—The Rise of True Crime*, PORTOLA PILOT (Apr. 13, 2022), https://perma.cc/X5KT-DTHK.

[151] Umar M, *Why Humans Are So Much Attracted to Money*, MEDIUM (Mar. 26, 2023), https://perma.cc/Q7BU-KG9B.

[152] Bradley, *supra* note 139.

[153] Bradley, *supra* note 139.

[154] *Id.*; *see, e.g.*, *The Rise of TikTok Detectives*, NOW TO LOVE (Sept. 16, 2023), https://perma.cc/6L5P-TFMH ("Wannabe Nancy Drews traveled to the scene to dig up the area and prominent TikTok star Dan Duffy was arrested for public disorder after saying he'd been in people's back gardens at night to hunt for information.").

[155] Bradley, *supra* note 139.

[156] Joseph R. Biden Jr., *Executive Order on Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety*, THE WHITE HOUSE: BRIEFING ROOM: PRESIDENTIAL ACTIONS (May 25, 2022), https://perma.cc/D2TS-ANZT

[157] Cf. *id.*

[158] *See, e.g.*, Monisha Kathika, *TikTok "Detectives" are Ruining People's Lives*, PHILLIPIAN (Jan. 27, 2023), https://perma.cc/S69A-TC3E.

killer" and harassed him consistently, driving Edward to commit suicide.[159] Sadly, this is not the first time modern-day "Nancy Drews" have dragged an innocent into the fray.[160] The internet accused Sunil Tripathi of being the Boston Marathon Bomber; social media users claimed he and the suspect were "one in the same."[161]

The persuasion of social media took Sunil from being a missing person to a suspect in the blink of an eye.[162] After the FBI released names of the suspects that did not include his name, Sunil returned to missing person status with still no leads as to where he had gone.[163] Sadly, Sunil committed suicide a month before the bombings occurred.[164] Some speculate that people are more susceptible to these false reports during times of crisis, as they "leverage . . . fear[]," which causes facts to spread "under the pressure of these feelings."[165]

Simply put, though "content creators think it's easy to solve a crime, a case needs to stand up in court."[166] While influencers, such as Guillard, post whatever they want in their fight for fame, innocent people are forever associated with their case and stuck in the court of public opinion and are left aiming to restore their lives to normalcy.[167]

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[159] Jackie Clark, *True Crime Has the Power to Change Lives – For Better and For Worse*, COMMUNIQUÈ (Feb. 15, 2023), https://perma.cc/4378-9SVB.

[160] *See generally* Traci G. Lee, *The Real Story of Sunil Tripathi, the Boston Bomber Who Wasn't*, NBC NEWS, https://perma.cc/H3VU-WRQD (last updated June 22, 2015, 9:05 AM EDT).

[161] *Id.*

[162] Anders Kelto, *3 Years After Boston Marathon Bombing, The Story of a Wrongly Accused Student*, NPR (Apr. 17, 2016, 8:00 AM ET), https://perma.cc/PCM7-4B24.

[163] *Id.*

[164] *Id.*; Lee, *supra* note 160.

[165] Louis W. Tompros et al., *The Constitutionality of Criminalizing False Speech Made on Social Networking Sites in a Post-Alvarez, Social Media-Obsessed World*, 31 HARV. J. L. & TECH. 66, 78 (2017), https://perma.cc/YSA6-TAZY (quoting Victor Luckerson, *Fear, Misinformation, and Social Media Complicate Ebola Fight*, TIME (Oct. 8, 2014), https://perma.cc/BLX7-4KZS).

[166] *The Rise of the TikTok Detectives*, *supra* note 154.

[167] Emma Epperly, *Fighting for Her Reputation: Legal Battle with TikTok Psychic Continues for UI Professor*, SPOKESMAN-REVIEW, https://perma.cc/6XY9-CAP4 (last updated Jul. 21, 2023, 10:12 PM).

IV. As the Digital World Expands, It Is Essential the Law Catches Up by Adopting New Rules and Innovative Ideas

A. *Social Media Platforms Should Adopt an 'Influencer Code of Conduct'*

Ashley Guillard and Ken Waks share one thing: both spread misinformation and conspiracy theories to millions.[168] Recall that there is no regulation for social media, and any existing corporate policies may place a double standard on different types of creators.[169] There should be a code of ethics or conduct enacted by legislators. Indonesia, for instance, implemented laws establishing criminal sanctions for "offenses relating to transmitting or distributing electronic information," broadly including conduct that breaches morality, insults, defamation, and misinformation that "results in consumer losses" or incites hatred against a minority group.[170] It is unlikely that the United States would follow in likeness with criminal sanctions, as the country is currently promoting the idea that the Internet deserves the same First Amendment protection applied to other media forms.[171] For instance, in *Reno v. American Civil Liberties Union*, the Court declared that "the government can no more restrict a person's access to words or images on the Internet than it can snatch a book out of someone's hands or cover up a nude statue in a museum."[172]

However, the First Amendment does not apply to social media platforms and traditional news media, as they are private entities, so it would be wise to implement organizations that assist in deleting the post-

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168 Emily Mae Czachor, *Professor Sues TikToker Who Accused Her in University of Idaho Murders*, CBS NEWS (Dec. 27, 2022, 2:29 PM EST), https://perma.cc/D75N-8KKD; Geoff Weiss & Mara Leighton, *A TikToker Influencer's Obsessive Investigation Into Unsolved Murders has Spiraled Into Fierce Backlash and Loss of His Job*, BUS. INSIDER (May 9, 2023, 6:06 PM EDT), https://perma.cc/GK99-VRB2.

169 Patricia Ashford, *Misinformation: Who Is Responsible and How Should They Be Held Accountable*, ARK. J. SOC. CHANGE & PUB. SERV. (Jan. 23, 2023), https://perma.cc/9M4W-C7ZA; *Social Media Policies: Mis/Disinformation, Threats, and Harassment*, STATES UNITED DEMOCRACY CTR. (June 24, 2024), https://perma.cc/W3FB-VSMG.

170 Petra Mahy et al., *Influencing the Influencers: Regulating the Morality of Online Conduct in Indonesia*, 14 POL. & INTERNET 574, 578 (2022), https://perma.cc/2M38-2F64.

171 *Internet Speech*, ACLU, https://perma.cc/27ZS-SB8Z (last visited Mar. 23, 2025).

172 *Id.*; 521 U.S. 844 (1997).

truth era.[173] Implementing an "Influencer Code of Ethics" is not new, with many different sources saying there should be some restraint, public condemnation, or code to hold influencers accountable.[174] In fact, many people believe that holding the influencer and the company accountable for actions is needed.[175]

Not surprisingly, studies have found that platforms can take more steps to moderate what information is posted to limit the spread of misinformation.[176] If platforms implement an influencer code of conduct that promotes accurate information instead of rewarding misinformation, it would be less appealing for influencers to stay the course.[177] Platforms can also battle misinformation and Internet sleuths by creating regulations with disclaimers about the information's veracity, such as X adding "fact checks."[178] Minor improvements can be the catalyst to initiate change by holding influential people accountable for things that may not be true.[179]

One may argue that there are already methods of civil action put into place that can combat false information, such as defamation suits.[180] After all, Professor Scofield has been battling Guillard in court, with the judge saying Guillard's claims were "clearly baseless."[181] The problem with this

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[173] Robert C. Fellmeth, *Social Media Must Balance 'Right of Free Speech' With Audience 'Right to Know'*, THE HILL (Jan. 20, 2023, 7:30 AM ET), https://perma.cc/X8JN-5L2P; *The Constitution*, WHITE HOUSE, https://perma.cc/9Z3J-U3ES (last visited Jan. 15, 2025).

[174] *See* Morten Rand-Hendriksen, *A Code of Ethics for Social Media Influencers*, LINKEDIN (Sept. 7, 2021), https://perma.cc/KE2L-UM6X; *see, e.g.*, *Maintaining Integrity Great Responsibility for Influencers*, GLOB. TIMES (May 23, 2023, 10:12 PM), https://perma.cc/S5DV-MBJG.

[175] Whitney Danhauer, *Spin Sucks Question: Should We Hold Social Media Influencers Accountable?*, SPINSUCKS, https://perma.cc/5WZQ-YF9Q (last visited Mar. 23, 2025).

[176] Univ. of S. Cal., *Study Reveals the Key Reason Why Fake News Spreads on Social Media*, PHYS ORG. (Jan. 18, 2023), https://perma.cc/5C7D-M7MA.

[177] Gizem Ceylanet et al., *Sharing of Misinformation is Habitual, Not Just Lazy or Biased*, PNAS (Jan. 17, 2023), https://perma.cc/HX2R-ZB7X.

[178] Samma Khullar, *Twitter Adds Fact-check Disclaimer to New Boss Elon Musk's Tweet Whining About Advertisers Fleeing*, SALON (Nov. 4, 2022, 2:50 PM EDT), https://perma.cc/H2UF-2L8C.

[179] Ken Klippenstein (@kenklippenstein), X (Nov. 13, 2022, 2:44 AM), https://perma.cc/M3E2-LM87.

[180] *See, e.g.*, Hannah Flood, *Twin Cities Lawyer: Accusing People of Crimes on Facebook Can Get You Sued*, FOX 9 (Nov. 11, 2019, 8:56 PM CST), https://perma.cc/QKF5-UJQC.

[181] Emma Epperly, *Judge Dismissed Counterclaims Brought by TikTok Psychic Against UI Professor, Calling Them 'Clearly Baseless'*, SPOKESMAN-REVIEW (Aug. 8, 2023, 9:30 PM), https://perma.cc/9BRJ-8QBQ.

argument lies in the cost and time it takes for such civil actions to occur.[182] A person can spend thousands of dollars (that they may not have) and years defending themselves against false accusations.[183] Individuals who cannot pay for a lawyer are "forced to go it alone," likely halting a case before it can begin.[184]

Although simply implementing a code of conduct will not fix all the negatives that internet sleuths bring, it can be a starting point for people to be aware of their responsibility to present honest and factual information.[185]

B. *The Potential Ethical Implications and Protecting Justice*

"[T]here is a fine line between *entertainment* and *insensitivity*."[186]

There is no doubt that True Crime is a big business, with some podcasts earning one hundred million dollars in a single year,[187] documentary series having deals worth hundreds of millions of dollars,[188] and influencers earning millions with multiple sites offering step-by-step guides to creating and monetizing channels.[189] People are entertained by seeing the worst of humanity, yet the real stories of victims and their families struggling to cope are forgotten, while influencers dominate the limelight, eager to discuss the next potential theory.[190] Victims' families face rumors and misinformation, and are left wondering why someone—whom they do not know and who

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[182] Aaron Minc, *How Much Does a Defamation Lawsuit Cost? Cost to Sue for Defamation*, MINC, https://perma.cc/5WXV-URNH (last updated Apr. 15, 2024).

[183] *Id.*; *Consequences of Sharing Misinformation*, LEXIS NEXIS (Feb. 13, 2024), https://perma.cc/QTT9-S8MS ("The United States: In contested cases, defendants can expect to spend $30,000 to $60,000 just in legal fees.").

[184] *The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans*, LSC, https://perma.cc/8V5P-628B (last visited Mar. 23, 2025).

[185] *See* Ashford, *supra* note 169.

[186] Moshayedi, *supra* note 150 (emphasis added).

[187] Josh Lora, *Has True Crime Lost Its Luster?*, FORBES (Nov. 22, 2023, 1:41 PM EST), https://perma.cc/FJ7G-SYSA.

[188] Lauren Sarner, *'Dhamer' is Netflix's Second-most Popular Show Ever: Ryan Murphy Finally Makes Good on $300 Million Deal*, N.Y. POST, https://perma.cc/SL2J-62VM (last updated Oct. 12, 2022).

[189] Andrew Fiebert, *How to Start a True Crime Blog and Unmask a Following*, LASSO, https://getlasso.co/how-to-start-a-blog/true-crime/ (last updated Oct. 3, 2024).

[190] *Id.*

lacks case details—gets to speak about the killings to a large audience.[191] Stacey Chapin, mother of Ethan Chapin, one of the murdered University of Idaho students, attended CrimeCon and watched a speaker mispronounce the names of the students involved in the tragedy and mistakenly describe the crime scene while sleuths eagerly watched.[192]

By forgetting that the facts are reality, influencers separate themselves from the damage done, viewing the situations in front of them as nothing more than another work of fiction.[193] It is not only influencers that have received backlash from families regarding the morality of presenting cases; in fact, families of the victims of Jeffrey Dahmer called the Netflix documentary series, *Dahmer*, "retraumatizing."[194] Netflix also tweeted, "[c]an't stop thinking about this disturbing scene from DAHMER where one of Jeffrey Dahmer's victims finally manages to escape . . . and the police actually bring him back inside the apartment. *Now on Netflix*."[195]

Rather than an opportunity to highlight values of justice, social change, and truth, the principal value of such a series is entertainment.[196] It is not a mode of enacting change when influencers are disrespecting victims by "channeling" the ghost of the deceased,[197] performing mukbangs while discussing brutal killings,[198] romanticizing convicted murderers,[199] and boasting about how much money they are making talking about a

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[191] Hudson, *supra* note 148.

[192] Mike Baker, *The Nation's Obsession With True Crime Meets a Mother's Grief*, N.Y. TIMES (Oct. 11, 2023), https://perma.cc/796J-6KZ7.

[193] *See* Clark, *supra* note 159.

[194] Bojana Cvijic, *Netflix Sensationalizes True Crime Stories for Profit*, SJSU NEWS (Oct. 5, 2022), https://perma.cc/JQ86-3E4H.

[195] Netflix (@netflix), X (Sept. 21, 2022, 2:04 PM), https://perma.cc/G598-44SU.

[196] Ezri Noe, True Crime Podcasts: Analyzing Ethical Principles, Advocacy, and Sensationalism 4 (2022) (unpublished Honors Thesis, Northwest University), https://perma.cc/NAC4-XJ6F.

[197] Ben Cost, *TikTok 'Psychics' Claiming to Channel Gabby Petito's Ghost Face Backlash*, N.Y POST, https://perma.cc/LAQ5-EN67 (last updated Sept. 24, 2021, 6:50 PM ET).

[198] Sehar Serang, *Stephanie Soo: Why True Crime is Unethical*, WOMAN ADVANCE (Dec. 1, 2022, 1:04 PM), https://perma.cc/448V-SFHS (referencing mukbang videos that feature someone eating a large quantity of food while discussing a topic).

[199] Kelsey Weekman, *Here's Why People Are Upset About Netlifx's Jeffrey Dahmer Show*, BUZZFEED (Oct. 3, 2022, 11:13 AM), https://perma.cc/CA4F-VZMJ.

situation.[200] A moment must exist when a person can take a step back, look beyond the laws, and wonder if monetizing content that is making light of terrible situations should be allowed.[201] Sadly, separating the motive for profit from any form of media is impossible in a capitalistic society.[202] However, the argument to make true crime more ethical is to ensure the content is well-researched, "non-sensationalist, non-glorifying, and socially aware" of the content's time and place.[203] The hope is to move away from turning tragedy into entertainment and instead, use the platform to help support and promote the families of victims, and to, at times, bring awareness to what may drive defendants to commit the crime, as a form of prevention.[204]

C. *The Legal Profession Needs to Expand and Learn from Those Who Understand Social Media*

Another possible solution to enforcing an influencer code of conduct would be for the government to establish legislation that holds the companies accountable; however, barriers, and the inherent need to get it right, slow the process.[205] Though the topic of ethics in social media has rarely been addressed, literature and regulations can be used as a launching pad, since most federal regulations bar any type of litigation against private companies.[206] Nevertheless, one must decide if they want a governmental

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[200] *See* Guynn et al., *supra* note 136.

[201] *See generally* Hazel Wright, *Ethics and True Crime: Setting a Standard for the Genre* (May 12, 2020) (Paper submitted in partial fulfillment of the requirements for the degree of Master of Arts in Writing: Book Publishing) (on file with the Portland State University Library), https://perma.cc/22Y8-BGX8.

[202] *The Future of Capitalism*, IESEINSIGHT, https://perma.cc/M9X2-NYYK (last visited Mar. 23, 2025).

[203] Wright, *supra* note 201, at 5.

[204] *See* Joseph Earp, *Where Are the Victims? The Ethics of True Crime*, THE ETHICS CTR. (Feb. 9, 2023), https://perma.cc/6EUU-U54E.

[205] *See generally* Jonathan Vanian, *Meta, X, TikTok, Snap and Discord Face Growing Appetite in Congress for Tighter Social Media Regulation*, CNBC (Jan. 31, 2024, 7:54 PM EST), https://perma.cc/KUY6-2AHC ("'I think we have to understand that there should be an inherent motivation for you to get this right,' Tillis said. 'Or Congress will make a decision that could potentially put you out of business.'").

[206] *See generally* Valerie C. Brannon, *Free Speech and the Regulation of Social Media Content*, CONG. RSCH. SERV. (Mar. 27, 2019), https://perma.cc/P2EF-89H9.

entity, who does not understand the information, putting laws in place that effectively change how social media works.

For instance, during several legislative hearings regarding social media platforms, such as Facebook, Twitter, and Google in 2021[207] and TikTok in 2023,[208] influencers took to the stage to showcase the Senate had no idea how social media worked, describing the hearings as "painful" and "cringe."[209] Some questions included "[w]hat does *yada yada yada* mean," "does TikTok access the home Wi-Fi network,"[210] and how Google searches work.[211] Meanwhile, others took to their platforms to mock the types of questions asked by the Senate and their overall lack of internet knowledge.[212]

Although people may believe they know what is necessary without expert opinion, people need expert opinion to help wade through the misinformation and determine the validity of viewpoints.[213] The legal profession then must look away from legislators and those who do not understand the internet and turn to those who are experts in the social media field. Although the simple solution is to ask influencers themselves, a new type of expert has arisen called *lawfluencers*.[214] A relatively new territory for the legal profession, lawyers use their legal knowledge and identity to produce content, such as LegalEagle,[215] a YouTube channel by Devin J. Stone.[216]

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[207] Shannon Bond, *Facebook, Twitter, Google CEOs Testify Before Congress: Four Things to Know*, NPR (Mar. 25, 2021), https://perma.cc/8AJP-SF9M.

[208] *See generally* Dara Kerr, *Lawmakers Grilled TikTok CEO Chew for 5 Hours in a High-Stakes Hearing About the App*, NPR, https://perma.cc/9TJX-7C8A (last updated Mar. 23, 2023, 5:34 PM ET).

[209] Penguinz0, *TikTok Congress Hearing Was Painful*, YOUTUBE (Mar. 25, 2023), https://perma.cc/4JXE-E4FT.

[210] Channelnewsasia, *TikTok's CEO was Asked if the App Accesses Wi-Fi at a US Congressional Hearing on Mar 23*, YOUTUBE, https://perma.cc/NGM9-3ZQ8 (last visited Jan. 15, 2025).

[211] NowThis Impact, *Congress Was Confused by the Internet During Hearing with Google CEO*, YOUTUBE (Dec. 13, 2018), https://perma.cc/5BWC-845D.

[212] @someguymark, TIKTOK (Mar. 24, 2023), https://perma.cc/E522-PQZY.

[213] *Why Do We Need Experts?*, YALE INSIGHTS (Oct. 10, 2013), https://perma.cc/8RK4-Z77C.

[214] Anthony Song & Justine Rogers, *Lawfluencers: Legal Professionalism on TikTok and YouTube*, 37 UNSW L. & SOC. JUST.1, 4 (2023).

[215] *See LegalEagle* (*@LegalEagle*), YOUTUBE, https://perma.cc/2FEC-QR5J (last visited Jan. 15, 2025).

[216] *Attorneys*, STONE L., https://perma.cc/NR9L-NXEG (last visited Mar. 23, 2025).

Rather than having 500 million people share their opinions on the legal system, a better option is supporting *lawfluencers* and using their knowledge as a device to drive change. Using their platform to spread information about the legal system and battle misinformation placed in media, *lawfluencers* can add their expertise and knowledge to public debate.[217] On social media, lawyers can combat misinformation, bring to light critical issues they are seeing in the profession, and move past restrictions that would be in place in a courtroom. Although some people state they are "done" with experts, a 2022 study found that others tend to defer to experts to determine if something is misinformation.[218] Unlike influencers with no rules of conduct, *lawfluencers* must remain ethical, following the Model Rules of Professional Conduct to ensure client legal affairs remain confidential and their conduct is not dishonest or fraudulent.[219] Although some lawyers may fear entering the social media sphere due to backlash—taking part in old schools of thought regarding staying away from the public eye—*lawfluencers* contribute to the public narrative and help battle misinformation, potentially helping future clients.

CONCLUSION

Although not everyone boasts about their discoveries following extensive criminal investigation like Ken Waks or about the truth gained from divine entities like Ashley Guillard, the negatives from #truecrime far outweigh any positives. In reality, true crime is not going anywhere anytime soon. The moment an influencer retires, the allure of fame and money or the possibility to crack a case from behind a computer screen guarantees another is ready to take their place. All the justice system can do is maneuver itself to be better equipped to try and promote the positive social change obtained from having many eyes on a case while adopting new methods to handle the consequences.

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217 *See* Russell M. Gold & Kay L. Levine, *How Public Defenders Can Use Social Media to Drive Change*, LAW 360 (July 21, 2023), https://perma.cc/BPX8-F26T.

218 *New University of Cambridge Study Reveals: People Trust Experts and Evidence, More Than the Media and Their Friends*, UNIV. CAMBRIDGE (May 26, 2022), https://perma.cc/KP2H-XCLN.

219 MODEL RULES OF PRO. CONDUCT Preamble & Scope (AM. BAR ASS'N 2024).

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