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STATEMENT OF PURPOSE

The *Wisconsin Journal of Law, Gender & Society* grew out of two traditions: the University of Wisconsin Law School's "law in action" approach and the interdisciplinary design of gender studies. Through "law in action" we look beyond the statutes and cases to study the practical effects of the law on individuals, marginalized communities, and society at large. The interdisciplinary approach, with an emphasis on gender identity, offers different perspectives through which to expand and challenge our understanding of the law and its implications on society.

The Journal, originally the *Wisconsin Women's Law Journal*, one of the earliest in the nation devoted to the study of women and the law, has strived to contribute insightful scholarship to this evolving field of study. Recognizing that women are a diverse group with differing beliefs and interests, and moreover that gender stereotyping and gender identity discrimination of any kind inhibits each individual's full equality under the law, we encourage articles that examine the intersection of law and gender with issues of race, ethnicity, socioeconomic status, and sexual orientation.

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HOW ABORTION LAWS DO AND DON'T WORK

Michelle Oberman[†]

Abstract

As conservative U.S. states undertake the recriminalization of abortion, those on all sides of the abortion war should be wondering what happens next. When abortion law “on the books” changes in the United States, what might the law “on the ground” look like? One answer lies in examining what happens today in countries with restrictive abortion laws. Israel’s 1977 law bars abortion unless approved by a “pregnancy termination committee.” Drawing on interviews with abortion committee members, lawmakers, advocates and others, this Article presents an ethnographic study of one country’s experience with a law criminalizing abortion.

Israel’s approach, limiting abortion access to those with qualifying conditions, is likely to be in play for some U.S. states in the years to come. But the significance of Israel’s experience lies beyond what it teaches us about the choices and challenges surrounding the implementation and enforcement of a restrictive abortion law. It surfaces vital questions about what abortion laws actually accomplish—questions this Article answers by identifying six distinct functions of abortion laws: criminal sanction, market-structuring force, informal adjudicatory process, shame sanction, expressive function, and truce. This Article describes these functions in turn, first considering the ways in which each one manifests in Israel, and then exploring the implications for U.S. states intent on recriminalizing abortion. The upshot is this: each of these functions brings into precise focus the ways in which forthcoming U.S. abortion crimes, on the ground, will necessarily struggle and fail to be seen as legitimate exercises of state authority.

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INTRODUCTION

Half a century into the United States' war over abortion's legality, a dramatic shift is in sight. As the conservative majority on the Supreme Court returns to the states the question of whether and when abortion ought to be legal, the dueling platitudes of choice and life will become obsolete.¹ The next phase in our abortion war will feature states experimenting with ways to outlaw abortion.

It will be a time of legal chaos. Experts estimate that abortion will remain legal in twenty-one states.² Meanwhile, lawmakers in the other twenty-nine will endeavor to enact abortion laws that will satisfy constituents who elected them, at least in part, on a promise that they would do something about abortion. Their task will be complicated by a rapidly expanding black market in abortion

1. With the Supreme Court's 2021 decision to allow Texas S.B. 8 to take effect, it would seem that the question is not whether or how the Court will eviscerate the Constitutional right to abortion, but when. See S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021); see also Adam Liptak, J. David Goodman & Sabrina Tavernise, *Supreme Court, Breaking Silence, Won't Block Texas Abortion Law*, N.Y. TIMES, <https://www.nytimes.com/2021/09/01/us/supreme-court-texas-abortion.html> [<https://perma.cc/YZS3-HXEG>] (updated Oct. 15, 2021); see also David D. Savage, *New Analysis: Supreme Court Signals Roe vs. Wade Will Fall After Allowing Texas to Ban Most Abortions*, L.A. TIMES (Sept. 2, 2021), <https://www.latimes.com/politics/story/2021-09-02/the-supreme-court-signals-that-roe-vs-wade-will-fall-now-that-texas-may-ban-early-abortions> [<https://perma.cc/6HP4-4Y49>] ("The Supreme Court's conservative majority has sent its strongest signal to date that Roe vs. Wade will fall, having given a green light to the nation's second-most populous state to outlaw abortions after six weeks of pregnancy.").

2. *What If Roe Fell?*, CTR. FOR REPROD. RTS. (Aug. 28, 2019), <https://maps.reproductiverights.org/what-if-roe-fell> [<https://perma.cc/VGN3-SV9D>].

medications, which will escalate to meet demand.³ Law enforcement challenges will abound—how to detect the crime, who to prosecute for it, and what to do about the reality that abortion, legal or otherwise, remains commonplace.⁴ Solutions will be elusive.

One thing everyone will agree on as we adjust to life in a post-*Roe* landscape is that it will no longer make sense to frame our debate over abortion law in simple terms of legality. Beyond the legal v. illegal binary lie urgent questions about how abortion laws work in practice, about what they are meant to accomplish and about whether they actually succeed in meeting their intended purposes. There will be no ducking these questions because their answers will determine the legitimacy and longevity of any law criminalizing abortion.

In an effort to answer these questions—to better understand the nature and function of contemporary abortion laws—I decided to investigate one country's experience with its law criminalizing abortion. Specifically, I chose to study Israel's abortion law.⁵ Enacted in 1977 and still in force today, it is unusual. It

3. See Lynn M. Morgan, *Reproductive Governance, Redux*, 38 MED. ANTHROPOLOGY 113 (2019) (discussing the economic dimension of regulating reproductive behaviors and the marketing of misoprostol); see also Claire Cain Miller & Margot Sanger-Katz, *Why America's Abortion Rate Might Be Higher Than It Appears*, N.Y. TIMES (Sept. 20, 2019), <https://www.nytimes.com/2019/09/20/upshot/abortion-pills-rising-use.html> [https://perma.cc/7JMX-38EP]; see also Cecilia Nowell, *Use of 'At-Home Abortion Pills' Rises Amid Pandemic and Faces New Threats*, GUARDIAN (Nov. 1, 2020), <https://www.theguardian.com/us-news/2020/nov/01/at-home-abortion-pills-increasingly-in-demand-amid-pandemic-under-new-threats> [https://perma.cc/2GX7-YMZ3].

4. See *infra* notes 61–67 and accompanying text for a discussion of the challenges of enforcing abortion crimes; see generally MICHELLE OBERMAN, *HER BODY, OUR LAWS: ON THE FRONT LINES OF THE ABORTION WAR, FROM EL SALVADOR TO OKLAHOMA* (2018) (describing the challenges of law enforcement in an era of abortion medications).

5. I struggled with my decision to study Israel's abortion law. It is a problematic example, and not just because the quirkiness of the law and the idiosyncrasies of Israeli culture make it an unlikely model for whatever comes next in the ongoing U.S. battle over abortion law. It feels problematic to me, personally, because of my opposition to Israel's ongoing occupation of territories seized in the 1967 war, and to the humanitarian crisis it has wrought. At a profound level, it feels irresponsible to ignore the Occupation when writing about Israel. Nor is the abortion law unrelated to the Occupation. Indeed, Israel's abortion law can be seen as part of a broad set of policies reflecting what is sometimes called Israel's demographic project. Whether for reasons of religious nationalism or secular Zionism, since the state's founding in 1948, the Israeli government has engaged in a large settlement enterprise and endeavored to increase the Jewish population in the region. See BARUCH KIMMERLING, *ZIONISM AND TERRITORY: THE SOCIO-TERRITORIAL DIMENSIONS OF ZIONIST POLITICS* (1983). But I am not a scholar of the Occupation. For a time, I considered expanding my research to include questions about how those living under Israeli occupation in the West Bank and Gaza accessed abortion. See, e.g., Francoise Daoud & Angel M. Foster, *Navigating Barriers to Abortion Access: Misoprostol in the West Bank*, in *ABORTION PILLS, TEST TUBE BABIES, AND SEX TOYS: EMERGING SEXUAL AND REPRODUCTIVE TECHNOLOGIES IN THE MIDDLE EAST AND NORTH AFRICA* 58 (L.L. Wynn & Angel M. Foster, eds., 2016). Ultimately, I decided I lacked the background and skills needed to mount a serious inquiry into these questions. Although I met with Israeli Arabs, including human rights lawyers and a committee social worker, a meaningful consideration of how Israel's abortion law affects both minority women living in Israel and those living in the Occupied Territories is beyond the scope of this project. In the end, I persevered with the project because it became clear that, in answering the narrow

makes abortion a crime unless it is approved by a “pregnancy termination committee,” which must be comprised of two doctors and a nurse or social worker.⁶ The law specifies the grounds on which a committee may approve a petition, although it does not mandate approval. It does mandate that at least one of the committee members be a woman.⁷

As an academic, I was drawn to Israel because its law seemed to pose an intermediate position between the all-out abortion bans in places like El Salvador, the site of my past research, and the current legality of abortion in the United States. Going into this project, I understood the world’s abortion laws as falling along a spectrum from least to most restrictive.⁸ I located Israel in the middle of this spectrum, given that abortion was not available by right, but rather, only when permitted by committee.⁹ The committee process intrigued me both because the U.S. used a similar system prior to *Roe*, and also because every indication is that it will once again become relevant, as states move to recriminalize abortion. Even the broadest ban must make an exception for life-threatening pregnancies.¹⁰ Doing so will require states to create some sort of adjudicatory process to rule on how and when a person qualifies for such an exception.¹¹

But, in the spirit of full disclosure, I was also drawn to study Israel’s law because I am an abortion-rights advocate. The idea of having to give one’s reasons for wanting an abortion and having to seek permission from strangers

question of how Israel’s abortion law worked, I was coming to understand vital lessons about how abortion laws work, in general. The more perspectives I heard on Israel’s law, the more I began asking new questions about our own battle over abortion law. In a sense, then, this Article is not so much about Israel as it is about the challenges we face in the U.S. as we approach the prospect of recriminalizing abortion.

6. § 315, Penal Law, 5737-1977, LSI Special Volume (1977), as amended (Isr.), https://knesset.gov.il/review/data/eng/law/kns8_penallaw_eng.pdf [<https://perma.cc/N9QZ-8JEV>].

7. *Id.*

8. See *The World’s Abortion Laws*, CTR. FOR REPROD. RTS., https://maps.reproductiverights.org/sites/default/files/WALM_2021update_V1.pdf [<https://perma.cc/EX7S-P2E4>] (last modified Feb. 23, 2021). For a critique of the map, see Rachel Rebouché, *Comparative Pragmatism*, 72 MD. L. REV. 85, 149–54 (2012).

9. I was mistaken. Indeed, as I demonstrate in this Article, the question of legality is only a small part of the picture when it comes to understanding how abortion laws function in practice.

10. See Richard H. Fallon Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS UNIV. L.J. 611, 625–26 (2007); see generally OBERMAN, *supra* note 4, at 119–38. There is surprisingly little consensus on what qualifies as a “life-threatening” condition during pregnancy. For a description of how experts can vary in their definition of whether a pregnancy poses a threat to life, see *id.* at 19–29 (describing a case in which the Supreme Court of El Salvador denied an abortion to a woman suffering from lupus on the grounds that death was not imminent). There are other exceptions commonly embraced, even by the majority of people who identify as pro-life, including permitting abortion in cases of rape, incest, or several fetal anomalies. Each of these exceptions comes bearing questions regarding how states might define and determine eligibility. For an elaboration on these questions, see *infra* note 115.

11. For a discussion of how these processes might inform abortion access, see *infra* notes 115–130 and accompanying text.

appalled me. I wanted to see how their system operated because it struck me as outrageous and degrading, and because I hoped that what I learned might prove useful to those who, like me, are preparing to meet the challenge of securing reproductive autonomy in a context in which states can make pregnancy compulsory.

Over the course of several years (2017–2019), I set out to study Israel's abortion committees by interviewing those with direct experience of how they worked. This qualitative research employed a snowball methodology,¹² which began by identifying eight experts, selected for their work on abortion committees and/or for their familiarity with the law. After interviewing them, I enlisted their help in connecting me with those who might shed additional light on the way the abortion law functioned. In all, over the course of my research, I conducted twenty-four interviews, meeting not only with committee members from various sectors of the country, but also with academics, advocates, doctors, politicians and scholars of Jewish law.¹³

At its core, the result is a narrow and descriptive case study, reflecting one country's experience with criminalizing abortion. As is so often true of comparative studies, it offers little predictive value. No matter the road the U.S. takes when we turn away from *Roe*, it will not be the same as that taken in Israel.¹⁴

And yet, in attending closely to the details of another country's experience with criminalizing abortion, I found I could think about abortion law without triggering the state of limbic arousal that so impedes our collective—and my personal—engagement with the subject. In the quiet space afforded by curiosity, I found myself better able to see the ways in which abortion laws work in practice in the twenty-first century.

Specifically, my study identifies and analyzes six distinct functions of modern abortion law: criminal sanction, market-structuring force, informal adjudicatory process, shame sanction, expressive function, and truce. Using the extended example of Israel's abortion law, I describe each of these functions in

12. Snowball sampling in sociology and statistical research is a recruitment technique of study where existing subjects are asked to identify future subjects from among their acquaintances. See generally Mark S. Handcock & Krista J. Gile, *Comment: On the Concept of Snowball Sampling*, 41 SOCIO. METHODOLOGY 367 (2011).

13. Early on, I decided against interviewing patients. Doing so in a rigorous manner would have complicated my study, posing methodological challenges as well as triggering the need for heightened oversight, given the sensitivity of the issue. Instead, I elected to focus my research on those who could help me to understand the purpose and the impact of the law. *But see infra* notes 49–51 and accompanying text, describing one patient's experience. For a study conducting interviews of committee members, see Nitzan Rimón-Zarfaty & Alan Jotkowitz, *The Israeli Abortion Committees' Process of Decision Making: An Ethical Analysis*, 38 J. MED. ETHICS 26 (2012).

14. Comparative law scholars caution against aiming beyond description. In his 1985 critique of comparative law scholarship, Professor Gunther Frankenberg observed that, “[a]s long as we understand foreign places as like or unlike home, we cannot begin to fully appreciate them, or ourselves. We travel as if blindfolded: visiting only landmarks of our past Only close attention to detail—variety and heterogeneity—can prevent our leveling others in images taken from our vision of the order of our own world.” Gunter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT’L L.J. 411, 412 (1985).

turn, first considering the ways in which they manifest in Israel, and then exploring how they might play out in the U.S. as states set about recriminalizing abortion.

A word about tone: in the pages below, I describe each of these functions in a largely dispassionate manner. It is true to the academic gaze through which I processed the intricate details of Israel's abortion regime. What is left unsaid, more often than not, is my discomfort and outrage at the way Israel's law, like any law criminalizing abortion, asserts dominion over the bodies and lives of anybody who might become pregnant. As you will see, Israel has a system in which abortion is illegal, yet everyone has access. But that access is predicated on a process that I find both absurd and degrading.

I have endeavored to omit my personal opinions because they only distract from the important lessons I would have you take from this Article. Regardless of your opinion on abortion's legality, I want you to come away with a more systematic understanding of how contemporary abortion laws work in practice. By understanding each of the six functions of Israel's abortion law, we are provided with guideposts that can help us navigate what lies ahead.

Part One provides an overview of Israel's abortion committee process by presenting selections from interviews with committee members and those directly familiar with the committee process. It serves as a foundation for the subsequent analysis. Part Two examines what the law accomplishes, calling attention to the relationship between the law on the books and the law in practice, and highlighting the practical functions of Israel's abortion law. Part Three highlights and interrogates the expressive function of abortion laws. Using Israel's law as a test case, I probe the messages abortion laws send and the factors that inform whether those messages are received. Part Four reflects on the reasons why Israel's law has endured for almost fifty years, despite the fact that no one is happy with it. This final section matters to a U.S. audience not because Israeli accord is a model that will work here, but rather because it illuminates the trade-offs implicit in our battle over abortion law.

PART ONE: THE COMMITTEE PROCESS

In 1977, the Israeli Knesset, the unicameral legislature of Israel, repealed an abortion law that Israel had inherited from the British when it became a country in 1948.¹⁵ The British Mandatory Criminal Law Ordinance of 1936 had banned abortion unless necessary to save the life of the pregnant person.¹⁶ By the mid-1970s, along with other countries around the world, Israel decided to reconsider its position on abortion.¹⁷ At the time, there was widespread

15. Criminal Code Ordinance No. 74 of 1936, §§ 175–77, 1936 Palestine Gazette 633 p. 1009–10, https://www.nevo.co.il/law_word/law21/pg-e-0633.pdf [<https://perma.cc/SZ2Z-ER9W>]. For a discussion of the historical background, including the legislative history, of Israel's current abortion law, see Noya Rimalt, *When Rights Don't Talk: Abortion Law and the Politics of Compromise*, 28 YALE J.L. & FEMINISM 327, 332–50 (2017).

16. Rimalt, *supra* note 15.

17. Rebecca Steinfeld, *Wars of the Wombs: Struggles over Abortion Policies in Israel*, 20 ISR. STUD. 1, 7–11 (2015). See Rimalt, *supra* note 15, at 333–34; see also Noga Morag-

consensus that the old law was ineffectual. Abortion was commonplace, and prosecutions were all but nonexistent.¹⁸ Lawmakers were spurred into action by a broad coalition of feminists, doctors, and a general public troubled by the risks associated with clandestine abortion.¹⁹

The 1977 law provides that abortion is illegal unless approved by a committee.²⁰ These committees operate out of hospitals and clinics across the country.²¹ In addition to specifying the composition of committees, the new law

provided that in order to obtain a legal abortion, a woman must fulfill one of five criteria: (1) the woman is under marriage age or over forty; (2) the pregnancy is the result of criminal, non-marital, or incestuous relations; (3) the fetus is likely to have a physical or mental defect; (4) continuation of the pregnancy is likely to endanger the woman's life or cause her physical or mental harm; or (5) family or social conditions dictate the abortion.²²

Other than one amendment in 1979, which eliminated the fifth criterion, the law remains in force today.²³

At first blush, the law—with its many exceptions—seems puzzling. Before my initial research trip to Israel, I read everything I could find about it. There is not much: a scattering of academic studies across four decades, and some recent newspapers stories.²⁴ Some things confused me from the start. I learned that

Levine, *Abortion in Israel: Community, Rights, and the Context of Compromise*, 19 L. & SOC. INQUIRY 313, 321–22 (1994).

18. See generally Steinfeld, *supra* note 17, at 6–11.

19. *Id.*

20. Rimalt, *supra* note 15, at 334. §§ 313–21, Penal Law, 5737-1977, LSI Special Volume (1978), as amended (Isr.).

21. See Steinfeld, *supra* note 17, at 15–16.

22. Rimalt, *supra* note 15, at 334. “The legal age of marriage in Israel used to be seventeen; in 2013, the Knesset passed a bill that raised the minimum marriage age to eighteen. See Marriage Age Law (Amendment No. 6), 5774-2013, SH No. 2416 p. 58 (Isr.).” *Id.* at 334 n.23.

23. *Id.* at 334 nn.22–24. For a discussion of why the fifth criterion might have been eliminated, see *infra* note 178 and accompanying text.

24. Rimalt, *supra* note 15; Steinfeld, *supra* note 17; Michal Raucher, *The Cultural and Legal Reproduction of Poverty: Abortion Legislation in Israel*, 30 J. FEMINIST STUD. RELIGION 147 (2014); Daphne Barak-Erez, *Reproductive Rights in a Jewish and Democratic State*, in CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL 228, 231–36 (Susanna Mancini & Michel Rosenfeld, eds., 2014); Delila Amir & Niva Shoshi, *Israeli Abortion Law: Feminist and Gender Implications*, in STUDIES OF LAW, GENDER AND FEMINISM (Daphne Barak-Erez et al. eds., 2007); Mairav Zonszein, *Israel's Abortion Committees*, N.Y. TIMES (June 12, 2015), <https://www.nytimes.com/2015/06/14/opinion/sunday/israels-abortion-committees.html> [<https://perma.cc/QV2M-2A8L>]; Renee Ghert-Zand, *Black Market Abortions in Israel*, FORWARD (Feb. 5, 2013), <https://forward.com/life/170506/black-market-abortion-in-israel/> [<https://perma.cc/2AXT-G87T>] (summarizing a Hebrew study by Shosh Mula, *The Underground of Black Abortions*, YEDIOT AHRONOT (Feb. 1, 2013)); Elana Maryles Sztokman & L. Ariella Zeller, *Abortion in Israel: When the Nation Enters the Womb*, LILITH (Dec. 11, 2011), <https://lilith.org/articles/abortion-in-israel/> [<https://perma.cc/PL6Z-TF73>];

upwards of ninety-eight percent of all petitions for abortion are approved,²⁵ yet the law is settled and uncontroversial. Rare efforts at amending it, such as by adding a religious leader to the committees, or by eliminating the committees altogether, have failed.²⁶

To understand what the law looked like in practice, I set about interviewing key stakeholders. In the pages that follow, I'll introduce you to them via excerpts drawn from our longer conversations.

A. *The Committee Members*

As a first step toward understanding how the law worked, I met with Dr. D'rorit Hochner, an obstetrician-gynecologist at Jerusalem's Hadassah Hospital—the preeminent hospital in the city, if not the country. When we met in May 2017, she had been the chair of Hadassah's pregnancy termination committee for forty years.²⁷

“Abortions are illegal,” Hochner told me. “I mean, you can't just go to see your gynecologist, or something and have an abortion because you don't want the pregnancy.”

“Here,” she said, reaching for a paper atop a stack of files and unfolding a 2' x 3' form on her desk. She stood over it, indicating the fine print in the upper right-hand corner. “This is the law, here. You cannot do an abortion without filling out one of these forms. And these are actually the paragraphs stating when you can approve an abortion.”

“So, either the woman is below 17 or above 40. Or the second paragraph, if the pregnancy results from illegal or forbidden sexual

Carmel Shalev & Sigal Gooldin, *The Uses and Misuses of In Vitro Fertilization in Israel: Some Sociological and Ethical Considerations*, 12 NASHIM: J. JEWISH WOMEN'S STUD. & GENDER ISSUES 151 (2006); Larissa I. Remennick & Amir Hetsroni, *Public Attitudes Toward Abortion in Israel: A Research Note*, 82 SOC. SCI. Q. 420 (2001); Morag-Levine, *supra* note 17; Delila Amir & Orly Biniamin, *Abortion Approval as a Ritual of Symbolic Control*, 3 WOMEN & CRIM. JUST. 5 (1992).

A couple of articles have appeared in the Hebrew press: Ofra Eidelman, *Even in 2016, at the Abortion Committee, It's Forbidden to Tell the Truth*, MARKER (June 10, 2016), <https://www.themarker.com/misc/themarkersmartphoneapp/premium-1.2972318> [<https://perma.cc/MZ8M-TFBD>]; Aviva Lori, *Lies I Told the Committee*, HAARETZ, <http://www.haaretz.co.il/misc/1.1127665> [<https://perma.cc/T946-JNCE>] (Aug. 31, 2011, 3:47 AM).

25. The Ministry of Health published abortion statistics in Israel in December 2015. In 2014, ninety-eight percent of all requests for a legal abortion were approved by the committees. Rimalt, *supra* note 15, at 366. According to one of my sources, it could be closer to ninety-nine percent. Interview with Professor D'rorit Hochner, OBGYN, Hadassah Hosp., Mt. Scopus, in Jerusalem, Isr. (May 21, 2017).

26. See *infra* note 208 and accompanying text for a description of one such failed endeavor. See *infra* note 211 and accompanying text for an explanation of the law's staying power.

27. See Interview with D'rorit Hochner, *supra* note 25. My research for this article was approved by Santa Clara University's Institutional Review Board. All interviews were taped and transcribed, and are kept on file with me. For the sake of clarity, I have made occasional minor edits.

relations. So, rape, or incest, or if the woman is unmarried or divorced, or something like this. Or if a woman comes and says: 'Okay, I'm married, I have two children, but this pregnancy is actually from somebody else.' You know, an affair."

"The third one is that we suspect that the fetus might suffer from a physical or a mental disorder. And then there's the fourth paragraph which is that the continuation of the pregnancy might risk the health of the woman—physically or psychologically."

"So, this is, you know, it's kind of a door out. Because if a woman, she is married, she has three children, and everything looks okay, and she and the baby both seem to be okay, but still she doesn't want the baby . . . So, then she can go to see a psychiatrist and say listen I'm considering abor—er, suicide and he will give her a kind of recommendation, that the continuation of the pregnancy might interfere with her . . . psychological situation. And this would be a certain approval."

"In general, we want to help women. Because you know, when a woman comes, a married woman, with kind of a normal environment. When she comes and asks for an abortion, it means that she is in agony: she needs it."

"So first of all, she'll come to the gynecologist, who will help her. Then she will come to the social worker at the hospital. We ask her to fill this form and also, we fill it: what's her gestational age, how many fetuses, and we explain the risks associated with the termination of pregnancy—the abortion."

"And the social worker is very experienced: she knows, according to what she learns whether the patient will be approved, but usually, the women are prepared, usually they know when they come that they'll get an approval."

"That's why it's almost . . . you know, automatically approved. But, it's according to the law; we're not going to do something which is not. And if the social worker sees this is a case [that is] going to be approved, then she'll do the committee, kind of – the committee: she comes to me, she comes to another physician, and that's the committee."²⁸

The conversation with Dr. Hochner, one of my first interviews on this project, made me a little concerned about what I was going to do with my findings. I worried that, by writing about them, I might get my sources in trouble, or worse, that my writing might call unwanted attention to a system that, however flawed, was working to provide access to safe, legal abortions. I did not want to trigger any controversy.

My curiosity was piqued, though, so I went ahead with my interviews, knowing that I could revisit the question of publication further down the road. Later conversations put my concerns to rest, and ultimately I came to see that

28. *See id.*

nothing I might say would pose such a risk because there is no abortion war in Israel. Israel's law represents an enduring truce; no one is happy about it, but everyone is willing to live with it.²⁹

Dr. Hochner had solved the mystery of why committees approve close to 100% of all cases that come before them: anyone who does not meet the law's criteria gets screened out ahead of time by the nurse or social worker.³⁰ To understand the way that Israel's abortion committees function, you must begin by understanding the pre-screening process, typically conducted by the committee's social worker.³¹ The next set of interviews describes that screening process, which begins long before the appointment with the pregnancy termination committee.

Dr. Hochner introduced me to Ms. Gila Segev, the social worker who has served with her on Hadassah Hospital's abortion committee for the past eighteen years. Ms. Segev detailed the various steps a person must take before obtaining an abortion and helped me understand the social worker's role.³²

Patients first see their own doctors in clinics outside the hospital . . . to do an ultrasound and blood test before they come here. Then she tells her doctor she wants an abortion, and they will tell her to call a committee at the hospital. Then, the secretary will give her an appointment. Most of the time they have to wait up to a week, but sometimes less. For example, if the lady in the office says: "I don't have a place for you." And the girl says: "But you know, I'm six weeks, and I don't want to wait too much, because I want to do it with pills, so I really have to do it urgent." So, the lady in the office doesn't say no, she says: "You know, let me ask the social worker." So, they are calling us, and we will take her, put her in. Sometimes, you know, they have, I don't know, ten cases for the committee already that day, but we say, "Just come without an appointment. You can wait and we'll try to fit you in." It can take some time. First you need to get the permission from the committee, and then you schedule the abortion. The wait for the committee and for an abortion is different from

29. On the question of truce, *see infra* Part 4.

30. The law permits nurses or social workers to serve on committees, where they typically pre-screen patients. Although I interviewed both, I refer to them here as social workers. For a fascinating discussion about the social workers' role, *see* Amir & Biniamin, *supra* note 24. At the same time, our conversation raised another mystery. There was—to my outsider's eyes—a surprising degree of informality in the committee process: no meetings, just a social worker getting signatures on forms. *See infra* notes 95–101 and accompanying text for an exploration of questions relating to informal adjudicatory processes.

31. It bears noting that, at some hospitals, a nurse plays this role. *See* Interview with Sharon Orshalimy, Exec. Dir., Open Door, in Tel Aviv, Isr. (May 26, 2017) (describing the ways in which some committees screen applicants via nurses, while others use social workers).

32. Interview with Gila Segev, Soc. Worker, Hadassah Hosp., in Jerusalem, Isr. (May 21, 2017).

hospital to hospital. After that, the problem is you can wait sometimes three weeks to have the abortion.³³

By the time they meet with the social worker, the typical patient will already have had a series of encounters—with their own doctor, with those performing the ultrasound and blood tests and with the abortion committee's secretary, who will prepare them for the meeting with the social worker.

Upon reading the law, I assumed that the abortion committees functioned like informal tribunals. That one seeking to end a pregnancy was required to plead one's case before such panels. These interviews suggested I was wrong. Although everyone I interviewed described their particular process for obtaining three signatures on the government's form, only some of the committee members I met actually required the pregnant patient to appear before the full committee. Indeed, it turns out that at least some committees, like Dr. Hochner's, never actually convene.

Instead, the patient will meet with the social worker ahead of time. During that meeting, the social worker will help identify the ways in which the patient might qualify for one of the law's "indications" or exceptions, thereby securing permission to have an abortion. If a patient is successful, they will leave the hospital not with an abortion, but rather with a prescription for an abortion. With that prescription in hand, the patient can begin making calls in order to schedule the procedure at a hospital of their choosing.³⁴

Through Ms. Segev's contacts and a few of my own, I was able to get a sense of how various social workers approach these meetings. I met with another social worker, a ten-year veteran of a Jerusalem hospital abortion committee. She provided a detailed description of her approach:

First, I ask her, "How are you?" I just start with an open question, and if I see that they struggle with that open question, then I'll start asking specific questions. My goal is, first of all, just to hear how they are, you know. "How are you approaching this whole thing in your life? Where are your thoughts? Obviously, you're pregnant. I know that already, I don't need to ask that. Obviously, you're coming for an abortion, but maybe you are not decided on the abortion. Are you decided on the abortion, or is that still an open question for you?"

Of ten women who come in, I would say, maybe, two, three women, are less sure of themselves. There are always some that, in the end, after going through the whole process, even though they sounded really sure of themselves, decide not to do it. Like, some of them say, "No way can I have this baby." And I sometimes play devil's advocate. I bring up issues, I bring up questions. I want them to think it through. I want them—and I say that to them, openly: "I'm going to ask you things that, maybe you don't want to talk about, and you can tell me, 'I don't want to talk about that.'" But I see my job as making

33. *See id.*

34. *Id.* Note that this can be a lengthy process—two or three weeks. *Id.*

sure that you've thought it through, and that you're making the right decision for you."

I'm worried that afterwards they'll have some psychological problems because they're not sure about it. I also want to make sure they're not being pressured by somebody else. It could be the spouse, the boyfriend, or whatever. It could be the parents.

And I sometimes try to get them to really focus: Is it the pregnancy? Is it the birth? Is it raising a child? You know. And sometimes I feel that there's some kind of psychological problem here because you have all the reasons why it should work, why you should have this baby. You don't have that many children, your children aren't that young, you have money, you're not that old, you know. And I do try to understand that and—those are the ones that, I think, surprise me more. It's that, they're so sure that they can't handle it.

I didn't talk about how I help them fit into the law, but . . . the major problem is the married women. So, you know, during the conversation, probably not in the beginning, but more middle, if there's a married woman, and she doesn't have a reason, and I know that the committee's not going to approve it, I will tell her that. And really the only way to get it approved is to send her to a psychiatrist.

That's a part of it that I'm uncomfortable with, and they often are very angry about. Not often—there are women who just play along with the game and go to the psychiatrist. But there are occasionally women who've expressed a lot of anger about that. They think it's ridiculous. They think that the psychiatrists are making money off of their situation. They have no psychological problem; they don't need to see a psychiatrist. And I try to explain to them that this is the law. For now, this is the way it is, and I'm trying to help them.³⁵

There is a built-in variability to these pre-committee appointments, as they are primarily personality-driven. Not all of the social workers I interviewed spent as much time on the process. Some saw ten or more patients a day, twice a week. Others, only six or seven a week. Not all were inclined to push their patients to clarify their reasons for wanting an abortion. Indeed, some social workers and committees approached their work in a rather perfunctory manner. One committee member put it this way, when I asked if there were ever cases that he found challenging:

We don't judge her. If she wants to study for her exams and can't have a child now, that's fine. The only time a woman will be denied is when she won't use one of the excuses. Like if she says, "I don't want to answer these questions; they're stupid."³⁶

35. See Interview with Anonymous Soc. Worker, in Jerusalem, Isr. (May 2017).

36. Interview with Anonymous Comm. Members at Large Pub. Hosp., in Tel Aviv, Isr. (Dec. 7, 2017).

Given the ninety-eight percent permission rate, it seems safe to say that most social workers share Dr. Hochner's sense that, "in general, we want to help women" qualify for an abortion. To be sure, there are hospitals—typically religious ones—that opt out of performing abortions.³⁷ As such, when choosing from the list of hospitals from which to seek a committee's permission, a patient is unlikely to encounter a social worker who objects to abortion, and therefore outright refuses to help them navigate the steps required to secure the committee's approval.

That said, I did hear stories involving committee members who disapproved of abortion, at least in some cases. In fact, many of those I interviewed described "strict" committees, which were marked not so much by a refusal to grant permission, but rather, by how they treated the patients that came before them. Consider this description from one Jerusalem social worker, who had recently attended a national meeting of abortion committee social workers:

[T]hey were, like, shocked that the women don't stand before the committee with us. It's really a big ordeal, and why should we put the women through that? But they had situations, at this conference, where the doctors were, you know, saying things like, "Well, why are you pregnant again?" Like berating these women. And I was like, "What? We wouldn't . . ." You know, we might berate the woman, but certainly not like . . . Well, anyway, it works very differently at every hospital.³⁸

B. *The Committee Proceedings*

The variability of Israel's abortion committee process is reflected not only in the divergent attitudes and approaches of the committee members I met, but also in the ways in which the committees reach their determinations. Some committees used nurses to quickly fill out the forms then took the patient before the full committee on the same day. Some convened at the end of the day, without patients present. Some never met, but just had the social worker or a nurse "do the running," as one social worker put it, describing the process of collecting signatures from one doctor, then the other.³⁹

37. See Steinfeld, *supra* note 17, at 15 and accompanying text ("Though all hospitals with gynecology departments are required to provide abortions, many do not."). It bears noting that Israel is the size of New Jersey, and has an extensive public transportation infrastructure, *What You Need to Know About Public Transportation in Israel*, MASA ISR. JOURNEY (May 1, 2021), <https://www.masaisrael.org/what-you-need-to-know-about-transportation-in-israel/> [https://perma.cc/YT2J-6AYP], so unlike the U.S., there is no significant access challenge created even when religious hospitals opt out of providing abortion care. See, e.g., Stephanie Goldberg, *Why Illinois' Newly Recognized 'Fundamental Right' is Getting Harder to Exercise*, CHI. BUS. (July 12, 2019, 3:11 PM), <https://www.chicagobusiness.com/health-care/why-illinois-newly-recognized-fundamental-right-getting-harder-exercise> [https://perma.cc/FF7V-GH22]. See generally Lori R. Freedman & Debra B. Stulberg, *The Research Consortium on Religious Healthcare Institutions: Studying the Impact of Religious Restrictions on Women's Reproductive Health*, 94 CONTRACEPTION 6 (2016).

38. Interview with Anonymous Soc. Worker, *supra* note 35.

39. Interview with Gila Segev, *supra* note 32.

One issue that is particularly inconsistent is the process for establishing a mental health crisis. This issue represents one of the only ways for a married woman to obtain permission for an abortion. Most of the social workers I interviewed described counseling such patients to see a psychiatrist and return to the committee with a written diagnosis confirming a mental health crisis. Here's what one said about her committee's approach to cases involving otherwise healthy married women seeking to end normal pregnancies:

The current committee chair usually demands a letter from a psychiatrist. He just wants a doctor—he wants it to be from a doctor. So, then we have to send the patients to these psychiatrists. And it could be somebody who's in therapy, you know, in care of a psychologist, and could bring us a real letter instead of some fictional letter that—you know, not fictional, but from somebody who met the woman for five minutes.⁴⁰

By contrast, I spoke with a Tel Aviv doctor and social worker, both committee members at a large metropolitan hospital.⁴¹ There, a married woman might avoid the need for an external psychiatric consultation because the committee includes a psychiatrist as one of the two doctors.⁴² She will have to appear before the full committee and will have to explain why the pregnancy threatens her mental health, but she will complete the entire process in a single day.⁴³

Beyond variability, I was interested in the more fundamental question of the experience of getting permission to have an abortion. Although I had decided against interviewing abortion patients,⁴⁴ I wanted to understand how the process worked for marginalized and vulnerable people. Intersectionality theory teaches that power structures are best revealed by viewing them through the experiences of the most disempowered.⁴⁵

Toward that end, I met with Sharon Orshalimy, the executive director of Open Door, an Israeli non-profit organization dedicated to helping teens and other vulnerable populations access sexual and reproductive health.⁴⁶ Her description of her clients' experiences offers a helpful lens for understanding the abortion committee process as a whole.

Orshalimy laughed when I started our interview by asking how a teen ever navigated the complex committee system. Here's how she responded:

40. Interview with Anonymous Soc. Worker, *supra* note 35 (also noting that this delay matters—a woman might be forced to wait as long as three weeks before having her abortion).

41. Interviews with Anonymous Tel Aviv Doctor and Soc. Worker, in Jerusalem, Isr. (Dec. 7, 2017).

42. *Id.*

43. *Id.*

44. See *supra* note 13 (detailing the reasons for my decision).

45. See generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

46. Interview with Sharon Orshalimy, *supra* note 31.

I always say, “How does a woman go through an abortion without talking to me first?” The system is so, so difficult! I run a national network of counseling and treatment centers for young people on issues of sexual health and reproduction. Most committees require an appointment, so you will need to first come to the secretary who will fill out the necessary paperwork and collect the fees.⁴⁷ And then you wait for your meeting with the social worker.

It’s amazing, when you go to the committee you sit in the waiting room and it’s all women. Except for the couples who have a problem with the pregnancy. . . . Then you see, when it’s a wanted pregnancy that didn’t develop, you see the men. It’s amazing to see.

And the social worker is nice, she has a nice social worker’s face. They sometimes think they’re doing good when they’re actually doing bad. For instance, the question, “Why didn’t you use contraception?” rather than, “What made it hard for you to use contraception?” or “Was it hard for you to ask for contraception?”

But they’re nice and it’s fine. And then, she meets the committee The minor will give the doctors the form she completed with the social worker, but they don’t even look at it. And sometimes the doctor will say, “Next time use the pill,” and she might have used it and it didn’t work, and they don’t know anything about her life. If it’s a girl that got raped, they don’t even look at what the social worker wrote and they say, “Next time use the pill.” And if it’s a second abortion, then they’ll start being very educational and very judgmental.⁴⁸

Orshalimy’s attitude inspired confidence that she could successfully and compassionately shepherd her clients through the committee process. But her description of the process itself offered little assurance that those moving through it on their own can count on finding the support they might need. True, the social workers are there as guides, helping people get from one step to the next. And indeed, I heard no stories of folks getting lost in the shuffle. Still, one cannot help but see how the idiosyncratic, personality-dependent nature of the system renders the quality of one’s experience largely a matter of chance.

The best insight I got into how an adult seeking an abortion might experience the committee process came from my interview with Noya Rimalt, a law professor at Haifa University.⁴⁹ Professor Rimalt is one of only a handful of academics to have studied and written about Israel’s abortion laws. In 2016 and 2017, she published two long articles, one in the *Tel Aviv University Law Review* and the other in *Yale Journal of Law & Feminism*, in which she advocates for the

47. Although national health insurance will, in most cases, cover the costs of the abortion, patients are responsible for paying the relatively minimal costs associated with the committee process.

48. Interview with Sharon Orshalimy, *supra* note 31.

49. Interview with Noya Rimalt, Professor of L., Univ. of Haifa, in Tel Aviv, Isr. (May 29, 2017).

abolition of Israel's abortion committees.⁵⁰ Her opposition is based on principled arguments in favor of individual rights, but it also grows out of her personal experience. Here is the story she shared with me:

[A]s a young married woman I experienced an unwanted pregnancy and I was so certain this was not right for me right now, you know. I was very young So anyhow, I went to my doctor. I was very determined. I told him I must have an abortion—that there was no doubt in my mind. And then I learned that I could not just have an abortion; that I would have to articulate my reason for wanting an abortion in legal terms. My doctor explained to me that you go to the committee and if you tell them that you didn't know that you were pregnant and you took some sort of medication that is not recommended for pregnant women—that is when you get approval of the committee.

My doctor gave me a letter. I went to the committee—I actually never saw the committee members. I only met a social worker. She was very paternalistic in the sense that she asked me, "Do I need to give you some information about how to prevent future pregnancy?" I told her, "Not necessary. You know, these things happen. I know all about contraception." She told me to wait and she went with the form. And after several minutes, I got the approval of the committee

At that time the thought of the committee didn't feel mortifying at all, because the way that my doctor gave me the information it felt—as he said to me, it was basically technical. There are no obstacles And even right afterwards, you know, it didn't feel humiliating. Only when I thought about it later, how I was lectured about contraceptives and about safe sexual behavior, and about how I needed to lie in order to exercise my rights—I mean, these feelings came later. At the time I was so focused about getting what I wanted in the safest way possible. And in the end, it was very fast. I went to a private hospital for the committee, and I also did the procedure in a private hospital.⁵¹

Professor Rimalt's story illuminates two new aspects relevant to our understanding of Israel's abortion committees. First, there is the question of fraud arising out of the story of how her doctor helped her qualify for an abortion. The fact that her doctor helped her pass the committee by giving her a phony prescription suggests, at the very least, that the committee process is susceptible to corruption.⁵²

Second, Professor Rimalt raised the issue of private sector medicine and how it intersects with abortion in Israel. Israel's National Health System—the

50. See Rimalt, *supra* note 15; see also Noya Rimalt, *From Unjust and Partial Access to Just Legislation: Toward a New Paradigm of Abortion Law in Israel*, 39 TEL AVIV U. L. REV. 415 (2016).

51. Interview with Noya Rimalt, *supra* note 49.

52. For a discussion of the role of fraud in the abortion committee process, see *infra* notes 102–107 and accompanying text.

public system—provides universal basic health care to its residents, enabling them to access doctors and hospital care at little or no cost.⁵³ Alongside this public system is a private system that consists of doctors practicing across the full range of specialties.⁵⁴ Many work out of private clinics, typically providing care on a fee-for-service basis.⁵⁵

Since 2014, abortion has been included as a covered treatment—if you are approved for the procedure, your insurance will pay for it.⁵⁶ But rather than going to a public hospital, Professor Rimalt sought care from the private sector, first obtaining permission from a private hospital's abortion committee, and afterwards, having her abortion at a private facility.

In order to understand the difference between the public and the private processes, I met with Dr. Danny Laor, a Jerusalem gynecologist in practice for four decades. He explained it bluntly:

If you go to a committee in a public hospital, it's free. If you go to a private hospital then it's on you. You have to pay. There are committees all around in public and private hospitals, but you will have to wait at a public hospital. So, if, for example, you heard that doctor X is a very good professional—he is fast and has excellent results—you would pay out of your pocket to go to see him.⁵⁷

Dr. Laor's summary made short work of answering the question of why one might go to a private facility. It's faster. But his description of the informality of his clinic's "committee" underscored the extent to which the country's entire abortion committee structure seemed to be a mindless bureaucracy—offering process for process's sake, rather than yielding any meaningful oversight over abortion access:

53. All Israelis are entitled to basic health care as a fundamental right. See Ruth Waitzberg & Bruce Rosen, *International Health Care System Profiles: Israel*, THE COMMONWEALTH FUND (June 5, 2020), <https://www.commonwealthfund.org/international-health-policy-center/countries/israel> [<https://perma.cc/W37L-DZNS>].

54. See *id.* for an overview of the relationship between Israel's national health plan and the private health care system that supplements it.

55. *Id.*

56. To be precise, abortion is available without cost for anyone under age thirty-three, and for those age thirty-three and above if their pregnancy is the result of unlawful sexual intercourse, the pregnancy endangers the life of the woman, or the fetus has a physical or mental anomaly. *Apply to Terminate Pregnancy (Abortion)*, GOV.IL (Nov. 18, 2020), <https://www.gov.il/en/service/pregnancy-termination-permission> [<https://perma.cc/F5BU-JCRN>]. The Knesset drew a somewhat arbitrary line at age thirty-three for budgetary reasons, but the plan is to eventually raise the age to forty. See Ido Efrati, *Israel to Fund All Abortions for Women 20–33 Starting Next Year*, HAARETZ, <https://www.haaretz.com/premium-israel-expands-abortion-funding-1.5306031> [<https://perma.cc/5QDX-NRAK>] (Apr. 10, 2018); see also Michele Chabin, *Israeli Government Offers Women Aged 20 to 33 Free Abortions*, WASH. POST (Jan. 7, 2014), https://www.washingtonpost.com/national/religion/israeli-government-offers-women-aged-20-to-33-free-abortions/2014/01/07/99155cc2-77b7-11e3-a647-a19deaf575b3_story.html [<https://perma.cc/N8ZY-SB9F>].

57. Interview with Dr. Danny Laor, Physician, Priv. Prac., in Tel Aviv, Isr. (Dec. 8, 2017).

That's it. I was performing. I was signing for other people who were performing. You have to have 3 signatures. There is a social worker and two doctors, and you sign. It's not a problem.⁵⁸

C. *The Take-Away*

It has taken me the better part of five years to make sense of what is going on with Israel's abortion law. Why are they satisfied with a process that on so many levels seems to me like a farce? What is the law accomplishing?

I went to Israel intent on measuring the difference between our legal abortion regime and their illegal one. In the words of comparative law scholar Gunther Frankenberg, I was traveling "blindfolded," seeking to understand Israel's abortion law only by noticing how it differed from U.S. law.⁵⁹ My interviews removed the blinds; I was astonished, then mesmerized by the details of how Israel's law actually worked. And in losing myself in those details, in chasing down answers to my stray questions about how and why it worked, I came to a deeper understanding of how abortion laws function, wherever they exist.

A word of caution: this is a small story—one country's experience with its law criminalizing abortion. It is not a law we are likely to see in the U.S.—not in red states or blue states, nor in any states in between. Rather, Israel's experience is useful to Americans in the manner of a looking-glass. By noticing the ways in which Israel's law works, we can better understand the choices we are making as we fight over abortion law here in the U.S.

In the sections that follow, we will consider two distinct ways in which abortion crimes might be thought to operate. First, there is the way they mediate abortion access. Second, there is the way they send—or endeavor to send—a message about abortion. In exploring each of these functions, I use Israel's experience as an extended example prior to considering whether and how a given function might be different in the U.S. In Part Two, I describe four ways in which laws criminalizing abortion serve to mediate access to abortion. After analyzing these practical impacts of abortion laws, Part Three turns to the question of how abortion crimes might serve a symbolic or message-sending function.

PART TWO: RESTRICTING ACCESS TO ABORTION AND THE REGULATORY FUNCTIONS OF ABORTION LAW

This section considers how abortion crimes operate in practice. Using Israel as a test case, I identify four distinct functions served by the law: criminal sanction, market-structuring force, informal adjudicatory process, and shame sanction.

58. *Id.*

59. *See* Frankenberg, *supra* note 14.

A. *Abortion Laws as Criminal Sanctions*

Perhaps the first thing to notice about Israel's abortion law is that the crime of illegal abortion is almost never prosecuted.⁶⁰ The lack of enforcement, however, is not a reflection of its rarity. Indeed, the country likely sees thousands of illegal abortions—ones that happen without a committee's approval—every year.⁶¹ In spite of these numbers, I could not find even one instance in which someone was prosecuted for performing an illegal abortion.⁶² Not one, in almost 50 years.

The lack of abortion prosecutions is not surprising. We know that abortion prosecutions were rare in the U.S. in the decades prior to *Roe v. Wade*. As historian Leslie Reagan notes in her history of U.S. abortion prosecutions, apart from sporadic, isolated efforts at law enforcement, such cases were rare.⁶³ A variety of factors inhibited prosecutions. Illegal abortion is, by definition, a clandestine affair. Absent medical complications, there are no witnesses. Historically, prosecutions focused on doctors, rather than on the person who had the abortion. The doctors typically had resources that permitted them to evade arrest. When they did face trial, courts sometimes resisted convicting, showing a disinclination to punish those whom they saw as victims or the doctors who helped them out of a desperate situation.⁶⁴

60. See Steinfeld, *supra* note 17, at 14. See also Sztokman & Zeller, *supra* note 24. It bears noting that Israel's law criminalizes performing an abortion, not having one. See § 313, Penal Law, 5737–1977, LSI Special Volume (1977), as amended (Isr.) (“Any person who knowingly interrupts a woman's pregnancy, either by medical treatment or in another manner, shall be liable to imprisonment for five years . . .”). In addition, it explicitly excludes prosecuting those who have abortions. See § 320, Penal Law, 5737–1977, LSI Special Volume (1977), as amended (Isr.) (“A woman upon whom an offence under this article is committed shall not bear criminal responsibility in connection with that offence.”).

61. Sources commonly assert that there are as many illegal abortions as there are legal ones. See, e.g., Rimalt, *supra* note 15, at 369. But see *infra* note 80 for why this estimate seems unfounded.

62. In all my interviews, I heard only one story of the government getting involved in response to an illegal abortion. The case involved a doctor who allegedly performed an abortion in his private office, without a committee. There was a medical complication, and although the patient survived, the incident triggered an inquiry by a government ethics committee. In the end, no charges were filed. Interview with Sharon Orshalimy, *supra* note 31. Estimates of illegal abortions in Israel vary widely, and despite my persistent efforts, I could not find experts who could explain how the figures were calculated, let alone whether they were verified. The most commonly cited figure in the media is 15,000 per year, yet it comes from an anti-abortion advocacy group, rather than researchers, so it may be inaccurate. Marissa Newman, *15,000 Illegal Abortions Performed in Israel Each Year, Activists Claim*, TIMES OF ISR. (Jan. 3, 2017), <https://www.timesofisrael.com/15000-illegal-abortion-performed-in-israel-each-year-activists-claim/> [https://perma.cc/7F8L-BGXF]. See *infra* notes 80–87 and accompanying text for a discussion of illegal abortion in Israel.

63. See LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, at 114, 164 (1997).

64. *Id.* See, e.g., Dupuy v. State, 325 S.W.2d 238 (1959). This attempt abortion prosecution involved a sting operation against an illegal abortion provider, and it illustrates the extent to which a state court might reach to avoid convicting those likely to have been involved in providing illegal abortions. *Id.* The case involved a pharmacist who arranged to

Abortion prosecutions remain rare in countries around the world today. In Chile, which until recently banned abortion under all conditions, there were seldom more than five abortion prosecutions a year.⁶⁵ The example of El Salvador, where abortion is likewise banned, is particularly instructive because the government actively endeavors to enforce its law.⁶⁶ There is a full-throttle effort at vigorous enforcement of the law banning abortion under all circumstances, featuring the requirement that health care providers report those suspected of having deliberately ended a pregnancy.⁶⁷ Nonetheless, typically there are fewer than ten prosecutions a year.⁶⁸ This figure is striking in a country where even government officials estimate that there are 35,000 abortions annually.⁶⁹

As U.S. states embrace the chance to recriminalize abortion, it is not clear how much effort they will focus on prosecution. After so many years of working to make it illegal, it stands to reason there will be an appetite for enforcing the law. Perhaps states will follow Texas's example, and take aim at those who aid and abet abortion—the partners, friends and family, the doctors—rather than the pregnant persons themselves.⁷⁰ Indeed, as of now, some states explicitly bar prosecuting the person who has the abortion.⁷¹ Abortion medicines will complicate this strategy, as the availability of mail-order abortifacients mean that much of the time, there will be no one else to prosecute. Certainly no doctor, as mail-order abortion medications eliminate the need for the doctors who once were the targets of abortion prosecutions.

meet the purportedly pregnant patient in a room, had laid out the surgical instruments and was prepared to perform the procedure when he was arrested. *Id.* The court, after noting that it took the woman several times to persuade the pharmacist to help her, acknowledged that, “he would no doubt have carried out this attempt had he not been thwarted in his efforts by the arrival of the police.” *Id.* at 239–40. Nonetheless, it overturned his conviction finding that the defendant had yet to touch her, and instead was “merely preparing” to perform the illegal act, and therefore not guilty of the attempt. *Id.*

65. See OBERMAN, *supra* note 4, at 8–9, 127.

66. *Id.* at 43–67.

67. *Id.* at 46–63 (describing the ways in which the government endeavors to enforce its abortion ban).

68. Agrupacion Ciudadana, *Del Hospital a la Cárcel: Consecuencias para las Mujeres por la Penalización, sin Excepciones de la Interrupción del Embarazo en El Salvador, 1998–2019* (Feb. 2019), <https://agrupacionciudadana.org/download/del-hospital-a-la-carcel-tercera-edicion/> [<https://perma.cc/KR78-DRJW>].

69. See OBERMAN, *supra* note 4, at 44 n.3. It bears noting that these prosecutions are marked by false accusations and wrongful convictions, targeting the poorest and most marginalized segments of the Salvadoran population. *Id.* at 54–60.

70. S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021). See Julia Kaye & Marc Hearn, *Even People Who Oppose Abortion Should Fear Texas's New Ban*, WASH. POST (July 19, 2021), <https://www.washingtonpost.com/outlook/2021/07/19/texas-sb8-abortion-lawsuits/> [<https://perma.cc/PX34-LW33>].

71. See NAT'L INST. FOR REPROD. HEALTH, WHEN SELF-ABORTION IS A CRIME: LAWS THAT PUT WOMEN AT RISK (June 2017), <https://www.nirhealth.org/wp-content/uploads/2017/06/Self-Abortion-White-Paper-Final.pdf> [<https://perma.cc/CGH7-S34C>]; see also Andrea Rowan, *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion*, 18 GUTTMACHER POL'Y REV. 70 (2015).

Although pro-life advocates generally maintain that they will not prosecute those accused of ending their own pregnancies, even where legally permissible, there is no “national policy” against prosecuting self-abortion. The U.S. legal system vests law enforcement decisions in locally elected prosecutors who exercise broad discretion in deciding which cases to bring.⁷² Their choices may be informed by many factors: staff resources, strength of evidence, perception of public will, moral crusade, and bias—whether conscious or unconscious. As Judge Stephanos Bibos notes, there is no check on “idiosyncratic prosecutorial discretion.”⁷³

In the context of abortion-related crimes, prosecutorial discretion in the U.S. already has led to a pattern of selective enforcement of abortion-related laws in response to cases involving miscarriages, stillbirths, or perceived risks taken while pregnant. Lawyers at the National Advocates for Pregnant Women have identified over 413 such prosecutions in forty-four states in the years since 1973.⁷⁴ Poor people of color, and in particular, Black pregnant people, are vastly overrepresented in these prosecutions—a fact that researchers attribute to the greater willingness of health care providers to notify law enforcement, along with increased arrest rates, and a greater likelihood of facing felony charges.⁷⁵

As states recriminalize abortion, law enforcement patterns will vary widely. But the pattern of race- and class-bias observed in abortion-related prosecutions in the years since 1973 suggests that enforcement will remain selectively targeted against the most marginalized, vulnerable members of society—those whom prosecutors view, or at least believe others will be willing to view, not as victims but rather, as villains.

Finally, because laws criminalizing abortion necessarily activate adjacent crimes, states might endeavor to enforce their abortion laws by prosecuting the purchase of abortion drugs—whether by the pregnant person or another.⁷⁶ For that matter, a host of crimes could be brought against those who aid and abet

72. See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009).

73. Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369 (2010).

74. Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH POL., POL’Y & L. 299, 304–05 (2013) (discussing these findings and the limitations of the research which led the authors to conclude that their findings represent a substantial undercount of cases).

75. Lynn M. Paltrow, *Roe v Wade and the New Jane Crow: Reproductive Rights in the Age of Mass Incarceration*, 103 AM. J. PUB. HEALTH 17, 19 (2013).

76. Such prosecutions are becoming more common. See, e.g., Emily Bazelon, *A Mother in Jail for Helping Her Daughter Have an Abortion*, N.Y. TIMES (Sept. 22, 2014), <https://www.nytimes.com/2014/09/22/magazine/a-mother-in-jail-for-helping-her-daughter-have-an-abortion.html> [<https://perma.cc/ZE98-V799>]. In Spring 2021, one of the U.S.’s leading reproductive justice organizations announced the creation of a legal defense fund dedicated to serving those prosecuted for self-managed abortion. See REPRO LEGAL DEF. FUND, <https://reprolegaldefensefund.org/> [<https://perma.cc/E25P-7W86>] (last visited July 12, 2021).

someone in ending a pregnancy.⁷⁷ Indeed, we may see states creating a de facto surveillance state in an effort to curb illegal abortion.

But the reality remains that no state will manage to prosecute its way out of the demand for abortion. We know from our inability to control access to illegal drugs generally that when there is a strong, latent demand for the product in question, the market always wins.⁷⁸

B. *The Market-Structuring Impact of Criminalizing Abortion*

An obvious, yet interesting function of Israel's abortion law is the way it sets the terms of the country's markets for both legal and illegal abortion. Specifically, by establishing the boundaries around legally permissible abortion, the law simultaneously determines the reasons why a person might opt for an illegal abortion.

This effect is true of any criminal law, at some level. As Professor David Jaros notes, "in a basic sense, lawmakers are in the business of creating criminal markets. All forms of regulation have the potential to drive unwanted behavior underground. Criminalizing the sale of illicit drugs creates a black market for drugs. Closing the borders creates a market for human smuggling."⁷⁹

One key impact of abortion laws is that, as they restrict access—even if only by delaying the process of ending a pregnancy or driving up the costs—they help determine the scope of the population that will seek illegal abortions.

In Israel, as elsewhere, it is challenging to determine illegal abortion rates.⁸⁰ Officially, Israel has one of the lowest abortion rates in the developed world—in

77. See, e.g., MO. REV. STAT. § 188.250 (2021) (Missouri's aid and abet abortion law). See also Michelle Oberman & W. David Ball, *When We Talk About Abortion, Let's Talk About Men*, N.Y. TIMES (June 2, 2019), <https://www.nytimes.com/2019/06/02/opinion/abortion-laws-men.html> [<https://perma.cc/9XXN-GL5F>]; Michelle Oberman, *When Abortion Is a Crime, What Happens to the Accomplices?*, WHAT WOULD A POST-ROE AMERICA LOOK LIKE?, DEBATABLE (N.Y. TIMES, New York, N.Y.), Dec. 10, 2021, <https://www.nytimes.com/2021/12/10/opinion/supreme-court-abortion-roe.html> [<https://perma.cc/RMC6-LKXN>].

78. See, e.g., Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs*, CATO INST. POL'Y ANALYSIS (Apr. 12, 2017), <https://www.cato.org/policy-analysis/four-decades-counting-continued-failure-war-drugs#> [<https://perma.cc/Z7VX-SGR5>].

79. David Michael Jaros, *Perfecting Criminal Markets*, 112 COLUM. L. REV. 1947, 1949 (2012). Economists have long identified government regulation as one of a variety of factors that structure the market for any good or service. See E.T. Grether & Robert J. Holloway, *Impact of Government Upon the Market System*, 31 J. MKTG. 1 (1967).

80. Recall that sources assert that Israel sees as many illegal (non-committee approved) abortions as legal ones. See Rimalt, *supra* note 15, at 369. Estimates are particularly squishy in Israel, because people refer to all abortions outside of the public hospital system as "private" abortions, yet some of these private abortions have the approval of private committees. See, e.g., Interview with Danny Laor, *supra* note 57 and accompanying text; see also Interview with Sharon Orshalimy, *supra* note 31 (discussing the existence of both types of "private" abortions).

On measuring rates, demographers and sociologists typically derive estimated abortion rates by using an algorithm that considers the number of women of reproductive age, contraceptive

2016, there were 9 abortions per 1,000 women of reproductive age, as compared to the European and North American rate of 17 per 1,000 in 2015–2019.⁸¹ If the numbers are sound, Israel appears to have both the lowest abortion rates and the highest birthrates of any country in the Organisation for Economic Cooperation and Development (OECD).⁸² And yet, these rates are undercut by reports that as many as half of all abortions in Israel are performed outside of the committee process and are hence, illegal.⁸³

Yet when one searches for data supporting the claim that half of all abortions are illegal, it is nonexistent. None of those I interviewed could point me in the direction of any study that helps assess the size of the illegal abortion market in Israel.⁸⁴ Whatever the size of the market, though, it likely has shrunk in the years since 2014, when the government began including abortion as a

prevalence, and numbers of reported abortions. From those figures, one can project an anticipated birth rate. Any downward deviation from that rate suggests the existence of illegal abortion. Additional data such as hospital admissions for miscarriage or pregnancy loss helps to supplement these estimates. The widespread use of abortion medications poses new challenges for such measurement. See Susheela Singh, Fatima Juarez, Elana Prada & Akinrinola Bankole, *Estimating Abortion Incidence: Assessment of a Widely Used Indirect Method*, 38 POPULATION RSCH. & POL'Y REV. 429 (2019); see also GUTTMACHER INST., *METHODOLOGIES FOR ESTIMATING ABORTION INCIDENCE AND ABORTION-RELATED MORBIDITY: A REVIEW* (Susheela Singh, Lisa Remez & Alyssa Tartaglione eds., 2010), <https://www.guttmacher.org/sites/default/files/pdfs/pubs/compilations/IUSSP/abortion-methodologies.pdf> [<https://perma.cc/GT6L-V8RA>].

81. See Ido Efrati, *Israel's Abortion Rate Falls as Birth Control, Traditional Mores Rise*, HAARETZ (May 13, 2018), <https://www.haaretz.com/israel-news/.premium-israeli-abortion-rate-falls-as-birth-control-traditional-mores-rise-1.6078515> [<https://perma.cc/E8KR-3T96>]. Between 2015 and 2019, the worldwide abortion rate is estimated at 39 per 1,000. See Jonathan Bearak, Anna Popinchalk, Bela Ganatra, Ann-Beth Moller, Özge Tunçalp, Cynthia Beavin, Lorraine Kwok & Leontine Alkema, *Unintended Pregnancy and Abortion by Income, Region, and the Legal Status of Abortion: Estimates from a Comprehensive Model for 1990–2019*, 8 LANCET GLOB. HEALTH 1152 (2020); see also *Unintended Pregnancy and Abortion Worldwide*, GUTTMACHER (July 2020), <https://www.thelancet.com/action/showPdf?pii=S2214-109X%2820%2930315-6> [<https://perma.cc/U4T8-UD8Z>].

82. Today, Israel has the highest fertility rates of any country in the OECD, an intergovernmental economic organization comprised of thirty-eight countries with high-income economies. According to the OECD, Israeli families have an average of 3.1 children. See *Family Database: Fertility Rates*, ORG. ECON. COOP. DEV., https://www.oecd.org/els/family/SF_2_1_Fertility_rates.pdf [<https://perma.cc/5J2Y-YGWG>] (last updated June 2021).

83. See Rimalt, *supra* note 15, at 369.

84. Sharon Orshalimy of Open Door described the practice of illegal abortion in Israel by explaining that in addition to committees and procedures performed at large public hospitals, one might get an abortion in a private clinic by paying out of pocket:

In the private sector, you have two types of abortions. You have one that goes through a committee [which is technically legal] and one that doesn't go through a committee, which is the illegal one No doctor will say he does abortions without a committee, [but] I know who does abortions without a committee so if I get a call from a woman who has a husband and there's no medical problem with the baby, I know where to refer her to.

Interview with Sharon Orshalimy, *supra* note 31.

covered benefit under National Health Insurance.⁸⁵ As a result, as Dr. Danny Laor told me, the market for non-committee abortions quickly contracted.⁸⁶

There are two populations that continue to seek illegal abortions in Israel. First, there are those whose abortions won't be covered because they are not citizens, and therefore lack access to national health insurance.⁸⁷ Second, there are those who opt out of the committee process, perhaps because they are married and don't want to go through the hassle (or charade) of getting a psychiatric diagnosis,⁸⁸ or perhaps because they object to the process altogether.

Throughout my research, I struggled with how to characterize the abortion committee process. It seems intrusive and insulting to me, yet most Israelis I met seemed to view it as more of a bureaucratic hassle rather than an ordeal to be survived. Still, there is no getting around the fact that the process is cumbersome. There are multiple meetings with strangers to whom one must recount details about how and why they became pregnant and why they want an abortion.⁸⁹ The delay routinely takes two, or even three weeks—which might feel like eons for one who has resolved to end their pregnancy.⁹⁰ Then there's the fact that the delay may bring negative health consequences, in addition to psychological distress.⁹¹ In short, for those who have the money and who value their time, there is ample reason to skip the committee process.

From a distance, we can see how the factors driving illegal abortion in Israel are not all that different from those driving illegal abortion anywhere else in the world. They are a response to the de facto costs associated with obtaining a legal abortion.

Consider the costs associated with obtaining an abortion in the U.S. In states around the country, restrictive abortion laws such as those requiring waiting periods or banning telemedicine have increased the time and expense of obtaining a legal abortion.⁹² One impact of these laws is a rapid rise in self-

85. See *supra* notes 53–56 and accompanying text.

86. Interview with Danny Laor, *supra* note 57.

87. Israel hosts significant populations of refugees and visiting workers, neither of which are covered. Israel's refugee population in 2020 was around 398,000. *Refugee Population by Country or Territory of Origin – Israel*, WORLD BANK DATA, <https://data.worldbank.org/indicator/SM.POP.REFG.OR?end=2020&locations=IL&start=1988&view=chart> [<https://perma.cc/P66F-36YB>] (last visited July 4, 2021). The population of guest workers in Israel is estimated at 250,000. *Israel Society & Culture: Foreign Workers*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/foreign-workers-in-israel> [<https://perma.cc/KJ7F-ZXQ7>] (last visited July 10, 2021).

88. See *infra* notes 104–07 and accompanying text regarding the question of whether people lie to the abortion committees.

89. See discussion *infra* at notes 131–49 and accompanying text on shame sanctions.

90. See Interview with Sharon Orshalimy, *supra* note 31; see also Interview with Gila Segev, *supra* note 32.

91. See Interview with Sharon Orshalimy, *supra* note 31. Furthermore, given the country's present cut off of seven weeks for eligibility to use medical abortion, the delay may well necessitate a surgical abortion.

92. One study examined the impact of Wisconsin laws on the cost of abortion. Although the abortion procedure itself cost on average \$593.00, for a single mother in rural Wisconsin, the actual cost was much higher. Additional costs triggered by the waiting period and the

managed abortion, typically using medications purchased from overseas pharmacies.⁹³ With the average cost far lower than that associated with clinic abortions, it is ever more common for people to manage their own abortions outside of the law.⁹⁴

What is evident, in view of the struggles associated with law enforcement, is that criminalizing abortion does a far better job creating a market in illegal abortions than it does at making abortion disappear.

C. *Criminalizing Abortion with Exceptions and Reliance on Informal Adjudication Processes*

Our focus on the enforcement challenges facing abortion crimes should not distract us from the ways in which these laws operate as laws, at a practical level. Whenever a law restricts access to legalized abortion, it must necessarily erect a mechanism for determining when and whether a person meets the criteria for a legal abortion. Administrative law scholars would call such mechanisms “informal adjudicatory processes,” denoting systems in which the legal rights of individuals are adjudicated through a protocol wherein the decisionmaker is not required to conduct an evidentiary hearing, as would be customary in a formal legal proceeding.⁹⁵ Many government decisions involving individuals are the result of informal adjudication.⁹⁶ In the U.S., for example, informal adjudicatory settings range from relatively formal proceedings, such as those seen in cases

distance to a clinic included gas, lodging, childcare and missed work, so that in the end, the abortion actually costs \$1,380. See Erica Hellerstein & Tara Culp-Ressler, *Pricing American Women Out of Abortion, One Restriction at a Time*, THINKPROGRESS (Feb. 25, 2015), <https://archive.thinkprogress.org/pricing-american-women-out-of-abortion-one-restriction-at-a-time-c545c54f641f/> [https://perma.cc/5ETS-79SL].

93. See Lauren Ralph, Diana G. Foster, Sarah Raifman, M. Antonia Biggs, Goleen Samari, Ushma Upadhyay, Caitlin Gerdtz & Daniel Grossman, *Prevalence of Self-Managed Abortion Among Women of Reproductive Age in the United States*, 3 JAMA NETWORK OPEN 2 (Dec. 18, 2020), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2774320> [https://perma.cc/DM6E-RWDE]; see also Abigail R.A. Aiken, Kathleen Broussard, Dana M. Johnson & Elisa Padron, *Motivations and Experiences of People Seeking Medication Abortion Online in the United States*, 50 PERSP. ON SEXUAL & REPROD. HEALTH 157 (2018); Diana G. Foster, *Dramatic Decreases in U.S. Abortion Rates: Public Health Achievement or Failure?*, 107 AM. J. PUB. HEALTH 1860 (2017); Rachel K. Jones, Elizabeth Witwer & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2017*, GUTTMACHER INST. (Sept. 2019), https://www.guttmacher.org/sites/default/files/report_pdf/abortion-incidence-service-availability-us-2017.pdf [https://perma.cc/6WF8-XCT8].

94. *The Availability and Use of Medication Abortion*, KAISER FAM. FOUND.: WOMEN'S HEALTH POL'Y (June 16, 2021), <https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/> [https://perma.cc/P4YB-NKYA].

95. See Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 741 (1976). See generally MICHAEL ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT (2019), <https://www.acus.gov/publication/federal-administrative-adjudication-outside-administrative-procedure-act> [https://perma.cc/SV6L-U77N].

96. See ASIMOW, *supra* note 95, at 1–2 (describing that many decisions involving individuals are made through the processes of adjudication).

involving termination of government benefits to those variable, loosely structured processes such as school disciplinary hearings.⁹⁷

The key to an effective informal adjudicatory process lies in being seen as legitimate by all players and parties.⁹⁸ Without their buy-in, the system cannot be sustained. Legitimacy encompasses three core values: accuracy (meaning that the process enables the adjudicator to reach an objectively correct result),⁹⁹ efficiency (in terms of minimizing cost and delay), and satisfaction (meaning that the individual subject to the procedure perceives it to be fair).¹⁰⁰ Typically, fairness is associated with being permitted to tell one's side of the story to an impartial and respectful adjudicator.¹⁰¹

With this background in mind, notice that Israel's abortion committees constitute a relatively informal adjudicatory system. Rather than setting specifics about the proceedings, the law provides only the barest of guidelines. It specifies the membership requirements for committees (two doctors, one social worker, at least one woman) and the grounds upon which they might approve an abortion. But the law is silent as to how, or even whether, the committees convene. There are no guidelines for deliberations, nor is there any check against bias, save for that inherent in the membership requirements.

As we have seen, the result is an adjudication process that is variable in the extreme. Some committees never meet; others convene to review medical records; others require the petitioner to appear before the full panel of decision-makers.

To my outsider's eye, this variability, along with the ease with which anyone can meet the conditions for what purports to be a law limiting access to abortions, suggested that this was not a legitimate adjudicatory process. But from the perspective of the three-fold test for legitimacy that applies to informal adjudications—accuracy, efficiency, and satisfaction to participants—one can make a surprisingly strong case for a process-based legitimacy that explains why Israel's system endures.

Let's start with the thorny question of accuracy. If accuracy requires that committees reach objectively correct results under the law, there really is only one challenge for Israel's box-ticking approach: that of married women with healthy pregnancies. As discussed, these women typically get permission by

97. *Id.* at 3–4 (classifying these hearings into three categories).

98. *See* Verkuil, *supra* note 95.

99. *Id.* at 742. *See also* Roger C. Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 591–93 (1972). Accuracy is thought to be the result of a sound process, which in the U.S. is informed by the Due Process Clause's basic procedural guidelines for fairness: notice, opportunity for comment, and an impartial tribunal. For a classic formulation of this standard, *see* *Mathews v. Eldridge*, 424 U.S. 319, 333–35 (1976).

100. Special thanks to Professor Michael Asimow for his help summarizing this literature. For more detail, *see* ASIMOW, *supra* note 95.

101. *See* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 135–59 (1990). It bears noting that the value of fairness may be in tension with the other values. For example, insofar as fairness requires greater attention to process, it may impede efficiency.

invoking mental distress.¹⁰² Evaluating the accuracy of the committee process requires ascertaining whether they are telling the truth.¹⁰³

Curious, I asked committee members whether they thought women ever lied.¹⁰⁴ Some were more skeptical than others. One social worker referred to the process of getting a psychiatrist's approval as "play[ing] the game."¹⁰⁵ Others testified to the accuracy of mental distress claims, understating the psychiatrist's role as bearing witness to the obvious truth that an unwanted pregnancy can trigger a mental health crisis. Ms. Segev understood how the psychiatrists' letters might seem like an evasion of the law, but she insisted, "[S]he doesn't have to lie. She's not lying! She's under pressure, she doesn't want the pregnancy, she has lots of problems She has a mental condition that she can't adapt to."¹⁰⁶

In the end, there is no way to validate the "accuracy" of committee approvals based on maternal mental health grounds, in part because the process outsources the determinations to external experts, and in part because we have no other basis from which to evaluate the empirical "accuracy" of such claims.¹⁰⁷ What clearly is true is that without reliance on experts the committees would struggle to devise an unbiased, neutral strategy for ensuring accuracy.

Turning to the comparatively simple question of efficiency, I was surprised to hear so little objection to the bureaucratic thicket one had to navigate in order to secure access to a legal abortion. It turns out that Israelis are accustomed to

102. So-called "mental health" exceptions to abortion bans are widespread; approximately half of the world's countries permit abortion on the grounds that a pregnancy threatens the woman's health, which is widely interpreted to include mental health. See Rachel B. Vogelstein & Rebecca Turkington, *Abortion Law: Global Comparisons*, COUNCIL ON FOREIGN RELS. (Oct. 28, 2019), <https://www.cfr.org/article/abortion-law-global-comparisons> [https://perma.cc/8B9S-QZPC].

103. There have been "exposés" in the Israeli media suggesting the possibility of fraud. See, e.g., Lori, *supra* note 24; Tali Kord, *Unwanted Pregnancies and Women's Right to Choose in Israel*, JERUSALEM POST (Feb. 11, 2017), <https://www.jpost.com/magazine/unwanted-pregnanciesand-womens-rightto-choose-478228?> [https://perma.cc/7T4V-NF5U].

104. The so-called mental health exception is sure to be controversial in U.S. jurisdictions, as pro-life advocates commonly view it as a loophole that permitted too many to obtain abortions in the pre-*Roe* era. See OBERMAN, *supra* note 4, at 69–95.

105. Interview with Anonymous Social Worker, *supra* note 35.

106. Interview with Gila Segev, *supra* note 32. In Haifa, feminist activist Hedva Eyal put the matter this way:

To be pregnant when you don't want to be pregnant is a crisis. This is what happens: they call me, and when they realize they cannot [just] have an abortion, it takes one or two days and they call again and they are in mental breakdown. They cry and they say "I can't sleep, I can't eat, I can't do anything. I don't know how I can face this." I don't know a psychiatrist who will say she's in "good health." If it's not something that she came in with—pre-existing mental problems—then the pregnancy and the fear that she won't be allowed an abortion creates a mental health crisis.

See Interview with Hedva Eyal, Coordinator, Isha L'Isha, in Haifa, Isr. (May 19, 2017).

107. On the silences surrounding abortion stories, see KATIE WATSON, *SCARLET A: THE ETHICS, LAW, AND POLITICS OF ORDINARY ABORTION* (2018). For a creative response to abortion stigma, see *The Untold Stories Project*, SEA CHANGE, <https://www.seachangeprogram.org/our-work/untold-stories-project/> [https://perma.cc/H58F-GQAJ] (last visited July 10, 2021).

navigating bureaucracy when accessing any number of government benefits, as well as to the government's intrusion into their personal lives.¹⁰⁸ None of those I interviewed objected to the multi-step process as inefficient. Instead, they viewed the system as efficient because it produces consistent results. Those seeking abortion can count on the process to yield the desired outcome in their individual case. Even Professor Rimalt, who opposes Israel's abortion committees, acknowledged: "When you compare Israel to the United States, certainly Israeli women are better off. I mean, there's no doubt about it. You experience an unwanted pregnancy, you can get an abortion soon and it's safe and affordable. Certainly, on this level, it's much better."¹⁰⁹

In terms of satisfaction to participants, this result-driven analysis also explains why participants might find it acceptable in spite of the ways it is simultaneously farcical. Some committee members I interviewed mentioned that occasionally patients express frustration, or even anger, with the process.¹¹⁰ But these responses were, by all accounts, atypical. And even then, there is a difference between frustration with having to complete yet another step, and dissatisfaction with the entire process. Although there are signs of disgruntlement evidenced in the occasional media exposés decrying the hypocrisy of the committee process,¹¹¹ there is no meaningful opposition to the law itself.¹¹²

At the end of the day, the best evidence of satisfaction with Israel's adjudicatory process lies in its staying power. As interpreted and applied, the law secures access to safe, legal, and affordable abortion and the committees enjoy widespread acceptance as a sound system for securing that access. As Israeli feminist activist Hedva Eyal put it, "This is the story with abortion in Israel: it's not a story."¹¹³

Things will be different in the U.S., in ways that will intensify the challenge of establishing a legitimate process.¹¹⁴ As states move to recriminalize abortion, they necessarily will face the challenge of devising adjudicatory processes because even the broadest ban must make an exception for life-threatening

108. Perhaps the most notable is mandatory conscription into military service, but there are a host of additional interventions. On bureaucracy in Israel and Israeli attitudes toward it, see Brenda Danet & Harriet Hartman, *Coping with Bureaucracy: The Israeli Case*, 51 SOC. FORCES 7 (1972).

109. Interview with Noya Rimalt, *supra* note 49.

110. Interview with Anonymous Social Worker, *supra* note 35 and accompanying text.

111. See *supra* note 103.

112. In 2015, Professor Noya Rimalt helped draft a bill to abolish the committees altogether. Several members of Knesset signed on to it, but it quickly stalled. See *infra* note 208 and accompanying text for a discussion of why the law endures.

113. See Interview with Hedva Eyal, *supra* note 106.

114. A recent report by the Columbia University Law, Rights and Religion Project documents the presence of informal adjudicatory processes that, even where abortion is legal, operate to restrict abortion access in Southern hospitals across the U.S. ELIZABETH REINER PLATT, KATHERINE FRANKE, CANDACE BOND-THERIAULT, LILIA HADJIVANOCA & AMY LITTLEFIEND, COLUM. L. SCH.: THE L., RTS., & RELIGION PROJECT, THE SOUTHERN HOSPITALS REPORT: FAITH, CULTURE, AND ABORTION BANS IN THE U.S. SOUTH (2021), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Reports/The_Southern_Hospitals_Report.pdf [<https://perma.cc/ZNX3-H5XJ>].

pregnancies.¹¹⁵ Such a process might involve formal hearings before judges, but concerns of accuracy (there is surprisingly little agreement on what constitutes a life-threatening pregnancy)¹¹⁶ and efficiency (given the urgent, technical nature of the inquiry) might argue for an informal, expert-driven adjudicatory process.¹¹⁷

Americans are so deeply divided about abortion that we necessarily will struggle to create impartial, fair processes. In thinking through the challenge, it is fascinating to revisit the work of Stanford law professors Herbert Packer and Ralph Gampell, whose 1959 study of so-called therapeutic abortion committees sheds light on the ways in which local entities—specifically hospitals—undertook to police access to legal abortion.¹¹⁸ Their study took place in California which, along with thirty-one other U.S. states at that time, prohibited abortion unless necessary to save life.¹¹⁹ Rather than specifying mechanisms for

115. See *supra* note 10. It bears noting that, even among people who favor criminalizing abortion, the majority support exceptions in cases of rape, incest, or several fetal anomalies. The General Social Survey conducted by the University of Chicago's National Opinion Research Center has polled individuals since 1972 regarding whether it should be possible to obtain a legal abortion if the woman's health is seriously endangered by the pregnancy. Between 1972 and 2018, support for bans regardless of the woman's health ranged between seven and fourteen percent. See Nat'l Op. Rsch. Ctr. at Univ. of Chi., *Current Affairs: Abortion if Woman's Health Seriously Endangered*, GSS DATA EXPLORER, <https://gssdataexplorer.norc.umd.edu/trends/Current%20Affairs?measure=abhlth> [<https://perma.cc/N8JW-GVXP>] (last visited July 8, 2021). Each of these issues raises complicated definitional questions. For example, what proof must one have of an alleged rape or a case of incest? Must there be a concurrent criminal case? Is it enough to file a police report? To have visited an emergency room?

116. For a description of how experts can vary in their definition of whether a pregnancy poses a threat to life, see OBERMAN, *supra* note 4, at 19–29 (describing a case in which the Supreme Court of El Salvador denied an abortion to a woman suffering from lupus on the grounds that death was not imminent). See also DAVID S. COHEN & CAROLE JOFFE, *OBSTACLE COURSE: THE EVERYDAY STRUGGLE TO GET AN ABORTION IN AMERICA* 209 (2020) (quoting Ohio doctor, Chrisse France, decrying this standard in U.S. practice today, “She cannot be seen at our public hospital unless pretty much she’s going to die today or maybe tomorrow.”).

117. For example, states requiring parental notification or consent currently use judicial bypass hearings to assess minors’ claims that they should be permitted to end their pregnancies without parental involvement. See Kari White, Subasri Narasimhan, Sophie A. Hartwig, Erin Carroll, Alexandra McBrayer, Samantha Hubbard, Rachel Rebouché, Melissa Kottke & Kelli Stidham Hall, *Parental Involvement Policies for Minors Seeking Abortion in the Southeast and Quality of Care*, SEXUALITY RSCH. & SOC. POL’Y (Jan. 18, 2021), <https://link.springer.com/content/pdf/10.1007/s13178-021-00539-0.pdf> [<https://perma.cc/RQ8Y-84BP>].

118. Herbert L. Packer & Ralph J. Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417, 418 (1959) (Noting these questions, among others: is the procedure limited to cases where its purpose is to avoid shortening the pregnant woman’s life? If so, how do we determine whether carrying the child to term will shorten life? If not, what other considerations are relevant? Is a threat to health necessarily a threat to life? Must the threat to life (or health) be on account of a somatic illness? Or is the woman’s mental condition also to be considered? If so, is a probability that suicide will ensue a justification for therapeutic abortion?). For a searing indictment of U.S. therapeutic abortion committee practices in the mid-twentieth century, see Rickie Solinger, “A Complete Disaster:” *Abortion and the Politics of Hospital Abortion Committees, 1950–1970*, 19 FEMINIST STUD. 241 (1993).

119. Packer & Gampell, *supra* note 118, at 418.

ascertaining whether a patient's condition qualified, state laws were general, leaving the medical profession to devise its own ways of determining eligibility.¹²⁰

Doctors felt uncomfortable making these decisions on their own. In addition to the lack of consensus on qualifying abortions, they also expressed concern over the legal implications of their decisions, worrying that an approval could bring prosecution, and a rejection might lead to a civil lawsuit, as in wrongful death, should the pregnant patient die.¹²¹ By the mid-twentieth century, hospitals around the country began to embrace so-called "therapeutic abortion committees" as a means of remedying these uncertainties.¹²² Packer and Gampell canvassed twenty-six committees, asking them to rule on an abortion's permissibility in a series of hypothetical scenarios that were either clearly legal, questionable, or plainly illegal.¹²³ Their findings offered a stinging indictment of both the committees, and of the law itself. Fueled in part by committee members' lack of consensus over what constituted a "valid" reason for terminating a pregnancy, whether legally or morally, three-quarters of the hospitals openly acknowledged diverging from the law's narrow requirements.¹²⁴

It is easy to see how these therapeutic abortion committees were illegitimate. Even setting aside the challenge of rendering accurate decisions without a clear definition of what is meant by a life-threatening pregnancy, the process failed to meet the basic requirements associated with satisfaction. Decisions were biased by the importation of extraneous considerations such as the decision-makers' personal beliefs about abortion, alongside their concerns about legal liability for themselves and their institutions.¹²⁵

120. The law did not specify a mechanism for evaluating individual cases. Instead, it fell to hospitals, which is where any qualifying abortion would be performed, to determine protocols. Packer and Gampell suggest that hospitals developed protocols at least in part as a defensive measure: to protect themselves from potential downstream criminal or civil liability. *See id.* at 421. *See also* CAROLE JOFFE, DOCTORS OF CONSCIENCE 31 (1995) (describing how doctors who performed abortions illegally would do so outside of the hospital setting, but legal abortions that met the test of necessary to save life would necessarily have been performed in a hospital, thereby implicating both medical and hospital oversight).

121. Packer & Gampell, *supra* note 118, at 449 ("[R]eputable members of the medical profession may well find it galling that their freedom from criminal and civil liability turns merely on the nonenforcement of provisions of law which, on their face, appear to embrace the conduct in question."). Texas's S.B. 8 law employs such a threat by way of subjecting doctors who provide abortions as early as six weeks to civil suit. *See supra* note 70.

122. Packer & Gampell, *supra* note 118, at 421 (citing Alan F. Guttmacher, *The Shrinking Non-Psychiatric Indications for Therapeutic Abortion*, in THERAPEUTIC ABORTION 12, 15 (Harold Rosen ed. 1954)).

123. *Id.* at 425–26.

124. *Id.* at 430. Their study concluded with a call for law reform—a call that was echoed by their Canadian counterparts in the 1977 Badgley Report, which found "gross inequities existed in the availability of therapeutic abortion to the women of Canada." W.D.S. Thomas, *The Badgley Report on the Abortion Law*, 116 CAN. MED. ASS'N J. 966, 966 (1977).

125. Interestingly, some of the Israeli committee members I interviewed noted a tendency to approve requests because of a fear of later being sued by petitioners. This was particularly so in disability-related requests for termination.

Nor was it possible to insulate oneself from this bias by seeking recourse by requesting a different committee.¹²⁶ Petitions to U.S. committees were brought by the patient's physician at the hospital in question, which then determined whether or not to pass on the petition.¹²⁷ Any recourse for a denial would have required the pregnant woman to find a new doctor who had privileges at another hospital. It was implicit in the process—brought by the doctor, rather than the patient—that the patient had no right to be heard, let alone by an impartial and respectful adjudicator. Nor was there a right to comment or appeal a denial.¹²⁸

All of these challenges will arise as states recriminalize abortion. The struggle to define life-threatening pregnancies is just the start. More complicated still is the challenge of devising an impartial and fair process. Which parties' interests will be represented, and by whom, when a pregnant person petitions for an exception? By what criteria will we select our adjudicators?

Whatever the deliberative process, it must be more robust than either Israel's or that of the midcentury U.S. committees. U.S. law accords increased due process rights when vital interests are at stake.¹²⁹ Will the pregnant person be entitled to a lawyer? Will the fetus? If unhappy with the outcome, can either party try a different committee? Will there be an expedited appeals process? And how will we safeguard against inequities, such as those that would follow from an inability to afford private counsel?¹³⁰

Navigating the details of this challenge lies beyond the scope of this article, but the importance of doing so cannot be overstated. To the extent that the law relies on a process that is insufficiently accurate, efficient, and satisfactory to participants, it will be seen as illegitimate.

126. In Israel, a committee rejection is not a binding decision. One can simply try another committee. Interview with Sharon Orshalimy, *supra* note 31.

127. See Packer & Gampell, *supra* note 118, at 421–22 (citing Alan F. Guttmacher, *The Shrinking Non-Psychiatric Indications for Therapeutic Abortion*, in THERAPEUTIC ABORTION 12, 15 (Harold Rosen ed. 1954)).

128. See Carole Joffe & Jody Steinauer, *Opinion: Even Texas Allows Abortions to Protect a Woman's Life. Or Does It?*, N.Y. TIMES (Sept. 12, 2021), <https://www.nytimes.com/2021/09/12/opinion/abortion-texas-roe.html> [<https://perma.cc/9752-LA9G>] (summarizing the research on pre-*Roe* therapeutic abortion committees, and speculating about the ways in which such committees might operate in a post-*Roe* landscape).

129. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (“[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail”); See also Simona Grossi, *Procedural Due Process*, 13 SETON HALL CIR. REV. 155, 158 (2017) (“[A] . . . procedural law that is not supported by logic, fairness, and efficiency considerations . . . violates due process.”).

130. For a thoughtful consideration of the constitutional protections of a pregnant person in light of state-compelled pregnancy, see Meghan Boone, *Reproductive Due Process*, 88 GEO. WASH. L. REV. 511, 526 (2020) (“Beyond its flexibility and ability to evolve, a third feature of due process is simply its function as a catchall constitutional backstop for determining the fairness of government action.”).

D. Abortion Crimes as Shame Sanctions

In addition to its criminal, economic, and regulatory functions, one might also see Israel's law as a variety of "shame sanction."¹³¹ Indeed, one might argue that just enduring the multi-step process is a punishment of sorts. According to Professor James Q. Whitman, shame sanctions are one of the five types of punishments that a society might inflict: "[D]eprivations of life (execution); of liberty (imprisonment); of bodily safety and integrity (corporal violence); of property (fines); and of what we might call 'dignity' (shaming)."¹³²

So-called shame sanctions are familiar from early American colonial history.¹³³ The public admonition, the ducking stool, standing in the pillory, the forced wearing of signs or letters listing one's offense, branding or maiming—all were employed as means of punishment by humiliation.¹³⁴ Although less common today, there are contemporary examples, such as sex crimes "prosecution" by publishing the names of those who hire sex workers.¹³⁵

It makes sense that laws against abortion might operate as shame sanctions. After all, shame lies at the heart of our battle over abortion. The argument for abortion shame sanctions goes something like this: those opposed to abortion stake their claim on moral grounds—abortion is *malum in se*, a wrong in and of itself.¹³⁶ One ought to be ashamed of doing something that is morally wrong. An abortion shame sanction uses humiliation as a way to punish wrongdoers by exposing them to opprobrium.

Israel's law is not an explicit shame sanction. It does not set out to punish a wrongdoer by *publicly* humiliating them. But one can see how the process it sets in motion is fraught with potential humiliation. To secure a legal abortion, one must explain, over and over, how they became pregnant and why they do not want a baby.¹³⁷ This task is hard because as a rule, people do not share abortion

131. For an interesting essay on how external forces drive abortion stigma, see Anuradha Kumar, Leila Hessini & Ellen M.H. Mitchell, *Conceptualising Abortion Stigma*, 11 *CULTURE, HEALTH & SEXUALITY* 625 (2009).

132. James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 *YALE L.J.* 1055, 1060 (1998). See also, Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 *U. CHI. L. REV.* 591 (1996).

133. Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 *MICH. L. REV.* 1880, 1915 (1991) ("[W]hite colonists lived in intimate, closely bound, and normatively cohesive communities, within which shaming could and did play a signal role in reinforcing standards of behavior.").

134. *Id.* at 1912–15.

135. Whitman, *supra* note 132, at 1056. For an interesting exploration of how shame sanctions might be employed in the context of sexual assault crimes, see Katharine K. Baker, *Sex, Rape and Shame*, 79 *B.U. L. REV.* 663 (1999).

136. *Malum in se*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A crime or an act that is inherently immoral.").

137. See *supra* Part I.

stories, let alone with strangers.¹³⁸ It takes on added weight in a culture that is known for pressuring women to have many children.¹³⁹

I am not claiming that Israel's law has the *effect* of causing women to feel shame.¹⁴⁰ Such an effect would be hard to measure and might vary considerably within and across cultures.¹⁴¹ What makes it a shame sanction is not whether the law actually causes shame, but rather, whether it attempts to impart it.

Notice how the social worker's screening interview might double as a platform for expressing moral judgment about the validity of pregnant applicants' reasons for seeking an abortion. In fact, in one of the more interesting articles about Israel's abortion law, Professors Delila Amir and Orli Biniamin report on their findings from interviews with twenty-nine committee social workers.¹⁴² Their analysis reveals what they describe as a "ritual" in which "the woman has to confess her . . . wayward behavior such as extra-marital relations, not using contraception, and enjoying sex with no reproductive intentions."¹⁴³ The social workers' responses were seen to reinforce normative attitudes toward women, about motherhood, sexuality, and contraception alike.

In my interviews with committee social workers, I encountered evidence of this sort of moral judgment against those who deviate from societal expectations. Consider Gila Segev's response when I asked if she ever struggled to approve an abortion:

138. For a superbly insightful analysis of abortion silence and the void in our cultural awareness of "ordinary abortions," see WATSON, *supra* note 107.

139. From its inception, the state of Israel has encouraged large families. David Ben Gurion, the country's first Prime Minister, famously urged women to do their national duty by having at least four children. Lilach Rosenberg-Friedman, *David Ben-Gurion and the 'Demographic Threat': His Dualistic Approach to Natalism, 1936-63*, 51 MIDDLE E. STUD. 1, 6 (2015), https://www.researchgate.net/profile/Lilach-Friedman/publication/276116215_David_Ben-Gurion_and_the_%27Demographic_Threat%27_His_Dualistic_Approach_to_Natalism_1936-63/links/56c3127408ae8a6fab59e9d9/David-Ben-Gurion-and-the-Demographic-Threat-His-Dualistic-Approach-to-Natalism-1936-63.pdf [https://perma.cc/7N5S-GEDL]; see also Dina Kraft, *Israel Booms with Babies as Developed World's Birth Rates Plummet. Here's Why.*, CHRISTIAN SCIENCE MONITOR (Dec. 14, 2018), <https://www.csmonitor.com/World/Middle-East/2018/1214/Israel-booms-with-babies-as-developed-world-s-birth-rates-plummet.-Here-s-why> [https://perma.cc/X3Z2-NC8E]. See *infra* note 172-73, regarding Israel's prenatal policies.

140. At least some women report feeling shamed by the process. See Steinfeld, *supra* note 17, at 16 ("Many experience the committee process as shameful. Health journalist Judy Siegel-Itzkovich told me that she thought 50 per cent of abortions performed illegally were a result of women avoiding the embarrassment and shame of the committee experience."). See also Ruth Eglash, *Redefining 'Pro-Choice,'* JERUSALEM POST (May 26, 2011), <https://www.jpost.com/magazine/lifestyle/redefining-pro-choice> [https://perma.cc/F2WZ-XSHN] (citing sociologist Yael Hashiloni-Dolev who regards the process as a "ceremony of shame and guilt" in which women have to "confess their sins or explain very intimate details about themselves to total strangers.").

141. My hunch is that there might be less shame for Israelis than there would be for Americans made to endure the process. There is no public battle over abortion and therefore no rhetoric equating abortion with murder. See *supra* notes 89-92 and accompanying text regarding cultural relativism and my struggle to characterize the committee process.

142. Amir & Biniamin, *supra* note 24.

143. *Id.* at Abstract.

You know, when it's a 16-year-old girl that says, "You know, I was at a party, and I drank something, and I wasn't thinking, and I did it." You know, I can understand her. I can't understand a married woman, thirty-five years old, has her three children that she planned. You're a grown up? Why didn't you go to your doctor and put in an IUD, or take some pills! You're not a little child. I will help her because she needs it, and she wants it, and it's her will, and, you know, I can't be the dispatcher that tells her what to do, or, like one said to me: "The state of Israel can't tell me to have children or not, you know. You are telling me how to plan my life." So, I will help her, if she needs, but sometimes, it gets me to be angry with them.¹⁴⁴

Again, it is not clear that the committee process actually causes those seeking abortion to feel ashamed. But it is obvious that the process for obtaining one requires being subjected to the moralizing scrutiny of strangers. In that sense, it is clear that one of the functions of Israel's abortion law is to shame those who seek abortions.¹⁴⁵

It is easy to imagine the ways in which anti-abortion lawmakers in the U.S. might employ abortion laws as shame sanctions. In a sense, they already do.¹⁴⁶ For instance, there is a shaming function at work in laws requiring medically unnecessary scans prior to ending a pregnancy.¹⁴⁷ These tests are not intended for the benefit of doctor or patient, but rather, they are favored because supporters hope the pregnant person will change their mind, after hearing the heartbeat or seeing the ultrasound.¹⁴⁸ What is unclear is why supporters believe this might happen. Is it because they believe people seeking abortions don't know what a fetus looks like—a supposition that seems implausible given the media saturation with fetal imagery? Perhaps it is also because, by inviting strangers into the

144. Interview with Gila Segev, *supra* note 32. Recall the words of the Anonymous Social Worker, who described pressing women to explain, "[why] they're so sure they can't handle it." See Interview with Anonymous Social Worker, *supra* note 35.

145. Indeed, one of my interviewees, Sharon Orshalimy, suggested that Israel's abortion policy, along with its generous support of infertility treatments and its pronatal stance, is all part of "building the IDF" (i.e., growing the population needed to serve in the country's military). See Interview with Sharon Orshalimy, *supra* note 31.

146. See CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN 21ST CENTURY AMERICA 167–71 (2017) (noting that judicial bypass hearings operate as a form of punishment, requiring time and effort and causing distress and humiliation). Abortion shame sanctions also fit into a larger pattern of religious conservatives seeking to use the law to control people's sexuality and reproduction, not just around abortion but also around transgender issues, same-sex marriage, and adoption, etc.

147. See, e.g., Jen Russo, *Mandated Ultrasound Prior to Abortion*, 16 AM. MED. ASS'N J. ETHICS 240 (2014).

148. See, e.g., Jeanne Monahan, *Ultrasound Policy*, ONE PAGER (July 2010), <https://downloads.frc.org/EF/EF10G59.pdf> [<https://perma.cc/L3YT-Y9Q4>] (defending the policy of mandating ultrasounds on "abortion-minded women" unless they have a life-threatening pregnancy or are victims of rape or incest, when, presumably, the shaming function of such scans would be unwarranted).

inherently private abortion decision, these laws attempt to inculcate and weaponize shame.¹⁴⁹

As states are permitted greater leeway in criminalizing abortion, they might harness the power of law to shame in any number of ways. But the question of how anti-abortion lawmakers will endeavor to weaponize shame exists alongside the arguably better question of whether any such sanctions will remain relevant in the world toward which we are headed. That is to say, a world in which abortion—legal or not—is no longer clinic-based, but instead managed with abortion medications, in the privacy of one's home.

This question recalls us to our broader inquiry into the nature and function of abortion laws in contemporary society. As we have seen, they can have a practical impact on society by mediating abortion access, whether directly or indirectly. But they might also serve a function that is far less concrete. The following section considers the expressive function of abortion laws, evaluating the proposition that in criminalizing abortion, a society sends a message that abortion is wrong.

PART THREE: THE EXPRESSIVE FUNCTION OF ABORTION LAW

Conventionally, criminal sanctions are justified as strategies for deterring or punishing disfavored behavior.¹⁵⁰ Making something illegal might also serve an expressive function in that forbidding an activity is a means of denouncing it, even if the law is unenforced and largely fails to deter or to punish those who break it. Think of laws against flag burning, which might be endorsed not out of a need to punish or deter, but rather as symbolic affirmations of the flag's dignity.¹⁵¹ Or indoor smoking bans, which scholars credit with sending the message that lawmakers believe smoking is hazardous.¹⁵²

In many ways, it is the expressive function of abortion laws that has animated the pro-life movement to date. Proponents of criminalizing abortion look to the law at least in part because of what it says, not what it does. In my previous research, when interviewing pro-life lawmakers, many declared their support for banning abortion not because they thought the law would greatly reduce abortion rates, but rather because they believed the law should “send a message.”¹⁵³

149. See, e.g., Kim Greene, *So-Called Pro-Life Laws Are Really About Shaming Women Who Seek Abortions*, COURIER J. (July 5, 2019), <https://www.courier-journal.com/story/opinion/2019/07/05/abortion-laws-so-called-pro-life-laws-shaming-women/1522094001/> [<https://perma.cc/BW3Z-NJ84>].

150. WAYNE R. LAFAVE, CRIMINAL LAW 34–35 (6th ed. 2017).

151. Geoffrey R. Stone, *Flag Burning and the Constitution*, 75 IOWA L. REV. 111 (1990).

152. Janice Nadler, *Expressive Law, Social Norms, and Social Groups*, 42 L. & SOC. INQUIRY 60 (2017).

153. See OBERMAN, *supra* note 4, 85–86 (quoting an anonymous Oklahoma senator: “The purpose of the law is to stop abortion. To send a moral message. To get the message out via the law, to spark a debate in the population. The government’s responsibility is to give people education. It is up to the government to tell them that abortion is wrong. It’s not an acceptable solution.”).

The criminal law's "message sending" function sounds quite simple, but it is not. The following section interrogates the expressive function of abortion law by examining Israel's abortion statute on three levels. First, I consider the narrow message Israel's law sends about abortion. Next, I turn to the law's embedded messages, recognizing that just beneath the surface, the law speaks to the status of fetuses, and of those who might become pregnant, encoding implicit messages about family, marriage, and sex. Finally, I consider the various forces that shape whether Israelis actually receive the messages sent by their abortion law.

A. The Surface Meaning of Laws Criminalizing Abortion

According to Professor Richard McAdams, a leading scholar of the law's expressive function, the starting place for assessing a law's message is its conventional meaning—that is, "the meaning derived from applying existing language conventions to the speaker's utterance."¹⁵⁴ Making sense of the plain meaning of Israel's law requires a brief aside on the relationship between secular and religious law in Israel. Israel is a secular democracy, yet, like other democracies in which a majority of the population belongs to a single faith tradition, there is a heavy religious influence throughout civil society, including in its laws.¹⁵⁵ The traces of religion in secular society are most evident in laws that bear on issues about which the religion has something to say, such as abortion.

Israel is a diverse country, and its parliament is comprised of political parties of every stripe: communists, Israeli Arab Christians, Israeli Arab Muslims, Jewish settlers from the Occupied Territories, etc.¹⁵⁶ Typically, the biggest parties—historically, both secular—must enter into coalition with smaller parties in order to garner a majority of votes, and the right to lead the government.¹⁵⁷ Consequently, relatively small parties are able to extract promises and concessions in exchange for joining the coalition. In the years since 2000, neither of the big secular parties has been able to form a winning coalition without including at least some religious parties.¹⁵⁸

Practically speaking, this means that even a secular government must tread lightly in setting laws governing issues that bear on religious observance.¹⁵⁹ To

154. RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 19 (2015).

155. Izhak Englard, *Law and Religion in Israel*, 35 AM. J. COMP. L. 185 (1987).

156. See Alex Lederman, *Knesset Elections 2021: A Guide to Israel's Political Parties*, ISR. POL'Y F. (Mar. 10, 2021), <https://israelpolicyforum.org/2021/03/10/knesset-elections-2021-a-guide-to-israels-political-parties/> [<https://perma.cc/6WXD-EL6Y>].

157. See generally Jacob Miller, *Why Building a Governing Coalition is Difficult in Israel*, HARV. POL. REV. (Oct. 15, 2021), <https://harvardpolitics.com/building-a-coalition-in-israel/> [<https://perma.cc/8U5X-HKF8>].

158. See David Pollock & Tamar Hermann, *The Increasingly Right Stuff: Religious Parties in Israel's Upcoming Election*, FIKRA F. (Sept. 5, 2019), <https://www.washingtoninstitute.org/policy-analysis/increasingly-right-stuff-religious-parties-israels-upcoming-election> [<https://perma.cc/2XB3-M76E>].

159. Typically these issues include marriage and divorce, along with broader issues impacting the ultra-Orthodox community, such as exemptions from military service and

understand the meaning of the simple text of Israel's abortion law, then, you first must understand how the country's dominant religion—Judaism—views the subject.

Although I am Jewish, I needed guidance to understand Jewish law on abortion and the ways in which Israel's abortion statute reflects its tenets. I was fortunate to meet Rabbi Michael Broyde, a U.S. law professor and an ordained Orthodox rabbi. Rabbi Broyde is an expert in Jewish law. He served for decades on the Beth Din of America, the highest court of Jewish law in the U.S. In addition to having a rigorous knowledge of Jewish law regarding abortion, like most Orthodox rabbis in the U.S., he has spent time living in Israel. Thus, he was able to help me make sense of how Israel's abortion statute squared with Jewish law.¹⁶⁰

Rabbi Broyde began by explaining that, under the dominant normative view of Jewish law, the developing fetus is not considered alive until its head and shoulders emerge from the body.¹⁶¹ Jewish law holds that life begins at birth, rather than, as many Christians believe, at conception.¹⁶² As such, Rabbi Broyde explained, the fetus lacks a conventional rights-based legal status.¹⁶³ Indeed, there is no mention of the fetus in Israel's law, nor is there any line-drawing over the course of pregnancy, whether at viability or any other stage of fetal development.¹⁶⁴

At the same time, Rabbi Broyde explained that abortion is plainly disfavored under Jewish law:

government subsidies for religious schools. For a compelling, comprehensive discussion of the impact of these compromises on gender bias, see the works of Daphne Barak-Erez. Barak-Erez is now an Israeli Supreme Court Justice, but previously was a law professor at Tel Aviv University, where she wrote extensively about gender and civil rights in Israel. See, e.g., Daphne Barak-Erez, *Law and Religion Under the Status Quo Model: Between Past Compromises and Constant Change*, 30 CARDOZO L. REV. 2495 (2009); Daphne Barak-Erez, *Can Equality Survive Exceptions*, 107 MICH. L. REV. FIRST IMPRESSIONS 134 (2009).

160. When I interviewed him, he had just returned from a year-long Fulbright in Jerusalem, and was visiting at Stanford University.

161. Interview with Rabbi Michael Broyde, Professor of Law, Emory Univ. Sch. L., at Stan. Univ. (Nov. 14, 2019).

162. See DAVID M. FELDMAN, MARITAL RELATIONS, BIRTH CONTROL, AND ABORTION IN JEWISH LAW 264–67 (1987).

163. See Interview with Rabbi Broyde, *supra* note 161. Which wasn't to say that the fetus did not matter in his eyes. Here's how he described Judaism's moral position on abortion: Abortion is not black and white; it's more or less problematic. It should happen as early as possible in a pregnancy, because it's less ethically complicated. Not that Jewish law mandates it be done early, but it's better for everyone if it's early: for the women, and for the community—that they shouldn't see pregnancies that result in abortion, that abortion shouldn't be normalized; and for the developing life, whose connection to humanness increases over time. Its rights are always subordinate to the woman's, but the obligation is to do the most ethical thing possible by terminating early. It's less problematic.

164. Until 1994, when Knesset created a secondary review process for late-term abortions, a committee might have approved an abortion at any stage of pregnancy. See Rimalt, *supra* note 15, 359–62.

Everybody knows abortion isn't murder—Rabbi Moshe Feinstein's [position] is plainly not followed and is deemed incorrect in practice. It is permissible for certain vitally necessary situations, according to Rabbi Eliezer Waldenberg That truth pervades Halacha¹⁶⁵ and informs social policy and explains why Israel's law is uncontroversial. Rabbi Feinstein says it is murder; his view leads to the public posture that abortion is murder. It's not the posture of nearly any competent Halachic authorities in private, though. All rabbis who actually answer such questions, as far as I can see, agree that abortion is a very serious issue, that we're enjoined not to kill it, but that abortion is not murder.¹⁶⁶

True to Talmudic tradition, in which the meaning of a law's text is not proclaimed but instead debated by commentators,¹⁶⁷ Rabbi Broyde's explanation called into view ongoing arguments among rabbinic scholars over the circumstances in which abortion is permissible under Jewish law. But his overarching conclusion—that Jewish law recognizes specific exceptions to a general moral prohibition against abortion—points the way to understanding both the connection between Jewish law and Israel's statute, and also to the reasons why the country's religious leaders can live with it.¹⁶⁸

Turning to the surface meaning of Israel's abortion law, one finds that the blanket prohibition and each of the law's exceptions has its analog in Jewish law or custom. The law's broad allowance for abortions when life or health is at stake is consistent with well-established Jewish law. As Rabbi Broyde explained: "The fetus is not considered alive until it is born. Jewish law obligates us to save life

165. The Hebrew term for Jewish law.

166. See Interview with Rabbi Broyde, *supra* note 161. To understand the significance of his point that, in private, everyone agrees that there are times when abortion is permissible, one must understand how abortion decisions get made in the Orthodox world. If an observant Jew faces an unwanted pregnancy, she would seek the counsel of her Rabbi, telling him her story and asking whether it would be morally permissible to get an abortion. The practice of coming to Rabbis with "Sheylahs" (moral questions) reflects a world view in which all decisions of consequence must be made in keeping with Jewish law, of which Rabbis are the ultimate arbiters.

167. HARRY AUSTRYN WOLFSON, *CRESCAS' CRITIQUE OF ARISTOTLE* 25–26 (HARV. UNIV. PRESS, Harvard Semitic Ser. No. 6, 1929).

168. For example, Agudath Israel, an Orthodox Jewish organization often aligned with the U.S. "pro-life" movement, supports abolishing legal abortion only if such laws include a religious exemption clause. See Ben Sales, *Orthodox Rabbis Compare Abortion to Murder—and Orthodox Women are Angry About It*, JEWISH TELEGRAPHIC AGENCY (Jan. 31, 2019), <https://www.jta.org/2019/01/31/culture/orthodox-groups-come-out-swinging-against-new-yorks-abortion-law> [<https://perma.cc/6WPQ-JYHE>]. Rabbi Broyde translates this position as permitting a woman to terminate a pregnancy in consultation with a religious authority whom she has selected and who permits the abortion. See Email from Rabbi Broyde, Professor of Law, Emory Univ. Sch. L., at Stan. Univ., to author (June 21, 2021) (on file with author). See also *From the Mailbox*, NEWS FROM THE AGUDAH (May 26, 2021), <https://myemail.constantcontact.com/News-From-Agudas-Yisroel-15-Sivan-5781-May-26-2021.html?soid=1101537112001&aid=vIze2MIFKT0> [<https://perma.cc/K4JQ-2WKX>] (regarding the ultra-Orthodox Agudas Yisroel's position on abortion).

and preserve health, so the mother's serious health interests always take precedence."¹⁶⁹

Long-standing custom helps explain the viability of the other exceptions. Rabbi Broyde noted that there is enormous social stigma in the Orthodox community—unlike the secular community—to having children out of marriage.¹⁷⁰ Community norms favor large families, with children born within wedlock. Permitting abortion for non-marital pregnancies helps to reinforce those norms, and to safeguard the individual's place within her community.

The broad clause permitting abortion in cases of "fear of fetal anomaly" likewise reflects community norms. Rabbi Broyde told me he gets no fewer than fifty inquiries a year from religious women struggling with abortion-related questions.¹⁷¹ The most common among them involves the permissibility of prenatal genetic testing after age thirty-five.¹⁷² He responds to them pragmatically, rather than juridically: "There's complex social pressure in these cases," he noted. "We want big families, with lots of children. And a woman comes to me saying, 'I want more children, but if I can't screen, I won't have more.' It's the difference between having six and nine kids."¹⁷³

Rabbi Broyde notes that prenatal screening and abortion, while technically impermissible, is commonly practiced in the Orthodox world.¹⁷⁴ As evidence, he notes that there are lower than expected rates of Down Syndrome and other genetic anomalies among Orthodox women giving birth after age thirty-five.¹⁷⁵

One final insight about the relationship between Jewish law on abortion and the 1977 statute relates back to the clause that was struck from the law in 1979. Recall that the original law permitted abortions when dictated by "family or social conditions."¹⁷⁶ This translated into permitting abortion on the grounds that one cannot afford to have a child. Jewish law contains no such exception, and indeed, finds it abhorrent. Rabbi Broyde was adamant: "Economic-related abortion is to be avoided. I'm not comfortable with the 'three bedrooms, fourth child' abortion. I tell them the kids can share a room. I reject lifestyle abortion."¹⁷⁷ His response might help explain why, when the religious parties gained political clout, two years after the abortion law was passed, the Knesset quickly eliminated the fifth clause.¹⁷⁸

Even if one can trace the outlines of Jewish law within the strictures of Israel's abortion statute, there remains a question of how those who are morally

169. Rabbi Broyde, personal communication (June 1, 2021).

170. *See id.*

171. *See* Interview with Rabbi Broyde, *supra* note 161 (regarding the practice of seeking rabbinic counsel).

172. *See id.*

173. *Id.*

174. He distinguished these tests from preimplantation genetic diagnosis, which is completely permissible. *Id.*

175. As Rabbi Broyde put it, "There is the public teaching in the community, which is that abortion is murder. Then there is the private teaching, which is that abortion is permissible in situations of enormous need, even if it is below the level of life threatening need." *Id.*

176. *See supra* notes 20–23 and accompanying text.

177. *See* Interview with Rabbi Broyde, *supra* note 161.

178. *See supra* note 23 and accompanying text.

opposed to abortion square their opposition with the reality that committees will approve virtually anyone who seeks an abortion. When I pressed Rabbi Broyde to explain how religious leaders both inside and outside Knesset could tolerate this situation, he said: “The Orthodox like abortion committees because the specter of having to appear before them will cause women to avoid unwanted pregnancy. We like the law because we don’t want to trivialize human life and dignity. The law has a pedagogic function. It teaches ethical conduct.”¹⁷⁹

It was surprising to hear Rabbi Broyde invoke the same justification for criminalizing abortion as I had heard from pro-life lawmakers and advocates throughout the U.S. and in places as distant as El Salvador. In the next subsection, I consider his suggestion that, in effect, the entire abortion committee process might be seen as a means for the Israeli government to send a message that abortion is disfavored.

B. The Messages Sent by Laws Criminalizing Abortion

Abortion opponents see criminalizing abortion as a way to broadcast the view that abortion is wrong.¹⁸⁰ But the reality is that if abortion laws send a message, they don’t just send one. Instead, they carry additional messages about sex, pregnancy, marriage, motherhood, the status of those capable of pregnancy, and the status of the developing life.

Consider the law’s message to those who might find themselves pregnant. Israel’s abortion law allocates to the state the power to compel a person to endure pregnancy, labor, and delivery against their will. Even if the committee’s approval is all but guaranteed, its message is an assertion of dominion over the bodies and lives of anyone capable of becoming pregnant.

In addition to this message, Israel’s law has more to say. Each of the permissible grounds for granting abortions sends its own morality message. There are messages about families—specifically, that children should be born to married couples. There are messages about motherhood—that one must have an approved reason for seeking to avoid it.¹⁸¹ And there are messages about sex.

179. See Interview with Rabbi Broyde, *supra* note 161.

180. See OBERMAN, *supra* note 4, at 79–87.

181. This is particularly so in the absence of a robust embrace of adoption, which is the case in Israel. This, incidentally, is also the de facto case in the U.S., where fewer than five percent of those facing unwanted pregnancies even contemplate placing their child and fewer than two percent ultimately opt to do so. Unlike in pre-*Roe* America, those who do not terminate unwanted pregnancies overwhelmingly opt to raise their babies. See Olga Khazan, *Why So Many Women Choose Abortion Over Adoption*, ATLANTIC (May 20, 2019), <https://www.theatlantic.com/health/archive/2019/05/why-more-women-dont-choose-adoption/589759/> [https://perma.cc/PT8Z-NRYJ] (“[A]bout 9 percent chose adoption before 1973, when *Roe v. Wade* legalized abortion. (The figure was higher for white women: 19 percent.)”). See also DIANA GREENE FOSTER, *THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION* (2020). The Turnaway Study is a longitudinal study examining the effects of unintended pregnancy on women’s lives, conducted by the ANSIRH at the University of California at San Francisco. For the study and its findings, see *The Turnaway Study*: ANSIRH, <https://www.ansirh.org/research/ongoing/turnaway-study> [https://perma.cc/VB9E-HZLW] (last visited July 9, 2021).

Take the rape exception, for example. Rape exceptions to abortion crimes posit that, if a person willingly has sex, it is fair to compel them to continue a pregnancy.¹⁸² By contrast, if the sex was itself a criminal act, then the pregnant person becomes a victim, and cannot justly be forced to carry an unwanted pregnancy. As other scholars have observed, rape exceptions send a message that pregnancy and childbirth are “the price of pleasure.”¹⁸³

Israel’s law also sends a message about the status of people with disabilities. The exception permitting abortion in cases of “fear of fetal anomaly” signals that the government places less value on the lives of individuals with disabilities than on those without disabilities. So great is the difference that the mere fear of disability is sufficient grounds for a committee to permit an abortion.¹⁸⁴

Professor Sagit Mor, a lawyer specializing in disability rights at Haifa University Law School, put a fine point on the message sent by such a law: “There is a moral question here. Abortion is not inherently problematic, from a disability rights perspective, assuming you’re not interested in any pregnancy at

182. Indeed, some assert that forced pregnancy is “the price of pleasure.” See Shari Motro, *The Price of Pleasure*, 104 NW. U. L. REV. 917 (2010). The rape exception is troubling for advocates on both sides of the abortion issue. For those inclined to support reproductive justice, these exceptions seem to treat nine months of pregnancy, with its attendant short and long-term risks to life and health, not to mention mental health, as a just punishment for the “crime” of consenting to sex. From the perspective of those who believe life begins at conception, it seems perverse to permit the destruction of a fetus, no matter how heinous the circumstances surrounding its conception. See, e.g., Paulina Firozi, *The Health 202: Rape Exemptions for Abortion are Dividing Republicans*, WASH. POST (May 21, 2019), <https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2019/05/21/the-health-202-rape-exemptions-for-abortion-are-dividing-republicans/5ce2fefb1ad2e54b957e7fc8/> [https://perma.cc/Q9PX-8QJ4].

183. See Motro, *supra* note 182. For an interesting exploration of the philosophical underpinnings of rape exceptions, see I. Glenn Cohen, *Are All Abortions Equal? Should There Be Exceptions to the Criminalization of Abortion for Rape and Incest?*, 43 J.L. MED. & ETHICS 87 (2014).

184. Fear of disability is baked into Israeli prenatal care, which is characterized by frequent screening for fetal anomalies. Professor Tsipy Ivry’s brilliant ethnographic study comparing prenatal care in Japan and Israel offers insight into Israel’s passionate embrace of prenatal screening. See TSIPY IVRY, *EMBODYING CULTURE: PREGNANCY IN JAPAN AND ISRAEL* (2010). She describes the manner in which even young, healthy pregnant patients are expected to undergo a series of tests and evaluations to insure the fetus is developing normally. Pregnancy in Israel, Ivry concludes, is an anxiety-fueled process in which routine, government-funded prenatal scans and lab tests emerge as both the source of and the response to anxiety about disability. *Id. passim*.

There are a variety of theories about why Israelis might be so focused on producing perfect babies. See, e.g., Yael Hashiloni-Dolev, *Between Mothers, Fetuses, and Society: Reproductive Genetics in the Israeli-Jewish Context*, 12 NASHIM: J. JEWISH WOMEN’S STUD. & GENDER ISSUES 129 (2006); Tsipy Ivry, *The Ultrasonic Picture Show and the Politics of Threatened Life*, 23 MED. ANTHROPOLOGY Q. 189 (2009); Larissa Remennick, *The Quest for the Perfect Baby: Why Do Israeli Women Seek Prenatal Genetic Testing?*, 28 SOCIO. HEALTH & ILLNESS 21 (2006); MEIRA WEISS, *THE CHOSEN BODY: THE POLITICS OF THE BODY IN ISRAELI SOCIETY* (2002).

all. What is morally problematic is to say you want a child, but not this one.”¹⁸⁵ By permitting abortions in response to fear of fetal anomaly, she noted, the state necessarily sends a message that the disabled fetus lies outside of the community of those whom it is obligated to protect.¹⁸⁶

My point here is a simple one: abortion foes may wish to use criminal law to broadcast their moral opposition, but abortion laws are not straightforward in the same way as flag burning laws. Abortion laws come freighted with ancillary messages. But the complexity of the message is only the beginning of the challenge when it comes to using abortion laws to send a message. The real challenge lies in making sure it gets heard.

C. *The Challenge of Sending a Message via Abortion Laws*

For all that we might accept the notion that laws can send messages, we know surprisingly little about how the “expressive function” of any law actually operates in practice. One leading scholar, Professor Richard McAdams, offers a “law as information” theory for how it might work.¹⁸⁷ Under this theory, an expressive law reveals the lawmakers’ beliefs, which in turn causes individuals to update their beliefs and ultimately to change their behaviors, usually in the direction of compliance.¹⁸⁸ McAdams posits that, for this theory to work in practice, a law must possess three key ingredients: clear audience meaning, publicity and legitimacy.¹⁸⁹

Viewing Israel’s law through the lens of these factors shows just how difficult it is for any abortion law, anywhere, to send a message.¹⁹⁰ First, consider

185. Interview with Sagit Mor, Senior Lecturer, Univ. Haifa L. Sch., in Jerusalem, Isr. (May 19, 2017). In flagging the “not *this* child” question, Professor Mor harkens back to the pivotal work of philosopher Adrienne Asch who called attention to the immorality of disability-based abortion. See Adrienne Asch, *Prenatal Diagnosis and Selective Abortion: A Challenge to Practice and Policy*, 89 AM. J. PUB. HEALTH 1649, 1652 (1999) (arguing that, while one can ethically support the right of a person to decide they do not want to have a child now, there is no legitimate moral basis to justify a decision to abort a pregnancy because they fear having a disabled child).

186. Debate over the legality of disability-based abortions is ongoing in the U.S. See, e.g., *Preterm v. McCloud*, 994 F.3d 512, 549–51 (6th Cir. 2021) (upholding an Ohio law banning abortion if the doctor is aware that the patient is obtaining an abortion based on a Down syndrome diagnosis). See also, Stefanija Giric, *Strange Bedfellows: Anti-Abortion and Disability Rights Advocacy*, 3 J.L. & BIOSCIENCES 736 (2016). But rather than contend with the factors that might lead a person to seek prenatal screening and to end a wanted pregnancy if the results indicated a fetal anomaly—that is, rather than focus on offsetting the very real costs associated with raising a disabled child—pro-life lawmakers have largely favored laws prohibiting abortion on the grounds of disability.

187. See MCADAMS, *supra* note 154.

188. *Id.* For a trenchant critique of McAdams on account of the absence of data to support his theory, see Book Note: Richard H. McAdams, *The Expressive Powers of Law*, 129 HARV. L. REV. 1160 (2016).

189. He uses these categories in his Coase lecture. See Richard McAdams, Professor of L., Univ. of Chi., Coase Lecture in Law and Economics: The Expressive Powers of Law (Apr. 15, 2014). In his book, he modifies the categories to expertise and aggregation. See MCADAMS, *supra* note 154, at 180.

190. I am indebted to Professor Janice Nadler for an enriching conversation about the expressive function of Israel’s law. Her work informs my thinking throughout this section.

the question of clear audience meaning. Although Israel's law on the books may send a clear message that abortion is disfavored, it is unlikely the person seeking an abortion will ever hear it. When they first approach their doctor to ask about abortion, the law will be introduced as a bureaucratic process in which approval is a mere technicality. "Here is how to get the abortion," they are told. Not, "The law may prevent you from getting one," let alone, "Abortion is bad." Nor will the social workers or doctors they meet disabuse them of the notion that approval is simply a matter of figuring out how to qualify. How can a law that is viewed—even to those appointed to administer it—as a technicality send a consistent message about "ethical conduct," as Rabbi Broyde put it?

Then there is the publicity challenge, because, in order for a law to exert an influence, those it governs must be aware of it. Restaurant indoor smoking bans are able to chill smoking behavior and simultaneously send a message that smoking is bad in large part because the bans happen in public.¹⁹¹ Israel's abortion law lacks such broad-scale publicity. Outside of an occasional media exposé, the fact that abortion is a settled issue means that there is almost no public discussion about abortion.¹⁹² A law cannot send a message if nobody hears it.

Finally, there is the question of legitimacy, which undergirds the expressive function of law, just as it did the criminal and regulatory functions.¹⁹³ The question of how a law's message will be received by the public turns in part on the deference the public is willing to accord to the government on the issue. Professor McAdams notes that government legitimacy is not automatic, but rather, earned.¹⁹⁴ Government actors might gain the necessary credibility by way of "aggregation" or "expertise"—something that signals a reason why the public should trust the conclusions reached by their lawmakers.¹⁹⁵ For example, he points to indoor smoking bans, which gained traction because lawmakers persuaded the public that they were acting on data showing that secondary smoke inhalation required nothing less.¹⁹⁶

When it comes to abortion, such legitimacy surely will be elusive. Lawmakers cannot lay claim to aggregated data or to special expertise in support of their position that abortion is wrong. It simply is not a question suitably resolved by majority rule.

Beyond these factors lies an even bigger challenge to using abortion law to send a message. Laws do not exist in a vacuum; they are entwined with other

191. See generally, Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1713–28 (2000) (applying expressive law theory to smoking bans and landlord liability law).

192. See *supra* note 24, citing to stories from Israel's popular press; Allison Kaplan Sommer, *Shhh! Don't Tell Evangelical Supporters of Israel, but Abortion There is Legal—and Often It's Free*, HAARETZ (May 22, 2019), <https://www.haaretz.com/israel-news/.premium.MAGAZINE-shhh-don-t-tell-evangelical-supporters-of-israel-about-the-country-s-abortion-laws-1.7274968> [<https://perma.cc/VD5R-2KBL>].

193. See *supra* notes 104–113 and accompanying text describing the significance of legitimacy in the Israel's abortion committees' administrative process.

194. See MCADAMS, *supra* note 154, at 186.

195. *Id.*

196. *Id.* at 197.

messages sent by the government and by the culture at large.¹⁹⁷ The capacity of an abortion law to send a message depends in part on the extent to which it is in concert with, rather than at odds with, the laws, policies, and cultural norms that inform whether a person might contemplate abortion.

Professor McAdams explains that any law hoping to send a message must distinguish itself against a noisy backdrop:

Individuals are constantly being bombarded by information from sources other than the law: the print media, Internet, social acquaintances, etc. For expression to change beliefs, there must be some factor that makes the legal signal strong enough to stand out against this background.¹⁹⁸

Interestingly, Israel's law fares comparatively well on the question of how its message aligns with the backdrop. In fact, one might understand Israel's abortion law as consistent with a host of laws and policies that encourage people to have children.¹⁹⁹ In Israel, there is guaranteed paid maternity leave—you can leave your job for twenty-six weeks, still get paid, and your employer cannot fire you.²⁰⁰ Parents enjoy access to local neighborhood, subsidized day care.²⁰¹ In addition to tax deductions, the Israeli government pays everyone—rich and poor alike—a small monthly allowance for each child under eighteen.²⁰²

197. See Nadler, *supra* note 152.

198. See McADAMS, *supra* note 154, at 180.

199. And they do. Recall that Israel has the highest fertility rates of any country in the OECD. Families have an average of 3.0 children. See *Family Database: Fertility Rates*, *supra* note 82.

200. See *Maternity Leave*, KOL ZCHUT, https://www.kolzchut.org.il/en/Maternity_Leave [<https://perma.cc/Q29Q-T6Q6>] (last visited June 19, 2021). By contrast, in the U.S., the only government support lies in family medical leave, which promises twelve weeks of unpaid leave time after the birth of a child. See Family and Medical Leave Act (FMLA), 29 U.S.C. § 2612.

201. See *Childcare in Israel*, EXPAT.COM (Sept. 18, 2017, 9:27AM), <https://www.expatriot.com/en/guide/middle-east/israel/15420-childcare-in-israel.html> [<https://perma.cc/2Z7S-SJCK>] (describing the relative level of state support that young Israeli families receive, compared to the U.S.). See also, *Register to State Recognized Daycare and Afternoon Care, and Request State Participation in Tuition Fees*, GOV.IL, https://www.gov.il/en/service/registration_for_day_care_centers_and_nurseries1 [<https://perma.cc/N422-ZPDU>] (last updated Feb. 7, 2020) (a government website describing eligibility for state supported day care). Rates of enrollment in both day care and preschool are among the highest in the developed world. DANA VAKNIN, TAUB CTR. FOR SOC. POL'Y STUD. IN ISR., *EARLY CHILDHOOD EDUCATION AND CARE IN ISRAEL COMPARED TO THE OECD* 26 (July 2020), [https://issuu.com/bernardvanleerfoundation/docs/publication_taub_center_early_childhood_education_#?~:text=The%20preschool%20enrollment%20rate%20for%20children%20ages%203%20to%205,percent%20\(OECD%2C%202019\)](https://issuu.com/bernardvanleerfoundation/docs/publication_taub_center_early_childhood_education_#?~:text=The%20preschool%20enrollment%20rate%20for%20children%20ages%203%20to%205,percent%20(OECD%2C%202019)) [<https://perma.cc/VJ6M-9BHP>]. Indeed, preschool enrollments rates are double that of the OECD average. *Id.*

202. See, e.g., *Children*, NAT'L INS. INST. OF ISR., <https://www.btl.gov.il/English%20Homepage/Benefits/Children/Pages/default.aspx> [<https://perma.cc/8KE2-3K8L>] (last visited on June 19, 2021).

Although these policies may not significantly offset the costs of having a child, surely, they are a benefit to parents, and, in particular, to Israel's poorest families. Regardless, the abortion law's pronatal message doesn't have to overcome opposing background messages; rather, it is in alignment with the state's ongoing effort to persuade married women to have more babies.²⁰³

Dwell for a moment on the U.S., whose laws and policies, by comparison, reflect no serious interest in encouraging people to have babies they can't "afford."²⁰⁴ Of the many disheartening things about the decades-long U.S. war over legalized abortion, there is this: it almost entirely ignores the forces that drive American abortion rates. Outside of the work of reproductive justice advocates, who call attention to the constellation of factors constraining the reproductive and life options of poor people of color,²⁰⁵ our abortion debate is largely disconnected from any discussion of the laws and policies that lead people to contemplate abortion.

Unlike Israel, the U.S. government does little to encourage poor people to have more children. Instead, a person struggling with whether to have an abortion hears the message that they must shoulder the costs of raising a child. To be sure, many factors contribute to U.S. abortion rates, but let's be clear about how much money matters: almost half of U.S. abortions go to people living below the federal poverty line.²⁰⁶

What message is sent by a law banning abortion in a society that offers so little to support parents and children once they are born? Any message about the

203. See *supra* note 139 and accompanying text.

204. Another example: anti-abortion advocates, keen to condemn abortion on the grounds of fetal anomaly, have enacted laws barring such abortions. See, e.g., *Preterm v. McCloud*, 994 F.3d 512, 549–51 (6th Cir. 2021) (upholding an Ohio law banning abortion if the doctor is aware that the patient is obtaining an abortion based on a Down syndrome diagnosis). At best, these laws offer a mute protest in the face of government policies that treat the costs associated with disability largely as a private matter. Who cares for the child if the mother wishes or needs to earn a salary? Will the state provide services that permit the child to flourish? Against a backdrop of a society that largely ignores the material conditions for disabled children, there is little hope that a message opposing such abortions will be heard, let alone heeded. As Professor Mor noted, when decrying Israel's response: "[T]here is a single pragmatic question behind all of it—the testing, the screening, the abortions. What is the structure of the welfare state in support of disabilities? A symbolic recognition of disability rights is meaningless without improving the material conditions for disabled people." See Interview with Sagit Mor, *supra* note 185.

205. See, e.g., *Mission and Vision*, IF, WHEN, HOW, <https://www.ifwhenhow.org/about/mission-vision/> [<https://perma.cc/3RRJ-LKT5>] (last visited July 12, 2021) (a leading reproductive justice organization, their vision statement reads: "We envision a transformation of the legal systems and institutions that perpetuate oppression into structures that realize justice, and a future when all people can self-determine their reproductive lives free from discrimination, coercion, or violence.").

206. See Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107 AM. J. PUB. HEALTH 1904, 1906–07 (2017). On the connection between abortion and poverty, see Jenna Jerman, Rachel K. Jones & Tsuyoshi Onda, *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, GUTTMACHER INST. (May 2016), <https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014> [<https://perma.cc/2YYJ-W3AX>].

sacredness of life gets distorted by the countervailing messages broadcast by our underfunded social safety net. In a country with no meaningful commitment to offsetting the very real costs of having children, the message sent by laws criminalizing abortion is more a salute to the idea of a baby than a declaration of welcome to the baby itself.

PART FOUR: ABORTION LAWS AS TRUCES

I have long wondered why countries continue to support laws outlawing abortion, given how poor a job these laws do either at stopping people from having abortions, or at punishing those who help them do so. The foregoing examination of the limits on abortion law's expressive function eliminates the fall-back justification, showing that it is baseless to defend abortion crimes by claiming they send a message.

How, then, to explain Israel's continued adherence to a law that lacks legitimacy at many levels? It always seemed to me that a corrupt law necessarily undermined the credibility of the entire rule of law. And yet, Israel's law endures and abortion in Israel is a settled issue.

To understand why Israeli lawmakers might be at peace with a law that seems patently illegitimate, I interviewed two members of Knesset. Our conversations called into view one final function of abortion law: it can serve as a negotiated compromise. An abortion crime might endure, even in the face of evident corruption, if lawmakers on all sides of the issue see it as the least-worst alternative.

The first member of Knesset (MK) I met was Meirav Michaeli, the leader of Israel's left-leaning Labor Party. A former television news anchor, she carries herself with the confidence of a celebrity and the passionate conviction of a radical feminist. She is both.²⁰⁷ In 2015, she co-sponsored a bill that would have abolished the committees,²⁰⁸ yet when I asked her, several years later, if she was working to overturn the law, her response was surprisingly muted:

Getting rid of the committees would be a good thing. But . . . the reality is that I don't think you can make things better than they are at this point in time. And I don't want, God forbid, to make it more difficult than it is today. I don't want to wake the bears. . . . [T]hey would fight. And they would not simply fight to leave the committees as they are

207. I met her for the first time when I spotted her having dinner in Jerusalem with Catherine MacKinnon, the renowned U.S. feminist and legal scholar, whom I knew from law professor circles. They have collaborated on various projects, including drafting Israel's powerful victim-centered sexual harassment laws. See, e.g. Orit Kamir, *Dignity, Respect, and Equality in Israel's Sexual Harassment Law*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 561 (Catharine A. MacKinnon & Reva B. Siegel, eds., 2003).

208. Hearings were held, but the bill quickly stalled. See Draft Bill for Pregnancy Termination, 5766-2015 (Private Member Bill) (Isr.), <https://main.knesset.gov.il/Activity/Legislation/Laws/Pages/LawBill.aspx?t=lawsuggestions&search&lawitemid=567500> [<https://perma.cc/G9HZ-U9F5>]. For more on the bill proposing the elimination of the committees, see Noya Rimalt, *From Unjust and Partial Access to Just Legislation: Toward a New Paradigm of Abortion in Israel*, 39 TEL AVIV UNIV. L. REV. 415 (2016) (in Hebrew).

today. They would fight to reinforce the whole concept and their control over it.²⁰⁹

MK Michaeli pulled back the curtain, reminding me that in a democratic society, many laws are simply negotiated settlements. Michaeli was steely-eyed in her condemnation of the patriarchal stance of Israel's abortion law, and indeed, of Israeli laws in general, when it comes to issues of women and gender. But she also pointed out that Israel's law facilitates abortion access far more effectively than is seen in many countries with more liberal laws. The current law was, to her mind, the best she could do for now.

The other lawmaker I interviewed was MK Dov Khenin. A lawyer with a Ph.D. in political science, Khenin served in the Knesset from 2006–2020 on behalf of Israel's Communist Party.²¹⁰ When I asked him to explain the abortion committees' persistence, given their apparent illegitimacy, he responded:

[T]here are many reasons why abortion is a settled issue here, the most obvious of which is that Israeli society is an overloaded society. There are many, many issues shaping the left-right continuum in the Israeli polity But the whole political arena is concentrated on one axis, which involves security, war, peace, Jews, Arabs, settlements, and occupation. These are the issues that organize politics in Israel; there is no real place for an issue like abortion.²¹¹

In the end, both lawmakers viewed the abortion law as problematic, but rather than fight to reform it, they understood that it worked well enough to leave it be while they addressed the pressing issues that animated and divided their electorate.

Khenin's response also helped me understand why a similar truce is unlikely here in the U.S. In Israel, abortion is not a part of the left-right continuum.²¹² One's stance on abortion does not function as a proxy for political and social identity. In Israel, abortion is just about abortion.

209. Interview with Meirav Michaeli, Former Member of Knesset, in Tel Aviv, Isr. (Dec. 3, 2017).

210. In 2015, his party teamed up with three Arab parties to form a single voting bloc, the "Joint List," of which Khenin was the only Jewish member. *See* JOINT LIST, <https://jointlist.org.il/> (last visited June 24, 2021) (Hebrew website); *see also* JOINT LIST, <http://www.moshtrka.com/> (last visited June 24, 2021) (Arabic website). In January 2020, after twelve years in Knesset, Khenin announced his resignation, saying he could do more to protect Israeli democracy outside of parliament. Jonathan Lis, *Democracy: Dov Khenin, Outgoing Communist Lawmaker, Admits Regrets*, HAARETZ (Jan. 9, 2019), <https://www.haaretz.com/israel-news/.premium.MAGAZINE-i-failed-to-defend-democracy-outgoing-communist-lawmaker-admits-regrets-1.6808565> [<https://perma.cc/8F7E-8F73>]. For more about Khenin's background, *see* *Members of the Knesset*, THE KNESSET, https://www.knesset.gov.il/mk/eng/mk_eng.asp?mk_individual_id_t=780 [<https://perma.cc/946C-V36D>] (last visited June 24, 2021).

211. Interview with Dov Khenin, Former Member of Knesset, in Jerusalem, Isr. (Dec. 4, 2018).

212. *Id.* Instead, Khenin noted that Israeli's find such identity by reference to religiosity, or to one's stance on the occupation.

By contrast, as scholars Carole Joffe and Rosaline Petchesky have observed, in the U.S., abortion is a “battering ram,” standing in for a broad agenda of socially conservative issues, from welfare policy to gay rights.²¹³ Americans rank abortion among the central issues informing our political and social identity. Here, the battle over abortion is at least in part not really about abortion at all. Abortion matters symbolically; it evokes the panoply of socio-political-religious issues that comprise the axis around which our society revolves.²¹⁴

A 2020 Gallup poll found that one in four Americans see abortion as a sort of personal litmus test. Thirty percent of people who consider themselves “pro-life” and nineteen percent of people who consider themselves “pro-choice” say they would only vote for a candidate who shares their view on abortion.²¹⁵

The intensity of our engagement with the abortion issue suggests that we are unlikely to see a truce anytime soon. Instead, activists and voters on all sides will be outraged by the multiple failings of our new abortion crimes.

CONCLUSION

The coming era in our abortion war won’t be marked by a quick resolution in which abortion laws are settled largely along existing lines of red and blue states. Instead, the laboratories of states aiming to criminalize abortion will need to work overtime as they come to understand the ways such laws function in practice. No longer will it suffice to invoke one’s stance on abortion’s legality as a proxy for one’s commitment to the moral issue itself. Platitudes cannot yield answers to the challenge of how to respond when the new criminal laws fall short of their supporters’ aspirations.

From the start, these laws will face legitimacy challenges. How could it be otherwise, if states turn a blind eye to the forces driving unwanted pregnancy, and look instead to the criminal law to deter and discourage abortion? Implemented according to the private sensibilities and biases of the individuals entrusted to enforce them, these laws will strain notions of fairness even without the reality that abortion will remain legal for those who can afford to travel, and even without a widespread market in abortion medications for those who cannot or prefer not to do so. Such challenges will constitute only part of the noisy

213. See Carole Joffe, *Abortion and Antifeminism*, 15 POL. & SOC’Y 207 (1987). See also ROSALINE PETCHESKY, *ABORTION AND WOMAN’S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM* (1990).

214. See JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* 114–39 (2021) (a comprehensive discussion of Germany’s abortion law, which, like Israel’s, was born of pragmatic compromise). In his book, Greene illustrates how competing visions of rights frame individual and collective identity in the U.S. He decries our attachment to rights, arguing the proliferation of rights-based interests has left courts struggling to “reconcile a diverse, unpredictable array of conflicting, important, and deeply felt individual and group interests with the government’s existential interest in governing.” *Id.* at 78–79.

215. Megan Brenan, *One in Four Americans Consider Abortion a Key Voting Issue*, GALLUP (July 7, 2020), <https://news.gallup.com/poll/313316/one-four-americans-consider-abortion-key-voting-issue.aspx> [<https://perma.cc/KDY7-AVU2>].

background that will corrupt and distort any message about the sanctity of life that lawmakers hope to send by banning abortion.

If there is a reason for optimism with respect to the coming phase of our abortion war, it is this: the manifold challenges to the legitimacy of laws criminalizing abortion are likely to provoke a reckoning with what is and is not accomplished by making abortion illegal.

We might do well, then, to consider how other countries have reached a settled compromise on abortion by centering the question of how best to deter abortion. Consider Germany, whose law—forged as a compromise during reunification—has been settled since 1994.²¹⁶ Germany's lasting accord was helped along by a general consensus by those on all sides of the abortion divide that counseling and financial assistance to pregnant women and families protected fetal life far better than a prohibition on abortion.²¹⁷ Once criminalization was set aside as a relatively ineffective tool for deterring abortion, German lawmakers came together around a compromise package of laws that focused on offsetting some of the biggest costs associated with having a child.²¹⁸ In short, they harnessed the law's capacity to shape reproductive behavior by addressing the needs of those who would keep their pregnancies, if they had the resources to do so.

Even if we don't look beyond our borders to find our path forward, of this I am sure: there is no way for states to recriminalize abortion without quickly finding themselves stumbling. My hope is that this stumbling will alert more of us to a deeper understanding of the nature and function of abortion laws in the twenty-first century. And just maybe, from that place of awareness, we will more wisely navigate the moral crossroads that lie just beyond the legal one now in sight.

216. See GREENE, *supra* note 214, at 130.

217. *Id.*

218. *Id.* (noting that a key to the accord on abortion, which required a seventy-two hour waiting period and mandatory state-sanctioned counseling, was the simultaneous passage of laws intended to incentivize childbearing:

[F]inancial assistance for stay-at-home parents; a guaranteed return to a parent's prior job if he or she took off *up to three years* to care for a child; extended day care and extensive tax credits for day care costs; increased rates for child support payments; extended paid leave to care for sick children; reemployment guarantees for empty nesters; sex education services; and a host of other measures relating to adoption, housing and taxation.).

THE ALIGNMENT OF U.S. CHILD MARRIAGE LAWS TO DATA AND CONSENT: TIME FOR A BRIGHT-LINE RULE AT THE AGE OF MAJORITY

Andrea Jeglum[†]

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INTRODUCTION

Lamenting the marriages of a nine-year-old in Tennessee, a ten-year-old in Kentucky, and twelve-year-olds in the cities of Chicago and New York,¹ an attorney named Hazel Palmer railed against loopholes in state marriage laws in 1939.² She argued that provisions for judicial review and parental consent of marriages failed to protect children,³ allowing child marriage to become a cancer in America.⁴ Based on her own experience representing children in divorce, she identified the harms of child marriage as physical, mental, and moral.⁵ Eighty-two years ago she asked with frustration, “Well, isn’t somebody going to do something about it?”⁶

Surprisingly, child marriage continues in the United States today in virtually the same way as when Hazel Palmer wrote to the Women’s Bar. Palmer’s article from 1939, with its anecdotes and legal references, could be published today with few edits. For example, Massachusetts continues to rely on legal precedent for child marriage from 1854.⁷ Massachusetts, along with eight other states,⁸ rely on the common law tradition derived from Roman and church canon law of the thirteenth century, which sets the age of consent at fourteen years for boys and twelve years for girls.⁹ The effects of this ancient history play out today in the forty-four states that still allow child marriage.¹⁰

Regrettably, for some of these children, their stories parallel those told by Hazel Palmer. Typically, a child marriage in the United States involves a sixteen- to seventeen-year-old;¹¹ however, modern accounts of U.S. child marriages document that children were wed to their abusers as young as eleven years of age

1. Hazel Palmer, *Child Marriage*, 25 WOMEN LAWS. J. 49–50 (1939).

2. *Id.*

3. *Id.* at 50; Rachel L. Schuman, *State Regulations Are Failing Our Children: An Analysis of Child Marriage Laws in the United States*, 60 WM. & MARY L. REV. 2337, 2335 (2019).

4. Palmer, *supra* note 1, at 51.

5. *Id.*

6. *Id.* at 49.

7. *Parton v. Hervey*, 67 Mass. 119 (1854).

8. These states have not enacted a statutory age minimum for marriage and rely on common law tradition: California, Massachusetts, Michigan, Mississippi, New Mexico, Oklahoma, Washington, and West Virginia. See *About Child Marriage in the U.S.*, UNCHAINED AT LAST <https://www.unchainedatlast.org/laws-to-end-child-marriage/> [<https://perma.cc/EGD8-K3AQ>] (last visited Jan. 28, 2022) [hereinafter UNCHAINED AT LAST: *About Child Marriage*].

9. Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. REV. 1817, 1824 (2012).

10. *United States’ Child Marriage Problem Study Findings April 2021*, UNCHAINED AT LAST 8 (Apr. 2021), <https://www.unchainedatlast.org/wp-content/uploads/2021/08/Study-PDF-FINAL.pdf> [hereinafter UNCHAINED AT LAST: *Findings April 2021*].

11. *Id.* at 2, 5.

in Florida,¹² thirteen years of age in Texas,¹³ and fourteen years of age in Tennessee after years of mistreatment.¹⁴ A fourteen-year-old American girl was taken to a gynecologist in the United States to perform a hymenoplasty before traveling to Yemen for a coerced marriage.¹⁵ American concepts of childhood and marriage have changed significantly since 1939, but our laws have not updated to codify our current understanding. Through simple legislation that raises the marriage age and closes loopholes, states can choose to end child marriage.¹⁶

Child marriage, of course, is not just a U.S. problem. It touches major countries and religions worldwide.¹⁷ In 2014, 720 million girls married before reaching the age of eighteen with 220 million marrying before their fifteenth birthday.¹⁸ The global COVID-19 pandemic has worsened the problem and placed another 10 million children at risk of marriage in the next decade due to intensified risk factors such as lack of education and educational opportunities, parental death, and teen pregnancy.¹⁹ Children who marry young risk relatively early death due to frequent pregnancies that usually follow early marriage. Pregnancy and complications from childbirth remain the leading causes of death for fifteen- to nineteen-year-old females globally according to a 2021 World

12. Terri Dobbins Baxter, *Child Marriage as Constitutional Violation*, 19 NEV. L.J. 39, 40 (2018); Nicholas Kristof, *11 Years Old, a Mom, and Pushed to Marry Her Rapist in Florida*, N.Y. TIMES (May 26, 2017), <https://www.nytimes.com/2017/05/26/opinion/sunday/it-was-forced-on-me-child-marriage-in-the-us.html> [https://perma.cc/9WFR-S7GZ]. After rape by both a church member and a minister, Sherry Johnson became a mother at ten years old. At age eleven, she was forced to wed the church member to conclude the rape investigation. The judge who approved the marriage stated, “What we want is for you to get married.” *Id.*

13. Marie Johnson-Dahl, Note, *Sixteen Candles on My Wedding Cake: Implications of Banning Child Marriage in America*, 2020 U. ILL. L. REV. 1045, 1047; Nicholas Kristoff, *An American 13-Year-Old, Pregnant and Married to Her Rapist*, N.Y. TIMES (June 1, 2018), <https://www.nytimes.com/2018/06/01/opinion/sunday/child-marriage-delaware.html?smid%20=fb-nytimes&smtyp=cur> [https://perma.cc/2RC9-E4PJ]. Dawn Tyree was wed at thirteen to her rapist, a family friend, to prevent a scandal and criminal charges for her husband. *Id.*

14. Baxter, *supra* note 12, at 41; Robinson v. Commonwealth, 212 S.W.3d 100 (Ky. 2006). Kentucky updated its marriage age to eighteen in 2018, with an exception for seventeen-year-olds. KY. REV. STAT. ANN. § 402.210 (LexisNexis 2021). A child, known as S.M.H., was forced to travel from Kentucky to Tennessee for a marriage at fourteen years old to the man who had been raping her three to four times per week since the age of twelve. The Kentucky Supreme Court upheld the rape convictions prior to the marriage but reversed and remanded the convictions after the marriage, based solely upon the victim’s age. *Id.*

15. Loretta M. Kopelman, *The Forced Marriage of Minors: A Neglected Form of Child Abuse*, 44 J.L. MED. & ETHICS 173, 173 (2016).

16. See Hamilton, *supra* note 9, at 1860–61.

17. Raquel Wildes Genet, Note, *Child Marriage in America: An Interim Solution Pending a Total Ban*, 40 CARDOZO L. REV. 2999, 3029 (2019); Nina Dethloff, *Child Brides on the Move: Legal Responses to Culture Clashes*, 32 INT’L J.L. POL’Y & FAM. 302, 305 (2018).

18. Dethloff, *supra* note 17, at 305.

19. Bhadra Sharma & Jeffrey Gettleman, *In Nepal and Across the World, Child Marriage is Rising*, N.Y. TIMES (Mar. 8, 2021), <https://www.nytimes.com/2021/03/08/world/asia/child-marriage-nepal-covid19.html> [https://perma.cc/5726-8WR6].

Health Organization report.²⁰ While not at a heightened risk of death, married children in the U.S. face other significant issues, such as divorce and poverty.²¹ Furthermore, children suffer lifelong consequences when they marry young, including higher rates of violence and increased risks for psychiatric disorders.²² The number of children affected by these lifelong risks is not insignificant.

Although the data does not confirm the age at marriage, the 2010 U.S. Census revealed 520,000 married or previously married teenagers between the ages of fifteen and nineteen.²³ The number of child marriages estimated in the 2010 Census represents the lowest rate in the United States since 1880 when the census began tracking marriage statistics.²⁴ Although this positive trend continued in the 2020 Census, there were still an estimated 297,033 children married between 2000 and 2018.²⁵

Additionally, the data shows that strong regional differences exist. Western and southern states, along with rural areas, have the highest rates of child marriage, with Nevada, Idaho, and Arkansas leading with the highest per capita rates.²⁶ Although less frequent, child marriage also occurs in the Northeast and Midwest.²⁷ For example, in Massachusetts, 1,246 child marriages took place from 2000 to 2018.²⁸ From its peak in 1960, the percentage of children married between the ages of fifteen and seventeen has decreased to its lowest level as of the 2010 Census data.²⁹ Despite the historic decline in child marriages, any number is too high. Common sense, basic biology, and scholarship from nearly every academic field conclude that child marriage harms the married child, their families, and society.

20. Anne Wijffelman, *Child Marriage and Family Reunification: An Analysis under the European Convention on Human Rights of the Dutch Forced Marriage Prevention Act*, 35 NETH. Q. HUM. RTS. 104, 107 (2017).

21. Hamilton, *supra* note 9, at 1817, 1845, 1847.

22. Johnson-Dahl, *supra* note 13, at 1068; Mary Templeton, Article, *Engaged and Underage: Advocating for a Child Marriage Ban in North Carolina*, 10 WAKE FOREST J.L. & POL'Y 311, 312, 315–16 (2020).

23. Hamilton, *supra* note 9, at 1841.

24. NICHOLAS L. SYRETT, AMERICAN CHILD BRIDE: A HISTORY OF MINORS AND MARRIAGE IN THE UNITED STATES 51, 256 (2016).

25. See UNCHAINED AT LAST: *Findings April 2021*, *supra* note 10, at 5.

26. See Johnson-Dahl, *supra* note 13, at 1053–54; Templeton, *supra* note 22, at 311; Vijayasri G. Aryama, “I Don’t”: *The Need for a Solution to the Child Marriage Problem in the United States*, 39 WOMEN’S RTS. L. REP. 386, 389 (2018). The top ten states with the highest per capita child marriage rates are: Nevada, Idaho, Arkansas, Kentucky, Oklahoma, Wyoming, Utah, Alabama, West Virginia, and Mississippi. UNCHAINED AT LAST: *Findings April 2021*, *supra* note 10, at 5.

27. Aryama, *supra* note 26, at 389.

28. *Child Marriage – Shocking Statistics*, UNCHAINED AT LAST, <https://www.unchainedatlast.org/child-marriage-shocking-statistics/> [<https://perma.cc/QU9Y-8QQR>] (last visited Oct. 17, 2021) [hereinafter UNCHAINED AT LAST: *Shocking Statistics*]; U.S.: *Massachusetts Should End Child Marriage*, HUM. RTS. WATCH, (Mar. 27, 2019, 10:00 AM), <https://www.hrw.org/news/2019/03/27/us-massachusetts-should-end-child-marriage-0#> [<https://perma.cc/3X6V-SWPT>].

29. SYRETT, *supra* note 24, at 256. In the year 1960, an estimated 6.65% of girls and 1.13% of boys between the age fifteen to seventeen were married. By the year 2010, those numbers had declined to an estimated 0.44% of girls and 0.31% of boys.

This Comment defines child marriage as a state-sanctioned legal union between one person and another when at least one party is younger than the legal age of majority in their state of residence. Children in most states reach majority at eighteen years old.³⁰ However, Nebraska and Alabama set majority at nineteen years of age, while Mississippi establishes majority at twenty-one.³¹ Most child marriages include a female child and an adult male.³² Nonetheless, this claim applies equally to all children under the age of majority regardless of gender identity. The term “child marriage” is not meant to incite emotion or disrespect minors. To the contrary, it acknowledges that persons under the age of majority have a unique legal status as children.³³ Moreover, international advocacy organizations use the term “child marriage” for the legal unions described above.³⁴

The marriage law loopholes bemoaned by Hazel Palmer in 1939, mainly judicial review and parental consent, continue to fail children and society today.³⁵ Part I of this Comment updates the reader by providing a global context for child marriage and reviews the legal history of child marriage in the U.S. It then discusses the effects of child marriage on the married child, the children of the married child, and the overall institution of marriage. Part II presents the current status of child marriage in U.S. law, explaining a child’s lack of ability to consent to a marriage contract and the implications of that lack of consent. Finally, Part III explains why every constraint placed on the allowance of child marriage, no matter how well intended, fails to work in practice. This Comment proposes that the only remaining solution to end child marriage requires that forty-four states³⁶ pass a bright-line rule with a minimum marriage age at the state’s age of majority.

I. CHILD MARRIAGE IN THE UNITED STATES

An understanding of the history of marriage worldwide and in the United States helps to explain why states must raise the minimum age for marriage to match that of legal majority. This history explains why the United States has a diverse patchwork of state laws and how this affects children.

30. Hamilton, *supra* note 9, at 1822.

31. SYRETT, *supra* note 24, at 12.

32. *Arranged/Forced Marriage*, UNCHAINED AT LAST, <https://www.unchainedatlast.org/about-arranged-forced-marriage/> [https://perma.cc/JPF3-WSQF] (last visited Aug. 31, 2021).

33. See RESTATEMENT (SECOND) OF CONTRACTS § 14 (AM. L. INST.1981).

34. See U.N. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Dec. 10, 1962, 521 U.N.T.S. 231; *see also* U.N. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

35. Palmer, *supra* note 1, at 50–51; Schuman, *supra* note 3, at 2347.

36. The six U.S. states of Delaware, New Jersey, Pennsylvania, Minnesota, Rhode Island, and New York have eliminated child marriage. DEL. CODE ANN. tit. 13 § 123 (2018); N.J. STAT. ANN. § 37:1–6 (2018); 23 PA. CONS. STAT. ANN. § 1304 (2020); MINN. STAT. ANN. § 517.02 (2020); 15 R.I. GEN. LAWS § 15-2-14 (2021); N.Y. DOM. REL. LAW § 15-a (Consol. 2021).

A. History

The global community began the movement toward increased child marriage protections in 1948.³⁷ In 1989, countries came together and ratified the United Nations Convention on the Rights of the Child (UNCRC).³⁸ Article 1 of the UNCRC defines a child as anyone below the age of eighteen, unless the child has attained majority earlier under local law.³⁹ While 196 countries are parties to the agreement, the United States has not ratified it.⁴⁰ In 1990, fifty-three African states went further and promulgated the African Charter on the Rights and of the Welfare of the Child (“Charter”).⁴¹ The Charter unequivocally prohibits the marriage of anyone under the age of eighteen and allows no exceptions for religious or cultural practices, consent of a local authority, or parental consent.⁴² The global community has also recognized links between child marriage and slavery, child trafficking, torture, and organized crime.⁴³ The United States has joined some of these global initiatives by funding anti-child marriage efforts elsewhere in the world, but has remained silent at home.⁴⁴

One reason for the national silence could be the lack of consensus in the fifty different state laws that govern marriage in the United States.⁴⁵ These variations exist because marriage is a state-sanctioned contract between two persons.⁴⁶ Although religious officials may perform ceremonies, they do so “by the power vested in them” by the state.⁴⁷ Consequently, each state has made its own decisions, creating a patchwork of regional trends.⁴⁸ These trends developed as the country grew and closely tracked regional societal norms that continue to this day.

History shows that states adapted their marriage laws to suit society’s changing needs. During times when men outnumbered women, such as the early

37. See Elizabeth Warner, *Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls*, 12 AM. U. J. GENDER SOC. POL’Y & L. 233, 254 (2004). Starting in 1948, a series of international treaties were signed that contained provisions regarding child marriage. The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights all contain provisions about men and women “of full age” entering into marriage with “the free and full consent of the intending parties.” The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery has language restricting the practice of forced marriages for money. Various other treaties directly or indirectly implicate the prohibition of child marriages. *Id.* at 254-56.

38. U.N. Convention on the Rights of the Child, *supra* note 34.

39. Warner, *supra* note 37, at 251.

40. *Id.*; U.N. Convention on the Rights of the Child, *supra* note 34 (The UNCRC is the most widely ratified human rights treaty in the world. To date, the United States is the only country that has not ratified the treaty, though Somalia has not ratified the treaty in full).

41. Warner, *supra* note 37, at 257.

42. *Id.*

43. *Id.* at 258-59; Wijffelman, *supra* note 20, at 108-09.

44. Templeton, *supra* note 22, at 329.

45. Johnson-Dahl, *supra* note 13, at 1052.

46. See SYRETT, *supra* note 24, at 11, 23, 113; see *Maynard v. Hill*, 125 U.S. 190, 213 (1888); see *Reynolds v. United States*, 98 U.S. 145, 165 (1878).

47. SYRETT, *supra* note 24, at 11, 23, 113.

48. Schuman, *supra* note 3, at 2360.

colonial times or westward expansion, child marriage was more prevalent, possibly due to the numerical imbalance between the sexes.⁴⁹ Furthermore, slaveholders in the southern states encouraged early marriage-like unions among slaves to expand slaveholding, possibly threatening a forced marriage to encourage finding a partner on one's own.⁵⁰ Similarly, southern laws supported the early marriage of plantation-owning whites, sometimes with their own relatives, to preserve inheritance and control property.⁵¹ In contrast, the laws of the northern industrial states emphasized parental control that usually delayed marriage of a child until the parents consented.⁵² Far from altruistic, these provisions allowed parents to maintain control of the wages of their working sons and the unpaid housework of their daughters.⁵³ State marriage laws could also be exclusionary; they failed to recognize many marriage arrangements of African Americans, Native Americans, Mormons, and those in common law marriages due to extended cohabitation.⁵⁴ States have demonstrated a remarkable ability to change their marriage laws to meet the priorities and prejudices of their constituencies.

As the United States expanded westward, the midwestern states began the trend of establishing a statutory minimum marriage age when they entered the Union with marriage laws based on a precise numerical age instead of the common law standard.⁵⁵ This trend continued westward to California where the state's legislature established marriage laws at its first meeting.⁵⁶ When these states entered the Union, they began to match the marriage age to previously established ages of consent and adulthood.⁵⁷ For a period of time, the midwestern and western states placed restrictions on child marriage that codified an exact minimum age for marriage at fourteen for girls and seventeen for boys, and required parental consent for girls under eighteen and for boys under twenty-one. These ages closely tracked the age of majority in those states at the time.⁵⁸ States that never adopted a statute, such as Massachusetts, currently have no minimum marriage age.⁵⁹ This means that children as young as twelve, the common law standard, may marry in such states if they meet the other statutory requirements.⁶⁰

The historical discussion based on age notably lacks the concept of child rights and autonomy. The idea of childhood as a separate and distinct period in life did not begin until the latter half of the nineteenth century, taking hold

49. Hamilton, *supra* note 9, at 1834; SYRETT, *supra* note 24, at 44.

50. SYRETT, *supra* note 24, at 59.

51. *Id.* at 16, 23, 44.

52. *Id.* at 23.

53. *Id.* at 24, 30.

54. SYRETT, *supra* note 24, at 17–18.

55. *Id.* at 30.

56. *Id.* at 34–35.

57. *Id.*

58. SYRETT, *supra* note 24, at 30, 34.

59. Johnson-Dahl, *supra* note 13, at 1048; MASS. ANN. LAWS ch. 207, § 25; Hamilton, *supra* note 9, at 1824; See UNCHAINED AT LAST: *About Child Marriage*, *supra* note 8 and accompanying text.

60. Johnson-Dahl, *supra* note 13, at 1048; Hamilton, *supra* note 9, at 1824.

initially in the Northeast.⁶¹ Rural states, where the agricultural season determined workload more than age, adopted the concept of childhood later.⁶² As economic opportunity for women grew and the concept of a childhood took hold in a state, that state raised the marriageable age and tightened the law. Thus, state laws changed at the pace of each state without a national consensus.

The regional, socio-economic, and religious divisions within the United States remain apparent today in child marriage statistics. The most frequent child marriages occur in poor, rural, western or southern, highly religious, white or Latinx communities, especially within conservative Protestant sects.⁶³ Conservative Protestants and Mormons marry the earliest of any religious group, including the religiously unaffiliated.⁶⁴ Interestingly, both secular and religious students who attend school with religiously-conservative peers also have a greater likelihood of early marriage.⁶⁵ Conservative Protestant sects do not endorse child marriage, but they do stress the importance of virginity and sex within marriage through organizations like True Love Waits, the Silver Ring Thing, and Focus on the Family.⁶⁶

Racially, white and Latina girls are most likely to marry young, while among boys, Latino boys are most likely to marry young, followed by white boys.⁶⁷ African Americans are the least likely to marry early.⁶⁸ A poor, rural, highly religious, white or Latinx girl living in a western or southern state describes the archetypal child bride in the United States. States that have higher populations of the archetypal child bride experience higher rates of child marriage and bear the burdens of child marriage more than other states.

To ameliorate these differences, the Commissioners on Uniform State Laws set the presumptive marriage age at eighteen with limited exceptions, including provisions for judicial review and parental consent, over fifty years ago.⁶⁹ Despite initiatives to create standardization, the voluntary nature of the Uniform Marriage and Divorce Act and the lack of state follow-through has created a chaotic landscape that allows circumvention of a state's marriage laws through performance of the marriage ceremony in a state with more lenient laws.⁷⁰ This practice, termed migratory marriage by Hazel Palmer in 1939, led some scholars

61. SYRETT, *supra* note 24, at 3, 51.

62. *Id.* at 50, 218, 220.

63. Johnson-Dahl, *supra* note 13, at 1074; Templeton, *supra* note 22, at 311; Baxter, *supra* note 12, at 49–50, 54, 58.

64. Hamilton, *supra* note 9, at 1842.

65. *Id.* at 1842–43.

66. Johnson-Dahl, *supra* note 13, at 1074.

67. Baxter, *supra* note 12, at 50.

68. *Id.*; Hamilton, *supra* note 9, at 1843. The low rate of early marriage amongst African Americans has been attributed in part to supportive familial networks available to African American girls and an eroded stigma of teen pregnancy within their communities. Baxter, *supra* note 12, at 50; SYRETT, *supra* note 24, at 255–56.

69. See Hamilton, *supra* note 9, at 1832.

70. See Schuman, *supra* note 3, at 2360; see also Palmer, *supra* note 1, at 50; Hamilton, *supra* note 9, at 1832; UNIF. MARRIAGE AND DIVORCE ACT § 201 (UNIF. L. COMM'N 1970).

to advocate for a national child marriage floor in 2019.⁷¹ One scholar advocated that Congress should tie federal education funding to state marriage age,⁷² providing a similar scheme as Congress did for highway funding—an incentive technique upheld by the Supreme Court in *South Dakota v. Dole*.⁷³ Despite the varied and complex state regulatory landscape, federal courts have been consistent in their interpretation of state marriage laws.

Although the U.S. Supreme Court has not ruled on child marriage, the federal courts' interpretations of the constitutionality of state marriage laws closely parallel the social history of the United States: focusing on states' rights and polygamy in the nineteenth century, the Due Process and Equal Protection Clauses in the twentieth century, and the recognition of same-sex marriages in the twenty-first century. In 1862, Congress outlawed bigamy in the Territories⁷⁴ and in 1878 the Supreme Court upheld this prohibition against the constitutional right of religious freedom in *Reynolds v. United States*.⁷⁵ In an opinion that distinguished religious beliefs from religious practices, the Court maintained that “professed doctrines of religious belief” cannot become “superior to the law of the land . . . to permit every citizen to become a law unto himself.”⁷⁶ Ten years later, the Court confirmed that “[m]arriage . . . has always been subject to the control of the legislature” when upholding a divorce decree issued directly by the Oregon Territory’s legislature.⁷⁷ In the twentieth century, the Supreme Court found forced sterilization of repeat criminals unconstitutional in the 1942 case *Skinner v. Oklahoma ex rel. Williamson*, and declared that marriage is “fundamental to the very existence and survival of the race” and “involves one of the basic civil rights of man.”⁷⁸

The Court continued expansion of the right to marry in the second half of the twentieth century. In 1967, quoting *Skinner*, the Court continued to find that marriage was a basic civil right in the famous anti-miscegenation case of *Loving v. Virginia*, when it found Virginia’s law prohibiting interracial marriage violated the Due Process Clause of the Fourteenth Amendment.⁷⁹ Further in 1978, the Court invalidated a Wisconsin statute that required up-to-date child support payments in order to be eligible for a marriage certificate in *Zablocki v. Redhail*.⁸⁰ The Court looked to its past decisions and held “the right to marry is of fundamental importance for all individuals.”⁸¹ Finally, in 2015, citing every case listed above from 1888 forward, Justice Kennedy announced the majority opinion in *Obergefell v. Hodges*, providing that “[t]he right to marry is a

71. Wildes Genet, *supra* note 177, at 3035; Palmer, *supra* note 1, at 50; *see* Schuman, *supra* note 3.

72. Schuman, *supra* note 3, at 2360.

73. *Id.* at 2358–59.

74. *Reynolds v. United States*, 98 U.S. 145, 168 (1878).

75. *Id.* at 166.

76. *Id.* at 167.

77. *Maynard v. Hill*, 125 U.S. 190, 203, 205, 216 (1888).

78. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

79. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

80. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

81. *Id.* at 384.

fundamental right inherent in the liberty of the person, . . . under the Due Process and Equal Protection Clauses of the Fourteenth Amendment[.]" granting same-sex couples the right to marry.⁸² Despite this vast body of jurisprudence on a state's right to regulate marriage and the constitutional right to marry, the Supreme Court has remained silent on child marriage.

A lower federal court finally spoke on child marriage in the 1982 case of *Moe v. Dinkins*.⁸³ This case involved a pregnant thirteen-year-old and a sixteen-year-old who wanted to marry.⁸⁴ Denied a marriage license because the mother of the thirteen-year-old withheld her consent, the couple challenged New York's parental consent law as a denial of liberty under the Due Process Clause.⁸⁵ The Second Circuit "affirm[ed] in all respects" District Court Judge Motley's ruling that parental consent does not violate constitutional rights; the right of a minor to marry does not trigger strict scrutiny; and there is a "rational relation" between the state interest in restricting marriage and promoting the welfare of children who lack "the capacity to act in their own best interests . . .".⁸⁶ While Judge Motley agreed that the Constitution applies to children, he found that the "unique position of minors" allows the state to exert a greater "scope of authority" over them than adults.⁸⁷ Describing the denial of marriage as a "temporary situation at worst[.]" the judge concluded that the children could shortly marry and the "mark of illegitimacy" on their child would be erased.⁸⁸ Due to this limited federal jurisprudence, the states have kept the power to craft child marriage guideposts relatively free of constitutional constraints.⁸⁹

B. *Effects of Child Marriage on Society*

This section illustrates the effects of child marriage on the married child, the married child's children, and the institution of marriage while noting the implications for society.

i. The Married Child

Famous author and feminist, Elizabeth Oakes Smith, termed her marriage the "great life-long mistake" when at sixteen, she wed thirty-one-year-old Seba Smith, a newspaper editor and author from Maine in 1823.⁹⁰ While she remained married to Smith, she became an advocate against the early marriage of girls to prevent others from experiencing what she did.⁹¹ She felt her early marriage "had deprived her of the ability to develop intellectually and physically at her own

82. *Obergefell v. Hodges*, 576 U.S. 644, 647 (2015).

83. *Moe v. Dinkins*, 669 F.2d 67 (2d Cir. 1982).

84. *Moe v. Dinkins*, 635 F.2d 1045, 1047 (2d Cir. 1980).

85. *Moe*, 669 F.2d at 68.

86. *Id.*

87. *Moe v. Dinkins*, 533 F. Supp. 623, 628 (S.D.N.Y. 1981), *aff'd*, 669 F.2d 67 (2d Cir. 1982) (citing *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944)).

88. *Id.* at 630.

89. Hamilton, *supra* note 9, at 1862.

90. SYRETT, *supra* note 24, at 98, 101–02.

91. *Id.* at 99.

pace, [and] to become an individual on her own terms before marrying.”⁹² Today, this “great life-long mistake” affects the married child in nearly all aspects of life.

Most importantly, married children are not safe; they are more likely to experience violence and sexual assault than those who marry after they reach majority.⁹³ First, teenagers aged sixteen to nineteen, both married and unmarried, risk intimate partner violence at three times the rate of the national average.⁹⁴ Second, early and frequent pregnancies often result from child marriage, heightening the risk of parent and infant mortality.⁹⁵ Third, child marriage negatively impacts the married child’s overall mental health,⁹⁶ and it is linked to increased rates of nicotine addiction and psychiatric disorders, including depression and specific phobias.⁹⁷ Adults who marry as children are three times more likely to develop antisocial personality disorder than those who marry as adults.⁹⁸ Fourth, child marriage drastically limits the education of the married child.⁹⁹ Married children are fifty percent more likely to drop out of high school, they are less likely to continue their education, and more likely to suffer educational underachievement.¹⁰⁰ Finally, child marriage contributes to the “feminization of poverty”¹⁰¹ as child brides are thirty-one percent more likely to live in poverty.¹⁰² With harmful consequences for personal safety, physical and mental health, educational attainment, and socio-economic status, one might conclude that Elizabeth Oakes Smith succinctly summed up the effects on the married child as a “great life-long mistake.”¹⁰³

ii. The Married Child’s Children

The research on children of young mothers does not differentiate by marriage status, making it difficult to isolate the long-term effects on children of a child marriage.¹⁰⁴ However, it is clear that the children of young mothers encounter many difficulties even before birth. As infants, these children have higher mortality rates, suffer more frequently from infant malnutrition, “have lower birth weights[,] and [face] higher rates of infant homicide, child abuse, and

92. *Id.* at 102.

93. Johnson-Dahl, *supra* note 13, at 1068.

94. Jonathan Black, *Marital Discord: Advocates Are Fighting to Outlaw Adult Marriages to Minors*, ABA J., Jan. 2018, at 16.

95. Templeton, *supra* note 22, at 316; Johnson-Dahl, *supra* note 13, at 1067.

96. Templeton, *supra* note 22, at 312; Johnson-Dahl, *supra* note 13, at 1066–67.

97. Hamilton, *supra* note 9, at 1847.

98. *Id.*

99. *Id.* at 1849.

100. Templeton, *supra* note 22, at 312, 314; Baxter, *supra* note 12, at 68.

101. Susanne Louis B. Mikhail, *Child Marriage and Child Prostitution: Two Forms of Sexual Exploitation*, 10 GENDER & DEV. 43, 48 (2002).

102. Hamilton, *supra* note 9, at 1847; Templeton, *supra* note 22, at 320; Gordon B. Dahl, *Early Teen Marriage and Future Poverty*, 47 DEMOGRAPHY 689, 691 (2010).

103. SYRETT, *supra* note 24, at 102.

104. Hamilton, *supra* note 9, at 1849.

neglect. . . .”¹⁰⁵ The children of young parents, even those born after their parents attain full adulthood, confront increased risks for behavioral problems, educational underachievement, poverty, and unemployment.¹⁰⁶ Moreover, the children resulting from early marriages are more likely to marry early themselves.¹⁰⁷ Thus, early marriages can contribute to a cycle of poverty and ill health.

iii. The Institution of Marriage

For better or worse, marriage remains a highly regarded institution in American society. In his landmark opinion in *Obergefell v. Hodges*, Justice Kennedy asserted “that marriage is a keystone of our social order.”¹⁰⁸ Justice Kennedy quoted Alexis de Tocqueville, “[t]here is certainly no country in the world where the tie of marriage is so much respected as in America” whose ideas on marriage had also been cited by a prior Court’s decision on marriage, namely *Maynard v. Hill*.¹⁰⁹ Despite all the deference shown to marriage by the courts, should the court show the same deference to child marriages?

Perhaps the strongest measure of a marriage’s contribution to “our social order[.]”¹¹⁰ is whether the union survives or ends in divorce. Unsurprisingly, child marriages are very likely to end in divorce,¹¹¹ which presents its own set of legal challenges for the child. The “age at marriage is one of the strongest and most consistent predictors of marital stability ever found by social science research.”¹¹² For those who marry in mid-adolescence, the divorce rate is nearly eighty percent, then steadily decreases with age.¹¹³ For marriages past mid-adolescence but under eighteen years of age, the divorce rate is nearly seventy percent.¹¹⁴ Alternatively, a marriage in the mid-twenties reduces the likelihood of divorce to thirty percent.¹¹⁵ Such a high divorce rate presents other unique challenges to the legal system. Divorced children may not be legal adults and have great difficulty receiving government benefits, finding housing, seeking assistance from domestic violence shelters, and signing contracts for housing or

105. Templeton, *supra* note 22, at 316 (quoting Erin K. Jackson, *Addressing the Inconsistency Between Statutory Rape Laws and Underage Marriage: Abolishing Early Marriage and Removing the Spousal Exemption to Statutory Rape*, 85 UMKC L. REV. 343, 358 (2017)).

106. Hamilton, *supra* note 9, at 1849.

107. *Id.* at 1841.

108. *Obergefell v. Hodges*, 576 U.S. 644, 669 (2015).

109. *Id.* (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Henry Reeve trans., rev. ed. 1990)).

110. *Id.*

111. Hamilton, *supra* note 9, at 1845.

112. *Id.* at 1844–45.

113. *Id.* at 1820. In this particular study, mid-adolescence relates to those persons fifteen years and younger. Tim B. Heaton, *Factors Contributing to Increasing Marital Stability in the United States*, 23 J. FAM. ISSUES 392, 407 (2002).

114. *Id.* at 1845.

115. *Id.* at 1820.

work.¹¹⁶ When states allow a child to wed with parental or judicial consent, the child may face the lack of capacity to file for divorce like an adult in that jurisdiction.¹¹⁷ The high rate of divorce in child marriage presents legal difficulties for the divorced child and does not support the ideal of marriage as a cherished institution of American society.¹¹⁸

The evidence leads to the conclusion that child marriage does not produce positive benefits for the married child, the children of the married child, or the institution of marriage. To the contrary, child marriage presents significant costs through cycles of poor health, poverty, low educational attainment, and divorce.¹¹⁹ Regardless of moral considerations, society must consider whether the option of child marriage for a few is worth the high price paid by all.

II. CHILD MARRIAGE AND THE LAW

The solution to child marriage in the U.S. is simple and needed immediately. State marriage laws, some from the thirteenth century, have long outlived their historic purposes of protecting property rights, inheritance, and the parental right to free labor. Forty-four states and the U.S. territories should enact a minimum age of eighteen, or the state's age of majority if higher,¹²⁰ for all persons. States should require a valid proof of age for marriage licenses and enact provisions allowing judges to invalidate marriages that were obtained through fraudulent documents.

State statutes that eliminate child marriage feature one simple sentence, a factor that should facilitate a bill's quick passage. In 2018, Delaware became the first state to prohibit child marriage with a statute that provides "[n]o individual under the age of 18 shall be granted a marriage license."¹²¹ Later that year, New Jersey enacted a statute that states, "A marriage or civil union license shall not be issued to a minor under the age of 18 years."¹²² In 2020, Pennsylvania became the third state by updating its law to read "No marriage license may be issued if either of the applicants for a license is under 18 years of age."¹²³ That same year Minnesota became the fourth state to eliminate child marriage, amending its law to read "A person who has attained the full age of 18 years is capable in law of contracting into a civil marriage, if otherwise competent."¹²⁴ In June of 2021, Rhode Island became the fifth state to ban child marriage, stating that "A

116. See Wildes Genet, *supra* note 17, at 3010, 3022; see Templeton, *supra* note 22, at 318; see Baxter, *supra* note 12, at 62.

117. See Wildes Genet, *supra* note 17, at 3010.

118. Some states do not have legal pathways for child divorces. Additionally, shelters and social organizations may not offer services to children for liability reasons or due to the risk of criminal charges for assisting runaways or contributing to the delinquency of a minor. Wildes Genet, *supra* note 17, at 3010.

119. See Hamilton, *supra* note 9, at 1844–48.

120. Children reach majority in Nebraska and Alabama at nineteen years of age and in Mississippi at twenty-one years of age. SYRETT, *supra* note 24, at 12.

121. DEL. CODE ANN. tit. 13, § 123.

122. N.J. STAT. ANN. § 37:1–6.

123. 23 PA. CONS. STAT. ANN § 1304 (West 2021).

124. MINN. STAT. ANN. § 517.02.

marriage license shall only be granted to a person of full age, attaining the age of eighteen (18) years shall be deemed full legal age.”¹²⁵ New York followed in August 2021, becoming the sixth and most recent state to ban child marriage.¹²⁶ Its version provides that “Any marriage in which either party is under the age of eighteen years is hereby prohibited.”¹²⁷

Complex statutes that try in good faith to balance the wishes of the child, the parents, the family, and the state have failed to protect children from the harms of early marriage. Public advocacy against child marriage can only go so far; the U.S. needs an age-based rule to shelter the most vulnerable children. Although an age-based rule will not solve the underlying economic and social conditions that lead to child marriage, it remains an important first step.

A. *Children and Contracts*

Ironically, the common law understood long ago what brain imaging can now confirm—children and adolescents are cognitively different from adults—and should not be treated the same.¹²⁸ Reasoning as an adult requires traits, such as the ability to predict risk and regulate dopamine, that adolescents gradually achieve over time.¹²⁹ The adolescent period begins at puberty—usually at nine or ten years old, when hormonal changes affect the brain—and lasts until the mid-twenties.¹³⁰ Neuroimaging studies confirm that the limbic brain, which responds to “immediate social-affective states” undergoes a rapid development in coordination with the relative slow development of the “frontal-parietal brain regions that allow for the regulation of emotions.”¹³¹ Studies show that by fifteen or sixteen years of age, an adolescent may achieve adult-like cognitive abilities.¹³² Effectively, an adolescent at these ages can process information like an adult, while still lacking judgment.¹³³

Even though an adolescent may reason like an adult, they cannot make decisions like one because the brain has difficulty regulating emotional states brought on by the immediate influx of social information. The adolescent brain struggles to accurately evaluate risk and reward.¹³⁴ A neuroeconomic test helps to show the range in decision-making between eight- to ten-year-olds and adults aged nineteen to twenty-five.¹³⁵ Given choices of equal expectant value, the eight- to ten-year-old group chose a high-risk/high-reward option, while the

125. 15 R.I. GEN. LAWS ANN. § 15-2-14 (West 2021).

126. N.Y. DOM. REL. LAW § 15-a (McKinney 2021).

127. *Id.*

128. *See, e.g.*, RESTATEMENT (SECOND) OF CONTS. § 14 (AM. L. INST. 1981).

129. Anna C. K. Van Duijvenvoorde & Eveline A. Crone, *The Teenage Brain: A Neuroeconomic Approach to Adolescent Decision Making*, 22 CURRENT DIRECTIONS PSYCH. SCI. 108, 108 (2013).

130. *Id.*

131. *Id.*

132. Hamilton, *supra* note 9, at 1855.

133. Baxter, *supra* note 12, at 76; Hamilton, *supra* note 9, at 1855.

134. *See* Van Duijvenvoorde & Crone, *supra* note 129, at 108–09.

135. *Id.*

nineteen- to twenty-five-year-olds chose a low-risk/low-reward choice.¹³⁶ Adolescents chose middle-risk/middle-reward options, indicating that risk aversion increases with age.¹³⁷ For marriage, this means that adolescents overestimate the rewards of marriage and underestimate the risks. Other studies suggest that adolescents assess risks in a similar way as adults, but are more comfortable with ambiguity in decision-making, perhaps thinking the ambiguous result will favor them.¹³⁸ Further, several studies show that adolescents are particularly susceptible to winning decisions, which flood the brain with dopamine, sending a robust signal to the ventral striatum.¹³⁹ The response from the ventral striatum, not found in children or adults, leads adolescents to make risky choices.¹⁴⁰ Although adolescents may conceptually understand a decision of marriage like an adult, they cannot make decisions like an adult.¹⁴¹

The function of the adolescent brain supports the common understanding that the law should treat children differently than adults. Minors are not legally independent and cannot own property, exercise options, make contracts, or maintain a claim in court on their own.¹⁴² The law makes exceptions for children who want to contract in certain situations with parental consent, such as military service.¹⁴³ Usually, these exceptions result in a net benefit to society or the contracting child and are limited to those aged close to the majority (e.g., seventeen-year-olds), and have a definite and limited duration of a few years. Even military service does not fully emancipate a minor from parental control. Some states view the emancipation as only temporary while the minor is on duty¹⁴⁴ while others leave it to the minor to choose whether to support themselves and make their own decisions or revert back to parental control and support.¹⁴⁵ Although the law protects children in many situations, it paradoxically makes a big exception for marriage, an intended life-long contract without any demonstrated benefit to the minor party.

Marriage is a contract, an exchange of mutual promises to perform and forbear. The Restatement (Second) of Contracts defines a contract as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”¹⁴⁶ The law has recognized a child’s inability to contract for centuries. In his highly influential Commentaries that codified the common law in the eighteenth century, becoming the definitive source of common law in the U.S., Sir William Blackstone stated that “want of age . . . is sufficient to avoid all other contracts, on account of the imbecility of judgment in the parties contracting . . . therefore

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* This study defines children as between the ages of eight and twelve. *Id.*

141. See Hamilton, *supra* note 9, at 1855.

142. *Ortega v. Salt Lake Wet Wash Laundry*, 108 Utah 1, 11, 156 P.2d 885 (1945).

143. *Wildes Genet*, *supra* note 17, at 3034.

144. *Fausser v. Fausser*, 50 Misc. 2d 601, 603, 271 N.Y.S.2d 59 (Fam. Ct. 1966).

145. *Id.*

146. RESTATEMENT (SECOND) OF CONTRS. § 1 (AM. L. INST. 1981).

it ought to avoid this, the most important contract of any.”¹⁴⁷ Blackstone asserted that a marriage contract could be voided if the participants were below the common law marriage age at the time of the union, but did not go further to disallow children to marry.¹⁴⁸ The main exceptions to child contract law in Blackstone’s time, marriage and military service, remain the same today. Elizabeth Oakes Smith seized on this discrepancy in the law, writing, “Now, here is a contract. One party is mature in life . . . the other party is a child, an infant in law, whose pen to a commercial contract would be worthless.”¹⁴⁹ Since the American Revolution, children have not had the capacity to contract, serve as witnesses, or be held responsible for many crimes.¹⁵⁰ American legal experts agree children cannot contract, although for marriage, the law provides exceptions and blurs, or in some cases erases, the line between child and adult.¹⁵¹

When children marry, the child’s inability to consent to a marriage contract creates a legal problem. Consent is defined as agreement, approval, or permission given voluntarily by a competent person.¹⁵² Children do not have the capacity to legally contract¹⁵³ because they cannot legally consent. To solve this problem, the law transfers the child’s consent to a court officer or parent, creating a legal fiction that the child consented to the marriage. Over fifty years ago, American lawyers highlighted the importance of consent. The Uniform Marriage & Divorce Act (UMDA), a 1970 model statute, defines marriage as “a personal relationship between a man and a woman arising out of a civil contract to which the consent of the parties is essential.”¹⁵⁴ The transfer of consent to circumvent the law’s traditional protections for children leaves them vulnerable to the value systems and review procedures of those people who should be their protectors.

People understand that a child is biologically different than an adult. Brain imaging has illuminated physical differences in child and adolescent brains.¹⁵⁵ Studies show that adolescents respond to stimuli differently and cannot evaluate decisions like an adult.¹⁵⁶ No scientific or legal evidence exists to support the legal fiction that children can consent and contract for marriage. The child marriage contracting exception is a vestige from the past,¹⁵⁷ an outlier that has long outlived its historical context.

147. SYRETT, *supra* note 24, at 113.

148. *Id.*

149. *Id.* at 112–13.

150. *Id.* at 112.

151. *Id.* at 12 (“American jurists agree.”).

152. *Consent*, BLACK’S LAW DICTIONARY (11th ed. 2019).

153. RESTATEMENT (SECOND) OF CONTS. § 14 (AM. L. INST. 1981).

154. UNIFORM MARRIAGE AND DIVORCE ACT § 201 (UNIF. L. COMM’N 1970).

155. *See, e.g.*, Van Duijvenvoorde & Crone, *supra* note 129, at 110–11.

156. *Id.* at 109.

157. *See* SYRETT, *supra* note 24, at 112.

B. A Child's Inability to Consent

To work around the foundational problem that a child cannot legally consent to a life-long contract, states have created regulatory frameworks that allow other parties to consent on the child's behalf.

i. The Failure of Transferring a Child's Consent to the Judiciary

Either due to indifference or the lack of data on the root causes of child marriage, state legislators are hesitant to update marriage laws.¹⁵⁸ States that have updated their marriage statutes have done so slowly, adding protections to balance perceived competing interests, such as judicial review. Twenty-two states allow judicial review.¹⁵⁹ During a judicial review and approval process, a court officer, such as a clerk or judge, reviews the marriage application for different factors such as coercion and the safety of the child.¹⁶⁰ The review may or may not involve an in-camera review.¹⁶¹ These statutes aim to create a narrowly tailored solution to a problem for which they do not have a firm understanding. Even with the best data and intentions, state legislators may not craft the best process to consent to a child marriage.

Children infrequently come to the courthouse for marriage applications¹⁶² and child marriage review is not a core competency of most county courthouses. Thus, the majority of U.S. courthouses are not conducive to child marriage applications. When children do come to the courthouse, twenty-nine states do not require an official proof of age.¹⁶³ For obvious reasons, even the most dedicated judge would have a difficult time determining the age of the applicant. For states that have judicial review, thirty states allow older children, usually sixteen- or seventeen-year-olds, to bypass the review entirely.¹⁶⁴

The phrase "judicial review" may erroneously imply that a family law judge reviews the marriage license application. However, a judge may never even see an application, as fifteen states allow clerks to approve all underage marriage applications.¹⁶⁵ Even in instances where an application is reviewed by a judge, twenty-two states do not require the judge to specialize in family or juvenile law.¹⁶⁶ Further, in twelve states, a judge has no statutory guidance for the

158. Republicinsanity, *Crazy/Stupid Republican of the Day: David Bates*, DAILY KOS (Jan. 3, 2020, 6:31 AM), <https://www.dailykos.com/stories/2020/1/3/1909192/-Crazy-Stupid-Republican-of-the-Day-David-Bates> [<https://perma.cc/E2EN-VGN3>].

159. See *Understanding State Statutes on Minimum Marriage Age and Exceptions, Appendix A: All States and D.C.*, TAHIRI JUST. CTR., <https://1t1s613brjl37bt4eg60v-wpengine.netdna-ssl.com/wp-content/uploads/2020/08/50-state-appendices-with-detailed-scorecards-on-features-of-states%E2%80%99-minimum-marriage-age-laws.pdf> [<https://perma.cc/NG9W-Y8ZG>] (last visited May 6, 2021).

160. Johnson-Dahl, *supra* note 13, at 1058.

161. *Id.*

162. See UNCHAINED AT LAST: *Shocking Statistics*, *supra* note 28.

163. TAHIRI JUST. CTR., *supra* note 159.

164. *Id.*

165. *Id.*

166. *Id.*

marriage review and remains ill-equipped to make the decision.¹⁶⁷ Judges lack training to accurately assess maturity and safety when statutes require a review of the child's maturity or circumstances.¹⁶⁸ This lack of guidance may allow judges to bring in personal opinions and biases about illegitimacy.¹⁶⁹ Most shockingly, when states do require judicial review, only seventeen of the twenty-two require the judge to consider the child's best interest.¹⁷⁰ Moreover, judges are not trained to detect forced or coerced child marriages, and statutes do not always require a private conversation with the judge.¹⁷¹ While the idea of judicial review sounds reasonable, the failures of the current system such as: lack of reliable age data, statutes that allow older children to bypass review, lack of statutory guidance for judges, and the lack of judicial training, ultimately result in uninformed decisions that do not provide the safeguards envisioned by state legislatures.

ii. The Failure of Transferring a Child's Consent to the Parent

Attorney Hazel Palmer lamented parental consent in 1939 as of one of the "many methods of avoiding the teeth in the present marriage laws."¹⁷² The idea of parental consent derives from a parent's fundamental right to "direct the upbringing and education of one's children" until the child reaches the age of majority.¹⁷³ This fundamental right of the parent is balanced with the state's interest in the child, the *parens patriae* doctrine, that allows the state to look after basic child welfare.¹⁷⁴

Again, the lack of data regarding why parents do or do not give consent for marriage leads to well-intentioned statutes that do not function well. Research shows that child marriages lead to poverty and an increased likelihood that children resulting from a child marriage will marry early themselves, perpetuating the cycle.¹⁷⁵ This cycle may help to explain why parental consent does not work as intended. Parental consent has added little if any value to the stability within child marriages.¹⁷⁶ Overwhelmed, impoverished, abandoned young mothers at risk for violence and physical and mental ailments may not be fully equipped to give the parental consent as envisioned by the legislature.

Laws that provide for parental consent may assume that the parent will act in the best interest of the child. However, parents are responsible for directing many forced and coerced marriages.¹⁷⁷ In general, parental consent laws are triggered when a child marries below a certain age, usually sixteen in most

167. *Id.*; Wildes Genet, *supra* note 17, at 3017; Johnson-Dahl, *supra* note 13, at 1055.

168. Baxter, *supra* note 12, at 75.

169. Templeton, *supra* note 22, at 324–25.

170. Wildes Genet, *supra* note 17, at 3018.

171. *Id.* at 3036, 3038.

172. Palmer, *supra* note 1, at 50.

173. Hamilton, *supra* note 9, at 1862.

174. *Id.*; Johnson-Dahl, *supra* note 13, at 1053.

175. Hamilton, *supra* note 9, at 1849.

176. *Id.* at 1861.

177. Johnson-Dahl, *supra* note 13, at 1070.

states.¹⁷⁸ The lack of any official proof of age for a marriage license in twenty-seven states hinders the application of even a strict parental consent law.¹⁷⁹ Parents may also make decisions based on what outcome is best for the family by sacrificing the interests of one member.¹⁸⁰ This concept, known as familism, leaves girls from these families vulnerable to marriage for religious or cultural reasons, or to protect a statutory rapist from within the familial community.¹⁸¹ Finally, the modern-day barter-and-trade principle exists when a foreign man pays money to the parents of a U.S. citizen child in exchange for a U.S. visa.¹⁸² There is no minimum age for a U.S. marriage visa¹⁸³ and these arrangements can be a significant source of income for a family,¹⁸⁴ sometimes replacing a dowry.¹⁸⁵ Although the exact reason for a parent's consent to a child's marriage may remain unknown, research shows that parents do not always make decisions to benefit the married child.

iii. The Failure of Consent to Sex Laws for Children and Marriage

When a child, who cannot legally consent to sex, marries someone who can consent, a natural conflict arises between civil and criminal law. The average age of consent in the U.S. is sixteen years of age with gradations in the laws for age differences.¹⁸⁶ A state that allows a pregnant girl under the age of sixteen to marry the father of her child may inadvertently sanction the legal union of a child to a statutory sex offender, depending upon the age range.¹⁸⁷ These types of marriages continue to occur. For example, in Maryland from 2000 to 2014, 69 of the 3,100 child marriages in the state involved a pregnant teenager marrying her statutory rapist.¹⁸⁸ What would be evidence of sexual assault to a prosecutor transforms to

178. Hamilton, *supra* note 9, at 1832.

179. TAHIRIH JUST. CTR., *supra* note 159.

180. Kopelman, *supra* note 15, at 178.

181. *Id.*

182. *Id.* at 174.

183. *Immigration Visa for a Spouse of a U.S. Citizen (IR1 or CR1)*, U.S. Department of State - Bureau of Consular Affairs, <https://travel.state.gov/content/travel/en/us-visas/immigrate/family-immigration/immigrant-visa-for-spouse.html>

[<https://perma.cc/4WTQ-DCAF>] (last visited Dec. 6, 2021). "U.S. Citizenship and Immigration Services approved 8,868 petitions involving minors for spousal or fiancé(e) entry into the U.S. between 2007 and 2017. The younger party was a girl in 95% of the petitions." UNCHAINED AT LAST: *Findings April 2021*, *supra* note 10.

184. Kopelman, *supra* note 15, at 174.

185. *Id.*

186. Asaph Glosser, Karen Gardiner & Mike Fishmen, *Statutory Rape: A Guide to State Laws and Reporting Requirements. Sexual Intercourse with Minors*, U.S. DEP'T HEALTH & HUM. SERV. (Dec. 15, 2004),

https://aspe.hhs.gov/sites/default/files/migrated_legacy_files/42881/report.pdf [<https://perma.cc/U89G-F36Y>]. The age of consent in most states depends on a combination of the minimum age of the victim, the age differential between the victim and perpetrator, and the minimum age of the perpetrator. *Id.*

187. See TAHIRIH JUST. CTR., *supra* note 159. Parental consent can lower the minimum age of marriage in thirty-two states and a pregnancy can lower that age even further in five states.

188. Wildes Genet, *supra* note 17, at 3007 n.46.

a legal union sanctioned by the state. The Executive Director of the Kentucky Association of Sexual Assault Programs commented that these marriages are the “legalized rape of children . . . [W]e cannot allow that to continue in Kentucky, and I cannot believe we are even debating this in the year 2018 in the United States.”¹⁸⁹ Consent laws have valid criticisms, mainly the disproportionate enforcement against youths of color and the transfer of sexual decision making from the youth to the state.¹⁹⁰ However, statutory laws remain, and child marriage serves as a legal loophole for their circumvention.

The modern-day reasons that support consent laws, such as lack of maturity or legal status, should apply to marriage.¹⁹¹ If a child is deemed legally unable to consent to sex, how can they be deemed to consent to marriage? Under the parental consent model for marriage, the child transfers her consent to the parent; but how would this work with sexual consent? Should the state allow parents to give consent to a third-party to have sex with their child, as young as ten or twelve in some states? The state does not allow transfer of consent in circumstances outside of marriage because such a transfer would be equivalent to child prostitution and it runs afoul of the *parens patriae* doctrine.¹⁹² Yet, the state sanctions this activity when it occurs within marriage.

Circumventing age of consent laws through marriage renders them useless and makes the state complicit in the sexual abuse of a child.¹⁹³ The marriage status of the child determines whether the state enforces the law or sanctions an otherwise criminal act. One scholar argues that the state denies constitutionally guaranteed equal protection to the pregnant teenager who marries the perpetrator but provides protection from assault to the teenager who does not marry, without any rational basis.¹⁹⁴ The constitutionality of marriage loopholes extends beyond the scope of this Comment, but the question raised remains important. How can the state prosecute the sexual assault of an unmarried victim and leave another victim to marry the assaulter? In many instances, parents pressure the child to marry the perpetrator.¹⁹⁵ Echoing the refrain that parental consent does not protect children, marriage laws that remove statutory consent protections do not shield the children in most need of the state’s protection.

iv. Failure of Judicial Enforcement

Historically, judges have had a difficult time invalidating even illegal marriages. Judges find themselves in this predicament when a parent or underage party falsified an age on a marriage application or when someone forged a parental consent.¹⁹⁶ For example, courts in Massachusetts have been reluctant to invalidate even illegal marriages since 1854 when the Supreme Judicial Court

189. Baxter, *supra* note 12, at 41 n.6.

190. Johnson-Dahl, *supra* note 13, at 1070.

191. Wildes Genet, *supra* note 17, at 3007.

192. Hamilton, *supra* note 9, at 1862.

193. Templeton, *supra* note 22, at 319.

194. Baxter, *supra* note 12, at 64.

195. *Id.* at 41; see *supra*, notes 12-14 and accompanying text.

196. See *Parton v. Hervey*, 67 Mass. 119, 121 (1854).

upheld a child marriage granted regardless of a forged parental consent form in *Parton v. Hervey*.¹⁹⁷

Sarah Hervey was thirteen at the time of her marriage to nineteen-year-old Thomas Parton.¹⁹⁸ Parton's brother-in-law obtained their marriage licenses by lying about their ages, claiming Sarah was eighteen and Thomas was twenty, and that they had parental consent.¹⁹⁹ At the false age of twenty, Thomas still needed parental consent as he was below twenty-one, the age of majority for men in most states before the Twenty-Sixth Amendment, which lowered the age of majority to 18.²⁰⁰ Sarah and Thomas were married without parental consent because of the forged legal license.²⁰¹ With the help of the town Marshal, Sarah's mother retrieved her daughter and brought her home.²⁰² Thomas brought a writ of habeas corpus for Sarah's return.²⁰³ Justice George Bigelow, of the state's highest court, found that the parental consent laws were directory, designed to punish those who would help minors get illegal marriage documents, but not intended to invalidate the union.²⁰⁴ Citing his desire to give marriage "the highest sanctions . . . and rendering it, as far as possible, inviolable," the court held that it was in the best interests of society "to guard against the manifest evils which would result from illicit cohabitation."²⁰⁵ He then reasoned that as Sarah was above the common law age of twelve for marriage, the legislature had not given him the authority to void the marriage.²⁰⁶

Unfortunately for child marriage, his opinion remains the controlling precedent today in Massachusetts and has persuaded other courts to follow his lead.²⁰⁷ Child marriage scholar Nicholas Syrett called this case "the most important legal precedent in the law governing children and their right to marry."²⁰⁸ Courts that follow the precedent of *Parton v. Hervey* and uphold illegally obtained marriages invalidate procedural safeguards put in place by the legislature like age and consent, and eliminate even these minimal child marriage protections.²⁰⁹

197. SYRETT, *supra* note 24, at 77.

198. *Id.*

199. *Id.*

200. *Id.* Passed and ratified in 1971, the Twenty-Sixth Amendment provides for the right to vote for citizens who are eighteen years of age or older. U.S. CONST. amend. XXVI, § 1.

201. SYRETT, *supra* note 24, at 77.

202. *Id.*

203. *Id.*

204. *Id.* at 80.

205. *Id.* at 94; *Parton v. Hervey*, 67 Mass. 119, 121 (1854).

206. SYRETT, *supra* note 24, at 80.

207. *Id.* at 94.

208. *Id.* at 77.

209. Did Sarah Hervey and Thomas Parton live happily ever after? No, unfortunately their marriage in 1854 resembled the fate of child marriages today. In 1857 Sarah had a son named Thomas Parton, Jr. Thomas Parton, Sr. abandoned them in 1859, a year and a half after her son was born. In 1865, Sarah was granted a divorce by the same high court that approved her union. She and Thomas Jr. moved to Boston where he became a saloon owner and then a fugitive for illegal liquor sales, dying before his fortieth birthday. Sarah maintained a roadhouse hotel that may have served as a house of ill repute. *See id.* at 95–96.

Judges are so uncomfortable with invalidating illegally approved unions that they have gone to extreme lengths, even upholding common law marriages *where no valid marriage license ever existed*. As recently as 2002, a Colorado court found that the state's statute did not expressly overrule common law marriages, determining that a common law marriage of a person is valid, regardless of whether the person had reached a marriageable age.²¹⁰ In this case, the Colorado Department of Human Services tried to invalidate the marriage of a fifteen-year-old who was granted a marriage license in violation of the state's provision of judicial review for anyone under sixteen years of age.²¹¹ The husband successfully argued that their marriage was legal because the underage bride had been living with him since she was fourteen and was thus his wife in common law, regardless of the invalid marriage license.²¹² This case exemplifies the failure of a state that had a judicial review process and the hurdles faced by child protection agencies. Even with these protections, judges are not willing or do not perceive that they have the authority to invalidate child marriages.

III. CHILD MARRIAGE SOLUTIONS

Child marriage and its historic purposes of protecting property rights, inheritance, and the parental right to free labor has no place in American society today. What we need today are state marriage laws that protect people, especially children. Early feminists and suffragists have advocated for the only effective solution since the 1850s: the elimination of child marriages.²¹³ Child marriage elimination is a natural fit with existing law and an obvious solution to a problem that has plagued the U.S. since its inception.

A. *State vs. Federal Solutions*

Without a national minimum age for marriage, some migratory marriages of children will continue, meaning children will travel to or be brought to states with lower ages or more lenient laws. The children most at-risk for marriage may live in states that might be slow to adopt a child marriage ban. These children would benefit the most from strong federal action that discourages migratory marriage or a race to the bottom. Despite the apparent sensibility of a national law or federal funding constraints, it would be difficult and time consuming to overcome the precedent and presumption that family law resides with the states.²¹⁴

Although tempting to rely on the federal government, child marriage reform at the state level may be quicker and more permanent. The federal government has become increasingly polarized with wide swings in agency policies from administration to administration that could affect a child marriage ban tied to government funding. The solution for child marriage should be permanent and

210. Baxter, *supra* note 12, at 48–49.

211. *Id.* at 47–48.

212. *Id.* at 47–49.

213. See SYRETT, *supra* note 24, at 103–04.

214. See Aryama, *supra* note 26, at 424; Obergefell v. Hodges, 576 U.S. 644, 647 (2015).

represent a step forward upon which to build further progress for women and children. This was the vision of the early suffragists and feminists, Elizabeth Oakes Smith and Elizabeth Cady Stanton, who both linked child marriage to unequal marriage contracting and the lack of a woman's legal existence during marriage.²¹⁵ Women's actual legal progress has worked backward from Smith's logic. The Married Women's Property Acts of the eighteenth and nineteenth centuries created a woman's legal existence after marriage.²¹⁶ Yet child marriage remains, a societal failure to adopt the full early feminist agenda. Today, momentum is finally building at the state level with New York and Rhode Island's enactment of legislation to eliminate child marriage and six additional states with pending child marriage bans in the summer of 2021.²¹⁷ The passage of child marriage laws at the state level may lead to faster and more lasting change than a federal route that would need to address federalism concerns.

B. Marriage at the Age of Majority

Marriage should only be allowed when both parties have equal status under the law by reaching the age of majority, thereby becoming a legal adult. This simple statutory enactment would ensure that both parties are legally equal. When both parties can perform legal activities, like signing a contract, both parties can protect themselves under the law and need not rely on the above-demonstrated failures of parental consent and judicial review systems currently in place. The marriage partners may contract for housing or access the courts for a divorce. These adult legal rights are key to the safety and security of the married couple and their children. Adult marriage allows both parties equal access to the state's legal system and the freedoms of adult decision-making.

C. The Institution of Marriage

American society gives the institution of marriage a certain reverence. When finding a fundamental right to marriage in *Obergefell*, Justice Kennedy lectured that, "[n]o union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family."²¹⁸ Rather than harm the institution, the prohibition on child marriage will increase marriage success rates by reducing the overall divorce rate. Recall that the divorce rate is nearly eighty percent in mid-adolescence and then steadily decreases.²¹⁹ Judge Motley, from the only federal child marriage case, explained that children are

215. SYRETT, *supra* note 24, at 110–15.

216. E. ALLAN FARNSWORTH, CAROL SANGER, NEIL COHEN, RICHARD BROOKS & LARRY GARVIN, *CONTRACTS* 4–17 (9th ed. 2019).

217. The six states that have strong child marriage bills pending are: Illinois, Kansas, Massachusetts, Michigan, New Hampshire, and South Carolina. *Child Marriage – Progress, UNCHAINED AT LAST*, <https://www.unchainedatlast.org/child-marriage-progress/> [https://perma.cc/WZN6-ZWDK] (last visited Aug. 31, 2021).

218. Johnson-Dahl, *supra* note 13, at 1052; *Obergefell*, 576 U.S. at 681.

219. *Supra* notes 113–17 and accompanying text.

not “foreclosed from marrying,” only delayed.²²⁰ Delayed marriages increase the time children spend in school, thereby increasing educational attainment and reducing poverty.²²¹ A delay also increases the likelihood of good physical and mental health and decreases the risk of sexual assault and violence.²²² Common sense reasons that greater educational achievement, better physical and mental health, less violence, and reduced poverty will increase the odds of a marriage’s success. Despite the overwhelming evidence from every field of study that child marriage harms the married child and their offspring, usually resulting in divorce, advocates of child marriage paradoxically profess to believe in the sanctity of marriage. The professed belief in marriage becomes a cloak for other less savory motives such as an obsession with sexual purity, the parental or familial control of children, or religious indoctrination.

D. *The Counter Arguments: Support for Child Marriage*

What support exists for child marriage, and who advocates to preserve it? Admittedly, there is a lack of scholarship on the pro-child marriage position. Instead, as with other topics in the U.S., the real debate occurs on the sidelines with proxy arguments of religious freedom, parental control, autonomy, and abortion.²²³ For others, there is a lack of concern or awareness. In response to seventeen-year-old Girl Scout Cassandra Levesque’s campaign to increase the marriage age to eighteen, state legislator David Bates defended New Hampshire’s marriage age of thirteen years for females stating, “We’re asking the legislature to repeal a law that’s been on the books for over a century . . . on the basis of a request from a minor doing a Girl Scout project.”²²⁴ Ms. Levesque was elected to the New Hampshire state legislature two years later when she was nineteen.²²⁵ According to David Bates, she did not know enough about marriage to have her Girl Scout project taken seriously at the state house but could have already been legally married in New Hampshire for four years. His flawed logic discounted a minor’s political opinions about child marriage yet upheld a law that would bind an even younger minor into a life-altering adult contract.

For others, it is not ambivalence, but religious claims that shelter the conviction to maintain the child marriage status quo. Conservative Protestant Evangelical Christians (“Evangelicals”) engage in early marriages most

220. *Moe v. Dinkins*, 533 F. Supp. 623, 630 (S.D.N.Y. 1981), *aff’d* 669 F.2d 67 (2d Cir. 1982).

221. Johnson-Dahl, *supra* note 13, at 1068; Hamilton, *supra* note 9, at 1847.

222. Johnson-Dahl, *supra* note 13, at 1068; Hamilton, *supra* note 9, at 1847–48.

223. See Johnson-Dahl, *supra* note 13, at 1062; see, e.g., Elise Young, *Murphy Signs New Jersey Child-Marriage Ban That Christie Vetoed*, BLOOMBERG (June 22, 2018, 3:22 PM), <https://www.bloomberg.com/news/articles/2018-06-22/murphy-signs-new-jersey-child-marriage-ban-vetoed-by-christie> [<https://perma.cc/MC2H-AVQH>].

224. Republicinsanity, *supra* note 158.

225. Leah Willingham, *Now a Legislator, Girl Scout Returns to State House to Raise Marriage Age to 18*, CONCORD MONITOR (Feb. 19, 2019, 5:07:25 PM), <https://www.concordmonitor.com/Cassie-Levesque-returns-with-another-child-marriage-bill-23591132> [<https://perma.cc/M5JV-A4T5>].

consistently.²²⁶ While not explicitly supporting child marriage, Evangelicals focus on virginity while holding that sex outside of marriage is illicit, both factors that may lead to support of child marriage.²²⁷ Members of the Church of Latter-Day Saints also tend to marry early.²²⁸ Orthodox Jews fought child marriage legislation in New Jersey for years by requesting a religious exemption that was not granted in the final legislation.²²⁹ As none of these religions profess a belief in child marriage, religion serves as a convenient and pious argument to shield a deeper discussion of the resistance to increased protections for children.

Proponents of child marriage autonomy are a diverse group with radical differences in their rationale for their support. A common theme, if one can be found, is that of flexibility.²³⁰ There is an honest concern that a potential child marriage has so many variables (e.g., religion, pregnancy, maturity of the child, autonomous versus coerced decision making, foster child situations, health and welfare of the child, age differences of the marrying partners, military service, etc.) that only a permissive statute can account for all of them and only a balanced statute can weigh the concerns of parents, families, religious groups, and the government. To them, a bright-line age rule is too restrictive. In many respects, proponents have valid concerns. Everyone knows a sixteen-year-old who is more mature than a twenty-five-year-old. Who would dispute that leaving an abusive home for a marriage at seventeen may provide better outcomes? Further, no one wants bystanders judging their relationships, and many are rightly hesitant to judge others. In a perfect, theoretical world, marriage laws would be tailored to every permutation that could present before the court and would be administered by a judge trained in family law, child development, and the signs of a forced and coerced marriage. The problem with this well-intentioned line of thinking is that it does not work in practice and alternatives exist for each of the harmful situations above. The abused teen can seek assistance, enter a foster home, or petition for emancipation. For the non-harmful situations, a bright-line rule is just a delay, rather than a prohibition, balanced by the overall lifelong harms to child spouses and their children described above.

E. The Counter Argument Response

This section will briefly address each of the main counterarguments against an age-based bright-line rule for child marriage. The first concern is that of religion, a powerful word but a vague argument. None of the main global religions maintain child marriage as an essential belief. The U.N. Convention on the Rights of the Child prohibits child marriage and was ratified over thirty years ago by the Holy See (the Vatican), Israel, and China, and acceded to by Saudi Arabia and India.²³¹ In the U.S., Evangelicals stress the importance of virginity

226. Johnson-Dahl, *supra* note 13, at 1074.

227. *Id.*

228. Hamilton, *supra* note 9, at 1842.

229. Johnson-Dahl, *supra* note 13, at 1060.

230. Wildes Genet, *supra* note 17, at 3031.

231. U.N. Convention on the Rights of the Child, *supra* note 34; *see supra* note 40 and accompanying text.

until marriage.²³² Young Evangelicals engage in sexual activity at the same rate as other children²³³ but may feel pressured or want to marry when pregnant. In this situation, a bright-line age rule allows the state to step in and fulfill its *parens patriae* role by requiring that all parties delay the marriage due to the overwhelming disastrous effects of child marriage on the child and their offspring. A bright-line rule does not consider or favor religion. Here, the issue lies not with religion or even marriage, but with the root cause of teenage pregnancy which can and should be resolved separately.

A subset of the religion argument is the doctrine of parental control, mainly invoked to advocate for a child's marriage due to certain religious beliefs about the child's situation. The U.S. Supreme Court upheld the parental control doctrine in the 1923 case of *Meyer v. Nebraska* when parents challenged public school instruction in English rather than the German language as preferred by the parents.²³⁴ This first major case gave parents a fundamental right to raise their children under the Due Process Clause of the Fourteenth Amendment.²³⁵ *Meyer v. Nebraska* and other cases test the rights of parents against the state, or the conflicting doctrines of parental control and *parens patriae*.²³⁶ However, the child marriage question differs and tests the rights of a child who will soon become an autonomous adult, against the rights of parents to direct the child's life today. Parents have a fundamental right to raise a child, but they do not have the right to make life-long decisions for a child who would be able to make them after reaching the legal age of majority.

Although parents have this fundamental right to raise their children, the states play a very active role in child rearing. States regulate newborn hearing, eye and dental exams, the use of car seats, school attendance, hearing and speech screening, work permits, driver's licenses, etc.²³⁷ States do not defer to parents to determine on their own when their child should drive, allow parents or familial groups to determine when a baby should use a car seat, or decide the timing for an age-based eye exam. Recall that between adults, marriage is a state sanctioned contract between two persons, excluding the parents. In light of this doctrine, it is reasonable to conclude that as parents are not involved in the marriage, they should not enter a potentially life-long contract on behalf of a child who cannot consent. In no other circumstances does the state cede so much power to parents, in return for such dismal outcomes as outlined in this Comment. A state's deference to parental control regarding child marriage seems wildly archaic and dangerously illogical when it maintains such a strict control over the timing of an eye exam.

Similarly, pro-choice abortion advocates worry that age restrictions on marriage might tighten age-based restrictions on abortion.²³⁸ This "slippery slope" argument pits two child advocate groups against one another and

232. Johnson-Dahl, *supra* note 1313, at 1074.

233. *Id.*

234. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

235. Wildes Genet, *supra* note 17, at 3023; Johnson-Dahl, *supra* note 13, at 1081.

236. See, e.g., *Meyer*, 262 U.S. 390.

237. See, e.g., 105 ILL. COMP. STAT. ANN. 5/27-8.1; MASS. ANN. LAWS ch. 32A, § 17F.

238. Johnson-Dahl, *supra* note 13, at 1065-66.

analogizes that the decision-making authority granted to a child to end a pregnancy is the same decision-making authority to enter a marriage. Judge Motley from the Southern District of New York, whose opinion was unanimously affirmed by the Second Circuit in 1982, did not agree.²³⁹ He reasoned,

Plaintiffs' reliance on the abortion and contraception cases is misplaced . . . Giving birth to an unwanted child involves an irretrievable change in position for a minor as well as an adult, whereas the temporary ban on the right to marry does not. Plaintiffs are not irretrievably foreclosed from marrying. The gravamen of the complaint . . . is not total deprivation but only delay.²⁴⁰

A bright-line rule preserves the contract of marriage for legal adults who can fully consent. The simple statutes passed by the six U.S. states do not interfere with access to abortion or sexual decision-making. In this example as well, child marriage serves as a proxy for children's access to abortion, a valid, but separate issue.

Finally, one must ask who benefits from resistance to child marriage protections? Unfortunately, weak child protection laws benefit those who exploit children. Marrying a child shelters the accused from sexual assault charges. Married children perform housework in the home or provide sex work for free. As discussed, a married child faces various difficulties leaving a violent marriage, finding housing, or seeking shelter. These complexities due to the child's legal status can trap the child and provide a benefit to the abuser or someone who benefits from a child's labor.

Since marriage is much more than a way to exert control over children, child marriage is wrong. The ideal of marriage as described by Justice Kennedy in *Obergefell v. Hodges* is vastly different than the grim reality for married children.²⁴¹ In order to resemble a "union unlike any other" that is the "keystone of our social order,"²⁴² consenting, equal-before-the-law adults must choose to enter a marriage contract. Status and consent were the foundations of the early feminists call to end child marriage and expand women's rights within marriage.²⁴³ In this respect, child marriage laws in the U.S. remain trapped in time and must be overhauled to protect children and the institution of marriage.

CONCLUSION

The child marriage bans passed by Delaware, New Jersey, Pennsylvania, Minnesota, Rhode Island, and New York confirm that the end to child marriage can occur at the state level with one simple sentence, containing as few as thirteen

239. See *Moe v. Dinkins*, 533 F. Supp. 623, 628 (S.D.N.Y. 1981), *aff'd* 669 F.2d 67 (2d Cir. 1982).

240. *Id.*

241. *Obergefell v. Hodges*, 576 U.S. 644, 646 (2015).

242. *Id.*

243. See SYRETT, *supra* note 24, at 102–03.

words. American legislators did not heed the call from Elizabeth Oakes Smith and Elizabeth Cady Stanton to end child marriage in the nineteenth century. The readers of the *Women Lawyers Journal* did not close marriage loopholes and strengthen child marriage protections as urged by Hazel Palmer in 1939. The harms of marriage to the child's physical and mental health and the low educational achievement resulting in poverty for the married child were known then and have been shown by this Comment to remain the same today. No one wins with child marriage.

To balance perceived competing interests, some states created restrictions for age, gender, judicial review, and parental consent. This Comment demonstrates that well intentioned or not, these safeguards have not worked and cannot invalidate even illegally obtained marriages. Other states have no child marriage laws at all, preferring to rely on the common law that usually sets the age for marriage at twelve for girls and fourteen for boys depending upon the judicial precedent in the state. With its patchwork of fifty different state marriage laws, the U.S. had fifty tries over centuries to enact balanced marriage statutes that protected children. The results show not one successful or model statute exists, except for the six recently passed child marriage bans. It is long past time to enact the obvious and simple solution.

The data show that child marriage harms the married child, the married child's offspring, and the institution of marriage. Common sense and contract law support the idea that states should reserve marriage for those who can legally consent to a life-altering and life-long contract. Thus, states must raise the marriageable age to match the age of legal majority, so each party enters the union as a legal adult. Armed with the data on the harms of marriage and with knowledge of the failures of the past, in the spirit of Hazel Palmer, we ask, "Well, isn't somebody going to do something about it?"²⁴⁴

244. Palmer, *supra* note 1, at 49.

WOMEN IN POLICING: INADEQUATE REMEDIES TO COMBAT HIRING AND WORKPLACE DISCRIMINATION IN POLICE DEPARTMENTS

Sarah Jones[†]

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INTRODUCTION

In the wake of widely publicized incidents of police brutality, social science researchers and the decision makers in police departments are reexamining the positive effect of women in policing.¹ Women in law enforcement have positive effects within the force and the community.² Female officers are less likely than their male colleagues to generate citizen complaints and elicit judgments or settlements on excessive force claims.³ Part of the reason for this is that women rely on a style of policing that utilizes less physical force and focuses on defusing and de-escalating potentially violent confrontations with citizens.⁴ Despite these positive effects, the recruitment and retention of female police officers is low.⁵

1. Ashley Fantz & Casey Tolan, *Want to Reform the Police? Hire More Women*, CNN (June 23, 2020, 10:38 AM), <https://www.cnn.com/2020/06/23/us/protests-police-reform-women-policing-invs/index.html> [<https://perma.cc/YDW6-A3PP>]; see generally Whitney Harvey, Gender Differences in Policing: A Consideration of Care Ethics (Dec. 2017) (M.S. thesis, University of Tennessee) (on file with author); Norma M. Riccucci, Gregg G. Van Ryzin & Cecilia F. Lavena, *Representative Bureaucracy in Policing: Does It Increase Perceived Legitimacy?*, 24 J. PUB. ADMIN. RSCH. & THEORY 537, 537 (2014) (examining whether increasing women's representation in domestic violence units will increase public trust in the department as a whole); Kimberly A. Lonsway, *Hiring & Retaining More Women: The Advantages to Law Enforcement Agencies*, NAT'L CTR. FOR WOMEN & POLICING 2 (2000) [hereinafter Lonsway: *Hiring & Retaining More Women*] ("communities are demanding a shift in focus from their law enforcement agencies, towards a more modern approach that emphasizes communication and cooperation with citizens . . . women officers rely on a style of policing that uses less physical force, are better at defusing and de-escalating potentially violent confrontations with citizens, and are less likely to become involved in problems with use of excessive force."); Amie M. Schuck & Cara Rabe-Hemp, *Citizen Complaints and Gender Diversity in Police Organisations*, 26 POLICING & SOC'Y 859 (2016) [hereinafter Schuck & Rabe-Hemp: *Citizen Complaints*].

2. Lonsway: *Hiring & Retaining More Women*, *supra* note 1, at 3–8 (outlining the fact that women officers: (1) are just as competent as male officers, (2) less likely to use excessive force, (3) focus on "community-oriented policing," (4) improve law enforcement's response to violence against women, (5) reduce sex discrimination and harassment in law enforcement, and (6) bring beneficial changes in policy). This article will use the terms "female officer" and "male officers" to distinguish between cisgender women and men in law enforcement. The use of this binary language most accurately reflects the current research on the topic and the way these conversations and experiences most often play out on the ground. The experiences of non-binary and trans officers are similarly, if not more egregiously, impacted by the same male-dominate culture and ideology of law enforcement departments but is beyond the scope of this work.

3. *Id.* at 1; Schuck & Rabe-Hemp: *Citizen Complaints*, *supra* note 1.

4. Kristin Poleski, *To Promote or Not to Promote: An Inquiry into the Experiences of Female Police Officers and Their Decisions to Pursue Promotion* 7–8 (June 2016) (Ph.D. dissertation, Western Michigan University) (on file with ScholarWorks, Western Michigan University).

5. U.S. DEP'T OF JUST., *WOMEN IN POLICING: BREAKING BARRIERS AND BLAZING A PATH* 3 (2019) [hereinafter DOJ REPORT: *WOMEN IN POLICING*].

Women make up more than half of the working age U.S. population but fewer than thirteen percent of law enforcement officers.⁶ Additionally, only 2.7% of America's police chiefs or executives are women.⁷ Pervasive gender discrimination in police departments is one reason for low recruitment and retention of female police officers.⁸ Hiring requirements in police departments disproportionately disadvantage women, and, once hired, women face various forms of gender discrimination and harassment in police departments.⁹

Discriminatory hiring and employment practices within police departments can be challenged and remedied through litigation.¹⁰ In particular, Title VII of the Civil Rights Act of 1964 and § 1983 of the Civil Rights Act of 1871 allow citizens to sue public officials for gender discrimination in employment practices.¹¹ Title VII and § 1983 both provide a statutory vehicle to challenge and potentially change discriminatory hiring and employment practices in police departments.¹² Successful litigation over discriminatory hiring and employment practices in police departments evens the playing field and gives women a better chance at joining historically male-dominant police departments.¹³ However, litigating Title VII or § 1983 claims each present unique challenges that can deter potential victims of gender-based employment discrimination from litigation and insulate offending police departments and officers.¹⁴ These limitations on

6. *Id.*

7. *Id.* at 27 n.2.

8. See Preeva Patel, *What Works: Retention & Culture*, 30X30 (2021), <https://30x30initiative.org/wp-content/uploads/2021/08/30X30-What-Works-Retention-Culture.pdf> [<https://perma.cc/YW8T-2XB2>]; see also *id. passim*; see also Arlether Ann Wilson, *Female Police Officers' Perceptions and Experiences with Marginalization: A Phenomenological Study 4* (Sept. 2016) (Ph.D. dissertation, Walden University) (on file with ScholarWorks, Walden University).

9. DOJ REPORT: WOMEN IN POLICING, *supra* note 5; Poleski, *supra* note 4, at 6 ("Women in law enforcement are often inexplicitly resented by their male counterparts and many face harassment. Additionally, many women encounter a 'brass' ceiling and are unable to rise to supervisory positions despite their qualifications."); Wilson, *supra* note 8, at 4 ("Though women are equally as capable of performing most police work, the unfairness in recruitment efforts and selection practices prevent women from entering the profession."); Tim Prenzler, *Rebuilding the Walls? The Impact of Police Pre-Entry Physical Ability Tests on Female Applicants*, 7 CURRENT ISSUES CRIM. JUST. 314, 319 (1996) (criticizing the physical ability tests used by police departments as unrelated to job performance and discriminatory); Michael L. Birzer & Delores E. Craig, *Gender Differences in Police Physical Ability Test Performance*, 15 AM. J. POLICE 93, 104 (1996) ("[S]ome police agencies are still utilizing physical ability testing methodologies that have an adverse impact on women and are indefensible in the area of job relatedness.").

10. See *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

11. See 42 U.S.C. § 2000e-2; 42 U.S.C. § 1983.

12. 42 U.S.C. § 2000e-2; 42 U.S.C. § 1983.

13. See *Dothard*, 433 U.S. at 332 (rejecting the state's argument that height and weight standards for women prison guards were justified under Title VII as a bona fide job requirement as the state produced no evidence correlating the height and weight restrictions with the requisite amount of strength contended to be essential for good job performance).

14. Jonathan M. Freiman, *The Problem of Qualified Immunity: How Conflating Microeconomics and Law Subverts the Constitution*, 34 IDAHO L. REV. 61, 64-68 (1997)

litigating gender discrimination allows discriminatory conduct and practices to go unchecked.¹⁵ This culture of nonaccountability contributes to the low rates of recruitment and retention of women in law enforcement.

This Comment argues that the statutory and judicial limitations of Title VII and § 1983 litigation weaken protections against public officials' misconduct. In particular, these limitations effectively excuse police departments and their officers from liability for their discriminatory employment practices. Further, this Comment contends that this lack of accountability permits police departments to continue their male-centric policies rather than adopt a gender-inclusive environment that would better serve the departments and the communities they serve. Part I of this Comment examines the forms of gender discrimination women in law enforcement face within police departments and argues that unchecked gender discrimination is a contributor to the low recruitment, retention, and promotion rates for female police officers. Part II examines the use and limitations of Title VII as a statutory vehicle available to female police officers who experience employment discrimination. Part III examines the use and limitations of § 1983 as an alternative statutory vehicle for female police officers who experience employment discrimination. Finally, this Comment concludes that Congress must remove the procedural hurdles that limit Title VII and override qualified immunity as a defense in order to effectively combat discriminatory employment practices in policing.

I. WHY WOMEN ARE NOT ENTERING AND REMAINING IN LAW ENFORCEMENT: MALE-CENTRIC HIRING STANDARDS AND WORK ENVIRONMENTS

Hiring, retaining, and promoting women in police departments has positive effects inside and outside the department,¹⁶ but pervasive gender discrimination

("[Q]ualified immunity has pulled the door to the courthouse nearly shut, leaving a crack so thin that only the most battered plaintiffs can still squeeze through."); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1222 (2015) (detailing how the evolution of the qualified immunity defense to § 1983 claims stops development of the law to declare when police misconduct is unconstitutional); Lynn Ridgeway Zehrt, *Twenty Years of Compromise: How the Caps on Damages in the Civil Rights Act of 1991 Codified Sex Discrimination*, 25 YALE J.L. & FEMINISM 249, 315 (2014) (discussing how damage caps under Title VII serve to "reinforce the view that women are regarded as second-class citizens. This legislative ideology codifies and even encourages discriminatory behavior against the classes who are most vulnerable."); see, e.g., Sarah Wallace, *Another Female NYPD Member Sues Police Department over Gender Discrimination*, NBC N.Y. (Aug. 21, 2020), <https://www.nbcnewyork.com/news/local/another-female-nypd-member-sues-police-department-over-gender-discrimination/2578618/> [<https://perma.cc/6QY5-7SGH>].

15. Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 854–55 (2001) ("Common sense supports this view that constitutional damages deter police misconduct to some appreciable degree.").

16. Lonsway: *Hiring & Retaining More Women*, *supra* note 1, at 3–8; see also Riccucci et al., *supra* note 1, at 548.

in hiring and employment practices keeps women out of policing.¹⁷ “Traditionally, individuals entering . . . police [departments] were predominantly young, uneducated, white m[en] frequently from a ‘police family.’”¹⁸ Despite changes to the law that penalize exclusionary and discriminatory employment practices,¹⁹ the exclusive “good ol’ boys club” culture persists.²⁰ In this section, this Comment examines the positive effects of women in policing and discusses how discriminatory hiring standards and employment practices are a contributor to the low recruitment, retention, and promotion rates of women in police departments.

A. A Different Approach: The Positive Effects of Women in Policing

Women’s different style of policing has positive effects in the form of increased trust in police departments by the public and a decreased use of force in favor of de-escalation techniques.²¹ Research shows that women positively affect policing in three distinct ways: (1) female officers use de-escalation techniques with greater frequency in citizen interactions, resulting in fewer complaints of excessive force;²² (2) the presence of female officers as lead officers reduces the occurrence of excessive force exhibited by male partners;²³ and (3) law enforcement departments that employ a greater proportion of female officers pay out fewer taxpayer dollars in litigation and settlement for excessive force claims.²⁴ This section examines these positive effects and asserts that they can be more widely achieved through the recruitment and retention of female officers in the force.

First, research demonstrates that female officers use less excessive force, and less force in general, than male officers.²⁵ Female officers generally possess better communication skills than male officers and are more successful in

17. Poleski, *supra* note 4, at 6–8; *see generally* PENNY E. HARRINGTON, NAT’L CTR. FOR WOMEN & POLICING, RECRUITING & RETAINING WOMEN: A SELF-ASSESSMENT GUIDE FOR LAW ENFORCEMENT (2001), <https://www.ojp.gov/pdffiles1/bja/185235.pdf> [<https://perma.cc/8ED2-ZJCD>] (outlining and offering solutions for various barriers women face, from recruitment to promotion, in police departments).

18. Poleski, *supra* note 4, at 38.

19. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (prohibiting employment discrimination based on sex).

20. Poleski, *supra* note 4, at 77–78.

21. *Id.* at 7–8, 40–41.

22. *Id.*

23. Amie M. Schuck & Cara Rabe-Hemp, *Women Police: The Use of Force By and Against Female Officers*, 16 WOMEN & CRIM. JUST. 91 (2005) [hereinafter Schuck & Rabe-Hemp: *Use of Force*]; *see also* Mindy E. Bergman, Jessica M. Walker & Vanessa A. Jean, *A Simple Solution to Policing Problems: Women!*, 9 INDUS. & ORGANIZATIONAL PSYCH. 590, 592 (2016).

24. KIM LONSWAY & MICHELLE WOOD, NAT’L CTR. FOR WOMEN & POLICING, MEN, WOMEN, AND POLICE EXCESSIVE FORCE: A TALE OF TWO GENDERS 2 (2002) [hereinafter LONSWAY & WOOD: *POLICE EXCESSIVE FORCE*] (“The average male officer costs somewhere between two and a half and five and a half times more than the average female officer in excessive force liability lawsuit payouts.”).

25. Lonsway: *Hiring & Retaining More Women*, *supra* note 1, at 2, 4; Schuck & Rabe-Hemp: *Citizen Complaints*, *supra* note 1 at 862–63.

cultivating the cooperation and trust required to de-escalate a potentially violent situation.²⁶ These skills are particularly valuable, as Maureen McGough, the Chief of Staff for the Policing Project at New York University, stated because, “[p]olicing—everyday policing—is about social services: domestic violence cases, dealing with people’s mental health problems, getting victims to open up, negotiating”²⁷ This focus on communication and community building improves the community’s impression of police job performance, trustworthiness, and fairness.²⁸ This approach may also increase the public’s willingness to cooperate with police and produce positive public safety outcomes.²⁹ In part due to this de-escalation approach, research shows that female police officers are less likely to injure suspects during an incident involving the police.³⁰

Second, having female officers on the force results in less extreme uses of force by all police officers.³¹ Male officers are almost three times more likely to have reported firing their weapon while on duty than their female counterparts.³² When female officers are paired with male officers, female officers have a calming effect on their male partners during high-stress assignments.³³ When male officers are paired with female officers, they use force less often, which results in fewer deaths by police hands.³⁴ When female officers are paired with one another, this combination results in even fewer occurrences of extreme force.³⁵

Third, as women are less likely to use force when handling suspects,³⁶ female officers receive fewer complaints or sustained allegations of excessive force than their male colleagues.³⁷ Specifically, a 2002 study found that female officers generated just five percent of citizen complaints and accounted for only six percent of the monetary damages that departments paid out in court judgments and settlements for excessive force claims.³⁸ In Minneapolis, Minnesota, officer conduct lawsuits cost taxpayers, through costs of settlements

26. Poleski, *supra* note 4, at 7–8, 40–41; see generally Riccucci et al., *supra* note 1 (reviewing a study on how an increase in women in a local domestic violence unit affects the public’s perception of the agency).

27. Fantz & Tolan, *supra* note 1.

28. Riccucci et al., *supra* note 1, at 548.

29. *Id.*

30. Peter B. Hoffman & Edward R. Hickey, *Use of Force by Female Police Officers*, 33 J. CRIM. JUST. 145, 149 (2005).

31. Bergman et al., *supra* note 23, at 590; Rich Morin, Kim Parker, Renee Stepler & Andrew Mercer, *Behind the Badge*, PEW RSCH. CTR.: SOC. & DEM. TRENDS (Jan. 11, 2017), <https://www.pewresearch.org/social-trends/2017/01/11/behind-the-badge/> [<https://perma.cc/T57T-5SM9>].

32. Morin et al., *supra* note 31.

33. Christine Jacqueline Johns, *Effects of Female Presence on Male Police Officers’ Shooting Behavior* 45 (1976) (M.S. thesis, Michigan State University) (on file with author).

34. Schuck & Rabe-Hemp: *Use of Force*, *supra* note 23.

35. *Id.*; see also Bergman et al., *supra* note 23, at 592–93.

36. Bergman et al., *supra* note 23, at 592–93.

37. LONSWAY & WOOD: POLICE EXCESSIVE FORCE, *supra* note 24, at 3.

38. *Id.*

and litigation, more than twenty-one million dollars between 2003 and 2014.³⁹ Between 2010 and 2014, only three of more than fifty Minneapolis officer conduct lawsuits involved women accused of using excessive force.⁴⁰ Cities and departments save money by retaining women on the force, who are statistically less likely to receive complaints of excessive force, which then turn into costly settlements and litigation.⁴¹ Additionally, based on the effect female officers have on their male partners, it is reasonable to assume pairing more female officers with male partners will reduce a department's costs further.⁴² Overall, female officers have a positive effect on community trust, incidents of excessive force by police, and the cost to taxpayers in litigating such disputes. Such outcomes help the mission of any police department in keeping its community safe.

B. Do Not Hire a Woman to do a Man's Job: Archaic Hiring Standards that Maintain Men's Dominance in Police Roles

Women are equally capable, and in some respects more capable, of performing police work as their male colleagues.⁴³ Bias in recruitment efforts and hiring practices frequently prevents women from entering the profession.⁴⁴ Police departments historically only hired men to fill law enforcement roles.⁴⁵ Even after women began seeking employment in police departments, their roles generally focused on social service or clerical duties.⁴⁶ Following the passage of Title VII of the Civil Rights Act, which prohibited sex discrimination in hiring and employment practices, women's participation in all roles of law enforcement increased.⁴⁷ In response to Title VII's legal protections, police departments implemented screening tests and hiring requirements that often discourage or bar women from employment in police departments.⁴⁸ This section examines the discriminatory impact of hiring standards in policing and contends that these outdated standards prevent police departments from recruiting and hiring more female officers.

39. Brandt Williams, *Women's Advocates Say Police Should Hire More Female Officers*, MPR NEWS (Dec. 15, 2014, 12:00 AM), <https://www.mprnews.org/story/2014/12/14/female-cops> [<https://perma.cc/C86L-APVS>].

40. *Id.*

41. LONSWAY & WOOD: POLICE EXCESSIVE FORCE, *supra* note 24, at 3.

42. *See id.*; *see also* Bergman et al., *supra* note 23, at 592–93.

43. Prenzler, *supra* note 9, at 321.

44. Wilson, *supra* note 8, at 4.

45. *Id.* at 17–21.

46. *Id.* at 23.

47. U.S. EQUAL EMP. OPPORTUNITY COMM'N, PROGRAM EVALUATION: RECRUITMENT & HIRING DISPARITIES IN PUBLIC SAFETY OCCUPATIONS (2018), <https://www.eeoc.gov/federal-sector/reports/program-evaluation-recruitment-hiring-gender-disparities-public-safety> [<https://perma.cc/XQJ9-WVF8>] [hereinafter EEOC RECRUITMENT & HIRING DISPARITIES].

48. Larry K. Gaines, Steve Falkenberg & Joseph A. Gambino, *Police Physical Agility Testing: A Historical and Legal Analysis*, 12 AM. J. POLICE 47, 48–55 (1993).

First, police departments implemented screening tests with height and weight requirements;⁴⁹ however, in *Dothard v. Rawlinson*, the Supreme Court found these requirements constituted unlawful discrimination against women.⁵⁰ After the Supreme Court's decision in *Dothard*, police departments increasingly implemented physical ability tests (PATs).⁵¹ PATs, commonly used by police departments in recruiting, focus on upper body strength, which does not correlate with aptitude to perform the actual duties of police officers.⁵² A female police officer who spoke at a police summit recounted the physical tests she had to pass at the police academy and expressed that, "I've made more than 1,000 arrests and not once did I have to do 24 push-ups before putting handcuffs on someone. I've never run a mile and a half after a suspect."⁵³ The actual duties of police officers require strong skills in community engagement, communication, and de-escalation.⁵⁴ Women statistically test higher in these skills, but PATs' overemphasis on upper body strength rather than more applicable skills, such as teamwork, communication, and judgment, may explain why female applicants more frequently fail at the police academy.⁵⁵ For example, while women made up about twenty percent of the police academy in Newark, New Jersey, the academy dismissed female applicants from training at rates between sixty-five and eighty-five percent, partially due to failing PATs.⁵⁶

Female applicants have challenged some PATs, alleging that the exams were specifically developed to screen out women rather than test work-required abilities.⁵⁷ Courts have ruled that PATs which produce disparate hiring practices based on sex violate Title VII of the Civil Rights Act, *unless* the employer can prove that their PAT correlates with the necessary functions of the occupation.⁵⁸ Despite this, many of the law enforcement agencies in the United States continue to rely on PATs in the hiring process.⁵⁹ The persistence of PATs in police hiring may be due to outdated ideas about what is a "necessary function" of police as

49. *Id.*

50. *Dothard v. Rawlinson*, 433 U.S. 321, 329–30 (1977) (ruling that the height and weight requirements excluded more than forty percent of women and less than one percent of men); *see also* *Blake v. City of Los Angeles*, 595 F.2d 1367, 1370–71 (9th Cir. 1979) (ruling that police height requirements violated Title VII because the police department did not establish that a height minimum was necessary for safe and efficient job performance).

51. *See* Gaines et al., *supra* note 48, at 50–54.

52. DOJ REPORT: WOMEN IN POLICING, *supra* note 5, at 16.

53. *Id.*

54. Poleski, *supra* note 4, at 7.

55. Birzer & Craig, *supra* note 9, at 106; *see also* DOJ REPORT: WOMEN IN POLICING, *supra* note 5, at 25.

56. Erin Schumaker, 'Hire More Women' has been Touted as a Quick Fix to Police Brutality Since Rodney King. Here's Why Empty Calls for Equality Fail, ABC NEWS (Aug. 2, 2020, 9:00 AM), <https://abcnews.go.com/US/hire-women-touted-quick-fix-police-brutality-rodney/story?id=71648383> [<https://perma.cc/V8A3-K4EC>].

57. Gaines et al., *supra* note 48, at 50–55.

58. *Hardy v. Strumpf*, 576 P.2d 1342 (Cal. 1978); *United States v. Buffalo*, 457 F. Supp. 612, 618 (W.D.N.Y. 1978).

59. Corina Schulze, *The Masculine Yardstick of Physical Competence: U.S. Police Academy Fitness Tests*, 22 WOMEN & CRIM. JUST. 89, 96–97 (2012).

well as the reluctance of female recruits to bring litigation in regard to PATs they suspect are discriminatory.⁶⁰

C. *You Passed the Test . . . Now Stay in Your Lane: Female Police Officers in Male-Dominated Police Departments*

If women manage to get hired and enter police departments, female police officers often face a work environment that is organizationally segregated, discriminatory, and which threatens sexual harassment.⁶¹ Police departments maintain a culture that “keeps women from promotions or other opportunities,” “tolerates sexual harassment,” “and attempts to silence” women that complain about the toxic culture with retaliation.⁶² Women often must comply with or tolerate unfair and sexist departmental rules and practices as they try to assimilate into the male-dominated police culture.⁶³ This section examines the discriminatory culture and practices common in police departments and contends that these practices prevent police departments from retaining and promoting qualified female officers.

i. Lack of Growth Opportunities and Promotions

The culture within police departments discourages women from pursuing assignments that have more promise for mentorship and career growth.⁶⁴ Police departments disproportionately place women in administrative roles or public relation roles and exclude them from the SWAT team and other elite units.⁶⁵ Administrative assignments have less room for professional growth in the

60. See HARRINGTON, *supra* note 17, at 63–67 (“Entry-level physical ability tests are often outdated, are not job-related, and are testing for physical requirements not needed to perform the job of a modern law enforcement officer. They put unnecessary emphasis on upper body strength and rely on methods of testing that eliminate large numbers of women who are, in fact, well qualified for the job.”); compare *Harless v. Duck*, 619 F.2d 611 (6th Cir. 1980) (finding a physical fitness test that required applicants to complete three out of these four tests: fifteen push-ups, twenty-five sit-ups, a six-foot standing broad jump, and a twenty-five-second obstacle course was not reasonably related to the job requirements of police officers and was discriminatory), with *Hardy*, 21 Cal. 3d 1 (holding that a city requirement that police officer applicants be able to scale a six-foot wall did not constitute sex discrimination based on an analysis survey that indicated that city police officers must occasionally scale walls or fences), and *Buffalo*, 457 F. Supp. 612 (finding the height, weight, and physical fitness tests for police patrol positions as a whole had a discriminatory effect on women but that the physical fitness test may be shown by new research to be a bona fide job requirement).

61. Patel, *supra* note 8; see also Wilson, *supra* note 8, at 23; see also DOJ REPORT: WOMEN IN POLICING, *supra* note 5, at 12.

62. Laura McCrystal & Justine McDaniel, *Latest Female Philly Cops Harassment Lawsuit Echoes Decades-Long Problem*, PHILA. INQUIRER (Aug. 23, 2019), <https://www.inquirer.com/news/philadelphia-women-police-sexual-harassment-discrimination-richard-ross-20190823.html> [<https://perma.cc/VV5T-3YXM>].

63. Wilson, *supra* note 8, at 23.

64. *Id.* at 23, 27.

65. *Id.* A SWAT team is a designated law enforcement team whose members are assigned to resolve critical incidents involving a threat to public safety which would exceed the capabilities of traditional law enforcement officers. *Id.*; Poleski, *supra* note 4, at 39.

department as compared to placement on the street or in elite SWAT units.⁶⁶ This organizational segregation occurs because, despite passing the same PATs, women are viewed by their superiors and colleagues as having less physical strength than male officers, despite the fact that the majority of police work involves civilian interaction with only occasional bursts of physical activity.⁶⁷ The placement of women in administrative roles likely contributes to female officers' low representation in leadership roles: only three percent of lieutenants and one percent of executives are women despite making up twenty percent of total officers.⁶⁸

Additionally, even if women manage to reach higher roles such as chief, they often are barred from the highest rungs of executive positions by a "brass ceiling."⁶⁹ For example, Chief Lori Pollock, after thirty-three years of exemplary and committed service, is the first and only woman to have held the position of Chief of Bureau of Crime Control Strategies where she commanded over 300 officers.⁷⁰ When Chief Pollock asked to be considered for Chief of Detectives, a role never held by a woman in the 175-year history of the NYPD, she was not even granted an interview and was instead demoted to Chief of Collaborative Policing, where she had five assistants and no command.⁷¹ After effectively being forced to retire from her post, Chief Pollock filed a federal gender-discrimination lawsuit alleging the police commissioner and the NYPD "systematically deny[] women the opportunity to compete for senior leadership positions."⁷² Chief Pollock's lawsuit followed another lawsuit filed by two female police chiefs alleging similar claims just a year prior.⁷³ In each of these suits, the plaintiffs alleged there was a "boys' club" at the upper echelons of the police hierarchy that made it nearly impossible for women to break through the "brass ceiling" and reach leadership positions, despite their equal or higher qualification compared to male applicants.⁷⁴ Although women have begun to reach positions of higher power, such as chief, many still feel the imposition of a "brass ceiling" imposed by law enforcement's male-dominant culture and

66. HARRINGTON, *supra* note 17, at 125–26.

67. Poleski, *supra* note 4, at 35 ("[W]hile most jobs are open to both males and women, there are still stereotypical attitudes in the work place such as jobs involving physical strength still being more suited to males and the expectation of women to prioritize childcare over work."); *see also* Wilson, *supra* note 8, at 40 ("[P]olicies are outdated and written to portray police work as dangerous, requiring excessive physical strength, and designed to confine female officers to domesticated or social worker roles.").

68. DOJ REPORT: WOMEN IN POLICING, *supra* note 5, at 12.

69. Wallace, *supra* note 14; "Brass Ceiling" is a reference to the "glass ceiling" of the business world but differs in that it describes the difficulty women in law enforcement and the military have in rising through the ranks.

70. *Id.*

71. *Id.*; Ashley Southall, *Top Female Chief Quits, Accusing N.Y.P.D. of Widespread Gender Bias*, N.Y. TIMES (Aug. 11, 2020), <https://www.nytimes.com/2020/08/11/nyregion/nypd-women-discrimination.html> [https://perma.cc/SD5Y-U85P].

72. Southall, *supra* note 71.

73. *Id.*

74. *See id.*

promotion practices.⁷⁵ The lack of room for career advancement for female officers is a likely contributor to the low rate of retention for female officers.⁷⁶

ii. Sexual Harassment and Retaliation for Reporting

Women in male-dominated professions, such as policing, are more likely to be harassed than their counterparts in other fields and are more likely to be ignored or retaliated against should they report such harassment.⁷⁷ Historically, women have been excluded from policing, and sexual harassment is one way of communicating that women are unwelcome.⁷⁸ Sexual harassment takes various forms, including inappropriate touching or contact by male officers or inappropriate comments directed toward a woman officer's sex life, body, or capabilities based on her gender.⁷⁹ Research into the problem of sexual harassment of female officers from the 1970s to today overwhelmingly concludes that sexual harassment is pervasive.⁸⁰ For example, of a sample of twenty female officers in the St. Louis area, seventy-five percent reported having been sexually harassed by fellow male officers or superiors.⁸¹ Yet in that same study, only twelve percent reported the harassment to a supervisor.⁸²

Beyond the physical and emotional harm of the harassment itself, women face difficulties when they complain or file sexual harassment claims.⁸³ These difficulties include "retaliation, waiting hours to speak to an internal affairs or commanding officer about a complaint, unnecessarily lengthy and cumbersome processes, and [a] lack of assurance that complaints would remain anonymous and confidential."⁸⁴ Many female officers never report the sexual harassment they experience because they fear they will be subjected to a variety of retaliatory practices.⁸⁵ Even if officers do lodge a complaint, the male officers are rarely disciplined or punished and the reporting female officer is likely to be ostracized by the department or transferred to another department.⁸⁶ One officer noted:

If you report [sexual harassment] you couldn't stay working here. You would be ostracized and you would have to find new friends. I don't think it would be possible to stay in police work, at least not in the

75. Wallace, *supra* note 14.

76. See HARRINGTON, *supra* note 17, at 125–26.

77. Timothy M. Maher, *Police Sexual Misconduct: Female Police Officers' Views Regarding Its Nature and Extent*, 20 WOMEN & CRIM. JUST. 263, 266–75 (2010) ("Specifically, the research reveals that whereas 50 to 58 percent of women in the general work-force have experienced sexual harassment, 69 to 77 percent of women in male-dominated professions have been harassed.").

78. *Id.* at 267.

79. Sarah L. Swan, *Discriminatory Dualism*, 54 GA. L. REV. 869, 884–87 (2020).

80. Maher, *supra* note 77, at 266.

81. *Id.* at 272.

82. *Id.*

83. DOJ REPORT: WOMEN IN POLICING, *supra* note 5, at 25.

84. *Id.*

85. Maher, *supra* note 77, at 271–72.

86. *Id.* at 272–73.

same area. You would have to move out of state [in order to remain in law enforcement].⁸⁷

This fear of retaliatory behavior by the department is not imagined; court documents of sexual harassment cases support this view and outline the harsh behavior women have faced after filing an internal or legal complaint.⁸⁸

The culture of gender segregation and harassment in police departments may explain the low number of women in police departments as well as their low representation in leadership positions.⁸⁹ By allowing these practices and behaviors to continue, police departments and the communities they serve are denied the benefits that female officers bring to the force.⁹⁰ Police departments should implement changes internally to combat these discriminatory practices; and, if police departments fail to do so, the legal system should penalize such practices while requiring departments to institute change.

II. TITLE VII AS A STATUTORY VEHICLE FOR HOLDING POLICE OFFICERS LIABLE FOR SEXUAL HARASSMENT AND GENDER DISCRIMINATION IN POLICE DEPARTMENTS

Having previously established the pervasive gender discrimination in both hiring and employment in policing, this Comment now discusses the available remedies for women who face such discrimination. Title VII is one avenue a female police officer can use to remedy gender-based hiring and employment practices.⁹¹ This section examines the history and procedural requirements of Title VII and discusses its limitations.

A. *Title VII of the Civil Rights Act of 1964: History and Procedural Requirements*

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, sex, color, religion, and national origin.⁹² Although Title VII originally applied only to private employers, Congress later amended Title VII to apply to the entire federal government as well as to all state and local government agencies.⁹³ Congress acted to rectify unconstitutional state sex discrimination, such as longstanding rules barring female employees from job

87. *Id.* at 273 (alteration in original).

88. *See, e.g.,* Passananti v. Cook County, 689 F.3d 655 (7th Cir. 2012).

89. HARRINGTON, *supra* note 17, at 125–26; Patel, *supra* note 8.

90. *See* Poleski, *supra* note 4, at 106; LONSWAY & WOOD: POLICE EXCESSIVE FORCE, *supra* note 24; Johns, *supra* note 33, at 45.

91. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; *Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/sex-based-discrimination> [<https://perma.cc/B9FJ-JJBV>] (last visited Oct. 15, 2021).

92. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

93. *Id.*; Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

opportunities.⁹⁴ Congress amended Title VII specifically to counter sex discrimination in government workplaces, such as police departments.⁹⁵ In other words, this amendment allows women who experience workplace harassment and discrimination in police departments to sue.⁹⁶ Title VII, in its current judicial application, forbids gender discrimination in any aspect of state agency employment.⁹⁷ Discrimination on the basis of gender or sex occurs when either an applicant or employee is treated unfairly because of their sex, usually through an adverse employment action concerning hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment.⁹⁸

B. Title VII: Judicial Application and Limitations

Title VII makes employment discrimination based on sex or gender actionable.⁹⁹ Aggrieved female officers can use Title VII litigation as a vehicle to invalidate and change discriminatory police hiring and promoting practices.¹⁰⁰ Title VII's prohibition against sex-based discrimination in employment is not an absolute one. This section discusses Title VII's limitations in judicial application, including the "bona fide" exception and the interpretation of "gender-motivated" harassing conduct.

i. The "Bona Fide" Exception

Discrimination based on sex, where the screened skill or characteristic is a "bona fide" occupational qualification reasonably necessary to the normal operation of a particular business or enterprise, is permissible under Title VII.¹⁰¹ Under limited circumstances, a discriminatory hiring practice may fall outside of the scope of Title VII and be permissible discrimination.¹⁰² The determining factor of whether a job requirement is lawfully discriminatory turns on whether it is a "bona fide" requirement, meaning the requirement is backed up by research showing it is necessary to complete the functions of the job.¹⁰³ The Supreme Court held that minimum height and weight requirements generally do not qualify as a "bona fide" exception as they create an arbitrary barrier to equal

94. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (upholding application of Title VII to state sex discrimination and ruling that the state has no Eleventh Amendment defense, as it has been overridden by Congress acting under its Fourteenth Amendment powers).

95. H.R. REP. NO. 92-238, at 2139-41, 2178-79 (1971); 117 CONG. REC. 32, 105 (1971) (statement of Rep. Patsy Mink) (Despite Title VII, "[t]he view that employment discrimination against women is perfectly natural and only reflects the inherent differences between the sexes continues to the detriment of the entire Nation."); *Fitzpatrick*, 427 U.S. 445.

96. *Fitzpatrick*, 427 U.S. at 449 n.2.

97. *See Sex Based Discrimination*, *supra* note 91.

98. *Id.*

99. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

100. *Id.* at 255-65.

101. 42 U.S.C.S. § 2000e-2(e) (LexisNexis 2021).

102. *Id.*

103. *Id.*; *Hardy v. Strumpf*, 576 P.2d 1342 (Cal. 1978); *United States v. Buffalo*, 457 F. Supp. 612, 628 (W.D.N.Y. 1978); *Harless v. Duck*, 619 F.2d 611 (6th Cir. 1980).

employment for women that is not necessary for effective job performance.¹⁰⁴ This holding does not foreclose job requirements that have a discriminatory effect on hiring so long as that requirement is necessary for job performance.¹⁰⁵ The reliability and validity of research necessary to meet that threshold varies depending on the court hearing the matter.¹⁰⁶

As time has gone on, police departments have crafted more detailed tests that have a discriminatory effect on female applicants but appear facially valid.¹⁰⁷ PATs are a common example.¹⁰⁸ Lower courts are split on whether physical performance tests constitute unlawful employment discrimination, despite clear evidence that most of these tests do not correlate with the actual duties of active police officers.¹⁰⁹

ii. Gender-Motivated Animus or Simple Teasing?

Another limitation of Title VII is that courts have difficulty determining whether inappropriate conduct towards women police officers constitutes actionable gender-motivated harassment or simple “teasing.”¹¹⁰ While sexual assault or unwanted touching are clear instances of sexual harassment, courts struggle to draw the line between gender-motivated harassment and simply insulting conduct.¹¹¹ For example, in *Passananti v. Cook County*, the Seventh Circuit discussed the difference between conduct motivated by gender-animus and conduct it characterized as distasteful teasing.¹¹² Terms such as “bitch” or “cunt” are sometimes used to sexually harass women and demean them, but in some cases these terms are not motivated by gender-animus.¹¹³ In the Seventh Circuit’s discussion, the court noted that the terms “bitch” and “cunt” are “sometimes used as a label for women who possess such ‘women faults’ such as ‘illtemper, selfishness, malice, cruelty, and spite.’”¹¹⁴ However, the court held that, despite the common negative gender roots of the terms “bitch” and “cunt,” there needs to be a showing that the term was used specifically because the alleged victim of the discriminatory conduct was a woman.¹¹⁵ The Seventh Circuit failed to clearly define where exactly the line is drawn between gender-linked comments that are solely insulting and ones that are discriminatory in nature.¹¹⁶

104. *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

105. *Id.*

106. Eve A. Levin, Note, *Gender-Normed Physical-Ability Tests Under Title VII*, 118 COLUM. L. REV. 567, 580 (2018).

107. Schulze, *supra* note 59.

108. DOJ REPORT: WOMEN IN POLICING, *supra* note 5, at 16.

109. *Hardy v. Strumpf*, 576 P.2d 1342 (Cal. 1978); *United States v. Buffalo*, 457 F. Supp. 612 (W.D.N.Y. 1978); *Harless v. Duck*, 619 F.2d 611 (6th Cir. 1980).

110. *See Passananti v. Cook County*, 689 F.3d 655 (7th Cir. 2012).

111. *See id.* at 667–68.

112. *Id.*

113. *Id.* at 666.

114. *Id.* at 665.

115. *Id.* at 666.

116. *See id.* at 666–69.

C. Title VII: Statutory and Administrative Limitations

Even if a litigant has a viable claim, other statutory and administrative limitations make it difficult for a potential litigant to file their claim and receive just compensation for the harm they have suffered. This section discusses statutorily imposed requirements to file and succeed in a claim under Title VII, including filing requirements with the EEOC and damage caps, and asserts that such requirements run contrary to the goal of Title VII to combat gender discrimination in the workplace.

i. Filing Requirements with the EEOC

Filing a claim under Title VII is a long and time-intensive process, which exposes complainants to harassment and retaliation that may have a chilling effect on other complainants filing meritorious claims. The Civil Rights Act of 1964, and its subsequent amendments, created the Equal Employment Opportunity Commission (EEOC) to enforce Title VII and eliminate unlawful employment discrimination.¹¹⁷ Rather than establishing an automatic private right of action, the Act requires sex discrimination charges to be filed with the EEOC.¹¹⁸ If the EEOC, in its investigation, finds reasonable cause to believe that a claim is true, then the EEOC can choose to pursue the claim; but this process takes, on average, about ten months.¹¹⁹ Generally, litigants must allow the EEOC 180 days to resolve their charge before being granted a Notice of Right to Sue from the EEOC to independently file a discrimination lawsuit.¹²⁰ Such administrative red tape makes filing claims more time consuming and opens up complainants to harassment and retaliation during that waiting period.¹²¹

For example, in 2020, NYPD Captain Sharon Balli filed an EEOC complaint alleging sexual harassment.¹²² Captain Balli believed the complaint would be confidential, but the department found out about the complaint and retaliation began immediately.¹²³ Captain Balli's schedule was changed, her bicycle tires were damaged, she had concerns her food and computer were being tampered with, she had her office searched without explanation, and she felt forced to work out of her department-issued vehicle in order to avoid the

117. Civil Rights Act of 1964, Pub. L. No. 88-352, § 705, 78 Stat. 241; Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103; *see also* Jordan J. Feist, Comment, *Discrimination, Retaliation, and the EEOC: The Circuit Split over the Administrative Exhaustion Requirement in Title VII Claims*, 118 PENN STATE L. REV. 169, 171 (2013).

118. *Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/filing-lawsuit> [<https://perma.cc/7XFB-M9FN>] (last visited Oct. 31, 2021); Feist, *supra* note 117, at 171.

119. *What You Can Expect After You File a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/what-you-can-expect-after-you-file-charge> [<https://perma.cc/SBC9-ZTR8>] (last visited Oct. 31, 2021).

120. *Id.*

121. *See, e.g.*, Wallace, *supra* note 14.

122. *Id.*

123. *Id.*

harassment in the department.¹²⁴ In laying out this pattern, Balli's attorney said, "The main pattern within the NYPD is anyone that speaks out against discrimination is punished and retaliated against. It's viewed as dissent. You're viewed as a rat. You're viewed as someone that can't be trusted."¹²⁵ By responding in this manner, departments discourage future complaints by intimidating other women in the department.

ii. Statutory Damage Caps

Originally, Title VII only provided for injunctive relief for discriminatory employment practices.¹²⁶ The Lilly Ledbetter Fair Pay Act of 2009 "provides for the recovery of compensatory and punitive damages in cases of intentional violations of Title VII."¹²⁷ Courts can award compensatory damages in cases involving intentional discrimination based on a person's sex to pay victims "for out-of-pocket expenses caused by the discrimination (such as costs associated with a job search or medical expenses) and compensate them for any emotional harm suffered (such as mental anguish, inconvenience, or loss of enjoyment of life)."¹²⁸ Courts may award punitive damages to "punish an employer who commits an especially malicious or reckless act of discrimination."¹²⁹ Even with this amendment allowing damages, what a litigant may recover is limited to \$50,000-\$300,000, depending on the size of the company or employer.¹³⁰ These limitations on damages discourage women experiencing discriminatory employment practices from pursuing litigation, as the damages they recover may not be sufficient to justify litigation.¹³¹ Additionally, any deterrent effect levied by monetary accountability will be minor and unlikely to encourage a change in conduct.¹³²

III. SECTION 1983 AND QUALIFIED IMMUNITY: SUING POLICE OFFICERS IN THEIR INDIVIDUAL CAPACITY FOR CONSTITUTIONAL VIOLATIONS

In addition to Title VII litigation, aggrieved female police officers can pursue § 1983 claims to remedy hiring or employment discrimination. 42 U.S.C. § 1983 is the principal tool to sue police officers acting under "color of law" in

124. *Id.*

125. *Id.*

126. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

127. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

128. *Remedies for Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/remedies-employment-discrimination> [https://perma.cc/7ACW-WHGQ] (last visited Feb. 12, 2021).

129. *Id.*

130. Limits for compensatory and punitive damages are \$50,000 for employers with 15–100 employees, \$100,000 for employers with 101–200 employees, \$200,000 for employers with 201–500 employees, and \$300,000 for employers with more than 500 employees. *Id.*

131. Zehrt, *supra* note 14, at 315; Leora F. Eisenstadt & Jeffrey R. Boles, *Intent and Liability in Employment Discrimination*, 53 AM. BUS. L.J. 607, 671 (2016).

132. Brentin Mock, *How Cities Offload the Cost of Police Brutality*, BLOOMBERG (June 4, 2020, 1:41 PM), <https://www.bloomberg.com/news/articles/2020-06-04/the-financial-toll-of-police-brutality-to-cities> [https://perma.cc/EC2E-V4NC].

their official capacity for violating an individual's constitutional rights.¹³³ An employee may sue a public employer under Title VII and § 1983 if the § 1983 violation rests on a claim of infringement of rights guaranteed by the Constitution or federal statute, which includes gender discrimination in employment practices.¹³⁴ Pursuing litigation under § 1983 presents a unique barrier in the form of the qualified immunity defense, which allows state actors to avoid liability.¹³⁵ This section examines the history and intent behind the passage of § 1983, as well as the inception of the qualified immunity defense, and asserts that qualified immunity has created an unnecessary hurdle for women suing police officers for sexual harassment and discrimination.

A. Section 1983: The Legislature's Intent to Hold Public Officials Accountable

In passing § 1983, Congress intended to protect citizens from unconstitutional state action.¹³⁶ The federal courts were to act as “guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law, ‘whether the action be executive, legislative, or judicial.’”¹³⁷ Section 1983 allows aggrieved parties to hold individual police officers, as opposed to entire departments, liable for civil rights violations.¹³⁸ Holding individual police officers personally liable may be the only effective way to change the culture in police departments.¹³⁹ When someone sues the department, the costs of that litigation or settlement do not come out of the offending officer’s pocket; rather, the costs are paid by the city budget through taxes.¹⁴⁰ These costs, that are simply pulled from other sources, are rarely discussed and therefore, rarely inspire real organizational change.¹⁴¹

B. Qualified Immunity: From “Good Faith” Defense to “Absolute Shield” for Police Officers

The doctrine of qualified immunity operates as a common law defense to civil rights claims brought under the congressionally-created § 1983.¹⁴² Although § 1983 provides aggrieved parties an avenue for remedy, the Supreme Court’s adoption of the “good faith belief” defense in *Pierson v. Ray*¹⁴³ eventually evolved into the qualified immunity defense, which created an “absolute shield”

133. 42 U.S.C. § 1983.

134. *Russell v. Moore*, 714 F. Supp. 883 (M.D. Tenn. 1989).

135. *Freiman*, *supra* note 14, at 61–62.

136. *Reinhardt*, *supra* note 14, at 1244.

137. *Id.*

138. 42 U.S.C. § 1983.

139. *Mock*, *supra* note 132.

140. *Id.*

141. *Id.*

142. See James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1601 (2011); *Reinhardt*, *supra* note 14, at 1244.

143. *Pierson v. Ray*, 386 U.S. 547 (1967).

against most claims.¹⁴⁴ This section will discuss the history of the qualified immunity defense and assert that, in its current form, it unduly bars potentially meritorious lawsuits against police officers.

i. Qualified Immunity: Development of the Defense

The U.S. Supreme Court first laid the foundation for the modern qualified immunity doctrine in *Pierson v. Ray*. In *Pierson*, the Court held that when police officers arrested a black man for sitting in a “whites only” bus terminal, they violated his constitutional rights.¹⁴⁵ In this case, the officers acted under an active but unconstitutional state law. Under the plain meaning of § 1983, arresting a citizen in violation of the Constitution was enough to impose liability,¹⁴⁶ but the Court invoked the common law “good faith belief” defense.¹⁴⁷ The Court found the officers arrested the plaintiff upon a good faith belief that he violated the law and that their actions in arresting him were lawful; the Court granted the officers immunity based on this “good faith belief.”¹⁴⁸

Over time, this traditional “good faith belief” defense developed into a much broader and more insulating defense. Fifteen years after its ruling in *Pierson*, the Court in *Harlow v. Fitzgerald* first articulated what is currently known as the “qualified immunity” defense.¹⁴⁹ The Court held that public officials “generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹⁵⁰ The qualified immunity defense became even more impenetrable when the Supreme Court issued its *Ashcroft v. al-Kidd* decision.¹⁵¹ In *Ashcroft*, the Court altered the standard from “a reasonable person” standard to the new standard: officers are immune from liability unless “‘the contours of [a] right [are] sufficiently clear’ that every ‘reasonable official would have understood that what he is doing violates that right.’”¹⁵² The Court further explained that for a law to be clearly established, “existing precedent must have placed the statutory or constitutional question beyond debate.”¹⁵³ The Court noted that this new standard “protects all but the plainly incompetent or those who knowingly violate the law.”¹⁵⁴

144. *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J. dissenting) (challenging the Court’s application of qualified immunity as an “absolute shield” for police officers which has diverged from its original “good faith” defense roots).

145. *Id.* at 558.

146. 42 U.S.C. § 1983.

147. *Pierson*, 386 U.S. at 556–57.

148. *Id.* at 557.

149. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

150. *Id.* at 818 (emphasis added).

151. *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011).

152. *Id.* at 741 (emphasis added); Reinhardt, *supra* note 14, at 1247.

153. *Ashcroft*, 563 U.S. at 742; Reinhardt, *supra* note 14, at 1247.

154. *Ashcroft*, 563 U.S. at 743; Reinhardt, *supra* note 14, at 1247–48.

ii. Qualified Immunity: The Chilling Effects on Litigation

Due to this standard for granting qualified immunity, law enforcement officers can continue their unconstitutional practices knowing they will rarely be called to account for their actions.¹⁵⁵ In fact, in a study of qualified immunity cases in federal courts of all levels, researchers found that approximately eighty percent of motions for qualified immunity were granted.¹⁵⁶ By granting police qualified immunity, a court halts the case and never allows the constitutional infraction to be determined on its merits.¹⁵⁷

In addition to this high standard for denying qualified immunity, lower courts are free to address whether a police officer is granted qualified immunity “without ever considering whether that official did, in fact, violate the constitutional rights of the plaintiff.”¹⁵⁸ A court will only grant relief when the relevant body of existing law has already applied the Constitution to *virtually the same circumstances* as are present in the current plaintiff’s case.¹⁵⁹ As a result, conduct that is unconstitutional is rarely found in cases, based on there being no precedent to inform that actor that their behavior was unconstitutional.¹⁶⁰ By creating no new precedent in which to find future liability, the doctrine of qualified immunity creates a cycle in which potentially unconstitutional conduct is perpetually protected and victims rarely have their cases heard on their merits.¹⁶¹

In applying the doctrine of qualified immunity, courts attempt to draw a harsh line between (a) police conduct, which *may* violate constitutional rights but is socially useful; and (b) police misconduct, which *clearly* violates constitutional rights and is devoid of social utility.¹⁶² Through the evolution of the judicially-created qualified immunity defense, the judiciary effectively usurped the role of the legislature in determining what conduct is lawful or unlawful.¹⁶³ Qualified immunity pulls the door to the courthouse nearly shut, so that only the most battered plaintiffs may have their claims heard.¹⁶⁴

C. *Qualified Immunity: An Extra Hurdle for Gender Discrimination and Harassment Claims*

The right to be free from sexual discrimination and harassment in the workforce is an established constitutional right,¹⁶⁵ but what conduct is so “clearly

155. See generally Gilles, *supra* note 15, at 857–59.

156. *Id.*

157. *Id.*

158. Reinhardt, *supra* note 14, at 1249; see also Pearson v. Callahan, 555 U.S. 223, 238 (2009).

159. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Reinhardt, *supra* note 14, at 1250.

160. Reinhardt, *supra* note 14, at 1249.

161. Pfander, *supra* note 142, at 1604–06.

162. Gilles, *supra* note 15, at 849–50.

163. See generally, Freiman, *supra* note 14.

164. *Id.* at 68.

165. Williams v. Herron, 687 F.3d 971, 978 (8th Cir. 2012).

established” as discriminatory that “every” officer would be aware they were violating that right is less clear. Sexual harassment claims under § 1983 are analyzed the same as sexual harassment claims under Title VII.¹⁶⁶ A female officer bringing a claim of employment discrimination or harassment needs to prove the same elements as a Title VII action, but must also defeat the qualified immunity defense.¹⁶⁷ This section examines how the courts have approached sexual discrimination and harassment cases brought under § 1983 and asserts that the extra hurdle presented by the qualified immunity defense bars potentially meritorious claims against male police officers.

When the discrimination is overtly sexual in nature, courts are willing to deny qualified immunity.¹⁶⁸ For example, in *Williams v. Herron*, the district court held that the employer’s sexual harassment of his employee was overt and pervasive enough as to violate the plaintiff’s right to be free from a hostile work environment under § 1983.¹⁶⁹ The plaintiff, Williams, was an employee hired by Dakota County Chief Deputy Sheriff Herron.¹⁷⁰ During Williams’s employment, she was coerced into having sexual relations with Herron and felt if she rejected him, her employment would be terminated.¹⁷¹ The court held that the nonconsensual sexual relationship paired with unwelcome harassment while working constituted gender discrimination.¹⁷² The court believed that “Williams showed she considered Herron’s conduct to be severe enough to alter the terms, conditions, or privileges of her employment, and that a reasonable person would consider it the same.”¹⁷³ The court further stated that “[h]ostile work environments caused by sexual harassment have long been recognized as constitutional violations.”¹⁷⁴

Conversely, courts draw a less clear line of what workplace interactions are actionable gender-based harassment as opposed to non-gender-motivated “teasing.”¹⁷⁵ For example, in *Massey v. Dorning*, an employee of the Madison County Sheriff’s Office sued the department and its sheriff under Title VII for having created a hostile work environment and under § 1983 for violating her right to equal protection by discriminating against her because of her sex.¹⁷⁶ Female employees were told that the office was a “male dominant workplace” where women were frequently called “whores” and “bitches.”¹⁷⁷ The sheriff informed Massey that if she filed a complaint, he would not discipline men for

166. *Id.*

167. *Id.* at 974–75.

168. *See, e.g., id.* at 975–77.

169. *Id.* at 978.

170. *Id.* at 973.

171. *Id.*

172. *Id.* at 977.

173. *Id.* at 976.

174. *Id.* at 978.

175. *Massey v. Dorning*, No. 18-cv-02045, 2020 U.S. Dist. LEXIS 21336, at *11 (N.D. Ala., Feb. 7, 2020).

176. *Id.* at *7–8.

177. *Id.* at *12.

offensive or discriminatory behavior; women were expected to accept it.¹⁷⁸ Due to this nonresponsive attitude, the process for filing a complaint or asking for official action in the department was often long, embarrassing, and, overall, unlikely to result in change.¹⁷⁹

In *Massey*, the court found that the conduct of the male employees was clearly gender-specific and was “precisely the sort of behavior that exposes women to disadvantageous conditions in the workplace.”¹⁸⁰ The district court thus found Massey clearly established that the sheriff’s alleged actions created a hostile work environment, his actions were unconstitutional, and he was not entitled to qualified immunity.¹⁸¹ Despite the positive outcome for Massey in this case, the standards cited and the test proposed by the court are not clearly defined and show an animus towards litigating harassing behavior.¹⁸² The court was reluctant to create a standard for determining which offensive conduct was actionable as they did not want to turn Title VII into a “general civility code.”¹⁸³ The only guidance the court offered was, “[t]o distinguish between indiscriminate objectionable conduct and actionable harassment, courts use their common sense to determine whether the offensive conduct is gender-specific.”¹⁸⁴ The use of a court’s “common sense” is a far cry from a standard that will consistently identify gender-motivated discriminatory conduct and hold police officers accountable for that conduct.¹⁸⁵

IV. PROPOSED CHANGES TO TITLE VII AND § 1983

Despite positive effects of women in policing, discriminatory hiring and employment practices prevent police departments from recruiting and retaining female officers to the detriment of police agencies and the communities they serve. Further, the current available remedies are inadequate to address this concern. In order to combat the pervasive employment discrimination in police departments, Congress needs to act to strengthen Title VII and to rebuff the qualified immunity defense so citizens may litigate their claims under § 1983 as Congress originally intended.

First, Congress should amend Title VII to remove statutory damage caps. Depending on the size of a company or employer, litigants’ recovery is limited to \$50,000–\$300,000.¹⁸⁶ The current statutory caps may reduce a potential award

178. *Id.* at *3.

179. *See generally id.* at *3–8; *see generally* HARRINGTON, *supra* note 17, at 133–34.

180. *Massey*, 2020 U.S. Dist. LEXIS 21336, at *12.

181. *Id.* at *11–12, *26, *34.

182. *See generally, id.*

183. *Id.* at *11 (reasoning that “simple teasing” or “offhand comments” that are offensive and suggest gender differences, but are innocuous in their effect on employment, are not so “objectively offensive” as to alter the condition of employment. On the other hand, the court reasoned that a woman “cannot be forced to endure pervasive, derogatory conduct and references that are gender-specific in the workplace, just because the workplace may be otherwise rife with generally indiscriminate vulgar conduct.”).

184. *Id.* (this standard is left undefined).

185. *See id.*

186. *Remedies for Employment Discrimination*, *supra* note 128.

to such a low amount that plaintiffs determine bringing a case is not worth it or attorneys refuse these cases altogether.¹⁸⁷ Removing these damage caps or raising them to allow damages to be calculated in proportion to the determined harm would go far in encouraging reform to discriminatory police employment practices through litigation.¹⁸⁸ By removing these damage caps, female officers who experience discriminatory hiring and employment practices in police departments would have the incentive and tools necessary to pursue litigation to punish offending departments and change department policies. If police departments are financially liable for their discriminatory conduct and practices, those practices are less likely to persist.

Second, Congress should amend Title VII to remove or heighten the bar for the “bona fide” exception to gender discrimination in employment. Congress should remove or raise the bar for proving a discriminatory hiring criterion meets the “bona fide” requirement of the occupation so that only in exceedingly rare circumstances is discrimination permissible. The ambiguity of the term has caused confusion and disparate applications in the courts as the evidence necessary to show whether a certain qualification is a “bona fide” requirement of the job is not clear.¹⁸⁹ Whether a proffered reason for gender discrimination qualifies as a job requirement should require a high level of proof with the presumption that such a requirement is impermissible gender-based employment discrimination. Instituting such a change would expose PATs, used in the majority of police departments nationwide, to judicial scrutiny and, potentially, do away with outdated concepts of what skills are required to be a police officer. This would open the door to new hiring criteria that integrates social science research suggesting skills in communication, de-escalation, and community engagement are the true indicators of who will best serve the community as police officers. This, in turn, would likely result in the hiring of more female officers.

Finally, Congress needs to legislatively end the qualified immunity defense. Justices from opposite sides of the ideological aisle, Sonia Sotomayor and Clarence Thomas, question the foundation and growth of this judicially-created defense.¹⁹⁰ The State of Colorado has already taken action to end their state equivalent of the qualified immunity defense.¹⁹¹ This Colorado bill was passed in order to hold state officials—in particular police officers—accountable in state

187. Eisenstadt & Boles, *supra* note 131, at 671.

188. *Id.* at 671–73.

189. Levin, *supra* note 106, at 574–75.

190. *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J. dissenting) (challenging the Court’s application of qualified immunity as an “absolute shield” for police officers which has diverged from its original “good faith” defense roots); *see also* *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J. dissenting), *cert. denied* (examining the legislative intent of § 1983 and contending the “good faith” common law doctrine does not justify the evolution of the modern qualified immunity defense).

191. Kimberly Kindy, *Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill*, WASH. POST (Oct. 7, 2021, 6:00 AM), https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html [<https://perma.cc/L42V-8P5E>].

court.¹⁹² Additionally, if an officer loses their case in state court, the state can revoke that officer's certifications and banish them from any local policing job in the state.¹⁹³ Inspired by the legislative action taken in Colorado, a dozen state legislatures have considered similar changes to hold police accountable.¹⁹⁴

Similar changes need to be made on the national level. Currently, the Ending Qualified Immunity Act of 2021 is being proposed in Congress.¹⁹⁵ The proposed bill would amend existing law to "explicitly state that the qualified immunity doctrine invented by the Supreme Court does NOT provide police officers that brutalize or otherwise violate civil rights with defense or immunity from liability for their actions."¹⁹⁶ Without pressure from the public for Congress to act, the Ending Qualified Immunity Act of 2021 is not likely to be passed.¹⁹⁷ Eliminating the qualified immunity defense on a national level would take away an additional bar for female police officers to litigate their claims of hiring and workplace discrimination. This would encourage such claims to be decided on their merits and punish offending officers for their discriminatory conduct.

192. Cary Aspinwall & Simone Weichselbaum, *Colorado Tries New Way to Punish Rogue Cops*, MARSHALL PROJECT (Dec. 18, 2020), <https://www.themarshallproject.org/2020/12/18/colorado-tries-new-way-to-punish-rogue-cops> [https://perma.cc/TD3U-4CSL].

193. *Id.*

194. *Id.*

195. Sandy Malone, *U.S. House, Senate Co-Introduce 'Ending Qualified Immunity Act,'* POLICE TRIBUNE (Mar. 2, 2021), <https://policetribune.com/u-s-house-senate-co-introduce-ending-qualified-immunity-act/> [https://perma.cc/8JXF-QC2G].

196. *Id.*

197. See Billy Binion, *Ayana Pressley Revives Justin Amash's Bill to End Qualified Immunity*, REASON (Mar. 1, 2021), <https://reason.com/2021/03/01/ayanna-pressley-ending-qualified-immunity-act-justin-amash-ed-markey-elizabeth-warren/> [https://perma.cc/M2UB-KT58].

BOUGIE FIRMS AND BLACK-BOX SALARIES: AVOIDING ANOTHER SIXTY YEARS OF GENDER- BASED PAY DISCRIMINATION

Cedric Kostelyna[†]

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INTRODUCTION

Attorney Draper joined the Atlanta office of prominent, international law firm Jones Day in 2011 and excelled at her work.¹ As a fourth-year associate, Draper earned a competitive \$180,000, but was puzzled to learn that a fellow fourth-year associate earned \$220,000.² The key difference between Draper and her fellow associate was sex: Draper is female while her fellow associate is male. Draper joined a group of litigants filing suit against Jones Day alleging violations of the Equal Pay Act (EPA), among other claims.³ Draper's claim alleged specific enough facts to survive a motion to dismiss, but many of her co-litigants were unsuccessful.⁴ Attorney Nalib Tolton also alleged receiving less pay than her male counterparts.⁵ However, the United States District Court for the District of Columbia dismissed Tolton's Equal Pay Act claim because she failed to plead her burden of alleging that she completed "substantially equal work" to that of her male counterpart.⁶

Fifty-seven years after the passage of the Equal Pay Act (EPA), women like Tolton are consistently unable to hold the legal profession accountable to the standard of equal pay for equal work regardless of gender. This failure is largely due to an unreasonably high bar litigants face in proving—and even pleading—EPA discrimination. Indeed, many plaintiffs are unable to have their EPA claims heard on the merits at all, let alone in front of a jury, as many suits are thrown out at the pleading stage or dismissed at summary judgment. While Draper's claim is still pending as of this writing, EPA caselaw demonstrates that she faces a steep, uphill battle: more often than not, the legal system fails women seeking equal pay for equal work.⁷

President John F. Kennedy signed the Equal Pay Act into law on June 10th, 1963.⁸ The 1963 EPA called for equal pay for equal work regardless of one's sex.⁹ Over half a century later, the EPA has yet to achieve its essential goal.¹⁰ Ironically, the failures of the EPA are particularly evident within the legal profession, most notably at large law firms. Indeed, the historically patriarchal

1. Tolton v. Day, No. 19-945, 2020 U.S. Dist. LEXIS 87793, at *22 (D.D.C. May 19, 2020).

2. *Id.* at *30, *108.

3. *See id.* at *2–3.

4. *See id.* at *106–10.

5. *Id.* at *11.

6. *See id.* at *109.

7. *See* Deborah Thompson Eisenberg, *Stopped at the Starting Gate: The Overuse of Summary Judgment in Equal Pay Cases*, 57 N.Y.L. SCH. L. REV. 815 (2012).

8. Albert H. Ross & Frank V. McDermott, Jr., *The Equal Pay Act of 1963: A Decade of Enforcement*, 16 B.C. L. REV. 1, 5 (1974).

9. L. Tracee Whitley, "Any Other Factor Other Than Sex:" *Forbidden Market Defenses and the Subversion of the Equal Pay Act of 1963*, 2 NE. U. FORUM 51, 51 (1997).

10. *See id.*; *see* Morgan A. Tufarolo, Comment, *You Haven't Come a Long Way, Baby: The Courts' Inability to Eliminate the Gender Wage Gap Fifty-Two Years After the Passage of the Equal Pay Act*, 24 AM. U. J. GENDER SOC. POL'Y & L. 305 (2016).

environment of these firms contributes to the failure of the EPA to take hold in traditionally male-dominated fields.¹¹ Additionally, these large firms typically employ a secretive “black-box” pay structure, which ensures that legal professionals are unable to directly compare their salary to that of their counterparts¹²—an often-fatal limitation for purposes of EPA claims. Black-box pay systems involve a managing partner or supervisory committee unilaterally determining employee salaries.¹³ Part of what makes this compensation structure problematic is the lack of transparency, a set formula or scale, and the accompanying policy barring employees from discussing compensation with one another.¹⁴

More broadly, the EPA’s failures are largely due to its high bar for establishing a *prima facie* claim of discrimination and the broad affirmative defenses available to employers facing EPA challenges. This article contends that Congress should revisit the EPA and modify the statutory language to lower the standard for establishing *prima facie* EPA claims and, additionally, narrow the scope of the broad affirmative defenses written into the EPA. Without significant revision to its statutory language, the EPA is unable to fulfill its legislative purpose.

As foundation for its probe into the EPA’s failure—and corresponding call for congressional action—this article analyzes how EPA claims have fared in the legal profession, and briefly examines how the legal profession compares to other historically male-dominated fields. To that end, this article proceeds in four parts. Part I will discuss the history of the EPA alongside women’s participation in the work force. Specifically, this part will overview the EPA’s enactment, legislative purpose and subsequent revisions; the discussion on women’s participation in the workforce will focus on women’s increased participation in traditionally male professions. Importantly, this discussion will emphasize the narrowing but persistent pay gap between men and women completing equal work, concluding that further congressional action is needed. Part II will first discuss the requirements of a *prima facie* EPA claim and the statutory affirmative defenses. Part II will also provide an overview of EPA caselaw and the competing interpretations by various circuits. Part III will evaluate *Tolton v. Day*¹⁵ and *Savignac v. Day*¹⁶ as modern-day examples of the EPA’s continued failure. Part III then compares the application of the EPA within the legal profession to the EPA’s application in other professions, including other traditionally male-dominated fields. Part III concludes that, while the EPA has

11. See, e.g., *Tolton*, 2020 U.S. Dist. LEXIS 87793; *Savignac v. Day*, 486 F. Supp. 3d 14 (D.D.C. 2020); Cynthia G. Bowman, *Women in the Legal Profession from the 1920s to the 1970s: What Can We Learn from Their Experience About Law and Social Change?*, 61 ME. L. REV. 1, 4 (2009).

12. Mark Herrmann, *Inside Straight: Analyzing ‘Black-Box’ Compensation*, ABOVE THE LAW (Aug. 16, 2012, 11:04 AM), <https://abovethelaw.com/2012/08/inside-straight-analyzing-black-box-compensation/> [<https://perma.cc/455B-QQED>].

13. *Id.*

14. *Id.*

15. *Tolton*, 2020 U.S. Dist. LEXIS 87793.

16. *Savignac*, 486 F. Supp. 3d (D.D.C. 2020).

had some valuable impact, it remains unable to break the “boys’ club”¹⁷ where men earn more in historically male-dominated fields. Finally, Part III proposes statutory revisions to the EPA as well as black-box compensation systems and considers how a newly written EPA can better achieve its legislative purpose. Part IV concludes by warning of the dangers of continued indifference to the EPA’s failures.

I. LEGISLATIVE HISTORY OF THE EPA AND WOMEN’S HISTORICAL ROLE IN THE WORKFORCE AND LEGAL PROFESSION

A. Background of the EPA

Equal pay legislation had a slow start despite the existence of statistics showing a clear disparity in wages for men and women working comparable jobs.¹⁸ Interestingly, male workers’ worry about wage depression from cheaper female labor led to a push for equal wages.¹⁹ Thus, incoming legislation originally focused on protecting the rights of male workers,²⁰ with Congress passing the Fair Labor Standards Act (FLSA) in 1938. However, the FLSA focused on issues such as a minimum wage and maximum workable hours for employees,²¹ reflecting congressional findings that lack of a minimum wage created unfair competition in commerce and labor disputes.²² The FLSA did not account for the influx of women into the workforce. As a result, Congress faced rising pressure to take additional steps to respond to calls for equal pay.

i. Enactment and Purpose of the EPA

During World War II, America saw support grow for an equal pay policy.²³ In 1942, the Congressional War Labor Board proposed an equal pay policy, known as General Order No. 16.²⁴ General Order No. 16 allowed women to receive equal pay “for comparable quality and quantity of work on the same or similar operations.”²⁵ Unfortunately, General Order No. 16 served to protect men more than women, as many employers were unwilling to hire women under this order since they no longer served as cheaper labor than their male counterparts.²⁶ General Order No. 16 nonetheless became a base for the first proposed federal

17. Liz Elting, *How to Navigate a Boys’ Club Culture*, FORBES (July 27, 2018, 4:49 PM), <https://www.forbes.com/sites/lizelting/2018/07/27/how-to-navigate-a-boys-club-culture/?sh=8486a834025c> [<https://perma.cc/859Q-2294>] (defining a “boys’ club” as a culture that excludes all but a given type of employee).

18. See Ross & McDermott, Jr., *supra* note 8, at 3–4.

19. *Id.* at 56.

20. *Id.* at 56 n.34.

21. See Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060.

22. *Id.* § 2(a).

23. Whitley, *supra* note 9, at 56.

24. *Id.*

25. *Id.*

26. See *id.*

equal pay law, introduced in Congress in 1945.²⁷ Even with public and bipartisan support, the 1945 proposal never saw passage in Congress.²⁸

Male employees were not the only ones upset by differential treatment in the workplace. In 1963, the President's Commission on the Status of Women found clear evidence showing differential treatment of women in employment practices and in state laws.²⁹ While states such as Michigan and Montana had protections in place for female workers guaranteeing them equal pay, most occupations in other states saw women working the same jobs for only sixty percent of the pay received by their male counterparts.³⁰ Higher divorce rates post-World War II meant women often acted as the sole breadwinner for the family, which, combined with public interest in women's liberation, led to women in the 1960s campaigning more zealously for equal pay.³¹ Labor unions also supported women receiving equal pay, although many unions held ulterior motives—desiring to protect men's wages from reduction due to the influx of cheap female labor.³² After congressional hearings on the subject, Congress enacted the EPA in June 1963 with strong pressure from President Kennedy's administration.³³ President Kennedy explained that the EPA was a necessary reform, as congressional hearings revealed that women received less than two-thirds of the pay men received for equal work.³⁴ The EPA, according to Congress, sought “[t]o prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce.”³⁵

Congress also noted in a “Declaration of Purpose” several negative policy outcomes that were avoided through the EPA's passage.³⁶ Specifically, Congress explained the EPA was needed in the labor market to: (1) avoid lowering wages and standards of living for employees, (2) use available workforce resources, (3) avoid labor disputes over unequal pay, (4) allow the free flow of goods in commerce, and (5) eliminate unfair competition based on lowering wages.³⁷

27. Ross & McDermott, Jr., *supra* note 8, at 4.

28. *Id.*

29. Whitley, *supra* note 9, at 56.

30. *Id.* at 55. The statistics within this work are not differentiated by race because the sources have not done so. In recent years, equal pay advocates and organizations have been vocal in challenging broad statistics on gender and pay as blind to the significant differences in pay among white women and women of color. While these sources often do not specify, it is a likely assumption that these statistics represent either the aggregate of all women's pay or primarily white women's pay.

31. *Id.*

32. *Id.* at 56.

33. *Id.* at 57.

34. Ross & McDermott, Jr., *supra* note 8, at 5–6 (the source states that women received less than two-thirds of the pay men received for equal work without specifying whether “women” refers to all women or just white women).

35. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56.

36. *See id.* § 2(a).

37. *Id.* In their own words, Congress sought to avoid,

Congress thus recognized objective reasons for the EPA's passage.³⁸ Interestingly, the consequences cited by Congress were almost identical to the consequences Congress found when initially enacting the FLSA.³⁹

Indeed, the EPA served as an amendment to the FLSA, which regulated wages and working hours of employees in the United States. The EPA originally contained an exemption to its terms for employees in executive, administrative, professional, and outside sales jobs.⁴⁰ However, these exceptions were eliminated with Congress' passage of the Education Amendments of 1972.⁴¹

Several years after the EPA's passage, the Supreme Court made clear that the EPA served a remedial function.⁴² For example, when a court found an EPA violation, the court could raise the impacted employee's wages and award back pay.⁴³ In addition, courts reserved the right to impose damages against employers if a plaintiff could prove willful violations of the EPA.⁴⁴ The Supreme Court quoted a congressional statement on the need for the EPA, that, "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same."⁴⁵ Americans saw a clear need to enforce the EPA and remedy pay inequality.

ii. Amendments and Relevant Provisions

The Bennett Amendment, named after Senator Wallace Bennett,⁴⁶ incorporated the affirmative defenses of the EPA including "any other factor other than sex" to all Title VII claims.⁴⁷ Senator Bennett alleged his purpose in this amendment was to ensure that, in the event of a conflict between laws, the relevant EPA provision would not be nullified.⁴⁸ While Senator Bennett's

(1) depresso[d] wages and living standards for employees necessary for their health and efficiency; (2) ... prevent[ing] the maximum utilization of the available labor resources; (3) ... caus[ing] labor disputes, thereby burdening, affecting, and obstructing commerce; (4) burden[ing] commerce and the free flow of goods in commerce; and (5) ... unfair method[s] of competition.

Id.

38. See § 2(b). This language can also be read as serving only to justify their power to enact the EPA under the Commerce Clause.

39. Compare *id.* § 2(a), with Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 2(a), 52 Stat. 1060, 1060 (codified as amended at 29 U.S.C. § 202).

40. Ross & McDermott, Jr., *supra* note 8, at 8-9 (citing 29 U.S.C.A. § 213(a) (Supp. 1973)).

41. *Id.*

42. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) ("Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry. . . .").

43. Whitley, *supra* note 9, at 59.

44. *Id.*

45. *Corning*, 417 U.S. at 195 (quoting S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963)).

46. See *County of Washington v. Gunther*, 452 U.S. 161, 173 (1981).

47. *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 252 (6th Cir. 1988).

48. *Gunther*, 452 U.S. at 173.

expressed intentions were good, as discussed later, interpretations of the phrase “any other factor other than sex” served to limit claimants alleging sex discrimination.

On the other hand, the Education Amendments of 1972 eliminated a loophole available for employers to avoid EPA claims. Existing language in the EPA made an exception to equal pay requirements for those working in executive, administrative, and professional jobs.⁴⁹ Originally drafted to apply to the Fair Labor Standards Act, the exception applied to teachers, academic administrative professionals, and those working in sales.⁵⁰ The Education Amendments completely removed the aforementioned exceptions from the EPA, opening up the possibility of bringing an EPA claim for those in executive, administrative, and professional jobs.

B. Women’s Participation in the Workforce

Prior to World War II, women made up less than twenty-five percent of the total labor force within the United States.⁵¹ The overseas conflict in World War II created a labor shortage as many men left factory jobs to serve their country in the war. By 1963, less than two decades later, women comprised more than a third of the United States labor force.⁵² The percentage of women participating in the labor force continued to increase and as of 2020, women made up forty-seven percent of the United States labor force.⁵³ The percentage is expected to increase in the future, inching closer to an even fifty percent of the workforce being comprised of women.⁵⁴

Even though women’s participation in the workforce gradually increased, the pay gap the EPA sought to remedy remained—and remains—prominent. For example, women comprised more than a third of the workforce in 1960,⁵⁵ yet still were only making less than sixty percent of the income of their male counterparts.⁵⁶ Women turned down jobs for which they were qualified due to the pay disparity when compared to men working the same position.⁵⁷

Regardless of the EPA’s passage in 1963, the gender wage gap—that is, the difference in women’s wages compared to their male counterparts—saw some

49. See, e.g., Ross & McDermott, Jr., *supra* note 8, at 8–9; 29 U.S.C. § 213(a)(1) (2018).

50. 29 U.S.C. § 213(a)(1) (2018).

51. Whitley, *supra* note 9, at 53.

52. Jessica Gottsacker, Note, *Waging War Against Prior Pay: The Pay Structure that Reinforces the Systemic Gender Discrimination in the Workplace*, 64 ST. LOUIS U. L.J. 113, 117 (2019).

53. *Women of Working Age*, U.S. DEP’T OF LABOR, <https://www.dol.gov/agencies/wb/data/latest-annual-data/working-women#Labor-Force-by-sex-race-and-hispanic-ethnicity> [<https://perma.cc/8QFJ-QXQD>] (last visited Sept. 29, 2021).

54. See *id.*

55. NAT’L EQUAL PAY TASK FORCE, FIFTY YEARS AFTER THE EQUAL PAY ACT 10 (2013), https://obamawhitehouse.archives.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf [<https://perma.cc/6DRA-EUYY>].

56. Whitley, *supra* note 9, at 55.

57. See Gottsacker, *supra* note 52, at 116.

improvement, but in recent years has stayed stagnant.⁵⁸ From 1973–1980, women continued to make about sixty-five percent of what their male counterparts made.⁵⁹ By 1990, however, the wage gap was twenty-eight percent, meaning the percentage of income received by women compared to their male counterparts was roughly seventy-one percent.⁶⁰ After this sharp increase, progress slowed, and women saw a mere five percent increase in their wages each decade compared to men, with the wage gap at about nineteen percent by 2010.⁶¹

i. Women's Participation in the Legal Profession

One of the first women to attend law school was Lemma Barkaloo, who attended Washington University in St. Louis School of Law starting in 1869 with one other woman, Phoebe Couzins.⁶² While Barkaloo did not graduate, she still gained admission to the bar and was the first female lawyer to try a case in a United States court.⁶³ Law schools began admitting female candidates to their program as early as the 1900s,⁶⁴ but women could not be admitted to the bar in every state until 1920.⁶⁵ The Great Depression further hindered women's progress breaking into the male-dominated legal profession.⁶⁶ The few women who did gain admission to the bar faced additional discrimination and sexism when seeking legal work. For example, women interviewing for legal jobs were often subjected to offensive and sexist questions, such as how they expected to be hired when a man with a family to support could be hired.⁶⁷ Still, women persisted and slowly began establishing a presence in the profession. For example, in 1939, almost fifteen percent of the lawyers in New York were women.⁶⁸

Notably, much of women's legal work during this time was for the government, which was not immune to gender-based pay discrimination either. For example, federal officials such as the U.S. District Attorney for the District

58. See THE WAGE GAP IS STAGNANT FOR A DECADE, NAT'L WOMEN'S L. CTR. (2016), <https://nwlc.org/wp-content/uploads/2016/09/Wage-Gap-Stagnant-2016-3.pdf> [<https://perma.cc/8UVF-97Y6>]; see also *Gender Wage Gap*, OECD, <https://data.oecd.org/earnwage/genter-wage-gap.htm> [<https://perma.cc/2TJL-37LF>] (last visited Feb. 21, 2022).

59. See *Gender Wage Gap*, *supra* note 58.

60. See *id.*

61. See *id.*

62. Audrey Wolfson Latourette, *Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives*, 39 VAL. U. L. REV. 859, 875 (2005); Karen Tokarz, *Lemma Barkaloo and Phoebe Couzins: Among the Nation's First Women Lawyers and Law School Graduates*, 6 WASH. U. J.L. & POL'Y 181, 182 (2001); Lemma Barkaloo's name is spelled two different ways in various sources, with one spelling her name as "Barkaloo" and the other spelling it as "Barkeloo".

63. Latourette, *supra* note 62, at 875–76.

64. See *id.* at 878–80.

65. Bowman, *supra* note 11, at 3.

66. *Id.* at 4.

67. *Id.*

68. *Id.* at 5.

of Columbia explicitly stated a refusal to hire women, claiming that women lacked the “cold dispassion” required for work in the legal profession.⁶⁹ Of the women who were able to get hired for legal jobs in the federal government, they faced pay discrimination and were less likely to retain their jobs for a substantial amount of time.⁷⁰

Women saw an increase in opportunities to join the legal profession during the 1940s.⁷¹ World War II resulted in many male lawyers leaving their desks for service in the armed forces, leaving firms with a labor shortage.⁷² Large law firms such as Ropes & Gray hired numerous women to make up for the loss in their workforce.⁷³ Yet, the women hired were quickly discouraged, often finding their work was that of support staff and not as “real” lawyers.⁷⁴

Moreover, even for the women who did break into large law firms, partnership prospects were bleak.⁷⁵ Using sexist rhetoric, partners in law firms explained why they were reluctant to hire or promote women.⁷⁶ Partners allegedly stated that women do not work as hard as men nor do clients enjoy working with them as much.⁷⁷ Much of the criticism of female lawyers from law firm partners also stemmed from a belief that female attorneys were loyal to their families over their firm, which was commonly used as an excuse to deny female attorneys pay raises.⁷⁸

Following the passage of the Civil Rights Act of 1964, specifically Title VII, women began to air their grievances against the “boys’ club”⁷⁹ of large law firms.⁸⁰ In 1971, women at New York area law firms engaged in a factual study that eventually revealed discriminatory experiences were still commonplace for female lawyers; they then filed a class action suit against firms such as Sullivan & Cromwell.⁸¹ The litigation was successful insofar as firms named in the suit agreed to follow hiring guidelines that would ensure more women received jobs.⁸² Nonetheless, these guidelines were essentially ineffective, as firms still excluded women from the male-dominated partnerships, sometimes described as

69. Karen M. Tani, *Portia’s Deal*, 87 CHI.-KENT L. REV. 549, 553 (2012).

70. *Id.* at 553–54.

71. Bowman, *supra* note 11, at 5–6.

72. *Id.*

73. *See id.* at 5.

74. *Id.* at 5–6.

75. *See, e.g.*, Bowman, *supra* note 11, at 5; Marc Brodherson, Laura McGee & Mariana Pires doe Reis, *Women in Law Firms*, MCKINSEY & CO. (2017), <https://www.mckinsey.com/~media/mckinsey/featured%20insights/gender%20equality/women%20in%20law%20firms/women-in-law-firms-final-103017.pdf> [https://perma.cc/KK4C-7NDG].

76. Bowman, *supra* note 11, at 12.

77. *Id.*

78. *Id.* at 13.

79. Elting, *supra* note 17.

80. *See* Bowman, *supra* note 11, at 12–14.

81. *Id.* at 14.

82. *Id.*

a clique.⁸³ Fifty years later, the problems of sexism and discrimination remain all too common within large law firms.

ii. A Modern Perspective on the EPA

Undoubtedly, strides have been made towards reaching the EPA's ultimate goal of equal pay for equal work. In June 2013, fifty years after the passage of the EPA, President Barack Obama's administration released a report discussing the progress made by the EPA.⁸⁴ The report recognized that the pay gap narrowed from women making only fifty-nine cents for every dollar made by men in 1963, to women making seventy-seven cents for every dollar made by male counterparts in 2011.⁸⁵ However, the report also acknowledged a significant pay gap remained,⁸⁶ noting that one of the impediments women still face to being on equal footing with their male counterparts is the "discriminatory barriers that exclude women from traditionally male dominated occupations, which pay more than traditionally female occupations;"⁸⁷ the report did not state how to further narrow the gender pay gap.

The legal profession in modern times is still male-dominated, as evidenced by statistics regarding first-year associate classes at law firms, law school graduating classes, and law school faculty makeup. Women's law school enrollment surpassed men's law school enrollment in 2016, and by 2018, women comprised over fifty-one percent of incoming law students.⁸⁸ While this shows a trend of increasing participation in the legal field by women, employment statistics highlight the lack of women in high-level legal positions.⁸⁹ In the 2011–2012 academic year at Yale Law School, nearly eighty percent of law school faculty were male.⁹⁰ Regardless of women's increased law school enrollment, men continue to hold positions of power in the field and academia.

When looking at the gender makeup of first-year associates in law firms, women make up forty-eight percent of incoming associate classes.⁹¹ However, this promising statistic is diminished when looking up the chain of command within law firms. Women represent a mere nineteen percent of equity partners in law firms while only twenty-five percent are managing partners.⁹² Moreover, for

83. *Id.* at 15–16.

84. NAT'L EQUAL PAY TASK FORCE, *supra* note 55.

85. *Id.* at 6.

86. *Id.* at 23.

87. *Id.* at 34.

88. Abigail Rowe, *The Party Paradox*, BEST LAWS. (June 25, 2018, 1:03 PM), <https://www.bestlawyers.com/article/women-now-outnumber-men-in-law-school/2029#:~:text=Women%20were%2050.3%20percent%20of,industry's%20progress%20on%20gender%20equality> [<https://perma.cc/NCH6-3LNS>].

89. *See* Brodherson et al., *supra* note 75.

90. Ruth Anne French-Hodson, *The Continuing Gender Gap in Legal Education*, FED. L. 80, 87 (July 2014), <https://www.fedbar.org/wp-content/uploads/2014/07/feature9-jul14-pdf-1.pdf> [<https://perma.cc/KS7P-N83H>].

91. While women made up a total of forty-seven percent of law firm junior associates, they made up only twenty-five percent of managing partners and only nineteen percent of equity partners. Brodherson et al., *supra* note 75.

92. *Id.*

every 100 female associates who receive a promotion to partnership, 141 male associates receive the same promotion.⁹³ This suggests a general trend that as lawyers move higher up the chain of command within a law firm it is increasingly likely the lawyer is male.⁹⁴

iii. Women in Other Male-Dominated Professions

Disparities in pay are not just prevalent in the legal profession. More obvious than anywhere else is the pay disparity among the field of professional athletes. Comparisons between male NBA players' and female NBA players' salaries show significant differences.⁹⁵ The average salary for a male NBA player in 2007 was a staggering 4.5 million dollars, compared to the average salary for a female NBA player of a mere \$55,000.⁹⁶ Pay ceilings further illustrate how wide the gap is between male and female athletes' earnings. In 2006, the highest paid male athlete pulled in eighty-seven million dollars, compared to the highest paid female athlete, who earned just shy of ten million.⁹⁷

Data from Johns Hopkins Medicine showed that women comprised a mere six percent of neurosurgeons in the United States.⁹⁸ The residency director at Johns Hopkins attributes the lack of women entering the profession to a number of factors including the boys' club mentality of the profession and the long, unusual hours worked by surgeons.⁹⁹ A global study regarding women's participation in surgery found that a lack of mentorship and postgraduate opportunities along with a lack of female role models and hostility towards female practitioners contributed further to the small percentage of women pursuing a career in surgery.¹⁰⁰

Additionally, the healthcare field shows an alarming trend of the pay gap widening, rather than shrinking.¹⁰¹ From 2018 to 2019, for example, male primary care physicians went from earning eighteen percent more than their female counterparts to twenty-five percent more than their female

93. *Id.* at 4.

94. *See id.*

95. Ann Travers, *The Sports Nexus and Gender Injustice*, 2 *STUDS. SOC. JUST.* 79, 84–85 (2008).

96. *Id.*

97. *Id.*

98. *Breaking Into an Old Boys' Club*, *JOHNS HOPKINS MED.* (June 1, 2009), https://www.hopkinsmedicine.org/news/publications/neuronow/summer_2009/breaking_into_an_old_boys_club [https://perma.cc/DS8X-UFVR].

99. *Id.*

100. I. H. Marks, A. Diaz, M. Keem, Seyedeh-Sanam Ladi-Sevedian, G.S. Philipo, H. Munir, T. I. Pomerani, H.M. Sughayer, N. Peter, C. Layy & D.C. Chang, *Barriers to Women Entering Surgical Careers: A Global Study into Medical Student Perceptions*, 44 *WORLD J. SURGERY* 37, 38–44 (2020).

101. *See* Jaime Ducharme, *The Gender Pay Gap for Doctors is Getting Worse. Here's What Women Make Compared to Men*, *TIME* (Apr. 10, 2019, 11:27 AM), <https://time.com/5566602/doctor-pay-gap/> [https://perma.cc/MM4K-5AWU].

counterparts.¹⁰² Among specialists, the pay gap was even greater, with male specialists making over thirty percent more than their female counterparts.¹⁰³

At a time when women educationally outperform men, receiving more degrees in higher education than men do, the question remains: why do women, especially in elite professions, continue to make less than their male counterparts?¹⁰⁴ Nearly sixty years later, it is clear that the EPA has not done its job.

II. EPA CASELAW AND A LACK OF PROGRESS IN ACHIEVING EQUAL PAY FOR EQUAL WORK

A. Overview of EPA Claims

The primary elements of the Equal Pay Act are found in Chapter 29 of the United States Code.¹⁰⁵ The relevant text states:

No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex¹⁰⁶

The statutory language can be broken into two distinct parts. First, the statute discusses the qualifications required for an employer to fall under the EPA and for a plaintiff to make a successful EPA claim. Second, the statute lists the four affirmative defenses employers have to successful EPA claims.

i. Prima Facie EPA Claim Requirements

A prima facie EPA claim requires a showing that (1) the jobs are “substantially equal,” and (2) that equal pay was not received by a person of one gender for the substantially equal work of a person of another gender.¹⁰⁷ The text clearly supports requiring that plaintiffs show their claim is based on a pay disparity “ . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working

102. *Id.*

103. *Id.*

104. NAT’L EQUAL PAY TASK FORCE, *supra* note 55.

105. 29 U.S.C. § 206(d)(1).

106. *Id.*

107. See, e.g., *id.*; *Black v. Barrett Bus. Servs.*, No. 18-CV-00096, 2019 U.S. Dist. LEXIS 88226, at *8–9 (D. Idaho); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

conditions”¹⁰⁸ As the following discussion demonstrates, this somewhat ambiguous statutory language makes bringing a successful EPA claim complicated and subject to non-uniform treatment by federal courts.¹⁰⁹

ii. Affirmative Defenses to EPA Claims

The EPA expressly provides four affirmative defenses available to employers facing an EPA claim.¹¹⁰ The first three affirmative defenses are straightforward, allowing an employer to justify a pay differential between employees of different sexes due to a seniority system, a merit system, or a system based on quantity and quality of work.¹¹¹ Much of the litigation surrounding the EPA rests on the fourth affirmative defense, which allows a pay differential based on “any other factor other than sex.”¹¹² The Supreme Court determined in *Corning Glass Works v. Brennan* that the structure of the EPA requires that once a prima facie EPA claim is established, the burden of proof shifts to the employer to show that a pay differential is justified under an EPA affirmative defense.¹¹³

B. Competing Interpretations of the EPA

EPA caselaw has been anything but straightforward, as courts have struggled to find a uniform meaning of certain statutory provisions. The differing interpretations and modes of analysis used by courts mostly pertain to what constitutes “substantially equal”¹¹⁴ work for purposes of the EPA and whether employers have shown pay differentials are based on “any other factor other than sex.”¹¹⁵

i. Competing Interpretations of “Substantially Equal” Work

As previously mentioned, a prima facie case of EPA discrimination requires a showing of unequal pay for “substantially equal work.”¹¹⁶ The statute provides that substantially equal work is work that requires “equal skill, effort, and responsibility, and which are performed under similar working conditions.”¹¹⁷

108. See 26 U.S.C. § 206.

109. *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069 (9th Cir. 1996) (holding that extra responsibilities assigned to a male coach meant that a female coach’s work was not “substantially equal” to the male coach’s work).

110. 26 U.S.C. § 206.

111. See *id.*

112. See, e.g., *id.*; Tufarolo, *supra* note 10, at 311; *Corning Glass Works*, 417 U.S. at 188.

113. *Corning Glass Works*, 417 U.S. at 196.

114. See, e.g., *Brobst v. Columbus Servs. Int’l*, 761 F.2d 148 (3d Cir. 1985); *Brewster v. Barnes*, 788 F.2d 985 (4th Cir. 1986); *Fallon v. Illinois*, 882 F.2d 1206 (7th Cir. 1989); *Brennan v. S. Davis Cmty. Hosp.*, 538 F.2d 859 (10th Cir. 1976).

115. See, e.g., *Covington v. S. Ill. Univ.*, 816 F.2d 317 (7th Cir. 1987); *EEOC v. J.C. Penney Co.*, 843 F.2d 249 (6th Cir. 1988); *Horner v. Mary Inst.*, 613 F.2d 706 (8th Cir. 1980).

116. See Equal Pay Act of 1963, Pub. L. No. 88-38, § 206(d)(1), 77 Stat. 56 (codified as amended at 29 U.S.C. § 206).

117. *Id.*

The Department of Labor (DOL) released its own standards for determining whether jobs are substantially equal,¹¹⁸ standards which courts apply using their own interpretation.¹¹⁹

The DOL standards for interpreting EPA claims are seemingly straightforward. According to the DOL standards, three elements of job duties must be considered when determining if a *prima facie* EPA claim involved “substantially equal work”:¹²⁰ specifically, the skill, effort, and responsibility of two purportedly “substantially equal” jobs.¹²¹ The DOL defines skill as “includ[ing] consideration of such factors as experience, training, education, and ability.”¹²² The DOL further clarified that “[skill] must be measured in terms of the performance requirements of the job.”¹²³ The second element, effort, is defined by the DOL as “concerned with the measurement of the physical or mental exertion needed for the performance of a job. Job factors which cause mental fatigue and stress, as well as those which alleviate fatigue, are to be considered”¹²⁴ Finally, the third element, responsibility, is defined as, “concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation.”¹²⁵

The Seventh Circuit has incorporated the DOL standards into their EPA jurisprudence. For example, in *Cullen v. Indiana University Board of Trustees*, the Seventh Circuit inquired into the skill, effort, and responsibility assigned to employees in similar jobs.¹²⁶ In *Cullen*, the plaintiff was the director of a respiratory therapy program, while the employee comparable to the plaintiff served as the director of a physical therapy program.¹²⁷ The parties made unequal amounts of money, with the male employee receiving much higher compensation.¹²⁸ In its analysis, the court first determined that the jobs required different skills, since the male employee’s position required the creation of graduate programs while the female plaintiff’s position did not.¹²⁹ Next, the court determined that the jobs required different amounts of effort, asserting that one job’s requirement of creating masters and doctorate programs necessitated more effort than the plaintiff’s allegedly similar task of making requests for funding.¹³⁰ Finally, the court looked at responsibility, again concluding that the extra responsibility of designing a graduate program for one job weighed against the

118. See 29 C.F.R. § 1620.15 (2021).

119. See, e.g., *Cavuoto v. Oxford Health Plans, Inc.*, 99-CV-00446, 2001 U.S. Dist. LEXIS 14357 (D. Conn. June 13, 2001); *Georgen-Saad v. Tex. Mut. Ins. Co.*, 195 F. Supp. 2d 853 (W.D. Tex. 2002).

120. See 29 C.F.R. § 1620.14 (2021).

121. See *id.*

122. 29 C.F.R. § 1620.15(a) (2021).

123. *Id.*

124. 29 C.F.R. § 1620.16(a) (2021).

125. 29 C.F.R. § 1620.17(a) (2021).

126. See *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 698–700 (7th Cir. 2003).

127. *Id.* at 696–97.

128. *Id.*

129. *Id.* at 699.

130. *Id.*

jobs being substantially equal.¹³¹ Therefore, because the creation of a graduate program required enhanced skill, effort, and responsibility by the male employee as compared to the female's position, the Seventh Circuit upheld the pay differential as permissible.

Another approach courts have taken is a "checklist" approach, where tasks of two employees are compared in name to illuminate whether the work was "substantially equal."¹³² This approach was outlined in *Cavuoto v. Oxford Health Plans, Inc.*, where the court determined the plaintiff failed to establish her EPA claim, because a comparison of the tasks in name only¹³³ showed differences in what employees were expected to do.¹³⁴ The court found that the plaintiff had the burden of proving specific facts to show the differing job duties required equal skill, effort, and responsibility, a burden she failed to meet.¹³⁵ In a later case, a plaintiff's EPA claim was struck down even when the jobs held by plaintiff and her higher-paid male counterpart were the same in title.¹³⁶ The court pointed to the failure to list specifically the duties of the two employees, and endorsed the "checklist" approach, stating that job content is the standard under the EPA, not job titles.¹³⁷

A third approach taken by courts is the "common core" approach. The common core approach closely mirrors the DOL standards.¹³⁸ This approach, adopted by the Third, Fourth, Seventh, and Tenth Circuits,¹³⁹ asks whether "a significant portion of the two jobs is identical."¹⁴⁰ The court then inquires whether there are differing or additional tasks that make the work substantially different.¹⁴¹ Notably, the inquiry into the common core of tasks usually turns on the second prong of inquiry—where courts analyze whether differing or additional tasks makes the work of one employee substantially different, thus justifying a pay differential.¹⁴²

The *Cullen* case helps illustrate the similarities between the common core approach and the DOL approach.¹⁴³ In *Cullen*, the court recognized the director

131. *Id.* at 700.

132. *See, e.g.,* *Cavuoto v. Oxford Health Plans, Inc.*, 99-CV-00446, 2001 U.S. Dist. LEXIS 14357, at *15–16 (D. Conn. June 13, 2001).

133. *See id.* at *18–20 (holding that a "payroll manager" did not have substantially equal work to an "accounts-payable manager").

134. *Id.*

135. *Id.* at 19–20.

136. *Fayson v. Kaleida Health, Inc.*, 00-CV-0860E, 2002 U.S. Dist. LEXIS 18591, at *35 (W.D.N.Y. Sept. 18, 2002).

137. *See id.*

138. *See, e.g., supra* text accompanying notes 120–25.

139. *See, e.g.,* *Brobst v. Columbus Servs. Int'l*, 761 F.2d 148 (3d Cir. 1985); *Brewster v. Barnes*, 788 F.2d 985 (4th Cir. 1986); *Fallon v. Illinois*, 882 F.2d 1206 (7th Cir. 1989); *Brennan v. S. Davis Cmty. Hosp.*, 538 F.2d 859 (10th Cir. 1976).

140. *Brobst*, 761 F.2d at 156.

141. *Id.*

142. *See, e.g.,* *Brobst*, 761 F.2d at 156; *Barnes*, 788 F.2d at 991; *Fallon*, 882 F.2d at 1209; *Cullen v. Ind. Univ. Bd. Of Trs.*, 338 F.3d 693, 699 (7th Cir. 2003); *Brennan*, 538 F.2d at 863.

143. *See Cullen*, 338 F.3d 693.

of the respiratory program and the director of the physical therapy program had a “common core” of responsibilities.¹⁴⁴ However, the court determined, pursuant to the second prong of the inquiry, that the two jobs were not substantially equal, since the physical therapy program director was also tasked with creating a graduate program.¹⁴⁵ The court vaguely mentioned the different levels of “ability” the jobs required by mentioning different fundraising requirements, the number of employees supervised, the amount of money the program generated, and the different levels of education the directors held.¹⁴⁶ Thus, although there was a common core of tasks undertaken by the comparators, the significant difference in responsibility warranted the pay differential.¹⁴⁷ This analysis closely mirrors the DOL standards in that it focuses on whether any additional job duties of one position are of such a significant nature as to justify a pay differential over another, even if there is a common core of tasks between the positions.¹⁴⁸

Finally, in *Brennan v. South Davis Community Hospital*, the Tenth Circuit Court of Appeals accepted the common core approach.¹⁴⁹ In *Brennan*, the Secretary of Labor brought the action against a hospital, alleging that female aides were paid less than their male counterparts.¹⁵⁰ The hospital tried to justify the pay differential on additional responsibilities of one job over another, again conceding that the common core of the tasks were similar.¹⁵¹ However, the court here determined that “extra tasks” did not make the differences between work done by female aides and male orderlies different, and that the common core of tasks was similar as such to create “substantially equal” work requirements.¹⁵² The court reached this determination since “both aides and orderlies were primarily involved in basic patient care and that any differences in duties did not involve significantly greater amounts of skill, effort or responsibility.”¹⁵³ Rather, the extra tasks in the aggregate lacked indication of a higher skill requirement for one position over the other.¹⁵⁴

ii. Court Interpretations of “Any Other Factor Other than Sex.”

A little over a decade after the enactment of the EPA, the United States Supreme Court first considered the scope of the fourth affirmative defense to EPA claims in the case of *Corning Glass Works v. Brennan*.¹⁵⁵ Early in the

144. *Id.* at 699–700.

145. *Id.*

146. The court noted the issue is comparison of jobs, not of qualifications. *Id.* Nonetheless, the court determined different levels of education could be “significant.” *Id.* at 699–701.

147. *See id.*

148. *See supra* notes 120–25 and accompanying text.

149. *See Brennan v. S. Davis Cmty. Hosp.*, 538 F.2d 859 (10th Cir. 1976).

150. *See id.* at 860.

151. *Id.* at 861.

152. *See id.* at 863–64.

153. *Id.* at 863.

154. *Id.* at 862–63.

155. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974).

opinion, the Supreme Court referred to this fourth affirmative defense as a “general catchall provision,”¹⁵⁶ and since then, circuits have disagreed about what factors fall under the umbrella of “any other factor other than sex.”¹⁵⁷ Since the *Corning Glass Works* decision, circuits have taken different approaches to interpreting “any other factor other than sex,” with the Third and Tenth Circuits taking a more employee-friendly approach compared to the Sixth Circuit.¹⁵⁸

In *Usery v. Allegheny County Institution*, the Third Circuit found limitations to the “any other factor other than sex” affirmative defense within the EPA to ensure it did not act as a boilerplate bar to all wage discrimination claims.¹⁵⁹ In *Usery*, the defendant employed male barbers and female beauticians, with the male barbers making \$165 more a month than the beauticians.¹⁶⁰ The court found that the work completed by the two positions was substantially similar, and the defendant responded using the “any other factor other than sex” affirmative defense.¹⁶¹ The defendant argued the pay differential was justified since separate licensing was needed for a barber versus a beautician.¹⁶² The Third Circuit rejected this argument, finding that the existence of separate statutory schemes and licensing for the two jobs did not constitute “any other factor other than sex” for purposes of the EPA.¹⁶³ The Third Circuit emphasized that job content, not classification, was the controlling factor in their decision, and that since both positions completed equal work, the need for a different license to be a barber versus a beautician was not a relevant factor.¹⁶⁴

Sixth Circuit case law trends towards a less employee-friendly interpretation of the EPA that holds employers to a low standard when using the “any other factor other than sex” affirmative defense.¹⁶⁵ In *Ambrose v. Summit Polymers, Inc.*, the plaintiff appealed a district court order entering summary judgment in favor of her employer.¹⁶⁶ The plaintiff alleged she performed equal work to that of her male colleagues with the same job title but was paid \$10,000 less per year.¹⁶⁷ The court agreed that the work completed by the plaintiff and a male comparator was equal for purposes of the EPA but found that the defendant employer met its burden of showing the pay differential was based on “any other

156. *Id.*

157. *See, e.g.,* *Covington v. S. Ill. Univ.*, 816 F.2d 317, 321–22 (7th Cir. 1987); *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988); *Horner v. Mary Inst.*, 613 F.2d 706, 713–14 (8th Cir. 1980).

158. *See Usery v. Allegheny Cnty. Inst. Dist.*, 544 F.2d 148 (3d Cir. 1976); *see also* *Brennan v. S. Davis Cmty. Hosp.*, 538 F.2d 859 (10th Cir. 1976).

159. *See Usery*, 544 F.2d at 153–54 (3d Cir. 1976). The court noted a lack of specific factors that fall under “any other factor other than sex,” and a lack of guidance as to determining appropriate factors. *Id.*

160. *Id.* at 151.

161. *Id.* at 152–54.

162. *Id.* at 154.

163. *Id.*

164. *Id.*

165. *See Ambrose v. Summit Polymers, Inc.*, 172 F. App’x 103 (6th Cir. 2006).

166. *Id.*

167. *Id.* at 104.

factor other than sex.”¹⁶⁸ The court recognized that equality of work, not equality of workers’ skill and education, was relevant in establishing an EPA case, but then went on to hold that prior experience and prior salary could constitute “any other factor other than sex” for purposes of the EPA’s affirmative defense.¹⁶⁹ Thus, the court found that the plaintiff having less experience was “any other factor other than sex” and justified a pay differential for equal work.¹⁷⁰

III. REVISING THE EPA TO BETTER ACHIEVE ITS LEGISLATIVE PURPOSE

Small revisions to the text of the EPA would vastly improve its ability to fulfill its legislative purpose of equal pay for equal work regardless of sex. Rewriting the EPA would also ensure more pay equality in the legal profession and help to eliminate the patriarchal structure underlying the legal profession.

A. Tolton and Savignac as Examples of the EPA’s Continued Failure

A closer analysis of *Tolton v. Day* and *Savignac v. Day* illustrates the EPA’s continued failure in modern times. As discussed below, part of the difficulty faced by litigants bringing an EPA claim is due to the secretive nature of the pay structure at law firms such as Jones Day. The level of specificity required for EPA pleadings combined with the lack of information available to associates on the work and salaries of their peers results in a contentious process often thwarted by a motion to dismiss.¹⁷¹ This cycle of hostility and discrimination is surely not aligned with the goals of the EPA and thus demands further scrutiny.

i. *Tolton v. Day*

Tolton v. Day is an example of a case that would survive a motion to dismiss if the EPA required less specificity regarding pay to establish a prima facie Equal Protection claim.¹⁷² *Tolton v. Day* consolidated the claims of nine plaintiffs who alleged they were paid less than their male comparators while performing substantially similar work.¹⁷³ Attorney and named plaintiff Nalib Tolton’s suit faced a motion to dismiss from defendant law firm Jones Day, which argued for dismissal because plaintiffs were unable to specifically identify comparable male attorneys that were paid more than the plaintiffs.¹⁷⁴ The plaintiffs based their claim on having the same job codes and titles as their male counterparts, but the court determined this was not enough, finding a lack of specific facts to show

168. *Id.* at 108.

169. *Id.* at 106–07.

170. *See id.* at 107.

171. *See, e.g., Tolton v. Day*, No. 19-945, 2020 U.S. Dist. LEXIS 87793, at *106 (D.D.C. May 19, 2020); *Savignac v. Day*, 486 F. Supp. 3d 14 (D.D.C. Sep. 4, 2020).

172. *See Tolton*, 2020 U.S. Dist. LEXIS 87793, at *97–98.

173. *See id.*

174. *See id.*

that the plaintiffs performed substantially equal work.¹⁷⁵ Thus, many plaintiffs' claims were dismissed.¹⁷⁶

Attorney Nalib Tolton was included in this group of plaintiffs who had their claims thrown out, as the court rejected her general contention that all associates perform substantially similar work.¹⁷⁷ It bears emphasizing that despite Tolton sharing a job title and amount of tenure with a male comparator at Jones Day,¹⁷⁸ which strongly suggests both individuals performed substantially similar work, the court still found that Tolton failed to meet her burden.¹⁷⁹ An amendment to the EPA modifying the standard for establishing a prima facie claim through a showing of shared job title and tenure would ensure litigants such as Tolton do not have otherwise valid claims thrown out.

ii. *Savignac v. Day*

*Savignac v. Day*¹⁸⁰ is another consolidated case consisting of EPA challenges, among other claims, against law firm Jones Day.¹⁸¹ This case, like *Tolton*, shows the high bar faced by plaintiffs making an EPA claim. Attorney Mark Savignac and Attorney Julia Sheketoff joined Jones Day as associates in 2017 and 2014, respectively.¹⁸² Attorney Sheketoff claimed an EPA violation by Jones Day, alleging that she received a raise smaller than that of her male colleagues within the same department.¹⁸³ Sheketoff alleged her lower salary was due to a negative review by a partner at the firm who wrote it only because Sheketoff is a woman.¹⁸⁴ When the court evaluated Sheketoff's EPA claims against a motion to dismiss, the court held that Sheketoff did not allege how her work was "substantially similar" to that of her male colleagues, and therefore dismissed her EPA claim.¹⁸⁵ Similar to *Tolton*, Jones Day argued that not all lawyers perform the same and similar functions, regardless of matching job titles and work being performed in the department.¹⁸⁶

The failure of Sheketoff's claim against a motion to dismiss further illustrates the unreasonably high bar for EPA claims. Even though Sheketoff and her male colleagues held the same job title and worked in the same department

175. *See id.* at *98, *104.

176. *Id.* at *106–10.

177. *Id.* at *108–09.

178. *Id.* at *11.

179. *Id.* at *108–09.

180. During the publication process, the litigants in *Savignac v. Day* filed a motion to reconsider. This motion was denied, with the court finding that Sheketoff failed to show she and the male comparators worked in jobs that required equal skill, effort, and responsibility, and were performed under similar working conditions. *Savignac v. Day*, Civil Action No. 19-2443, 2021 U.S. Dist. LEXIS 81681, at *25–27 (D.D.C. Apr. 28, 2021).

181. *Savignac v. Day*, 486 F. Supp. 3d 14, 19 (D.D.C. 2020).

182. *Id.*

183. *Id.* at 20.

184. *Id.*

185. *Id.* at 31.

186. *Id.*

of Jones Day,¹⁸⁷ Sheketoff's failure to allege that she worked as many hours or as "hard" as those with higher salaries caused her claim to fall apart.¹⁸⁸ The court found that Sheketoff's allegations that her counterparts had the same level of seniority and worked in the same department was not enough to show "substantially similar" work.¹⁸⁹ As a practical matter, this is an unjust ruling from the court, as the black-box compensation system bars employees from discussing salaries. Moreover, if Jones Day indeed maintains that some similarly situated associates work more hours and work "harder" than others, this information is not available to employees due to the black-box system. Finally, even if it is acknowledged that some associates do perform substantially different work than others for EPA purposes (thereby justifying a pay differential), this information can assuredly be presented at later stages of the litigation to defend a claim. A solution exists through an amended EPA standard for establishing a prima facie case: allowing claims to survive a motion to dismiss purely based on a showing of the same job title and tenure. Furthermore, as a more appropriate remedy, employers would still be afforded the opportunity to rebut the claim at a subsequent procedural stage.

B. Analysis of the EPA's Impact in the Legal Profession Versus Other Traditionally Male-Dominated Fields

Some other traditionally male-dominated fields worth examining include the military and athletics. EPA claims in all fields are subject to the same prima facie requirements; however, nuances of the professions combined with the prima facie EPA claim requirements create different environments in which an EPA claim is more likely to succeed.

As discussed, a notable difference between EPA claims in the legal profession versus EPA claims in other professions involves the ability to compare salaries. The secretive nature of pay structures within many law firms such as Jones Day compared with more regulated work, such as government jobs, means it is often harder for a litigant in the legal profession to prove one of the basic requirements of the EPA: specifically demonstrating that wages given to male counterparts are higher despite substantially equal work. Transparency in salary can be the defining factor in determining whether a prima facie EPA claim exists.

A traditionally male field which has seen some success with prima facie EPA claims is the military. In *Brooks v. United States*, a plaintiff from the Center for Naval Engineering (CNE) alleged receiving less pay than her similarly situated male colleague.¹⁹⁰ Although the plaintiff's claim was ultimately dismissed pursuant to an affirmative defense to the EPA, the plaintiff still made a successful prima facie showing of pay discrimination based on gender.¹⁹¹ The

187. *Id.* at 20.

188. *Id.* at 31.

189. *Id.*

190. *Brooks v. United States*, 101 Fed. Cl. 340 (2011).

191. *Id.* at 346–47.

plaintiff's evidence of the EPA violation was bolstered by the regulated pay scales mandated for employees in the CNE.¹⁹²

In athletics, pay transparency has also helped boost EPA claims. For instance, the United States sued the University of New Mexico on behalf of the university's women's track and field assistant head coach, alleging the former employee was paid less than her male counterparts while performing substantially similar work.¹⁹³ The court found that the employee provided sufficient evidence she was paid less than the men's track and field assistant coaches.¹⁹⁴

C. *Suggested Revisions to the EPA*

Simple revisions to the EPA could combat its inability to effectively help litigants in the legal profession receive equal pay for equal work. As previously stated, one of the largest bars to successful EPA claims comes from the steep requirements for a prima facie case, with sixty-eight percent of EPA claims in federal courts failing at the summary judgment stage.¹⁹⁵

Currently, a prima facie claim requires a showing that (1) jobs compared are "substantially equal" and (2) that equal pay was not received by a person of one gender for the substantially equal work of a person of another gender.¹⁹⁶ Both of these elements require revision in order to better serve EPA litigants. The first element, "substantially equal," should be modified to "substantially or facially equal." The second element should be reworked to allow a prima facie case to proceed past the pleading stage even if evidence is not immediately available to show the exact difference in pay. This modification should allow claims to proceed when there is a reasonable suspicion that equal pay is not received by a person of one gender for the substantially equal work of a person of another gender. In theory, discovery processes would then allow the plaintiff access to information typically unavailable in black-box pay schemes.

Changing the language of "substantially equal" to "substantially or facially equal" could help remedy many failed EPA claims. Under this proposed standard, for the first element of a prima facie case to be met, a plaintiff would only need to show that their job and the job of a comparator have the same name or title and a similar tenure on the job, and thus the work completed is facially equal.

Of course, a plaintiff could take the route of giving a more factually detailed claim that shows substantial similarity between the jobs, but that should not be a requirement early in the litigation. Given that EPA cases can lead to extensive

192. *Id.* at 342–43.

193. *United States v. N.M. State Univ.*, No. 16-CV-911, 2018 U.S. Dist. LEXIS 19003, at *13 (D.N.M. Feb. 6, 2018).

194. *Id.*

195. Eisenberg, *supra* note 7, at 817.

196. *See* 29 U.S.C. § 206(d)(1); *Black v. Barrett Bus. Servs.*, No. 18-CV-00096, 2019 U.S. Dist. LEXIS 88226, at *8–9 (D. Idaho); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

discovery,¹⁹⁷ the raw pay data is likely to be turned over to the court one way or another. However, requiring a plaintiff to know such extensive pay data between themselves and a comparator before bringing a claim significantly disadvantages plaintiffs working in fields that keep such information secretive—such as Attorney Tolton’s at Jones Day.¹⁹⁸

i. Ensuring Uniformity and Fairness in EPA Jurisprudence

As a less drastic alternative to revising the text of the EPA, the Supreme Court could set a standard for interpreting EPA claims to resolve the ambiguities between circuit interpretations. Using the “common core” approach of *Cullen v. Indiana University Board of Trustees*,¹⁹⁹ litigants would only need to show that the compared jobs involved the same common core of tasks, and minimal extra duties or responsibilities to bring a successful EPA claim. However, this interpretation keeps in place some of the barriers to an EPA claim. The approach fails to account for when information on salary or job duties is unavailable, as was the case in both *Tolton* and *Savignac*.²⁰⁰ A plaintiff can allege completing the same common core of tasks but, without specific facts, would fail to meet the pleading standard required under the EPA.²⁰¹ Nonetheless, the common core approach has been effective in consistently striking down gender-based pay differentials that are not sufficiently rooted in additional skill, effort, or responsibility, in accordance with the language of the EPA.²⁰²

ii. Policy Solutions to Combat the Boys’ Club and Black-Box Pay Structures in Elite Professions

As discussed, much of the EPA’s failure comes from patriarchal structures within work environments as opposed to the statute itself. Both the black-box pay scales and the boys’ clubs of large law firms need to be reconsidered for the EPA to properly function.

Ideally, Congress should pass legislation to provide that employers engaging in these black-box pay scales cannot have EPA claims dismissed due to lack of specificity regarding salaries. This would allow companies that insist on the black-box pay scale to keep their preferred method of determining compensation. At the same time, this method would prevent these employers

197. See, e.g., *EEOC v. Universal Underwriters Ins. Co.*, 653 F.2d 1243, 1244 (8th Cir. 1981); *Lang v. Kohl’s Food Stores, Inc.*, 217 F.3d 919, 922 (7th Cir. 2000); *Moore v. Publicis Groupe SA*, No. 11 Civ. 1279, 2012 U.S. Dist. LEXIS 92675, at *10 (S.D.N.Y. June 28, 2012).

198. See *Tolton v. Day*, No. 19-945, 2020 U.S. Dist. LEXIS 87793 (D.D.C. May 19, 2020); see also *Savignac v. Day*, 486 F. Supp. 3d 14 (D.D.C. 2020).

199. *Supra* text accompanying notes 144–48.

200. See *Tolton*, 2020 U.S. Dist. LEXIS 87793; *Savignac*, 486 F. Supp. 3d, at 19.

201. The EPA requires a plaintiff to show their work is “substantially equal” to that of a comparator who is paid more. An EPA pleading must have more than “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements” to make it past the pleading stage. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

202. See, e.g., *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693 (7th Cir. 2003); *Brennan v. S. Davis Cmty. Hosp.*, 538 F.2d 859 (10th Cir. 1976).

from the apparent immunity to EPA legislation they enjoy due to their pay structure. Through this type of legislation, Congress would send a clear message that black-box pay structures will not offer immunity from EPA claims, and in doing so, encourage employers to opt for a more transparent pay structure.

Dismantling the boys' club culture in large law firms proves to be more difficult, as it is often impossible to infiltrate a boys' club and change it from within.²⁰³ Ideally, an independent regulatory agency would oversee the management and hiring of large law firms and force those firms to provide transparent explanations about why one employee was hired or received a promotion over another. While this may not immediately eradicate the boys' club culture, this is one step towards increased accountability and transparency in the workplace. Oversight by an independent regulatory agency would act as a natural way to avoid secretive hiring and promotion processes often common in boys' club cultures.²⁰⁴

CONCLUSION

Without a revision to the EPA or a more lenient pleading standard, the legislative goal of equal pay for equal work regardless of sex will not be met. Given that nearly sixty years have passed since the enactment of the EPA²⁰⁵ and there is still a significant pay gap between men and women working equal jobs, action is undoubtedly needed to make the EPA more effective. Congress should revisit the EPA and amend its standard for establishing prima facie claims to ease the burden of showing that work is "substantially similar." The result of this changed legislation would be an increased number of claims surviving the pleading stage, where currently many claims fail in large part because of employer pay secrecy policies. Alternatively, the Supreme Court should take up and affirm a modern EPA case, such as *Rizo v. Yovino*²⁰⁶ and use the opinion to establish the "common core"²⁰⁷ approach as the correct lens to analyze EPA claims. Not only would the ambiguities regarding statutory interpretations be resolved, but the EPA would be better positioned to serve its legislative purpose.

To conclude: if the EPA's high bar for establishing a prima facie case remains unadjusted, the EPA is likely to continue to fail women seeking equal pay for equal work. This is especially true in professions that are historically male-dominated and use black-box pay systems. The EPA provides many plaintiffs the opportunity to prove discriminatory pay based on gender but has still failed to further narrow the pay gap since 2016. In an era of social reckoning, it is embarrassing that the text of decades-old legislation meant to combat gender inequalities is still unable to effectively do so. The purpose of the EPA was to

203. Elting, *supra* note 17.

204. *See id.*

205. Ross & McDermott, Jr., *supra* note 8.

206. In *Rizo*, the Ninth Circuit overruled *Kouba* and held that prior pay does not qualify as "any other factor other than sex" to beat a prima facie EPA case. *Rizo v. Yovino*, 950 F.3d 1217, 1229 (9th Cir. 2019).

207. *See supra* text accompanying notes 144–48.

remedy employment discrimination in the private sector.²⁰⁸ Without a remedy to the shortcomings of the EPA itself, private employment discrimination is likely to continue for at least another sixty years.

208. See Ross & McDermott, Jr., *supra* note 8, at 5 n.26.

RECALCULATING ESSA TO ACCOUNT FOR “EVERY STUDENT:” THE NEED TO ELIMINATE “SUBTRACTIVE SCHOOLING” AMONG LATINO BOYS AND FUND CULTURALLY RESPONSIVE TEACHING

Veronica A. Mantilla^{†}*

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From the moment of his birth it is whispered in his ears that Latin[o] boys don't cry. And the first time he does, God will open up the sky and say, "How dare you? Vulnerability is not an ability I blessed you with. There is no room for those tears. Suck it up, boy!"

– Jorge Rodriguez-Jimenez¹

INTRODUCTION

"Boys don't cry, you are a man," is the message my student,² Manny, recalls from his earliest confrontation with machismo. The incident involved an encounter with his father when Manny was crying as a toddler. When Manny could not articulate a reason to explain his emotions, his father said, "stop crying or I will hit you so you can actually cry about something." This experience taught him that "being a man," according to his father's worldview, required not showing emotion or weakness.

Manny is now a first-generation high school graduate and the oldest child of two Mexican migrants. Manny aspires to be a professional boxer, attend college, and is currently waiting to start his military training. He is family-oriented, strong-headed, and motivated. In school, Manny was known for his leadership, athletic ability, and erratic behavior.

Manny's story—one of emotional trauma beginning at a young age—is very near and dear to me, but it is not unusual. Arguably, Manny's dedication to his own improvement puts a positive spin on a very serious and systemic problem. Manny, unlike many other Latino boys, was never entangled in the legal system and proceeded to graduate high school, despite the increased risk of dropping out. Ultimately, Manny and I agreed that some of his issues could have been alleviated through modern education reforms, namely culturally relevant curriculum and restorative justice programs. Indeed, these educational programs have improved the lives of many minority children and should be pursued by lawmakers seeking to enact sorely needed education reform legislation.

1. Jorge Rodriguez-Jimenez, *The Story Told In This Poem About A Latin Boy Being Broken Down By Machismo Will Pull At Your Heart*, MITÚ (Dec. 1, 2017, 5:43 PM), <https://wearemitu.com/things-that-matter/poet-latin-boys-dont-cry/> [<https://perma.cc/MN5Q-YLZL>].

2. Note to the reader: Prior to attending law school, I earned my Masters in Secondary Education from Johns Hopkins while teaching at two different inner-city schools. I taught 10th grade Chemistry for three years. I met "Manny" my final year of teaching. At the time, he was sixteen years old. Nearly four years later, we continue to stay in touch and I always enjoy catching up with him. Upon learning that I was writing a comment regarding machismo among Latino boys and potential legal/educational remedies, Manny expressed interest in sharing his story. His story—one shaped by engrained machismo from a young age—is common to many Latino boys and illustrative of the systemic failings of the education system. Manny believes that if he knew more and was educated earlier about overcoming social and cultural barriers, his life would be very different from what it is today.

In 2018, the Hispanic and Latino populations represented 18.3% (59.9 million) of the United States population and were the country's largest ethnic and racial minority.³ More than half of the growth of the United States population from 2000 to 2010 was attributed to the increase in the Latino population.⁴ From this information we can draw two conclusions: (1) the Latino population will continue to grow and comprise a greater percentage of the population at large;⁵ and (2) the increased population will result in the enrollment of more Latino youth in schools.⁶

These statistics indicate several truths, both positive and negative. First, Latino youth represented roughly a quarter of the student population in 2015–16.⁷ As the Latino community grows, the proportion of Latino children in schools will correspondingly increase.⁸ While the data indicates that more Latino youth are persisting and remaining in school, Latino boys are still more at-risk of dropping out of school than any other ethnic and racial group.⁹ Importantly, as student retention increases, more Latino youth are subject to the content and knowledge that schools impart on them. This presents an opportunity for schools to educate Latino boys—from an early age—about engrained cultural behaviors that make them more susceptible to dropping out of school and engaging in problematic behavior. For instance, machismo and similar learned behaviors can have devastating effects on the educational and personal development of Latino boys. Furthermore, because Latino students are disproportionately suspended and expelled,¹⁰ they also may benefit from restorative justice programs in school

3. *Disclaimer*: for the purposes of continuity in this Comment, all references to Hispanic and Latinos will be referred to as Latino/s. Hispanic and Latino are often used interchangeably in literature even though they describe different groups – where Latinos generally describe Spanish speakers with origins in Latin America and Hispanic describes Spanish speaking people from Spain. Provided that this Comment focuses on Latino students in the United States, primarily Mexican students, Latino is the most appropriate term to use. *Hispanic Heritage Month 2019*, U.S. CENSUS BUREAU (Aug. 20, 2019), <https://www.census.gov/newsroom/facts-for-features/2019/hispanic-heritage-month.html#:~:text=59.9%20million,of%20the%20nation's%20total%20population> [https://perma.cc/LTZ4-YFSP].

4. Sharon R. Ennis, Merarys Rios-Vargas & Nora G. Albert, *The Hispanic Population: 2010*, U.S. CENSUS BUREAU 1, 1–2 (May 2011), <https://www.census.gov/content/dam/Census/library/publications/2011/dec/c2010br-04.pdf> [https://perma.cc/XC5X-VYLD].

5. Michelle Camacho Liu, *Investing in Higher Education for Latinos – Trends in Latino College Access and Success*, NAT'L CONF. OF STATE LEGISLATURES 1, 1 (July 2011), <https://www.ncsl.org/documents/educ/trendsinalatinosuccess.pdf> [https://perma.cc/VM4T-VSUW].

6. *See id.*

7. OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., 2015-16 CIVIL RIGHTS DATA COLLECTION: SCHOOL CLIMATE AND SAFETY (May 2019), <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf> [https://perma.cc/228P-SAEZ].

8. *See id.*

9. *See* Jens Manuel Krogstad, *5 Facts About Latinos and Education*, PEW RSCH. CTR. (July 28, 2016), <https://www.pewresearch.org/fact-tank/2016/07/28/5-facts-about-latinos-and-education/> [https://perma.cc/EU4Z-EEVE].

10. OFF. FOR CIV. RTS., *supra* note 7.

discipline as an alternative to exclusionary measures. In fact, many school districts across the country have implemented these programs and have seen positive results and reduced disparities.¹¹

Schools, state legislatures, and the federal government can and must actively participate in dismantling the misconceptions associated with cultural practices like machismo. In the public education realm, this process should include expanding culturally relevant curriculum and restorative justice programs. While most legal scholarship related to education reform and school discipline focuses on the disparate impacts of the “school to prison pipeline” (StPP)¹² on Black and African American boys, this Comment demonstrates the unique experiences and consequences of the StPP for Latino boys—a group that remains at increased likelihood of educational failure and entanglement with the criminal justice system.¹³ This Comment will focus its analysis on the federal government’s role in public education and its ability to foster equity through new legislation. Indeed, the Biden Administration, along with a new Democrat-controlled Congress, should pursue a central role in reforming public education policy to combat the continued, harmful racial disparities in achievement and school discipline.¹⁴

11. See Jennifer Guerra, *School Hopes Talking It Out Keeps Kids from Dropping Out*, NPR (June 22, 2013), <https://www.npr.org/2013/06/22/194467944/schools-try-restorative-justice-to-keep-kids-from-dropping-out> [https://perma.cc/CD9T-38ZR]; David Washburn & Daniel J. Willis, *The Rise of Restorative Justice in California Schools Brings Promise, Controversy*, EDSOURCE.ORG (May 13, 2018), <https://edsource.org/2018/the-rise-of-restorative-justice-in-california-schools-brings-promise-controversy/597393> [https://perma.cc/YLM9-K3U5]; Aliyya Swaby, *Twice a Week, These Texas Students Circle Up and Talk About Their Feelings. It’s Lowering Suspensions and Preventing Violence*, TEX. TRIB. (May 29, 2018), <https://www.texastribune.org/2018/05/29/texas-schools-restorative-justice-violence-suspensions/> [https://perma.cc/8MKA-U42K]; Emily Richmond, *When Restorative Justice in Schools Works*, THE ATL. (Dec. 29, 2015), <https://www.theatlantic.com/education/archive/2015/12/when-restorative-justice-works/422088/> [https://perma.cc/Q7QW-9UPE]; DONNA HARGENS, JEFFERSON CNTY. PUB. SCHS. RESTORATIVE JUSTICE PRACTICES IN SCHOOLS: REVIEW OF THE LITERATURE AND CURRENT DISTRICT DATA BRIEF (2012), https://www.jefferson.kyschools.us/sites/default/files/RestorJustisPract2011_JV.pdf [https://perma.cc/N2LK-LAJS].

12. Jennifer Castillo, *Tolerance in Schools for Latino Students: Dismantling the School to Prison Pipeline*, 26 HARV. KENNEDY SCH. J. HISPANIC POL’Y 43 (May 2015), <https://hjhp.hkspublications.org/wp-content/uploads/sites/15/2015/07/HJHP-Volume-26.pdf> [https://perma.cc/99DQ-EJCN] (“The school to prison pipeline refers to the practice of pushing students out of educational institutions, primarily via zero tolerance and harsh disciplinary policies, and into the juvenile and adult criminal justice systems. The pipeline has emerged in part as a response to the media panic over youth violence and the need to keep dangerous students out of schools . . . Research shows that these policies have failed to make schools safer and have been linked to an increased likelihood of academic underperformance, as well as increased suspensions and expulsions rates and elevated drop-out rates.”).

13. *Id.*

14. See Carolyn A. Brown & Caterina Di Tillio, *Discipline Disproportionality Among Hispanic and American Indian Students: Expanding the Discourse in U.S. Research*, 2 J. EDUC. & LEARNING 47 (2013); *Moments in America for Hispanic Children*, CHILD.’S DEF. FUND (2017), childrensdefense.org/wp-content/uploads/2018/06/state-of-americas-children.pdf [https://perma.cc/M8EG-ZFRS]; Castillo, *supra* note 12.

Generally speaking, the Biden Administration (and Congress) has three options: propose brand new legislation, do nothing, or revamp the Every Student Succeeds Act (ESSA). Each of these options present its own challenges. First, although most appealing, implementing new legislation will require time. The second option is to do nothing, leaving ESSA (a policy enacted while Biden served as vice president) unmodified. As noted by many other legal scholars, ESSA effectively revoked all federal government control to regulate the public education system, leaving the bulk of education regulation to states and local government.¹⁵ While ESSA was well-intentioned, its framework has proven ineffective in meaningfully improving student achievement and reducing racial disparities.¹⁶ Continuing to permit the use of a broken system is not sufficient and, similarly, will only contribute to the rapid decline of equity in public education. Thus, the administration would be well-served to choose the moderate option—modifying ESSA to remedy its significant flaws, most pressingly the persisting inequity in public education.

This Comment proposes necessary reform to ESSA by recommending that the federal government mandates terms to improve student equality before allocating funding to schools. The Comment proceeds in four parts. Part I provides historical background on the three major federal legislative initiatives to reform public education: the Elementary and Secondary Education Act (1965), No Child Left Behind (2002), and the Every Student Succeeds Act (2015). Part I also overviews the Spending Clause of the Constitution and its role in crafting legislation that conditions federal funding to states. Part II consists of an analysis of the social and cultural factors that impact Latino boys. Part III overviews two key areas of school reform which should be addressed by the next iteration of the ESSA: the implementation of culturally responsive curriculum and shifting to alternative disciplinary practices like restorative justice. Part III also analyzes California's implementation of these practices, and the respective level of effectiveness they are achieving among Latino boys. Part IV details how ESSA can be modified to condition federal funds—in accordance with the United States Supreme Court's Spending Clause jurisprudence—on states' implementation of culturally responsive teaching and restorative justice programs. Part IV specifically advocates for such an amendment, identifying the improved outcomes among Latino boys (and *all* students) that can be achieved by such legislation, and ties these equity-driven proposals back to the historical roots of the federal government's role in public education.

15. Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CALIF. L. REV. 1309 (2017); Christian B. Sundquist, *Positive Education Federalism: The Promise of Equality After the Every Student Succeed Act*, 68 MERCER L. REV. 351, 374–75 (2017); see Kimberly Jenkins Robinson, *Restructuring the Elementary and Secondary Education Act's Approach to Equity*, 103 MINN. L. REV. 915, 933–35 (2018).

16. Laura Alder-Greene, *Every Student Succeeds Act: Are Schools Making Sure Every Student Succeeds?*, 35 TOURO L. REV. 11 (2019); ALL. FOR EXCELLENT EDUC., EVERY STUDENT SUCCEEDS ACT PRIMER: REDUCING INCIDENTS OF SCHOOL DISCIPLINE (2016), https://all4ed.org/wp-content/uploads/2016/07/NAACP_School-Discipline-Reform-under-ESSA.pdf [<https://perma.cc/EMV8-R6CD>].

I. FEDERAL ROLE IN PUBLIC EDUCATION: A COMPLICATED HISTORY

Before unpacking the history of public education, case law, and Congress's authority under the Spending Clause, this part focuses on the primary issue that first sparked congressional involvement in education in 1965: improving educational outcomes for low-income students and students with disabilities.¹⁷ Over the next half-century, however, the federal government waffled between tightening and loosening its grasp on the public education system while reiterating a message that its policies will promote equality, equity, and improve student outcomes. This part highlights three iterations of the Elementary and Secondary Education Act of 1965, notes the differences between each version, and elaborates on the implications the revisions had on public schools. Lastly, this part turns to the Constitution and unpacks congressional oversight of federal spending, specifically when and how it applies to education.

A. Setting the Stage for the Elementary and Secondary Education Act of 1965 (ESEA)

Prior to the civil rights movement, the federal government's involvement in education was limited.¹⁸ The states assumed the role of structuring a public education system, as implied by the Tenth Amendment.¹⁹ During this period, the Supreme Court reinforced the states' duty to regulate public education by upholding state laws at issue in education cases.²⁰ Consequently, the lack of direction from the federal government permitted the acceptance of a pervasive ideology which continues to plague the public education system today—"separate but equal."²¹

Acceptance of the separate but equal standard flourished in response to the Supreme Court's decision in *Plessy v. Ferguson*, where the Court held that Louisiana's statute mandating separate railcars for white and black passengers did not violate the Equal Protection Clause of the Fourteenth Amendment.²² The Court reasoned, "When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed."²³ Noted education and legal scholar, Justin Driver, makes a salient point regarding how this principle was applied to the field of education: although *Plessy* is not explicitly about education, its holding impacted the educational system by permitting segregated education based on race so long as the separate

17. Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 (amended 2015).

18. See Sundquist, *supra* note 15, at 367.

19. U.S. CONST. amend. X.

20. See, e.g., *Cumming v. Bd. of Educ. of Richmond Cnty.*, 175 U.S. 528 (1899); *Gong Lum v. Rice*, 275 U.S. 78 (1927).

21. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

22. *Id.* at 551–52.

23. *Id.* at 551.

arrangements were “reasonable” under the Equal Protection Clause.²⁴ Unbeknownst at the time, this decision set the stage for further intervention years later in the seminal case, *Brown v. Board*.

Brown v. Board of Education is one of the most cited U.S. Supreme Court cases of all time because it was instrumental in declaring racial discrimination in public education unconstitutional.²⁵ The Court emphasized the importance of desegregation, noting the profound effect of segregation on public education by referring to the direct effect separation has on the “hearts and minds” of (primarily minoritized) children.²⁶ *Brown* was only the beginning of a much larger and ongoing movement to integrate schools and to solidify the federal government’s involvement in education.²⁷

In 1965, President Johnson signed the Elementary and Secondary Education Act (ESEA) as part of his “War on Poverty.”²⁸ The ESEA was the first comprehensive federal legislation centered on public education; it focused its attention on supporting children of low-income families by providing financial assistance to educational agencies and expanding education programs.²⁹ The ESEA provided little detail outside of payment criteria: payments would occur every year for five years to state and local educational agencies and for an amount based on average per pupil expenditure.³⁰ Any local educational agency was eligible to receive a grant under this program so long as it was approved by a state educational agency.³¹ Approval requirements were very relaxed: the payments had to be used for programs to meet needs of deprived children, ensure that funds were controlled by a public agency and used for the reasons outlined in the Act, the funds had to be used in a manner consistent with state plans for constructing schools, and the local educational agency would create a report for the state education agency “as reasonably necessary.”³²

In 1968, Title VII of the ESEA, otherwise known as the Bilingual Education Act, was passed.³³ The purpose of the Bilingual Education Act was to provide funding to school districts to develop bilingual education programs in response

24. JUSTIN DRIVER, *THE SCHOOL HOUSE GATE* 34–35 (2018).

25. *Brown v. Bd. Of Educ.*, 347 U.S. 483 (1954); Lauren Mattiuzzo, *Most-Cited U.S. Supreme Court Cases in HeinOnline: Part III*, HEINONLINE BLOG (Sept. 26, 2018), <https://home.heinonline.org/blog/2018/09/most-cited-u-s-supreme-court-cases-in-heinonline-part-iii/> [https://perma.cc/8SFQ-4BTE].

26. *Brown*, 347 U.S. at 494 (explaining that “[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children.”).

27. See Black, *supra* note 18.

28. Catherine A. Paul, *Elementary and Secondary Education Act of 1965*, VCU LIBRS.: SOC. WELFARE HIST. PROJECT (2016), <https://socialwelfare.library.vcu.edu/programs/education/elementary-and-secondary-education-act-of-1965/> [https://perma.cc/R9HE-Q5E2]; Robinson, *supra* note 15, at 926.

29. Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 (amended 2015); Paul, *supra* note 28.

30. Elementary and Secondary Education Act § 1501.

31. *Id.* § 1112.

32. *Id.*

33. Title VII of the Elementary and Secondary Education Act of 1965, Pub. L. 90-247, § 702, 79 Stat. 27 (1965); Kate Menken, *NCLB and English Language Learners: Challenges and Consequences*, 49 THEORY INTO PRAC. 121, 122 (2010); Paul, *supra* note 28.

to the increased numbers of non-English speaking immigrants moving to the United States.³⁴ States were encouraged to develop bilingual education programs using funds from the federal government to bolster teacher training and provide increased access to resources and development.³⁵ This was the first act of its kind that catered to supporting English Language Learners, and lead to further legislation for other minoritized groups in the future.³⁶ Indeed, this re-authorization demonstrated a continuing federal commitment to ensuring a quality education for students at the margins of society.

However, although well-intentioned, the program was not flawless. Even after the program was amended in 1970, it continued to prioritize funding structures over resolving academic inequalities.³⁷ After several years, the federal government discovered it could no longer afford to supplant money which instead could be provided by the states for education.³⁸ Correspondingly, in 1970, the ESEA was amended to emphasize the *supplementary* nature of federal funding.³⁹

B. No Child Left Behind. Instead, Many Children.

After recognizing that the Title I requirements of the ESEA were too relaxed, the federal government increased state accountability by restricting federal funding to merely supplement state funding and provided strict guidelines aimed at closing the gap between schools receiving Title I funding from non-Title I schools.⁴⁰ And yet, a few years later, the federal government gradually lowered its standards for Title I funding. This contributed to the shock of No Child Left Behind (NCLB) legislation which drastically increased federal oversight in public education for better or for worse.⁴¹

NCLB was implemented by the Bush Administration in 2001 with the mission of “clos[ing] the achievement gap with accountability, flexibility, and choice”⁴² Unlike the ESEA, NCLB applied to all schools regardless of whether they received Title I funds.⁴³ NCLB contained a ten-part plan to address academic achievement of disadvantaged students by conducting a thorough

34. Amy J. Orr, *The Bilingual Education Act of 1968*, IMMIGR. TO THE U.S., <https://immigrationtounitedstates.org/379-bilingual-education-act-of-1968.html> [https://perma.cc/D9P7-W5KF] (last visited Jan. 12, 2021).

35. *Id.*

36. *Id.*

37. See Black, *supra* note 15, at 1318.

38. See Elementary and Secondary Education Act of 1965, Pub. L. 114-95, §§ 1118(b), 2031 (1965).

39. Elementary and Secondary Education Act of 1965, Pub. L. 91-230, § 109, 8 Stat. 1196 (1965) (amended 1970).

40. *Id.*

41. *Id.*; Sundquist, *supra* note 15, at 352.

42. See No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1425 (2002).

43. *Id.*

investigation into teacher preparedness, curricula, and student data while promoting school choice and demanding school improvement.⁴⁴

Under NCLB, the federal government sought to improve student outcomes and the educational system at large by requiring standardized testing in math, English language arts, and science.⁴⁵ Schools were required to report the assessment data, adequate yearly progress (AYP). Schools also were evaluated on the performance of students as a whole and in sub-categories based on socioeconomic status, disability, race, and more.⁴⁶ If all students or certain subgroups failed to achieve “proficiency” on state exams for two consecutive years or more, then the school would be sanctioned and labeled “in need of improvement.”⁴⁷ Sanction severity increased for every year students failed to meet proficiency goals. After two consecutive years, students were allowed to transfer to higher performing public schools in the same district. After three years, schools were required to offer free tutoring to students at the cost of the district. Beyond three years, schools could be branded as failing, transitioned to charters, or worse, shut down.⁴⁸ To add to the challenge, individual states had the discretion to determine which exams to use for state testing and what students needed to earn to achieve “proficiency.”⁴⁹ The overly stringent testing requirements of NCLB combined with the full curricula discretion of the states left schools with their hands tied and priorities confused: whether to teach to the test with the hope of passing federal muster or whether to prioritize student learning.⁵⁰

Although NCLB aimed to improve student outcomes by increasing standards for the public education system, it undoubtedly fell short in almost every way except in exposing the disparities in performance among categories of students. After discovering that many schools could not achieve the goals set forth in NCLB, forty-two states, Puerto Rico, and the District of Columbia sought waivers from the NCLB.⁵¹ The waivers required states to adopt new learning standards.⁵² Many schools willingly adopted the waiver, viewing it as the lesser of two evils because it eliminated the impossible standard of full proficiency of all students required by NCLB at the cost of implementing a new teacher

44. Cory Turner, *No Child Left Behind: What Worked, What Didn't*, NPR (Oct. 27, 2015), <https://www.npr.org/sections/ed/2015/10/27/443110755/no-child-left-behind-what-worked-what-didnt> [https://perma.cc/7W9V-GZC3]; Robinson, *supra* note 15, at 928–31; Sundquist, *supra* note 1515, at 372–73.

45. Black, *supra* note 15, at 1324–25. Sundquist, *supra* note 15, at 376 (explaining math and English assessments occurred annually from grades three to eight and once in high school, whereas science assessments occurred at least three times from grades three to twelve).

46. Black, *supra* note 15, at 1324; Alyson Klein, *No Child Left Behind*, EDUC. WEEK (Apr. 10, 2015), <https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04> [https://perma.cc/B4Y9-3H7Z].

47. Robinson, *supra* note 15, at 929–33. Black, *supra* note 15, at 1325.

48. Klein, *supra* note 46.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*; Black, *supra* note 15, at 1329.

evaluation system and curriculum.⁵³ However, not all parties were pleased with this change. After years of attempting to make a broken system work, the combination of new evaluation methods and Common Core was the last straw for many seasoned teachers, forcing many to choose between compliance and retirement.⁵⁴

i. NCLB's Impact on Latino Students

NCLB had a profound impact on specific groups, such as students with special needs and English Language Learners (ELLs).⁵⁵ This Comment will focus on the impact on the Latino community. First, unlike the ESEA, which encouraged bilingual education programming in schools, NCLB replaced the Bilingual Education Act with Title III, the English Language Acquisition, Language Enhancement, and Academic Achievement Act.⁵⁶ Under the guidance of the new Title, all students, including ELLs were required to participate in state standardized testing.⁵⁷ Not only were ELLs required to take all of the same standardized exams as native-English speakers, in English, but they also had to take exams to evaluate English proficiency.⁵⁸

By refusing to change the testing model for ELLs, many students and teachers suffered in numerous ways at the hands of the federal government. First, the testing required by NCLB made it impossible and unfair to assess academic achievement of ELLs because success on these exams required students to demonstrate two levels of proficiency: the English language and the core subject matter.⁵⁹ Second, ELLs trailed behind their native-English speaking peers on standardized examinations by roughly twenty to fifty percentage points—which had broader implications for schools in the AYP.⁶⁰ Third, in certain states where students were required to pass standardized assessments to graduate from high school, ELLs fell behind and graduated at lower rates compared to other

53. See Black, *supra* note 15, at 1329.

54. Eileen FitzGerald, *Teachers Retiring This Year in High Numbers*, NEWS TIMES (June 30, 2013), <https://www.newstimes.com/local/article/Teachers-retiring-this-year-in-high-numbers-4628502.php> [<https://perma.cc/ADG5-TER7>].

55. See Alan Singer, *Will Every Student Succeed? Not With This New Law*, HUFFINGTON POST (Dec. 6, 2016), https://www.huffpost.com/entry/will-every-student-succeed_b_8730956 [<https://perma.cc/KC7F-KKZ4>] (“According to a coalition of civil rights groups, including the Southern Poverty Law Center and the New York chapter of the NAACP Legal Defense and Educational Fund, federal oversight of education will be much too weak to ensure education for Black and Latino students in many of the ‘red states’ and ESSA does not address disparities in school discipline procedures and suspension policies that target minority boys.”).

56. Menken, *supra* note 33, at 122.

57. *Id.*

58. *Id.* As a matter of fact, since 2007, the U.S. Department of Education has required ELLs to take the same English Language Arts (ELA) standardized exam as native English speakers once they have lived in the U.S. for one year. *Id.*

59. Isabella Sanchez, *The Effects of NCLB Accountability on ELLs*, NEWAMERICA.ORG (June 24, 2015), <https://www.newamerica.org/education-policy/edcentral/title-iii-accountability-ells/> [<https://perma.cc/JZ2E-BE5L>].

60. Menken *supra* note 33, at 125.

students.⁶¹ Consequently, many ELLs dropped out of schools with the understanding that they would never be able to achieve the impossible—pass the exams required to graduate.⁶² Although NCLB intended to increase school accountability and improve student outcomes, it made drastic changes at the cost of many non-native English speakers, especially Latinos. Arguably, this act pushed Latino students to the back of the line and excused their lack of success by punishing schools, effectively leaving behind a demographic that is still trying to catch up over a decade later.

C. Every Student Succeeds Act —Potentially

After many years of pillaging the public education system, No Child Left Behind was superseded by the Every Student Succeeds Act in 2015—a reauthorization of the Elementary and Secondary Education Act of 1965.⁶³ ESSA aspired to improve state and local educational programs by ensuring success for students and schools.⁶⁴ Under ESSA, many of the strict government oversights implemented during NCLB were eliminated. Most notably, the Department of Education could not encourage the adoption of Common Core. Additionally, states could permissibly withdraw from the program;⁶⁵ teachers were no longer required to be “highly qualified”; parents were no longer notified if their child was attending a school branded “in need of improvement”; and schools were not penalized for missing AYP goals.⁶⁶ By and large, ESSA empowered states to determine their own goals for education in public schools with very little restriction, enforcement, or oversight.⁶⁷

To receive federal funding, ESSA provides that state educational agencies are required to submit a plan to the Education Secretary detailing items such as state academic standards, school accountability, annual testing, school support and improvement activities, and how the state will support low-income and minority children in schools.⁶⁸ Like NCLB, ESSA continued to emphasize college preparedness as measured by student performance on standardized assessments in math, English language arts, and science.⁶⁹ Furthermore, ESSA championed change by requiring states to intervene in low-performing schools

61. *Id.*

62. *See id.* at 125.

63. Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

64. *Id.*; *Every Student Succeeds Act (ESSA)*, U.S. DEP’T OF EDUC., <https://www.ed.gov/essa?src=rn> [<https://perma.cc/8DDK-YAAW>] (last visited Jan. 14, 2021).

65. Black, *supra* note 15, at 1332.

66. Alder-Greene, *supra* note 16, at 16–17.

67. Isabela Schettino, Katherine Radvany & Amy Stuart Wells, *Culturally Responsive Education Under ESSA: A State-by-State Snapshot*, PHI DELTA KAPPAN (Sept. 23, 2019), <https://kappanonline.org/essa-culturally-responsive-education-states-schettino-badvany-wells/> [<https://perma.cc/5VFG-YCFV>].

68. Every Student Succeeds Act, Pub. L. No. 114-95, § 2222, 129 Stat. 1802, 1938-39 (2015).

69. 20 U.S.C. §§ 6311(b)(1)(A), (D) (2016); Robinson, *supra* note 15, at 934.

where the graduation rate was less than sixty-seven percent.⁷⁰ However, unlike NCLB, ESSA prioritized ELL students by allocating funding for programs dedicated to supporting ELLs—including teacher training—and requiring states to report ELL English proficiency assessment data.⁷¹ For these reasons and more, many proponents celebrated ESSA for making steps in the right direction, even if the legislation did not fundamentally address root causes of education inequality.⁷²

ESSA provides that, once complete, state plans are reviewed by the Secretary of Education.⁷³ However, the Secretary lacks the authority to add new requirements and criteria; condition approval of the state plans, including the addition of new requirements; require data collection; or issue non-regulatory guidance to solicit information from states regarding successful implementation of the plan.⁷⁴ These limitations render the Secretary powerless.⁷⁵ In fact, the ESSA limits federal intervention in every area, prescribing wide discretion to the states.⁷⁶ Like the earliest edition of the ESEA, ESSA permits federal government funding with very little guidance (and enforcement) in return, thereby calling into question the presence of the federal government's participation in public education—if present at all.

D. *The Federal Government and the Spending Clause*

Article I, Section 8, clause 1 of the Constitution details the parameters of Congress's spending powers, where Congress can, "lay and collect Taxes, Duties, Imposts, and Excises to pay the Debts and provide for the common Defence and general Welfare of the United States."⁷⁷ Two leading cases where the Supreme Court explored the scope of the Spending Clause are *United States v. Butler* and *South Dakota v. Dole*. In *Butler*, the Supreme Court acknowledged that the Constitution delegates spending of money for public purposes to Congress, despite holding that Congress does not have the power to regulate

70. See *Every Student Succeeds Act (ESSA)*, *supra* note 64; Klein, *supra* note 46; Alder-Greene, *supra* note 16, at 15.

71. See *Every Student Succeeds Act*, Pub. L. No. 114-95 § 1111(b)(1)(F), 129 Stat. 1802, 1825 (2015); *Every Student Succeeds Act*, Pub. L. No. 114-95 § 1008(a)(2)(B), 129 Stat. 1862.

72. Alder-Greene, *supra* note 16, at 16–17.

73. *Every Student Succeeds Act*, Pub. L. No. 114-95 § 1204(f)(1), 129 Stat. 1802, 1890 (2015).

74. *Id.* § 1118(b)(4); see generally Andrew Ujifusa, *With White House Backing, Senate Overturns ESSA Accountability Rules*, ED WEEK (Mar. 9, 2017), <https://www.edweek.org/policy-politics/with-white-house-backing-senate-overturns-essa-accountability-rules/2017/03> [<https://perma.cc/G2KC-CLWA>].

75. *Id.* § 1111(e)(1); Emily Richmond, *Senate Unwinds School Accountability Rules*, EDUC. WRITERS ASS'N (Mar. 10, 2017), <https://www.ewa.org/blog-educated-reporter/senate-unwinds-school-accountability-rules> [<https://perma.cc/V6ET-YUK3>].

76. *Every Student Succeeds Act*, Pub. L. No. 114-95 § 1111(e)(1), 129 Stat. 1802, 1842 (2015); Andy Smarick, *Accountability and the Every Student Succeeds Act*, THOMAS B. FORDHAM INST. (Dec. 1, 2015), <https://edexcellence.net/articles/accountability-and-the-every-student-succeeds-act> [<https://perma.cc/N7N7-ZBJ9>].

77. U.S. CONST. art. I, § 8, cl. 1.

agriculture under the Agricultural Adjustment Act because it was reserved to the states.⁷⁸

In *South Dakota v. Dole*, the Court evaluated whether it was constitutional for Congress to attach conditions to federal funds.⁷⁹ In that case, Congress enacted a law requiring the Secretary of Transportation to withhold a percentage of federal highway funds from states that did not adopt a minimum drinking age of twenty-one years.⁸⁰ Ultimately, the Court held that the law was a valid use of spending power and Congress did not induce the states to engage in activities that would be unconstitutional.⁸¹

Recently, the Supreme Court analyzed the scope of the spending power in *NFIB v. Sebelius*.⁸² In *NFIB*, the Court considered whether Congress had the power to withhold federal funding from states that failed to expand Medicaid programing under the Affordable Care Act (ACA).⁸³ The Court explained that Congress could not coerce states into accepting new conditions by threatening to withhold funds.⁸⁴ The ACA's proposed commandeering of federal funds is distinguishable from *Dole*, where states were merely gently *encouraged* to adopt the minimum age legislation.⁸⁵ In *Dole*, if states chose not to comply with the law, Congress would withhold five percent of federal highway funding or one-half of a percent of the state's budget.⁸⁶ In *NFIB*, the financial stakes were much higher and the risks of not participating in the ACA could mean sacrificing ten percent of a state's total budget.⁸⁷ The Court concluded that the expansion provisions of the ACA were unconstitutionally coercive, leaving states with little choice whether to comply with the expansion.⁸⁸

This Comment proposes that the federal government place more conditions on federal funding to the states for the second largest congressional spending initiative, education, in conformance with the Court's jurisprudence.⁸⁹ Part IV specifically recommends that Congress condition state funding for education by encouraging states to implement culturally responsive pedagogy and restorative justice practices as an alternative disciplinary system. By conforming with the terms of *Dole* and *NFIB*, these conditions can be attached within the scope of Congress's spending power and are not unduly coercive.⁹⁰

78. *United States v. Butler*, 279 U.S. 1 (1936).

79. *South Dakota v. Dole*, 483 U.S. 203, 209 (1987).

80. *Id.* at 205.

81. *Id.* at 210–11.

82. *NFIB v. Sebelius*, 567 U.S. 519 (2012).

83. *Id.* at 580–81.

84. *Id.*

85. *Id.*; *Dole*, 483 U.S. at 211.

86. *Dole*, 483 U.S. at 211.

87. *NFIB*, 567 U.S. at 582.

88. *Id.* at 588.

89. *Id.*

90. *See id.*; *see Dole*, 483 U.S. 203.

II. THE EDUCATIONAL IMPLICATIONS OF A GROWING LATINO POPULATION

In the introduction, I shared an anecdote about Manny and his confrontation with machismo. In this part, I more broadly overview common social and cultural experiences of Latino boys, with a focus on unpacking the social constructions within the Latino community that play a significant role in poor educational development. This includes an analysis of acculturation and adverse childhood experiences, which shed light on the implications of machismo and its powerful influence on many Latino youth. Ultimately, this analysis indicates a need for expanded culturally responsive teaching and restorative justice practices in our schools.

A. *Disparate Experiences of Latino Boys in K-12 Public Schools*

In a recent survey conducted by the Civil Rights Data Collection (CDRC) from the 2015–16 school year, Latino boys comprised thirteen percent of the student enrollment at K-12 public schools, whereas Black and African American boys represented eight percent and White boys represented twenty-five percent.⁹¹ Among these Latino boys, fifteen percent received an out-of-school suspension and sixteen percent were expelled.⁹² Additionally, a study comparing student drop-out rates found that the drop-out rate was highest among Latino boys at 9.3%, in comparison to White boys at 4.7%, and Black boys at 6.8%.⁹³ Fortunately, the study also demonstrated that the overall drop-out rate for Latino youth between ages sixteen and twenty-four decreased from sixteen percent in 2010 to eight percent in 2019.⁹⁴

Research indicates that one suspension doubles the likelihood of a student dropping out before graduation.⁹⁵ Furthermore, this effect is compounded with every suspension that follows.⁹⁶ This reality plagues Black and Brown students given that they represent roughly half of the public school population and make up forty percent of the suspended student population.⁹⁷

The statistics above suggest that something is interfering with Latino boys' persistence and achievement in school. One theory to explain this is known as

91. OFF. FOR CIV. RTS., *supra* note 7.

92. Comparatively, Black male students represented eight percent of enrolled students, accounted for twenty-five percent of students who received an out-of-school suspension, and twenty-three percent of the students expelled. White male students represented twenty-five percent of students enrolled and twenty-four percent who received out-of-school suspension, and twenty-seven percent of students who were expelled. *Id.*

93. *Status Dropout Rates*, NAT'L CTR. FOR EDUC. STATS., U.S. DEP'T OF EDUC. (2021), [https://nces.ed.gov/fastfacts/display.asp?id=16#:~:text=Status%20dropout%20rates%20were%20higher,%2C%20Asian%20\(2.3%20vs](https://nces.ed.gov/fastfacts/display.asp?id=16#:~:text=Status%20dropout%20rates%20were%20higher,%2C%20Asian%20(2.3%20vs) [https://perma.cc/6QEZ-8FUU] (additionally, Hispanic girls also had the highest drop-out rate among all other races at six percent).

94. *Id.*

95. Elizabeth Pufall Jones, *The Link Between Suspensions, Expulsions, and Dropout Rates*, AM. PROMISE ALL. (Sept. 5, 2018), <https://www.americaspromise.org/opinion/link-between-suspensions-expulsions-and-dropout-rates> [https://perma.cc/S7AK-8Z29].

96. *Id.*

97. *See id.*; *see Status Dropout Rates*, *supra* note 93.

“subtractive schooling.”⁹⁸ From a three-year study of Latino youth in Texas, Angela Valenzuela, Professor of Educational Policy and Planning, found that Latino youth experience loss or confusion surrounding cultural self-identity, affecting their performance in school.⁹⁹ She notes this process occurs in two steps. First, by removing the students’ culture and language (“de-Mexicanization”), students are left susceptible to academic failure.¹⁰⁰ Second, the role of caring between teachers and students in learning is lacking when Latino boys are involved.¹⁰¹ This is a lose-lose situation. Students are disinvested in school, feel like their cultures and language are not valued, and are disconnected from their own culture.¹⁰² Consequently, students are perceived as lazy, lost, or indifferent by teachers, particularly by teachers with different cultural backgrounds and values.¹⁰³ This is an unacceptable, yet, ultimately solvable systemic issue that currently hinders the success of Latino youth as they proceed through the educational system.

i. The Enigma of Machismo

Machismo is a learned, socially constructed, and reinforced set of expectations, attitudes, and beliefs associated with what it means to be a Latino man.¹⁰⁴ Machismo consists of both positive and negative characteristics.¹⁰⁵ For example, machismo holds that men must provide for their families’ every need, while embodying bravery and loyalty, seemingly positive qualities.¹⁰⁶ Correspondingly, machismo tends to result in men’s self-belief that they are the superior sex, must conduct themselves as authoritative figures, and are thus justified in exhibiting dominance and aggression.¹⁰⁷ Finally, as a consequence of their “manliness,” men must be emotionally reserved and cannot show

98. Angela Valenzuela, *Subtractive Schooling: U.S. – Mexican Youth and the Politics of Caring*, in REFLEXIONES 123 (Victor J. Guerra ed., 1999); Richard Thomas, *The Boys in the Back: Using Culturally Responsive Teaching to Connect with Latino Male Students in Middle School* (Dec. 2019) (Ph.D. dissertation, Arizona State University) (on file with author).

99. Valenzuela, *supra* note 98.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. See Marilyn Valenciano, *A Grounded Theory Approach to Exploring the Impact of Machismo on Second-Generation Latina Women’s Identity Formation* (Dec. 2014) (Ph.D. dissertation, University of Pennsylvania) (Scholarly Commons); Alicia Nunez, Patricia Gonzalez, Gergory Talavera, Lisa Sanchez-Johnsen, Scott Roesch, Sonia Davis, William Arguelles, Veronica Womack, Natania Ostrovski, Lizette Ojeda, Frank Penedo & Linda Gallo, *Machismo, Marianismo, and Negative Cognitive-Emotional Factors: Findings from the Hispanic Community Health Study/Study of Latinos Sociocultural Ancillary Study*, 4 J. LATINX PSYCH. 202, 211 (2016); see Jose M. Fragoso & Susan Kashubeck, *Machismo, Gender Role Conflict, and Mental Health in Mexican American Men*, 1 PSYCH. MEN & MASCULINITY 87, 88 (2000); Zoila G. Tovar-Blank, Terence J. G. Tracey, G. Miguel Arciniega & Thomas C. Anderson, *Toward a Fuller Conception of Machismo: Development of a Traditional Machismo and Caballerismo Scale*, 55 J. COUNSELING PSYCH. 19, 19 (2008).

105. Nunez et al., *supra* note 104.

106. *Id.*

107. *Id.*

weakness.¹⁰⁸ Thus, machismo exists in a dichotomy, encouraging qualities that are seemingly difficult to reconcile.

Machismo does not exist in a vacuum. It is one part of the social construction describing the male-female relationship; marianismo is the female counterpart.¹⁰⁹ To fully understand the breadth of machismo, it is necessary to understand the intertwined role of marianismo.¹¹⁰ Marianismo, like machismo, is rooted in values and beliefs associated with how Latina women are viewed and expected to behave in society.¹¹¹ For example, women should be nurturing, feminine, and passive.¹¹² They are expected to put the needs of their family before their own—which may require suffering in silence—and to be respectful of their husbands.¹¹³

Together, machismo and marianismo reinforce the patriarchal family model by emphasizing the traditional power structure and interconnectedness of family. However, internalizing these norms can lead to damaging consequences. For example, unequal power dynamics that excuse aggressive behavior of men make women more susceptible to domestic violence and abuse and further contribute to gender inequality.¹¹⁴ Latino men are more prone to engage in risk-taking behavior such as substance and alcohol abuse as alternative methods to suppress emotion and cope with stress.¹¹⁵ Both sexes may experience increased rates of anxiety and depression resulting from maintaining the expectations and values of the imposed gender norms.¹¹⁶ This tension can be, and is, very confusing for children, often contributing to an adverse childhood experience,¹¹⁷ and impacting identity development because children are channeled into their respective roles from an early age.¹¹⁸

108. See *id.*; Fragoso & Kashubeck, *supra* note 104, at 87.

109. Valenciano, *supra* note 104, at 11.

110. Nunez et al., *supra* note 104, at 206.

111. *Id.*

112. *Id.*

113. Valenciano, *supra* note 104.

114. See Bibiana M. Mancera, Sandor Dorgo & Elias Provencio-Vasquez, *Risk Factors for Hispanic Male Intimate Partner Violence Perpetration*, 11 AM. J. MEN'S HEALTH 969, 976 (2015).

115. Fragoso & Kashubeck, *supra* note 104, at 88; see, e.g., Martin Guevara Urbina & Ilse Aglae Pena, *Capital Punishment, Latinos, and the United States Legal System: Doing Justice or an Illusion of Justice, Legitimated Oppression, and Reinforcement of Structural Hierarchies*, 66 UCLA L. REV. 1762 (2019); ESPERANZA UNITED, PREVALENCE & OCCURRENCE OF IPV, <https://nationallatinonetwork.org/learn-more/facts-and-statistics/prevalence-and-occurrence> [https://perma.cc/38MW-REZ6] (last visited Feb. 25, 2021); Mancera, *supra* note 114.

116. Fragoso & Kashubeck, *supra* note 104, at 87; Nunez et al., *supra* note 104.

117. See Amelie Ramirez, *Latino Childhood Development Research: Childhood Trauma*, SALUD AM. (Nov. 14, 2017), <https://salud-america.org/latino-childhood-development-research-childhood-trauma/> [https://perma.cc/BY5R-J4FV].

118. See Valenciano, *supra* note 104.

B. Acculturation and Its Role in Understanding Machismo

Acculturation is described as a cultural modification of an individual, group, or people which occurs by adapting or borrowing traits from another culture.¹¹⁹ There are many factors that influence acculturation such as culture, language, and circumstances surrounding a person's migration.¹²⁰ Culture is particularly important because the difference, and potentially dissonance, between the values of one's culture of origin and the migrant culture may require increased understanding and adaptation to adjust to the new receiving culture.¹²¹ For language, one who shares the same language in both their country of origin and their migrant country will likely have an easier acculturation process, compared to a person who may have to learn a different language.¹²² Finally, one's reason for migrating can greatly influence his or her ability to adopt the receiving country's culture, which is intertwined with the receiving society's attitudes and patterns of acculturation.¹²³

These factors complicate the acculturation process. For example, voluntary immigrants holding professional degrees may be welcomed with open arms because they will be viewed by the receiving country as viable contributors to society and culture.¹²⁴ Conversely, migrants who seek asylum as refugees or experience discrimination in the receiving country may be more resistant to adopting values of the receiving culture.¹²⁵ This resistance and feeling of unwantedness can result in more challenges with acculturation into the new society, potentially impacting one's mental and physical health.¹²⁶ For example, adult migrants often experience more challenges with adopting practices and values of a receiving society because they had more contact with their countries of origin than migrant children did.¹²⁷ Consequently, adults may experience higher levels of acculturative stress resulting from lack of a social support network, increased anxiety, depression, greater conflict with dismantling gender roles, and a longer adjustment period.¹²⁸

Thus, it is essential to understand the effects of acculturation especially when paired with one's status as a migrant, first-generation, or second-generation American, because it can lead to vastly different experiences of machismo among Latino men. Correspondingly, manifestations of machismo will vary per child. Because of the diversity of experiences among Latino boys, training focused on unpacking the implications of acculturation and understanding culture is necessary for educational staff at schools. Cultural training will bolster

119. See Seth Schwartz, Jennifer Unger, Byron Zamboanga & Jose Szapocznik, *Rethinking the Concept of Acculturation: Implications for Theory and Research*, 65 AM. PSYCH. 237 (2010).

120. *Id.*

121. *Id.*

122. *See id.*

123. *Id.*

124. *Id.*

125. *Id.* at 6.

126. *Id.* at 15–16.

127. *Id.* at 8.

128. Fragoso & Kashubeck, *supra* note 104104, at 87–89.

staff awareness, foster a more inclusive learning environment, minimize or eliminate “subtractive schooling,” and encourage re-evaluation of disciplinary practices necessary to combat disruptive behavior.

C. How Student At-Home Experiences Influence School Behavior

According to the 2011–2012 National Survey of Children’s Health, approximately thirty percent of Latino children in non-immigrant families reported multiple adverse childhood experiences (ACEs), compared to sixteen percent reported by Latino children in immigrant families.¹²⁹ ACEs are defined broadly as experiences that may have long term negative effects on many aspects of their development and health.¹³⁰ ACEs may consist of, but are not limited to, domestic abuse, exposure to violence and substance abuse, and family dysfunction.¹³¹ Consequently, children who experience ACEs may suffer from substance use, poor physical and mental health, and lower rates of academic achievement.¹³²

One of the largest sources of ACEs among U.S. native and immigrant Latinos is economic hardship.¹³³ About 5.7 million Latino children living in the U.S. experience poverty.¹³⁴ Many of these children are raised in households with immigrant parents who are often unauthorized to reside permanently in the United States.¹³⁵ Consequently, many of these immigrant parents feel unsafe in their communities, which directly impacts their children.¹³⁶ As a result of their migrant status and desire to protect their children, parents prevent Latino children from accessing resources, connecting with the community, and participating in programs such as early childhood education—programs that have the ability to provide a sense of security for children and their families.¹³⁷

With limited intervention and aid, children with exposure to two or more ACEs may experience substantially more challenges in school compared to peers with fewer exposures.¹³⁸ For example, exposure to ACEs may lead to chronic

129. Ramirez, *supra* note 117; Tania Maria Caballero, Sara B. Johnson, Cara R. Munoz Buchanan & Lisa Ross DeCamp, *Adverse Childhood Experiences Among Hispanic Children in Immigrant Families Versus US-Native Families*, PEDIATRICS, Nov. 2017, at 1, 4.

130. Caballero et al., *supra* note 129, at 2.

131. *Id.*

132. Ramirez, *supra* note 117 (“Latino youth with higher ACE scores were found to have significantly increased odds of attempting suicide and school misconduct. More than three of four children ages 3–5 who have been expelled from preschool also had ACEs.”).

133. *Id.*

134. Julia Mendez Smith, *Early Childhood Education Programs as Protective Experiences for Low-Income Latino Children and Their Families*, ADVERSITY & RESILIENCE SCI., Aug. 13, 2020, at 191, 192.

135. *Id.*

136. *Id.*

137. *Id.*

138. Christina D. Bethell, Paul Newacheck, Eva Hawes & Neal Halfon, *Adverse Childhood Experiences: Assessing The Impact On Health and School Engagement and the Mitigating Role of Resilience*, HEALTH AFFAIRS, Dec. 2014, at 2106, 2111; Ramirez, *supra* note 117.

absenteeism and retention issues.¹³⁹ According to the 2011–12 National Survey of Children’s Health, children with two or more ACEs were 2.67 times more likely to repeat a school grade compared to their peers with zero exposure to an ACE.¹⁴⁰ Exposure to ACEs can also lead to increased drop-out rates resulting from low academic achievement or behavioral challenges such as disengagement, aggression, and anxiety.¹⁴¹ Furthermore, students with three or more ACEs are at risk of developing mood-based disorders such as depression, attention deficit hyperactivity disorder (ADHD), antisocial behavior, and accumulating toxic stress levels.¹⁴²

ACEs, especially at a young age, can have extremely detrimental effects on children. When paired with other stressors such as non-citizen status of immigrant parents, discrimination, feelings of unwantedness, and acculturation, Latinos are even more vulnerable.¹⁴³ As the Latino community grows, it is essential to implement procedures in schools to help combat the effects of ACEs at all levels by building resilience, adopting multi-tiered support systems, and establishing alternative disciplinary systems.¹⁴⁴

III. THE EDUCATIONAL BENEFITS OF CULTURALLY RESPONSIVE TEACHING AND RESTORATIVE JUSTICE—CALIFORNIA AS A MODEL FOR LEGISLATION AND IMPLEMENTATION

Under the guidance of congressional actions of the past and an understanding of the urgent implications on the Latino community, this Part focuses on two items. First, it highlights the evidentiary practices that will improve the outcomes of Latino boys in schools: culturally responsive teaching and restorative justice. Second, it gives an overview of California’s movement (and corresponding legislation) toward incorporating culturally responsive teaching and restorative justice into all of its schools.

A. *Culturally Responsive Teaching is Caring, Respectful, Teaching*

Culturally responsive teaching (CRT) is a pedagogy that encourages teachers to implement various teaching strategies in the classroom to promote integration and empowerment of students in learning and sharing their own culture.¹⁴⁵ CRT “rests on three criteria or propositions: (a) Students must experience academic success; (b) students must develop and/or maintain cultural

139. Paul Carlson, *Impact of Adverse Childhood Experiences on Academic Achievement of School-Aged Learners* 12, 15–16 (July 8, 2019) (M.Ed. thesis, Concordia University St. Paul) (DigitalCommons@CSP).

140. Bethell et al., *supra* note 138, at 2111.

141. Carlson, *supra* note 139, at 18–19.

142. *Id.* at 19–20; Tenah K.A. Hunt, Kristen S. Slack & Lauren M. Berger, *Adverse Childhood Experiences and Behavioral Problems in Middle Childhood*, 67 CHILD ABUSE & NEGLECT 391, 399 (2017).

143. See Smith, *supra* note 134, at 192; see also Schwartz et al., *supra* note 119, at 8.

144. Carlson, *supra* note 139, at 20–26.

145. See Deborah A. Harmon, *Culturally Responsive Teaching Through a Historical Lens: Will History Repeat Itself?*, 2 INTERDISC. J. TEACHING & LEARNINGS 12, 12 (2012).

competence; and (c) students must develop a critical consciousness through which they challenge the status quo of the current social order.”¹⁴⁶ If fostered effectively, students will engage with their peers and the world in a way that uses their own culture as a vehicle for learning.¹⁴⁷ As a result, students will feel more connected to learning, feel validated, and gain confidence.¹⁴⁸ In a society that is becoming increasingly diverse, it is critical that teachers continue to grow with their students and use their expertise to drive learning in manners that are accessible to students from all cultural backgrounds and levels of understanding.

Culturally responsive teaching pedagogy requires dismantling decades of classroom practices by changing the teaching dynamic from being teacher-centered to student-centered.¹⁴⁹ Teachers can do this by leveraging their students’ strengths to create a more functional learning environment by promoting respect, care, and high expectations.¹⁵⁰ This can be achieved through many practices. For example, teachers can promote student-to-student learning where the teacher serves as a facilitator rather than the focal point of instruction.¹⁵¹ This method increases student community in the classroom, increases student engagement in education as opposed to passively listening to a lecture, and allows students to embrace their own cultures’ approaches to learning.¹⁵² Teachers can also reshape curriculum to integrate learning about other cultures by, for example, incorporating students’ “home languages” into conversations and reading books by authors with similar cultures.¹⁵³ These techniques empower students to feel more connected to their learning and their cultures, boost teacher awareness, and create community.¹⁵⁴

Fostering relationships is an essential element of CRT and it is achieved effectively in two parts. First, teachers must foster their own identity development and understanding of other cultures.¹⁵⁵ This can be achieved in many ways including, teacher training on teaching diverse students, implicit biases, and social-emotional awareness. After such training, teachers are more equipped to foster relationship building in the classroom.

Building relationships is vital for understanding students and creating a culture that caters to their learning needs.¹⁵⁶ Often, relationships must be built

146. Gloria Ladson-Billings, *But That's Just Good Teaching! The Case for Culturally Relevant Pedagogy*, 34 THEORY INTO PRACTICE 159, 160 (1995).

147. *Id.* at 161.

148. *See id.* at 160–61.

149. The Education Alliance, *Culturally Responsive Teaching*, BROWN UNIV., <https://repository.library.brown.edu/studio/item/bdr:jrttt2c4/> [https://perma.cc/7ZG9-N9YR] (last visited Jan. 31, 2022).

150. *Id.*

151. *Id.*

152. *See id.*; BONNIE M. DAVIS, HOW TO TEACH STUDENTS WHO DON'T LOOK LIKE YOU: CULTURALLY RESPONSIVE TEACHING STRATEGIES 15–16 (Dan Alpert et al. eds., 2d ed. 2012).

153. Adriana Valdez, Benefits of Culturally Relevant Literature on Latino Students 8–10 (May 14, 2019) (M.A. thesis, California State University Monterey Bay) (DigitalCommons@CSUMB).

154. *Id.* at 23–26.

155. Thomas, *supra* note 98.

156. *Id.* at 29.

first before students engage in learning.¹⁵⁷ Relationship building should also go beyond the perimeter of the classroom and include relationships between parents and teachers. Fostering parent-teacher relationships builds trust between parents and schools, can help improve student behavior, and improve student academic achievement.¹⁵⁸

CRT pedagogy is a growing area containing many other techniques that can foster student investment in school. For the purposes of this Comment, I intentionally named only a few examples, particularly those that I feel are most effective for Latino boys. In Part IV I will delve into my reasoning for highlighting these methods in particular.

B. Restorative Justice Overview: Out with StPP and in with RJP

Restorative justice practices (RJP) in schools serves as an alternative to zero-tolerance policies and exclusionary discipline practices like suspension and expulsion.¹⁵⁹ Restorative justice originated in the 1970s as a mediation technique between victims and offenders in the criminal justice system; more recently, schools have been implementing this model instead of other exclusionary options that have more harmful effects on children, specifically minoritized and special needs students.¹⁶⁰ Unlike zero-tolerance methods where students may lack closure, restorative justice prioritizes student growth by encouraging conversation between the student and the harmed party so the student can learn about the impacts of his or her actions.¹⁶¹

RJP can be implemented in several different ways, all of which aim to improve school communities while addressing the root causes of behavior issues.¹⁶² Schools may use victim-offender mediation conferences, group conferences, and circles.¹⁶³ Among those options there are two categories of activities: community building, which helps to build trust between students and staff, and peacemaking, which aims to remediate harm and make reparations.¹⁶⁴ Some schools have even extended restorative justice practices between staff members.¹⁶⁵ These practices often involve many people and it is not unusual for

157. STEFFEN SAIFER, KEISHA EDWARDS, DEBBIE ELLIS, LENA KO & AMY STUCZYNSKI, *CULTURALLY RESPONSIVE STANDARDS-BASED TEACHING: CLASSROOM TO COMMUNITY AND BACK* 73 (2d ed. 2011).

158. See Laura Van Der Wal, *Parent-Teacher Relationships and the Effect on Student Success 4-5* (Aug. 7, 2020) (M.A. thesis, Northwestern College, Iowa).

159. TREVOR FRONIUS, SEAN DARLING-HAMMOND, HANNAH PERSSON, SARAH GUCKENBERG, NANCY HURLEY & ANTHONY PETROSINO, *WESTED JUST. & PREVENTION RSCH. CTR., RESTORATIVE JUSTICE IN U.S. SCHOOLS* 21 (2019).

160. *Id.* at 1, 9; Ted Wachtel, *Defining Restorative*, INT'L INST. FOR RESTORATIVE PRACS. 2 (Nov. 2016), https://www.iirp.edu/images/pdf/Defining-Restorative_Nov-2016.pdf [<https://perma.cc/BB8E-MB3V>].

161. See FRONIUS ET AL., *supra* note 159, at 9–10.

162. *Id.* at 1–2.

163. *Id.* at 10.

164. *Id.*

165. See Cindy Long, *Restorative Discipline Makes Huge Impact in Texas Elementary and Middle Schools*, NAT'L EDUC. ASS'N (Aug. 25, 2016), <https://www.nea.org/advocating->

an entire class of students or smaller advisory to participate in community building.¹⁶⁶ Alternatively, circles may be limited to include the victim, offender and facilitator.¹⁶⁷

After restorative conferences, the participants typically determine the restorative sanction for the offender.¹⁶⁸ Often, these sanctions do not result in exclusionary discipline and instead focus on “community service, restitution, apologies, or agreements to change specific behaviors, such as the offender agreeing to comply with certain conditions, sometimes in exchange for incentives.”¹⁶⁹ When used effectively there is little, if any, need for exclusionary discipline and, as a result, students feel more connected to the school community.¹⁷⁰

C. *A California Case Study: CRT and Restorative Justice in Action*

California contains the largest Latino population in the United States.¹⁷¹ In 2015, Latinos represented over half of the children (3.3 million) enrolled in California’s K-12 public schools.¹⁷² Many of these students are disadvantaged due to “poverty, lack of English language proficiency, and disability.”¹⁷³

In evaluating student success and improved outcomes, much of the work must start with teacher education. The California Code of Regulations outlines the educational requirements for teachers.¹⁷⁴ This regulation requires that educators demonstrate knowledge of skills to facilitate individual growth and to achieve academic success, including an understanding of human development.¹⁷⁵ The regulation requires an understanding of the effects of family socio-economic status on student growth and development, the effect of educators’ own biases and how they affect providing services to students with different socio-economic, racial, and social backgrounds, and culturally appropriate communication styles and counseling strategies.¹⁷⁶ Additionally, this regulation outlines that teachers must identify pupils who are at risk of failing and work with other staff members to prevent student failure, with physical, social,

for-change/new-from-nea/restorative-discipline-makes-huge-impact-texas-elementary-and [https://perma.cc/2XKU-CRUU].

166. FRONIUS ET AL., *supra* note 159, at 10.

167. *Id.*

168. *Id.*

169. *Id.* at 10–11.

170. *See id.* at 10; Long, *supra* note 165; Washburn & Willis, *supra* note 11.

171. Jens Manuel Krogstad, *Hispanics Have Accounted for More than Half of Total U.S. Population Growth Since 2010*, PEW RSCH. CTR. (July 10, 2020), <https://www.pewresearch.org/fact-tank/2020/07/10/hispanics-have-accounted-for-more-than-half-of-total-u-s-population-growth-since-2010/#:~:text=Some%20of%20the%20nation's%20largest,of%20the%20nation's%20Hispanic%20population> [https://perma.cc/EV58-VDBY].

172. CAL. SENATE. OFF. OF RSCH., *A STATISTICAL PICTURE OF LATINOS IN CALIFORNIA 2017 UPDATE* 58 (2017).

173. *Id.*

174. Cal. Code. Regs. tit. 5, § 80632.1 (2021).

175. *Id.* § 80632.1(a)(1)(A).

176. *Id.* § 80632.1(a)(1)(A)(4), (a)(1)(F-G).

intellectual and emotional programs, and to engage in conflict resolution.¹⁷⁷ According to this regulation, school staff should have the necessary training to engage with diverse groups of students because they do have some cultural competency training and understanding of bias and how it can effect student learning. Additionally, it is worth noting that, as of 2004, California enacted legislation to perform studies used to evaluate availability and effectiveness of cultural competency training for teachers and administrators.¹⁷⁸

Another key area linked to reduced student outcomes is suspension and expulsion practices. Many states are shifting away from overly harsh zero-tolerance policies of the past and adopting alternative practices such as restorative justice.¹⁷⁹ Currently in California, suspension will only be imposed in circumstances where alternative methods of correction do not result in proper conduct.¹⁸⁰ The California statute outlines several other methods of correction including restorative justice practices; conferences between school personnel, students, and their families; referrals to the school counselor, psychologist, and social worker; and utilization of resource panels to help create an individualized plan to improve student behavior.¹⁸¹

Furthermore, California's legislature encourages school safety plans, which include strategies such as restorative and transformative justice programs and positive behavior intervention support to help maintain positive school climate, and increase safety and student engagement.¹⁸² This state-wide movement has led to significant investment to support and bolster restorative justice in schools after observing reduced numbers of suspensions, truancy, and increased investment in schools.¹⁸³ For example, the Los Angeles Unified School District allocated more than \$10 million annually for restorative justice, with the goal of implementing practices in each of its 900 schools by 2020.¹⁸⁴ For the 2017–18 school year, the Oakland Unified School District budgeted \$2.5 million for restorative justice.¹⁸⁵ Additionally, during the 2017–18 school year, the San Diego Unified School District approved an \$800,000 budget for restorative justice.¹⁸⁶

Although the path to implementing restorative justice in California is largely positive, it has also been extremely challenging.¹⁸⁷ Not only do these programs require extensive training, they often require teachers to shift their

177. *Id.* § 80632.1(a)(2)-(3).

178. CAL. EDUC. CODE § 44238 (Deering 2004).

179. *See, e.g.*, COLO. REV. STAT. § 22-32-144 (2011); CONN. GEN. STAT. § 10-222g (2014); DEL. CODE ANN. tit. 14, § 703 (2019); FLA. STAT. § 1006.13 (2019); 105 ILL. COMP. STAT. 5/10-22.6 (2019); IND. CODE ANN. § 20-28-3-3.5 (LexisNexis 2020); LA. STAT. ANN. § 17:41 (2021); ME. STAT. tit. 20-A, § 1001(15-A) (2019); 603 MASS. CODE REGS. 53.05 (2021).

180. CAL. EDUC. CODE § 48900.5(a) (Deering 2020).

181. *Id.* § 48900.5(b).

182. CAL. EDUC. CODE § 32282.1(a)-(b) (Deering 2015).

183. Washburn & Willis, *supra* note 11.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

mindset in approaching discipline, which is well-received by some and opposed by others.¹⁸⁸ However, the rewards make the challenges worth it, as evidenced by reduced suspension numbers and the fostering of a school climate where students feel more connected and supported.¹⁸⁹

Overall, California legislation reflects the shift toward adopting culturally responsive programming in schools. The schools that have adopted these programs experienced positive outcomes, as indicated by measures such as reduced truancy and number of suspensions. These positive outcomes have even encouraged larger districts in the state to embrace restorative justice practices. Furthermore, California legislation acknowledges the importance of cultural competency and requires educators to complete training. These encouraging developments should be noted and pursued by federal lawmakers striving for the ideal of equal educational opportunity.

IV. MAKING ESSA ADD UP

As mentioned in Part I, ESSA has great potential as indicated by its shift away from standardized testing to a more holistic, child-friendly approach to measuring achievement. However, ESSA is not there yet.¹⁹⁰ Indeed, although a well-intentioned law, ESSA represents a complete federal retreat from public education. With the understanding that Congress has the ability to condition federal funding for public education, Part I challenged Congress to condition federal funding on the implementation of CRT and restorative justice practices in schools. Furthering this argument, this Part concludes by revisiting the issues addressed in Part II with a more positive outlook, one where CRT and restorative justice practices widely exist and actively change the outcome for Latino boys.

A. Amending ESSA

ESSA was integral in dismantling NCLB and fundamentally reinstated legislation that benefitted a variety of students—including the Latino population. However, the retreat of federal government oversight calls into question the effectiveness of this legislation: are states *actually* being held accountable and for what?

Indeed, at its surface, ESSA says all the right things: schools need to be held accountable, students must participate in annual testing, equity should be pursued through concrete action, and states must have academic standards. However, it does not provide guidance on how failures will be mitigated—only that intervention tactics are deferred for three years after implementing new

188. *Id.*

189. *Id.*

190. Andrew M.I. Lee, *What is the Every Student Succeeds Act (ESSA)?*, UNDERSTOOD FOR ALL INC., <https://www.understood.org/en/school-learning/your-childs-rights/basics-about-childs-rights/every-student-succeeds-act-essa-what-you-need-to-know> [https://perma.cc/FSJ7-2D69] (last visited Jan 12, 2021).

plans.¹⁹¹ Three years is a substantial length of time, especially for growing minds.¹⁹² Incapable of advocating for themselves, it is on the shoulders of adults to ensure that students receive the education they deserve. Unfortunately, ESSA opens the door to many different interpretations of what constitutes a quality education by placing the burden on the states to create their own definitions.¹⁹³ States are often referred to as “laboratories for democracy,”¹⁹⁴ but arguably here, experimentation has gone too far and on for too long.

ESSA’s failure to adequately regulate public education and the corresponding, persisting inequalities make clear that the federal government should return to its ESEA roots and take an active role in improving public education, especially for the most vulnerable students. Amending ESSA is the most feasible option available now to accomplish such reform. As a starting point, Congress should adopt two evidence-based practices which show great promise in improving outcomes for Latino boys and the student body at large: culturally responsive teaching and alternative approaches to exclusionary discipline in the form of restorative justice.

B. Congressional Authority to Condition Federal Funding for Public Projects

As demonstrated in Part I, Congress has the authority under the Spending Clause to allocate funding to the states for the purpose of achieving broader public policy initiatives.¹⁹⁵ The enactment of the ESEA created a substantial amount of federal funding to the states for the purposes of promoting educational equity among the poor.¹⁹⁶ The only issue the federal government encountered with ESEA was the lack of state contributions to the program.¹⁹⁷ Shortly thereafter, the federal government conditioned funding on the expectation that states would also contribute funding to the programming.¹⁹⁸ At no point did ESEA spending ever appear to be beyond the scope of congressional power—even at the height of conditional requirements established by one subsequent version of the law, No Child Left Behind.¹⁹⁹

191. Gregory Korte, *The Every Student Succeeds Act vs. No Child Left Behind: What’s Changed?*, USA TODAY (Dec. 11, 2015, 4:25 PM), <https://www.usatoday.com/story/news/politics/2015/12/10/every-student-succeeds-act-vs-no-child-left-behind-whats-changed/77088780/> [<https://perma.cc/9RC8-Q5HE>].

192. See *Child Development: Early Brain Development*, CDC <https://www.cdc.gov/ncbddd/childdevelopment/early-brain-development.html> [<https://perma.cc/TNA8-5MNE>] (last visited Jan. 20, 2021) (“Although the brain continues to develop and change into adulthood, the first 8 years can build a foundation for future learning, health and life success.”).

193. Every Student Succeeds Act, Pub. L. 114-95 §§ 1111(a)-(g) (2015).

194. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

195. *South Dakota v. Dole*, 482 U.S. 203, 207 (1987).

196. Paul, *supra* note 28.

197. See *id.*

198. Elementary and Secondary Education Act Amendments of 1970, Pub. L. No. 91-230, § 109(a), 84 Stat. 121 (codified as amended in scattered sections of 20 U.S.C. (2012)).

199. Eloise Pasachoff, *Conditional Spending after NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 614–15 (2013).

During the era of NCLB, Congress dictated extensive parameters for states to receive federal funding for education. However, the restrictions still never rose to the level of controversy of *NFIB*. NCLB was a significant revision compared to prior versions of ESEA. Indeed, it increased testing requirements, teacher evaluation structures, and more; yet, it did not condition funds on accepting NCLB over another program.²⁰⁰ Although NCLB appeared to be vastly different from ESEA, the funding channels remained the same and Congress only conditioned how the funds allocated under NCLB were to be used.²⁰¹ As noted by *Dole* and *NFIB*, Congress *can* condition funding, so long as it is not coercive.²⁰² Despite its vast changes, conditions, and controversy, NCLB was never considered unduly coercive or overreaching. By the same token, ESSA is not coercive especially because it loosened conditions compared to NCLB.²⁰³

With these considerations in mind, increasing conditions on federal educational funding for the programs I recommend is within the limits established by *Dole* and *NFIB* and remain less obtrusive than NCLB.²⁰⁴ In fact, as of Fall 2019, roughly thirty-four states adopted some form of culturally responsive practices and/or hired culturally competent educators per their ESSA plans.²⁰⁵ Thus, it should be a very easy for both the states and the federal government to enhance culturally responsive practices in schools with the supplanted funding under Title I and Title II. Many states are already making efforts toward these ends and federal intervention can help ensure uniform best practices. In addition, federal intervention will engage those states that have not yet implemented these highly effective practices.

Amending ESSA to condition funding on these programs also aligns with the initial equity goals of ESEA—to provide equal educational opportunities for poor and disadvantaged students.²⁰⁶ The earliest reauthorizations of ESEA forged the path for other legislation rooted in improving equity for all students like the Bilingual Education Act and Individuals with Disabilities Education Act (IDEA). Amending ESSA would expand on the equity goals set forth by ESEA by adopting culturally responsive methods and restorative justice practices, which are known to help students of color but in fact, improve school culture and learning among all students.

C. Amending ESSA Will Generate Positive Change Among Latino Boys and Increase Student Persistence in School

Culturally responsive teaching and restorative justice practices are two steps that are already familiar to schools which can make a huge difference in the learning trajectory of Latino boys. As discussed above, there are many

200. *Id.* at 614–15.

201. *Id.*

202. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987); *NFIB v. Sebelius*, 567 U.S. 519, 583–84 (2012).

203. *NFIB*, 567 U.S. at 580.

204. *Id.*

205. Schettino et al., *supra* note 67.

206. Paul, *supra* note 28.

reasons why Latino boys feel disconnected and disinvested in education. Significantly, most of these factors have some relation to students not feeling culturally accepted by schools. CRT and restorative justice practices are highly impactful among Latino boys because both encourage relationship building and promote cultural understanding between students and teachers.

In the past decade, several case studies were conducted across the United States observing the positive effects of CRT, like the California case study mentioned above.²⁰⁷ Several trends emerge from these studies. First, Latino boys are more successful in schools that provide professional development about CRT, collaboration, and teacher identity.²⁰⁸ Second, Latino students experience an increased level of school performance in schools where teachers affirm students' racial, ethnic, cultural identities and academic successes.²⁰⁹

The overarching message is that teachers must be equipped with skills first. CRT and restorative justice are not systems that can be implemented overnight, as both require professional development for all school staff. This training is most effective when teachers are encouraged to: (1) unpack their own understanding of identity and learn about other cultures, and (2) collaborate with other educators to learn how to develop a CRT curriculum, implement the curriculum, and use restorative justice practices.²¹⁰

This is where a conditional funding amendment to ESSA can be particularly helpful. Namely, it is a great opportunity to use federal resources to support teacher development, promote uniformity, and foster equal education by recommending that states use funding for professional development and restorative justice practices.

When adequately prepared, teachers can use CRT and restorative justice to create a foundation for a strong community where students can learn empathy, feel cared for, be held accountable, and celebrate diversity—which all work against harmful subtractive schooling.²¹¹ Latino youth will then feel more valued, have teachers they can turn to in times of need, and are comfortable learning in class.²¹² Additionally, CRT and restorative justice practices both foster social-

207. Rosann Tung, Vivian Dalila Carlo, Melissa Colon, James Del Razo, John Diamond, Aletha Frazier Raynor, Daren Graves, Paul Kuttner, Helena Miranda & Andresse Rose, *Promising Practices and Unfinished Business: Fostering Equity and Excellence for Black and Latino Males*, ANNENBERG INST. FOR SCH. REFORM AT BROWN UNIV. (Apr. 2015), https://www.cce.org/uploads/files/PromisingPractices_UnfinishedBusiness_FullStudy_FINAL.pdf [https://perma.cc/5FVZ-G779]; Thomas, *supra* note 98; Valdez, *supra* note 153; Sara Maria Castro Olivo, *The Effects of a Culturally-Adapted Social-Emotional Learning Curriculum on Social-Emotional and Academic Outcomes of Latino Immigrant High School Students* (Jan. 2007) (Ph.D. dissertation, University of Oregon), <https://strongkids.uoregon.edu/researchPDFs/CastroOlivo2006.pdf> [https://perma.cc/K4RK-S9LB].

208. Tung et al., *supra* note 207.

209. *Id.*

210. *Id.*

211. See Thomas, *supra* note 98, at 38.

212. *Id.*; Jenny Muniz, *5 Ways Culturally Responsive Teaching Benefits Learners*, NEW AM. (Sept. 2019), <https://www.newamerica.org/education-policy/edcentral/5-ways->

emotional awareness and teach students to self-regulate. The ability to self-regulate and exhibit control are invaluable skills for Latino boys who historically are exposed to adults who are not effective self-regulators. Teaching students these skills make them less combative and more capable of voicing concerns as they arise, rather than resorting to violence or aggression, which are leading reasons why Latino youth are suspended and expelled in the first place. As highlighted above, suspensions and expulsions have a cumulative effect that interferes with a student's likelihood to graduate from high school. These methods are two essential tools that can change the learning dynamic for Latino boys and empower them, so they feel more equipped for learning, supported, and ultimately, prepared for collegiate level learning. Furthermore, the effects of CRT and restorative justice practices extend beyond Latinos and benefit all students. With benefits that drastically outweigh any detriments, it should not be a decision of if CRT and restorative justice are implemented in all schools but when. The time is now.

CONCLUSION: CONGRESS, TAKE THE REIGNS

Unpacking Manny's memory solidified my belief that combating machismo among Latino boys is a crucial element of education reform. As discussed, this can be effectively accomplished through expanding culturally responsive teaching practices and implementing restorative justice programs. Today, Manny recognizes that the machismo engrained in his family's culture stunted his personal and educational development and he has worked hard to improve himself in recent years. While Manny's commitment to bettering himself is admirable, many similarly situated boys will end up on a darker path without further intervention. This should not be accepted as the norm among Latino boys, nor any other historically marginalized group.

This Comment explored the scope of the federal government's spending power, critiqued current educational policy, and provided recommendations for improving ESSA to endorse critical developments in educational pedagogy and alternative measures of student success. Although CRT and restorative justice practices are relatively new, they show great potential for the Latino community and other communities of color. Accordingly, this Comment strongly encourages Congress to intervene and condition state supplanted funding to adopt culturally responsive teaching and restorative justice practices by using California as a model. Prioritizing CRT and restorative justice will only further the education goals established under the ESEA while simultaneously improving the educational system for students of color—and for all.

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