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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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MAKING INVISIBLE VICTIMS WHOLE: A REPLY TO DIAMANTIS

Chad Flanders[†]

ABSTRACT

Professor Mihailis Diamantis’s paper on *Invisible Victims* identifies a surprising gap in the remedies provided by the criminal justice system: they leave certain victims of crime out in the cold.¹ Victims of crimes perpetrated by those with immunity from prosecution or whose perpetrators are only found after statutes of limitations run may never have their day in court and never see the wrongs done against them punished.

Professor Diamantis proposes a unique kind of remedy for these victims, namely, criminal trial without punishment. But Diamantis’s proposal raises more questions than it answers. Diamantis uncritically assumes that the remedy that victims usually want is the punitive remedy that the criminal justice system gives them. There are many reasons to doubt this, both with visible and invisible victims. Sometimes victims want remedies that the criminal justice cannot provide, such as recognition of the wrongs they have suffered, reconciliation with those who committed the crimes against them, and help and support to move past the trauma they have endured. In this response to *Invisible Victims*, I raise questions about the feasibility of Professor Diamantis’s idea of trials without punishment, but more generally take issue with his reliance on the criminal justice system as the best (or only) means to make invisible victims “visible.”

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1. Mihailis E. Diamantis, *Invisible Victims*, 2022 WIS. L. REV. 1 (2022).

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INTRODUCTION

One of the most powerful attractions of criminal law is the claim that, when used properly, it “speaks for the victims” of crime.² It claims to give something, some kind of satisfaction, to those who have been harmed, abused, and sometimes forgotten. And it does not merely give victims revenge; it gives them *justice*. Victims can get their day in court—their status gets elevated, restored, as compared to their perpetrators. Punishment brings the offender down and raises up the victim, at least in theory.³ Professor Mihailis Diamantis works in this long tradition by bringing to the light a class of what he calls “invisible victims,” who are, by reason of either law or circumstance, unable to get that day in court.⁴ Victims whose perpetrators have died, for example, will miss out on confronting that person at trial; statutes of limitations and various immunities to prosecution protect perpetrators from criminal liability, again leaving victims out in the cold.⁵

In siding with “invisible victims,” Diamantis largely buys into the conventional criminal justice narrative about speaking for victims. But this narrative has faced increasing scrutiny over the past several decades.⁶ Why assume that most (or even some) victims always want what the criminal justice system gives them? Maybe victims do not want punishment for their perpetrators, or even a trial. They may want the perpetrator not to offend again, but it is not clear that punishment and trial achieve such results. Maybe victims want reconciliation between themselves and the perpetrator.⁷ Maybe they do not care about the perpetrator so much and mostly just want something for

2. Examples of prosecutors using their closing arguments exhorting juries to “speak for” the victims by means of their verdict are legion (and frequently the object of litigation). *See, e.g.,* State v. McKinney, No. W1999-00844-CCA-R3-DD, 2001 WL 298636, at *14 (Tenn. Crim. App. Mar. 28, 2001), *aff’d*, 74 S.W.3d 291 (Tenn. 2002) (“Who speaks for the victims? Who speaks for the victims and their families and their co-workers? I’ll tell you who speaks for them, juries. What speaks for them? Just verdicts.”). Prosecutors also sometimes add that *they* are speaking for the victim. *See, e.g.,* United States v. Rodriguez, 581 F.3d 775, 803 (8th Cir. 2009) (collecting cases).

3. *See generally* Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFFS. 208 (1984) (exploring the deterrence, retributivist, and rehabilitative justifications for punishment).

4. *See* Diamantis, *supra* note 2.

5. *Id.* at 11–21.

6. *See, e.g.,* MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006) (tracing the rise of mass incarceration in part to claims about the needs and rights of victims); AYA GRUBER, *THE FEMINIST WAR ON CRIME* (2020) (criticizing reliance on the criminal justice system to address the victimization of women); MARCUS DUBBER, *VICTIMS IN THE WAR ON CRIME* (2002) (noting the political and rhetorical uses of acting on behalf of victims of crime). For a good recent survey of the literature on victims, see the special issue of the Brooklyn Law Review on victims. Kate Mogulescu, *Foreword: The Role of the “Victim” in the Criminal Law System*, 87 BROOK. L. REV. 1105 (2022).

7. *See, e.g.,* DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* (2019) (suggesting alternatives to incarceration to meet the needs of victims).

themselves—therapy, social services, or recognition. In short, recent scholarship has challenged the idea that what victims want is always what the criminal justice system gives them.⁸ These scholars have contested the narrative that the prosecutor is the one who speaks for them, and that the criminal justice system is a kind of one-size-fits-all remedy for victims.

I too reject the idea that, simply because we have found a new class of victims (invisible victims), the answer is obviously or necessarily more of the same: to funnel them through the criminal justice system so that they can be treated more like other victims. Rather, the existence of invisible victims, and their unique circumstances, should be seen as an opportunity—an opportunity to rethink what victims want, what they should get, and, most importantly, what it means to listen to (rather than speak for) victims. I look at invisible victims in nearly the opposite way Diamantis does, *viz.*, as a reason for questioning the criminal justice system and its remedies, rather than doubling down on what the criminal justice system has to offer victims.

My response to Diamantis proceeds in four parts. The first part very briefly summarizes Diamantis's argument in *Invisible Victims* by placing it in the context of the rise of the victims' rights movement. The second part examines the more direct answer to Diamantis's worries about invisible victims—making them into more conventional victims by abolishing more statutes of limitations for crimes or getting rid of diplomatic immunity.⁹ In part three, I examine the practicalities of Diamantis's proposal of trial without punishment. Diamantis seems to imagine that having more trials would be easy—that we can just add an invisible victims' docket. But this ignores how our system is largely a system of pleas, not a system of trials.¹⁰ Diamantis's general inattentiveness to how his proposal would fit into the status quo ends up weakening his proposal's overall attractiveness, whatever its normative merits.

It is in the fourth part that I depart most substantially with Diamantis. My criticisms in the second and third parts operate internally to his project. Why not just eliminate those parts of the law that create invisible victims? What would it look like to implement a system of trials without punishment? But these criticisms presuppose that his project in general is a sound one, that it would be a worthwhile thing to try to bring invisible victims into the ambit of the criminal justice system, at least part of the way.

It is not clear that using the criminal justice system is the only way to solve the problems Diamantis identifies. There may be many solutions to the problems that attend being the victim of a crime, and the criminal justice system may not be the best one. The criminal justice system has its own problems and pathologies, and it may not be good to get invisible victims (or for that matter, many actual victims) wrapped up in them. It may not even be what invisible victims *want*, perhaps particularly in some of the cases Diamantis identifies. This

8. See sources cited *supra* notes 7–8.

9. If giving victims the benefit of their day in court is as important as Diamantis says it is, it is puzzling why he does not consider this solution more seriously.

10. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (“[C]riminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”).

is a time of growing creativity in thinking outside of the criminal justice box; people are talking and writing about restorative justice, and about attacking more directly the immediate problems victims face. These solutions may give victims, invisible or otherwise, what they actually want and need—which in many cases lies outside of what the criminal justice system has to offer. A trial may not always be the answer, for invisible and visible victims alike.

I. INVISIBLE VICTIMS AND THE NARRATIVE OF VICTIMHOOD

Many have recently written about the victims' rights movement as a driver of mass incarceration.¹¹ There are two overlapping and intertwined strains to this narrative. On the one hand, the narrative focuses on the criminal justice system bringing in new groups of people to push their claims within that system. A major case in point is bringing women's victimhood into the purview of the criminal justice system. Violence against women is no longer seen as a private problem, but as one that the criminal justice system ought to take seriously.¹² "[T]aking the problem seriously," means that the criminal justice system—police, prosecutors, judges—should more actively intervene into the abuses suffered by women, usually at the hands of men.¹³ Thus, there are mandatory arrest laws, or more generally there are stiffer punishments for crimes which typically involve women as victims. There may be new categories of victims, such as domestic victims, or there may be new types of crimes, such as domestic assault. In a very real sense, before these waves of reforms, women were "invisible victims" because the criminal justice system did not really attend to the harms that they were suffering. At the extreme, to take one obvious example, marital rape was not traditionally treated as a crime.¹⁴ But this has changed: the claims of such victims now have a remedy in the criminal justice system's response—the victim can call the police; the perpetrator will be prosecuted and sentenced. Something similar might also be said, e.g., about hate crime laws and the protection they gave to previously "invisible" victims.¹⁵

On the other hand, there has been greater recognition given to the claims of victims *as such*, not of this or that group of victims (e.g., women). There are now victims' bills of rights, and victims are provided with an array of services to help them navigate the criminal justice system—running from simply getting

11. See sources cited *supra* note 7. The focus of this scholarship is largely the rise of the women's rights movement and its involvement with the carceral state. I discuss this *infra*. See also Aya Gruber, *#MeToo and Mass Incarceration*, 17 OHIO ST. J. CRIM. L. 275, 279 (2020) ("Despite a burgeoning political consensus that the U.S. incarcerates too many people, uses criminal law as the solution to too many problems, and maintains horrific prison conditions, feminists continue to champion novel penal laws and expanded carceral regimes to address the gender issues that appear on their radars.").

12. See Gruber, *supra* note 12, at 279.

13. See especially GRUBER, *supra* note 7.

14. See generally ROBIN WEST, *MARRIAGE, SEXUALITY, AND GENDER* (2007) (tracing the history of laws regulating marriage).

15. Shirin Sinnar & Beth A. Colgan, *Revisiting Hate Crimes Enhancements in the Shadow of Mass Incarceration*, 95 N.Y.U. L. REV. ONLINE 149, 150 (2020) ("Hate crimes laws arose out of a convergence between civil rights advocates and a more conservative victims' rights movement, and arguably won acceptance by capitalizing on law-and-order politics.").

information about the progress of the case to having an actual attorney represent their interests at hearings.¹⁶ Victims may have greater rights to speak about whether bail should be set or at sentencing, where they may give a victim impact statement. Victims have the right to attend court hearings, even if they are witnesses who will testify at trial. After a conviction, victims may have greater rights to get restitution from the perpetrator of the crime. The idea that the *state* runs the show against the defendant even finds some opposition in the rise of the victims' rights movement. The victim becomes more and more a participant in the entire process, and the prosecutor may feel compelled to not simply do what makes sense for the state, but also to respond to the demands (real and perceived) of the victim. Victims, when given these rights and responsibilities as participants in the system, may feel less invisible to the state and to the defendant. Their role in the process gets more acknowledged and their concerns get prioritized.

Diamantis's essay fits into both of these trends.¹⁷ He wants to bring in a new group into the process, *viz.*, invisible victims, who have been the victims of a crime, but who have been shut out from the criminal justice system. In this, they are like women in the mid-twentieth century (and before), whom the law failed to recognize, or to recognize as much as it ought to have. Diamantis wants us to see this group of invisible victims as true victims the criminal justice system does not sufficiently take into account, and he wants to champion their interests. In doing this, he fits in with the more general trend of the victims' rights movement. Diamantis wants to give this group of victims a new standing, a new kind of remedy—trial without punishment. For invisible victims are not like women who do not have the protection of the law *at all*. There are criminal laws which ostensibly protect invisible victims, but other laws or practices (such as statutes of limitations or diplomatic immunity) remove the possibility of trial and/or punishment. Diamantis wants to give these victims at least a partial remedy in a trial where they at least can get *some* satisfaction. Here, the focus on the victim is really at the center, because at least some of the state's interests, *e.g.*, confinement, fall out entirely. The victim gets the expressive benefit of their day in court.

Most significantly, Diamantis's article fits into the narrative that links claims of the victims' rights movement and mass incarceration. At first, this connection might not be easy to see. Diamantis's remedy expressly excludes the possibility of incarceration at the end. But this overlooks broader similarities. Diamantis says that what invisible victims *deserve* is a remedy from the criminal justice system. In saying this, he funnels another group of victims into the criminal justice system and says that this is where their claims properly belong. This "funneling" is the basis, I think, of the criticism that the victims' rights movement has fueled mass incarceration—by treating the problems that victims face as having their proper resolution in the criminal justice system and only the criminal justice system, and that, accordingly, the system should expand to meet

16. Paul Cassell, *Crime Victims' Rights*, UTAH L. FAC. SCHOLARSHIP 33 (2017), <https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1032&context=scholarship> [<https://perma.cc/T3UC-4JT6>].

17. As he himself seems to acknowledge. Diamantis, *supra* note 2, at 9–10, 33–34.

those demands.¹⁸ Diamantis doubles down on this: even when the law really does not give victims the satisfaction that *real* victims get, the criminal justice can still give them a trial. There is something legitimating about this, because it confirms their claims as *potentially* real claims that a trial is the proper response to. It says that we owe invisible victims at least the procedure (trial) that real victims get, even if the end result, *i.e.*, punishment, never arrives. Diamantis's praise of the criminal justice system in general is on full display in his article; it echoes why he thinks we *owe it to* invisible victims to give them justice via the criminal justice process.

II. WHY KEEP INVISIBLE VICTIMS INVISIBLE?

Further examination reveals a tension in the development of Diamantis's argument. He wants to give invisible victims their day in court, so that at least they can be heard and get the expressive validation that comes with a guilty verdict. But this remedy stops short of the real remedy that the criminal justice system can give victims: punishing the perpetrators. Punishment, too, has expressive value: it is possibly the most serious condemnation society can give to someone who engages in criminal behavior.¹⁹ Punishment, at least in the form of incarceration also has extrinsic value: it can protect society, and it can protect the victim. These are benefits (if that is the right word) that victims of crimes can usually get from punishment—but they are not available to invisible victims. This lack of remedy raises an obvious question: should we not remove the primary reason that invisible victims *are* invisible?²⁰ In other words, an obvious solution for the problem Diamantis identifies would simply be to get rid of the laws that prevent the perpetrators of crimes from facing full liability under the criminal justice system.²¹

The force of this question may be easiest to see in cases of statutes of limitations. In fact, there has been movement to allow survivors of sexual abuse to file *civil* lawsuits against the perpetrators after a statute of limitations has lapsed.²² But I see no reason not to get rid of some of these limitations when it comes to criminal liability, and there has been some movement here as well.²³

18. See GRUBER, *supra* note 7, at 75.

19. "Society gives out harsh punishments for serious crimes because it wants to condemn those crimes in no uncertain terms. This is to say that, conventionally, hard treatment is society's way of expressing disapproval of criminal acts." Chad Flanders, *Shame and the Meanings of Punishment*, 54 CLEV. ST. L. REV. 609, 612 (2006).

20. See, e.g., Rachel Korberg, *Statutes of Limitations for Sex Crimes Further Punish Survivors. It's Time to End Them.*, WASH. POST (Feb. 4, 2022, 1:36 P.M.), <https://www.washingtonpost.com/opinions/2022/02/04/sex-crime-statutes-of-limitations-end/> [https://perma.cc/Q97D-JJRR].

21. Diamantis says he assumes all of these laws are "correct." Diamantis, *supra* note 2, at 8.

22. Mihailis E. Diamantis, *Limiting Identity in Criminal Law*, 60 B.C. L. REV. 2011, 2084–85 (2019).

23. Erin Murphy, *End Statute of Limitations on Civil Child Sex Abuse Claims*, *Iowa Democrats Say*, GAZETTE (May 10, 2022, 4:39 PM), <https://www.thegazette.com/state-government/end-statute-of-limitations-on-civil-child-sex-abuse-claims-iowa-democrats-say/>

Of course, there may be obvious *ex post facto* problems going forward if we were to expand or eliminate statutes of limitations for crimes. The point remains, however: if it is bad that these statutes of limitations make some victims invisible because their perpetrators can escape criminal liability, then that seems to be a good reason to remove those barriers to full remedy—to give victims trial *plus* punishment, if the perpetrator is convicted. If being an invisible victim is bad, and the reason the victim becomes invisible is because of an arbitrary legal barrier, then the solution—the most direct and obvious solution—seems not to give that invisible victim something approaching satisfaction in the criminal justice system, but simply to make that invisible victim an actual victim that can go through the ordinary channels of the criminal justice system. Why should we only allow trial for the victim whose perpetrator is able to avoid being formally charged until one day after the statute of limitations runs? It is unclear how Diamantis would answer this question as a general matter, yet his entire response, and the creation of a new style of remedy for invisible victims, seems to depend on a good, general answer to this question.

Suppose Diamantis's answer is that, in fact, there are good reasons for having statutes of limitations.²⁴ We could guess what Diamantis might say some of these reasons are. The conventional reasons for statutes of limitations tend to be pragmatic. The longer you wait to charge, the greater likelihood that witnesses will not be easily found, or if found, they may not remember in detail what happened. Evidence might be destroyed, or spoiled, or simply lost. More principled reasons may go to the vexation that the putative defendant may face—he or she may simply want to know if there is an end date to the worry that they may be living under as the government decides whether to charge. On the victim's side, too, there may be similar concerns: maybe finality is good for some victims, too, as they no longer have to worry about the possibility of having to testify at a trial, or even to relive the trauma of the crime again.²⁵ Perpetrators and their victims, although each very differently situated, may both have reasons for wanting to move on.

But now we can see the tension in Diamantis's position from the other end. If there are good reasons for having statutes of limitations in the first place, then these reasons must also weigh against running the machinery of the criminal justice system just for the sake of a trial. The pragmatic reasons have force here, as well—they speak to the difficulties of proof that may come with a trial: evidence may be destroyed or lost, and witnesses may become harder to find, or have a harder time remembering what happened. However, non-pragmatic reasons hold some weight as well. A suspect may want to know that there is a point at which they can relax, at least as to the specific charges that may be hanging over their head. And victims may want to know that there is a point

[<https://perma.cc/3JSD-L6TU>] (“Last year, Iowa repealed its statute of limitations on criminal charges for child sex abuse.”).

24. See Diamantis, *supra* note 2, at 16.

25. On the general claim that finality is good in the legal system, see Reihan Salam, *William Baude on Judicial Finality*, NAT'L REV. (Sept. 23, 2011, 3:41 PM), <https://www.nationalreview.com/the-agenda/william-baude-salam/> [<https://perma.cc/9AAP-PECM>].

where the potential criminal prosecution of their perpetrator may never happen—which may be a relief, as it may spare them from the ordeal of a trial. They, too, can go on with their lives.

The point is not that one way or the other is the way to go—that is, that Diamantis either should favor abolishing all of these limits, or none of them. The point is that this analysis of *whether* and *why* to keep certain limitations on liability doesn't occur in his article. In other words, there is no consideration of whether the reasons underlying the limitations on prosecution that he identifies might counsel either (a) getting rid of those limitations, or (b) foregoing any remedy in these cases, including the trial-only remedy that Diamantis favors. It is very plausible to think that there may be different judgments based on different legal barriers to conviction. As I have already said, the case against at least some statutes of limitations seems rather strong—but again, this would have to involve a more nuanced analysis of individual laws. For example, the case for diplomatic immunity also may rest on rather weak grounds, especially for distant relatives of diplomats, or for staff.²⁶ Diamantis himself recognizes immunity from criminal prosecution for presidential acts remains an open question.²⁷ Again: would Diamantis favor getting rid of this? The tenor of his article suggests that he would—the existence of invisible victims is bad, and so allowing them to use all of the criminal justice system would be good,²⁸ in fact, better than just giving them only the remedy of a trial. But we don't get this answer, or the analysis, which may suggest that Diamantis favors the opposite conclusion: that the case for limiting the remedies available in many cases is strong, and so giving invisible victims the right to have their perpetrator tried (but not punished) is the best we can do.

Of course, there will be cases where lifting the legal restriction would not solve the problem. If the perpetrator is dead, then there is no way that the law can bring that person back to life. And for some victims, repealing the legal restriction will not change the fact that they can no longer get a remedy. As noted above, *ex post facto* problems prevent a change in the law from reaching back to help the victims of crimes committed under the old legal regime. Even if we ended all statutes of limitations, diplomatic immunity, and official immunities, there would still be invisible victims who could not avail themselves of the remedies offered by the criminal justice system—their perpetrators would still be untouchable by the criminal law. But surely the force of Diamantis's argument is that it is bad that the law creates invisible victims, and that it will keep on creating them so long as we have these legal limitations on prosecution. He should care not just about providing a half remedy for some victims, but, going

26. The case for allowing diplomatic immunity is also weaker the more serious the crime is. See Krista Friedrich, *Statutes of Liberty? Seeking Justice Under United States Law When Diplomats Traffic in Persons*, 72 BROOK. L. REV. 1139, 1170–71 (2007) (“Diplomatic immunity should not trump international human rights norms or constitutional prohibitions against slavery-like practices.”).

27. Diamantis, *supra* note 2, at 44.

28. There are other places where I think that legal immunity is just a bad idea and we should probably get rid of it, such as the existence of preemptive pardons.

forward, whether those who might be invisible victims should be able to get the remedies available to real victims.²⁹

III. PRACTICALITIES OF A “TRIAL ONLY” REMEDY

Diamantis’ paper is abstract and almost resolutely philosophical, so it may be an open question whether he is offering a practical proposal as regards to invisible victims, or whether his main point is to provoke deeper thought about who counts as a victim, who should have access to the criminal justice system, and the value of trials-without-punishment. But I propose in this section of my paper to take Diamantis’ proposal seriously, as if it were meant not simply to be a philosophical thought experiment, but as an actual proposal to reform the system—to open the courthouse doors to invisible victims, rather than leave them out into the cold. I have already raised questions in this register above, *viz.*, about whether the best solution to the problem that Diamantis highlights might be to make substantive changes to the law, rather than simply to give some previously excluded victims access to trial. But here I drill down on the proposal that Diamantis favors, which is to give invisible victims the benefit of the trial, while stopping short of giving them the right to have their perpetrators punished. What would such a system look like? More to the point, how would it work? There are real questions at each stage of the process, and I think that these questions should make us more skeptical of Diamantis’ proposal on its face.

We start with a general observation, which is that our criminal justice system is not one of trials but rather one of pleas.³⁰ Most cases at the state and federal level never go to trial—rather, it is usually in the interests of the defendant to not take a risk of going to trial and losing, but rather pleading out to an offense or set of offenses.³¹ This all-important fact about how crime is prosecuted today is mostly undiscussed by Diamantis. Indeed, it is somewhat odd to see Diamantis blame scholars for collapsing trial and punishment in analyzing the criminal justice system,³² when it is simply a fact that there are very few trials, and as a

29. Diamantis does not discuss qualified immunity in his list of invisible victims, which strikes me as another missed opportunity, given that qualified immunity fits quite well into his scheme. To be sure, Diamantis says his focus is on criminal cases but his emphasis on the value of the trial seems it should also apply, albeit with some adjustments, to civil trials as well. In any event, qualified immunity prevents trial for victims who may have been wronged by official action. Indeed, in some cases, a judge will hold that a police officer, for example, has violated the constitutional rights of the victim, but that the case should not proceed to trial because the officer is immune to liability. *See, e.g., Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. 2019) (en banc) (officer given immunity against claim of excessive force on the ground that law was not “clearly established” that his use of force was unlawful). Would Diamantis object to this in the name of the invisible victims and ask that there at least be a trial, even if no damages (etc.) could be assessed against the officer?

30. As the Supreme Court recently emphasized in two cases regarding plea bargaining. *Lafler v. Cooper*, 566 U.S. 156 (2012); *Missouri v. Frye*, 566 U.S. 134 (2012).

31. On the interests of defendants in taking pleas, see, for example, Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 Miss. L.J. 1195, 1245 (2015) (“[F]or all types of crimes, the average federal defendants who went to trial would have been much better off pleading guilty, even after accounting for their chances for acquittal.”).

32. Diamantis, *supra* note 2, at 29.

result sentencing becomes the main event. Ours is a system that processes people accused of crimes, not a system for trying them. In one sense, it is easy to see Diamantis lamenting this fact, which he probably does. He appreciates the trial and its supposed truth finding features and expressive importance. Diamantis probably thinks we should have more trials generally. But the lack of trials in the status quo and for the foreseeable future makes a lot of his proposal seem a little naive. Diamantis wants to have a system where there are more trials which do not result in punishment, in a system where there are hardly any trials, period.

Do we really think that such trials will be a priority in a system where there are already massive delays for real trials,³³ and most cases end in pleas rather than a trial?³⁴ If we are to take Diamantis's proposal for trials for invisible victims seriously, because nothing else comes close to the truth finding and expressive value of trial, then we have to create a system very different than the one we have now. Diamantis's recognition that trials are costly and resources are scarce is not sufficiently attentive to this point.³⁵

So, let us imagine that prosecutors and defendants would come to invisible trials in much the same way that things happen in the present-day criminal justice system. That is, suppose that the defendant appears before trial, and simply wants to plead guilty. Can the judge accept this plea? It would seem, on the one hand, that many defendants in this situation would simply accept the plea for a case in which punishment is off the table. Putting aside for the moment the question of collateral consequences,³⁶ why go through a trial when there's a guarantee that you will not be punished at the end? You might want to vindicate your name, for sure, but you might also want to avoid the inconvenience and potential embarrassment that a trial would entail. All of the expressive reasons why Diamantis wants a trial might be equally good reasons for a defendant to avoid a trial and instead say that they have committed the crime, go on their way, and walk out the door of the courthouse.

On the other hand, maybe Diamantis will say that the judge should not accept the plea, or maybe Diamantis will bar the judge from accepting pleas at all. The value of the process, Diamantis says again and again, is precisely that the victim will get some recognition via a trial that they have been wronged and that this person is answerable for the wrong by the trial process, even though they will not be punished. A plea shortcuts this. At the same time, it seems wrong in many cases to make the defendant go through the trial when he or she is willing to admit guilt.

Now, let us consider the actual trial and consider how it might proceed in a case involving an invisible victim. Remember, the key component of this trial process for Diamantis is that it is a foregone conclusion that no punishment will

33. Covid-19, of course, has made the backlog in trials even worse. Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the Covid-19 Pandemic and Beyond*, 115 NW. U. L. REV. 1875, 1885 (2021) (limited trials during pandemic has "led to overwhelming backlogs in many jurisdictions").

34. See *Lafley*, 566 U.S. 156; *Frye*, 566 U.S. 134 (recent Supreme Court cases acknowledging that most cases end in pleas).

35. Diamantis, *supra* note 2, at 10.

36. I return to this point *infra*.

result. It is an open question how each side would approach such a strange thing. For the prosecutor's office, which is already strapped for resources and consumed with actual trials for real crimes, they may not treat what is basically a show trial all that seriously, and they may be eager to take a plea as well.³⁷ Why should prosecutors invest time and energy into a trial where either way the jury decides, the defendant goes free? Could the state simply outsource the job to some private attorney who wants to make a name for themselves with a flashy show trial?

There are questions on the other side too. Diamantis says that in cases where the prosecution proceeds to trial against an unpunishable criminal, they should get a public defender. Diamantis is aware that this is not a matter of constitutional right because there is no possibility of the defendant being sentenced to prison time, but put that to the side.³⁸ Public defender's offices seem even more strapped for resources than prosecutor's offices are.³⁹ Why should they be involved in a trial where, again, the end result is always that the defendant goes free? Why should a real attorney spend time and energy and money going after an acquittal for a client, when those resources can and would be better spent on trying to keep someone out of jail? Why should the defendant get a real attorney, in other words, for what is a symbolic trial? The show trial nature of the whole affair becomes even more problematic when Diamantis says that the trial can go on even when the defendant is absent or dead.⁴⁰ This raises further questions about how effective a defense attorney can be when, for example, their client never shows up to trial and where counsel has never met their client.⁴¹

Let us skip to the end of the trial or post-plea,⁴² and suppose that the defendant has been found guilty. Diamantis rules out punishment for the

37. See generally Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 267, 270 (2011).

38. Diamantis, *supra* note 2, at 51–52.

39. Public Defender offices have been perpetually underfunded, which can, and has, hindered the quality of representation that public defenders are able to provide. See, e.g., Stephen F. Hanlon, *Case Refusal: A Duty for A Public Defender and A Remedy for All of A Public Defender's Clients*, 51 IND. L. REV. 59, 61 (2018) (public defenders are underfunded and are burdened by excessive caseloads).

40. The case of a defendant who commits suicide (or is killed) and is then tried in absentia seems extremely ethically fraught—possibly a matter more of vengeance than justice. The defendant cannot testify in their defense, of course, nor aid in their defense more generally. But Diamantis seems eager to allow this kind of show trial. See Diamantis, *supra* note 2, at 48–49.

41. On the other side, Diamantis ignores the possibility that many victims may not want to cooperate. In these cases, we have to question whether the prosecution should go ahead with the trial anyway. My sense is that they should not, but Diamantis does not deal with this issue.

42. As for the process of the trial, the questions also can be multiplied almost without end. Can the defendant file motions to suppress, changes of venue, etc.? Does the trial have to be a jury trial, or can it be a bench trial? See Diamantis, *supra* note

defendant, but does he also rule out the fact of conviction? When asked on a job application if they have been convicted of a crime, can the defendant honestly answer “no”? Perhaps not, as Diamantis says that a conviction represents the stamp of a “declaration of guilt in the public record.”⁴³ Moving on, does the defendant who has been adjudicated guilty in one of these trials face any collateral consequences? Might there be immigration consequences, or consequences for receiving state benefits? In general, how exactly is the defendant’s criminal record supposed to look after such a conviction? Could the fact of the conviction-but-no-punishment be used in calculating a sentence in another (real) sentencing proceeding? Could the defendant ever move to have the conviction expunged, or the record sealed? Could the “conviction” be used in a custody battle, to raise questions about the fitness of the defendant to be a parent? Does a felony conviction from one of these trials mean that the defendant is really a felon? After all, because Diamantis is not repealing the laws which protect the defendants, they haven’t really broken the law. I suspect that Diamantis has to be committed to minimizing any effect of the trial.⁴⁴ It is only the process that the victim gets. There is no lasting effect beyond the trial itself. But this question, like much else, is unresolved by Diamantis in his article.⁴⁵

The force of these questions goes beyond merely the point that Diamantis’s proposal needs a lot more fleshing out before we take it seriously. That is true, certainly. But I believe it goes further: it shows how unusual his proposal is. It seems to want to give victims as much as they can get, but not to the point of a full remedy—which would involve not just trial but also punishment. Such an in-between position invites precisely the inquiries I have made above. Generalizing a lot of those questions; we might wonder, why should prosecutors and public defenders take a trial that can never yield a punishment seriously? Why put resources into something that has only symbolic and expressive value? Why put your best attorney on that case, or why not just let defendants all plead out, if possible? These questions put pressure on the idea that we can give victims something valuable by giving them a trial—this depends a lot on lawyers and defendants making non-punishment trials a priority and wanting to take the cases to trial.

A shadowy trial may not convey the expressive punch that Diamantis wants it to either, especially if it is treated as unimportant by prosecutors and defenders alike.⁴⁶ And of course, at the end of the day, the defendant is not punished. We

2, at 30 (arguing that trial ideally has to be a cross-section of community as jurors). Do the same rules of evidence apply as in a real trial? Can a speedy trial motion be filed??

43. Diamantis, *supra* note 2, at 29.

44. In conversation, Diamantis has told me he sides with this option.

45. There is an open question, too, about whether the verdict in an invisible victim trial has a preclusive effect. If a fugitive (or someone presumed dead) is tried in absentia, found not guilty and then discovered—is a second trial barred? Diamantis deals with the case of a fugitive who is indicted, but not one who is exonerated. Diamantis, *supra* note 2, at 44–45.

46. The appeals process can also create special difficulties. Can defendants who

lose the expressive “punch” of punishment and get only the expressive value of trial, if there even is a trial. The victim may want more than just the process—victims may also want the result, and the expressive value it has. It may not be enough that there is a conviction. Moreover, maybe the victim will want the perpetrator to be incarcerated, for the sake of feeling safe, or for the sake of future deterrence of the perpetrator and others possibly tempted to commit the same offense. It might add insult to injury to have a trial and a conviction, and the defendant walking free. Diamantis has sympathy for the victims, to be sure, and wants to get them something. But it is not clear that this something would be enough on his own terms. It may not be enough in practice, because attorneys may treat the trial as a non-event: prosecutors may not be especially concerned about pursuing a conviction, knowing that it will not result in prison time, and defense attorneys may just encourage a plea to avoid the pain and expense of trial. In principle, too, the fact that victims get *something* in Diamantis’s proposal does not necessarily mean that they get what they want, or what they should want. They may want all that the criminal justice system gives to other victims. At least, Diamantis does not give us a reason to think that they might not want that. On his own terms, again, it is not clear that Diamantis’s project succeeds in solving the problem he identifies.⁴⁷

IV. ALTERNATIVE REMEDIES FOR INVISIBLE (AND VISIBLE) VICTIMS

The criticism of the last two parts were effectively internal criticisms. They could be read in a friendly, rather than hostile, spirit. They take Diamantis’s project on its own terms. Given those terms, why not just repeal the statutes limiting prosecution for these offenses? And on the proposal’s own terms, how is the trial supposed to look? Should we be worried about trials not looking like normal trials, because the participants won’t see the stakes as being as high? And should we be worried that victims might not see the trials as enough? I think these questions push Diamantis in a direction he might be already inclined to go—to give the full measure of justice that the criminal justice system can give to victims. It is just that Diamantis thinks that he is constrained as to how much the criminal justice system is able to give to invisible victims.⁴⁸ He wants to give them some of what the criminal justice system gives to other victims. This tendency in Diamantis’s paper is what makes brings his proposal as in line with the main narrative about victims that I sketched in Part I of my reply. He only sometimes talks about alternative remedies, and mainly to highlight some of their

lose at trial appeal? Do they get a public defender at the appeal too? Can they file a habeas motion? Again, Diamantis says nothing about these practical matters.

47. I have left mainly to one side Diamantis’s implicit assumption that various aspects of the criminal justice system make it a superior vehicle for revealing truth. See, e.g., Diamantis, *supra* note 2, at 31, 38. This is certainly open to question. Exclusionary rules mean that probative evidence is not always presented at trial. And there are well known problems with prosecutors not turning over evidence, with falsified confessions, with reliance on eyewitness testimony, etc., etc.

48. Although, as I noted above, Diamantis does not always explain why the constraints are justified.

problems. In this section, I will consider those alternatives, and give them a much more prominent place in analyzing the condition of invisible victims.

This shift, however, requires us to question the overall direction of Diamantis's paper, and we might do well to focus on the example he starts his paper with—the Tulsa race massacre.⁴⁹ It shows some of the problems with sticking with a criminal justice-oriented framework in trying to fashion an appropriate remedy for invisible victims. Diamantis sketches some of the awful facts that make up the Tulsa race massacre to open his essay.⁵⁰ He is right that there was a massive failure of justice, and most obviously a failure of justice that happened at around the time the massacre happened. This was when, I think Diamantis would agree, the criminal justice system response would have been most appropriate. It is where one would need the express condemnation of what had happened, and the deterrence and incapacitation of those who committed the offense. The true awfulness of the massacre lies not only in the facts of the massacre itself, but the collective failure of an adequate response to what happened. The community sat idly by, adding to the pain of those who suffered at the hands of the wrongdoers. The effects of that wrongdoing linger today.⁵¹ But the same response that would have been adequate, possibly even vital, at the time of the original offenses no longer seems to fit. For one, many of the victims are no longer alive, although three still are, and their suffering forms the basis of ongoing civil litigation against Tulsa.⁵² Here the actual victims are for the most part not just invisible, but no longer living—at least the direct victims of the original offenses. Moreover, there are no more living perpetrators—in the sense of the direct perpetrators of the original offenses. Although Diamantis takes this as an example of a case where there are invisible victims, this claim seems hard to parse given how long ago the offense was.

It is harder still to imagine what a trial would look like. Would it involve the descendants of the original perpetrators? How would that work? Either Diamantis has a theory of agency extended through time, or this example simply does not seem to help us understand his theory better. It points instead to a fact about the world that we live in, and where there exist historic injustices. For many historic injustices, it is simply too late for the criminal justice system to do its work. The time to do its work was in the moment, or at least very close to the moment. There may just be, from the perspective of the criminal law, wrongs that no criminal trial and no punishment in the present can even possibly repair. That is, there may exist some tragedies that cannot be compensated for in the way that they should have been compensated for. We do not have to call the

49. See Diamantis, *supra* note 2, at 2.

50. See *id.*

51. Andre M. Perry, Anthony Barr & Carl Romer, *The True Costs of the Tulsa Race Massacre, 100 Years Later*, BROOKINGS (May 28, 2021), <https://www.brookings.edu/research/the-true-costs-of-the-tulsa-race-massacre-100-years-later/> [https://perma.cc/58CQ-LG9E].

52. David Williams, *Led by a 105-Year-Old Survivor, Lawsuit Seeks Reparations in 1921 Tulsa Race Massacre*, CNN (Sept. 2, 2020, 10:00 PM), <https://www.cnn.com/2020/09/02/us/tulsa-massacre-lawsuit-trnd/index.html> [https://perma.cc/BH2J-DUAA].

victims here invisible, except in the sense that they were wrongly made invisible by the racist society that enabled the wrongs against them to happen with impunity. They were real victims. We know that now and should have acted like they were at the time they were made victims.

But this conclusion should not lead to a dead end of any further inquiry about the topic. It does seem to be the case that the injuries caused still last on into the present.⁵³ The descendants of the victims are still hurt by the original wrongs, and the descendants of the original perpetrators still likely benefit from what happened long ago. It may not make sense to punish those descendants via the criminal justice system, but that does not mean that we can do nothing. In fact, some still-living victims are suing the city of Tulsa in a civil lawsuit.⁵⁴ That remedy is more plausible than staging a show criminal trial against the relatives of the perpetrators. And this should give us pause about instinctively reaching for the tools of the criminal justice system as somehow a one size fits all solution to historical injustice—for that matter, any kind of injustice. The Tulsa case shows us that sometimes turning to the criminal justice system simply will not work and that we have to look elsewhere. Indeed, we might take the lesson in the Tulsa case and apply it more broadly—even in places where we might look to some version of a typical criminal justice response (a trial, even if there is no punishment), we might want to find a remedy somewhere else, in some other area of law, or perhaps not even in law at all. Options outside of the criminal justice system may get us some of what we were seeking there; they may even give us more. It is a mistake to assume that because justice demands some recognition of the victims, it must be recognition through the criminal justice system.⁵⁵

Consider the following alternative remedies we might consider, some of which Diamantis also raises, if only to dismiss.⁵⁶ I set them out here, mindful that they are not exclusive of one another, in several senses. Many of the remedies get at the same thing—some form of healing or recognition—and certainly finding one kind of remedy appealing does not mean taking that remedy as the sole type of remedy, to the exclusion of the others. Multiple remedies may be needed to address the harm.

Reconciliation

We might imagine that what the victims would want in the Tulsa case is not punishment or a trial, but instead some manner of reconciliation with the

53. See, e.g., Perry et al., *supra* note 52 (“[A]nother important and often neglected dimension to this history is the devastating effects of destroyed communal wealth, which had supported the flourishing of the city’s Black residents.”).

54. Chris Polansky, *Tulsa Race Massacre Reparations Lawsuit Can Proceed*, NPR (May 6, 2022), <https://www.npr.org/2022/05/06/1097261193/tulsa-race-massacre-reparations-lawsuit-can-proceed> [<https://perma.cc/9SA9-M59Z>].

55. Victim demands for justice when there is no possibility of trial only seem “puzzling” if we take a criminal trial and punishment as the *only* means of effective redress. See Diamantis, *supra* note 2, at 9, 27.

56. See Diamantis, *supra* note 2, at 32–38.

perpetrators of the crimes. Of course, because the perpetrators and the victims are for the most part no longer alive, this cannot be done directly. But it can be done indirectly, and symbolically. Maybe it could take the form of a truth and reconciliation commission, as existed in South Africa after apartheid.⁵⁷ Or perhaps it could be something much smaller, such as small group meetings between heirs on both sides. The point here would be to assess the damage done and get a measure of healing. And the goal is not so much backward looking, but a mix of forward and backward looking—to get a sense of the past damage done, and to try to find constructive ways to move past it. Such types of healing are gaining ground in the criminal justice system, as alternatives to the idea that what is necessary for victims is that their abusers get punished.⁵⁸ The programs, although small scale, seem to have gotten purchase from many victims, and seem to speak more directly to the kind of remedy they want, and the kind of things that will move them toward that remedy.⁵⁹

Restitution

In some cases, the damage done will not only be symbolic, but have a cost to it—indeed, sometimes a cost that can be put into dollars. In the Tulsa litigation, the plaintiffs are asking, in part, for money damages for the ongoing financial damage that the original massacre has caused.⁶⁰ They are able, at least to some extent, to put a price tag on the damage. And, as is familiar from tort law, financial losses aren't generally limited only to the bottom line in terms of lost business or lost revenue. They can also go toward recovery for emotional damage and distress. No one, of course, believes that money can make everything right, or can undo the original damage; for the victims of the Tulsa massacre, there is a sense in which they can never be made whole, no matter how much money they are awarded. But money may at least go some way toward helping those who are living with the legacy of the massacre. It may mean more, in fact, than a trial without punishment. It may give victims the resources to build a life for themselves that is outside of the shadow that the victimhood they and their predecessors have suffered has cast over their lives. Again, as with reconciliation, it may be that money or financial support more generally is what victims really need, and say they want, rather than setting up a trial that will end in no punishments .

57. Diamantis quotes one of the foremost advocates of Truth and Reconciliation Commissions (TRCs), Bishop Desmond Tutu. *See* Diamantis, *supra* note 2, at 35.

58. *See*, for example, the work of Common Justice. COMMON JUST., https://www.commonjustice.org/the_common_justice_model (last visited Feb. 12, 2023) [<https://perma.cc/XL9S-3EDM>]. The model is further discussed in SERED, *supra* note 8.

59. I am a little befuddled that Diamantis thinks that a conclusion by a Truth and Reconciliation Commission that wrongs have happened stops short of a “moral judgment” on the matter. *See* Diamantis, *supra* note 2, at 40.

60. *See* Williams, *supra* note 53.

Recognition

Another form of remedy is some form of recognition. It is hard to separate recognition from the previous two types of remedies, if only because it seems the goal of reconciliation would be some sort of recognition of the victims and of the wrongs they have suffered, and it would be hard to have pure restitution without a message that the restitution is meant to recognize a prior loss. But there could also be something like pure recognition, as seems to have happened when the mayor of Tulsa apologized on behalf of the city on the one hundredth anniversary of the race massacre.⁶¹ There have been similar apologies; for example, the Catholic Church apologized for its complicity in the Holocaust and for its involvement in slavery.⁶² The function of these apologies may be to help reconciliation, and may lay the groundwork for restitution. Consider, in this regard, the United States' apology for the internment of Japanese Americans.⁶³ But recognition of a wrong may also have intrinsic worth. That is, be valuable on its own—a statement that we are aware of the wrong that has happened and are sorry, and that the victims did not deserve it.

Prevention and education

I consider lastly a remedy that is almost entirely forward-looking. We might imagine that a proper response to the wrong of, say, the Tulsa massacre is to build institutions and to fund programs that would prevent anything like it from happening again. We might create a memorial, or a museum, or put money towards educational programs. More broadly, funding for jobs programs or for measures to promote Black-owned businesses would also be a way to build the infrastructure that was destroyed in the massacres. Some of these preventative measures may look like restitution, and indeed, some of them may also be. But

61. See Ryan Love, *Tulsa Mayor Apologizes for the City's Role in Race Massacre 100 Years Ago*, FOX23 NEWS (May 31, 2021, 4:44 PM) (quoting Facebook page in which Mayor G.T. Bynum acknowledged that “Tulsa’s city government failed to protect Black Tulsans from murder and arson on the night of the 1921 Tulsa Race Massacre, and from discrimination in subsequent decades.”), <https://www.fox23.com/news/local/tulsa-mayor-apologizes-citys-role-race-massacre-100-years-ago/FJVRYAQJHJAMVJH5AZ3YQ7FGP4/> [https://perma.cc/94JS-AYDL]. I am not saying that this apology was *enough*.

62. See Rachel L. Swarns, *Catholic Order Pledges \$100 Million to Atone for Slave Labor and Sales*, N.Y. TIMES (Mar. 15, 2021), <https://www.nytimes.com/2021/03/15/us/jesuits-georgetown-reparations-slavery.html> [https://perma.cc/E9FB-BLJQ]; William Drozdiak, *Vatican Gives Formal Apology for Inaction during Holocaust*, WASH. POST (Mar. 17, 1998), <https://www.washingtonpost.com/archive/politics/1998/03/17/vatican-apologizes-to-jews/ce5ea6e9-bd97-4022-b639-288342b63455/> [https://perma.cc/7KD5-PVNM].

63. See Helen Yoshida, *Redress and Reparations for Japanese American Incarceration*, NAT'L WORLD WAR II MUSEUM (Aug. 13, 2021), <https://www.nationalww2museum.org/war/articles/redress-and-reparations-japanese-american-incarceration> [https://perma.cc/RSW6-WB5Z].

the goal here would be different: it would be to empower those who have suffered, and who bear the legacy of past victims, in order to create a society where nothing like the Tulsa race massacre could ever happen again. It is not outside of this remedy, either, to have some more punitive measures—such as laws against hate crimes. But prevention here should be read more broadly, not as deterrence in the punitive sense (i.e., greater punishment), but in the sense of creating the conditions of a society where such crimes no longer happen.

These are four possible remedies for what happened in Tulsa, and by no means are they the only possible four. They are remedies that seem appropriate in the absence of the realistic possibility of a criminal trial and criminal punishment. If we turn to Diamantis's other example, the case of the perpetrator dying seems to most closely align with the situation of the victims of the Tulsa massacre and their descendants. In the case of the death of Jeffrey Epstein we might say that, given that a trial is out of the question, what the victims need is healing. They need recognition, they need material support (at least some of them), and they need the assurance that things like that will not happen to others. Having a trial of Epstein in absentia seems not to give them any of those things. What actually happened—allowing victim testimony in the face of a motion to dismiss⁶⁴—seems more adequately represented not as Diamantis' does (as a sort of mini-trial) but more like a separate thing, cognizable in its own right. The victims were given a forum to be heard, and to gain recognition for what they went through. It does not seem that something like this has to go through the criminal justice system. Its relationship to a criminal trial seems more attenuated than Diamantis makes it out to be.

Would trials without punishment make sense for other types of limitations on prosecution, of the sorts that Diamantis lists in his paper?⁶⁵ Possibly. As previously discussed, Diamantis needs to more carefully consider what reasons there are in favor of keeping those limitations. In some cases, we might want to modify or eliminate things like statutes of limitations for certain crimes or diplomatic immunity for certain people. But to the extent that these limitations are justified, then the question becomes, in those circumstances, what is the best thing for victims? What makes sense as a remedy? Diamantis says we ought to give victims at least part of what the criminal justice system can offer—a trial, but without punishment. That remains unclear. Maybe in some cases it would be better to offer victims something from the menu of options above. A meeting with some hope of reconciliation might be better; restitution might be in order, and where it is not available by other means, an apology, or even support for institutions that would create a world in which similar harms might not befall other victims. These options are becoming increasingly discussed when it comes to actual victims. I see no reason not to look toward them and to consider them for the invisible victims that Diamantis has identified.

64. See the discussion in Diamantis, *supra* note 2, at 27–28.

65. Diamantis, *supra* note 2, at 11–22.

CONCLUSION

Despite my criticisms of Diamantis's proposal, I do not wish to conclude on a critical note. Diamantis has helped us by categorizing and conceptualizing a unique group of victims—what he calls invisible victims—that are largely outside the traditional processes and remedies of the criminal justice system. He has also stressed the benefits of trial, when it happens. Invisible victims have, in fact, been victimized by crime. The limits that the system places on their remedy can seem unfair. Diamantis wants to fix this, and at least give victims their day in court, and I am sympathetic to that impulse. What I am less sympathetic to is the idea that the best way to remedy the problem is to give victims a half-measure of the criminal justice system—a trial and no punishment. Not only does this raise some very real practical questions, which I have tried to highlight, it also raises deeper questions about how we should deal with victims generally and whether it is always best to funnel them into the criminal justice system. It is not always clear that this is what victims want. It is terrible to be a victim of crime, and we should attend to victims and their needs. But we should not assume uncritically that what the criminal justice system has to offer—either in part or in whole—is the best response to those real, and sometimes very visible, needs.

TRANS OPTICS AND PANOPTICONS: TRANS VISIBILITY, ANTI-TRANSNESS, AND SURVEILLANCE

Jennifer Gisi†

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INTRODUCTION

Visibility, especially for historically and presently marginalized groups, is often aspirational, signaling a broader understanding and acceptance of the group through heightened awareness and representation. Yet, in his discussion of Bentham’s panopticon, which refers to a circular prison that trains the prisoner to internalize his own surveillance, Foucault declares that “[v]isibility is a trap.”¹ The constant visibility of the prisoner within the panopticon makes him vulnerable to surveillance, and so he moderates his own behavior as if he is always surveilled.² But panopticism offers anyone the surveilling role; “[a]ny

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1. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 200 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

2. *Id.* at 201.

individual . . . can operate the machine.”³ The current anti-trans legal landscape in the United States suggests that the panoptic machine is roaring. In 2021, eight states passed laws or adopted policies banning or curtailing the participation of trans youth in sports.⁴ This is a continuation of other explicitly anti-trans laws and policies, such as the bathroom bills proposed in a number of states throughout 2017.⁵ These bills can be considered a reaction to the heightened visibility of trans people and their existences in the past ten years or so,⁶ presenting as an effort to police those whose bodies or experiences fall outside the accepted norm of binary, biologically rooted gender.

In a similar timeframe, there has been more vocal criticism of the criminal legal system generally and of policing specifically. Although the recent focus on the criminal legal system has largely been based on race,⁷ the system has also long targeted trans people, especially trans people of color.⁸ One of the means of policing and criminalizing has been through policies such as stop-and-frisk, codified as constitutional under *Terry v. Ohio*.⁹ Stop-and-frisk has been used to harass and punish those the police deem fit for surveillance. This article highlights the United States Supreme Court’s tacit endorsement of law enforcement’s unrestrained discretion in choosing who they surveil and relates that choice in subject of scrutiny to the visibility of those deemed deviant from the norm.

This article sketches out a history of trans visibility, focusing primarily on visibility within popular culture as well as the function of visibility in the medical system. This article draws on a history of the weaponization of visibility within

3. *Id.* at 202.

4. See H.R. 391, 2021 Leg., Reg. Sess. (Ala. 2021); S. 354, 93d Gen. Assemb., Reg. Sess. (Ark. 2021); S. 1028, 2021 Leg., Reg. Sess. (Fla. 2021); S. 0228, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); H.D. 3293, 2021 Leg., Reg. Sess. (W. Va. 2021); S. 2536, 2021 Leg., Reg. Sess. (Miss. 2021); H.R. 112, 67th Leg., Reg. Sess. (Mont. 2021); S.D. Exec. Order No. 2021-05 (Mar. 29, 2021); S.D. Exec. Order No. 2021-06 (Mar. 29, 2021).

5. See Joellen Kralik, ‘Bathroom Bill’ Legislative Tracking, NAT’L CONF. ST. LEGISLATURES, <https://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx> (Oct. 24, 2019) [<https://perma.cc/4CKF-WLK6>].

6. See *infra* pp. 4–6.

7. See, e.g., Gene Demby, Shereen Marisol Meraji, Leah Donnelly, Steve Drummond, Brianna Scott & Alyssa Jeong Perry, *The Racial Reckoning That Wasn’t*, NPR: CODE SWITCH (June 9, 2021, 1:16 AM), <https://www.npr.org/2021/06/08/1004467239/the-racial-reckoning-that-wasnt> [<https://perma.cc/8WBT-68YB>]; Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/Y5CY-PUH3>].

8. See Katelyn Burns, *Why Police Often Single Out Trans People for Violence*, VOX (June 23, 2020, 7:30 a.m.), <https://www.vox.com/identities/2020/6/23/21295432/police-black-trans-people-violence> [<https://perma.cc/5C72-23H7>] (“21 percent of Black trans women will face incarceration at least once in their lifetimes, a rate significantly higher than the general population. Additionally, there have been reports of police sexually assaulting trans women going back decades.”); see also Leonore F. Carpenter & R. Barrett Marshall, *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 WM. & MARY J. WOMEN & L. 5 (2017).

9. *Terry v. Ohio*, 391 U.S. 1, 30 (1968).

the criminal legal system in order to connect the increased visibility of trans people to the history of criminalization and surveillance. In drawing these connections, this article then frames recent anti-trans legislation involving bathroom usage and sports participation as extensions of this surveillance, furthered by state legislatures and the individuals delegated authority to continue this surveillance.

This article addresses anti-trans sentiment in the law, with a specific focus on how laws addressing trans people extend societal and political surveillance of the non-normative with the purpose of policing deviance. This article proceeds in three parts: Part I explores trans visibility in the contexts of popular culture and the medical system. It addresses the somewhat contradictory facts that visibility and identification of transness can be lifesaving and affirming, but also dangerous. Part II expands on the perils of visibility, with a discussion of criminalization through visibility and surveillance, drawing on *Terry v. Ohio* and later cases; the unreviewable use of stop-and-frisk, especially against trans sex workers; and the violence in prison and jail systems that disproportionately targets trans people. Part III looks at explicitly anti-trans legislation, such as the rash of bathroom bills proposed in a number of states and proposed laws to govern sports participation by trans athletes. It argues that these laws serve a role in raising visibility of trans people and deputizing their surveillance to individual, private citizens. Finally, this article concludes that this path—from visible to criminalized to civilly and socially sanctioned—is a part of the machine of externalized and internalized surveillance

I. TRANS VISIBILITY: POTENTIAL AND PERIL

A. *The Transgender Tipping Point: Visibility in Media*

In 2014, *Time* published a cover story with the headline *The Transgender Tipping Point: America's Next Civil Rights Frontier*.¹⁰ The story itself is a moment that increases visibility, providing a primer on what transness is and outlining the recent medical and political history of transness in the United States, from Christine Jorgensen¹¹ to Laverne Cox.¹² It describes the experiences of a few transgender people, including Rose Hayes, a software engineer, Cassidy Lynn Campbell, a teen elected homecoming queen, and Mac Davis, an eleven-year-old on the boys' basketball team.¹³ In addition to providing visibility and context of transness and trans people, the article discusses the increase in trans visibility.¹⁴ The article attributes some of this increase to the advent of the

10. Katy Steinmetz, *The Transgender Tipping Point: America's Next Civil Rights Frontier*, TIME (May 29, 2014, 6:08 AM), <https://time.com/135480/transgender-tipping-point/> [<https://perma.cc/H7SP-GJW4>].

11. Christine Jorgensen made headlines in the 1950s as a former soldier who underwent sex reassignment surgery. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

internet, enabling awareness of trans people within the broader culture,¹⁵ and notes three signs of increased trans consciousness: Laverne Cox becoming a sought-after celebrity with her role in *Orange Is the New Black*, the use of trans models in an ad campaign for Barney's, and the popularity of Janet Mock's memoir.¹⁶ In her interview with *Time*, Cox also points out the benefits of this increased visibility:

We are in a place now . . . where more and more trans people want to come forward and say, 'This is who I am.' And more trans people are willing to tell their stories. More of us are living visibly and pursuing our dreams visibly, so people can say, 'Oh yeah, I know someone who is trans.' When people have points of reference that are humanizing, that demystifies difference.¹⁷

In the year following *The Transgender Tipping Point*, Caitlyn Jenner came out as a trans woman in an interview with Diane Sawyer.¹⁸ Some have noted this as a further tipping point, particularly given Jenner's cross-generational fame: Jenner was known to older generations as an Olympic athlete, while recognized by younger generations as a member of the Kardashian family.¹⁹ This made Caitlyn Jenner "arguably the most famous openly transgender person in the world"²⁰ and perhaps uniquely positioned to highlight trans existence and trans issues.²¹ Jenner addresses this position in the Diane Sawyer interview. After being asked whether her coming out is merely a publicity stunt for *Keeping Up with the Kardashians*, Jenner replies that she can use her fame and position within reality television to raise some awareness: "What I'm doing is going to do some good, and we're [going to] change the world."²² Later that same year, Jenner appeared on the cover of *Vanity Fair*.²³ Like the Diane Sawyer interview, the article discusses what good Jenner's visibility can provide for the trans community, particularly focusing on lowering rates of suicide and attempted suicide among trans people.²⁴ Jenner's coming out, along with the prominence

15. *Id.*

16. *Id.*

17. *Id.*

18. Bruce Jenner, 'I'm a Woman,' ABC NEWS (Apr. 24, 2015), <https://abcnews.go.com/2020/video/bruce-jenner-interview-diane-sawyer-woman-part-30572231> [<https://perma.cc/CR7V-GPYH>].

19. Allison Bader, *Whose Bathroom Is It, Anyway?: The Legal Status of Transgender Bathroom Access Under Federal Employment Law*, 91 S. CAL. REV. 711, 720 (2018).

20. *Id.*

21. *Id.*

22. Bruce Jenner, 'I'm a Woman,' *supra* note 18.

23. Buzz Bissinger, *Caitlyn Jenner: The Full Story*, VANITY FAIR (June 25, 2015), <https://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz> [<https://perma.cc/V66Q-5DVG>].

24. *Id.*

of Laverne Cox and the coming out of other celebrities like Chaz Bono, mark an increasing visibility of the trans community.²⁵

The Transgender Tipping Point is not the first public discussion of the increasing visibility of trans people. Increases in trans visibility were highlighted prior, especially in the context of schooling, where it was noted that schools and universities needed to begin devising policies for this increasingly visible population.²⁶ In fact, the first Transgender Day of Visibility, celebrated on March 31, 2009, was created to focus on positive elements of trans life.²⁷ This is in contrast to Transgender Day of Remembrance, which, though important, focuses on death in the community.²⁸ According to Rachel Crandall, who is credited with coming up with the event, one of the goals of Transgender Day of Visibility was to help expand dialogue.²⁹ Regardless of when exactly transgender visibility hit a tipping point, the literature largely agrees that the past few decades have led to increased visibility and awareness of trans people.³⁰

25. See, e.g., Kyle C. Velte, *Mitigating the “LGBT Disconnect”: Title IX’s Protection of Transgender Students, Birth Certificate Correction Statutes, and the Transformative Potential of Connecting the Two*, 27 AM. U.J. GENDER SOC. POL’Y & L. 29, 31 (2019); Patrick D. Murphree, *Schools in the Middle: Resolving Schools’ Conflicting Duties to Transgender Students and Their Parents*, 86 UMKC L. REV. 405, 406 (2017).

26. See, e.g., Lara E. Pomerantz, *Winning the Housing Lottery: Changing University Housing Policies for Transgender Students*, 12 U. PA. J. CONST. L. 1215, 1216 (2010); Richard Pérez-Peña, *College Health Plans Respond as Transgender Students Gain Visibility*, N.Y. TIMES (Feb. 12, 2013), https://www.nytimes.com/2013/02/13/education/12sexchange.html?_r=2&https://perma.cc/4ZV4-93SA; Robert Anderson, *Way Out West: A Comment Surveying Idaho State’s Legal Protection of Transgender and Gender Non-Conforming Individuals*, 49 IDAHO L. REV. 587, 620 n.273 (2013); Holly V. Franson, *The Rise of the Transgender Child: Overcoming Societal Stigma, Institutional Discrimination, and Individual Bias to Enact and Enforce Nondiscriminatory Dress Code Policies*, 84 U. COLO. L. REV. 497, 503 (2013).

27. Jessica Carreras, *Transgender Day of Visibility Plans Erupt Locally, Nationwide*, PRIDE SOURCE (Mar. 26, 2009), <https://pridesource.com/article/34351/> [<https://perma.cc/92SR-35G9>].

28. *Id.*

29. *Id.*

30. See, e.g., Blaise Vanderhorst, *Whither Lies the Self: Intersex and Transgender Individuals and a Proposal for Brain-Based Legal Sex*, 9 HARV. L. & POL’Y REV. 241, 241 (2015) (“The last few decades have seen remarkable progress towards greater social visibility and legal recognition of the substantive rights of two minority groups: transgender individuals . . . and the intersex.”); M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 946 (2015) (“Widespread misunderstanding continues to exist despite the recent increase in transgender visibility in the media.”); Adena L. Wayne, Note, *“Unique Identities and Vulnerabilities”: The Case for Transgender Identity as a Basis for Asylum*, 102 CORNELL L. REV. 241, 252 n.70 (2016) (“Transgender visibility has increased dramatically since 2000.”); Sonia K. Katyal, *The Numerus Clausus of Sex*, 84 U. CHI. L. REV. 389, 390 (2017) (“Across the world, the rise and visibility of transgender rights movements have forced a persistent rethinking of the legal presumptions associated with science, sex, and gender.”); Bader, *supra* note 19, at 719 (“there is no question that transgender people and the legal questions surrounding their rights have become much more visible in the last decade”); Anne Elisabeth Poe, Note, *Title VII’s Hidden Agenda: Sex Discrimination, Transgender Rights, and Why Gender Autonomy Matters*, 72

The benefits of visibility are both discussed and exemplified in some of these pieces. Cox explains that visibility and knowledge of trans people can be humanizing and demystifying.³¹ Although less specific, Jenner describes interest in using her public platform for good.³² At the same time that it voices the good of visibility, *The Transgender Tipping Point* also creates visibility, not only of Laverne Cox or even the lives of individual, non-celebrity trans people, but also in raising awareness of the difficulties that trans people face as a population, such as their greater statistical likelihood of experiencing poverty, unemployment, or suicide.³³ Both the Diane Sawyer interview and the *Vanity Fair* story include the estimated population of transgender people in the United States, 700,000, and mention the job discrimination, homelessness, and violence that trans people often face.³⁴

The need for humanizing points of reference is particularly salient when considering the treatment of trans people in media prior to the visibility tipping point(s). Trans people had been stereotyped almost “exclusively as comical or disturbing.”³⁵ According to a study by the Gay & Lesbian Alliance Against Defamation (GLAAD), trans people on television from 2002–2012 appeared disproportionately as “villains, psychopathic killers, sex workers, or victims.”³⁶ Outside of negative portrayals of trans people in fiction, transness has often been demonized or pathologized in more academic settings. The work of trans-exclusionary academics like Janice Raymond impugned the existence of trans women, arguing that they are deceivers seeking to “rape women’s bodies.”³⁷ Stigmatizing and demonizing depictions of transness in media and academia spill over into other institutions.³⁸ Combatting harmful stereotypes and rhetoric regarding trans people is critical:

ALA. L. REV. 641, 642 (2021) (“The last few decades have witnessed the rise of transgender visibility on both a national and global scale.”).

31. Steinmetz, *supra* note 10.

32. Bissinger, *supra* note 23.

33. Steinmetz, *supra* note 10.

34. Bruce Jenner, ‘I’m a Woman,’ *supra* note 18; Bissinger, *supra* note 23.

35. Henry Parr, Note, *Fixing Medicaid to “Fix Society”: Extending Medicaid Coverage of Gender-Affirming Healthcare to Transgender Youth*, 43 FORDHAM URB. L.J. 71, 134 (2016).

36. *Id.* at 134–35 (citing *Victims or Villains: Examining Ten Years of Transgender Images on Television*, GLAAD, <https://www.glaad.org/publications/victims-or-villains-examining-ten-years-transgender-images-television> [<https://perma.cc/Z5LB-QCKN>]). It is worth noting that being a sex worker or being portrayed as a sex worker should not categorically be considered harmful, but depictions of sex workers, like depictions of trans people generally, can be based in harmful stereotypes and assumptions regarding sex workers and sex work.

37. JULIA SERRANO, WHIPPING GIRL: A TRANSSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY 248 (2009) (quoting JANICE RAYMOND, THE TRANSSEXUAL EMPIRE 104 (1979)).

38. For example, “transsexualism” was classified by the medical and psychiatric community as a mental disorder in 1980 as part of the Diagnostic and Statistical Manual of Mental Disorders. Steinmetz, *supra* note 10. This was later updated to gender identity disorder, then gender dysphoria in 2013. Whether the medicalization of transness is harmful, or more harmful than beneficial, is discussed in Section I.B, *infra*.

As transgender people make up such a small element of society, it is imperative that transgender advocates are given adequate platforms from which to advance their points of view to large audiences so that people become aware that transgender people exist in society and are fundamentally the same as cisgender people. They are human beings who want to be respected, to be left to their own devices, and to be given the chance to find their happiness.³⁹

Despite the benefits of increased visibility, it also comes with risks and downsides. Trans visibility can be “a double-edged sword,” where, along with significant support and acceptance, visibility brings increased violence against trans people.⁴⁰ According to a comparative study across nations, countries with strong visibility of trans people and a stronger trans rights movement experience the highest absolute numbers of murders of trans people.⁴¹ Some scholars have drawn a connection between trans visibility and anti-trans legislation, using North Carolina’s bathroom bill as an example of discriminatory legislation that accompanied the increased social visibility of trans people.⁴²

In his book, *Normal Life*, trans scholar Dean Spade notes the ubiquity and harm of trans invisibility within systems as well as interpersonally: “Trans people are told by the law, state agencies, private discriminators, and our families that we are impossible people who cannot exist, cannot be seen, cannot be classified, and cannot fit anywhere.”⁴³ However, Spade is more than skeptical that visibility is either a sufficient goal or even an unalloyed good, arguing that the benefits of visibility need to be weighed against the risk that systems will co-opt visibility as a sign of fairness while continuing to harm trans people.⁴⁴ In addition to the harm that systems of surveillance can amplify through heightened visibility (discussed in further detail below), Spade is also critical of using visibility as part of a more assimilationist political project that seeks the endorsement of those in power, particularly in contrast to a movement that “seeks to build justice for trans people by challenging these same officials and

39. Michael J. Griffin, Comment, *Intersecting Intersectionalities and the Failure of the Law to Protect Transgender Women of Color in the United States*, 25 TUL. J.L. & SEXUALITY 123, 137–38 (2016). Cisgender, or cis, is a term used to refer to those who are not trans; generally, this means someone whose gender identity matches with the sex assigned at birth, where the gender man matches with the sex male, and gender woman matches with the sex female. *Glossary of Terms: Transgender*, GLAAD, <http://www.glaad.org/reference/transgender> (last visited Jan. 16, 2022) [<https://perma.cc/4PNH-WFG5>].

40. Anne Elisabeth Poe, Note, *Title VII’s Hidden Agenda: Sex Discrimination, Transgender Rights, and Why Gender Autonomy Matters*, 72 ALA. L. REV. 641, 642 (2021).

41. Brian Kritiz, *Direct and Structural Violence Against Transgender Populations: A Comparative Legal Study*, 31 FLA. J. INT’L L. 211, 225 (2020).

42. Murphree, *supra* note 25, at 406.

43. DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 19 (2015).

44. *Id.* at 47.

institutions for the ways they endanger and harm trans people.”⁴⁵ It is worth noting, however, that visibility can play a part in the latter type of movement. For example, Spade discusses Laverne Cox and Janet Mock, two “influential public figures in the context of this new visibility” who have maintained grassroots connections and a focus on the criminalization of Black trans women.⁴⁶

The increase in the visibility of the trans community does come with benefits, including the ability to humanize trans people to the wider community that may be unfamiliar with trans people or transness and to encourage others to come out, or even just to question traditional designations of sex and gender. Increased visibility may also enable trans and cis people to share information regarding the structural problems trans people face in society and to draw attention to radical political projects seeking justice. Yet, there are risks that arise with heightened visibility, such as co-optation into assimilationist politics, interpersonal and structural violence, and, as discussed below, heightened surveillance.

B. The Medicalization of Transness: Diagnosis as Legibility and Surveillance

The double-edged nature of visibility for the transgender community is exemplified through the medical model of understanding gender, especially trans genders. Historically, there exists two legal models of understanding gender: the first is the biological, through which gender and biology are inextricably linked. The second is the medical, through which the state of being trans is considered a psychological condition.⁴⁷ In contrast to the biological model, the medical model is appealing because it integrates trans people into its conception of gender and affirms their existence. The medical model, through the act of diagnosis, can be explanatory, providing individuals with the ability to understand themselves better.⁴⁸ At the same time that medicalization may provide legibility of transness to individuals, it can also make transness legible to the legal system, and often allows for the legal protection of rights based on medical status.⁴⁹ According to one scholar, “as medical regulation of gender transitions has become more uniform and visible, courts have been willing to grant at least rudimentary legal protections to transgender litigants who are able to provide documentation of a GID [gender identity disorder] diagnosis and related medical treatment.”⁵⁰ Others argue that, particularly as the medical establishment moves toward a less

45. *Id.* at 119.

46. *Id.* at 148.

47. Franklin H. Romeo, Note, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 718 (2005).

48. See Craig Konnoth, *Medicalization and the New Civil Rights*, 72 STAN. L. REV. 1165, 1179 (2020). Konnoth describes diagnosis as an act that can alter identity and can “act as a threshold for membership in a broader political and social community.” *Id.*

49. Romeo, *supra* note 47, at 726; see also Konnoth, *supra* note 48.

50. Romeo, *supra* note 47, at 726.

pathologizing mode of treatment, medicalization functions as a means to an end—that is, protection of civil rights—within an imperfect system.⁵¹

Proponents of the medical model acknowledge, however, that there are downsides to this model of gender identity and legibility. Medicalization may create stigma rather than understanding,⁵² and the medical model at times presents itself as the only “legitimate” means of being trans.⁵³ Barriers to medical care make the veneration of the medical model all the more problematic: frequently people in need of services because of their marginalized status experience obstructions to that service, also due to their marginalized status.⁵⁴ Often, trans people’s interactions with law and identity are reliant on the medical system, as legal (and medical) gender markers are often required for birth certificates, driver’s licenses, marriage licenses, and protection from employment discrimination.⁵⁵ The medical model serves a gatekeeping role, requiring that a person first make themselves visibly trans to prove authenticity and obtain transition-related treatment, and then adhere to a strict, particular mode of gender in order to maintain legitimacy.⁵⁶ Some scholars have expressed concern with placing the authority to define gender, sex, and identity in the hands of medical practitioners, especially as medicine has the impulse to be pathologizing.⁵⁷

Chase Strangio, the Deputy Director for Transgender Justice with the ACLU, speaks specifically to the limited visibility that is afforded through the medical model. He draws both on his own experiences with the medical system and as an advocate for LGBTQ rights, as well as the scholarship and legal history of trans and reproductive rights in developing his argument.⁵⁸ He argues that, when interacting with trans patients, doctors tend to send two alarming messages: that the medical care sought by trans people is solely transition-related, and that trans people have no desire for biological children.⁵⁹ He suggests that this is a result of a lacking public imagination regarding trans people, where trans people only exist in transition-specific contexts.⁶⁰ In Strangio’s analysis, the discourse regarding reproductive rights (and its erasure of trans men in particular) partially explains the public’s limited imagination of trans people that fails to account for their existence outside of transition-related contexts.⁶¹ However, it also closely relates with the precarity of a visibility and legibility that is predicated on medicalization. If an understanding of trans identity in, for example, the context

51. Konnoth, *supra* note 48, at 1175.

52. *Id.* at 1173.

53. Romeo, *supra* note 47, at 733.

54. *Id.* at 733–34.

55. Dean Spade, Commentary, *Resisting Medicine: Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 16–17 (2003).

56. *Id.*

57. See, e.g., Chase Strangio, *Public Interest Practitioner Section: Can Reproductive Trans Bodies Exist?*, 19 CUNY L. REV. 223, 225–26 (2016).

58. *Id.*

59. *Id.* at 223–24.

60. *Id.* at 224.

61. *Id.*

of marriage, custody of children, or rights in prison is rooted first in medical diagnosis or treatment as to legitimize identity,⁶² then the public imagination of transness will similarly be rooted in medical diagnosis or treatment, specifically transition-related diagnosis or treatment. This demonstrates the limits of the visibility provided by the medical model, in which visibility only exists in certain contexts, and, in these contexts, the person is strictly non-normative. These limits are further aggravated by narratives of transition often promulgated by the medical model, in which a trans person had a “gender troubled childhood”⁶³ marking a person’s transness as so essentializing and overwhelming as to eclipse any other characteristics, including the desire to produce children biologically.⁶⁴

The medical system and how it relates to transness provides a useful example of some of the benefits and pitfalls that arise with increased visibility. Most of the downsides of the medical model discussed above are broad concerns regarding the gatekeeping role of medicine in determining trans people’s identities and rights. As Spade discusses, medicine often governs interactions with law.⁶⁵ In particular, how the medical or any other model of visibility shapes interactions with criminal law is of immediate concern. According to Spade, “The belief that being named in this way has a benefit for the well-being of trans people has to be reexamined with an understanding that the alleged benefit of such naming provides even greater opportunity for harmful systems to claim fairness and equality while continuing to kill us.”⁶⁶ The next Part of this article discusses the impacts of visibility in the criminal context.

II. POLICING AND PUNISHMENT: THE CRIMINAL LEGAL SYSTEM

A. *Stop-and-Frisk: Terry and the Legacy of Cases Sanctioning the Surveillance and Policing of Trans People*

In *Terry v. Ohio*, the Supreme Court established the constitutionality of the practice of stop-and-frisk, allowing police officers to stop anyone so long as they have a reasonable suspicion that an individual has committed or is committing a crime and then permitting a frisk of the person for weapons if the police have reason to believe their own or others’ safety is in danger.⁶⁷ The legality of stop-and-frisk is controlled by the Fourth Amendment, which protects people against unreasonable searches and seizures.⁶⁸ Although traditional interpretations of the Fourth Amendment require probable cause in order to conduct searches and

62. Spade, *supra* note 55, at 17.

63. *Id.* at 21.

64. As used here, there is a distinction between the terms “essential” and “essentializing.” A trait, like transness, may be essential as a fundamental and important aspect of the person’s identity, often intersecting with many other traits. When a trait is essentialized, however, it is used as a stereotype, separate from the person’s specific identity and often ignoring the person’s other intersecting traits. Strangio, *supra* note 57, at 224.

65. Spade, *supra* note 55.

66. SPADE, *supra* note 43, at 46.

67. *Terry v. Ohio*, 391 U.S. 1, 30–31 (1968).

68. U.S. CONST., amend. IV.

seizures of individuals, *Terry*'s reasonable suspicion standard significantly lowered the threshold of suspicion necessary for police searches and seizures.⁶⁹ In *Terry*, the Court finds that a reasonable suspicion justifies a seizure. Crucially, however, the Court's opinion notes the necessary first step of surveillance by the officer, without weighing in on the justification for or the legitimacy of the officer's surveillance.⁷⁰ By declining to criticize or promulgate any standards regarding the initial surveillance, the Court allows for police to use near-total discretion in selecting who, what and when to surveil.

While *Terry* did not originate the constitutionalizing of excessive police discretion, the facts of the case are so underwhelming that it highlights the Court's tacit endorsement of police surveillance without any standard of suspicion. In *Terry*, Officer McFadden testified that he was patrolling the area, using habits of observation where he would "stand and watch people or walk and watch people at many intervals of the day."⁷¹ When he saw the defendants, John Terry and Richard Chilton, "[t]hey didn't look quite right" to him.⁷² According to the Court, the officer's reasonable suspicion was piqued when he observed Terry and Chilton pacing in front of a store entrance. That the officer even noticed the pacing was because he "took up a post of observation"⁷³ after he noticed the men. The officer, however, "was unable to say precisely what first drew his eye to them."⁷⁴ Notably, the officer in *Terry* was white, while Terry and Chilton were Black.⁷⁵ The defendants' race marked them for surveillance, giving the officer time to scrutinize lawful behavior and deem it suspicious. The Court's decision not to analyze, criticize, or set any guidelines for an officer's decision to scrutinize individuals, even when an officer has been unable to provide any reason—especially any non-racially-motivated reason—to begin surveillance allows officers near-total free rein in the initial act of surveillance. The Court abdicated any oversight of police decisions to surveil individuals and as a result stop-and-frisk has been overwhelmingly employed against those who are visibly deviant, whether that deviance is based in race, disability, or gender presentation.⁷⁶

Following the Court's decision in *Terry*, police have continued to employ stop-and-frisk with unchecked discretion in choosing who and what to surveil. The selection of locations where law enforcement patrol is notable. In *United States v. Arvizu*, a family in a minivan was pulled over and searched near the

69. *Terry*, 391 U.S. at 36–39 (Douglas, J., dissenting).

70. *Id.* at 30 (holding that a "carefully limited search" is legitimate if a reasonable suspicion is raised as to the existence of criminal activity or as to a person's dangerousness after an officer "*observes unusual conduct*") (emphasis added).

71. *Id.* at 5.

72. *Id.*

73. *Id.*

74. *Id.*

75. Russell L. Jones, *Terry v. Ohio: Its Failure, Immoral Progeny, and Racial Profiling*, 54 IDAHO L. REV. 511, 517 (2018).

76. See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540, 661–62 (S.D.N.Y. 2013); see also SPADE, *supra* note 43, at 46; Carpenter & Marshall, *supra* note 8, at 6.

border between the United States and Mexico.⁷⁷ The area was patrolled “as part of a coordinated effort to stem the flow of illegal immigration and smuggling across the international border.”⁷⁸ In *Arizona v. Johnson*, three individuals in a car were pulled over by officers and searched, in a search and seizure the Court found constitutional.⁷⁹ The seizure was initiated after officers ran a license plate check and discovered that the vehicle registration had been suspended.⁸⁰ The police were only in that area running license plate checks because they were patrolling a neighborhood “associated with the Crips gang.”⁸¹ In both *Arvizu* and *Johnson*, the selection of locations of surveillance was based on racist assumptions and perceptions of the areas in which law enforcement was patrolling.

The use of stop-and-frisk against trans people is another example of police using discretion in surveillance to target visibly non-normative groups. The phrase “walking while trans” describes the phenomenon of trans women regularly being stopped and harassed by police officers who assume that the women are engaging in sex work.⁸² Although it can be difficult to find accurate data on police interactions with trans people, studies collected by law professors Leonore F. Carpenter and R. Barrett Marshall have found that trans women experience a pattern of being profiled by police on the street.⁸³ For example, one study of Latina trans women in Los Angeles found that nearly sixty percent of respondents reported being stopped by law enforcement despite not violating the law.⁸⁴ In examples from their own clients, Carpenter and Marshall found that the stops “appeared to be predicated only on the visible transgender identity of the individual and their presence in an area of Philadelphia with a known reputation for sex work.”⁸⁵ This ability of police to profile and target trans people descends from the lowered standard for intervention set out by *Terry*.⁸⁶ Without the need for probable cause, police can decide “‘who to stop, question or detain’ so ‘discrimination may come into play and may determine both the initiation and outcome of interactions.’”⁸⁷ The outcomes of interactions with police are often devastating for anyone, but as the next section discusses, these interactions are often especially calamitous for trans people.

77. *United States v. Arvizu*, 534 U.S. 266, 268 (2002).

78. *Id.* at 269.

79. *Arizona v. Johnson*, 555 U.S. 323, 334 (2009).

80. *Id.* at 327.

81. *Id.*

82. Carpenter & Marshall, *supra* note 8, at 6.

83. *Id.* at 14–15.

84. *Id.* at 15.

85. *Id.* at 16.

86. Carolyn Calhoun, Note, “*Bullseye on Their Back*”: Police Profiling and Abuse of Trans and Non-Binary Individuals and Solutions Beyond the Department of Justice Guidelines, 8 ALA. C.R. & C.L. L. REV. 127, 136 (2017).

87. *Id.* at 137 (quoting AMNESTY INT’L, USA: STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. (2005)).

B. Anti-Trans Violence in Jails and Prisons

Throughout the United States, trans people face high levels of criminalization due to social disparities rooted in discrimination and stigmatization. Factors that contribute to criminalization include poverty, unemployment,⁸⁸ difficulty obtaining medical care, and police profiling and harassment of trans people.⁸⁹ Perhaps obviously, this criminalization often leads to imprisonment. Prisons are sites of enormous violence, especially for trans people. In both men's and women's facilities, trans people experience persecution, medical neglect, and violence.⁹⁰ Strip searches (that is, state-sanctioned sexual assaults⁹¹) are frequently used in prisons against trans and cis people.⁹²

Because prison facilities are sex-segregated, being sent to prison—already a dangerous experience—can be even more fraught for trans people. Often, officials make decisions about a trans person's sex or determine assignment based on the individual's genitals.⁹³ Placement of trans women in men's prisons frequently leads to rape and abuse, “endemic in an atmosphere of deliberate indifference.”⁹⁴ In women's facilities, those whom staff determine are “too masculine” face a significantly increased risk of harassment, punishment, and assault.⁹⁵ Trans people experience disproportionately high rates of sexual assault in prisons.⁹⁶

The violence experienced by trans people through policing and imprisonment does not exist in a vacuum. Those who are targets for imprisonment and violence are the “other,” falling outside of racial, gender, or sexual norms.⁹⁷ The criminal legal system constructs and enforces these norms, but they are also the product of social and civil institutions⁹⁸ including state legislatures, as discussed in Part III.

88. Steinmetz, *supra* note 10; SPADE, *supra* note 43, at 46.

89. SPADE, *supra* note 43, at 46.

90. *Id.*

91. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 63 (Greg Ruggiero ed., 2003).

92. SPADE, *supra* note 43, at 46.

93. Marie-Amélie George, *Framing Trans Rights*, 114 NW. U. L. REV. 555, 613 (2019).

94. Darren Rosenblum, “Trapped” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 523–24 (2000).

95. SPADE, *supra* note 43, at 46.

96. See, e.g., Julia C. Oparah, *Feminism and the (Trans)Gender Entrapment of Gender Nonconforming Prisoners*, 18 UCLA WOMEN'S L.J. 239, 261–63 (2012); see also VALERIE JENNESS, CHERYL L. MAXSON, KRISTY N. MATSUDA & JENNIFER MACY SUMNER, CTR. FOR EVIDENCE-BASED CORR., U.C. IRVINE, VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES (2007), https://cpb-us-e2.wpmucdn.com/sites.uci.edu/dist/0/1149/files/2013/06/PREA_Presentation_PREA_Report_UCI_Jenness_et_al.pdf [https://perma.cc/LL59-MMN2] (finding that 59% of transgender sample reported experiencing sexual assault, while 4.4% of the randomly selected sample reported experiencing sexual assault).

97. SPADE, *supra* note 43, at 5.

98. *Id.* at 54.

III. PUBLIC LIFE AND SCHOOLS: THINK OF THE CHILDREN

A. *Going to the Bathroom: Policing of Gender in Public Spaces*

In 2017, a number of bathroom bills—laws requiring sex-segregated bathrooms or requiring that individuals use bathrooms designated for their assigned sex at birth—were proposed across the states.⁹⁹ The United States has a history of sex segregation in a variety of areas, including bathroom access.¹⁰⁰ However, bathroom access has not always been particularized to sex.¹⁰¹ Bathrooms were not sex-segregated until around 1870, when communal bathrooms took precedence over individual-use.¹⁰² By 1887, Massachusetts legally required sex-segregated bathroom facilities.¹⁰³ Soon after, 43 other states followed suit.¹⁰⁴ A justification for sex-segregating bathrooms is often expressed in terms of comfort: people may be more comfortable performing bodily functions and undressing when in the presence of people they believe to be of their own gender.¹⁰⁵ Some have argued that sex-segregation of bathroom facilities serves to promote sex stereotypes,¹⁰⁶ which in turn may shape people's comfort levels in bathrooms. It is important to note that sex segregation in bathroom access is not necessarily "commonplace and universally accepted."¹⁰⁷ Assumptions that sex-segregated bathrooms should be universally accepted often contribute to more explicitly anti-trans rationales, such as the belief that trans-inclusive bathroom policies will give free rein to sexual predators to access women's spaces by pretending to be trans.¹⁰⁸

Distinguishing bathroom access by gender or sex affects all people, cis and trans alike, but often has a disproportionate effect on gender minorities, which include intersex people as well as trans people.¹⁰⁹ The rigid binary of sex enforced through strict sex-segregation of bathrooms can lead to increased depression in trans people and encourages rigorous adherence to gender norms in order to avoid surveillance.¹¹⁰ According to one survey, more than 40% of transgender students will find ways to avoid using the restroom—including

99. See Kralik, *supra* note 5.

100. Marc Edelman, *Exploring Gender Minorities' Bathroom Rights Under the Donald Trump Presidency*, 56 U. LOUISVILLE L. REV. 381, 383 (2018).

101. Timothy J. Graves, *Breaking the Binary: Desegregation of Bathrooms*, 36 GA. ST. U.L. REV. 381, 384 (2020).

102. Edelman, *supra* note 100, at 383.

103. *Id.*

104. *Id.*

105. *Id.* at 384.

106. *Id.*; see also Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133 (2010).

107. Graves, *supra* note 101, at 384 (citing *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 734 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part)).

108. *Id.* at 398.

109. Edelman, *supra* note 100, at 385.

110. *Id.* at 389.

fasting or dehydrating—when required to use a special restroom or a restroom that is misaligned with their gender.¹¹¹

A number of states proposed laws that were “biology-based.”¹¹² House Bill 2 in North Carolina was the only such bill to be passed into law.¹¹³ The bill required that all communal public bathrooms be segregated by biological sex, defined as the sex listed on a person’s birth certificate.¹¹⁴ The bill has since been partially repealed, but anti-trans panic still has a strong hold over state legislatures, as discussed in the section below.

While legislatures have largely turned away from bathroom bills to enforce gender binaries, bathroom access and usage is still a legal issue primarily relegated to the courts.¹¹⁵ Recently, in *Grimm v. Gloucester County School Board*, Gavin Grimm, a trans high school student, sued for discrimination after being forced to use a separate and private bathroom facility from the regular student restroom.¹¹⁶ The Fourth Circuit ruled for Grimm, finding that the school had violated his equal protection rights with its bathroom policy.¹¹⁷ However, in *Johnston v. University of Pittsburgh*, the Western District of Pennsylvania found that a university does not engage in unlawful discrimination by prohibiting a trans man from using bathrooms and locker rooms designated for men.¹¹⁸ The validity of this outcome has been questioned following the Supreme Court’s ruling in *Bostock v. Clayton County*, where the Court found that employers who fire someone for being gay or transgender violates Title VII protections against discrimination based on sex.¹¹⁹ Courts have a number of methods of analyzing claims of discrimination related to sex-segregated bathrooms, including scrutiny under Title VII of the Civil Rights Act of 1964,¹²⁰ Title IX of the Education Amendments Act of 1972,¹²¹ and the Equal Protection Clause of the Fourteenth Amendment.¹²² When interpreting Title IX, courts look to Title VII.¹²³

In *Female Masculinity*, Jack Halberstam writes extensively about what he terms “the bathroom problem.”¹²⁴ He argues that although feminist and gender

111. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 597 (4th Cir. 2020).

112. Graves, *supra* note 101, at 384.

113. *Id.* at 385.

114. *Id.*

115. *Id.*

116. *Grimm*, 972 F.3d at 601.

117. *Id.* at 613–14.

118. *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657, 683 (W.D. Pa. 2015).

119. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020); *see also Grimm*, 972 F.3d at 613.

120. 42 U.S.C. § 2000e.

121. 20 U.S.C. §§ 1681–88.

122. U.S. CONST. amend. XIV, § 1; *see also Graves*, *supra* note 101, at 386–89.

123. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 718 (4th Cir. 2016).

124. JACK HALBERSTAM, *FEMALE MASCULINITY* 20 (1998) [hereinafter HALBERSTAM, *FEMALE MASCULINITY*]. Halberstam was assigned female at birth, and at the time of writing *FEMALE MASCULINITY*, identified as a butch woman and used she/her pronouns. Today, Halberstam prefers he/him pronouns, and describes his gender as “improvised.” Jack Halbertstam, *On Pronouns*, JACK HALBERSTAM BLOG (Sept. 3, 2012), <http://jackhalberstam.com/on-pronouns> [https://perma.cc/JR7G-Z47V].

theory has increased awareness and understanding that gender is flexible and somewhat fluid, these very traits of gender allow for a continued authentication of the gender binary.¹²⁵ In other words, “because the definitional boundaries of male and female are so elastic, there are very few people in any given public space who are completely unreadable in terms of their gender.”¹²⁶ However, ambiguous gender is treated and policed as deviant.¹²⁷ He uses experiences in the bathroom as examples of the policing of such deviance.¹²⁸ He describes entering the women’s bathroom at Chicago O’Hare airport and someone calling security on him after mistaking him for a boy or man, and the same happening at the Denver airport on the same trip.¹²⁹ Though these examples arose at airports, he explains: “[H]aving one’s gender challenged in the women’s rest room is a frequent occurrence in the lives of many androgynous or masculine women; indeed, it is so frequent that one wonders whether the category ‘woman,’ when used to designate public functions, is completely outmoded.”¹³⁰ He argues, however, that the bathroom problem is not a result simply or only of mistaken gender identification, but instead that this serves both as creator and creation of the function of women’s bathrooms as a space to enforce gender conformity:

The accusation “you’re in the wrong bathroom” really says two different things. First, it announces that your gender seems at odds with your sex (your apparent masculinity or androgyny is at odds with your supposed femaleness); second, it suggests that single-gender bathrooms are only for those who fit clearly into one category (male) or the other (female). Either we need open-access bathrooms or multigendered bathrooms, or we need wider parameters for gender identification.¹³¹

According to Halberstam, the bathroom already functions as a site of social policing of the gender binary and conformity.¹³² In some ways, the bathroom bills proposed and passed are redundant. Social policing has existed in sex-segregated bathrooms and, as made clear by his anecdote of having security called on him in the bathroom, there already has been some force bolstering this social policing. However, bathroom bills seek to codify social policing into legal policing. With bathroom bills, the enforcement of gender through social policing becomes formalized and creates a mutual relationship between the individual doing the enforcement and the state. The individual is supported by the state but is also deputized to act on behalf of the state. Policing others’ gender becomes not just an individual acting on their own behalf, but someone acting to defend

125. HALBERSTAM, FEMALE MASCULINITY, *supra* note 124.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 20–21.

131. *Id.* at 23–24.

132. *Id.* at 20.

the law of the state. This allows for the act of gender policing to take on broader implications, as discussed later in Section C.

B. Sports Governance

Since the flurry of bathroom bills introduced in 2017, there has largely been a shift of focus in state legislatures to sports-related anti-trans legislation. In 2021, eight states passed laws or adopted policies that limit the participation of trans youth in school sports.¹³³ Alabama House Bill 391 requires that students participate in sex-segregated sports, determined by “biological gender.”¹³⁴ Arkansas passed into law the *Fairness in Women’s Sports Act*, which requires the participation in sex-segregated sports based on “biological sex.”¹³⁵ Florida also signed into law a *Fairness in Women’s Sports Act*, requiring sex-segregated team placement based on “biological sex at birth.”¹³⁶ Tennessee’s Senate Bill 0228, now codified as Public Chapter Number 40, similarly requires designation based on “sex at the time of the student’s birth, as indicated on the student’s original birth certificate.”¹³⁷ In West Virginia, House Bill 3293 requires designation based on “biological sex of the athlete at birth,” where biological sex is defined by an individual’s “reproductive biology and genetics at birth.”¹³⁸ Mississippi, too, passed a law requiring team designation based on “biological sex.”¹³⁹ Montana passed the *Save Women’s Sports Act*, also requiring team designation based on “biological sex” and explicitly excluding “students of the male sex” from teams designated for “females, women, or girls.”¹⁴⁰ In South Dakota, Governor Kristi Noem issued two executive orders which limited participation on girls’ or women’s teams to “females, based on their biological sex, as reflected on their birth certificate issued at the time of birth” at institutions of higher education, and to “females, based on their biological sex, as reflected on their birth certificate or affidavit provided upon initial enrollment” at public schools or school district events.¹⁴¹

There are a number of problems with these laws and policies, not the least of which is their discriminatory effect on trans people, especially children. For example, the enacted version of Alabama House Bill 391 refers to “biological sex,” “biological males,” and “biological females,” but its introduced version

133. H.R. 391, 32d Leg., Reg. Sess. (Ala. 2021); S. 354, 93d Gen. Assemb., Reg. Sess. (Ark. 2021); S. 1028, 2021 Leg., Reg. Sess. (Fla. 2021); S. 0228, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); H.D. 3293, 2021 Leg., Reg. Sess. (W. Va. 2021); S. 2536, 2021 Leg., Reg. Sess. (Miss. 2021); H.R. 112, 67th Leg., Reg. Sess. (Mont. 2021); S.D. Exec. Order No. 2021-05 (Mar. 29, 2021); S.D. Exec. Order No. 2021-06 (Mar. 29, 2021).

134. Ala. H.R. 391.

135. Ark. S. 354.

136. Fla. S. 1028.

137. Tenn. S. 0228.

138. W. Va. H.D. 3293.

139. S. 2536, 2021 Leg., Reg. Sess. (Miss. 2021)

140. H.R. 112, 67th Leg., Reg. Sess. (Mont. 2021)

141. S.D. Exec. Order No. 2021-05 (Mar. 29, 2021); S.D. Exec. Order No. 2021-06 (Mar. 29, 2021).

refers to “biological gender.”¹⁴² Generally, gender is not determined by biology or biological factors, whereas sex is based in biological traits. GLAAD defines sex as the following:

[The classification of a person as] “male” or “female,” based on the appearance of their external anatomy, and an M or an F is written on the birth certificate. However, the development of the human body is a complex process, and sex is not solely determined by anatomy, nor is it strictly binary.¹⁴³

In contrast, gender is often defined in terms of gender identity and gender expression, neither of which are based on biological traits.¹⁴⁴ Gender identity is internal, whereas gender expression is external, manifesting in socially classified cues of masculinity or femininity generally intended to align with one’s gender identity rather than assigned sex at birth.¹⁴⁵ The conflation of sex and gender in the text of Alabama House Bill 391 suggests that legislators either do not know the differences between sex and gender, something understood by many scholars and medical professionals, or do not care. Nevertheless, the state has passed legislation over subjects to which it is ignorant or indifferent.

It is also worthwhile to note that many of these laws are constructed with an assumption that trans women and girls who may seek to participate in women’s and girls’ sports are not really women. For example, although the Tennessee law requires team designation be based on sex at birth, the law requires that “gender for purposes of participation in ... athletic activity” be determined by sex assigned at birth.¹⁴⁶ This framing pays lip service to the distinctions between sex and gender, while ultimately concluding that gender, at least in the context of athletics, is synonymous with sex. The Tennessee law then goes on to describe the apparent effects of boys participating in girls’ sports, referring again to biological sex while expressing skepticism of assertions of gender. According to the bill, “permitting boys who are male in every biological respect to compete in girls’ athletic competitions if they *claim* a female gender identity” leads to deleterious effects on cis girls in athletic competitions.¹⁴⁷ This language reflects a suspicion of the idea that gender and sex can be separate or incongruous, and therefore a suspicion of even the mere concept of transness.

Perhaps even more insidious is how most of these bills and orders are framed not necessarily as hostile toward trans people—though they are—but as primarily protective of cis girls and women. By giving discriminatory laws titles such as the *Fairness in Women’s Sports Act* or the *Save Women’s Sports Act*, legislators construct a population both in need of and more worthy of protection

142. H.R. 391, 32d Leg., Reg. Sess. (Ala. 2021).

143. *Glossary of Terms: Transgender*, GLAAD, <http://www.glaad.org/reference/transgender> (last visited Jan. 16, 2022) [<https://perma.cc/3M8A-W3LS>].

144. *Id.*

145. *Id.*

146. S. 0228, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021).

147. *Id.* (emphasis added).

than others. The findings and reasonings in support of the legislation emphasize biological differences between men and women and boys and girls, including the “physical advantages” of those assigned male at birth.¹⁴⁸ After listing these apparent advantages, the laws then turn to the states’ interests in providing women and girls opportunities: to ensure that women in sports are on a “fair playing field,”¹⁴⁹ to “maintain fairness for women’s athletic opportunity,”¹⁵⁰ to prevent “boys displacing girls in competitive events,”¹⁵¹ to promote “equal athletic opportunity,”¹⁵² and to prevent the threat that “males” in women’s sports will “diminish opportunities for women.”¹⁵³ As with the bills that are more explicit in their conflation of gender and sex and their disbelief in transness, these bills neglect or outright reject the legitimate existence of transness.

Despite these laws being advanced in response to increasing visibility and acceptance of trans people, they do not name trans people in so many words. They erase trans people as a means of reinforcing a rigid gender and sex binary. The framing of the laws suggests that they protect the opportunities of women and girls from their usurpation by men and boys; the underlying logic is that trans women and girls are not really women or girls. Because the focus of protection through the bills is cis women and girls, trans men and boys are also erased. However, this erasure occurs in a slightly different way; the bills presume athletic superiority in those assigned male at birth but provide no reasons why trans men and boys must play on teams designated for women and girls.¹⁵⁴

Another facet of these bills, which relates to the idea of delegating the enforcement of sex and gender binaries, is the private cause of action included in a number of the bills. Arkansas’s Senate Bill 354, Florida’s Senate Bill 1028, Mississippi’s Senate Bill 2536, Montana’s House Bill 112, and West Virginia’s House Bill 3293 all include a civil remedy for violation of the law excluding trans athletes.¹⁵⁵ Many of these are framed as “opportunities” for cis women and girls: students who are “deprived of an athletic opportunity”¹⁵⁶ or “aggrieved by a violation”¹⁵⁷ of the law are given the right to seek injunctive relief or monetary damages.¹⁵⁸ By incorporating a civil remedy, where private individuals bring claims for losses which they assert are due to a trans athlete’s participation on a team that matches their gender, the enforcement of these laws is in part deputized

148. H.R. 391, 32d Leg., Reg. Sess. (Ala. 2021).

149. *Id.*

150. S. 1028, 2021 Leg., Reg. Sess. (Fla. 2021)

151. Tenn. S. 0228.

152. H.D. 3293, 2021 Leg., Reg. Sess. (W. Va. 2021).

153. S.D. Exec. Order No. 2021-05 (Mar. 29, 2021); S.D. Exec. Order No. 2021-06 (Mar. 29, 2021).

154. H.R. 391, 32d Leg., Reg. Sess. (Ala. 2021); Tenn. S. 0228.

155. S. 354, 93d Gen. Assemb., Reg. Sess. (Ark. 2021); S. 1028, 2021 Leg., Reg. Sess. (Fla. 2021); S. 2536, 2021 Leg., Reg. Sess. (Miss. 2021); H.R. 112, 67th Leg., Reg. Sess. (Mont. 2021); W. Va. H.D. 3293.

156. Ark. S. 354; Fla. S. 1028; Miss. S. 2536; Mont. H.R. 112.

157. W. Va. H.D. 3293.

158. *See, e.g.*, Ark. S. 354; Fla. S. 1028; W. Va. H.D. 3293; Miss. S. 2536; Mont. H.R. 112.

to the individual. Like with the codification of gender policing in bathrooms, the individual cause of action makes the policing of gender in the sports context both a social and legal effort.

C. The Current and Evolving State of Anti-Trans Law

Bathroom and sports bills, as harmful as they are on their own, were a canary in the coal mine for the continued escalating attacks on trans and queer people and their rights. As this article was being written, state legislatures continued to attack trans rights, expanding from the spheres of bathrooms and sports to civil rights, free speech and expression, education, public accommodations, and healthcare.¹⁵⁹ In 2022, 278 anti-LGBTQ bills were proposed in state legislatures, twenty of which became law.¹⁶⁰ As of January 2023, the ACLU is tracking 184 anti-LGBTQ bills across the United States.¹⁶¹ In South Carolina, the legislature has proposed a state constitutional amendment that would “define transgender people out of existence.”¹⁶² Bills have continued to require or implicate frightening levels of surveillance. Like some of the sports bills described above, legislatures continue to include a private right of action to enforce the provisions of these new bills.¹⁶³ Other bills require teachers or school administrators to take on the role of surveillant and report any student who changes their name, attire, or pronouns “in a manner that is inconsistent with the student’s biological sex at birth.”¹⁶⁴ A number of states have introduced (or passed) bills to prevent or limit gender affirming healthcare; lest there be any doubt that these bills seek to enforce gender normativity, they provide exemptions for identical treatments when offered to cisgender or intersex youth, rather than transgender youth.¹⁶⁵

This article has presented a fairly bleak outlook both on visibility and on the direction of anti-trans legislation and behavior in the United States. There is a concerted effort at the state level to pass anti-trans legislation, and the degree of anti-trans activity at the start of 2023 is not heartening. Utah’s ban on trans healthcare for minors has already been passed into law.¹⁶⁶ However, there are

159. *Mapping Attacks on LGBTQ Rights in U.S. State Legislature*, ACLU, <https://www.aclu.org/legislative-attacks-on-lgbtq-rights> (last visited Jan. 29, 2023) [<https://perma.cc/W973-BZSU>].

160. *Over 120 Bills Restricting LGBTQ Rights Introduced Nationwide in 2023 So Far*, ACLU (Jan. 19, 2023, 10:00 AM), <https://www.aclu.org/press-releases/over-120-bills-restricting-lgbtq-rights-introduced-nationwide-2023-so-far> [<https://perma.cc/KUE2-PACS>].

161. ACLU, *supra* note 159.

162. ACLU, *supra* note 160; *see also* S. 276, 125th Reg. Sess. (S.C. 2023).

163. *See, e.g.*, S. 83, 2023 Leg., Reg. Sess. (Iowa 2023).

164. S. 354, 2023 Leg., Reg. Sess. (Ind. 2023).

165. ACLU, *supra* note 159; *see also* S. 16, 2023 Gen. Assemb., Reg. Sess. (Utah 2023) (prohibiting sex characteristic surgical procedures on a minor but excluding “surgery or other procedures or treatments performed on an individual who (A) is born with external biological sex characteristics that are irresolvably ambiguous.”)

166. Kim Bojórquez & Shawna Chen, *Utah Becomes First State in 2023 to Ban Gender-Affirming Care for Youth*, AXIOS (Jan. 28, 2023), <https://www.axios.com/2023/01/28/utah-transgender-health-care-ban> [<https://perma.cc/DN7S-35QU>].

potential solutions to and means of combatting the current and mounting harms against trans people. There have been successes in the past year through organized resistance: in February of 2022, Arizona's bill banning gender-affirming healthcare failed to pass out of committee following testimony by trans youth.¹⁶⁷ There is also the potential for expanded protections at the federal level. The Equality Act, if passed, would set a federal floor of civil rights protection for gender identity and sexual orientation.¹⁶⁸

However, defeating anti-trans legislation before it goes into effect or even setting a base protection for trans people does not necessarily ameliorate the harms trans people are facing and will continue to face. Relying on defeat in state legislatures is a particularly weak position, as new legislation can always be introduced and states that succeed in passing anti-trans legislation may work to expand the reach of those laws.¹⁶⁹ Further, the problems of policing and surveillance are broader than anti-trans legislation.¹⁷⁰ Anti-trans bills create, reflect, and exacerbate the conditions of surveillance that currently exist within society, both within and outside of the legal sphere.

D. *Surveilling the Implications of Anti-Trans Legislation*

Both efforts analyzed here—bathroom bills and anti-trans athletics legislation—seek to limit the access of trans people to public spaces and as such have broader implications in limiting trans acceptability in public. Although often enforced by state officials, the drawing of attention to and limiting of trans people's, particularly trans children's, access to public bathrooms and sports serves to constrain trans people's public existence, both legally and socially. This aligns with Foucault's description of systems of surveillance becoming de-institutionalized, made more informal and adapting to the supposedly free state.¹⁷¹ Public spaces become sites of enforcement. In *The Cultural Politics of Emotion*, feminist and queer theorist Sara Ahmed argues that heteronormativity in public spaces limits the degree of comfort, or fitting into public, that an individual may have:

167. Samantha Riedel, *Thanks to Trans Kids, Arizona's Anti-Trans Bill Is Dead*, THEM (Feb. 10, 2022), <https://www.them.us/story/arizona-anti-trans-bill-youth-activism> [https://perma.cc/4J8B-CFWE]. Currently, no anti-trans healthcare bills have been introduced in Arizona. ACLU, *supra* note 159.

168. *The Equality Act*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/equality> (May 23, 2022) [https://perma.cc/KZL5-64RT].

169. For a discussion of the potential for states to expand the reach of their laws, and the constitutional questions these moves pose, see David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023). Although Cohen, Donley and Rebouché's focus is on abortion law, similar mechanisms could be applied to trans-specific legislation.

170. See, e.g., Tori Otten, *Florida Panel Recommends Forcing Student Athletes to Give Schools Their Menstrual History*, NEW REPUBLIC (Jan. 26, 2023, 10:43 AM), <https://newrepublic.com/post/170192/florida-panel-student-athletes-give-schools-menstrual-history> [https://perma.cc/2ZD6-JZCG].

171. FOUCAULT, *supra* note 1, at 211.

Heteronormativity functions as a form of public comfort by allowing bodies to extend into spaces that have already taken their shape. Those spaces are lived as comfortable as they allow bodies to fit in; the surfaces of social space are already impressed upon by the shape of such bodies (like a chair that acquires its shape by the repetition of some bodies inhabiting it: we can almost see the shape of bodies as ‘impressions’ on the surface). The impressions acquired by surfaces function as traces of bodies. We can even see this process in social spaces. As Gill Valentine has argued, the ‘heterosexuali[z]ation’ of public spaces such as streets is naturali[z]ed by the repetition of different forms of heterosexual conduct (images on billboards, music played, displays of heterosexual intimacy and so on), a process which goes unnoticed by heterosexual subjects. The surfaces of social as well as bodily space ‘record’ the repetition of acts, and the passing by of some bodies and not others.¹⁷²

According to Ahmed, the extended permeation of heteronormativity in the public sphere enforces the default of heterosexuality both by encouraging comfort in those who are able to fit into the space—in other words, heterosexuals—and encouraging discomfort in those who are unable to fit—in other words, non-heterosexuals. Ahmed’s contention of heteronormativity’s construction of the public space and comfort can be extended to the concept of cishnormativity—that is, the normalization and naturalization of cis people and the denormalization of trans people within society. Just as the repeated forms of heterosexual conduct in the public sphere create a normalized heterosexual public sphere, so too do repeated forms of cis conduct in the public sphere. When, for example, gender and sex are conflated, that conflation may not necessarily go noticed by someone who is cis, as a general lack of incongruity between their gender and their sex assigned at birth can mean that the conflation of gender and sex already seems natural to them. When they see the conflation of gender and sex, it reinforces that naturalization. However, someone whose gender does not match with their sex assigned at birth is far more likely to notice the conflation, which in turn reinforces their lack of fit and comfort within the cishnormativity of society.

In a chapter describing the political implications of fear, Ahmed discusses how, in response to the events of September 11, 2001—which, notably, has been used for the extraordinary expansion of the surveillance state in the United States and elsewhere¹⁷³—surveillance and policing of the other was framed as essential to democratic citizenship. She argues that citizenship is made to require the policing of those who “look suspicious,” where one’s appearance of

172. SARA AHMED, *THE CULTURAL POLITICS OF EMOTION* 148 (2d ed. 2014) (citation omitted).

173. See ARUN KUNDNANI, *THE MUSLIMS ARE COMING!: ISLAMOPHOBIA, EXTREMISM, AND THE DOMESTIC WAR ON TERROR* 48 (2014).

suspiciousness is already determined based on racialized traits.¹⁷⁴ This policing translates fear into values such as love, community, and freedom, which serve to defend the prevailing social and institutional forms, both creating and enshrining a particular mode of civil society. Thus, according to Ahmed, “[t]o be brought into international civil society ... others must ‘mimic’ these rules of conduct and forms of governance. Henceforth, the emphasis on values, truths and norms that will allow survival *slides easily into the defen[s]e of particular social forms or institutions.*”¹⁷⁵ The individual’s policing of others in order to define themselves as within the scope of civil society and uphold that society has long been a feature of United States history involving the otherizing of racial, ethnic, and sexual minorities. In his book *The Muslims Are Coming!*, Professor Arun Kundnani highlights surveillance programs that use members of the community to conduct the surveillance; informants were to collect the names of people attending Islamic study groups and to encourage Muslims to make inflammatory statements.¹⁷⁶ He describes the effects of such programs: “There is the same sense of not knowing whom to trust, of choosing one’s words with special care when discussing politics They have heard the stories, so they are careful—just in case.”¹⁷⁷ The external policing by others encourages internal, self-enforced policing.

Ahmed and Kundnani’s specific examples of post-9/11 racialized policing by civilians can be analogized to the policing of transness and gender deviance encouraged by bathroom bills and anti-trans sports legislation. The spaces governed by such laws are public, involving a degree of mingling between those who may be or wish to be more normative, or wish to encourage normativity within their children, and those who appear deviant in some way. Although the laws are enforced by the state, they are similarly enforced by individuals who deputize themselves to defend their self-conception, their conception of their children, and their conception of the state. In the case of bathrooms, the deputization is necessary for the enforcement of the norms because there are generally not inspectors or guards stationed at public bathrooms to ensure that everyone enters the sex-segregated bathroom that matches their sex assigned at birth. To enforce such norms, others within the bathroom must be willing to do the enforcement. In the case of the anti-trans athletics laws, the deputization occurs most obviously in the form of the private cause of action for civil remedies. In both of these instances, the individual’s involvement in enforcement is both personal and systemic. Policing gender in bathrooms is, on an interpersonal level, generally framed in terms of safety. Policing gender in sports is framed as protecting one’s opportunities to excel in sports, as well as in higher education through scholarships. Through bathroom bills and anti-trans sports legislation, these personal interests are translated into state and societal interests: to enforce gender conformity more broadly, for the sake of the society.

174. AHMED, *supra* note 172, at 78.

175. *Id.* (emphasis in original).

176. KUNDNANI, *supra* note 173, at 137.

177. *Id.* at 281.

CONCLUSION

There are numerous benefits to increased visibility of trans people and the trans community, but those benefits are tempered by the risks that arise out of such visibility and the harms of increased surveillance. Surveillance arises within the criminal legal system, a system that is fraught with physical violence, but it also arises in the civil legal context. The wave of anti-trans legislation that has come out of state-level governments incorporates a more pedestrian type of violence through surveillance, one which solicits and encourages individuals to police the gender of others, especially children. The end result is the internalization of such surveillance and policing, which in turn causes hyper-cautiousness in the expression of gender. Resistance of such externalized and internalized surveillance is crucial to preserve and strengthen the freedom of all people—trans and cis alike.

A FEMINIST EYE ON THE NEW LAW FOR CARE WORK COMPENSATION IN CHINA

Tiantian Zhu & Zhizhuang Duan†*

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INTRODUCTION

On the first day of 2021, the first Civil Code of the People's Republic of China (the Civil Code) came into effect. A new law for care work compensation popped up before the public eye. Article 1088 of the Civil Code states:

Where one spouse is burdened with additional duties for raising children, looking after the elderly, or assisting the other spouse in his work, the said spouse has the right to request for compensation upon divorce against the other party, and the other part shall make due compensation. The specific arrangements for making such compensation shall be determined by the spouses through agreement, or adjudicated by the people's court where no such agreement is reached.¹

Scholars and the public commonly refer to Article 1088 as “housework compensation.” This article will discuss a broader concept, “care work compensation,” meant to encompass familial responsibilities such as child care, elderly care, and household duties, examining how courts compensate for these responsibilities in divorce.

China's family law has before addressed the issue of care work and how to adequately compensate a spouse's share of care work in cases of divorce. Before the recent Civil Code, Article 40 of the Marriage Law of People's Republic of China (2001 Amendment) allowed the homemaker to ask for compensation in divorce if the couple had agreed in writing that any property acquired by each spouse in the marriage was separate property.² The presumption was that individuals could only ask for care work compensation when they did not share their spouse's property. Otherwise, property division was considered enough for care work compensation. Article 1088 of the Civil Code, however, allows for care work compensation no matter how spouses arrange their property interests.³ The purpose of this change is to protect vulnerable spouses and to promote

1. Zhonghua Renmin Gongheguo Minfa Dian (中华人民共和国民法典) [The Civil Code of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., May. 28, 2020, effective Jan. 1, 2021), art. 1088, P.R.C. LAWS [hereinafter Civil Code].

2. Zhonghua Renmin Gongheguo Hunyin Fa 2001 Xiuzheng (中华人民共和国婚姻法 (2001修正)) [Marriage Law of the People's Republic of China (2001 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 28, 2001, effective Apr. 28, 2001), art. 40, P.R.C. LAWS. Not sharing property is quite uncommon among Chinese spouses. A survey shows that 96% of Chinese spouses have joint titles for property during the marriage. Only 4% of spouses do not share any title of property. See Xia Yinlan (夏吟兰) & Xue Ninglan (薛宁兰), Lun Fuqi Gongtong Caichan de Rending Yu Fenge—Yi Sanshi Lihun Anjian Diaocha Shuju Fenxi Wei Lujing (论夫妻共同财产的认定与分割——以三市离婚案件调查数据分析为路径) [*The Definition and Distribution of Joint Property—Based on the Survey of Divorce Cases in Three Cities*], Xia Yinlan & Long Yifei (夏吟兰, 龙翼飞) Jiashifa Yanjiu (家事法研究) [Researches on Family Law] 221, (SOC. SCI. ACAD. PRESS (CHINA)) (2011); see also Wei Chen, Lei Shi & Wenjun He, *Empirical Research on Judicial Practice of the Post-Divorce Relief System - Targeted on Sampled Cases Handled in a Grass-Roots People's Court in Chongqing in 2010-2012*, 2014 INT'L SURV. FAM. L., 51, 66 (2014).

3. Civil Code, *supra* note 1.

gender equality in marriage.⁴ However, Article 1088 remains controversial in China a year after its enactment.

A Beijing district court first ruled on a care work compensation case under Article 1088 in February 2021.⁵ A couple had married in 2015 and had a son together.⁶ They began to live separately in July 2018.⁷ The child had been living with the wife since September 2018.⁸ In the divorce petition, the wife asked for ¥160,000 (around \$25,219) in compensation based on Article 1088.⁹ The wife claimed that she had cared for the child and done the care work alone during the marriage, whereas her husband had done nothing but work.¹⁰ The court ruled for equal division of marital property and additional care work compensation in ¥50,000 (around \$7,880) to the wife.¹¹

The case went viral online and sparked intense debate about whether a married person should be paid for care work and, if so, how to determine the monetary value of care work.¹² On one hand, people who do not support care work compensation argue that care work is a family arrangement that benefits both spouses. On the other hand, those who support care work compensation believe the compensation amount was too low for market price.¹³ The judge in

4. An official news source says Article 1088 “not only reveals that China’s laws care about vulnerable parties in marriage, but also promote gender equality by ensuring justice and equality in legal applications.” See Wang Yufang, (王郁芳) & Fu Yaning (付雅宁), Yi Lihun Jiawulaodong Buchang Zhidu Cujin Nannü Shizhi Pingdeng (以离婚家务劳动补偿制度促进男女实质平等) [*Utilizing Divorce Housework Compensation to Promote Essential Gender Equality*], *Zhongguo Funu Bao* (中国妇女报) [CHINA WOMEN NEWS] (June 8, 2021), http://www.nwccw.gov.cn/2021-06/08/content_293026.htm [https://perma.cc/Z5QA-5WA8].

5. Bai Jingjing (白晶晶), Lihun Huo Wuwanyuan Jiawu Buchang, Buneng Na Baomu Gongzi Biao zhun Hengliang, (离婚获5万元家务补偿, 不能拿保姆工资标准衡量) [*Divorce received 50,000 yuan of housework compensation, which cannot be measured by the nanny salary standard*], *Xinhua Wang* (新华网) [XINHUA NET] (Feb. 24, 2021), http://www.xinhuanet.com/comments/2021-02/24/c_1127131417.htm [perma.cc/XC8F-9VZS].

6. *Id.*

7. *Id.*

8. *Id.* Note the case did not mention where had the child lived from July to September 2018.

9. *Id.*

10. *Id.*

11. *Id.*

12. Topics with tags about the case, such as “#Full-Time Housewife Received ¥50,000 Housework Compensation# (#全职太太离婚获5万家务补偿#)” and “#Beijing Full-time Housewife Received ¥50,000 Housework Compensation# (#北京全职太太离婚获5万家务补偿#),” had been viewed almost 1 billion times on Weibo (a Twitter like social media). Many people thought the compensation was too low and unfair to the wife because it would cost much more than ¥50,000 to hire a housekeeper or nanny to work for five years. People criticized that the court order justified the exploitation of women in marriage.

13. *China Court Orders Man to Pay Wife for Housework in Landmark Case*, BBC News (Feb. 24, 2021), <https://www.bbc.com/news/world-asia-china-56178510>; see also Helen Davidson, *Woman Awarded \$7,700 for Five Years of Housework in China Divorce Ruling*, *GUARDIAN* (Feb. 24, 2021), <https://www.theguardian.com/world/2021/feb/24/woman-awarded-7700-for-five-years-of-housework-in-china-divorce-ruling> [https://perma.cc/87VV-38S5].

the case expressed the difficulty of valuing care work and explained the factors she had considered in determining the compensation: the duration of the marriage, the content of the care work, the husband's income, and average living expenses in the area.¹⁴ The court, however, did not compare the wife's care work with market labor.¹⁵ An opinion published on Xinhua Net, an official media, explained the reason why: "[C]are work made by spouses is different from contracted work between employers and nannies is because 'love' is weighed into the care work."¹⁶

This article examines the effect of Article 1088 on gender equality by looking into Article 1088's legal application in courts and public policy, pinpointing impacts on modern families. The authors have found the gender hierarchy largely remains unchanged today despite the public's modernizing views of family and society in China. Women still act as the primary caregivers in families. Laws and policies like Article 1088 aim to change the persistent gender gap in families yet justify traditional gender roles because the court rules compensation based on pity rather than recognizing the value of care work. Perpetual institutional constraints on China's women, entrenched by public enthusiasm for family values, are a primary reason the law has so far failed to promote gender equity.

This article is organized as follows: Part I summarizes existing scholarship on care work compensation. Part II explores how courts have used Article 1088 in divorce cases with or without care work agreements and shows how courts have failed to protect homemakers under the new law because of a lack of clear understanding of care work's value. Part III details how the gender stereotype of women as caretakers persists in public policy and modern families. Part IV examines why Article 1088 has failed so far to protect homemakers in marriage. This article suggests that the legal failure of homemaker protection may be traced to broader financial issues in China's family law, including marital property and alimony. Probing family law problems regarding financial matters, the authors propose that courts recognize the value of care work independent of other family law financial issues.

I. LITERATURE REVIEW

Until recently, Chinese research on the value of what has been termed "housework" has focused on the relationship between the wife's contribution to care work in marital property distribution. Before Article 1088 of the Civil Code, Ma Yinan criticized granting care work compensation only to spouses who did

14. Jiating Zhufu Lihun Huo Wuwan Jiawu Buchang, Zhushen Faguan: Panjue Shi Kaoli Sige Yinsu(家庭主妇离婚获5万家务补偿, 主审法官: 判决时考虑四个因素)[*A Homemaker Receives 50k Housework Compensation in Divorce, the Chief Judge: Four Factors Considered in Judgement*], *Zhongguo Zhisheng* (中国之声) [THE VOICE OF CHINA] (Feb. 23, 2021) [hereinafter *Zhongguo*], <http://m.news.cctv.com/2021/02/22/ART17zgk735gwcoqbICyeMKn210222.shtml> [https://perma.cc/9GCE-6RLM].

15. Bai Jingjing (白晶晶), *supra* note 5.

16. *Id.*

not share property because most Chinese spouses shared their property.¹⁷ After the enactment of Article 1088, family law scholars have debated whether to permit care work compensation to all spouses regardless of property allocation and how to value care work.

China's marriage law grants spouses the joint title of marital property.¹⁸ Equal distribution of marital property is the primary reason why some scholars do not support separate care work compensation. Lin Xiuxiong notes that equal distribution of property in divorce aims to protect financially dependent full-time homemakers.¹⁹ Xia Yinlan echoes that equal distribution of property recognizes the value of women's care work because it considers everything earned by the spouses during marriage as attributable to both spouses.²⁰ Wang Yang argues separate care work compensation under the equal distribution of property would be "repetitive dual compensation" because the value of care work has been recognized in marital property distribution.²¹ However, Wang Weiling criticizes the "repetitive dual compensation" argument as ignoring working caretakers who take both unpaid and paid work.²² Xia Yinlan suggests considering the spouse's human capital and potential interest when courts recognize the economic value of care work.²³ These studies, however, overlook many factors affecting the

17. Ma Yinan (马忆南), Tong Yuanling (童元玲), Pan Li (潘丽) & Wang Jing (王晶), *Lihun Caichan Fenge Ruogan Wenti de Shehui Xingbie Fenxi* (离婚财产分割若干问题的社会性别分析) [*Gender Analysis of the Division of Property in Divorce*], 77, *Funu Yanjiu Luncong* (妇女研究论丛) [COLLECTION OF WOMEN'S STUDIES], 42, 42–46 (2006).

18. Article 1062 of the Civil Code of PRC states: the following property acquired during the marriage is the spouse's marital property and both parties have the title of the marital property: (1) property, including wages, bonuses, and labor compensation; (2) earnings from production, operation, and investment; (3) earnings from intellectual property; (4) property acquired by inheritance or gift. Article 1063 lists separate property: (1) prenuptial property that belongs to one spouse; (2) compensation or indemnification received by one spouse for personal injuries; (3) the property going only to one spouse as specified in a will or as a gift; (4) one spouse's private articles for daily use. See Civil Code, *supra* note 1, art. 1062–63.

19. LIN XIUXIONG (林秀雄), *Fuqi Caichanzhi Zhi Yanjiu* (夫妻财产制之研究) [THE STUDY OF MARITAL PROPERTY], (CHINA U. OF POL. SCI. AND L. PRESS), Apr. 12, 2001, at 184.

20. Xia Yinlan (夏吟兰), *Dui Zhongguo Fuqi Gongtong Caichan Fanwei de Shehui Xingbie Fenxi—Jianlun Jiawulaodong de Jiazhi* (对中国夫妻共同财产范围的社会性别分析—兼论家务劳动的价值) [*Research From the Prospect of Gender Analysis on the Scale of Marital Property in China—Study on the Value of Housework*], *Faxue Zazhi* (法学杂志) [L. SCI. MAG.], 2005, at 71.

21. Wang Yang (汪洋), *Gongtong Caichanzhi Xia Lihun Jingjibuchan de Jiazhi* (共同财产制下离婚经济补偿的价值基础、教义构造与体系协调) [*Basic Value, Dogmatics Construction and System Coordination in Economic Compensation for Divorce under Communal Property System*], *Funu Yanjiu Luncong* (妇女研究论丛) [J. OF CHINESE WOMEN'S STUD.], 2021, at 73.

22. Wang Weiling (王伟玲), *Jiyu Xingbie de Jiating Neibu Fengong Yanjiu* (基于性别的家庭内部分工研究) [Research on the sexual division of labor], 22 *Chongqing Daxue Xuebao—Shehui Kexue Ban* (重庆大学学报—社会科学版) [J. OF CHONGQING U. SOC. SCI. ED.] 135 (2016).

23. Xia Yinlan (夏吟兰), *Minfadian Lihun Jiawu Laodong Jingji Buchang Zhidu Wanshan de Renquan Neihan* (民法典离婚家务劳动经济补偿制度完善的人权内涵) [The Human Rights Connotation of the Economic Compensation System for Housework in Case of Divorce in the Civil Code], 2 *Renquan Yanjiu* (人权研究) [CHINESE J. OF HUM. RTS.] 19 (2020)

division of care work in the home. Economists note that resources controlled by individuals determine their bargaining power in care work division in the home.²⁴

Although Article 1088 is, on its face, gender-neutral, it is difficult to apply equally to men and women.²⁵ Resources obtained by each spouse are influenced by gender. Especially in families, spouses are labeled by their gender and are expected to conform to gender norms. Gender inequality in care work division is a firm consensus among scholars.²⁶ Society often defines women's success through their management of domestic responsibilities, no matter how much they financially contribute to the family.²⁷ Many individuals do not sense the inequality in families because of internalized gender roles.²⁸ Moreover, an anthropological study shows gender inequality in care work division worsens with age.²⁹

Western feminist writers have naturally spoken out against gender inequality in the division of family labor. Joan Williams describes how traditional gender roles prevent women from being "ideal workers" in professional fields, and how men maintain their masculinity by not performing care work.³⁰ Summarizing sociological and economical research on care work, Katharine Silbaugh argues that reasons for its problematic distribution between the sexes are not only gender inequality in employment but also the inferiority of care work over paid work in law.³¹ Martha Fineman further attacks

24. Gary S. Becker, *Human Capital, Effort and the Sexual Division of Labor*, 3 J. OF LAB. ECON. 33, 53 (1985).

25. *See id.*

26. Zuo Jiping states that traditional gender roles comprehensively influence daily life and production. *See* Zuo Jiping (左际平), Cong Duoyuan Shijiao Fenxi Zhongguo Chengshi de Fuqi Bupingdeng (从多元视角分析中国城市的夫妻不平等) [*Analysis of Husband and Wife Inequality in Chinese Cities from Multiple Perspectives*], in Zhongguo Funu Yanjiu Shi Nian (1995~2005) (中国妇女研究十年 (1995~2005)) [Ten Years' of Chinese Women's Studies (1995~2005)] 739, 739-47 (Liu Bohong (刘伯红), Jiang Xiuhua (姜秀花), Tan Lin (谭琳), and Mi Ruixin (宓瑞新主编) eds., 2005).

27. Jiping Zuo, Yanjie Bian, *Gendered Resources, Division of Housework, and Perceived Fairness: A Case in Urban China*, 63 J. OF MARRIAGE & FAM. 1122, 1122-33 (2001).

28. *Id.* at 1127-1128.

29. By analyzing China Family Panel Studies (CFPS), Han Zhong and Wu Wenkai agree that women perform more care work than men but point out that older women perform more care work than younger women. *See* Han Zhong (韩中), Wu Wenkai (吴文铠), Jingji Ziyuan He Xingbie Guannian Dui Jiawu Laodong Shijian de Yingxiang Fenxi (经济资源和性别观念对家务劳动时间的影响分析) [*An Analysis of the Influence of Economic Resources and Gender Concept on Housework Hours*], 5 Renkou Yu Shehui (人口与社会) [POPULATION AND SOC'Y] 96 (2020).

30. *See* Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2237-2245 (1994) [hereinafter Williams, *Is Coverture Dead?*]. In later work, Williams shows that workplaces are male dominated and proposes that workplaces adapt around families' needs, the value of housework and women's earning power to better the function families. *See* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 67 (2001) [hereinafter WILLIAMS, UNBENDING GENDER].

31. Katharine Silbaugh points out that women's role in care work was considered expressive, but not productive. Based on economic studies, Katharine Silbaugh argues that

institutional gender disparity in politics and the economy in a book aptly titled *The Illusion of Equality*, where she criticizes the equality reformation of family law in the U.S. as only “rule-equality” that cannot actually bring “individualized justice for women.”³² In a later work, Fineman coins the term “assumed families” and explains how society uses the term to justify non-recognition of “dependency work assigned to caretakers.”³³

To change the disparate status of women and men in caretaking, scholars have proposed different solutions. Because husbands continue to benefit from wives’ care of minor children—not only during the marriage but even after divorce—Joan Williams proposes equal distribution of all wages of each spouse—even those earned after the divorce.³⁴ The period of sharing post-divorce wages would be determined by the duration of the marriage.³⁵ Katharine Silbaugh suggests examining women’s care work in economic terms and argues the co-existence of economic and emotional understanding of care work.³⁶ Martha Fineman advocates public support to families and breaks the wall between private and public by explaining that care work benefits the public.³⁷ Naomi Cahn agrees that women’s care work affects their lives in workplaces and entrenches existing family structures. Cahn suggests women give up their authority in care work and embrace fathers’ caring.³⁸

In China, applications of Article 1088 imply an artificial assumption of gender equality at home. The modernization of China is changing families and individuals, but the gender hierarchy largely remains the same. Women today face discrimination in workplaces and in families. In workplaces, women face inferior treatment because of their innate physical differences from men and due to gender stereotypes of women as solely caretakers or mothers. Meanwhile, in

laws should change the ways of considering care work because of the importance of care work in the time and money of our daily lives. See Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 3 (1996-1997).

32. See MARTHA FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM*, 23 U. OF CHI. PRESS 252 (1991).

33. Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER, SOC. POL’Y & L. 13, 14 (2000) [hereinafter Fineman, *Cracking the Foundational Myths*]; see also MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 44, 108-09, 208 (2004). Susan F. Appleton and D. Kelly Weisberg rephrase Fineman’s argument as “keep dependency private.” See SUSAN FREILICH APPLETON & D. KELLY. WEISBERG, *FAMILIES UNDER CONSTRUCTION: PARENTAGE, ADOPTION, AND ASSISTED REPRODUCTION*, 34 (2nd ed. 2021).

34. See Williams, *Is Coverture Dead?*, *supra* note 30, at 2257–61.

35. *Id.*

36. Katharine B. Silbaugh, *Commodification and Women’s Household Labor*, 9 YALE J.L. & FEMINISM 81, 83 (1997).

37. Martha Fineman argues that laws and the state construct family as a private sphere which is isolated from the public. The binary construction justifies the state’s inactions in many family/private issues. See Fineman, *Cracking the Foundational Myths*, *supra* note 33.

38. Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, 214 (2000).

the family, women are beginning to have more control over their families' daily lives but are still more likely than men to take on care work in the home.³⁹

Women in China must balance the inequitable distribution of care work with their professional responsibilities. The dichotomy of "men are breadwinners, women are caregivers" fits few Chinese families today. Two-worker families are common in China, yet women are still the primary caretakers in those Chinese families.⁴⁰ Women now have dual responsibilities in both the workplace and family.⁴¹ The meaning of care work has become more complicated than before.

This article will attempt to address the paradox of an idealistic, well-intentioned Chinese law, aimed at equality between the sexes and the unfortunately unequal reality of its effect. So long as the "rule-equal"⁴² compensation Article 1088 devalues care work by "turning labor into love,"⁴³ a new formula is necessary to compensate for care work in the home.

One point of clarification here: care work compensation refers only to care work performed by cross-sex spouses, not by their parents or same-sex spouses. China does not recognize same-sex marriages, so the care work issue between same-sex partners is not governed by family law. Further, even in modern Chinese families, spouses' parents are primary contributors to care work in the home. As Yifei Shen says, older parents are "the second wife" in their children's marriages.⁴⁴ The authors posit that a spouse's parents' contributions to domestic

39. After observing and interviewing spouses and parents in Shanghai, Shen Yifei contends that China is now in a post-patriarchy time—where paternal authority is fading, but male authority generally remains strong. In the post-patriarchal China, the power of daughters-in-law has increased, but the power of mothers-in-law is decreasing. In other words, younger women are gaining power over older women but not over men. See Shen Yifei (沈奕斐), "Houfuzhizhi Shidai" de Zhongguo—Chengshi Jiating Neibu Quanli Guanxi Bianqian Yu Shehui ("后父权制时代"的中国—城市家庭内部权力关系变迁与社会) [China in Postpatriarchy Times—Society and the Changes of Internal Power Relationship in Urban Families], 31 Guangxi Minzu Daxue Xuebao Zhaxue Shehui Kexue Ban (广西民族大学学报哲学社会科学版) [J. OF GUANGXI U. FOR NAT'L Y (PHIL. AND SOC. SCI. ED.)] 43, 43 (2009).

40. In dual-worker families, mothers are often the primary contributors to daily housework and their children's education, while fathers typically play a supporting role. This unequal distribution of care work can put a strain on mothers, forcing them to sacrifice their own work and career opportunities. Yanxia Zhang (张艳霞), Zixuan Wang (王梓萱), Jiecheng He Xingbie Shijiao Xia Chengshi Shuangzhigong Jiating de Kehou Tuoguan—Yi Beijingshi Qu Weili (阶层和性别视角下城市双职工家庭的课后托管实践—以北京市区为例) [Practice of After-school Daycare Services for Students with Dual-Career Parents from the Perspectives of Social Classes and Gender: A Case Study in S District of Beijing], 6 Zhonghua Nüzi Xueyuan Xuebao (中华女子学院学报) [J. OF CHINA WOMEN'S UNIV. ISSUE] 50, 54 (2020).

41. Qi Zhao (赵琦), Jiawu Laodong Dui Chengzhen Nüxing Zhiye Fazhan de Yingxiang Fenxi (家务劳动对城镇女性职业发展的影响分析) [An Analysis of the Influence of Housework on Urban Women's Career Development], 1 Renkou Yu Jingji (人口与经济) [POPULATION & ECON.] 13, 14 (2009).

42. Fineman, *Cracking the Foundational Myths*, *supra* note 33, at 23.

43. Silbaugh, *supra* note 36, at 83.

44. SHEN YIFEI (沈奕斐), *Geti Jiating iFamily—Zhongguo Chengshi Xiandaihua Jincheng Zhong de Geti, Jiating Yu Guojia* (个体家庭iFamily——中国城市现代化进程中的个体、家庭与国家) [iFAMILY—INDIVIDUAL, FAMILY AND THE STATE IN THE MODERNIZATION OF URBAN CHINA] 76 (Shanghai Sanlian Shudian (上海三联书店) 2013).

life are akin to a gift and, as such, different from a spouse's care work. Therefore, spousal parents' contributions to domesticity will not be part of this conversation.

II. ARTICLE 1088 IN THE COURTROOM

In this section, the authors analyze available family law decisions in China based on Article 1088 of the Civil Code to give as comprehensive as possible a picture of how care work compensation is decided in divorce cases. These cases are found in Chinalawinfo (北大法律信息网). Chinalawinfo lists 122 cases ruled based on Article 1088 of the Civil Code. The authors select nineteen of the available cases for the case studies but do not list all cases here.⁴⁵ There are two categories of available cases: divorce cases and post-divorce cases. In divorce cases, the parties argue whether one spouse should receive compensation. In post-divorce cases, divorced couples file lawsuits because of the enforcement of divorce agreements or the distribution of financial benefits. In either case, the parties may or may not have a compensation agreement when they divorce.

Some parties have financial agreements, and others do not. In cases with agreements, courts have supported spousal autonomy and granted homemakers the agreed amount of payment. In the post-divorce case without any agreement, courts will often reject the plaintiff's care work compensation petition.⁴⁶ Yet, most cases with spousal agreements do not explicitly state that the payment was for care work compensation. Chinese divorce courts grant a range of payments to homemakers without distinguishing care work compensation from alimony or marital property distribution. So, it is hard to determine how these courts evaluate care work in divorce cases. The fact remains: courts consistently grant homemakers low compensation in cases without existing financial agreements.⁴⁷ This section will compare how courts rule on divorce cases in China with and without existing agreements.

A. The Ambiguous Status of Care Work in China

Cases show that Chinese courts consider care work as a factor in marital property distribution and alimony, but do not consider care work as an independent issue in divorce cases.⁴⁸ Disputes over care work agreements have been invisible in courtrooms until now.⁴⁹ Spousal agreements in available cases do not have specific housework or care work compensation clauses. So, this section examines divorce cases to investigate the status of care work in

45. See *infra* Appendix A. The reason for choosing these nineteen cases is that they represent several common scenarios of cases ruled based on Article 1088. It is unnecessary to list all available cases because they are not binding and have many similarities. In many cases, the courts do not even explain their application of the law. So, it is repetitive to list all cases.

46. See, e.g., Qu Mou yu Xu Mou Lihun Jiufen (曲某与徐某离婚纠纷) [a certain QU v. a certain XU, a divorce case] Fabao (北大法宝), Chinalawinfo (北大法律信息网) (Yucheng People's Ct. Sept. 22, 2021).

47. See *infra* Appendix A.

48. *Id.*

49. *Id.* The authors interviewed a family judge who concurs that care work agreements between spouses have not been seen in the courtroom. The judge stated that care work compensation is settled with marital property distribution in uncontested divorces.

courtrooms and to attempt to forecast the enforceability of future care work agreements by analogizing fidelity agreements.

Zhang v. Feng is an example of how China's courts have viewed care work as an element of alimony.⁵⁰ The plaintiff and the defendant agreed that the husband pay the wife a one-time sum of ¥150,000 (\$23,734) compensation and ¥3,000 (\$475) financial support per month after their divorce.⁵¹ Although the spousal agreement did not identify reasons for the one-time compensation, the defendant husband did not comply with the agreement and refused to pay the plaintiff. After confirming the one-time compensation was of the spouse's free will, the court paradoxically cited Article 1088 to support the compensation.⁵² The court did not treat care work as an independent factor to consider in a divorce. Although the homemaker received a payment, the justification for the payment is ambiguous.

Zhang v. Feng is not unique. *Wu v. Pan* also reveals the ambiguous application of Article 1088 in divorce cases.⁵³ In *Wu v. Pan*, the defendant wife would not agree to divorce unless the plaintiff husband agreed to pay the defendant for her care of their two children and the husband's mother.⁵⁴ The defendant argued that she cared for their children for more than ten years and cared for the husband's mother until her death. The words the defendant used in the answer are "child support of their children" and "alimony of caring for his mother."⁵⁵ Although the court cited Article 1088 in the case ruling, the court refused the defendant's child support and alimony request but granted the defendant financial support amounting to ¥100,000 (\$15,779) instead.⁵⁶ The amorphous line between financial support and care work compensation in Chinese divorce court decisions shows that the courts appear to lack both a clear definition and a bright-line rule for care work compensation.

B. Forecast of Care Work Agreements

Article 1088 allows spouses to have care work agreements during marriage.⁵⁷ Although spouses have not yet brought lawsuits about care work agreements, it is meaningful to forecast the enforceability of such agreements. The authors look to fidelity agreements—agreements made between spouses to

50. Zhang Mou yu Feng Mou Lihun Jiufen (张某与冯某离婚纠纷) [Civil Judgment of First Instance on Property Dispute after Zhang and Feng Divorce] Peking University Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Beijing Chaoyang People's Ct., Feb. 26, 2021).

51. *Id.*

52. Article 1091 of the Civil Code says that if one spouse faces financial difficulty in divorce, the financially capable spouse should provide financial assistance. But the court's reasoning is confusing here because the couples already have an agreement about financial support, which the court confirms later. In other words, the court justifies the financial support twice. See Civil Code, *supra* note 1, art. 1091.

53. Wu Mou yu Pan Mou Lihun Jiufen (吴某与潘某离婚纠纷) [Civil Judgment of the First Instance of the Divorce Dispute Between Wu and Pan] Peking University Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Lankao Cnty. People's Ct., Apr. 25, 2021).

54. *Id.*

55. *Id.*

56. *Id.*

57. See Civil Code, *supra* note 1, art. 1088.

address the issue of infidelity in a relationship⁵⁸—to predict how courts might decide care work agreements in the future.

Fidelity and care work agreements both bring private family affairs into the public sphere and ask for legal intervention. Spouses sign contracts with lifestyle clauses that govern marriage's non-financial issues to constrain their private lives. Fidelity agreements are spouses' voluntary commitment to sexual constraints within marriage, with a fine for non-compliance. Care work agreements are spouses' voluntary exchange of home labors. Sex life and daily care work in the home are supposed to be free from public intrusion. Moreover, although the two types of agreements set price tags on an individual's sex life and home labors, both are otherwise expected to be free from commodification.

Chinese courts often avoid enforcing fidelity agreements in several ways. First, courts may decline the validity of a fidelity agreement by ruling that the agreement was not based on the couple's authentic expressions.⁵⁹ Additionally, courts often do not recognize agreements signed before the marriage is registered—because no fidelity could legally exist before the establishment of marriage.⁶⁰ “[I]nadequate evidence of the affair” is another common reason courts use to decline the enforcement of fidelity agreements.⁶¹ Further, courts may refuse to enforce a fidelity agreement because the divorce decree has already distributed marital properties, so no financial disputes will be entertained.⁶²

According to our research on fidelity agreements, courts have shown little interest in stepping into people's lifestyles and recognizing different family arrangements. Thus, spouses in China today generally divide care work at home without payment agreements, despite the new law. Nonetheless, even if spouses have care work agreements during the marriage, these agreements, like fidelity agreements, are unlikely to be recognized or enforced by the courts. In other words, care work within a marriage is still considered to be an expression of love in Chinese courtrooms. Courts are uncomfortable valuing care work in the home at market price. It is hard to imagine the courts recognizing care work agreements within marriage.

58. Spouses may enter into a fidelity agreement, which states that if one spouse engages in infidelity during the marriage, they may be required to pay a fine, give up property rights, reduce parenting time, or increase child support payments upon the dissolution of marriage. Shanping Li (李珊珊), *Minfadian Shidai Beijing Xia de Zhongcheng Xieyi* (民法典时代背景下的忠诚协议) [*Fidelity Agreements in the Era of Civil Code*], 5 *Jiaoda Faxue* (交大法学) [SJTU L. REV.] 107, 107–08 (2022).

59. Yan Mou Jia Su Tu Mou Jia Lihun Jiufen (颜某甲诉涂某甲离婚纠纷) [Civil Judgment of the Divorce between Yan and Tu], Peking University Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Yunan Shidian People's Ct. 2016).

60. *Id.*

61. Cao Mou yu Wang Mou Jia Lihun Jiufen (曹某与王某甲离婚纠纷) [Civil Judgment of the Divorce between Cao and Wang], Peking University Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Shandong Taian Intern. People's Ct. Aug. 19, 2016).

62. Hu Mou yu Liu Mou Lihun Hou Caichan Jiufen (胡某与刘某离婚后财产纠纷) [Civil Ruling on Property Dispute after Divorce between Hu and Liu], Peking University Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Neimenggu Hulunbeier Intern. People's Ct. Aug. 3, 2020).

C. Case Studies in Care Work Compensation

Without an agreed amount of payment in writing between spouses, courts tend to grant a low amount of compensation to homemakers. In the two divorce cases examined below, both without spousal agreements, one case shows the highest compensation and the other shows the lowest compensation granted among the cases studied.

In *Yu v. Zhang*, the wife, Yu, requested ¥500,000 (around \$78,879) compensation because she was caring for three children and helping with her husband's work during their six-year marriage.⁶³ The wife stated that she had confirmed depression and anxiety disorder because of domestic violence.⁶⁴ Evidence showed that the husband's annual income was ¥2,000,000 (around \$315,500).⁶⁵ The court granted ¥300,000 (around \$47,327) compensation to the wife because of her home labor and mental health condition.⁶⁶ The authors argue that the husband's high income and the wife's mental health condition were reasons the wife received the highest compensation among cases.

In *Jiang v. Wang*, by contrast, the homemaker received the least compensation. The wife, Wan, had taken care of two children and her in-laws after her husband ran away from the home in 1995.⁶⁷ The court granted ¥15,000 (around \$2,366) compensation for the wife's care work during a thirty-seven-year marriage.⁶⁸ Care work compensation in both cases was lower than the market price for care work.⁶⁹

Other cases that drew public attention confirm that compensation to homemakers is low. A husband who cared for children and family alone for ten years received ¥15,000 (around \$2,356) care work compensation;⁷⁰ a housewife

63. Yu Mou 1, Zhang Mou Lihun Jiufen (于某1、张某离婚纠纷) [Civil Judgment of First Instance on Yu 1 and Zhang's Divorce Dispute], Peking University Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Shandong Laiyang People's Ct. July 22, 2021).

64. *Id.* at 6.

65. *Id.* at 4.

66. *Id.* at 6–7.

67. Jiang Mou 1 yu Wang Mou Lihun Jiufen (江某1与王某离婚纠纷) [Civil Judgment of the Divorce between Jiang and Wang] Peking University Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Anhui Woyang People's Ct. Apr. 25, 2021).

68. *Id.*

69. In 2018, the average annual income of housekeepers was ¥48,052 (about \$6,850) in Beijing and ¥32,582 (about \$4,650) in Jinan. The average annual income of babysitters was ¥70,528 (about \$10,075) in Beijing and ¥44,534 (about \$6,363) in Jinan. See Sa Zhihong (萨支红), Zhang Mengji (张梦吉), Liu Siqu (刘思琪), Liu Jing (刘京) & Xin Ruiping (辛瑞萍), Jiazheng Gong Shengcun Zhuangkuang Yanjiu: Jiyu Beijing, Jinan Beifangzhe Qudong ouyangng Diaocha (家政工生存状况研究: 基于北京、济南被访者驱动抽样调查) [Research on the Living and Working Conditions of Domestic Workers in Beijing and Jinan: Findings from Respondent-Driven Sampling Surveys], 5 Funu Yanjiu Luncong (妇女研究论丛) [J. OF CHINESE WOMEN'S STUD.] 56, 62 (2020). Care work includes both housekeeping and babysitting, and sometimes also includes eldercare.

70. Zhongxin Wang (中新网), Jiawu Youjia! Jilin Yi Jiating Zhufu Lihun Huo 15k Jingji Buchang (家务有价! 吉林一家庭煮夫离婚获1.5万元经济补偿) [Housework has a price! A Househusband receives 15K Divorce Financial Compensation], SOHU NEWS (Jan. 12, 2022, 10:31 PM), https://www.sohu.com/a/516182660_120046968 [https://perma.cc/ZWX4-B95P].

received ¥10,000 (around \$1,570) care work compensation for her five years caring for the home;⁷¹ a housewife who took care of her family alone received ¥15,000 (around \$2,356).⁷² A common complaint from the public regarding care work compensation is that the compensation is too low to afford a nanny.⁷³ Courts respond by refusing to increase compensation, reasoning that care work is an expression of love and affection.⁷⁴ Even for Yu, the wife who received the most compensation, the monthly average compensation for her care work was only ¥4,166 (around \$657), far lower than her husband's income.⁷⁵

These case analyses show that spouses who enjoy the benefits of care work and judges who are supposed to assess its worth do not realize the value of care work, even after Article 1088. Any payment granted to homemakers in divorce cases is seen as the court's mercy to the homemaker, rather than a fair evaluation of the worth of their work in the home.

III. CARE WORK INSIDE AND OUTSIDE THE HOME

This section examines policies and changes in workplaces and families to explore the history of institutional gender inequality in modern China. Women's status shows positive changes in public and private spheres, but women still face more restrictions because of their gender than men. In public, Chinese women's education level and employment rate have increased over the past decade. In 2019, 51.7% (15.679 million) of the Chinese population with a four-year college degree were women; 50.6% (1.448 million) of those with a graduate degree were women.⁷⁶ In the employment market, 43.2% of employees were women; in urban areas, female employment had increased 37.5% from 2010 to 2019.⁷⁷ In private,

71. Zhang Cheng (章程), Guangdong Gaoyuan Fabu Guanchi Shishi Minfadian Bage Dianxing Anli (广东高院发布贯彻实施民法典8个典型案例) [*Guangdong People's Supreme Court Publishes 8 Representative Cases of the Civil Code*], DAYOO (Nov. 26, 2021, 1:21 PM), https://news.dayoo.com/guangdong/202111/26/139996_54125190.htm [https://perma.cc/QAR2-7GK3].

72. Souhu Xinwen (搜狐新闻), Jiawulaodong Jiujiang Jiazhi Jihe? Zhejiang Taizhou Yi Quanzhitaitai Lihun Shi Ti Jiawubuchang 19 Wan (家务劳动究竟价值几何? #浙江台州一全职太太离婚时提家务劳动补偿19万) [*How Much is Housework? A Full-time Homemaker in Taizhou, Zhejiang Requests 190K Housework Compensation*], SOHU NEWS (June 24, 2021, 3:00 PM), https://www.sohu.com/a/473822240_121156042.

73. A media starts an online vote about the number of housework compensations on Weibo. 0.4 million people among total 0.42 million people chose "should pay more." Phoenix Weekly, WEIBO (Feb. 21, 2021), <https://m.weibo.cn/status/4607125802197301> [https://perma.cc/PHQ2-YEEN].

74. See Bai Jingjing (白晶晶), *supra* note 5.

75. Yu Mou 1, Zhang Mou Lihun Jiufen (于某1、张某离婚纠纷) [Civil Judgment of First Instance on Yu 1 and Zhang's Divorce Dispute], Peking University Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Shandong Laiyang People's Ct. July 22, 2021).

76. Guojia Tingjiju (国家统计局) [NAT'L BUREAU OF STATISTICS], 2019 Nian Zhongguo Funü Fazhan Gangyao (2011-2020) Tongji Jiance Baogao (2019年“中国妇女发展纲要(2011—2020年)”统计监测报告) [Statistical Monitoring Report of the 2019 "Outline for the Development of Chinese Women (2011-2020)"] (Dec. 28, 2020), http://www.stats.gov.cn/tjsj/zxfb/202012/t20201218_1810126.html [https://perma.cc/5Z89-WTLD].

77. *Id.*

women today have more shared authority in family decision-making.⁷⁸ Chinese men are also spending more time on care work than before.⁷⁹ Well-educated spouses tend to divide care work equally.⁸⁰ These changes appear to support the argument that women's status in China has substantially improved, and women can freely arrange their careers and family.

Nevertheless, gender inequality still commonly exists in China, in the home and workplace. Inequality inside and outside the family is intertwined to constrain women's agency in both care work at home and career choice. This part begins with China's history of gender equality development and moves to show how policies and social changes constrain female agency today.

A. The History of Gender Equality in China

Since the People's Republic of China (PRC) was established in 1949, the Chinese government has been trying to improve women's status in both the public and private spheres. Gender equality in China was codified in the 1954 Constitution.⁸¹ The 1950 version of the Marriage Law prohibits arranged marriages and confirms that spouses have equal rights in marriage.⁸² These laws aim to overturn the hierarchy and patriarchy that previously suppressed women. Also, Chinese women have had the right to work for more than half a century, but the right is given along with restrictions that ensure women's performance of

78. The fourth Chinese national survey of women's social status shows that more than 80% of spouses decide significant family affairs jointly. 91.1% spouses decide protection together. More than 89.5% of women participate in investment/loans and 90.0% of women participate in real property purchases. The latter two numbers have relatively increased 14.8% and 15.6% compared to 2012. Zhong Yuhao (钟煜豪), *Zhongguo Funü Shehui Diwei Diaocha: Yihun Nvxing Pingjun Meitian Jiawu Laoding Liangxiaoshi* (中国妇女社会地位调查: 已婚女性平均每天家务劳动两小时) [The Survey of Chinese Women's Social Status: Married Women Spend Two Hours a Day in Housework], *Zhongqing Zaixian* (中青在线) [CHINA YOUTH ONLINE] (Dec. 21, 2021), http://news.cyol.com/gb/articles/2021-12/29/content_9RbENFaGq.html [<https://perma.cc/9DFR-T9QX>].

79. *Id.*

80. The in time spent on housework narrows when both men and women are well-educated. The gap between the average time for men and women with bachelor's degrees is forty minutes per day, and the time gap between men and women with a high school degree is sixty-two minutes. But the gap is partly because well-educated men and women spend less time in housework overall. They may pay others to do the housework. Tian Tong (田童), Wang Qiyan (王琪延), Wei Jiajia (韦佳佳), *Jiawu Laodong Zhong de Xingbie Chayi Yanjiu* (家务劳动中的性) [A Study on Gender Differences in Housework], *Guojia Tingjiju* (国家统计局) [NAT'L BUREAU OF STATISTICS] (Nov. 11, 2018) [hereinafter *Housework Gender Statistics*], http://www.stats.gov.cn/tjsz/tjsj/tjcb/dysj/201811/t20181108_1632284.html [<https://perma.cc/WD5V-N5BU>]. Jianlin Niu agrees that education level is one of the factors that affect distribution of housework. See Jianlin Niu (牛建林), *Zhuanxingqi Zhongguo Jiating de Jiawu Fengong Tezheng Jiqizai Shengming Zhouqi Zhong de Bianhua* (转型期中国家庭的家务分工特征及其在生命周期中的变化) [Gender Division in Housework and Its Dynamics within the Life-cycle in Transitional China] 8 *Laodong Jingji Yanjiu* (劳动经济研究) [INST. POPULATION AND ECONS.] 42, 61 (2020).

81. Article 86 and Article 96 of the 1954 Constitution affirm women's equal rights in politics, economics, culture, society, and families. See XIANFA art. 86, art. 96, § 3 (1954).

82. *Zhonghua Renmin Gongheguo Hunyin Fa* (中华人民共和国婚姻法) [The Marriage Law of the People's Republic of China] (promulgated by CENT. PEOPLE'S GOV'T Council, May. 1, 1950, effective May. 1, 1950), art. 1, P.R.C. LAWS.

care work.⁸³ The right to work does not give women the right to choose between the two, but allows the chance for a double burden of work and family care.⁸⁴ In reality, although the right to work gives women opportunities to experience the world outside the family, women still need to do care work after work.⁸⁵ The right to work does not relieve women from care work..

At the same time, policies have advocated ignoring the difference between men and women. The de-emphasis on gender differences obscured women's inferiority in the male-dominated society. To encourage women to participate in agricultural work, an official news source, the People's Daily published the slogan "women can hold half of the sky."⁸⁶ This slogan, widely used in China's conversation about gender equality, expresses the idea that women have the same power as men in constructing the socialism of the PRC. In fact, women gained the right to work more because of the practical labor demand in China at that time, not to achieve gender equality.⁸⁷ Other slogans and terms were produced simultaneously to diminish the difference between men and women. For example, the popular identity of people in their 20s in the Mao era (1949-1976) was *qingnian* (youth).⁸⁸ Young females did not like to be categorized as *funü*

83. Gail Hershatte notes the long-term feminization of agriculture in the Great Leap Forward. The filming of agriculture contributed to the improvement of rural living conditions and the funding of industrialization. President Mao advocated the production of steel and grain. The fever of producing steel in the Great Leap Forward assigned men and women different work in the steel industry. All farm work relied on women. Public support of domestic work at that time aimed to liberate women's labor to participate in field work. See GAIL HERSHATTER, *THE GENDER OF MEMORY: RURAL WOMEN AND CHINA'S COLLECTIVE PAST* 236, 266 (2014).

84. See HERSHATTER, *supra* note 83, at 266.

85. Hershatte commented in a BBC interview that women in the Mao era benefited from working outside the family. At the same time, women were required to care for the whole family after work. Hershatte further noted that the Mao government never discussed women's burden of caring for families alone. See Zi Peng (梓鹏), Zhonggong Jiandang Bainian: Nüxing Cong "Nengding Banbiantian" Dao Huigui Jiating Jianshe Hexie Shehui (中共建党百年: 女性从"能顶半边天"到回归家庭建设和谐社会) [One Hundred Years of CPC: Women from 'Holding Half of the Sky' to Returning Families to Build a Harmony Society], BBC News (July 2, 2021), <https://www.bbc.com/zhongwen/simp/chinese-news-57649035> [<https://perma.cc/8S69-LD6X>] (China).

86. The origin of the slogan is controversial. Some state that the slogan was created by Mao Zedong. Some claim that it was transferred from a proverb by the official media. See Geng Huamin (耿化敏) & Zhang Leilei (张蕾蕾), "Funü Nengding Banbiantian" de Kaozheng ("妇女能顶半边天"的考证) [The Research of "Women Can Hold Half of the Sky"], 3 Beijing Guancha (北京观察) [BEIJING OBSERVATION] 74 (2015).

Gail Hershatte echoes the deemphasis of gender difference in work during the Mao era. Women in the Mao era took on the same work as men in infrastructure construction, like carrying sand and stone. See HERSHATTER, *supra* note 83, at 241.

87. See Zi Peng (梓鹏), *supra* note 85. Petula Sik Ying Ho and Stevi Jackson also point out that the widely used slogan, "women hold half the sky," emphasized "the naturalness of gender differences." See Petula Sik Ying Ho & Stevi Jackson, *Locating Sexual Politics and Gendered Lives: East Asian Perspectives*, 30 J. GENDER STUD. 503, 507 (2021).

88. See Wang Zheng, *Call Me "Qingnian" But Not "Funü": A Maoist Youth in Retrospect*, in SOME OF US: CHINESE WOMEN GROWING UP IN THE MAO ERA 27 (Xueping Zhong, Wang Zheng & Bai Di eds., 2001) [hereinafter SOME OF US]. Another Chinese female writer born in the Mao Era shared that she had no idea of her gender as a teenager in the 1970s.

(women).⁸⁹ “Women” became a derogatory word.⁹⁰ Eliminating the idea of gender did not improve gender hierarchy in Chinese society but did serve to publicly hide gender inequality in women’s daily lives.

B. Gender Equality Outside the Family

Some positive changes have been seen in women’s education and employment in China in recent years, but institutional constraints have not improved. The increased employment rate of women did not mean gender equality in employment. Female employees in China still encounter hiring discrimination, gender pay gap, different required retirement ages, and glass ceilings for promotion.⁹¹ Gender discrimination in the workplace is one reason Chinese women continue with their education, because they need to strengthen their qualifications to win the chance to compete with men in the workplace.⁹²

Chinese women are often excluded from top managerial positions in all areas. Even though 43.2% of Chinese employees are women, they have a hard time getting to the top. Leading roles in political arenas are particularly elusive for women. A national report shows that only 33.4% of directors and 36.4% of supervisors in China’s major corporations are female, but statistics for the political arena are still lower.⁹³ At the top authority level, only 24.9% of the National People’s Congress’s⁹⁴ deputies and 20.4% of the Chinese People’s Political Consultative Conference’s⁹⁵ members are female; at the local level, only 11.9% of directors are female.⁹⁶

She said, “I positively identified myself as a non-gendered youth with strengths, strengths that were won through constant struggles with the contradictions of being a youth and a woman.” She only became aware of the concept of gender when she came to the U.S. for graduate school and found out that “gender hierarchy existed, but [she] did not see it. [She] did not realize [she] was assigned to a service a job that reflected an extension of ‘traditional’ women’s work in the public sphere.” Lihua Wang, *Gender Consciousness in My Teen Years, in SOME OF US* 120, 131.

89. See *SOME OF US*, *supra* note 88, at 27.

90. *Funü* (Woman) still has a derogatory meaning in China. Public culture distinguishes “woman” and “girl” by picturing “girls” as young, beautiful, and energetic. The public sets March 7th as “Girls’ Day” as the counterpart of March 8th, known as International Women’s Day.

91. Li Xueting (李雪婷), 2021 *Zhongguo Nüxing Zhichang Xianzhuang Diaocha Baogao* (2021中国女性职场现状调查报告发布:职场女性更高知 领导力自信更强) [2021 Chinese Women’s Workplace Status Survey Report Released: Women are More Knowledgeable and Confident in Leadership], *Zhongguo Funu Wang* (中国妇女网) [CHINA WOMEN’S NETWORK] (Mar. 8, 2021), <http://www.cnwomen.com.cn/2021/03/08/99222107.html> [https://perma.cc/U8Z9-H3RH].

92. Paitou Jujiao (排头聚焦), *Nüxing Shoujiaoyu Chengdu Chaoguo Nanxing, Biye Haishi Jiating Zhufu, Dushu Zhenheng Gaibian Mingyun?* (女性受教育程度超过男性, 毕业还是家庭主妇, 读书真能改变命运?) [More Women are Educated than Men, but Still are Housewives, Does Education Really Change Destiny?], *BAIDU* (百度) (Dec. 23, 2020), <https://baijiahao.baidu.com/s?id=1686868054945995610&wfr=spider&for=pc> [https://perma.cc/GST3-9MWQ].

93. *Housework Gender Statistics*, *supra* note 80.

94. *Id.* The National People’s Congress is the national legislature of China.

95. *Id.* The Political Consultative Conference is the advisory body in China.

96. *Id.*

Gender inequality in public is highly related to women's role in private. Public policy implicitly expects women in China to be the primary caregivers. This assumed burden of care work influences women of reproductive age and older. Recent changes in China's family planning policy may cause discrimination against women in the public sphere due to their increased load of care work at home.⁹⁷ The following sections examine China's retirement age, as well as the latest three-child family planning policy, to show how Chinese women of different ages are affected in their careers by care work.

1. Retirement Age and Care Work

Current retirement ages in China differ based on an employee's gender and the type of work they do. The retirement age in China is sixty for men, fifty-five for female professionals and civil servants, and fifty for other female workers.⁹⁸ The reasons given for setting different retirement ages for men and women are physical differences and caregiving responsibilities, "[the government] giv[es] female workers special protection. Besides equal pay to female workers, (the ordinance) gives them special treatment because of their special physical condition and their care of the next-generation."⁹⁹ Another official statement cites women's physical condition in response to the common questioning of the difference in retirement age by gender.¹⁰⁰

97. A recruiter notes the concerns an employer has about hiring female employees: "Would she be pregnant soon? How many children does she plan to have? How much maternity leave will she take? Will she quit her job after becoming a mom?" Jessie Yeung & Nectar Gan, *Chinese Women Were Already Discriminated in The Workplace. A Three-child Policy Might Make Things Worse*, CNN BUS. (June 6, 2021, 8:46 PM), <https://www.cnn.com/2021/06/05/business/china-three-child-policy-discrimination-intl-hnk-dst/index.html> [<https://perma.cc/RKD7-7WVK>].

98. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Pizhun <Guowuyuan Guanyu Anzhi Laoruobingcan Ganbu de Zanxing Banfa> (全国人民代表大会常务委员会关于批准《国务院关于安置老弱病残干部的暂行办法》的决议) [Resolution of the Standing Committee of the National People's Congress of the People's Republic of China on Approving the Interim Measures of the State Council on the Placement of Elderly, Weak, Sick and Disabled Cadres] (promulgated by State. Council of P.R.C., June, 2, 1978, effective June, 2, 1978), art. 4, P.R.C. LAWS; see also, Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Pizhun <Guowuyuan Guanyu Gongren Tuixiu, Tuizhi de Zanxing Banfa> (全国人民代表大会常务委员会关于批准《国务院关于工人退休、退职的暂行办法》的决议) [Resolution of the Standing Committee of the National People's Congress of the People's Republic of China on Approving the Interim Measures of the State Council on Worker Retirement and Resignation] (promulgated by State. Council of P.R.C., May, 24, 1978, effective May, 24, 1978), art. 1, P.R.C. LAWS.

99. Li Lisan, a political leading official, notes that "the draft of regulations shows that the state gives female workers special protection. Female workers have general work benefits based on the principal of equal pay, and they have special benefits because of women's special physical condition and to protect the next generation." Guanyu Laodong Baoxian Tiaoli Caoan de Jidian Renshi (关于劳动保险条例草案的几点认识) [Comments on the Draft of Labor Insurance Regulations], Renmin Ribao (人民日报) [PEOPLE'S DAILY], Dec. 8, 1950.

100. Ma Wenrui, a former minister of the Department of Human Resources, states that, "[W]e think, it is necessary to set different retirement ages for female workers and civil servants because of women's physical conditions and different work environment. Although male workers and civil servants work in different environments, we do not need to distinguish

Scholars have criticized the two arguments. The physical condition argument does not hold because physical differences between men and women are less significant than socially constructed differences in a male-dominated society.¹⁰¹ For example, the childcare argument is closely connected to the stereotype of women as caretakers. Public policy in China encourages women to involve themselves in the job market, but simultaneously expects women to provide primary care for children and families.¹⁰² Moreover, women's work is considered an assisting contribution to families, causing them to leave the job market earlier than men.¹⁰³ It is hard to say this differential treatment protects women's rights when it actually justifies women's burden of care work, and thereby can create a long-term impediment to their careers.

The younger retirement age rule plus the need to increase their education disadvantages women in the workplace. The higher education level means longer education duration. If individuals attend primary school at age six, they will enter the job market around twenty-five after earning a master's degree, or around thirty after earning a doctoral degree. Assuming all well-educated women work as civil servants and retire at fifty-five, the maximum work duration for women with master's degrees is thirty years, and just twenty-five years for women with doctoral degrees. For employers, a shorter career length means female employees are likely to make fewer contributions than male employees under similar conditions. The shorter career length also shrinks female employees' chances for promotion because they will have less time for personal growth in their careers.

Some scholars have advocated an identical retirement age for men and women, arguing that differential treatments no longer make sense because of improved living conditions, comparative life expectancy,¹⁰⁴ and current educational situations for both sexes.¹⁰⁵ However, the difference in retirement

their retirement age because the different work environments do not make much difference in their health conditions." Ma Wenrui (马文瑞), Genju Gedi Zhigong de Yijian Xiugai Guowuyuan Guanyu Gongren, Zhigong Tuixiu de Zanding Guidingdeng Sige Caoan de Shuoming (根据各地职工的意见修改国务院关于工人, 职员退休的暂行规定等四个草案的说明) [Statement of Local Worker Proposed Revision of the Council's Tentative Regulation of Workers and Employees Retirement and Other Three Drafts], Jiangxisheng Renmin Zhengfu Gongbao (江西省人民政府公报) [GAZ. OF THE PEOPLE'S GOV'T OF JIANGXI PROVINCE], Feb. 6, 1958, at 9.

101. Evelyn Nakano Glenn, *The Social Construction and Institutionalization of Gender and Race: An Integrative Framework*, in REVISIONING GENDER 3, 4–6 (Myra M. Ferree, Judith Lorber & Beth B. Hess eds. 1999).

102. See Guanyu Laodong Baoxian Tiaoli Caoan de Jidian Renshi, *supra* note 99.

103. Pan Jingtang (潘锦棠), Shijie Nannü Tuixiu Nianling Xianzhuang Fenxi (世界男女退休年龄现状分析) [Analysis of the Status Quo of Retirement Age for Men and Women in the World], 4 Gansu Shehui Kexue (甘肃社会科学) [GANSU ACAD. SOC. SCI.] 103, 107 (2003).

104. World Bank data shows that Chinese women have longer life expectancy at birth than Chinese men. See *Life expectancy at birth – China*, WORLD BANK, <https://data.worldbank.org/indicator/SP.DYN.LE00.IN> [<https://perma.cc/V9Y6-6BJR>] (last visited Nov. 21, 2022).

105. Tong Yufen (童玉芬) & Gong Qiannan (宫倩楠), Zhongguo Nannü Tongling Tuixiu Wenti Sikao (中国男女同龄退休问题思考) [Reflections on Retirement at the Same Age for Men and Women in China], Shandong Gonghui Luntan (山东工会论坛) [SHANDONG

ages has remained the same. Now, in fact, the government plans to put off retirement because of the increase in China's elderly population and resulting structural demographic changes.¹⁰⁶

Care work is a fundamental reason why the state does not implement identical retirement age for women and men. Older females are primary caregivers in Chinese families in two ways. First, older females are essential assistants in their adult children's families. Older females relieve their younger counterparts' burden of care and save younger women time for careers.¹⁰⁷ Second, the gender gap of time spent on care work increases as spouses age.¹⁰⁸ Although women of any age spend more time on care work than men, the time gap between genders reflects the fact that women carry more care duties when they get old, but men do less care work when they get old.¹⁰⁹ The time gap of care work between women and men ages twenty to twenty-four is twenty-three minutes but rises to one hour and thirty-nine minutes between women and men older than sixty.¹¹⁰ Thus, the discrepancy spikes to 4.3 times more care work for women older than sixty. Different understandings of family, education level, and employment rates in the different age groups may explain the gender discrepancy. However, the comparative study still points out that older females are the primary contributors to care work in the home.

2. Three-Child Policy and Care Work

Apart from different retirement ages for women and men, the latest three-child policy shows how public policy in China aims to maintain women's roles as mothers and caretakers. The era of the three-child policy began on May 31, 2021.¹¹¹ Five years after the abandonment of the one-child policy, the falling

TRADE UNION F.], Dec. 28, 2020, at 3, https://www.acftu.org/wjzl/ghqk/jxwz/sdghlt/202012/t20201228_749971.html?70keOa4k=qAqccqc_Xj_Xj_XBQkHx6Tz6R0enyPXFfn56afHKyVqqqqqqqqqqqXG [https://perma.cc/23TV-5RZD].

106. Zhonggong Zhongyang Guanyu Zhiding Guomin Jingji he Shehui Fazhan Dishisige Wunian Guihua he Erlingsanwu Yuanjing Mubiao de Jianyi (中共中央关于制定国民经济和社会发展第十四个五年规划和二〇三五年远景目标的建议) [Suggestions of the Central Committee of the Communist Party of China on Formulating the Fourteenth Five-Year Plan for National Economic and Social Development and the Vision for 2035], Zhonghua Renmin Gongheguo Zhongyang Renmin Zhengfu (中华人民共和国中央人民政府) [CTR. PEOPLE'S GOV'T PEOPLE'S REPUBLIC CHINA] (Nov. 3, 2020), http://www.gov.cn/zhengce/2020-11/03/content_5556991.htm [https://perma.cc/3ZTM-ZE3L].

107. See Hua Shuming (华淑名) & Chen Weiming (陈卫民), Gedai Zhaoliao Zhichi dui Qingnian Nuxing Feinong Jiuye de Yingxiang (隔代照料支持对青年女性非农就业的影响) [The Influence of Grandparents' Childcare Support on Young Women's No-agricultural Employment], 1 Qingnian Yanjiu (青年研究) [YOUTH STUD.] 60, 68 (2020).

108. Zhong Yuhao (钟煜豪), *supra* note 78.

109. *Id.*

110. *Id.*

111. Lunuo (吕诺) & Tian Xiahang (田晓航), Shishi Sanhai Shengyu Zhengce, Peitao Shengyu Zhichi Cuoshi—Jiedu <Zhongguo Zhongyang Guowuyuan Guanyu Youhua Shengyu Zhengce Cujin Renkou Changqi Junheng Fazhan de Jueding> (实施三孩生育政策, 配套生

childbirth rate in China impelled the government to move to a two-child policy and then a three-child policy. Unfortunately, allowing three children per family has not brought the expected increase in new births.¹¹² The birth rate dropped to 7.52% in 2021, reaching another record low.¹¹³ The financial burden of childrearing, the workload of childcare, and female workers' work-life tension are primary reasons for low desire to procreate.¹¹⁴ These three reasons reflect women's predominant roles in procreation and parenting. No matter how much the employment rate and education level increase, women still shoulder, for the most part, the intense burden of childrearing—which further constrains their desire to procreate.¹¹⁵ This section explores the three-child policy, highlighting relevant measures that reflect how low reproductive rates compound the dilemma women in China face when balancing care work and professional work. Family planning policies, especially those that try to build a procreation-friendly environment, instead push women to the edge of traditional gender roles.

Targeting reasons for females' low procreation desire, central and local governments passed coordinated policies to protect working females from maternity discrimination in the workplace, hoping to stimulate females' procreation desire.¹¹⁶ State provisions for parental leave, medical coverage of pregnancy and childbirth, and the protection of women's employment rights were considered essential elements in building a childbirth-friendly environment. Aiming to reduce females' burden in birth and encourage males to

育支持措施——解读《中共中央国务院关于优化生育政策促进人口长期均衡发展的决定》) [Implementing the Three-child Policy, Reproduction and Supporting Birth Support Measures—Interpreting the Decision of the Central Committee of the Communist Party of China and the State Council on Optimizing of Reproduction Policies and Promoting the Long-term Harmonious Development of Population], *Zhonghua Renmin Gongheguo Zhongyang Renmin Zhengfu* (中华人民共和国中央人民政府) [CTR. PEOPLE'S GOV'T PEOPLE'S REPUBLIC CHINA], (July 20, 2021), http://www.gov.cn/zhengce/2021-07/21/content_5626255.htm [https://perma.cc/8QTJ-PAQC].

112. Huangsha (黄莎) & Yang Xiaona (杨晓娜), *Sanhai Zhengce Shijian Duan Duanqi Xiaoguo Bumingxian, Guojia Weijianwei: Peitao de Jiji Shengyu Zhichi Cuoshi Zai Luxu Chutai Zhong* (三孩政策时间短短期效果不明显 国家卫健委: 配套的积极生育支持措施在陆续出台中) [The Short-Term Effect of the Three-Child Policy is Not Obvious. The National Health and Medical Commission: Supportive Measures for Active Childbearing Support are Being Introduced One After Another], *Renming Wang* (人民网) [PEOPLE'S DAILY ONLINE], <http://henan.people.com.cn/n2/2022/0121/c351638-35105398.html> [https://perma.cc/NA29-KMN9] (last visited Nov. 10, 2022).

113. Guojia Tingjiju (国家统计局) [NAT'L BUREAU STAT.], Wang Pingping: Renkou Zongliang Baochi Zengzhang Chengzhenhua Shuiping Wenbu Tisheng (王萍萍: 人口总量保持增长城镇化水平稳步提升) [Wang Pingping: The Population Keeps Growing and The Level of Urbanization Keeps Increasing], *Zhongguo Jingji Wang* (中国经济网) [CHINA ECON. NET] (Jan. 18, 2022), http://www.stats.gov.cn/tjsj/sjjd/202201/t20220118_1826538.html [https://perma.cc/E3LQ-38X5].

114. Lunuo (吕诺) & Tian Xiahang (田晓航), *supra* note 111.

115. Ji Yingchun (计迎春) & Zheng Zhenzhen (郑真真), *Shehui Xingbie he Fahzan Shijiao Xia de Zhongguo Dishengyulü* (社会性别和发展视角下的中国低生育率) [China's Low Procreation Rate From the Perspective of Gender and Development], 8 *Zhongguo Shehui Kexue* (中国社会科学) [CHINESE SOC. SCI.] 145 (2018).

116. *See Chinese Regions Extend Maternity Leave to Encourage Births*, BLOOMBERG NEWS (Nov. 26, 2021), <https://www.bloomberg.com/news/articles/2021-11-26/chinese-regions-extend-maternity-leave-to-encourage-births>? [https://perma.cc/BSB3-RWZW]

become more involved in care work, local policies have increased the length of maternity leave and allowed paternity leave as well.¹¹⁷ Unfortunately, these policies could not relieve women's burden of childbirth, but rather put female employees at higher risk of employment discrimination because they might have three children.¹¹⁸ These policies inadvertently threw the cost of employees' procreation benefits to employers and highlighted the gender difference in childrearing, thus aggravating women's situation in the workplace and in families.

The extension of paid maternity leave is an example of how government policy aims to challenge long-standing gender expectations on women and care work. However, it ironically penalizes women in the public sphere and exacerbates their situation in the workplace by rewarding them for fulfilling the traditional gender role as mothers and primary care providers. To encourage procreation, new local regulations have extended maternity leave from 158 to 190 days, to give women more time to recover from childbirth and relieve the pressure of newborn care.¹¹⁹ All maternity leave is paid and job-protected. In other words, employers must pay on-leave employees the same salary and benefits as other employees. Provinces have allowed various extensions of maternity leave.¹²⁰ Anhui Province, Guizhou Province, and Ningxia Autonomous Region give women an extra sixty-day maternity leave in addition to the nationally mandated ninety-eight day leave.¹²¹ Hainan Province and Henan Province allow an additional three month maternity leave beyond the

117. See *infra* notes 121–24.

118. See BLOOMBERG NEWS, *supra* note 116.

119. See *infra* notes 121–24.

120. See *infra* notes 121–24.

121. Anhuisheng Renkou Yu Jihuashengyu Tiaoli (安徽省人口与计划生育条例) [Anhui Province Population and Family Planning Regulation], (promulgated by STANDING COMM. PEOPLE'S CONG. ANHUI PROVINCE, Nov. 19, 2021, effective Jan. 1, 2022) ANHUI PEOPLE'S CONG., Nov. 24, 2021, [http://www.ahrd.gov.cn/article.jsp?strId=e90f4a1a6086456ba5aecc9ce9fac03e&strCollId=19118826acbf4b9a9eb668d667734965&strWebSiteId=1448865560847002&\[https://perma.cc/J37R-TBHV \]](http://www.ahrd.gov.cn/article.jsp?strId=e90f4a1a6086456ba5aecc9ce9fac03e&strCollId=19118826acbf4b9a9eb668d667734965&strWebSiteId=1448865560847002&[https://perma.cc/J37R-TBHV]) (China); Ningxia Huizu Zizhiqu Renkou Yu Jihuashengyu Tiaoli (宁夏回族自治区人口与计划生育条例) [Population and Family Planning Regulation of Ningxia Hui Autonomous Region], (promulgated by STANDING COMM. PEOPLE'S CONG. NINGXIA HUI AUTONOMOUS REGION, Nov. 30, 2021), art. 38, HEALTH COMM'N OF NINGXIA HUI AUTONOMOUS REGION, Dec. 27, 2021, http://wsjkw.nx.gov.cn/zfxxgk_279/zcfg/202112/t20211227_3256637.html [https://perma.cc/T3NR-28EV] (China); Guizhousheng Renkou Yu Jihuashengyu Tiaoli (贵州省人口与计划生育条例) [Guizhou Province Population and Family Planning Regulation], (promulgated by STANDING COMM. PEOPLE'S CONG. GUIZHOU PROVINCE, Sept. 29, 2021), art. 33, GUIZHOU HEALTH COMM'N, Oct. 9, 2021, http://wjw.guizhou.gov.cn/zwgk_500663/xxgkml/zcwj/flfg/202110/t20211009_70795910.html (China) [https://perma.cc/FD2L-8Y99].

mandatory.¹²² Jiangxi Province allows 188 days of maternity leave.¹²³ Some provinces allow maternity leave bonuses for second and third children. Zhejiang Province provides an extra sixty-day maternity leave for the first child and an extra ninety-day maternity leave for the second and third children.¹²⁴

Besides extending maternity leave, current policies grant male employees paternity leave ranging from fifteen to thirty days to encourage males to participate in childbirth and newborn care.¹²⁵ Paradoxically, the new paternity leave rules merely highlight women's dominant role in care work and enlarge the labor cost gap between female and male employees—worsening female employees' situation both at home and in the workplace.

The short duration of paternity leave only scratches the surface of redistribution of care work. Fifteen to thirty days are not enough to care for either new mothers or newborns. Chinese have a tradition of a thirty-day postpartum confinement.¹²⁶ New moms may need special care for recovery from the delivery

122. Hainansheng Renkou Yu Jihuashengyu Tiaoli (海南省人口与计划生育条例) [Hainan Province Population and Family Planning Regulation], (promulgated by STANDING COMM. PEOPLE'S CONG. HAINAN PROVINCE, Dec. 30, 2021), art. 27, STANDING COMM. PEOPLE'S CONG. HAINAN PROVINCE, Dec. 30, 2021, <https://www.hainanpc.net/hainanpc/xxgk/xfsd/2021123023105246818/index.html> (China) [<https://perma.cc/55H9-FPNP>];

Henansheng Renkou Yu Jihuashengyu Tiaoli (河南省人口与计划生育条例) [Henan Province Population and Family Planning Regulation], (promulgated by STANDING COMM. PEOPLE'S CONG. HENAN PROVINCE, Nov. 27, 2021), art. 25, Guojia Falv Fagui Shujuku (国家法律法规数据库) [NAT. LAWS AND REGUL. DATABASE], <https://flk.npc.gov.cn/detail2.html?ZmY4MDgxODE3ZGZhMGVjMDAxN2UwMDFINmM2MDE0YjU%3D> [<https://perma.cc/6VTF-7RBM>] (China).

123. Jiangxisheng Weisheng Jiankang Wei Guanyu Yinfa Guanyu Jiangxisheng Renkou Yu Jihuashengyu Tiaoli Shishi Zhong Youguan Wenti Juti Yingyong de Zhidao Yijian de Tongzhi (江西省卫生健康委关于印发《关于<江西省人口与计划生育条例>实施中有关问题具体应用的指导意见》的通知) [Guiding Opinions on the Specific Application of Relevant Issues in the Implementation of the Regulations on Oral and Family Planning], (promulgated by HEALTH COMM'N JIANGXI PROVINCE, effective Sept. 29, 2021), art. 4, http://www.jiangxi.gov.cn/art/2021/11/3/art_5338_3756419.html.

124. Zhejiangsheng Renkou Yu Jihuashengyu Tiaoli (浙江省人口与计划生育条例) [Zhejiang Province Population and Family Planning Regulation], (promulgated by Standing Comm. People's Cong. Zhejiang Province, effective Nov. 25, 2022), art. 22, Health Comm. of Ningbo Mun., Dec. 1, 2021, http://wjw.ningbo.gov.cn/art/2021/12/1/art_1229127570_58924401.html [<https://perma.cc/4SVB-QAAL>] (China).

125. Guizhou Province, Hainan Province and Zhejiang Province allow male employees 15-day paternity leave. Anhui Province allows men 30-day paternity leave. Jiangxi Province allows 30-day paternity leave. Ningxia Autonomous Region allows 25-day paternity leave. See *supra* notes 122–24.

126. See Leslie Hsu Oh, *I Tried the Chinese Practice of 'Sitting the Month' After Childbirth*, THE WASH. POST (Jan. 8, 2017), https://www.washingtonpost.com/national/health-science/i-tried-the-chinese-practice-of-sitting-the-month-after-childbirth/2017/01/06/54517ee0-ad0b-11e6-a31b-4b6397e625d0_story.html [<https://perma.cc/EM37-EB5A>]. See also Louisa Lim, *For Chinese Moms, Birth Means 30 Days In Pajamas*, NPR (July 20, 2011), <https://www.npr.org/2011/07/20/138536998/for-chinese-moms-birth-means-30-days-in-pajamas> [<https://perma.cc/5KEJ-WXQU>].

and feeding the newborn.¹²⁷ The duration of paternity leave is not enough for the required care work following childbirth. The significant gap between maternity leave and paternity leave indicates that policy intends women as primarily responsible for childcare, and men need not spend equal time in childcare, nor supporting their wives. Women may have physical needs for recovery from childbirth; however, the physical need does not usually require the extra leave of more than one hundred days. Thus, the underlying goal of extending maternity leave is to entrench women as mothers. By giving women significantly more extended parental leave than their husbands after childbirth, the policy emphasizes that “women’s biology [is] their destiny.”¹²⁸

Further, the large gap between the length of paternity and maternity leaves creates advantages for males in the workplace. That gap creates different trade-offs and labor costs for employers considering who to hire. Since parental-leave employees are paid and job-protected, and given significant differences in length of maternity versus paternity leave, gender becomes a main factor in determining labor costs.¹²⁹ When a male and a female employee have three children and use parental leave three times, the employer needs to pay the female employee far more parental leave (384 to 525 days) than the male employee (45-90 days). Employers will inevitably consider such a vast gap in potential labor costs when hiring or promoting female and male employees. Therefore, female employees are at high risk of encountering disadvantages in the workplace due to the new family planning policies. In this situation, female employees face the painful dilemma of social pressure to conform to a traditional role as mothers at the expense of developing their careers. Similar to differentiated retirement ages, current parental leave regulations defeat their own stated purpose of protecting women by instead solidifying women’s role as mothers and caretakers.

127. Although some traditional beliefs of postpartum confinement are criticized, it is common for women to “sit the month” after birth. The emergence of commercial postpartum care institutions and paid labors share the work of new mother care and newborn care. Family members, generally mothers and mothers-in-law, still need to care for the new mother and newborns. See Flora Lee Peir, *In Queens, New Mothers and Old Asian Custom*, NEW YORK TIMES (June 3, 2011), <https://www.nytimes.com/2011/06/05/nyregion/bringing-an-asian-tradition-for-new-mothers-to-new-york.html> [<https://perma.cc/Z3BV-QKDY>]; see also Leslie Hsu Oh, *I tried the Chinese practice of ‘sitting the month’ after childbirth*, WASH. POST (Jan. 8, 2017), https://www.washingtonpost.com/national/health-science/i-tried-the-chinese-practice-of-sitting-the-month-after-childbirth/2017/01/06/54517ee0-ad0b-11e6-a31b-4b6397e625d0_story.html [<https://perma.cc/9QWG-3P3N>].

128. See Mary Ziegler, *An Incomplete Revolution: Feminists and the Legacy of Marital-Property Reform*, 19 MICH. J. GENDER & L. 259, 269 (2013).

129. Chunxia Wang (王春霞), Jingti Yanchang Nüxing Chanjia Keneng Dailai de Jiuye Qishi (警惕延长女性产假可能带来的就业歧视) [*Be Cautious of the Employment Discrimination Brought By the Extension of Women’s Maternity Leave*], Zhongguo Funü Bao (中国妇女报) [CHINA WOMEN’S NEWS] (Feb. 28, 2022), <https://news.cctv.com/2022/02/28/ARTIPe6ankO8cgjVrFXLRLsi220228.shtml> [<https://perma.cc/ZA7R-9R3L>]; see also Hui Yang (杨慧), Sanhai Zhengce Xia Qiye Shengyu Chengben Fudan Yu Duice Yanjiu (三孩政策下企业声誉成本负担及对策研究) [*Research on the Burden of Childbirth Costs Paid by Enterprises and Its Countermeasures under the Three-child Policy: An Analysis Based on the Extension of Maternity Leave*], 1 Renkou Yu Jingji (人口与经济) [POPULATION & ECON.] 17, 19 (2022).

C. Gender Inequality Inside the Family

Along with changes in the public sphere, the modernization of Chinese families is also changing the meaning of care work. Care work in modern families no longer only consists of cleaning, cooking, feeding children, and doing groceries. The content of care work has become more diverse, requiring more time and energy of caregivers than before. This section explores the parenting of education in China to show how women, the primary contributors to parenting, are channeled to perform the new standard of childrearing in a modernized and globalized society. This section elucidates the differences between various education methods that women adopted because of their rural-urban differences and socioeconomic status gaps.

Education is the primary mission of parenting for most Chinese parents. Parents in both rural and urban families make every effort to provide the best educational environment for their children. Although the mobility of social classes in China has been fluctuating in recent years,¹³⁰ education is still a predictable way for low-status individuals to move upward.¹³¹ Especially for working-class families and rural families, academic achievement is the main way to improve their children's lives, even though scholars argue that the education system fails as a pathway towards upward mobility for migrant children.¹³² The expeditious economic development of China in recent decades comes with intensive internal competition. Chinese parents face intense anxiety about their children's education because of their desire for the children's best outcome in a competitive society.¹³³ This pressure has changed general views of parenting in modern China.

130. Family, residence area, and gender are all reasons for the education gap in China. Li Chunling, a sociologist, comments that the basic reason for education inequality is the rapidly growing gap between rich and poor. Online education during the pandemic has enlarged the gap between different families. See Li Chunling's interview by a blog. Zhang Yichuan (张一川), Hanmen Nanchutou, Zhongchan Ye Jiaolü (寒门难出头, 中产也焦虑: 中国的教育机会不平等怎么办?) [*Children From Poor Families are Hard to Succeed, Middle-Class are Anxious: What to do about China's Education Equality*], Zhishi Fenzi (知识分子) [THE INTELLECTUAL] (Oct. 29, 2020), <http://zhishifenzi.com/depth/depth/10299.html> [<https://perma.cc/UR8W-D4UV>]. The imbalanced distribution of educational sources in rural and urban areas is another important reason for children in poor families having a hard time moving upward. Similarly, after-school tutoring amplifies the gap between poor and rich families. As Helen Gao states: "while many of their urban peers attend schools equipped with state-of-the-art facilities and well-trained teachers, rural students often huddle in decrepit school buildings and struggle to grasp advanced subjects such as English and chemistry amid a dearth of qualified instructors." See Helen Gao, *China's Education Gap*, NEW YORK TIMES (Sept. 4, 2014), <https://www.nytimes.com/2014/09/05/opinion/sunday/chinas-education-gap.html> [<https://perma.cc/CTR6-CFTC>]. The fever of after school tutoring makes poor families realize that education does not only happen in free public schools but also in paid after-school tutoring institutions. Rural families cannot find tutoring in rural areas and cannot afford tutoring online or in urban areas.

131. See Xiong Yihan, *The Broken Ladder: Why Education Provides No Upward Mobility for Migrant Children in China*, 221 THE CHINA Q. 161, 162–63 (2015).

132. *Id.* at 181.

133. See Wendy Ye, *China's Harsh Education Crackdown Sends Parents and Businesses Scrambling*, CNBC (Aug. 4 2021), <https://www.cnbc.com/2021/08/05/chinas->

In urban China, a new version of intensive parenting is called “Chicken Child” (*Jiwa*) (鸡娃), an abbreviation of the slang “injecting chicken blood into children,” which means to psych children up and push them to overall success.¹³⁴ *Jiwa* parenting is the product of market-oriented education, requiring parents to substantially devote their time and money to support their children’s after-school education.¹³⁵ Unlike urban *Jiwa* parents, rural parents generally cannot afford after-school tutoring for children. However, they still hope their children will have a better academic performance by attending urban schools. So, it is not uncommon for rural parents to move to cities for their children.¹³⁶

How Chinese parents educate their children differs in rural and urban families, but the common feature is that mothers serve as the education providers. Studies show that mothers spend much more time than fathers with children’s schoolwork.¹³⁷ A national survey in China shows that 52.5% of employed mothers are responsible for helping with most children’s schoolwork, yet the number of employed fathers who help is only 16.4%.¹³⁸ Another sample survey in Shanghai shows that 63% of parents responsible for the contact with schools are mothers, and mothers in 62.4% of the families surveyed have primary duties of child education.¹³⁹ By contrast, only 27.1% of fathers reported they were a primary contact for their children’s schools, and 30.6% had responsibility for primary education of their child.¹⁴⁰ Fathers may seriously care about children’s education at a given moment, but it will not last too long.¹⁴¹ Adding to the unpleasantness of these gender roles, fathers, whilst remaining inattentive, will frequently complain about a mother’s educational decisions.¹⁴²

1. Urban Mothers and Education Anxiety

Jiwa began with upper-class parents and middle-class parents in big cities and has become a popular new form of parenting in urban China.¹⁴³ More intense and diverse than “tiger parenting” or intensive parenting, *Jiwa* parenting starts

harsh-education-crackdown-sends-parents-businesses-scrumbling.html
[<https://perma.cc/GA4W-2TUS>].

134. See Mina Yan, The New Popular Parenting Term in China is ‘Jiwa’ — or ‘Chicken Blood’ Parenting, INSIDER (Nov. 2, 2021), <https://www.insider.com/jiwa-parenting-why-is-it-so-popular-in-china-2021-10> [<https://perma.cc/PT7N-LS7P>].

135. *Id.*

136. *Id.*

137. Zhong Yuhao (钟煜豪), *supra* note 78.

138. Jin Yihong (金一虹) & Yang Di (杨笛), Jiaoyu “Pingma”: “Jiazhang Zhuyi” de Shengxing Yu Muzhi Zaizao (教育“拼妈”: “家长主义”的盛行与母职再造) [*Coming into the Times of “Competing Mothers in Educational Field”: The Popularity of Parentocracy and Reconstruction of Motherhood*], 2 Nanjing Shehui Kexue (南京社会科学) [NANJING J. OF SOC. SCI.] 61, 63 (2015).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. See Jin Yihong (金一虹) & Yang Di (杨笛), *supra* note 138; see also Li Jingkui, *A Chinese Education: Why Are Chinese Parents and Kids Going to Extremes?*, (Grace Chong trans.) THINKCHINA (June 4, 2021), <https://www.thinkchina.sg/chinese-education-why-are-chinese-parents-and-kids-going-extremes> [<https://perma.cc/V78Z-N8V6>].

from preschool and requires Pre K-12 children to learn advanced schoolwork and creative skills.¹⁴⁴ Children attend intensive after-school tutoring for a variety of subjects. Besides traditional programs like dancing, English, drawing, or the International Mathematical Olympiad, some programs cover subjects such as computer programming and Pre-MBA.¹⁴⁵ Managing coursework alone is just the start for *Jiwa* parenting. Travel during breaks and study abroad are necessary to cultivate a child with open eyes. Parents spare no effort to give their children the individualized education of the elite. *Jiwa* requires substantial financial, physical, and mental investment in parenting. Even for parents who cannot afford such an investment, the environment pushes them to try their best to avoid feeling guilt toward their children.¹⁴⁶

Before the double-reduction policy suppressed after-school tutoring institutions, parents needed to learn with children and instruct children at home because advanced courses were too hard for children to understand.¹⁴⁷ When the government sensed the already intense education anxiety was being ramped up

144. Jiwa parents go further than “tiger mothers” because the booming of China’s economy brings hypercompetitive pressure to parents. The growth of private elite education promotes this competition for education. See Emily Feng, *Forget Tiger Moms. Now China’s ‘Chicken Blood’ Parents Are Pushing Kids To Succeed*, NPR (Sept. 6, 2021), <https://www.npr.org/2021/09/06/1024804523/forget-tiger-moms-now-chinas-chicken-blood-parents-are-pushing-kids-to-succeed> [https://perma.cc/3LJY-M4T8]; see also Yan, *supra* note 134.

145. Alexandra Stevenson and Cao Li, *China Targets Costly Tutoring Classes. Parents Want to Save Them*, NEW YORK TIMES (Oct. 21, 2021), https://www.nytimes.com/2021/07/30/business/economy/china-education-tutors.html?_ga=2.187774624.909409507.1674111531-1624321996.1634071723 [https://perma.cc/65JY-JD8M].

146. Under the intense education anxiety, parents feel trapped in Jiwa parenting. After a mother heard that her neighbor had sent their kindergarten child to learn programming, the mother said that she felt nervous and was afraid that her child would be left behind because she did not provide the platform for her child. See, Fang Jialiang (房家梁), Fengkuang “Jiwa,” Ni de “Yuer Jiaolü” Keneng Haowu Yiyi (疯狂“鸡娃”，你的“育儿焦虑”可能毫无意义) [Crazy “Jiwa,” Your “Parenting Anxiety” Could be Meaningless], Zhongguo Xinwen Wang (中国新闻网) [CHINANEWS] (Mar. 13, 2021), <https://www.chinanews.com.cn/cul/2021/03-13/9431186.shtml> [https://perma.cc/K2ZM-VTZQ].

147. On July 24, 2021, the Chinese government passed a policy called “double-reduction”, to contain in-person and online after-school tutoring. The government complained that profit-seeking institutions had “hijacked” China’s education. Institutions can no longer tutor students on weekends or during breaks, and no tutoring is allowed for children under six. China’s education stocks suffered a cliff dive after the policy. See Edwin Chan, Zheping Huang, Yuan Gao & Shiyin Chen, *China to Overhaul Education Sector ‘Hijacked by Capital’*, BLOOMBERG (July 26, 2021, 3:35 AM CDT), <https://www.bloomberg.com/news/articles/2021-07-25/china-to-overhaul-private-education-sector-hijacked-by-capital> [https://perma.cc/Y78Q-TYP7].

by after-school tutoring programs, it shut them down.¹⁴⁸ Nonetheless, parents and children are still not free from education anxiety.¹⁴⁹

With no tutoring institutions, parents decided to teach their children at home.¹⁵⁰ For example, a mother decided to learn English with her son via online apps, books, and movies at home.¹⁵¹ She also signed up for an online adult English training class to learn English for her son.¹⁵² A popular saying is “*jiwa xian ziji*” (鸡娃先自鸡), which means: “before parents give their children chicken blood, they should first give it to themselves.”¹⁵³

Parenting has been extended to participating in children’s after-school tutoring, learning new knowledge with children, and becoming a home teacher. As the primary contributor of parenting, urban mothers are children’s “educational agents.”¹⁵⁴ They need to tailor an education plan that best suits their individual children by utilizing available resources to help them gain acceptance into prestigious universities.¹⁵⁵

Besides *Jiwa* parenting, this emphasis on “accompanying” in childrearing reproduces advanced motherhood duties.¹⁵⁶ Public culture and social media have constructed an image of ideal parents as financially capable in children’s education and living, with time and love to accompany children’s daily life.¹⁵⁷

2. Study Mamas in Motion

This part examines two groups of “study mamas”: rural study mamas, who stay in China, and overseas study mamas, who move with their children’s education. The unbalanced distribution of educational resources in rural versus

148. See Xuepeng Jin & Yirong Sun, *Does Double Reduction Policy Decrease Educational Pressures on Chinese Family?*, in PROCEEDINGS OF THE 2021 INTERNATIONAL CONFERENCE ON EDUCATION, LANGUAGE & ART 771, 772 (2022).

149. A ban of after-school tutoring does little to relieve anxiety. “[A]s long as there is competition, parents will still have their anxiety.” See Alexandra Stevenson and Cao Li, *supra* note 145.

150. Jin Dandan (金丹丹), Meiwan Peidu Yinian Shengxia 3 Wan Peixunfei, Hangzhou Mama Dui Peixun Ban “Duansheli” (每晚陪读一年省下3万培训费 杭州妈妈对培训班“断舍离”) [*Accompanying the Child to Study Every Night for a Year Saves 30k, a Hangzhou Mama Deconstructs After-school Tutoring*], Qianjiang Wanbao (钱江晚报) [QIANJIANG EVENING NEWS], http://qjwb.thehour.cn/html/2021-08/13/content_3952563.htm?div=-1 (last visited Feb. 13, 2023) [<https://perma.cc/56DQ-586X>].

151. *Id.*

152. *Id.*

153. Li Jingkui, *supra* note 143.

154. See Yang Ke (杨可), Muzhi de Jingjiren Hua—Jiaoyu Shichanghua Beijing Xia de Muzhi Bianqian (母职的经纪人化——教育市场化背景下的母职变迁) [*Motherhood as Educational Agent: Changes in Motherhood in the Context of Market-Oriented Education*], 2 Funü Yanjiu Luncong (妇女研究论丛) [J. OF CHINESE WOMEN’S STUD.] 79, 82–83 (2018).

155. See *Id.* at 84–85.

156. See Jin Yihong (金一虹) & Yang Di (杨笛), *supra* note 138.

157. Zhang Pin (张品) & Lin Xiaoshan (林晓珊), Peiban de Mozhou: Chengshi Qingnian Fumu de Jiating Shenghuo, Gongzuo Yali Yu Yuer Jiaoliu (陪伴的魔咒：城市青年父母的家庭生活、工作压力与育儿焦虑) [*The Curse of Accompanying: Young Urban Parents’ Family Life, Work Pressure and Childrearing Anxiety*], 4 Zhongguo Qingnian Yanjiu (中国青年研究) [CHINA YOUTH STUD.] 69, 75 (2020).

urban China does not give rural families much opportunity for *Jiwa* parenting. This imbalance pushes rural families to send their children to urban schools for better education.¹⁵⁸ As rural families send their children to urban schools, wealthy parents send their children to study abroad to be able to succeed in global competition.¹⁵⁹ To care for the children, families choose one parent—almost always the mother—to move to new cities or other countries with the children.¹⁶⁰ Both rural and urban mothers who move to improve their children's education are called study mamas.¹⁶¹ The social mobility of study mamas is thus inextricably linked to their children's education.

Unlike the professional development of urban *Jiwa* mothers, a study mama's work is repetitive traditional housework, like cooking, buying groceries, and laundry.¹⁶² Study mamas are characteristically isolated in cities and trapped

158. See Lei Wanghong (雷望红), *Zhongguo Chengxiang Muzhi Xingxiang Heyi Fenhua—"Jiaoyu Jiatinghua" Zhong de Chengshi "huma" Yu Nongcun "Maoma"* (中国城乡母职形象何以分化——“教育家庭化”中的城市“虎妈”与农村“猫妈”) [Maternity Image Differentiation Between the Urban and Rural in China——Urban “Tiger Mother” and Rural “Cat Mother” in “Class Consolidation”] 10 Tansuo Yu Zhengming (探索与争鸣) 148, 154 (2020); see also Wu Huifang (吴惠芳), Wu Yunrui (吴云蕊) & Chen Jian (陈健), *Peidu Mama: Xingbie Shijiao Xia Nongcun Funü Zhaoliao Laodong de Xintedian—Jiyu Shanxisheng Yxian he Henansheng Gxian de Diaocha* (陪读妈妈: 性别视角下农村妇女照料劳动的新特点——基于陕西省县和河南省县的调查) [Students' Accompanying Mothers: New Dimensions of Rural Women's Care Work from a Gender Perspective], 154 *Funü Yanjiu Luncong* (妇女研究论丛) [J. OF CHINESE WOMEN'S STUD.] 28, 29 (2019) [hereinafter *Rural Care Work*].

159. The age for students to study abroad is lowering in China. A study abroad report from an education institution shows that 29% of intended study abroad students are K-12 students. See Xindongfang Qiantu Chuguo (新东方前途出国) [New Oriental Vision Overseas], 2021 *Zhongguo Liuxue Baipishu* (2021 中国留学白皮书) [2021 Report on Chinese Students' Overseas Study], Xin Dongfang (新东方) [NEW ORIENTAL], https://liuxue.xdf.cn/special_zonghe/2021_report/ (last visited Mar. 7, 2022) [<https://perma.cc/DW8X-GMLL>]. 52.63% of Chinese high-net-worth individuals send their children to study overseas in K-12. 0.30% of high-net-worth families send children to study abroad in primary schools, 13.76% send to junior high schools, and 30.57% send to high schools. *Preferred time period for Chinese millionaires to send their children to study abroad in 2015*, STATISTA (May 25, 2016), <https://www.statista.com/statistics/792286/china-preferred-time-period-for-millionaires-to-send-children-abroad/> [<https://perma.cc/G4R2-CM8H>]. The United States, the United Kingdom, Singapore, Canada, Australia, and the Netherlands are popular destinations for Chinese K-12 students. Although many families send their children to boarding schools, some choose to move with their children because of the cost of boarding schools and concerns that their children are too young to live alone in a foreign country. Parents worry that minor children will be exposed to adverse influences and suffer from mental issues if they study abroad alone. A mother said she and her husband decided to accompany their daughter to study in Toronto because they were afraid that their child could not handle the change of environment alone. See Li Yu (李钰), *Liuxue Peidu Gaibugai? Buyiyang de Guandian, Yiyang de Ai Yu Qiangua* (留学陪读该不该? 不一样的观点, 一样的爱与牵挂) [Should One be a Study Mama? Different Opinions, the Same Love and Bonding], *Liuxue* (留学) [STUDY ABROAD MAG.], Apr. 5, 2019, at 62.

160. Although no specific studies show that the mother is the primary parent to migrate because of their children's education, research for this article encountered zero academic papers about fathers moving overseas for their children's education.

161. *Rural Care Work*, *supra* note 158, at 28.

162. *Id.* at 31–33.

at home with care work.¹⁶³ Living in unfamiliar environments and being trapped by housework, study mamas cannot meet the requirements of local paid job markets or integrate into local societies.¹⁶⁴ Rural study mamas cannot find paid jobs because the care work fragments their time, making it impossible for them to meet employers' requirements.¹⁶⁵ One mom said, "[I] cook three meals a day, [with only] a 2-hour break. Which employer would want workers like us?"¹⁶⁶

Although overseas study mamas may have better educational backgrounds and financial situations than rural study mamas, care work similarly prevents overseas mamas from going outside the home to work and enjoy society.¹⁶⁷ Some overseas study mamas had well-paid jobs in China, but quit their jobs to accompany their children to study abroad.¹⁶⁸ Therefore, some overseas study mamas are low-income immigrants.¹⁶⁹ For example, an overseas study mama, who was a manager in a communications company before moving to the U.S., said, "[C]aring for children alone here, without any help, [I] do not dare to be sick. [My life] is worse than that of an illiterate person."¹⁷⁰ Thus, overseas study mamas share a feature with *Jiwa* mothers and rural study mamas—education anxiety. Education anxiety among overseas Chinese is more intense compared to urban Chinese because their children's academic achievement is needed for the immigrant family to both overcome the limitation of their immigrant status and to facilitate upward mobility.¹⁷¹

It is common for study mamas to admonish themselves due to inability to gain a paying job and the repetitive nature of daily care work. They also feel overwhelmingly repentant if their children do not meet expected academic success. One study mama said, "I feel all the work I have done is useless. [I] work every day but see no effort [from my child], and [I] do not earn any money."¹⁷² At the same time, study mamas highly value their husbands' work as

163. *Id.* at 32.

164. *Id.* at 34–35.

165. *Id.* at 32.

166. *Id.* at 32.

167. See Vivian Wing Yeung Leung, Yidan Zhu, Hsin-Yun Peng & A. Ka Tat Tsang, *Chinese Immigrant Mothers Negotiating Family and Career: Intersectionality and the Role of Social Support*, BRITISH J. OF SOC. WORK, Sept. 2018, at 1, 3–4.

168. Fenghuang Weishi (凤凰卫视), ZUMENG BIAN—ZHONGGUO XINYIMIN (逐梦彼岸—中国新移民) [*Chasing Dreams Abroad—New Chinese Immigrants*], PHOENIX TV (June 25, 2017), http://www.phoenixtv-distribution.com/?post_type=products&page_id=15364 [https://perma.cc/XZL4-V5U9].

169. Florrie Fei-Yin Ng, Irene Nga-Lam Sze, Catherine S. Tamis-LeMonda, & Diane N. Ruble, *Immigrant Chinese Mothers' Socialization of Achievement in Children: A Strategic Adaptation to the Host Society*, 88 CHILD DEV. 979, 981 (2016).

170. Fenghuang Weishi (凤凰卫视), *supra* note 168.

171. Asian students have the best academic performance among all students in all races. For example, the U.S. national statistic shows that the average SAT score of Asian students is 1223 in 2019, which is 109 points higher than white students and 290 points higher than African American students. See *Fast Facts*, NAT. CTR. FOR EDUC. STATS., <https://nces.ed.gov/fastfacts/display.asp?id=171> (last visited Mar. 7, 2022) [https://perma.cc/2AJM-TDNF]. There are many after-school tutoring institutions that help Chinese students to learn subjects after school in the U.S., cities with larger Asian populations, e.g., in the San Francisco and Bay area. See Fei-Yin Ng et al., *supra* note 169, at 991.

172. *Rural Care Work*, *supra* note 158, at 32.

a respectful sacrifice to the family and feel guilty for their “uselessness” in helping the family.¹⁷³

According to Joan Williams, both wealthy and low-income families are less gender-neutral in family roles than middle-class, educated families.¹⁷⁴ The courts’ refusal to adequately compensate women for care work implies “commodification anxiety”¹⁷⁵—the fear that merchandising care work will degrade traditional values of marriage. Consequently, the compensation of care work under Article 1088 is “an all-or-nothing approach.”¹⁷⁶ Homemakers’ labor can only be recognized if they terminate their marriages.

We suggest breaking down the distinction between care work as being either “love work” or “market work” and legally recognizing the economic importance of domestic labor in court decisions by taking into account the opportunity cost of the homemaker. The current legal status of care work differs from Article 1088’s purpose of remediating women’s disadvantages caused by care work and promoting gender equality at home. Courts now grant care work compensation out of pity to homemakers, not because they recognize the financial importance of care work. Applications of Article 1088 have tended to set a straightforward standard in determining the amount of compensation. The standard is simple to apply but overlooks the gender difference in care work during a marriage. Therefore, considering an individual’s opportunity cost is necessary for evaluating care work.

D. Detach Care Work Compensation from Marital Property Distribution and Alimony

The limitations of marital property rules in China and institutional gender inequality are two primary reasons care work should be valued independently

173. *Rural Care Work*, *supra* note 158, at 34–35.

174. Joan Williams argues that high-status men and low-status men are more likely to ask their wives not to seek work in the marketplace. The reason for high-status men do so is that their education makes them feel that only career success makes a successful life, so the burden of care work goes to the women. However, since lower-status men cannot attain career success like high-status men, they prefer to choose and build a male-dominated work environment to express masculinity. Furthermore, family is the place for lower-status men to continually exercise their authority. *See* Williams, *Is Coverture Dead?*, *supra* note 30, at 2239–45.

175. Joan Williams mentioned *Hoak v. Hoak*, 370 S.E.2d 473, 476 (W. Va. 1988), a U.S. case in which the court reasoned that “characterizing spousal contributions as an investment in each other as human assets demeans the concept of marriage.” Williams points out that the human capital theory violated the “impenetrable boundary between the realms of family and market” and caused commodification anxiety. Williams, *Is Coverture Dead?*, *supra* note 30, at 2277.

176. The all-or-nothing approach is common in family law issues. Sally F. Goldfarb notes the all-or-nothing approach in cases of domestic violence. Goldfarb discusses how protection orders, which are intended to protect victims of abuse, often undermine the victim’s autonomy by placing them in an “all-or-nothing” situation. The middle ground, where the legal system will intervene in the abusive relationship, while not completely ending the relationship, is unattainable. The victim must sacrifice either their relationship or legal protection. *See* Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1501 (2008).

from marital property distribution and alimony. Marital property distribution, the allocation of alimony, and care work compensation constitute a system that allows spouses to claim property rights in divorce.¹⁷⁷ Scholars have debated the balance among these three pieces in achieving gender equality in marriage. These financial issues are related to a common problem that women encounter after marriage dissolution—divorce impoverishment. Women disproportionately face a decline in household income and living conditions after divorce.¹⁷⁸ Care work is one of the reasons that women are impoverished after divorce.¹⁷⁹

Under current family law in China, the division of marital property is justified by marital relationships. When a divorce case involving property distribution goes to court, there are three steps that are typically followed: (1) define whether the disputed property is marital;¹⁸⁰ (2) divide the marital property equally between each spouse;¹⁸¹ and (3) examine whether there is any fault that might lead to a deduction in the division of marital property.¹⁸²

177. See Ran Keping (冉克平), *Minfadian Lihun Jiuji Zhidu de Tixihua Chanshi* (民法典离婚救济制度的体系化阐释) [*A Systematic Explanation of the Divorce Relief System in the Civil Code*], 5 *Zheng Fa Lun Cong* (政法论丛) [J. POL. & L.] 25, 26 (2021).

178. See Thomas Leopold, *Gender Differences in the Consequences of Divorce: A Study of Multiple Outcomes*, 55 *DEMOGRAPHY* 769, 792 (2018).

179. Scholars point out other reasons that cause women's financial vulnerability at divorce. For example, discrimination in the workplace, women's financial dependency upon husbands, women's disadvantages in legal representation at divorce, and lawyers' discrimination towards women. See Penelope E. Bryan, *Reasking the Woman Question at Divorce*, 75 *CHI.-KENT L. REV.* 713, 716–20 (2000); see also Elizabeth Steiner, Note, *Why Are Divorced Mothers Economically Disadvantaged? And What Can Be Done About It?*, 17 *TEX. J. WOMEN & L.* 131, 135–36 (2007). In China, women also encounter adverse treatment at divorce. Judges force women to accept unfair divorce settlements because judges desire peaceful and efficient settlement. This judicial preference for settlements leads men to devise strategies to attain more marital property, including child custody claims or simply refusing to divorce. For example, men may claim child custody even though they do not want the child, or men may refuse to divorce even if they do not want to stay married. Through such strategies, men have “a higher stack of bargaining chips” in divorce negotiations. Thus, because of their sincere desire to end the marriage and to win child custody, women are more likely to give up marital property to secure the divorce. See HE XIN, *DIVORCE IN CHINA: INSTITUTIONAL CONSTRAINTS AND GENDERED OUTCOMES* 167, 179–83 (2021).

180. There are two types of property acquired during marriage in China: marital and separate. Article 1062 describes marital property as: (1) property, including wages, bonuses, and labor compensation; (2) earnings from production, operation, and investment; (3) earnings from intellectual property; and (4) property acquired by inheritance or gift. See Civil Code, *supra* note 1, art. 1062. Article 1063 lists separate property: (1) prenuptial property that belongs to one spouse; (2) compensation or indemnification received by one spouse for personal injuries; (3) the property going only to one spouse as specified in a will or as a gift; and (4) one spouse's private articles for daily use. *Id.* art. 1063.

181. Article 1062 states that the husband and the wife have joint possession of all marital property. *Id.* art. 1062.

182. See *id.* art. 1092 (“Where one spouse conceals, transfers, sells off, destroys or damages, or squanders the community property, or creates a false community debt in an attempt to unlawfully seize the property of the other spouse, the said spouse may receive less or no property upon partition of the community property in the case of divorce.”). Further, if one spouse's fault leads to a divorce, the no-fault party has the right to claim damages. *Id.* Faults include bigamy, cohabitation with any third party, domestic violence, and maltreatment of any family member. See *id.* art. 1042.

With the enactment of Article 1088, marital property distribution joins the conversation of care work. Following the relationship theory of marital property distribution, scholars argue that separate recognition of care work is unnecessary because the equal distribution of marital property to homemakers covers care work. Further, the separate recognition of care work is a dual recognition, unfair to the wage-earners, given that homemakers also benefit from earnings outside the family.¹⁸³

This argument proceeds with three parts: (1) care work is equally divided between spouses; (2) spouses can benefit equivalently from paid and unpaid work; and (3) the equal distribution of marital property can fairly compensate an individual's contributions to the family. However, because of gender differences in families and the public, each assumption is false. Therefore, this section argues that home laborers should be compensated independently because spouses do not benefit equally from paid and unpaid work during the marriage.

1. The Relationship Theory of Marital Property and Care Work

The distribution of marital property and care work compensation in China presumes that married couples are a unit even upon the dissolution of marriage. This presumption demonstrates why courts are hesitant to recognize care work separately. The definition and division of marital property are based on the marital relationship. Although the distribution outcome is an equal split of property, the distribution of marital property in China is different from community property in the U.S. The U.S. constructs community property on the theory of marriage as a partnership or contract.¹⁸⁴ Community property in the U.S. recognizes a woman's property right in marriage and overturns the title theory of coverture.¹⁸⁵ However, the equal distribution of marital property in China is based on the assumption that married spouses become a whole entity.¹⁸⁶ Like the definition of marriage under coverture, spouses are assumed to be "one-flesh" under the relationship-based property rule. A person automatically loses his or her personhood and merges with the spouse into a "community" when married.¹⁸⁷ However, unlike coverture, where the wife does not have a separate

183. See Ran Keping (冉克平), *supra* note 177.

184. Stephen D. Sugarman describes marriage as an economic partnership between a man and a woman. All earnings acquired during the marriage should belong to the partnership. Most important, Sugarman argues that there should be no spousal support under the partnership analogy because partners "just walk away from the dissolved partnership with all their own human capital." See Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 130, 139–40. (Stephen D. Sugarman & Herma Hill Kay eds., 1990). For examples of redefining marriage as a contract, see generally Marjorie Maguire Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204 (1982) (discussing the legal regulation of marriage in America and illustrating various possibilities for contracts within marriages).

185. Schultz, *supra* note 184.

186. See Civil Code, *supra* note 1, art. 1066.

187. An exception that recognizes individual rights in marriage allows a spouse to ask for the division of marital property without divorce when the other spouse conceals, transfers, sells off marital property, or commits any conduct that seriously damages the spouses' joint

legal existence, the relationship-based property rule creates a marriage that has the legal status of both husband *and* wife. Marriage secures each spouse half the proportion of property accumulated by the couple during the relationship.¹⁸⁸ So, the relationship-based equal distribution of marital property does not bring equality in marriage because it absorbs individuals and overlooks individual contributions and self-sacrifice in marriage.

Distributing marital property based on the marital relationship perpetuates the traditional gender division of family responsibilities. Constructing spousal property rights based on conjugal identities embraces stereotypical duties of husbands and wives, deepening the idea that women are responsible for care work. Under the current “one-flesh” basis of marital property in China, courts can simply distribute property without valuing any contribution made by spouses individually.¹⁸⁹ This straightforward approach ignores individual efforts in the operation of marriages and is inconsistent with the function of modern families. The operation of marriage today is not based on the marriage relationship, *per se*, but on individual contributions made by both spouses based on their individual identities and capabilities. Marital property gained in marriage must therefore be credited to the value of each spouse’s work, whether paid or unpaid.

2. Gender Inequality in the Division of Family Responsibilities

Equal distribution of marital property cannot recover individual contributions in marriage fairly because of institutional gender inequality. The precondition of the joint title of marital property is that spouses cooperate fairly to accumulate properties. Under the precondition, spouses can freely arrange resources and responsibilities at home without public intrusion.¹⁹⁰ In the ideal context, spouses would contribute fairly to the accumulation and benefit equally from joint property.

Regretfully, however, family responsibilities are unfavorable to homemakers—generally women. We have shown how both the public and private spheres construct the idea that women are meant to be homemakers. Even

property interests, or refuses to pay when the other spouse has the statutory duty of supporting a third person’s medical need. *See id.*

188. China’s family law is self-contradictory. China passed a binding legal interpretation, the Third Interpretation of Marriage Law, to break the presumption that the entire marital house is marital property regardless of which party paid for and held the title. Under the Third Interpretation, a home paid for and titled in one spouse’s name before the marriage is separate property, even if the other spouse contributes toward loan repayments during the marriage. The Third Interpretation was, in part, a response to growing societal concerns of “gold diggers” marrying only to acquire wealthy men’s property interests. The Third Interpretation is widely criticized for gender discrimination. Chinese traditional culture expects men to pay for the real property and women to pay for house remodeling and home appliances. Further, the Third Interpretation reduced the property that could be shared at divorce, which worsens women’s financial situations. *See Valerie L. Chang, Note, No Gold Diggers: China’s Protection of Individual Property Rights in the New Martial Property Regime*, 45 GEO. WASH. INT’L L. REV. 149, 149–52, 166 (2013).

189. Contribution is never an issue in property distribution under China’s family law. The law assumes that spouses have equal title of any property that they accumulated during the marriage. *See Civil Code, supra* note 1.

190. *Id.*

though the employment rate of women is increasing, women are expected to perform care work as soon as they come home. Individual contributions to families, however, are valued solely based on financial earnings. So, care work is free labor but not a contribution. Full-time homemakers, like study mamas, are simply regarded as consumers of the husband's earnings. Therefore, the equal distribution of marital property under the law in China seems to only ensure numerical equality, as each spouse is granted an equal share of the property's value regardless of their individual contribution towards its acquisition. Gender equality remains a fantasy until the financial value of care work is recognized.

3. Non-monetary Earnings and Marital Property

Current marital property distribution law in China only recognizes financial property that spouses have attained during marriage, overlooking non-financial aspects of marriage that lead to financial success.¹⁹¹ One spouse, frequently the husband, gains work experience, attains professional degrees, and pursues networking opportunities during marriage.¹⁹² The other spouse, then, must tend to care work. It is widely agreed that one's personal and financial potential can increase when working outside the home.¹⁹³ However, for married individuals, achieving financial success can be challenging without the support of the stay-at-home spouse. Still, earning potential is personal and often ignored in the courtroom.¹⁹⁴

Courts refuse to recognize a spouse's personal growth, characterized by education, work experience, and workplace connections, as marital property in divorce. In *Liu v. Sun*, a husband filed a divorce petition in 2021 and asked the court to divide ¥15,000 (around \$2,373) of marital property and ¥85,200 (around \$13,484) of debts.¹⁹⁵ The couple wed in 2014 and had two children.¹⁹⁶ The husband began his four-year doctoral program in 2014 and was home for only two days each month.¹⁹⁷ The wife cared for their two children and her parents-in-law throughout the husband's doctoral program.¹⁹⁸ The wife denied the debt and requested to divide property the husband omitted from the petition, including real property gifted by his parents, savings, and the husband's relocation fee for his faculty position at a university.¹⁹⁹ In addition, the wife asked for ¥30,000 (around \$4,747) for care work provided during the marriage.²⁰⁰ In the end, the court ordered the husband to pay ¥20,000 (around \$3,165) in

191. *Id.*

192. *See infra* Appendix A.

193. As Katharine Silbaugh points out, earning potential is the most important factor in financial security. *See* Silbaugh, *supra* note 36, at 64.

194. *See infra* Appendix A.

195. Liu Mou, Sun Mou Lihun Jiufen (刘某、孙某离婚纠纷) [a certain LIU v. a certain SUN, a divorce case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Shandong Yantai People's Ct. Oct. 14, 2021).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

compensation but denied the wife's request to divide the real property, savings, and relocation fee.²⁰¹ The court reasoned that the unreceived relocation fee could not be divided. Further, the wife could not ask for the previously-received relocation fee because it had already been used for investment and paying off debt.

This ruling disadvantaged the wife. First, the court wrongfully ruled that the relocation fee was not marital property.²⁰² The husband earned the relocation fee from the faculty position, which was impossible for him to get if he did not have the doctoral degree earned during the marriage. As part of the husband's personal growth, the doctoral degree was essential for him to earn the disputed property. Both the husband and wife put efforts to earn the disputed marital property. The husband spent time and effort on earning the degree and finding the job, and the wife contributed at least equally by taking care of the family during the husband's studies and early career. However, only the husband's contributions are recognized by the court, and only the husband has title of the disputed property. Ignoring care work's value to the husband's personal growth is unjustified. The court should follow the legislative purpose of Article 1088 and affirm the financial value of a wife's care work.

The case expresses a common marriage scenario: one spouse gains earning potential during the marriage with support from the other, yet earning potential does not transform into monetary property when the marriage ends. Family members support each other's personal growth because they believe the growth is an investment in the family's overall benefits.²⁰³ However, family resources consumed while investing in one spouse's growth are difficult to reimburse. In the end, the supportive homemaker may leave the marriage with limited financial resources and encounter sometimes severe financial hardship. Meanwhile, the wage-earner ends up with improved career status because of personal growth during the marriage.

E. Valuing the Opportunity Cost of the Homemaker

Now, there is a debate over whether courts should assign care work the same value as paid work in divorce cases.²⁰⁴ Without a clear standard for valuing care work, judges have had broad discretion in deciding how to compensate care work. Even though the standard judges use to determine care work compensation has been mostly unclear, judges have consistently refused to assign care work

201. *Id.*

202. The court wrongfully applied the law in refusing the wife's request for the division of the relocation fee. The fee fell into the husband's earnings during the marriage, which, according to a facial reading of Article 1062, is marital property. If some of the received relocation fee was used for investment, the earnings of the investment would still be marital property. *See* Civil Code, *supra* note 1, art. 1062.

203. Milton Regan sees marriage as an economic partnership that "reflects a joint effort to enhance the human capital of one spouse as part of a strategy to maximize total household income." Milton C. Regan Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2320 (1994).

204. *See supra* text accompanying notes 5–16.

the value of its market price or grant homemakers a considerable payment.²⁰⁵ These rulings have sparked criticism and have led the public to think care work is worthless.²⁰⁶

We propose to do what the courts will not and break the dichotomy of family and workplace by considering the opportunity cost of homemakers as a way to value care work. Opportunity cost is the potential benefit an individual misses out on by pursuing alternative courses of action. Opportunity cost in this article refers to a homemakers' potential earnings lost from performing care work instead of paid work. We argue that a homemakers' opportunity costs are an important factor to consider in applying Article 1088 because compensating opportunity costs fits the intention of Article 1088.²⁰⁷

Care work is unique because of emotional connections between family members. However, emotional bonds between family members should not conflict with the financial values of care work. Individuals can also build emotional ties in their paid market jobs.²⁰⁸ By focusing solely on the emotional aspect of care work and ignoring its economic value, the current application of law perpetuates gender inequality, which goes against the legislative purpose of compensating care work, leaving care work compensation a meaningless rule that merely exacerbates inequity for women, especially full-time homemakers, in the family arena.

Many wage earners argue that their paid work is for the family's good and not merely themselves. They contend that although women today generally take on more care work than men, men shoulder a higher financial burden.²⁰⁹ Thus, it is unjust to compensate wives for their care work because husbands and wives both benefit from paid and unpaid work in marriage. Indeed, today, men are still expected to act as breadwinners and shoulder heavier financial burdens than ever because of the increase in living costs.²¹⁰ However, unlike repetitive housework, which constantly consumes the performer's resources and earning potential, paid

205. See cases listed *infra* Appendix A.

206. See *supra* text accompanying notes 5–16.

207. The legal purpose of Article 1088 is to rectify gender inequality. The article seeks to address the imbalance in care work division between spouses by taking into account the opportunity costs incurred by the care work provider and providing compensation for those costs. This serves as a means of addressing the gender disparity in care work. See Civil Code, *supra* note 1, art. 1088.

208. See Silbaugh, *supra* note 36, at 26.

209. Joan Williams concurs that “masculinity is measured by the size of the paycheck.” See Williams, *Is Coverture Dead?*, *supra* note 30, at 25.

210. The disposable income of Chinese increases every year. For example, the disposable income increases 5.1% in the first three quarters of 2022 than 2021. See 2022 Nian Qiansan Jidu Jumin Shouru He Xiaofei Zhichu Qingkuang (2022年前三季度居民收入和消费支出情况) [*The Review of Citizens' Income and Cost in the First Three Quarters of 2022*]. Sociological studies have revealed that men are still the primary financial providers in Chinese families, despite the fact that many married women also work and earn wages. A study also indicates that women often do not have the autonomy to manage their household income; Liu Fei (刘飞), Jiating Shouru Guanliquan Yu Zhongguo Fuqi de Jiawu Laodong Fengong (家庭收入管理权与中国夫妻的家庭劳动分工) [*Household Income Management Power and Division of Labor in Housework Between Chinese People*], 6 Shehuixue Pinglun (社会学评论) [SOCIO. REV. OF CHINA] 82, 82, 96–97 (2022).

work brings the wage-earner human capital. Wives, as homemakers, primarily consume their own resources, which deplete and devalue outside the family, such as time and earning potential, to benefit the family.

The flip side of wage earners' personal growth is the homemaker's opportunity cost. Homemakers sacrifice opportunities to accumulate their own earning potential to perform care work.²¹¹ This sacrifice is the essential reason that women face a decline of financial position after marriage dissolution.²¹² Women's post-divorce impoverishment is affirmed by cases in the case study.²¹³ Many women encountered financial difficulties after divorce because they devoted their energy and time in care work during the marriage and consumed their earning potential.²¹⁴

Defining unpaid home labor as merely an act of love perpetuates traditional gender roles. Drawing a line between family and marketplace is equally unreasonable, given that the division of care work has also been constructed by the market.²¹⁵ Ultimately, the problem of setting either the marketplace or love as the standard for valuing care work is that both approaches ignore different values of homemakers' individual backgrounds. Therefore, breaking the false dichotomy is important. The concept of opportunity cost could provide a solution.

1. Why Opportunity Cost?

The change of care work compensation from pre- to post-Article 1088 signals that the marital property rules cannot fairly compensate the value of care work.²¹⁶ But what is the value of care work? The text of Article 1088 gives the answer. Article 1088 states that "the spouse who has performed more" in care

211. Katharine Silbaugh determines that women's lower earning potential is a result of care work. See Silbaugh, *supra* note 31, at 60. Also, Betty Berry argues similarly that women "forfeit their ability to earn money and accumulate property" in marriage because of care work; Ziegler, *supra* note 128, at 270 (citing BETTY BERRY, REPORT OF NEW YORK NOW COMMITTEE ON MARRIAGE AND DIVORCE (1970)).

212. See HE XIN, *supra* note 179.

213. See *infra* Appendix A

214. Scholars also made the same arguments. See Thomas Leopold, *Gender Differences in the Consequences of Divorce: A Study of Multiple Outcome*, 55 DEMOGRAPHY 769, 771, 785 (2018); see also Sanfoem L. Braver, *The Gender Gap in Standard of Living that After Divorce: Vanishingly Small?*, 33 Family Law Quarterly 111, 121–22 (1991). Pingyan Zhu and Fang Wang (祝平燕, 王芳), Fengxian Shehuixue Shijiao Xia Lihun Funu Pinkunhua Wenti Tanxi (风险社会学视角下离婚妇女贫困化问题探析) [*An Analysis of the Poverty Problem of Divorce Women, From the Perspective of the Risk of Sociology*], 5 Zhonghua Nüzi Xueyuan Xuebao (中华女子学院学报) [J. OF CHINA WOMEN'S U] 45, 45–46 (2010).

215. Each spouse's division of care work labor is affected by the spouse's income. The spouse who earns more from paid work always takes less domestic labor. Dana V. Hiller, *Power Dependence and Division of Family Work*, 10 SEX ROLES 1003, 1006 (1991).

216. Sun Ruojun (孙若军), Lihun Jiuji Lifa Yanjiu (离婚救济制度立法研究) [*Legislative Research on Divorce Relief System*], Faxuejia(法学家)[THE JURIST], 2018, 161, 166. (arguing before the enactment of the Civil Code that the compensation of care work should be evaluated in divorce cases); see also Ma Yanan et al., *supra* note 17 (pointing out in 2006 that the law was not enough for care work compensation and proposing to establish a care work compensation system).

work can ask the “benefiting spouse” to pay compensation.²¹⁷ Its words imply that care work compensation is based on the premise that one spouse disproportionately benefits from the other’s care work. Under the relationship-based marital property rules in China,²¹⁸ the beneficiary of the homemaker’s care work is the family because marriage absorbs individuals. In reality, the benefit of care work substantially shifts to the spouse who does less care work in the home, especially after divorce. Meanwhile, homemakers face obstacles in public and private spheres. Therefore, it is necessary to consider the homemaker’s foreseeable loss because of care work, which includes, as this article discusses, opportunity cost.

An obstacle in compensating homemakers for opportunity cost is assuming that the spouse who provides more care work has bleaker career opportunities or financial conditions than the other spouse. The assumption is not universally true. A homemaker could earn more than the other spouse.²¹⁹ Therefore, we propose basing the homemaker’s opportunity cost not solely on the homemaker’s career loss nor the benefiting spouse’s earning potential, but instead on the balance between the two partners’ loss and earnings in the home and the workplace. If the compensation is only determined by which spouse earns more in marriage, homemakers with higher incomes are unlikely to receive care work compensation in divorce. However, the meaning of care work compensation extends beyond mere financial payment to the homemaker, it looks to revert the social and legal devaluation of care work and recognize the value of care work.

Setting opportunity cost as the standard of valuing a homemaker’s domestic work must account for the intersectionality of individuals and families. The ages, residences, educational backgrounds, financial conditions, and work experiences of individual homemakers determine what they give up because of care work. A professional woman may sacrifice her promotion opportunity to be a manager because of care work. A rural study mama may sacrifice her work opportunity as a cashier in a grocery store to move to the city. It is unfair to set a uniform amount to compensate for both of these hypothetical women’s care work.

The context of Article 1088 and its applications reveal that the financial and class differences between families and individuals is not considered. Although judges say they consider several factors in determining compensation amounts,²²⁰ courts consistently grant low compensation in most cases for care work.²²¹ Court rulings show that an abused woman with a financially capable husband is likely to receive better compensation for her care work than a woman

217. Civil Code, *supra* note 1, art. 1088.

218. Civil Code, *supra* note 1, art. 1062.

219. Clare Lyonette and Rosemary Crompton suggest that men whose female partners earn similar or more money and work similar or longer hours tend to do more housework than men whose partners earn less or work fewer hours. However, it is still the norm for women to do more housework regardless of their income or working hours. See Clare Lyonette and Rosemary Crompton, *Sharing the Load? Partners’ Relative Earnings and the Division of Domestic Labour*, 29 WORK, EMP. & SOC’Y 23, 33–34 (2015).

220. See Zhongguo, *supra* note 14.

221. See *infra* Appendix A.

who was never abused but whose husband earned less.²²² Still, the amount of compensation will be significantly lower than the husband's earnings.²²³ If courts do not come to value individual and family differences, homemakers are unlikely to ever receive fair compensation.

Unlike setting the market price as the standard for valuing care work, opportunity cost is valuable for illuminating what homemakers have sacrificed because of their care work. However, comparing care work's value with market jobs disadvantages women with low education levels and income. For a rural study mama who lives with her children in a city, working as a cashier or waitress would generate income less than the cost of hiring nannies to care for her children. Comparing these hypotheticals justifies care work in the home for women with low incomes and promotes the unfair idea that only women with good earning capacity should be compensated for their home labor.

2. Limitation of Opportunity Cost

There are shortcomings of opportunity cost. Opportunity cost leaves out homemakers who do not intend to participate in paid work. The implication of opportunity cost is that the homemaker sacrifices personal growth of their career. Still, some people do not intend to enter the job market and would rather devote themselves to family through care work. The opportunity cost still emphasizes the binary of the family and the workplace, which could perpetuate the existence of full-time homemakers.²²⁴ However, the negative influence could be financially relieved by the joint property rules of marital property;²²⁵ the full-time homemakers could receive half of the marital property. We also highlight that care work compensation is about financially relieving homemakers and reverting the negative social and legal ramifications of care work. By emphasizing the loss of homemakers, opportunity cost could change public and legal views of care work as an expression of love.

222. Yu Mou yu Zhang Mou Lihun Jiufen (于某与张某离婚纠纷) [a certain YU v. a certain ZHANG, a divorce case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Laiyang People's Ct. Shandong, July 22, 2021).

223. The court repetitively mentioned the abuse in the ruling. Therefore, the authors argue that the abuse could be one reason for the court to order relatively high compensation to the wife. Typically, courts use the local per capita disposable income multiplied by the duration of marriage to determine the amount of compensation. *E.g.*, Yu Mou yu Zhang Mou Lihun Jiufen (于某与张某离婚纠纷) [a certain YU v. a certain ZHANG, a divorce case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Laiyang People's Ct., July 22, 2021).

224. The opportunity cost of care work indicates that the spouse performing care work could potentially earn an income if they used that time for paid employment instead. However, this assumption does not take into account that a full-time homemaker may not desire a paid job and may prefer to prioritize their family responsibilities. Therefore, it could be argued that the opportunity cost of care work should not be considered as a justification for compensation in cases where the homemaker has made a conscious choice not to pursue paid employment.

225. Civil Code, *supra* note 1, art. 1062.

CONCLUSION

Social norms, culture, and current laws in China have led to a problematic distinction between paid work and care work. The emphasis on care work as the voluntary and unpaid responsibility of one spouse to the family due to love has perpetuated this issue. In the public and private spheres, the social culture persists in seeing women as caretakers. Although women have ways to exercise agency in the domestic sphere, such as having control in daily life and being less subordinate to husbands and in-laws, care work can both consciously and unconsciously subvert these efforts. At the same time, Chinese law does not recognize the financial and social significance of care work and thus perpetuates the idea that care work is worthless. This negative perception of care work could make men less willing to participate in domestic labor at home because domestic labor or care work can prevent them from achieving socially-approved success. So, women remain the primary homemakers.

How to fairly value care work becomes the key to breaking this vicious circle. Asking the husband to share income after divorce is an option, but the method may not be feasible in China. Unlike the U.S., where many states have adopted common law property, Chinese spouses' wide adoption of joint property narrowed the space for care work compensation.²²⁶ China's family law also blends alimony and fault-based divorce compensation with care work compensation, and time is still needed for courts to learn the significance of care work to gender equality. Therefore, this article chooses opportunity cost as the ideal measure for determining care work compensation. We do not believe that separating care work while increasing compensation in the workplace will ever resolve gender inequality at home. Still, these changes are needed to break established norms that inhibit gender equality.

226. Civil Code, *supra* note 1, art. 1062.; *see also* Sun Ruojun (孙若军), *supra* note 216, at 167 (arguing that care work compensation must be jointly considered with the property division in Chinese families).

APPENDIX A

The following table includes the case briefs for nineteen selected cases. Issues and rules will not be listed, because these cases' issues and rules are the same. The issue in these cases is whether the caretaking spouse should receive care work compensation. The rule applied is Article 1088.²²⁷ Sometimes the courts do not explain why they apply Article 1088.

Briefing of Selected Cases

<i>a certain YU v. a certain ZHANG, a divorce case</i> ²²⁸	
Facts	The plaintiff/wife cared for the three children. The defendant/husband physically abused the plaintiff. The defendant had businesses with annual profit of \$314,160. The plaintiff asked for around \$78,540 compensation.
Analysis	The plaintiff took more care burden during the marriage. The plaintiff will still take more care work because she has child custody for the three children.
Conclusion	The court granted the plaintiff around \$47,124 compensation given the average local disposable personal income.
<i>a certain FU v. a certain LIU, a divorce case</i> ²²⁹	
Facts	The plaintiff/wife cared for the child and the elderly during the marriage because the defendant/husband served the army for years. The plaintiff asked for \$7,854 compensation for care work and emotional distress damages.
Analysis	The plaintiff took all care work during the defendant's service.
Conclusion	The plaintiff received \$7,854 compensation
<i>a certain FENG v. a certain YANG, a divorce case</i> ²³⁰	
Facts	The plaintiff took of the child and did not have a job. The plaintiff asked for childcare compensation for the nine months for \$7,000.
Analysis	Both parties are responsible for childrearing. However, because the child was too young (nine-month-old), the plaintiff did not

227. Civil Code, *supra* note 1, art. 1088.

228. Yu Mou yu Zhang Mou Lihun Jiufen (于某与张某离婚纠纷) [a certain YU v. a certain ZHANG, a divorce case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Laiyang People's Ct. Shandong, July 22, 2021).

229. Fu Mou yu Liu Mou Lihun Jiufen (付某与刘某离婚纠纷) [a certain FU v. a certain LIU, a divorce case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Huxi District People's Ct., Oct. 27, 2021).

230. Feng Mou yu Yang Mou Lihun Jiufen (冯某与杨某离婚纠纷) [a certain FENG v. a certain LIU, a divorce case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Shenyang People's Ct., Oct. 15, 2021).

	<i>have paid work and financial recourse.</i> The plaintiff should receive some care work compensation.
Conclusion	The plaintiff received \$1,413 compensation
<i>a certain FENG v. a certain WANG</i> , a divorce case ²³¹	
Facts	The plaintiff had served the army for years during the marriage. The defendant took care of the child and the family. The defendant asked for \$15,708 compensation for her care work.
Analysis	The court stated that the defendant primarily cared for the family because of the plaintiff's work in the military. The defendant also contributed more to the family because the defendant took care of the child's health issues for years.
Conclusion	The defendant received \$3,000 compensation.
<i>a certain LIU v. a certain SUN</i> , a divorce case ²³²	
Facts	During the plaintiff's doctoral study, the defendant/wife had taken care of the child with her in-laws. The plaintiff asked for \$4,700 care work compensation.
Analysis	The defendant cared more for the family than the plaintiff.
Conclusion	The defendant received \$3,000 compensation.
<i>a certain LIU v. a certain FENG</i> , a divorce case ²³³	
Facts	One of the parties' children had disabilities. The plaintiff/ husband did not care for their children. The defendant asked for \$7,854 care work compensation.
Analysis	The defendant cared for their children, especially the child with disabilities
Conclusion	The defendant received \$1,500 compensation.
<i>a certain WU v. a certain ZHANG</i> , a post-divorce case ²³⁴	
Facts	The couple signed a compensation agreement in divorce stated that the defendant should pay the plaintiff certain real property, vehicle, and money. The defendant did not follow the agreement, so the plaintiff filed the lawsuit.
Analysis	The court did not analyze why Article 1088 should be applied in

231. Feng Mou yu Wang Mou Lihun Jiufen (冯某与王某离婚纠纷) [a certain FENG v. a certain WANG, a divorce case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Zhifu People's Ct., Nov. 25, 2021).

232. Liu Mou yu Sun Mou Lihun Jiufen (刘某与孙某离婚纠纷) [a certain LIU v. a certain SUN, a divorce case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Zhifu People's Ct., Oct. 14, 2021).

233. Liu Mou yu Feng Mou Lihun Jiufen (刘某与冯某离婚纠纷) [a certain LIU v. a certain FENG, a divorce case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Baita Dist. People's Ct., Feb. 5, 2021).

234. Wu Mou yu Zhang un Mou Lihun Jiufen (吴某与张某离婚后损害责任纠纷) [a certain WU v. a certain ZHANG, a post-divorce case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Erqi People's Ct., July 12, 2021).

	this case. The court only mentioned the defendant stated that he felt guilty to the plaintiff.
Conclusion	The defendant needed to perform duties under the compensation agreement.
<i>a certain WU v. a certain PAN</i> , a divorce case ²³⁵	
Facts	The defendant/wife had cared for their children and mother in-law for years. They had been living separately since 2014. ²³⁶ The defendant asked for \$31,000 compensation for her childcare work and \$15,000 for eldercare work.
Analysis	The plaintiff was an unfit husband and father. The defendant took care of the child alone after their separation in 2014. The defendant did not have a stable place to live, so the plaintiff should provide the defendant <i>financial assistance</i> .
Conclusion	The defendant received \$15,000 in financial assistance.
<i>a certain LIANG v. a certain LI</i> , a divorce case ²³⁷	
Facts	After the defendant married the plaintiff, she concentrated on care work and did not have any paid work.
Analysis	The defendant did not have any income after the divorce because she focused on care work. The defendant should be compensated by the plaintiff.
Conclusion	The defendant received \$1,500 in care work compensation.
<i>a certain ZHANG v. a certain FENG</i> , a post-divorce case ²³⁸	
Facts	The parties signed a divorce agreement that required the husband to pay the wife a one-time compensation and monthly alimony. The parties did not state what the basis of one-time compensation is. The plaintiff/wife took care of the child during the marriage and did part-time jobs for a living after the divorce.
Analysis	The court did not provide why it applied Article 1088.
Conclusion	The defendant should follow the agreement and pay the plaintiff, including \$22,030 in comeptions and \$7,417 in financial support.

235. Wu Mou yu Pan Mou Lihun Jiufen (吴某与潘某离婚纠纷) [a certain WU v. a certain PAN, a divorce case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Lankao People's Ct., Apr. 25, 2021).

236. This is different from "separation" in the U.S. family law. China does not have a law like "separation." In this case, the parties' separation is not a legal action. It was the parties' choice to live separately. The court did not order them to do so. *See id.*

237. Liang Mou yu Li Mou Lihun Jiufen (梁某与李某离婚纠纷) [a certain LIANG v. a certain LI, a divorce case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Xinhui People's Ct., Apr. 09, 2021).

238. Zhang Mou yu Feng Mou Lihun Jiufen (张某与冯某离婚纠纷) [a certain ZHANG v. a certain FENG, a divorce case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Beijing Chaoyang People's Ct., Feb. 26, 2021).

<i>ZHANG a certain PING v. WANG a certain TAO</i> , a divorce case ²³⁹	
Facts	The plaintiff had been taking care of the child after the parties had been living separately in 2016. The plaintiff asked for \$9,000 compensation but <i>did not state the purpose of the compensation.</i>
Analysis	The court did not provide why it applied Article 1088.
Conclusion	The defendant should pay the plaintiff \$4,700 in <i>financial support.</i>
<i>a certain QU v. a certain XU</i> , a post-divorce property case ²⁴⁰	
Facts	The parties divorced in 2021 without any property distribution. The plaintiff/wife filed the lawsuit to ask for property distribution and care work compensation. The plaintiff took care of the child and the elderly during the marriage.
Analysis	<i>The court rejected to award care work compensation</i> because (1) care work is different from property distribution and (2) a care work compensation petition should be filed during the divorce proceedings.
Conclusion	The plaintiff's care work petition was rejected.
<i>a certain LI v. a certain WANG</i> , a divorce case ²⁴¹	
Facts	The couple married in 2017 and had a child in 2018. The defendant asked for childcare compensation from April 2019 to May 2021 for \$157 per month.
Analysis	The court did not provide why it applied Article 1088.
Conclusion	The defendant received \$1,130 of compensation in total.
<i>a certain LI v. a certain CHEN</i> , a divorce case ²⁴²	
Facts	The couple married in 2017 and had a child. The defendant/wife asked for \$2,3000 care work compensation.
Analysis	the defendant did not provide evidence to show she cared for the family more than the plaintiff
Conclusion	the defendant's care work petition was rejected.

239. Zhang Mou Ping yu Wang Mou Tao Lihun Jiufen (张某萍与王某涛离婚纠纷) [ZHANG a certain PING v. WANG a certain TAO, a divorce case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Huancui People's Ct., May. 17, 2021).

240. Qu Mou yu Xu Mou Lihun Jiufen (曲某与徐某离婚纠纷) [a certain QU v. a certain XU, a divorce case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Yucheng People's Ct., Sept. 22, 2021).

241. Li Mou yu Wang Mou Lihun Jiufen (李某与王某离婚纠纷) [a certain LI v. a certain WANG, a divorce case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Zhifu People's Ct., Sept. 17, 2021).

242. Li Mou yu Chen Mou Lihun Jiufen (李某与陈某离婚纠纷) [a certain LI v. a certain CHEN, a divorce case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Pudong People's Ct., Nov. 26, 2021).

<i>a certain LI v. a certain WU</i> , a post-divorce property case ²⁴³	
Facts	The parties had a divorce agreement stating that the defendant should pay the plaintiff \$78,540 compensation for her care work and emotional distress in the marriage. The defendant did not follow the agreement, and the plaintiff filed the lawsuit.
Analysis	The court did not provide why it applied Article 1088 but affirmed the plaintiff's right to ask for care work compensation under Article 1088.
Conclusion	The defendant should follow the agreement and pay the plaintiff.
<i>a certain LI v. a certain ZHOU</i> , a post-divorce case ²⁴⁴	
Facts	The plaintiff/wife had been taken care of the child and the family during the marriage. The defendant/husband had an affair and abused the plaintiff. The plaintiff asked for \$15,700 damage recovery and \$7,500 compensation. <i>The plaintiff did not state the purpose of the compensation.</i>
Analysis	The plaintiff took care of the family, but the defendant had an affair and abused the plaintiff.
Conclusion	The defendant should <i>pay the plaintiff \$2, 937 damage recovery.</i>
<i>a certain LI v. a certain TU</i> , a post-divorce property case ²⁴⁵	
Facts	The defendant should pay the plaintiff \$12,500 within three years of divorce. The plaintiff filed the lawsuit asking the defendant to follow the agreement. <i>The parties did not mention anything about care work.</i>
Analysis	The court did not provide why Article 1088 should be applied.
Conclusion	The defendant should follow the agreement and pay the plaintiff.
<i>a certain LI v. a certain WANG</i> , a post-divorce property case ²⁴⁶	
Facts	The parties signed a divorce agreement in 2018. The defendant should pay the plaintiff \$34,500. <i>The court did not discuss the parties' care work.</i>
Analysis	The court did not provide why Article 1088 should be applied.

243. Li Mou yu Wu Mou Lihun Jiufen (李某与吴某离婚后财产纠纷) [a certain LI v. a certain WU, a post-divorce property case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Yongtai People's Ct., Mar. 30, 2021).

244. Li Mou yu Zhou Mou Lihun Jiufen (李某与周某离婚后损害责任纠纷) [a certain LI v. a certain ZHOU, a post-divorce case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Fengtai People's Ct., Aug. 31, 2021).

245. Li Mou yu Tu Mou Lihun Jiufen (李某与涂某离婚后财产纠纷) [a certain LI v. a certain TU, a post-divorce property case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Changting People's Ct., Feb. 16, 2021).

246. Li Mou yu Wang Mou Lihun Jiufen (李某与王某离婚后财产纠纷) [a certain LI v. a certain WANG, a post-divorce case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Mengcheng People's Ct., Apr. 24, 2021).

Conclusion	The defendant should follow the agreement and pay the plaintiff.
<i>a certain JIANG v. a certain WANG</i> , a divorce case ²⁴⁷	
Facts	The couple had a <i>de facto</i> marriage, but the plaintiff/husband left home in 1995. The defendant had been taking care of the children and in-laws since 1995. The defendant asked for care work compensation but not gave the specific number.
Analysis	The defendant took care of the family alone.
Conclusion	The plaintiff should pay the defendant \$2,300 compensation for her care work in 26 years.

247. Jiang Mou yu Wang Mou Lihun Jiufen (江某与王某离婚纠纷) [a certain LI v. a certain TU, a divorce case], Beida Fabao (北大法宝) Chinalawinfo (北大法律信息网) (Woyang People's Ct., Apr. 25, 2021).

NO TURNING BACK: A PROGRESSIVE APPLICATION OF STAND YOUR GROUND LAWS TO REMOVE THE DUTY TO RETREAT FOR WOMEN WHO KILL ABUSERS OUT OF SELF- DEFENSE

Luma Khabbaz[†]

ABSTRACT

Stand Your Ground laws gained mainstream attention after George Zimmerman shot and killed Trayvon Martin, a Black teenager, in Florida. However, Stand Your Ground laws are neither new nor unique to Florida or other conservative states. Thirty-nine states remove the duty to retreat from self-defense law in some way through statute, case law, or jury instructions. These laws have received significant bad press from liberal and mainstream media, especially given the rise in gun violence and racial injustice. At the same time, the United States has seen a major push for criminal legal reform and mainstream conversation around prison abolition.

This Note examines the pervasive problem of women killed at the hands of their abusers in the context of this tense legal landscape. Some women kill their abusers in self-defense, but many unsuccessfully claim self-defense at trial. Even in the states that have a Stand Your Ground defense, women face myriad challenges that put them at a disadvantage when claiming self-defense. However, in understanding these laws and who they are meant to protect, it appears that these women's physical and psychological experiences of domestic violence map almost perfectly onto the already existing justifications for this legal defense.

This Note attempts to break apart from a highly ideologically intertwined legal doctrine to apply it to a group of vulnerable people in our society—victims of domestic violence. That said, this Note takes an abolitionist and progressive approach to criminal defense and hopes that this is a stepping-off point for other

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disenfranchised groups, including Black men and youth, to assert successful self-defense claims.

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INTRODUCTION

In 2012, George Zimmerman, a neighborhood watch volunteer, shot and killed Trayvon Martin, an unarmed seventeen-year-old Black child.¹ Martin was wearing a hooded sweatshirt and carrying a bag of Skittles and a bottle of juice.² Zimmerman, believing Martin looked suspicious, called the town's police, who told him not to follow Martin.³ Despite that instruction, Zimmerman pursued and ultimately shot and killed Trayvon Martin.⁴ Zimmerman was charged with second-degree murder and proceeded to trial with a claim of self-defense.⁵ After a month-long trial and two days of deliberation, a jury of six women found Zimmerman not guilty of murder.⁶ Trayvon's death led to the formation of the

1. *Florida Teen Trayvon Martin is Shot and Killed*, Provided in *This Day in History*, February 26, HISTORY, <https://www.history.com/this-day-in-history/florida-teen-trayvon-martin-is-shot-and-killed> (Feb. 24, 2021) [<https://perma.cc/YJ5F-K8L6>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

Black Lives Matter Network,⁷ as well as an influx of news stories about Stand Your Ground laws.⁸

What remains unclear is whether the acquittal of George Zimmerman can truly be attributed to Florida's Stand Your Ground law. In Stand Your Ground states, individuals who feel threatened have no duty to retreat to protect themselves or their family members in their homes or public spaces.⁹ Zimmerman did not proceed in trial with a defense of Stand Your Ground immunity, instead opting for a traditional self-defense claim.¹⁰ Nonetheless, a Stand Your Ground defense is baked into Florida's self-defense doctrine,¹¹ so it was included in the jury instructions. Regardless of the reasoning behind Zimmerman's acquittal, the killing of Trayvon Martin and Zimmerman's subsequent trial brought Stand Your Ground laws to the forefront of public awareness.¹²

Stand Your Ground laws remove the duty to retreat before acting in self-defense. These laws, unsurprisingly, have proven to be controversial, given their expansive view of justifiable homicide. Critics argue that Stand Your Ground laws encourage vigilantism, violence, and a "kill first, ask questions later" mentality.¹³ However, expansive self-defense laws can also be used to advance progressive understandings of criminal defense for vulnerable groups. This Note focuses on how one such class of people could benefit from expansive self-defense doctrines such as Stand Your Ground laws—survivors of domestic violence who kill their abusers. This Note will use both the words "victim" and

7. See *id.* The Black Lives Matter Network was formed by Patrisse Cullors, Alicia Garza, and Opal Tometi to "eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes." *Id.* (quoting *About, BLACK LIVES MATTER*, <https://blacklivesmatter.com/about/> [<https://perma.cc/NSG3-VLBG>]).

8. See, e.g., Eyder Peralta, *Trayvon Martin Killing Puts 'Stand Your Ground' Law in Spotlight*, NPR: THE TWO-WAY, (Mar. 19, 2012), <https://www.npr.org/sections/thetwo-way/2012/03/19/148937626/trayvon-martin-killing-puts-stand-your-ground-law-in-spotlight> [<https://perma.cc/U3JE-D6KK>].

9. See Cynthia V. Ward, "Stand Your Ground" and Self-Defense, 42 AM. J. CRIM. L. 89, 90 (2015).

10. See *id.* at 91, n.4.

11. See FLA. STAT. § 776.012 (2022) ("A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground . . .").

12. See, e.g., Mark Memmott, *Obama: 'Trayvon Martin Could Have Been Me 35 Years Ago'*, NPR: THE TWO-WAY (July 19, 2013), <https://www.npr.org/sections/thetwo-way/2013/07/19/203660128/obama-trayvon-martin-could-have-been-me-35-years-ago> [<https://perma.cc/Y89Z-VZ4V>].

13. *What Are "Stand Your Ground Laws?"* BRADY UNITED, <https://www.bradyunited.org/fact-sheets/what-are-stand-your-ground-laws> [<https://perma.cc/2MAK-TK4M>] (quoted text attributed to Kelly Sampson, Counsel, Constitutional Litigation, Legal Alliance and Racial Justice at Brady United); see also Hannah Knowles & Emmanuel Felton, *'Stand Your Ground' Laws Spread – and Grow 'More Extreme' – 10 Years After Trayvon Martin's Death*, WASH. POST (Feb. 25, 2022), <https://www.washingtonpost.com/nation/2022/02/25/stand-your-ground-trayvon-martin/> [<https://perma.cc/9GNF-JKMQ>].

“survivor,” primarily using “victim” when describing active abuse.¹⁴ Understanding different forms of abuse, including non-physical abuse, is integral to understanding the psychological responses of victims, because the danger that a domestic violence victim faces may not be contemporaneous with the physical battering.¹⁵ When women kill their abusers out of self-defense, tenets of self-defense laws that were not created with these women in mind cannot account for the grave imminent danger they, or anyone put in their position, must have perceived.¹⁶ Survivors of domestic violence deserve to avail themselves of self-defense laws—if indeed they were defending themselves from being seriously injured or killed. The current conceptions of self-defense doctrine require an imminence factor that is incompatible with the experiences of victims of domestic violence, who exist under constant threat of harm or death.

Legal scholarship suggesting this type of reform is slim, however. Shortly after Martin’s death, Professor Brandi Jackson first explored the concept in an article where she argued that Stand Your Ground legal doctrine should be extended to protect survivors of domestic violence.¹⁷ This Note adds to that scholarship by offering an extension of Professor Jackson’s article with more modern and expansive understandings of domestic violence, as well as a discussion of how current laws can be adapted to apply to vulnerable populations

14. The debate of using the word victim vs. survivor often comes down to personal preference. While “survivor” is used as an empowering term for those who feel a loss of control, some people prefer “victim.” See, e.g., Kate Harding, *I’ve Been Told I’m a Survivor, Not a Victim. But What’s Wrong with Being a Victim?*, TIME (Feb. 27, 2020), <https://time.com/5789032/victim-survivor-sexual-assault/> [https://perma.cc/S64X-B7JD] (describing her sexual assault experience as having *endured* something, not *survived* it). Aside from personal preference, the difference between victim and survivor generally follows a continuum. Victim usually refers to someone who has recently experienced abuse or someone who has been subjected to a crime, while survivor refers to the recovery process. See RAPE, ABUSE, & INCEST NAT’L NETWORK, NATASHA ALEXENKO, JORDAN SATINSKY, & MARYA SIMMONS, VICTIM OR SURVIVOR: TERMINOLOGY FROM INVESTIGATION THROUGH PROSECUTION 1 (Sexual Assault Kit Initiative), <https://sakitta.org/toolkit/docs/Victim-or-Survivor-Terminology-from-Investigation-Through-Prosecution.pdf> [https://perma.cc/HQW3-LZCZ]. While this source refers to sexual assault, this Note refers to victims and survivors following the same logic.

15. See Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1207–08 (1993) (“Thus, behavior which may not be considered threatening by the recipient in one relationship may be considered a clear sign of danger in another relationship, due to the context of prior violence and abuse in which the behavior occurs To negate the impact of the time period between discrete episodes of serious violence—a time period during which the woman may never know when the next incident will occur, and may continue to live with ongoing psychological abuse—is to fail to recognize what some battered women experience as a continuing ‘state of siege.’”).

16. The first half of this sentence refers to factual self-defense, while the second half refers to the legal doctrine of self-defense. This Note uses the phrase “self-defense” sometimes in a factual manner, to describe the context in which women kill their abusers out of fear. However, it also uses the phrase “self-defense” in a legal manner, to describe the various doctrines and statutes that outline a legal justification for self-defense. The Note will clarify which way it is being used if it is unclear.

17. See Brandi L. Jackson, *No Ground on Which to Stand: Revise Stand Your Ground Laws So Survivors of Domestic Violence Are No Longer Incarcerated for Defending Their Lives*, 30 BERKELEY J. GENDER L. & JUST. 154 (2015).

and their unique experiences, such as survivors of domestic violence. This Note also considers and refutes potential counterarguments and concerns about Stand Your Ground expansion having adverse effects on other marginalized groups, such as Black men.

This Note will examine in three parts how self-defense doctrines that eliminate a duty to retreat, often regarded as conservative and patriarchal, can actually help protect survivors of domestic violence while also furthering the purpose of the laws. Part I will explore the background of Stand Your Ground laws, teasing out statutes and case law from various states to incorporate into an amended proposal of Stand Your Ground laws. Part II will examine the paradigm case, *State v. Stewart*, a Kansas self-defense case about a woman who killed her abusive husband. This discussion will highlight the points where the defendant was clearly acting in self-defense but could not avail herself of that legal defense. Part II will then lay out the cultural, legal, and psychological reasons victims who kill their abusers are unable to successfully assert self-defense claims. Part II will conclude with a discussion of modern cases where women acted in self-defense against an abuser. Part III will attempt to apply Stand Your Ground law in a practical way that synthesizes existing legal frameworks with the practical realities faced by women who are victims of abuse. Lastly, Part III will explore the limitations to this Note's recommendations and evaluate relevant counterarguments.

I. BACKGROUND ON STAND YOUR GROUND LAWS: STATUTES, CASE LAW, AND APPLICATION

A. *What is Stand Your Ground law and where is it present?*

While Stand Your Ground laws came into mainstream after the death of Trayvon Martin, our society has long-recognized expansive views of the self-defense doctrine. At the initial advancement of society and government, deadly force could be used only in narrow exceptions, in exchange for the benefits of living under a rule of law.¹⁸ These narrow exceptions initially included a legal obligation to retreat to safety and only use force if retreat was physically impossible.¹⁹ Retreat was not required in one's home, but to use deadly force there had to be no other alternative.²⁰ This is known as the castle doctrine, which is a common law defense that rests on the assumption that a man's home is his "castle"²¹ and that he should not have to retreat if he feels that he or his family is

18. Saul Cornell, *Natural Rights, Common Law, and the English Right of Self-Defense*, 14 *INSIGHTS ON L. & SOC'Y* 4, 4 (2013) ("Society and government were designed to provide the security and certainty unavailable in the state of nature.").

19. *Id.*

20. *Id.*

21. This Note keeps the gendered connotation attached to the castle doctrine to further demonstrate that self-defense laws were not created with women in mind. While the original doctrine referring to a "man's castle" is not by itself proof of gender bias in the law, it sets up the context for the rest of the discussion.

in danger.²² Moving through the continuum of self-defense exceptions, Stand Your Ground laws descend from the castle doctrine.²³ While Stand Your Ground laws came into mainstream in the last decade, some version of them has existed since at least the turn of the twentieth century.²⁴ Unlike the initial self-defense doctrine, which is restricted to using force as a last possible resort outside the home, Stand Your Ground laws remove the duty to retreat to safety.²⁵ Stand Your Ground laws differ somewhat from state-to-state, but generally impose a lower burden on the defendant and expand the self-defense standard by removing the duty to retreat altogether, as long as the person threatened is somewhere they are legally allowed to be.

Currently, thirty-nine states—through statute, case law, or jury instructions—have removed the duty to retreat before engaging in self-defense if an individual fears imminent danger and is somewhere they are legally allowed to be.²⁶ Only eleven states require people to retreat—if they can do so safely—

22. Benjamin Levin, Note, *A Defensible Defense?: Reexamining Castle Doctrine Statutes*, 47 HARV. J. ON LEGIS. 523, 530 (2010) (“The common law rule that a man could kill an intruder to prevent a violent felony—defense of habitation—is paralleled by the self-defense rule that a man owes no duty to retreat in his own home from an intruder intending to cause death or serious bodily harm.”).

23. See Elizabeth B. Megale, *Deadly Combinations: How Self-Defense Laws Pairing Immunity with a Presumption of Fear Allow Criminals to “Get Away with Murder”*, 34 AM. J. TRIAL ADVOC. 105, 112 (2010).

24. Matthew G. Simons, *Lethal Weapon: How Pennsylvania’s Stand-Your-Ground Law Effectively Limits the Reasonable Belief Element of Self-Defense*, 82 U. PITT. L. REV. 241, 250 (2020).

25. See *id.*

26. See ALA. CODE § 13A-3-23(b) (2022) (Alabama); ALASKA STAT. § 11.81.335(b)(5) (2022) (Alaska); ARIZ. REV. STAT. ANN. § 13-405(B) (2022) (Arizona); ARK. CODE ANN. § 5-2-607(b) (2022) (Arkansas); CALCRIM No. 505 (California); *People v. Toler*, 9 P.3d 341, 343-44 (Colo. 2000) (en banc) (Colorado); FLA. STAT. § 776.012 (2022) (Florida); GA. CODE ANN. § 16-3-23.1 (2022) (Georgia); IDAHO CODE § 19-202A(3) (2022) (Idaho); *People v. McGraw*, 149 N.E.2d 100, 103 (Ill. 1958) (Illinois); IND. CODE § 35-41-3-2 (2022) (Indiana); IOWA CODE § 704.1 (2022) (Iowa); KAN. STAT. ANN. § 21-5222(c) (2022) (Kansas); KY. REV. STAT. § 503.055(3) (2022) (Kentucky); LA. STAT. ANN. § 14:20(C) (2022) (Louisiana); MICH. COMP. LAWS § 780.972 (2022) (Michigan); MISS. CODE ANN. § 97-3-15(4) (2022) (Mississippi); MO. REV. STAT. § 563.031(3) (2022) (Missouri); MONT. CODE ANN. § 45-3-102 (2021) (Montana); NEV. REV. STAT. ANN. § 200.120(2) (2021) (Nevada); N.H. REV. STAT. ANN. § 627:4(III) (2022) (New Hampshire); NMRA, Crim, UJI 14-5190 (New Mexico); N.C. GEN. STAT. § 14-51.3(a) (2022) (North Carolina); N.D. CENT. CODE § 12.1-05-07(2)(b) (2021) (North Dakota); OHIO REV. CODE ANN. § 2901.09(B) (2022) (Ohio); OKLA. STAT. tit. 21, § 1289.25(D) (2022) (Oklahoma); *State v. Sandoval* 156 P.3d 60, 64 (Or. 2007) (Oregon); 18 PA. CONS. STAT. § 505(b)(2) (2022) (Pennsylvania); S.C. CODE ANN. § 16-11-440 (2020) (South Carolina); S.D. CODIFIED LAWS § 22-18-4 (2022) (South Dakota); TENN. CODE ANN. § 39-11-611(b)(1) (2022) (Tennessee); TEX. PENAL CODE § 9.31(e) (2021) (Texas); UTAH CODE ANN. § 76-2-402(4) (2022) (Utah); *State v. Hatcher*, 706 A.2d 429, 435 (Vt. 1997) (Vermont); *Foot v. Commonwealth*, 396 S.E.2d 851, 855-56 (Va. 1990) (Virginia); *State v. Redmond*, 78 P.3d 1001, 1003 (Wash. 2003) (en banc) (Washington); W. VA. CODE § 55-7-22 (2022) (West Virginia); WIS. STAT. § 939.48(1) (2022) (Wisconsin); WYO. STAT. ANN. § 6-2-602(e) (2022) (Wyoming).

before using force, except for in the home (and in some states, a car or workplace).²⁷

Florida has arguably the most well-known Stand Your Ground law, particularly after George Zimmerman killed Trayvon Martin. The wording of the law is typical among states that have Stand Your Ground language. In relevant part, the Florida self-defense statute reads:

A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony. A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in criminal activity and is in a place where he or she has a right to be.²⁸

This statute allows for use of deadly force if the person reasonably believes they are in danger of imminent death or great bodily harm. The person does not have a duty to retreat if they are somewhere they are allowed to be and not engaging in criminal activity. This statute has a few ambiguous words²⁹ that are defined and interpreted by courts, as described in the following section.

B. Nuances teased from Stand Your Ground statutes and case law

The texts of states' statutes and judge-made case law, as well as pattern jury instructions in some cases, all further courts' understandings of the applications of the law when deciding who can avail themselves of a Stand Your Ground defense and in what scenarios. This section will focus on using statutes and case law in a variety of states to illustrate the nuances of Stand Your Ground laws in application. These pieces will act as components when constructing and applying a self-defense standard that allows women who kill their abusers to avail themselves of the defense.

It is difficult to ignore the fact that there may have been possibility for safe retreat for Zimmerman, even if it was not required by law. Indeed, various states have considered the possibility of retreat in their self-defense laws, either to explicitly allow or disallow inquiry into the availability of retreat. To ensure that

27. See CONN. GEN. STAT. § 53a-19(b) (2022) (Connecticut); DEL. CODE ANN. tit. 11, § 464(e)(2) (2022) (Delaware); HAW. REV. STAT. § 703-304(5) (2022) (Hawaii); ME. REV. STAT. tit. 17-A, § 108(C)(3) (2022) (Maine); *Bruce v. State*, 145 A.2d 428, 433 (Md. 1958) (Maryland); *Commonwealth v. Teixeira*, 160 N.E.3d 1179, 1189–91 (Mass. 2021) (Massachusetts); *State v. Devens*, 852 N.W.2d 255, 258 (Minn. 2014) (Minnesota); NEB. REV. STAT. § 28-1409(4)(b) (2022) (Nebraska); N.J. STAT. ANN. § 2C:3-4(2) (West 2022) (New Jersey); N.Y. PENAL LAW § 35.15(2)(a) (Consol. 2022) (New York); *State v. Linde*, 876 A.2d 1115, 1129 (R.I. 2005) (Rhode Island).

28. FLA. STAT. ANN. § 776.012(2) (2022) (emphasis added).

29. These include “reasonably” and “imminent.”

juries do not consider this non-element, Mississippi law requires that “no finder of fact shall be permitted to consider” the defendant’s non-retreat as evidence of the reasonableness, necessity, or amount of force that was used in self-defense.³⁰ Wisconsin, in contrast, allows fact-finders to at least consider the possibility of retreat and the defendant’s knowledge of available retreat in assessing reasonableness, even when there is no duty to retreat.³¹

While the castle doctrine also removes the duty to retreat in the home, the logic behind it is to protect from intruders. California is a castle doctrine state by law, meaning there is no duty to retreat in the home. However, there remains a question if the doctrine could apply to a threat in the home by a non-intruder or a member of the household. In *People v. Gleghorn*, the California Court of Appeals held that a person is justified to defend themselves in a violent attack in their home even if the attacker is a member of the household, given a finding that a reasonable person in the situation would have perceived imminent injury or death.³² The court made a distinction that the attacker being a member of the household merely removes the presumption of reasonableness of the use of force that attaches to other castle doctrine scenarios, where someone unlawfully enters the home.³³ However, parties can prove that their actions were reasonable, albeit with a higher persuasive burden.³⁴

The stage of trial in which a Stand Your Ground defense can be presented could meaningfully change defendants’ trial strategies and outcomes. In Florida, Stand Your Ground law provides an immunity that shields those who employ it from arrest, charge, and prosecution.³⁵ Consequently, this is a defense that can be raised in a pre-trial motion, rather than only as an affirmative defense at trial.³⁶ The motion proceeds with an evidentiary hearing in front of a judge.³⁷ If the case persists past this phase, a Stand Your Ground defense may be raised as an affirmative defense at trial.³⁸ There are some meaningful differences between the options. For one, a Florida defendant who is not successful at the pre-trial hearing can still present the affirmative defense in trial. Further, an immunity signifies that the defendant should not have been arrested in the first place. An affirmative defense “assumes the complaint or charges to be correct” and says, “Yes, I did it, but I had a good reason.”³⁹

Another way to frame the legal immunity provided by these laws is to look at Idaho’s self-defense law. Idaho’s self-defense statute contains no duty to retreat—much like other states—but its wording is notable. The statute states that “No person in this state shall be placed in legal jeopardy of any kind whatsoever

30. MISS. CODE ANN. § 97-3-15(4) (2022).

31. See *State v. Wenger*, 593 N.W.2d 467, 471 (Wis. Ct. App. 1999); Wis. JI-Criminal 810.

32. See *People v. Gleghorn*, 238 Cal. Rptr. 82 (Ct. App. 1987).

33. *Id.* at 86–87.

34. See *id.*

35. *Mederos v. State*, 102 So. 3d 7, 11 (Fla. Dist. Ct. App. 2012) (quoting *Dennis v. State*, 51 So. 3d 456, 462 (Fla. 2010)).

36. *Id.*

37. *Id.*

38. *Id.*

39. *State v. Cohen*, 568 So. 2d 49, 51–52 (Fla. 1990).

for protecting himself or his family by reasonable means necessary.”⁴⁰ Notably, the phrasing of “legal jeopardy of any kind” in the first line of the statute places very centrally the fact that there will be absolutely no legal consequences for protecting oneself and one’s family, rather than the more typical, “[a] person is justified in using or threatening to use deadly force . . .” in Florida’s statute.⁴¹ Idaho takes deference to defendants even further. Subsection two reads,

The defense of self or of another does not require a person to wait until he or she ascertains whether the danger is apparent or real. A person confronted with such danger has a clear right to act upon appearances such as would influence the action of a reasonable person.⁴²

In defining what is considered reasonable belief, Michigan includes in its Self-Defense Act a subjective permission to use deadly force with no duty to retreat in situations in which “[t]he individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.”⁴³

Virtually all states with Stand Your Ground laws reattach the duty to retreat when the defendant was the initial aggressor, but there is little jurisprudence that delineates what an initial aggressor is.⁴⁴ The general rule is that an aggressor is “not justified in using force to protect himself from the counterattack that he provoked by unlawful force.”⁴⁵ An initial aggressor can revive the right to self-defense through a good faith, communicated withdrawal, and determining whether the defendant was the initial aggressor is a question for the jury.⁴⁶ Sometimes, threats and verbal abuse suffice.⁴⁷ Leading criminal law expert Joshua Dressler explains that someone who is the first to use physical force as a result of a threat is not necessarily the first aggressor, since a threat can, in rare cases, constitute initial aggression.⁴⁸ An initial aggressor can become the non-aggressor and vice versa. The Colorado Supreme Court explains, “[a]fter an initial aggressor effectively withdraws from an encounter, the original non-aggressor becomes the aggressor when the original non-aggressor ‘continues or threatens the use of unlawful physical force.’”⁴⁹ However, in most criminal trials,

40. IDAHO CODE § 19-202A(1) (2022). Also of note is the use of gendered language in the statute.

41. FLA. STAT. § 776.012(2) (2022).

42. § 19-202A(2).

43. MICH. COMP. LAWS § 780.972(1)(a) (2022).

44. CYNTHIA LEE & ANGELA H. HARRIS, CRIMINAL LAW: CASES AND MATERIALS 622 (4th ed. 2019).

45. Joshua D. Brooks, *Deadly-Force Self-Defense and the Problem of the Silent, Subtle Provocateur*, 24 CORNELL J. L. & PUB. POL’Y 533, 537 (2015).

46. *Id.* at 539.

47. Alon Lagstein, Note, *Beyond the George Zimmerman Trial: The Duty to Retreat and Those Who Contribute to Their Own Need to Use Deadly Self-Defense*, 30 HARV. J. RACIAL & ETHNIC JUST. 367, 379 (2014).

48. Brooks, *supra* note 45, at 539. (quoting Joshua Dressler).

49. *Castillo v. People*, 2018 CO 62, ¶ 43, 421 P.3d 1141 (2018).

juries are merely provided with applicable law and jury instructions. For example, in Florida it is up to the jury to determine whether the evidence they heard established that the person who used force was in fact the initial aggressor.⁵⁰ However, being the initial aggressor is not dispositive of an improper use of force. The jury must also then decide whether the initial aggressor acted in a way that still justified use of force.⁵¹

Stand Your Ground laws are not immune from producing absurd results, though even absurd cases can shed light on language that can lead the way toward progressive applications of the laws. Both traditional self-defense laws and Stand Your Ground laws require some level of imminent danger for justified use of force. A Florida judge tossed out a murder charge against a man who chased a suspected burglar and stabbed him to death.⁵² The judge found the murder justified because the burglar had “swung a bag of stolen car radios at Garcia—an object that a medical examiner at a hearing testified could cause ‘serious harm or death.’”⁵³ This case demonstrates that a judge could consider even a fleeing perpetrator (albeit one who had just threatened the use of deadly force) to constitute an imminent threat to the defendant. Similarly, a grand jury in Louisiana declined to charge a man who fired into a car after a drug deal gone bad.⁵⁴ The car was driving away when the defendant shot.⁵⁵ The local sheriff said that someone could have jumped out of the car with a gun and that the defendant had “decided to stand his ground.”⁵⁶ Again, this case demonstrates that imminence can be more attenuated than otherwise thought. By this logic, a car driving away that *might* contain someone who *might* get out of the car and shoot can justify the use of force. Further, because the defendant was not physically backed into a situation in which he could not safely retreat, Stand Your Ground functioned to remove that duty. Instead, the defendant felt psychologically backed into a wall—since he feared the possibility of danger—and, based on the sheriff’s language, did not want to risk deciding whether he could safely retreat.

These cases demonstrate that Stand Your Ground laws and the judges who interpret them have historically relaxed the imminence standard typically required by self-defense laws. These are standards that feminists have long been told are too important to do away with, despite how incompatible they are with the experiences of domestic violence victims, who may need to avail themselves of self-defense laws.⁵⁷ Some scholars insist that self-defense laws are constructed

50. State v. Floyd, 186 So. 3d 1013, 1022 (Fla. 2016).

51. *Id.*

52. Suevon Lee, *Five ‘Stand Your Ground’ Cases You Should Know About*, PROPUBLICA (June 8, 2012), <https://www.propublica.org/article/five-stand-your-ground-cases-you-should-know-about> [https://perma.cc/H2GZ-RFRC].

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. See Joshua Dressler, *Feminist (or “Feminist”) Reform of Self-Defense Law: Some Critical Reflections*, 93 MARQ. L. REV. 1475, 1479–80 (2010) (“Feminists point out that self-defense law developed primarily in the context of male-on-male violence. . . . Even if she can avoid injury today, she is effectively incarcerated in the home with a violent partner . . . feminists have argued that self-defense law is guilty of applying . . . ‘boys’ rules.”).

in a way to protect human life, not out of a distrust of women and a bias toward male behavior.⁵⁸ However, the origin and application of these laws suggests otherwise.

II. THE PROBLEM: BATTERED WOMEN WHO KILL THEIR ABUSERS OUT OF SELF-DEFENSE

A. *The Paradigm Case: State v. Stewart*

This Note focuses on women who kill their abusers out of self-defense under legal frameworks that place duties on them to retreat and show contemporaneous imminent danger. This Note argues that such legal frameworks are not compatible with the experiences of victims of domestic violence, leaving a justice gap for these women. In order to demonstrate the problem, this Note will be working with a paradigm case, *State v. Stewart*.

In *Stewart*, a Kansas jury had acquitted a woman, Peggy Stewart, who killed her abusive husband, Mike Stewart, in his sleep.⁵⁹ The state, contending that the trial court erred in giving a self-defense instruction when there was no imminent danger, filed a reserved question to resolve whether the Kansas statute excused homicide by a battered wife with no evidence of a deadly threat or imminent danger “contemporaneous with the killing.”⁶⁰ While the Kansas Supreme Court could not reverse Peggy’s acquittal, it answered definitively that the trial court erred in giving a self-defense instruction, since Peggy shot her husband in his sleep and therefore was not in imminent danger.⁶¹ The court also noted that the trial court’s instruction allowing the jury to use Peggy’s subjective belief that she was in imminent danger to determine the reasonableness of her actions (rather than the viewpoint of a reasonable person in her circumstances) was in error.⁶²

It is important to lay out a few of the facts the Kansas Supreme Court had at its disposal and, in fact, used in its opinion when it concluded there was no imminent threat to Peggy and that the jury instructions favored Peggy’s subjective belief rather than an objective one. Mike had a history of abusing Peggy.⁶³ He held a gun to Peggy’s head and threatened to kill her when she asked him to stop abusing her daughter.⁶⁴ Mike ordered Peggy to kill and bury her daughter—she did not, but she did file for divorce.⁶⁵ He once chased Peggy outside, grabbed her by the hair and beat her up.⁶⁶ He came into her place of work and drove all her customers away with a gun. Then, he forced her to come home

58. *E.g., id.* at 1480.

59. *See State v. Stewart*, 763 P.2d 572 (Kan. 1988).

60. *Id.* at 640.

61. *See id.*

62. *Id.*

63. *See id.* at 640–644 (detailing the abusive acts that Peggy endured). This section is not exhaustive of all the acts of abuse included in the court opinion. It also is not clear that the court opinion is exhaustive of all the abuse Peggy endured by Mike.

64. *Id.* at 641.

65. *Id.*

66. *Id.*

and have sex with him.⁶⁷ One time, Mike woke Peggy up from sleep by beating her with a baseball bat.⁶⁸ Peggy told her friends that Mike would probably kill her one day.⁶⁹

Shortly before Mike's death, Peggy ran away from him for the first time.⁷⁰ Her daughter had her admitted to the hospital, because she was suicidal.⁷¹ Mike came to get Peggy, and the hospital released Peggy to Mike's care.⁷² When they got home, Mike told Peggy that he would kill her if she ever ran away from him again.⁷³ The following day, Peggy found a loaded gun—which she testified she was afraid of—in the house and hid it under a mattress.⁷⁴ As Peggy cleaned the house that day, Mike kept telling her that she should not bother cleaning because she would not be there for long, nor should she bother with things that she could not take with her.⁷⁵ She was afraid he was going to kill her.⁷⁶ That night, Peggy heard voices in her head telling her to “kill or be killed.”⁷⁷ That same night, she killed Mike in his sleep.⁷⁸

While the Kansas Supreme Court said the issue in this case was a lack of imminence, it is clear from the facts that Peggy, as any reasonable person in her position would, feared that she would be killed when Mike woke up. This suggests not a lack of imminence, but rather a faulty and restrictive understanding of imminence that forced upon Peggy an unfair risk calculation. The court breezed past the fact that Mike had a loaded gun in the home. This fact, coupled with Mike's repeated death threats and history of abuse, leaves no real question that Peggy's life was in imminent danger. The court further mentioned that there were two cars in the driveway,⁷⁹ but it failed to account for the psychological inability Peggy had to retreat safely, let alone her physical inability. Peggy had tried to run away before and was unsuccessful. In fact, her attempted escape very well might have been the reason Mike's behavior had escalated, telling Peggy she should not bother cleaning a house she would not be in for long.

Further, the court took issue with the jury instructions and stated that the trial court implied the reasonable person standard was subjective to Peggy's circumstances.⁸⁰ A quick glance at the facts could lead a jury to find that the “circumstances surrounding the killing were sufficient to create a reasonable belief in the defendant that the use of deadly force was necessary.”⁸¹ The jury

67. *See id.*

68. *Id.* at 642.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* Mike told the hospital he “needed his housekeeper.” *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 643.

79. *Id.* at 642–43.

80. *Id.* at 640.

81. *Id.* at 646.

instructions the trial court used came largely from those suggested by the Kansas Supreme Court itself just six years earlier in *State v. Simon*. The Kansas Supreme Court's suggested jury instructions read as follows:

A person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself or another against such aggressor's imminent use of unlawful force. A reasonable belief implies both a belief and the existence of facts that would persuade a reasonable man to that belief.⁸²

In Peggy's case, the trial court changed "reasonable man" to "reasonable person" in its instructions.⁸³ The trial court then added an instruction that included a determination of whether Peggy's subjective belief that she was defending herself was reasonable.⁸⁴ The Kansas Supreme Court itself admits that the test for self-defense employs both a subjective and objective standard, but it found that the trial court took it too far when it used the court's own suggested language in addition to a sentence about subjective belief.⁸⁵

While the court confusingly shut down its own suggested language for reasonableness, perhaps the hesitation lay in applying a standard that was never made to fit Peggy's case. The use of reasonable "man" in the Kansas Supreme Court's suggested language is emblematic of a legal standard that puts women like Peggy at a disadvantage in self-defense cases. This standard will never be the right fit for women who kill their abusers, because the reasonable person is, by its original definition, a man.

B. Legal, cultural, and psychological incompatibilities for survivors of domestic violence in the law

There are reasons women like Peggy Stewart are unable to avail themselves of defenses that are separate from the text of the law at issue. Compounded, these legal, psychological, and cultural issues make it very hard for women who kill their abusers to prove self-defense. This subsection will proceed by discussing problems with the pervasive "reasonableness" legal standard. Then, it will explore modern understandings of domestic violence, illustrating the "reasonable person" in the context of an abusive relationship. Lastly, it will examine modern cases that demonstrate how the problem can sometimes lie in the application of a law that fails to protect a group of people it is meant to protect.

1. The reasonable person standard

One of the biggest roadblocks women face in availing themselves of expansive self-defense doctrines is our limited and detached-from-reality view of what a reasonable person looks like. Self-defense doctrine generally rests on

82. *State v. Simon*, 646 P.2d 1119, 1122 (Kan. 1982).

83. *Stewart*, 763 P.2d at 649.

84. *Id.*

85. *Id.*

an honest and reasonable belief that the person was faced with an imminent threat of unlawful force, that the force used was necessary to repel the threat, and that the force was proportionate to the threatened force. The question of what constitutes a reasonable person or belief has long confused legal scholars.⁸⁶ Ironically, as controversy surrounding the standard grew, so did its inclusion in more areas of law.⁸⁷ However, with self-defense—which often requires a split-second decision rather than a fully informed one—courts had to consider how to treat a defendant who honestly and reasonably believed deadly force was necessary but was mistaken.⁸⁸ A traditional understanding of reasonable belief was an objective one—meaning, a reasonable person in the defendant’s position.⁸⁹ By the early twentieth century, though, a quasi-objective, quasi-subjective test emerged that took into account the defendant’s subjective characteristics, such as size, disability, age, and specific knowledge about their attacker.⁹⁰ This shift came from the understanding that the law should not equally criminalize those who act with intention and those who act with negligence.⁹¹

The pervasive reasonable person standard that exists throughout statute and case law began as the reasonable man standard.⁹² Though it was meant to be a gender-neutral standard, it was created in a time when women were not considered equal to men.⁹³ Eventually the reasonable man standard transformed into the reasonable person standard, but critics still question its neutrality in a legal system that was built and still revolves around male norms.⁹⁴

The legal standard of reasonableness is designed to maximize freedom of individuals while minimizing intrusiveness caused by an individual exercising that freedom.⁹⁵ In order for this standard to function with objectivity, courts must not favor one individual or group’s norms and freedoms over the other. However, “[s]ince the reasonable man standard established one group’s norms and ideals as dominant, it effectively undermined the desired neutrality of the

86. See Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1234–35 (2010) (claiming “the test is characterized by a lack of clarity about the exact nature of the subjective and objective characteristics of the reasonable person”).

87. What constitutes a reasonable belief is a question that often feels like the central question of American law: the standard is now used in negligence law, criminal law, administrative and public law, and discrimination law. *Id.*

88. Simons, *supra* note 24, at 252.

89. *Id.*

90. *Id.* at 253.

91. *Id.* Courts were uneasy with equally punishing people who acted with malice and intention—and thus were more morally blameworthy—and those who acted with negligence. *Id.* This suggests that there exists in criminal law an inherent inquiry into the subjective circumstances that lead a person to kill.

92. Robert Unikel, Comment, *Reasonable Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence*, 87 NW. U. L. REV. 326, 330 (1992).

93. *Id.* at 330–31.

94. *See id.* at 336.

95. *Id.* at 329.

reasonableness principle.”⁹⁶ This bias is exacerbated in a society where men make up the majority of judges, “who have experienced the traditional forms of male socialization, [and] are, consequently, instinctively predisposed to accept the male perspective.”⁹⁷ Therefore, the mere changing of the term to a neutral one, or even to a reasonable woman standard, does not imbue objectivity back into the standard.

When judges and juries apply the law, they decide which norms and actions strike the right balance between maximizing the individual or group’s freedom while minimizing intrusiveness. This leads to a culture where reasonableness is by default coded as a male trait. Even the *Stewart* opinion is coded with language suggesting a lack of reasonableness by Peggy, a severely abused woman. As an introductory phrase to set up Peggy and Mike’s marriage, the opinion reads, “Following an annulment from her first husband and two subsequent divorces in which she was the petitioner, Peggy Stewart married Mike Stewart in 1974.”⁹⁸ The court immediately puts her judgment of relationships into relevance in the opinion. If there was plausible deniability that this judgment was the reason for bringing up her previous relationships, the doubt disintegrates at “in which she was the petitioner.”⁹⁹ The court reveals the predicament of reasonableness for a woman—it is unreasonable for a woman to be in multiple marriages and to instigate multiple divorces to leave her husbands, but it is also unreasonable for her not to attempt to leave her current husband (for a second time) after he has threatened to kill her if she ever left again. The court in *Stewart* also focused on Peggy’s physical ability to retreat from the home, despite documented failed and dangerous attempts to leave Mike prior to that night. The court’s retreat calculation, and any self-defense law that bakes retreat into the analysis, is fundamentally incompatible with the experience of domestic violence survivors. In domestic violence, “safe retreat” is not a realistic possibility. In fact, retreat is often extremely dangerous. Research shows that 77% of domestic violence-related homicides happen upon separation.¹⁰⁰ By the *Stewart* court’s reasoning, the only reasonable domestic violence victim is the one who stays and gets killed.

Reasonableness becomes even more at issue when the killing by self-defense happens in the home. As discussed above, the California Court of Appeals held in *Gleghorn* that if someone kills out of self-defense another member of the household, the presumption of reasonableness is removed.¹⁰¹ This means a victim would have to prove reasonableness, when there is a presumption that killing a member of your household is unreasonable. For the reasons mentioned above, the cards are stacked against victims of domestic violence—

96. *Id.* at 332. The reasonable person standard was created during a time where women were not regarded as people under the law, and court opinions demonstrated that the law and society did not believe women had the same level of competency as men. *Id.* at 331–32.

97. *Id.* at 336.

98. *State v. Stewart*, 243 P.2d 636, 640 (Kan. 1988).

99. *Id.*

100. *Eighteen Months After Leaving Domestic Violence is Still the Most Dangerous Time*, BATTERED WOMEN’S SUPPORT SERVS. (June 11, 2020), <https://www.bwss.org/eighteen-months-after-leaving-domestic-violence-is-still-the-most-dangerous-time/> [<https://perma.cc/RTM9-3N2V>].

101. *See People v. Gleghorn*, 193 Cal. App. 3d 196, 203 (1987).

who are usually women—in proving reasonableness. This becomes even more complicated when considering once again the incompatibility of traditional self-defense and the reality of gender violence. This defense was designed for male-on-male violence, such as “single-incident aggression in a bar or on the street.”¹⁰² In contrast, situations in which women find themselves in need of defending themselves are likely to show up in the home. More than half of all female homicide victims were killed in relation to intimate partner violence, with more than 98% of perpetrators being men.¹⁰³ On the other hand, about 4.9% of male murder victims are killed by an intimate partner.¹⁰⁴ It is unclear what proportion were killed by women acting in self-defense, but there is reason to believe this number in part reflects this phenomenon.¹⁰⁵

2. The lived experience of domestic violence victims

Current understandings of domestic violence do not conform to the reality of many survivors claiming self-defense after killing their abusers. Courts have recognized a partial or complete criminal defense to murder predicated on the battered woman syndrome.¹⁰⁶ Who is considered a battered woman under the defense draws its authority from Dr. Lenore Walker, who appears as an expert in many of these cases.¹⁰⁷ This Note argues that Dr. Walker’s understanding of domestic abuse—which is accepted in courts as evidence for whether someone has asserted a successful battered woman defense—is flawed.

In 1979, Lenore Walker identified the “cycle of violence” in abusive relationships.¹⁰⁸ It proceeds in three phases. First, there is the tension-building phase, where minor battering incidents can occur.¹⁰⁹ In this phase, a victim may inadvertently accept the abuse by nurturing or calming the batterer, because she wants to prevent the anger from escalating.¹¹⁰ She may blame outside, isolated events for the abuse and tend to minimize it.¹¹¹ Next comes the “acute battering incident,” which is characterized by a discharge of the tension from phase one, and where the violence that erupts can be unpredictable.¹¹² Walker asserts that

102. See Dressler, *supra* note 57, at 1479–80.

103. Camila Domonoske, *CDC: Half of All Female Homicide Victims Are Killed by Intimate Partners*, NPR (Jul. 21, 2017), <https://www.npr.org/sections/thetwo-way/2017/07/21/538518569/cdc-half-of-all-female-murder-victims-are-killed-by-intimate-partners> [<https://perma.cc/D38W-VNHY>].

104. *The Scope of the Problem: Intimate Partner Homicide Statistic*, VAWNET, <https://vawnet.org/sc/scope-problem-intimate-partner-homicide-statistics> (last visited Feb. 18, 2023) [<https://perma.cc/RL5Q-ZMKM>].

105. *Id.*

106. Nancy L. Guerin, *People v. Walker: The Battered Husband Defense*, 7 CRIM. JUST. J. 153, 153 (1983).

107. See *id.* at 155–57.

108. See Anita Neuberger Blowers & Beth Bjerregaard, *The Admissibility of Expert Testimony on the Battered Woman Syndrome in Homicide Cases*, 22 J. PSYCHIATRY & L. 527, 530 (1994) (citing LENORE WALKER, *THE BATTERED WOMAN* (1979)).

109. LENORE WALKER, *THE BATTERED WOMAN* 55 (Reprint ed. 2009).

110. *Id.* at 56.

111. *Id.*

112. *Id.* at 59–60.

sometimes a victim may provoke a phase-two incident because she knows it is coming and wants to get it out of the way in order to proceed to the third phase, often known as the honeymoon phase.¹¹³ In fact, the third phase is welcomed by both parties, according to Walker.¹¹⁴ It is the “kindness and contrite loving behavior” phase, which is characterized by calmness.¹¹⁵ Walker describes victims during this stage as “happy, confident, and loving.”¹¹⁶ Some models of the cycle of violence separate the last stage into two, “reconciliation” and “calm.”¹¹⁷

The cycle of violence theory has pervaded government agencies, advocates, and even the judicial system.¹¹⁸ However, because it does not articulate the reality that many survivors face, it problematically leaves out some people from the picture. In fact, “[m]any survivors never describe a ‘honeymoon’ [or calm] phase. Instead, they feel the near-constant presence of power and control in the relationship.”¹¹⁹ The cycle theory also assumes that violence always proceeds in a repeated and predictable pattern.¹²⁰ This places survivors in the position to have both predicted and acted reasonably in accordance with this cycle. However, it does not account for the increased escalation of violence in some relationships, with a continuous trajectory toward life-threatening behavior.¹²¹

Scholars McLeod, Pharris, Boyles, Winkles, and Stafford have developed a modern understanding of violence that takes into account the nuanced realities abuse victims face. For one, many victims experience poly-victimization, or multiple types of abuse in one relationship. Further, coercive control, including constant manipulation and the psychological loss of autonomy, lies at the core of abusive relationships.¹²² Their Model of Systemic Relational Violence notably excludes a characterization of a reduced violence (or honeymoon) phase.¹²³ They argue that the honeymoon phase appears to exist only when viewed from an outside perspective.¹²⁴ For self-defense purposes, this concept of a honeymoon phase is extremely problematic, since the objective reasonable person is not meant to be an outsider, but someone in a similar situation as the domestic violence victim. An understanding contrary to what an objective person in that position would be perceiving is one that has no place in assessing the justification of use of force.

113. *Id.* at 60.

114. *Id.* at 65.

115. *Id.*

116. *Id.* at 66.

117. Angelica Bottaro, *How to Recognize and End the Cycle of Abuse*, VERYWELL HEALTH, <https://www.verywellhealth.com/cycle-of-abuse-5210940> (June 8, 2022) [<https://perma.cc/DF7E-TXNK>].

118. David Axlyn McLeod, Angela Pharris, Elizabeth Boyles, Rachael Winkles, & Wendy Stafford, *The Model of Systemic Relational Violence: Conceptualizing IPV as a Method of Continual and Enforced Domination*, 1 TRAUMA CARE 87, 91 (2021).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 87.

123. *Id.* at 94.

124. *Id.*

3. Presence of imminence

For victims of domestic abuse, the loss of control and threat of violence is constant.¹²⁵ Indeed, “[s]tatistically, research has shown that the threat of violence will nearly always result in enacted violence at some point in the relationship.”¹²⁶ The periods of calm are not a lack of abuse, but rather are periods of control made evident by the victim staying with her abuser and being compliant.¹²⁷ The abuser will use “sentinel events” as enforcement to regain control if they feel like the victim is gaining autonomy. A sentinel event is defined as “an unexpected occurrence involving death or serious physical or psychological injury, or the risk thereof.”¹²⁸ Rather than a cycle of escalation that reverts back to a honeymoon phase, this theory posits that the relationship fluctuates between violence and the threat of violence.¹²⁹ Thus, for a victim, there is *always* an imminent fear of violence.

This modern and inclusive understanding of domestic violence is necessary to avoid punishing victims for not being the right type of victim. Yet, even knowing what we know about the reality of women abused, elements of a traditional self-defense claim cannot account for these realities. For example, requiring the imminent danger to be “contemporaneous with the killing,” like the Kansas Supreme Court required in *Stewart*, ignores the fact that in an abusive relationship there is constant imminent danger, even on the best day, as the cycle of violence escalates. Unfortunately, due to both inapplicable legal standards—such as the reasonable person standard—as well as cultural issues—such as biased judges and juries—current Stand Your Ground laws are not a perfect solution for the issues this class of people face.

4. Initial aggressor

As discussed briefly above, most states have an exception to a successful self-defense claim if the defendant was the initial aggressor. However, this language is also incompatible with the experiences of victims of domestic violence and could hinder a successful defense. Women often use force as a reaction to past abuse or a feeling of powerlessness in a relationship.¹³⁰ For many women, this use of force in response to abuse has earned their relationship a label of “mutual abuse.”¹³¹ However, president and CEO of the National Coalition Against Domestic Violence (NCADV) Ruth Glenn does not believe in mutual abuse.¹³² Self-defense against a primary aggressor may look like abuse, but it

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. These are known as the “enforcement zone” and the “control zone.” *Id.*

130. Angela de la Garza, *The Re-Victimization of Domestic Violence Victims*, 35 *BYU J. PUB. L.* 35, 50 (2020).

131. See Morgan Sung & Doha Madani, *Experts Question the Phrase “Mutual Abuse” After Testimony in Depp-Heard Trial*, NBC NEWS (Apr. 22, 2022, 7:53 PM), <https://www.nbcnews.com/pop-culture/celebrity/experts-question-phrase-mutual-abuse-testimony-johnny-depp-amber-heard-rcna25461> [https://perma.cc/D62E-DTE8].

132. *Id.*

does not come with the same implications of an abuser who holds power and control.¹³³ Abuse is about omnipresent power and control, rather than about individual acts. Psychologist Dr. Betsey Usher argues that only one person in an abusive relationship has the power and control.¹³⁴ Two common tactics of abusers are provoking the victim to fight back and making the victim believe they are the abuser.¹³⁵ Dr. Usher writes, “When the survivor hits their limit and most likely has [Complex Post-Traumatic Stress Disorder], they fight back. Fighting back can include name-calling, physically pushing back, screaming/yelling, and any other ways you have reacted that I didn’t mention. This person wants their freedom back, not power or control.” If being an initial aggressor includes these reactive survival mechanisms, the psychology of domestic violence victims is completely incompatible with this element as written in self-defense laws.

C. Modern cases of domestic violence victim self-defense

Despite often overwhelming evidence, it remains difficult for survivors to prove their fear of violence was reasonable in self-defense situations. In 2014, Aylaliya “Liyah” Birru was convicted of felony assault for shooting her husband.¹³⁶ Birru asserts her husband “slammed her into a wall, pulled her hair, and struck her in the ribs.”¹³⁷ In fear, she grabbed his gun and shot, thinking it was empty.¹³⁸

Birru was being physically abused in her own home by a violent man in possession of a handgun.¹³⁹ Yet, she was still convicted of felony assault after she grabbed *his gun* in fear to protect herself.¹⁴⁰ This was not the first time he had physically abused her.¹⁴¹ Birru met her husband while he was working at the U.S. Embassy in Ethiopia. He became violent after they moved to America, and she was in constant fear for her life.¹⁴² After serving her felony assault prison term, she was picked up by Immigration and Customs Enforcement and detained there, despite being a permanent resident.¹⁴³ An assistant district attorney stated

133. *See id.*

134. Betsy Usher, *Does Mutual Abuse Exist? If Someone is Reacting to the Abuse is That Abuse?*, DR. BETSY USHER (Aug. 2020), <https://www.drbetsyusher.com/blog/does-mutual-abuse-exist-if-someone-is-reacting-to-the-abuse-is-that-abuse> [https://perma.cc/38ZS-RVDX].

135. *Id.*

136. Char Adams, *These Women Survived Abuse and Assault. Now They’re Behind Bars. Should They Be?*, VOX, <https://www.vox.com/the-highlight/2019/8/23/20828367/cyntoia-brown-sexual-domestic-abuse-prison-pipeline> (Aug. 30, 2019, 11:36 AM) [https://perma.cc/8CTD-WZVN].

137. *Id.*

138. *Id.*

139. *See id.*

140. *See id.*

141. *See id.*

142. *Id.*

143. Aaron Morrison, *‘I Was in Constant Fear’: Immigrant Faces Deportation After Prison for Domestic Dispute*, APPEAL, <https://theappeal.org/i-was-in-constant-fear->

of her prosecution that, “The only evidence that the defendant was a victim of domestic violence was provided by the defendant The evidence clearly showed that she shot the victim in the back while he was fleeing from the home and that he posed no immediate threat to the defendant.”¹⁴⁴ Birru was convicted in California, which uses the castle doctrine,¹⁴⁵ and Birru was in the home. What’s more, California’s criminal jury instructions read:

A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger . . . has passed. This is so even if safety could have been achieved by retreating.¹⁴⁶

Even in a state with expansive self-defense laws, courts often insist on applying standards differently to women, notably women of color. In 2010, Marissa Alexander was charged with aggravated assault in Florida—the state that put Stand Your Ground laws on the proverbial map—for firing a warning shot to scare off her abusive, estranged husband.¹⁴⁷ Alexander went to the home she used to share with her estranged husband to grab some of her things when he showed up unexpectedly and eventually threatened to kill her.¹⁴⁸ Alexander ran to her car to leave but could not because the garage door was broken, so she retrieved her gun and fired a warning shot at a wall, for which she received a twenty-year sentence.¹⁴⁹ Florida Congresswoman Corrine Brown pointed out the contradiction:

The Florida criminal justice system has sent two clear messages today One is that if women who are victims of domestic violence try to protect themselves, the Stand Your Ground law will not apply to them . . . the second is that if you are Black, the system will treat you differently.¹⁵⁰

immigrant-faces-deportation-after-prison-for-domestic-dispute/ (May 29, 2019); *see also* Adams, *supra* note 136 (“[T]he Illegal Immigration Reform and Immigrant Responsibility Act has allowed for immigrants convicted of certain crimes to be detained after their release and deported.”).

144. Morrison, *supra* note 143.

145. *See* CAL. PENAL CODE § 198.5 (2022).

146. CALCRIM No. 505.

147. *See* Jeannine Amber, *In Her Own Words: Marissa Alexander Tells Her Story*, ESSENCE (Oct. 27, 2020), <https://www.essence.com/news/marissa-alexander-exclusive/> [<https://perma.cc/2D3K-M6M4>].

148. *Id.*

149. *Id.*

150. *Id.* There are statistics that show that current Stand Your Ground laws elicit racial disparities in the success of the defense. Homicides with white shooters who kill Black victims are five times more likely to be deemed justifiable than the reverse situation. Kami Chavis, *The Dangerous Expansion of Stand-Your-Ground Laws and its Racial Implications*, DUKE CTR. FOR FIREARMS L. (Jan. 18, 2022), <https://firearmslaw.duke.edu/2022/01/the-dangerous->

The trial court in Alexander's case repeatedly made improper instructions and rulings antithetical to the protections afforded to criminal defendants in Alexander's position. For example, the trial court disregarded the most basic tenet of criminal law—the presumption of innocence that can only be overcome when the prosecution meets its burden of proof.¹⁵¹ In criminal trials, the prosecution must prove the defendant's guilt beyond a reasonable doubt, which means that the defendant need not even present a defense, though they certainly may. Fortunately, the district court of appeals in the First District of Florida reversed Alexander's conviction, because the trial court had instructed the jury that Alexander must have proved her self-defense claim beyond a reasonable doubt.¹⁵² This error, the appellate court found, was a fundamental one, because it deprived Alexander of a "trial under the correct rule."¹⁵³ The appellate court also found that the trial court erred in precluding self-defense when there is no injury to the victim.¹⁵⁴ The trial court's argument puts women like Alexander in an impossible position.

Even more, Alexander lived in Florida, which has a Stand Your Ground law that removes the duty to retreat. Even though it was not required, Alexander did attempt to retreat, and even though it was not required, the trial court still noted Alexander's missed opportunities to retreat. The state's answer brief reads,

The Court notes that despite the Defendant's claim she was in fear for her life at that point and trying to get away from Rico Gray she did not leave the house through the back or front doors which were unobstructed. Additionally, the garage door had worked previously and there was no evidence presented to support her claim [that the garage door wouldn't open].¹⁵⁵

Despite the expansive law and its applications, a Black woman in Florida was denied her right to a Stand Your Ground immunity. Instead, she faced the criminal legal system as a defendant and the process of an appeal. And while the appellate court reversed and remanded because of the improper burden-shifting on the defendant and requiring an injury to assert self-defense, the court made no mention of the fact that Florida self-defense law does not mandate retreat even if there is an ability to do so.¹⁵⁶

One example of a successful release of a woman who killed an abuser out of fear and self-defense is Cyntoia Brown. Brown spent fifteen years in prison

expansion-of-stand-your-ground-laws-and-its-racial-implications/ [https://perma.cc/WKF9-FWYF]. This Note recognizes these racial disparities and argues that the issue lies not with the existence of expansive self-defense laws, but with standards and applications that are incompatible with defendants who are not white men.

151. Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 724 (2011).

152. *Alexander v. State*, 121 So. 3d 1185, 1189 (Fla. Dist. Ct. App. 2013).

153. *Id.* at 1188.

154. *Id.* at 1189.

155. Answer Br. of Appellee, *Alexander v. State*, 121 So. 3d 1185 (Fla. Dist. Ct. App. 2013) (No. 1D12-2469), 2013 WL 10629596 at *2.

156. *Alexander*, 121 So. 3d at 1198.

for killing a man who had sexually trafficked her since she was sixteen years old.¹⁵⁷ Brown was eventually granted clemency, but only after hundreds of thousands of people, including celebrities such as Rihanna and LeBron James, got involved.¹⁵⁸ This is a success story for Brown, but it offers no reprieve for the women who cannot get this coverage, and it provides no additional recourse through the existing criminal legal system, but rather through a governor who has no legal obligation to consider any clemency petition.

III. RECOMMENDATIONS

A. *Using a variation of Stand Your Ground laws for battered women who kill their abusers*

Regardless of where solutions may take us, these recommendations begin with a few undisputable facts. First, traditional self-defense doctrine does not easily map onto experiences that survivors face when they kill their abusers out of self-defense. Next, self-defense laws, such as Stand Your Ground laws, have been moving toward a standard that removes the duty to retreat. There is no going back, literally—retreat is not always baked into the law, and it should not always be. Survivors of domestic violence are a perfect example of people who may be in extreme and imminent danger and be unable to leave safely, even when appearing otherwise from an outsider's perspective.

Stand Your Ground laws and cases illustrate the proposition that one can sometimes be backed against a wall psychologically or in fear, and this fear can justify using deadly force.¹⁵⁹ The presumption began with the castle doctrine, which asserted that one does not have to retreat if they are attacked in their own home. Now, the presumption, at least in many states, is that one should not have to attempt to retreat or make the calculation of safe retreat if the person is legally allowed to be somewhere and senses imminent danger. Victims of domestic violence make these calculations all the time and end up dead. In fact, the most dangerous time in an abusive relationship is when the victim leaves the abusive partner.¹⁶⁰ As mentioned above, an overwhelming amount of domestic violence-related homicides happen upon separation.¹⁶¹

The Model of Systemic and Relational Violence clearly supports the proposition that victims of domestic violence are—at all times—in imminent danger, both during control and enforcement stages.¹⁶² And we now know that an overwhelming majority of domestic violence murders happen when the victims attempt to leave. A self-defense standard that does not mandate the risky calculation of retreating maps perfectly onto many victims' experiences with protecting themselves in a dangerous relationship.

157. Adams, *supra* note 136.

158. *Id.*

159. See, e.g., Lee, *supra* note 52 (discussing the Louisiana case where a man shot into a car driving away).

160. BATTERED WOMEN'S SUPPORT SERVS., *supra* note 100.

161. *Id.*

162. McLeod et al., *supra* note 118, at 94.

This Note proposes that Stand Your Ground law be an available defense in all jurisdictions for victims who kill their abusers out of self-defense. While the framework of removing a duty to retreat of Stand Your Ground law maps onto survivors' experiences, the cases and statutes discussed above help fine-tune this defense. Such a defense could be asserted as an immunity through a pre-trial evidentiary hearing, like under Florida's framework, or through an affirmative defense at trial.¹⁶³ Once a case makes it to trial, the survivor has to establish her affirmative defense and be judged by a jury of her peers. While potentially less educated on domestic violence—though not necessarily—there is likely a higher chance that jurors are women than the judge in a pre-trial hearing. In fact, fewer than one-third of state judges are women.¹⁶⁴ What's more, Black, American Indian, and Alaskan Native women experience domestic violence at rates 30-50% higher than White, Hispanic, and Asian women.¹⁶⁵ However, women of color make up only about 8% of state judges.¹⁶⁶ For bias purposes, it may initially make sense to proceed to trial with an affirmative defense.

However, juries are fickle, and an affirmative defense gives survivors only one bite at the apple. Despite bias and the lack of a jury, proceeding with an immunity that necessitates a pre-trial evidentiary hearing gives survivors two bites out of the same apple—or more protection. Defendants who are unsuccessful or fail to request immunity will still be able to claim an affirmative defense at trial. However, it is imperative—given what we know about situations like Peggy Stewart's—that the pre-trial evidentiary hearing feature evidence about the history of abuse in the relationship, attempts to leave, and modern understandings of constant imminent danger in abusive relationships.

The next recommendation stems from one of the biggest roadblocks for women who kill their abusers out of self-defense—the requirement of imminent danger must be expanded to include death threats and the reasonable belief of a person in the situation of an abused woman. Courts must be willing to accept expert testimony that lays out what a reasonable person in the situation of someone in an abusive relationship would be experiencing. Understandings of domestic violence like Lenore Walker's cycle of violence (which has led to the battered woman syndrome understood by the judiciary) assess the relationship's appearance from the outside. While this has a veneer of objective reasonableness, it leaves out an essential piece of the reasonableness analysis that courts rely on all the time—subjectivity.

In fact, subjectivity has already found its way into reasonable person analyses for self-defense claims. Size differences between victims and

163. *Mederos v. State*, 102 So. 3d 7, 11 (Fla. Dist. Ct. App. 2012).

164. Michele L. Jawando & Allie Anderson, *Racial and Gender Diversity Sorely Lacking in America's Courts*, CTR. FOR AM. PROGRESS (Sept. 15, 2016), <https://www.americanprogress.org/article/racial-and-gender-diversity-sorely-lacking-in-americas-courts/#:~:text=A%20recent%20report%20on%20racial,percent%20are%20people%20of%20color> [https://perma.cc/BA5V-HC5P].

165. Buddy T, *How Domestic Violence Varies by Ethnicity*, VERYWELL MIND (Apr. 26, 2021), <https://www.verywellmind.com/domestic-violence-varies-by-ethnicity-62648> [https://perma.cc/ES26-XTZ6].

166. Jawando & Anderson, *supra* note 164.

defendants have become admissible into evidence, as well as physical disability and age.¹⁶⁷ Courts have taken into consideration the violent nature of the victim as well as whether the defendant was aware of this violent nature, thus imbuing subjectivity into the reasonable person.¹⁶⁸ This also includes previous threats of violence as well as actual violence.¹⁶⁹ Some states, like Michigan, have inserted a subjectivity justification in their self-defense statute, which this Note argues is beneficial.¹⁷⁰ Such a provision would allow for an analysis of the abusive relationship from the perspective of the person experiencing abuse, which looks completely different than from an outsider perspective, as discussed above. To require a victim of domestic violence to calculate safe retreat based on anything other than the horrible abuse she'd persistently experienced would be an unfair burden to impose. This is especially true given what we know about when, where, and how often domestic violence escalates to physical harm.¹⁷¹

Lastly, this Note recommends that jurisdictions clearly define what it means to be an initial aggressor in their self-defense statutes and to define it in a way that considers the realities of abuse. Without a clear delineation of what makes someone an initial aggressor, the opportunity is ripe for judges and juries to see a victim like Peggy Stewart as the initial aggressor. Instead, the definition should consider the history of abuse and threats the victim faced—such as Mike Stewart threatening to kill Peggy multiple times, including if she ever left him.

B. Limitations of the recommendations

One of the most obvious limitations to these recommendations is the fact that Stand Your Ground-type laws exist in a majority of states, yet the problem persists. However, considering the cultural, legal, and social limitations discussed in this paper, this is not a testament to whether Stand Your Ground laws can apply to this class of persons. Instead, it is a testament to our unwillingness to apply laws equally across society. Much work is required to reframe the public perception of these laws, as well as the perception of victims of domestic violence who kill their abusers.

Stand Your Ground laws became extremely politicized after the unjust killing of Trayvon Martin in 2012.¹⁷² Organizations such as the National Rifle Association (NRA) have backed the laws, and the laws have a seemingly partisan divide.¹⁷³ In Iowa, Democratic legislators walked out of a session to avoid voting

167. Richard Singer, *The Resurgence of Mens Rea: II—Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459, 491–92 (1987).

168. *Id.* at 492.

169. *Id.*

170. See MICH. COMP. LAWS § 780.972(1)(a) (2022).

171. In the home, by a current or ex-intimate partner, violence perpetually and unpredictably escalates to “sentinel” events. McLeod et al., *supra* note 118, at 94.

172. Rachel Weiner, *The Political Battle Over ‘Stand Your Ground’ Laws*, WASH. POST (Mar. 23, 2012), https://www.washingtonpost.com/blogs/the-fix/post/the-political-battle-over-stand-your-ground-laws/2012/03/22/gIQAVcJ2VS_blog.html [https://perma.cc/9QZ4-RYX7].

173. *Id.*

on a Stand Your Ground bill.¹⁷⁴ However, most states, both Republican and Democratic, have removed the duty to retreat in certain situations, whether through legislature, common law, or pattern jury instructions.¹⁷⁵

In fact, there is a potential for these laws to be framed as progressive, assuming they keep vulnerable people out of prison.¹⁷⁶ The liberal conversation that surrounds Stand Your Ground laws cannot be ignored. Since the murder of Trayvon Martin by George Zimmerman, there have been many conversations about the racial implications of Stand Your Ground.¹⁷⁷ By no means is this Note suggesting that Trayvon Martin's death was not racially motivated, nor is it suggesting that there is not a serious white supremacy problem under which Black people are violently killed at the hands of civilians and law enforcement. However, criminal law expert and feminist scholar Aya Gruber argues there are consequences to restricting criminal defenses that run contrary to progressive agendas. Using rhetoric and statistics, she argues that the current liberal position on discriminatory leniency—i.e., where defendants who offend against minorities benefit from “discriminatory mercy”—perpetuates narratives that there are some criminal defendants who are worthy of sympathy and some who are worthy of mistreatment.¹⁷⁸ Gruber reminds readers that,

The vast majority of defendants who would be affected by narrowing murder defenses are not the sexists, racists, and homophobes about whom progressives worry, and they are decidedly not privileged. First, they are youthful offenders, many falling between the ages of eighteen and twenty-four. Second, they are men of color.¹⁷⁹

The FBI Bureau of Justice Statistics reports that between 1980 and 2008, African-Americans constituted 52.5% of homicide defendants.¹⁸⁰ The goal of this paper is to take an existing doctrine and apply it to a vulnerable class of people—abused women who kill their abusers—in hopes that it will open the door to address those overwhelmingly affected by the criminal legal system.

Along with reframing how we see Stand Your Ground laws, reframing our understanding of victims of domestic violence will help remove current limitations on successful defenses. The biggest current limitation is the inability to prove imminence of threat. The prevailing and outdated theory in courtrooms is the battered woman syndrome and the corresponding cycle of violence.¹⁸¹ This

174. *Id.*

175. See compiled laws, *supra* note 26.

176. See Aya Gruber, *Leniency as a Miscarriage of Race and Gender Justice*, 76. ALB. L. REV. 1571, 1574–75 (2013).

177. See, e.g., Inigo Alexander, *From Trayvon Martin to Ahmaud Arbery—‘Stand Your Ground’ Laws Remain Controversial*, NEWSWEEK (Feb. 26, 2022, 3:00 AM), <https://www.newsweek.com/ten-years-after-trayvon-martin-stand-your-ground-laws-remain-controversial-self-defense-1682571> [<https://perma.cc/6Q3V-PRDP>].

178. Gruber, *supra* note 176, at 1571, 1604.

179. *Id.* at 1625.

180. *Id.*

181. See Neuberger Blowers & Bjerregaard, *supra* note 108, at 529–31.

theory disadvantages defendants, because it applies an outside perspective onto the relationship that often suggests the victim is able to leave, at least during the so-called honeymoon phase. However, more modern understandings of relational violence suggest that the abuse is constant—it just looks different at different phases. Physical abuse is merely one form of enforcement of the abuse; at all other times, the abuse is maintained through control.¹⁸² Knowing that the relationship escalates to sentinel events that can be deadly and that the most dangerous time for a victim in an abusive relationship is when she tries to leave, an imminence requirement is more likely to be satisfied.¹⁸³

CONCLUSION

We are at a point of no return when it comes to Stand Your Ground principles infiltrating self-defense laws across the country. For better or for worse, our lawmakers and courts have decided that, in a moment of reasonably imminent danger, one should not have to make the risky calculation of whether safe retreat is possible. Our society also has a pervasive problem with domestic abuse. For some victims of domestic abuse, it is kill or be killed. Expanding Stand Your Ground laws to these women who kill their abusers helps women who were honestly acting in self-defense, and it furthers the purpose of the laws.

This Note does not have all the answers and solutions to this pervasive problem. However, it attempts to put out into scholarship a potential solution. The goal is to begin exploration into reframing existing doctrines and laws to benefit those who are vulnerable to violence and power. This Note recognizes the controversies that surround both Stand Your Ground laws as well as victims of domestic violence. However, a system that protects vulnerable criminal defendants—such as survivors of domestic violence—and that applies laws equally can only stand to progress our society.

182. McLeod et al., *supra* note 118, at 91, 94.

183. *See Id.* at 94; *see also* BATTERED WOMEN'S SUPPORT SERVS., *supra* note 100.

COMMITTING CRIMES KEPT HER ALIVE: UNITED STATES V. DINGWALL AND THE CRIMINALIZATION OF DOMESTIC VIOLENCE VICTIMS

Madeline Weston[†]

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INTRODUCTION

In *United States v. Dingwall*, the United States Court of Appeals for the Seventh Circuit correctly held that courts should allow criminal defendants to offer evidence of abuse and its effects to support their duress defense.¹ The duress defense has two elements: reasonable fear of imminent death or

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1. *United States v. Dingwall*, 6 F.4th 744, 746 (7th Cir. 2021). *See generally* MODEL PENAL CODE § 2.09(1) (AM. L. INST. 1962) (“Duress: It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.”).

serious injury, and the absence of reasonable, legal alternatives to committing the crime.² When considering a duress defense, courts should allow criminal defendants to offer evidence of abuse and its effects to support their defense. Evidence of abuse can inform the factfinder as to how an objectively reasonable person in the defendant's circumstances might behave, which could satisfy the objective standard for duress.

The defendant, Marjory Dingwall, was charged with three counts of robbery and three counts of brandishing a firearm during a crime of violence.³ However, she claimed she committed the robberies under duress due to physical and emotional abuse from her boyfriend, Aaron Stanley.⁴ The United States District Court for the Western District of Wisconsin denied Dingwall the opportunity to offer evidence, including expert opinions, of battering and its effects to support her duress defense.⁵ She pleaded guilty to three counts of robbery in violation of the Hobbs Act⁶ and one count of brandishing a firearm during and in relation to an act of violence.⁷ The district court sentenced Dingwall to 30 months and one day of imprisonment.⁸

On appeal, the Seventh Circuit considered whether the district court impermissibly denied Dingwall's motion to offer a defense of duress on the grounds that she was unable to objectively demonstrate that she was (1) threatened with imminent violence if she did not commit the charged offenses and (2) lacked reasonable alternatives to breaking the law.⁹ The Seventh Circuit followed the Sixth, Ninth, and District of Columbia Circuits in concluding that evidence of domestic violence helps "inform the jury how an objectively reasonable person under the defendant's circumstances might behave," even if there is not an immediate physical presence of the threat.¹⁰

The court in *Dingwall* stated that it is a "rare case,"¹¹ but such a statement disregards strong evidence of how pervasive domestic violence is in the United States. According to a report by the U.S. Commission on Civil Rights, at least 50 percent of women entering prisons reported "experiencing physical or sexual violence prior to their incarceration."¹² Other studies report that up to 90 percent of women experienced "traumatic events" prior to being incarcerated such as

2. *E.g.*, *United States v. Sawyer*, 558 F.3d 705, 711 (7th Cir. 2009).

3. *Dingwall*, 6 F.4th at 745.

4. *Id.* at 745–46.

5. *Id.* at 746.

6. 18 U.S.C. § 1951(a) (2022) (The Hobbs Act prohibits actual or attempted robbery affecting interstate commerce.).

7. *Dingwall*, 6 F.4th at 746.

8. *Id.* at 750.

9. *Id.* at 746.

10. *Id.* (citing *Dando v. Yukins*, 461 F.3d 791 (6th Cir. 2006); *United States v. Lopez*, 913 F.3d 807 (9th Cir. 2019); *United States v. Nwoye (Nwoye II)*, 824 F.3d 1129 (D.C. Cir. 2016)).

11. *Dingwall*, 6 F.4th at 746.

12. U.S. COMM'N ON CIVIL RIGHTS., WOMEN IN PRISON: SEEKING JUSTICE BEHIND BARS (2020), [HTTPS://WWW.USCCR.GOV/FILES/PUBS/2020/02-26-WOMEN-IN-PRISON.PDF](https://www.usccr.gov/files/pubs/2020/02-26-WOMEN-IN-PRISON.PDF) [https://perma.cc/6C32-NA7V].

interpersonal or sexual violence.¹³ While this study did not include statistics on the prior abuse of transgender and non-binary people who are incarcerated, nearly half of transgender people have been sexually assaulted at some point in their lifetime, and transgender people of color have even higher rates of victimization.¹⁴ Fifty-four percent of transgender people have experienced some form of domestic violence.¹⁵

The rates of prior abuse in incarcerated people are high and disproportionately impact women.¹⁶ If a defendant's crime is related to their victimization, the data surrounding abuse and incarceration supports that many defendants would be able to present evidence of battering and its effects to support a duress defense. This Note argues that the *Dingwall* holding was correct and analyzes the important precedent the Seventh Circuit set. It further argues that the majority did not adequately understand that *Dingwall* is not a narrow ruling or a "rare case," because there are likely many cases that involve criminal defendants who are also victims of domestic violence. Not allowing evidence of battering and its effects significantly disadvantages survivors of violence and contributes to mass incarceration.

Part I of this Note provides background on the *Dingwall* case. Part II of this Note analyzes evidence of battering and its effects, also called "battered woman syndrome." Part II also critiques the government's arguments in *Dingwall* and discusses the majority's reasoning in its decision. It also discusses different approaches various federal courts have taken to analyze the affirmative defense of duress in the context of domestic violence and discusses the policy implications of the decision. Part III of this Note concludes that the *Dingwall* decision was correct and discusses its implications on future cases where prosecutors charge survivors of violence with crimes related to their victimization.

I. BACKGROUND

A. *Dingwall* Facts

Marjory Dingwall met Aaron Stanley in Madison, Wisconsin while she was in treatment for substance abuse, and they began a relationship, despite the fact that Stanley was a volunteer van driver at Dingwall's treatment center and was out of recovery.¹⁷ Dingwall later relapsed, was barred from her treatment center, and moved into a rented room with her daughter.¹⁸ Dingwall left when she woke up one night and found her landlord sitting on her bed, forcing her to move from

13. *Id.*

14. Nat'l Res. Ctr. on Domestic Violence, *VIOLENCE AGAINST TRANS AND NON-BINARY PEOPLE*, VAWNET, <https://vawnet.org/sc/serving-trans-and-non-binary-survivors-domestic-and-sexual-violence/violence-against-trans-and> (last visited Sept. 14, 2022) [<https://perma.cc/68WT-FNPZ>].

15. *Id.*

16. *WORDS FROM PRISON- DID YOU KNOW...?*, ACLU, <https://www.aclu.org/other/words-prison-did-you-know> (last visited Oct. 31, 2021) [<https://perma.cc/UX28-DP82>].

17. *United States v. Dingwall*, 6 F.4th 744, 747 (7th Cir. 2021).

18. *Id.* at 747–48.

a homeless shelter to a friend's home before she eventually moved in with Stanley.¹⁹ After moving in with Stanley, she returned to the homeless shelter due to concerns about how he treated her.²⁰

After a week at the homeless shelter with her daughter, Dingwall moved back in with Stanley.²¹ Stanley began using drugs and abusing Dingwall emotionally and physically.²² Stanley hit her, strangled her, dragged her down the stairs, hit her on the side of her head, and broke her nose.²³ Stanley also purchased a gun, which worsened his abuse, and one night shot into the mattress where Dingwall usually slept.²⁴ Dingwall also stated that during their ten-month relationship there was "verbal abuse, demeaning sexual activities and escalating acts of physical violence that culminated in incidents where Stanley beat her and threatened her with a gun in the midst of accusing her of cheating on him."²⁵ He also monitored her phone and took her food stamp card.²⁶

Stanley would commit robberies to obtain money for drugs.²⁷ He stated that Dingwall owed him money (presumably because she lived with him), so she told him that she would ask her parents for the money.²⁸ Dingwall's parents refused to give her money, so she told Stanley that there was an issue routing the money from her parents to give herself more time to find a different source of money for Stanley.²⁹ Because of the delay, Stanley pistol-whipped her for not having the money.³⁰

In January of 2019, Stanley drove Dingwall to the gas station where she then committed her first robbery; he did not beat her that night.³¹ Dingwall committed the second and third robberies while Stanley was at work.³² But after she committed the second robbery, Stanley told Dingwall he needed more money and suggested she rob another gas station.³³ Although Dingwall robbed the second and third stores to avoid abuse, Stanley still strangled her and punched her in the face the morning after the third robbery.³⁴ Authorities arrested Dingwall a few days later.³⁵ Stanley was subsequently charged with four counts

19. *Id.* at 748.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*; Nick Buffo, *Three People Charged with Robbing Various Dane County Businesses*, ABC WKOW, https://www.wkow.com/news/crime/three-people-charged-with-robbing-various-dane-county-businesses/article_f9175c05-e36a-5015-93f2-222a6e964055.html (last visited Nov. 20, 2021) [<https://perma.cc/MBA5-QJYK>].

32. *Dingwall*, 6 F.4th at 748.

33. *Id.*

34. *Id.* at 749.

35. *Id.*

of robbery that were committed during the same period, between December of 2018 and January of 2019, but none of the charges were related to the robberies committed by Dingwall.³⁶

B. Evidence of Battering and its Effects, also known as “Battered Woman Syndrome”

In *Dingwall*, the court used the phrase “battering and its effects” because it is more inclusive and less prone to stereotyping of victim-survivors³⁷ than “battered woman syndrome.”³⁸ The term battered woman syndrome was often used as courts took a new look at domestic violence in the 1970s and 1980s, and the term continues to be used in many courts.³⁹

i. What is “Battered Woman Syndrome?”

The domestic violence movement was historically framed as a battered women’s movement, which created a gender binary that excluded female abusers and male abuse victims.⁴⁰ This framing perpetuated stereotypes of what an abuser does or does not look like, and marginalized survivors who don’t identify as cisgender heterosexual females but still need access to resources.⁴¹

According to the National Coalition Against Domestic Violence, one in four women and one in nine men experience “severe intimate partner physical violence, intimate partner contact sexual violence, and/or intimate partner stalking with impacts such as injury, fearfulness, post-traumatic stress disorder, use of victim services, [and] contraction of sexually transmitted diseases.”⁴² Additionally, transgender individuals experience a disproportionate rate of domestic violence compared to cisgender individuals,⁴³ and a higher rate of LGBTQ+⁴⁴ individuals experience rape, physical violence, or stalking by an

36. *Serial Robber Sentenced to 7 Years in Federal Prison*, WMTV NBC15, (Aug. 27, 2019, 4:19 PM), <https://www.nbc15.com/content/news/Serial-robber-sentenced-to-7-years-in-federal-prison-558477721.html> [<https://perma.cc/J8QL-DBRG>].

37. This author uses the term “victim-survivor” to acknowledge that people who have experienced trauma may identify as a victim, a survivor, or both in discussing their experience of domestic and/or sexual violence.

38. *Dingwall*, 6 F.4th at 747 n.2.

39. *Id.*

40. Jamie R. Abrams, *The Feminist Case for Acknowledging Women’s Acts of Violence*, 27 YALE J.L. & FEMINISM 287, 313 (2016).

41. *Id.*

42. *Statistics*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/statistics> (last visited Oct. 31, 2021) [<https://perma.cc/3VK6-PWYL>].

43. SARAH M. PEITZMEIER, MANNAT MALIK, SHANNA K. KATTARI, ELLIOT MARROW, ROB STEPHENSON, MADINA AGÉNOR & SARI L. REISNER, *PARTNER VIOLENCE IN TRANSGENDER POPULATIONS: SYSTEMATIC REVIEW AND META-ANALYSIS OF PREVALENCE AND CORRELATES*, 110 AM. J. PUB. HEALTH, 1 (2020).

44. “LGBTQ” stands for lesbian, gay, bisexual, transgender, and queer. The plus sign is added to include other sexual orientations and gender identities not listed. *GLAAD Media Reference Guide – LGBTQ Terms, 11th Edition*, GAY & LESBIAN ALL. AGAINST DEFAMATION <https://www.glaad.org/reference/terms> (last visited Oct. 6, 2022) [<https://perma.cc/5KZ7-F5HE>].

intimate partner at some point in their lifetime when compared to heterosexual individuals.⁴⁵

Traditionally, the battered woman syndrome theory led to controversy in duress cases but garnered acceptance in the self-defense context.⁴⁶ Possible explanations for this dichotomy are either sympathy for women who kill their abusers, or a lack of sympathy for abusers who are killed.⁴⁷ Courts can distinguish the affirmative defense of duress from self-defense because the crimes are committed against third parties, not the aggressor. Crimes committed under duress are done in cooperation with the aggressor, or, as in the *Dingwall* case, the abuser.

Battered woman syndrome is accepted more often in the context of self-defense cases, although some argue that the theory of battered woman syndrome better explains crimes committed under duress than crimes committed in self-defense.⁴⁸ Scholars argue that if battered woman syndrome accurately describes why domestic violence victims might act a certain way, then, in theory, the variance of acceptance of battered woman syndrome in the context of self-defense versus duress is unexplainable.⁴⁹ However, the duress defense may be less favored due to the moral preference of defensive force over coerced force and the fact that the duress defense excuses crimes that are committed against innocent third parties.⁵⁰ Some critics of battered woman syndrome testimony argue that it holds men and women to different standards and implies that women do not have the same capacity for self-governance as men.⁵¹

ii. Expert Testimony on Battered Woman Syndrome

Dingwall attempted to admit evidence of expert testimony of battering and its effects to support her duress defense. Rule 702 of the Federal Rules of Evidence governs admissibility of expert testimony.⁵² An expert may testify in the form of an opinion if their specialized knowledge in the subject matter helps the trier of fact to understand the evidence or determine a fact in issue.⁵³ Rule 401 of the Federal Rules of Evidence governs relevant testimony.⁵⁴ The rule provides that evidence is relevant if: (1) it has any tendency to make a fact more

45. LYNNE BREWER-MUSE, *DOMESTIC VIOLENCE AND THE LGBTQ COMMUNITY*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE (June 6, 2018, 10:49 AM), <https://ncadv.org/blog/posts/domestic-violence-and-the-lgbtq-community> [https://perma.cc/5MZX-9SDE].

46. Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 220 (2002).

47. *Id.* at 249.

48. *Id.* at 265.

49. *Id.*

50. *Id.*

51. Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1, 6 (1994).

52. FED. R. EVID. 702.

53. *Id.*

54. FED. R. EVID. 401.

or less probable than it would be without the evidence and (2) the fact is of consequence in determining the action.⁵⁵

Concerns about the use of battered woman syndrome evidence led the Department of Justice to issue a report on the use of evidence of battering in criminal defense trials.⁵⁶ The report emphasized that a “battered woman’s defense” in itself does not exist, and expert testimony in cases involving domestic abuse should only be used to support a claim of duress, not replace it.⁵⁷ Critics of this kind of expert testimony claim that it will lead to unreasonable acquittals, but such evidence’s admission is not synonymous with acquittal.⁵⁸ Critics may fear that allowing evidence of battering and its effects to support a duress defense sets the bar too low, especially in situations where the violent partner is not present during the crime. However, in a study of appeals involving battered women defendants, 63% of the convictions were upheld, even though 70% of the cases admitted evidence of battering and its effects.⁵⁹ Therefore, the opportunity to present evidence of battering and its effects does not equate to acquittal.

Dr. Darnald Hanusa created an expert report for Dingwall from the Midwest Domestic Violence Resource Center.⁶⁰ Dingwall was diagnosed with post-traumatic stress disorder (PTSD) and battered woman syndrome.⁶¹ Battered woman syndrome is defined in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5),⁶² and Dr. Hanusa stated that Dingwall was a victim of what he described as an “extraordinarily extreme case of relationship abuse.”⁶³ In his report, he noted that abuse can affect the victim’s cognition and perception, including “a loss of assumption of safety” and an increased tolerance for “cognitive inconsistency” to adjust to the partner’s unpredictable conduct.⁶⁴ He explained that when this occurs a person’s capacity to evaluate options is “diminished substantially,” and a person will likely take whatever action has the highest predictability of stopping the violence against them, even if it is detrimental to their well-being.⁶⁵ In Dingwall’s case, Dr. Hanusa argued that the only thing that would plausibly stop Stanley’s abusive behavior was for Dingwall to do exactly what Stanley told her to do, even if it meant committing a crime like robbery.⁶⁶

55. *Id.*

56. See NAT’L INST. OF JUST., U.S. DEP’T OF JUST. & NAT’L INST. OF MENTAL HEALTH, U.S. DEP’T OF HEALTH & HUM. SERVS., THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS (1996), <https://www.ojp.gov/pdffiles/batter.pdf> [<https://perma.cc/QJ4G-4UMC>].

57. *Id.* at i–ii.

58. *Id.* at iv.

59. *Id.* at iii–iv.

60. United States v. Dingwall, 6 F.4th 744, 749 (7th Cir. 2021).

61. *Id.*

62. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

63. *Dingwall*, 6 F.4th at 749.

64. *Id.*

65. *Id.*

66. *Id.*

C. United States v. Dingwall Arguments

The Seventh Circuit held in *Dingwall* that expert evidence on battering and its effects could help Dingwall meet her burden on both elements of her duress defense.⁶⁷ This holding is essential for defendants who are facing criminal charges as a result of their victimization.

The government did not dispute that Dingwall suffered severe abuse or that her history of abuse should be considered after her conviction and during sentencing.⁶⁸ However, the government argued that domestic violence should not be an “absolute excuse” for Dingwall’s decision to commit armed robberies.⁶⁹ Additionally, the government noted in its brief that Dingwall stated that she had committed the robberies because she needed rent money and acted alone.⁷⁰ What Dingwall did not share was that Stanley began to “hound” her to help pay for expenses so that she and her daughter could live in the apartment.⁷¹ She later stated that it was Stanley’s idea for her to commit the robberies, and she did it to “keep him happy” and “high on crack,” since he didn’t abuse her when he was high.⁷²

The government also focused on the fact that Stanley never directly threatened Dingwall with violence if she did not commit the charged offenses.⁷³ Specifically, it noted that Stanley didn’t even know about the second robbery.⁷⁴ It also argued that Stanley forced Dingwall to obtain money—not commit armed robbery—as he was still under the impression that Dingwall’s parents would provide money for him and Dingwall.⁷⁵ The government focused on the “imminent” danger requirement of a duress defense, arguing that Dingwall feared future harm—as opposed to imminent harm—and was therefore not entitled to a duress defense.⁷⁶

Contrary to the government’s argument, the duress defense does not require a direct threat of violence (such as the quintessential example of having a gun to your head). Instead, its two elements require (1) reasonable fear of imminent death or serious injury, (2) and the absence of reasonable, legal alternatives to committing the crime.⁷⁷ Given Stanley’s repeated abuse, Dingwall had a reasonable fear of death or serious injury if she did not produce the money. Given the repeated cycles of abuse she endured and her reliance on Stanley for food and shelter for her and her daughter, Dingwall lacked any reasonable, legal alternatives to committing the crime.

67. *Id.* at 757.

68. Brief for the United States at 14, *United States v. Dingwall*, 6 F.4th 744, 746 (7th Cir. 2021) (No. 20-1394).

69. *Id.*

70. *Id.* at 6.

71. *Id.* at 8.

72. *Id.*

73. *Id.* at 19.

74. *Id.*

75. *Id.*

76. *Id.* at 21.

77. *United States v. Sawyer*, 558 F.3d 705, 711 (7th Cir. 2009).

Although the *Dingwall* case focused on whether expert testimony on battering and its effects should be admitted into evidence, the government also focused on whether the duress defense should even apply to Dingwall.⁷⁸ The government argued that Dingwall only faced the “likely empty” threat of eviction, not substantial injury or death.⁷⁹ It also argued that Dingwall had “ample opportunity” to request help instead of committing the robbery because Stanley was sitting in a parked car down the street and Dingwall had the couple’s only weapon while committing one of the robberies.⁸⁰ This argument oversimplifies Dingwall’s options. Dingwall and her daughter’s housing was dependent on Stanley.⁸¹ Stanley took her food stamp card from her, which took away her ability to feed herself and her daughter independently.⁸² She was unable to return to the addiction treatment center that she had previously attended due to her struggles with addiction.⁸³ Additionally, even if she did leave and stay with a friend or return to a homeless shelter, there was no guarantee that doing so would keep her safe from Stanley’s abuse. In fact, victims of domestic abuse are usually at a greater risk of violence once they leave an abusive situation.⁸⁴

The government also argued that Dingwall could not satisfy the reasonable person standard.⁸⁵ It argued that the standard required for a duress defense cannot be satisfied simply through evidence about how Dingwall would have reacted in a certain circumstance. Further, even if the standard for a duress defense was satisfied, it argued that the defense was not enough to warrant complete mitigation of punishment.⁸⁶ The government further argued that Dingwall’s argument asked the court to change the objective reasonable person standard, which asks how a reasonable person would have reacted in those circumstances, and instead asked to allow a subjective standard of how Dingwall herself would have reacted in certain circumstances.⁸⁷ The government stated that this standard was legally impermissible to satisfy the standard for a duress defense.⁸⁸

Dingwall wanted to use the expert testimony provided by Dr. Hanusa to explain how the abuse she suffered affected her “perceptions, choices, and behavior.”⁸⁹ She argued that a reasonable person *in her situation* could fear imminent death or serious injury if they did not commit the robbery and might not see any other reasonable alternatives to the crimes.⁹⁰

78. Brief for the United States, *supra* note 68, at 14.

79. *Id.* at 15.

80. *Id.*

81. United States v. Dingwall, 6 F.4th 744, 748 (7th Cir. 2021).

82. *Id.*

83. *Id.* at 747.

84. *Why Do Victims Stay*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/why-do-victims-stay> (last visited Sept. 14, 2022) [<https://perma.cc/LRJ4-W5BV>].

85. Brief for the United States, *supra* note 68, at 16.

86. *Id.* at 17.

87. *Id.* at 16.

88. *Id.*

89. United States v. Dingwall, 6 F.4th 744, 751 (7th Cir. 2021).

90. *Id.*

The Seventh Circuit found that expert testimony of battering and its effects could show that Dingwall had a reasonable fear of imminent violence.⁹¹ The court noted that courts frequently consider individual circumstances when applying objective standards such as a “hostile environment” in employment discrimination cases, “communication” in child sexual abuse cases and “excessive force” in law enforcement officer misconduct cases.⁹² Any assessment of the reasonableness of a defendant’s actions must consider the defendant’s particular circumstances.⁹³ For example, a person who has experienced violence at the hands of their partner is more likely to fear death or great bodily harm from a verbal altercation with their partner than a person who has not experienced violence from their partner.⁹⁴ The evidence that Stanley strangled Dingwall⁹⁵ makes her claim of reasonable fear of death or great bodily harm highly persuasive, given that research has shown that non-fatal strangulation is a leading risk factor for homicide of women.⁹⁶

The court also found that expert testimony of battering and its effects could show that Dingwall lacked a reasonable alternative to breaking the law.⁹⁷ The circumstances Dingwall faced would be the focus of the fact-finder’s analysis, even if a reasonable person who has never been battered might conclude that there was an alternative to committing each robbery.⁹⁸ The court stressed that its opinion does not change the role of a district judge in deciding the admissibility of evidence including expert opinions, but the judge cannot “take over the role of a jury in weighing evidence in deciding the credibility of testimony.”⁹⁹ This decision did not guarantee that Dingwall would succeed on her duress defense, but rather stated that the expert testimony was improperly excluded on the grounds that it was not relevant, or insufficient to support a duress defense.¹⁰⁰

II. ANALYSIS

A. *The Criminal Defense of Duress*

The Model Penal Code defines duress as a defense to conduct that an actor engaged in because they were coerced or threatened by the use of unlawful force that a reasonable person in their situation would be “unable to resist.”¹⁰¹ The

91. *Id.* at 757–58.

92. *Id.* at 755–56.

93. *Id.* at 757.

94. Stephanie M. Wildman & Dolores A. Donovan, *Is the Reasonable Man Obsolete?: A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435, 445–46 (1980).

95. *Dingwall*, 6 F.4th at 748.

96. *See, e.g.*, NANCY GLASS, KATHRYN LAUGHON, JACQUELYN CAMPBELL, CAROLYN REBECCA BLOCK, GINGER HANSON, PHYLLIS W. SHARPS & ELLEN TALIAFERRO, *NON-FATAL STRANGULATION IS AN IMPORTANT RISK FACTOR FOR HOMICIDE OF WOMEN*, 35 J. EMERGENCY MED. 329 (2008).

97. *Dingwall*, 6 F.4th at 758.

98. *Id.*

99. *Id.* at 760–61.

100. *Id.* at 761.

101. MODEL PENAL CODE § 2.09(1) (AM. L. INST., 1962).

criminal defense of duress is rarely asserted and is known to be a difficult defense to “conceptualize and justify” compared to other criminal law defenses.¹⁰² Duress is an affirmative defense, meaning that it is raised as a defense during trial, not used as a mitigating factor in sentencing.¹⁰³ Duress is similar to a necessity defense in that it protects against crimes committed under threat, but differs in that necessity relates to natural threats and duress relates to manmade threats.¹⁰⁴ Additionally, a duress defense involves more than two parties, since the defendant is committing a crime against someone other than the person threatening the defendant, unlike self-defense cases.¹⁰⁵ A duress defense also differs from self-defense in that many jurisdictions do not allow a criminal defendant to assert a duress defense for certain crimes such as intentional homicide.¹⁰⁶ For example, in Wisconsin, there is no complete duress defense for first-degree intentional homicide. Instead, the statute allows mitigation from first to second-degree intentional homicide if duress is established.¹⁰⁷

The defense of duress has existed under common law for centuries and all Anglo-American jurisdictions allow duress as a defense to criminal conduct, but the defenses may differ based on jurisdiction.¹⁰⁸ For example, some jurisdictions require that the crime committed by the defendant be “less severe than the harm threatened to coerce the actor into committing that crime.”¹⁰⁹ Other jurisdictions do not allow a duress defense if the threat is made towards a third party and not the actor themselves.¹¹⁰

B. Different Approaches Various Federal Courts Have Taken to Analyze Evidence of Abuse and its Effects for the Affirmative Defense of Duress

Because there is a circuit split, the jurisdiction in which a criminal defendant is prosecuted can determine whether or not evidence of battering and its effects is allowed to support a duress defense.¹¹¹ In *Dingwall*, the Seventh Circuit held that a reasonable jury could find that Dingwall’s actions were justified because the threat of Stanley’s violence satisfied the element of duress

102. Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse-And Why It Matters*, 6 BUFF. CRIM. L. REV. 833, 833 (2003).

103. See, e.g., WIS. STAT. ANN. § 939.46 (West 2022) (explaining that coercion is a defense to a prosecution for a crime) (emphasis added).

104. Compare *id.*, with WIS. STAT. ANN. § 939.47 (West 2022).

105. Westen & Mangiafico, *supra* note 102, at 855.

106. Paul H. Robinson, Matthew G. Kussmaul, Camber M. Stoddard, Ilya Rudyak & Andreas Kuersten, *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37, 90 (2015).

107. § 939.46.

108. Westen & Mangiafico, *supra* note 102, at 836–37.

109. Robinson et al., *supra* note 106, at 89.

110. See *id.* at 91.

111. See generally *United States v. Lopez*, 913 F.3d 807 (9th Cir. 2019); *Nwoye II*, 824 F.3d 1129 (D.C. Cir. 2016); *Dando v. Yukins*, 461 F.3d 791 (6th Cir. 2006); *United States v. Willis*, 38 F.3d 170 (5th Cir. 1994), *United States v. Navedo-Ramirez*, 781 F.3d 563 (1st Cir. 2015); *United States v. Dixon*, 901 F.3d 1170 (10th Cir. 2018).

that required a reasonable person to fear imminent death or violence.¹¹² The court sided with the Sixth, Ninth, and D.C. Circuits in its decision regarding the admission of expert testimony of battering and its effects in cases where a duress defense is raised.¹¹³ In contrast, the First, Fifth, and Tenth Circuits have held that this type of evidence is not admissible.¹¹⁴

i. Federal Courts that Include Evidence

In 2006, the Sixth Circuit set the federal precedent to formally allow the introduction of evidence of battering and its effects in a duress defense.¹¹⁵ In *Dando v. Yukins*, the court found that Dando's trial counsel was ineffective for not exploring a duress defense and introducing evidence of battered woman syndrome.¹¹⁶ Dando committed a string of armed robberies and assaults with her boyfriend.¹¹⁷ She was charged with "three counts of armed robbery, one count of conspiracy to commit armed robbery, two counts of assault with intent to rob while armed, and two counts of unlawful possession or use of a financial transaction device."¹¹⁸ Dando had a long history of sexual and physical abuse from her partner and told her attorney that he had threatened to kill her right before she committed the crimes for which she was charged.¹¹⁹ Despite Dando's attempt to explain her history of violence from her boyfriend, the court-appointed counsel recommended that she plead no contest to all charges and refused to request mental health expert assistance, stating that the expert would "cost too much money."¹²⁰

The Sixth Circuit's language in deciding *Yukins* bears similarity to the *Dingwall* opinion, stating that "a reasonable person in her situation would likely have feared death or serious bodily harm" given the history of domestic violence in Dando's relationship.¹²¹ Although *Yukins* differs from *Dingwall* in that *Dingwall*'s attorney did raise a duress defense, the cases are similar because Dando argued that she only committed the crimes because she felt that her life was at risk, just like *Dingwall*.

In 2016, the D.C. Circuit decided *United States v. Nwoye*, where the defendant was convicted of extortion.¹²² The defendant wanted to present a duress defense even though the abuser was not physically present.¹²³ In fact, he was actually on the other side of the country when the crimes were committed,

112. See *United States v. Dingwall*, 6 F.4th 744, 746 (7th Cir. 2021).

113. *Id.*

114. See *Willis*, 38 F.3d at 171; *Navedo-Ramirez*, 781 F.3d at 563-64; *Dixon*, 901 F.3d at 1170.

115. See *Yukins*, 461 F.3d at 791.

116. See *id.* at 800-01.

117. *Id.* at 793.

118. *Id.* at 794.

119. *Id.*

120. *Id.*

121. Compare *id.* at 802, with *United States v. Dingwall*, 6 F.4th 744, 754 (7th Cir. 2021).

122. *Nwoye II*, 824 F.3d 1129 (D.C. Cir. 2016).

123. See *id.* at 1131-32.

but he was monitoring and repeatedly threatening Nwoye.¹²⁴ When he was around her he would beat her and strangle her, and he would often threaten to kill her and bury her inside his house.¹²⁵ The court held that “although a jury might not find the appearances sufficient to provoke a reasonable person’s fear, they might conclude otherwise as to a reasonable person’s perception of the reality when enlightened by expert testimony on the concept of hypervigilance.”¹²⁶ This sentiment is echoed in *Dingwall*, where the court offers no promise of success, but concludes that this kind of expert testimony does inform the fact-finder of the reasonableness of the defendant’s actions.¹²⁷ *Dingwall* presents an even stronger case for duress than *Nwoye* because Stanley was living in the same city and home as Dingwall, making her fear of his actions even more reasonable.¹²⁸

Most recently, in 2019 the Ninth Circuit said that expert testimony of battering and its effects could be used in *United States v. Lopez*.¹²⁹ In this case, Lopez was charged for buying a gun for her abuser.¹³⁰ The abuser later used the gun purchased by Lopez to take his own life after a car chase with police.¹³¹ The opinion stated that expert testimony can be used to explain how a reasonable person can nonetheless be trapped and controlled by another “at all times even if there is no overt threat at any given moment.”¹³² In *Dingwall*, Stanley did not hold a gun to Dingwall’s head and force her to commit the robberies at the moment.¹³³ However, Stanley made it clear that if she did not do as he asked, there would be life-threatening consequences.¹³⁴

Before the *Dingwall* decision, the Seventh Circuit decided *United States v. Young*, a case where the government requested the introduction of evidence of battering and its effects when a victim recanted her account of the violence she experienced.¹³⁵ The government introduced testimony to explain that recanting was common with victims of violence and that the fact that the victim recanted did not mean that she was not credible.¹³⁶ The majority in *Young* stated, “it would seem anomalous to allow a battered woman, where she is a criminal defendant, to offer this type of expert testimony to help the jury understand the actions she took yet deny her that same opportunity when she is the complaining witness and/or victim and her abuser is the criminal defendant.”¹³⁷ The court in *Dingwall*

124. *Id.* at 1132.

125. *Id.*

126. *Id.* at 1137 (*quoting* *People v. Humphrey*, 921 P.2d 1, 17 (Cal. 1996) (Brown, J. concurring)).

127. *United States v. Dingwall*, 6 F.4th 744, 761 (7th Cir. 2021).

128. *See id.* at 748.

129. *See United States v. Lopez*, 913 F.3d 807, 807 (9th Cir. 2019).

130. *See id.* at 812–13.

131. *Id.* at 813.

132. *Id.* at 820 (*quoting* *United States v. Marengi*, 893 F. Supp. 85, 95 (Me. 1995)).

133. *United States v. Dingwall*, 6 F.4th 744, 748 (7th Cir. 2021).

134. *Id.*

135. *United States v. Young*, 316 F.3d 649 (7th Cir. 2002).

136. *Dingwall*, 6 F.4th at 753.

137. *Id.* at 754.

cited this prior case, stating that the government's position was inconsistent.¹³⁸ The government's changing position in these "similar contexts" demonstrated that there may be "significant value" in the evidence of battering and its effects that Dingwall sought to introduce.¹³⁹

ii. Federal Courts that Exclude Evidence

In 1994, the Fifth Circuit held in *United States v. Willis* that battered woman syndrome evidence was "irrelevant."¹⁴⁰ Willis sold marijuana to an undercover officer and had a gun in her purse.¹⁴¹ She was convicted of carrying a firearm during the commission of a drug trafficking crime.¹⁴² Similar to Dingwall, the defendant admitted that she was involved, but raised the affirmative defense of duress due to fear of violence from her partner and argued that if she would not have allowed him to put his gun in her purse he would have beaten her in a restaurant.¹⁴³ The court stated that expert testimony regarding the abuse that Willis suffered couldn't be admitted because it related to the defendant's subjective weakened mental condition.¹⁴⁴ However, the court said that it could be used for mitigation in sentencing.¹⁴⁵ In *Dingwall*, the government cited this case in its brief, stating that "a battered woman's generalized fear of her abuser, though genuine and profound, provokes our sympathy, but [it] cannot provoke the application of legal standard of duress whose essential elements are absent."¹⁴⁶ *Willis* was decided in 1994 and the Fifth Circuit has not heard this issue since.¹⁴⁷ Although *Willis*-backed arguments may have held persuasive merit thirty years ago, society's understanding of domestic violence and its effects have vastly changed.

In 2015, the First Circuit excluded a doctor's testimony regarding the defendant's diagnosis of battered woman syndrome in *United States v. Navedo-Ramirez*, but still voiced support for admitting relevant testimony of abuse.¹⁴⁸ After she was charged with various offenses involving drugs and weapons, Navedo-Ramirez wanted to testify that she had a long history of suffering from domestic abuse and sexual assault by various men.¹⁴⁹ The court excluded a doctor's testimony on battered woman syndrome, finding that it would not be helpful to the jury because Navedo-Ramirez's testimony had adequately conveyed that she participated in the drug transaction because she feared for her

138. *Id.*

139. *Id.*

140. *United States v. Willis*, 38 F.3d 170, 177 (5th Cir. 1994) (citing *United States v. Triplett*, 922 F.2d 1174, 1183 (5th Cir. 1991)).

141. *Id.* at 173.

142. *Id.*

143. *Id.* at 174.

144. *Id.* at 175.

145. *Id.* at 176.

146. Brief for the United States, *supra* note 68, at 23.

147. *Willis*, 38 F.3d at 177.

148. *United States v. Navedo-Ramirez*, 781 F.3d 563, 567 (1st Cir. 2015).

149. *Id.* at 565–66.

son's life and her own.¹⁵⁰ However, the First Circuit agreed that, in general, testimony about the long-term effects of being battered or domestic violence could be relevant in a case where a defendant claimed that she engaged in criminal activity only because she was forced by an abusive domestic partner.¹⁵¹ Therefore, even though the First Circuit excluded Navedo-Ramirez's testimony, it still recognized that it could be relevant in cases with facts similar to *Dingwall*.

In 2018, the Tenth Circuit held in *United States v. Dixon* that expert testimony did not address the objective reasonableness of the defendant's behavior.¹⁵² Dixon, a 21-year-old woman, embezzled money due to her financial situation at home.¹⁵³ Dixon supported her mother, who is disabled, and had been sexually abused by her stepfather since she was twelve years old.¹⁵⁴ Her stepfather was asked to leave the home, so he cut off all financial support and said he would only help with finances if he was allowed to live in the home.¹⁵⁵ The court called the battering and its effects "non-tangible psychological conditions" because it was not an "external, concrete" factor.¹⁵⁶

In *Dingwall*, the government mirrored this argument and provided two examples of non-tangible psychological conditions that it deemed would be permissible: colorblindness, which a court may use to consider "what a reasonable person who is unaware of certain color-related facts might do," and a photographic memory, which a court may use to consider what a reasonable person "with access to such knowledge might do."¹⁵⁷ The government focused on narrow conditions that it deemed permissible for a "reasonable person" analysis.¹⁵⁸ Such an argument ignores the fact that courts often consider non-tangible psychological conditions. For example, in Wisconsin, when looking at intent,¹⁵⁹ mental disease or defect,¹⁶⁰ or adequate provocation, courts must focus on the state of mind of the defendant,¹⁶¹ which often requires insight into the psychological conditions of the defendant. *Dingwall* was able to offer evidence of expert testimony that she suffered from battered woman syndrome, which is a tangible, diagnosable condition and an "external, concrete" factor.

C. Policy Implications of the *Dingwall* Decision

The *Dingwall* holding and its implications do not live within the pages of the Seventh Circuit's decision. The holding allows victim-survivors who face

150. See *id.* at 568.

151. *Id.*

152. *United States v. Dixon*, 901 F.3d 1170, 1181 (10th Cir. 2018).

153. *Id.* at 1173–74.

154. *Id.* at 1174.

155. *Id.*

156. *Id.* at 1183.

157. Brief for the United States, *supra* note 68, at 33.

158. *Id.*

159. See WIS. STAT. ANN. § 939.23 (West 2022).

160. See WIS. STAT. ANN. § 971.15 (West 2022).

161. See WIS. STAT. ANN. § 939.44(b) (West 2022) ("‘Provocation’ means something which the defendant reasonably believes the intended victim has done which causes the defendant to lack self-control completely at the time of causing death").

incarceration because they committed a crime under duress to use evidence of battering and its effects to prove their duress defense. Additionally, it validates the experiences of victim-survivors and promotes more just outcomes in our criminal justice system.

The Seventh Circuit called *Dingwall* a “rare case” in the majority opinion.¹⁶² While it is true that the specific facts of *Dingwall* are unique to her experience, the intersection between domestic violence and incarceration is commonplace. According to the ACLU, 79% of women in federal and state prisons reported physical abuse and over 60% reported past sexual abuse.¹⁶³ Women convicted of violent crimes are more likely to have experienced violence and to be incarcerated because they responded to that abuse violently.¹⁶⁴ Although not every incarcerated woman is in prison due to victimization, the high correlation between victims of prior violence and subsequent incarceration demonstrates the *Dingwall* holding’s importance.

i. De-Criminalizing Domestic Violence Victims

In general, societal norms and perceptions of domestic violence have changed drastically. Family and intimate partner violence was previously deemed as a private family matter and not a criminal act.¹⁶⁵

In the 1970s, intimate partner violence began to be recognized as a social and legal problem.¹⁶⁶ Feminist movements in the 1960s and 1970s helped reform criminal justice policy to criminalize intimate partner violence.¹⁶⁷ The Violence Against Women Act (“VAWA”) was not passed by Congress until 1994 and domestic violence was not recognized as a federal crime until 1996.¹⁶⁸ This allowed federal law to address some of the domestic violence cases that were overburdening state and local criminal justice systems.¹⁶⁹

The delay in addressing domestic violence within the criminal justice system is also mirrored in public opinion.¹⁷⁰ Respondents to a survey on domestic violence awareness and perceptions were confident on which acts of physical aggression should be labeled as domestic violence, but varied in certainty

162. United States v. Dingwall, 6 F.4th 744, 746 (7th Cir. 2021).

163. ACLU, *supra* note 16.

164. *Id.*

165. See Richard Johnson, *Changing Attitudes About Domestic Violence*, 50 L. & ORDER 60 (2002).

166. See Bonnie E. Carlson & Alissa Pollitz Worden, *Attitude and Beliefs About Domestic Violence: Results of a Public Opinion Survey*, 20 J. INTERPERSONAL VIOLENCE 1197, 1197 (2005).

167. See Leigh Goodmark, *Should Domestic Violence be Decriminalized?*, 40 HARV. J.L. & GENDER 53 (2017) for a discussion on the division in feminist movements. Factions of the movement oppose criminalization of domestic violence because it disproportionately sends people of color and low-income people to prison. Instead, some groups argue for abolishing the carceral state and increasing support services and education.

168. W. Dist. of Tenn., The U.S. Attorney’s Off., *Federal Domestic Violence Laws*, DEP’T OF JUST. (May 26, 2020), <https://www.justice.gov/usao-wdtn/victim-witness-program/federal-domestic-violence-laws> [<https://perma.cc/9LRZ-UXRJ>].

169. *Id.*

170. See generally Carlson & Pollitz Worden, *supra* note 166.

regarding whether other abusive behaviors should be considered illegal.¹⁷¹ In general, respondents were less likely to label a woman's aggressive behavior as domestic violence compared to a man's aggressive behavior.¹⁷² However, the respondents' gender, age, and secondhand familiarity with domestic violence incidents played a role in opinions and beliefs surrounding domestic violence.¹⁷³

The #MeToo movement, started by Tarana Burke, increased awareness on the dynamics of sexual abuse and gender-based violence.¹⁷⁴ Burke increased public understanding of not only domestic abuse, but also the criminalization of abuse survivors.¹⁷⁵

Despite these changing attitudes, underserved communities remain disproportionately affected by domestic violence and its effects.¹⁷⁶ For example, Black women experience domestic violence at a higher rate than white women and are imprisoned at nearly twice the rate.¹⁷⁷ Additionally, some studies show that Black women are convicted for killing their abusive husbands at nearly twice the rate of white women.¹⁷⁸ One reason that women of color are more likely to be arrested and convicted even though they are victims relates to mandatory arrest policies for domestic violence.¹⁷⁹ A New York City study found that, of the women who had been arrested with their abusers or arrested as a result of a complaint from their abusers, 66% were African American or Latina, and 43% were living below the poverty line.¹⁸⁰ A study of women who were incarcerated at Rikers Island in New York found that "most of the domestic violence survivors interviewed reported engaging in illegal activity in response to experience of abuse, the threat of violence, or coercion by a male partner."¹⁸¹ Another study showed that, of the 525 women living at a mental health center who were abused and had committed at least one crime, nearly half of the women had been coerced into committing crimes by their abusers as "part of a structural sequence of actions in a climate of terror and diminished, violated sense of self."¹⁸²

171. *Id.* at 1206.

172. *Id.*

173. *Id.* at 1213–14.

174. See Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45 (2019).

175. Victoria Law, *When Abuse Victims Commit Crimes*, ATLANTIC (May 21, 2019), <https://www.theatlantic.com/politics/archive/2019/05/new-york-domestic-violence-sentencing/589507/> [<https://perma.cc/SSM4-DH8A>].

176. Susan Green, *Violence Against Black Women – Many Types, Far-reaching Effects*, INST. FOR WOMEN'S POL'Y RSCH., <https://iwpr.org/iwpr-issues/race-ethnicity-gender-and-economy/violence-against-black-women-many-types-far-reaching-effects/> (last visited Oct. 31, 2021) [<https://perma.cc/3P4S-C5C6>]; see also E. Ann Carson, *Prisoners in 2016*, BUREAU OF JUST STAT., U.S. DEP'T OF JUST. (2018), <https://bjs.ojp.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/4END-AXF6>].

177. Green, *supra* note 176; Carson, *supra* note 176, at 13.

178. Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA L. REV. 191, 197 (1991).

179. GREGG D. CARUSO, REJECTING RETRIBUTIVISM: FREE WILL, PUNISHMENT, AND CRIMINAL JUSTICE, 235 (2021).

180. *Id.*

181. *Id.*

182. *Id.*

In 2006, Cyntoia Brown was convicted of aggravated robbery and first-degree murder and sentenced to life in prison for the murder of Johnny Allen, a 43-year-old man.¹⁸³ In 2004, Brown, then 16 years old, went home with Allen for sex after being picked up at a Sonic drive-in in Nashville, Tennessee.¹⁸⁴ Brown shot and killed Allen when she believed that she saw him reaching for a gun.¹⁸⁵ She left with Allen's firearms and money, and she used his pickup truck to drive away.¹⁸⁶ Brown claimed that she acted in self-defense, but prosecutors argued that she shot Allen to rob him.¹⁸⁷ Brown never testified at her trial, but during her appeal she testified that, at the time of the murder, she was in an abusive relationship with a drug dealer who forced her into sex trafficking.¹⁸⁸

Brown, a woman of color, was a minor at the time of the crime and was a victim of sex trafficking.¹⁸⁹ She was still sentenced to life in prison.¹⁹⁰ She served fifteen years of her sentence before she was granted clemency by then-governor of Tennessee Bill Haslam.¹⁹¹ In 2017, Brown's case went viral with the rise of the #MeToo movement and even garnered attention from celebrities like Rihanna and Kim Kardashian.¹⁹² Kardashian retweeted a popular image that garnered over 176,000 retweets and 460,000 likes, stating:

Imagine at the age of 16 being sex-trafficked by a pimp named 'cut-throat.' After days of being repeatedly drugged and raped by different men you were purchased by a 43-year-old child predator who took you to his home to use you for sex. You end up finding enough courage to fight back and shoot and kill him. Your [sic] arrested as a result tried and convicted as an adult and sentenced to life in prison. This is the story of Cyntoia Brown. She will be eligible for parole when she is 69 years old. #FreeCyntoiaBrown.¹⁹³

Cyntoia Brown's case focused on her use of force in the context of self-defense because Brown was only in her situation because she was forcefully being sex trafficked and her crime was committed during the commission of that illegal act.¹⁹⁴ Her facts likely wouldn't support a duress defense, but her case brought global attention to the issue of criminalizing victims of abuse and the

183. Bobby Allyn, *Cyntoia Brown Released After 15 Years in Prison for Murder*, NPR (Aug. 7, 2019, 12:24 PM ET), <https://www.npr.org/2019/08/07/749025458/cyntoia-brown-released-after-15-years-in-prison-for-murder> [https://perma.cc/75Y9-SLAY].

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. Kim Kardashian (@KimKardashian), TWITTER (Nov. 21, 2017, 9:57 AM), <https://twitter.com/kimkardashian/status/933001503123554304?lang=en> [https://perma.cc/2AME-NSX5].

194. Allyn, *supra* note 183.

lack of resources and justice available for survivors of violence who have been charged with crimes related to their victimization.

Some states have made efforts to change their legislation to address this issue. In the 2019-2020 legislative session, New York passed Senate Bill 1077, allowing a judge to consider whether abuse is directly related to a person's crime.¹⁹⁵ If so, the judge can choose to depart from the state's sentencing guidelines for violent felonies, extending to both acts of self-defense and coercion by the abuser.¹⁹⁶ If the judge finds abuse to be a significant factor, they have the discretion to sentence the victims to an "alternative-to-incarceration" program.¹⁹⁷ This act also allows survivors who are already incarcerated to petition for resentencing under the new guidelines.¹⁹⁸

Similarly, in 2016, Illinois passed a law directing judges to consider the role of abuse during sentencing.¹⁹⁹ Survivors who are already imprisoned can petition for resentencing if evidence of abuse was not presented during sentencing.²⁰⁰ This law, however, only provides an opportunity for resentencing after a criminal conviction and does not provide an absolute bar to the conviction the way a duress defense would in many jurisdictions.²⁰¹

The Supreme Court of Wisconsin addressed crimes committed as a direct result of victimization, and specifically human trafficking, in July 2022.²⁰² Chrystul Kizer met Randy Volar, a thirty-three-year-old white man, when she was sixteen years old.²⁰³ He abused her and about a dozen other underage Black girls, even filming portions of this abuse.²⁰⁴ In February of 2018, a fifteen-year-old girl called the police from Volar's home.²⁰⁵ She pleaded that a man had given her drugs and was going to kill her before abruptly ending the call.²⁰⁶ Later, police found her wandering the streets wearing only a bra and jacket and under the influence of LSD.²⁰⁷ After police searched Volar's home, he was arrested on child sexual assault charges but was released without bail.²⁰⁸ Police proceeded to sit on the case for three months before sending the case to the district attorney's office.²⁰⁹

195. Law, *supra* note 175; *see also* N.Y. CRIM. PROC. LAW § 440.47(1)-(2) (McKinney 2022).

196. Law, *supra* note 175.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *See* Robinson et. al., *supra* note 106 at 90.

202. State v. Kizer, 2022 WI 58, 403 Wis. 2d 142, 976 N.W.2d 356.

203. Jessica Contrera, *He Was Sexually Abusing Underage Girls. Then, Police Said, One of Them Killed Him*, WASH. POST (Dec. 17, 2019), <https://www.washingtonpost.com/graphics/2019/local/child-sex-trafficking-murder/> [https://perma.cc/87SM-F8YJ].

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

In June of 2018, Volar paid for Chrystul, then seventeen, to take an Uber from Milwaukee to his home in Kenosha.²¹⁰ Chrystul stated that when she told Volar that she didn't want to have sex with him, he pinned her to the floor.²¹¹ She then shot him, set a fire in the home, and left in his car.²¹² She confessed to these events days later and was charged with arson, along with first-degree intentional homicide.²¹³

Under Wisconsin law, victims of human trafficking or child sex trafficking have "an affirmative defense for any offense committed as a direct result" of the trafficking.²¹⁴ The Wisconsin Supreme Court held that this is a complete defense to charges of first-degree intentional homicide even if no one was prosecuted or convicted for the trafficking.²¹⁵ The Court explained that an offense is "committed as a direct result" of trafficking if there is a "logical, causal connection between the offense and trafficking such that the offense is not the result, in significant part, of other events, circumstances, or considerations apart of the trafficking violation."²¹⁶

Other states have similar statutes that provide affirmative defenses to crimes if the defendant was coerced to commit the crime and had a reasonable fear of harm, but only if the defendant is a victim of human trafficking.²¹⁷ Recent case law and legislation reveal shifting attitudes surrounding punishment for crimes committed as a result of victimization, but more work needs to be done to protect victims, including those not subject to human trafficking. Crimes like Dingwall's invoke the same policy justifications that are used for trafficking defenses; a causal connection between the offense and violence and reasonable fear, but Dingwall was unable to submit evidence of the abuse she suffered and its effects to raise a duress defense.²¹⁸

Criminalizing actions like Dingwall's has grievous societal implications. Close to 2 million people in the United States are incarcerated and an estimated 79 million people have a criminal record.²¹⁹ Around 113 million U.S. adults have an immediate family member that has been to prison or jail.²²⁰ In a global context, as of September of 2021, the Prison Policy Initiative found that the U.S. has the highest incarceration rate in the world, but even more shockingly found that every single state in the United States "incarcerates more people per capita than

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. See WIS. STAT. ANN. § 939.46(1m) (West 2022).

215. See *State v. Kizer*, 2022 WI 58, 403 Wis. 2d 142, 976 N.W.2d 356.

216. *Id.* at 358.

217. See, e.g., *In re D.C.*, 275 Cal. Rptr. 3d 191 (Cal. Ct. App. 2021) (interpreting CAL. PEN. CODE § 236.23(a) (West 2022)).

218. *United States v. Dingwall*, 6 F.4th 744, 746–47 (7th Cir. 2021).

219. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POLICY INITIATIVE (MAR. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> [<https://perma.cc/YS2K-XFDP>].

220. *Id.*

virtually any independent democracy on earth.”²²¹ Independent of other social or economic factors, children with parents who are incarcerated or were formerly incarcerated are more likely to “drop out of school, develop learning disabilities, misbehave in school,” and experience homelessness.²²² They are also more likely to suffer from physical conditions such as migraines, asthma, and high cholesterol, as well as psychological conditions including depression, anxiety, and post-traumatic stress disorder (“PTSD”).²²³

Children regularly suffer adverse health consequences from being exposed to intimate partner violence (“IPV”).²²⁴ Such adverse outcomes include an increased risk of “psychological, social, emotional and behavioral problems including mood and anxiety disorders, PTSD, substance abuse and school-related problems in children and adolescents.”²²⁵ Children that are exposed to IPV also face an increased risk of physical, sexual, and emotional abuse, as well as neglect.²²⁶ In extreme cases of abuse, children are at a high risk of acute harm and death.²²⁷ In Dingwall’s case, her daughter lived in a home where domestic violence occurred.²²⁸ Then, Dingwall was arrested for crimes that resulted from her victimization and was subsequently incarcerated.²²⁹ Domestic violence impacts those far beyond the victim, and repeated incarceration of victims does nothing to address the harm done to children in the home, nor does it address the mass incarceration crisis in the United States.

Within the criminal justice system, there has also been a change in judicial education and an increased awareness of the dynamics of intimate partner violence. In a Department of Justice commission report on *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials*, there was a “strong consensus” among the researchers, judges, prosecutors, and defense attorneys interviewed that battered woman syndrome does not “adequately reflect the breadth or nature of the scientific knowledge now available concerning battering and its effects.”²³⁰

Judges play a crucial role in criminal justice reform. Judicial education on the dynamics of domestic and sexual violence is important to ensure that victims of violence are not re-victimized in the courtroom. In 1998, the National Judicial

221. Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL’Y INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html> [<https://perma.cc/7EXL-TM5N>].

222. Leila Morsy & Richard Rothstein, *Mass Incarceration and Children’s Outcomes*, ECON. POL’Y INST. (Dec. 22, 2016), <https://www.epi.org/publication/mass-incarceration-and-childrens-outcomes/> [<https://perma.cc/L2VG-Z54V>].

223. *Id.*

224. C. Nadine Wathen & Harriet L. MacMillan, *Children’s Exposure to Intimate Partner Violence: Impacts and Interventions*, 18 PAEDIATRICS CHILD HEALTH 419, 419 (2013).

225. *Id.*

226. *Id.*

227. *Id.* at 419–20.

228. *United States v. Dingwall*, 6 F.4th 744, 748 (7th Cir. 2021).

229. *Id.* at 750.

230. NAT’L INST. OF JUST., U.S. DEP’T OF JUST. & NAT’L INST. OF MENTAL HEALTH, U.S. DEP’T OF HEALTH & HUM. SERVS., *supra* note 56, at i–ii.

Institute on Domestic Violence was formed.²³¹ Since then, the Institute has provided interactive, skills-based domestic violence workshops for over 9,000 judges and other judicial officers across the United States.²³² In Wisconsin, the law requires judges to complete 60 credits of judicial continuing education during their six-year term yet most of the required credits can be used on various topics.²³³ More judges and justices must be informed on the implications of domestic violence, specifically in the context of criminal defendants that are survivors of violence. Doing so will help mitigate the criminalization of victimization, leading to fewer instances of mass incarceration.

CONCLUSION

The Seventh Circuit was correct to allow the admission of expert testimony of battering and its effects to support a duress defense. The *Dingwall* decision set an important precedent for survivors of violence who have been charged with crimes related to their victimization. To meet her burden of proof on her affirmative defense of duress, Dingwall needed to show that she (1) was threatened with imminent violence if she did not commit the charged offenses and (2) lacked reasonable alternatives to breaking the law.²³⁴ If Dingwall was able to offer expert testimony regarding the abuse she suffered at the hands of Stanley, she likely would have been able to meet that burden. Evidence of domestic violence and Dingwall's diagnosis of BWS and PTSD would inform the factfinder as to how an objectively reasonable person in her circumstances may behave, even if there is not an immediate physical presence of the threat.

This holding is a step in the right direction for the justice system. All courts have or will face defendants who have experienced physical, sexual, or emotional abuse. If the defendant's victimization is related to their charged crimes, all state and federal courts should admit this type of evidence to support defenses. Defense attorneys can ask their clients if they've experienced violence, and if so, if their crime is related to that victimization. Clients who are victim-survivors may not recognize that the decisions they're making through the course of their representation are affected by their or past or ongoing violence.

The United States Supreme Court has not ruled on the issue despite the circuit split on the admission of expert testimony in duress cases. Supreme Court Justice Brett Kavanaugh, formerly Judge Kavanaugh of the District of Columbia Circuit, authored the 2016 *United States v. Nwoye* decision that allowed the

231. NAT'L JUD. INST. ON DOMESTIC VIOLENCE, <https://njjdv.org/> (last visited Jan. 11, 2022) [<https://perma.cc/3WJW-6NGR>].

232. *About Us*, NAT'L JUD. INST. ON DOMESTIC VIOLENCE, <https://njjdv.org/about-us> (last visited Jan. 11, 2022) [<https://perma.cc/2NV8-7BHX>].

233. See Memorandum from Amber Peterson, Legal Advisor, Wis. Dir. of State Courts Off. of Ct. Operations on Training Requirements for Judges and Guardians ad Litem to the Members of the Legis. Study Comm. on Child Placement & Support (Sep. 24, 2018), https://docs.legis.wisconsin.gov/misc/lc/study/2018/1785/020_september_25_2018_meeting_10_00_a_m_room_412_east_state_capitol/sept25_peterson_sup_ct [<https://perma.cc/2ZKW-ST3T>].

234. *United States v. Dingwall*, 6 F.4th 744, 746 (7th Cir. 2021).

admission of expert testimony regarding battering and its effects.²³⁵ If this issue went to the Supreme Court, it would have at least one justice in the current conservative majority who has previously ruled in favor of admitting this kind of evidence. The Supreme Court should act to resolve this circuit split given the harmful implications it has on victims of domestic violence.

In *Dingwall*, the Seventh Circuit's decision not only allowed Dingwall to offer evidence of the abuse she suffered in her criminal trial but also ensures that future criminal defendants facing convictions as a result of their victimization are not barred from introducing this evidence due to a lack of precedent on this issue. The right to present evidence of battering and its effects should not depend on where you live or in which jurisdiction your alleged crime will be prosecuted.

235. See *Nwoye II*, 824 F.3d 1129 (D.C. Cir. 2016).



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