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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.

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THE IDEALIZED VICTIM-TERMINOLOGY IN HUMAN TRAFFICKING FOR SEX WORKERS—PROVIDING ACCESS TO PROTECTIONS OR RENDERING RIGHTS CONDITIONAL?

Inga K. Thiemann

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INTRODUCTION

The concept of the “Victim of Trafficking” in anti-trafficking policy and legislation creates an idealized category, which builds on historical ideas of female victims of the “White Slave Trade,”¹ and is as such gendered, racialized, and exclusionary. This Article analyzes and critiques this idealized victim category and its effects on actual victims of trafficking. Female victims of trafficking in the sex industry find themselves in a double bind due to two competing binaries, which are at the core of the sex work and trafficking narratives: (1) the “Madonna–Whore” dichotomy, which forces women into a binary of good or deviant, with sex workers at the extreme end of the deviant scale;² and (2) the “innocent victim–evil trafficker” binary, which negates the

1. JO DOEZEMA, *SEX SLAVES AND DISCOURSE MASTERS: THE CONSTRUCTION OF TRAFFICKING* 15 (2010).

2. See, e.g., Ann M. Lucas, *Article, Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 *BERKELEY WOMEN’S L.J.* 47 (1995); Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 *U. PA. L. REV.* 1655 (2010).

agency that victims of trafficking and exploitation may nonetheless express in their job choices (such as voluntarily entering sex work) and their migratory journeys (such as voluntarily crossing borders). Combined, these two concepts create a victim category that is unattainable for most victims of exploitation and human trafficking while also barring them from rights-based protections.

The notion of the ideal victim is also intertwined with conceptualizations of sex work as equivalent to human trafficking, enabling a blanket condemnation of sex work in the name of “saving victims.” The concept essentially creates a double bind in which all sex work is perceived as exploitative and potentially as human trafficking, while only a small subset of exploited sex workers is seen as meeting the standard of being credible victims of trafficking.

First, this Article analyzes the category of “Victim of Trafficking” as it is found in the academic and legal discourse of various countries, focusing on both its historical development and its implementation in law and policy responses. It highlights definitional problems, historic legacies of the “Madonna–Whore” binary, and the definition’s relationship with migration and prostitution policies.³ Contemporary legal definitions of trafficking are based on the 2000 United Nations Trafficking Protocol, a supplementary protocol of the U.N. Convention Against Transnational Organized Crime (UNTOC), whereas victims of trafficking are not expressly defined.⁴ While the Trafficking Protocol is historically recent, many of its concepts can be traced to historical treaties. The implicit definition of victims of trafficking through the definition of trafficking must thus be read through its historical context, which Section 1 of this Article provides.

Second, this Article argues that the victim narrative also positions all sex workers as helpless victims of exploitation and slavery, lacking agency, which contradicts their simultaneous perception as deviants. Building on Diana Meyers’s concept of victims,⁵ this Article develops a new approach to analyzing different victim categories: that of rights-holding and charity-receiving victims. By categorizing victims of trafficking, particularly for sexual exploitation, as an example of charity-receiving victims, this Article exposes the victim category in human trafficking as one that essentially strips victims of rights instead of empowering them. The conditionality of services, together with their temporariness, cements trafficked persons’ status as passive non-actors and as recipients of charity and “protections.” By rendering trafficked persons passive and helpless, in need of charity and protection, the victim category emphasizes

3. Both the terms prostitution and sex work are used throughout this article. While I prefer the terminology of “sex work,” the use of “prostitution” is sometimes more accurate to reflect the language used by others (e.g., when a jurisdiction criminalises prostitution, it does not equate prostitution with sex work).

4. G.A. Res. 55/25, annex, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Nov. 15, 2000).

5. Diana Tietjens Meyers, *Two Victim Paradigms and the Problem of “Impure” Victims*, 2 HUMANITY 255 (2011).

their lack of agency. Help for “helpless victims” can then be provided through time-limited, conditional services.⁶

Consequently, this Article argues for an abolition of the existing victim category in order to enable a labor rights approach to human trafficking. The possibilities of creating rights-based policies, which are centered on decriminalization and a workers’ rights-focused approach to sex work, are currently absent in trafficking narratives. Such an approach encompasses the rights of sex workers by situating sex work within greater labor rights discourses and questions about women’s work.⁷ This Article calls for a decoupling of the terminology of sex work and trafficking, while arguing that a policy and legislative focus on access to rights and labor protections within the sex industry also reduces the prevalence of exploitation, including cases of exploitation amounting to human trafficking. Thus, if the goal of anti-trafficking policy and legislation is truly to protect vulnerable women from exploitation, there is a strong case for implementing legal and policy reform and for letting go of a victim category that reflects problematic historic notions of victimhood and offers little in terms of actual victim protection.

I. WHO IS A “VICTIM OF TRAFFICKING”? THE IDEALIZED VICTIM NARRATIVE

“Victim of Trafficking” is a concept with multiple meanings in different contexts—depending on whether it is used in a legal or in a policy context, in media coverage, or by non-governmental organizations (NGOs) and anti-trafficking advocates. Legislators and policymakers themselves even define “victim of trafficking” differently depending on the context in which they operate: it is often used broadly in awareness-raising campaigns,⁸ but restrictively in the context of granting (conditional) rights or protections to those

6. For an example of limited protections in anti-trafficking policies, see the Council of Europe Convention, which is widely considered to be the most generous agreement on victim protection provisions for victims of trafficking. Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, 2005, CETS No. 197; see also Anne Gallagher, *Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments*, 8 EUR. J. MIGRATION & L. 163 (2006).

7. See Inga K. Thiemann, *Beyond Victimhood and Beyond Employment? Exploring Avenues for Labour Law to Empower Women Trafficked into the Sex Industry*, 48 INDUS. L. J. 199 (2019).

8. See the following examples of awareness raising campaigns, e.g., *Spot the Signs of Modern Slavery*, HOPE FOR JUSTICE, <https://hopeforjustice.org/spot-the-signs/> [<https://perma.cc/8NNT-USXB>] (last visited May 18, 2022); *Spot the Signs of Modern Slavery*, UNSEEN UK, <https://www.unseenuk.org/about-modern-slavery/spot-the-signs/> [<https://perma.cc/RMX7-HV8D>] (last visited May 18, 2022); HOME OFFICE, MODERN SLAVERY AWARENESS & VICTIM IDENTIFICATION GUIDANCE (2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655504/6.3920_HO_Modern_Slavery_Awareness_Booklet_web.pdf [<https://perma.cc/34LF-2BB8>].

identified as victims of trafficking.⁹ This section first explores the theoretical foundations and history of the term before addressing its use in law and policy.

The idealized “Victim of Trafficking” concept is a highly gendered category, which is founded in the historical notion of the female victim of trafficking in the sex industry.¹⁰ At its core are two competing dichotomies: that of the “Madonna–Whore,” and that of the “innocent victim against the evil trafficker” or “the exploited prostitute and evil pimp.”

The “Madonna–Whore” dichotomy builds on notions of active male vs. passive female sexuality and pits “good women,” who are innocent, sexually passive and chaste, against “bad women,” who are too sexually active, either in their private sex lives or by engaging in sex work and are therefore constructed as “deviant.”¹¹ In the Madonna–Whore dichotomy, the female sex worker is the epitomized form of the whore. She seems to reject socially desirable femininity, lacks innocence, and engages in deviant behavior.

Historical conceptualizations of victims of trafficking, or victims of the “White Slave Trade” are built on the assumption that no “good woman” voluntarily enters sex work and therefore “innocent women” must be forced into the sex industry. In this conceptualization of all sex workers as potential victims, victims are denied full personhood as rights-holders, which in turn renders the “victims’ rights” bestowed upon them charitable gifts, conditional on their perfect victimhood, rather than the full human rights and labor rights of persons whose rights have been violated.

Amy Russell argues that the “depiction of the trafficked woman as an innocent, abused victim is a useful construction for the state as it removes her as an agent” who willfully crossed a border.¹² Instead of portraying trafficked persons as complex beings, by casting them as passively innocent, the state can present itself as the savior of the innocent and lay the blame for trafficked persons’ exploitation solely on the traffickers, “who are understood as criminal ‘others.’”¹³ Thus, migrant women who are exploited by their employers but have crossed borders through irregular channels need to assert their innocence in order

9. See, e.g., the “conclusive grounds” decision criteria of the U.K. government: “Following a positive reasonable grounds decision, Competent Authorities are required to make a second identification decision which is to conclusively decide if the individual is a victim of trafficking. At the conclusive stage the competent authority will consider whether, on the balance of probabilities, there is sufficient information to conclude that the individual has been trafficked.” HOME OFFICE, NATIONAL REFERRAL MECHANISM: GUIDANCE FOR CHILD FIRST RESPONDERS (2010), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/233310/NRM_child_first_responders_guidance.pdf [<https://perma.cc/9TPC-M6CL>].

10. See generally DOEZEMA, *supra* note 1; see generally CHARLES TERROT, *THE MAIDEN TRIBUTE: A STUDY OF THE WHITE SLAVE TRAFFIC OF THE NINETEENTH CENTURY* (1959).

11. Deborah Tanzer, *Real Men Don’t Eat Strong Women: The Virgin-Madonna-Whore Complex Updated*, 12 J. PSYCHOHISTORY 487 (1985); Orly Bareket, Rotem Kahalon, Nurit Shnabel & Peter Glick, *The Madonna-Whore Dichotomy: Men Who Perceive Women’s Nurturance and Sexuality as Mutually Exclusive Endorse Patriarchy and Show Lower Relationship Satisfaction*, 79 SEX ROLES 519, 519 (2018).

12. Amy M. Russell, *The Boundaries of Belonging: Gender, Human Trafficking and Embodied Citizenship*, J. GENDER STUD. 318, 329 (2016).

13. *Id.*

to claim “victim of trafficking” status. In this scenario, trafficked women’s passivity in their victimhood is absolute and their personhood is denied, as they become objects in the traffickers’ crime. Their own irregular border crossings are turned into non-actions, as passive victims are not perceived as making choices, but as being moved across borders like objects.

Casting women as helpless, agency-devoid victims, who are forced into prostitution and unable to escape, absolves them of their border transgressions. If they never had a choice, they can neither violate state borders by migrating, nor act immorally by engaging in prostitution. As Jacqueline Berman notes, popular narratives of trafficking describe the circumstances of trafficked women as “[a] nefarious underworld populated by ‘dark,’ haunting criminals; hundreds of thousands of young, innocent, ‘white’ girls kidnapped and violated; sovereign borders transgressed under the cover of the night.”¹⁴ While there are cases to which this narrative applies, it is an extreme scenario which ignores the “complexities around women’s victimization, exploitation, agency and resistance, as well as various other forms of non-sexual exploitation.”¹⁵

This willful ignorance towards other forms of exploitation that amount to human trafficking creates a victim category that is unattainable for the majority of victims, including those who do not meet racist and classist assumptions about worthy victims. Whereas these other victims are theoretically covered by the U.N. Trafficking Protocol’s definition and domestic anti-trafficking legislation, as we will see below, many of them do not meet the victim category of whom we think of as a victim of trafficking, which places them outside the scope of most anti-trafficking measures and protections for victims.

A. Legal Definitions of Trafficking and Its Victims

There is no one clear definition of a victim of trafficking, not even in the United Nations Trafficking Protocol. This main international protocol on human trafficking defines victims of trafficking indirectly, by framing the status of the victims through the crimes of perpetrators.¹⁶ According to the U.N. Trafficking Protocol:

- (a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of

14. Jacqueline Berman, *Biopolitical Management, Economic Calculation and “Trafficked Women”*, 48 INT’L MIGRATION 84, 85 (2010).

15. Selda Dagistanli & Sanja Milivojevic, *Appropriating the Rights of Women: Moral Panics, Victims and Exclusionary Agendas in Domestic and Cross-Borders Sex Crimes*, 40 WOMEN’S STUDS. INT’L F. 230, 237 (2013).

16. G.A. Res. 55/25, annex, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Nov. 15, 2000).

others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) “Child” shall mean any person under eighteen years of age.¹⁷ Neither in the Protocol itself nor in the *travaux préparatoires* does the U.N. Protocol define exploitation, coercion, or a position of vulnerability, leaving room for interpretation.¹⁸ Most regional and domestic implementations of the U.N. Protocol have maintained this broad definition, keeping the crime of trafficking vague.¹⁹ By extension, the notion of who is a victim of trafficking also remains vague.

An important dimension of the U.N. definition is the concept of consent. According to the U.N. Protocol, victims’ consent is irrelevant if coercive or deceptive means have been proven.²⁰ However, Marjan Wijers convincingly argues that in reality trafficked persons, especially those in the sex industry, have to prove that they did not consent,²¹ otherwise they are not “considered a ‘real’ victim.”²² When sex workers have to prove their innocence, despite no legal requirement to do so, access to protections for victims of sex trafficking is restricted to those who are deemed sufficiently innocent. Thus, already arising from the U.N. Protocol are discrepancies between the definition of the crime of human trafficking and the notions of credible victimhood contained within.

17. *Id.*

18. *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, UNITED NATIONS, <https://www.unodc.org/unodc/en/treaties/CTOC/travaux-preparatoires.html> [https://perma.cc/F4DE-H72W] (last visited May 18, 2022).

19. See, e.g., Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, 2005, CETS No. 197; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and replacing Council Framework Decision 2002/629/JHA, 2011 O.J. (L 101) 1; Modern Slavery Act 2015, c. 30 (U.K.).

20. G.A. Res. 55/25, annex, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Nov. 15, 2000).

21. Marjan Wijers, *Purity, Victimhood and Agency: Fifteen Years of the UN Trafficking Protocol*, 4 ANTI-TRAFFICKING REV. 56, 58, 65–66 (2015).

22. *Id.* at 65–66.

The U.N. Trafficking Protocol also builds on a legacy of highly gendered counter- trafficking legislation.²³ On the surface, the U.N. Trafficking Protocol defines trafficking in gender-neutral terms and seems to apply to all persons equally.²⁴ However, there are a number of instances in which it blatantly or indirectly continues narratives of idealized victimhood and is gendered in problematic ways: the text mentions the category of “women and children” at several occasions, switching from the wider construction of exploitation of all persons to a narrower category, which focuses on the vulnerability of women and children. The phrase “especially women and children” in the Preamble, but also throughout the text of the Protocol, also echoes older White Slavery and Trafficking treaties, as well as the concerns of states and NGO lobbying groups that wanted to highlight the situation of women and children in order to maintain the connection between trafficking and prostitution.²⁵

As Kay Warren points out, this “coupling [of] vulnerability with the female gender and dependent children is a very potent imagery for the construction of worthy victims.”²⁶ This imagery both creates worthy victims and at the same time creates an idealized victim category,²⁷ which is unattainable for many trafficked persons, as they do not fit the “paradigmatic horror story of human trafficking—the young (white) woman or child being duped and kidnapped for exploitation in the illegal commercial sex industry.”²⁸ Equally, the special mention of “women and children” creates a category that puts women and children on the same footing, and treats “women as children, denying them the right to have control over their own bodies and lives.”²⁹

Additionally, even though human trafficking in the U.N. Protocol includes a variety of categories, historical legislation dealt exclusively with human trafficking for sexual exploitation—a phrase used synonymously with prostitution.³⁰ The definition of trafficking mentions the “exploitation of prostitution” and “other forms of sexual exploitation,” without a definition of what these two concepts entail.³¹ It is a compromise between the anti-sex work NGOs that demanded the inclusion of prostitution in the definition of trafficking

23. See Kay Warren, *The 2000 UN Human Trafficking Protocol: Rights, Enforcement, Vulnerabilities*, in *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* 242, 249–51 (Mark Goodale & Sally Engle Merry eds., 2007).

24. G.A. Res. 55/25, annex, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Nov. 15, 2000).

25. See Melissa Ditmore & Marjan Wijers, *The Negotiations on the UN Protocol on Trafficking in Persons*, 4 NEMESIS 79 (2003); Wijers, *supra* note 21.

26. Warren, *supra* note 23, at 247.

27. See *id.* at 263.

28. Dana Raigrodski, *Economic Migration Gone Wrong: Trafficking in Persons Through the Lens of Gender, Labor and Globalization*, 25 INT’L & COMP. L. REV. 79, 97 (2015).

29. Wijers, *supra* note 21, at 62.

30. DOEZEMA, *supra* note 1, at 115–16.

31. G.A. Res. 55/25, annex, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Nov. 15, 2000); *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, *supra* note 18.

and the sex workers' rights NGOs' demand not to define the two concepts out of fear for a definition that would render all sex work as exploitation.³² The exploitation of the prostitution of others or other forms of sexual exploitation was deliberately left undefined to enable state parties with different legislation on prostitution, ranging from regulating sex work to banning prostitution, to be able to become party to the Protocol.³³ Unlike in historical anti-trafficking treaties, there is no longer an explicit mention of an equation of sex work and victimhood in the U.N. Trafficking Protocol. Nonetheless, this ideal victim's legacy continues through the focus on the coerced sexual exploitation of women and the special mention of "exploitation of prostitution" and "women and children" throughout the Protocol.³⁴

The U.N. Trafficking Protocol's definition of trafficking is therefore founded on a narrow historic concept of human trafficking as sexual slavery in the context of migrant prostitution. Nonetheless, its legal definition encompasses human trafficking for sexual exploitation, human trafficking for labor exploitation and services, as well as the exploitation of organ trading.³⁵ Such a broad definition, built on such a narrow original concept, makes it both too wide and too narrow, if trafficking is to be distinguished from other forms of exploitation and from human smuggling.

B. Definitions of Trafficking and Victimhood—Effects on Policy and Legislation

Human trafficking is predominantly conceptualized within a criminal law framework at the international level and in most domestic legislation. The United Nations Trafficking Protocol, the key international agreement on human trafficking, is part of the U.N. Convention Against Transnational Organized Crime (UNTOC).³⁶ The convention's position under the UNTOC umbrella situates counter-trafficking measures in an international criminal law, rather than a human rights-focused context. The U.N. Trafficking Protocol takes the so-called 3P-approach, focusing on a combination of prosecution, prevention, and protection. This approach is also reflected in regional and domestic responses to human trafficking. On both an international and domestic level, the focus within this approach is on the criminalization of human trafficking and the prosecution of its perpetrators.³⁷ Despite its international criminal law origin, the approach is sometimes *wrongly* called a "human rights approach," as it incorporates certain

32. Wijers, *supra* note 21.

33. Ditmore & Wijers, *supra* note 25, at 79–80; Wijers, *supra* note 21, at 57–58.

34. Raigrodski, *supra* note 28, at 88; *see also* Bridget Anderson, *Migration, Immigration Controls and the Fashioning of Precarious Workers*, 24 WORK, EMP. & SOC'Y 300 (2010).

35. G.A. Res. 55/25, annex, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Nov. 15, 2000).

36. *Id.*

37. *See, e.g., 3Ps: Prosecution, Protection, and Prevention*, U.S. DEP'T OF STATE, <https://www.state.gov/3ps-prosecution-protection-and-prevention/> [https://perma.cc/9Z6U-Z95F] (last visited Apr. 22, 2022); Seo-Young Cho, *Evaluating Policies Against Human Trafficking Worldwide: An Overview and Review of the 3P Index*, 1 J. HUM. TRAFFICKING 86 (2015).

protections for victims.³⁸ However, the protections are only afforded to those who meet countries' narrow victim categories and behave in ways deemed acceptable by governments in destination countries.³⁹ Normally, human rights are afforded some categories of people but not others.

In the context of the contemporary criminal law approach and its victim category, the historical treaties' focus on "protecting innocent women" plays a role in shaping a narrative that continues through today.⁴⁰ This narrative both affects the demands placed on "innocence" for victims, and conceptualizes trafficked persons as requiring rescue and charity, rather than rights.⁴¹

The continuation of the historical victim category, placed into the context of a criminal law approach, sets trafficking up as a binary criminal act with two polar opposites: the trafficker as the perpetrator and the trafficked person as the victim. By defining trafficking as a phenomenon that only concerns criminals in their active role as traffickers and trafficked persons as passive victims, trafficking is placed outside of any larger societal context and trafficked persons are defined as mere props to the traffickers' crimes.⁴² The binary approach obscures state contributions to conditions that foster trafficking.⁴³ States contribute to trafficking risks through exclusionary immigration regimes and lack of labor controls,⁴⁴ but these factors remain invisible in a neat victim-perpetrator binary. The binary is thus convenient for governments in destination countries, as it ignores their role in creating conditions which can render people vulnerable to human trafficking.⁴⁵

Building on the broad definition of human trafficking in the U.N. Trafficking Protocol, NGOs, the media, and governments, policymakers use human trafficking as an umbrella term, sometimes blurring the lines of the

38. TOM OBOKATA, *TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A MORE HOLISTIC APPROACH* 32–37 (2006); James C. Hathaway, *The Human Rights Quagmire of Human Trafficking*, 49 VA. J. INT'L L. 1, 2–3 (2008); Sarah H. Krieg, *Trafficking in Human Beings: The EU Approach between Border Control, Law Enforcement and Human Rights*, 15 EUR. L. J. 775, 783–86 (2009); Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76 (2012).

39. GLOB. ALL. AGAINST TRAFFICKING IN WOMEN, *COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD* 41, 208–17 (2007); Rutvica Andrijasevic, *Sex on the Move: Gender, Subjectivity and Differential Inclusion*, 29 SUBJECTIVITY 389, 94–123 (2009).

40. See, e.g., Mark David Wyers, *Coercion and Voluntarism in Sex Work*, in *SELLING SEX IN THE CITY: A GLOBAL HISTORY OF PROSTITUTION, 1600S–2000S* 775 (Magaly Rodríguez García, Lex Heerma van Voss, & Elise van Nederveen Meerkerk eds., Brill 2017); DOEZEMA, *supra* note 1.

41. Marjan Wijers, *supra* note 21.

42. Bridget Anderson & Rutvica Andrijasevic, *Sex, Slaves and Citizens: The Politics of Anti-Trafficking*, 40 SOUNDINGS 135, 137 (2008).

43. *Id.*

44. CATHRYN COSTELLO & MARK FREEDLAND, *MIGRANTS AT WORK: IMMIGRATION AND VULNERABILITY IN LABOUR LAW* (1st ed. 2014); see generally Judy Fudge, *Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers*, 34 COMP. LAB. L. & POL'Y J. 95 (2012).

45. BRIDGET ANDERSON, *US AND THEM?: THE DANGEROUS POLITICS OF IMMIGRATION CONTROL* (1st ed. 2013); Rutvica Andrijasevic & Bridget Anderson, *Conflicts of Mobility: Migration, Labour and Political Subjectivities*, 29 SUBJECTIVITY 363 (2009).

definition even further. Particularly in awareness-raising campaigns, these definitions then encompass everyone who may be a trafficked person,⁴⁶ including people who might be described as smuggled or as irregular migrants under different circumstances.⁴⁷ In non-binding statements, policymakers often state that trafficking victims make up a large percentage of irregular migrants, evoking an emotional response based on a curious combination of pity for the “victim of trafficking” and fear of the influx of migrants in destination states.⁴⁸ In political rhetoric, human trafficking has been portrayed as one of the main methods through which people enter Western countries; for example, the then-British Home Office Minister Theresa May stated in March 2007 that “three quarters of illegal immigrants to Britain are trafficked,”⁴⁹ giving an impression that the government wants to help all these victims of a terrible crime, while at the same time protecting Britain’s borders. Thus, for the general discourse in the media, “victim of trafficking” incites both fear of floods of irregular migrants, as well as pity for trafficked persons. The ambiguity of the category helps to contribute to a climate of remedies for “real victims” rather than rights for all exploited persons as human beings and for exploited workers as workers.

At the same time, anti-trafficking measures, particularly those under the “prevention” category of the U.N. Protocol’s 3P-approach, often focus on border control and restriction of migrants’ movements.⁵⁰ This focus results in more tightly controlled borders and more restrictive visa regulations as well as more extensive police investigations and raids.⁵¹ Evidence, however, indicates such measures have the opposite effect: stronger borders force migration further underground, increase the potential violence and abuse to which women are especially subjected, and make facilitating cross-border movement, forced labor and exploitative practices more profitable.⁵² Equally, “rescue missions” and raids in red light districts often lead to a criminalization of migrant sex workers who

46. See the following examples of awareness raising campaigns, e.g.: HOPE FOR JUSTICE, *supra* note 8; UNSEEN UK, *supra* note 8; HOME OFFICE, *supra* note 8.

47. The category of “irregular migrants” can encompass all migrants without regularized status, including those whose status is pending (e.g., refugees and asylum seekers), as well as those who entered a country through regular channels, but whose visa expired (e.g., overstaying on a tourist or work visa). It also includes those who knowingly or unknowingly violated some conditions of their stay (e.g., working too many hours on a student visa) and those who entered the destination country through irregular channels. Not all irregular migrants are aware of their lack of legal immigration status.

48. Anderson & Andrijasevic, *supra* note 42, at 137.

49. Rutvica Andrijasevic & Bridget Anderson, *Anti-Trafficking Campaigns: Decent? Honest? Truthful?*, 92 FEMINIST REV. 151, 153–54 (2009).

50. Inga K. Thiemann, *Human Trafficking as a Migration Crisis*, in THE OXFORD HANDBOOK OF MIGRATION CRISES 721, 725–26 (2019).

51. Annalee Lepp, *Trafficking in Women and the Feminization of Migration: The Canadian Context*, 21 CAN. WOMAN STUDS. 90, 96 (2002); Anderson & Andrijasevic, *supra* note 42, at 136, 144; Edith Kinney, *Victims, Villains, and Valiant Rescuers: Unpacking Sociological Constructions of Human Trafficking and Crimmigration in Popular Culture*, in THE ILLEGAL BUSINESS OF HUMAN TRAFFICKING 87, 95 (Maria João Guia ed., 2015); Jennifer M. Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3037 (2006).

52. See Anderson & Andrijasevic, *supra* note 42; Lepp, *supra* note 51, at 96.

are either unable to access the legal protections of “victim of trafficking” status or are unwilling to be “rescued” as victims of trafficking, regardless of whether or not they find themselves in exploitative working conditions.⁵³

The same is also true for attempts to prevent advertising for sex work online. Particularly in the context of SESTA/FOSTA legislation in the United States,⁵⁴ there is little evidence regarding its effectiveness in preventing human trafficking.⁵⁵ Instead, there has been some evidence to its negative effects on police investigations into human trafficking cases,⁵⁶ as well as numerous reports of sex workers losing their livelihoods, exploitative third parties attempting to gain control by offering “protection,” as well as loss of sex workers’ access to vetting processes and safety information through blacklists, etc.⁵⁷

Instead of focusing on the root causes that lead to exploitation and human trafficking, such as poverty, lack of social service provisions, and a lack of protection of workers’ rights, human trafficking is normally treated as an exceptional crime, necessitating criminal law solutions, with victims who require “rescue” and temporary paternalistic protections. Thus, traffickers’ explicit exploitation—that of the vulnerabilities and implicit exclusions of trafficked persons from the political community—is maintained in trafficked persons’ continued status as non-right holders as “rescued” victims of trafficking.

C. Conditional Rights for “Real Victims”

Trafficked persons, particularly women and particularly in the sex industry, must then fulfil the conditions of being a “real” victim in order to qualify for a “rescue” from their traffickers.⁵⁸ There is significant divergence between governments’ rhetoric about the need to protect victims of human trafficking and the actual protections available to victims of trafficking. Since a “Victim of Trafficking” is not only a rhetorical category, but also an administrative and legal

53. Kinney, *supra* note 51.

54. SESTA/FOSTA refers to the “Stop Enabling Sex Traffickers Act” and the “Allow States and Victims to Fight Online Sex Trafficking Act,” legislation introduced to—as their names imply—prevent sex trafficking and online sex trafficking by creating liability for platforms regarding advertisements for sexual services.

55. Melissa Gira Grant, *The Real Story of the Bipartisan Anti-Sex Trafficking Bill that Failed Miserably on Its Own Terms*, THE NEW REPUBLIC (June 23, 2021), <https://newrepublic.com/article/162823/sex-trafficking-sex-work-sesta-fosta> [<https://perma.cc/9WN2-J6DY>].

56. KENDRA ALBERT, EMILY ARMBRUSTER, ELIZABETH BRUNDIGE, ELIZABETH DUNNING, KIMBERLY KIM, LORELEI LEE, LINDSEY RUFF, KORICA SIMON & YUEYU YANG, FOSTA IN LEGAL CONTEXT, (2020), <https://www.ssrn.com/abstract=3663898> [<https://perma.cc/C8C2-NLNH>].

57. Danielle Blunt & Ariel Wolf, *Erased: The Impact of FOSTA-SESTA and the Removal of Backpage on Sex Workers*, 14 ANTI-TRAFFICKING REV. 117 (2020), <https://www.antitraffickingreview.org/index.php/atjournal/article/view/448> [<https://perma.cc/GG29-LRFJ>]; Amelia Gallay, *Sex Sells, But Not Online: Tracing the Consequences of FOSTA-SESTA*, BLOG: BERKELY J. CRIM. L. (Dec. 4, 2021), <https://www.bjcl.org/blog/sex-sells-but-not-online-tracing-the-consequences-of-fosta-sesta> [<https://perma.cc/8FL6-4K7Y>].

58. See Kinney, *supra* note 51, at 95; Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 104 AM. J. INT’L L. 609, 636–37 (2014).

category with implications for state protections and obligations towards trafficked persons, policymakers have made the category “victim of trafficking” both narrow and vague at the same time.⁵⁹

The U.K. offers a good example of this: in order to be granted temporary “potential victim of trafficking” status through its National Referral Mechanism, a person must first pass the so-called “reasonable grounds decision.” The “reasonable grounds decision” is made on the basis of a first responder⁶⁰ reaching the conclusion that “I suspect, but I cannot prove” that someone is a victim of trafficking.⁶¹ “A positive reasonable grounds decision results in ‘protection from removal for a minimum of forty-five days as well as access to support arrangements, as detailed by Article 12 of the [Council of Europe] Convention which sets out victims’ rights to material and psychological assistance.”⁶² During this initial forty-five-day period, also called the “recovery and reflection period,” the relevant authority assesses the claim and makes a so-called “conclusive grounds decision.”⁶³ This “conclusive grounds decision” determines whether or not a person is considered to be a victim of trafficking and whether or not their situation requires *temporary* leave to remain in the U.K. beyond the initial forty-five days.⁶⁴ National Crime Agency data reveals that only about half of the people who enter the National Referral Mechanism through a “reasonable grounds decision” receive positive conclusive grounds decisions.⁶⁵ Clearly then,

59. As outlined above, the legal definition is vague, whereas I will demonstrate in this section, through the example of the U.K., that the application of the category is narrow.

60. *National referral mechanism guidance: adult (England and Wales)*, Gov.UK (Apr. 1, 2022), <https://www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms/guidance-on-the-national-referral-mechanism-for-potential-adult-victims-of-modern-slavery-england-and-wales> (explaining how a first responder’s “reasonable grounds decision” can be based on the police force, U.K. Visas and Immigration, Border Force, Immigration Enforcement, the National Crime Agency, local authorities, the Gangmasters and Labour Abuse Authority (GLAA), and a number of specialist NGOs).

61. KAYLAAN, FACTSHEET 1: THE NATIONAL REFERRAL MECHANISM – PROCESS AND SUPPORT, <http://www.kalayaan.org.uk/wp-content/uploads/2020/10/FACTSHEET-1-NRM.pdf> [<https://perma.cc/3BYC-DQSX>] (last accessed May 31, 2022).

62. Abigail Stepnitz, *A Lie More Disastrous than the Truth: Asylum and the Identification of Trafficked Women in the UK*, 1 ANTI-TRAFFICKING REV. 104, 110 (2012).

63. JEREMY OPPENHEIM, INTERIM REVIEW OF THE NATIONAL REFERRAL MECHANISM FOR VICTIMS OF HUMAN TRAFFICKING Annex D (2014); *see generally* OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, NATIONAL REFERRAL MECHANISMS JOINING EFFORTS TO PROTECT THE RIGHTS OF TRAFFICKED PERSONS A PRACTICAL HANDBOOK (2004); Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, 2005, CETS No. 197, Art. 13, implemented by the U.K. 7/29/22 11:03:00 AM

64. OPPENHEIM, *supra* note 63; OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, *supra* note 63; Stepnitz, *supra* note 62.

65. U.K. government statistics show that, with an average waiting time of 524 days, there were 733 positive conclusive grounds decisions in Q3 2021 arising out of approximately 2000 reasonable grounds decisions per quarter in Q1–Q3 2020. These are approximations which account for variability of individual case length but indicate that significantly less than half of reasonable grounds decisions result in conclusive grounds decisions. *See Modern Slavery: National Referral Mechanism and Duty to Notify Statistics UK, Quarter 3 2021 –*

the threshold to achieve official “victim of trafficking” status is much higher than politicians’ blanket statements.

It can therefore be assumed that while then-Home Office Minister Theresa May construed “three quarters of illegal immigrants” to Britain as “Victims of Trafficking” in the wider sense,⁶⁶ most of these potential victims of trafficking would fail to pass the vague test of the “reasonable grounds decision,” let alone the test for a “conclusive grounds” decision. It is thus unlikely that those migrants who are used in rhetoric on the high numbers of human trafficking would be able to claim government protections as trafficked persons. For those victims who do not meet preconceptions of idealized victimhood, temporary leave to remain, as well as social, legal, and medical services are out of reach.⁶⁷

The categorization of trafficked persons is difficult, and the differentiation between smuggled persons, exploited illegal migrants, and victims of trafficking is almost impossible to make in practice.⁶⁸ Even those who fit both policymakers’ media rhetoric and the administrative and legal categories of a trafficked person do not necessarily experience an improvement of their situation through the authorities. For those who do, the protections offered through the legal category of “Victim of Trafficking” are temporary and conditional remedies, such as temporary leave to remain. In the U.K., such leave to remain beyond the forty-five-day recovery and reflection period is only granted if the trafficked person is needed as a witness in criminal proceedings or on compassionate grounds (e.g., a high risk of retaliation by traffickers, a high risk of re-trafficking, or other safety concerns in the country of origin).⁶⁹

Public statements and policy initiatives, such as posters at airports offering help for “Victims of Trafficking,” use language implying protection and help for trafficked persons. However, “rescuing” trafficked persons usually includes first arresting and detaining them, and ultimately repatriating them.⁷⁰ Annalee Lepp argues that migrant sex workers are the ones bearing the cost of states’ “protectionist, anti-immigration, and law and order agenda.”⁷¹ Migrant sex workers are excluded from labor protections, while being at risk of not only

July to September Second Edition, GOV.UK (Jan. 27, 2022), [https://www.gov.uk/government/statistics/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-quarter-3-2021-july-to-september/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-quarter-3-2021-july-to-september#:~:text=3.2%20Conclusive%20grounds%20decisions&text=The%20proportion%20of%20positive%20conclusive,victims%20\(data%20table%2016\) \[https://perma.cc/EMV8-SB47\]](https://www.gov.uk/government/statistics/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-quarter-3-2021-july-to-september/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-quarter-3-2021-july-to-september#:~:text=3.2%20Conclusive%20grounds%20decisions&text=The%20proportion%20of%20positive%20conclusive,victims%20(data%20table%2016) [https://perma.cc/EMV8-SB47]).

66. Andrijasevic & Anderson, *supra* note 49, at 153.

67. Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, (2007); Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605 (2009); Kinney, *supra* note 51.

68. Andrijasevic & Anderson, *supra* note 49, at 153; *see generally* Chuang, *supra* note 58.

69. Stepnitz, *supra* note 62, at 111–13.

70. *See generally* Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMGR. L.J. 337 (2007).

71. *See* Lepp, *supra* note 51, at 91.

exploitation, but also unwelcome “rescue” and return to their country of origin. The justification for these policies is that they supposedly save women from their captors. However, this response overlooks women’s socioeconomic and family conditions, which caused them to migrate (voluntarily or through the use of coercion or deception) in the first place. The preconditions that create push factors for migration, both voluntary migration and human trafficking, often have not changed since a woman’s original departure, making trafficked women likely to re-migrate.⁷² It also creates an illusion of “home” as a safe place—a narrative that is untrue for women not only in the context of “home” as country of origin,⁷³ but also in the context of “home” in the sense of working in the private sphere.⁷⁴ Additionally, the conditionality of services in destination countries on “Victim of Trafficking” status is based either on worthiness as a victim—by fulfilling the narrow victim category—or usefulness to the prosecution—by being a credible victim in the context of legal proceedings. This conditionality of services, together with their temporariness, normalizes trafficked persons’ status as non-citizens,⁷⁵ and as recipients of charity and “protections.” Thus, the victim category, which requires absolute and passive victims, maintains trafficked persons’ exclusion from labor rights and human rights at the hand of the traffickers and ignores the underlying exclusions they face as women, migrants, and sex workers that facilitated their initial alienation from those rights. Through the continuous stress of the criminal-victim dichotomy, anti-trafficking policy reiterates ideas of women as passive and naïve victims who need “rescue” from traffickers, even if “rescue” means forcible return to their home country. Equally, women need “protection” by the state, even though this may include the “protection” of being kept out by Western countries or being forced to stay “at home” in countries of origin.⁷⁶

Focusing on trafficking as a category distinct from other forms of irregular migration shifts the focus away from a larger picture of underlying vulnerabilities. It restricts the human rights violations to those perpetrated by traffickers, employers, and pimps, who deny access to basic human and labor rights. However, even if trafficked persons’ and exploited migrants’ freedoms were not restricted by traffickers and employers, they would still fail to access

72. *Id.* at 96.

73. Joshua M. Price, *The Apotheosis of Home and the Maintenance of Spaces of Violence*, 17 *HYPATIA* 39 (2002); Rutvica Andrijasevic, *The Difference Borders Make: (Il)legality, Migration and Trafficking in Italy among Eastern European Women in Prostitution*, in *UPROOTINGS/REGROUNDINGS: QUESTIONS OF HOME AND MIGRATION* 251 (Sara Ahmed, Claudia Castañeda, Anne-Marie Fortier & Mimi Sheller eds., Berg 2003); Laura Goldsack, *A Haven in a Heartless World? Women and Domestic Violence*, in *IDEAL HOMES?: SOCIAL CHANGE AND DOMESTIC LIFE* 121 (Tony Chapman & Jenny Hockey eds., Routledge 1999).

74. The same is true in the context of sexual violence and violence against women, both areas of gendered violence in which the notion of home as a safe place is an illusion.

75. Anderson & Andrijasevic, *supra* note 42, at 143–44.

76. Céline Nieuwenhuys & Antoine Pécoud, *Human Trafficking, Information Campaigns, and Strategies of Migration Control*, 50 *AM. BEHAV. SCIENTIST* 1674, 1688 (2007); Nandita Sharma, *Travel Agency: A Critique of Anti-Trafficking Campaigns*, 21 *REFUGE* 53, 58 (2003).

those rights. Governments actively restrict vulnerable migrants' access to certain social rights, such as the possibility to sue for wages not received, which is one of the main sources of all irregular migrants' vulnerabilities. In the case of human trafficking for sexual exploitation, this problem is amplified because the gains from prostitution are not considered to be wages at all, as prostitution is not considered legal work in most countries' legislation. By blaming the vulnerabilities of trafficked persons solely on the trafficker, states obscure their own roles in creating such vulnerability, and questions regarding the human and labor rights of migrant workers are excluded from the debate.⁷⁷

II. UNDERSTANDING THE IDEALIZED VICTIM CATEGORY: THE CASE FOR "HEROIC AND PATHETIC" OR "RIGHT-HOLDING AND CHARITY-RECEIVING" VICTIMS

Diana Meyers offers the categorization of heroic victims and pathetic victims to understand idealized victimhood. Both types of victimhood require innocence, in that the victim's consent to their plight needs to be ruled out.⁷⁸ However, the other requirements starkly differ for heroic and pathetic victims: heroic victims are engaged in political struggle, non-violently resisting repressive powers. They are perceived to be pursuing a just cause. Heroic victims are seen as acting within their rights and thereby become deserving of assistance and compassion. Pathetic victims on the other hand, lack this "worthy cause" and need to pass a higher threshold of innocence and a higher need for intervention to be deserving of attention and help, both of which they can only reach through extreme levels of passivity.⁷⁹

Meyers argues that women experiencing exploitative conditions in the sex industry do not have a "higher calling" and therefore cannot be heroic victims. However, they also do not fit neatly into the "pathetic victim" category, as they are often active agents in their migratory projects. Many of them display "heroic" levels of willingness to sacrifice themselves to save "themselves, their children, and sometimes extended families from homelessness, chronic hunger, and other deprivations."⁸⁰ However, as Meyers describes, "these women do not have grand visions of justice, nor do they pursue political solutions like those that heroic victims characteristically fight for."⁸¹

The heroic victim category, with its focus on political action, righteous anger, and resistance, is an essentially sexist category, as it favors traditionally male actions in the public sphere and ignores women's actions in the private sphere that could nonetheless be construed as heroic, albeit in a different manner from heroic victims.⁸² While Meyers offers an interesting categorization, her angle of heroic victims as male and pathetic victims as female focuses mostly on

77. Anderson & Andrijasevic, *supra* note 42, at 142.

78. Meyers, *supra* note 5, at 260.

79. *Id.*

80. *Id.* at 263.

81. *Id.* at 264.

82. *Id.*

what can be constructed as political action and “pathetic victims” needing to be “purer” victims because they lack this credibility of a “worthy cause.”

While Meyers’ division is a useful starting point to think about the categorization of victims, the notion of a “worthy cause”—or lack thereof—has limitations in explaining victims of trafficking in particular. I argue instead that those she calls “pathetic victims” lack credibility as full participants in the political community, not due to a lack of political ambition, but because they have no access to participation as “full persons” with rights in society. These victims are not “rights-holding victims,” or “citizen victims,” but victims perceived as in need of charity and protection. “Charity-receiving victims,” as I would like to call them, cannot escape the victim-category once they enter it. It could thus be argued that “rights-holding victims” are by default male citizens, who are able to express violations of their human rights and labor rights without necessarily entering an absolute and eternal victim category. They have always been considered full agents who demand something that is rightfully theirs. Women, persons of color, and migrants have historically had to claim their worthiness and innocence in order to access protection, rather than rights, and are perceived as “charity-receiving victims.” Whereas access to rights as full citizenship has been extended beyond citizen men, legal systems are nonetheless built on the “reasonable man” standard, transformed into the “reasonable person” standard, and thus historically excluded and vulnerable groups may continue to struggle to access their rights. This is particularly true for groups like migrant sex workers whose role as rights-holders remains contested today.⁸³

In this context, the victim category then becomes a form of benevolent sexism, a well-meaning protection from harm for women, at the expense of empowerment and access to rights. By casting women as ideal, helpless and innocent victims, their perceived passivity is amplified. Selda Dagistanli and Sanja Milivojevic suggest that “the notion of ‘ideal victim’ [is] indeed paternalistic, disempowering and harmful” as it obscures “the realities of women’s victimization while romanticizing women’s struggles for disingenuous ends,”⁸⁴ such as the increase of border controls and restrictive migration regimes.

The “victim of trafficking” category, with its focus on passivity, is then a hyper-feminized category, an extreme of the “charity-receiving victim.” This

83. JYOTI SANGHERA & BANDANA PATTANAIK, *TRAFFICKING AND PROSTITUTION RECONSIDERED: NEW PERSPECTIVES ON MIGRATION, SEX WORK, AND HUMAN RIGHTS* (Kamala Kempadoo ed., Routledge 2d ed. 2016); *Amnesty International Stands Behind the Human Rights of Sex Workers and Calls for the Decriminalization of Sex Work*, <https://www.voice4sexworkers.com/en/amnesty-international-stellt-sich-hinter-die-menschenrechte-von-sexarbeiterinnen-und-fordert-die-entkriminalisierung-von-sexarbeit/> [<https://perma.cc/33CF-8DYU>] (Aug. 12, 2015); Michele R. Decker, Anna-Louise Crago, Sandra K. H. Chu, Susan G. Sherman, Meena S. Seshu, Kholi Buthelezi, Mandeep Dhaliwal & Chris Beyrer, *Human Rights Violations against Sex Workers: Burden and Effect on HIV*, 186 *LANCET* 196 (2014); GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION (Kamala Kempadoo & Jo Doezeema, eds., 1998); Ine Vanwesenbeeck, *Sex Workers’ Rights and Health: The Case of the Netherlands*, in *GLOBAL PERSPECTIVES ON PROSTITUTION AND SEX TRAFFICKING* (Rochelle L. Dalla, Lynda M. Baker, John DeFrain & Celia Williamson, eds., 2011).

84. Dagistanli & Milivojevic, *supra* note 15, at 239.

especially prevents women from accessing rights and instead only offers them protection. However, men who are trafficked are also harmed by the restrictive nature of the ideal “victim of trafficking” category, as they are conceptually excluded from it. There is a strong reluctance amongst men to come forward as victims of *any* type of trafficking, as they perceive the category as emasculating and shameful, even if they meet the conditions.⁸⁵ For male victims of sexual exploitation, this exclusion is particularly severe, as they are often afterthoughts both in anti-sex work agendas which describe sex work as violence against women, as well as in anti-trafficking rhetoric which views trafficking for sexual exploitation as a problem solely affecting women and girls.

Women, in order to navigate the boundaries of transgressions and victimhood, must fully embrace their victim identity by displaying the passivity and lack of agency that is expected of ideal female victimhood. They are either cast as undeserving, deviant migrant sex workers, excluded from the category of the ideal “victim of trafficking,” or they try to navigate the small margins between asserting agency within the limited range of options available to them, and the levels of helplessness required to be worthy victims.

Establishing women’s innocence and infantilizing them through that discourse makes it easier to equate trafficked women with children, which in turn reinforces the view of trafficking as a forceful act against “the innocent,” implying that the women have no agency in the trafficking process, and that all of them are unwilling to engage in sex work.⁸⁶ As outlined in the context of trafficking narratives and anti-trafficking legislation above, this infantilization of women is common practice. Casting women as helpless, agency-deprived, childlike actors who ended up in prostitution against their will and who are unable to escape their predicament retroactively absolves them of wrongdoing. By describing women as imprisoned, they can neither possibly have voluntarily transgressed state borders by migrating, nor the boundaries of acceptable moral conduct by engaging in prostitution.⁸⁷ In this, “victims’ naivety and powerlessness must be manifest to meet the government-set benchmark of ‘genuine’ and ‘deserving’ victimhood.”⁸⁸ For example in the U.K., the “binary of ‘deserving victim–non-deserving illegal immigrant’ runs through a range of [...] government documents.”⁸⁹ Thus, the current victims’ rights approach infantilizes potential victims of trafficking as helpless victims, thereby creating a victim category that is almost impossible to attain. At the same time, the approach also creates artificial borders between “acceptable” exploitation of irregular immigrants and unacceptable exploitation of “true victims” of human trafficking. In this context, neither law nor policy acknowledges that “the fact

85. International Organization for Migration, *0800 800 818 - Documentary on Trafficking in Human Beings* (2012).

86. TIJANA STOLIC, *SEPARATING THE INNOCENTS FROM THE ILLEGALS: VISUAL REPRESENTATION OF THE VICTIMS OF SEX TRAFFICKING IN ANTI-TRAFFICKING CAMPAIGNS* 49, Thesis, Helsinki University 2014.

87. *Id.*; Berman, *supra* note 14.

88. Kiril Sharapov, “*Traffickers and Their Victims*”: *Anti-Trafficking Policy in the United Kingdom*, 43 *CRITICAL SOCIO.* 91, 99 (2015).

89. *Id.* at 99–100; *see also* Stepnitz, *supra* note 62.

that one occupies a position of vulnerability need not deprive one of agency; and conversely, the fact that one acted in a way that appears autonomous does not mean that one's autonomy was not in fact circumscribed or impaired by experiences of vulnerability."⁹⁰

Denying that agency and vulnerability coexist means the victim category within the human trafficking discourse has repressive instead of emancipatory effects on the already precarious situation of the women concerned, and further denies women's agency.⁹¹ Meanwhile the possibilities of creating policies, which are rights-based and demonstrate a government's unwillingness to accept exploitation, racism, and discrimination and could enable indiscriminate access to basic human rights, are neglected.⁹²

In the European context accessing the "victim category" is normally about accessing assistance and leave to remain. Women who try to receive a right to remain must aspire to be the ideal victim—a category that is, as discussed, often out of their reach. These women have transgressed the borders of gendered acceptable behavior, as well as national borders.

Due to the limiting narrative of what a victim of trafficking needs to look like, women in the sex industry find themselves in a double bind. Some women attempt to assert their agency in the process, either in having chosen sex work or in having chosen to migrate. Some try to fulfil the criteria of being a worthy victim. Others try to straddle both categories by asserting agency in one situation but acknowledge elements of force in other contexts. Consequently, many women position themselves as the main actors in their migration process and focus on their determination to migrate independently, often to support their families. These women distance themselves from the "victim" category when talking about their migratory process. Some assert their willingness to work in the sex industry, and their desire to escape external control from a pimp or trafficker, rather than wanting to necessarily leave sex work.⁹³ Additionally, some try to assert their unwillingness to accept being sent back to their country of origin as a rescue measure.⁹⁴ Others reject prostitution altogether and try to meet requirements of the idealized "victim of trafficking" by conforming to acceptable normative gendered categories and asserting aspirations of motherhood and family life. Prejudices about sex workers and the idealized victim category in human trafficking make it difficult for these women to maintain the nuance of their individual experiences. These experiences may include both freely chosen and forced migration, exploitative and voluntary sex work, as well as aspirations to meet ideals of motherhood and family life while also engaging in "unacceptable" work, such as sex work, to be able to create the financial conditions for that family life.

90. FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE 22 (Rosemary Hunter, Clare McGlynn & Erika Rackley eds., 2010).

91. MARJAN WIJERS & LIN LAP-CHEW, TRAFFICKING IN WOMEN: FORCED LABOUR AND SLAVERY-LIKE PRACTICES IN MARRIAGE, DOMESTIC LABOUR AND PROSTITUTION 19 (1997).

92. Lepp, *supra* note 51, at 91; see Andrijasevic & Anderson, *supra* note 49.

93. Eleonore Kofman, *Citizenship, Migration and the Reassertion of National Identity*, 9 CITIZENSHIP STUD. 453.

94. *Id.*

Convergently, in the American context, human trafficking for sexual exploitation is viewed as more of a domestic problem. Due to the full criminalization of sex work in most states (with the exception of Nevada), questions of victimhood or criminality are more about perceived transgressions about sex work itself, rather than migration. Whereas the impetus is less on achieving legal migration status, there is a focus on avoiding criminal sanctions. For many sex workers in exploitative working conditions, the options are either criminalization for prostitution or identification with “victim of trafficking” status. Consequently, sex working women also feel compelled to access the “victim of trafficking status,” if it is available to them. Whereas “rescue” and rehabilitation for sex workers may still involve community service and other obligations, it normally avoids criminalization.

III. CONFRONTING THE VICTIM NARRATIVE—LABOR RIGHTS APPROACHES TO HUMAN TRAFFICKING

Despite some attempts to include workers in other industries in conversations about human trafficking,⁹⁵ as the scope of the U.N. Protocol and its implementation into law in most countries would allow, narratives about human trafficking continue to focus on human trafficking into the sex industry and the concept of victimhood that goes with it. At the same time, both in Europe and the United States the idealized and inaccessible “victim of trafficking” category, as well as the lack of other options for accessing rights and protection, detract from conversations about exploitation in all industries, including the sex industry, as a workers’ rights issue.

All workers in casual and under-regulated types of work, not just those in the sex work industry, are more likely to end up in and to be unable to escape exploitative working conditions, up to and including situations that could qualify as human trafficking. Within the trafficking literature, previous attempts to focus on labor exploitation have focused on broadening the scope of approaches to trafficking to other areas of work, and to move away both from the focus on sex work, as well as the from the criminal law approach.⁹⁶ Equally, within the sex work as work discourse, there have been attempts both by sex workers’ rights groups as well as labor scholars to highlight exploitation within the sex industry as a labor rights issue.⁹⁷

95. See, e.g., the work of Focus on Labour Exploitation in the U.K., FOCUS ON LABOR EXPLOITATION, <https://www.labourexploitation.org/> [<https://perma.cc/3HQR-VXXS>], and the reports by the KOK in Germany, *German NGO Network against Trafficking in Human Beings*, KOK, <https://www.kok-gegen-menschenhandel.de/en/home> [<https://perma.cc/UKN5-X4DY>].

96. See Shamir, *supra* note 38, for the pioneering piece proposing this approach.

97. Katie Cruz, *Unmanageable Work, (Un)Liveable Lives: The UK Sex Industry, Labour Rights and the Welfare State*, 22 SOC. & LEGAL STUD. 465 (2013); Katie Cruz, Kate Hardy & Teela Sanders, *False Self-Employment, Autonomy and Regulating for Decent Work: Improving Working Conditions in the UK Stripping Industry*, 55 British J. Indus. Rels. 274 (2017); Thiemann, *supra* note 7; Inga Thiemann, *Villains and Victims, but No Workers: Why a Prosecution-Focussed Approach to Human Trafficking Fails Trafficked Persons*, 6 ANTI-

I argue that in order to bring the two approaches together, it is necessary to let go of the idealized “victim of trafficking” narrative. The removal of the idealized victim category allows us to view exploited workers in all industries as workers first and foremost. Workers require improved access to labor protections that reflect the realities of their working conditions. Instead of treating human trafficking as an exceptional crime that only affects a small group of people, placing human trafficking on a continuum of exploitation in wage labor can enable a rights-based response.⁹⁸ Thus, responses to exploitation of under-protected workers in all industries, including sex work, need to focus on labor responses to exploitation.

However, in most jurisdictions, both in the United States and in European countries, sex work is completely removed from labor protections.⁹⁹ In the United States, labor rights approaches to sex work may seem wholly out of reach, as sex work is fully prohibited in most jurisdictions. Recent attempts to introduce decriminalization legislation may nonetheless create the opportunity for labor rights considerations.

For migrant sex workers and victims of human trafficking in the sex industry, a shift to acknowledge sex work as labor would open up the possibility to view the exploitation they experience as a violation of labor rights and human rights. This could lead to an alternative response to human trafficking which focuses on the violation of workers’ rights, rather than viewing them as passive victims in need of protections or so-called victims’ rights. By “legitimizing” sex work as work, sex workers would be enabled to challenge exploitative working conditions, have access to—depending on country of work—employment tribunals or civil court proceedings, as well as potentially have access to health insurance, unemployment protections, and maternity leave.¹⁰⁰ Victims of trafficking would be enabled to sue not only for harm, but also for wages not

TRAFFICKING REV. (2016),
<https://www.antitraffickingreview.org/index.php/atrjournal/article/view/177/180>
[\[https://perma.cc/ZQ5K-Q2MQ\]](https://perma.cc/ZQ5K-Q2MQ).

98. Cathryn Costello, *Migrants and Forced Labour: A Labour Law Response*, in THE AUTONOMY OF LABOUR LAW (Alan Bogg, Cathryn Costello, ACL Davies & Jeremias Adams-Prassl eds., Hart Publishing 1st ed. 2015).

99. Some European countries, such as the Netherlands and Germany, have a regulatory model that acknowledges sex work as work and thus allows for labor rights within the sex industry. The same is true for decriminalization approaches in New Zealand and parts of Australia. End Demand legislation (sometimes also called the “Equality model” in U.S. literature) does not allow for any labor rights for sex workers.

100. Even countries that have a regulatory approach to sex work, such as the Netherlands and Germany, nonetheless do not have fully realized labor rights. For example, in Germany, exploitation and human trafficking in the sex industry continue to be viewed as separate phenomena from exploitation in other industries. If victims are able to make claims for compensation, these tend to be for harm rather than for, e.g., wages not received, except in cases where additional extortion can be proven. Thus, *de jure* rights to certain legal remedies do not necessarily translate into *de facto* enjoyment of those rights. The lack of implementation of rights does not necessarily preclude their potential. Scope for the availability of labor rights for sex workers exists both under regulatory and decriminalization approaches, the latter being the preferred option of most sex workers’ rights activists. See also Inga K. Thiemann, *Sex Work Regulation, Anti-Trafficking Policy, and Their Effects on the Labour Rights of Sex Workers in Germany*, 36 INT’L J. COMPAR. LABOUR L. & INDUS. REL. 195, 214–15 (2020).

received, which in some cases would translate into financial independence. Additionally, shifting responses to exploitation in the sex industry towards a focus on labor exploitation would put into question raids on brothels which focus on migration status of the workers, rather than their working conditions. Furthermore, the separation or “siloing” of employment and immigration procedures, a recommended practice to improve detection and reporting of labor exploitation more broadly, could be extended to the sex industry if sex work were recognized as labor.

CONCLUSION

The current idealized category of “victim of trafficking” is embedded in a victims’ rights approach that conditionally protects “worthy” victims. This approach creates a victim category that is almost impossible to attain and creates artificial borders between “acceptable” exploitation and unacceptable exploitation. In order to achieve credibility in their victimization, women have to reject their agency in their migratory projects and choice of occupation and instead present themselves as helpless and innocent. By doing so they can access charitable protection, but not rights. The focus on protections over rights allows governments in destination countries to be perceived as benevolent: in creating this “victim of trafficking” narrative of absolute helplessness, governments can be seen as saving innocent victims, while at the same time maintaining exclusion and restrictions in immigration regimes and silencing criticism of restrictive immigration policies.

Wendy Chapkis argues that legislation on human trafficking “create[s] a politically strategic exception to a punishing rule.”¹⁰¹ Thus, the trafficking narrative keeps in place the structures that create human trafficking, while “rescuing” those who are able and willing to present themselves as absolute victims. Furthermore, such an approach ignores the underlying structures in labor and migration created by government policy and legislation, as well as the effect of social structures and prejudice, and the harmful exclusions and stigmatization faced by (migrant) sex workers in particular.

As a result, criminal law based anti-trafficking initiatives are based on regulating women’s sexuality, curtailing migration processes, and protecting the State by responding to a popular idea of trafficking as transnational organized crime. [...] These interventions [are] not only futile in terms of eradicating and preventing trafficking, but also ultimately harmful for women, and for both potential and actual victims of labor and sexual exploitation,¹⁰²

as they perpetuate gendered concepts of victimhood and exclude women from a truly rights-based approach.

This Article defines the current victim category in human trafficking as one that offers no rights, but only charitable protections to the select few “worthy” victims. By exposing the gendered category of rights-holding and charity-receiving victims, the Article opens up the possibility to address gaps in human trafficking policies and advocate for a truly rights-based approach that is rooted

101. Krieg, *supra* note 38, at 789–90.

102. Dagistanli & Milivojevic, *supra* note 15.

in labor rights. The victim category in human trafficking contributes to maintaining these harmful stereotypes. Exposing the victim category's harmful underlying assumptions is a first step to promote a focus on rights instead of rescue.

Victimization in sex work does not exist within a vacuum—there are significant similarities between victims of trafficking and other victims of labor exploitation. Approaches to human trafficking that are serious about ending severe forms exploitation and decreasing overall risks of exploitation must include labor rights policies and cannot exclude the sex industry from such considerations. The continued separation of sex work from other forms of exploitable labor is harmful, as is the conflation of all sex work with human trafficking.

A GLOBAL STUDY OF PROSTITUTION POLICY

Alexia Tomlinson, Mary Haggerty, Caroline Rini[†]

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INTRODUCTION

In recent years, the commercial sex trade has appeared at the forefront of political discourse.¹ Debates rage on about the best way to tackle the harms associated with commercial sex, with some proponents arguing for policies that legalize and legitimize the sex trade, and others arguing for measures aiming to

[†] We, the authors of this analysis, are feminists who work with criminalized survivors of commercial sexual exploitation as part of our professional activities, which include providing legal services in the form of criminal record relief. We seek to achieve a world with less exploitation, less sexual violence, and increased levels of gender equity. We are publishing this analysis to help progress the debate regarding prostitution policy and help achieve that goal. Additionally, for the purposes of transparency, we are part of multiple organizations that work to further the Equality Model. At this time, we feel the Equality Model, particularly its emphasis on a robust, fully funded social safety net, is the superior model. However, we recognize the limitations of this model, and will continue to support its evolution as more solutions become available.

1. See Emily Bazelon, *Should Prostitution Be a Crime?*, N.Y. TIMES (May 5, 2016), <https://www.nytimes.com/2016/05/08/magazine/should-prostitution-be-a-crime.html> [<https://perma.cc/U5Z3-WRYP>].

shrink or abolish the sex trade.² Impassioned advocates debate the correct way to address commercial sex in what one advocate referred to as a “bloody ideological battle.”³ Input from people with lived experience informs these conversations, but the lack of comprehensive prevalence studies complicates the discussion.⁴ However, drawing on international norms and stated goals demonstrates three key principles on which prostitution policy advocates agree: (1) decreasing number of children exploited by the sex trade; (2) decreasing physical and sexual violence perpetuated against those in the sex trade; and (3) ensuring a reality of choice and consent for those in the sex trade.⁵

This Article analyzes the four prominent prostitution policies—Full Criminalization Model, Full Decriminalization Model, Legalization Model, and Equality Model—as they relate to these three key agreements.⁶ Part II of this Article serves as an introduction to the four policy models and discusses their relative strengths and flaws as well as the ways they aim to achieve the three key agreements. Part III examines how four representative countries—the United States, New Zealand, Germany, and Sweden—have implemented the differing schemes and the ways in which three of them successfully achieved the three key agreements. It is undisputed that the Full Criminalization Model does not achieve any of these three goals. Finally, Part IV argues that advocates should prioritize the key principles of agreement over ideology, to further improve efforts to effectively reduce all forms of sexual violence.

I. PROSTITUTION POLICIES: AN INTRODUCTION

Globally, there are four predominant prostitution policy options: Full Criminalization Model, Legalization Model, Full Decriminalization Model, and the Equality Model.⁷

2. See, e.g., Margot Boyer-Dry, *What’s the Best Way to Protect Sex Workers? Depends on Whom You Ask*, N.Y. TIMES, <https://www.nytimes.com/2021/07/23/nyregion/sex-workers-nyc.html> [https://perma.cc/NT4R-9EJS] (last updated July 24, 2021).

3. *Id.*

4. See Michelle Madden Dempsey, *What Counts as Trafficking for Sexual Exploitation? How Legal Methods Can Improve Empirical Research*, 3 J. HUM. TRAFFICKING 61 (2017).

5. See, e.g., Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, 2237 U.N.T.S. 319; Kristen Wells, *The 2019 Trafficking Victims Protection Reauthorization Act: A Topical Summary*, POLARIS PROJECT (2019), <https://polarisproject.org/wp-content/uploads/2020/01/Polaris-TVPRA-2019-Analysis.pdf> [https://perma.cc/98RH-785S]; *Opheffing Algemeen Bordeeleverbod*, nos. 1–3, 1 July 1997.

6. See *infra* Part II for a discussion on the four policy models.

7. See Sex Workers & Allies Network, *The Law and Sex Work: Four Legal Approaches to the Sex Sector*, YALE L. (Apr. 2020), https://law.yale.edu/sites/default/files/area/center/ghjp/documents/the_law_and_sex_work.pdf [https://perma.cc/7AED-47CR].

A. Full Criminalization Model⁸

The first prostitution policy model is the Full Criminalization Model. Under this Model, all aspects of the sex trade are criminalized; this includes the sale and purchase of sex, as well as any conduct facilitating or promoting the commercial sex trade.⁹ All adult actors can face criminal penalties for their conduct.¹⁰ These laws maximize prostitution arrests and prosecutions instead of being designed to identify and assist persons in prostitution—including children—who have faced trafficking, victimization, or exploitation.¹¹

This Model begins with the assumption that the sale of sex is an immoral act and relies on punishment principles of deterrence and retribution to decrease the prevalence of prostitution.¹² Scholars generally justify the Full Criminalization Model by raising four claims: (1) the sex trade is associated with other forms of criminality; (2) the sex trade increases rates of sexually transmitted infections (“STIs”); (3) the sex trade is inherently immoral; and (4) the sex trade is intrinsically self-destructive and debilitating.¹³ However, each of these justifications is demonstrably untrue.¹⁴ Even taking at face value the claims that full criminalization advocates propose, the Model fails to achieve or even acknowledge the broader goals of prostitution policy.

The Full Criminalization Model fails to decrease the number of children exploited by the sex trade, and instead, it allows children to slip through the cracks of the criminal justice system and face sexual exploitation. Without specific laws in place, including safe harbor laws, which grant full immunity to children for prostitution offenses, children can and do face criminalization under

8. See Tesla Carrasquillo, Comment, *Understanding Prostitution and the Need for Reform*, 30 *TOURO L. REV.* 697, 704 (2014). Full Criminalization is the only prostitution policy model that does not actively seek to achieve the three key principles of agreement outlined in Part I. However, given that the majority of countries fully criminalize prostitution and the sex trade, it would be irresponsible not to discuss its foundation and flaws.

9. See ROBERT WEITZER, *LEGALIZING PROSTITUTION: FROM ILLICIT VICE TO LAWFUL BUSINESS* 48 (N.Y. Univ. Press 2012).

10. See Lara Gerassi, *A Heated Debate: Theoretical Perspectives of Sexual Exploitation and Sex Work*, 42 *J. SOCIO. SOC. WELFARE* 79 (2015). The only exception to Full Criminalization is those identified by law enforcement as trafficking victims under local law or international standard, however many of these individuals continue to experience criminalization in countries that fully criminalize the sex trade. Cynthia Soohoo, *Criminalization of Trafficking Victims*, *TRAFFICKING VICTIMS ADVOC. PROJECT* (Legal Aid Soc’y/Int’l Women’s Hum. Rts. Clinic, New York, N.Y.), Apr.–May 2015, at 1.

11. Soohoo, *supra* note 10, at 3.

12. See Gerassi, *supra* note 10.

13. See David A. J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 *U. PA. L. REV.* 1195, 1215 (1979) (noting that “[i]n order to understand the uniquely American practice of the criminal prohibition of prostitution per se, we must take seriously the four arguments familiarly offered in its defense: (1) criminogenesis; (2) the control of venereal disease; (3) the intrinsically immoral and degrading nature of commercial sex; and (4) cognate to (3), the self-destructive or debilitating nature of prostitution. Of these arguments, (1) and (2) do not justify absolute criminal prohibitions; therefore, the gravamen of the argument for criminalization turns, as well shall see, on the proper weight to be given to (3) and (4).”).

14. See *id.* at 1215–21.

the Full Criminalization Model because it treats children engaged in prostitution as criminals instead of as victims.¹⁵ The instinct towards criminalization also prevents children from being identified as victims of sex trafficking and permits them to be treated as criminals by law enforcement.¹⁶

The Full Criminalization Model does not decrease the level of violence perpetrated against those in the sex trade or advance their health and safety; instead, the Model traps persons in prostitution in “cycles of surveillance, policing, arrest, prosecution, diversion, and incarceration” for low-level offenses not limited to prostitution.¹⁷ Scholars have indicated that this cycle of surveillance and prosecution prevents persons in prostitution from accessing needed services given the high bar to access such services, which includes many lengthy conversations with police and cooperation with criminal prosecution of possible traffickers.¹⁸ Similarly, criminalization impacts a person in prostitution’s trust in police because of constant, arbitrary arrest and detention, disparate treatment, naming and shaming, extortion, blackmail, confiscation of property, revocation of child custody, forced rehabilitation, expulsion, deportation, denial of access to criminal justice services and justice for themselves against possible offenders, and even instances of assault and harassment by police officers.¹⁹ Additionally, when prostitution is illegal, those in the sex trade are less likely to seek medical care and more likely to engage in dangerous sex practices, resulting in lower health outcomes for persons in prostitution.²⁰

15. See *Human Trafficking Issue Brief: Safe Harbor*, POLARIS PROJECT (2015), <https://polarisproject.org/wp-content/uploads/2019/09/2015-Safe-Harbor-Issue-Brief.pdf> [https://perma.cc/3ETW-54JL] (“Child victims of human trafficking are forced, induced, or coerced into providing . . . commercial sex. A trafficked child may be compelled to engage in illegal activities such as prostitution or the selling of drugs, and instead of being treated as victims, many are treated as criminals and are prosecuted accordingly.”); see also Soohoo, *supra* note 10.

16. See Soohoo, *supra* note 10.

17. Glob. Health Just. P’ship, *Diversion from Justice: A Rights-Based Analysis of Local “Prostitution Diversion Programs” and their Impacts on People in the Sex Sector in the United States* (Sept. 2018) (unpublished report) (on file with the Yale Law School and the Yale School of Public Health).

18. See Carole S. Vance, *States of Contradiction: Twelve Ways to Do Nothing about Trafficking While Pretending To*, 78 *JOHNS HOPKINS U. PRESS* 933, 937 (2011).

19. See GLOB. ALL. AGAINST TRAFFIC IN WOMEN, *COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD* 78 (Mike Dottridge ed., 2007).

20. See Scott Cunningham & Manisha Shah, *Decriminalizing Indoor Prostitution: Implications for Sexual Violence and Public Health*, 85 *REV. OF ECON. STUD.* 1683, 1689 (2018); see also W.B., *Senegal’s Innovative Approach to Prostitution*, *ECONOMIST* (Apr. 12, 2018), <https://www.economist.com/the-economist-explains/2018/04/12/senegals-innovative-approach-to-prostitution/> [https://perma.cc/7RMT-GM72] (claiming, “[African states] have been at the forefront of the continent’s ongoing AIDS epidemic. One study in 2013 found that in 16 African countries, an average of 37% of sex workers were HIV positive. Yet one African country does things differently. Senegal is the only place in Africa where sex workers are regulated by the state. Identification cards confirm the women as sex workers and give them access to some free health care, condoms and education initiatives. Why is this small west African state so different?”).

The Full Criminalization Model fails to address whether those involved in the sex trade have a reality of choice and consent regarding their participation. In fact, the Model inherently assumes culpability on behalf of all actors. Further, it fails to consider coercive factors that result in exploitation or trafficking by treating all actors as criminals and removing consideration of possible victimization.²¹

B. Full Decriminalization Model

The Full Decriminalization Model is the “complete removal of criminal penalties related to the sex trade;”²² this includes removing criminal penalties not only from the actors selling sex in prostitution, but also managers, brothel owners, and sex buyers’ participation in prostitution.²³ Advocates of the Full Decriminalization Model maintain that there is nothing inherently violent about the sex trade; commercial sex is a form of labor like any other and the only reason to condemn sex as work is moral judgment or ignorance.²⁴ Proponents of this approach contend that the elimination of criminal consequences would result in better outcomes for those in prostitution by: (1) improving encounters with law enforcement; (2) protecting persons in prostitution from bad actors within the sex trade; and (3) decreasing stigma for those involved in the sex trade.²⁵

Encounters between law enforcement and people in the sex trade would improve, first, and most obviously, due to the absence of criminalization. Law enforcement will have less of a reason to engage with the sex trade generally, thereby narrowing the potential for negative interactions. An individual’s status as a participant in the sex trade *alone* does not put them at risk of arrest. Currently, criminalization of the sex trade disproportionately impacts historically marginalized and over-criminalized groups, including people of color, immigrants, and members of the LGBTQ community.²⁶ These over-criminalized groups will continue to be over-criminalized *regardless* of the legal status of

21. Ane Mathieson, Easton Branam & Anya Noble, *Prostitution Policy: Legalization, Decriminalization and the Nordic Model*, 14 SEATTLE J. SOC. JUST. 367, 426 (2016) (“Punishment of the prostituted individual fails to acknowledge that conscription into prostitution is driven by a combination of coercive factors. It is also a policy model that has come to favor the pardon of prostitution exploiters, often erroneously perceived by the criminal justice system as the victims in this industry. These misunderstandings of the nature of prostitution and trafficking have further entrenched this grey market industry.”).

22. Sex Workers & Allies Network, *supra* note 7.

23. See Amanda Srsic, Katarzyna Dubas-Jakóbczyk & Ewa Kocot, *The Economic Consequences of Decriminalizing Sex Work in Washington, DC—A Conceptual Model*, 11 SOC’YS 112, 114 (2021).

24. See Dr. Tlaleng Mofokeng, *Why Sex Work is Real Work*, TEEN VOGUE (Apr. 26, 2019), <https://www.teenvogue.com/story/why-sex-work-is-real-work> [https://perma.cc/A3KS-GK5X].

25. *The Facts*, DECRM NOW UK, <https://decrimnow.org.uk/the-facts/> [https://perma.cc/8Y2A-ETC3] (last visited Mar. 8, 2022).

26. See GLOB. NETWORK OF SEX WORK PROJECTS, *THE IMPACT OF CRIMINALISATION ON SEX WORKERS’ VULNERABILITY TO HIV AND VIOLENCE* 3 (2017); LALA B HOLSTON-ZANNELL, AM. CIV. LIBERTIES UNION, *SEX WORK IS REAL WORK, AND IT’S TIME TO TREAT IT THAT WAY* (2020).

prostitution, because the specific criminal charges against these groups are pretextual, and the true driving consideration is discrimination. Alternatively, it *could* be argued that prostitution specifically has always been a driving force in the over-criminalization of these groups, and that the Full Decriminalization Model will lower the overall rates of criminalization in these communities.

The Full Decriminalization Model increases protection from bad actors within the sex trade, proponents contend, because the lack of criminal penalties will encourage persons in prostitution to report crimes and abuse by bad actors within the sex trade, thus increasing personal and public safety.²⁷ While this would be a positive outcome, it is not a logically sound contention given the statistics of sexual violence for the entire population. Put another way, rape is not regularly reported by victims outside of the sex trade, so the cause for lack of reporting within the sex trade is unlikely to be the sex trade itself.²⁸ Preliminary research supports this assertion: a 2007 study by the University of Otago reported to the Prostitution Law Review Committee found that many sex workers were still not comfortable reporting sexual or physical violence to the police.²⁹

Regarding the stigma against persons in prostitution, the Full Decriminalization Model has mixed normative results. There is no doubt that stigma against persons in prostitution has decreased in correlation with decriminalization efforts. However, attitudes in New Zealand show that they have not decreased enough for all of those within prostitution to feel safe reporting crimes committed against them.³⁰

In premise, the Full Decriminalization Model accomplishes two of the three key agreements. By ending the criminalization of the trade, the sexual and physical violence against people in the sex trade would likely decrease. First, because in countries where decriminalization occurs, persons in prostitution report increased ability to turn away clients in favor of other, presumably safer, clients. Second, because criminalization itself is generally violent. Policing in many places inevitably leads to violent encounters with law enforcement, and experiences of violence during incarceration are frequent.

Additionally, the subsequent mistrust of law enforcement following the criminalization of a population results in less safe communities. Mistrust of law enforcement leads people in the sex trade to underreport crimes committed

27. Rachel Marshel, *Sex Workers and Human Rights: A Critical Analysis of Laws Regarding Sex Work*, 23 WM. & MARY J. WOMEN & L. 47, 61–63 (2016); BUREAU OF PUB. AFFS., U.S. STATE DEP'T, THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING (2004).

28. For example, in the United States, 310 rapes are reported for every 1,000 rapes that occur. These statistics are for the crime of rape among the United States population and show a profound sense of discomfort in reporting this crime. RAPE, ABUSE & INCEST NAT'L NETWORK, *The Vast Majority of Perpetrators Will Not Go to Jail or Prison*, THE CRIM. JUST. SYS.: STATISTICS, <https://www.rainn.org/statistics/criminal-justice-system> [https://perma.cc/ED5Y-9NL7] (last visited Mar. 27, 2022).

29. See GILLIAN ABEL, LISA FITZGERALD & CHERYL BRUNTON, THE IMPACT OF THE PROSTITUTION REFORM ACT ON THE HEALTH AND SAFETY PRACTICES OF SEX WORKERS 120–22 (2007), <https://www.otago.ac.nz/christchurch/otago018607.pdf> [https://perma.cc/4BAZ-RXSE].

30. *See id.*

against them. In theory, removing criminalization would increase levels of crime reporting and therefore safety in adults as well as children exploited by the trade. Children in the sex trade would only be viewed through the lens of victimhood, not criminalization, increasing their chances of being removed from the trade and offered services.

The Full Decriminalization Model alone would not accomplish the third agreement of ensuring the reality of choice. Removing criminalization helps to ensure that anyone who would like to participate in the sex trade are free to do so. It does nothing to ensure that individuals experiencing economic necessity are freely choosing to exchange sex for basic needs like food and housing.

C. Legalization Model

Under the Legalization Model, the sex trade is regulated. Buying and selling of sex is legal and subject to rules and regulations determined by national or local governments. Under a system of legalization, sex trafficking or “forced prostitution” is still illegal and subject to criminal penalties.³¹ Proponents of the Legalization Model maintain that there is nothing inherently immoral or violent about the sex trade and advance many of the same arguments as proponents of the Full Decriminalization Model.³² Further, supporters contend that the Legalization Model benefits society through increased tax revenue and reallocation of law enforcement resources.³³ Regulatory schemes vary dramatically depending on the impetus for legalization.³⁴ Generally, the regulations fall within one of three general categories: (1) how and where prostitution occurs; (2) health and safety regulations; and (3) general labor protections.³⁵ In theory, the Legalization Model aims to make the sex trade safer by bringing the black-market trade into the light, increasing health and safety protections for those selling and purchasing sex, and decreasing the stigma associated with prostitution.³⁶

There are several types of regulatory schemes controlling how and where prostitution occurs. When handled at a national level, prostitution may be limited to particular venues, e.g., legalization of brothels but not street-based prostitution, or particular locations.³⁷ In other instances, national governments

31. See Seo-Young Cho, Axel Dreher & Eric Neumayer, *Does Legalized Prostitution Increase Human Trafficking?*, 41 *WORLD DEV.* 67, 68 (2013).

32. Annamarie Forestiere, *To Protect Women, Legalize Prostitution*, *HARV. C.R.-C.L. L. REV.*, Oct. 1, 2019, at 1.

33. See *id.* at 2; see also Chika Unigwe, *Legalizing Prostitution Brings Protection and Better Care*, *N.Y. TIMES* (Sept. 19, 2013, 12:22 PM), <https://www.nytimes.com/roomfordebate/2012/04/19/is-legalized-prostitution-safer/legalizing-prostitution-brings-protection-and-better-care> [https://perma.cc/YJ5L-93T9].

34. Giorgia Serughetti, *Rethinking Force and Consent, Victimisation and Agency: A Feminist Approach to Prostitution Policy*, 3 *FEMERIS* 79, 88 (2018).

35. See generally WEITZER, *supra* note 9.

36. *Id.*

37. See, e.g., *Opheffing Alegemeen Bordeeleverbod*, nos. 1-3 1 July 1997, *Stb.* 1999; *NEV. REV. STAT.* § 201.354 (2021).

leave regulations to localities. Local governments may impose temporal or spatial limitations using ordinances or zoning regulations.³⁸

Given the rates of violence in the sex trade and the increased risk of STIs, the health and safety of those involved is of paramount concern. The Legalization Model attempts to address both concerns. By legalizing prostitution and regulating the circumstances under which sex can be purchased, barriers between those selling sex and law enforcement are theoretically removed. This enables those in prostitution to report violence committed against them and seek recompense when appropriate. Further, in countries where selling sex is only legal in brothels, the venue itself is expected to provide some level of protection to those working within its walls. To address the increased risk of STI transmission, regulations may require regular testing or medical checkups for those selling sex or implementing hygiene protocols for businesses.³⁹

More generally, where prostitution is legal, the full protection of labor laws applies to those identified as employees or contractors selling sex. There are often requirements that individuals must meet to obtain these protections including licensure or registration. The requirements to obtain such licenses may include citizenship or legal residency, as in the case of the Netherlands, or age limitations, as in Senegal.⁴⁰ While registration and licensure can be protective, they can also limit access in a way that drives individuals to illegal participation in the sex trade.⁴¹ Where an individual is not part of the legal scheme, they do not receive the benefits and protections they are due.⁴² For those who are within the legal scheme, typical labor laws such as pension or retirement contributions, the right to sue for unpaid services, or minimum wage apply.⁴³ Other regulations

38. See DOROTHEA CZARNECKI, HENNY ENGELS, BARBARA KAVEMANN, WILTRUD SCHENK, ELFRIEDE STEFFAN & DOROTHEE TÜRNU, *PROSTITUTION IN GERMANY – A COMPREHENSIVE ANALYSIS OF COMPLEX CHALLENGES* (2014).

39. See generally Branwyn Poleykett, *Chapter 7. Molecular and Municipal Politics: Research and Regulation in Dakar*, in *PARA-STATES & MED. SCI.* 237, 243 (Paul Wenzel Geissler ed., 2020) (“The law requires that providers of sexual services present themselves at regular intervals (officially every fifteen days, in practice, once a month), at a dedicated clinic, and that they submit to compulsory serological and gynecological examinations.”); Jason Chan, *Decriminalization of Prostitution in China*, 13 *NEW ENG. J. INT’L & COMPAR. L.* 329, 348 (2007) (“In order to obtain a license to run a brothel legally, a brothel owner must fulfill certain requirements.”).

40. *Starting as a Self-Employed Sex Worker in the Netherlands*, BUSINESS.GOV.NL, <https://business.gov.nl/starting-your-business/checklists-for-starting-a-business/starting-as-a-self-employed-sex-worker-in-the-netherlands/> [<https://perma.cc/4UAT-XMAQ>] (last visited Mar. 3, 2022); Chi Mgbako & Laura A. Smith, *Sex Work and Human Rights in Africa*, 33 *FORDHAM INT’L L. J.* 1178, 1212–13 (2010). See also Joyce Outshoorn, *Policy Change in Prostitution in the Netherlands from Legalization to Strict Control*, 9 *SEX RSCH. & SOC. POL’Y* 233 (2012) (discussing increasing regulation of the sex industry in the Netherlands, including heightened registration and documentation standards for sex workers); Carrasquillo, *supra* note 8, at 718–19 (outlining current prostitution regulation in the Netherlands).

41. See generally WEITZER, *supra* note 9, at 84.

42. *Id.* at 92 (discussing the reality of those selling sex outside the legal scheme in Tijuana and Victoria).

43. BUNDESMINISTERIUM FÜR FAMILIE, SENIOREN, FRAUEN UND JUGEND, *THE NEW PROSTITUTE PROTECTION ACT (DAS NEUE PROSTITUTIONSGESETZ)* 3 [hereinafter *THE NEW*

are more invasive; in Nevada, for example, brothel workers may not leave the brothel while under contract except to go to such places as beauty parlors and doctor's offices and also are prohibited from living within the community in which the brothel is located.⁴⁴

In theory, the Legalization Model accomplishes two of the three identified key goals of prostitution policy through a comprehensive regulatory scheme. First, by requiring licensing, governments could ensure that those legally selling sex are adults and that children are protected. Second, under the Legalization Model, physical and sexual violence against those in the sex trade should decrease because in theory, a regulatory scheme that ensures protection within brothels would protect many of those persons selling sex, and others could be ensured access to criminal and civil remedies if they face violence. However, this would require improved access to, and treatment within, judicial systems. As vulnerable individuals are regularly over criminalized and under-represented, it is difficult to imagine a mere shift in the law regarding prostitution would change their access to justice more broadly.

Finally, and least promisingly, the Legalization Model does not address whether the individual selling sex has *actual* choice regarding their participation. While sex trafficking is illegal, the increase in the sex trade paired with limitations as to who can engage in selling sex does not necessarily result in protection for those without choice or ensure that those registered are doing so of their own free will.

D. Equality Model⁴⁵

The Equality Model has four key tenets: (1) decriminalization of the person in prostitution; (2) criminalization of sex buyers and facilitators, with a commitment to treating buying sex as a serious form of exploitation; (3) a public education campaign about the inherent harms of prostitution; and (4) funded, robust, and holistic social safety net and services for victims of commercial sexual exploitation.⁴⁶ The goal of the Equality Model is to “combat sex

PROSTITUTION ACT], <https://www.bmfsfj.de/resource/blob/117624/ac88738f36935f510d3df8ac5ddcd6f9/prostschg-textbausteine-en-data.pdf> [https://perma.cc/2ZAY-T27T] (last visited Mar. 22, 2022) (“[*Prostitutionsgesetz*] gives prostitutes the right to demand that clients pay the agreed fee, and they have the right to go to court if necessary. Clients can no longer refuse to pay the money, for example, because they allegedly were unsatisfied.”).

44. Carlin Meyer, *Decriminalizing Prostitution: Liberation or Dehumanization?*, 1 CARDOZO WOMEN’S L.J. 105, 107 (1993).

45. The Equality Model is also known as the Sex Buyer Law, Demand Reduction Model, the Swedish Model, Nordic Model, Abolitionist Model, or Partial Decriminalization. WORLD WITHOUT EXPLOITATION, EQUALITY NOT EXPLOITATION: AN OVERVIEW OF THE GLOBAL SEX TRADE AND TRAFFICKING CRISIS, AND THE CASE FOR THE EQUALITY MODEL 11 (2019), <https://www.equalitymodelus.org/wp-content/uploads/2020/02/Equality-Not-Exploitation-white-paper-November-2019.pdf> [https://perma.cc/87VX-HYDK] [hereinafter EQUALITY NOT EXPLOITATION].

46. See *What is the Nordic Model?*, NORDIC MODEL NOW!, <https://nordicmodelnow.org/what-is-the-nordic-model/> [https://perma.cc/TD46-C45N] (last visited Mar. 24, 2022).

trafficking and commercial sexual exploitation, [and] promote gender equity” while making no value judgments about the morality of selling sex.⁴⁷ The model was inspired by Sweden’s 1999 Sex Purchase Act, *Sexköpslagen*, which was derived from extensive research into the sex trade.⁴⁸ The research demonstrated two facts upon which *Sexköpslagen* and the Equality Model are based: (1) prostitution is gendered—the people who buy sex are predominantly men, and the people from whom sex is bought are predominantly women and children and (2) violence, physical and sexual, is an inherent part of the sex trade.⁴⁹

The first and second tenets focus on the gendered nature of prostitution. Decriminalizing the person selling sex is a recognition of their historic vulnerability and economic disadvantage in society. Additionally, the criminalization of sex buyers and facilitators is a recognition that they are not merely passive participants in violence of the sex trade but are active perpetrators of violence.

The third tenet, a comprehensive public awareness campaign addressing the violence inherent in the sex trade, was derived from the Swedish Campaign against Prostitution and Trafficking in Women (“the Swedish Campaign”). The Swedish Campaign was implemented between 2002 and 2003, primarily to educate and raise awareness about prostitution and global trafficking in women.⁵⁰ It did so by taking steps to target the male demand for prostitution by raising awareness about the conditions of those being sexually exploited and carrying out a nationwide poster campaign.⁵¹

The fourth tenet supports exploited persons by advocating for “holistic, robust social services which provide necessary medical and psychological care as well as economic, educational, and housing assistance to survivors as they attempt to escape their exploitation.”⁵² Persons in prostitution often suffer from mental health conditions, substance use disorder, and long-term effects of physical injuries.⁵³ Additionally, victims of exploitation often rely on traffickers

47. EQUALITY NOT EXPLOITATION, *supra* note 45, at 11.

48. See Gunilla Ekberg, *The Swedish Law That Prohibits the Purchase of Sexual Services*, 10 VIOLENCE AGAINST WOMEN 1187, 1188–92 (2004).

49. *Id.*

50. NORDIC BALTIC CAMPAIGN AGAINST TRAFFICKING IN WOMEN, FINAL REPORT 2002 108–09 (2004), <http://norden.diva-portal.org/smash/get/diva2:701073/FULLTEXT01.pdf> [<https://perma.cc/2649-GMYT>] (indicating how the Swedish Campaign was part of a larger campaign put on by the Nordic Council of Ministers called the Nordic-Baltic Campaign Against Trafficking in Women).

51. *Id.* at 108–10 (“[T]hree posters [with Swedish Campaign messaging] were displayed in 2,215 public locations around the country, such as at bus shelters, in subway stations and on streetcars.”).

52. EQUALITY NOT EXPLOITATION, *supra* note 45, at 24.

53. Nitasha Puri, Kate Shannon, Paul Nguyen & Shira M. Goldberg, *Burden and Correlates of Mental Health Diagnoses Among Sex Workers in an Urban Setting*, 17 BMC WOMEN’S HEALTH, no. 133, 2017, at 1, 5–7, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5735638/pdf/12905_2017_Article_491.pdf [<https://perma.cc/Z757-XV8Z>]; Kara Marie Brawn & Dominique Roe-Sepowitz, *Female juvenile prostitutes: Exploring the relationship to substance use*, 30 CHILD. & YOUTH SERV. REV. 1395 (2008).

for basic needs including food.⁵⁴ After victimization, survivors report “feeling helpless and hopeless, struggling to feel competent with life skills, ashamed about their past victimization, and angry about missed education and job training.”⁵⁵ The Equality Model seeks to limit vulnerabilities of those who may experience exploitation in the sex trade and provide services and support to those seeking to exit.⁵⁶

The Equality Model has a unique approach to reaching the goals outlined in the three key agreements. This model acknowledges that the sex trade operates by traditional economic principles and if the industry is normalized, there is a corresponding increase in demand.⁵⁷ For instance, a United States study “found that over 20% of men who had never paid for sex reported that they would consider doing so if . . . sex buying were legal.”⁵⁸ Where there is an increase in the demand for commercial sex, without a corresponding voluntary increase in supply, trafficking and exploitation consequently increases.⁵⁹

The Equality Model is the only model to recognize the need to decrease demand in order to minimize trafficking.⁶⁰ Additionally, in recognizing the driving role played by the demand for sex, the Equality Model acknowledges the imbalance of power in the commercial sex trade. Inherent in the policy is the recognition that prostitution gives those with both choice and power the opportunity to purchase access to the bodies of those without choice or power.⁶¹ Lastly, the Equality Model aims to end the society stigma that persons in prostitution are “morally inferior” or “engaged in prostitution by choice” through public education.⁶² This is necessary for the Model’s success; if society does not

54. Jennifer McQuaid, *Understanding the Psychological Effects of Sex Trafficking to Inform Service Delivery*, 64 FORCED MIGRATION REV. 42, 42 (2020).

55. *Id.*

56. Ending Human Trafficking Podcast, *The Equality Model: A Paradigm Change to Reduce Sex Trafficking*, at 12:27 [https://endinghumantrafficking.org/219/\[https://perma.cc/3BDA-XDVK\]](https://endinghumantrafficking.org/219/[https://perma.cc/3BDA-XDVK]) (last visited Jan. 30, 2022) (noting this consists of offering services such as “grants for housing, grants for job training, [and] case management services . . .”).

57. See, EQUALITY NOT EXPLOITATION, *supra* note 45, at 13; *What is the Equality Model? And Why Is Its Adoption In the United States So Vital?*, EQUAL NOT EXPLOITED, <https://www.equalitymodelus.org/why-the-equality-model/> [https://perma.cc/FGW5-LQKN] [hereinafter EQUALITY MODEL US]; see also Brad Tuttle, *Germany Has Become the Cut-Rate Prostitution Capital of the World*, TIME (June 18, 2013), <http://business.time.com/2013/06/18/germany-has-become-the-cut-rate-prostitution-capital-of-the-world/> [https://perma.cc/4PSG-P2MT] (showing an increase in demand in Germany with legalization of prostitution).

58. EQUALITY NOT EXPLOITATION, *supra* note 45, at 14.

59. See EQUALITY NOT EXPLOITATION, *supra* note 45, at 14 (“When the sex trade market grows, the only way to satisfy increased demand is to traffic vulnerable women, girls, and transwomen from more disenfranchised communities or from abroad.”); see generally, Tuttle, *supra* note 57; see also *The Link Between Prostitution and Sex Trafficking*, *supra* note 27.

60. EQUALITY NOT EXPLOITATION, *supra* note 45, at 16–17.

61. See Ekberg, *supra* note 48, 1188–92; see also *What Is the Nordic Model?*, *supra* note 46.

62. EQUALITY NOT EXPLOITATION, *supra* note 45, at 24.

understand the harm inherent in the sex trade, it becomes challenging to implement survivor-focused services for which the Equality Model advocates.⁶³

The strengths of the Equality Model do not diminish its flaws—it requires complete buy-in from the government implementing the policy. Changes to the criminal law alone are insufficient to address the harms of the sex trade without well-funded exit services, a dedication to changing public opinion on prostitution, and a commitment to eradicating gender-based violence. Even when these conditions are met, societal prejudices may prevent the total success of the Model. This is demonstrated by the increase in violence toward minority populations in Norway and the global stigma against those who sell sex.⁶⁴ However, these flaws pale in comparison to the successes seen in countries that have adopted Equality Model principles.

II. AN ILLUSTRATION OF EACH MODEL VIA AN OVERVIEW OF FOUR COUNTRIES

Four countries are analyzed in this Article, each incorporating one of the four legal regimes governing prostitution policy: the United States embodies the Full Criminalization Model across all fifty states;⁶⁵ New Zealand fully decriminalizes both the buying and selling of sex; Germany legalizes and regulates prostitution; and Sweden demonstrates the Equality Model.

A. *The United States*

The United States follows the Full Criminalization Model.⁶⁶ The federal government does not have the power to regulate commercial sex outside of interstate or foreign travel; as such, prostitution is left to the control of each

63. *Id.* at 24–25.

64. Ulla Bjørndahl, *Dangerous Liaisons* 12 (2012), <https://humboldt1982.files.wordpress.com/2012/12/dangerous-liaisons.pdf> [<https://perma.cc/8ULV-SLZS>] (calling attention to problematic areas of Equality Model implementation); Molly Simmons, *As Sex Workers, We Know the “Equality Model” Is a Dangerous Mistake*, IN THESE TIMES (Feb. 24, 2021), <https://inthesetimes.com/article/sex-workers-equality-model-new-york> [<https://perma.cc/G8NH-QCWG>].

65. Although all fifty U.S. States follow Full Criminalization, ten counties in rural Nevada follow Legalization. Since 1971, the sale and purchase of sex in licensed houses of prostitution has been legal in ten Nevada counties with populations of less than 700,000. Within those counties, there are twenty operational brothels. *See* NEV. REV. STAT. ANN. § 201.354 (LexisNexis 2021). *See also* Michelle Price, *Pandemic Makes Prostitution Taboo in Nevada’s Legal Brothels*, AP NEWS (Feb. 20, 2021), <https://apnews.com/article/prostitution-taboo-nevada-coronavirus-c0647f194e2c7bf76743d671843cac4d> [<https://perma.cc/62L5-T2A8>]. *See also* Michelle Rindels, *Indy Explains: How Legal Prostitution Works in Nevada*, NEV. INDEP. (May 27, 2018), <https://thenevadaindependent.com/article/the-indy-explains-how-legal-prostitution-works-in-nevada/> [<https://perma.cc/G5UC-4Q7B>].

66. Note that recent expansions of trafficking recognition, the TVPRA, and vacatur remedies are an acknowledgement of the reality of consent. Additionally, progressive prosecutors using their power to “decriminalize” prostitution should be here too.

individual state.⁶⁷ Currently, all fifty states⁶⁸ criminalize prostitution in all forms: buying sex, selling sex, and the facilitation of commercial sex.⁶⁹

From its founding until the late nineteenth century, prostitution was legal in the United States.⁷⁰ However, in the 1870s, the United States' attitude towards prostitution shifted following the publication of articles blaming persons in prostitution for the spread of STIs.⁷¹ In response, state and local governments began to impose more regulations on the sex industry eventually leading to full criminalization the sex trade.⁷² Such regulations began with the Social Evil Ordinance in St. Louis, Missouri, which required physicians to provide health care to persons in prostitution, and the 1910 White Slave Traffic Act, known today as the Mann Act, which imposed heavy penalties on transporting, aiding, abetting, or causing the interstate transportation of a women for an "immoral purpose."⁷³

Even the United States Supreme Court in 1908 commented on prostitution policy in a case that granted effect to the Congressional intent to ban the importation of women and girls into the United States; concerning persons in prostitution, it said:

The lives and example of such persons are in hostility to "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization, the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement."⁷⁴

This comment by the Supreme Court concretely demonstrates how morality, stemming directly from religious ideology, influenced the United

67. CHARLES DOYLE, CONG. RSCH. SERV., R43597, SEX TRAFFICKING: AN OVERVIEW OF FEDERAL CRIMINAL LAW 1 (2015) <https://sgp.fas.org/crs/misc/R43597.pdf> [<https://perma.cc/43VH-HF5D>]; see 18 U.S.C.S. § 2421 (LexisNexis, Lexis Advance through Public Law 117-80, approved December 27, 2021).

68. The only exception is several rural counties in Nevada. These counties have adopted a legal scheme with extensive regulation of prostitution. However, for the purpose of this discussion the larger context of Full Criminalization is most relevant, and the minor impact of these small counties can be disregarded. See *Counties Where Prostitution Is Legal in Nevada*, LAS VEGAS DEF. GROUP (Aug. 24, 2021) <https://www.shouselaw.com/nv/blog/prostitution/counties-where-prostitution-is-legal-in-nevada/> [<https://perma.cc/56HX-XEEC>].

69. See Anne Gunderson, *The Effect of Decriminalizing Prostitution on Public Health and Safety*, CHI. POL'Y REV. (Feb. 26, 2018), <https://chicagopolicyreview.org/2018/02/26/the-effect-of-decriminalizing-prostitution-on-public-health-and-safety/> [<https://perma.cc/5L76-55HF>].

70. See Carrasquillo, *supra* note 8, at 702.

71. See *id.* at 703.

72. See *id.*

73. *Id.* See also James Wunsch, *The Social Evil Ordinance*, 33 AM. HERITAGE, Feb./Mar. 1982, <https://www.americanheritage.com/social-evil-ordinance/> [<https://perma.cc/RM5H-8RU8>]; *The Full Text of the MANN Act*, PBS, <https://www.pbs.org/kenburns/unforgivable-blackness/mann-act-full-text/> [<https://perma.cc/6J5U-K5K7>] (last visited Mar. 5, 2022).

74. *United States v. Bitty*, 208 U.S. 393, 401 (1908) (quoting *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885)).

States' prostitution policy.⁷⁵ The shift in attitude toward prostitution in the United States, characterized by some scholars as a moral crusade,⁷⁶ led to the implementation of the Full Criminalization Model in forty-nine of fifty states by 1971.⁷⁷ To date, the crime of prostitution is classified as a public order offense in most states.⁷⁸

Although all fifty states criminalize both the purchasing and selling of sex, the commercial sex trade flourishes across the United States, demonstrating the ineffectiveness of the Full Criminalization Model.⁷⁹ Ultimately, the Full Criminalization Model is an un-nuanced policy that fails to achieve the three key goals of prostitution policy.

The Full Criminalization Model fails to decrease the number of children exploited by the sex trade despite the widespread condemnation of the prostitution of children.⁸⁰ Despite this recognition, only thirty-four states in the United States have laws explicitly prohibiting the criminalization of victims of child sex trafficking.⁸¹ These protections, known as "Safe Harbor" laws, vary

75. Richards, *supra* note 13, at 1219–20.

76. See Ronald Weitzer, *The Movement to Criminalize Sex Work in the United States*, 37 J. L. & Soc. 61, 62 (2010) ("Although some observers have documented a growing 'mainstreaming' or 'normalization' of the sex industry – especially regarding pornography and stripping, where there has been some spillover into mainstream media coupled with sheer abundance on the Internet – prostitution remains beyond the pale in the United States. Indeed, prostitution is being increasingly demonized, marginalized, and criminalized as a result of the efforts of a robust moral crusade. The crusade initially targeted sex trafficking, but then expanded its targets to prostitution, pornography, stripping And all other types of commercial sex. The punitive trend may be viewed as a reaction to the increasing availability and mass marketing of sexual services and to what crusade and political leaders view as an alarming normalization of sex for sale.").

77. Alyssa Castro, *Better in Theory: The Road to Prostitution Reform in Pennsylvania*, 9 RUTGERS J.L. & PUB. POL'Y 37, 45 (2012); Ann M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 BERKELEY WOMEN'S L. J. 47 (1995) (discussing criminalization of prostitution as a function of societal changes during the Progressive Era between 1896 and 1916).

78. See, e.g., DEL. CODE. ANN. Tit. 11, § 1343 (2021); FLA. STAT. ANN. § 796.07 (LexisNexis 2021); 18 PA. CONS. STAT. § 5902 (2021).

79. See Mathieson et al., *supra* note 21, at 426.

80. See generally Shared Hope International, *Non-Criminalization of Juvenile Sex Trafficking Victims* (Jan. 2016), <https://sharedhope.org/wp-content/uploads/2014/04/JUSTRESPONSE-POLICY-PAPER-NON-CRIMINALIZATION-OF-JUVENILE-SEX-TRAFFICKING-VICTIMS.pdf> [<https://perma.cc/9KJ2-K4PN>]; see also Trafficking Victims Protection Act of 2000, 22 U.S.C.A § 7101 (Westlaw through Pub. L. No. 106-386) (Purchasing sex from a child in the United States is illegal at the federal level and identified as child sex trafficking. Individuals under 18 years of age are included within the scope of "severe forms of trafficking.").

81. *Human Trafficking Issue Brief: Safe Harbor*, *supra* note 15 ("The most protective age-based statutes for minors have adopted immunity for children under the age of eighteen for prostitution, promoting prostitution, or other non-violent offenses if the offense was committed as a direct result of being a victim of human trafficking. In a less protective approach, some other states only provide immunity for children under a certain age (typically fourteen or fifteen) or for first time offenders. CSEC victims who do not receive immunity are diverted from criminal proceedings to a services program and charges against the child are dismissed when he or she successfully completes the program.").

significantly.⁸² In states without Safe Harbor, children who are victims of sex trafficking face criminalization for prostitution, resulting in their entry into the criminal justice system; this criminalization causes traumatization and may impact future opportunities such as education or employment.⁸³

Multiple studies demonstrate that most persons in prostitution enter the sex trade before the age of eighteen; girls of color enter prostitution at an earlier age than white girls.⁸⁴ A study from Illinois discussed the behaviors of sex buyers in online chat rooms, finding that despite recognition of the potential extreme youth of persons in prostitution, buyers were not deterred from engaging in the purchase of sex, showing a willingness to risk raping children.⁸⁵ Comparing 135 trafficked and non-trafficked girls ages eleven to seventeen in residential care, one study found that trafficked girls were more likely to have a substance abuse disorder, gang involvement, juvenile justice system involvement, and have faced intimate partner violence.⁸⁶ As such, child victims of sex trafficking experience wide range effects of trauma prior to, during, and after trafficking across all areas of their lives; child sex trafficking results in sexual, physical, and emotional trauma impacting health, education, economic status and resulting in legal, social, relational, sexual, and spiritual issues.⁸⁷

82. *Id.*

83. *See id.*; see also Michelle Madden Dempsey, *Decriminalizing Victims of Sex Trafficking*, 52 AM. CRIM. L. REV. 207, 211–12 (2014) (Vill. Pub. L. & Legal Theory Working Paper Series, Paper No. 2014-1015), https://www.academia.edu/29032984/Decriminalizing_Victims_of_Sex_Trafficking/ [<https://perma.cc/R39H-W62N>].

84. JODY RAPHAEL & KATIE FIEFER, WHAT WE KNOW ABOUT SEX TRAFFICKING, PROSTITUTION, AND SEXUAL EXPLOITATION IN THE U.S. 73–88 WORLD WITHOUT EXPLOITATION (2017), https://endsexualexploitation.org/wp-content/uploads/Research-Summary_What-we-know-about-trafficking-prostitution-and-exploitation-in-US-.pdf [<https://perma.cc/F2H8-9R9A>];

FRANCES GRAGG, IAN PETTA, HAIDEE BERNSTEIN, KARLA EISEN, & LIZ QUINN, NEW YORK PREVALENCE STUDY OF COMMERCIAL SEXUALLY EXPLOITED CHILDREN, Final Report (2007), <http://www.ocfs.state.ny.us/main/reports/csec-2007.pdf> [<https://perma.cc/M2MU-Z32X>] (noting that in upstate New York 16% of trafficked girls were under the age of 13 and in New York City 4% were under 13); DOMINIQUE ROE-SEPOWITZ & KHARA JABOLA-CAROLUS, SEX TRAFFICKING IN HAWAII: PART II, THE STORIES OF SURVIVORS, ARIZ. STATE UNIV. & HAW. STATE COMM'N ON THE STATUS OF WOMEN 5 (2019) https://socialwork.asu.edu/sites/default/files/stir/final_finalexecutive_summary_part_ii_sex_trafficking_in_hawaii.pdf [<https://perma.cc/G2CX-Y2HN>] (finding that in Hawaii the average first sex trafficking experience was 14.7 years of age, with a range of 11 to 20 years of age).

85. Lara Janson, “Our Great Hobby:” *An Analysis of Online Network for Buyers of Sex in Illinois*, 52–54 (2013), <https://icasa.org/docs/misc/caase%20report%20online%20buyers%20of%20sex%20in%20illinois.pdf> [<https://perma.cc/ZHA9-EKL8>].

86. Kristine Hickie & Dominique Roe-Sepowitz, *Adversity and Intervention Needs among Girls in Residential Care with Experiences of Commercial Sexual Exploitation*, CHILD. & YOUTH SERV. REV., 93, 15–17 (2018).

87. *Impact of Trafficking*, NAT'L CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/what-child-trauma/trauma-types/sex-trafficking/effects#:~:text=Children%20and%20adolescents%20who%20have,%2C%20soci>

The Full Criminalization Model in the United States fails to ensure the health and safety of those in the sex trade. Persons in prostitution face overwhelming levels of criminalization; a 2016 survey by the National Survivor Network found that ninety-one percent of survivors surveyed reported being arrested.⁸⁸ Moreover, the criminalization of selling sex often disproportionately impacts low-income women, trans women, and women of color.⁸⁹ In Pennsylvania, women have consistently been arrested for prostitution-related offenses at rates significantly higher than men.⁹⁰ In 2017, black adults made up thirty-seven percent of adult prostitution arrests, despite making up only 13.4% of the United States population.⁹¹ Only about six percent of men who buy sex in the United States have reported ever having been arrested as a result.⁹² These

al%2C%20relational%2C%20sexual%20and/ [https://perma.cc/EZA5-CRGC] (last visited Mar. 5, 2022).

88. BETH JACOBS & STEPHANIE RICHARD, NATIONAL SURVIVOR NETWORK MEMBER SURVEY: IMPACT OF CRIMINAL ARREST AND DETENTION ON SURVIVORS OF HUMAN TRAFFICKING 3 (2016), <https://nationalsurvivornetwork.org/wp-content/uploads/2017/12/VacateSurveyFinal.pdf> [https://perma.cc/P2ZV-35CP].

In contrast, sex buyers often face no repercussions for their conduct: in the United States, between 70,000 and 80,000 people are arrested each year for prostitution crimes, and yet sex buyers account for only 10% of arrests. *See generally, Racial and Gender Disparities in the Sex Trade*, RIGHTS4GIRLS (Sept. 2018), <https://rights4girls.org/wp-content/uploads/r4g/2018/09/Racial-Justice-fact-sheet-Sept-2018-Final.pdf> [https://perma.cc/PZ2Y-PK6L]; *Prostitution in the United States*, HG, <https://www.hg.org/legal-articles/prostitution-in-the-united-states-30997> [https://perma.cc/VR6R-T9P8] (last visited Jan. 31, 2022).

89. *See Racial and Gender Disparities in the Sex Trade*, *supra* note 88; ACLU, IS SEX WORK DECRIMINALIZATION THE ANSWER? 11, https://www.aclu.org/sites/default/files/field_document/aclu_sex_work_decrim_research_brief.pdf [https://perma.cc/63YM-TG2W] (last visited Jan 21, 2022).

90. *See* INSTITUTE TO ADDRESS COMMERCIAL SEXUAL EXPLOITATION, REPORT ON COMMERCIAL SEXUAL EXPLOITATION IN PENNSYLVANIA SPRING 2021, <http://cseinstitute.org/wp-content/uploads/2021/06/Spring-2021-Report-FINAL-pages.pdf> [https://perma.cc/FJB3-AQ79] (last visited Apr. 13, 2022); INSTITUTE TO ADDRESS COMMERCIAL SEXUAL EXPLOITATION, REPORT ON COMMERCIAL SEXUAL EXPLOITATION IN PENNSYLVANIA SPRING 2020, <http://cseinstitute.org/wp-content/uploads/2021/06/Spring-2021-Report-FINAL-pages.pdf> [https://perma.cc/6ANE-FZ89] (last visited Apr. 13, 2022); INSTITUTE TO ADDRESS COMMERCIAL SEXUAL EXPLOITATION, REPORT ON COMMERCIAL SEXUAL EXPLOITATION IN PENNSYLVANIA SPRING 2019, <http://cseinstitute.org/wp-content/uploads/2021/06/Spring-2021-Report-FINAL-pages.pdf> [https://perma.cc/D9LG-4N9V] (last visited Apr. 13, 2022); INSTITUTE TO ADDRESS COMMERCIAL SEXUAL EXPLOITATION, REPORT ON COMMERCIAL SEXUAL EXPLOITATION IN PENNSYLVANIA SPRING 2018, <http://cseinstitute.org/wp-content/uploads/2021/06/Spring-2021-Report-FINAL-pages.pdf> [https://perma.cc/K4HS-ZQDU] (last visited Apr. 13, 2022).

91. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-43> [https://perma.cc/E23X-HL2H] (last visited Apr. 13, 2022); *QuickFacts: Connecticut*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/CT/SEX255218#SEX255218> [https://perma.cc/L97C-QPQA] (last visited Mar. 5, 2022).

92. DEMAND ABOLITION, WHO BUYS SEX? UNDERSTANDING AND DISRUPTING ILLICIT MARKET DEMAND 5 (2018), <https://www.demandabolition.org/wp-content/uploads/2019/07/Demand-Buyer-Report-July-2019.pdf> [https://perma.cc/5WCD-WDVF].

arrest rates are emblematic of larger systemic issues in the United States criminal justice system; vulnerable and minority populations are over-criminalized and underserved.⁹³

Further, due to stigma and lack of agency or protection, those in prostitution are incredibly vulnerable to violence. A 2008 study from Chicago also found that forty-three percent of sex buyers believe that if they pay, the woman should do anything asked of them; thirteen percent said they would rape a woman if they could get away with it; nineteen percent said they had raped a woman; twenty-one percent said they did not believe it was possible for a woman in prostitution to be raped because receiving money for sex eliminates the right to say no.⁹⁴ Persons in prostitution face violence and victimization from law enforcement; sexual violence against both children and adults is the second most common type of violence perpetrated by law enforcement.⁹⁵ Law enforcement also uses legal tactics to commit sexual assault in the engagement of police investigations, ranging from encouraged sexual encounters with confidential informants in prostitution stings, sexual violence against persons in custody or in questioning, or those who simply encounter police on patrol.⁹⁶

Finally, the Full Criminalization Model in the United States ignores the question of choice, consent, and culpability. In the United States, those who buy sex are predominantly white, educated, middle-aged, married men with a disposable income,⁹⁷ while those who sell sex are predominantly indigent, women and girls of color, demonstrating the inherent coerciveness of the trade based upon economic status and power imbalances.⁹⁸ Further, poverty,

93. See *Racial Justice*, ACLU, <https://www.aclu.org/issues/racial-justice> [https://perma.cc/ZFD5-SWZU] (last visited Feb. 1, 2022).

94. RACHEL DURCHSLAG & SAMIR GOSWAMI, DECONSTRUCTING THE DEMAND FOR PROSTITUTION: PRELIMINARY INSIGHTS FROM INTERVIEWS WITH CHICAGO MEN WHO PURCHASE SEX 2–22 (2008), <https://humantraffickinghotline.org/sites/default/files/Deconstructing-the-Demand-for-Prostitution%20-%20CAASE.pdf> [https://perma.cc/E2KH-NY7K].

95. *The Cato Institute's National Police Misconduct Reporting Project*, Annual Report, CATO INST. (2010), <https://www.leg.state.nv.us/Session/77th2013/Exhibits/Assembly/JUD/AJUD338L.pdf> [https://perma.cc/QGS3-Y4LE].

96. See e.g., Nancy Philips & Craig R. McCoy, *Extorting Sex with a Badge*, PHILA. INQUIRER (Mar. 29, 2007), https://www.inquirer.com/philly/news/special_packages/inquirer/Extorting_sex_with_a_badge.html [https://perma.cc/8LHX-Y9N7].

97. See generally DEMAND ABOLITION, *supra* note 92.

98. JODY RAPHAEL, KATIE FIEFER, JAYNE BIGELSEN, MICHELLE DEMPSEY, & SHEA RHODES, GET THE FACTS. WHAT WE KNOW ABOUT SEX TRAFFICKING, PROSTITUTION, AND SEXUAL EXPLOITATION IN THE U.S. 73–88 (2020) (analyzing multiple research studies regarding the characteristics of women in prostitution and finding that 48.1% disclosed physical abuse by a parent or guardian; 53.2% reported being sexually molested; 40% reported being raped as a child; 50% had a parent with a substance abuse disorder; 36% had been involved in social services; 58.3% reported that they ran away from home; and African American women entered prostitution earlier than other women. The authors also identified the clear connection between prostitution and homelessness, noting that homeless individuals trade sex for money, food, shelter, alcohol, or drugs, while falling prey to pimps, traffickers, and buyers and only very small percentages of persons in prostitution do not use alcohol or drugs while engaged in the trade).

homelessness, drug addiction, childhood abuse, and domestic violence trap individuals into prostitution, demonstrating the inherent coercive factors that drive individuals into the sex trade when they are left with no other choice.⁹⁹

B. New Zealand

New Zealand ascribes to the Full Decriminalization Model. The New Zealand government passed the Prostitution Reform Act of 2003 (“PRA”), which fully decriminalized prostitution across the country.¹⁰⁰ The act’s purpose is to decriminalize prostitution and create a framework conducive to public health that meets the following goals: (1) safeguarding the human rights of sex workers and protecting them from exploitation; (2) promoting the welfare and occupational health and safety of sex workers; and (3) prohibiting the purchase of sex from persons under eighteen years of age.¹⁰¹

Despite adopting a Full Decriminalization Model in name, New Zealand implemented several regulations regarding the sex trade. The PRA created a brothel operator certification system and implemented certain health and safety requirements for brothels.¹⁰² Small owner-operated brothels, or brothels with up to four people where each worker “retains control over their earnings,” are exempt from the licensing scheme.¹⁰³ Those travelling to New Zealand on a visa are not permitted to work in the sex trade, doing so would be a breach of their immigration status.¹⁰⁴ Finally, the PRA retained the prohibition against minors engaging in prostitution.¹⁰⁵ The maximum sentence for receiving payment for commercial sexual services of a person under eighteen is seven years.¹⁰⁶ Each of these regulations are intended to prevent commercial sexual exploitation within the decriminalized sex trade.

Prostitution has been practiced in New Zealand since the early days of European colonization.¹⁰⁷ Throughout the nineteenth century, prostitution was widely accepted, with most local governments regulating brothels.¹⁰⁸ In 1869, to protect sex buyers, New Zealand passed its first piece of legislation that regulated the sex trade: the Contagious Diseases Act.¹⁰⁹ This legislation permitted occasional medical examinations of “common prostitutes,” resulting in the imprisonment of women found to be carrying a contagious disease.¹¹⁰ During the

99. *Id.*

100. Prostitution Reform Act 2003, s 3, (N.Z.).

101. *Id.*

102. *Id.*, ss 8, 34.

103. *Id.*, ss 4(1)(b), 5(1), 34(1).

104. *Id.*, s 19(2).

105. *Id.*, s 3(d).

106. *Id.*, ss 21, 23(1).

107. PAUL BELAMY, N.Z. PARLIAMENTARY LIBR., PROSTITUTION LAW REFORM IN NEW ZEALAND 1 (2012), <https://www.parliament.nz/resource/en-NZ/00PLSocRP12051/c62a00e57bd36e84aed237e357af2b7381a39f7e> (noting that traders visiting the island nation traded weapons for sexual access to native men and women.).

108. *Id.* at 1–2.

109. *Id.* at 2.

110. *Id.*

twentieth century, New Zealanders began to tolerate prostitution less and less.¹¹¹ In 1961, the government outlawed brothel-keeping, living on the earnings of prostitution, and procuring sexual intercourse; each offense carried a maximum five-year penalty.¹¹² In the 1990s, however, calls for decriminalization of the sex trade intensified.¹¹³

New Zealand has seen successes with the Full Decriminalization Model, most notably in the realm of attitudes toward law enforcement, and in the ability to refuse clients. One study found that fifty-seven percent of persons in prostitution interviewed said that police attitudes towards sex workers improved.¹¹⁴ The same study found that, significantly, sixty-four percent of people interviewed found it easier to refuse clients.¹¹⁵

Despite these successes, anti-trafficking organizations across New Zealand have identified major flaws with the PRA.¹¹⁶ Evaluating the first principle of agreement, despite the PRA's goal of eliminating the sexual exploitation of children, this form of exploitation continues to persist in New Zealand, both on the street and in legal brothels.¹¹⁷ In fact, relaxed regulations surrounding prostitution have resulted in parents selling access to their children, allowing adults to sexually assault and rape children in exchange for money.¹¹⁸ Although the government has convicted adults of sexually exploiting children, it has not "identif[ied] any victims in these cases as trafficking victims."¹¹⁹ Instead, sources refer to these children as "underage prostitutes."¹²⁰

The PRA does not seem to lead to an increase in safety for persons in prostitution either.¹²¹ While the government promised that the Full

111. *Id.*

112. *Id.*

113. *Id.* at 3.

114. ABEL ET AL., *supra* note 29, at 163.

115. *Id.* at 116.

116. *Prostitution in New Zealand*, COAL. AGAINST TRAFFICKING IN WOMEN AUSTL., <https://www.catwa.org.au/prostitution-in-new-zealand/> [<https://perma.cc/XG59-S44Y>] (last visited Jan. 31, 2022) (identifying PRA issues).

117. See Michelle Cooke, *Supreme Court Dismisses Brothel Keeper's Appeal*, STUFF N.Z. (July 23, 2012) <http://www.stuff.co.nz/national/7330679/Supreme-Court-dismisses-brothel-keepers-appeal> [<https://perma.cc/K974-HKVT>].

118. Olivia Carville, *Exposed: The Dark Underbelly of Human Trafficking in New Zealand*, N.Z. HERALD (Sept. 21, 2016), <https://www.nzherald.co.nz/nz/exposed-the-dark-underbelly-of-human-trafficking-in-new-zealand/4WLQWPXXOCMIOTQQF4K44HB64/> [<https://perma.cc/Z9YF-WEMH>]; In 2015, a fourteen-year-old girl was pimped out by her mother who "posted ads to a classified section of the *New Zealand Herald*." By the time this child escaped, she had been raped over 1,000 times while her mother made over \$100,000. Morgan Theakston, *New Zealand fails to fully meet minimum standards to eliminate trafficking*, TEARFUND, [https://www.tearfund.org.nz/The-Tearfund-Blog-\(1\)/July-2021/New-Zealand-drops-to-Tier2-in-TIP-report.aspx](https://www.tearfund.org.nz/The-Tearfund-Blog-(1)/July-2021/New-Zealand-drops-to-Tier2-in-TIP-report.aspx) [<https://perma.cc/5ABB-GV73>] (Jul. 26, 2001).

119. *Id.*

120. *Id.*

121. See generally Julie Bindel, *Prostitution Is Not a Job. The Inside of A Woman Is Not a Workplace*, THE GUARDIAN (Apr. 30, 2018), <https://www.theguardian.com/commentisfree/2018/apr/30/new-zealand-sex-work-prostitution-migrants-julie-bindel> [<https://perma.cc/G9WY-YU8A>].

Decriminalization Model “would result in less violence, regular inspection of brothels, and no increase of the sex trade,” these promises have not come to fruition.¹²² Violent attacks on women in prostitution by pimps and sex buyers still take place.¹²³ One survivor noticed that “men feel even more entitled when the law tells them it is okay to buy us” and several women in prostitution have been brutally murdered since the passing of the PRA.¹²⁴ Despite the fact that New Zealand’s population is half the size of Sweden’s, New Zealand sees more violence against persons in prostitution, including a higher murder rate against persons in prostitution.¹²⁵

Moreover, illegal, unlicensed brothels run rampant in New Zealand, undermining the PRA’s goal for brothel licensure and inspection.¹²⁶ There is an extensive illegal market for sex: for every licensed brothel in New Zealand, four operate illegally.¹²⁷ Brothel-keepers that seek licensure in New Zealand must fill out a three-page application and pay a \$250 fee.¹²⁸ Once a brothel-keeper is licensed, they set the prices—not the person in prostitution.¹²⁹ Survivors recount how even state-licensed brothel-keepers set all-inclusive prices, forcing the person in prostitution to cater to the sex buyer’s every whim.¹³⁰ Such business models entirely revoke the question of consent—regardless of what a sex buyer

122. *Id.*

123. *Id.*

124. *See id.*; see also Penny White, *Remembering the Murdered Women Erased by the Pro-Sex Work Agenda*, FEMINIST CURRENT (Nov. 3, 2015), <https://www.feministcurrent.com/2015/11/03/remembering-the-murdered-women-erased-by-the-pro-sex-work-agenda/> [https://perma.cc/U2AK-R3YD].

125. White, *supra* note 124.

126. Bindel, *supra* note 121.

127. *Id.*

128. *Application for Brothel Operator Certificate*, NEW ZEALAND MINISTRY OF JUSTICE, <https://www.justice.govt.nz/assets/Documents/Forms/Application-for-brothel-operator-certificate-PR1.pdf> [https://perma.cc/55BY-TM8Q] (last visited Jan. 31, 2022) (showing application). For comparison, the brothel-keeper application is six pages shorter than a printout of the one needed to adopt a dog from SPCA of New Zealand and requests only basic information; it also costs the same amount of money to adopt a dog and open a brothel. *See SPCA of New Zealand*, ADOPTETS, <https://adopt.adoptets.com/application-request/4f7e4594-bd38-4370-b395-0d3b3ea51c37> [https://perma.cc/982F-9424] (last visited Mar. 10, 2022); *Brothel Operator Certification*, NEW ZEALAND MINISTRY OF JUSTICE, <https://www.justice.govt.nz/licences-certificates/brothel-operator-certification/apply-for-a-brothel-operator-certificate/#:~:text=A%20brothel%20certificate%20application%20costs,1%20authenticated%20passport%20style%20photo> [https://perma.cc/E364-XAST] (last visited Mar. 10, 2022).

129. *See* Julie Bindel, *This is What Really Happens When Prostitution is Decriminalized*, INDEPENDENT (Aug. 6, 2017), <https://www.independent.co.uk/voices/prostitution-decriminalisation-new-zealand-holland-abuse-harm-commercialisation-a7878586.html> [https://perma.cc/78D3-UJC4] (detailing how pricing works).

130. *Id.*

seeks, their desires *must* be satisfied; where consent cannot be revoked, it cannot be considered truly and freely given.¹³¹

Regarding the reality of choice for people in prostitution, since 2004, one year after the PRA was enacted, the United States Department of State has identified New Zealand as a destination country for human trafficking.¹³² Until 2015, sex trafficking cases were exclusively investigated by immigration authorities, and New Zealand did not identify domestic trafficking as a crime.¹³³ Instead, sex trafficking, both of minors and adults, merely constituted a violation of the PRA.¹³⁴ However, even after specifically criminalizing labor and sex trafficking in 2015, New Zealand has never used that law to prosecute a sex trafficking crime.¹³⁵ The lack of attention on victims and survivors of sex trafficking makes it likely that many people in the sex trade are without real choices.

C. Germany

In early 2002, Germany fully legalized prostitution by passing *Prostitutionsgesetz*, or the Prostitution Act.¹³⁶ This Act aimed to end prostitution's status as an offense offending public morals and make prostitution like any other occupation.¹³⁷ Prior to 2002, prostitution was generally accepted in Germany and, to some extent, decriminalized, though facilitating prostitution was still illegal.¹³⁸ However, the Federal Court of Justice, Germany's highest court, and other high-level German courts, have found prostitution to be against

131. See generally Michelle Madden Dempsey, *Defining Sex Trafficking in International and Domestic Law: Mind the Gaps*, 26 EMORY. INT'L L. REV. 137, 147–50 (2012).

132. *Id.*

133. *Crime Act 1961*, N.Z. LEGIS., <https://www.legislation.govt.nz/act/public/1961/0043/107.0/DLM328722.html> [<https://perma.cc/8JQP-6TLT>] (last visited Mar. 20, 2022).

134. See 2021 *Trafficking in Persons Report: New Zealand*, U.S. DEPT. OF STATE, <https://www.state.gov/reports/2021-trafficking-in-persons-report/new-zealand/> [<https://perma.cc/F4QH-CQLS>] (last visited Jan. 31, 2022).

135. *Id.*

136. Nisha Lilia Diu, *Welcome to Paradise*, TELEGRAPH, <http://s.telegraph.co.uk/graphics/projects/welcome-to-paradise/> [<https://perma.cc/N92V-GM3Y>] (“The idea of the law, passed by Chancellor Gerhard Schröder’s Social Democrat-Green coalition, was to recognize prostitution as a job like any other.”); see also Gesetz zur Regelung der Rechtsverh. . . ltnisse der Prostituierten, ProstG, [Law Regulating the Legal Relationships of Prostitutes], Dec. 20, 2001, [BGBl] (Ger.).

137. See Czarnecki et. al., *supra* note 38, at 4; Diu, *supra* note 136 (stating the benefits the act sought to give to persons in prostitution).

138. See generally Czarnecki et. al., *supra* note 38; Margarete von Galen, *Prostitution and the Law in Germany*, 3 CARDOZO WOMEN’S L. J. 349 (1996) (The extensive history of prostitution in Germany is complicated by the rise of Nazi Germany and the division of Germany into East and West Germany. During the division, prostitution was illegal in East Germany and was legal in West Germany. West Germany had registration requirements including regular testing—however, many individuals selling sex did not register to avoid testing requirements).

good morals and harmful to the common good since 1901.¹³⁹ Such a finding resulted in persons in prostitution being unable to sue for a buyer's failure to pay for services.¹⁴⁰

Thus, *Prostitutionsgesetz* expanded existing German employment protections to those engaged in the sale of sex.¹⁴¹ Specific protections were created to address issues in the sex trade. The Act gave persons in prostitution the right to demand the agreed upon payment from sex buyers who refuse to pay because they were allegedly unsatisfied.¹⁴² Further, *Prostitutionsgesetz* sought to legalize contracts between persons in prostitution and brothels or escort agencies, as long as the agreement complied with legal regulations and did not infringe upon the rights of persons in prostitution.¹⁴³ As legal employees, either self-employed or working for a "prostitution business," persons in prostitution are covered by social insurance and pay into health, unemployment, pension, nursing care, and accident insurance.¹⁴⁴ However, criminal laws addressing trafficking or forced prostitution still exist in Germany: the German Criminal Code explicitly criminalizes exploitation of prostitutes, controlling prostitution, commercial promotion of prostitution, sexual exploitation of a minor, among other crimes.¹⁴⁵ Additionally, the federal law enables local governments to control the sex trade within its boundaries; municipalities with under 50,000 inhabitants can prohibit prostitution entirely and large municipalities can implement spatial or temporal limitations on prostitution.¹⁴⁶

The Legalization Model created a boom in the sex trade in Germany, earning it the nickname, Europe's "biggest brothel."¹⁴⁷ Organized venues for the sex trade have opened across the country including mega-brothels, FKK or "naked" clubs, flat-rate brothels, caravans or "lovemobiles," and drive-through

139. Czarnecki et al., *supra* note 38, at 4, 9.

140. *Id.*

141. See Gesetz zur Regelung der Rechtsverh. . ltnisse der Prostituierten [ProstG] [Law Regulating the Legal Relationships of Prostitutes] Dec. 20, 2001, BUNDESGESETZBLATT, Teil I [BGBl I] 21 (Ger.).

142. BUNDEMINISTERIUM FÜR FAMILIE, SENIOREN, FRAUEN UND JUGEND [FEDERAL MINISTRY FOR FAMILY AFFAIRS, SENIOR CITIZENS, WOMEN AND YOUTH], THE NEW PROSTITUTION PROTECTION ACT (DAS NEUE PROSTITUIERTENSCHUTZGESETZ), <https://www.bmfsfj.de/resource/blob/117624/ac88738f36935f510d3df8ac5ddcd6f9/prostschg-textbausteine-en-data.pdf> [<https://perma.cc/4TAV-V6G7>] ("[*Prostitutionsgesetz*] gives prostitutes the right to demand that clients pay the agreed fee, and they have the right to go to court if necessary. Clients can no longer refuse to pay the money, for example, because they allegedly were unsatisfied."); see also Czarnecki et al., *supra* note 38, at 9 (buyers cannot base legal objections on the non-performance of particular services or sex acts).

143. BUNDEMINISTERIUM FÜR FAMILIE, SENIOREN, FRAUEN UND JUGEND [FEDERAL MINISTRY FOR FAMILY AFFAIRS, SENIOR CITIZENS, WOMEN AND YOUTH], *supra* note 142, at 3–4.

144. *Id.* at 8.

145. Czarnecki et al., *supra* note 38, at 11.

146. *Id.* at 15

147. *Prostitution is Legal Across Countries in Europe, but It's Nothing Like What You Think*, BUSINESS INSIDER (Mar. 13, 2019, 10:54 AM), <https://www.businessinsider.com/prostitution-is-legal-in-countries-across-europe-photos-2019-3> [<https://perma.cc/BT9G-QDV5>].

“sex boxes.”¹⁴⁸ This boom led to significant problems including exploitation within certain business models, particularly flat-rate brothels, and a lack of registration. In response, Germany enacted the *Prostituiertenschutzgesetz* or Prostitution Protection Act in 2017.¹⁴⁹ *Prostituiertenschutzgesetz* sought to rectify issues arising from *Prostitutionsgesetz* by mandating persons in prostitution register with the government, aiming to better connect them to state-sponsored resources.¹⁵⁰ During registration, persons in prostitution are supposed to be informed of their rights, connected to health and social services, and informed of how to access help in an emergency.¹⁵¹ Only those eligible for employment in Germany can register to sell sex.¹⁵² Additionally, the Act prohibits sex without a condom, flat-rate brothels, and “gang-bang parties.”¹⁵³

Many of the goals of prostitution policy have not been realized under the Legalization Model, as implemented in Germany. These implementation issues seem to be inherent to the Legalization Model rather than merely a problem under the German regulatory scheme.

Minors continue to experience commercial sexual exploitation in Germany, despite the alleged protections afforded by the Legalization Model.¹⁵⁴ Following the initial implementation of the *Prostitutionsgesetz*, purchasing sex from minors age sixteen or seventeen was made explicitly criminal in 2008.¹⁵⁵ While reliable data about child trafficking is difficult to obtain, Germany is regarded as a destination country for child trafficking.¹⁵⁶ Girls are recruited by “lover boys,” traffickers using the promise of a romantic relationship to coerce underage girls into selling sex. There is a high rate of migrant and Roma children being

148. Diu, *supra* note 136.

149. BUNDEMINISTERIUM FÜR FAMILIE, SENIOREN, FRAUEN UND JUGEND [FEDERAL MINISTRY FOR FAMILY AFFAIRS, SENIOR CITIZENS, WOMEN AND YOUTH], *supra* note 142, at 4.

150. *See id.* at 3 (“The aim of the new regulations is to provide people who work as prostitutes with information about their rights and obligations, and to encourage them to exercise their rights and seek help if they need it.”).

151. *Id.* (Persons in prostitution also go through an informational interview upon registering that seeks to also inform them of their rights).

152. ProstG Dec. 20, 2001, BGBl I 21 (Ger.); *see* Prostitutionst. . tigkeit – Issuance of a registration certificate, Service-Portal Berlin, <https://service.berlin.de/dienstleistung/328121/en/> [<https://perma.cc/EX6M-7MNA>] (last accessed April 13, 2022).

153. *Germany Introduces Unpopular Prostitution Law*, DW (Feb. 07, 2017), <https://www.dw.com/en/germany-introduces-unpopular-prostitution-law/a-39511761> [<https://perma.cc/VB83-3W6S>]; Diu, *supra* note 136 (“Flat rate” brothels paid persons in prostitution for a shift, making their money from a share of the profits from the bar and the entrance fee buyers are charged. The women were given strict rules, including nudity at all times and an obligation to offer unprotected sex. If a rule was broken, the women would have to pay a fine to the brothel. Although these conditions seem to lean towards trafficking and coercion, a German court ruled them legal because brothel owners had a “right of direction” similar to that over an employee.).

154. *See generally* ECPAT INT’L, *Germany* (2012), https://ecpat.org/wp-content/uploads/2021/08/A4A_V2_EU_GERMANY.pdf [<https://perma.cc/3S6D-2763>].

155. Czarnecki et al., *supra* note 38, at 11.

156. ECPAT INT’L, *supra* note 154, at 10.

exploited within the sex trade due to language barriers, poverty, or other vulnerabilities.¹⁵⁷

The continued violence against persons in prostitution and continued exploitation, despite the implementation of the Legalization Model, are, perhaps, best illustrated through the examples of German mega-brothels, specifically Pascha and Paradise.¹⁵⁸ Cologne, Germany is home to one of Europe's largest brothels, Pascha.¹⁵⁹ Women pay €185 for twenty-four-hour use of one of the rooms, meaning they must perform sex acts with at least four men to break even.¹⁶⁰ The buyers who enter—about 1,000 a day—pay five euros for entry, yet negotiate independently with the person in prostitution on the price of sex acts.¹⁶¹ In Stuttgart, Jürgen Rudloff and Michael Beretin own a brothel chain called Paradise.¹⁶² At the Stuttgart Paradise, *everyone* pays to enter.¹⁶³ Again, the price of any sex act is negotiated between the buyer and the person in prostitution, averaging about fifty euros for half an hour.¹⁶⁴ In addition to an entrance fee, persons in prostitution must pay a daily tax of twenty-five euros and the cost of a dormitory bed, if they end up staying the night.¹⁶⁵ As a result, they often end up being the customers of brothels, rather than employees.¹⁶⁶ Those who work at the brothels are considered independent contractors rather than employees.¹⁶⁷ Even if they were legal employees, a majority of the women working in brothels cannot even apply for state-sponsored benefits because they are not German or E.U. citizens.¹⁶⁸

157. ECPAT INT'L, *supra* note 154, at 8; U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT JUNE 2021 252 (2021), <https://www.state.gov/wp-content/uploads/2021/09/TIPR-GPA-upload-07222021.pdf> [<https://perma.cc/8VEZ-M2J4>].

158. Diu, *supra* note 136; BUSINESS INSIDER, *supra* note 147.

159. BUSINESS INSIDER, *supra* note 147.

160. *Id.*

161. *Id.*

162. *Id.*; see also Hilke Lorenz, *Trouble in Paradise: The Rise and Fall of Germany's 'Brothel King'*, THE GUARDIAN (June 22, 2019, 4:00 PM), <https://www.theguardian.com/global-development/2019/jun/22/trouble-in-paradise-rise-and-fall-of-germany-brothel-king-jurgen-rudloff> [<https://perma.cc/4V9W-9WKJ>] ("According to [Helmut] Sporer, more than 90% of these women come from south-east Europe and Africa, and half are under 21.").

163. Diu, *supra* note 136.

164. *Id.*

165. Lorenz, *supra* note 162.

166. Diu, *supra* note 136 ("Pascha's main income is the rent we get from the girls," says Hermann Müller, the club's chain-smoking 39-year-old night manager.").

167. See *id.*

168. Greggor Mattson, *The Cultural Politics of European Prostitution Reform: Governing Loose Women*, 104 (2016); Maryann Seals, *Worker Rights and Health Protection for Prostitutes: A Comparison of The Netherlands, Germany, and Nevada*, 36 Health Care for Women Int'l 784, 789 (2013). Scholars estimate that there are 400,000 persons in prostitution in Germany, yet in 2019, only around 40,000 were registered with the German government—meaning 90% are not registered. This figure dropped to 24,940 in 2020 during the COVID-19 pandemic. When an individual sells sex outside of Germany's regulatory scheme, they are doing so *illegally* and thus are unable to access the benefits and protections legalization intended to provide. Of those persons registered as prostitutes in 2020, only one-fifth were

When it comes to choice and consent under the German Legalization Model, it is difficult to claim that there is true consent. Few of the women working in brothels are German citizens; many have been transported to Germany for the purpose of working in the brothels.¹⁶⁹ Many of the women working in brothels have pimps, traffickers, or abusive boyfriends who control the sale of sex.¹⁷⁰ Paradise brothels' owner, Jürgen Rudloff was convicted of aiding and abetting trafficking.¹⁷¹ Rudloff's high-volume business model at his brothels required enough women to meet the demand, something he struggled with since opening Stuttgart Paradise in 2008.¹⁷² Investigation into Rudloff revealed he was working with gangs in Augsburg to traffic women from Eastern Europe.¹⁷³ According to testimony from pimps that he worked with, Rudloff's trial revealed that trafficking was pivotal to the success of his business.¹⁷⁴ In Paradise, women were required to earn 500 euros a day and would be beaten otherwise; pimps even tattooed their names on the bodies of these women.¹⁷⁵ For his involvement, Rudloff only received five years in prison.¹⁷⁶ This is not unusual for those convicted of sex trafficking in Germany; seventy-two percent of convicted traffickers receive "fully suspended sentences, fines, or less than one year imprisonment" for their convictions.¹⁷⁷

That said, those engaged in selling sex who are registered with the German government are due the full protection of the law. They need not fear arrest or prosecution for engaging in the sale of sex. If registered, they are enrolled in retirement contributions and receive health care.¹⁷⁸ Additionally, access to the justice system enables persons in prostitution to be appropriately compensated either as an employee or as an independent contractor.

German citizens along with 8,800 Romanians, 2,800 Bulgarians, and 1,800 Hungarians. For the select few women who do elect to get health insurance, the monthly premiums are 500 euros due to the risk of the job. *See Registered Sex Workers in Germany Drop Sharply in Pandemic*, Associated Press (July 1, 2021), <https://apnews.com/article/europe-germany-coronavirus-pandemic-pandemics-health-43dec11288056622589fec60fa64e780> [https://perma.cc/66JS-SPE9]; *Sex Workers Speak Out Against German Prostitution Law*, DW, <https://www.dw.com/en/sex-workers-speak-out-against-german-prostitution-law/a-59539574> [https://perma.cc/CZ7N-PJ5S].

169. ASSOCIATED PRESS, *supra* note 168; *see also* Diu, *supra* note 136 ("Often these women only travel to the country for eight weeks at a time, often making several trips a year.").

170. *Id.*

171. Lorenz, *supra* note 162.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. U.S. DEP'T OF STATE, *supra* note 157, at 250.

178. Diu, *supra* note 136; For the select few women who do elect to register, health insurance monthly premiums are 500 euros due to the risks associated with the job.

D. Sweden

In 1999, Sweden adopted the Sex Purchase Law, which prohibits the purchase of sexual services but decriminalizes the sale of sex.¹⁷⁹ In 2005, the offense was incorporated into the Swedish Penal Code.¹⁸⁰ This was part of a larger, long-term effort on the part of the Swedish government to prevent sex trafficking and encourage gender equality.¹⁸¹

Sweden's Penal Code was informed by decades of public debate regarding gender power dynamics and catalyzed by the 1980 ratification of the United Nations Convention for the Elimination of All Forms of Discrimination Against Women.¹⁸² Between 1980 and 1995, the Swedish government took several actions but in 1995, rates of street prostitution were still high.¹⁸³ A national government report estimated that there were approximately 2,500 to 3,000 women in prostitution in Sweden, 650 of whom were in street prostitution.¹⁸⁴ In 1998, the number of women estimated to be participating in street prostitution rose to 726.¹⁸⁵ That same year, the Government Bill 1997/98 55 on violence against women was presented to the Swedish parliament, which resulted in Act on Violence Against Women ("*Kvinnofrid*").¹⁸⁶ The heart of this Act was a commitment to ending violations of women's integrity, which included strengthening sexual harassment offenses and creating new crimes, like penalizing repeated minor instances of male violence against women as a pattern of abuse.¹⁸⁷

The Swedish system reflects the belief that prostitution is gender-based violence catalyzed by systemic inequalities.¹⁸⁸ Further, it codifies the principle that victims should never be criminalized for acts performed as a direct result of their victimization.¹⁸⁹ This legal scheme serves as the inspiration and basis for

179. See Maddy Coy, Helen Pringle & Meagan Tyler, *The Swedish Sex Purchase Law: Evidence of its Impact*, NORDIC MODEL INFO. NETWORK 1, 1 (July 2016), https://www.catwa.org.au/wp-content/uploads/2016/12/NMIN_briefing_on_Sweden_July_16.pdf [https://perma.cc/3PZ8-FWRY] (outlining Swedish Sex Purchase Act).

180. *Equal Power and Influence for Women and Men – That's What Sweden is Aiming for*, SWEDEN INST., <https://sweden.se/life/equality/gender-equality> [https://perma.cc/C4TB-VKKB] (Dec. 14, 2021).

181. See Ekberg, *supra* note 48, at 7 (highlighting long-term goals of Swedish policies).

182. *Id.* (signifying Sweden's focus on responding to human trafficking).

183. See Coy et al., *supra* note 179 (underscoring problematic statistics surrounding prostitution in Sweden).

184. *Id.* (noting estimates of persons in prostitution before Sex Purchase Act).

185. *Id.* (explaining that prostitution remained persistent and problematic during the 1990s).

186. See *id.*; *Act on Violence Against Women (Government Bill 1997/98 55)*, UN WOMEN, <https://evaw-global-database.unwomen.org/fr/countries/europe/sweden/1998/act-on-violence-against-women—government-bill-1997-98-55> [https://perma.cc/629M-S4VN] (last visited Apr. 8, 2022).

187. *Act on Violence Against Women (Government Bill 1997/98 55)*, *supra* note 186.

188. See Ekberg, *supra* note 48, 1188–92; EQUALITY MODEL US, *supra* note 57; *What is the Nordic Model?*, *supra* note 46 (outlining six central tenants of Equality Model).

189. See EQUALITY MODEL US, *supra* note 57.

the Equality Model which works to combat an uneven distribution of power between women and men in positions of privilege by targeting the commercialization of the female body.¹⁹⁰ An important backdrop to the Swedish legal system is its robust social safety net and commitment to ensuring alternatives to prostitution. In 2002, comprehensive laws imposing criminal liability for human trafficking came into force.¹⁹¹

Sweden underwent “a 50% decrease in street prostitution, and a significant decline in the number of men purchasing sex within two years after the law was implemented.”¹⁹² The Sex Purchase Act aims to decrease harm committed against persons in prostitution by specifically criminalizing the conduct of the men who drive the market.¹⁹³ A government report in 2010 suggested that there was no evidence that the criminalization of sex buyers had a negative impact on those in prostitution.¹⁹⁴

Despite these successes, a 2008 study estimated that approximately 300 women were still on the streets, and 300 women and fifty men were identified in Swedish online prostitution advertisements.¹⁹⁵ Furthermore, “[a] 2010 Swedish report showed that since the sex purchase ban, there has been an increase in the online sex trade across Scandinavia, not only because of the law but also...because of the Internet boom”—however, the increase occurred mostly in Denmark and Norway.¹⁹⁶ Despite these reports, estimates of the extent of prostitution are seldom discussed and compared because they are often “difficult to interpret in relation to the ban...”¹⁹⁷ Furthermore, additional factors such as internet availability and mobile technology must be considered when analyzing the increase of online prostitution.¹⁹⁸ Thus, more research is needed in Sweden, as well as in other countries, to investigate the relationship between social and

190. See Sven-Axel Månsson, *The History and Rationale of Swedish Prostitution Policies*, 2 DIGNITY: J. ANALYSIS EXPLOITATION & VIOLENCE 1 (2017).

191. Ekberg, *supra* note 48, at 6 (finding the Swedish approach to prostitution led to more comprehensive legislation).

192. See Coy et al., *supra* note 179 (noting findings related to size of prostitution markets in Sweden based on independent evaluations); EQUALITY MODEL US, *supra* note 57 (documenting statistics that support Equality Model legislation).

193. Ministry of Justice, *Evaluation of the Prohibition of the Purchase of Sexual Services*, <https://www.government.se/articles/2011/03/evaluation-of-the-prohibition-of-the-purchase-of-sexual-services/> [https://perma.cc/V6K9-P5SQ] (Mar. 8, 2011) (finding no negative effect on persons in prostitution).

194. *Id.*

195. Coy et al., *supra* note 179 (finding limitations of Equality Model regarding online prostitution).

196. Luba Fein, *Has the Nordic Model Worked? What Does the Research Say?*, NORDIC MODEL NOW! (Dec. 22, 2019), <https://nordicmodelnow.org/2019/12/22/has-the-nordic-model-worked-what-does-the-research-say/> [https://perma.cc/83D2-BGUU] (increasing reports of online sex trade).

197. Charlotta Holmström & May-Len Skilbrei, *The Swedish Sex Purchase Act: Where Does it Stand?*, 4 OSLO L. REV. 82, 90 (2017), <https://www.idunn.no/doi/pdf/10.18261/issn.2387-3299-2017-02-02> [https://perma.cc/JRM2-5QGM] (suggesting limitations to online prostitution data).

198. *Id.* at 101 (exploring additional factors to explain increase of online prostitution).

legal norms as well as the wider developments of technology and how it interacts with new prostitution laws.

III. IMPACT

In the anti-trafficking community, there is a broad consensus that persons in prostitution should not be criminalized.¹⁹⁹ Beyond this agreement, there are differing approaches on how to treat the rest of the industry.²⁰⁰ Those in favor of the Full Decriminalization and Legalization Models contend that no one in the industry should be criminalized, including sex buyers and brothel owners.²⁰¹ Alternatively, those supporting the Equality Model support criminalization of sex buyers, pimps, and brothel owners.²⁰²

A. End Criminalization

While members of the anti-trafficking community may disagree on which policy model is most effective, they share many of the same ideologies and the same core goal: to ensure the safety of those in prostitution and end exploitation.²⁰³ Those who support the Legalization, Full Decriminalization, and Equality Models all agree that persons in prostitution should not be criminalized because criminalization exposes these individuals to abuse and violence and bars access to services such as healthcare.²⁰⁴ Each of these three policy models recognizes and agrees that criminalization unjustly harms those in prostitution.

The consequences of criminalization go beyond an arrest or criminal conviction. First, criminalization creates additional barriers for persons in prostitution and can make it difficult to exit “the life.”²⁰⁵ Having a criminal record creates barriers to employment opportunities, safe housing, government benefits, immigration remedies, and educational resources.²⁰⁶ Although someone may want to exit “the life,” these barriers “can narrow options for developing financial

199. EQUALITY MODEL US, *supra* note 57.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* (“There is broad consensus in the gender justice and human rights communities – and across the political spectrum – that those who have been prostituted or trafficked should not be criminalized.”).

204. See, e.g., SARAH SAKHA, EMILY GREYTAK & MYA HAYNES, ACLU, IS SEX WORK DECRIMINALIZATION THE ANSWER?, 5–11, 15 (2020), https://www.aclu.org/sites/default/files/field_document/aclu_sex_work_decrim_research_brief.pdf [<https://perma.cc/6JLN-TDRZ>]; YALE GLOB. HEALTH JUST. P’SHIP & SEX WORKERS & ALLIES NETWORK, *supra* note 8; Forestiere, *supra* note 32.

205. Press Release, Polaris Project, Polaris Statement on Bill to Decriminalize the Sex Trade in Washington, D.C. (Oct. 15, 2019) [hereinafter Polaris Press Release].

206. See generally Sarah Bernson, *Beyond the Sentence – Understanding Collateral Consequences*, National Institute of Justice, <https://judicialmisconduct.us/drupal/sites/default/files/2018-05/Bernson=UnderstandingCollateralConsequences.pdf> (2013).

self-sufficiency...creat[ing] dependency upon prostitution as a means of support....”²⁰⁷

Moreover, criminalization of selling sex only makes the industry more dangerous.²⁰⁸ Persons in prostitution are treated as criminals rather than victims. As such, they are less likely to report crimes committed against them due to fear of arrest.²⁰⁹ In turn, sex buyers and law enforcement exploit this fear to control, harass, or abuse persons in prostitution.²¹⁰ Even if a person does report a crime, few reports end in conviction.²¹¹

The Full Criminalization Model prevents persons in prostitution from obtaining access to support services such as exit strategies and mental health support.²¹² Many in prostitution are not there voluntarily; they are per se trafficking victims because they are minors or they are adults under the control of traffickers and/or pimps.²¹³ They may be trapped by poverty, substance use disorder, or trauma. Moreover, many persons in prostitution are more likely to have suffered sexual abuse as children.²¹⁴ Among survivors, long-term negative consequences, including PTSD and suicidal ideation, are common.²¹⁵

Criminalization does not provide a solution to any of these systemic problems; on this we categorically agree.

B. Working Together

Notwithstanding the passionate debates due to the strong advocacy for each model, there are many themes and goals about which those seeking to address

207. MICHAEL SHIVELY, KRISTINA KLIORYS, KRISTIN WHEELER & DANA HUNT, A NATIONAL OVERVIEW OF SEX TRAFFICKING AND PROSTITUTION DEMAND REDUCTION EFFORTS 14 (2012), <https://www.ojp.gov/pdffiles1/nij/grants/238796.pdf> [<https://perma.cc/68KV-XDZB>].

208. See, e.g., SAKHA ET AL., *supra* note 204, at 1; YALE GLOB. HEALTH JUST. P'SHIP & SEX WORKERS & ALLIES NETWORK, *supra* note 8; Forestiere, *supra* note 32.

209. See Michelle J. Anderson, *Prostitution and Trauma in U.S. Rape Law*, 2 J. TRAUMA PRAC. 75 (2003); Polaris Press Release, *supra* note 205.

210. See Polaris Press Release, *supra* note 205.

211. See, e.g., *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/R8SA-A4L5>] (last visited Apr. 13, 2022).

212. See EQUALITY NOT EXPLOITATION, *supra* note 45, at 23–24.

213. *Ending Human Trafficking Podcast*, *supra* note 56, at 07:41, 25:38 (“[S]ex trade surveys and studies have shown [persons in prostitution] want to exit the sex trade, it’s not what they would want to be doing with themselves and their lives if given meaningful other choices.”).

214. EQUALITY NOT EXPLOITATION, *supra* note 45, at 22 (“Those in prostitution are disproportionately likely to have suffered abuse, often sexual abuse, in childhood, compared to those not in prostitution . . .”).

215. Astrid Zweynert, *Violence, Self-Harm and Suicide Common Among Trafficked Children: Researchers*, REUTERS (Sept. 8, 2015), <https://www.reuters.com/article/us-health-trafficking-children/violence-self-harm-and-suicide-common-among-trafficked-children-researchers-idUSKCN0R81WP20150908> [<https://perma.cc/9BUJ-9BXS>] (explaining mental health consequences of trafficking).

the harms of prostitution do agree.²¹⁶ To best advocate for persons in prostitution, it is imperative that advocates work together and focus on these shared goals.

Despite these significant agreements, the conversation surrounding prostitution policy tends to concentrate on the disagreement over whether to criminalize buyers, traffickers, and brothel owners.²¹⁷ Rather than focusing on this convergence in views, members of the anti-trafficking and pro-prostitution communities should work together to advance their shared goals.²¹⁸ Identifying areas of agreement, such as at the three key principles we have outlined, and focusing on policy advancement that achieves these goals would improve the lives of persons in prostitution regardless of the policy model in place.

There are many specific policy changes that would have an immense, nearly immediate impact on people in prostitution and those vulnerable to exploitation. Improving social services for children, such as foster care and education, would result in fewer vulnerabilities, minimizing the risk of commercial sexual exploitation at the outset. Throughout childhood, and as a person enters adulthood, ensuring meaningful access to mental and physical health care will improve outcomes for all, including those currently in the sex trade, previously in the sex trade, or vulnerable. Ensuring that migrants and non-citizens have access to resources, language education, and support systems will reduce the chances that they are forced into selling sex to meet their basic needs. Establishing exit services for those seeking to exit the sex trade, including trauma counselling, job training, and access to housing increases the likelihood that those who remain have a free choice to do so.²¹⁹ Minority populations including immigrants, people of color, and people in the LGBTQ community tend to be subjected to all forms of exploitation²²⁰ and therefore must receive dedicated attention from those seeking to eradicate sexual exploitation.

216. See, e.g., EQUALITY NOT EXPLOITATION, *supra* note 45, at 10; Steven P. Kurtz, Hilary L. Surratt, Marion C. Kiley & James A. Inciardi, *Barriers to Health and Human Services for Street-Based Sex Workers*, 16 J. HEALTH CARE POOR & UNDERSERVED 345, 351 (2005).

217. See, e.g., SAKHA ET AL., *supra* note 204, at 2, 18; YALE GLOB. HEALTH JUST. P'SHIP & SEX WORKERS & ALLIES NETWORK, *supra* note 8; Forestiere, *supra* note 32.

218. See EQUALITY NOT EXPLOITATION, *supra* note 45, at 9–10.

219. See Martine Shareck, Pearl Buhariwala, Maha Hassan & Patricia O'Campo, *Helping Women Transition out of Sex Work: Study Protocol of a Mixed-Methods Process and Outcome Evaluation of a Sex Work Exiting Program*, 20 BMC WOMEN'S HEALTH 227, 228, 234 (2020); PAT MAYHEW & ELAINE MOSSMAN, EXITING PROSTITUTION: MODELS OF BEST PRACTICE 31–33 (2007), [https://www.nzpc.org.nz/pdfs/Mayhew-and-Mossmann,-\(2007c\)-Exiting-Prostitution-Models-of-best-practice.pdf](https://www.nzpc.org.nz/pdfs/Mayhew-and-Mossmann,-(2007c)-Exiting-Prostitution-Models-of-best-practice.pdf) [<https://perma.cc/J7LR-NJ25>]; Marian Hatcher, Alisa L. Bernard, Allison Franklin, Audrey Morrissey, Beth Jacobs, Cherie Jimenez, Kathi Hardy, Marlene Carson, Nikki Bell, Rebecca Bender, Rebekah Charleston, Shamere McKenzie & Vednita Carter, *Exited Prostitution Survivor Policy Platform*, 3 DIGNITY: J. SEXUAL EXPLOITATION & VIOLENCE 1, 6 (2018).

220. See RIGHTS4GIRLS, *supra* note 88 (first citing BUREAU OF JUST. STAT., CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS 6 (2011); then citing THE NAT'L CTR. FOR VICTIMS OF CRIME, NCVRW RESOURCE GUIDE 24 (2013)) ("In a two-year review of all suspected human trafficking incidents across the country, 94% of sex trafficking victims were female, 40% were Black, and 24% were Latinx."); SAKHA ET AL., *supra* note 204, at 11 (noting violence experienced by trans women of color in the sex trade).

In addition to these more tangible goals, advocates must continue to confront sexual violence across society. While there are many harms associated with the sex trade, the defining harm is sexual violence. However, sexual violence is not unique to the sex trade. According to Equality Now, “[o]ver her lifetime, one in three women will experience physical or sexual violence—regardless of age, background, or country—which means that sexual violence impacts women and girls in epidemic proportions.”²²¹ Sexual violence and the threat of sexual violence are so deeply ingrained in most cultures that feminists have coined the term rape culture to discuss its ubiquity.²²² Reducing sexual violence would result in a dramatic increase in quality of life for people in prostitution, and benefit all people, particularly women.

Ending the criminalization of persons in prostitution and ensuring holistic support to vulnerable populations are steps upon which all advocates can agree. It is the responsibility of those seeking to improve the lives of persons in prostitution to set aside ideological differences and work together to meet this overriding goal.

221. *Ending Sexual Violence*, EQUALITY NOW, https://www.equalitynow.org/end_sexual_violence/ [https://perma.cc/H2A9-RD3P] (last visited Apr. 11, 2022).

222. The prevailing nature of this violence is frequently, in the authors’ experiences, what leads some feminists to believe that there is no way to create a safe sex trade. If our friends are not safe merely dating, what about the commercialization of these encounters makes them safer?

A ROSE BY ANY OTHER NAME: THE CASE FOR ABOLISHING WISCONSIN’S SEX OFFENDER NAME-CHANGE BAN

Anna Hartz[†]

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INTRODUCTION

[T]he state has always valued the lives and the innocence of specific children and women more highly than those of others, and both innocence and sexual normalcy continue to be used to cloak regressive, heteronormative, and punitive state practices. . . . Too often, constructs of the good, the bad, and the innocent are simply

mobile artifacts that often shield racial privileges, rationalize gender and sexual oppression, and perpetuate systemic institutional ignorances.¹

Transgender people are more likely than cisgender people to face homelessness, poverty, and family alienation.² As a result, they are more likely to be forced into the underground economy³ and consequently into the criminal legal system.⁴ In addition to disparately cruel treatment while incarcerated, these individuals face heightened risk of sex offender registration;⁵ this carries unexpected collateral consequences, such as felony name-change laws, which lead to housing and employment discrimination and threats of violence.⁶

Laws preventing people with felony convictions from changing their names violate the First Amendment's freedom of expression and protection against compelled speech, as well as the Fourteenth Amendment's Due Process Clause.⁷ The disparate impact of name-change laws on transgender people continues a long tradition of criminalization of queer identity and state infringement on the right to freedom of expression.⁸ Consequently, courts should overturn felony name-change bans as unconstitutional for their unnecessary infringement on the First and Fourteenth Amendment rights of already marginalized offenders.

Part I of this Comment will provide background on transgender identities and the legal issues trans people commonly face. Part II will examine sex offender registries and laws criminalizing queerness. Part III will analyze the collateral consequences of sex offender conviction and their disparate impact on transgender people. Part IV will focus on challenging felony name-change bans and analyzing *State of Wisconsin v. C.G.* and *Krebs v. Graveley*, two recent challenges to Wisconsin's name-change ban by transgender registered sex

† This Comment is dedicated to the queer and trans people who have been fighting for liberation since the first brick was thrown at Stonewall.

1. Erica R. Meiners, *Never Innocent: Feminist Trouble with Sex Offender Registries and Protection in a Prison Nation*, 9 MERIDIANS 31, 36 (2009) (emphases removed).

2. See Transformative Just. L. Project of Ill., *Quick Guide to the Criminalization of Transgender and Gender Non-Conforming People*, PRISON LEGAL NEWS (Feb. 8, 2016), <https://www.prisonlegalnews.org/news/publications/guide-criminalization-trans-gender-non-conforming-people-transformative-justice-law-proj-il/> [<https://perma.cc/36FP-Y2R2>].

3. Will Kenton, *Underground Economy*, INVESTOPEDIA, <https://www.investopedia.com/terms/u/underground-economy.asp> [<https://perma.cc/8XY8-MQ5B>] (Mar. 22, 2022) ("The underground economy refers to economic transactions that are deemed illegal, either because the goods or services traded are unlawful in nature, or because transactions fail to comply with governmental reporting requirements.").

4. See Transformative Just. L. Project of Ill., *supra* note 2.

5. Lark Mulligan, Comment, *Dismantling Collateral Consequences: The Case for Abolishing Illinois' Criminal Name-Change Restrictions*, 66 DEPAUL L. REV. 647, 672–73 (2017); CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, UNJUST: HOW THE BROKEN CRIMINAL JUSTICE SYSTEM FAILS LGBT PEOPLE 125 (2016).

6. Mulligan, *supra* note 5, at 648–52.

7. See U.S. CONST. amends. I, XIV; see also Mulligan, *supra* note 5, at 683–95.

8. See, e.g., Mulligan, *supra* note 5, at 671–76.

offenders.⁹ Part V will discuss possible policy solutions and remedies for transgender offenders.

I. SOCIOLOGICAL BACKGROUND

Transgender (“trans”) people are people whose gender identity differs from the sex they were assigned at birth.¹⁰ A transgender woman is someone whose sex was assigned male at birth but who identifies as a woman, and a transgender man is someone whose sex was assigned female at birth but identifies as a man.¹¹ The terms “nonbinary” and “genderqueer” refer to people whose gender falls outside of the archetypal male–female binary.¹² People whose identity aligns with the sex they were assigned at birth are cisgender.¹³

Because they identify with a gender that does not match their assigned sex, many transgender people choose to transition, adapting their physical presentation to match their identity.¹⁴ Social transition can involve changing one’s outward appearance (such as clothing, makeup, or hairstyle), changing names, and adopting new pronouns.¹⁵ Medical transition alters physical and sexual characteristics of the body and can include medical procedures ranging from laser hair removal to hormone therapy to surgery.¹⁶ While not every transgender person undergoes transition-related medical treatments, there is an overwhelming consensus in the medical community that these procedures are medically necessary for many transgender people.¹⁷

Social and medical transition can be critical for many transgender people for several reasons.¹⁸ Some trans people experience gender dysphoria, which can cause serious emotional distress that affects their health and everyday lives because their outward presentation does not align with their gender.¹⁹ Medical and social transitioning can help alleviate dysphoria and substantially improve

9. *Krebs v. Graveley*, 861 F. App’x 671 (7th Cir. 2021); *State v. C.G. (In the Interest of C.G.)*, 2021 WI App 11, 396 Wis. 2d 105, 955 N.W.2d 443.

10. *Understanding Gender Identities*, TREVOR PROJECT (Aug. 23, 2021), <https://www.thetrevorproject.org/resources/article/understanding-gender-identities/> [<https://perma.cc/B8UY-TEX7>].

11. *Frequently Asked Questions About Transgender People*, NAT’L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), https://transequality.org/sites/default/files/docs/resources/Understanding-Trans-Full-July-2016_0.pdf [<https://perma.cc/T8RV-HEH8>].

12. *Understanding Gender Identities*, *supra* note 10.

13. *Id.*

14. *See id.*

15. *Frequently Asked Questions for Youth*, TRANSYOUTH FAM. ALLIES (2010), <http://www.imatyfa.org/assets/faq-youth.pdf> [<https://perma.cc/P88G-3LRS>].

16. *Id.*; *What Do I Need to Know About Transitioning?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/gender-identity/transgender/what-do-i-need-know-about-transitioning> [<https://perma.cc/PEC3-B79J>] (last visited Mar. 27, 2022).

17. *Frequently Asked Questions About Transgender People*, *supra* note 11.

18. *Id.*

19. *Id.*

trans people's lives and mental health.²⁰ Further, societal marginalization and discrimination can lead trans people to experience mental health conditions and suicidal ideation at disproportionately high rates.²¹ Access to gender-affirming care and legal identity recognition can often help relieve these symptoms.²²

A. *Trans Issues 101*

i. Sociological Problems Faced by Transgender People

Studies of transgender people tend to find disturbing patterns of mistreatment and discrimination.²³ Relative to cisgender people, trans people face disparately high barriers to the most basic elements of life, such as employment, housing, accessing medical care, and family and community support.²⁴ Transgender people also experience harassment and violence at alarmingly high rates, and each of these hardships leads to arrests and convictions at rates disproportionate to the general population.²⁵

Two of the most common issues faced by transgender people are misgendering and deadnaming. Misgendering is the act in which someone intentionally or unintentionally uses pronouns or honorifics that the person does not use.²⁶ Deadnaming is when a person is called by their birth name or given name with which they no longer identify.²⁷ Misgendering and deadnaming can lead to "feelings of anxiety, low self-esteem, negative body image, and isolation from family, friends, and coworkers."²⁸ Misgendering and deadnaming are forms

20. *Id.*; see also SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, NAT'L CTR. FOR TRANSGENDER EQUAL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY* 107 (2016) ("Respondents who had transitioned ten or more years prior to participating in the survey (24%) were substantially less likely to be currently experiencing serious psychological distress, in contrast to those who had transitioned within the past year (41%). While psychological distress was higher among those early in their transition, it was higher yet among those who have not transitioned but wanted to. Nearly half (49%) of those who have not transitioned but wanted to were currently experiencing serious psychological distress, compared with 36% of those who had transitioned at any time prior to taking the survey.") (citation omitted).

21. JAMES ET AL., *supra* note 20, at 103, 112.

22. *See id.* at 107.

23. *E.g., id.* at 4.

24. *Id.*

25. *Id.*; see also CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, *supra* note 5, at 43–50.

26. See Sam Langford, *Let's Talk About Deadnaming, Misgendering, and How to Not Do It*, JUNKIE (Sept. 4, 2018), <https://junkee.com/deadnaming-misgendering-trans/174009> [<https://perma.cc/EXL5-AEU3>].

27. *Id.*

28. Ian F. Tapu & Rebecca A. Copeland, *Cultural Competency in Hawai'i: Affirming Gender Identity and Expression*, HAW. BAR J., Oct. 2019, at 20; see also Stephanie Julia Kapusta, *Misgendering and Its Moral Contestability*, 31 HYPATIA 502, 504–06 (2016).

of microaggressive behavior that, in the aggregate, can lead to substantial psychological harm for transgender people.²⁹

The opposite is also true. Researchers at the University of Texas found that when transgender youth are able to use their chosen names in every area of life, their risk of suicidal ideation decreases.³⁰ Researchers involved in the study asked transgender individuals between the ages of fifteen and twenty-one whether their names were used in four specific areas: at work, at school, with friends, and at home.³¹ They found that young people who could use their chosen names in all four scenarios experienced seventy-one percent fewer symptoms of depression, thirty-four percent fewer symptoms of suicidal ideation, and a sixty-five percent decrease in attempted suicide compared to those who were not able to use their names.³²

In addition to psychological distress, deadnaming can induce or amplify existing feelings of gender dysphoria, which the DSM-5 designates as “clinically significant distress or impairment related to a strong desire to be of another gender, which may include desire to change primary and/or secondary sex characteristics.”³³ While not all transgender people experience dysphoria, misgendering can and often does lead to feelings of stigmatization. To mitigate this in the legal profession, the Hawaii Bar Journal has provided instructions to legal practitioners for how best to represent their clients in a gender-affirming manner, including “consistently us[ing] the name and pronoun that conforms to the other person’s gender identity. . . . [i]n all correspondence and court documents, request[ing] that co-workers, opposing counsel, court staff, and

29. See Kapusta, *supra* note 28, at 504. (“‘Microaggressions are the everyday verbal, nonverbal, and environmental slights, snubs, or insults, whether intentional or unintentional, that communicate hostile, derogatory, or negative messages to target persons based solely upon their marginalized group membership’ (Sue 2010, 3). . . . Research indicates that microaggressions ‘may on the surface appear quite harmless, trivial, or be described as ‘small slights,’ but ‘have a powerful impact upon the psychological well-being of marginalized groups’ (Sue 2010, 3). Those subject to them may suffer from chronic health problems, persistent anxiety, fatigue, stress, hypervigilance, anger, fear, depression, shame, and a sense of loneliness. The harm of micro-aggressive misgendering in relation to transgender people is commonplace in many different contexts of social interaction (Nordmarken 2014, 130; Nordmarken and Kelly 2014, 150–51).”).

30. De Elizabeth, *Using a Transgender Person’s Name Can Decrease Their Risk of Depression and Suicide*, TEEN VOGUE (Mar. 31, 2018), <https://www.teenvogue.com/story/using-transgender-persons-name-decrease-risk-of-depression-suicide> [<https://perma.cc/8A2Y-QKR3>]; *Using Chosen Names Reduces Odds of Depression and Suicide in Transgender Youths*, UT NEWS (Mar. 30, 2018), <https://news.utexas.edu/2018/03/30/name-use-matters-for-transgender-youths-mental-health/> [<https://perma.cc/P3QB-ZRG4>].

31. Stephen T. Russell, Amanda M. Pollitt, Gu Li & Arnold H. Grossman, *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behavior Among Transgender Youth*, 63 J. ADOLESCENT HEALTH 503, 503–04 (Mar. 30, 2018).

32. *Using Chosen Names Reduces Odds of Depression and Suicide in Transgender Youths*, *supra* note 30.

33. Jack Turban, M.D., *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS’N (NOV. 2020), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [<https://perma.cc/46LH-Z6LQ>].

judges also do the same, and ensur[ing] that your request is followed.”³⁴ Similarly, some legal ethicists argue that misgendering transgender clients should be considered misconduct under the Model Rules of Professional Conduct.³⁵

Beyond psychological consequences, misgendering is an act of violence³⁶ that belies a system that is violent to transgender people, particularly transgender women of color.³⁷ Trans women are murdered at rates amounting to a public health crisis,³⁸ and yet police routinely mistreat and deadname transgender victims.³⁹ Since transgender people are more likely to interact with police than the general population, maltreatment by police officers exposes trans people to additional violence.⁴⁰ Because misgendering can lead to serious psychological consequences, as well as discrimination and violence, thoughtful advocacy is crucial to assisting trans clients in overcoming these barriers.⁴¹

ii. Legal Problems Faced by Transgender People

a. Correcting Identity Documents to Reflect Authentic Selves

One of the primary legal problems transgender people face is correcting identity documents to reflect their authentic name and gender. Changing name and gender markers poses a difficulty to many trans people (including those that have not received a felony conviction).⁴² Procedural, legal, and bureaucratic

34. Tapu & Copeland, *supra* note 28, at 22.

35. See e.g., *id.*; Chan Tov McNamara, *Misgendering as Misconduct*, 68 UCLA L. REV. DISCOURSE 40, 44 (2020).

36. Sam Riedel, *Deadnaming a Trans Person Is Violence—So Why Does the Media Do It Anyway?*, HUFF POST (Mar. 17, 2017), https://www.huffpost.com/entry/deadnaming-a-trans-person-is-violenceso-why-does_b_58cc58cce4b0e0d348b3434b

[<https://perma.cc/WD85-KUEP>] (“For transgender people, our relationships to our names are complicated, to say the least. What we’re called has power, and hearing a blatantly masculine or feminine name applied to you when you’re trying to realign your gender in a different direction can be a source of profound, dysphoria-inducing anxiety. Hearing or seeing one’s old name can induce a visceral sense of terror that no matter how much progress one makes in their transition, the person they used to be (or pretended to be) is still there. . . . Hence the term “deadname”: a name that shall not be spoken, for it invokes a restless spirit. Many trans people will go to great lengths to prevent people from finding out their deadnames, destroying irreplaceable photos and documents in an effort to ensure that who they really are is the only identity most will remember.”).

37. Annamarie Forestiere, *America’s War on Black Trans Women*, HARV. CIV. RTS. CIV. LIBERTY L. REV. (Sept. 23, 2020), <https://harvardcrl.org/americas-war-on-black-trans-women/> [<https://perma.cc/S9YB-RDP4>].

38. See *Murders of Transgender People in 2020 Surpasses Total for Last Year in Just Seven Months*, NAT’L CTR. FOR TRANSGENDER EQUAL. (Aug. 7, 2020), <https://transequality.org/blog/murders-of-transgender-people-in-2020-surpasses-total-for-last-year-in-just-seven-months> [<https://perma.cc/5UXA-X3JA>].

39. CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, *supra* note 5, at 47–48.

40. *Id.* at 44.

41. See JAMES ET AL., *supra* note 20 (finding thirty-six percent of surveyed individuals had a negative experience when presenting identification documents).

42. *Id.* at 81.

barriers exist at virtually every step of the process, making it difficult to obtain new birth certificates, IDs, passports, and social security cards.⁴³ Often, a name and gender marker change is prohibitively expensive, and burdensome state requirements prevent those who want to update their documents from doing so.⁴⁴

Among trans people who attempt to obtain a court-ordered name change, many report negative experiences with court staff and judges, including misgendering, invasive medical questions about their transition, and verbal harassment.⁴⁵ Unfortunately, failure to update these documents can often lead to negative—and dangerous—consequences:

[Trans people] were asked about their experiences when they have shown an ID with a name or gender that does not match the gender in which they present. Overall, nearly one-third (32%) of individuals who have shown IDs with a name or gender that did not match their presentation reported negative experiences, such as being harassed, denied services, and/or attacked.⁴⁶

Because accurate IDs and birth certificates are necessary for accessing public services, obtaining housing and employment, entering places of public accommodation, and voting, a person's inability to update them to match their gender presentation can often lead to discrimination and denial of services.⁴⁷

In Wisconsin, the process to change one's legal name involves filing several forms with the county clerk of courts, paying substantial filing fees, publishing three consecutive third-class public notices in a local newspaper prior to one's hearing date and paying associated fees, attending the hearing with an affidavit of publication, receiving approval from the local judge, and filing the order for name change so as to receive an amended birth certificate.⁴⁸ This process can take up to eight weeks and cost in excess of \$300.⁴⁹

43. *Issues: Identity Documents & Privacy*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/issues/identity-documents-privacy> [https://perma.cc/7HQE-58RE] (last visited Oct. 24, 2020).

44. *Id.*; see also JAMES ET AL., *supra* note 20, at 82 (explaining of those surveyed in the 2015 U.S. Transgender Survey, only eleven percent were able to update their name and gender on all IDs and records, and thirty-five percent of those who did not try to change their legal name did not try because they could not afford it).

45. JAMES ET AL., *supra* note 20, at 84 ("Reports of only sometimes or never being treated with respect were higher for certain groups of people, including people who were currently working in the underground economy, such as sex work, drug sales, or other work that is currently criminalized (41%), and people who had not had any hormonal or surgical treatment (35%). Respondents who interacted with judges or court staff who thought or knew they were transgender were asked about specific experiences during their interactions. Twenty-three percent (23%) were referred to by the wrong gender pronouns (such as he, she, or they) or title (such as Mr. or Ms.) during their interactions. Almost one in five (19%) people who interacted with judges or court staff were asked questions about their gender transition, such as whether they take hormones or have had any surgery. Nearly one in ten (9%) reported that they received unequal treatment or service, and 3% were verbally harassed.").

46. *Id.* at 89.

47. *Issues: Identity Documents & Privacy*, *supra* note 43.

48. *Wisconsin ID Documents Change: A Guide to Changing a Name and Gender Marker on Wisconsin and Federal Identification Documents*, TRANS LAW HELP WIS., 4-9 (Feb. 2020), <https://www.translawhelp.com/wp-content/uploads/2020/03/WI-Name-Gender-Marker-Change-Guid-20200218.pdf> [https://perma.cc/CB4Y-MZ54].

49. *Id.* at 3.

To change a gender marker on a Wisconsin birth certificate, a petitioner *must* have had gender-affirming surgery and must present to the court a notarized physician's letter confirming "surgical sex-change procedure."⁵⁰ Due to the high cost of surgery and the fact that many transgender people simply do not want to undergo gender-affirming surgery, this requirement effectively forecloses much of the transgender population in Wisconsin from obtaining a legal gender marker change.⁵¹ Since there is no unified process for changing all identifying documents, a trans person must follow various other bureaucratic processes to update their name and gender marker on their social security card, state ID, passport, and financial records.⁵²

b. Police Profiling and Harassment

Policing has a direct impact on the overcriminalization of transgender people.⁵³ In addition to excessive policing of low-income and marginalized communities generally, transgender people are particularly targeted by the policing of gender norms and aggressive enforcement of anti-prostitution statutes.⁵⁴ This kind of over-policing pushes transgender people into the criminal legal system and reduces public safety.

In a survey of transgender women and their experiences with sex work, many reported police profiling them as sex workers, regardless of their involvement in the sex trade.⁵⁵ Trans activists have called attention to this problem with the slogan "Walking While Trans," a corollary to the "Driving While Black" rallying cry.⁵⁶ The breadth of police discretion under vague indecency ordinances allows police to arrest people using as little as possession

50. WIS. STAT. § 69.15(4)(b) (2019).

51. Only one in every four survey respondents had undergone some form of gender-affirming surgery. See JAMES ET AL., *supra* note 20, at 100–02 ("Transgender men (42%) were more likely to have had any kind of surgery than transgender women (28%) or nonbinary respondents (9%). Respondents who were living in poverty (17%) were less likely to have had any surgery, as were those who had low incomes."). Further, not all transgender people *want* to undergo gender-affirming surgery, effectively foreclosing the option of obtaining a gender marker change in Wisconsin. *Id.*, at 103.

52. See *Wisconsin ID Documents Change: A Guide to Changing a Name and Gender Marker on Wisconsin and Federal Identification Documents*, *supra* note 48.

53. CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, *supra* note 5, at 46–50.

54. *Id.*

55. See ERIN FITZGERALD, SARAH ELSPETH PATTERSON, DARBY HICKEY, CHERNO BIKO & HARPER JEAN TOBIN, NAT'L CTR. FOR TRANSGENDER EQUAL., *MEANINGFUL WORK: TRANSGENDER EXPERIENCES IN THE SEX TRADE* 17 (2015).

56. See Otillia Steadman, *New York's "Walking While Trans" Ban Has Been Repealed*, BUZZFEED NEWS (Feb. 2, 2021, 6:06 PM), <https://www.buzzfeednews.com/article/otillisteadman/new-york-walking-while-trans-repealed> [<https://perma.cc/SL8J-CFHX>]; for background on police profiling of Black drivers, see David A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highways*, ACLU (June 1999), <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways> [<https://perma.cc/CAY5-TXSM>].

of condoms as evidence of prostitution.⁵⁷ Likewise, transgender sex workers report a wide range of alarming experiences with police and the law enforcement system. In Human Rights Watch's examination of policing in New Orleans, for example, police subjected transgender women to constant harassment, verbal abuse, and stops for suspicion of prostitution; these women were also sometimes asked for sex in exchange for leniency.⁵⁸ If transgender women experience hate violence and subsequently turn to the police for help, they are 6.1 times more likely to experience physical violence by police than other hate crime survivors.⁵⁹

I. LEGAL BACKGROUND

A. Laws Criminalizing Queerness

State laws have criminalized consensual sex between individuals of the same sex and certain sex acts for centuries.⁶⁰ These laws were frequently called "anti-sodomy laws," the enforcement of which discriminatorily targeted LGBTQ people.⁶¹ While the Supreme Court struck down state sodomy bans in 2003 in *Lawrence v. Texas*,⁶² LGBTQ people are still criminalized through discriminatory enforcement of other laws. Several categories of laws are disproportionately used against LGBTQ people: HIV criminalization laws that rely on outdated science and stereotypes, state indecency laws that frequently target LGBTQ people engaging in consensual sex and sex work, and drug laws that disproportionately impact people of color and low-income people, many of whom are LGBTQ.⁶³

HIV criminalization laws—adopted during the height of AIDS panic and misinformation⁶⁴—criminalize consensual sex between an HIV-positive person and an HIV-negative person.⁶⁵ Most states explicitly criminalize exposing or transmitting HIV to another person, and punishment for crimes under these statutes can be severe.⁶⁶ Thirty-three states punish HIV-related offenses as felonies, several more (including Wisconsin) have an HIV status sentencing enhancement, and nine states' sentences include sex offender registration.⁶⁷ In

57. MEGAN MCLEMORE, HUM. RIGHTS WATCH, SEX WORKERS AT RISK: CONDOMS AS EVIDENCE OF PROSTITUTION IN FOUR US CITIES 2 (2012).

58. MEGAN MCLEMORE, HUM. RIGHTS WATCH, IN HARM'S WAY: STATE RESPONSE TO SEX WORKERS, DRUG USERS, AND HIV IN NEW ORLEANS 3 (2013).

59. OSMAN AHMED & CHAI JINDASURAT, NAT'L. COAL. OF ANTI-VIOLENCE PROGRAMS 2014 REPORT ON LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED HATE VIOLENCE 9 (2015).

60. CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT, *supra* note 5, at 37.

61. *Id.*

62. *Lawrence v. Texas*, 539 U.S. 558 (2003).

63. CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT, *supra* note 5, at 37.

64. *See* PRESIDENTIAL COMM'N ON THE HUM. IMMUNODEFICIENCY VIRUS EPIDEMIC, WASHINGTON, DC, THE PRESIDENTIAL COMM'N ON THE HUM. IMMUNODEFICIENCY VIRUS EPIDEMIC REP. 139 (1988) (recommending states establish criminal penalties as a way of deterring people with HIV from engaging in behavior likely to transmit the virus).

65. CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT, *supra* note 5, at 37.

66. *Id.* at 38.

67. *Id.*

California specifically, these prosecutions carry high conviction rates and disproportionately target marginalized individuals, such as people of color and transgender people.⁶⁸

In addition to HIV criminalization, laws regulating consensual sex unfairly target LGBTQ people. Beginning in the mid-twentieth century, anti-sodomy laws came to be used almost entirely against gay and bisexual men.⁶⁹ In 2003, the U.S. Supreme Court ruled in *Lawrence v. Texas* that the government could not legislate personal relationships and private activity between consenting adults;⁷⁰ this, in theory, removed the criminal threat that millions of gay and bisexual men lived with, including raids on gay bars and fear of police entrapment.⁷¹ However, data shows that, since *Lawrence*, police still target queer men, youth, and transgender people for consensual sex under “crimes against nature,” solicitation, and statutory rape laws.⁷² Many of these offenses result in sex offender registration following a conviction, leading to worsened systemic discrimination for LGBTQ people, increased risk of gender-based violence, and exclusion from employment, housing, family, and community.⁷³

B. Sex Offender Registries

Sex offender registries have been the subject of substantial legal and academic criticism since their inception, and this Comment joins such criticism.⁷⁴ Many legal scholars, judges, and practitioners alike have critiqued the way sex offender registries contribute to mass incarceration, serve predominantly political ends, and fail to accomplish many of their alleged goals.⁷⁵ Because laws relating to sex offenders are generally subject to rational basis review, registries have typically survived legal challenges to their constitutionality despite heavy criticism.⁷⁶

Where other carceral laws and harsh penal schemes have sharply decreased in popularity over the years, sex offender registry and notification laws have

68. *Id.* at 37–38.

69. *Id.* at 69.

70. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

71. CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT, *supra* note 5, at 39.

72. See *id.* at 40, 50, 55.

73. *Id.*

74. See, e.g., Catherine L. Carpenter, *A Sign of Hope: Shifting Attitudes on Sex Offense Registration Laws*, 47 SW. L. REV. 1 (2017).

75. See, e.g., *id.*; see also Logan, *infra* notes 77–79 for examples of legal and academic critique.

76. David A. Singleton, *Sex Offender Residency Statutes and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws*, 3 U. ST. THOMAS L.J. 600, 618 (2006). Even registration cases that did not involve sex offenses have had their constitutionality upheld. *E.g.*, *People v. Johnson*, 870 N.E.2d 415, 426 (Ill. 2007) (affirming the State’s interest in automatic registration of offenders who commit crimes against minors despite lack of sexual motivation); *State v. Smith*, 2010 WI 16, ¶¶ 35–39, 323 Wis. 2d 377, 780 N.W.2d 90 (determining that automatic registration did not violate equal protection or due process when applied to a defendant who was convicted of false imprisonment of a minor that involved no sexual misconduct).

continued to thrive.⁷⁷ This is in part due to nationwide moral panic about pedophilia that emerged in the wake of several high profile child murders, including the murders of Jacob Wetterling and Megan Kanka.⁷⁸ Manipulating the fear of the public by naming the laws after child victims has been remarkably effective in continued stigmatization of sex offenders, despite bloated regulatory schemes that include many, many offenses beyond child sexual assault and including strict liability offenses⁷⁹ and crimes committed by minors.⁸⁰

Sex offender registries have expanded well beyond their initial purpose, and fail to provide the community with their intended notice.⁸¹ As one legal scholar has described, “these are the casualties of a system that at the outset was intended to protect the public from dangerous offenders but that has evolved into the politically motivated pursuit of harsher laws designed to satisfy a fearful public.”⁸² Because these laws have become excessively punitive and maintain little connection to their initial regulatory purpose, meaningful criminal legal system reform cannot occur without sex offender registry abolition.

C. Name Change Restrictions

Most states restrict felons from changing their names to varying degrees. Wisconsin prevents individuals from changing their names if they are currently required to register as a sex offender.⁸³ Felons who are not currently required to register as a sex offender can elect to make a name change.⁸⁴ However, if a felon is currently on parole, there is legal precedent for denying a name change petition at the judge’s discretion.⁸⁵ The state interests allegedly advanced by these restrictions include making accurate information about criminal convictions available via its registry and preventing individuals from concealing the fact that they have been convicted of registrable sex offenses by assuming new names.⁸⁶

II. BEYOND THE REGISTRY: CRIMINAL COLLATERAL CONSEQUENCES

77. See Wayne A. Logan, *Database Infamia: Exit from the Sex Offender Registries*, 2015 WIS. L. REV. 219, 220–21 (2015).

78. See Wayne A. Logan, *Megan’s Laws as a Case Study in Political Stasis*, 61 SYRACUSE L. REV. 371, 374–82 (2011).

79. Logan, *supra* note 77, at 220–21, 240; Kendra Clark, *Specters of California’s Homophobic Past: A Look at California’s Sex Offender Registration Requirements for Perpetrators of Statutory Rape*, 52 U.C. DAVIS L. REV. 1747, 1754–55 (2019).

80. See, e.g., WIS. STAT. § 301.45(1)(g) (requiring all youth adjudicated delinquent of a sex offense to register for a minimum of fifteen years).

81. Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1081 (2012).

82. *Id.*

83. WIS. STAT. § 301.47 (2019–20).

84. TRANS LIFELINE MICROGRANTS, NAME CHANGE GUIDE FOR PEOPLE WITH CRIMINAL RECORDS, TRANS LIFELINE (2020).

85. *Id.*

86. Mulligan, *supra* note 5, at 659.

FOR SEX OFFENDERS

There are many formal collateral consequences associated with sex offender registration. For example, the National Inventory of Collateral Consequences of Conviction lists more than 7,000 collateral consequences associated with sex offenses in American jurisdictions.⁸⁷ This database lists nearly one hundred such collateral consequences in Wisconsin, ranging from restrictions on movement and employment eligibility to loss of custody and mandatory child support.⁸⁸ Other significant consequences in Wisconsin include registration for life, restrictions on movement, restrictions on interaction with children, inability to obtain federal housing assistance and other benefits, among others.⁸⁹

The most pertinent collateral consequence to this analysis, of course, is Wisconsin's sex offender name-change ban ("Name-Change Ban").⁹⁰ Wisconsin is just one of many states that restricts felons' ability to change their names. These laws range from somewhat restrictive to quite burdensome on non-incarcerated felons' speech interests. In thirteen states, name change petitioners are not statutorily required to disclose their criminal history during name change proceedings, and judges are not statutorily required to consider criminal history when determining whether to grant the name change.⁹¹ While judges may inquire as to criminal history, it is not mandatory. In twenty-nine states, petitioners must either submit to a mandatory criminal background check, disclose if they have ever been convicted of or are pending conviction for a felony, or disclose if they are currently required to register as a sex offender.⁹² In several of these states,

87. *Collateral Consequences Inventory*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <https://niccc.nationalreentryresourcecenter.org/consequences> [https://perma.cc/N459-2G5C] (last visited Feb. 26, 2022).

88. *Id.*

89. *Id.*

90. WIS. STAT. § 301.47 (2019–20).

91. See ALASKA R. CIV. PROC. 84; D.C. CODE § 16-2501 (Lexis Advance through Law 24-45); GA. CODE ANN. § 19-12-1 (Lexis Advance through 2021 Reg. Gen. Assemb.); KAN. STAT. ANN. § 60-1402 (LexisNexis, Lexis Advance through 2021 Reg. Leg. Sess.); KY. REV. STAT. ANN. § 401.030 (LexisNexis, Lexis Advance through 2021 Reg. Sess.); MASS. ANN. LAWS ch. 210, § 12 (LexisNexis, Lexis Advance through 2022 Leg. Sess.); MISS. CODE ANN. § 93-17-1 (Lexis Advance through 2021 Reg. Sess.); MO. REV. STAT. § 527.270 (LexisNexis, Lexis Advance through 2021-2022 Gen. Assemb.); MONT. CODE ANN. § 27-31-101 (LexisNexis, Lexis Advance through 2021 Sess.); NEB. REV. STAT. ANN. § 25-21,271 (LexisNexis, Lexis Advance through 2021-2022 Leg.); N.M. STAT. ANN. § 40-8-1 (LexisNexis, Lexis Advance through 2021 Leg. Sess.); S.D. CODIFIED LAWS § 21-37-5 (LexisNexis, Lexis Advance through 2021 Gen. Sess.); WYO. STAT. ANN. § 1-25-101 (Lexis Advance through 2021 Gen. Sess.).

92. See ALA. CODE § 15-20A-36 (LexisNexis, Lexis Advance through No. 22-33 of 2022 Sess.); ARIZ. REV. STAT. ANN. § 12-601 (LexisNexis, Lexis Advance 2021 Legis.); ARK. CODE ANN. § 9-2-102 (Lexis Advance through 2021 Reg. Sess.); CAL. CIV. PROC. CODE § 1279.5 (Deering, Lexis Advance through 2021 Reg. Sess.); COLO. REV. STAT. § 13-15-101 (Lexis Advance through Ch. 1 of 2022 Reg. Sess.); CONN. GEN. STAT. § 52-11 (LexisNexis, Lexis Advance through Acts of 2021 Reg. Sess.); FLA. STAT. ANN. § 68.07 (LexisNexis, Lexis

people who are required to register are prohibited from changing their legal names until they are no longer required to register, at which point they become eligible to change their legal names.⁹³ In six states, petitioners with certain convictions are permanently barred from changing their legal names, and other petitioners with felony convictions are subject to a mandatory waiting period before they become eligible to change their names.⁹⁴

Wisconsin's purported interest in preventing legal name changes for sex offenders is to protect the public by maintaining accurate records of state residents and ensuring that offenders do not escape the state's notice.⁹⁵ Theoretically, if these offenders are not presently incarcerated, a name change could allow them to escape state scrutiny and possibly present a danger to the public. The Supreme Court would likely regard public safety as a sufficiently compelling government interest.⁹⁶ However, this notion is overinclusive because there are narrower ways to achieve accurate criminal records. Since many other states maintain successful registries while allowing offenders to undergo a legal name change by sending notice of the change to law enforcement agencies,⁹⁷ this rationale for blanket name-change bans fails.⁹⁸ In fact, if a name change petitioner is a registered sex offender, notice to law enforcement after the change takes effect is *required* regardless of state law.⁹⁹

Advance through 2021 Reg. Sess.); HAW. REV. STAT. ANN. § 574-5 (LexisNexis, Lexis Advance through 2021 Legis. Sess.); IDAHO CODE § 7-804 (Lexis Advance through 2021 Reg. Sess.); IND. CODE ANN. § 34-28-2-3 (Burns, Lexis Advance through Pub. L. No. 1-221); MD. RULE 15-901; MICH. COMP. LAWS SERV. § 711.1 (LexisNexis, Lexis Advance through Act 8 of 2022 Reg. Legis. Sess.); MINN. STAT. § 259.13 (LexisNexis, Lexis Advance through 2021 Reg. Sess.); NEV. REV. STAT. ANN. § 41.290 (LexisNexis, Lexis Advance through 2021 Reg. Sess.); N.D. CENT. CODE § 32-28-02 (Lexis Advance through 2021 Spec. Sess. of 2021-2022 Legis. Assemb.); N.H. CIR. CT. FAM. DIV. RULE 9.4 (repealed 2020); N.J. STAT. ANN. § 2A:52-1 (LexisNexis, Lexis Advance through 2021-2022 Second Ann. Sess.); N.Y. CIV. RIGHTS LAW § 61-1 (Consol., Lexis Advance through 2022 released Chap. 1-16); N.C. GEN. STAT. § 101-5 (Lexis Advance through Sess. L. 2021-192 of 2021 Reg. Sess.); OKLA. STAT. tit. 12, § 1631 (LexisNexis, Lexis Advance through 2021 First Reg. Sess.); S.C. CODE ANN. § 15-49-20 (LexisNexis, Lexis Advance through 2022 Reg. Sess. Act No. 119); TEX. FAM. CODE ANN. § 45.103 (LexisNexis, Lexis Advance through 2021 Reg. Sess.); VT. STAT. ANN. tit.15, § 816 (Lexis Advance through 2021 Spec. Sess.); VA. CODE ANN. § 8.01-217 (Lexis Advance through Act 2 of 2022 Reg. Sess.); WASH. GRANT DIST. CT. LCRLJ 65; WIS. STAT. § 301.47 (LexisNexis, Lexis Advance through Act 118 of 2021-2022 Legis. Sess.).

93. See, e.g., ALA. CODE § 15-20A-36 (2021); CAL. CIV. PROC. CODE § 1279.5(d) (Deering 2021); CONN. GEN. STAT. ANN. § 52-11 (West 2021); HAW. REV. STAT. ANN. § 574-5 (LexisNexis 2021).

94. See, e.g., LA. STAT. ANN. § 13:4751(D) (2021); 735 ILL. COMP. STAT. 5/21-101 (2014); 54 PA. CONS. STAT. § 702 (2021); TENN. CODE ANN. § 29-8-101 (2021); TEX. FAM. CODE ANN. § 45.103 (2021); W. VA. CODE ANN. § 48-25-103 (LexisNexis 2021).

95. See *supra* notes 90–93 and accompanying text for a cross-state comparison.

96. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 705 (2008) (“For these reasons, I conclude that the District’s statute properly seeks to further the sort of life-preserving and public-safety interests that the Court has called ‘compelling.’”).

97. See *supra* notes 91–92.

98. See Mulligan, *supra* note 5, at 663–64.

99. *Id.*

The informal collateral consequences felons face are undeniably reinforced by the state practice of sex offender registration, ensuring that punishment for the crime extends well beyond incarceration and formal punishment. In addition to the many formal collateral consequences sex offenders face, there are even more pervasive informal consequences associated with registration.¹⁰⁰ These include social stigmatization and ostracization from their community. This also leads to loss of job and housing opportunities on the basis of conviction, not only in a formal sense (i.e., denial of public housing benefits), but also in an informal sense (i.e., landlords's denials of leases on the basis of a sex offense conviction).¹⁰¹ As with most aspects of the criminal legal system, negative consequences always disparately impact more marginalized offenders.¹⁰² For transgender people, who already face pervasive housing and employment discrimination, these collateral consequences can be even more severe.¹⁰³ For those forced to continue using their deadname due to felony name-change bans, the combination of forced outing and sex offender stigmatization can be extremely dangerous.

III. CHALLENGING THE NAME-CHANGE BAN: AN EXAMINATION OF *KREBS V. GRAVELEY* AND *STATE OF WISCONSIN V. C.G.*

Wisconsin's sex offender name-change ban has faced several legal challenges over the past year, both in federal and state court.¹⁰⁴ Plaintiff Karen Krebs, a lifetime registrant permanently prohibited from legally changing her name, sued in the Eastern District of Wisconsin, seeking to enjoin the local district attorney from prosecuting her for violating the Name-Change Ban and requesting the court declare it unconstitutionally violative of the First Amendment.¹⁰⁵ The District Court declined to do either, and she appealed to the Seventh Circuit, which affirmed the District Court's judgment.¹⁰⁶

Meanwhile, a juvenile registrant has contested the Name-Change Statute in state court as part of her challenge to her registry requirement, filing a post-dispositional motion asking the circuit court to stay sex offender registration or, alternatively, to declare Wisconsin Statutes section 301.45 unconstitutional.¹⁰⁷ After the circuit court denied her motion, she appealed her First and Eighth Amendment claims to Wisconsin Court of Appeals, which affirmed the circuit

100. See Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103 (2013).

101. *Id.* at 1106.

102. See, e.g., *Americans with Criminal Records*, SENT'G PROJECT, <http://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf> [https://perma.cc/Z9TK-27F2] (last visited Jan. 17, 2017).

103. Transformative Just. L. Project of Ill., *supra* note 2.

104. See *Krebs v. Graveley*, 861 F. App'x 671 (7th Cir. 2021); *State v. C.G.* (In the Interest of C.G.), 2021 WI App 11, 396 Wis. 2d 105, 955 N.W.2d 443.

105. *Krebs v. Graveley*, No. 19-CV-634-JPS, 2020 WL 1479189, at *1 (E.D. Wis. Mar. 26, 2020), *aff'd*, 861 F. App'x 671 (7th Cir. 2021).

106. *Krebs*, 861 F. App'x at 674.

107. *In re C.G.*, 2021 WI App 11, ¶¶ 1–3.

court's judgment.¹⁰⁸ Her case is now pending before the Wisconsin Supreme Court.¹⁰⁹ Neither appellant raised Fourteenth Amendment challenges to this statute, and its legality under the Fourteenth Amendment has not been settled.

This paper will address the First Amendment arguments raised in each case, and the potential Fourteenth Amendment challenges that could be raised in the future. I will argue that the First Amendment issue has been incorrectly decided, and that the right to legal recognition of one's identity should be fundamental, regardless of the state's alleged regulatory interest.

A. First Amendment Challenges to Wisconsin's Name-Change Ban

The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. . . . To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity.¹¹⁰

These two plaintiffs have argued that Wisconsin's Name-Change Ban implicates the First Amendment because names are speech, and the First Amendment protects freedom from compelled speech and freedom of expression.¹¹¹ They argue the statute violates the First Amendment for two reasons: (1) it unconstitutionally compels speech, and (2) it is an unconstitutional speaker- and content-based restriction on expression that does not withstand either intermediate or strict scrutiny.¹¹²

When evaluating whether a statute violates the First Amendment, a court first considers whether the speech or expression at issue is protected by the First Amendment.¹¹³ If the First Amendment is implicated, the court then considers whether the state has a compelling interest in restricting the protected speech and, if so, "whether the [s]tate's countervailing interest is sufficiently compelling to justify" the restriction on constitutionally protected speech.¹¹⁴ The state has the burden to show that the statute passes constitutional muster.¹¹⁵

108. *Id.*

109. See Case History of State v. C.G., WIS. SUP. CT. AND CT. APPEALS CASE ACCESS, <https://wscca.wicourts.gov/appealHistory.xml?caseNo=2018AP002205&cacheId=B835BFC389A480C319D58E34E0960918&recordCount=1&offset=0&linkOnlyToForm=false&sortDirection=DESC> [https://perma.cc/D9PW-PW9D] (last visited Feb. 19, 2022).

110. *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

111. Brief & Short Appendix of Plaintiff-Appellant Karen Krebs, *Krebs v. Graveley*, 861 F. App'x 671 (7th Cir. 2021) (No. 20-1656), 2020 WL 3846787, at *13 [hereinafter Brief of Plaintiff Krebs]; Brief & Appendix of Respondent-Appellant-Petitioner at 30–31, *State v. C.G.* (In the Interest of C.G.), 2018AP2205 (Wis. filed May 27, 2021); Non-Party Brief of *Amici Curiae* ACLU Foundation and ACLU of Wisconsin Foundation in Support Of Petitioner C.G. at 4–5, *State v. C.G.* (In the Interest of C.G.), 2018AP2205 (Wis. filed Aug. 11, 2021) [hereinafter Amicus Brief in Support of C.G.].

112. Brief of Plaintiff Krebs, *supra* note 111.

113. See *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

114. *Id.* at 716.

115. *State v. Stevenson*, 2000 WI 71, ¶ 10, 236 Wis. 2d 86, 613 N.W.2d 90.

Different types of restrictions trigger different levels of scrutiny. Content-based restrictions on speech trigger strict scrutiny, meaning they are presumptively unconstitutional and are only upheld if the government proves that they are narrowly tailored to serve a compelling state interest.¹¹⁶ Similarly, a speaker-based restriction that operates as a de facto content restriction is subject to strict scrutiny.¹¹⁷ Content-neutral laws are afforded a more lenient intermediate standard of scrutiny.¹¹⁸ Under this standard, “a law must be ‘narrowly tailored to serve a significant governmental interest.’ In other words, the law must not ‘burden substantially more speech than is necessary to further the government’s legitimate interests.’”¹¹⁹ However, under any First Amendment analysis, there must be a government interest in restricting the expression, and that interest must outweigh the burden on expression that it creates.¹²⁰

The *Krebs* court found that the plaintiff had not sufficiently demonstrated that the First Amendment was implicated, and held that the issue had not been properly raised.¹²¹ The State argues in both cases that the ban does not implicate the First Amendment because it does not prohibit sex offenders from using their names socially, but rather bars them from petitioning a circuit court to change their names.¹²² The State claims, and the court of appeals agreed, that this is a restriction on conduct, not speech.¹²³ However, this argument fails because names are speech, and an inability to legally change one’s name compels them to speak their former, unwanted name indefinitely.

Courts were flatly wrong to find this law does not implicate the First Amendment because names are words, not conduct. Even if this law only implicated conduct, that conduct is likewise protected: “[i]f the law is considered ‘a ban on petitioning a circuit court for a legal name change,’ it violates the First Amendment right to petition the government in addition to the right to free speech.”¹²⁴ Naming oneself is a constitutionally protected act of self-expression, and a name expresses information to the world, particularly one’s gender: “naming oneself is a literal act of identity formation and self-determination—particularly for transgender people—which the First Amendment was intended

116. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383, 395–96 (1992); *State v. Oatman*, 2015 WI App 76, ¶ 12, 365 Wis. 2d 242, 871 N.W.2d 513. Content-based laws are those which “draw[] distinctions based on the message a speaker conveys.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 564 (2011)).

117. *Reed*, 576 U.S. at 170 (“[A] law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based.”).

118. See *Texas v. Johnson*, 491 U.S. 397, 407 (1989).

119. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (citations omitted) (quoting *McCullen v. Coakley*, 537 U.S. 464, 466–67 (2014)).

120. *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

121. *Krebs v. Graveley*, 861 F. App’x 671, 674 (7th Cir. 2021).

122. See Response Brief of State of Wisconsin, at 23–30, *State v. C.G. (In the Interest of C.G.)*, 2018AP2205 (Wis. filed June 30, 2021).

123. *State v. C.G. (In the Interest of C.G.)*, 2021 WI App 11, ¶¶ 29–30, 396 Wis. 2d 105, 955 N.W.2d 443.

124. Amicus Brief in Support of C.G., *supra* note 111, at 2.

to protect.”¹²⁵ As one Wisconsin jurist stated, “[i]t is difficult to imagine many acts of speech more integral to self-expression than choosing one’s own name.”¹²⁶ For transgender people, this right of self-determination is of the utmost importance—legal identity recognition has proven to have a substantially positive effect on trans people’s mental health and wellbeing.¹²⁷ The ability to determine and alter one’s identity is a fundamental aspect of freedom of expression, and should necessarily be free of unnecessary state intrusion.

i. This Law Unconstitutionally Compels Speech, and Should Be Subject to Strict Scrutiny

Under section 301.47, the state forces trans registrants to express a falsehood about their identity—here, that these two women are men—whenever they must provide their legal name. This is government-compelled speech, and it cannot survive strict scrutiny.

Plaintiff Krebs argues that a statute that compels speech, by nature, implicates the First Amendment, pursuant to *Janus v. AFSCME* and *Wooley v. Maynard*.¹²⁸ Specifically, Plaintiff Krebs notes this passage:

When speech is compelled, . . . individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding “involuntary affirmation” of objected-to beliefs would require “even more immediate and urgent grounds” than a law demanding silence.¹²⁹

Since this statute forces Plaintiff Krebs to engage in speech to which she objects without a sufficiently compelling government interest to justify it, she argues that it should fail strict scrutiny.¹³⁰ While a name is not an idea per se, it usually communicates one’s gender, and being subjected to superfluous state regulation of your gender expression is demeaning. Further, being forced to use one’s deadname could reasonably be interpreted as endorsing both the old identity itself and the legitimacy of the state’s control over one’s gender expression.

125. Mulligan, *supra* note 5, at 690.

126. Koutnik v. Berge, No. 03-C-345-C, 2004 U.S. Dist. LEXIS 13926, at *16 (W.D. Wis. July 19, 2004) (citing Salaam v. Lockhart, 905 F.2d 1168, 1170 (8th Cir. 1990)).

127. See, e.g., Arjee Restar, Harry Jin, Aaron Breslow, Sari L. Reisner, Matthew Mimiaga, Sean Cahill & Jaclyn M.W. Hughto, *Legal Gender Marker and Name Change is Associated with Lower Negative Emotional Response to Gender-Based Mistreatment and Improve Mental Health Outcomes Among Trans Populations*, 11 SSM Population Health, May 11, 2020, at 1, 6–7, <https://doi.org/10.1016/j.ssmph.2020.100595> [<https://perma.cc/EFW5-FG4V>] (finding that, compared to participants who did not change their name on their passport or driver’s license, those who changed their name on both documents had lower odds of experiencing an emotionally upsetting response due to gender-based mistreatment, depression, anxiety, and global psychiatric distress).

128. See Brief of Plaintiff Krebs, *supra* note 111, at *11, *13.

129. *Id.* at *13 (quoting *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448, 2464 (2018)).

130. *Id.*

Wisconsin's Name-Change Ban compels registrants to convey a message about their identities with which they disagree—to identify themselves as someone they are not, and out themselves as transgender. Even if registrants are free to use their chosen names informally, Wisconsin requires use of legal names in such circumstances as driving, voting, hunting and fishing, among others.¹³¹ For trans registrants who cannot obtain a legal name change, each of these situations forces them to out themselves, potentially exposing them to violence and discrimination.¹³² To hold that this law does not impose a speech burden because it allows for informal name use seems willfully ignorant of the frequency with which one must identify oneself.

Laws compelling non-commercial speech are subject to strict scrutiny,¹³³ meaning that the courts in these cases were incorrect to hold that the First Amendment does not apply to the Name-Change Ban. A law is not narrowly tailored to survive strict scrutiny when a less restrictive alternative is readily available.¹³⁴ In other words, the Name-Change Ban must be “‘actually necessary’ to achieve [a compelling government] interest” under this standard.¹³⁵ The Name-Change Ban plainly fails this standard, since other states operate without such a prohibition.¹³⁶ The least restrictive alternative would be to allow registrants to legally change their names and then report the new name to the registry like any other alias.

ii. This Law is an Unconstitutional Speaker-Based Restriction on Expression

Theoretically, the First Amendment was intended to protect individual sovereign autonomy from oppressive state interests:

Freedom of expression permits and encourages the exercise of these capacities: it supports a mature individual's sovereign autonomy in deciding how to communicate with others; it disfavors restrictions on communication imposed for the sake of the distorting rigidities of the orthodox and the established. In so doing, it nurtures and sustains the self-respect of the mature person The value of free expression, in this view, rests on its deep relation to self-respect arising from autonomous self-determination without which the life of the spirit is meager and slavish.¹³⁷

131. See WIS. STAT. § 343.14; WIS. STAT. § 5.02(6m); WIS. STAT. § 29.024(2)(b).

132. See *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 934 (W.D. Wis. 2018) (“As a group, transgender individuals have been subjected to harassment and discrimination in virtually every aspect of their lives, including in housing, employment, education, and health care.”).

133. See *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 798 (1988).

134. *State v. Baron*, 2009 WI 58, ¶ 47, 318 Wis. 2d 60, 769 N.W.2d 34.

135. *United States v. Alvarez*, 567 U.S. 709, 725 (2012).

136. See Mulligan, *supra* note 5, at 664, for a discussion of states that do not require criminal history disclosure to obtain a name change.

137. David A. J. Richards, *Free Speech and Obscenity Law: Toward A Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974).

Autonomy and self-expression are fundamentally private interests. Forcing someone to use a name that does not reflect their identity “fundamentally contradicts the two private interests in names: self-expression and identity-formation.”¹³⁸

The name-change ban is a speaker-based restriction on freedom of expression, applying only to one class of speakers—registered sex offenders.¹³⁹ The First Amendment generally prohibits “restrictions distinguishing among different speakers, allowing speech by some but not others.”¹⁴⁰ Wisconsin law prevents the imposition of unduly burdensome speech restrictions that apply only to registered sex offenders, because “[t]hose citizens have the same First Amendment rights as any other.”¹⁴¹ The name-change ban unconstitutionally prohibits only registered sex offenders from gaining official recognition of names reflecting their religious, ethnic, familial or gender identities. This type of restriction is subject to intermediate scrutiny.¹⁴² As outlined in the following section, the Name-Change Ban fails intermediate scrutiny because it unnecessarily burdens speech when the already available alternative of registering aliases serves the state’s interests just as well.

iii. The State’s Alleged Interest in this Law Fails Even Intermediate Scrutiny

It is difficult to see how the state’s alleged interest in preventing offenders’ anonymity is advanced by this restriction. The statute first implicates the First Amendment by regulating intrinsically expressive conduct—the primary means by which people announce their identity to the outside world, and one of the most fundamental steps in gender identity formation. The courts in these cases profoundly misunderstand the transgender experience by failing to recognize the psychological distress and dysphoria often associated with deadnaming, and the frequency with which one is required to use their legal name.¹⁴³ Even if names were not affirmatively expressive, the statute would implicate the First Amendment by forcing sex offenders to speak in ways to which they do not consent.

Strict scrutiny should apply in these cases, but even if it did not, the statute in question is not well-tailored, and the government’s alleged interest is not substantial. The state already punishes sex offenders with Class H felony charges

138. Mulligan, *supra* note 5, at 687.

139. *See Reed v. Town of Gilbert*, 576 U.S. 155, 170–71 (2015) (describing what constitutes a speaker-based restriction on freedom of expression generally).

140. *Citizens United v. FEC*, 558 U.S. 301, 340 (2010).

141. *State v. Oatman*, 2015 WI App 76, ¶ 17, 871 N.W.2d 513, 518–19.

142. *See State v. Jackson*, 2020 WI App 4, ¶ 6, 938 N.W.2d 639, 642–43 (citation omitted).

143. *See, e.g., State v. C.G. (In the Interest of C.G.)*, 2021 WI App 11, ¶ 7, 396 Wis. 2d 105, 955 N.W.2d 443 (“Neither the fact that she may feel uncomfortable when having to use her legal name, nor that she feels ‘outed’ when she does use her legal name, renders the statute unconstitutional as applied to her. Ella is capable of expressing herself and identifying herself consistent with her gender identity. Because the name-change ban in Wis. Stat. §301.47 does not restrict Ella’s ability to express herself, we need not utilize a First Amendment analysis because the statute does not implicate the First Amendment.”)

for failing to notify the Department of Corrections of any required changes.¹⁴⁴ If, in fact, the purpose of such a penalty is to deter offenders from trying to go anonymous, it should likewise be sufficient to ensure that offenders who would legally change their names properly inform the state of such a change. Furthermore, the process to obtain a legal name change in Wisconsin is so public that it should be nearly impossible for the state to lose someone in such a case.¹⁴⁵ The state interest alleged here is simply not substantial nor is it narrowly tailored to achieve its ends.

B. Fourteenth Amendment Substantive Due Process Challenges

While the Fourteenth Amendment is not at issue in *Krebs v. Graveley* or *State of Wisconsin v. C.G.*, it could provide a compelling argument in similar cases. Since substantive due process review protects fundamental rights violated by state action, it could be used to challenge a statute such as this one. Because the courts in these cases have been largely resistant to First Amendment challenges, a substantive due process argument may fare better.¹⁴⁶

i. Substantive Due Process

Laws preventing someone from changing their name violate the rights to privacy and liberty under the Fourteenth Amendment's Due Process Clause¹⁴⁷ because it unnecessarily forces individuals to disclose their gender identity, exposing them to potential discrimination and harm. The Supreme Court has applied strict substantive due process scrutiny to any law that directly impinges upon a fundamental right which qualifies as a "liberty" interest under the Due Process Clause, including the right to privacy.¹⁴⁸ The Court has used two tests to determine whether an asserted interest qualifies as a fundamental privacy right that triggers strict scrutiny.¹⁴⁹ The conservative test asks whether the asserted privacy interest is a fundamental right deeply rooted in the nation's history or in the concept of ordered liberty.¹⁵⁰ The liberal test asks whether an asserted privacy interest is central to personal dignity and autonomy or is at the heart of liberty.¹⁵¹

The liberal test recognizes that cultural norms and conceptions of government authority necessarily change as society evolves. For example, the

144. See WIS. STAT. § 301.45(6).

145. See generally, *Wisconsin ID Documents Change: A Guide to Changing a Name and Gender Marker on Wisconsin and Federal Identification Documents*, *supra* note 48 (discussing the name change process in Wisconsin and its publication requirements).

146. See Mulligan, *supra* note 5, at 678–79 for in-depth discussion of a potential Equal Protection challenge.

147. U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

148. See, e.g., *Roe v. Wade*, 410 U.S. 113, 164 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

149. Julia Shear Kushner, *The Right to Control One's Name*, 57 UCLA L. REV. 313, 342–43 (2009).

150. *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997).

151. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

Supreme Court's decision in *Obergefell v. Hodges* extended substantive due process protection to marriage as a fundamental privacy right.¹⁵² This provides a legal starting point for further expansion of LGBTQ rights and liberties: "the fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity."¹⁵³ If a state law impinges upon a fundamental right under either of these tests, then the Court will use strict scrutiny to analyze the constitutionality of that law.¹⁵⁴ To satisfy strict scrutiny, the law must be a necessary means of achieving a compelling governmental interest.¹⁵⁵

The right to control one's name is inherent to personal dignity and autonomy, and it should easily satisfy the more liberal test. Justice O'Connor's words in *Planned Parenthood v. Casey*, while referring not to naming oneself but the right to privacy, nonetheless evoke the fundamentality of controlling one's own identity: "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."¹⁵⁶ There are few things more central to one's identity formation, to one's own concept of existence, than their name—it is for this reason that many transgender people begin their transition by choosing a new name.¹⁵⁷ Not only does a name change allow them to signify their gender to others, it allows them to affirm their gender to themselves, creating feelings of gender euphoria¹⁵⁸ and developing their identity.¹⁵⁹

The fundamental right to one's name also passes the more conservative test, since the right to change names is "well-established in the common law of England and the United States," making it deeply-rooted in the nation's history.¹⁶⁰ Likewise, permanently barring a name change on the basis of a criminal conviction is by no means "essential to the concept of ordered liberty"

152. See *Obergefell v. Hodges*, 576 U.S. 644 (2015).

153. *Id.* at 645 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); and then citing *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965)); see also J. Courtney Sullivan, *What Marriage Equality Means for Transgender Rights*, N.Y. TIMES (July 16, 2015), <https://www.nytimes.com/2015/07/16/opinion/what-marriage-equality-means-for-transgender-rights.html> [<https://perma.cc/23H8-2Y8G>] (explaining that *Obergefell* is a victory for the transgender community and that transgender advocates believe that Due Process liberties should extend beyond same-sex marriage to include the right to change the gender marker on a birth certificate, or to use a restroom that matches one's gender identity).

154. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

155. *Id.*

156. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

157. See Riedel, *supra* note 36.

158. See generally Em Murphy, *Gender Dysphoria and Euphoria*, VICTIM SERV. CTR. CENT. FLA., (Nov. 20, 2020), <https://www.victimservicecenter.org/gender-dysphoria-and-euphoria/> [<https://perma.cc/Z8N4-WVCD>] (describing gender euphoria as "almost the opposite of dysphoria, and usually happens when trans folk feel sound in their gender, whether socially, physically, or cognitively. This can be in social situations where their pronouns/names are used correctly or for things that make them feel more comfortable in their gender, like binding or wearing certain clothing.").

159. Mulligan, *supra* note 5, at 688.

160. Kushner, *supra* note 148, at 346–47.

because nineteen states do not consider criminal records at all in name change proceedings, indicating that the public policy justification for this law is not so overwhelming that it has been universally adopted in the name of ordered liberty.¹⁶¹

While the Court has not held name changes to be a fundamental privacy right, several analogous cases indicate that it should. For example, courts have held parents' right to name their child is encompassed within the right to privacy protected by the Fourteenth Amendment, finding that laws preventing such failed even rational basis review.¹⁶² Further, courts have found other rights associated with one's transgender identity to be fundamental privacy rights.¹⁶³ The Supreme Court of Illinois, for example, held that a city ordinance criminalizing "cross-dressing" violated trans people's First Amendment rights because it was "fundamentally inconsistent with 'values of privacy, self-identity, autonomy, and personal integrity that . . . the Constitution was designed to protect.'"¹⁶⁴ Likewise, courts have extended prisoners the right to protect the privacy of their transgender identity, even though inmates typically have limited privacy expectations.¹⁶⁵

If a law implicates a fundamental privacy right, then it must satisfy strict scrutiny to be constitutional, and it must be a necessary means of achieving a compelling governmental interest.¹⁶⁶ Here, the Wisconsin Name-Change Ban should not survive strict scrutiny because the state's interest in regulating name changes is not compelling, since the state already requires registrants to record aliases in the registry. The contention that allowing registrants to change their names legally could make tracking them more difficult than under the current system is belied by the fact that registrants *can* use registered aliases, and that Wisconsin's legal name change process requires petitioning the court and publication in a local newspaper. Nor is the regulation narrowly tailored to the state's interests, since the state should have no trouble tracking registrants who must literally go to court to obtain a legal name change. The burden on transgender individuals' liberty and privacy in these instances is severe, and the consequences can endanger their lives and livelihoods: "because control over

161. Mulligan, *supra* note 5, at 693.

162. See *O'Brien v. Tilson*, 523 F. Supp. 494, 496 (E.D.N.C. 1981) (holding that parents' right to name their child is encompassed within the right to privacy protected by the Fourteenth Amendment); *Jech v. Burch*, 466 F. Supp. 714, 718–19 (D. Haw. 1979) (holding the same). Although both courts found that the offending statutes failed the rational basis test, citations to cases such as *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), and *Griswold v. Connecticut*, 381 U.S. 479 (1965), implied that they viewed the parental naming right as part of the privacy rights rubric. The right may thus be subject to higher scrutiny, though the courts in *Jech* and *O'Brien* found such analysis unnecessary. In fact, the court in *O'Brien* explicitly stated that it "need not decide whether the state must show a compelling state interest or some lesser interest . . . because even under the most relaxed of standards . . . the statute proves to be patently defective." *O'Brien*, 523 F. Supp. at 496.

163. *City of Chicago v. Wilson*, 389 N.E.2d 522, 523–25 (Ill. 1978) (alteration in original) (quoting *Kelley v. Johnson*, 425 U.S. 238, 250–51 (1976) (Marshall, J., dissenting)).

164. *Id.* at 524.

165. *Powell v. Schriver*, 175 F.3d 107, 112–13 (2d Cir. 1999).

166. See, e.g., *Roe v. Wade*, 410 U.S. 113, 150 (1973).

one's name should be deemed fundamental, many of the existing name-change laws require reform to be brought within constitutionally permissible boundaries."¹⁶⁷ The least restrictive alternative would be to allow registrants to change their names and then report the name to the registry as they would with an alias.

IV. POLICY CONSIDERATIONS AND REMEDIES

Restrictions on name changes do not advance a sufficiently compelling and narrowly-tailored state interest to justify the danger deadnaming poses to trans individuals. A permanent ban on name changes functionally defeats the government interest in maintaining accurate sex offender registries when the offender in question is, for all intents and purposes, living using a different name and identity. Allowing these individuals (and others) to change their names would instead allow the registries to maintain more accurate information, rather than less accurate. Here, an absolute and permanent prohibition on name changes is not a narrowly tailored means of achieving the state's proffered goals. Rather, the state could allow for registry of multiple names, as it did prior to the statute's 2003 passage. Then, sex offenders could be allowed to change their names legally while also advancing the state's interest in maintaining an accurate sex offender registry.

The failure of these challenges in courts should prompt a broader policy discussion about the role of sex offender registries and restrictions on felons' rights of self-expression. This paper is not an analysis of the role courts play in perpetuating systemic inequality; however, the courts in these cases have repeatedly declined to recognize the vastly disproportionate impact the law has on marginalized groups.

I am not the first, nor will I be the last, person to argue that registries are ineffective at accomplishing most of their aims. They have repeatedly been demonstrated to harm already-marginalized people and socially ostracize those forced to register.¹⁶⁸ Reform of this system is in the interest of public welfare and equity. Dismantling, or at least narrowing, sex offender registries can undo some of the harm mass incarceration has inflicted on marginalized communities while still keeping communities safe.¹⁶⁹ Abolishing the carceral system that further marginalizes the nation's most vulnerable is ultimately key to attaining equity for these groups. Reconceptualizing responses to crime from non-carceral frameworks and abolishing the prison-industrial complex is perhaps the most significant step for trans rights in the criminal legal system.¹⁷⁰ In the meantime, a compassionate state would let its citizens express themselves as authentically as they can by allowing them the liberty to legally change their names.

167. Kushner, *supra* note 148, at 343.

168. See Carpenter, *supra* note 74.

169. See *id.*

170. See CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, *supra* note 5, at 44.

CONCLUSION

Name changes implicate some of the most fundamental aspects of humanity, self-expression and identity formation. Wisconsin's sex offender name-change ban violates the First Amendment's Freedom of Speech Clause, as well as the Fourteenth Amendment's Due Process Clause. Whatever state interest this law may serve is overshadowed by the disparate impact it has on transgender individuals such as Karen Krebs. On appeal, the Seventh Circuit likely will not find this law violative of the First Amendment—but it should. Individually, transgender plaintiffs like Ms. Krebs would benefit from the ability to legally match their names with their gender identity. Collectively, the State of Wisconsin would benefit from maintaining more accurate criminal records, records that reflect the actual lives and names of those on its registries. The ability to change one's name is at the heart of liberty protected under the Constitution. Transgender people, including those registered as sex offenders, deserve the safety and dignity a legal name change affords.

THE EQUALIZING EFFECT OF UNIONIZATION ON THE GENDER WAGE GAP

KIRSTEN WILSHIRE SALMONS[†]

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INTRODUCTION

In its 2018 decision in *Janus v. AFSCME*, the United States Supreme Court overruled forty years of precedent in labor law when it ruled that labor unions could no longer impose mandatory fees upon public sector employees.¹ *Janus*

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triggered a flurry of state legislation both from state legislatures trying to reduce the ruling's impact and from states seeking to fully implement it.² *Janus* likewise precipitated a dramatic drop in union membership and dues payment,³ as the Supreme Court's decision enabled public sector workers to enjoy the benefits of union representation without having to pay for them.⁴ The long-term effects of *Janus* remain to be seen, but the decision is significant as it marks a landmark victory for the anti-union movement in the ongoing debate over unionized labor in the United States at a time when anti-union legislation is on the rise and union participation is at an all-time low.⁵

Janus and the rising anti-union movement are occurring at the same time as a decades-long fight to pass the Paycheck Fairness Act (PFA) in order to stop gender-based pay inequality.⁶ The PFA would close loopholes in earlier anti-wage discrimination laws and make it easier for women to fight gender-based wage discrimination.⁷ However, attempts to pass the proposed Act have been met with concerns about overly pro-employee provisions creating too much uncertainty and exposure to litigation for employers. Thus, despite repeated reintroductions of the Paycheck Fairness Act to Congress, it has yet to pass.

whose unmatched organization, editing, and support was instrumental in getting this article publication-ready. I am grateful to my husband, Earl, for his unrelenting encouragement throughout law school and the writing of this article. This article is dedicated to my family, and especially to my late father-in-law, Earl Wayne Salmons, Jr., who was a champion for young women's athletics and education, and who touched so many lives through his years of coaching girls' basketball. In one of our last conversations, you jokingly told me to cite you in this article. While I could not find a way to fit any of your wisdom into this piece, I do rejoice in naming you in this dedication; I know you would be so proud of me today.

1. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). Prior to *Janus*, employees could decline to join the union, but could still be required to pay a portion of union dues, generally called "agency fees," attributable to the union's collective bargaining activities. *Id.* at 2460–61. Nonmembers could not be required to pay for other union activities, like political and ideological projects. *Id.* Under *Janus*, public sector employees can refuse to pay even the agency fees. *Id.*

2. Steve Delie, *How the Janus Decision Changed America*, THE HILL (June 26, 2020, 8:00 AM), <https://thehill.com/opinion/finance/504468-how-the-janus-decision-changed-america> [<https://perma.cc/3RVP-AJGU>].

3. *See id.*

4. Rebecca Rainey & Ian Kullgren, *1 Year After Janus, Unions are Flush*, POLITICO (May 17, 2019, 12:00 PM), <https://www.politico.com/story/2019/05/17/janus-unions-employment-1447266> [<https://perma.cc/29VS-7UUG>].

5. *See e.g., Right-to-Work Resources*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx> (last visited Feb. 12, 2021) [<https://perma.cc/HVG2-JV2P>] (showing that 6 states enacted new statutes or a constitutional amendment establishing right-to-work laws from 2010 to 2020, the highest amount of state right-to-work legislation passed in a single decade since the 1950s); Kate Gibson, *Union Participation in the U.S. Slid to Record Low in 2019*, CBS NEWS (Jan. 22, 2020, 2:51 PM), <https://www.cbsnews.com/news/union-membership-slid-to-record-low-in-2019> [<https://perma.cc/2T85-KMX9>].

6. *See* Ella Nilsen, *The House Just Passed a Bill to Close the Gender Pay Gap*, VOX (Mar. 27, 2019, 5:42 PM), <https://www.vox.com/2019/3/27/18282775/paycheck-fairness-act-gender-pay-gap-pelosi> [<https://perma.cc/ZY6N-32GK>].

7. *See id.*

In this Comment, I posit that these two legal developments are interconnected. The gender wage gap is narrower among unionized women workers compared to women who are not in a union.⁸ Women in labor unions also enjoy other non-wage benefits like sick leave and health insurance at higher rates than their non-unionized counterparts.⁹ Unions would therefore be an excellent tool to decrease gender-based economic inequality in the United States. However, the ongoing shift away from unionization in the U.S. legal system threatens to diminish that tool. Accordingly, income inequality should be a core policy consideration in the debate about unionization and a strong impetus for advancing union power in the United States.

In Section I of this Comment, I explore the current state of union legislation and litigation. I evaluate the after-effects of *Janus v. AFSCME*, state proliferation of right-to-work laws, and their impact on unionization. In Section II, I explain the benefits unionization provides for women workers and labor unions' role in decreasing the gender wage gap. In Section III, I compare and contrast the efficacy of unionization to women's other existing routes to remedying the gender wage gap—particularly litigation. Finally, in Section IV, I propose changes to legislation and union practices in order to empower labor unions to be a more effective tool in decreasing the gender wage gap.

I. BACKGROUND: THE STATE OF UNIONS

The American labor movement dates back to the early years of the nation's founding, with the earliest recorded labor strike occurring in New York in 1768 in protest against wage cuts.¹⁰ A century later, in the years following the American Civil War, the United States saw a dramatic growth in population and industrialization.¹¹ It was during this period that the first federations to represent union interests were created.¹² By 1886, the labor movement “became a real force to be reckoned with and took on more of the shape we see today.”¹³

Women have been an active force in the labor movement since its early days.¹⁴ For example, women millworkers in Lowell, Massachusetts were among the earliest actors in the organized labor movement.¹⁵ In the 1830s, women workers at the Lowell mills struck in protest of wage cuts, and in the 1840s, they organized as the Lowell Female Labor Reform Association, which led the fight

8. Elise Gould & Celine McNicholas, *Unions Help Narrow the Gender Wage Gap*, ECON. POL'Y INST.: WORKING ECON. BLOG (Apr. 3, 2017), <https://www.epi.org/blog/unions-help-narrow-the-gender-wage-gap> [https://perma.cc/PHC7-LCVV].

9. *Id.*

10. *Labor Movement*, HISTORY (Mar. 31, 2020), <https://www.history.com/topics/19th-century/labor> [https://perma.cc/5D3R-DSC5].

11. See *The Early Labor Movement*, PBS: HIST. DETECTIVES, <https://www.pbs.org/opb/historydetectives/feature/the-early-labor-movement/> [https://perma.cc/F4MC-83QB] (last visited Feb. 12, 2021).

12. *Id.*

13. *Id.*

14. See *Our Labor History Timeline*, AFL-CIO, <https://aflcio.org/about-us/history> [https://perma.cc/P9MA-JJWF] (last visited Feb. 12, 2021).

15. *Id.*

for a ten hour workday in Lowell.¹⁶ In 1909, over twenty thousand women rose up in a general strike against New York's shirtwaist industry in the Uprising of 20,000.¹⁷ Today, women workers make up approximately 45.5% of all union membership.¹⁸

Throughout the late nineteenth century and into the early twentieth century, organized labor grew in popularity,¹⁹ but the clashes between striking workers and their employers were tumultuous and often violent.²⁰ In 1935, Congress responded by passing the Wagner Act.²¹

Officially known as the National Labor Relations Act (NLRA), the Wagner Act was created to "diminish the causes of labor disputes burdening or obstructing interstate commerce."²² The Act also created the National Labor Relations Board (NLRB), which was authorized to make, amend, and rescind rules necessary to carry out the purpose of the Act.²³ Section 7 of the Act establishes employees' right to organize, join labor unions, and bargain

16. Thomas Dublin, *Women, Work, and the Family: Female Operatives in the Lowell Mills, 1830–1860*, 3 FEMINIST STUD. 30, 32 (1975).

17. Tony Michels, *Uprising of 20,000 (1909)*, JEWISH WOMEN'S ARCHIVE, <https://jwa.org/encyclopedia/article/uprising-of-20000-1909> [<https://perma.cc/MJ93-34G8>] (last visited Feb. 12, 2021).

18. INST. FOR WOMEN'S POL'Y RSCH., IWPR #R409, STATUS OF WOMEN IN THE STATES: THE UNION ADVANTAGE FOR WOMEN, <http://statusofwomendata.org/wp-content/uploads/2015/08/R409-Union-Advantage.pdf> [<https://perma.cc/ZE34-MDQK>]. The U.S. Bureau of Labor Statistics found that, in 2014, women made up 45.5% of all union membership, up from 33.6% in 1984. *Id.*

19. See RYAN NUNN, JIMMY O'DONNELL & JAY SHAMBAUGH, THE SHIFT IN PRIVATE SECTOR UNION PARTICIPATION, THE HAMILTON PROJECT (Aug. 2019), https://www.brookings.edu/wp-content/uploads/2019/08/UnionsEA_Web_8.19.pdf [<https://perma.cc/8V6B-NJ23>] (Figure 1 shows a gradual increase in "union density" from 1880 to the 1940s and 50s, and then a gradual decline through 2015.); see also *Labor Movement*, *supra* note 10.

20. Striking employees clashed with police and private security forces were sent to quash strikes, resulting in bloody battles and sometimes death over workers' fight for better wages and working conditions. See *Labor Wars in the U.S.*, PBS WISCONSIN, <https://www.pbs.org/wgbh/americanexperience/features/theminewars-labor-wars-us/> [<https://perma.cc/962M-S9AR>] (last visited Feb. 13, 2022). For instance, in the 1877 Great Railroad Strike, state militias were mobilized against striking employees across multiple states, resulting in bloodshed and at least ten deaths. *Id.* In the 1892 Homestead Strike, gunfire broke out between workers and private guards. *Id.* In 1897, nineteen striking miners were killed by police in what has come to be known as the Lattimer Massacre. *Id.* From 1912 to 1913, fifty people were killed in a clash between striking miners and private security guards. *Id.* In 1914, the Colorado National Guard and private security guards attacked a tent colony of striking workers in what came to be known as the Ludlow Massacre; the attack resulted in twenty deaths, including two women and eleven children. *Id.* The examples go on.

21. Int'l Ass'n of Machinists Dist. 10 & Its Local Lodge 1061 v. State, 2017 WI App 66, 378 Wis.2d 243, 903 N.W.2d 141, 145.

22. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935).

23. National Labor Relations Act, ch. 372, § 3(a), 49 Stat. 449, 451 (1935) (current version at 29 U.S.C. § 153(a)); *id.* § 6(a), 49 Stat. at 452 (current version at 29 U.S.C. § 156).

collectively with their employers.²⁴ The Wagner Act also identifies a series of unfair labor practices (ULPs), such as interfering with employees' rights to organize, for which the NLRB could take action against employers.²⁵ These provisions of the Wagner Act reflect the opinion in Congress at the time that employer interference in labor organization was detrimental to workers and to the economy.²⁶

Following World War II, however, attitudes shifted.²⁷ Some members of Congress felt that the law had become too favorable to unionization.²⁸ In 1947, Congress passed the Taft-Hartley Act (officially, the Labor Management Relations Act), which modified several provisions of the National Labor Relations Act in ways that were more favorable to employers.²⁹ The Taft-Hartley amendments granted employees the right to refrain from participating in union activities.³⁰ "Union shop" agreements, on the other hand, were still allowed.³¹ Under union shop agreements, unions could nonetheless require new employees to join the union as a condition of continued employment.³² However, the Taft-Hartley Act also created § 14(b) of the NLRA, which provides that the Act shall not be construed as authorizing "agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."³³

24. *Id.* § 7, 49 Stat. at 452 (current version at 29 U.S.C. § 157, amended in 1947 to include employees "shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)").

25. *Id.* §§ 8(1)–(5), 49 Stat. at 452–53 (current version at 29 U.S.C. §§ 158(a)(1)–(5)); *see id.* § 10, 49 Stat. at 453–55 (1935) (current version at 29 U.S.C. § 160).

26. *See* National Labor Relations Act, ch. 372, § 1, 49 Stat. 449, 449–50 (1935) (current version at 29 U.S.C. § 151).

27. After the war, inflation skyrocketed, and wages did not keep up. *Strike Wave: United States 1945–1946*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/strike-wave-united-states> [<https://perma.cc/JFH9-F4E8>] (last visited Feb. 13, 2022). The largest wave of labor strikes in U.S. history followed, as two million people went on strike between 1945 and 1946. *Id.* In the 1946 election, Republican candidates pointed to the strike wave as a sign of radicalism in unions and their members. *Id.* That platform proved successful, as Republicans took both the House and Senate that year. *Id.*

28. *Int'l Ass'n of Machinists Dist. 10 & its Local Lodge 1061 v. State*, 2017 WI App 66, ¶ 12, 378 Wis. 2d 243, 253, 903 N.W.2d 141, 145 (quoting *Sweeney v. Pence*, 767 F.3d 654, 681 (7th Cir. 2014)).

29. *See* Nelson Lichtenstein, *How Wal-Mart Fights Unions*, 92 MINN. L. REV. 1462, 1466 (2008).

30. *1947 Taft-Hartley Substantive Provisions*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/who-we-are/our-history/1947-taft-hartley-substantive-provisions> [<https://perma.cc/4AFB-6267>] (last visited Feb. 13 2021); Labor Management Relations Act, ch. 120, sec. 101, § 7, 61 Stat. 136, 140 (1947) (current version at 29 U.S.C. § 157).

31. *Int'l Ass'n of Machinists*, 903 N.W.2d at 146.

32. *Id.*

33. Labor Management Relations Act, ch. 120, sec. 101, § 14(b), 61 Stat. 136, 151 (1947) (current version at 29 U.S.C. § 164(b)).

Courts have historically interpreted § 14(b) “[to] allow[] individual states to ban union-shop agreements”³⁴ as well as agreements that require employees to pay union fees.³⁵ State laws that ban such agreements are now commonly referred to as right-to-work laws. Right-to-work laws have been a powerful tool for reducing union power in the past few decades, with significant consequences for all workers, and especially women, as discussed in Section B, *infra*.

In the decades following the passage of the Taft-Hartley Act, union participation and power have seen a gradual decline. At its peak in the 1950s, thirty-five percent of the United States’ workforce was unionized.³⁶ In the 1970s, unions’ popularity and power began to decline.³⁷ Unionization had halved by the 1980s, to just seventeen percent of the workforce.³⁸ Today, union participation is at an all-time low: as of 2019, only 10.3% of all workers are represented by a union.³⁹ This overall decline in union participation has not been limited to any particular industry or region,⁴⁰ except that the decline in union membership was principally among private sector union jobs, where only about 6.5% of workers were unionized as of 2017.⁴¹ Public sector union participation, on the other hand, remained relatively steady over the decades, but it too has seen a decline in recent years.⁴²

This decline is not because unions have become socially unpopular. Forty-eight percent of all nonunion workers report that “they would vote for a union if given the opportunity”⁴³ These numbers suggest many more workers want union representation than can access it under current U.S. labor and employment practices.⁴⁴ This discrepancy in worker interest in unionization versus the actual number of unionized workers may be explained by the steps businesses have taken to make it more difficult for workers to unionize, and the efforts state legislatures make to weaken the collective bargaining power of labor unions.

34. *Int’l Ass’n of Machinists*, 903 N.W.2d at 146.

35. *Id.* (citing *Sweeney v. Pence*, 767 F.3d 654, 661 (7th Cir. 2014)).

36. Steven Greenhouse, *Union Membership in U.S. Fell to a 70-year Low Last Year*, N.Y. TIMES (Jan. 21, 2011), <https://www.nytimes.com/2011/01/22/business/22union.html#:~:text=The%20peak%20unionization%20rate%20was,and%20after%20World%20War%20II> [https://perma.cc/T79D-6UDB].

37. *Labor Movement*, *supra* note 10.

38. *Id.*

39. Gibson, *supra* note 5.

40. NUNN ET AL., *supra* note 19, at 2.

41. JULIA WOLFE & JOHN SCHMITT, ECON. POL’Y INST., A PROFILE OF UNION WORKERS IN STATE AND LOCAL GOVERNMENT (June 7, 2018), <https://www.epi.org/publication/a-profile-of-union-workers-in-state-and-local-government-key-facts-about-the-sector-for-followers-of-janus-v-afscme-council-31/> [https://perma.cc/TJ4S-R5ZS]; NUNN ET AL., *supra* note 19, at 2.

42. WOLFE & SCHMITT, *supra* note 41.

43. CELINE McNICHOLAS, MARGARET POYDOCK, JULIA WOLFE, BEN ZIPPERER, GORDON LAFER & LOLA LOUSTAUNAU, ECON. POL’Y INST., UNLAWFUL: U.S. EMPLOYERS ARE CHARGED WITH VIOLATING FEDERAL LAW IN 41.5% OF ALL UNION ELECTION CAMPAIGNS (Dec. 11, 2019), <https://www.epi.org/publication/unlawful-employer-opposition-to-union-election-campaigns/> [https://perma.cc/YXD7-TLZN].

44. *Id.*

A. The National Labor Relations Act is an Insufficient Tool for Protecting Workers' Rights

U.S. labor laws have remained generally unchanged since 1959.⁴⁵ The current National Labor Relations Act is the backbone of United States' labor law, but it is comprised almost entirely of the original Wagner Act of 1935 and the 1947 and 1959 amendments of the Taft-Harley Act and Landrum-Griffin Act, respectively.⁴⁶ The NLRA is stagnant and reflects the anti-union sentiment of the era when the Taft-Hartley amendments were implemented. It is therefore no surprise that the NLRA is an insufficient tool for protecting workers' rights to collective bargaining with their employers today.

Private employers have become more aggressive in recent years in their opposition to union activity.⁴⁷ They are highly motivated to prevent employee unionization because unions reallocate earnings from employers to employees.⁴⁸ Studies suggest that the increased earnings that unionized workers enjoy come from employer profits.⁴⁹ Firms' average market value drops \$40,500 per unionized worker; this works out to about a ten-percent wage premium to employers when their employees unionize.⁵⁰ Employers respond, in turn, by spending big on preventing employees from unionizing.⁵¹ Today, employers spend about \$340 million per year on union avoidance advisors to help prevent employee unionization.⁵²

Employers also use illegal tactics to prevent their employees from unionizing. The NLRA expressly bars employers from engaging in ULPs to interfere with employee unionization.⁵³ Yet, employers violate the NLRA with great frequency.⁵⁴ To illustrate, researchers found that employers were charged with violating the NLRA in a shocking 41.5%—*nearly half*—of all NLRB-supervised union elections from 2016 to 2017.⁵⁵ Specifically, employers' charges included illegally firing workers in 19.9% to 29.6% (depending on metrics used) of all elections; using coercion, threats, and retaliation in 29.2% of elections; and illegally disciplining employees in 29.3% of elections.⁵⁶

45. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1532–33 (2002).

46. *Id.*

47. NUNN ET AL., *supra* note 19, at 9.

48. *Id.* at 3.

49. *Id.* at 11.

50. *Id.*

51. See McNICHOLAS ET AL., *supra* note 43.

52. *Id.*

53. See 29 U.S.C. §§ 158(a)(1)–(5). ULPs include interference with workers' right to organize through tactics like threatening employees who vote for a union, interfering in the formation of labor unions, discriminating against employees who join labor unions, retaliating against workers who file charges with the NLRB, and refusing to bargain in good faith with labor unions. McNICHOLAS ET AL., *supra* note 43.

54. See McNICHOLAS ET AL., *supra* note 43.

55. *Id.*

56. *Id.*

Why are illegal practices so rampant? Likely because the NLRA is too weak. The NLRA is considered a remedial statute, so the NLRB cannot impose punitive damages against employers who violate the NLRA.⁵⁷ Courts may impose injunctions against employers, ordering them to refrain from future engagement in illegal anti-unionization tactics,⁵⁸ and employers may be ordered to pay back-pay to employees they fire illegally,⁵⁹ but employers cannot be forced to pay punitive damages for ULPs.⁶⁰

Evidently, these consequences are insufficient to deter employers from engaging in ULPs. Any effort to improve employees' ability to unionize—and therefore, to use unions as a tool to further reduce the gender wage gap—will require strengthening the NLRA's enforcement provisions and making ULPs less attractive to employers.

B. The Rise in Right-to-Work Legislation

While pro-labor law stagnates, anti-union legislation has exploded in the U.S. in recent years. In the last decade, six states enacted right-to-work laws, bringing the national total to twenty-seven states and Guam.⁶¹ This is the largest increase in right-to-work law proliferation since the 1940s and 1950s,⁶² when the Taft-Hartley Act's passage made such laws legal.⁶³

Right-to-work laws make it unlawful to require employees to pay union fees as a condition of employment.⁶⁴ This means employees can work for a company that is covered by an exclusive bargaining relationship with a labor union without paying union fees. As a result, employees in right-to-work states get to enjoy the benefits of being unionized while the unions in those states are left to depend solely upon employees who voluntarily pay fees. Right-to-work laws are lauded for supposedly preserving freedom of speech rights because they excuse employees from paying for services and policies that they may not agree with, especially given unions' presence in political activism.⁶⁵ Right-to-work

57. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10–11 (1940).

58. See McNICHOLAS ET AL., *supra* note 43; see also 29 U.S.C. § 160(j).

59. McNICHOLAS ET AL., *supra* note 43.

60. *Id.*; *Republic Steel Corp.*, 311 U.S. at 10–11.

61. *Right-to-Work Resources*, *supra* note 5.

62. *Id.*

63. Under the Taft-Hartley revisions to the Wagner Act, employees had the right to refrain from participation in unions. Labor Management Relations Act, ch. 120, sec. 101, § 7, 61 Stat. 136, 140 (1947) (current version at 29 U.S.C. § 157).

64. See, e.g., Wis. Stat. § 111.04(3)(a)(3) (2021–22).

65. See, e.g., Raymond J. LaJeunesse, Jr., *The Future Looks Bright for the Right-to-Work Movement*, REGUL. REV. (Apr. 5, 2019), <https://www.theregreview.org/2019/04/05/lajeunesse-right-to-work-movement/> [https://perma.cc/6VWH-GSRF]; Mark Mix, *We Need to Pass the National Right-to-Work Act. No One Should be Forced to Join a Union*, USA TODAY (Sept. 1, 2019, 5:00 AM), <https://www.usatoday.com/story/opinion/2019/09/01/national-right-work-forced-join-union-column/2150416001> [https://perma.cc/WK2D-KHQG]. It should be noted, however, that, since the 1970s, even in the absence of right-to-work laws, unions have not been able to impose compulsory fees for unions' ideological and political activities. See *infra* notes 84–92 and accompanying text.

laws are also attractive to employees for the simple reason that they let the employee decide how they will spend their own money and take home more of their pay.

“Under federal law, unions are required to provide all services to any worker covered by a union contract, . . . regardless of whether that person chooses to pay dues.”⁶⁶ Accordingly, these laws can lead to a free-rider problem, in which employees are disincentivized from joining unions or paying dues since they will enjoy the benefits of any agreement the union comes to, whether or not they participate.⁶⁷ The consequence is that unions in right-to-work states may have fewer resources available to them, and, accordingly, less bargaining power.

It follows that union participation is lower in states with right-to-work laws than in those without them.⁶⁸ Furthermore, right-to-work laws are associated with lower wages for *all* employees in a state, whether unionized or not.⁶⁹ On average, right-to-work laws are associated with wages that are 3.2% lower for all workers in a state than they would be without such a law.⁷⁰ The right-to-work wage penalty is more pronounced for women workers.⁷¹ The average wage penalty for full-time women workers in right-to-work states is 4.4%, compared to full-time men workers who only see 1.7% lower pay.⁷² That wage penalty is even larger when broken down by race or ethnicity, at 4.8% for Black women and 4.4% for Hispanic women.⁷³ While labor unions work to dramatically narrow the gender wage gap for all employees in an industry,⁷⁴ right-to-work laws have precisely the opposite effect, and lay another roadblock in the way of women’s access to equal pay.

Furthermore, states with right-to-work laws are associated with lower non-wage benefits for all workers.⁷⁵ For example, the rate of access to employer-sponsored healthcare is 2.6% lower in right-to-work states than non-right-to-work states.⁷⁶ This consequence of right-to-work laws also disproportionately

66. GORDON LAFER, ECON. POL’Y INST., THE LEGISLATIVE ATTACK ON WAGES AND LABOR STANDARDS, 2011–2012 (Oct. 31, 2013), <https://www.epi.org/publication/attack-on-american-labor-standards/> [<https://perma.cc/DJ4X-5QWU>].

67. NUNN ET AL., *supra* note 19, at 9.

68. *Id.*

69. INST. FOR WOMEN’S POL’Y RSCH, *supra* note 18, at 6.

70. ELISE GOULD & HEIDI SHIERHOLZ, ECON. POL’Y INST., BRIEFING PAPER NO. 299, THE COMPENSATION PENALTY OF “RIGHT-TO-WORK” LAWS 5 (2011), <https://files.epi.org/page/-/old/briefingpapers/BriefingPaper299.pdf> [<https://perma.cc/VW89-UNAZ>].

71. *Id.* at 6.

72. INST. FOR WOMEN’S POL’Y RSCH., *supra* note 18, at 6.

73. GOULD & SHIERHOLZ, *supra* note 70, at 6.

74. *See* Gould & McNicholas, *supra* note 8.

75. GOULD & SHIERHOLZ, *supra* note 70, at 6.

76. *Id.* at 2.

affects women, since women bear much of the burden of familial and childcare,⁷⁷ and they represent the vast majority of single parents.⁷⁸

C. Janus v. AFSCME and Its Aftermath

The Supreme Court's 2018 *Janus v. AFSCME* decision marked a major loss for union power. In *Janus*, the United States Supreme Court ruled that, under the Free Speech clause of the First Amendment, states and public-sector unions could no longer impose mandatory union fees upon employees who did not want to join the union.⁷⁹ Through this decision, the Supreme Court effectively imposed the so-called worker protections of right-to-work laws upon all public sector workers across the United States.

The plaintiff, Mark Janus, was an Illinois state employee in the Department of Healthcare and Family Services.⁸⁰ The employees in his unit were represented by the nation's largest trade union of public employees and the defendant in this case, the American Federation of State, County, and Municipal Employees (AFSCME).⁸¹ Janus refused to join the AFSCME, but as a state employee, he was governed by the Illinois Public Labor Relations Act, which provided that public-sector employees could still be required to pay fees toward the union's collective bargaining activity, even if they declined to join the union or strongly objected to the union's activities.⁸² Janus brought his claim to the Supreme Court, challenging the Act on the grounds that it violates the free speech rights of nonmember public employees.⁸³

This issue had come before the Court forty years earlier in *Abood v. Detroit Board of Education*.⁸⁴ In *Abood*, the Supreme Court found that policies requiring employees to pay union fees were beneficial because they supported union activity and prevented free riding by employees who might otherwise enjoy the

77. See JANELLE JONES, JOHN SCHMITT & NICOLE WOO, CTR. FOR ECON. & POL'Y RSCH., WOMEN, WORKING FAMILIES, AND UNIONS 1 (June 2014), <https://www.cepr.net/documents/women-union-2014-06.pdf> [<https://perma.cc/WRE8-2NWD>].

78. Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RSCH. CTR. (Apr. 25, 2018), <https://www.pewresearch.org/social-trends/2018/04/25/the-changing-profile-of-unmarried-parents/> [<https://perma.cc/7KF4-65NZ>] (Eighty-one percent of solo parents—“those who are raising at least one child without a spouse or partner in the home”—are women.).

79. See *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448 (2018).

80. *Id.* at 2461.

81. *Id.*; AM. FED'N OF STATE, CNTY., & MUN. EMPS., QUESTIONS AND ANSWERS ABOUT AFSCME 11 (2017), <https://www.afscme.org/about/AFSCME-WMAH-QA-Booklet.pdf> [<https://perma.cc/99LG-SBXQ>].

82. See *Janus*, 138 S. Ct. at 2459–61.

83. See *id.* at 2462.

84. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), overruled by *Janus*, 138 S. Ct. at 2486.

benefits of the collective bargaining without contributing financially to the union's efforts.⁸⁵

However, the *Abood* Court took issue with the fees' imposition on employees' First Amendment rights. The law at issue in *Abood* permitted mandatory fees both for collective bargaining efforts and for the union's political activities. The Court found that requiring employees to pay fees meant that employees were being forced to subsidize activities that are political in nature, and, furthermore, "that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment."⁸⁶

The First Amendment's protection of freedom of speech has been interpreted to include "both the right to speak freely and the right to refrain from speaking at all."⁸⁷ Being forced to speak against one's will, then, potentially violates the First Amendment if the forced speech is "protected." Protected speech includes contributions to an organization to spread a political message "[b]ecause '[making] a contribution . . . enables like-minded persons to pool their resources in furtherance of common political goals'"⁸⁸ Thus, under the First Amendment, an employee's decision whether or not to contribute financially to a political cause is protected free speech.⁸⁹

The *Abood* Court acknowledged that an employee may have ideological objections to a wide array of union activities directly related to its collective bargaining efforts which would implicate the First Amendment; for example, an employee's "moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan."⁹⁰ However, the Court found that the benefits of compulsory spending on collective bargaining activity outweighed the First Amendment interests.⁹¹

85. *See id.* at 221–22. The *Abood* Court saw another benefit of compulsory union fees which is beyond the scope of this Comment: the promotion of "labor peace" in the public sector. *Id.* at 220–24. Labor peace is the idea that when an employer can enter into an exclusive bargaining arrangement with a single union, it is more conducive to peaceful interaction and stability in labor negotiations. *See id.* at 220–21. The Court reasoned that without compulsory fees, employees of the same company could join multiple unions, whose competing bargaining would disrupt that peace. *Id.*

86. *Id.* at 234.

87. U.S. CONST. amend. I; *Janus*, 138 S. Ct. at 2463 (citations omitted) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

88. *Abood*, 431 U.S. at 234 (alteration in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 22 (1976)).

89. *See id.* at 222.

90. *Id.*

91. The *Abood* Court held as follows:

To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson and Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.

Id. (first citing *Ry. Emps.' Dep't v. Hanson*, 351 U.S. 225 (1956); and then *Int'l Ass'n of Machinists v. St.*, 367 U.S. 740 (1961)).

Accordingly, the *Abood* Court held that a union could not spend money obtained from compulsory funds on political activity, like expressing political views, supporting candidates, or other ideological causes not related to its collective bargaining duties.⁹² Unions could spend money on these goals, but that money could only come from voluntary dues—not from dues that employees were required to pay.⁹³ However, unions could still collect mandatory payment from employees, so long as that money, called “agency-shop fees,”⁹⁴ was only used for “collective bargaining activities”⁹⁵ (but the Court refused to draw a line or further define what constituted “collective bargaining” versus political activity).⁹⁶ Thus, *Abood* held that laws requiring public sector employees to pay “agency fees” (a percentage of union fees) toward collective bargaining were enforceable under the First Amendment.

Abood was largely unchallenged for decades. However, in 2012, the Supreme Court in *Knox v. SEIU* proclaimed the *Abood* rule an “anomaly” in First Amendment jurisprudence,⁹⁷ signaling a murky future for the case’s precedential value. And then, in 2014, in *Harris v. Quinn*, personal assistants working in Illinois and represented by the Service Employees International Union (SEIU) challenged Illinois’s Public Labor Relations Act on the same First Amendment grounds as *Janus*.⁹⁸ Striking down the claim, the Supreme Court refused to extend *Abood* to partial-public, quasi-public employees, and private employees.⁹⁹ The Court reasoned that *Abood* did not apply to the plaintiffs in *Harris* because they were not “full-fledged” public employees.¹⁰⁰ The Court left *Abood* in place, but again criticized it as “questionable on several grounds.”¹⁰¹ The Court reasoned that, except in the rarest circumstances, no one should be compelled to subsidize another party’s speech if he or she does not support it.¹⁰² The Court further degraded the *Abood* precedent, indicating that, in its rule, the *Abood* Court misunderstood case law and failed to appreciate the differences in public speech between public and private employees.¹⁰³ Finally, in 2018, the Supreme Court in *Janus* overruled *Abood*, holding that laws requiring public sector employees to pay agency fees to their unions are in violation of the First Amendment.¹⁰⁴

Janus applies only to public employees, but it has broad-reaching effects. It has laid groundwork for future First Amendment challenges against labor

92. *Id.* at 234–35.

93. *Id.* at 235–36.

94. *Id.* at 212.

95. *Id.* at 213.

96. *Id.* at 235–36.

97. *See Knox v. SEIU, Local 1000*, 567 U.S. 298, 311 (2012).

98. *Harris v. Quinn*, 573 U.S. 616, 626 (2014).

99. *Id.* at 645–46.

100. *Id.* at 646–47.

101. *Id.* at 617.

102. *Id.* at 656.

103. *See id.* at 655–56.

104. *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2486 (2018).

laws.¹⁰⁵ *Janus* also instigated a flurry of state legislation proposals responding to the decision by passing legislation both to limit *Janus*'s impact and to fully implement its rule.¹⁰⁶

Unions representing public sector employees experienced a mass exodus of agency fee-payers post-*Janus*. In 2018, AFSCME saw a ninety-eight percent drop in agency fee-payers, SEIU lost ninety-four percent, and two teachers unions likewise saw substantial declines.¹⁰⁷

Janus marks what will likely be yet another factor in the decline in American unionization. Private sector union participation has plummeted in the past few decades.¹⁰⁸ Public-sector unionization has been more stable,¹⁰⁹ but *Janus* could change that. Evidence from states with right-to-work legislation suggests as many as twenty to seventy-one percent of public-sector workers will choose to stop paying union fees now that they can no longer be compulsory.¹¹⁰ The long-term effects of *Janus* have yet to be seen, but the case's impact could be substantial on the nation's overall union participation.

II. THE EQUALIZING EFFECT OF UNIONS FOR WOMEN WORKERS

The dramatic obstacles both private and public sector labor unions face in the United States today should be concerning to advocates for gender pay equality, as labor unions are demonstrably better for women workers. Unionization reduces the gender wage gap and increases access to non-wage benefits.¹¹¹ These are substantial factors in the fight for economic gender equality.

A. Unionization Reduces the Gender Wage Gap

Unionization is associated with higher wages for women workers. Unions tend to increase the wages of workers at the middle and bottom of the wage scale; because women workers are overrepresented at lower wage levels, unions disproportionately increase the wages of women workers.¹¹² Additionally, unions

105. By mid-2020, over ninety *Janus*-related lawsuits had been filed by public-sector employees across the country disputing continued union membership, demanding return of paid dues and cessation of dues collection, and challenging exclusive representation with mixed success. Jessica Barnett & Matthew Causer, *Public-Sector Unions Two Years After Janus v. AFSCME*, COMMONWEALTH FOUND. (June 26, 2020), <https://www.commonwealthfoundation.org/policyblog/detail/public-sector-unions-two-years-after-janus-v-afscme> [https://perma.cc/J8LN-5RR4].

106. Delie, *supra* note 2.

107. Robert Iafolla, *Mass Exodus of Public Union Fee Payers After High Court Ruling*, BLOOMBERG LAW (Apr. 5, 2019, 3:10 PM), <https://news.bloomberglaw.com/daily-labor-report/mass-exodus-of-public-union-fee-payers-after-high-court-ruling> [https://perma.cc/M7V7-ZH2T].

108. NUNN ET AL., *supra* note 19, at 3.

109. *Id.*

110. See Aaron Tang, *Life After Janus*, 119 COLUM. L. REV. 677, 679–80 (2019) (explaining that the wide variation in the predicted data depends on the data sets and methodology used).

111. Gould & McNicholas, *supra* note 8.

112. JONES ET AL., *supra* note 77, at 16.

increase transparency and reduce discretion in wage setting by ensuring wages are based on objective factors like skill, effort, and responsibility.¹¹³ As a result, unionized women earn higher wages than non-unionized women workers, at an average rate of about thirteen percent or \$2.50 per hour.¹¹⁴

Moreover, the wage gap is narrower among unionized workers compared to non-unionized workers. Working women in unions are paid ninety-four cents for every dollar paid to unionized working men, whereas non-unionized women workers are paid seventy-eight cents for every dollar paid to non-unionized men.¹¹⁵ Significantly, unionization is also associated with a narrower gender wage gap across all major racial and ethnic groups.¹¹⁶ In fact, Black unionized women earn the same as Black unionized men, compared to a twelve-cent wage gap among nonunionized Black women and men.¹¹⁷

Unions therefore substantially increase women workers' pay and dramatically reduce the pay gap across all racial categories. These empirical benefits of labor unions suggest that unions should be a central part of the conversation surrounding gender-based economic inequality.

B. Unionization Increases Employee Access to Non-Wage Benefits

In addition to higher wages, women in labor unions also tend to enjoy more non-wage benefits than their non-unionized counterparts.¹¹⁸ For example, unionized women are thirty-six percent more likely to receive health insurance benefits through their employer, fifty-three percent more likely to participate in employee-sponsored retirement plans, and, in the private-sector, eighteen percent more likely to receive paid sick leave, and twenty-one percent more likely to receive paid vacation and holidays.¹¹⁹ These benefits even extend even into unionized lower-wage positions; for example, unionization has the biggest impact on healthcare access for typically low-wage workers or workers with less than a high school degree, such as hotel and office cleaners, child-care workers, and health aides.¹²⁰

These non-wage benefits are particularly significant for women workers and arguably impact the gender wage gap. Women work, on average, more paid hours than they did forty years ago (1,664 paid hours per year in 2012, compared to 925 in 1979), but despite this change, women haven't seen a change in the amount of unpaid labor they perform. Women still perform about two-thirds of unpaid childcare, eldercare, and housework.¹²¹ This data suggests that, even as women have joined the workforce in higher numbers, and are working longer hours, their burdens in the home and family have not decreased. Women are

113. INST. FOR WOMEN'S POL'Y RSCH., *supra* note 18, at 4.

114. JONES ET AL., *supra* note 77, at 1.

115. Gould & McNicholas, *supra* note 8.

116. INST. FOR WOMEN'S POL'Y RSCH., *supra* note 18, at 4.

117. Gould & McNicholas, *supra* note 8.

118. See JONES ET AL., *supra* note 77, at 1.

119. *Id.* at 1–2.

120. *Id.* at 1.

121. *Id.*

expected, at a substantially higher rate than men, to balance work and home duties.¹²²

It follows that, since in society today, women remain disproportionately responsible for domestic work and family care, they would benefit disproportionately from jobs that gave them the flexibility to balance work and family. Non-wage benefits offer this flexibility. For example, paid vacation and sick leave give workers the flexibility to take time off of work to care for sick children, relatives, and themselves, without consequences like lost wages or reduced opportunities to advance.

Non-wage benefits are particularly important among workers who are the sole income-earners for their families, who cannot rely upon other earners' jobs to provide income or benefits like employer-provided health insurance to cover their families' needs. This is an issue that disproportionately affects women. Indeed, forty percent of women with children under eighteen are the sole breadwinners for their family,¹²³ and a full seventy-one percent of single parents are women.¹²⁴

The continued lack of flexibility and benefits in the American workplace makes it more difficult for women to participate in the labor force, pushing some women into part-time jobs or out of work altogether.¹²⁵ Non-wage benefits give women workers more flexibility to juggle childcare and domestic work, making it easier to ensure their need to parent doesn't interfere with their employment. More non-wage benefits for women therefore serves the important function of increasing women's career access and money-making ability.

Accordingly, labor unions' ability to increase wages is a significant part of narrowing the gender wage gap, but so is the greater access to non-wage benefits that labor unions tend to provide to women workers, because it makes it easier for women to participate in the workplace in the face of societal burdens placed on women for childcare and care of the home.

III. EXISTING LEGISLATION VERSUS LABOR UNIONS

Three years before the passage of the first major piece of wage-equalizing legislation, the Equal Pay Act of 1963, American women earned about fifty-nine cents for every dollar men earned.¹²⁶ Women's earnings relative to men have certainly increased in the intervening decades, but the wage gap is far from closed. As of 2018, American women earned only eighty-two cents for every

122. See *id.* at 4. The increase in the hours women work "did not coincide with a comparable decrease in their share of unpaid work." *Id.* Men's share of child-care work has increased over the last half-century, but "fathers in 2000, on average, still spent only half as many hours as mothers did on childcare." *Id.*

123. Nicole Michele Barnhart, Article, *Gender Wage Inequality: Is More Legislation the Answer?*, 40 SEATTLE U. L. REV. 1435, 1438 (2017).

124. See Livingston, *supra* note 78.

125. Trina Jones, *A Different Class of Care: The Benefits Crisis and Low-Wage Workers*, 66 AM. U. L. REV. 691, 725–26 (2017).

126. Marianna DelPo Kulow, *Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Laws—A Necessary Tool for Closing the Residual Gender Wage Gap*, 50 HARV. J. ON LEGIS. 385, 405 (2013).

dollar men earned.¹²⁷ That gap is even wider when earnings are broken down by race, as white women earn seventy-nine cents, Black women earn sixty-two cents, and Latinx women earn fifty-four cents per dollar earned by white men.¹²⁸ Thus, in sixty years, the wage gap has only decreased by twenty-three cents. If this rate would have continued, women would be expected to reach an equal wage by 2059.¹²⁹ However, the wage gap has been stagnant since the early 2000s.¹³⁰ At the current rate of change, wage equality will not be reached until the year 2152.¹³¹ It is clear that, despite decades of legislative efforts to close the gender wage gap, more still needs to be done.

A. Existing Legislation is Insufficient to Close the Gender Wage Gap

Several major pieces of legislation have sought to counter pay inequality, including the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, and the Lilly Ledbetter Fair Pay Act of 2009.¹³² These Acts have made substantial changes to women's earnings over the past several decades and created an avenue for women who experience pay discrimination to seek redress. However, these laws fall short of solving the wage gap problem, in part because they are written or have been interpreted in ways that make it difficult for women workers to bring and succeed upon a claim. Furthermore, these Acts do not get to the heart of pay inequality issues, like pay secrecy, implicit bias, and systemic inequality.

i. The Equal Pay Act

The Equal Pay Act was passed to remedy the unequal pay structure in the private industry by requiring that "equal work be rewarded by equal wages."¹³³ However, judicial interpretation of the Equal Pay Act has made it difficult for victims of gender-based pay inequality to succeed in their claims. Furthermore, even if a plaintiff does succeed on the merits, the penalties are too low to compel employers to change their conduct.

To bring a claim under the Equal Pay Act, a plaintiff must simply show that an employer pays employees of different sexes different wages "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."¹³⁴ The burden then

127. Robin Bleiweis, *Quick Facts About the Gender Wage Gap*, CTR. FOR AM. PROGRESS (Mar. 24, 2020), <https://www.americanprogress.org/article/quick-facts-gender-wage-gap/> [https://perma.cc/P6K6-FC6M].

128. *Id.*

129. Barnhart, *supra* note 123, at 1437.

130. *See id.*

131. *Id.*

132. The Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d)); The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e); The Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended).

133. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (quoting S. REP. NO. 88-176 (1963)).

134. *Id.*

falls upon the employer to assert that this pay differential is justified under one of the four exceptions under the Equal Pay Act:¹³⁵ “(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”¹³⁶ Congress included these exceptions to give employers some flexibility in establishing employee compensation schemes.¹³⁷ The congressional record seems to suggest this fourth exception, “any factor other than sex,” includes only job-related conditions.¹³⁸ However, courts have interpreted the fourth exception as a broad, catch-all provision,¹³⁹ which gives employers a lot of opportunities to defend pay inequality at the expense of employee litigants. This relieves employers of liability and dilutes the Equal Pay Act’s power to narrow the gender wage gap.

Courts have interpreted the “other factor” exception to include factors unrelated to the job. For example, a number of federal courts have held that pay inequality based on prior income is an acceptable defense under the “other factor” exception of the Equal Pay Act.¹⁴⁰ This construction of the “other factor” exception undermines the Equal Pay Act’s efficacy. Since women are systematically paid less than men, basing a woman’s wage off of her previous income will inevitably perpetuate the cycle of women being paid less than men. In another Seventh Circuit decision, *King v. Acosta Sales and Marketing*, the court goes so far as to suggest that a “random decision is a factor other than sex.”¹⁴¹ The court qualified this exception by asserting that if a decision was “random,” the distribution of pay between men and women should also be random.¹⁴² Nonetheless, this rule grants employers broad leeway in defending their unequal pay decisions, which is difficult for employees to counter.

ii. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 provides that it is an unlawful employment practice for an employer to discriminate against an employee on the basis of sex.¹⁴³ Judicial interpretation of this Act has made it difficult for plaintiffs alleging income inequality to succeed under this provision.

135. *Id.* at 196–97.

136. 29 U.S.C. § 206(d) (2021).

137. Victoria Lazar, Comment, *Not Any Factor Other than Sex: A Proper Limit to Defending the Equal Pay Act*, 1 UNIV. CHI. LEGAL F. 309, 313 (1989).

138. *Id.*

139. *Corning Glass Works*, 417 U.S. at 196.

140. *E.g.*, *Wernsing v. Dep’t of Hum. Servs.*, 427 F.3d 466 (7th Cir. 2005). In *Wernsing*, the plaintiff was paid less than her male colleague in a position which required equal skill, effort, and responsibility, and which was performed under similar working conditions. *Id.* The plaintiff’s employer defended the pay differential by asserting that the plaintiff was paid less in her previous position than her male colleague, and the court accepted this defense under the “other factor” provision of the Equal Pay Act. *Id.*

141. *King v. Acosta Sales & Mktg.*, 678 F.3d 470, 475 (7th Cir. 2012).

142. *Id.*

143. 42 U.S.C. § 2000-e2(a)(1) (2021).

When an employee's claim is based upon disparate treatment but there is no direct evidence of discriminatory intent, a defendant employer only needs to point to a legitimate reason for the disparate treatment.¹⁴⁴ This model creates a much lower burden for employers, and it assumes gender bias is only intentional.¹⁴⁵ In practice, however, discrimination is not always intentional. The gender-wage gap is the result of systemic inequality, stemming from ingrained practices and biases that we are often unaware of.¹⁴⁶ As such, even if there is no intent, there is still, in fact, gender inequality. Courts' focus on intent under the disparate treatment approach fails to address this issue and provide adequate remedies.

Plaintiffs do have another route to a successful Title VII claim that is not centered on a finding of intent: disparate impact. Disparate impact occurs when "a facially neutral practice affects both men and women differently."¹⁴⁷ However, disparate impact has weaker remedial options than disparate treatment. Plaintiffs alleging a successful disparate *treatment* claim may be entitled to injunctive relief, equitable relief (such as back pay), compensatory damages, and punitive damages.¹⁴⁸ Disparate *impact* claimants, on the other hand, are entitled only to injunctive relief and equitable relief (such as front or back pay), with no access to compensatory or punitive damages.¹⁴⁹

iii. The Lilly Ledbetter Fair Pay Act of 2009

In 2009, President Obama signed the Lilly Ledbetter Fair Pay Act, which made it easier for litigants to bring a Title VII claim without running afoul of the statute of limitations for the litigation.¹⁵⁰ Passed in response to the Supreme Court case *Ledbetter v. Goodyear Tire & Rubber Co.*,¹⁵¹ the Act starts the clock for an

144. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800–02 (1973); Kya Rose Coletta, Note, *Women and (In)Justice: The Effects of Employer Implicit Bias and Judicial Discretion on Title VII Plaintiffs*, 16 HASTINGS BUS. L.J. 175, 186 (2020).

145. Coletta, *supra* note 144, at 202.

146. *See, e.g., id.* at 178–84 (explaining the science of implicit bias and its systematic effects in workplaces, such as a law office).

147. *Id.* at 185–86.

148. Meghan E. Changelo, Article, *Reconciling Class Action Certification with the Civil Rights Act of 1991*, 36 COLUM. J.L. & SOC. PROBS. 133, 136–37 (2003).

149. *Id.* at 138.

150. Megan R. Roby, Comment, *Surviving Draconian Law Unscathed: An Alternative to the Ledbetter Fair Pay Act, or an Employer's Guide to Compliance*, 37 OHIO N. UNIV. L. REV. 245, 256 (2011).

151. *See* H.R. REP. NO. 110-237, at 1–2 (2007); Lilly Ledbetter sought to bring a pay inequality claim under Title VII, but employees must bring their claims to the EEOC within 180 or 300 days, depending upon the state or else they are barred from bringing their claim. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) at 621–23. Ledbetter brought her claim more than 180 days after her employer made the initial discriminatory pay decision, but she argued that the EEOC charging period should restart with every paycheck because the initial discriminatory decision had a pour-over effect on later paychecks, in which she was inevitably paid less because of that initial unequal pay decision. *Id.* at 628–29. The Supreme Court rejected her argument, holding that "current effects [of discrimination] alone cannot breathe life into prior, uncharged discrimination." *Id.* at 992.

employee to bring their claim with each new paycheck the employee receives in which they receive discriminatory pay, rather than basing the statute of limitations upon an initial discriminatory pay decision.¹⁵² The Lilly Ledbetter Act diminishes some of the impact that compensation secrecy can have in preventing employees from bringing timely claims because they simply don't know they are being paid unfairly. However, the Act certainly does not prohibit pay secrecy, so it remains difficult for women workers to identify pay inequality in employment settings that keep pay data private. Furthermore, the women who do discover pay inequality and are able to bring their claims under the extended statute of limitations the Lilly Ledbetter Act provides must nonetheless navigate the same obstacles of bringing their Title VII claims.

iv. The Proposed Paycheck Fairness Act

Although the focus of this Comment is on labor unions as an alternative to pay inequality legislation for narrowing the gender wage gap, it is worth noting that there has been an ongoing effort to improve the efficacy of pay inequality legislation over the past few decades. Since 1997, legislators in Congress have been trying to pass The Paycheck Fairness Act (PFA).¹⁵³ The PFA would potentially remedy some of the weaknesses of the Equal Protection Act. For example, it would clarify the “factor other than sex” exception, by providing that the pay disparity must be “based on a bona fide, job-related factor.”¹⁵⁴ The Act would also increase the remedies available to plaintiffs to include compensatory and punitive damages in equal pay litigation, and it would make it easier for plaintiffs to bring claims by enhancing protections for workers who disclose their income.¹⁵⁵

These changes could potentially enhance the power of litigation as a tool to decrease income inequality. However, the PFA has failed multiple times in Congress,¹⁵⁶ and even if it passes, all of these legislative tools carry the same general weakness: employees must pursue their claim through litigation. This means that remediation can only be achieved on a case-by-case basis, which is inefficient in the scope of the nationwide, systemic wage inequality.

The PFA certainly offers a hopeful avenue to pay inequality, but labor unions offer a still relatively untapped solution.

152. 42 U.S.C. § 2000-e5(e)(3)(A) (2018).

153. Kulow, *supra* note 126, at 422–23.

154. *The Paycheck Fairness Act*, Am. Bar Ass'n., https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/discrimination/the-paycheck-fairness-act/#:~:text=The%20Paycheck%20Fairness%20Act%20will%20clarify%20the%20%E2%80%9Cfactor%20other%20than,is%20consistent%20with%20business%20necessity [https://perma.cc/H4P8-D9YL] (last visited Feb. 14, 2021).

155. *Id.*

156. Toni Van Pelt, *The Paycheck Fairness Act Would Help Close the Gender Wage Gap. Why Won't the Senate Pass It?*, *Fortune* (Aug. 26, 2019), <https://fortune.com/2019/08/26/womens-equality-day-paycheck-fairness-act/> [https://perma.cc/9EVY-3NW9].

B. Unions are Particularly Well-Suited to Decrease the Gender Wage Gap

It is clear that existing federal legislation for wage equality is, on its own, insufficient. Labor unions, on the other hand, are empirically effective at narrowing the gender wage gap.¹⁵⁷ This is likely due, in part, to the fact that unions are structurally equipped to resolve some of the very areas where gender discrimination legislation fails. Through collective bargaining, labor unions can standardize wages, increase pay transparency, and implement effective grievance processes for workers who experience discrimination.¹⁵⁸

The “merit gap” has closed,¹⁵⁹ and even after controlling for variables like experience and education, women still earn only eighty-two cents for every dollar men earn.¹⁶⁰ It is clear, therefore, that discrimination must play a role in the wage gap,¹⁶¹ so any viable solution to the wage gap must address discrimination. Wage standardization in labor unions is effective at decreasing the wage gap because it works to neutralize the effects of discrimination. Standardized wage rates can nullify or diminish the effect of employers’ gender biases—both conscious and unconscious—by having a standardized system rather than one based upon individual decision-making.¹⁶²

Pay transparency gives workers more information about what their colleagues are being paid so that they can recognize pay inequality and negotiate for higher wages. This helps resolve the issues that led to *Ledbetter v. Goodyear* and the passage of the Lilly Ledbetter Act.

Perhaps most importantly, collective bargaining allows workers to pool their resources to effectuate more widespread change in a corporation, as opposed to placing the onus on single employees or groups of employees to seek redress. This is key for women workers, because litigation is the principal tool existing wage discrimination laws provide, and litigation is expensive and time-consuming. A lack of access to resources, time, and money may deter many individual workers from seeking redress for discrimination. Through collective bargaining practices unions preemptively prevent wage discrimination and offer employees easier methods of reconciliation if discrimination does occur. This obviates employees’ need to turn to litigation. Moreover, the very nature of collective bargaining means that wage discrimination can be fought at a group level, rather than on a case-by-case basis. Through unionization, the road to greater economic equality can therefore be shorter and smoother.

IV. PROPOSED CHANGES TO LEGISLATION AND UNION PRACTICES

Labor unions are an empirically effective tool for narrowing the gender wage gap.¹⁶³ Proponents of equalized pay across genders should therefore be concerned about the decline in union participation and influence in both the

157. See, e.g., JONES ET AL., *supra* note 77, at 1.

158. Gould & McNicholas, *supra* note 8.

159. Kulow, *supra* note 126, at 405.

160. *Id.* at 406.

161. See *id.*

162. JONES ET AL., *supra* note 77, at 17.

163. See, e.g., *id.* at 1.

private and public sector. In this section, I offer some options that policymakers and activists should consider to narrow the gender wage gap.

A. Using Government Reimbursement to Neutralize Janus

The full effects of *Janus* upon public-sector unionization are yet to be seen. However, looking to states with right-to-work legislation suggests that many public-sector workers will stop paying union dues as a result of the Supreme Court's ruling.¹⁶⁴ This could mean labor unions representing public sector workers could face a substantial decline in funding and influence in coming years. Such a decline could make it more difficult for the union to advocate for or represent workers and, consequently, could undermine the wage equalizing impact of the union for women workers. Legislative solutions to neutralize *Janus*'s effects would likely help the strength of labor unions.

One option, explored by various scholars and justices is the adoption of a government reimbursement model.¹⁶⁵ Under this model, government employers could potentially sidestep *Janus* by directly reimbursing unions for bargaining-related expenses.¹⁶⁶ Instead of collecting operating fees from employees, unions representing public-sector employees would bill the government directly at the end of the year for bargaining-related expenses.¹⁶⁷ The government, in turn, would recoup that cost through an equivalent reduction in workers' future wage raises.¹⁶⁸

Thus, employees would be paying the same dollar amount toward union representation that they would under compulsory agency fees, but payment would flow directly from the government to the union, rather than through the employee. There would likely be costs in changing to this new process, but all things remaining equal, this solution should be revenue-neutral for unions and the government.¹⁶⁹ Moreover, employees could actually net higher incomes because the government reimbursement would be pre-tax, as opposed to direct payment of union fees which generally come from after-tax dollars.¹⁷⁰

To preserve the union's independence despite collecting its paychecks directly from employers, disputes over the unions' funding requests should be decided by an independent review board, such as the Public Employee Relations Boards which are already tasked with administering public-sector collective bargaining laws in several states.¹⁷¹ However, critics of this model question whether union independence could truly be maintained.¹⁷²

This model is not perfect. There would be certain costs involved in changing to this reimbursement model; tax benefits aside, employees would

164. Tang, *supra* note 110, at 679–80.

165. *Id.* at 680–81.

166. *Id.* at 680.

167. *Id.*

168. *Id.*

169. *Id.* at 684.

170. *Id.*

171. *Id.* at 719–20.

172. See, e.g., *id.* at 707–10.

receive smaller paychecks; and the preservation of union neutrality could not be guaranteed. Nonetheless, this model would avoid the First Amendment protections created by *Janus* because it does not force workers to pay union fees, while still allowing labor unions to maintain sufficient funding to support collective bargaining efforts for workers. It is therefore worth considering adopting the government reimbursement model or using it as a basis for other solutions to neutralize the impact of *Janus*.

B. Passing the Protecting the Right to Organize Act

Labor laws should be strengthened to advance unionization and better protect workers who choose to unionize. Currently, labor laws are ineffective at preventing businesses from engaging in unlawful tactics to prevent their employees from unionizing, because these laws are merely remedial. The National Labor Relations Act should be amended to include harsher consequences for employers who engage in ULPs.

In 2020, the House passed H.R. 2474, a bill entitled “Protecting the Right to Organize Act” or “The PRO Act.”¹⁷³ The PRO Act discourages businesses from engaging in unfair, anti-union business practices—like retaliating against employees who join a union or file charges with the NLRB—by imposing additional penalties for employers who engage in unfair business practices.¹⁷⁴

Whereas the current NLRA provides that an employer who has unfairly fired an employee must reinstate the employee and pay backpay,¹⁷⁵ the PRO Act amends the NLRA to require employers to pay the employee backpay “without any reduction (including any reduction based on the employee’s interim earnings or failure to earn interim earnings), front pay (when appropriate), consequential damages, and an additional amount as liquidated damages equal to two times the amount of damages awarded.”¹⁷⁶ The bill also provides an additional \$500 civil penalty per violation for employers committing ULPs.¹⁷⁷ Furthermore, the PRO Act attaches a \$10,000 civil penalty per violation for employers who violated orders of the NLRB.¹⁷⁸ These amplified penalties increase the cost for employers trying to use unlawful practices to prevent their employees from unionizing, thereby making it easier for workers to unionize and the labor force to enjoy the wage equalizing impact of unionization.

The PRO Act also makes it easier to unionize by requiring a business, within two days of the NLRB directing a union election, to provide contact information to the union for all employees who can participate in the vote.¹⁷⁹ Unlike the current situation, under which employers have no obligation to give

173. Eli Rosenberg, *House Passes Bill to Rewrite Labor Laws and Strengthen Unions*, WASH. POST (Feb. 6, 2020), <https://www.washingtonpost.com/business/2020/02/06/house-passes-bill-rewrite-labor-laws-strengthen-unions/> [<https://perma.cc/GD2F-DL3L>].

174. Protecting the Right to Organize Act of 219, H.R. 2474, 116th Cong. § 2 (2020).

175. 29 U.S.C. § 160(c) (2018).

176. H.R. 2474 § 2.

177. *Id.*

178. *Id.*

179. *Id.*

contact information to unions, the PRO Act levels the playing field in union elections by giving both employers and unions access to voting employees.

Significantly, the PRO Act neutralizes state right-to-work laws for private sector workers. The bill proposes allowing for collective bargaining agreements that require all employees to contribute fair-share fees, which would thereby preempt state right-to-work laws prohibiting such agreements.¹⁸⁰

The PRO Act passed the House in 2020,¹⁸¹ but it never made it to the floor in the Senate. The Act was reintroduced in the House on February 4, 2021.¹⁸² This piece of legislation would make it easier for workers to unionize by disincentivizing employers from engaging in unfair business practices, giving unions better access to employees during union elections and neutralizing state private-sector right-to-work laws. Therefore, legislators and activists interested in narrowing the gender wage gap should work to pass the PRO Act or legislation like it in order to update the NLRA and make it easier for workers to unionize and engage in collective bargaining.

CONCLUSION

Labor unions are an effective tool for narrowing the gender wage gap, and they have strengths in areas where extant wage discrimination legislation is lacking. However, with the rise of right-to-work laws, insufficient penalties for businesses engaging in unfair labor practices, and the potentially serious blow to public sector labor unions from *Janus v. AFSCME*, labor unions are struggling in this country.

Parties interested in narrowing the gender wage gap should therefore make it a part of their agenda to preserve the strength of labor unions. Unions can be saved by taking steps to neutralize the impact of *Janus v. AFSCME* through solutions such as enacting a direct reimbursement program through which employers pay unions directly for their costs of representation. The passage of legislation like the PRO Act can make it easier for employees to unionize by imposing stronger penalties for private businesses engaging in ULPs and making it less attractive for private businesses to engage in those practices. By making it easier for employees to participate in unions and neutralizing policies that promote free-riding, unions can be made stronger and therefore more capable of advancing employees' needs, such as raising women workers' wages and non-wage benefits.

Women make up a massive segment of the workforce, yet they are still paid less than men and enjoy fewer non-wage benefits than men. Existing equal pay legislation has failed for nearly sixty years to close the wage gap, and the United States is poised to face another century and a half of wage inequality if it

180. *Id.*

181. Rosenberg, *supra* note 173.

182. Jonathan A. Siegel & Thomas V. Walsh, *Congressional Democrats Advance Pro-Labor Initiatives with Reintroduction of the PRO Act*, NAT'L L. REV. (Feb. 11, 2021), <https://www.natlawreview.com/article/congressional-democrats-advance-pro-labor-initiatives-reintroduction-pro-act> [<https://perma.cc/FD9R-2UKL>].

continues upon this path. It is time to look for another solution, and labor unions are a great place to turn to.

PRINCIPLED INSTITUTIONALISM OR IMPRACTICAL RIGIDITY? EXAMINING STRICT STARE DECISIS AND THE MALE-ONLY DRAFT

Jimmy Morrissey

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INTRODUCTION

The Military Selective Service Act (MSSA) requires every male citizen and resident of the United States, between the ages of eighteen and twenty-six,

to register for the draft.¹ While the Act facially discriminates on the basis of sex, the Supreme Court ruled in *Rostker v. Goldberg* that the Act did not violate any due process or equal protection rights under the Fifth Amendment of the Constitution.² Nearly four decades later, the Fifth Circuit applied *Rostker* to reverse a lower court's holding that the MSSA was unconstitutional in *National Coalition for Men v. Selective Service System*.

The Fifth Circuit arrived at the wrong outcome when it reversed the lower court's ruling. The court reasoned that, as a "strict stare decisis" court, it could not overturn Supreme Court precedent without an order from the Supreme Court itself.³ However, the last time the Supreme Court ruled on the issue of expanding the draft to include women in *Rostker*, it found the military's exclusion of women from active combat roles to be dispositive of the issue.⁴ Now that such an exclusion is no longer on the books,⁵ *Rostker* should no longer be considered binding precedent, and the Supreme Court should allow lower courts to examine sitting precedent in narrow contexts.

Section I of this Note will discuss the creation of the military draft and the exclusion of women from combat up until 2013, along with challenges to the male-only draft. Section II will analyze the Fifth Circuit's application of stare decisis and argue that the Supreme Court should allow lower appellate courts to deviate from precedent in due process cases where legislative or regulatory acts render the Court's original reasoning in a specific case obsolete. Section III will analyze how legislative acts in the 1990s and the Department of Defense's 2013 decision to fully integrate women into all combat roles undermine the Supreme Court's holding in *Rostker* and therefore conclude that the Fifth Circuit should have affirmed the district court's ruling.

I. PROHIBITION ON WOMEN SERVING IN ACTIVE COMBAT AND CHALLENGES TO THE MALE-ONLY DRAFT

A. Creation of The Male-Only Draft

The Military Selective Service Act was enacted on June 24, 1948 and has remained largely unchanged since it was originally signed into law.⁶ The Act was enacted "[t]o provide for the common defense by increasing the strength of the Armed Forces of the United States,"⁷ and did so by establishing the Selective Service System.⁸ The Selective Service System is responsible for maintaining an active registry of eligible citizens. This registry is used when the President sees fit to select and induct such citizens "as may be required to provide and maintain

1. 50 U.S.C.S. § 3802(a) (LexisNexis 2022).

2. *Rostker v. Goldberg*, 453 U.S. 57, 78–79 (1981).

3. *Nat'l Coal. for Men v. Selective Serv. Sys.*, 969 F.3d 546, 549 (5th Cir. 2020).

4. *Rostker*, 453 U.S. at 79.

5. See National Defense Authorization Act for Fiscal Years 1992 And 1993, Pub. L. 102–190, § 531, 105 Stat. 1290, 1365 (1991).

6. See 50 U.S.C. app. §§ 451, 453.

7. 50 U.S.C. app. § 451.

8. 50 U.S.C. app. § 460(a)(1).

the strength of the Armed Forces.”⁹ With limited exemptions set out in the Act, every male citizen between eighteen and twenty-six is eligible for compulsory registration.¹⁰ Failure to comply with the MSSA by registering for the draft can result in up to \$10,000 in fines, five years of imprisonment, and various other penalties, including denial of federal student loans.¹¹

President Gerald Ford suspended registration procedures under the MSSA after the War in Vietnam sparked strong public opposition to the military draft.¹² President Jimmy Carter later reinstated registration requirements in 1980 due to the Soviet invasion of Afghanistan and requested that Congress provide funding to the Selective Service System for the registration of both male and female citizens.¹³

In response, both houses of Congress held hearings on the impact of registering women for the draft.¹⁴ Through various committee hearings, members of President Carter’s administration and various military officials made clear that equity concerns drove the decision to request the authority to register women.¹⁵ While the Senate extensively debated a proposed amendment to the MSSA which would have authorized the registration of women, the Joint Resolution ultimately passed by Congress did not allocate funds sufficient to cover the registration of women.¹⁶ A Senate Report that included findings endorsed by House and Senate conferees considering the 1981 Defense Authorization Bill justified this exclusion by arguing that “[t]he principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people . . . current law and policy exclude women from being assigned to combat in our military forces, and the Committee reaffirms this policy.”¹⁷ At the time, women were prohibited from serving in certain combat roles in the Navy and Air Force by statute,¹⁸ and could not serve in combat in The Army and Marine Corps as a matter of Department of Defense (DOD) policy.¹⁹

B. Challenges to the Draft’s Exclusion of Women

While Congress has yet to amend the MSSA to include women in its registration requirement, the Act has been challenged in the courts several times,

9. 50 U.S.C. app. § 454(a).

10. 50 U.S.C.S. § 3802(a) (LexisNexis 2022).

11. *See* 50 U.S.C. app. § 462.

12. *See* Proclamation No. 4360, 40 Fed. Reg. 14,567 (Mar. 29, 1975).

13. *Rostker v. Goldberg*, 453 U.S. 57, 60 (1981).

14. *Id.* at 72–73.

15. *Id.* at 79–80.

16. *Id.* at 60 (citing S. REP. NO. 96-789, at 2 (1980)).

17. *Id.* at 77.

18. “Women may not be assigned to duty on vessels or in aircraft that are engaged in combat missions . . .” *Rostker*, 453 U.S. at 76 (citing 10 U.S.C. § 6015 (1976 ed., Supp. III) (repealed 1993). Female members of the Airforce were prohibited from being assigned “to duty in aircraft engaged in combat missions.” 10 U.S.C. § 8549, *repealed by* Pub. L. No. 102–190, § 531.

19. *Rostker*, 453 U.S. at 76.

often under equal protection or due process claims. The Fourteenth Amendment to the United States Constitution provides that a State may not “deny to any person within its jurisdiction the equal protection of the laws.”²⁰ While the language in the Fourteenth Amendment only explicitly applies to States, the Supreme Court has ruled that equal protection of the laws is guaranteed federally by the Fifth Amendment’s Due Process Clause.²¹ Therefore, while the “equal protection of the laws” and “due process of law” are not interchangeable concepts, many federal equal protection claims are brought under the Fifth Amendment’s Due Process Clause.²²

The Supreme Court has ruled that “equal protection of the laws” only requires those persons or classes of persons who are “similarly situated” to be treated the same.²³ Although there is no precise formula, classes are “similarly situated” for the purposes of an equal protection challenge when they are *prima facie* identical in all relevant aspects.²⁴ Plaintiffs in an equal protection case have the burden of showing that they are similarly situated to another group for purposes of the challenged government action.²⁵ When the government treats one class of people different from another similarly situated class of people, that distinct treatment is reviewable under the Equal Protection Clause,²⁶ and by extension the Fifth Amendment’s Due Process Clause at the federal level.

When evaluating laws that distinguish by sex, courts apply intermediate or “heightened” scrutiny.²⁷ Under heightened scrutiny, the government must show that a challenged law is (1) *substantially related* to (2) an *important* governmental interest.²⁸ In deciding an Equal Protection Clause challenge to a law containing a sex-based distinction, courts must also assess whether there is a way to further the government’s interest in a sex-neutral way.²⁹ In order to defend a sex-based classification as substantially related to serving an important interest, the government must demonstrate that sex-neutral alternatives would not work well.³⁰

The Supreme Court first considered the constitutionality of the male-only draft under a Fifth Amendment due process challenge in *Rostker v.*

20. U.S. CONST. amend. XIV, § 1.

21. *Bolling v. Sharp*, 347 U.S. 497, 499 (1954).

22. See Gabrielle Fromer, Note, *With Equal Opportunity Comes Equal Responsibility: The Unconstitutionality of a Male-Only Draft*, 18 GEO. J. GENDER & L. 173, 182 (citing *Bolling v. Sharp*, 347 U.S. at 499).

23. *M. v. Superior Ct. of Sonoma Cnty*, 450 U.S. 464, 469 (1981); *Rostker*, 453 U.S. at 78.

24. See *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004).

25. *Klinger v. Dep’t of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994). Notwithstanding a direct binding precedent on the law being challenged, courts will decide whether the plaintiffs and the claimed group are similarly situated on an *ad hoc* basis, because “[t]he similarly situated inquiry depends on what government action the plaintiffs are challenging . . .” *Id.*

26. *Reed v. Reed*, 404 U.S. 71, 75 (1971).

27. See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

28. *Id.*

29. Fromer, *supra* note 22, at 183.

30. See *Rostker v. Goldberg*, 453 U.S. 57, 94–95 (1981) (Marshall, J. & Brennan, J., dissenting); See also Fromer, *supra* note 22, at 183.

Goldberg.³¹ The procedural history of *Rostker* coincides with the suspension and subsequent reinstatement of the registration requirement by Presidents Ford and Carter.³² In 1971, a group of men who were required to register under the MSSA filed a complaint in the United States District Court for the Eastern District of Pennsylvania. In 1974, a three-judge District Court panel convened to consider whether the MSSA violated the due process clause by relying on an unlawful sex-based discrimination, and declined to dismiss the case.³³ After President Ford suspended draft registration, the case sat idle for five years, until in 1979 the court Clerk proposed that the case be dismissed.³⁴ The district court denied the Clerk's proposal along with the government's motions to dismiss on various justiciability grounds, and on July 18, 1980, permanently enjoined the government from requiring registration under the MSSA, holding that the Act violated the Due Process Clause.³⁵ The Director of Selective Service filed a notice of appeal, and the next day, the Third Circuit stayed the District Court's order permanently enjoining registration under the Act.³⁶ On December 1, 1980, the Supreme Court noted probable jurisdiction.³⁷

In an opinion authored by Justice Rehnquist, the Supreme Court reversed the District Court's ruling, finding that the MSSA did not violate the Due Process Clause.³⁸ In its analysis, the Court gave heavy deference to Congress; this deference relied both on separation of powers doctrine generally³⁹ and on prior precedent lending to "a healthy deference to legislative and executive judgments in the area of military affairs . . ."⁴⁰ As the Court noted: "[It] is difficult to conceive of an area of governmental activity in which the courts have less competence . . . [than the] complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force . . ."⁴¹ After noting its deference to Congress, however, the Court nevertheless reaffirmed that Congress still remained subject to the limitations of the Due Process Clause in the area of military affairs.⁴²

The Court then shifted its focus to the governmental interest behind the MSSA. To satisfy the heightened scrutiny test, the sex-based distinction within the MSSA had to be (1) *substantially related* to (2) an *important* governmental interest. The Court stated that since Congress had debated extensively on the issue of whether to amend the MSSA before declining to do so, the adopted

31. *Rostker*, 453 U.S. 57.

32. *See Rostker*, 453 U.S. at 60–63.

33. *Id.* at 61–62.

34. *Id.* at 62.

35. *Id.* at 63.

36. *Id.* at 64.

37. *Id.*

38. *Id.* at 78–79.

39. *See id.* at 65 ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968))).

40. *Rostker*, 453 U.S. at 66.

41. *Id.* at 65 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

42. *Id.* at 67.

findings contained in the 1980 Senate Report passed by Congress validly demonstrated congressional purpose behind the Act.⁴³ The Court was careful to articulate the basis for its reliance on the Senate Report: “Congress did not change the MSSA in 1980, but it did thoroughly reconsider the question of exempting women from its provisions, and its basis for doing so. The 1980 legislative history is, therefore, highly relevant in assessing the constitutional validity of the exemption.”⁴⁴

Relying heavily on the Senate and House Reports on whether to fund the registration of women in response to President Carter’s 1980 request, the Court found that the governmental interest behind the MSSA was important.⁴⁵ After an extensive analysis of the 1980 Senate Report findings, the Court found that the purpose of the MSSA’s registration requirement was “to prepare for a draft of *combat troops*.”⁴⁶ The Court, citing the Constitution’s grant of power to Congress to “raise and support armies,”⁴⁷ found this to be an “important governmental purpose.”⁴⁸

Next, the Court turned its attention to the question of whether the male-only registration requirement within the MSSA was *substantially related* to the important governmental interest of preparing a draft of combat troops. The Court relied on then-existing statutory bans on women serving in certain combat roles, along with the findings contained in the Senate Report, to hold that the male-only distinction was substantially related to the Act’s purpose.⁴⁹ The Court also noted that the policies banning women from combat made women differently situated from men in the context of the MSSA, and that an equal protection challenge cannot survive where the classes given distinct treatment by the law are not similarly situated.⁵⁰ The Court therefore relied exclusively on existing policy and law precluding women from combat to support its holding that men and women were not similarly situated for the purposes of the draft, and that the MSSA consequently did not violate the Due Process Clause.

C. *The Integration of Women into Combat Roles*

In the years since *Rostker* was decided by the Supreme Court, the laws and policies surrounding the prohibition of women in combat have changed. Over two decades the military has developed extensive experience efficiently deploying combat units that include both men and women. A combination of legislative and executive acts has led to the United States Armed Forces opening up combat positions to women across all branches of the military. Congress repealed the statutory bans on women serving in certain combat roles in the Navy

43. *See id.* at 74–75.

44. *Id.* at 75.

45. *See Id.* at 73–74.

46. *Id.* at 76.

47. U.S. CONST. art. 1, § 8, cl. 12.

48. *Rostker*, 453 U.S. at 70.

49. *Id.* at 76–78.

50. *See id.* at 78–79 (“The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality.”).

and Air Force under the National Defense Authorization Act for Fiscal Years 1992 and 1993.⁵¹ Further, in 2013, the Department of Defense largely repealed the policy precluding women from serving in any combat roles in the Army and Marine Corps.⁵² The new policy opened up combat positions to women and required any exceptions to be narrowly tailored and approved by the Chairman of the Joint Chiefs of Staff and the Secretary of Defense.⁵³ Finally, the Secretary of Defense announced in a 2015 press briefing that all combat roles in the Armed Forces would be open to women with no exception.⁵⁴

These policy adjustments reflect a change in the realities of women serving in many combat roles over the last half-century. As Secretary of Defense Carter stated in his 2015 press briefing, the 2013 decision to open up combat roles to women with limited exceptions

reflected, among other things, the fact that by that time the issue of women in combat per se was no longer a question. It was a reality, because women had seen combat throughout the wars in Iraq and Afghanistan, serving, fighting, and in some cases making the ultimate sacrifice alongside their fellow comrades in arms.⁵⁵

Indeed, in 2016 women made up 17.3% of active duty officers and 15.5% of active duty enlisted personnel across all branches of the military.⁵⁶ As of November 2016, 166 women had lost their lives and over 1,000 had been wounded in action since 2003, while over 9,000 women have received Army Combat Action Badges for “actively engaging or being engaged by the enemy” in modern combat operations.⁵⁷

Since the 2015 announcement from Secretary Carter that the Department of Defense would open all combat roles to women, Congress has reconsidered whether to amend the MSSA to include registration requirements

51. National Defense Authorization Act for Fiscal Years 1992 And 1993, Pub. L. 102–190, § 531, 105 Stat. 1290, 1365 (1991).

52. *Restrictions On Assignments Of Military Women: A Brief History*, NAT’L WOMEN’S L. CTR. 11 (Jan. 2014), https://nwlc.org/wp-content/uploads/2015/08/women_in_military_assignment_history_05_16_2011.pdf [<https://perma.cc/6ZSK-BBAQ>] (citing Memorandum on Elimination of the 1994 Direct Ground Combat Definition and Assignment Rule from the Secretary of Defense and Chairman of the Joint Chiefs of Staff for the Secretaries of the Military Departments, Acting Under Secretary of Defense for Personnel and Readiness, and Chiefs of the Military Services (Jan. 24, 2013)).

53. *Id.* at 12.

54. Dep’t of Def. Press Briefing by Secretary Ash Carter in the Pentagon Briefing Room, U.S. Dep’t of Def. (Dec. 3, 2015) [hereinafter DOD Press Briefing], <https://www.defense.gov/Newsroom/Transcripts/Article/632578/departments-of-defense-press-briefing-by-secretary-carter-in-the-pentagon-briefi/> [<https://perma.cc/8NBX-NPQG>].

55. *Id.*

56. KRISTY N. KAMARCK, CONG. RSCH. SERV., R42075, WOMEN IN COMBAT: ISSUES FOR CONGRESS 13 (2015), <https://fas.org/sgp/crs/natsec/R42075.pdf> [<https://perma.cc/58V9-9EVV>].

57. *Id.* at 8.

for women. The Draft America's Daughters Act of 2016 (DADA), which provided for a gender-inclusive amendment to the MSSA, was ultimately defeated in Congress after it was removed from the final Fiscal Year 2017 National Defense Authorization Act (2017 NDAA).⁵⁸ Congress's failure to pass DADA was largely blamed on how politically unpopular it was: on the presidential campaign trail, Senator Ted Cruz attacked his opponents' support of the bill, saying "they think we should put our little girls on the front line."⁵⁹ Instead of DADA, the 2017 NDAA created a commission to study whether the Selective Service System was needed at all.⁶⁰ With no action from Congress further enforcing an exclusion from combat, the changes in the policy and reality of women serving in the Armed Forces since 1980 have made men and women similarly situated for the purposes of a combat draft. These changed circumstances made the constitutionality of the MSSA ripe for another due process challenge.

D. National Coalition for Men v. Selective Service System

In 2013, the National Coalition for Men's Rights (NCMR), a self-described "civil action and education group," brought a suit for injunctive relief against the Selective Service System.⁶¹ The NCMR argued that the MSSA violated their due process right to be free from sex discrimination under the Fifth Amendment of the U.S. Constitution.⁶² The plaintiffs were originally granted leave to amend their pleadings after a California district court ruled that they did not have standing and, after the case relocated to Texas, refiled.⁶³ The District Court for the Southern District of Texas found that the plaintiffs did have standing, and that *Rostker* no longer applied to the question of whether the MSSA violated the Due Process Clause because the facts underpinning the *Rostker* Court's reasoning had changed.⁶⁴ The court reasoned that since women were now able to serve in combat, men and women were similarly situated classes in the context of draft registration.⁶⁵ As a result, the district court found that the male-only draft was not substantially related to an important governmental interest, and ruled that the MSSA violated the class members' due process right to be free from sex discrimination. The district judge granted

58. Fromer, *supra* note 22, at 174–75.

59. Ryan Browne, *Should Women be Drafted? GOP Spars over Issue ahead of South Carolina Vote*, CNN POL. (Feb. 19, 2016), <https://www.cnn.com/2016/02/19/politics/candidates-spar-women-draft/index.html> [<https://perma.cc/V8NT-4NLX>].

60. National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114–328, § 552(b)(1)(C), 130 Stat. 2000, 2131 (2016).

61. Nat'l Coal. for Men v. Selective Serv. Sys., No. CV 13-2391, 2013 U.S. Dist. LEXIS 192954, at *1 (C.D. Cal. July 29, 2013) (Plaintiffs brought the case months after the Department of Defense's announced policy changes in January of the same year).

62. Nat'l Coal. for Men v. Selective Serv. Sys., 969 F.3d 546, 548 (5th Cir. 2020).

63. Nat'l Coal. for Men v. Selective Serv. Sys., 355 F. Supp. 3d 568, 572 (S.D. Tex. 2019).

64. *Id.* at 576, 580.

65. *Id.* at 581.

summary judgment for the plaintiff; however, the judge declined to grant injunctive relief, citing the plaintiff's apparent failure to argue for or request injunctive relief in their briefing and motion for summary judgment.⁶⁶

The government appealed, arguing that *Rostker* was still good law, and even if it wasn't, the male-only draft was still constitutional under Congress's broad power to raise and support armies.⁶⁷ Plaintiff-appellees were joined by amici on appeal: many civil rights organizations led by the ACLU of Texas submitted an amicus brief arguing that the Fifth Circuit should affirm the lower court's ruling.⁶⁸ However, the Fifth Circuit ruled that as a "strict stare decisis" court, it could not overrule a Supreme Court case without explicit directions to do so from the Court itself.⁶⁹ Thus, the court found *Rostker* to be controlling precedent, reversing the lower court's decision. The Fifth Circuit should not have been bound by the Supreme Court's decision in *Rostker*. Instead, the Fifth Circuit should have strongly considered reexamining the MSSA in light of Congress's repeal of statutory bans on women serving in combat and the Department of Defense's new policies allowing women to serve in all combat roles.

II. THE FIFTH CIRCUIT DOES NOT CITE CASE LAW SUPPORTING STRICT STARE DECISIS WHEN LEGISLATIVE OR REGULATORY ACTION COMPLETELY INVALIDATES A SINGULAR LINE OF REASONING

In its reversal of the district court's ruling, the Fifth Circuit cited a series of cases from the Supreme Court that underlined one central idea: lower courts should not overrule Supreme Court precedent, even if the facts underlying the Court's reasoning had changed since it had last decided an issue.⁷⁰ While these cases do stand for the general rule that "it is [the] Court's prerogative alone to overrule one of its precedents,"⁷¹ *National Coalition for Men* bears important distinctions from each of them, in a way that has yet to be addressed directly by the Supreme Court in a binding opinion.⁷² *National Coalition for Men*, unlike the cases cited by the Fifth Circuit, concerns a precedent which invokes a singular, dispositive line of reasoning, based on legislative and regulatory acts which have since been repealed. These distinctions make *National Coalition for Men* a perfect example of a case for which a narrow exception to the sweeping doctrine of stare decisis should be made for lower appellate courts.

66. *Id.*

67. *Nat'l Coal. for Men*, 969 F.3d at 548.

68. Brief for American Civil Liberties Union Foundation of Texas et. al. as Amici Curiae Supporting Respondents, *Lesmeister v. Selective Service System*, 969 F.3d 546 (2020) (No. 19-20272), 2019 WL 5541177.

69. *Nat'l Coal. for Men*, 969 F.3d at 549.

70. *See id.* at 549.

71. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

72. *See Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

The doctrine of stare decisis is without a doubt an indispensable pillar of American jurisprudence, and operates to promote “the evenhanded, predictable, and consistent development of legal principles”⁷³ However, its exercise in the immediate context of *National Coalition for Men* has the undesirable effect of leaving an unconstitutionally discriminatory law on the books until the Supreme Court decides to review it, or Congress opts to act. Such an outcome surely has the opposite effect of contributing to “the actual and perceived integrity of the judicial process,”⁷⁴ especially in the context of a constitutional challenge. *National Coalition for Men* was a missed opportunity to create a narrow exception to stare decisis in such a way that the goals of the doctrine could be furthered without weakening its foundation.

A. Rostker is Distinguished from Case Law Cited by the Fifth Circuit

The Supreme Court case law cited by the Fifth Circuit in support of strict stare decisis does not support an application of strict stare decisis in *National Coalition for Men*. No case cited supports the principle that a lower court must uphold a Supreme Court precedent when the reasoning behind said precedent has been completely undermined by legislative or regulatory action. Several cited cases are distinct because each disputed precedent is based on multiple, non-dispositive lines of reasoning, such that even if multiple lines of reasoning were undermined, the outcome would be the same. Others are distinct because the main change since the adopted precedent was in the mindset and membership of the Court itself. In one way or another, each of the cases are clearly distinct from *National Coalition for Men*, in which the underlying change is a direct result of legislative and regulatory action.

i. State Oil v. Khan

The first Supreme Court case cited by the Fifth Circuit in *National Coalition for Men* is *State Oil Co. v. Khan*.⁷⁵ In *State Oil*, the Supreme Court considered whether to uphold a rule it had established in an earlier case, *Albrecht v. Herald Co.*⁷⁶ The *Albrecht* rule established that vertical maximum price fixing was *per se* unlawful.⁷⁷ However, since *Albrecht*, the Court had become aware of the ways the rule was antithetical to the purpose of the Sherman Act, which granted the Court the authority to form common law rules around its enforcement, in that such vertical maximum price fixing actually promoted competition and curbed local monopolies.⁷⁸ The Court reversed the Ninth Circuit and held that *Albrecht* was no longer good law, but noted that “[d]espite . . . *Albrecht*’s ‘infirmities, [and] its increasingly wobbly, moth-eaten foundations’

73. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

74. *Id.*

75. *Nat’l Coal. for Men*, 969 F.3d at 549.

76. *State Oil Co.*, 522 U.S. at 10–11 (citing *Albrecht*, 390 U.S. 145 (1968) overruled by *State Oil Co.*, 522 U.S. at 7).

77. *Id.*

78. *Id.* at 18.

... [t]he Court of Appeals was correct in applying that principle despite disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents."⁷⁹

However, the Court in *State Oil* also ruled that "stare decisis is not an inexorable command."⁸⁰ While the Court applied this statement to its own consideration of past precedent,⁸¹ there is no reason a similar sentiment could not be extended to lower courts in specific contexts. *National Coalition for Men* provides an opportunity for such a limited circumstance, in the form of an equal protection challenge under the Fifth Amendment. What distinguishes *National Coalition for Men* from *State Oil* and the other cases cited by the Fifth Circuit is that it concerns (1) a singular line of reasoning that was dispositive of the issue, and (2) the reasoning was undermined completely by subsequent legislative or regulatory action. Lower courts facing similar challenges to Supreme Court precedent should be allowed to at least consider whether the factual developments render the precedent obsolete, especially where a constitutional claim is at stake.

State Oil is meaningfully distinct from *National Coalition for Men* in two ways: first, the factual developments that occurred between *Albrecht* and *State Oil* were not concrete legislative or regulatory acts, but rather the very effects of the *Albrecht* rule's application.⁸² The Court explicitly stated that the *Albrecht* rule had the opposite effect of what the Court intended, namely to provide a more competitive marketplace for independent dealers.⁸³ Outside of any effects created by the adoption of the *Albrecht* rule, the only factual developments between *Albrecht* and *State Oil* were the Court's own decisions weakening the *Albrecht* decision's reasoning.⁸⁴ In comparing *State Oil* to *National Coalition for Men*, the Fifth Circuit failed to distinguish between factual developments in the form of clear statutory and policy shifts, and the Court doubting its original reasoning through "the lessons of accumulated experience."⁸⁵ Put more simply, the Fifth Circuit should have distinguished between a precedent made murky by the realities of its application and one that had been completely undermined by clear legislative and regulatory action.

The second way *State Oil* can be distinguished from *National Coalition for Men* is that, while the *Albrecht* rule was undermined by factual developments leading up to *State Oil*, the reasoning underpinning the rule was multifaceted, and no singular line of reasoning was dispositive of whether vertical maximum

79. *Id.* at 20 (quoting *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996)).

80. *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

81. *See id.*

82. *See State Oil Co.*, 522 U.S. at 16–18.

83. *See id.* ("In response, as one commenter has pointed out, 'the ban on maximum resale price limitations declared in *Albrecht* in the name of 'dealer freedom' has actually prompted many suppliers to integrate forward into distribution, thus eliminating the very independent trader for whom *Albrecht* professed solicitude.'" (quoting 7 P. Areeda, *Antitrust Law*, P1635, 395 (1989))).

84. *See id.* "With the views underlying *Albrecht* eroded by this Court's precedent, there is not much of that decision to salvage." *Id.* at 21.

85. *Id.* at 20.

price fixing was *per se* unlawful.⁸⁶ While “[t]he *Albrecht* decision was grounded in the fear that maximum price fixing by suppliers could interfere with dealer freedom,” it was justified by the Court on other theoretical grounds.⁸⁷ These grounds may have together made up the rationale behind the *Albrecht* rule, but the Court never once pointed to any of them as being dispositive of the issue.⁸⁸ By contrast, the Court in *Rostker* was clear that the ban on women serving in combat “entirely justified” the exclusion of women from the draft.⁸⁹

ii. *Roper v. Simmons*

The Fifth Circuit next cited *Roper v. Simmons*, an odd case to cite for support. *Roper* presents an example of a state supreme court overruling Supreme Court precedent, only to have its judgment affirmed on review.⁹⁰ Only Justice O’Connor’s dissent, which the Fifth Circuit cites, chided the circuit court for its apparent transgression.⁹¹ Not only is *Roper* an example of the Supreme Court affirming a lower court’s overruling of its own precedent, but the case is meaningfully distinct from *National Coalition for Men*. In *Roper*, the challenged precedent did not rely on a singular line of reasoning, and that reasoning had not been completely undermined by subsequent factual developments.

In *Roper*, the Court reconsidered the question of whether executing juvenile offenders aged sixteen and seventeen was permissible under the Eighth and Fourteenth Amendments.⁹² In an earlier case, *Stanford v. Kentucky*, the Court had ruled that the Constitution did not bar capital punishment for juvenile offenders who were older than fifteen.⁹³ In an opinion authored by Justice Scalia, the Court held in *Stanford* that, while many States did not impose the death penalty on juveniles,⁹⁴ the petitioners failed to establish a national consensus that such a punishment was cruel and unusual, and therefore unconstitutional under the Eighth Amendment.⁹⁵

Roper arose out of the Missouri Supreme Court’s application of a recent Supreme Court decision to overrule another related precedent. In 2003, the Missouri Supreme Court effectively overruled *Stanford*’s allowance of the death penalty for juveniles,⁹⁶ citing another Supreme Court case, *Atkins v. Virginia*. In

86. See *State Oil Co.*, 522 U.S. at 16–18 (“*Albrecht* was animated in part by the fear that vertical maximum price fixing could allow suppliers to discriminate against certain dealers, restrict the services that dealers could afford to other customers, or disguise minimum price fixing schemes.” *Id.* at 12.). See generally, *Albrecht*, 390 U.S. 145.

87. *State Oil Co. v. Khan*, 522 U.S. at 16; see *Albrecht*., 390 U.S. at 148–52.

88. See *Albrecht*, 390 U.S. at 148–52.

89. *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981).

90. *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

91. *Nat’l Coal. for Men v. Selective Serv. Sys.*, 969 F.3d 546, 549–50 (5th Cir. 2020) (citing *Roper*, 543 U.S. at 594 (O’Connor, J., dissenting)).

92. *Roper*, 543 U.S. at 555–56.

93. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

94. *Id.* at 370. (“Of the 37 States whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders.”).

95. *Id.* at 380.

96. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 400 (Mo. 2003).

Atkins, the Court overruled *Penry v. Lynaugh*, a case decided on the same day as *Stanford* in which the Court ruled that the Constitution did not prohibit executing an intellectually disabled person.⁹⁷ The Missouri Supreme Court argued that *Stanford* allowed courts to consider current standards of decency in determining whether a punishment was cruel and unusual.⁹⁸ Additionally, *Atkins* demonstrated that the national consensus on capital punishment had changed in the fourteen years since *Stanford* was decided.⁹⁹

The Supreme Court granted certiorari and affirmed the Missouri Supreme Court's ruling in *Roper v. Simmons*, finding that in the years since *Stanford*, more states had prohibited capital punishment for juveniles and the execution of juveniles had become very uncommon.¹⁰⁰ However, the Court noted that "[t]he number of States that have abandoned capital punishment for juvenile offenders since *Stanford* is smaller than the number of States that abandoned capital punishment for the [intellectually disabled] after *Penry*,"¹⁰¹ and that the better metric for tracking national consensus on the execution of juveniles focused on "the consistency of the direction of change."¹⁰² The Court also relied on the fact that, "[s]ince *Stanford*, no State that had previously prohibited capital punishment for juveniles has reinstated it," a fact that carried "special force in light of the general popularity of anticrime legislation."¹⁰³

While the Fifth Circuit cites Justice O'Connor's dissent in this case to advocate for "strict stare decisis," *Roper* is a prime example of the Court recognizing a narrow exception to the general doctrine of stare decisis. *Roper* allows a lower court interpreting a Supreme Court case to revisit and overrule binding precedent when the precedent is predicated on context specific facts such as an outdated national consensus. While the "objective indica" used by the Court to measure national consensus include state legislation, allowing a lower court to freely interpret such a nebulous factual context without being bound by the Supreme Court's ruling on the matter surely is incompatible with the version of stare decisis articulated by the Fifth Circuit in *National Coalition for Men*.

Furthermore, the factual context barely changed between the *Stanford* and *Roper* decisions, and there was no clear change in the underlying legislation or regulation. Both of these factors distinguish *Roper* from *National Coalition for Men*. When the Missouri Supreme Court overruled *Stanford*, the facts

97. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

98. *State ex rel. Simmons*, 112 S.W.3d at 407 ("To say that this determination must be made based on the state of the law and standards that existed when *Stanford* was decided in 1989, and that to do otherwise is to overrule *Stanford*, is simply incorrect. This Court clearly has the authority and the obligation to determine the case before it based on current—2003—standards of decency.").

99. *Id.* at 406–07.

100. *Roper v. Simmons*, 543 U.S. 551, 564 (2005) ("30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach . . . even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent.").

101. *Id.* at 566.

102. *Id.* (citing *Atkins v. Virginia*, 536 U.S. 304, 315, n. 18 (2002)).

103. *Id.*

underlying the U.S. Supreme Court's reasoning in *Stanford* had not significantly changed inasmuch as those facts were interpreted differently by the members of the Court. In *Stanford*, Justice Scalia clarified that the national consensus sufficient to label a punishment cruel and unusual would not be met by a simple majority of state legislatures prohibiting such a punishment.¹⁰⁴ In *Roper*, the Court admitted that only five additional states had prohibited the execution of juveniles since *Stanford*, but pointed to the general trend against such punishments as evidence of a national consensus.¹⁰⁵ Thus, while the factual underpinnings of *Stanford* had changed slightly when *Roper* was decided, they certainly did not change in a way that clearly repudiated *Stanford's* outcome based on its reasoning. The clearer shift was in the priorities of the majority of Justices on the Court and how they chose to interpret the "objective indicia" of national consensus. This is distinct from the change in facts underlying the reasoning in *Rostker*, in which subsequent legislative and regulatory acts clearly and completely repudiated the reasoning.

iii. *Rodriguez de Quijas v. Shearson/American Express, Inc.*

Finally, the Fifth Circuit cited *Rodriguez de Quijas v. Shearson/American Express, Inc.* as an example of how the Supreme Court has upheld "strict stare decisis." In *Rodriguez de Quijas*, the Supreme Court reviewed a Court of Appeals' decision to overturn another Supreme Court case, *Wilko v. Swan*.¹⁰⁶ The plaintiff in *Rodriguez de Quijas* had signed a binding arbitration agreement with a broker, whom they brought suit against after their investments didn't pay out.¹⁰⁷ A district court ordered all the plaintiff's claims to be submitted to arbitration except those raised under § 12(2) of the Securities Act which, under *Wilko*, were required to proceed in court.¹⁰⁸ The Court of Appeals reversed, ruling that the arbitration agreement was fully enforceable because subsequent Supreme Court decisions had rendered *Wilko* obsolete.¹⁰⁹

The Court found that, while *Wilko* was incorrectly decided, the Court of Appeals should not have renounced the case on its own authority: "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling

104. See *Stanford v. Kentucky*, 492 U.S. 361, 370–71 (1989) ("In invalidating the death penalty for rape of an adult woman, we stressed that Georgia was the *sole* jurisdiction that authorized such a punishment. In striking down capital punishment for participation in a robbery in which an accomplice takes a life, we emphasized that only eight jurisdictions authorized similar punishment. In finding that the Eighth Amendment precludes execution of the insane and thus requires an adequate hearing on the issue of sanity we relied upon (in addition to the common-law rule) the fact that 'no State in the Union' permitted such punishment.") (citations omitted).

105. *Roper*, 543 U.S. at 565–66.

106. *Rodriguez de Quijas v. Shearson/American Express, Inc.* 490 U.S. 477, 479 (1989).

107. *Id.* at 478.

108. *Id.* at 479.

109. *Id.*

its own decisions.”¹¹⁰ The Fifth Circuit relied on this holding to establish support for its doctrine of strict stare decisis in *National Coalition for Men*.¹¹¹

Rodriguez de Quijas is distinguishable from *National Coalition for Men* because the facts underlying the contested precedent did not change. While the reasoning in *Wilko* was undermined by other Court decisions over time, much like the reasoning in *Albrecht*, the context in which *Wilko* was applied did not change. *Rodriguez de Quijas* only stands for the rule that when a case’s lines of reasoning are rejected in separate cases, the case that the line of reasoning was originally applied to is still precedent until explicitly overturned. By analogy, if a separate Supreme Court case had acknowledged that men and women were similarly situated for the purposes of a draft without squarely addressing the issue of whether the MSSA was unconstitutional, then *Rodriguez de Quijas* would have a direct application to *National Coalition for Men*. However, no such case exists, and *Rodriguez de Quijas* only serves to further general support for strict stare decisis without providing much guidance for the context of the challenge to the MSSA.

B. Tangible Shifting of Legislative and Regulatory Priorities Mandates a Reevaluation of Whether Due Process Rights are Infringed

One of the most important distinctions that *National Coalition for Men* bears from the three cases above is that it involves a heightened scrutiny due process challenge to a federal statute.¹¹² Such challenges necessarily involve fact-intensive inquiries into whether a challenged piece of legislation’s dissimilar treatment of two otherwise similarly situated groups is substantially related to an important governmental interest.¹¹³ Any due process analysis relying on legislative intent that has been rendered obsolete by more recent acts of Congress should therefore not be treated as binding precedent. That is to say, stare decisis should not bar a lower appellate court’s re-evaluation of a higher court’s due process analysis where the original analysis relies entirely on stale legislative intent. The reasoning for such an exception is twofold: it increases access to the courtroom for the very people who need that access most and ensures that justice is served when a law unconstitutionally discriminates.

First, requiring a due process challenge in such circumstances to rise to the Supreme Court is an incredibly inefficient and expensive process. The plaintiff pool for such appeals is therefore limited to those who have the time and money to go all the way in court, assuming the claim even makes it to the Supreme Court in the first place. In a given term, the Supreme Court usually

110. *Id.* at 484.

111. *See Nat’l Coal. for Men v. Selective Serv. Sys.*, 969 F.3d 546, 549–50 (5th Cir. 2020).

112. *Nat’l Coal. for Men*, 969 F.3d at 546. *Cf.* *State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997) (addressing price fixing under Sherman Act); *Roper v. Simmons*, 543 U.S. 551, 556 (2005) (considering juvenile death penalty under Eighth Amendment); *Rodriguez de Quijas v. Shearson/American Express, Inc.* 490 U.S. 477, 478 (1989) (concerning arbitration under Securities Act).

113. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

receives between seven and eight-thousand petitions for a writ of certiorari; of those petitions, roughly eighty, or one percent, are granted.¹¹⁴ Additionally, the mere process of filing a petition for a writ of certiorari will often accrue thousands of dollars in legal fees.¹¹⁵ Thus, by requiring the Supreme Court alone to review its precedent in equal protection cases, the Court places a huge barrier in the way of reconsidering any outcomes that have clearly been rendered invalid by subsequent legislative and regulatory acts.

These barriers to arguing a case before the Supreme Court make it more likely that dated assumptions will control the constitutionality of a discriminatory law for much longer than necessary. This would allow an unconstitutional law to continue to infringe upon people's rights in the meantime, creating the potential for gradual erosion of such rights. Requiring the Supreme Court to personally review all of its past rulings, no matter how dependent such rulings were on the facts before the Court at the time of the ruling, is an extremely inefficient and burdensome process, both for the Court and for affected persons alike.

Second, a due process claim relates not just to the language, but also to the application of a law, and therefore necessarily requires a fact-intensive inquiry into how the application of the law operates in the context in which it is being challenged. Where the context of a challenged law's application significantly changes, its constitutionality must be given a fresh evaluation. Allowing for such review where a challenged precedent has been completely undermined by subsequent legislative action would hardly go against the grain; there are many examples of the Court reexamining its constitutional jurisprudence in more modern contexts.¹¹⁶ While there is merit to confining broader, settled constitutional determinations to the Court's purview, the Court's application of the law to certain facts should not be impervious to review by lower appellate courts where the facts have since changed.

This is particularly relevant where a group facing discrimination by a law which has already passed a constitutional test become resituated, to the point that the same law would not pass a due process challenge as it applies to them under their new circumstances. What could make a legal classification substantially related to an important governmental interest in one decade could change dramatically in the next. In the immediate context of *National Coalition*

114. *Frequently Asked Questions: General Information*, SUP. CT. U.S. https://www.supremecourt.gov/about/faq_general.aspx [<https://perma.cc/7MWA-57ZV>] (last visited Jan. 28, 2022).

115. Emily Belz, *High Court, High Costs*, WORLD (Sep. 13, 2017), <https://wng.org/articles/high-court-high-costs-1618203551>; Adriene Hill, *How Much Does a Big Supreme Court Case Like Gay Marriage Cost?*, MARKETPLACE (Mar. 25, 2013), <https://www.marketplace.org/2013/03/25/how-much-does-big-supreme-court-case-gay-marriage-cost/>.

116. *See Roper*, 543 U.S. at 564–65 (2005). *See also* *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980) (“[T]his Court has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment’s passage.”); *Tennessee v. Garner*, 471 U.S. 1, 13 (1985) (“Because of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of a historical inquiry.”).

for Men, changes in technology and the societal views of women serving in combat have effectively resituated women so that they are similarly situated to men in the context of serving as combat troops. While such a scenario is rare, the irregularity of such a dilemma makes carving out a narrow exception for lower appellate court review of Supreme Court precedent an ideal solution.

This is not to argue that there are not valid concerns relating to the preservation of stare decisis that could potentially stand in the way of such an exception. There is clear value in respecting “the Supreme Court’s singular role in deciding the continuing viability of its own precedents.”¹¹⁷ Allowing lower appellate courts to reexamine the constitutionality of laws already examined by the Supreme Court does threaten the institutional structure of the judiciary and legal system at some level. However, the goals of stare decisis would not be weakened by creating an exception in such limited circumstances, particularly where the reasoning in a challenged equal protection precedent is completely undermined by subsequent legislative acts. Limiting lower appellate court review of Supreme Court precedent to these select circumstances would help avoid the ill effects of allowing potentially unconstitutional laws to remain valid, while preserving the integrity of the Court’s authority. An exception for such extreme circumstances is far too narrow to threaten the overall integrity of stare decisis.

Finally, the justifications for following the Fifth Circuit’s “strict stare decisis” doctrine are weak when the issue that the lower courts must consider is one of how the law should apply to a set of facts. As Justice Brandeis wrote, dissenting in *Burnet v. Coronado Oil & Gas Co.*:

The reasons why this Court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the Constitution. . . . This is strikingly true of cases under the due process clause when the question is whether a statute is unreasonable, arbitrary or capricious; [or] of cases under the equal protection clause when the question is whether there is any reasonable basis for the classification made by a statute In every such case the decision, in the first instance, is dependent upon the determination of what in legal parlance is called a fact, as distinguished from the declaration of a rule of law. When the underlying fact has been found, the legal result follows inevitably. The circumstance that the decision of that fact is made by a court, instead of by a jury, should not be allowed to obscure its real character.¹¹⁸

To paraphrase Justice Brandeis, applications of the Constitution to statutes in specific contexts are clearly findings of fact as opposed to interpretations of the

117. *Perez v. Stephens*, 745 F.3d 174, 180 (5th Cir. 2014).

118. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 410–11 (1932) (Brandeis, J., dissenting).

law. Stare decisis is a valuable tool for settling the law, and therefore does not need to apply with such strict force in especially fact intensive situations. Federal due process challenges provide a perfect and necessary opportunity for a narrow exception to strict stare decisis, provided that the precedent being called into question rests on a singular line of reasoning undermined by subsequent legislative acts.

II. THE INTEGRATION OF WOMEN INTO ACTIVE COMBAT SHOULD SUBJECT *ROSTKER* TO REVIEW BY LOWER COURTS

The ways in which *National Coalition for Men* is distinct from the three Supreme Court cases cited by the Fifth Circuit above make it an ideal candidate for creating a narrow exception to the doctrine of strict stare decisis. The precedent being challenged in *Rostker* is based on a singular, dispositive line of reasoning that has been completely undermined by subsequent legislative and regulatory action. These characteristics, along with the policy arguments in favor of excepting federal due process claims from strict stare decisis, highlight *National Coalition for Men* as a template for allowing lower courts to review binding precedent in highly particular circumstances. Even if such an exception is never recognized, the Supreme Court's reasoning in *Rostker* supports the conclusion that the male-only draft requirement of the MSSA is an unconstitutional discrimination on the basis of sex, given that men and women are now similarly situated for the purposes of such a draft.

A. The Reasoning in *Rostker* is Singular, Dispositive, and Invalidated by Tangible Legislative and Regulatory Action

The factors that distinguish *National Coalition* from *State Oil*, *Roper*, and *Rodriguez de Quijas* are what should compel its exemption from an application of strict stare decisis for lower appellate courts. First, the challenged precedent in *Rostker* is condensed into a singular line of reasoning that articulates a clear condition which is dispositive of the outcome. This line of reasoning, which leads to the Court's conclusion that the MSSA is constitutional, relies solely on the fact that women are not similarly situated for the draft because the legislature and military forbid women from serving in combat. While the Court went to great lengths to defer to Congress and cited to congressional disapproval of women serving in combat, it was the very prohibition of women in combat that made women dissimilarly situated to men.¹¹⁹ As the Court acknowledged, the combat ban entirely justified discrimination on the basis of sex in draft registration.¹²⁰

Second, the precedent in *Rostker* is in conflict with clear actions taken by Congress and the Executive Branch, including constitutionally prescribed methods of law and rulemaking to eliminate the ban on women serving in

119. *Rostker v. Goldberg*, 453 U.S. 57, 76–79 (1981).

120. *Id.* at 79.

combat entirely.¹²¹ These actions so obviously undermine the Supreme Court's reasoning in *Rostker* that a lower court should not necessarily be expected to uphold such a defunct case. By repealing the statutory ban on women serving in combat positions in the Navy and Air Force, and by opening up all armed forces combat positions to women, the government has made men and women similarly situated within the context of the MSSA's purpose to create a draft of combat troops. In doing so, Congress and the DOD have completely undermined the reasoning that the Court relied on in *Rostker*.

This final factor should bear considerable weight when noting the deference that the Court afforded Congress in *Rostker*. While Congress has not yet amended the MSSA to either include women in the draft or abolish registration altogether, its repeal of the bans on women serving in combat should be persuasive guidance for any court seeking to review the MSSA after *Rostker*. In *Rostker*, the Court was clear that "the complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches."¹²² A court reviewing *Rostker* today would apply similar deference towards the acts of Congress and the Executive Branch since 1981, acts which at the very least display the Government's belief that men and women are similarly situated for combat.

While the Fifth Circuit argued that a Supreme Court ruling later undermined by factual developments can only be overruled by the Court itself,¹²³ the Court's entire reasoning in *Rostker* was based on the legislative ban on women serving in combat. Since this ban no longer exists, it is unnecessary and inefficient to require the Supreme Court to revisit *Rostker* when its outcome clearly no longer controls the constitutionality of the MSSA.

B. By the Rostker Court's Own Reasoning, the Male-Only Draft Currently Violates the Due Process Clause

Even if an exception to the Fifth Circuit's strict stare decisis doctrine could not be carved out, any court applying the Supreme Court's reasoning in *Rostker* would arrive at the conclusion that men and women are currently "similarly situated" with regard to their ability to serve in combat, and the MSSA must therefore be an unconstitutional violation of the Fifth Amendment's Due Process Clause. Part of the Fifth Circuit's error is that it applies the *facts* of *Rostker* to decide the challenge in *National Coalition for Men*.

121. National Defense Authorization Act for Fiscal Years 1992 And 1993, Pub. L. 102-190, § 531, 105 Stat. 1290, 1365 (1991); DOD Press Briefing, U.S. DEP'T OF DEF. (Dec. 3, 2015), <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/632578/departme nt-of-defense-press-briefing-by-secretary-carter-in-the-pentagon-briefi/> [<https://perma.cc/8NBX-NPQG>].

122. *Id.* at 65-66 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

123. *Nat'l Coal. for Men v. Selective Serv. Sys.*, 969 F.3d 546, 549-50 (5th Cir. 2020).

However, the entire context upon which *Rostker* was decided has changed, such that if the exact reasoning were applied by the Supreme Court today, it would arrive at a different outcome. In the words of the Court in *Rostker*:

This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic registration. Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft.¹²⁴

As the Court articulated, the precise reason why men and women were not similarly situated for the purposes of a draft was *because of* the combat restrictions on women. Now that such restrictions have been repealed by Congress and the Department of Defense,¹²⁵ it must follow that men and women are similarly situated for the purposes of a draft, especially when one considers the deference afforded to Congress by the *Rostker* Court. The Fifth Circuit could still adhere to the Supreme Court's reasoning in *Rostker* to declare the MSSA unconstitutional without violating stare decisis. To pretend that *Rostker*'s outcome would still apply if reexamined today is to waste the Supreme Court's time by making explicit what is already obvious. In the meantime, the exclusion of women from the draft, which Justice Marshall referred to as "one of the most potent remaining public expressions of ancient canards about the proper role of women,"¹²⁶ remains the law.

CONCLUSION

In its effort to maintain its status as a "strict stare decisis" circuit, the Fifth Circuit fails to acknowledge that modern developments in the United States military have rendered *Rostker* completely obsolete. The cases cited by the Fifth Circuit are all distinct from *National Coalition for Men* in that none of them concerns a federal due process challenge. Furthermore, none of these cases concern precedent directly undermined by later legislative and regulatory acts. The factual basis on which the *Rostker* Court's reasoning rests is singular in nature, dispositive of whether the MSSA is constitutional, and is completely invalidated by the integration of women into combat roles via legislative and executive action.

Stare decisis should not be applied so strictly as to impede the efficacy of the courts, especially where fact-intensive applications of the law are involved. Even if there is merit to applying strict stare decisis to an equal protection challenge, the Fifth Circuit was obtuse not to acknowledge that *Rostker* practically overrules itself when applied to the current circumstances; if the

124. *Rostker*, 453 U.S. at 78.

125. See National Defense Authorization Act for Fiscal Years 1992 And 1993, Pub. L. 102-190, 105 Stat. 1290, 1365 (1991); DOD Press Briefing, *supra* note 54.

126. *Id.* at 86 (Marshall, J., dissenting) (citation omitted).

MSSA's male-only draft is "entirely justified" by a ban on women serving in combat, then it by extension must fail an equal protection challenge when men and women are "similarly situated" to serve in combat.



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