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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 for society.

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A CALL FOR CHANGE: REFORMING ARIZONA’S JUDICIAL PRACTICES TO INCLUDE PROTECTED PARTIES ON EX PARTE ORDERS OF PROTECTION AS A DEFAULT¹

Kat Baiardi[†]

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1. This paper was written under the advisement of Professor of Law, Negar Katirai, while I was a candidate for a Juris Doctorate at the James E. Rogers College of Law at the University of Arizona. This research was conducted in 2021 after a year of working as a limited practice student representing and providing legal advice to survivors of domestic violence in the James E. Rogers College of Law’s Domestic Violence Law Clinic under the supervision of the clinical director, Professor Negar Katirai. During the time I spent working with survivors in the clinic, I heard survivors’ stories of the negative experiences and outcomes they faced in family law and civil order of protection cases and the impacts that it had on them. Those experiences prompted me to conduct this research and review civil order of protection cases. I want to thank all of the survivors who have shared their stories with me and all of the advocates, attorneys, and mental health practitioners who support and advocate for survivors of gendered violence. I want to especially thank Professor Negar Katirai who has taught me more than words can express. I am eternally grateful for your guidance, wisdom, and all that you have done and continue to do for the community, thank you.

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INTRODUCTION

It is well documented that survivors of domestic abuse are treated unfairly when they engage with the legal system.² Survivors are routinely disbelieved in family courts when they allege abuse in custody cases, including both allegations of partner and child abuse.³ Researchers have found that courts believe and credit a survivor's allegations of partner abuse in custody cases less than half the time, and rates of crediting a survivor's allegations are even lower when survivors allege child abuse.⁴

Researchers have offered explanations for why courts do not credit and believe survivors. Deborah Epstein, Professor and Co-Director of the Domestic Violence Law Clinic at Georgetown Law, and Lisa Goodman, Professor of Psychology at Boston College, explain that courts find survivors' experiences implausible because they view survivors' stories as both internally and externally inconsistent.⁵ These "inconsistencies" in survivors' stories are, in part, due to the way that psychological trauma can affect memory and, consequently, a survivor's linear storytelling ability.⁶ However, courts are not adequately trained in the dynamics of abuse and the impacts of trauma, and there is a pervasive societal belief that only "consistent" stories are believable. Therefore, the inconsistencies in survivors' stories function as a mechanism for courts to discredit them.⁷ In addition, Epstein and Goodman explain that courts discount survivors' credibility because of gender bias, cultural norms of not believing women, and by questioning survivors' motives for telling their stories.⁸

Psychologist Dr. Amelia Mindthoff, legal psychologist Deborah Goldfarbe, and law professor Kelly Behre used legal psychology research to expand on these explanations and found that credibility discounting is also explained by judicial misconceptions of domestic violence and how people respond to violence.⁹ They

2. Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers' Testimony Project, Women's Narratives, and Court Reform*, 37 ARIZ. ST. L.J. 709, 745–51 (2005); Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 405–20 (2019).

3. Joyanna Silberg & Stephanie Dallam, *Abusers Gaining Custody in Family Courts: A Case Series of Over Turned Decisions*, 16 J. CHILD CUSTODY 140, 141 (2019); Joan S. Meier, Sean Dickson, Chris O'Sullivan, Leora Rosen & Jeffrey Hayes, *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations*, GW L. FAC. PUBL'NS & OTHER WORKS 4 (2019), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2712&context=faculty_publications [<https://perma.cc/JAQ8-U8NK>].

4. Meier et al., *supra* note 4, at 11.

5. Epstein & Goodman, *supra* note 3, at 407–20.

6. *Id.* at 407–10.

7. *Id.* at 407–20.

8. *Id.* at 420–36.

9. Amelia Mindthoff, Deborah Goldfarbe & Kelly Alison Behre, *How Social Science Can Help Us Understand Why Family Courts May Discount Women's Testimony in Intimate Partner Violence Cases*, 53 FAM. L. Q. 243, 250–61 (2019).

posit that when survivors' experiences or behaviors do not align with judicial conceptions about domestic violence they are regarded as less credible.¹⁰

This lack of crediting and believing survivors has significant impacts for survivors' case outcomes, their lives, and the lives of their children. In family court proceedings, when courts do not credit and believe survivors' allegations of abuse, the abusive parent can retain custody of the children.¹¹ Further, research has found that when courts do not credit allegations of abuse, survivors, particularly female survivors, who initially had custody of the children, can lose custody to the abusive parent.¹² Alarming this research also found that survivors can still lose custody of the children to the abusive parent even when the court credits their allegations of abuse.¹³

The court's allowance of abusers to retain custody puts both survivors and their children at risk of harm. Abusers use children to continue to exert power and control over survivors, which perpetuates cycles of violence and leaves survivors at risk of harm from abusers.¹⁴ Additionally, domestic violence and child abuse often occur simultaneously, so allowing abusers to retain custody puts children in situations where they are likely to be abused.¹⁵

Juvenile dependency cases also fail to adequately address domestic abuse. In juvenile dependency cases, under failure-to-protect grounds, survivors can have their kids taken away and/or their parental rights severed because of their partner's abuse of them and/or the children.¹⁶ Removal from the survivors' care can lead to negative outcomes for children.¹⁷ Research suggests removing a child from a safe and loving parent can cause emotional and psychological trauma to the child that can last a lifetime.¹⁸

The current system does not adequately address domestic abuse and fails to give equitable outcomes to survivors and their children, perpetuating further harm. This paper looks at 179 domestic violence civil orders of protection filed in 2019 in Pima County, Arizona. This research found that courts routinely excluded protected parties on ex parte orders of protection and that protected parties were included on ex parte orders at higher rates for male petitioners than for female petitioners. The review also found differing case outcomes regarding protected parties at the contested hearing for male and female petitioners with

10. *Id.*

11. Meier et al., *supra* note 4, at 12–13.

12. *Id.* at 11–13.

13. *Id.*

14. Rosie Gonzalez & Janice Corbin, *The Cycle of Violence: Domestic Violence and Its Effects on Children*, 13 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 405, 413–16 (2010).

15. *Id.*

16. Nancy K. D. Lemon, *The Legal System's Response to Children Exposed to Domestic Violence*, 9 FUTURE CHILD. 67, 71 (1999).

17. Joan S. Meier & Vivek Sankaran, *Breaking Down the Silos that Harm Children: A Call to Child Welfare, Domestic Violence and Family Court Professionals*, GW L. FAC. PUBL'NS & OTHER WORKS 19 (2021), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2809&context=faculty_publications [<https://perma.cc/W8X2-XXE2>].

18. *Id.*

similar allegations. Lastly, this research showed inconsistencies in which type of allegations led to the inclusion of protected parties on ex parte orders. These findings represent another way the legal system fails survivors of domestic abuse. Having protected parties on orders of protection is a legal mechanism survivors can use to protect their children from abuse by preventing their abuser from seeing or contacting their child. When courts do not include protected parties on ex parte orders of protection, they effectively inhibit survivors from using these orders as a tool for child protection. This not only puts children in a position where they are vulnerable to harm at the hands of the abusive parent, but it also can have impacts for survivors in custody cases and juvenile dependency cases. Having a child on an order of protection as a protected party can lead to more favorable outcomes for survivors in custody cases because it can make it more likely that courts will credit survivors' allegations of abuse and award custody to the survivor and not the abusive parent. Having a child on an order of protection as a protected party can also prevent a survivor from having their children taken away or their parental rights severed in a juvenile dependency proceeding under failure-to-protect grounds.

In light of these findings, this paper will present an argument for courts in Arizona¹⁹ to include children as protected parties on ex parte orders of protection as a default – thus relying on the contested hearing instead of the ex parte hearing to determine if protected parties should remain on the order. Part I of this paper will give background information on orders of protection and the legal requirements to file a petition for an order of protection in Arizona. Part II will discuss findings from looking at 179 civil order of protection cases filed in 2019 in Pima County Superior Court. Part III will argue that courts should include protected parties on ex parte orders of protection as a default and rely on contested hearings to make required findings regarding protected parties in light of the discoveries in Part II and because of notions of fair administration of justice, procedural processes, and public policy. Parts IV and V will argue that courts should make these changes because failure to do so prematurely forecloses survivors' abilities to access the benefits of having a protected party on an order of protection in custody and juvenile dependency cases.

PART I. BACKGROUND

A. Brief Overview of Orders of Protection

Orders of protection are civil orders that can be sought by survivors of domestic abuse.²⁰ They prohibit the defendant from contacting the petitioner, among other things, in the aim of protecting survivors from further abuse.²¹

19. The advocated change in judicial practices is limited to courts in Arizona because the cases that were reviewed that formed the basis of this argument were decided in Arizona and this paper was written after consideration and review of the laws, procedural processes, and the author's practical experience in Arizona.

20. Carolyn V. Williams, Comment, *Not Everyone Will "Get It" Until We Do It: Advocating for an Indefinite Order of Protection in Arizona*, 40 ARIZ. ST. L.J. 371, 378 (2008).

21. *Id.*

In order to obtain an order of protection, generally a petitioner must file a petition that states the reasons why they are seeking an order of protection.²² In most states, order of protection statutes limit who may seek one.²³ The parties must have a qualifying relationship and there must be some incident of domestic violence alleged in the petition.²⁴ However, states define qualifying relationships and codify domestic violence differently, which affects the availability of this remedy by jurisdiction.²⁵

B. Arizona's Requirements for Obtaining an Order of Protection

1. Qualifying Relationship

In Arizona, to obtain an order of protection the petitioner must have a qualifying relationship with the defendant and must file a petition stating an allegation of domestic violence as codified by the statute.²⁶ The parties have a qualifying relationship if: they were or are married; they live together; one is pregnant by the other; they have a child together; they are or were in a romantic or sexual relationship;²⁷ or they are related by blood or marriage.²⁸ Additionally, a child who lives or lived with the defendant and was related by blood to either a former spouse of the defendant or to a person who lives or lived with the defendant has a qualifying relationship.²⁹

2. Domestic Violence

For a court to grant an order of protection the petitioner must have a qualifying relationship with the defendant, as outlined above, and the court must find reasonable cause to believe that an act of domestic violence may happen or that an act of domestic violence has happened within the last year (or longer, if it finds good cause to consider a longer period of time).³⁰

Arizona defines domestic violence to include assault, aggravated assault, sexual assault, kidnapping, endangerment, unlawful imprisonment, threatening or intimidating, harassment, stalking, disorderly conduct, as well as other acts.³¹

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 378–79.

26. ARIZ. REV. STAT. ANN. §§ 13-3601(A), -3602(A) (2023).

27. The court determines if the parties have a current or previous sexual or romantic relationship by considering the following factors: the type and length of the relationship, the frequency of the parties interaction and if the relationship has ended the length of time since it ended. § 13-3601(A)(6).

28. § 13-3601(A)(1)–(6).

29. § 13-3601(A)(5).

30. § 13-3602(E)(1)–(2).

31. Arizona's definition of domestic violence also includes the following acts: interfering with judicial proceedings, cruelty to animals, any act that is a dangerous crime against children, homicides, custodial interference, unlawful disclosure of images depicting states of nudity or specific sexual activity, criminal trespass, criminal damage, preventing the

Of note, Arizona’s definition of domestic violence differs from societal definitions³² of domestic violence because it does not include financial abuse, emotional abuse, or coercive control.³³ This limited definition of domestic violence curtails some survivors’ abilities to obtain an order of protection because some survivors experience abuse in forms that are not codified by the domestic violence statute.

C. Protected Parties

Petitioners can request that another person—a “protected party”—be included on the order of protection.³⁴ If the petitioner lists a child as a protected party on the petition and that child is not also the defendant’s child, the court can include the child on the order based solely on the danger the defendant poses to the petitioner.³⁵ However, if the petitioner lists a protected party that is also the defendant’s child, the court must consider additional factors and make a separate reasonable cause finding regarding that child prior to including them on the order as a protected party.³⁶ In order to include a shared child as a protected party, the court must find reasonable cause to believe that either (A) physical harm may result or has resulted to the child; or (B) the alleged acts of domestic violence involved the child.³⁷ Additionally, the court has to consider: (1) “whether the child may be harmed if the defendant is permitted to maintain contact with the child, and (2) whether the child may be endangered if there is contact outside the presence of the plaintiff.”³⁸

D. Arizona’s Procedure and Findings Required for Ex Parte Orders of Protection

After the petitioner files a petition for an order of protection, the petitioner alone must attend a short ex parte hearing to verify the contents of their petition.³⁹ At that hearing, the court may grant the order of protection if they find the parties have a qualifying relationship and there is reasonable cause to believe that an act of domestic violence may happen, or that an act of domestic violence has happened within the last year, or longer, if they find good cause to consider a longer period of time.⁴⁰ In practice courts grant ex parte orders of protection to petitioners at incredibly high rates.⁴¹

use of a telephone in an emergency, use of telephonic communication to harass or intimidate, and surreptitious photographing or filming. § 13-3601(A).

32. Williams, *supra* note 21, at 375–76; Epstein & Goodman, *supra* note 3, at 417.

33. *See id.*

34. ARIZ. R. PROT. ORD. P. 23(b)(2).

35. ARIZ. R. PROT. ORD. P. 23(e)(2).

36. *Id.*; ARIZ. R. PROT. ORD. P. 35(b).

37. ARIZ. R. PROT. ORD. P. 5(b)(1).

38. ARIZ. R. PROT. ORD. P. 35(b).

39. ARIZ. R. PROT. ORD. P. 23.

40. ARIZ. R. PROT. ORD. P. 23(e).

41. Data collected by the Pima County Superior Court indicates that in 2019 the court granted ex parte orders of protection to ninety percent of petitioners who filed petitions for orders of protection.

E. Remedies Available

If the court grants an order of protection the court may order the following remedies: (1) enjoin the defendant from committing domestic violence offenses; (2) grant one party the use and exclusive possession of the parties' residence on a showing that there is reasonable cause to believe that physical harm may otherwise result; (3) restrain the defendant from contacting the plaintiff or other specifically designated persons and from coming near the residence, place of employment or school of the plaintiff or other specifically designated locations or persons on a showing that there is reasonable cause to believe that physical harm may otherwise result; (4) if the court finds that the defendant is a credible threat to the physical safety of the plaintiff or other specifically designated persons, prohibit the defendant from possessing or purchasing a firearm for the duration of the order; (5) if the order was issued after notice and a hearing at which the defendant had an opportunity to participate, require the defendant to complete a domestic violence offender treatment program; (6) grant relief that is necessary for the protection of the alleged victim and other specifically designated persons and that is proper under the circumstances; (7) grant the plaintiff the exclusive care, custody, or control of any animal that is owned by the plaintiff, the defendant, or a minor child residing in either of their homes, and order the defendant stay away from the animal and forbid them from taking or committing an act of cruelty or neglect against the animal.⁴²

F. Arizona's Procedure After The Ex Parte Order of Protection Is Granted

After the court grants an ex parte order of protection, the defendant must be served with the order.⁴³ After service, and at any time during the duration of the order of protection, the defendant has the ability to challenge the order by requesting a contested hearing.⁴⁴ If the defendant does contest the order, a contested hearing will be scheduled within ten business days of the defendant notifying the court of their intent to contest.⁴⁵ At the contested hearing both parties are able to testify, present evidence, and call witnesses.⁴⁶ At this hearing the petitioner has the burden of proof to show that there is reasonable cause to believe that an act of domestic violence has happened or may happen based on the allegations listed in the contents of their petition.⁴⁷ After each party has the opportunity to present their case, the court may quash, amend, or uphold the order of protection based on whether it finds the petitioner has met their burden.⁴⁸

PART II. FINDINGS FROM REVIEWING 179 ORDER OF PROTECTION CASES FILED

42. ARIZ. REV. STAT. ANN. § 13-3602(G)(1)–(7) (2023).

43. § 13-3602(I).

44. § 13-3602(L).

45. *Id.*

46. ARIZ. R. PROT. ORD. P. 38(g).

47. ARIZ. R. PROT. ORD. P. 38(g)(1)–(3).

48. ARIZ. R. PROT. ORD. P. 38(g)(3)–(4).

2023]

A CALL FOR CHANGE

9

IN PIMA COUNTY SUPERIOR COURT IN 2019

The following section is a summary of findings from reviewing 179 civil order of protection cases filed in 2019 in the Pima County Superior Court of Arizona. The findings from this review form the basis of the coming argument that, when petitioners request a protected party in their petition, courts in Arizona should include protected parties on ex parte orders of protection as a default and use the contested hearing instead of the ex parte hearing to make their required findings regarding protected parties.

A. Background and Data Collection

The cases reviewed for this project were accessed through the legal records department at the Pima County Superior Court in Arizona. I requested all of the civil order of protection cases that were filed from January 1, 2019, to December 31, 2019, from the clerk of the legal records department. Following this request, I received a printout of 179 case numbers. Then, using the public records search engine available in the office of the legal records department, I looked at all of the case documents that were a part of the public record. Available in most cases were the petitions for the orders of protection, the ex parte orders, and any subsequent orders from after contestation, if applicable. Some cases also had minute entries or motions, and a handful had exhibits attached to the petition.

Yet, the 179 cases that I reviewed were only a subset of all the petitions for orders of protection that were filed in Pima County Superior Court in 2019. After my research concluded, I received data from the Pima County Superior Court showing that 2,472 petitions for orders of protection were filed in Pima County Superior Court in 2019. It is unclear why I only received a subset of the cases requested at the time of data collection. Unfortunately, that subset of 179 cases was the extent of the data made available to me during the data collection stage of this project. Thus, those 179 cases form the basis for the discussion in this paper.

B. Findings

The following are findings from reviewing 179 order of protection cases filed in Pima County Superior Court in 2019. First, most petitioners were women; 145 of the 179 petitions were filed by female petitioners. Second, most petitioners, 141 of 179, filed petitions seeking protection from current or former romantic partners. The majority of the remaining 38 petitioners sought protection from family members, and a few sought protection from roommates. Of the petitions seeking protection from a romantic partner, the majority, 96 percent, were seeking protection from an opposite-sex romantic partner.⁴⁹

49. Only 5 of the 141 petitioners seeking protection from a current or previous romantic partner sought protection from a same-sex romantic partner. The remaining 136 petitioners sought protection from opposite-sex romantic partners.

In 177 of the 179 cases reviewed the court granted the petitioner an ex parte order of protection. In 93 of the 177 cases where the court granted the ex parte order to the petitioner the defendant contested the order.⁵⁰

In only 2 of the 179 cases reviewed were petitioners denied an ex parte order of protection. In both of those cases the petitioner had an order of protection taken out against them by the party they were now seeking an order of protection against. The existing order of protection against them was the only allegation of “domestic violence” each petitioner listed in the contents of their petitions for an order of protection. So, in both of those cases the petition was blatantly legally insufficient because it did not plausibly allege domestic violence.

This data exemplifies the court’s high rate of granting ex parte orders to petitioners and its practice of granting ex parte orders of protection to petitioners liberally, only denying ex parte orders when the petition is blatantly legally insufficient.⁵¹

1. Protected Parties

In 115 of the 179 petitions filed, petitioners requested that a protected party be included on the order of protection.⁵² In 77 of the 115 cases the court granted an ex parte order to the petitioner that included the protected party. In 41 of the 77 cases where the court granted an ex parte order that included the protected party, the defendant contested the order.

In 36 of the 115 petitions requesting a protected party, the court granted the ex parte order to the petitioner, but did not include the protected party. In 2 of the 115 petitions requesting a protected party, the court denied the ex parte order. These were the only 2 cases reviewed where the court denied the ex parte order to the petitioner, as mentioned above.

Looking at the 115 cases where petitioners requested that a protected party be included on the order, an overwhelming majority of the protected parties requested were children of the petitioner. The protected party’s relationship to both the petitioner and the defendant was not readily clear from the face of the petition. The blank petition form for an order of protection does not have a space that must be filled out indicating the relationship of the requested protected party to either the petitioner or defendant. So, the protected party’s relation to the petitioner and defendant was deduced through the respective birthdates and/or last names of the protected party and through the allegations in the petition. The

50. Defendants requested a contested hearing in 93 of the 177 cases where petitioners were granted ex parte orders of protection. In the remaining 84 cases defendants did not request a contested hearing.

51. Looking at the 179 cases reviewed for this project, which was a subset of all the cases filed in Pima County Superior Court in 2019, ex parte orders were granted to petitioners around 99% of the time. The only 2 ex parte orders that were denied featured patently insufficient petitions. However, the overall rate of granting ex parte orders of protection to petitioners, when looking at all 2,472 petitions filed in Pima County Superior Court in 2019, was approximately 90%. Regardless of the data set, the court granted ex parte orders of protection to petitioners an overwhelming majority of the time.

52. In the remaining 64 of the 179 petitions, petitioners did not request a protected party be included on the order of protection.

relationship between the defendant and the requested protected party was also deduced from minute entries and/or final orders that made provisions for the defendant to contact the child, or from notes acknowledging a separate, ongoing family law case between the parties.

i. Case Outcomes for Female Petitioners Requesting Protected Parties

Female petitioners filed 96 of the 115 petitions for orders of protection that requested a protected party. In 63 of the 96 cases where female petitioners filed petitions for orders of protection requesting a protected party the court granted an ex parte order including the protected party. In 32 of the 96 cases where female petitioners filed for orders of protection requesting a protected party the court granted the ex parte order but did not include the protected party on the order. In one of the cases where female petitioners filed requesting a protected party the court denied the ex parte order.

The following information describes case outcomes in the 63 cases where the court granted female petitioners ex parte orders that included protected parties. In 33 of the 63 cases, the defendant contested the order of protection. In 7 of the 33 cases where the defendant contested, the outcome of the case depended on whether one or both parties failed to appear to the contested hearing.⁵³ In one of the 33 cases, the court upheld the order after a hearing when the defendant no longer objected to the order of protection. In one of the 33 cases, the court amended the order to allow the defendant to contact the petitioner, who filed on behalf of a minor child (the protected party), but otherwise upheld the order as to the protected party and the protected locations. In 5 of the 33 cases where the defendant contested, the court quashed the order in its entirety after a hearing. In 13 of the 33 cases where the defendant contested, the court affirmed the order as to the petitioner but removed one or all of the protected parties after a hearing. Lastly, in 6 of the 33 cases where the defendant contested, the court upheld the order in its entirety after the contested hearing.

ii. Case Outcomes for Male Petitioners Requesting Protected Parties

Male petitioners made up 19 of the 115 cases filed where petitioners requested a protected party on the order. In 4 of the 19 cases where men filed a petition requesting a protected party, the court granted the ex parte order to the petitioner, but did not include the protected party. In one of the 19 cases, the petition for the ex parte order was denied. In 14 of the 19 cases, the court granted the ex parte order and included the protected party on the order.

In 8 of the 14 cases where the court granted an ex parte order to a male petitioner that included a protected party, the defendant requested a contested hearing. In 3 of those cases where the defendant contested, the outcome of the case depended on whether one or both parties failed to appear at the contested

53. Assuming the parties received actual notice of the contested hearing, if the petitioner fails to appear to the contested hearing and the defendant appears, the order will be quashed. If the petitioner appears but the defendant does not, the order will be upheld. If both parties fail to appear, the order will be upheld. ARIZ. R. PROT. ORD. P. 38(f).

hearing.⁵⁴ Of the remaining 5 cases where the defendant contested, in one case the court dismissed the order in its entirety after a hearing; in 3 cases the court upheld the order in its entirety after a hearing and, in the final case, the court amended the order as to a protected location, but upheld the rest of the order.

iii. *Gender Difference For Including Protected Parties*

Overall, when looking at the 115 petitions requesting protected parties, protected parties were included on ex parte orders in approximately two thirds of cases. This is fairly low considering the court's overall rate of granting ex parte orders to petitioners is significantly higher.⁵⁵ Additionally, female petitioners were granted ex parte orders that included protected parties at lower rates than male petitioners. Female petitioners were granted ex parte orders including protected parties 66% of the time, while male petitioners were granted ex parte orders including protected parties 74% of the time. Case outcomes at the contested hearing also differed for female and male petitioners. In 13 of 33 cases where the defendant contested a female petitioner's order of protection that included one or many protected parties, the court removed one or all of the protected parties from the order but upheld the order as to the petitioner. Meanwhile, in none of the 8 cases where the defendant contested a male petitioner's ex parte order including one or many protected parties did the court uphold the order as to the petitioner but remove the protected parties from the order after the contested hearing.

The allegations from both women and men who filed petitions requesting protected parties were not noticeably different. Both women and men had allegations of harassment, assault, assault of the child(ren), assaults in front of the child(ren), stalking, etc. However, despite similar allegations, whether the protected parties were included on the ex parte orders and the case outcomes at the contested hearing differed for female and male petitioners. To exemplify the differing case outcomes at the contested hearing for similar allegations, consider the following cases. In 2 cases, the court upheld the order of protection granted to a male petitioner that included a protected party after a contested hearing, where both petitioners' allegations did not mention the protected party and the petitioner alleged stalking, threats, and/or harassment to themselves alone. Whereas in 9 cases where female petitioners alleged similar allegations of harassment and threats to themselves alone and did not mention the protected party, the court removed one or all of the protected parties after the contested hearing. In another 2 cases, the court upheld an order including a protected party granted to a male petitioner after the contested hearing when the allegations involved physical violence towards the protected party, presumably a shared child. In contrast, in two cases where female petitioners had similar allegations of physical and sexual violence towards the protected party, presumably also a shared child, the court upheld the order of protection as to the female petitioner but removed one or all of the protected parties after the contested hearing. In all of these above described cases alleging child abuse, the protected parties were

54. *See id.*

55. *See supra* note 52.

presumably shared children given the parties were married, the birthdates of the protected parties, the last names of the protected parties, and/or the wording of the allegations in the petition, e.g., “he hit our child”.

The differences in case outcomes and rates of granting ex parte orders including protected parties could be explained by difference in sample size. Fewer men filed petitions for orders of protection requesting protected parties than women, so it is possible the gendered differences found were due to the difference in number of cases reviewed for male and female petitioners. Additionally, as stated earlier, it was not always clear in the publicly-available case information whether the child listed as a protected party by the petitioner was also a child of the defendant. Due to this, another possible reason for the different rate of including protected parties by gender could be that more men than filed listed a protected party that was not a shared child with the defendant compared to women. If true, this would eliminate the need for the court to make an independent reasonable cause determination for the child. This would make it easier for the protected party to be included on the ex parte order and make it easier for the protected party to remain on the order at the contested hearing.

However, one possible reason for the differences in rates of granting ex parte orders and case outcomes at the contested hearing could be gender bias and credibility discounting. Leigh Goodmark, a professor at the University of Maryland Francis King Carey School of Law, found that courts view the testimony of women litigants, specifically in the context of domestic violence, as less credible than male litigants.⁵⁶ Credibility determinations are crucial in the context of ex parte order of protection hearings. At the ex parte hearing, only the petitioner is present and in a majority of cases the only form of evidence presented is the testimony of the petitioner.⁵⁷ Given the enormous role judicial credibility determinations play in how the court weighs testimony, credibility discounting can be outcome determinative at ex parte hearings. As such, if the court finds female litigants less credible, then it is less likely to find that they have met their burden of proof, as compared to their male counterparts. Thus, creating barriers to female petitioners’ ability to obtain orders of protection. This could explain why the court granted male petitioners ex parte orders that included the protected party at higher rates than female petitioners.

Gender bias and discrediting female survivor’s allegations could also explain the differing case outcomes for male and female petitioners at the contested hearing. Most of the cases reviewed were filed by petitioners seeking protection from their current or former heterosexual romantic partners, meaning most cases involved a female party opposing a male party. Given that survivors may not have access to corroborating evidence of the abuse,⁵⁸ it is possible that testimonial weight and credibility determinations played a large role in the outcome of the contested hearings. So, if the court finds male litigants more credible than female litigants it may give their testimony more weight than the female survivor or female defendant’s testimony. This could explain why the

56. Goodmark, *supra* note 3, at 745–46.

57. See ARIZ. R. PROT. ORD. P. 23; Epstein & Goodman, *supra* note 3, at 404–05.

58. Epstein & Goodman, *supra* note 3, at 404–05.

court did not remove any protected parties after the contested hearing for male litigants, but did so for female litigants in a significant number of cases. It may have found the male litigant's testimony regarding the danger the defendant posed to the protected party more compelling than the female defendant's testimony. Or in cases where the male litigant was the defendant, it may have found the male litigant's testimony regarding the lack of danger they posed to the protected party more compelling than the female petitioner's testimony.

Additionally, some of the differing case outcomes for cases involving similar allegations of child abuse could also be explained by gendered credibility discounting. In a review of thousands of family law cases, researchers found that courts credit female survivors' allegations of child abuse, child sexual abuse, or a combination thereof against fathers at incredibly low rates, between 13% - 27% depending on the type(s) of abuse alleged with lower rates of crediting when mothers alleged child sexual abuse.⁵⁹ In the four cases discussed above, the court upheld the order including a protected party for male petitioners but removed the protected parties for female petitioners after the contested hearings. In all of these cases, the petitioners' alleged either child physical or sexual abuse of the protected party, who was presumably a shared child, by the defendant (presumably a co-parent). The contrast in case outcomes for male and female petitioners in these cases could be explained by the court's discrediting of female petitioners' allegations of child abuse given the research demonstrating the court's low rate of believing mothers' allegations of child physical and sexual abuse against fathers.

The differing case outcomes regarding protected parties at the contested hearing for male and female petitioners with similar allegations will not be discussed further in this paper. However, these outcomes are mentioned to contextualize the other findings in this review. This review found gendered case outcomes in both the rates of granting ex parte orders including protected parties and outcomes regarding protected parties after the contested hearing. Given the gendered outcomes were twofold, these findings are less likely to be from random variability and chance. Instead, these findings are more plausibly explained by a gendered phenomenon such as gender bias and/or credibility discounting.

2. Inconsistencies in Judicial Decisions to Include Protected Parties

This review also found that there is a lack of consistency in what allegations the court found sufficient to include a protected party on an ex parte order. Consequently, similarly situated petitioners with similar fact patterns and allegations had varied case outcomes. The outcomes were so varied and lacking in uniform reasoning that there was no reliable predictor as to what fact patterns and allegations enabled protected parties to be included on ex parte orders.

For example, in two separate cases a woman filed a petition for an order of protection against her male romantic partner listing the petitioner's child as a protected party. In both cases the contents of the petition listed allegations of physical violence and assault that took place in front of the child. In one case,

59. Meier et al., *supra* note 4, at 11.

the court granted an ex parte order that included the child as a protected party and in the other it did not. In the case where the child was not included as a protected party, it was clear that the child was a child in common with the defendant because the final order mentioned an ongoing family law case between the parties involving the child. In the other case, the child was presumably also a child in common with the defendant, considering the parties were married and the child had the last name of the defendant. This is mentioned to point out that it is unlikely that the independent reasonable cause determinations required for a shared child could account for the outcome differences in these cases.

To further demonstrate the inconsistencies, in some cases, singular allegations of harassment or stalking, to the petitioner alone without mention of the protected party(ies), were sufficient to include protected parties on ex parte orders. While, in other cases, similar allegations were insufficient to include protected parties on ex parte orders.

Additionally, in one case, a woman filed a petition for an order of protection against her husband, alleging that he threatened her with weapons, threatened to kill her, and that he assaulted the children. In that case, the children were not included on the ex parte order as protected parties. The children were presumably the children of the defendant, given that the parties were married and the children had the last name of the defendant. However, in another case with similar allegations of abuse by the petitioner, but involving no allegations of abuse directed at the child, the child in common was included on the ex parte order as a protected party. There, a woman filed for an order of protection against her male romantic partner and requested protection for the child in common. In the contents of her petition she stated that the defendant threatened to kill her while brandishing a gun. In that case, the child was included on the ex parte order. The child was also a shared child with the defendant, as deduced from the provisions to coordinate parenting time that were made later in the case after the contested hearing.

The different outcomes in the two cases above are especially counterintuitive and inconsistent considering the independent reasonable cause findings and considerations the court must make before including a shared child as a protected party. As outlined in Part I, before the court can issue an ex parte order including a defendant's child as a protected party, it must find reasonable cause to believe the child has been harmed, may be harmed, or was involved in the domestic violence.⁶⁰ These independent reasonable cause findings required for a child in common make the case outcomes in the two cases above especially troubling. The court did not include the child as a protected party in the case that involved allegations of child abuse, but it did include the child as a protected party in the case where the allegations were almost exactly the same except there were no allegations of child abuse or even any allegations mentioning the child. Considering that courts must consider if the child was abused or involved in the abuse before including a shared child on the order, it is perplexing that the court included the child on the ex parte order in the case that did not allege abuse involving or mentioning the child and not in the case that specifically alleges

60. ARIZ. R. PROT. ORD. P. 5(b).

child physical abuse. These cases are only a few of the many examples of the court's inconsistencies. However, they represent the varied outcomes that in some cases were seemingly contrary to the statutory requirements and showcased the complete lack of judicial consensus over what allegations are sufficient to include a protected party on an ex parte order that were found in this review.

One explanation to account for these judicial inconsistencies is that there were nuances in individual cases, such as evidence aside from testimony presented in one case and not another, or a finding that the petitioner was credible in one case and not the other. However, in multiple instances, seemingly similar cases had varied outcomes, making the inconsistencies less easily dismissed as isolated differences in individual cases. This explanation is also less plausible when considering the nature and context of ex parte hearings and that there was no evidence attached to the petitions in any of the cases discussed above and in most of the cases reviewed. Further, ex parte hearings are incredibly short,⁶¹ and courts usually ask the petitioner to verify the contents of the petition.⁶² Additionally, due to the nature of domestic violence, survivors may not have corroborating evidence of the abuse.⁶³ Survivors may also be seeking an order of protection when they are emergently fleeing a violent relationship, which leaving the relationship may be the most dangerous time for survivors.⁶⁴ As such, survivors may be more concerned with securing immediate safety rather than gathering evidence to present at the ex parte hearing. Lastly, a majority of petitioners are self-represented and lack access to legal advice that might counsel them to present evidence corroborating the allegations, making it even less likely that any evidence, aside from testimony, will be presented.⁶⁵ Given this context and the expedient and emergent nature of ex parte hearings, petitioners often do not have evidence—aside from testimony—readily available to present. Therefore, courts are making initial reasonable cause determinations mostly on the basis of the sufficiency of the allegations in the petition, which again makes these inconsistencies less plausibly explained by individual case differences.

In light of these findings, Part III of this paper will argue that when petitioners request protected parties in Arizona they should be included on ex parte orders as a default and courts should rely on contested hearings instead of ex parte hearings to make the required findings regarding protected parties because of notions of fair and consistent administration of justice, procedural

61. Ex parte order of protection hearings are usually conducted in approximately 15 minutes or less in Pima County, Arizona. The time frame stated is based on the author's experience practicing in this jurisdiction and working and conversing with other legal practitioners, advocates, and petitioners in this jurisdiction.

62. ARIZ. R. PROT. ORD. P. 23(c).

63. Alesha Durfee, "Usually It's Something in the Writing": Reconsidering the Narrative Requirement For Protection Order Petitions, 5 UNIV. OF MIAMI RACE & SOC. JUST. L. REV. 469, 470-71 (2015) ("As acts of domestic violence often occur in private, there may be no witnesses to corroborate the victim's allegations. Additionally, victims may not report the violence or seek treatment from a health care provider and thus not have any external documentation.").

64. Veronica J. Joice, *A Restraining Order and A Handgun: North Carolina's Attempt to "Empower" Victims of Domestic Violence*, 50 HOW. L.J. 289, 300 (2006).

65. Epstein & Goodman, *supra* note 3, at 404.

processes, and public policy concerns. Parts IV and V will argue that protected parties should be included by default on ex parte orders of protection so as to not prematurely foreclose petitioners' access to the favorable outcomes that having a protected party on an order of protection can have in custody and juvenile dependency cases in Arizona.

PART III. COURTS IN ARIZONA SHOULD INCLUDE PROTECTED PARTIES ON EX PARTE ORDERS OF PROTECTION AS A DEFAULT BECAUSE OF NOTIONS OF FAIR ADMINISTRATION OF JUSTICE, PROCEDURAL PROCESSES, AND PUBLIC POLICY

A. Fair and Consistent Administration of Justice

Courts in Arizona should, as a default, include protected parties on ex parte orders of protection when it is requested by petitioners to comport with notions of fair and consistent administration of justice. Due to the nature of ex parte proceedings in Arizona, as outlined above, courts are making initial reasonable cause determinations at ex parte hearings based mostly on the allegations listed in the petition. The research in Part II indicates that there is no judicial consensus over what allegations in the petition are sufficient to include a protected party on an ex parte order. The following are some additional examples of varied case outcomes to further illustrate the inconsistencies in judicial decisions regarding protected parties.

In some instances, allegations that did not mention the protected party witnessing, being present for, or experiencing the abuse were sufficient to include the protected parties on the ex parte order and in some cases they were not. Additionally, in some cases ex parte orders including protected parties were granted when petitioners made allegations of physical violence in front of the protected party while for other cases with the same allegations the ex parte order did not include the protected party. The varied outcomes for cases involving the types of allegations above are specifically mentioned because these decisions are seemingly contrary to the independent reasonable cause statutory requirements for including a shared child on the order.

To further exemplify the court's lack of uniformity, this review has found differing rates of including protected parties on ex parte orders based on the gender of the petitioner.⁶⁶ Female petitioners were granted ex parte orders including protected parties 66% of the time, while male petitioners were granted ex parte orders including protected parties 74% of the time. So, similarly situated male and female petitioners did not always get congruent case outcomes regarding including protected parties on ex parte orders. The lack of uniformity and inconsistencies apparent in these decisions and the gendered differences in case outcomes are counter to principles of fair and consistent administration of justice because decisions to include protected parties on ex parte orders are seemingly arbitrary and there is no reliability or predictability in what allegations will be sufficient. To assure fair and consistent outcomes for indistinguishable cases in Arizona, the discretion at the ex parte hearing should be tapered by courts defaulting to include protected parties on ex parte orders of

66. *See supra* Part II.

protection when protected parties are requested by petitioners. This reform is needed, especially considering that when the court utilizes its discretion over whether to include protected parties it does so in ways that are gendered, lack reliability and consistency, and are seemingly contrary to the statutory requirements, as documented above and in Part II.

B. Procedural Processes

Defaulting to including protected parties at the ex parte hearing would rely on Arizona's existing procedural processes and the superior forum – the contested hearing – to determine if protected parties should remain on the order of protection.

The ex parte hearing is the initial hearing of the case and the stage at which the petition first becomes an order, if the court grants one. The case starts when the petitioner files a petition for an order of protection; then the petitioner alone attends the ex parte hearing, where the court either grants or denies the ex parte order.⁶⁷ Assuming the court grants the ex parte order, the defendant is then served with a copy of the order.⁶⁸ After the defendant is served, they can challenge the order of protection by requesting a contested hearing.⁶⁹ If the defendant chooses to contest, the court must schedule a hearing within ten business days of contestation.⁷⁰ At the contested hearing, both parties are able to testify, present evidence, and call witnesses.⁷¹

The contested hearing is a better forum than the ex parte hearing to determine if protected parties should be included on orders of protection. At contested hearings both parties are present, have meaningful notice, have the opportunity to be heard, and can testify and present evidence. In contrast, at ex parte hearings only the petitioner is present and hearings are incredibly short (fifteen minutes or less),⁷² and usually petitioners only verify the contents of their petition.⁷³ Ex parte hearings are also held on the same day the petition is filed, so petitioners have limited ability to prepare.⁷⁴ Petitioners are often unrepresented and therefore may lack access to legal advice: on what to expect when filing a petition, to bring corroborating evidence to the ex parte hearing, and what the requirements for obtaining an order of protection are.⁷⁵ Further, petitioners may be in a state of trauma and may be more concerned with meeting their basic needs

67. See ARIZ. R. PROT. ORD. P. 23.

68. ARIZ. REV. STAT. ANN. § 13-3602(I) (2023).

69. ARIZ. R. PROT. ORD. P. 23.38(a).

70. *Id.* § 13-3602(L).

71. ARIZ. R. PROT. ORD. P. 38(g)(1-3).

72. See *supra* note 62.

73. See ARIZ. R. PROT. ORD. P. 23.

74. In Pima County Superior Court when petitioners file petitions for orders of protection the clerk will notify the Judge assigned to hear ex parte orders of protection. Petitioners then have to wait for the Judge to be available and they could be waiting for a couple minutes or for a couple hours, depending on the Judges availability. However, once the Judge is available the ex parte hearing will take place.

75. See Epstein & Goodman, *supra* note 3, at 404; See Durfee *supra* note 64 at 476.

and securing safety after fleeing a violent relationship.⁷⁶ Given these conditions, petitioners may even be unaware that they must attend an ex parte hearing after filing the petition. Even if petitioners are aware they must attend a hearing, they may not be prepared given the context outlined above. Whereas with the contested hearing, petitioners are notified of the hearing a couple days to a week in advance assuring they have actual notice of the hearing and some, albeit limited, time to prepare. The notice a contested hearing affords allows petitioners some ability to consult with an attorney or gather evidence prior to the hearing. Therefore, the contested hearing is a better forum to assure petitioners have actual notice and a meaningful opportunity to be heard. Contested hearings are also a better evidentiary forum for the court to make its findings regarding whether protected parties should remain on the order of protection because at the contested hearing, unlike the ex parte hearing, both parties are present. With both parties able to testify and present evidence, the court is able to reach a decision in greater totality of the circumstances with more precision and accuracy, as compared to the ex parte hearing. The court is also more likely to consider corroborating evidence besides testimony at the contested hearing since it will be hearing from two parties instead of one and the parties will have notice enabling them time to prepare and gather evidence.

Utilizing the contested hearing instead of the ex parte hearing to make the required findings regarding protected parties would not burden the court's resources or the defendants' rights in a significant way. First, including protected parties on ex parte orders as a default is not a substantial shift from the court's existing practices. As mentioned above in Part II, courts are already including protected parties on ex parte orders about two thirds of the time. Further, the rate of defendants contesting orders of protection found in this review is about the same regardless of if the ex parte order included a protected party or not. In the 100 cases where petitioners were granted ex parte orders not including protected parties, only in 52% of cases did the defendant contest the order of protection. Meanwhile in the cases where petitioners were granted ex parte orders including protected parties the defendant contested in 53% of cases. Based on these findings, defaulting to including protected parties would not significantly burden the court's resources by drastically increasing the number of contested hearings requested by defendants.

Second, Arizona's existing structure and procedure for orders of protection already have provisions that protect defendants' rights. Defendants can request a contested hearing and, if they do, that hearing will occur no more than ten business days after it is requested.⁷⁷ So, including protected parties on ex parte orders as a default would not interfere with defendants' due process rights in a significant way. Further, any brief disruption to a defendant's parental rights defaulting to including protected parties can cause is justifiable considering the high risk of harm not including protected parties can have on children. Most requested protected parties are children, as exemplified in this review, and research demonstrates that intimate partner violence and child abuse often occur

76. See Durfee *supra* note 64 at 470-76.

77. ARIZ. REV. STAT. ANN. § 13-3602(L) (2023).

simultaneously, indicating a substantial portion of people who abuse their partners also abuse their children.⁷⁸ Decades of social science research has found that a child experiencing violence, and even witnessing violence, has significant adverse long standing impacts on their wellbeing.⁷⁹ Given this context, any brief disruption to a defendant's parental rights defaulting to including protected parties on ex parte orders can have is outweighed and justified by child safety concerns.

C. Public Policy

Including protected parties on ex parte orders as a default advances Arizona's public policy goal of child protection.⁸⁰ The public policy goal of protecting children is evident in both the laws for dependency proceedings and child protective services and in custody standards for family law cases in Arizona.⁸¹ For example, in title 8 of the Arizona Revised Statutes, establishing the department of child safety, the chapter declares the department's purpose is to protect children.⁸² In custody cases, legal decision-making and parenting time determinations are all made according to what is in the best interests of the child and the court considers all factors relevant to the child's physical and emotional wellbeing.⁸³ These subsections from two separate titles illuminate the state's interest in ensuring the safety and wellbeing of children within its jurisdiction. If courts wish to uphold the public policy aims of the state, then they should include protected parties on ex parte orders as a default.

The review in Part II found that most requested protected parties are children and that the court lacks consistency in what allegations it finds sufficient to include protected parties on ex parte orders. In light of both these findings and the ex parte hearing's limitation as an evidentiary forum, it is all but guaranteed the court has put children at risk of harm by not including them on ex parte orders. Not including a protected party on an ex parte order can have devastating impacts for immediate child safety and children's long term wellbeing. An order of protection prohibits the defendant/abuser from contacting or seeing the child, shielding the child from experiencing or witnessing further abuse. Consequently, not including a child on an order puts the child's safety in jeopardy because the defendant/abuser is still able to access the child, enabling them to commit future acts of abuse.

Witnessing or experiencing abuse not only puts children's immediate physical safety in peril, it also threatens their long-term wellbeing and quality of life. Research indicates that children exposed to domestic abuse, even if they do not experience the abuse directly, can experience negative physical and emotional repercussions.⁸⁴ Children who live in homes with domestic abuse can

78. See Gonzalez & Corbin, *supra* note 15, at 413-16.

79. *Id.* at 407.

80. ARIZ. REV. STAT. ANN. § 8-451 (2023).

81. *Id.*; § 25-403.03(B).

82. § 8-451.

83. § 403(A).

84. See Gonzalez & Corbin, *supra* note 15, at 413.

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develop trauma-related symptoms including depression, low self-esteem, and aggression.⁸⁵ Witnessing abuse in childhood is also an adverse childhood experience that can have negative consequences throughout life and is a risk factor for perpetuating violence in the future.⁸⁶

Additionally, there are high rates of simultaneous partner and child abuse.⁸⁷ Domestic abuse is often associated with other forms of abuse like child abuse and sexual abuse.⁸⁸ Statistics show that more than half of male abusers will abuse children as well as their partners.⁸⁹ So, children living in a household with domestic abuse have an increased likelihood of experiencing abuse themselves and almost inevitably will witness abuse.

In light of the high risk of harm perpetrators of domestic abuse can pose to children, the court should prioritize child safety by defaulting to include protected parties on ex parte orders. Defaulting to including protected parties errs on the side of caution and child protection by utilizing a better forum (the contested hearing) to decide if protected parties should remain on orders, ensuring children's safety is not arbitrarily placed at risk because of the court's inconsistent practices and the ex parte hearing's limitations. Therefore, making child safety a primary consideration and advancing the state's public policy goals of child protection.

PART IV. COURTS IN ARIZONA SHOULD INCLUDE PROTECTED PARTIES ON EX PARTE ORDERS OF PROTECTION BECAUSE OF THE IMPLICATIONS HAVING A PROTECTED PARTY ON AN ORDER OF PROTECTION CAN HAVE ON CUSTODY OUTCOMES

A. Background and Overview of Custody Laws in Arizona

In Arizona, child "custody"⁹⁰ awards include determinations about both parenting time and legal decision-making.⁹¹ Parenting time is the schedule of time during which each parent has access to a child.⁹² Legal decision-making is the legal right and responsibility to make all non-emergency legal decisions for a child, including education, health care, religious training, and personal care decisions.⁹³ In custody cases, the court may award either joint or sole legal

85. *Id.*

86. *Id.* at 417.

87. *Id.* at 416.

88. *Id.* at 415.

89. *Id.*

90. Arizona's statutes do not use the term "custody." Arizona makes orders for what is colloquially known as custody by making orders for legal decision-making and parenting time of the child. However, practitioners in this jurisdiction still use the term informally to refer to cases involving parenting time and legal decision-making issues. This paper will use the term custody to refer to these types of cases where parenting time and/or legal decision-making is at issue to make the author's argument more widely and readily understood to practitioners in this and other jurisdictions.

91. *See* ARIZ. REV. STAT. ANN. §§ 25-401, 403 (2023).

92. § 25-401(5)).

93. § 25-401(3).

decision-making to parents.⁹⁴ Joint legal decision-making means both parents share decision-making authority over the child.⁹⁵ Sole legal decision-making means one parent has the legal right and responsibility to make major decisions for the child.⁹⁶

The court makes legal decision-making and parenting time awards under the best interests of the child standard.⁹⁷ Under the best interest of the child standard, the court considers: (1) the relationships between the parent and the child; (2) the interaction and interrelationship of the child with their parents, siblings and any other person who may significantly affect the child's best interest; (3) the child's adjustment to home, school and community; (4) the child's wishes, if they are of suitable age and maturity; (5) the mental and physical health of all individuals involved; (6) which parent is more likely to allow the child frequent, meaningful and continuing contact with the other parent; (7) whether one parent acted in bad faith with regard to the custody proceeding (misleading the court, delaying proceeding, etc.); (8) whether there has been domestic violence or child abuse pursuant to Arizona Revised Statutes title 25, section 403.03; (9) if there was coercion or duress used by a parent in obtaining an agreement regarding legal decision-making or parenting time; and (10) whether either parent was convicted of an act of false reporting of child abuse or neglect.⁹⁸

In addition to these factors, in determining legal decision-making, the court shall also consider: (1) the agreement or lack of an agreement by the parents regarding joint legal decision-making; (2) whether a parent's lack of an agreement is unreasonable or is influenced by an issue not related to the child's best interests; (3) the past, present and future abilities of the parents to cooperate in decision-making about the child; and (4) whether the joint legal decision-making arrangement is logistically possible.⁹⁹

1. Domestic Violence as a Consideration Under the Best Interests Standards

One of the factors considered under the best interests of the child standard is whether there has been domestic violence or child abuse as defined in section 403.03.¹⁰⁰ Under 403.03(A), if the court determines that there has been "*significant*" domestic violence or "*a significant history* of domestic violence" the court cannot award joint legal decision-making to the parents, thus requiring it to order sole legal decision-making to one of the parents.¹⁰¹ If the court finds there has been significant domestic violence or a significant history of domestic

94. § 25-403.01(A).

95. § 25-401(2).

96. § 25-401(6).

97. § 25-403(A).

98. *Id.*

99. § 25-403.01(B)(1)–(4).

100. § 25-403(A)(8).

101. § 25-403.03(A); *see also* Hurd v. Hurd, 219 P.3d 258, 261 (Ariz. Ct. App. 2009); DeLuna v. Petitto, 450 P.3d 1273, 1276 (Ariz. Ct. App. 2019).

violence it will usually award sole legal decision-making to the survivor parent.¹⁰² However, doing so is not statutorily required, nor is the court expressly precluded from awarding sole legal decision-making to the abusive parent by statute.¹⁰³ Yet, because evidence of domestic violence is considered contrary to the best interests of the child,¹⁰⁴ it usually awards sole legal decision-making to the non-abusive parent upon a finding of significant domestic violence or a significant history of domestic violence.¹⁰⁵

i. What is Considered Significant Domestic Violence is Not Defined

What constitutes “significant domestic violence” and “a significant history of domestic violence” is not defined in Arizona’s statute defining domestic violence, Arizona Revised Statutes title 13, section 3601, or in title 25, subsection 403.03(A), which gives the trial courts ample discretion to determine what is significant domestic violence or a significant history of domestic violence.

In *DeLuna v. Petitto*, the Arizona Court of Appeals noted, “[T]he [trial] court has the discretion to weigh the evidence and determine the degree of the domestic violence’s “significance” for the purpose of § 25-403.03(A).”¹⁰⁶ In *DeLuna* the appellate court reasoned that the trial court was within its discretion to find that the domestic violence was not significant or that there was not a significant history of domestic violence, despite the father having committed an aggravated assault that constituted domestic violence as defined in section 3601.¹⁰⁷ In addition, the father stalked and harassed the mother, leading her to obtain an order of protection in 2017, and the father repeatedly violated the protective order by coming to the mother’s house and “sending what the court described as ‘troubling[,]’ ‘offensive and disrespectful’ text messages.”¹⁰⁸

There is also no set standard for determining what is significant domestic violence or a significant history of domestic violence, which only compounds the trial court’s discretion. In an unpublished case, *Rodriguez v. Reynolds*, the trial court did not find significant domestic violence or a significant history of domestic violence.¹⁰⁹ In determining if there was significant domestic violence the trial court applied the following three-factor test: “(1) [t]he seriousness of the particular incident of domestic violence, (2) the frequency or pervasiveness of the domestic violence, (3) and the passage of time and its impact.”¹¹⁰ The

102. *Garcia v. Robinson*, No. 1 CA-CV 19-0726 FC, 2021 WL 1310942, ¶ 4 (Ariz. Ct. App. Apr. 8, 2021); *Smith v. Smith*, No. 1 CA-CV 20-0159 FC, 2021 WL 1759207, ¶ 14 (Ariz. Ct. App. May 4, 2021); *In re Marriage of Morris & Mandel*, No. 2 CA-CV 2022-0083-FC, 2023 WL 3066247 (Ariz. Ct. App. Apr. 25, 2023).

103. § 403.03(A).

104. ARIZ. REV. STAT. ANN. § 25-403.03(B)(2023).

105. *See supra* note 102.

106. *DeLuna*, 450 P.3d at 1277.

107. *Id.* at 1276–78.

108. *Id.* at 1266.

109. *See Rodriguez v. Reynolds*, No. 1 CA-CV 21-0044 FC, 2021 WL 4621142, ¶¶ 10–15 (Ariz. Ct. App. Oct. 7, 2021).

110. *Id.* ¶ 12 (quoting the trial court).

appellate court noted that there is no statutory definition of significant for domestic violence, and the superior court is left within its discretion to weigh the evidence and determine the degree of significance.¹¹¹ It also indicated that there is no uniform test to determine significance.¹¹² When discussing the factors the trial court used to determine significance, the court stated, “[T]hese factors seem reasonable’ for defining *significant* in the context of domestic violence. And, while we acknowledge there may be other reasonable approaches, the test the court applied here was not inappropriate and was within its discretion.”¹¹³

However, despite the trial court’s ample discretion to determine if the domestic violence is significant or if there has been a significant history of domestic violence, one limit to the court’s discretion is it must rely on the definition of domestic violence provided in section 3601.¹¹⁴ In *Engstrom v. McCarthy*, the appellate court reversed the trial court’s award of sole legal decision-making to the mother after finding that the trial court’s determination that there was significant domestic violence was not clearly relying on only the statutory definition of domestic violence in section 3601.¹¹⁵ The trial court stated its finding of significant domestic violence as follows:

“[T]he domestic violence involved in this case is significant. It involves coercive control and using the parties’ children to further traumatize Mother. While the court does not find sexual violence occurred, the Court does find Father exerted control over Mother by encouraging Mother to participate in online sexual activity, have sex with prostitutes, threatening to have affairs or leave Mother if Mother failed to gratify Father, and convincing Mother that she was the one who tried to ‘control’ Father. Further, Father’s actions in driving by Mother’s workplace with the children in the car to ensure Mother was at work, buying clothing for the children with the same-sounding name as Mother’s online porn name, exploiting his telephonic contact with the children, and otherwise trying to manipulate the children in order to further control (i.e., victimize) Mother is untenable and intolerable. In the spectrum of domestic violence, the acts in this case are significant.”¹¹⁶

The appellate court reasoned that it was not clear if the trial court was only relying on acts defined as domestic violence under section 3601 to conclude that there had been significant domestic violence. The trial court mentioned acts that did not constitute domestic violence under section 3601, such as the father’s controlling behavior and threats to be unfaithful if the mother didn’t comply with

111. *Id.* ¶ 13.

112. *See id.*

113. *Id.* (partially quoting *DeLuna*, 450 P.3d at 1277, n.6)(emphasis in original)(citation omitted).

114. *Engstrom v. McCarthy*, 411 P.3d 653, 657–58 (Ariz. Ct. App. 2018).

115. *Id.* at 658.

116. *Id.* at 657 (quoting the trial court explaining its findings in the case).

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his demands.¹¹⁷ So, despite courts having ample discretion to determine if the domestic violence is significant or if there has been a significant history of domestic violence, courts are still bound to consider only acts that fit under the limited definition of domestic violence listed in section 3601.¹¹⁸

ii. *If the Abuse is Not Considered Significant There Could Still be a Finding of Domestic Violence*

If the court does not find that there has been significant domestic violence or a significant history of domestic violence it could still find that there has been domestic violence, which still impacts custody decisions.¹¹⁹ Domestic violence under title 25, subsection 403.03(D) is defined as when a person: (1) intentionally, knowingly or recklessly causes or attempts to cause sexual assault or serious physical injury; (2) places a person in reasonable apprehension of imminent serious physical injury to any person; (3) engages in a pattern of behavior for which a court may issue an ex parte order to protect the other parent who is seeking child custody or to protect the child and the child's siblings.¹²⁰ In determining if someone has committed an act of domestic violence, the court shall consider all relevant factors, including: (1) findings from another court of competent jurisdiction; (2) police reports; (3) medical reports; (4) records of the department of child safety; (5) domestic violence shelter records; (6) school records; and (7) witness testimony.¹²¹

If the court finds that there has been domestic violence, as defined in subsection 403.03(D), that finding creates a rebuttable presumption that it is contrary to the child's best interests to award sole or joint legal decision-making to the abusive parent.¹²² However, this presumption does not apply if there are findings that both parents have committed domestic violence.¹²³

If the presumption does apply, it can be rebutted. If it is rebutted, the court can award sole or joint legal decision-making to the abusive parent. However, the court must make specific findings that there is sufficient evidence to rebut the presumption that the award would be contrary to the child's best interests before such an award is granted.¹²⁴ To determine if the abusive parent has rebutted the presumption the court shall consider all of the following: (1) whether

117. *Id.*

118. Domestic violence under ARIZ. REV. STAT. ANN. § 13-3601 (2023), as previously noted, includes: assault, aggravated assault, harassment, stalking, disorderly conduct, interfering with judicial proceedings, cruelty to animals, kidnapping, any act that is a dangerous crime against children, homicides, endangerment, threatening or intimidating, custodial interference, unlawful imprisonment, sexual assault, unlawful disclosure of images depicting states of nudity or specific sexual activity, criminal trespass, criminal damage, preventing the use of a telephone in an emergency, use of telephonic communication to harass or intimidate, and surreptitious photographing or filming.

119. ARIZ. REV. STAT. ANN. § 25-403.03(D) (2023).

120. *Id.*

121. § 25-403.03(C)(1)–(7).

122. § 25-403.03(D); *see also* DeLuna v. Petitto, 450 P.3d 1273, 1276–77 (Ariz. Ct. App. 2019).

123. § 25-403.03(D).

124. § 25-403.03(E); *see also* DeLuna, 450 P.3d at 1277–78..

the parent has demonstrated that being awarded sole or joint legal decision-making or substantially equal parenting time is in the child's best interests; (2) whether the parent has successfully completed a batterer's prevention program; (3) whether the parent has successfully completed a program of alcohol or drug abuse counseling; (4) whether the parent has successfully completed a parenting class; (5) if the parent is on probation, parole or community supervision, whether the parent is restrained by a protective order that was granted after a hearing; (6) whether the parent has committed any further acts of domestic violence.¹²⁵

iii. *Courts Should Include Protected Parties On Ex Parte Orders As a Default Considering The Favorable Outcomes Having an Order of Protection Can Have for Survivors and Their Children in Custody Cases In Arizona*

A survivor having an order of protection against their abusive partner—specifically one that includes a shared child on the order as a protected party—can lead to more favorable outcomes for survivors and their children in custody proceedings. An order of protection including a protected parties increases the likelihood the court will find domestic violence, significant domestic violence, or a significant history of domestic violence. Improving the chances survivors will retain custody of their children given the bars to, or presumptions against, abusers getting legal decision-making upon a finding of domestic violence, significant domestic violence, or a significant history of domestic violence. These favorable outcomes are vital in wake of the prevalent inequity survivors experience in family courts. Research indicates that family courts routinely disbelieve survivors' allegations of abuse and survivors often receive negative outcomes in family court proceedings, such as losing custody to their abuser.¹²⁶ In light of this, Arizona courts should default to including protected parties on ex parte orders. So as to not prematurely and arbitrarily limit survivors' access to the positive and protective implications these orders can have, especially considering the court's inconsistent practices regarding including protected parties, as documented in Part II. The following sections will detail the positive implications an order of protection can have for survivors and delve more deeply into the inequities survivors experience in family courts.

1. *Having an Order of Protection Increases The Likelihood The Court Will Find Domestic Violence, Significant Domestic Violence, or Significant History of Domestic Violence*

First, having an order of protection can positively impact custody determinations because orders of protection increase the likelihood the court will find domestic violence, significant domestic violence, or significant history of domestic violence. Courts in Arizona are permitted to consider findings from another court of competent jurisdiction to determine if significant domestic violence, a significant history of domestic violence, or domestic violence

125. § 25-403.03(E).

126. See Meier et al., *supra* note 4.

occurred for the purposes of custody awards. Pursuant to Arizona Revised Statutes title 25, subsection 403.03(C), the court is expressly permitted to consider findings from another court of competent jurisdiction in determining if domestic violence occurred for the purposes of custody.¹²⁷ In a memorandum decision, *Garcia v. Robinson*, the Arizona Court of Appeals interpreted that statute to also allow courts to consider findings from another court of competent jurisdiction in determining if there was significant domestic violence.¹²⁸ There, the appellate court affirmed the trial court's finding that the domestic violence was significant, thus precluding an award of joint legal decision-making.¹²⁹ In finding that there had been significant domestic violence, the trial court took judicial notice of the father's felony aggravated assault conviction for strangling the mother to where she lost consciousness and had difficulty swallowing following the strangulation.¹³⁰ On appeal, the appellate court noted that the trial court was permitted to consider findings from another court of competent jurisdiction in determining if a person committed significant domestic violence for the purposes of custody awards pursuant to subsection 403.03(C).¹³¹

Orders of protection are findings from "another court of competent jurisdiction," therefore courts can consider them for custody determinations. In *Olesen v. Daniel*, the Arizona Court of Appeals stated the trial court is permitted to consider findings from another court of competent jurisdiction after the trial court found that there had been domestic violence when considering two orders of protection and an additional family law order.¹³²

The record of findings an order of protection creates increases the chances, and in some cases assures, the court will find domestic violence or significant domestic violence for custody determinations. In *Olesen*, the trial court found that the father had committed acts of domestic violence and this created a rebuttable presumption against the father having legal decision-making.¹³³ On appeal, the appellate court vacated the trial court's custody order, because the trial court erred by failing to make specific findings on the record as to if the father rebutted the presumption that him having sole or joint legal decision-making is contrary to the best interests of the child because of the domestic violence.¹³⁴ However, in its discussion, the appellate court affirmed the trial courts finding that father had committed an act of domestic violence that triggered the presumption against father having sole or joint legal decision-making, reasoning: "[O]n three prior occasions (memorialized in two protective orders and the 2016 Order), courts found Father committed acts of domestic violence against Mother. The superior court correctly found the three prior orders

127. § 25-403.03 (C)(1).

128. *Garcia v. Robinson*, No. 1 CA-CV 19-0726 FC, 2021 WL 1310942, ¶ 3 (Ariz. Ct. App. Apr. 8, 2021).

129. *See id.* ¶ 1.

130. *Id.* ¶ 3.

131. *Id.*

132. *Olesen v. Daniel*, 484 P.3d 139, 143 (Ariz. Ct. App. 2021)

133. *Id.*

134. *Id.* at 143–45.

established a statutory presumption against Father having legal decision-making authority for the children.”¹³⁵

There the orders of protection were dispositive on the issue of whether the father had committed domestic violence for the purposes of custody.¹³⁶ The appellate court held that issue preclusion barred the father from re-litigating whether he had committed acts of domestic violence.¹³⁷ The court reasoned that the courts in the orders of protection and family law cases had already found, after conducting hearings where the father had a full opportunity to participate, that the father had committed acts of domestic violence.¹³⁸ This case illuminates the substantial, and in some cases dispositive, effect that orders of protection can have on findings of domestic violence or significant domestic violence for custody determinations in Arizona.

An order of protection creates a record of findings of domestic violence that courts can consider in determining if domestic violence or significant domestic violence has occurred for the purposes of custody. Therefore, having an order of protection makes it more likely, and in cases where issue preclusion bars the abusive parent from re-litigating the findings of domestic violence, guarantees that courts will find that there has been domestic violence, if not significant domestic violence, for the purposes of custody determinations. A finding of domestic violence or significant domestic violence is critical for survivors because it increases the likelihood that they will retain custody of the child due to the bars or presumptions against the abuser getting legal decision-making that are triggered upon a finding of domestic violence or significant domestic violence.

2. An Order of Protection That Includes a Protected Party is a Factor Weighing Towards A Finding of Significant Domestic Violence

Second, having an order of protection that includes a shared child as a protected party is a factor that weighs in favor of a finding of significant domestic violence or a significant history of domestic violence. As previously mentioned, trial courts have ample discretion over what constitutes significant domestic violence or a significant history of domestic violence. Due to this breadth of discretion, there are inconsistencies in what is considered significant or a significant history of domestic violence. However, children witnessing or being involved in the abuse is a factor in favor of a determination that the domestic violence is significant or that there is a significant history of domestic violence.¹³⁹

In an unpublished opinion, *Petrizze v. Johnson*, the Arizona Court of Appeals held the trial court did not abuse its discretion in awarding joint legal decision-making to the parents because the record supported its findings that

135. *Id.* at 143.

136. *See id.*

137. *Id.* at 143–44.

138. *Id.*

139. *See Petrizze v. Johnson*, No. 1 CA-CV 18-0401 FC, 2019 WL 1306733, ¶ 12 (Ariz. Ct. App. Mar. 21, 2019).

there was no significant domestic violence.¹⁴⁰ The trial court, in finding that there was no significant domestic violence, reasoned that “‘the domestic violence in this case [was] dated, and [did] not involve the children directly,’ and ‘[a]ll incidents were remote in time and involved (with the exception of one choking allegation) a verbal rather than a physical altercation.’”¹⁴¹ This reasoning indicates that children being involved in the abuse is a factor weighing towards the abuse being significant. Further, to indicate that children witnessing abuse and/or experiencing or being involved in the abuse is a factor weighing towards the abuse being significant, compare two similar fact patterns: in one case, a child witnessed the abuse, and in another, the child presumably did not. In an unpublished decision, *Smith v. Smith*, the court found that there was significant domestic violence where the child witnessed the father assault mother, which later resulted in the father pleading guilty to a misdemeanor assault.¹⁴² In *Rodriguez v. Reynolds*, the father also pled guilty to a misdemeanor assault, but in that case there was no mention of a child being present or witnessing the assault of the mother, so the child presumably was not involved.¹⁴³ In *Rodriguez*, the trial court held that the domestic violence was not significant.¹⁴⁴ Additionally, in *Garcia v. Robinson*, the trial court held that the domestic violence was significant where the father was convicted of felony aggravated assault for strangling the mother, in the presence of the child, to where she lost consciousness and had difficulty swallowing following the strangulation.¹⁴⁵

Therefore, children witnessing or being involved in the abuse is a factor weighing in favor of a determination that there is significant domestic violence. Thus, having a child as a protected party on an order of protection can increase the likelihood of a finding of significant domestic violence. As mentioned above, in order for a shared child to be included on an order of protection as a protected party the court must make additional findings and considerations.¹⁴⁶ The court must find reasonable cause to believe that physical harm may result or has resulted to the child, or that the alleged acts of domestic violence involved the child.¹⁴⁷ The court is also obligated to consider: (1) whether the child may be harmed if the defendant is permitted to maintain contact with the child; and (2) whether the child may be endangered if there is contact outside the plaintiff’s presence.¹⁴⁸

In light of these required findings, having a shared child included as a protected party on an order of protection means the court found reasonable cause

140. *Id.*

141. *Id.* (quoting the trial court’s findings)..

142. *Smith v. Smith*, No. 1 CA-CV 20-0159 FC, 2021 WL 1759207, ¶¶ 2, 14 (Ariz. Ct. App. May 4, 2021).

143. *See Rodriguez v. Reynolds*, No. 1 CA-CV 21-0044 FC, 2021 WL 4621142 (Ariz. Ct. App. Oct. 7, 2021).

144. *See id.* ¶¶ 10–15.

145. *Garcia v. Robinson*, No. 1 CA-CV 19-0726 FC, 2021 WL 1310942, ¶¶ 3–4 (Ariz. Ct. App. Apr. 8, 2021).

146. ARIZ. R. PROT. ORD. P. 5(b); ARIZ. R. PROT. ORD. P. 35(b).

147. ARIZ. R. PROT. ORD. P. 5(b).

148. ARIZ. R. PROT. ORD. P. 35(b).

to believe that the child was either involved in or experienced the abuse or may experience abuse. Consequently, that order creates a record that the child was or may be involved in the abuse that the court can consider in determining if there was domestic violence, significant domestic violence, or a significant history of domestic violence for the purposes of custody.¹⁴⁹ Given that whether the child was involved in the abuse is a factor weighing in favor of a finding of significant domestic violence, having an order of protection that, in effect, creates a record that the child was involved in the abuse weighs in favor of a determination that the domestic violence was significant.¹⁵⁰ A finding that there was significant domestic violence, or a significant history of domestic violence would preclude the abusive parent from having joint legal decision-making, thus increasing the likelihood the survivor would retain custody.¹⁵¹

3. Courts in Arizona Should Include Protected Parties on Ex Parte Orders As A Default Considering The Inequities Survivors Experience In Family Courts

As mentioned above, having an order of protection including a protected party can have positive impacts for survivors in custody cases because it increases the likelihood of a finding of domestic violence or significant domestic violence. The favorable outcomes that having an order of protection including a protected party can have are even more important considering the prevalence of inequity in family courts. Family courts have been well documented as posing an uphill battle for survivors, and often family court intervention can lead to unfavorable outcomes for survivors. Research has shown that family courts fail to take allegations of abuse and domestic violence that surface through custody disputes seriously.¹⁵² A national study of thousands of family law cases found that a mother's claims of abuse of any kind including domestic abuse, child abuse, child sexual abuse, or a combination thereof against fathers was credited by courts less than half of the time.¹⁵³ The research indicates that family law

149. ARIZ. REV. STAT. ANN. § 25-403.03(C)(1) (2023).

150. See *Petrizze v. Johnson*, No. 1 CA-CV 18-0401 FC, 2019 WL 1306733 (Ariz. Ct. App. Mar. 21, 2019); *Smith v.*

Smith, No. 1 CA-CV 20-0159 FC, 2021 WL 1759207 (Ariz. Ct. App. May 4, 2021); *Rodriguez v. Reynolds*, No. 1

CA-CV 21-0044 FC, 2021 WL 4621142 (Ariz. Ct. App. Oct. 7, 2021). However, having an order of protection with a child as a protected party alone is not dispositive because of the court's ample discretion over what is significant domestic violence or a significant history of domestic violence. In *Brumley v. Brumley*, the trial court found that the domestic violence was not significant and that the father rebutted the presumption that joint legal decision making would be contrary to the best interests of the child despite mother having an order of protection that expired a year prior with the child listed as a protected party. In finding that the abuse was not significant the court reasoned that the incidents of abuse occurred while the mother was pregnant with the child and that the incidents were verbal altercations and personal property damage. See *Brumley v. Brumley*, No. 1 CA-CV 17-0498 FC, 2018 WL 2208037 (Ariz. Ct. App. May 5, 2018).

151. § 25-403.03(A).

152. Silberg & Dallam, *supra* note 4, at 141.

153. Meier et al., *supra* note 4, at 10–16.

courts disbelieve female survivors' allegations of abuse more often than not, and rates of believing or crediting survivors' allegations of abuse are even lower when they allege child abuse.¹⁵⁴

Studies have also found that family courts often treat mothers who allege domestic abuse and child abuse during custody cases poorly, and consequently they receive unfavorable outcomes such as losing custody to their abuser.¹⁵⁵ In 2008 the Leadership Council on Child Abuse and Interpersonal Violence used empirical data to estimate that 58,000 children a year are placed in the custody of an abuser.¹⁵⁶ Abusers getting custody is a serious issue that puts children at incredibly high, and in some cases life threatening, risk of harm because intimate partner violence and child abuse are often occurring simultaneously.¹⁵⁷ In 2018 Congress found that, in the last ten years, at least 653 children were murdered in the United States by a parent involved in a family law case, often after some form of visitation was given by the court to that parent over objections from the protective co-parent.¹⁵⁸ These findings led Congress to pass House Resolution 72, which urged family courts to safeguard children.¹⁵⁹

In addition to children being at risk when abusers retain custody, survivors are also at risk because abusers use children to continue to exert power and control over survivors, perpetuating cycles of violence. Therefore, when family courts grant custody to abusers, it puts survivors and their children at an increased risk of continuing to experience violence and abuse.

The realities of what survivors experience in family courts makes it all the more pertinent for courts to include protected parties on ex parte orders of protection as a default. Not including protected parties on ex parte orders prematurely forecloses survivors' ability to access and use orders of protection as a tool to protect their children and to combat the inequities they experience in family courts. Not defaulting to include protected parties on ex parte orders can unjustly limit survivors' access to the child protective functions of orders especially considering the findings in this review of the court's seemingly arbitrary and inconsistent decisions to include protected parties on ex parte orders. Therefore, to not prematurely and arbitrarily limit survivors' access to the positive and protective impacts an order including a protected party can have in light of the discrediting and barriers survivors are experiencing, courts in Arizona should default to including protected parties on ex parte orders.

PART V. COURTS IN ARIZONA SHOULD INCLUDE PROTECTED PARTIES ON EX PARTE ORDERS OF PROTECTION BECAUSE OF THE IMPLICATIONS HAVING A PROTECTED PARTY ON AN ORDER OF PROTECTION CAN HAVE IN JUVENILE

154. *See id.*

155. Silberg & Dallam, *supra* note 4, at 141.

156. *Id.*

157. *See* Gonzalez & Corbin, *supra* note 15.

158. Silberg & Dallam, *supra* note 4, at 141.

159. *Id.*

DEPENDENCY PROCEEDINGS

This section will first discuss the juvenile dependency process and grounds for a dependency action, then it will discuss the favorable outcomes that having an order of protection including a protected party can have for survivors in the context of those proceedings.

A. Juvenile Dependency Process

Generally, the juvenile dependency process is the legal process by which the state and courts intervene when there has been an allegation of abuse or neglect of a child.¹⁶⁰ The process aims to ensure the child's safety and wellbeing.¹⁶¹ A dependency proceeding usually begins when the Department of Child Safety, or the jurisdictional equivalent, files a petition for dependency after investigating an allegation of child maltreatment or abuse and after an initial determination that the situation is severe enough for the state to intervene.¹⁶² Once a dependency petition has been filed, and in the event that it would be unsafe for the child to remain with the parents, the child is usually taken out of the care of their parents or guardians and placed in temporary out-of-home care.¹⁶³

Juvenile dependency cases can last for years,¹⁶⁴ however they usually end with either the child being returned to the parent(s), if the court finds that the parent(s) complied with their case plan and that returning the child would not create a substantial risk of harm to the child, or in termination of the parent's parental rights, or the child aging out of the system.¹⁶⁵

B. Grounds for Juvenile Dependency in Arizona

In Arizona, the state can intervene in the family through a dependency proceeding if the child is: (1) in need of proper and effective parental care and control and who has no parent or guardian, or one who has no parent or guardian willing to exercise or capable of exercising such care and control; (2) destitute or who is not provided with the necessities of life, including adequate food, clothing, shelter or medical care; or (3) living in an unfit home by reason of abuse, neglect, cruelty or depravity by a parent, a guardian or any other person having custody or care of the child.¹⁶⁶

Under title 8, subsection 201(15)(a)(i), the state can intervene if the child lacks a parent willing and able to exercise proper and effective parental care and

160. See Kyndra C. Cleveland & Jodi A. Quas, *Parents' Understanding of the Juvenile Dependency System*, 24 PSYCH. PUB. POL'Y & L. 459 (2018).

161. *Id.* at 459.

162. *See id.* at 460.

163. *See id.*; See ARIZ. REV. STAT. ANN. §§ 8-821, 8-825 (2023); Arizona Department of Child Safety, *Chapter 3: Case Planning and Services*, May 7, 2023, [Chapter 03 : Case Planning and Services \(azdcs.gov\)](https://azdcs.gov/Chapter-03-Case-Planning-and-Services).

164. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, CHILD WELFARE OUTCOMES REPORT (2023).

165. *See* ARIZ. REV. STAT. ANN. §§ 8-845, -862 (2023).

166. § 8-201(15)(a).

control,¹⁶⁷ “or in other words, lacks a fit parent.”¹⁶⁸ Proper and effective parental care and control includes preventing the child from experiencing sexual as well as other physical abuse, which includes preventing the child from experiencing abuse by a co-parent.¹⁶⁹ Thus, making one parent’s abuse of the child grounds for a dependency proceeding against both parents.

Further, one parent not being able to prevent the child from experiencing abuse by a co-parent could be grounds for a dependency action against the parent “who failed to protect” even when that “failure” is for reasons seemingly out of their control.¹⁷⁰ In *Pima Cty. Juv. Action No. J-77188*, a trial court gave visitation to an abusive father in a family law case and the appellate court determined that the order giving visitation to the father made the mother legally incapable of protecting the child from further abuse by the father, holding that the custody order and the inability to legally protect the child formed a legally sufficient basis for a dependency petition against the mother.¹⁷¹ Thus, being legally incapable of protecting a child from the abusive parent could be grounds for a dependency action against the protective co-parent.¹⁷² In *Sofia C. v. Department of Public Safety*, the appellate court upheld the juvenile court’s order finding the child dependent as to the mother.¹⁷³ The juvenile court, in finding the child dependent as to the mother, relied in part on the mother’s legal inability to protect the child from the father because of the lack of custody orders in the family law case and the threat that the father posed to the child’s safety given his history of domestic violence, substance use, and mental health issues.¹⁷⁴

C. Having an Order of Protection Including a Protected Party Can Have Favorable Outcomes For Survivors in Juvenile Dependency Cases In Arizona

Having a shared child as a protected party on an order of protection can lead to more favorable outcomes for survivors in juvenile dependency cases in Arizona. Having an order of protection with a shared child as a protected party could protect survivors from a juvenile dependency proceeding brought under “failure to protect” grounds. Having an order of protection with a shared child as a protected party prohibits the abuser/ defendant from contacting or seeing the

167. § 8-201(15)(a)(i)

168. Donald W. v. Department of Child Safety, 444 P.3d 258, 267 (Ariz. Ct. App. 2019).

169. *In re Appeal in Pima Cnty. Juv. Action No. J-77188*, 678 P.2d 970, 973 (Ariz. Ct. App. 1983); *In re Appeal in Pima Cnty. Juv. Dependency Action No. 96290*, 785 P.2d 121, 125 (Ariz. Ct. App. 1990).

170. *In re Action No. J-77188*, 678 P.2d at 973–74.

171. *Id.*

172. *Id.*

173. *Sofia C. v. Dep’t of Child Safety*, No. 2 CA–JV 2015–0084, 2015 WL 5332227, ¶ 1 (Ariz. Ct. App. Sept. 14, 2015).

174. *Id.* ¶¶ 16–17. However, lacking legal custody of a child alone, when the child lives with the parent and the parent is otherwise fit and capable of exercising parental control does not render a parent incapable of exercising proper parental care and control in order to form a sufficient basis for a dependency petition. See *Meryl R. v. Ariz. Dept. of Econ. Sec.*, 992 P.2d 616, 617–18 (Ariz. Ct. App. 1999).

shared child.¹⁷⁵ As such, that order of protection gives survivors a legal means to prevent the abuser from further harming or abusing the child, thus protecting the child. Having this order of protection legally protecting the child also insulates a survivor from a dependency case brought under failure to protect grounds. Given that failure to protect the child from abuse, including being legally incapable of protecting the child from abuse, could form the basis of a juvenile dependency petition in Arizona.¹⁷⁶

Further, a survivor avoiding a juvenile dependency case under failure to protect grounds would not only benefit the survivor, but it would also benefit their child. It would benefit survivors by avoiding the temporary or permanent disruption to their custody and parental rights and by avoiding the stress of state intervention. Additionally, it would benefit the child because removal of the child from the survivor's care through a dependency proceeding can negatively impact the child. Research suggests that removing a child from a safe and loving parent can cause emotional and psychological trauma that can last a lifetime.¹⁷⁷ So, avoiding a dependency proceeding could also prevent the child from experiencing further trauma due to family separation.

Orders of protection including a protected party can insulate survivors from juvenile dependency proceedings under failure to protect grounds and in doing so prevent children from experiencing further trauma from state intervention. Therefore, to not prematurely and arbitrarily limit survivors' access to the positive and protective impacts an order including a protected party can have, especially considering the court's inconsistent practices found in this review, courts in Arizona should include children as protected parties on ex parte orders as a default.

CONCLUSION

In sum, this paper advocates for a shift in judicial practices in Arizona. The findings in Part II of this review formed the basis for the advocated shift in judicial practices. This review found a lack of judicial consensus and consistency in what allegations courts in Arizona found sufficient to include protected parties on ex parte orders of protection. This was apparent through the varied case outcomes for several cases involving similar allegations. The review also found different rates of granting ex parte orders of protection including protected parties and different case outcomes for similar allegations at the contested hearing based on the gender of the petitioners. These findings represent another way the legal system is failing survivors of domestic violence through judicial practices that are arbitrarily limiting survivors', particularly female survivors', access to a legal remedy for child protection.

In light of these findings, this paper argued that protected parties should be included on ex parte orders of protection as a default, thus relying on the

175. See ARIZ. REV. STAT. ANN. § 13-3602 (2023).

176. *In re Appeal in Pima Cnty. Juv. Action No. J-77188*, 678 P.2d 970, 973 (Ariz. Ct. App. 1983); *In re Appeal in Pima Cnty. Juv. Dependency Action No. 96290*, 785 P.2d 121, 125 (Ariz. Ct. App. 1990).

177. Meier & Sankaran, *supra* note 18, at 19.

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contested hearing instead of the ex parte hearing to determine if a protected party should remain on the order. This advocated shift aims to address the court's inconsistencies in its decisions to include a protected parties on ex parte orders and the gendered impacts of such that were found in this review by limiting the discretion the court has at the ex parte hearing and placing the decision to keep protected parties on orders of protection with the superior evidentiary forum. The hope is that this advocated shift will reduce the gender disparity in case outcomes and increase survivors' access to orders of protection and consequently the positive and protective impacts those orders can have for the safety and wellbeing of survivors and their children.

RECENT LEGAL CHALLENGES INVOLVING A CHILD’S GENDER IDENTITY IN SCHOOL: AN EXPLORATION OF THE “FUNDAMENTAL” RIGHTS OF PARENTS

Suzanne E. Eckes & Maggie L. Piano†*

ABSTRACT

For many years, parents have alleged, through litigation, a fundamental right to direct the education of their children.¹ Much of the previous litigation in this area addresses instruction, the right to attend private schools, and various curricular concerns.² Most recently, school districts across the country are attempting to balance the privacy rights of transgender³ and gender non-conforming students against parents’ asserted right to know about their children’s gender identities.⁴ In a few situations, parents have challenged school district policies that might not permit educators to inform parents about their

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1. See generally Susan E. Lawrence, *Substantive Due Process and Parental Rights: From Meyer v. Nebraska to Troxel v. Granville*, 8 J.L. & Fam. Stud. 71 (2006); Timothy Schubert, Note, *School Closures and Parental Control: Reinterpreting the Scope and Protection of Parents’ Due Process Right to Direct their Children’s Education*, 90 Fordham L. Rev. 1817 (2022).

2. See Lawrence, *supra* note 1; Schubert, *supra* note 1.

3. Please see GLAAD’s website for a definition of terms when referring to LGBTQ+ persons. These terms include: sex, transgender, gender identity, gender expression, sexual orientation, transsexual, trans, and cis- and cisgender. *GLAAD Media Reference Guide, 11th Edition, Glossary of Terms: Transgender*, GLAAD, <https://www.glaad.org/reference/trans-terms> [<https://perma.cc/66HH-BRD4>]. Although these definitions were relied upon, it is important to note that, when discussing legal cases, our discussion reflects the language used by the courts.

4. See, e.g., Stephen Sawchuk, *Are Teachers Obligated to Tell Parents Their Child Might Be Trans? Courts May Soon Decide*, EDUC. WK. (Apr. 28, 2022), <https://www.edweek.org/policy-politics/are-teachers-obliged-to-tell-parents-their-child-might-be-trans-courts-may-soon-decide/2022/04> [<https://perma.cc/2NNZ-K2PM>]; Donna St. George, *Gender Transitions at School Spur Debate Over When, or If, Parents are Told*, WASH. POST (July 18, 2022, 6:00 AM), <https://www.washingtonpost.com/education/2022/07/18/gender-transition-school-parent-notification/> [<https://perma.cc/P8N3-AUN3>].

child's use of preferred names and pronouns in class.⁵ Parents have argued that they have a fundamental right, rooted in the Fourteenth Amendment's Due Process Clause, to be informed on such matters.⁶ At the same time, school districts are trying to navigate these emerging issues.

This article will examine some of the legal and policy considerations related to this topic. We begin with a discussion of how parents have relied on substantive due process when arguing that they have a fundamental right to direct the upbringing of their children. We also examine how that argument may have been impacted by the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.⁷ We then consider how both the Supreme Court and federal circuit courts have viewed parental claims involving a fundamental right to direct the upbringing of their children within the context of education. In doing so, we explore some of the recent legal challenges initiated by parents and how these relate to knowledge of their children's gender identities within the school context. Next, we analyze important policy considerations that might support states' interests in elevating the rights of the child over the rights of their parents in situations where the child's health or safety is threatened.⁸ Finally, we conclude with a discussion of the practical application of the topics addressed in this article as well as a summary of the potential impact of the Court's decision in *Dobbs* on the rights of parents in schools.

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5. See *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, No. 8:20-3552-PWG, 2022 U.S. Dist. LEXIS 149021 (D. Md. Aug. 18, 2022); *Ricard v. USD 475 Geary Cnty.*, No. 22-CV-04015, 2022 U.S. Dist. LEXIS 83742, at *2 (D. Kan. May 9, 2022); *Doe v. Madison Metro. Sch. Dist.*, 2021 WI App 60, ¶ 2, 399 Wis. 2d 102, 963 N.W.2d 823, *aff'd*, *Doe v. Madison Metro. Sch. Dist.*, 2022 WI 65, 403 Wis. 2d 369, 976 N.W.2d 584; Verified Complaint for Preliminary & Permanent Injunctive Relief, Declaratory Judgement & Damages, *Littlejohn v. Sch. Bd. of Leon Cnty.*, No. 21-CV-00415, at 2 (N.D. Fla. Oct. 18, 2021); *Foot v. Town of Ludlow*, Civil Action No. 22-30041-MGM, 2022 U.S. Dist. LEXIS 236102 (D. Mass. Dec. 14, 2022); Complaint For Declaratory, Injunctive and Additional Relief at 2, *D.F. v. Sch. Bd. of Harrisonburg*, No. CL22-1304 (Va. Cir. Ct. June 1, 2022).

6. E.g., *Madison Metro.*, 2021 WI App 60, ¶ 2.

7. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

8. It is important to note that this issue comes at a time when anti-trans legislation is being pushed in several states that seeks to restrict the rights of trans students. It is not surprising that this legislation has been found to negatively impact transgender students' mental health. See Elliot A. Tebbe, Melissa Simone, Emily Wilson & Madeline Hunsicker, *A Dangerous Visibility: Moderating Effects of Antitrans Legislative Efforts on Trans and Gender-Diverse Mental Health*, 9 PSYCH. SEXUAL ORIENTATION & GENDER DIVERSITY 259 (2021); Landon D. Hughes, Kacie M. Kidd, Kristi E. Gamarel, Don Operario & Nadia Dowshen, "These Laws Will Be Devastating": Provider Perspectives on Legislation Banning Gender-Affirming Care for Transgender Adolescents, 69 J. ADOLESCENT HEALTH 976 (2021).

I. SUBSTANTIVE DUE PROCESS AND THE IMPACT OF DOBBS

The Supreme Court has found that the Due Process Clause of the Fourteenth Amendment includes both “procedural” and “substantive” components.⁹ The procedural component concerns the fairness of the procedures used when the state deprives anyone of life, liberty, or property.¹⁰ The substantive component prohibits wrongful governmental actions.¹¹ Specifically, substantive due process requires that any time the government deprives a person of life, liberty, or property, the government must provide a sufficient justification.¹² Substantive due process has been relied upon for many years to protect important personal liberties.¹³ For example, the substantive due process component was the focus in earlier cases that upheld the constitutional right to an abortion.

Many rights are not explicitly spelled out in the Constitution, such as abortion, sexual intimacy, marriage, contraception, and other areas of an individual’s personal life. However, these unenumerated rights have found protection within the Constitution under the Fourteenth Amendment’s Due Process Clause. As discussed, substantive due process protects people from the arbitrary deprivation of life, liberty, and property. Although the Constitution does not clearly define “liberty,” the Supreme Court has recognized a certain zone of privacy that the government is constrained from regulating.¹⁴ This understanding of privacy provided a foundation to include other personal matters, including parental rights.

When the Supreme Court overturned *Roe v. Wade*¹⁵ and *Casey v. Planned Parenthood*¹⁶ in *Dobbs*,¹⁷ it held that the U.S. Constitution does not confer a right to an abortion. In doing so, the Court repudiated long-established precedent related to substantive due process and privacy rights linked to abortion. Justice Alito’s majority opinion reflected the originalist contention that a right not included within the text of the Constitution or within the original public meaning of the Constitution might be beyond the reach of the Court. *Dobbs* reversed the Court’s previous finding of a fundamental right to privacy under the Due Process Clause,¹⁸ which allowed for the control of one’s own body, because it was not

9. KELSEY Y. SANTAMARIA, CONG. RSCH. SERV., PRIVACY RIGHTS UNDER THE CONSTITUTION: PROCREATION, CHILD REARING, CONTRACEPTION, MARRIAGE, AND SEXUAL ACTIVITY 2 (2022).

10. *Id.*

11. *Id.*

12. *See Davidson v. Cannon*, 474 U.S. 344, 353 (1983) (Blackmun, J., dissenting).

13. *See id.* at 352.

14. *See* Kimberly Wehle, *What Roe Could Take Down With It*, ATLANTIC (Dec. 3, 2021), <https://www.theatlantic.com/ideas/archive/2021/12/what-roe-could-take-down-it/620892/> [https://perma.cc/AG38-W5AV].

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

16. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

17. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

18. *See Griswold v. Connecticut*, 381 U.S. 479 (1965).

explicitly addressed within the actual text of the Constitution.¹⁹ In *Dobbs*, the Court also observed that abortion was likely not contemplated when the Fourteenth Amendment was ratified in 1868. As such, it found that abortion was not a right protected by the Constitution.²⁰ Indeed, the *Dobbs* decision raises questions about the future of substantive due process and its assumed fundamental right to privacy.

Not surprisingly, there has been much discussion about how the *Dobbs* opinion could impact other areas involving unenumerated rights, such as the right to marry or the right to use birth control. After all, the right to marriage and the right to use contraception have also been rooted for many years in substantive due process, according to the Supreme Court. Justice Thomas' concurring opinion in *Dobbs* suggested that the protection of marriage and contraception as fundamental rights are open for further review, while the three dissenting justices raised concerns about how long these other fundamental privacy rights might be protected. The *Dobbs* majority did stress that its opinion does not "undermine" other decisions; it attempted to distinguish the issue of abortion from these other cases involving a fundamental right to privacy.²¹ However, this insistence from the Court did not seem to convince everyone. For example, Congress was concerned enough about marriage rights after the *Dobbs* decision that it enacted the Respect for Marriage Act, requiring states to recognize legal marriages performed in other states.²²

One could argue that the *Dobbs* decision weakened *all* fundamental rights protected under the Fourteenth Amendment's Due Process Clause. Specifically, questions arise about how the decision might impact parents' rights to control the upbringing of their children. Similar to abortion, marriage, and contraception, parental rights are not mentioned in the Constitution and were likely not contemplated by the framers. And, similar to abortion, marriage, and contraception, the Supreme Court has suggested that a parental right to manage their child's upbringing without state interference is rooted in a right of privacy.²³ There has been widely accepted Supreme Court precedent that parents have a

19. *Dobbs*, 142 S. Ct. at 2266.

20. *Id.* at 2242.

21. *Id.* at 2241.

22. Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

23. Justice Alito in *Dobbs* contended that if the Constitution was silent on abortion, it was because the Constitution conferred no right to have one. *See Dobbs*, 142 S. Ct. at 2242. We note that the Constitution also fails to address the nature of parental authority. Justice Scalia, for example, in earlier cases argued that because this discussion on parental rights is absent in the text of the Constitution, it is then not tethered to the Constitution. In fact, he wrote that *Meyer v. Nebraska* and *Pierce v. Society of Sisters* were wrongly decided for that reason. *See Troxel v. Granville*, 530 U.S. 57, 92–93 (2000) (Scalia, J., dissenting). It is beyond the scope of this article to discuss what the framers had in mind when the U.S. Constitution was ratified; there are many publications that discuss why the founders did not include certain topics and other debates about the public meaning of those topics at the time of the ratification on the Constitution and subsequent amendments. *See, e.g.,* Erwin Chemerinsky, *More Just: Teaching about Constitutional Law and the Supreme Court*, BERKELEY L. (Mar. 24, 2022), <https://www.law.berkeley.edu/podcast-episode/teaching-about-constitutional-law-and-the-supreme-court/> [https://perma.cc/B7VH-N7GG].

fundamental right to direct the upbringing of their children. Given this precedent, how might this unenumerated “fundamental” right be viewed in light of *Dobbs*?

II. A PARENT’S FUNDAMENTAL RIGHT TO RAISE A CHILD

Historically, plaintiff parents have argued that some school district guidelines violate their fundamental right to direct the care, custody, education, and control of their minor children. In response to such claims, the Supreme Court has sometimes found that parents have a “fundamental liberty interest” and the right to “direct the upbringing and education of children under their control,”²⁴ though it has never carefully defined the precise boundaries of what this fundamental liberty interest entails.

There have been a series of decisions from the Court that established the premise that parents have a fundamental liberty interest related to the education of their children. In 1923, the Court recognized parents’ rights to direct the education of their children for the first time. In *Meyer v. Nebraska*, the Court examined the Fourteenth Amendment’s Due Process Clause to conclude that parents are constitutionally entitled to seek out a specific kind of education for their children.²⁵ At issue in *Meyer* was a Nebraska law that restricted teachers from teaching in a foreign language and schools from teaching foreign languages in general. Although it appeared that the law may have been fueled by anti-German sentiment after World War I, the state contended that it sought to promote civic development. A private school teacher who taught a student in German challenged the state statute after he was convicted of violating the law.²⁶ The Court found that the teacher’s right to teach and the parents’ right to engage the teacher to instruct their children were within the liberty interests protected by the Fourteenth Amendment.²⁷ The Court invoked rational basis review and ruled that the state law did not rationally relate to the state’s objectives.²⁸ In 1925, the Court decided another case involving a state law that required children to attend public school. In *Pierce v. Society of Sisters*, an Oregon law required children to attend public schools; parents argued that the law interfered with their right to raise their children.²⁹ The Court ruled that this law unreasonably interfered with parents’ liberty right to direct and control the upbringing of their children.³⁰ Again, the Court applied the same standard as it did in *Meyer* and found that the law did not rationally relate to the state’s objective of standardizing education for students.

The *Meyer* and *Pierce* cases are often invoked when discussing parental rights in schools. However, the Supreme Court has provided for some limitations to the rulings in these cases. In 1976, the Supreme Court emphasized that *Pierce*

24. *Troxel*, 530 U.S. at 65 (quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925)).

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

26. *Id.* at 397.

27. *Id.* at 400.

28. *Id.* at 393.

29. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

30. *Id.* at 503, 532.

provides “no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society.”³¹ The Court further observed, “The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by *reasonable* government regulation.”³²

While the Supreme Court has established some degree of parental rights under substantive due process, it has not articulated a clear or consistent level of scrutiny to be used in cases involving parental rights issues. In both *Meyer* and *Pierce*, the Court assessed the laws at issue using rational basis review, which considers whether the state’s actions are rationally related to a legitimate state interest. However, this standard of review has not been applied to all parental rights cases. In *Wisconsin v. Yoder*, the Court examined a case involving Amish parents who challenged a state law requiring them to send their children to public school until the children were sixteen.³³ The parents alleged that requiring their children to attend school up to the age of sixteen conflicted with their religious beliefs and rights to freely exercise their religion. Siding with the parents, the Court wrote:

[T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.³⁴

The Court applied strict scrutiny review in the *Yoder* case, requiring that there be a compelling state interest behind the state law and the law be narrowly tailored to achieve that interest.³⁵ Interestingly, a more recent Supreme Court opinion did not address the issue of scrutiny. In *Troxel v. Granville*, a case involving grandparents, the Supreme Court failed to articulate what level of scrutiny applied in parental care cases.³⁶ In this opinion, the grandparents wanted more visitation than what the mother permitted. In a plurality decision, the Court held that fundamental parental rights could not be infringed upon by a law that was so broad as to permit nonparental visitation petitions from anyone at any

31. *Runyon v. McCrary*, 427 U.S. 160, 177 (1976) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972) (White, J. concurring)).

32. *Id.* at 178 (emphasis added).

33. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972).

34. *Id.* at 232.

35. *See id.* at 208–09. As discussed, the parents alleged that their religious rights were violated, which triggered strict scrutiny review with this particular issue. *See id.* at 214.

36. *See Troxel v. Granville*, 530 U.S. 57 (2000).

time.³⁷ Again relying on the Fourteenth Amendment, the Court reaffirmed the role of the parent when it comes to the care, custody, and control of the child, but did not state which level of scrutiny should be employed to make such decisions.³⁸

As a result of the lack of clear scrutiny standards, many lower courts have continued to employ rational basis review in cases involving parents who initiate similar parental rights challenges. For example, in a case involving a parental challenge to a school community service requirement, the Second Circuit wrote that “the Supreme Court . . . has never expressly indicated whether this ‘parental right’ when properly invoked against a state regulation, is fundamental, deserving strict scrutiny, or earns only a rational basis review.”³⁹ The Second Circuit ultimately employed rational basis review in the case. The Second Circuit also used rational basis review in another case involving a parent who contested a requirement that his child attend a school health class, alleging that he had a fundamental liberty interest to decide the education of his child.⁴⁰ According to the court, “*Meyer, Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught.”⁴¹ Other circuits have taken a similar approach,⁴² with one court holding that it was “follow[ing] almost eighty years of precedent analyzing parental rights in the context of public education under a rational-basis standard.”⁴³

In sum, the Supreme Court has recognized a constitutional right of parents to raise their children. That said, this right has never been absolute. While parents do have the right to seek a certain education for their child, this right is limited to certain aspects of the educational experience.⁴⁴ As discussed below, the justice system has also recognized some instances where a state may have a legitimate interest to intervene and assist or protect the child. Other important questions arise about how the *Dobbs* decision might weaken a parent’s liberty interest in

37. *Id.* at 73–74.

38. Interestingly, Justice Thomas argued that strict scrutiny should apply and that parents have fundamental right to direct the upbringing of their children. *Id.* at 80 (Thomas, J., concurring). As discussed above, this reasoning seems to contradict his more recent line of reasoning as it relates to fundamental rights in *Dobbs*.

39. *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 461 (2d Cir. 1996).

40. *Leebaert v. Harrington*, 332 F.3d 134, 142 (2d Cir. 2003).

41. *Id.* at 141.

42. *See Parker v. Hurley*, 514 F.3d 87, 101 (1st Cir. 2013) (rejecting strict scrutiny in another parental challenge to the curriculum); *Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 176 (4th Cir. 1996) (finding school officials had a legitimate reason for requiring community service program); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir. 2001) (finding in favor of school district in case involving a parental challenge to school uniform policy); *Griffin High Sch. v. Illinois High Sch. Ass’n*, 822 F.2d 671, 672–73 (7th Cir. 1987) (finding parent did not have a fundamental right to reject school’s student transfer policy); *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1188 (9th Cir. 2006) (rejecting parent’s objection to school using a psychological assessment with students at the school).

43. *Littlefield*, 268 F.3d at 289.

44. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158 (1944) (suggesting that states can prosecute parents who harm their child’s well-being).

being able to control the upbringing of a child. The Court deemed the liberty interest argument in *Dobbs* “exceptionally weak,”⁴⁵ explaining that abortion is not mentioned in the Constitution and was not likely contemplated by the founders. Similar arguments can be applied to parental rights.⁴⁶

III. RECENT LEGAL CONTROVERSIES: TENSIONS BETWEEN PARENTS’ ASSERTED RIGHT TO KNOW AND SCHOOL POLICIES INVOLVING TRANS AND GENDER NON-CONFORMING STUDENTS

American jurisprudence regarding the contours of a parent’s right to direct the upbringing of their child has evolved into the question of whether parents have a right to know about their child’s gender identity. Lawsuits on this topic have been filed by parents in Maryland, Iowa, Massachusetts, Wisconsin, and Virginia. These cases raise the question of whether parents’ fundamental right to direct the care, custody, education, and control of their minor children currently bestowed by the Fourteenth Amendment includes a fundamental right to be informed about their children’s gender identities by a school. The cases are briefly discussed below to provide a few illustrative examples of how the issue is playing out from a legal perspective.⁴⁷

In the federal case based in Maryland, *Montgomery County*, three parents filed a lawsuit alleging that the school district’s guidelines for student gender identity violated their state and federal constitutional rights as parents.⁴⁸ The parents’ complaint included an allegation that the school district violated their Fourteenth Amendment right to direct the care, custody, education, and control of their minor children by issuing guidance to its staff on matters concerning support for transgender and gender non-conforming students. Specifically, the plaintiffs contended that the school district’s guidelines were designed to avoid parental involvement and exclude parents from being part of significant decisions affecting their children’s care, health, education, and future.⁴⁹

The school district filed a motion to dismiss this portion of the complaint which the federal district court granted, determining that the plaintiffs’ constitutional rights as parents do not include a fundamental right to be promptly informed of their children’s gender identity.⁵⁰ According to the court, the language that was included in the district’s guidelines was clear in that it was not intended to be inflexibly applied to every transgender and gender non-

45. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228,2266 (2022).

46. See generally Chemerinsky, *supra* note 26 and corresponding discussion.

47. Some of these cases include multiple legal claims. We have chosen to focus only on the matters involving school policies related to informing parents about a student’s gender identity.

48. *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, No. 8:20-3552-PWG, 2022 U.S. Dist. LEXIS 149021 (D. Md. Aug. 18, 2022). For an earlier and more thorough discussion of the Maryland case from the authors, see Maggie Paino & Suzanne Eckes, *Do Parents Have a Fundamental Right to Know About Their Child’s Gender Identity in School?*, 405 ED. L. REP. 17 (2022) (this section builds off our earlier work).

49. See Paino & Eckes, *supra* note 52, at 18.

50. *Montgomery Cnty.*, 2022 U.S. Dist. LEXIS 149021, at *3.

conforming student.⁵¹ Instead, the guidelines took a case-by-case approach and stated that each student's situation should be evaluated more flexibly.⁵² Further, the guidelines actively supported familial involvement in the development of a gender support plan; however, there was consideration of the student's privacy and the potential need for staff to avoid disclosure of gender identity to parents without student consent, especially if the student had not disclosed their gender identity to their parents or if their parents were unsupportive.⁵³ That said, even where family support was not apparent, the inclusion of family was one of the identified goals in the guidelines.⁵⁴ As such, the court found that these guidelines cannot be read to adopt a policy that actively excludes parents. Rather, the guidelines balance the interests of parents and students by encouraging parental input when the student consents but avoiding it when the student expresses concern related to their personal well-being. Ultimately, the school district created a nuanced policy that balances parent and student rights while promoting the safety and well-being of the student over a parent's right to know.⁵⁵

In its decision, the district court underscored that the Supreme Court has consistently stated that parents have a liberty interest protected by the Fourteenth Amendment in directing their children's schooling, but also that reasonable regulation by the state is permissible even if it conflicts with that interest.⁵⁶ The court employed rational basis review, which requires that the guidelines adopted by the school district need only "bear some rational relationship to a legitimate state interest" to be constitutional.⁵⁷ The district court found that the school district met this standard because there is a legitimate interest in providing a safe and supportive environment for all students. Further, the district court reasoned that the guidelines are rationally related to achieving that result.⁵⁸

The parents contended that the school district's guidelines should be subject to strict scrutiny. The district court disagreed with the parents but acknowledged in its decision that, even if the guidelines were examined under strict scrutiny, the school district would still prevail. The court explained that, to survive strict scrutiny, the school district would be required to demonstrate that the guidelines are narrowly tailored in furtherance of a compelling state interest. The compelling state interests involved were offering students a safe and welcoming school environment, not discriminating against transgender and gender-nonconforming students, and protecting student privacy.⁵⁹

51. *Id.* at *16–19.

52. *Id.*

53. *Id.*

54. *Id.*

55. *See* Paino & Eckes, *supra* note 52, at 19.

56. *Id.*

57. *Montgomery Cnty.*, 2022 U.S. Dist. LEXIS 149021, at *35.

58. *Id.*

59. *Id.* at *36; *see also* Ricard v. USD 475 Geary Cnty., No. 22-CV-04015, 2022 U.S. Dist. LEXIS 83742 (D. Kan. May 9, 2022) (granting teacher's motion for preliminary injunction where a federal district court had employed strict scrutiny review in a case with some similar facts).

The *Montgomery County* court also stressed that some federal circuits have found that *Meyer* and *Pierce* do not establish a “fundamental right” for parents to dictate the nature of their children’s education in public schools that requires the application of strict scrutiny in all contexts. For example, the Sixth Circuit rejected a constitutional challenge by parents to a school dress code. The Sixth Circuit stated:

The critical point is this: While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally committed to the control of state and local authorities.⁶⁰

Likewise, the *Montgomery County* court pointed out that the Second Circuit ruled in *Leebaert v. Harrington* that:

Meyer, Pierce, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught. . . . [The] recognition of such a fundamental right . . . would make it difficult or impossible for any public school authority to administer school curricula responsive to the overall educational needs of the community and its children.⁶¹

Montgomery County provides the most in-depth analysis of the issue to date. Nevertheless, we touch upon other recent legal controversies to provide some additional context on the matter. For example, a school policy in Iowa was challenged by parents under the Fourteenth Amendment, among other claims.⁶² The school policy addressed communication with parents related to transgender students. The policy stated that schools should make a case-by-case determination about appropriate arrangements concerning names, pronouns, and other related issues. These determinations could be based on a student’s or family’s wishes. Starting in seventh grade, students were given more control in how they would like to involve parents. The federal district court denied the parents’ motion for a preliminary injunction because the plaintiffs failed to demonstrate a probability of success on their child-rearing claim.⁶³

60. *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395–96 (6th Cir. 2005) (emphasis in original).

61. *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2002).

62. *See Parents Defending Educ. v. Linn-Mar Cmty. Sch. Dist.*, No. 22-CV-78 CJW-MAR, 2022 U.S. Dist. LEXIS 169459 (N.D. Iowa Sep. 20, 2022).

63. *See id.* at *31.

In Massachusetts, parents challenged a school district's decision not to inform them about their children's request to use a different preferred name and pronoun in school.⁶⁴ They alleged a violation of their parental rights under the Fourteenth Amendment, among other claims. The school's policy stated that, "[s]chool personnel should speak with the student first before discussing a student's gender nonconformity or transgender status with the student's parent or guardian" and "discuss with the student how the school should refer to the student, e.g., appropriate pronoun use, in written communication to the student's parent or guardian."⁶⁵ The district appeared to use this policy with students of all ages. The court dismissed the complaint. It found that, even though the school district may not have executed the policy perfectly, its policy was consistent with state law that sought to provide a safe school environment for transgender and gender nonconforming students.⁶⁶

In a Wisconsin case, parents challenged a school's decision to refer to a student by the student's preferred pronouns and name in school.⁶⁷ The parents asked the school to refer to their child by the child's legal name because they wanted to take the decision to transition more slowly.⁶⁸ The judge refused the school district's motion to dismiss the complaint, finding that the parents' allegations relating to their fundamental right to raise their children were sufficient enough to survive the motion.⁶⁹ In another Wisconsin case, parents challenged a school district's "Guidance & Policies to Support Transgender, Non-binary & Gender-Expansive Students" and filed an action for declaratory and injunctive relief.⁷⁰ The parents argued that when students were allowed to choose preferred names and pronouns and "change their gender identity" in school without parental permission, it violated the parents' fundamental right to direct the upbringing of their children under the Fourteenth Amendment and the Wisconsin Constitution.⁷¹ Although the school's guidance did acknowledge that families can play an essential role in supporting LGBTQ+ students, the district advised school staff to use the student's legal name and gender pronouns when communicating with a student's family members.⁷² These substantive issues were never examined, as the state supreme court reviewed a procedural issue instead. In a later proceeding, a state circuit court dismissed the lawsuit for lack

64. *Foot v. Town of Ludlow*, Civil Action No. 22-30041-MGM, 2022 U.S. Dist. LEXIS 236102 (D. Mass. Dec. 14, 2022).

65. *Id.* at *11.

66. *Id.* at *27.

67. *T.F. v. Kettle Moraine Sch. Dist.*, No. 2021-CV-1650, 2022 Wis. Cir. LEXIS 8 (June 1, 2022).

68. *Id.*

69. *Id.*

70. *Doe v. Madison Metro. Sch. Dist.*, 2021 WI App 60, 399 Wis. 2d 102, 963 N.W.2d 823.

71. *Id.*

72. *Id.*

of standing.⁷³ This dismissal for lack of standing is currently being appealed.⁷⁴ A judge in Virginia dismissed a similar case due to lack of standing as well.⁷⁵

As the cases discussed above illustrate, this is an evolving legal issue that remains unsettled. Some of the cases discussed above are still working their way through the courts. It is also important to highlight that parents in other school districts have initiated similar challenges, but these cases have not yet been examined by a court.⁷⁶ As such, we anticipate several more lawsuits within the near future. New research on this issue will also continue to inform our thinking on the matter. Finally, it will be interesting to observe if the *Dobbs* decision will be relied upon in this new line of cases involving parents' right to know about their children's gender identity at school. Similar to the plaintiffs in *Dobbs*, the parents in these cases contend that their right to know and control the upbringing of their children is also protected under the liberty interest found within the Due Process Clause. As noted, in *Dobbs*, the liberty interest argument was found to be "exceptionally weak."

IV. OTHER POLICY CONSIDERATIONS

Beyond the legal argument discussed above, there are several other important policy- related considerations that surround this topic that might be helpful to school officials and judges. For example, numerous studies suggest that the negative school environment created for transgender and gender non-conforming students ultimately impacts their general well-being, and their overall school experience can produce academic and psychological side effects.⁷⁷ The 2021 National School Climate Survey, published by GLSEN, provides

73. *Doe v. Madison Metro. Sch. Dist.*, Case No. 20-CV-454 (Wis. Cir. Ct. Nov. 23, 2022), <https://www.aclu.org/cases/doe-v-madison-metropolitan-school-district?document=doe-v-mmsd-decision-and-order-dismissing-case> [<https://perma.cc/US2F-A87Z>].

74. Scott Girard, *WILL Appeals Dismissal of Lawsuit over MMSD Gender Identity Guidance*, CAP TIMES (Nov. 29, 2022), https://captimes.com/news/education/will-appeals-dismissal-of-lawsuit-over-mmsd-gender-identity-guidance/article_dbbe5b69-91cc-5eb7-9985-93a71c2e7fb9.html [<https://perma.cc/9PUM-G2W2>].

75. *Figliola v. Sch. Bd. of Harrisonburg*, Case No. CL 22-1304 (Vir. Cir. Ct. Dec. 2, 2022), <https://adfllegal.org/sites/default/files/2022-12/Figliola-v-Harrisonburg-City-Public-Schools-2022-12-02-Trial-Court-Opinion.pdf> [<https://perma.cc/QZ6D-AYGU>]; see also Kayla Brooks, *Pieces of Lawsuit Against Harrisonburg City Schools Dismissed*, WHSV (Dec. 8, 2022), <https://www.wHSV.com/2022/12/08/pieces-lawsuit-against-harrisonburg-city-schools-dismissed/> [<https://perma.cc/M4J4-J8LF>].

76. See, e.g., *Parents Sue Eau Claire Schools for Transgender Policy*, A.P. (Sept. 7, 2022), <https://apnews.com/article/religion-eau-claire-gender-identity-parental-rights-gay-641002ba63019549a145e8b54a23c0c6> [<https://perma.cc/NQ7Z-AA3S>].

77. See, e.g., JOSEPH G. KOSCIW, CAITLIN M. CLARK & LEES MENARD, GLSEN, *THE 2021 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LGBTQ+ YOUTH IN OUR NATION'S SCHOOLS* (2022); NAT'L ACADS. OF SCIS., ENG'G & MED., *UNDERSTANDING THE WELL-BEING OF LGBTQI+ POPULATIONS* (Charlotte J. Patterson, Martín-José Sepúlveda & Jordyn White eds., 2020); INST. OF MED., *THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE* (2011); Mollie T. McQuillan, *Scaling Gender and Sexual Diversity Policies in K-12 Schools*, EDUC. POL'Y (Dec. 14, 2021), <https://doi.org/10.1177/08959048211058461> [<https://perma.cc/3YCG-HM5T>].

insight into the school experience for America's LGBTQ+ students.⁷⁸ The findings of this most recent report indicate that America's public schools have done a poor job of providing a safe and welcoming environment for LGBTQ+ students.⁷⁹ Further, a review of the National School Climate Surveys published by GLSEN since 2015 reveal that conditions have not improved over the past six years, meaning schools have been unable to provide a more positive school experience for LGBTQ+ students over time.⁸⁰ In general, transgender students have experienced the most hostile school environments.

Those students experiencing higher levels of victimization because of their gender identity or expression are three times more likely to have missed school in the past month and twice as likely to report that they did not plan to pursue postsecondary education than their peers experiencing lower levels of victimization.⁸¹ These students had, on average, lower GPAs and were more likely to be disciplined than their peers experiencing lower levels of victimization.⁸² The negative school environment also contributed to lower levels of self-esteem and higher levels of depression among students experiencing higher levels of victimization because of their gender identity or expression.⁸³

The *Montgomery County* court supported the school's maintenance of student privacy on matters related to sexual orientation and gender identity as a legitimate state interest, and also acknowledged the existence of compelling state interests for school district policies that support transgender and gender non-conforming students. The school district's policy and the court seemed to consider many facets of the issue at hand. Specifically, the creation of a safe and welcoming school environment for all students, the equitable treatment and non-discrimination of transgender and gender non-conforming students, and the protection of student privacy were all identified as compelling reasons for developing guidance and policies that support these students. This section summarizes research and legal cases that address these identified compelling interests and support policies that might sometimes elevate student rights over parental rights. While this article has discussed school policies that aim to support transgender and gender non-conforming students at school, the overall school experience for such students has not proven to be a positive one. As such, we believe it important to highlight these areas of weakness in current school policies and how such interests might be handled in a manner that supports and promotes the student.

School safety and culture are of particular concern for these students. In comparison to their non- LGTBQ+ peers, LGBTQ+ students experienced heightened levels of verbal and physical harassment and assault while at school. Of LGBTQ+ students surveyed, 81.8% indicated that they felt unsafe at school, and 16.2% ultimately transferred to a different school because they felt so

78. KOSCIW ET AL., *supra* note 83.

79. *See id.*

80. *See id.* and previous editions of the report.

81. *Id.* at 35–36.

82. *See id.* at 35–41.

83. *See id.* at 42–43.

unsafe.⁸⁴ Overall, 58.9% of LGBTQ+ students reported that they experienced discriminatory policies and practices while at school.⁸⁵ These policies and practices imposed particular limitations on transgender and gender non-conforming students by preventing the use of chosen name or pronouns, restricting use of bathrooms or locker rooms that aligned with a student's gender identity, imposing dress codes, and denying access to participate in sports.⁸⁶ In response to these unfriendly school policies, 45.1% of LGBTQ+ students avoided using school bathrooms, 42.6% avoided using school locker rooms, and 78.8% avoided school functions or extracurricular activities.⁸⁷ These findings from the GLSEN report demonstrate the significance of student- supportive policies related to gender identity. The court in *Montgomery County* seemed to recognize the barriers to equitable education and the need to rectify these issues to prevent further harm.

One important factor in establishing a positive environment for transgender and gender non- conforming students is the recognition of student privacy related to matters of gender identity and expression. Although the *Montgomery County* court did not discuss the sensitivities of disclosing a student's sexual orientation or gender identity in the Maryland case, an earlier decision from the Third Circuit might provide some general insight on the matter. *Sterling v. Borough of Minersville* involved a teenager who committed suicide after a police officer threatened to reveal the student's sexual orientation to his family.⁸⁸ The teenager's mother prevailed in her lawsuit filed on behalf of her son's estate; the circuit court found that the police officer violated her child's Fourteenth Amendment right to privacy. The court observed, "It is difficult to imagine a more private matter than one's sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity."⁸⁹ This case highlights additional concerns surrounding this issue and perhaps raises awareness about some collateral circumstances that may arise. The court in *Montgomery County* seemed to take these unintended but real consequences into consideration when rendering its decision. Specifically, this court recognized that not all families will be supportive when their children are questioning their gender identities.⁹⁰ The research is clear that when transgender students do not feel supported in school and by their families it can negatively impact their overall well-being.⁹¹

While schools are struggling to provide a safe and positive environment for students, GLSEN has identified general practices to help establish a more positive and less hostile school climate. Specifically, GLSEN pointed to five

84. *Id.* at 10–13.

85. *Id.* at 32.

86. *Id.*

87. *Id.* at 10–12.

88. *Sterling v. Borough of Minersville*, 232 F.3d 190, 192–93 (3d Cir. 2000).

89. *Id.* at 196.

90. *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, No. 8:20-3552-PWG, 2022 U.S. Dist. LEXIS 149021, at *39 (D. Md. Aug. 18, 2022).

91. See Mark A. Schuster, Sari L. Reisner & Sara E. Onorato, *Beyond Bathrooms — Meeting the Health Needs of Transgender People*, 375 NEW ENG. J. MED. 101 (2016).

school resources critical to ensuring improved school experiences and academic performance. LGBTQ+ students, including transgender and gender non-conforming students, who had these resources available were less likely to feel unsafe while at school because of their sexual orientation, gender expression, or gender identity. Further, these students performed better academically and exhibited higher levels of self-esteem and lower levels of depression than their counterparts who did not have these resources available at their school. These resources include supportive student clubs like Gay-Straight Alliances and Sexuality Alliances,⁹² inclusive instruction, inclusive curricular resources, supportive educators, and inclusive and supportive school policies such as anti-bullying policies that explicitly support transgender and gender non-conforming students.⁹³

In June 2021, the U.S. Department of Education released a fact sheet for education institutions that outlines general practices for schools to implement in support of transgender and gender non-conforming students. The fact sheet outlines several examples of policies and practices that schools may pursue and develop in their efforts to provide safe, supportive, and equitable learning environments. In particular, the U.S. Department of Education recommends:

- ☐ Schools and districts use welcoming and inclusive language in school mission statements.
- ☐ Schools and districts ensure they adopt clear policies that affirm each student's right to be free from discrimination based on sexual orientation or gender identity in all aspects of school.
- ☐ Schools and districts adopt policies that respect all gender identities, such as using the name a student goes by and pronouns that reflect a student's gender identity and ensuring student privacy.
- ☐ Schools and districts develop guidance to assist school staff on how to support students and communicate with families.
- ☐ Schools and districts provide safe spaces for students and promote opportunities to connect with other students.
- ☐ Schools and districts provide professional development opportunities for educators on "equitable and supportive treatment" of LGBTQ+ youth and marginalized communities.⁹⁴

While the guidance from the U.S. Department of Education provides high-level examples of equitable and supportive policies and practices pertaining to transgender and nonbinary youth, other organizations such as the American Civil Liberties Union (ACLU) along with four other equal rights groups (ACLU et al.)

92. See *Tips on Starting a GSA*, ACLU, https://www.aclu.org/files/assets/tips_on_starting_a_gsa_nov_2011.pdf [https://perma.cc/M2AP-F27K].

93. KOSCIW ET AL., *supra* note 83, at 131–32.

94. U.S. DEP'T OF EDUC., SUPPORTING TRANSGENDER YOUTH IN SCHOOL (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/ed-factsheet-transgender-202106.pdf> [https://perma.cc/H433-4P42].

have published guidance specifically to address the development of school policies and practices that support transitioning students.⁹⁵ Although the guidance is tailored to students who are transitioning, ACLU et al. recognize that each individual has a unique experience and therefore one comprehensive approach does not lend itself to effective policy development. As such, the guidance encourages schools and districts to identify what steps are appropriate to cultivate the most positive experience possible for each transitioning student. To provide a basic framework for schools, ACLU et al. identify some universal best practices that can then be customized to meet the needs of the particular transitioning situation. These best practices include the creation of a tailored gender transition plan; the support of student privacy; the establishment of a collaborative process to provide support throughout the transition; the recognition of student identity by using correct names and pronouns; and the adoption of non-discrimination and harassment policies that not only address gender identity but also respond to bullying and harassment with research-based interventions to create a more inclusive school culture.⁹⁶

CONCLUSION AND RECOMMENDATIONS

School personnel are in a difficult position when trying to balance a student's right to privacy and a parent's asserted right to know. Given the lack of court opinions addressing this matter, definitive legally focused recommendations for school officials and policy makers may be premature. Nevertheless, there are many policy, ethical, and legal concerns to consider. The analysis of the sparse evolving litigation suggests that parents' constitutional rights to direct the upbringing of their children do not always override school policies that are in the best interest of the child. The school district in Maryland seemed to strike the right balance with its guidance document. Its aim was to involve parents but, at the same time, school officials acknowledged the unfortunate reality that informing some parents could raise health and safety concerns for the student when parents are not supportive. The school districts in Iowa and Massachusetts also seemed to take this more tempered approach. In all three cases, the courts promoted the best interest of the child over the rights of the parent. In sum, when there is reason to believe that sharing information with parents might result in physical or emotional harm for the child, school policies must be balanced in favor of the student. In particular, if information about a student's gender identity is shared with an unsupportive parent, the child might be no longer welcome at home. We know from the research that that when this occurs, transgender students can experience physical or emotional harm.⁹⁷ In this type of situation with an unsupportive parent, a school should tip the balance in

95. See ASAF ORR & JOEL BAUM, *SCHOOLS IN TRANSITION: A GUIDE FOR SUPPORTING TRANSGENDER STUDENTS IN K-12 SCHOOLS* (Beth Sherouse ed. 2015), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/Schools-In-Transition.pdf> [<https://perma.cc/XN4E-CUPJ>].

96. *Id.*

97. See, e.g., Schuster et al., *supra* note 97.

favor of protecting the student's privacy and elevate the student's right over the parent's right.⁹⁸

As noted, courts have not established a consistent standard of review for cases involving parental rights related to their child's education. With no confirmed standard, it becomes challenging to signal whether subsequent cases involving student privacy rights regarding gender identity and expression are to be evaluated based on rational basis or strict scrutiny review. That said, the *Montgomery County* case indicates the existence of a legitimate state interest as well as a compelling state interest for instituting and implementing a policy that promotes student privacy over a parent's right to know. At a minimum, the health and safety of the child is a legitimate interest for school officials and, as data has shown, transgender and gender non-conforming students face both unhealthy and unsafe environments in today's K-12 schools. Further, as noted by the Third Circuit in *Sterling*, the state does not seem to have a legitimate interest in disclosing private information about a student's sexuality.⁹⁹ Lastly, the need to avoid discriminatory policies that prevent transgender and gender non-conforming students from accessing school and the education experience in a similar manner to other students is a critical provision of public schools. For these reasons, similar to what the court decided in *Montgomery County*, it is possible that in future litigation a similar school policy might also satisfy either rational basis or strict scrutiny review.¹⁰⁰

The last salient issue discussed relates to whether the fundamental right for parents to direct the upbringing of their children under the Fourteenth Amendment's Due Process Clause has been weakened after *Dobbs*. Indeed, parental rights and education are not mentioned in the

U.S. Constitution. Like abortion, they are not enumerated rights. Likewise, similar to abortion, parental rights were not likely contemplated by the framers at the time the Fourteenth Amendment was ratified. Therefore, it would appear that this conferred right to raise a child may be vulnerable to judicial review just as was abortion in *Dobbs*. The weakening or reversal of parental rights under the Fourteenth Amendment would confirm the primacy of a student's command over their personal information. If this is the case, school districts may have even more rationale and support for withholding information from parents in accordance with the student's preference.

98. See *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 2000) (involving a teenager who committed suicide after a police officer threatened to reveal the student's sexual orientation to his family; the Third Circuit observed that "[i]t is difficult to imagine a more private matter than one's sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity").

99. See *id.*; Paino & Eckes, *supra* note 52.

100. As discussed, in *Montgomery County* the court found that the school's policy would have been upheld whether employing rational basis or strict scrutiny review. *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, No. 8:20-3552-PWG, 2022 U.S. Dist. LEXIS 149021, at *35–36 (D. Md. Aug. 18, 2022).

DISCRETION AND CREDIBILITY, DIGNITY AND MERCY: THE CASE OF PT,¹ A CRIMINALIZED SURVIVOR

Lila Meadows & Leigh Goodmark[†]

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INTRODUCTION

The criminal legal system routinely punishes survivors of intimate partner violence in a variety of ways, including by convicting and incarcerating them

1. We have used initials to identify both the criminalized survivor and her former boyfriend in this article to prevent her case from being identified, as she is still living in the community. We have not provided citations to the records of her bail hearings, trial, and sentencing hearing for the same reason. All documents are on file with the authors.

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when they act in self-defense. Survivors who are “imperfect victims”—who fail to conform to victim stereotypes that cast victims of intimate partner violence as weak, passive, white, straight, middle class, and morally upright—are often deemed not credible or not worthy of mercy and compassion by prosecutors, courts, and parole boards.² In this paper, we tell the story of one such survivor, exploring how her status as an “imperfect victim” led to a race against time and the criminal legal system to have her released before her death.

I. IMPERFECT VICTIMS

To be recognized as a victim of intimate partner violence by the criminal legal system, a woman³ who acts in self-defense must be a perfect victim, one who is credible and conforms to victimization stereotypes. But to meet these standards is a difficult task, and most women who assert self-defense find themselves labeled imperfect victims.

Imperfect victims lack credibility. The credibility of women who make claims of intimate partner violence has long been doubted.⁴ Law professor Deborah Epstein and psychologist Lisa Goodman offer two reasons for this skepticism. First, women’s stories may appear “internally inconsistent and therefore implausible” as a result of the physical and emotional trauma that victims of violence have experienced. Second, victims are seen as untrustworthy storytellers who exhibit inappropriate demeanor, have false motives in coming forward, and lack credibility simply because they are women.⁵ These “credibility discounts” make it difficult for women arguing self-defense to persuade judges and juries that their actions were justified. And the more a victim of violence perceives that her credibility is at issue, “the more likely she is to feel upset, destabilized, or even (re)traumatized . . . making her appear even less credible.”⁶

Perfect victims are white—and they perform their whiteness in a particular way. Victimization has long been tied to whiteness. Only white women are seen as “true women”; therefore, only white women can be “true victims.”⁷ Being

2. LEIGH GOODMARK, *IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM* *passim* (2023).

3. In this article, we will focus on cisgender, heterosexual, female victims of intimate partner violence in relationships with cisgender, heterosexual men. While intimate partner violence is found in any and all permutations of relationships, federal crime victimization research suggests that it continues to be most prevalent among these pairings, and this is the kind of relationship at issue in the case we discuss here.

4. See, e.g., Carolyn Copps Hartley, “He Said, She Said”: *The Defense Attack of Credibility in Domestic Violence Felony Trials*, 7 VIOLENCE AGAINST WOMEN 510, 539–40 (2001); *Panel Discussion: Advocating for Victims of Domestic Violence*, 20 WOMEN’S RTS. L. REP. 73, 76–77 (1999); Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between “The Truly National and the Truly Local”*, 42 B.C. L. REV. 1081, 1122 (2001).

5. Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 405–06 (2019).

6. *Id.* at 424.

7. See Shelby A.D. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 HOW. L.J. 297, 324 (1995); see also JOY JAMES, *RESISTING STATE VIOLENCE*:

legible as victims means hewing as closely to whiteness as possible. But even white women may not be white enough. “Respectable women” are worthy of protection; “rough women” are not.⁸ Sufficient proximity to whiteness to be deemed a victim is often not available to women of color at all, particularly when they are perceived as angry or strong. April was charged with arson after a candle was knocked over as she tried to defend herself from her partner. During her trial, “I was told to act like a little white girl . . . to look sad, to try to cry, to never look the jury in the eye. It didn’t really work for me because the judge took one look at me and said, ‘You look pretty mean; I bet you could really hurt a man.’”⁹

Imperfect victims defy stereotypes about women subjected to abuse. Early theories about intimate partner violence posited that women who claimed abuse were masochists who spurred their partners to violence to meet their own needs.¹⁰ In the late 1970s, psychologist Lenore Walker proposed a different theory to explain the behavior of victims of violence: learned helplessness. Walker argued that over time, confronted with violence they cannot anticipate, control, or prevent, women begin to assume that they are powerless to change the situation in any way and give in to passivity, self-blame, and fatalism.¹¹ Walker married learned helplessness with her theory on the cycle of violence to create “battered woman syndrome,” a construct meant to explain the actions of women who killed their partners in self-defense. Battered woman syndrome was not a defense in and of itself;¹² instead, it enabled courts to admit evidence of domestic violence to explain why women perceived threats as imminent or immediate and to establish the reasonableness of these beliefs.¹³ While it opened the door to evidence that had not previously been available to explain the context in which women took defensive action, it also cemented stereotypes of battered women as fragile, passive, and irrational.¹⁴ Later literature on intimate partner violence would use terms like helpless, meek, powerless, deferential, submissive, compliant, unassertive, and defenseless to describe women subjected to abuse.¹⁵

Women, particularly women of color, confront questions about their credibility from the moment they make their allegations of abuse public. Those

RADICALISM, GENDER, AND RACE IN U.S. CULTURE 144 (1996); BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION 7, 15–16 (2012); ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR 197 (2017).

8. Evan Stark, *Framing and Reframing Battered Women*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 277 (Eve S. Buzawa & Carl G. Buzawa eds., 1992).

9. BETH E. RICHIE, COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN 119 (1996).

10. LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 55–56 (2012).

11. LENORE E. WALKER, THE BATTERED WOMAN 49–50 (1979).

12. *See, e.g.*, State v. Hodges, 716 P.2d 563, 570 (Kan. 1986).

13. Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 425–27 (1991).

14. Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1 *passim* (1994); Melanie Randall, *Domestic Violence and the Construction of “Ideal Victims”: Assaulted Women’s “Image Problems” in Law*, 23 ST. LOUIS U. PUB. L. REV. 107, 124 (2004).

15. GOODMARK, *supra* note 10, at 63–64.

doubts are exacerbated when they fail to conform to the stereotypes attached to women subjected to abuse. “[W]omen who are abrasive and argumentative, who are aggressive towards their abusers for any reason (including self-defense), or who otherwise fail to conform to traditional female gender roles” are imperfect victims.¹⁶ Women who abuse substances, have mental health issues, engage in sex work, are the primary breadwinners in their families, or fight back are imperfect victims.¹⁷ And when, like PT, women violate norms around gender and victimization, they face attitudes ranging from skepticism to outright hostility when they act in self-defense against their abuser(s). PT had whiteness, but little else, on her side.

II. THE STORY OF PT

PT doesn’t remember how she got her hands on heroin at the age of twelve, but she does remember the way it made her feel—numb, euphoric, pain-free. By the time PT reached the ninth grade, she was regularly injecting heroin in the school bathroom with a friend and in the process of dropping out of school altogether. Once PT was disenrolled from school, her life began to revolve around finding and using drugs in increasing quantities. Though she was arrested for drug-related offenses three times the year she turned eighteen, PT was never offered treatment for her worsening addiction. That same year, PT moved across the country with her then-boyfriend. There, her addiction to heroin deepened and she also began using methamphetamine. Without a way to support an addiction that, at its height, required \$500 - \$600 a day to buy drugs, PT turned to sex work to survive. While sex work provided the means to feed her addiction, it also exposed her to extreme violence. PT cannot recall the number of times she was physically assaulted, robbed, and raped from ages eighteen to twenty-one.

Four years after moving across the country, PT was arrested while in a stolen car and sentenced to several months in jail. After four months, PT was transferred to an inpatient drug treatment program, an environment that she recalls as one of the most stable and peaceful of her life. For the first time in many years, she was surrounded by people who she felt supported her and wanted her to have a good life—something that she finally wanted for herself. After about a month at the facility, a doctor noticed an irregularity with PT’s heartrate. PT shrugged it off as the result of many years of drug use, but the doctor persisted. An EKG led to a CAT scan, which uncovered a liver tumor. When the technician spotted the tumor and told PT that it looked like cancer, she began to have a panic attack. A nurse gave her a shot of Ativan to calm her nerves while she waited to speak with a doctor. The drug counselor who accompanied PT to the hospital told her that, because she allowed the nurse to administer Ativan, she had “relapsed” and would need to start the drug program over again.

16. Mekha Rajan & Kathy A. McCloskey, *Victims of Intimate Partner Violence: Arrest Rates Across Recent Studies*, in *BACKS AGAINST THE WALL: BATTERED WOMEN’S RESISTANCE STRATEGIES* 36 (Kathy A. McCloskey & Marilyn H. Sitaker, eds., 2009).

17. Rose Corrigan & Corey S. Shdaimah, *People with Secrets: Contesting, Constructing, and Resisting Women’s Claims About Sexualized Victimization*, 65 CATH. U. L. REV. 429, 431 (2016).

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Devastated by the drug counselor's reaction and the doctor's diagnosis of a rare form of Stage IV cancer, PT used methamphetamine that evening. A week after her diagnosis, she returned to Maryland to receive treatment with the support of her family. Her drug use again spiraled out of control. She was 22 years old.

After returning to Maryland, PT connected with FA, a man she had known in middle school. PT recalled that, even as kids, he was unstable. When they dated in middle school, FA threatened to kill PT and blow up her family's home after PT ended the relationship. When they reconnected, FA was selling heroin and marijuana and was himself addicted to methamphetamine and Xanax. While FA provided constant access to the drugs PT relied on to control both her physical and emotional pain, this access came at a price. FA was controlling and physically violent, often locking PT in a closet to prevent her from leaving and strangling her during arguments.

One evening after their relationship resumed, FA was scheduled to work a shift at a restaurant; PT planned to pick him up. FA spent the hours before his shift smoking methamphetamine. PT used both heroin and meth to control her constant, cancer-related pain in the hours before she was supposed to pick FA up from work. When PT arrived at the restaurant eight minutes later than FA's shift ended, FA became enraged, screaming at and threatening PT and throwing her out of the truck so that he could drive. As FA's tirade continued, PT asked him to stop at her mother's house, where she intended to spend the night; she was not feeling well and did not want FA's behavior to escalate further. FA refused and begged her to stay at their apartment, telling her he couldn't stand the thought of being without her.

FA was in the kitchen of their apartment when PT received a phone call from her mother asking her to come home. When FA overheard the conversation, he again became enraged and smashed the television in the living room, where PT was seated on the couch. The argument moved to the kitchen, where FA grabbed PT by the neck and held her against the kitchen cabinets. While strangling her, FA told PT that he was finally going to kill her. PT, struggling to breathe and very much believing his threat, blindly reached behind her onto the counter and grabbed a small paring knife. She swung her arm forward and stabbed him in the upper chest once, resulting in what the autopsy later showed was a two-centimeter deep stab wound. Initially, PT did not realize she had made contact at all. There was no blood and FA pushed PT on his way out of the apartment to disable the truck's fuse box so that PT could not leave.

While FA was outside dismantling the truck, PT texted an acquaintance to pick her up and take her to her uncle's house. FA and PT continued to shout at each other while she waited for her ride. At the time she left, PT did not believe that FA was seriously injured. Once arriving at her uncle's home, PT used heroin to calm her nerves. When she awoke the next morning, she learned that FA's mother had found him in the apartment, slumped over near the door. An autopsy later revealed that the stab wound had punctured FA's pericardium. FA died of internal bleeding.

III. PT AND THE CRIMINAL LEGAL SYSTEM

By the time of the incident that led to her re-incarceration, PT was suffering from Stage IV terminal liver cancer. Her boyfriend had been abusing her for the last year. When she reached for the kitchen knife, she truly believed that if she did not defend herself, he would kill her.

a. Prosecutors

Prosecutors chose to charge PT with crimes related to FA's death despite her contention that she acted in self-defense. Their comments during trial and sentencing make it clear that they did not believe her claims. In their closing argument, for example, prosecutors contended that there was no evidence that PT's boyfriend had assaulted her that evening, and that even if he had, grabbing a knife and stabbing him was not a reasonable response to that assault. At sentencing, prosecutors argued that PT had intentionally taken her boyfriend's life and any remorse that she had shown was not genuine. They asked the court to impose the maximum sentence of ten years of incarceration.

Prosecutors did not care about PT's medical condition. At her bail hearing, for example, prosecutors argued that PT's medical condition was far less important than the fact that she had killed her boyfriend and her potential as a flight risk. Prosecutors suggested that PT be kept in "isolation"—solitary confinement—at the county detention center to prevent her from contracting COVID, which, given her immunocompromised status, could kill her.

b. Judges

The first interaction PT had with the court was at her bail hearing. At that hearing, PT's lawyer informed the court that PT was battling a rare form of liver cancer, and that while treatment could extend her lifespan, the median length of survival for patients in similar stages of disease progression was only twelve months. Despite the fact that COVID was raging at the time of her bail hearing and that PT was still receiving chemotherapy, the judge refused to grant bail, finding that she was a flight risk. Because of delays caused by COVID, PT remained in jail for months until jury trials resumed.

The judge in PT's case sentenced her to a lengthy period of incarceration despite documentation from her treating physician that her condition was terminal and knowing that she would not receive adequate medical care for her condition while in prison. The judge acknowledged PT's illness, saying, "So does that mean that I am heartless and care not about her condition? Not at all . . . I hope that you will still be here at the end of the sentence that is given," then sentenced her to ten years, suspending all but nine,¹⁸ all but guaranteeing that PT would die in prison without some intervention.

18. Maryland law gives courts the authority to suspend the execution of a sentence, allowing the court to supervise the defendant while on a period of probation and to impose the full sentence should an individual violate the terms of probation. MD CODE ANN., CRIM. PROC. § 6-221 (West 2012). In D.G.'s case, the court suspended only one year of the ten year sentence, requiring D.G. to serve nine years—well beyond her anticipated life expectancy.

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c. Parole Commission

PT was transferred to the Department of Corrections shortly after her sentencing and immediately admitted to the infirmary. Within weeks, she required hospitalization in the community for a condition stemming from the infirmary's inability to manage her pain and the effects of an aggressively spreading cancer. After just a month and two separate hospitalizations, the private contractor for the prison system filed a wholly inadequate request for medical parole on PT's behalf. The request was less than a page and contained little detail about the exact nature of her condition, her prognosis, or the infirmary's inability to adequately manage her condition. Critically, the request failed to attach any documentation related to her recent hospitalizations or from her treating physicians in the community, who at that point had downgraded her prognosis to mere months to live and had concerns related to the prison's management of both her medical care and nutrition. Not surprisingly, given the dearth of documentation, the Maryland Parole Commission denied the initial request for medical parole. After PT retained counsel, PT asked the Commission to reconsider that request and provided a wealth of documentation regarding PT's condition, lack of treatment, and dire prognosis; the Commission later reversed its decision. But instead of sending her home to receive hospice treatment—the recommendation of her treating physicians—the Commission required that she enter a medical facility, thus creating another dilemma: what hospice facility would admit a murderer?¹⁹

IV. ON DISCRETION AND CREDIBILITY, COMPASSION AND MERCY

A. Discretion and Credibility

1. Discretion

Prosecutors have almost unfettered discretion in determining which cases to pursue.²⁰ In the cases of criminalized survivors like PT, prosecutors often bring cases either because they think they can win or, and relatedly, because they do not believe the defendant is a victim.²¹ Evidence of abuse must be overwhelming for prosecutors to decline to pursue cases, and even with strong evidence, prosecutors are likely to pursue the cases of imperfect victims like PT.²² Although she was white, PT was the wrong kind of white—a “rough” woman, rather than a “respectable” one, from a lower income family. Additionally, PT's prior convictions and drug use made it easy for prosecutors to dismiss her claim that FA had abused her.

19. After a significant amount of work and agreement to guidelines that no other resident at the facility was required to follow, a placement for PT was finally secured.

20. ANGELA J. DAVIS, *The Prosecution of Black Men*, in *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* 178, 179 (Angela J. Davis ed., 2017).

21. GOODMARK, *supra* note 2, at 58.

22. *Id.* at 59.

Judges have similarly broad discretion in sentencing, so long as mandatory minimums do not attach to those sentences.²³ In PT's case, the penalty for manslaughter was capped at ten years with no mandatory minimum sentence and the judge retained discretion to impose whatever sentence he deemed appropriate.²⁴ Despite her claim of self-defense, which, as we will discuss in the next section, the judge may have doubted, and despite her illness, which the judge accepted, the judge sentenced PT to what he characterized as "the middle to top" of the applicable sentencing range. The judge explained that, based on the facts, he believed it was appropriate to impose a sentence slightly above the middle of the statutory ceiling (and what was, in reality, just one year less than the maximum sentence). It is clear from the sentence that the judge did not accept PT's version of the facts—and discretion allowed the judge to manifest that disbelief in her sentence.

2. Credibility

Prosecutors frequently refer to themselves as the voice of victims.²⁵ But who is seen as a victim is contested ground in a criminal trial. The criminal legal system operates under a strict victim/offender binary; there can only be one of each. Once a person has been labeled a defendant, prosecutors are no longer able to appreciate that person as a victim. Instead, prosecutors argue that the defendant was angry or jealous, that the violence did not occur, or that the person could have left rather than using force to defend herself.²⁶ Prosecutors in PT's case relied heavily on the argument that PT's account of the abuse she suffered—both prior to the day FA died and the day of—was not credible and leaned on her history of substance abuse to implicitly attack her credibility.

The judge, too, seemed skeptical of PT's story, asking whether the jury might have found differently if PT had talked to police immediately rather than denying that she had been in her boyfriend's apartment that night. While conceding that her failure to confide in police had nothing to do with the legal elements of the charge for which she was convicted, the judge suggested that her initial denials may have made himself and the jury question the credibility of her account—possibly accounting for the decision to sentence her at the upper end of the range.

23. Maryland courts are "vested with virtually boundless discretion" when sentencing a defendant following a conviction in a criminal case. *Lopez v. State*, 458 A.3d 810, 819 (Md. 2018) (quoting *Cruz-Quintanilla v. State*, 165 A.3d 517, 520 (Md. 2017)); *Logan v. State*, 425 A.2d 632, 642 (Md. 1981).

24. MD. CODE ANN., CRIM. LAW § 2-207 (West 2021).

25. See, e.g., Tracy Prior, *Victim Services and Victims' Rights: Elevating Victims' Voices at a Critical Time* 8, NAT'L DIST. ATT'YS ASS'N (Apr. 2021), <https://ndaa.org/wp-content/uploads/WPS-Victim-Advocacy-Best-Practices-Guide-April-2021-FINAL.pdf> [<https://perma.cc/L42C-343F>].

26. GOODMARK, *supra* note 2, at 60.

B. Compassion and Mercy

From the moment she was charged with killing her boyfriend, the criminal legal system denied PT humanity and compassion. At the start of her trial, for example, PT's attorney informed the judge that PT had been sent to court without the medication that she was taking four times daily to treat her cancer. The bailiff responded that it was not his job to provide medication. The next day, PT was sent to court again without her medication, which left her in such excruciating pain that she could not focus on the trial or assist in her defense. During her sentencing hearing, PT's attorney, in arguing for a sentence of home confinement, noted that PT had to be kept in solitary confinement after her cancer treatments and could not participate in clinical trials that might save her life because of her incarceration. Her attorney also explained that PT was in almost constant pain in the jail because the jail would not provide her with time release medication—medication that would also be unavailable to her in prison. PT's attorney concluded, "She has been incarcerated for over two years for defending herself, with a terminal illness during a pandemic. You don't think she has suffered enough?" The judge nonetheless sentenced her to incarceration—essentially sentencing her to torture until her death. And PT's medical care while incarcerated was indeed torturous. She was not given medication sufficient to manage her pain and she could not eat because of the pain. When PT lost so much weight that her survival was jeopardized, she was sent to the hospital. She was shackled during transport and her stay in the hospital, where she was under the supervision of correctional officers. PT remained in the hospital only long enough to gain enough weight that she could be "safely" returned to prison.

Legal scholars have grappled with the definition of mercy and the tension between doing justice and being merciful.²⁷ Mercy seems to allow, however, for the exercise of discretion to refrain from imposing punishment that might otherwise be considered just.²⁸ Accepting for the sake of argument that punishing PT was just—that given her "unique circumstances and characteristics" she deserved to be punished—mercy would still have enabled prosecutors to refrain from bringing a case forward, the judge to sentence PT to home confinement, and the parole commission to allow her to die at home.²⁹ As law professor Vera Bergelson argues, the exercise of mercy may be especially appropriate in cases of "atypical offenders." These offenders include "[p]erhaps someone very old or very sick. Someone for whom traditional punishment would be disproportionately harsh."³⁰ PT would certainly have met both of those criteria.

27. See, e.g., Albert W. Alschuler, *Justice, Mercy, and Equality in Discretionary Criminal Justice Decision Making*, 35 J.L. & RELIGION 18 (2020); Vera Bergelson, *Justice or Mercy?*, 71 RUTGERS U. L. REV. 959 (2019); David Dolinko, *Some Naïve Thoughts on Justice and Mercy*, 4 OHIO STATE J. CRIM. L. 349 (2007); R.A. Duff, *The Intrusion of Mercy*, 4 OHIO STATE J. CRIM. L. 361 (2007); Jeffrie G. Murphy, *Punishment, Forgiveness, and Mercy*, 35 J.L. & RELIGION 5 (2020).

28. See Alschuler, *supra* note 27, at 19; Bergelson, *supra* note 27, at 963; Duff, *supra* note 27, at 363.

29. See Bergelson, *supra* note 27, at 963–64.

30. *Id.* at 972.

Throughout PT's interactions with the criminal legal system, there were opportunities for system actors—prosecutors, judges, parole commissioners—to act with humanity and compassion and to grant her mercy. Rarely did anyone make use of those opportunities.

V. ABOLITION FEMINISM

So long as prosecutors, judges, and parole boards doubt the credibility of criminalized survivors and refuse to exercise the discretion to dismiss their claims, criminalized survivors will be punished by the criminal legal system. And while that punishment is not always as severe as dying in prison as a result of a nine-year sentence, criminalized survivors are denied humanity and compassion in countless other ways: through inhumane conditions of confinement, denial of medical care, and rape and sexual assault in prison. They are placed in isolation and separated from their newborn children. They are told in a thousand different ways that their suffering does not matter. In a binary world of victims and offenders, their convictions erase their victimization.³¹ Some have argued that the criminal legal system can be reformed to better meet the needs of criminalized survivors.³² We disagree. The only way to ensure that survivors of gender-based violence are spared the indignities suffered by PT is to abolish the criminal legal system.

Abolition feminism provides a theoretical framework for understanding that effort. Abolition feminism “opposes, rather than legitimates, oppressive state systems.”³³ Abolition feminism recognizes that intervention by the criminal legal system does not decrease or deter violence, but merely manages it, and does significant harm to women and queer and trans people, particularly people of color, in the offing.³⁴ Abolition feminism understands that the state is a perpetrator of gender-based violence in a variety of venues, including through prisons.³⁵ Abolition feminism demands that we dismantle the structures that support the criminalization of survival, including police, prosecutors, courts, prisons, probation and parole, and shift resources instead to preventing harm and meeting basic human needs.

Thanks to the grant of medical parole, PT most likely will not die in prison.³⁶ But the criminal legal system has heaped indignity after indignity upon

31. GOODMARK, *supra* note 2, at 108–25.

32. *Id.* at 171.

33. ALISON PHIPPS, *ME, NOT YOU: THE TROUBLE WITH MAINSTREAM FEMINISM* 163 (2020).

34. *See generally* ANGELA Y. DAVIS, GINA DENT, ERICA R. MEINERS & BETH E. RICHIE, *ABOLITION. FEMINISM. NOW.* (2022).

35. *See* Beth E. Richie, *Reimagining the Movement to End Gender Violence: Anti-racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice*, 5 U. MIA. RACE & SOC. JUST. L. REV. 257 (2015); *see also* RITCHIE, *supra* note 7.

36. Maryland law allows the parole commission to return an individual previously granted medical parole to the custody of the Department of Corrections if “the Commission has reason to believe that a parolee is no longer so debilitated or incapacitated as to be physically incapable of presenting a danger to society.” MD. CODE ANN., CORR. SERVS. § 7-309(g)(1) (West 2018).

her. While her case is unique in that she was prosecuted and sentenced knowing that she would be unlikely to survive a term of imprisonment, it differs in degree, but not in kind, from the cases of other criminalized survivors. Criminalized survivor Kwaneta Harris has spent almost eight years in solitary confinement in a Texas prison where temperatures soar to 130 degrees in the summer and she is denied medical care because of staffing shortages.³⁷ Criminalized survivor LeeAnn Adkins will be listed on the sex offender registry for the rest of her life because she tried to help younger women doing survival sex work.³⁸ Criminalized survivor Janet Carter, wheelchair bound and suffering from early onset dementia, Parkinson's disease, a neurocognitive disorder, and memory-related aftereffects from a head injury and chemotherapy, was told by a California parole commissioner that her "lack of memory appears to be selective" as they denied her parole.³⁹ All of these women faced the same skepticism about their credibility. All interacted with parts of the criminal legal system that declined to exercise discretion in a way that manifested mercy, compassion, or humanity. None of this is an aberration. This is how the criminal legal system operates. As long as we continue to send survivors into this system, we will have cases like PT's, and Kwaneta Harris's, and Lee Ann Adkins's, and Janet Carter's. The question is whether we can accept living in a society that imposes such harm—that is willing to let a young woman who fights to save her own life die in prison—and call that justice.

37. Personal communication with the authors, available upon request; *see also* Kwaneta Harris & Leigh Goodmark, *Let's Abolish Systems That Criminalize and Punish Survivors of Abuse*, TRUTHOUT (Jan. 20, 2023), <https://truthout.org/articles/lets-abolish-systems-that-criminalize-and-punish-survivors-of-abuse/> [<https://perma.cc/SZA3-8ST5>].

38. LeAnn Adkins, *Labels, Supervision and Surveillance: Motherhood and Sex Offender Status*, 15 SCHOLAR & FEMINIST ONLINE (2019), <https://sfoonline.barnard.edu/labels-supervision-surveillance-motherhood-sex-offender-status> [<https://perma.cc/Q6QW-C3AR>].

39. Sam Levin, *An Elderly Woman in Prison is Losing Her Memory. Why Won't California Release Her?*, GUARDIAN (Dec. 19, 2022, 6:00 AM), <https://www.theguardian.com/us-news/2022/dec/19/california-elderly-prison-losing-memory-release> [<https://perma.cc/D6FE-C3XB>].

TURNING THE TABLES: HOW THOSE WHO ARE ACCUSED DENY, ATTACK, AND REVERSE

Ailyn Aguilar Quinonez and Tamara Kuennen[†]

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INTRODUCTION

Most people who experience sexual assault and domestic violence do not report it to police,¹ and many do not even disclose it to loved ones.² One of the most cited reasons for their reluctance to talk is the fear of not being believed.³ This fear is well-founded. When people report abuse, friends and family are often skeptical, and law enforcement—police, prosecutors, and judges—often disregard their claims.⁴ Indeed, feminist legal scholars have argued that a primary legal response to accusers of rape is denial⁵ and to domestic violence is dismissal.⁶

1. Regarding the reporting of sexual assault, see *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/P8FL-9WVQ>] (“Only 310 out of every 1,000 sexual assaults are reported to police. That means more than 2 out of 3 go unreported.”) (citing RACHEL E. MORGAN & ALEXANDRA THOMAS, BUREAU OF JUST. STAT., NCJ 301775, CRIMINAL VICTIMIZATION, 2020 (2021)). Regarding the reporting of domestic violence, two national studies were conducted in 2015. One study, conducted by the ACLU, surveyed more than 900 domestic violence service providers about their clients’ experiences with police. See DONNA COKER, SANDRA PARK, JULIE GOLDSCHIED, TARA NEAL & VALERIE HALSTEAD, ACLU, RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING (2015), www.aclu.org/responsesfromthefield [<https://perma.cc/UZY2-6XPQ>]. “An overwhelming majority of the survey respondents (88%) reported that police “sometimes” or “often” do not believe survivors or blamed survivors for the violence. A similarly large majority (83%) reported that police “sometimes” or “often” do not take allegations of sexual assault and domestic violence seriously.” *Id.* at 1. The other, conducted by the National Domestic Violence Hotline, surveyed survivors themselves. TK LOGAN & ROBERTA VALENTE, NAT’L DOMESTIC VIOLENCE HOTLINE, WHO WILL HELP ME? DOMESTIC VIOLENCE SURVIVORS SPEAK OUT ABOUT LAW ENFORCEMENT RESPONSES (2015), <https://www.thehotline.org/wp-content/uploads/media/2020/09/NDVH-2015-Law-Enforcement-Survey-Report-2.pdf> [<https://perma.cc/BRS7-CBRC>]. In the National Domestic Violence Hotline survey, just over half of the 637 women surveyed reported that they had never called the police for help when they experienced domestic violence. *Id.* at 2. Of these, 80% stated they were somewhat or extremely afraid to call and would not call in the future. *Id.* at 4. Of the people who had previously called the police, 67% stated they were somewhat or extremely afraid to call the police in the future. *Id.* at 8.

2. DEBORAH TUERKHEIMER, CREDIBLE: WHY WE DOUBT ACCUSERS AND PROTECT ABUSERS 2 (2021) [hereinafter TUERKHEIMER, CREDIBLE] (describing how, outside of the legal system, friends’ and families’ quick judgments and disbelief are even worse than the responses accusers receive from inside the system).

3. See *supra* note 1 and accompanying text.

4. ANITA HILL, BELIEVING: OUR THIRTY-YEAR JOURNEY TO END GENDER VIOLENCE 34–35 (2021) [hereinafter HILL, BELIEVING] (describing the messages that people who experience abuse hear, both inside and outside of courts, that excuse and dismiss gender-based abuse, including that if you are the only one complaining, it must not really have happened; you are overreacting; it’s not so bad and “their equivalents [that] are ubiquitous and intended to silence and shame victims.”).

5. Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 2 (2017) [hereinafter Tuerkheimer, *Incredible Women*] (discussed *infra* Section II.A) (describing a “law enforcement regime predisposed to dismiss [accusers’] complaints”).

6. Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399,

Compounding the fear of not being believed is the fear that the abuser will retaliate.⁷ Retaliation may come in many forms, including physical violence, stalking, intimidation, and harassment.⁸ While all these forms of retaliation are prohibited by law, one kind of retaliation is perfectly legal and even constitutionally protected: filing a lawsuit.⁹ Defamation, retaliatory restraining orders, and counter-claiming abuse within the context of a divorce or child custody case are just a few of the types of claims that can be utilized to retaliate, and they are on the rise.¹⁰ Defamation is the most widely known, because of its increasing use by male celebrities such as Johnny Depp, Roger Ayles, and Donald Trump. Indeed, the media frenzy surrounding celebrities' lawsuits against their accusers has broadcast the message, loudly and clearly, that if you report abuse, you'd better be prepared to be sued.¹¹ Indeed, defamation has been termed a "growth industry,"¹² and its use by people accused of gender-based violence has dramatically increased since 2017, when the #MeToo movement went viral.¹³

Thus, compounding two of the fears that victims often experience—not being believed by others and retaliation by the abuser—is the fear that the abuser will not merely deny the allegations, but will turn the tables, claiming to be the "real victim." And, further, that when the abuser turns the tables, *they will be believed*. Social scientists Jennifer Freyd and Sarah Harsey have documented abusive partners' use of a technique called "DARVO," which is the simultaneous use of three behavioral tactics: deny, attack, and reverse victim-and-offender.¹⁴ Like the threat of a lawsuit, this technique has gained notoriety.¹⁵

400 (2019) (discussed *infra* Section II.A.) (describing "systems designed to furnish [accusers] with help and protection dismiss the importance of [their] experiences.").

7. JUDITH LEWIS HERMAN, ET AL., *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* 33-50 (1992).

8. *Id.*

9. The constitutional right to petition the government for redress of grievances is stated explicitly in the First Amendment to the U.S. Constitution. U.S. CONST. amend. I; see also Tamara L. Kuennen, *Recognizing the Right to Petition for Victims of Domestic Violence*, 81 FORDHAM L. REV. 837 (2012) (discussing the right to petition in the context of domestic violence and sexual assault).

10. See discussion *infra* Section I.B.

11. Sarah J. Harsey & Jennifer J. Freyd, *Defamation and DARVO*, 5 J. TRAUMA & DISSOC. 481, 482 (2022) [hereinafter Harsey & Freyd, *Defamation and DARVO*].

12. RODNEY A. SMOLLA, 1 LAW OF DEFAMATION § 1:5 (2d ed. 2022) ("By any measure, defamation in the United States has now long been a 'growth industry.'")

13. Madison Pauly, *She Said, He Sued*, MOTHER JONES (March/April 2020) <https://www.motherjones.com/crime-justice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault/> [https://perma.cc/XJ92-VVH6] (reporting that at least 100 defamation cases had been filed since 2014 by those accused of sexual assault, and that, of these, about half were filed in the years following the rise of #MeToo, indicating a sharp increase in the number of people taking their alleged victims to court); see also Jorie Dugan, *Defamation Lawsuits: Another Tactic to Silence Survivors*, MS. MAGAZINE (Jan. 8, 2022).

14. Harsey & Freyd, *Defamation and DARVO*, *supra* note 11.

15. Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence, and Student Discipline in Education*, 54 WAKE FOREST L. REV. 303, 340 (2019) (referring to Donald Trump and Justice Clarence Thomas).

Referring to Donald Trump, the Daily Show host Trevor Noah captured the danger of DARVO.¹⁶ Noah explained that Trump's

most powerful tool is that he knows how to wield victimhood. He knows how to offer victimhood to people who have the least claim to it, which is a really really powerful tool because you realize that what he's doing in that moment is he's saying "the real victims of the #MeToo movement are men. They're the real victims. Someone can accuse you at any time and your life is over."

They're the real victims. . . . I think people take for granted how powerful that message was. There are a lot of men who that message will connect with They make it sound like all men have been accused, alright, but 99.9 percent of men have not been accused. . . . [T]hen what they do is create an idea that all men need to band together to stop this from happening because it could happen to you and then men become the victims. And it's such a powerful tool to use, because if you convince men that they are the true victims of the #MeToo movement, you get men to fight against the movement that's really about holding men who are doing bad things accountable [P]eople go, "Why don't women come forward?" Because when you do, the President of the United States will use you as a punchline in front of a crowd. . . . [I]f you can convince people that they are, in fact, the victims when they are [in] a position of power, [then] you have the most powerful tool that you can wield.¹⁷

It is no wonder that people, particularly those who express themselves as women and transgender, are reluctant to report intimate partner violence and sexual assault. When the accused are successful in persuading the public, decision-makers (police, judges, and social service workers), or worse, the friends and family to whom a person might first turn, reporting is chilled.¹⁸

This essay contributes to feminist legal scholars' identification of the "credibility discount"¹⁹ imposed upon accusers of intimate partner violence and sexual assault, the vast majority of whom identify as women.²⁰ The essay

16. At the time Noah commented, Dr. Christine Blasey Ford had come forward with allegations of sexual assault by Supreme Court Justice Brett Kavanaugh. *Trever Noah's Powerful Message on Trump and Male Victimhood During #MeToo*, DAILY BEAST, <https://www.thedailybeast.com/trevor-noahs-powerful-message-on-trump-and-male-victimhood-during-metoo> (Oct. 5, 2018) [<https://perma.cc/2NM2-PX6R>].

17. *Id.*

18. Harsey & Freyd, *Defamation and DARVO*, *supra* note 11 at 482–83.

19. A term of art coined by law professor Deborah Tuerkheimer. *See* discussion *infra* Section II.A.

20. We are struggling with labels and categories and acknowledge that we are excluding people with the labels we have chosen. *See* Michele Bograd, *Strengthening Domestic Violence Theories: Intersections of Race, Class, Sexual Orientation, and Gender*, DOMESTIC VIOLENCE AT THE MARGINS 25–9 (Natalie Sokoloff Ed. 2005) (arguing that by defining victims of intimate partner abuse and sexual assault as women, scholars render invisible gay and lesbian battering

contributes to the literature by examining the relationship between how and why accusers are not believed, and the use of DARVO by the accused in the form of retaliatory litigation.²¹ Whereas credibility discounting focuses on the characteristics and behaviors of the accuser, along with the public reaction to those characteristics and behaviors, DARVO shines the spotlight on the tactics of the accused. DARVO is an analytical tool to identify, in advance, how perpetrators' counter-allegations of abuse may intensify the credibility discount, thereby furthering our understanding of how abusers employ courts of law and public opinion in potentially dangerous manners. This new focus—on the accused—suggests additional solutions to address the credibility discount.

This essay proceeds in three parts. Part I demonstrates how people accused of abuse weaponize law to not merely deny accusations and attack the credibility of accusers, but to turn the tables and reverse the roles of victim and offender, *i.e.*, use DARVO. Although popular accounts of the use of DARVO by celebrities serve to illustrate the point this essay makes, the weaponization of lawsuits in this way is not a strategy reserved for the rich and famous. Nor is it limited to defamation. Other kinds of legal actions include claims of “parental alienation” by the accused in child custody litigation and the filing of retaliatory civil protection orders. Part II reviews the literature on both credibility discounting and DARVO in the context of intimate partner abuse, which demonstrates that DARVO has yet to be fully explored in the legal literature. This Part argues that understanding and anticipating the use of DARVO adds to feminist scholars' analysis by, first and foremost, naming it. Naming the problem is powerful not merely for the purpose of illuminating the phenomenon, but also drawing its sting proactively. By directing our attention to the accused, we also redirect our focus to where it belongs, thereby decreasing the burden on the accuser to be a “perfect victim,”²² a seemingly intractable problem long identified by feminist legal scholars. Finally, Part III plants seeds for reforms that have the potential to address DARVO and provides ideas for future research.

and collapse too simplistically a continuum of gender identity and sexual orientation). On the other hand, we are aware that people who identify and/or express themselves as women, people who present marginalized identities, and who live in communities that experience concentrated disadvantage are: 1) abused at higher rates, both by intimate partners and by the state; and 2) chilled from disclosing or reporting at higher rates. We want to acknowledge these facts without “invisibilizing” people who identify as men and boys and who also suffer, while also not “annihilate[ing] group concepts like gender, race and class.” See Susan Archer Mann, *The Scholarship of Difference: A Scholarship of Liberation?*, 70 SOCIO. INQ. 475, 486 (2000).

21. Discussed *infra* Section I.B. For the moment, we observe that two books in the past year include HILL, *BELIEVING*, *supra* note 4 and TUEKHEIMER, *CREDIBLE*, *supra* note 2. Just prior to these books (and just this year made into a movie), was JODI KANTOR & MEGAN TWOHEY, *SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT* (2019).

22. LEIGH GOODMARK, *IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM* (2023).

I. WEAPONIZATION OF LAW BY THE ACCUSED

A. Background

The tale of a happily ever after sets the stage. From rom-coms to Disney princess movies, the fairytale of falling in love is one that the entertainment industry has sold for ages. Of course, falling in love is not as simple as it is often portrayed, nor does it end after exchanging “I dos.” The reasons for committing to someone vary. For example, this essay’s first author, Ailyn, dreams and hopes she will marry when she falls unconditionally and irrevocably in love. When thinking of such a romanticized concept, she subconsciously thinks of safety and loyalty. She does not expect failure, betrayal, and—especially—fear. Ailyn knows she has internalized a fairytale—despite knowing the statistics—like “one in four women and one in ten men nationwide experience sexual violence, physical violence, or stalking by an intimate partner in their lifetimes.”²³

Intimate partner violence is most often described by anti-gender-based violence advocates as one person attempting to gain control of another using harmful tactics such as fear, intimidation, physical/sexual abuse, psychological/emotional abuse, and financial abuse.²⁴ These tactics provide only a glimpse into myriad individualized forms of intimate abuse. Despite the prevalence of abuse and the clearly gendered nature and effects of it,²⁵ vast numbers of women who experience abuse do not report it.²⁶

The low percentage of reports may be a product of reporting not being a realistic option for many. Some survivors state that the abuse in their relationship is a personal matter that should be dealt with in private, while others explain that fear of retaliation, belief that the offender’s actions were warranted or “not severe,” fear of the system that is supposed to protect them, as well as a desire to protect the offender and children are some reasons for not disclosing

23. Ashley Beeman, Note, *The Need for More States to Adopt Specific Legislation Addressing Abusive Use of Litigation in Intimate Partner Violence*, 20 SEATTLE J. FOR SOC. JUST. 825, 827 (2022).

24. Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1107 (2009) (addressing civil domestic violence laws and suggestions on how to better serve women who have been subjected to such harm).

25. GOODMARK, *supra* note 22. (“Both demographically and conceptually, intimate partner violence is a gender problem.” Goodmark discusses statistics of the gendered nature of this type of violence, discussing how women are more likely to experience overlapping forms of abuse (such as stalking, sexual assault and physical violence whereas most men experience only physical violence); women are almost twice as likely to be subjected to severe physical violence; and women’s daily lives more significantly impacted than men’s by fear, post-traumatic stress; missing work; needing health care, housing or legal help).

26. *See supra* note 1; *see also* Thomas L. Hafemeister, *If All You Have Is A Hammer: Society’s Ineffective Response to Intimate Partner Violence*, 60 CATH. U. L. REV. 922 (2011) (“between 1994 and 2005, only fifty-eight percent of female and about fifty-two percent of male IPV victims reported their attacks to the police, and some studies indicate that rates of non-reporting may be even higher.”).

abuse.²⁷ Ailyn is no stranger to needing to stay below the radar of the state or out of the eye of the public, for that matter. Her parents immigrated to the United States from Mexico City. Their immigration status was a gray cloud of worry that loomed over the entire family—a constant presence and reminder to maintain a low profile and withhold details of their homelife from others. By the time Ailyn was seven years old, she was well aware of the gravity of the issue and the importance of keeping their secret.

Other immigrant families must keep a second secret—that of intimate partner abuse. Mariela Olivares, Professor of Law at Howard University, captured with heartbreaking clarity how immigrants dealing with abuse are more vulnerably situated because of the extreme likelihood that their immigration status will be used against them.²⁸ Immigrant women, statistically at higher risk for abuse, face the additional barriers of being low-income, ineligible for public benefits, unfamiliar with the U.S. legal system, and frequently unable to speak English.²⁹ Ultimately, many immigrants who do not have legal immigration status (or whose partners do not) may feel they need to comply with a partner's demands, no matter how coercive, and that there is nowhere to turn for help given the risk of deportation.

Ailyn thinks of how her family might have handled abuse, had it occurred. There is no doubt in her mind that they would have stayed quiet. It is difficult to admit that she would have kept abuse within her home a secret—not because she is ashamed—but because of the complexity of abuse in relationships and the layers of context, morals, and values to grapple with. Ailyn grew up having been taught to do the “right thing” in accordance with mainstream white, male values. The “right thing” would be to report abuse. But when doing the right thing can result in a domino effect of hardships, a person learns to weigh the options carefully. It is difficult for Ailyn to fully comprehend—even upon reflection as an adult, a feminist, a law student—that she would not have reported. As complicated as it may seem, it boils down to the reality that protecting others often trumps protecting oneself.

Of course, immigrant status may be one of a thousand different barriers to reporting abuse. For example, this essay's second author, Tammy, was born to white U.S. citizen parents, but neither Tammy nor her mom talked to anyone about the abuse of her mother by her father—let alone reported it to authorities. Tammy's parents were teenagers when Tammy was born, and the three lived in a trailer park in a small town outside of Cedar Rapids, Iowa. Tammy's mom would later chalk up the abuse to the crazy effects of alcohol. Because Tammy's

27. *Id.* at 923; see also Alyssa R. Leader, *A “SLAPP” in the Face of Free Speech: Protecting Survivors’ Rights to Speak Up in the “Me Too” Era*, 17 FIRST AMEND. L. REV. 441, 444 (2019) (addressing the need for an increase in anti-SLAPP statutes, as well as various changes that could be implemented to better ensure survivors of intimate partner violence are able to wholly exercise their First Amendment rights).

28. Mariela Olivares, *Battered by Law: The Political Subordination of Immigrant Women*, 64 AM. U. L. REV. 231, 238 (2014) (discussing identity politics and the continued identity oppression, and detailing the added struggles for immigrant victims of domestic violence).

29. *Id.* at 236–37.

parents were frequently drunk, yelling and “low level” physical violence were the norm. And in 1973 and 1974, abuse like what Tammy witnessed wasn’t even “a thing” yet. “Battered wives” was a term that had only existed for a few years,³⁰ and “battered” wasn’t remotely how Tammy’s mom would have identified herself. It didn’t occur to Tammy until well into adulthood to talk to anyone about the abuse.

Between these two stories, themes emerge that apply to many who experience abuse. For example, we all navigate structural barriers, though the burdens of these barriers are distributed unequally.³¹ For Ailyn, the brutality of U.S. immigration policies shaped her childhood. Ailyn’s father had already been deported once by the time Ailyn was born. Against this backdrop, her father and her older brother—who was not born in the U.S.—had to leave the country indefinitely and wait for their number to be called for re-entry. Ailyn and her mom lived in constant fear until they returned eight months later. All to tick the boxes of U.S. immigration law. For Tammy, the structures that cabined her life were different. Citizenship was a privilege of which she was not even aware. Rather, Tammy was raised in a rural, low-income, white community where cultural attitudes about gender roles and the acceptability of gender violence lagged by two decades those of people in urban, educated communities. Tammy’s, and her teenaged parents’, experiences were well within the norms of the trailer park.

In sum, why people don’t report abuse is as complicated as why people abuse. In the next section, we explore one of the predominant theories for why people abuse, and how such abuse can manifest in the legal system.

B. Litigation vs. Litigation Abuse

The legal system is the primary system in the United States to which people experiencing intimate abuse can turn for help.³² The responses it offers are arrest and prosecution of the perpetrator in the criminal legal system, and, in the civil system, orders of protection that restrain the perpetrator from contacting the victim. Both remedies rely upon the premise that separation of the perpetrator from the victim will stop the abuse.

Counterintuitively, intimate partner violence frequently does not end when the relationship does. In fact, separation may heighten the risk of further

30. See discussion *infra* Part II.

31. Beth E. Richie, *Foreword* to DOMESTIC VIOLENCE AT THE MARGINS xvi (Natalie J. Sokoloff Ed., 2005) (observing that in contexts where we analyze intimate partner violence, the violence is different for people who live in communities where disadvantage is concentrated and where structures impact people differently and arguing for an analysis of difference rather than sameness).

32. LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 18 (2012) (tracing the history of legal responses to domestic violence since the early 1970s and persuasively arguing that the passage of the Violence Against Women Act in 1994 “cemented the position of the legal system as the primary responder to domestic violence in the United States.”).

violence.³³ One reason for this is the challenge the end of a relationship creates for the person who is abusive. They may begin to feel they have lost control when their partner leaves and thus wish to regain it.³⁴ Though precisely why someone abuses and how the abuse unfolds may be unique, the need for one party to maintain control has been a central tenet not only of anti-domestic violence activists' explanations of intimate partner violence,³⁵ but also social scientists'.

For example, psychologists Gutowski and Goodman characterize coercive control as "central to the experience of [intimate partner violence]," further defining the situation as one where a party attempts to gain control of another by use of social power, such as wealth, authority, and influence.³⁶ Misusing court proceedings can be another coercive use of social power. Also known as "paper abuse,"³⁷ "vexatious or abusive litigation,"³⁸ and "stalking by way of the courts,"³⁹ this tactic can be used purposefully by aggressors to avoid taking

33. Ellen R. Gutowski & Lisa A. Goodman, *Coercive Control in the Courtroom: The Legal Abuse Scale*, 19 J. OF FAM. VIOLENCE 527, 527 (2023); see also Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Analysis*, 46 FAM. CT. REV. 476, 483 (2008) ("It is well established that homicide rates are higher for women who have separated from their partners than for women in intact relationships, and this heightened risk of homicide following a separation is not found for men.") (internal citations omitted).

34. Kelly & Johnson, *supra* note 33, at 480 ("It is often the case that Situational Couple Violence continues through the separation process and that Coercive Controlling Violence may continue or even escalate to homicidal levels when the perpetrator feels his control is threatened by separation.").

35. See, e.g., *Why People Abuse*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/identify-abuse/why-do-people-abuse/> [https://perma.cc/F4QL-WQZ4] ("Domestic violence stems from a desire to gain and maintain power and control over an intimate partner."); *Understanding the Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROGRAMS, <https://www.theduluthmodel.org/wheels/faqs-about-the-wheels/> [https://perma.cc/J4H4-AQUU] ("Battering is one form of domestic or intimate partner violence. It is characterized by the pattern of actions that an individual uses to intentionally control or dominate his intimate partner.").

36. Gutowski & Goodman, *supra* note 33, at 2. For a compelling narrative demonstrating the use of social power, see BETH SIPE & EVELYN J. HALL, *I AM NOT YOUR VICTIM: ANATOMY OF DOMESTIC VIOLENCE* (2014). Beth endured seventeen years of abuse at the hands of her husband, a high-ranking military officer. Sam Sipe used his rank and "nice guy" work persona to discredit Beth's allegations of domestic violence.

37. Susan L. Miller & Nicole L. Smolter, "Paper Abuse": *When All Else Fails, Batterers Use Procedural Stalking*, 17 VIOLENCE AGAINST WOMEN 637 (2011) (exploring generally the coercive control tactic of paper abuse, a form of abuse that has yet to be fully researched and understood).

38. David Ward, *In Her Words: Recognizing and Preventing Abusive Litigation Against Domestic Violence Survivors*, 14 SEATTLE J. SOC. JUST. 429, 438 (2015) (providing insight on how overlooked abusive litigation is and his efforts to change this).

39. Anna McLemore, *Stalking by Way of the Courts: Tennessee's Abusive Civil Action Law and Why All States Should Adopt a Similar Approach to Abusive Litigation in the Family Law Context*, 28 UCLA WOMEN'S L.J. 333, 342 (2021) (explaining how survivors of abusive relationships face the possibility of abuse via court long after the relationship has ended, and how the court's current approach is not adequately addressing this).

responsibility for their wrongful actions.⁴⁰ Professor David Ward catalogued multiple ways that people use the litigation process to harm a partner, including excessive and frivolous filings, re-litigating issues, seeking continuances, reneging on agreements, demanding embarrassing information through discovery, violating court orders, making false attacks within ongoing litigation, and reporting false allegations to agencies outside of court.⁴¹

These uses of litigation are a win-win for the aggressor—even if they do not obtain their preferred outcome, they achieve prolonged contact and prolonged control. As one survivor described:

The most horrible sufferings have been not only physical, they have been emotional, psychological, and financial! He never stops harassing me—the courts are his legal playgrounds! He uses the courts to inflict suffering. He constantly, and I do mean constantly, has me in court. His lawyer helps him to wear us out. He wants to inflict as much suffering as he can on me and the court itself enables him to. The end is never coming—it never ends!⁴²

Based on our representation of survivors in a public interest, nonprofit setting,⁴³ we describe three types of legal actions that we have seen abusive partners increasingly rely on (regardless of whether they have lawyers) in retaliation for their partners reporting abuse. These are defamation lawsuits, claims of parental alienation, and retaliatory protection orders.

1. Defamation

*I thought I was done suffering at the hand of this person. I thought he was done making my life miserable. All of a sudden I'm being sued.*⁴⁴

Defamation suits, when used properly, provide compensation to those who have been harmed by a false statement.⁴⁵ Generally, to prove a defamation lawsuit, the individual bringing the suit must demonstrate: “(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a

40. *Id.*; Jessica Klein, *How Domestic Abusers Weaponize the Courts*, ATLANTIC (July 18, 2019), <https://www.theatlantic.com/family/archive/2019/07/how-abusers-use-courts-against-their-victims/593086> [<https://perma.cc/4Q74-JZTY>].

41. Ward, *supra* note 38, at 438–46.

42. *Id.* at 429.

43. We work at the Student Law Office of the University of Denver Sturm College of Law, representing low-income people in a variety of civil court cases, including civil protection orders, claims for money damages of all sorts (including defamation), and theft of wages. Author Kuennen has worked at the office for twenty years. Over the course of the past three years, she has observed that in half the cases in which she represents people who report their experiences of abuse, the person accused files a civil lawsuit, a domestic relations lawsuit, or a counterclaim within a lawsuit alleging that they, and not the accusing party, are the “real victim.”

44. Leader, *supra* note 27, at 449.

45. *See* SMOLLA, *supra* note 12, at § 1:5.

third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.”⁴⁶

Filing a defamation lawsuit as a response to the *truthful* reporting of abuse is another matter. As described by social scientists Sarah Harsey and Jennifer Freyd, accusing victims of defamation is a means of implementing all three behavioral tactics of DARVO.⁴⁷ First, the abuser is denying they have abused another by claiming the allegations of abuse as false and defamatory; second, they are attacking, by making the harmed person endure prolonged run-ins while also financially burdening them with frivolous and costly litigation; and third, they are reversing the roles in an attempt to rebrand themselves as the “actual victim.”⁴⁸ As stated by Harsey and Freyd: “Defamation lawsuits targeting abuse survivors tick all the DARVO boxes.”⁴⁹

Taylor Swift defended herself against a perpetrator’s use of DARVO. In 2013, Swift reported to her staff that a member of her team inappropriately touched her at a meet-and-greet.⁵⁰ The incident was captured in a photograph.⁵¹ In 2017, the man filed a defamation suit against her, alleging wrongful termination⁵² as a result of her allegedly false statements.⁵³ When asked about the damage to the plaintiff’s reputation, Ms. Swift responded by reminding the public where responsibility properly should lie: “I am being blamed for the unfortunate events of his life that are a product of his decisions and not mine.”⁵⁴ This case, which ultimately resulted in a ruling in favor of Swift, is an illustration of how, regardless of one’s name or social status, those who speak up are often scrutinized and discounted.

Swift’s case occurred at about the same time that the #MeToo movement went viral⁵⁵ and thousands of people gave voice to abuse they had experienced

46. RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

47. The three tactics are deny, attack, and reverse victim and offender. Harsey & Freyd *Defamation and DARVO*, *supra* note 11, at 482–83.

48. *Id.* at 483. (“[B]y suing for defamation, those accused are collectively denying they are guilty of their behavior while asserting that any claims against them are false (in most cases, individuals cannot be defamed by true statements). Alleged perpetrators who sue alleged victims for defamation often attack the mental competence and motivations of the defendant in the defamation lawsuit. Moreover, defamation lawsuits position the plaintiffs—i.e., the abusers—as victims harmed by libel or slander. This is the three-pronged DARVO response—deny, attack, reverse victim and offender—packaged in a lawsuit intended to intimidate, silence, and punish victims.”).

49. *Id.*

50. *Mueller v. Swift*, No. 15-CV-1974, 2017 WL 2362137, at *1–2 (D. Colo. May 31, 2017).

51. *Id.* at *1, *3.

52. *See id.*

53. *Id.*

54. Leader, *supra* note 27, at 449.

55. Though BIPOC activist Tarana Burke began the movement in 2006, it was with Alyssa Milano’s tweet in 2017 that the movement gained widespread traction, which according to some constituted white women’s coopting of the movement. *See, e.g.,* AYA GRUBER, *THE FEMINIST WAR ON CRIME* 10–11 (2020) (noting that Burke’s original intention

but had previously not reported.⁵⁶ The public's reaction to the movement was not all positive. While many women felt empowered, many others were concerned that claims of past assaults would now be opportunistically used to illegitimately ruin reputations.⁵⁷ Such public doubt and erosion of trust in victims enables aggressors to execute DARVO behavior.⁵⁸

The irony, of course, is that plaintiffs filing bogus defamation claims aim to hold their partners accountable for the very conduct (lying) they themselves are committing. A successful retaliatory defamation lawsuit starts a chain reaction. The suit further exploits the law of defamation, causes untold additional trauma for the person who experienced abuse, from having to publicly retell and relive the events, chills others from coming forward to report their experiences of abuse, and discredits survivors of abuse as a whole.⁵⁹

2. Claims of Parental Alienation in Child Custody Proceedings

*He told me what could be worse [than winning custody in court] is if he killed all of us, and then he said actually worse than that, if he killed the children and not me so that I would have to live without them.*⁶⁰

One means of gaining or maintaining control over a partner is threatening the partner with taking them to court and winning sole custody of the children.⁶¹ When this threat is apparent, whether implied or explicit, parents experiencing abuse may act in ways that appear counter-intuitive to how people experiencing abuse “should” react. For example, they may want the child to maintain a relationship with the abusive parent, or they may stay in a marriage rather than leave it because, although it is abusive, they are at least able to supervise the relationship between the abusive partner and the child. The abusive parent may take note of this and begin using the children as a way to further control the other parent, a tactic that some anti-domestic violence advocates call “custody blackmail.”⁶² Custodial threats are a way to manipulate and potentially secure a level of compliance from the other parent.⁶³ Unsuccessful threats may evolve

to support the invisible, resource-less survivors, was lost in the “celeb fracas” after Milano’s tweet).

56. Leader, *supra* note 27, at 445.

57. *Id.* at 446.

58. Harsey & Freyd, *Defamation and DARVO*, *supra* note 11, at 482.

59. Shaina Weisbrot, *The Impact of the #MeToo Movement on Defamation Claims Against Survivors*, 23 CUNY L. REV. 332, 339 (2020); *see also* Leader, *supra* note 27, at 447–48 (detailing the growing use of retaliatory defamation lawsuits and exposing the aftermath of reporting abuse).

60. Letter from Amy Castillo to Chairman Vallario and Members of the Md. House Judiciary Comm. (Feb. 25, 2010), https://www.washingtonpost.com/wp-srv/metro/pdf/HB_700_Testimony_Amy_Castillo.pdf [<https://perma.cc/HCC4-U5YX>].

61. Ward, *supra* note 38, at 435 (“Above all else, survivors indicated that seeking sole custody of children was a common tactic that abusers used against them.”).

62. Gutowski & Goodman, *supra* note 33, at 528.

63. Ward, *supra* note 38, at 435.

into slandering the victim's fitness as a parent,⁶⁴ which can harmfully bias custody evaluations.⁶⁵

In court, abusers commonly play the victim in order to “distort information and distract from the abusive dynamics present in the relationship.”⁶⁶ With distorted information and domestic violence denials, a misleading image of the victim is painted—one of parental alienation.⁶⁷ The misleading image of parental alienation is worsened when coupled with the systemic bias in favor of “friendly parent” statutes.⁶⁸ In fact, one study found that “in non-alienation cases courts credit 40.4% of mothers’ abuse allegations, [but] in alienation cases, they credit only 23%.”⁶⁹ When abusive fathers crossclaim alienation, courts disbelieve mothers’ claims of any kind of abuse 2.3 times more than when there are no allegations of alienation.⁷⁰ The essence? “Fathers who allege the mother has engaged in parental alienation are more likely to win custody themselves.”⁷¹ In other words, survivors—most often women—reporting abuse risk having their child taken away when abusive fathers turn the tables, claiming they are the real victims—not of abuse by the mother, but by her alienating him from the children.⁷²

64. *Id.* at 443.

65. Joan Meier, *Dangerous Liaisons: Social Science and Law in Domestic Violence Cases* GEO. WASH. UNIV. L. REV. 1, 8 (2017) (“[T]he scientific evidence supporting major concepts [used in family court] . . . is scant, thus, custody evaluations can be biased and address the evaluators’ favorite concepts (e.g., Parent Alienation Syndrome, Psychological Parent) as opposed to some objective truth.”).

66. Beeman, *supra* note 23, at 832.

67. Amelia Mindthoff, Debora Goldfarb, & Kelly Alison Behre, *How Social Science Can Help Us Understand Why Family Courts May Discount Women’s Testimony in Intimate Partner Violence Cases*, 53 FAM. L. Q. 243, 249 (2019).

68. Joyanna Silberg & Stephanie Dallam, *Abusers Gaining Custody in Family Courts: A Case Series of Overturned Decisions*, 16 J. CHILD CUSTODY. 140, 145 (2019).

69. Joan Meier, *Denial of Family Violence in Court: An Empirical Analysis and Path Forward for Family Law*, 110 GEO. L.J. 835, 886 (2022) (citing her own unpublished empirical research).

70. *Id.*

71. Beeman, *supra* note 23, at 834.

72. JOAN S. MEIER, SEAN DICKSON, CHRIS O’SULLIVAN, LEORA ROSEN & JEFFREY HAYES, *CHILD CUSTODY OUTCOMES IN CASES INVOLVING PARENTAL ALIENATION AND ABUSE ALLEGATIONS* 14 (2019) (exploring outcomes in custody/abuse litigation, concluding generally that fathers’ claims of parental alienation increase the probability of mothers losing custody of their children, and specifically: “When Fathers cross-claim alienation, courts are more than twice as likely to disbelieve Mothers’ claims of (any) abuse than if fathers made no alienation claim. . . . When Fathers cross-claim alienation, court are almost 4 (3.9 times) more likely to disbelieve Mothers’ claims of child abuse than if fathers made not alienation claim.”).

3. Retaliatory Civil Protection Orders

*I guess I need a knife in my back or at least to be bleeding profusely from the head and shoulders to get an [order for protection].*⁷³

Retaliatory protection orders, legally known as “mutual civil protection orders,” can be established in various ways, such as: “(1) mutual petitioning and abuse; (2) mutual finding of abuse without a separate petition; and (3) agreement for a mutual order without a finding of abuse or separate petition.”⁷⁴ One reason behind the enactment of mutual protection orders is to protect parties from each other who have entered into an abusive dynamic, thus mandating both to stay away from each other.⁷⁵ This is arguably valuable given that the main effort appears to be protection without labeling one specific individual as the wrongdoer.⁷⁶ However, a constructive court order has the power to become a weapon when sought for improper reasons.

Weaponizing of mutual protection orders can occur when the court is led to believe by the party who is the primary aggressor that both parties are equally dominant in the relationship.⁷⁷ This is prone to happen when two parties are alleging abuse, thereby making it difficult to determine truthfulness. A layer of complexity is added when the deciding judge is inexperienced in IPV litigation abuse, thus leading to a possible domino effect of granted frivolous mutual protection orders, and subsequently to police confusion.⁷⁸

Differentiating the aggressor from the victim is a challenging task given the stakes (a charge, a record, etc.). For this reason, officers are more likely to arrest both parties when there is a mutual protection order in place.⁷⁹ By naming both parties as restrained parties on the order, the court creates a “your word against mine” dilemma, resulting in mutual protection orders not being enforced as effectively as regular orders.⁸⁰ Moreover, if the person experiencing abuse appears in court to address additional acts of violence or child custody, the

73. Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1051 (1992) (analyzing the harms of mutual orders).

74. Olivia M. Fritsche, Note, *The Role of Enticement in a Violation of a Protection Order*, 71 WASH. & LEE L. REV. 1473, 1502 (2014) (discussing the drawbacks of mutual orders in light of multiple avenues from which to approach the issue of domestic violence).

75. *Id.* at 1502–03.

76. Topliffe, *supra* note 73, at 1053.

77. *Id.* at 1060–61; see also Justine A. Dunlap, *Soft Misogyny: The Subtle Perversion of Domestic Violence “Reform”*, 46 SETON HALL L. REV. 775, 795–96 (2016) (arguing that in a context similar to that of a protective order court, at the scene of a police investigation of a domestic disturbance, batterers used domestic violence mandatory arrest laws as a weapon, portraying to the police that the abuse was mutual, leading to arrest of both parties rather than only the primary aggressor).

78. Klein, *supra* note 40; Dunlap, *supra* note 77, at 795–96.

79. Dunlap, *supra* note 77, at 795–96.

80. Topliffe, *supra* note 73, at 1061.

mutual protection order has now tainted the victim's credibility, for the court may also become conflicted about whom to believe and how to proceed.⁸¹

The complexities of mutual protection orders have led many states to prohibit them, or to implement explicit limiting provisions.⁸² Specifically, states have barred mutual orders unless parties have separately petitioned the court for relief.⁸³ Similarly, courts require both parties to separately meet their burden of proof prior to a mutual order being issued.⁸⁴ The states that do allow mutual orders without a petition for relief still require a showing of violence.⁸⁵ Maryland, for example, permits mutual orders "if the judge makes a detailed finding of fact that . . . both parties acted primarily as aggressors; and . . . neither party acted primarily in self-defense."⁸⁶

C. *The Toll of Litigation Abuse*

Litigation abuse can range from the types of claims we have analyzed (defamation lawsuits, claims of parental alienation, and retaliatory protection orders) to what some may consider unobtrusive methods of misusing our legal system—such as order modifications and repeated court continuances. For many abusers, order modifications are used not to seek a fairer outcome but, rather, as a way to maintain direct contact with the other party.⁸⁷ As Gutowski and Goodman describe it, this is particularly the case when there is a protection order in place against the abuser, thus making court appearances the only legal way to continue their abuse.⁸⁸ In this context, repeated court continuances are also used as a coercive tactic with a goal to prolong a case as much as possible.⁸⁹ Though order modifications and court continuances may not be considered as obvious means of litigation abuse, they are both significantly time-consuming and financially consuming.⁹⁰

Legal abuse is financially harmful.⁹¹ Frequent and unnecessary court appearances have the potential to utterly drain finances, as they mean court fees

81. *Id.* at 1054.

82. Fritsche, *supra* note 74, at 1503–04 (“[N]ine states allow mutual orders, twelve states are silent on mutual orders, and thirty states expressly prohibit mutual orders without a separate petition.”).

83. *Id.*

84. *E.g.*, COLO. REV. STAT. 13-14-106(3) (2023) (providing, “A court shall not grant a mutual protection order to prevent domestic abuse for the protection of opposing parties unless each party has met his or her burden of proof . . . and the court makes separate and sufficient findings of fact to support the issuance of the mutual protection order to prevent domestic abuse for the protection of opposing parties. A party may not waive the requirements set forth in this subsection (3)”).

85. Fritsche, *supra* note 74, at 1504.

86. *Id.* at 1504 (quoting MD. CODE. ANN., FAM. LAW § 4-506 (2012)).

87. Leah J. Pollema, Note, *Beyond the Bounds of Zealous Advocacy: The Prevalence of Abusive Litigation in Family Law and the Need for Tort Remedies*, 75 UMKC L. REV. 1107, 1110 (2007) (discussing the problem of abusive litigation).

88. Gutowski & Goodman, *supra* note 33, at 2.

89. Pollema, *supra* note 87, at 1118.

90. *Id.* at 1110.

91. Gutowski & Goodman, *supra* note 33, at 1; Ward, *supra* note 38, at 451–53.

and missing work.⁹² Equally, if not more draining, are the costs in time and in stress.

Perhaps most draining, and often described as the most painful, is the mental impact of the misuse of the legal system.⁹² One study gathered information from litigants' legal and non-legal advocates on how many litigants had experienced retraumatization via the legal system.⁹³ This study revealed that 81% of those surveyed identified the abuser's legal actions to be retraumatizing, 60% reported retraumatization by court personnel, and 83% of respondents reported the court procedures and outcomes as retraumatizing.⁹⁴ Retraumatization of this kind can lead to insomnia, lack of concentration, and, in more severe cases, Post Traumatic Stress Disorder (PTSD).⁹⁵ Furthermore, the legal process can cause abusers to start believing their own fallacies, and those experiencing abuse may begin to internalize the same as true.⁹⁶ In this way, people who experience abuse begin to question and doubt their own experiences,⁹⁷ thereby self-imposing the very "credibility discounting" that feminist legal scholars have recently named and made visible. It is to this topic we next turn.

II. THE POWER OF NAMING WHAT IS HAPPENING

The power of naming has deep roots in the anti-gender-based violence movement of the 1970s (then called the "battered women's movement"). Before then, "battering"—now known most widely as "domestic violence"—went unrecognized as a legal or social concept.⁹⁸ Since then, naming and claiming the many forms that gender-based violence may take has been one of the most effective devices for making visible that which otherwise is not.⁹⁹ Think, for

92. See, e.g., Ward, *supra* note 38; Klein, *supra* note 40.

93. Lisa A. Tucker, *The [E]x Factor: Addressing Trauma from Post-Separation Domestic Violence As Judicial Terrorism*, 99 WASH. U. L. REV. 339, 364 (2021) (citing Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81, 92–93 (2020)).

94. *Id.*

95. *Id.* at 365.

96. Topliffe, *supra* note 73, at 1060–61.

97. Dunlap, *supra* note 77, at 802–03.

98. SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 29–33 (1982) ("The emerging feminist movement painstakingly detailed the conditions of daily life that would allow women to call themselves battered."); see also ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 21–22 (2000) ("First, 'battered women' were set forth as a definable group or category."); DONILEEN R. LOSEKE, *THE BATTERED WOMAN AND SHELTERS: THE SOCIAL CONSTRUCTION OF WIFE ABUSE* 21–29 (1992) (presenting the collective representations of the "battered woman" as constructed by activists in the 1970s and demonstrating the critical importance of naming and socially constructing the "battered woman").

99. See generally Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multicultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1078–87, 1098–1100 (2006) (Explaining that "naming and claiming was part of the process of becoming empowered and of becoming a part of the domestic violence community," but also critiquing the early movement's naming for excluding women of color).

example, of the power of naming “sexual harassment,”¹⁰⁰ “rape culture,”¹⁰¹ “date rape,”¹⁰² “lesbian battering,”¹⁰³ and “MeToo.”¹⁰⁴

For us, the term “credibility discounting”—the unwarranted and prejudicial doubt cast on people when they report their experience of sexual assault and intimate abuse¹⁰⁵—has had the same effect. Now that it has been named, we can see it clearly.¹⁰⁶ We argue that naming abusers’ use of DARVO in the legal system, like naming the credibility discounting of women, has enormous potential to decrease the pervasive blaming of people who experience abuse by keeping the spotlight focused on the accused. As we demonstrate below, discussion of the “credibility discount” has caught on in the feminist legal literature about abuse.¹⁰⁷ Discussion of DARVO, however, has not.¹⁰⁸ We hope to spark that discussion.

100. See generally CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 1, 4 (1979).

101. See generally Peggy Reeves Sanday, *The Socio-Cultural Context of Rape: A Cross-Cultural Study*, 37 J. SOC. ISSUES 5 (1981).

102. See generally SUSAN ESTRECH, *REAL RAPE* 10–26, 101 (1987).

103. See generally NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING (Kerry Lobel, Nat’l Coal. Against Domestic Violence ed., 1986).

104. See generally Tarana Burke, *What ‘MeToo’ Made Possible*, TIME (Oct. 12, 2022, 12:01 PM) <https://time.com/6221110/tarana-burke-me-too-anniversary/> [https://perma.cc/3JAA-BPV9] (“I . . . founded the ‘metoo’ movement to support survivors of sexual assault in 2006. . . . [M]illions of people . . . responded to the hashtag.”).

105. Tuerkheimer, *Incredible Women*, *supra* note 5, at 3.

106. TUERKHEIMER, *CREDIBLE*, *supra* note 2, at 9 (“Once you have a name for it, you see credibility discounting everywhere. It’s not isolated or idiosyncratic—it’s patterned and predictable.”).

107. Although the term “credibility discounting” was coined relatively recently, scholars have long observed the unwarranted and prejudicial biases against women’s credibility. See, for example, the body of scholarship produced by Professor Julia Simon-Kerr, beginning with a Note she published as a law student. Julia Simon-Kerr, Note, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854 (2008).

108. Only four legal scholars have identified the use of DARVO in the legal system, and none has discussed DARVO at length. See Kelly Alison Behre, *Deconstructing the Disciplined Student Narrative and Its Impact on Campus Sexual Assault*, 61 ARIZ. L. REV. 885, 906 (2019) (“In some cases, disciplined students . . . tak[e] an offensive stance, suing their sexual assault victims for defamation or including their sexual assault victim’s name in the pleadings and using the legal system to harass or embarrass victims. Some completely flip the script by claiming that the student who reported the sexual assault was the real aggressor.”); Cantalupo, *supra* note 15, at 340 (observing the use of DARVO by those accused of sexual assault on college campuses and noting Justice Clarence Thomas’s use of DARVO: “[W]hen now-Justice Clarence Thomas called Professor Anita Hill’s accusations a ‘high-tech lynching . . . this rhetoric used our nation’s history of racist brutality as a DARVO technique.”); Nancy Chi Cantalupo, *Title IX and X*, 25 ROGER WILLIAMS U. L. REV. 225, 228 (2020) (“[W]e can see in, for instance, Harvey Weinstein’s, Brett Kavanaugh’s, and Donald Trump’s reactions to being accused of sexual harassment and violence just a few of the many recent examples of the DARVO phenomenon.”); Thomas E. Kadri, *Networks of Empathy*, 2020 UTAH L. REV. 1075, 1103–1104 (2020) (“When abusers are confronted . . . , they often deny This retaliation can come in many forms, from untruthfully contradicting the accusations to spreading lies about the victim to threatening frivolous legal claims in order to re-exert control and prolong the

A. The Credibility Discounting of Accusers

Law professor Deborah Tuerkheimer coined the term “credibility discounting.”¹⁰⁹ It refers to the “unwarranted failure to credit an assertion where this failure stems from prejudice.”¹¹⁰ In *Incredible Women*, Tuerkheimer demonstrated the systemic discounting of rape accusers’ credibility that takes into account widely held assumptions about women who allege rape, such as that the accuser is vindictive and therefore lying, she is regretful about consenting, and therefore lying, or that she is not capable of assessing whether she consented due to intoxication, and therefore lying.¹¹¹ Because these notions are preconceived, Tuerkheimer argued that the credibility discounting that occurs within law should not only be recognized, but in certain circumstances actionable as discrimination.¹¹² “[W]hen rape victims confront a law enforcement regime predisposed to dismiss their complaints, they are effectively denied the protective resources of the state.”¹¹³

In her book, *Credible*, Tuerkheimer further developed her conceptual analysis.¹¹⁴ She argued that a cluster of forces corrupts our judgments, making us prone to both discount the credibility of accusers and inflate the credibility of the accused.¹¹⁵ Tuerkheimer called this cluster the “credibility complex” and included within it two main forces: culture¹¹⁶ and law.¹¹⁷ Each of us brings to the table when we analyze the veracity of an accusation both cultural attitudes and the influence of law,¹¹⁸ but we are not *aware* of these forces when we do so.¹¹⁹ Unbeknownst to us, these forces corrupt our judgments. Specifically, when confronted with an accusation, these forces systematically corrupt our judgments of three dimensions of any claim: 1) that the incident happened; 2) that it was wrong (it happened and is actually the fault of the accuser rather than the

abuse. All of these indignities can inflict serious . . . ‘gaslighting’ that causes you to doubt your own reality.”); and Alexzandria Johnson, *Hip Hop*, 42 N.C. CENT. L. REV. 139, 155 (2019) (“This tactic can be used by indirectly introducing character evidence through testimony by defendants themselves, or exceptions and exclusions to the rules of evidence.”).

109. Tuerkheimer, *Incredible Women*, *supra* note 5, at 3 (“Although systemic disbelief is variegated, the staying power of what I call ‘credibility discounting’ is the dominant feature of our legal response to rape.”).

110. *Id.*

111. *Id.* at 9.

112. *Id.* at 7.

113. *Id.* at 8.

114. TUERKHEIMER, *CREDIBLE*, *supra* note 2.

115. *Id.* at 3.

116. *Id.* at 3–4 (Tuerkheimer describes the cultural aspect of the credibility complex as a set of shared ideas and values, that although fractured creates a shared system of meaning.).

117. *Id.* at 4 (Tuerkheimer describes the legal aspect of the credibility complex as the statutes, judicial interpretations, evidence, rules and procedures that not only reinforce cultural attitudes but in turn contribute to their creation.).

118. *Id.* at 5 (“[L]aw does more than reflect or encode what is otherwise normatively constructed.” . . . [L]aw is part of the cultural processes that actively contribute in the composition of social relations.’ Law lays bare the credibility complex while fortifying it.”) (internal citation omitted).

119. *Id.* at 3.

accused); and 3) that the incident matters (that it happened and was wrong, and that it was serious enough to warrant concern).¹²⁰

Tuerkheimer convincingly demonstrated through the recounting of multiple celebrity and non-celebrity cases of sexual assault and the legal system's responses to them that credibility discounting is the primary response of the legal system to an accuser's allegations of rape.¹²¹ She was in good company in publishing a book filled with examples of systemic credibility discounting. In 2021, law professor Anita Hill (who made history when she testified before Congress in 1991 about the sexual harassment she experienced by Justice Clarence Thomas) published *Believing*, and in 2019, journalists Jodi Kantor and Megan Twohey (who broke the legions of assaults perpetrated by Harvey Weinstein) published *She Said*.¹²² Hill described the phenomenon of "structural denial" to explain the widespread doubting of women's reports of abuse and assault, in which mansplaining and gaslighting through rules, procedures, and systems amount to institutional violence.¹²³ Kantor and Twohey documented the open secret of Weinstein's treatment of women, emphasizing how it was made possible by the "institution of Hollywood."¹²⁴

Law professor Deborah Epstein and psychologist Lisa Goodman extended the application of credibility discounting to include not just accusations of sexual assault, but also intimate partner violence. In 2019, Epstein and Goodman published *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*.¹²⁵ This seminal article demonstrated the myriad reasons why women who accuse intimate partners of abuse are not believed, including legal system actors' implicit and explicit biases, lack of understanding of the effects of physical and emotional trauma on litigants' capacity to tell a linear story, and skepticism of accusers' motives—to name but a few.¹²⁶

The credibility discount imposed on accusers—predominately women—draws our attention to implicit and explicit biases. One bias is gender. Others include, but are not limited to, depending upon the accuser's identity and social status, race, class, ability, age, citizenship, and sexual orientation. The more marginalized and less socially powerful the accuser, the greater the discount.¹²⁷

120. *Id.* at 10–11 ("Unless all parts of the allegation—*it happened, it's wrong, it matters*—are accepted, the allegation will be dismissed as untrue, unworthy of blame, or unimportant. These three discounting mechanisms can overlap, and they often blur together—but each on its own is enough to sink an allegation.") (emphasis in original).

121. Tuerkheimer, *Incredible Women*, *supra* note 5 at 3.

122. HILL, *BELIEVING*, *supra* note 4; KANTOR & TWOHEY, *supra* note 21.

123. HILL, *BELIEVING*, *supra* note 4, at 41–43.

124. KANTOR & TWOHEY, *supra* note 21, at 28.

125. Epstein & Goodman, *supra* note 6.

126. *Id.*

127. TUERKHEIMER, *CREDIBLE*, *supra* note 2, at 6 ("Marginalized women suffer the most in the discount. They are least likely to be believed by formal officials or by family and friends.").

Conversely, the more socially powerful the accused—most often a man—the greater the credibility boost he is afforded.¹²⁸

B. DARVO

DARVO has, with only a few exceptions, gone unnoticed by feminist legal scholars writing about intimate partner violence.¹²⁹ Yet preceding the #MeToo movement, which is when law scholars named the credibility discount, social scientist Jennifer Freyd began testing a theory.¹³⁰ The theory affected the credibility of accusers (mostly women), but it focused on attributes and behaviors of the accused (mostly men).¹³¹ Freyd posited that, in intimate relationships, when people are accused of violence, many not only deny the abuse to defend themselves, but they do two more things: first, they attack the accuser's credibility.¹³² Second, they argue that they are the real victim, and their partner is the real perpetrator.¹³³ Freyd coined the term "DARVO" to describe the use of all three behavioral tactics simultaneously: deny, attack, and reverse victim and offender.¹³⁴

The purpose of DARVO is to convince decision-makers outside of the relationship—police, judges, juries, members of the public—not to believe the accuser.¹³⁵ Lawyers do this all the time; indeed, deny and attack are the very purposes of cross-examination of a witness at trial and "reverse victim and offender" a tactic that is often aspired to, depending upon the facts of the case. Lawyers for the accused, like the accused themselves, can cross the line. Take, for example, the strategy proposed by attorney Lisa Bloom, when she made a pitch to Harvey Weinstein to retain her as his attorney. She advised Weinstein regarding one of his accusers to initiate a

counterops online campaign to push back and call her out as a pathological liar. A few well placed articles now will go a long way if things blow up for us down the line. We can place an article re her

128. *Id.* at 3 ("The most vulnerable women experience credibility discounting at its extreme, while men who are protected by greater status or position are the beneficiaries of massive credibility boosts.").

129. *See supra* text accompanying note 109 (only three four legal scholars have mentioned DARVO).

130. Jennifer J. Freyd, *Violations of Power, Adaptive Blindness and Betrayal Trauma Theory*, 7 FEMINISM & PSYCH. 22, 29 (1997) ("I have recently begun to think about a way to conceptualize the events that occur when a victim or a concerned observer openly confronts an abuser about his or her behavior after a long period of silence in which the abuser could abuse without facing consequences. My proposal, currently very speculative, is that a frequent reaction of an abuser to being held accountable is the 'DARVO' response.").

131. *Id.* at 30.

132. *Id.* at 29.

133. *Id.* at 30.

134. *Id.* at 29. ("DARVO" stands for "Deny, Attack and Reverse Victim and Offender.").

135. Sarah Harsey & Jenifer J. Freyd, *Deny, Attack, and Reverse Victim and Offender (DARVO): What is the Influence on Perceived Perpetrator and Victim Credibility?*, 29 J. OF AGGRESSION, MALTREATMENT & TRAUMA 897 (2020).

becoming increasingly unglued, so that when someone Googles her this is what pops up and she is discredited. We have all the facts based on publicly available information.¹³⁶

Although Bloom did not represent Weinstein at trial, his defense attorneys portrayed his accusers as liars out for fame and fortune, blamed them for putting themselves in vulnerable positions, presented them as vengeful and regretful about having had consensual sex with Weinstein, and attacked them for waiting years to report, all the while remaining friendly with him.¹³⁷ Books written about Weinstein outline an elaborate network of lawyers and private detectives who worked diligently to smear the credibility of his accusers long before the trial.¹³⁸

DARVO is not a tactic reserved for use by lawyers, however. The accused themselves use it, and they do so regardless of whether they have an attorney. In our practice in the past year, several of our clients were sued for money damages when they reported abuse to law enforcement. In one of the cases, we represented a survivor of abuse seeking to obtain a civil protection order. At trial, she testified about a night of terror, during which her ex-boyfriend strangled her to the point that she lost consciousness. He testified that she was lying, and that she attacked him. The judge found by a preponderance of the evidence that she proved her case and found that the ex-boyfriend was not credible. He was criminally charged for attempted murder for the strangulation, though at the criminal trial he was acquitted. After the criminal trial, the ex-boyfriend sued our client for \$24,505.00. His complaint stated:

I was acquitted of five separate charges, some felony some misdemeanor. These charges were initiated solely by the defendant. . . . These claims were not only embellished but proven to be false. I'm willing to provide evidence of my acquittal as well as my testimony that [our client] was the instigator of the night in question.¹³⁹

This is a classic example of an attempted use of DARVO. Freyd and Harsey explain its purpose:

For those who have committed abusive acts, the ability to influence how others perceive them and their victims is indispensable. Convincing bystanders that no abusive behavior took place (or that if something did occur it was not harmful) and that the victim is untrustworthy gives the perpetrator a clear advantage in both social networks and the legal system. If successful, the perpetrator can avoid blame and thereby avoid disadvantageous outcomes. The victim's

136. KANTOR & TWOHEY, *supra* note 21, at 101.

137. TUERKHEIMER, CREDIBLE, *supra* note 2, at 5 (discussing the first criminal conviction of Weinstein for rape by a jury in New York City where a verdict of guilty was reached in February 2020).

138. KANTOR & TWOHEY, *supra* note 21; *see also* RONAN FARROW, CATCH AND KILL: LIES, SPIES, AND A CONSPIRACY TO CATCH PREDATORS (2019).

139. Notes and pleadings on file with authors.

account is doubted and ultimately disregarded in favor of the perpetrator's narrative.¹⁴⁰

In the anti-domestic violence field, advocates know, from the experiences that women recount, that coercive controllers use DARVO. But we have not explicitly named it. We advise women to beware that abusive partners are “charming,”¹⁴¹ “manipulative,”¹⁴² and persuasive at “performing good behavior.”¹⁴³ We hear story after story from women of their partners’ ability to “gaslight.”¹⁴⁴ Since the early 1980s, we have explicitly named the proactive “threatening to report” a partner to a government agency as a tactic of abuse.¹⁴⁵ But we have not named DARVO explicitly, particularly when it comes to reporting abuse to authorities in the legal system.

Because the legal system is the primary responder to the issue of intimate partner violence,¹⁴⁶ and thus preventing future abuse is one of the most fundamental protections the government can provide,¹⁴⁷ awareness of DARVO should be critical to police, prosecutors, judges and even court clerks who seek to do their jobs effectively. It should also be important to them for a more self-serving reason: ridiculing the person who attempts to hold the offender accountable is a common tactic of abusers’ use of DARVO.¹⁴⁸

Harsey and Freyd’s research has shown that the use of DARVO by abusive partners does indeed influence observers’ perceptions, leading them to view accusers as more responsible for the abuse perpetrated against them.¹⁴⁹ “Conversely, DARVO causes perpetrators to be seen as less responsible for the abuse they committed and as less abusive in general.”¹⁵⁰ Critically, this influence

140. Harsey & Freyd, *supra* note 135, at 899.

141. See, e.g., Bri, *How an Abusive Partner's "Good" Behavior is Part of the Act*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/resources/how-an-abusive-partners-good-behavior-is-part-of-the-act/> [<https://perma.cc/LM8C-K7EW>] (“A common trait of many abusive partners is that they are really charming, especially at the beginning of a relationship and in the first stages of dating. You might begin to feel like they understand you better than any other partners before and can treat you better because of it.”).

142. *Id.* (“Moving back and forth between the good and bad behavior is an intentional manipulation tactic that plays upon your desire for them to return to the good behavior.”).

143. *Id.* (“Another aspect of the abuser’s performance that makes it really difficult to see things clearly is that their partners are usually, though not always, the only ones who get to see both of the parts they play. People with controlling, unhealthy and abusive attitudes know their behavior is not okay. That’s why they don’t show it to most of the people in their lives or treat others with the same level of abuse. This can add to a victim’s confusion. When everyone else is saying how great they are and admiring their charming behavior, it might validate the hope that the good behavior is the ‘real’ person.”).

144. *Id.* (“[G]aslighting is one of the most common and effective abuse tactics. With this tactic, an abuser actively tries to make their victim question reality or if what they believe is actually true.”).

145. See the Power and Control Wheel, one of the most longstanding and widely used tools developed by “battered women’s” activists (as they called themselves) in the early 1980s, in which a named tactic of abuse that batterers often use is “threatening to report her to welfare.” ELLEN PENCE, IN OUR BEST INTERESTS 37 (Kate Regan ed.1987).

146. GOODMARK, *supra* note 32, at 18.

147. See generally Kuennen, *supra* note 9.

148. Freyd, *supra* note 130, at 30.

149. Harsey & Freyd, *supra* note 135, at 910.

150. *Id.*

can be mitigated with intensive educational intervention, such as an interactive activity with extensive examples.¹⁵¹ “By identifying and calling out DARVO when it occurs, we may be able to effectively interrupt perpetrators’ attempts to discredit and silence their victims.”¹⁵² In addition, widespread awareness of DARVO might make abusers’ retaliatory lawsuits less socially acceptable to pursue and ultimately less successful.¹⁵³

A. DARVO’s Focus on the Accused Rather than Accuser

The literature on credibility discounting focuses our attention on the words and behaviors of the person alleging abuse—the “accuser.” It is a powerful and damning analysis of how police, prosecutors, judges, attorneys, and the public at large downgrade accusers’ credibility while at the same time elevating the interests of the men who are accused.¹⁵⁴

For years, however, feminist legal scholars and activists have argued that we must stop focusing on—indeed, stop blaming—the person experiencing abuse, and instead train our eye not only on the person committing abuse but the structures and cultural attitudes that foster and perpetuate abuse.¹⁵⁵ As stated by renowned activist Ellen Pence in the early 1980s:

The turning from a political to a psychological understanding of battering is the result of the increasing influence on the battered women’s movement, and on the women’s movement in general, of traditional mental health therapeutic models. We must constantly be aware of the tremendous pressures to view women’s oppression as a sickness rather than as a political, social and cultural condition.¹⁵⁶

Analyzing the actions of the accused—and societal support for them—places responsibility where it ought to be. It allows us to confront tactics used by coercively controlling partners that distort our decision-making so that we can better wield our power to decide who is credible.¹⁵⁷ And it makes visible how

151. *See id.* at 911.

152. *Id.* at 913.

153. Harsey & Freyd, *Defamation and DARVO*, *supra* note 11, at 485; *see also* TUERKHEIMER, CREDIBLE, *supra* note 2, at 8 (“If we rewire ourselves to respond more fairly to the accusations that come our way, law reform and cultural change will follow. Over time, we can dismantle the credibility complex.”).

154. TUERKHEIMER, CREDIBLE, *supra* note 2, at 7–8.

155. Nowhere is the focus and blame we cast on accusers more clearly demonstrated than by the age-old question asked of women who allege domestic violence: “Why didn’t you leave?” As feminists have long argued, the critical question ought to be: “Why did he do that?” *See generally* Laurie S. Kohn, *Why Doesn’t She Leave – The Collision of First Amendment Rights and Effective Court Remedies for Victims of Domestic Violence*, 29 HASTINGS CONST. L.Q. 1 (2001-2002).

156. PENCE, *supra* note 145, at 1.

157. TUERKHEIMER, CREDIBLE, *supra* note 2, at 7 (We are borrowing here from Tuerkheimer’s argument that there is an alternative to credibility discounting: “by confronting the influences that distort our decision-making, we can better wield our power to decide who’s credible.”).

our culture and the legal system (the forces that, unbeknownst to us, comprise the “credibility complex”) are complicit.¹⁵⁸ As stated beautifully by Freyd when she first introduced the concept of DARVO:

I have observed that one particularly useful strategy for avoiding accountability that appears in the cases of sexual abuse and assault uses logic like this: “I am innocent until proven guilty. You cannot prove I am guilty. Therefore I am technically innocent. Therefore I am actually innocent.” . . . The offender takes advantage of the confusion we have in our culture over the relationship between public provability and reality (and a legal system that has a certain history in this regard) in redefining reality. . . . As a consequence of this strategy, along with the biases in our legal system and culture, claims of being victim to false accusations may be more speakable than claims of being victim to sexual and domestic offenses.¹⁵⁹

III. PROPOSED SOLUTIONS

Without awareness of DARVO, courts unwittingly perpetuate some abusers’ capacity to maintain control, both emotionally and physically. In this section, we describe two law reform efforts that aim to prevent the accused partner’s use of DARVO. One is the implementation of anti-SLAPP protections in many of the states. The other effort, more in its infancy, is the promulgation of statutes that prohibit non-disclosure agreements in sexual assault cases. Because there can be no single reform or universal solution to the complicated problem of intimate partner violence,¹⁶⁰ let alone the prevention of DARVO as a method used by many abusive partners, we conclude by arguing that education to increase contextual awareness of DARVO is critical.

A. Anti-SLAPP Laws

A “SLAPP” suit is a Strategic Lawsuit Against Public Participation, and it is filed with the intention of limiting a survivor’s right to speak, thus implicating the First Amendment.¹⁶¹ A typical SLAPP is a retaliatory defamation suit, as

158. See *supra* note 117 and accompanying text.

159. Freyd, *supra* note 130, at 30.

160. Natalie J. Sokoloff & Ida Dupont, *Domestic Violence, Examining the Intersections of Race, Class and Gender—An Introduction*, in *DOMESTIC VIOLENCE AT THE MARGINS 2* (Natalie J. Sokoloff ed. 2005) (“Although much pioneering work on domestic violence approached intimate partner violence as a monolithic phenomenon that affected all women the same, this ‘universalizing approach’ increasingly has been regarded as inadequate and inappropriate to explain the experiences or address the needs of battered women from diverse backgrounds.”); see also Richie, *supra* note 31, at xvii (“[N]o single voice, no central authority, and no common analysis will lead to safety for all women.”).

161. Shannon Hartzler, *Protecting Informed Public Participation: Anti-Slapp Law and the Media Defendant*, 41 VAL. U. L. REV. 1235, 1240 (2007) (explaining the effects of SLAPP suits and states’ responses to the problems these suits raise).

discussed above. It is a method of burdening those who have been courageous enough to speak against abuse via extensive and costly court proceedings.¹⁶²

Currently, thirty-two states and the District of Columbia have anti-SLAPP laws.¹⁶³ Such laws aim to: “1) provide for early, quick, effective, and inexpensive dismissal of frivolous SLAPP lawsuits; and 2) protect the rightful exercise of First Amendment rights (such as petitioning activity).”¹⁶⁴ Additionally, anti-SLAPP statutes provide a special protection for individuals facing SLAPPs by shifting the burden to abusive partners to prove that their suits are not retaliatory, frivolous, and/or groundless.¹⁶⁵

Specifically, in an anti-SLAPP proceeding, the court determines whether the allegations of the abused constitute a form of speech or petition that is protected by law, such as an allegation of abuse made in the context of a civil protection order proceeding. If the allegation is protected speech, the burden shifts to the abusive partner who has filed suit (for example, a plaintiff in a defamation case) to demonstrate the probability of winning at trial. If they cannot so prove at an early phase of the litigation, the case is dismissed.¹⁶⁶

Anti-SLAPP statutes thus protect those experiencing domestic violence when they report.¹⁶⁷ However, because these laws depend heavily on the facts of each individual case and there is no federal anti-SLAPP statute, the level of protection provided when there are retaliatory suits is inconsistent, and in some states minimal.¹⁶⁸ It would thus be beneficial to expand anti-SLAPP statutes in order to extend protection to a greater population.

A Tennessee law provides one example that could be followed. In 2018, Tennessee addressed abusive litigation within the family law context by enacting a law allowing courts to implement filing restrictions on those found to be misusing the court system.¹⁶⁹ This law protects parties who are or were in an abusive intimate relationship by holding a hearing where a judge can determine if the lawsuit is being used with the intent to “harass or maliciously injure.”¹⁷⁰ In 2020, Washington followed Tennessee’s example by passing Senate Bill 6268.¹⁷¹ Similar to Tennessee, Washington provides protection from abusive litigation via pre-filing restrictions.¹⁷²

Though every state currently has a version of Federal Rule of Civil Procedure 11 to rely upon (no lawsuit should be frivolous or groundless), this

162. *Id.* at 1240; Leader, *supra* note 27, at 447.

163. Tianna Gibbs, Chart of Anti-SLAPP Statutes in 50 U.S. States and D.C. (Dec. 2020) (on file with authors).

164. Tianna Gibbs, Summaries of Domestic Violence and Related Cases in the U.S. Involving Anti-SLAPP Statutes 3 (Dec. 2020) (on file with authors) [hereinafter Summaries].

165. *Id.*

166. Leader, *supra* note 27, at 452.

167. Summaries, *supra* note 165, at 3.

168. Leader, *supra* note 27, at 451.

169. Klein, *supra* note 40.

170. McLemore, *supra* note 39, at 337.

171. S. 6268, 2020 Leg., Reg. Sess. (Wa. 2020), <https://app.leg.wa.gov/bills/summary?Year=2019&BillNumber=6268> [https://perma.cc/7WGG-837A].

172. Beeman, *supra* note 32, at 826 (citing WASH. REV. CODE § 26.51 (2020)).

rule alone does not recognize that abusive litigation in the family law context is different from other civil cases.¹⁷³ The Tennessee law recognized that abusive litigation in the family law context requires the specific intent to harass or financially injure the defendant.¹⁷⁴

Not only would it be beneficial for other states to adopt legislation like that of Tennessee and Washington—creating a process whereby courts can identify abusive litigants—but it would further be helpful to broaden the scope of whom these laws protect. Currently, protective laws cover those who are or were in an intimate relationship involving domestic violence. However, it would be beneficial to specify that “domestic violence” does not only refer to physical assaults, but also encompasses psychological, emotional, and economic abuse.¹⁷⁵

Though anti-SLAPP protections alone may not deter some abusive partners from filing suit, they are a step in the right direction of combatting what is seemingly one of the least understood, most overlooked, and increasingly perpetrated forms of abuse.¹⁷⁶

B. Non-disclosure Agreements

Non-disclosure agreements (NDAs), originally used to protect new ideas,¹⁷⁷ have become a mechanism to further control and silence victims of assault.¹⁷⁸ Despite being portrayed as protecting victims and their privacy, NDAs have arguably resulted in protecting perpetrators (as well as employers) in workplace-related allegations of assault.¹⁷⁹ This is because NDAs silence both parties; the facts of any alleged assault never see the light of day and, as a result, neither those in the immediate workspace nor the public at large know of the occurrence

173. See Mclemore, *supra* note 39, at 343; FED. R. CIV. P. 11.

174. McLemore, *supra* note 39, at 361.

175. Beeman, *supra* note 23, at 828.

176. McLemore, *supra* note 39, at 343.

177. Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 20 (2015).

178. Julie Macfarlane, *How A Good Idea Became A Bad Idea: Universities and the Use of Non-Disclosure Agreements in Terminations for Sexual Misconduct*, 21 CARDOZO J. CONFLICT RESOL. 361, 370 (2020).

179. *Id.* at 363–64 (“NDAs are often presented as a means to protect victims of sexual assault or harassment at their request. This is a misleading framing. Victims are often not even consulted where NDAs are used between an employer and an employee as part of a deal reached following the termination of employment for sexual misconduct. . . . It is important, therefore, to recognize that such agreements are not concerned with protecting the privacy of victims. They are expressly for the protection of the employer and employee.”)

or prevalence of sexual assault in the workplace.¹⁸⁰ NDAs utterly chill disclosure and open discussion of abuse.¹⁸¹

Because NDAs have been shown to protect the individual causing abuse more than the individual alleging abuse, it would be helpful to develop stronger laws that improve accountability.¹⁸² One example may be voiding agreements that disallow disclosure of abuse.¹⁸³ Since the #MeToo movement, sixteen states have developed bills in relation to NDAs and harassment.¹⁸⁴ California, in particular, enacted legislation making it unlawful to prevent employees from disclosing information regarding unlawful acts in the workplace.¹⁸⁵ Despite movement in the right direction, it would be valuable to further advocate for a ban of NDAs when any form of abuse is involved.

C. Judicial Education to Identify Red Flags

As discussed throughout this article, the legal system's primary response to reports of intimate partner violence is to separate the parties. Consequently, when criminal charges have been filed and thus contact between defendant and victim prohibited, or a civil protection order has issued, or the parties have divorced or

180. See KANTOR & TWOHEY, *supra* note 21 (In their investigation of Harvey Weinstein, the reporters located several accusers who previously signed nondisclosure agreements to settle their claims against Weinstein. The reporters observed, "The United States had a system for muting sexual harassment claims, which often enabled the harassers instead of stopping them. Women routinely signed away the right to talk about their own experiences. Harassers often continued onward, finding fresh ground on which to commit the same offenses. The settlements and confidentiality agreements were almost never examined in law school classrooms or open court. This was why the public had never really understood that this was happening. Even those in the room with long histories of covering gender issues had never fully registered what was going on.").

181. Julie Goldscheid, *#MeToo, Sexual Harassment, and Accountability: Considering the Role of Restorative Approaches*, 36 OHIO ST. J. DISP. RESOL. 689, 704–05 (2021) (arguing for "integrative restorative approaches" for workers who disclose sexual harassment incidents in the workplace. Further discussing the dangers of widespread use of non-disclosure agreements).

182. See *id.* at 705, 724 ("[T]he persistence of sexual harassment and workplace inequality, notwithstanding decades of law reform, reinforces the importance of considering new approaches that better advance accountability and equality. . . . [S]eparating harassers from a workplace without any other intervention directed at accountability merely passes the problem on to another set of co-workers and employees; it does nothing to address the underlying harmful conduct.").

183. See Elizabeth Tippet, *Non-Disclosure Agreements and the #MeToo Movement*, Disp. Resol. Mag., Winter 2019, at 13, 15.

184. *Id.* at 14. These states are: Arizona, California, Hawaii, Illinois, Louisiana, Maine, Maryland, Nevada, New Jersey, New Mexico, New York, Oregon, Tennessee, Vermont, Virginia, and Washington. See John A. Duberstein, *New State Laws Restrict Employers' Use of Non-Disclosure Agreements*, SCHWARTZ HANNUM PC (Sept. 2022), <http://www.shpclaw.com/new-state-laws-restrict-employers-use-of-nondisclosure-agreements?p=11399#:~:text=Background,Vermont%2C%20Virginia%2C%20and%20Washington> [https://perma.cc/XNQ3-M4XK].

185. CAL. GOV'T CODE § 12964.5(B)(i) (West 2022) ("For an employer to require an employee to sign a nondisparagement agreement or other document to the extent it has the purpose or effect of denying the employee the right to disclose information about unlawful acts in the workplace.").

legally separated, it is understandable that judges, police, prosecutors and other legal actors make the assumption that the abuse in the relationship will end.¹⁸⁶ If the alleged perpetrator may no longer have contact with the victim—the logic goes—then they can no longer commit abuse.¹⁸⁷

Because many abusive partners use coercively controlling violence, however, this assumption is faulty. Coercively controlling partners escalate threats and violence when their partners make the decision to end the relationship,¹⁸⁸ and coercive control can take many subtle forms shy of the use of physical or sexual force.¹⁸⁹ These include indirect contact, such as contact with the friends and family of the victim, direct contact, but using a fake profile on social media or the creation of a phone number or email address unknown to the victim, or sinister conduct such as stalking and surveilling.

Another subtle but powerful form of coercion that we discussed earlier is custody blackmail. Those who weaponize children find success because the legal system inadvertently allows it. Professors Joyanna Silberg and Stephanie Dallam discuss how the “friendly parent” ideal may be “prevent[ing] nonoffending parents from being able to protect themselves and their children from violence at the hands of the other parent.”¹⁹⁰ Friendly parent provisions, and the like, have shaped courts’ judgments partly because of the “best interest of the child” objective.¹⁹¹ And while such an objective is imperative, it has tended to overlook the safety of a parent by custodially reprimanding those who do not want to “share.”¹⁹² The reprimand generally comes from the flawed assumption that a parent refusing to abide by friendly parent provisions has an illegitimate motive (*i.e.* parental alienation), rather than the motive of trying to protect themselves or the child from further abuse.¹⁹³

When a person experiencing abuse initiates legal action, such as by reporting abuse to authorities, filing for divorce or child custody, or filing for a civil protection order, they have not merely made the decision to end the relationship, but have taken concrete action to effectuate that decision. Ironically, the legal action that they hope will protect them may instead trigger a more insidious campaign of abusive tactics by a coercively controlling partner that fall below the radar of the legal system. Or, rather, that weaponize the legal system to further their abuse.

186. See generally Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L. J. 2, 16 (2006) (arguing generally that separation of intimate partners though the use of civil and criminal protection orders is the primary solution provided by the legal system to the problem of domestic violence, and that prohibiting an alleged perpetrator’s presence near the putative victim serves to reduce the likelihood that violence will recur).

187. See *id.*

188. See Kelly & Johnson, *supra* note 33 at 483 (arguing that one of the predictors of a future attack, and particularly of the increased risk of a lethal attack after separating from an abusive partner, is the partner’s history of using coercive control).

189. *Id.* at 481–82 (describing the effectiveness of “nonviolent control tactics” in “coercively controlling” intimate partner violence).

190. Silberg & Dallam, *supra* note 68, at 145.

191. See Meier, *supra* note 69, at 853, 864.

192. See Beeman, *supra* note 23, at 834.

193. Meier, *supra* note 69, at 864.

Because post-separation abuse generally goes unrecognized by courts, training about and awareness of it as a form of continued intimate partner violence is key.¹⁹⁴ For starters, courts must implement a system to identify actions that comprise frivolous matters or matters involving the same parties repeatedly.¹⁹⁵ Understanding the signs of coercive control versus other forms of intimate partner violence is critical to doing so, given that coercively controlling partners are the most likely to use both any means necessary to maintain control and DARVO. This is because with coercive control, unlike situational violence, the abusive partner's behavior is part of a larger pattern of placing limits on the autonomy of their partner.

Knowledge of DARVO—not just who is most apt to use it, but what it is—has in and of itself been shown to be an effective educational intervention.¹⁹⁶ So too has awareness that retaliatory litigation is on the rise.¹⁹⁷ Because DARVO has been shown not only to cause perpetrators to be seen as less responsible for the abuse they committed and as less abusive in general but also to cause victims to be perceived as less believable,¹⁹⁸ proactive education that prepares judicial personnel to identify it and react appropriately also has the potential to mitigate implicit biases, including confirmation bias.¹⁹⁹

CONCLUSION

In this article, we argued that feminist legal scholars should be talking about DARVO. DARVO is the use of three behavioral tactics: deny, attack, and reverse victim-and-offender. Scholars should name DARVO with the same fortitude they have named credibility discounting, because DARVO shines the spotlight on the behavior of the accused rather than the accuser, and because without calling attention to DARVO it is an overlooked, if not invisible, form of intimate partner violence. By more widely discussing DARVO, we can take a step in the right direction towards identifying litigation abuse, including unwarranted defamation lawsuits, child weaponization in family law cases, and retaliatory civil protection orders. Such progress will create space for those who have endured abuse not only to exercise their First Amendment right to report violence, but to speak out about their experience without fear of chastisement or retraumatization.

194. See Beeman, *supra* note 23, at 844.

195. See *id.* at 852–53.

196. Harsey & Freyd, *supra* note 135, at 911.

197. See Harsey & Freyd, *Defamation and DARVO*, *supra* note 11, at 485.

198. Harsey & Freyd, *supra* note 135, at 910.

199. Mindthoff, et al., *supra* note 67, at 264 (“Even when individuals lack domain-specific expertise, a reminder of the responsibility they have (e.g., reminding judges that they hold the fate of the parties’ in their hands) can also mitigate confirmation bias.”).

AMERICAN HYSTERIA: AN ANALYSIS OF RECENT ANTI-TRANSGENDER LEGISLATION PASSED IN THE NAME OF PROTECTING WOMEN’S SPORTS

Christian Hanson[†]

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INTRODUCTION

In March 2020, in the midst of the rapidly-evolving COVID-19 pandemic,¹ the Idaho legislature stayed in session to pass two bills specifically targeting transgender individuals.² These bills then went to Governor Brad Little's desk where he signed them into law the same day.³ The legislature passed two bills: the first, banning gender changes on birth certificates; and the second, a bill banning transgender individuals from participating in women's sports at all educational levels.⁴ In April 2023, the legislature passed a law which makes it a felony punishable by up to ten years in prison for providing puberty blockers and hormones to individuals under eighteen.⁵ The "Fairness in Women's Sports Act" creates a ban on transgender women playing in women's sports at any public school or any school with a team that competes against a public school.⁶ The Act also includes a provision which would require any "dispute regarding a student's sex" to be resolved by the student providing a signed statement from their doctor verifying their biological sex to the school.⁷ Later that same year, a district court judge granted a temporary injunction against the law.⁸ Following Idaho's lead, thirty-one other states introduced bills with nearly identical language and requirements in an attempt to keep transgender women out of women's sports.⁹ Of these bills, twenty-one have been passed into law.¹⁰ All of these laws have little chance of withstanding judicial scrutiny.

1. See, e.g., *A Timeline Of COVID-19 Developments In 2020*, AM. J. OF MANAGED CARE (Jan. 1, 2021), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020> [https://perma.cc/MA7Q-9TBJ].

2. *Hecox v. Little*, 479 F. Supp. 3d 930, 984 (D. Idaho 2020), *aff'd* No. 20-35813, 2023 WL 1097255 (9th Cir. 2023); IDAHO CODE § 33-6203 (2023); H.R. 509, 65th Leg., 2nd Reg. Sess. (Idaho 2020).

3. *Hecox*, 479 F. Supp. 3d at 984.

4. IDAHO CODE § 33-6203; H.R. 509, 65th Leg., 2nd Reg. Sess. (Idaho 2020).

5. Audrey Dutton, *New Law Makes it a Crime in Idaho to Provide Gender-Affirming Care to Transgender Youth*, IDAHO CAP. SUN (April 4, 2023 9:24 PM), <https://idahocapitalsun.com/2023/04/04/it-is-now-a-crime-in-idaho-to-provide-gender-affirming-care-to-transgender-youth/> [https://perma.cc/V6Z3-PULK]; H.R. 71, 67th Leg., Reg. Sess. (Idaho 2023).

6. IDAHO CODE § 33-6203 (2023).

7. *Id.*

8. *Hecox*, 479 F. Supp. 3d at 989.

9. The states are Alabama, Arizona, Arkansas, Connecticut, Florida, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wisconsin. See Priya Krishnakumar, *This Record-Breaking Year for Anti-Transgender Legislation Would Affect Minors the Most*, CNN, <https://www.cnn.com/2021/04/15/politics/anti-transgender-legislation-2021/index.html> (Apr. 15, 2021, 9:46 AM) [https://perma.cc/P4KT-DPZR].

10. *Ban on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, <https://www.lgbtmap.org/img/maps/citations-sports-participation-bans.pdf> (Mar. 23, 2023) [https://perma.cc/LT5Q-5SM4].

These new laws have a paternalistic aim to “save women’s sports.”¹¹ However, the laws do not protect women, and instead further marginalize transgender and nonbinary teenagers who are at greater risk for mental health issues and social stigma.¹² These laws typically create a cause of action against a school when a student is “deprived of an athletic opportunity” and also require a student whose gender is under suspicion to undergo a physical examination to confirm their biological sex.¹³

Part I of this Article discusses the history of women’s sports in the United States. Part II analyzes these new laws governing the participation of transgender girls in sports and discusses the justifications and legislative findings supporting their precursor bills. Part III discusses the holding in *Bostock v. Clayton County* and how the federal courts who have heard cases challenging these bills have applied it. Part IV discusses why the legislation fails to achieve its stated goals. Part V reveals the detrimental effect of anti-transgender legislation, even when it is struck down by the courts. Finally, Part VI discusses how legislatures should be focusing their efforts to protect women’s sports.

I. BACKGROUND

Women have played sports since the days of Homer in 800 BC, but it was not until the late 1800s when attitudes in the United States began to change about women’s ability to exert themselves safely that women were truly able to participate in organized sports.¹⁴ Prior to that time, women could engage in leisure sports like horseback riding and “showboating,” but physical activity was discouraged because many thought that mental and physical labor should be reduced during menstruation.¹⁵ In the early twentieth century, women became increasingly active in competitive sports and the National Amateur Athletic Federation (NAAF) formed to govern women’s participation in intercollegiate sports.¹⁶ However, the NAAF limited travel and awards because competitive sports were in conflict with “the philosophy of women’s physical educators in the 1920s.” By the 1940’s, women actively participated in the workforce, and the All-American Girls Baseball League started in 1943 when Major League Baseball games were cancelled due to World War II.¹⁷ The potential for women taking part in competitive sports grew in tandem with the realization that women

11. See, e.g., H.R. 112, 67th Leg. Sess. (Mont. 2021).

12. See, e.g., THE TREVOR PROJECT, NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH 3 (2021), <https://www.thetrevorproject.org/wp-content/uploads/2021/05/The-Trevor-Project-National-Survey-Results-2021.pdf> [<https://perma.cc/AYS8-33X7>] (finding that 52 percent of transgender youth have considered suicide in the past year and 20 percent have attempted suicide in the past year).

13. E.g., Fairness in Women’s Sports Act, IDAHO CODE §§ 33-6201–06 (2023).

14. See Richard C. Bell, *A History of Women in Sport Prior To Title IX*, SPORT J., (Mar. 14, 2008), <https://thesportjournal.org/article/a-history-of-women-in-sport-prior-to-title-ix/> [<https://perma.cc/KY88-QVUG>].

15. *Id.*

16. *Id.*

17. *Id.*

could do the jobs that had traditionally been reserved for men.¹⁸ The civil rights movement and the National Organization for Women (NOW) led the fight for equality in the late sixties, and by 1972 Title IX was passed to ensure women and men received an equal education, which included the opportunity to participate in sports programs.¹⁹

Congress passed Title IX to combat discrimination in all schools that receive federal funding.²⁰ The text of Title IX states that, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”²¹ As the language of the statute suggests, Title IX covers a wide range of activities at all educational levels, but its impact on high school sports has been considerable. The number of women playing sports in American high schools has increased tenfold, from less than 300,000 in 1971 to over 3,000,000 in 2019.²²

Title VII of the Civil Rights Act of 1964 makes it illegal for an employer to “fail or refuse to hire or to discharge any individual . . . because of such individual’s race, color, religion, sex, or national origin”²³ The landmark Supreme Court case *Bostock v. Clayton County*, decided in the 2020 term, expanded the definition of “sex” within the meaning of Title VII to include transgender and gay individuals in the workplace.²⁴ The Court held that the ruling was limited to Title VII.²⁵ Considering that Title IX and Title VII have nearly identical language, it stands to reason that this expanded definition could also apply to Title IX.²⁶ Additionally, Title IX, like Title VII, has applications beyond what the drafters anticipated, as evidenced by cases like *Oncale v. Sundowner Offshore Services, Inc.* which prohibited same-sex sexual harassment.²⁷ In *Bostock*, Justice Gorsuch wrote for the majority:

[A]pplying protective laws to groups that were politically unpopular at the time of the law’s passage—whether prisoners in the 1990s or homosexual and transgender employees in the 1960s—often may be seen as unexpected. But to refuse enforcement just because of that, because the parties before us happened to be unpopular at the time of the law’s passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the

18. *See id.*

19. *Id.*

20. *See* U.S. DEP’T OF JUST., EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX 1 (2012).

21. 20 U.S.C. § 1681(a).

22. NAT’L FED’N OF STATE HIGH SCH. ASS’NS, 2018-19 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY, 54 (2018-19).

23. 42 U.S.C § 2000e-2(a)(1).

24. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

25. *Id.* at 1753.

26. *See* 42 U.S.C § 2000e-2(a)(1); 20 U.S.C § 1681(a).

27. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms.²⁸

This expanded definition was used by the Southern District of West Virginia in conjunction with the Fourteenth Amendment to enjoin West Virginia's "Save Women's Sports Bill," because the transgender plaintiff was "excluded from participation in an education program 'on the basis of sex'."²⁹ West Virginia's bill exemplifies anti-transgender legislation introduced around the country, and has striking similarities with its progenitor out of Idaho in its language, legislative findings, and effect.

On February 13, 2020, the "Fairness in Women's Sports Act" (the Act) was introduced and read in the Idaho Legislature for the first time.³⁰ By March 20, just four short weeks after it was introduced, it was signed into law.³¹ The Act is supported by sparse legislative findings that include predominately opinion pieces, as well as case law from the 1960s to the 1990s.³² The Act requires any public institution or any school that competes against a public institution to expressly designate their sports teams based on biological sex.³³ Any teams designated for "females, women, or girls shall not be open to students of the male sex," and in the event that a student's sex is disputed, the student in question must produce a statement signed by their health care provider to verify the student's biological sex.³⁴ This verification can be accomplished through a physical examination relying on "the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels."³⁵ The law's primary mechanism for enforcement is a private cause of action for any student who "is deprived of an athletic opportunity or suffers any direct or indirect harm as a result of a violation of this chapter."³⁶ Anyone who prevails in a lawsuit brought under the Act can recover money damages for psychological, emotional, and physical harm, as well as attorney's fees.³⁷ In the wake of Idaho passing the Act, thirty-one other states introduced laws banning transgender girls from competing in women's sports at all academic levels.³⁸ As of May 1, 2023, twenty-one of these states have passed laws transgender sports bans into law.³⁹

28. *Bostock*, 140 S. Ct. at 1751.

29. *B. P. J. v. W. Va. State Bd. Of Educ.*, 550 F. Supp. 3d 347, 356 (S.D.W. Va. 2021).

30. Fairness in Women's Sports Act, H.R. 500, 65th Leg., 2nd Reg. Sess. (Idaho 2020), <https://legislature.idaho.gov/sessioninfo/2020/legislation/H0500/> [<https://perma.cc/Q3XX-MXCZ>].

31. *Id.*

32. *See* IDAHO CODE §33-6202 (2023).

33. §33-6203.

34. *Id.*

35. *Id.*

36. §33-6205.

37. *Id.*

38. *See* Krishnakumar, *supra* note 9.

39. Alabama, Arizona, Arkansas, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming. MOVEMENT ADVANCEMENT PROJECT, *supra* note 10.

II. ANTI-TRANSGENDER SPORTS BILLS AND WOMEN'S SPORTS

Six out of thirty-two of these bills are yet to face judicial challenge.⁴⁰ The bills in the thirty-two states can be broadly categorized into those which require a medical exam to verify the biological sex of the athlete and those which do not.

A. *Bills including a medical exam component*

Idaho's law includes a provision which requires a student to undergo a physical examination when their biological sex is disputed.⁴¹ Mississippi's law also includes a medical examination requirement in situations where a student's biological sex is disputed and appears to have copied Idaho's law word-for-word.⁴² Even the legislative findings have been grafted from the Idaho bill.⁴³ The only changes to the bill are superficial; the legislature inserted Mississippi instead of Idaho and altered the name of the bill to the "Mississippi Fairness Act".⁴⁴

Some states do not require a dispute over a student's sex before verifying their sex at birth. For example, West Virginia's law tasks the Secondary School Activities Commission with verifying that each student is participating "according to the student's sex at the time of the student's birth."⁴⁵ This verification is done by obtaining a copy of the student's birth certificate. In the event that a birth certificate cannot be obtained, the person enrolling the student must produce an affidavit explaining the inability and a statement from a physician "indicating the pupil's sex based solely on the pupil's unaltered internal and external reproductive anatomy."⁴⁶ Instead of creating a dispute component like Idaho, West Virginia has created its law as a prophylactic measure by verifying student sex before they are allowed to play.

B. *Bills that do not include a medical examination component*

Six states have passed legislation which does not require or allow for a medical examination if there is a dispute over a student's sex.⁴⁷ Arkansas and Montana copy the legislative findings from Idaho and include provisions for private causes of action for students who "suffer any direct or indirect harm as a

40. Alabama, Arkansas, Florida, Mississippi, Tennessee, and Texas. Montana's bill was ruled unconstitutional for higher education, but not for K-12 students. *See Barrett et al. v. Montana*, DV-21-581B (2022); Alex Sakariassen, *Transgender Athlete Bill Declared "Unconstitutional,"* MONT. FREE PRESS (Sept. 16, 2022) <https://montanafreepress.org/2022/09/16/montana-transgender-athlete-bill-ruled-unconstitutional/> [<https://perma.cc/FQ6D-M64N>].

41. IDAHO CODE §33-6203 (2023).

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

43. *Id.*

44. *Id.*

45. H.D. 3293, 85th Leg., 1st Reg. Sess. (W. Va. 2021). South Dakota and Tennessee take a similar approach. *See* S. 46, 97th Leg. Sess. (S.D. 2022) and S. 228, 112th Gen. Assemb. (Tenn. 2021).

46. *See* H.D. 3293, 85th Leg., 1st Reg. Sess. (W. Va. 2021).

47. Alabama, Arkansas, Florida, Montana, Tennessee, Texas.

result of a violation” but do not include provisions for a medical exam.⁴⁸ Florida’s “Fairness in Women’s Sports Act” creates a private cause of action and does not require presentation of a birth certificate but assumes a student’s biological sex is “correctly stated . . . at birth if the statement was filed at or near the time of the student’s birth.”⁴⁹

Alabama’s bill states simply that “a public K-12 school *may not* allow a biological female to participate on a male team if there is a female team in a sport. A public K-12 school *may never* allow a biological male to participate on a female team.”⁵⁰ The phrase “may never” when it comes to “biological males” playing on girls’ teams is inserted in an attempt to stress the vital importance of keeping “biological males” off of girls’ teams. Texas’s bill states that students may not compete on a team “that is designated for the biological sex opposite to the student’s biological sex” as stated on the student’s official birth certificate.⁵¹ Texas also allows girls to play on boys’ teams if there is not a corresponding girls’ team.⁵²

Finally, there is Tennessee, which requires the student’s sex to be determined by “the student’s original birth certificate.”⁵³ If the student’s birth certificate does not state a sex, then “the student must provide other evidence indicating the student’s sex at the time of birth.”⁵⁴ The law fails to explain what sort of evidence is sufficient and saddles the student or their guardian with any costs associated with providing the evidence.⁵⁵

These examples represent the range of options that states have used to verify a student’s sex, but at bottom, they all seek to create a mechanism to keep transgender girls far from participating on girls’ sports teams. The verification process, coupled with the threat of damages to any student who is indirectly harmed by a transgender girl’s participation on a girls’ sports team, guarantees that transgender girls will not participate, regardless of skill level or “biological” advantage. As names like “The Fairness in Women’s Sports Act,” “Mississippi Fairness Act,” “The Save Women’s Sports Act” suggest, these bills have been introduced and passed under the guise of protecting women’s sports but fail to do so.

C. Justifications

The stated justification for these laws is protecting women and girls from athletes who have genetic advantages due to testosterone levels and genetic

48. S. 354, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); H.R. 112, 67th Leg. Sess. (Mont. 2021).

49. FLA. STAT. §1006.205 (2021)

50. H.R. 391, 2021 Reg. Sess. (Ala. 2021) (emphasis added).

51. H.R. 25, 87th Leg., 3rd Spec. Sess. (Tex. 2021).

52. *Id.*

53. S. 228, 112th Gen. Assemb. (Tenn. 2021).

54. *Id.*

55. *Id.*

makeup.⁵⁶ Other differences between men and women, as well as providing opportunities for girls and women to be able to compete in their respective sports equally, have also been put forward as the primary motivation behind these bills.⁵⁷ Idaho's bill lists sources which state that "courts have recognized that the inherent, physiological difference between males and females result in different athletic capabilities."⁵⁸ The bill discusses male and female as foregone conclusions, declaring that sports teams should be categorized based on biological sex, but this gross oversimplification leads to exclusion for students who do not present as cisgender. The legislature's focus on biological sex refuses to account for female students who appear "boyish" and might be subjected to an invasive and potentially traumatizing verification of their sex. The legislative findings and testimony discussed below suggest that, regardless of their justifications, legislatures are trying to solve a problem that simply does not exist.

D. Legislative findings

The Idaho Legislature heard testimony from Ty Jones, the executive director of the Idaho High School Activities Association (IHSAA).⁵⁹ The IHSAA oversees all high school sports in Idaho.⁶⁰ Jones noted that no student had ever complained about transgender athletes and, to his knowledge, no transgender student had ever competed under their policy of including transgender athletes.⁶¹ The court referred to the 2020 Idaho Attorney General's written opinion warning that the bill was "legally infirm," "raised serious constitutional . . . concerns" and argued that it would produce a "potential privacy intrusion on all female student athletes."⁶² Representative Barbara Ehardt, however, referenced two transgender athletes in Connecticut and argued that their participation "exemplified the 'threat' the bill sought to address."⁶³ The two athletes she referred to are high school runners Terry Miller and Andraya Yearwood.⁶⁴ Although the two have

56. "Men also have higher natural levels of testosterone, which affects traits such as hemoglobin levels, body fat content, the storage and use of carbohydrates, and the development of type 2 muscle fibers, all of which result in men being able to generate higher speed and power during physical activity." S. 2536, 2021 Reg. Sess. ¶7 (Miss. 2021) (citation omitted).

57. "Having separate sex-specific teams furthers efforts to promote sex equality. Sex-specific teams accomplish this by providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition and accolades, college scholarships, and numerous other long-term benefits that flow from successes in athletic endeavors." *Id.* ¶12.

58. *Id.*

59. *Hecox v. Little*, 479 F. Supp. 3d 930, 947 (D. Idaho 2020), *aff'd* No. 20-35813, 2023 WL 1097255 (9th Cir. 2023).

60. IDAHO HIGH SCHOOL ACTIVITIES ASSOCIATION, <https://idhsaa.org/about> [https://perma.cc/9GS6-BYYB].

61. *Hecox*, 479 F. Supp. at 947.

62. *Id.* at 947–48.

63. *Id.*

64. See Pat Eaton-Robb, *Terry Miller, Andraya Yearwood, Transgender Sprinters, Finish 1st, 2nd at Connecticut Championships*, WASH. TIMES (February 24, 2019), <https://www.washingtontimes.com/news/2019/feb/24/terry-miller-andraya-yearwood-transgender-sprinter/> [https://perma.cc/DCU4-ZBVP].

impressive records, they don't win every race. Miller took second and third place in two consecutive races, losing to cisgender girls.⁶⁵ Reading between the lines, the real issue is not that transgender girls are so dominant that they are depriving cisgender girls of meaningful athletic competition. Rather, it is that their participation, regardless of their competitive ability and results, somehow robs cisgender girls of opportunity. By this metric, how poorly do transgender athletes have to perform before they aren't robbing a cisgender student of an opportunity?

Taking a broader view, these bills champion the thrill and edification of winning and lament how unfortunate it is that some girls have their hopes and dreams shattered by male students claiming to be girls.⁶⁶ But these statements find little support in reality. The Associated Press reached out to twenty-four state lawmaker sponsors of these bills and the conservative groups which champion them. Collectively, they "cannot cite a single instance in their own state or region where such participation has caused problems."⁶⁷ The NCAA doesn't collect data on how many transgender athletes compete at the collegiate level, but Ohio and Kansas track the number of transgender athletes in high school sports,⁶⁸ and neither have legislation on the books regarding transgender athletes. Kansas estimates that there are five transgender student athletes statewide and Ohio reports nine over the past five years.⁶⁹ The complete absence of any examples of dominant transgender athletes at the high school level aside from two successful but not unbeatable runners in Connecticut highlights the absurdity of attempting to ban the extremely small number of transgender female athletes from competing. The sudden influx of legislation leads one to believe that there is an imminent crisis in women's sports but, in truth, it represents an attempt to solve a problem which simply does not exist. Even setting aside that there are very few transgender female who compete at all, the reality is that the jury is out as to whether transgender athletes who suppress their testosterone have significant advantages over cisgender athletes.⁷⁰ Transgender women would have to be far more dominant than Miller or Yearwood and would have to participate at unprecedented levels to have any noticeable impact.⁷¹ The

65. Shawn McFarland, *For the Second Week in a Row, Canton's Chelsea Mitchell Beats Terry Miller in 55-Meter Dash, This Time to Win State Open Title*, HARTFORD COURANT (Feb. 22, 2020), <https://www.courant.com/sports/high-schools/hc-sp-chelsea-mitchell-terry-miller-55-meter-dash-state-open-20200222-zdwb7shfbnfrxajs2hgmdwutbi-story.html> [https://perma.cc/EG5Q-E235].

66. S. 228, 112th Gen. Assemb. (Tenn. 2021)

67. David Crary & Lindsay Whitehurst, *Lawmakers Can't Cite Local Examples of Trans Girls in Sports*, AP NEWS (March 3, 2021), <https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports-914a982545e943ecc1e265e8c41042e7> [https://perma.cc/6SMS-KGXY].

68. *Id.*

69. *Id.*

70. *Hecox v. Little*, 479 F. Supp. 3d 930, 978 (D. Idaho 2020).

71. Only 0.7% of teenagers thirteen to seventeen identify as transgender, or about 150,000 total. JODY L. HERMAN, ANDREW R. FLORES, TAYLOR N.T. BROWN, BIANCA D.M. WILSON & KERITH J. CONRON, WILLIAMS INST., UCLA SCH. OF L., *AGE OF INDIVIDUALS WHO IDENTIFY AS TRANSGENDER IN THE UNITED STATES 2* (January 2017). 57% of high school students played a sport in 2019. CTRS. FOR DISEASE CONTROL & PREVENTION, 1991-2019

justifications and findings of these laws became a prominent issue in recent judicial challenges.

III. JUDICIAL CHALLENGES

Four key cases offer insight into how state and federal courts will decide whether these new laws are constitutional: *Bostock v. Clayton County*, *Grimm v. Gloucester County School Board*, *Hecox v. Little*, and *B.P.J. v. West Virginia State Board of Education*. All four offer guidance as to how Title IX and the Fourteenth Amendment should be used to evaluate the content, structure, and stated goals of these statutes. The Equal Protection Clause of the Fourteenth Amendment states that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”⁷² The Fourteenth Amendment, along with the Supreme Court’s recent expansion of the definition of “sex” in *Bostock*, has opened the door for the judiciary and the Department of Justice to extend Title IX protection to gay and transgender individuals.⁷³

A. *Bostock v. Clayton County*

Justice Gorsuch, writing for the majority in *Bostock*, makes it clear that sexual orientation and gender identity are protected statuses: “[A]s we’ve seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”⁷⁴ The defendants argued that expanding Title VII would cause it to apply to “sex-segregated bathrooms, locker rooms, and dress codes.”⁷⁵ The Court declined to address those issues and focused exclusively on Title VII.⁷⁶ It may be a similar fear that drove the state legislatures to introduce bills banning transgender girls from playing on girls’ sports teams within six months of the *Bostock* decision.⁷⁷ This Title VII expansion anxiety was realized in *Grimm v. Gloucester*.

HIGH SCHOOL YOUTH RISK BEHAVIOR SURVEY DATA, <https://yrbs-explorer.services.cdc.gov/#/graphs?questionCode=H82&topicCode=C06&location=XX&year=2019> [<https://perma.cc/7LCJ-D5ZR>]. Assuming liberally that 57% of transgender students want to play sports and are not barred by legislative or social factors, there are approximately 85,500 transgender athletes nationwide. The actual number is almost certainly far lower.

72. U.S. CONST. amend. XIV, § 1.

73. See *B.P.J. v. W. Va. State Bd. Of Educ.*, 550 F. Supp. 3d 347, 356 (S.D.W. Va. 2021); U.S. Dept. of Just., Memorandum on Application of *Bostock v. Clayton County* to Title IX of the Educ. Amends. of 1972 (Mar. 26, 2021) (explaining *Bostock* and the close interpretations applied between Title VII and Title IX and “developing jurisprudence” suggest that Title IX should be read to include “protections against sexual orientation and gender identity discrimination”).

74. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020).

75. *Id.* at 1753.

76. *Id.*

77. *Bostock* was decided on June 15, 2020. Mississippi introduced Senate Bill 2536 in January 2021, West Virginia introduced House Bill 3293 on March 18, 2021, Tennessee passed Senate Bill 228 on March 26, 2021, and Arkansas passed Senate Bill 354 on March 25, 2021.

i. Grimm v. Gloucester and expansion of Title VII

Just two months after *Bostock*, the Fourth Circuit held that Gavin Grimm, who had been transgender since before he knew what that word meant, could not be barred from using the men’s restroom. By creating a new policy requiring students to use the bathroom conforming to their birth certificate, the Gloucester County school board violated the Equal Protection Clause and Title IX.⁷⁸ The Fourth Circuit recounted a harrowing tale of Gavin facing discrimination and public humiliation, all while spending the majority of his high school career in court battling with the school district. At one school board hearing, “one person called Grimm a ‘freak’ and likened him to a dog.”⁷⁹ The parents had two concerns: First, “that the ‘majority’ must be protected.” Second, allowing transgender students to use the bathroom with which they identify, would lead to male students pretending to be girls in order to get into their bathroom and prey on them, operating under the misapprehension that cisgender men would disguise themselves to gain access to the women’s bathroom.⁸⁰

Ultimately, the Fourth Circuit applied intermediate scrutiny, which applies to cases of gender discrimination and requires the state action in question to further the interests of said state through means which are “substantially related” to said interest.⁸¹ The court held that the board’s policy violated the Fourteenth Amendment because it is not substantially related to “the important objective of protecting student privacy.”⁸² The court found that “many courts . . . have held that various forms of discrimination against transgender people constitute-sex based discrimination for purposes of the Equal Protection Clause because such policies punish transgender persons for gender nonconformity, thereby relying on sex stereotypes.”⁸³ The court also held that the bathroom policy discriminated against Gavin on the basis of sex because of the Supreme Court’s holding in *Bostock*: “although *Bostock* interprets Title VII . . . it guides our evaluation of claims under Title IX.”⁸⁴

B. Hecox v. Little

Title IX and the Fourteenth Amendment were used once again in *Hecox v. Little* to issue a temporary injunction against Idaho’s “Save Women’s Sports Act.” Lindsay Hecox is a transgender student athlete at Boise State University (BSU) in Idaho who has been undergoing hormone treatment and wanted to try out for the BSU track team in the fall of 2020.⁸⁵ Under the NCAA rules at the time, she could because she had the prerequisite one year of hormone treatment

78. *Grimm v. Gloucester Cnty. Sch. Bd.*, 97 F.3d 586, 619 (4th Cir. 2020).

79. *Id.* at 599.

80. *Id.*

81. *See Craig v. Boren*, 429 U.S. 190, 197 (1976).

82. *Grimm*, 97 F.3d at 607.

83. *Id.* at 608.

84. *Id.* at 616.

85. *Hecox v. Little*, 479 F. Supp. 3d 930, 946 (D. Idaho 2020), *aff’d* No. 20-35813, 2023 WL 1097255 (9th Cir. 2023).

completed.⁸⁶ Her co-plaintiff is a seventeen-year-old cisgender student who has played sports since she was a child—she plays soccer and competes in track for Boise High School.⁸⁷ She joined Lindsay because “most of her closest friends are boys, she has an athletic build . . . and has at times been thought of as ‘masculine’.” She is worried that another student might dispute her sex under the new law.⁸⁸

The District Court of Idaho made note of the timeline that accompanied the Idaho bill.⁸⁹ Introduced on February 13, 2020, the bill passed committee eight days later and arrived on Governor Little’s desk by March 19, despite a letter from the Attorney General warning that the bill “raised serious constitutional and other legal concerns due to the disparate treatment and impact it would have on transgender and intersex athletes, as well as its potential privacy intrusion on all female student athletes.”⁹⁰ This warning appears to have legs, because the court granted the plaintiff’s motion for preliminary injunction to bar the legislation from going into effect.⁹¹

While the opportunity to play on a sports team is not a fundamental right and discrimination based on gender or sex does not trigger strict scrutiny, the legislation discriminates on the basis of sex and will accordingly have to withstand intermediate scrutiny.⁹² This standard was somewhat ironically created in *United States v. Virginia*, given that case was the first citation in Idaho’s legislative findings for the “Fairness in Women’s Sports Act.”⁹³ The state conceded that the bill was subject to intermediate scrutiny, but claimed it did not discriminate against transgender students because it “treats all biological males the same and prohibits them from participating in women’s sports to protect athletic opportunities for biological females” and can “readily withstand this form of review.”⁹⁴

The district court held that, while “redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes is a ‘legitimate and important government interest,’”⁹⁵ the principles involved in separating men and women’s sports teams “do not appear to hold true for women and girls who are transgender.”⁹⁶ The court distinguished the Ninth Circuit’s holding in *Clark v. Arizona Interscholastic Association*, which upheld

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 947–48.

90. *Id.* at 947.

91. *See id.* at 989.

92. *See id.* at 973–75.

93. The Idaho legislature quotes from *United States v. Virginia*, 518 U.S. 515, 533 (1996): “[I]nherent differences between women and men . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.” IDAHO CODE §33-6202 (2023).

94. *Hecox*, 479 F. Supp. 3d at 974-75.

95. *Id.* at 976 (quoting *Clark v. Arizona Interscholastic Ass’n.*, 695 F. 2d 1126, 1131 (9th Cir. 1982)).

96. *Id.*

disallowing men to play on women's high school volleyball teams for the simple fact that the plaintiffs here are not men, but transgender women.⁹⁷

The district court outlined four points to justify the injunction. First, it held that transgender women have been victims of past discrimination and “the Act excludes a historically disadvantaged group (transgender women). . . and further discriminates against a historically disadvantaged group (cisgender women) by subjecting them to the sex dispute process.”⁹⁸ Second, the Act does not allow transgender women and girls to participate on any sports team because they will not play on men's teams, and forcing them to do so would be “equivalent to gender identity conversion efforts, which every major medical association has found to be dangerous and unethical.”⁹⁹ Third, since less than one percent of the population is transgender, they could not “‘displace’ cisgender women in athletics ‘to a substantial extent’”¹⁰⁰ and the NCAA and Idaho High Schools Activities Association's (IHSAA) policies of allowing transgender students to compete after one year of hormone therapy produced zero examples of any disruption to women's sports.¹⁰¹ Fourth, “it is not clear that transgender women who suppress their testosterone have significant physiological advantages over cisgender women.”¹⁰²

The justification for the Act fared no better. Intermediate scrutiny “requires that a law solves an actual problem and that the ‘justification must be genuine, not hypothesized.’”¹⁰³ Without any “empirical evidence that sex inequality or access to athletic opportunities are threatened by transgender women athletes in Idaho,” the complete ban of transgender women athletes is unrelated to the “interests the Act purported advances.”¹⁰⁴ There is no evidence in the legislative record of any “history of transgender athletes ever competing in sports in Idaho,” no evidence that cisgender female athletes have been displaced by transgender athletes, and no evidence to “suggest a categorical bar against transgender female athlete's participation in sports is required to... ‘protect athletic opportunities for females’ in Idaho.”¹⁰⁵ The court also took issue with the incredible scope of the Act compared to its purported justification of protecting athletic scholarship opportunities for women:

[A]ny female athlete, from kindergarten through college, is generally subject to the Act's provisions. Clearly the need for athletic scholarship is not implicated in primary school and intramural sports in the same way that it may be for high school and college athletes. As such, “the breadth of the [law] is so far removed from [the] particular

97. *Id.*

98. *Id.* at 977.

99. *Id.*

100. *Id.*

101. *Id.* at 979.

102. *Id.*

103. *Id.* (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

104. *Id.*

105. *Id.* at 978–79.

justifications” put forth in support of it, that it is “impossible to credit them.”¹⁰⁶

C. B.P.J v. West Virginia State Board of Education

Similarly, a West Virginia district court enjoined West Virginia’s equivalent of the “Fairness in Women’s Sport Act” under Title IX, primarily because transgender students make up a tiny percentage of the total student body and the plaintiff was clearly being discriminated against on the basis of her sex.¹⁰⁷ The eleven-year-old plaintiff, B.P.J., was diagnosed with gender dysphoria in 2019 and participated on the all-girls cheerleading team in elementary school.¹⁰⁸ The law barred her from participating on the girls’ track team because the definition of biological sex in the statute provided that “‘Biological sex’ means an individual’s physical form as a male or female based solely on the individual’s reproductive biology and genetics at birth.”¹⁰⁹

The District Court for the Southern District of West Virginia applied intermediate scrutiny based on *Grimm*, because “discrimination against transgender people is inherently based in sex,” and “in the alternative, *Grimm* finds that transgender people are a quasi-suspect class and therefore entitled to intermediate scrutiny. . . .”¹¹⁰ The court did not delve into legislative findings and assumed that the state’s proffered justification is legitimate, but “as applied to B.P.J. is not substantially related to providing equal athletic opportunities for girls.”¹¹¹ Allowing her to play on the girls’ teams would not deprive cisgender female athletes from athletic opportunity partially because she “is the only transgender student at her school interested in school-sponsored athletics” and partially because transgender children make up less than one percent of thirteen-to-seventeen-year-olds.¹¹² Unlike the court in *Hecox*, the District Court for the Southern District of West Virginia addressed how Title IX applies to transgender athletes. The court held that she was clearly being excluded from school athletics on the basis of her sex,¹¹³ that she was harmed by the law, and that she was treated worse than others who were similarly situated:

All other students in West Virginia secondary schools—cisgender girls, cisgender boys, transgender boys, and students falling outside of any of these definitions trying to play on the boys’ teams—are permitted to play on sports teams that best fit their gender identity. Under this law, B.P.J. would be the only girl at her school . . . that is

106. *Id.* at 983 (quoting *Romer v. Evans*, 517 U.S. 620, 635 (1996)).

107. *See B.P.J. v. W. Va. State Bd. Of Educ.*, 550 F. Supp. 3d 347 (S.D.W. Va. 2021).

108. *Id.* at 351.

109. *Id.* at 352; IDAHO CODE §33-6203 (2023).

110. *B.P.J.*, 550 F. Supp. 3d at 354.

111. *Id.* at 355.

112. *Id.* at 356.

113. *Id.* (citing *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020)).

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forbidden from playing on a girls' team and must join the boys' team.¹¹⁴

Even without subsequent judicial challenge, the bills won't accomplish their declared goals of protecting scholarship opportunities and ensuring that women can compete with each other fairly.

IV. WHY THE LEGISLATION WON'T ACHIEVE ITS STATED GOALS

Ensuring that girls and women receive equal opportunities to participate in scholastic athletics has been and should continue to be a priority for state legislatures, but statutes which categorically ban transgender girls from participating do not achieve that goal. The statutes are not based on any scientific data justifying them at the elementary to high school level. In fact, they are not based on any scientific data whatsoever showing a disparity between the athletic abilities of transgender and cisgender girls.

A. Lack of scientific data

Although state legislatures are adamant that women's sports are *under attack* by transgender women, their stance simply is not supported by the data. As the predecessor bill to the other thirty-one states, Idaho's oft-regurgitated findings are insufficient to support a complete ban on transgender girls playing sports with cisgender girls. The findings rely primarily on opinion pieces that have no basis in science and discuss the differences between cisgender men and women who compete at elite levels such as professional sports and the Olympics, again playing into the incorrect narrative that transgender women are simply cisgender men in disguise.¹¹⁵ A scientific study from the Karolinska Institutet in Sweden and a law review article from Duke Law Professor Doriane Coleman are the only findings which provide any possible scientific justification.¹¹⁶ Outside of these two articles, the legislative findings include little more than persuasive authority from other jurisdictions and baseless opinions.¹¹⁷ However, the Karolinska study undermines the legislature, and the article has been misused.

The Idaho legislature cites the Karolinska study, which studied adult athletes, and states, "[t]he benefits that natural testosterone provides to male athletes is not diminished through the use of puberty blockers and cross-sex hormones."¹¹⁸ They describe the findings of the study as "a man who identifies

114. *Id.*

115. See IDAHO CODE §33-6202 (2023).

116. See *id.*; Anna Wiik, Tommy R. Lundberg, Eric Rullman, Daniel P. Andersson, Mats Holmberg, Mirko Mandić, Torkel B. Brismar, Olof Dahlqvist Leinhard, Setareh Chanpen, John N. Flanagan, Stefan Arver & Thomas Gustafsson, *Muscle Strength, Size and Composition Following 12 Months of Gender-Affirming Treatment in Transgender Individuals*, 105 J. CLINICAL ENDOCRINOLOGY & METABOLISM 805, 806 (2019); Doriane Lambelet Coleman, *Sex in Sport*, 80 L. Contemp. Probs. 63, 74 (2017).

117. See Neel Burton, *The Battle of the Sexes*, Psychology Today (July 2, 2012); Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734, 738 (R.I. 1992); Petrie v. Ill. High Sch. Ass'n, 394 N.E.2d 855, 861 (Ill. App. Ct. 1979).

118. IDAHO CODE §33-6202 (2023).

as a woman and is taking cross-sex hormones ‘had an absolute advantage’ over female athletes and ‘will still likely have performance benefits’ over women.”¹¹⁹ In reality, the study had nothing to do with comparing transgender athletes to cisgender athletes; it studied the differences between eleven transgender women and twelve transgender men after twelve months of gender-affirming treatment.¹²⁰ The study did not compare cisgender women and transgender women. Instead, it compared the two groups of transgender adult participants in order to determine how much muscle mass the transgender women lost, and how much the transgender men gained after a year of gender-affirming treatment.¹²¹

The claim that natural testosterone is not diminished through gender affirming treatments was removed from the study after peer review.¹²² In *Hecox*, the Idaho legislature could not provide any justification for why they chose to use the pre-peer-reviewed version of the article.¹²³ The peer-reviewed findings of the study state that “cross-sex hormone treatment markedly affects muscle function, size, and composition in transgender individuals. While the [transgender men] experienced robust changes on lower-limb muscle mass and strength, the corresponding changes in [transgender women] were modest.”¹²⁴ Again, this finding is between transgender men and transgender women, and does not compare either group to cisgender men or cisgender women. Most glaringly, the study only studied adults, not high school age children.

Professor Doriane Lambelet Coleman’s work was also cited in the legislative findings for Idaho’s bill.¹²⁵ Professor Coleman implored the Governor to veto the bill because her research was misused by the Idaho legislature and stated that “there is no legitimate reason to seek to bar all transgender girls and women from girls’ and women’s sport, or to require students whose sex is challenged to prove their eligibility in such intrusive detail.”¹²⁶ She said the legislature should instead use the NCAA rule and stated that “no other state has enacted such a flat prohibition against transgender athletes, and Idaho shouldn’t either.”¹²⁷

Professor Coleman is a staunch advocate for preserving competition in women’s sports by requiring students who identify as women but have not transitioned physically to play in the male category.¹²⁸ She champions Title IX as an essential piece of legislation for protecting women’s rights, and writes that expansion to cover transgender individuals should be exempted when it comes

119. *Id.*

120. See Wiik, et al., *supra* note 116.

121. *Id.* at 15.

122. *Hecox v. Little*, 479 F. Supp. 3d 930, 981 (D. Idaho 2020), *aff’d* No. 20-35813, 2023 WL 1097255 (9th Cir. 2023).

123. *Id.*

124. Wiik et al., *supra* note 116.

125. *Hecox*, 479 F. Supp. 3d at 948.

126. *Id.*

127. *Id.*

128. See Doriane Coleman, Martina Navratilova & Sanya Richards-Ross, *Opinion: Pass the Equality Act, but Don’t Abandon Title IX*, WASH. POST (Apr. 29, 2019), https://www.washingtonpost.com/opinions/pass-the-equality-act-but-dont-abandon-title-ix/2019/04/29/2dae7e58-65ed-11e9-a1b6-b29b90efa879_story.html.

to women's sports.¹²⁹ Her explicit focus is on the performance gap between male- and female-bodied athletes, and she bases her findings on historical performance differences in competitive sports between said athletes.¹³⁰

In the legislative findings for the Act, the Idaho legislature cited an op-ed piece Professor Coleman wrote alongside Martina Navratilova and Sanya Richards-Ross in which they defend sex segregation in women's sports.¹³¹ Professor Coleman and her co-authors write: "Yet the reality is that putting male- and female-bodied athletes together is co-ed or open sport. And in open sport, females lose."¹³² They go as far as calling the ACLU's stance that "there is 'ample evidence that girls can compete and win against boys'" an outright denial of science.¹³³ They write that Title IX should include a sports exception, because:

Sports already include transgender women and girls in their programs. If they haven't transitioned physically, they're included without condition in the male category. As the NCAA's inclusive practice have shown, this category isn't based on identifying as a man; it's based on having male biology. And if the athletes are at least a year into their hormonal transition – the medical standard of care – they can compete in the female category.¹³⁴

The authors do not feel that this standard adequately deals with the performance gap, but "the fact remains that it is on the books as an effort to accommodate the competing claims for fairness and inclusion."¹³⁵ So why then is Professor Coleman not an easy ally of the states that have attempted to ban transgender athletes from competing with cisgender women?

Professor Coleman acknowledges that, "We need to find a path to equality also for trans[gender] people. And we need to be thoughtful about how they are included within an institution whose design is at odds with who they are."¹³⁶ Her acknowledgement reveals the fundamental issue with the way Idaho created their bill—they did not exercise the requisite thoughtfulness and care that the issue requires. Her testimony to the Idaho state legislature forced her to endorse the NCAA's policy, which she does not agree with. If the core concern is an increasing number of transgender women playing women's sports, then a more data and science driven screening process is clearly required. Further, scientific issues aside, the legislation attempts to solve a problem which simply does not exist.

129. See Doriane Lambelet Coleman, Michael J. Joyner & Donna Lopiano, *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 DUKE J. GENDER L. & POL'Y 69 (2020).

130. *Id.*

131. IDAHO CODE §33-6202 (10) (2023).

132. Coleman et al., *supra* note 129.

133. *Id.*

134. *Id.*

135. *Id.*

136. Coleman et al., *supra* note 129, at 133.

B. Absence of an issue

Public opinion is mixed on whether transgender girls should be permitted to compete with cisgender girls. According to a poll by Hart Research Associates, a public opinion polling firm that regularly works with NBC and the Wall Street Journal, 73% of voters agree with the following statement: “[S]ports are important in young people’s lives. Young transgender people should be allowed opportunities to participate in a way that is safe and comfortable for them.”¹³⁷ The rate of agreement is even higher among voters with children under age eighteen, with 80% agreement and 48% in “strong agreement.”¹³⁸ According to a recent NPR and Ipsos poll, 63% of Americans are opposed to allowing transgender girls participation on teams matching their gender identity.¹³⁹ While public sentiment appears to be split over the question of whether transgender athletes should be allowed to compete on teams that match their gender identity,¹⁴⁰ the public is in agreement that the issue should not be subject to legislation. According to a PBS News Hour poll, 67% of respondents would not support a prohibition “on transgender athletes from joining sports teams that match their gender identity.”¹⁴¹ Although transgender rights have provided a potent wedge issue in recent years, the fact of the matter is that even if the vast majority of the country wanted to prohibit transgender girls from playing sports with cisgender girls, legislation imposing a discriminatory bans is not going to bring home the gold.

As discussed above, there are only a small number of transgender students, and even fewer who wish to compete in sports. A flat ban on an already marginalized population not only sends a negative and damaging message, but also has unintended side-effects—even if the laws are repealed.

V. WHY IT MATTERS EVEN IF THE LAWS ARE STRUCK DOWN

When a legislature goes through the necessarily arduous process to draft a bill, debate on it, pass it through both houses, and obtain the signature of the governor, it sends a powerful message. The legislature is the democratic instrument which carries out the will of the people and when it passes a law, it is supposedly speaking with the voice of the people. So, when the legislature passes

137. HART RSCH. ASSOCS., AMERICANS’ VIEWS ON THE EQUALITY ACT 4 (March 16, 2021), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/ME-14049-HRC-Equality-Act-3-16-2021.pdf?mtime=20210316175245&focal=none> [https://perma.cc/ZQ98-R5U5].

138. *Id.* at 5.

139. Melissa Block, *Americans are Deeply Divided on Transgender Rights, a Poll Shows*, NPR (June 29, 2022, 5:00 AM) <https://www.npr.org/2022/06/29/1107484965/transgender-athletes-trans-rights-gender-transition-poll> [https://perma.cc/34GW-NGLB] (finding that 63 percent of Americans are “opposed to allowing transgender women and girls to compete on teams that align with their gender identity”).

140. Matt Loffman, *New Poll Shows Americans Overwhelmingly Oppose Anti-Transgender Laws*, PBS, (April 16, 2021, 5:00 AM), <https://www.pbs.org/newshour/politics/new-poll-shows-americans-overwhelmingly-oppose-anti-transgender-laws> [https://perma.cc/HGV6-2JUA].

141. *Id.*

a law that requires a transgender student to be inspected by their doctor before they can play on a sports team, it is making a clear statement: “You don’t belong here.” This sort of heavy-handed lawmaking is dangerous because it further oppresses an already historically marginalized community, delegitimizes government, and creates uncertainty within the legal system by passing legally infirm laws.

A. Transgender and nonbinary youth face greater challenges

A 2016 survey found that 37% of transgender men and women experienced at least one physical attack in their lifetime, and half of these attacks were linked to their gender identity.¹⁴² A 2020 study by the Center for American Progress found that 66% of transgender, genderqueer, and agender respondents felt that discrimination had moderately or slightly “negatively affected [their] psychological well-being” in the past year.¹⁴³ 28% felt that discrimination negatively affected their mental well-being “to a significant degree.”¹⁴⁴

These issues are magnified in LGBTQ youth, especially in school settings. 70% of transgender, nonbinary, and gender nonconforming youth ages twelve to twenty-two in Wisconsin experienced some form of victimization from their peers in the previous year.¹⁴⁵ School climates that accept and acknowledge LGBTQ youth result in better outcomes later in life.¹⁴⁶ Students who feel welcome and safe within their schools have lower rates of drug use, better mental health, and lower rates of suicide.¹⁴⁷ These outcomes are stymied by legislatures attempting to bar transgender and nonbinary youth from participation in sports. When state governments refuse a delicate approach to issues like these, they not only harm marginalized communities, but undermine confidence in the democratic process.

B. This type of legislation makes legislatures look ineffective

It is essential to democracy that the people can maintain trust and believe in the legitimacy of their government. Legislatures damage their credibility when they utilize their vast powers to create bills solely to gain political points at the expense of marginalized communities. According to the Pew Institute, only about 20% of Americans believed in 2022 that they “trust the government in

142. Gia Elise Barboza, Silvia Dominguez & Elena Chace, *Physical Victimization, Gender Identity and Suicide Risk Among Transgender Men and Women*, 4 PREVENTIVE MED. REPS. 385, 387 (2016).

143. Lindsay Mahowald, Mathew Brady & Caroline Medina, *Discrimination and Experiences Among LGBTQ People in the US: 2020 Survey Results*, CTR. FOR AM. PROGRESS (April 21, 2021, 9:02 AM), <https://www.americanprogress.org/article/discrimination-experiences-among-lgbtq-people-us-2020-survey-results/> [https://perma.cc/75UL-SML7].

144. *Id.*

145. Brittany J. Allen, Ben Andert, Jay Botsford, Stephanie L. Budge & Jennifer L. Rehm, *At the Margins: Comparing School Experiences of Nonbinary and Binary-Identified Transgender Youth*, 90 J. SCH. HEALTH 1, 5 (2020).

146. *See id.* at 2.

147. *Id.*

Washington to do what is right . . .”¹⁴⁸ In a time when citizens are looking for responses and solutions to a pandemic, passing laws like the sports bans can only further harm the relationship between the populace and government at all levels. Trust (or lack thereof) in government has major social implications.

These implications are wide-ranging, and the UN writes that “Greater public trust has been found to improve compliance in regulations and tax collections, even respect for property rights. It also gives confidence to consumers and investors, crucial to creating jobs and the functioning of economies more broadly.”¹⁴⁹ Lack of trust “damages every aspect of government—from basic functionality to a long-term erosion of morale and efficacy.”¹⁵⁰ Professor William Howell writes that in order to reverse this distrust we would need “wide segments of the public seek[ing] reform to allow for and encourage more meaningful debate.”¹⁵¹ Any sort of meaningful, good-faith debate cannot survive in an environment where the legislature is willing to pass laws without input from legal experts, scientists, and athletes who are positioned to advise and assist in crafting women’s sports bills that acknowledge the unique challenges that cisgender and transgender women face.

In copy and pasting one bill from Idaho, the states trample on the idea of states serving as “laboratories of democracy.”¹⁵² Supreme Court Justice Brandeis described the concept: “a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁵³ These laboratories are meant to craft legislation for the betterment of their people. When the legislatures refuse to write bills for their own states, they instill the distinct impression that they have no problem legislating in the absence of the will of their constituents. Even if the people of Idaho support a flat ban on trans women playing with cisgender women, the experiment is nothing short of a failure if it is constitutionally infirm. Idaho owes

148. *Public Trust in Government: 1958-2022*, PEW RSCH. CTR. (June 6, 2022), <https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/> [<https://perma.cc/QGQ9-YSXQ>].

149. Jonathan Perry, *Trust in Public Institutions: Trends and Implications for Economic Security*, UNITED NATIONS DEP’T OF ECON. AND SOC. AFFS. (July 20, 2021), <https://www.un.org/development/desa/dspd/2021/07/trust-public-institutions> [<https://perma.cc/8W2G-E6SF>].

150. Billy Morgan, *Why Public Distrust Could Prove ‘Corrosive’ to U.S. Democracy*, UCHI. NEWS, (Mar. 26, 2019), <https://news.uchicago.edu/story/why-public-distrust-could-prove-corrosive-us-democracy> [<https://perma.cc/FS7U-PE73>].

151. *Id.*

152. “This theory argues that because most power is reserved to state and local governments under the Constitution, a diverse system of laws can develop and take root. The state-level innovations that are successful and beneficial will be copied across the country because states must prevent their citizens from voting with their feet and moving away to other states because of perceived advantages in their legal systems.” Lynn Eisenberg, Note, *States as Laboratories for Federal Reform: Case Studies in Felon Disenfranchisement Law*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 539, 575 (2012).

153. Keeling Baker, *A Progressive Call to Arms: Laboratories of Democracy*, HARVARD POL. REV. (Dec. 3, 2020), <https://harvardpolitics.com/laboratories-of-democracy> [<https://perma.cc/Z626-CLE6>].

it to its populace to listen to the experts and make a good-faith attempt to protect women's sports legally.

Legislators should be wielding their power in ways that protect not only women's sports, but the interests and well-being of the transgender community. Instead of issuing flat bans which reduce participation and further marginalize the community, legislatures should be carefully crafting legislation which attempts to balance the interests of both groups. Carefully-written legislation could achieve the stated goals of "protecting women's sports" through a variety of alternative methods aside from simply banning transgender women from participation wholesale.

VI. WHAT PROTECTING WOMEN'S SPORTS SHOULD LOOK LIKE

Instead of specifically targeting transgender women, legislatures should focus on increasing state budgets for women's athletics to increase the number of activities offered and to encourage young women to participate. State legislatures are well within their power to craft legislation in order to ensure that girls are able to participate on a level playing field while also creating room for transgender girls to play on teams which adhere to their gender identity.

A. Increased funding and more programs

If women's sports are truly in need of saving, there is arguably no better way than to increase the funding given to schools to create robust women's sports programs. A bill that seeks to reduce the funding disparity between men's and women's sports at the collegiate level on down will have a tremendous effect in giving women more opportunities to participate in sports and provide more support for women's sports facilities.¹⁵⁴ Title IX has made massive strides in leveling the playing field between men and women's sports, but there is still more that can be done. When the legislature opens its coffers and puts increased funding into women's programs, it ensures that the programs will remain protected, and women will be able to participate in rich and diverse activities that men have enjoyed for decades longer.¹⁵⁵ This funding could still be accompanied by bills that make sure women have scholastic opportunity and are able to fairly compete by acknowledging science, and consulting experts who have been

154. Law firm Kaplan Hecker & Fink found that the NCAA spent \$4,285 per Division I men's basketball athlete and about \$2,500 per Division I women's basketball athlete in the 2018-19 season. Jaclyn Diaz, *The NCAA's Focus on Profits Means Far More Gets Spent on Men's Championships*, NPR (Oct. 27, 2021, 9:25 AM), <https://www.npr.org/2021/10/27/1049530975/ncaa-spends-more-on-mens-sports-report-reveals> [https://perma.cc/3PL9-6MH8].

155. According to a 2019 survey by the Aspen Institute, an international nonprofit dedicated to increasing youth participation in sports, "29% of families with girls in sports dedicate more than 1% of the family's gross income to sports, compared to 23% of families with a boy in sports." Additionally, families with girls in sports spent \$228 more annually on "travel, lodging and lessons." Jon Solomon, *Survey: Sports Parents Now Spend More Money on Girls than Boys*, PROJECT PLAY (Apr. 6, 2020), <https://www.aspenprojectplay.org/news/sports-parents-now-spend-more-money-on-girls-than-boys> [https://perma.cc/T2TK-ZPLZ].

engaging in vigorous debate over the advantages that trans women have over cisgender women for over a decade.

B. Carefully crafted legislation in consultation with experts

These bills were passed far too quickly, and the legislatures rammed them through without adequately considering the implications.¹⁵⁶ If state legislatures truly believe that allowing transgender girls to play on women's sports teams will sound the death knell of sports programs around the country, then they are free to pass legislation. A flat ban does not appear to have any success in surviving judicial review, but carefully crafted, narrow legislation that includes appropriate guidelines and requirements for allowing transgender girls to play with cisgender girls will achieve the intended goal of making sure women and girls are not put on an unequal playing field. Bills created with input from the scientific and medical community will not only pass judicial muster but will show that the legislature cares about equality for all groups of people.

Perhaps this lack of input is best illustrated by Professor Coleman's opposition to Idaho's bill. She should be the first person to defend bills aimed at protecting women's sports. Instead, she is put in an untenable position of defending the NCAA's policy with which she disagrees because she sees the danger and high likelihood for failure because of the way the bills are currently written. The only proponents these bills can muster are religious groups who are not scientifically, but politically motivated, and willing to send a message while ignoring people like Professor Coleman who have the background and knowledge required for such bills. Mirroring the NCAA's standard,¹⁵⁷ for example, would have been a supremely simple solution based on longstanding policies that would have a much better chance of surviving judicial review and scrutiny from the public. The unintended consequence of Title IX expansion reveals another motivation for scholars and experts like Professor Coleman to speak out against these bills.

VII. CONCLUSION

Saving women's sports requires more than barring transgender women from competing with cisgender women. State legislatures who wish to preserve the successes of Title IX should not copy flat bans from other states which have been largely unsuccessful and condemned even by their would-be supporters. Instead, they should adopt thoughtful legislation which encourages an approach

156. See *Hecox v. Little*, 479 F. Supp. 3d 930, 984 (D. Idaho 2020), *aff'd* No. 20-35813, 2023 WL 1097255 (9th Cir. 2023); Keith Ridler, *Idaho Governor Signs into Law Anti-Transgender Legislation*, AP NEWS (Mar. 30, 2020), <https://apnews.com/article/laws-virus-outbreak-us-news-courts-id-state-wire-301b65cf83f4e958a196a45f43c912c4> [<https://perma.cc/X9ZP-STCN>].

157. Media Center, *Board of Governors Updates Transgender Participation Policy*, NCAA (Jan. 19, 2022, 8:41:00 PM), <https://www.ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx> [<https://perma.cc/294X-YTD8>] (outlining the changes to the NCAA's transgender participation policy for the 2022–23 season).

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similar to what has already been in effect for decades and has been largely successful in protecting women's ability to compete. State legislatures who refuse to balance the competing needs of both communities foster a climate not of open discussion and solutions, but of fear and outrage.

THE CHILD TAX CREDIT’S BENEFITS FOR LOW INCOME MOTHERS AND AN ARGUMENT TO EXTEND THE TAX RELIEF FOR YEARS TO COME

Melissa Franca[†]

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INTRODUCTION

The COVID-19 pandemic has completely changed the landscape of American life since March of 2020. Single mothers have been one of the groups hit most devastatingly by these changes.¹ As childcare facilities and schools closed, single mothers were forced to take on the role of caretaker, teacher, and parent all while trying to earn income to support their children.² Government programs, such as stimulus checks and unemployment benefits, were put into place to provide temporary relief for Americans.³

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1. See Amanda Barroso & Rakesh Kochar, *In the Pandemic, the Share of Unpartnered Moms at Work Fell More Sharply than Among Other Parents*, PEW RSCH. CTR. (Nov. 24, 2020), <https://www.pewresearch.org/fact-tank/2020/11/24/in-the-pandemic-the-share-of-unpartneredmoms-at-work-fell-more-sharply-than-among-other-parents> [<https://perma.cc/KR8W-4RGR>].

2. *Id.*

3. *FACT SHEET: The American Rescue Plan Will Deliver Immediate Economic Relief to Families*, U.S. DEP'T OF TREASURY (Mar. 18, 2021), <https://home.treasury.gov/news/featured-stories/fact-sheet-the-american-rescue-plan-will-deliver-immediate-economic-relief-to-families> [<https://perma.cc/3VU5-62RF>].

While these programs helped in the short term, there was still a large need for more extensive relief packages.⁴ The American Rescue Plan, passed in March of 2021, focused on immediate economic relief.⁵ This relief included stimulus checks, state and local recovery funds, emergency rental and homeowner's assistance funds, and an expansion of the Child Tax Credit.⁶

Under the American Rescue Plan, the Child Tax Credit established a holistic and meaningful financial step to aid American families, building on the pre-pandemic version of the Child Tax Credit.⁷ Pre-pandemic Child Tax Credits did not do enough for low-income families because they were not fully refundable, the benefit was not actualized until taxes were filed, and the credit did not do enough to aid with the costs of raising children in the United States today.

The expanded Child Tax Credit increased benefits to working-class families, particularly those of low-income mothers, by extending the credit to lowest-earning families who were not included in earlier iterations of the credit.⁸ The credit allowed mothers to gain supplemental income through monthly payments for aid in raising their children.⁹ These payments can be put towards childcare, supplies, or housing needs.¹⁰ The implementation of the credit is projected to decrease child poverty by 40 percent over time.¹¹ The benefit would be realized by children from all racial and ethnic groups.¹²

The American Rescue Plan's tax credit particularly benefits low-income single mothers, as they are the group most affected by loss of income due to the pandemic and have the greatest increase in monetary benefits under the

4. William G. Gale & Grace Enda, *Economic Relief and Stimulus: Good Progress but More Work to do*, BROOKINGS (Dec. 16, 2020), <https://www.brookings.edu/research/economic-relief-and-stimulus-good-progress-but-more-work-to-do> [https://perma.cc/KHZ3-TQF3].

5. U.S. DEP'T OF TREASURY, *supra* note 3.

6. *Id.*

7. *FACT SHEET: Biden-Harris Administration Announces Child Tax Credit Awareness Day and Release Guidance for Unprecedented American Rescue Plan Investments Support Parents and Healthy Child Development*, WHITE HOUSE (June 11, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/11/fact-sheet-biden-harris-administration-announces-child-tax-credit-awareness-day-and-releases-guidance-for-unprecedented-american-rescue-plan-investments-to-support-parents-and-healthy-child-dev> [https://perma.cc/G5ZS-CTTY].

8. *See Policy Basics: The Child Tax Credit*, CENTER ON BUDGET & POL'Y PRIORITIES (Dec. 7, 2022), <https://www.cbpp.org/research/federal-tax/the-child-tax-credit#:~:text=The%20Child%20Tax%20Credit%20Under%20the%20American%20Rescue%20Plan%20Act&text=The%20maximum%20credit%20amount%20increased,olds%20for%20the%20first%20time> [https://perma.cc/3L5Z-BBQB].

9. *Id.*; American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4, 144 (2021).

10. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4, 144 (2021); CENTER ON BUDGET & POL'Y PRIORITIES, *supra* note 8.

11. GREGORY ACS & KEVIN WERNER, HOW A PERMANENT EXPANSION OF THE CHILD TAX CREDIT COULD AFFECT POVERTY 1 (2021), https://www.urban.org/sites/default/files/publication/104626/how-a-permanent-expansion-of-the-child-tax-credit-could-affect-poverty_1.pdf [https://perma.cc/N2VQ-E3PU].

12. *Id.*

legislation.¹³ While this credit expired after December 2021, it is crucial that the benefit be renewed for years to come in order to realize the change in child poverty promised by the legislation.¹⁴

This Note proceeds in three parts. Part I provides background information regarding single mothers in the United States and their experiences of poverty through the COVID-19 pandemic. Part II explains the structure of the U.S. tax system in relation to single mothers as well as the Child Tax Credits of the past. Part III discusses the Child Tax Credit in the American Rescue Plan and the benefits of its structure and impact on single mothers. Finally, Part IV proposes a renewal of the credit.

I. SINGLE MOTHERS IN THE UNITED STATES

A. Single Mothers and Poverty

When thinking of single mothers, many images and ideas come to mind. The oversimplified single mother, as depicted in popular media, devotes all of her time to working and caring for her family.¹⁵ The reality is that single mothers and single-parent families are not all similar to each other.

Over nineteen million children live in single-parent homes in the United States.¹⁶ Nearly sixteen million of these single-parent households have female heads of household.¹⁷ Over 20 percent of children in the United States live in homes with single mothers.¹⁸ Single mothers can be defined as female heads of household who are unwed. The majority of single-parent households in the US are headed by women.¹⁹ These mothers are predominantly poor and women of color.²⁰

13. See CENTER ON BUDGET & POL’Y PRIORITIES, *supra* note 8; WHITE HOUSE, *supra* note 7.

14. ACS & WERNER, *supra* note 11, at 1–3; American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4, 144 (2021).

15. See Elizabeth Bruno, *Why Can’t Pop Culture Get Single Moms Right?*, ATLANTIC (Apr. 3, 2014), <https://www.theatlantic.com/entertainment/archive/2014/04/why-cant-pop-culture-get-single-moms-right/359922> [<https://perma.cc/DV7X-BWBB>].

16. Erin Duffin, *Number of Children Living with a Single Mother or a Single Father in the U.S. from 1970 to 2022*, STATISTA (Dec. 12, 2022), <https://www.statista.com/statistics/252847/number-of-children-living-with-a-single-mother-or-single-father> [<https://perma.cc/RTS3-B694>].

17. *Id.*

18. Paul Hemez & Chanell Washington, *Percentage and Number of Children Living with Two Parents has Dropped Since 1968*, U.S. CENSUS BUREAU (Apr. 12, 2021), <https://www.census.gov/library/stories/2021/04/number-of-children-living-only-with-their-mothers-has-doubled-in-past-50-years.html> [<https://perma.cc/34C7-M3KY>].

19. *Single Mother Statistics*, SINGLE MOTHER GUIDE (May 17, 2021), <https://singlemotherguide.com/single-mother-statistics> [<https://perma.cc/5ML2-2JW4>].

20. *Id.*

Additionally, single mothers often work in industries that systemically undervalue and underpay their labor, such as childcare and service.²¹ These women are typically less likely than their married counterparts to hold a bachelor's degree.²² Women also earn less than men on average, potentially contributing to the elevated levels of poverty in single-mother households.²³ Women are directed into these industries because, for many, it is the only accessible way they are able to care for their children and families.²⁴ Without a college degree, it is difficult for them to find work that would sustain themselves and their children.²⁵

Single-mother families are more likely to experience poverty.²⁶ Single-parent households rely on one wage earner, and while child support may be expected to help support children there are exceptionally high rates of unpaid child support funds.²⁷ Families of color are the most likely to be single-mother households experiencing poverty.²⁸ Native American single-mother households experience the highest rates of poverty, with forty-three percent of those families living in poverty.²⁹ More than one third of Black and Hispanic single-mother households live in poverty.³⁰ As the preceding data shows, the issue of poverty in single mother households intersects with race.

The amount of time that children spend in poverty during their childhood can greatly affects their futures.³¹ Children who are raised in poverty have less academic success than their non-impooverished counterparts and are less likely to graduate from high school.³² They are also less likely than their counterparts to

21. DEBORAH POVICH, BRANDON ROBERTS & MARK MATHER, WOKRING POOR FAMS. PROJECT, LOW-INCOME WORKING MOTHERS AND STATE POLICY (Winter 2013-14), https://www.prb.org/wp-content/uploads/2014/02/WFPF_Low-Income-Working-Mothers-Report_021214.pdf [<https://perma.cc/5WXX-53S7>].

22. MELANIE KRUELIS, LINDSEY REICHLIN CRUSE & BARBARA GAULT, INST. FOR WOMEN'S POL'Y RSCH., SINGLE MOTHERS IN COLLEGE: GROWING ENROLLMENT, FINANCIAL CHALLENGES, AND THE BENEFITS OF ATTAINMENT 3 (2017), <https://iwpr.org/iwpr-issues/student-parent-success-initiative/single-mothers-in-college-growing-enrollment-financial-challenges-and-the-benefits-of-attainment> [<https://perma.cc/5EWD-KL6U>].

23. Women earned 84 percent of what men earned in 2020. *See* Barroso & Kochar, *supra* note 1.

24. *See Status of Women in the States*, INST. FOR WOMEN'S POL'Y RSCH., <https://statusofwomendata.org/explore-the-data/work-family/> [<https://perma.cc/P7ZV-DYK8>].

25. *See* KRUELIS ET AL., *supra* note 22, at 1.

26. SINGLE MOTHER GUIDE, *supra* note 19.

27. Only forty-four percent of custodial parents receive the full payment of child support, and just sixty-nine percent of parents receive any child support payments at all. *44 Percent of Custodial Parents Receive the Full Amount of Child Support*, U.S. CENSUS BUREAU (Jan. 30, 2018), <https://www.census.gov/newsroom/press-releases/2018/cb18-tps03.html> [<https://perma.cc/RV88-XCHX>].

28. SINGLE MOTHER GUIDE, *supra* note 19.

29. *Id.*

30. *Id.*

31. *Id.*

32. CAROLINE RATCLIFFE, CHILD POVERTY AND ADULT SUCCESS 3-4 (2015), <https://www.urban.org/sites/default/files/publication/65766/2000369-Child-Poverty-and-Adult-Success.pdf> [<https://perma.cc/8J5F-FSH2>].

be consistently employed.³³ Even temporary relief from persistent poverty has positive effects that will follow children through adulthood.³⁴

B. Single Mothers and the COVID-19 Pandemic

The COVID-19 pandemic exacerbated problems single mothers faced and created a multitude of new challenges. Added financial and childcare strains burdened single mothers across the board, most devastatingly affecting low-income mothers.³⁵

Single mothers predominantly work in industries that were negatively affected by the pandemic: the service industry, housekeeping, and personal care.³⁶ Single mothers saw a drop in employment of nine percent, the highest of any group of parents partnered or unpartnered.³⁷ Within this group, single mothers with young children experienced the largest drop in labor force participation due to the pandemic.³⁸ Without work, single mothers were unable to earn income to support their families.³⁹

In addition to the dwindling service industry, starting in March 2020, nearly all schools and daycare centers shut down in-person teaching and care to aid stay-at-home and social distancing efforts.⁴⁰ Many believed that this would be a temporary issue, but even in May of 2021, nearly one-third of students were attending school virtually.⁴¹

With children out of school, single mothers struggled to figure out how to care for their newly at-home children and earn a living wage.⁴² Many women with small children were forced to leave the workforce in order to stay home and take care of their children who were too young to stay home alone.⁴³ Childcare services that remained open during the pandemic were limited and expensive—

33. *Id.* at 4.

34. *See id.*

35. Misty L. Heggeness, Jason Fields, Yazmin A. Garcia Trejo & Anthony Schulzetenberg, *Tracking Job Losses for Mothers of School-Age Children During a Health Crisis*, U.S. CENSUS BUREAU (March 3, 2021), <https://www.census.gov/library/stories/2021/03/moms-work-and-the-pandemic.html> [<https://perma.cc/RV9B-W7M6>].

36. *Economic Impact of Covid-19 on Single Mothers*, WOMEN'S COUNCIL WIS., https://womenscouncil.wi.gov/Documents/SingleMothersCOVIDInfoSheet_F_Corr.pdf [<https://perma.cc/Y58F-5473>].

37. Barroso & Kochar, *supra* note 1.

38. *Id.*

39. *Id.*

40. *See id.*

41. *Back-to-School Statistics*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=372> [<https://perma.cc/XXZ4-RGT6>].

42. *See* Barroso & Kochar, *supra* note 1.

43. Lauren Webber, *As Schools Plan to Reopen, Single Parents Have Few Child-Care Options*, WALL ST. J. (Aug. 2, 2020), <https://www.wsj.com/amp/articles/as-schools-plan-to-reopen-single-parents-have-few-child-care-options-11596381796> [<https://perma.cc/AX9Q-2MTQ>].

exceeding \$800 a month per child on average pre-Covid.⁴⁴ The combination of full-time childcare and unemployment or underemployment made it nearly impossible for single mothers to regain financial wellness without government aid.⁴⁵

To address the growing financial precarity of the average U.S. resident, Congress came forward with an initial economic relief plan.⁴⁶ The CARES Act included an economic stimulus check of \$1,200 to individuals earning \$75,000 or less, and a decreased payment to those making up to \$99,000.⁴⁷ An additional \$500 for each child under the age of seventeen was also provided, leaving out dependents over the age of seventeen.⁴⁸

The CARES Act stimulus provision was the first time the U.S. government distributed a stimulus check directly to citizens,⁴⁹ yet the measure was nowhere near enough to compensate for the increased financial burdens of job and childcare losses. In March 2020, the average cost of rent for a two-bedroom apartment was \$1,150.⁵⁰ For most Americans, the stimulus check barely covered rent for one month, let alone other basic necessities. While families received additional \$600 payments for minor, dependent children, they were also insufficient to cover the average monthly expenses associated with raising a child.⁵¹ Two more rounds of stimulus checks have since gone out over a period of nearly a year.⁵²

The CARES Act also put into effect an eviction moratorium until July 2020.⁵³ The eviction moratorium specifically protected tenants from new eviction proceedings for nonpayment of rent. However, the moratorium did not

44. See MARK LINO, KEVIN KUCZUNSKI, NESTOR RODRIGUEZ & TUSA REBECCA SCHAP, U.S. DEP'T OF AGRIC., EXPENDITURES ON CHILDREN BY FAMILIES, 2015 (March 2017), <https://fns-prod.azureedge.us/sites/default/files/resource-files/crc2015-march2017.pdf> [https://perma.cc/9K98-92JK]; Allie Johnson, *Poll: Many Parents Will Put Summer Childcare on a Credit Card This Year*, BANKRATE (May 19, 2021), <https://www.bankrate.com/finance/credit-cards/summer-childcare-survey/> [https://perma.cc/M669-BULJ].

45. See LINO ET AL., *supra* note 46.

46. Emily Cochrane & Sheryl Gay Stolberg, *\$2 Trillion Coronavirus Stimulus Bill is Signed Into Law*, N.Y. TIMES (Mar. 27, 2020), <https://www.nytimes.com/2020/03/27/us/politics/coronavirus-house-voting.html> [https://perma.cc/N8A9-XP GP].

47. *Id.*

48. See *id.*

49. *Id.*

50. *Average Monthly Apartment Rent in the United States from January 2017 to February 2021, By Apartment Size*, STATISTA (Mar. 25, 2021), <https://www.statista.com/statistics/1063502/average-monthly-apartment-rent-usa/> [https://perma.cc/X68R-XWV2].

51. *Covid-19 Economic Relief Bill: What It Means for States*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/state-federal/covid-19-economic-relief-bill> (Jan. 4, 2021) [https://perma.cc/9ZQ2-M86S].

52. *Id.*; Bruno, *supra* note 15.

53. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

forgive previously unpaid rent.⁵⁴ The eviction moratorium was extended several times beyond its first iteration in the CARES Act.⁵⁵

The eviction moratorium protected those who could not pay rent from being evicted, but provided only a temporary solution.⁵⁶ While those without jobs were protected from immediate eviction, the moratorium only delayed eviction for those who remained jobless after the moratorium was lifted.⁵⁷

While the eviction moratoriums aided families, there are more effective options for rental assistance to low income families. Studies have shown that housing vouchers—vouchers providing rent payment—are the most effective way to address eviction related to poverty.⁵⁸ While single mothers could not actively be evicted during these eviction moratoriums, these evictions seemed imminent.⁵⁹ These women do not have the resources to support themselves, let alone take action to fight against these discriminatory housing practices.⁶⁰ Eviction moratoriums have undoubtedly had some benefits, but they do not do enough to solve the problems brought on by the pandemic.

Additionally, federal and state governments also provided several options of unemployment assistance in the form of additional benefits under the Federal Pandemic Unemployment Compensation program.⁶¹ This aid was crucial for the millions of unemployed. Unfortunately, state agencies distributing these benefits were ill-equipped to handle the sheer volume of unemployment claims.⁶² State

54. *Id.*

55. *Federal Eviction Moratoriums in Response to the Covid-19 Pandemic*, CONG. RSCH. SERV. (Mar. 30, 2021), [https://crsreports.congress.gov/product/pdf/IN/IN11516#:~:text=The%20CARES%20Act%20eviction%20moratorium,\(August%2023%2C%202020\).&text=The%20CDC%20moratorium%20does%20not%20address%20notices%20to%20vacate](https://crsreports.congress.gov/product/pdf/IN/IN11516#:~:text=The%20CARES%20Act%20eviction%20moratorium,(August%2023%2C%202020).&text=The%20CDC%20moratorium%20does%20not%20address%20notices%20to%20vacate) [https://perma.cc/5448-YUBJ].

56. *See id.*

57. *Cf. id.*

58. *See* Daniel Gubits, Jill Khadduri & Jennifer Turnham, *Housing Patterns of Low Income Families With Children: Further Analysis of Data from the Study of Effects of Housing Vouchers on Welfare Families*, JOINT CTR. FOR HOUS. STUD., HARV. U. (Sep. 2009), <https://www.jchs.harvard.edu/sites/default/files/w09-7.pdf> [https://perma.cc/D6XH-QWEX]; Lauren Dunton, Meghan Henry, Eliza Kean & Jill Khadduri, *Study of PHA's Efforts to Serve People Experiencing Homelessness*, U.S. DEP'T OF HOUS. & URB. DEV. (Feb. 2014), https://www.huduser.gov/portal/publications/pdf/pha_homelessness.pdf [https://perma.cc/2CVE-7FSV].

59. Sandler, *supra* note 59.

60. *Cf. id.*

61. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020); Laura Schulte, *Coronavirus Exposed Huge Flaws in the Wisconsin Unemployment System. Where things stand and what still needs to be done*, MILWAUKEE JOURNAL SENTINEL (Aug. 3, 2021, 11:26 AM), <https://www.jsonline.com/story/news/local/wisconsin/2021/07/29/covid-exposed-flaws-unemployment-system-where-things-stand-now/7939753002/> [https://perma.cc/GB98-94T4]; *Unemployment Insurance Relief During Covid-19 Outbreak*, U.S. DEPT. OF LAB., <https://www.dol.gov/coronavirus/unemployment-insurance> [https://perma.cc/FAX5-QANJ].

62. Cochrane & Gay Stolberg, *supra* note 46; Ben Zipperer & Elise Gould, *Unemployment Filing Failures*, ECON. POL'Y INST.: WORKING ECON. BLOG (April 28, 2020).

agencies had various issues and did not have the capacity to provide unemployment assistance to all who required it.⁶³ While unemployment benefits could have been an efficient way to aid those who lost their jobs due to the pandemic, somewhere between eight and twelve million workers were unable to file for unemployment because of the difficulty of the process.⁶⁴

At the time of this article, specific statistics on the failures of the expanded unemployment benefits are not yet available. However, single mothers were likely among the group who were unable to sign up for the benefits.⁶⁵ Even for mothers who were able to file for unemployment benefits, the temporary government aid programs put into place at the beginning of the pandemic did little to aid families and single mothers with the long term and lasting effects of the pandemic.

Ultimately, while federal and state governments have attempted to remedy some of the issues facing the poorest families, including those households of single mothers, the initiatives have continued to fall short for these families. While stimulus checks provided families with immediate monetary aid, the amount was a drop in the bucket for those who lost all sources of income.⁶⁶ The eviction moratorium helped families who were facing eviction for nonpayment of rent, but the moratorium did not forgive a tenant's unpaid rent, potentially leading to eviction.⁶⁷ The moratorium did not go far enough.⁶⁸ Children in single mother households will be disadvantaged as these temporary relief programs did not do enough to support their families.

II. THE TAX SYSTEM AND THE CHILD TAX CREDIT

A. *Placing the Child Tax Credit in Context of the Tax System*

To understand the implications and realities of the Child Tax Credit, it is important to understand the underlying tax structure in the United States, particularly in relation to single mothers. If married, taxpayers may file individually or jointly.⁶⁹ For the purpose of this Note, the focus will be put on individually filing taxpayers with dependent children.

An individual taxpayer may be able to file as a head of household if they are unmarried and primarily house a qualifying person, which may be a child.⁷⁰ Particularly, a single taxpayer can file as a head of household if they have a qualifying child.⁷¹ A qualifying child has a parental relation with the taxpayer,

7:00 AM), <https://www.epi.org/blog/unemployment-filing-failures-new-survey-confirms-that-millions-of-jobless-were-unable-to-file-an-unemployment-insurance-claim/> [https://perma.cc/5PX2-BB64].

63. Zipperer & Gould, *supra* note 65.

64. *Id.*

65. Webber, *supra* note 43; Zipperer & Gould, *supra* note 65.

66. NAT'L CONF. OF STATE LEGISLATURES, *supra* note 51.

67. CONG. RSCH. SERV., *supra* note 55.

68. Sandler, *supra* note 59.

69. I.R.C. § 6013.

70. I.R.C. § 2 (b)(1).

71. *Id.*

resides at the same residence as the taxpayer, is under a set age, and must be a dependent.⁷²

When filing as a head of household, taxpayers may claim a head of household credit.⁷³ The benefit of the head of household status is that the standard deduction and thresholds for certain credits are higher than those given to single taxpayers.⁷⁴ Head of household taxpayers may then claim various additional credits, like the Child Tax Credit, if they are below a particular income level.⁷⁵

Some credits reduce a taxpayer's tax liability, and if the tax liability is below zero, the taxpayer does not receive any additional benefit.⁷⁶ Conversely, there are certain tax credits that allow a taxpayer to be refunded the amount that exceeds their tax liability.⁷⁷

The US tax code is rather progressive, but it still affects low-income mothers more than other groups.⁷⁸ While the lowest-income taxpayers generally have a negative federal income tax liability, the highest-income individuals pay most of the individual federal income taxes.⁷⁹

However, this structure ignores that all individuals who work pay payroll taxes of up to nearly eight percent of their income into Medicare and Social Security.⁸⁰ This percentage is naturally a larger burden on low-income mothers than their higher-income counterparts, leaving low-income single mothers with modest amounts to devote to housing, childcare, and the mounting costs of everyday life.

The head of household filing status serves as an example of how the United State's progressive system still fails low-income individuals and mothers. The head of household filing status is meant to help American families deal with the rising costs of childcare, but the actual application of its associated benefits increases the disparities between poorer and higher-income families.⁸¹ Categorization as head of household increases the threshold for determining the marginal tax rate,⁸² but this structure results in higher-income taxpayers

72. I.R.S. Fact Sheet FS-2005-7 (Jan. 2005), <https://www.irs.gov/pub/irs-news/fs-05-07.pdf> [<https://perma.cc/4PXY-5LV8>].

73. 26 U.S.C. § 32(a).

74. I.R.C. § 63(c)(2)..

75. *Child Tax Credit*, IRS (Jan. 24, 2023), <https://www.irs.gov/credits-deductions/individuals/child-tax-credit> [<https://perma.cc/P3W3-5KAA>].

76. *Credits and Deductions for Individuals*, IRS (Jan. 11, 2023), <https://www.irs.gov/credits-deductions-for-individuals> [<https://perma.cc/68XG-HCVH>].

77. *Id.*

78. Akari Atoyama-Little, Note, *Taxing Single Mothers: A Critical Look at the Tax Code*, 88 N.Y.U. L. REV. 2146 (2013).

79. *Id.* at 2155 (“[T]he top quintile pays 83% of all federal individual income tax paid.”).

80. John Olson, *What Are Payroll Taxes and Who Pays Them?*, TAX FOUND. (July 25, 2016), <https://taxfoundation.org/what-are-payroll-taxes-and-who-pays-them/> [<https://perma.cc/68M2-WKMA>].

81. Jacob Goldin & Zachary Liscow, *Beyond Head of Household: Rethinking the Taxation of Single Parents*, 71 N.Y.U. TAX L. REV. 368 (2018).

82. *Id.* at 373; I.R.C. § 1(b).

receiving a larger monetary benefit from filing with this status than lower-income taxpayers.⁸³

B. History of the Child Tax Credit

The Child Tax Credit has historically worked similarly to other tax credits. The first version of the Child Tax Credit was established in the Taxpayer Relief Act of 1997.⁸⁴ Throughout the early 1990s, in order to combat the rising cost of raising children and slow wage growth, lawmakers and policy groups conceived the idea of providing a tax credit to all families with children under the age of eighteen.⁸⁵

While the credit was initially envisioned to aid all families with children, the finalized legislation eventually aimed to aid only middle- and upper-class families.⁸⁶ The credit was essentially nonrefundable and provided a \$500 credit per child under seventeen whose parent or head of household fit within particular tax brackets, excluding those who earned the least.⁸⁷ The credit was applied by calculating the tax liability of the taxpayer when filing their federal income taxes.⁸⁸ Consequently, this distribution of the credit resulted in the taxpayer only realizing the benefit as an offset of their tax liability, not as gains in financial wealth. Because the lowest earners had little or no federal tax liability, they were unable to realize the credit's benefits.

Over the years, the credit has evolved and changed in order to have a greater benefit and reach. In 2001, the Economic Growth and Tax Relief Reconciliation Act increased the maximum per child amount and made the credit partially refundable to taxpayers for the first time.⁸⁹ The Act's goal was to raise the credit amount to \$1,000 per child by 2010. However, due to the 2008 financial crisis, the \$1,000 per child maximum amount was never realized.⁹⁰ Similarly, Congress decreased the refundability threshold in response to the financial crisis.⁹¹

After 2008, Congress worked to keep the Child Tax Credit alive, although there were times when the tax credit was extremely low or refundability was not common.⁹² After nearly a decade-long struggle, the 2017 Tax Revision

83. See Goldin & Liscow, *supra* note 84, at 368–69.

84. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §101, 11 Stat. 788, 769-99.

85. CONG. RSCH. SERV., THE CHILD TAX CREDIT: LEGISLATIVE HISTORY (2018), https://www.everycrsreport.com/files/20180301_R45124_08f18f1240d9fd41057b6f4b3f183e5e778b11ca.pdf [<https://perma.cc/ZHN6-UQZT>].

86. *Id.* at 1–2.

87. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §101, 11 Stat. 788, 769-99.

88. *Id.*

89. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 201, 115 Stat. 38, 45–46.

90. CONG. RSCH. SERV., *supra* note 88, at 5.

91. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 501, 122 Stat. 3765, 3876; American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1002, 123 Stat. 115, 312-13.

92. CONG. RSCH. SERV., *supra* note 88, at 10.

reimagined the credit by increasing the credit to \$2,000 per child and the refundable portion to \$1,400 per child.⁹³

The original intent of the Child Tax Credit was to create a progressive program that would aid families with the financial burdens of raising children. While the Child Tax Credit was not originally as extensive as proposed,⁹⁴ the revisions to the credit over time have brought it even beyond its initial goal. However, the reality is that even as the credit neared its intended support in the 2017 expansion, its application left out those who needed it most. The lowest-income families were unable to realize the benefit of the credit as their income was too low to qualify.

III. THE AMERICAN RESCUE PLAN CHILD TAX CREDIT AND ITS IMPACT ON SINGLE MOTHERS

The 2021 American Rescue Plan's (ARP) Child Tax Credit, passed in response to the COVID-19 pandemic, was the biggest expansion of the Child Tax Credit in history.⁹⁵ It expanded the credit from \$2,000 per child over the age of six to \$3,000, and it expanded the credit to \$3,600 per child under the age of six.⁹⁶ The age limit to receive the credit was also raised from sixteen to seventeen years old.⁹⁷ The threshold for the heads of households to receive the credit is \$112,500, with no minimum requirement to receive the credit.⁹⁸ Additionally, for the first time, the credit became fully refundable.⁹⁹ It was also the first time that a portion of the credit was being distributed as a monthly payment.¹⁰⁰ These payments were automatic, as long as the recipient had filed a 2019 or 2020 federal income tax return or signed up to receive a stimulus check from the Internal Revenue Service.¹⁰¹

The monthly payments under ARP began in July 2021 and expired in December 2021 without an extension.¹⁰² The main benefits of the 2021 Child Tax Credit in comparison to past tax credits for children included a dramatic increase in the amount distributed, improved refundability, and inclusion of monthly payments of \$250 or \$300 per child.¹⁰³

93. Tax Cuts and Jobs Act of 2017, Pub. L. 115-97, § 11022, 131 Stat. 2054, 2073-74.

94. The National Commission on Children's recommendation for the initial credit was a refundable \$1,000 credit per child under eighteen. Adjusted for inflation this would be about \$2,000 today. CONG. RSCH. SERV., *supra* note 88, at 2.

95. *The Child Tax Credit*, WHITE HOUSE, <https://www.whitehouse.gov/child-tax-credit/> [https://perma.cc/VC7Y-XB3B].

96. *See id.*

97. *Id.*

98. *Id.*

99. *Tax Policy Center Briefing Book: Key Elements of the US Tax System*, TAX POL'Y CTR., <https://www.taxpolicycenter.org/briefing-book/what-child-tax-credit> [https://perma.cc/CPN6-WVF6].

100. WHITE HOUSE, *supra* note 99.

101. *Id.*

102. *Id.*

103. *Id.*; TAX POL'Y CTR., *supra* note 103.

The total cost of raising a child in the United States was roughly \$800 a month for lower-income single-parent families pre-pandemic.¹⁰⁴ Many single mothers support their children on wages at or around minimum wage.¹⁰⁵ With the federal minimum wage being \$7.25 per hour (adding up to about \$1,160 per month),¹⁰⁶ it is nearly impossible for mothers earning such an income to house and support themselves and their children.

Even before the pandemic, it was nearly impossible to raise children under these conditions. But with the pandemic, the majority of the minimum wage and low wage workers who lost their jobs were women, so raising children has only become harder.¹⁰⁷ This is precisely why the expansion of the Child Tax Credit is crucial to financially aiding families. At the time, the 2017 Child Tax Credit's amount was the most expansive, but it was not available to families who were not required to file taxes.¹⁰⁸ These are the poorest families and are those who likely would benefit the most from government financial aid to help raise their children. Many of these families are single-mother households.¹⁰⁹ The expanded Child Tax Credit fully addresses the original purpose that the 1997 Child Tax Credit wished to address.¹¹⁰ The Credit's expansion to all families with income below the threshold created material benefits for low-income families and mothers.¹¹¹ This restructuring allows the Child Tax Credit to function similar to a child allowance, helping families support their children.¹¹² Because the Child Tax Credit provided consistent financial benefits to families, even in its beginning months, it was able to affect real change for the lowest income groups.¹¹³

104. Single parent families who make less than \$59,200 spend between \$9,330 and \$9,980 annually to raise a child. Webber, *supra* note 43; LINO ET AL., *supra* note 44.

105. Sarah Jane Glynn, *Raising the Minimum Wage Is Key To Supporting the Breadwinning Mothers Who Drive the Economy*, CTR. FOR AM. PROGRESS (Feb. 23, 2021), <https://www.americanprogress.org/article/raising-minimum-wage-key-supporting-breadwinning-mothers-drive-economy/> [<https://perma.cc/J39F-PHUL>].

106. *Minimum Wage*, U.S. DEP'T OF LAB., <https://www.dol.gov/general/topic/wages/minimumwage> [<https://perma.cc/UX3G-P336>].

107. WOMEN'S COUNCIL WIS., *supra* note 36.

108. 2017 Tax Revision, Pub. L. No. 115-97, § 11022, 131 Stat. 2054, 2073-74 (2017); TAX POL'Y CTR., *supra* note 103.

109. *The Hard Truth: Single Moms vs. Single Dads*, SINGLE PARENT PROJECT, <https://www.singleparentproject.org/single-parent-statistics> [<https://perma.cc/L5TQ-C2SU>].

110. WHITE HOUSE, *supra* note 99; Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 101, 111 Stat. 788, 797-99 (1997).

111. WHITE HOUSE, *supra* note 99.

112. Jason Jabbari, Leah Hamilton, Stephen Roll & Michal Grinstein-Weiss, *The New Child Tax Credit Does More Than Just Cut Poverty*, BROOKINGS: UP FRONT (Sept. 24, 2021), <https://www.brookings.edu/blog/up-front/2021/09/24/the-new-child-tax-credit-does-more-than-just-cut-poverty/> [<https://perma.cc/RCH3-52G4>].

113. *Id.*

A. Refundability

A major attribute of the Child Tax Credit that made it important to low-income mothers is that the credit was fully refundable.¹¹⁴ A fully refundable credit has not previously been available for the Child Tax Credit.¹¹⁵ This was a major milestone because of the structure of the tax code. In the past, those with a higher tax liability likely benefited from the entirety of the Child Tax Credit because their liability was higher than the refundable amount.¹¹⁶ Low-income individuals with lower tax liabilities would only be able to receive up to the refundable amount if the deduction exceeded their tax liability.¹¹⁷

With full refundability came concerns regarding who gets the money and how it is being used. One critique of the 2021 Child Tax Credit was that higher-income families received the entire benefit, as did the poorest families.¹¹⁸ The refundable portion being sent to families monthly seemed to provide near universal aid to families raising children. While some policymakers thought that providing aid to higher-income families—those whose income was on the upper threshold of the credit—raising children was unfair, it would be detrimental to get rid of the fully refundable credit entirely. The credit allows low and higher-income families to supplement their income to provide for their children. Allowing the credit to expire because of payments made to higher-income families completely ignores the 3.8 million children that were kept from poverty in November 2021.¹¹⁹

Refundability allows the tax system to benefit low-income families in the same way that it benefits those who can realize the full extent of the credit without full refundability. The tax code is inherently classist by benefiting those who earn more and have greater assets.¹²⁰ Full refundability of the credit evens the playing field for the lowest-earning families and helps achieve the original purpose of the credit by financially aiding families with children.

B. Expansion

The expansion allowed for those who did not previously qualify to receive the credit due to low income to become eligible to receive the credit.

A major argument that opponents of the Child Tax Credit make is that allowing the lowest income families to receive the credit encourages parents to not participate in the labor force. There is some notable research that points out

114. WHITE HOUSE, *supra* note 7.

115. CONG. RSCH. SERV., *supra* note 88, at 1.

116. See Atoyama-Little, *supra* note 81.

117. See *id.*

118. Richard Rubin & Andrew Duehren, *Democrats Debate Duration, Details of Child Tax Credit Extension*, WALL ST. J. (Sept. 28, 2021), <https://www.wsj.com/articles/democrats-debate-duration-details-of-child-tax-credit-extension-11632828474> [https://perma.cc/57JJ-YKA2].

119. *November Child Tax Credit Payment Kept 3.8 Million Children from Poverty*, CTR. ON POVERTY & SOC. POL'Y, COLUM. UNIV. (Dec. 15, 2021), <https://www.povertycenter.columbia.edu/news-internal/monthly-poverty-november-2021> [https://perma.cc/LXQ5-CNX6].

120. Atoyama-Little, *supra* note 81.

that over time, labor participation may go down,¹²¹ but many scholars believe that the expansion of the credit will not only keep parents working in the labor force but also allow those who have been unable to work to re-enter the labor force.¹²² Another response to this argument is that even though there is currently a labor shortage, quality labor is scarce.¹²³

The expansion allows for parents to return to the labor force by helping parents cover the cost of childcare.¹²⁴ This specifically helps low-income mothers cover the costs of childcare. This allows parents who found it difficult to balance caring for their children and participating in the labor force to work with some aid in financing care for their children. This reduces barriers to employment that parents face. It is unclear as to whether the credit will encourage labor force participation, but in its short run, it did not negatively affect labor participation.

Additionally, the expansion payments helped to counter child poverty and food insecurity.¹²⁵ Families in need were able to increase spending on food items with their newly eligible tax credits.¹²⁶ The focus of relief for parents is an actionable and vital part of raising children.¹²⁷ Parents are not foregoing careers because of the child tax credit but are supplementing their income and improving childcare.

The Child Tax Credit also encourages participation in the economy.¹²⁸ With expansion to low-income families, the credit allows those who would not regularly be participating in the economy to participate in purchasing necessities.¹²⁹ This not only contributes to higher consumer spending, but also generates revenues from state and local sales taxes and is projected to account for 500,000 full time jobs at the median wage.¹³⁰ The credit not only will help individual families but has the potential to benefit the economy as well.

121. Kevin Corinth, Bruce D. Meyer, Matthew Stadnicki & Derek Wu, *The Anti-Poverty, Targeting, and Labor Supply Effects of the Proposed Child Tax Credit Expansion*, NAT'L BUREAU OF ECON. RSCH. 3–4 (Oct. 2021), https://www.nber.org/system/files/working_papers/w29366/w29366.pdf [https://perma.cc/4UXJ-W7AT].

122. Elizabeth Ananat, Benjamin Glasner, Christak Hamilton & Zachary Parolin, *Effects of the Expanded Child Tax Credit on Employment Outcomes*, CTR. ON POVERTY & SOC. POL'Y, COLUM. UNIV. (Oct. 10, 2021), <https://www.povertycenter.columbia.edu/publication/2021/expanded-child-tax-credit-impact-on-employment> [https://perma.cc/VXU5-DAHR].

123. Don Howard, *The Labor Shortage Is a Quality Jobs Shortage*, FORBES (Nov. 30, 2021, 8:15 AM), <https://www.forbes.com/sites/forbesnonprofitcouncil/2021/11/30/the-labor-shortage-is-a-quality-jobs-shortage/?sh=4ac3d97329b2> [https://perma.cc/63BD-GNUK].

124. Ananat et al., *supra* note 126.

125. *Id.*

126. *Id.*

127. *See id.*

128. Samuel Hammond & Robert Orr, *Report: Measuring the Child Tax Credit's Economic and Community Impact*, NISKANEN CENTER (Aug. 2, 2021), <https://www.niskanencenter.org/report-measuring-the-child-tax-credits-economic-and-community-impact/> [https://perma.cc/BLW7-X5J8].

129. *See id.*

130. *Id.*

C. Monthly Payments

Prior to the ARP Child Tax Credit, the benefit of the credit would be realized once a year when taxes were filed.¹³¹ ARP changed the credit to a monthly payment, creating a holistic and consistently beneficial financial stimulus for all who qualified. With monthly costs of raising a child for a low-income family at roughly \$800, a \$250 or \$300 monthly check would be a massive benefit to families living paycheck to paycheck.¹³² Single mothers are more likely to be living and caring for their children under financial instability.¹³³

This monthly payment structure gives families options on how they will spend their tax credit. Single mothers can have the discretion and ability to apply the installments of the credit to all aspects of childcare. Particularly, when it comes to the COVID-19 pandemic, monthly payments make more sense for single mothers.¹³⁴ The monthly payments positively affected low-income families in multiple facets of their livelihoods.¹³⁵ Families are able to use the monthly payments on childcare, food, and housing. Seventy-nine percent of families that received the credit immediately spent the funds to help with different necessities—like childcare, utilities, housing, and groceries—relieving financial stress for families.¹³⁶ Even with reports that low-income households had trouble receiving the first installment of the credit, more families gained access to the monthly payments, and the benefits of the credit became more prominent and necessary.¹³⁷

In the past, low-income families have had to rely on the Supplemental Nutrition Assistance Program (SNAP) and the Earned Income Credit.¹³⁸ These low-income families could not rely on the Child Tax Credit as they were disproportionately ineligible to receive it.¹³⁹ While the Child Tax Credit is not perfect, families with income of \$25,000 were less likely to receive the benefit than higher income families.¹⁴⁰ The potential for these families to receive these

131. WHITE HOUSE, *supra* note 99.

132. LINO ET AL., *supra* note 44.

133. *Nearly 40 Percent of Americans with Annual Incomes over \$100,000 Live Paycheck-to-Paycheck*, PR NEWSWIRE (June 15, 2021), <https://www.prnewswire.com/news-releases/nearly-40-percent-of-americans-with-annual-incomes-over-100-000-live-paycheck-to-paycheck-301312281.html> [<https://perma.cc/TD2E-ZRLN>].

134. See Barroso & Kochar, *supra* note 1.

135. Zachary Parolin, Elizabeth Ananat, Sophie M. Collyer, Megan Curran & Christopher Wimer, *The Initial Effects of the Expanded Child Tax Credit on Material Hardship*, NAT'L BUREAU OF ECON. RSCH. (Sept. 2021), https://www.nber.org/system/files/working_papers/w29285/w29285.pdf [<https://perma.cc/LK9L-JMFQ>].

136. *90% of Parents Receiving the Child Tax Credit Said Funds Were Helpful or Made a Huge Difference in Families' Lives*, PARENTS TOGETHER ACTION (Aug. 10, 2021), <https://parentstogetheraction.org/2021/08/10/new-survey-90-of-parents-receiving-the-child-tax-credit-said-funds-were-helpful-or-made-a-huge-difference-in-their-families-lives/> [<https://perma.cc/B3JN-73HE>].

137. WHITE HOUSE, *supra* note 99.

138. *Id.*

139. *Id.*

140. *Id.*

benefits is more progressive than past policies aimed at single- parent and low-income households.¹⁴¹ Current effects are imperfect as the entirety of the Child Tax Credit's benefits are not yet fully realized. Without a renewal of the credit, analyzing its full effects may prove impossible.

Food insufficiency reduction has been a major benefit and would continue to be a major benefit of the Child Tax Credit.¹⁴² Food insufficiency was reduced by twenty-seven percent in low-income families just two months after the first installment of the credit.¹⁴³ This uptick in reduction of food insufficiency for the poorest families is in part due to the fact that all families were able to access to credit.¹⁴⁴ The benefit of the credit can be directly applied to groceries and cover most if not all the groceries for children for the month.

IV. RENEWAL OF THE CREDIT

It is clear that the Child Tax Credit benefits American families, particularly ones headed by single women. The credit lapsed in December of 2021 and monthly payments ended at that time. There are several reasons why renewing this credit is crucial for low-income families, particularly due to the lasting effects of the COVID-19 pandemic.

First, the Child Tax Credit should not be discontinued because the pandemic still rages on while the every day costs associated with childcare rise.¹⁴⁵ As of February 2023, only 68 percent of adults in the United States are vaccinated, short of the 80 percent goal.¹⁴⁶ The vaccination rate for teens and small children is lower than this as well.¹⁴⁷ The coronavirus has mutated and begun infecting vaccinated and unvaccinated alike, causing labor disruptions.¹⁴⁸ These disruptions have caused new uncertainty and continued to feed inflation.¹⁴⁹

141. *See id.*; *see also* CONG. RSCH. SERV. *supra* note 88.

142. *See* WHITE HOUSE, *supra* note 7.

143. *Id.*

144. Claire Zippel, *After Child Tax Credit Payments Begin, Many More Families Have Enough to Eat*, CTR. ON BUDGET AND POL'Y PRIORITIES (Aug. 30, 2021), <https://www.cbpp.org/blog/after-child-tax-credit-payments-begin-many-more-families-have-enough-to-eat> [https://perma.cc/NS7H-7B6K].

145. *See Purdue Agricultural Economists Highlight Inflation and Pandemic-Related Uncertainty in Annual Outlook*, PURDUE UNIV. (Jan. 13, 2022), <https://www.purdue.edu/newsroom/releases/2022/Q1/purdue-agricultural-economists-highlight-inflation-and-pandemic-related-uncertainties-in-annual-outlook.html> [https://perma.cc/Q3F4-BUWE].

146. *US Coronavirus Vaccine Tracker*, USA FACTS (Aug. 31, 2023), <https://usafacts.org/visualizations/covid-vaccine-tracker-states> [https://perma.cc/WM8S-AMYE].

147. Lindsey Tanner, *COVID-19 Vaccination Rates for Children Are Low. Experts Say Parents Are 'Taking an Enormous Risk'*, PBS NEWS (Jan. 12, 2022, 4:52 PM), <https://www.pbs.org/newshour/nation/covid-19-rates-for-children-are-low-experts-say-parents-are-taking-an-enormous-risk> [https://perma.cc/MGR7-778N].

148. *See* David J. Lynch, *Omicron Fallout and Tough Labor Talks Likely to Rattle Supply Chains and Fuel Inflation*, WASH. POST (Jan. 15, 2022, 3:05 PM), <https://www.washingtonpost.com/business/2022/01/15/omicron-supply-chain-inflation/> [https://perma.cc/2SES-WLRC].

149. *See id.*

Along with the continuing pandemic, everyday commodities have risen in price and will continue to do so through 2023.¹⁵⁰ Gas is necessary for families raising children in the United States: Ninety-one percent of parents have access to a car.¹⁵¹ Transportation is vital to take children to school, get groceries, and doing other tasks necessary to raise children. The credit allowed families to supplement their income and utilize the credit to make sure cars had fuel. Renewing the credit could not come at a better time as gas prices rise and inflation cripple families' abilities to provide for their children.¹⁵²

If not renewed, the progress that the credit previously made will be erased.¹⁵³ Those who previously did not qualify for the credit are now unable to claim it.¹⁵⁴ This disproportionately affects children of color as well as those living in single-mother households.¹⁵⁵ The regular payments greatly expanded the benefit to families monthly and have been returned to a once-a-year lump sum.¹⁵⁶ The funds most often used to pay bills, buy groceries or clothes, and pay rent are no longer in the pockets of families who require the funds the most, making them again more disadvantaged than higher-income earners.

Even if not identical to the ARP Child Tax Credit, a modified version of the credit is essential to aid families in the wake of the pandemic. One way to reinterpret the credit is to exclude families who are higher earners from receiving monthly payments. In the ARP Child Tax Credit, even those families that make above the threshold receive some monthly payment.¹⁵⁷ This was a point of concern for lawmakers when considering expanding the credit.¹⁵⁸ The credit does the most to aid families with the lowest incomes. While it is beneficial to all families even in a modified amount, low-income families rely on the credit more than those who have higher incomes. If a tradeoff is necessary, limiting the credit to poorer families would be beneficial.

Additionally, a modified credit should not limit the credit to those who are working or have a minimum income requirement. The credit's greatest benefit is reducing child poverty rates. Some of these children are in families that do not receive the credit because they do not earn enough income. Limiting the credit

150. *EIA Forecasts Natural Gas Prices to Remain Near \$4/MMBtu in 2022, Slightly Lower in 2023*, U.S. ENERGY INFO. ADMIN. (Jan. 14, 2022), <https://www.eia.gov/todayinenergy/detail.php?id=50898> [<https://perma.cc/6CVZ-FEBR>].

151. Matt Timmons, *Car Ownership Statistics in the U.S.*, VALUE PENGUIN (Aug. 17, 2022), <https://www.valuepenguin.com/auto-insurance/car-ownership-statistics> [<https://perma.cc/YUU5-L5RR>].

152. See U.S. ENERGY INFO. ADMIN., *supra* note 154.

153. Kris Cox, Chuck Marr, Arloc Sherman & Stephanie Hingtgen, *If Congress Fails to Act, Monthly Child Tax Credit Payments Will Stop, Child Poverty Reductions Will Be Lost*, CTR. ON BUDGET & POL'Y PRIORITIES (Dec. 3, 2021), <https://www.cbpp.org/research/federal-tax/if-congress-fails-to-act-monthly-child-tax-credit-payments-will-stop-child> [<https://perma.cc/R5GE-8PJ6>].

154. See *id.*

155. *Id.*

156. See *id.*

157. See WHITE HOUSE, *supra* note 99.

158. See Rubin & Duehren, *supra* note 122.

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to not include these families will create more disparities between families who receive the credit and those who don't.

The COVID-19 pandemic and its repercussions have made it even more difficult for single low-income mothers to make ends meet. Ultimately, a renewed Child Tax Credit is crucial to creating equity between low-income single-mother families and higher-income families. Even in its short-lived existence, the ARP's Child Tax Credit combatted child poverty and food insecurity.¹⁵⁹ The future of the credit is unclear, but if renewed, it would provide major relief to a large percentage of American households. The ARP's Child Tax Credit and its attributes set a standard for a tax credit that brings to fruition the aid envisioned in its earlier version. The tax code has persistently failed low-income families, and a new vision for the tax credit has the potential to make the tax system more accessible and equitable.

159. See Ananat et al., *supra* note 126.



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