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Table of

1 Contesting and Controlling Abortion in China's Courts

Molly Bodurtha, Benjamin Liebman, Li Chenqian, & Wu Xiaohan

81 The Personal (Jurisdiction) is Political: The Reach and Overreach of Abortion Bounty-Hunter Laws

Sarah Geller

Contents

Defamation in the Time of Deepfakes 122

Abigail George

CONTESTING AND CONTROLLING ABORTION IN CHINA'S COURTS

BY MOLLY BODURTHA,[*] BENJAMIN LIEBMAN,[**] LI CHENQIAN[***] & WU XIAOHAN[****]

Abstract

The decision of the United States Supreme Court in *Dobbs v. Jackson Women's Health Organization* has brought renewed global attention to how legal systems protect and restrict women's reproductive autonomy. Central themes have included how the rollback of reproductive rights in the United States coincides with the judiciary's embrace of a broader "jurisprudence of masculinity" and the relationship between abortion restrictions and authoritarianism, as multiple countries have enacted restrictive measures while undergoing democratic backsliding.

Yet, the scholarly conversation on abortion, democracy, and how courts reflect and entrench gender disparities entirely omits China—the largest authoritarian state and a country with a high incidence of abortion. This is largely unsurprising: the central challenge facing Chinese women has not been abortion access but state-mandated birth control and abortion. Almost no prior scholarship examines how Chinese courts adjudicate disputes over abortion. This lack of attention reflects the common understanding that courts play no role in regulating reproduction and that abortion remains unproblematic in China.

Yet Chinese courts do confront and decide claims involving abortion. Drawing on a dataset of more than 30,000 civil cases discussing abortion, this Article examines men's claims that their wives obtained abortions without their "authorization." Chinese courts rarely award damages explicitly on this basis. Yet, men's claims to have legal rights to

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control women's reproductive choices are common, despite having no legal basis in Chinese law. The persistence of such claims suggests that women's access to abortion care is more regulated in China than academic and popular accounts have conveyed.

As China shifts toward encouraging rather than restricting births, traditional views of gender roles and the family increasingly align with the Party-state's new pro-natalist policies. Courts may be an important venue for adjudicating reproductive rights and enforcing such policies. From a comparative perspective, China also presents an important example of how abortion and gender are contested in a legal system in which constitutional rights play little role and the legal status of abortion appears to be settled. This demonstrates that resolving the legal status of abortion may not eliminate legal conflict, but rather open up new areas of legal contestation regarding reproductive rights. Men's claims to control women's reproductive choices in China suggest the need for scholars to place more attention on the role of private law litigation in contesting and restricting reproduction across legal systems, and the ways in which rights advocacy can serve both regressive and progressive goals, in both democratic and authoritarian systems alike.

INTRODUCTION

> *"We must ask ourselves: if the nation gives up its control over reproduction, who will actually come to hold this power?"*[1]
>
> *—Lü Pin, Chinese feminist*

The United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*[2] has brought renewed global attention to how legal systems, and in particular courts, protect and restrict women's reproductive autonomy.[3] One central theme in literature on *Dobbs* is how the rollback of reproductive rights in the United States coincides with the

1 Lü Pin (吕频), Shengyu Zizhuquan, Ji Bushuyu Guojia, Ye Bushuyu Fuquan Jiating (生育自主权,既不属于国家,也不属于父权家庭) [Reproductive Rights Belong Neither to the Nation Nor to the Patriarchal Family], Douban (豆瓣) [DOUBAN] (Nov. 11, 2013), https://site.douban.com/226278/widget/notes/15319990/note/318707543/ [https://perma.cc/SYE9-K6CE].

2 Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).

3 *See, e.g.*, Risa Kaufman, Rebecca Brown, Catalina Martínez Coral, Jihan Jacob, Martin Onyango & Katrine Thomasen, *Global Impacts of* Dobbs v. Jackson Women's Health Organization *and Abortion Regression in the United States*, 30 SEX. & REPROD. HEALTH MATTERS 1 (2022).

Court's embrace of a broader "jurisprudence of masculinity."[4] A related theme has been the relationship between abortion restrictions, democracy, and authoritarianism,[5] as countries beyond the United States have enacted restrictive measures while undergoing democratic backsliding.[6] Some have argued the Court's decision to return the abortion debate to the "democratic process" was grounded purely in doctrine: substantive due process, constitutional interpretation, and the nature of stare decisis.[7] Others have emphasized that more than doctrine—and more than abortion itself—has always been at stake in the legal contestation of abortion.[8]

In *Dobbs*, the majority, concurring, and dissenting opinions all discussed abortion regulations in other countries.[9] The Chief Justice's concurrence, in particular, clearly

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4 Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799 (2023). *Cf.* JULIE C. SUK, *Misogyny and Maternity*, *in* AFTER MISOGYNY 87, 87–95 (2023); Aliza Forman-Rabinovici & Olatunde C. A. Johnson, *Political Equality, Gender, and Democratic Legitimation in* Dobbs, 46 HARV. J. L. & GENDER 81 (2023).

5 *See, e.g.*, Melissa Murray & Katherine Shaw, Dobbs *& Democracy*, 137 HARV. L. REV. 728, 763-76 (2024); Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67 (2022); Erica Chenoweth & Zoe Marks, *Revenge of the Patriarchs: Why Autocrats Fear Women*, 101 FOREIGN AFFS. 103 (2022).

6 *See, e.g.*, *Poland: Regression on Abortion Access Harms Women*, AMNESTY INT'L (Jan. 26, 2022), https://www.amnesty.org/en/latest/news/2022/01/poland-regression-on-abortion-access-harms-women/ [https://perma.cc/K2C9-88KD]; Malu Cursino, *Hungary Decrees Tighter Abortion Rules*, BBC NEWS (Sept. 13, 2022), https://www.bbc.com/news/world-europe-62892596 [https://perma.cc/K4US-4ZPY].

7 *Dobbs*, 597 U.S. at 268.

8 *See, e.g.*, KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 11–40 (Brian Barry & Samuel L. Popkin, eds.) (1984); Kate Millett, *What is to Be Done*, 75 CHI.-KENT L. REV. 659, 661 663 (2000); Linda C. McClain & James E. Fleming, *Ordered Liberty After* Dobbs, 35 J. AM. ACAD. MATRIMONIAL L. 623, 623, 636–45 (2023); Melissa Murray & Jessica Valenti, Keynote Discussion at the NYU School of Law Symposium: Women's Rights and Backsliding Democracies (April 14, 2023) *in* Dobbs*, Abortion Rights and the State of U.S. Democracy*, MS. MAGAZINE (May 15, 2023), https://msmagazine.com/2023/05/15/dobbs-abortion-rights-us-democracy/ [https://perma.cc/95UR-Y94B].

9 Justice Alito's majority opinion explicitly referenced China's permissive abortion policies, noting that, according to the Mississippi legislature's findings, China is one of "six countries" that "permit nontherapeutic or elective abortion-on-demand after the twentieth week of gestation." *Dobbs*, 597 U.S. at 232 n.15. Meanwhile, Roberts' concurrence cited "China and North Korea" as two of the "handful of countries" that "permit elective abortions after twenty weeks." *Id.* at 351 (Roberts, J., concurring). The dissenters discussed abortion laws in many other countries, noting that "more than 50 countries around the world—in Asia, Latin America, Africa, and Europe—have expanded access to abortion in the past 25 years." *Id.* at 400 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

associated elective abortion with authoritarian governance in China and North Korea.[10] Meanwhile, the dissenters, like many academic commentators, noted that the elimination of the right to abortion in *Dobbs* makes the United States an outlier among liberal democracies.[11]

Despite the comparative references in *Dobbs* to global practices, the scholarly conversation on abortion, democracy, and how courts reflect and entrench gender disparities entirely omits China, the world's largest authoritarian state and also a country with a high incidence of abortion.[12] This is not entirely surprising. For most of the past forty-five years, the central challenge facing Chinese women has not been access to reproductive healthcare but state-mandated contraception, sterilization, and abortion.[13] Although Chinese law includes both duties to practice birth planning and explicit protections for women's reproductive autonomy,[14] abortion has generally been understood to be a question of Communist Party policy, not law.[15] Today, China continues to regulate reproduction through a three-child policy, even as the state has shifted from controlling reproduction to encouraging it.[16]

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10 *See id.* at 351 (Roberts, J., concurring).

11 *See id*. at 400 (Breyer, Sotomayor, & Kagan, JJ., dissenting) ("[I]t is American States that will become international outliers after today."). *See also* Roe *Abolition Makes U.S. a Global Outlier*, FOREIGN POL. (June 24, 2022), https://foreignpolicy.com/2022/06/24/roe-v-wade-overturned-global-abortion-laws/ [https://perma.cc/2YS3-W25J]; Kaufman et al., *supra* note 3, at 3.

12 *See Unintended Pregnancy and Abortion Rates: China*, GUTTMACHER INSTITUTE, https://www.guttmacher.org/regions/asia/china [https://perma.cc/MH2T-A9L6] (last visited Aug. 2, 2023) (providing average annual rates of abortion in China per 1,000 women aged 15–49); Tian Wang & Quanbao Jiang, *Recent Trend and Correlates of Induced Abortion in China: Evidence from the 2017 China Fertility Survey*, 22 BMC WOMEN'S HEALTH 1, 2 (2022) ("In 2019, the number of induced abortions documented in China was 9.76 million. However, given the underreporting and concealment of induced abortions that occur in private hospitals and clinics, the actual number is likely to be higher.") (footnote omitted).

13 Therese Hesketh, Li Lu, & Zhu Wei Xing, *The Effect of China's One-Child Family Policy After 25 Years*, 353 NEW ENG. J. OF MED. 1171, 1171 (2005) ("The policy depends on virtually universal access to contraception and abortion. . . . There is heavy reliance on long-term contraception, with intrauterine devices and sterilizations together accounting for more than 90 percent of contraceptive methods used since the mid-1980s.").

14 *See infra* notes 48–52, 74–82 and accompanying text.

15 *See infra* notes 45–46.

16 *See infra* notes 61–70 and accompanying text.

There is exhaustive scholarship on China's regulation of reproduction, marriage, and divorce.[17] Yet almost no prior scholarship, in English or Chinese, examines how Chinese courts adjudicate disputes over abortion.[18] This lack of attention reflects the common understanding that Chinese courts play no role in regulating reproduction and that abortion remains unproblematic in China. This lack of attention to men's potential use of the court system to control women's choices also reflects the fact that scholarship on reproduction in China overwhelmingly focuses on state-driven birth planning policy.

Yet the reality is different. Chinese courts do confront and decide claims involving abortion.[19] Drawing on a dataset of more than 30,000 civil cases discussing abortion,[20] this Article examines one distinct line of legal argument: claims by men that their wives obtained abortions without the man's authorization. Chinese courts rarely explicitly award damages for an "unauthorized" or "unilateral" abortion, but men's legal claims that they have the right to control women's reproductive choices are common.[21]

These cases stand out beyond their clear articulation of male authority to dictate women's reproductive decisions. Men's claims to have a legal right in women's reproductive choices also have no formal basis in Chinese law, which explicitly provides that men cannot seek damages for a claim that a spouse obtained an abortion without the husband's consent.[22] The persistence of such claims suggests that women's access to abortion care is more regulated in China than academic and popular accounts have conveyed and that courts play a role in both stigmatizing and regulating reproductive choices. Courts often do so indirectly, by legitimizing men's claims and by penalizing women for their reproductive choices.[23] While men seek redress to which they have no legal right, many women do not seek redress to which they are entitled or fail to highlight the legal flaws in men's arguments.[24] Some courts rely on the law to reject men's claims, but many others legitimize them, relying on

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17 *See infra* notes 31 and 84.

18 *See infra* note 30.

19 *See infra* note 136 and accompanying text.

20 *See infra* note 136 and accompanying text.

21 *See infra* Part III.A.

22 *See infra* note 80 and accompanying text.

23 Throughout this article, we use the term women to refer to people with the capacity for pregnancy. We do this to conform to how Chinese courts and academic literature use the term.

24 *See infra* Part III.A–B.

the woman's "unauthorized abortion" as a basis for granting him compensation or denying her relief.[25]

Our findings carry major implications for understanding the future of abortion regulation in China and for comparative study of the role of courts and law in regulating abortion. For much of the thirty-eight years in which the one-child policy was in effect, birth planning in China operated largely outside the legal system.[26] As China shifts toward encouraging rather than restricting births,[27] traditional views of gender roles and the family increasingly align with state policy. Courts may be an important venue for adjudicating reproductive rights and for enforcing the Party-state's new pro-natalist policies. At the very least, scholars should be attuned to the ways courts can reinforce gendered social and cultural norms, even when the law provides robust protection for women's rights.

Our findings also hold key lessons for scholars seeking to understand global trends in a post-*Dobbs* world. In particular, China presents an important example of how abortion and gender are contested in a legal system in which constitutional rights play little or no role and in which the legal status of abortion appears to be settled. China demonstrates that resolving the status of abortion does not eliminate legal conflict, but rather opens up new areas of legal contestation regarding reproductive rights. Recognizing how and when abortion is litigated in China suggests the need for scholars to place more attention on the role of private law litigation in contesting and restricting reproduction across legal systems. Men's claims to control women's reproductive choices in China also highlight how rights advocacy can serve regressive as well as progressive goals in both democratic and authoritarian systems. Our findings indicate that regime type may not dictate how legal systems address legal conflict over abortion.

I. Background and Regulatory Framework

China's one-child policy and the resulting state regulation of reproduction, including state-mandated abortion, has generated extensive scholarly and popular literature. Law is largely absent from this story. This is not surprising: for the first two decades of the one-

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25 *See infra* Part III.A.

26 *See infra Part* I.A.

27 *See infra* Part I.A.

child policy, there was no national law on birth planning.[28] Instead, the policy was largely pursued through Communist Party policy documents and provincial-level regulations.[29] Despite the centrality of state regulation of reproduction to Chinese life over the past forty years, almost no prior scholarship has examined how courts adjudicate reproductive disputes.[30] In contrast, law and courts have been central to the regulation of marriage, with extensive legal scholarship on the role of law in regulating the family going back to the early years of the People's Republic of China (PRC).[31] Yet this literature largely overlooks the degree to which reproduction and women's bodies are sites of contention within divorce litigation.

A. Regulating Reproduction: A History of Abortion and Reproductive Rights in China

Before the 20th century, abortion in China was largely understood to be a private household matter, with patriarchs afforded significant authority over reproductive decisions within the family.[32] Prior scholarship has noted imperial-era attitudes toward abortion

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28 China did not enact a birth planning law until 2001, more than 20 years after the one-child policy's launch. *See* Renkou yu Jihua Shengyu Fa (人口与计划生育法) [2001 Law on Population and Birth Planning], art. 20 (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2001, effective Sept. 1, 2002) 2002 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 1194 (China) (referring to the obligations of "husbands and wives of child-bearing age" to practice birth planning and use contraception) [Law on Population and Birth Planning]. Most provinces enacted regulations on birth planning in the 1980s, reflecting Party policies. *See* Zhang Cuiling (张翠玲) & Liu Hongyan (刘鸿雁), *Zhongguo Jihua Shengyu Jiange Zhengce de Lishi Biandong Fenxi* (中国计划生育间隔政策的历史变动分析) [*Historical Analysis of the Changes to China's Birth Planning & Interval Policy*], 31 NANYANG RENKOU (南方人口) [S. CHINA POPULATION] 40, 42–43, 2016.

29 *See infra* notes 42–43.

30 We located one Chinese-language article with different methodology from our own that examines disputes regarding reproductive rights. *See* Zhang Hua (张华), *Nüxing Shengyuquan de Sifa Baohu Zhuangkuang Kaocha: Jiyu 543 Fen Yigongkai Caipan Wenshu de Shizheng Fenxi* (女性生育权的司法保护状况考察: 基于543份已公开裁判文书的实证分析) [*Investigation of Judicial Protection of Women's Reproductive Rights: Empirical Analysis of 543 Public-Access Court Decisions*], 20 XINAN ZHENGFA DAXUE XUEBAO (西南政法大学学报) [J. SW. UNI. POL. SCI. & L.], no. 5, 45, 2018 (China).

31 *See, e.g.*, Michael Palmer, *The Re-Emergence of Family Law in Post-Mao China: Marriage, Divorce and Reproduction*, 141 CHINA Q. 110 (1995); Margaret Y.K. Woo, *Shaping Citizenship: Chinese Family Law and Women*, 15 YALE J. L. & FEMINISM 99 (2003); JENNIFER ALTEHENGER, *What Is a Basic Spirit?: The Marriage Law and the Model Legal Education Campaign*, *in* LEGAL LESSONS: POPULARIZING LAWS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949–1989, 89, 89–126 (2018).

32 *See* Bernard Hung-kay Luk, *Abortion in Chinese Law*, 25 AM. J. COMP. L. 372, 381–82 (1977). The logic of parental autonomy was reflected in imperial laws that decriminalized infanticide. *See id.*; Susan M. Rigdon,

followed a Confucian logic, recognizing potential parents' legally cognizable interests in pregnancies without giving fetuses an equivalent status to that of persons.[33] Abortion was not regulated in any capacity until the final years of the Qing Dynasty (1644–1911), when China first criminalized abortion as part of reforms importing Western legal concepts.[34] This prohibition carried over into the Republican Era (1911–1949), during which obtaining or providing abortion care was criminalized, though the prohibition was rarely enforced.[35]

Although the regulation of reproduction in China has vacillated between pro- and anti-natalist policies since the beginning of the 20th century, one aspect has been consistent: reproductive autonomy was and continues to be subordinate to state interests in modernization[36] and national development.[37] The PRC banned abortion among cadres in 1950 as part of a broader effort to encourage more births.[38] The absolute abortion ban was relaxed after 1953,[39] but doctors largely avoided providing abortions, and the number performed in clinics remained low.[40] The Great Leap Forward (1958–1962) ushered in a

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Abortion Law and Practice in China: An Overview with Comparisons to the United States, 42 Soc. Sci. & Med. 543, 544 (1996).

33 *See* Luk, *supra* note 32, at 379–84 (discussing the ontological and ethical status of fetuses in imperial China); Matthew H. Sommer, *Abortion in Late Imperial China: Routine Birth Control or Crisis Intervention?*, 31 Late Imperial China 97, 120 (2010) (discussing abortion as a mode of managing evidence stemming from illicit relationships and resultant social crises).

34 Luk, *supra* note 32, at 384–86.

35 Sarah Mellors-Rodriguez, Reproductive Realities in Modern China: Birth Control and Abortion, 1911–2021, at 19, 45–51 (2023).

36 *See id.* at 18–25.

37 *See* Leta Hong Fincher, Betraying Big Brother: The Feminist Awakening in China 171–85 (2018).

38 *See* Jiguan Budui Funü Ganbu Datai Xianzhi de Banfa (机关部队妇女干部打胎限制的办法) [Measures Restricting Female Cadres from Obtaining Induced Abortion] (promulgated by the Min. of Health of the Cent. People's Gov., Apr. 20, 1950) (China); *see also* Elina Hemminki, Zhuochun Wu, Guiying Cao & Kirsi Viisainen, *Illegal Births and Legal Abortions – The Case of China*, 2 Reprod. Health 5 (2005). The state also limited access to contraception and encouraged doctors to "convince abortion-seeking women to continue their unwanted gestation." Weiwei Cao, *The Regulatory Model of Abortion in China Through a Feminist Lens*, 29 Asian Women 27, 37–38 (2013).

39 *See* Mark Savage, *The Law of Abortion in the Union of Soviet Socialist Republics and the People's Republic of China: Women's Rights in Two Socialist Countries*, 40 Stan. L. Rev. 1027, 1066, 1072–75 (1988) (noting that after 1953, women with four or more children could access abortion, and that 1957 regulations prohibited spousal consent requirements).

40 *See* Rigdon, *supra* note 32, at 545.

reassessment of the campaign for population growth.[41] In the 1960s, the state renewed its emphasis on birth control to encourage women's participation in the workforce to address economic challenges.[42]

In 1980, state policy shifted decidedly toward controlling births with China's launch of the one-child policy.[43] Regulating abortion was central to this effort: most restrictions on abortion were removed as the state embarked on campaigns to reduce the number of births.[44] All couples seeking to give birth had to obtain prior approval, even for a first child.[45] Given targets to control population growth, local authorities pursued a range of coercive measures including compulsory IUD insertion, sterilization for couples with two or more children, and forced abortions for out-of-plan births.[46] The number of abortions skyrocketed, remaining at more than forty abortions for every 100 live births through the early 1990s. [47] Although this effort was carried out through Communist Party policy, not law, both the 1980 Marriage Law and the 1982 PRC Constitution imposed legal duties

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41 *See* MELLORS-RODRIGUEZ, *supra* note 35, at 74–75.

42 *See* Guanyu Zuohao Jihua Shengyu Gongzuo de Baogao (关于做好计划生育工作的报告) [Report Regarding Performing Birth Planning Work Well] (promulgated by the Min. of Health, published by the St. Council, July 8, 1971, effective July 8, 1971) (China), https://www.pkulaw.com/chl/ba973434575ec1eebdfb.html? [https://perma.cc/NV85-6CXE]. The state promoted birth control during the Cultural Revolution (1966–1976), but women faced uncertainty as to whether they might be subject to discipline or persecution based on the Party's fluctuating standards of socialist morality. *See* MELLORS-RODRIGUEZ, *supra* note 35, at 77–80, 147–48. The burden of birth control and sterilization also fell overwhelmingly on women. *See id.*

43 *See* Guanyu Kongzhi Woguo Renkou Wenti Zhi Quanti Gongchandang yuan, Gongqingtuanyuan de Gongkaixin (关于控制我国人口问题致全体共产党员、共青团员的公开信) [Open Letter to All Communist Party Members and Youth League Members Regarding Limiting Our Country's Population] (published by Cent. Comm. of the CCP, Sept. 25, 1980) (China), http://data.people.com.cn/rmrb/19800926/1/f10ed46a2af74f8bbeb97c58e2835b16_print.html [https://perma.cc/8QQU-35LR].

44 *See* Hemminki et al., *supra* note 38, at 5. The remaining restrictions related to who could perform abortions and where. *See id.*

45 *See id.*

46 *See* Cuntong Wang, *Induced Abortion Patterns and Determinants Among Married Women in China: 1979 to 2010*, 22 REPROD. HEALTH MATTERS 159, 160 (2014).

47 *See* MELLORS-RODRIGUEZ, *supra* note 35, at 179; *see also Limiting Access to Abortions Won't Solve China's Population Woes*, THE ECONOMIST (Oct. 1, 2021), https://www.economist.com/graphic-detail/2021/10/01/limiting-access-to-abortions-wont-solve-chinas-population-woes [https://perma.cc/M8HA-ETLK] (discussing China's contemporary abortion rate of roughly 28 per 1,000 women, compared with 13.5 per 1,000 in the United States).

on husbands and wives "to practice birth planning."[48] These provisions reflected the anti-natalist shift in national policy and the fact that the state only contemplated reproduction in the context of marriage.[49] The few restrictions on abortion that existed during this period were designed to limit the growth of sex-selective abortions that resulted from the one-child policy and that, along with female infanticide, led to a growing gender imbalance in births.[50] China adopted an explicit ban on fetal sex determination in 1986,[51] and many provinces issued regulations designed to limit sex-selective abortions, including in some cases requiring pre-approval for abortions after fourteen weeks.[52]

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48 Hunyin Fa (婚姻法) [Marriage Law], art. 12 (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 10, 1980, effective Jan. 1, 1981) 1980 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 385 (China) [hereinafter 1980 Marriage Law]; XIANFA (宪法) [CONST.] art. 49 (1982) (China) (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 4, 1982, effective Dec. 4, 1982) 2018 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 2 (China).

49 *See* 2001 Law on Population and Birth Planning, art. 20.

50 *See* Xiaoyi Jin & Lige Liu, *"Bare Branches" and the Marriage Market in Rural China: Preliminary Evidence from a Village-Level Survey*, 46 CHINESE SOCIO. REV. 83, 84 (2013) (noting an imbalance in births of 118 males for every 100 females in 2010). The imbalanced population has, among other things, made finding eligible spouses more difficult for men, who vastly outnumber women and are referred to, if unmarried, as "bare branches." *Id.* at 86. The scarcity of women has increased financial pressure on men's families to offer greater inducements for women to marry their sons. *See id.*; Quanbao Jiang, Yanping Zhang & Jesús J. Sánchez-Barricarte, *Marriage Expenses in Rural China*, 15 CHINA REV. 207, 223 (2015) (discussing marriage-related debt).

51 *See* Guanyu Chongshen Yanjin Jinxing Taier Xingbie Yuce de Tongzhi (关于重申严禁进行胎儿性别预测的通知) [Notice Reaffirming the Strict Prohibition on Fetal Sex Determination] (promulgated by the Min. of Health & Nat'l Fam. Plan. Comm., Apr. 15, 1993, effective Apr. 15, 1993) (China), https://www.pkulaw.com/chl/7b5642e72437a676bdfb.html? [https://perma.cc/8LHH-L6QQ] (discussing the 1986 promulgation of standards prohibiting fetal sex determination); 2001 Law on Population and Birth Planning, art. 35; *see also* Jinzhi Fei Yixue Xuyao de Taier Xingbie Jianding he Xuanze Xingbie Rengong Zhongzhi Renshen de Guiding (禁止非医学需要的胎儿性别鉴定和选择性别人工终止妊娠的规定) [Provisions on Prohibiting Fetal Sex Identification for Non-Medical Needs and Sex-Selective Pregnancy Termination] (promulgated by the Nat'l Health & Fa. Plan. Comm., Mar. 28, 2016, effective May 1, 2016) (China), https://www.pkulaw.com/chl/f379c6a6c7f44310bdfb.html? [https://perma.cc/XZ45-VAK3].

52 At least seventeen provinces passed regulations banning unapproved abortions after fourteen weeks of pregnancy in the years after 1986. *See infra* note 69. Five of those provinces (Guizhou, Hainan, Fujian, Liaoning, and Jilin) have abolished the restrictions on abortions after fourteen weeks. *See infra* note 69. As of June 2023, restrictions on abortion after fourteen weeks remain effective in at least thirteen provinces. *See infra* note 69.

China began to address the harsher edges of the one-child policy with the adoption of the Population and Birth Planning Law in 2001.[53] Although the one-child limit remained, the law banned a range of coercive practices and clarified situations in which couples could have a second child.[54] The one-child policy remained for another thirteen years until China shifted to a two-child policy in 2015[55] and a three-child policy in 2021.[56]

Although the one-child policy resulted in frequent conflicts between state agents and those subject to coercive measures,[57] courts played a relatively minor role in resolving such disputes between individuals and the state.[58] The reporting on the few disputes that did wind up in court suggests that such disputes mostly came in the form of individuals challenging the imposition of fines for violations of birth-planning policies.[59] Official data on administrative litigation—lawsuits against the state—shows a steady number of cases

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53 The law also established a mechanism through which families could pay a "social compensation fee" for additional children, instead of undergoing abortions. Law on Population and Birth Planning, art. 41.

54 *See id.* at arts. 4, 18, 19.

55 *See* Renkou yu Jihua Shengyu Fa (2015 Xiuzheng) (人口与计划生育法 (2015修正))[Population and Birth Planning Law (2015 Amendments)], art. 18 (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 27, 2015, effective Jan. 1, 2016) (China), https://www.pkulaw.com/chl/18c6c388fc14eaa9bdfb.html? [https://perma.cc/9X6R-QBJD].

56 The changes to the Population and Birth Planning Law in 2015 and 2021 raised the number of legally permissible births without altering the underlying scheme of citizens' reproductive rights and obligations. *See* Renkou Yu Jihua Shengyu Fa (2021 Xiuzheng) (人口与计划生育法(2021修正) [Population and Birth Planning Law (2021 Amendments)] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 20, 2021, effective Aug. 20, 2021), art. 18 (China), https://www.pkulaw.com/chl/d560ce000fba464cbdfb.html? [https://perma.cc/S5NC-K7KN].

57 *See, e.g.*, Liu Jitong (刘继同), *Zhongguo Renkou he Jihua Shengyu Zhengce Moshi de Zhidu Chuangxin yu Zhanlüe Zhuanxing* (中国人口和计划生育政策模式的制度创新与战略转型) [*Systemic Innovation and Strategic Transformation of China's Population and Birth Planning Policy Model*], 12 XUEXI YU SHIJIAN (学习与实践) [STUDY AND PRAC.], at 15 (2007) (discussing how the government's "results-oriented approach" inevitably led to "blunt and coercive" measures, which resulted in "serious, newly formed social problems and dissatisfaction with the government," as well as "intensified social conflicts").

58 *See* Chen Zhongle (谌中乐) & Su Yu (苏宇), *Jihua Shengyu Zhidu Biange yu Fazhihua* (计划生育制度变革与法治化) [*The Reform and Legalization of the Birth Planning System*], 4 QINGHUA FAXUE (清华法学) [TSINGHUA L. REV.] 84, 98 (2010) (discussing courts' limited role to date in administrative litigation regarding birth planning laws and policies).

59 *See, e.g.*, Chen, *supra note* 58, at 98; Wu Shengyin (吴生银), *Renmin Fayuan Yi Shouli Jihua Shengyu Xingzheng Anjian shi Biyao de* (人民法院依法受理计划生育行政案件是必要的) [*It Is Necessary for People's Courts to Accept Birth Planning Administrative Cases in Accordance with the Law*], HUNAN CAIBAO (湖南财报) [HUNAN FINANCIAL REP.], 35, 36 (1997).

relating to birth planning, with courts accepting just over 5,000 such disputes in 2014, the last full year that the policy remained in place.[60]

The relaxation of the one-child policy did not signal the state's retreat from regulating reproduction.[61] China's birth planning apparatus remains in place, and some have speculated it might be redeployed to further the state's new interest in encouraging births as China struggles to manage its growing demographic imbalance.[62] Policy pronouncements have signaled that restricting abortion may be part of such efforts, although no concrete measures have been announced to date. In 2021, the central government promulgated guidelines stating that it would "aim to reduce medically unnecessary abortions," as part of a ten-year plan on improving women's health.[63] The guidelines did not elaborate on how the state planned to do so,[64] but they appear to build upon a 2018 National Health Commission Interpretation that emphasized China's "large number" of abortions.[65] The 2018 Interpretation stated that abortion can "seriously harm women's health and fertility," "lead to complications," "endanger physical and mental health," and "through causing infertility, . . . threaten familial harmony and happiness."[66]

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60 Courts accepted 141,880 administrative lawsuits in 2014. *Renmin Fayuan Sifa Tongji Lishi Dianji 1949-2016* (人民法院司法统计历史典籍 1949-2016) [*A Historical Compilation of Judicial Statistics of the People's Court 1949-2016*], XINGZHENG JI PEICHANG JUAN (行政及赔偿卷) [ADMINISTRATION & COMPENSATION VOL.], Zuigao Renmin Fayuan (最高人民法院) [Supreme People's Court], at 180, 184.

61 *See* Arianne M. Gaetano, *The Chinese State, "Reform and Opening," and the Regulation of Women in Urbanizing China*, 47 URB. ANTHROPOLOGY & STUD. CULTURAL SYS. & WORLD ECON. DEV. 301, 312–13 (2018).

62 *See infra* note 396 and accompanying text.

63 Zhongguo Funü Fazhan Gangyao (2021-2030) (中国妇女发展纲要(2021—2030年)) [China Outline for Women's Development (2021–2030)] (published by the State Council, Sept. 27, 2021), § 2(1) (China), https://www.chinanews.com.cn/gn/2021/09-27/9574812.shtml [https://perma.cc/34W4-RTFC]. The news prompted anxiety within civil society about the signal the policy sends to lower-level officials who might begin restricting abortion access. *See* Vivian Wang, *China's Vow to Reduce Abortions Sparks Public Worries*, N.Y. TIMES (Sept. 27, 2021), https://www.nytimes.com/2021/09/27/world/asia/china-abortion-limits.html [https://perma.cc/XP24-5LUN].

64 *See id.*

65 Rengong Liuchan Hou Biyun Fuwu Guifan (2018 Ban) Wenjian Jiedu (《人工流产后避孕服务规范 (2018版)》文件解读) [Interpretation of the Standards for Post-Abortion Contraceptive Services (2018 Edition)] (published by the Nat'l Health Comm., Women's Health Div., Aug. 17, 2018) (China), http://www.nhc.gov.cn/fys/s3578/201808/c18f377e993f4a43ac068e826b7671ae.shtml [https://perma.cc/7R27-UBNN].

66 *Id.*

The central government has proposed policies to encourage reproduction both directly and indirectly, including by limiting couples' access to divorce.[67] Nevertheless, under national regulations, abortion remains widespread and permitted at any stage of pregnancy, subject only to a prohibition on sex-selective abortions.[68] Twelve provinces, however, have gone a step further than the national regulations, banning all abortions after fourteen weeks, except in situations involving a fetus with a detected disability or developmental abnormality, a danger to the health or life of the woman or the fetus, the potential parents' divorce, or the woman's becoming a widow while pregnant.[69] At least seven provinces require pre-approval by birth planning officials of all abortions after fourteen weeks.[70] At

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67 *See* Elsie Chen & Sui-Lee Wee, *China Tried to Slow Divorces by Making Couples Wait. Instead, They Rushed*, N.Y. TIMES (Feb. 26, 2021), https://www.nytimes.com/2021/02/26/business/china-slowing-divorces.html [https://perma.cc/2GPX-PPJC]. Provincial and local governments have also introduced incentives encouraging married couples to have children. *See* Nichole Hong & Zixu Wang, *Desperate for Babies, China Races to Undo an Era of Birth Limits. Is It Too Late?*, N.Y. TIMES (Feb. 23, 2023), https://www.nytimes.com/2023/02/26/world/asia/china-birth-rate.html [https://perma.cc/X8F7-UZAW]; Jessie Yeung, *These Chinese Villages are Paying Couples to Have More Children*, CNN (Sept. 24, 2021), https://www.cnn.com/2021/09/24/china/three-child-cash-incentive-intl-hnk/index.html [https://perma.cc/HBY2-XQ75].

68 *See supra* note 43. Although the central government encourages and subsidizes fertility of married, middle-class, Han women, rules targeting minorities, and particularly Uyghurs, have become more restrictive. *See* Amy Qin, *China Targets Muslim Women Push to Suppress Births in Xinjiang*, N.Y. TIMES (May 10, 2021), https://www.nytimes.com/2021/05/10/world/asia/china-xinjiang-women-births.html [https://perma.cc/88NH-LBFX]; MELLORS-RODRIGUEZ, *supra* note 35, at 213.

69 The provincial regulations, many of which identify themselves as restrictions on sex-selective abortions but are framed in general terms, restrict abortion after fourteen weeks. *See, e.g.*, Hebei Sheng Jinzhi Fei Yixue Xuyao Jianding Taier Xingbie he Xuanze Xingbie Zhongzhi Renshen Guiding (2019 Xiuzheng) (河北省禁止非医学需要鉴定胎儿性别和选择性别终止妊娠规定 (2019修正)) [Hebei Province Regulations on Prohibiting Non-Medically Necessary Identifications of Fetal Sex and Sex-Selective Pregnancy Terminations (2019 Amendments)] (promulgated by the Hebei Prov. People's Gov't, Jan 14, 2008) (China), https://www.gov.cn/flfg/2008-02/21/content_895815.htm [perma.cc/VV5R-DTJC]; Guanyu Jiaqiang Rengong Zhongzhi Renshen Shoushu Zhengming Guanli Gongzuo de Tongzhi (14–17 Weeks) (关于加强人工终止中期妊娠手术证明管理工作的通知(14-27周)) [Heilongjiang Province 2016 Notice on Strengthening the Management of Certifications for Second-Trimester Artificial Pregnancy Termination Operations (14–27 Weeks)] (promulgated by the Heilongjiang Prov. Health & Fam. Plan. Comm., Aug. 30, 2016) (China), https://mp.weixin.qq.com/s/gZsmXx9XiNGGhsa8Ct_iqw [https://perma.cc/9HX3-2TBW].

70 Those provinces whose regulations clearly require pre-approval are Heilongjiang, Jiangsu, Hubei, Hunan, Yunnan, Gansu, and Jiangxi (although it is unclear whether Jiangxi's permit process has been implicitly repealed by subsequent regulations). Jilin previously required departmental permission for abortions after fourteen weeks. *See, e.g.*, Jiangsu Sheng Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jinzhi Fei Yixue Xuyao Taier Xingbie Jianding he Xuanze Xingbie Rengong Zhongzhi Renshen de Jueding (2022 Xiuzheng), 江苏省人民代表大会常务委员会关于禁止非医学需要胎儿性别鉴定和选择性别人工终止妊娠的决定(2022修正) [Jiangsu Province People's Congress Standing Committee Decision on Restricting

least some municipal regulations impose de facto spousal consent requirements.[71] One province established a mechanism allowing members of the public to submit complaints regarding "illegal pregnancy terminations" in exchange for 5,000 *yuan*; violations of the regulation can result in fines up to 3,000 *yuan* and a prohibition from having further children.[72] In another province, local government authorities are instructed to "criticize and educate" those who obtains an abortion after fourteen weeks without authorization, and authorized to "suspend" those persons' ability to obtain a license to have further children.[73] Although these rules arose in response to sex-selective abortions, the legal infrastructure they create could be used to limit abortions more generally.

Non-Medically Necessary Fetal Sex Determination and Artificial Sex-Selective Pregnancy Terminations (2022 Amends.)], art. 7 (China), https://wjw.jiangsu.gov.cn/art/2023/3/2/art_80252_10784552.html [https://perma.cc/CM4G-FK68] ("Without approval from the health and sanitation department, no institution or individual is permitted to carry out an artificial abortion procedure."); Guanyu Jinzhi Fei Yixue Xuyao de Taier Xingbie Jianding he Xuanze Xingbie de Rengong Zhongzhi Renshen de Guiding, 关于禁止非医学需要的胎儿性别鉴定和选择性别的人工终止妊娠的规定 [Regulation Restricting Non-Medically Necessary Fetal Sex Determination and Artificial Sex-Selective Pregnancy Terminations] (Yunnan Province), art. 7 (China), http://ynswsjkw.yn.gov.cn/html/2015/faguiguizhangxin_0813/2973.html [https://perma.cc/RYJ5-LGAL] ("Those who have satisfied the reproductive criteria of the various provincial, regional, and municipal government bodies, who have already obtained licenses to reproduce, who are . . . over fourteen weeks pregnant . . . , and who seek a nonmedically necessary pregnancy termination procedure must seek approval from the county-level family planning department . . . and obtain a certificate."].

71 *See, e.g.*, Kunshan Shi Guanyu Jiaqiang Renshen 14 Zhou Yishang Rengong Zhongzhi Renshen Guanli de Tongzhi (2015) (昆山市关于加强妊娠14周以上人工终止妊娠管理的通知 (2015)) [Kunshan City Notice Regarding Strengthening Management of Artificial Pregnancy Termination After 14 Weeks (2015) (promulgated by the Kunshan Mun. Health & Fam. Plan. Comm., Dec. 22, 2015) (China), http://www.ks.gov.cn/kss/c113206puf/201512/46360ab8b1d14a869fe40e2d2f378207.shtml [https://perma.cc/E9LC-TGFB])] (requiring wives to apply jointly with husbands).

72 Anhui Sheng Jinzhi Fei Yixue Xuyao Jianding Taier Xingbie he Xuanze Xing Zhongzhi Renshen de Guiding (安徽省禁止非医学需要鉴定胎儿性别和选择性终止妊娠的规定) [Anhui Provincial Regulations Prohibiting on Non-Medically Necessary Fetal Sex-Determination and Sex-Selective Abortions] (promulgated by the Standing Comm. of the Anhui Prov. People's Cong., Sept. 22, 2000, effective Nov. 01, 2000), arts. 17, 21 (China), https://law.pkulaw.com/chinalaw/16796879.html [perma.cc/2CBB-SJ83].

73 *See* 关于禁止非医学需要的胎儿性别鉴定和选择性别的人工终止妊娠的规定 [Regulation Restricting Non-Medically Necessary Fetal Sex Determination and Artificial Sex-Selective Pregnancy Terminations] (Yunnan Province), art. 7 (China), http://ynswsjkw.yn.gov.cn/html/2015/faguiguizhangxin_0813/2973.html [https://perma.cc/RYJ5-LGAL].

In addition to stating that couples have a duty to practice family planning, Chinese law includes the right to reproduce and the right not to reproduce.[74] The Law on the Protection of Women's Rights and Interests (LPWRI), first promulgated in 1992, establishes women's "freedom not to reproduce."[75] The 2022 revision of the LPWRI additionally provides that "when medical institutions perform reproductive surgery, specialized examinations, or specialized treatment, such institutions should obtain consent from the woman, and respect the will of the woman if her family or relatives disagree."[76] Although the provision explicitly addressing women's medical autonomy was not in effect at the time of the cases we examine in this Article, the new language nevertheless reflects prior recognition of women's freedom to make reproductive choices.[77] For instance, Ministry of Health regulations adopted in 2010 that contain model consent forms for abortion providers do not require consent by anyone other than the patient, except when the patient is incapacitated.[78]

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74 The law provides, "[c]itizens have the right to reproduce and to implement birth planning [i.e., utilize birth control] in accordance with the law." 2001 Law on Population and Birth Planning, art. 17.

75 Funü Quanyi Baozhang Fa (妇女权益保障法) [Law on the Protection of the Rights and Interests of Women] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 3, 1992, effective Oct. 1, 1992), art. 47, 1992 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 386 (China) [hereinafter 1992 LPWRI]; *see also* Funü Quanyi Baozhang Fa (妇女权益保障法) [Law on the Protection of the Rights and Interests of Women] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 10, 2022), art. 32 (China), https://www.pkulaw.com/chl/0ce7baee60f8694dbdfb.html?way=listView [perma.cc/VK62-BPJN] [hereinafter LPWRI]; Chinese law provides fetuses with no status or rights, aside from the Civil Code, which allows for fetuses that are eventually born to inherit property from relatives who predecease their birth. *See* Minfa Dian (民法典) [Civil Code] (promulgated by Nat'l People's Cong., May 28, 2020, effective Jan. 1, 2021), art. 1, 155, 2020 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 2 (China) [hereinafter Civil Code].

76 LPWRI, art. 21.

77 The 1992 and 2022 versions of the law both state that women have the right "not to reproduce." 1992 LPWRI, art. 47; LPWRI, art. 32. In presentations of this paper in China in July 2023, one commentator noted that, regardless of the LPWRI, the Population and Birth Planning Law frames the obligation to use contraception as jointly imposed upon "husband and wife." *See* 2001 Law on Population and Birth Planning, art. 17, 20. That commentator argued that because the law speaks of reproduction primarily in the context of marriage, it implicitly grants rights to men as well as women. The cited language remains in the revised 2021 Law on Population and Birth Planning. Yet, despite those comments, reading that cited language against the backdrop of the LPWRI and 2011 SPC Interpretation nevertheless suggests a legal base for women's reproductive autonomy. *See infra* note 80.

78 *See* Weisheng Bu Yizheng Si Guanyu Tuijian Shiyong Yiliao Zhiqing Tongyi Shu de Han (《卫生部医政司关于推荐使用《医疗知情同意书》的函) [Letter from the Medical Policy Department of the Ministry of Health on the Recommended Use of the "Medical Informed Consent Form"] (promulgated by the Min. Health, Mar. 4, 2010) (China); *see also* Civil Code, art. 1219.

The Supreme People's Court (SPC) has also clarified that women have the authority to make decisions about reproduction without the consent of their male partners. Likely in response to cases in which men asserted a right to control women's reproductive choices,[79] in August 2011 the SPC promulgated an official Interpretation of the Marriage Law ("the 2011 SPC Interpretation") clarifying that women's unilateral exercise of reproductive autonomy to terminate a pregnancy does not entitle their male partners' to compensatory damages.[80] Article 9 of the 2011 SPC Interpretation provides, "if a husband requests compensatory damages because his wife terminated a pregnancy without authorization from the husband, the court will not support such an award of compensatory damages."[81] The same provision establishes that "a husband's and wife's dispute over whether or not to reproduce, causing marital feelings to entirely break down" can serve as grounds for a divorce.[82] Accordingly, reproductive disputes can serve as grounds justifying a divorce, but not as grounds for compensatory damages. The LPWRI's and SPC's statements affirming

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79 *See* Fuqi Shuangfang Yin Shifou Shengyu Fasheng Jiufen, Fayuan Ruhe Chuli? (夫妻双方因是否生育发生纠纷，法院如何处理?) [How Should Courts Deal with Married Couples' Disputes Over Whether to Have Children?], Wuhou Qu Renmin Zhengfu (武侯区人民政府) [Wuhou District People's Government] (May 2, 2018) (China), https://www.cdwh.gov.cn/wuhou/c109276/2018-05/02/content_20ec8071652b457c919ef350a7db0815.shtml [https://perma.cc/YE9Q-Z8GE] (publishing cases disclaiming men's attempts to invoke reproductive rights against women).

80 *See* Guanyu Shiyong Zhonghua Renmin Gonghe Guo Hunyin Fa Ruogan Wenti de Jieshi (San), Fashi [2011] Shiba Hao (关于适用《中华人民共和国婚姻法》若干问题的解释（三）法释[2011] 18号) [Third Interpretation Regarding Questions about Applying the PRC Marriage Law [2011] No. 18] (promulgated by the Jud. Comm. Sup. People's Ct., Aug. 9, 2011, effective Aug. 13, 2011), art. 9 (China), https://www.pkulaw.com/chl/bee928fef142583fbdfb.html [https://perma.cc/3KES-MNYB] [hereinafter 2011 SPC Interpretation]. The SPC, which has hundreds of judges, has broad powers to issue judicial interpretations guiding lower courts. *See generally* Note, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213 (2016). These often read like statutes and are published to resolve issues that have arisen in practice for lower courts. *Id.* The SPC often issues such interpretations to clarify issues that have been left unclear by statutory law adopted by the National People's Congress, China's legislature, or to respond to specific issues that have arisen in the course of lower court adjudications. *Id.* at 2221–22. For major laws, the SPC often issues judicial interpretations soon after the law is promulgated, and also issues additional interpretations as new issues arise in practice. *Id*.

81 *See* 2011 SPC Interpretation.

82 *Id.*; *see also* Hunyin Fa (婚姻法) [Marriage Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 28, 2001, effective Apr. 28, 2001), art. 32 (China), https://www.pkulaw.com/chl/1bad5c748927dd10bdfb.html?keyword=%E5%A9%9A%E5%A7%BB%E6%B3%95&way=listView [perma.cc/Z4CV-YXLA] [hereinafter 2001 Marriage Law]. The 2001 Marriage Law was applicable for all of the cases discussed in this article. In 2021, the Marriage Law was incorporated into and replaced by China's new Civil Code. *See* Minfa Dian (民法典) [Civil Code] (promulgated by Nat'l People's Cong., May 28, 2020, effective Jan. 1, 2021), 2020 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 2 (China) [hereinafter Civil Code].

that women have the freedom to make reproductive decisions autonomously stand in contrast to rules in other jurisdictions, including Taiwan, that require a partner's consent to an abortion.[83]

B. Regulating Divorce: Progressive Aims & Gendered Outcomes

Although courts played marginal roles in enforcing China's one-child policy, they have been central fora for resolving divorce disputes. Extensive scholarship has explored courts' role in adjudicating marriage disputes, noting how ingrained biases, state emphasis on maintaining family unity, and institutional constraints lead to gendered outcomes.[84] Yet this literature largely overlooks the degree to which divorce actions have also emerged as a space in which disputes about women's access to reproductive care are contested.

China has long sought to use the regulation of marriage as a tool for achieving greater equality for women and for transforming and governing Chinese society.[85] China first adopted a Marriage Law in 1950, immediately after the PRC's establishment.[86] The law was revised in 1980 and again in 2001.[87] Each revision was understood and celebrated as an effort to address persistent social issues, including gender inequality.[88] The 1950 Marriage Law sought to free women from forced marriages by providing access to divorce for the

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83 *See infra* note 410 (discussing Taiwan's and Japan's spousal consent statutes). *See also* Chao-ju Chen, *Mothering in the Shadow of Patriarchy: The Legal Regulation of Motherhood and Its Discontents in Taiwan*, 1 NAT'L TAIWAN UNIV. L. REV. 45, 56–57 (2006).

84 *See generally* HE XIN, DIVORCE IN CHINA: INSTITUTIONAL CONSTRAINTS AND GENDERED OUTCOMES (2021); LI KE, MARRIAGE UNBOUND: STATE LAW, POWER, AND INEQUALITY IN CONTEMPORARY CHINA (2022); ETHAN MICHELSON, DECOUPLING: GENDER INJUSTICE IN CHINA'S DIVORCE COURTS (2022).

85 *See* William P. Alford & Shen Yuanyuan, *Have You Eaten? Have You Divorced? Marriage, Divorce and the Assessment of Freedom in China*, *in* IDEAS OF FREEDOM IN THE CHINESE WORLD 4–15 (William Kirby ed. 2003).

86 *See* Hunyin Fa (婚姻法) [Marriage Law] (promulgated by the Cent. People's Governance Comm., May 1, 1950, effective May 1, 1950) (China), https://www.pkulaw.com/chl/1d3157c46da80f68bdfb.html?keyword=%E5%A9%9A%E5%A7%BB%E6%B3%95&way=listView [perma.cc/4NTW-26LK] [hereinafter 1950 Marriage Law].

87 *See* 1980 Marriage Law; 2001 Marriage Law.

88 *See* Alford & Shen, *supra* note 85.

first time.[89] The 1980 Marriage Law then codified no-fault divorce.[90] The 2001 Marriage Law elaborated on conditions under which a divorce could be granted due to a "breakdown in mutual affections."[91] As a result of these successive amendments, Chinese law today includes a hybrid system of fault-based and no-fault divorce.[92]

The equalizing objectives of the 2001 Marriage Law are also reflected in the provisions governing asset division.[93] Article 39 of the 2001 Marriage Law provides that if parties fail to reach an agreement as to the disposition of their jointly-owned property, the courts must make a judgment based on "the principle of taking into consideration the rights and interests of the child and the wife."[94] Article 53 of the LPWRI further provides that "the state is to ensure that women enjoy property rights equal to those of men."[95]

Yet the promise of greater equality through the laws governing marriage and divorce has been stymied both by cultural norms and state interests. Important recent scholarship by Li Ke, He Xin, and Ethan Michelson documents the persistently gendered outcomes of divorce adjudication in China.[96] Most significantly, despite the outward appearance of liberalization, it has become increasingly difficult for couples to obtain a divorce over the last several decades, with the proportion of divorce petitions that courts reject growing steadily.[97] He Xin explains how the institutional constraints faced by judges, including the professional evaluation metrics to which judges are subject and immense caseloads, compel judges to use procedural mechanisms to swiftly dismiss cases despite their

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89 *See* LI, *supra* note 84, at 87; *see also* 1950 Marriage Law, arts. 1, 7 (articulating its aim to create "a system of marital freedom" and "gender equality").

90 *See* 1980 Marriage Law, art. 25.

91 2001 Marriage Law, art. 32 (providing "breakdown" may be found and divorce granted where a party commits bigamy, adultery, domestic violence, familial abandonment, or excessive gambling or drinking, where the parties have not lived together for two years due to disagreement, or in "other circumstances causing breakdown").

92 *See* LI, *supra* note 84, at 166–67.

93 *See* 2001 Marriage Law, art. 39.

94 *Id.*

95 LPWRI, art. 53. Separately, courts must also order one party to provide "financial assistance" to another party suffering from "living difficulties" after divorce. *See* 2001 Marriage Law, art. 42.

96 *See generally* LI, *supra* note 84; HE, *supra* note 84; and MICHELSON, *supra* note 84.

97 *See* LI, *supra* note 84, at 172–74.

merits.[98] Michelson describes courts' reluctance to grant divorce through the judiciary's "dual imperative to maximize judicial efficiency and minimize social unrest," reflecting the Party-state's view that maintaining family units facilitates social stability, even when women seek divorce based on domestic violence.[99]

The result is the routine denial of initial divorce petitions, forcing women to remain in marriages for a six-month waiting period before they can petition again.[100] Many such relationships are abusive.[101] Courts routinely overlook claims of domestic violence, despite the 2001 Marriage Law, which clarifies that abuse can be grounds for divorce and fault-based compensation,[102] and a 2008 SPC guidance, which urges courts to deny child custody to those who commit domestic violence.[103] Scholars explain the gap between law and practice not only by reference to institutional pressures but also as owing to the judiciary's patriarchal beliefs, which normalize and diminish domestic violence as a private matter meant to be managed within the household,[104] despite courts' affirmative obligations to address domestic violence allegations.[105] Moreover, if men leave court disgruntled, the threat of future violence—against women and even judges themselves—looms large.[106]

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98 *See* Xin He, *When the Cultural Explanation Is Inadequate: The Institutional Constraints of Chinese Judges in Divorce Cases*, 28 MICH. ST. INT'L L. REV. 439 (2020).

99 MICHELSON, *supra* note 84, at 3–4, 16–17.

100 *See* LI, *supra* note 84, at 184–87.

101 *See* MICHELSON, *supra* note 84, at 242. *Cf.* UNFPA China, *Research on Gender-based Violence and Masculinities in China: Preliminary Findings*, U.N. POPULATION FUND CHINA 3 (2013), https://china.unfpa.org/sites/default/files/pub-pdf/Executive%20Summary_Research%20on%20GBV%20and%20Masculinities%20in%20China.pdf [https://perma.cc/PR48-G3GD] (52% of men reported perpetrating violence against women).

102 *See* 2001 Marriage Law, arts. 32, 46; *see also* HE, *supra* note 84, at 108–10.

103 *See* Sheji Jiating Baoli Hunyin Anjian Shenli Zhinan (《涉及家庭暴力婚姻案件审理指南》) [Guidance on Deciding Marital Cases Involving Domestic Violence] (promulgated by Rsch. Office of Sup. People's Ct., Mar. 2008, effective Mar. 2008), art. 63 (China), https://www.pkulaw.com/chl/b001df0ee5c6c01abdfb.html [https://perma.cc/84MB-TZMP] ("The party causing harm shall not directly raise children"). *See also* MICHELSON, *supra* note 84, at 383.

104 *See* LI, *supra* note 84, at 103, 186–87; HE, *supra* note 84, at 198.

105 *See* 1992 LPWRI, art. 46; *see also* LPWRI, art. 65; *see also* Fan Jiating Baoli Fa (反家庭暴力法) [Anti-Domestic Violence Law] (promulgated by Standing Comm. Nat'l People's Cong., Dec. 27, 2015, effective Mar. 1, 2016), arts. 4–7, 20, 23, 32, 36 (China), https://www.pkulaw.com/chl/ac57ba1df4413457bdfb.html?keyword=%E5%8F%8D%E5%AE%B6%E5%BA%AD%E6%9A%B4%E5%8A%9B%E6%B3%95&way=listView [perma.cc/HD3Z-7FBR].

106 *See* HE, *supra* note 84, at 40–47; LI, *supra* note 84, at 240–243.

Gendered outcomes are also apparent in determinations on custody and asset division.[107] Li, Michelson, and He document how patrilineal and patrilocal socioeconomic conditions interact with courts' custody and asset division determinations to produce widely uneven outcomes depriving women of parental and proprietary rights.[108] Exacerbating apparent judicial bias are lapses in advocacy made on behalf of women—lawyers often pressure women to give up their rights to resolve cases.[109]

One of the most contentious aspects of asset division concerns who will retain the bride price, an amount of money often paid by men as part of a marriage contract.[110] Although the CCP banned the practice after assuming power in 1949,[111] the custom reemerged as central to marriage negotiations in the post-1978 reform era.[112] Today, despite the Marriage Law's prohibition on the "arrangement, purchase, or sale of marriage" or "using marriage as a means of obtaining property,"[113] Chinese law accommodates—and courts readily enforce—bride price agreements.[114] In 2003, the SPC released an official Interpretation elaborating

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107 *See* MICHELSON, *supra* note 84, at 382–89.

108 *See* MICHELSON, *supra* note 84, at 382; LI, *supra* note 84, at 238–39.

109 *See* HE, *supra* note 84, at 179. *See also* LI, *supra* note 84, at 119–20 ("When law practitioners do attend to women's and men's marital grievances, the former tend to reshape the latter's perceptions of discontent and remake or unmake their rights claims. In converting some grievances into disputed issues and others into nonissues, these practitioners become instrumental in presetting decision-making agendas inside courtrooms.").

110 The "bride price," or *caili* (彩礼), signifies an amount of money an affianced man and his family pay to facilitate marriage. *See* Wei Shuang, A Feminist Critical Discourse Analysis of Ideological Conflicts in We-Media Representations of Bride Price in Mainland China, at 1–10 (July 27, 2020) (Ph. D. dissertation, Peking University) (China) (analyzing male resentment and feminist critique within heated online discourse relating to the bride price); *see also supra* note 50 (discussing how China's gender imbalance imposes steep financial consequences on men in the marriage market).

111 *See* Wei, *supra* note 110, at 40–42.

112 *See id.* at 44.

113 2001 Marriage Law, art. 3.

114 The custom is criticized by men, who resent marriage costs, and women, who argue *caili*（彩礼）[bride price] "require[s women] to be faithful to their husbands' families because of this exchange" and reinforces women's "subordination within [their] husband's family." *See* Wei, *supra* note 110, at 1–5, 50. For a discussion of courts' adjudications of bride price disputes, see Hu Yunhong & Song Tianyi (胡云红、宋天一), *Caili Fanhuan Jiufen Falü Shiyong Yanjiu* (彩礼返还纠纷法律适用研究) [*Researching the Application of Law to Disputes over the Return of the Bride Price*], ZHONGGUO ZHENGFA DAXUE XUEBAO (中国政法大学学报) [J. CHINA UNIV. POL. SCI. & L.], no. 6, 5–27 (2022) (China).

grounds upon which a court should order a party upon marital dissolution to return a bride price.[115] Yet courts retain extensive discretion in making such determinations.[116]

Despite the wide-ranging scholarship on divorce litigation in China, most accounts overlook the role that reproduction plays in such disputes. None of the three important recent books in English on divorce litigation in China discuss abortion or disputes about reproduction, although all three document the role of domestic violence, including spousal rape.[117] The extensive literature in Chinese on divorce litigation likewise almost entirely omits discussion of the role of abortion or reproductive rights.[118]

The roles courts play in resolving divorce cases in China highlight the range of factors that can influence such court decisions. China's four-tiered court system is formally unitary, with the same law applying nationwide.[119] Yet courts have extensive discretion in individual cases.[120] Courts are obligated to follow national laws, but also often face pressure to decide cases in line with a range of Party-state goals that extend beyond formal

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115 *See* Guanyu Shiyong Zhonghua Renmin Gonghe Guo Hunyin Fa Ruogan Wenti de Jieshi (Er), Fashi [2003] Shijiu Hao (关于适用《中华人民共和国婚姻法》若干问题的解释（二）[2003]19号) [SPC's Second Interpretation Regarding Questions about Applying the PRC Marriage Law No. 19 [2003]] (promulgated by the Jud. Comm. Sup. People's Ct., Dec. 25, 2003, effective Apr, 1, 2004) (China), https://www.pkulaw.com/chl/7584ab701c2393f6bdfb.html? [https://perma.cc/9KM4-T826] [hereinafter 2003 SPC Interpretation]; *see also* ZUIGAO RENMIN FAYUAN MINSHI SHENPAN DIYITING (最高人民法院民事审判第一庭) [SUP. PEOPLE'S CT. FIRST CIV. DIV.], ZUIGAO RENMIN FAYUAN HUNYIN FA SIFA JIESHI (ER) DE LIJIE YU SHIYONG (《最高人民法院婚姻法司法解释（二）的理解与适用) [UNDERSTANDING AND APPLYING THE SPC JUDICIAL INTERPRETATIONS OF THE MARRIAGE LAW (VOL. II)] 147 (Renmin Fayuan 2015 Nianban (人民法院2015年版) [The People's Ct. Press, 2015 ed.] 2015) (China); Hu & Song, *supra* note 114, at 22.

116 *See* HE, *supra* note 84, at 192.

117 *See* HE, *supra* note 84; LI, *supra* note 84; MICHELSON, *supra* note 84.

118 *See generally* HE, *supra* note 84; LI, *supra* note 84; MICHELSON, *supra* note 84.

119 *See* Fayuan Zuzhi Fa (法院组织法) [Organic Law of the People's Courts] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 26, 2018, effective Jan. 1, 2019), arts. 12–13, 2019 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 735 (China); *see also Chinese Common Law?*, *supra* note 80 at 2216–17 (discussing the role of judicial decision-making in China's civil law system, in which the Standing Committee of the National People's Congress is vested with ultimate authority to interpret law) (citing Lifa Fa (立法法) [Law on Legislation] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000, amended Mar. 15, 2015), art. 7, 2015 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 2. (China)).

120 *See* Rachel E. Stern, Benjamin L. Liebman, Margaret E. Roberts & Alice Z. Wang, *Automating Fairness? Artificial Intelligence in the Chinese Courts,* 59 COLUM. J. TRANSNAT'L L. 515, 550–51 (2021) (discussing the role artificial intelligence may play in shaping the discretion afforded to courts in China).

written law.[121] The most notable of these goals is the demand that courts facilitate Party-state efforts to maintain social stability.[122] But other values, notably morality and court-defined views of fairness, also impact court decisions.[123] It is not rare for courts to award damages, in particular emotional damages, without providing specific rationales for doing so, or for courts to ignore certain legal arguments made by litigants. Courts likewise will at times ignore apparently binding law.[124] These issues occur in a wide range of contexts, not just those touching on women's rights or gender.[125] But such practices may also facilitate gendered outcomes, as courts either do not resolve certain claims made by women or seek to achieve what the courts perceive to be equitable outcomes to contentious cases.

II. Methodology

Beginning in 2014, China's Supreme People's Court (SPC) ordered all courts in China to place most court decisions online.[126] Public judgments are uploaded to a centralized platform, China Judgments Online (CJO).[127] As of August 2023, CJO included more than 142 million judicial documents.[128] Our research draws on a database of 42 million cases, which includes all cases made public from the launch of CJO in 2014 to September 2, 2018. Not all cases are made public; from the beginning, rules requiring case publication

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121 *See* Zeming Liu, *Integrating the "Socialist Core Values" into Legal Judgments: China's New Model of Authoritarian Legality*, 62 COLUM. J. TRANSNAT'L L. 215, 221–25, 233–45 (2023); Zhu Suli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L L. 533, 539–40 (2007).

122 *See* Liu, *supra* note 121 ("Ultimately, the transformation of Chinese law signifies a new model of authoritarian legality, which extends the concept of law itself to accommodate the state-imposed, moralistic social norms.").

123 *See generally* Rachel E. Stern, Benjamin L. Liebman, Wenwa Gao & Xiaohan Wu, *Liability Beyond Law: Conceptions of Fairness in Chinese Tort Cases*, 2023 A. J. L. & SOC. 1 (describing how ideas of fairness, not just concerns about stability, lead courts in China to decide cases beyond the formal written law).

124 *See id.*, at 3–4, 6; Benjamin L. Liebman, *Ordinary Tort Litigation in China: Law versus Practical Justice?*, 13 J. TORT L. 197, 216–18, 225 (2020) [hereinafter Liebman, *Ordinary Tort Litigation*].

125 *See, e.g.*, Liebman, *Ordinary Tort Litigation*, *supra* note 124.

126 For details on the limitations in what is put online, see Stern et al., *supra* note 120 at 521; Benjamin L. Liebman, Margaret E. Roberts, Rachel E. Stern & Alice Z. Wang, *Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law*, 8 J. L. & COURTS 177, 177–183 (2020).

127 *See* ZHONGGUO CAIPAN WENSHU WANG (中国裁判文书网) [CHINA JUDGMENTS ONLINE] (China), http://wenshu.court.gov.cn/ [https://perma.cc/RF6Z-GLKG].

128 *See id.*

have included numerous exceptions, ranging from cases relating to state secrets and individual privacy, to cases resolved through mediation, to "other cases not suitable for publication."[129] Disclosure rates also vary across substantive areas, with disclosure rates highest for criminal cases and lowest for civil cases.[130] More recently, the SPC has signaled that it will no longer aim to place most cases online, instead focusing on posting cases with particular guiding or educational significance.[131] The period we examine, thus, provides a rare window into the functioning of everyday justice in China.

Most significantly for this Article, beginning in 2016 SPC rules stated that divorce and child custody cases should not be made public.[132] The rules also called for divorce cases that had previously been made public to be deleted from the website.[133] Though compliance with these rules was often spotty, the number of divorce cases made public has declined.[134] More recently, courts have dramatically reduced the number of cases made public; the CJO

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129 Zuigao Renmin Fayuan Guanyu Renmin Fayuan zai Hulianwang Gongbu Caipan Wenshu de Guiding, (最高人民法院关于人民法院在互联网公布裁判文书的规定、法释[2013]26号) [Provisions of the SPC on the People's Courts' Issuance of Judgments on the Internet, Judicial Interpretation No. 26 (2013)] (promulgated by the Jud. Comm. Sup. People's Ct., Nov. 23, 2013, effective Jan. 1, 2014) SUP. PEOPLE'S CT. GAZ., Nov. 21, 2013 (China), http://gongbao.court.gov.cn/Details/d0e837bbafb75a8863b4d4c407d694.html [perma.cc/7YHT-NZ53] [hereinafter Judicial Interpretation No. 26].

130 *See* Xiaohan Wu, Margaret E. Roberts, Rachel E. Stern, Benjamin L. Liebman, Amarnath Gupta & Luke Sanford, *Addressing Missingness in Serialized Bureaucratic Data: The Case of Chinese Courts*, 21ST CENTURY CHINA CTR. RSCH. PAPER SERIES, June 2022, at 1.

131 *See* Benjamin L. Liebman, Rachel E. Stern, Xiaohan Wu & Margaret Roberts, *Rolling Back Transparency in China's Courts*, 123 COLUM. L. REV. 2407, 2421 (2023) (describing "a dramatic reduction in the volume of cases being made public").

132 Guanyu Renmin Fayuan zai Hulianwang Gongbu Caipan Wenshu de Guiding, Fashi [2016] 19 Hao (关于人民法院在互联网公布裁判文书的规定、法释[2016]19 号) [Regulations on the Publication of Judgments on the Internet by the People's Courts, Judicial Interpretation No. 19 [2016]] (promulgated by the Jud. Comm. Sup. People's Ct., July 25, 2016, effective Oct. 1, 2016) SUP. PEOPLE'S CT. GAZ., Aug. 29, 2016 (China), http://gongbao.court.gov.cn/Details/415f49dd8baaa04b479d57af9616ef.html [https://perma.cc/62KZ-VPPW]. Rules in place prior to 2016 did not bar publication of divorce cases but required names to be redacted. *See* Interpretation No. 26, *supra* note 129.

133 The SPC made this clear in a press briefing after publication of the rules. *See* Liang Zhou (梁宙), *Zuigaofa: Lihun Susong Caipan Wenshu bu Shangwang Gongkai, Yi Gongbu de Ying Jishi Chehui* (最高法：离婚诉讼裁判文书不上网公开 已公布的应及时撤回) [*SPC: Opinions in Divorce Litigation Should Not be Published Online and Those Already Published Should be Promptly Withdrawn*], JIEMIAN XINWEN (界面新闻) [INTERFACE NEWS] (Aug. 30, 2016) (China), https://www.jiemian.com/article/825695.html [https://perma.cc/565M-LHQ8].

134 *See* Stern et al., *supra* note 120.

has also deleted hundreds of thousands of previously public cases.[135] These steps mean that cases from the early years of China's experiment with transparency likely provide a distinctive opportunity to understand court practice on family law, in particular.

Our database includes 36,711 civil cases containing Chinese-language terms used to describe abortion.[136] Of these, 30,205 were first-instance cases, with the remainder being appeals or rehearings. Divorce cases accounted for more than half of these cases: 15,152 first-instance cases.[137] Although cases referring to abortion were spread across 184 causes of action, only three other categories of cases had at least 1,000 cases.[138]

We focus on a subset of divorce cases involving claims by men that a woman terminated a pregnancy "without authorization" (擅自) or "unilaterally" (私自). We began our research by reading a random sample of divorce cases that included a discussion of abortion. Cases involving these allegations of 'unauthorized' or 'unilateral' abortions quickly emerged as a distinctive trend and the most notable strategic use of arguments about abortion among the reviewed cases.[139] In our dataset, 949 divorce cases involved claims that a woman terminated a pregnancy either "without authorization" or "unilaterally." An additional 116

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135 *See* Liebman et al., *supra* note 131 at 2425.

136 We searched our database for any first-instance civil cases with the following terms: 流产 (miscarriage or abortion); 引产 (labor induction); 终止妊娠 (pregnancy termination); 堕胎 (abortion); 打胎 (abortion); 坠胎 (abortion); 打掉孩子/小孩/胎儿 (aborting a child/fetus); and 人流手术 (human-assisted abortion). We initially read a random sample of civil cases mentioning abortion, which helped refine our search terms and eliminate case types in which abortion was mentioned figuratively or in passing (for example, insurance cases mentioning abortion as a covered treatment). One term, *liuchan* (流产), refers to either induced abortions or natural miscarriages. In reading cases, we relied upon context, in particular the parties' descriptions of circumstances under which pregnancies terminated, to determine whether parties were referring to induced abortions, miscarriages, or stillbirths.

137 In all cases, a couple's marriage has been formally registered.

138 These were automobile accident disputes (3,251 cases), marital property disputes (2,988 cases), and medical injury liability disputes (1,214 cases).

139 Our reading of a random sample of other categories of civil cases revealed other contexts in which claims regarding abortion arise: women sue to recover half of the costs of an abortion from their male partner; women sue to recover damages from a tort that caused miscarriage; husbands in divorce litigation contend their spouses obtained abortions to conceal infidelity; wives in divorce litigation cite to their husband not caring for them after a miscarriage as evidence or relationship breakdown; women sue healthcare providers for malpractice causing a miscarriage; and women sue their employers for wages and benefits during periods when they recovered from abortions or miscarriages. We also read random samples of 250 criminal and administrative cases. Most administrative cases involved individuals challenging fines for out-of-plan births; some involved men arguing authorities should not have authorized their wives' abortions. Criminal cases largely involved

similar claims arose in other categories of cases involving intimate partner disputes, such as marital property disputes or cases arising from unmarried cohabitation, making for a total of 1,065 cases. We read all 1,065 cases and coded all 949 divorce cases in detail.[140]

Our approach is limited by what we can see in court decisions. We do not know whether the paper record created by courts accurately reflects litigant arguments because litigant filings and evidence are not made public.[141] We likewise do not know whether cases in our database are representative of the full range of disputes regarding pregnancy termination. Despite these limitations, close reading of more than 1,000 cases allows us to identify a distinct pattern of legal arguments made by men regarding abortion and to develop an understanding of how courts respond to such arguments. Considering the number of actual divorce disputes that are channeled into mediation and not adjudicated in court, our data offers a partial, yet valuable window into phenomena that may have broader prevalence beyond the courtroom.[142] What emerges is an understanding of how men articulate claims regarding reproduction to restrict women's autonomy and obtain favorable court outcomes despite such claims' lack of legal basis.

III. Findings

Given the legal framework rejecting male rights to control or participate in women's reproductive decisions, why and how do men assert such rights? This part examines men's arguments that their spouses wrongfully obtained abortions unilaterally or without the man's authorization, as well as the responses of women and the courts. Section A. focuses on men's legal claims. Section B. looks beyond specific legal claims to discuss how men use arguments regarding their partners' abortions to discredit women or explain away domestic violence. Section C. explores limited resistance to these claims from women and judges. Therein, we highlight courts' tendencies to avoid engaging directly with claims regarding abortion.

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either clinics' illegal practice of medicine or assault-induced miscarriages. Though fewer in number, such cases also raise intriguing questions for future research.

140 For each case, we tracked legal representation; each party's claims; grounds for those claims; courts' rulings with respect to those claims and reasoning; parties' narratives of the events; evidence introduced; laws cited; use of certain arguments and tactics; and whether certain common features, such as domestic violence, were present.

141 *See* Liebman et al., *supra* note 131. Subsequent studies could develop our findings through interviews of those involved in adjudicating reproductive disputes.

142 *See* Li, *supra* note 84, at 94–95.

In contrast to prior literature focusing on reproductive restrictions in China that originate from the state, we show how men use litigation to exert control over and stigmatize women's reproductive choices. Many of our findings resonate with prior work on divorce litigation in China, with the gap between formal legal commitments to equality and women's rights, on the one hand, and actual practice, on the other. Yet we also identify a previously unexamined area of legal contestation: women's reproductive autonomy.

A. What Men Claim & What They Obtain: Damages, Divorce, & Other Relief

Men's claims that women obtained "unauthorized" or "unilateral" abortions are relatively rare given the total volume of divorce cases in China—we identified nearly 1,000 divorce cases in which such claims arose, while our database contains 1.87 million divorce cases. Yet the consistency with which men raise such claims—in major cities and rural counties, while either represented or unrepresented by legal counsel—suggests a pattern of legal argument that is deeply rooted and likely more widespread than in just the 1,000 cases we identified. Throughout the cases, men described their partners' pregnancy terminations as willful, unilateral, and destructive choices for which women were at fault and should be held accountable,[143] even though nearly half of the women argued they miscarried or that their pregnancies ended involuntarily.[144]

In the majority of cases we read, men cited their wives' abortions as evidence of their wives' fault and sought damages or other relief, such as custody or divorce. In two-thirds of the cases we read, men argued their wives' abortions entitled them to compensation or were reason to deny payment to their wives.[145] In the remaining one-third of cases, the man cited his wife's pregnancy termination to argue either for or against divorce but sought no compensation.[146]

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143 *See, e.g.*, Liu v. Xiao (刘某某诉肖某某), Hebei Chengde Cnty. People's Ct. (河北省承德县人民法院), (2016)冀0821民初506号, Mar. 10, 2016 (China) (even though the court found the wife experienced a "stillbirth," the husband argued his wife's abortion was a "violation of his reproductive rights" for which she "should be morally condemned" and "legally punished"). Although the cases we study sometimes include the full names of parties, the rules governing online publication require redaction of names so that only parties' surnames are listed. We thus include only the family names of litigants in this article.

144 *See infra* notes 168–169 and accompanying text.

145 Men made these arguments in 641 out of 949 cases.

146 In 167 of the 515 cases in which men sued for divorce as plaintiffs (32%), men sought only to be legally extracted from the relationship and requested no other form of financial compensation or other relief (such as child custody.)

Although women rarely contested men's legal arguments, many courts endorsed men's arguments and issued rulings that appeared to penalize women for unilaterally terminating pregnancies. Collectively, these cases suggest that stigma against women who unilaterally exercise their right to abortion—and thereby effectively reject societal expectations that women reproduce—remains prevalent.[147] These cases also illustrate how exercising one's legal rights to reproductive autonomy can be costly for women.

1. Emotional and Fault-Based Damages for an Abortion

Some men portrayed their wives' pregnancy terminations as causing emotional injury entitling them to damages.[148] In one 2016 case from Hubei province, a man sued for a divorce, his wife's return of the 94,278 *yuan* bride price, and 50,000 *yuan* in emotional damages because she obtained an abortion "unilaterally," despite the man's insistence on wanting to have a child.[149] The man recounted how his spouse returned to her hometown to rest after finding out she was pregnant, but later informed the plaintiff that the pregnancy ended.[150] The man claimed her conduct "shocked, saddened, and dealt a psychological blow to" him and his family, and "deprived him of his right to be a father."[151] Multiple men even blamed their development of previously-diagnosed mental illnesses, such as paranoid schizophrenia, on their wives' "unauthorized abortions."[152] In each of these cases, men

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147 For more on the pressure to reproduce that women in China often face, see generally Xiaorong Gu, *'You Are Not Young Anymore!': Gender, Age, and the Politics of Reproduction in Post-Reform China*, 13 ASIAN BIOETHICS REV. 57, 58, 66–68, 72– 73 (2021) (discussing "the phenomenon of childless women at their late 20s and 30s being labelled as deviants who upset social norms . . . and cause moral panics in society" and noting that "[c]onsistent with the Confucian family ethos . . . , women's reproduction often is framed as a family responsibility in line with filial piety expectations rather than an individual choice") (citations omitted); James M. Raymo, Hyunjoon Park, Yu Xie & Wei-jun Jean Yeung, *Marriage and Family in East Asia: Continuity and Change*, 41 ANN. REV. SOCIOLOGY 471, 472 (2015) ("Another distinctive feature of the traditional East Asian family is the paramount importance of family lineage. . . . This emphasis on lineage and ancestor worship is particularly pronounced in Chinese culture.").

148 Men requested emotional, fault-based damages due to their partners' pregnancy terminations in 12% of cases (115 out of 949 cases).

149 Tu v. You (涂某某诉游某某), Hubei Huanggang Huangzhou Dist. People's Ct. (湖北省黄冈市黄州区人民法院), (2016)鄂1102民初1349号, Aug. 8, 2016 (China).

150 *See id.*

151 *Id.* The defendant asserted her right to terminate a pregnancy at her discretion but claimed the termination occurred after she experienced abnormal uterine bleeding. *Id.*

152 *See, e.g.*, Pan v. He (潘某某诉何某某), Jiangxi Xunwu Cnty. People's Ct. (江西省寻乌县人民法院), (2015)寻民一初字第109号, July 9, 2015 (China).

portrayed women's pregnancy terminations as per se wrongs, not because the abortion infringed any fetal interests, but because it disrupted a husband's and his family's interests in producing children on their terms.[153]

Some men argued their wives' pregnancy terminations violated men's families' rights to heirs.[154] One male plaintiff in a 2014 case in Henan province argued that the defendant owed him 20,000 *yuan* in emotional damages because her "unauthorized abortion caused material and mental harm both to the plaintiff and his family."[155] In another case from 2014, a woman from Hubei province sued for a divorce, claiming that she had reluctantly terminated her pregnancy at her husband's request following a fight.[156] The defendant argued that he "regretted his moment of anger and asking her to knock out the pregnancy," but contended that his wife should not have taken him seriously and that her "unauthorized abortion caused his parents to be spiritually crushed."[157] He requested a return of the bride price, emotional damages, and a court order requiring the plaintiff to "apologize to his parents for causing them spiritual suffering."[158]

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153 *Id. Cf.* MELLORS-RODRIGUEZ, *supra* note 35, at 77, 147–48 (discussing conceptions that women's "natural duty (*tianran yiwu*) [is] to become mothers").

154 *See, e.g.*, Xue v. Jin (薛某某诉靳某某), Hebei Gaoyang Cnty. People's Ct. (河北省高阳县人民法院), (2016)冀0628民初432号, May 30, 2016 (China) ("The defendant lied often and unilaterally killed our child, which caused great pain for me and my family."); Yang v. He (杨某某诉何某某), Henan Lingbao City People's Ct. (河南省灵宝市人民法院), (2014)灵民一初字第1751号, Oct. 30, 2014 (China) (after a woman introduced hospital records proving domestic violence by her husband caused her to miscarry, the husband argued the woman willfully had a unilateral abortion "without notifying her husband or his family"); Zhang v. Jin (张某某诉金某某), Hubei Tongcheng Cnty. People's Ct. (湖北省通城县人民法院), (2016)鄂1222民初445号, May 15, 2016 (China) (after a woman alleged her husband often physically abused her and once tried to strangle her several months after she gave birth, her husband recounted how she obtained an "unauthorized abortion" during her second pregnancy, even though his "parents strongly objected and were dissatisfied").

155 Miao v. Zhang (苗某某诉张某某), Henan Nanzhao Cnty. People's Ct. (河南省南召县人民法院), (2014)南召民初字第865号, Jan. 20, 2015 (China).

156 *See* Wang v. Ren (王某某诉任某某), Hubei Wuhan Jiangxia Dist. People's Ct. (湖北省武汉市江夏区人民法院), (2014)鄂江夏乌民初字第00158号, July 28, 2014 (China).

157 *Id.*

158 *Id.*

Men in these cases frequently appealed to notions of "rights" or "criminality" to reinforce their claims.[159] In one case from Guizhou province, a man argued that his wife "inhumanely knocked out a six to seven-month-old fetus in her womb without informing [him]."[160] He requested 13,000 *yuan* in economic loss, 50,000 *yuan* in emotional damages, and a court order that the plaintiff "submit to a criminal investigation into her liability for defrauding the defendant, destroying their family, and intentionally knocking out their fetus."[161] Men claimed their spouses' pregnancy terminations violated an array of rights, including their "reproductive rights" or "right to reproduce,"[162] "knowledge rights,"[163] and "right to be a father."[164] None of these rights have any justiciable content under Chinese law. Nonetheless, men's claims to have legal rights regarding women's pregnancy terminations appear to serve as both rhetorical devices and efforts to find a legal basis for such claims.

With the law on women's side, one might expect women to contest men's arguments. In rare cases, women did. For example, one woman argued that her husband, who accused her of obtaining a "unilateral abortion," was "abusing the right to sue in court,"[165] yet

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159 Men invoked "rights" (权利) in seventy-three cases (approximately 8%) and occasionally accused their wives of criminal violations or grave injustice. *See, e.g.*, Guo v. Xiao (郭某某诉肖某甲), Anhui Jieshou City People's Ct. (安徽省界首市人民法院), (2014)界民一初字第00646号, Mar. 21, 2014 (China); Han v. Zhang (韩某某诉张某某), Shaanxi Liquan Cnty. People's Ct. (陕西省礼泉县人民法院), (2014)礼民初字第00647号, Aug. 12, 2014 (China); Lin v. Ma (林某某诉马某某), Liaoning Panshan Cnty. People's Ct. (辽宁省盘山县人民法院), (2016)辽1122民初87号, Mar. 15, 2016 (China).

160 Liang v. Li (梁某某诉李某某), Guizhou Qinglong Cnty. People's Ct. (贵州省晴隆县人民法院), (2016)黔2324民初283号, June 6, 2016 (China).

161 *Id.*

162 Men claimed "reproductive rights" in fifty-two cases.

163 Men claimed "knowledge rights" in ten cases.

164 Men claimed "rights to be a father" in ten cases. In a handful of cases, men claimed other rights, including their: "rights as husbands" (作为丈夫的权利); "parental right to be informed" (作为孩子父亲的知情权); "legal rights and interests" (合法权益) generally; "spousal rights" (配偶权); "familial rights and interests" (全家的权益); and "right to have children" (生育子女的权利). In one case, the husband claimed fetuses are "jointly owned by husbands and wives under national law." Xu v. Liao (徐某某诉廖某某), Guangdong Jieyang Jiedong Dist. People's Ct. (广东省揭阳市揭东区人民法院), (2015)揭东法民一初字第251号, Apr. 27, 2014 (China).

165 *See, e.g.*, Zeng v. Ding (曾某某诉丁某某), Hubei Huangshi Xisaishan Dist. People's Ct. (湖北省黄石市西塞山区人民法院), (2014)鄂西塞民初字第00229号, May. 27, 2014 (China).

women seldom argued that men's claims for emotional damages lacked legal basis.[166] Instead, many women disputed only the facts, not law. In nearly half of the cases in which women appeared in court,[167] women argued their pregnancy terminations were involuntary and caused by either a natural miscarriage, stillbirth, medical necessity, coercive pressure from their husbands, or domestic violence.[168] Many other women argued their partners consented to their abortions and introduced records of texts, emails, and phone calls to prove their husbands encouraged and agreed with the decisions to terminate pregnancies.[169] In some cases, women suggested the pregnancy itself was involuntary, which accords with the prevalence of domestic violence allegations in our data.[170] Women's focus on contesting the voluntariness of their pregnancy terminations suggests they felt the need to justify abortions—as if terminating a pregnancy without a partner's consent would constitute a wrong.[171]

Courts likewise rarely cited to the law to reject men's claims for emotional damages. In a small number of cases, courts granted men emotional damages for their wives' "unauthorized" or "unilateral" abortions in direct contravention of the 2011 SPC

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166 *Cf., e.g.*, Feng v. Yu (冯某某诉余某某), Guizhou Chishui City People's Ct. (贵州省赤水市人民法院), (2014)赤民初字第1589号, Dec. 19, 2014 (China) (female defendant arguing that her husband's claim for emotional damages because of her abortion was "totally unfounded in fact and law").

167 In nearly 12% of cases, women did not appear as defendants in court. *Cf.* MICHELSON, *supra* note 84 (describing a pattern of female defendants failing to appear at divorce hearings as being partially due to fear of exposing themselves to their abusers).

168 In 390 cases, women contested the voluntariness of their pregnancy termination. In 83 cases, or one-fifth of cases where voluntariness was contested, women claimed to have miscarried due to domestic violence.

169 *See, e.g.*, Zeng v. Ding (曾某某诉丁某某), Hubei Huangshi Xisaishan Dist. People's Ct. (湖北省黄山市西塞山区人民法院), (2014)鄂西塞民初字第00229号, May. 27, 2014 (China) (where a woman introduced medical records of abuse and bank statements indicating her husband personally authorized payment for her abortion); Zeng v. Yuan (冯某某诉余某某), Hubei Chenzhou Beihu Dist. People's Ct. (湖北省郴州市北湖区人民法院), (2015)郴北民一初字第1245号, Feb. 17, 2016 (China) (where a woman introduced medical records indicating she suffered a trauma-induced miscarriage, text messages from her allegedly abusive husband indicating he knew she was pregnant during the abuse, and a recording of him encouraging her to abort her pregnancy).

170 33% of cases included allegations of domestic violence. Many involved allegations of forcible sex and sexual abuse. *See, e.g.,* Du v. Wang (杜某某诉王某某), Henan Shangcheng Cnty. People's Ct. (河南省商城县人民法院), (2016)豫1524民初5号, Mar. 8, 2016 (China).

171 Some women may also have been trying to demonstrate a "reproductive dispute" existed to persuade the court to grant divorce. For a discussion of the relevant law, see *supra* notes 79–83.

Interpretation.[172] We encountered only four such decisions.[173] In one case, an unrepresented man from Shandong countered his wife's allegations of "frequent domestic violence" with accusations that she obtained a "secret abortion" without his "consent or knowledge."[174] Implying the abortion was evidence of infidelity, the man claimed his spouse violated his "right to know" and owed him 60,000 *yuan* in emotional damages, 30,000 *yuan* for her medical costs, and an explanation of why she obtained an abortion.[175] The court ordered the woman to compensate the man 5,000 *yuan* in emotional damages.[176]

In another case, a woman from Hebei province petitioned for divorce a second time, citing her husband's physical and verbal abuse.[177] Her husband claimed that she was the party at fault and owed him the bride price, 50,000 *yuan* in emotional damages, and other relief, because she "concealed the fact she obtained an abortion," depriving him of his "right to be a father."[178] The court granted the divorce, but ordered her to return the bride price and compensate her husband 20,000 *yuan* in emotional damages for her "unauthorized abortion."[179] Despite her allegations of domestic violence, the court declared she "ran away due to trivial household matters," that she was guilty of a "civil violation" for obtaining an abortion at five months without her husband's consent, and that she should compensate

172 Two of the four cases involved domestic violence allegations. *See, e.g.*, Li v. Sun (李某某诉孙某某), Shanxi Lingchuan Cnty. People's Ct. (山西省陵川县人民法院), (2015)陵民初字第184号, May 21, 2015 (China) (finding that the husband engaged in defamatory online harassment of the plaintiff after her abortion but interpreting his conduct as evidence of genuine emotional pain and ordering the plaintiff to pay him 7,000 *yuan* for her "unauthorized abortion"); Wang v. Peng (王某某诉彭某某), Hebei Chengde Cnty. People's Ct. (河北省承德县人民法院), (2014)承民初字第1668号, July 8, 2015 (China); Huang v. Wen (黄某某诉文某某), Shandong Shen Cnty. People's Ct. (山东省莘县人民法院), (2015)莘民一初字第1714号, Oct. 12, 2015 (China) ; Peng v. Ding (彭某某诉丁某某), Jiangxi Pingxiang Xiangdong Dist. People's Ct. (江西省萍乡市湘东区人民法院), (2015)湘排民初字第121号, Mar. 17, 2016 (China).

173 These cases represent approximately 5% of the cases in which men raised emotional damage claims and the court granted a divorce.

174 Huang v. Wen (黄某某诉文某某), Shandong Shen Cnty. People's Ct. (山东省莘县人民法院), (2015)莘民一初字第1714号, Oct. 12, 2015 (China).

175 *Id.*

176 *See id.*

177 *See* Wang v. Peng (王某某诉彭某某), Hebei Chengde Cnty. People's Ct. (河北省承德县人民法院), (2014)承民初字第1668号, July 8, 2015 (China).

178 *Id.* (husband requested wife compensate him tens of thousands of *yuan* for various expenditures incurred during marriage).

179 *Id.*

her husband for the "significant mental damage" she caused him by "terminating her pregnancy."[180] These cases are small in number but are also consistent with prior findings that judges at times go beyond the law to appease litigants and mitigate the possibility of protest.[181]

In cases where courts denied men emotional damages, courts rarely rejected men's arguments in clear terms. Many courts ignored the man's claim and reproductive dispute entirely,[182] while some expressly rejected the request for damages but did so without referencing contrary law.[183] For example, many courts rejected men's claims of emotional damages only because of insufficient evidence—not because of their lack of legal basis.[184]

2. Bride Price

Although the SPC's interpretations provide that bride prices shall be returned if a couple has not "lived together," some men instead focused their arguments for the return of the bride price on pregnancy termination.[185] In these cases, men portrayed their partners' pregnancy terminations as violations of implied marriage contracts in which reproduction is expected.[186] The finding that disagreements over reproduction can lead to relationship

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180 *Id.* Notably, the man argued his wife's "late-term abortion" at five months contravened "appropriate family planning procedures," appearing to invoke a province-level regulation that aims to prevent sex-selective abortion by limiting abortions after fourteen weeks of pregnancy. *Id.* The court recounted that a local agency fined the woman 500 *yuan* and the hospital performing the abortion 10,000 *yuan*. *See id.*

181 *See* MICHELSON, *supra* note 86, at 3–4, 16–17.

182 *See infra* Part III Section C.2.

183 *See infra* note 374 and accompanying text (describing how only 4% of courts cited the 2011 SPC Interpretation).

184 Even in cases where the court denied men's requests for emotional damages, the grounds upon which the claims were dismissed were neither uniform nor explicit rejections of men's arguments. Many courts did not elaborate on why men's claims had "no legal basis," while several courts denied the claims due to insufficient evidence of the man's emotional pain, indicating such damages may be theoretically possible.

185 *See infra* notes 195–196 and accompanying text.

186 Men requested the return of the bride price or engagement gifts based on the woman's abortion in 40% of cases (380 out of 949). For an illustration of the extent to which women's "failure" to reproduce can result in men's hostility, see, e.g., Luo v. Huang (罗某某诉黄某某), Guangdong Lianzhou City People's Ct. (广东省连州市人民法院), (2016)粤1882民初791号, Sept. 19, 2015 (China) (man arguing that his wife terminated pregnancies unilaterally without his permission, though his wife recounted how she suffered from four miscarriages, one of which was due to domestic violence, but nonetheless wanted to provide him with

breakdowns is not surprising. However, it is novel to observe that courts at times provide a compensatory remedy for the perceived violation of such expectations. Moreover, men in these cases notably seek to translate the genuine financial pressure they face in affording marriage into pressure on their female partners to reproduce.[187]

In one 2015 case from Shanghai, a man recounted confiscating his wife's property, including the bride price and engagement jewelry, upon learning she had an abortion.[188] He justified his actions by asserting "[she] terminated a pregnancy without asking [me] first."[189] In another case from Jiangxi province, a woman sued for a divorce, pleading that her husband was "mentally abnormal" and that his "sole purpose in marrying the plaintiff was to have a child."[190] Her husband insisted that the two stay married, emphasizing that he spent 50,000 *yuan* on the marriage and that the plaintiff "aborted their child without authorization" and "violated [his] reproductive rights."[191] In many litigants' apparent worldviews, creating a line of succession operated as a nonnegotiable condition for fulfilling their marital obligations.

Women only occasionally objected to these arguments, contending that they had not violated their husbands' reproductive rights. Some called their husbands "sexist" or "misogynistic," citing, among other things, their husbands' preference for male children.[192]

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a child so badly that she underwent reverse tubal ligation surgery). For a general discussion of the growth of collateral marital contracting in China after the passage of the 2001 Marriage Law, as well as a commentary on the marital "traditions that… make motherhood virtually mandatory for women to be treated as adults," see Davis, *supra* note 116, at 565–66, 570–71.

187 *See* Jiang et al., *supra* note 50 at 214–15 (describing how the bride price can be worth many times average annual income).

188 *See* Wang v. Lu (王某某诉陆某某), Shanghai Jinshan Dist. People's Ct. (上海市金山区人民法院), (2015)金民一(民)初字第3736号, Dec. 3, 2015 (China).

189 *Id.* The plaintiff argued she only obtained an abortion because the couple did not have financial means to support their child because the defendant "refused to find work" and did not care about the plaintiff. *Id.*

190 Zhou v. Ge (周某某诉戈某某), Jiangxi Xingan Cnty. People's Ct. (江西省新干县人民法院), (2014)干民一初字第522号, Nov. 10, 2015 (China).

191 *Id.*

192 *See, e.g.*, Bu v. Chen (卜某某诉陈某某), Henan Xiayi Cnty. People's Ct. (河南省夏邑县人民法院), (2015)夏民初字第03755号, Dec. 24, 2015 (China) (woman claiming that her husband and his family "thought women are inferior to men"); Zhang v. Li (张某某诉某某), Anhui Funan Cnty. People's Ct. (安徽省阜南县人民法院), (2015)南民一初字第01707号, June 30, 2015 (China); Xu v. Liu (许某某诉刘某某), Henan Mengjin Cnty. People's Ct. (河南省孟津县人民法院), (2015)孟民四初字第90号, June 25, 2015 (China); Pang v. Chen

Others described being dehumanized in being held to such expectations and valued primarily on the basis of reproductive obedience.[193] Some women gave these objections a legal formulation, arguing that their pregnancy proved the two meaningfully "lived together," thereby negating their husband's claim to the bride price.[194]

Men's arguments regarding the bride price appeared far more effective than requests for emotional damages.[195] Courts split roughly 50–50 on whether to order the return of the bride price.[196] In awarding men the bride price, courts appeared to use their broad discretion to determine whether a couple had "lived together" to compensate men and

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(庞某某诉陈某某), Guangdong Zhanjiang Potou Dist. People's Ct. (广东省湛江市坡头区人民法院), (2016)粤0804民初1139号, Sept. 19, 2015 (China); Liu v. Zeng (刘某某诉曾某某), Guangxi Hezhou Babu Dist. People's Ct. (广西壮族自治区贺州市八步区人民法院), 贺八民一初字第3303号, Nov. 17, 2015 (China).

193 Some female litigants described how their husbands and husbands' families would treat them with derision if they experienced reproductive difficulties. *See, e.g.*, Sun v. Bi (孙某某诉毕某某), Jiangsu Guanyun Cnty. People's Ct. (江苏省灌云县人民法院), (2015)灌少民初字第00432号, Aug. 7, 2015 (China) (woman pleading that her "husband's parents had a negative opinion of her because she was unable to bear a second child"); Yang v. Wang (杨某某诉王某某), Henan Xihua Cnty. People's Ct. (河南省西华县人民法院), (2014)西民初字第407号, May 13, 2015 (China) (woman alleging that her husband, who argued she had a unilateral abortion causing "injury to him and his family," did not "think of [her] as a human being at all."); Wang v. Yan (王某某诉闫某某), Shaanxi Yang Cnty. People's Ct. (陕西省洋县人民法院), (2017)陕0723民初1106号, Aug. 23, 2015 (China) (woman alleging that her husband and "his family did not treat me like I was a person at all," did not take care of her or pay for treatment when she was ill during pregnancy, and accused her of being lazy and not doing enough housework).

194 *See, e.g.*, Zhou v. Wu (周某某诉吴某某), Jiangsu Nanjing Lishui Cnty. People's Ct. (江苏省南京市溧水县人民法院), (2014)溧民初字第2003号, Nov. 28, 2015 (China) (woman arguing that her husband had not satisfied the legal conditions for returning the bride price and describing the mental and physical difficulties she experienced in terminating a pregnancy after seven months); Hu v. Qin (胡某某诉覃某某), Guangdong Guangzhou Tianhe Dist. People's Ct. (广东省广州市天河区人民法院), (2015)穗天法民一初字第1937号, Jan. 12, 2016 (China) (woman arguing that she spent the bride price on their joint livelihood and that his parents were chairpersons of construction firms and had no grounds to claim "financial hardship"); Shen v. Sun (沈某某诉孙某某), Jiangsu Wuxi Beitang Dist. People's Ct. (江苏省无锡市北塘区人民法院), (2014)北民初字第0704号, July 18, 2014 (China) (woman arguing that "because [she and her husband] had already wedded and lived together," she should not have to return the bride price and noting that she terminated the pregnancy because of their frequent arguments and only after notifying her husband).

195 Although men requested the bride price or engagement gifts based on the woman's abortion in 40% of all the cases in our dataset, courts only reached the issue in 239 cases, i.e., those in which the court had granted a divorce.

196 Courts ordered the woman to return the bride price in 113 of the 239 cases in which they decided the issue.

penalize women for "unauthorized abortions."[197] In fewer than half of such cases,[198] courts discussed one or both of the relevant statutory grounds for returning the bride price: failure to live together and financial hardship caused by the bride price payment.[199] Although some

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197 *See, e.g.*, Liu v. Li (刘某某诉李某某), Gansu Jingyuan Cnty. People's Ct. (甘肃省靖远县人民法院), (2013)靖乌民初字第251号, Jan. 16, 2014 (China); Zhao v. Wu (赵某某诉吴某某), Shaanxi Zhouzhi Cnty. People's Ct. (陕西省周至县人民法院), (2017)陕0124民初61号, Apr. 17, 2017 (China). For a discussion of how surveyed judges feel they lack adequate guidance on the bride price analysis and enjoy broad discretion in adjudicating such disputes, see Hu & Song, *supra* note 114. An important caveat is that judges may have felt obligated by law to return the bride price if one of the statutory factors is found (even if on mixed evidentiary grounds), yet still exercise their discretion in favor of women by reducing the amount of the bride price that women are ordered to return.

198 The Marriage Law and a subsequent SPC interpretation establish that courts should support demands for the return of the bride price in three situations: failure to complete marriage registration formalities; failure to live together after completing marriage registration formalities; or financial hardship to the person who paid the bride price. *See* 2003 SPC Interpretation. According to a 2004 SPC commentary reprinted in 2015, whether the couple has "lived together" after completing marriage registration depends on whether the couple has actually lived together and has "experienced providing and receiving mutual support" for one another. Zuigao Renmin Fayuan Minshi Shenpan Diyiting (最高人民法院民事审判第一庭) [SUP. PEOPLE'S CT. FIRST CIV. DIV.], ZUIGAO RENMIN FAYUAN HUNYIN FA SIFA JIESHI (ER) DE LIJIE YU SHIYONG (《最高人民法院婚姻法司法解释（二）的理解与适用) [UNDERSTANING AND APPLYNG THE SPC JUDICIAL INTERPRETATIONS OF THE MARRIAGE LAW (VOL. II)] 147 (Renmin Fayuan 2015 Nianban (人民法院2015年版) [The People's Ct. Press, 2015 ed.] 2015) (China). The SPC acknowledged this policy aims to strike a balance between avoiding "situations where people utilize marriage as a trap to obtain a valuable bride price" and situations where people, particularly in "rural areas," begin marriages in substance without registration. *Id.*

Some scholars and lower-level courts have argued courts' assessments of whether couples have "lived together" should take into account whether "the parties have fulfilled the rights and obligations within the husband-wife relationship," either before or after registration; sexual activity; and the duration of the marriage. Guo Yinghua & Du Qiong (郭英华、杜琼), *Caili Fanhuan Xingwei Zhouyi Jianshi Hunyinfa Sifa Jieshi er Dishitiao ji Xiangguan Guiding* (彩礼返还行为刍议——兼释《婚姻法司法解释(二)》第十条及相关规定) [*Behavioral Patterns in Returning the Bride Price: An Explanation of Article 10 and Related Provisions of the Second Judicial Interpretation of the Marriage Law*], XINGZHENG YU FA (行政与法) [ADMIN. & L.], no. 2, at 115, 115-123 (2019) (China). Notably, some lower courts have maintained that parties' fault—a criterion not within any of the SPC Interpretation's recognized grounds for bride price return—should play a role. *See, e.g.*, Guo v. Lü (郭某某诉吕某某), Henan Song Cnty. People's Ct. (河南省嵩县人民法院), (2014)嵩民五初字第22号, May 29, 2014 (China); *see also* Ma Yinan & Zhuang Shuangli (马忆南、庄双澧), *Caili Fanhuan de Sifa Shijian Yanjiu* (彩礼返还的司法实践研究) [*Research on the Judicial Practice of Returning the Bride Price*], 31 ZHONGHUA NÜZI XUEYUAN XUEBAO (中华女子学院学报) [CHINA ACAD. OF WOMEN J.], no. 4, 10-19 (2019) (China). In practice, courts often order the return of a portion of the bride price, with the amount determined in part by how long the couple lived together.

199 Out of 113 cases in which courts awarded men the bride price, the court cited a short period of living together in 16 cases, financial hardship in 20 cases, and both in 17 cases.

courts required men to satisfy pleading and evidentiary burdens,[200] many did not, explicitly granting a "presumption" of hardship based solely on the payment.[201] One court in Hebei province ordered a woman to return 55,000 *yuan* of the bride price despite contested facts, because "rural customs" created a presumption that men typically provide women "three gold pieces" as part of the bride price.[202] Likewise, when courts awarded the bride price to men on the basis of the couple "failing to live together," they often insinuated that couples who have not procreated have not "lived together" in a meaningful sense.[203] Many courts overlooked one major explanation by women for why the couple did not live together for a longer period: domestic violence. In one case from Jiangxi province, a woman requesting divorce testified that her husband "punched, kicked, and strangled her, making her fear for her life and forcing her to leave."[204] Her husband countered that she was at fault for terminating a pregnancy without his authorization, despite her testimony that the fetal heartbeat had ceased, likely due to her domestic violence-induced depression.[205] The court ordered her to return the bride price, reasoning that the defendant "spent a significant amount of money on their marriage" and their "short period of living together" warranted the refund.[206]

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200 For instance, one court required that the male litigant demonstrate "absolute" financial hardship and reliance on state support, as opposed to "relative" financial hardship. Hu v. Tang (胡某某诉汤某某), Gansu Jiuquan Suzhou Dist. People's Ct. (甘肃省酒泉市肃州区人民法院), (2017)甘0902民初2927号, Oct. 13, 2017 (China). This was evinced simply by the fact the husband's family had taken out a multi-purpose loan when the couple entered into their marriage. *See id.*; *see also* Hu & Song, *supra* note 114.

201 *See, e.g.*, Wang v. Si (王某某诉司某某), Henan Runan Cnty. People's Ct. (河南省汝南县人民法院), (2014)汝民初字第00265号, July 15, 2014 (China); Xia v. Huang (夏某某诉黄某某), Fujian Lianjiang Cnty. People's Ct. (福建省连江县人民法院), (2014)连民初字第901号, July 7, 2014 (China).

202 *See, e.g.*, Yang v. Zhang (杨某某诉张某某), Hebei Jinzhou City People's Ct. (河北省晋州市人民法院), (2017)冀0183民初1333号, May 20, 2014 (China).

203 *See, e.g.*, Li v. Zhao (李某某诉赵某某), Xinjiang Korla City People's Ct. (新疆维吾尔自治区库尔勒市人民法院), (2015)库民初字第2626号, Aug. 31, 2015 (China) (ordering a woman, who claimed domestic violence, to return the bride price and engagement gifts worth more than 60,000 *yuan* because a real marriage had not formed, while also denying her claims for medical and emotional damages); Ji v. Xiang (纪某某诉项某某), Inner Mongolia Uxin Banner People's Ct. (内蒙古自治区乌审旗人民法院), (2014)乌民初字第1741号, Dec. 10, 2014 (China) (ordering a domestic violence survivor to pay court fees and the bride price because "a real marriage did not exist").

204 Cai v. Song (蔡某某诉宋某某), Jiangxi Yujiang Cnty. People's Ct. (江西省余江县人民法院), (2014)余民一初字第323号, Jan. 30, 2014 (China).

205 *See id.*

206 *Id.*

Numerous courts offered no rationale for their bride price determinations. This is not unusual: Chinese courts often provide scant legal analysis in decisions. More than 30% of courts adjudicating bride price disputes ordered the wife to return the bride price to her husband without providing any justification or legal analysis.[207] By contrast, only one court denied a male litigant's bride price claim without citing any basis for its decision,[208] though, as indicated above, some courts denied men's bride price claims by simply noting that the male litigants failed to offer sufficient proof of their claims.[209] Several courts expressly invoked considerations of equity, fairness, and social values to order the return of the bride price, despite these factors not being recognized grounds in the SPC interpretation.[210] Likewise, some courts ordered the return of the bride price based on a finding of the woman's fault, even though fault is not among the three listed legal grounds.[211] For instance, one court in Jiangsu province ordered a woman to return the bride price based on the "degree of fault

207 In 37 of 113 cases in which men succeeded in their claims for return of bride price, courts ordered the return without any analysis or legal justification.

208 *See* Wang v. Du (王某诉杜某), Shanxi Wugong County People's Ct. (陕西省武功县人民法院), (2014) 武民初字第00947号, Mar. 9, 2015 (China) (ruling, following the receipt of testimony regarding domestic violence, that the male plaintiff's claim for a return of the bride price was not supported, without further elaboration).

209 *See, e.g.*, Liu v. Zhao (刘某诉赵某), Henan Handan City Fengfengkuang Dist. People's Ct. (河北省邯郸市峰峰矿区人民法院), (2015) 峰民初字第11号, May 26, 2015 (China) (denying male plaintiff's request for a return of a 40,000 *yuan* bride price where the plaintiff provided no evidence in support of that claim); Liu v. Xiao (刘诉肖), Hebei Chengde Cnty. People's Ct. (河北省承德县人民法院), (2016) 冀0821民初506号, Mar. 10, 2016 (denying both the female plaintiff's and the male defendant's respective claims for the return of marital property because the parties presented insufficient evidence).

210 *See, e.g.*, Hu v. Tang (胡某某诉汤某某), Gansu Jiuquan Suzhou Dist. People's Ct. (甘肃省酒泉市肃州区人民法院), (2017)甘0902民初2927号, Oct. 13, 2017 (China) (holding that "according to the civil law's principle of fairness, the defendant's request for the return of the bride price is supported."); Li v. Jia (李某某诉贾某某), Shaanxi Dali Cnty. People's Ct. (陕西省大荔县人民法院), (2016)陕0523民初2365号, Oct. 18, 2014 (China) (holding that woman should return the bride price based on "public order and good customs").

211 *See, e.g.*, He v. Dong (何某某诉董某某), Anhui Si Cnty. People's Ct. (安徽省泗县人民法院), (2015) 泗民一初字第01122 号, May 5, 2014 (China) (holding that although a couple had lived together for more than 1.5 years before they fought, the woman should return the 100,000 *yuan* bride price due to "the short duration of their marriage as well as the unauthorized abortion and relatively large size of the bride price"); Chen v. Luo (陈某某诉罗某某), Hunan Liling City People's Ct. (湖南省醴陵市人民法院), (2016)湘 0281民初311号, Mar. 28, 2016 (China) (responding to the man's allegations that the "unauthorized abortion was totally irresponsible toward the family, caused great injury to both the plaintiff's property and spirit, and totally destroyed their marital feelings," by ordering the woman to return the bride price and commenting "both sides had faults"); Cao v. Lin (曹某某诉林某某), Jiangsu Xinghua City People's Ct. (江苏省兴化市人民法院), (2014)泰兴民初字第2197号, Dec. 11, 2014 (China) (stating that bride price determinations are based on "factors such as the cause of the marital dispute and the parties' fault," before awarding the man a portion of the bride price).

between the parties," when the only allegation levied against her involved an "unauthorized abortion."[212] In another Jiangsu case, the court ordered the woman to return 30,000 *yuan* of the bride price because "the parties only lived together for one month before separating" and "the defendant terminated her pregnancy without authorization."[213] In many of these cases, courts appeared not only to be applying the SPC's 2003 Interpretation but also to be providing legal recourse for men's expectations that marriages secured by a bride price payment confer an enforceable expectation of reproduction.

3. Custody

In addition to pursuing a broad range of claims for pecuniary relief,[214] men also cited their partners' abortions while staking claims for nonpecuniary relief. Some men argued

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212 Zhou v. Wu (周某某诉吴某某), Jiangsu Nanjing Lishui Dist. People's Ct. (江苏省南京市溧水区人民法院), (2014)溧民初字第2003号, Nov. 28, 2014 (China).

213 Shen v. Sun (沈某某诉孙某某), Jiangsu Wuxi Beitang Dist. People's Ct. (江苏省无锡市北塘区人民法院), (2014)北民初字第0704号, July 18, 2014 (China) (woman arguing that she terminated a pregnancy only because the two argued extensively during her pregnancy, and not because she was uncommitted to "living together" as a married couple). *See also, e.g.*, Guo v. Guo (郭某某诉郭某某), Ningxia Yanchi Cnty. People's Ct. (宁夏回族自治区盐池县人民法院), (2014)盐民初字第512号, Sept. 15, 2014 (China) (finding that the man's "physical abuse caused her to leave the home" after reviewing photos of the woman's injuries but still ordering her to return the 25,000 *yuan* bride price); Zhao v. Wu (赵某某诉吴某某), Shaanxi Zhouzhi Cnty. People's Ct. (陕西省周至县人民法院), (2017)陕0124民初61号, Apr. 17, 2017 (China) (although the woman claimed they were married for two years and she "miscarried because of the male plaintiff," the court ordered her to return the bride price, opining that "she was certainly at fault for terminating her pregnancy without authorization or the consent of the plaintiff and his family"); Du v. Wang (杜某某诉王某某), Henan Shangcheng Cnty. People's Ct. (河南省商城县人民法院), (2016)豫1524民初5号, Mar. 8, 2016 (China) (ignoring the woman's request for spousal support, ordering a return of a large portion of the bride price, and denying her request for damages due to domestic violence, even though she introduced police reports, photos of her injuries, and medical records documenting the costs of her domestic violence-induced miscarriage).

214 Some men sought forms of pecuniary relief specific to their perceived circumstances, beyond the categories of economic damages that recur in these cases, (i.e., emotional damages, bride price return.) For instance, some men requested reimbursement for the costs of their wives' reproductive care or for administrative fees paid to the Family Planning Commission to register a second child, where such a license was never utilized due to an abortion. *See, e.g.*, Liang v. Li (梁凡妹诉李金祥), Guizhou Qinglong Cnty. People's Ct. (贵州省晴隆县人民法院), (2016) 黔2324民初283号, June 6, 2016 (China) (male litigant sought reimbursement for lost work while he cared for his spouse while she was on medical leave); Niu v. Fu (牛某某诉付某某), Henan Tanghe Cnty. People's Ct. (河南省唐河县人民法院), (2016) 唐民一初字第1260号, Mar. 14, 2016 (China) (male litigant sought reimbursement for costs of wife's abortion); Ayi v. Busha (阿依某某诉布沙某某), Sichuan Ganluo Cnty. People's Ct. (四川省甘洛县人民法院), (2016) 川3435民初70号, Apr. 5, 2016 (China) (male litigant sought various forms of relief and to avoid paying for the costs of the birth of one of his children). A few men sought compensation for "loss of youth" and even for labor performed in service of their wives'

their partner's abortion was a reason to award the man custody.[215] In a 2014 case from Guangdong province, the husband's only argument for custody was that his wife "had taken the initiative to abort [our] second child. Therefore, custody of [our] first child should be granted to [me]."[216] Likewise, in a 2016 case from Gansu province, a woman petitioned for divorce after having fled her marital home due to domestic violence.[217] Her husband argued that because she obtained an "abortion procedure without his consent or authorization" and "ran away from home," thus "failing to fulfill her obligations as a mother," he should be awarded custody of their children, who were twins.[218] In its factual summary, the court

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families' land or business during the marriage. *See, e.g.*, Luo v. Yuan (罗某某诉袁某某), Sichuan Jianwei County People's Ct. (四川省犍为县人民法院), (2016)川1123民初159号, Mar. 9, 2016 (China) (male litigant sought 150,000 *yuan* in damages as a "loss of youth fee"); Li v. Cai (黎某诉蔡某), Guangdong Yangshan County People's Ct. (广东省阳山县人民法院), (2015)清阳法黎民初字第208号, Jan. 18, 2016 (China) (male litigant sought 50,000 *yuan* as a "loss of youth" fee); Gao v. Zhang (高某诉张某), Zhejiang Jiaxing Xiuzhou People's Ct. (浙江嘉兴市秀洲区人民法院), (2010)嘉秀王民初字第130号, Sept. 16, 2010 (China) (male litigant sought, inter alia, compensation for years of allegedly unpaid labor for his wife's parents' business, while his wife alleged that he began working for her parents once his career "failed"); Yin v. Chen (殷某某诉陈某某), Anhui Xuancheng City Xuanzhou Dist. People's Ct. (安徽省宣城市宣州区人民法院), (2015)宣民一初字第01385号, Aug. 13, 2015 (China) (male litigant sought compensation for "more than twenty years of hard labor" on his wife's family's land, for which he was allegedly "not compensated").

215 Custody was disputed in 111 cases. In many cases, men's allegations of their wives' "unauthorized abortion" were not explicitly cited as the basis for their requests to be granted custody; however, men raised the subject of their wives' pregnancy terminations for seemingly no other purposes than emphasizing their wives' relative faults, before requesting custody. *See, e.g.*, Lin v. Liu (林某某诉刘某某), Anhui Ma'anshan Huashan Dist. People's Ct. (安徽省马鞍山市花山区人民法院), (2015)花民一初字第01398号, Aug. 19, 2015 (China) (husband arguing his wife, who alleged fleeing domestic violence, was "immoral" for "aborting their five-month old daughter" and for moving out and that he deserved custody, child support, and equitable division of their assets); Wang v. Zhu (汪某某诉朱某某), Zhejiang Kaihua Cnty. People's Ct. (浙江省开化县人民法院), (2017)浙0824民初2487号, Oct. 14, 2017 (China) (husband alleging that his wife once obtained an "unauthorized abortion" and requested custody after the wife alleged that he failed to support their daughter following their separation); Peng v. Li (彭某某诉李某某), Hunan Liling City People's Ct. (湖南省醴陵市人民法院), (2013)醴法民一初字第326号, Apr. 2, 2014 (China) (husband citing his wife's "unauthorized abortion" as the "main issue in the relationship" and requested full custody after the wife alleged she was the sole caregiver to their toddler).

216 Jiang v. Lin (江某某诉林某某), Guangdong Jieyang Jiedong Dist. People's Ct. (广东省揭阳市揭东区人民法院), (2014)揭东法曲民初字第84号, Apr. 8, 2014 (China).

217 *See* Duan v. Guo (段某某诉郭某某), Gansu Jingtai Cnty. People's Ct. (甘肃省景泰县人民法院), (2016)甘0423民初848号, May 4, 2016 (China).

218 *Id.*

did not discuss the domestic violence issue—instead, it focused on the woman's "abortion without the husband's consent," and then awarded each parent custody of one twin.[219]

No court explicitly cited a woman's reproductive decision as grounds for denying custody. However, within the cases we read, courts granted men custody at two times the rate they granted women custody. Courts often did so without explanation or simply because children had been residing with the man's family following a separation,[220] even though separations are often due to domestic violence and the default conditions of a patrilocal marriage system.[221] In one case from Hunan province, a woman petitioned for divorce and custody, alleging her husband threatened and beat her severely after she obtained an abortion, which caused them to separate.[222] After the husband argued that their child would "suffer" under her mother's custody, the court found "the plaintiff's private abortion shook their marital foundation" and awarded him custody.[223] Generally, our findings confirm prior scholarship, which has found that courts deny women custody at disproportionate rates.[224] Our findings additionally suggest that judicial bias against women who exercised reproductive autonomy may constitute an additional finger on the scale weighing against women in custody determinations.

4. Divorce

In one-third of the cases we read, men referenced an "unauthorized abortion" simply to argue for or against a divorce. To these men, the "unauthorized abortion" explained why conflict arose in the relationship or served as evidence of a "breakdown of mutual affection" so severe that their wives were unwilling to bear children with them. Unlike the

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219 *Id.*

220 *See, e.g.*, Guo v. Feng (郭某某诉冯某某), Henan Puyang Cnty. People's Ct. (河南省濮阳县人民法院), (2014)濮民初字第2853号, Dec. 24, 2014 (China) ("Regarding the question of child-rearing," the couple's child "currently lives with the [male] defendant. Because changing the child's living and educational environment is not conducive to child's development," the father shall be awarded custody.); Ren v. Sun (任某诉孙某), Shandong Yanggu Cnty. People's Ct. (山东省阳谷县人民法院), (2016)鲁1521民初2376号, Aug. 18, 2016 (China) (because the couple's daughter "currently lives with the [male] defendant," and because "unauthorized changes to her living environment are not conducive to her development," she "shall live with the defendant").

221 MICHELSON, *supra* note 84.

222 *See* Chen v. Zhang (陈某某诉张某某), Hunan Luxi Cnty. People's Ct. (湖南省泸溪县人民法院), (2014)泸民初字第80号, Apr. 11, 2014 (China).

223 *Id.*

224 *See* MICHELSON, *supra* note 84, at 382–89.

arguments for financial compensation, these claims are recognized under Chinese law.[225] Yet many such arguments came with a strong tone of opprobrium for women who sought reproductive care[226] and could have resulted in adverse outcomes for women.[227]

Courts regularly dismiss first-time divorce petitions on procedural grounds, regardless of the merits of the claims.[228] In cases where courts did eventually grant divorces, many courts attributed marital breakdown to the woman's pregnancy termination.[229] However, only a handful of courts cited the law that allows courts to grant divorce on the basis of reproductive disputes.[230] Instead, in granting men's petitions for divorce, several courts

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225 *See supra* notes 79–82 and accompanying text.

226 *See infra* Part III Section B.2–B.3.

227 On one hand, where men relied on such arguments to seek divorce, women faced losing custody and the socioeconomic safety net of their marriages. *See, e.g.*, Li v. Wei (李某某诉魏某某), Henan Qianxi Cnty. People's Ct. (河北省迁西县人民法院), (2016)冀 0227民初1299号, Aug. 30, 2016 (China); Pang v. Chen (庞某某诉陈某某), Guangdong Zhanjiang Potou Dist. People's Ct. (广东省湛江市坡头区人民法院), (2016)粤0804民初1139号, Sept. 19, 2015 (China). The consequences of this are disparately high for women, given the stigmatization of divorce and the maintenance of patrilocal and patrilineal customs. *Cf.* HE, *supra* note 84, at 141–72. On the other hand, where men cited their partner's abortion to oppose divorce, women were forced to remain in often abusive marriages. *See, e.g.*, Wu v. Cao (吴某某诉曹某某), Shandong Linshu Cnty. People's Ct. (山东省临沭县人民法院), (2015)沭民初字第931号, May 7, 2015 (China); Wang v. Zhao (王某某诉赵某某), Ningxia Lingwu City People's Ct. (宁夏回族自治区灵武市人民法院), (2015) 灵民初字第2905号, Nov. 25, 2015 (China). Outcomes could be even worse for women who were disabled, older, or divorced, as they were encouraged to stay in abusive marriages. The courts estimated that such women would struggle to remarry or support themselves after divorce. *See, e.g.*, Zhong v. Huang (钟某某诉黄某某), Guangdong Yunan Cnty. People's Ct. (广东省郁南县人民法院), (2016)粤5322民初67号, Mar. 3, 2016 (China) (remarking that a woman should be grateful for the husband's "generosity" for "voluntarily marrying" someone with a hearing disability after she petitioned for a divorce from her three-year "unbearable marriage" in which her husband physically and sexually abused her); Jiang v. Miao (姜某某诉苗某某), Hubei Nanzhang Cnty. People's Ct. (湖北省南漳县人民法院), (2014)鄂南漳长民初字第00226号, Nov. 20, 2014 (China) (denying a woman's petition for divorce, because the couple was "older and should cherish their relationship").

228 *See supra* notes 100–101 and accompanying text.

229 *See, e.g.*, Cao v. Shen (曹某诉沈某某), Jilin Siping Tiexi Dist. People's Ct. (四平市铁西区人民法), (2015)四西郊民初字第235号, July 8, 2015 (China) ("This court believes . . . . that the defendant's lack of consideration for the plaintiff's feelings in doing away with the couple's children without authorization, especially, was extremely injurious to the couple's connection and led the marriage to an irretrievable point"); Wang v. Ren (王某诉任某), Hubei Wuhan City Jiangxia Dist. People's Ct. (湖北省武汉市江夏区人民法院), (2014)鄂江夏乌民初字第00158号, July 28, 2014 (China) ("The pregnancy termination, which was undertaken due to quarrels over trivial things, caused the relationship to deteriorate.").

230 *See supra* notes 79–82.

suggested that couples who did not procreate did not have a "real marriage."[231] Although dismissing divorce petitions is courts' default ruling, some courts specifically used the fact of a prior pregnancy termination to deny women's divorce petitions. Several judges interpreted evidence of pregnancy as evidence of sexual activity between the parties and, therefore, inferred the existence of a good marriage.[232] In one case from Jiangsu province, the court declared that "the parties must have a good relationship if the defendant became pregnant multiple times."[233] In another case, a woman seeking divorce claimed to have suffered serial abuse within her marriage.[234] The defendant introduced the plaintiff's ultrasound to demonstrate "that the relationship between the parties is good."[235] The court denied the divorce and adopted the man's rationale: the parties "conceived a child, which is evidence of a good marital relationship."[236]

Other courts denied women divorces despite allegations of spousal abuse and sexual assault because of the couple's reproductive potential and the husband's desire to continue the relationship.[237] In a case from Hebei province, the female plaintiff petitioned for divorce and recounted to the court her experience of being forced to have sex with the

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231 *See, e.g.*, Li v. Zhao (李某某诉赵某某), Xinjiang Korla City People's Ct. (新疆维吾尔自治区库尔勒市人民法院), (2015)库民初字第2626号, Aug. 31, 2015 (China) (ordering domestic violence survivor to return the 70,000 *yuan* bride price because a real marriage had not formed, while denying her claims for medical and emotional damages).

232 *See, e.g.*, Wang v. Zhang (王某某诉张某某), Shandong Leling City People's Ct. (山东省乐陵市人民法院), (2016)鲁1481民初1191号, June 23, 2014 (China) (denying a woman's divorce request, despite her introducing medical records showing she was hospitalized for domestic violence, because the parties had a daughter and therefore had an "average" relationship); Yang v. Zhang (杨某某诉张某某), Shaanxi Yang Cnty. People's Ct. (陕西省洋县人民法院), (2016)陕 0723民初1467号, Sept. 21, 2016 (China); He v. Bian (何某某诉边某某), Shaanxi Yulin Yuyang Dist. People's Ct. (陕西省榆林市榆阳区人民法院), (2016)陕0802民初5415号, Aug. 10, 2016 (China); Yang v. Wang (杨某某诉王某某), Henan Xihua Cnty. People's Ct. (河南省西华县人民法院), (2014)西民初字第407号, May 13, 2015 (China). *Cf.* UNFPA China, *supra* note 101 at 3 (reporting that 14% of men surveyed admitted to sexually assaulting their partners).

233 Wang v. Liu (王某某诉刘某某), Jiangsu Huaian Qingpu Dist. People's Ct. (江苏省淮安市清浦区人民法院), (2014)浦民初字第4177号, Dec. 4, 2016 (China).

234 *See* Liu v. Zhu (刘某某诉朱某某), Jiangxi Pingxiang Anyuan Dist. People's Ct. (江西省萍乡市安源区人民法院), (2016)赣0302民初399号, May 30, 2016 (China).

235 *Id.*

236 *Id.*

237 *See, e.g.*, Zhong v. Huang (钟某某诉黄某某), Guangdong Yunan Cnty. People's Ct. (广东省郁南县人民法院), (2016)粤5322民初67号, Mar. 3, 2016 (China) (denying a divorce claim from a woman married to an allegedly sexually and physically abusive defendant, ordering her to pay court fees, and encouraging her "to

defendant multiple times, including one instance of physical and sexual abuse that induced a miscarriage.[238] The defendant denied that the couple had anything but a good marriage, yet accused the plaintiff of "obtaining an abortion without the defendant's consent or authorization."[239] The court denied the woman's petition and ordered her to pay all court fees, opining that "although the plaintiff claims the defendant committed sexual abuse against her, leading to the breakdown of their relationship, the plaintiff has not satisfied her burden of proof, so this court cannot support a divorce."[240] The court proceeded to wish the two well in their marriage: "The two sides should cherish one another's feelings. It is inevitable for husbands and wives to have conflicts, and divorce is not a solution . . . . The two should mutually respect one another and be considerate and sincere toward one another. If so, everything will be okay."[241] Court decisions thus normalized men's expectations that wives remain reproductively—and sexually—available to their husbands, while legally confining women to abusive relationships.

B. How Men Discredit Women

This Part discusses how, beyond seeking compensation, custody, or divorce, men also strategically used claims regarding abortion to rationalize domestic abuse, question a range of conduct by women, and raise doubts about their wives' sexual morality. Male litigants were aided by legal counsel in most cases presenting these claims,[242] suggesting that lawyers believed such arguments had strategic value. Courts' expressions of sympathy toward men and reprimands of women, which often mirrored men's arguments in both style and substance, indicate that such litigation strategies were often effective.

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cherish her existing family…dispel the idea of a divorce, communicate more with the defendant, and give the children a healthy and happy environment in which to grow up").

238 *See* Wang v. Ning (王某某诉宁某某), Hebei Handan Yongnian Dist. People's Ct. (河北省邯郸市永年区人民法院), (2012)永民初字第03602号, Jan. 29, 2013 (China).

239 *Id.*

240 *Id.*

241 *Id.*

242 Men were represented by a lawyer in at least 511 cases (54%). In 65 of the 115 cases in which men requested emotional or fault-based damages based on the pregnancy termination (57% of such cases), the court decisions noted that men were represented.

1. Distracting From and Rationalizing Abuse

Men's arguments regarding unauthorized abortions often appeared to be efforts to distract attention from claims of abuse, rather than simply efforts to obtain compensation or other relief.[243] Men responded to women's accounts of domestic violence that led to hospitalization (and in some cases loss of their pregnancies) by offering a different account of why their wives were hospitalized: to obtain an abortion without the husband's consent.[244] In one 2016 case in Shandong province, for example, a woman sued for divorce, custody, and half of her husband's income earned during the marriage.[245] According to the plaintiff, her husband had a serious temper and could not handle their newborn daughter's crying; he began physically abusing the plaintiff and cut her and their daughter off financially.[246] The plaintiff introduced hospital records to prove that she was treated for domestic violence.[247] In response, the defendant asserted that the hospital records did not relate to or prove treatment for domestic violence, but rather were the result of an "abortion she obtained without his authorization."[248]

Men repeatedly introduced women's medical records as evidence, including records of gynecological exams, abortion procedures, medical bills, and ultrasounds, to argue that

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243 *See, e.g.*, Yan v. Xiao (严某某诉肖某某), Sichuan Gao Cnty. People's Ct. (四川省高县人民法院), (2015)宜高民初字第589号, May 10, 2015 (China) (when a wife argued she fled due to domestic violence, her husband argued that her spending habits, departure, and unilateral abortion were evidence not of domestic violence, but rather of her intent to defraud him); Hu v. Tang (胡某某诉汤某某), Gansu Jiuquan Suzhou Dist. People's Ct. (甘肃省酒泉市肃州区人民法院), (2017)甘0902民初2927号, Oct. 13, 2017 (China) (wife alleged her husband caused her to miscarry by forcibly having sex with her during her pregnancy, after which he "spread negative rumors" about her and accused her of willfully terminating her pregnancy; her husband responded that the abortion proved she intended to defraud him through the marriage); Jia v. Li (贾某某诉黎某某), Gansu Chongxin Cnty. People's Ct. (甘肃省崇信县人民法院), (2015)崇民初字309号, Aug. 20, 2015 (China) (a woman introduced medical records and hospital reports to prove that her husband had stabbed her, and he responded that she had obtained an abortion without his consent).

244 *See, e.g.*, Yue v. Cai (岳某某诉蔡某某), Ningxia Wuzhong Litong Dist. People's Ct. (宁夏回族自治区吴忠市利通区人民法院), (2015)吴利民初字第2845号, Nov. 27, 2015 (China) (after a woman alleged suffering persistent domestic violence, resulting in a miscarriage, her husband denied only the specific allegation that he "dragged her down the stairs" and claimed she went to the hospital to abort a fetus, not for trauma treatment).

245 Wang v. Zhang (王某某诉张某某), Shandong Leling City People's Ct. (山东省乐陵市人民法院), (2016)鲁1481民初1191号, June 23, 2014. (China).

246 *See id.*

247 *See id.*

248 *Id.*

women had terminated healthy pregnancies.[249] Male efforts to introduce such evidence coincided with cases in which women alleged domestic violence.[250] In one case from Jiangxi province, a woman without a lawyer sued for divorce, arguing that her husband abused her and that the two had been separated for three years.[251] The defendant claimed that their relationship had soured when the plaintiff announced that she "aborted their child without authorization" and ran away.[252] He introduced a copy of an ultrasound performed on the plaintiff to prove "the relationship between the parties [was] good"—that the two were sexually active.[253] In these cases—and potentially in a great number of cases in which female litigants were less vocal in raising claims of abuse—female litigants were effectively forced to confront their alleged abusers as those men accessed their personal medical information. By introducing medical evidence, abusers may also have been weaponizing the very fact and result of their abuse: a pregnancy.

In a related set of cases, male litigants attempted to rationalize abusive conduct as an emotional but justifiable reaction to learning about their wives' reproductive decisions.[254] One

249 Men did so in eighty-nine cases.

250 In twenty-seven of the eighty-nine cases in which men introduced such evidence, women claimed to have been either survivors of domestic violence or to have lost a pregnancy involuntarily. In eleven of these cases, women alleged their husband's domestic violence caused them to miscarry. In a 2012 case from Hebei province, for example, a woman recounted her experience of being forced to have sex with the defendant multiple times, including one instance of physical and sexual abuse that led her to lose a pregnancy. Wang v. Ning (王某某诉宁某某), Hebei Handan Yongnian Dist. People's Ct. (河北省邯郸市永年区人民法院), (2012)永民初字第03602号, Jan. 29, 2013 (China). The defendant argued that the plaintiff obtained a "voluntary abortion without his consent" and introduced his mother's testimony that she attended a fetal check-up with the plaintiff earlier in the pregnancy, which he claimed proved the fetus's viability. *Id.*

251 *See* Liu v. Zhu (刘某某诉朱某某), Jiangxi Pingxiang Anyuan Dist. People's Ct. (江西省萍乡市安源区人民法院), (2016)赣0302民初399号, May 30, 2016 (China).

252 *Id.* The male litigant stated that "everyone wanted the child." *Id.*

253 *Id.* Unfazed by the allegations of abuse, the court denied the divorce petition, holding it was persuaded by the man's "evidence the parties had a good marital relationship." *Id.* Men also argued that pregnancies were evidence of healthy, loving marriages. *See, e.g.*, Wang v. Ning (王某某诉宁某某), Hebei Handan Yongnian Dist. People's Ct. (河北省邯郸市永年区人民法院), (2012)永民初字第03602号, Jan. 29, 2013 (China); Wang v. Zhao (王某某诉赵某某), Ningxia Lingwu City People's Ct. (宁夏回族自治区灵武市人民法院), (2015)灵民初字第2905号, Nov. 25, 2015 (China).

254 *See, e.g.*, Zhang v. Deng (张某某诉邓某某), Gansu Jishishan Baoan Dongxiang and Sala Autonomous Cnty. People's Ct. (甘肃省积石山保安族东乡族撒拉族自治县人民法院), (2016)甘2927民初153号, June 28, 2016 (China) (husband admitting that he beat his wife with a leather belt because she terminated her pregnancy); Yang v. Feng (杨某某诉冯某某), Ningxia Yongning Cnty. People's Ct. (宁夏回族自治区永宁县人民法院), (2016)宁0121民初754号, June 23, 2016 (China) (husband admitting he beat his wife because

woman's divorce petition alleged that her husband suffered from a "harmful machismo" and was prone to domestic violence, especially after she obtained an abortion.[255] The defendant did not contest her allegations of domestic violence but rationalized their conflicts as being caused by the plaintiff's "unauthorized abortion."[256] In another case, a woman from Hubei province petitioned for divorce, claiming that her husband exhibited highly controlling behavior, surveilled her communications, and eventually began physically abusing her.[257] The defendant admitted to the abuse but blamed their conflict on her "unauthorized abortion."[258] In two other cases, men attempted to legitimize abusive, controlling behavior by arguing that they acted to protect the pregnancy.[259] One male defendant asserted a sense of entitlement to have sex and reproduce with his spouse, arguing that "allegations of spousal rape are contrary to the understanding of husbands and wives."[260]

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she terminated a pregnancy, although she alleged she terminated the pregnancy because she suffered from dysplasia); Xia v. Luo (夏某某诉罗某某), Hunan Changsha Kaifu Dist. People's Ct. (湖南省长沙市开福区人民法院), (2015)开民一初字第05189号, Dec. 21, 2015 (China) (husband admitting to beating his wife after learning about her miscarriage but argued that she took no action to mitigate the risk of miscarriage and denied him his "reproductive and knowledge rights").

255 Qu v. He (屈某某诉何某某), Chongqing Banan Dist. People's Ct. (重庆市巴南区人民法院), (2016)渝0113民初445号, Mar. 18, 2016 (China).

256 *Id.* The court denied the woman's divorce petition and urged the couple to "enhance communication, mutually care for one another, [and] try to understand one another" *Id.*

257 *See* Shen v. Chen (申某某诉陈某某), Hubei Xianfeng Cnty. People's Ct. (湖北省咸丰县人民法), (2014)鄂咸丰民初字第00338号, May 30, 2014 (China).

258 *Id.* The court granted the divorce, requiring the female plaintiff to pay all court fees, and finding that "the plaintiff's obtaining an induced unauthorized abortion led to an emotional crisis." *Id.*

259 One man admitted to locking his wife in a room "to protect the fetus" when she was attempting to "run away and obtain an unauthorized abortion." Liao v. Huang (廖某某诉黄某某), Henan Xinyang Pingqiao Dist. People's Ct. (河南省信阳市平桥区人民法院), (2014)平民初字第02434号, Dec. 29, 2014 (China). Another man rationalized confiscating his wife's phone and refusing to let her communicate with others, claiming that "using [her] phone is not good for [her] health when [she is] pregnant." Gou v. Tan (苟某某诉谭某某), Chongqing Shizhu Tujia Autonomous Cnty. People's Ct. (重庆市石柱土家族自治县人民法院), (2016)渝0240民初2553号, Aug. 18, 2016 (China).

260 Zhong v. Huang (钟某某诉黄某某), Guangdong Yunan Cnty. People's Ct. (广东省郁南县人民法院), (2016)粤5322民初67号, Mar. 3, 2016 (China). In this case, the man did not seek the bride price, but claimed his wife was "lazy" and using him for money. *Id.* Additionally, responding to his wife's allegations of sexual assault, he called her "frigid" (性冷淡) and argued that her claims were disingenuous, as neither the police nor the Women's Federation had ever received a complaint from her. *Id.* For further discussion of sexual entitlement, see Brian Wong, *The Long Road to Ending Gendered Violence in China*, 3 U.S.-ASIA L. INST. PERSPS. 1, 1–2 (2022).

In several cases, men admitted to using coercive tactics outside of court to prevent their spouses from accessing abortions. In a 2016 case from Guangdong, a male litigant sought the court's assistance to prevent his wife from obtaining an abortion.[261] She sued for divorce after three years of marriage, claiming the defendant's "personality changed" once she gave birth to a daughter and that he physically abused and sexually assaulted her.[262] Calling the marriage "unbearable," she requested a divorce and custody.[263] The defendant requested the court deny the petition.[264] He argued that the plaintiff could not seek a divorce while pregnant, but only six months after terminating a pregnancy or one year after childbirth,[265] ignoring the fact that the relevant legal restriction on filing for divorce during or after a pregnancy applies only to men.[266] The defendant threatened the plaintiff with "unpredictable consequences" if she "illegally and without authorization used certain tactics to obtain an abortion" to extricate herself from the relationship.[267] The court did not address the legal argument or the woman's pregnancy, but it rejected the divorce, ordered the woman to pay court fees, and effectively returned her to her husband's control.[268] In another case, a husband admitted to making his wife sign a "guarantee letter" after she obtained an abortion.[269] In the letter, she admitted to her fault and promised both not to terminate a pregnancy again and "to live a good life with her husband."[270] In yet another

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261 *See* Zhong v. Huang (钟某某诉黄某某), Guangdong Yunan Cnty. People's Ct. (广东省郁南县人民法院), (2016)粤5322民初67号, Mar. 3, 2016 (China) (the suit was a first-time petition).

262 *Id.*

263 *Id.*

264 *Id.*

265 *Id.*

266 *See* 2001 Marriage Law, art. 34. Another court deemed it "necessary" under the same provision to adjudicate a man's divorce claim when he sought divorce less than six months after his spouse miscarried. Qu v. Pan (曲某某诉潘某某), Liaoning Dandong Yuanbao Dist. People's Ct. (辽宁省丹东市元宝区人民法院), (2016)辽0602民初995号, Sept. 28, 2016 (China).

267 Zhong v. Huang (钟某某诉黄某某), Guangdong Yunan Cnty. People's Ct. (广东省郁南县人民法院), (2016)粤5322民初67号, Mar. 3, 2016 (China).

268 *Id.*

269 Niu v. Fu (牛某某诉付某某), Henan Tanghe Cnty. People's Ct. (河南省唐河县人民法院), (2016) 唐民一初字第1260号, Mar. 14, 2016 (China).

270 *Id.*

case, a woman alleged that her husband often beat her, "especially when she refused to have sex with him," and had threatened to "kill her entire family if she obtained an abortion."[271]

Men's efforts to use abortion to distract from and discredit domestic violence claims appear to have succeeded in many cases: Courts often did not acknowledge women's domestic violence allegations, but instead recounted men's allegations that women obtained "unauthorized abortions."[272] In the rare cases where courts did acknowledge domestic violence, courts used passive language—such as that the two "had fights"—and thus did not attribute blame to the husband.[273] Some courts balanced women's fault for having an abortion against men's fault for engaging in adultery, domestic violence, or defamation, and let losses lie based on that comparison.[274] In a 2014 case from Jiangsu province, a woman sued for a divorce and division of assets, claiming that her husband frequently beat her and that she was "forced" to terminate her pregnancy, after which her husband's "violence" continued.[275] Her husband, who had a lawyer, agreed to a divorce, but argued his wife should compensate him for emotional damages for her "unauthorized abortion."[276] The court granted the divorce but ordered him to pay only a fraction of their joint assets,

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271 Lü v. Wen (吕某某诉文某某), Guangxi Pubei Cnty. People's Ct. (广西壮族自治区浦北县人民法院), (2016) 桂0722民初327号, Mar. 9, 2016 (China) (the female litigant explained that she initially tried to cope with her husband's physical and sexual abuse by complying and providing him with a son, but she decided she could no longer tolerate the abuse and sought divorce during her second pregnancy, at which point her husband continued to threaten, follow, and harass her).

272 Chinese court opinions generally recount each party's arguments, followed by the court's factual summary. *See, e.g.*, Ma v. Ding (马某某诉丁某某), Henan Sanmenxia Hubin Dist. People's Ct. (河南省三门峡市湖滨区人民法院), (2016)豫1202民初1162号, May 24, 2016 (China).

273 *See, e.g.*, Cheng v. Zhou (程某某诉周某某), Shaanxi Xian Lintong Dist. People's Ct. (陕西省西安市临潼区人民法院), (2015)临潼民初字第01298号, Aug. 20, 2015 (China) (writing that "she had soft tissue injuries all over her body," without describing who inflicted them but then used active language when writing "she aborted her pregnancy without informing him.").

274 *See, e.g.*, Mei v. Xu (梅某某诉徐某某), Anhui Tongling Cnty. People's Ct. (安徽省铜陵县人民法院), (2014)铜民一初字第00573号, Jan. 5, 2015 (China) (ruling that "both parties were responsible for mishandling the situation" after the wife allegedly obtained an abortion without her husband's consent and the husband allegedly harassed her and defamed her as being adulterous, while also arguing that she should not have terminated the pregnancy).

275 Yuan v. Yue (袁某某诉岳某某), Jiangsu Xuzhou Tongshan Dist. People's Ct. (江苏省徐州市铜山区人民法院), (2014) 铜茅民初字第959号, Aug. 27, 2014 (China).

276 *Id.*

given "the relative fault of the parties."[277] His alleged faults involved domestic violence and gambling, while hers only involved an abortion.[278]

Our analysis confirms the prior scholarship regarding divorce litigation: courts distrust women, ignore extensive documentation of domestic violence,[279] routinely characterize domestic violence as unproblematic,[280] and rarely intervene to stop or even acknowledge abuse.[281] We additionally find that courts are more sympathetic to men's claims about

277 *Id.*

278 *See id.*

279 Courts routinely ignored extensive documentation of domestic violence, including hospital diagnostic records, photos of injuries, and police reports. *See, e.g.*, Lin v. Hong (林某某诉洪某某), Fujian Nanan City People's Ct. (福建省南安市人民法院), (2015)南民初字第5460号, Sept. 25, 2015 (China) (ruling that evidence of injuries alone could not prove who caused them); Yin v. Chen (殷某某诉陈某某), Anhui Xuancheng Xuanzhou Dist. People's Ct. (安徽省宣城市宣州区人民法院), (2015)宣民一初字第01385号, Aug. 13, 2015 (China) (ruling that hospital records, photos of injuries, and police reports indicating domestic violence did not prove that the wife's husband was the cause); Dong v. Zhu (董某某诉朱某某), Zhejiang Shaoxing Yuecheng Dist. People's Ct. (浙江省绍兴市越城区人民法院), (2007)越民一初字第1985号, Oct. 9, 2007 (China) (ruling that the evidence proved the wife broke her nose, but it did not prove that her husband broke it).

280 *See, e.g.*, Dong v. Zhu (董某某诉朱某某), Zhejiang Shaoxing Yuecheng Dist. People's Ct. (浙江省绍兴市越城区人民法院), (2007)越民一初字第1985号, Oct. 9, 2007 (China) (ruling that frequent physical abuse did "not rise to the level of domestic violence"); Mu v. Li (穆某某诉李某某), Henan Yongcheng City People's Ct. (河南省永城市人民法院), (2013)永民初字第2898号, Oct. 16, 2013 (China) (interpreting a signed guarantee letter promising to stop committing domestic violence as evidence that a man was not a threat, despite his persistent violations of the statement); Xiao v. Zhang (肖某某诉张某某), Hunan Huarong Cnty. People's Ct. (湖南省华容县人民法院), (2016)湘0623民初286号, Apr. 11, 2016 (China) (ruling that a man's behavior did not constitute domestic violence even after he injured his wife so severely that she had to miss work and was recommended ten days of rest by her doctor); Ma v. Ma (马某某诉马某某), Ningxia Guyuan Yuanzhou Dist. People's Ct. (宁夏回族自治区固原市原州区人民法院), (2015)原民初字第3088号, Nov. 20, 2015 (China) (finding that "the [marital] relationship [was] acceptable," even though the wife described her husband beating her with a leather belt until she miscarried and he did not deny it, because "conflicts are inevitable"); Xiao v. Chen (肖某某诉陈某某), Hunan Chenzhou Suxian Dist. People's Ct. (湖南省郴州市苏仙区人民法院), (2016)湘1003民初418号, Sept. 19, 2016 (China) (denying divorce, despite finding domestic violence, because the husband promised to "correct his behavior"); Xu v. Zhao (许某某诉赵某某), Gansu Dunhuang City People's Ct. (甘肃省敦煌市人民法院), (2015)敦民初字第1480号, Dec. 10, 2015 (China) (holding that allegations of physical and verbal abuse did not amount to domestic violence and constituted average "family arguments").

281 *See, e.g.*, Gu v. Chen (顾某某诉陈某某), Jiangsu Taixing City People's Ct. (江苏省泰兴市人民法院), (2014)泰济民初字第0578号, Aug. 13, 2014 (China) (stating that the couple had a solid relationship, despite the woman's claim that she miscarried due to domestic violence); Cheng v. Zhou (程某某诉周某某), Shaanxi Xi'an Lintong Dist. People's Ct. (陕西省西安市临潼区人民法院), (2015)临潼民初字第01298号, Aug. 20,

women's unilateral abortions than women's claims regarding domestic violence or their reproductive trauma.[282] These disparities suggest a segment of the judiciary is guided by two unspoken maxims. First, male pain should be taken seriously, while female pain can be ignored and excused. Second, perceived offenses to men's reproductive interests are more serious than violence against women.

2. Problematizing Women's Conduct: From Accessing Healthcare to Contraceptive Use

Men also used arguments regarding abortion to problematize and question other healthcare choices by their spouses. For instance, men sought to assign blame to women for using contraception, even though Chinese law requires all couples to practice birth control.[283] In a 2014 case, an unrepresented woman from Jiangxi province sued for divorce, alleging her husband had subjected her to nearly lethal domestic violence, leading her to miscarry.[284] She introduced as evidence photos depicting her injuries and medical records demonstrating she miscarried due to gynecological complications. The defendant, who was represented by a lawyer, responded that the plaintiff had utilized contraception (birth control pills) "without authorization […] which caused her pregnancy to develop abnormally and brought the defendant great psychological pain."[285] In a case from Guangxi, a male petitioner similarly argued his wife was at fault for taking contraceptives before her pregnancy, which "caused fetal development issues" and led to her having to obtain an "unauthorized abortion."[286]

Other men made similar arguments that women were responsible for jeopardizing their pregnancies.[287] One male defendant from Zhejiang asked the court to deny his wife's divorce

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2015 (China) (denying divorce because the couple only fought over "trivial" matters, despite the woman's claim that husband beat her severely, resulting in hospitalization).

282 *See infra* Part III Section C.1.

283 *See* 2001 Law on Population and Birth Planning, art. 20.

284 *See* Cai v. Song (蔡某某诉宋某某), Jiangxi Yujiang Cnty. People's Ct. (江西省余江县人民法院), (2014)余民一初字第323号, Jan. 30, 2014 (China).

285 *Id.*

286 He v. Yang (何某某诉杨某某), Guangxi Rong Cnty. People's Ct. (广西壮族自治区容县人民法院), (2016)桂0921民初1631号, July 27, 2016 (China).

287 *See, e.g.*, Zhang v. Gong (张某某诉巩某某), Gansu Wushan Cnty. People's Ct. (甘肃省武山县人民法院), (2014)武民初字第550号, Aug. 12, 2014 (China) (husband accusing his wife of "killing their child"

request, arguing that "he had always wanted a child more than anything, but that he was forgiving and not angry when the plaintiff obtained an abortion without authorization."[288] He described the plaintiff's hysterectomy as destroying his hopes for the marriage.[289] In another case, a woman recounted how she suffered from chronically elevated blood pressure during her pregnancy and how, when she "risked her life" to become pregnant a second time, her husband prevented her from seeking timely care, resulting in her suffering a disabling cerebral infarction.[290] Her husband, who was ultimately awarded custody as a non-disabled parent, argued that she obtained a unilateral abortion without his consent.[291]

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when the court found his wife sought treatment for lupus); Fang v. Li (方某某诉李某某), Guangdong Lufeng City People's Ct. (广东省陆丰市人民法院), (2014)汕陆法甲民初字第17号, Apr. 2, 2014 (China) (husband arguing that his wife deceived him by saying she was spending money on "medical treatment," but actually spent it on a "unilateral abortion"); Li v. Zhang (李某某诉张某某), Sichuan Dazhou Tongchuan Dist. People's Ct. (四川省达州市通川区人民法院), (2014)通川民初字第3312号, Oct. 13, 2014 (China) (husband's family placed so much pressure on the pregnant wife to seek specific medical treatment that she found objectionable, leading her to threaten suicide); Wang v. Wang (王某某诉王某某), Shandong Jinan Licheng Dist. People's Ct. (山东省济南市历城区人民法院), (2016)历城民初字第3315号, Jan. 13, 2016 (China) (husband sought divorce, bride price, and emotional damages for his wife's "unilateral abortion" and accused her of "marital fraud," though she presented hospital records showing she suffered from severe nausea, fainting, and vomiting during pregnancy, leading to health concerns for her and the fetus); Pan v. Gu (潘某某诉顾某某), Guizhou Danzhai Cnty. People's Ct. (贵州省丹寨县人民法院), (2016)黔2636民初66号, Mar. 18, 2016 (China) (wife describing how her husband verbally abused her on street outside of a hospital after she sought treatment for a gynecologic hemorrhage, signifying her pregnancy's termination); Wang v. Huang (王某某诉黄某某), Shaanxi Xianyang Qindu Dist. People's Ct. (陕西省咸阳市秦都区人民法院), (2016)陕0402民初379号, Apr. 18, 2016 (China) (husband acknowledging that the fetus lacked a heartbeat and that the pregnancy was causing his wife to be increasingly ill, but he still dissuaded her from undergoing an operation, which she later did "unilaterally"); Li v. Tao (李某某诉陶某某), Yunnan Zhanyi Cnty. People's Ct. (云南省沾益县人民法院), (2015)沾民初字第1215号陕0402民初379号, Sept. 14, 2015 (China) (husband accusing his wife of obtaining an abortion without his consent, but she alleged she terminated her pregnancy because her husband injured her head); Liang v. Liu (梁某某诉刘某某), Shanxi Lan Cnty. People's Ct. (山西省岚县人民法院), (2017)晋1127民初463号, June 16, 2017 (China) (husband accusing his wife of privately and voluntarily terminating a pregnancy, while the wife argued her pregnancy ended due to fetal hypoplasia).

288 Shen v. Mao (沈某某诉毛某某), Zhejiang Shaoxing Yuecheng Dist. People's Ct. (浙江省绍兴市越城区人民法院), (2016)绍越民初字第4785号, Mar. 21, 2016 (China).

289 *Id.*; *see also* Gu v. Zeng (顾某某诉曾某某), Zhejiang Jiashan Cnty. People's Ct. (浙江省嘉善县人民法院), (2013)嘉善西民初字第67号, July 25, 2013 (China) (man expressing frustration that he "paid close to 40,000 *yuan* to treat wife's congenital heart disease, so she could have a baby," only for her to obtain an "unauthorized abortion").

290 Liu v. Sun (刘某某诉孙某某), Hunan Xinhua Cnty. People's Ct. (湖南省新化县人民法院), (2015)新法民一初字第1271号, Sept. 9, 2015 (China).

291 *See id.*

Other men argued that their spouses harmed their pregnancies by "going hiking"[292] or using "a cell phone."[293]

In a small set of cases, men argued that women had given birth "without authorization" and should have terminated their pregnancies.[294] Almost all of these cases involved women initiating a suit against a partner to whom they were not married for his failure to pay child support.[295] In each case, the man's defense was that he should be exempted from support obligations because she gave birth without his "consent" or "authorization."[296] Just as men argued that women's unauthorized pregnancy terminations were wrongful, men in these cases painted the continuation of the pregnancy as a selfish act that violated either

292 Tang v. He (汤某某诉何某某), Shanghai Jing'an Dist. People's Ct. (上海市静安区人民法院), (2016)沪0106民初12133号, Aug. 25, 2016 (China).

293 Gou v. Tan (苟某某诉谭某某), Chongqing Shizhu Tujia Autonomous Cnty. People's Ct. (重庆市石柱土家族自治县人民法院), (2016)渝0240民初2553号, Aug. 18, 2016 (China). While men appeared inclined to find fault with a wide range of healthcare decisions made by their partners, we could not find cases within CJO in which women challenged their husband's decisions to obtain vasectomies as wrongful.

294 We located fourteen cohabitation and child support cases where men claimed that their partners had "unauthorized births." *See* Hu v. Yang (胡某某诉杨某某), Hunan Jishou City People's Ct. (湖南省吉首市人民法院), (2015)吉民初字第1754号, Dec. 25, 2015 (China); Wan v. Geng (万某某诉耿某某), Beijing Pinggu Dist. People's Ct. (北京市平谷区人民法院), (2015)平少民初字第05531号, Sept. 29, 2015 (China); Xiang v. Zhang (向某某诉张某某), Guangdong Wuchuan City People's Ct. (广东省吴川市人民法院), (2015)湛吴法民一初字第167号, Aug. 24, 2015 (China); Yang v. Yang (杨某某诉杨某某), Chongqing Yubei Dist. People's Ct. (重庆市渝北区人民法院), (2017)渝0112民初11761号, June 16, 2017 (China); Chai v. Wang (柴某某诉王某某), Zhejiang Jiangshan City People's Ct. (浙江省江山市人民法院), (2014)衢江民初字第289号, May 8, 2014 (China); Zhang v. Lü (张某某诉吕某某), Zhejiang Hangzhou Xiacheng Dist. People's Ct. (浙江省杭州市下城区人民法院), (2011)杭下民初字第1675号, Dec. 15, 2011 (China); Wang v. Li (王某某诉李某某), Fujian Xiamen Huli Dist. People's Ct. (福建省厦门市湖里区人民法院), (2015)湖民初字第1418号, June 10, 2015 (China); Yang v. Wang (杨某某诉王某某), Jilin Yedian City People's Ct. (吉林省桦甸市人民法院), (2016)吉0282民初3868号, Dec. 26, 2016 (China); Liu v. Liao (刘某某诉廖某某), Guangdong Zhaoqing Duanzhou Dist. People's Ct. (广东省肇庆市端州区人民法院), (2015)肇端法民一初字第349号, Dec. 30, 2015 (China); Yang v. Zhu (杨某某诉朱某某), Zhejiang Dongyang City People's Ct. (浙江省东阳市人民法院), (2016)浙0783民初6075号, June 24, 2016 (China); Li v. Li (李某某诉李某某), Beijing City High People's Ct. (北京市高级人民法院), (2018)京民申1433号, Mar. 30, 2018 (China); Du v. Yang (杜某某诉杨某某), Chongqing Wushan Cnty. People's Ct. (重庆市巫山县人民法院), (2013)山法民初字第01978号, Apr. 18, 2014 (China); Li v. She (李某某诉佘某某), Henan Shaan Cnty. People's Ct. (河南省陕县人民法院), (2015)陕民初字第626号, July 7, 2015 (China); Cao v. He (曹某某诉何某某), Shanxi Zhangzi Cnty. People's Ct. (山西省长子县人民法院), (2015)长民初字第1046号, May 3, 2016 (China).

295 *See supra* note 294. However, in one case, a man sued his spouse for having a second child in violation of national policy. Cao v. He (曹某某诉何某某), Shanxi Zhangzi Cnty. People's Ct. (山西省长子县人民法院), (2015)长民初字第1046号, May 3, 2016 (China).

296 *See supra* note 294.

the men's rights to not become fathers[297] or an agreement between the parties not to have children.[298] Some men referred to their payments of several thousand *yuan* to their partners to facilitate an abortion as if it were contractual consideration.[299] For instance, in one 2015 case from Hunan province, a woman requested custody, child support, and compensation for half of the child's medical expenses from her partner, whom she alleged had been absent from her and the child's life.[300] The defendant argued that the plaintiff's "childbirth without the defendant's consent violated his reproductive rights."[301] In these cases, courts uniformly ruled in favor of women and ordered men to pay child support.[302] Many cited Article 25 of the Marriage Law, which establishes that children born out of wedlock have the same rights as children born into marriages.[303]

Two themes run through men's arguments regarding unauthorized abortions and unauthorized births. First, men use legal and rights-focused rhetoric to reinforce arguments that appeal to socially conservative values and that cast their partners as immoral actors.

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297 *See, e.g.*, Liu v. Liao (刘某某诉廖某某), Guangdong Zhaoqing Duanzhou Dist. People's Ct. (广东省肇庆市端州区人民法院), (2015)肇端法民一初字第349号, Dec. 30, 2015 (China) ("she had a child for her happiness, but in so doing condemned the child to a life of unhappiness").

298 *See, e.g.*, Yang v. Yang (杨某某诉杨某某), Chongqing Yubei Dist. People's Ct. (重庆市渝北区人民法院), (2017)渝0112民初11761号, June 16, 2017 (China) (man arguing he and his partner entered into an "agreement that she would not give birth, expressing his clear objection to her continuing her pregnancy").

299 *See, e.g.,* Xiang v. Zhang (向某某诉张某某), Guangdong Wuchuan City People's Ct. (广东省吴川市人民法院), (2015)湛吴法民一初字第167号, Aug. 24, 2015 (China); Chai v. Wang (柴某某诉王某某), Zhejiang Jiangshan City People's Ct. (浙江省江山市人民法院), (2014)衢江民初字第289号, May 8, 2014 (China); Wang v. Li (王某某诉李某某), Fujian Xiamen Huli Dist. People's Ct. (福建省厦门市湖里区人民法院), (2015)湖民初字第1418号, June 10, 2015 (China); Yang v. Wang (杨某某诉王某某), Jilin Yedian City People's Ct. (吉林省桦甸市人民法院), (2016)吉0282民初3868号, Dec. 26, 2016 (China); Liu v. Liao (刘某某诉廖某某), Guangdong Zhaoqing Duanzhou Dist. People's Ct. (广东省肇庆市端州区人民法院), (2015)肇端法民一初字第349号, Dec. 30, 2015 (China); Yang v. Zhu (杨某某诉朱某某), Zhejiang Dongyang City People's Ct. (浙江省东阳市人民法院), (2016)浙0783民初6075号, June 24, 2016 (China).

300 *See* Hu v. Yang (胡某某诉杨某某), Hunan Jishou City People's Ct. (湖南省吉首市人民法院), (2015)吉民初字第1754号, Dec. 25, 2015 (China).

301 *Id.*

302 *See supra* note 294.

303 *See* 2001 Marriage Law, art. 25.

Second, when litigation becomes contentious, men manipulate women's capacity for pregnancy, regardless of the decisions women make in managing their pregnancies.[304]

3. Insinuating Licentiousness

Men also used women's abortions to discredit their spouses, insinuating that their wives were engaging in sexual activity for purposes other than reproduction and flouting traditional gender roles.[305] For instance, many male litigants cited their spouse's "unauthorized abortions" as the primary evidence that their spouses were never committed to the marriage. Specifically, men claimed their wives' abortions were components of plans to commit "marital fraud" (骗婚) and dishonestly obtain bride-price payments.[306] Some men alleged their pregnant spouses extorted them by threatening to have an abortion unless the men paid large sums of money.[307] Others accused their wives of covertly terminating pregnancies resulting from extramarital affairs.[308] Men combined claims that women engaged in unauthorized abortions with arguments that their wives refused to do

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304 In other cases, women pleaded that their husbands would not be satisfied regardless of how pregnancies were handled. For example, in a 2015 case in Beijing, a woman claimed her husband accused her of becoming pregnant with someone else's child, urged her to obtain an abortion, and then, following her abortion, accused her of defrauding him for marital assets. *See* He v. Yao (何某某诉姚某某), Beijing Tongzhou Dist. People's Ct. (北京市通州区人民法院), (2015)通民初字第14188号, Sept. 28, 2015 (China).

305 *Cf.* Zhang v. Lü (张某某诉吕某某), Zhejiang Hangzhou Xiacheng Dist. People's Ct. (浙江省杭州市下城区人民法院), (2011)杭下民初字第1675号, Dec. 15, 2011 (China) (man, who argued his partner gave birth "without authorization," downplaying their relationship in which he paid her rent and claimed the two "were not in a boyfriend-girlfriend relationship, but just spent the night together after meeting in a nightclub" and that "she sleeps with other people"); HE, *supra* note 84 at 201–02 (discussing how women avoid raising subjects related to sex out of fear of being seen as indecent, promiscuous, or licentious).

306 Some men making this argument cited Article 3 of the Marriage Law, which prohibits "exacting of money or gifts in connection with marriage," repurposing a legal provision designed to protect women. *See* 2001 Marriage Law, art. 3.

307 *See, e.g.*, Ma v. Jia (马某某诉贾某某), Beijing Chaoyang Dist. People's Ct. (北京市朝阳区人民法院), (2013)朝民初字第29105号, Jan. 10, 2014 (China).

308 *See, e.g.*, Meng v. Xu (孟某某诉徐某某), Shandong Linyi Lanshan Dist. People's Ct. (山东省临沂市兰山区人民法院), (2014)临兰民初字第836号, Apr. 16, 2014 (China). *See also, e.g.*, Hu v. Huang (胡某某诉黄某某), Fujian Yongding Cnty. People's Ct. (福建省永定县人民法院), (2014)永民初字第2326号, Dec. 16, 2014 (China) (husband insinuating that his wife committed adultery with her ex-husband because she took her daughter from the previous marriage to visit the child's father).

"household chores,"[309] behaved "rudely" to the man's parents,[310] engaged in sex work,[311] became "addicted to the internet, neglecting her children,"[312] and stayed out late playing mahjong.[313]

Male litigants also at times used value-laden language to describe both pregnancies and pregnancy terminations, heightening the moral stakes of their claims and bolstering their assertions that their spouses were at fault. The term most frequently utilized by male litigants was *dadiao* (打掉), which means "knock out."[314] The phrase is common, although coarse, in China and does not carry as much of a negative connotation as it might in English. By contrast, if women referred to their pregnancy terminations at all,[315] they most often used the term *liuchan* (流产), which is the most generic term signifying a miscarriage, abortion, or pregnancy termination.[316] Men were also four times more likely than women to refer to a pregnancy in language that endowed a fetus with personhood. For instance, male litigants claimed their spouses aborted "a child" (小孩, 孩子) in 177 cases, a "little life" in two cases (小生命, 一条生命), and the plaintiff's "flesh and blood" ("原告的亲骨

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309 *See, e.g.*, Jing v. Chang (井某某诉常某某), Beijing Fengtai Dist. People's Ct. (北京市丰台区人民法院), (2013)丰民初字第18880号, Jan. 14, 2014 (China).

310 *See, e.g.*, Ke v. Zheng (柯某某诉郑某某), Guangdong Maoming Maonan Dist. People's Ct. (广东省茂名市茂南区人民法院), (2012)茂南法民初字第852号, July 10, 2012 (China).

311 *See, e.g.*, Chen v. Zhao (陈某某诉赵某某), Jiangsu Yizheng City People's Ct. (江苏省仪征市人民法院), (2016)苏1081民初541号, Feb. 15, 2016 (China) (husband suggesting that his wife was a sex worker). *Cf.* Wang v. Li (王某某诉李某某), Fujian Xiamen Huli Dist. People's Ct. (福建省厦门市湖里区人民法院), (2015)湖民初字第1418号, June 10, 2015 (China) (man arguing that his partner gave birth "without authorization" and that they met at a karaoke bar and slept together, insinuating that she was a sex worker).

312 *See, e.g.*, Chen v. Liu (陈某某诉刘某某), Shandong Laizhou City People's Ct. (山东省莱州市人民法院), (2014)莱州民初字第1965号, Jan. 27, 2015 (China).

313 *See* Xu v. Jiang (徐某某诉蒋某某), Shanghai Minhang Dist. People's Ct. (上海市闵行区人民法院), (2016)沪0112民初3665号, Mar. 31, 2016 (China).

314 In 248 cases (approximately 26%), men used the term "*dadiao*." By contrast, women used "*dadiao*" in forty-eight cases. Women often used medical terminology in their arguments, describing their pregnancy terminations as receiving "healthcare" (治疗/医疗), undergoing an "operation" (手术), or experiencing a "stillbirth" (胎死腹中), "hemorrhage" (大出血), or "inability to save the fetus" (没有保住).

315 In 306 out of 838 cases in which women appeared in court, women made no reference to pregnancy termination.

316 Women used the term "miscarriage" (流产) in 241 cases.

肉") and a "baby" (婴儿) in one.[317] In contrast, women only referred to their pregnancies as representing "children" (小孩, 孩子) in forty-two cases, and such language was generally utilized to respond to men's claims or describe a pregnancy loss caused by domestic violence. Courts' language was also revealing as to their views on abortion, as judges occasionally copied men's value-laden terminology, emphasizing fetuses' gestational age in several cases and using the term "child" to describe a fetus.[318]

Courts frequently criticized or attached moral blame to women's reproductive decsions, suggesting men's attempts to use arguments regarding abortion to discredit women resonated with judges.[319] In 2015, a woman from Ningxia Hui Autonomous Region petitioned for divorce, claiming that she and her husband often fought and that he kicked her out of their home and physically assaulted her mother.[320] When her husband accused her of obtaining an unauthorized abortion, she claimed it was medically necessary and introduced ultrasound

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317 Men referred to fetuses' gestational age and the duration of their spouses' terminated pregnancies in 149 cases.

318 Courts emphasized the gestational age of a pregnancy in several cases and used the term "child" at one-third of the rate they used the term "fetus." *See, e.g.*, Xiang v. Xia (项某某诉夏某某), Hubei Huangmei Cnty. People's Ct. (湖北省黄梅县人民法院), (2017)鄂1127民初3128号, Feb. 27, 2018 (China); Yang v. Li (杨某某诉李某某), Henan Jiyuan City People's Ct. (河南省济源市人民法院), (2014)济民一初字第193号, July 23, 2014 (China); Fu v. Zhang (符某某诉张某某), Shandong Shanghe Cnty. People's Ct. (山东省商河县人民法院), (2015)商民初字第849号, July 29, 2015 (China); Luo v. Zheng (罗某某诉郑某某), Chongqing Qijiang Dist. People's Ct. (重庆市綦江区人民法院), (2016)渝0110民初4854号, Sept. 14, 2016 (China). One court even stated, "the loss of an innocent life before it came into this world is regrettable and upsetting." Li v. Zhou (李某某诉周某某), Shandong Jiaozhou City People's Ct. (山东省胶州市人民法院), (2014)胶民初字第3247号, Mar. 17, 2015 (China).

319 *See, e.g.*, Liu v. Li (刘某某诉李某某), Hebei Tangshan Lunan Dist. People's Ct. (河北省唐山市路南区人民法院), (2012)南民初字第412号, June 7, 2012 (China) (holding that "[the wife's] conduct of obtaining an abortion was improper…"); Chen v. Si (陈某某诉司某某), Shanxi Zezhou Cnty. People's Ct. (山西省泽州县人民法院), (2014)泽民初字第400号, June 24, 2014 (China) (finding that "[the wife's] behavior in obtaining an abortion was improper"); Li v. Tao (李某某诉陶某某), Yunnan Zhanyi Cnty. People's Ct. (云南省沾益县人民法院), (2015)沾民初字第1215号, Sept. 14, 2015 (China) (stating that "both parties are at fault," when the only allegation against the woman was her "unilateral abortion" and the allegations against the husband involved him beating her until she lost her pregnancy and was hospitalized); Li v. Chen (李某某诉陈某某), Jiangxi Fuzhou Dongxiang Dist. People's Ct. (江西省抚州市东乡区人民法院), (2014)东民初字第736号, Nov. 13, 2014 (China) (chastising the woman for not adhering to a joint plan in managing her pregnancy, "a major event in the life of a husband and wife"); Xi v. Dai (奚某某诉戴某某), Anhui Wuhu Wanzhi Dist. People's Ct. (安徽省芜湖市湾沚区人民法院), (2013)芜民一初字第00545号, June 18, 2013 (China) ("While the plaintiff was at her parent's home, she—for unknown reasons—obtained an abortion.").

320 *See* Kong v. Li (孔某某诉李某某), Ningxia Shizuishan Dawukou Dist. People's Ct. (宁夏回族自治区石嘴山市大武口区人民法院), (2015)石大民初字第2111号, Aug. 6, 2015 (China).

records to demonstrate she suffered from a subcutaneous lipoma, a condition that required the excision of benign tumors across her abdomen and made pregnancy unsustainable.[321] The woman argued her husband neglected her during her treatment and pregnancy loss.[322] The court denied her divorce petition and thus awarded no damages.[323] However, the court took the opportunity to comment: "During her pregnancy, the plaintiff did not negotiate or communicate with the defendant and underwent a labor induction operation without the defendant's authorization or knowledge. Because of this, the plaintiff was at fault."[324] The court did not acknowledge the plaintiff's medical condition or the alleged abuse.[325]

Judicial moralization appeared across our data with regularity: A Chongqing court opined in 2016 that the female litigant's abortion was "completely wrong" and "harmful to the marital relationship."[326] The court seemed unperturbed by her husband's admission that he exchanged blows with his wife.[327] The same year, a Shaanxi court denied a husband emotional damages for his wife's "unilateral abortion," but wrote that his wife "did not respect her husband's reproductive rights."[328] In a case from Jiangsu province, the court ordered the female litigant, who had obtained an abortion, to "reflect on her behavior and how it affected the relationship."[329] Another court from Jiangsu wrote that the woman's "unauthorized abortion did not take into account the feelings of the plaintiff and his family," even though the woman described discovering at an ultrasound that the fetus lacked a heartbeat.[330]

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321 *See id.*

322 *See id.*

323 *See id.*

324 *Id.*

325 *See id.*

326 Luo v. Zheng (罗某某诉郑某某), Chongqing Qijiang Dist. People's Ct. (重庆市綦江区人民法院), (2016)渝0110民初4854号, Sept. 14, 2016 (China).

327 *See id.*

328 Qi v. Liu (齐某某诉刘某某), Shaanxi Fuping Cnty. People's Ct. (陕西省富平县人民法院), (2016)陕0528民初958号, May 10, 2016 (China).

329 Ding v. Ren (丁某某诉任某某), Jiangsu Nantong Tongzhou Dist. People's Ct. (江苏省南通市通州区人民法院), (2015)通高民初字第01347号, Sept. 25, 2015 (China).

330 Wang v. Liu (王某某诉刘某某), Jiangsu Huaian Qingpu Dist. People's Ct. (江苏省淮安市清浦区人民法院), (2014)浦民初字第4177号, Dec. 4, 2016 (China).

In criticizing women, courts overlooked the self-defensive nature of women's attempts to extricate themselves from abusive marriages and seek out abortion care.[331] For instance, in a 2015 case from Shanghai, a male defendant requested the court deny his wife's petition, alleging that she ran away from home and obtained an abortion without his consent.[332] The court chided the woman, who alleged domestic violence, characterizing her "refusal to return to their marital home" and "refusal to cohabitate with the defendant" as a "unilateral avoidance tactic that is not an appropriate way to handle matters in the marital relationship."[333]

In several cases, the term "unauthorized abortion" appeared to originate from the court, rather than the male litigant.[334] In some cases when men failed to appear in court, courts seemingly stepped in to advocate for the absentee male litigant, described the woman's pregnancy termination as "unauthorized," and denied her a divorce because, in the court's view, the "unauthorized abortion," not fundamental breakdown, caused the relationship to be strained.[335]

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331 *See, e.g.*, Liu v. Wang (刘某某诉王某某), Hunan Shuangfeng Cnty. People's Ct. (湖南省双峰县人民法院), (2014)双民一初字第711号, Dec. 1, 2014 (China) (criticizing a woman for having an "extreme personality" and "not fulfilling [her] marital obligations;" the woman allegedly attempted suicide and obtained an "unauthorized abortion" before running away); Sun v. Jiang (孙某某诉蒋某某), Zhejiang Jiashan Cnty. People's Ct. (浙江省嘉善县人民法院), (2008)善民一初字第292号, July 18, 2008 (China) (criticizing an absentee woman, who the plaintiff claimed was "unwilling to have children," as being "wrong" and "incorrect" for running away and "not facing her problems").

332 *See* Sun v. Jiang (孙某某诉蒋某某), Shanghai Chongming Cnty. People's Ct. (上海市崇明县人民法院), (2015)崇民一(民)初字第3889号, July 24, 2015 (China).

333 *Id.*

334 *See, e.g.*, Dai v. Sun (代某某诉孙某某), Henan Dancheng Cnty. People's Ct. (河南省郸城县人民法院), (2013)郸民初字第1350号, Oct. 23, 2013 (China); Chen v. Yang (陈某某诉杨某某), Guangxi Ziyuan Cnty. People's Ct. (广西壮族自治区资源县人民法院), (2011)资民初字第480号, Jan. 14, 2012 (China) (awarding the absentee male defendant visitation rights and commenting that it was "wrong" for the plaintiff to obtain an abortion without the man's consent). However, it is possible litigants made arguments not summarized or repeated in final court opinions.

335 *See, e.g.*, Shen v. Chen (申某某诉陈某某), Hubei Xianfeng Cnty. People's Ct. (湖北省咸丰县人民法院), (2014)鄂咸丰民初字第00338号, May 30, 2014 (China) (accepting a man's statement over the phone and noting, in reference to the man's admission that he abused his wife, that the plaintiff's "unauthorized abortion led to an emotional crisis"); Jiang v. Jiang (蒋某某诉蒋某某), Hunan Xinning Cnty. People's Ct. (湖南省新宁县人民法院), (2014)宁民一初字第925号, Jan. 6, 2015 (China) (allowing an absentee man's father to allege the female litigant obtained an "unauthorized abortion," denying her divorce petition, and finding that her "unauthorized abortion" was responsible for their conflict).

In summary, men and their lawyers deployed a variety of tactics relating to their wives' pregnancy terminations, to obtain—or to block their wives from obtaining—relief from the courts. Courts appeared to be swayed by these tactics. Courts seemed inclined to accept as fact men's accounts of the circumstances surrounding a pregnancy termination, as well as of the state of the couple's marriage, even when women offered a different account.[336] Courts also penalized women for exercising their reproductive rights while materially rewarding men. More broadly, many of the courts faulted women for terminating a pregnancy without their husband's permission and equated abortion to domestic violence. In so doing, courts assigned ethical and moral obligations to women that do not exist in the law and privileged patriarchal norms over legal ones.

C. How Women and Judges Respond

As discussed above, women rarely challenged their husbands' legal arguments directly, gave voice to their own trauma, or asserted their own rights. Likewise, the cases in which courts explicitly rejected men's arguments and reaffirmed women's reproductive rights were rare. Instead, most women adopted non-combative positions. Courts typically avoided the issue of abortion, although some courts rejected men's arguments and applied the law to support women.

1. Women's Muted Resistance and Claims

Throughout the cases we read, women's responses to men's arguments were often muted. One case from Inner Mongolia provides an example.[337] A woman petitioned for a divorce in 2015 after suffering serial abuse by her husband.[338] The woman described how after one year of marriage she feared her husband, who drank excessively, "tortured" her, and harmed dogs and cats with knives.[339] She recounted two particular occasions on which he set their home on fire and pushed her into the flames while screaming that he wished

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336 *See, e.g.*, Jiang v. Miao (姜某某诉苗某某), Hubei Nanzhang Cnty. People's Ct. (湖北省南漳县人民法院), (2014)鄂南漳长民初字第00226号, Nov. 20, 2014 (China) (inferring that a woman obtained a voluntary abortion from medical records describing "labor induction," even though induction procedures could be used to treat a variety of conditions under which pregnancies are naturally terminated).

337 *See* Zhang v. Bao (张某某诉包某某), Inner Mongolia Horqin Right Middle Banner People's Ct. (内蒙古自治区科右中旗人民法院), (2015)右民初字第569号, June 8, 2015 (China).

338 *See id.*

339 *Id.*

for her to die.[340] The woman presented hospital records as evidence she miscarried at six months due to her husband's physical abuse.[341] He claimed she "knocked out their child without authorization" and requested she return the 80,000 *yuan* bride price.[342] Although the woman had a lawyer and receipts for her hospitalization, she sought only a divorce and her pre-marital property.[343] She did not claim reimbursement for medical expenses, emotional damages, or any other damages, despite having strong claims.[344] Nor did she challenge the legal basis of her husband's claim.[345] The case reflects how extra-legal barriers facing female litigants, including threats of continued violence and social expectations about what women deserve, may result in less assertive advocacy on behalf of women.[346]

Women's assertions of their injuries were infrequent and subdued, particularly compared to men's claims.[347] Women seldom requested fault-based emotional damages regarding their husband's role in their pregnancy and its termination.[348] Despite the prevalence of domestic violence within the data, eighty percent of women who alleged domestic violence did not seek fault-based damages to which they are entitled under the Marriage Law.[349]

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340 *See id.*

341 *See id.*

342 *Id.*

343 *See id.*

344 *See id. See also infra* notes 349 and 350.

345 *See* Zhang v. Bao (张某某诉包某某), Inner Mongolia Keyouzhong Banner People's Ct. (内蒙古自治区科右中旗人民法院), (2015)右民初字第569号, June 8, 2015 (China). The husband agreed to a divorce, but requested she return the 80,000 *yuan* bride price. *Id.*

346 For a discussion of socialized diffidence and barriers to women's self-assertion in a comparative context, see LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE (2003).

347 For instance, women requested returns of their pre-marital property, usually consisting of furniture and household items, in just 10% of cases (102), whereas men requested a return of either the bride price or engagement gifts in 40% of cases (380).

348 Women requested emotional, fault-based damages for reproductive trauma alone in twenty cases, although more claims were based on domestic violence, cheating, and abandonment. By comparison, men requested emotional damages because of their partners' abortions in 115 cases.

349 Women requested emotional, fault-based damages in only 20% of cases in which they alleged domestic violence. *See* 2001 Marriage Law, art. 46. It is possible that a greater percentage of women suffered, but did not allege, domestic violence, given women's potential hesitancy to incite their husbands and discuss intimate household matters, as well as the disparity between the statistical accounts of the incidence of domestic violence and the lower rate at which it is alleged in the cases we read. *See, e.g.*, Chen v. Liu (陈某某诉刘某

Women also rarely requested need-based awards for financial difficulties or compensation for half of the costs of their medical care, despite the law authorizing such damages.[350] Lawyers often failed to raise clear statutory claims on their female clients' behalf.

Yet some women asserted their rights and articulated offense at the arguments proffered by their spouses. In one 2013 case, a *pro se* litigant from Hebei province countered her husband's claim that her "unauthorized abortion dealt a blow to his heart" and entitled him to the 30,000 *yuan* bride price.[351] She alleged that she obtained a medically necessary abortion when complications arose following domestic violence, and asserted "a right as a woman to decide whether or not to give birth, without others' interference."[352] Nonetheless, comprehensive and forceful self-advocacy on behalf of women was highly unusual. Rather, women regularly declined to assert the full extent of their own legally-cognizable injuries and reproductive trauma, while acquiescing to the premises of men's arguments, both in cases where women had legal representation and where they did not.[353]

某), Shandong Laizhou City People's Ct. (山东省莱州市人民法院), (2014)莱州民初字第1965号, Jan. 27, 2015 (China) (where the woman initially entered sparse pleadings, but the court eventually elicited that she suffered abuse at trial).

350 Women requested financial assistance in fewer than thirty cases, although they were likely entitled to it in a greater number of cases. *See* 2001 Marriage Law, art. 42. Likewise, other litigants had grounds under Article 46 to request damages due to adultery but did not do so. *See id.* at art. 46. Women requested the man contribute to the medical costs of the woman's reproductive care in only 10% of cases, although it is likely women could have done so in a greater number of cases. *See supra* notes 94 and accompanying text (discussing spousal obligations to pay for medical treatment); *see also* Zuigao Renmin Fayuan Minyiting Fuzeren jiu "Zuigao Renmin Fayuan Guanyu Shenli Sheji Fuqi Zhaiwu Jiufen Anjian Shiyong Falü Youguan Wenti de Jieshi" Dajizhewen (最高人民法院民一庭负责人就《最高人民法院关于审理涉及夫妻债务纠纷案件适用法律有关问题的解释》答记者问) [The Responsible Person from the Supreme People's Court First Civil Division Answers Questions from Reporters on 'The SPC Interpretations on Questions Concerning Application of the Law to Trying Marital Debt Dispute Cases'], Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan (中华人民共和国最高人民法院) [Sup. People's Ct.] (Jan. 17, 2018) (China), [https://perma.cc/96NE-C4TW] (clarifying that spouses' joint assets and liabilities typically includes medical costs).

351 Shi v. Cui (史某某诉崔某某), Hebei Luan Cnty. People's Ct. (河北省滦县人民法院), (2013)滦民初字第2455号, May 30, 2013 (China).

352 *Id.*

353 Women who contested the voluntariness of their pregnancy terminations were represented in 61% of cases. In the cases we read, 58% of women who appeared in court were represented by lawyers.

A small number of women sought compensation linked to their pregnancy terminations.[354] One woman argued that the court should recognize that "the termination of her pregnancy [after seven months] was also very physically and emotionally painful for her" and "she was the party who was truthfully hurt emotionally in this process."[355] In another case, a woman from Guangdong province countered her husband's allegations of her "unauthorized abortion" with testimony that she terminated her pregnancy after she lost hope for the relationship, given his verbally and physically abusive conduct, harassment of her at her workplace, and their separation.[356] She requested 50,000 *yuan* in emotional damages for domestic violence, having to undergo an abortion, and reputational harm.[357] She called for the court to "protect the legal rights and interests of women."[358] Additionally, in a handful of cases, women requested men pay additional compensation, including wages from periods during which women were recovering from a miscarriage or abortion and could not work.[359] Our findings indicate that the majority of women who did advocate for

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354 *See, e.g.*, Liang v. Zhou (梁某某诉周某某), Jilin Baicheng Taobei Dist. People's Ct. (吉林省白城市洮北区人民法院), (2015)白洮西民初字第184号, Jul. 30, 2015 (China) (woman requesting the court order her husband to compensate her for costs of her miscarriage treatment, "because husbands and wives face mutual obligations of support"). Separately, one woman's assertiveness with respect to the trauma stemming from the marriage also invoked other legal rights. *See, e.g.*, Bai v. Sun (白某某诉孙某某), Inner Mongolia Kailu Cnty. People's Ct. (内蒙古自治区开鲁县人民法院), (2014)开民初字第1140号, Apr. 22, 2014 (China) (woman claiming that her husband's abuse led to her miscarriage and that he surveilled and limited her communications, "violating her right to privacy").

355 Zhou v. Wu (周某某诉吴某某), Jiangsu Nanjing Lishui Cnty. People's Ct. (江苏省南京市溧水县人民法院), (2014)溧民初字第2003号, Nov. 28, 2015 (China) (reserving the right to claim emotional damages and recover her abortion costs).

356 Hu v. Qin (胡某某诉覃某某), Guangdong Guangzhou Tianhe Dist. People's Ct. (广东省广州市天河区人民法院), (2015)穗天法民一初字第1937号, Jan. 12, 2016 (China).

357 *See id.*

358 *Id.*; *see also, e.g.*, Liang v. Li (梁某某诉李某某), Guizhou Qinglong Cnty. People's Ct. (贵州省晴隆县人民法院), (2016)黔2324民初283号, June 6, 2016 (China) (woman arguing that her husband's accusation that she "murdered her child" was absurd and hurtful, especially when he neglected her during a "painful miscarriage"); Lin v. Lin (林某某诉林某某), Fujian Putian Licheng Dist. People's Ct. (福建省莆田市荔城区人民法院), (2015)荔民初字第208号, Apr. 17, 2015 (China) (woman requesting the court consider "the rights and interests of women, under Marriage Law"); Gong v. Liu (龚某某诉刘某某), Jiangxi Xingan Cnty. People's Ct. (江西省新干县人民法院), (2016)赣0824民初197号, Apr. 26, 2016 (China) (woman accusing her husband, who prevented her from visiting their son, of denying her the "right to be a mother"); Yang v. Yi (阳某某诉易某某), Jiangxi Yichun Yuanzhou Dist. People's Ct. (江西省宜春市袁州区人民法院), (2015)袁民一初字第509号, Apr. 23, 2015 (China) ("I have the right to decide whether or not to have children.").

359 *See, e.g.*, Cheng v. Dong (程某某诉董某某), Hubei Yunmeng Cnty. People's Ct. (湖北省云梦县人民法院), (2014)鄂云梦民初字第00057号, Jan. 6, 2014 (China).

themselves more strongly were represented by lawyers.[360] Yet, the fact that these cases are so rare suggests that legal representation is often inadequate.

Courts overwhelmingly denied women's claims for emotional damages and medical reimbursement, despite the Marriage Law authorizing such damages.[361] Although the law establishes that debts and expenditures incurred during the marriage should be divided and that courts must be mindful of women's interests in asset division,[362] the courts rarely invoked these provisions.[363] Instead, courts frequently denied women reimbursement without analysis[364] or by referencing the "unauthorized" nature of the abortion.[365] For

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360 For instance, women were represented in nearly 65% of cases in which they requested emotional damages.

361 In cases where women asked for reimbursement of half of their medical costs, they alleged to have paid for medical care with separate assets, suggesting the couple did not merge finances upon marriage. Courts ordered sharing of medical costs in only twenty-eight of the eighty-three cases in which women requested such relief and a divorce was granted.

362 *See* 2001 Marriage Law, art. 39, 41.

363 Two courts that ordered men to pay half of their wives' medical costs appealed to equitable notions. *See* Sun v. Zhuang (孙某某诉庄某某), Liaoning Xinmin City People's Ct. (辽宁省新民市人民法院), (2014)新民民三初字1440号, Apr. 1, 2014 (China) (reasoning that "pregnancy was a very intimate issue for the defendant, whose body suffered as a result of the operation," so "social morality dictates the man should pay"); Lu v. Ji (路某某诉姬某某), Shanxi Fuping County People's Ct. (陕西省富平县人民法院), (2015)富平民初字第02414号, Mar. 19, 2015 (China) (concluding that ordering the man to pay half of the documented costs of his wife's abortion would be appropriate "from the perspective of women's rights protection"). *Cf.* Ma v. Wu (马某某诉吴某某), Gansu Linxia City People's Ct. (甘肃省临夏市人民法院), (2015)临市法民初字第1293号, Mar. 16, 2016 (China) (ordering the defendant to return a portion of the bride price and the male plaintiff to pay half of his wife's proven medical costs, without citing equitable considerations, in a case involving documented and repeated domestic violence toward the female defendant).

364 Of the fifty-four cases where courts denied women reimbursement, courts ignored the request in eleven cases, denied it as having "no legal basis" without elaboration in nine cases, and denied it because of "insufficient evidence" in twenty cases. Courts also occasionally ignored women's claims for compensation without comment. *See, e.g.*, Du v. Guo (杜某某诉郭某某), Hebei Zhengding Cnty. People's Ct. (河北省正定县人民法院), (2014)正民新初字第00139号, Apr. 17, 2014 (China) (ignoring a woman's request for 30,000 *yuan* in costs stemming from her miscarriage); Zhou v. Wu (周某某诉吴某某), Jiangsu Nanjing Lishui Cnty. People's Ct. (江苏省南京市溧水县人民法院), (2014)溧民初字第2003号, Nov. 28, 2015 (China) (ignoring a woman's claim for 30,000 *yuan* in mental damages, but addressing the man's claim for the same).

365 *See, e.g.*, Du v. Wang (杜某某诉王某某), Henan Shangcheng Cnty. People's Ct. (河南省商城县人民法院), (2016)豫1524民初5号, Mar. 8, 2016 (China) (denying a woman reimbursement of 30,000 *yuan* in costs stemming from her treatment for a miscarriage induced by domestic violence, even though she introduced medical receipts, testimony regarding sexual and physical violence, and photos of her injuries, because she did not provide sufficient evidence the "pregnancy termination was due to domestic violence" and because she "did

instance, in a 2014 case from Hebei province, the court denied a woman's request for 4,665 *yuan* in medical expenses, reasoning that she "did not discuss the abortion with the defendant."[366] Likewise, in a 2013 case, a Henan court denied the plaintiff's request for 2,763 *yuan* in medical expenses for treatment following a miscarriage, stating that because she "obtained an unauthorized abortion without the defendant's consent," and because the court "does not support" such acts, it would "not divide those costs between the parties."[367] Courts granted women emotional damages at a nearly equivalent rate to that which they granted men emotional damages for the woman's "unauthorized abortion"—even though women's claims were typically grounded in domestic violence or adultery and were authorized by the Marriage Law.[368]

Overall, the advocacy made by or on behalf of women suffered from chronic weaknesses and critical omissions, even though women were represented by lawyers in the majority of cases and the law clearly supported women. Men sought compensation to which they were not entitled, while women failed to seek redress to which they were entitled. What explains

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not consult the plaintiff" before terminating her pregnancy); Li v. Zhou (李某某诉周某某), Shandong Jiaozhou City People's Ct. (山东省胶州市人民法院), (2014)胶民初字第3247号, Mar. 17, 2015 (China) (denying a woman medical reimbursement because the abortion was undertaken "of her own initiative"). Several courts conflated the law on asset division with fault-based damages and denied women reimbursement for medical care because they did not adequately prove the miscarriage was caused by the husband's domestic violence. *See, e.g.*, Li v. Zhang (李某某诉张某某), Hebei Botou City People's Ct. (河北省泊头市人民法院), (2015)泊民初字第2403号, Nov. 25, 2015 (China); Li v. Zhao (李某某诉赵某某), Xinjiang Korla City People's Ct. (新疆维吾尔自治区库尔勒市人民法院), (2015)库民初字第2626号, Aug. 31, 2015 (China).

366 Miao v. You (苗某某诉尤某某), Hebei Zhuozhou City People's Ct. (河北省涿州市人民法院), (2014)涿民初字第3149号, Oct. 31, 2014 (China).

367 Yu v. Tian (余某某诉田某某), Henan Yongcheng City People's Ct. (河南省永城市人民法院), (2013)永民初字第1276号, June 4, 2013 (China).

368 *See* 2001 Marriage Law, arts. 42, 46. Courts granted women fault-based emotional damages, including for domestic violence, cheating, abandonment, and reproductive trauma, in just five cases. Courts granted men emotional damages for the woman's pregnancy termination in four cases. Courts' reluctance to grant women fault-based damages was often clear. *See, e.g.*, Chen v. Lu (陈某某诉卢某某), Guangdong Zhaoqing Dinghu Dist. People's Ct. (广东省肇庆市鼎湖区人民法院), (2013) 肇鼎法民一初字第10号, May 6, 2013 (China) (denying a woman fault-based damages because she presented only "evidence of domestic violence, but not adultery"); Li v. Zhao (李某某诉赵某某), Xinjiang Korla City People's Ct. (新疆维吾尔自治区库尔勒市人民法院), (2015)库民初字第2626号, Aug. 31, 2015 (China) (reasoning that a woman did not sufficiently prove the connection between the domestic violence and her miscarriage, after she requested emotional damages because her husband's domestic violence caused her to miscarry); Pan v. He (潘某某诉何某某), Jiangxi Xunwu Cnty. People's Ct. (江西省寻乌县人民法院), (2015)寻民一初字第109 号, July 9, 2015 (China) (denying a woman's claim for fault-based damages, despite her allegations of suffering from fraud and violence against her family members, because she did not sufficiently prove "emotional injury").

this gendered advocacy gap? Female litigants and their lawyers may have internalized patriarchal norms and harbor low expectations as to what they, as women, can and should receive.[369] Female litigants may also have internalized the idea that a woman's unilateral termination of a pregnancy could constitute a wrong. Women and their lawyers may also understand that institutional actors—including judges, village cadres, and public security officers—often fail to intervene on behalf of women. In a system that is widely known to be stacked against women, women's primary goals may be to extricate themselves from abusive marriages and avoid triggering violent retaliation. Nevertheless, the small number of cases in which women assert their legal rights provide an alternative picture of what could be.

2. Judicial Avoidance & Rare Rejections of Male Entitlement

Despite the prevalence of cases in which courts expressly endorsed men's arguments, their dominant response was avoidance: In nearly 50% of cases, courts remained silent in the face of men's arguments that their spouses terminated their pregnancy without their agreement and avoided any explicit mention of the reproductive dispute in their analysis.[370] Courts' avoidance is not surprising: scholarship on divorce litigation in China has noted that litigants rarely raise and courts often ignore a range of issues, from claims of domestic violence to most matters relating to sex, including impotence and sexual orientation.[371] Although courts possibly avoid discussing abortion because they do not believe men's claims merit any response, such avoidance likely reflects broader discomfort with issues tied to sex, reproduction, and intimate family life. Court opinions generally include summaries of each party's factual arguments, followed by courts' findings of facts. Many courts ignored allegations regarding pregnancy terminations in their findings; reluctant to even use terms such as "pregnancy," "abortion," or "miscarriage," courts frequently stated instead that the parties "did not have children"[372] or "quarreled over trivial, household matters" (因生活琐事争吵)[373]—the same phrase courts use to downplay domestic violence.

369 *See* He, *supra* note 84, at 198.

370 In 451 cases (47%), the court ignored the reproductive aspect of the dispute.

371 *See* He, *supra* note 84, at 201–02, 220. *But see, e.g.*, Zhang v. Qin (张某某诉秦某某), Chongqing Tongliang Dist. People's Ct. (重庆市铜梁区人民法院), (2015)铜法民初字第04499号, Sep. 24, 2015 (China) (woman talking openly about her husband's impotence).

372 *See, e.g.*, Zhang v. Gong (张某某诉巩某某), Gansu Wushan Cnty. People's Ct. (甘肃省武山县人民法院), (2014)武民初字第550号, Aug. 12, 2014 (China).

373 *See, e.g.*, Ma v. Ma (马某某诉马某某), Ningxia Guyuan Yuanzhou Dist. People's Ct. (宁夏回族自治区固原市原州区人民法院), (2015)原民初字第3088号, Nov. 20, 2015 (China).

Similarly, only 4% of courts cited the most relevant piece of law, the 2011 SPC Interpretation.[374] Although courts operating under resource constraints[375] may seek to avoid conflict escalation and bring swift resolution to the dispute,[376] courts' failures to reject men's arguments may also serve to reinforce patriarchal social norms and discourage women from asserting their rights. Overall, judicial avoidance may signify that reproductive disputes are too intimate an arena for formal legal rights to carry any meaning.[377]

Not all courts avoided arguments regarding reproduction or sided with men. A small number of courts explicitly rejected men's claims that their wives' decisions to terminate pregnancies were "unauthorized," either by citing the 2011 SPC interpretation or writing that such claims have no legal basis.[378] For instance, one Chongqing court rejected a man's claim for emotional damages due to his wife's alleged violation of his "reproductive rights."[379] The court wrote:

> When women, without their husband's consent, unilaterally terminate a pregnancy […] a husband cannot utilize reproductive rights he enjoys to challenge and constrain his wife's reproductive right to choose . . . . [E]ven if the plaintiff underwent an abortion procedure to terminate a pregnancy, that does not violate the defendant's reproductive rights.[380]

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374 Failure to cite binding law is not uncommon in China. *See, e.g.*, Liebman, *supra* note 124 at 216–18, 225.

375 *See* HE, *supra* note 84, at 34–35.

376 Li and He explain judicial avoidance as a byproduct of fear: judges overseeing divorce disputes consciously avoid rulings that could create disgruntled men capable of violence against the other party and judges. *See* HE, *supra* note 84, at 40–47; LI, *supra* note 84, at 240–43.

377 Extensive scholarship has documented how courts avoid involvement in domestic violence, viewing it as a domestic matter. *See, e.g.*, HE, *supra* note 84, at 110.

378 Only 4% of courts cited the most relevant piece of law, the 2011 SPC Interpretation. However, a larger percent of courts summarily dismissed men's reproductive arguments as having "no legal basis" without providing further detail into their reasoning. *See, e.g.*, Bai v. Jiang (白某某诉蒋某某), Gansu Yuzhong Cnty. People's Ct. (甘肃省榆中县人民法院), (2016)甘0123民初246号, Apr. 7, 2016 (China); Li v. Lan (李某某诉兰某某), Hebei Longyao Cnty. People's Ct. (河北省隆尧县人民法院), (2014)隆民初字第204号, Mar. 27, 2014 (China). All courts to consider men's arguments that their spouse's had "unauthorized births" rejected such claims.

379 Gou v. Tan (苟某某诉谭某某), Chongqing Shizhu Tujia Autonomous Cnty. People's Ct. (重庆市石柱土家族自治县人民法院), (2016)渝0240民初2553号, Aug. 18, 2016 (China).

380 *Id.* The court awarded the woman 5,000 *yuan* for medical costs. *See id.*

Other opinions demonstrated judges' capacity to appreciate women's experience of pregnancy and abuse. One court in Zhejiang province reacted to a man's argument that his wife obtained an "unauthorized abortion" by stating that the man should have cared for his spouse following her miscarriage.[381] Another court denied a man's claim for the bride price in part because his wife's pregnancy termination "hurt her physically and psychologically."[382] In some cases, courts' support for women extended beyond expressions of empathy to citations of relevant laws affirming women's interests.[383] For instance, one court in Henan province denied the man's bride price claim "because the parties cohabitated for a period and because the defendant was pregnant, the plaintiff cannot satisfy the conditions required by our law to justify a return of the bride price."[384] In another case, a Shanghai court applied the LPWRI to award a woman favorable division of the marital assets based on "principles of promoting the lawful rights and interests of women" and "the plaintiff's having to undergo medical treatment," referring to abortions into which the male defendant pressured her.[385]

These cases come across as outliers because they largely apply the law as written. What explains these outliers within the law? One theory is that the cases come from more developed areas, where judges may be better trained. Another possibility is the gender of the deciding judges, or the presence of layperson "people's assessors" (人民陪审员) on the adjudicative panel, might make a difference.[386] Yet we identified no such patterns in

381 Jiang v. Yin (蒋某某诉尹某某), Zhejiang Linhai City People's Ct. (浙江省临海市人民法院), (2015) 台临民初字第74号, Feb. 2, 2015 (China) (stating "after the defendant terminated her pregnancy, she suffered from various illnesses, and needs better care and consideration from the plaintiff.").

382 Zhang v. Li (张某某诉李某某), Shandong Yanggu Cnty. People's Ct. (山东省阳谷县人民法院), (2015) 阳民初字第1440号, Sept. 15, 2015 (China).

383 *See, e.g.*, Li v. Wen (李某某诉文某某), Hubei Xiaochang Cnty. People's Ct. (湖北省孝昌县人民法院), (2014)鄂孝昌民初字第01370号, Feb. 25, 2015 (China) (denying a man's bride-price request "because the parties cohabitated for a time and the defendant was pregnant.").

384 *Id.*

385 Wei v. Qiang (卫某某诉强某某), Shanghai Pudongxin Cnty. People's Ct. (上海市浦东新区人民法院), (2014)浦民一（民）初字第1736号, July 17, 2015 (China).

386 As of 2017, 32.7% of China's judiciary was female. *See Pingdeng Fazhan Gongxiang: Xinzhongguo 70 Nian Funü Shiye de Fazhan yu Jinbu* (平等 发展 共享：新中国70年妇女事业的发展与进步) [*Equality, Development & Sharing: The Progress and Development of Women's Work in the 70 Years Since the Founding of New China*], GUOWUYUAN XINWEN BANGONGSHI (国务院新闻办公室) [ST. COUNCIL INFO. OFFICE] (Sept. 9, 2019) (China), http://www.xinhuanet.com/politics/2019-09/19/c_1125015082.htm. [https://perma.cc/L6VR-ZPSU]. Several prior studies have attempted identifying effects of judges' genders on case outcomes and the institutional pressures judges face. *See, e.g.*, Yiwei Xia, Tianji Cai & Hua Zhong, *Effect of Judges' Gender*

these cases. Many cases from developed cities ignore the law. Similarly, the ratio of male to female judges does not appear to differ across the cases where courts legitimate or reject men's claims.

Although some judges rejected men's claims and affirmed women's rights, in the vast majority of cases, courts did not follow the law or protect women's dignity and equality. Instead, most courts adjudicating disputes about abortion reinforced women's reproductive subordination to men—through either affirmative endorsement of men's claims or passive neglect of both women's pain and men's wrongdoing.

IV. Implications

What will happen if and when the state retreats from regulating reproduction? On the eve of China relaxing its one-child policy, leading women's rights activist Lü Pin[387] posed this question.[388] Lü argued that with the one-child policy the Chinese state "only temporarily suspended and confiscated the patriarchy's power, though both have always competed for control over women's wombs."[389] The loosening of the one-child policy, she predicted, would provide an opportunity for the reassertion of traditional views regarding the role of women in society.[390]

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on Rape Sentencing, 19 CHINA REV. 125, 128, 140–42 (2019) (finding no consistent differences between the criminal sentences imposed on men convicted of rape by male and female judges, but finding "the presence of a female-dominated collegiate bench does make a difference [in shortening] sentence lengths"); Shen Anqi & Zhu Lingyao (沈安琪、朱玲瑶), *Shenpan Nüxing Zuifan de Nüxing Faguan: Guanyu Xingbie yu Shenpan de Zhongguo Anli Yanjiu* (审判女性罪犯的女性法官：关于性别与审判的中国案例研究) [*How Female Judges Judge Female Culpability: A Case Study in Gender Difference and Adjudication in China*], HENAN JINGCHA XUEYUAN XUEBAO (河南警察学院学报) [HENAN POLICE COLLEGE J.], no. 5, at 47, 52–53 (2020) (China) (observing that female judge-interviewees "explicitly blamed female [criminal defendants] for violating expectations of motherhood and their gender," in addition to the law, and resisted interpreting female litigants' plights through structural lenses).

387 Lü Pin founded *Feminist Voices,* one of China's most widely read media sources focusing on women's issues, in 2009, and remained its editor-in-chief until Chinese authorities shut the site down in 2018 as part of a broader crackdown on the #MeToo movement and women's rights advocacy. Leta Hong Fincher & Lü Pin, *Feminist Voices in China: From #MeToo to Censorship*, COUNCIL FOREIGN REL. (July 28, 2018), https://www.cfr.org/event/feminist-voices-china-metoo-censorship [https://perma.cc/2ME3-D4GA].

388 *See* Lü, *supra* note 1.

389 *Id.*

390 *See id.*

Our findings illustrate how Lü's concerns manifest in interpersonal disputes in China's courts. Our findings also shed light on the source and nature of those concerns by explicating men's efforts to weaponize partners' reproductive history. Abortion manifests as a symbol of women's agency and resistance to their husbands' control. Men's efforts to problematize abortion signify that many still conceive of women's value as inextricably tied to reproductive capacity and take women's reproductive cooperation for granted. The cases we analyze also show how these ideas resonate with legal institutions.

What insights do these cases offer for understanding the state's role in regulating reproduction in China, both now and in the future? And what does the existence of legal conflict regarding abortion in a context unburdened by debates about religion or constitutional arguments regarding privacy, fetal rights, judicial review, or democratic legitimacy, tell us about the likely trajectory of legal disputes regarding abortion globally? This Section turns to these questions, examining first the implications for understanding the state's role in regulating reproduction in China, and then insights about the nature of legal debates about abortion in China and elsewhere.

A. China's Constant, Yet Evolving Regulation of Reproduction

Two decades ago, William P. Alford and Shen Yuanyuan asked whether "the cause of freedom in China will best be advanced through the state's retrenchment and a concomitant ceding of power to non-state actors."[391] Alford and Shen's hesitancy to celebrate the state's retreat from regulating marriage grew out of a recognition that freedom from the state entails an absence of state protection from the dangers posed by other actors, notably men.[392] Our findings demonstrate that such concerns were prescient in the context of reproduction as well.

Despite lawmaking efforts to establish and strengthen women's rights and the Party-state's relaxation of birth regulation, the Party-state has been unwilling or unable to ensure that women's rights are protected from social pressures and non-state forces. Prior scholarship has noted how legal protections for women do not necessarily mean that the state takes women's issues seriously—it was exactly because the Party-state did not see

391 Alford & Shen, *supra* note 88, at 1.

392 *See id.* at 19 ("We would do well . . . to heed the concerns that other Chinese feminists have raised . . . about assumptions of society's benevolence and from this, to be mindful of the perhaps singular capacity of the state to curb private abuses of power and structure an environment in which freedom might be widely enjoyed.").

women as a genuine threat to stability or power that it advanced laws protecting women's rights.[393] According to Alford and Shen, the "state's indifference, if not condescension, toward women helps explain how the debates [about the PRC's marriage laws] were able to achieve such public prominence and take on the character they did."[394] The state's tolerance of women's rights advocacy has been more limited in recent years, as authorities have shuttered women's rights organizations and jailed some activists.[395] This shift not only reflects a tightening of regulation over civil society in general but also suggests that the Party no longer views advocacy of women's rights with indifference. Future efforts to advocate for women's reproductive autonomy are likely to be seen as more of a threat, particularly if such arguments are in tension with state policies encouraging more births.

One constant in China's approach to regulating reproduction has been advancing or restricting women's rights in service of state goals. The one-child policy was itself an example: the Party-state justified the policy by arguing that it facilitated women's greater participation in the workforce.[396] In the end, however, the policy yielded birth planning without fundamentally altering conceptions of women's roles and status. If anything, the policy raised the stakes of couples' singular opportunity to have children, placed additional pressures on women, and inflamed latent biases against women and girls, resulting in heightened rates of female infanticide. These outcomes reflect the fact that the goal of the one-child policy was to limit births—not to liberate women. Similarly, the protection of women's rights in the 2001 Birth Planning Law was secondary to the Party-state's goals of reducing social conflict over reproduction and addressing the growing gender imbalance in births.

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393 *See, e.g.*, Alford & Shen, *supra* note 85, at 22.

394 *Id.* at 22.

395 *See Gender-Based State Violence & Reprisals Against Women Human Rights Defenders in China*, CHINESE HUM. RTS. DEFS. (July 23, 2023), https://www.nchrd.org/2023/07/we-strip-you-naked-to-crush-your-spirit-gender-based-state-violence-reprisals-against-women-human-rights-defenders-in-china/ [https://perma.cc/M2WJ-4FK7]. *See also, e.g.*, Li Maizi, *I Went to Jail for Handing out Feminist Stickers in China*, GUARDIAN (Mar. 7, 2017), https://www.theguardian.com/commentisfree/2017/mar/08/feminist-stickers-china-backash-women-activists [https://perma.cc/2S3B-M6XA].

396 For discussions of how the policy centered itself on women's welfare, see 2001 Population and Birth Planning Law, art. 3 ("The implementation of the population and family planning work shall combine with an increase in opportunities in education and employment for women, and the enhancement of women's health and the promotion of their social status."); Susan Greenhalgh, *Fresh Winds in Beijing: Chinese Feminists Speak Out on the One-Child Policy and Women's Lives*, 26 SIGNS 847, 853–55 (2001) ("[T]he policies and programs of the state were justified by a narrative of women's health and liberation."); Vanessa L. Fong, *China's One-Child Policy and the Empowerment of Urban Daughters*, 104 AM. ANTHROPOLOGIST 1098, 1099–1105 (2002).

Our findings also raise questions regarding the future of the regulation of reproduction in China. How will the Party-state apparatus enforce its new pro-natalist policies? The Party-state may have relaxed birth planning, but it has not retreated. It continues to view reproduction as something to be managed. Formal laws have hardly changed, other than to shift birth limits from one to two to three children, and the vast birth planning bureaucracy remains in place, though merged into the National Health Commission.[397] To date, many watching for shifts in the Party-state's approach to abortion have looked for clues in Party-state policy documents—in particular, whether the Party-state may seek to restrict or ban abortion. If and when the state decides to shift policy, the legal infrastructure to do so is in place.

As the Party-state's efforts to boost birth rates to combat demographic imbalance take a more defined shape over the coming years, will the courts be transformed from passive guardians of male power into active participants in state efforts to encourage or even compel births? Our findings suggest that changes in abortion policy may manifest in subtle ways, particularly within private law litigation. The Party-state has relied on courts to restrict divorce in service of Party-state goals of family unity and, by extension, social stability. It seems possible and perhaps even likely that restrictions on abortion will likewise come through increased stigmatization of abortion in courts' resolution of routine marital disputes.[398] If nothing else, one lesson from our research is that observers seeking clues to shifting state attitudes toward abortion should pay attention to developments in the courts as well as policy pronouncements. The courts and men may be well-positioned to serve the Party-state's new pro-birth policies, when and if the Party-state demands it. This effort may already be partially underway in the form of Party instructions to courts to promote social stability and to embrace "socialist core values" in deciding cases.[399]

397 Li Zhichao, Tan Xihan & Liu Bojia Liu, *Policy Changes in China's Family Planning: Perspectives of Advocacy Coalitions*, 20 INT'L. J. ENV'T. RSCH. & PUB. HEALTH 1, 12 (2023).

398 Relying on the private family structure for discipline and the cultivation of what the state sees as productive members of society is not a new tactic within the playbook of Chinese governance. On the centrality of the family unit to Chinese governance, see Di Wang, *Jia, as in Guojia: Building the Chinese Family into a Filial Nationalist Project*, 5 CHINA L. & SOC. REV. 1, 3–5 (2020); Alford & Shen, *supra* note 88, at 3. This tactic is also certainly not unique to China. *See generally* Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1 (2012).

399 Although discussion of "socialist core values" does not currently include discussions of the obligation to reproduce, some model cases have made clear that courts should support patriarchal norms, and that those norms should at times trump or merge with legal norms. *See generally* Liu, *supra* note 121. These insights build on a growing body of work on the Chinese legal system that seeks to explore the actual sources of law that Chinese judges apply and respond to arguments that the Chinese courts have become more law-based. *See, e.g.*, Taisu Zhang & Tom Ginsburg, *China's Turn Toward Law*, 59 VA. J. INT'L L. 306 (2019). Prior work has

A related question is how much courts continue to defer to cultural or social norms in marital disputes, especially in cases involving reproduction. The receptivity of courts to men's claims—sometimes passive, sometimes active—also highlights that altering legal norms without changing or challenging social norms may limit the effectiveness of these new legal norms. Yet, viewing reproductive rights in China solely in terms of a struggle between new legal rights and resurgent cultural traditions may also be reductionist. China is home to multiple traditions, including a revolutionary heritage of women's agency and autonomy.[400] While men's claims to have a right to participate in women's reproductive decisions may be rooted in patriarchal traditions, they may also reflect strategic efforts to maximize court payouts in divorce litigation. The intersection of Confucian traditions with contemporary capitalist culture may produce the results we observe in these cases. Nevertheless, the combination of cultural and political traditions in China does not bode well for those hoping to see stronger protections for reproductive autonomy in China—at least not through the courts.

B. Comparative Implications

China has long been considered an outlier in global discourse on abortion and reproduction, both because of its permissive approach to abortion and due to its long history of coercive birth planning. Yet China presents an important case study for observing and understanding legal conflict regarding reproduction precisely because abortion, due to its relative ubiquity, has generally been understood to be neither contentious nor stigmatized in Chinese society. China also stands out for its strong legal protections for abortion access. Our findings suggest that the central question in China is shifting from when and how

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examined: (1) how conceptions of fairness and morality influence decisions (*see, e.g.*, Stern et al., *Liability Beyond Law*, *supra* note 123; Liebman, *Ordinary Tort Litigation*, *supra* note 124); (2) how courts turn to Party normative documents, (*see, e.g.*, Benjamin Liebman, Rachel Stern, Eva Gao, Xiaohan Wu & Margaret Roberts, *Seeing the Shadow: Party Documents in Chinese* Courts, BERKELEY J. OF INT'L L. (forthcoming 2025)); and (3) when stability concerns prevail over legal arguments, (*see, e.g.*, Benjamin L. Liebman, *Legal Reform: China's Law-Stability Paradox,* Daedalus (Spring 2014)). Our findings add deep-seated cultural norms to this list. Indeed, one takeaway is that male litigants may not see themselves as seeking redress beyond the law. Rather, they seek to have the legal system reflect and protect deep-rooted cultural traditions and viewpoints.

400 *See generally* Liu Huawen (柳华文), *Zhongguo Funü Quanli Fazhan 100 Nian: Cong Qianglie de Zhengzhi Dandang dao Rizhen Wanshan de Falü Baozhang* (中国妇女权利发展 100 年: 从强烈的政治担当到日臻完善的法律保障) [*100 Years of Women's Rights Development in China: From Strong Political Commitment to Gradually Improving Legal Protections*], 5 RENQUAN (人权) [HUM. RTS.] (2021).

the state compels abortion to when and how the state and private actors combine to limit women's reproductive autonomy and exploit women's reproductive capacity.[401]

Might China's experience have implications for how reproductive rights are litigated elsewhere? At first glance, China's rapid shift from coercive birth planning to Party-state encouragement of more births suggests that what happens in China may be of little relevance to debates elsewhere. Yet our analysis suggests at least three potential paths for deepening comparative research on how reproductive rights are contested and adjudicated. In the discussion that follows we first discuss insights that our study yields for understanding the role of private law litigation in regulating reproduction. We then turn to a discussion of how rights advocacy can serve regressive goals in both liberal and illiberal societies. We conclude by discussing the implications of the interplay of authoritarian governance, democracy, and women's reproductive autonomy.

1. Regulating Reproduction through Private Law

Observing the role of abortion in legal disputes in China helps to illuminate how private law litigation can serve to regulate reproduction even when the legality of abortion is formally settled by law. In Western systems, legal questions surrounding abortion and women's rights to autonomy over their own bodies are constitutionalized[402]—simply put, constitutional litigation is the site of legal struggle. In contrast, there is no constitutional controversy in China, because there is no significant debate regarding the legality of abortion, and the constitution is rarely a site of legal contestation. Yet the absence of constitutional debate in China does not mean there is no legal conflict regarding women's reproductive autonomy: the site of conflict is instead recast in private law claims.

Men's attempts to use divorce litigation to challenge abortions demonstrate the regenerative nature of the abortion debate and men's eagerness to find new grounds on which to contest abortion as a means of controlling women—grounds that are beyond the usual contest over whether abortion is legally permissible. The cases we analyze illustrate that abortion is being disputed because of its salience as a social matter to men who find themselves uneasy with (or willing to exploit societal disapproval of) women's reproductive unavailability and socioeconomic and sexual independence.[403] Stigmatization

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401 *See generally* Julie C. Suk, *A World Without* Roe*: The Constitutional Future of Unwanted Pregnancy*, 64 WM. & MARY L. REV. 443 (2022) (discussing how society fails to compensate women for reproductive labor).

402 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

403 *See* Murray, *supra* note 4.

and contestation of women's reproductive autonomy arise in China even when the law is straightforward. National laws clearly articulate women's rights, religious debates about fetal life are absent, and there are few, if any, debates about constitutional interpretation, federalism, judicial review, precedent, or substantive due process. China thus provides a case study of how abortion is persistently contested by patriarchal constituents as a proxy battle over women's appropriate status in society.

Understanding how and where abortion is contested in China's courts suggests methodological insights for scholars studying reproductive rights in other jurisdictions. Scholars should be attuned to how private law litigation may become a site of legal struggle over reproductive rights even (and perhaps particularly) after the legal status of abortion is settled. Legal resolution of the constitutional status of abortion will not eliminate legal conflict over abortion.

Other countries have seen a similar uptick of novel forms of litigation designed to restrict women's reproductive autonomy. In the United States, for example, the issue has received renewed attention as anti-abortion activists seek to weaponize the civil justice system as a tool for restricting abortion.[404] The United States is not alone in this trend toward private enforcement. In Uruguay, Argentina, and Colombia, courts have granted men preliminary injunctions restricting their partners' access to otherwise legal abortion on paternity rights grounds,[405] despite the existence of constitutional or other legal protections for abortion.[406] Other jurisdictions in which abortion is legal require spousal consent,

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404 *See, e.g.*, John C. P. Goldberg & Benjamin C. Zipursky, *Tort Theory, Private Attorneys General, and State Action: From Mass Torts to Texas S.B. 8*, 14 J. TORT L. 469, 470 (2021); Laura Blockman, *"A Solemn Mockery": Why Texas's Senate Bill 8 Cannot Be Legitimized Through Comparisons to Qui Tam and Environmental Protection Statutes*, 77 U. MIA. L. REV. 786 (2023). Even prior to the fall of *Roe*, Texas' Senate Bill 8 circumvented *Roe* by granting members of the public the authority to regulate abortion through private rights of action targeting anyone who "performs or induces an abortion," "knowingly engages in conduct that aids or abets the performance or inducement of an abortion," or "intends to engage" in such conduct. S.B. 8, § 3, 87th Leg., Reg. Sess. (Tex. 2021) (upheld in Whole Women's Health v. Jackson, 142 S. Ct. 522 (2021)). *See also Memo: Twelve States and Counting Poised to Copy Texas' Abortion Ban*, NARAL PRO-CHOICE AMERICA (Oct. 20, 2021), https://reproductivefreedomforall.org/news/twelve-states-and-counting-poised-to-copy-texas-abortion-ban/ [https://perma.cc/A8DR-U5AV].

405 *See* Sofia Armando, Guillermina Pappier, Maria José Arango Salazar & Natalia Acevedo Guerrero, *The Alleged Right to Paternity as an Obstacle to Access the Right to Abortion*, O'NEILL INST. (June 30, 2022), https://oneill.law.georgetown.edu/the-alleged-right-to-paternity-as-an-obstacle-to-access-the-right-to-abortion/ [https://perma.cc/96VG-MBKF].

406 *See* Suk, *supra* note 401 (citing Corte Constitucional [Constitutional Court], Feb. 21, 2022, Sentencia C-055/22, Comunicado de prensa [C.P.] (vol. 5, pg. 1) (Colom.); *La Justicia de San Juan Aceptó el Pedido de*

opening the door for men to assert rights to control women's choices.[407] And still, in other jurisdictions, abortion can be considered as grounds for courts to find "marital fault" and award damages or material relief on that basis.[408]

Attention needs to be paid to how reproduction may be regulated even when abortion is not the primary issue being litigated. Abortion is being regulated in China not by formal legal authorization of vigilante lawsuits, as in Texas,[409] or through a rule requiring spousal consent, as in Taiwan or Japan.[410] The case of China helps illuminate that the many ways in which women's rights are adjudicated and restrained may be difficult to see—in China, reproduction is also regulated in the hidden corners of the legal system, through routine legal arguments that seek to privilege men and by court decisions receptive to these arguments.

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un Hombre Para Impedir que su ex Pareja Aborte, INFOBAE (May 2, 2021), https://www.infobae.com/sociedad/policiales/2021/05/02/la-justicia-de-san-juan-acepto-el-pedido-de-un-hombre-para-impedir-que-su-ex-pareja-aborte/ [https://perma.cc/TNB4-3S8B].

407 According to the Guttmacher Institute, twelves countries or territories required spousal consent as of 2019. *See* Lisa Remez, Katherine Mayall & Susheela Singh, *Global Developments in Laws on Induced Abortion: 2008–2019*, 46 INT'L PERSPS. ON SEXUAL & REPROD. HEALTH 53, 55 (2020). *See also, e.g.*, Ayse Dayi, *Neoliberal Health Restructuring, Neoconservatism and the Limits of Law: Erosion of Reproductive Rights in Turkey*, 21 HEALTH & HUM. RTS. J. 57, 59 (2021) (Turk.). For a discussion of third-party authorization's discordance with human-rights norms, see *Law and Policy Guide: Third-Party Authorization*, CENT. FOR REPROD. RTS., https://reproductiverights.org/maps/worlds-abortion-laws/law-and-policy-guide-third-party-authorization/ [https://perma.cc/F79V-JHMC] (last visited Mar. 18, 2023).

408 *See* Oberster Gerichtshof [OGH] [Supreme Court] May 28, 2015, 9 Ob 29/15b (Austria); OGH, Oct. 23, 2017, 5 Ob 166/17y (Austria).

409 S.B. 8, § 3, 87th Leg., Reg. Sess. (Tex. 2021). *See also* Caroline Kitchener, *Antiabortion Groups Plan New Crackdowns, Emboldened After Election*, WASH. POST (Nov. 20, 2024), https://www.washingtonpost.com/politics/2024/11/20/antiabortion-crack-down-pills/ [https://perma.cc/76NL-G4QQ] (reporting that "Texas Right to Life would help file at least one lawsuit [under Senate Bill 8] by February [2025]," and that, according to the group's director, it "is now searching for plaintiffs to file suit against those who help facilitate abortions, focusing on men who disagreed with their partner's decision to end her pregnancy").

410 *See* Yousheng Baojianfa (優生保健法) [Genetic Health Act], art. 9 (enacted Jul. 8, 2009) (Taiwan) ("Induced abortion to a married woman . . . shall be subject to her husband's consent unless her husband is missing, unconscious or deranged."); Botai Hogohō (母体保護法) [Maternal Health Act], Act No. 156 of 1948, art. 14 (Japan) ("[I]nduced abortion can be performed, provided that consent from both the woman and her spouse is provided."); *see also MOJ Backtracks as Women Protest Abortion Proposal*, TAIPEI TIMES (Nov. 4, 2024), https://www.taipeitimes.com/News/front/archives/2024/11/06/2003826455 [https://perma.cc/QN47-5D2X]. *But see* Lily LaMattina, *Amendments to Taiwan Abortion Law Could Remove Need for Husband's Consent*, TAIWAN NEWS (Nov. 13, 2024), https://taiwannews.com.tw/news/5970842 [https://perma.cc/5TGV-NDKU].

2. Recasting Rights

Scholarship on Western liberal systems has detailed how rights can be manipulated and recast to support regressive, illiberal goals. One example is the scholarship on how the language of human rights has been weaponized by some in the United States to argue in favor of "unalienable rights" to property and religion at the expense of women's rights, racial equality, and LGBTQ+ rights.[411] Others have noted how the statutory "right to know" under the Freedom of Information Act,[412] originally viewed as supporting progressive goals, has been reformulated to support libertarian goals that seek to obstruct rather than advance government action.[413] The repurposing of rights has also generated scholarly attention in the field of gender studies with the growth of the "men's rights" movement.[414]

The insight that the discourse of rights can be used for regressive as well as progressive purposes has, however, largely been overlooked in the growing body of scholarship on authoritarian legal systems.[415] Writing on China, for example, has often assumed either that there is little space for rights advocacy in China or that increased rights discourse will over time equate to more civil liberties.[416] Sociolegal literature on China has documented how greater state emphasis on legal education and the formal incorporation of new rights

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411 *See, e.g.*, Katharine G. Young, *Human Rights Originalism*, 110 GEO. L. J. 1097, 1100 (2022).

412 Freedom of Information Act, 5 U.S.C. § 552.

413 *See, e.g.*, David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 148–52 (2018); MICHAEL SCHUDSON, THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY, 1945–1975, at 28–63 (2015).

414 *See, e.g.*, Mary Ziegler, *Men's Reproductive Rights: A Legal History*, 47 PEPP. L. REV. 665 (2020); Pam Lowe & Sarah-Jane Page, *Rights-Based Claims Made by UK Anti-Abortion Activists*, 21 HEALTH & HUM. RTS. J. 133 (2019); Lisa Gotell & Emily Dutton, *Sexual Violence in the 'Manosphere': Antifeminist Men's Rights Discourses on Rape*, 5 INT'L J. CRIME, JUST. & SOC. DEMOCRACY 65 (2016).

415 *Cf.* Erica Frantz & Andrea Kendall-Taylor, *A Dictator's Toolkit: Understanding How Co-Optation Affects Repression in Autocracies*, 51 J. PEACE RSCH. 332 (2014) (discussing cooptation in authoritarian *political* systems).

416 *See, e.g.*, Kurt M. Campbell & Ely Ratner, *The China Reckoning: How Beijing Defied American Expectations*, 97 FOREIGN AFF. 60, 60–64 (2018) (discussing the "assumption" that China's apparent openness would result in "political liberalization," as "a burgeoning Chinese middle class demand[ed] new rights and pragmatic officials embrac[ed] legal reforms that would be necessary for further progress"). *Cf.* Eva Pils, *Asking the Tiger for His Skin: Rights Activism in China*, 30 FORDHAM INT'L L. J. 1209 (2007) (explaining the dilemmas facing rights lawyers in China, including the potential for advocacy to generate government suppression).

into law has engendered greater rights-based advocacy by citizens.[417] In a wide range of contexts, including land rights, environmental rights, and the rights of those facing gender- and health-based discrimination, Chinese citizens have sought to use the state's embrace of law to protect their interests.[418] Sometimes this advocacy takes place in courtrooms, other times it takes place on the street or online. Often such claims reach beyond the law as formally written and reflect demands for new rights. An optimistic reading of these developments casts the popular demand for law and rights as a positive restraint on the Party-state, compelling the Party-state to observe the law.[419] Others note law can be a vehicle for social mobilization.

Our findings regarding abortion litigation highlight another possible outgrowth of the state's emphasis on law and rights: the reformulation of arguments for protecting entrenched cultural norms and interests in the language of the law.[420] What appears particularly striking in our findings is that men use rights-based discourse not just to fill in gaps in the law, but also to demand that courts ignore clearly binding law—and that courts are at least sometimes receptive to such arguments. The extensive literature on rights-based advocacy in China has not accounted for non-state actors' illiberal weaponization of rights. Although scholars have noted how Party-state leaders privilege certain rights over others or argue that China has a different approach to rights than Western nations, scholarship has yet to examine how individual litigants may similarly use the language of rights to advance or entrench cultural or social norms that marginalize women.

Observing when and how individual litigants weaponize rights-based claims may be a fruitful area for comparative research across authoritarian legal systems. Rights are central

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417 *See, e.g.*, Mary E. Gallagher, *Mobilizing the Law in China: "Informed Disenchantment" and the Development of Legal Consciousness*, 40 L. & SOC'Y REV. 783 (2006) (studying the meaning of the rise in legal consciousness in China for rights awareness, rights mobilization, litigiousness, public perceptions of the legal system's legitimacy, etc.).

418 *See generally* RACHEL E. STERN, ENVIRONMENTAL LITIGATION IN CHINA: A STUDY IN POLITICAL AMBIVALENCE (2013); Neysun Mahboubi, *Suing the Government in China*, *in* DEMOCRACY IN CHINA, KOREA, AND SOUTHEAST ASIA? LOCAL AND NATIONAL PERSPECTIVES, 141–154 (Kate Xiao Zhou ed. 2017) (discussing the promises and limitations of administrative litigation against the Chinese state).

419 *See* Zhang & Ginsburg, *supra note* 399.

420 Our findings are also a reminder that more lawyers do not equate to more law or to a fairer application of law. In prior years, the lack of legal representation was often one explanation for the disadvantaged position of women in divorce litigation, or the failure of courts to follow the law. Today legal representation is far more widespread. Our findings suggest that ineffective advocacy remains widespread, as lawyers routinely perpetuate inequity by neglecting to rebut legal fallacies or to demand full recovery for their clients.

to legal arguments in China, even if those rights are often largely articulated as private law rights. In the cases we read, men appear to be taking advantage of the significant space opened up for rights-based advocacy in the post-1978 reform period, appealing to entrenched cultural norms, and seeking to align their own claims with the state's goals. The tightening of political control in China in recent years may not result in the elimination of rights-based legal claims; it may simply shift the scales in favor of more regressive claims.[421]

3. Authoritarianism, Constitutional Democracy, and Abortion

A third area for deepening comparative research is to examine the relationship between authoritarianism and greater restrictions on women's reproductive autonomy. In the United States, the Supreme Court's decision in *Dobbs* has brought renewed attention to the subject, given the majority's insistence on returning decisions about abortion to a "democratic process" characterized by severe representational deficits.[422] Recent commentary has noted how authoritarians (and want-to-be autocrats), including Donald Trump, Narendra Modi, Jair Bolsonaro, and Recep Tayyip Erdoğan, use misogynistic language and policy platforms to consolidate support for militaristic, nativist projects aiming to "restore" the nation and entrench existing power structures.[423] In China, this can be seen in an array of recent state actions, including the crackdown on portrayals of so-called "sissy men" in the media and in the omission of even a single woman in the Politburo Standing Committee following the Twentieth Communist Party Congress in 2022.[424]

Yet one key insight from this Article is that it may be a mistake to view the state's indifference toward women's rights as due solely or primarily to China's authoritarian system, in particular its long history of instrumentalizing reproduction to serve state goals. Significant efforts have been made to provide legal protections for women. Yet such rights

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421 *Cf.* Murray, *supra* note 4 (discussing the Roberts Court's privileging male-coded rights over female-coded rights).

422 *See* Forman-Rabinovici & Johnson, *supra* note 4; Siegel, Mayeri & Murray, *supra* note 6.

423 *See* Nitasha Kaul, *The Misogyny of Authoritarians in Contemporary Democracies*, 23 INT'L STUD. REV. 1619 (2021).

424 *See* Joe McDonald, *China Bans 'Sissy Men' from TV in New Cultural Crackdown*, L.A. TIMES (Sept. 2, 2021), https://www.latimes.com/world-nation/story/2021-09-02/china-bans-sissy-men-tv-new-crackdown-culture [https://perma.cc/HZB5-D4ZU]; Shen Lu, *No Women on China's Politburo for First Time in a Quarter Century,* WASH. POST (Oct. 23, 2022), https://www.wsj.com/livecoverage/china-xi-jinping-communist-party-congress/card/no-women-on-china-s-politburo-for-first-time-in-qwSOFxdl9smnVTbgmCv8 [https://perma.cc/X893-W92Z].

run into entrenched cultural norms and institutional interests. It is thus no surprise that courts that find themselves adjudicating questions regarding reproductive rights either avoid such questions entirely or privilege cultural continuity, social stability, and their own interests in resolving cases. China's political system has surely played a significant role in shaping how courts adjudicate cases touching on gender rights and reproduction. The Party-state continues to view women's rights through the lens of its own goals. But the similarities to how courts elsewhere adjudicate reproductive rights also suggest caution in assuming that such outcomes are due solely or primarily to Party policy. The cases we analyze illustrate that infringement of rights should not always be interpreted as caused by—and may even be occurring despite—China's political system.

Similarly, it may be a mistake to assume that democratic systems will necessarily be better protectors of women's rights and reproductive autonomy. After all, similar claims seeking to restrict abortion arise in vastly different legal contexts and regime types. In the United States, much of the debate about abortion has been cast in terms of the role of unelected institutions in a democratic society—with critics and supporters of abortion rights presenting their positions within the context of democratic theory.[425] Yet what the case of China helps us to see is that legal conflict over gender and reproductive rights will arise and persist regardless of constitutional structure or regime type. Our findings confirm that institutional resolution of the abortion debate will not resolve the issue as a social matter, in China, the United States, or elsewhere.[426] Rather, resolving the abortion debate will likely require resolving broader, deeper, and more intransigent debates about gender and male power.

CONCLUSION

Party-state birth planning authorities are not the only forces constraining women's reproductive autonomy in contemporary China. Likewise, law and courts are not irrelevant to regulating abortion in China. Men seek to control women's reproductive autonomy and use the courts to do so. Chinese courts have not only served as unexpected fora for contesting reproduction, but have also played an indirect role in regulating abortion by ignoring,

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425 *See* Murray & Shaw, *supra* note 5, at 731 ("Despite this lofty talk of returning the abortion question 'to the people,' the *Dobbs* majority's conception of democracy . . . collapses upon close examination . . . [and] the conception of democracy it displays is profoundly limited.").

426 For a discussion of how laws can be usefully discordant with social values, see CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996). For a discussion of how on a global level "more legal grounds for abortion [and healthcare capacity-building] do not inevitably translate to more access" due to "entrenched stigma," see Remez et al., *supra* note 407, at 61.

legitimizing, and occasionally rewarding men's claims. Our findings paint a picture of how persistent male claims to control women's reproduction can be, how and why women and their lawyers often fail to raise legal objections to such claims, and how legal institutions often bend or ignore the law in favor of deep-rooted cultural norms. As China emerges from an era in which the state coercively administered contraception, sterilization, and abortion, the relaxation of birth regulation does not necessarily equate to greater freedom for women. In addition, as the Chinese Party-state increasingly embraces pro-birth policies, the Party-state seems likely to rely on a combination of cultural norms and private law enforcement to achieve its new goals of restricting abortion and encouraging births.

Scholars working across a range of jurisdictions should be attuned to how legal systems create space for and reinforce men's claims to control women's reproductive choices, even when the right to abortion is clear and well-established in law. In particular, scholars should consider how routine private law lawsuits can become sites where reproductive rights are either fulfilled or denied, how rights can be weaponized to serve regressive goals, and the extent to which political regime type affects how and where a state regulates abortion. The U.S. Supreme Court's ruling in *Dobbs* has reignited and reshaped global conversation regarding reproductive rights.[427] China's recent experiences demonstrate that there is much to learn from looking beyond frameworks that assume a clear divide between authoritarian and liberal systems when it comes to regulating abortion. Viewing how abortion is contested in China's courts reveals what is at the core of litigation over reproductive rights: a struggle between men and women to control women's bodies, one in which the participants regularly search for new modes of legal expression.

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427 *See, e.g.*, Kaufman et al., *supra* note 3.

THE PERSONAL (JURISDICTION) IS POLITICAL: THE REACH AND OVERREACH OF ABORTION BOUNTY-HUNTER LAWS

SARAH GELLER*

Abstract

Extraterritorial laws between states have long been debated, but less discussed are the implications of these extraterritorial theories on personal jurisdiction. As anti-abortion states continue to pass extraterritorial laws targeting abortion—bounty-hunter abortion laws—it becomes increasingly important to address the role personal jurisdiction will play in attempts to enforce these laws. Personal jurisdiction may serve as a useful roadblock to stop bounty-hunter lawsuits. This Note seeks to fill this gap in the literature by examining both the role personal jurisdiction will play in extraterritorial anti-abortion lawsuits and the fit between theories underlying personal jurisdiction and extraterritoriality. In this context, the governing state and federal precedents and the values underlying personal jurisdiction do not support exercise of personal jurisdiction over out-of-state defendants. Part I details states that have currently enacted bounty-hunter laws, the ongoing lawsuits related to these laws, and the issues these suits have presented for the basic requirements of personal jurisdiction. Part II lays out the menu of ways these cases might be handled, specifically by addressing the likely types of defendants and exploring how personal jurisdiction would—or, more aptly, would not—apply. Part III concludes by discussing theories underlying personal jurisdiction and how they support judges finding that bounty-hunter lawsuits against out-of-state defendants should not proceed. I argue that both Supreme Court precedent and personal jurisdiction's underlying normative values indicate that courts should not have personal jurisdiction over out-of-state abortion-suit defendants. Personal jurisdiction is one of the many procedural roadblocks—in addition to questions of substantive law—that will arise in civil enforcement mechanism lawsuits.

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INTRODUCTION

Skye Torres was living in Texas when she discovered that she was pregnant by her now ex-fiancé.[1] Unfortunately, Texas is one of the twenty-six states and three United States territories that have heavily restricted or almost completely banned abortion[2] in the aftermath of *Dobbs v. Jackson Women's Health Organization*.[3] After Torres informed her partner that she would be seeking an abortion because of the financial and mental burden of caring for a child, Torres' mother, Amanda Trevino, assisted her in obtaining an abortion on April 18, 2023.[4] Torres refused to provide her partner with additional details regarding the procedure.[5] Now, Torres' ex-fiancé is suing both Torres and Trevino using Texas's Heartbeat Ban's ("SB8") bounty-hunter law,[6] which is a part of a larger bill restricting abortion access and creating civil penalties for abortion in Texas.[7] The bounty-hunter law includes a civil enforcement mechanism that incentivizes private citizens to sue individuals who helped someone obtain an abortion, rather than using the typical criminal penalties in which state officials commence the action.[8] Civil enforcement mechanisms were initially implemented in anti-abortion legislation to avoid state action,[9] which would have violated *Roe v. Wade*'s

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1 *See* Petition at 1–2, Lummus v. Torres, No. 23-CV-1461 (Tex. Dist. Ct. Galveston Cnty. Sept. 5, 2023).

2 *See, e.g.*, *After* Roe *Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS. (2022), https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/MN5X-7682] [hereinafter *After* Roe *Fell*, CTR. FOR REPROD. RTS.].

3 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

4 *See* Petition at 2–3, *Lummus*, No. 23-CV-1461.

5 *See id.*

6 *See id.*

7 *See* S. 8, 87th Sess., 2021 Tex. Gen. Laws 125.

8 *See* Alan Feuer, *The Texas Abortion Law Creates a Kind of Bounty Hunter. Here's How it Works.*, N.Y. TIMES (Sept. 10, 2021), https://www.nytimes.com/2021/09/10/us/politics/texas-abortion-law-facts.html [https://perma.cc/K8NE-JYJH] ("It removes enforcement entirely from state jurisdiction, and vastly expands who can sue, and who can be sued, over abortions. The statute, for example, permits anyone—even people who live outside Texas—to file a complaint in any court in the state if they believe an abortion has been performed.").

9 *See* Erin Douglas & Carla Astudillo, *We Annotated Texas' Near-Total Abortion Ban. Here's What the Law Says About Enforcement.*, TEX. TRIB. (Sept. 10, 2021), https://www.texastribune.org/2021/09/10/texas-abortion-law-ban-enforcement/ [https://perma.cc/F7P3-EYDN] ("[T]he law dramatically expands the concept of a civil lawsuit and is aimed at keeping providers from using the constitutional right to an abortion under Roe v. Wade as a legal defense.").

protection of the right to abortion.[10] In the aftermath of *Dobbs*, this legal workaround is no longer necessary.[11] However, states continue to include civil enforcement mechanisms in their anti-abortion legislation to provide additional opportunities for restricting abortions.[12]

Texas state courts will clearly have personal jurisdiction over Skye Torres and Amanda Trevino. Personal jurisdiction is a constitutional requirement derived from the Due Process Clause[13] and mandates that a forum state where the court sits must possess "minimum contacts" with a defendant to hear a case.[14] Torres and Trevino's Texas residencies and in-state presence create the requisite minimum contacts with Texas.[15] But unnamed parties who helped Torres may also be at risk, and it remains unclear where or how Torres received her abortion. As the lawsuit continues and more parties are potentially named as defendants, issues of personal jurisdiction may arise for out-of-state defendants. Such defendants may use lack of personal jurisdiction as a defense against activist anti-abortion lawsuits.[16] Accordingly, it is imperative to understand when a court can exercise personal jurisdiction over out-of-state individuals who provide or facilitate abortions.

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

11 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) ("*Roe* and *Casey* must be overruled.").

12 *See* Emma Bowman, *As States Ban Abortion, the Texas Bounty Law Offers a Way to Survive Legal Challenges*, NPR (July 11, 2022), https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law [https://perma.cc/8BTP-6CCM] ("The anti-abortion advocates who developed the Texas law . . . thought criminal laws in comparison offered fewer ways to survive court challenges and too much discretion to the more progressive prosecutors who might fail to enforce the law.").

13 The Due Process Clause can be found in both the Fifth and Fourteenth Amendments of the United States Constitution. U.S. CONST. amends. V, XIV. The Fifth Amendment states that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Fourteenth Amendment states, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

14 *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("[D]ue process requires only that in order to subject a defendant to a judgment in personam . . . he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (citation omitted)).

15 Residence, often referred to as presence in a state, and the intent to stay there are the two determiners of domicile. *See* Lea Brilmayer, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728–29 (1988) [hereinafter Brilmayer, *General Jurisdiction*]. Domicile is a traditional basis of personal jurisdiction and establishes sufficient minimum contacts for a court to exercise jurisdiction. *See id.* at 730.

16 Anti-abortion is used throughout this Note to describe states with laws that ban or severely limit abortion and policies that support denying or limiting abortion access. Additionally, this Note will use the term pro-

Franz Theard, a New Mexico doctor and abortion provider, is being sued in Texas for providing medical abortions to Texas residents.[17] Theard opened his New Mexico clinic in 2010 because of his fear that *Roe* would be overturned and his frustration with the increasingly difficult conditions he faced as an abortion provider in Texas.[18] After SB8 passed in Texas, Theard "made it his mission to persuade the women of East Texas to come west instead of going to Oklahoma, Louisiana, Kansas or Arkansas" to help provide easily accessible abortions.[19] Now, Theard faces an SB8 lawsuit from a Texas resident who alleges that some of Theard's patients have taken misoprostol—the abortion drug taken after mifepristone—in their home state of Texas, violating Texas law.[20] As the lawsuit continues, Theard's New Mexico residence could block personal jurisdiction in Texas state court.[21]

While Skye Torres is only one woman, and Franz Theard one provider, many women[22] from anti-abortion states with bounty-hunter laws[23] or other anti-abortion laws have crossed state borders to receive an abortion and received help from out-of-state individuals.[24] Any

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choice. Pro-choice generally refers to policies that promote abortion access and reproductive rights, leaving the decision of whether to get an abortion up to the individual.

17 *See* Petition at 1, Byrn v. Theard, No. 51499-A (Tex. Dist. Ct. Taylor Cnty. Dec. 5, 2022).

18 *See* Jada Yuan, *The New Mexico Provider Trying to Save Abortion for Texas Women*, WASH. POST MAG. (May 10, 2022), https://www.washingtonpost.com/magazine/2022/05/10/new-mexico-border-provider/ [https://perma.cc/9LB3-349L].

19 *Id.*

20 *See* Petition at 2–5, *Byrn*, No. 51499-A.

21 *See infra* Part II.A.3.

22 For the sake of linguistic clarity, this Note will typically refer to the people seeking and obtaining abortions as women. I acknowledge that some individuals who get abortions and are affected by these laws are not women, and their experiences are important to include in the narratives surrounding abortion.

23 Bounty-hunter laws refer to state laws that seek to penalize, either civilly or criminally, actions that happen *out of state*. The laws analyzed in this Note target abortions that occur out of state, whether by targeting the individual who received the abortion or by targeting individuals or organizations who helped that person receive an abortion. *See* Bowman, *supra* note 12.

24 *See* Claire Cain Miller & Margot Sanger-Katz, *Despite State Bans, Legal Abortions Didn't Fall Nationwide in Year After* Dobbs, N.Y. TIMES (Oct. 24, 2023), https://www.nytimes.com/2023/10/24/upshot/abortion-numbers-dobbs.html [https://perma.cc/PPD9-J25W] ("The biggest increases in legal abortions occurred in states that border those with bans, suggesting that many patients traveled across state lines."); *see also* Zolan Kanno-Youngs & Edrya Espriella, *A New Border Crossing: Americans Turn to Mexico for Abortions*, N.Y. TIMES (Sept. 25, 2023), https://www.nytimes.com/2023/09/25/world/americas /mexico-abortion-women-

combination of the two cases described above (and detailed in Part I) will likely occur in states with bounty-hunter laws in place.[25] As women continue seeking abortions out of state, lawsuits will inevitably arise between citizens of different states. All fifty states have their own "long-arm statute," which allows them to assert personal jurisdiction over out-of-state defendants.[26] But, in addition to complying with these statutes, assertions of personal jurisdiction must always satisfy constitutional due process.[27]

This Note serves to highlight and chronicle the personal jurisdiction issues that civil lawsuits over interstate abortions may raise. I argue that both Supreme Court precedent and personal jurisdiction's underlying normative values indicate that courts should not have personal jurisdiction over out-of-state abortion-suit defendants. Personal jurisdiction is one of the many procedural roadblocks—in addition to substantive law questions—that will arise in civil enforcement mechanism lawsuits.[28] Since personal jurisdiction for civil cases differs from jurisdiction in criminal cases, this Note will focus on states that have enacted anti-abortion laws with a civil enforcement mechanism, specifically bounty-hunter laws targeting out-of-state defendants. This Note discusses cases that have been brought in both federal and state courts. As of now, most cases have been in state court, likely because

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border.html [https://perma.cc/6NB5-G22E] (explaining that some women have traveled to Mexico to get an abortion, raising additional questions about jurisdiction over international citizens).

25 *See* Jill Filipovic, *Abortion Bans Are Empowering Abusive Men—and Prominent "Pro-Life" Activists Are Representing Them*, MS. MAG. (May 8, 2024), https://msmagazine.com/2024/05/08/abortion-bans-violence-against-women-ex-boyfriend-husband-abuse/ [https://perma.cc/K2MJ-GPEH] ("[S]everal men have indeed taken advantage of these [anti-abortion] laws in an effort to control their ex partners [sic]. And it's also not particularly surprising—although it is appalling—that they've found support and legal representation from some of the most powerful people in the U.S. anti-abortion movement.").

26 *See* LONG-ARM STATUTES: A FIFTY-STATE SURVEY (Vedder, Price, Kaufman & Kammholz, P.C., 2003).

27 *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("[D]ue process requires . . . if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"); *see also* Pennoyer v. Neff, 95 U.S. 714, 733 (1877) ("[P]roceedings in a court of justice to deter mine [sic] the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.").

28 Other likely legal issues include choice of law, justiciability, standing, and venue. Beyond procedural roadblocks, many scholars have also raised questions about the right to travel and whether states can criminalize activity outside of their borders. *See, e.g.*, David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 22–23 (2023).

the cases do not meet diversity[29] or federal question[30] requirements for standing in federal court.[31] However, personal jurisdiction analyses will remain the same for both federal and state court cases, and this Note discusses both.[32] In analyzing jurisdiction, this Note focuses on adjudicative rather than prescriptive jurisdiction; in other words, this Note discusses a court's power over an individual rather than the creation of substantive extraterritorial rules (which would be better analyzed as a choice of laws issue).[33] Prescriptive jurisdiction remains another topic ripe for exploration, but this Note explores the often less-addressed issue of adjudicative jurisdiction.[34] Additionally, this Note focuses on defendants who *aid* abortions in some way, as most bounty-hunter laws do not target women who receive

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29 *See* 28 U.S.C. § 1332 (explaining that federal courts have original jurisdiction when the amount in controversy exceeds $75,000 and the parties are from different states or places). It is likely these cases would not meet the amount in controversy requirements given that the statute allows for "not less than $10,000 for each abortion." S. 8, 87th Sess., 2021 Tex. Gen. Laws 127–28. Therefore, cases would need to allege at least eight abortions in order to meet the amount in controversy required. Additionally, joinder of Texas defendants who aided or abetted in any way would destroy diversity. *See* 28 U.S.C. § 1332 (requiring complete diversity among defendants in a diversity jurisdiction suit).

30 *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

31 Additionally, the civil enforcement nature of the suit means that defendants would likely not meet Article III standing requirements for federal courts, creating another barrier to these suits being raised in federal courts. *See* Lea Brilmayer, *Abortion, Full Faith and Credit, and the "Judicial Power" Under Article III: Does Article IV of the U.S. Constitution Require Sister-State Enforcement of Anti-Abortion Damages Awards?*, 44 COLUM. J. OF GENDER & L. 3 (2024) [hereinafter Brilmayer, *Abortion Full Faith and Credit*]; *see also* TransUnion LLC v. Ramirez, 594 U.S. 413, 417 (2021) ("To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm . . . Central to assessing concreteness is whether the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts." (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 340–41 (2016))).

32 The requirement of personal jurisdiction in state courts is rooted in the Fourteenth Amendment's Due Process Clause. *See Int'l Shoe*, 326 U.S. at 316 (1945). The Supreme Court has yet to determine whether the Fifth Amendment extends this same requirement to federal courts. *See* Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 582 U.S. 255, 257 (2017) ("[T]he question remains open whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."). But the Federal Rules of Civil Procedure base a federal court's jurisdiction on the state court's ability to exercise jurisdiction in that same forum. *See* FED. R. CIV. P. 4I(1). Additionally, "[f]ederal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons." Daimler AG v. Bauman, 571 U.S. 117, 125 (2014) (citing FED. R. CIV. P. 4(k)(1)(A)).

33 For a discussion of choice of law in the context of abortion, see Brilmayer, *Abortion Full Faith and Credit*, *supra* note 31.

34 *See infra* Part II.

abortions, and abortion recipients are less likely to raise a successful personal jurisdiction defense.[35]

Extraterritorial laws between states have long been debated,[36] but less discussed are the implications of these extraterritorial theories on personal jurisdiction.[37] As anti-abortion states continue to pass extraterritorial laws targeting abortion, it becomes increasingly important to address the role personal jurisdiction will play in attempts to enforce these laws. This Note seeks to fill this gap in the literature by examining both the role personal jurisdiction will play in extraterritorial anti-abortion lawsuits and the fit between theories underlying personal jurisdiction and extraterritoriality. In this context, the governing state and federal precedents and the values underlying personal jurisdiction do not support exercise of personal jurisdiction over out-of-state defendants. Part I details states that have currently enacted bounty-hunter laws, the ongoing lawsuits related to these laws, and the issues these suits have presented for the basic requirements of personal jurisdiction. Part II lays out the menu of ways these cases might be handled, specifically by addressing the likely types of defendants and exploring how personal jurisdiction would—or, more aptly, would *not*—apply. Part III concludes by discussing theories underlying personal jurisdiction and how they support judges finding that bounty-hunter lawsuits against out-of-state defendants should not proceed.

I. The Current Landscape

In 2022, the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*, a watershed case that overturned *Roe v. Wade* and held that there is no federal constitutionally-

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35 An individual is subject to general jurisdiction in a state where it is found that the individual has domiciled. *See* Brilmayer, *General Jurisdiction*, *supra* note 15, at 728–29 ("A state has a special relationship with its domiciliaries that justifies the state's exercise of judicial and regulatory authority over these residents. Indeed, most courts treat as self-evident the state's right to subject domiciliaries to the jurisdiction of its courts."). A person has domicile in a state if they have both "physical presence in a new location and an intent to make the place home." *Id.* at 729. Additionally, the bounty-hunter laws examined in this Note do not target the women who received an abortion. *See, e.g.*, S. 8, 87th Sess., 2021 Tex. Gen. Laws 125.

36 *See generally* Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855 (2002).

37 *See generally* Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. UNIV. L. Q. 377 (1985) (explaining that states can only assert extraterritorial jurisdiction over out-of-state defendants in situations of liability-related contact with the state); Jeffrey M. Schmitt, *Rethinking the State Sovereignty Interest in Personal Jurisdiction*, 66 CASE W. RSRV. L. REV. 769 (2016) (arguing for the importance of considering sovereignty in personal jurisdiction opinions).

recognized right to abortion in the United States.[38] In response to *Dobbs*, many states passed laws banning or restricting abortion within their borders.[39] Beyond the question of how far such restrictions can go, many were left wondering about the right to travel for an abortion.[40] In his *Dobbs* concurrence, Justice Kavanaugh wrote about this concern: "For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel."[41] Such unenforceable promises do not guarantee that those who travel or help someone travel are protected; it remains unclear how state governments define providing abortions or traveling to get them.[42] Using the state laws discussed below, many state and local government officials may try to limit travel for abortions by punishing engaging in or aiding such behavior.[43] In such lawsuits, personal jurisdiction will be a useful barrier for pro-choice individuals and organizations to deploy against states' attempts to extraterritorially impose their anti-abortion beliefs on bordering states.

A. State Laws

In the lead-up to—and in the wake of—*Dobbs*, many states passed restrictions or bans on abortion.[44] As discussed, one method of implementing these laws has been the civil

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38 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) ("The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision.").

39 *See* Mabel Felix & Laurie Sobel, *A Year After* Dobbs*: Policies Restricting Access to Abortion in States Even Where It's Not Banned*, KFF (June 22, 2023), https://www.kff.org/policy-watch/year-after-dobbs-policies-restricting-access-to-abortion/ [https://perma.cc/C9LQ-FK2S] ("Almost one year after the Supreme Court overturned Roe v. Wade . . . abortion laws and access to abortion are uneven across the country.").

40 *See* Cohen et al., *supra* note 28, at 22–23 ("Until there is a national ban, the movement will use state powers to stop as many abortions as possible, including outside state borders.").

41 *Dobbs*, 597 U.S. at 346 (Kavanaugh, J., concurring).

42 *See* Thor Benson, *Interstate Travel Post-*Roe *Isn't as Secure as You May Think*, WIRED (July 25, 2022), https://www.wired.com/story/insterstate-travel-abortion-post-roe/ [https://perma.cc/J739-2GK6]; *see also* Rachel M. Cohen, *The Coming Legal Battles of Post-*Roe *America*, VOX (June 27, 2022), https://www.vox.com/2022/6/27/23183835/roe-wade-abortion-pregnant-criminalize [https://perma.cc/MR9H-RY8K] ("[T]he questions around what it means to both provide and obtain an abortion have evolved considerably since the pre-*Roe* days, as have questions about what it means to 'cross state lines' to get one.").

43 *See infra* Part I.A.

44 *See* Felix & Sobel, *supra* note 39.

enforcement mechanism.[45] The civil enforcement mechanism is part of a larger piece of anti-abortion legislation that allows private citizens to sue those who have aided someone in receiving an abortion.[46] Such laws, often called bounty-hunter laws or trafficking laws, are a method for anti-abortion states to police behavior outside their borders.[47] They are essentially extraterritorial laws that try to force the state's own viewpoint onto other states and expand the reach of who they can punish. Other states have attempted to combat these laws by passing "interstate shield laws" with the aim of protecting their citizens who help someone in an anti-abortion state obtain an abortion.[48] Catalogued below is information about states with enacted or attempted civil enforcement mechanisms in their anti-abortion laws.[49]

Idaho's Fetal Heartbeat Preborn Child Protection Act creates a private right of action to sue another for abortion-related conduct: "Any female upon whom an abortion has been attempted or performed, the father of the preborn child, a grandparent of the preborn child, a sibling of the preborn child, or an aunt or uncle of the preborn child" is able to sue any medical professional who has performed or attempted to perform an abortion.[50] Thus, people who were not even the recipient of an abortion can also sue doctors using these statutes. Pro-choice advocates attempted to challenge this law in state court under a variety of state and federal constitutional arguments, but the court denied their claims.[51] The Idaho bounty-hunter law remains active.[52]

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45 *See* Bowman, *supra* note 12 ("[SB 8] allows private citizens to file a civil lawsuit against anyone who knowingly 'aids or abets' an abortion.").

46 *See id.*

47 *See id.*

48 *After* Roe *Fell*, CTR. FOR REPROD. RTS., *supra* note 2 (chronicling states with interstate shield laws: California, Oregon, Washington, Nevada, Colorado, New Mexico, Minnesota, Illinois, New York, Vermont, Maryland, Delaware, Hawaii, New Jersey, Connecticut, Massachusetts, and Maine).

49 This Note focuses on laws with civil enforcement mechanisms, not criminal laws, as jurisdiction needed for criminal cases differs from the personal jurisdiction needed for civil cases.

50 S. 1358, 66th Leg., Reg. Sess. (Idaho 2022).

51 *See* Planned Parenthood Great Northwest v. Idaho, 522 P.3d 1132, 1148 (Idaho Sup. Ct. 2023).

52 S. 1358, 66th Leg., Reg. Sess. (Idaho 2022).

Texas has passed the most restrictive, widest reaching, and most notorious bounty-hunter law.[53] The statute allows for "[a]ny person, other than an officer or employee of a state or local governmental entity in this state" to bring a civil action lawsuit against anyone who "performs," "aids[,] or abets" an abortion.[54] Such language seemingly allows *any* individual, with no connection whatsoever to the aborted fetus, to sue over *any* abortion, including out-of-state abortions.[55]

Some courts may adopt statutory constructions that narrow the range of suits permitted. For example, in *Van Stean v. Texas Right to Life*, a multidistrict litigation suit in the District Court of Travis County, Texas, the court held that SB8's grant of a cause of action to "any person" violated both Texas and federal standing requirements.[56] As this case demonstrates, courts may choose to interpret "any person" more narrowly to limit the number of suits possible.[57] Even so, the district court's opinion in *Van Stean* is non-precedential, and thus other Texas courts may interpret "any person" using broader understandings. Even with narrowed understandings, SB8 remains broad enough to put many people and their actions at risk for civil lawsuits.

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53 *See, e.g.*, *Texas' Radical Abortion Ban Could Lead to Copycat Bills. Here's What to Know.*, ACLU (Oct. 6, 2021), https://www.aclu.org/news/reproductive-freedom/heres-what-to-know-about-texas-radical-new-abortion-ban [https://perma.cc/L4MP-5RPS] ("While SB 8 is uniquely egregious, it's a stark example of what's at stake in the nationwide fight for reproductive freedom. Its impact could spread to millions more nationwide if other states follow suit with copycat bills.").

54 "Any person, other than an officer or employee of a state or local governmental entity in this state" may sue "any person who: (1) performs or induces an abortion in violation of this subchapter; (2) knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of this subchapter, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter; or (3) intends to engage in the conduct described by Subdivision (1) or (2)." S. 8, 87th Sess., 2021 Tex. Gen. Laws 127.

55 *See id.*

56 Van Stean v. Texas Right to Life, No. D-1-GN-21-004179, slip op. at 36 (Tex. Dist. Ct. Travis Cnty. Dec. 9, 2021) ("Applying these principles, this court holds that SB 8's grant of standing for persons who have not been harmed to sue persons who have not harmed them, mandating a large award without proof of harm, is unconstitutional."), *aff'd*, 2023 WL 3687408 (Tex. Ct. App., Austin May 26, 2023).

57 *See, e.g.*, *id.*

Additionally, counties within Texas have proposed their own ordinances that would use similar civil enforcement mechanisms to punish those helping people obtain abortions.[58] In one city, Llano, the proposed (and currently tabled) ordinance "make[s] it illegal to transport anyone to get an abortion on roads within the city or county limits. The laws allow any private citizen to sue a person or organization they suspect of violating the ordinance."[59] Lubbock County, a Texas county bordering New Mexico, passed such an ordinance "to make it illegal for anyone to transport a pregnant woman through the county, or pay for her travel, for the purpose of seeking an abortion."[60] As of August 2023, two counties in Texas had passed such civil enforcement anti-abortion trafficking ordinances, and twenty others have showed interest in similar measures.[61]

Eleven states have introduced or proposed a variation of their own bounty-hunter anti-abortion laws, mainly following the same wording of SB8, but these laws have stalled or failed for various reasons.[62] These states include Alabama,[63] Arizona,[64] Arkansas,[65] Florida,[66]

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58 *See* Caroline Kitchener, *Highways Are the Next Antiabortion Target. One Texas Town is Resisting.*, WASH. POST (Sept. 1, 2023), https://www.washingtonpost.com/politics/2023/09/01/texas-abortion-highways/ [https://perma.cc/48JK-VW7Y]; J. David Goodman, *In Texas, Local Laws to Prevent Travel for Abortions Gain Momentum*, N.Y. TIMES (Oct. 24, 2023), https://www.nytimes.com/2023/10/24/us/texas-abortion-travel-bans.html [https://perma.cc/987C-X5ZZ] ("The ordinances . . . rely on the same enforcement mechanism as the abortion ban: lawsuits by private citizens.").

59 *See* Kitchener, *supra* note 58.

60 *See* Goodman, *supra* note 58.

61 *See* Kitchener, *supra* note 58.

62 *See* Susan Rinkunas, *We're Tracking All the Texas-Style Abortion Bills*, JEZEBEL (Jan. 4, 2022), https://jezebel.com/were-tracking-all-the-texas-style-abortion-bills [https://perma.cc/27DT-HC7X].

63 *See* H.R. 23, 2022 Leg., Reg. Sess. (Ala. 2022). This bill was not passed.

64 *See* H.R. 2483, 55th Leg., 2d Reg. Sess. (Ariz. 2022). This bill was not passed.

65 *See* S. 13, 93d Gen. Assemb., 2d Spec. Sess. (Ark. 2021). This bill was not passed.

66 *See* H.R. 167, 2022 Leg., Reg. Sess. (Fla. 2022). This bill was not passed.

Iowa,[67] Louisiana,[68] Minnesota,[69] Missouri,[70] Ohio,[71] Oklahoma,[72] and Wisconsin.[73] More states and counties may try to pass similar civil enforcement mechanism laws, especially if lawsuits based on these civil enforcement mechanisms succeed.[74] If one state succeeds in its mission to enact its extraterritorial policies on non-residents, it could signal to other anti-abortion states that they could do the same and revitalize proposed bills in anti-abortion states. Thus, it is especially important that such lawsuits not only fail, but that they fail quickly.

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67 *See* H.R. 510, 90th Gen. Assemb., Reg. Sess. (Iowa 2023). This bill has stalled after introduction to the House Judiciary.

68 *See* H.R. 800, 2022 Leg., Reg. Sess. (La. 2022). This bill was not passed.

69 *See* H.R. 2898, 92d Leg., Reg. Sess. (Minn. 2022). This bill was not passed.

70 Representative Mary Elizabeth Coleman proposed a bounty-hunter law, targeted mainly at residents of the neighboring state Illinois, but the proposal never made it into the final bill. *See* H.B. 2012, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022); *see also* Tessa Weinberg, *Missouri House Blocks Effort to Limit Access to Out-of-State Abortions*, MO. INDEP. (Mar. 29, 2022), https://missouriindependent.com/2022/03/29/missouri-house-blocks-effort-to-limit-access-to-out-of-state-abortions/ [https://perma.cc/7KNL-4WN6]; Caroline Kitchener, *Missouri Lawmaker Seeks to Stop Residents from Obtaining Abortions Out of State*, WASH. POST (Mar. 8, 2022), https://www.washingtonpost.com/politics/2022/03/08/missouri-abortion-ban-texas-supreme-court/ [https://perma.cc/8CJ7-CY3K].

71 *See* H.R. 480, 134th Gen. Assemb., Reg. Sess. (Ohio 2021). This bill was not passed.

72 *See* S. 1503, 2022 Leg., Reg. Sess. (Okla. 2022). The Oklahoma laws were passed but then struck down by the Oklahoma Supreme Court in 2023, as they did not provide exceptions for situations where a mother's life was in danger. *See* Oklahoma Call for Reprod. Just. v. State, 531 P.3d 117, 123 (Okla. Sup. Ct. 2023). The Oklahoma Supreme Court had previously found that the state Constitution provides a "right to abortion in life-threatening situations," which is the precedent the court relied on in this decision. *Oklahoma Supreme Court Ruling Affirms Right to Life-Saving Abortion Care*, CTR. FOR REPROD. RTS. (June 2023), https://reproductiverights.org/oklahoma-supreme-court-overturns-abortion-bans/ [https://perma.cc/QXP5-EN49]; *accord* Oklahoma Call for Reprod. Just. v. Drummond, 543 P.3d 110, 115 (Okla. Sup. Ct. 2023). This decision was based on the lack of life in danger exception, and it is very possible, and likely, that the legislature in Oklahoma could pass new legislation similar to the one struck down, this time adding in a provision for emergencies.

73 *See* S. 923, 2021–2022 Leg., Reg. Sess. (Wis. 2022). This bill was not passed.

74 *See* Kitchener, *supra* note 58. For the idea that more states will pass similar bounty-hunter laws based on model legislation, see Memorandum from James Bopp, Jr., Nat'l Right to Life Comm. General Counsel, Courtney Turner Milbank, & Joseph D. Maughon to Nat'l Right to Life Comm. (June 15, 2022), https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf [https://perma.cc/Q8KP-4D47].

B. Bounty-Hunter Lawsuits

As of the writing of this Note, Texas state court dockets include suits grounded in Texas's SB8 bounty-hunter law.[75] Some lawsuits are between Texas resident defendants and Texas resident plaintiffs, meaning personal jurisdiction will not be at issue.[76] However, these cases still provide insight into what the new battle over abortion will look like in court. As more women continue to travel out of state for abortions, these lawsuits will likely continue to proliferate.[77]

One way for defendants in bounty-hunter cases to avoid a trial on the merits, and thus liability, is to challenge the personal jurisdiction of the court by asserting state civil procedure defenses and their rights under constitutional due process.[78] Lack of personal jurisdiction acts as a strong defense, as it prevents the case from being heard *before* the merits are even considered;[79] this is especially important in courts where judges might themselves be anti-abortion and in states where harsh anti-abortion laws and sentiment exist. In Texas, the state equivalent of a Federal Rules of Civil Procedure 12(b)(2) lack of personal jurisdiction defense is Rule 120 of the Texas Rules of Civil Procedure. Rule 120 allows a defendant to file for appearance to contest the court's jurisdiction over the defendant.[80] Since SB8 is a Texas law, if the defendants could beat personal jurisdiction in Texas courts, then they would have won the proverbial boxing match, as there would be no arena left to stage this fight. The following discussion of ongoing cases assesses what this fight looks like now and how it will continue to develop.

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75 *See generally* Petition for Review at 12, De Mino v. Gomez, No. 22-0517 (Tex. Sup. Ct. Aug. 22, 2022); Petition, Lummus v. Torres, No. 23-CV-1461 (Tex. Dist. Ct. Galveston Cnty. Sept. 5, 2023); Petition, Byrn v. Theard, No. 51499-A (Tex. Dist. Ct. Taylor Cnty. Dec. 5, 2022).

76 In these cases, domicile will provide a clear basis of personal jurisdiction over the defendants. *See* Brilmayer, *General Jurisdiction*, *supra* note 15, at 728–29.

77 *See* Filipovic, *supra* note 25 (reporting that "[a]nother Texas man murdered his girlfriend after she traveled to Colorado for an abortion . . . [and] a third Texas man found out his ex-girlfriend was planning to travel out of state to end her pregnancy, and he also hired [anti-abortion lawyer] Jonathan Mitchell to help stop her.").

78 U.S. CONST. amend. X; U.S. CONST. amend. XIV, §1.

79 *See* Fed. R. Civ. P. 12(b)(2).

80 The other states that have passed bounty-hunter laws also have their own equivalents of FRCP 12(b)(2). Most states have such an equivalent. For example, Oklahoma has Section 2012(B)(2) of Title 12 of Oklahoma Statutes, and Idaho has Rule 12(b)(2) of the Idaho Rules of Civil Procedure.

One sweeping lawsuit targets numerous non-Texas residents.[81] In *Byrn v. Theard*, a Texas citizen has requested the deposition of Franz Theard, a New Mexico doctor at a clinic that provides mifepristone.[82] In this suit, Byrn is asserting both a civil right of action—using SB8 as his basis—and a criminal right of action, claiming criminal jurisdiction for Texas under Texas Penal Code §1.04(a).[83] Yet Byrn never asserts a basis for personal jurisdiction for the civil aspect of the lawsuit.[84] The petition describes a woman with the pseudonym of Kayleigh who took the mifepristone she received at Theard's clinic once she was already back in Texas.[85] Byrn is not only attempting to attack Theard with this lawsuit, but also other potential defendants, as "[l]iability under SB 8 would also extend to anyone who paid for Kayleigh's abortion, anyone who referred Kayleigh to Theard's clinic, and anyone who knowingly provided Kayleigh with transportation to or from the Women's Reproductive Clinic of New Mexico."[86] As this case develops, Theard, and any other soon-to-be-named parties, should assert a Texas Rule 120 defense, arguing that the Texas court lacks personal jurisdiction to hear the case.

As of the publication of this Note, *Lummus v. Torres* has been transferred from the District Court of Galveston County, Texas, to the newly-created Texas Fifteenth District Court of Appeals.[87] The case involves civil and criminal claims by a man suing his ex-partner and her mother for his ex-partner's abortion.[88] Both of the defendants currently named are Texas residents, so personal jurisdiction is not yet an issue.[89] However, Lummus, the plaintiff, explicitly stated in his petition that he is considering suing others involved

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81 *See* Petition at 5, *Byrn*, No. 51499-A ("Any person who was complicit in this illegal abortion—including every employee, volunteer, and donor of the Women's Reproductive Clinic of New Mexico, and anyone who aided or abetted this illegal abortion in any manner . . . is equally liable under the Texas Heartbeat Act.").

82 *See id.* at 1.

83 *See id.* at 4–6.

84 *See id.*

85 *See id.* at 4.

86 *Id.* at 5.

87 *See* Adolfo Pesquera, *Texas Supreme Court Sends 6 Cases to the New Court of Appeals*, LAW.COM: TEX. LAW. (Sept. 6, 2024), https://www.law.com/texaslawyer/2024/09/06/texas-supreme-court-sends-6-cases-to-the-new-court-of-appeals/ [https://perma.cc/D8SL-SA6C].

88 *See* Petition at 1–3, Lummus v. Torres, No. 23-CV-1461 (Tex. Dist. Ct. Galveston Cnty. Sept. 5, 2023).

89 *See id.* at 1. For a discussion of why personal jurisdiction is not an issue for in-state residents, see Brilmayer, *General Jurisdiction*, *supra* note 15.

in the abortion.[90] As SB8 cases develop and additional defendants are joined, issues of personal jurisdiction will inevitably arise.

In *De Mino v. Gomez*, the Texas Supreme Court was confronted with the question of who can sue using SB8 when a Chicago resident sued a Texas citizen using Texas's SB8 civil enforcement mechanism.[91] One personal jurisdiction issue raised in the petition for review, as part of the question about standing, is whether "the trial court err[ed] by failing to dismiss the lawsuit filed by Felipe Gomez for lack of standing based on Gomez's status as an out-of-state plaintiff who is unaffected by Texas state law in general and would not be subject to long-arm jurisdiction for lack of contacts with Texas?"[92] While the main issue in this case is not personal jurisdiction, questions of personal jurisdiction will play an important role in determining whether this suit can continue. Since Gomez is the plaintiff, not the defendant, his out-of-state residency will be less relevant to personal jurisdiction, as courts typically focus on the defendant's contact with the state rather than the plaintiff's.[93] Even still, this case serves as an example of how, in many instances, procedural grounds can dictate the outcome before substantive questions are even addressed.

C. Personal Jurisdiction in Civil Suits

As bounty-hunter lawsuits proliferate, the issue of personal jurisdiction will only become more critical. By asserting a defense based on a lack of personal jurisdiction, defendants can avoid going to trial on the merits of the claims against them. This defense is available to *all* potential defendants, as the Supreme Court has consistently interpreted the Due Process Clause of the Fourteenth Amendment to require courts to gain personal jurisdiction over defendants haled into their courtrooms.[94] Thus, personal jurisdiction can act as a counterbalance against anti-abortion states' extraterritorial assertions of power.

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90 Petition at 6, *Lummus*, No. 23-CV-1461 ("Mr. Lummus is considering whether to sue individuals and organizations that participated in the killing of his unborn child.").

91 *See* Petition for Review, De Mino v. Gomez, No. 22-0517 (Tex. Dec. 2, 2022).

92 *Id.* at 8.

93 *See* Keeton v. Hustler Mag., Inc., 465 U.S. 770, 779 (1984) (finding "we have not to date required a plaintiff to have 'minimum contacts' with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant. On the contrary, we have upheld the assertion of jurisdiction where such contacts were entirely lacking.").

94 *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("[D]ue process requires . . . if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"); *see also* Pennoyer v. Neff, 95

It has long been debated whether the personal jurisdiction requirement is rooted in fairness to defendants, as guaranteed by the Due Process Clause, or in federalism concerns regarding state sovereignty and power.[95] One's preferred theoretical basis often determines how they believe personal jurisdiction should apply. As Part III will discuss, applying both theories to bounty-hunter lawsuits supports the conclusion that courts lack personal jurisdiction in these cases of out-of-state defendants. In addition to drawing on theoretical frameworks of personal jurisdiction, courts will rely on precedent to assess whether they have personal jurisdiction over bounty-hunter lawsuit defendants.

In both federal and state courts, defendants can assert a "lack of personal jurisdiction" by invoking Federal Rules of Civil Procedure Rule 12(b)(2) or the equivalent state rules when responding to a pleading.[96] The remaining sections of this Note explore how different theories of personal jurisdiction interact with bounty-hunter laws and, ultimately, why courts should not find personal jurisdiction in these cases.

II. How Much Contact Is Enough Contact?

This Note structures Part II by the type of defendant. Courts structure their determination of jurisdiction by "focus[ing] on 'the relationship among the defendant, the forum, and the litigation.'"[97] In line with that principle, this Note examines how courts would analyze these issues. Part II.A covers individuals who may be subject to lawsuits and the various bases of personal jurisdiction that may apply to them. These individuals are divided into two main groups: personal acquaintances and medical personnel. Part II.B discusses entity defendants, such as corporations, and the types of personal jurisdiction applied to them in bounty-hunter lawsuits. Each theory of personal jurisdiction affects the likelihood of defendants being brought before an out-of-state court, but the application of personal jurisdiction remains debatable based solely on precedent, warranting a deeper look at the underlying theories. Part III will explore these underlying theories of personal jurisdiction, considering who might be subjected to it and why they should or should not be.

U.S. 714, 733 (1877) ("[P]roceedings in a court of justice to deter mine [sic] the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.").

95 *See* Schmitt, *supra* note 37, at 769 ("While some opinions state that the law is based on state sovereignty, others hold that it is instead derived exclusively from the Due Process Clause's concern for fairness.").

96 FED. R. CIV. P. 12(b)(2); *see, e.g.*, TEX. R. CIV. P. 120(a); OKLA. STAT. tit. 12, § 2012(B)(2) (effective Nov. 1, 2004); IDAHO R. CIV. P. 12(b)(2).

97 *Keeton*, 465 U.S. at 775 (citing Shaffer v. Heitner, 433 U.S. 186, 204 (1977)).

A. Individual Defendants

1. Recipients of Abortions

This Note does not focus on how recipients of abortions could be subject to personal jurisdiction. This is partly because bounty-hunter laws focus on *aiding* abortions rather than *receiving* them.[98] Some bounty-hunter laws even explicitly exclude suits against women who received an abortion.[99] Nonetheless, women who obtain an out-of-state abortion would generally be subject to personal jurisdiction in their home state because domicile satisfies personal jurisdiction requirements, specifically general jurisdiction.[100] Such women would have domicile in their home state because of their "physical presence" and "intent to make the place home."[101] As such, personal jurisdiction raises difficulties for women trying to obtain out-of-state abortions because their home states can hold them accountable in court using general jurisdiction.[102]

2. Personal Acquaintances

Individuals who help someone obtain an out-of-state abortion may be targeted by bounty-hunter laws.[103] This may include friends who provide a car ride to an abortion clinic, family members who provide a place to stay, or like-minded individuals who help fund an abortion.[104] Beyond personal acquaintances, even strangers can be sued under bounty-hunter laws; an Uber driver who knows a rider's drop-off location is an abortion

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98 *See, e.g.*, S. 8, 87th Sess., 2021 Tex. Gen. Laws 127 (creating civil liability for "any person who . . . knowingly engages in conduct that aids or abets the performance or inducement of an abortion . . .").

99 *See, e.g.*, S. 1503, 2022 Leg., Reg. Sess. (Okla. 2022) ("[A] civil action under this section shall not be brought: 1. Against the woman upon whom an abortion was performed . . . or against a pregnant woman who intends or seeks to abort her unborn child in violation of this act.").

100 *See* Brilmayer, *General Jurisdiction*, *supra* note 15, at 730 ("Domicile is traditionally the strongest basis supporting general jurisdiction . . . Domicile provides such a strong foundation for the imposition of general personal jurisdiction because it typically satisfies four of the major theoretical justifications for the assertion of jurisdiction: convenience for the defendant, convenience for the plaintiff, power, and reciprocal benefits.").

101 *Id.* at 728–29.

102 *See id.*

103 *See* S. 8, 87th Sess., 2021 Tex. Gen. Laws 127 ("[A]ny person who . . . knowingly engages in conduct that aids or abets the performance or inducement of an abortion . . . .").

104 *See id.*

clinic could arguably meet the mens rea requirement of "knowingly" engaging in conduct that aids an abortion.[105] Since bounty-hunter laws are so broad, there is no clear set of actions that would subject a person to a lawsuit. As such, any actions connected to someone from a bounty-hunter state receiving an abortion could potentially put another at risk for being sued.[106]

a. Tag Jurisdiction

The most straightforward method for establishing personal jurisdiction over individuals is transient jurisdiction—also known as "tag" jurisdiction—or physical presence in the state for notice and service.[107] The United States has a long history of considering physical presence in a state upon being served with a lawsuit sufficient to establish personal jurisdiction in that state.[108] In *Burnham v. Superior Court of California*, the Supreme Court determined that "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"[109] Thus, it is firmly established that physical presence is enough for personal jurisdiction over individuals.[110]

"Tag" jurisdiction could cause issues for potential defendants in bounty-hunter suits, as it could restrict their ability to travel to states with bounty-hunter laws. While there may seem to be a simple solution—do not travel to a bounty-hunter law state if you have aided an abortion—this is easier said than done. Potential defendants may be unaware that their travel puts them at risk and could then be served with notice of a lawsuit. This is especially risky when it remains unclear what actions constitute aiding and abetting an abortion and

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105 *See id.*

106 *See, e.g.*, *id.*

107 *See Transient Jurisdiction*, LEXROLL (2023), https://encyclopedia.lexroll.com/encyclopedia/transient-jurisdiction [https://perma.cc/53DY-N2RQ].

108 *See* Burnham v. Superior Ct. of Cal., 495 U.S. 604, 610 (1990) ("Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State.").

109 *Id.* at 619.

110 *See, e.g.*, THOMAS D. ROWE, SUZANNA SHERRY & JERRY TIDMARSH, CIVIL PROCEDURE 477 (5th ed. 2020) ("Most courts hold that *Burnham* does not apply to corporations: one cannot obtain jurisdiction over a corporation by serving one of its officers in the forum state.").

when individuals lack the legal knowledge to avoid liability.[111] Not only is it important for those aiding abortions to be aware of the risks in their own state, they may also need to be educated on what consequences they could face in the home states of people who received abortions. Overall, "tag" jurisdiction is the most straightforward method of establishing personal jurisdiction, and bounty-hunter suit defendants would have little room to contest it.[112]

b. Specific Jurisdiction: Minimum Contacts

The most common form of personal jurisdiction that courts claim over out-of-state defendants is specific jurisdiction, or jurisdiction where the defendant's activity in the court's state gives rise to the lawsuit.[113] In determining whether there is specific jurisdiction, a court will look at the defendant's contacts with the state.[114] Courts focus their analysis of jurisdictional contacts on the defendant.[115] Courts do not have a singular bright-line rule for how much contact is enough to establish specific jurisdiction.[116] As such, courts faced

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111 *See* Benson, *supra* note 42; Terry Gross, *The U.S. Faces "Unprecedented Uncertainty" Regarding Abortion Law, Legal Scholar Says*, NPR (Jan. 18, 2023), https://www.npr.org/sections/health-shots/2023/01/17/1149509246/the-u-s-faces-unprecedented-uncertainty-regarding-abortion-law-legal-scholar-say [https://perma.cc/33S7-5CXL] ("We don't know any of the answers to that . . . which is why state legislators are willing to try things out that are unprecedented in recent history and potentially constitutionally questionable as well.").

112 *See* ROWE, SHERRY & TIDMARSH, *supra* note 110 ("Although the validity of transient or 'tag' jurisdiction is well established, its use is fairly rare. The availability of specific personal jurisdiction where a natural person has minimum contacts, and general jurisdiction where the person lives, usually suffices for plaintiffs' needs.").

113 *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) ("The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can . . . hardly be said to be undue.").

114 *See id.* at 316 ("[D]ue process requires only that . . . if [a defendant] be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'") (citation omitted).

115 *See* Keeton v. Hustler Mag., Inc., 465 U.S. 770, 780 (1984) ("The plaintiff's residence is not, of course, completely irrelevant to the jurisdictional inquiry. As noted, that inquiry focuses on the relations among the defendant, the forum and the litigation . . . lack of [plaintiff's] residence will not defeat jurisdiction established on the basis of defendant's contacts.").

116 *See* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 77–78 (1980) [hereinafter Brilmayer, *How Contacts Count*] ("And the majority's conclusory characterizations supplied no analysis of how and why some contacts count toward personal jurisdiction and others do not.").

with these bounty-hunter cases must choose their own path on what constitutes sufficient "minimum contacts," thereby determining who can be sued.[117]

Courts will likely analogize to a variety of precedents to decide whether defendants in bounty-hunter cases would be subject to specific jurisdiction. The Supreme Court has previously looked toward whether a defendant "purposefully avails" themselves of a forum state in determining jurisdiction over the defendant.[118] In determining what behavior constitutes purposeful availment, the Court found that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant" was not enough for personal jurisdiction on its own.[119] Personal acquaintances' actions likely constitute "unilateral activity,"[120] as their contact with the forum state occurs through their relationship with the defendant, whom they help to obtain an abortion. What mattered more to the Court was that the defendant had "purposefully avail[ed] itself of the privilege of conducting activity within the forum State, thus invoking the benefits and protections of its laws."[121] Potential defendants in bounty-hunter suits do not benefit from the protection of these states' laws in the same way as, for instance, a company that provides services to customers in a state, as personal acquaintances largely keep to themselves in their respective states.

One argument that bounty-hunter plaintiffs may make is that the effects of the abortion aider's actions are enough to confer jurisdiction.[122] To support this argument, they will likely turn toward *Calder v. Jones*.[123] In that case, the intentional tort by the out-of-state plaintiff had such a large and targeted effect on the forum state that the Supreme Court found jurisdiction proper.[124] Forum states may argue that the loss of their potential future residents' lives has such an effect. However, this argument ignores that the effect is not targeted at the state itself, unlike in *Calder*. Individuals who help someone obtain an abortion are not doing so to specifically influence happenings in Texas or Idaho, but

117 *See Int'l Shoe Co.*, 326 U.S. at 319.

118 *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958).

119 *Id.*

120 *See id.*

121 *Id.*

122 *See* Calder v. Jones, 465 U.S. 783, 789 (1984).

123 *See id.*

124 *See id.* ("In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California.").

rather because they have an interest in helping a friend or family member choose their own reproductive path.[125]

The Supreme Court's treatment of intentional torts and personal jurisdiction illustrates this principle. *Walden v. Fiore* involved an intentional tort inflicted by an out-of-state resident against forum state residents.[126] In denying personal jurisdiction over the defendant, the Supreme Court clarified that "our 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."[127] When an individual helps another person receive an abortion, their contact is with the *person*, not the person's home state.

In contrasting the two intentional tort cases, the Supreme Court clarified that part of what distinguished *Calder* from *Walden* is that the tort of libel in *Calder* definitionally occurs in the state in which the false and damaging information is spread.[128] In contrast, abortions are more similar to the tort in *Walden* because the "damage" of the abortion—the loss of potential life—does not occur in the forum state, but wherever the abortion takes place. While this loss of potential life could affect residents of the forum state, its effects are not "expressly aimed" at the forum state in the same way as libel.[129] Individuals who help others obtain an abortion are likely the safest under this logic, as their actions target an individual person obtaining an abortion rather than the forum state.

c. Reasonableness

In determining personal jurisdiction, courts will also consider whether it is *reasonable* to subject a defendant to personal jurisdiction in that court.[130] The reasonableness

125 *See* Christina Maxouris, *Some Americans Are Offering to Help Others Travel Out of State for an Abortion. But in a Post-*Roe *Era, Experts Urge Caution.*, CNN (July 3, 2022), https://www.cnn.com/2022/07/03/us/abortion-help-travel-out-of-state-online-offers/index.html [https://perma.cc/ACK6-CVGZ] ("'We have to support each other, [let] people know that they're not alone.'").

126 *See* Walden v. Fiore, 571 U.S. 277, 279–81 (2014).

127 *See id.* at 285.

128 *See id.* at 287–88.

129 *See Calder*, 465 U.S. at 789.

130 *See* Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 114 (1987) ("A consideration of these factors in the present case clearly reveals the unreasonableness of the assertion of jurisdiction over Asahi, even apart from the question of the placement of goods in the stream of commerce."). But in recent years, the Roberts Court has turned away from emphasizing reasonableness to focus more on minimum contacts,

considerations for personal jurisdiction are generally malleable and act as a vague, multi-factored test geared toward mediating a relationship between states. Thus, the reasonableness test may be very important in the bounty-hunter context, as courts may be more apt to turn toward squishy standards when faced with gray areas like this one. In considering reasonableness, courts look to "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief," as well as "the interstate judicial system's interest in obtaining the most efficient resolution of controversies" and "the shared interest of the several States in furthering fundamental substantive social policies."[131] These factors are not new considerations for the personal jurisdiction realm, however, as courts consider many of these same elements in their minimum contacts tests.[132]

On balance, the reasonableness factors cut against finding personal jurisdiction over out-of-state abortion bounty-hunter defendants. In terms of burden, traveling to a state with which these defendants have very little relationship beyond their relationship with the abortion recipient is a substantial burden. The plaintiff's interest in obtaining relief, at first glance, seems to weigh in favor of finding jurisdiction, as plaintiffs likely could not sue in states where these civil enforcement mechanism laws did not exist.[133] Yet, the lack of cause of action elsewhere suggests that, in allowing personal jurisdiction in bounty-hunter

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so reasonableness arguments may be less persuasive to the current Supreme Court. *See, e.g.*, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351 (2021); Mallory v. Norfolk S. Ry. Co., 600 U.S. 122 (2023); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 883 (2011) ("Justice Brennan's concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power. This Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment.").

131 *Asahi*, 480 U.S. at 113.

132 For example, in analyzing minimum contacts in *McGee v. International Life Insurance*, the Supreme Court not only considered the defendant's contacts with the state, but also the state's interest in providing a remedy for its resident, the burden of the plaintiff suing elsewhere, and the nature and ease of the defendant's travel to the forum state. *See* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223–24 (1957) ("It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."). *See also* Linda J. Silberman, *Judicial Jurisdiction in the Conflict of Laws Course: Adding a Comparative Dimension*, 28 VAND. J. TRANSNAT'L L. 389, 399 (1995) ("Asahi's constitutional reasonableness check on assertions of jurisdiction in the United States seems redundant; the minimum contacts test itself invokes a consideration of the relationships among the defendant, the state, and the nature of the litigation.").

133 *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981) ("In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair, . . . the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.").

matters, a court would essentially allow an anti-abortion state to impose its own views on surrounding states. A state's interest in providing a remedy is not an excuse for that state's laws to cross borders. By design, these bounty-hunter laws are meant to be invoked not by people who have been injured, but rather individuals that have been delegated massive law enforcement authority on behalf of the state to avoid constitutional challenges.[134] This lack of a concrete injury requirement undermines the state's asserted interest in providing redress for its citizens. Part III discusses these underlying concerns and their applications further.[135]

A forum state, like Texas, may assert that it has a strong interest in providing a remedy for injuries to potential life.[136] Bounty-hunter laws may be a way for states to provide such a remedy. But this rationale declines in strength as the connection between the individual suing and the aborted fetus becomes more attenuated. In considering the fairness of personal jurisdiction, a court could consider the state resident's relationship to the fetus as a relevant factor.[137] A biological father suing someone for aiding in an abortion seems to have a stronger claim of injury than a random Texas citizen, but the law authorizes both to sue. How much the protection of potential life matters depends on a person's views on abortion, viability, and when life begins. But, regardless of what one believes about potential life, in considering underlying concerns about fairness, the nature of the plaintiff's injury and that injury's relation to the state are relevant.

The remaining two reasonableness factors also likely weigh in favor of courts finding that there is not personal jurisdiction over individuals in bounty-hunter cases. Since bounty-hunter laws are extraterritorial, they are, by nature, not agreed upon by a collection of states. Instead, they allow one state to force its laws on others. Interstate interest in an efficient solution is lacking for bounty-hunter laws because there is no interstate agreement that abortions require a "solution" in the first place. Anti-abortion states would hope to expand their prohibitions, whereas pro-choice states would attempt to limit any prohibitions. As for limiting controversy and promoting efficiency, courts would best attain these goals by

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134 *See* Douglas & Astudillo, *supra* note 9 ("Not only are private individuals allowed to enforce the law by suing others, but the state is prevented from enforcing or attempting to enforce the law. Experts say this is a legal maneuver designed to withstand a court challenge on the law's constitutionality.").

135 *See infra* Part III.A.

136 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 301 (2022) ("These legitimate interests include respect for and preservation of prenatal life at all stages of development . . . .").

137 *See* Asahi Metal Ind. Co. v. Superior Ct. of Cali., 480 U.S. 102, 113 (1987) ("A court must consider . . . the interests of the forum State.").

refusing to entangle themselves in extraterritorial policies. Finally, this same logic would apply to any "shared interest of the several States in furthering fundamental substantial social policies."[138] No such shared interest exists in this case, and if it did, that shared interest seems to belong to the number of states that have passed interstate shield laws, which outweighs the number of states with currently enacted bounty-hunter laws.[139] In the situation of bounty-hunter abortion cases as applied to individuals, reasonableness considerations weigh in favor of courts not finding personal jurisdiction.

3. Medical Personnel

One of the main categories of individuals who could be subject to bounty-hunter lawsuits are medical personnel, including doctors, abortion providers, nurses, pharmacists, and others involved in work at abortion clinics or similar service providers.[140] Because of their status as individual defendants, many of the ways courts might analyze personal jurisdiction with regards to personal acquaintances could also apply to medical personnel. These include applying "tag" jurisdiction, a similar minimum contacts analysis, and the reasonableness factors. There are some ways in which medical personnel's status or unique behavior may alter a court's analysis of their potential for personal jurisdiction, detailed below.

a. Specific Jurisdiction: Minimum Contacts

Medical personnel are likely more in danger than personal acquaintances, especially if they are engaging in advertising or other types of activities to recruit patients. The Supreme Court has previously found that a single contract between a life insurance company and a resident of the forum state was enough to establish personal jurisdiction.[141] While this ruling may seem like it would automatically create personal jurisdiction for medical personnel, this may not be the case. The contract in *McGee* included the sending and receipt of multiple

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138 *Id.*

139 *Compare After* Roe *Fell*, CTR. FOR REPROD. RTS., *supra* note 2, *with* S. 8, 87th Sess., 2021 Tex. Gen. Laws 125 *and* S. 1358, 66th Leg., Reg. Sess. (Idaho 2022).

140 *See, e.g.*, S. 8, 87th Sess., 2021 Tex. Gen. Laws 127 ("Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action against any person who . . . performs or induces an abortion in violation of this subchapter[.]").

141 *See* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) ("It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State.").

payments during a person's lifetime,[142] which is in sharp contrast with the limited, discrete, temporal nature of performing an abortion. It is then likely relevant whether a clinic sent communications into Texas or targeted Texas residents with advertising or if the person receiving the abortion simply drove to this clinic in a neighboring state.

Additionally, in determining that there was personal jurisdiction for the party with the singular contract, the Court acknowledged that the modernization of the American economy has led to increasing circumstances in which there would be personal jurisdiction over out-of-state defendants.[143] It is then relevant whether a court would view abortion as a commercial industry within a national economy—this would be most relevant to medical personnel and clinic employees. Abortions likely are part of the national economy,[144] but whether they are commercial likely depends on personal definitions and opinions on the subject.[145]

In achieving the purposes of personal jurisdiction, judges should look to the sensitive nature of abortion to categorize it beyond a typical economic or commercial activity. Beyond this, states have a large police power that could potentially be used to justify more sweeping jurisdiction over behaviors that affect their state. Yet, a state's police power would not justify regulation outside its borders. The Supreme Court has also been careful in the years since its recognition of the modernization of the American economy to ensure that modernization does not constitute justification for finding personal jurisdiction in all commercial situations.[146]

Anti-abortion proponents often argue that doctors and health centers benefit financially from abortions, which could weigh towards viewing their activities as a commercial

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142 *See id.* at 221–22.

143 *See id.* at 222–23 ("Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years.").

144 ASHA BANERJEE, THE ECONOMICS OF ABORTION BANS (2023), https://www.epi.org/publication/economics-of-abortion-bans/ [https://perma.cc/W83G-LQQD].

145 *See* Katherine Florey, Dobbs *and the Civil Dimension of Extraterritorial Abortion Regulation*, 98 N.Y.U. L. REV. 485, 529 (2023) (explaining that in *Pennoyer*, the court made "an exception to territorial principles for questions of personal status" and implying that courts do the same for abortion). Ideas such as Florey's underscore that whether courts view abortion as commercial or more personal could have lasting effects on how the cases are adjudicated.

146 *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980).

relationship constituting availment of the patient's home state.[147] However, this argument seems weak at best, as any so-called benefit would come from the woman herself and not the forum state, as explored in the earlier discussion of *Walden*. Using the Supreme Court's articulation of purposeful availment,[148] many, if not most, abortion providers would likely not be subject to personal jurisdiction because it would be unfair to subject them to the laws of a state from which they are not reaping benefits.

However, there are some abortion providers who actively reach out to potential patients in the forum state. Franz Theard, a New Mexico doctor and abortion provider, has run his clinic in new ways since SB8 went into effect.[149] Theard has even gone as far as offering incentives to women traveling to his clinic from other states, "like rolling the tax New Mexico charges for the procedure into a flat $700 fee, or the free abortions he offered on International Women's Day in March and on Armed Forces Day in May."[150] He goes so far as acknowledging that many people may even be traveling long distances to see him and addresses that directly as well by "offer[ing] $100 to $150 back as a fuel rebate, on a discretionary basis and if the journey seems like a financial hardship."[151] Theard is just one of many doctors and providers who remain at risk for lawsuits based on their active help to women in anti-abortion states.[152]

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147 *See generally* Debbie Lesko, *The Abortion Industry Doesn't Want You to Hear These Facts*, FOX NEWS (May 20, 2022), https://www.foxnews.com/opinion/abortion-industry-facts [https://perma.cc/BHT6-C59E] ("Abortion providers make money off abortions and the sale of baby body parts for research."); Melanie Israel, *Abortion Is Planned Parenthood's "Essential" Billion-Dollar Business*, HERITAGE FOUNDATION (Apr. 21, 2020), https://www.heritage.org/life/commentary/abortion-planned-parenthoods-essential-billion-dollar-business [https://perma.cc/L667-P8BX] ("A recent Heritage Foundation report analyzing many years of Planned Parenthood's medical and financial data found that the organization is a billion-dollar abortion business with an increasing market share of total annual abortions in the United States.").

148 *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958).

149 *See* Yuan, *supra* note 18 ("Theard opened his office on weekends to make it easier for patients to come from East Texas and got his staff on board with the cause.").

150 *Id.*

151 *Id.*

152 *See generally* Emily Bazelon, *Risking Everything to Offer Abortions Across State Lines*, N.Y. TIMES (Oct. 4, 2022), https://www.nytimes.com/2022/10/04/magazine/abortion-interstate-travel-post-roe.html [https://perma.cc/2UJU-YGL4].

Abortion providers like Theard may be at greater risk if they gear their behavior to help provide abortions to people of a certain state.[153] Even so, such activities seem distinct from trying to cause harm or have effects occur in the forum state.[154] For instance, a Texan plaintiff, and subsequently a Texan judge, could certainly argue that Theard's incentives constitute purposeful availment of Texas's residents, thereby conferring personal jurisdiction in Texas. Yet this argument fails to get at what, if any, benefits Theard would be receiving *from Texas* by providing abortions to Texan women. One underlying idea behind purposeful availment is that a defendant can be subject to personal jurisdiction when they structure their activities to ingrain themselves in the forum state.[155] Here, Theard is not availing himself of the privileges of the forum state. Instead, he is incentivizing women of the anti-abortion state to *leave* Texas. Perhaps judges could make a distinction between reaching out to *enter* a state's market and reaching out in order to persuade women to leave a state.[156] Even with such a distinction, it is likely relevant whether providers like Theard are actively advertising to a specific state, like Texas, or whether they are broadly trying to attract business. Situations such as Theard's remain the most precarious, as when there is such clear advertising—perhaps indicating purposeful availment—courts could have the strongest argument for having personal jurisdiction. Other abortion providers and clinics could potentially take this lesson to keep their advertising, if they choose to have any, broadly aimed rather than aimed at women in specific states.

Additionally, the Court in *Walden* states that "physical entry into the State—either by the defendant in person or through an agent, goods, mail, or some other means—is certainly a relevant contact."[157] However, relevance is not determinative. The entry of a

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153 *See, e.g.*, Yuan, *supra* note 18.

154 Personal jurisdiction precedent asserts that the general rule is one of purposeful availment and the exception to that rule may include situations such as intentional torts. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 877–78 (2011) ("There may be exceptions, say, for instance, in cases involving an intentional tort. But the general rule is applicable in this products-liability case, and the so-called 'stream-of-commerce' doctrine cannot displace it.").

155 *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) ("[T]his 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities . . . .") (citation omitted).

156 For a separate, but related, argument about First Amendment issues raised by advertising by abortion providers and related organizations, see Jeremy W. Peters, *First Amendment Confrontation May Loom in Post-*Roe *Fight*, N.Y. TIMES (June 29, 2022), https://www.nytimes.com/2022/06/29/business/media/first-amendment-roe-abortion-rights.html [https://perma.cc/U7XX-P9QV].

157 Walden v. Fiore, 571 U.S. 277, 285 (2014).

singular mifepristone pill into a forum state prescribed by a doctor on one occasion seems vastly different from the entry of thousands of mifepristone pills prescribed by a doctor to many women over the period of several months. The Supreme Court's amorphous standards on the extent of physical entry necessary to establish minimum contacts provide little guidance. Certainly, though, contact with the person who reenters the forum state does not seem to be enough given *Walden*'s holding.[158] Thus, abortion providers would likely be safe if the person who returns to the forum state does so *after* having already completed the abortion; this would confine the potential defendant's contacts to the forum *resident* rather than the forum *state*.

The Supreme Court has indicated protection against personal jurisdiction in situations where the contacts remain too tenuous, which would likely include those who prescribe or sell mifepristone. In describing tenuousness, the Supreme Court has eschewed the "stream of commerce" argument and instead focused on the defendant's broader expectation of entering a market.[159] The Court found that selling a product in one state with the foresight that it might end up in another state would not be enough contact to establish personal jurisdiction.[160] Any bounty-hunter argument that doctors or pharmacists selling and prescribing mifepristone in a state bordering forum states are subject to personal jurisdiction because of their knowledge that there was a *possibility* of their medicine ending up in these anti-abortion states likely fails.[161]

But this argument becomes more difficult to make when providers reach out to patients in forum states.[162] While it may not be enough that these abortion providers have entered the "stream of commerce," it could be enough that they have engaged in sufficient contact

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158 *See id.* ("But the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him.").

159 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–99 (1980) ("The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.").

160 *Id.* at 297 ("This is not to say, of course, that foreseeability is not wholly irrelevant . . . Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.").

161 For an example of one such doctor who may provide a basis for a case like this, *see, e.g.*, Petition, Byrn v. Theard, No. 51499-A (Tex. Dist. Ct. Taylor Cnty. Dec. 5, 2022).

162 *See id.*

with the forum state that they could "reasonably anticipate being haled into court there."[163] Generally, assessing how much contact is enough to anticipate being haled into court would bring judges back to the purposeful availment discussion above. Providers may want to be careful to avoid specific advertising or publicity about their tactics to avoid liability, but for most run-of-the-mill medical personnel, courts would find that there is not personal jurisdiction because of a lack of contacts.

B. Corporate and Entity Defendants

Also potentially at risk under bounty-hunter laws are corporate and entity defendants, including abortion funds, hospitals and health systems, insurance companies, online retailers, and pharmacies.[164] This Note focuses on individuals rather than corporate defendants because these corporate entities will have greater legal capacity to defend themselves from bounty-hunter lawsuits than individuals likely would. Additionally, existing lawsuits at the time of this Note have so far targeted individuals,[165] perhaps because individuals are more vulnerable. Also outside the scope of this Note are online mifepristone retailers, in part because the same personal jurisdiction tests as applied to other corporations could also be applied to online mifepristone retailers. The main analysis of corporate defendants here takes place under general jurisdiction; this is the area of personal jurisdiction where these defendants differ most from individuals. There also may be slight changes in the reasonableness analysis for entities.

1. General Jurisdiction

One manner in which courts can assert jurisdiction is where an organization's contacts with a state are so extreme or continuous that the court would have jurisdiction regardless of whether the claims are related to the defendant's contacts with the state.[166] General jurisdiction is based on the idea that it is fair to "regulat[e] the activities of insiders,

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163 *World-Wide Volkswagen Corp.*, 444 U.S. at 297–98.

164 *See, e.g.*, S. 8, 87th Sess., 2021 Tex. Gen. Laws 127 (creating civil liability for "any person who . . . knowingly engages in conduct that aids or abets the performance or inducement of an abortion, *including paying for or reimbursing the costs of an abortion through insurance or otherwise*[.]" (emphasis added)).

165 *See generally* Petition for Review, De Mino v. Gomez, No. 22-0517 (Tex. Aug. 22, 2022); Petition, Lummus v. Torres, No. 23-CV-1461 (Tex. Dist. Ct. Galveston Cnty. Sept. 5, 2023); Petition, *Byrn*, No. 51499-A.

166 *See* Daimler AG v. Bauman, 571 U.S. 117, 118 (2014) ("'[G]eneral jurisdiction' [is] exercisable when a foreign corporation's 'continuous corporate operations within a state [are] so substantial and of such a nature

regardless of where the activities occur."[167] Courts will need to determine which abortion-related corporations could be considered "insiders" in a forum state. Even though general jurisdiction remains a less commonly used tool of jurisdiction, it still has possibly powerful ramifications given the importance of choice of law in these bounty-hunter suits.[168]

There is a relatively high bar of conduct required for a court to find general jurisdiction over a defendant corporation. In order to render itself subject to general jurisdiction, a corporation must be "at home" through "continuous and systematic contact."[169] The Court has confirmed and expanded upon this test, elaborating that "[t]he paradigm all-purpose forums for general jurisdiction are a corporation's place of incorporation and principal place of business."[170] Generally, abortion funds and other large abortion-focused organizations can attempt to avoid jurisdiction by incorporating only in states without bounty-hunter laws in place. Some localized abortion funds, like the Lilith Fund in Texas,[171] might be subject to general jurisdiction even if they are not incorporated in that state, as their principal place of business likely could still be the forum state.

Business contacts and activities in the forum state alone would not be enough to establish general jurisdiction for abortion funds and other corporations, even if they were engaging in many activities in the forum state. In one case, a Colombian helicopter corporation was sued in Texas state court because of a helicopter crash in Peru where four United States citizens died.[172] The Supreme Court held that the business's contacts of "sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from Bell Helicopter for substantial sums; and sending personnel to

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as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.'" (citation omitted)).

167 Brilmayer, *General Jurisdiction*, *supra* note 15, at 782.

168 *See id.* at 725 ("[A] plaintiff may seek the application of a distant forum's law because it is more favorable than the law of the state where the cause of action arose. Such forum shopping is a persistent problem in general jurisdiction cases, given current minimal restraints of a state's choice of law.").

169 Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011).

170 *Daimler AG*, 571 U.S. at 118.

171 *See* Oscar Hartzog, *Where to Donate to Abortion Funds Right Now*, ROLLING STONE (May 11, 2022), https://www.rollingstone.com/culture/culture-news/abortion-funds-to-donate-to-how-to-help-1351451/ [https://perma.cc/S9YP-RXTN].

172 *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 409–10 (1984).

Bell's facilities in Fort Worth for training" were not enough to establish general jurisdiction in Texas.[173] Even general business involvement in a state would likely not be enough for courts to find general jurisdiction for abortion funds and similarly situated organizations. Instead, courts would look for the presence of the leaders of the corporations in the forum state.[174] It is easy to imagine how national abortion funds—like the Women's Reproductive Rights Assistance Project or the National Abortion Federation—or multi-state funds—like Access Reproductive Care-Southeast or Midwest Access Coalition—could have their executives scattered in many states, including forum states.[175] Yet, there may not be enough leaders to make the forum state that organization's "principal place of business."[176]

Issues for corporations remain especially relevant, as in the recent Supreme Court case *Mallory v. Norfolk Southern Railway*, the Court ruled that states may validly enact consent laws requiring *all* companies to consent to general personal jurisdiction in order to conduct business in that state.[177] In *Mallory*, the plaintiff was not a resident of the forum state and the cause of action had not occurred there.[178] Still, the Court allowed general jurisdiction because of Pennsylvania's consent law, confirming that the railroad company had consented to the exercise of general jurisdiction by doing business there.[179] Mifepristone producers, abortion funds, and other incorporations would need to carefully avoid anti-abortion states who have such consent laws in place to avoid liability, especially as such laws might increase. Justice Barrett's dissent in *Mallory* may act as a warning as well—if states can tie consent to doing business there, what is to stop them from tying consent to other acts?[180]

As the personal jurisdiction landscape and consent laws change in the aftermath of *Mallory*, corporations engaging in abortion-related activities will need to take special notice to avoid liability going forward. Even more worrisome is the huge array of corporations

173 *Id.* at 416.

174 *See* Perkins v. Benguet Consol. Min. Co., 342 U.S. 437, 447–48 (1952).

175 *See* Hartzog, *supra* note 171.

176 *Daimler AG*, 571 U.S. at 118.

177 *See* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 127 (2023).

178 *See id.* at 135.

179 *See id.*

180 *See id.* at 168 (Barrett, J., dissenting) ("So on the Court's reasoning, corporations that choose to do business in the State impliedly consent to general jurisdiction. The result: A State could defeat the Due Process Clause by adopting a law at odds with the Due Process Clause.").

with a more attenuated relationship to abortion, like insurance companies that cover abortion procedures and costs. These corporations do business in a vast number of states and could be sued using bounty-hunter laws. The expansion of general jurisdiction in *Mallory* puts such companies at risk and they have limited ability to predict lawsuits because of the breadth of bounty-hunter laws. Courts may hope to avoid such a large extension of personal jurisdiction to these uninvolved entities and may look to the underlying values of personal jurisdiction to stop this. In his concurrence, Justice Alito offers one potential way to stop this expansion of state extraterritoriality: the dormant Commerce Clause.[181] States may face a separate constitutional obstacle if they choose to enact *Mallory*-type laws.[182] If courts fail to rein in personal jurisdiction, corporations may look to other legal arguments to limit a state's extraterritorial reach and strike down such laws.

2. Reasonableness

Courts will likely engage in similar reasonableness inquiries for entity defendants as they did for individuals. One of the potential differences in this analysis is that plaintiffs might have a marginally improved reasonableness argument for personal jurisdiction for corporate entities. This is because it is likely easier for entity defendants to defend themselves in another state due to increased legal and financial capabilities and resources.

III. Theories Behind Personal Jurisdiction and Where They Lead Us

Stuck in the twilight zone of personal jurisdiction confusion, judges will need a light to guide their path forward. Personal jurisdiction precedent offers a hazy glow at best, so another source is necessary. Judges can and should turn toward the theoretical, values-based underpinnings of personal jurisdiction to decide these cases. The theories behind personal jurisdiction can help judges parse how best to decide these bounty-hunter cases to fit with the aims of procedure. This inquiry into underlying theories of personal jurisdiction reinforces the analysis from Part II by allowing judges to apply personal jurisdiction precedent and policy in a way that is most faithful to its underlying goals. There are two main categories that most views of personal jurisdiction can be sorted into—state

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181 *See id.* at 158–59 (Alito, J., concurring) ("It is especially appropriate to look to the dormant Commerce Clause . . . Because the right of an out-of-state corporation to do business in another State is based on the dormant Commerce Clause, it stands to reason that this doctrine may also limit a State's authority to condition that right.").

182 *See id.* at 150 (Alito, J., concurring) (explaining that "the Pennsylvania Supreme Court did not address" the dormant Commerce Clause issue and the Supreme Court should "remand the case for further proceedings.").

sovereignty and fairness to the individual defendant.[183] Each supports the idea that judges should not find personal jurisdiction over most out-of-state defendants in the abortion and bounty-hunter-laws context.

Much of the decision-making for personal jurisdiction hinges on how judges choose to apply precedent to the facts in front of them. In a gray area of law, such as personal jurisdiction, decisions often seem largely unpredictable, and judges may employ motivated reasoning given this latitude. This may be especially alarming to pro-choice activists, as both the federal courts and Supreme Court have become more conservative in recent years.[184] Additionally, in state courts where judges will decide these bounty-hunter lawsuits, judges may be chosen via partisan elections.[185] While personal jurisdiction cases do not typically fall along party lines,[186] this could change in the context of abortion, where there seems to be more of a partisan split in the decision-making of some judges.[187] Justice Alito accused the dissent in *Dobbs* of allowing substantive policy goals to affect their procedural

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183 *See generally* Weisburd, *supra* note 37; Harold S. Lewis, *Three Deaths of State Sovereignty and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699 (1983); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529 (1991); Schmitt, *supra* note 37. *See also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) ("It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.").

184 *See generally* John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/short-reads/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/ [https://perma.cc/K3WK-PRRB]; *see also* Nina Totenberg, *Supreme Court to Hear Abortion Pill Case*, NPR (Dec. 12, 2023), https://www.npr.org/2023/12/13/1218332935/mifepristone-abortion-pill-supreme-court [https://perma.cc/C8SW-QVCE] ("The U.S. Supreme Court reentered the abortion debate Wednesday, agreeing to review a lower court decision that would make mifepristone, the commonly used abortion pill, less accessible.").

185 *See* Ross Ramsey, *Analysis: Voters Elect Texas' Judges. The State Might Take That Power—But It's Risky.*, TEX. TRIB. (Jan. 20, 2020), https://www.texastribune.org/2020/01/20/voters-elect-texas-judges-state-might-take-that-power-but-its-risky/ [https://perma.cc/7G8K-RM2F]; *see also* Douglas Keith, *The Politics of Judicial Elections, 2021–2022*, BRENNAN CTR. (Jan. 29, 2024), https://www.brennancenter.org/our-work/research-reports/politics-judicial-elections-2021-2022 [https://perma.cc/9WAT-6D5E].

186 *See, e.g.*, *Mallory*, 600 U.S. at 122.

187 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

decision-making in other decisions.[188] Whether anti-abortion judges will do the same is yet to be seen but remains a pressing worry.[189]

Personal jurisdiction precedent can offer some hope that judges may stop themselves from overreaching in out-of-state abortion contexts. But the Supreme Court's recent willingness to overturn precedent[190] and the malleability of personal jurisdiction precedent make this limiting principle more of a weak hope than a firm promise. It is important to explore the ideological and traditional underpinnings of personal jurisdiction going forward to create a sounder basis for constraining extraterritorial anti-abortion policies.

A. State Sovereignty

In asserting personal jurisdiction, a state subjects a person to its own laws and standards.[191] Many scholars—and the Supreme Court, at times—have pointed to the idea that personal jurisdiction is based on a state's sovereignty, or its right to assert its control and power over a person that is in some way affecting or interacting with the forum state. Personal jurisdiction debates "implicate[] more than just selecting a courthouse; [they are] dispute[s] about how to determine when a particular state government may demand obedience from a particular person."[192] In the bounty-hunter cases, this "demand[ed] obedience"[193] would reach a new level. Beyond forcing the laws of the state onto the possible defendant, these anti-abortion states would effectively subject defendants to that state's opinions on abortion. Additionally, the breadth of the law also impacts matters of state sovereignty as bounty-hunter legislation attempts to rope in extraterritorial residents of other states with essentially zero contact.

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188 *See id.* at 286–87 ("[The Court's abortion cases] have ignored the Court's third-party standing doctrine. They have disregarded standard *res judicata* principles. They have flouted the ordinary rules on the severability of unconstitutional provisions, as well as the rule that statutes should be read where possible to avoid unconstitutionality. And they have distorted First Amendment doctrines.").

189 Scholars often debate whether judges' substantive policies influence their decisions in procedural cases that may otherwise not have outcomes they agree with. *See generally* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051 (1995).

190 *See, e.g.*, *Dobbs*, 597 U.S. at 231.

191 *See* Weisburd, *supra* note 37, at 378.

192 *Id.*

193 *Id.*

The Supreme Court has pointed to state sovereignty as a theory for asserting personal jurisdiction.[194] Yet, in asserting that basis, the Court has recognized that state sovereignty is limited because multiple states will hold this power and restrain one another.[195] State sovereignty may actually cut *against* granting states expansive personal jurisdiction.[196] Courts may adopt a narrower view of personal jurisdiction because of such state sovereignty concerns.[197] States' authority would then be kept within their borders and confined to only the most clear-cut situations of personal jurisdiction.

In her *Mallory* dissent, Justice Barrett expressed concern about how state sovereignty may be misunderstood in the Court's most recent ruling. Justice Barrett described personal jurisdiction as protecting "an individual right."[198] But the right extends beyond just individual protections "when a State announces a blanket rule that ignores the territorial boundaries on its power, [because] federalism interests are implicated too."[199] The Supreme Court has a long tradition of enforcing state sovereignty as a *limiting* principle on personal jurisdiction rather than an expansive one.[200] While Justice Barrett remained in the dissent in *Mallory*, her point that state sovereignty is a well-respected principle in personal jurisdiction precedent is accepted among the Court.[201]

194 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

195 *See id.* at 293 ("The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.").

196 *See* Schmitt, *supra* note 37, at 782 ("Just as Virginia lacks the authority to regulate the rest of the country, it also lacks the power to force the people of the United States to submit to its courts.").

197 *See id.* ("[T]he source of the sovereign power of the states[] unquestionably limits the power of a state to regulate extraterritorial conduct. This same reasoning dictates that the scope of state sovereignty must limit a state's assertion of personal jurisdiction over out-of-state defendants.").

198 Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 169 (2023) (Barrett, J., dissenting).

199 *Id.*

200 *See id.* ("The Due Process Clause protects more than the rights of defendants—it also protects interstate federalism. We have emphasized this principle in case after case.").

201 *See, e.g.*, Hanson v. Denckla, 357 U.S. 235, 251 (1958) ("Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States."); Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 582 U.S. 255, 263 (2017) ("And at times, this federalism interest may be decisive.").

In asserting their power over an out-of-state bounty-hunter-law defendant, state courts would be taking the position that their own state's laws and influence win out over the defendant's home state. For example, if a Texas court were to find personal jurisdiction over a New Mexico doctor, that court is essentially allowing Texas's anti-abortion policies to trump New Mexico's pro-choice policies. State sovereignty does not boil down to one singular state's ability to enforce its laws. Bounty-hunter lawsuits are battles between states, with anti-abortion states seeing how far they can possibly extend their influence.

Courts will inevitably face "practical problems" in attempting to balance and weigh "the several state interests the concept [of state sovereignty] appears to embrace."[202] If courts were to side only with the bounty-hunter states, they would infringe on the sovereignty of the pro-choice states that allow their citizens to freely perform and aid abortions. Anti-abortion states may argue that their laws are not as impactful in protecting potential life if they cannot stop women from leaving their borders to go receive abortions elsewhere. Yet pro-choice states can make similar, if not stronger arguments, that their laws would be meaningless if their citizens could be sued elsewhere for engaging in perfectly legal behavior in their home state. This may be especially true in states that have passed interstate shield laws attempting to protect their citizens.[203]

Personal jurisdiction is the first test of this conflict between states sovereignties, since it determines whether a lawsuit can proceed at all. Other potential barriers to bounty-hunter lawsuits may succeed, like courts' ultimate choice of law, but they would do so on substantive grounds, which would not bar the lawsuit from the start the way personal jurisdiction would.[204] Thus, it is essential to incorporate substantive legal concerns like state sovereignty into the personal jurisdiction analysis.

State sovereignty is not a one-way street solely helping the forum state, but rather a push-and-pull between the forum state and the state of the potential defendant.[205] In the

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202 Lewis, *supra* note 183, at 716.

203 *See After* Roe *Fell*, CTR. FOR REPROD. RTS., *supra* note 2 ("Interstate shield laws protect abortion providers and helpers in states where abortion is protected and accessible from civil and criminal consequences stemming from abortion care provided to an out-of-state resident.").

204 *See* Perdue, *supra* note 183, at 571 ("[P]ersonal jurisdiction can be treated as not merely related to choice of law, but a doctrine whose sole purpose is to keep cases out of states that would not be permitted to apply their own law.").

205 *See* Lewis, *supra* note 183, at 716 ("The interests of the forum state—interests themselves elusive of precise quantification—must presumably be weighed against the interests of other sovereign states in

likely impending cases involving state abortion laws, this push-and-pull seems to weigh heavily in favor of the states of the defendant, as much of the activities and events in question have likely occurred in that state. While personal jurisdiction can exist in multiple forums at once, in a situation where the state sovereignty underlying any assertion of personal jurisdiction would conflict, only one state's assertion of sovereignty can win out and apply over any conflicting claims.[206]

Some scholars have found that the due process value of protecting "individual liberty" through personal jurisdiction means that personal jurisdiction constraints on court power are a substantive due process right.[207] If personal jurisdiction is a substantive due process right, it may be subject to the history and tradition framework that other substantive due process rights now receive.[208] If that is true, then the underlying values of personal jurisdiction, essentially its historical basis, seem relevant now more than ever. If the Supreme Court takes its rhetoric from *Dobbs* about protecting federalism and states' rights seriously,[209] then it should also limit instances of states' ability to impose their own laws and policies on surrounding states.[210] Ultimately, it would be most in line with the underlying goal of state sovereignty for judges to find that there is no personal jurisdiction in the majority of

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vindicating their own substantive policies or affording local litigants a forum.") (footnote omitted).

206 *See* Kreimer, *supra* note 36, at 464 ("The Constitution was framed on the premise that each state's sovereignty over activities within its boundaries excluded the sovereignty of other states.").

207 *See* Perdue, *supra* note 183, at 535 ("This description of the relationship between the due process clause and personal jurisdiction suggests that personal jurisdiction is a substantive due process right."). Substantive due process is a legal concept rooted in the Fifth and Fourteenth Amendments' respective Due Process Clauses. It incorporates a vast swath of rights, largely not agreed upon, that up until recently included abortion. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 292 (2022); *see also* Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501–08 (1999) ("Substantive due process asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose.").

208 *See, e.g.*, *Dobbs*, 597 U.S. at 231 ("That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'") (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

209 *See id.* at 302 ("The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.").

210 *See* Kreimer, *supra* note 36, at 462 ("The tradition of American federalism stands squarely against efforts by states to punish their citizens for conduct that is protected in the sister state where it occurs.").

bounty-hunter cases, since extraterritoriality is inconsistent with the goals of federalism and state sovereignty.[211]

B. Fairness

In addition to infringing on state sovereignty, allowing personal jurisdiction in many of these bounty-hunter cases would be inherently unfair to defendants. The underlying theory of fairness in personal jurisdiction stems from the principle that it is only fair for a court to hale a defendant into court if they have in some way, through their contacts or presence, decidedly subjected themselves to the sovereignty of that state.[212] A defendant should be able to "structure his conduct in a way that makes him immune to suit there."[213] Personal jurisdiction then applies in situations where defendants have subjected themselves to the will of that state. The Court's analysis of fairness for personal jurisdiction has typically centered around the defendant's activities and contacts, not what would be "fair" to the state.[214]

Fairness is also intertwined with minimum contacts analysis. It is easy to see how fairness could become conflated with the minimum contacts analysis—personal jurisdiction is fair when the defendant had an extensive amount of contact with the forum state. However, it is important that courts have an independent conception of fairness to preserve the doctrine's due process underpinnings.

For bounty-hunter laws, the fairness concerns would likely weigh heavily in favor of finding no personal jurisdiction. As abortion access continues to change across geographic lines,[215] it raises the question of whether citizen-based personal jurisdiction is truly

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211 *See id.* at 519 ("The effort to prosecute a citizen at home for taking advantage of the options permitted by a sister state is at odds with this understanding of federalism.").

212 *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) ("[T]his 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, . . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities.") (quoting Keeton v. Hustler Mag., Inc., 465 U.S. 770, 774 (1984)); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984).

213 Brilmayer, *How Contacts Count*, *supra* note 116, at 96.

214 *See* Lewis, *supra* note 183, at 706 ("[The personal jurisdiction analysis is] from the standpoint of the defendant, not the sovereign.").

215 *See* B. Jessie Hill, *The Geography of Abortion Rights*, 109 GEO. L.J. 1081, 1087 (2021) ("The Fourteenth Amendment's operation thus depends on geographical facts in its references to the location of birth and of residence, as well as to being within the "jurisdiction" of the United States.").

consensual in the way personal jurisdiction is meant to be. This is especially true when residents choose to live in a state with pro-choice policies, but under bounty-hunter laws would then be subjected to extraterritorial anti-abortion laws. In this way, "[r]egulation affecting borders is therefore not only a quintessential exercise of sovereignty but also one fraught with the possibility of creating and enforcing inequality."[216] It would be acutely unfair to subject residents to outside laws they did not intend or consent to live under. Personal jurisdiction analysis would need to consider such principles of fairness to prevent enforcing the inequality of extraterritorial laws. Much of the reasoning weighing against personal jurisdiction in these lawsuits stems from the fact that potential defendants—doctors, providers, and individuals helping someone receive an abortion—receive almost no benefits from the forum state. If anything, potential defendants are benefitting others more than they are receiving benefits themselves. Abortion clinics and doctors do receive financial compensation for their services,[217] which could arguably be a benefit. But this benefit is derived from the citizens of the state more than the benefits provided by a forum state itself. Benefits conferred by forum states are typically things like the "health and safety . . . guaranteed by the State's police, fire, and emergency medical services," "free[dom] to travel on the State's roads and waterways," and enjoyment of "the State's economy."[218] Any "benefits" potential defendants receive from the forum state stem indirectly from residents of the forum state. This link is too attenuated to establish fairness in finding personal jurisdiction over these defendants. The "asymmetry"[219] that Justice Brennan worries would occur between a potential defendant and the forum state if they could skirt personal jurisdiction while receiving benefits from the forum state is not at issue in situations where such benefits do not exist in the first place. It would thus be unfair to subject these potential defendants to personal jurisdiction from anti-abortion states' overreach through bounty-hunter laws.

C. A Path Forward

Pro-choice activists would likely prefer something more substantive than relying on personal jurisdiction defenses to stop bounty-hunter cases. One proposed option is federal

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216 *Id.*

217 *See generally* Lesko, *supra* note 147; Israel, *supra* note 147.

218 Burnham v. Superior Ct. of Cal., 495 U.S. 604, 637 (1990) (Brennan, J., concurring).

219 *See id.* at 638 ("Without transient jurisdiction, an asymmetry would arise: A transient would have the full benefit of the power of the forum State's courts as a plaintiff while retaining immunity from their authority as a defendant.").

pro-choice legislation.[220] But this remains unlikely, at least for the near future, as the constitutional power for Congress to enact such a law remains unclear[221] and Congress has failed to gain the requisite votes needed for such legislation to pass.[222] As a stopgap measure, some states have passed interstate shield laws.[223] In general, though, the pro-choice movement could use any help in the fight for abortion rights.[224] Personal jurisdiction acts as a possible check on the otherwise forceful anti-abortion movement. As the number of bounty-hunter lawsuits grows, pro-choice activists may turn to personal jurisdiction as a possible saving grace. It is therefore even more important to understand the underlying goals of personal jurisdiction and how these goals can be used to demonstrate a lack of personal jurisdiction in bounty-hunter lawsuits.

Beyond the issue of how to weigh different states' sovereignty against one another, courts must also grapple with how to balance state sovereignty and fairness against one another.[225] Scholars have long asked whether one outweighs the other.[226] Beyond this, the Supreme Court has also contradicted itself regarding which aim of personal jurisdiction

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220 *See Women's Health Protection Act (WHPA)*, CTR. FOR REPROD. RTS. (June 23, 2023), https://reproductiverights.org/the-womens-health-protection-act-federal-legislation-to-protect-the-right-to-access-abortion-care/ [https://perma.cc/8U2Z-CMXZ].

221 *See* Robert A. Levy, *No Constitutional Authority for a National Abortion Law*, THE HILL (July 11, 2022), https://thehill.com/opinion/congress-blog/3552965-no-constitutional-authority-for-a-national-abortion-law/ [https://perma.cc/29GG-YBUD]; *see also* William H. Hurd, *Does Congress Have the Constitutional Authority to Codify Roe?*, BLOOMBERG L. (May 17, 2022), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XE487L8O000000 [https://perma.cc/USX8-TBAF].

222 *See U.S. Senate Fails to Pass Abortion Rights Legislation*, CTR. FOR REPROD. RTS. (May 11, 2022), https://reproductiverights.org/us-senate-fails-to-pass-abortion-rights-bill/ [https://perma.cc/RYU9-4CD3].

223 *See After* Roe *Fell*, CTR. FOR REPROD. RTS., *supra* note 2.

224 *See* Alexandra Zayas, *"This Was Not a Surprise": How the Pro-Choice Movement Lost the Battle for* Roe, PROPUBLICA (May 3, 2022), https://www.propublica.org/article/this-was-not-a-surprise-how-the-pro-choice-movement-lost-the-battle-for-roe [https://perma.cc/UTR4-KYE8].

225 *See* Lewis, *supra* note 183, at 717 ("[The Court] offers no clue as to how strongly sovereignty concerns must tilt against the forum's jurisdiction in order to overcome the factors that demonstrate its fairness to the parties.").

226 *Compare* Lewis, *supra* note 183 (asserting that fairness is a more clearly articulated theory behind personal jurisdiction than any vaguely asserted ideas of state sovereignty), *with* Schmitt, *supra* note 37 (arguing for a revival in the importance of state sovereignty to personal jurisdiction and refuting scholarship abandoning the concept).

carries greater weight.[227] Regardless of such disagreement, in the context of bounty-hunter abortion cases, both theories weigh in favor of reduced applications of personal jurisdiction. This approach toward personal jurisdiction would help courts avoid the complicated tasks of weighing the two theories against one another or staking a claim of which theory matters more.

CONCLUSION

In the wake of *Dobbs*, state abortion policy will only continue to splinter across the United States. With this divergence, anti-abortion states will continue trying to enforce their views extraterritorially, as some states have already done using bounty-hunter laws. In this fight, it is more important than ever that pro-choice activists have tools for preventing harmful and frivolous lawsuits against abortion providers and medical personnel, the friends and family of people who have obtained abortions, and larger corporations like abortion funds. Personal jurisdiction should be one such tool. Under current personal jurisdiction precedent, potential defendants in bounty-hunter litigation would have strong arguments against personal jurisdiction. Questions remain about the personal jurisdiction doctrine in grayer areas where defendants reach out to forum states. But even on those debatable issues, returning to the fundamental values of state sovereignty and fairness reinforces the case for dismissal. When personal jurisdiction precedent remains unclear, judges should harness these underlying theories to help illuminate the path ahead. Above all, one truth remains abundantly clear—this fight is not ending any time soon, so every battle counts.

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227 *Compare* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."), *with* Hanson v. Denckla, 357 U.S. 235, 251 (1958) ("Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.").

DEFAMATION IN THE TIME OF DEEPFAKES

ABIGAIL GEORGE*

Abstract**

Deepfake technology, powered by artificial intelligence, has enabled the quick and easy creation of hyperrealistic videos that superimpose one person's face onto another's body. While the technology has benign applications, it has also been overwhelmingly used to create nonconsensual pornography. Deepfake pornography is a severe sexual offense that has targeted hundreds of thousands of women. This Note, the first comprehensive analysis of deepfake pornography under defamation law, sketches a framework for advocates and judges to apply defamation to cases of deepfake pornography.

This Note argues that deepfakes—in achieving photorealism and simulating someone's true body and private life—qualify as defamatory false statements of fact. As this Note shows, when alleged defamatory statements strive for (and achieve) hyperrealism, and they purport to reveal a truth about someone's private sex life, they qualify as false statements of fact. Cursory indications that a deepfake is "fake" or even viewers' knowledge that it is "synthetic" refer solely to the manner of creation, not its signified meaning. The photovisual realism of deepfakes collapses the distinction between form and meaning or signified and signifier. As signifiers whose forms perfectly resemble their signified, deepfakes leave no room for the person depicted to disavow their message or for the statements to transform into a parody or commentary protected by the First Amendment. Thus, the knowledge that a deepfake is fake does little to undermine the reputational harm and, consequently, the defamation claim. Finally, this Note addresses defamation law's peculiar and controversial "actual malice" scienter requirement. As actual malice relates to knowledge or reckless disregard for the falsity of the statement and not a defamatory intent, it applies to creator-

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[**] Content warning: This Note contains graphic descriptions of sexual violence.

distributors who use synthetic processes to make deepfakes, albeit often claiming a benign or parodic purpose.

INTRODUCTION

In April 2018, Rana Ayyub—a well-known investigative journalist from India—received a seemingly innocuous message that a video of her was circulating online.[1] Ayyub had recently made headlines for campaigning for justice following the rape and murder of an eight-year-old Kashmiri girl, so she wondered if the clip was from her recent interviews on BBC News and Al Jazeera in which she condemned the Bharatiya Janata Party's (BJP) support of the accused.[2] She hoped that the video would not exacerbate the backlash she was experiencing.[3] When she clicked on the link, she was shocked.[4] "What he sent me was a porn video, and the woman in it was me."[5]

The video was a nonconsensual deepfake pornography (NCDP) video created using artificial intelligence ("AI") and publicly available photos of Ayyub.[6] After appearing on the internet, the video of Ayyub was shared tens of thousands of times via WhatsApp and Twitter.[7] "I started throwing up. I just didn't know what to do. In a country like India, I knew this was a big deal. I didn't know how to react, I just started crying."[8]

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1 *See* Rana Ayyub, *I Was the Victim of a Deepfake Porn Plot Intended to Silence Me*, HuffPost (Nov. 21, 2018, 8:11 AM), https://www.huffingtonpost.co.uk/entry/deepfake-porn_uk_5bf2c126e4b0f32bd58ba316/ [https://perma.cc/DCS8-A86K].

2 *See id.*

3 *See id.*

4 *See id.*

5 *Id.*

6 *See id.*

7 Ayyub, *supra* note 1; *see also* Lilian Stolk, *If Deepfakes Are a Threat, This Is It: A Feminist Perspective on the Impact of Deepfake Pornography*, The Hmm (June 5, 2020), https://thehmm.nl/if-deepfakes-are-a-threat-this-is-it/ [https://perma.cc/Z2GS-4NDP] ("Via WhatsApp, the video ended up on almost every phone in India.").

8 Ayyub, *supra* note 1.

As the video continued to circulate, Ayyub faced a wave of online and physical harassment and familial, personal, health, and professional consequences.[9] She was inundated with harassing comments on social media.[10] She was called "Jihadi Jane" and "Isis Sex Slave."[11] After receiving messages asking her rates for sex, Ayyub was hospitalized due to anxiety and heart palpitations.[12] Ayyub always considered herself an outspoken feminist but was silenced due to the abuse: "From the day the video was published, I have not been the same person . . . I've self-censored quite a bit out of necessity."[13]

Unfortunately, Ayyub's story is not uncommon. Deepfake pornography,[14] also known as sexual deepfakes,[15] refers to synthetically created, sexually explicit images or videos of people that are produced without their consent.[16] Deepfake pornography has targeted over 105,000 women, and nearly half of U.S. high school students have heard of deepfakes depicting classmates.[17] Women affected by deepfake pornography have dropped out of

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9 *See id.*

10 *See id.*

11 *Id.*

12 *Id.* ("I used to be very opinionated, now I'm much more cautious about what I post online.").

13 *Id.* ("I always thought no one could harm me or intimidate me, but this incident really affected me in a way that I would never have anticipated.").

14 "Deepfake" is a portmanteau of "deep" and "fake," referring to the fact that it uses "deep learning," a subset of machine learning that relies on artificial neural networks and is manipulated content. *See* GRAHAM MEIKLE, DEEPFAKES 2 (2022). Deepfakes owe their name to the Reddit user u/xual who created the anonymous Reddit forum r/Deepfakes in 2017 to create and share deepfake pornography. *Id.* at 3.

15 *See* Victoria Rousay, Sexual Deepfakes and Image-Based Sexual Abuse: Victim-Survivor Experiences and Embodied Harm, 12–13 (May 2023) (A.L.M. thesis, Harvard University) (arguing that the term "sexual deepfakes" better captures their violation, abuse, and lack of consent).

16 I am adapting Danielle Citron and Mary Anne Franks' definition of nonconsensual pornography, which they define as "the distribution of sexually graphic images of individuals without their consent." Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014).

17 *See* MEIKLE, *supra* note 14, at 75 (noting that the app DeepNude had over 500,000 download requests, targeting 104,852 women); Elizabeth Laird, Maddy Dwyer & Kristin Woelfel, *In Deep Trouble: Surfacing Tech-Powered Sexual Harassment in K–12 Schools*, CTR. FOR DEMOCRACY & TECH., 11 (Sept. 2024), https://cdt.org/wp-content/uploads/2024/09/2024-09-26-final-Civic-Tech-Fall-Polling-research-1.pdf [https://perma.cc/EN5E-B5G9]; *see also infra* notes 64–65 and accompanying text.

school,[18] left their jobs,[19] and implemented "permanent" and "significant" changes in their behavior, attitudes, and relationships.[20]

Deepfake pornography is not limited to an obscure corner of the internet. Since first appearing on Reddit in 2017,[21] the accuracy and accessibility of deepfake pornography have each grown at an exponential rate with no signs of slowing. At least 244,625 videos of deepfake pornography circulate online,[22] and the top six deepfake-pornography websites receive over thirty-one million visits per month.[23] Deepfake technology has evolved from requiring hundreds of facial images and advanced computer skills to needing just one image, twenty-five minutes, and basic computer skills.[24] Sexual deepfake images can even be made on user-friendly iPhone apps.[25] In a few years, it will be possible to make realistic

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18 *See* Noelle Martin, *Image-Based Sexual Abuse and Deepfakes: A Survivor Turned Activist's Perspective*, THE PALGRAVE HANDBOOK OF GENDERED VIOLENCE AND TECHNOLOGY 55, 60 (Anastasia Powell, Asher Flynn & Lisa Sugiura eds., 2021).

19 *See* Rousay, *supra* note 15, at 107 ("Unfortunately, for some victim-survivors like Lia, despite the content being fake, she was still fired from her job after her employer saw the video.").

20 *Id.* at 110 (discussing a "state of permanency" in which survivors remain hindered by fear of being recognized or revictimized); *see also* Jayna Nickert, *The Damage Caused by Deepfake Porn*, HEALTHNEWS (Nov. 16, 2023), https://healthnews.com/mental-health/anxiety-depression/the-damage-caused-by-deepfake-porn/ [https://perma.cc/36JY-BQEQ] (noting that deepfake pornography leads to anxiety, panic, depression, posttraumatic stress disorder, and dissociation).

21 *See* MEIKLE *supra* note 14.

22 Matt Burgess, *Deepfake Porn Is Out of Control*, WIRED (Oct. 16, 2023), https://www.wired.com/story/deepfake-porn-is-out-of-control/ [https://perma.cc/2EUK-4LVV] (noting that over 113,000 such videos were uploaded in the first nine months of 2023 and more were produced in 2023 than in all other years combined).

23 [JOHN DOE WEBSITE ANALYTICS] (data on file with *Columbia Journal of Gender & Law*); *see also 2023 State of Deepfakes: Realities, Threats, and Impact*, SEC. HERO (2023), https://www.securityhero.io/state-of-deepfakes/#key-findings [https://perma.cc/52V4-NXSZ] (finding that the ten most popular deepfake pornography platforms had over 300 million combined views in 2023).

24 *See 2023 State of Deepfakes*, *supra* note 23 (reporting that it takes less than twenty-five minutes and is free to create a sixty-second deepfake video with just one face image); *see also* Tate Ryan-Mosley, *A High School's Deepfake Porn Scandal Is Pushing US Lawmakers Into Action*, MIT TECH. REV. (Dec. 1, 2023), https://www.technologyreview.com/2023/12/01/1084164/deepfake-porn-scandal-pushing-us-lawmakers/ [https://perma.cc/NFF3-HNZT] ("Creating a convincing deepfake five years ago required hundreds of images . . . which meant those at greatest risk . . . were celebrities and famous people with lots of publicly accessible photos [but] now, deepfakes can be created with just one image.").

25 For example, the app DeepNude—advertising itself as "the superpower you always wanted"—allowed users to upload photos of any woman for the app to generate naked images of. MEIKLE, *supra* note 14, at 73.

three-dimensional sex avatars of any person without their consent.[26] Accordingly, while deepfakes initially primarily targeted women in the public sphere,[27] private individuals are now the main target,[28] with the number of deepfake videos increasing 900% each year.[29]

Deepfakes are experiencing a meteoric rise as a form of gender-based violence.[30] Yet, they have largely escaped political, legal, and public scrutiny for at least three reasons. First, deepfake pornography causes a "silencing effect," wherein victims remove themselves from online spaces and do not risk speaking out publicly for fear of provoking retaliation and driving more viewers to their intimate content.[31] Moreover, with few exceptions, the inability of mainstream media and politicians to see deepfakes as gender-based violence is astonishing.[32] Instead, they focus attention on deepfakes as political or security threats,[33]

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26 *See* DANIELLE CITRON, THE FIGHT FOR PRIVACY: PROTECTING DIGNITY, IDENTITY AND LOVE IN THE DIGITAL AGE 48 (2022) [hereinafter CITRON, FIGHT FOR PRIVACY].

27 In 2019, a report showed that ninety-nine percent of subjects in deepfake pornography were actresses or musicians working in the entertainment sector. *See* HENRY AJDER ET AL., DEEPTRACE, THE STATE OF DEEPFAKES: LANDSCAPE, THREATS, AND IMPACT 2 (2019), https://regmedia.co.uk/2019/10/08/deepfake_report.pdf [https://perma.cc/EN2W-75QQ]. Deepfake pornography has targeted almost every woman in the public eye. There are over 1,000 deepfake videos of Emma Watson that collectively have over fifteen million views, rendering it "essentially a separate porn genre on its own." MEIKLE, *supra* note 14, at 61.

28 *See* CITRON, FIGHT FOR PRIVACY, *supra* note 26, at 48 (noting that sixty-three percent of users of a deepfake chatbot uploaded photos of girls or women they knew personally); *see also* MEIKLE, *supra* note 14, at 72 (referring to the shift toward targeting private individuals as the "domesticat[ion]" of synthetic porn); Stolk, *supra* note 7, at 7–9 (noting that creators accept requests for deepfakes of specific people and frequently receive requests for deepfakes of ex-girlfriends).

29 Matthew Miller, *Deepfakes: Real Threat*, KPMG, 3 (2023), https://kpmg.com/kpmg-us/content/dam/kpmg/pdf/2023/deepfakes-real-threat.pdf [https://perma.cc/BCU4-WP77].

30 *See supra* notes 21–23 and accompanying text.

31 *See* MY IMAGE MY CHOICE, https://myimagemychoice.org/ [https://perma.cc/6G2B-WJP5] (describing the "silencing effect" causing victims to "modify their behavior, retreat from online spaces, and [be] shut out from full participation in public discourse – especially online . . . Most people don't want to risk speaking out about their experiences because this might provoke retaliation, or drive more viewers to their intimate content."); Rousay, *supra* note 15, at 110 (performing a qualitative data analysis of fifty-eight survivors of deepfakes to find that all participants "remove[d] or self-censor[ed] their online presence").

32 *See infra* notes 118–136 and accompanying text.

33 *See, e.g.*, NSA, FBI & CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, CYBERSECURITY INFORMATION SHEET: CONTEXTUALIZING DEEPFAKE THREATS TO ORGANIZATIONS 1 (2023), https://media.defense.gov/2023/Sep/12/2003298925/-1/-1/0/CSI-DEEPFAKE-THREATS.PDF [https://perma.cc/EQ9M-C7XC] (listing the ways deepfakes can be "abused" as threatening brands, impersonating leaders, and gaining access to sensitive

eschewing the fact that ninety-eight percent of deepfakes are pornographic.[34] Of those images, ninety-nine percent depict women.[35] To put it simply, deepfakes are—and always have been—a gender-based violence issue.[36] Finally, existing legal mechanisms have largely left the women targeted without recourse.[37] Women who seek legal recourse are often told by law enforcement that the perpetrator did not break any laws.[38] Aside from a few piecemeal convictions and creative lawsuits, there have been no truly effective ways for victims to protect themselves.[39]

The sexualization of women in the public sphere and threats of gender-based violence are hardly new. But nonconsensual deepfake pornography presents a novel and urgent threat because technological advances have rendered the videos effectively indistinguishable

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information); Dan Robitzski, *Pentagon's AI Director Calls for Stronger Deepfake Protections*, FUTURISM: THE BYTE (Aug. 30, 2019), https://futurism.com/the-byte/pentagon-ai-director-deepfake-protections [https://perma.cc/2KMZ-EVU6] (noting that the Pentagon is allocating vast financial resources to combating this challenge to national security).

34 *See 2023 State of Deepfakes*, *supra* note 23.

35 *See id.* While deepfake pornography primarily affects women, "it won't be long" until homosexual deepfake pornography of men is used to "cost someone their life or liberty in certain parts of the world." NINA SCHICK, DEEPFAKES: THE COMING INFOCALYPSE 159–60 (2020). The most popular deepfake website recently released a "gay version." [JOHN DOE WEBSITE #1] (link on file with *Columbia Journal of Gender & Law*).

36 *See, e.g.*, Citron & Franks, *supra* note 16, at 353 (arguing that image-based sexual abuse is also a form of sex discrimination); Rousay, *supra* note 15 ("Findings from this study suggest that sexual deepfake abuse is a severely gendered phenomenon in which heteronormativity has become the template for enacting sexual violence."); Stolk, *supra* note 7 (arguing that the real danger of deepfakes is to gender equality, not "the truth").

37 *See, e.g.*, Anne Pechenik Gieseke, Note, *"The New Weapon of Choice": Law's Current Inability to Properly Address Deepfake Pornography*, 73 VAND. L. REV. 1479 (2020); Ryan-Mosley, *supra* note 24 ("[T]he dearth of regulation and legal precedent on deepfake pornography means that victims . . . have little to no recourse."); *see also infra* Section I.B.1 (explaining why revenge porn statutes do not apply to victims of NCDP since deepfakes do not expose the woman's "real" body).

38 *See, e.g.*, Ayyub, *supra* note 1; Martin, *supra* note 18, at 58 (explaining that she called the police, went to the police station, and hired a private investigator, but "there was nothing they could do, or did do").

39 *See* Micah Kindred, *Deepfakes: The Effect on Women and Potential Protections*, U. CIN. L. REV. (Aug. 2, 2023), https://uclawreview.org/2023/08/02/deepfakes-the-effect-on-women-and-potential-protections/ [https://perma.cc/QC97-ZPLY]; *see also* Markus Scheiber, *San Francisco Files First-of-its-Kind Lawsuit to Tackle AI Deepfake Nudes*, POLITICO (Aug. 17, 2024), https://www.politico.com/news/2024/08/17/san-francisco-lawsuit-ai-deepfake-nudes-00174487 [https://perma.cc/58GP-V45C] (noting that the 2024 lawsuit targeting deepfakes is "first-of-its-kind"); *infra* Section I.C.1 (describing the current laws targeting deepfakes).

from real videos and undetectable as fake.[40] This Note is the first comprehensive analysis of deepfake pornography under defamation law. Previously, defamation has been overlooked, cursorily dismissed, or only hinted at in passing as a potential legal pathway.[41] This Note argues that defamation law—while by no means a panacea[42]—is the best avenue to pursue legal recourse in the time of deepfakes for at least three reasons. First, at a time when mediation of reputations occurs primarily in cyberspace, courts have shown their willingness to award defamation damages for harm that occurs beyond traditional jurisdictional boundaries.[43] Second, defamation law consistently recognizes noneconomic, dignitary interests implicated by false statements shared publicly, which are precisely the interests infringed upon by deepfake pornography.[44] Third, as this Note shows, when allegedly defamatory statements strive for—and achieve—hyperrealism and the video insinuates that it is revealing a "truth" about someone's private sex life, these images fit squarely into the defamation framework, contrary to what some scholars have argued.[45] Cursory indications that a deepfake is "fake" or viewers' knowledge that it is "synthetic" refer solely to the manner of creation. This knowledge does little to undermine the reputational harm and, consequently, the defamation claim.[46]

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40 *See, e.g.*, Emily van der Nagel, *Verifying Images: Deepfakes, Control, and Consent*, 7 PORN STUD. 424, 424–25 (2020) (arguing that deepfakes "continue a long history of women's images being used to harass, humiliate, and harm them").

41 *See, e.g.*, Gieseke, *supra* note 37, at 1500 ("Defamation . . . fails as an option due to the intent requirement."); Aasha Shaik, *Deepfake Pornography: Beyond Defamation Law*, YALE CYBER LEADERSHIP F. (July 20, 2021), https://www.cyber.forum.yale.edu/blog/2021/7/20/deepfake-pornography-beyond-defamation-law [https://perma.cc/G9PJ-S7UD] (arguing that using defamation "would be missing the actual point, which is the violation of consent"); Moncarol Y. Wang, Comment, *Don't Believe Your Eyes: Fighting Deepfaked Nonconsensual Pornography with Tort Law*, 2022 U. CHI. LEGAL F. 415, 441 (2023) (arguing that the "Achilles heel" of defamation is "that the publication must be to a third party").

42 *See infra* notes 99–105 (noting the downsides of civil liability for cyberviolence).

43 *See infra* Section III.A.3.

44 *See infra* Part II.

45 *See, e.g.*, Jessica Ice, *Defamatory Political Deepfakes and the First Amendment*, 70 CASE W. RSRV. L. REV. 417, 434 (2019) ("[G]ood-faith deepfake creators will have a rather easy shield against culpability: any indication, either in the video itself or on the location (webpage) where the video was posted, that the video is a fake."); Shaik, *supra* note 41 ("It would be trivially easy for producers and distributors of nonconsensual deepfake pornography to skirt this issue entirely by simply posting 'fake' in the title . . . ."); Stolk, *supra* note 7 ("Since everybody knows [deepfakes of Emma Watson] are fake, they probably won't damage her image and reputation very much."); *see infra* Part III.

46 *See infra* Section III.B.

This Note argues that deepfakes—in achieving photorealism and purporting to be revealing a truth about a person's sex life—qualify as defamatory. Part I establishes deepfake pornography as a novel and egregious sexual offense facilitated by exponential technological advancements. It then discusses and reveals the shortcomings of legislation not specific to deepfakes, legislation specific to deepfakes, and the common law of torts. Part II canvasses the nature of deepfakes' harm, establishing them as a sexual offense infringing upon core rights of autonomy, dignity, and reputation. Finally, Part III discusses how deepfake pornography—regardless of whether it is indicated as or known to be fake—is actionable under defamation.

I. What Deepfakes Are and What Deepfakes Are Not

This Part situates deepfake pornography at the intersection of disruptive new AI technologies and gender-based cyberviolence—both of which suffer from a profound lack of legal attention and remedies. Section I.A describes the history and technology of deepfakes. Section I.B places deepfake pornography on the continuum of image-based sexual abuse and discusses why revenge-pornography legislation does not apply to deepfake pornography. Section I.C addresses potential paths for legal recourse, settling on defamation law.

A. The Landscape of Synthetic Media and Deepfake Technology

Although definitions vary, deepfakes essentially involve taking a small portion of a person's voice or photo and using generative AI to create a hyperrealistic portrayal of that person doing or saying things they never did.[47] Deepfakes are a form of synthetic media, or media doctored or generated by artificial intelligence, which itself is on the spectrum of manipulated media.[48]

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47 *See* DEAN FIDO & CRAIG A. HARPER, NON-CONSENSUAL IMAGE-BASED SEXUAL OFFENDING: BRIDGING LEGAL AND PSYCHOLOGICAL PERSPECTIVES 3 (2020) (deepfakes entail "[u]sing visual editing software to superimpose the likeness of another onto sexually explicit material"); Gieseke, *supra* note 37, at 1481 ("Deepfake technology uses artificial intelligence to realistically manipulate videos by splicing one person's face onto another's.").

48 *See* MEIKLE, *supra* note 14, at 3.

Of course, manipulated media is nothing new.[49] But deepfakes distinguish themselves from previous forms of manipulated media in both scale and kind.[50] Deepfakes are created via deep-learning algorithms, most commonly Generative Adversarial Networks (GAN), or diffusion networks. While the technological specificities are noteworthy,[51] for the purposes of this Note, these networks are quick, accessible, and lead to consistent, eerily photorealistic representations of a woman's intimate life.[52] Deepfakes come in many forms,[53] but the vast majority consist of face-swapping, or taking a woman's face, analyzing her body shape over her clothes, and superimposing her likeness onto the naked body of another.

It is difficult to convey just how realistic deepfakes are to those unfamiliar with recent technological advancements. The realism of today's deepfakes is nothing short of extraordinary. Research indicates that high-quality deepfake videos can "easily" fool the public, with less than a quarter being recognized as fake.[54] To the dismay of investors allocating billions of dollars toward research,[55] mechanical deepfake detectors currently

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49 Photographs and audio recordings have been manipulated since their advent. Early examples include altered photos of Abraham Lincoln and Joseph Stalin. *See* SCHICK, *supra* note 35, at 26–27.

50 Ice, *supra* note 45, at 427 ("[T]he method of creation (by deep learning or artificial intelligence) [is] a key way to distinguish deepfakes from other faked videos . . . because the use of deep learning in a video's creation implies that such a video can be created more easily [and look more realistic] than a manually manipulated video.").

51 *See generally* LOVELEEN GAUR, DEEPFAKES: CREATION, DETECTION, AND IMPACT 1–6 (2022). *See also* SCHICK, *supra* note 35, at 44–45 (describing Generative Adversarial Networks as employing a "constant iterative process" until achieving a close-to-perfect depiction).

52 *See* SCHICK, *supra* note 35, at 44–45.

53 These include face reenactment (manipulating someone's facial features), face generation (creating a new face not based on any real individual), face swapping (replacing one person's face with another's), and speech synthesis (replicating voices). *See* Carolyn Pepper, Peter Raymond & Talia Fiano, *Reputation Management and the Growing Threat of Deepfakes*, BLOOMBERG L. (July 9, 2021), https://news.bloomberglaw.com/us-law-week/reputation-management-and-the-growing-threat-of-deepfakes [https://perma.cc/4T6D-FLMF].

54 *See* Pavvel Korshunov & Sébastien Marcel, *Deepfake Detection: Humans vs. Machines*, ARXIV, 4 (Sept. 7, 2020), https://arxiv.org/pdf/2009.03155 [https://perma.cc/E42M-ZA9E] (finding a bias toward assuming the authenticity of videos and that participants identified deepfake videos as fake 24.5% of the time); Klair Somoray & Dan J. Miller, *Providing Detection Strategies to Improve Human Detection of Deepfakes*, 149 COMPUT. HUM. BEHAV. 1, 8 (2023) (finding that even when participants were told they would be shown deepfakes and instructed on detection techniques, their ability to detect them was "generally poor" and only slightly above chance (60.7%)).

55 *See also* NSA et al., *supra* note 33, at 6–7 (noting that the organizations developing deepfake detectors include Microsoft, Intel, Google, the Air Force Research Lab, and Adobe).

fare no better than human detectors.[56] More importantly, a successful deepfake detector would do little to mitigate the harm to the hundreds of thousands of women. For those victims, their injury is not derived from viewers mistaking the content for being real but from the public exposure of sexualized depictions of their bodies.[57]

Deepfake pornography is not magic, and it is "no longer rocket science."[58] While realistic synthetic video was previously costly and "an exceedingly complex operation for even the most experienced digital artists," it is now "a single button press to create a face-swapped video."[59] Sexual deepfake photographs are even more accessible. For example, the app DeepNude—advertising itself as "the superpower you always wanted"—allows users to upload photos of any woman.[60] Then, the app would generate a naked image of her.[61] The use of gendered pronouns is intentional: The databases used by DeepNude and other deepfake pornography software are typically trained exclusively on cisgender female bodies, meaning they can only generate deepfakes of women.[62]

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56 As deepfake technology improves, detection methods have tried to catch up, with some detection methods analyzing light, shadows, eye movement, and even blood circulation. But as soon as detection methods advance, deepfake technology responds by addressing the weak point. *See* Jason Haas, *Deepfake Dilemma*, INTELL. PROP. MAG., Sept. 2019, at 33. *See also* NSA et al., *supra* note 33, at 6–7 (calling the development of detectors a "cat and mouse game").

57 *See infra* Section II.B.

58 Samantha Cole, *AI-Assisted Fake Porn Is Here and We're All Fucked*, VICE (Dec. 11, 2017), https://www.vice.com/en/article/gydydm/gal-gadot-fake-ai-porn [https://perma.cc/ME6C-28Q9].

59 Erik Gerstner, *Face/Off: "DeepFake" Face Swaps and Privacy Laws*, DEF. COUNS. J., Jan. 2020, at 2; *see also* NSA et al., *supra* note 33, at 2 ("[T]he market is now flooded with free easily accessible tools . . . that make the creation or manipulation of multimedia essentially plug-and-play."). Creators of deepfakes can exploit these publicly available images as "training data" for their algorithms. These sophisticated software tools meticulously analyze the photographs to accurately identify and replicate facial expressions, mannerisms, and idiosyncratic gestures. *See* MEIKLE, *supra* note 14, at 72.

60 MEIKLE, *supra* note 14, at 73. DeepNude had more than 500,000 download requests, targeting more than 104,852 women. Even though the app's creators took it offline after it launched in 2019, versions of the code continue to circulate widely. *See id.* at 73–74.

61 *See id.* at 73.

62 For example, DeepNude was trained on photographs of 10,000 female bodies. *See id.* at 74. Similarly, Porn Star by Face, one of the most popular databases used by creators of deepfake videos, was trained with data from 4,000 women and does not provide "matches" for men. *See id.* at 72. The algorithm crunches data of physical features to find a "match" between a woman they want to make deepfake pornography of and an existing pornography star. The site describes itself as "The First Porn Star face-recognizing search engine based on deep neural networks." *Id.*

Reddit's removal of the original forum for deepfakes and nominal bans by mainstream platforms have done little to quell the extensive and resilient online ecosystem dedicated to the creation and dissemination of deepfake pornography.[63] Over 9,500 websites specialize in nonconsensual sexual imagery.[64] Deepfake creators can use any one of the forty-two open-source, user-friendly machine-learning tools available online and ask questions in any of the fifteen deepfake-creation community websites totaling over 600,000 members.[65] Websites that host deepfake-pornography websites are "participatory culture[s],"[66] providing extensive guides and forums dedicated to answering questions.[67] These sites typically employ a revenue-sharing model encouraging users to become content creators.[68]

As the adage goes, technology is neither good nor bad; nor is it neutral.[69] Deepfakes have beneficial applications, such as protecting the identity of victims when sharing their stories or testifying to Congress.[70] Outside of pornography, deepfakes can be employed

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63 Reddit's removal of /r/Deepfakes on February 7, 2018, did little to stop the proliferation of online deepfake forums and tools. *See* MEIKLE, *supra* note 14, at 50–51. NCDP is hosted both on dedicated deepfake pornography websites and mainstream pornography websites. *See id.*; *see* AJDER ET AL., *supra* note 27, at 3 (demonstrating the exponential growth of GANs since 2007).

64 *See* CITRON, FIGHT FOR PRIVACY, *supra* note 26, at 71.

65 *See 2023 State of Deepfakes*, *supra* note 23.

66 The largest website that hosts deepfake pornography had more than 275,000 members as of February 2022, but there are likely to be even more users since most videos can be accessed without an account. MEIKLE, *supra* note 14, at 56–57. *See also id.* at 60 (calling the largest deepfake website a "participatory culture" analogous to the interactive models of major social media platforms such as TikTok).

67 The website includes extensive training materials for users who want to learn how to make deepfake videos. Over 10,000 forum posts on the website respond to questions and explain the technical aspects of creating deepfakes. *See id.* at 59 ("The site walks the user through how to extract images of their chosen celebrity. . . and . . . explains how to optimize and align images . . . how to train the neural networks, how to merge the resulting images, and how to use basic post-production techniques . . . .").

68 *See id.* at 58.

69 This is Melvin Kranzberg's first law of technology. *See* Melvin Kranzberg, *Technology and History: "Kranzberg's Laws,"* 27 TECH. & CULTURE 544, 545 (1986).

70 *See* ANOTHER BODY (WILLA 2023) (using deepfake technology to create a documentary in which victims told their stories without being identified).

for comedy,[71] entertainment,[72] malevolent political purposes,[73] and fraud.[74] As stated previously, most scholarship and government resources focus on deepfakes in the political and national security spheres,[75] turning a blind eye to the fact that deepfake technology was both pioneered for pornography and that it is overwhelmingly used to create nonconsensual pornography.[76]

B. Gender-Based Cyberviolence and Pornography

Deepfakes are not just a form of synthetic media; they also exist on the continuum of image-based sexual abuse[77] and cyber gender violence.[78] Other forms of image-based

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71 *See, e.g.*, BuzzFeedVideo, *You Won't Believe What Obama Says in This Video*, YOUTUBE (Apr. 17, 2018), https://www.youtube.com/watch?v=cQ54GDm1eL0&ab_channel=BuzzFeedVideo [https://perma.cc/FM7J-M8DE].

72 *See* Gerstner, *supra* note 59, at 3.

73 *See* Paul Sonne, *Fake Putin Speech Calling for Martial Law Aired in Russia*, N.Y. TIMES (June 5, 2023), https://www.nytimes.com/2023/06/05/world/europe/putin-deep-fake-speech-hackers.html [https://perma.cc/3UAC-CTBJ].

74 *See, e.g.*, Kindred, *supra* note 39 ("Deepfakes have been used for cybercrime, extortion, targeted attacks, misinformation, fraud, getting around authentication methods, and threats to personal, professional, and company reputations.").

75 *See supra* note 33.

76 *See* MEIKLE, *supra* note 14, at 51 ("Non-consensual deepfake porn . . . is . . . the predominant use of synthetic video to date."). Notwithstanding the lack of formal legal structures addressing the gendered issues posed by the rapid proliferation of digital media and information, pornography itself has been at the forefront of many of these innovations and the development of new forms of media. In fact, "demand for, and take-up of, new technologies has been consistently driven by the desire of audiences to access pornographic material more easily and more privately." Rebecca Sullivan & Alan McKee, PORNOGRAPHY: STRUCTURES, AGENCY AND PERFORMANCE 49 (2015). Internet pornography spurred the development of webcams, secure online credit card payment systems, banner advertisements and pop-ups, and streaming video technologies. *See* Susanna Paasonen, *Online Pornography*, *in* THE SAGE HANDBOOK OF WEB HISTORY 551, 551 (Niels Brügger & Ian Milligan eds., 2018).

77 Image-based sexual abuse refers to the umbrella of "offences involving the nonconsensual-generation, taking, and/or distribution of private sexual images." FIDO & HARPER, *supra* note 47, at 7.

78 *See, e.g.*, Danielle Citron, *The Continued (In)visibility of Cyber Gender Abuse*, 2023 YALE L.J.F. 333, 341 [hereinafter Citron, *Continued (In)visibility*].

sexual abuse include revenge pornography,[79] upskirting,[80] downblousing,[81] and cyber-flashing.[82] Professor Danielle Citron coined the term "cyber gender abuse" to capture the "gendered nature" of cyberviolence.[83] Scholar Emma Jane writes of cyberhate that "[m]isogynists have never had so many opportunities to collectivize and abuse women with so few consequences."[84] One in twelve American adults under thirty have been victims of image-based sexual abuse, and almost two-thirds have been harassed online.[85] But, despite the prevalence of technology-facilitated violence, there is a "never-ending dismissal of cyber gender abuse"[86] due in part to a "tendency to tolerate, trivialize, or dismiss these harms."[87]

1. Deepfake Pornography and Nonconsensual "Revenge" Pornography

Nonconsensual "revenge" pornography (NCP)[88] is a form of image-based sexual abuse with considerable similarities to deepfake pornography. Owing in large part to the work

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79 See *infra* Section I.B.2.

80 *See* FIDO & HARPER, *supra* note 47, at 3 (defining upskirting as "[t]he non-consensual and surreptitious capturing of intimate images under an individual's clothing").

81 *See* CITRON, FIGHT FOR PRIVACY, *supra* note 26, at 73 (remarking that "A down-blouse thread on a hidden camera site had more than 150,000 videos with titles like 'Very busty white girl spotted on Japan street with jiggling big boobs,' 'Black woman with dreadlocks in bikini,' and 'Sexy Asian Teen.'").

82 *See* FIDO & HARPER, *supra* note 47, at 3 (defining cyber-flashing as "[s]haring sexually explicit images via digital technologies . . . to unsuspecting or non-consenting recipients").

83 Citron, *Continued (In)visibility*, *supra* note 78, at 337 (coining the term "cyber gender abuse" to refer to the "gendered nature" of cyber abuse).

84 EMMA JANE, MISOGYNY ONLINE: A SHORT (AND BRUTISH) HISTORY 51 (2017).

85 *See* Emily A. Vogels, *The State of Online Harassment*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/internet/2021/01/13/the-state-of-online-harassment/ [https://perma.cc/S6MH-UCTG]; MY IMAGE MY CHOICE, *supra* note 31.

86 Citron, *Continued (In)visibility*, *supra* note 78, at 340 (connecting the law's historic nonrecognition of harms that disproportionately affect women to the law's current nonresponse to cyber gender abuse).

87 Citron & Franks, *supra* note 16, at 347 (attributing the dearth of effective legal protections to a "lack of understanding about the gravity, scope, and dynamics of the problem; historical indifference and hostility to women's autonomy; inconsistent conceptions of contextual privacy; and misunderstandings of First Amendment doctrine").

88 Nonconsensual "revenge" porn is "intimate media that is created, obtained, or distributed without the subject's consent." Chad D. Post, *101: How to Combat Revenge Porn*, WIS. LAW. (Feb. 11, 2020), https://www.

of feminist activists and scholars, forty-six states have now criminalized nonconsensual pornography,[89] and a civil cause of action for it exists at the federal level.[90] But while deepfake pornography and nonconsensual pornography are normatively equivalent, they are legally distinct.[91] Deepfake pornography is synthetically created, whereas nonconsensual pornography consists of non-manipulated, real depictions.[92] In other words, the intimate depictions in deepfakes—even when indistinguishable from physical reality—are not actual photographic captures of the featured woman's body. Indeed, there is an often-overlooked second victim in deepfake pornography: the person whose images and sex work are used nonconsensually to stock the database of bodies.[93] As such, deepfakes are excluded from revenge-porn legislation due to statutory phrases like "person whose

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wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=2&ArticleID=27466 [https://perma.cc/6RDP-J3FT]. Most scholars prefer the term "nonconsensual pornography" to revenge porn. *See id.* (showing how "revenge porn" is a misnomer because only eleven percent of perpetrators share intimate images for the purposes of revenge).

89 *See* Citron & Franks, *supra* note 16; *see also* Brooklynn Armesto-Larson, *Nonconsensual Pornography: Criminal Law Solutions to a Worldwide Problem*, 21 OR. REV. INT'L. L. 177 (2020).

90 In 2022, the reauthorization of the Violence Against Women Act established "a federal civil cause of action for individuals whose intimate visual images are disclosed without their consent." *Fact Sheet: Reauthorization of the Violence Against Women Act (VAWA)*, THE WHITE HOUSE (Mar. 16, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/16/fact-sheet-reauthorization-of-the-violence-against-women-act-vawa/ [https://perma.cc/SL2R-NZRX].

91 *See* FIDO & HARPER, *supra* note 47, at 17–18 (stating that revenge porn laws do not apply to deepfakes); *see also* Wang, *supra* note 41 (arguing that "seeking relief for DNCP victims via NCP laws—on the theory that both involve nonconsensual acts and reputational damage—is likely insufficient").

92 Most of the photographs or videos in nonconsensual pornography were taken by the victim themselves. *See* Post, *supra* note 88.

93 Professor Rebecca Delfino calls attention to this often-overlooked second victim in a deepfake pornography video: "Although the actor whose body is featured may have consented to the original pornographic video, they likely never agreed to have another person's face superimposed onto their body. They, too, have been victimized." Rebecca A. Delfino, *Pornographic Deepfakes: The Case for Federal Criminalization of Revenge Porn's Next Tragic Act*, 88 FORDHAM L. REV. 887, 898 (2019). The President of the Adult Performance Artist Guild (APAG), the largest union of adult actors, stated, "[S]top pretending that the people in porn are not human beings—that we're not being exploited 10 times worse" than mainstream actors. Hallie Lieberman, *Inside the Glitchy and Horny World of AI Porn*, THE DAILY BEAST (Aug. 25, 2023), https://www.thedailybeast.com/inside-the-glitchy-and-horny-world-of-ai-porn. [https://perma.cc/NS8L-SNMP]. Some adult performers are finding creative ways to respond to their changing industry, such as by creating AI images of themselves to increase their revenue stream. *See id.*

intimate parts" or "engaged in sexual conduct."[94] But the feature of deepfakes that closes the door to NCP laws—namely, their falsity—pushes the door open to defamation, which was never a viable path for nonconsensual "real" porn.[95]

It may be argued that deepfake pornography and revenge porn are normatively distinct because viewers of deepfakes presumably are aware that the content is fake,[96] whereas the "allure" of revenge porn is that the images are real.[97] But this distinction turns out to be largely misplaced. Viewers of deepfakes are often misled and unable to discern the falseness of the video or photo, and the "allure" of deepfakes is that they are indistinguishable from a real depiction of the person.[98] Creators go to lengths to use real women's faces with the overarching (and often attained) goal of photorealism.

There are several roadblocks to legal accountability for cyber gender abuse. First, challenges arise with identifying perpetrators of online abuse due to VPNs and software that make their IP addresses unidentifiable.[99] In the world of deepfake pornography, perpetrators are even more likely to try to hide their identity—in fact, the websites actively encourage it. For example, the largest deepfake-pornography website urges users to "always . . . stay[] anonymous online [because] your privacy is important to us."[100] Of course, the privacy of

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94 *See, e.g.*, OR. REV. STAT. ANN. § 163.472 (West 2024); OHIO REV. CODE ANN. § 2917.211 (West 2019) (using the statutory language of [the person in the image] is "in a state of nudity or is engaged in a sexual act"); ME. REV. STAT. ANN. tit. 17-A, § 511-A (West 2016) (using the statutory language of "photograph, videotape, film or digital recording of another person in a state of nudity or engaged in a sexual act"). For a compilation of state revenge porn statutory language, see *States with Revenge Porn Laws*, C.A. GOLDBERG, PLLC (https://www.cagoldberglaw.com/states-with-revenge-porn-laws/#1558636661661-9e82fe80-c2a5 [https://perma.cc/UC9X-YZQZ].

95 *See infra* Part III.

96 *See* Delfino, *supra* note 93, at 897 (arguing that deepfake viewers are "in on the joke").

97 *See* Citron, *Continued (In)visibility*, *supra* note 78, at 347 ("The draw to these sites is that the women featured have not consented to the posting of their images.").

98 *See* FIDO & HARPER, *supra* note 47, at 16 (noting that with deepfake pornography, it is "hard to tease apart fact from fiction"); *see infra* Part II.

99 *See* message from Jane Doe to Abigail George (Jan. 7, 2023, 17:36 EST) (on file with *Columbia Journal of Gender & Law*) (expressing that even though she knew who the perpetrator was, she did not pursue legal action because he lived in Canada and she lived in the United States).

100 [John Doe Website] allows anyone who is "verified" to upload videos. The verification process only involves showing links to their datasets, an email address, and a username. The email address does not even have to be "real." *See* [JOHN DOE WEBSITE #2] (on file with *Columbia Journal of Gender & Law*).

the women they target is seemingly not a concern—an irony that likely bypasses deepfake creators.

Furthermore, online platforms—"the best-positioned entities to respond to most harmful content"—are immune from liability for distributing deepfake pornography under Section 230 of the Communications Decency Act (CDA).[101] Passed by Congress in 1996,[102] the CDA grants platforms sweeping immunity from liability for user-generated content.[103] Accordingly, these "platforms' power now includes the ability to ignore the propagation of damaging deep fakes."[104] But while Section 230 immunizes platforms, individual creators and distributors can be held legally liable.[105]

C. Three Legal Approaches and Their Shortcomings

The obstacles to legal accountability for cyber gender abuse, coupled with the sheer rate of technological advancement, have allowed deepfakes to proliferate into one of the gravest gender-based violence issues of our time. This section turns to existing or proposed paths to legal recourse. A few nuclear options have been placed on the table, such as banning all deepfake technology or telling all women to avoid posting photos of themselves

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101 Danielle K. Citron & Robert Chesney, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CAL. L. REV. 1753, 1798 (2019) ("Section 230 has evolved into a super-immunity that, among other things, prevents the best-positioned entities to respond to most harmful content."); *see* 47 U.S.C. § 230(c)(2).

102 *See* 47 U.S.C. § 230(c)(2) ("No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to . . . material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable . . . .").

103 *See, e.g.*, Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401 (2017) (detailing cases in which Courts have provided broad immunity for internet platforms); *see also* Herrick v. Grindr, 306 F. Supp. 3d 579, 585–86 (S.D.N.Y. 2018) (dismissing a case against Grindr after it failed to remove an impersonator who posted the plaintiff's nude photos, falsely claimed he had rape fantasies, and shared his home address, causing over 1,000 men to approach his home).

104 Citron & Chesney, *supra* note 101, at 1798.

105 While Congress has held hearings on Section 230, no substantive changes have been made. For an overview of the history and interpretation of Section 230, see JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019).

online.[106] These options are not only impractical but also undesirable.[107] Moreover, an option such as requiring watermarks on all deepfakes—something China implemented[108] and the Biden Administration considered[109]—may be less nuclear but is equally ill-conceived.[110] More tenable legal paths to recourse include (1) legislation not specific to deepfakes, (2) legislation specific to deepfakes, and (3) the common law of torts.

1. Legislation Not Specific to Deepfakes

In response to the urgent crisis of deepfakes, lawyers and victim advocates have attempted to fit square pegs into round holes. Existing crimes such as impersonation,[111] cyberstalking,[112] and harassment are recognized in several states. At the federal level, suggestions that the Anti-Stalking Punishment and Prevention Act or the Video Voyeurism

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106 *See* Jesselyn Cook, *Here's What It's Like to See Yourself in a Deepfake Porn Video*, HUFFPOST (June 23, 2019), https://www.huffpost.com/entry/deepfake-porn-heres-what-its-like-to-see-yourself_n_5d0d0faee4b0a3941861fced?ncid=engmodushpmg00000004/ [https://perma.cc/C96T-NA4L] (reporting that women have been told that they only thing they can do to keep themselves safe is stay offline).

107 As stated previously, there are many beneficial applications of deepfakes. *See supra* notes 71–73.

108 *See* Asha Hemrajani, *China's New Legislation on Deepfakes: Should the Rest of Asia Follow Suit?*, THE DIPLOMAT (Mar. 8, 2023), https://thediplomat.com/2023/03/chinas-new-legislation-on-deepfakes-should-the-rest-of-asia-follow-suit/ [https://perma.cc/X8B3-ACKV].

109 *See* Press Release, The White House, Fact Sheet: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence (Oct. 30, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/ [https://perma.cc/6RS8-KNMW] ("The Department of Commerce will develop guidance for content authentication and watermarking to clearly label AI-generated content.").

110 For an explanation of why watermarking is not effective, see Ben Colman, *The Inadequacy of Deepfake Watermarking*, REALITY DEFENDER (May 15, 2023), https://realitydefender.com/insights/the-inadequacy-of-deepfake-watermarking/ [https://perma.cc/CAE4-BFHE]. Moreover, services exist to remove watermarks. *See* CITRON, FIGHT FOR PRIVACY, *supra* note 26, at 48.

111 Several states, including California, Hawaii, Louisiana, Mississippi, New York, Rhode Island, and Texas, have impersonation crimes. *See* CAL. PENAL CODE § 528.5 (West 2011); HAW. REV. STAT. ANN. § 711-1106.6 (West 2008); N.Y. PENAL LAW § 190.25 (McKinney 2019); 11 R.I. GEN. LAWS ANN. § 11-52-7.1 (West 2019); TEX. PENAL CODE ANN. § 33.07 (West 2019).

112 Thirty-four states have cyberstalking laws. For an overview of the various state cyberstalking laws, see Ashley N.B. Beagle, *Modern Stalking Laws: A Survey of State Anti-Stalking Statutes Considering Modern Mediums and Constitutional Challenges*, 14 CHAP. L. REV. 457 (2011).

Prevention Act apply to deepfakes have turned out to be wishful thinking.[113] In 2023, the first and only American prosecution for deepfake pornography occurred under New York's aggravated harassment and cyberstalking laws.[114] But overall, legislation not specific to deepfakes is unlikely to ever result in significant prosecutions due to their typically high mens rea requirements, prosecutors' unwillingness to interpret such statutes loosely, and other idiosyncrasies.[115] More broadly, since showing the requisite intent is often a limiting factor for cyber-abuse prosecutions, defamation law's reduced and peculiar scienter requirement is a better fit.[116]

2. Legislation Specific to Deepfakes

Many scholars and advocates have pushed for statutory bans on deepfake pornography.[117] In 2023, the United Kingdom became the first jurisdiction to expressly criminalize deepfake pornography.[118] In the United States—reflecting general trends toward the importance of

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113 *See* Anti-Stalking Punishment and Prevention Act, 18 U.S.C. § 2261A(2) (2012) (criminalizing the use of an "interactive computer service or electronic communication service . . . to engage in a course of conduct that . . . causes, attempts to cause, or would reasonably be expected to cause substantial emotional distress to a person"). While this law appears promising, it is unlikely to result in any prosecutions because of the focus on repeat offenders and the intent requirement. *See id.*; Video Voyeurism Prevention Act, 18 U.S.C. § 1801 (2004) (penalizing intentional and nonconsensual "capturing" images of a person's private area, particularly when the person reasonably expects privacy). This Act does not extend to deepfakes for the same reason as revenge porn laws. *See id. See also supra* Section I.B.1.

114 In an especially egregious case, a man was prosecuted and convicted in New York for creating and disseminating deepfake pornography of several underage women using photos from their social media. *See* Press Release, District Attorney, County of Nassau, Seaford Man Sentenced to Jail and 10 Years' Probation as Sex Offender for 'Deepfaked' Sexual Images (Apr. 18, 2023), https://www.nassauda.org/CivicAlerts.aspx?AID=1512 [https://perma.cc/VET7-2VX6].

115 *See* Citron & Chesney, *supra* note 101, at 1801 ("Although a wide range of deep fakes might warrant criminal charges, only the most extreme cases are likely to attract the attention of law enforcement.").

116 *See infra* Section III.A.2.

117 *See, e.g.*, Delfino, *supra* note 93 (making the case for criminalizing deepfake pornography); Douglas Harris, *Deepfakes: False Pornography is Here and the Law Cannot Protect You*, 17 DUKE L. & TECH. REV. 99, 102 (2019).

118 *See* Online Safety Act 2023, c. 50, § 66(B)(1)(a) (UK) (criminalizing "intentionally shar[ing] a photograph or film which shows, or *appears to show*, another person . . . in an intimate state") (emphasis added); *see also* Press Release, New Laws to Better Protect Victims From Abuse of Intimate Images, Ministry of Justice & Right Hon. Dominic Raab (Nov. 25, 2022) (UK), https://www.gov.uk/government/news/new-laws-to-better-protect-victims-from-abuse-of-intimate-images [https://perma.cc/5XLN-CVEN] (announcing that the Online Safety Act would "specifically criminalize[]" nonconsensual sexual deepfakes).

state-conferred rights[119] and mirroring the path of revenge-porn laws—states are once again blazing the trail on deepfake legislation. In 2019, a small smattering of states began introducing and promulgating deepfake-related legislation.[120] In 2024, the tide turned, with more deepfake legislation introduced in the first half of that year than in the previous six years combined.[121] As of October 2024, twenty-nine states have enacted legislation dealing with pornographic deepfakes.[122] The approaches to such legislation vary, with some states amending existing revenge-porn statutes to include "digital images,"[123] while others have instituted wholly new crimes or civil penalties.[124] Arizona, California, Colorado, Hawaii, Illinois, Massachusetts, Minnesota, New York, Vermont, and Wyoming have laws addressing the nonconsensual creation and distribution of adult deepfake pornography.[125]

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119 *See, e.g.*, Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1856–59 (2023).

120 In 2019, California became the first state to pass legislation giving victims of nonconsensual deepfake pornography a private right of action. *See* CAL. CIV. CODE § 1708.86 (West 2021). *See also* Eric Kocsis, *Deepfakes, Shallowfakes, and the Need for a Private Right of Action*, 126 DICK. L. REV. 621, 638–39 (2022) (analyzing the California law).

121 *See* BALLOTPEDIA, STATE OF DEEPFAKE LEGISLATION 2024 ANNUAL REPORT 10 (2024) (reporting that forty-seven deepfake-related bills were enacted in 2024 compared to thirty-one between 2019 and 2023).

122 *See id.*

123 *See* VT. STAT. ANN. tit. 13, § 2606 (West 2024) (effective June 6, 2024) (amending the definition of "visual image" to include "an image created or altered by digitalization"); WASH. REV. CODE ANN. § 9A.86.030 (West 2024) (effective June 6, 2024) (amending several existing laws on disclosing intimate images to include "fabricated depiction" and "digitalization"); H.B. 2678, 2019 Leg., Reg. Sess. (Va. 2019). As of July 2023, Illinois citizens could sue for damages for deepfakes under the state's law on revenge pornography. *See* 740 ILL. COMP. STAT. ANN. 190/5 (West 2024).

124 *See* WYO. STAT. ANN. § 6-4-306 (West 2021) (effective July 1, 2021) (defining "image" to include a "computer generated image that purports to represent an identifiable person" and establishing the offense as a misdemeanor punishable by up to one year in prison). *See also* Cassandre Coyer, *States Are Targeting Deepfake Pornography—But Not in a Uniform Way*, ALM LAW (Aug. 10, 2023), https://www.law.com/legaltechnews/2023/08/10/states-are-targeting-deepfake-pornography-but-not-in-a-uniform-way/?slreturn=20231021183045 [https://perma.cc/F68D-6W4J].

125 *See* H.B. 2394, 56th Leg., 2nd Sess. (Ariz. 2024); Assemb. B. 602, 2019 Leg., Reg. Sess. (Cal. 2019); CO S.B. 24-011, 2024 Leg., Reg. Sess. (Colo. 2024); S.B. 309, 31st Leg., Reg. Sess. (Haw. 2021); H.B. 2123, 103rd Gen. Assemb., (Ill. 2023); H.B. 4744, 193rd Gen. Ct. (Mass. 2024); H.B. 1370, 2023 Leg., 93rd Sess. (Minn. 2023); S.B. 1042, 2023 Leg., Reg. Sess. (N.Y. 2023); H.B. 2678, 2019 Leg., Reg. Sess. (Va. 2019); WYO. STAT. ANN. § 6-4-306 (West 2021). *See generally* BALLOTPEDIA, AI DEEPFAKE LEGISLATION TRACKER, https://legislation.ballotpedia.org/ai-deepfakes/search?status=Enacted&category=Pornographic%20material&orderby=stateAsc&session=2024&session=2023&session=2022&session=2021&session=2020&session=-2019&page=1 [https://perma.cc/RC23-NHZ3].

In addition, Alabama, Florida, Georgia, Idaho, Indiana, Iowa, Louisiana, New Hampshire, South Dakota, Texas, Utah, Virginia, and Washington have legislation addressing both adult and child deepfake pornography.[126] Finally, legislation in Kentucky, Mississippi, North Carolina, Oklahoma, Tennessee, and Wisconsin is limited to addressing pornographic deepfakes involving children.[127]

At the federal level, the situation looks bleak. Not surprisingly, the only legislation passed by Congress mentioning deepfakes dealt exclusively with national security.[128] Even so, several other deepfake bills have been introduced in Congress. The Malicious Deepfake Prohibition Act of 2018[129] focused primarily on political interference, and the DEEP FAKES Accountability Act of 2019[130] proposed a watermark requirement. Both bills expired at the end of their terms.[131] At the time of writing, the most promising bill is the Preventing Deepfakes of Intimate Images Act, introduced in May 2023.[132] The Act would establish a criminal and a civil cause of action,[133] entitling victims to up to $150,000 in

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126 *See* ALA. CODE § 13A-6-240 (2024); FLA. STAT. ANN. § 775.0847 (West 2022); GA. CODE ANN. § 16-11-90 (West 2021); GA. CODE ANN. § 39-5-5 (West 2025); IOWA CODE ANN. § 708.7 (West 2024); IDAHO CODE ANN. § 18-6606 (West 2024); IND. CODE ANN. § 32-21.5-2-1 (West 2024); LA. STAT. ANN. § 73:14.14 (2024); N.H. REV. STAT. ANN. § 644:9-A (2024); S.D. CODIFIED LAWS § 22-21-4 (2022); TEX. PENAL CODE ANN. § 21.165 (West 2023); UTAH CODE ANN. § 76-5B-103 (West 2024); VT. STAT. ANN. tit. 13, § 2606 (amended 2024); WASH. REV. CODE ANN. § 9A.86.030 (West 2024).

127 *See, e.g.*, H.B. 591, 2024 Gen. Assemb., Reg. Sess. (N.C. 2024).

128 *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 5709, 133 Stat. 2168 (2019) (requiring the Director of National Intelligence to generate a report on the "national security impacts of machine-manipulated media" and assess China's and Russia's capabilities).

129 S. 3805, 115th Cong. (as introduced to the Senate, Dec. 21, 2018). The Act would have imposed criminal liability on distributors and creators, designating a federal sentence of ten years for deepfakes that disturb elections, but it was stalled and expired due to concerns over First Amendment violations. *See id.*

130 H.R. 3230, 116th Cong. (2019) (allowing for a private right of action to receive statutory damages and injunctive relief). *But see* FIDO & HARPER, *supra* note 47, at 18 (noting that the Deep Fake Accountability Act "does little to aid victims of deepfake media production who have been depicted in a sexualized manner as it only necessitates the need to include a watermark to indicate that the media is fake").

131 *See* S. 3805, 115th Cong. (2018); H.R. 3230, 116th Cong. (2019).

132 *See* H.R. 3106, 118th Cong. (as introduced to the House, May 5, 2023).

133 *See id.* §§ 1309A(b)(1), 2252D(a)(1) (establishing a civil cause of action provided the discloser knew or "recklessly disregard[ed] whether, the individual has not consented to such disclosure" and a criminal cause of action for defendants who distribute "with the intent to harass, annoy, threaten, alarm or cause substantial harm to the finances or reputation of the depicted individual").

damages and an injunction to remove the images.[134] While the Act would be a "good first step,"[135] as of September 2024, it only has fifty-nine co-sponsors in the House and a "one" percent chance of being enacted.[136]

Moreover, the inherent digital and global nature of deepfake pornography poses significant roadblocks to the effectiveness of a ban in one jurisdiction without banning it in all jurisdictions.[137] Even so, a U.S. federal ban would carry the most weight globally since over half of pornography videos originate from and most deepfake-pornography websites are hosted in the United States.[138] Of course, this Note does not intend for defamation law to displace the importance of new legislation. In fashioning a response to this gender-based violence crisis, the adoption of a federal statute offers a promising—albeit incomplete—solution. This Note argues for a common law path to recourse in addition to any potential statutory one.

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134 *See id.* § 1309A(d)(1)(A)(i)–(iv) (entitling the plaintiff to recover any of the defendant's profits from the disclosure, damages sustained by the individual, including for emotional distress or up to $150,000 in liquidated damages, punitive damages, and attorney fees). The Act would also allow the plaintiff to remain anonymous. *See id.* § 1309A(d)(2).

135 Ryan-Mosley, *supra* note 24**.**

136 *See* GOVTRACK, H.R. 3106: PREVENTING DEEPFAKES OF INTIMATE IMAGES ACT, https://www.govtrack.us/congress/bills/118/hr3106 [https://perma.cc/F42L-8PNT] (analyzing the Bill's current posture and support).

137 *See* Citron, *Continued (In)visibility*, *supra* note 78, at 348 ("Most sites are hosted in countries like the United States where the risk of liability for privacy invasions is low."); FIDO & HARPER, *supra* note 47, at 20 (arguing with regard to image-based sexual abuse that "there is a clear argument for uniformed punishments and legislation to be applied in a globally connected world"); *see also* Martin, *supra* note 18, at 58 (explaining that the police could not do anything about her deepfakes because the websites were hosted overseas).

138 *See* Marleen J.E. Klaassen & Jochen Peter, *Gender (In)equality in Internet Pornography: A Content Analysis of Popular Pornographic Internet Videos*, 52 J. SEX RSCH. 721, 725 (2015) (finding evidence that 51.8% of pornography videos originated in the United States).

3. Liability via Common Law Torts

In the realm of tort law, torts other than defamation, such as intentional infliction of emotional distress (IIED),[139] false light,[140] and the right of publicity,[141] have been proposed and may provide recourse for deepfake pornography. Although promising, bringing an IIED claim without an accompanying defamation claim is a long shot due to its status as a "disfavored cause of action"[142] and difficulties in demonstrating "severe emotional distress."[143] The right of publicity and false light are limited to nonconsensual commercial uses of identities, so while potentially viable for monetized deepfakes, they do not address deepfake pornography at large as a sexual offense.[144] More broadly, privacy torts are "widely deemed out-of-date" to address the harms experienced in the digital and information age.[145]

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139 The Restatement (Second) of Torts establishes IIED as "extreme and outrageous conduct intentionally or recklessly caus[ing] severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." § 46(1) (AM. L. INST. 1965). Courts have applied IIED to cases of NCP, even awarding up to $6.4 million, suggesting that they might be willing to apply it in cases of NCDP. *See* Christine Hauser, *$6.4 Million Judgment in Revenge Porn Case Is Among Largest Ever*, N.Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/us/revenge-porn-california.html [https://perma.cc/8DCX-XA3K] (awarding $6.4 million in a revenge porn case); *see also* Wang, *supra* note 41, at 434 (arguing that IIED "is likely the most powerful tort available for DNCP victims").

140 False-light torts arise when a plaintiff's identifying features are used in connection with a controversial issue such that it creates a false message linking the two. *See* Bruce A. McKenna, *False Light: Invasion of Privacy*, 15 TULSA L.J. 113 (1979).

141 *See* MICHAEL D. MURRAY, RIGHT OF PUBLICITY IN A NUTSHELL 2 (2d ed. 2022) ("[T]he right of publicity protects a person's name, image, likeness, persona, and often their voice or other distinctive characteristics, from unauthorized commercial exploitation by others.").

142 *See* Russell Fraker, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 VAND. L. REV. 983, 984 (2019) (demonstrating that IIED is a "disfavored cause of action" and "[c]ourts appear wary of holding defendants liable for plaintiffs' emotional injuries").

143 RESTATEMENT (SECOND) OF TORTS § 46(1) (AM. L. INST. 1965).

144 *See* MURRAY, *supra* note 141.

145 Mala Chatterjee, Extending the Legal Person 35 (Oct. 11, 2023) (unpublished manuscript) (on file with *Columbia Journal of Gender & Law*); *see generally* Pavesich v. New England Life Ins. Co., 122 Ga. 190, 205 (1905) (using natural law principles to establish the first common law right to privacy, reasoning that a "right to withdraw from the public gaze … [is] embraced within the right of personal liberty . . . [which] embraces the correlative right of privacy.").

In contrast, defamation is alive and well in the age of the internet and mass communication.[146] A longtime—albeit unlikely—ally in the fight against gender-based violence,[147] defamation once again fits the bill in the time of deepfakes. At its core, defamation assigns liability to people who disseminate false statements, presented as true, leading to reputational damage.[148]

II. The Harm and Proper Remedy of Deepfakes

A cardinal doctrine in tort law states that the remedy is proportional to the harm.[149] So, in the quest for a proper remedy, this Part reframes nonconsensual deepfake pornography from benign internet amusement to a severe sexual offense infringing on core rights of sexual autonomy and reputation. Section II.A shows that by violating a person's sexual autonomy and consent, deepfakes are normatively equivalent to contact-based sexual offenses, thereby calling for heightened scrutiny. Section II.B shows how deepfakes are a harm to reputation as protected by the law of defamation.

As a preliminary matter, much of the harm caused by deepfake pornography is intangible, and the American legal system, save for defamation, has long been unwilling to acknowledge and rectify non-material or non-economic harms. Thus, this Part will be framed by Professor Mala Chatterjee's "extended selves" thesis.[150] Chatterjee argues that since "[mental processes] can extend beyond our bodies into the external world, so too do any interests and rights we might have with respect to our mental processes." [151] Thus, "[t]here is no good reason for the law to distinguish between our bodies and

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146 *See, e.g.*, Jane E. Kirtley, *Uncommon Law: The Past, Present and Future of Libel Law in a Time of "Fake News" and "Enemies of the American People,"* 2020 U. CHIC. LEGAL F. 117, 117 (2020) ("[T]he United States is experiencing a growth in libel suits brought by both public officials and private figures.").

147 *See infra* notes 255–259 and accompanying text.

148 *See* RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1965).

149 *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–83 (1976) (identifying one of the defining features of civil litigation as "[t]he scope of the relief is derived more or less logically from the substantive violation under the general theory that the plaintiff will get compensation measured by the harm caused by the defendant's breach of duty . . . in tort by paying the value of the damage caused.").

150 Professor Mala Chatterjee argues that "our extended selves are presently either protected as property or legally unprotected." Chatterjee, *supra* note 145, at 25. She writes that the American legal system "conceptualize[s] information as either (owned) property or (free) speech." *Id.*, at 26.

151 *Id.* at 8.

certain information entities when delineating the boundaries of ourselves."[152] Accordingly, deepfake pornography implicates sexual autonomy and dignity because, as an informational entity carrying one's likeness and identity, deepfakes are extensions of the self.

A. Establishing Deepfake Pornography as a Sexual Offense

By violating a person's sexual autonomy and consent, deepfakes are normatively equivalent to contact-based sexual offenses, thereby calling for heightened scrutiny. This section shows that the protected rights and interests justifying heightened scrutiny for sexual crimes apply squarely to deepfake pornography. But what are those protected rights? Legal systems have a long, disturbing history of conceiving of sexual violence in terms of male and patriarchal interests.[153] In the last few decades—largely in response to calls from scholars and feminist advocates—sexual crimes have been reconceptualized in terms of violations of sexual autonomy.[154] "Sexual autonomy has emerged as something like a fundamental right."[155]

Despite not involving physical contact or force, nonconsensual deepfake pornography is a sexual offense to the extent that it appropriates a sexual identity and obliges sexual conduct onto that identity (an extension of the self) without the identity holder's consent. In doing so publicly, deepfakes reduce the victim's identity to sex in the eyes of the community.

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152 *Id.* at 31.

153 *See* Mustafa T. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory in Rape Law Is Turned on Its Head*, 11 WIS. WOMEN'S L.J. 37, 52 (1996) (noting that ancient legal systems for punishing rapists were premised not on the woman's harm but on harm caused to the victim's father); *see also* Susan Estrich, *Rape*, *in* FEMINIST JURISPRUDENCE 158, 162 (Patricia Smith ed., 1993) (noting that in rape law "while the focus is on the female victim, the judgment of her actions is entirely male").

154 *See* Jeb Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1382 (2013); Nora Scheidegger, *Balancing Sexual Autonomy, Responsibility, and the Right to Privacy*, 22 GER. L.J. 769, 770 (2021) ("The right to sexual autonomy has developed into a fundamental human right worthy of state protection."); *see also* Coker v. Georgia, 433 U.S. 584, 597 (1977) (describing the wrongness of rape as a violation of "personal integrity and autonomy" and "the ultimate violation of self"); STEPHEN SCHULHOFER, UNWANTED SEX 111 (2000) (defining sexual autonomy as "the freedom of every person to decide whether or when to engage in sexual relations"); JOAN MCGREGOR, FORCE, CONSENT, AND THE REASONABLE WOMAN, *in* IN HARM'S WAY: ESSAYS IN HONOR OF JOEL FEINBERG 231, 250 (Jules L. Coleman & Allen Buchanan eds., 1994) (describing the moral wrongness of rape as a violation of one's "sexual self-determination").

155 Rubenfeld, *supra* note 154, at 1382.

Deepfake pornography is not parody, satire, or "research."[156] It is just pornography. Even under Justice Potter Stewart's famous "I know it when I see it" formulation, most deepfakes qualify.[157] Pornography differs from other explicit media in that its primary purpose is sexual arousal.[158] Deepfake pornography—like real pornography—is often "masturbation material" and "[w]hat was words and pictures becomes, through masturbation, sex itself."[159]

Pornography and feminism—to put it mildly—have a vexed relationship. Antipornography feminists—most notably, Catharine MacKinnon and Andrea Dworkin—lambaste pornography as the linchpin of women's inequality and as systematically objectifying women.[160] For philosopher Martha Nussbaum, one of the worst kinds of objectification is denial of autonomy, which happens by "treat[ing] the object as lacking in autonomy and self-determination."[161] Thus, objectification is intrinsically linked to violations of autonomy. While Mill-inspired pro-pornography liberals and antipornography feminists disagree over whether pornography's objectification extends to all women,[162] they can agree that by forcing the likeness of a non-consenting victim to appear in sexual and often violent depictions, the creator treats the depicted woman as lacking in self-determination.[163] If the creators acknowledged her autonomy, they would have asked for

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156 *See* [JOHN DOE WEBSITE #2] (on file with *Columbia Journal of Gender & Law*) (describing deepfake pornography as "machine-learning research").

157 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

158 *See* MARI MIKKOLA, PORNOGRAPHY: A PHILOSOPHICAL INTRODUCTION 2 (2019).

159 CATHARINE A. MACKINNON, ONLY WORDS 25 (1996).

160 Fundamentally, objectification involves perceiving and treating an individual as a mere object or tool for use. In this regard, anti-pornography feminists extend their critique beyond the objectification of female performers in the production and consumption of pornography. This critique also alleges that men's consumption of pornography fosters a general perception of women as objects, primarily for sexual gratification, thus perpetuating their objectification—which has been a central concept in feminism generally. *See, e.g.*, *id.*; Andrea Dworkin, *Censorship, Pornography and Equality*, FEMINIST JURISPRUDENCE 449, 454 (Patricia Smith ed., 1993) (arguing that "[pornography] is the subordination of women perfectly achieved").

161 Martha C. Nussbaum, *Objectification,* 24 PHIL. & PUB. AFFS. 249, 257 (1995) (elaborating on feminists' objectification critique of pornography by listing seven ways that being treated "as an object" occurs: instrumentality, denial of autonomy, inertness, fungibility, violability, ownership, and denial of subjectivity).

162 *See* Judith Hill, *Pornography and Degradation*, 2 HYPATIA 39, 45 (1987) (explaining that even if pornography treats women as means and instruments for male pleasure, the harm does not extend to women generally).

163 Whereas objectification via instrumentalization and fungibility occurs in regular pornography, in deepfake pornography, there is also a denial of autonomy, inertness, ownership, and subjectivity. *See* Nussbaum,

consent and confined themselves to how she desired to be depicted sexually or respected her wish to not be depicted at all.

Of course, erotic depictions carry a wide range of cultural and social meanings, and there is a growing movement of feminist pornography that focuses both on ethical production and challenging ideas about desire, beauty, and power.[164] But content-wise, the representations popular on mainstream pornography and now deepfake-pornography websites have been the subject of widespread criticism[165] for disproportionately showing "aggressive acts against women such as gagging, choking, sadomasochism, and gang rape, as well as aggressive anal sex and degrading practices like 'ass-to-mouth' and ejaculation in women's faces and mouths."[166] Quantitative content analyses of the most popular pornography have found acts of physical aggression in forty to eighty-eight percent of scenes.[167] This category of depictions appears to have even higher rates in deepfake pornography.[168] A few examples include "Nikki Haley Loves Sexual Torture," "Greta Thunberg gets a facial at the gym," and "AOC swallows 35 loads."[169] Thus, deepfake pornography not only objectifies the woman depicted, it often does so violently.

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supra note 161; CITRON, FIGHT FOR PRIVACY, *supra* note 26, at 114 ("Unwanted exposure of our naked bodies makes us acutely aware that others see us as objects that can be violated, rather than as human beings deserving respect.").

164 *See generally* THE FEMINIST PORN BOOK: THE POLITICS OF PRODUCING PLEASURE (Tristan Taormino et al. eds. 2013).

165 *See* Elizabeth Wolgast, *Pornography and the Tyranny of the Majority*, *in* FEMINIST JURISPRUDENCE 431, 435 (Patricia Smith ed., 1993) (arguing that women are represented as "inferior or less-than-human beings to be used by others in sexual and sadistic ways"); MACKINNON, *supra* note 159, at 17 ("With pornography, men masturbate to women being exposed, humiliated, violated, degraded, mutilated, dismembered, bound, gagged, tortured and killed . . . men come doing this.").

166 MAX WALTMAN, PORNOGRAPHY: THE POLITICS OF LEGAL CHALLENGES (2021).

167 Ana J. Bridges et al., *Aggression and Sexual Behavior in Best-Selling Pornography Videos: A Content Analysis Update*, 16 VIOLENCE AGAINST WOMEN 1065 (2010) (finding acts of physical aggression such as spanking, gagging, hair pulling, choking, and slapping in 88% of scenes, and verbal aggression such as name-calling in 48% of scenes); Marleen J. E. Klaassen & Jochen Peter, *Gender (In)equality in Internet Pornography: A Content Analysis of Popular Pornographic Internet Videos*, 52 J. SEX RSCH. 721, 728 (2015) (finding 40% of videos depicted physically violent acts toward women, most commonly spanking or gagging).

168 *See* [JOHN DOE WEBSITE #2] (links on file with *Columbia Journal of Gender & Law*).

169 [JOHN DOE WEBSITE #2 & 3] (links on file with *Columbia Journal of Gender & Law*).

For years, cyberfeminists have been screaming that digital and physical spaces and selves are coproduced and inseparable.[170] "Digital dualism" refers to the "systematic bias to see the digital and physical as separate."[171] This bias obscures our perception, constructing a boundary between on- and offline.[172] Cyberfeminist Nathan Jurgenson argues that "people are enmeshing their physical and digital selves to the point where the distinction is becoming increasingly irrelevant."[173] The self is an "augmented self," or a physical body and digital profile "acting in constant dialogue."[174]

Recall that deepfakes aren't about generating random, artificial personas—creators focus on replicating specific people, usually someone known personally. Thus, when deepfake creators appropriate someone's likeness with hyperrealistic accuracy, they usurp one's identity. Deepfakers are not shy about including identifying features of the victim with their uploads. As deepfakers hide behind VPNs, their videos usually include the full name of the subject and often other identifying information such as their college, city, address, phone number, and credit card number.[175] As a usurpation of identity, deepfake pornography is greater than a simple invasion of privacy or identity theft. [176] Sexual

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170 *See generally* DONNA HARAWAY, A CYBORG MANIFESTO (1985) (theorizing about a socialist, feminist cyborg that challenges singular identities and control matrices that contain women and other marginalized groups); LEGACY RUSSELL, GLITCH FEMINISM: A MANIFESTO (2020). The term "cyberfeminism" was coined by Sadie Plant in a 1996 essay in which she defines cyberfeminism as "an insurrection on the part of the goods and materials of the patriarchal world, a dispersed, distributed emergence composed of links between women, women and computers, computers and communication links, connections and connectionist nets." Sadie Plant, *On the Matrix: Cyberfeminist Simulations*, THE GENDERED CYBORG 325, 335 (Fiona Hovenden et al. eds., 1st ed. 2000).

171 Nathan Jurgenson, *Digital Dualism Versus Augmented Reality*, CYBORGOLOGY (Feb. 24, 2011), https://thesocietypages.org/cyborgology/2011/02/24/digital-dualism-versus-augmented-reality/ [https://perma.cc/ST6R-Z3KC].

172 *See id.* (noting that IRL ("in real life") should be replaced by AFK ("away from keyboard")).

173 *Id.* ("And our selves are not separated across these two spheres as some dualistic 'first' and 'second' self but is instead an augmented self.").

174 *Id.*

175 *See* CITRON, FIGHT FOR PRIVACY, *supra* note 26. For example, in the case of Taylor Klein, the deepfaker included her phone number and the name of her college, prompting many of her classmates to send messages on Instagram and threaten to come to her house; *see also* ANOTHER BODY, *supra* note 70.

176 Sex law's progress has yet to extend to image-based sexual abuses, which are still usually seen as mere invasions of privacy rather than sexual offenses. *See* Roni Rosenberg & Hadar Dancig-Rosenberg, *Reconceptualizing Revenge Porn*, 63 ARIZ. L. REV. 199, 219 (2021) (arguing that revenge pornography should be classified as a sexual offense and not merely an invasion of privacy).

violations reduce a person's identity to sex alone, whereas other forms of identity theft, such as credit card fraud, invade a person's privacy but do not reduce a person's identity to their wallet.[177]

Many deepfake victims experience an invasion of the self that is incredibly similar to contact-based assault. Rape is a violent, possessory act: "a rape victim's body is taken over, invaded, occupied, taken control of—*taken possession of*—in a fashion and to a degree not present in ordinary acts of theft, robbery, assault and so on."[178] Rape is "such complete and invasive physical control over [your body that it] … is in an elemental sense no longer your own."[179] Likewise, creators of deepfake pornography take full control of their target's identity to assert unwavering possession of their likeness, forcing them to conform to their will. One victim testified: "When it's your own face reacting and moving, there's this panic that you have no control."[180] Another said: "There's something really visceral about seeing an incredibly hyper-realistic image of yourself in somebody's extreme misogynistic fantasy of you."[181] Thus, deepfake pornography not only subjects a person to public objectification, but it also converts their digital body to an entity they no longer can control.

Even though deepfake pornography is not a physical occupation of the body, when someone watches the video of themselves, they experience it as such. "Sexual-privacy invasions are experienced like physical penetrations of the body."[182] The diversity and extent of trauma of contact-based sexual offenses and other kinds of image-based sexual

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177 For Professor Jed Rubenfeld, the unique harm or "special violation" of rape, making it worse than assault or battery, is a violation of self-possession, not sexual autonomy. Rubenfeld, *supra* note 154, at 1426. Rubenfeld writes: "The right to self-possession implies the freedom not to have another person forcibly take sexual possession of one's body, which in turn implies the freedom not to be forced into sexual service." *Id.* at 1443.

178 *Id.* at 1426.

179 *Id.*

180 Cook, *supra* note 106; *see also, e.g.*, Rousay, *supra* note 15; Message from Jane Doe to Abigail George (Dec. 29, 2023, 16:15 EST) (on file with *Columbia Journal of Gender & Law*) (describing that she had trouble looking at herself in the mirror and taking showers after the incident).

181 Emine Saner, *Inside the Taylor Swift Deepfake Scandal: 'It's Men Telling a Powerful Woman to Get back in Her Box,'* THE GUARDIAN (Jan. 31, 2024), https://www.theguardian.com/technology/2024/jan/31/inside-the-taylor-swift-deepfake-scandal-its-men-telling-a-powerful-woman-to-get-back-in-her-box [https://perma.cc/QFK8-GLRN].

182 Danielle Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1925 (2019) [hereinafter Citron, *Sexual Privacy*].

abuse have been well-documented.[183] Deepfakes incur the same indelible trauma as contact-based sexual offenses.[184] Many victims make explicit comparisons to contact-based sexual assault: "In 2018, I was inebriated at a party, and I was used for a man's sexual gratification without my consent. Today, I have been used by hundreds of men for sexual gratification without my consent."[185] Moreover, as a digital record, deepfake pornography is a material trace that haunts the victim for the rest of their life.[186] One survivor explained: "It felt like the image was ammunition that could be used against me for the rest of my life."[187]

1. The Contextual Nature of Consent

Even though there is no physical contact or force involved while making them, deepfakes constitute violations of consent. Most nonconsensual deepfakes are created using publicly available photos of an individual—usually, photographs freely shared on social media or other online directories. Most women are not aware of a deepfake's creation until someone (or some *bot*) brings it to their attention.[188] This means they do not (and cannot) actively object to its creation; as they are not given any opportunity to reject, they have not

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183 *See generally* Crime Survivors Speak 2022: National Survey of Victims' Views on Safety and Justice, ALL. FOR SAFETY & JUST. (Sept. 2022), https://allianceforsafetyandjustice.org/wp-content/uploads/2022/09/Alliance-for-Safety-and-Justice-Crime-Survivors-Speak-September-2022.pdf [https://perma.cc/6CKV-KCCZ]; Samantha Bates, *Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors*, 12 FEMINIST CRIMINOLOGY 22, 22 (2017) (finding that victims suffer from "trust issues, posttraumatic stress disorder (PTSD), anxiety, depression, suicidal thoughts, and several other mental health effects"); Corey Call, *Perceptions of Image-Based Sexual Abuse Among the American Public*, 22 CRIMINOLOGY, CRIM. JUST., L. & SOC.'Y 30, 32 (2021) (finding that image-based sexual abuse causes "powerlessness, shame, humiliation, anxiety, depression, loss of self-esteem, eating disorders, and other psychological issues"); Mudasir Kamal & William J. Newman, *Revenge Pornography: Mental Health Implications and Related Legislation*, 44 J. AM. ACAD. PSYCH. L. 359, 359 (2016).

184 *See* Bates, *supra* note 183 (demonstrating the similar effects of revenge porn and sexual assault); *see also* Nandini Comar, *The Rise of Revenge Porn*, GARBO (Oct. 29, 2021), https://www.garbo.io/blog/revenge-porn [https://perma.cc/V82U-BPMB] ("The repercussions of such abuse are the same as in-person sexual assault.").

185 Maya Elaine Higa (@mayahiga), X (Jan. 31, 2023, 7:55 PM), https://twitter.com/mayahiga/status/1620586546083803136 [https://perma.cc/YRM3-WN8Q].

186 *See* Rousay, *supra* note 15.

187 ANOTHER BODY, *supra* note 70.

188 *See* Message from Jane Doe to Abigail George (Jan. 5, 2024, 17:35 EST) (on file with *Columbia Journal of Gender & Law*); ANOTHER BODY, *supra* note 70.

consented.[189] Even the *Model Penal Code* now acknowledges that someone does not have to say "no" or physically resist to show they do not consent.[190] When a deepfaker makes a pornography video without the consent of the woman featured, they know she is unable to object to it. This is especially true when the deepfaker knows the woman personally and could easily ask for permission but chooses not to, knowing she would almost certainly refuse.[191]

Consent's contextual nature refers to the fact that "sharing information for one purpose is not permission to share for other uses."[192] Thus, it should be glaringly obvious that a woman who made her photographs publicly available online did not consent to her image being used to turn her likeness into pornography. While "passive acquiescence" is a long and enduring indication of consent in rape law,[193] defamation recognizes the contextual nature of consent regarding photographs.[194] When a plaintiff "had no reason to anticipate" a photograph's distortion, a defendant "should have . . . shown [them] before publication."[195] Therefore, as the next section continues to show, deepfakes constitute egregious public sexual offenses implicating fundamental rights that are protected by defamation law.

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189 Mustafa Kasubhai argues that rather than focusing on force, sexual assault law should focus on a requirement of affirmative consent: "rape law should concentrate on consent rather than force" and "non-consent must be presumed." Kasubhai, *supra* note 153, at 41.

190 MODEL PENAL CODE § 213.0(2) (AM. L. INST. 2021).

191 *See supra* note 28 and accompanying text (showing the growing rate of deepfakers targeting people they know personally).

192 Citron & Franks, *Criminalizing Revenge Porn*, *supra* note 16, at 355. For a discussion about the contextual nature of privacy, see HELEN NISSENBAUM, PRIVACY IN CONTEXT (2009).

193 *See* Susan Estrich, *Rape*, *in* FEMINIST JURISPRUDENCE 158, 177 (Patricia Smith ed., 1993) ([T]he law puts a special burden on the rape victim to prove through her actions her nonconsent . . . .); Perez v. State, 94 S.W. 1036, 1038 (Tex. Crim. App. 1906) (finding that "[m]ere copulation, coupled with passive acquiescence, is not rape . . . . [E]very exertion in her power under the circumstances must be made to prevent the crime, *or* consent *will be presumed*."); Kasubhai, *supra* note 153, at 53 (noting that still today, in the United States, "few courts will consider verbal non-consent sufficient to convict a man of rape").

194 *See, e.g.*, Burton v. Crowell Pub. Co., 82 F.2d 154, 156 (2d Cir. 1936).

195 *Id.*

B. Deepfakes, Dignity, and Reputation

In contrast to the law's recent recognition of a woman's right to sexual autonomy, reputation is a long-established core right—legally protected by the law of defamation.[196] Although it is uncontested that reputation is the sole protected interest underlying the tort of defamation,[197] reputation itself is notoriously elusive.[198] Definitions vary,[199] but a common thread is "the social apprehension that we have of each other."[200] The Second Restatement of Torts defines defamatory communication as that which "tends to harm the reputation of another as to lower [them] in the estimation of the community."[201] Scholar David Rolph argues that "reputation as celebrity" is appropriate in the digital and information era, wherein the community within and by which one's reputation rises or falls is no longer a single social class or group but a global village.[202] Reputation as celebrity recognizes that one interacts with one's community primarily through media, and so "all reputation, and consequently all damage to reputation, is mediated, that is, it occurs through some form of medium of communication."[203] As publicized violations of a sexual nature, pornographic deepfakes inflict reputational harm by tarnishing how the targeted woman is seen by others in her community.

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196 *See* DAVID ROLPH, REPUTATION, CELEBRITY AND DEFAMATION LAW 1 (2008).

197 *See id.* ("It is clear that reputation is the sole interest directly protected by the law of defamation." (citations omitted)).

198 *See* Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 692 (1986) ("Reputation . . . is a mysterious thing."); HAROLD LUNTZ & DAVID HAMBLY, TORTS: CASES AND COMMENTARY 1.4.03 (1985) (describing reputation as "nebulous yet much cherished"); ROLPH, *supra* note 196, at 1 (noting that "there has been scant attention given to this crucial concept").

199 *See, e.g.*, Reputation, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/reputation [https://perma.cc/QQ2D-PJWB] (defining reputation as "overall quality or character as seen or judged by people in general" and "a place in public esteem or regard: good name"). "Reputation" comes from the Latin verb *reputare*, meaning "to take into consideration." *Id.* Robert Post famously introduced a three-part typology of legally cognizable types of reputation: reputation as property, reputation as honor, and reputation as dignity. *See* Post, *supra* note 198, at 693.

200 *See* Post, *supra* note 198, at 692.

201 RESTATEMENT (SECOND) OF TORTS § 559 (AM. L. INST. 1965).

202 ROLPH, *supra* note 196, at 172.

203 *Id.* at 172. Reputation as celebrity is premised on "the plaintiff interacting with his or her audience through the media." *Id.*

Deepfakes publicly allege that their sexual depiction is the truth of the woman's sexuality. For example, the app DeepNude claimed to be "[r]evealing truth hidden under clothing."[204] The goal of deepfakes is not to depict a fictional world cut off from reality or to be satirical—they aim to be authentic portrayals of the target's intimate life. Creators focus on making deepfakes as realistic as possible, with many forums dedicated to troubleshooting glitches that expose their synthetic nature. In other words, deepfakes may have a false manner of creation, but they do not purport to depict a false image of the victim's sex life. Instead, deepfakes say: *this is how this person's naked body looks*, and *these are their facial and emotional responses to sex*.

Deepfakes' synthetic creation does not preclude them from alleging truths about their subjects. As a genre, pornography straddles fact and fiction. Sociologist Matthew Ezzell analyzes empirical data to conclude that consumers view pornography as real and not just fantasy.[205] Even if pornography consumers "know" that the subjects are actors, "[t]he majority of consumers consider the performers and the sex to be real."[206] They understand the depictions as a model for real sexual life.[207] This model bleeds off the screen, "directly shaping" real-world social interaction and behaviors.[208] Defamation law recognizes that something can be fictional and still presuppose or imply derogatory and false things.[209] So, regardless of whether viewers know that a deepfake is synthetic, they perceive an alleged truth of the featured person, which often imputes ideas like "Emma Watson enjoys rape" or "[Alexandria Ocasio-Cortez] enjoys choking."[210] This is not an abstract philosophical idea; it is a concrete lived experience for victims. Consider the hundreds of men who sent private

204 MEIKLE, *supra* note 14, at 73.

205 *See* Matthew B. Ezzell, *Pornography Makes the Man*, *in* THE PHILOSOPHY OF PORNOGRAPHY: CONTEMPORARY PERSPECTIVES 17 (Lindsay Coleman & Jacob Held eds., 2016).

206 *Id. See also* MIKKOLA, *supra* note 158.

207 *See* Ezzell, *supra* note 205, at 24 (showing a national poll that pornography is leading to habituation, desensitization, increased tendencies to objectify women in and outside of pornography, pushing sexual partners to try positions seen in pornography, and pressuring women to have sex).

208 *Id*. Following a comprehensive national survey of men who consume pornography, journalist Pamela Paul testified that the men "found the way they looked at women in real life warping to fit the pornography fantasies they consumed on screen." Testimony of Pamela Paul, Written Testimony to Congress (Nov. 10, 2005), https://www.judiciary.senate.gov/imo/media/doc/paul_testimony_11_10_05.pdf [https://perma.cc/83VC-P2PQ].

209 *See* MIKKOLA, *supra* note 158, at 165 ("one can communicate [a] view . . . without explicitly saying so"). Mikkola argues that "pornography may well say harmful things about women and sexuality, even if it does not do so explicitly and even if it purports to be fictional." *Id. See* Section III.2.

210 [JOHN DOE WEBSITES 2 & 3] (links on file with *Columbia Journal of Gender & Law*).

messages to deepfake-pornography victims Taylor Klein and Rana Ayyub asking their rates for sex or asking "to come over to fuck" them.[211]

In addition to aiming at exposing a truth about their subject, deepfakes publicly claim knowledge of the subject.[212] Philosopher Rae Langton proposes that pornography generates "maker's knowledge" or "the special knowledge someone has of something, in virtue of making that thing."[213] Langton compares maker's knowledge to a blueprint that a designer or architect uses, as their beliefs are a blueprint for the real world.[214] Maker's knowledge suggests "an agent who is maker of his own actions" or "somehow a maker of the actions of others."[215] Deepfake creators pick from the library of blueprints of existing pornography videos and fit a real woman onto one, creating a blueprint of that woman's sexual life. The target's sexual life—her desires, fantasies, and pleasure—are no longer her own. They belong to the blueprint creator, who makes them according to his will.[216] Deepfakes that play on the target's professional capacities not only assert knowledge of her sex life but also her professional identity. For example, there are videos titled "[G]lobal [W]arming has [C]reated a Monster—And Greta [Thunberg] Fucks It," "Alexandria Ocasio-Cortez Goes to 'Great Lengths' to Snatch Up New Voters," and "Kate Middleton—Duchess of Anal."[217] These explicitly play on the target's professional capacities, publicly associating her professional identity and achievements with sex.

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211 Ayyub, *supra* note 1; MY IMAGE MY CHOICE, *supra* note 31.

212 Pornography has been theorized both as a speech act and as a social ontology. The speech-act view of pornography, drawing on J. L. Austin, views pornography as doing something in addition to saying something. Perlocution is the idea that speech acts can cause additional extra-linguistic effects beyond the literal meaning of the words spoken. *See* RAE LANGTON, SPEECH ACTS AND UNSPEAKABLE ACTS (1993). Mari Mikkola wants to shift the conversation about pornography from speech act theory to social ontology. Mikkola suggests an artifactual analysis of pornography: "The term 'pornography' does not pick out an abstract entity but an array of concrete things—something that a proper philosophical understanding of pornography in my view should bear closely in mind." MIKKOLA, *supra* note 158, at 240.

213 Rae Langton, *Speaker's Freedom and Maker's Knowledge*, *in* SEXUAL SOLIPSISM: PHILOSOPHICAL ESSAYS ON PORNOGRAPHY AND OBJECTIFICATION 289, 289–310, 301 (2009).

214 *See id.* at 308. *See also* MIKKOLA, *supra* note 158, at 251–52 (building on Langton's contention to argue that "who the maker is makes a difference").

215 Langton, *supra* note 213, at 308.

216 *See id.* at 216 (The subject of the video "is somehow an extension of himself" and "her autonomy has been excluded from the picture.").

217 [JOHN DOE WEBSITES 2 & 3] (links on file with Abigail George).

Applied to deepfake pornography, maker's knowledge reveals how deepfakes are not just harmless fantasies but claims of knowledge over their subjects.[218] Beliefs can both aim at truth and count as knowledge.[219] Thus, when deepfake creators strive for (and typically achieve) hyperrealistic depictions of women—whether public figures or personal acquaintances—they both aim at truth and assert knowledge about her in a public manner. Nominal indications that a video or image is "fake" do little to change that.[220]

So, deepfakes are false statements asserting a truth, disseminated to a person's community, and affecting how she is seen in the eyes of others. As a result, victims lose autonomy or control over their reputations. For example, one affected woman described: "I founded a non-profit animal sanctuary at 22 years old. I have raised over $1 million for conservation work at 24 years old. I have created zero sexual content in my three years on Twitch. Despite this, my face was stolen so men could make me into a sexual object to use for themselves."[221] As her testimony suggests, deepfakes displace reputations that victims worked to build (founding a non-profit, etc.) with images of sexualization.[222]

There are several objections to characterizing nonconsensual deepfake pornography as a sexual offense incurring reputational harm. First, people may argue that deepfake pornography is closer to a sexual fantasy than a sexual offense.[223] But deepfakes are categorically distinct from sexual fantasies for the simple reason that they are shared with

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218 *See* Langton, *supra* note 213, at 305 (contending that non-synthetic pornography consists of "justified beliefs, some true and justified beliefs and perhaps some knowledge").

219 *See id.* at 304 ("[The] self-fulfilling nature of a belief about what we are going to do is what enables that belief both to aim at truth, and to count as knowledge.").

220 *See* Saner, *supra* note 181 (describing the impact as being unrelated to whether people know it is not real).

221 Maya Elaine Higa (@mayahiga), X (Jan. 31, 2023, 7:55 PM), https://twitter.com/mayahiga/status/1620586546083803136 [https://perma.cc/YRM3-WN8Q].

222 Noelle Martin described: "They are literally robbing your right to self-determination, effectively, because they are misappropriating you, and your name and your image and violating you permanently." Max Aitchison, *Aussie Student's X-Rated Horror After Innocently Googling her own Name to Discover Someone Had Done the Unthinkable - and Her Life Will Never Be the Same Again*, DAILY MAIL (Apr. 17, 2023), https://www.dailymail.co.uk/news/article-11981501/Aussie-students-horror-Googling-life-never-again.html [https://perma.cc/9A4W-TT2N]. Moreover, recall that journalist Ayyub was discredited from her work. *Supra* notes 1–13 and accompanying text.

223 *See generally* Carl Öhman, *Introducing the Pervert's Dilemma: A Contribution to the Critique of Deepfake Pornography*, 22 ETHICS & INFO. TECH. 133 (2020).

others.[224] If someone makes a nonconsensual deepfake and no one else knows about it, the creator is within a *locus poenitentiae*, and little (if any) harm occurs.[225] As previously explained, the depicted person is harmed when they, or others, see or know about it. On a related note, defendants are likely to contend that when deepfakes are labeled as such, no harm ensues since viewers know they are fake.[226] But as previously explained, "fake" refers to deepfakes' synthetic creation, not to the claims they make about the woman depicted.[227]

III. A Defamation Framework

The previous Parts described how deepfake pornography—a sexual offense infringing upon the victim's right to reputation—presents a novel legal issue that has evaded existing legal protections. This Part shows how that harm has a legal remedy in the time-tested principles of defamation law. It starts with the less-contested ways deepfakes fit into the defamation framework and ends with defamation's biggest love-hate relationship: freedom of speech. Section III.A addresses publication, mental state, and damages in defamation claims for deepfakes. Section III.B shows how deepfake pornography, in constituting a fundamental harm to reputation, qualifies as a defamatory statement. Finally, Section III.C examines balancing the plaintiff's right to reputation with the defendant's freedom of speech.

A. Lower-Hanging Fruit

Notwithstanding minor interstate variations, the essential components of a defamation claim are a false and defamatory assertion regarding another, publication to a third party, at

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224 *See id.*

225 In Latin, "locus poenitentiae" means "place where one can change their mind or attitude." JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS (9th ed. 2021). In criminal law, it refers to the concept that crimes occurring solely in the minds or thoughts of defendants are not legally recognizable. *See id.*

226 The fantasy critique claims that pornography or deepfake pornography does not say anything about women because it is fictional. *See* Alan Soble, *Pornography*, 11 SOC. THEORY & PRAC. 61, 73 ("As fantasy, pornography is a vision of the way things ought to be or could be, regardless of the way things actually happen to be[:] Pornography cannot [therefore] be charged with falsely and maliciously describing women.").

227 "Deepfake" is a misnomer since the videos assert truths of their subjects. So even when the viewer or maker knows that it is a deepfake and synthetically created, they aim at (and assert) a truth about a subject. *See supra* note 204 and accompanying text.

least negligence on the part of the defendant, and harm arising from the publication.[228] This section tackles the last three. Section III.B addresses the first element.

1. Publication

Publication refers to the act whereby the defamatory content is either intentionally or negligently relayed to a third person.[229] Posting deepfakes online amounts to publication.[230] This is consistent with their injury: the gravamen of the harm occurs when deepfakes are shared and when the targeted person sees the content themselves.[231] Even in cases where deepfakes are used for (s)extortion or blackmail, the crux of the threat is that they will be disseminated to a third party.[232] Moreover, creators incur liability if a third party sees the content in a non-purposeful, negligent way, such as by looking at someone's phone[233] or glancing at a left-open tab.[234] Finally, people who disseminate deepfakes they did not personally create may also face liability under the "republication rule."[235]

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228 *See* RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1965).

229 *See id.* § 577 cmt. a.

230 *See* ROLPH, *supra* note 196, at 71–72.

231 *See supra* Part II.

232 *See* Citron, *Continued (In)visibility*, *supra* note 78, at 342.

233 *See* Message from Jamie Doe to Abigail George (Jan. 6, 2024, 15:35 EST) (on file with *Columbia Journal of Gender & Law*) (explaining that a friend found deepfakes of her while looking through her boyfriend's photographs).

234 In a now notorious incident, Atrioc, a famous YouTube live streamer, accidentally left open a tab showing deepfake pornography of another famous live streamer. *See* Max Miceli, *Atrioc Apologizes A Second Time With Pledge To Help Women Affected By Deepfake Websites*, DOT ESPORTS (Feb. 1, 2023), https://dotesports.com/streaming/news/atrioc-apologizes-a-second-time-with-pledge-to-help-women-affected-by-deepfake-websites [https://perma.cc/6XS5-SYLC].

235 *See* RESTATEMENT (SECOND) OF TORTS § 581(1) (AM. L. INST. 1965) ("[O]ne who only delivers or transmits defamatory matter published by a third person is subject to liability [as if he had originally published it] if, but only if, he knows or has reason to know of its defamatory character."). The republication rule has largely been curtailed for internet postings. *See* Benjamin C. Zipursky, *The Monsanto Lecture: Online Defamation, Legal Concepts, and The Good Samaritan*, 51 VALPARAISO U.L. REV. 1, 5–6 (2016). *But see* Matthew D. Bunker & Clay Calvert, *"Defamation Live": The Confusing Legal Landscape of Republication in Live Broadcasting and a Call for a "Breaking News Doctrine,"* 39 COLUM. J.L. & ARTS 497 (2016) (discussing the relevance of the republication rule for live broadcasts).

2. Mental State of Perpetrators

In *New York Times v. Sullivan*, the Supreme Court established that defamation of public figures requires showing "actual malice," a term of art meaning "knowledge that [the alleged defamatory statement] was false or [] reckless disregard of whether it was false."[236] Crucially, the reference point in determining fault is the falsity of the statement—not the intended effects on the plaintiff. Thus, defendants in defamation actions involving public figures are subject to strict liability as to whether the statements defame the plaintiff, and their mental state must only be proved vis-à-vis the statement's falsity. In other words, even when the defendant believed the defamatory statements conveyed the victim in a neutral or positive light, they are liable as long as others reasonably understood a defamatory meaning referring to the plaintiff.[237] The fault standard is even lower for defaming private persons. Ten years after *Sullivan*, the Court in *Gertz v. Welch* refused to extend the actual malice standard to cases involving private individuals, giving states the green light to "define for themselves the appropriate standard of liability."[238] While states have adopted varied approaches, most apply a negligence standard.[239]

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236 New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964); *see also* McCafferty v. Newsweek Media Grp., Ltd., 955 F.3d 352, 359 (3d Cir. 2020) ("'Actual malice' is a term of art that does not connote ill will or improper motivation."). Even "the outer limit of malice," reckless disregard, means that the defendant "entertained serious doubts as to the truth of the statement or . . . had a subjective awareness of probably falsity." Kendall v. Daily News Pub. Co., 716 F.3d 82, 89, 91 (3d Cir. 2013).

237 *See* PROSSER AND KEETON ON THE LAW OF TORTS 809 (W. Page Keeton et al. eds., 5th ed. 1984). As long as a defamatory meaning referring to the plaintiff is reasonably understood by others, the publisher has strict liability, regardless of whether they intended it as defamatory. *See id.* ("If a defamatory meaning, which is false, is reasonably understood, the defendant publishes at his peril, and there is no possible defense except the rather narrow one of privilege."). *See* W.S. Holdsworth, *A Chapter of Accidents in the Law of Libel*, 57 L.Q. REV. 74, 83–84 (1941) (noting that defendants are strictly liable even if they publish statements that are innocuous on their face, could reasonably be construed to be innocuous on its face, or not intended to refer to the plaintiff); Jeremiah Smith, *Jones v. Hulton: Three Conflicting Views as to Defamation*, 60 U. PA. L. REV. 365, 461–63 (1912).

238 Gertz v. Welch, 418 U.S. 323, 347, 349 (1974) (noting that showing knowledge of falsity or reckless disregard for the truth is required for awarding of punitive damages).

239 *See* RESTATEMENT (SECOND) OF TORTS § 580B (AM. L. INST. 1965) (summarizing the fault standard for private individuals as the defendant "act[ing] negligently in failing to ascertain" whether a statement was false); *see also, e.g.*, Haueter v. Cowles Pub. Co., 811 P.2d 231, 236 (Wash. Ct. App. 1991).

A deepfake creator's mental state as to any intended harm to the plaintiff varies significantly from case to case.[240] But in every case, creators know the content is fake since they use synthetic processes to make it.[241] Accordingly, public figures who bring defamation cases for deepfakes will have no problem showing that creator-distributors acted with actual malice. In cases of private individuals, plaintiffs will have an even easier time meeting the negligence bar and can likely sweep in defendants who distribute deepfakes without having created them.

More broadly, establishing the requisite mens rea for perpetrators has long been a hurdle in cases of gender-based cyberviolence[242] and is likely to be a significant pitfall in criminal convictions for deepfake pornography or under the federal cause of action proposed in the Preventing Deepfakes of Intimate Images Act.[243] At recent oral arguments in a criminal cyberstalking case in which a stalker had sent thousands of threatening messages over the course of years, Chief Justice John Roberts suggested that the message "[s]taying in cyber life is going to kill you. Come out for coffee. You have my number," could be an innocuous and solicitous "invitation to get off the computer."[244]

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240 *Compare* DANIELLE CITRON, HATE CRIMES IN CYBERSPACE 17 (2014) (noting that perpetrators "know that women will be seen as sluts . . . . [and] make them unemployable, undateable, and at risk for sexual assault") *with* FIDO & HARPER, *supra* note 47, at 41 (claiming that deepfake creators may be motived by several factors such as curiosity, compulsivity, or gratification of sexual fetishes). *See also* [JOHN DOE WEBSITE #4] (on file with *Columbia Journal of Gender & Law*) (deleting all his videos, a famous creator acknowledged that he "feel[s] like the total piece of shit I am" and "the best course of action" is to "wipe my part off the internet and help decrease the number of future videos of those involved").

241 Those who disseminate but do not create may not meet the actual malice standard for public figures, but they would likely still meet the negligent standard for private individuals.

242 *See* Citron, *Continued (In)visibility*, *supra* note 78, at 363. Interestingly, seventy-four percent of regular viewers of deepfake pornography report that they do not feel guilty about it. *2023 State of Deepfakes*, *supra* note 23. Yet over two thirds said they would feel "shocked and outraged by the violation of someone's privacy and consent" if someone close to them became a victim of deepfake pornography, and nearly three quarters of respondents would report the incident to the authorities. *Id.* The dissonance between consuming it and thinking about the consequences if someone close to them was affected reveals how cyberspace acts as a moral vacuum.

243 H.R. 3106, 118th Cong. (as introduced to the House, May 5, 2023). *See supra* text accompanying note 132.

244 Transcript of Oral Argument at 53–56, Counterman v. Colorado, 600 U.S. 66 (2023) (No. 22-138). Counsel for Counterman compared the statements to a child saying, "I will kill you," after their sibling took the last brownie. *Id.* at 32. Likewise, Justice Alito considered how such statements could take place in the context of a mystery novel. *See id.* at 32–33. Justice Thomas lamented the growing hypersensitivity of society, saying some of the stalker's statements were not "threatening in and of themselves, and yet someone could be triggered by those statements or hypersensitive about those statements and feel threatened." *Id.* at 73. For an

There is a real threat that judges will interpret deepfakes similarly, especially considering that ninety percent of judges have never heard of deepfake pornography.[245] So while deepfake websites' and creators' claims that the videos are "not meant to harm or humiliate anyone"[246] may shield them from criminal liability, such lip service will not bar defamation claims, which only require showing knowledge of the statement's falsity, not intent to harm the victim.

3. Making Victims Whole Again: Damages for Non-Economic Harms

Defamation holds a peculiar place in the common law for its recognition of non-economic harms in calculating damages and—subject to a few exceptions—not barring suits that do not show pecuniary loss.[247] Plaintiffs who bring defamation cases for deepfake pornography can receive damages for reputational harm, emotional distress, medical expenses for psychiatric help, attorney's fees, and punitive damages.[248] Defamation adheres to a well-established principle—dating back to the Middle Ages and now applying in cyberspace—that the greater the visibility and accessibility of the publication, the greater the harm and corresponding remedy.[249] Modern courts acknowledge the compounding

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overview of the impact of the decision in this case on cyber gender abuse, see Citron, *Continued (In)visibility*, *supra* note 78, at 359–64.

245 *See* Vanessa Caldwell, *Her Face Was Deepfaked Onto Porn. When Police Wouldn't Help, She Did Her Own Investigation*, CBC DOCS (Nov. 22, 2023), https://www.cbc.ca/documentaries/the-passionate-eye/her-face-was-deepfaked-onto-porn-when-police-wouldn-t-help-she-did-her-own-investigation-1.7035523 [https://perma.cc/MX8K-WTSM].

246 *See* [JOHN DOE WEBSITE #5] (link on file with *Columbia Journal of Gender & Law*). In fact, the major deepfake pornography websites appear to have cursorily consulted lawyers. They include disclaimers such as "the videos are created for entertainment and learning purposes only." [JOHN DOE WEBSITE #2] (link on file with *Columbia Journal of Gender & Law*).

247 Historically, the common law of defamation occurred in the Star Chamber, where defendants could be made to pay damages to a plaintiff as well as receive criminal punishments. *See* ROLPH, *supra* note 196, at 52. "There was no necessary relationship with provable damage to reputation and the damages awarded . . . . [It] developed as a pragmatic remedy." *Id.* at 79. In the Middle Ages, slander, because of its transient nature, required proof of "special damages" or economic harm to recover. Leslie Yalof Garfield, *The Death of Slander*, 35 COLUM. J. L. & ARTS 17, 17 (2012). *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) ("The common law of defamation is an *oddity* of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss." (emphasis added)).

248 *See* ROLPH, *supra* note 196, at 77–83 (providing an overview of defamation damages).

249 *See* RESTATEMENT (FIRST) OF TORTS § 621, cmt. c (AM. L. INST. 1938) (noting that in determining the amount of damages, the juror or other trier of fact "may consider the area of dissemination and the extent and

harm to reputation as defamatory statements spread in cyberspace.[250] For example, in Rudy Giuliani's 2023 election-fraud defamation case, the plaintiffs were awarded over $32 million to compensate for the reputational harm incurred from statements Giuliani made on Twitter.[251] Thus, in deepfake cases, plaintiffs' damages stand to increase as the deepfake spreads online.[252] Many perpetrators spread deepfakes through bots that send anonymous emails and messages to people in the victim's community.[253] Finally, as the deepfake-pornography industry becomes increasingly monetized, more targeted women will be able to add to their damages by showing pecuniary loss.[254]

Of course, in cases of sexual abuse, it is difficult to ever make plaintiffs "whole again." But defamation damages at least reflect the unique harms inflicted by allegations related to the plaintiff's sex life. In fact, sex is no stranger to defamation law. There is a centuries-old, plentiful (and occasionally troubling) body of case law arising from imputations related

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duration of the circulation of the publication"); Cantu v. Flanigan, 705 F. Supp. 2d 220, 227–28 (E.D.N.Y. 2010) (listing "the extent to which the statements were circulated" as a factor that the jury may consider when calculating damages); ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 10.5.1 (2008) (discussing the criteria and proof juries may consider).

250 *See* ROLPH, *supra* note 196, at 73.

251 Guiliani tweeted suggesting that two election workers engaged in election fraud in Georgia, leading to them receiving scores of abusive and harassing phone calls, as well as messages and attacks by Trump supporters. *See* Eileen Sullivan, *Jury Orders Giuliani to Pay $148 Million to Election Workers He Defamed*, N.Y. TIMES (Dec. 15, 2023), https://www.nytimes.com/2023/12/15/us/politics/rudy-giuliani-defamation-trial-damages.html [https://perma.cc/H8FN-RVD5]. Moreover, in the recent Jean Carroll-Donald Trump defamation case, the jury awarded Carroll $1.7 million for reputational harm. *See* Rachel Schilke, *Jury Orders Trump to Pay $5 Million in Damages to Carroll for Battery and Defamation*, WASH. EXAM'R (May 9, 2023), https://www.washingtonexaminer.com/news/1638923/jury-orders-trump-to-pay-5-million-in-damages-to-carroll-for-battery-and-defamation/ [https://perma.cc/B8VF-RP5T].

252 *See* ROLPH, *supra* note 196, at 73 ("[P]ublishers who chose to publish defamatory matter online did so in the full knowledge that the greater the coverage, the greater the potential profit and thus the greater the risk of defamation that such publishers ought to consider or bear." (citation omitted)).

253 *See* Message from Jane Doe to Abigail George (Jan. 5, 2024, 17:35 EST) (on file with *Columbia Journal of Gender & Law*).

254 Many videos on deepfake pornography websites, such as MrDeepFakes, are shortened versions of longer videos available for purchase on Fan-Topia, a platform allowing online creators to charge for their content. *See* Kat Tenbarge, *Found Through Google, Bought with Visa and Mastercard: Inside the Deepfake Porn Economy*, NBC NEWS (Mar. 27, 2023), https://www.nbcnews.com/tech/internet/deepfake-porn-ai-mr-deep-fake-economy-google-visa-mastercard-download-rcna75071 [https://perma.cc/MNX7-FQ5A]. Creators on MrDeepFakes also accept requests and advertise for paid positions to help them create content. *See id.*

to sexual behavior.[255] In early slander courts, female plaintiffs commonly brought slander actions against male defendants for allegations of unchastity or adultery, most commonly being called a "whore."[256] These courts "protect[ed] the interests of women rather than men,"[257] and ninety percent of cases were brought by women.[258] In the early nineteenth century, a gendered reform movement led to the passing of the Slander of Women Act in several common law countries and American states, declaring imputations of unchastity or adultery towards women defamatory without needing to show economic loss.[259] While the normative values underlying defamation cases for deepfake pornography would differ from such sexual slander cases, the similarities are striking: women using defamation to fight against sexual violence when other legal mechanisms have failed them.

B. Defining Defamatory: Moral Fault, Moral Standards, and Ridicule

Although the common law varies by state, prevalent formulations establish a statement as defamatory if it tends to "harm the reputation of another as to lower [them] in the estimation of the community" or exposes them "to hatred, contempt, or ridicule."[260] Deepfake pornography plaintiffs can meet this standard in three ways: by showing that the

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255 *See generally* LAURA GOWING, DOMESTIC DANGERS: WOMEN, WORDS, AND SEX IN EARLY MODERN LONDON (1999) (describing the history of women and defamation in early modern England); *see also* S.M. WADDAMS, SEXUAL SLANDER IN NINETEENTH-CENTURY ENGLAND: DEFAMATION IN THE ECCLESIASTICAL COURTS, 1815–1855 xii (2000) (providing a historical analysis of defamation case papers in ecclesiastical courts in the first half of the nineteenth century).

256 WADDAMS, *supra* note 255, at 66, 121 (noting that the most common insult was "whore," and in some towns almost everyone must have known someone involved in a sexual slander defamation suit).

257 *Id.* at xii ("[It] was a jurisdiction that put a certain amount of power directly into women's hands, even where social stature and financial resources were lacking.").

258 *Id.*; *see also* Jessica Lake, *Whores Aboard and Laws Abroad: English Women and Sexual Slander in Early Colonial New South Wales*, 35 GENDER & HIST. 916, 917 (2023) (noting a "pronounced gender pattern" in slander cases in the first half of the nineteenth century in England).

259 North Carolina was the first jurisdiction to pass the Act, in 1808. Lake, *supra* note 258, at 916. *See also* Slander of Women Act, 1891, 54 & 55 Vict., c. 51 (UK) (establishing that imputing "unchastity" or "adultery" to a woman was per se defamation); Alexandros Antoniou & Dimitris Akrivos, *Homosexuality, Defamatory Meaning and Reputational Injury in English Law*, *in* DIVERSE VOICES IN TORT LAW 175, 189–90 (Kirsty Horsey ed., 2024) (describing how the term "lesbian" came to be defamatory under these acts).

260 RESTATEMENT (SECOND) OF TORTS § 559 (AM. L. INST. 1965); Parmiter v. Coupland, 151 ER 340 (1840). *But see* Scott v. Sampson, 8 QBD 491 at 503 (1882) (establishing a more general test for defamation as "a false statement [about a man] to his discredit").

deepfake (1) caused a sizable part of the community to impose moral fault on the plaintiff; (2) generated an immoral association; or (3) exposed the plaintiff to ridicule.

In assessing standards for injury to reputation, defamation is famously flexible due to its intrinsic linkage with subjective moral standards.[261] Societal prejudices have often formed the basis of actionable defamatory claims, including imputations of being homosexual, having mental illness, having HIV/AIDS, and performing abortions.[262] As historical work has shown, defamation acts as a barometer of a community's contingent moral taxonomy.[263] When community morals shift, the law of defamation responds.[264] This is both a hazard and a strength of the common law. Before it is too late and the public exposure of nonconsensual sexual deepfakes becomes far too commonplace to be shunned by the community and collective morality, judges and juries can declare nonconsensual sexual deepfakes defamatory.

Importantly, even when libelous statements are clearly doctored, fictional, or known to be fake, they can still be defamatory. Defamation can often be established through "inference, implication or insinuation."[265] There are always mediations in any medium that acts as a vessel for libelous statements. Thus, in the case of deepfakes, it does not matter whether viewers think the material is synthetic or real. Deepfakes *infer* that the depicted individual is the *type* of person that would engage in the depicted conduct, *insinuate* that the depictions correspond to the plaintiff's real intimate life, or *impute* that the plaintiff's moral worth is equal to their sexuality. In other words, the question is not whether viewers know that the deepfake is synthetically created or not; it is whether they associate the recognizable subject of the video with the conduct depicted in the video. And they unequivocally do.[266]

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261 LAWRENCE MCNAMARA, REPUTATION AND DEFAMATION 5 (2007) (noting "deep-seated problems with the legal framework"); Lake, *supra* note 258, at 917 (asserting that English defamation law "is riddled with doctrinal anomalies and unparalleled complexity").

262 *See, e.g.*, Hepburn v. TCN Channel Nine [1983] 2 NSWLR 682 (Austl.); MCNAMARA, *supra* note 261, at 103–04 (noting that the enduring legacy of the "ethical dominance of Christian tradition" has run up against burgeoning hegemony of liberal ethics).

263 *See* ROLPH, *supra* note 196, at 12 (arguing that "the concept of reputation changes historically, reflecting social, political, economic, cultural and, most importantly, technological changes.").

264 *See* MCNAMARA, *supra* note 261, at 101.

265 Carwile v. Richmond Newspapers, 82 S.E.2d 588, 592 (Va. 1954).

266 *See supra* notes 238–244 and accompanying text.

The first path to establishing a statement as defamatory asks if the statement injures the plaintiff's reputation in the views of the "right-thinking" person.[267] In contrast to their English and Australian counterparts, American courts tend to apply a sectional standards approach, which instead asks if a substantial part of the population regards the referenced conduct as immoral.[268] Thus, it places no moral judgment on the imputation itself, thereby sidestepping culture wars and prejudice. By extension, declaring sexual deepfakes as injurious to one's reputation does not involve value judgments about the morality of engaging in pornographic sex.[269]

In a strikingly analogous case to deepfake videos referencing the depicted person's employment or school, a federal district court found doctored photographs depicting the plaintiff acting in a sexually explicit matter defamatory; the photographs identified him as a "porn star," and contained references to his employer.[270] The photographs were defamatory despite being undoubtedly faked because they "impute[d] an unfitness for Plaintiff to perform the duties of a youth soccer coach" and "prejudice[d] Plaintiff in his profession or trade."[271] In contrast to the technological prowess behind deepfakes, the photographs at issue were crudely doctored via Photoshop. Thus, deepfakes that impute that the subject should be defined by their sexuality and not their professional accomplishments are defamatory even if viewers know they are fake.

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267 Kimmerle v. New York Evening Journal, 186 N.E. 217, 218 (N.Y. 1930). *See Developments in the Law: Defamation*, 69 HARV. L. REV. 875, 885 (1956) ("When an idea would lower the plaintiff in the esteem of a significant segment of the community, the courts have shown no hesitation in finding that its publication will support an action, however small the number of actual recipients, when damage is presumed or special damage is shown." (footnotes omitted)).

268 Such an approach is reflected in the Restatement (Second) of Torts, which establishes the standard as "in the eyes of a substantial and respectable minority[.]" § 559 cmt. e (AM. L. INST. 1965). The sectional standards approach contrasts with the general standards test. The latter asks what "ordinary, decent folk in the community" or the "average sensible citizen" would consider unethical. MCNAMARA, *supra* note 261, at 117. Thus, the sectional standards approach avoids attempts at discerning collective, unified community moral standards. In so doing, it can sidestep culture wars and prejudice and is better suited to a pluralistic society. *See id.*; Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 7–8 (1996) (arguing that a substantial and respectable minority standard "embodies the traditional liberal values of tolerance and respect for diversity necessary in a multi-cultural, multi-ethnic society.").

269 *See* Shaik, *supra* note 41 (arguing that using a defamatory approach means arguing that pornographic content harms a woman's reputation, thereby "perpetuat[ing] the patriarchal notion that it is wrong for women to be expressly sexual").

270 *See* Tharpe v. Lawidjaja, 8 F. Supp. 3d 743, 778, 786 (W.D. Va. 2014).

271 *Id.* at 786.

Second, statements can be defamatory via immoral association without suggesting the plaintiff bears moral fault. Consider the famous case brought by Princess Youssoupoff after the film *Rasputin, the Mad Monk* depicted Rasputin raping her.[272] The court found the film defamatory even though being raped does not impute any moral discredit on the victim's part.[273] Two relevant principles arise from this case. First, statements can be defamatory even if they do not suggest any fault on the part of the plaintiff.[274] Being raped, even though it did not imply "moral discredit," tarnished Princess Youssoupoff's reputation.[275] Second, defamation can apply to largely fictionalized depictions—even ones that are heavily dramatized and aggrandized. Most people who watch Hollywood blockbusters take the veracity of their historical depictions with a grain of salt. Yet because the film suggested there was a kernel of truth in its depiction of Princess Youssoupoff, it affected her reputation.[276] And since the depiction implied a "diminution of moral worth," it was defamatory.[277]

Finally, defamation cases premised on exposing the plaintiff to "ridicule" can succeed even when there is no negative moral judgment, no imputed moral fault, and an obvious mistake such that no one would think the material was true.[278] These principles have already

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272 *See* Youssoupoff v. Metro-Goldwyn Mayer (1934) 50 TLR 581, CA.

273 *See id. See also* MCNAMARA, *supra* note 261, at 142–47.

274 McNamara writes that "*Youssoupoff* shows that the court thought that female sexual purity could be lost either with or without any fault on a woman's part. A woman's reputation could be disparaged by allegations that she has been sexually promiscuous, but it could also be disparaged by imputations that suggested she had been engaged in or subjected to some kind of sexual act, regardless of her own conduct, will, or volition." MCNAMARA, *supra* note 261, at 147.

275 *Id.* at 145.

276 In a similar fashion, in Snyder v. New York Press Co., 121 N.Y.S. 944 (App. Div. 1910), a newspaper story described how a process server entered the plaintiff's home and saw the plaintiff in the bath. *See id.* at 944–45. Again, the article did not "impute immoral conduct or character" but had "a direct tendency to subject the plaintiff[] to unfavorable comment, to diminish her respectability, to abridge her comfort and enjoyment, and to expose her to public ridicule, such as provokes contempt, not merely such as may be sportive and thoughtless." *Id.* at 945–46.

277 MCNAMARA, *supra* note 261, at 148. McNamara distinguishes "moral fault" from "immoral association," in which a plaintiff's reputation is damaged not by their choice to engage in frowned upon behavior but by "someone else's behavior" or some other circumstances. *Id.* He writes: "[I]t was not the absence or moral fault that was determinative of actionability, but the diminution of moral worth." *Id.* (emphasis omitted).

278 For example, a defendant was liable for defamation for publishing an article on evolution and placing a photograph of the plaintiff next to the gorilla, stating, "Stanislaus Zbyszko, the Wrestler, Not Fundamentally Different from the Gorilla in Physique." Zbyszko v. New York American, Inc. 239 N.Y.S. 411, 412 (App. Div. 1930). The Court reasoned: "[I]t is not necessary that words impute disgraceful conduct to the plaintiff." *Id.*

been applied in photographs exposing the naked bodies of plaintiffs.[279] The landmark case for assessing defamatory statements based on exposing the plaintiff to "ridicule" is *Burton v. Crowell*, written in 1936 by Judge Learned Hand.[280] The plaintiff, a steeplechaser, had posed for photographs that were published in an advertisement for Camel cigarettes.[281] But, by way of a trompe d'œil, a girth hanging over the stirrup appears as the plaintiff's oversized and exposed penis.[282] The plaintiff's name appeared near the photograph with the caption, "Get a lift with a camel."[283] Judge Hand reasoned that statements exposing a plaintiff "to more than trivial ridicule" were actionable provided that the plaintiff was not "thin-skinned" or a "self-important prig," and the incident was not capable of being "laugh[ed] off."[284] In his typical fashion, Learned Hand cryptically analyzed what constituted the reputational harm despite the "obvious mistake," meaning no one would think it exposed the plaintiff's actual naked body.[285] First, the plaintiff suffered harm by "being known indefinitely as the absurd victim of the unhappy mischance." [286] In fact, "[t]he obvious mistake only added to the amusement."[287] Second, Judge Hand elevated the plaintiff's sense of self-worth to a legally protected interest.[288] He stated, "[t]he gravamen of the wrong in defamation . . .

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at 413; *see also* McNamara, *supra* note 261, at 166 (commenting that the article in *Zbyszko* "did not attribute any flaw for which the plaintiff was somehow responsible, but it still seemed to suggest that the plaintiff was a lesser person than others even though he bore no moral responsibility for carrying that lesser status.").

279 *See* Ettingshausen v. Austl. Consol. Press, [1991] 23 NSWLR 443, 443–44, 447 (finding that a rugby player who had a naked photograph of him taken in the showers after a game was defamed because "as a result of the exposure of his genitals, he has been held up (or exposed) to ridicule"); *see also* Obermann v. ACP Publ'g Pty Ltd, [2001] 1022 NSWSC ¶ 40 (holding that an Olympic water polo player's exposed breasts in a photograph exposed her to ridicule).

280 *See* Burton v. Crowell Publ'g. Co., 82 F.2d 154, 154 (2d Cir. 1936).

281 *See id.*

282 *See id.*

283 *Id.*

284 *Id.* at 155–56.

285 *Id.* at 155 ("Nobody could be fatuous enough to believe any of these things; everybody would at once see that it was the camera, and the camera alone, that had made the unfortunate mistake").

286 *Burton*, 82 F.2d at 155.

287 *Id.* at 156 (reasoning that "it was the mere association on the plaintiff . . . that was thought to lower him in others' esteem").

288 *See id.*

[is] the feelings, that is, the repulsion or the light esteem, which [the] opinions [of others] engender."[289]

While the "mistake" in deepfake pornography is by no means "obvious," even a narrow reading of *Burton* establishes that deepfakes that are crudely made or have watermarks can still expose the plaintiff to ridicule.[290] Moreover, legally recognizable harm occurs even if people merely have heard about the deepfake without seeing it since the deepfake associates the plaintiff with a pornography campaign in the minds of the public.[291] For example, a boss fired one victim after hearing about her deepfakes.[292] *Burton* also shows that reputational harm can include "the feelings" of deepfake victims.[293] More broadly, the *Burton* principle reveals that defamation suits do not provide recourse to the plaintiff by showing the world that the statements are false. Likewise, the harm from deepfake pornography is not primarily derived from people thinking the videos are real and would not dissipate if they were exposed as false.[294]

C. The First Amendment: Distinguishing Deepfakes from Parody

The last—and often hardest—hurdle for defamation claims is the defendant's freedom of speech, which must always be balanced with the plaintiff's right to reputation. Once a defamatory statement crosses the thin and blurry line from "false statement of fact" to "parody," it enjoys First Amendment protection.[295] Thus, plaintiffs in deepfake cases will need to show that the deepfake pornography contains a false statement of fact, which is a claim about the plaintiff that reasonable viewers perceive to be true. Echoing the lip service paid by some major deepfake hosting websites, defendants in defamation actions

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289 *Id.*

290 *Id.*

291 *See* Ayyub, *supra* note 1 (describing her family's reaction from hearing about the deepfake).

292 *See* Rousay, *supra* note 15, at 107.

293 *Burton*, 82 F.2d at 156.

294 *See supra* text accompanying note 57. "Fake" is in the name of the medium and in the name of the largest website dedicated to deepfake pornography. [JOHN DOE WEBSITE #2] (link on file with *Columbia Journal of Gender & Law*).

295 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (holding that in the realm of defamatory statements, "there is no constitutional value in false statements of fact").

for deepfakes are likely to assert the defense of parody.[296] As an entirely new technology that is only just beginning to be litigated, the contours of whether and when deepfakes qualify as parody will certainly need to percolate in lower federal courts. But previous principles suggest that deepfakes are doing something entirely different from parody.

The Supreme Court fleshed out the parody-false statement of fact distinction in *Hustler v. Falwell*.[297] The material in question, a satirical advertisement in *Hustler* magazine, featured a photograph of Reverend Jerry Falwell, a religious right-wing leader known for his public admonitions about sexual morality.[298] Paralleling an advertising campaign in which celebrities recounted their first time drinking Campari, the advertisement depicted Falwell recounting his "first time" having sex with his mother.[299] The advertisement contained exaggerated and implausible content, such as a goat in an outhouse, and included a disclaimer that it was "not to be taken seriously."[300] Chief Justice William Rehnquist, writing for the majority, upheld the dismissal of Falwell's defamation claim because advertisement parody, albeit "patently offensive and [] intended to inflict emotional injury," is not "reasonably [] interpreted as stating actual facts."[301] Lower circuit courts explain: If "a reasonable reader would not accept the statements at face value, the statements do not cause damage to the plaintiff's reputation."[302]

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296 *See* [JOHN DOE WEBSITE #2] (link on file with *Columbia Journal of Gender & Law*) (claiming the videos are for "entertainment and learning purposes only"); [JOHN DOE WEBSITE #2] (link on file with *Columbia Journal of Gender & Law*) (requiring users to acknowledge a disclaimer that the videos "are intended as parody of the celebs portrayed"). Of course, these disclaimers are mere lip service. On a forum post about potential legal consequences, one of the top moderators and creators replied, "It's all just machine learning research ;)." [JOHN DOE WEBSITE #5] (link on file with *Columbia Journal of Gender & Law*).

297 *See* Hustler Mag. v. Falwell, 485 U.S. 46 (1988). The false statement of fact framework also applies to IIED claims, as it did in Hustler. *See id.* at 52.

298 *See id.* at 47; SUSAN DUDLEY GOLD, PARODY OF PUBLIC FIGURES: HUSTLER MAGAZINE V. FALWELL 14 (2014) (describing Falwell as "a preacher with his own radio and television shows" who was "well known for his religious and political activities," called his political organization the "Moral Majority," and had "proclaimed he had tried to turn the public against pornography 'with every breath in my body'").

299 *Hustler*, 485 U.S. at 48.

300 *Id.*

301 *Id.* at 48.

302 Hogan v. Winder, 762 F.3d 1096, 1106 (10th Cir. 2014) (citing Mast v. Overson, 971 P.2d 928, 933 (Utah Ct. App. 1998)).

In a well-publicized case, Kimerli Jayne Pring, who had recently been crowned Miss Wyoming, sued *Penthouse* magazine for publishing an article in which Miss Wyoming—bestowed with magical sexual powers—performs oral sex on a football player, causing him to levitate.[303] In what was the largest libel award to date, a jury awarded Pring twenty-six million dollars.[304] But the Tenth Circuit overturned the award on appeal because "a reader would . . . have understood that the charged portions were pure fantasy and nothing else."[305] The material "described something physically impossible in an impossible setting."[306]

These precedents, *inter alia*, reveal the judicial philosophy behind requiring defamation claims to be false statements of fact.[307] If a reasonable person interprets the statements as hyperbole or parody, they are protected by the First Amendment.[308] Parody, as defined by copyright law, uses some elements of a prior composition to create a new one that

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303 *See* Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 440–44 (10th Cir. 1982). For an account by Pring's attorney, see GERRY SPENCE, TRIAL BY FIRE: THE TRUE STORY OF A WOMAN'S ORDEAL AT THE HANDS OF THE LAW (1986).

304 *See Jury Says Penthouse Magazine Libeled a Former Miss Wyoming*, N.Y. TIMES (Feb. 21, 1981), https://www.nytimes.com/1981/02/21/us/jury-says-penthouse-magazine-libeled-a-former-miss-wyoming.html [https://perma.cc/P7ZC-HMH8].

305 *Pring*, 695 F.2d at 443 ("It is impossible to believe that anyone could understand that levitation could be accomplished by oral sex before a national television audience or anywhere else. The incidents charged were impossible. The setting was impossible.").

306 *Id.*

307 Moreover, in Greenbelt v. Bresler, a well-known real estate developer sued a local newspaper for libel. *See* Greenbelt Co-op. Publ'g Ass'n v. Bresler, 398 U.S. 6, 7–8 (1970). The newspaper had reprinted statements in which city council meeting attendees described Bresler's negotiating position as "blackmail." *Id.* at 7. Justice Stewart reasoned that no reader would believe the council members were actually charging Bresler with blackmail and "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable." *Id.* at 14. Similarly, the Superior Court of New Jersey found that a college newspaper's statements claiming that a school administrator was available on a "whoreline" for "good telephone sex" were not assertions of fact, instead being "treated as a protected expression[s] of opinion." Walko v. Kean Coll. of New Jersey, 561 A.2d 680, 683–84 (Law. Div. 1988). The court opined that "[n]o reasonable person, even glancing at the offending ad, could possibly conclude that it was a factual statement of plaintiff's availability for 'good telephone sex.'" *Id.* at 683.

308 *See* Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 57 (1988) ("But for reasons heretofore stated this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here.").

comments on the original work.[309] Across all the cases in which a defamation claim was struck down for not being a false statement of fact, the alleged libelous material depicted unrealistic—usually, physically impossible—situations.[310] A statement that a plaintiff's fellatio made someone levitate is clearly untrue.[311] Claiming that a moral majority religious leader engaged in drunken incestuous relations in an outhouse is so exaggerated that no one would think it was asserting a truth.[312] Even though the *Hustler* ad provides commentary and refers to the plaintiff (thereby affecting public perception of him), readers are aware of a dissonance between the statements and reality.[313] In contrast, the allure of deepfake pornography is precisely that it realistically exposes the plaintiff's body and sex life.

Once again, technological advancements enable deepfake pornography to be identical to the plaintiff's physical body, distinguishing it from parody.[314] For the women whose identities are appropriated, the most harmful part of deepfakes is their realism.[315] Deepfake pornography asserts something about who the victim is: a sexual object. In contrast to the statement that the plaintiff's fellatio made someone levitate,[316] deepfake pornography is not an impossible claim: reasonable viewers see it as realistic, naked depictions of the victim.[317] It should be painfully evident to judges and juries that these videos serve the

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309 *See* Campbell v. Acuff-Rose Music, 510 U.S. 569, 580 (1994) ("For the purposes of copyright law, the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works.").

310 *See Pring*, 695 F.2d 443 (describing fellatio with the power to cause levitation); New Times, Inc. v. Isaacks, 146 S.W.3d 144 (Tex. 2004) (describing a six-year-old placed in ankle shackles); Walko v. Kean Coll. of New Jersey, 561 A.2d 680, 683–84 (Law. Div. 1988) (describing a school administrator placing an ad in the school magazine for good telephone sex).

311 *See Pring*, 695 F.2d at 443.

312 *See Hustler*, 485 U.S. at 48.

313 *See id.*

314 *See supra* notes 54–56.

315 *See, e.g.*, Cook, *supra* note 106 (quoting a victim as saying, "When it's Photoshop, it's a static picture and can be very obvious that it's not real . . . [b]ut when it's your own face reacting and moving, there's this panic that you have no control.").

316 *See Pring*, 695 F.2d at 443.

317 *See supra* notes 54–56 (listing studies showing the low detection rate of deepfakes).

primary purpose of realistic sexual exposure of the plaintiff.[318] More broadly, the Court has justified certain protections for defamatory statements to give freedom of expression necessary "breathing space."[319] If the Court is concerned about giving freedom of expression enough room to breathe, it should acknowledge that deepfake pornography is suffocating the women it targets.[320]

CONCLUSION

Deepfakes are particularly pernicious public sexual offenses—whose accuracy, accessibility, and popularity only continue to grow.[321] Deepfakes may be a new phenomenon, but they fit into old defamation principles. What is "fake" about deepfakes is not their purported representation or "message" but their manner of creation or "medium." Something can be fake (in the false sense) but still allege a truth about someone—like a lie. In fact, that is precisely what defamation protects: false statements, alleging a truth, causing reputational harm.[322] Thus, a defamation frame reveals deepfake pornography as a core infringement of noneconomic, dignitary, and reputational interests. Moreover, in a time of "(in)visibility of cyber gender abuse," defamation acknowledges the compounding nature of harm as it spreads in cyberspace and the particularly nefarious nature of sexual imputations.[323] It is not necessary to have large-scale publicized defamation suits à la Johnny Depp-Amber Heard for each of the 100,000 women targeted by deepfakes.[324] Common law rulings do more than resolve disputes between the parties in the action; they announce

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318 There is an even stronger case when deepfakes appear on conventional porn sites rather than dedicated deepfake sites. *See* New Times, Inc. v. Isaacks, 91 S.W.3d 844, 853–54 (Tex. App. 2002) (holding that determining if statements are false statements of fact depends upon a reasonable person's perception of the entirety of the publication, not merely on individual statements).

319 New York Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964) (justifying certain protections for erroneous statements as necessary "breathing space" for freedom of expression).

320 *See 2023 State of Deepfakes*, *supra* note 23; *see also supra* notes 14–16 and accompanying text. Professor Mary Anne Franks stated, "There's a massive chilling effect that deepfake pornography has on women's speech because the way to make yourself safer is to censor yourself." Cook, *supra* note 106.

321 *See supra* notes 21–29 and accompanying text.

322 *See* RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1965).

323 Citron, *Continued (In)visibility*, *supra* note 78; *supra* Section III.A.3.

324 For an account of the Johhny Depp-Amber Heard defamation case, see NICK WALLIS, DEPP V. HEARD: THE UNREAL STORY (2023).

moral and legal norms.[325] Defamation suits can succeed. When they do, they will generate ripple effects, sending a message to those behind their screens that they are not immunized from legal accountability and that sexual abuse remains legally cognizable even when it occurs in cyberspace. Everyone deserves the ability to construct and direct their sexual lives and reputations—on and off the screen.

325 For the criticisms of the dispute resolution model of litigation, see generally Owen M. Fiss, *Two Models of Adjudication*, *in* HOW DOES THE CONSTITUTION SECURE RIGHTS? 36 (Robert A. Goldwin & William A Chambra eds. 1985); Susan A. Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227 (1990).