Columbia Journal of Gender & Law

2026 | Issue 46.3

Columbia Journal *of* Gender & Law

Issue 46.3

The spacious home of today's feminist movement.

The *Columbia Journal of Gender and Law* (*CJGL*) is published by students at Columbia University School of Law. Please direct general correspondence to the following addresses:

Columbia Journal of Gender and Law
Columbia University School of Law
435 West 116th Street
New York, NY 10027

Email: jrngen@law.columbia.edu

Subscriptions: Subscriptions are $65 per volume for institutions, $50 per volume for public interest organizations, $40 per volume for individuals, and $20 per volume for current students. For international subscribers, please add $10. Individual issues may be purchased for $20, subject to availability.
Email: jrngen@law.columbia.edu

Submissions: *CJGL* welcomes unsolicited submissions of articles, book reviews, essays, comments, and letters. Please note that due to the volume of materials received, submissions to *CJGL* will not be returned to the author.
Email: columbia.jgl.submissions@gmail.com

The *Columbia Journal of Gender and Law* (*CJGL*) is an interdisciplinary journal designed to address the interplay between gender and sexuality law, and its effects at the personal, community, national, and international levels. The articles we publish reflect an expansive view of gender and sexuality law—embracing issues related to feminism and gender and sexuality studies that cut across all races, ethnicities, classes, sexual orientations, gender identities, and cultures. *CJGL* also publishes articles that merge and blend disciplines—revealing the connections between law and philosophy, psychology, history, religion, political science, literature, and sociology.

CJGL operates by consensus and welcomes all law students at Columbia Law School to apply, regardless of status as a first-year law student, J.S.D. student, or LL.M. student. All editors and staff members are involved in *CJGL*'s decision-making process with respect to selection and editing of articles. Members work in teams and follow articles from acceptance to publication.

In fostering dialogue, debate, and awareness about gender-related issues, our goal is to advance feminist scholarship and gender and sexuality studies at Columbia Law School. We strive to break through traditional legal and academic confines, and serve as both a community and an outlet for interested students, faculty members, and practitioners.

CJGL publishes issues in both the fall and spring semesters. The size of our issues depends upon the number of articles our members vote to accept. We traditionally publish two issues per volume.

The editors and staff members of *CJGL* are grateful for your support. We look forward to your continued readership and welcome your contributions and responses.

Advisory

Board

Senior Editorial Board

Editor-in-Chief
Kylie Regan

Executive Editor
Hannah LeBaron

Executive Managing Editor
Alexander Hempel

Managing Notes Editor
Sarah Hubner

Editors

Business & Digital Editor
Adara Rosenbaum

Notes Editors
Eliza Namnoum • Serra Tickey

Symposium & Special Projects Editor
Lauren Young

Submissions Editors
Rebecca Ju • Olivia Li

Article Editors
Carly Feldman • Joseph Kelly
Samantha Kerns • Jennifer Zhang

Production Editors
Isabella Husein • Omar Kassam
Madison Tammaro • Amy Tang

Staff Members

Hannah Agar • Hannah Ahn • Emily Baca Loaiza

Yiwen Bao • Manasi Chande • Meagan Chang

Will Damarjian • Ebrah Rabia Dubac • Meher George

Will Gu • Anushka Gupta • Chloe Hu

Pally Huang • Annie Isabel • Alex Jacobson

Caroline Kells • Olivia Kim • Claire Kim

Hadley Kim • Annie Jewel Kong • Maggie Kormann

Cheyanne Lawrence • Yoony Lee • Elliot Y. Lin

Sylvia Liu • Bryan Miller • Anouk Murmann

Lexi Nelson • Michelle Ondari • Emily Stanton Paule

Kristen Quesada • Yuka Saji • Henry Schock

Alyssa Sugar • Connor Sullivan • Catrin Thomas

Sophia Travis • Krithika Vasireddy • Maggie Wainwright

Alex Worrall • Joanne Yang

Table of

Contents

ALL MY PATIENTS LIVE IN TEXAS: *TEXAS V. CARPENTER* AND THE CHALLENGE TO NEW YORK'S TELEMEDICINE SHIELD LAW

CARLY FELDMAN*

Abstract

This article examines the legal conflict between abortion "shield laws" in abortion-permissive states and the extraterritorial reach of anti-abortion statutes via a recent case brought against an abortion provider in New York. In December 2024, Texas Attorney General Ken Paxton filed a civil suit against Dr. Margaret Carpenter, a New York physician and co-founder of the Abortion Coalition for Telemedicine, alleging she violated Texas' total abortion ban by prescribing and shipping medication to a Texas resident via telehealth. This Note analyzes how this case serves as the first major test for New York's shield law, highlighting that while such laws offer robust protections regarding professional licensing and extradition, they remain vulnerable to out-of-state discovery tactics and the possible enforcement of civil judgments.

Part I provides an overview of the abortion provision landscape post-*Dobbs*, including interstate travel, telemedicine abortion provision, and the statutory frameworks behind "bounty hunter" laws in abortion-hostile states and "shield laws" in abortion-permissive states. Part II discusses the claims made in *Texas v. Carpenter* and analyzes the interactions between New York's shield law and Texas' anti-abortion laws. Part III addresses the constitutional threat to shield laws posed by the U.S. Constitution's Full Faith and Credit Clause and how anti-abortion states may try to force shield states to enforce their judgments. Finally, it argues that shield states must enact specific judgment enforcement provisions—such as New York's proposed S.B. 1995—which frame the refusal to satisfy out-of-state

* J.D. 2026, Columbia Law School; B.A. 2021, University of California, Berkeley. I would like to sincerely thank Julianna Gesiotto and Taylor Brewer, Staff Attorneys at the California Women's Law Center and my supervisors on the statutory research which began my work on this Note. Thank you to Anna Barcellos for her help with the health policy research. I am also grateful to Professor Jessica Bulman-Pozen for her feedback and guidance as my Note advisor. Lastly, a huge debt of gratitude is owed to Eliza Namnoum and the staff of the *Columbia Journal of Gender and Law* for their tireless efforts to publish this Note.

judgments as an exercise of a state's police power. By narrowing the mechanisms of enforcement rather than denying the judgment's validity, shield states can better insulate their providers from "bounty hunter" laws and state-led litigation while navigating the "exacting" demands of the Full Faith and Credit Clause.

INTRODUCTION

In the years since *Dobbs*, liberal and conservative states have been playing a cat and mouse game, with each finding new ways to provide or deny access to abortion within the letter of the law. After trigger bans took effect, the landscape of abortion care changed dramatically. Interstate travel and telehealth provision of medication abortion provided opportunities for patients in abortion-hostile states to receive abortion care. However, as new methods of providing care proliferated, so too did new conservative laws targeting them. In response, abortion-permissive states passed "shield laws" to prevent providers from facing extraterritorial liability, allowing patients in states where abortion is banned to continue receiving care. Part I of this Note details this back-and-forth progression of abortion laws across the country.

With diametrically opposed laws dividing the country's abortion policies, it was only a matter of time before someone fired the first shot to challenge shield laws. In December 2024, Texas Attorney General Ken Paxton filed a civil case against Dr. Margaret Carpenter, a physician residing in New York and co-founder of the Abortion Coalition for Telemedicine, for violating Texas' total abortion ban and licensing laws, alleging that she had prescribed and shipped abortion medication to a Texas resident.[1] Part II of this Note explores the conflicting abortion laws of Texas and New York, analyzes the recent challenge to New York's law in *Texas v. Carpenter*, and details the ways the state has already successfully deterred lawsuits against providers. It concludes that while some provisions of New York's shield law could have provided effective procedural protections, the more substantive portions shoot and miss.

Dr. Carpenter never responded to the complaint, and the Texas district court issued a default judgment against her on February 13, 2025. Part III of this Note suggests an important way New York could protect Dr. Carpenter from the liability imposed by Texas: enacting S.B. 1995, a bill preventing the enforcement of judgments against providers. The Note then addresses potential challenges faced by judgment enforcement provisions in

---

1 Petition and Application for Temporary and Permanent Injunctive Relief at 5, State of Texas v. Carpenter, No. 471-08943-2024 (Tex. Dist. Ct. Dec. 12, 2024) [hereinafter Petition].

shield laws, most notably via the Full Faith and Credit Clause of the Constitution, and suggests ways that shield states may insulate their laws from challenges going forward.

I. Background

To understand the potential workings of shield laws, it is important to understand the landscape of abortion care's legality across the country after *Dobbs*. First, after the U.S. Supreme Court overturned *Roe v. Wade* in 2022,[2] trigger laws took effect, banning abortion with very limited exceptions in over a dozen anti-abortion states.[3] As a result, the number of patients traveling out of state for abortions increased by large margins, and providers in abortion-permissive states continued to provide care to those willing to travel.[4] The FDA's relaxation of regulations further allowed more patients to be treated via the prescription of medication abortion, and virtual clinics employing telehealth services to reach more patients proliferated.[5] Conservative lawmakers doubled down, passing laws imposing civil and criminal liability for providers treating patients from their states or seeking to prescribe and ship abortion medication into their states.[6] Pro-abortion activists, scholars, and ultimately lawmakers countered by devising a new set of laws to protect providers—laws which use a variety of mechanisms to shield providers residing in abortion-permissive states from liability imposed by abortion-hostile states. Shielded by their home states, activists and providers began to lead coordinated efforts to provide reproductive care to patients in need via telehealth prescription of medication abortion.

A. Abortion Care Post-*Dobbs*

1. Interstate Travel

Patients throughout the country increasingly depend on out-of-state abortions. Due to the "trigger laws" that effectuated total or near-total abortion bans as soon as *Roe v. Wade*

2 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022).

3 Kimya Forouzan et al., *The High Toll of U.S. Abortion Bans: Nearly One in Five Patients Now Traveling Out of State for Abortion Care*, GUTTMACHER INST. (Dec. 7, 2023), https://www.guttmacher.org/2023/12/high-toll-us-abortion-bans-nearly-one-five-patients-now-traveling-out-state-abortion-care [https://perma.cc/S6JQ-9WWN].

4 *Id.*

5 *See* David S. Cohen et al., *Abortion Pills*, 76 STAN. L. REV. 317, 325 (2024).

6 *See Abortion in the United States Dashboard*, KFF (Jan. 6, 2026), https://www.kff.org/womens-health-policy/dashboard/abortion-in-the-u-s-dashboard/ [https://perma.cc/FH8L-ELTG].

was overturned, abortion is now illegal, with very limited exceptions, in thirteen states.[7] Nearly one in five patients are now traveling out-of-state for abortion care in America.[8] In 2023, 74% of patients receiving abortions in New Mexico traveled from out-of-state (an increase from 38% in 2020); in Illinois, this percentage doubled from 21% to 42%; and in Colorado, it increased from 13% to 31%.[9] In total, abortions in states bordering others with complete bans increased by 38% between 2020 and 2023.[10] Since 2020, there has been an 11% increase in clinician-provided abortions in states without a total abortion ban.[11] After *Dobbs*, average travel time to the nearest abortion facility increased from twenty-eight to one hundred minutes, and the proportion of women who lived more than one hour's drive from a facility increased from 15% to 33%.[12] Increases in distance were greatest in the Southern states; most residents in Arkansas, Louisiana, Mississippi, and Texas had to drive four or more hours to reach the nearest facility as of September 2022.[13] Patients in Florida face a 2,391% increase in the average driving time to get an abortion, with an additional eight hours and forty-six minutes; in Texas, post-*Dobbs* bans created an 869% increase in average driving times.[14]

Interstate travel is a worst-case scenario for a patient seeking to terminate a pregnancy, leading to profound negative impacts on abortion access across the country. Studies have attempted to illustrate the burdens associated with interstate travel, focusing on the psychological stress of navigating the disclosure of the pregnancy and termination to families or workplaces, the financial costs of having to take off work, pay for travel,

---

7 Total or near-total abortion bans exist in Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, North Dakota, Oklahoma, South Dakota, Tennessee, Texas and West Virginia. *Id.*

8 Forouzan et al., *supra* note 3.

9 *Id.*

10 Isaac Maddow-Zimet & Candace Gibson, *Despite Bans, Number of Abortions in the United States Increased in 2023*, GUTTMACHER INST. (Mar. 19, 2024), https://www.guttmacher.org/2024/03/despite-bans-number-abortions-united-states-increased-2023 [https://perma.cc/H2AS-N8BK].

11 Isaac Maddow-Zimet et al., *Monthly Abortion Provision Study*, GUTTMACHER INST. (Dec. 18, 2024), https://osf.io/k4x7t/ [https://perma.cc/WLT7-L77P].

12 Benjamin Rader et al., *Estimated Travel Time and Spatial Access to Abortion Facilities in the U.S. Before and After the* Dobbs v. Jackson Women's Health *Decision*, 328 JAMA 2041, 2044 (2022).

13 *Id.*

14 Sara Estep, *Abortion Access Mapped by Congressional District: 6-Week Abortion Ban Update*, CTR. FOR AM. PROGRESS (June 20, 2024), https://www.americanprogress.org/article/abortion-access-mapped-by-congressional-district-6-week-abortion-ban-update/ [https://perma.cc/DB8X-DDFA].

childcare, or lodging, and the emotional burden of going to an unfamiliar place after your home state has denied care by law.[15]

Predictably, these burdens do not affect all populations equally, and many factors may lead to disproportionate impacts of abortion restrictions on specific populations. Data reflects that rural women, younger women, and those of lower socioeconomic status are more likely to travel longer distances and bear a higher financial burden in doing so.[16] For instance, in Florida, driving time to get to an abortion clinic for districts with high shares of Black or Hispanic women was more than 90 minutes longer than times for districts with lower shares of these populations.[17] Further, greater shares of Hispanic and Black women report not being able to cover an emergency medical expense using their current savings compared to white women, making interstate travel expenses again more burdensome on these populations.[18] Low-income patients, though more likely to need abortion care, are more likely to be priced out of abortion care due to interstate travel and failure of insurance to cover the medical expense.[19] Reduced access to paid sick days and affordable childcare also exacerbate wealth disparities reflected in abortion access when state laws force patients to travel to another state.[20] Having to raise money for travel and procedure costs can lead to a delay in seeking care, which can cause clinics to turn away patients who exceed

---

15 Katrina Kimport & Maryani Palupy Rasidjan, *Exploring the Emotional Costs of Abortion Travel in the United States Due to Legal Restriction*, 120 CONTRACEPTION 109956, at 3 (2023), https://www.contraceptionjournal.org/article/S0010-7824(23)00009-4/fulltext [https://perma.cc/N6FW-Z6E2].

16 Jill Bar-Walker et al., *Experiences of Women Who Travel for Abortion: A Mixed Methods Systematic Review*, 14 PLOS ONE e0209991, at 17 (2019), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0209991 [https://perma.cc/66DX-K26S].

17 Estep, *supra* note 14.

18 Latoya Hill et al., *What Are the Implications of the Dobbs Ruling for Racial Disparities?*, KFF (Apr. 24, 2024), https://www.kff.org/womens-health-policy/what-are-the-implications-of-the-dobbs-ruling-for-racial-disparities/ [https://perma.cc/Q8F3-PWLH].

19 Usha Ranji et al., *Key Facts on Abortion in the United States*, KFF (Jun. 21, 2024), https://www.kff.org/womens-health-policy/issue-brief/key-facts-on-abortion-in-the-united-states/#How-much-do-abortions-cost [https://perma.cc/UX2U-UXVA].

20 Elizabeth B. Harned & Liza Fuentes, *Abortion Out of Reach: The Exacerbation of Wealth Disparities After* Dobbs v. Jackson Women's Health Organization, A.B.A.: HUM. RTS. MAG. (Jan. 6, 2023), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/wealth-disparities-in-civil-rights/abortion-out-of-reach/ [https://perma.cc/RSH2-SGMD].

states' legal gestational limits.[21] Abortion funds—local organizations which provide direct financial and logistical assistance to abortion seekers—reported a 39% increase in requests for support in the year after the *Dobbs* decision, disbursing a total of over thirty-six million dollars.[22] Lastly, abortion providers in states where abortion is legal and protected have become overwhelmed by such dramatic increases in patients. In turn, this has led to longer wait times and delayed care for patients at "destination facilities"—clinics in states where abortion is legal—that experienced surging demand from patients traveling from states with total or near-total bans.[23]

2. Medication Abortion and Telehealth Services

The "abortion pill revolution" began in 2000 with the FDA's approval of the drug mifepristone as an abortifacient, offering an accessible alternative to the in-clinic procedure for patients seeking an abortion before ten weeks of pregnancy had elapsed.[24] Since then, a complicated regulatory scheme has emerged, and hundreds of studies have proven the drug to be exceptionally safe.[25] Now, a majority of the abortions performed in the United States are done via prescription of medication, particularly as a two-step regimen involving mifepristone and misoprostol, rather than via medical procedure in a doctor's office.[26] There

---

21 *See* Ushma D. Upadhyay et al., *Denial of Abortion Because of Provider Gestational Age Limits in the United States*, 112 AM. J. PUB. HEALTH 1305, 1305 (2022).

22 *Critical Role of Abortion Funds Post-*Roe, NAT'L NETWORK OF ABORTION FUNDS (Jan. 18, 2024), https://abortionfunds.org/abortion-funds-post-roe/ [https://perma.cc/WP77-XMDL]. Though they experienced a dramatic surge in donations in the months immediately following the *Dobbs* decision, there was a "staggering" drop off in giving. Eden Stiffman, *Abortion Funds Face Slowdown in Giving a Year After Supreme Court Ruling*, CHRON. PHILANTHROPY (June 12, 2023), https://www.philanthropy.com/article/abortion-funds-face-slowdown-in-giving-a-year-after-supreme-court-ruling [https://perma.cc/R2RH-G3JL].

23 Caitlin Myers, *Who's Trapped in Post-*Dobbs *America?*, SOC'Y OF FAM. PLAN. (2024), https://societyfp.org/awarded_grants/sfp18-ttc8/ [https://perma.cc/X9WA-8S84] (citing Caitlin Myers, *Abortion Appointment Availability Survey*, SOC'Y OF FAM. PLAN. (May 8, 2024), https://osf.io/z4tcr/wiki/home/ [https://perma.cc/U3XX-8XK4]); *see also* Isaac Maddow-Zimet et al., *New State Abortion Data Indicate Widespread Travel for Care*, GUTTMACHER INST. (Sep. 2023), https://www.guttmacher.org/2023/09/new-state-abortion-data-indicate-widespread-travel-care [https://perma.cc/FF5J-GDQ9] (detailing how regional clustering of states with total bans or severe restrictions amplifies the impact of one state's ban, as a ban in one state can affect the ability of people throughout the region to access care).

24 *See* Cohen et al., *supra* note 5, at 326.

25 *Id.*

26 Amy Friedrich-Karnik, Isabel DoCampo & Candace Gibson, *Medication Abortion Remains Critical to State Abortion Provision as Attacks on Access Persist*, GUTTMACHER INST. (Feb. 25, 2025), https://www.

were approximately 642,700 medication abortions in the United States in 2023, accounting for 63% of all abortions in the formal health care system, and increasing from 2020, when medication abortions accounted for 53% of all abortions.[27]

Providers of reproductive healthcare have sought to ease access barriers by using telehealth to prescribe the medication abortion regimen remotely and relieve destination facilities' overwhelm. In 2021, after the COVID-19 pandemic, the FDA relaxed a prior rule requiring in-person doctor visits for provision of the abortion pill regimen, allowing providers who meet certain requirements to prescribe to patients whom they treat remotely via telehealth.[28] Around 27% of abortions are now performed via telehealth through the prescription of medication abortion, an increase from 4% in April 2022.[29]

Telehealth abortion care has proliferated online. The percentage of facilities offering medication abortion via telehealth increased from 7% to 31% between 2020 and 2022, including both brick-and-mortar facilities and virtual clinics.[30] Virtual abortion clinics, referral networks, and online pharmacies specifically dedicated to abortion, birth control, and emergency contraception take advantage of the FDA's relaxed restrictions and send abortion medication to states where it is legal.[31] Online abortion clinics ship medication directly to patients' homes through specialty pharmacies that meet the FDA's requirements

---

guttmacher.org/2025/02/medication-abortion-remains-critical-state-abortion-provision-attacks-access-persist [https://perma.cc/VZV6-YXFL].

27 Rachel K. Jones & Amy Friedrich Karnik, *Medication Abortion Accounted for 63% of All U.S. Abortions in 2023—An Increase from 53% in 2020*, GUTTMACHER INST. (Mar. 19, 2024), https://www.guttmacher.org/2024/03/medication-abortion-accounted-63-all-us-abortions-2023-increase-53-2020 [https://perma.cc/Q4NQ-DHQE].

28 *U.S. FDA Permanently Allows Mail-Order Abortion Pills*, BBC (Dec. 16, 2021), https://www.bbc.com/news/world-us-canada-59692830 [https://perma.cc/2TJQ-SPDY]. It is also worth noting that the FDA's regulation of abortion medication is anything but lax. There is general consensus in the medical community that the medications are widely over-regulated and over-restricted, particularly in light of their relative safety compared to other widely used medications, like Viagra or penicillin (both of which are more likely to lead to complications than the abortion medications). *See* Cohen et al., *supra* note 5, at 326.

29 *#WeCount Report: April 2022 to June 2025*, SOC'Y OF FAM. PLAN. (Dec. 9, 2025), https://societyfp.org/research/wecount/ [https://perma.cc/S2WJ-75BV].

30 ADVANCING NEW STANDARDS IN REPROD. HEALTH, AVAILABILITY OF TELEHEALTH SERVICES FOR MEDICATION ABORTION IN THE U.S., 2020–2022 (Jun. 2023), https://www.ansirh.org/sites/default/files/2023-06/AFD%20Telehealth%20Issue%20Brief%206-14-23%20Final.pdf [https://perma.cc/C85D-URGE].

31 *See, e.g.*, CARAFEM, https://info.carafem.org/ [https://perma.cc/5UGM-FD9P]; 199 ABORTION TELEMEDICINE, https://www.abortiontelemedicine.com/ [https://perma.cc/T5ZW-VQ3B]; HEY JANE (2026),

to dispense mifepristone, and some offer pharmacy pick-up or expedited shipping.[32] Virtual clinics provide synchronous and asynchronous care, with estimated treatment costs ranging from $90 to $600; a few accept private insurance or Medicaid, while some offer sliding-scale payments, funding from an abortion fund, or other forms of financial assistance to patients.[33] These services are usually offered for pregnancies up to ten to thirteen weeks.[34]

Thus, although in-person abortion procedures require patients seeking out-of-state care to overcome a myriad of travel-related challenges, medication abortion seemed a workable path toward reaching patients who otherwise would have to travel long distances across state lines: where medication abortion is a viable option, patients' physical distance to a clinic has no bearing on their ability to successfully terminate the pregnancy.[35]

However, anti-abortion states caught on to this possibility and introduced additional restrictions specific to the use of medication abortion and telehealth. As a result, most of the above-mentioned virtual clinics only operate in states where providing medication abortion via mail is legal and restrict their services to a small number of states.[36] Some patients and providers were able to work around the restrictions by using mail forwarding and temporary addresses, but this comes with legal risk. Other clinics, unwilling to take on such liability, use software to confirm a patient's location in an abortion-permissive state.[37]

---

https://heyjane.com/ [https://perma.cc/KDH3-PLCQ]; LILITH CLINIC (2026), https://www.lilithclinic.com/ [https://perma.cc/H5E6-2RD6].

32 *See* Leah R. Koenig et al., *Virtual Clinic Telehealth Abortion Services in the United States One Year after* Dobbs*: A Landscape Review*, 26 J. MED. INTERNET RES. E50749, at 5 (Aug. 5, 2024), https://www.jmir.org/2024/1/e50749/PDF [https://perma.cc/C85D-URGE] (finding that virtual clinics have proliferated since the *Dobbs* decision, though some of the clinics studied have since shut down their online presence, suggesting they have ceased or limited their operations).

33 *Id.*

34 *Id.*

35 Mette Løkeland et al., *Medical Abortion with Mifepristone and Home Administration of Misoprostol up to 63 Days' Gestation*, 93 ACTA OBSTET. GYNECOL. SCAND. 647, 651 (2014).

36 Twenty-five states and Washington, D.C. currently do not restrict the use of telehealth medication abortion and the shipment of the drugs to patients. *The Availability and Use of Medication Abortion*, KFF (Mar. 10, 2025), https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/ [https://perma.cc/49WA-ST9M]; *see also* CARAFEM, https://carafem.org/abortion-pills [https://perma.cc/K4B6-GKQZ] (serving 19 states and Washington, D.C. for pregnancies up to 12 weeks); 199 ABORTION TELEMEDICINE, https://www.abortiontelemedicine.com [https://perma.cc/KG9E-NY86].

37 Cohen et al., *supra* note 5, at 330.

Part II.B of this Note details the restrictions imposed by anti-abortion states on medication abortion, as well as the potential liability facing providers who use telehealth to prescribe it.

B. Medication Abortion and Telemedicine Restrictions

1. Nationwide and Administrative Challenges

First, anti-abortion activists tried and failed to eradicate medication abortion provision nationwide, and telehealth prescription across state lines, by directly targeting the FDA's approval of mifepristone.[38] Attacks may also continue on the federal administrative level: *Project 2025* laid out a step-by-step plan for dismantling abortion access in the United States through executive action, directing the FDA to rescind its approval of mifepristone and to take measures to counter "mail-order abortions" by revitalizing the Comstock Act of 1873.[39] This plan includes a directive to "[s]top promoting or approving mail-order abortions in violation of long-standing federal laws that prohibit the mailing and interstate carriage of abortion drugs," eliminating the need for Congressional action entirely.[40] The Biden Administration's Department of Justice issued a memo determining that the Comstock Act only applies when the sender intends for the drug to be used for an illegal abortion, and because every state still has some (if extremely narrow) legal uses of abortion drugs, there is no way to determine the intent of the sender.[41] Although the Department of Justice has

38 Food & Drug Admin. v. All. for Hippocratic Med., 602 U.S. 367 (2024). This case was dismissed on standing grounds at the Supreme Court, *id.* at 374, and mifepristone will likely see additional challenges with new parties in the coming years should the incoming Trump administration fail to revoke FDA approval itself.

39 THE HERITAGE FOUND., MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 458–59 (Paul Dans & Steven Groves eds., 2023), https://static.project2025.org/2025_MandateForLeadership_FULL.pdf [https://perma.cc/5MH7-YL2X]. President Trump has picked Fox News correspondent Marty Makary to lead the FDA, who has not publicly commented on his thoughts about mifepristone, though he has furthered a conclusively debunked claim that fetuses feel pain during abortions. Usha Ranji et al., *A New Reproductive Health Landscape? Possible Actions That Could be Undertaken During the Second Trump Administration*, KFF (Dec. 19, 2024), https://www.kff.org/womens-health-policy/issue-brief/a-new-reproductive-health-landscape-possible-actions-that-could-be-undertaken-during-the-second-trump-administration/ [https://perma.cc/3T4M-SX47].

40 THE HERITAGE FOUND., *supra* note 39, at 459; *see also* Shoshanna Erlich, *Reading the Warning Signs: How Trump's Administration Could Crack Down on Abortion*, MS. MAG. (Jan. 8, 2025), https://msmagazine.com/2025/01/08/trump-administration-doj-bondi-abortion-pill-comstock-act-mifepristone/ [https://perma.cc/SWC5-FPNM].

41 Mabel Felix et al., *The Comstock Act: Implications for Abortion Care Nationwide*, KFF (Apr. 15, 2024), https://www.kff.org/womens-health-policy/issue-brief/the-comstock-act-implications-for-abortion-care-nationwide/ [https://perma.cc/B5LK-46NS].

not yet rescinded or revised this opinion, it could do so at any time.[42] Additionally, many members of the Trump Administration's Office of Legal Counsel have signaled unequivocal positions supporting use of the Comstock Act against abortion providers.[43]

2. State Restrictions

Meanwhile, anti-abortion states have introduced a variety of laws restricting abortion access via medication abortion or telehealth. Thirteen states currently have total or near-total abortion bans in effect, which include bans on the provision of medication abortion.[44] Most of these states have other laws that ban medication abortion and telehealth provision of it, but these laws are superseded by the total bans.[45] An additional thirteen states restrict

---

42 *See* Katelynn Richardson, *Bondi's DOJ Won't Enforce Law That Could Avert Growing Red State Crisis*, DAILY CALLER NEWS FOUND. (March 13, 2026), https://dailycaller.com/2026/03/13/pam-bondi-doj-comstock-act-abortion-pill/ [https://perma.cc/UMY3-AVMU]; Memorandum, Best Practices for OLC Legal Advice and Written Opinions, U.S. Dep't of Just., Off. of Legal Couns. (July 16, 2010), https://www.justice.gov/olc/page/file/1511836/dl?inline [https://perma.cc/3ZY4-MR7Y] (updated June 9, 2022) ("[A]s with any system of precedent, past decisions may be subject to reconsideration and withdrawal in appropriate cases and through appropriate processes.").

43 *See, e.g.*, Susan Rinkunas, *The Trump Administration Is Staffing Up With Comstock Act Abortion Ban Zealots*, BALLS & STRIKES (Jul. 14, 2025), https://ballsandstrikes.org/law-politics/trump-abortion-olc-lawyers/ [https://perma.cc/7T5H-WP7E]; Madison Pauly, *Anti-Abortion Leaders Lobby Trump Officials for an Abortion Pill Crackdown*, MOTHER JONES (Jan. 24, 2025), https://www.motherjones.com/politics/2025/01/the-anti-abortion-movement-is-lobbying-the-trump-administration-for-an-abortion-pill-crackdown/ [https://perma.cc/2VS7-UEUC].

44 Total or near-total bans exist in Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia. *Abortion in the United States Dashboard*, KFF (Jan. 6, 2026), https://www.kff.org/womens-health-policy/abortion-in-the-u-s-dashboard/ [https://perma.cc/BS5R-5XWE]. Though Missouri has a statutory total abortion ban, voters enacted a constitutional amendment protecting abortion access in November 2024, and its laws remain subject to protracted litigation; as of July 2025, a preliminary injunction has prevented the enforcement of some, but not all, of the state's bans and restrictions. Comprehensive Health of Planned Parenthood Great Plains v. Missouri, 2416-CV31931 (Mo. Cir. Ct. July 3, 2025).

45 *See, e.g.*, IND. CODE ANN. § 16-34-2-1(d) (West, Westlaw through 2026 2d Reg. Sess., 124th Gen. Assemb., effective Mar. 5, 2026) (explicitly banning telemedicine); OKLA. STAT. ANN. tit. 63, § 1-729.1 (West, Westlaw through 2026 2d Reg. Sess., 60th Leg., ch. 4); ARK. CODE ANN. §§ 20-16-1504, 20-17-1703 (West, Westlaw through 2025 Reg. Sess., 95th Gen. Assemb.); MISS. CODE ANN. § 41-41-107(3) (West, Westlaw through 2026 Reg. Sess., effective Mar. 25, 2026); ALA. CODE § 26-23E-7 (Westlaw through 2026 Reg. Sess. Act 2026-263); KY. REV. STAT. ANN. § 311.728 (West, Westlaw through 2025 Reg. Sess.) (requiring a provider's physical presence to prescribe the medication); LA. STAT. ANN. § 40:962.2 (Westlaw through 2025 Reg. and 1st Extr. Sess.) (prohibiting shipment of the medication and its sale via the internet).

access to telehealth use for medication abortion in some way.[46] These states do so by requiring the physician's physical presence in order to prescribe the medication, requiring in-person counseling necessitating two separate trips to a clinic, or preventing the shipment of abortion medication in the mail.[47] For instance, Wisconsin requires that the first of the two-drug regimen for medication abortion be taken in the presence of a physician, while Arizona has an explicit ban on the use of telemedicine for abortion.[48] More restrictions loom on the horizon: state legislatures continue to introduce new bills which seek to ban or restrict the use of medication abortion or prohibit its provision via telehealth.[49] On September 17, 2025, Texas governor Greg Abbott passed a comprehensive law banning the manufacture, distribution, mailing, or other provision in any manner of any abortion-inducing drug to a patient within Texas state lines.[50]

3. Extraterritorial Criminalization

Most total or near-total abortion bans include provisions that allow for the imposition of criminal penalties on abortion providers, even when they are acting from states where abortion is completely legal using telehealth services. Thirty-three states currently impose criminal penalties for performing abortions in some instances.[51] Criminal penalties for

---

46 *The Availability and Use of Medication Abortion*, KFF (Mar. 10, 2025), https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/ [https://perma.cc/DPL2-FFE6].

47 *See, e.g.*, N.C. GEN. STAT. ANN. § 90-21.82(b)(5) (West, Westlaw through 2025 Reg. Sess. S.L. 2025-97) (requiring a provider's physical presence); ARIZ. REV. STAT. ANN. § 36-2153 (Westlaw through 2d Reg. Sess., 57th Leg., effective Feb. 12, 2026) (requiring counseling); N.C. GEN. STAT. ANN. § 14-44.1 (Westlaw) (prohibiting shipment).

48 WIS. STAT. ANN. §§ 940.15(5), 253.105(2)(b) (West, Westlaw through 2025 Act 108, except Acts 17, 68, 69, 104, 106, and 107, published Mar. 31, 2026), *challenged by* Planned Parenthood of Wis., Inc. v. Kaul, 384 F. Supp. 3d 982 (W.D. Wis. 2019), *aff'd*, 942 F.3d 793 (7th Cir. 2019); ARIZ. REV. STAT. ANN. § 36-3604 (Westlaw).

49 *See State Legislation Tracker*, GUTTMACHER INST. (Nov. 15, 2025), https://www.guttmacher.org/state-legislation-tracker [https://perma.cc/28Y3-C8GM] (scroll to tools tracking laws which ban the use of medication abortion and which prohibit telemedicine for medication abortion).

50 H.B. 7, 89th Leg., 2d Spec. Sess. (Tex. 2025) (codified at TEX. HEALTH & SAFETY CODE ANN. § 171A.051 (West, Westlaw through 2025 Reg. and 2d Called Sess., 89th Leg.)).

51 ALA. CODE § 26-23H-4 (Westlaw through 2026 Reg. Sess. Act 2026-263); ARIZ. REV. STAT. ANN. §§ 36-2322, 36-2322 (Westlaw); ARK. CODE ANN. §§ 5-61-301–304 (West, Westlaw through 2025 Reg. Sess., 95th Gen. Assemb.); DEL. CODE. ANN. tit. 24, § 1790(b) (West, Westlaw through 153rd Gen. Assemb. ch. 244); FLA. STAT. ANN. §§ 390.01112, 390.0111 (West, Westlaw through 2026 Reg. Sess. effective Mar. 30, 2026); GA. CODE ANN. §§ 16-12-140–141 (West, Westlaw through 2026 Reg. Sess. Act 375); IDAHO

providers can include life imprisonment and fines up to $100,000.[52] These penalties may also apply to patients seeking or obtaining abortions.[53] In October 2024, Louisiana went so far as to enact a law classifying mifepristone and misoprostol as controlled substances,

---

CODE ANN. § 18-622 (West, Westlaw through 2d Reg. Sess., 68th Leg., ch. 3); IND. CODE ANN. § 16-34-2-1 (West, Westlaw through 2026 2d Reg. Sess., 124th Gen. Assemb., effective Mar. 5, 2026); IOWA CODE ANN. §§ 146B.2, 707.7 (West, Westlaw through 2026 Reg. Sess. effective Mar. 25, 2026); KAN. STAT. ANN. § 65-6724(j) (West, Westlaw through 2026 Reg. Sess. effective Apr. 2, 2026); KY. REV. STAT. ANN. § 311.772 (West, Westlaw through 2025 Reg. Sess.); LA. STAT. ANN. § 14:87.7 (Westlaw through 2025 Reg. and 1st Extr. Sess.); MISS. CODE ANN. § 41-41-45 (West, Westlaw through 2026 Reg. Sess., effective Mar. 25, 2026); MO. ANN. STAT. § 188.017(2) (West, Westlaw through 2025 1st Reg. and 2d Extr. Sess., 103rd Gen. Assemb.); MONT. CODE ANN. §§ 50-20-109, 50-20-112 (West, Westlaw through 2025 Reg. Sess. except S.B. 437); NEB. REV. STAT. ANN. § 28-3,106 (West, Westlaw through 2d Reg. Sess., 109th Leg., effective Mar. 13, 2026); NEV. REV. STAT. § 200.220 (West, Westlaw through 83rd Reg. Sess. and 36th Spec. Sess. ch. 13); N.H. REV. STAT. ANN. § 329:44 (Westlaw through 2026 Reg. Sess. ch. 7); N.M. STAT. ANN. §§ 30-5A-3, 30-5A-5 (West, Westlaw through 2026 2d Reg. Sess., 57th Leg., effective Mar. 10, 2026); N.C. GEN. STAT. ANN. § 90-21.81B(2) (West, Westlaw through 2025 Reg. Sess. S.L. 2025-97); N.D. CENT. CODE ANN. § 12.1-19.1-02 (West, Westlaw through 2026 Reg. Sess.); OHIO REV. CODE ANN. § 2919.195(A) (West, Westlaw through 136th Gen. Assemb. File 64); OKLA. STAT. tit. 21, § 861 (West, Westlaw through 2026 2d Reg. Sess., 60th Leg., ch. 4); 18 PA. STAT. AND CONS. STAT. ANN. § 3211(a) (West, Westlaw through 2026 Reg. Sess. Act 10); S.C. CODE ANN. § 44-41-630(B) (Westlaw through 2026 Act 106); S.D. CODIFIED LAWS § 22-17-5.1 (Westlaw through 2026 Reg. Sess. effective Mar. 27, 2026); TENN. CODE ANN. § 39-15-213 (West, Westlaw through 2026 2d Reg. Sess., 114th Gen. Assemb., ch. 613); TEX. HEALTH & SAFETY CODE ANN. § 170A.004 (Westlaw); UTAH CODE ANN. § 76-7a-201 (West, Westlaw through 2025 Gen., 1st Spec., and 2d Spec Sess.); VA. CODE. ANN. § 18.2-71.1 (West, Westlaw through 2026 Reg. Sess. ch. 11); W. VA. CODE ANN. § 16-2R-3 (West, Westlaw through 2026 Reg. Sess. approved Mar. 17, 2026); WIS. STAT. ANN. § 253.107 (Westlaw); WYO. STAT. ANN. § 35-6-505 (West, Westlaw through Laws 2026, ch. 81, § 4, effective Mar. 9, 2026) (Wyoming's prior abortion ban was struck down in State v. Johnson, 582 P.3d 380 (Wyo. 2026)); *see* CUNY SCH. OF L. ET AL., CRIMINALIZATION AND PUNISHMENT FOR ABORTION, STILLBIRTH, MISCARRIAGE, AND ADVERSE PREGNANCY OUTCOMES (Human Rights & Gender Justice Clinic, CUNY School of Law 2023), https://www.law.cuny.edu/wp-content/uploads/media-assets/2023_Clinics_HRJG_SUMMARY_US-Criminalization-of-Abortion-Pregnancy-Outcomes.pdf [https://perma.cc/EZG3-EH8F]; *see also* Mabel Felix, Laurie Sobel & Alina Salganicoff, *Criminal Penalties for Physicians in State Abortion Bans*, KAISER FAM. FOUND. (Mar. 4, 2025), https://www.kff.org/womens-health-policy/criminal-penalties-for-physicians-in-state-abortion-bans/ [https://perma.cc/XUY8-PK9Z].

52 ALA. CODE §§ 26-23H-6(a), 13A-5-6 (Westlaw) (class A felony subject to life imprisonment or a sentence up to 99 years); TEX. HEALTH & SAFETY CODE ANN. § 170A.004 (Westlaw); TEX. PENAL CODE ANN. § 12.32 (Westlaw) (first degree felony subject to 5 to 99 years or life and a fine up to $10,000); LA. STAT. ANN. § 14:87.7(C) (Westlaw) (imprisonment from 1 to 10 years and fines from $10,000 to $100,000); ARK. CODE ANN. § 5-61-404(b) (Westlaw) (up to a 10 year prison sentence and a $100,000 penalty).

53 *See* WENDY A. BACH & MADALYN K. WASILCZUK, PREGNANCY JUST., PREGNANCY AS A CRIME: A PRELIMINARY REPORT ON THE FIRST YEAR AFTER DOBBS 2 (2024), https://www.pregnancyjusticeus.org/wp-content/uploads/2024/09/Pregnancy-as-a-Crime.pdf [https://perma.cc/R77V-QDLH] (documenting five criminal cases in which prosecutions of pregnant individuals contained allegations related to abortion).

creating a crime of "coerced criminal abortion" by means of abortion-inducing drugs and racketeering activity.[54] Notably, anti-abortion states have a valid personal jurisdiction claim over an out-of-state actor who causes the result of a criminal abortion within their state's borders, limited only by a mens rea requirement.[55] As a result, anti-abortion states can prosecute providers residing in abortion-permissive states.

Additionally, though these crimes almost always explicitly exclude abortion recipients from criminal liability, at least sixty-one people have been criminally investigated or arrested for self-managing their own abortion or helping someone else do so.[56] Abortion medication was involved in over half of these cases, and at least eleven of the criminalized individuals had obtained the pills online.[57] Thus, the criminalization of abortion has a profound impact on providers who seek to care for patients beyond their state lines using telehealth and medication abortion, as well as the patients who seek them out.

4. Private Civil Enforcement Mechanisms

Some states have put into effect anti-abortion laws with private civil enforcement mechanisms ("PCEMs"), also known as "bounty hunter" laws, which allow any private citizen to sue anyone they suspect of having performed, provided, aided, or attempted to perform, provide, or aid an abortion to a citizen of their state, even if the conduct occurred in another state.[58] In September 2025, Texas enacted a new law expanding its private right of action to specifically include violations of its telemedicine abortion ban, allowing citizens

---

54 S.B. 276, 2024 Leg., Reg. Sess. (La. 2024) (codified at LA. STAT. ANN. §§ 14:87.1(1)(a), 40:969(C), 14:87.6.1, 3, 15:1352(A)(71), and 40:964 (Schedule IV)(F) (Westlaw)). Nine other states have followed suit, seeking to criminalize the sale, purchase, or distribution of medication abortion drugs. *See* Kimya Forouzan, *State Policy Trends 2025: Full Year Analysis*, GUTTMACHER INST. (Dec. 16, 2025), https://www.guttmacher.org/2025/12/state-policy-trends-2025-full-year-analysis [https://perma.cc/T5YG-92R4].

55 Darryl K. Brown, *Extraterritorial State Criminal Law, Post*-Dobbs, 113 J. CRIM. L. & CRIMINOLOGY 853, 866–67 (2024); *see also* David Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 30–35 (2023).

56 Laura Huss et al., *Self-Care, Criminalized: The Criminalization of Self-Managed Abortion from 2000 to 2020*, IF/WHEN/HOW (2023), https://ifwhenhow.org/wp-content/uploads/2023/10/Self-Care-Criminalized-2023-Report.pdf [https://perma.cc/32DV-LPMB].

57 *Id.*

58 *See, e.g.*, S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021) (codified at TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)(2) (West, Westlaw through 2025 Reg. and 2d Called Sess., 89th Leg.)). For additional discussion on private civil enforcement mechanisms, see generally Charles W. Rhodes & Howard M. Wasserman, *Solving the Procedural Puzzles of the Texas Heartbeat Act and its Imitators: The Potential for Defensive Litigation*,

to sue in qui tam actions over the provision of medication abortion in all forms.[59] Like the criminal provisions, these bills leave abortion providers vulnerable to liability even if they provide care that is legal under their own state's law. Courts in PCEM states must be able to establish personal jurisdiction over the provider, creating a possible defense for brick-and-mortar providers in abortion-permissive states, but telehealth providers remain vulnerable. For providers of in-person abortion care to out-of-state patients, a state attempting to enforce a PCEM would likely lack personal jurisdiction if the entirety of the care occurs (i.e., both abortion medications are ingested) in another state. For telehealth providers prescribing across state lines, however, courts will likely be able to assert personal jurisdiction, as a provider has made sufficient contact with the PCEM state.[60]

In sum, developments in technology and medicine have made abortion safer and easier to access than ever before through telemedicine and medication abortion; in response, anti-abortion actors have enacted a number of draconian civil and criminal measures to ensure that accessing abortion is nearly impossible for patients in conservative states. Cognizant of the fact that patients in anti-abortion states will continue to seek abortions as necessary care regardless of their states' laws, and recognizing that these patients would be relying on providers in abortion-permissive states, pro-abortion activists countered with a new method of ensuring care reached as many patients as possible: new laws that would protect in-state providers from legal liability beyond their home state's borders.

C. Shield Laws

In 2022, abortion-permissive states began passing legislation to protect their own providers from potential liability under the laws of other states. To date, twenty-two states and Washington, D.C. have passed "shield laws," which protect abortion providers from civil, criminal, or professional liability in situations where they have provided care that

---

75 S.M.U. L. REV. 187, 194 (2022), and Diego A. Zambrano et al., *The Full Faith and Credit Clause and the Puzzle of Abortion Laws*, 98 N.Y.U. L. REV. 382, 385 (2023).

59 *See* H.B. 7, 89th Leg., 2d Spec. Sess. (Tex. 2025) (codified at TEX. HEALTH & SAFETY CODE ANN. § 171A.101 (Westlaw)).

60 Further personal jurisdiction discussion is beyond the scope of this article. For additional discussion, see generally Sarah Geller, *The Personal (Jurisdiction) Is Political: The Reach and Overreach of Abortion Bounty-Hunter Laws*, 45 COLUM. J. GENDER & L. 81 (2024) (discussing personal jurisdiction in extraterritorial lawsuits brought under private civil enforcement mechanisms), and Zambrano et al., *supra* note 58, at 385, 388 n.40 (discussing personal jurisdiction and purposeful availment with regard to the mailing of abortion pills).

is completely legal within their own state.[61] The laws seek to protect both brick-and-mortar providers, who may see patients traveling from other restrictive states, and providers who facilitate "shielded" care across state lines using telehealth to prescribe medication abortion to patients in abortion ban or restriction states. The following section provides an overview of the types of provisions included in shield laws across the country, although laws vary greatly from state to state.

1. Criminal Enforcement Provisions

In an effort to prevent the use of their courts to enforce the criminalization of abortion and gender-affirming care, abortion-permissive states have implemented criminal protections for those charged in another state for crimes arising out of in-state acts involving protected care. Some shield laws prohibit arrests and the issuance of warrants for arrest directly, and others prohibit the issuance of summonses for out-of-state prosecution for crimes involving protected healthcare.[62]

Most effectively, twenty-one states with shield laws prohibit extradition of a person charged in another state for engaging in protected care unless the accused was physically present in the demanding state at the time of the alleged offense.[63] These provisions protect telehealth providers who prescribe medication abortion remotely from their home state, which could constitute an actionable crime in abortion-hostile states.[64] Should a hostile state seek to prosecute an individual for prescribing medication abortion to a patient in their state, governors in shield states are able to prevent extradition of the provider for these crimes. Consequently, providers can continue to treat patients both in their home states and across state lines without fear of arrest or prosecution, though they lose this protection upon traveling to the prosecuting state or any other states without shield laws.

---

61 *See* Kimya Forouzan, *Shield Laws Related to Sexual and Reproductive Health Care*, GUTTMACHER INST. (Jan. 5, 2026), https://www.guttmacher.org/state-policy/explore/shield-laws-sexual-and-reproductive-health-care [https://perma.cc/42Q4-3RY9].

62 *See, e.g.*, N.Y. CRIM. PROC. LAW § 140.10(3-a) (McKinney, Westlaw through L. 2026, chs. 1–49, 61–99) (preventing arrest for protected healthcare-related activity); VT. STAT. ANN. tit. 13 § 6650 (West, Westlaw through 2025–2026 Adjourned Sess. effective Mar. 16, 2026) (prohibiting courts from issuing summonses in criminal proceedings). *See generally* Forouzan, *supra* note 61.

63 *See, e.g.*, N.Y. CRIM. PROC. LAW § 570.17 (Westlaw). *See generally* Forouzan, *supra* note 61.

64 *See supra* Section I.B.3.

2. Information, Evidence, and Privacy Protections

Shield laws also seek to ensure patient confidentiality and hinder private or state actors from facilitating the imposition of liability on providers of protected healthcare. Twenty-two states' shield laws include provisions that prohibit state law enforcement from providing investigative assistance to, cooperating with, or expending resources for another state in conjunction with a civil or criminal proceeding regarding protected care.[65] Many states prevent courts from issuing ex parte orders authorizing wiretaps or searches, summonses compelling witness testimony, or subpoenas seeking document evidence for cases involving protected care.[66] Some states go so far as to prevent private businesses from sharing information across state lines.[67] Additionally, some states have employed data privacy protections and address confidentiality programs to protect patients and providers of reproductive healthcare; in 2025, states also passed legislation allowing providers of telehealth abortion medication to request that the dispensing pharmacy print the practice or facility name rather than the provider's individual name in order to prevent out-of-state targeting of individual doctors.[68] Thus, shield laws attempt to prevent claimants from using private civil enforcement mechanisms to successfully bring actions against providers by dramatically hindering discovery processes. They similarly seek to make it very difficult for law enforcement in abortion-hostile states to gather evidence against telehealth providers when the care occurs within the bounds of a shield state.

---

65 Forouzan, *supra* note 61; *see, e.g.*, N.Y. EXEC. LAW § 837-X (Westlaw).

66 *See, e.g.*, COLO. REV. STAT. § 16-15-102(1)(d) (West, Westlaw through 2d Reg. Sess., 75th Gen. Assemb., effective Mar. 31, 2026); N.Y. C.P.L.R. § 3102(e) (Westlaw) (prohibiting witness testimony); N.Y. C.P.L.R. § 3119(g) (Westlaw) (prohibiting issuance of subpoenas).

67 CAL. PENAL CODE § 13778.3(f) (West, Westlaw through 2026 Reg. Sess. ch. 7) (prohibiting in-state businesses from knowingly providing information to another state and from complying with any civil or criminal process for purposes of out-of-state abortion litigation); CAL. CIV. CODE § 1798.99.90 (Westlaw through 2026 Reg. Sess. ch. 7); CONN. GEN. STAT. ANN. § 42-526(a)(1)(C) (West, Westlaw through 2026 Reg. Sess. effective Mar. 3, 2026); NEV. REV. STAT. ANN. § 603A.540 (West, Westlaw through 83rd Reg. Sess. and 36th Spec. Sess. ch. 13) (prohibiting use of geofencing to collect data of a person located at a family planning center or clinic). *See generally* Carleen M. Zubrzycki, *The Abortion Interoperability Trap*, 132 YALE L.J.F. 197 (2022), https://yalelawjournal.org/pdf/F7.ZubrzyckiFinalDraftWEB_6jsh8oxp.pdf [https://perma.cc/FAY6-DEUE] (discussing the gap left by abortion shield law information protections where HIPAA compliance requires interoperability of health systems). For more discussion of geofencing, see generally Marlaina Pinto, Note, *Abortions, Location Data, and the Fourth Amendment: Geofence Warrants in a Post*-Roe *World*, 22 COLO. TECH. L.J. 175 (2023) (discussing geofencing protections in New York, Missouri, Utah, and California).

68 *See, e.g.*, S. 36-A, 2025–2026 Leg., Reg. Sess. (N.Y. 2025) (codified at N.Y. EDUC. LAW §§ 6807(b-1), 6810(1-a) (Westlaw)); S.B. 25-129, 75th Gen. Assemb., Reg. Sess. (Colo. 2025) (codified at COLO. REV. STAT. § 12-280-124(2)(b) (Westlaw)).

3. Judicial Provisions

A subset of states have judicial provisions preventing their courts from applying another state's law if doing so would create liability for protected care.[69] These measures, however, are not particularly helpful in nullifying litigation, as anti-abortion cases will be brought in the courts of the anti-abortion state rather than the shielded state. More effectively, however, a handful of states additionally prohibit the enforcement of anti-abortion judgments issued in another state altogether.[70] These provisions are imperfect measures seeking to nullify the effects of the judgments within state borders, but they notably do not invalidate the judgment permanently, particularly in the issuing state. Additionally, while states like California, Hawaii, and Minnesota have laws that prevent the enforcement of any judgment issued relating to the provision of protected healthcare, other states only prevent their courts from enforcing judgments "issued without jurisdiction."[71] This discrepancy creates a wide gap that excludes judgments against telehealth providers, as states can likely still assert jurisdiction over providers who have availed themselves of the state's laws by prescribing to patients located there.[72]

States have also transparently attempted to protect their shield laws from legal challenge by declaring outright that any other state's law which interferes with, or authorizes liability for, engaging in protected care is contrary to the public policy of the enacting state. This may allow states to elude Full Faith and Credit Clause challenges while continuing to forbid hearing PCEM cases, as the cases would be deemed contrary to the public policy of

69 *See, e.g.*, CAL. HEALTH & SAFETY CODE § 123467.5(b)(1) (Westlaw); CAL. CIV. CODE § 1798.307 (Westlaw); COLO. REV. STAT. § 13-21-133(2) (West, Westlaw through 2d Reg. Sess., 75th Gen. Assemb., effective Mar. 31, 2026); DEL. CODE ANN. tit. 10, § 3928(b)(1) (West, Westlaw through 153rd Gen. Assemb. ch. 244); 735 ILL. COMP. STAT. ANN. 40/28-15 (Westlaw through 2026 Reg. Sess. P.A. 104-460); MASS. GEN. LAWS ANN. ch. 12, § 11I 3/4 (West, Westlaw through 2026 2d Ann. Sess. ch. 11); VT. STAT. ANN. tit. 12 § 7305 (West, Westlaw through 2025–2026 Adjourned Sess. effective Mar. 16, 2026); WASH. REV. CODE ANN. § 7.115.020(4) (West, Westlaw through 2026 Reg. Sess. ch. 267).

70 *See, e.g.*, CAL. HEALTH & SAFETY CODE § 123467.5(b)(2) (Westlaw); COLO. REV. STAT. ANN. § 13-21-133(3) (Westlaw); HAW. REV. STAT. ANN. § 636C-9 (West, Westlaw through 2026 Reg. Sess. Act 2); 735 ILL. COMP. STAT. ANN. 40/28-20 (Westlaw); ME. REV. STAT. ANN. tit. 14, § 9004 (Westlaw through 2025 2d Reg. Sess., 132nd Leg., ch. 607); MD. CTS. & JUD. PROC. § 11-802(a) (West, Westlaw through 2026 Reg. Sess. effective Feb. 24, 2026), MASS. GEN. LAWS ANN. ch. 218 § 4A(c, g) (Westlaw); MINN. STAT. ANN. § 548.252(b) (West, Westlaw through 2026 Reg. Sess. effective Mar. 28, 2026); 23 R.I. GEN. LAWS ANN. § 23-101-4 (West, Westlaw through 2026 Reg. Sess. ch. 6); VT. STAT. ANN. tit. 12, § 7303 (Westlaw).

71 Colorado, Illinois, Maine, Maryland, Massachusetts, Rhode Island, and Vermont laws restrict their judgment enforcement provisions based on jurisdiction or due process. *See supra* note 70.

72 *See supra* Section I.B.4; *supra* note 60.

the state. The actual application of the Full Faith and Credit Clause exception, however, remains to be explored.

4. Professional Protections

Most shield states prevent their licensing boards from taking adverse action against licensees for engaging in protected care or as a result of legal liability or adverse action against the provider's license in an abortion-hostile state.[73] At least three shield states (California, Connecticut, and Illinois) took steps to prevent adverse actions by healthcare institutions against providers who had engaged in protected care.[74] Institutions like hospitals, outpatient clinics, and health centers are therefore prohibited from restricting or terminating a provider's privileges as a result of discipline imposed by an abortion-hostile state. Some states prohibit medical malpractice insurers from taking any adverse action against a health care provider, including rate increases, risk classification changes, and refusal to issue or renew policies, on the basis of the provider's participation in protected care or due to an adverse action in another state.[75]

5. Clawback Provisions

In some states, shield laws contain "clawback" provisions, which establish a private right of action for a party who has a judgment entered against them where liability is based on participation in protected care.[76] Providers who have judgments entered against them may recover the full value of the judgment and attorneys' fees and costs for both the in-state and out-of-state action. In some states, providers cannot make claims until after a judgment has already been entered in another state. However, a majority of shield laws create a right of action for anyone who has a proceeding *commenced* against them in

---

73 Forouzan, *supra* note 61; *see, e.g.*, N.Y. EDUC. LAW § 6531-B (Westlaw).

74 CAL. BUS. & PROF. CODE § 805.9 (Westlaw); CONN. GEN. STAT. ANN. § 19a-567 (West, Westlaw through 2026 Reg. Sess. effective Mar. 3, 2026); 225 ILL. COMP. STAT. ANN. § 65/65-65(a)(1) (Westlaw) (shielding registered nurses); 225 ILL. COMP. STAT. ANN. § 85/30.1(a) (Westlaw) (shielding pharmacies).

75 *See, e.g.*, CAL. INSUR. CODE § 11589.1(a)(1) (Westlaw); COLO. REV. STAT. §§ 10-4-109.6, 10-16-121(1)(f)(I) (Westlaw); CONN. GEN. STAT. ANN. § 38a-835 (Westlaw); DEL. CODE ANN. tit. 18, § 2535 (West, Westlaw through 153rd Gen. Assemb. ch. 244); ME. REV. STAT. ANN. § 2159-F (Westlaw); MD. CODE ANN., INS. § 19-117 (Westlaw); N.Y. INS. LAW § 3436-a (Westlaw); OR. REV. STAT. ANN. § 676.313 (West, Westlaw through 2026 Reg. Sess., 83rd Leg. Assemb., effective Mar. 10, 2026).

76 DEL. CODE ANN. tit. 10, § 3929 (Westlaw); D.C. CODE ANN. § 2-1461.02 (West, Westlaw through Dec. 6, 2025); 740 ILL. COMP. STAT. ANN. 126/29-15 (Westlaw).

another state for participating in protected care, so a judgment need not be entered against them for the right of action to be established.[77] States have varying statutes of limitations for the commencement of a reciprocal claim. Most causes of action do not apply to a judgment entered in another state that is based on an action where no part of the conduct that formed the basis for liability occurred in the shield state. This means that providers who face liability after traveling from the shield state to provide care in abortion-hostile states may not initiate an action under the statute.

6. Telehealth Protections

As shield laws have gained prominence, they have begun to include specific language relevant to the provision of telehealth care. For instance, Colorado's shield law provides that "[a] licensed health-care provider shall not be prosecuted, investigated, or subjected to any penalty if the health-care provider prescribes an abortifacient to a patient and the patient ingests the abortifacient in another state so long as the abortifacient was prescribed or administered consistent with accepted standards of practice under Colorado law and did not otherwise violate Colorado law."[78] The validity of this type of explicit protection has also gone untested, but at least eight states' shield laws specifically include telehealth providers in their protections against out-of-state consequences.[79] As more abortion-hostile states begin to make explicit telehealth prohibitions, shield states continue to expand and strengthen their shield laws to explicitly protect telemedicine abortion care.[80]

---

77 *See, e.g.*, CAL. CIV. CODE § 1798.303 (Westlaw); MASS. GEN. LAWS ANN. ch. 12, § 11I 1/2(d) (West, Westlaw through 2026 2d Ann. Sess. ch. 11); MINN. STAT. ANN. § 604.415 (West, Westlaw through 2026 Reg. Sess. effective Mar. 28, 2026); N.M. STAT. ANN. § 24-35-8 (West, Westlaw through 2026 2d Reg. Sess., 57th Leg., effective Mar. 10, 2026); N.Y. CIV. RTS. LAW § 70-b (Westlaw); VT. STAT. ANN. tit. 12, § 7302(c-d) (West, Westlaw through 2025–2026 Adjourned Sess. effective Mar. 16, 2026); WASH. REV. CODE ANN. § 7.115.040 (West, Westlaw through 2026 Reg. Sess. ch. 267).

78 S.B. 23-188, 74th Leg., Reg. Sess. (Colo. 2023) (codified at COLO. REV. STAT. ANN. § 18-13-133 (Westlaw)).

79 Kimya Forouzan et al., *State Policy Trends 2024: Anti-Abortion Policymakers Redouble Attacks on Bodily Autonomy*, GUTTMACHER INST. (Dec. 16, 2024), https://www.guttmacher.org/2024/12/state-policy-trends-2024-anti-abortion-policymakers-redouble-attacks-bodily-autonomy [https://perma.cc/X5JD-2UM9]; *see also State Legislation Tracker*, GUTTMACHER INST. (Nov. 15, 2025), https://www.guttmacher.org/state-legislation-tracker [https://perma.cc/K32P-CAPF] (scroll to "Protects access to medication abortion").

80 *See id.*; *see also* Forouzan, *supra* note 61.

D. Shielded Abortion Telemedicine

As a result of the passage of shield laws, telehealth provision of abortion has become a valuable tool for abortion providers to provide care to patients in abortion-hostile states, particularly those who cannot physically travel. Recognizing this as one of the most efficient, cost-effective, and accessible ways to provide abortion care to patients in states with abortion bans, pro-abortion resource and advocacy groups like the Abortion Coalition for Telemedicine (ACT) and Plan C have centered their efforts on bolstering interstate telehealth provision of medication abortion.[81] ACT and Plan C's websites provide lists of clinics where patients can find telemedicine abortion care based on their location and gestational age.[82] Providers of abortion medication to states where abortion is illegal can be divided into three categories: community networks which mail pills, e-commerce websites that sell generic pills, and online clinics.

1. Community Networks

First, there are informal services seeking to meet the needs of those in states with total abortion bans, run by community volunteers and nonprofits with an eye towards reproductive justice rather than systematic provision of healthcare. These networks ship generic versions of the medication from within the United States, usually for free.[83] Though they only ship to those with confirmed pregnancies, no medical consultation is provided, and no prescription is needed. The community networks are based on models of community care and mutual aid. Some also provide medical or emotional support during the abortion via secure messaging on apps like Signal or Proton Mail.

2. E-Commerce Medication Websites

Other websites provide limited services and patient support but sell abortion medication cheaply and ship directly to patients in all fifty states.[84] They do not require prescriptions or

---

81 *About*, ABORTION COAL. FOR TELEMEDICINE, https://www.theactgroup.org/#about [https://perma.cc/3HHF-PG8G]; *Abortion Pills by Mail in Every State*, PLAN C (2025), https://www.plancpills.org/ [https://perma.cc/H8K7-URJN].

82 *See supra* note 81.

83 *See, e.g.*, *Read About Community Support Networks*, RED STATE ACCESS (2026), https://www.redstateaccess.com/who-are-community-providers [https://perma.cc/P3LY-HFR8].

84 *See Websites That Sell Pills*, PLAN C (2025), https://www.plancpills.org/websites-that-sell-pills [https://perma.cc/46B4-6C95].

consultations to dispense the pills. While these sites usually provide abortion medication with the most accessible processes and prices, they come with more risks than online clinics. They sell generic abortion pills, usually made in India, which are not regulated by the FDA. Plan C tests the pills they review to ensure that they are real abortifacients but does not guarantee the results or continuing reliability. They do not follow strict data privacy or digital security protocols, leaving patients in states with hostile law enforcement particularly vulnerable to criminal liability for self-managing their abortion.

3. Online Clinics

These clinics use telemedicine platforms to provide pills by mail and clinician support for patients. Clinicians reside and practice in states where abortion is legal and prescribe via in-state pharmacies approved by the FDA to dispense mifepristone.[85] Before shield laws were passed, some online clinics provided pills to patients in abortion-hostile states via international prescribers, distributors, and pharmacies.[86] Patients in abortion-hostile states fill out an online consultation form or have phone or video appointments directly with a doctor to get the prescription. After eligibility is confirmed, the patient is emailed with directions for payment, and the shipment is mailed to their door in nondescript packaging, usually within a week. Patients receive guidance for taking the pills and follow-up care, and some clinics offer secure messaging with providers for ongoing support. These clinics

---

85 *See, e.g.*, AID ACCESS (2026), https://aidaccess.org/ [https://perma.cc/8DR5-EP3K]; WE TAKE CARE OF US, https://www.wetakecareof.us/care [https://perma.cc/7TYP-UFGU]; THE MASS. MEDICATION ABORTION PROJECT (2025), https://www.cambridgereproductivehealthconsultants.org/map [https://perma.cc/68T9-KJUS]; A SAFE CHOICE & OPTIO WOMEN'S HEALTH (2026), https://optiowomenshealth.com/ [https://perma.cc/D3D8-N25F]; ABUZZ (2025), https://www.abuzzhealth.com/ [https://perma.cc/9UBE-HDWE] (does not ship to Texas).

86 The organization on the forefront of telemedicine abortion medication, Aid Access, worked with European doctors to prescribe the medication and dispensed the pills cheaply by mail via a pharmacy in India, until June 2023, when many shield laws were passed. Cohen et al., *supra* note 5, at 330. Other clinics continue to operate under international laws but still ship to the United States, including to abortion-hostile jurisdictions. These clinics relied on lax FDA enforcement of customs regulations, which in most countries allow individuals to receive prescribed medicines for personal use via international mail. Abortion Pills in Private, a European company which shipped medication abortion to the United States, follows this model. ABORTION PILLS IN PRIVATE (2026), https://www.abortionpillsinprivate.com/ [https://perma.cc/RHD7-77FF]; *see also* Stephania Taladrid, *The Post-Roe Abortion Underground*, NEW YORKER (Oct. 10, 2022), https://www.newyorker.com/magazine/2022/10/17/the-post-roe-abortion-underground [https://perma.cc/HCG4-X4ZQ]; Caroline Kitchener, *Blue-State Doctors Launch Abortion Pill Pipeline into States with Bans*, WASH. POST (Jul. 19, 2023), https://www.washingtonpost.com/politics/2023/07/19/doctors-northeast-launch-abortion-pill-pipeline-into-states-with-bans/ [https://perma.cc/6VM8-3YX8].

usually offer more advanced data privacy protections to safeguard patients against digital monitoring by law enforcement.[87]

Shielded telemedicine represents one of the only ways in which patients in abortion-hostile states may obtain reproductive freedom, but it is far from ideal. The landscape for shielded care remains in flux as laws across the country shift. Additionally, online search engine algorithms can obscure providers' visibility to potential patients, making services more difficult to find.[88] Patients using these services may still face criminal or civil liability in their home states for self-managing their abortions, as shield laws do not extend to patients.[89] Patients may face legal liability if they are reported to the police by a subsequent medical provider or an acquaintance, or because of the way they dispose of fetal tissue.[90]

Despite these risks, the strategies employed by shielded providers have proven effective over the past year. From April to June 2024, nearly 10% of all abortions in the United States—nearly 10,000 a month—were telehealth abortions provided by states with shield laws to people in states with restrictions on abortion.[91] By June 2025, this number had risen

---

87 Kristen Poli, *The Most Popular Digital Abortion Clinics, Ranked by Data Privacy*, WIRED (Aug. 21, 2023), https://www.wired.com/story/most-popular-digital-telehealth-medication-abortion-ranked-data-privacy/ [https://perma.cc/6YCT-B7SW]. Aid Access further tells its potential patients that it "has never and will never disclose any private health data to any authority. We will not comply if we are ever subpoenaed." *Aid Access Online Abortion Pill Service Ranked Best for Data Privacy by Wired*, AID ACCESS (2026), https://aidaccess.org/en/page/4011606/aid-access-online-abortion-pill-service-ranked-best-for-data-privacy [https://perma.cc/VQB7-RN6Q].

88 Rachel Cohen, *The Abortion Provider That Republicans Are Struggling to Stop, but Silicon Valley Could*, VOX (May 7, 2022), https://www.vox.com/23056530/aid-access-abortion-roe-wade-pills-mifepristone [https://perma.cc/M7BK-27AR].

89 Huss et al., *supra* note 56 (detailing the 61 cases where patients have been investigated or arrested for self-managing their abortions).

90 Some people facing criminalization for self-managing their abortion have been discovered when tissue has been found in the public sewer system or stored or buried at home, though the majority of confirmed cases came to the attention of law enforcement via reports from people the patients had trusted with information. Huss et al., *supra* note 56, at 30; *see also Frequently Asked Questions*, PLAN C (2025), https://www.plancpills.org/guide-how-to-get-abortion-pills#safety-considerations [https://perma.cc/7R39-WG3U] (under "Is this legal? Can someone get in trouble for using abortion pills?").

91 SOC'Y OF FAM. PLAN., #WECOUNT REPORT: APRIL 2022 TO JUNE 2024, at 4 (Oct. 22, 2024), https://societyfp.org/wp-content/uploads/2024/10/WeCount-Report-8-June-2024-data.pdf [https://perma.cc/9HLW-6X2A]. In April–June 2024, the Society of Family Planning observed an average of over 7,700 monthly telehealth abortions provided under shield laws to people in states with total abortion bans or 6-week bans, and nearly 2,000 monthly telehealth abortions provided under shield laws to people in states with restrictions

to over 15%, and more than half of all telehealth abortions were being provided under shield laws.[92] In this sense, the shield laws have worked: patients in abortion-hostile states, bolstered by their legal protections,[93] are getting abortions from doctors and clinicians in abortion-permissive states.

The extent to which the laws actually prevent providers from facing liability, however, is unclear. Before now, shield laws had never been challenged by abortion-hostile states, and shielded telehealth providers have enjoyed the deterrent effects of the laws rather than their actual protections. By allowing patients to obtain medication by themselves, at home, with heightened digital privacy, shielded telemedicine practices likely evaded legal challenges by making it difficult to discover cases and bring lawsuits in the first place. Individuals receiving care and their providers could be the only ones who know that such care is happening, minimizing the ability of anti-abortion activists to find plaintiffs or individuals willing to come forward and admit that abortive telemedicine care had taken place. Despite abortion-permissive state legislatures touting the ironclad nature of the laws, however, it remains unclear which portions of the procedural and substantive protections the shield laws offer will operate to actually prevent liability for providers.[94] Part II of this Note explores the first case filed to impose liability on a physician for the provision of abortion medication via telehealth.

---

that explicitly ban telehealth abortion or implicitly preclude telehealth due to in-person visit requirements. *Id.* at 5 fig. 3. This amounts to an average monthly number of telehealth abortions provided under shield laws in April–June 2024 of over 9,700, compared to a nationwide monthly average of around 98,000 abortions overall across the first six months of 2024. *Id.* at 2.

92 *#WeCount Report, April 2022 to June 2025: #WeCount Data Explorer*, SOC'Y OF FAM. PLAN. (Dec. 9, 2025), https://societyfp.org/research/wecount/wecount-june-2025-data/ [https://perma.cc/RD94-ZMLX] (showing 95,270 total abortions and 14,770 provided via telehealth under shield laws; this number only reflects data reporting from clinicians providing abortions and does not include e-commerce avenues or community networks).

93 *Id.*

94 Kate Lisa, *State of Politics: Hochul Signs Law to Protect Abortion Providers Using Telemedicine,* N.Y. STATE OF POL. (Jun. 23, 2023), https://nystateofpolitics.com/state-of-politics/new-york/politics/2023/06/23/hochul-signs-law-to-protect-abortion-providers-using-telemedicine [https://perma.cc/85QM-M4Y9].

II. Texas v. Carpenter: A Shield Law's First Test

In December 2024, the Texas Attorney General, Ken Paxton, filed suit against Dr. Margaret Carpenter, a physician operating in New Paltz, New York.[95] Dr. Carpenter is a co-founder of the Abortion Coalition for Telemedicine, which advocates for the passage of shield laws in state legislatures, "established a playbook for shielded clinicians" to provide medication abortion, and now works directly with clinicians to "launch shielded practices so more patients can legally receive interstate telemedicine abortion care."[96] ACT's website at one time described its founders as "leaders in the reproductive freedom movement who have harnessed their collective medical and legal expertise to meet this moment with comprehensive support for the clinicians stepping up to provide telemedicine care for patients in abortion-hostile states."[97] Dr. Carpenter also founded the abortion telemedicine service Hey Jane, a virtual clinic which only sends abortion medication to states where medication abortion is legal.[98] The petition in *Texas v. Carpenter* alleged that Dr. Carpenter provided abortion medication to a patient in Texas through telehealth services in violation of Texas' abortion ban and licensing laws.[99]

A. Factual Allegations

The petition alleged that in May 2024, an unnamed female resident of Collin County, Texas, became pregnant and sought an abortion without consulting the baby's father.[100] This woman was twenty years old and did not want to have a child. Her state's government had forbidden her from terminating the pregnancy; there are no abortion clinics in the state

---

95 Petition, *supra* note 1, at 5.

96 *What We Do*, ABORTION COAL. FOR TELEMEDICINE (2023), https://www.theactgroup.org/what-we-do [https://web.archive.org/web/20241214060107/https://www.theactgroup.org/what-we-do].

97 *Who We Are*, ABORTION COAL. FOR TELEMEDICINE (2023), https://www.theactgroup.org/who-we-are [https://web.archive.org/web/20241214061503/https://www.theactgroup.org/who-we-are].

98 Alejandra O'Connell-Domenech, *Texas AG Sues New York Doctor for Providing Abortion Pills Across State Lines*, HILL (Dec. 13, 2024), https://thehill.com/policy/healthcare/5039888-texas-ag-sues-new-york-doctor-for-providing-abortion-pills-across-state-lines/ [https://perma.cc/C4PE-U4XL]; *see* HEY JANE (2026), https://www.heyjane.com/ [https://perma.cc/32F9-GMU8].

99 Petition, *supra* note 1, at 1.

100 *Id.* at 5.

of Texas.[101] Her most accessible options for receiving in-person abortion care would be driving six hours across Texas and Oklahoma state lines to a clinic in Kansas or flying to New Mexico. Due to the massive influx of out-of-state patients, getting an appointment with a licensed physician in Kansas could take weeks.[102] Because her insurance likely would not cover any abortion procedures, she would likely either pay around $600 out-of-pocket, not including travel expenses, or try to receive funding from an abortion fund online.[103]

Instead, the woman sought to get abortion medication online via telemedicine. The complaint did not allege how she contacted Dr. Carpenter. It did allege that at some point, the woman received one box containing mifepristone, with instructions allegedly written by

---

101 TEX. HEALTH & SAFETY CODE ANN. §170A.002 (West, Westlaw through 2025 Reg. and 2d Called Sess., 89th Leg.); *Abortion Search*, I NEED AN A, https://ineedana.com [https://perma.cc/Z85A-8FRR] (follow "Search your options now" hyperlink, then search location field for "Dallas, Texas").

102 *See* Keith Grant, *Kansas Sees Surge in Out-of-State Abortion Patients*, KWCH (Dec. 20, 2024), https://www.kwch.com/2024/12/20/kansas-sees-surge-out-of-state-abortion-patients/ [https://perma.cc/BB8X-A8XC]. Kansas state law additionally imposes a litany of restrictions and requirements for abortion care, but these are currently enjoined and were enjoined when Dr. Carpenter's patient sought care in 2024. Hodes & Nauser v. Kobach, No. 23-CV-03140, 2023 WL 7130406 (Kan. Dist. Ct. Oct. 30, 2023) (order granting preliminary injunction); 2025 WL 1253697 (Kan. Dist. Ct. April 30, 2025) (upholding injunction). These restrictions include a mandatory 24-hour waiting period after the patient receives state-mandated "counseling" which contains medically unfounded statements that an abortion procedure poses a "risk of premature birth in future pregnancies" and "risk of breast cancer." KAN. STAT. ANN. §§ 65-4a10(a), 65-1130(d)(1), 65-6709 (West, Westlaw through 2026 Reg. Sess. effective Apr. 2, 2026) (limiting performance of abortions to only physicians; imposing a mandatory twenty-four hour waiting period and biased counseling). The case challenging these restrictions went to trial on September 26, 2025, and a decision has yet to be issued. *Challenging Kansas's Harmful Abortion Restrictions*, CTR. FOR REPROD. RTS. (last updated Feb. 6, 2026), https://reproductiverights.org/cases/hodes-nauser-v-kobach/ [https://perma.cc/XL2V-8W4G].

103 *How Much Does an Abortion Cost?*, I NEED AN A, https://www.ineedana.com/estimate-abortion-costs [https://perma.cc/8WGC-9BBE] (estimating an in-clinic procedure to cost an average of $594, and a medication abortion to cost an average of $580). Texas law restricts coverage for all state-regulated insurance plans; even if the patient had private insurance, Texas law requires that insurers cover elective abortions through separate riders which essentially transfer the full costs of the procedure back to patients as premiums. 1 TEX. ADMIN. CODE § 354.1167 (Westlaw through 51 Tex. Reg. No. 1342); TEX. INS. CODE ANN. §§ 1218.003–.005 (Westlaw). Further, it is highly unlikely that even a large private insurer would cover non-emergency medical services for an elective abortion in another state, both due to plan restrictions and due to potential liability for "aiding and abetting" the provision of abortion services. TEX. HEALTH & SAFETY CODE ANN. § 171.208 (Westlaw); *see also* Alina Salganicoff et al., *Abortion Coverage Limitations in Medicaid and Private Insurance Plans*, KFF (Apr. 30, 2026), https://www.kff.org/womens-health-policy/abortion-coverage-limitations-in-medicaid-and-private-insurance-plans [https://perma.cc/Y85D-VSQ9]. Texas law also now prohibits abortion assistance funds. TEX. GOV. CODE § 2273.001 et seq (Westlaw).

Dr. Carpenter to "take this medication first," and a pill bottle of misoprostol with directions to take it after the mifepristone.[104]

After the woman experienced heavy bleeding, she asked the father to take her to the hospital. The hospital alerted the father to the fact that the woman had been pregnant, and he suspected that she had attempted to end the pregnancy.[105] When he returned home, he "discovered the [abortion] medications from Carpenter," but no facts were alleged as to how the medications were linked to Dr. Carpenter. The petition contained no direct attestations from the patient or the potential father. Attorney General Paxton and Ernest C. Garcia, Chief of Texas' Administrative Law Division, then filed the petition and application for temporary and permanent injunctive relief in Collin County, Texas, where the patient resides.[106] Dr. Carpenter never filed an answer to the petition. After proving that the State had adequately served her at her last known address through its Secretary of State, Texas obtained a default judgment against her.[107]

---

104 Petition, *supra* note 1, at 5.

105 *Id.* Patients are not required to report to clinicians that they took abortion medication in order to receive care. Doctors cannot identify the presence of misoprostol in a patient's blood even within five minutes of an oral dose, making a miscarriage and medication abortion medically undetectable. Thus, though the hospital could disclose that the patient had been pregnant, it had no way of knowing that she had taken abortion medication. *Misoprostol Detection in Blood*, GYNUITY HEALTH PROJECTS (2014), https://gynuity.org/assets/resources/factsht_misoinblood_en.pdf [https://perma.cc/YKU2-HBCF]; *Talking to Health Care Providers After a First Trimester Miscarriage or Abortion*, PHYSICIANS FOR REPROD. HEALTH (Apr. 23, 2023), https://www.innovating-education.org/wp-content/uploads/2023/04/23_02-Talking-to-Health-Care-Providers-After-a-First-Trimester-Miscarriage-or-Abortion-One-Pager-1.pdf [https://perma.cc/35M3-Q5V8]. Had the father not "suspected that the biological mother had in fact done something to contribute to the miscarriage or abortion of the unborn child," the patient's symptoms would not be evidence that she had ingested the medication. Petition, *supra* note 1, at 6.

106 Petition, *supra* note 1, at 1. Texas asserted that venue was proper in Collin County under TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a)(1) (Westlaw), which states that all lawsuits shall be brought "in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred." Dr. Carpenter could have challenged this assertion by stating that she performed the acts which created the liability (her mailing of the medication) entirely in New York, but this argument would likely have failed. The standard for telehealth is that the care occurs where the patient, not the provider, is located. Cohen et al., *Abortion Pills*, *supra* note 5, at 356 (citing FED'N OF STATE MED. BDS., THE APPROPRIATE USE OF TELEMEDICINE TECHNOLOGIES IN THE PRACTICE OF MEDICINE 4 (2022), https://www.fsmb.org/siteassets/advocacy/policies/fsmb-workgroup-on-telemedicineapril-2022-final.pdf [https://perma.cc/FKU7-554G]).

107 Default Judgment, State of Texas v. Carpenter, No. 471-08943-2024 (Tex. Dist. Ct. Feb. 13, 2025).

B. Texas' Abortion Laws

Texas law defines abortion as "the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant."[108] Texas regulates the provision of abortion care across three chapters of its Health and Safety Code. The first, Chapter 170, was in place before the overturning of *Roe v. Wade* and prohibits performing an abortion on a viable fetus only during the third trimester of a pregnancy, with certain exceptions.[109]

The second, Chapter 171, consists of eight subchapters passed between 2003 and 2026 and imposes a litany of restrictions on abortion procedures.[110] Relevant here are its general provisions, which state that abortions may only be performed by physicians licensed to practice in Texas and require physicians to have active admitting privileges at a hospital located within thirty miles of the location where the abortion takes place.[111] Additionally, Subchapter D regulates abortion medication and states that abortion medication may not be

---

108 TEX. HEALTH & SAFETY CODE ANN. § 245.002(1) (Westlaw).

109 *Id.* §§ 170.001–170.002 (Westlaw). These provisions are preempted by Section 170A but remain law in Texas.

110 Woman's Right to Know Act, H.B. 15, 78th Reg. Sess. (Tex. 2003) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.001–171.005, 171.011–171.018 (Westlaw) (requiring physicians to discuss specific medical risks with the patient and giving patients the right to review informational materials published by the state)); H.B. 15, 82d Reg. Sess. (Tex. 2011), *amending* TEX. HEALTH & SAFETY CODE ANN. §§ 171.002, 171.012, 171.013(a), 171.015, *and adding* §§ 171.0121–171.0124 (requiring a sonogram prior to an abortion); Pre-Born Pain Act, H.B. 2, 83d Leg., 2d Called Sess. (Tex. 2013), *adding* TEX. HEALTH & SAFETY CODE ANN. § 171.0031 and subchapters C and D (requiring abortion clinics to meet ambulatory surgical standards, requiring doctors performing abortions to have admitting privileges at a nearby hospital, and prohibiting abortions at or after 20 weeks post-fertilization), *invalidated in part by* Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016); S.B. 8, 85th Reg. Sess. (Tex. 2017), *amending* TEX. HEALTH & SAFETY CODE ANN. §§ 171.002(1) and 171.061(1) and adding subchapters F and G (banning partial-birth and dismemberment abortions); S.B. 4, 82d Leg., 2d Called Sess. (Tex. 2021), *amending* TEX. HEALTH & SAFETY CODE ANN. §§ 171.006, 171.061, 171.063 *and adding* §§ 171.0631, 171.0632, 171.065, *and* 171.066 (imposing additional restrictions on the use of medication abortion); Texas Heartbeat Act, S.B. 8, 87th Reg. Sess. (Tex. 2021), *amending* TEX. HEALTH & SAFETY CODE ANN. § 171.012(a) *and adding* Subchapter H (banning abortions after detection of a fetal heartbeat and creation of a private civil enforcement mechanism); H.B. 7, 89th Leg., 2d Spec. Sess. (Tex. 2025) (codified at TEX. HEALTH & SAFETY CODE ANN. § 171A.051 (specifically banning the manufacture, distribution, mailing, or prescription of abortion-inducing drugs to any resident in the state)).

111 TEX. HEALTH & SAFETY CODE ANN. §§ 171.003, 171.0031 (Westlaw). Notably, these two provisions were invalidated by the Supreme Court in Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016), only six years before it would reverse course in Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

provided by courier, delivery, or mail service, and that physicians must examine patients in person before prescribing the medication.[112]

The third chapter, Chapter 170A, was created by Texas' trigger ban legislation, which became effective in August 2022 and preempts much of Chapter 171.[113] This chapter prohibits the performance, induction, or attempt of all abortions, performed at any gestational age, with narrow exceptions for those performed in the exercise of "reasonable medical judgment" to prevent the death or "substantial impairment of a major bodily function" of the mother.[114] Chapter 170A establishes a civil penalty of at least $100,000 for each violation of Section 170A.002 and authorizes the Attorney General to enforce the provision.[115]

Texas' judgment imposes liability on Dr. Carpenter under both Chapters 170A and 171 of its Health and Safety Code, asserting that she performed an abortion via telemedicine without a Texas license or active admitting privileges at a Texas hospital, mailed the patient an abortion-inducing drug, and failed to examine the patient in person.[116] The petition also listed violations of the Texas Occupations Code and the Texas Administrative Code for practicing telemedicine and prescribing a drug without a Texas medical license.[117] Though the Texas Occupations Code creates additional civil penalties of $1,000, enforceable by the

---

112 TEX. HEALTH & SAFETY CODE ANN. §§ 171.063(b-1), (c)(1), (c)(6) (Westlaw).

113 Human Life Protection Act of 2021, H.B. 1280, 87th Reg. Sess. (Tex. 2021) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 170A.001–007 (Westlaw) and taking effect on the 30th day after the issuance of a United States Supreme Court judgment in a decision overruling, wholly or partly, Roe v. Wade)).

114 TEX. HEALTH & SAFETY CODE ANN. §§ 170A.002(a), (b) (Westlaw).

115 *Id.* § 170A.005 (Westlaw).

116 Petition, *supra* note 1, at 4.

117 Default Judgment, State of Texas v. Carpenter, No. 471-08943-2024 (Tex. Dist. Ct. Feb. 13, 2025); Petition, *supra* note 1, at 2. The petition cites TEX. OCC. CODE ANN. §§ 151.002(a)(13)(A) (Westlaw) (defining "practicing medicine"), 151.056(a) (applying the definition to telemedicine), 155.001 (requiring licensure to practice medicine), and 165.159 (creating a criminal penalty for practicing without a license). It also cites 22 TEX. ADMIN. CODE §§ 175.1 (requiring Texas licensure for practicing telemedicine) and 175.4(a), (c) (declaring that the validity of prescriptions issued as a result of telemedicine services are determined by the same standards that apply to in-person settings). The Texas Medical Board has since repealed TEX. ADMIN. CODE § 175.4 and replaced its telemedicine practice requirements in January 2025. *See* 50 Tex. Reg. 2 (Jan. 10, 2025) and 22 TEX. ADMIN. CODE § 175.3 (Westlaw through 51 Tex. Reg. No. 1342).

Attorney General for each violation of the licensing requirements, the petition did not seek such penalties.[118]

C. New York's Shields

Suits like this one are exactly the type of liability that abortion-permissive states sought to protect against when passing shield laws. The New York State Legislature passed S.1066-B, its first shield law, in 2023. Along with the New York State Academy of Family Physicians, Dr. Carpenter's organization, the Abortion Coalition for Telemedicine, was "the key engine" behind passage of the shield law.[119] The law contains provisions clearly meant to help providers like Dr. Carpenter avoid liability for telemedicine provision of reproductive health services to patients in abortion-hostile states, though its success in doing so is yet to be seen. Reporting on the law touted it as providing an "ironclad" shield against criminal and civil litigation relating to the prescription of abortion medication to patients across the United States.[120] This Note argues that though these laws are most certainly not ironclad and will face a significant challenge on appeal, they may successfully provide Dr. Carpenter adequate protection from the civil liability imposed by the Texas Attorney General.

The shield law covers a broad scope of health care services, and it certainly intends to include clinicians like Dr. Carpenter, who provide telehealth services to abortion-hostile states. The law first defines "reproductive health care" to include all services and care relating to the human reproductive system, including that of a "prescribing" or "dispensing" nature and care provided by means of telehealth services.[121] Next, as relevant here, it defines "legally protected health activity" to include any act "undertaken while physically present

---

118 TEX. OCC. CODE ANN. § 165.101 (Westlaw); *see* Petition, *supra* note 1.

119 Carrie N. Baker, *U.S. Clinicians Can Now Mail Abortion Pills to States Banning Abortion, Thanks to Shield Laws in Five States*, MS. MAG. (Jul. 24, 2023), https://msmagazine.com/2023/07/24/usa-mail-abortion-pills/ [https://perma.cc/4MKD-LEP6].

120 *Id.*

121 N.Y. CRIM. PROC. LAW § 570.17(1)(a) (McKinney, Westlaw through L. 2026, chs. 1–49, 61–99) (defining the term to "mean and include all services, care, or products of a medical, surgical, psychiatric, therapeutic, diagnostic, mental health, behavioral health, preventive, rehabilitative, supportive, consultative, referral, prescribing, or dispensing nature relating to the human reproductive system provided in accordance with the constitution and the laws of this state, whether provided in person or by means of telehealth or telehealth services, which includes, but is not limited to, all services, care, and products relating to pregnancy, assisted reproduction, contraception, miscarriage management or abortion, including but not limited to care an individual provides to themself.") (incorporated by reference in civil provisions mentioned).

in this state" by "providers" or "facilitators" of reproductive health care to aid any patient in the "receipt of or attempt to receive reproductive health care, regardless of the location of the recipient of such care."[122]

1. Inapplicable Provisions

Most of New York's law, however, would not have aided Dr. Carpenter in preventing the case from moving forward against her in Texas, even if she had tried to fight the case in Texas courts. New York's shield law modifies its rules of evidence, but the protections of this provision are vague and only apply to New York courts. The provision states that evidence related to a provider's involvement in legally protected health activity with out-of-state patients "shall not be offered against such party as evidence that such party has engaged in any wrongdoing" by virtue of the patient's presence in another state.[123] In New York courts, then, a party bringing an action against Dr. Carpenter could not use any evidence that she had treated patients in Texas or violated Texas laws against her in the proceedings. However, New York rules of evidence do not apply outside of its state borders, and it is difficult to see how this provision would aid Dr. Carpenter or other defendants in her position in out-of-state proceedings. Evidence provisions across various states' shield laws operate in the same way, serving merely as a message to abortion-hostile states that these types of claims are unwelcome in shield states' courthouses. The case against Dr. Carpenter has shown that anti-abortion litigants—particularly those acting on behalf of state governments like Texas'—can effectively leverage the courts in their home states to impose liability without being affected whatsoever by shield laws.

2. Potentially Effective Provisions

One provision of New York's law could have effectively stalled the lawsuit in the discovery phase. New York's shield law prohibits New York courts and county clerks from issuing subpoenas or orders compelling witness testimony or deposition in connection with out-of-state proceedings related to legally protected health activity occurring in New

---

122 *Id.* § 570.17(1)(c)(ii) (Westlaw) (defining the term to include "any act or omission undertaken while physically present in this state to aid or encourage, or attempt to aid or encourage, any person in the receipt of or attempt to receive reproductive health care or gender-affirming care, regardless of the location of the recipient or provider of such care[.]"). "Legally protected health activity" includes acts done by patients, providers and insurance administrators for both reproductive care and gender-affirming care. *See generally Id.* § 570.17(1)(c) (Westlaw).

123 *Id.* § 4550 (Westlaw).

York.[124] Typically, when a party seeks to enforce an out-of-state subpoena or order, it would need to file a petition in a New York court to domesticate it; the court would then issue a local subpoena or order to enforce it in New York.[125] New York courts are now forbidden from domesticating any orders related to provision of legally protected health activity.

Thus, though the Texas court could still have subpoenaed Dr. Carpenter or the Abortion Coalition for Telemedicine for documents, discovery, or witness testimony, the order or subpoena would be unenforceable against them in New York. This could have provided a significant procedural hurdle for the Texas Attorney General in substantiating the allegations that Dr. Carpenter practiced telehealth in violation of Texas' regulations and prescribed the medication. Without any documents or information about Dr. Carpenter's telehealth practice or her records of the appointment to treat the patient in question, Texas would have had to rely solely on indirect evidence of Dr. Carpenter's involvement.[126]

Second, licensing protections in New York will allow Dr. Carpenter to continue to practice medicine in her home state regardless of the judgment against her in Texas. New York's shield law prevents a physician from being disciplined, suspended, or having their license revoked based on the provision of any "legally protected health activity" and creates a limited exemption from professional misconduct.[127] Even if Dr. Carpenter had been convicted of a crime in Texas for shipping the abortion pills, the shield law ensures that criminal or civil liability imposed by another state based on the provision of protected care does not affect the provider's licensure.

---

124 *Id.* §§ 3119(e), 3102(g) (Westlaw).

125 *Id.*

126 That said, shield laws do little to protect Dr. Carpenter's patients' records, as HIPAA requirements require and facilitate the exchange of patient information across state lines:

> [I]magine that Jane Doe, a resident of Missouri, gets an abortion in Connecticut. She then returns home to Missouri, where, under a pending bill, it would be unlawful for any person to perform or induce . . . an abortion on a resident or citizen of Missouri . . . regardless of where the abortion is or will be performed . . . . [E]ven if the new Connecticut law would prevent Jane Doe's Connecticut abortion providers from giving her medical records to prosecutors or litigants in her home state, those prosecutors or litigants could circumvent this protection by subpoenaing any other provider with access to her abortion records.

Zubrzycki, *supra* note 67, at 198. While this concern certainly applies to in-person reproductive care, it is possible that ACT operates outside of HIPAA procedures or otherwise protects patient information from being shared with other providers in Texas.

127 N.Y. EDUC. LAW §§ 6531-B, 6509-f (Westlaw).

Dr. Carpenter also could have used the discovery provision to challenge Texas' jurisdiction over her. Texas asserted jurisdiction over the case under its long-arm statute, which states that a nonresident does business in the state if the nonresident "contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in [Texas]."[128] With the shield law preventing any discovery from Dr. Carpenter or her practice in New York, there may not have been sufficient evidence to prove that Dr. Carpenter "contracted" with the patient in Texas at all for the purposes of the long-arm statute.[129]

New York's law therefore would have provided Dr. Carpenter only a narrow source of protection in the discovery phase of the suit brought by Texas and certainly did not create an ironclad defense against most out-of-state consequences. The court in Collin County could still have issued an order compelling testimony from individuals in Texas, such as the patient's partner, who initially located the abortion medication, or potentially the patient herself.[130] In theory, the Texas court could have subpoenaed the mail service from which the patient received the medication, so long as the company was not located entirely in a shield law state.[131] Further, it is unclear from the petition whether Texas was already in possession of the packages of medication Dr. Carpenter allegedly provided to the patient by mail, but the state could have ordered the patient or her partner to produce them, as they are not covered by the shield law.[132] New York's evidence provision would not apply, and the attorney general could have lawfully entered this as evidence of her wrongdoing and violation of Texas' statutes.

---

128 TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (West, Westlaw through 2025 Reg. and 2d Called Sess., 89th Leg.).

129 *See* Geller, *supra* note 60, at 108 (arguing that the Supreme Court has indicated protection against personal jurisdiction in situations where contacts are based on the sale or prescription of mifepristone). Here, Texas could have made the argument that ACT and Dr. Carpenter had reasonable expectations that they were entering the Texas market by establishing their telemedicine practice specifically to treat patients in states where abortion is illegal. *But see* Walden v. Fiore, 571 U.S. 277, 285 (2014) (holding that physical entry into the state by a defendant through mail is "certainly" a relevant contact, 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.").

130 TEX. CIV. PRAC. & REM. CODE ANN. § 121.013 (Westlaw).

131 *Id.*

132 *See* Zubrzycki, *supra* note 67, at 209.

3. State Resource Provisions

Like many other shield law states, New York prohibits state or local government employees and entities from cooperating with, providing information to, or expending any state resources in furtherance of any investigation or proceeding which seeks to impose civil or criminal liability for legally protected health activity occurring in New York.[133] This provision is now at the center of the conflict between Texas and New York's laws; the government-cooperation provision failed to protect Dr. Carpenter at the initial Texas litigation stage but is now providing the most important protection for her in New York's courts.

At the outset, it was unlikely that Texas would have needed to rely upon New York state resources to further its civil case, as it had already located Dr. Carpenter's home and business addresses at the time of filing the complaint.[134] However, Texas' motion for default judgment evidences that the state successfully leveraged many publicly available state resources against Dr. Carpenter.[135] The motion attaches as exhibits searches for the defendant's information using government licensing lookups from multiple states with shield laws, including New York.[136] First, Texas proves its proper service of the complaint on Dr. Carpenter using the New York State Education Department's Office of the Professions Verification Search;[137] it next attaches two screenshots from the Ulster County Parcel Viewer tool on the county's website to prove her residency at and ownership of property in New Paltz, New York.[138] The motion also attaches a Department of State Division of Corporations entity lookup for Possible Health Medical, P.C., a business of Dr. Carpenter's

---

133 N.Y. EXEC. LAW § 837-X(2) (McKinney, Westlaw through L. 2026, chs. 1–49, 61–99).

134 Colorado, Massachusetts, and Vermont's shield laws add reproductive care providers to their address confidentiality programs in order to provide additional privacy protections, making state resource provisions more impactful. COLO. REV. STAT. § 24-30-2103 (West, Westlaw through 2d Reg. Sess., 75th Gen. Assemb., effective Mar. 31, 2026); MASS. GEN. LAWS ANN. ch. 9A, § 2(1)(b) (West, Westlaw through 2026 2d Ann. Sess. ch. 11); VT. STAT. ANN. tit. 15, §§ 1150–1152 (West, Westlaw through 2025–2026 Adjourned Sess. effective Mar. 16, 2026).

135 Motion for Default Judgment, State of Texas v. Carpenter, No. 471-08943-2024 (Tex. Dist. Ct. Jan. 23, 2025) [hereinafter Motion for Default Judgment].

136 *Id.*

137 Exhibit 1 to Motion for Default Judgment, *supra* note 135, https://eservices.nysed.gov/professions/verification-search [https://perma.cc/2H7S-HKTF].

138 Exhibit 2 to Motion for Default Judgment, *supra* note 135, https://ulstercountyny.gov/maps/parcel-viewer/ [https://perma.cc/53LF-5EE7].

used for telemedicine services.[139] Texas' successful use of state governments' resources to further this claim is in direct violation of New York's broad resource-sharing protection in its shield law, which prohibits all state or local entities from expending any resources in furtherance of any proceeding which seeks to impose civil liability upon a person for legally protected healthcare.[140] Clearly, then, the telemedicine shield laws did not prevent Texas from using New York state resources and information to further the litigation, as New York was not prepared to modify its publicly available resources as part of its compliance with its own shield law.

New York's resources law was not the only one to fail to protect Dr. Carpenter at this stage. Texas produced evidence from other states with shield laws, including Oregon, Illinois, California, Connecticut, and Vermont.[141] Texas offered this not only as evidence that service to Dr. Carpenter's address was proper, but also to prove one of the central points of its claim against her—that she was not a resident of the State of Texas and is therefore in violation of Texas' administrative code:

> Throughout the defendant's self-reporting of her residence, home, home office and her alternate business address, to all the above referenced governmental entities, Dr. Carpenter has never indicated or suggested that she has ever been a resident of the State of Texas or that she maintains a regular place of business in the State of Texas or has any designated agent for service of process in the State of Texas, rather Dr. Carpenter has represented, at all times relevant to the plaintiff's petition, that she is a resident of and has her regular place of business in the State of New York.[142]

---

139 Exhibit 5 to Motion for Default Judgment, *supra* note 135, https://apps.dos.ny.gov/publicinquiry/entitydisplay [https://perma.cc/5MUN-BBTL].

140 N.Y. EXEC. LAW § 837-X(2)(a) (McKinney, Westlaw through L. 2026, chs. 1–49, 61–99) ("No state or local government entity shall cooperate with or provide information to any out-of-state individual or out-of-state agency or department regarding any legally protected health activity in this state, or otherwise expend or use time, moneys, facilities, property, equipment, personnel or other resources in furtherance of any investigation or proceeding that seeks to impose civil or criminal liability or professional sanctions upon a person or entity for any legally protected health activity occurring in this state.").

141 Exhibits 3, 4, 6–10, 12–13 to Motion for Default Judgment, *supra* note 135.

142 Motion for Default Judgment, *supra* note 135.

Texas' open circumvention of shield laws raises many questions, but above all, it speaks to the need for more robust enforcement and modification of shield states' standard operating procedures in order to prevent publicly available resources from being leveraged against providers of telemedicine abortion care.

That said, on March 27, 2025, the acting clerk of Ulster County in Kingston, New York, refused to grant Texas' motion to enforce the judgment rendered against Dr. Carpenter in Collin County, Texas.[143] He also prevented Texas from filing a summons that sought to force Dr. Carpenter to pay the imposed penalty and comply with its ruling.[144] The clerk refused an additional demand by the Texas Attorney General's office in July 2025.[145] Because New York does not have a provision in its laws explicitly blocking the enforcement of judgments, the clerk must rely on the resource sharing provision in order to block this action. From here, Texas will likely bring its challenge to the constitutionality of all shield laws to the Supreme Court.[146]

D. What Texas Didn't Do: Deterrent Effects

1. Criminal Liability

Texas notably did not seek criminal penalties against Dr. Carpenter, though many were available under the state's laws. Chapter 170A creates criminal liability by declaring the performance of a successful abortion to be a first-degree felony.[147] Additionally, violation of Chapter 171's general provisions in Subchapter A constitutes a Class A misdemeanor

---

143 Press Release, Taylor Bruck, Acting Ulster Cnty. Clerk, Statement from Acting County Clerk Taylor Bruck on Filing from Texas Attorney General Ken Paxton (Mar. 27, 2025), https://clerk.ulstercountyny.gov/sites/default/files/2025-03-27%20Rejected%20Filing%20Press%20Release.pdf [https://perma.cc/QT2X-7KWE].

144 *Id.*

145 Michael Hill, *New York Clerk Again Refuses to Enforce Texas Judgment Against Doctor Who Provided Abortion Pills*, ASSOC. PRESS (Jul. 14, 2025), https://apnews.com/article/abortion-pills-lawsuit-texas-new-york-carpenter-2601c059ed475f97e8c8bdd722cce7da [https://perma.cc/4238-GQA3].

146 Pam Belluck, *New York County Clerk Blocks Texas Court Filing Against Doctor Over Abortion Pills*, N.Y. TIMES (Mar. 27, 2025), https://www.nytimes.com/2025/03/27/health/new-york-texas-abortion-shield-law.html [https://perma.cc/7ZPZ-UFYV].

147 TEX. HEALTH & SAFETY CODE ANN. § 170A.004(b) (West, Westlaw through 2025 Reg. and 2d Called Sess., 89th Leg.). Attempts are punishable as second-degree felonies.

punishable by a fine of up to $4,000.[148] Chapter 171, Subchapter D, establishes a state jail felony offense for violation of its provisions.[149]

There are likely many reasons the Attorney General chose not to bring criminal charges against Dr. Carpenter, including the potential for extremely long sentences in the state of Texas, lack of public support for criminalization of abortion in general, and a higher burden of proof in a criminal prosecution.[150] Texas' choice to pursue only civil liability against Dr. Carpenter speaks to a deterrent effect of shield laws on the imposition of criminality onto out-of-state healthcare providers. However, this deterrent effect has not stopped conservative lawmakers in other states from bringing criminal charges. Notably, in Louisiana, Dr. Carpenter was indicted by a grand jury for providing abortion-inducing drugs to a minor child in violation of a separate medication-specific law that criminalizes delivering, dispensing, distributing, or providing a pregnant woman with an abortion-inducing drug and knowingly causing an abortion.[151]

It is very unlikely, however, that the action in Louisiana will hinder Dr. Carpenter's operations. While extraterritorial criminalization poses more complicated questions for in-person care and travel across state lines, telemedicine provision of abortion medication remains particularly well-protected from criminal liability by shield laws. All shield states have enacted provisions preventing the extradition of a clinician facing criminal liability for the provision of protected healthcare.[152] New York law states that the governor will not recognize any demand for the extradition of a person subject to criminal liability based

---

148 *Id.* § 171.0031 (Westlaw).

149 *Id.* § 171.065 (Westlaw).

150 *In Swing States, Majorities of Republicans and Democrats Oppose Criminalizing Abortion Before Fetal Viability*, UNIV. MD. SCH. PUB. POL.: PROGRAM FOR PUB. CONSULTATION (Sep. 4, 2024), https://publicconsultation.org/swing-six-abortion/abortion/ [https://perma.cc/Q32D-MV9B] (finding that support for abortion criminalization at all stages of pregnancy is as low as 7% to 13% in swing states, including only 10% to 25% of Republicans and 3% to 7% of Democrats; nationally, support is just 11% (Republicans 19%, Democrats 5%)).

151 *See* Emily Cochrane & Pam Belluck, *Louisiana Indicts Another Out-of-State Doctor Over Abortion Pills*, N.Y. TIMES (Jan. 13, 2026), https://www.nytimes.com/2026/01/13/us/louisiana-abortion-pills-california-indictment.html [https://perma.cc/PM6D-F837]; Autumn Billings, *Louisiana's Puzzling Prosecution of a New York Abortion Doctor*, REASON (Feb. 10, 2025), https://reason.com/2025/02/10/louisianas-puzzling-prosecution-of-a-new-york-abortion-doctor/#:~:text=On%20January%2031%2C%20a%20West,to%20the%20mother's%20underage%20daughter [https://perma.cc/6MHV-6TEY]; LA. STAT. ANN. § 14:87.9 (Westlaw through 2025 Reg. and 1st Extr. Sess.).

152 *See* Forouzan, *supra* note 61.

on the provision of protected health activity unless the demanding state alleges that the accused provider was present in the demanding state at the commission of the crime.[153] Additionally, New York prevents arrest of any person for protected health activity within the state.[154]

So far, these measures have worked: Governor Kathy Hochul immediately refused Dr. Carpenter's extradition to Louisiana.[155] Had Texas brought criminal charges, New York law would prohibit the governor from recognizing the charges, directing law enforcement to arrest Dr. Carpenter, and extraditing her to Texas for trial. Because telemedicine providers remain lawfully situated in their home states even as they treat patients, these provisions effectively preclude enforcement of potential criminal charges.

2. Private Civil Enforcement Mechanisms

Next, Dr. Carpenter's provision of telehealth medication abortion remains uniquely well-protected from the imposition of liability via Texas' private citizen enforcement mechanism by New York's shield law, which includes a "clawback claim" right of action.

PCEM liability in Texas would likely exist for Dr. Carpenter, and it seems that a plaintiff with proper standing exists in the patient's partner and father of the child. The architects of the "Heartbeat Bill" sought to impose liability for care provided outside of Texas' jurisdiction, including care provided when patients themselves travel out of the state. Worse, Texas' House Bill 7, passed in 2025, updated its "bounty hunter" law to reflect its post-*Dobbs* abortion ban and target out-of-state telemedicine abortion providers, though not in time to apply to Dr. Carpenter's actions.[156] Even without this updated law, and despite the fact that due process concerns provide potential protection from PCEM liability for in-person providers, Texas' PCEM would likely have applied to Dr. Carpenter's actions anyway.[157] Because Dr. Carpenter mailed the medication and had contact with the patient

153 N.Y. CRIM. PROC. LAW § 570.17 (McKinney, Westlaw through L. 2026, chs. 1–49, 61–99).

154 *Id.* § 140.10(3-a) (Westlaw).

155 Pam Belluck, Benjamin Oreskes & Emily Cochrane, *Abortion Provider Won't Be Extradited to Louisiana, N.Y. Governor Says*, N.Y. TIMES (Feb. 13, 2025), https://www.nytimes.com/2025/02/13/nyregion/abortion-extradition-louisiana-doctor.html [https://perma.cc/ZQ2P-DCUC].

156 *See* H.B. 7, 89th Leg., 2d Spec. Sess. (Tex. 2025) (codified at TEX. HEALTH & SAFETY CODE ANN. § 171A.101 (West, Westlaw through 2025 Reg. and 2d Called Sess., 89th Leg.)).

157 Due process constraints likely protected in-person care provided within the abortion-permissive state, as courts in PCEM states must be able to establish personal jurisdiction over the provider. Had Dr. Carpenter

while she was in Texas, an out-of-state party (like the patient's disgruntled partner, for instance) would likely be able to assert personal jurisdiction over Dr. Carpenter, as she has made sufficient contacts with Texas to avail herself of its laws.[158] Moreover, the father of the fetus would likely have proper standing to bring the private enforcement action under Texas' PCEM law.[159] Assuming he was willing to be directly involved in the case and publicly named, it would be very difficult to challenge his standing as an interested party. It seems, then, that many factors could have aligned to finally use Texas' PCEM against an extraterritorial actor.

In June 2022, however, New York passed an additional shield law creating a strong clawback claim for telemedicine doctors. The bill amended New York's Civil Rights law to establish a new cause of action for unlawful interference with protected rights, allowing providers to recover the full costs of any judgment issued against them based on the provision of protected care.[160] A claim arises when any person demonstrates that their receipt or provision of protected care results in litigation or criminal charges brought against them in any court in the United States. Successful claimants may recover compensatory damages, costs, and attorneys' fees, as well as punitive damages in the event that a plaintiff can demonstrate that the action against them was "commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the exercise of rights protected in New York."[161] Had the patient's partner brought a suit against Dr. Carpenter under Texas' bounty hunter law, she could sue him back under § 70-b for the amount of the judgment, costs, and attorneys' fees from both actions, and punitive damages. The New York State Legislature designed the law specifically to protect

---

provided the care to the Texas patient while both were present in New York, and the patient had ingested both medications in New York, due process would likely prevent Texas from asserting its laws over either of them.

158 *See, e.g.*, Hanson v. Denckla, 357 U.S. 235, 253 (1958); TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (West, Westlaw through 2025 Reg. and 2d Called Sess., 89th Leg.).

159 *See* Texas Ass'n of Bus. v. Texas Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993) (standing in Texas courts requires that there "(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought" (citing Bd. of Water Eng'rs of State v. City of San Antonio, 83 S.W.2d 722, 724 (Tex. 1955))); TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West, Westlaw through 2025 Reg. and 2d Called Sess., 89th Leg.). If an action were filed in federal court, or removed to federal court based on diversity of citizenship, federal standing requirements would apply. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992); First Amended Complaint at 1–2, Rodriguez v. Coeytaux, No. 3:25-cv-225 (S.D. Tex. Feb. 1, 2026) (H.B. 7 action, discussed further *infra* note 163, filed in federal court based on diversity of citizenship).

160 S.B. 9039-A, 2022 Leg., Reg. Sess. (N.Y. 2022) (codified at N.Y. CIV. RTS. LAW § 70-b (McKinney, Westlaw through L. 2026, chs. 1–49, 61–99)).

161 N.Y. CIV. RTS. LAW § 70-b(3)(b) (Westlaw).

out-of-state telemedicine practices like those targeted by Texas; in fact, ACT helped write the bill.[162]

Overall, few lawsuits against out-of-state providers using PCEM causes of action have ever been reported, especially post-*Dobbs*; multiple factors likely contribute to this, including the enhanced privacy and security of telemedicine combined with the safety and lack of evidence created by medication abortion.[163] Even where the most motivated of Texas private enforcers are able to find evidence against telemedicine abortion providers, clawback rights of action may have a considerable deterrent effect.

As for Dr. Carpenter, a claim under New York's clawback statute may be available, but any attempt will run into issues with sovereign immunity. Dr. Carpenter's clawback claim would lie against the Texas Attorney General rather than against a private citizen.[164] Under the Eleventh Amendment, a citizen may not sue states or their officials for money damages unless the state has waived sovereign immunity.[165] Thus, though she could bring a case

---

162 Carrie N. Baker, *U.S. Clinicians Can Now Mail Abortion Pills to States Banning Abortion, Thanks to Shield Laws in Five States*, Ms. MAG. (Jul. 24, 2023), https://msmagazine.com/2023/07/24/usa-mail-abortion-pills/ [https://perma.cc/48E3-CU6T].

163 In December 2022, a Texas Court limited the S.B. 8 bounty hunter cause of action to people who had experienced injury under the law, dramatically reducing the number of available plaintiffs, though some aspects of the litigation are still ongoing. Gomez v. Braid, 04-22-00829-CV, 2024 WL 697105 (Tex. App. Feb. 21, 2024); *see also* Geller, *supra* note 60, at 94 (citing Petition, Byrn v. Theard, No. 51499-A (Tex. Dist. Ct. Dec. 5, 2022)). In February of 2026, taking advantage of H.B. 7 and Texas' new PCEM for telemedicine abortion care, Texas citizen Jerry Rodriguez filed an amended complaint in federal court against Dr. Remy Coeytaux, a California doctor responsible for providing Mr. Rodriguez's then-girlfriend with telemedicine abortion care, alleging a violation of the new telemedicine abortion care ban and asserting a claim for wrongful death under Texas' fetal personhood provisions. Analysis of this case is beyond the scope of this article, but it suffices to say that Dr. Coeytaux would be able to invoke California's own clawback provision should a judgment be entered against him, though it certainly did not have a deterrent effect on Mr. Rodriguez in filing his claim. *See* First Amended Complaint, Rodriguez v. Coeytaux, No. 3:25-cv-00225 (S.D. Tex. Feb. 1, 2026); *see also* Zahiyah Carter, *Galveston Man Sues California Doctor Under New Texas Law Allowing Lawsuits Over Abortion Pills*, TEX. TRIB. (Feb. 3, 2026), https://texastribune.org/2026/02/02/texas-california-abortion-pill-lawsuit-bounty-hunter-law-hb-7 [https://perma.cc/2HEJ-C4HG].

164 In 2019, the Supreme Court held that states retain their sovereign immunity from private suits brought in the courts of other states, but how this issue would play out in the face of a clawback statute claim is an open question. *See* Fran. Tax Bd. of Cal. v. Hyatt, 587 U.S. 230, 236 (2019). For additional discussion on sovereign immunity and clawback statutes, including *Hyatt*, see *Comity and Clawback Statutes After S.B. 8*, 102 TEX. L. REV. 185, 214–16 (2023).

165 "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or

against Attorney General Ken Paxton under New York's clawback law, he would have a strong defense against liability under the Eleventh Amendment.

Notably, Vermont's own clawback provision attempts to circumvent sovereign immunity. The statute creates a right of action for tortious interference with a legally protected healthcare activity, including reproductive health services, intended to act similarly to New York's as described above: when someone in another state initiates an action against a Vermont provider of abortion care for treating patients outside of Vermont, the provider may initiate an action for tortious interference.[166] The law states that "an attorney shall not be liable under this section, if acting on behalf of another and within the scope of the attorney's license. A lawyer acting pro se, or a public prosecutor having the personal discretion to decide whether to bring abusive litigation, shall not be immune under this subsection."[167] The validity of this provision has yet to be tested by any parties seeking to use a clawback claim against an Attorney General or prosecutor; it is likely, however, that a suit would not be allowed under the Eleventh Amendment.[168]

Texas' decision to forgo criminal charges, and the relative dearth of private civil enforcement cases, illuminates the ways in which shield laws are currently working to deter imposition of liability on abortion providers. But, to properly protect providers like Dr. Carpenter, New York must expand its laws.

III. Defeating Texas' Impending Challenge

Though New York's shield law has temporarily stopped Texas from enforcing its judgment against Dr. Carpenter, the civil judgment against her still stands, and challenges to the constitutionality of enforcement across state lines are sure to arise. Similar to clawback

---

Subjects of any Foreign State." U.S. CONST. amend. XI; *see Hyatt*, 587 U.S. at 236.

166 VT. STAT. ANN. tit. 12, § 7302(c) (West, Westlaw through 2025–2026 Adjourned Sess. effective Mar. 16, 2026).

167 *Id.* § 7302(g) (Westlaw).

168 The most widely recognized exception to the sovereign immunity doctrine, *Ex parte* Young, is narrow, only applying to prospective relief. It does not permit judgments against state officers declaring that they violated law in the past, as would be the case with Dr. Carpenter's clawback claim. *See* Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (citing *Ex parte* Young, 209 U.S. 123 (1908)). Further, in *Whole Woman's Health II*, the Court held that the *Ex parte* Young doctrine did not apply to the Attorney General but could extend to "executive licensing officials" who have enforcement power via the Health Department in Texas. Whole Woman's Health v. Jackson, 595 U.S. 30, 45 (2021).

claims, preventing enforcement of a judgment would render the verdict essentially symbolic in nature, disincentivizing state officials and individuals alike from filing civil cases. Thus, if the Supreme Court were to uphold New York's refusal to domesticate the judgment and enforce it against Dr. Carpenter, shield states would have successfully defeated the possibility that anti-abortion states could punish doctors outside of their own territory, even where patients receive telemedicine abortion care inside state lines. However, if the Court were to hold the judgment enforceable in New York, the project of telemedicine shield laws would be rendered ineffective. The next section of this Note describes potential challenges to the clerk's refusal to enforce the judgment and argues that the action would likely survive review.

A. Potential Challenges

Anti-abortion states seeking to impose liability, like Texas, may claim that shield provisions violate the Full Faith and Credit Clause. California's law, for instance, explicitly dictates that the State shall not enforce or satisfy a judgment received via an extraterritorial law authorizing civil actions against a person for receiving, seeking, performing, or providing an abortion, or for aiding, abetting, or attempting such activity.[169] The Full Faith and Credit Clause poses a challenge to these laws, as it contains an "exacting" demand to ensure the enforcement of judgments across state lines.[170] Though there is a limited public policy exception to choice of law provisions or "venue bars," the public policy exception does not apply to judgment enforcement.[171] Indeed, the Court has ruled that the clause "ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system . . . demanded it,"

---

169 CAL. HEALTH & SAFETY CODE § 123467.5(b)(2) (West, Westlaw through 2026 Reg. Sess. ch. 7); *see also* MINN. STAT. ANN. § 548.252(b) (West, Westlaw through 2026 Reg. Sess. effective Mar. 28, 2026). 735 ILL. COMP. STAT. ANN. 40/28-20 (Westlaw through 2026 Reg. Sess. P.A. 104-460); VT. STAT. ANN. tit. 12, § 7303 (Westlaw); MASS. GEN. LAWS ANN. ch. 218, § 4A (West, Westlaw through 2026 2d Ann. Sess. ch. 11); COLO. REV. STAT. ANN. § 13-21-133(3) (West, Westlaw through 2d Reg. Sess., 75th Gen. Assemb., effective Mar. 31, 2026).

170 Baker by Thomas v. Gen. Motors Corp., 522 U.S. 222, 233 (1998); Estin v. Estin, 334 U.S. 541, 546 (1948).

171 Nevada v. Hall, 440 U.S. 410, 422 (1979), *overruled on other grounds by* Franchise Tax Bd. of California v. Hyatt, 587 U.S. 230 (2019). Historical analysis supports the use of the public policy exception in favor of shield states, but not private civil enforcement mechanisms. *See* Joseph William Singer, *Conflict of Abortion Laws,* 16 NE. U. L. REV. 313, 345–46 (2024) (the public policy exception has been used historically "only when a state refuses to recognize rights created elsewhere," but not "to allow a state to create obligations by imposing its regulations on conduct that was lawful in the place where it happened.").

and that there are no considerations of policy that would justify denial of an out-of-state judgment.[172]

However, a judicial carve-out does exist where another state's judgment would interfere with the forum state's own police powers. In *Baker by Thomas v. Gen. Motors Corp.*, the Supreme Court specified that a court must have the authority in the first place to issue a judgment before it may displace that of another state.[173] As no state has the authority to regulate enforcement measures in another state, the Full Faith and Credit Clause thus does not force a state to adopt another's practices regarding the time, manner, and mechanisms of enforcing judgments. Instead, "enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law."[174] Using *Baker*'s exception, some courts have essentially created an additional carve-out in the Full Faith and Credit doctrine where the enforcement of an extraterritorial judgment interferes with the valid exercise of a state's police power.[175] This carve-out could apply to the power of each state to regulate abortion on their own terms.

To explicate, in *Rosin v. Monken*, the Seventh Circuit ruled that the Full Faith and Credit Clause did not require that a judgment be enforced where it interfered with a state's powers to regulate its own sex offender registry. The court repurposed *Baker*'s demand that the issuing state have authority and ruled that the Full Faith and Credit Clause need not apply in police power cases, because such authority does not extend past state lines.[176] The plaintiff argued that Illinois was required under the Full Faith and Credit Clause to recognize a New York judgment, which had acknowledged a previous plea agreement exempting him from sex offender registration.[177] The Seventh Circuit ruled that Illinois did not need to displace its own sex offender laws for New York's less restrictive ones, because it had police power over the health and welfare of its citizens and had the right to choose its

---

172 Estin v. Estin, 334 U.S. 541, 546 (1948); Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 438 (1943).

173 522 U.S. 222 (1998).

174 *Id.* at 235.

175 Note that others have declined to do so. *See, e.g.*, Finstuen v. Crutcher, 496 F.3d 1139 (10th Cir. 2007).

176 "In *Baker*, the Supreme Court made clear that the Full Faith and Credit Clause cannot be used by one state to interfere impermissibly with the exclusive affairs of another." Rosin v. Monken, 599 F.3d 574, 577 (7th Cir. 2010) (citing Baker by Thomas v. Gen. Motors Corp., 522 U.S. 222, 239 n.12 (1998)).

177 Rosin v. Monken, 599 F.3d 574 (7th Cir. 2010).

"preferred mechanism[s]" of sex offender enforcement.[178] This satisfied *Baker*'s mandate that a state "cannot command obedience elsewhere on a matter [that it] lacks authority to resolve," because New York had "no authority to dictate to Illinois the manner in which it can best protect its citizenry."[179] The Eleventh and Second Circuits have followed suit with respect to sex offender registration.[180]

Similarly, the Fifth Circuit ruled in *Adar v. Smith* that states may also control the issuance of birth certificates without interference by a judgment from another state, denying a same-sex couple's application for re-issuance of their adoptive child's birth certificate in Louisiana after the couple had legally adopted the child in New York.[181] The Louisiana Registrar of Vital Records and Statistics justified its denial by citing a state law which required couples to be married to adopt,[182] and the Fifth Circuit affirmed that the Full Faith and Credit Clause does not extend to enforcing an adoption decree across state lines.[183] The Registrar had not denied any *recognition* to the New York adoption decree, as it had indeed recognized the plaintiffs as the legal parents of their adopted child, but instead had merely chosen the manner in which it wanted to enforce the decree by refusing to re-issue the birth certificate.[184] Particularly in the area of "family relations," it ruled, each state has a right to enforce judgments as it sees fit.[185]

Thus, shield law states may have a strong argument for using the police power exception by claiming that anti-abortion states do not have the authority to dictate the way other states regulate abortion as a matter of family relations or public health and welfare, and therefore the Full Faith and Credit Clause does not compel them to enforce anti-abortion judgments.

---

178 *Id.* at 577.

179 *Id.* at 240 (quoting *Baker*, 522 U.S. at 240).

180 Lindsey v. Comm'r of Fla. Dep't of L. Enf't, No. 22-10420, 2022 WL 4231823, at *3 (11th Cir. Sep. 14, 2022); Spiteri v. Camacho, 622 F. App'x 9, 10 (2d Cir. 2015).

181 Adar v. Smith, 639 F.3d 146, 150 (5th Cir. 2011).

182 *Adar*, 639 F.3d at 151; *see* LA. CHILD. CODE ANN. art. 1198 (Westlaw through 2025 Reg. and 1st Extr. Sess.).

183 *Adar*, 639 F.3d at 158.

184 *Id.* at 159–160.

185 *Id.* at 161. *But see* Matter of Mary, 169 N.Y.S.3d 483 (N.Y. Sup. Ct. 2022) (holding that New York Court could not, consistent with the Full Faith and Credit Clause, amend petitioner's Vermont birth certificate as required by New York's Civil Rights Law governing petitions for change of sex designation).

Abortion falls squarely into the police powers of the state.[186] States should therefore not have the authority to enforce their own police power on abortion in the courts of other states. Texas' law allows it to hold a New York provider liable for performing an act in New York which is completely legal under New York's laws.[187] For a Texas judgment to be enforceable in New York, Texas must have had the authority to make the judgment against a provider in the first place, and states do not have the authority to make abortion decisions for other states. If New York were to pass S.B. 1995, blocking the judgment against Dr. Carpenter would constitute an exercise of New York's own police power over the telemedicine practices of doctors within its jurisdiction—regardless of where Dr. Carpenter's patient resides.

That said, the Supreme Court has not yet validated this police power exception. In *V.L. v. E.L.*, it ruled that Alabama *was* required to give full faith and credit to a Georgia adoption decree, but did not reference the police power issue directly.[188] *V.L.* instead stated that, where an original issuing court has statutorily granted jurisdiction over matters of adoption, it also has the requisite adjudicatory authority required by *Baker*.[189] Without any further precedent, it may be difficult to argue that anti-abortion judgments require shield states to adopt the enforcement *practices* of another state, particularly where a judgment is only for statutory damages. Shield law states may have a stronger argument where the judgment whose enforcement is sought includes injunctive relief enjoining a provider from performing future abortions, as this could be seen as attempted interference with the shield state's police power to regulate abortion.[190] For instance, Texas' petition against Dr. Carpenter included a prayer for injunctive relief to prevent her from providing medication abortion to Texas residents in the future.[191] New York could argue that any injunction issued against Dr. Carpenter would represent Texas unlawfully interfering with the enforcement of

---

186 *See generally* Barbier v. Connolly, 113 U.S. 27, 31 (1885) (a state's police power permits it to enact laws promoting "the health, peace, morals, education, and good order of the people"); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 300–01 (2022); Bigelow v. Virginia, 421 U.S. 809, 824–25 (1975).

187 The constitutionality of judgment enforcement provisions notwithstanding, enforcement would additionally depend on whether a Texas court could establish personal jurisdiction over the provider. *See supra* note 60.

188 V.L. v. E.L., 577 U.S. 404 (2016).

189 *Id.* at 407.

190 S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021) (codified at TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)(2) (West, Westlaw through 2025 Reg. and 2d Called Sess., 89th Leg.)).

191 Petition, *supra* note 1, at 8–9.

New York's laws; in other words, only New York has the police power to control when and how doctors within its state lines, and licensed to practice under its regulations, prescribe abortion medication.

Anti-abortion states may thus attempt to read *Baker*'s time, manner, and mechanism exceptions much more narrowly. Though both *Rosin* and *Adar* directly cite to it, the *Baker* opinion specifically disavows the notion that it creates a "sweeping exception" to the Full Faith and Credit Clause, instead ruling on the more procedural grounds that an extraterritorial judgment may not interfere with a judicial process underway in another state between *other parties*.[192] Anti-abortion judgments sought to be enforced in a shield law state would involve the same parties litigating across state lines and therefore could be distinguished completely from a narrow reading of *Baker*'s time, manner, and mechanism exception. While there is a path, then, for shield states to defend against Full Faith and Credit Clause challenges on this point, it would be reasonable for the Court to invalidate the judgment enforcement provisions of shield laws.

B. Potential Solutions

Some states attempted to circumvent potential challenges under the Full Faith and Credit Clause by only preventing the enforcement of extraterritorial judgments "issued without jurisdiction."[193] However, courts were never obligated to afford full faith and credit to judgments rendered without subject-matter or personal jurisdiction.[194] These laws likely protect shield state providers who perform abortions on out-of-state patients who travel across state lines to receive their abortions. However, they do not protect telehealth providers who prescribe and supply medication abortion via mail to patients in other states,

---

192 The Michigan judgment is not entitled to full faith and credit; we have endeavored to make plain, because it impermissibly interferes with Missouri's control of litigation *brought by parties who were not before the Michigan court* . . . If the Bakers had been parties to the Michigan proceedings and had actually litigated the privileged character of Elwell's testimony, the Bakers would of course be precluded from relitigating that issue in Missouri.

Baker by Thomas v. Gen. Motors Corp., 522 U.S. 222, 239 n.12 (1998) (internal citations omitted).

193 COLO. REV. STAT. ANN. § 13-21-133(3) (West, Westlaw through 2d Reg. Sess., 75th Gen. Assemb., effective Mar. 31, 2026); 735 ILL. COMP. STAT. ANN. 40/28-20 (Westlaw through 2026 Reg. Sess. P.A. 104-460); MASS. GEN. LAWS ANN. ch. 218, § 4A(g) (West, Westlaw through 2026 2d Ann. Sess. ch. 11); ME. REV. STAT. ANN. tit 14, § 9004(1) (Westlaw through 2025 2d Reg. Sess., 132nd Leg., ch. 607); VT. STAT. ANN. tit. 12, § 7303(a) (West, Westlaw through 2025–2026 Adjourned Sess. effective Mar. 16, 2026).

194 *See* V.L. v. E.L., 577 U.S. 404, 407 (2016).

because providers will likely be found to have sufficient minimum contacts with the state to establish personal jurisdiction, or to have purposefully availed themselves of the state's laws by shipping the medication.[195] As such, these laws do not provide any protections for providers like Dr. Carpenter, and New York should avoid using this wording in crafting a new law to protect telehealth provision of medication abortion.

Meanwhile, states like California, Maryland, and Minnesota do not include this restriction to jurisdictionally-deficient judgments, but their laws may still be amended to better protect telehealth providers.[196] Most of the shield laws passed in 2022 and 2023 only address potential liability via private civil enforcement mechanisms, neglecting action by state officials. To further protect shielded telemedicine practices within their states, legislatures should supplement their shield laws with specific wording covering judgments issued in actions brought by state actors, including penalties, fees, and fines for contempt.

New York does not have any judgment enforcement provisions on its books; a New York court may still compel Dr. Carpenter to pay the judgment issued against her in Texas. New York's shield laws would thus better protect its providers from extraterritorial liability by including a judgment enforcement provision dictating that New York courts may not enforce a judgment in a *manner* which would interfere with any patient's bodily autonomy or reproductive freedom.[197] By wording the law carefully, pro-abortion lawmakers can argue that the law abides by the Full Faith and Credit Clause by merely defining the manner or mechanism by which a judgment may be enforced rather than preventing judgment enforcement entirely. Currently, S.B. 1995, a judgment enforcement law proposed in the New York State Legislature, is worded so as to exempt a provider's personal property or real estate from "application to the satisfaction of [a] money judgment" issued by another state for providing an abortion.[198] This appears to successfully frame the law as regulation of the manner in which the state enforces the judgment: Texas may seek—and even obtain—

---

195 Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement, 326 U.S. 310, 316 (1945); Hanson v. Denckla, 357 U.S. 235, 253 (1958).

196 CAL. HEALTH & SAFETY CODE § 123467.5(b)(2) (West, Westlaw through 2026 Reg. Sess. ch. 7); MD. CODE ANN., CTS. & JUD. PROC. § 11-802(a) (West, Westlaw through 2026 Reg. Sess. effective Feb. 24, 2026); MINN. STAT. ANN. § 548.252(b) (West, Westlaw through 2026 Reg. Sess. effective Mar. 28, 2026).

197 *See, e.g.*, CAL. HEALTH & SAFETY CODE § 123466(a) (Westlaw) ("The state shall not deny or interfere with a woman's or pregnant person's right to choose or obtain an abortion before the viability of the fetus, or when the abortion is necessary to protect the life or health of the woman or pregnant person.").

198 S.B. 1995, 2025 Leg., Reg. Sess. (N.Y. 2025), https://legislation.nysenate.gov/pdf/bills/2025/S1995 [https://perma.cc/KQ2T-2S43].

enforcement in its courts, but New York will not allow the creditor to apply it towards Dr. Carpenter's income or property.[199]

New York also has a catch-all provision in its civil practice laws that allows a judgment debtor to prevent the enforcement of foreign judgments based on any other grounds as a court deems appropriate, requiring only whatever security for satisfaction of the judgment would be required in New York.[200] Dr. Carpenter could attempt to invoke this provision to prevent the enforcement of the judgment for an extended period of time, or, to the extent that the enforcement would not prevent Dr. Carpenter from practicing medicine in the future, without much recourse on the other side under the Full Faith and Credit Clause.

Additionally, New York has a journalist shield law, which could be adapted for the protection of reproductive services. This law allows New York courts to deem foreign defamation judgments against New York journalists non-recognizable or to grant declaratory relief with respect to a journalist's liability for the judgment.[201] New York's abortion shield law could look similar, granting its courts the authority to deem foreign judgments issued in connection with anti-abortion litigation non-recognizable.

CONCLUSION

Abortion law is a mess. It would make far more sense to have a nationwide policy. However, left to Congress, the likely outcome would be a nationwide ban on abortion with few exceptions. This would not accurately reflect current public opinion about

---

199 *Id.*

200 N.Y. C.P.L.R. § 5404(b) (McKinney, Westlaw through L. 2026, chs. 1–49, 61–99) ("Stay - Based upon other grounds. If the judgment debtor shows the supreme court any ground upon which enforcement of a judgment of the supreme court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction of the judgment which is required in this state.").

201 *Id.* § 302(d) (Westlaw) ("Foreign defamation judgment. The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any NY resident, for the purposes of rendering declaratory relief with respect to that person's liability for the judgment, and/or for the purpose of determining whether said judgment should be deemed non-recognizable pursuant to section fifty-three hundred four of this chapter, to the fullest extent permitted by the United States constitution, provided: (1) the publication at issue was published in New York, and (2) that resident or person amenable to jurisdiction in New York (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in New York to comply with the foreign defamation judgment.").

abortion—most Americans do not support total abortion bans.[202] Thus, maintaining a state-by-state abortion policy is likely the only way to ensure that abortion access continues to be available in America. Pro-abortion activists must recognize that there is no returning to a pre-*Dobbs* reality, at least for the next two years or longer, without a significant change in political winds. To protect providers and ensure that bodily autonomy remains intact in as many jurisdictions as possible, pro-abortion lawmakers must be able to anticipate the coming challenges from anti-abortion states and tailor their laws to reflect exceptions to the Full Faith and Credit Clause that defend each state's expression of its own police power. Though the continuous passage of state laws with direct reference to other states' laws is a complicated, resource-heavy approach, it is the most pragmatic one in the face of a conservative-majority executive branch, Congress, and Supreme Court.

---

202 *See Broad Public Support for Legal Abortion Persists 2 Years After Dobbs*, PEW RSCH. CTR. (May 13, 2024), https://www.pewresearch.org/politics/2024/05/13/broad-public-support-for-legal-abortion-persists-2-years-after-dobbs/ [https://perma.cc/JDR8-UXKW]; *In Swing States, Majorities of Republicans and Democrats Oppose Criminalizing Abortion Before Fetal Viability*, UNIV. MD. SCH. PUB. POL.: PROGRAM FOR PUB. CONSULTATION (Sep. 4, 2024), https://publicconsultation.org/swing-six-abortion/abortion/ [https://perma.cc/7PVY-AAH4].

SEX ON TRIAL

NATHALIE GREENFIELD & SANDRA L. BABCOCK*

Abstract

On January 21, 2025, the U.S. Supreme Court recognized in *Andrew v. White* that the State's introduction of sexualizing evidence in a woman's capital trial may violate due process. In Brenda Andrew's case, prosecutors presented evidence about her sexual relationships, clothing, and style of underwear as proof that she was guilty of capital murder. Our research, supported by a grant from the National Science Foundation, reveals for the first time that the prosecution's tactics in Brenda Andrew's case were far from unique. Based on a systematic review of the trial transcripts of every woman currently on death row in the United States, we demonstrate that capital prosecutors routinely weaponize women's sexuality in ways that are legally questionable and culturally regressive in order to secure punitive outcomes. We document cases across multiple states in which prosecutors discuss women's bodies, underwear, intimate relationships, and sexual experiences in their capital trials as proof of their immoral and criminal mindset. In so doing, the State encourages jurors to convict and condemn women based on their violation of gendered moral codes.

We present our findings against a historical backdrop of women's criminal prosecutions in the United States and Europe. The prosecutorial tactics we document are modern-day echoes of sex-shaming tactics commonplace in the prosecution of women for witchcraft and other offenses dating back hundreds of years. Although such tactics have been documented by historians and social scientists in isolated case studies, this paper is the first

* Nathalie Greenfield is an Associate Attorney and Mitigation Specialist at Phillips Black and a Consultant with the Cornell Center on the Death Penalty Worldwide. Sandra L. Babcock is a Clinical Professor of Law at Cornell Law School, where she is the Faculty Director of the Cornell Center on the Death Penalty Worldwide. We gratefully acknowledge the women on death row and their lawyers who have shared critical information and documents that allowed us to carry out this research. Thanks go to our brilliant Cornell colleagues, including Rachel Goldberg, Esha Sraboni, Chelsea Halstead, Bahar Mirhosseni, Kathryn Adamson, Allison Koenecke, and Andrea Wen-Yi Wang. This Article would not have been possible without our excellent team of researchers, including Lauren Byrne, Stuart DeButts, Katie Donoho, Emma Dougherty, Claudia Fleshman, Alexa Johnson-Gomez, Sunni Horton, Robert Kreklau, Emma Lester, Sofía López Cartagena, Corinne Noonan, Marea O'Connor, Colleen Tam, Natalie Turner, Jazé Shaw-Young, Zoie Valencia, and Tylinn Wilson. Special thanks to Natalie Turner for above-and-beyond Bluebooking assistance.

to conclude that the sexualization of women capital defendants is an ongoing and pervasive problem that undermines the quality of justice women receive. We conclude with a call for systemic reform—including legislation—to limit the ways in which prosecutors can invoke irrelevant evidence of women's sex lives in criminal proceedings.

INTRODUCTION

On January 21, 2025, the U.S. Supreme Court recognized in *Andrew v. White* that the State's introduction of sexualizing evidence in a woman's capital trial may violate due process.[1] Brenda Andrew, the only woman on death row in Oklahoma, had been convicted and sentenced to death for the murder of her husband.[2] The Court summarized the evidence introduced to secure her conviction and death sentence:

> [T]he prosecution elicited testimony about Andrew's sexual partners reaching back two decades; about the outfits she wore to dinner or during grocery runs; about the underwear she packed for vacation; and about how often she had sex in her car. . . . In its closing statement, the prosecution again invoked these themes, including by displaying Andrew's "thong underwear" to the jury, by reminding the jury of Andrew's alleged affairs during college, and by emphasizing that Andrew "had sex on [her husband] over and over and over" while "keeping a boyfriend on the side."[3]

Media coverage[4] and commentary[5] failed to recognize an extraordinary aspect of the *Andrew* decision: never before had the Court found that sex-stereotyping evidence could

1 Andrew v. White, 604 U.S. 86, 87 (2025). The authors are counsel for Ms. Andrew.

2 Sandra Babcock, Valena Beety & Susan Sharp, *Why Has Brenda Andrew Been on Death Row for Two Decades? It Has Everything to Do with Sex*, OKLAHOMAN (July 13, 2023), https://www.oklahoman.com/story/opinion/2023/07/13/guests-is-brenda-andrew-on-death-row-for-adultery/70404140007/ [https://perma.cc/U4NS-2URY].

3 *Andrew*, 604 U.S. at 88–89. The Court remanded Ms. Andrew's case and instructed the Court of Appeals to determine "whether a fair-minded jurist could disagree that the evidence 'so infected the trial with unfairness' as to render the resulting conviction or sentence 'a denial of due process.'" *Id.* at 91.

4 *See, e.g.*, John Fritze & Devan Cole, *Supreme Court Revives Case of Death Row Inmate Who Says She Was "Sex-shamed" at Trial*, CNN (Jan. 21, 2025), https://edition.cnn.com/2025/01/21/politics/brenda-andrew-supreme-court-death-penalty-case [https://perma.cc/PXX4-D2UZ].

5 *See, e.g.*, Amy Howe, *Supreme Court Sends Capital Case Back for Reconsideration Over Focus on Sex*, SCOTUSBLOG (Jan. 23, 2025), https://www.scotusblog.com/2025/01/supreme-court-sends-capital-case-back-for-reconsideration-over-focus-on-sex/ [https://perma.cc/QW3V-RJW9].

undermine the fairness of a woman's criminal trial.[6] Absent from the coverage was any insight into the prevalence of sexualizing evidence in women's capital trials, the historical context for such practices, or the extent to which they reflect deeply rooted gender bias.

This Article fills that gap.[7] We analyze the cases of all women currently sentenced to death in the United States to determine how their bodies have been put on trial.[8] Our research reveals that the prosecution's tactics in Ms. Andrew's case were far from unique. Indeed, prosecutors introduced sexualizing evidence in 71% of these cases, ranging from testimony regarding women's sexual experiences to judgments of their appearance. Some of the evidence and argument we describe is explicit, such as the State's introduction of sex toys into evidence. Other evidence is more subtle, such as the argument that girls of color are sexually "mature" for their age.[9] In all instances, prosecutors' sexualization of women capital defendants demeans them and invites jurors to judge them based on gendered moral codes.

The tactics we describe are not novel. Historian David Baker has documented similar practices dating back hundreds of years.[10] More recently, sociologists and legal scholars have described prosecutions of women that relied on gendered tropes to obtain convictions.[11]

---

6 The Supreme Court remanded Ms. Andrew's case to the Court of Appeals for the Tenth Circuit. That court issued a decision on January 13, 2026, declining to grant Ms. Andrew any relief and refusing to consider the full spectrum of the prosecution's sexualizing and sex-stereotyping evidence. *See* Andrew v. Tinsley, 164 F.4th 789 (10th Cir. 2026). The panel decision has been appealed to the en banc court.

7 This Article has been supported by a grant from the National Science Foundation, funding that is now imperiled by the Trump administration's aversion to research focused on discrimination experienced by women, gender minorities, and people of color.

8 As we explain below, our dataset encompasses forty-eight women sentenced to death between 1990 and 2022. This includes all women currently on death row. *See infra* notes 21–24 and accompanying text.

9 As we explain below, this "adultification" of girls of color encourages jurors to view their experiences of child sexual abuse as less harmful.

10 *See* DAVID W. BAKER, WOMEN AND CAPITAL PUNISHMENT IN THE U.S.: AN ANALYTICAL HISTORY 81, 94–99, 153 (2016) (describing capital prosecutions of women throughout U.S. history).

11 *See, e.g.*, Patricia Wilkins, *Stories That Kill: Masculinity and Capital Prosecutors' Closing Arguments*, 71 CLEV. ST. L. REV. 1147, 1184–85 (2023) (citing prosecution arguments in the North Carolina capital case of Velma Barfield); Kathryn A. Farr, *Defeminizing and Dehumanizing Female Murderers: Depictions of Lesbians on Death Row*, 11 WOMEN & CRIM. JUST. 49, 56 (2000) (analyzing twentieth-century capital cases in the United States). *See generally* Jessica Sutton et al., *Death by Dehumanization: Prosecutorial Narratives of Death-Sentenced Women and LGBTQ Prisoners*, 95 ST. JOHN'S L. REV. 1053 (2021); MARY WELEK ATWELL, WRETCHED SISTERS: EXAMINING GENDER AND CAPITAL PUNISHMENT 19 (2014) (describing the role of sexuality

Yet most research in this field has relied on scattered case studies from Europe, Australia, and the United States to draw generalized conclusions about the treatment of women or gender minorities.[12] Because earlier scholars lacked access to trial transcripts for a large number of women, they were forced to speculate about the prevalence of sex-shaming in the contemporary criminal legal system. As a result, the existence of pervasive gender bias in criminal prosecutions remained hidden from public view. Our research provides the first glimpse into the systemic nature of gender bias—a finding that should spur policymakers to adopt systemic solutions.

This is not to say that previous research lacks any empirical foundation. Indeed, the case studies examined by earlier scholars confirm many of our findings. Three themes, in particular, emerge from the scholarship. First, women defendants who are perceived as overtly sexual—either through the clothes they wear, the number of intimate partners they have, or their focus on sexual pleasure—are cast as promiscuous and blameworthy.[13] Case studies from the United Kingdom and the United States have explained as much.[14] Second, women who have same-sex partners are cast as deviant and violent in ways that

---

in the cases of Karla Faye Tucker and Teresa Lewis); Joey L. Mogul, *The Dykier, the Butcher, the Better: The State's Use of Homophobia and Sexism to Execute Women in the United States*, 8 CUNY L. REV. 473 (2005).

12 *See, e.g.*, Sutton et al., *supra* note 11, at 1064; Mogul, *supra* note 11, at 491; *see also* Siobhan Weare, *"The Mad", "The Bad", "The Victim": Gendered Constructions of Women Who Kill Within the Criminal Justice System*, 2 LAWS 337, 346–48 (2013) (describing the cases of Myra Hindley and Rosemary West); LIZZIE SEAL, WOMEN, MURDER AND FEMININITY 30–49, 57–63, 66–83, 106–63 (2010) (describing capital and non-capital cases in the United States and England and Wales).

13 *See, e.g.*, Weare, *supra* note 12, at 347 (noting that female killers who have sexually "deviant" lifestyles are punished harshly); Helena Kennedy, *The Myth of the She-Devil: Why We Judge Female Criminals More Harshly*, GUARDIAN (Oct. 2, 2018), https://www.theguardian.com/uk-news/2018/oct/02/the-myth-of-the-she-devil-why-we-judge-female-criminals-more-harshly [https://perma.cc/G7UD-ALTJ] (describing the cases of Myra Hindley and Amanda Knox).

14 Notable cases include that of Susan Smith, who was capitally prosecuted for killing her children in South Carolina. Ms. Smith's sexual relationships were chronicled by prosecutors and recounted by journalists, who cast her as a "temptress." *See* Barbara Barnett, *Medea in the Media*, 7 JOURNALISM 411, 421–22 (2006). Another example is the notorious case of Myra Hindley, convicted with a male co-defendant of a series of murders in the United Kingdom in the 1960s, in which "the prosecution sexualised all of her relationships even if they were not sexual in nature." Weare, *supra* note 12, at 348. The case of Cynthia Sommers, who was convicted in 2007 of killing her husband in San Diego, California, is also illustrative. During her trial, prosecutors introduced evidence that she had obtained breast implants, participated in a "wet T-shirt contest," and had multiple sexual partners after her husband's death. She was later exonerated. *See* Danielle Bernstein, *Why Women's Wrongful Convictions Are So Difficult to Overcome*, THE APPEAL (Aug. 14, 2023), https://theappeal.org/womens-wrongful-convictions-no-crime-sexual-stereotypes/ [https://perma.cc/BVM4-S7JG].

are explicitly linked to their sexual orientation.[15] Twenty-five years ago, Kathryn Farr examined the cases of five lesbian women on death row in the United States, and concluded that in all five cases the defendants were represented as "masculinized and man-hating."[16] Since then, other scholars have argued that queer women facing capital prosecution are stigmatized as "immoral, deviant, and pathological,"[17] and that prosecutors leverage anti-LGBTQ bias to obtain death sentences.[18] Third, scholars examining non-capital cases have documented how women of color are subjected to a host of stereotypes linked to sexual behavior and expression, including the "adultification" of girls who are victims of gender-based violence[19] and the stereotype of Black women as aggressive.[20]

Our research reinforces these findings. But rather than focusing on isolated case studies, we analyze transcripts drawn from the entire population of women on death row to document patterns of bias. Exposing these patterns allows us to identify how gender bias affects assessments of culpability and death-worthiness. It also serves to identify areas where courts and legislatures should impose greater limits on prosecutorial evidence and rhetoric. Equipped with our data, defense teams can more effectively defend women from deeply prejudicial sexualizing evidence. Ultimately, our aim is to ensure that women in the criminal legal system are judged based on their actions, not their sex lives or appearances.

We begin this Article in Part I by providing an overview of the women in our dataset, including their personal characteristics and crimes of conviction. In Part II, we situate our research in historical context, and in Part III we outline our methodology for the present study. Part IV describes the range of sexualizing evidence and argument utilized by prosecutors

---

15 *See generally* Sutton et al., *supra* note 11; Mogul, *supra* note 11.

16 Farr, *supra* note 11, at 61.

17 Mogul, *supra* note 11, at 480.

18 *See* Mogul, *supra* note 11, at 483–91 (discussing the cases of Bernina Mata in Illinois and Wanda Allen in Oklahoma); Sutton et al., *supra* note 11, at 1058–61 (discussing the cases of Bernina Mata in Illinois, Wanda Allen in Oklahoma, and Aileen Wuornos in Florida).

19 *See* Mikah K. Thompson, *Sexual Exploitation and the Adultified Black Girl*, 94 ST. JOHN'S L. REV. 971, 974 (2020); *cf.* REBECCA EPSTEIN, JAMILIA BLAKE & THALIA GONZÁLEZ, GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 5, 8 (2017), https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf [https://perma.cc/6CL4-QPVF] (describing how Black girls are seen as more sexually knowledgeable and "less needing of protection").

20 *See* Jacklyn Huey & Michael J. Lynch, *The Image of Black Women in Criminology: Historical Stereotypes as Theoretical Foundation*, *in* RACE, CRIME, AND JUSTICE: A READER 127, 133 (Shaun Gabbidon & Helen Taylor Greene eds., 2005).

in contemporary capital cases. In Part V, we explore the impact of sexualizing evidence on the fairness of women's capital prosecutions. Part VI concludes with recommendations for courts, policymakers, prosecutors, and defense teams.

I. Women on Death Row in the United States

This Article builds on research the authors have published regarding forty-eight women sentenced to death in the United States.[21] Below, we describe the characteristics of the women in our dataset and our main research findings to date.

A. Overview

Our dataset encompasses forty-eight persons legally recognized as women[22] who were sentenced to death in the United States between 1990 and 2022.[23] Twenty-eight (58%) of the people in our dataset are white; eleven (23%) are Black; six (13%) are Latina, two (4%) are Asian or Pacific Islander, and one (2%) is Native American.[24] Nineteen women—more than a third of the women in our dataset—were condemned to death in California. The rest were sentenced in Texas (seven women), Alabama (five women), Arizona (three women), North Carolina (two women), Florida (three women), and in nine other states that each

---

21 *See* Sandra Babcock, Nathalie Greenfield & Kathryn Adamson, *Women on Death Row in the United* States, 46 CARDOZO L. REV. 1 (2024) [hereinafter Babcock et al., *Women on Death Row*]; Sandra Babcock & Nathalie Greenfield, *Gender, Violence, and the Death Penalty*, 53 CAL. WEST. INT'L L.J. 327 (2023) [hereinafter Babcock & Greenfield]; Sandra Babcock, *Gendered Capital Punishment*, 31 WM. & MARY J. RACE, GENDER & SOC. JUST. 1 (2025) [hereinafter Babcock, *Gendered Capital Punishment*].

22 Trans women are on death row in states including Ohio, Florida, California, and Oregon. *See Death Row: Women*, DEATH PENALTY INFO. CTR. (Oct. 7, 2025), https://deathpenaltyinfo.org/death-row/women [https://perma.cc/Y8M3-RMRT]; Zyst v. Kelly, 338 Or. App. 597, 599 n.1 (2025). There is one trans man on death row in California. *See* Babcock & Greenfield, *supra* note 21, at 378 n.224. The forty-eight cases in our dataset comprise forty-seven cisgender women and one trans man who presented as a woman at the time of trial. While recognizing shortcomings in our use of terminology, we will refer to those in the dataset as "women" throughout this Article as we primarily analyze their trial experiences, and all presented as women at trial.

23 This group was the entire women's death row population in January 2023, when we began collecting transcripts.

24 We have identified each woman's race based on data maintained by the Death Penalty Information Center, which is based on reporting by the NAACP Legal Defense and Education Fund. *Death Row: Women*, *supra* note 22. We recognize, however, that this data does not capture the complexity of each woman's racial identity. For example, one woman—who is identified as Black by the NAACP Legal Defense and Education Fund—has been identified in court pleadings as a person of Native American and African American descent. *See* Keaton v. State, 375 So. 3d 44, 83 n.7 (Ala. Crim. App. 2021).

sentenced one woman: Georgia, Idaho, Kentucky, Louisiana, Mississippi, Pennsylvania, Ohio, Oklahoma, and Tennessee.

As a group, death-sentenced women share certain distinguishing features. First, the overwhelming majority (96%) have experienced physical, sexual, and other forms of gender-based violence throughout their lives.[25] Second, the great majority (85%) are mothers.[26] Third, most (71%) had no exposure to the criminal legal system prior to their arrest on capital murder charges.[27] Finally, at least 83% of the women in our dataset live with psychological or intellectual disabilities.[28]

The crimes for which women are sentenced to death also share certain salient features. Of the women in our dataset, 85% were condemned to death for killing someone they knew—most commonly a child in their care or an intimate partner.[29] Nearly two-thirds (63%) of the women had co-defendants; of these, almost all were male.[30] Two-thirds of the women's co-defendants were current or former intimate partners, all of whom were male.[31]

B. Gendered Dynamics of Capital Prosecutions

The great majority of the women in our dataset were prosecuted in courtrooms dominated by men. Men "decide whether they will be capitally charged, whether they will receive a plea bargain, whether certain categories of evidence will be admitted, and how their stories will be told."[32] Of the women in our dataset, 96% were prosecuted under a male elected district attorney,[33] and 88% were tried before a male judge.[34] Most women

---

25 *See generally* Babcock & Greenfield, *supra* note 21.

26 Babcock et al., *Women on Death Row*, *supra* note 21, at 17.

27 *Id.* at 12. Of the women in our dataset, 71% had no prior convictions, and 92% had never been convicted of a crime of violence. *See id.*

28 *Id.* at 15.

29 *Id.* at 25.

30 *Id.* at 43.

31 *Id.* at 44.

32 Babcock, *Gendered Capital Punishment*, *supra* note 21, at 3.

33 Babcock et al., *Women on Death Row*, *supra* note 21, at 21.

34 *Id.* at 23.

(69%) had all-male defense teams, and 56% were prosecuted by an all-male team of trial prosecutors.[35]

Our research indicates that the stories trial actors tell about women capital defendants are deeply gendered. Prosecutors, in particular, invoke a variety of stereotypes to persuade juries of women's blameworthiness; the most common involve women's perceived failures as mothers, their scheming or manipulative nature, and their sexual deviance.[36] Defense attorneys, in turn, frequently rely on stereotypes of women as nurturing caretakers.[37]

Women's experiences of gender-based violence also feature prominently in many capital trials.[38] As noted above, nearly all women on death row have experienced gender-based violence in their lives prior to their arrest on capital charges.[39] Women's experiences of violence shape their lives in myriad ways, and often bear directly on questions of legal and moral culpability.[40] But when women testify about the violence they suffered, or when expert witnesses describe the impact of gender-based violence on women's mental health, prosecutors routinely rely on gendered tropes to undermine their experiences.[41]

II. Women's Sexuality on Trial Throughout History

Prosecutors have long emphasized women's sexual behavior and expression in their criminal trials.[42] For centuries, women have been targeted and executed when they express sexuality in ways that are counter to dominant social norms.[43] The weaponization of sex that we observe in today's capital trials developed from this historical context.

---

35 *Id.* at 22.

36 Babcock, *Gendered Capital Punishment*, *supra* note 21, at 11.

37 *Id.* at 13.

38 Babcock & Greenfield, *supra* note 21, at 382.

39 *Id*. at 329.

40 *Id*. at 335.

41 *Id*. at 382.

42 FRANCES HEIDENSOHN, WOMEN AND CRIME 94 (2d ed. 1995) (observing that "[o]ffences which have apparently nothing to do with sexuality are—when committed by women—transformed into expressions of female sexuality or the lack of it.").

43 SEAL, *supra* note 12, at 64 (noting that, throughout history, "[W]omen have been judged more harshly than men if they do not meet expectations of appropriate sexual behaviour in terms of chasteness and

The condemnation of women's sexual expression draws on some of the oldest and most enduring stories in human history. The Christian Bible has long established the perils of the seductive woman. Eve, as the prototypical temptress and source of sin, is one of the most influential cultural figures in this regard.[44] Her story of the forbidden fruit has become the foundational narrative for the concept of sin.[45] Other biblical women, such as Jezebel or Delilah, present similar cautionary tales of unchecked female sexuality and power.[46]

Allegories of dangerous female sexuality are also found in Greek mythology. Whether we look to Circe, the Titan goddess of sorcery who seduces Odysseus; Pasiphae, the Greek goddess whose sexuality produces the monstrous minotaur; or Helen of Troy, whose legendary beauty was the catalyst for a decades-long war, ancient stories are littered with examples of women whose sexuality and appearance signal peril.[47] These powerful tropes about women and sex have persisted over centuries. Criminal legal systems in the Christian-rooted Global North operate within this religious and cultural context.

---

monogamy[.]"). Indeed, in the United States, laws criminalizing sexual relations for women and queer people have existed throughout the country's history. *See, e.g.*, Adultery, N.Y. PENAL LAW § 255.17 (McKinney 2023) (repealed 2024) (criminalizing adultery as a Class B misdemeanor); Lawrence v. Texas, 539 U.S. 558 (2003) (finding unconstitutional previously-held prohibitions on sodomy); *see also* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (overruling federal abortion protections).

44 Sarah Nicholson & Zanne Domoney-Lyttle, *Women and Gender in the Bible and the Biblical World: Editorial Introduction*, 6 OPEN THEOLOGY 706, 706–07 (2020); *see also* Rosemary R. Ruether, *Sexism and Misogyny in the Christian Tradition: Liberating Alternatives*, 34 BUDDHIST-CHRISTIAN STUD. 83, 86–87 (2014).

45 Roche Coleman, *Was Eve the First Femme Fatale?*, 42 VERBUM ET ECCLESIA 1, 2 (2021). While the biblical text of Genesis 3 does not explicitly state that Eve *seduced* Adam after eating the forbidden fruit, later interpretations, particularly those drawing on the "femme fatale" archetype, have portrayed her as actively enticing Adam through her beauty and words. *Id.*

46 The Phoenician princess Jezebel has become a cultural embodiment of female wickedness, sexual immorality, and harlotry. She combines numerous unfeminine attributes: she is idolatrous, foreign, malevolent, and sexually suggestive, making her a powerful symbol of destructive female power and sexual independence. *See* KEVIN KILLEEN, *How Jezebel Became Sexy: Ahab, Naboth's Land and Jezebelian Hermeneutics*, *in* THE POLITICAL BIBLE IN EARLY MODERN ENGLAND 207, 227–28 (2017). In a similar vein, Delilah, Samson's Philistine partner described in Judges 14–16, presents another example of a woman who uses her seductive charm and persistence to betray a man, leading to his downfall. *See* Carol Smith, *Delilah: A Suitable Case for (Feminist) Treatment?*, *in* THE FEMINIST COMPANION TO JUDGES 93, 99 (A. Brenner ed., 1993).

47 Ancient Rome was no different: the goddess Venus was known for her powers of sex and beauty, and Ovid's *Metamorphoses* details the seductive and dangerous power of women's beauty. *See* MARY BEARD, WOMEN AND POWER 9 (2017).

The witch trials of early modern Europe and the colonial United States provide stark examples of these tropes.[48] As far back as the early 1400s, women's sexual histories were used to punish them—particularly in witchcraft cases. At the heart of this weaponization of women's sexual expression was state punishment of behavior that contravened expectations of women as chaste, demure, and deferential, particularly behavior that expressed sexual agency and knowledge.[49] Indeed, as we describe below, women's sexual histories—including histories of promiscuity, sexual agency, and gender-based violence at the hands of men—have long constituted evidence against them. Women's bodies have provided "proof" of crimes, and women have received harsher punishments for not conforming to

48 The European "witch craze" reached its height in the late sixteenth and early seventeenth centuries, during what is known as the "early modern period." By this point tens of thousands of people—predominantly women—had been executed. *See* LYNDAL ROPER, WITCH CRAZE 6–7 (2004). We focus on early modern Europe and the colonial United States because of the extensive scholarship documenting women's trials in these regions—particularly trials in Europe for Satanic witchcraft—and because European legal traditions have contributed to the development of the American legal system. Nevertheless, the patterns we describe below are not confined to the Global North or to the sixteenth and seventeenth centuries. Women are still prosecuted as witches in multiple countries. One 2020 U.N. study reports that there were at least 20,000 documented accusations of witchcraft across 60 countries between 2009 and 2019. U.N. INDEP. EXPERT ON THE ENJOYMENT OF HUM. RTS. BY PERSONS WITH ALBINISM ET AL., CONCEPT NOTE ON THE ELIMINATION OF HARMFUL PRACTICES RELATED TO WITCHCRAFT ACCUSATIONS AND RITUAL KILLINGS 2 (Nov. 2020), https://www.ohchr.org/en/documents/tools-and-resources/concept-note-elimination-harmful-practices-related-witchcraft [https://perma.cc/4ND4-A636]. In the Central African Republic, for example, witchcraft prosecutions make up 40% of court cases, and Saudi Arabia has carried out executions for witchcraft and sorcery within the past decade. Graeme Wood, *Hex Appeal*, ATLANTIC (June 2010), https://www.theatlantic.com/magazine/archive/2010/06/hex-appeal/308103/ [https://perma.cc/7QSC-VMJD]; *Saudi Woman Executed for 'Witchcraft and Sorcery'*, BBC NEWS (Dec. 12, 2011), https://www.bbc.co.uk/news/world-middle-east-16150381 [https://perma.cc/NUE9-PNL2]; *Saudi Arabia: Witchcraft and Sorcery Cases on the Rise*, HUM. RTS. WATCH (Nov. 24, 2009), https://www.hrw.org/news/2009/11/24/saudi-arabia-witchcraft-and-sorcery-cases-rise [https://perma.cc/YDL7-9LN8]. Moreover, women continue to be prosecuted for sexual activity—including capital prosecutions, as occurred in the 2012 case of a woman stoned to death in Mali for having extramarital sex. *See* U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., ADULTERY AS A CRIMINAL OFFENCE VIOLATES WOMEN'S HUMAN RIGHTS 7–8 (2012), https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/AdulteryasaCriminalOffenceViolatesWomenHR.pdf [https://perma.cc/PRW4-CQN2].

49 Women tried for satanic witchcraft were frequently deemed subversive because they were perceived variously as nonsexual or as over-sexual. *See* MARION GIBSON, WITCHCRAFT: A HISTORY IN THIRTEEN TRIALS 14 (2023) ("Witches were often seen as unwomanly women: child-haters, anti-mothers, anti-housewives."); *id.* at 259–60 (explaining that deviant sex, as determined by contemporaneous moral codes, formed a critical component of many women's witchcraft trials). Indeed, some writers have argued that the European witch craze of early modern period was driven, in part, by church leaders' fears of female knowledge regarding the "secrets of nature"—including knowledge of fertility, sex, and reproduction. *See* MATILDA JOSLYN GAGE, WOMAN, CHURCH, AND STATE: A HISTORICAL ACCOUNT OF THE STATUS OF WOMAN THROUGH THE CHRISTIAN AGES, WITH REMINISCENCES OF THE MATRIARCHATE 233 (1893); ROPER, *supra* note 48, at 4 (describing the perceived suspicious nature of women's exchanges, intimacy, and fertility to witch hunters).

sexual expectations of heteronormativity and chastity. The prevalence of testimony and argument about women's sexuality in contemporary capital prosecutions[50] thus builds on prosecutorial practices established hundreds of years ago.

A. Women's Sexual Histories as Evidence

Through the fifteenth to seventeenth centuries in Europe and, later, colonial America, promiscuity and sexual agency became reasons to suspect women of witchcraft.[51] Women "thought to have extramarital lovers or [who] had given birth to illegitimate children" were "marked . . . out as transgressors against Christian morality,"[52] as were "[w]omen who made their own decisions about sex and religion."[53] These women were targeted as witches and capitally punished because "[t]heir unregulated sexual activities and their lone childbearing troubled their accusers, and were thought to be linked to special female knowledges [sic] about sex and fertility."[54] One of the earliest accounts of a witchcraft trial involves accusations against Helena Scheuberin in Austria, a woman who initially aroused suspicions because she had multiple extramarital affairs. Her accusers argued that she was "promiscuous, untrustworthy, independent . . . deceitful [and] spirited."[55] During her interrogation, she was also asked if she was a virgin at the time of her marriage.[56]

Ms. Scheuberin's trial is far from unusual. Throughout the early modern period, women as far apart as the Arctic Circle, Scotland, and the colonial United States were confronted with evidence of their adultery, sexual desires, and other unchristian sexual practices as

---

50 *See infra* Part IV.

51 GIBSON, *supra* note 49, at xvi.

52 *Id.*

53 *Id*. at 12.

54 *Id*. at xvi.

55 *Id.* at 12. Helena Scheuberin's "outspoken" nature rendered her a target because of her defiance of religious and cultural tropes in fifteenth-century Austria. Condemnation of women for using blunt language was not confined to that era. Nellie Duncan, for example, was tried in 1940s Britain under witchcraft charges and the evidence against her included testimony that she was "foul mouthed." *Id.* at 187–206. And more recently still, Brenda Andrew's 2004 capital murder trial in Oklahoma contained repeated references to her "foul mouth," her use of curse words, and her unfeminine language. *See* Petitioner's Supplemental Brief at 1–10, Andrew v. Tinsley, 164 F.4th 789 (10th Cir. 2026).

56 GIBSON, *supra* note 49, at 16.

proof of their immoral and corrupt characters.[57] The seventeenth-century Essex witch trials in the United Kingdom saw multiple women put to death after being made to describe the orgies they purportedly enjoyed, including orgies with fictional animals.[58] And during the seventeenth-century trials of the Vardø Witches in what is now Norway, Sámi women were accused by their white sexual partners of practicing witchcraft because the women had extramarital sexual relationships.[59]

Evidence of women's sexual practices also led to more severe punishment. In sixteenth-century North Berwick, Scotland, a convicted witch, Effie McCalzean, was burned alive rather than being hanged along with her fellow witches because, unlike them, she was "an undutiful wife" and therefore deserved a more painful death.[60]

Experiences of gender-based violence have long been used as evidence against women. For accused witches, prosecutors turned abuse into seduction and sexual violence was a sword, not a shield, in the courtroom. The case of Marie-Catherine Cadière in seventeenth-century France exemplifies this: Ms. Cadière endured rape at the hands of a clergyman, but when she reported it, the perpetrator subsequently accused her of witchcraft and seduction.[61] Women who were raped in jail while awaiting trial similarly saw sexual violence used to incriminate them—in one German case, the woman's accusers determined that she had used witchcraft to seduce the guards into having sex with her.[62]

Sex was bound up in women's trials during the witch craze because the witch, at her core, was "a human who had sex with the devil."[63] Indeed, seduction by the devil

---

57 *See id.* at 24–83 (describing early modern witchcraft trials in Scotland, Norway, and the United States).

58 *See id.* at 84–105; Trace M. Maddox, *The Lawyer, The Witch, and The Witness: Proving Witchcraft in English Courts*, 35 YALE J.L. & HUMS. 666, 699–700 (2025) (describing the prevalence of evidence about witches' "familiars," or spirit animals, in English witchcraft trials).

59 GIBSON, *supra* note 49, at 52.

60 *Id.* at 42.

61 *Id.* at 141–46.

62 ROPER, *supra* note 48, at 56, 59–60.

63 *Id.* at 84. *See* HENRI BOGUET, AN EXAMEN OF WITCHES 29 (E. Allen Ashwin trans., 1929) (opining that "[t]he Devil uses [women] so because he knows that women love carnal pleasures, and he means to bind them to his allegiance by such agreeable provocations."); ROPER, *supra* note 48, at 84 (explaining that demonologists "mix[ed] a low view of women with a high regard for the power of sex.").

was "the story all witches had to provide" and the story all accusers wanted to hear.[64] Testimony regarding demonic orgies, unchristian lust, and suspicious relationships became commonplace in women's trials across Europe and colonial America, and women's torture-induced confessions frequently drew on their own sexual lives to provide the information and detail that interrogators sought to hear.[65] Inappropriate sex and relationships (including experiences of violence) shaped accusations, and the details of these relationships then served as critical evidence against them—ultimately condemning them to death.

B. Women's Bodies as Evidence

Prosecutors' reliance on women's clothing, appearance, and bodies to infer guilt in capital trials also has historical roots. Women's bodies have long been held up to invite shame and punishment. For example, common punishments for women as far back as the eighth century included public stripping and nude whippings.[66] Punishment, shame, sex, and women's bodies thus have deep and interconnecting tendrils.

Prosecuting authorities have also long drawn on women's bodies as proof of guilt. During the witch craze in Europe and the North American colonies, witch finders made assumptions about women based on how proper their clothing was and how attentive they were to men,[67] and many believed that beauty was dangerous as it was "the most potent instrument of the demon."[68]

---

64 ROPER, *supra* note 48, at 62.

65 *Id.* at 84–85; GAGE, *supra* note 49, at 217. The interrogation of Bess Clarke in seventeenth-century Essex, for example, saw interrogators question her about her illicit child and "carnal relations" with the devil. In answering, Ms. Clarke relived her own experiences of sex and pregnancy and thereby cemented her own status as a condemned woman. *See* GIBSON, *supra* note 49, at 94–95.

66 *See* GAGE, *supra* note 49, at 282–83. Under the reign of Emperor Charlemagne during the Holy Roman Empire, "wom[e]n of the town" were punished by being "dragged naked through the city streets, subject to all the cruel tortures of an accompanying mob." *Id.* at 221. Such punishments also recall the treatment of women accused of having sexual relations with occupying soldiers in France following the end of the Second World War. Accusers took women to the streets to publicly shave their heads, a punishment designed to humiliate, defeminize, and shame women for inappropriate sexual conduct. *See* Fabrice Virgili, *Les « tondues » à la Libération: le corps des femmes, enjeu d'une réaproppriation*, 1 CLIO. FEMMES, GENRES, HISTOIRE 111, 112–13 (1995).

67 *See* GIBSON, *supra* note 49, at 10.

68 2 WILLIAM EDWARD HARTPOLE LECKY, HISTORY OF EUROPEAN MORALS 358 (3d ed. 1902); *see also* GAGE, *supra* note 49, at 251 (explaining that "Devils were said to be very fond of women with beautiful

One particularly chilling use of women's bodies as evidence of guilt was the practice of witch-pricking. As one historian writes, "What made the witch recognizable for what she was were signs in her body. She had the tell-tale 'Devil's mark' or darkened mole or bump . . . and her sexual organs were well used."[69] Accusers, interrogators, and executioners—who were overwhelmingly male—therefore inspected women's bodies for so-called "witch marks" and evidence of sexual activity. Accused women were completely shaved, every part of their bodies—including genitalia—inspected for marks, and the marks then pricked with needles to ascertain if they drew blood or if the witch experienced sensation.[70] Marks "were often found around the genital area."[71] One accused witch in 1747 Germany, Magdalena Bollman, had so many needles inserted into areas around her genitals to see if she experienced sensation there that she died under this torture.[72]

Women's naked bodies were not only part of the evidence, but they were part of the performance of trial. Decisionmakers were invited to observe women without clothes: accusers sometimes stripped women for interrogation and trial during the witch craze because the devil might be hiding in her clothes, and court records indicate that some trials began with the executioner ordering the accused to strip naked for the proceedings.[73] As we explain in Part IV, these practices are echoed in the prosecution of women for capital offenses today.

---

hair."). Equally, many of the accused witches were elderly women—women no longer considered beautiful or fertile. *See* GIBSON, *supra* note 49, at xiii. Just as we see in today's cases, women's sexualized appearances and nonsexualized appearances were both presented as reason to convict her. *See infra* Section IV.B.

69 ROPER, *supra* note 48, at 9.

70 *Id.* at 49–56; GIBSON, *supra* note 49, at 36–37. *See* Maddox, *supra* note 58, at 700–02 (describing the practice of stripping women to search for a witch mark, or "witch's teat" in English witchcraft trials, the results of which "became standard pieces of evidence"); ORNA ALYAGON DARR, MARKS OF AN ABSOLUTE WITCH: EVIDENTIARY DILEMMAS IN EARLY MODERN ENGLAND 112 (2016) (explaining that by "the 1630s[,] the search [for witch's teats] became quite routine").

71 ROPER, *supra* note 48, at 54.

72 *Id.* at 49.

73 *Id*. at 54–56.

C. Sex and Intersectional Bias Through a Historical Lens

During the height of witchcraft persecutions, "[e]verywhere the most helpless classes were the victims."[74] These "most helpless classes" were frequently women who were cast out of society because of their illegitimate children, unmarried status, inability to bear children, or behavior that defied Christian norms.[75] And while people of all genders, classes, and racial backgrounds became entangled in the historical persecution of witches, women with multiple marginalized identities were particularly vulnerable to accusation.[76]

The witch hunts of the sixteenth and seventeenth centuries targeted poor and uneducated women who were unable to withstand interrogation from powerful men.[77] Historians have documented how women on the margins of society due to poverty "were used to agreeing with powerful men who deigned to speak to them" and were prone to submitting to authority.[78] Some scholars have found that women with disabilities and mental illnesses were vulnerable to making false confessions and to accusations on account of their difference.[79] Women of different racial and ethnic backgrounds—particularly women from communities that did not subscribe to Christian norms around sex, relationships, and marriage—were also targeted.[80] For example, historian Marion Gibson documents the Puritans' targeting of indigenous populations in northern Europe and details how some Vardø women were accused of witchcraft because of their liberal attitudes to intimate partnerships.[81] While there is a paucity of research on women with multiple marginalized identities during the early modern witch hunts, there are some historical examples of how accusers wielded class and race, along with gender, to women's detriment—as remains the case today.

---

74 GAGE, *supra* note 49, at 232.

75 GIBSON, *supra* note 49, at 90–92, 260.

76 *See id.* at 260.

77 *See* ROPER, *supra* note 48, at 45–49.

78 GIBSON, *supra* note 49, at 37.

79 *See* GIBSON, *supra* note 49, at 84–106, 229–60. Gibson speaks of the historical targeting of women who are "disabled, vulnerable, or unwell," which criminal justice practitioners in the United States may understand through the lenses of intellectual disability and mental illness.

80 *Id.* at 44–64, 106–27.

81 *Id.* at 44–64.

D. The Male Gaze

Criminal proceedings focusing on women's sexuality were historically driven by men. Church leaders making pronouncements on sexuality and morality were men.[82] During the early modern period in Europe, "demonologists" were "often men who were educated in law and theology."[83] And courtroom accusers, interrogators, decisionmakers, and executioners were overwhelmingly men.[84]

The demonological texts and philosophies of this period indicate a male fascination with female lust and sex, and the details that interrogators elicited during witchcraft confessions—replete with stories of orgies and sex with the devil—were "incredible" and "riveting."[85] As one historian explains, "[T]he sheer fascination of the material often got the better of [male interrogators]."[86] The hatred and terror that drove the violence against women through the witch craze "were shaped by social tensions and religious beliefs, but the passions themselves derived from deeply rooted fantasies" about women's bodies, their "demonic lovers," and their fertility.[87]

Historical prosecutions of women remind us of the enduring fascination with women's sexuality. These tales of sex and sin evoke some of the oldest stories in human history and have inspired artistic works across centuries that have entered the cultural canon, from fine art to literature to plays.[88] But they also demonstrate that women's counter-normative sexual histories, sexual expression, experiences of violence, and their very bodies have been part of the prosecutorial playbook for centuries. Accusers have long weaponized women's sexuality against them to prosecute, convict, and kill; as our findings show in Part IV, these practices continue today.

---

82 *See* GAGE, *supra* note 49, at 221.

83 ROPER, *supra* note 48, at 11.

84 *See id.* at 45–49.

85 *Id.* at 11.

86 *Id.*

87 *Id.* at 7.

88 Examples in the arts include Hans Baldung, The Witches (1510) (on file with the Metro. Museum of Art, Drawings and Prints, object no. 41.1.201); in literature include NATHANIEL HAWTHORNE, THE SCARLET LETTER (James R. Osgood & Co., 2d ed. 1878) (1850); and in theater include ARTHUR MILLER, THE CRUCIBLE (Penguin Books 2003) (1953).

III. Methodology for the Present Study

Our dataset consists of the trial transcripts of forty-eight people who were sentenced to death between 1990 and 2022[89] and who presented as women during their trials.[90] We identified basic demographic information for each person, including their race, age, year of sentence, and state of conviction from the transcripts. We also obtained descriptive data on the women—including information relating to their status as parents and mental health histories—in this way.

We identified prosecutorial narratives relating to sex in the trial transcripts using three primary methods. First, we reviewed the State's guilt- and penalty-phase closing arguments for each defendant to understand the core themes that prosecutors drew upon to argue for conviction and death, noting sex-related narratives where they occurred. Second, we coded portions of the transcripts containing the defendant's testimony and the prosecution and defense closing arguments at the guilt and penalty phases. We applied a predetermined set of codes designed to capture discourse relating to sex, appearance, sexuality, and gender-based violence.[91] Third, we reviewed the State's opening arguments in cases that heavily featured the pertinent themes to elaborate on the patterns that had begun to emerge.

From this information, we identified six core categories related to sexuality and appearance that prosecutors repeatedly invoked and turned to the remainder of the transcripts to understand how these themes appeared throughout each trial. Collaborating with colleagues in the field of information sciences who work frequently with large linguistic corpora, we expanded the scope of what was humanly reviewable in our dataset

---

89 We selected this time period by reference to the women on death row in the United States in January 2023, when we began collecting transcripts for this work. At that time, the oldest case of a woman on death row was prosecuted in 1990 and the most recent in 2022. We collected the transcripts of the entire women's death row population at that time. Four of the cisgender women in our dataset—Tiffany Cole, Michelle Sue Tharp, Angelina Rodriguez, and Susan Eubanks—have since had their death sentences reversed. We continue to include them in our dataset because their death sentences fall within the parameters of our research.

90 There are also several transgender women on death row, as detailed in Part I, *supra*. These women all presented as men at the time of trial and for this reason we do not discuss them here. Our dataset also includes one transgender man, who presented as a woman at the time of trial.

91 This stage of our review drew on data gathered as part of a multi-year project at the Cornell Center on the Death Penalty Worldwide led by Sandra Babcock. Cornell researchers are reviewing each woman's transcripts for gender bias using the qualitative coding software MaxQDA. This project captures forms of gender bias that exceed the scope of this Article, but for the purposes of our research here, we isolated coded excerpts relevant to sex, appearance, and intimate relationships.

by using computational tools to run keyword searches across all of the transcripts.[92] We drew up a list of keywords for input into computational searches by reference to the six identified categories and isolated each sentence containing a keyword across the entire body of transcripts.[93] After removing false positives from the findings,[94] we reviewed the remaining sentences to further understand how prosecutors invoke women's sexuality and appearance during the trials, isolate further examples from witness testimony and attorneys' arguments, and refine our categorization of the data.

The data that emerged from this review of women's transcripts was rich and varied. However, our reliance on a large corpus, comprising many thousands of pages across forty-eight trial transcripts, means that there are gaps in our findings. We did not set out to undertake a forensic linguistic analysis of every trial, nor do we purport to have captured each use of sex, appearance, and sexuality in the women's trials, as we were not able to review each and every page. Rather, our focus on limited extracts from women's trials necessarily means that we have underestimated the prevalence of pertinent testimony throughout the body of the trial. Our reliance on a written record also means that we cannot capture the non-verbal cues that are often critical to discern how prosecutors behave—whether through gesture, intonation, or innuendo.[95]

---

92 Researchers in the social sciences have developed targeted procedures for keyword-based searches that can identify the relevant text in a corpus. *See* Alicia Eads et al., *Separating the Wheat from the Chaff: A Topic and Keyword-Based Procedure for Identifying Research-Relevant Text*, 86 POETICS 1, 1 (2021). From a list of keywords, researchers versed in certain computational tools can scan large bodies of text for relevant usage of the words and export the data from the corpora.

93 We provided our colleagues in Cornell Information Sciences with a list of twenty keywords, which we chose by drawing on our years of experience defending women facing capital charges and by reviewing the categories that had already emerged from our initial review of the arguments. We used word stems to capture all variations of the stem. Our twenty chosen keywords were: Adulter-, Affair, Prostitut-, Lover, Seduc-, Flirt-, Intercourse, Sex, Orgasm, Abort-, Lesbian, Homosexual-, Sin-, Kiss-, Panty / panties, Bra, Naked, Porn-, Masturbat-, Fellatio. Our colleague Andrea Wang ran these searches and provided us with the exported data, which listed each use of a keyword and the sixty words before and after each keyword.

94 For example, one of our keywords was "naked." The search returned several false positives in which trial actors discussed whether something was visible to the "naked eye."

95 *See* Sue Osthoff, *When Victims Become Defendants: Battered Women Charged With Crimes*, *in* WOMEN, CRIME, AND CRIMINAL JUSTICE: ORIGINAL FEMINIST READINGS 232, 234 (Claire Renzetti & Lynne Goodstein eds., 2001) (noting, with respect to criminalized women who have endured intimate partner violence, that beliefs and values "are communicated subtly *and* openly, deliberately *and* unconsciously, via innuendo, an attitude, the physical stance or the tone of voice of a defense attorney, prosecutor, judge, or witness").

For these reasons, we do not purport to present the full scope of prosecutors' invocation of sex in women's trials. We do, however, identify recurrent tools in the prosecutorial toolbox that shame, humiliate, and vilify women for their sexuality and appearance. And everything we report in this Article was presented to decisionmakers in women's trials—decisionmakers who were tasked with determining whether the woman before them should live or die based, in part, on sex-related evidence.

IV. Sexualization of Women on Death Row Today

Most of the women in our dataset were prosecuted at the turn of the twenty-first century, hundreds of years after women were sentenced to death as witches. Although women are no longer stripped naked in court proceedings, prosecutors in the modern era continue to invoke images of their bodies and sexual activities as part of the proceedings against them. Indeed, our research reveals that prosecutors systematically weaponize women's sexuality in ways that are legally questionable and culturally regressive in order to secure punitive outcomes.

Of the forty-eight transcripts we reviewed for this Article, we identified thirty-four cases in which prosecutors presented sexualizing evidence or arguments. We define "sexualizing evidence" as witness testimony and physical evidence characterizing women's sexual relationships, sex work, sexual activities, sexualized appearance, and histories of sexual violence.[96] We define "sexualizing argument" as statements made by prosecutors during cross-examination, as well as during opening and closing arguments, that address these themes.

Prosecutors presented sexualizing evidence or argument in a wide spectrum of capital cases in our dataset. These cases involved victims with varying relationships to the defendant, including children, acquaintances, and strangers. Below, we discuss the major categories of sexualizing evidence we identified. In Part V, we explain why this matters.

---

96 We applied the following definitions to these terms in analyzing the discourse used by trial actors in the forty-eight cases in our dataset. "Sexual relationships" encompasses consensual relationships that involve sexual intercourse, sex play, sexual contact such as kissing, and flirtation. "Sex work" includes prostitution, sex trafficking, stripping, and any other exchange of sex for money, goods, or services. "Sexual activities" encompasses masturbation and any other sexual activities that women engage in without the involvement of an intimate partner. "Sexualized appearance" encompasses descriptions of women's appearance that highlight their bodies, faces, and hair. "Histories of sexual violence" encompasses evidence that the defendant experienced nonconsensual sexual contact, including rape, childhood sexual abuse, and other forms of sexual assault.

A. Women's Sexual Relationships and Sexual Pleasure

Prosecutors discussed women's sexual relationships at trial in a wide range of capital cases across multiple jurisdictions. We found that prosecutors introduced some of the most extensive and detailed evidence of women's sexual relationships in cases where the defendant was accused of murdering her husband or intimate partner. In cases involving allegations of adultery, prosecutors often invoked themes drawn from Christian theology to attack women's character. Women's sexual pleasure—and the measures they took to increase it—was also a theme in several cases.

The relevance of women's sex lives to their alleged crimes was often opaque. In some cases—particularly those where the victim was the defendant's intimate partner—prosecutors argued that evidence of the defendant's sexual affairs was relevant to establish her motive to kill. But even in those cases, prosecutors often elicited explicit, irrelevant details of women's sex lives, such as the sexual positions they preferred or the locations where they had sex. In other cases, prosecutors made no attempt to connect evidence of women's sexual activity to the crime. In those cases, we could discern no legitimate purpose for the introduction of the evidence. Below, we describe the range of evidence and arguments regarding women's intimate relationships.

1. Hypersexualizing Women Defendants

Evidence that women defendants had multiple sexual partners or engaged in extramarital sex emerged as a prominent theme among the forty-eight cases in our dataset. In some cases, witnesses or prosecutors used sex-related slurs to describe defendants.[97] More commonly, prosecutors elicited descriptions of sex from witnesses and/or highlighted the defendant's sexual practices during closing arguments at the guilt or penalty phases of trial.[98]

---

97 Reporter's Transcript of Proceedings at 4125, Oklahoma v. Andrew, No. CF-01-6189 (Okla. Dist. Ct. 2004) [hereinafter Andrew Transcript] ("what a slut puppy she must be"); Reporter's Transcript on Appeal at 2914, People v. Williams, No. KA080108-01 (Cal. 2012) [hereinafter Williams Transcript] ("the defendant was a nymphomaniac"); Transcript of Record at 2545, People v. Eubanks, No. SCN 069937 (Cal. Super. Ct. 1999) [hereinafter Eubanks Transcript] (calling defendant a "trashy girl").

98 Death penalty trials in the United States are bifurcated into guilt and penalty phases. During the guilt phase, the factfinder's obligation is to determine whether the defendant is guilty of the crime charged. During the penalty phase, the factfinder determines what sentence to impose. *Stages in a Capital Case*, DEATH PENALTY INFO. CTR. (2026), https://deathpenaltyinfo.org/resources/high-school/about-the-death-penalty/stages-in-a-capital-case [https://perma.cc/PX53-2B8D].

Below, we discuss cases from Oklahoma, Arizona, Ohio, and California where evidence of the defendant's sexual activity featured prominently. All but one of these cases involved women accused of killing their husbands.

a. Brenda Andrew

On September 22, 2004, Brenda Andrew was condemned to death in Oklahoma for the murder of her husband.[99] Throughout her capital murder trial, prosecutors elicited detailed testimony about Ms. Andrew's intimate relationships,[100] her affairs,[101] and her flirtatious behavior.[102] The prosecution called two men to testify about their past sexual relationships with Ms. Andrew.[103] Prosecutors asked one of them to describe the frequency and locations that the couple had sex:

> Q. Did you have sex with her any other places than at her house and at the motels?
> A. Car.
> Q. How many occasions did you have sex with her in her car?
> A. Several.
> Q. Was it her car or your car?
> A. Her car.[104]

Prosecutors portrayed Ms. Andrew as sexually assertive, eliciting testimony that she initiated an affair by "rub[bing] up against" a man in a grocery store and that she was "very hospitable" to men she liked.[105] Other witnesses testified throughout the trial about

---

99 Cynthia Calkins & Natalia Feldgun, *Did Sex Shaming Lead to the Death Penalty?*, AM. PSYCH. ASS'N (Sep. 1, 2024), https://www.apa.org/monitor/2024/09/sex-stereotypes-death-penalty [https://perma.cc/MP2K-58TL].

100 Andrew Transcript, *supra* note 97, at 250–51, 4123–24.

101 *Id.* at 323.

102 *Id*. at 247.

103 *Id.* at 248–51, 361–67.

104 *Id.* at 249–51.

105 *Id.* at 247.

"all these affairs"[106] and condemned her "adultery."[107] In its closing statements at the guilt phase, the prosecution even read aloud Mr. Andrew's journal entries about an alleged sexual relationship that Ms. Andrew had while she was an unmarried freshman at college—almost twenty years before the shooting.[108] The prosecution called Ms. Andrew a "slut puppy" who "had sex on [Mr. Andrew] over and over and over and . . . [kept] a boyfriend on the side."[109]

Oklahoma Court of Criminal Appeals Judge Arlene Johnson recognized the dehumanizing impact of the prosecution's evidence, stating (in dissent) that the prosecution's arguments and testimony served "no purpose other than to hammer home that Brenda Andrew is a bad wife, a bad mother, and a bad woman."[110]

b. Wendi Andriano

Exactly three months after Brenda Andrew was condemned to death, Wendi Andriano was sentenced to die in an Arizona courtroom for the murder of her husband, Joe Andriano.[111] At trial, the prosecutor painted Ms. Andriano as sexually voracious, repeatedly referencing her flirtatious behavior[112] and sexual relationships[113]—even those that predated her relationship with her husband.[114]

---

106 *Id.* at 450.

107 *Id.* at 127.

108 *Id.* at 4123–24.

109 *Id.* at 4125.

110 Andrew v. State, 164 P.3d 176, 206 (Okla. Crim. App. 2007) (Johnson, J., concurring in part and dissenting in part).

111 Ariz. Sup. Ct., Oral Argument Case Summary: State v. Wendi Elizabeth Andriano, https://www.azcourts.gov/Portals/45/07Summaries/April24CR050005AP.pdf [https://perma.cc/BK37-GXWY].

112 [Sep. 7, 2004] Reporter's Transcript of Proceedings at 31, 55, State v. Andriano, No. CR-2000-096032 (Ariz. Super. Ct. 2004) [hereinafter Andriano Transcript] (for nonconsecutively paginated transcripts, the date of the transcript is provided in brackets).

113 *See, e.g.*, [Nov. 16, 2004] Andriano Transcript, *supra* note 112, at 74–76.

114 [Oct. 13, 2004] Andriano Transcript, *supra* note 112, at 50–51 (describing Ms. Andriano's prior relationship with a pastor's son); [Oct. 28, 2004] Andriano Transcript, *supra* note 112, at 76–77 (questioning Ms. Andriano about early sexual relationships); [Nov. 1, 2004] Andriano Transcript, *supra* note 112, at 105–09 (same). The prosecution even attempted to introduce evidence that Ms. Andriano had taken a test for chlamydia.

During trial, a defense expert on intimate partner violence testified extensively about the physical and sexual abuse Ms. Andriano experienced in her marriage.[115] In his cross-examination, the prosecutor repeatedly insinuated that Ms. Andriano was promiscuous and, as a consequence, she could not be considered a victim of intimate partner violence. He asked the expert whether Ms. Andriano was "chaste" when she first met her husband.[116] He followed up by asking whether the expert knew that Ms. Andriano had two affairs[117] and was "constantly kissing on men" in bars.[118]

The prosecutor's cross-examination of Ms. Andriano similarly focused on her sexual activity.[119] He asked her to name the man with whom she first had sexual intercourse and to verify the names of other men she had had sex with.[120] He repeatedly asked her whether she cried when she had sex with other men.[121] He interrogated her about sexual relationships that predated her marriage.[122] He questioned her about a birthday celebration during which she "ended up between the legs" of a man in a limo.[123] And he questioned her at length about a brief affair she had while married, asking her to confirm the locations and times where she had sex.[124]

In closing arguments at the guilt phase, the prosecutor focused extensively on Ms. Andriano's sexual relationships before and after her marriage.[125] He argued that she was

---

The judge sustained the defense objection to the evidence. [Nov. 2, 2004] Andriano Transcript, *supra* note 112, at 3–4.

115 [Oct. 12, 2004] Andriano Transcript, *supra* note 112, at 77–78, 90–91, 96–97, 127–28, 133–34; [Oct. 13, 2004] Andriano Transcript, *supra* note 112, at 6–38.

116 [Oct. 13, 2004] Andriano Transcript, *supra* note 112, at 53.

117 *Id.* at 157.

118 *Id.* at 69, 123.

119 [Oct. 28, 2004] Andriano Transcript, *supra* note 112, at 75–77; [Nov. 1, 2004] Andriano Transcript, *supra* note 112, at 52–53, 57–58, 91–96, 105–09.

120 [Oct. 28, 2004] Andriano Transcript, *supra* note 112, at 75–77.

121 [Nov. 1, 2004] Andriano Transcript, *supra* note 112, at 105–07.

122 *Id.* at 105–09.

123 *Id.* at 96.

124 *Id.* at 52–54.

125 [Nov. 16, 2004] Andriano Transcript, *supra* note 112, at 75–76, 83–85, 87–89.

sexually aggressive, relating how she "groped" a man she met because "I guess the woman has needs and she's going to do something about it."[126]

c. Donna Roberts

In 2003, Donna Roberts was convicted of capital murder in Ohio in connection with the death of her former husband.[127] Her boyfriend, who killed her husband and argued it was in self-defense, was also sentenced to death.[128]

Throughout her trial, prosecutors elicited detailed testimony about Ms. Roberts' sex life,[129] including descriptions of sex acts[130] and repeated references to the color and style of her underwear.[131] In his opening statement, the prosecutor underscored that her co-defendant and lover was young and Black,[132] and she was an "older white woman."[133] Later, he described another sexual relationship that Ms. Roberts had with a Black man, stating that he was "the persuasion that she prefers, a large black man."[134]

Calling Ms. Roberts a "depraved murderess" in his closing argument, the prosecutor argued that she "use[d] people to satisfy her sexual desires."[135] He recalled that she was unfaithful to her "boy toy convict" when she gave oral sex to an "ex-con."[136] He described the hotel room in which she planned to have sex with her boyfriend, and twice mentioned

---

126 *Id.* at 88.

127 State v. Roberts, 850 N.E.2d 1168, 1171 (Ohio 2006).

128 *Id.*

129 Transcript of Proceedings at 5087, State v. Roberts, No. 01-CR-793 (Ohio C.P. 2003) [hereinafter Roberts Transcript]; *id.* at 6346.

130 *Id.* at 5088, 5442, 6118.

131 *Id.* at 5073, 6120.

132 *Id.* at 5067, 5084.

133 *Id.* at 5084.

134 *Id.* at 5087.

135 *Id.* at 6117.

136 *Id.*

that she had red "thong" panties[137] with the "butt end cut out."[138] Finally, he suggested that the jury wear "latex gloves" when they reviewed correspondence between Ms. Roberts and her boyfriend, suggesting that there could be "bodily substances" from Ms. Roberts on them, including "vaginal secretions."[139] Ms. Roberts' lawyers did not object to this argument, which was unsupported by any evidence.

At the penalty phase, the defense presented no witnesses. The only person to testify—in an unsworn statement—was Ms. Roberts herself.[140] She castigated the prosecution for sexualizing her, pointing out the irrelevance of her underwear and the race of the men she dated.[141] Although her defense attorneys failed to object to the prosecution's arguments, Ms. Roberts noted that the prosecution's sexualizing evidence was irrelevant[142] and designed to portray her as a "dirty little old lady."[143] She also called out the prosecution's deliberate race-baiting in his opening statement. By stating that her preference was for "a black man," Ms. Roberts said, the prosecutor was sowing "the seeds of evil, racism, and intolerance and Antisemitism."[144] With respect to the prosecution's repeated mention of her underwear, Ms. Roberts stated, "What does red thong underwear have to do with a murder case? Can anybody tell me? Mr. Bailey kept harping and harping on a red thong. So what?"[145]

d. Camila Jones[146]

Camila Jones was sentenced to death in California in 1998 after being tried jointly with her husband[147] for her niece's murder. Ms. Jones was a childhood victim of sexual abuse

---

137 *Id*. at 6120, 6144.

138 *Id*.

139 *Id*. at 6131.

140 *Id.* at 6253–300.

141 *Id.* at 6281.

142 *Id.* at 6262.

143 *Id.* at 6281.

144 *Id.* at 6263. Ms. Roberts is Jewish, and she pointed out that the prosecution went out of their way to identify her as such. *Id.* at 6264.

145 *Id.* at 6262.

146 Camila Jones is not her real name. We have assigned a pseudonym at the request of the defense team.

147 Ms. Jones' husband was also sentenced to death.

at the hands of her stepfather,[148] who raped her repeatedly beginning when she was eleven years old.[149] She met her husband when she was fifteen.[150] Ms. Jones testified that her husband was violent and controlling, and that he beat and raped her.[151] Two defense experts testified that she was a battered woman.[152]

In response, the prosecution sought to portray Ms. Jones as a sexually promiscuous woman who liked "kinky sex."[153] The State introduced in evidence a dildo that was found in the couple's apartment, along with a number of pornographic videos, whose titles the prosecutor had the witness read aloud.[154] When Ms. Jones testified in her defense, the prosecutor questioned her at length about the dildo, a vibrator that her husband had bought for her, and her sex life with her husband. The prosecutor also accused her of "flashing her breasts" at a man who she testified had raped her.[155]

The prosecution called as a witness a man who had a brief affair with Ms. Jones and asked him to explain how many times they had sex, where it happened, and who was present.[156] During his cross-examination of Ms. Jones, the prosecutor asked her over and over again to confirm that she had extramarital sex, and queried whether she used contraception when she had intercourse.[157] The prosecutor used this testimony to suggest that she was not a battered woman—because a battered woman would not dare to have an affair.[158]

---

148 Transcript of Record at 5836, 7343–46, People v. Jones (Cal. Super. Ct. 1998) [hereinafter Jones Transcript].

149 *Id.* at 7346.

150 *Id.* at 7379.

151 *Id.* at 7382–87.

152 *Id.* at 9279, 9403.

153 *Id.* at 5768.

154 *Id*. at 6149–50. When Ms. Jones testified, she stated that her husband used the dildo to rape her. *Id*. at 7391–92.

155 *Id*. at 7833.

156 *Id.* at 9666–72.

157 *Id*. at 7818–26.

158 *Id.* at 9359–63.

The four cases we describe above illustrate the spectrum of sexualizing evidence we found in our review: prosecutors invoked irrelevant details about the defendants' sexual experiences, invoked sexual tropes ("kinky sex," "slut puppy"), drew attention to women's bodies and clothing, and cast them as sexual aggressors rather than victims of sexual violence. Prosecutors in these cases were unabashed in their efforts to demonize the defendants by tethering their character to their sexual expression. Below, we elaborate on some of the themes revealed by our analysis.

2. Adultery and Christian Values

In cases where prosecutors focused on women's extramarital relationships, they frequently invoked religious themes to cast women as sinners. If defense witnesses testified about the defendant's religious faith, prosecutors attacked the sincerity of her beliefs by pointing out that adultery was sinful.[159] In all of the cases we discuss below, women were charged with killing their husbands or intimate partners.[160]

In the Arizona case of Wendi Andriano, who had been raised in a strict Christian home,[161] the prosecution argued that by having an extramarital affair, she was not taking care of her husband "in a Christian sense."[162] The prosecutor repeatedly emphasized her betrayal of her Christian upbringing, stating that at school she learned to be a "good Christian woman" and a "good wife."[163] By moving in with her husband before she was married, she disobeyed her father in contravention of her faith.[164] Through her "infidelity," he argued, she violated one of the Ten Commandments set forth in Exodus.[165] The prosecution concluded that Ms. Andriano was "using religion as a crutch when it benefits her,"[166] since "infidelity is

159 *See infra* note 179 and accompanying text.

160 All of the cases were prosecuted in states where more than half of the adult population is "highly religious." *See* Michael Lipka & Benjamin Wormald, *How Religious is Your State?*, PEW RSCH. CTR. (Feb. 29, 2016), https://www.pewresearch.org/short-reads/2016/02/29/how-religious-is-your-state/?state=north-carolina/ [https://perma.cc/JMT7-UYH7].

161 [Oct. 6, 2004] Andriano Transcript, *supra* note 112, at 20–21; [Oct. 12, 2004] Andriano Transcript, *supra* note 112, at 43–44.

162 [Oct. 13, 2004] Andriano Transcript, *supra* note 112, at 73.

163 *Id.* at 132.

164 [Nov. 16, 2004] Andriano Transcript, *supra* note 112, at 17.

165 *Id.* at 133.

166 *Id.*

something that is not sanctioned by the Christian religion."[167] Finally, in arguing that the jury should disregard Ms. Andriano's faith as a reason to spare her life, the prosecutor asked, "[H]ow can she say she has strong religious convictions when she's going out and committing adultery?"[168]

The prosecution used similar tactics in the case of Blanche Taylor Moore, who, at 93, is the oldest woman currently on death row.[169] Ms. Moore was convicted and sentenced to death in North Carolina for the murder of her partner.[170] Ms. Moore was the daughter of a minister[171] and, according to defense[172] and prosecution[173] witnesses, was a person of deep religious faith whose life revolved around her church.[174]

At trial, the prosecutor presented testimony that Ms. Moore had an extramarital affair with a pastor,[175] and suggested that she had uncontrollable "sexual impulses."[176] In closing argument at the guilt phase, he argued that Ms. Moore was "a woman who ate of the fruit of the tree of knowledge, of good and evil."[177] At the penalty phase, he further disparaged her religious faith, suggesting that someone with "traditional conservation [sic] Christian

---

167 *Id.* at 134.

168 [Dec. 15, 2004] Andriano Transcript, *supra* note 112, at 103.

169 Russ Bowen, *Turning 90: North Carolina's Blanche Moore is Oldest Woman on Death Row in U.S.*, WBTW NEWS13 (Feb. 15, 2023), https://www.wbtw.com/news/state-regional-news/turning-90-north-carolinas-blanche-moore-is-oldest-woman-on-death-row-in-us/ [https://perma.cc/PFL8-DDEX].

170 *Id.*

171 Transcript of Record at 2257, 2751, State v. Moore, No. 89-CRS-25053 (N.C. Super. Ct. Crim. Sess. 1990) [hereinafter Moore Transcript].

172 *Id.* at 2203.

173 *Id.* at 1031.

174 *Id.* at 2262.

175 *Id.*

176 *Id*. at 2405.

177 *Id.* at 2573.

values" would not have had a relationship with a man she was not committed to,[178] and arguing that she had "used the Bible as a disguise."[179]

In the case of Brenda Andrew, the prosecution opened its case with testimony from two pastors about Ms. Andrew's relationship with James Pavatt, her co-defendant and a member of her congregation.[180] One of the pastors pointed out that adultery was "against our teachings and God's word."[181] During the penalty phase, after defense witnesses testified about Ms. Andrew's religious beliefs,[182] the prosecution contrasted Ms. Andrew's adultery with her husband's upstanding Christian faith.[183] The prosecution told the jury that Mr. Andrew was "a good Christian man"[184] who "wanted desperately to be a man who was committed to God," while Ms. Andrew "can't be a woman of God because she's sleeping with a married man."[185]

In all of these cases, prosecutors sought to cast women outside of their faith communities by detailing sexual practices that were—in the prosecution's view—inconsistent with the tenets of Christianity. In so doing, they encouraged jurors to condemn the defendants not only for the crimes they committed, but for their perceived deviance from biblical teachings.

3. Sexual Pleasure and Eroticized Violence

Women's sexual pleasure, and the steps they took to achieve it, featured in several trials. In our research, we did not encounter a single description of sex as wholesome or natural. While partly attributable to the nature of capital prosecutions, which seek to demonize the defendant such that a jury will condemn her to die, this particular perversion of women's experiences is nevertheless noteworthy. In some cases, women's sexual pleasure played no

178 *Id.* at 2861.

179 *Id.* at 2896.

180 Andrew Transcript, *supra* note 97, at 123–27, 206–07.

181 *Id.* at 127.

182 *Id.* at 4246.

183 *Id.* at 4125; Andrew v. White, 604 U.S. 86, 89 (2025) (noting that at "both the guilt and sentencing phases, prosecutors contrasted Andrew with the victim, whom they asserted had been 'committed to God'").

184 Andrew Transcript, *supra* note 97, at 4492.

185 *Id.* at 4124–25.

apparent role in the crime. In other cases, women were described as perpetrating sexual violence. These two categories of cases are described below.

a. Sexual Pleasure

In their 2010 prosecution of Manling Williams, an Asian American woman, prosecutors twice called her a "nymphomaniac."[186] Prosecutors called as a witness the man with whom Ms. Williams had a brief affair, asking him to relate the number of times they had sex over the course of a night.[187] They also introduced in evidence a text message Ms. Williams sent him indicating that her legs were "sore" from having intercourse.[188] Prosecutors invoked the text in every argument they made before the jury: in their opening and closing statements at the guilt phase, and in opening and closing statements at the penalty phase.[189] In their guilt phase closing argument, prosecutors argued that Ms. Williams' legs were "sore" because she had "so much sex."[190] In fact, they argued, she wanted sex "three times a day" and her husband "gave it to her every time she wanted it."[191] At the penalty phase, the prosecution also introduced evidence of letters that Ms. Williams sent to another incarcerated person while in the county jail, including one in which she told her correspondent she wanted to send him a photo of herself in a "bathing suit."[192] While the defense contested the admissibility of this letter based on its prejudicial nature, the state successfully argued that it "paint[ed] a different picture than the quiet, honest, caring person" that the defense presented.[193] In arguing that Ms. Williams should be sentenced to death at the penalty phase, the state argued that the text and evidence about Ms. Williams' sexuality revealed "the person that this defendant is."[194]

---

186 Williams Transcript, *supra* note 97, at 2887, 2914.

187 *Id.* at 5812, 5815.

188 *Id.* at 5817.

189 *Id.* at 823, 2912, 5597, 6610, 7590.

190 *Id.* at 2912.

191 *Id.* at 2914.

192 *Id.* at 6602, 6617.

193 *Id.* at 5183.

194 *Id.* at 5597.

In the case of Wendi Andriano, described above, a defense expert described Ms. Andriano's sexual relationship with her husband. According to the expert, the couple's encounters were brief and affectionless, and Ms. Andriano used lubricant during intercourse.[195] Even though the expert had not opined on the reason why Ms. Andriano used lubricant, the prosecution seized on the testimony, claiming that she required lubricant because she found her husband to be "gross and skinny."[196] He then queried repeatedly whether Ms. Andriano needed to use lubricant with the man with whom she had an affair.[197]

In closing argument at the guilt phase, the prosecution returned to the topic of lubricant, questioning whether Ms. Andriano used it when she had sex with two men prior to her marriage to her husband.[198] The prosecutor then faulted Ms. Andriano for not enjoying sex with her husband:

> When she talks about this issue of the lubricant, the only thing that I can tell you is that . . . you weren't in love with him because you could not even bring yourself to the point of enjoying the most intimate thing that two people in love do, that's enjoy sexual intercourse. Couldn't do it.[199]

In these cases, prosecutors deliberately invoked women's sexual experiences to cast them as either perverted (she had "so much sex") or inadequate (she couldn't enjoy sexual intercourse with her husband without lubricant).

b. Eroticized Violence

We have previously observed that 85% of women on death row were sentenced to death for killing people who are known to them.[200] Of the seven women who were convicted of killing strangers, only three were convicted of crimes involving sexual assaults of women

---

195 [Oct. 12, 2004] Andriano Transcript, *supra* note 112, at 63.

196 *Id.* at 68.

197 *Id.* at 68–69.

198 [Nov. 16, 2004] Andriano Transcript, *supra* note 112, at 75.

199 *Id*. at 76.

200 *See* Babcock et al., *Women on Death Row*, *supra* note 21, at 28 (noting that only seven of forty-eight cases involved stranger killings).

or girls—and in all three of these cases, women were tried and convicted in joint trials with their (male) intimate partners.[201]

In each of these three cases involving sexual assault, the defense presented extensive evidence that the defendants had been subjected to severe intimate partner violence by their co-defendants and had been victims of rape.[202] Indeed, these cases involve some of the most harrowing accounts of sexual violence among the cases in our dataset.

In these three cases, the prosecution sought to prove that each woman was an active and equal participant in sex crimes. To that end, they presented detailed evidence of sex acts, some of which were directly linked to the facts of the crime. At the same time, much of the testimony went far beyond the crime itself to hypersexualize the defendants.[203] In large part, this evidence and argument discredited the women's accounts of their own experiences of sexual violence.[204] We do not seek to parse this testimony here, given that it would require a far more detailed discussion of the crimes themselves—which are, as we explain above, anomalous.

B. Women's Appearance

While women's naked bodies are no longer physically inspected during interrogation and trial, their bodies continue to be wielded as evidence against them. In at least sixteen transcripts, prosecutors presented evidence regarding women's bodies, underwear, and appearance. They often drew on this evidence in their arguments, inviting jurors to sexualize the body of the woman in the courtroom before them, or, alternatively, inviting jurors to conclude that she is unfeminine because of her appearance. This tactic was often combined with other sexualizing arguments described above. Prosecutors sometimes reinforced these narratives by introducing the defendant's underwear into evidence, showing jurors photos of the defendant unclothed, or denigrating the way she dressed in the courtroom, thereby ensuring that women's bodies were front and center in their capital trials.

---

201 *See* People v. Coffman, 96 P.3d 30, 48 (Cal. 2004); People v. Daveggio, 415 P.3d 717, 729 (Cal. 2018); People v. Thornton, No. RIF-096679 (Cal. Super. Ct. 2001).

202 *See* 58 Transcript at 10780–83, 10832, People v. Snyder, No. RIF-096679 (Cal. Super. Ct. 2006) [hereinafter Snyder Transcript]; Coffman, 96 P.3d. at 52, 54; 39 Reporter's Daily Transcript of Proceedings at 8551, People v. Daveggio, No. 134147A (Cal. Super. Ct. 2002) [hereinafter Daveggio Transcript].

203 We have previously described the prosecution's tactics in all three cases of invoking debunked stereotypes of battered women. *See* Babcock & Greenfield, *supra* note 21, at 385–89.

204 *See id.*

1. Sexualizing Women's Appearance

Prosecutors frequently sexualized the appearance of women defendants. We observed testimony and argument about women's clothing, their bodies, and their underwear in our dataset, engaging the jury in moral judgments based on the defendant's appearance. In most of these cases, prosecutors made no attempt to link the descriptions of women's bodies and undergarments to the elements of the crime or aggravating factors relevant to punishment.[205]

a. Sexualizing Women's Bodies

The prosecutors in Brenda Andrew's case deployed several tactics to sexualize her appearance. Throughout the guilt phase of Ms. Andrew's trial, and alongside the above-mentioned evidence about her affairs, the State elicited testimony about her "sexy outfits," "provocative" clothing, and "revealing" dresses.[206] One witness described Ms. Andrew's "cleavage" while another described her "leather outfit[s]."[207] An acquaintance testified that she looked like a "hoochie."[208] Even Ms. Andrew's hair was presented as reason to condemn her, with prosecution witnesses variously describing it as "rolled [out] . . . really big," "very Gothic, long black hair," and dyed red, ostensibly to attract a man.[209]

---

205 In a few cases, the State's discussion or introduction of the defendant's underwear had some evidentiary value. In one case, for example, the State alleged that the defendant used panties to strangle the victims and entered photos of that underwear into evidence. *See* Transcript of Record at 1399, People v. Rottiers, No. RIF-132260 (Cal. Super. Ct. 2010) [hereinafter Rottiers Transcript]. In another case, the defendant's underwear had blood spatters on it that the State tested for DNA. Transcript of Record at 7309, People v. Caro, No. CR 47813 (Cal. Super. Ct. 2001) [hereinafter Caro Transcript]. Our focus is not on the State's introduction of evidence that has some plausible relevance; rather, the cases at issue are those in which descriptions and photos of the defendant, her body, and her underwear were gratuitous and unconnected to the crime of which she was charged.

206 Andrew Transcript, *supra* note 97, at 247, 349, 357.

207 *Id.* at 323, 343.

208 *Id.* at 323.

209 *Id.* at 324, 343, 498–99. The State also elicited testimony that Ms. Andrew's hair looked unwashed the day after her husband died. *Id.* at 2727. The inconsistency here demonstrated by the State—condemning Ms. Andrew both for the maintenance of her hair and her failure to maintain her hair the day after her husband died—highlights the impossible standards that women defendants are held to. No matter women's gender presentation or sexuality, the State frequently finds ways to fault it.

Ms. Andrew's choice of underwear was presented as further evidence of her guilt. During the guilt phase closing argument, the prosecutor, Gayland Gieger, held up before the jury several pairs of Ms. Andrew's "thong underwear"[210] in "[shades of] red, black, and pink,"[211] drawing "gasps" from the courtroom.[212] With jurors moments from deliberations, the prosecutor argued that Ms. Andrew must be guilty because no real "grieving widow" would wear such underwear after her husband's death.[213] The State introduced Ms. Andrew's "thong underwear" into evidence, with no objection from the defense.[214]

Mr. Gieger was not the only prosecutor to discuss the defendant's clothing and underwear. The prosecutor in Wendi Andriano's trial, Juan Martinez, asked witnesses about her "skimpy clothing"[215] and argued that on one occasion Ms. Andriano was "all sassed up in her pink little outfit."[216] When Ms. Andriano testified in her own defense, the prosecutor questioned her about a "dress and panties" that she was "hiding" in her office when having an affair.[217] Four times in succession the prosecutor asked Ms. Andriano about her "black panties" before producing a photo and asking her, "[T]hose are your panties, right?"[218] The State introduced the photo of Ms. Andriano's underwear into evidence, along with photos of Ms. Andriano in a bikini.[219]

---

210 *Id.* at 4103.

211 Nick Trougako & Michael Baker, *Andrew Case in the Hands of Jury: Deliberation Will Resume Today at 9 A.M.*, OKLAHOMAN (July 13, 2004), https://www.oklahoman.com/story/news/2004/07/13/andrew-case-in-hands-of-jury-br-deliberations-will-resume-today-at-9-am/61982390007/ [https://perma.cc/9956-MBFP].

212 *Id.*

213 Andrew Transcript, *supra* note 97, at 4103.

214 *Id.* at 2359.

215 [Oct. 5, 2004] Andriano Transcript, *supra* note 112, at 155.

216 [Nov. 16, 2004] Andriano Transcript, *supra* note 112, at 63.

217 [Nov. 1, 2004] Andriano Transcript, *supra* note 112, at 126.

218 *Id.*

219 *Id.* at 34, 127. Such photos are reminiscent of the nude photo of the defendant that prosecutors introduced in Mary Ellen Samuels' case. Ms. Samuels was sentenced to death in California in 1994 and her death sentence was vacated in 2019. Order Denying in Part and Granting in Part Petition for Writ of Habeas Corpus at 62, Samuels v. Espinoza, No. CV 10-3225 SJO (C.D. Cal. Nov. 22, 2019). During her trial, the State showed jurors a blown-up photo of Ms. Samuels, naked and surrounded by money, as evidence that she had killed her husband for financial gain. Ann W. O'Neill, *Judge Allows Photo of Widow in Slaying Trial*, L.A. TIMES (Mar. 10, 1994), https://www.latimes.com/archives/la-xpm-1994-03-10-me-32439-story.html [https://perma.cc/BC3E-9Z32]. Ms. Samuels recently filed a habeas appeal raising the sexualizing nature of the evidence presented against

In another case, that of Susan Eubanks in California, the prosecutor also pressed a witness on the style of the defendant's underwear:

> Q. Do you recall what she was wearing?
> A. Yeah. She had on a white t-shirt and red panties.
> Q. What type of panties
> A. I—
> Q. Style?
> A. Just—just normal. I wouldn't know how to describe them.
> Q. Well, would they be something that would come up to the naval [sic] or bikini?
> A. I'd describe it as like a bikini bottom.[220]

Similarly, in Donna Roberts' guilt-phase trial, the male prosecutor spoke about a pair of Ms. Roberts' "red thong panties" five times in his opening argument alone.[221] During the trial, the State questioned a witness twice about Ms. Roberts' "red thong underwear"[222] and returned to the theme in its guilt-phase closing argument, telling jurors that they should consider "the red thong panties" as part of the evidence of guilt.[223] This focus prompted Ms. Roberts, when giving a statement in her own defense during the penalty phase, to clarify: "I am wearing regular underwear today."[224]

Prosecutors in the California trial of Socorro Caro also spoke about underwear. Here, the prosecutors displayed photos of Ms. Caro's underwear, including closeups of the

---

her—including the photograph. Media coverage of her appeal continues to describe Ms. Samuels as a "green widow" and "a hard-partying, drug-using, club-going, shameless flirt," even reproducing the above-described photo of her. *See* Kathianne Boniello, *Hard-Partying 'Green Widow'—Seen Naked in Pile of Cash—Insists Murder Conviction Came from 'Sex-Shaming'*, N.Y. POST (Feb. 7, 2026), https://nypost.com/2026/02/07/us-news/californias-green-widow-mary-ellen-samuels-pushes-for-freedom-slams-sex-shaming-prosecutors/ [https://perma.cc/2RLY-48MY].

220 27 Transcript of Record at 3033, People v. Eubanks, No. SCN 069937 (Cal. Super. Ct. 1999) [hereinafter Eubanks Transcript].

221 Roberts Transcript, *supra* note 129, at 5073, 5076.

222 *Id.* at 5337.

223 *Id.* at 6144.

224 *Id.* at 6239.

"vaginal staining" on the inside of her underwear.[225] Though the underwear had evidentiary value insofar as there was blood on it, the State questioned its forensic expert witness far beyond blood spatter evidence. The prosecutor walked the expert through testimony variously describing "the vaginal staining in the crotch," the "cotton liner" of the panties, the "inside portion" of the "panties" (even though blood from Ms. Caro's gunshot wound would logically be on the outside of the underwear), and "lighter colored" "staining" on the underwear.[226] Each of these descriptions was accompanied by a photo displayed on the courthouse screens for the jury to see.[227]

In other cases, prosecutors have focused on a woman's breasts in their efforts to sexualize her. Darlie Routier was convicted in Texas. During her trial, the State asked a witness twice about her breast implants, despite a motion in limine from the defense to bar the prosecution from this line of questioning.[228] Prosecutors asked Ms. Routier's husband about Ms. Routier's "diet pills" and her desire to "look[] the way she had before [her son] was born," before asking, "[Y]'all had spent five thousand dollars for breast implants, hadn't you?"[229]

Later, the State asked two witnesses about Ms. Routier's appearance, specifically asking one witness whether Ms. Routier "ever w[ore] a bra."[230] Both witnesses replied that she did not wear a bra, with one witness elaborating, in response to further State questions, that "everything was showing usually," which was "very tacky."[231] The prosecutor returned to this testimony in her punishment-phase closing argument, referring twice to Ms. Routier's lack of a bra.[232] Similarly, in the Texas case of Kimberly Cargill, a prosecutor asked a law enforcement witness to describe Ms. Cargill's clothing during a traffic stop four days

---

225 Caro Transcript, *supra* note 205, at 7370.

226 *Id.* at 7369–73.

227 *Id.*

228 Transcript of Record at 4422, State v. Routier, No. F96-39973-MJ (Tex. Crim. Dist. Ct. 1997) [hereinafter Routier Transcript].

229 *Id*. at 4348. The State raised Ms. Routier's breasts again later in Mr. Routier's testimony. *Id.* at 4467.

230 Routier Transcript, *supra* note 228, at 5416, 5463.

231 *Id.* at 5463.

232 *Id.* at 5662.

after the offense. The witness replied, "[S]he didn't—she had no bra on, and she—some underwear on, but that was it."[233]

In the case of Josephine Black,[234] the State took issue with the fact the defendant *did* wear a bra. The State asked two separate witnesses whether Ms. Black was wearing a bra after the night-time fire that she was accused of starting.[235] Ms. Black said she was sleeping when the fire started; the State argued that she was awake, as evidenced by the clothes she was wearing—including a bra.[236] Although the question of whether Ms. Black ordinarily slept in her bra was relevant to the State's theory of the case, prosecutors pressed Ms. Black to share extraneous details such as her bra size, whether her bra was washed, and whether she ever wore her sister's bra.[237]

b. Feminine Appearance

Women's gender presentation also features in some of their capital cases, including testimony and argument about the defendant's clothing, hair, makeup, and nails. Such testimony often seeks to present the defendant as a woman who is vain and image-obsessed. Prosecutors painted one woman on California's death row as vain because she was "going shopping" and "got [her] hair done."[238] The State described Maria Alfaro in California as "self-centered" because of the "looks of the defendant."[239] And in Socorro Caro's case, the State determined that she was different "from any other woman" because of "her vanity," which manifested in decisions to have weekly manicures and to see a dietician to lose

233 [May 10, 2012] Transcript of Record at 154, State v. Cargill, No. 241-1510-10 (Tex. Crim. Dist. Ct. 2012) [hereinafter Cargill Transcript].

234 Josephine Black is not the defendant's name. We have used a pseudonym at the defense team's request.

235 Transcript of Record at 994, 1270, State v. Black (Ala. Cir. Ct. 2009) [hereinafter Black Transcript].

236 Black Transcript, *supra* note 235, at 907. In closing, the State argued that jurors should consider the fact that Ms. Black wore a bra at night as evidence of guilt because she was "fully dressed" and not in "pajamas" after the fire. *Id.* at 4003.

237 *Id.* at 3782. Conversely, prosecutors in Darlie Routier's case invited an inference of guilt from testimony that Ms. Routier was *not* wearing panties under her nightwear after the death of her children at night, asking a law enforcement witness, "Does it strike you odd that a person who is getting ready to call 911 on the telephone wouldn't have on their panties?" Routier Transcript, *supra* note 228, at 2967.

238 10 Transcript of Record at 1799, People v. Smith (Cal. Super. Ct. 2017) (pseudonym used at the request of the defense team) [hereinafter Smith Transcript].

239 Trial Transcript at 2001–02, People v. Alfaro, No. C-82541 (Cal. Super. Ct. 1992) [hereinafter Alfaro Transcript].

weight.[240] Indeed, the State elicited testimony from witnesses about the defendant's regular manicures in at least three cases in our dataset.[241]

Prosecutors commented on women's hairstyles in some cases. In Josephine Black's case, prosecutors elicited testimony that the defendant went to the hair salon after the fire in which her sons died—a fact that the State also raised in its closing argument.[242] Brenda Andrew's trial saw prosecutors quiz witnesses about Ms. Andrew's hair color and style, as noted above.[243] And in the case of Taylor Parker, who is on death row in Texas, the State pressed witnesses with multiple questions about Ms. Parker's hair and appearance. Witnesses described how Ms. Parker was "very fake" because she liked to "show off body parts," did not like to leave the house without "some kind of hairstyle," and was "chang[ing] her hair . . . [and] fixing her hair all the time . . . right down to how her messy bun looked."[244]

Makeup is another area of focus for some prosecutors. In addition to pressing witnesses on Taylor Parker's hair, the State elicited testimony that Ms. Parker was "obsessed with how she looked" because she spent "hours on end" making sure her "makeup was[] perfect . . . . Her makeup couldn't be smeared."[245] In Brooke Rottiers' case, the State elicited testimony describing how Ms. Rottiers wore "some weird makeup and a short skirt and stuff."[246] Similarly, in Maria Alfaro's capital trial, prosecutors asked two witnesses whether Ms. Alfaro usually wore "red lipstick."[247] In its guilt-phase closing argument, the State urged jurors to "look past the red lipstick, you've got to look past the hair, you've got to look past the clothing."[248] The State even presented Ms. Alfaro's stereotypically feminine

---

240 Caro Transcript, *supra* note 205, at 8778, 9595–96, 10536, 10715–16.

241 [May 16, 2012] Cargill Transcript, *supra* note 233, at 34; [Jul. 11, 2017] Transcript of Record at 120, State v. Allen, CR2011-138856-003 (Ariz. Super. Ct. 2017) [hereinafter Allen Transcript]; Caro Transcript, *supra* note 205, at 9595.

242 Black Transcript, *supra* note 235, at 2954, 2993–94, 4032.

243 *See supra* notes 206–209 and accompanying text.

244 44 Transcript of Record at 150, State v. Parker, No. 20F1345-202 (Tex. Crim. App. 2022) [hereinafter Parker Transcript]; 45 Parker Transcript at 170.

245 45 Parker Transcript, *supra* note 244, at 169.

246 Rottiers Transcript, *supra* note 205, at 3422.

247 Alfaro Transcript, *supra* note 239, at 1011, 1103.

248 *Id.* at 2001.

looks as a reason to condemn her, arguing that "beautiful people can be very ugly"[249]—an argument also made in Brenda Andrew's guilt phase trial when the (male) prosecutor argued that Ms. Andrew was "an attractive woman" but that looks were deceiving.[250]

2. De-Sexualizing Women's Appearance

Women's appearances present a double-edged sword in their capital trials. As we have seen above, women are vilified for taking too much care of their appearance. Equally, though, women are criticized for not conforming to stereotypical expectations of femininity. Recall Darlie Routier's case, in which the State elicited testimony that she was "tacky" for not wearing a bra.[251] The State further asked witnesses to describe Ms. Routier's appearance, to which witnesses variously responded that "usually she was without makeup, shorts, baggy shirts"[252] and "the way she was dressed, she always wore—she always had all of her jewelry on, her hair was never fixed, she never had any makeup on."[253]

Prosecutors produced similar descriptions of Manling Williams. One exchange with a witness detailed her appearance:

> A. She was always very poorly—in my opinion, poorly dressed.
> Q. What about when she would go out?
> A. She would usually wear the slacks she would wear to work because they were basic black slacks . . . .
> Q. And she would do her makeup when she would go out?
> A. Just basic. She didn't do a whole lot.[254]

---

249 *Id.*

250 Andrew Transcript, *supra* note 97, at 3908, 4121.

251 Routier Transcript, *supra* note 228, at 5463.

252 *Id.* at 5416.

253 *Id.* at 5463.

254 Williams Transcript, *supra* note 186, at 7382.

The witness later stated that Ms. Williams "didn't really wear makeup to work."[255] These descriptions of Ms. Williams led the State to describe her as "frumpy"[256] and her own counsel to call her "dowdy."[257]

In contrast to the sexualization of women's bodies, clothing, and presentation choices that we have seen above, some prosecutors sought to emphasize the defendant's "unwomanly" appearance.[258] In Brooke Rottiers' case, the prosecution emphasized her "physicality, her strength"[259] and that she was "6 feet, 250 pounds."[260] The State paradoxically used its sexualization of Ms. Rottiers to de-feminize her, stating that the defendant—a sex worker who stood accused of using her underwear as a murder weapon—was "physically intimidating, aggressive, and she has no qualms about being physically aggressive with a man. With a man."[261] Prosecutors argued that "this person . . . all 6 feet, 250 pounds of her" did not "deserve" life.[262]

Shawna Forde's case, in Arizona, similarly evoked tropes of the defendant as a masculine woman. The State elicited testimony that Ms. Forde was "short," "heavy set," "didn't have any makeup on," and that she "dressed in camouflage."[263] In its guilt-phase

---

255 *Id*. at 7400.

256 *Id*. at 7382.

257 *Id*. at 7400.

258 These are tactics that prosecutors also use to target queer women, as described with respect to the case of Celeste Carrington in Section IV.D *infra*.

259 Rottiers Transcript, *supra* note 205, at 3942.

260 *Id.* at 4468.

261 *Id.* at 3906.

262 *Id.* at 4468. Ms. Rottiers' case presents a combination of sexualizing and de-sexualizing language, alternating between descriptions of her physicality and testimony about underwear and her sex work. Such a tactic discredited Ms. Rottiers in multiple ways—her sexuality was presented as a moral stain on her character, and prosecutors weaponized her alleged easy facility with men, combined with her physicality, to propose a narrative of Ms. Rottiers as the person in control of her male co-defendants.

263 [Jan. 25, 2011] Transcript of Record at 94, State v. Forde, CR-20092300-001 (Ariz. Super. Ct. 2011) [hereinafter Forde Transcript]. Some of the description of Ms. Forde during her trial was important for identification purposes, as the State sought to place her at the scene of the offense. The repeated descriptions of Ms. Forde in this way, though, especially in closing arguments, transcend any necessary identification measures and arguably sought to demean her.

closing argument, the prosecutor described Ms. Forde as "a short, fat white woman"[264] who "was barking out orders almost in a military fashion" to her male co-defendants.[265] The State's portrayal of Ms. Forde's appearance and her behavior presented her as the unfeminine leader of the offense.[266]

When it comes to their appearances, women are in a double bind. Whereas Brenda Andrew and Wendi Andriano were attacked for being too sexual in their femininity—and the style and color of their underwear was held up as proof—Shawna Forde and Brooke Rottiers were criticized for not being feminine enough.

3. Weaponizing Women's Courtroom Appearance

We noted several cases in which prosecutors drew jurors' attention to perceived differences between the testimony about a defendant's appearance and her appearance in the courtroom. The crux of these comments, often appearing in closing arguments, was that the defendant's appearance in court created a false image of who she was. In Brenda Andrew's trial, the prosecutor told jurors in closing that the "meek and quiet and pretty" woman sat before them was not "the real Brenda Andrew."[267] Rather, the prosecutor argued, "the real Brenda Andrew" was the adulterous woman described by witnesses.[268] Similarly, in Maria Alfaro's case, prosecutors contrasted Ms. Alfaro's choice of lipstick in the courtroom with the portrayal of her as unkempt they presented during the trial, thereby framing her makeup choices as deceptive.[269] And in Brittany Holberg's case, the State argued that the defendant in the courtroom—"a 25-year-old female with bows in her hair, in a nice suit"—was an

---

264 [Feb. 10, 2011] Forde Transcript, *supra* note 263, at 85.

265 *Id.*

266 The defense then reinforced these tropes in its closing arguments by contrasting Ms. Forde's physical presentation with another woman involved in the case, a woman who had "curling irons, . . . flat irons, the hello kitty diamond, [and] cheap costume jewelry." *Id.* at 129.

267 Andrew Transcript, *supra* note 97, at 3908.

268 *Id.*

269 Alfaro Transcript, *supra* note 239, at 2001. Prosecutors had asked witnesses during the trial whether Ms. Alfaro wore red lipstick prior to trial, eliciting testimony that she did not. *See id.* at 1011, 1103. The appeals to Ms. Alfaro's appearance during the closing argument therefore contrasted the makeup choices of the person before the jury with the allegedly real defendant, as presented by the state's testimony. *See supra* notes 239, 247 and accompanying text.

"illusion."[270] The prosecutor spoke of the "bows in her hair" no fewer than three times in his argument.[271]

Prosecutors in two Arizona cases also evoked floral imagery to contrast the defendant in the courtroom with the defendant of the State's narrative. During Wendi Andriano's trial, the State detailed how Ms. Andriano initiated sexual contact with a man in a bar before commenting: "She's the one that initiated—this demure little lotus blossom we have here."[272] And in Sammantha Allen's case, the prosecutor argued in the guilt-phase closing statement that Ms. Allen was "no shrinking violet."[273]

No defense attorneys raised contemporaneous objections to these prosecutorial remarks about their client's appearance. Donna Roberts, speaking in an unsworn statement during her own penalty phase, was the only person across the trial transcripts we reviewed to point out the absurdity of the State's tactics. In his closing, the prosecutor argued that the "State's exhibit 403 shows the real Donna Roberts, the person in the photograph, the defendant with the heavy makeup and dyed hair."[274] Ms. Roberts responded:

> I really did dye my hair and I really did wear makeup, and Mr. Bailey [the prosecutor] thinks that because of that, I'm an evil person. I don't think there's one woman in here that doesn't care how she looks, that doesn't fix her hair and doesn't wear makeup. The matriarchs in the Bible, they all wore makeup from berries and plants to look nice for their husbands. Today we're the same.[275]

---

270 [Mar. 13, 1998] Transcript of Record at 1168, State v. Holberg, No. 11492-C (Tex. Crim. Dist. Ct. 1998) [hereinafter Holberg Transcript].

271 *Id.* at 1167–68, 1831.

272 [Nov. 16, 2004] Andriano Transcript, *supra* note 112, at 88.

273 [June 20, 2017] Allen Transcript, *supra* note 241, at 98.

274 Roberts Transcript, *supra* note 127, at 6117.

275 *Id.* at 6268.

C. Sex Work and Trafficking

At least nine of the women (19%) in our dataset worked in the sex industry.[276] But this is likely an underestimate. Sex work is stigmatizing,[277] and women may not have disclosed prior sex work to defense teams—or if they did, defense teams may have opted not to present the evidence at trial. This would be unsurprising, given our observation that prosecutors often commented on women's experiences as sex workers in disparaging ways.

In the case of Brittany Holberg, a woman sentenced to death in 1998, prosecutors referred to her repeatedly as a "crack addict prostitute"[278] and a "hooker."[279] The defendant testified that she had killed the victim, a former client, in self-defense.[280] The prosecution argued that her experience as a sex worker rendered her testimony wholly incredible. The following exchange, taken from the prosecution's cross-examination of the defendant, is typical:

> Q. In order to be a successful prostitute, as you were, to get any kind of repeat business, you would have to at least give the appearance that this was something you enjoyed. Correct?
> A. Yes.
> Q. Okay. And, in fact, that may have something to do with the fact that a prostitute's customer is called a trick. Would you agree with me? There's an element of deceit or deception involved in this business, isn't there?
> A. I believe on both parts, yes.
> Q. Okay. Fair enough. But we're speaking of you right now. There is that side of this business where the prostitute, the hooker at least has to appear to be enjoying it, there's an element of deceit. Would you agree with me?

---

276 We found references to the defendant's sex work in eight transcripts. In a further case, the defendant's post-conviction lawyer informed us that her client had engaged in sex work. Because sex work is stigmatizing for some people, we have deliberately omitted mention of their names here.

277 *See* Rachel Marshall, *Sex Workers and Human Rights: A Critical Analysis of Laws Regarding Sex Work*, 23 WM. & MARY J. WOMEN & L. 47, 65 (2016).

278 [Mar. 13, 1998] Holberg Transcript, *supra* note 270, at 22, 73, 74.

279 [Mar. 11, 1998] Holberg Transcript, *supra* note 270, at 81; [Mar. 5, 1998] Holberg Transcript, *supra* note 270, at 86.

280 [Mar. 13, 1998] Holberg Transcript, *supra* note 270, at 29.

A. Yes, I would.[281]

In closing argument at the guilt phase, the prosecution argued that the defendant, "a woman who is a crack addict and prostitute and a confirmed liar who would abandon her own two-year-old child in order to continue using drugs," was guilty of capital murder.[282]

Prosecutors and judges also mischaracterized child sex trafficking as prostitution,[283] implying that underage girls who were trafficked for sex were willing participants.[284] In the case of one woman in California, multiple witnesses testified that the defendant had begun to trade sex for money as a child—possibly as early as age thirteen.[285] By age fourteen or fifteen, she was regularly seen in the company of older men and women;[286] the defendant explained that one woman would take all of her earnings and give her drugs in exchange.[287] In closing argument, the prosecutor argued that "she chose the lifestyle that she led."[288] Although child sex trafficking victims are incapable of consenting to their exploitation,[289] the trial judge—who, under California law, must re-weigh the aggravating and mitigating

281 *Id.* at 80–81.

282 *Id.* at 27.

283 *See* Nickera Rodriguez, *The Plight of Cyntoia Brown: Can Safe Harbor Laws Prevent the Prosecution of Child Sex Trafficking Victims?*, 31 U. FLA J.L. & PUB. POL'Y 459, 461 (2021) ("The Trafficking Victims Protection Act of 2000 and its subsequent reauthorizations define human trafficking as: a) [S]ex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age.").

284 Prosecutors and judges were not the only trial actors to mischaracterize child sex trafficking as prostitution. In one case of a woman defendant who was around fourteen years old when she was trafficked, defense counsel and defense experts repeatedly referred to her as engaging in "prostitution" for money. [Feb. 16, 2011] Forde Transcript, *supra* note 263, at 67, 136–38, 169–70.

285 Alfaro Transcript, *supra* note 239, at 1516, 1533–34, 4092.

286 *Id.* at 1528–29.

287 *Id.* at 1620–21.

288 *Id.* at 4368.

289 CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, BEST PRACTICES IN DEFENDING WOMEN AND GENDER MINORITIES 79 (2025), https://dpw.lawschool.cornell.edu/wp-content/uploads/2025/07/Best-Practices-in-Defending-Women-and-Gender-Minorities.pdf [https://perma.cc/D2NE-A6GX] [hereinafter DEFENSE MANUAL].

factors after the jury returns its verdict[290]—concluded that the defendant made a voluntary choice to sell sex:

> It also appears to the court that people are really the sum total of the choices we make in our life. She chose to leave school. She chose to use drugs. She chose to engage in acts of prostitution on the streets. . . . She made all of those choices. Those are all choices. There was no evidence presented to the court that those were involuntary choices, anybody forced her into doing that, things of that nature.[291]

D. Intersectional Bias

Women with multiple marginalized identities are particularly vulnerable to biased prosecutorial narratives. This section details some of the ways in which prosecutors' sexualization of women interacts with race, sexual orientation, gender identity, and socioeconomic status, providing examples from transcripts in our dataset across each category.

1. Women of Color

Black feminist scholars have documented how women's various identities (including gender, race, gender identity, economic precarity, disability, and immigration status) affect their experiences both as victims and offenders.[292] Women of color are not afforded the same benefits of youth granted to white girls, for example. Society "adultifies" girls belonging to racial minorities, meaning that people view, respond to, and interact with these girls as if they were adults.[293] Black girls are often mistakenly perceived to be biologically older than they are.[294] As a result, Black girls are perceived as needing less protection and nurturing

---

290 CAL. PENAL CODE § 190.4(e) (West, Westlaw through 2026 Reg. Sess. ch. 7).

291 Alfaro Transcript, *supra* note 239, at 4506.

292 *See, e.g.*, Kali Nicole Gross, *African American, Mass Incarceration, and the Politics of Protection*, 102 J. AM. HIST. 25, 28–29 (2015) (discussing the history of masculinization of Black women and how such negative stereotypes contributed to Black women's disproportionate incarceration); Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African American Woman and the Battered Woman's Syndrome*, 1995 WIS. L. REV. 1003, 1036 (1995) ("Black women have never been placed on a pedestal; the cages in which they have been held have been real, not metaphoric.").

293 EPSTEIN, BLAKE & GONZÁLEZ, *supra* note 19, at 4.

294 *Id.* at 6.

than white girls and are seen as less innocent than their white peers, particularly on topics related to sex.[295] Across our dataset, prosecutors used sexualizing evidence to adultify and hypersexualize women of color.

a. Adultification of Women of Color

We saw adultification at work in the capital trial transcripts of several women of color. In the case of Grace Connell,[296] a woman of color who was sentenced to death in California, the prosecutor sought to downplay evidence that when she was an eleven-year-old child, she was repeatedly raped by a man who was twice her age.[297] As an eleven-year-old, Ms. Connell was incapable of consenting to sexual intercourse, and the perpetrator committed a felony punishable by a minimum of six years in prison.[298] Nevertheless, the prosecutor characterized Ms. Connell as a "mature 11-year-old" who engaged in a "consensual relationship" with the perpetrator.[299] "[I]t's not the same as forcible rape," the prosecutor argued.[300] "So my objection to this whole rape narrative is we need to call what happened to the defendant what it actually is. It is consensual intercourse with an older man."[301]

The State presented this adultification of Ms. Connell alongside racial stereotypes elicited during the prosecutor's cross-examination of a defense witness, in which the prosecutor asked questions about the "primitive or prior culture" of "members" of Ms. Connell's racial group.[302] The prosecutor also posited that people of Ms. Connell's racial background "sometimes have trouble really governing themselves."[303] The prosecution's racially-loaded questions about Ms. Connell's supposedly violent culture further minimized the abuse she endured and the mental health consequences of that abuse. Discounting expert

---

295 *Id.* at 1, 8; *see also* Trevariana Mason, *Extreme Sentences Disproportionately Impact and Harm Black Women*, NAT'L BLACK WOMEN'S JUST. INST. (Sep. 23, 2021), https://www.nbwji.org/post/extreme-sentences-disproportionately-impact-and-harmblack-women [https://perma.cc/4HDU-WTH8].

296 Grace Connell is not her real name. We are using a pseudonym at the request of the defense team.

297 Reporter's Transcript at 1957, People v. Connell (Cal. Super. Ct. 2014) [hereinafter Connell Transcript].

298 CAL PENAL CODE § 288.5 (West 2006).

299 Connell Transcript, *supra* note 297, at 1957.

300 *Id.*

301 *Id.*

302 *Id.* at 1545.

303 *Id.* at 1542.

testimony that Ms. Connell was traumatized by the rapes,[304] the prosecution argued she suffered little long-term consequences because she did not have any "sexual dysfunction" and because "she didn't become a prostitute."[305]

Maria Alfaro was similarly cast as a mature adult when she was still a child. Ms. Alfaro was raped by a friend of her father's when she was nine years old.[306] In cross-examining a defense expert who testified about the rape, the prosecutor repeatedly emphasized that Ms. Alfaro was smoking cigarettes at age nine.[307] The focus on cigarettes served to create the image of an adult smoking after sex in the jurors' minds, and thereby minimized Ms. Alfaro's experiences of sexual abuse. And the prosecutors' tactics worked. Ms. Alfaro was only eighteen years of age at the time of the offense, making her one of the youngest women to be condemned in our dataset. Yet in their comments to the jury in re-weighing the evidence, the trial judge determined that Ms. Alfaro's youth should not be mitigating because she was "streetwise":

> It does appear that the defendant was eighteen years old at the time of the crime. If mere age by itself without any other factor is involved, it would appear perhaps that the age of eighteen might be a mitigating factor in the case. I think you have to put the age in context of what her background shows about she had dropped out of school at an early age, been out on the streets for a substantial period of time, been involved in the drug culture for a substantial period of time, things of that nature. So it would appear that in a streetwise sense she was much more mature than her age would indicate. So it doesn't appear that the age of the defendant at the time of the crime is really a substantial mitigating factor in the case.[308]

b. Hypersexualization of Women of Color

In addition to being adultified, women of color are routinely hypersexualized. Angelina Rodriguez, a Latina woman sentenced to death in California, was portrayed as

---

304 *Id.* at 1820–21. An expert witness testified that the perpetrator sexually abused Ms. Connell for a period of three years, from the ages of eleven to thirteen. *Id.*

305 *Id.* at 1957.

306 Alfaro Transcript, *supra* note 239, at 1867.

307 *Id.* at 1876, 4151.

308 *Id.* at 4505.

a sexually active woman from a young age, despite being a victim of child sexual abuse. Prosecutors asked witnesses to describe her multiple marriages and extramarital sexual relationship,[309] arguing that "she jumped essentially from man to man, including married men."[310] Prosecutors repeatedly referred to her "lover[s]"[311] and "hookup[s],"[312] described how she was "having play time" with a sexual partner,[313] and condemned her for "actively cheat[ing] on her husband."[314] They also criticized her for "flirting with" a sheriff's deputy in the jail.[315] In closing argument at the guilt phase, prosecutors argued that Ms. Rodriguez killed her husband so she could be with her "young boyfriend."[316] These repeated and explicit depictions of Ms. Rodriguez as a sexually loose woman—including when she was still a teenager—appeal to racialized stereotypes of the exotic and seductive Latina.[317] Moreover, the prosecution's argument that Ms. Rodriguez was "greed[y]" for seeking financial stability from a husband and that she was motivated by "money money money" appealed to stereotypes about Latinx, immigrant populations as poor and money-hungry.[318]

---

309 Transcript of Record at 2455–56, 2458–59, 2492–94, 3703–04, People v. Rodriguez, No. BA213120 (Cal. Super. Ct. 2003) [hereinafter Rodriguez Transcript].

310 *Id.* at 3704.

311 *See, e.g.*, *id.* at 1737, 2581, 2640.

312 *Id*. at 1740, 2633, 2640, 2645.

313 *Id*. at 2584.

314 *Id*. at 2581.

315 *Id.* at 3777–79.

316 *Id*. at 2640.

317 *See* ISABEL MOLINA-GUZMÁN, DANGEROUS CURVES: LATINA BODIES IN THE MEDIA 152–74 (2010). The State continues to hypersexualize Ms. Rodriguez in this way. In a recent pleading filed in Ms. Rodriguez's state post-conviction proceedings, the Los Angeles County District Attorney equated evidence about Ms. Rodriguez's history of childhood rape (evidence that Ms. Rodriguez's lawyers argued was relevant to her mental state) with evidence that Ms. Rodriguez had "play time" and "hookup[s]" with a younger man (evidence that the lawyers argued was irrelevant to the offense). The prosecutor's comparison of child rape to consensual affairs, claiming that these experiences are all evidence of Ms. Rodriguez's "sexual history," represents precisely the kind of problematic and sex-shaming attitude that Ms. Rodriguez's lawyers claim infected her trial. Respondent's Opposition to Petitioner's Motion for Leave to Amend and File Supplemental Petition at 14 n.2, *In re* Rodriguez, No. BA213120 (Cal. Super. Ct. Mar. 5, 2026).

318 *See* Naily Ananda Putri & Fitria Akhmerti Primasita, *The Counter-Stereotypical Representation of Latinas in the American Police Procedural Comedy Series Brooklyn Nine-Nine (Fox & NBC, 2013-2021)*, 11 J. TRANSNAT'L AM. STUD. 16, 17–18 (2024); Hannah Lipman, *Embodying Hollywood's Hispanic Body: The Impact of the Male Gaze on Hispanic Women in Film*, 13 HOHONU 27, 27–31 (2014).

In the case of Jane Smith,[319] a Black woman on California's death row, the State underscored that the defendant had a child with a man who was not her husband. Evoking tropes about Black women's sexualities and their "baby daddies,"[320] the State told jurors in its opening statement that Ms. Smith's daughter was "fathered by another man."[321] Prosecutors elicited testimony about Ms. Smith holding herself out to be single while married.[322] During the guilt-phase closing, prosecutors again raised that Ms. Smith's daughter was not fathered by her husband[323] and continued this drumbeat into the penalty phase, asking witnesses about who Ms. Smith was "fooling" with.[324]

Prosecutors in the case of a Latina woman, Camila Jones, similarly highlighted that she had a child from a man who was not her husband. Further, they repeatedly emphasized that Ms. Jones had six children, marshalling stereotypes around Latina women having many children.[325] The State argued that "it's the defendant's choice to have a child with somebody that wasn't her husband. It was the defendant's choice to have six children. Although she says that [her partner] wanted her fat and pregnant, I highly doubt [he] wanted her fat and pregnant with somebody else's child."[326]

2. LGBTQ+ Defendants

Scholars have previously documented the homophobic and transphobic narratives that prosecutors employ in queer people's criminal trials.[327] Overt appeals to derogatory tropes, such as masculinizing lesbian women, hypersexualizing gay men, or pathologizing

---

319 Jane Smith is not the defendant's real name. We have used a pseudonym at the defense team's request.

320 *See* Lisa Rosenthal & Marci Lobel, *Stereotypes of Black Women Related to Sexuality and Motherhood*, 40 PSYCH. WOMEN Q. 414, 414–27 (2016).

321 Smith Transcript, *supra* note 238, at 1545.

322 *Id.* at 1909.

323 *Id.* at 1435.

324 *Id.* at 1450, 1683, 1693.

325 Jones Transcript, *supra* note 148, at 7754, 7757, 8094, 9279.

326 *Id.* at 5493.

327 *See* VALENA E. BEETY, MANIFESTING JUSTICE: WRONGLY CONVICTED WOMEN RECLAIM THEIR RIGHTS 96–107 (2022) (documenting how homophobic narratives can contribute to the wrongful incarceration of queer women). *See generally* Mogul, *supra* note 11 (documenting cases of homophobia in capital cases); Sutton et al., *supra* note 11 (same).

transgender people, pervade the trials of people in the LGBTQ+ community.[328] Here, we focus on how those tropes intersect with the sexualizing evidence and arguments that prosecutors employed across our dataset.[329]

a. Sexual Orientation and Danger

Prosecutors sought to introduce testimony about the defendant's same-sex sexual interactions while incarcerated in multiple cases. Although prosecutors sometimes claimed that such information was relevant to show the defendant's poor disciplinary record and inability to abide by prison rules, such evidence had no discernible relevance to the jury's life-or-death determination. Rather, it appeared that the prosecution presented such testimony to draw attention to the defendant's perceived sexual orientation, paint her as a sexual predator, and cast her as a danger to other women in the prison no matter the consensual nature of the interactions—drawing on discriminatory and deeply dehumanizing ideas about queer people endangering society. In effect, such testimony asks jurors to regard queer defendants as a threat and therefore return a death verdict.

Sammantha Allen was sentenced to death in Arizona. During the penalty phase of her trial, the State called a witness to testify about a relationship that Ms. Allen may have had while incarcerated at the county jail:

> Q. There can be no sexual contact of any kind with other inmates, that's prohibited?
> A. That's my understanding, yes. . . .
> Q. Even if it's consensual, it is a violation?
> A. That is correct.
> Q. One of the disciplinary write-ups the defendant got, exhibit number 227, was for kissing another inmate?

328 Sutton et al., *supra* note 11, at 1054.

329 The sexual orientation and gender identity of the defendant is not always known from the transcript, nor did we seek to find out this information where it was not readily available from the transcripts. The defendant's sexual orientation is frequently immaterial to the State's use of homophobic tropes, though those tropes have even more force when the parties identify the defendant with the queer community. Prosecutors' use of evidence about a defendant's same-sex relationships in prison, for example, fan the flames of homophobia irrespective of the defendant's sexual orientation. Further, and as we have noted elsewhere, many defense teams fail to adequately discuss topics related to sex and gender with their clients. *See* DEFENSE MANUAL, *supra* note 289, at 4–5. This means that much of the pertinent information about the defendant's identity and social history—information that sheds light on the State's narrative at trial—remains hidden.

A. I understand that. I don't have it in front of me, but you are correct. . . .[330]

The prosecutor elicited detail about the appropriate sanction for a same-sex kiss, the number of infractions Ms. Allen had on her record, and referred repeatedly to "the kissing" throughout the witness' testimony, thus constantly reminding jurors of this interaction.[331]

The State has employed similar tactics in other cases, regardless of the defendant's sexual orientation. When Victoria Brown[332] took the stand in her own defense, the prosecutor questioned her about her relationships in jail. Ms. Brown confirmed that she had such relationships to "pass the time."[333] In Virginia Caudill's case in Kentucky, the State questioned her about the women she shared a cell with and their sexual interactions as "lovers," insinuating that Ms. Caudill may have participated in a relationship that made other women "jealous."[334] In Olivia Davis'[335] case, prosecutors had sought to introduce testimony that Ms. Davis "attacked" another inmate because Ms. Davis "believed that [the other inmate] slept with . . . her wife while she was in prison" but reached a stipulation with defense counsel to avoid discussing the "homosexual references."[336] In one case, the trial judge refused to allow the prosecution to introduce such evidence because of the risk of bias to the defendant, explaining that he was not going to admit the evidence of "homosexual activity."[337] Instead, the judge instructed prosecutors to "not let the jurors know the nature of the rule violations, just that she has been found to have violated [the jail rules.]"[338]

---

330 [Jul. 24, 2017] Allen Transcript, *supra* note 241, at 87–88.

331 *Id.* at 88–89. In a bench conference before the testimony—testimony that, unusually, the defense objected to—the county prosecutor explicitly stated that she sought to introduce the testimony to present Ms. Allen as a sexual aggressor and threat to other women living in prison. *Id.* at 73–74. The prosecutor wanted jurors to know that the "prohibited contact" was "not just a kiss on the cheek." *Id.* The court ultimately allowed the testimony because it was based on a prison report that the defense team had previously introduced. *Id.* at 81–82.

332 Victoria Brown is not her real name. We have used a pseudonym at the request of the defense team.

333 Transcript of Record at 501, State v. Brown (Ala. Cir. Ct. 2006) [hereinafter Brown Transcript].

334 Transcript of Record at 123, Commonwealth v. Goforth, No. 99-CR-146 (Ky. Cir. Ct. 2013) [hereinafter Caudill Transcript].

335 Olivia Davis is not her real name. We have used a pseudonym at the request of the defense team.

336 Transcript of Record at 4253, People v. Davis (Cal. Super. Ct. 2015).

337 Transcript of Record at 4418, People v. Dalton, No. 135002 (Cal. Super. Ct. 1995).

338 *Id.* at 4421.

b. Appearance and Queer Identities

The State exploited Celeste Carrington's appearance to infuse his trial with discriminatory comments from the outset. Carrington[339] is a Black transgender man who was tried as a lesbian woman. The trial transcript contains overt references to his sexual orientation, "girlfriends," and identity as a "lesbian."[340] One of the first sentences the prosecutor uttered in her opening statement contained a physical description, combining racialized and homophobic tropes:[341] "What you will hear is that at the time the defendant was arrested, she was five-eight, 230 pounds."[342] The prosecutors followed by stating that "she wore baggy pants; long shirts was her style of dress"[343] and that while the victim was a "small woman," Carrington was a "larger woman."[344] In its opening, the State also made sure to note that the defendant "was living with another woman."[345]

The State continued to stoke fear on the basis of the defendant's race and gender presentation throughout the trial. Witness testimony detailed that "she's not a small woman, [she's a] strong woman."[346] Witnesses variously described the defendant as "the macho one," "very macho," and "too macho."[347] The defense did not object to the State's strategy. Rather, the State's insistence on trafficking in homophobic and racial tropes was aided by the defense team, who asked their own expert witness whether "homosexuality is a mental disorder" under the American Psychiatric Association's diagnostic manual.[348]

---

339 We refer to Carrington without an honorific or first name in accordance with his preferences.

340 Reporter's Transcript on Appeal at 5680, 5983, California v. Carrington, No. C-29739 (Cal. Super. Ct. 1994) [hereinafter Carrington Transcript].

341 Black women are routinely defeminized to portray them as aggressive and dangerous. *See* Rosenthal & Lobel, *supra* note 320; Blackburn Center, *The Historical Roots of the Sexualization of Black Women and Girls*, BLACKBURN CTR. (Feb. 20, 2019) https://www.blackburncenter.org/post/2019/02/20/the-historical-roots-of-the-sexualization-of-black-women-and-girls [https://perma.cc/RQ5X-LTAQ].

342 Carrington Transcript, *supra* note 340, at 3688.

343 *Id.* at 3698.

344 *Id.* at 3706.

345 *Id.*

346 *Id.* at 5418.

347 *Id.* at 5683, 6300.

348 *Id.* at 6428.

The State returned to this theme in its guilt-phase closing argument, emphasizing Carrington's size: "She's five-seven, five-eight, at the time 230 pounds. . . . She's bigger than most of the deputies there. She's bigger than your average person, gender neutral, man or woman."[349] By drawing a comparison of Carrington's appearance to that of the deputies, the State argued that Carrington's size rendered him threatening, thereby grounding its argument in the defendant's gender presentation. In pulling together these defeminizing themes, prosecutors argued that Carrington was unworthy of protection in a "paternalistic" society, telling jurors, "[Y]ou do not need to protect this woman, if you feel that unconsciously."[350]

c. Trading in Homophobia

Other appeals to homophobia involve more complex narratives about the defendant and the queer community. These appeals nevertheless draw on tropes around queer identities to achieve the same end: dehumanizing the defendant. Such was the case in the trial of Jessica Johnson,[351] an Asian American woman on death row. There, the State sought to enmesh the defendant in gay communities and played on stereotypes portraying Asian women as hypersexual and mysterious.[352] Ms. Johnson was accused of killing a fortuneteller and her daughter, but the State opened by telling jurors that "[t]his case has greed, lust, obsession, revenge, incestuous relationship, straight sex, gay sex, manipulations, lies, the occult, threats, stealing things, and stealing lives."[353] While the State's theory was that Ms. Johnson secured an accomplice to the murders by promising to set him up with male sexual partners, the prosecutor's questions elicited details that presented Ms. Johnson as a corrupting force embedded in the gay community. The State questioned one male witness about Ms. Johnson's role in facilitating his relationships with other men, with the prosecutor asking this witness about at least three different gay men and Ms. Johnson's

---

349 *Id.* at 6696.

350 *Id.* at 6669.

351 Jessica Johnson is not the defendant's real name. We have assigned a pseudonym at the request of the defense team.

352 Prosecutors sometimes referred to the defendant by her Vietnamese name, which served to emphasize her Asian immigrant roots to the jury. *See* Transcript of Record at 2094–2100, People v. Johnson (Cal. Super. Ct. 2010) [hereinafter Johnson Transcript]. *See generally* Maria Cecilia Hwang et al., *The Gendered Racialization of Asian Women as Villainous Temptresses*, 35 GENDER & SOC. 567 (2021).

353 Johnson Transcript, *supra* note 352, at 1377.

connection to them.[354] The defense objected to some of this questioning, arguing that it was irrelevant and "salacious," but to no avail.[355] The prosecutor then elicited testimony from a second witness, Ms. Johnson's alleged accomplice, that Ms. Johnson wanted "to introduce [him] to some of those homosexual guys. The gay guys."[356] The State also questioned this witness about whether he had previously told Ms. Johnson that he was interested in same-sex interactions, implying that she was the immoral force behind her accomplice's sexual orientation.[357]

In Maureen McDermott's case, the State alleged that Ms. McDermott hired men to kill her gay roommate and stage it to look like a "homosexual murder."[358] The State's theory was that Ms. McDermott staged the murder "to look like it was done by homosexuals," specifically "to look like an argument between two gay men."[359] The State called the jury's attention to Ms. McDermott's and the victim's sexual orientation in its opening statement.[360] In closing argument at the penalty phase, the prosecution argued that "McDermott's morality was zero"[361] and that "she was basically from the gutter."[362] In a case where the prosecution identified Ms. McDermott as a lesbian on the first day of trial, its denigration of her as being "from the gutter" implicitly invited the jury to connect her sexual orientation to its assessment of her death-worthiness.

---

354 *Id.* at 2094 (eliciting testimony that Ms. Johnson "introduce[d]" the witness to another man "for sex purposes"); *id.* at 2099 (asking the witness if Ms. Johnson "ever introduced [him] to any other homosexual men"); *id.* at 2102 (asking about a third man, "a homosexual" who was "a friend" of Ms. Johnson's according to the State).

355 *Id.* at 2094, 2100–01.

356 *Id.* at 2121–22.

357 *Id.*

358 Transcript of Record at 4498, People v. McDermott, No. A810541 (Cal. Super. Ct. 1990) [hereinafter McDermott Transcript].

359 *Id.* at 4494.

360 *Id.* at 4493.

361 *Id.* at 11078.

362 *Id.*

3. Women of Poor Socioeconomic Status

Rural women and women from lower socioeconomic backgrounds are some of the most vulnerable women in society.[363] In some cases, prosecutors highlighted defendants' socioeconomic status by drawing on stereotypes around poorer women's sexualities, such as "welfare queens" or "white trash" women.[364] For example, prosecutors invoked language that disparaged poorer women's appearances in their trials. Prosecutors in Darlie Routier's trial elicited testimony that she was "tacky" because of the loose clothing she wore, her lack of makeup and bra, and her hair that was "never fixed."[365] Susan Eubanks' prosecutors called her a "trashy girl" and claimed that she was so "trashy" that her mother-in-law would never have picked her to marry her son.[366]

In both Socorro Caro and Sammantha Allen's trials, the State elicited testimony about the defendant's manicures, but to different ends. Ms. Caro was presented as a woman who married into money and had "once a week" manicures as a sign of vanity afforded to her as a woman of means.[367] Indeed, prosecutors presented Ms. Caro's love of the lifestyle she married into as the motive for her husband's death—the State claimed that upon separation with her husband, Ms. Caro "was stripped of her financial freedom" and could no longer "get[] manicures once a week," giving her a motive to kill.[368]

Conversely, in Sammantha Allen's case, the State elicited testimony about Ms. Allen's manicures to invite judgment of her perceived irresponsibility as a poor woman

---

363 Committee on the Elimination of Discrimination Against Women, General Recommendation No. 33 on Women's Access to Justice, U.N. Doc. CEDAW/C/GC/33 (Aug. 3, 2015); *see also* Committee on the Elimination of Discrimination Against Women, General Recommendation No. 34 on the Rights of Rural Women, U.N. Doc. CEDAW/C/GC/34 (Mar. 7, 2016).

364 Katia Savchuk, *Poor Journalism: Is Media Coverage of the Poor Getting Better or Worse?*, CAL. MAG. (Apr. 6, 2016), https://alumni.berkeley.edu/california-magazine/online/poor-journalism-media-coverage-poor-getting-better-or-worse/ [https://perma.cc/SS9G-S8J7]; Catherine Powell & Camille Gear Rich, *The "Welfare Queen" Goes to the Polls: Race-Based Fractures in Gender Politics and Opportunities for Intersectional Coalitions*, 108 GEO. L.J. 105, 115 (2020) ("[T]he welfare queen was used to stereotype and villainize Black women on public assistance and using other social welfare programs. Americans were told that the welfare queen was indolent and self-indulgent . . . .").

365 Routier Transcript, *supra* note 228, at 5462.

366 24 Eubanks Transcript, *supra* note 97, at 2545.

367 Caro Transcript, *supra* note 205, at 9595–96, 9681–82.

368 *Id*. at 10715–16.

who had children to feed.[369] Prosecutors asked witnesses repeatedly about why Ms. Allen did not work, pressing them on why she "didn't get a job,"[370] did not "contribut[e] to the household,"[371] and did not "want to work."[372] The State concluded thus: "So what all this tells you is that the defendant is lazy."[373] In light of these judgments about her socioeconomic status, the State disparaged Ms. Allen for doing anything for herself, asking one witness, of Ms. Allen, "Her nails are done, aren't they?"[374] and following up with, "So she's clearly got enough money to get her nails done?"[375] The State even elicited testimony that such spending, for a woman of Ms. Allen's means, was "frivolous."[376]

E. Sexuality and Motherhood

Over 85% of the women in our dataset are mothers.[377] Like many women in the criminal legal system, they had caregiving responsibilities before their incarceration.[378] Yet prosecutors wielded their motherhood as another reason to condemn them—particularly when their sexual behavior fell short of pervasive tropes around how mothers should behave.

Societal norms continue to expect women to be attentive and caring mothers, wives, and homemakers.[379] "Good" mothers are those who are nurturing, emotional, and perpetually

369 Trial testimony established that Ms. Allen's family frequently lived below the poverty line. [Jul. 11, 2017] Allen Transcript, *supra* note 241, at 120.

370 [Jul. 18, 2017] Allen Transcript, *supra* note 241, at 92.

371 *Id.* at 77.

372 *Id.* at 93.

373 [Jul. 31, 2017] Allen Transcript, *supra* note 241, at 132.

374 [Jul. 13, 2017] Allen Transcript, *supra* note 241, at 15.

375 *Id.*

376 [Jul. 18, 2017] Allen Transcript, *supra* note 241, at 27.

377 Babcock et al., *Women on Death Row*, *supra* note 21, at 12.

378 *See* Laura M. Marushak & Jennifer Bronson, *Parents in Prison and Their Minor Children: Survey of Prison Inmates, 2016*, BUREAU OF JUST. STAT. (Mar. 30, 2021), https://bjs.ojp.gov/library/publications/parents-prison-and-their-minor-children-survey-prison-inmates-2016 [https://perma.cc/3BED-S72W].

379 *See generally* C. Nathan DeWall, T. William Altermatt & Heather Thompson, *Understanding the Structure of Stereotypes of Women: Virtue and Agency as Dimensions Distinguishing Female Subgroups*, 29 PSYCH. WOMEN Q. 396 (2005).

available for their children.[380] Prosecutors in Sammantha Allen's trial drew heavily on these tropes to condemn her as a poor mother because of her sexual life. The State called multiple family members, former sexual partners, and other acquaintances of Ms. Allen's to comment on her sexual history, highlighting that she had children from different fathers—a refrain that taps into stereotypes about women of poorer socioeconomic status being burdens on society and unfit parents.[381] The State told jurors that Ms. Allen was "a 23-year-old mother of four," arguing that by having children, she "[had] now made—not only has she made the house overcrowded, she now goes and has another baby, . . . making the house even more crowded."[382]

Prosecutors pressed witnesses about the parenthood of Ms. Allen's children and her relationships with their fathers. The State asked one former partner, "Is he—a father to any of Sammantha's children?"[383] and asked another about "the different last names for [her] kids."[384] One of Ms. Allen's ex-partners took the stand in the penalty phase, and the prosecutor asked multiple questions about Ms. Allen's children, including: "Was it your child?" "So she was cheating on you?" "But do you know if the child that the defendant miscarried was yours?"[385]

During their penalty-phase closing statement, prosecutors argued that "[Ms. Allen] certainly didn't have any problems with boyfriends after she turned 18, because she married three of them in pretty short order"[386] and later said, "In fact, she was married *too many times*."[387]

This focus on Ms. Allen's sexual history and the paternity of her children was presented alongside days of testimony about Ms. Allen's capacities as a mother. The prosecutor

---

380 *See* Patricia Easteal et al., *How Are Women Who Kill Portrayed in Newspaper Media? Connections with Social Values and the Legal System*, 51 WOMEN'S STUD. INT'L. F. 31, 32 (2015).

381 *See* Tatiana Masters et al., *Jezebel at the Welfare Office: How Racialized Stereotypes of Poor Women's Reproductive Decisions and Relationships Shape Policy Implementation*, 18 J. POVERTY 1, 2 (2014).

382 [Jul. 31, 2017] Allen Transcript, *supra* note 241, at 139.

383 [June 14, 2017] Allen Transcript, *supra* note 241, at 57.

384 [Jul. 17, 2017] Allen Transcript, *supra* note 241, at 35.

385 [Jul. 11, 2017] Allen Transcript, *supra* note 241, at 128–30.

386 [Jul. 31, 2017] Allen Transcript, *supra* note 241, at 97.

387 *Id.* at 121 (emphasis added).

bemoaned in its guilt-phase closing that she "wasn't fixing the bunk beds or wiping up baby vomit,"[388] and in its penalty-phase closing that she "pushed off her responsibilities for changing [her children] to [others]."[389] The prosecutor even appealed to jurors directly to condemn Ms. Allen as a parent, telling them, "Many of you, I'm sure, are parents, and you know that, quite simply, there are ways to do this, to get your kids to stay in school, keep doing their work."[390]

Prosecutors invoked women's sexual histories to condemn them as poor mothers in other cases, too. Brenda Andrew's jury heard in detail about how she "flirt[ed]" with a sexual partner in front of her son and how she had sex with a boyfriend in the family home.[391] The State questioned witnesses about the relationship between Ms. Andrew's partners and her children, introducing into evidence a holiday card that Ms. Andrew and her children sent one of her partners[392] and eliciting testimony that her home was "filthy" and "unkempt" while her children lived there.[393] Much of the State's condemnation of Ms. Andrew as a mother came during the penalty phase, during which the State asked successive witnesses whether Ms. Andrew was a good mother in light of her affairs.[394] The prosecutor asked one witness no fewer than nine consecutive questions about whether Ms. Andrew was a "good mother," including whether "a good mother would run off with her boyfriend."[395] The prosecutor then evoked this testimony during the State's penalty phase closing to argue that Ms. Andrew was not a "good mother" because she "br[ought] men into her house with her children there."[396]

Similarly, in Susan Eubanks' trial, the State argued in closing that Ms. Eubanks' affairs caused "chaos" in her house for her children and referred to a diary kept by her husband

---

388 [June 27, 2017] Allen Transcript, *supra* note 241, at 27.

389 [Jul. 31, 2017] Allen Transcript, *supra* note 241, at 132.

390 *Id.* at 32.

391 Andrew Transcript, *supra* note 97, at 248, 251.

392 *Id.* at 2309.

393 *Id.* at 1991.

394 *Id.* at 4312–46.

395 *Id.* at 4346.

396 *Id.* at 4394.

about Ms. Eubanks going out at night and not making dinner for their children.[397] In Wendi Andriano's trial, the prosecutor noted that Ms. Andriano was not taking care of her children when she was knocking on the door of a man she was seeing.[398] The message is clear: in the eyes of the State, women's sexual histories render them unfit mothers and therefore bad women deserving of death.

Women's attention to their image, as previously described in Part IV.B, is another way in which prosecutors target defendants' perceived shortcomings as mothers. In Kimberly Cargill's case, the State argued that she was a poor mother because she was vain at the expense of her children, asking the defendant, "[Y]ou're dumping [your child] off with no food while you go get your nails done?"[399] The State adopted the same tactic in Ms. Allen's case, questioning witnesses about her inability to feed her children while emphasizing that "she's clearly got enough money to get her nails done"[400] and that she was a "stay-at-home mother, who didn't want to work."[401] The transcripts in our dataset reveal that prosecutors powerfully weaponize women's sexuality to condemn them as mothers—a tactic that is all the more harmful when combined with intersectional biases such as race or socioeconomic status.

F. Blaming Survivors of Sexual Violence

Gender-based violence is ubiquitous in the lives of women on death row.[402] Of the women in our dataset, 96% experienced one or more forms of physical, sexual, psychological, or socioeconomic violence before their arrest on capital charges.[403] At least 74% of these women experienced sexual violence.[404]

---

397 Eubanks Transcript, *supra* note 220, at 1066, 1151, 2552.

398 [Oct. 13, 2004] Andriano Transcript, *supra* note 112, at 63–64.

399 [May 16, 2012] Cargill Transcript, *supra* note 233, at 34.

400 [Jul. 13, 2017] Allen Transcript, *supra* note 241, at 15.

401 [Jul. 31, 2017] Allen Transcript, *supra* note 241, at 121.

402 Babcock & Greenfield, *supra* note 21, at 358.

403 *Id.*

404 *Id.* at 359.

In some of the trial transcripts we reviewed, defense teams presented evidence of women's experiences of sexual violence at either the guilt or penalty phases of trial.[405] Most commonly, that evidence was presented through expert testimony or through the testimony of the defendants themselves.[406] Women testified about childhood sexual abuse,[407] about rape,[408] and about having to get abortions resulting from rape.[409] Some women were trafficked as children,[410] and some were forced to have sex with fathers,[411] grandfathers,[412] or other family members.[413] In no case, however, did the prosecution fully acknowledge the severity of the abuse or credit the women's accounts. Instead, they sought to discredit, minimize, or dismiss the evidence—often by invoking debunked stereotypes of sexual assault victims.[414]

With respect to victims of sexual violence, prosecutors sometimes sought to undermine their accounts by portraying them as sexual aggressors. The case of Janeen Snyder is a particularly potent example of this tactic. Ms. Snyder was sentenced to death alongside her intimate partner, Michael Thornton, for the murder and sexual torture of a young woman.[415] As a young teenager, Ms. Snyder moved in with Mr. Thornton's family, and Mr. Thornton—who was twenty-six years her senior—cast himself as her surrogate father.[416] He raped her

---

405 *Id.* at 377.

406 *See id.* at 378, 384 (discussing expert testimony in the case of Lisa Jo Chamberlin); *id.* at 385–86 (discussing expert testimony in the case of Cynthia Coffman).

407 *Id.*

408 Jones Transcript, *supra* note 148, at 7392.

409 Rodriguez Transcript, *supra* note 309, at 3782.

410 *See supra* notes 276–290 and accompanying text.

411 30 Reporter's Transcript of Proceedings at 6492, 6537, 6568–69, People v. Bell (Cal. Super. Ct. 2002) [hereinafter Bell Transcript] (the defendant's real name is not Bell; we have used a pseudonym at the request of the defense team).

412 Rodriguez Transcript, *supra* note 309, at 3510, 3636–37.

413 *See* Jones Transcript, *supra* note 148, at 5826, 5835 (describing abuse by stepfather).

414 *See* Babcock & Greenfield, *supra* note 21, at 385–91 (presenting cases in which prosecutors used disproven stereotypes to delegitimize and minimize evidence of abuse).

415 Snyder Transcript, *supra* note 202, at 2547.

416 *Id.* at 8308, 9428.

for the first time when she was fourteen[417]—then continued to rape her "vaginally, orally, and anally, including while she was in restraints."[418]

In response to this testimony, the prosecutor sought to portray Ms. Snyder as sexually precocious at an "inappropriate" age.[419] When a defense psychologist testified about how Mr. Thornton repeatedly raped Ms. Snyder, the prosecution suggested that it was a "sexual experience" in which Ms. Snyder was "willing to sell herself" to Thornton for a "business opportunity":

> Now, I know there is a huge age imbalance, that he is 15—she is 15, he is much older than her, but the sexual experience is expressed as him offering her a business opportunity and her, essentially—sadly, willing to sell herself for this business opportunity?[420]

In his penalty phase closing argument, the prosecutor argued that Ms. Snyder was the one with the power in her relationship with the older Mr. Thornton:

> And she had another power. She had power over her partner. She had power over her partner, Michael Thornton. . . . What was her power? You know, Michael Thornton apparently couldn't get an erection. And she needed her sex, didn't she?[421]

In the California case of Christine Bell, a defense expert testified that Ms. Bell had been repeatedly raped by her father over a period of years, beginning when she was only eleven or twelve.[422] Her father also became her trafficker.[423] Starting at age eleven, her father forced her to trade sex for money and collected her earnings.[424] The prosecution downplayed the significance of this testimony, repeatedly suggesting that Ms. Bell was

---

417 *Id.* at 10783.

418 *See* Babcock & Greenfield, *supra* note 21, at 388 (citing Snyder Transcript, *supra* note 202, at 10780–83).

419 Snyder Transcript, *supra* note 202, at 10945.

420 *Id.* at 10934.

421 *Id.* at 11179–80.

422 Bell Transcript, *supra* note 411, at 6568–69.

423 *Id.* at 6484–85, 6488.

424 *Id.* at 6485.

a "dominatrix" despite her status as a child sex trafficking victim.[425] The prosecutor, a woman, asked a witness whether Ms. Bell ever described her favorite sexual practices, and whether she "bragg[ed]" about "liking stuff shoved up her," and that "sodomy was best."[426] The prosecutor also asked whether the witness knew that Ms. Bell "liked women," implying that she was bisexual.[427] Later, the prosecutor elicited testimony that Ms. Bell "got off on aggressive, violent, sex."[428]

The tactics we describe above play on the same tropes that have been roundly condemned when invoked by defense attorneys—and which led to so-called "rape shield" laws.[429] Scholars have pointed out that women in the criminal legal system are rarely viewed as victims, even when their experiences of gender-based violence are closely intertwined with the actions that led to their arrest.[430] This is often referred to as the victim/defendant binary.[431] A woman can be either a victim, or a defendant, but she cannot be both. Prosecutors in the cases we describe above reinforced this binary by blaming victims for the sexual violence they endured as children—and by simultaneously casting them as sex-crazed women who "got off on" or "needed" sex.

V. The Impact of Sexualizing Evidence

The evidence and argument detailed above does not exist in a void. Once jurors have heard and seen evidence concerning the defendant, her body, her underwear, her appearance,

---

425 *Id.* at 6482, 6516.

426 *Id.* at 6483–84.

427 *Id.* at 6484.

428 *Id.* at 7862.

429 *See generally* Suzanne St. George Coble, Emily Denne & Stacia N. Stolzenberg, *Blaming Children: How Rape Myths Manifest in Defense Attorneys' Questions to Children Testifying About Child Sexual Abuse*, 37 J. INTERPERSONAL VIOLENCE 17–18 (2022) (providing an overview of rape myths and their invocation by defense attorneys in sexual assault cases involving children).

430 *See generally* LEIGH GOODMARK, IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM (2023). *See also* Michal Buchhandler-Raphael, *Survival Homicide*, 44 CARDOZO L. REV. 1673, 1675–76 (2023).

431 *Breaking the Binary: When Survivors of Abuse Become the Accused*, JBWS (2026), https://jbws.org/news/breaking-the-binary-when-survivors-of-abuse-become-the-accused/ [https://perma.cc/D2KZ-SZUQ]; *"Perpetrator" vs. "Victim" and the Impact of Carceral Logic*, VA. SEXUAL AND DOMESTIC VIOLENCE ACTION ALL. (June 13, 2024), https://vsdvalliance.org/press_release/perpetrator-vs-victim-and-the-impact-of-carceral-logic/ [https://perma.cc/75HQ-NLYN].

and her sexual life, it cannot be unheard or unseen. Such evidence goes with jurors into the deliberation room and informs their decisionmaking.

This section will map out some of the ways in which sexualizing evidence affects the quality of justice that women defendants receive. First, sexualization erases women's individuality and personhood. This affects all aspects of women's cases—from their interrogation through to their clemency appeals—by using gendered stereotypes to position the defendant as someone who does not adhere to socially accepted norms.[432] Second, prosecutors use sexualizing evidence to heighten women's legal culpability, including through their theories of motive. Third, prosecutors specifically draw on sexualizing evidence to heighten women's moral culpability and increase their chances of receiving death sentences. Ultimately, prosecutors' use of sexualizing evidence and argument can render a defendant's trial fundamentally unfair—as the Supreme Court recognized in *Andrew v. White*—by deflecting jurors' focus from an assessment of the defendant's guilt or the appropriate penalty to a referendum on her femininity and morality.

A. Dehumanizing Women Through Stereotypes

The overarching impact of sexualizing evidence is to reduce the defendant to an archetype of an evil woman. Evidence focused on women's sexual histories and bodies juxtaposes the defendant and "normal" women, inviting judgment about their failure to adhere to conventional feminine norms. These views of "normality" are premised on societal expectations of how women should conduct themselves as wives and mothers: a woman should "remain chaste, . . . [and] remain true to her husband."[433] She should be demurely dressed and not attract male attention.[434] And she should not have sex outside of

---

432 In the case of Karla Faye Tucker, for example, scholars have described how accounts of her sexual pleasure during the murder of the victim affected perceptions of her case long after her trial. *See* Joan Howarth, *Executing White Masculinities: Learning from Karla Faye Tucker*, 81 OR. L. REV. 183, 226–28 (2002).

433 Julia Simon-Kerr, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854, 1862 (2008).

434 *See* Naomi Ellemers, *Gender Stereotypes*, 69 ANN. REV. PSYCH. 275, 280 (2018).

hetero-patriarchal marriage structures.[435] Jurors' perceptions of the defendant and her case are filtered through this lens, shaping their evaluations of her guilt and punishment.[436]

Prosecutors' presentation of sexualizing evidence engenders "hostility toward, and negative stereotyping of, women"[437] by positioning defendants outside the boxes of chastity, fidelity, and sexual heteronormativity. Women who enjoy sex, who have too much sex, who have sex with women, who have sex outside of marriage, who have sex for remuneration, and who are too sexual while being mothers fly in the face of cultural tropes. Instead of being chaste, the defendant is cast as a hypersexual harlot. Rather than being demure, she wears revealing or, alternatively, masculine clothing. As for women who are wives, prosecutors argue that their infidelity "proves a character fault[,] such as promiscuity or immorality" that the jury can rely on "to find that the defendant is an immoral or evil person," a finding that leads jurors to conclude she is "more likely to commit criminal acts such as murder than is a person of good character."[438] In this way, sexualizing evidence invokes "jurors' fears of a society out of control, one where women's sexuality [runs] amok."[439] Prosecutors' presentation of testimony and argument sexualizing the defendant at all phases of the trial thus grounds the State's case—including the conclusions that it asks jurors to draw—in stereotypical views about women's roles in society.

Moreover, the nature of stereotypes deprives defendants of individualized proceedings at all phases of their trial. Stereotypes reflect "general expectations about members of

---

435 Amanda Potts & Siobhan Weare, *Mother, Monster, Mrs, I: A Critical Evaluation of Gendered Naming Strategies in English Sentencing Remarks of Women Who Kill*, 31 INT'L J. SEMIOTICS L. 21, 36 (2018) (explaining that married women are expected to adhere to "appropriate femininity" associated with "passivity, good character and membership [in] a (dedicated) heterosexual marriage.").

436 The pictures that prosecutors paint of the defendant at trial affect post-conviction proceedings, too. For example, appellate courts in Brenda Andrew's case have continued to characterize her behavior as poor "for a woman," and the Oklahoma Court of Criminal Appeals even determined that some of the sexualizing evidence in her case was relevant as it showed that Ms. Andrew's co-defendant "was just the latest in a long line of men she seduced." Andrew v. State, 164 P.3d 176, 185–92 (Okla. Crim. App. 2007). In the case of Brittany Holberg, one Fifth Circuit judge referred to her as a "cocaine-addled prostitute" in dismissing her self-defense claim. Holberg v. Guerrero, 130 F.4th 493, 508 (5th Cir. 2025) (Duncan, J., dissenting), *vacated on grant of reh'g en banc*, 145 F.4th 625 (5th Cir. 2025).

437 Sergio Herzog & Shaul Oreg, *Chivalry and the Moderating Effect of Ambivalent Sexism: Individual Differences in Crime Seriousness Judgments*, 42 L. & SOC'Y REV. 45, 50 (2008).

438 Joseph Colquitt, *Evidence and Ethics: Litigating in the Shadows of the Rules*, 76 FORDHAM L. REV. 1641, 1651 (2007).

439 ATWELL, *supra* note 11, at 19.

particular social groups"[440] that are "highly resistant to counter-evidence."[441] By sexualizing the defendant, prosecutors ask jurors to judge her as a representative of a group.[442] Evidence grounded in stereotypes anchors jurors' perceptions of the defendant's blameworthiness in social values and normative judgments about women, instead of individualized information about the offense.[443] The defendant's individuality is flattened and she becomes a one-dimensional archetype—the adulterous slut, the man-hating lesbian, the irresistible and deadly siren whom the jury must punish.

Such reductionism is particularly harmful because it means that prosecutors invite jurors to judge women's morality by their failure to conform to cultural tropes. Prosecutors' focus on women's sexual expression and sexual histories prompts jurors to consider "not only what the woman has done but also who she is with respect to her position in the family and in society."[444] In so doing, the State encourages jurors to convict and condemn women based on their violation of gendered moral codes. Prosecutors wield these violations as proof of the defendant's bad character and lack of morality. "Sexually deviant" women are deemed less worthy of compassion, the evidence they present is less trustworthy, and their lives are more expendable.[445] And the State blinds jurors to the defendant's humanity by focusing their attention on her transgressions against gender norms—a tactic that is devastating in the penalty phase of capital trials, when jurors are tasked with weighing whether the defendant is a human worthy of life.[446] Women who are presented as failures of

---

440 Ellemers, *supra* note 434, at 276.

441 Deborah Epstein & Lisa Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 433 (2019).

442 REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES 9 (2011) (explaining that by virtue of membership in a group—here, the group "women"—a person is "is believed to conform to the generalized view or preconception" of the group).

443 *See* Epstein & Goodman, *supra* note 441, at 432–33 ("[M]ost commonly held derogatory stereotypes include those that devalue the words of women[.] . . . [O]nce formed, these stereotypes are highly resistant to counterevidence.").

444 Herzog & Oreg, *supra* note 437, at 49.

445 *See* Weare, *supra* note 12, at 347 (explaining that the law aims to control sexually deviant women and in the process is "excessively punitive to them"); Farr, *supra* note 11, at 55–56 (describing study findings of women on death row as portraying women as "ruthless, manipulative, seductive and often lustful" and "heterosexually unattached").

446 In the penalty phase, the jury must consider "the diverse frailties of humankind," a task that is rendered impossible when the State reduces the defendant to a villainous archetype based on her sexual transgressions. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

femininity by their deviation from societally-prescribed roles as chaste wives and mothers are thus easier to condemn—a woman who cannot abide by the laws of womanhood is more likely to flout the laws of the land, or so the prosecutorial playbook says.

The noxious effect of gender-biased evidence premised on such stereotypes packs a powerful punch in the courtroom, and prosecutors know it. Studies have shown that the criminal legal system holds mothers to a higher standard than other defendants.[447] Indeed, one study found that courts have imposed more severe sentences against mothers who were less involved in their children's lives as compared to attentive mothers,[448] and juries have tended to reward female defendants who portray themselves as loving and nurturing mothers.[449] In capital sentencing, women who deviate from these cultural expectations—including through their sexual behavior and appearance—are portrayed as "representing the evil side of heterosexual female nature—ruthless, manipulative, seductive and often lustful."[450] Womanhood is thus a millstone around the neck of women who are viewed as failing to meet societal expectations.

Courts have recognized the harmful impact of reducing women to dehumanizing stereotypes in their criminal proceedings. The Supreme Court has repeatedly prohibited state action perpetuating "overbroad generalizations about the different talents, capacities, or preferences of males and females"[451] and explained that state actors cannot impose on women "natural and proper timidity" or the idea that "[t]he paramount destiny and mission of wom[e]n [is] to fulfil[l] the noble and benign offices of wife and mother."[452] As the Supreme Court recently explained in *Andrew v. White*, evidence premised on stereotypes about women—or, rather, evidence that the defendant *failed* to abide by these tropes—can rise to the level of a due process violation where that evidence affects the fundamental

---

447 *See* Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 95–96 (1993) (explaining that "criminal law is more likely to impose an affirmative duty on mothers than other classes of people").

448 Melinda Tasca et al., *The Role of Parental Status and Involvement in Sentence Length Decisions: A Comparison of Men and Women Sentenced to Prison*, 65 CRIME & DELINQ. 1899, 1899 (2019).

449 Jenny E. Carroll, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice*, 75 TEX. L. REV. 1413, 1446 (1997).

450 Farr, *supra* note 11, at 56.

451 United States v. Virginia, 518 U.S. 515, 533 (1996).

452 J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 132–34 (1994) (quoting Bradwell v. State, 16 Wall. 130, 141 (1873)).

fairness of the trial.[453] Such evidence creates "the risk that a jury will convict a defendant for crimes other than those charged—or that, uncertain of guilt, it will convict a defendant because a bad person deserves punishment."[454]

Sexualizing evidence prejudices women by drawing on jurors' explicit and implicit biases.[455] Jurors are more likely to find a defendant guilty if they perceive the person—rather than the facts of the case—negatively.[456] Moreover, prosecutors speak with a voice of authority in the courtroom. As noted in *Berger v. United States*, "[I]mproper suggestions, insinuations and, especially assertions of personal knowledge [by prosecutors] are apt to carry much weight against the accused when they should properly carry none."[457] Trial prosecutors' decisions to present evidence about the defendant's sexuality therefore prime jurors to pass moral judgments about the defendant based on information that lacks any bearing on the offense.[458] This applies equally to cases in which prosecutors make direct appeals to jurors about the defendant's sexuality and to cases in which they present sexualizing evidence in piecemeal fashion. In many cases, sexualizing evidence is introduced throughout the trial, accumulating through witness testimony and prosecutors' comments. The effects of these tactics are no less pernicious. As the Supreme Court has recognized, "Some toxins can be deadly in small doses."[459]

Ultimately, sexualizing evidence dehumanizes the defendant in the eyes of the decisionmaker. Prosecutors' use of lurid, voyeuristic detail paints lasting mental pictures for jurors of the defendant's body, underwear, and sexual behavior, turning her trial into

453 604 U.S. 86, 87 (2025).

454 Old Chief v. United States, 519 U.S. 172, 181 (1997).

455 Implicit bias refers to "automatically evoked mental associations about social groups," including associations based on race and gender. B. Keith Payne & Jason W. Hannay, *Implicit Bias Reflects Systemic Racism*, 25 TRENDS COGN. SCI. 927, 927 (2021).

456 *See* Neil A. Rector et al., *The Effect of Prejudice and Judicial Ambiguity on Defendant Guilt Ratings*, 133 J. SOC. PSYCH. 651, 657–58 (2010).

457 295 U.S. 78, 88 (1935); *see also* Buck v. Davis, 580 U.S. 100, 121 (2017) (the prejudicial effect of testimony advancing racial stereotype "was heightened due to the source of the testimony . . . a medical expert bearing the court's imprimatur.").

458 *See* Weare, *supra* note 12, at 346–47.

459 *Buck*, 580 U.S. at 122 (rejecting argument that prejudicial invocations of defendant's race were *de minimis* because they only occurred twice). The deadly effect of sexualizing evidence is particularly important in capital cases, where, as the Supreme Court has explained, "The risk of . . . prejudice infecting [the] proceeding is especially serious . . . ." Turner v. Murray, 476 U.S. 28, 35 (1986).

a titillating show. When jurors see Brenda Andrew's "thong underwear," the State wants them to picture her wearing it. When they hear about Camila Jones' dildo, the State invites them to think about her using it. When they see photos of Donna Roberts' "red thong panties," hear about Wendi Andriano's lubricant, or contemplate Manling Williams' "sore" legs, the State asks them to imagine the defendant having sex. Women's trials become a spectacle through which the State turns the defendant into a grotesque figure upon whom jurors can project their desires, hatred, and condemnation. The State's use of sexualizing evidence thus asks jurors to punish the defendant as a symbol of all that is sinful about female sexuality.

B. Heightening Legal and Moral Culpability

Beyond tainting jurors' every perception of the defendant, prosecutors use sexualizing evidence to heighten women's legal and moral culpability.

1. Legal Culpability

In cases including male and female co-defendants, the State has used sexualizing evidence to increase women's relative culpability. Prosecutors have accomplished this by arguing that the female defendant controlled her male partner through sex, for example, and therefore is the more responsible party of the two. The prosecution in Tiffany Moss' case stated in their closing arguments that Ms. Moss "seduced" her male co-defendant and was therefore more culpable.[460] Testimony in Sammantha Allen's trial focused on her sexual relationships with male partners and her interactions with her male co-defendant, leading the prosecution to argue that she was "no shrinking violet" and was a leader in the offense.[461] In Brenda Andrew's case, Ms. Andrew's co-defendant—who was also her sexual partner—admitted to shooting Ms. Andrew's husband, but the prosecution argued that Ms. Andrew controlled her co-defendant through their sexual relationship.[462]

Another way in which prosecutors use sexualizing evidence to heighten women's legal culpability is through motive. In multiple cases, women's sexual histories and appearances have served to solidify the State's alleged motive for the murder. By drawing on tropes about

---

460 Transcript of Reporter at 2733, State v. Tiffany Nicole Moss, No. 18-B-01541-1 (Ga. Super. Ct. 2019).

461 [June 20, 2017] Allen Transcript, *supra* note 241, at 98.

462 Petitioner's Supplemental Response Brief at 16, Andrew v. Tinsley, 164 F.4th 789 (10th Cir. 2026).

bitter, man-hating women,[463] prosecutors perpetuate the notion that women cannot separate from a partner without resorting to extreme emotions, whether hysteria or visceral hatred. Prosecutors then argue that those extreme emotions—and women's resultant inability to regulate their emotions in an appropriately feminine way[464]—are the impetus for the crime.

Prosecutors in Socorro Caro's case, for example, explicitly used Ms. Caro's appearance to support their theory of motive. In the guilt-phase closing, the prosecutor argued that "[Ms. Caro] knew her marriage was troubled. She knew that Dr. Caro was leaving," which "stripped [her] of her financial freedom. This just had to be a humiliating moment for her. This woman, who was getting manicures once a week."[465] The prosecutor then stated: "The defendant wasn't going to get to be Mrs. Dr. Xavier Caro, and so Dr. Caro wasn't going to get his family. She took away his children."[466]

Susan Eubanks' prosecutors similarly premised their theory of motive on their portrayal of the defendant as a wronged woman. The closing argument contains multiple references to Ms. Eubanks being "very anti-male" and a "man hater" because of problems with a sexual partner and being out for "revenge against men who hurt her."[467] Prosecutors posited that she was a bitter and rejected woman who "carried out her very sick, sick crime, all because of a man who she couldn't have."[468] In Virginia Caudill's case, prosecutors argued that a break up with her boyfriend triggered an emotional spiral that saw Ms. Caudill murder his mother.[469] And in Angelina Rodriguez, Manling Williams, and Brenda Andrew's cases, the State argued that each defendant resorted to murdering her husband because she was having sex with another man and wanted to be with him.[470]

---

463 *See* Robin E. Roy et al., *Effects of Stereotypes About Feminists on Feminist Self-Identification*, 32 PSYCH. WOMEN Q. 81, 146 (2007).

464 Prosecutors frequently use demeanor evidence to target women's emotions, drawing on tropes around women's appropriate expression of emotion. *See* E. Ashby Plant et al., *The Gender Stereotyping of Emotions*, 24 PSYCH. WOMEN Q. 81, 81 (2000) ("For decades, the belief that women are more emotional than men has been one of the most consistent gender stereotypes.").

465 Caro Transcript, *supra* note 205, at 10738.

466 *Id.* at 10787.

467 Eubanks Transcript, *supra* note 220, at 1064.

468 *Id.* at 1080, 1151.

469 Caudill Transcript, *supra* note 334, at 55.

470 Rodriguez Transcript, *supra* note 309, at 1737; Williams Transcript, *supra* note 186, at 7591; Andrew Transcript, *supra* note 97, at 4100–01.

2. Moral Culpability

Prosecutors also marshal sexualizing evidence to affect jurors' determinations of moral culpability. Sexualizing evidence frequently serves to discredit women's mitigation narratives. As noted above, women on death row are almost uniformly survivors of gender-based violence, and over 74% have experienced sexual violence before their incarceration.[471] Sexualizing evidence frequently undercuts defendants' ability to adequately present evidence of their abuse as a mitigation narrative, or even as part of their defense of the crime. This is because sexualizing evidence in its many forms renders the defendant an imperfect victim, and prosecutors urge juries to look for perfect victimhood in order to credit a defendant's experiences of abuse.[472]

Women portrayed as hypersexual or working in the sex trade are often regarded as imperfect victims because they were "asking for it."[473] The State's focus on the defendant's body and clothing plays to myths about women inviting male attention, and therefore renders any history of abuse less credible.[474] As a case in point, the State's focus on Wendi Andriano's affairs, sexual interactions with men in bars, and underwear rendered her evidence of domestic violence in her marriage less credible in the eyes of the jury. The State's sexualization of Ms. Andriano deprived jurors of the opportunity to understand her as a victim of abuse.

The adultification of women of color also heightens their moral culpability. As noted above, presenting women of color as mature and sexually active while they are children undermines the impact of the defendant's history of abuse. In Grace Connell's case, the State repeatedly insisted that the childhood rapes she endured were "consensual" and that she was a "mature 11-year-old."[475] This prevented jurors from fairly weighing the harm of Ms. Connell's experiences of sexual violence.[476] Conversely, prosecutors' de-sexualization of defendants, regardless of the defendant's sexual orientation, undercuts the believability of their sexual violence histories. While queer women experience some of the highest rates

---

471 *See supra* notes 403–404 and accompanying text.

472 GOODMARK, *supra* note 430, at 9–10 (2023).

473 *Id.*

474 *See* DEFENSE MANUAL, *supra* note 329, at 29.

475 Connell Transcript, *supra* note 297, at 1957.

476 *See* Babcock & Greenfield, *supra* note 21, at 389–90.

of gender-based violence nationwide, the State's portrayal of a defendant as "masculine" invites skepticism of the possibility that the defendant could have been a victim of sexual violence.[477] In Shawna Forde's case, for example, Ms. Forde's defense team sought to present information about her history of childhood sexual abuse and physical violence—a history that was effectively neutralized by the State's presentation of Ms. Forde as a masculine military leader.[478]

Finally, prosecutors use sexualizing evidence to demonize sexual identities falling outside of monogamous, heterosexual paradigms. Same-sex sexual behavior among women capital defendants is often equated with aggression or dominance.[479] The State's introduction of the defendant's sexual activity in prison thus portrays the defendant as a risk to other incarcerated women. By presenting evidence of prison sexual activity, the State asks jurors to conclude that giving the defendant a life sentence is dangerous to other prisoners. Rather, she must die.[480]

C. Defense Responses to Sexualizing Evidence

A robust discussion of defense responses to the State's sexualizing evidence and argument is beyond the scope of this Article.[481] It nevertheless bears note that much of the evidence we have documented throughout this Article was admitted without any objection from defense counsel. Where defense counsel did object, those objections frequently failed to explain the problematic gender biased elements of the challenged evidence and judges frequently overruled the objections.[482] Similarly, attorneys rarely requested limiting instructions for sexualizing evidence and when they did, judges often failed to grant them. In Brenda Andrew's trial, for example, defense counsel requested limiting instructions four

477 *See* DEFENSE MANUAL, *supra* note 329, at 28.

478 Forde Transcript, *supra* note 263, at 1516.

479 *See* Sutton et al., *supra* note 11, at 1061–62.

480 Prosecutors in Angelina Rodriguez's case used similar reasoning to ask for death but premised their argument on her seduction of male correctional officers, as opposed to other incarcerated women. The State elicited testimony from one officer stating, "I don't see her as a high-risk inmate. I think that she might be somewhat manipulative, she might be a person that would be inclined to be maybe seductive with some of the male staff." Rodriguez Transcript, *supra* note 309, at 3701–02.

481 Research and analysis into how defense teams work with gendered themes in women's trials is needed. To this end, the authors are studying ineffective assistance of counsel claims in women's cases—the scope of which covers defense responses to gender biased evidence—and will publish this research in due course.

482 *See, e.g.*, Andrew Transcript, *supra* note 97, at 2958.

times regarding testimony from Ms. Andrew's former sexual partners.[483] The trial judge denied these requests.[484]

Moreover, defense attorneys are often complicit in sexualizing the defendant. In Donna Roberts' case, for example, defense counsel introduced a photograph of a sex toy and asked a witness, "And are there, for lack of a better term, sex toys in that photograph?"[485] Similarly, defense experts in Shawna Forde's trial testified that Ms. Forde was a "prostitute" when she was still a child—as opposed to more accurately characterizing the interactions as child sex trafficking.[486] In Brenda Andrew's case, even the trial judge commented on Ms. Andrew's makeup and appearance.[487] Stories and stereotypes about women, sex, and sin are so powerful that all courtroom actors perpetuate them.[488]

VI. Conclusion and Recommendations

In this Article, we provide the first systematic analysis of sexualizing evidence in women's contemporary capital cases. We conclude that prosecutors routinely rely on varied forms of sexualizing evidence to obtain women's convictions and death sentences. The narratives that prosecutors wield today are modern-day invocations of the sexualizing evidence deployed against women during early modern witchcraft trials. Following the Supreme Court decision in *Andrew v. White*, Brenda Andrew's case was remanded to the Court of Appeals for the Tenth Circuit, where the State continued to argue that Ms. Andrew "crave[d] the admiration of men and will go to abnormal lengths to get their attention. It's

---

483 *Id.* at 107–10, 313, 431.

484 *See id.* The trial judge even commented on Ms. Andrew's appearance during her guilt-phase trial, telling defense counsel that their client "d[id]n't need makeup" because she was "a pretty woman." *Id.* at 1145.

485 Roberts Transcript, *supra* note 127, at 5687.

486 Forde Transcript, *supra* note 263, at 169.

487 Andrew Transcript, *supra* note 97, at 1145.

488 While this Article is informed by the forty-eight capital cases in our dataset, these tactics are not limited to capital cases. In the case of one woman tried capitally and sentenced to life, the defense opened its closing argument by telling jurors that the case was about "[f]ear, love, sex, lies and dirty little secrets." [May 3, 2013] Transcript of Record at 21, State v. Jane Doe (Ariz. Ct. App. 2013) (we are using a pseudonym at the request of the defendant's legal team). During the trial, defense counsel repeatedly called his client "the dirty little secret on the side." *Id.* at 90. He spoke of his client's sexual experiences in similarly sensationalized and erotic language throughout the argument, evoking her "sexual rendezvous," *id.* at 35, her "booty calls," *id.* at 56, a "faked . . . orgasm," *id.* at 61, and a "French maid outfit," *id.* at 71.

hardly an admirable trait."[489] The panel decision denying Ms. Andrew relief still refused to unequivocally say that her underwear was not relevant to her legal or moral culpability.[490] In the twenty-first century, as in the seventeenth, legal actors wield women's sexuality as a weapon. Until the legal system acknowledges the pervasiveness of these tactics and their prejudicial impact, every woman facing capital proceedings risks being judged on irrelevant details of her sex life and appearance.

Our findings have broad implications for courts, prosecutors, the defense bar, policymakers, and scholars. Below, we outline a number of recommendations to limit the introduction of sexualizing evidence in criminal proceedings involving women and gender minorities.

A. Evidentiary Rules

Courts must hold prosecutors to a high bar when they seek to introduce sexualizing evidence in women's trials. General assertions that evidence "goes to motive" are insufficient to justify testimony or argument regarding the details of women's sexual relationships or sexual pleasure. Sexual slurs are per se prejudicial and thus should never be permitted. Arguments—whether overt or implicit—that women who flirt or have affairs are bad mothers should also be excluded. Descriptions of women's clothing or appearance should be prohibited, except to the limited extent that they are necessary to identify the defendant. Photographs of women defendants in revealing clothing, discussion of their underwear, and physical evidence of defendants' underwear or sex aids should likewise be excluded unless they are directly related to one or more elements of the criminal offense. Whenever sexualizing evidence is admitted, judges should instruct the jury regarding the limited purpose(s) of such evidence.

Second, prosecutors' attacks on the credibility of sexual assault victims who are criminal defendants should be subjected to the same degree of scrutiny as defense attacks on the credibility of sexual assault complainants. Prosecutors know that the primary evidence of sexual violence is the victim's own account—and that sexual assaults often take place behind closed doors.[491] As the Department of Justice instructs prosecutors, "[T]hese crimes

---

489 Respondent's Supplemental Brief at 30, Andrew v. Tinsley, 164 F.4th 789 (10th Cir. 2026).

490 Andrew v. Tinsley, 164 F.4th 789, 799 (2026). Ms. Andrew filed a petition for en banc review on April 27, 2026, the outcome of which is currently pending.

491 U.S. DEP'T OF JUST., OFF. ON VIOLENCE AGAINST WOMEN, FRAMEWORK FOR PROSECUTORS TO STRENGTHEN OUR NATIONAL RESPONSE TO SEXUAL ASSAULT AND DOMESTIC VIOLENCE INVOLVING ADULT VICTIMS 2–5

generally do not occur in front of witnesses, nor are they captured on video, and they rarely result in dispositive physical evidence."[492] This is particularly true for childhood sexual abuse.[493] Thus, prosecutors should not be permitted to argue that jurors should dismiss women's accounts of sexual violence in the absence of independent corroboration.[494] Prosecutors should also be precluded from arguing that childhood sexual abuse victims were mature for their age. Nor should they be permitted to discredit women's experiences of violence by pointing to their attire.

B. Legislative Reform

The judges in our dataset largely failed to limit the admission of sexualizing evidence. Thus, to ensure that irrelevant sexualizing evidence and gender bias play no role in jurors' and judges' assessments of women's legal and moral culpability, legislatures should adopt evidentiary rules that impose stringent gatekeeping requirements for such evidence. To that end, and in response to our research, the California Committee on Revision of the Penal Code has recommended amendments to state rules of evidence "to require heightened judicial scrutiny before admitting evidence or argument likely to trigger gender-based stereotypes."[495] The Committee's recommendations would require courts to hold a hearing outside the presence of the jury to "weigh[] the risk of reinforcing gender stereotypes against the evidence's probative value."[496] Recognizing that trial actors may fail to apprehend the nature of gender-biased evidence, the Committee enumerated several categories of evidence that require heightened scrutiny, including:

> (a) Information about the defendant's sexual activity, orientation, sexual partners, reproductive choices, gender presentation, or romantic relationships;
> (b) Sexually suggestive photos or images;

(May 2024), https://www.justice.gov/ovw/media/1352371/dl?inline [https://perma.cc/Y3UX-8CKK].

492 *Id.*

493 *See id.*

494 After intense lobbying by victims' rights advocates, most states have eliminated the requirement that a victim's account of sexual assault be corroborated. *See* Tyler J. Buller, *Fighting Rape Culture with Noncorroboration Instructions*, 53 TULSA L. REV. 1, 13–14 (2017).

495 COMM. ON REVISION OF THE PENAL CODE, ANNUAL REPORT AND RECOMMENDATIONS 12 (2025), https://clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2025.pdf [https://perma.cc/R5WF-MXKF].

496 *Id.*

> (c) Evidence related to clothing, appearance, or gender expression when used to suggest or reinforce gender-based stereotypes;
> (d) References to a defendant's failure to conform to traditional gender roles, including parenting expectations; and
> (e) Appeals to notions of a "woman's nature" or "emotional" disposition.[497]

The Committee also recommended the adoption of post-conviction pathways to retrial where defendants "can show that gender-biased evidence or argument affected their trial and that there is a reasonable probability that the outcome would have been different if such evidence were not admitted."[498] On February 17, 2026, California Assemblymember Sade Elhawary introduced Assembly Bill 2014, which seeks to codify the Committee's recommendations.[499] Other states should consider similar measures to provide redress for women who have been convicted in trials where such evidence was introduced.

C. Training

Judges, prosecutors, and criminal defense teams should receive training on gender stereotypes and women's pathways to incarceration. All trial actors must be educated regarding the nature of gender bias and how it can affect the quality of justice women receive. Moreover, trial actors should be sensitized to the prevalence of gender-based violence in the lives of women in the criminal legal system.[500]

D. Scholarship

More research is needed into non-capital prosecutions of women and gender minorities to determine whether sexualizing evidence is as prevalent in those cases as it was in our dataset. Scholars should also research the extent to which sexualizing evidence plays a role in policing and charging decisions for low-level crimes. For example, to what extent do police rely on descriptions of women's attire to justify stops, searches, or arrests of women

---

497 *Id.*

498 *Id.*

499 A.B. 2014, State Assemb., 2025–2026 Reg. Sess. (Cal. 2026), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202520260AB2014 [https://perma.cc/FV5U-ADYD].

500 *See* Babcock & Greenfield, *supra* note 21, at 336, 399.

suspected of illegal sex work?[501] How do courts weigh women defendants' experiences of sexual violence in sentencing decisions? To what extent do appellate courts embrace and rely upon the same sexualizing evidence to uphold women's convictions and sentences?

We also call on the capital defense community to recognize the extent to which gender bias provides yet another reason to question the legitimacy of capital punishment. The issue of systemic gender bias—and the extent to which the capital defense community has internalized many of the same stereotypes that undermine the fairness of women's capital cases—has long been ignored. This failure has deprived the death penalty abolition movement of a powerful argument: misogyny, like racism, is rampant in the criminal legal system, and it plays an unacceptable role in determining who is singled out for the harshest of punishments.

501 *See generally* Kate Mogulescu, *Your Cervix is Showing: Loitering for Prostitution Policing as Gendered Stop & Frisk*, 74 U. MIA. L. REV. 68 (2020).

THE BASE OF THE ICEBERG: TARGETED FINANCIAL SANCTIONS AS A TOOL TO COMBAT STRUCTURAL VIOLENCE AGAINST WOMEN GLOBALLY

SARAH K. HUBNER*

Abstract

Violence against women is most often understood, and addressed, through the lens of direct, physical harm. This Note argues that such a framework is inadequate. Drawing on the theory of structural violence, first articulated by sociologist Johan Galtung and later refined by medical anthropologist Dr. Paul Farmer, this Note contends that women globally are disproportionately harmed not only by individual actors but by the economic, legal, and political systems that constrain their agency, limit their access to resources, and prevent them from attaining the highest standard of physical and mental health. These forms of indirect, institutional violence sit at the base of the iceberg—pervasive, normalized, and largely overlooked in both legal scholarship and U.S. foreign policy. This Note examines the current U.S. human rights sanctions regime, in particular the Global Magnitsky sanctions program, and identifies a significant gap: sanctions designations related to gender-based violence have been limited almost entirely to direct, conflict-related sexual violence, leaving structural forms of violence against women and girls largely unaddressed. It argues that the U.S. government must expand its practical interpretation of what constitutes a "serious human rights abuse" under the Global Magnitsky Human Rights Accountability Act and Executive Order 13818 to encompass gender-based structural violence, particularly where state actors, legal institutions, and government officials are identifiable conduits of harm. It further advocates for gender-sensitive implementation of any sanctions designations to mitigate the risk of disproportionate harm to the very populations such measures seek to protect. Lastly, the Note considers the viability of this proposed framework in light of the

* J.D. 2026, Columbia Law School; A.B. 2021, Duke University. I want to extend my sincerest thanks to Professor Sarah Knuckey for her insightful guidance and feedback as my advisor for this Note. I am also incredibly grateful for the entire editorial staff of the *Columbia Journal of Gender and Law* for their diligent and thoughtful work in seeing this Note through to publication.

second Trump Administration's significant departure from prior U.S. gender and human rights policy.

INTRODUCTION

As men [and women], we are all equal in the presence of death.[1]

The words of the Latin writer and philosopher Publius Syrus capture a sentiment shared by many in society across time and space: the thought of death as the great equalizer.[2] However, when a woman dies, she is more likely to have lived in poverty, more likely to have faced food insecurity, and more likely to have been a victim of interpersonal violence than her male counterparts.[3] These disparities are further exacerbated by where a woman lives, her level of education, and her access to wealth.[4]

1 PUBLIUS SYRUS, THE MORAL SAYINGS OF PUBLIUS SYRUS, A ROMAN SLAVE 13 (D. Lyman trans., 1856).

2 *See generally* Mark Arsenault et al., *Is Death the Great Equalizer?*, BOS. GLOBE (Sep. 26, 2020), https://apps.bostonglobe.com/metro/investigations/spotlight/2020/09/last-words/part1-dying-poor/ [https://perma.cc/ET69-WR3N]; Deborah Carr, *Is Death "The Great Equalizer"? The Social Stratification of Death Quality in the United States*, 663 ANNALS AM. ACAD. POL. & SOC. SCI. 331 (2016) (describing the concept of death as a "great equalizer" as a myth due largely to socioeconomic disparities and other conditions that influence the timing and quality of death).

3 *See* U.N. WOMEN & U.N. DEP'T OF ECON. & SOC. AFFS., PROGRESS ON THE SUSTAINABLE DEVELOPMENT GOALS: THE GENDER SNAPSHOT 2025 6 (2025), https://www.unwomen.org/sites/default/files/2025-09/progress-on-the-sustainable-development-goals-the-gender-snapshot-2025-en.pdf [https://perma.cc/D8KR-TGNV] [hereinafter THE GENDER SNAPSHOT 2025] ("In 2025, an estimated 9.2 per cent of women and girls live in extreme poverty compared to 8.6 per cent of men and boys."); *id*. at 7 ("Globally, over one in eight women aged 15–49 has been subjected to physical and/or sexual violence by a current or former intimate partner in the previous 12 months (12.5 per cent)."); *id.* at 13 ("Food insecurity affects women more than men. In 2024, the gender gap in the global prevalence of moderate or severe food insecurity increased to 1.9 percentage points compared to 1.3 in 2023, with women experiencing higher rates (26.1 per cent) than men (24.2 per cent)."); *see also* WORLD HEALTH ORG., VIOLENCE AGAINST WOMEN PREVALENCE ESTIMATES, 2023, at 49 (2025), https://www.who.int/publications/i/item/9789240116962 [https://perma.cc/XPN3-HRZL] ("In 2023, almost one in three women (840 million) have been subjected to physical or sexual violence, or both, by an intimate partner or sexual violence by a non-partner, at least once in their lives—a number that has remained largely unchanged for more than two decades."); Ginette Azcona & Antra Bhatt, *Poverty is Not Gender-Neutral*, SDG ACTION (Mar. 6, 2023), https://sdg-action.org/poverty-is-not-gender-neutral/ [https://perma.cc/B3BS-45JT]; U.N. *Report: Global Hunger Numbers Rose to as Many as 828 Million in 2021*, WORLD HEALTH ORG. (July 6, 2022), https://www.who.int/news/item/06-07-2022-un-report--global-hunger-numbers-rose-to-as-many-as-828-million-in-2021 [https://perma.cc/KT6R-3PMN]; *Violence Against Women*, WORLD HEALTH ORG. (Mar. 25, 2024), https://www.who.int/news-room/fact-sheets/detail/violence-against-women [https://perma.cc/5U4N-V9WP].

4 *See* U.N. WOMEN & U.N. DEP'T OF ECON. & SOC AFFS., PROGRESS ON THE SUSTAINABLE DEVELOPMENT GOALS: THE GENDER SNAPSHOT 2022, at 4 (2022), https://unstats.un.org/sdgs/gender-snapshot/2022/

The story of Dorothy N., a widow in Tanzania, illustrates this phenomenon.[5] Despite enjoying a good standard of living, completing secondary school and obtaining a specialized diploma, and working as a secondary school teacher, Dorothy N. was left destitute under the Customary Laws of Inheritance of Tanzania after her husband passed.[6] Her marital home was sold, her marital household's belongings were returned to her late husband's family, and her children were taken from her.[7] In her own words, she was seriously ill, recovering from paralysis in her hand, and "left with nothing from [her] husband."[8]

In recent decades, scholars have increasingly emphasized this so-called *structural violence*—when structures and institutions harm people by preventing them from meeting their basic needs or rights—to explain stories like Dorothy N.'s and to inform the questions of who lives, who dies, at what time, and under what quality of life?[9] The rights people enjoy, and their subsequent health outcomes, are not a coincidence.[10] They are routinely, institutionally, and socially determined. American medical anthropologist, physician, and global health practitioner Dr. Paul Farmer wrote in his landmark memoir, *Pathologies of Power: Health, Human Rights, and the New War on the Poor*:

> Human rights violations are not accidents; they are not random in distribution or effect. Rights violations are, rather, symptoms of deeper pathologies of power and are linked intimately to the social conditions that so often determine who will suffer abuse and who will be shielded

---

GenderSnapshot.pdf [https://perma.cc/F3TY-QFML] [hereinafter THE GENDER SNAPSHOT 2022].

5 *See* Dorothy N., *My Life as a Widow*, *in* WOMEN CHALLENGING VIOLENCE—EXPERIENCES FROM EASTERN AND SOUTHERN AFRICA 11, 11–13 (Frederich Ebert Stiftung ed., 1994).

6 *Id.* at 11.

7 *Id.* at 12.

8 *Id.*

9 *See, e.g.*, Claire Herrick & Kirsten Bell, *Concepts, Disciplines and Politics: On 'Structural Violence' and the 'Social Determinants of Health'*, 32 CRITICAL PUB. HEALTH 295, 301–02 figs. 2 & 3 (2022) (providing statistics on the prevalence of academic scholarship on structural violence and the social determinants of health); *see also* Paula Braverman & Laura Gottlieb, *The Social Determinants of Health: It's Time to Consider the Causes of Causes*, 129 PUB. HEALTH REP. 19, 20 (2014) ("A large and compelling body of evidence has accumulated, particularly during the last two decades, that reveals a powerful role for social factors—apart from medical care—in shaping health across a wide range of health indicators, settings, and populations." (internal citations omitted)).

10 *See generally* Paula Braveman, *What Are Health Disparities and Health Equity? We Need to Be Clear*, 129 PUB. HEALTH REP. 5 (2014) (providing a discussion of health disparities and health equity).

> from harm. If assaults on dignity are anything but random in distribution or course, whose interests are served by the suggestion that they are haphazard?[11]

Global public health researchers, medical professionals, and the international development community have long recognized that individual harms are often caused by institutional and sociological forces.[12] The law and legal institutions are no different; "[l]aws are not science; they are normative ideology and are thus tightly tied to power."[13] Nevertheless, structural violence is a concept under-addressed in legal scholarship and under-applied in policy efforts by the United States, other states in the Global North,[14] and international or regional organizations to remedy violence against women and girls, a long-standing, pervasive public health crisis.[15]

---

11 PAUL FARMER, PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS, AND THE NEW WAR ON THE POOR 7 (2003) [hereinafter FARMER, PATHOLOGIES OF POWER].

12 *See* Gloria Macassa, *Does Structural Violence by Institutions Enable Revictimization and Lead to Poorer Health Outcomes?—A Public Health Viewpoint*, 89 ANNALS GLOB. HEALTH 58, at 1–7 (2023) (internal citations omitted) (discussing the state of research on structural violence among the public and health and health science communities).

13 FARMER, PATHOLOGIES OF POWER *supra* note 11, at 235 (citing OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 6 (1991)).

14 References to "Global North" and "Global South" (also referenced herein) speak to the "framework for understanding and analyzing the relative prosperity and international power of countries around the world, which has become increasingly popular following criticism of other taxonomic systems, such as the three-world system and the developed and developing countries system." Miles Kenny, *Global North and Global South*, ENCYCLOPEDIA BRITANNICA (Nov. 17, 2024), https://www.britannica.com/topic/Global-North-and-Global-South [https://perma.cc/28WW-QR8V]; *see also* Rory Horner & Pádraig Carmody, *Global North/South*, *in* INTERNATIONAL ENCYCLOPEDIA OF HUMAN GEOGRAPHY 181, 181 (2d ed. 2020) ("The (Global) 'North–South' divide is a popular current lexicon to refer to the gap between what have variously been termed developed and developing countries (and sometimes industrial and nonindustrial/industrializing), First and Third Worlds, and associations with rich and poor, haves and have-nots. It is a binary which underlies most framings of world development, which is characterized globally by combined and uneven development.").

15 At the time of publication of this Note, the author has identified two pieces of traditional legal scholarship that explicitly utilize a structural violence framework in their analysis. *See generally* Matiangai Sirleaf, *Ebola Does Not Fall from the Sky: Structural Violence & International Responsibility*, 51 VAND. J. TRANSNAT'L L. 477, 482 (2021) (analyzing the Ebola epidemic to demonstrate how "international law and its various actors can facilitate structural violence"); Erin M. Carr, *The "History and Tradition" of the Sanctification of Structural Violence: A Review of the Cyclical Corrosion of Constitutional Protections*, 27 J. GENDER, RACE & JUST. 1 (2024) (utilizing a structural violence framework to explain how state actors, including the U.S. Supreme Court, perpetuate harm against communities of color, women, and the LGBTQ+ community). *See also Departmental Update: Gender Based Violence is a Public Health Issue: Using a Health Systems Approach*,

In recent years, the U.S. government has prioritized combatting gender-based violence at home and abroad.[16] In 2012, the U.S. Congress first requested a "multi-year strategy to prevent and respond to violence against women and girls,"[17] which led to the development of the landmark *U.S. Strategy to Prevent and Respond to Gender-Based Violence Globally* (the "Global Gender-Based Violence Strategy" or the "Strategy").[18] The Global Gender-Based Violence Strategy, which was subsequently updated in 2016[19] and 2022,[20] elevated the human rights of women and girls globally as a U.S. national security, diplomatic, and foreign assistance priority. However, action under the Strategy—particularly economic sanctions designations—has largely been limited to conflict-related sexual violence ("CRSV") and other forms of direct, physical violence against women.[21]

WORLD HEALTH ORG. (Nov. 25, 2021), https://www.who.int/news/item/25-11-2021-gender-based-violence-is-a-public-health-issue-using-a-health-systems-approach [https://perma.cc/VS9Z-UBZF]; Heidi Stöckl & Susan B. Sorenson, *Violence Against Women as a Global Public Health Issue*, 45 ANN. REV. PUB. HEALTH 277, 278 (2024); Isabel Goicolea, *What a Critical Public Health Perspective Can Add to the Analysis of Healthcare Responses to Gender-Based Violence that Focus on Asking*, 23 BMC PUB. HEALTH 1, 1 (2023); Claudia Garcia-Moreno & Charlotte Watts, *Violence Against Women: An Urgent Public Health Priority*, 89 BULL. WORLD HEALTH ORG. 2, 2 (2011); Ann Öhman et al., *'The Public Health Turn on Violence Against Women': Analysing Swedish Healthcare Law, Public Health and Gender-Equality Policies*, 20 BMC PUB. HEALTH 1, 1–2 (2020) (all speaking to the status of gender-based violence as a public health issue).

16 *See, e.g.*, Jacqueline Howard, *White House Launches National Plan to End Gender-Based Violence*, CNN (May 25, 2023), https://www.cnn.com/2023/05/25/health/gender-based-violence-white-house-plan [https://perma.cc/VY3L-J8MP]; *Statement by President Joe Biden on the Occasion of International Day for the Elimination of Violence Against Women*, THE WHITE HOUSE (Nov. 25, 2024), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/11/25/statement-by-president-joe-biden-on-the-occasion-of-international-day-for-the-elimination-of-violence-against-women-4/ [https://perma.cc/3CRN-235L].

17 H.R. Rep. No. 112-331, § 7061 (2012) (Conf. Rep.); *see also* Exec. Order No. 13623, 3 C.F.R. 296 (2012) (responding to and expanding upon Congress' request in § 7061 of House Conference Report 112-331).

18 U.S. DEP'T OF STATE & U.S. AGENCY FOR INT'L DEV., U.S. STRATEGY TO PREVENT AND RESPOND TO GENDER BASED VIOLENCE GLOBALLY (2012), https://2009-2017.state.gov/documents/organization/196468.pdf [https://perma.cc/ZPP4-7PJ3].

19 U.S. DEP'T OF STATE & U.S. AGENCY FOR INT'L DEV., U.S. STRATEGY TO PREVENT AND RESPOND TO GENDER BASED VIOLENCE GLOBALLY: 2016 UPDATE (2016), https://www.state.gov/wp-content/uploads/2019/03/258703.pdf [https://perma.cc/7YBZ-2WEH].

20 U.S. DEP'T OF STATE & U.S. AGENCY FOR INT'L DEV., U.S. STRATEGY TO PREVENT AND RESPOND TO GENDER BASED VIOLENCE GLOBALLY: 2022 UPDATE (2022), https://2021-2025.state.gov/wp-content/uploads/2022/12/GBV-Global-Strategy-Report_v6-Accessible-1292022.pdf [https://perma.cc/N77D-F8W5] [hereinafter 2022 GLOBAL GENDER-BASED VIOLENCE STRATEGY].

21 *Id.* at 33, 60.

While these forms of violence against women are issues of great import, women (like other marginalized groups) often face more harm as a result of the "pathologies of power" described by Dr. Farmer—the hallmark of structural violence.[22] Hundreds of millions of women globally are routinely unable to meet their basic needs.[23] "Three in [ten] women worldwide—which translates to nearly [one] billion women globally—say they cannot afford the food or shelter they or their families need."[24] Yet, we too often view violence against women in too narrow of a framework—one unduly focused on overt physical acts—and ignore structural inequities that cause harm. The persistent view of gender-based violence as only domestic, intimate partner, interpersonal, or conflict-related violence stifles effective policy making aimed at advancing the rights of women and girls globally, particularly their right to the highest attainable level of health.[25]

This Note draws on the theory of structural violence to reveal the ways in which U.S. human rights sanctions policy fails to adequately conceptualize violence that is not physical or direct as a violation of the human rights of women and girls globally. Part I presents a brief overview of the theoretical framework of structural violence and its application to global public health and argues that structural violence uniquely affects women and girls. Lurking beneath the surface, these pervasive, indirect, and institutional forms of violence make up the base of the iceberg. Part II examines the U.S. government's existing view of gender-based violence and identifies the gaps in the U.S. targeted human rights sanctions regime, the Global Magnitsky Sanctions Regulations.[26] Part III argues that U.S. human rights policy must evolve to meet an expanding, intersectional definition of "serious human rights abuse" that includes gender-based structural violence and advocates for utilizing such an expanded definition in the Global Magnitsky sanctions program. It evaluates which forms of structural violence are better suited to mitigation via targeted financial sanctions

---

22 *See* FARMER, PATHOLOGIES OF POWER, *supra* note 11, at 43–44 (describing the "Axis of Gender" and the interaction between gender and socioeconomic status in the violation of women's rights); *see also id.* at 164–67 (discussing how gender inequality in conjunction with poverty puts individual women at greater risk of HIV infection and subsequent AIDS diagnosis).

23 HOLOGIC, YEAR 4 GLOBAL REPORT: THE HOLOGIC GLOBAL WOMEN'S HEALTH INDEX 34 (2024), https://hologic.womenshealthindex.com/sites/default/files/2025-01/Hologic_Global_Womens_Health_Index_Year_4_Report.pdf [https://perma.cc/BP5U-TZ82].

24 *Id.*

25 *See* Rekha Pande & Sita Vanka, *Introduction*, *in* GENDER AND STRUCTURAL VIOLENCE 1, 5 (Rekha Pande & Sita Vanka eds., 2019).

26 The Global Magnitsky sanctions regulations are codified in the Code of Federal Regulations at 31 C.F.R. pt. 583.

and emphasizes the need for gender-sensitive implementation of any sanctions designations to mitigate the risk of disproportionate harm to the very populations such measures seek to protect. Lastly, Part IV briefly considers the viability of the proposed solutions in light of President Donald Trump's return to office.

I. Violence Against Women Is More than Physical

Structural violence is a term that is rarely employed in legal scholarship but is well examined by scholars of international development, global public health, and human geography.[27] The term was first pioneered by Norwegian sociologist Johan Galtung in 1969 in an effort to reconceptualize academia's understanding of "peace" and "violence."[28] It was later developed further by liberation theologians in an effort to address poverty, oppression, and inequality in the second half of the twentieth century[29] and then refined in the context of medical anthropology.[30] Galtung argued that violence should not be seen solely as physical harm or health deprivation intentionally inflicted by an actor.[31] Rather, violence can be indirect, is built into structures, and manifests as "unequal power and consequently as unequal life chances."[32] Under Galtung's theory, economic, political, legal, religious, and cultural institutions can hinder individuals, groups, and societies "from reaching their

---

27 *See* Joia S. Mukherjee et al., *Structural Violence: A Barrier to Achieving the Millennium Development Goals for Women*, 20 J. WOMEN'S HEALTH 593, 593 (2002); *see also supra* note 15 (detailing the current state of the application of structural violence frameworks to legal scholarship).

28 Mukherjee et al., *supra* note 27, at 593; Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RSCH. 167, 167–71 (1969) [hereinafter Galtung, *Violence, Peace, and Peace Research*].

29 Liberation theology is a theological approach that predominantly arose in Latin America in 1960s, particularly in the context of the reform of Catholicism. It engages in socioeconomic analyses, with social concern for the poor and "political liberation for oppressed people," as well as addressing other forms of perceived inequality. *See* DICTIONARY OF HISTORICAL TERMS 203 (Chris Cook ed., 2d ed. 1998); João Chave, *Latin American Liberation Theology: The Creation, Development, Contemporary Situation of an On-Going Movement*, *in* HANDBOOK OF GLOBAL CONTEMPORARY CHRISTIANITY: THEMES AND DEVELOPMENTS IN CULTURE, POLITICS, AND SOCIETY 113, 114 (Stephen J. Hunt ed., 2015).

30 Barbara Rylko-Bauer & Paul Farmer, *Structural Violence, Poverty, and Social Suffering*, *in* THE OXFORD HANDBOOK ON THE SOCIAL SCIENCE OF POVERTY 47, 61–63 (David Brady & Linda M. Burton eds., 2017) (explaining the application of structural violence to medical anthropology); *see also* Paul E. Farmer et al., *Structural Violence and Clinical Medicine*, 3 PLOS MED. 1686, 1686 (2006) [hereinafter Farmer et al., *Structural Violence and Clinical Medicine*].

31 Galtung, *Violence, Peace, and Peace Research*, *supra* note 28, at 168.

32 *Id.* at 171.

full potential."[33] This violence manifests as disparities in access to influence, education, and healthcare, among other critical resources, culminating in preventable morbidity and mortality.[34] This Part explains the distinction between direct and structural violence and discusses applying a structural violence lens to discussions about global public health. It then provides a high-level overview of the ways in which women and girls can be subjected to structural violence and its resulting poor health outcomes.

A. A Theoretical Framework: Structural Violence

1. The Iceberg: Distinguishing Direct and Structural Violence

Though the term "violence" may naturally invoke a direct, physical image in its standard, colloquial use, Galtung defines violence as the "avoidable impairment of fundamental human needs" or the reduction of one's capacity to meet those needs "below what would otherwise be possible."[35] Structural violence expands the traditional view of violence as *direct* and is used to describe *indirect* violence that is not necessarily tied to a single identifiable individual actor.[36] Structural violence "complicates conventional

---

33 Farmer et al., *Structural Violence and Clinical Medicine*, *supra* note 30, at 1686 box 1 (internal citations omitted).

34 Farmer et al., *Structural Violence and Clinical Medicine*, *supra* note 30, at 1686 box 1 (citing Johan Galtung, *Kulturelle Gewalt*, 43 DER BURGER IM STAAT 106 (1993) [hereinafter Galtung, *Kulturelle Gewalt*]; Paul Farmer, *An Anthropology of Structural Violence*, 45 CURRENT ANTHROPOLOGY 305, 307 (2004)); *see also* Rylko-Bauer & Farmer, *supra* note 30, at 47 ("By structures we mean social relations and arrangements—economic, political, legal, religious, or cultural—that shape how individuals and groups interact within a social system. These include broad-scale cultural and political-economic structures such as caste, patriarchy, slavery, apartheid, colonialism, and neoliberalism, as well as poverty and discrimination by race, ethnicity, gender, sexual orientation, and migrant/refugee status. These structures are violent because they result in avoidable deaths, illness, and injury; and they reproduce violence by marginalizing people and communities, constraining their capabilities and agency, assaulting their dignity, and sustaining inequalities.").

35 Kathleen Ho, *Structural Violence as a Human Rights Violation*, 4 ESSEX HUM. RTS. REV. 1, 4 (2007) (citing Galtung, *Kulturelle Gewalt*, *supra* note 34, at 106). To illustrate this distinction between the avoidable and unavoidable, Galtung raises the example of death due to tuberculosis during the eighteenth century compared to the time of publication of *Violence, Peace, and Peace Research*, saying: "[v]iolence is that which increases the distance between the potential and the actual, and that which impedes the decrease of this distance. Thus, if a person died from tuberculosis in the eighteenth century it would be hard to conceive of this as violence since it might have been quite unavoidable, but if he dies from it today, despite all the medical resources in the world, then violence is present according to our definition." Galtung, *Violence, Peace, and Peace Research*, supra note 28, at 168.

36 Galtung, *Violence, Peace, and Peace Research*, *supra* note 28, at 170.

wisdom because it does not conceive of violence as spectacular, sensational, or hyper visible."[37] Rather, it is "almost invisible"[38] not because it is rare, concealed, or unimportant but because its presence is accepted (whether rightfully or wrongfully) as a natural part of how we see the world.[39] Galtung helpfully draws a clear distinction between these two principal types of violence:

> We shall refer to the type of violence where there is an actor that commits the violence as *personal* or *direct*, and to violence where there is no such actor as *structural* or *indirect*. In both cases individuals may be killed or mutilated, hit or hurt in both senses of these words, and manipulated by means of stick or carrot strategies. But whereas in the first case these consequences can be traced back to concrete persons as actors, in the second case this is no longer meaningful. There may not be any person who directly harms another in the structure. The violence is built into the structure and shows up as unequal power and consequently as unequal life chances.[40]

Although they are distinct concepts, structural and direct violence interact, influence, and reinforce each other. Structural violence can manifest in an assortment of ways, ranging from individual, interpersonal violence like homicide and domestic violence, to state violence, genocide, and war.[41]

---

37 Sirleaf, *supra* note 15, at 483 (citing ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 13 (2011)).

38 Farmer et al., *Structural Violence and Clinical Medicine*, *supra* note 30, at 1686 box 1.

39 *See* Galtung, *Violence, Peace, and Peace Research*, *supra* note 28, at 173 ("Structural violence is silent . . . [and] may be seen as about as natural as the air around us."); Nancy Scheper-Hughes & Philippe Bourgois, *Introduction: Making Sense of Violence*, *in* VIOLENCE IN WAR AND PEACE: AN ANTHOLOGY 5 (Nancy Scheper-Huges & Philippe Bourgois eds., 2004) (stating that structural violence is "not deviant behavior, not disapproved of, but to the contrary is defined as virtuous action in the service of generally applauded conventional social, economic, and political norm").

40 Galtung, *Violence, Peace, and Peace Research*, *supra* note 28, at 170–71 (emphasis in original) (internal citation omitted).

41 *See* JAMES GILLIGAN, VIOLENCE: REFLECTIONS ON A NATIONAL EPIDEMIC 196 (1997) ("Structural violence is . . . the main cause of behavioral violence on a socially and epidemiologically significant scale (from homicide and suicide to war and genocide). The question as to which of the two forms of violence—structural or behavioral—is more important, dangerous, or lethal is moot, for they are inextricably related to each other, as cause to effect.").

Years after first raising structural violence as a concept, Galtung went on to present a causally-connected "triangle of violence" that introduces direct, structural, and cultural violence to the conversation surrounding peace and violence studies.[42] Commentators have described the structure of the triangle as an iceberg.[43] Only a small part of an iceberg can be seen above the water, while the majority lies hidden beneath the surface.[44] The visible tip represents direct violence, often involving the "intentional use of physical force or power against other persons by an individual or a small group of individuals."[45] The two invisible types of violence, structural and cultural, sit at the iceberg's base.[46] Galtung defines "cultural violence" as "those aspects of culture, the symbolic sphere of our existence—exemplified by religion and ideology, language and art, empirical science and formal science (logic and mathematics)—that can be used to justify or legitimize violence in its direct or structural form." He states that "cultural violence makes direct and structural violence look, even feel, right—at least not wrong."[47] This Note does not address cultural violence beyond observing its existence and interaction with direct and structural violence.

With the iceberg analogy in mind, the underlying principle of structural violence is inequality, especially in the distribution of resources.[48] However, it is not merely about the unequal distribution itself but rather about who and what has the power to decide that distribution.[49] These distributional effects then influence direct violence and vice versa, particularly as it relates to gender-based violence.[50] In fact, studies have shown that

---

42 Johan Galtung, *Cultural Violence*, 27 J. PEACE RSCH. 291, 294 (1990) [hereinafter Galtung, *Cultural Violence*].

43 Macassa, *supra* note 12, at 2 (internal citations omitted); Julia Paulson & Leon Tikly, *Reconceptualizing Violence in International and Comparative Education: Revisiting Galtung's Framework*, 67 COMPAR. EDUC. REV. 771, 773–75 (2023).

44 Macassa, *supra* note 12, at 2.

45 *Id.*

46 *Id.*

47 Galtung, *Cultural Violence*, *supra* note 42, at 294.

48 Galtung, *Violence, Peace, and Peace Research*, *supra* note 28, at 171.

49 *Id.* at 170–71; *see also* Paulson & Tikly, *supra* note 43, at 774 ("Galtung defined structural violence as both the uneven distribution of resources and the uneven distribution of the power to decide the distribution of resources, including the uneven distribution of education and literacy, which he identified as forms of structural violence.").

50 *See* Pande & Vanka, *supra* note 25, at 4–5.

structural violence is known to interact with and reinforce direct violence in the form of intimate partner violence ("IPV") perpetrated against women.[51] Galtung expressed this sentiment in *Violence, Peace, and Peace Research*, remarking, "[W]hen one husband beats his wife there is a clear case of personal violence, but when one million husbands keep one million wives in ignorance there is structural violence."[52]

2. Structural Violence as a Concept in Global Public Health

Galtung's concept of structural violence, explained in detail *supra* Part I.A.1, did not gain mainstream traction in academia and the medical community until Dr. Paul Farmer applied the theory to the field of global public health and medical anthropology, in particular to his research and interventions combating the HIV/AIDS epidemic in the rural Central Plateau of Haiti.[53] Farmer clarified that "structural" refers to the way violence is embedded into the political and economic systems of society, while "violence" refers to the harm these systems cause to individuals.[54] Professor of Sociology Fernando De Maio

---

51 *See, e.g.*, Catherine Flynn et al., *When Structural Violence Creates a Context That Facilitates Sexual Assault and Intimate Partner Violence Against Street Involved Young Women*, 68 WOMEN'S STUD. INT'L F. 94, 94–103 (2018) (finding that structural violence through exclusion and violence created a context that facilitated sexual violence revictimization and IPV); Tameka L. Gillum, *The Intersection of Intimate Partner Violence and Poverty in Black Communities*, 46 AGGRESSION & VIOLENT BEHAV. 37, 37–44 (2019) (finding that women in the United States who experienced both poverty and IPV had very poor physical and psychological health); Miguel Felipe Sánchez-Sauco et al., *Sociocultural Aspects of Drug Dependency During Early Pregnancy and Considerations for Screening: Case Studies of Social Networks and Structural Violence*, 78 MIDWIFERY 123, 127–28 (2019) (finding that structural violence and domestic violence interact to influence drug dependency and maternal health among expectant mothers in Spain); Shilo St. Cyr et al., *Intimate Partner Violence and Structural Violence in the Lives of Incarcerated Women: A Mixed-Method Study in Rural New Mexico*, 18 INT'L. J. ENV'T. RSCH. & PUB. HEALTH 1, 11–12 (finding that victimized and incarcerated women returning to their rural communities in New Mexico were at an even greater risk of mental health and ill health, substance abuse, and recidivism because of a compounding structural context, including criminalized interpersonal relationships and persistent racial and economic inequalities rooted in colonialism).

52 Galtung, *Violence, Peace, and Peace Research*, *supra* note 28, at 171.

53 *See* FARMER, PATHOLOGIES OF POWER, *supra* note 11, at 19–20, 30–31; *see also* Farmer et al., *Structural Violence and Clinical Medicine*, *supra* note 30, at 1686; Farmer, *An Anthropology of Structural Violence*, *supra* note 34, at 307; Paul Farmer, *On Suffering and Structural Violence: A View From Below*, 125 DAEDALUS 261, 271–72 (1996). Dr. Farmer spent several years in Haiti working with his international nonprofit public health organization "Partners in Health." He called for a reduction in structural vulnerability and poverty as an approach to eradicating HIV/AIDS. *See* HMS Communications, *In Memoriam: Paul Farmer*, HARVARD MED. SCH. (Feb. 21, 2022), https://hms.harvard.edu/news/memoriam-paul-farmer [https://perma.cc/YL3V-86SD]; Rylko-Bauer & Farmer, *supra* note 30, at 48–49.

54 *See* Farmer et al., *Structural Violence and Clinical Medicine*, *supra* note 30, at 1686.

explains that "[f]or Farmer, structural violence is a wide-ranging tool describing 'a host of offensives against human dignity,' including poverty, racism and discrimination, [and] gender inequality, as well as 'the more spectacular forms of violence that are uncontestably human rights abuses, some of them punishment for efforts to escape structural violence.'"[55] It is a concept for understanding the material harm, social injustices, and vulnerability to diseases, suffering, lack of access to care, and poor health outcomes caused by broader social, political, economic and legal forces.[56] Essentially, the theory seeks to explain the distribution of suffering across the world.

De Maio describes Farmer's understanding of structural violence as "a multi-level idea, through which different 'axes' of oppression—based on economic inequality, patriarchy, racism, or other forms of discrimination—may intersect to generate preventable morbidity and premature mortality in marginalised populations."[57] Farmer indicates that these structural inequities, whether in the labor market, the justice system, or in access to healthcare, quality housing, and healthy food—which often correlate with poverty, racism, and disenfranchisement—are "embodied and experienced as violence" by constraining individuals' ability to make decisions and fulfill basic health needs.[58] Intervention by governments through law, regulation, and policy may in fact reinforce these structural inequities that perpetuate harm against women and other marginalized groups.

Altogether, Farmer emphasizes that structural violence constitutes a violation of human rights when power distributed through structures constrains individual human agency to the extent that meeting basic human needs becomes impossible. Human rights scholar Kathleen Ho applies this concept to racial inequality and the incidence of HIV/AIDS in the United States.[59] She notes that social structures, in particular racism, systemically disadvantage African-American men and women who then suffer from the "unequal life

---

55 Fernando De Maio, *Paul Farmer: Structural Violence and the Embodiment of Inequality*, *in* THE PALGRAVE HANDBOOK OF SOCIAL THEORY IN HEALTH, ILLNESS AND MEDICINE 675, 680 (Fran Collyer ed., 2015) (internal quotation marks omitted) (quoting FARMER, PATHOLOGIES OF POWER, *supra* note 11, at 8).

56 *See* Herrick & Bell, *supra* note 9, at 296–98.

57 De Maio, *supra* note 55, at 680.

58 PAUL FARMER, PARTNER TO THE POOR 293 (Haun Saussy ed., 2010); *see also* FARMER, PATHOLOGIES OF POWER, *supra* note 11, at 40 ("For many, including most of my patients and informants, choices both large and small are limited by racism, sexism, political violence, and grinding poverty.").

59 Ho, *supra* note 35, at 4; *see supra* Part I.A.1.

chances" described by Galtung.[60] According to Ho, "[T]here is no [one] person that directly harms those HIV-infected African-American women, rather it is the structure of racial inequality, historically rooted in slavery, that perpetuates constraints in agency and unequal opportunities to receive an education, have access to medical care and justice and to secure a stable job." She rightfully asks not, "Why [do] people suffer from HIV/AIDS?" but, "Why African-Americans as a group and women in particular suffer disproportionately?" and, "Why is it harder for them to access medical care and treatment once they are infected or to have access to food, shelter and safety . . . ?"[61] These are the types of questions critical to understanding how structural violence operates, what steps can be taken to address it, and why it is that women, especially marginalized women, are more often affected—finding themselves at the intersection of multiple axes of oppression.

B. Structural Violence Against Women and the Role of Institutional Actors

Although Galtung's theory of structural violence was circulated more than fifty years ago and then popularized by Dr. Farmer, it has not, until recently, been applied extensively to human rights issues or to understand the incidence of violence against women and girls. In recent years, efforts have been made to "redraw the conventional map of violence against women" and "challeng[e] the notion that 'violence against women' is synonymous with 'domestic violence.'"[62] Academic literature has begun to take up these questions and explore structural violence as a heterogenous phenomenon perpetrated against women. Several studies have reported empirical findings regarding structural violence and its effects on women's health, a largely theoretical concept up until recently.[63] Notably, findings

---

60 Ho, *supra* note 35, at 4.

61 *Id.*

62 Pande & Vanka, *supra* note 25, at 5.

63 *See id.* at 5–10; Sirleaf, *supra* note 15, at 485 (observing that efforts to study structural violence may partially be the result of criticisms of structural violence as "too much of a black box"); *see also* Parul Sinha et al., S*tructural Violence on Women: An Impediment to Women Empowerment*, 42 INDIAN J. COMM. MED. 134, 135 (2017) ("There is a need for crossnational studies on violence against women. The breadth of such a study should help to confirm the structural factors that impact violence against women all across the world, regardless of content."); Luissa Vahedi et al., *"The Pandemic Only Gave Visibility to What Is Invisible": A Qualitative Analysis of Structural Violence During COVID-19 and Impacts on Gender-Based Violence in Brazil*, 23 BMC PUB. HEALTH 1, 2–3 (2023); Stephanie Rose Montesanti, *The Role of Structural and Interpersonal Violence in the Lives of Women: A Conceptual Shift in Prevention of Gender-Based Violence*, 15 BMC WOMEN'S HEALTH 1, 1–2 (2015) (all academic scholarship attempting to explain the effects of structural violence on women and girls).

have illustrated that structural violence can serve as a significant barrier against women's development and their exercise of fundamental human rights.[64]

Further, in certain scenarios, structural violence has been described as a root cause of poverty, hampering women's autonomy, well-being, and economic development; much of this violence is state-sanctioned through gender-blind, discriminatory, or neglectful law and policy making.[65] Global data indicates that the pace of reform on women's legal rights is too slow, and significant efforts are still needed to mitigate instances of structural violence. U.N. Women and the U.N. Department of Economic and Social Affairs jointly reported that, based on the latest available Sustainable Development Goals[66] ("SDGs") data, "reforming laws, closing gaps in legal protections, and removing gender-discriminatory laws could take up to 286 years at the current rate of change."[67] For instance, only four of fifty-two countries with SDG data for the years 2019 through 2021 "have legal frameworks, including customary laws, that guarantee women's equal rights to land ownership and/or control."[68] While the picture has improved since 2021, "data from 131 countries in 2024 reveal substantial challenges" in removing gender-discriminatory laws to establish gender equality frameworks.[69] Moreover, "[i]n 2024, only 26 [percent] of the 121 countries" with data have comprehensive systems in place to track gender-budget allocations across government to help mitigate the unequal distribution of resources, a figure unchanged since 2021.[70]

Structural violence against women can manifest in two principal ways: "pre-mature death attributed to inequitable life opportunities [] and a reduced quality of life in which

---

64 *See* Sinha et al., *supra* note 63, at 136; Mukherjee et al., *supra* note 27, at 596.

65 *See* G. Nokukhanya Ndhlovu, *Structural Violence and the Perpetuation of Women's Poverty: Exploring the Issue of Child Maintenance in South Africa*, 11 DEV. STUD. RSCH. 1, 1–2 (2024) (internal citations omitted).

66 The 2030 Agenda for Sustainable Development, adopted by all United Nations member states in 2015, introduced the 17 Sustainable Development Goals ("SDGs"). The aim of the SDGs is "peace and prosperity for people and the planet" while tackling climate change and working to preserve oceans and forests. *See The 17 Sustainable Development Goals*, U.N. DEP'T OF ECON. & SOC. AFFS., https://sdgs.un.org/goals [https://perma.cc/C85D-RD7B].

67 *See* THE GENDER SNAPSHOT 2022, *supra* note 4, at 10.

68 *Id.* at 11.

69 *See* THE GENDER SNAPSHOT 2025, *supra* note 3, at 16.

70 *Id.* at 17.

human potential is diminished."[71] The resultant negative health outcomes include "physical health consequences" like "injury, unwanted pregnancy, miscarriage, HIV/AIDS, permanent disabilities, and low-performance rates" and "mental health consequences" including "depression, fear, anxiety, sexual dysfunction, neurosis, and obsessive behavior."[72] However, structural violence takes many forms across sociocultural, economic, political, and legal systems and leads to a wide range of negative health outcomes for women, their children, and the wider society.[73] Comprehensively evaluating the recommendations raised in this Note first requires an understanding of how each of these types of structural violence functions in practice.

1. Structural Violence in Sociocultural and Economic Systems

Structural violence against women in its sociocultural form is most often thought of as a manifestation of patriarchy and misogyny.[74] Certain systems and informal institutions heighten existing inequalities and "perpetuate an early devaluation of, and violence against [women and] girls."[75] However, as is the case with many forms of structural violence, it is difficult to pinpoint specific actors responsible for "committing" this violence, as it is built into long-standing social, cultural, and even religious systems.[76] Economic institutions reinforce these systems by consistently underpaying women, ignoring their

---

71 Dyan Mazurana & Susan McKay, *Women, Girls, and Structural Violence: A Global Analysis*, *in* PEACE, CONFLICT, AND VIOLENCE: PEACE PSYCHOLOGY FOR THE 21ST CENTURY 130, 130 (Daniel J. Christie, Richard V. Wagner & Deborah Du Nann Winter eds., 2001) (citing BIRGIT BROCK-UTNE, FEMINIST PERSPECTIVES ON PEACE AND PEACE EDUCATION (1989)).

72 Sinha et al., *supra* note 63, at 136; *see also* Eva Neeley et al., *"Ashamed, Silent and Stuck in a System"—Applying a Structural Violence Lens to Midwives' Stories on Social Disadvantage in Pregnancy*, 17 INT'L. J. ENV'T. RES. & PUB. HEALTH 9355, 9355–57 (2020); Mounia El Kotni, *Structural Violence: An Important Factor of Maternal Mortality Among Indigenous Women in Chiapas, Mexico*, *in* MATERNAL DEATH AND PREGNANCY-RELATED MORBIDITY AMONG INDIGENOUS WOMEN OF MEXICO AND CENTRAL AMERICA 147, 147 (David Schwartz ed., 2018); *How Structural Violence Impacts Maternal Mortality*, PARTNERS IN HEALTH, https://www.pih.org/article/how-structural-violence-impacts-maternal-mortality [https://perma.cc/EVU6-MZ7A] (all describing the various negative health consequences of structural violence against women).

73 *See* Pande & Vanka, *supra* note 25, at 5.

74 *See* Mazurana & McKay, *supra* note 71, at 130–31 (internal citations omitted).

75 *Id.* at 131.

76 *See* Akhil Gupta, *Introduction: Poverty as Biopolitics*, *in* RED TAPE: BUREAUCRACY, STRUCTURAL VIOLENCE, AND POVERTY IN INDIA 3, 20 (2012).

labor contributions, and discriminating against them across both formal and informal labor markets.[77]

For example, certain populations in low- and middle-income countries exhibit a strong gender preference for sons over daughters, often resulting in higher rates of "form[s] of direct violence resulting from structural violence," such as selective abortion and female infanticide.[78] This gender preference is strengthened by other social and economic institutions present throughout a woman's life span, including dowry systems, wage disparities, and the "invisible" or "unseen" nature of much of the women's labor market—all of which create the characteristic "unequal life chances" emphasized by Galtung and Farmer that cause female children to be viewed as more of an economic liability than their male counterparts.[79] Further research has shown that this type of gender preference can even lead to health disparities between sons and daughters in early childhood,[80] limiting women and girls from equally sharing in access to the highest attainable standard of physical and mental health as a right enshrined in several international legal instruments.[81]

Sociocultural structural violence may also manifest in the unequal distribution of food or healthcare services and in disparities in access to education.[82] In most sub-Saharan

---

77 Mazurana & McKay, *supra* note 71, at 131, 133–34.

78 *Id.* at 131–32.

79 *See id.* at 132–34; *see also* Kien Le & My Nguyen, *Son Preference and Health Disparities in Developing Countries*, 17 SSM POP. HEALTH 1, 1 (2022) (citing Farah Deeba Chowdury, *Dowry, Women and Law in Bangladesh*, 24 INT'L. J.L., POL'Y & FAM. 198, 198–210 (2010)*;* Amit Kaplan, *"Just Let it Pass by and It Will Fall on Some Woman": Invisible Work in the Labor Market*, 36 GENDER & SOC'Y 838, 840 (2022) (citing Arlene Kaplan Daniels, *Invisible Work*, 34 SOC. PROBS. 403, 403–15 (1987); Erin Hatton, *Mechanisms of Invisibility: Rethinking the Concept of Invisible Work*, 31 WORK, EMP. & SOC'Y 336, 336–51 (2017)) ("The concept of "invisible" [or "unseen"] work was coined in feminist literature to explain the various types of (mostly women's) unpaid labor, which are therefore economically, socially, and culturally devalued."); U.N. WOMEN & ASIAN DEV. BANK, GENDER EQUALITY AND THE SUSTAINABLE DEVELOPMENT GOALS IN ASIA AND THE PACIFIC 16 (2018) ("Women and girls spend as much as 11 times more of their day than men and boys on unpaid care and domestic work, including cooking, cleaning, and collecting water and fuel."); Dil Rahut, Aichurek Kurmanbekova & Subhasis Bera, *Uncovering Women's Burden of "Unseen Work,"* ADBI INST.: ASIA PATHWAYS (May 1, 2023), https://www.asiapathways-adbi.org/2023/05/uncovering-womens-burden-of-unseen-work [https://perma.cc/C3QX-8QB7] (citing JOSEPH E. STIGLITZ, AMARTYA SEN & JEAN PAUL FITOUSSI, REPORT BY THE COMMISSION ON THE MEASURE OF ECONOMIC PERFORMANCE AND SOCIAL PROGRESS (2009)).

80 *See* Le & Nguyen, *supra* note 79, at 6–7.

81 *See infra* Part III.A.2.

82 *See* Mazurana & McKay, *supra* note 71, at 130–31.

African countries, for example, research has shown that the gender division of labor ascribes to women the responsibilities of pregnancy, birth, and childcare, yet leaves them with insufficient resources and access to care to adequately meet that burden.[83] Researchers Moa Dahlberg and Suruchi Thapar-Björkert separately found that the social phenomenon of xenophobia in Gauteng, South Africa functions as structural violence by limiting refugee women's ability to access resources like food, secure housing, transportation, and healthcare.[84]

2. Structural Violence in Legal and Political Systems

Compared to social, cultural, and economic forms of violence, structural violence in legal and political systems is more often governmentally or institutionally sponsored in some capacity. When the government or other legal systems fail to address the sociocultural and economic forms of structural violence discussed above, governmental support of structural violence manifests "through its inattention to 'private' matters," as evidenced across the world.[85] Beyond passive inaction, governmental support also more directly includes laws and systems that permit certain types of violence toward women, strip women of their bodily autonomy, offer no support for childcare or parental leave, ignore unpaid child support, and leave women who work in domestic or agricultural settings without sufficient protections."[86] Researchers Dahlberg and Thapar-Björkert note that, despite the ostensible role of governments as "guarantors of the rights of citizens, " states actually "reproduce[] inequalities" and create conditions in which "the poor are merely allowed to die."[87] For example, a study showed that during the COVID-19 pandemic in Brazil, the lack of government-implemented social protection policies exacerbated existing structural violence and increased the vulnerability of communities at the margins of Brazilian society: persons living in favelas, migrants, Black women, children, and trans

---

83 Simona Simona, *Structural Violence and Maternal Healthcare in Sub-Saharan Africa: A Theoretical Perspective*, 11 SOC. SCIS. 194, 196 (2022).

84 *See* Moa Dahlberg & Suruchi Thapar-Björkert, *Conceptualizing Xenophobia as Structural Violence in the Lives of Refugee Women in Gauteng, South Africa*, 46 ETHNIC & RACIAL STUD. 2768, 2773–74 (2023).

85 Mazurana & McKay, *supra* note 71, at 136.

86 *Id.* (citing MARILYN WARING, IF WOMEN COUNTED (1988); Christina Murray & Catherine O'Regan, *Putting Women in the Constitution*, *in* PUTTING WOMEN ON THE AGENDA (Susan Bazilli ed., 1991)).

87 Dahlberg & Thapar-Björkert, *supra* note 84, at 2774 (internal quotation marks omitted) (citing Gupta, *supra* note 76, at 5).

persons.[88] The research found that government "policies of inaction and erasure" including "[h]armful ideologies, [i]nadequate provision of basic survival needs, [and] [s]tate neglect" amplified other adverse outcomes "including worsening child abuse and neglect, emerging forms of psychological GBV, direct and indirect state-sanctioned violence, and deepening poverty[,]" all of which contribute to morbidity and mortality.[89]

Legal and governmental institutions may also take more deliberate actions that cause harm to women globally and may be targeted by the strategy proposed by this Note. Professor Rangita de Silva Alwis raised forced sterilization and other forms of obstetric violence—such as violations of rights to informed consent and bodily autonomy while women and birthing persons seeks reproductive healthcare—as examples.[90] She found that "[i]ndividual instances of obstetric abuse are part of a broader context of gender-based structural violence as they infringe upon women's autonomy and their ability to make decisions freely about their bodies and sexuality."[91] When the government of Chile implemented a policy of forcible sterilization of HIV-positive women,[92] more than forty percent of those women sterilized reported either being coerced or undergoing the procedure without their consent.[93] The forced sterilization—direct violence—exists within the context of lack of consent and coercion—structural violence.

This reflects how state-sanctioned policies can simultaneously embody both direct and structural violence, reinforcing and legitimizing one another. Rather than existing as isolated incidents, acts of direct violence against women, like forced sterilization, are embedded within and enabled by broader systems of structural inequality that erode women's autonomy, limit their decision-making power, and normalize the subordination of their bodily rights to governmental authority. This intersection of direct and structural violence underscores the need for a comprehensive human rights sanctions policy that addresses not only individual instances of harm but also the institutional frameworks that permit, perpetuate, and at times actively orchestrate such harm on a global scale.

---

88 Vahedi et al., *supra* note 63, at 15.

89 *Id*. at 5, 14.

90 *See* Rangita de Silva de Alwis, *Obstetric Violence and Forced Sterilization: Conceptualizing Gender-Based Institutional Violence*, 9 U. PA. J.L. & PUB. AFFS. 95, 99 (2024).

91 *Id.* at 111.

92 *Id.* at 102–03.

93 *Id.* at 103.

As suggested by these examples, varying levels of government or institutional involvement will make certain forms of structural violence more easily targeted by financial sanctions as proposed by this Note.[94] However, under the executive branch's current interpretation of the Global Magnitsky Human Rights Accountability Act—the statutory basis for most human rights sanctions designations by the U.S. government—"violation[s] of internationally recognized human rights" and "serious human rights abuse[s]"[95] fail to capture the structural human rights violations described by Farmer and Ho.[96] Consequently, structural forms of violence against women across the Global South have largely been left unaddressed by U.S. human rights sanctions programs. This Note evaluates whether and how closing this gap may be practicable.

II. The United States' Approach: Current Legal and Policy Landscape

Beginning with embargoes and military blockades prior to the War of 1812, the U.S. government's use of economic sanctions spans several hundreds of years.[97] However, economic sanctions remained largely unused between the War of 1812 and the early twentieth century, when they evolved into their modern form in the wake of World War I with the rise of the League of Nations.[98] Economic sanctions surged after World War II, predominantly employed to "protect the U.S. financial system from abuse." Though

---

94 *See infra* Part III.

95 Global Magnitsky Act, Pub. L. No. 114-328, tit. XII, subtit. F, 130 Stat. 2000 (2016) (codified as amended at 22 U.S.C. §§10101–03) [hereinafter Global Magnitsky Act].

96 *See infra* Part II.

97 *See About OFAC*, U.S. DEP'T. OF THE TREASURY: OFF. OF FOREIGN ASSETS CONTROL, https://ofac.treasury.gov/about-ofac [https://perma.cc/2ZUY-XDFW] [hereinafter *About OFAC*]; Benjamin Coates, *The United States and International Sanctions*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF AMERICAN HISTORY 2 (John Butler ed., 2024) ("Sanctions exist at the intersection of choice and compulsion. This position reflects their dual ancestors: private boycott and military blockade.").

98 *See* Coates, *supra* note 97, at 2 ("Modern sanctions emerged in the wake of World War I by combining these two lineages [the boycott and the blockade]."); T. Clifton Morgan et al., *Economic Sanctions: Evolution, Consequences, and Challenges*, 37 J. ECON. PERSPS. 3, 6 (2023) ("In the aftermath of World War I, there was broad interest in the use of economic sanctions as an alternative to war."); Benjamin Coates, *A Century of Sanctions*, OHIO ST. U.: ORIGINS, CURRENT EVENTS IN HIST. PERSP. (Dec. 2019), https://origins.osu.edu/article/economic-sanctions-history-trump-global [https://perma.cc/4PVH-GFD2]. *See also generally* NICHOLAS MULDER, THE ECONOMIC WEAPON: THE RISE OF SANCTIONS AS A TOOL OF MODERN WAR 69–81 (2022) (detailing the development of League of Nations sanctions in the wake of World War I).

early sanctions were typically "broader, [country-wide] comprehensive embargo[es],"[99] narrower economic sanctions, in combination with export controls and other trade measures, have become preferred in recent years. These serve as catch-all governmental tools to respond to foreign policy challenges, alter the behavior of states and individual actors, and reduce the incidence of violence and human rights abuses abroad.[100] The United States escalated its use of these tools following the September 11, 2001 attacks, with research indicating that the United States has "impos[ed] about two-thirds of the world's sanctions since the 1990's."[101] Moreover, the United States "uses sanctions most often and with greater economic consequences than any other country[,]" while also typically functioning as "the instigator and enforcer of the application of [multi-lateral] sanctions by other countries[.]"[102]

Scholars, commentators, and policymakers have mixed views on the effectiveness of economic sanctions.[103] Nevertheless, recent U.S. presidential administrations have

---

99 RICHARD NEPHEW, COLUM. SCH. OF INT'L & PUB. AFFS., ISSUE BRIEF: THE FUTURE OF ECONOMIC SANCTIONS IN A GLOBAL ECONOMY 7, 8 (May 2015), https://gallery.mailchimp.com/20fec43d5e4f6bc717201530a/files/Issue_Brief_The_Future_of_Economic_Sanctions_in_a_Global_Economy_May_2015.pdf [https://perma.cc/URH2-VRP7].

100 U.S. DEP'T OF THE TREASURY, THE TREASURY 2021 SANCTIONS REVIEW 1 (2021) [hereinafter TREASURY SANCTIONS REVIEW]; *see also* Maksim Likho, *Economic Impact of the U.S. and U.N. Sanctions*, 52 ATL. ECON. J. 245, 245 (2024); Jonathan Masters, *What Are Economic Sanctions?*, COUNCIL ON FOREIGN RELS. (June 24, 2024), https://www.cfr.org/backgrounder/what-are-economic-sanctions [https://perma.cc/6J92-M94W].

101 Manu Karuka, *Hunger Politics: Sanctions as Siege Warfare*, *in* SANCTIONS AS WAR: ANTI-IMPERIALIST PERSPECTIVES ON AMERICAN GEO-ECONOMIC STRATEGY 51, 55 (Stuart Davis & Immanuel Ness eds., 2022) (citing Joy Gordon, *Economic Sanctions, Just War Doctrine, and the "Fearful Spectacle of the Civilian Dead"*, 49 CROSSCURRENTS 387, 387 (1999)).

102 Tim Beal, *Sanctions as Instrument of Coercion: Characteristics, Limitations, and Consequences*, *in* SANCTIONS AS WAR: ANTI-IMPERIALIST PERSPECTIVES ON AMERICAN GEO-ECONOMIC STRATEGY 27, 27 (Stuart Davis & Immanuel Ness eds., 2022).

103 *See generally* Dursun Peksen, *When Do Imposed Economic Sanctions Work? A Critical Review of the Sanctions Effectiveness Literature*, 30 DEF. & PEACE ECON. 635 (2019); Maarten Smeets, *Can Economic Sanctions Be Effective?*, WORLD TRADE ORG., WORKING PAPER NO. ERSD-2018-03 (2018), https://www.wto.org/english/res_e/reser_e/ersd201803_e.pdf [https://perma.cc/67Z8-9E74]; Claas Mertens, *Carrots as Sticks: How Effective Are Foreign Aid Suspensions and Economic Sanctions?*, 68 INT'L STUD. Q. 1, 3 (2024); EDGAR MORGENROTH, THE INST. OF INT'L AFFS., A BRIEF REVIEW OF THE EFFECTIVENESS OF ECONOMIC SANCTIONS (2023); Daniel Drezner, *Are Economic Sanctions Effective Foreign Policy Tools?*, TUFTSNOW (July 8, 2024), https://now.tufts.edu/2024/07/08/are-economic-sanctions-effective-foreign-policy-tools [https://perma.cc/Y8EV-EP53]; Paddy Hirsch, *Why Sanctions Don't Work—But Could if Done Right*, NPR (Apr. 11, 2023), https://www.npr.org/sections/money/2023/04/11/1169072190/why-sanctions-dont-work-but-could-if-done-

continued to leverage sanctions to achieve foreign policy and national security objectives, harnessing the power of the U.S. dollar, the perception of sanctions as a peaceful alternative to military intervention, and the relatively low implementation cost.[104] Former Deputy Secretary of the Treasury, Wally Adeyemo, admitted in 2021 that sanctions "have become the [United States'] tool of first resort to address national security, foreign policy, and economic challenges."[105]

Gender-based sanctions efforts have included targeting actors responsible for direct violence against women globally, especially in conflict zones. However, they have yet to address structural forms of violence against women globally in any significant capacity. Part II of this Note provides a brief primer on the United States' economic sanctions regime, then examines the U.S. government's historical definition of gender-based violence. Against this background, Part II discusses how the United States has operationalized the U.S. Department of the Treasury's ("Treasury" or "Treasury Department") Office of Foreign Assets Control to target human rights violations in a sanctions program administered under the Global Magnitsky Sanctions Regulations.

---

right [https://perma.cc/AJR6-BUA2] (all providing detail on the debate surrounding the effectiveness of economic sanctions).

104 *See* TREASURY SANCTIONS REVIEW, *supra* note 100, at 2 (describing the 933% increase in OFAC sanctions designations between 2000 and 2021; according to Treasury's 2021 Sanctions Review, at the end of 2000, the Specially Designated Nationals list included 912 individuals and entities, compared with 9,421 at the time of the report's release); *see also* NEPHEW, *supra* note 99, at 4; Miriam Berger, *What Are Economic Sanctions, and How Did They Become Washington's Foreign Policy Tool of Choice?*, WASH. POST (Feb. 22, 2022), https://www.washingtonpost.com/world/2021/04/15/faq-united-states-economic-sanctions/ [https://perma.cc/52RQ-WQZ5]; Daniel Drezner, *The Rise of Economic Sanctions in U.S. Foreign Policy*, ECONOFACT (June 25, 2024), https://econofact.org/the-rise-of-economic-sanctions-in-u-s-foreign-policy [https://perma.cc/JT8A-AHMV]; PETER E. HARRELL, BROOKINGS, HAS THE U.S. REACHED "PEAK SANCTIONS"? (July 2024), https://www.brookings.edu/wp-content/uploads/2024/07/20240701_Harrell_Sanctions.pdf [https://perma.cc/Y8F5-MG23]; W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EUR. J. INT'L L. 86, 87, 89 (1998).

105 Press Release, U.S. Dep't of the Treasury, READOUT: Deputy Secretary of the Treasury Wally Adeyemo's Roundtable Discussion with Securities Industry and Financial Markets Association Board of Directors (Apr. 21, 2021), https://home.treasury.gov/news/press-releases/jy0141 [https://perma.cc/2US6-RZNJ]; *see also Treasury Deputy Chief Says Reviewing Costs, Benefits of U.S. Sanctions*, REUTERS (Apr. 21, 2021), https://www.reuters.com/article/us-usa-treasury-sanctions/treasury-deputy-chief-says-reviewing-costs-benefits-of-us-sanctions-idUSKBN2C82W5/ [https://perma.cc/65GY-4THR]; Daniel W. Drezner, *Treasury's Promising Start on Reforming Economic Statecraft*, WASH. POST (Oct. 20, 2021), https://www.washingtonpost.com/outlook/2021/10/20/treasurys-promising-start-reforming-economic-statecraft/ [https://perma.cc/UX6D-8C8V].

A. A Primer on U.S. Human Rights Sanctions

1. U.S. Economic Sanctions: An Overview

Generally, economic sanctions serve as a tool for enforcement of international standards or norms, addressing both "acute crises and long-term [foreign policy] goals."[106] They are "punitive measures . . . imposed by one country, [a] group of countries, or a multilateral body . . . on a target country, entity, or group of individuals" in response to the violation of said norms.[107] These measures include various trade prohibitions, financial service restrictions, import/export controls, and the suspension of foreign aid or diplomatic ties, among others.[108] By leveraging economic or political pressure to modify the behavior of a target entity, sanctions act as a mechanism for advancing strategic interests and objectives, including humanitarian improvements, regional stability, and non-proliferation efforts.[109]

In the United States, the government's ability to impose economic sanctions originates from Congress.[110] The U.S. Constitution grants Congress the authority to regulate international commerce under Article I, Section 8.[111] Typically, U.S. economic sanctions programs and other restrictions begin with "statutes that assign to the President, or []other officer[s] in the executive branch, the authority to limit or prohibit international economic transactions, imports and exports, or entry into the United States."[112] Most often, the authorizing statutes are the International Emergency Economic Powers Act ("IEEPA")

---

106 Ian Allen, *Due Process Boundaries of U.S. Economic Sanctions*, 26 N.Y.U. J. LEGIS. & PUB. POL'Y 239, 244–45 (2024) (citing David S. Cohen & Zachary K. Goldman, *Like It or Not, Unilateral Sanctions Are Here to Stay*, 113 AM. J. INT'L L. UNBOUND 146, 146–47, 151 (2019)).

107 SARAH KRULIKOWSKI, U.S. INT'L TRADE COMM'N, ECONOMIC SANCTIONS: AN OVERVIEW 1 (Mar. 2024), https://www.usitc.gov/publications/332/executive_briefings/ebot_economic_sanctions_overview.pdf [https://perma.cc/D6BM-XAUZ].

108 EDWARD J. COLLINS-CHASE, CONG. RSCH. SERV., R47829, SANCTIONS PRIMER: HOW THE UNITED STATES USES RESTRICTIVE MECHANISMS TO ADVANCE FOREIGN POLICY OR NATIONAL SECURITY OBJECTIVES 4–8 (2023), https://www.congress.gov/crs-product/R47829 [https://perma.cc/TUG4-NDZE].

109 KRULIKOWSKI, *supra* note 107, at 1.

110 COLLINS-CHASE, *supra* note 108, at 2–3, 13–14.

111 U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes[.]").

112 COLLINS-CHASE, *supra* note 108, at 2.

and the National Emergencies Act ("NEA").[113] However, there are several other statutory authorities relevant to U.S. sanctions programs, including the Trading With the Enemy Act ("TWEA") and the Export Control Reform Act of 2018 ("ECRA").[114]

Under the relevant statutory authority, the President, via Executive Order, directs the pertinent executive agency to act. The agency then may issue implementing regulations.[115] However, Congress remains relevant, not only through legislative authorization, but also by engaging in oversight over and appropriating funds to the executive agencies implementing and enforcing U.S. sanctions programs.[116] The federal judiciary may also rule on constitutional considerations relating to the President's sanctions authority, particularly when a sanctioned individual seeks delisting via injunctive relief from an Article III court.[117]

---

113 *Id.* at 2–3; *see also* Allen, *supra* note 106, at 246–48; JENNIFER K. ELSEA, CONG. RSCH. SERV., IF12063, ENFORCEMENT OF ECONOMIC SANCTIONS: AN OVERVIEW 1 (2024), https://www.congress.gov/crs-product/IF12063 [https://perma.cc/P9W3-XCRP] ("Most economic sanctions are imposed using authority delegated to the President in the [IEEPA] and the [NEA]."); CHRISTOPHER A. CASEY ET AL., CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 18 (2025), https://www.congress.gov/crs-product/R45618 [https://perma.cc/2UQA-B5QM] ("[T]he President and Congress together have often turned to IEEPA to impose economic sanctions in furtherance of U.S. foreign policy, national security, and economic objectives. While initially enacted to circumscribe presidential emergency authority, presidential emergency use of IEEPA has expanded in scale, scope, and frequency since the statute's enactment."); Andrew Boyle, *Checking the President's Sanctions Powers*, BRENNAN CTR. FOR JUST. (June 10, 2021), https://www.brennancenter.org/our-work/policy-solutions/checking-presidents-sanctions-powers [https://perma.cc/WSF7-TWXT]; *see also* International Emergency Economic Powers Act, P.L. 95-223 (Dec. 28, 1977), 91 Stat. 1626 (codified as amended at 50 U.S.C. §§ 1701 et seq. (2018)); National Emergencies Act, P.L. 94-412 (Sept. 14, 1976), 90 Stat. 1255 (codified as amended at 50 U.S.C. § 1601 et seq. (2018)).

114 *See generally* Trading with the Enemy Act, Pub. L. No. 65-91, § 2, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. § 4301 et seq.); Export Control Reform Act, Pub. L. No. 115-232, tit. XVII, subtit. B, 132 Stat. 2208 (2018). For a non-exhaustive list of the statutory authorities to OFAC sanctions programs *see OFAC Legal Library: United States Statutes*, U.S. DEP'T OF THE TREASURY: OFF. OF FOREIGN ASSETS CONTROL, https://ofac.treasury.gov/additional-ofac-resources/ofac-legal-library/united-states-statutes [https://perma.cc/PYM6-HAUY].

115 *See* Allen, *supra* note 106, at 248; ELSEA, *supra* note 113, at 1.

116 *See* COLLINS-CHASE, *supra* note 108, at 13–15; Allen, *supra* note 106, at 249. For example, Section 1264 of the Global Magnitsky Human Rights Accountability Act requires the President to report to Congress on the implementation of those sanctions, including an annual summary of actions taken. Global Magnitsky Act, 22 U.S.C. § 10103.

117 Allen, *supra* note 106, at 251 (citing 5 U.S.C. § 706(2); Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury, 686 F.3d 965, 976 (9th Cir. 2012)).

Predominantly, the U.S. departments of State ("State Department"), Commerce ("Commerce Department"), and the Treasury, in coordination with ancillary executive agencies, administer a range of sanctions regimes designed to advance specific geopolitical goals, bolster national security, and uphold international human rights standards.[118] The State Department functions as the primary architect of diplomatic and defense-related constraints (e.g., restrictions on the issuance of visas and the award of foreign and military aid), while the Commerce Department directs and monitors the U.S. export control regime, restricting the export of sensitive dual-use goods and services and other critical and emerging technologies.[119] The U.S. government also serves as an administrator for U.N. Security Council multilateral sanctions. These measures are designed to advance several global interests, including the prevention of unconstitutional shifts in power, the containment of terrorism, and the promotion of international human rights and non-proliferation.[120] However, the proposal raised in this Note is focused only on targeted financial sanctions administered by the Treasury Department's Office of Foreign Assets Control ("OFAC").[121]

2. OFAC's Financial Sanctions

Within the Treasury Department, OFAC is the foremost enforcement authority for financial sanctions issued against both states and non-state actors (e.g., "terrorists, and narcotics traffickers.")[122] Specifically, OFAC regulates transactions between U.S. persons and sanctioned foreign persons, access to U.S.-based assets, and the use of the U.S. dollar and the U.S. banking system.[123] These sanctions programs can be country-specific or thematic (e.g., focused on human rights, corruption, narcotics, election interference,

---

118 KRULIKOWSKI, *supra* note 107, at 1–2.

119 COLLINS-CHASE, *supra* note 108, at 11–13.

120 *See Sanctions*, U.N. SEC. COUNCIL, https://main.un.org/securitycouncil/en/sanctions/information [https://perma.cc/AN9E-H394]; COLLINS-CHASE, *supra* note 108, at 3. *See generally* 2023 FACT SHEETS: SUBSIDIARY ORGANS OF THE UNITED NATIONS SECURITY COUNCIL, U.N. DEP'T OF POL. & PEACEBUILDING AFFS. (2023), https://main.un.org/securitycouncil/sites/default/files/subsidiary_organs_series_7sep23_.pdf [https://perma.cc/U65C-9AB7].

121 *See About OFAC*, *supra* note 97; COLLINS-CHASE, *supra* note 108, at 12.

122 *About OFAC*, *supra* note 97. Note that enforcement of criminal violations of financial sanctions and civil forfeitures, along with investigations of related conduct (e.g., money laundering, export control violations) are handled by the U.S. Department of Justice. *See* ELSEA, *supra* note 113, at 2.

123 COLLINS-CHASE, *supra* note 108, at 12. OFAC sanctions regulations are found at 31 C.F.R. pt. 500 et seq.

etc.).[124] OFAC administers more than three dozen country-specific and thematic sanctions programs including "Foreign Interference in a United States Election Sanctions," "Counter Narcotics Trafficking Sanctions," and "Cyber-Related Sanctions."[125]

OFAC-administered sanctions may be targeted interventions—selectively "barring only certain trade and financial transactions" with specific individuals—or comprehensive prohibitions that effectively sever all economic and commercial ties with the target nation.[126] Targeted or "smart" sanctions tend to be favored over comprehensive sanctions programs or embargoes because proponents believe they carry a lower risk of unintended humanitarian effects, corruption, and retaliation.[127] Broad, country-wide sanctions programs tend to inflict the most harm on civilian groups and non-culpable parties.[128] The Treasury Department recommends minimizing the use of comprehensive sanctions "in order to mitigate [these]

---

124 *Sanctions Programs and Country Information*, U.S. DEP'T. OF THE TREASURY: OFF. OF FOREIGN ASSETS CONTROL, https://ofac.treasury.gov/sanctions-programs-and-country-information [https://perma.cc/LD7A-4RAM] [hereinafter *OFAC Sanctions Programs & Country Info*].

125 *Id.*

126 14 ROBERT L. HAIG, BUS. & COM. LITIG. FED. CTS. § 157:15 (5th ed. 2024); COLLINS-CHASE, *supra* note 108, at 9; *see also* Uri Friedman, *Smart Sanctions: A Short History*, FOREIGN POL'Y (Apr. 23, 2012), https://foreignpolicy.com/2012/04/23/smart-sanctions-a-short-history/ [https://perma.cc/9SWG-N2AX]; Morgan et al., *supra* note 98, at 6 ("Recent uses [of sanctions] emphasize, to a much greater extent, the necessity of designing sanctions to target key individuals, companies, or sectors (for example, 'smart' or 'targeted' sanctions including financial and travel sanctions) rather than using sanctions as a blunt instrument designed to harm the entire target nation (for example, trade sanctions).").

127 *See* Elizabeth Clark Hersey, *No Universal Target: Distinguishing Between Terrorism and Human Rights Violations in Targeted Sanctions Regimes*, 38 BROOK. J. INT'L L. 1231, 1239–40 (2013) (detailing the two "major drawbacks" associated with "general" or comprehensive sanctions: questionable success rates and harm to innocent civilians); Daniel P. Ahn & Rodney D. Ludema, *The Sword and the Shield: The Economics of Targeted Sanctions*, 130 EUR. ECON. REV. 1, 3 (2020) (internal citations omitted) ("Supporters of targeted sanctions trumpet their value in concentrating economic harm on the key actors involved in a conflict while minimizing 'collateral damage' to innocent bystanders, often referring to them 'smart' sanctions."); Masters, *supra* note 100. *See generally* Matthew Craven*, Humanitarianism and the Quest for Smarter Sanctions*, 13 EUR. J. INT'L L. 43 (2002) (discussing the shift from comprehensive sanctions programs to targeted sanctions with humanitarian exemptions).

128 *See, e.g.*, Aidan Cover, *Sanctions and Consequences: Third-State Impacts and the Development of International Law in the Shadow of Unilateral Sanctions on Russia*, 100 U. DET. MERCY L. REV. 441, 446–49 (2023) (discussing the unintended "spillover effects of sanctions" on civilian populations); *Questions and Answers: How Sanctions Affect the Humanitarian Response in Syria*, HUM. RTS. WATCH (June 22, 2023), https://www.hrw.org/news/2023/06/22/questions-and-answers-how-sanctions-affect-humanitarian-response-syria [https://perma.cc/R586-BGBZ] (describing how the U.S.' comprehensive embargo and European sanctions against Syria affected humanitarian operations in the country).

unintended economic and political impacts on domestic workers and businesses, allies, and non-targeted populations abroad."[129] Complete trade embargoes, with the exception of certain limited exemptions published in OFAC General Licenses,[130] are only in force against a very small number of countries or regions.[131]

OFAC also maintains a blacklist known as the Specially Designated Nationals and Blocked Persons ("SDN") List.[132] Designation to the SDN List is not country specific. Rather, individuals designated under any of OFAC's active sanctions programs are SDNs.[133] Listing freezes affected parties' U.S. assets and generally prohibits their dealings with U.S. persons. In practice, this also restricts the ability of SDNs to carry out transactions through U.S. banks, even as intermediary banks, or in U.S. dollars, regardless of where blocked persons are located.[134] Currently, more than 17,000 entities and individuals worldwide are listed on the SDN List.[135]

---

129 TREASURY SANCTIONS REVIEW, *supra* note 100, at 5.

130 *Frequently Asked Questions: OFAC Licenses*, U.S. DEP'T. OF THE TREASURY: OFF. OF FOREIGN ASSETS CONTROL, https://ofac.treasury.gov/faqs/topic/1506 [https://perma.cc/ZAG6-ZVFT]; COLLINS-CHASE, *supra* note 108, at 10–11 (discussing the purpose of OFAC general licenses).

131 *See e.g.*, *Cuba Sanctions*, U.S. DEP'T. OF THE TREASURY: OFF. OF FOREIGN ASSETS CONTROL, https://ofac.treasury.gov/sanctions-programs-and-country-information/cuba-sanctions [https://perma.cc/4XAE-326Z]; *Iran Sanctions*, U.S. DEP'T. OF THE TREASURY: OFF. OF FOREIGN ASSETS CONTROL, https://ofac.treasury.gov/sanctions-programs-and-country-information/iran-sanctions [https://perma.cc/36LA-6TPY]; *North Korea Sanctions*, U.S. DEP'T. OF THE TREASURY: OFF. OF FOREIGN ASSETS CONTROL, https://ofac.treasury.gov/sanctions-programs-and-country-information/north-korea-sanctions [https://perma.cc/LFJ7-VCL8]; *Ukraine-/Russia-Related Sanctions*, U.S. DEP'T. OF THE TREASURY: OFF. OF FOREIGN ASSETS CONTROL, https://ofac.treasury.gov/sanctions-programs-and-country-information/ukraine-russia-related-sanctions [https://perma.cc/JRR7-BWS4]; *see also* Cuban Assets Control Regulations, 31 C.F.R. pt. 515; Iranian Transactions and Sanctions Regulations, 31 C.F.R. pt. 560; North Korea Sanctions Regulations, 31 C.F.R. pt. 510; Ukraine-/Russia-Related Sanctions Regulations, 31 C.F.R. pt. 589.

132 KRULIKOWSKI, *supra* note 107, at 2; ELSEA, *supra* note 113, at 1; 14 BUS. & COM. LITIG. FED. CTS. § 157:15. A searchable and downloadable form of the SDN List is available at *Sanctions List Search*, U.S. DEP'T. OF THE TREASURY: OFF. OF FOREIGN ASSETS CONTROL, https://sanctionssearch.ofac.treas.gov/ [https://perma.cc/QZ7V-HUUS] [hereinafter *SDN List*].

133 *See* KRULIKOWSKI, *supra* note 107, at 2; ELSEA, *supra* note 113, at 1.

134 KRULIKOWSKI, *supra* note 107, at 2; *Frequently Asked Questions: Basic Information on OFAC and Sanctions*, U.S. DEP'T. OF THE TREASURY: OFF. OF FOREIGN ASSETS CONTROL, https://ofac.treasury.gov/faqs/topic/1501 [https://perma.cc/9ZHR-JZTT].

135 *Where is OFAC's Country List? What Countries Do I Need to Worry About in Terms of U.S. Sanctions?*, U.S. DEP'T. OF THE TREASURY: OFF. OF FOREIGN ASSETS CONTROL, https://ofac.treasury.gov/sanctions-programs-

Typically, OFAC sanctions for human rights purposes are targeted financial sanctions—also called "smart" sanctions—directed at individual actors, who are then added to the SDN List. The Global Magnitsky sanctions program, authorized by the Global Magnitsky Human Rights Accountability Act, is the predominant human rights sanctions program enforced by OFAC and relevant to the analysis in this Note.

3. The Origins of Magnitsky Sanctions

As discussed *supra* Part II.A.1, sanctions are commonly authorized via IEEPA.[136] However, there are several other supplemental statutory authorities that permit the President to issue Executive Orders and direct executive agencies to carry out financial sanctions designations. One such statutory authority is the Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012 ("Magnitsky Act").[137] Congress passed the Magnitsky Act in 2012, and it was signed into law by former President Barack Obama the same year.[138] Initially, the predominant purpose of the legislation was to reestablish permanent normal trade relations with the Russian Federation and Moldova by repealing application of the Jackson-Vanik Amendment.[139]

While the statute was fundamentally trade legislation, Congress also intended for the Magnitsky Act to denounce human rights abuses in Russia and to serve as a tool to promote these rights after the detention, torture, and subsequent death of Russian anticorruption and tax lawyer, Sergei Magnitsky.[140] Magnitsky was targeted after investigating corruption by

---

and-country-information/where-is-ofacs-country-list-what-countries-do-i-need-to-worry-about-in-terms-of-us-sanctions [https://perma.cc/J9QV-HPB9]; *see also SDN List*, *supra* note 132.

136 Allen, *supra* note 106, at 246–48.

137 Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112–208 tit. IV, 126 Stat. 1496 [hereinafter Magnitsky Act].

138 *See* Office of the Press Secretary, The White House, *Statement by the Press Secretary on H.R. 6156* (Dec. 14, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/12/14/statement-press-secretary-hr-6156 [https://perma.cc/V3H6-35YH]; Cecily Rose, *Magnitsky Sanctions, Corruption, and Asset Recovery*, *in* GRAND CORRUPTION 224, 225–26 (Robert I. Rotberg & Fen Osler Hampson eds., 2024).

139 The Jackson-Vanik Amendment to the Trade Act of 1974 was intended to affect U.S. trade relations with countries with non-market economies—originally, countries of the Soviet Bloc. *See* 19 U.S.C. § 2432(a).

140 Rose, *supra* note 138, at 225–26; Kim Van der Borght, *From Jackson-Vanik to Magnitsky: Continuing a Tradition of Ineffective Human Rights Bolt Ons to Trade Bills*, 7 HUM. RTS. & INT'L LEGAL DISCOURSE 237, 252 (2013); *see also* Press Release, House Foreign Affs. Comm., Russia Human Rights Legislation Passes Foreign

the Russian government, which attempted to cover up Magnitsky's death while in prison.[141] Like other sanctions-authorizing statutes, the Magnitsky Act enabled the U.S. President to determine that individual Russian citizens "who were involved in the acts of corruption . . . uncovered by Magnitsky" had violated international human rights norms and subsequently, through the Treasury Department, designate such individuals to the SDN List.[142]

4. Going Global: The Global Magnitsky Human Rights Accountability Act

The Global Magnitsky Human Rights Accountability Act ("Global Magnitsky Act"), enacted within the National Defense Authorization Act for Fiscal Year 2017, "effectively globalizes" the authorities of the 2012 Magnitsky Act to individuals and covered activities outside of Russia and not necessarily related to the death of Sergei Magnitsky.[143] The Global Magnitsky Act authorizes the President to sanction any individual responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights, or any foreign government official responsible for acts of significant corruption.[144]

In particular, the Global Magnitsky Act authorizes the President to deny entry into the United States, revoke already-issued visas, and block property under U.S. jurisdiction of, and prohibit U.S. persons from entering into transactions with, any foreign person (individual or entity)[145] that the President determines is "responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights," as defined at 22 U.S.C. §2304(d)(1), against those working (1) "to expose illegal activities of government officials" or (2) "to obtain, exercise, defend, or promote internationally recognized human rights and freedoms such as the freedoms of religion, expression, association, and assembly, and the rights to a fair trial and democratic elections."[146] The

---

Affairs Committee, https://web.archive.org/web/20130110194137/http://archives.republicans.foreignaffairs.house.gov/news/story/?2401.

141 Rose, *supra* note 138, at 225–26.

142 *Id.* at 226; *see also* Hersey, *supra* note 127, at 1231–32.

143 MICHAEL A. WEBER, CONG. RSCH. SERV., IF10576, HUMAN RIGHTS AND ANTI-CORRUPTION SANCTIONS: THE GLOBAL MAGNITSKY HUMAN RIGHTS ACCOUNTABILITY ACT 1 (2025), https://www.congress.gov/crs-product/IF10576 [https://perma.cc/K8UJ-ZATV]; Rose, *supra* note 138, at 227.

144 Global Magnitsky Act, 22 U.S.C. § 10102(a).

145 *Id.* § 10102(b)(1)–(2); WEBER, *supra* note 143, at 1.

146 Global Magnitsky Act, 22 U.S.C. § 10102(a)(1)–(2).

Global Magnitsky Act also gives the President the power to sanction foreign government officials responsible for acts of significant corruption, senior associates of such officials, or facilitators of such acts, which include "the expropriation of private or public assets for personal gain, corruption related to government contracts or the extraction of natural resources, bribery, or the facilitation or transfer of the proceeds of corruption to foreign jurisdictions."[147]

Since its initial enactment, the scope of the Global Magnitsky Act has been expanded to cover additional behavior. On December 20, 2017, President Donald Trump issued Executive Order 13818 "Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption," finding that "the prevalence and severity of human rights abuse and corruption . . . ha[d] reached such scope and gravity that they threaten[ed] the stability of international political and economic systems" and "constitute[d] an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States," invoking the Global Magnitsky Act and emergency authorities stated in IEEPA and NEA, as well as authority under the Immigration and Nationality Act ("INA").[148] Notably, E.O. 13818 expanded the pertinent standard of behavior warranting sanctions designation to those actors determined "to be responsible for or complicit in, or to have directly or indirectly engaged in, *serious human rights abuses*," compared to "*gross violations of internationally recognized human rights*" as stated in the Global Magnitsky Act itself.[149] Further, the Executive Order refers not just to "acts of significant corruption" but merely "corruption," dropping the requirement that such conduct be "significant."[150] Likewise, the Executive Order extends coverage to secondary, not merely primary, participants in sanctionable conduct.[151]

---

147 *Id.* § 10102(a)(3)–(4).

148 Exec. Order No. 13818, 3 C.F.R. § 583.101 app. A (2017); Press Release, U.S. Dep't of the Treasury, United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe (Dec. 21, 2017), https://home.treasury.gov/news/press-releases/sm0243 [https://perma.cc/HW5P-NKPE].

149 Exec. Order No. 13818 § 1(a)(ii)(A) (emphasis added); Global Magnitsky Act, 22 U.S.C. § 10102(a)(1) (emphasis added).

150 Exec. Order No. 13818 § 1(a)(ii)(B); Global Magnitsky Act, 22 U.S.C. § 10102(a)(3).

151 Exec. Order No. 13818 § 1(a)(iii)(A); *see also* Rose, *supra* note 138, at 227.

Human rights advocates praised E.O. 13818 for using this more permissive language, essentially broadening the reach of U.S. human rights sanctions.[152] Under this broader authority, in 2023 alone, the Treasury Department sanctioned seventy-eight foreign persons under the Global Magnitsky sanctions program, bringing the total to more than 650 foreign persons designated since 2017 in connection with serious human rights abuses, corruption, or both.[153] 2025 data indicates that recent public designations include 262 individuals, 330 entities, and 157 fishing vessels, spanning more than fifty countries globally.[154]

B. Gender-Based Violence and U.S. Financial Sanctions

While some of these designations have aimed to address gender-based violence, such action has been relatively limited. When defining gender-based violence in legislation and policy objectives, the U.S. government typically utilizes a narrow definition. As a result, sanctions designations related to gender-based violence by OFAC under the Global Magnitsky sanctions program—which are already relatively uncommon—are further limited to only direct, physical violence against women. This gap is aggravated by an absence of disaggregated, gender-specific data on the effects of sanctions and a lack of engagement with women's, LGBTQ+, and related civil society and non-governmental organizations in target countries, which are often optimally positioned to provide insights to the U.S. government as to local priorities and data surrounding the incidence of violence against women, both direct and structural, at a grassroots level.[155]

1. Defining "Gender-Based Violence" in the Context of U.S. Government Action

In the United States, and particularly by the U.S. government, violence against women is most often viewed and studied through the lens of interpersonal or physical violence. For instance, the Violence Against Women Act ("VAWA"), enacted initially in 1994 and reauthorized by Congress four times since, most recently in 2022, addresses predominantly

---

152 *See* Rob Berschinski, *Trump Administration Notches a Serious Human Rights Win. No, Really*, JUST SEC. (Jan. 10, 2018), https://www.justsecurity.org/50846/trump-administration-notches-human-rights-win-no-really/ [https://perma.cc/53KN-MVAU].

153 U.S. DEP'T. OF STATE, GLOBAL MAGNITSKY HUMAN RIGHTS ACCOUNTABILITY ACT ANNUAL REPORT, 89 Fed. Reg. 13795, 13795 (2024).

154 WEBER, *supra* note 143, at 1–2.

155 *See* KALLIE MITCHELL & MAX THOMPSON, NEW LINES INST., GENDERING ECONOMIC SANCTIONS: BEST PRACTICES FOR THE U.S. 17 (2023).

individual, behavioral acts of violence against women, such as domestic and dating violence, sexual assault, and stalking.[156] While it addresses non-physical forms of abuse including emotional, economic, and psychological abuse, it does not contemplate violence against women that is not perpetrated by individual actors.[157]

Likewise, even the 2022 Global Gender-Based Violence Strategy, which deliberately aimed to address gender-based violence from a more intersectional perspective than was customary previously and explicitly recognized that "[g]ender-based violence is rooted in structural gender inequalities, patriarchy, and power imbalances,"[158] limited the definition of gender-based violence to "harmful threat[s] or act[s] directed at an individual or group based on actual or perceived sex, gender, gender identity or expression, sex characteristics, sexual orientation, and/or lack of adherence to varying socially constructed norms around masculinity and femininity."[159] Again, this definition focuses not on institutions but individual perpetrators of direct violence or the threat of direct violence. Further, despite advocating for the use of a "Social-Ecological Approach to Violence" to prevent and mitigate gender-based violence at the domestic level during the Biden Administration,[160] the U.S. government has failed to sufficiently translate a more intersectional approach to violence prevention to its foreign policy and human rights promotion efforts, largely

---

156 *See* Violence Against Women Act, 34 U.S.C. § 12291; *see also* EMILY J. HANSON, CONG. RSCH. SERV., R47570, THE 2022 VIOLENCE AGAINST WOMEN ACT (VAWA) REAUTHORIZATION 1 (2023), https://www.congress.gov/crs-product/R47570 [https://perma.cc/U8Z5-3YYD].

157 HANSON, *supra* note 156, at 2; *see also Domestic Violence*, U.S. DEP'T. OF JUST.: OFF. OF VIOLENCE AGAINST WOMEN, https://www.justice.gov/ovw/domestic-violence [https://perma.cc/9XX7-WY6W].

158 *See* 2022 GLOBAL GENDER-BASED VIOLENCE STRATEGY, *supra* note 20, at 7–8 (discussing the Biden Administration's goal of advancing equity and inclusivity and its understanding of the root causes of gender-based violence).

159 *Id.* at 8.

160 THE WHITE HOUSE, U.S. NATIONAL PLAN TO END GENDER-BASED VIOLENCE: STRATEGIES FOR ACTION 26–27 (2023), https://bidenwhitehouse.archives.gov/wp-content/uploads/2023/05/National-Plan-to-End-GBV.pdf [https://perma.cc/45AU-UN24] [hereinafter the Domestic Plan]. In the Domestic Plan, the U.S. Centers for Disease Control and Prevention ("CDC") utilizes a four-level social-ecological model "to better understand violence and the effect of potential prevention strategies." *Id.* at 27. In employing the Social-Ecological Approach the U.S. government recognizes that domestic violence and prevention strategies exist at four levels: individual, relational, communal, and societal. In particular, the U.S. government recognizes that "effective prevention requires recognizing and addressing risk factors that may contribute to the likelihood that a person will perpetrate or experience GBV, such as adverse childhood experiences (ACEs), harmful social and gender norms, and economic insecurity." *Id.* at 26.

limiting its Global Magnitsky sanctions designations to perpetrators of traditional direct violence.

2. Are Sanctions Gendered? Global Magnitsky Sanctions Targeting Gender-Based Violence

In line with the U.S. government's relatively narrow understanding, the Biden Administration utilized its authority under the Global Magnitsky Act and E.O. 13818 to target certain instances of gender-based violence but did not contemplate forms of structural violence as targets for OFAC sanctions.[161] Specifically, in 2022, in accordance with the Global Gender-Based Violence Strategy, former President Biden issued a historic *Presidential Memorandum on Promoting Accountability for Conflict-Related Sexual Violence* (the "Memorandum"), committing to fully exercising U.S. authorities—including sanctions, visa restrictions, and security assistance vetting—to impose consequences on perpetrators of CRSV.[162] A relevant and previously unprecedented policy in the Memorandum was the following section regarding the imposition of economic sanctions:

> It is the policy of the United States to fully exercise existing authorities to impose economic sanctions and implement visa restrictions in order to promote justice and accountability for acts of CRSV; devote the necessary resources to ensure regular coordination and reporting on CRSV incidents and to conduct training on CRSV issues more broadly, including to support the designation of sanctions targets; [and] strengthen the implementation of other existing tools and authorities to promote accountability for CRSV, including the provision of United States security assistance.[163]

Notably, the Memorandum stressed that "an act of CRSV" may "constitute a 'serious human rights abuse' for purposes of designation" under the Global Magnitsky Act, opening the door for OFAC to work towards addressing violence against women.[164] It further clarified that the "criteria for targeting certain abuses or violations of human rights" in

---

161 *See* 2022 GLOBAL GENDER-BASED VIOLENCE STRATEGY, *supra* note 20, at 33, 60.

162 *See* Press Release, The White House, Memorandum of November 28, 2022, on Promoting Accountability for Conflict-Related Sexual Violence, 87 Fed. Reg. 74485, 74485 (Nov. 28, 2022).

163 *Id.* § 1.

164 *Id.* § 2.

country-specific sanctions programs "may include CRSV."[165] Since then, OFAC has listed several perpetrators of gender-based violence in the Global South on the SDN List, thus subjecting them to an asset freeze and generally prohibiting them from transactions involving U.S. persons, in U.S. dollars, or through U.S. banks.[166]

However, these designations do not address indirect, institutional forms of violence against women and girls. Further, compared to other executive agency action, OFAC sanctions are not sufficiently "gendered."[167] Not only does OFAC largely not target misconduct directed predominantly at women in its sanctions programs, but sanctions are often implemented and monitored in a gender-blind manner that fails to adequately consider how measures disproportionately affect different groups.[168] A sanction that might look neutral on paper will impact men and women differently because of existing social, economic, and power imbalances.[169] While the use of OFAC General Licenses aims to mitigate some of these concerns by exempting humanitarian goods and services, more work still needs to be done. Given this gap, and the reality that "unilateral sanctions . . . are here to stay," it is necessary to evaluate how U.S. sanctions policy could be reformed to reach perpetrators of structural violence and ways in which any newly designed targeted

---

165 *Id.*

166 *See, e.g.*, Press Release, U.S. Dep't of the Treasury, Marking International Women's Day, Treasury Sanctions Iranian Officials and Entities for Serious Human Rights Abuses (Mar. 8, 2023), https://home.treasury.gov/news/press-releases/jy1327 [https://perma.cc/TL4T-FTJU]; Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Two South Sudanese Officials Responsible for Conflict-Related Sexual Violence (June 20, 2023), https://home.treasury.gov/news/press-releases/jy1552 [https://perma.cc/S8JA-5YPC]; Press Release, U.S. Dep't of the Treasury, Treasury Designates Perpetrators of Human Rights Abuse and Commemorates the 75th Anniversary of the Universal Declaration of Human Rights (Dec. 8, 2023), https://home.treasury.gov/news/press-releases/jy1972 [https://perma.cc/VP6E-3AGW]; Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Former Haitian Politician and Gang Leader for Their Connections to Serious Human Rights Abuse (Sep. 25, 2024), https://home.treasury.gov/news/press-releases/jy2612 [https://perma.cc/VHY4-QDHN]; Press Release, U.S. Dep't. of the Treasury, Treasury Sanctions Sudanese Commander Involved in Human Rights Abuses in West Darfur (Nov. 12, 2024), https://home.treasury.gov/news/press-releases/jy2710 [https://perma.cc/7M29-Z6XG] (all examples of Global Magnitsky designations issued by the Biden Treasury Department under the guidance set out in the Memorandum).

167 MITCHELL & THOMPSON, *supra* note 155, at 3.

168 *Id.* at 4–5, 7; *see also* Press Release, U.N. Hum. Rs., Off. of the High Comm'r, Unilateral Sanctions Hurt All, Especially Women, Children and Other Vulnerable Groups—U.N. Human Rights Expert (Dec. 8, 2021), https://www.ohchr.org/en/press-releases/2021/12/unilateral-sanctions-hurt-all-especially-women-children-and-other-vulnerable?LangID=E&NewsID=27931 [https://perma.cc/HXW3-J4KV].

169 MITCHELL & THOMPSON, *supra* note 155, at 7.

sanctions measures may be adapted to account specifically for the risk of unintended harms to women and other already marginalized groups.[170]

III. Applying U.S. Human Rights Sanctions to Tackle Structural Violence

As discussed *supra* Part II, the United States, other nations in the Global North, and institutions like the United Nations have already begun to employ targeted financial sanctions to tackle physical forms of violence against women and girls.[171] Manifestations of structural violence perpetrated by government and legal institutions may serve as a functional equivalent to direct violence committed by individual actors for the purpose of sanctions designations as the culpable parties are more easily identifiable. Subsequently, Part III of this Note argues that utilizing Global Magnitsky sanctions to remedy structural violence against women in low- and middle-income countries will require the U.S. government to greatly expand its interpretation of what constitutes a "serious human rights abuse" and "violations of internationally recognized human rights" to a breadth that is atypical historically under the Global Magnitsky Act and related executive authorities. It highlights the human right to health as a relevant basis for this broader interpretation. Further, Part III asserts that certain forms of structural violence condoned or inadequately addressed by legal and governmental systems can be targeted by financial sanctions, while others practically cannot.

A. Framing Structural Violence as a "Serious Human Rights Abuse"

1. What Currently Warrants Designation Under the Global Magnitsky Act?

Under the Global Magnitsky Act, the President only has the power to designate entities and individuals for their direct or indirect role in "gross violations of internationally recognized human rights."[172] The Global Magnitsky Act defines "gross violation[] of internationally recognized human rights" according to its definition in the Foreign Assistance Act of 1961.[173] It includes "torture or cruel, inhuman, or degrading treatment

170 Cohen & Goldman, *supra* note 106, at 151.

171 *See supra* note 166; Sophie Huve, *The Use of U.N. Sanctions to Address Conflict-Related Sexual Violence*, GEO. INST. FOR WOMEN, PEACE, & SEC. (2018), https://giwps.georgetown.edu/wp-content/uploads/2018/03/Use-of-UN-Sanctions-to-Address-Conflict-related-Sexual-Violence.pdf [https://perma.cc/6NPV-3DFQ].

172 Global Magnitsky Act, 22 U.S.C. § 10102(a)(1).

173 *Id.* § 10101(2).

or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person."[174]

While President Trump, via Executive Order 13818, expanded the standard for sanctionable behavior to "serious human rights abuse" during his first term, sanctions designations under the Global Magnitsky Sanctions Regulations have largely been limited to killings, torture, and unlawful or arbitrary detentions, with only occasional application to gender-based violence, enforced disappearance, and certain acts of human trafficking.[175]

Critically, even with the broadened scope, the Global Magnitsky sanctions regime still requires conduct to reach a certain level of gravity to be sanctionable. This is where the difficulty lies. Structural violence is a morally weighted term, and the United States in particular, whether it be the government or parts of its citizenry, often hesitates to view certain entitlements as human rights and certain behavior as violative of those rights despite relative global consensus.[176] This is particularly challenging given the Global Magnitsky Act requires the President consider "credible evidence" of the sanctionable conduct before directing the Treasury Department to make any sanctions designations.[177]

2. Looking to International Human Rights Instruments

Nevertheless, "serious" and "gross" are not terms defined in either the Global Magnitsky Act or in E.O. 13818. And, since the enactment of the Foreign Assistance Act in 1961, the global understanding of human rights (legal and otherwise) has evolved significantly. The framework for human rights has become more expansive, to include not just basic civil and

---

174 22 U.S.C. § 2304(d)(1).

175 Exec. Order No. 13818 § 1(a); *Fact Sheet: U.S. Global Magnitsky Sanctions*, HUM. RTS. WATCH (June 30, 2023), https://humanrightsfirst.org/library/u-s-global-magnitsky-sanctions/ [https://perma.cc/Z6AM-KFU2].

176 *See, e.g.*, *Human Rights*, ACLU (2026), https://www.aclu.org/issues/human-rights [https://perma.cc/JUR9-L34Q] ("The United States has ratified or acceded to fewer key human rights treaties than all other countries in the G20 group."); Kathryn Libal & Ken Neubeck, *The Rights of the Child to an Adequate Standard of Living: Applying International Standards to the U.S. Case*, *in* THE STATE OF ECONOMIC AND SOCIAL HUMAN RIGHTS: A GLOBAL OVERVIEW 175, 177 n.3 (Lanse Minkler ed., 2013) ("[T]he United States . . . still officially denies the existence of economic human rights.").

177 22 U.S.C. § 10102(a); *see also id*. § 10102(c) ("In determining whether to impose sanctions under subsection (a), the President shall consider—(1) information provided jointly by the chairperson and ranking member of each of the appropriate congressional committees; and (2) credible information obtained by other countries and nongovernmental organizations that monitor violations of human rights.").

political rights, but also economic, social, and cultural rights, with a growing emphasis on the rights of marginalized groups.[178] Conceiving of structural violence as a human rights violation is not unfounded in academic scholarship and human rights research.[179] This evolution is compatible with utilizing a structural violence framework, particularly as the international community increasingly stresses the importance of the fundamental human right to health as an inclusive right.[180] While structural violence against women may not shock the conscience in the same way CRSV and more direct acts of violence do, its effects on morbidity and mortality directly implicate the human right to health, enshrined in both binding and aspirational non-binding international human rights instruments.[181] The U.S. government can look to this fundamental right in order to build out its understanding of "serious human rights abuse."

---

178 *See The Evolution of Human Rights*, *in* COMPASS MANUAL OF HUMAN RIGHTS FOR YOUNG PEOPLE, COUNCIL OF EUR. (2002), https://www.coe.int/en/web/compass/the-evolution-of-human-rights [https://perma.cc/3DJE-G6SR]; Lanse Minkler, *Introduction: Why Economic and Social Human Rights?*, *in* THE STATE OF ECONOMIC AND SOCIAL HUMAN RIGHTS: A GLOBAL OVERVIEW 1, 2 (Lanse Minkler ed., 2013) ("[Economic and social] rights are becoming increasingly recognized in the law."); Dinah L. Shelton, *An Introduction to the History of International Human Rights Law* 1 (Geo. Wash. Legal Studies Research Paper No. 346, 2007), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2045&context=faculty_publications [https://perma.cc/KT3Z-J2H6].

179 *See supra* Part I.A.2 (discussing Farmer and Ho's portrayal of structural violence as a violation of fundamental human rights).

180 Audrey R. Chapman & Salil D. Benegal, *Globalization and the Right to Health*, *in* THE STATE OF ECONOMIC AND SOCIAL HUMAN RIGHTS: A GLOBAL OVERVIEW 61, 61 (Lanse Minkler ed., 2013) ("According to the [United Nations Committee on Economic, Social and Cultural Rights], the right to health is an inclusive right that goes well beyond the [basic provisions in international instruments]."); UNHCR & WHO, FACT SHEET NO. 31, THE RIGHT TO HEALTH 3 (2008), https://www.ohchr.org/sites/default/files/Documents/Publications/Factsheet31.pdf [https://perma.cc/PE4B-UZKW] [hereinafter RIGHT TO HEALTH FACT SHEET]. As an inclusive right, the right to health extends to access to quality healthcare and the "underlying determinants of health" including: "[s]afe drinking water and adequate sanitation; [s]afe food; [a]dequate nutrition and housing; [h]ealthy working and environmental conditions; [h]ealth-related education and information; and [g]ender-equality." *Id.* at 3; *see also Right to Health: An Inclusive Right for All*, WORLD MED. ASS'N (2026), https://www.wma.net/what-we-do/human-rights/right-to-health/ [https://perma.cc/UUC2-HZ4U].

181 *See supra* Part I; *see e.g.*, The International Convention on the Elimination of All Forms of Racial Discrimination art. 5(e)(iv), Dec. 21, 1965 [hereinafter ICERD]; The International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966 [hereinafter ICESCR]; The Convention on the Elimination of All Forms of Discrimination Against Women arts. 11(1)(f), 12, 14(2), Dec. 18, 1979 [hereinafter CEDAW]; The Convention of the Rights of the Child art. 24, Nov. 20, 1989 [hereinafter UNCRC]; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families arts. 28, 43(e), & 45(c), Dec. 18, 1990; The Convention on the Rights of Persons with Disabilities art. 25, Mar. 3, 2007 [hereinafter UNCRPD].

As the World Health Organization ("WHO") makes clear, "*The right to the enjoyment of the highest attainable standard of physical and mental health*, to give it its full name, is not new."[182] The right was first defined with the signing and later enactment of the Constitution of the World Health Organization in 1946 and 1948, respectively.[183] It thus existed formally in some capacity prior to the enactment of the Foreign Assistance Act of 1961 and has continued to be substantiated since.[184]

Specifically, the Preamble of the Constitution of the WHO defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity" and asserts that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."[185] The right to health has since been recognized on several occasions "in most of the core international human rights treaties as well as other international and regional instruments and declarations."[186] This includes in the 1948 Universal Declaration of Human Rights ("UDHR") and the 1966 International Covenant on Economic, Social and Cultural Rights ("ICESCR").[187]

While the UDHR is not binding, and the United States has not ratified the ICESCR, both speak to the long-standing international consensus on human rights and thus can inform the common understanding of what constitutes a violation of the human right to health within an international law framework. Notably, in 2000, the ratification of General Comment No. 14 ("GC 14") by the U.N. Committee on Economic, Social and Cultural Rights clarified the legal scope of the right to health globally. GC 14 transformed the discourse from a narrow interpretation of the ICESCR to a comprehensive framework, clarifying that the right is not a "right to be healthy," but rather an entitlement to the underlying determinants of health—

182 RIGHT TO HEALTH FACT SHEET, *supra* note 180, at 1.

183 *Id*.

184 *See* Constitution of the World Health Organization (entered into force Apr. 7, 1948), https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1 [https://perma.cc/F67Y-CCHS]; *see also* Chapman & Benegal, *supra* note 180, at 61–64 (tracing the development of the right to health from 1948).

185 Constitution of the World Health Organization, *supra* note 184, at pmbl.

186 Alan S. Gutterman, *Right to Health Under International Law*, at 1 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4316428 [https://perma.cc/8LGT-ZA8G].

187 G.A. RES. 217 (III) A, Universal Declaration of Human Rights art. 25 (Dec. 10, 1948) (mentioning health as part of the right to an adequate standard of living); ICESCR art. 12, Dec. 16, 1966 ("The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health . . . .").

ranging from clinical care to sanitation and nutritional security.[188] The social determinants of health and structural violence go hand in hand.

Today, the right to health is relevant to all U.N. member states: "every State has ratified at least one international human rights treaty recognizing the right to health."[189] This includes the United States, which has ratified the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), which explicitly recognizes "[t]he right to public health, medical care, social security and social services" in Article 5.[190] Further, the United States has signed, but not ratified, ICESCR, along with the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), the Convention on the Rights of the Child ("UNCRC"), and the Convention on the Rights of Persons with Disabilities ("UNCRPD"), all of which enumerate the right to health.[191] CEDAW is particularly informative, as it calls directly on states to "take all appropriate measures to eliminate discrimination against women in the field of healthcare in order to ensure, on a basis of equality of men and women, access to healthcare services, including those related to family planning."[192]

The discourse surrounding the right to health has gained significant momentum within the global human rights architecture in recent years. States continue to affirm their commitment to safeguarding the right to health through "international declarations, domestic legislation and policies, and . . . international conferences."[193] Some of this

---

188 Chapman & Benegal, *supra* note 180, at 61–62 (citing U.N. Committee on Economic, Social and Cultural Rights: The Right to the Highest Attainable Standard of Health (Article 12): General Comment 14, U.N. Doc. E/C.12/2000/4 (2000)).

189 RIGHT TO HEALTH FACT SHEET, *supra* note 180, at 1.

190 ICERD art. 5(e)(iv), Dec. 21, 1965; *see also* Maya K. Watson, *The United States' Hollow Commitment to Eradicating Racial Discrimination*, ABA: HUM. RTS. MAG. (Jan. 6, 2020), https://www.americanbar.org/groups/crsj/resources/human-rights/archive/us-hollow-commitment-eradicating-global-racial-discrimination/ [https://perma.cc/J5BY-TVBR]. Note that despite signing and ratifying ICERD, the United States does not recognize competence under ICERD art. 14, Dec. 21, 1965, an individual complaint mechanism allowing the Committee on the Elimination of Racial Discrimination to consider complaints from individuals and groups who claim their rights have been violated. ICERD art. 14(2)–(5), Dec. 21, 1965.

191 *Ratification of International Human Right Treaties—USA*, UNIV. OF MINN.: HUM. RTS. LIBR. (Feb. 1, 2023), http://hrlibrary.umn.edu/research/ratification-USA.html [https://perma.cc/D75R-J8VQ]; *see also supra* note 181.

192 CEDAW art. 12(1), Dec. 18, 1979.

193 RIGHT TO HEALTH FACT SHEET, *supra* note 180, at 1.

action has directly addressed discrimination and violence against women that implicates structural violence and can inform the U.S. government's interpretation of human rights for the purpose of Global Magnitsky sanctions. For example, the 1995 Beijing Declaration and Platform for Action outlines priorities for the global empowerment of women and girls, including protection from gender-based violence and access to basic reproductive healthcare.[194] While the agreement is non-binding, advocates often use it to pressure governments into loosening restrictions on women's lives and argue that its principles function as international norms.[195] By framing structural violence as a phenomenon that produces mortality and morbidity and thus prevents women from exercising their *right to the enjoyment of the highest attainable standard of physical and mental health*, advocates can use the Global Magnitsky Act's sanctions to identify and redress structural violence.

B. What Forms of Structural Violence Should Be Targeted by Sanctions?

Even assuming a willingness by U.S. executive authorities to expand their practical definition of "serious human rights abuse" to cover structural violence and other state-imposed impediments to the right to health—a willingness undoubtedly dependent on the presidential administration in power and other extraneous factors—practical difficulties remain. Critically, targeted or "smart" financial sanctions require OFAC to identify an individual or entity to designate to the SDN List. Though structural violence is

---

194 *See* Beijing Declaration and Platform for Action, Fourth World Conference on Women, Sep. 15, 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995). The 1995 Beijing Declaration and Platform for Action arose out of then-First Lady Hillary Clinton's declaration that "human rights are women's rights and women's rights are human rights" at the 1995 U.N. Fourth World Conference on Women in Beijing China. *See The First Lady's International Rallying Cry From Beijing: "Women's Rights Are Human Rights!"*, WILLIAM J. CLINTON PRESIDENTIAL LIBR. & MUSEUM, https://www.clintonlibrary.gov/museum/first-ladys-international-rallying-cry-beijing-womens-rights-are-human-rights [https://perma.cc/9QQJ-4MEP].

195 *See* Mahinour ElBadrawi, *Charting the Path Beyond Beijing+30: Reflections on CSW69 and the Need for Transformative Change*, CTR. FOR ECON. & SOC. RTS. (Mar. 27, 2025), https://www.cesr.org/charting-the-path-beyond-beijing30-reflections-on-csw69-and-the-need-for-transformative-change/ [https://perma.cc/5U3T-XDDS] ("When [the Beijing Declaration] was introduced, [it] served as a milestone for women's rights, identifying critical areas such as access to education, labor force participation, political representation, and strategies to combat violence. Although it galvanized momentum around the globe, its core commitments have always been political rather than legally binding, meaning that each government's implementation depends heavily on national priorities and available resources."). *See also generally* U.N. WOMEN, WOMEN'S RIGHTS IN REVIEW 30 YEARS AFTER BEIJING (2025), https://www.unwomen.org/sites/default/files/2025-03/womens-rights-in-review-30-years-after-beijing-en.pdf [https://perma.cc/26K6-DZ8V] (detailing progress on the implementation of the Beijing Declaration thirty years after its adoption).

often embedded in social and cultural norms and customs,[196] institutionally centered forms of structural violence against women may still be suitable targets for U.S. foreign policy action and sanctions designation. Governmental and legal institutions and representatives that enforce or reinforce practices, norms, or phenomena that harm women may be more easily identified than other more "invisible" and socially embedded forms of structural violence, like sexism and misogyny.

It would be impractical and misguided for the U.S. government to direct sanctions or other interventions at individual parents or family members in jurisdictions that demonstrate a strong preference for sons and act on that preference, for example.[197] Similar logic applies to practices like honor killings and female genital mutilation or cutting, both of which are deeply embedded societal tools for controlling women's bodies, sexuality, and spaces.[198] Not only would identifying culpable individuals or groups be difficult, but also the consequences of sanctions for a small number of people—essentially eliminating their ability to engage with the U.S. economic system—would do little to functionally motivate change, particularly as some residents of the Global South may never engage directly with U.S. companies or transact in U.S. dollars.[199] Furthermore, it is important to

196 *See supra* Part I.

197 *See supra* Part I.B.1.

198 *See* Stephanie Rose Montesanti & Wilfreda E. Thurston, *Mapping the Role of Structural Violence and Interpersonal Violence in the Lives of Women: Implication for Public Health Interventions and Policy*, 15 BMC WOMEN'S HEALTH 1, 8 (2015) ("Structural and symbolic violence is represented through cultural norms and practices that discriminate against girls, such as female genital mutilation, forced marriage, dowry, and honor killing, and pose a violation of human rights in some countries."); *see also* Eda Asli Seran, *The Honour Killings in Turkish Jurisprudence*, *in* GENDER AND STRUCTURAL VIOLENCE 11, 11–13 (Rekha Pande & Sita Vanka eds., 2019); Abha Chauhan, *Women's Sexuality and the Phenomenon of 'Honour Killings' in India*, *in* GENDER AND STRUCTURAL VIOLENCE 20, 21–24 (Rekha Pande & Sita Vanka eds., 2019); Emanuela Fink, *Genital Mutilation as an Expression of Power Structures: Ending FGM through Education, Empowerment of Women and Removal of Taboos*, 10 AFR. J. REPROD. HEALTH 13, 14 (2006).

199 Despite the dollar's predominant position as the world's reserve currency and the role of international economic institutions like the International Monetary Fund and World Bank in supporting through financial assistance and policy guidance, ordinary, individual residents of the Global South may never interact with the U.S. financial system or transact in U.S. dollars. While many ordinary residents may receive remittances from family members living abroad and certain jurisdictions have functionally adopted the U.S. dollar as domestic currency, for the rural poor specifically, much of the population is "unbanked" and economic life operates largely outside any formal financial system—U.S. or otherwise. *See* WORLD BANK, THE GLOBAL FINDEX 2025: CONNECTIVITY AND FINANCIAL INCLUSION IN THE DIGITAL ECONOMY 105 (2025), https://openknowledge.worldbank.org/bitstreams/9288bdc5-7a9b-42de-a47c-3746fd68f22a/download [https://perma.cc/6GKN-BBN5] ("1.3 billion adults worldwide still lack financial accounts and are thus unable to benefit directly from the formal financial system.").

strike a careful balance between addressing genuine instances of structural violence against women and imposing burdensome restrictions on non-target populations due to cultural practices, particularly given the potential externalities already associated with existing sanctions programs.[200]

By comparison, U.S. government intervention and sanctions designations are better directed at governmental entities, legal bodies, and natural persons in positions of authority that either explicitly condone these practices, preferences, and disparities or allow them to persist by failing to adequately address them through law or other policy decisions. Discriminatory laws also fall into this category of more easily targetable, structural violence. For example, restrictive inheritance laws like those affecting Dorothy N., even those that are customary in nature, are carried out by judges, courts, and other national and local legal authorities.[201] Similarly, anti-LGBTQ+ laws and laws restricting women's access to reproductive healthcare serve as suitable targets.[202]

Scenarios in which sanctions would be appropriate share a common theme: the implementation, or lack thereof, of policies eliminating gender inequities and the enforcement of discriminatory laws are all political decisions. As such, there are individuals, government agencies, and other actors with real power that may be influenced by designation to the Treasury Department's SDN List and the inability to transact in U.S. dollars, through U.S. banks, or with U.S. persons, particularly as parts of the Global South are heavily reliant on U.S. humanitarian aid and American non-profits and deal regularly with the U.S. dollar as the world's "reserve currency."[203] Moreover, there is more likely to be "credible evidence"

---

200 *See infra* Part III.C.

201 *See* Monica E. Mhoja & Helen Kijo-Bisimba, *Tanzanian Customary Laws of Inheritance—A Case of Cultural Violence Against Women*, *in* WOMEN CHALLENGING VIOLENCE—EXPERIENCES FROM EASTERN AND SOUTHERN AFRICA 2, 3–4 (Frederich Ebert Stiftung ed., 1994); Lucy J. Kimaro, *Gender Violence and Widowhood, A Challenge to Religious Leaders in Sub-Saharan Africa*, *in* GENDER AND STRUCTURAL VIOLENCE 74, 79–81 (Rekha Pande & Sita Vanka eds., 2019); *see also* Tamar Ezer, *Inheritance Law in Tanzania: The Impoverishment of Widows and Daughters*, 7 GEO. J. GENDER & L. 599, 606–14 (2006) (all discussing the role of the judicial system and discriminatory court decisions in carrying out inheritance law to the disadvantage of widows).

202 *See* MITCHELL & THOMPSON, *supra* note 155, at 15–16 (discussing calls by Ugandan civil society organizations for the U.S. government to sanction Ugandan government officials for passing one of the world's harshest anti-LGBTQ+ laws, making "aggravated homosexuality" a capital offense).

203 *See* OECD, PRELIMINARY OFFICIAL DEVELOPMENT ASSISTANCE LEVELS IN 2024, at 3 (2025), https://one.oecd.org/document/DCD(2025)6/en/pdf?utm_source=miragenews&utm_medium=miragenews&utm_campaign=news [https://perma.cc/6XVY-865U] (noting that in 2024, the United States contributed the

to justify the designation as required by the Global Magnitsky Act because "[s]tructural violence under a purported rule of law requires justification, and so its maintenance leaves both normative code and a paper trail."[204] Saliently, there are actors that can be considered blameworthy, and thus there is an opportunity for behavior to be changed with sanctions designations if the U.S. government shifts away from its typical approach and adopts a wider interpretation of what qualifies for designation under the Global Magnitsky Sanctions Regulations. Broadening the Global Magnitsky Act's application to "secondary participants" also provides room for the designation of individuals and entities that may be a step removed from any direct harm—imperative given that structural violence, by definition, is indirect.

C. Minimizing the Risk of Disproportionate Harm to Women and Other Marginalized Groups

Although these recommended measures have the potential to alter the behavior of bad actors beyond U.S. borders, any sanctions designations or changes more broadly to OFAC policies should prioritize limiting unintended effects on women and other vulnerable populations. While targeted financial sanctions are designed to isolate specific individuals or entities, scholarship suggests that despite an emphasis on precision, they may still disproportionately impact women through indirect socioeconomic channels.[205] Research indicates that even targeted measures, particularly when applied to key state-owned industries or financial sectors, can trigger significant fiscal contractions, leading governments to implement austerity measures that prioritize regime survival over social

---

greatest percentage of official development assistance (30%)). *See also generally* Evan Cooper & Alessandro Perro, *Scenarios for U.S. Foreign Aid in 2035*, STIMSON (Sep. 19, 2025), https://www.stimson.org/2025/scenarios-for-us-foreign-aid-in-2035/ [https://perma.cc/7WYV-EMWE]; George Ingram, *Global South Perspectives on U.S. Development Assistance Changes and Future Directions*, BROOKINGS (Feb. 23, 2025), https://www.brookings.edu/articles/global-south-perspectives-on-us-development-assistance-changes-and-future-directions/ [https://perma.cc/9UPF-YXLW] (discussing the humanitarian implications of the Trump administration's recent cuts to the U.S. Agency for International Development ("USAID")); *The Dollar: The World's Reserve Currency*, COUNCIL ON FOREIGN RELS. (July 19, 2023), https://www.cfr.org/backgrounders/dollar-worlds-reserve-currency [https://perma.cc/QM8R-ZVS3]; Upamanyu Lahiri & Erin Eckman, *What's Behind the U.S. Dollar's Dominance and Why it Matters*, BIPARTISAN POL'Y CTR. (Sep. 2, 2025), https://bipartisanpolicy.org/explainer/whats-behind-the-u-s-dollars-dominance-and-why-it-matters/ [https://perma.cc/PS95-FWNH] (discussing the role of the U.S. dollar as the global reserve currency and the use of the U.S. dollar by governments and institutions in low- and middle-income countries).

204 FARMER, PARTNER TO THE POOR, *supra* note 58, at 295.

205 *See* Kate Perry, *Better for Whom? Sanction Type and the Gendered Consequences for Women*, 36 INT'L RELS. 151, 151 (2022); MITCHELL & THOMPSON, *supra* note 155, at 9.

well-being.[206] "The targeting of regimes and political leaders negatively affects the economy of states, as elites can be placed in competition with civilians for resources."[207] Moreover, because women are statistically more reliant on "government social spending"—such as education, healthcare, and social welfare programs—the resulting budgetary cuts to these sectors diminish their access to essential resources and increase their unpaid labor burden.[208]

To mitigate these risks, sanctions designations under the strategy proposed in this Note, and U.S. sanctions policy more generally, should transition from gender-blind to gender-sensitive implementation. Scholarly recommendations emphasize the necessity of conducting ex-ante impact assessments of humanitarian impacts of sanctions regimes "as part of their implementing and monitoring."[209] With gender in mind, these assessments could also identify specific gender-sensitive vulnerabilities in a target state, a region's labor market, or a social infrastructure before sanctions are finalized. Implementing agencies, like OFAC, should also establish broader permanent humanitarian carve-outs that go beyond the exemptions for basic food and medicine included in OFAC General Licenses. Additionally, to combat overcompliance or de-risking behavior by private financial institutions,[210] regulators should issue clear, gender-sensitive compliance guidance, consistent with broader efforts under the global Women, Peace, and Security agenda.[211]

---

206 Perry, *supra* note 205, at 155.

207 MITCHELL & THOMPSON, *supra* note 155, at 9.

208 *See* Perry, *supra* note 205, at 154–55, 157–61; *see also* Cooper Drury & Dursun Peksen, *Women and Economic Statecraft: The Negative Impact International Economic Sanctions Visit on Women*, 20 EURO. J. INT'L RELS. 463, 483 (2012).

209 Erica S. Moret, *Humanitarian Impacts of Economic Sanctions of Iran and Syria*, 24 EURO. SEC. 120, 133 (2015).

210 *See* Guidance Note on Overcompliance with Unilateral Sanctions and its Harmful Effects on Human Rights, U.N. HUM. RTS., OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/special-procedures/sr-unilateral-coercive-measures/resources-unilateral-coercive-measures/guidance-note-overcompliance-unilateral-sanctions-and-its-harmful-effects-human-rights [https://perma.cc/NNQ2-46VF] ("As governments increasingly use unilateral sanctions to pursue foreign policy objectives, it has become common for banks and other financial service providers to over-comply with them to reduce legal, regulatory or business risks associated with inadvertent violations. Yet over-compliance with such sanctions has harmful effects on the entire range of human rights.").

211 The Women, Peace, and Security (WPS) agenda is a global policy framework, anchored by UN Security Council Resolution 1325, that recognizes women as essential actors—not just victims—in conflict prevention, peacebuilding, and post-conflict reconstruction, and calls for their meaningful participation in peace processes and security decision-making. *See* S.C. Res. 1325 (Oct. 31, 2000). The United States codified the agenda into law through the Women, Peace, and Security Act of 2017, the first such legislation passed by any country, and

These measures, taken together, offer the opportunity for a more coherent, gendered sanctions policy and may help ensure that human rights sanctions targeting the indirect forms of violence that sit at the base of the iceberg do not themselves function as structural violence. However, even with these possible safeguards, there are considerable practical barriers to the successful adoption and implementation of the policy proposed by this Note.

IV. Looking Forward: The Implications of the Second Trump Presidency

While President Trump, like his predecessors, did not hesitate in his first term to utilize OFAC sanctions, big questions remain given the actions Trump has taken early in his second term, his role as a so-called disruptor, and his significant departure from the Biden Administration's policies.[212] Part IV briefly considers the implications of President Trump's return to the White House on the viability of the strategy proposed *supra* Part III, given the Trump Administration's stark shift from former President Biden on issues related to gender, human rights, health, and humanitarian aid.

A. The Trump Administration and OFAC

The first Trump Administration used OFAC heavily.[213] This includes 686 human rights sanctions designations and 565 corruption sanctions designations under the Global

---

embedded WPS commitments across its diplomatic, defense, and development agencies. However, the second Trump Administration has since walked back its implementation despite the WPS Act remaining law. *See generally* KAYLA MCGILL & RACHEL WEIN, NEW LINES INST., POLICY REPORT: THE ELIMINATION OF THE U.S. WOMEN, PEACE AND SECURITY CAPACITY AT THE DEPARTMENT OF STATE (2026), https://newlinesinstitute.org/wp-content/uploads/FINAL-01082025_WPS-Elimination_Mcgill-Wein-nlisap-1.pdf [https://perma.cc/AE5U-JE32].

212 *See generally Tracking Regulatory Changes in the Second Trump Administration*, BROOKINGS (Jan. 22, 2026), https://www.brookings.edu/articles/tracking-regulatory-changes-in-the-second-trump-administration/ [https://perma.cc/7ZKN-3G8L] (tracking a "curated selection of new, delayed, and repealed rules, notable guidance and policy revocations, executive actions, and important court battles across key policy areas").

213 President Trump imposed more than 5,000 sanctions on firms, individuals, and countries during his first Presidential term between 2017 and 2021. *See* Jeff Stein & Federica Coco, *How Four Presidents Unleashed Economic Warfare Across the Globe*, WASH. POST (July 25, 2024), https://www.washingtonpost.com/business/interactive/2024/us-sanction-countries-work/. [https://perma.cc/9AVB-648B]. Further, in 2019, former Secretary of the Treasury Steven Mnuchin commented that he "spen[t] half of his time working on sanctions matters." Alan Rappeport, *Trump Overrules Own Experts on Sanctions, in Favor to North Korea*, N.Y. TIMES (Mar. 22, 2019), https://www.nytimes.com/2019/03/22/world/asia/north-korea-sanctions.html [https://perma.cc/YS3F-DAAN].

Magnitsky Act, more than double the equivalent designations under former President Obama.[214] Despite plans by former President Biden to reconsider and potentially scale back the use of economic sanctions, they are still viewed by many as a more palatable tool than other forms of humanitarian intervention, given that they are lower-cost and often lower-risk.[215] It is expected that the second Trump Administration will continue to leverage OFAC sanctions in an attempt to achieve certain foreign policy goals, especially related to Russia, China, Venezuela, and Iran.[216] However, it is likely that over the remainder of his second term, President Trump's use of OFAC sanctions authorities will vary not just from his first term but also from the Biden Administration.[217]

In his first few weeks in office, the President rescinded a Biden-era Executive Order authorizing OFAC sanctions on persons undermining peace, security, and stability in the West Bank and reinstated targeted financial sanctions against the International Criminal Court ("ICC"), in particular listing as an SDN Karim Ahmad Khan, the Prosecutor of the ICC responsible for issuing arrest warrants against Israeli Prime Minister Benjamin Netanyahu and Israeli Defense Minister Yoav Gallant.[218] Many of these actions are

---

214 *See* MITCHELL & THOMPSON, *supra* note 155, at 6.

215 Masters, *supra* note 100; *see also* THE TREASURY 2021 SANCTIONS REVIEW, *supra* note 100, at 1.

216 Christopher Sabatini, *The Trump Administration's Sanctions Policy Could Matter More than Its Use of Tariffs*, CHATHAM HOUSE (Jan. 28, 2025), https://www.chathamhouse.org/2025/01/trump-administrations-sanctions-policy-could-matter-more-its-use-tariffs [https://perma.cc/7XVU-GJ3Q]; *Sanctions Will Be Central to Trump's Regional Policy*, THE SOUFAN CTR. (Jan. 27, 2025), https://thesoufancenter.org/intelbrief-2025-january-27/ [https://perma.cc/J8WY-G2ZW].

217 *See id.*; Daniel Tannebaum, *Sanctions Expectations in a Second Trump Administration*, ATL. COUNCIL (Nov. 22, 2024), https://www.atlanticcouncil.org/blogs/econographics/sanctions-expectations-in-a-second-trump-administration/ [https://perma.cc/NRL4-6HSK].

218 *See* Exec. Order No. 14148, 90 Fed. Reg. 8237 (Jan. 20, 2025); Exec. Order No. 14203, 90 Fed. Reg. 9369 (Feb. 6, 2025); Press Release, U.S. Dep't of the Treasury, Office of Foreign Assets Control, Termination of Emergency With Respect to the Situation in the West Bank; West Bank-related Designation Removals (Jan. 24, 2025), https://ofac.treasury.gov/recent-actions/20250124 [https://perma.cc/RA7Q-N7EC]; Press Release, U.S. Dep't of the Treasury, Off. of Foreign Assets Control, Issuance of Executive Order Imposing Sanctions on the International Criminal Court; International Criminal Court-Related Designation (Feb. 13, 2025), https://ofac.treasury.gov/recent-actions/20250213 [https://perma.cc/SYC8-W3NS]; *see also* Erik Woodhouse & Edwin Goetz, *President Trump's Executive Orders & Actions—Sanctions*, CROWELL & MORING LLP (Jan. 23, 2025), https://www.cmtradelaw.com/2025/01/president-trumps-executive-orders-actions-sanctions/ [https://perma.cc/2AS7-7EXT].

considered controversial by critics in the human rights space and depart significantly from the actions of former President Biden.[219]

Further, since Trump's return to office, OFAC's utilization of the Global Magnitsky sanctions program has been relatively limited and has not included any designations addressing violence against women in any form, indicating that its priorities may—at least for the time being—lie elsewhere.[220] The focus, by comparison, has largely been on counter-narcotics and counter-terrorism designations related to drug trafficking in the Caribbean, the war in Gaza, tensions with Iran, and sanctions evasion by Venezuela.[221]

---

219 *See generally* Kenneth Roth, *Trump's Sanctions Against the ICC are Disgraceful*, GUARDIAN (Feb. 9, 2025), https://www.theguardian.com/commentisfree/2025/feb/09/trump-icc-sanctions [https://perma.cc/CAE9-NJS8]; *What Do the Trump Administration's Sanctions on the ICC Mean for Justice and Human Rights?*, AMNESTY INT'L (Mar. 25, 2025), https://www.amnesty.org/en/latest/campaigns/2025/03/what-do-the-trump-administrations-sanctions-on-the-icc-mean-for-justice-and-human-rights/ [https://perma.cc/H53F-EPTQ]; *Revocation of Sanctions Against Violent Israeli Settlers Will Encourage Terrorist Attacks Against Palestinians, Fuel Instability*, DAWN (Jan. 27, 2025), https://dawnmena.org/revocation-of-sanctions-against-violent-israeli-settlers-will-encourage-terrorist-attacks-against-palestinians-fuel-instability/ [https://perma.cc/7FG8-ZHNL] (all criticizing President Trump's early OFAC actions after returning to the White House in January 2025).

220 *See e.g.*, Press Release, U.S. Dep't of the Treasury, Off. of Foreign Assets Control, Global Magnitsky Designation (July 30, 2025), https://ofac.treasury.gov/recent-actions/20250730 [https://perma.cc/H28M-V3R8]; Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Alexandre de Moraes (July 30, 2025), https://home.treasury.gov/news/press-releases/sb0211 [https://perma.cc/43S9-ZQUL] (designating a Brazilian Supreme Federal Court justice for his alleged use of "his position to authorize arbitrary pre-trial detentions and suppress freedom of expression"); Press Release, U.S. Dep't of the Treasury, Off. of Foreign Assets Control, Transnational Criminal Organizations Designations; Burma-related Designations; Global Magnitsky Designations; Cyber-related Designations (Sep. 8, 2025), https://ofac.treasury.gov/recent-actions/20250908 [https://perma.cc/9HRZ-927F]; Press Release, U.S. Dep't of the Treasury, Off. of Foreign Assets Control, Global Magnitsky Designations (Sep. 22, 2025), https://ofac.treasury.gov/recent-actions/20250922 [https://perma.cc/D55R-B4PH]; Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Support Network of Brazilian Supreme Court Justice (Sep. 22, 2025), https://home.treasury.gov/news/press-releases/sb0257 [https://perma.cc/2332-6Q42] (designating an entity and individual for their alleged support of the aforementioned Brazilian Supreme Federal Court justice); *see also generally Recent Actions*, U.S. DEP'T. OF THE TREASURY: OFF. OF FOREIGN ASSETS CONTROL, https://ofac.treasury.gov/recent-actions [https://perma.cc/28AC-XZV5] (providing access to Treasury Department notices of all recent, public OFAC designations).

221 Press Release, U.S. Dep't of the Treasury, Treasury Sanctions One of the Caribbean's Largest Narcotics Traffickers and His Network (Jan. 22, 2026), https://home.treasury.gov/news/press-releases/sb0369 [https://perma.cc/79YF-NQAC]; Press Release, U.S. Dep't of the Treasury, Treasury Exposes and Disrupts Hamas's Covert Support Network (Jan. 21, 2026), https://home.treasury.gov/news/press-releases/sb0368 [https://perma.cc/5TRW-C8RQ]; Press Release, U.S. Dep't of the Treasury, Treasury Increases Pressure on Houthi Smuggling and Illicit Revenue Generation Networks (Jan. 16, 2026), https://home.treasury.gov/news/press-releases/sb0367 [https://perma.cc/AH2G-L5BD]; Press Release, U.S. Dep't of the Treasury, Secretary Bessent Announces Sanctions Against Architects of Iran's Brutal Crackdown on Peaceful Protests (Jan. 15,

Despite this action, it remains possible that funding allocated to OFAC and its key functions will decrease in the coming months, given the general aversion of President Trump's political base to assisting Ukraine and the President's attempts to negotiate with the Russian Federation regarding the ongoing war in Ukraine. Moreover, the Trump Administration seems to have placed greater emphasis on the use of tariffs, compared to targeted (or comprehensive) financial sanctions.[222] Even so, the efficacy of such sanctions—which relies on a certain level of harmonization with allies like the United Kingdom and European Union[223]—could be reduced by the President's efforts, whether intentional or otherwise, to distance the United States from its allies across the Atlantic.[224]

B. Changing Policies: What Is Next?

The largest remaining question regards the status of the 2022 Global Gender-Based Violence Strategy, which served as the guiding document for President Biden's decision to apply Global Magnitsky sanctions to perpetrators of CRSV but is no longer accessible directly via the State Department website.[225] The first Trump Administration did not revoke

---

2026), https://home.treasury.gov/news/press-releases/sb0364 [https://perma.cc/H5C4-YX5T]; Press Release, U.S. Dep't of the Treasury, Treasury Targets Oil Traders Engaged in Sanctions Evasion for Maduro Regime (Dec. 31, 2025), https://home.treasury.gov/news/press-releases/sb0348 [https://perma.cc/DW2B-E7HR].

222 *See* Shiloh Grayson, Trump's Tariffs are Replacing Sanctions, ROYAL U.S. INSTIT. FOR DEF. & SEC. STUD. (Apr. 29, 2025), https://www.rusi.org/explore-our-research/publications/commentary/trumps-tariffs-are-replacing-sanctions [https://perma.cc/VS9U-67MR].

223 *See* Press Release, U.S. Dep't of the Treasury, Strengthening Global Sanctions: Two Years of Enhanced Partnership (Nov. 19, 2024), https://home.treasury.gov/news/featured-stories/strengthening-global-sanctions-two-years-of-enhanced-partnership [https://perma.cc/CG4C-SGZ2] (highlighting OFAC's partnership with the UK's Office of Financial Sanctions Implementation and noting the "financial sanctions work best when implemented multilaterally").

224 *See generally* Oriol Junqueras i Vies, *Against Those Who Sow Fear: Europe and the End of American Dependability*, CTR. FOR INT'L POL'Y (Apr. 16, 2026), https://internationalpolicy.org/publications/europe-for-democracy/ [https://perma.cc/F5RJ-M3RV] (discussing the deterioration of U.S.-Europe relations throughout the second Trump Administration).

225 Attempting to access the 2022 Global Gender-Based Violence Strategy directly through the Trump State Department's website results in an error message. *See* https://www.state.gov/reports/united-states-strategy-to-prevent-and-respond-to-gender-based-violence-globally-2022/ [https://perma.cc/ZE75-VX33]. The Strategy is still accessible through the Biden Administration State Department's archived site (available at https://www.state.gov/u-s-department-of-state-archive-websites [https://perma.cc/CG27-74MV]). Further, the *Presidential Memorandum on Promoting Accountability for Conflict-Related Sexual Violence* issued by President Biden is no longer accessible via the White House's website, indicating the Trump Administration has likely rescinded the Memorandum.

the 2016 iteration of the Global Gender-Based Violence Strategy and even published several factsheets regarding its implementation.[226] Nevertheless, U.S. officials during President Trump's first term quietly attempted to roll back support for efforts to protect and develop the rights, health, and safety of women and girls worldwide.[227] Since President Trump's second inauguration on January 20, 2025, these efforts have been amplified at home and abroad.[228] Notably, the Trump Administration has in the last year completely eliminated the Women, Peace, and Security Program at the State Department; announced in January 2026 its decision to withdraw the United States from sixty-six international organizations, conventions, and treaties, including the U.N. Entity for Gender Equality and the Empowerment of Women and the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict; and "formally exited" from the WHO.[229]

Bearing this in mind, it is doubtful that the second Trump Administration gives credence to the 2022 iteration of the Global Gender-Based Violence Strategy, which not only includes a focus on cross-sectional marginalized populations—including transgender people, whom

---

226 *See e.g.*, USAID, FACT SHEET: STRATEGY TO PREVENT AND RESPOND TO GENDER-BASED VIOLENCE GLOBALLY, https://2017-2020.usaid.gov/sites/default/files/documents/2155/GBV_Factsheet.pdf [https://perma.cc/X7J2-UDPU].

227 *See* Amy Steimer-King, *The Trump Administration Wants to Reverse the U.N.'s Work for Women*, MS. MAGAZINE (Mar. 22, 2019), https://msmagazine.com/2019/03/22/the-trump-administration-wants-to-reverse-the-uns-work-for-women%EF%BB%BF/ [https://perma.cc/QE4L-82BZ]; *see also Trump Administration Civil and Human Rights Rollbacks*, THE LEADERSHIP CONF. ON CIVIL & HUM. RTS. (2026), https://civilrights.org/trump-rollbacks/ [https://perma.cc/EQR8-NJSG].

228 *See e.g.,* Floriane Borel, Samira Damavandi, & Irum Taqi, Policy Analysis: Six Months In: How the Trump Administration Is Undermining Sexual and Reproductive Health and Rights Globally, Guttmacher Inst. (Aug. 1, 2025), https://www.guttmacher.org/2025/08/six-months-how-trump-administration-undermining-sexual-and-reproductive-health-and-rights [https://perma.cc/8P7V-VBBY].

229 Noel James, *Women This Week: Hegseth Announces End to Women, Peace and Security Program*, COUNCIL ON FOREIGN RELS. (May 2, 2025), https://www.cfr.org/blog/women-week-hegseth-announces-end-women-peace-and-security-program [https://perma.cc/W87T-M2B9]; Press Release, The White House, Withdrawing the United States from International Organizations, Conventions, and Treaties that Are Contrary to the Interests of the United States (Jan. 7, 2026), https://www.whitehouse.gov/presidential-actions/2026/01/withdrawing-the-united-states-from-international-organizations-conventions-and-treaties-that-are-contrary-to-the-interests-of-the-united-states/ [https://perma.cc/79YF-NQAC]; Shelly Inglis, *U.S. Turns its Back on Global Efforts for Women and Children Terrorized by Violence and Conflic*t, CONVERSATION (Jan. 22, 2026), https://theconversation.com/us-turns-its-back-on-global-efforts-for-women-and-children-terrorized-by-violence-and-conflict-273177 [https://perma.cc/HL4V-XJZB]; Press Release, U.S. Dep't. of Health & Hum. Servs., Fact Sheet: U.S. Withdrawal from the World Health Organization (Jan. 22, 2026), https://www.hhs.gov/press-room/fact-sheet-us-withdrawal-from-the-world-health-organization.html [https://perma.cc/HZ2D-TAY3].

the second Trump Administration does not legally recognize[230]—and diversity, equity, and inclusion, but also offers specific policy objectives related to the U.S. Agency for International Development ("USAID"), which the President has attempted to eliminate.[231] It is expected that any action by the Trump Administration under the Strategy, or more likely a new strategy as is required by congressional mandate, will focus less heavily on efforts to advance equity and inclusivity and instead fall back on a more customary understanding of gender-based violence, making sanctions designations targeting structural violence against women unlikely.

Further, the atypical and largely controversial actions surrounding the President's decision to gut USAID and other humanitarian aid programs could extend to human rights sanctions policy in ways that constrain the United States' capacity and willingness to use the Global Magnitsky Act to target structural violence. Beyond the wider implications on global health,[232] the Global Magnitsky Sanctions regime has historically relied on a whole-of-government evidentiary and analytical infrastructure, drawing on reporting from USAID-funded civil society organizations, field-based human rights monitors, and implementing

---

230 On January 20, 2025, President Trump signed Executive Order 14168, titled "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," which declares it the official policy of the United States to recognize only two sexes, male and female, as biological and immutable, and directs also federal agencies to reflect this policy in official documents and communications. Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025).

231 *See* 2022 GLOBAL GENDER-BASED VIOLENCE STRATEGY, *supra* note 20, at 7–9, 50, 56–57; *see also* Melissa Quinn, *Trump and Elon Musk Are Upending USAID. Here's What to Know About Its Work*, CBS NEWS (Feb. 4, 2025), https://www.cbsnews.com/news/trump-and-elon-musk-are-upending-usaid-heres-what-to-know-about-its-work/ [https://perma.cc/ME2B-WF37]. Despite ongoing litigation, since July 1, 2025, USAID's operations have ceased and U.S. foreign assistance programs are now being administered by the State Department. *See* Mary Kekatos & Chris Boccia, *USAID Programs now being run by State Department as agency ends operations*, ABC (Jul. 1, 2025), https://abcnews.com/Health/usaid-programs-now-run-state-department-agency-ends/story?id=123373289 [https://perma.cc/KR7D-N9EP]. However, the legality of the decision to freeze foreign aid and dissolve USAID is still actively being challenged in federal court. For a comprehensive chronological account of the Trump Administration's actions to freeze foreign aid and dissolve USAID beginning January 20, 2025, see Jennifer Kates, Anna Rouw & Stephanie Oum, *U.S. Foreign Aid Freeze & Dissolution of USAID: Timeline of Events*, KAISER FAM. FOUND. (Oct. 24, 2025), https://www.kff.org/global-health-policy/u-s-foreign-aid-freeze-dissolution-of-usaid-timeline-of-events/ [https://perma.cc/KJY2-55JW].

232 *See generally* Auwal Rabiu Auwal, *The Global Implications of U.S. Withdrawal from WHO and the USAID Shutdown: Challenges and Strategic Policy Considerations*, 13 FRONTIERS PUB. HEALTH 1 (Jun 2, 2025); *What USAID Did, and the Effects of Trump's Cuts on Lifesaving Aid*, OXFAM AM. (Jan. 27, 2026), https://www.oxfamamerica.org/explore/issues/making-foreign-aid-work/what-do-trumps-proposed-foreign-aid-cuts-mean/ [https://perma.cc/U694-DFYM].

partners to identify perpetrators of violence and document abuses with specificity to support sanctions designations.[233] The dismantling of USAID has not only severed many of those information pipelines but has also signaled to foreign governments and non-state actors that the United States is withdrawing from the broader international community.[234] Whether by design or as a consequence of broader ideological and budgetary priorities, the second Trump Administration appears to be dismantling the very infrastructure upon which an effective gender-based sanctions policy depends.

Despite the President's apparent fondness for economic sanctions as a foreign policy tool, the combination of these factors makes it unlikely that the Trump Administration's Treasury Department will be particularly amenable to expanding the use of Global Magnitsky sanctions to target structural violence against women. It is unclear whether the Treasury Department, in its current form, will use existing sanctions authority to address even *direct* violence against women. Moreover, actions by the Trump Administration at home restricting reproductive rights, immigration, and speech increasingly cast doubt on the position of the United States as a monitor and promoter of human rights,[235] so one might fairly question whether the policy recommendations proposed by this Note are suited to the political moment. But evaluation of these issues remains critical, particularly if a more progressive-leaning presidential administration were to return to the White House in January 2029.

---

233 *See* HUM. RIGHTS FIRST, FACT SHEET: U.S. GLOBAL MAGNITSKY SANCTIONS (2026), https://humanrightsfirst.org/wp-content/uploads/2026/03/Magnitsky_2026_Factsheet16.pdf [https://perma.cc/JUH3-4ZCF] ("Unusually, the President is required by law to consider 'credible information obtained by . . . nongovernmental organizations that monitor violations of human rights' in implementing this program. The Treasury and State Departments accept and consider recommendation files from NGOs and historically have consulted with NGOs that submit such information. Since 2017, roughly one-third of the USG's sanctions under this program have had a basis in recommendations submitted by the civil society network that [Human Rights First] coordinates.").

234 *See generally* Jeremy Konydyk, *What We Lost When We Lost U.S.A.I.D.*, N.Y. TIMES (Feb. 8, 2026), https://www.nytimes.com/2026/02/08/opinion/usaid-humanitarian-aid-america.html [https://perma.cc/YH7Y-FANT]; Matteo Caravani, *The Demise of USAID: A 'Revolution' Against the Wretched of the Earth*, 33 J. POVERTY & SOC. JUST. 347 (2025).

235 *See US: Trump Administration's Pervasive Attacks*, HUM. RTS. WATCH (Feb. 4, 2026), https://www.hrw.org/news/2026/02/04/us-trump-administrations-pervasive-attacks-on-rights [https://perma.cc/W6DU-WUFE]; Graham Smith, *The State Department Is Changing Its Mind About What It Calls Human Rights*, NPR (Apr. 18, 2025), https://www.npr.org/2025/04/18/nx-s1-5357511/state-department-human-rights-report-cuts [https://perma.cc/ZS8X-N55K]; *The Trump Administration's First Actions in 2025 Targeting Patients, Providers, and Reproductive Health Care Access*, NAT'L WOMEN'S L. CTR. (Feb. 25, 2025), https://nwlc.org/resource/the-trump-administrations-first-actions-in-2025-targeting-patients-providers-and-reproductive-health-care-access/ [https://perma.cc/RP65-CKRZ].

CONCLUSION

Structural violence is an under-studied and under-addressed phenomenon in the sanctions context. Of course, President Trump's return to the White House limits the potential viability of a more adequately "gendered" human rights sanctions policy in the near-term. However, the space for addressing structural violence against women does exist if the U.S. government makes a conscious effort both to expand its understanding of gender-based violence and to employ a wider interpretation of what constitutes a "serious human rights abuse" under the Global Magnitsky Act and E.O. 13818. Each day that action is not taken, more women, like Dorothy N., experience suffering and fall victim to premature morbidity and mortality, in part because the legal and governmental institutions meant to protect their right to health instead infringe upon it. Nonetheless, it is important to recognize that more research is needed on the exact functional parameters required to operationalize the strategy proposed by this Note. It is critical to understand that any financial sanctions, even "smart" sanctions, can have unintended effects on the populations of targeted countries and communities, especially among women and girls.[236] Poorly designed and implemented sanctions programs may fail to protect these already marginalized groups. Any efforts by the U.S. Treasury to expand its Global Magnitsky sanctions program to address structural violence must be matched by engagement with local civil society groups and supported by quality, comprehensive data in order to mitigate these risks.

---

236 *See* MITCHELL & THOMPSON, *supra* note 155, at 16–18; Press Release, U.N. Hum. Rts., Off. of the High Comm'r, Unilateral Sanctions Hurt All, Especially Women, Children and Other Vulnerable Groups—U.N. Human Rights Expert (Dec. 8, 2021), https://www.ohchr.org/en/press-releases/2021/12/unilateral-sanctions-hurt-all-especially-women-children-and-other-vulnerable?LangID=E&NewsID=27931 [https://perma.cc/MG6W-L26Y].

THE RIGHT TO DISCONNECT AS A FEMINIST DEMAND: LABOR LAW, FLEXIBLE WORK, AND THE GENDERED POLITICS OF LEISURE

LARA TORBAY*

Abstract

This Article explores the right to disconnect as a feminist response to the gendered impacts of digitally-enabled flexible work. While remote and flexible arrangements are often hailed for enhancing work-life balance, especially for women, they frequently result in overwork, time poverty, and the erosion of boundaries between paid and unpaid labor. The pressure to remain constantly reachable, often described as the "technological imperative," exacerbates these issues, particularly for women who continue to shoulder disproportionate care responsibilities. In this context, disconnection is increasingly proposed as a remedy to the demands of flexible work. Drawing on feminist theories of time and labor, this Article critiques prevailing narratives that frame disconnection as a matter of individual self-care. Such framings obscure the structural pressures driving constant availability and risk reinforcing social inequalities. Instead, this Article advocates for enshrining disconnection as a collective labor right. Through a comparative legal analysis of existing disconnection laws in France, Germany, Portugal, and beyond, it argues that only robust legal protections—especially those imposing obligations on employers—not to intrude outside working hours can effectively safeguard workers' time. Reframed as a collective right, disconnection emerges as a vital feminist demand for reclaiming free time and resisting the encroachment of work into private life.

---

* MLaw 2023, University of Fribourg; BLaw 2021, University of Fribourg. I am profoundly grateful to the *Columbia Journal of Gender and Law* for their incredible work on this piece. I would also like to extend my sincere thanks to the Swiss National Science Foundation and my PhD supervisor Professor Eva Maria Belser for their support, as well as Moses May-Hobbs, whose help and fortitude made this piece possible. This work is dedicated to my mother, who I hope will soon have time for what she wills.

INTRODUCTION

Work has undeniably and drastically changed in recent years. Generally, work is increasingly done online: remote working, also known as telework or home office,[1] is extremely popular,[2] especially during and after the COVID-19 pandemic.[3] This fits into the broader trend of flexible work, i.e. a "worker's control over when[4] and where they work."[5] Once reserved to managerial positions, flexible work arrangements have spread across companies' hierarchies.[6] They are now common in most occupations, extending to workers whose routine tasks used to be entirely tied to the office desk.[7] Enabling this shift, technologies of work have evolved and now include digital tools such as email, video conference software, shared calendars, clouds, and so on. In a broader sense, technologies ranging from 3D printing to the spread of artificial intelligence (AI) use imply a redefinition of business models and production methods.[8] New communication technologies shape

---

1 On telework and its impact on workers and productivity, see Tammy D. Allen et al., *How Effective Is Telecommuting? Assessing the Status of Our Scientific Findings*, 16 PSYCH. SCI. PUB. INT. 40, 42 (2015); Nicholas Bloom et al., *Does Working from Home Work? Evidence from a Chinese Experiment*, 130 Q.J. ECON. 165, 166 (2015); Ellen Ernst Kossek et al., *Telecommuting, Control, and Boundary Management: Correlates of Policy Use and Practice, Job Control, and Work–Family Effectiveness*, 68 J. VOCATIONAL BEHAV. 347, 348 (2006).

2 *See generally* KARIN FAST & ANDRE JANSSON, TRANSMEDIA WORK—PRIVILEGE AND PRECARIOUSNESS IN DIGITAL MODERNITY (2019); MELISSA GREGG, WORK'S INTIMACY (2011).

3 Anja-Kristin Abendroth et al., *Has the COVID-19 Pandemic Changed Gender- and Parental-Status-Specific Differences in Working from Home? Panel Evidence from Germany*, 29 GENDER, WORK & ORG. 1992, 1992 (2022).

4 On the distinction between flextime and working time autonomy, *see* Heejung Chung & Tanja van der Lippe, *Flexible Working, Work-Life Balance, and Gender Equality: Introduction*, 151 SOC. INDICATORS RSCH. 365, 367 (2020).

5 Chung & Van der Lippe, *supra* note 4, at 365; *see also* Erin Kelly et al., *Changing Workplaces to Reduce Work-Family Conflict: Schedule Control in a White-Collar Organization*, 76 AM. SOCIO. REV. 265, 265 (2011).

6 Paula Rodríguez-Modroño & Purificación López-Igual, *Job Quality and Work-Life Balance of Teleworkers*, 18 INT. J. ENV'T. RSCH. & PUB. HEALTH 3239, 3240 (2021); *see also* Paula Rodríguez-Modroño & Purificación López-Igual, *Who is Teleworking and Where From? Exploring the Main Determinants of Telework in Europe*, 12 SUSTAINABILITY 8797, at 9 (2020); Sebastian K. Boell et al., *Telework Paradoxes and Practices: The Importance of the Nature of Work*, 31 NEW TECH. WORK & EMP. 114, 114 (2016).

7 Rodríguez-Modroño & López-Igual, *supra* note 6, at 3240.

8 *See* Johannes Gartner et al., *The Accelerating Disconnection of Work from Time and Place: New Questions for HR*, in RSCH HANDBOOK ON HUM. RES. MGMT. & DISRUPTIVE TECH. 270, 270 (Tanya Bondarouk & Jeroen Meijerink eds., 2024).

the norms and tasks of work[9] and contribute to the creation of boundless and spatially extensible selves,[10] especially for white-collar workers.[11]

The merits of flexible work seem clear: it allows employees to perform work in a setting and at a time that suits them best, thereby enabling them to find a better balance between their jobs and their private lives. Flexible work is often argued to be especially advantageous to women who are employed while having childcare responsibilities. Indeed, it can allow workers to adapt to the demands of both the workplace and the family.[12] Flexible work is therefore often argued to promote gender equality, as it can lead to better work-life balance for women.[13]

But the reality of our current work landscape differs significantly from the ideal of flexible, healthy work arrangements allowing paid employment and private life to happily cohabit. According to Suzanne Franks, the observed trends towards "[i]nsecure and casual work, short-term contracts, antisocial hours or long hours . . . make it more difficult than ever to fulfil the expectations of parenting and community."[14] The promises of flexible work in particular have not been fulfilled: recent studies show that, rather than enabling balance between work, family obligations, and leisure, flexible arrangements ultimately led to the expansion of paid work onto private life.[15] Research shows that remote work

---

9 Judy Wajcman, *The Digital Architecture of Time Management*, 44 SCI. TECH. & HUM. VALUES 315, 315 (2019).

10 Karin Fast, *The Disconnection Turn: Three Facets of Disconnective Work in Post-Digital Capitalism*, 27 CONVERGENCE 1615, 1621 (2021).

11 Gartner et al., *supra* note 8, at 270.

12 Laura Lükemann, *Flexibility Potentials of Digital Work Communication—Mother's Labour Market Involvement in Comparative Perspective*, 27 CMTY. WORK & FAM. 627, 642 (2024); *see also* Susan G. Singley & Kathryn Hynes, *Transitions to Parenthood: Work-Family Policies, Gender, and the Couple Context*, 19 GENDER & SOC'Y 376, 390–95 (2005).

13 On work/family balance, quality of life, and workplace arrangements, see generally MARGARETA BACK-WIKLUND ET AL., QUALITY OF LIFE AND WORK IN EUROPE—THEORY, PRACTICE AND POLICY (2011); S. Campbell Clark, *Work/Family Border Theory: A New Theory of Work/Family Balance*, 53 HUM. RELS. 747 (2000).

14 SUZANNE FRANKS, HAVING NONE OF IT: WOMEN, MEN AND THE FUTURE OF WORK 212 (1999).

15 Yvonne Lott & Heejun Chung, *Gender Discrepancies in the Outcomes of Schedule Control on Overtime Hours and Income in Germany*, 32 EUR. SOCIO. REV. 752, 762–63 (2016); Clare Kelliher & Deirdre Anderson, *Doing More with Less? Flexible Working Practices and the Intensification of Work*, 63 HUM. RELS. 83, 98 (2010); Scott Schieman & Marisa Young, *Is There a Downside to Schedule Control for the Work-Family Interface?*, 31 J. FAM. ISSUES 1391, 1408–11 (2010).

tends to lead to an increase in work-to-home spillover; in their free time, teleworkers are more likely than in-person workers to think about their job and perform job-related tasks.[16] By allowing work to escape the confines of the physical workplace, new work technologies allow waged labor to be boundless and thus harder to limit or contain.[17] An "always-on" culture develops, where workers feel pressured to constantly be available for work, to demonstrate quick responsiveness at all times,[18] and to remain continuously connected to the organizations employing them.[19] Such pressures have been termed "the mobile imperative"[20] or "the technological imperative."[21] The negative effects of this shift impact certain groups disproportionately; this is typically the case for women, as I argue in this Article.[22]

In this paper, I seek to underscore that the effects of flexible work on women specifically are more damaging than ordinarily assumed, and I argue that the right to disconnect must be understood as a pressing feminist demand. Due to a profoundly anchored gendered division of labor, flexible work can potentially cement traditional gender roles both in the home and in the labor market.[23] In this regard, Clawson and Gerstel contend that flexible

---

16 Alan Felstead & Golo Henseke, *Assessing the Growth of Remote Working and its Consequences for Effort, Well-Being and Work-Life Balance*, 32 NEW TECH. WORK & EMP. 195, 207–08 (2017); Philip Badawy & Scott Schieman, *Control and the Health Effects of Work-Family Conflict: A Longitudinal Test of Generalized Versus Specific Stress Buffering*, 61 J. HEALTH & SOC. BEHAV. 324, 336 (2020).

17 Ward van Zoonen & Anu E. Sivunen, *The Impact of Remote Work and Mediated Communication Frequency on Isolation and Psychological Distress*, 31 EUR. J. WORK & ORG. PSYCH. 610, 617–18 (2021).

18 Diana Gant & Sara Kiesler, *Blurring the Boundaries: Cell Phones, Mobility, and the Line between Work and Personal Life*, *in* WIRELESS WORLD—SOCIAL AND INTERACTIONAL ASPECTS OF THE MOBILE AGE 121, 129–30 (2002); John Sherry & Tony Salvador, *Running and Grimacing: The Struggle for Balance in Mobile Work*, *in* WIRELESS WORLD—SOCIAL AND INTERACTIONAL ASPECTS OF THE MOBILE AGE 108, 113–114 (Barry Brown et al. eds., 2001).

19 Judy Wajcman & Emily Rose, *Constant Connectivity: Rethinking Interruptions at Work*, 32 ORG. STUD. 941, 957 (2011).

20 Geoff Cooper, *The Mutable Mobile: Social Theory in the Wireless World*, *in* WIRELESS WORLD—SOCIAL AND INTERACTIONAL ASPECTS OF THE MOBILE AGE 19, 28 (Barry Brown et al. eds., 2001).

21 Sherry & Salvador, *supra* note 18, at 113–14.

22 On the gendered impacts of flexible work arrangements, see DAN CLAWSON & NAOMI GERSTEL, UNEQUAL TIME: GENDER, CLASS, AND FAMILY IN EMPLOYMENT SCHEDULES 9–11 (2014).

23 Lott & Chung, *supra* note 15, at 760–63; Cath Sullivan & Suzan Lewis, *Home-Based Telework, Gender, and the Synchronization of Work and Family: Perspectives of Teleworkers and Their Co-Residents*, 8 GENDER, WORK & ORG. 123, 141 (2001).

work encourages workers to "do gender" by allowing them to fulfil the social normative roles ascribed to them.[24] Unlike men, women are expected to increase their responsibility within the family when working flexibly.[25] Rather than diminishing work-family conflicts, flexible work might therefore lead to their increase.[26] Given the tendency towards overwork in flexible working arrangements, women may be doubly penalized, ultimately performing more paid and unpaid labor, the limit between the two progressively blurring.[27]

Of course, the impact of the increasing encroachment of the workplace's pressures into women's private lives varies greatly. In this Article, I center my analysis on women who perform waged labor outside of the home and who take on most domestic and care responsibilities. This specific position best exemplifies the gendered dynamics at play both in and between the workplace and the home. It is, however, evident that not all women are in such positions. As Valerie Bryson writes:

> [A] minority of women are able to opt out of most caring responsibilities and, in effect, to behave as men have traditionally done. Variations in conditions of employment and support for carers mean that the stress of combining paid employment and family responsibilities is much greater in some nations than others, and it is experienced very differently by different groups of women.[28]

This analysis thus does not rely on a reified, universal idea of womanhood; it only describes general trends, centering on an increasingly common pattern in women's lives, one where they must fulfill the demands of domestic labor while earning some kind of wage. This

---

24 CLAWSON & GERSTEL, *supra* note 22, at 9–11.

25 Margo Hilbrecht et al., *'I'm Home for the Kids': Contradictory Implications for Work-Life Balance of Teleworking Mothers*, 15 GENDER, WORK & ORG. 454, 471–73 (2008); Chung & Van der Lippe, *supra* note 4, at 366.

26 Heejung Chung & Tanja van der Lippe, *supra* note 4, at 369; Timothy D. Golden et al., *Telecommuting's Differential Impact on Work-Family Conflict: Is There No Place Like Home?*, 91 J. APPLIED PSYCH. 1340, 1346–48 (2006); Allen et al., *supra* note 1, at 361.

27 Schieman & Young, *supra* note 15, at 1408.

28 VALERIE BRYSON, GENDER AND THE POLITICS OF TIME—FEMINIST THEORY AND CONTEMPORARY DEBATES 148 (2007).

focus appears especially relevant given that employed mothers are consistently shown to be one of the most time-pressured groups in society.[29]

As a reaction to the pressures of remaining constantly reachable and available for and by work, disconnection, widely understood as a set of strategies to reduce digital media involvement,[30] has been encouraged by human resources departments[31] and self-help authors[32] alike. The message is clear: a healthy life can only be achieved if one takes care to regularly and thoroughly disconnect. In the context of work specifically, disconnecting involves a range of habits such as leaving one's work laptop aside over the weekend, responding to work-related messages only during fixed hours, and avoiding logging into work email accounts outside of work hours. As I argue in this Article, this understanding of disconnection is strikingly limited. When understood as an individual choice one can and should make, disconnection becomes workers' personal responsibility. The search for a solution to a demonstrably damaging societal phenomenon is thereby framed as an individual choice one should make rather than a collective response one could advocate for politically.

The language of rights is perhaps the most appropriate and effective language to express this collective understanding of disconnection. The right to disconnect has thus unsurprisingly emerged in public discourse as a potential solution to this erosion of workers' rights. The right to disconnect has been recognized in some capacity in several countries, including France, Italy, Portugal, and Australia. However, the effectiveness of the right's protections varies greatly. It is therefore crucial to examine the modalities of the right to disconnect in each country when discussing its potential in countering the negative effects of constant availability enabled by new technologies.

---

29 *See* Judy Rose, *"Never Enough Hours in a Day": Employed Mothers' Perceptions of Time Pressure*, 52 AUSTL. J. SOC. ISSUES 116, 116 (2017).

30 *See* Trine Syvertsen & Gunn Enli, *Digital Detox: Media Resistance and the Promise of Authenticity*, 26 CONVERGENCE 1269, 1269 (2019).

31 *See Aidez Les Salariés à Mieux Déconnecter*, ORANGE BUS. (June 16, 2016), https://www.orange-business.com/fr/magazine/aidez-les-salaries-a-mieux-deconnecter [https://perma.cc/Z8XL-FULL]; *Telefónica's Agreement Regarding Employees Digital Disconnection*, TELEFÓNICA (Nov. 24, 2018), https://www.telefonica.com/en/communication-room/reports/agreement-employees-digital-disconnection/ [https://perma.cc/D9TM-BSYH].

32 For examples of digital hygiene self-help, see generally CELESTE HEADLEE, DO NOTHING—HOW TO BREAK AWAY FROM OVERWORKING, OVERDOING, AND UNDERLIVING (2020); CAL NEWPORT, DIGITAL MINIMALISM: CHOOSING A FOCUSED LIFE IN A NOISY WORLD (2019).

In this Article, I understand the right to disconnect as a feminist demand. My analysis focuses on the right to disconnect as one potential solution to the gendered consequences of the technological imperative on women. The kind of work discussed here is flexible but not necessarily remote. Indeed, pressures to remain perpetually reachable take countless and widely differing forms across occupational classes. Exploring the gendered effects of the technological imperative, I argue that women are specifically and disproportionately harmed by the expectation of constant availability, especially due to the excessive share of unpaid work they bear and the resulting lack of free time they face. The term "free time" is used synonymously with leisure time, i.e. time that can be spent doing recreational activities to maintain or enhance one's satisfaction or well-being. Further, I contend that the common framing of disconnection as an individual choice is a misguided approach to the technological imperative and is especially disadvantageous for women. I then turn my attention to the right to disconnect as a collective and legal-political alternative to the individualistic conception of disconnection-as-lifestyle-choice. Adopting a comparative legal approach, I assess various iterations of the right to disconnect in some of the legal systems where it has been enshrined. In this context, I argue that only a right to disconnect with a wide personal scope and a high normative density, which includes an obligation upon employers not to contact workers outside of office hours, has any chance of being effective. I conclude that the demand for the right to disconnect must be understood as a feminist demand, one that, if met, could protect women from disproportionate harm while benefiting all workers.

I. The New Work Landscape

A. The Post-Fordist Work Ethic

According to Karin Fast, today's flexible regime of work[33] is characterized by "a large category of relatively autonomous knowledge workers, whose digitally connected workplace is not necessarily tied to a specific location."[34] Work is now more flexible than ever, with the rigid structure of a set workplace and clearly defined office hours rapidly fading away.[35] Underlining the tremendous importance of such changes, some scholars

---

33 RICHARD SENNETT, THE CULTURE OF THE NEW CAPITALISM 47–49 (2007).

34 Fast, *supra* note 10, at 1617; *see also* SENNETT, *supra* note 33, at 1–15.

35 *See* Fast, *supra* note 10, at 1617.

argue that we are undergoing another industrial revolution, one characterized by the increasingly blurred boundary between the physical and digital worlds.[36]

This material shift has been both accompanied and enabled by a conceptual one. In the last decades, work under post-Fordist capitalism has gone hand-in-hand with a shift in the demands placed on workers. As Kathi Weeks explains, "Whereas Fordism demanded from its core workers a lifetime of compliance with work discipline, post-Fordism also demands of many of its workers flexibility, adaptability, and continual reinvention."[37] The ideal worker must show their devotion to the job through constant availability and long working hours.[38] Emotional states and attitudes—such as enthusiasm and commitment to the job—have significantly increased in importance;[39] "happiness—like resiliency and flexibility—has become a 'moral imperative.'"[40] Emphasis is now placed on the totality of workers' behavior, rather than on their productivity in particular.[41] In short, "[a] worker's devotion to work serves as a sign of his or her capacities."[42] Work must not only be performed but also identified with.[43] As Weeks points out, "As an ideal of worker subjectivity, this requires not just the performance of a role, but a deeper commitment of the self, an immersion in and identification not just with work, but with work discipline."[44]

With this shift in work's expectations of workers came a reciprocal shift in their expectations of it: "With each reconstitution of the work ethic, more is expected of work: from an epistemological reward in the deliverance of certainty, to a socioeconomic reward

---

36 KLAUS SCHWAB, THE FOURTH INDUSTRIAL REVOLUTION 11–17 (2017); STEPHEN BARLEY ET AL., THE CHANGING NATURE OF WORK: CAREERS, IDENTITIES, AND WORK LIVES IN THE 21ST CENTURY 111–13 (2017).

37 KATHI WEEKS, THE PROBLEM WITH WORK: FEMINISM, MARXISM, ANTIWORK POLITICS, AND POSTWORK IMAGINARIES 70 (2011).

38 MARY BLAIR-LOY, COMPETING DEVOTIONS: CAREER AND FAMILY AMONG WOMEN EXECUTIVES 19–50 (2003).

39 WEEKS, *supra* note 37, at 70.

40 Fast, *supra* note 10, at 1617 (quoting EDGAR CABANAS & EVA ILLOUZ, MANUFACTURING HAPPY CITIZENS: HOW THE SCIENCE AND INDUSTRY OF HAPPINESS CONTROL OUR LIVES 10 (2017)).

41 Barbara Townley, *Selection and Appraisal: Reconstituting "Social Relations"?*, *in* NEW PERSPECTIVES ON HUMAN RESOURCE MANAGEMENT 92, 106 (John Storey ed., 1989).

42 WEEKS, *supra* note 37, at 71.

43 *Id*. at 74.

44 *Id.*

in the possibility of social mobility, to an ontological reward in the promise of meaning and self-actualization."[45] Work is now framed—and experienced—as the core of personal identity;[46] it is "expected to be the whole of life, colonizing and eclipsing what remains of the social."[47]

B. The Double-Edged Sword of Flexible Work

The spread of remote work has often been understood as a positive shift, one allowing better work-life balance. Some research even suggests that flexible work arrangements contribute to workers' general physical health, reducing absenteeism and somatic symptoms.[48] Some argue that flexible work is especially beneficial to women.[49] Research shows that flexible working arrangements enabled by digital technologies allow women to work longer hours despite their care and housework responsibilities, thereby facilitating their participation in paid employment.[50] Longer hours in turn have the potential to advance women's careers.[51] Moreover, flexible work enables women to maintain their working hours even during family-intensive times,[52] including after childbirth.[53] This is especially important given that women's involvement in the labor market is often limited after childbirth due to caregiving responsibilities.[54]

---

45 *Id.*

46 STANLEY ARONOWITZ & WILLIAM DIFAZIO, THE JOBLESS FUTURE: SCI-TECH AND THE DOGMA OF WORK 302 (1994).

47 WEEKS, *supra* note 37, at 76.

48 Nicole Shifrin & Jesse S. Michel, *Flexible Work Arrangements and Employee Health: A Meta-Analytic Review*, 36 WORK & STRESS 60, 74 (2022).

49 On the benefits of flexible work for women, see generally BACK-WIKLUND ET AL., *supra* note 13; Campbell Clark, *supra* note 13.

50 Ines Entgelmeier & Timothy Rinke, *Work-Related ICT Use and the Dissolution of Boundaries Between Work and Private Life*, 11 SOCIAL INCLUSION 211, 215–21 (2023).

51 Lükemann, *supra* note 12, at 629.

52 Sylvia Fuller & C. Elizabeth Hirsh, *"Family-Friendly" Jobs and Motherhood Pay Penalties: The Impact of Flexible Work Arrangements Across the Educational Spectrum*, 46 WORK & OCCUPATIONS 3, 32 (2018).

53 Heejung Chung & Mariska Van der Horst, *Women's Employment Patterns After Childbirth and the Perceived Access to and Use of Flexitime and Teleworking*, 71 HUM. RELS. 47, 66 (2018).

54 Suzanne M. Bianchi et al., *Housework: Who Did, Does or Will Do It, and How Much Does It Matter?*, 91 SOC. FORCES 55, 56 (2012); Wilfred Uunk et al., *The Impact of Young Children on Women's Labour Supply: A*

However, research shows that the promised advantages of flexible work have not been consistently delivered and that such arrangements come with health risks of their own.[55] Heejung Chung notes the existence of a flexibility paradox: though flexible work such as remote working was meant to facilitate a balanced split between work and home life, such arrangements tend to lead to increased work-family conflicts and overwork.[56] Studies show that teleworkers tend to experience frequent work interruptions, longer working hours,[57] and general work intensification characterized by increased pressure to work in one's free time under tight deadlines.[58] Telework tends to result in an increase in unpaid overtime hours,[59] the boundary between work and private life blurs as homes become workspaces, and free time can be interrupted at any point as constant availability comes to be expected.[60] This is unsurprising given that, according to Ashley Parry, "A key trend driving the rise of flexible work arrangements in recent decades is the prioritization of work over other aspects of one's life, particularly in the American context."[61] This prioritization is not strictly voluntary: if, as discussed above, showing commitment to the job is of increasing value to employers, workers have little choice but to self-exploit.[62] Workers increasingly

---

Reassessment of Institutional Effects in Europe, 48 ACTA SOCIOLOGICA 41, 41–42 (2005); Tanja van Dijk & Liset van der Lippe, *Comparative Research on Women's Employment*, 28 ANN. REV. SOCIO. 221, 221–23 (2002).

55 HEEJUNG CHUNG, THE FLEXIBILITY PARADOX: WHY FLEXIBILITY LEADS TO (SELF-)EXPLOITATION 69–79 (2022).

56 *Id.*

57 *See* Karlene Cousins & Daniel Robey, *Managing Work-Life Boundaries with Mobile Technologies: An Interpretive Study of Mobile Work Practices*, 28 INFO. TECH. & PEOPLE 34, 61 (2015).

58 *See* Alan Felstead & Golo Henseke, *Assessing the Growth of Remote Working and Its Consequences for Effort, Well-Being and Work-Life Balance*, 32 NEW TECH. WORK. EMP. 195, 208 (2017).

59 *See* Heejung Chung & Mariska van der Horst, *Flexible Working and Unpaid Overtime in the UK: The Role of Gender, Parental and Occupational Status*, 151 SOC. INDICATORS RSCH. 495, 495 (2018); *see* Melissa Mazmanian, Wanda J. Orlikowski & JoAnne Yates, *The Autonomy Paradox: The Implications of Mobile Email Devices for Knowledge Professionals*, 24 ORG. SCI. 1337, 1338 (2013).

60 *See* Kossek et al., *supra* note 1, at 350.

61 Ashley Parry, *The Flexibility Paradox and Spatial-Temporal Dimensions of COVID-19 Remote Work Adaptation Among Dual-Earner Mothers and Fathers*, 32 GENDER, WORK & ORG. 15, 17 (2025).

62 On the topic of self-exploitation, *see* CHUNG, *supra* note 55, at 69–79; Parry, *supra* note 61, at 16. On other theories explaining the flexibility paradox beyond the phenomenon of self-exploitation, see Kelliher & Anderson, *supra* note 15, at 98; Chung & Van der Horst, *supra* note 53, at 66.

perceive themselves as expected to remain perpetually available to their employer.[63] Such expectations imply efforts to remain quickly responsive and consequently involve constant connectivity.[64] Under these conditions, "[t]urning off one's phone becomes a virtual act of negligence or insubordination."[65]

C. Widening the Scope: A Concern for All Workers

Research on the technological imperative regrettably tends to focus on upper- and middle-class, remote knowledge workers.[66] This phenomenon is undeniably especially relevant to white-collar[67] workers.[68] Yet these pressures are also acutely felt by blue-collar, unsalaried workers—those working on call, under short-term contracts or no contract at all, within what is usually referred to as the gig economy.[69] The imperative to remain constantly available to employers—whether actual or potential—is in fact arguably especially harmful to the kind of precarious worker whose socioeconomic position implies constant fears of being under- or unemployed. Workers whose work schedules are determined by their employers and changed daily have been found to be the most affected by work-life

---

63 *See* Daantje Derks, Heleen van Mierlo & Elisabeth B. Schmitz, *A Diary Study on Work-Related Smartphone Use, Psychological Detachment and Exhaustion: Examining the Role of the Perceived Segmentation Norm*, 19 J. ORG. HEALTH PSYCH. 74, 74 (2014); Nicola Green, *Who's Watching Whom? Monitoring and Accountability in Mobile Telephone Relations*, *in* WIRELESS WORLD: SOCIAL AND INTERACTIONAL ASPECTS OF THE MOBILE AGE 32, 41 (Barry Brown, Nicola Green & Richard Harper eds., 2002); Ian Towers et al., *Time Thieves and Space Invaders: Technology, Work and the Organization*, 19 J. ORG. CHANGE MGMT. 593, 615 (2006).

64 *See* Nadine Büchler, Claartje L. ter Hoeven & Ward van Zoonen, *Understanding Constant Connectivity to Work: How and for Whom is Constant Connectivity Related to Employee Well-Being?*, 30 INFO. & ORG. 1, 2–3 (2020); Daantje Derks et al., *Work-Related Smartphone Use, Work-Family Conflict and Family Role Performance: The Role of Segmentation Preference*, 69 HUM. RELS. 1045, 1063 (2016); Wajcman & Rose, *supra* note 19, at 957.

65 Kaspar Villadsen, *Constantly Online and the Fantasy of 'Work-Life Balance': Reinterpreting Work-Connectivity as Cynical Practice and Fetishism*, 23 CULTURE & ORG. 363, 365 (2017).

66 *See* Fast, *supra* note 10, at 1619.

67 As understood in the context of this Article, this term simply means "relating to office work."

68 *See* Fast, *supra* note 10, at 1619.

69 On the gig economy and precarious workers' experience of (free) time, see generally Rebecca Shein, *From Free Time to Idle Time: Time, Work-Discipline, and the Gig Economy*, *in* RESEARCH HANDBOOK ON LAW AND MARXISM 407 (Paul O'Connell & Umut Özsu eds., 2021).

spillover, especially when they are women.[70] Indeed, "[w]omen of the lower working class have fewer financial resources in order to cope with unpredictable and unreliable work hours."[71]

Though its effects and form vary depending on the position, workplace and industry in question, the technological imperative impacts workers across occupational classes. It affects the white-collar remote office worker, employed in a stable position yet constantly logged into his or her emails out of fear of seeming uncommitted to the job and perhaps missing out on career opportunities. It also greatly impacts the precarious, on-demand worker who knows that the employer regularly giving them odd jobs can contact them at any time of the day and that showing quick responsiveness is crucial to being hired again. The pressure to be constantly available impacts in-person workers as well, whenever, for instance, they feel obligated to remain reachable outside of work because their employer regularly contacts them last minute and outside of office hours to fill in for someone else's shift or to come back to help close shop.

D. The Technological Imperative's Pervasive Logic

A staggering number of workers—whether in person or remote, salaried or not—face a common problem, albeit with consequences of varying gravity: they cannot leave their phone or laptop aside, as they might be contacted at any moment by employers or colleagues, and they fear seeming uncommitted or unreliable if they do not respond quickly to this contact. Because of this, they can never truly leave work.[72]

Though its ramifications vary significantly depending on the job, workplace, and industry in question, the *logic* of the technological imperative is always the same: responsiveness is both expected and, at times, rewarded, while unavailability is understood

---

70 Yvonne Lott, *Does Flexibility Help Employees Switch Off from Work? Flexible Working-Time Arrangements and Cognitive Work-to-Home Spillover for Women and Men in Germany*, 151 SOC. INDICATORS RSCH. 471, 484–85 (2018).

71 Chung & Van der Lippe, *supra* note 4, at 375.

72 This is especially the case for global workers. *See* Ward van Zoonen, Jennifer Gibbs & Anu Sivunen, *Constant Connectivity in Global Work: Understanding the Role of Technological, Social and Individual Pressures to Connect*, *in* PROCEEDINGS OF THE 58TH HAWAII INTERNATIONAL CONFERENCE ON SYSTEM SCIENCES 732, 732 (Tung X. Bui ed., 2025).

as unprofessional, betraying a lack of commitment to the job. This punitive logic[73] leads many workers to fear being excluded from important career opportunities or facing other forms of reprisal for having failed to show responsiveness outside of their usual working hours. Constant demands on workers' attention by necessity erode the quality of their leisure time.

II. The Gendered Drawbacks of Work Flexibility

A. Time Poverty and the Gendered Division of Labor

Women are generally more affected than men by time poverty,[74] i.e. a situation in which one enjoys "little to no discretionary time" outside of paid or unpaid labor.[75] Time poverty is understood here as both the reality and "the acute feeling of having too much to do and not enough time to do it."[76]

The gendered division of labor is generally argued to be the main cause of women's time poverty. Women today still take on most unpaid care[77] work, that is, "non-remunerated work carried out to sustain the well-being, health and maintenance of other individuals in a household or the community."[78] This is unsurprising given clear and relatively stable gender

---

73 *See* Flavia Cavazotte, Ana Heloisa Lemos & Kaspar Villadsen, *Corporate Smart Phones: Professionals' Conscious Engagement in Escalating Work Connectivity*, 29 NEW TECH., WORK & EMP. 72, 81 (2014).

74 *See* Elizabeth Hyde, Margaret E. Greene & Gary L. Darmstadt, *Time Poverty: Obstacle to Women's Human Rights, Health, and Sustainable Development*, 10 J. GLOB. HEALTH 1, 1 (2020); Yana van der Meulen Rodgers, *Time Poverty: Conceptualization, Gender Differences, and Policy Solutions*, 40 SOC. PHIL. & POL'Y 79, 97 (2023).

75 Hyde, Greene & Darmstadt, *supra* note 74, at 1.

76 Maria Giulia Trupia, Isabelle Engeler & Cassie Mogilner Holmes, *Time Poverty*, *in* ELGAR ENCYCLOPEDIA OF CONSUMER BEHAVIOR 301, 301 (Johanna Gollnhofer, Reto Hofstetter & Torsten Tomczak eds., 2024) (emphasis omitted).

77 As the care work discussed in this Article is of the unpaid, domestic kind, the terms "domestic" and "care" will be used interchangeably.

78 LAURA ADDATI ET AL., INT'L LAB. OFF., CARE WORK AND CARE JOBS FOR THE FUTURE OF DECENT WORK 40 (2018), https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40dgreports/%40dcomm/%40publ/documents/publication/wcms633135.pdf [https://perma.cc/V6G7-SXCL]. For more precise examples of what this kind of work entails, see *id.* at 41.

norms.[79] Research, for instance, shows that more than three quarters of unpaid domestic care work worldwide is done by women.[80] In 2016, it was found that women in the UK shouldered 60% more unpaid work than men.[81] Highlighting a similar trend, the European Institute for Gender Equality found in 2021 that women with children spend an average of 2.3 hours daily on housework, whereas men with children spend only 1.6 hours on such tasks.[82] Similarly, the Gender Equity Policy Institute found in 2024 that American working women spend more than twice as much time on housework than their male counterparts,[83] and this discrepancy also continues into retirement.[84] By one 2020 estimate, women in the United States spend on average 37% more time on unpaid household work than men.[85]

---

79 *See* Man Yee Kan, Oriel Sullivan & Jonathan Gershuny, *Gender Convergence in Domestic Work: Discerning the Effects of Interactional and Institutional Barriers from Large-Scale Data*, 45 SOCIO. 234, 246–47 (2011); Evrims Altintas & Oriel Sullivan, *Fifty Years of Change Updated: Cross-National Gender Convergence in Housework*, 35 DEMOGRAPHIC RSCH. 455, 466 (2016); Scott Coltrane, *Research on Household Labor: Modeling and Measuring the Social Embeddedness of Routine Family Work*, J. MARRIAGE & FAM. 1208, 1226 (2000); Joanna Syrda, *Gendered Housework: Spousal Relative Income, Parenthood and Traditional Identity Norms*, 37 WORK, EMP. & SOC'Y 794, 809–10 (2022); Sarah Thébaud, Sabino Kornrich & Leah Ruppanner, *Good Housekeeping, Great Expectations: Gender and Housework Norms*, 50 SOCIO. METHODS & RSCH. 1187, 1206–07 (2021).

80 JACQUES CHARMES, THE UNPAID CARE WORK AND THE LABOUR MARKET. AN ANALYSIS OF TIME USE DATA BASED ON THE LATEST WORLD COMPILATION OF TIME-USE SURVEYS 3 (2019), https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@dgreports/@gender/documents/publication/wcms_732791.pdf [https://perma.cc/V6G7-SXCL]; ADDATI, *supra* note 78, at 53.

81 *Women Shoulder the Responsibility of 'Unpaid Work'*, OFF. NAT'L STAT. (Nov. 10, 2016), https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/womenshouldertheresponsibilityofunpaidwork/2016-11-10 [https://perma.cc/W4LJ-AEJZ].

82 DAVIDE BARBIERI ET AL., EUR. INST. GENDER EQUAL., GENDER EQUALITY INDEX 2021: HEALTH, at 52 (2021), https://eige.europa.eu/sites/default/files/documents/gender_equality_index_2021_health.pdf [https://perma.cc/ 638Y-MXBH].

83 *See* NATALIA VEGA VARELA & LEYLY MORIDI, GENDER EQUITY POL'Y INST., THE FREE TIME GENDER GAP: HOW UNPAID CARE AND HOUSEHOLD LABOR REINFORCES WOMEN'S INEQUALITY 2 (2024), https://thegpi.org/reports/GEPI-Free-Time-Gender-Gap-Report.pdf [https://perma.cc/T6R6-QCM3].

84 *Id.* at 3.

85 CYNTHIA HESS ET AL., INST. FOR WOMEN'S POL'Y RSCH., PROVIDING UNPAID HOUSEHOLD AND CARE WORK IN THE UNITED STATES 2 (2020), https://iwpr.org/wp-content/uploads/2020/01/IWPR-Providing-Unpaid-Household-and-Care-Work-in-the-United-States-Uncovering-Inequality.pdf [https://perma.cc/6NRU-34N6].

The idea of a second shift—a shift of unpaid work following women's shift of paid work[86]—thus remains relevant today. It is worth acknowledging, however, that this second shift can be avoided by some economically privileged women through the employment of migrant women or women from a poorer socioeconomic background as domestic workers, thereby displacing the burden of housework from one class of women to another and transferring gender inequalities from the household to the global care chain.[87] In such scenarios, the issue of the gendered division of labor is displaced rather than solved. The (feminist) task at hand is then to challenge an uneven and gendered division of labor, rather than passing it on from one group of women to another, less privileged one.[88]

Of course, the unevenly distributed burden of unpaid care and domestic work affects the amount of free time at women's disposal. American women enjoy on average 13% less free time than men.[89] This gap is even larger for women aged 18 to 24, who have 20% less free time than men their age, and those aged 35 to 44, who face the greatest free-time gender gap with 23% less free time than their male counterparts.[90] To put it differently, in the case of women in the United States aged 18 to 24, this means that they will enjoy on average 434 fewer hours of free time than men their age per year.[91] Women's caring responsibilities often mean that they "have no time available to spend as they wish."[92] It follows that any further threat to free time can have especially dire consequences on women specifically.

Women's time poverty is mediated by factors of class and race. It is low-income and single mothers that face the most extreme time poverty. According to Bryson, in the United States, "Because lone parents are disproportionately African American, these double effects

---

86 Regarding the second shift overall, see generally ARLIE HOCHSCHILD & ANNE MACHUNG, THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME (2012).

87 *See* Arlie Russell Hochschild, *Global Care Chains and Emotional Surplus Value*, *in* JUSTICE, POLITICS, AND THE FAMILY 250 (Daniel Engster & Tamara Metz eds., 2014); Nathalie Morel & Clément Carbonnier, *Taking the Low Road: The Political Economy of Household Services in Europe*, *in* THE POLITICAL ECONOMY OF HOUSEHOLD SERVICES IN EUROPE 1, 16–17 (Nathalie Morel & Clément Carbonnier eds., 2015); Allison Weir, *Global Care Chains: Freedom, Responsibility, and Solidarity*, 46 S.J. PHIL. 166, 166 (2008).

88 *See* Weir, *supra* note 87, at 172–73.

89 VEGA VARELA & MORIDI, *supra* note 83, at 6.

90 *Id.*

91 *Id.*

92 BRYSON, *supra* note 28, at 146.

of income and time poverty are often compounded by those of ethnic disadvantage."[93] Nationality is also a key factor in determining the extent of women's time poverty, as the weight of gender roles varies depending on cultural context and some national governments provide more support to parents than others.[94]

B. Women's Less Leisurely Leisure

Not only do women generally have less free time than men, but the free time they do have is more constrained and interrupted.[95] Mothers especially will often rely on time-squeezing strategies—"sacrific[ing] leisure and personal care in order to allocate time to children"[96]—that tend to impair the quality of their leisure time, and general welfare.[97] Bryson contends that, for women with caring responsibilities, "leisure time cannot be planned in advance, but can only be snatched in unpredictable fragments . . . and it cannot easily be used to engage in activities outside the home."[98]

The leisure time of women with childcare responsibilities is hence "more likely to be combined with other activities than that of men, . . . more fragmented and liable to interruption, and . . . less likely to take the form of pure adult leisure without children present."[99] Women's leisure time tends to be "less leisurely than men's"[100]; it is as much a qualitative as a quantitative issue.[101] In short, as Marybeth Mattingly and Suzanne Bianchi

---

93 *Id.* at 149.

94 *See id.* at 150; Lyn Craig & Killian Mullan, *Parental Leisure Time: A Gender Comparison in Five Countries*, 20 SOC. POL. 329, 345–49 (2013); Mara A. Yerkes, Anne Roeters & Janeen Baxter, *Gender Differences in the Quality of Leisure: A Cross-National Comparison*, 23 CMTY., WORK & FAM. 367, 379–80 (2020); *see* Tess Kay, *Leisure, Gender and Family: The Influence of Social Policy*, 19 LEISURE STUD. 247, 261–63 (2000) (analyzing the ways in which family-related social policy impacts the leisure time of women in heterosexual couples).

95 *See* Stella Chatzitheochari & Sara Arber, *Class, Gender and Time Poverty: A Time-Use Analysis of British Workers' Free Time Resource*, 63 BRIT. J. SOCIO. 451, 467–68 (2012).

96 LYN CRAIG, CONTEMPORARY MOTHERHOOD: THE IMPACT OF CHILDREN ON ADULT TIME 135 (2007).

97 *Id.* at 93.

98 BRYSON, *supra* note 28, at 147.

99 *Id.* at 164.

100 Michael Bittman & Judy Wajcman, *The Rush Hour: The Character of Leisure Time and Gender Equity*, 79 SOC. FORCES 165, 168–69 (2000).

101 *See* Rose, *supra* note 29, at 127 (describing the ways in which mothers struggle to find quality free time).

explain, "A triple burden is apparent. Women have less free time. The free time they have is often contaminated by other activities or the presence of children, and their free time is not as beneficial to them as to men in terms of reducing feelings of time pressure."[102]

C. The Challenge of Competing Temporalities

Women's time tends to be split between several activities at once. Because women must often juggle paid and unpaid work, multitasking is an integral part of the way they spend their time. Research suggests that time-management strategies "such as multitasking seemed to increase the feeling of time pressure, rather than reduce it."[103] Some theorists argue that the domestic work that women predominantly take on involves the assimilation of a "distinctive temporal consciousness," one where the "assumption that tasks and events can be scheduled in advance as separate items" does not apply.[104] Rather, "polychronic time" takes over in the home, that is, time that is oriented towards people and their needs and where tasks are unpredictable and tend to overlap.[105] The monochronic time of work does not, therefore, fit the way time itself is structured in the home for many women, yet "the time discipline of the workplace is increasingly felt in the home."[106] To be able to bridge the demands of both waged and unwaged labor, women must increasingly use time management skills and act as if "the emotional and physical needs of partners, family and friends can be organized into a tick list of tasks to be performed in pre-allocated time slots."[107] Women's "activities are being forced into an inappropriate temporal straitjacket" that abides by the logic of market capitalism's cost effectiveness.[108]

---

102 Marybeth B. Mattingly & Suzanne M. Bianchi, *Gender Differences in the Quantity and Quality of Free Time: The U.S. Experience*, 81 SOC. FORCES 999, 1022–24 (2003).

103 Rose, *supra* note 29, at 127.

104 BRYSON, *supra* note 28, at 129–30; *see* E.P. Thompson, *Time, Work-Discipline and Industrial Capitalism*, 38 PAST & PRESENT 56, 60 (1967).

105 BRYSON, *supra* note 28, at 130. On polychronic time and domestic work, see generally EDWARD HALL, THE DANCE OF LIFE: THE OTHER DIMENSIONS OF TIME (1989).

106 BRYSON, *supra* note 28, at 132.

107 *Id.*

108 *Id.* at 134. On the imposition of inappropriate temporalities on domestic work, see generally Cristina Carrasco & Maribel Mayordomo, *Beyond Employment*, 14 TIME & SOC'Y 231 (2005); Helga Maria Hernes, *Chronopolitics: A Time to Live and a Time to Work*, *in* WELFARE STATE AND WOMAN POWER: ESSAYS IN STATE FEMINISM 101 (Helga Maria Hernes ed., 1987); JERRY A. JACOBS & KATHLEEN GERSON, THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY (2004); Linda McKie, Susan Gregory & Sophia Bowlby, *Shadow*

This is *a fortiori* the case now that work technologies allow paid employment to systematically intrude spatially into workers' private lives. Increasingly, working mothers are less obliged to move between competing temporalities—a task already difficult enough as it is—and must instead continuously "straddle multiple temporalities."[109] This creates a vicious cycle, one where a lack of time results in a third shift: "the emotional work necessary to repair the damage caused by time pressures at home."[110] The intrusion of waged labor into the home does not diminish the amount of labor women altogether carry but instead creates more "damage control" labor down the line.[111]

D. An Ever-Elusive Work-Life Balance

Remote work and digitally enabled, flexible, on-demand jobs have nonetheless been understood as a potential solution to women's lack of time, as they purportedly allow better work-life balance.[112] Of course, the pressures to reach such a balance mostly fall on women's shoulders, as they are the ones expected to take on most of care labor. Mary Runte and Albert J. Mills argue that the dilemma between the demands of work and those of family life is one that almost exclusively concerns women—the very notion of such a conflict has in fact primarily been developed in relation to women's work.[113] As they point out, "It is women who navigate between parental and employee roles. It is therefore women who pay the 'toll' for crossing the boundary between work and family."[114]

Times: The Temporal and Spatial Frameworks and Experiences of Caring and Working, 36 SOCIO. 897 (2002); HELGA NOWOTNY, TIME: THE MODERN AND POSTMODERN EXPERIENCE (1994).

109 Christine Everingham, *Engendering Time: Gender Equity and Discourses of Workplace Flexibility*, 11 TIME & SOC'Y 335, 338 (2002).

110 BRYSON, *supra* note 28, at 146 (quoting ARLIE HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK 51 (1997)).

111 *Id.* at 146.

112 *See* Fuller & Hirsh, *supra* note 52, 7–10. On the decrease of gender discrimination in remote work, see generally Laura Doering & András Tilcsik, *Location Matters: Every Day Gender Discrimination in Remote and On-site Work*, 36 ORG. SCI. 547.

113 Mary Runté & Albert J. Mills, *Paying the Toll: A Feminist Post-Structural Critique of the Discourse Bridging Work and Family*, 10 CULTURE & ORG. 237, 240 (2004); *see also* Janet Smithson & Elizabeth H. Stokoe, *Discourses of Work–Life Balance: Negotiating 'Genderblind' Terms in Organizations*, 12 GENDER, WORK & ORG. 147, 164 (2005) (suggesting that work-life balance is strongly associated with women).

114 Runté & Mills, *supra* note 113, at 240.

The blurring of this boundary only implies further encroachment of work into family life. It is always the latter that is shaped by and made to accommodate the former: "the goal may be to achieve balance between work and family, but such balance must never be achieved at the expense of the employer's profitability."[115] In almost all mainstream discussions on work-family balance, maintaining—or even increasing—productivity and job commitment is central, tempering negative effects on family life rather than questioning this fundamental prioritization.[116] As waged work takes all hours of a normal working day, unwaged work is done overtime, sped up by time-saving technologies so it can be done while meeting the demands of full-time employment.[117] The balance is already conspicuously tilted in favor of waged work.[118] According to Runté and Mills, the search for work-life balance is thus bound to fail: "[a]ttempts to 'balance' work and family commitments within a context that has already shifted the scales so heavily in favor of the work domain is . . . more than a little misleading."[119] It follows that "far from being distinctly separate spheres, the work domain has thoroughly intruded on and compromised the family domain."[120] Conversely, any attempt to take time for family life, usually made by women, is understood as an intrusion on work.

The idea of work-family balance, reinforced by the discourse of work flexibility, therefore strikingly disadvantages women. Rather than representing an exceptional opportunity to liberate women from the constraints of work, work flexibility discourse reinforces the very issue it purportedly seeks to address by allowing work to seep into every aspect of life. Although it arguably has concrete organizational advantages for many women, the demands of waged work can never go unmet and "the nature of the interaction remains work-defined."[121] It is precisely because of this relation remaining unchanged that when the separation between work and private life comes undone, the former inexorably takes over the latter.

---

115 *Id.* at 244.

116 *Id.*; *see also* Abigail Gregory & Susan Milner, *Editorial: Work-Life Balance: A Matter of Choice?*, 16 GENDER, WORK & ORG. 1, 3–5 (2009) (providing an overview of the feminist critique of work-life balance).

117 Runté & Mills, *supra* note 113, at 244–45.

118 *See id.*

119 *Id.* at 244.

120 *Id.* at 246.

121 *Id.*

III. The "Personal Choice" of Disconnection

A. Self-Exploitation and the Problematization of Choice

Much of the problem underlying flexible work pertains to the notion of choice. Ultimately, the discussion boils down to the question: why don't (women) workers simply stop working once the workday is over? As I argue in the following pages, the act of "simply disconnecting" proves to be much more complicated than its proponents portray it to be. But another factor, self-exploitation, must be mentioned again here—this time through a gendered lens. As highlighted above, flexible work is firmly anchored in a particularly potent post-Fordist ethics demanding flexibility and emotional involvement from all workers, regardless of their work arrangements.[122] As Kathi Weeks puts it, today, "It is not obedience that is prized, but commitment; employees are more often expected to adopt the perspectives of managers rather than simply yield to their authority."[123] In this context, the difference between workers' skills and their attitudes becomes increasingly thin. Attitudes and emotional states—such as commitment, sociability, enthusiasm, and positivity—all become as much a part of a job's requirements as skills.[124] Thus, "the willingness and capacity of workers to manipulate and project their attitudes in the organization's interest are central to their competence on the job."[125] It is then unsurprising that many workers are unwilling to stop working when work keeps coming to them; after all, as Doug Henwood argues, "workers are expected to be the architects of their own better exploitation."[126] They are also expected to subject themselves to "continuous self-scrutiny . . . in the name of accountability."[127] These pressures are especially heavy for women, who face gendered pressures and discrimination in work contexts[128] and therefore tend to

---

122 *See* WEEKS, *supra* note 37, at 70.

123 *Id.*; *see* MADELEINE BUNTING, WILLING SLAVES: HOW THE OVERWORK CULTURE IS RULING OUR LIVES 110 (2004).

124 *See* Doug Henwood, *Talking About Work*, 49 MONTHLY REV. 18, 22 (1997).

125 Robin Leidner, *Rethinking Questions of Control: Lessons from McDonald's*, *in* WORKING IN THE SERVICE SOCIETY 29, 46 (Cameron Lynne Macdonald & Carmen Sirianni eds., 1996), *quoted in* WEEKS, *supra* note 37, at 70.

126 Henwood, *supra* note 124, at 22, *quoted in* WEEKS, *supra* note 37, at 70.

127 Bogdan Costea, Norman Crump & Kostas Amiridis, *Managerialism, the Therapeutic Habitus and the Self in Contemporary Organizing*, 61 HUM. RELS. 661, 673–74 (2008).

128 *See generally* Donna Bobbitt-Zeher, *Gender Discrimination at Work: Connecting Gender Stereotypes, Institutional Policies, and Gender Composition of Workplace*, 25 GENDER & SOC'Y 764, 764 (2011) (describing

fear their employers' and colleagues' judgement more than their male counterparts.[129] In particular, women report fearing that they seem less committed to the job or less capable than their colleagues.[130] Such fears effectively function as a disciplinary mechanism, which leads women to self-regulate their behavior to fit the norms of their workplace.[131] Women are therefore especially prone to self-exploitation in contexts where they might fear they have more to prove than their male colleagues.

Given this array of risks and covert forms of harm, technologically enabled flexible work is far from straightforwardly liberatory for women. Though measures to promote work flexibility are in many ways practical in ensuring that women can attend to their various kinds of waged and unwaged labor, they nonetheless reinforce exploitative dynamics that systematically disadvantage women. Much of the freedom or ease that is gained through teleworking is arguably offset by what Bryson describes as the "counter-pressures to work intensification in the globalized employment market."[132] Rather than permitting a concrete shift towards a feminist understanding of time, work flexibility has extended capitalistic temporalities to all tasks. Evidently, "[t]he kind of instant, abbreviated messaging that new technology encourages is . . . very different from the grounded, relational time that caring relationships may require."[133] It is thus unsurprising that widespread telework during the COVID-19 pandemic did not allow more leisure for women. In fact, research shows that childcare and domestic work responsibilities were unevenly distributed between spouses.[134] In general, women who work flexibly are highly likely to expand their care and domestic

---

the ways in which gender stereotyping and organizational factors contribute to gender discrimination in the work place); Madeline E. Heilman & Suzette Caleo, *Gender Discrimination in the Workplace*, *in* THE OXFORD HANDBOOK OF WORKPLACE DISCRIMINATION 73 (Adrienne J. Colella & Eden B. King eds., 2018) (exploring the role of gender stereotypes in the selection, promotion, and evaluation of women in the workplace); Madeline E. Heilman, *Gender Stereotypes and Workplace Bias*, 32 RSCH. ORGANIZATIONAL BEHAV. 113, 113 (2012) (describing the negative impact of gender roles on women's career progress).

129 Isabell C. Loeschner, Understanding Peripheral Work Connectivity—Power and Contested Spaces in Digital Workplaces 184–85 (Apr. 2016) (Ph.D. dissertation, London School of Economics) (ProQuest).

130 *See id*. at 185.

131 *Id*.

132 *See* BRYSON, *supra* note 28, at 141.

133 *Id.* at 141–42.

134 *See* Allison Dunatchik et al., *Gender, Parenting, and the Rise of Remote Work During the Pandemic: Implications for Domestic Inequality in the United States*, 35 GENDER & SOC'Y 194, 203 (2021); Daniel L. Carlson & Richard J. Petts, *U.S. Parents' Domestic Labor During the First Year of the COVID-19 Pandemic*, 41 POPULATION RSCH. & POL'Y REV. 2393, 2405–08 (2022).

work.[135] It thus stands to reason that remote work, conceptualized as one of the main solutions to women's constant split between different forms of labor, tends to reinforce the idea that it is up to women to find balance between the countless tasks they take on every day. The proposal of remote work as a solution to women's time pressures implies that women can (and should) remain responsible for both their paid job and most of the necessary unpaid labor their family and community demand. It does not challenge the status quo, nor does it question waged work's primacy in the work-life balance. As Susan Christopherson puts it, "While the problem of work-family balance may be widely recognized, the strategy most popular with employers—the flexible work schedule—neither reduces the hours of work nor challenges the assumption that social reproduction should be a private, and largely female, responsibility."[136]

B. Digital Self-Care: Disconnection as Distinction

Disconnection was championed by human resources (HR) experts and self-help influencers alike as a remedy to the negative consequences of remote work sketched above. The idea is simple: to maintain a healthy lifestyle, good digital hygiene is necessary.[137] This includes regular complete disconnection from work emails and messages, as well as reducing one's screentime in general. In short, our daily use of technology should not only be diminished but also more mindful.[138] This shift is also taking place in the working world, which Fast calls the "disconnection turn in work": "'always on' workers are now advised to be 'sometimes off' for the sake of their *digital wellbeing* (and/or productivity)".[139] The "disconnection turn" reflects the construction of a new work ideal—one that turns "away from the enduring romanticization of overwork, busyness, and media-induced flexibility."[140]

---

135 Hilbrecht et al., *supra* note 25, at 471–73; Sullivan & Lewis, s*upra* note 23, at 141.

136 WEEKS, *supra* note 37, at 172 (citing Susan Christopherson, *Trading Time for Consumption: The Failure of Working-Hours Reduction in the United States*, *in* WORKING TIME IN TRANSITION: THE POLITICAL ECONOMY OF WORKING HOURS IN INDUSTRIAL NATIONS 171, 182–83 (Karl Hinrichs et al. eds., 1991)).

137 *See* Fast, *supra* note 10, at 1618–19; Karin Fast, Johan Lindell & André Jansson, *Disconnection as Distinction: A Bourdieusian Study of Where People Withdraw from Digital Media*, *in* DISENTANGLING: THE GEOGRAPHIES OF DIGITAL DISCONNECTION 61, 62 (André Jansson & Paul C. Adams eds., 2021).

138 Fast, *supra* note 10, at 1616.

139 *See id*. at 1617–18.

140 *See id.* at 1618.

Disconnection is framed therein as an individual choice that one can make to live a healthier life. Such a choice is often positioned as "a form of empowerment or even resistance,"[141] a rebellion showing "commitment to self-determination" and "real-life social relations."[142] Disconnection is understood as a "set of techniques by which workers can *regain control* over increasingly liquid life domains".[143] As mentioned in the introduction, such an approach to disconnection must be criticized, however, as it turns the necessary remedy for a societal issue into an individual choice: a commodity that few can afford. Discourses of disconnection-as-individual-choice only reinforce logics of "self-optimization, responsibilization, and commodification."[144]

Research suggests that disconnection as a self-care practice or a solution to the pressures of constant connectivity is most popular in class-privileged groups.[145] Unsurprisingly, digital detox is mostly marketed to those rich in capital but poor in time.[146] Disconnection has become a matter of good taste[147] and "socially stratifying."[148] Disconnection-as-individual-choice thus fits into a "grander scheme of non-consumption dispositions that make for social recognition and distinction."[149] Even when used as a tool for political mobilization, disconnection is more likely to be used by the "tech-savvy elite."[150]

---

141 Pepita Hesselberth, *Discourses on Disconnectivity and the Right to Disconnect*, 20 NEW MEDIA & SOC'Y 1994, 1999 (2017); *see* Fast, Lindell & Jansson, *supra* note 137, at 62.

142 Hesselberth, *supra* note 141, at 1999.

143 Fast, *supra* note 10, at 1618–19.

144 Syvertsen & Enli, *supra* note 30, at 1279–80; *see* Laura Portwood-Stacer, *Media Refusal and Conspicuous Non-Consumption: The Performative and Political Dimensions of Facebook Abstention*, 15 NEW MEDIA & SOC'Y 1041, 1048 (2013).

145 *See* Miriana Cascone & Tiziano Bonini, *'Disconnecting from My Smartphone Is a Privilege I Do Not Have': Mobile Connection and Disconnection Practices Among Migrants and Asylum Seekers in Three Migrant Reception Centres of Sicily*, 27 NEW MEDIA & SOC'Y 5201, 5205 (2025). *See generally* Francine M. Deutsch, *Undoing Gender*, 21 GENDER & SOC'Y 106 (2007) (discussing the intersection between gender and class in relation to flexible work arrangements).

146 *See* Alex Beattie & Elija Cassidy, *Locative Disconnection: The Use of Location-Based Technologies to Make Disconnection Easier, Enforceable and Exclusive*, 27 CONVERGENCE 395, 406–07 (2021).

147 *Id.*

148 Fast, *supra* note 10, at 1624.

149 *Id.*

150 *Id.*

Undoubtedly, few members of financially precarious working classes have the material possibility of disconnecting: employees in lower occupational classes face higher risks of underemployment and enjoy both less job security and less bargaining power.[151] Free time is, of course, not only a gendered question, but it is also class-differentiated. Research shows that those employed in lower-paying and lower-status positions tend to enjoy less sleep and free time than more privileged workers.[152] They are also more likely to self-exploit by working longer hours.[153]

When the issue of free time is understood as both gendered and classed, it seems especially regrettable that disconnection tends to be a choice only the most privileged can make; low-income women are the most time-poor and hence most in need of meaningful disconnection. Indeed, "[w]omen's time poverty is particularly acute in low-income households without private transport or the kind of labour-saving household equipment that many other families take for granted."[154] In such contexts, women's financial poverty interacts with their time poverty.[155] Disconnection, when framed in a way that inevitably excludes low-income women, is profoundly ill-equipped to address the gendered and classed impact of constant connectivity.

C. Consumer Activism: Individualism and Self-Responsibilization

Calls for disconnection, when disconnection is framed as a personal choice or habit, tend to be both individualistic and moralizing, usually relying on the logic of responsiblization.[156] As Pepita Hesselberth writes:

---

151 Zhuofei Lu, Senhu Wang & Wendy Olsen, *Revisiting the 'Flexibility Paradox': Degree of Work Schedule Flexibility and Time Use Patterns Across Gender and Occupational Groups*, 10 HUMANS. & SOC. SCIS. COMMC'NS 1, 4 (2023); *see* Hande Inanc, *Unemployment, Temporary Work, and Subjective Well-Being: The Gendered Effect of Spousal Labor Market Insecurity*, 83 AM. SOCIO. REV. 536, 537 (2018) (describing temporary workers' job insecurity).

152 Chatzitheochari & Arber, *supra* note 95, at 452–54.

153 *Id.* at 452–54; Lu, Wang & Olsen, *supra* note 151, at 4.

154 BRYSON, *supra* note 28, at 149–50.

155 RUTH LISTER, CITIZENSHIP: FEMINIST PERSPECTIVES 141 (2d ed. 2003).

156 *See* Rose, *supra* note 29, at 123 (describing the ways in which single mothers tend to blame themselves for their lack of time).

> What I find flustering about these accounts is how effortlessly they lend themselves to a narrative of personal responsibility . . . in which individuals are unapologetically held accountable for their own (mis)use of technology, and therewith for their time-waste and burnouts, as if these can be divorced from the newly emerged economy of attention and the technological milieu that sustains it.[157]

This conception of disconnection fits a broader tendency where "problems inherent to present-day capitalism are constructed as individual problems to be solved through self-improvement rather than political intervention."[158] Rather than a collective and liberatory practice, disconnection is an individual measure that centers on resilience[159] or "bounce-backability."[160] As Fast remarks, "In order not to break under the weights of flexibilized, neoliberal capitalism, workers are stimulated to take care of themselves."[161] This serves capitalism in turn by securing continued productivity.[162] Disconnection is not, therefore, in tension with the constant productivity model; on the contrary, it is framed as a means to ensure its sustainability. Disconnection serves the well-being of workers in spite of the pressures of "always-on" work culture, rather than diminishing them.

Furthermore, this individualized understanding of disconnection often inscribes itself within consumer activism, thus inevitably turning disconnection into a commodity. The positioning of disconnection as a healthy lifestyle choice opens new, lucrative markets.[163] From luxury digital detox retreats to apps blocking access to their user's phone for a limited period, calls to disconnect also serve to advertise a plethora of services that can purportedly help cement good digital habits.[164] In short, the emerging disconnection industry offers solutions to restore the perceived loss of self-control and meaningfulness resulting from

---

157 Hesselberth, *supra* note 141, at 1998.

158 Fast, *supra* note 10, at 1624.

159 *Id.* at 1617.

160 Rosalind Gill & Shani Orgad, *The Amazing Bounce-Backable Woman: Resilience and the Psychological Turn in Neoliberalism*, 23 SOC. RSCH. 477, 478 (2018).

161 Fast, *supra* note 10, at 1617.

162 *Id.* at 1618.

163 Lise-Marie Nassen et al., *Opt-Out, Abstain, Unplug. A Systematic Review of the Voluntary Digital Disconnection Literature*, 81 TELEMATICS & INFORMATICS 1, 1 (2023).

164 Fast, *supra* note 10, at 1618.

excessive connectivity.[165] This is of little surprise since, as Hesselberth notes, "[E]very form of (consumer) activism tends to open up new market potential."[166]

D. The Gendered Nature of Disconnection

The conception of disconnection as a lifestyle choice also has significant gendered implications. As women generally tend to be held to high standards with respect to maintaining a healthy, balanced lifestyle, disconnection runs the risk of becoming less a choice than a duty. Against the backdrop of women's duty to disconnect, Fast explores the tasks of what she calls the "post-digital housewife," which result from disconnection and, like other forms of housework,[167] "are vital for the management of daily life and to capitalist value creation."[168] Fast focuses specifically on the ways in which disconnected work forms an integral part of today's "second shift" and constitutes a form of digital labor.[169] Digital labor is continuous with older forms of domestic, devalued, "quasi voluntary" "women's work."[170] It is to emphasize this continuity that the term housewife is mobilized—a post-digital housewife can in fact have a full-time job. The task of the post-digital housewife after the disconnection turn is "to secure the digital health of family members,"[171] in yet another instance of unwaged care work. It includes, for instance, forms of post-digital parenting, such as monitoring a child's screentime.[172] Ironically, it seems that women must use ever more of their so-called free time to make sure that their loved ones disconnect. This fits a pattern where women's labor includes the generation of quality free time for others.[173] Such demands are especially present in upper-middle class milieus, where taking care to limit one's screentime and to let go of work demands outside of office hours has become an important social norm and is increasingly understood as a necessary element

165 Nassen et al., *supra* note 163, at 2.

166 Hesselberth, *supra* note 141, at 1999.

167 Melissa Gregg & Rutvica Andrijasevic, *Virtually Absent: The Gendered Histories and Economies of Digital Labor*, 123 FEMINIST REV. 1, 2 (2019); Kylie Jarret, *The Relevance of "Women's Work": Social Reproduction and Immaterial Labor in Digital Media*, 14 TELEVISION & NEW MEDIA 15, 22–24 (2014).

168 Fast, *supra* note 10, at 1622.

169 KYLIE JARRETT, FEMINISM, LABOUR AND DIGITAL MEDIA—THE DIGITAL HOUSEWIFE 2–4 (2016).

170 Fast, *supra* note 10, at 1622.

171 *Id.* at 1623.

172 *Id.*

173 BRYSON, *supra* note 28, at 134.

of any good, healthy family life.[174] Hence, as Fast points out, the post-digital housewife's position "seems at the same time privileged (notably in terms of class and ethnicity) and deprived (in terms of gender)."[175]

Thus, from a feminist perspective, disconnection from work becomes disconnection *as work*:[176] it is up to women to make sure that not only they, but also the people they care for, meaningfully disconnect. This task is especially difficult—if not straightforwardly futile—in a world as connected as ours. Indeed, "[t]he more we move towards 24/7 connectivity, the more work it is to permanently or temporarily disconnect, and the more work must be done to find compensatory solutions and alternatives."[177] Disconnection is then another item added to the list of the countless daily habits and unrealistic standards that women must make sure they and their loved ones adhere to and practice. In other words, rather than protecting women from constant work demands, disconnection becomes one more burden to carry, another demand placed on their time. Crucially, then, not only does flexible, digital work fail to fulfill its promises, but so does disconnection when framed as a personal choice. "The disconnection turn in work brings with it promises about increased worker autonomy and self-realization," but so did the forms of flexible work that this very turn seeks to address.[178]

IV. The Right to Disconnect

A. Turning Away from Choice: The Benefits of a *Right* to Disconnect

The right to disconnect has often been grouped with other measures characteristic of the disconnection turn. According to Fast, the right to disconnect represents just one manifestation of the turn among many, including "workfulness" programs, distraction-blocking apps and digital detox tourism.[179] Though I agree that the right to disconnect inscribes itself within the disconnection turn, I argue that it differs substantially from the other phenomena listed and avoids many of their pitfalls. Legal reforms—unlike

174 Fast, *supra* note 10, at 1623.

175 *Id.*

176 *Id.* at 1616.

177 TRINE SYVERTSEN, DIGITAL DETOX: THE POLITICS OF DISCONNECTING 10 (2020).

178 Fast, *supra* note 10, at 1624.

179 *Id.* at 1616.

phone-free holidays or self-help apps—represent a kind of collective bargaining that hold the potential to carry radical demands.[180] Although rights typically concern the individual, they are necessarily the result of collective mobilization. The right to disconnect, unlike manifestations of disconnection-as-lifestyle, does not restrict disconnection to the self-optimizing and self-care practices of a well-earning and highly educated elite. Instead, it frames disconnection as a collective guarantee belonging to each and every worker, one that protects them against the encroachment of work into every aspect of life. The right to disconnect, therefore, frames disconnection as a political demand inscribed in a long lineage of workers' rights, rather than as a lifestyle; as a legal guarantee, not as a personal choice; as a necessary condition for the protection of workers' health, not as a productivity-optimizing or pleasure-enhancing privilege; and as a means of limiting work's increasing demands on our time, rather than as an attempt to withstand and embrace these demands better.

As Fast notes, Trine Syvertsen identifies in disconnection a notable change from previous forms of media activism: "a shift in emphasis from improving the media to improving the user."[181] A similar observation could be made regarding disconnection from work in particular: the emphasis is placed on improving the worker, not the conditions of work. I nonetheless contend that the right to disconnect can break with this logic. As will be argued below, when it includes the prohibition of contacting employees outside of working hours, the right to disconnect seeks to improve the employer, not the employee—the working conditions themselves rather than the worker. The right to disconnect diverges from the logic sketched above by limiting additional encroachment of work on our time rather than urging workers to deal with its encroachment better. The point of the right to disconnect isn't to "'fix' workers' inept self-regulation,"[182] but to shift the responsibility for workers' well-being onto the law and the employers it is meant to regulate.

The right to disconnect not only has the advantage of shedding light on the shortcomings of workers' protection, but it also escapes the predominant disconnection discourse described above, which places the burden of disconnection on individuals. Echoing the old (yet ever-relevant) refrain, "the personal is political," demands for the recognition of a right to disconnect reframe what is often considered a personal matter—to be solved by making specific individual choices—as a structural workers' issue that can only be

180 *See* Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1548 (2022).

181 SYVERTSEN, *supra* note 177, at 73, *quoted in* Fast, *supra* note 10, at 1618.

182 Fast, *supra* note 10, at 1622.

dealt with collectively. In a pattern characteristic of social movements such as feminism, disconnection should be reconceptualized from a personal, individual choice, facilitated by the purchase of specific products and services, into a collective demand for change in the workplace, one that can be made visible, and at least partially met, through the enshrinement of rights.

B. A Comparative Legal Analysis

1. The French Model

As calls to enshrine a right to disconnect have grown over the last few years, disconnection has made its way into legal discourse. This right has not emerged in a vacuum; the right to disconnect is evidently anchored in the logic of both labor law (specifically working time legislation) and international human rights law (Article 24 of the Universal Declaration of Human Rights protects the right "to rest and leisure").[183]

The right to disconnect has been introduced into the national legislation of several countries. France was a pioneer in this regard,[184] the right having already been part of political discourse in the early 2000s[185] and having been the subject of a national cross-sectoral agreement as early as 2013.[186] The right to disconnect was made into law in 2016, introduced in the Loi El-Khomri, in the context of significant and controversial reforms in French labor law.[187] These reforms aimed to relax and simplify French labor law,[188] introducing, for instance, the possibility for employers to make company-specific

---

183 G.A. RES. 217 (III) A, Universal Declaration of Human Rights art. 24 (Dec. 10, 1948).

184 MARK BELL ET AL., A RIGHT TO DISCONNECT: IRISH AND EUROPEAN LEGAL PERSPECTIVES—A PUBLIC POLICY REPORT OF THE COVID-19 LEGAL OBSERVATORY 20 (2021); Isabel Vieira Borges, *R2D: The Right to Disconnect from Work*, *in* THE LEGAL CHALLENGES OF THE FOURTH INDUSTRIAL REVOLUTION, LAW, GOVERNANCE AND TECHNOLOGY 249, 262 (Dario Moura Vincente et al. eds., 2023); *see also* Loïc Lerouge & Francisco Trujillo Pons, *Contribution to the Study on the 'Right to Disconnect' from Work. Are France and Spain Examples for Other Countries and EU Law?*, 13 EUR. LAB. L.J. 450, 455 (2022).

185 Matteo Avogaro, *Right to Disconnect: French and Italian Proposals for a Global Issue*, 4 L.J. SOC. & LAB. REL. 110, 113 (2018).

186 Vieira Borges, *supra* note 184, at 262.

187 Avogaro, *supra* note 185, at 115.

188 BELL ET AL., *supra* note 184, at 21.

collective agreements bypassing the maximum weekly working time of thirty-five hours.[189] The right to disconnect was recognized in the law's third chapter, titled *Sécuriser les parcours [des salariés] et construire les bases d'un nouveau modèle social à l'ère du numérique* (securing employees' trajectories and building the basis of a new social model in the digital era), but the other reforms introduced alongside it triggered widespread unrest throughout the country, as they significantly weakened workers' protections.[190] Accordingly, it is important to place the French right to disconnect within its context: this important new form of worker protection in the digital era was recognized while other guarantees were weakened, and the right to disconnect was thereby overshadowed by the loss of protections workers otherwise suffered through the reform.[191]

The right to disconnect was subsequently added in Article L. 2242-8 of the French Labor Code. Paragraph 7 of the norm pertains to the mandatory collective bargaining on professional gender equality and on quality of work. Since paragraph 7 came into force on January 1, 2017,[192] collective bargaining must address the "modalities of the employee's ability to fully exercise his right to disconnection and the implementation by the company of measures to regulate the use of digital tools, with a view to ensuring respect for rest and vacation times, as well as personal and family life."[193] On May 9, 2018, any reference to the right to disconnect was eliminated from Article L. 2242-8, paragraph 7 having been repealed through Law No. 2018-771.[194] Today, the right to disconnect is enshrined in Article L. 2242-17, 7 ° of the French Labor Code. The Law No. 2021-1018 of August 2, 2021 established its most recent version.[195]

---

189 *Id.*

190 Avogaro, *supra* note 185, at 115; BELL ET AL., *supra* note 184, at 20.

191 BELL ET AL., *supra* note 184, at 21.

192 Avogaro, *supra* note 185, at 115.

193 CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L2242-8 ¶ 7 (2017) (author's translation).

194 Vieira Borges, *supra* note 184, at 262.

195 "La négociation annuelle sur l'égalité professionnelle entre les femmes et les hommes et la qualité de vie et des conditions de travail porte sur: . . . 7° Les modalités du plein exercice par le salarié de son droit à la déconnexion et la mise en place par l'entreprise de dispositifs de régulation de l'utilisation des outils numériques, en vue d'assurer le respect des temps de repos et de congé ainsi que de la vie personnelle et familiale. A défaut d'accord, l'employeur élabore une charte, après avis du comité social et économique. Cette charte définit ces modalités de l'exercice du droit à la déconnexion et prévoit en outre la mise en œuvre, à destination des salariés et du

The new regulation on the right to disconnect protects the employees of companies employing a minimum of fifty people, as well as all workers subject to *forfait en heures* ("hourly rate") or *forfait en jours* ("daily rate") regimes.[196] Doubts have since arisen about the application of the right to disconnect to companies with fewer than fifty employees.[197] In any case, making the right to disconnect a matter to be addressed within mandatory collective bargaining widens the personal scope of the right, making it applicable to employees in a wide range of sectors. The right to disconnect applies to both remote workers[198] and part-time employees.[199] However, it is worth highlighting that the right to disconnect applies only to salaried employees (*salariés*).[200] The French right to disconnect therefore excludes self-employed workers who provide services to companies as external contractors.[201] It also excludes the public sector, who fall under another legal regime.[202] A right to disconnect for the public sector has been debated in the French Parliament in the context of an intended reform of the civil service but was ultimately rejected in 2019. The reasons stated for this decision were the "specifics of the public sector and the necessity of continuous service."[203]

As the right to disconnect applies to a variety of contexts, some of which differ starkly from others, the right is formulated in general terms.[204] The French right to disconnect, as anchored in Article L. 2242-17 of the French Labor Code, has indeed been criticized for

---

> personnel d'encadrement et de direction, d'actions de formation et de sensibilisation à un usage raisonnable des outils numériques."

CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L2242-17 ¶ 7.

196 Avogaro, *supra* note 185, at 116.

197 Vieira Borges, *supra* note 184, at 262.

198 Assel Kaishatayeva et al., *Right to Disconnect: Complexities of Legalization (in the Context of International Regulatory Experience)*, 12 J.L. & SUSTAINABLE DEV. 11, 11 (2024).

199 BELL ET AL., *supra* note 184, at 23.

200 *Id.*

201 *Id.*

202 *Id.*

203 Confédération Française des Travailleurs Chrétiens, *Droit à la déconnexion pour le salarié: de quoi parle-t-on?*, CFTC (Nov. 13, 2019), https://www.cftc.fr/actualites/droit-a-la-deconnexion-en-2019-de-quoi-parle-t-on [https://perma.cc/T33R-X3JQ], *translated by* BELL ET AL., *supra* note 184, at 23.

204 Avogaro, *supra* note 185, at 116.

its vagueness.[205] The French state has left the task of detailing how the right to disconnect should be implemented to "social partners,"[206] i.e., organizations that represent employees and employers, because legislation failed to define the right beyond articulating general aims.[207] In particular, the choice of appropriate (technical) measures to ensure the right is respected and observed is left to the employer.[208] Mandatory collective agreements can implement a range of provisions and sanctions to enshrine the right and deal with any violations of it.[209] They can also contain programmatic norms aimed at the mitigation of health risks linked to "always on" work cultures.[210] In fact, the French framework places great emphasis on prevention.[211]

Crucially, if social partners in a given situation should find themselves unable to come to a collective agreement regulating the right to disconnect, Article L. 2242-17 of the French Labor Code delegates the power to the employer to unilaterally issue a charter in place of it.[212] Although the social and economic committee, a representative body mandatory for companies with at least eleven employees, must be consulted in this process,[213] the employer is not ultimately bound by its position.[214] This charter must guarantee the employee's right to disconnect and place a particular focus on the reasonable use of digital tools.[215] However, though violations of the obligation to negotiate the charter can be punished by a fine set at a maximum of 1% of the employer's remuneration and earnings,[216] the absence of a

---

205 BELL ET AL., *supra* note 184, at 21.

206 Avogaro, *supra* note 185, at 116; BELL ET AL., *supra* note 184, at 25; Kaishatayeva et al., *supra* note 198, at 11.

207 Laëtitia Morel, *Le droit à la déconnexion en droit français: La question de l'effectivité du droit au repos à l'ère du numérique*, 3 LAB. & L. ISSUES 1, 6 (2017).

208 BELL ET AL., *supra* note 184, at 25.

209 Avogaro, *supra* note 185, at 116.

210 *Id.*

211 Kaishatayeva et al., *supra* note 198, at 11.

212 BELL ET AL., *supra* note 184, at 22.

213 *Id.* at 22–23.

214 Lerouge & Pons, *supra* note 184, at 460.

215 Avogaro, *supra* note 185, at 116; BELL ET AL., *supra* note 184, at 22.

216 CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L2242-8 ¶ 3.

charter is not sanctioned.[217] Ultimately, French law "authorizes the company, without the involvement of employees, to unilaterally delimit this right."[218]

Because precise formulation of the right to disconnect has been left to social partners, its definition and modalities remain legally unclear. It is, for example, up to social partners to decide whether the right to disconnect is formulated as a right or as an obligation of the employee. That is, depending on the individual formulation of the right to disconnect, employees might be not only entitled but obliged to disconnect outside of working hours. The introduction of such an obligation into law, however, has been rejected.[219] Some commentators have found this rejection especially regrettable, arguing that an obligation to disconnect would have made the norm more effective.[220] Conversely, trade unions argued that the introduction of an obligation to disconnect would have placed the burden of drawing clear boundaries between work and private life on employees rather than on their employers.[221] Expressing a similar sentiment, Mark Bell et al. highlight, "What may be problematic about the above solutions is striking the right balance in order to ensure that the right to disconnect remains a right and does not turn into an obligation."[222] If an obligation were to be legally enshrined, the failure to comply with this obligation to disconnect could be used to weaken workers' protections, thus distorting the purpose of the right to disconnect.[223]

In short, the French approach to the right to disconnect is to recognize the right while leaving the specifics of its formulation and implementation to negotiations between employers and employees. As Isabel Vieira Borges argues, "[I]f there is no consensus

---

217 Lerouge & Pons, *supra* note 184, at 460.

218 Caterina Timellini, *Disconnection: A Right in a Phase of Progressive Definition*, *in* NEW FORMS OF EMPLOYMENT: CURRENT PROBLEMS AND FUTURE CHALLENGES 118, 122 (Jerzy Wratny & Agata Ludera-Ruszel eds., 2020).

219 Avogaro, *supra* note 185, at 116.

220 *Id.*

221 *Id.*

222 BELL ET AL., *supra* note 184, at 25.

223 *Id.* (discussing a 2016 agreement signed by the Société Générale bank, which specified that employees consulting or replying to any work-related messages outside of working hours of their own initiative would not be considered to be working). Such a clause is for instance in clear violation of French case law that makes clear that workers shall be remunerated for work performed outside of their usual working hours. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] soc., July 12, 2018, No. 17-13.029.

over the R2D measures and the internal mechanisms for regulating the use of digital tools, then it is the employer who will establish the rules, without any direct sanctions for non-compliance."[224] It seems necessary to point out that leaving so much latitude in the implementation of the right to disconnect to employers raises doubts about the effectiveness of the right. Not only can employers significantly shape the right to their advantage, but they also have the option not to respect it at all, especially given the lack of legal sanctions in case of non-compliance.[225] Crucial questions pertaining to working time and workload remain legally unanswered.[226] The French right to disconnect ultimately represents a "great manifestation of confidence in[] private regulation."[227]

2. The German Model

Given the importance of self-regulation in the French model, scholarship surprisingly often contrasts the model to the German approach to the right to disconnect. Germany has adopted a model that entirely relies on self-regulation: efforts to protect employees' right to disconnect must be made by companies themselves. There is therefore no right to disconnect enshrined in German legislation.[228] Over the last decades, several German companies—including Audi, Volkswagen, BMW and Telekom—have adopted their own codes of conduct, which state that employees should not be contacted outside of their working hours, except in exceptional and urgent cases.[229] These internal codes of conduct have the potential to change work cultures that have normalized constant connectivity and raise awareness of the risks associated with such systems.[230] However, "most of these guidelines only constitute recommendations and the practical implementation heavily depends on the direct superior."[231]

---

224 Vieira Borges, *supra* note 184, at 262–63.

225 *Id.* at 262.

226 Morel, *supra* note 207, at 7.

227 Reinhard Singer & Stephan Klawitter, *The Protection of Crowdworkers Under German Law*, *in* NEW FORMS OF EMPLOYMENT—CURRENT PROBLEMS AND FUTURE CHALLENGES 95, 102 (Jerzy Wratny & Agata Ludera-Ruszel eds., 2020).

228 Vieira Borges, *supra* note 184, at 272.

229 BELL ET AL., *supra* note 184, at 27; Nathalie Maier & Verena Ossoinig, *Freizeit und Beruf—Rechtliche und technische Unterstützung der Work-Life-Balance*, 41 DER BETRIEB 2391, 2393 (2015).

230 BELL ET AL., *supra* note 184, at 27.

231 *Id.*; Maier & Ossoinig, *supra* note 229, at 2393.

Nevertheless, the German state has deemed the self-regulatory approach sufficient, not recognizing the need to introduce a right to disconnect into its legislation.[232] The labor legislation defining workers' availability and protecting them against disproportionate workloads—the Working Time Act (ArbZG) of June 6, 1994[233] and the OSH Act (ArbSchG) of August 7, 1996,[234] as well as the European Union Directive 2003/88/EC[235]—are argued to adequately protect workers' health.[236] This position is shared by the German Trade Union Confederation (*Deutscher Gewerkschaftsbund*), which has argued that the issue of workers' being presumed to be constantly available is a problem resulting from failures to enforce current labor law rather than one requiring the recognition of a new right.[237] Bell et al., however, argue that this position is unconvincing, as "the narrative that there is no need for a right to disconnect because the current legal framework is cohesive and exhaustive is contradicted by the plethora of academic contributions on the matter."[238] There certainly remain significant grey areas within German labor law, one of which being the unclear definition of the kind of action that constitutes a disruption of a worker's rest period.[239] This is hugely significant as an interruption of a worker's rest should technically restart the count of the mandatory daily rest period of eleven hours under § 5(1) of the ArbZG.

The recent shift in the way work is organized and conceived poses a more fundamental problem that is not limited to German law. The protection of workers' health through mandatory rest periods and a limit on work hours is only effective if working hours are clearly defined and delimited. However, remote working, flexible working time models, or trust-based working hours do not allow for a strict schedule with clear differentiation

232 Vieira Borges, *supra* note 184, at 272.

233 Arbeitszeitgesetz [ArbZG] [Working Time Act], June 6, 1994, BUNDESGESETZBLATT [BGBL] I at 1170–71, as amended by art. 52 of the Law of October 23, 2024, BGBl at I 323.

234 Arbeitsschutzgesetz [ArbSchG] [OSH Act], August 7, 1996, BUNDESGESETZBLATT [BGBL] I at 1246, as amended by art. 7 of the Law of December 22, 2025, BGBl I at 369.

235 2003 O.J. (L 299) 9.

236 *Id.*

237 Bell et al., supra note 184, at 27–28; Deutscher Gewerkschaftsbund, Schriftliche Stellungnahme des Deutschen Gewerkschaftsbundes Ausschuss für Arbeit und Soziales, 19. Wahlperiode, Rahmenbedingungen für orts- und zeitflexibles Arbeiten, Homeoffice und mobile Arbeit, at 9 (Apr. 9, 2021).

238 BELL ET AL., *supra* note 184, at 29.

239 *Id.* at 28; Thomas UW Baeck, *Aktuelle Herausforderungen des Arbeitszeitrechts—betriebsnahe Vereinbarungen als Lösungsansatz, Ein Plädoyer für die Stärkung der Betriebsparteien in Arbeitszeitfragen*, 2020 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 96, 99 (2020).

between work and rest. This is where the flexibility gained by many professionals feeds into trends that ultimately lead to their exhaustion. Ultimately, when discussing the right to disconnect, "the crux of the legislative matter at hand lies within a balancing act of desirable flexibility and necessary protection of health and leisure."[240] In short, not only is it unclear what constitutes an interruption of a worker's rest period but also when a rest period starts and ends.[241] This leads to clear shortcomings in terms of workers' protection which cannot be addressed within Germany's current legislative framework, necessitating the explicit recognition and enforcement of a right to disconnect. In this regard, the German self-regulatory model provides too much leeway for companies to offer a right to disconnect that is weakened and ineffective at best, and non-existent at worst. Crucial decision-making power is left in the hands of employers who have clear interests in implementing the mildest right to disconnect possible.[242] With this in mind, and in light of the above presentation of the French approach, it seems that Germany's self-regulatory model is not as starkly different from France's as one might think. Both approaches ultimately leave much of the implementation and enforcement of the right to disconnect to the discretion of the employer, without introducing meaningful safeguards or sanctions to regulate employers' behavior.

3. The Portuguese Model

It therefore is particularly important to focus analysis on models of the right to disconnect that place more explicit constraints upon employers. Portugal's approach is noteworthy in this regard. The Portuguese right to disconnect was introduced by Law 83/2021, in force as of January 1, 2022.[243] The right is now enshrined in Article 199A of the Portuguese Labor Code. The introduction of the right was prompted by the COVID-19 pandemic, after many legislative proposals on the topic had been rejected on the grounds that Portuguese labor law already provided sufficient protection of workers' rest period.[244] Article 199A of the Portuguese Labor Code now dictates that:

240 BELL ET AL., *supra* note 184, at 29.

241 Vieira Borges, *supra* note 184, at 274.

242 This is the case although it has been proven that fewer working hours and consequently more rest are in fact to the advantage of employers, as it increases productivity. But a R2D still implies important efforts on the shoulders of employers that must ensure its respect. It also impedes on employers' flexibility, as it takes away their prerogative to contact employees at their convenience, even outside of working hours.

243 Lei n.º 7/2009 de 12 de fevereiro [Act no. 7/2009 of 12 February], https://diariodarepublica.pt/dr/legislacao-consolidada/lei/2009-34546475 [https://perma.cc/2U96-GLSU].

244 Vieira Borges, *supra* note 184, at 267–68.

> 1 – The employer has the duty to refrain from contacting the worker during the rest period, except in situations of force majeure. 2 – For the purposes of Article 25, any less favourable treatment given to a worker, namely in terms of working conditions and career progression, is a discriminatory action, for exercising the right to a rest period, under the terms of the previous number. 3 – It is a serious offense to violate the provisions of number 1.[245]

Crucially, rather than conceptualizing the right to disconnect as a right that can be exercised by the employee, the Portuguese approach imposes it as an obligation for the employer to abstain from contacting their employees outside of their working hours.[246] This choice is profoundly important. Firstly, it places the responsibility to protect the right to disconnect on the employer: employers must refrain from any contact, so that employees are not forced to systematically defend and assert their right to disconnect. Secondly and relatedly, choosing the employer's duty model over the worker's right model has the practical consequence of reversing the burden of proof: "the onus is on the employer to prove that the duty to ensure employee rest entitlement has been fulfilled" and that no contact was initiated outside of working hours.[247] This model clearly grants additional protections to workers compared to approaches that enshrine the right to disconnect solely as a worker's right and that leave significant leeway to employers in its implementation. Additionally, the Portuguese model has the advantage of conferring protection against discrimination.[248] It explicitly takes into account the very real possibility that under a laxer right to disconnect regime, employees striving to exercise their right could be disadvantaged in their career progression or even suffer disciplinary measures as a result. The Portuguese approach, however, does have critical flaws, the most notable being that the duty not to contact employees outside of their working hours only falls on employers.[249] This means that coworkers do not have to refrain from contacting their colleagues, leaving them free to potentially encroach on their colleagues' rest period and thereby jeopardize the right to disconnect.

---

245 CÓDIGO DO TRABALHO [LABOR CODE], art. 199-A.

246 Vieira Borges, *supra* note 184, at 268.

247 *Id.*

248 *Id.*

249 *Id.*

4. The Right to Disconnect in the EU

The above-cited examples are not the only interesting case studies available today. By now, many EU member states have joined the movement towards the recognition of the right to disconnect, including Spain, Belgium, Italy, Slovakia, and Ireland. It is then unsurprising that the EU Parliament has also taken up the issue. The EU legislation does not include an explicit right to disconnect but does provide protection to workers by requiring that employers ensure that their employees enjoy enough rest.[250] The protection of sufficient rest implies that workers should not be pressured to be constantly available and that they should have meaningful, uninterrupted breaks from work's demands. In fact, the right to disconnect can arguably already be derived from EU legislation,[251] and is implied in numerous EU instruments.[252] Still, enshrining a right to disconnect in EU legislation would protect workers' right to rest more emphatically and provide an opportunity to regulate the matter with more precision and clarity.[253] The European Parliament recognized this reality, passing a resolution containing a recommendation of the right to disconnect in 2021.[254] The resolution also recommended that the European Commission draft a Directive on the right.[255] The necessity of a European right to disconnect is clearly stated in the resolution, describing the right as "a fundamental right which is an inseparable part of the new working patterns in the new digital era," and which is "of particular importance to the most vulnerable workers and those with caring responsibilities."[256] The 2021

---

250 BELL ET AL., *supra* note 184, at 13; Vieira Borges, *supra* note 184, at 254.

251 Vieira Borges, *supra* note 184, at 254.

252 *See, e.g.*, Consolidated Version of the Treaty on the Functioning of the European Union art. 153(1)(a), (b), (i), Oct. 16, 2012, 2012 O.J. (C 326) 47; Charter of Fundamental Rights of the European Union art. 31, 20, 21, 23, Dec. 12, 2007, 2012 O.J. (C 326) 391; *The European Pillar of Social Rights Action Plan*, at 44–46, COM (2021) 102 final (Mar. 4, 2021); Council Directive 89/391, 1989 O.J. (L 183) 29; Council Directive 91/383, 1991 O.J. (L 206) 19; Council Directive 2019/1152, 2019 O.J. (L 186) 105; Council Directive 2019/1158, 2019 O.J. (L 188) 79; Council Directive 2002/14, 2002 O.J. (L 80) 29; Council Directive 2002/58, 2002 O.J. (L 201) 37; Council Directive 2003/88, 2003 O.J. (L 299) 9.

253 BELL ET AL., *supra* note 184, at 13.

254 *See* European Parliament Resolution of 21 January 2021 with Recommendations to the Commission on the Right to Disconnect, EUR. PARL. DOC. P9_TA(2021)0021 (2021), https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_EN.html [https://perma.cc/LD33-BZ4J]; Report with Recommendations to the Commission on the Right to Disconnect, EUR. PARL. DOC. A9-0246/2020 (2020), https://www.europarl.europa.eu/doceo/document/A-9-2020-0246_EN.html [https://perma.cc/2LHG-DMY6].

255 *See* EUR. PARL. DOC. P9_TA(2021)0021; EUR. PARL. DOC. A9-0246/2020.

256 EUR. PARL. DOC. P9_TA(2021)0021, at pmbl. H; *see* Vieira Borges, *supra* note 184, at 257.

European Parliament resolution provides information regarding the model that the EU is most inclined to follow. Article 1(1) indeed provides minimum requirements both to allow workers to exercise their right to disconnect and to ensure that employers respect the right.[257] The right is thereby conceived as both a worker's right to disconnect and an employer's obligation not to disrupt periods of rest. This approach seems to provide a more extensive and effective protection of the right to disconnect than other models do, similar to the Portuguese model presented above.

5. Non-European Models

It is worth highlighting here that the recognition of a right to disconnect is not solely a European phenomenon. In fact, several Latin American countries have enshrined the right in their legislation. Chile implemented a right to disconnect in March 2020,[258] followed by Argentina in July 2020[259] and Colombia in January 2022.[260] Both Chile and Argentina recognize the right to disconnect in the context of remote work. Argentina has further protected the right to disconnect by adopting a worker's right/employer's obligation model. As Article 5 of the Law 27.555/2020 states, on the one hand "the person who works under the telecommuting modality will have the right not to be contacted and to disconnect from digital devices and/or information and communication technologies, outside of their working day and during leave periods"; on the other hand, the employer "may not require [their employees] to perform tasks," "nor send communications, by any means, outside the working day."[261] Colombia's right to disconnect goes further: it applies to *all* workers, including those working in the public sector, and protects the worker's right "to have no contact, by any means or tool, whether technological or not, for issues related to their field or work activity, at times outside the ordinary or maximum legal working day, or agreed, or in their vacations or breaks."[262] The employer is obliged to refrain from contacting employees outside of their working hours; non-compliance "may constitute workplace harassment,

257 EUR. PARL. DOC. P9_TA(2021)0021, at art. 1(1).

258 *Id.* at 271.

259 *Id.*

260 *Id.*

261 Law No. 27555, art. 5, Aug. 14, 2020, [34.450] B.O. 3, https://www.boletinoficial.gob.ar/detalleAviso/primera/233626/20200814 [https://perma.cc/7UUH-S4KD] (author's translation).

262 Law 2191/2022, art. 3, enero 6, 2022, DIARIO OFICIAL [D.O.], https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=177586 [https://perma.cc/RDQ7-WGNY] (author's translation).

under the terms and in accordance with the provisions of Law 1010 of 2006."[263] The use of anti-harassment legislation to supplement the right to disconnect legislation is a unique addition that might facilitate the realization of such a right as an effective and enforceable right.

Outside of Europe and Latin America, Australia recently enshrined the right to disconnect in its labor legislation through the Fair Work Legislation Amendment (Closing Loopholes) Act 2024.[264] The Australian right to disconnect allows employees to "refuse to monitor, read or respond to contact, or attempted contact"—both from their employer and from third parties—"if the contact or attempted contact relates to their work and is outside of the employee's working hours."[265] There is an exception to this right: an employee may refuse contact except where "the refusal is unreasonable."[266] The law further details what factors should be taken into account in judging whether a refusal was reasonable or not.[267]

6. The (Non-Existent) U.S. Right to Disconnect

Despite this wave of recognition around the world, the right to disconnect is not popular everywhere. For instance, the United States, a country notorious for its intense work culture,[268] is nowhere near recognizing the right. As Paul M. Secunda highlights in his Article on the right to disconnect, "Overworking seems like the quintessential American ideal—only through hard work is one able to achieve the elusive American dream of upward social mobility."[269] In this context, it is unsurprising that a right to be truly disconnected

263 L. 2191/2022, art. 4, enero 6, 2022, DIARIO OFICIAL [D.O.], https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=177586 [https://perma.cc/9AQR-MYES] (author's translation).

264 *See generally* AUSTL. CHAMBER OF COM. & INDUS., THE RIGHT TO DISCONNECT (2024), https://acci.com.au/Common/Uploaded%20files/Smart%20Suite/Smart%20Library/a28a3645-1adf-496c-b0e5-ca00de6c893e/4531-ACCI-guides_The-Right-to-Disconnect-WEB.pdf [https://perma.cc/M9CS-SA5P] (providing an overview of the Australian right to disconnect).

265 *Fair Work Legislation Amendment (Closing Loophole No. 2) Act 2024* (Cth) s 333M(1)-(2), https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/num_act/fwlaln2a2024513/sch1.html [https://perma.cc/XTV2-VSPB].

266 *Fair Work Legislation Amendment (Closing Loophole No. 2) Act 2024* (Cth) s 333M(3), https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/num_act/fwlaln2a2024513/sch1.html [https://perma.cc/XTV2-VSPB].

267 *Id.*

268 Paul M. Secunda, *The Employee Right to Disconnect*, 9 NOTRE DAME J. INT'L & COMP. L. 3, 5 (2019).

269 *Id.*

from work, aiming to protect workers' rest, is not receiving much attention. Besides U.S. work culture, another central factor explaining the lack of momentum behind the right to disconnect in the United States is the thinness of workers' protections in U.S. law. Most U.S. workers are employed-at-will,[270] meaning that there is no formal contract between an employee and their employer. The work relationship can be terminated by either party at will, for any (legal) reason and at any moment.[271] Given the inherent power an employer has over their employees, most U.S. workers "work scared,"[272] fearing that they might lose their job. This has evident consequences on workers' relationship to free time: a worker scared of losing his or her job will answer any message and accept any request made by their employer, even outside of working hours.[273] It seems clear that U.S. law insufficiently protects workers, a majority of whom feel overworked and overwhelmed.[274] The right to disconnect is seemingly therefore the most important and urgent of all in a country like the United States. Given this pressing need, Secunda proposes a right to disconnect model that could fit the United States' legal framework: a right provided under the Occupational Safety and Health Act, which "allow[s] the implementation of enforceable default rules through its General Duty Clause, when there is no existing safety and health permanent regulation."[275] This model would include anti-retaliation features[276] and use regulations against workplace violence as a template.[277] Secunda's proposal is promising and shows that the recognition of a right to disconnect in the United States is far from impossible under U.S. law.

---

270 Jesse Rudy, *What They Don't Know Won't Hurt Them: Defending Employment-at-Will in Light of Findings That Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307, 330–31 (2002); *see* Secunda, *supra* note 268, at 25.

271 *See* Secunda, *supra* note 268, at 25.

272 *See id.* at 26.; *see also* David De Cremer et al., *Can Employees Really Speak Up Without Retribution?*, HARV. BUS. REV. (Oct. 18, 2016), https://hbr.org/2016/10/can-employees-really-speak-up-without-retribution [https://perma.cc/94AW-Y7R3].

273 *See* Secunda, *supra* note 268, at 26.

274 *See id.* at 27.

275 *See id.* at 32.

276 *See id.*; 29 U.S.C. § 660(c).

277 Secunda, *supra* note 268, at 32.

7. Comparative Insights

In light of the above, it is clear that the right to disconnect, like any right, is not monolithic. Its definition, scope, modalities and enforcement mechanisms can vary greatly. The right to disconnect can be explicitly legally enshrined, as is the case in France, or left to the discretion of employers and their companies' internal regulation, as in Germany. When legally enshrined, the right to disconnect can be provided under a state's labor law, as is most often the case, or under broader legislation pertaining to the economy or digital rights, as is the case in Belgium[278] and Spain.[279]

The personal scope of the right to disconnect also varies greatly. The question of whether the right should encompass all workers or only salaried employees is crucial. The term employee—as used, for example, in French legislation (*le salarié*)—implies a specific and codified work relation between the employer and the worker that is by no means universal. Many workers in dire need of a right to disconnect are not technically their employer's employee, as they are hired as on-demand external contractors. To exclude this kind of worker from the right to disconnect is especially regrettable given the rapid growth of the gig economy,[280] where workers enjoy little protection against health risks and economic exploitation.[281] When the right to disconnect only applies to employees, the question regularly arises of whether it should apply to only specific subcategories. For instance, as mentioned above, the French right to disconnect only applies to employees working in the

278 Loi du 26 mars 2018 relative au renforcement de la croissance économique et de la cohésion sociale [Law on Strengthening Economic Growth and Social Cohesion], M.B., Mar. 30, 2018, arts. 16–17, https://www.ejustice.just.fgov.be/cgi/article.pl?language=fr&sum_date=2026-02-19&pd_search=2018-03-30&numac_search=2018011490&page=1&lg_txt=F&caller=list&2018011490=0&view_numac=2018011490fx2018011490fx2018011490d%26%2365533%3B2018011490fx2018011490d&view_numac=2018011490fx2018011490fx2018011490d%26%2365533%3B2018011490fx2018011490d&htit=au+renforcement+de+la+croissance+%E9conomique+et+de+la+coh%E9sion+sociale&choix1=And&choix2=And&fr=f&nl=n&du=d&trier=promulgation [https://perma.cc/PC2G-HD6R].

279 Protección de Datos Personales y garantía de los derechos digitales art. 88 (B.O.E. 2018, 294), https://www.boe.es/buscar/act.php?id=BOE-A-2018-16673 [https://perma.cc/2UA3-RH68].

280 On the growth of the gig economy, see generally Gerald Friedman, *Workers Without Employers: Shadow Corporations and the Rise of the Gig Economy*, 2 REV. KEYNESIAN ECON. 171 (2014).

281 The gig economy is characterized by an on-demand labor model "that is compensated on a piece-rate basis." Paul Glavin et al., *Über-Alienated: Powerless and Alone in the Gig Economy*, 48 WORK & OCCUPATIONS 399, 403 (2021). Crucially, gig work represents an arrangement "outside standard employment contracts." NAMITA DATTA ET AL., WORLD BANK, WORKING WITHOUT BORDERS: THE PROMISE AND PERIL OF ONLINE GIG WORK 10 (2023), https://thedocs.worldbank.org/en/doc/75ec866c182238e087167ce03244c8da-0460012023/original/Reading-Deck-Working-without-borders-updated.pdf [https://perma.cc/59VG-SZPB].

private sector. Another relevant example is the Italian right to disconnect, which has been explicitly recognized in Article 19 of Law No. 81/2017.[282] The provision, however, only applies to "smart" or "agile workers" (*lavoro agile*),[283] that is, employees working partially or completely remotely. This is criticized by Reinhard Singer and Stephan Klawitter, since "anchoring the right to disconnect to the only typology of agile work recalls the behavior of the person who throws the stone and hides the hand, as it is absolutely evident that this problem is not (and cannot be) limited only to this working method, representing a problem shared by most employees today."[284]

Furthermore, the right to disconnect can be defined in various ways. It can be conceptualized as a worker's guarantee,[285] as a right or obligation to disconnect, or as the employer's obligation to abstain from contact. In other words, there remains the question of whether workers are entitled to disconnect outside of working hours or whether they must. The right to disconnect can also include a variety of obligations on the side of the employer, ranging from raising awareness about the health risks linked to "always-on" work cultures to an obligation to refrain from contacting employees outside of their working hours. The latter obligation could also apply to workers themselves, so as to prevent coworkers from exerting pressure on each other to remain constantly connected.

C. Proposal for an Effective Right to Disconnect

It is clear that many different models for the right to disconnect can be adopted to fit the needs of a particular legal regime or the specific working culture of a country. However, the choices made in defining and recognizing the right are not only shaped by circumstances. They are political decisions pertaining to a sensitive and fundamental issue: the protection of workers' health and well-being in a changing professional landscape marked by the

---

282 Art. 19, Misure per la tutela del lavoro autonomo non imprenditoriale e misure volte a favorire l'articolazione flessibile nei tempi e nei luoghi del lavoro subordinato [Measures to protect non-entrepreneurial self-employment and to promote flexible working time and place arrangements], n. 81, 22 May 2017, https://def.finanze.it/DocTribFrontend/getAttoNormativoDetail.do?ACTION=getSommario&id=%7B9872E708-F077-4699-AB74-F9DAECD29C24%7D#:~:text=81%20%2D,nei%20luoghi%20del%20lavoro%20subordinato [https://perma.cc/8D5J-YPZJ].

283 Avogaro, *supra* note 185, at 120–23.

284 Singer & Klawitter, *supra* note 227, at 124.

285 Whereas most states recognize a right to disconnect, Colombia for instance strengthens the protection of the right to disconnect by enshrining it as a statutory guarantee. Garantía del derecho a la desconexión laboral [Guarantee of the right to disconnect from work], L. 2191/22 art. 4, enero 6, 2022, DIARIO OFICIAL [D.O.].

digital turn of recent years. The specific definition, scope, and modalities of the right to disconnect chosen in a given context will have an enormous impact on the effectiveness of the right's implementation. It is thus paramount to specifically address them when arguing in favor of a right to disconnect from a feminist perspective. Advocating for a right to disconnect in vague, general terms runs the risk of obtaining a recognized yet ineffective right. This would be deeply unfortunate given the right to disconnect's potential in mitigating the gendered consequences of changing work conditions in the post-digital era. It is thus necessary to draw meaningful insights from comparative law. The European Law Institute, for instance, has provided a set of ten guiding principles for European regulation of the right to disconnect.[286]

An obligation to refrain from contacting employees or co-workers outside of working hours is, I argue, necessary for the right to disconnect to be effective. The case of Australia illustrates this well. Although the right to disconnect is perhaps too new for definite conclusions to be drawn, 79% of Australian employees surveyed were afraid to exercise their right to disconnect, although 80% of respondents were regularly contacted outside of working hours.[287] It therefore seems clear that fears of retaliation are too great for the right to disconnect to be truly effective when conceived solely as a worker's right. When understood as an employer's obligation, the right can be enforced without the need for workers to be put in the thorny situation of asserting their right against their employer.

The obligation to refrain from contacting employees or coworkers outside of working hours for work-related purposes raises the further question of whether exceptions should be allowed in exceptional cases. Though some countries that have implemented the right foresee such exceptions in their legislation, I am of the opinion that such clauses distort the right to disconnect to the point that they risk defeating its very purpose. Ultimately, workers will not be able to truly disconnect—and therefore properly rest—if they know that they might be contacted at any point for a work emergency. The knowledge that a work emergency might arise and that an urgent call might be received forces workers to keep their phones close, check them regularly, and to keep, in a sense, a part of their minds constantly at work. This is antithetical to meaningful rest and the fulfilling use of free time. To risk stating the obvious, the right to disconnect must imply the possibility of disconnecting

286 EUR. L. INST., GUIDING PRINCIPLES ON IMPLEMENTING WORKERS' RIGHT TO DISCONNECT 10–12 (2023), https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Guiding_Principles_Workers_Right_to_Disconnect.pdf [https://perma.cc/7J5U-XECQ].

287 Mia Lockett, *The 'Right to Disconnect' Not Improving Work-Life Balance*, INSIDE SMALL BUS. (Nov. 28, 2024), https://insidesmallbusiness.com.au/people-hr/the-right-to-disconnect-not-improving-work-life-balance [https://perma.cc/ZN34-HD7H].

completely for the full duration of a worker's rest period. Most "urgent" matters can realistically be foreseen in advance (e.g., when a significant deadline must be met). In such cases, workers can be asked to work extra hours and be financially compensated for them. Additionally, what qualifies as "urgent" is, in most professional fields, relative: most work emergencies can indeed be addressed the following workday. However, if a field of work involves recurrent and objective emergencies, clearly defined on-call periods should be put in place, during which workers who must remain available are therefore paid.

In my view, it is clear that the right to disconnect should have a personal scope that is as broad as possible, encompassing all employees at the very least, but arguably—within the limits that enforceability imposes—all workers, including gig-economy workers, who are among the most marginalized and least protected of workers but do not count as salaried employees. The protection of this category of workers remains too peripheral in discussions of the right to disconnect. The right is usually understood in connection with white-collar remote workers; it is their needs and concerns that take center stage in legislative efforts to enshrine the right to disconnect. Yet, as I argue in this paper, the right to disconnect is necessary for a range of workers across occupational classes, economic sectors, and organizational structures. As stated above, it is in fact the most precarious workers who would benefit most from the right to disconnect. Of course, the inclusion of on-demand, unsalaried workers in the scope of the right to disconnect poses important challenges: whereas white-collar knowledge workers' problem tends to be overwork, "many precarious workers are underemployed, in the sense that they are not able to work as many hours as they would like, or find that their hours fluctuate vary considerably from week to week."[288] Nonetheless, they should not be excluded from the scope of the right to disconnect. As Anne Davies points out:

> "[A] zero-hours" worker who is liable to be called in to work a shift at short notice will typically need to be capable of being contacted by the employer and able to get to the workplace reasonably quickly. Rather like "on call" time, this "available" time cannot be regarded as genuine rest time, nor is it remunerated.[289]

Penalties to discourage workers from turning down such shifts are well-documented: "there is a long-standing tradition that casual workers who turn down a shift may either be

---

288 Anne Davies, *Working Time*, *in* THE OXFORD HANDBOOK OF THE LAW OF WORK 349, 359 (Guy Davidov et al. eds., 2024).

289 *Id.*

removed from the employer's list altogether or not asked again for a period of time."[290] Such situations are especially dire for precarious women workers, who are often more likely to have to turn down such last-minute jobs due to their caring responsibilities, thereby facing consequences that they quite literally cannot afford. This constellation is one that should evidently fall under the right to disconnect's protection. Several proposals exist to ensure that workers are protected in such scenarios. For instance, the EU Directive on Transparent and Predictable Working Conditions requires that workers with unpredictable schedules be required to work only within "predetermined reference hours and days" and that they must be given reasonable notice ahead of shifts.[291] If one or both of these conditions are not met, workers cannot be penalized for turning down shifts.[292] As Davies points out, such norms are of great importance, as they give workers "a clear indication of when they cannot be called in to work at all" and provide them with "the opportunity to turn down last-minute shifts without suffering adverse consequences."[293] This kind of provision should be an integral and central part of the right to disconnect.

Furthermore, any approach to the right to disconnect that gives significant decision-making or rights-shaping power to employers is inadequate. Indeed, "where the law commands employers and employees to reach an agreement about the latter's 'right to disconnect,' this right appears to be neither mandatory nor binding."[294] Relying on self-regulation runs the risk that "employers will create rules that seem to favor employees on the surface, but in fact fail to provide substantive protections."[295] The specific rights and obligations that the right to disconnect implies must be enshrined as precisely and clearly as possible within legislation, leaving only the purely technical aspects of its implementation to employers. These precise obligations should mandate that both employers and coworkers abstain from work-related contact outside of working hours. Penalties for non-compliance should be put in place and clearly legally defined. Enforcement mechanisms must be

---

290 *Id.*

291 *Id.*

292 *Id.*

293 *Id.*

294 Hesselberth, *supra* note 141, at 2006–07.

295 Secunda, *supra* note 268, at 31. On the shortcomings of industry self-regulation, see generally Martha Lagace, *Industry Self-Regulation: What's Working (and What's Not)?*, HARV. BUS. SCH. (Apr. 9, 2007), https://www.library.hbs.edu/working-knowledge/industry-self-regulation-whats-working-and-whats-not [https://perma.cc/WA49-QVYZ].

modelled after other forms of worker protections enshrined within labor law or, as in the case of the United States, rely on contract law, tort law, and good faith protections.

With its many possible implementations, it is clear that the legal enshrinement of the right to disconnect is far from straightforward. This is especially true because the right reveals countless shortcomings and grey areas within labor law. More specifically, since the right to disconnect relies on the distinction between working hours (during which workers may be contacted) and free time (during which they may not), it sheds a harsh light on our growing inability to define what counts as a working hour. As mentioned in the context of Germany's approach to the right to disconnect, the increasing flexibility of work poses significant problems to our ability to measure and define working hours. As stated above, the fact that work has become untethered from any single physical place blurs the distinction between working and private life. For many people, work is where their laptop or their phone is—but so is their home, family life, and intimacy. The blurring of this distinction profoundly disrupts labor regulations that were made at a time when the definition of work was straightforward and easy to maintain: work was performed in a fixed place during predefined, specific and often unchanging hours. The right to disconnect relies upon a work/private life distinction that should be legally uncomplicated but, due to far-reaching changes in work organization and conditions, is no longer clear. However, this uncertainty cannot be used as an argument to reject the recognition of the right to disconnect. On the contrary, the gaps it exposes only highlight the right's potential. The right to disconnect forces us to recognize the flaws in current work legislation and creates a clear incentive to remedy them. The reasons why the right seems unrealizable or unenforceable are the same reasons why workers' protection in general is immensely weakened. In short, the difficulties in enshrining an effective right to disconnect are due to labor law's shortcomings rather than the right's inherent unfeasibility. Rather than giving up on a new, necessary right, significant focus should be placed on updating labor law. These efforts must include the codification of a right to disconnect and a rethinking of the ways in which work hours are defined and counted that enables the right's effective exercise.

D. The Right to Disconnect as a Feminist Demand

The right to disconnect—if conceived as described above—could play a role in resolving an issue that disproportionately impacts women. Though the right to disconnect does not remedy the gendered division of (unpaid) labor and its unfairness, it does protect women from the exacerbation of time poverty—and resulting exhaustion—they suffer by preventing waged work's demands to cumulate with those of unwaged labor in the home.

Could the right to disconnect then be understood as a feminist demand? Work—whether waged or unwaged—has often been at the center of feminist concerns. Feminist demands regarding work have tended to be articulated on two axes: either as a demand for women to gain better access to waged work as a "ticket out of culturally mandated domesticity,"[296] or as a demand for the unwaged labor they perform to be revalued and recognized as work.[297] That is, feminists have traditionally asked for more or better work, or for their unwaged labor to be recognized as work. As Weeks points out, although such demands are important, they leave the ethics of work intact.[298] Indeed, both kinds of demand treat waged work as the standard against which all labor must be measured. Feminists have thereby tended to maintain work's centrality and sanctification, rather than challenge them. Weeks underscores the necessity for women to mobilize around anti-work politics: the demand for more and better work can be a feminist demand, but so can the call for less work.[299] Of course, "the point is not to deny the present necessity of work or to dismiss its many potential utilities and gratifications, but rather to create some space for subjecting its present ideals and realities to more critical scrutiny."[300]

In a sense, the right to disconnect is a step in the direction Weeks preconizes. It can inscribe itself not only as a way to protect women from the disproportionate and specific impact constant work-availability has on their lives, but also as a way to resist work's slow encroachment upon every space. The right to disconnect is consequently a feminist demand in at least two ways. Not only does the right help to mitigate the negative gendered effects of constant connectivity pressures, but it also participates in the crucial feminist fight against the intrusion of waged work's demands, logic, and ethics into all aspects of our lives.

This statement must, however, be nuanced. The right to disconnect only demands less work insofar as work currently violates existing labor legislation. Since workers are pressured to remain constantly available to employers, they enjoy less free time and perform more work than existing labor legislation intended them to. To put it differently, demands for the recognition of the right to disconnect only call for proper adherence to the legal status quo. Rather than expanding workers' rights, the right to disconnection only

---

296 WEEKS, *supra* note 37, at 12.

297 *Id.* at 13.

298 *Id.*

299 *Id.*

300 *Id.* at 17.

protects workers from the erosion of the rights they already have, and above all, the right to meaningful, uninterrupted rest. Although the right to disconnect is a step in the direction of feminist anti-work engagement, it remains only that: a first step. It is a defensive maneuver, meant to resist the crumbling of workers' rights rather than to demand more extensive protections or more free time. The right to disconnect nevertheless has the advantage of questioning what role and room waged work should be given in our lives. It prompts us to politicize free time anew and to see waged work as disproportionately central to our lives. This kind of reframing of work as a threat to our collective well-being, rather than a vector for it, is especially important in an era where work is understood as a privileged site of self-actualization.

It is also worth highlighting that, for the right to disconnect to constitute a feminist demand, gender must be an integral part of its formulation. This inclusion has not been present in the legal orders examined: the norms enshrining the right to disconnect discussed in this paper are all formulated in gender-neutral ways. This formulation is problematic from a feminist perspective, as gender-neutral laws tend to reinforce male norms.[301] Gender must be taken into account during legislative processes and explicitly included in laws enshrining the right to disconnect to ensure women's interests have genuine legal protection. The feminist potential of rights will otherwise remain limited.

CONCLUSION

Work is increasingly flexible, remote, on-demand, and in many ways more precarious. Some of these changes have been welcomed, as salaried work in a bounded space during specific, unchanging hours is a rigid framework that can prove stifling. But the newfound flexibility of work has also come at great social costs, including sinking standards of worker protection. Office hours—and the limits they set to protect workers from overwork—have become increasingly meaningless as work is performed remotely, according to flexible and changing schedules.[302] The lack of clear delineation between waged work and free time is only worsened as workers—whether they perform their tasks at a designated workplace or remotely from a place of their choice—are increasingly expected to remain available at all times for work. They can not only be contacted at any time by colleagues and employers alike, which already represents an intrusion of work into their private life, but can also be

---

301 *See generally* Abigail C. Saguy, Juliet A. Williams & Mallory Rees, *Reassessing Gender Neutrality*, 54 L. & SOC'Y REV. 7 (2020) (critiquing 'gender-neutrality' in law).

302 Davies, *supra* note 288, at 350.

encouraged to answer to work-related inquiries in their free time. This definitionally strips free time of its restful potential.

In this Article, I have argued that the increasing intrusion of work into employees' free time has significant gendered consequences, focusing my analysis on the gendered politics of free time. Women have much less genuinely free time than men: not only does their disproportionate shouldering of unpaid work leave less time for leisure, but their leisure is itself often interrupted by the people they are the primary carers for and fragmented between the countless tasks they take on each day. The intrusion of work into women's private lives is therefore of particular importance, as it risks nibbling away the already scarce time they can dedicate to leisure. In short, according to Bryson, recent research seems to show that "many people are indeed highly time stressed and that in general the pressures are particularly acute for women, whose time remains disproportionately constrained by domestic responsibilities."[303]

In this context, I turn to disconnection as a potential solution to counter the expectation that workers must always be reachable and available for work. Although disconnecting from professional emails and private social media alike may be a healthy habit to adopt, this option is simply not available to most. Many people fear reprisal if they are unreachable by work outside of office hours. Disconnection, when understood as an individual choice, is strikingly ill-equipped to face the challenges contemporary forms of work entail. Not only does this conception of disconnection depoliticize the issue by treating it as a form of self-care, but it also proposes a solution only available to the most privileged. Few people can meaningfully disconnect from work without potentially facing consequences. When framed as an individual choice, disconnecting is only possible for those who do not risk their livelihood by doing so. Moreover, disconnection-as-lifestyle-choice is especially unfit to protect women from overwork, as the burden of ensuring that they and their loved ones make the healthy, socially-valorized choice to disconnect each day inevitably falls disproportionately on their shoulders. Disconnection thus becomes one more issue that women must think about, one more habit they must adopt, and one more value that they must uphold for themselves and their family. Disconnection *from* work becomes disconnection *as* work. This shift is evidently profoundly problematic, as the solution to technologically enabled and managerially encouraged overwork cannot be exclusionary. It is only if disconnection is framed as a collective demand that the most precarious workers—those that work's growing omnipresence most direly affects—will be able to fight against the expectation of constant availability.

---

303 BRYSON, *supra* note 28, at 177.

In order to move away from an individualistic, depoliticized conception of disconnection, the language and framework of rights is immensely useful. In fact, the right to disconnect has already been enshrined in several legal orders across the world, from France and Portugal to Chile and Australia. The modalities of the right vary greatly from one country to another. It can be framed as a worker's right to disconnect, but also as an employer's obligation to refrain from contacting employees outside of working hours; its personal scope can include different segments of the population, including or excluding non-salaried or public sector workers. In this Article, I have argued that the right to disconnect offers weak protection when too many of its modalities are left legally undefined or when it fails to include an employer's obligation to abstain from contacting employees outside of working hours. Therefore, I contend that the right to disconnect must be conceived both as a worker's right and an employer's obligation; that it must be defined in detail in legislation and accompanied by clear penalties in case of noncompliance; and that it must include precarious, non-salaried workers in its personal scope.

The right to disconnect, thus conceived, can and must be understood as a feminist demand in at least two ways: first, because it seeks to resolve an issue that disproportionately affects women, and second, because it meaningfully participates in feminist anti-work politics. The right to disconnect can and should therefore be mobilized by feminists as a feminist demand embedded in workers' struggle, so that it can take into account women's experiences, interests, and needs.

However, there are broader issues underlying the negative effects of flexible work that the right to disconnect cannot remedy by itself. For this reason, the right to disconnect should not be addressed without highlighting certain fundamental problems relating to labor under contemporary capitalism. First, the right to disconnect cannot solve the fundamental problems entailed by the rise of the gig economy, forcing workers into highly precarious employment strung together from individual "gigs" where they still work yet legally do not have a job.[304] Labor law in general must be thought over and its concepts redefined to better fit work's contemporary forms if it is to avoid the rapid further erosion of workers' protection. What an employer, an employee, and, crucially, working time *is* must be reevaluated, as their current legal definitions leave such enormous loopholes in workers' protection that labor law's very purpose is undermined.[305] Precarity in general must be fought against if the right to disconnect is to be truly effective, as many workers are currently "so in need of work and pay that they will make themselves available without

304 *See, e.g.*, Friedman, *supra* note 280, at 171–73.

305 Davies, *supra* note 288, at 361.

getting paid to do so."[306] In this context, it is imperative to steer away from narratives that frame flexibility as a win-win situation for employers and workers, because "[t]he flexibility offered by precarious forms of work is almost always much more beneficial to employers than it is to workers."[307]

Furthermore, any broader discussion of the right to disconnect in relation to the gender politics of free time must include discussions of unwaged work. Without this consideration, only one part of the average woman's working day is accounted for, while an entire shift is ignored.[308] It is only by simultaneously advocating for workers' rights (accounting for waged work) and challenging the gendered division of labor (by considering unwaged work) that free time can be both created and protected. This approach also ensures that the specter of the "work-life balance" discourse is kept at bay. Indeed, arguments in favor of the right to disconnect often mention its potential to improve work-life balance.[309] Ironically, this same argument was used to promote flexible work arrangements. Work-life balance remains an ever-present and vague promise, always on the horizon but never quite reachable; it will remain so as long as it ignores the underlying problem of the exploitation of women's unpaid labor. The right to disconnect—just like flexible work—will not realize the promise of work-life balance. Women will both feel and be exploited as long as waged labor's demands and logic keeps expanding into every aspect of life, and as long as unwaged labor remains undervalued and unfairly distributed. Whereas the right to disconnect seeks to mitigate the former phenomenon, the latter remains unaddressed by it. A feminist demand for less work must then "link this critical analysis of waged work to an interrogation of the organization of both waged and unwaged reproductive work."[310] The broader issue underlying this Article is the undervaluing of care amid the erosion of welfare states.[311] Although my analysis focuses on a specific aspect of the relation between gender and work, many other research foci and political demands are necessary to ensure

---

306 *Id.* at 359.

307 *Id*.

308 Meg Luxton, *Time for Myself: Women's Work and the 'Fight for Shorter Hours'*, *in* FEMINISM AND POLITICAL ECONOMY: WOMEN'S WORK, WOMEN'S STRUGGLES 167, 176 (Heather Jon Maroney & Meg Luxton eds., 1987); *see* WEEKS, *supra* note 37, at 211.

309 *See, e.g.*, EUR. L. INST., *supra* note 286, at 15 ("[T]he R2D will contribute to achieving a better work-life balance, by guaranteeing resting time and improving the predictability of working schedules.").

310 WEEKS, *supra* note 37, at 172.

311 Trudie Knijn, *Marketization and the Struggling Logics of (Home) Care in the Netherlands*, *in* CARE WORK, GENDER, LABOR AND THE WELFARE STATE 232, 235 (Madonna Harrington Meyer ed., 2000).

that leisure becomes and remains a possibility for women. These include better public service delivery and provision of welfare, as well as accessible child and elderly care.[312] The fight for free time comes hand in hand with the fight against the gendered division of labor, as Weeks puts it:

> To the extent that the present organization of domestic labor is not contested and employers can continue to make distinctions between workers on the basis of their assumed responsibility or lack of responsibility for the work of social reproduction, we are more likely to be offered what are alleged to be solutions for the problem of long working hours—more part-time, flextime, and overtime work, and multiple jobs—than we are to win shorter hours for all workers.[313]

Of course, the gendered impact of flexible work is complex; flexibility is by no means an unadulterated evil. However, as Chung and van der Lippe counsel, "[F]lexible working can be useful in enabling a better work–life balance and family functioning, yet we need to be aware of the potential gendered ways in which it is being/and is expected to be used."[314] Many women might genuinely find their quality of life improved by flexible work arrangements and do feel like work can be left aside at the end of the day. Research also shows that many skilled professionals of all genders value flexible work arrangements while being aware of the accompanying risks.[315] Though it is tempting to rely on such cases to frame boundaryless work as a neutral phenomenon impacting individuals differently, it is necessary to draw attention to the demonstrable negative consequences of flexible work on women as a whole. Indeed, "[e]ven though workers may not all want the same things, there is still an important role for collective solidarity in creating conditions in which workers may effectively express their personal needs."[316] Accordingly, it is not my intention to claim that flexible work is inherently damaging to gender equality or to women's well-being. Rather, I wish to highlight the need to mitigate the negative gendered effects of it. Such efforts, I argue, can be helped by the recognition and implementation of a binding and well-defined right to disconnect as sketched in this Article. They will never, however,

---

312 WEEKS, *supra* note 37, at 172; *see* van der Meulen Rodgers, *supra* note 74, at 97–101 (proposing similar policies).

313 WEEKS, *supra* note 37, at 162.

314 Chung & van der Lippe, *supra* note 4, at 375.

315 Mazmanian, Orlikowski & Yates, *supra* note 59, at 16.

316 Davies, *supra* note 288, at 361.

be fully successful without broader changes in the way gender is constructed and enforced. As Chung and van der Lippe argue, "[F]lexible working is not used in a vacuum and as long as our gender normative views about mothers and fathers roles do not change, the way people perceive flexible working will be used by men and women is unlikely to change and will feed into how they will in fact be used."[317]

The right to disconnect, then, is only a first step—an essential damage control measure to limit waged work's expansionist logic. It is a necessary condition for preserving what William Morris identifies as a definitional element of the kind of work worth doing: "rest enough and good enough to be worth having."[318] Genuinely free time is worth being fought for. Far from being a fixed resource at our disposal, it "must first be made before it can be spent."[319] Like any resource, it is the terrain of competing claims and political antagonism; it must be fought for, won, and distributed justly. Based on the analysis above, it is evident that women's access to their fair share of it is long overdue. Not only do women already suffer from a lack of leisure time due to the unwaged labor they take on, they are now also overwhelmed by potentially never-ending waged labor demands creeping in through contemporary communication technologies.

In an important sense, women have never enjoyed a work-free home. The household has always had unrecognized, undervalued, and unpaid labor. It has always been a place of work. However, this is no reason to allow the demands, temporality, ethics, and logic of waged work to encroach upon the home. On the contrary, it is ever more critical to demand work-free spaces and time frames. Not only are such work-free moments necessary for women's mental and physical health, but they also leave room to create meaning and enhance life's pleasures. Weeks underlines the radical potential of demanding time "for what we will," that is, not just more family time but also time to spend outside of and beyond the family. As Weeks writes:

> The demand would be for more time not only to inhabit the spaces where we now find a life outside of waged work, but also to create spaces in which to constitute new subjectivities, new work and nonwork ethics, and new practices of care and sociality.[320]

---

317 Chung & van der Lippe, *supra* note 4, at 376.

318 WILLIAM MORRIS, USEFUL WORK VERSUS USELESS TOIL 99 (Cambridge Univ. Press 2013) (1884).

319 Everingham, *supra* note 109, at 340.

320 WEEKS, *supra* note 37, at 174.

The demand for the right to disconnect must inscribe itself within "a movement for the time to imagine, experiment with, and participate in the kinds of practices and relationships—private and public, intimate and social—that 'we will.'"[321] Only with genuinely free time can women wonder about what they want and need, find new desires out, and, in turn, organize around and make claims based on these recovered or newly-created wants. In other words, demanding free time means claiming time both for what we will and for finding out what precisely that means. The right to disconnect, therefore, constitutes a feminist demand in the face of the encroachment of waged work upon the time necessary not only to rest but also to wonder, question, revolt, and create—the time necessary to become otherwise and to take the world along with us in that change.

321 *Id.* at 171.