BERKELEY JOURNAL OF GENDER, LAW & JUSTICE

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From the Membership

The Berkeley Journal of Gender, Law & Justice is guided by an editorial policy that distinguishes the Journal from other law reviews and feminist publications. Our mandate is to publish feminist legal scholarship that critically examines the intersection of gender with one or more other axes of subordination, including, but not limited to race, class, sexual orientation, and disability. Therefore, discussions of “women’s issues” that treat women as a monolithic group do not fall within our mandate. Because conditions of inequality are continually changing, our mandate also is continually evolving. Articles may come within the mandate because of their subject matter or because of their analytical attention to differences in social location among women. The broad scope of this mandate, and the diversity of scholarship it supports, is reflected in this volume of the Berkeley Journal of Gender, Law & Justice.

The majority of pieces submitted to this Journal, however, do not fall within the mandate. There are far too few of us in legal education and practice committed to advocating for women, let alone focusing on those women least served by the legal system. Rather than abandon or modify our mandate in response to the limited pool of available scholarship, we hope to cultivate and support such scholarship by recommitting ourselves to the vision our mandate reflects. We need your help. This forum can only exist with the vigorous participation of thinkers and writers nationwide who share our vision and our commitment. We urge you, our readers and friends, to consider the issues raised in the Berkeley Journal of Gender, Law & Justice as you pursue your own work. Share your work-in-progress with us. Publish with us. Tell your colleagues, students, and teachers about us. If you read an unpublished paper or hear a speech at conference that addresses the mandate of the Journal, refer it to us. Join us in nurturing and critically engaging the legal research, theories, and strategies required to serve the interest we share in social justice.
From the Editors

We are proud to present Volume 35 of the Berkeley Journal of Gender, Law & Justice. We are deeply grateful to you, our readers, for your continued support of the Journal and the community it fosters. This Volume of the Journal continues in our commitment to intersectional feminist issues. Our commitment has only grown in an increasingly volatile political climate in which the erosion of basic rights for the underrepresented, particularly undocumented persons and persons of color, is both unprecedented and normalized by those in power.

The articles in this Volume reflect these concerns. They call attention to the failings of political, judicial, and social systems that continuously marginalized communities we care most about. But these articles also reflect the Journal’s continued optimism that by raising up the voices that call for change, we might play a small part in broadening the lens of legal scholarship.

Over the past thirty-five years, our membership has striven to read, analyze, and promote work that engages fully with the injustice that legal systems around the world reflect, perpetuate, and work to address. We are honored to continue that work through publication of academic scholarship. Our home institution, the University of California, Berkeley, School of Law, hosts all of our past issues in the online repository where every article we have published is available for free at https://www.law.berkeley.edu/library/journals/bglj. Beginning with our next volume, we will no longer be publishing in print.

We open Volume 35 with a critical look at our own profession. In Women Law Deans, Gender Sidelining, and Presumptions of Incompetence, Laura M. Padilla updates her previous article examining the demographics of deans of ABA and AALS member law schools. Padilla presents her own data, based on surveys sent to the deans of ABA and AALS law schools. While the percentage of women and in particular women of color in deanship positions has increased since her last article, there is still a large gap between the percentage women in these powerful positions, and the percentage women make up in the general population. This article explores some of the possible reasons for such a gap, including the difficulties of gender sidelining and presumptions of incompetence that women face even if they are able to obtain these positions. Padilla uses data from surveys to illustrate these points, and to suggest actions that may help in closing the gender gap in law deanships.

As a membership, we remain dedicated to examining and reexamining our understanding of key terminology, not the least of which is “intersectionality”
itself. In their article *Reconceptualizing Intersectionality in Judicial Interpretation: Moving Beyond a Formalistic Account of Discrimination in the HRC Opinions in Yaker and Hebbadj on French Prohibitions of Islamic Coverings*, Monika Zalnieriute & Catherine Weiss critique the U.N. Human Rights Committee’s current interpretation of “intersectional” discrimination. Zalnieriute and Weiss advocate for a contextual approach to intersectionality that resists over-policing historically oppressed groups and instead encourages judicial systems to consider that patriarchal and oppressive practices transcend religion, race, and culture. Beginning with recent HRC decisions, Zalnieriute and Weiss put forward a call to judicial bodies globally to engage with questions of intersectional oppression in a more honest, holistic, and productive manner.

In the past several years, healthcare policy has become an issue that influences myriad other social justice reforms. In her article, *When the Body Is a Weapon: An Intersectional Feminist Analysis of HIV Criminalization in Louisiana*, Rachel Brown examines how women, particularly Black and trans women, living with HIV in Louisiana have been subjected to harmful state action as the result of their HIV positive status. Brown critiques the way Louisiana law has elided a medical condition with criminality, often to the detriment of marginalized groups of women. Brown provides history of the state’s response to HIV through legal systems and in the process depicts a number of ways that people who need assistance and compassion from state welfare systems have been penalized through no fault of their own.

In *Locking Up Children: Detention-as-Protection for Child Sex Trafficking Victims*, Venna Subramanian explains the dilemma of how to best service child victims of sex trafficking. First examining the depth and breadth of the problem, Subramanian explains the types of individual, familial, and social factors that put so many children at risk of becoming victims of trafficking. Subramanian then turns to the current systems in place for addressing the issue, arguing that juvenile detention punishes and re-traumatizes victims, while an underfunded child welfare system is unable to address the unique needs of trafficking victims and often creates a “revolving door” between the child welfare system and sex trafficking. Subramanian further discusses the ways in which these systems strip victims of their agency and net-widen in order to bring child victims within the system. To avoid these harms, Subramanian argues for a public health approach to trafficking victims that would focus on early prevention, community buy-in, and centering victim agency.

Lastly, James Hampton looks at the way the Supreme Court has responded to other intersections between the law and healthcare policy in *The First Amendment and the Future of Conversion Therapy Bans in Light of National Institute of Family and Life Advocates v. Harris*. By examining the recent developments surrounding First Amendment professional speech jurisprudence, Hampton argues that the
recent *NIFLA* decision should not roll back constitutional protections for conversion therapy bans enacted by state and local government. The decision, which struck down a California law requiring crisis pregnancy centers to post notices informing patients about access to abortion services, raises potential questions about which standard of scrutiny should apply to statutes banning medical professionals from participating in conversion therapy that attempts to “cure” a minor of homosexuality. Hampton argues that because conversion therapy bans apply to conduct that merely incidentally includes speech, they should be analyzed under intermediate scrutiny, and thus pass constitutional muster.

***

On behalf of the *Journal’s* membership and Editorial Board, we once again thank you for sharing our commitment to intersectional feminist legal scholarship. We hope the ideas put forth herein will open new avenues of thought and spur discussion in the legal field and beyond. It is our strongest desire that all of our collective voices be heard.
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Thank You, Friends & Sponsors

Since its inception, the Berkeley Journal of Gender, Law & Justice has relied on the tireless efforts of contributors and editors to bring thoughtful, passionate scholarship into publication. But we have not, and cannot, do so alone. We rely on our friends, alums, sponsors, and broader community to sustain the life of this journal. Without their support this journal would not be a community of advocates for social justice. One of many ways our friends have supported us is through financial contributions. To our friends:

Laura Beckerman  
Barbara Flagg  
Hannah Haksgaard  
Sue Hansen  
Becca Rausch

we thank you for your ongoing support and commitment to the journal.
Women Law Deans, Gender Sidelining, and Presumptions of Incompetence

Laura M. Padilla†

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INTRODUCTION

In 2007, I wrote A Gendered Update on Women Law Deans: Who, Where, Why, and Why Not? [hereinafter A Gendered Update].1 which examined the number of women law deans, including women of color, their paths to deanships, and what the future might hold for decanal leadership from a gendered and racialized lens. A Gendered Update reported that in the 2005-2006 period, thirty-one law deans at the 166 Association of American Law Schools (“AALS”) member schools were women (18.7%).2 Only three of the thirty-one women law deans were women of color (1.8%).3

Much new scholarship concerning women in leadership has emerged since I wrote A Gendered Update. One book and one article in particular prompted me to return to the topic of women law deans. In 2012, the University Press of Colorado published the groundbreaking book, Presumed Incompetent: The Intersections of Race and Class for Women in Academia [hereinafter Presumed Incompetent].4 Presumed Incompetent is a powerful collection of essays that explore presumptions of incompetence that haunt women of color in the Academy.5 It noted, “[a]lthough intellectually we understand institutionalized systems of domination, study them, and teach their details and histories, in our hearts and innermost selves we may also—at the same time—somehow internalize the ideas about our presumed incompetence that are so pervasive in our everyday lives.”6 The same presumptions of incompetence that accompany women when they enter the Academy often follow them up the career ladder through the tenure process.

2. Id. at 461. Note that some schools had female interim deans, but I did not include them in the percentage set forth above because of their temporary status. During that same reporting period, 135 of the 166 AALS-member schools (81.3%) had male deans.
3. Id. at 461-64 (especially notes 79-82).
4. PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA (Gabriella Gutiérrez y Muhs, Yolanda Flores Niemann, Carmen G. González & Angela P. Harris eds., 2012).
5. Institutions of Higher Education are commonly referred to as the Academy. See, e.g., Chad Wellmon, The University is Dead, Long Live the Academy! Reflections on the Future of Knowledge, ABC NEWS (Nov. 6, 2017), https://perma.cc/FQU5-C4PJ (“When I refer to The Academy, I mean those activities, practices, goals and norms related to the creation, cultivation and transmission of knowledge.”).
6. See PRESUMED INCOMPETENT, supra note 4, at xi.
These presumptions are even present when women are appointed as deans, sowing seeds of doubt about their competence and undermining what may appear from the outside to be enviable careers.

Professor Jessica Fink wrote *Gender Sidelining and the Problem of Unactionable Discrimination* [hereinafter *Gender Sidelining*], which was published in 2018.™ *Gender Sidelining* explores harmful gender-generated behaviors which are neither actionable nor significant enough individually to warrant a comprehensive response, but whose cumulative effect can be devastating:

>[W]omen experience . . . adverse treatment at work that the law does not address: [Men] workers often garner more of the limelight than their [women] coworkers, attracting more attention and recognition. Women often lack access to important opportunities or feel subjected to greater scrutiny than their [man] peers. . . None of these slights, in isolation, likely would give rise to a viable antidiscrimination claim. Yet collectively, these incidents— . . . “gender sidelining”—accumulate to create very real obstacles and barriers to advancements for women at work.™

Women in law school leadership positions, especially women of color, are intimately familiar with gender sidelining, having experienced it in positions leading up to their deanships, and while running their institutions.

It has been over twelve years since I wrote *A Gendered Update*, about seven years since *Presumed Incompetent* went to press, and just over a year since *Gender Sidelining* was published. Each work has a different thesis, yet their discussions of presumptions of incompetence and gender sidelining all address challenges that women, especially women of color, face in leadership roles. This Article explores these same topics in the context of law deans.

This Article starts with updated data on the number of women law deans, including women of color, and demonstrates increased numbers of both women and women of color in deanships. It then shifts to plausible explanations for this growth: some optimistic and some more skeptical. On the positive side, it is logical that new appointments reflect women’s increased representation in the broader legal population, which serves as the source of most new dean hires.™ In addition, there seems to be some recognition that women bring something new and different to leadership: a greater willingness to change, be flexible, and approach old problems in new ways.™ On the other hand, running a law school has become more challenging because of a decline in applications and credentials since 2011,

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8. *Id.*.
which has translated into smaller classes and budgets, voluntary and involuntary layoffs, more work, and less pay. It may be no coincidence that as the job became less desirable, women were appointed in greater numbers.

Next, this Article provides narrative descriptions of women’s experiences in leadership, including experiences unique to women of color, such as common stories of presumptions of incompetence, and gender sidelining. The stories are culled from surveys sent to all women law deans. The survey responses reveal challenges in leadership roles, risks taken, and battles won and lost, and display increased obstacles for women of color. This Part also dissects women deans’ experiences with presumptions of incompetence and gender sidelining, and explores relationship and family patterns revealed by survey responses. It also compares the answers from these surveys to those conducted for A Gendered Update, and suggests potential trends and truths.

The next Part of this Article develops ideas on how to continue increasing the number of women law deans and provide them support for success. It also outlines ideas and tools to prevent, ameliorate, and end gender sidelining and presumptions of incompetence. Even more promising, it also explores how to flip the script on these destructive forces and celebrate the strength, change, and opportunities women bring to law school communities through their leadership. This Article closes with a summary and cautious hope for continued diversification of the decanal ranks.

I. AN UPDATE ON WOMEN LAW DEANS

The percentage of women law deans has steadily increased since the first woman ascended to the position in 1898, approaching 21% by the end of 2014. By 2015, the percentage hovered between 25–27%. As of August 1, 2019, 31.5% of law deans at the 203 American Bar Association (“ABA”) schools were...
women (64 women). At the same time, 33.5% of law deans at the 179 AALS-member schools were women (60 women). While the number and percentage of women law deans of color also grew significantly, their numbers remain small. As of August 1, 2019, women of color represented 9.6% of law deans at ABA schools (19.5 women of color), and 9.2% of law deans at AALS-member schools (16.5 women of color). Nonetheless, this increase represents progress since 2006 when there were only three women law deans of color. Five Latina women have been appointed as deans,

In recent years, many law schools have appointed women deans, with a noticeable uptick in the 2015-2016 academic year when there were fifty-seven women deans at the then 207 ABA law schools, representing approximately 27.5% of all law deans. The trend continued: “To date in 2017, 14 of 28 (50%) new deans are women. Two are women of color.”

The 2019 numbers reveal continued increases in the number of women law deans, ranging from 31.5% at ABA schools, to 33.5% at AALS-member schools. Today’s numbers represent a far cry from the early days of women deans.

The first school to appoint a woman dean, the Washington College of Law, was established “principally for the education of women in the law . . . the first law school established by and for women in the United States.” Given its

17. See Appendix A, infra at 53, for a list of women law deans at ABA schools (note that interim deans are not included in the number of women law deans given their temporary status, but they are included in Appendix A. Two law schools have co-deans (the other co-dean at each school is a man). I count each co-dean as ½ to reflect 1 dean total per law school); see also ABA COMMISSION ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW (Jan. 2018), https://perma.cc/9XTM-QZUA (documenting 32.4% of deans were women, including interim deans as of January 13, 2018).

18. “Since 1900, 179 law schools from across the country have become members of the Association of American Law Schools. Additionally, 18 law schools are fee-paid non-members.” Member Schools, ASS’N AM. L. SCH., https://perma.cc/6NR9-YL8K. See also Appendix A, infra at 53 (listing women law deans at AALS schools).

19. For detailed information on the ABA and AALS schools led by women of color, see Appendix B, infra at 58. Rutgers has a co-dean, who serves with a male co-dean. For statistical accuracy relative to the total number of ABA and AALS law schools, each co-dean counts as ½ (so each law school is credited with one dean total).

20. See Padilla, supra note 2, at 461-62.

21. See infra notes 53-60, and accompanying text.

22. See infra notes 61-61, and accompanying text.

23. See infra notes 50-52, and accompanying text.

24. See, e.g., Karen Sloan, If It’s a New Law Dean, it’s Likely a Woman, LAW.COM (Mar. 30, 2017), https://perma.cc/NPG8-ULLC (noting in 2017, that “March has been a good month for women law deans. Six of the eight new law deans appointed this month are women, with a seventh taking on an interim dean role for the coming academic year.”).


26. Thomas, supra note 155 (listing 2017’s women appointees, their institutions, and their prior positions).

founding mission, it is no surprise that the Washington College of Law was the first law school to appoint a woman dean in the United States, Ellen Spencer Mussey, in 1898.\textsuperscript{28} The school’s second through fourth deans (all of whom served before the school received ABA approval) were all women,\textsuperscript{29} as was the fifth dean, “Helen Arthur Adair, who was named Acting Dean on January 15, 1943, three months before the school received A.B.A. approval. Adair continued to serve as acting dean until 1947, when the school was accepted for membership in the A.A.L.S.”\textsuperscript{30} Another early pioneer was Miriam Theresa Rooney who served as “the founding dean of Seton Hall University School of Law at the time it received A.B.A. approval in 1951.”\textsuperscript{31} The University of Miami School of Law appointed M. Minnette Massey as Acting Dean from 1962-1965,\textsuperscript{32} the first of many women to serve as dean of the institution.\textsuperscript{33} In those early days, however, women deans were few and far between.

The number of women law deans has grown, with women serving at law schools of all rankings, including several at top law schools. Impressive among the new dean announcements in 2017’s bumper crop was Yale’s appointment of its first woman dean, Heather Gerken.\textsuperscript{34} When asked whether she felt her appointment as Yale’s first woman law dean was significant, she responded, “I’m proud of it, especially because I have a 14-year old daughter. But I will say there are a lot of firsts that came before me. Kate Smith was our interim dean . . .”\textsuperscript{35} As of April 2018, in addition to Yale, women have led many of the top ten law

\textsuperscript{28} Id. at 632.
\textsuperscript{29} Id. Mussey served as dean from the law school’s incorporation in 1898 until 1913, and co-founder Gillette then served from 1913-1923. Id. at 632 n.125. Elizabeth C. Harris served briefly from 1923-1924, followed by Laura H. Halsey who also served briefly from 1924-1925. Id. at 666. She was followed by Grace Hays Riley who served until 1943. Id. at 667. Riley was followed by Helen Arthur Adair. Id.
\textsuperscript{31} Id. at 222 (Dean Rooney served until 1961).
\textsuperscript{32} Peter Burke, University of Miami School of Law’s First Female Dean Dies at 89, WPLG LOC. 10 NEWS (Nov. 18, 2016), https://perma.cc/E7FR-AC86.
\textsuperscript{33} For example, Soia Mentschikoff was dean at the University of Miami from 1974-1982. Jason Kelly, Legal Light, 111 U. CHI. MAG. 42, 43 (Winter 2019), https://perma.cc/7CZW-NWTH.
\textsuperscript{34} Heather Gerken Selected as Next Dean of Yale Law School, YALE L. SCH. NEWS (Feb. 21, 2017), https://perma.cc/9N64-KM7R.
\textsuperscript{35} Karen Sloan, Meet Heather Gerken, Yale’s First Woman Law Dean, NAT’L L. J. (Feb. 27, 2017), https://perma.cc/CBU7-UBER.
In 1969, Howard Law appointed the first woman law dean of color, Patricia

When writing *A Gendered Update* in 2005, only a handful of women had run elite law schools: Barbara Aronstein Black served as dean of Columbia Law School from 1986–1991. Kathleen Sullivan was dean at Stanford Law School from 1999–2004, and Elena Kagan was dean at Harvard Law School from 2003–2009. As of this writing, six of the ten top law schools have had at least one woman dean, with Berkeley and Columbia boasting two each, and Stanford three, with the recent appointment of Jenny Martinez, the first woman of color and first Latina to lead a top ten law school. These appointments represent significant improvement in women’s representation in elite law school leadership.

The 19.5 women of color serving as deans at ABA law schools and 16.5 at AALS-member schools provide many reasons to celebrate. Since *A Gendered Update*, the first Native American and Asian American deans have been appointed and the number of women of color serving as law deans has quintupled.

Unfortunately, the story of women of color as law deans is a fairly new one. In 1969, Howard Law appointed the first woman law dean of color, Patricia...

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36. In the most recent U.S. News rankings, the top 10 law schools were: Yale, Stanford, Harvard, Chicago, Columbia, NYU, Penn, Michigan, Berkeley, Duke, Northwestern, and Virginia. Best Law Schools, U.S. NEWS & WORLD REPORT. https://perma.cc/V29N-CEMV.


42. *Supra* note 377.

43. Dethlefsen, supra note 39.


46. *See Appendix B, infra at 58.*
Roberts Harris. From then until 2006, all women law deans of color were Black, as are fourteen of the 19.5 current ABA deans (76%), and 10.5 of the 16.5 AALS deans (68%).\footnote{Linda Charlton, Patricia Roberts Harris, N.Y. TIMES, Dec. 22, 1976, at 16.} Effective January 1, 2018, L. Song Richardson became dean at the University of California at Irvine School of Law,\footnote{I count Dean Richardson as both Black and Asian American under both the ABA and AALS lists, which explains why the numbers do not add up. I anticipate it will be increasingly difficult to categorize women of color by race as we move towards more mixed-race identities. See, e.g., Susan Saulny, Counting by Race Can Throw Off Some Numbers, N.Y. TIMES, Feb. 10, 2011 at A1 (discussing the federal government’s inconsistent categorization of multiracial individuals when keeping racial statistics).} “becoming the only woman of color to serve in this role among U.S. News & World Report’s top 30 law schools.”\footnote{See Appendix A, infra at 53; Appendix B, infra at 58.} She is also the first woman dean of Asian descent. Since then, Sudha Setty—the second Asian woman and first of South Asian descent—was appointed law dean at Western New England School of Law, where she started her term July 1, 2018.\footnote{Black women are the only group who can claim a critical mass of women law deans.}

There have been other noteworthy milestones. Drexel was the first law school to hire a Latina dean when it appointed Jennifer Rosato as its acting dean from 2006–2007,\footnote{Jennifer L. Rosato, Reflections of a Reluctant Pioneer, 48 CAL. W. L. REV. 444, 445 (2012).} its first year in operation. Dean Rosato is the first serial Latina dean, serving her second deanship at Northern Illinois University College of Law from 2009–2015.\footnote{DePaul University Names Jennifer Rosato Perea Dean for the College of Law, DEPAUL C. L., (Mar. 25, 2015), https://perma.cc/V66E-4HW4; Jennifer L. Rosato Perea, DEPAUL C. L., https://perma.cc/JP4G-ZLBV.} In 2015, DePaul School of Law appointed her as dean, where she continues to preside.\footnote{Leticia M. Diaz, BARRY U., https://perma.cc/E54G.} Since Dean Rosato broke through in 2006, five other law schools have appointed Latina deans. Barry University School of Law named Leticia Diaz dean (the first Cuban American woman) effective January 7, 2007, where she continues to serve.\footnote{She is also the first woman dean of Asian descent. Since then, Sudha Setty— the second Asian woman and first of South Asian descent— was appointed law dean at Western New England School of Law, where she started her term July 1, 2018.} UCLA made a newsworthy appointment in 2010 when it named Rachel F. Moran, the Robert D. and Leslie-Kay Raven Professor of Law at the University of California, Berkeley, School of Law, as the first Latina dean of a top-ranked U.S. law school.\footnote{This year, the University of Puerto Rico named Vivian Neptune dean, where she continues to serve. That same year, Loyola University New Orleans College of Law named María Pabón Lopez dean, where she served until the end of the 2014–2015 academic year.} In 2011, the University of Puerto Rico named Vivian Neptune dean, where she continues to serve. That same year, Loyola University New Orleans College of Law named María Pabón Lopez dean, where she served until the end of the 2014–2015 academic year.\footnote{Colleen Dulle, Law Dean Resigns, MAROON (Dec. 12, 2014), https://perma.cc/MP5K-L22U; Debra Cassens Weiss, New UCLA Law Dean Will Be First Latina at Helm of a Top 20 Law School, ABA J. (June 9, 2010), https://perma.cc/MW8P-BP5N.}
started her term as dean at Stanford Law School April 1, 2019.\textsuperscript{60} As of August 1, 2019, there were four active Latina law deans at ABA schools and three at AALS-member schools.

In yet another historic first, in 2011, the University of Arkansas School of Law appointed Stacy Leeds—the first Native American woman law dean in the country—where she served until 2018.\textsuperscript{61} That same year, 2018, Washburn University School of Law appointed Carla Pratt dean,\textsuperscript{62} making her the second Native American woman law dean.

There is much more race and gender diversity today than in the law school decanal past. Close to 50\% of new law dean hires over the past few years have been women.\textsuperscript{63} From 1950–1980, there was only one woman law dean of color; in 2002, there were two women law deans of color.\textsuperscript{64} Now there are more than nineteen. However, there is still room for improvement as a critical mass of Asian American, Latina, and Native American women law deans has not yet emerged. Even with many appointments of women deans over the past decade, the overall percentage of women law deans has grown gradually and remains lower than the percentage of women in the Academy\textsuperscript{65} and the general population,\textsuperscript{66} leveling out at around 32.5\%.\textsuperscript{67} While this is much better than the 18\% reported in 2007, some lament the numbers are too low and should better represent the number of women in law school and the general population.\textsuperscript{68}

\section*{II. Why Are There More Women Law Deans Today?}

There are many reasons for today’s larger percentage of women law deans,

\textsuperscript{60} Brad Hayward, \textit{Professor Jenny S. Martínez Appointed Dean of Stanford Law School}, \textit{Stan. News} (Feb. 6, 2019), https://perma.cc/ZMA4-4RKF.
\textsuperscript{63} Thomas, \textit{supra} note 15 (“To date in 2017, 14 of 28 (50\%) new deans are women. Two are women of color. In 2015, 46\% of new law dean appointments were women.”).
\textsuperscript{64} Kay, \textit{supra} note 30, at 225, 227 (Respecting the small number of women law deans of color, Dean Kay noted: “Only one—Dean Marilyn Yarbrough of Tennessee—has held office as dean at a majority white law school. Two of the historically black law schools—Howard and North Carolina Central—have had women deans: indeed, both have had two.”).
\textsuperscript{65} \textit{See infra} notes 75-83, and accompanying text.
\textsuperscript{66} \textit{See, e.g., 2018 Population Estimates by Age, Sex, Race and Hispanic Origin}, U.S. Census Bureau, https://perma.cc/8BF6-KTBT (providing statistics which show 49.1\% males and 50.8\% females in the US population).
\textsuperscript{67} \textit{See supra} notes16-18, and accompanying text.
\textsuperscript{68} \textit{See, e.g., Sloan, supra} note 24 (quoting Tracy Thomas: “the current population of law deans is 30 percent women. Our current students are 50 percent women, as are the associate law dean ranks. The leadership needs to be representative of society.”); Haskell, \textit{supra} note 25 (“Law programs and their leadership remain potentially gendered: women make up only about a third of the total number of law school Deans in the United States . . . .”).
with the needle leveling out at approximately 32.5%, including about 9% of law dean positions held by women of color. There is more gender parity in law schools which leads to more women law school graduates and professors—the pool from which most deans are selected. Some leaders have developed tools to create pathways to deanships for women and minorities. Perhaps more cynically, law school deanships are no longer the plum positions they once were. This Part will address each of these potential explanations in turn.

Women now represent approximately 50% of law students, translating into a larger population of women lawyers, judges, and law professors. In 2016, the ABA reported that women comprised 50.7% of first-year law students, 51.3% of the total JD enrollment, and 52.7% of JDs awarded. The ABA also reported that women made up 48.7% of summer associates, 45% of associates, 18% of equity partners, and 36% of those in the legal profession. Given that law school classes routinely include at least 50% women, there are more women in the pipeline to the legal Academy, the source of most deans.

Regardless of gender or race, most newly appointed deans started their academic careers as law professors and many served as associate dean or in some high-level administrative capacity, as interim or acting dean, or as a dean elsewhere. While some deans are selected from the ranks of judges, politicians, and the business world, most law school deans still emerge from faculty positions or administrative appointments at law schools, where there are more women now than in the past. According to the ABA’s 2013 Annual Questionnaire, 4,410 law professors were men, of whom 3,632 had tenure and 778 were tenure-track. By comparison, 2,497 law professors were women, of whom 1,766 had tenure and 731 were tenure-track. Thus, women made up 32.7% of the tenured law faculty compared to men who made up 67.3%. And women constituted 48.4% of the tenure-track law faculty in comparison to men’s 51.6%. While the number of

69. Cf. ABA COMMISSION ON WOMEN, supra note 17, at 4 (noting that 31.1% of the deans of AALS-member schools were women, which “represents 183 deans at AALS-member schools, three of which have two co-deans each, and includes permanent and interim deans”).
70. See supra note 19, and accompanying text; Appendix B, infra at 58.
72. See ABA COMMISSION ON WOMEN, supra note 17, at 4.
73. Id.
74. Id.
75. See Karen Sloan, Rise in Number of Women Deans at U.S. Law Schools, NAT’L L. J., June 22, 2015, at 3 ("[M]any of the women assuming deanships this summer (2015) have served as interim, associate or assistant deans, or have chaired faculty committees.").
76. See, e.g., Kay, supra note 30, at 224. Of the current women serving as deans, six previously served as judges (Madeleine M. Landrieu, Elizabeth A. McClanahan, Elaine Mercia O’Neal, Carla D. Pratt, A. Gail Prudenti, and Penny Willrich). See Attachment A, infra at 155. Note, however, that of the new deans in 2015, no women came from the bench, bar or law firms, but two of the 15 men appointed were previously in private practice. See Sloan, supra note 75.
78. Id.
tenured and tenure-track women is still below the number of men, there is good news. First, the percentage of tenure-track women is approaching the percentage of tenure-track men. While not quite equal, it is much closer than the percentage of tenured faculty where the gap between men and women is much larger. Second, as of 2013, there were many more tenured and tenure-track women law professors than when I wrote *A Gendered Update*, which reported that women comprised 6.4% of tenured law professors in 2000, 5.9% in 2001, 25.1% in 2003, and 25.3% in 2005.  

Just as the number of women in law school went from imperceptible, to more than a novelty, to roughly equal with men, the number of women in leadership has increased as well. Clearly there is a much larger number of women lawyers and law professors than at any point in history, which provides a greater pipeline for potential deans. “The subsequent growth in the number of [women] law graduates and faculty has deepened the pool of eligible dean candidates. And successful leadership by women in law schools and the broader profession has opened doors.” However, it takes time for the increased number of women in law school to trickle up into positions of leadership, suggesting more intentional steps are necessary.

Beyond the starting point of increasing the number of women in the Academy, there have been proactive steps to increase the number of women law deans. One such step helped jump-start a noticeable increase in women law deans in the late 1990s: “[A] list of prospective women deans eventually developed, and Dean Judith Areen of the Georgetown University Law Center, maintained the list from 1997–2001, when the AALS took over responsibility for the list.”

One year after Dean Areen started the databank, the number of women law deans increased

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80. See Professor Cunnea [pseudonym of L.S., Esq.], *A Timeline of Women’s Legal History in the United States and at Georgetown University* 4, (1998) https://perma.cc/B6T4-HZ9C (“1869 Lemma Barkaloo becomes the first woman law student in the nation. She does not complete her degree at the Law Department of Washington University in St. Louis, but chooses to take the Missouri bar after one year of study. She passes, and begins practicing in 1870, just months before her death at approximately age 22 of typhoid fever . . . . 1870 Ada Kepley, the first woman to earn a formal law degree in the U.S., graduates with an L.L.B. from Union College of Law in Chicago, now known as Northwestern University . . . . 1871 Belva Ann Lockwood matriculates at the new National University Law School after being rejected during the past three years by the law schools at Georgetown University, Howard University, and Columbian College . . . . 1898 Women found a law school to accommodate female students rejected from established schools due to their gender.”).
81. In 1948–1949, 2.8% of law students were women, in 1958–1959, 3.1% were women, in 1968–1969, 6% were women, in 1978–1979, 30.8% were women, in 1988–1989, 42.2% were women, in 1998–1999, 46.1% were women, and in 2008–2009, 46.9% were women. ABA, *First Year and Total J.D. Enrollment by Gender (1947–2011)* (Oct. 2011), https://perma.cc/9SGU-DVNY.
83. Sloan, *supra* note 75.
84. Padilla, *supra* note 1, at 457 (citations omitted).
from fourteen to twenty.85 While the AALS no longer maintains that databank, others have taken effective steps to continue the progress:

In 2007, Seattle Law and the Society of American Law Teachers hosted the first Promoting Diversity in Law School Leadership program—a two-day conference devoted to preparing women and minorities for the search process... every two years 20 or more aspiring deans learn about the interview process; leadership positions available; financial management and budgeting; dealing with constituents including alumni and donors; and paths into associate or assistant deanships. Attendees develop relationships with sitting deans.86

Seattle University School of Law convened the most recent conference in 2018.87 In a similar vein, the University of Georgia School of Law hosted a Women’s Leadership in Academia Conference in 2018.88 The University of Virginia hosted the follow-up Women’s Leadership in Academia Conference in 2019,89 and there are plans for conferences to rotate among sponsoring schools in upcoming years, with BYU hosting in 2020.

Dean Areen and Dean Testy’s path-breaking work (supported by the AALS and the Society of American Law Teachers (“SALT”)), and the recent collaborative women’s leadership in academia initiative have removed some of the mystery of landing a deanship and created a way forward for women and minorities to pursue law deanships—resulting in increased numbers of both. The more women there are in powerful positions, the easier it will be for even more women, including women of color, to emerge as leaders. “At the point where there is a critical mass, there is less pressure to constantly prove oneself as the exception by meeting standards twice as high as those in the status quo.”90

The current number of women law deans moves us towards a significant tipping point of “normalizing” women deans. This, in turn, makes it more acceptable and less risky for law schools to appoint women to deanships. As of April 17, 2018, of the dean vacancies then covered in the Faculty Lounge,91 four

85. Id. at 457-458.
86. Sloan, supra note 75.
88. Georgia, BYU, Michigan State, UCLA, the University of Tennessee, the University of Virginia and Yale commenced a multi-year initiative that will “feature regional leadership conferences aimed at preparing women in legal education for leadership opportunities and advancement.” Women’s Leadership Initiative, U. GA. SCH. L., https://perma.cc/PSR2-QRDA. For conference information, see Women’s Leadership in Academia Conference, U. GA. SCH. L. (July 19–20, 2018), https://perma.cc/Y5H6-VMFK. For a more detailed description of conference content, which is designed to promote women to positions of leadership in higher education, see infra notes 224–225, and accompanying text.
89. For details on the schedule, panels and speakers, see Women’s Leadership in Legal Academia 2019 Conference, U. VA. SCH. L.,https://perma.cc/T8AD-CBUC.
90. Padilla, supra note 1, at 493–94.
91. The Faculty Lounge is an online resource that reports on “Conversations about law, culture, and academia,” which includes a tab that tracks news on law deans. FAC. LOUNGE,
schools listed their finalists. Of those, Texas A&M had three men\(^92\) the University of Washington had three men and one woman,\(^93\) Florida International University had two men and one woman,\(^94\) and the University of Arkansas had three women and one man.\(^95\) Of the deans appointed during this same period, there were three men and two women.\(^96\) Compared to when I wrote *A Gendered Update*, it is now more commonplace to see women on lists of dean finalists and as newly appointed deans.

Through a more cynical lens, it is possible there are more women deans now because the position is less desirable. Starting around 2011, law school applications dropped as did applicants’ entering credentials.\(^97\) From 2010 to 2015, the number of law school applicants declined from 87,900 to 54,500.\(^98\) The dip in applicants translated into smaller entering law school classes throughout the country.\(^99\) The declines created several challenges from how to maintain bar passage rates and respectable employment statistics for law school graduates to how to balance law school budgets and other pressing financial issues. “We had a crisis in legal education in the sense that applications fell precipitously—for everyone... All of a sudden, we experienced a huge management and budget situation that hadn’t been the case before.”\(^100\) Many law schools do not have deep endowments and are heavily tuition-dependent.\(^101\) With such a dramatic decline in the number of students, there was a deep cut in tuition revenues. As a result, law schools had to slash budgets, create voluntary retirement programs, and—as a last alternative—institute layoffs.\(^102\) Perhaps it is a coincidence that the percentage of

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94. FIU Law Names Dean Finalists, FAC. LOUNGE (Apr. 12, 2018), https://perma.cc/6Q3L-ZFZL.
95. Arkansas Law Dean Finalists, FAC. LOUNGE (Mar. 1, 2018), https://perma.cc/CJG8-KGGS.
98. Id.
99. Id.
women law deans rose during this period to approximately 32.5%; the highest percentage to date. Or perhaps it is because the job was less rewarding financially and more challenging overall. One dean feared this might be the case, expressing “concern that women may be getting more opportunities to lead because traditional dean candidates are waiting for legal education’s problems to subside. ‘It’s not a good time to be a dean. It’s very difficult. The goal is housekeeping, rather than growth . . . I’m going to be keeping an eye on whether, as things stabilize, opportunities for women decline.’”

A phenomenon coined as the “glass cliff” lends credence to this hypothesis. The term was developed by Dr. Michelle Ryan and Professor Alex Haslam when they conducted research into what occurs when women (and other populations that have been pushed to the margins) ascend to leadership roles. Ryan and Haslam found that such leaders are more likely to be appointed when a position carries a greater risk of failure and criticism.

To summarize, there are many reasons for the rise in women law deans’ numbers. There are more women law students, professors, and high-level administrators. Thus, there is a more robust pipeline of potential candidates, more mentors to guide them along the path to a deanship, and more role models. With this burgeoning critical mass, there is less scrutiny of women and women of color, and less resistance to the idea of their leadership, making it a more hospitable climate. At the same time, being a law dean is now more challenging than ever and perhaps less prestigious.

III. NARRATIVES FROM WOMEN AT THE TOP

Many women have risen to the pinnacle of law school leadership, each with a unique path and story. Yet similarities emerge in many of their experiences. This Part explores common challenges women face in leadership positions, culled from surveys sent in two waves in 2018. Many are expressed through the lens of women’s narratives describing experiences such as rocky paths to deanships, glass cliffs, and stories of triumph.

A. Methodology and Introducing the Data

In Spring 2018, I sent surveys to the 14 current women law deans of color and four former women deans. Seven women completed the survey.


103. See Sloan, supra note 75. See also Cooper, supra note 100.
105. A copy of the spring survey is at the end of this paper as Appendix C, infra at 60.
106. I also sent the survey to former women deans of color, Maria Pabón Lopez and Rachel Moran, and to Judith Areen and Kellye Testy, both of whom were instrumental in working to increase the diversity and number of women law deans.
(approximately 39% response rate) with some preferring to answer more personal parts through a telephone interview. A chapter in Presumed Incompetent II focuses on the results of the Spring survey which is also woven into this Part. In Fall 2018, I sent an updated version of the survey to the 52 remaining women law deans. Twenty-four women responded to the survey (approximately 46% response rate). In Fall 2018, I also sent a slightly modified version of the survey to 137 men deans, including 108 white men and 29 men of color. Twenty-nine of the 108 white men responded to the survey (approximately 27% response rate), and one of the 29 men of color responded to the survey (approximately 3% response rate).

<table>
<thead>
<tr>
<th>Survey Recipients</th>
<th>Number of Recipients</th>
<th>Number who Responded</th>
<th>Response Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Women of Color</td>
<td>18</td>
<td>7</td>
<td>39%</td>
</tr>
<tr>
<td>White Women</td>
<td>52</td>
<td>24</td>
<td>46%</td>
</tr>
<tr>
<td>Men of Color</td>
<td>29</td>
<td>1</td>
<td>3.4%</td>
</tr>
<tr>
<td>White Men</td>
<td>108</td>
<td>29</td>
<td>27%</td>
</tr>
</tbody>
</table>

Many women who responded to the survey, and some men, asked that their responses to questions about personal experiences be reported anonymously. That request has been respected. I appreciate the time deans took to respond to the survey along with their candor, honesty, and willingness to share their experiences, including some deeply personal ones.

Regardless of whether they had time to answer the survey, several women expressed gratitude for this project and how important it is to gather and share women’s responses and their leadership stories. For many women, especially women of color, the stories are set within a framework of micro-aggressions that remain part of the fabric cloaking professional women in the Academy and beyond. A Catalyst study described negative impacts of micro-aggressions or “emotional taxes,” and how common they remain for people of color:

For Asian, Black, Latinx, and multiracial employees, decades of research tell us that exclusion, discrimination, and bias can be daily experiences. These experiences occur both inside and outside the workplace, and they can be sharply painful. Taken together, they impose an Emotional Tax with heavy personal consequences. This Emotional Tax can also harm businesses by preventing employees from being able to thrive at work.

108. A copy of the fall survey sent to white women law deans is at the end of this paper as Appendix D, infra at 65.
109. A copy of the fall survey sent to all men law deans is at the end of this paper as Appendix E, infra at 67.
110. However, I have attributions for each quote and the original survey responses on file.
111. Dnika J. Travis & Jennifer Thorpe-Moscon, Day-to-Day Experiences of
Women deans of color frequently pay emotional taxes, costs typically not incurred by traditional deans. Emotional taxes make challenging work even harder and wound these women’s spirits, as the experiences in this Part reveal.

This Part of the Article is longer than the other parts because it contains many stories, each of which is worth telling. Communicating women’s leadership experiences and struggles may help offset and perhaps eliminate the emotional tax that women law deans pay. Moreover, it is therapeutic: “[t]here is no greater agony than bearing an untold story inside you.”112 The stories in this Part acknowledge the truth of those who live(d) them; emphasize that barriers remain for women in the Academy, especially women of color, even when they are leaders; provide guidance for the next generation of leaders; and share kernels of knowledge and moments of gratification. “[P]ersonal stories may bridge the epistemological gap that frequently appears between the lives of people with a particular privilege and those who lack that privilege . . . . Storytelling by individuals, when done well, packs an emotional punch and provides the psychological detail necessary to understand a person with very different life experiences.”113 Doubts about ability can have deep and long-lasting impacts, but sharing stories about those experiences can be cathartic:

The women who tell their stories . . . individually and collectively experience physiological and psychic effects from being presumed incompetent. Mounting public health evidence suggests that chronic stress—like the pressure of being continually misperceived or belittled or having to fight off microaggressions—can result in higher levels of hypertension, cardiovascular disease, and coronary heart disease.114

The battles are real and the impacts can be devastating, but they can also lead to greater strength, resilience, and satisfaction.

B. Presumed Incompetent

The survey asked law deans whether they had experiences where they were presumed incompetent. While some women indicated they had no such experiences, the overwhelming majority did, as did the man of color who responded to the survey and some white men. One woman of color bluntly responded, “All the time. By colleagues, students, when I was on the bench—it’s ingrained in many until you have the opportunity to demonstrate your expertise.”115 Her experience was consistent with stereotypes about racial minorities: “Latinos and African-Americans of working-class backgrounds are

112. MAYA ANGELOU, I KNOW WHY THE CAGED BIRD SINGS 74 (1968).
113. Harris & González, supra note 4, at 3 (citations omitted).
114. Id. at 7 (citations omitted).
115. Survey of Dean Penny Willrich, Arizona Summit School of Law.
particularly vulnerable to being stereotyped as unqualified, undeserving, and uncollegial.\textsuperscript{116} One academic leader described the burden presumptions of incompetence placed on her and other women leaders:

Among the many challenges associated with being a [woman] college leader, perhaps the greatest is the additional effort required to demonstrate competence and engender the support and confidence of the campus and community. While qualified by virtue of our credentials, experiences, and achievements, few women are fortunate enough to come into office with the presumption that they are highly skilled and competent to lead in the complex environment that is a college or university. Women often have to prove themselves in multiple ways before the scrutiny subsides.\textsuperscript{117}

It is remarkable that women with top qualifications which equal or outdo men’s qualifications still endure prove-it-again bias,\textsuperscript{118} are questioned about their competency, and are rarely recognized as capable until they prove otherwise.

Presumptions of incompetence arise in myriad ways and, perhaps counterintuitively, can be more pronounced the further up the leadership ranks one rises. One white woman wrote how her competency was not a problem as a professor or even Associate Dean, but when she applied for the top leadership position—the law school Dean—things changed:

I rarely encountered anything I would consider sexist in nature when I was an associate dean. I think everyone is happy if anyone does the thankless work. It was not until I was in the running to be the dean with the promise of real power that several of my male colleagues openly campaigned against me in surprising ways. Despite my history of leading and accomplishing significant initiatives at the school and 17 years of good relationships, a handful of older male colleagues challenged my competency, collegiality and attacked me personally. They also tried to shut down the non-tenure track vote, which primarily is comprised of women who supported me. A significant number of my female colleagues told me later that they were disappointed and disheartened by the nature of the attacks, which they felt were clearly sexist. I set a collaborative tone from the beginning of my deanship and things have been fine since I took over, but the aggressive attacks on the front end truly surprised me. I absolutely believe that a man with my track record and developed relationships would have been


\textsuperscript{117} See \textit{What Are the Biggest Challenges You’ve Faced as a Female Leader?} [hereinafter Biggest Challenges], \textit{The Chronicle of Higher Education} (Nov. 25, 2018), https://perma.cc/2WDB-P2MV (quoting Roslyn Artis, President, Benedict College).

\textsuperscript{118} Prove-it-again bias means women have to work harder even if they are more accomplished every step along the way. See Joan C. Williams, \textit{The 5 Biases Pushing Women out of STEM}, \textit{Harv. Bus. Rev.} (Mar. 25, 2015), https://perma.cc/R5NS-DPXN (“Black women were considerably more likely than other women to report having to deal with this type of bias.”).
viewed by these same men as the obvious successor to the dean and welcomed with open arms.\textsuperscript{119}

This experience reveals how a woman can be perceived as a competent professional while moving up the leadership ladder, but when reaching for the top rung, she may face resistance and even worse—intentional undermining and character slurs.

Although she did not have specific examples of presumptions of incompetence, one woman of color said she felt dismissed and talked over,\textsuperscript{120} which is common in practice and the Academy. Another woman of color said when she started her deanship it was common for her to enter a room where she was not necessarily presumed incompetent but was basically invisible. However, once she was introduced as the law school dean, she was treated with deference and practically crowned with a presumption of competence.\textsuperscript{121}

A white woman noted that she had many experiences where she was presumed incompetent: “Individuals showing surprise when I tell them I’m the dean or when I’m introduced . . . , assumptions made that the man standing next to me must be the dean, being present when a person described someone else as looking like a dean—you know, he’s tall, balding, has a beard and wears glasses—he looks like a dean.”\textsuperscript{122} The Dean continued “I’m often made to feel that I’m not enough or don’t belong, and many older, white male alumni have literally no idea how to interact with me.”\textsuperscript{123} Another white woman was overlooked as the leader and publicly undermined by faculty: “three male colleagues . . . often challenged me in emails to entire faculty. If they did not agree with my decisions they would write emails that challenged my competency. I have had alums ask me if I am the new dean’s wife. Or tell me I don’t look like a dean.”\textsuperscript{124}

Women of color reported frequent challenges to their authority that was often race and gender based. One college president said:

Women presidents of color sometimes face challenges to their leadership that may not be so apparent to others. Some people still hold fixed ideas about leaders and how they should look and sound. Currently, only about 30 percent of our nation’s college and university presidents are women. For women presidents of color, the percentage is even lower. And, for Asian-American women

\textsuperscript{119} Survey of Dean Wendy Hensel, Georgia State University School of Law.
\textsuperscript{120} Survey of Dean Verna Williams, University of Cincinnati College of Law.
\textsuperscript{121} Interview by Laura Padilla with Dean Danielle Conway, then Dean of University Maine School of Law (May 9, 2018) (notes from conversation and completed survey on file with the author).
\textsuperscript{122} Dean preferred to answer anonymously.
\textsuperscript{123} Dean preferred to answer anonymously.
\textsuperscript{124} Dean preferred to answer anonymously.
presidents, the percentage is minuscule.\(^{125}\)

This same woman with impeccable credentials, was subjected to unacceptable overt bias:

Years after I earned a Ph.D. from the University of California at Berkeley and held senior cabinet level positions, I still had colleagues question my qualifications. Perhaps even more shocking were the racist and sexist statements that some work peers felt entitled to say, some directly to me. Since my appointment as president, I have been called many things, including a “genetically inferior weed.” I also was told that “No J-p from an internment camp will ever be my president.”\(^{126}\)

Given that women of color face aggressive and demeaning behavior, it is intriguing to consider how much more productive women leaders would be if they could just focus on their work without dodging so many unnecessary challenges.

There is an interesting dynamic when women, especially women of color, are met with initial presumptions of incompetence based on race and gender. While such presumptions may diminish once these women ascend to leadership, they still have to earn the perception of competence. For example, one woman of color said she had experiences where she was presumed incompetent but “so far when I take action that demonstrates competence people seem pleasantly surprised.”\(^{127}\) The essence of privilege is that we default to presumptions of competence for white men, until they prove otherwise. But for women, “prove-it-again” is the norm. “Women of color, white women, and men of color reported that they have to go ‘above and beyond’ to get the same recognition and respect as their colleagues.”\(^{128}\)

When asked whether he experienced presumptions of incompetence, one man of color wrote, “The assumption is that persons of color are not as competent as white men. I have dealt with that often.”\(^{129}\)

Twenty-six white men responded to the survey question about presumptions of incompetence, and the majority of them (twenty) said they had not really experienced presumptions of incompetence. A few of the remaining respondents did not have direct experiences but wrote about some indirect ones. For example, one man wrote:

This probably doesn’t answer your question as intended, but I think all professional academic leaders presume that academics who assume

\(^{125}\) Id., supra note 117 (quoting Judy Sakai, President, Sonoma State University).

\(^{126}\) Id.

\(^{127}\) Dean preferred to answer anonymously.

\(^{128}\) ABA Commission on Women in the Profession, You Can’t Change What You Can’t See, Interrupting Racial & Gender Bias in the Legal Profession 7 (2018), https://perma.cc/F2H6-4SWN.

\(^{129}\) Dean preferred to answer anonymously.
deanships and other leadership positions are incompetent in budget and other management areas. It may be that women and minorities face even greater hurdles in that realm. (I would not know personally as a white male).  

Two men wrote of religion or class-based presumptions of incompetence. One said,

First, I have often been treated differently because I am a faithful member of the Church of Jesus Christ of Latter-day Saints (sometimes called the Mormons). . . . My sense is that some people believe anyone who is fatuous enough to believe in God must not be a rigorous thinker. Second, I am a first-generation college student. This issue is less visible to people than my religion (which manifests publicly not only by my affiliation with BYU, but also by my refusal to drink alcohol, coffee, etc. and in other choices). Nevertheless, most members of the legal academy at elite institutions come from fairly privileged backgrounds, and I sometimes have the sense that people are dismissive of the insights of those who do not have similar backgrounds.

Another man wrote,

I grew up in poverty on a family farm. As a child, my teachers sometimes behaved as if they were doing me a favor when placing me in the advanced classes or acted surprised when I excelled. As a child on a farm in a poverty-stricken township, my imagination regarding my own future was quite limited. That lack of imagination has continued into my career, causing me (for example) never to even consider applying for the deanship until after numerous colleagues encouraged me to do so. Yet, it seems I have had some success in my career. Why? Because I had teachers, mentors and others who believed in me and encouraged me. And I have never experienced the fear that a Black man would certainly feel when lights have flashed behind me on a dark highway at night. I have also not had men explain things to me that I already well understood, simply because of my gender. I have not been presumed dangerous or someone to be hated because I choose to wear a head covering. So while the answer to the question is “yes,” it is an affirmative response that is complicated because of the other privileges I have so clearly benefited from.

These responses from white men confirm that when people in power are “other,” they are likelier to experience presumptions of incompetence, regardless of the source of “other.”

Some deans responded to the question about presumptions of incompetence by blending it with mansplaining. One woman of color said from her first deanship

130. Dean preferred to answer anonymously.
131. Survey of Dean Gordon Smith, BYU Law School.
132. Survey of Dean William P. Johnson, Saint Louis University School of Law.
through her third, and present, deanship, people still tell her what to do or ask, “have you thought of [insert something germane to an issue which she had considered extensively]?” Or they may ask whether she understands an issue or assume she does not and proceed to “mansplain” it to her. A white woman wrote:

I was tested when I first arrived (I was new to the faculty when I began as dean) and had to prove myself in terms of both competency and a certain kind of mettle—can she make thoughtful contributions in appointments committee meetings, can she raise money, will she be able to stand her ground in the face of certain faculty members who are used to having their way? A few colleagues (particularly older males) offered me an excess of advice on matters of recruitment and retention of individual candidates—presumably fearing that I would not exercise sound judgment without their advice—and fussed over whether I was listening to the “right people” on the faculty (I think they meant the more traditional people whose views had historically carried the most weight with deans). Now, 3.5 years into the job, such phenomena have largely faded. I do not know whether a male dean would have had these experiences, but there were times when I wondered.133

Given that most surveyed women experienced presumptions of incompetence and twenty of twenty-six surveyed men did not, I expect colleagues and students view most new women law deans as incompetent more often than they view new men law deans as incompetent. But when women law deans are given an opportunity to prove themselves, presumptions of incompetence and attempts to undermine them decline.

C. Gender Sidelining

The surveys also asked about experiences with gender sidelining. Not surprisingly, there is “a long line of research showing that when it comes to the workplace, women speak less, are interrupted more, and have their ideas more harshly scrutinized.”134 Some common forms of gender sidelining include “manterrupting,” “bropropriating,” and “mansplaining”:

**Manterrupting:** Unnecessary interruption of a woman by a man.

**Bropropriating:** Taking a woman’s idea and taking credit for it.

**Mansplaining:** When a man explains something to a woman in a patronizing way and it often begins with a man completely disregarding a woman’s opinions

133. Dean preferred to answer anonymously.
134. See Jessica Bennett, *How not to be “Manterrupted” in Meetings*, TIME (Jan. 20, 2015), https://perma.cc/6SZV-QEZK (noting that a result of “manterruption” is “[w]omen hold back. That, or we relinquish credit altogether. Our ideas get co-opted (bro-opted), re-appropriated (bro-propraiated) – or they simply fizzle out. We shut down, become less creative, less engaged. We revert into ourselves, wondering if it’s actually our fault. Enter spirals of self-doubt.”).
Gender sidelining also occurs when men are presumed to be in charge, and conversely, when women are not presumed to be leaders. This happens to women in all professions, including law. The ABA recently reported that “81 percent of women say they were mistaken for a lower-level employee.”\(^{136}\) This experience is especially common for women lawyers of color, who “reported that they had been mistaken for administrative staff, court personnel, or janitorial staff at a level 50 percentage points higher than white men. This was the largest reported difference.”\(^{137}\) As noted in the survey responses about presumptions of incompetence, many women indicated that because of stereotypes of what law deans should look like, they were rarely assumed to be the dean.

Most women who responded to the survey had stories of gender sidelining. One woman of color said when she was in a leadership capacity (for example, running a faculty, department head, or board meeting or hosting a fundraising event), there was not much gender sidelining.\(^{138}\) However, when she attended big events where she was not in a leadership role (for example, an ABA Deans’ meeting), she noticed some patterns with gender sidelining. At the large group events, gender sidelining increased, especially “mantering,” which some senior white women deans also engaged in. In smaller breakout groups, gender sidelining decreased. Other women noted similar experiences, with one white woman writing:

> I have experienced it [gender sidelining] frequently at deans’ conferences, in senior leadership meetings at universities, etc. I continue to try to build professional and personal relationships with people until they learn to respect and listen to me. If they clearly aren’t willing to do that after some effort on my part, I move on without them.\(^{139}\)

When respect is offered but not reciprocated, the self-preservation mechanism of letting go and moving forward is more productive than the Sisyphean task of perpetually pushing a boulder up a hill.

A Black woman who served in a state with a small population where 94.8% of the residents are white\(^{140}\) said she experienced resistance from the Foundation


\(^{136}\) Liane Jackson, *Women’s Experiences Differ from Men’s—and Affect Their Longevity in Law*, ABA J. (Oct. 1, 2018), https://perma.cc/LGG4-AHGK (describing challenges women in law face and why experienced women lawyers who have practiced more than 20 years are leaving the profession).

\(^{137}\) ABA COMMISSION ON WOMEN, supra note 128, at 7.

\(^{138}\) Interview by Laura Padilla with Jennifer Rosato Perea, Dean of DePaul University College of Law (Apr. 20, 2018) (notes from conversation and completed survey on file with the author).

\(^{139}\) Survey of Dean Lisa Kloppenberg, Santa Clara School of Law.

\(^{140}\) The state of Maine has a population of 1,335,907, and almost 95% of the residents are White. *Quick Facts: Maine*, U.S. CENSUS BUREAU (Jul. 1, 2018), https://perma.cc/P428-RBES.
Board when she arrived. In conversations, board members often “mansplained” why she did not really get it: “well, you are from away,” or “you’re not from around here.”¹⁴¹ Those statements may have been a pretext for something like “how would an African American woman who is not from here have any idea how to run this law school.” As this dean laid out her vision, she was not directly met with mansplaining or presumptions of incompetence, but the prove-it-again bias was clearly present and she did not receive much support. Common responses included “I just don’t understand your vision,” and “you have not made your case.” This dean has a military background where she worked up through the ranks and acquired leadership training along the way, making it unlikely she would present a vision to the board unless she was prepared and had an achievable plan to actualize her vision. Thus, immediate reactions to her vision likely arose as variations on sidelined behavior. After a few years in her deanship, she noted she had more widespread support and there were significant changes in how she was perceived.¹⁴²

A white woman described a situation where initial resistance gave way to eventual support, but only after mansplaining, rudeness, and unnecessary obstructions to the solution that was present all along. She wrote:

Since becoming dean, I have had encounters with a powerful [alumnus] who repeatedly told me ‘you don’t know what you’re talking about’ when I informed him that the College’s relationship with his organization was not sustainable. After 9 months of refusing to accept my conclusion, he finally agreed that I was correct and ‘came up with’ the solution that I offered at the beginning of our discussions.¹⁴³

Many women shared stories of lukewarm or inconsistent support early in their deanships, but for many, that changed as the deans proved themselves. Enduring “prove-it-again” bias is draining, but for many women deans, it is part of the package that comes with leadership. A white woman responded to the question of whether she had any experiences with gender sidelining by writing:

So many I don’t even notice. The most flagrant was when the University President told me he was going to ask one of our top donors to play a round of golf with him and two others. By implication, I was not included. Finally I said, I don’t play golf (he knew that) but I would love to join you for lunch or dinner. The event never happened but I was stunned at the ease with which he excluded

¹⁴¹. Interview by Laura Padilla with Danielle Conway, then Dean of University Maine School of Law, (May 9, 2018) (notes from conversation and completed survey on file with the author).
¹⁴³. Survey of Dean Wendy Hensel, Georgia State University School of Law.
me. He would not have done that to a man.\textsuperscript{144}

Women law deans’ experiences are common among women leaders in higher education. A college president wrote:

It’s safe to say that there is still a proverbial boys’ club lurking in each of America’s cities and towns. Sometimes, they exist through connections, networks, and an unofficial shorthand. Other times, the boys’ clubs present themselves in physical form as places where a small number of mostly white businessmen golf together, drink together, and do business together, often all at the same time.\textsuperscript{145}

These not so subtle ways of excluding women leaders, whether from interacting with powerful donors or alumni, or otherwise conducting business where women are rare, are reminders that some men are still uncomfortable with women in leadership.

A woman of color responded to the gender sidelining question by noting, “It happens—if I let it happen—sometimes you have to know when to pick your battles.”\textsuperscript{146} This telling statement suggests the potential for gender sidelining is omnipresent. Women have to be on the offensive to minimize gender sidelining but cannot be consumed by it and often succeed in spite of it. Women who completed the survey made it clear through their stories that they have experienced gender sidelining but persevered. While these deans ultimately have done well and made a difference, it took significant extra work to obtain a vote of confidence that privileged deans likely get on arrival. As grueling as it may be to stay the course, their dedication pays off when their leadership and competence are eventually recognized, allowing them to model professionalism and success and show that women can effectively run law schools. Their mere presence can neutralize gender sidelining, make it less likely and certainly less acceptable, and help reduce emotional taxes for themselves and other women.

The survey sent to men modified the sidelining question to read: “Some people, especially from underrepresented groups, have professional experiences with sidelining (e.g., being silenced, marginalized, etc.). Have you had any such experiences and if you have, can you elaborate, or would you prefer to discuss by telephone interview?”\textsuperscript{147} The man of color who responded said he often has such experiences, in particular at campus leadership meetings.\textsuperscript{148} Of the twenty-five white men who responded to this question, the majority (twenty-two), said they did not have sidelining experiences. One response was not on point and one man said he experienced a small amount of sidelining. The remaining dean said, “As a

\begin{footnotes}
\footnotetext[144]{Dean preferred to answer anonymously.}
\footnotetext[145]{\textit{Biggest Challenges}, supra note 117 (quoting Elizabeth Meade, President, Cedar Crest College).}
\footnotetext[146]{Survey of Dean Penny Willrich, Arizona Summit School of Law.}
\footnotetext[147]{See Appendix E, \textit{infra} at 67.}
\footnotetext[148]{Dean preferred to answer anonymously.}
\end{footnotes}
WOMEN LAW DEANS

gay male I had early employers in my career encourage me to keep that aspect of my life secret, as if that advice was actually intended to make my path easier. It is perhaps the opposite effect.”149 This white man experienced sidelined not in the traditional sense, but by being discouraged from revealing an integral part of himself. Another man wrote that he had not really experienced sidelined, “because I have always preferred to play a background role (at least until this current role). But I have certainly seen colleagues sidelined—disproportionately women.”150 This affirms many women’s experiences with sidelined.

Gender sidelined includes many behaviors beyond mansplaining and bropropriating, including being subject to greater scrutiny. “[Women] faculty of color[‘s] . . . teaching, scholarship, and service is generally subject to extra scrutiny (the double standard), and they encounter constant pressure to prove themselves and overcome the resentment of their colleagues by making extraordinary efforts to ‘fit in’ and put others at ease.”151 One dean said expectations for women of color, herself included, were higher and people expected results overnight. She thought there was more patience for white men who were subject to less scrutiny. Another angle, she explained, is she seemed to be judged not just for herself, but for her race, so she represented a demographic in a way that privileged deans did not. Thus, if she was not successful, there would be behind-closed-doors talk about whether they should have taken a risk on a [fill in the race] woman. Professor Wing described this common experience:

It is the plight of minorities to know that their whole subgroups may be judged by their individual behavior. If I failed, it might mean that no other black woman would be hired in the future. ‘We tried a black woman once. It didn’t work out’ might be the refrain. Yet the administration would never say that the failure of one white male meant that another should never be hired again.152

Another dimension to the enhanced scrutiny problem involves assessments or evaluations. “[W]omen’s mistakes tend to be noticed with greater frequency and are remembered for longer; they tend to be judged more rigorously than men by their superiors; and they tend to receive more polarized evaluations.”153 One woman of color said people constantly looked over her shoulder and there was always someone who wanted to push her out, complaining that she was not good enough.154 Moreover, there was an expectation she would solve pervasive law school problems, such as reversing the application decline and improving yield and matriculants’ entering credentials.

149. Dean preferred to answer anonymously.
150. Survey of Dean William P. Johnson, Saint Louis University School of Law.
152. Adrien Katherine Wing, Lessons from a Portrait: Keep Calm and Carry on, in PRESUMED INCOMPETENT, supra note 4, at 356.
153. Fink, supra note 7, at 81–82.
154. Dean preferred to discuss this part anonymously in a phone interview.
Another woman of color commented on a different aspect of this idea. She said she was not only subject to early and frequent scrutiny respecting her law school leadership, but also in terms of what she was doing for people of color, including faculty, staff, and students. There was ongoing vigilance over whether she struck the right balance between doing too much and too little for people of color.

D. The Impact of Gender and/or Race on Leadership

The surveys asked how gender and/or race impacted deans’ leadership. A common response among women deans involved adaptation, “a slow, usually unconscious modification of individual and social activity in adjustment to cultural surroundings.” 155 All deans must adapt, but women, especially women of color, have to adapt in more ways and in more circumstances to reduce challenges to their authority and to make their constituents more comfortable. 156 One dean said gender and race impact her leadership because she is a woman of color who wants to be authentic, but authenticity is constrained by expectations. This experience has been succinctly described as follows:

When an academic woman’s behavior thwarts expectations, she may be punished for her transgression in subtle and not-so-subtle ways, including negative student evaluations, patronizing and insulting comments from colleagues, and blatantly racist and sexist remarks from students, faculty, and staff. Indeed, these macro- and micro-aggressions may actually increase as a woman of color is promoted from assistant to associate and finally to full professor, assumes administrative responsibilities, and enters environments that are even less diverse than the ranks of junior faculty. 157

One dean said some roles are easier to adapt because they are more consistent with who she is as a woman of color. But at times, she has to force a “nice response” (even if a different one is called for), think about how she dresses and presents herself, remember to bring cookies occasionally, and not be too assertive for fear of offending. Prof. Flores Niemann wrote about this experience saying:

Faculty, staff, and students may have particularly adverse reactions—conscious

156. Prof. Yolanda Flores Niemann cautioned that “Women of color cannot—and should not—reasonably be expected to change their culture because they have entered a white academic world. However, cultural differences may be misperceived, misinterpreted, and/or translated as not belonging to academia or noncollegial by their white colleagues and/or students.” Yolanda Flores Niemann, Lessons from the Experiences of Women of Color Working in Academia, in PRESUMED INCOMPETENT, supra note 4, at 472. Women of color take a risk being themselves, if those “selves” are noticeably different than the norm.
and unconscious—toward women of color who are not perceived as adequately nurturing or feminine. The stereotype of the mammy and motherly Latina are particularly strong. Women who do not meet stereotypical expectations that they will nurture students arouse anger, distrust, and feelings of betrayal.\textsuperscript{158}

A woman of color wrote about pressure placed on her appearance: “I am expected to have high emotional intelligence and I am expected to wear heels and skirts or dresses and to appear feminine.”\textsuperscript{159} Expectations about roles and appearances add a layer to the tightrope women walk beyond overseeing their law schools. A report published by the ABA explained the “tightrope bias,” saying “[w]omen of all races reported pressure to behave in feminine ways, including backlash for masculine behaviors and higher loads of non-career-enhancing ‘office housework.’”\textsuperscript{160} One white woman described the tightrope bias she experienced:

I have been called out by male colleagues as not collegial when I challenge their conclusions or approach to issues. Typically, these male colleagues are widely viewed as the least collegial and most aggressive on the faculty. I have never received this criticism from female colleagues, and the context in which these comments are made is incredibly trivial. This charge would not have been thrown at any of my male colleagues for the identical behavior at issue.\textsuperscript{161}

Other women wrote that they also thought carefully about their assertiveness. One white woman said:

Over time I have seen value in assessing the context so I can determine whether the situation calls for me to establish my authority in more assertive ways. Sometimes it is important, e.g., if I am in the company of someone who interrupts me or makes eye contact with the men in the room but not me. I do think that women tend much more than men to open an intervention in a discussion with a self-effacing qualifier (“I’m not an expert, but . . . “ or “I don’t know if others feel this way, but . . . “). I have very deliberately worked to eliminate from emails and verbal interventions reflexive apologies or self-deprecation, and working to do so has made me realize how habitually I did it before.\textsuperscript{162}

Another white woman wrote of a different aspect of adapting to make others more comfortable:

My greatest challenge has been the lack of leadership skills and vision in

\textsuperscript{158} Flores Niemann, supra note 156, at 469.
\textsuperscript{159} Dean preferred to answer anonymously.
\textsuperscript{160} ABA COMMISSION ON WOMEN, supra note 128, at 8.
\textsuperscript{161} Survey of Dean Wendy Hensel, Georgia State University School of Law.
\textsuperscript{162} Dean preferred to answer anonymously.
university leaders and their feeling threatened by ambitious goals and vision—
with very rare exception, I always found that I had to ‘play small’ to make them
comfortable . . . very confining and limits progress.163

Women’s survey results indicated that they expend considerable effort
thinking about how they are perceived or how to navigate the tightrope, which can
be depleting. For women of color, the tightrope is more challenging given the
intersection of race and gender:

Women of color may feel compelled to conceal or mute aspects of their identities
to make their students and colleagues feel comfortable—to mask the very
diversity that makes their presence in legal academia so valuable. They may
sidestep controversial topics . . . shun ethnic hairstyles or attire, and behave in
an exaggeratedly lady-like manner to avoid triggering stereotypes, such as “the
angry black woman,” or the “working-class Chicana militant.”164

Serving as dean is daunting enough when you can bring your best and most
complete self to the job; when you have to leave a significant part behind to make
others more comfortable, everyone loses.

When white men were asked whether gender impacted their leadership style,
twenty-five responded, including eleven who responded no, not really or it’s hard
to say. Many responded with examples of positive impacts gender had on their
leadership, whether deserved or not: “I know I get the benefit of the doubt, or a
default favorable impression, from multiple constituencies.”165 Another wrote that
gender impacted him, “in fortunate and unfortunate ways. Fortunate ways
associated with white male privilege, authority automatically accorded to a tall,
white, older male wearing a tie. Unfortunate in the way some constituencies make
assumptions about me based on these characteristics.”166 Echoing that view,
another dean said, “As a tall white male in my 60’s people make assumptions
about me. I have to take extra steps to avoid reinforcing stereotypes about me.
Also, throughout my professional career people took me seriously and afforded
credibility to me. I often subconsciously proceed with that expectation.”167 One
man elaborated, writing:

Although I am not a typical male in many ways, I nevertheless have the privilege
of white skin, my gender, my sexual orientation and gender identity. It is
important to be mindful of that. My own implicit bias is real, and it would be
silly and dangerous not to recognize that. My privileges undoubtedly affect who
I am and, therefore, my leadership style. That makes it critically important to be

163. Survey of former Dean, now LSAC President and CEO, Kellye Testy.
165. Dean preferred to answer anonymously.
166. Dean preferred to answer anonymously.
167. Dean preferred to answer anonymously.
conscious and intentional in my decision-making.\textsuperscript{168}

Women expressed more challenges associated with gender and power, including some associated with remaining authentic as a “token” law dean.\textsuperscript{169} Nonetheless, authenticity in deanships that often carries a price, also has many positive impacts. One dean said she can be more influential as the Latina voice at the table, bringing legitimacy to her perspective.\textsuperscript{170} Others said they can represent perspectives that are frequently missing or underrepresented. One dean noted that she could use her role as a Black woman to genuinely address the need to diversify her law school. She was able to bring in twenty-five students of color from rural and poverty-stricken areas despite tremendous resistance from her faculty to adopt a program which would diversify and improve the law school’s reputation.\textsuperscript{171}

Another dean said “My experience as a black woman marks how I treat colleagues, students and faculty members. I do not dismiss personal experiences and I listen to all my constituents.”\textsuperscript{172} She went on to note that many prior deans (“white middle age Latino men”) were very dismissive of women’s voices and people of color. One dean wrote that while her gender and race did not impact her leadership style, the unique intersectionality of her gender and race added value to the goal of diversifying the least diverse profession.\textsuperscript{173} While she may not have to adapt as much as others, she recognized that her presence made a difference in the legal profession where women of color are severely underrepresented.

Many deans expressed disappointment at the inconsistency of law school and university support. While there was much fanfare on their hiring and warm welcomes following their introduction, many were soon left on their own. A recent study touched on this experience, revealing an unexpected negative impact when women and people of color are appointed as leaders. It found “white [men] managers on average experienced a ‘lower sense of identity with their company’ after the appointment of a [woman] and/or racial minority CEO.”\textsuperscript{174} It also reported “that white [men] executives working under a [woman] and/or racial minority were also less likely to provide help to fellow colleagues, with an

\begin{thebibliography}{9}
\bibitem{johnson} Survey of Dean William P. Johnson, Saint Louis University School of Law.
\bibitem{tokens} “Tokens are seen stereotypically. For people of color, the stereotypes are largely negative, racist, and sexist, and there are damaging consequences of these perceptions. Tokenized persons feel isolated and lonely, not only on their campus, but sometimes in their predominantly white communities-at-large.” See Flores Niemann, supra note 157, at 473.
\bibitem{experience} For example, she noted that she can legitimately state, “from my experience,” and then share stories from her lived experience as a Latina. Survey of Dean Jennifer Rosato Perea, DePaul University College of Law.
\bibitem{neptun} Survey of Dean Vivian Neptune, University of Puerto Rico School of Law.
\bibitem{willrich} Survey of Dean Penny Willrich, Arizona Summit School of Law.
\end{thebibliography}
especially negative effect on help provided to minority status colleagues.”\textsuperscript{175}

This trend is especially troubling for women law deans as it can create serious morale and productivity problems while also making it difficult for team-building and collaboration. When administrations and peers already set high expectations of women deans’ performance and heavily scrutinize their actions, women deans’ jobs become even more difficult if white men who work under them identify less with the law school because of their appointment and become less inclined to help their colleagues, especially colleagues of color.\textsuperscript{176}

Along with the pressure of high expectations, the small margin for error, and the worry about being a poor representative for your gender and/or race, some women lamented the occasional debilitating loneliness they experienced. As a sole woman in leadership, a dean may suffer from the impact of “high visibility, . . . loneliness, . . . stereotyping and racism . . . Tokens are highly visible, living in a glass house; their actions, words, demeanor, dress—virtually everything about them—is noticed in these environments.”\textsuperscript{177} Women’s isolation, coupled with higher expectations and the pressures of “prove-it-again” bias, can make it hard to connect genuinely with others. A white woman candidly wrote:

In other aspects of my life, friendships have always sustained me but I find as dean that they are harder to come by. Faculty for the most part do not seek me out for deeper friendship even though they are, with rare exception, extremely warm and cordial and I think they genuinely like me. But I don’t get invited to many dinner parties. It’s for me to issue the invitations. My counterpart deans are very busy and it’s hard to get on one another’s calendars. I depend on my family for basic companionship and have fewer friends I can rely on for company and conversation over walks, coffee, going for a drink, etc., than I had before I was a dean. I find that aspect of the job quite difficult.\textsuperscript{178}

As more women are appointed law deans, the pool of women allies, mentors, and support network members will expand. This group can provide more resources than previously available to counter the isolation of being a woman in a deanship. This may be happening already as one white woman wrote that the support of women deans “has been very important to my development. They call me back when I have a question and they have suggested leadership paths for me in AALS. The annual women dean dinner at our dean’s meeting is one of my favorite events.”\textsuperscript{179}

\begin{thebibliography}{99}
\bibitem{175} \textit{Id.}
\bibitem{176} I read this study after I sent out the dean’s survey, so I did not include a question about the phenomenon described in the study. However, I will follow up on it in the future.
\bibitem{177} Flores Niemann, \textit{supra} note 1566, at 473 (citations omitted).
\bibitem{178} Dean preferred to answer anonymously.
\bibitem{179} Dean preferred to answer anonymously.
\end{thebibliography}
IV. PATTERNS IN THE SURVEY RESULTS

A. The Greatest Barriers to Becoming Dean

Survey responses made it clear that work/professional life balance is challenging for all law deans, yet it seems to be more challenging for women law deans. It is no secret that professional women face a range of disparate challenges that are less common for men, and work-life balance may be the most pressing. This issue has been well documented in law, with the ABA reporting:

- 60% of women said they left firms because of caretaking commitments, compared to 46% of men;
- 54% of women said they were responsible for arranging child care, as opposed to 1% of men;
- 39% of women said the task of cooking meals fell on their shoulders, compared to 11% of men; and
- 34% of women say they leave work for children’s needs, versus 5% of men.

Not only do women who are mothers often bear a disproportionate share of family responsibilities, they also endure maternal bias on the work front. The ABA reported on the maternal wall, finding that “[w]omen of all races reported that they were treated worse after they had children[,] Women also observed a double standard between male and female parents.”

Women of color who responded to the Spring 2018 survey answered the question about the greatest barriers to becoming a dean with a three-way tie between work/personal life balance, the old boys’ network, and lack of mentors. That was followed by a two-way tie between insufficient management and leadership experience.

181. ABA COMMISSION ON WOMEN, supra note 128, at 6.
White women who responded to the Fall 2018 survey indicated that insufficient leadership experience was the greatest barrier to becoming a dean, followed by work/personal life balance, insufficient management experience, and the old boys’ network.

The man of color who responded to the survey selected, but did not prioritize, work/personal life balance, the old boys’ network, and lack of mentors.
as the greatest barriers to becoming a dean. White men who responded to the Fall 2018 survey also struggled with work/personal life balance, selecting it as the greatest barrier to becoming a dean, followed by insufficient management experience, insufficient leadership experience, and lack of mentors. The old boys’ network option did not make the top four.

In summary, the women and man of color, and the white men selected work/personal life balance as the greatest barrier to becoming a dean, or as tied for first place as the greatest barrier. White women selected it as the second greatest barrier. Given the demands of running a law school, it is not surprising that work/personal life balance is a struggle regardless of gender or race. With that said, it is worth further investigation as to why white women did not select it as their first choice.

B. Hope for Change

Regardless of gender or race, law deans who responded to the survey agreed on the need for more diversity in decanal ranks. This consensus affirms the importance of studying and reporting on the composition of law deans and advocating for more diversity, while outlining steps to achieve the same.

In response to the survey question on what changes they hoped to see for deans in the future, the top choice for women of color in the Spring 2018 survey was more diversity, followed by more support and a tie between better professional/personal balance and less bureaucracy.

182. Dean preferred to answer anonymously.
The top choice for white women was for more diversity (61.9%), followed by better professional/personal balance (52.4%), then a three-way tie between more varied leadership style, more support, and less bureaucracy (8% each).
The one man of color also selected diversity as the top change he hoped to see for deans in the future (it was the only option he selected).\(^{183}\) White men also selected diversity as their first choice (66.7%), followed by less bureaucracy (55.6%), better professional/personal balance (48.1%), and more support (40.7%).

### C. Relationship Status

The surveys asked deans about their relationship status, and the responses are similar to what *A Gendered Update* reported in 2005–2006:

A majority of the women who completed the surveys, and all but one of the men, were either married or in partnerships. Not one survey respondent was single, and only 7.7% of the men and 14.3% of the women were divorced. None of the men were widowed, and 9.5% of the women were widowed.\(^{184}\)

Here is a summary of the survey information from *A Gendered Update*:

<table>
<thead>
<tr>
<th></th>
<th>Married or in Partnerships</th>
<th>Divorced</th>
<th>Single</th>
<th>Widowed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Men</td>
<td>92.3%</td>
<td>7.7%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Women</td>
<td>76%</td>
<td>14.3%</td>
<td>0</td>
<td>9.5%</td>
</tr>
</tbody>
</table>

All seven women of color who completed the Spring 2018 survey answered the question about relationship status. Six of these women were married or in a partnership and one was divorced. Anecdotally, the divorced woman said the

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183. Dean preferred to answer anonymously.
divorce ended her deanship. All twenty-four women who completed the Fall 2018 survey responded to the question about relationship status. Nineteen were married or in a partnership, one was single and four were divorced.

The man of color who completed the Fall 2018 survey responded that he was married. Of the 30 white men who completed the survey, twenty-nine responded to the question about relationship status. Twenty-six were married or in a partnership, two were single, and one was divorced. Here is a summary of the information from the Spring and Fall 2018 surveys:

<table>
<thead>
<tr>
<th></th>
<th>Married or in Partnerships</th>
<th>Divorced</th>
<th>Single</th>
<th>Widowed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Women of Color</td>
<td>6 (86%)</td>
<td>1 (14%)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>White Women</td>
<td>19 (79.2%)</td>
<td>4 (16.6%)</td>
<td>1 (4.2%)</td>
<td>0</td>
</tr>
<tr>
<td>Men of Color</td>
<td>1 (100%)</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>White Men</td>
<td>26 (89.6%)</td>
<td>1 (3.5%)</td>
<td>2 (6.9%)</td>
<td>0</td>
</tr>
</tbody>
</table>

Although the survey results from *A Gendered Update* did not differentiate deans based on race, comparing the 2007 results to the current survey is informative. Compared to that cumulative group, the current percentage of women of color who are married or in a partnership is about 10% higher (86% now compared to 76.2%), and the percentage of white women is slightly higher (79.2% now compared to 76.2%). Women of color are divorced at about the same rate (14% now compared to 14.3%), and the percentage of white women is slightly higher (16.6% now compared to 14.3%). A small percentage was widowed (9.5%) and none currently are. White men are slightly less likely to be married or in a partnership now (89.6% compared to 92.3%). A smaller percentage are divorced now (3.5% compared to 7.7%) and likelier to be single (6.9% compared to 0).

### D. Parenthood

With respect to deans’ parental status, at the time I wrote *A Gendered Update*, over 92% of men had children and approximately 71% of women had children. *A Gendered Update* reported:

Over ninety percent of the men had children. Not one man answered that he did not have children; however, one declined to answer. Just over seventy percent of the women had children, and close to thirty percent did not have children. That means women deans are nearly thirty percent as likely as men not

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185. Dean preferred to answer anonymously. She reported her ex-husband threatened to file for sole custody because she spent too much time at work.

186. Dean preferred to answer anonymously.

187. White men law deans may be the only group in the US population with a declining divorce rate!
to have children.\textsuperscript{188}

Below is a summary of the survey information from \textit{A Gendered Update}.\textsuperscript{189}

<table>
<thead>
<tr>
<th></th>
<th>Have children</th>
<th>Do not have children</th>
<th>Declined to Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Men</strong></td>
<td>92.3%</td>
<td>0</td>
<td>7.7%</td>
</tr>
<tr>
<td><strong>Women</strong></td>
<td>71.4%</td>
<td>28.6%</td>
<td>0</td>
</tr>
</tbody>
</table>

All seven women of color who completed the Spring 2018 survey answered the question about parental status and all seven had children. Four women had one child and three had two children. Women of color on average had 1.4 children.\textsuperscript{190}

Twenty-four white women completed the Fall 2018 survey and twenty-three responded to the question about children. Eighteen women had children (twelve had two children each, five had three children each, and one had four children). Five women did not have children (one had no children but had stepchildren). In addition, two women with children also had stepchildren (one had two stepchildren in addition to her two children, and one had four stepchildren in addition to her three children). White women on average had 1.9 children (not including stepchildren).

The man of color who completed the Fall 2018 survey answered the question about parental status, stating that he had children but did not specify how many.

Thirty white men completed the survey and twenty-nine responded to the question about parental status. Twenty-seven men had children (two men had five children each, three men had four children each, eleven men had three children each, nine men had two children each, and one man had one child). Two men did not have children. White men on average had 2.6 children (not including stepchildren).

Here is a summary of the survey information from the Spring and Fall 2018 surveys:

<table>
<thead>
<tr>
<th></th>
<th>Deans with Children (+ number)</th>
<th>Average Number of Children</th>
<th>Deans Without Children</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Women of Color</strong></td>
<td>Total = 7 (100%) 3: 2 children 4: 1 child</td>
<td>1.4</td>
<td>0</td>
</tr>
<tr>
<td><strong>White women</strong></td>
<td>Total = 18 (78.3%) 1: 4 children 5: 3 children 12: 2 children</td>
<td>1.9</td>
<td>5 (21.7%)</td>
</tr>
<tr>
<td><strong>Men of Color</strong></td>
<td>1 (100%) (number not specified)</td>
<td>?</td>
<td>0</td>
</tr>
</tbody>
</table>

\textsuperscript{188} Padilla, supra note 1, at 526.
\textsuperscript{189} Id.
\textsuperscript{190} While one cannot have a fraction of a child, for comparison purposes the average is helpful.
White Men  Total = 27 (93.1%)
2: 5 children
3: 4 children
11: 3 children
10: 2 children
1: 1 child

Based on the survey results, all deans are likelier to have children now than they were when I wrote *A Gendered Update*, with a slight bump for men from 92.3% to 93.1%. Approximately 71.4% of women had children when I wrote *A Gendered Update*, compared to 100% of women of color now and 78.3% of white women.

During all relevant periods, men were more likely to have children than women. While I do not have data on the number of children deans had when I wrote *A Gendered Update*, currently men are likelier to have more children than women (2.6 children compared to 1.9 for white women and 1.4 for women of color). Women are three times as likely not to have children as men (21.7% compared to 6.9%). While the gap is shrinking, women deans have fewer children than men and are likelier to be childless than men. This may be simple choice or a result of the ongoing gender imbalance in the domestic sphere, which makes balancing dean’s work with family life more challenging for women than men.

V. GENDER SIDELINING, PRESUMPTIONS OF COMPETENCE, AND OTHER HURDLES: GETTING AROUND THEM, OVER THEM, AND RID OF THEM

A. What We Have Learned

For all the extra hurdles women face in deanships, they also have many unique opportunities to touch lives, shape policies and make a positive difference. L. Song Richardson is one of only two women of color currently leading one of the top thirty law schools in the United States and notes that she would like to encourage others. "Through my life I have been inspired by other women and the incredible work they’ve done, and I hope with me in this position it will potentially inspire other women to dream big and work hard to achieve their dreams." Many women noted that they valued the opportunity to serve, and to be a voice for the underserved. There is a unique place for women to provide hope, leadership, and guidance for those who aspire to leadership. Many of the women respondents wrote that such a role is important to them.

The stories from the survey revealed that even if you reach your career goal...
of becoming a law school dean, a privileged position which commands respect and opens doors, if you are a woman, especially from an under-represented group, the position typically comes with more hurdles and challenges than it does for other deans. While the stories include many victories, they are tempered by ongoing presumptions of incompetence and gender sidelining.

Numerous columnists and commentators have written about the tendency for women to be ‘manterrupted’ at work, to have their ideas ‘bropropriated’ or ‘bro-opted’ by [men] colleagues”), and to face additional obstacles that are rarer for privileged members of the Academy. 194 “Not only the demographics but the culture of academia is distinctly white, heterosexual, and middle- and upper-middle-class. Those who differ from this norm find themselves, to a greater or lesser degree, ‘presumed incompetent’ by students, colleagues, and administrators.” 195 Sadly, that is often the default or starting position for women, including many of the deans who responded to my survey. However, these women do not give up easily as evidenced by their current positions. Thus, it is no surprise that many persisted, succeeded, and eventually neutralized the presumptions that accompanied them when they arrived. However, their strength is not always enough: this Part will detail some steps to ameliorate or reduce the hurdles described in the previous Part.

B. Solutions

From the manner in which men and women conduct themselves in meetings, to the manner in which they receive mentoring and guidance, to the manner in which they receive credit (or not) for their workplace contributions, men and women tend to experience the workplace in profoundly different ways. 196

Whether in the context of the corporate world or the Academy, women experience professional life in radically different ways than their more privileged colleagues. Difference by itself is not bad. However, when difference is a proxy for discrimination or bias it is a problem which is likelier to persist as long as women are underrepresented as law deans. This Part thus touches on how to increase the number of women law deans, but mostly it focuses on improving retention and women’s experiences by reducing and preventing gender sidelining, presumptions of incompetence, and other microaggressions women face as law deans. The retention portion shares deans’ ideas on what sustains them. Woven throughout are thoughts about flipping the script on gender sidelining and presumptions of incompetence, moving towards assumptions of competence, and laying the foundation for success for women in leadership in the Academy.

194. See, e.g., DiGeronimo, supra note 135; Bennett, supra note 134.
195. Harris & González, supra note 4, at 3.
196. See Fink, supra note 7, at 79.
1. **Acknowledge the Problem and Support it With Data**

An essential starting point is acknowledging ongoing problems: women are underrepresented as law deans and those who serve experience presumptions of incompetence, gender sidelining, and relentless microaggressions. Some will argue these problems are going away on their own and do not require attention. However, many women’s experiences, like those described in this Article, contradict naïve assertions that the problems are made up, solved, or will effortlessly disappear.

One logical step towards convincing naysayers that the problem exists is to present data. Raw data speaks volumes, and there are reams of it on men and women’s numbers in the general population, higher education, law partnerships, deanships, and presidencies. Tracking from the beginning, there are roughly equal numbers of girls and boys at birth. These statistics continue through college, and into law school. However, when proceeding to tenure-track positions and then into leadership and power roles, the data reveal a decline in women’s representation. Even if data falls on deaf ears or some deny the statistics, it demonstrates that chronic issues remain with women’s underrepresentation.

Research suggests that disseminating accurate data may not be enough. It may be more effective to couple it with statements that disparities persist even when people want to overcome biases (the types of biases, for example, that lead to women of color’s underrepresentation in leadership roles). “When we communicate that a vast majority of people hold some biases, we need to make sure that we’re not legitimating prejudice. By reinforcing the idea that people want to conquer their biases and that there are benefits to doing so, we send a more effective message: Most people don’t want to discriminate, and you shouldn’t either.”

Quantitative data should be supplemented with qualitative data—chronicles of women’s experiences such as those outlined in this Article—to emphasize that change starts with numbers but it does not end there. The numbers become more tangible and resonate more when they are attached to stories.

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197. See John F. Dovidio, *Part II: Introduction, in Presumed Incompetent*, supra note 4, at 113 (“The psychological evidence suggests that readers—both men and women—will be inclined to dismiss the events described as exaggerations or illustrations of ‘oversensitivity.’”).

198. In the United States, approximately 105 boys are born for each 100 girls. *Sex Ratios at Birth, Worldwide*, PEW RESEARCH CENTER (Nov. 19, 2015) https://perma.cc/B82A-46RM. I do not mean to diminish other gender or non-gendered identities. However, this Article reports on the status of male/female and men/women due to its focus on women and women of color in deanships and because most available data is limited to the binary.

199. See, e.g., Nancy Cantor, *Part III: Introduction, in Presumed Incompetent*, supra note 4, at 221 (“women have become the majority population on campus, earning 60 percent of the undergraduate and half the PhDs and professional degrees awarded each year.”).

200. Id. (“Between 1989 and 1997, the proportion of tenured minority women went down.”). See also Harris & González, supra note 4, at 2 (“In 2007, women of color held only 7.5 percent of full-time faculty positions. Moreover, the percentage of women of color declined steadily with rising academic rank.”).

Disseminating quantitative and qualitative information about women’s underrepresentation can highlight the problem and create more impetus to increase women’s numbers. Struggle, bias, and sidelining should diminish when women are not such a novelty in leadership roles. “Critical mass may not be a panacea for the ills of the academic workplace, but it can relieve the soul-crushing isolation, the painful stigma, and the exhausting service requirements.”

2. Continue to Increase Women in Leadership

One struggle for women who aspire to leadership is getting in the door. A college leader said “the biggest challenge I face as a woman college president is needing to wrench open doors that might open automatically for my male counterparts. But I do this, and I make progress—as I lead, make myself heard, and assert myself in pursuing my goals.” More women in leadership makes it easier for doors to open, even if just an inch. But women still have to push the door wide open to make room at the table for themselves and other outsiders. Even when women arrive, once in, the mine-filled path can lead to a steep drop-off. “Women and people of color are already more likely to be promoted to high leadership levels within companies during times of crisis, a phenomenon known as the ‘glass cliff.’ If they are unable to lead their companies out of a crisis, they are quickly replaced by white men, according to a 2014 study on the phenomenon.”

While proportionality is not a cure-all, increasing the number of women deans can reduce tokenism and emotional taxes; allow women to demonstrate competence, leading to presumptions of the same; and deter sidelining behaviors. Change will not occur spontaneously, especially when powerful people are convinced there is no problem, or worse, who fear change and remain invested in preserving the status quo. “The culture of academia, ultimately, is impervious to change because its power structure is designed to reproduce itself. When the people in power receive a mandate to search out excellence, the first place they look is to people like themselves, and too often that is also where the search ends.”

203. Biggest Challenges, supra note 117 (quoting Elizabeth Meade, President, Cedar Crest College).
204. da Silva, supra note 174.
205. See, e.g., Bettina Apotheker, Foreword, in PRESUMED INCOMPETENT, supra note 4, at xiii (noting “the repeated efforts by contemporary white academics, lawyers, and politicians to manipulate statistics and feign liberal intentions while denouncing affirmative action, claiming ‘reverse discrimination’ . . . and blaming students of color and women for their presumed ‘failures.’”).
206. “The repeated efforts by contemporary white academics, lawyers, and politicians to manipulate statistics and feign liberal intentions while denouncing affirmative action, claiming ‘reverse discrimination’ . . . and blaming students of color and women for their presumed ‘failures.’”
207. Harris & González, supra note 4, at 7. See also Padilla, supra note 1, at 531.
3. Take Proactive Steps to Diversify Deanships

In order to achieve progress, legal education institutions must actively pursue diversity with concrete actions, not merely vague goals. As González noted, “[t]o ensure that commitments to diversity are not just aspirational, academic leaders should establish promotion of diversity as one of the criteria for evaluating deans and department chairs, devise concrete performance standards to measure progress, and reward successful schools and departments with additional resources.”208 In other words, search committees should themselves be diverse and make diversity a priority.

To achieve their goals, search committees can take several steps such as: (1) hiring an executive search firm with both a record of, and commitment to, seeking a diverse candidate pool; (2) preparing a job description that stresses the law school’s commitment to diversity and highlights concrete examples of that commitment; (3) using creative and targeted approaches to establish a broad candidate pool with members of traditionally underrepresented groups; (4) engaging in training on best hiring practices that enhance diversity and minimize unconscious bias, gender sideling, and presumptions of incompetence; and (5) asking candidates to submit a statement on diversity and inclusion so they can describe how they would personally contribute to or support diversity. One college president who has been subject to overt and implicit bias emphasized that “it’s critical for higher-education leaders to appoint diverse search committees, to commit to having periodic implicit bias training, and to have diverse voices and perspectives around leadership tables.”209

4. Promote a Broader Range of Leadership Styles

In order to open the door wider for women to obtain deanships and succeed as leaders, higher education institutions must move away from long-standing preferences for male leadership styles and towards a broader range of leadership styles.210 This shift benefits law schools in the same way that teaching to a variety of learning styles benefits students:211 it leads to educators reaching more students, resonates with a broader cross-section, and creates more diversity in how issues are framed and resolved. Diverse leadership can draw from experience to right equity imbalances such as women’s disproportionate service obligations,212 the

209. Biggest Challenges, supra note 117 (quoting Judy K. Sakai, President, Sonoma State University).
210. See Padilla, supra note 1, at 503, 534.
211. See, e.g., M.H. Sam Jacobsen, A Primer on Learning Styles: Reaching Every Student, 25 Seattle U. L. Rev. 139 (2001) (discussing how knowledge of learning styles helps professors achieve their pedagogical goals and how professors can most effectively help their students grow).
212. See KERRY ANN O’MEARA, GUDRUN NYUNT & COURTNEY LENNARTZ, RESEARCH BRIEF #1: GENDER AND WORKLOAD, https://perma.cc/9YE7-APR3 (finding that women faculty “engage in more campus service and teaching-mentoring related activities than their male
“prove-it-again” bias they are subject to, and lower average salaries. In addition, a shift away from predominantly male leadership towards more inclusive leadership can reduce sidelining, promote confidence, allow more voices to be heard, and lead to success by different paths.

Institutions and decisionmakers alike must take deliberate steps to support a broader range of leadership styles. Sheryl Sandberg and Adam Grant described concrete steps and benefits of such support:

To motivate women at work, we need to be explicit about our disapproval of the leadership imbalance as well as our support for female leaders. When more women lead, performance improves. Start-ups led by women are more likely to succeed; innovative firms with more women in top management are more profitable; and companies with more gender diversity have more revenue, customers, market share and profits. A comprehensive analysis of 95 studies on gender differences showed that when it comes to leadership skills, although men are more confident, women are more competent.

5. Acknowledge the Benefits of More Diverse Leadership

Institutions of higher education shortchange themselves and their constituents when there are few women leaders, thus, one recommended step is for educational institutions to acknowledge the positive consequences of leadership diversity. Although identifying traits as “female” risks oversimplifying and essentializing gender characteristics, many women deans were very forthright about common experiences of how gender impacted their leadership. One dean colleagues[...] that these differences become more pronounced as faculty move along in their careers[...], and that “[w]omen of color face particular demands for unrewarded work as they are called upon to represent faculty of color and women” in the form of “more mentoring and advising work and being asked to serve on more faculty searches and diversity-related committees than white faculty and male faculty of color.”.

213. See Williams, supra note 118.

214. Although I have no data on deans’ salaries, it is widely reported that women lawyers earn less than men. An ABA report found that “[w]omen of color agreed that their pay is comparable to their colleagues of similar experience and seniority at a level 31 percentage points lower than white men; white women agreed at a level 24 percentage points lower than white men.” ABA COMMISSION ON WOMEN, supra note 128, at 7. Women law professors are alleged to earn less than their male peers, and at least one law school settled a gender-pay gap lawsuit for $2.7 million. See Elizabeth Hernandez, DU Law School’s “Fix” for Its Gender-pay Gap Revealed a Female makes $30,000 Less Than Her Peers, THE DENVER POST (Jun.5, 2019), https://perma.cc/8VAU-3WTC.

215. Adam Grant & Sheryl Sandberg, When Talking About Bias Backfires, N.Y. TIMES (Dec. 6, 2014), https://perma.cc/BD2R-HRBE. See also Tiffany Pham, Think You’re Not Biased Against Women At Work? Read This, FORBES (Dec. 20, 2016), https://perma.cc/GE93-LV2W (“[S]tudy after study shows that female leaders tend to be better leaders than their male counterparts. At every single level of the corporate ladder, women are rated as better overall leaders than men by peers, bosses, direct reports and colleagues. What is even more interesting is that when such findings are shared with women, they believe what makes them great leaders is that they are not complacent and continuously try to outdo themselves and prove themselves and are therefore more keen to take feedback to heart”).
said “My leadership style is relationship-driven, which comes from how women are acculturated. I have a high EQ, which is more common in women, and I use my emotional intelligence constantly in working with constituencies and in problem solving.”\textsuperscript{216} Several other women mentioned emotional intelligence and related traits like being collaborative, team-based, and community builders. Another shared some of these traits but then contrasted them with traits less stereotypically feminine: “I am highly collaborative and efficient, which I attribute to a more feminine management style. I communicate in a transparent and straightforward way even when delivering negative news, which is less of a typically feminine style.”\textsuperscript{217}

Many deans also wrote that their gender roles as mothers influenced their leadership style. “I am a nurturer by nature and that helps empower me. I think as a female and mother I know how to multitask.”\textsuperscript{218}

Law schools are often risk-averse and wed to precedent, so they tend to conduct business the same way they always have. I challenge them to disrupt that model with fresher leadership which can enhance problem-solving and team-building, both of which benefit the law school and those involved with it. Making room for many voices and women’s leadership helps undo the damage of decades of silencing, normalizes women as leaders, and boosts morale. With better morale and workplace satisfaction, greater productivity often follows. Morale always matters, even more so for the success of women who arrive with high expectations about what they can accomplish, but do not get consistent support and whose mistakes are often magnified. As institutions welcome more leadership styles, women will find it easier to lead authentically and bring their unique strengths to their deanships. Acceptance of diverse leadership improves law schools and retention while enhancing the likelihood of a dean’s success.

6. Fill the Toolbox

Institutions must provide diverse leaders with ongoing support. Although institutions might celebrate hiring women and have good intentions with respect to diversity, they can derail deans’ success by failing to provide adequate support. Support can range from establishing a point person at the university, on the university board, and other key bodies who can share information, introductions, and an overview of that body, to providing an orientation and training, and setting up initial meetings with influential persons who might not be obvious.

By giving new outsider deans more support, law schools stand to benefit more from their presence as “the extent to which women’s efforts and accomplishments are (or are not) recognized in the workplace can create a self-fulfilling prophesy, either reinforcing achievement or worthlessness.”\textsuperscript{219} In turn,

\textsuperscript{216} Dean preferred to answer anonymously.
\textsuperscript{217} Survey of Dean Wendy Hensel, Georgia State University School of Law.
\textsuperscript{218} Dean preferred to answer survey anonymously.
\textsuperscript{219} Fink, supra note 7, at 92.
WOMEN LAW DEANS

women who feel their efforts appreciated and recognized will work harder; those “who feel overlooked and ignored may see their drive and ambition diminish.”

When women leaders make room for all voices, including women who are likelier to have been silenced, sidelined and presumed incompetent, they create an opportunity for inclusiveness and contributions that would have otherwise been missed. Many of us have shared the experience of hearing students say that they never or rarely spoke up before our class, but having a professor who also was “other,” who looked like them or shared some of their life story, made them feel competent and more welcome to contribute. If that is the effect of diverse leadership in a law school classroom, imagine the potential that could be unleashed by having the “other” as the law school leader? When women lead, staff and students, especially members of underrepresented groups, feel affirmed and inspired, thus improving law school satisfaction and outputs.

Women can better position themselves as competitive candidates by acquiring leadership training. Many academics have little experience with budgets, management, conflict-resolution and other skills which are required to competently carry out a dean’s daily duties, and as already noted in this Article, those are some of the main entry barriers to becoming a dean. The University of Georgia School of Law hosted a Women’s Leadership in Academia Conference in July 2018, which addressed many of these topics through informative and thought-provoking panels, breakout sessions, and workshops. Topics included: “Exploring the Value of Female Mentoring Relationships to Cultivate Law School Leadership;” “Outside the Four Walls of the Law School: Law Faculty and Staff as Campus and University Service Leaders;” “Strategies for Conflict Management and Dialogue;” “Engendering Equality Within Your Institution: Establishing a Women’s Committee to Achieve Meaningful Change;” “Addressing Gender Disparities in Institutional Service Workloads;” the “Academic Search Process;” “Negotiation Strategies;” and “Leadership Challenges and Solutions over the Course of a Career.” Participants also had the opportunity to consult with executive search firm leaders and obtain individualized feedback on their CVs.


221. See Jagdeep S. Bhandari, Nicholas P. Cafardi, & Matthew Martin, Who Are These People? An Empirical Profile of the Nation’s Law School Deans, 48 J. LEGAL EDUC. 329, 343 (1998) (observing that according to one study, in 1996-1997, 27.6% of all deans had prior decanal experience and 57.1% of deans had prior administrative experience). But see Kay, supra note 30, at 219 (alleging that “[a]lmost none of them [women law deans] has had prior administrative experience, although some of them have previously been Associate Deans or Interim Deans”).

222. See supra, Part IV A–B.

223. See supra, Part IV A–B.


Education and training like that provided by the Women’s Leadership in Academia and the University of Seattle/SALT conferences position women to present themselves as viable candidates for deanship openings and to get to know potential mentors, sponsors, and executive search firm principals.

Women can also situate themselves for advancement by seeking and accepting stretch assignments which are “challenging projects in which an employee must develop new skills and improve their capabilities in order to be successful.”

Stretch assignments are important because they “not only prepare employees for future managerial roles, [but they also] highlight high potentials and put them on the map for leadership consideration.”

Stretch assignments undoubtedly help those moving up the career ladder, but they still go to men much more frequently than women. Thus, part of the strategy for increasing women in leadership is to ensure that women receive as many stretch assignments as their men counterparts, or even more to make up for lost time.

For companies striving to close persistent gender gaps, allocating critical assignments to high-potential women in more intentional and strategic ways can make a dramatic difference [in diversifying the pipeline and moving more women into leadership roles].

Mentoring is another tool to both create a bigger pool of women for deanships and retain existing deans. It is especially invaluable to have mentors who have been in your shoes. More women law deans have this opportunity now than ever because of the increase in number of diverse law deans working today. Compare the situation in 2006, when there were only three women deans of color to today, when there are 19.5 women of color, many of whom were mentored by their predecessors.

Having more women leaders in the future will make an even bigger difference, but increasing the number of women law deans requires intentional steps given the historical absence of women law deans.

On a positive note, there are now more available mentors than ever from underrepresented groups as well as countless powerful mentors who are happy to help and who make a bigger difference than previously recognized. “Mentoring was recently found to be the most impactful activity for increasing diversity and inclusion at work, compared to diversity training and a variety of other diversity initiatives. Receiving mentorship from senior [men] can increase compensation and career progress satisfaction for women, particularly for those working in [men]-dominated

227. Id.
228. Id.
230. See, e.g., Flores Niemann, supra note 156, at 496.
231. See Padilla, supra note 1, at 510.
industries.”

Women—especially underrepresented women—may still be reluctant to seek out busy, powerful people as mentors, but should not hesitate given that mentoring benefits mentors and mentees alike. “[A] mentor relationship can provide the mentee valuable lessons from the mentor’s story, insights about an industry or company, and key opportunities and introductions’... Sharing your experiences helps you, too. ‘We teach what we need to learn, so it’s an opportunity to reflect on the lessons you want to apply in your own career.’”

The power of an effective mentor cannot be understated. When I saw an advertisement in the San Diego Daily Transcript for a law professor position at California Western School of Law in 1991, I immediately reached out to one of my law school mentors: Professor Miguel Méndez. He introduced me to Professor Frank Valdes, who had recently joined the California Western faculty. Professor Valdes’ mentoring was instrumental in helping me obtain the coveted job. He explained the process, including the initial interview and—in case I passed that test—the full day interview. Not only did he moot my job talk and provide constructive feedback, he also patiently shared background information on everyone I was scheduled to meet. This included telling me who might be challenging or supportive, what the school was looking for, and other information that better equipped me for the interview. An effective mentor will do that and much more. Formal and informal mentoring are both crucial for women in leadership and yield positive outcomes for mentors and mentees. While it will not eliminate the hurdles, having a mentor who knows where the hurdles are and how high they are, and has strategies to get over them can be pivotal in a dean’s success.

Finding effective sponsors is equally crucial. As one dean puts it, “[t]he academic landscape is littered with landmines and unwritten rules that may torpedo the careers of those who do not receive proper guidance and support. In addition to mentors, women of color also need sponsors—highly respected senior faculty who will advocate for them in faculty meetings and behind closed doors


233. “Women tend to be less comfortable making a formal request for help... so one of the best things you can do as a mentor is offer help when you see an opportunity.” Emily Hite, Not Your Mother’s Mentor, MEDIUM: STAN. ALUMNI (Jun. 25, 2018), https://perma.cc/F69X-NPM8.

234. Id.

235. I did not use the traditional AALS Faculty Recruitment Conference to obtain my position. See Faculty Recruitment Conference, ASS’N AM. L. SCH., https://perma.cc/KF7Z-K2EL. Rather, I responded to an advertisement. That would be very rare today.


237. Frank Valdes made a lateral move to the University of Miami School of Law in 1996, where he remains. See Francisco Valdes, U. MIAMI SCH. L., https://perma.cc/X9SC-M2CM.
when they are being reviewed for tenure and promotion."238 While it makes sense to have senior faculty as sponsors when going through the tenure process, women in positions of power should also seek other influential sponsors such as provosts, deans, board members, and community leaders. Trustworthy sponsors can introduce decision-makers and influencers; provide information about advancement opportunities in the Academy; secure invitations to important events; acknowledge your presence; elevate your ideas and initiatives; and otherwise present you as impressive, accomplished, and worthy of respect. According to a women’s career coaching company, “The best sponsor is a member of leadership who not only provides you with valuable information to increase your skills but works as an advocate for your advancement in meetings and other situations where you are not present.”239

In addition to cultivating effective sponsors, women deans should also sponsor others who aspire to deanships—promoting them to influential people, making introductions, and being part of their wisdom council. “‘Critical sponsorship’ and ‘one-off’ instances of support at the right moments’ are how programmer Tracy Chou describes the professional backing she finds most helpful to give and receive.”240 If you have made it to a position of power, you have access to many others in similar positions and should use those relationships to pay it forward.

7. Call Out Biases and Be an Ally

To address the impact of negative gender-based expectations, one tool is to stand with women deans, support their leadership, and remind critics who unfairly demean women that their dean is simply exhibiting leadership on behalf of the institution. In the absence of such alliances, the “silencing that women experience in the workplace often becomes part of a vicious circle: The more women feel silenced or ‘man-terrupted’ or as if their ideas have been “‘bro-opted’ by male peers, the more they may doubt their real value in the workplace.”241 Although women deans are less likely to have issues with silencing given how far they have made it in the leadership realm, the problem persists, as does tightrope bias. “When a woman speaks in a professional setting, she walks a tightrope. Either she’s barely heard or she’s judged as too aggressive. When a man says virtually the same thing, heads nod in appreciation for his fine idea. As a result, women often decide that saying less is more.”242 One college president said, “Anecdotally, I do think that [women] leaders can sometimes face a ‘double bind’ because of gender: meaning when [men] leaders are aggressive, hard-charging, and exacting, they are often

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238. González, supra note 116, at 52.
239. Turo, supra note 226.
240. Hite, supra note 233.
241. Fink, supra note 7, at 89.
perceived as being ‘strong.’ When [women] leaders exhibit the same qualities, it can generate a negative reaction because, for some, those characteristics are not seen as being stereotypically [feminine].” 243 These cycles and biases cannot be combated unless people in the room begin to acknowledge them and call them out.

Strategic alliances are essential in even seemingly insignificant moments because challenges abound for women leaders. Even the choice of words matters, depending on whether those words are attributed to a man or woman. “Research has shown that the manner in which listeners break down information when both a [man] and [woman] speaker are saying the same thing may differ significantly according to the gender of the speaker.” 244 Not only are words viewed differently depending on whether a man or woman says them, but traits are viewed differently depending on whether they are associated with a man or woman. A Pew study found that “Americans are much more likely to use powerful in a positive way to describe men (67% positive) than women (92% negative).” 245 It also found that “Americans saw leadership and ambition as traits that society values more in men than in women.” 246 Fighting stereotypes and conscious as well as unconscious bias and expectations is an ongoing battle, but an essential one.

One college president suggested that “[w]hen women leaders resist the pressure to acquiesce to such cultural expectations, we grant permission to our colleagues (and students) to forge a path that is defined by their abilities. We create learning environments that are more just and conducive to success.” 247 As we get more accustomed to women leading, it will become the new normal so we should be less inclined to discount what they say or constrain them with outdated expectations. When there is a normative shift and women routinely lead their institutions, not only will we be less likely to disregard their voices, devalue them or assess them negatively if they do not match our unconscious biases, but gender sidelining should also decline. We can even shift to considering women’s positive leadership traits or—more radically—we may not consider gender at all.

Setting up a network of allies and being an ally can help combat multiple problems, including “manterruption.” For example, if a woman colleague is “manterrupted,” she can utilize suggestions from a Newsweek article: “Verbal Chicken” (keep talking until the interrupter stops), 248 “Lean in (Literally),”

243. Biggest Challenges, supra note 117 (quoting Susan Herbst, President, University of Connecticut).
244. Fink, supra note 7, at 88. It gets worse. “[G]ender can impact the extent to which others find a speaker to be dependable, intelligent or reliable. Research indicates that even when a female voice generally is deemed trustworthy, clear, and comprehensible, her voice still will receive lower ratings when compared with a man’s voice.” Id.
246. Id.
247. Biggest Challenges, supra note 117 (quoting Mariko Silver, President, Bennington College).
because “if you put your elbows on the table, research has shown that you’re less likely to be interrupted;”\textsuperscript{249} and “Womanerrupt” (“Find a wingman or wingwoman who will interrupt the interrupter when you get interrupted”).\textsuperscript{250} Women leaders can also subtly intervene to allow a woman to finish her thought, call on other women, re-claim control when men take over the conversation, pause to make room for other voices, and give credit to women for their ideas. One college president provided more suggestions:

I have to consciously interject myself into their conversations at public events, and find ways to get time with them one-on-one to achieve what the male presidents in my area can usually achieve with less effort. I must often work twice as hard to overcome the natural marginalization not just of women in leadership positions, but also of my institution, a small women’s college, in its place amid larger co-ed institutions and some of the sports-powerhouse universities throughout my region.\textsuperscript{251}

These tools provide ways to minimize gender sidelining and may be effective enough over time to eliminate the problems.

“Bropropriation,” is another problem that can be mitigated through teamwork. Almost every dean who responded to the survey and every professional woman with whom I have discussed “bropropriation” has had her ideas “bropropriated.” One article suggested responding to “bropropriation” with either a “Thank ‘n’ Yank” or a “Wingman (or Wingwoman)” approach.\textsuperscript{252} “Thank ‘n’ Yank” means thanking the “bropropriator” for picking up your idea and supporting it but making clear it is your idea.\textsuperscript{253} The wingman or wingwoman approach involves having your wing either publicly support your idea when you propose it or running interference when a colleague tries to “bropropriate” your idea by giving you credit for the idea which the bropropriator was trying to hijack.\textsuperscript{254} One dean wrote that these types of sidelining behaviors occur, but she developed strategies to prevent them:

It has not been easy but my faculty meetings and even Academic Senate meetings run smoothly when I run them, providing each participant an opportunity to express themselves. Especially women of color. Humor also works to demonstrate that ‘the female professors just said that,’ or was the author of the idea and the men are trying to take credit.\textsuperscript{255}

\textsuperscript{249}. Id.
\textsuperscript{250}. Id.
\textsuperscript{251}. Biggest Challenges, supra note 117 (quoting Elizabeth Meade, President, Cedar Crest College)
\textsuperscript{252}. Seven Practical Ways to Combat Workplace Sexism, supra note 2486.
\textsuperscript{253}. Id.
\textsuperscript{254}. Id.
\textsuperscript{255}. Survey of Dean Vivian Neptune, University of Puerto Rico School of Law.
When the leader is a woman who looks out for others—especially those from other underrepresented groups—and uses humor to point out sideling and defuse tension, it is a more hospitable environment for everyone.

8. Practices That Sustain

One way to improve retention for outsider deans like women is to encourage them to take adequate care of themselves. In that vein, the survey asked deans what sustained them, and this Part closes with some of their suggestions. One woman in her third deanship said she is sustained by an “optimistic attitude, family, running, [and] knowing I am doing the right things for the right reasons.” How you view the world often becomes a self-fulfilling prophesy, so establishing a setpoint of optimism can get you through the challenges of deaning. Healthy habits are also important given the stress, long hours, and demands of a law school deanship.

Many women wrote that exercise, including running and yoga, and meditation were important. Faith and family were also common sources of sustainability. One dean said her son sustains her: she does everything for him. Another said her faith, family, and friends sustained her. Given the loneliness mentioned earlier and job demands including much work done in isolation and constant battles, it is vital to have a personal support network—family and friends who you can be yourself with and who can provide kindness, laughter, and a shoulder to lean on. Another dean echoed the importance of faith, noting that meditation and prayer, a happy home life, and diversity of opportunity sustained her. Each dean should have her own well that she can dip into to refresh, recharge, and renew.

Another dean said her trust in the excellent education provided at her school and in the new generation of lawyers sustained her. A former dean said her commitment to equal justice sustains her, and others wrote that serving and making a difference kept them going. One woman wrote that she is sustained by her “desire to be a positive role model for young women and people of color and help more of them enter the legal profession and succeed.” These responses stem from the idea that it is important to believe strongly enough in what you do that it will sustain you when you face sideling, competence questions, microaggressions, and other challenges due to being a leader who is “other.”

Women who make it to a law school deanship have much to be proud of and many have a broad base of support, but they also walk a hazard-filled path. This

256. Survey of Dean Jennifer Rosato Perea, DePaul University College of Law.
257. Survey of Dean Danielle Conway, University of Maine School of Law.
258. Survey of Prof. Maria Pabón, former dean at Loyola University New Orleans College of Law.
259. Survey of Dean Penny Willrich, Arizona Summit College of Law.
260. Survey of Dean Vivian Neptune, University of Puerto Rico School of Law.
261. Survey of Kellye Testy, former dean, now President/CEO of LSAC.
262. Survey of Dean Carla Pratt, Washburn University School of Law.
Part discussed ways to make the path to a deanship a bit less rocky and, once in a dean’s position, how to reduce sidelining and presumptions of incompetence both for women deans and other underrepresented leaders. It also incorporated deans’ suggestions for sustainability, with an eye towards making the job more welcoming and improving retention.

CONCLUSION

This Article started with data on women law deans, reporting on changes in the numbers and explaining why the numbers have increased in the past decade. Even with these gains, the percentage of women, especially women of color who are law deans, remain below their representation in the general population. Gender sidelining and presumptions of incompetence play a role in hindering entry to law deanships as well as retention as described by many women’s survey answers. Their responses were disheartening and encouraging in turn, and revealed the depth of strength and resilience their experiences have honed. The Article provided some ideas to ameliorate or eradicate gender sidelining and presumptions of incompetence as well as ways to broaden entry opportunities and improve retention for women law deans. I hope that if I write an update on the status of women and women of color as law deans in ten years, women will have achieved parity in the ranks of law deans and extra challenges women face will have diminished.
## APPENDIX A

### LAW SCHOOLS WITH WOMEN DEANS

<table>
<thead>
<tr>
<th>ABA Law Schools</th>
<th>AALS Schools</th>
<th>Dean</th>
<th>Woman Of Color</th>
<th>Term</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Albany Law Sch.</td>
<td>X</td>
<td>Alicia Ouellette</td>
<td></td>
<td>10/1/14 – present</td>
</tr>
<tr>
<td>3. Appalachian Sch. of Law</td>
<td></td>
<td>Elizabeth A. McClanahan#</td>
<td></td>
<td>9/2/19 – present</td>
</tr>
<tr>
<td>4. Ariz. Summit Law Sch.^263</td>
<td></td>
<td>Penny Willrich#264</td>
<td>Black</td>
<td>1/1/17 – present</td>
</tr>
<tr>
<td>5. Univ. of Ark., Fayetteville Robert A. Leflar Law Ctr.</td>
<td>X</td>
<td>Margaret Sova McCabe</td>
<td></td>
<td>7/1/18 – present</td>
</tr>
<tr>
<td>6. Univ. of Ark. at Little Rock, William H. Bowen Sch. of Law</td>
<td>X</td>
<td>Theresa M. Beiner</td>
<td></td>
<td>7/1/18 – present</td>
</tr>
<tr>
<td>7. Barry Univ. Sch. of Law</td>
<td></td>
<td>Leticia M. Diaz</td>
<td>LatinX (Cuban)</td>
<td>1/7/07 – present</td>
</tr>
<tr>
<td>8. Bos. Univ. Sch. of Law</td>
<td>X</td>
<td>Angela Onwuachi-Willig</td>
<td>Black</td>
<td>8/15/18 – present</td>
</tr>
<tr>
<td>9. Univ. at Buffalo Sch. of Law, State Univ. of N.Y.</td>
<td>X</td>
<td>Aviva Abramovsky</td>
<td></td>
<td>1/7/17 – present</td>
</tr>
<tr>
<td>10. Univ. of Cal. Irvine Sch. of Law</td>
<td>X</td>
<td>L. Song Richardson</td>
<td>Asian (Korean) &amp; Black</td>
<td>1/1/18 – present</td>
</tr>
<tr>
<td>11. Univ. of Cal., L.A. Sch. of Law</td>
<td>X</td>
<td>Jennifer Mnookin</td>
<td></td>
<td>8/1/15 – present</td>
</tr>
<tr>
<td>12. Capital Univ. Law Sch.</td>
<td>X</td>
<td>Rachel M. Janutis</td>
<td></td>
<td>6/1/14 – present</td>
</tr>
<tr>
<td>13. Benjamin N. Cardozo Sch. of Law</td>
<td>X</td>
<td>Melanie Leslie</td>
<td></td>
<td>7/1/15 – present</td>
</tr>
</tbody>
</table>

^263 A ^ mark denotes that the school is currently on probation.

^264 A hashtag denotes the dean was a judge before being appointed dean.
<table>
<thead>
<tr>
<th></th>
<th>Law School</th>
<th>Dean</th>
<th>Race</th>
<th>Start Date – End Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>15.</td>
<td>Chi.-Kent Coll. of Law, Ill. Inst. of Tech.</td>
<td>Anita Krug</td>
<td></td>
<td>8/1/19 – present</td>
</tr>
<tr>
<td>16.</td>
<td>Univ. of Cincinnati Coll. of Law</td>
<td>Verna L. Williams</td>
<td>Black</td>
<td>5/8/17 – 3/30/19 Interim; 4/1/19 – present</td>
</tr>
<tr>
<td>17.</td>
<td>City Univ. of N.Y. Sch. of Law</td>
<td>Mary Lu Bilek</td>
<td></td>
<td>8/15/16 – present</td>
</tr>
<tr>
<td>18.</td>
<td>Columbia Law Sch.</td>
<td>Gillian Lester</td>
<td></td>
<td>1/1/15 – present</td>
</tr>
<tr>
<td>19.</td>
<td>DePaul Univ. Coll. of Law</td>
<td>Jennifer L. Rosato Perea</td>
<td>LatinX (Nicaraguan)</td>
<td>7/1/15 – present</td>
</tr>
<tr>
<td>20.</td>
<td>Univ. of Detroit Mercy Sch. of Law</td>
<td>Phyllis L. Crocker</td>
<td></td>
<td>7/1/14 – present</td>
</tr>
<tr>
<td>21.</td>
<td>Univ. of DC Sch. of Law</td>
<td>Renée McDonald Hutchins</td>
<td>Black</td>
<td>4/17/19 – present</td>
</tr>
<tr>
<td>22.</td>
<td>Duke Univ. Sch. of Law</td>
<td>Kerry Abrams</td>
<td></td>
<td>7/1/18 – present</td>
</tr>
<tr>
<td>23.</td>
<td>Duquesne Univ. Sch. of Law</td>
<td>April Barton</td>
<td></td>
<td>7/1/19 – present</td>
</tr>
<tr>
<td>24.</td>
<td>Emory Univ. Sch. of Law</td>
<td>Mary Anne Bobinski</td>
<td></td>
<td>8/1/19 – present</td>
</tr>
<tr>
<td>26.</td>
<td>Univ. of Fla. Fredric G. Levin Coll. of Law</td>
<td>Laura Ann Rosenbury</td>
<td></td>
<td>7/1/15 – present</td>
</tr>
<tr>
<td>27.</td>
<td>Fla. State Univ. Coll. of Law</td>
<td>Erin O’Hara O’Connor</td>
<td></td>
<td>7/1/16 – present</td>
</tr>
</tbody>
</table>

[^265]: Case Western and Rutgers each have co-deans, who serve along male co-deans. For statistical accuracy relative to the total number of ABA and AALS law schools, each co-dean counts as ½ (so each law school is credited with one dean total).

[^266]: One asterisk denotes the dean is an Interim Dean.
## WOMEN LAW DEANS

<table>
<thead>
<tr>
<th></th>
<th>University</th>
<th>Interim Dean</th>
<th>Start Date – End Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>28</td>
<td>Ga. State Univ. Coll. of Law</td>
<td>Leslie Wolf*</td>
<td>7/1/19 – present</td>
</tr>
<tr>
<td>29</td>
<td>Maurice A. Deane Sch. of Law at Hofstra Univ.</td>
<td>A. Gail Prudenti#</td>
<td>5/1/17 – present</td>
</tr>
<tr>
<td>30</td>
<td>Howard Univ. Sch. of Law</td>
<td>Danielle R. Holley-Walker</td>
<td>7/14/14 – present</td>
</tr>
<tr>
<td>31</td>
<td>Univ. Ill. John Marshall Law Sch.</td>
<td>Darby Dickerson</td>
<td>1/1/17 – present</td>
</tr>
<tr>
<td>32</td>
<td>Univ. of Ky. Coll. of Law</td>
<td>Mary J. Davis*</td>
<td>7/1/19 – present</td>
</tr>
<tr>
<td>33</td>
<td>Lewis and Clark Law Sch.</td>
<td>Jennifer Johnson</td>
<td>6/1/14 – present</td>
</tr>
<tr>
<td>34</td>
<td>Loyola Univ. New Orleans Coll. of Law</td>
<td>Madeleine M. Landrieu#</td>
<td>7/1/17 – present</td>
</tr>
<tr>
<td>35</td>
<td>The Univ. of Memphis Cecil C. Humphreys Sch. of Law</td>
<td>Katharine Traylor Schaffzin</td>
<td>5/22/18 – 7/5/19</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Interim; 7/5/19 - present</td>
</tr>
<tr>
<td>36</td>
<td>Mercer Univ. Law Sch.</td>
<td>Cathy Cox</td>
<td>7/1/17 – present</td>
</tr>
<tr>
<td>37</td>
<td>Miss. Coll. Sch. of Law</td>
<td>Patricia Bennett (followed Wendy Scott, Black)</td>
<td>12/1/16 – present</td>
</tr>
<tr>
<td>38</td>
<td>Univ. of Miss. Sch. of Law</td>
<td>Susan Hanley Duncan</td>
<td>8/1/17 – present</td>
</tr>
<tr>
<td>39</td>
<td>Univ. of Mo., Columbia, Sch. of Law</td>
<td>Lyrissa Barnett Lidsky</td>
<td>7/1/17 – present</td>
</tr>
<tr>
<td>40</td>
<td>Univ. of Mo., Kan. City, Sch. of Law</td>
<td>Barbara Glesner Fines</td>
<td>3/1/17 – present</td>
</tr>
<tr>
<td>41</td>
<td>Univ. of N.H. Sch. of Law</td>
<td>Megan Carpenter</td>
<td>7/1/17 – present</td>
</tr>
</tbody>
</table>

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267. Wendy Hensel is serving as interim provost and senior vice president for academic affairs at Georgia State University, effective July 1, but is expected to return as Dean of the law school, which explains why Leslie Wolf is serving as Interim Dean.
<table>
<thead>
<tr>
<th></th>
<th>Institution</th>
<th>X</th>
<th>Name</th>
<th>Race/Ethnicity</th>
<th>Tenure</th>
</tr>
</thead>
<tbody>
<tr>
<td>42.</td>
<td>N.C. Cent. Univ. Sch. of Law</td>
<td>X</td>
<td>Elaine Mercia O’Neal*#</td>
<td>Black</td>
<td>7/16/18 – present</td>
</tr>
<tr>
<td>43.</td>
<td>N. Ill. Univ. Coll. of Law</td>
<td>X</td>
<td>Laurel A. Rigertas*</td>
<td></td>
<td>7/1/19 – present</td>
</tr>
<tr>
<td>44.</td>
<td>N. Ky. Univ. Sch. of Law</td>
<td>X</td>
<td>Judith Daar</td>
<td></td>
<td>7/1/19 – present</td>
</tr>
<tr>
<td>45.</td>
<td>Northwestern Univ.</td>
<td>X</td>
<td>Kimberly A. Yuracko</td>
<td>Black</td>
<td>9/1/18 – present</td>
</tr>
<tr>
<td>46.</td>
<td>Univ. of Or. Sch. of Law</td>
<td>X</td>
<td>Marcilynn A. Burke</td>
<td>Black</td>
<td>7/1/17 – present</td>
</tr>
<tr>
<td>47.</td>
<td>Pa. State Univ. Dickinson Law</td>
<td>X</td>
<td>Danielle Conway</td>
<td>Black</td>
<td>7/1/19 – present</td>
</tr>
<tr>
<td>49.</td>
<td>Univ. of Pittsburgh, Sch. of Law</td>
<td>X</td>
<td>Amy J. Wildermuth</td>
<td></td>
<td>7/1/18 – present</td>
</tr>
<tr>
<td>50.</td>
<td>Univ. of P.R., Sch. of Law</td>
<td>X</td>
<td>Vivian I. Neptune Rivera</td>
<td>LatinX (Puerto Rican)</td>
<td>2/1/11 – present</td>
</tr>
<tr>
<td>51.</td>
<td>Univ. of Richmond Sch. of Law</td>
<td>X</td>
<td>Wendy Collins Perdue</td>
<td></td>
<td>7/1/11 – present</td>
</tr>
<tr>
<td>52.</td>
<td>Rutgers Law Sch.</td>
<td>X</td>
<td>Kimberly Mutcherson, Co-Dean 268</td>
<td>Black</td>
<td>1/1/19 – present</td>
</tr>
<tr>
<td>53.</td>
<td>St. Thomas Univ. Sch. of Law</td>
<td>X</td>
<td>Tamara F. Lawson</td>
<td>Black</td>
<td>6/1/18 – 10/31/18 Interim; 11/1/18 – present</td>
</tr>
<tr>
<td>54.</td>
<td>Univ. of S.F. Sch. of Law</td>
<td>X</td>
<td>Susan Freiwald</td>
<td></td>
<td>7/1/18 – 6/30/19 Interim; 7/1/19 – present</td>
</tr>
<tr>
<td>55.</td>
<td>Santa Clara Univ. Sch. of Law</td>
<td>X</td>
<td>Anna M. Han*269</td>
<td>Asian (Chinese)</td>
<td>6/1/19 – present</td>
</tr>
</tbody>
</table>

268. Case Western and Rutgers each have co-deans, who serve along male co-deans. For statistical accuracy relative to the total number of ABA and AALS law schools, each co-dean counts as ½ (so each law school is credited with one dean total).

269. Lisa Kloppenberg is serving as interim provost at Santa Clara University but is expected to return as Dean of the law school, which explains why Anna Han is serving as Interim Dean.
<table>
<thead>
<tr>
<th></th>
<th>Institution</th>
<th>Gender*</th>
<th>Name</th>
<th>Start Date</th>
<th>End Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>56</td>
<td>Seattle Univ. Sch. of Law</td>
<td>X</td>
<td>Annette E. Clark</td>
<td>7/1/13</td>
<td>present</td>
</tr>
<tr>
<td>57</td>
<td>Seton Hall Univ. Sch. of Law</td>
<td>X</td>
<td>Kathleen A. Boozang</td>
<td>7/1/15</td>
<td>present</td>
</tr>
<tr>
<td>58</td>
<td>S. Ill. Univ. Sch. of Law, Carbondale</td>
<td>X</td>
<td>Cindy Buys*</td>
<td>7/23/18</td>
<td>present</td>
</tr>
<tr>
<td>59</td>
<td>S. Methodist Univ. Dedman Sch. of Law</td>
<td>X</td>
<td>Jennifer M. Collins</td>
<td>7/1/14</td>
<td>present</td>
</tr>
<tr>
<td>60</td>
<td>Southwestern Law Sch.</td>
<td>X</td>
<td>Susan Westerberg Prager</td>
<td>8/1/13</td>
<td>present</td>
</tr>
<tr>
<td>61</td>
<td>Stanford Law Sch.</td>
<td>X</td>
<td>Jenny Martinez</td>
<td>4/1/19</td>
<td>present</td>
</tr>
<tr>
<td>62</td>
<td>Stetson Univ. Coll. of Law</td>
<td>X</td>
<td>Michèle Alexandre</td>
<td>6/17/19</td>
<td>present</td>
</tr>
<tr>
<td>63</td>
<td>Univ. of Tenn. Coll. of Law</td>
<td>X</td>
<td>Melanie D. Wilson</td>
<td>7/1/15</td>
<td>present</td>
</tr>
<tr>
<td>64</td>
<td>Thomas Jefferson Sch. of Law^</td>
<td>X</td>
<td>Linda Keller*</td>
<td>10/14/18</td>
<td>present</td>
</tr>
<tr>
<td>65</td>
<td>Touro Coll. Law Ctr.</td>
<td>X</td>
<td>Elena Langan</td>
<td>8/1/19</td>
<td>present</td>
</tr>
<tr>
<td>66</td>
<td>Univ. of Tulsa Coll. of Law</td>
<td>X</td>
<td>Lyn Entzeroth</td>
<td>7/1/15</td>
<td>present</td>
</tr>
<tr>
<td>67</td>
<td>Univ. of Utah Coll. of Law</td>
<td>X</td>
<td>Elizabeth Kronk Warner</td>
<td>Native American (Sault Tribe of Chippewa Indians)</td>
<td>7/1/19</td>
</tr>
<tr>
<td>68</td>
<td>Univ. of Va. Sch. of Law</td>
<td>X</td>
<td>Risa L. Goluboff</td>
<td>7/1/16</td>
<td>present</td>
</tr>
<tr>
<td>69</td>
<td>Wake Forest Univ. Sch. of Law</td>
<td>X</td>
<td>Jane Aiken</td>
<td>7/1/19</td>
<td>present</td>
</tr>
<tr>
<td>70</td>
<td>Washburn Univ. Sch. of Law</td>
<td>X</td>
<td>Carla D. Pratt</td>
<td>Native American</td>
<td>6/30/18</td>
</tr>
<tr>
<td>71</td>
<td>Wash. Univ. in St. Louis Sch. of Law</td>
<td>X</td>
<td>Nancy Staudt</td>
<td>5/15/14</td>
<td>present</td>
</tr>
<tr>
<td>72</td>
<td>W. New England Univ. Sch. of Law</td>
<td>X</td>
<td>Sudha N. Setty</td>
<td>Asian (Indian)</td>
<td>7/1/18</td>
</tr>
</tbody>
</table>
## Appendix B

### Law Schools with Women Deans of Color

<table>
<thead>
<tr>
<th>ABA Law Schools</th>
<th>AALS Schools</th>
<th>Dean</th>
<th>Race</th>
<th>Term</th>
</tr>
</thead>
<tbody>
<tr>
<td>3. Barry Univ. Sch. of Law</td>
<td>Leticia M. Diaz (LatinX)</td>
<td>1/7/07 – present</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. Bos. Univ. Sch. of Law</td>
<td>X</td>
<td>Angela Onwuachi-Willig</td>
<td>Black</td>
<td>8/15/18 – present</td>
</tr>
<tr>
<td>5. Univ. of Cal. Irvine Sch. of Law</td>
<td>X</td>
<td>L. Song Richardson (Asian &amp; Black)</td>
<td>1/1/18 – present</td>
<td></td>
</tr>
<tr>
<td>6. Univ. of Cincinnati Coll. of Law</td>
<td>X</td>
<td>Verna L. Williams</td>
<td>Black</td>
<td>5/8/17 – 3/30/19 Interim; 4/1/19 – present</td>
</tr>
<tr>
<td>7. DePaul Univ. Coll. of Law</td>
<td>X</td>
<td>Jennifer L. Rosato Perea (LatinX)</td>
<td>7/1/15 – present</td>
<td></td>
</tr>
<tr>
<td>8. Univ. of DC Sch. of Law</td>
<td>Renée McDonald Hutchins</td>
<td>Black</td>
<td>4/17/19 – present</td>
<td></td>
</tr>
<tr>
<td>10. Howard Univ. Sch. of Law</td>
<td>Danielle R. Holley-Walker</td>
<td>Black</td>
<td>7/14/14 – present</td>
<td></td>
</tr>
<tr>
<td>11. Miss. Coll. Sch. of Law</td>
<td>Patricia Bennett (followed)</td>
<td>Black</td>
<td>12/1/16 – present</td>
<td></td>
</tr>
</tbody>
</table>

---

270. A ^ mark denotes that the school is currently on probation.
271. A hashtag denotes the dean was a judge before being appointed dean.
272. A ~ mark denotes the school is recognized as a Historically Black College/University.
273. One asterisk denotes the dean is an Interim Dean.
<table>
<thead>
<tr>
<th>No.</th>
<th>Institution</th>
<th>Name(s)</th>
<th>Race/Ethnicity</th>
<th>Start Date</th>
<th>End Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>12.</td>
<td>N.C. Cent. Univ. Sch. of Law</td>
<td>Wendy Scott (Black)</td>
<td></td>
<td>7/16/18 – present</td>
<td></td>
</tr>
<tr>
<td>13.</td>
<td>Univ. of Or. Sch. of Law</td>
<td>Elaine Mercia O’Neal* (Black)</td>
<td></td>
<td>7/1/17 – present</td>
<td></td>
</tr>
<tr>
<td>14.</td>
<td>Pa. State Univ. Dickinson Law</td>
<td>Danielle Conway (Black)</td>
<td></td>
<td>7/1/19 – present</td>
<td></td>
</tr>
<tr>
<td>15.</td>
<td>Univ. of P.R., Sch. of Law</td>
<td>Vivian I. Neptune Rivera (LuatinX (Puerto Rican))</td>
<td></td>
<td>2/1/11 – present</td>
<td></td>
</tr>
<tr>
<td>16.</td>
<td>Rutgers Law Sch.</td>
<td>Kimberly Mutcherson, Co-Dean²⁷⁴</td>
<td></td>
<td>1/1/19 – present</td>
<td></td>
</tr>
<tr>
<td>17.</td>
<td>St. Thomas Univ. Sch. of Law</td>
<td>Tamara F. Lawson (Black)</td>
<td></td>
<td>6/1/18 – 10/31/18 Interim; 11/1/18 – present</td>
<td></td>
</tr>
<tr>
<td>18.</td>
<td>Santa Clara Univ. Sch. of Law</td>
<td>Anna M. Han*²⁷⁵ (Asian (Chinese))</td>
<td></td>
<td>6/1/19 – present</td>
<td></td>
</tr>
<tr>
<td>20.</td>
<td>Stetson Univ. Coll. of Law</td>
<td>Michèele Alexandre (Black)</td>
<td></td>
<td>6/17/19 – present</td>
<td></td>
</tr>
<tr>
<td>21.</td>
<td>Univ. of Utah Coll. of Law</td>
<td>Elizabeth Kronk Warner (Native American (Sault Tribe of Chippewa Indians))</td>
<td></td>
<td>7/1/19 – present</td>
<td></td>
</tr>
<tr>
<td>22.</td>
<td>Washburn Univ. Sch. of Law</td>
<td>Carla D. Pratt (Native American)</td>
<td></td>
<td>6/30/18 – present</td>
<td></td>
</tr>
<tr>
<td>23.</td>
<td>W. New England Univ. Sch. of Law</td>
<td>Sudha N. Setty (Asian (Indian))</td>
<td></td>
<td>7/1/18 – present</td>
<td></td>
</tr>
</tbody>
</table>

²⁷⁴ Rutgers has a co-dean, who serves along a male co-dean. For statistical accuracy relative to the total number of ABA and AALS law schools, each co-dean counts as ½ (so each law school is credited with one dean total).

²⁷⁵ Lisa Kloppenberg is serving as interim provost at Santa Clara University but is expected to return as Dean of the law school, which explains why Anna Han is serving as Interim Dean.
### APPENDIX C

**DEAN’S SURVEY SENT TO WOMEN OF COLOR SPRING 2018**

1. Where are you presently serving as dean and when did your term start?  
   School: __________________________  
   Term: __________________________

2. Have you worked as a dean at any other law school(s)?  Yes  No  If yes, where and when?  
   School: __________________________
   Term: __________________________

3. Undergraduate school, major, year of graduation and degree(s):
   __________________________

4. Did you go to graduate school?  Yes  No  If yes, where, year of graduation, and degree(s):
   __________________________

5. Law school and year of graduation: __________________________

6. If you were involved in extracurricular activities during law school, please list them here: __________________________

7. Were you on law review?  Yes  No  If yes, what position?
   __________________________

8. What motivated you to attend law school? (check all that apply)  
   □ Interest in public policy  □ Public service  □ Prestige  
   □ More career options  □ Good income  
   □ Other: __________________________

9. Who was the law dean where you received your JD?
   __________________________

---

276. One person counted as Black, Asian, and Mixed.  
277. One person counted as Black, Asian, and Mixed.  
278. One person counted as Black, Asian, and Mixed.
10. Were there any women deans while you were in law school?  □ Yes  □ No  If yes, who?  

11. Were there any women professors while you were in law school?  Yes  □ No  If yes, do you recall who?  

**Work Experience:**

12. Did you clerk after law school?  □ Yes  □ No  If yes, where?  

13. If you practiced law before becoming a law professor, please answer the following:  
   a. Where did you work, how long, and in what practice area?  

   b. Did you have any mentors?  Yes   □ No  If yes, how did they impact you?  
      □ Taught professional skills  □ Provided professional support  
      □ Provided personal support  □ Taught management skills  
      □ Offered career advice  □ Share networking opportunities  
      □ Other:  

   c. Is your leadership style influenced by your work as an attorney?  
      □ Yes  □ No  If yes, how?  
      □ Better negotiator  □ Better communicator  
      □ More comfortable with conflict  □ Other:  

14. Were you a professor before becoming a dean?  Yes  □ No  If yes, please answer the following:  
   a. Where and how many years?  

   b. While teaching, what did you consider deans’ most prominent qualities?  (check all that apply)  
      □ Ambitious  □ Approachable  
      □ Assertive  □ Authoritative  
      □ Autonomous  □ Collaborative  
      □ Confident  □ Confrontational  
      □ Creative  □ Decisive  
      □ Emotionally Intelligent  □ Empathetic  
      □ Empowered Others  □ Relationship Oriented  
      □ Risk Taker  □ Supportive
15. What was the process to obtaining your 1st deanship (if this is not your 1st), and your current deanship?

16. What motivated you to apply for a deanship? (check all that apply)
- Professionally enriching
- Provide needed/different leadership
- Prestige
- Next logical career step
- Growth opportunity
- Opportunity to serve
- Other:_________

17. Which of the following dean’s roles do you enjoy the most? (rank, with 1 the most enjoyable)
- Leadership
- Prestige
- Working with students
- Working with faculty and staff
- Fundraising
- Working with alumni
- Planning
- Being part of a team
- Problem-solving
- Other________

18. What have your greatest challenges been as a dean? (rank, with 1 the most challenging)
- Accreditation Issues
- Balancing work/personal time
- Budget & Finances
- Faculty Issues
- Staff Issues
- Student Issues
- Fundraising
- University Demands
- Human Resources
- Lack of Support
- Authority Being Challenged
- Other:

19. What changes do you hope to see for future deans? (check all that apply)
- More varied leadership style
- Less bureaucracy
20. What skills do you consider important for those who aspire to a deanship? (rank, with 1 the most important)
- Ability to effectively confront
- Communicate well
- Compromise wisely
- Ability to lead multiple constituencies
- Negotiate well
- Patience
- Risk-taker
- Management experience
- Budget experience
- Fundraising experience
- Emotional intelligence
- Other: ____________________

21. What are the greatest barriers to becoming a dean? (check all that apply)
- Insufficient leadership experience
- Insufficient management experience
- Insufficient fundraising experience
- Lack of mentors to guide the process
- Old Boys’ Network
- Work/personal life balance
- Other: ____________________

22. What advice do you have for people considering a deanship?
23. Is there any specific advice for women or women of color considering a deanship?

24. *Do you prefer to answer the remaining questions anonymously?*

   □ Yes  □ No

25. Do you think your gender and/or race impact your leadership style, and if so, how?

26. Many women, especially women of color, have professional experiences where they are presumed incompetent. Have you had any such experiences and if you have, can you elaborate, or would you prefer to discuss by telephone interview?

27. Many women, especially women of color, have professional experiences with gender sidelining (e.g., being “mantrupted,” “bro-propriated,” silenced, marginalized or ignored with their contributions devalued, or subject to greater scrutiny, or having something “mansplained” or ideas ignored, or observing men demanding more attention and receiving more credit/respect etc.). Have you experienced gender sidelining and if you have, can you elaborate, or would you prefer to discuss by telephone interview?

28. What is your marital status?

   □ Married or Partnership  □ Single  □ Divorced  □ Widowed  □ Prefer not to answer  □ Other:

29. If you are married or in a partnership, please answer the following:

   a. What does your spouse or partner do?

   b. How does your spouse or partner support your deanship?

30. Do you have any children?  □ Yes  □ No  If yes, how many and what years were they born?
31. What sustains you?

_______________________________________________________

32. Are there any former deans or others you believe I should reach out to in connection with my research? ☐ Yes ☐ No If yes, who?

_______________________________________________________

33. Is there anything else you want to share?

_______________________________________________________

34. Would you be willing to be interviewed by phone? ☐ Yes ☐ No. If yes, please indicate the best way to reach you:

_______________________________________________________

APPENDIX D
DEAN’S SURVEY SENT TO WHITE WOMEN FALL 2018

1. Name, current deanship & term:
2. Were you on law review? Yes No If yes, what position?
3. What motivated you to attend law school? (check all that apply)
   Interest in public policy Public service Prestige
   More career options Good income Media (i.e., LA Law)
   Other: _________________________________________________________
4. Were there any woman law dean(s) at your law school? Yes No If yes, who?
5. Did you clerk after law school? Yes No If yes, where?
6. If you practiced law before becoming a law professor/dean, please answer the following:
   a. Where did you work, how long, and in what practice area?
   b. Did you have any mentors? Yes No If yes, how did they impact you?
      Taught professional skills Provided professional support
      Provided personal support Taught management skills
      Offered career advice Shared networking opportunities
      Other: _________________________________________________________
   c. Is your leadership style influenced by your work as a lawyer? Yes No If yes, how?
      Better negotiator Better communicator More comfortable with conflict
      Other: _________________________________________________________
7. If you were a professor before becoming a dean, please answer the
following:

a. Where did you teach and how long?
b. While teaching, what did you consider your dean’s most prominent qualities? (check all that apply)
   - Ambitious
   - Approachable
   - Assertive
   - Authoritative
   - Autonomous
   - Collaborative
   - Confident
   - Confrontational
   - Creative
   - Decisive
   - Emotionally Intelligent
   - Empathetic
   - Empowered Others
   - Relationship Oriented
   - Risk Taker
   - Supportive
   - Task Oriented
   - Motivator
   Other: __________________________________________________

8. If you were not a professor before becoming a dean, what did you do before being appointed dean?

9. What was the process to obtaining your 1st deanship (if this is not your 1st), and your current deanship?

10. What motivated you to apply for a deanship? (check all that apply)
    - Professionally enriching
    - Provide needed/different leadership
    - Prestige
    - Next logical career step
    - Growth opportunity
    - Opportunity to serve
    Other: _____________________________________________________

11. Which of the following dean’s roles do you enjoy the most? (rank, with 1 as best)
    - Leadership
    - Prestige
    - Working with students
    - Working with faculty & staff
    - Fundraising
    - Working with alumni
    - Being part of a team
    - Planning
    - Problem-solving
    Other: ______________________________________________________

12. What have your greatest challenges been as a dean? (rank, with 1 as most challenging)
    - Accreditation Issues
    - Balancing work/personal time
    - Budget & Finances
    - Faculty Issues
    - Staff Issues
    - Student Issues
    - Fundraising
    - University Demands
    - Human Resources
    - Lack of Support
    - Authority Being Challenged
    Other: _____________________________________________________

13. What changes do you hope to see for future deans? (check all that apply)
    - More varied leadership style
    - Less bureaucracy
    - More diversity
    - Better professional/personal balance
    - More support
    Other: _____________________________________________________

14. What skills are important for dean aspirants (rank, with 1 as most important)
    - Effectively confront challenges
    - Communicate well
    - Compromise wisely
    - Effectively lead multiple constituencies
    - Negotiate well
    - Patience
    - Risk-taker
    - Management experience
    - Budget experience
    - Fundraising experience
    - Emotional intelligence
    Other: _____________________________________________________

15. What are the most important qualities of a good dean? (check all that apply)
WOMEN LAW DEANS

Ambitious  Approachable  Assertive
Authoritative  Autonomous  Collaborative
Confident  Confrontational  Creative
Decisive  Emotionally Intelligent  Empathetic
Empowered Others  Relationship Oriented  Risk Taker
Supportive  Task Oriented  Motivator
Other:

16. What are the greatest barriers to becoming a dean? (check all that apply)
   Insufficient leadership experience  Insufficient management experience
   Insufficient fundraising experience  Lack of mentors
   Old Boys’ Network  Work/personal life balance
   Other:

17. What advice do you have for women considering a deanship? Do you prefer to answer the remaining questions anonymously?  Yes  N
18. Do you think your gender impacts your leadership style, and if so, how?
19. Many women have professional experiences where they are presumed incompetent. Have you had any such experiences and if you have, can you elaborate, or would you prefer to discuss by telephone interview?
20. Many women have professional experiences with gender sidelining (e.g., being “maninterrupted,” “bro-propriated,” silenced, marginalized or ignored with their contributions devalued, or subject to greater scrutiny, or having something “mansplained” or ideas ignored, or observing men demanding more attention and receiving more credit/respect etc.). Have you experienced gender sidelining and if you have, can you elaborate, or would you prefer to discuss by telephone interview?
21. What is your marital status?
   Married or Partnership  Single  Divorced  Widowed
   Prefer not to answer  Other:
22. If you are married or in a partnership, please answer the following:
   a. What does your spouse or partner do?
   b. How does your spouse or partner support your deanship?
23. Do you have any children?  If yes, how many and what years were they born?
24. What sustains you?
25. Are there any former deans or others you believe I should reach out to in connection with my research and if yes, who?
26. Is there anything else you want to share?
27. If you prefer to be interviewed by phone, please indicate the best way to reach you.

APPENDIX E
DEAN’S SURVEY SENT TO MEN FALL 2018

1. Name, current deanship & term:
2. Were you on law review?  Yes  No  If yes, what position?
3. What motivated you to attend law school? (check all that apply)
Interest in public policy  
Public service  
Prestige  
More career options  
Good income  
Media (i.e., LA Law)  
Other:  

4. Did you clerk after law school?  
Yes  
No  
If yes, where?  

5. If you practiced law before becoming a law professor/dean, please answer the following:  
   a. Where did you work, how long, and in what practice area?  
   b. Did you have any mentors?  
   Yes  
   No  
   If yes, how did they impact you?  
   Taught professional skills  
   Provided professional support  
   Provided personal support  
   Taught management skills  
   Offered career advice  
   Shared networking opportunities  
   Other:  

6. If your leadership style is influenced by your work as a lawyer, how? (check all that apply)  
Better communicator  
Better negotiator  
More comfortable with conflict  
Other:  

7. If you were a professor before becoming a dean, please answer the following:  
   a. Where did you teach and how long?  
   b. While teaching, what did you consider your dean’s most prominent qualities? (check all that apply)  
   Ambitious  
   Approachable  
   Assertive  
   Authoritative  
   Autonomous  
   Collaborative  
   Confident  
   Confrontational  
   Creative  
   Decisive  
   Emotionally Intelligent  
   Empathetic  
   Empowered Others  
   Relationship Oriented  
   Risk Taker  
   Supportive  
   Task Oriented  
   Motivator  
   Other:  
   c. Were there any women law dean(s) at your law school?  
   Yes  
   No  
   If yes, who?  

8. If you were not a professor before becoming a dean, what did you do before being appointed dean?  

9. What was the process to obtaining your 1st deanship (if this is not your 1st), and your current deanship?  

10. What motivated you to apply for a deanship? (check all that apply)  
Professionally enriching  
Provide needed/different leadership  
Prestige  
Next logical career step  
Growth opportunity  
Opportunity to serve  
Other:  

11. Which of the following dean’s roles do you enjoy the most? (rank, with 1 the most enjoyable)
WOMEN LAW DEANS

1. Leadership __Prestige __Working with students
   __Working with faculty & staff __Fundraising __Working with alumni
   __Being part of a team __Planning __Problem-solving
   ☐ Other:

2. What have your greatest challenges been as a dean? (rank, with 1 the most challenging)
   __Accreditation Issues __Balancing work/personal time __Budget & Finances
   __Faculty Issues __Staff Issues __Student Issues
   __Fundraising __University Demands __Human Resources
   __Lack of Support __Authority Being Challenged
   ☐ Other: ______________________

3. What skills do you consider important for those who aspire to a deanship? (rank, with 1 the most important)
   ☐ Effectively confront challenges ☐ Communicate well
   ☐ Compromise wisely ☐ Effectively lead multiple constituencies
   ☐ Negotiate well ☐ Patience
   ☐ Risk-taker ☐ Management experience
   ☐ Budget experience ☐ Fundraising experience
   ☐ Emotional intelligence ☐ Other: ______________________

4. What do you consider the most important qualities of a good dean? (check all that apply)
   ☐ Ambitious ☐ Approachable ☐ Assertive ☐ Authoritative
   ☐ Autonomous ☐ Collaborative ☐ Confident ☐ Confrontational
   ☐ Creative ☐ Decisive ☐ Emotionally Intelligent ☐ Empathetic
   ☐ Empowered Others ☐ Relationship Oriented ☐ Risk Taker
   ☐ Supportive ☐ Task Oriented ☐ Motivator
   ☐ Other: ______________________

5. What do you consider the greatest barriers to becoming a dean? (check all that apply)
   ☐ Insufficient leadership experience ☐ Insufficient management experience
   ☐ Insufficient fundraising experience ☐ Lack of mentors
   ☐ Old Boys’ Network ☐ Work/personal life balance
   ☐ Other: ______________________

6. What changes do you hope to see for deans in the future? (check all that apply)
   ☐ More varied leadership style ☐ Less bureaucracy ☐ More diversity
   ☐ Better professional/personal balance ☐ More support
   ☐ Other: ______________________

7. What advice do you have for those considering a deanship?

Do you prefer to answer the remaining questions anonymously? ☐ Yes ☐ No

8. Do you think your gender impacts your leadership style, and if yes, how?

9. Some people, especially from underrepresented groups, have professional experiences where they are presumed incompetent. Have you had any such experiences and if you have, can you elaborate, or would you prefer to discuss by telephone interview?
20. Some people, especially from underrepresented groups, have professional experiences with sidelining (e.g., being silenced, marginalized, etc.). Have you had any such experiences and if you have, can you elaborate, or would you prefer to discuss by telephone interview?

21. What is your marital status?
   - Married or Partnership
   - Single
   - Divorced
   - Widowed
   - Prefer not to answer
   - Other: ___________________________

22. If you are married or in a partnership, please answer the following:
   a. What does your spouse or partner do?
   b. How does your spouse or partner support your deanship?

23. Do you have any children? If yes, how many and what years were they born?

24. What sustains you?

25. If you prefer to be interviewed by phone, please indicate the best way to reach you.
Reconceptualizing Intersectionality in Judicial Interpretation: Moving Beyond Formalistic Accounts of Discrimination on Islamic Covering Prohibitions

Monika Zalnieriute & Catherine Weiss†

ABSTRACT

This article analyzes the United Nations Human Rights Committee’s (“HRC”) consideration of legal prohibitions on Islamic face-coverings in Yaker v. France and Hebbadj v. France, and argues that the HRC’s recognition of discrimination at play represents a significant departure from the judicial trend of accepting such prohibitions in Europe. We contend that the HRC’s limited interpretation of intersectionality in the cases elides the full extent of harms and violations arising from such legislation. However, we suggest that judicial understanding of discrimination can be enhanced by drawing on a modified UN concept of harmful traditional practices, which allows an understanding of Islamic face-covering as one among many global patriarchal practices. Decolonizing jurisprudence on intersectional discrimination in this way allows an explicit recognition and articulation of how an exclusive focus on prohibitions of practices of members of minority groups, without attention to majority patriarchal practices, contributes to legitimating sexist and racist targeting of minority groups—and entrenches sexism against women more broadly.

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INTRODUCTION

Political and legal tensions as well as public controversies concerning Muslim women’s covering\(^1\) have been widespread in Europe over the last three decades.\(^2\) Against a background of rising anti-Muslim racism and a refugee crisis, many national and local governments have enacted laws regulating the wearing of face-coverings. France, Belgium, Italy, Switzerland, Russia, Germany, Spain, Bulgaria, the Netherlands, Denmark, and Austria,\(^3\) as well as states in other parts of the world, have established various forms of such prohibitions.\(^4\)

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1. We are aware of differences between forms of Muslim covering. In this article, the term “Islamic covering” refers both to garments that cover the face, and garments that cover the head, leaving the face visible. See A. Moors, *The Dutch and the Face-Veil: The Politics of Discomfort*, 17 SOCIAL ANTHROPOLOGY/ANTHROPOLOGIE SOCIALE 393, 402 (2019) (arguing that the use of the term ‘burqa’ in much political discourse to refer to face-covering garments is intended to conjure up images of barbarism through its association with the Taliban regime).


4. A number of Muslim-majority African states have introduced various prohibitions on face covering, including Chad, parts of Niger, Cameroon (Muslim-majority in the region the burqa was banned), and Gabon. David Blair, *Why West Africa’s Muslim-majority states are banning the burqa*, TELEGRAPH (May 2, 2016), https://perma.cc/65U5-NJBC. All 15 member states of the Economic Community of West African States (ECOWAS) have also officially endorsed a prohibition on clothing that prevents the clear identification of persons. *ECOWAS Leaders Seek to Ban Wearing of Hijabs*, AFRICAN SUN TIMES (Dec. 17, 2015), https://perma.cc/69J5-42BF. However, we argue that such prohibitions present different problems for analysis than those in those in European countries, in which Muslims generally constitute small minorities usually from immigration from former colonies. That is, analysis of prohibitions on face-
In this context, on 23 October 2018, the United Nations Human Rights Committee ("HRC" or "Committee") delivered groundbreaking opinions in *Yaker v. France* and *Hebbadj v. France*, finding that France violated two Muslim women’s rights to freedom of religion and non-discrimination under the *International Covenant on Civil and Political Rights* ("ICCPR") by fining them for wearing niqab, a garment covering the face. These decisions present a significant departure from the judicial precedent set by the European Court of Human Rights ("ECtHR"), which upheld the same French law, and has recently reinstated its legitimization of face-covering bans in cases concerning Belgium. The 2018 HRC decisions also sit in contrast to the stances of other UN treaty bodies, such as the committees on the *Convention on Elimination of All Forms of Racial Discrimination* ("CERD") and on the *Convention on Elimination of All Forms of Discrimination Against Women* ("CEDAW"), which have failed to question the legitimacy of the French measures. The latest HRC opinions therefore have important implications for the future of legislation governing face-covering, for the jurisprudence of the ECtHR and opinions of other UN treaty bodies, and for human rights law and legal theory more generally.

In this article, we analyze the *Yaker* and *Hebbadj* decisions with a focus on the development of intersectionality jurisprudence, and suggest that the HRC’s recognition of discrimination in such cases is a significant departure from a judicial trend of acceptance of face-covering prohibitions. However, we argue that the judicial approach to intersectionality in *Yaker* and *Hebbadj* elides the extent of harms and violations arising from the French legislation on Islamic covering on women and girls of Muslim cultural background. Relying on a socio-legal covering should be sensitive to the context of power relations in which they operate.

11. The reference to "Muslim cultural background" is a translation of the phrase "de culture musulmane," which is commonly used by anti-prohibition activists in France to include women and girls whose heritage or ancestry is from regions in which Islam is dominant, but
interdisciplinary approach, \(^1\) and grounded in anti-racist and decolonial radical feminist theory, \(^2\) we recommend that courts and treaty bodies enhance their understanding of intersectionality by reference to a modified concept of “harmful traditional practices,” \(^3\) which allows the understanding of Islamic coverings as one among many patriarchal practices globally. We argue that future development of jurisprudence around intersectional discrimination should explicitly articulate how an exclusive focus on practices of oppressed minority groups, without attention to related patriarchal practices engaged in by the majority, contributes to legitimating sexist and racist targeting of minority group—and in certain circumstances entrenches sexism against women more broadly.

**I. FACTUAL AND LEGAL BACKGROUND**

Laws regulating face-covering in European states are generally framed in religion- and gender-neutral terms, such as ‘the covering of the face’, but it is widely acknowledged by members of the public, politicians, scholars and judiciary alike that they target Muslim women. \(^4\) France was the first European country to...
enact nationwide legislation on full-face coverings, prohibiting their wearing in public spaces in 2010.\textsuperscript{16} France passed this legislation in a wider historical context of campaigns against religious symbols from the public sphere in the name of “laïcité,” a form of secularism. Laïcité refers to a system of separation of religion and the state, encoded in the French Law in 1905.\textsuperscript{17} In 2004, France enacted a law amending the Education Code prohibiting ostentatious wearing of religious symbols or garb in public schools.\textsuperscript{18} French lawmakers claimed the measure aimed to promote secularism and sexual equality.\textsuperscript{19} The UN treaty bodies found that the prohibition was permissible as long as France could ensure that it did not entail discriminatory effects in education,\textsuperscript{20} and European Court of Human Rights (“ECtHR”) upheld the law in 2009.\textsuperscript{21}

The 2010 French law restricted covering within the wider public sphere. Specialists and the general public alike imagined that it would not survive the scrutiny of the ECtHR.\textsuperscript{22} However, in \textit{S.A.S. v. France} (2014)\textsuperscript{23}—as well as in the more recent cases \textit{Dakir v. Belgium} (2017)\textsuperscript{24} and \textit{Belcacemi and Oussar v. Belgium} (2017)\textsuperscript{25}—the ECtHR upheld the total prohibition of face covering, holding that national laws limiting individuals’ rights to freedom of religion were

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\textsuperscript{17} \textit{French Law of 1905, JO 11 December 1905; see generally J. Foyer, La Genèse de la loi de séparation (2005) 48 ARCHIVES DE PHILOSOPHIE DU DROIT 75; J. Rivero, La notion juridique de laïcité (1949) RECUEIL DALLOZ 137.}


\textsuperscript{19} \textit{Id.}

\textsuperscript{20} \textit{See CERD, CONCLUDING OBSERVATION REGARDING FRANCE, Apr. 18, 2005, CERD/C/FRA/CO/16; CEDAW, CONCLUDING OBSERVATION REGARDING FRANCE, Apr. 8, 2006, CEDAW/C/FRA/CO/6.}


permissible as long as they were based in law and proportionately served a “legitimate aim.” Interestingly, the “legitimate aim” of the French law that the ECtHR accepted in S.A.S. was not the maintenance of national security. Instead, the Court accepted the French government’s claim to the legitimate aim of maintenance of public order along with its proposed underlying value of “living together” (le “vivre ensemble”). According to the French government, the prohibition of face covering was essential for France’s multiracial society to “live together.”

In many ways, the conclusion in S.A.S. was not unexpected, given the ECtHR’s reluctance over the last twenty years to find violations of Article 9 of the ECHR. When considering complaints concerning restrictions on religious clothing in schools, the Strasbourg Court has either declared that these complaints were inadmissible, or found that the measures were justifiable under Article 9(2) of the ECHR. The exception to this pattern was Ahmet Arslan v. Turkey, in which the ECtHR found the conviction of (male and female) members of a religious group for wearing religious garments in public violated Article 9. The 2010 French ban was similar to the prohibition of religious garments in public spaces considered in Ahmet Arslan, but the ECtHR distinguished that case from S.A.S. on the basis that the Ahmet Arslan prohibition did not concern the covering of the face.

In this legal context, the HRC received two separate complaints in 2016 from two women who had been convicted in France in 2012 for wearing niqab in public: Yaker v. France and Hebbadj v France. The HRC is one of the nine UN treaty bodies, each of which are a committee of experts established to monitor governments’ implementation of specific human rights treaties. All State parties,


such as France, are legally obliged to submit regular reports to the HRC on how the ICCPR is being implemented in the domestic context. The HRC examines country reports and produces recommendations in the form of “Concluding Observations.” In addition to this reporting procedure, UN treaty bodies can consider and issue decisions regarding inter-state or individual complaints. While such decisions are not generally considered binding on States, they constitute a reasoned interpretation of the relevant treaty to which the States parties have agreed to be legally bound. As France has acceded to the individuals’ complaints mechanism under the ICCPR by ratifying its First Optional Protocol, the HRC was authorized to issue a decision on France’s compliance with its ICCPR obligations.

II. OPINION OF THE HRC IN YAKER AND HEBBADJ

On October 23, 2018, the HRC found in Yaker and Hebbadj that the 2010 French legislation under which the women had incurred criminal convictions for wearing of niqab in public disproportionately harmed the petitioners’ right to manifest their religious beliefs and thus violated ICCPR Articles 18 and 26, which secure rights to freedom of religion and non-discrimination. As the UNHRC’s reasoning in both cases is identical, the analysis here refers to the Committee’s reasoning in Yaker.

A. Freedom of Religion

The Committee first addressed Article 18 of the ICCPR, which concerns the right to freedom of thought, conscience and religion. In particular, Article 18 of the ICCPR states:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have

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33. Individual complaints are established under the First Optional Protocol, which requires state consent to bring this type of case. See Optional Protocol to the International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 16, 1966; entry into force March 23, 1976, in accordance with Article 9, https://www.perma.cc/G68U-KUAT.
35. ICCPR, art. 18 and 26, 999 U.N.T.S. 171.
or to adopt a religion or belief of his choice.

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

In interpreting the freedom of a person “to manifest his religion or belief in worship, observance, practice and teaching,” under Article 18(1), the Committee first recalled one of its official statements on interpretation of the provisions of the ICCPR, known as “general comments.” General comment No. 22 establishes “[t]he freedom to manifest religion or belief may be exercised ‘either individually or in community with others and in public or private’” and “include[s] not only ceremonial acts, but also such customs as . . . the wearing of distinctive clothing or head coverings . . . .”

Having found the French law constituted an interference under Article 18(1), the Committee considered whether such interference was permitted under Article 18(3). In this regard, the Committee emphasized that:

Paragraph 3 of Article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.

The French government argued that this right is not absolute, and that the 2010 law was a legitimate limitation of the right to religious freedom because it was aimed at “protecting public safety” and the “rights and freedoms of others.” The Committee acknowledged that States could require individuals to show their faces in specific circumstances for identification purposes with regard to pursuing the legitimate aim of securing public safety and order. However, it found that France failed to explain “why covering the face for certain religious purposes—i.e., the niqab—is prohibited, while covering the face for numerous other purposes,

37. See General comment No. 22 on Article 18 (CCPR/C/21/Rev.1/Add.4), ¶ 4.
38. Id. at ¶ 8.4.
39. Id. at ¶ 8.6.
40. Id. at ¶ 8.7.
including sporting, artistic, and other traditional and religious purposes, is allowed.”\textsuperscript{41} The Committee further observed that France had not described any context, or provided any examples, in which there was a specific and significant threat to public order and safety that would justify such a blanket ban on full-face covering.\textsuperscript{42} Even if such interference could be qualified as necessary, the Committee stated that a general ban on the niqab would be disproportionate to pursuing that legitimate aim.\textsuperscript{43}

Weighing France’s assertion of the importance of the “protection of rights of others,” the HRC found the concept of “living together” to be inadequate justification. It acknowledged that a State might have an interest in the promotion of sociability and mutual respect among individuals in its territory, and “that the concealment of the face could be perceived as a potential obstacle to such interaction,”\textsuperscript{44} However, the Committee held that protecting “the fundamental rights and freedoms of others requires identifying what specific fundamental rights are affected, and the persons so affected.”\textsuperscript{45} In this regard, the concept of “living together” failed the specificity requirement because France was presented the concept in “very vague and abstract” terms.\textsuperscript{46} The HRC also noted that, because the ICCPR does not protect the “right to interact with any individual in public and the right not to be disturbed by other people wearing full-face veil[,]” these rights cannot provide the basis for permissible restrictions under Article 18(3). The Committee held that even if such a vague objective of “living together” could be considered legitimate, a blanket criminal ban would not be considered proportionate to it.\textsuperscript{47} On this basis, the Committee found that imposing the law on Muslim women who choose to wear niqab as part of their religion is in violation of Article 18 of the ICCPR.\textsuperscript{48}

\textbf{B. Cross-Discrimination: Sex and Religion}

The Committee went further and observed that the French ban, despite being drafted in facially neutral terms, did stipulate exceptions for most contexts of face covering in public, such as for sports, carnivals and health reasons, “thus limiting the applicability of the ban to little more than the full-face Islamic veil,” and noted that the Act was “primarily enforced against women wearing the full-face veil.”\textsuperscript{49} The HRC therefore focused on Article 26 of the ICCPR, which sets out a principle of equality and addresses discrimination on prohibited grounds:

\begin{itemize}
\item \textsuperscript{41} Id.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id. at ¶ 8.8.
\item \textsuperscript{44} Id. at ¶ 8.9.
\item \textsuperscript{45} Id. at ¶ 8.10.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id. at ¶ 8.11.
\item \textsuperscript{48} Id. at ¶ 8.12.
\item \textsuperscript{49} Id. at ¶ 8.13.
\end{itemize}
All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.\(^{50}\)

It recalled General comment No. 22 on the wearing of distinctive clothing or head coverings being protected as a freedom of religion under ICCPR, and emphasized the concern for and suspicion of “any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community.”\(^{51}\) The Committee noted that “a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate.”\(^{52}\) However, not every differentiation on the grounds listed in Article 26 amounts to discrimination, if it is based on reasonable and objective criteria,\(^{53}\) in pursuit of an aim that is legitimate under the Covenant.\(^{54}\)

The HRC held that France could not explain why such differential treatment of Islamic face-coverings was justified. The Committee was of the opinion that this differential treatment disproportionately burdened Muslim women and found the French ban to be “intersectional discrimination based on gender and religion.”\(^{55}\) The HRC noted that the ban, instead of protecting niqabi women, “could have the opposite effect of confining them to their homes, impeding their access to public services and exposing them to abuse and marginalization,”\(^{56}\) and that “the Act’s effect on certain groups’ feelings of exclusion and marginalization could run counter to the intended goals.”\(^{57}\) The HRC concluded that the French government is under an obligation to provide the affected women with an effective remedy in full reparation, with financial compensation, and to prevent similar violations in the future, including reviewing the 2010 law in light of ICCPR.

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50. ICCPR, art. 26, 999 U.N.T.S. 171.
51. General comment No. 22 (48) (art. 18) ¶ 2, Comment adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, U.N. Human Rights Committee (Sept. 27, 1993).
55. Yaker, at ¶ 8.17.
56. Yaker, at ¶ 8.15.
III. DEVELOPING RESISTANCE TO JUDICIAL ACCEPTANCE OF DISCRIMINATION

Decisions in *Yaker* and *Hebbadj* are situated within a network of judicial and political pronouncements, such as earlier ECtHR opinions and the concluding observations of various UN treaty bodies, on the legitimacy of the face-covering measures in both France and Europe more generally. The HRC opinions are of unparalleled importance because their holdings contrast with the judicial and policy interpretative trend at the ECtHR and other UN treaty bodies over the last 20 years. Until now, this interpretative trend meant upholding the validity of restrictions—including total bans—on head- and face-covering in Europe.

In particular, it is worth recalling the history of restrictions on face-covering in the deliberations of UN treaty bodies and the ECtHR. As mentioned earlier, the decisions issued by the UN treaty bodies, such as the HRC, are not legally binding on States in a strict sense. Although they do not represent a hard precedent that other UN treaty bodies must follow, these decisions are authoritative interpretative statements on human rights treaties, and State parties, as well as other monitoring and international tribunals such as the ECtHR, do find them persuasive.

The UN treaty bodies legitimated the first French measure of 2004, finding it complied with CERD and CEDAW. First, in 2005, the UN CERD Committee did not view the 2004 measure as constituting *prima facie* interference with the rights of Muslim women and girls. Therefore, they did not request that France justify the necessity and proportionality of the measure. The Committee recommended that France “should continue to monitor the implementation of the Act of 15 March 2004 closely, to ensure that it has no discriminatory effects and that the procedures followed in its implementation always place emphasis on dialogue, to prevent it from denying any pupil the right to education and to ensure that everyone can always exercise that right.” In 2008, the UN CEDAW Committee followed this approach, accepting the ban in principle while highlighting that it “should not lead to a denial of the right to education of any girl and their inclusion into all facets of French society.” Similarly, in 2009, the ECtHR upheld the 2004 French measure.

It is remarkable that the HRC did not follow this series of decisions

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58. *Yaker*, at ¶ 10.
upholding the bans. As early as 2008, the Committee’s “Concluding Observations” on France had noted the discriminatory implications of the measure and suggested that France re-examine its position in light of guarantees of freedom of conscience and religion, as well as the guarantee of equality in the ICCPR:

The Committee is concerned that both elementary and high school students are barred by Act No. 2004/228 of 15 March 2004 from attending the public schools if they are wearing so-called “conspicuous” religious symbols. . . . Thus, observant Jewish, Muslim, and Sikh students may be excluded from attending school in company with other French children. The Committee notes that respect for a public culture of laïcité would not seem to require forbidding wearing such common religious symbols. (articles 18 and 26).63

Instead, France extended the application of the ban from educational spaces to the entirety of public space.

In Yaker and Hebbadj, the HRC additionally recognized the disproportionate impact and indirect discrimination of such bans on women from Muslim cultural backgrounds. In contrast to the CERD and CEDAW Committee Observations on the 2004 French law, the HRC recognized that the 2010 ban interferes with the right to freedom of religion. It then placed the burden of justification on France to demonstrate that such a restriction on religious expression is necessary and proportionate to a legitimate aim.64 Although the ECtHR also acknowledged interference with the right to freedom of religion in S.A.S. and the cases that followed, the HRC recognized that the interference particularly affected women from specific religious and cultural backgrounds and constituted discrimination under Article 26 of the ICCPR.65 The opinions in Yaker and Hebbadj are consistent with the earlier HRC pronouncement on the French bans and strengthen the HRC’s role and potential in future development of discrimination jurisprudence, which explicitly recognizes and engages with the concept of intersectionality.

**IV. BEYOND FORMALISTIC JUDICIAL INTERPRETATIONS OF INTERSECTIONALITY**

The concept of intersectionality66 is now widely acknowledged in international policy and legal discourse as an important tool for understanding how discrimination against women *qua* women is interlinked with discrimination on

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64. *Yaker*, at ¶ 8.7–9, 8.15.
65. *Id.* at ¶ 8.15.
other grounds.\textsuperscript{67} However, intersectionality’s effectiveness and implementation in practice remains fuzzy. Arguably, this blurring is demonstrated by the rhetoric and practice of the UN treaty bodies. For example, in 2010, the Committee on CEDAW acknowledged intersectionality as a “basic concept for understanding the scope of the general obligations of States parties [of the Convention].”\textsuperscript{68} However, its own view—as well as that of the CERD Committee—on the 2004 French law suggests that despite the currency of the concept, the UN treaty bodies themselves show little ability to grasp intersectional discrimination in great depth.

In such a context, the HRC’s critique of the 2004 French law in its 2008 Concluding Observations on France, and its finding of “intersectional discrimination” of gender and religion in Yaker and Hebbadj suggests that the concept of intersectionality had a stronger influence. These latest decisions—even if without explicit detailed elaboration of intersectional discrimination—are laudable solely on that ground. However, to fully honor the nuance and complexity demanded by an intersectional approach,\textsuperscript{69} the HRC’s jurisprudence should go beyond formalistic interpretations of intersectionality and identify the full extent of the violations and harms involved in the 2010 French law and its operation.

A. UN Treaty Bodies and Courts Must Recognize the Full Extent of Negative Effects of Face Covering Prohibitions on Women and Girls of Muslim Cultural Backgrounds.

The HCR decisions referred to some of the negative effects of the face-covering prohibition, in particular that it could result in the confinement of niqabi women in their homes and that it might increase discrimination against this group (whether the niqab was imposed or chosen).\textsuperscript{70} Even if French lawmakers are genuinely concerned with furthering gender equality, the law punishes the victims


\textsuperscript{69} See also Timo Makkonen, Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore (Apr. 2002) (unpublished Master’s dissertation, Åbo Akademi University) (similarly critiquing legal understandings of intersectionality).

of the very practice it condemns. The HRC in *Yaker* and *Hebbadj* highlighted this contradiction, but it might have gone further by explicitly recognizing that the potential human rights implications of the prohibition are not limited to restriction of freedom of movement. The prohibition also implicates, *inter alia*, rights to privacy, education, and employment thereby affecting the entire social and public lives of women of an oppressed minority group. Such serious potential impacts were suggested by the HRC in its General Comment No. 28 of 2000:

Regulation[s] of clothing to be worn by women in public . . . may involve a violation of a number of rights guaranteed by the Covenant, such as: Article 26, on non-discrimination; Article 7, if corporal punishment is imposed in order to enforce such a regulation; Article 9, when failure to comply with the regulation is punished by arrest; Article 12, if liberty of movement is subject to such a constraint; Article 17, which guarantees all persons the right to privacy without arbitrary or unlawful interference; Articles 18 and 19, when women are subjected to clothing requirements that are not in keeping with their religion or their right of self-expression; and, lastly, Article 27, when the clothing requirements conflict with the culture to which the woman can lay a claim.

In addition to these serious violations that might be committed by the state and public institutions/bodies—which were not mentioned by the HRC in *Yaker* and *Hebbadj*—many broader negative effects of the face-covering ban issue from horizontal interactions among individuals and/or groups of individuals. A state-centered or vertical human rights framework, focusing largely on the relationship between the individual and the state, is often unable to fully capture these broader negative effects that understandings of intersectionality articulate. In the case of France’s 2010 law and the 2004 law preceding it, these negative effects may involve, for instance, increased physical and verbal violence towards the group it targets (women wearing Muslim head-coverings) or an increased tolerance of such violence. This may occur partially because the law has legitimizing effects.

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71. See, e.g., Bouteldja, supra note 13; SCOTT, supra note 2.
73. U.N. HUMAN RIGHTS COMM., CCPR General Comment No. 28 The Equality of Rights between Men and Women (Article 3) adopted at its Sixty-Eighth Session, March 29, 2000, CCPR/C/21/Rev.1/Add.10.
75. The power of law to normalize, legitimize and justify social phenomena is widely discussed in legal theory, see, e.g., Akram, supra note 15, at 459–66; JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS (1994); RONALD DWORKIN, LAW’S EMPIRE (Harvard University Press 1986); see also Colin Tatz, Racism, Responsibility and Reparation: South Africa, Germany and Australia 31 AUSTRALIAN J. POLITICS & HISTORY 162, 165 (1985) (discussing how the law legitimizes racist beliefs); Shelley Bielesfeld, *The Dehumanising Violence of Racism: The Role of Law* (D Phil thesis,
law normalizes popular prejudice, making some individuals or groups feel more justified in engaging in violence towards women wearing Islamic head-coverings than they would if the government had not officially singled out these garments as unacceptable. For example, following the enactment of the 2010 law, in many cases when women wearing Muslim head-coverings were physically attacked, perpetrators felt justified in their behavior because, according to them, such women were terrorists.76

In addition to physical and verbal violence, there is evidence of increased horizontal discrimination of other forms following the passing of head and face-covering laws in France. For example, in the aftermath of the 2004 law, which was restricted to public educational settings, women wearing headscarves have been refused service in banks77 and restaurants,78 forbidden from swimming at public pools79 and from accessing gyms,80 prevented from accompanying their children on school field trips,81 discriminated against in the job market,82 fired from their jobs,83 and ostracized from mainstream feminist groups.84 The public has also targeted women wearing headscarves when they have expressed themselves publicly: for example, when competing in a reality TV show,85 representing a

76. See, e.g., ‘Marseille: une jeune femme voilée agressée, accusée d’être “terroriste”’ LE PARISIEN (Nov. 18, 2015), https://www.perma.cc/T5PW-JBNJ (reporting the perpetrator of a young woman assaulted her at the exit of a metro station while calling hers a terrorist); French Girl Attempts Suicide after “Veil Attack”, FRANCE 24 (Feb. 9, 2013) https://www.perma.cc/YH46-UU8X (detailing how two skinheads attacked a 16-year-old girl “with a “sharp object,” ripped off her headscarf, shouted Islamophobic insults and hit her on the shoulder before fleeing by car); S. D., Agression Islamophobe dans un parc, une femme voilée insultée et frappée, LA VOIX DU NORD (June 14, 2017), https://www.perma.cc/AFTX-JUCU (discussing the influence of Islamophobia and Le Pen’s Front National far-right political party on violence against Muslim women).


83. Thomas Hubert, French Veil Ban Upheld in Controversial Court Case, FRANCE 24 (Nov. 27, 2013), https://www.perma.cc/HAG6-JKMX.

84. Christine Delphy, Feminists are Failing Muslim Women by Supporting Racist French Laws, THE GUARDIAN (Jul. 20, 2015), https://www.perma.cc/F43X-SHDD.

student union, and running for political office.

This slippage from the precise target and context of the ban (headscarfs in schools) to other contexts is further illustrated by decisions of school teachers and authorities that girls who had attempted to wear headscarves to school should not be permitted to wear long skirts or bandanas either. The 2016 “burkini affair,” in which a number of French towns prohibited the wearing of body-covering clothing on beaches in summer, measures that France’s highest administrative court, the State Council (Conseil d’Etat), later found to be unlawful—is a recent example of the same phenomenon of slippage from the precise targets of the 2004 and 2010 laws to different locations and items of clothing. Additionally, despite the State Council ruling, some town mayors have kept the ban in place by simply changing their bans’ wording.

These examples reveal how prohibitions on covering may reinforce racism, violence, and discrimination faced by women from Muslim cultural backgrounds in France. The HRC does not go far enough to address or identify the extent of this discrimination in their decisions. We argue that the full complexity of impact of the French bans cannot be fully understood and accounted for by limited judicial interpretations of discrimination based solely on sex and religion. In order to identify and address how structural racism and sexism shape the French legislation on face-coverings, we recommend drawing on a modified version of the UN concept of ‘harmful traditional practices’ in the future development of jurisprudence on intersectional discrimination.

B. Courts and UN Treaty Bodies Must Decolonize Their Understanding of Harmful Traditional Practices.

In Yaker the HRC noted:

[The blanket ban on the full-face veil introduced by the Act appears to be based on the assumption that the full veil is inherently discriminatory and that women who wear it are forced to do so. While acknowledging that some women may be subject to family or social pressures to cover their faces, the Committee observes that the wearing of the full veil may also be a choice — or even a means of]

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staking a claim — based on religious belief, as in [Sonia Yaker’s] case. To support its claim, the UNHRC decision cites S.A.S. v. France, para. 119, where the ECtHR found that “a State Party cannot invoke gender equality in order to ban a practice that is defended by women—such as the applicant—in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.”

This recognition of covering as a choice contrasts with the perspective of the French government and the UN treaty bodies that the niqab is inherently oppressive to women and that its wearing is forced, either by sanctions or by cultural constraints and conditioning. The French government and UN treaty bodies frame the issue as the imposition of oppressive clothing practices on women within patriarchal societies, while the HRC draws on the claim that if an individual woman chooses to cover, it cannot be considered as oppressive of her.

These two arguments appear irreconcilable. In this article, we propose a third approach to move beyond this dichotomy, one that is better suited to fully capture the interlinked racist and sexist dimensions of the French law. We suggest that discrimination jurisprudence should draw on a modified version of the concept of ‘harmful traditional practices’ based on the work of feminist scholars Winter, Thompson and Jeffreys. The concept of harmful traditional practices was elaborated by the UN in 1995 to address harms to women and children that do not easily fit into a human rights framework. In line with its CEDAW mission,

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92. Yaker, at ¶ 8.15 (citing S.A.S., at ¶ 119)

93. Id.

94. These two contrasting arguments follow the general outline of the debate in the social sciences as to whether structure or agency is the primary force shaping human behavior. Structure is understood as social arrangements that limit or constrain available options for individuals, while agency is understood as individuals’ capacity to perceive their situation and act accordingly. See Patrick Baert & Filipe Carreira da Silva, Social Theory in the Twentieth Century and Beyond 14 (2009) (describing how structuralism “does not simply say that structures are constraining, but that they are constraining to the extent that they preclude the possibility of the individual’s agency”).

95. For a different, albeit related, analysis of the role of autonomy in religious practices, see Farnah Ahmed, The Autonomy Rationale for Religious Freedom, 80(2) MODERN L. REV. 238 (2017), arguing the protection currently offered to religious practices under right to religious freedom under human rights law cannot be sufficiently justified by reference to the value of autonomy.

96. Bronyn Winter, Denise Thompson & Sheila Jeffreys, The UN Approach to Harmful Traditional Practices: Some Conceptual Problems, 4 INT’L FEMINIST J. POLITICS 72 (2002); see also Sheila Jeffreys, Beauty and Misogyny: Harmful Cultural Practices in the West (2005). Although we have chosen to focus on the critique of harmful traditional practices developed by Winter, Thompson and Jeffreys, it should be noted that many women activists and scholars from Muslim cultural backgrounds in France have made arguments that challenge the agency/structure binary with more direct reference to the French context. This work includes, most importantly, analyses of the implications of France’s colonial history in Algeria and its impacts on French attitudes towards Islamic head-coverings. See, e.g., H. Bouteldja, supra note 13; H. Bentouhami, Les feminismes, le voile et la laïcité à la française, SOCIO, available at https://journals.openedition.org/socio/3471.

97. G.A. Res. 34/180, Convention on the Elimination of all Forms of Discrimination Against
the UN defines harmful traditional practices as those practices that are damaging to the health of women and girls, are performed for men’s benefit, create stereotyped roles for the sexes, and are justified by tradition or custom. The 1995 UN Factsheet cites a number of such practices, including: female genital mutilation, son preference, female infanticide, early marriage and dowry, early pregnancy, nutritional taboos and practices related to child delivery, and violence against women. However, as Winter et al. have pointed out, apart from violence against women, the practices mentioned in the Factsheet originate in and are mostly practiced in non-Western countries. They argue that this focus constitutes “Western bias” in leaving out what they call “harmful traditional/cultural practices in the West.” For Winter et al., such Western practices include beauty practices like cosmetic surgery, high heels, makeup, and hair removal, all of which fulfill the criteria for harmful traditional practices laid out in the Factsheet. They are however careful to specify that:

[Although we are arguing that there are cultural practices harmful to women in the West, too, we are not arguing that Western practices are equivalent to those identified by the UN, that female genital mutilation (FGM), say, is a kind of cosmetic surgery (Greer 1999). In arguing that there are practices in the West which also count as [harmful traditional practices], we are simply making the point that a culture of male domination exists in the West as well.]

The purpose of this argument thus is not to trivialize the forms of violence against women listed in the UN Fact Sheet, but simply to point out that related harmful practices exist in Western countries. Critiquing this quasi-exclusive focus on practices originating in non-Western contexts is important for two reasons. Firstly, this focus contributes to racist bias and discrimination by implying that only non-Western cultures are patriarchal. In a direct continuation of colonial discourses, this focus feeds into ideas of people from non-Western backgrounds as different from and inferior to “civilized” Europeans due to their “primitive,” “barbaric” patriarchal practices. Secondly, the implication that only non-Western cultures

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98. Id. at ¶ 87
99. See id.
100. See Winter, Thompson & Jeffrey, supra note 100, at 72.
101. Id. Winter et al. use the terms “traditional” and “cultural” interchangeably, echoing the usage in the UN FACT SHEET, supra note 14. This article will follow the same practice.
102. See Jeffrey, supra note 96 (describing harms to women of western beauty practices); Naomi Wolf, THE BEAUTY MYTH (1990); Sandra Lee Bartky, Femininity and Domination: studies in the Phenomenology of Oppression (1990); Susan Bordo, Unbearable Weight: Feminism, Western Culture, and the Body (1993).
103. Winter, Thompson & Jeffrey, supra note 104, at 73.
104. For more information on colonial discourses, see Frantz Fanon, A DYING COLONIALISM (Grove Press, 1965); Scott, supra note 2; Bouteldja, supra note 13; Hourya Bentouhami, Phénoménologie politique du voile, 44 PHILOSOPHIQUES 2 (2017).
105. Sherene Razack, Imperiled Muslim women, dangerous Muslim men and civilized Europeans:
are patriarchal underestimates the patriarchal nature of commonplace Western practices, making these practices harder to combat. Thus, a modified harmful traditional/cultural practices approach points towards the wider sexist implications of the French prohibitions. In particular, through its failure to recognize—even its explicit erasure of—the connections between Islamic face-coverings and other, much more widespread patriarchal practices engaged in by French women, the French law actually hinders efforts to address the sexism that affects all women in French society.\textsuperscript{106}

The modified concept of harmful traditional/cultural practices thus provides a useful tool to decolonize political and legal approaches to Islamic covering by analyzing western beauty practices as harmful cultural practices along with niqab and other Muslim head-coverings. The UN’s original concept of harmful traditional practices recognizes that practices harmful to women can be constrained by culture,\textsuperscript{107} and that women’s choices to engage in them are shaped by tradition and social pressure, whether direct or indirect.\textsuperscript{108} The modified version we propose emphasizes that this is the case for women from western cultural backgrounds as well as women from Muslim cultural backgrounds. This allows Muslim covering to be seen not as isolated and unique, but as a practice situated on a continuum with many others throughout the world, including the practices of western societies such as France. Moreover, this approach emphasizes that France’s 2010 law singles out a practice engaged in by only a very small number of women from a minority ethnic group, while failing to address much more common harmful traditional practices in which women of all ethnic backgrounds in France routinely engage.\textsuperscript{109}

Consequently, the modified harmful traditional practices approach is helpful in understanding how the 2010 French law engages in intersectional discrimination on the basis of race and sex. It highlights how the law increases racist and sexist targeting of a particular group of French women by focusing exclusively on a single patriarchal practice engaged in by only some members of this group, while ignoring related practices engaged in by the majority.

**CONCLUSION**

The ground-breaking UNHRC decisions in *Yaker* and *Hebbadj* find France to have violated two Muslim women’s freedom of religion by fining them for wearing niqab. These holdings are in striking contrast to the decisions of the

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\textsuperscript{107} G.A. Res. 34/180.

\textsuperscript{108} Id.

\textsuperscript{109} See, e.g., Christine Delphy, *Anti-sexism or Anti-racism, in SEPARATE AND DOMINATE: FEMINISM AND RACISM AFTER THE WAR ON TERROR* (David Broder, tr. 2015) (arguing that this practice fails to address much more common harmful traditional practices).
ECtHR and other UN treaty bodies (notably CERD and CEDAW), which have consistently failed to find the French laws against Islamic face-coverings discriminatory. In this article, we noted the continuity in the UNHRC’s approach to this issue, and argued that its decisions, which appear to be grounded in a commitment to intersectionality, indicate the development of resistance to the judicial acceptance of discrimination.

However, the UNHRC decisions fail to grasp the full extent of harms created by the 2010 law. In this article, we proposed one useful tool for the future development of intersectional discrimination jurisprudence to better comprehend the structural racism and sexism in which the French laws prohibiting Islamic face-coverings in public are embedded. We suggested that the use of a modified version of the UN concept of harmful traditional/cultural practices—following the work of Winter et al., to recognize Islamic head-coverings as existing on a continuum of harmful traditional practices from all countries in the world—can better reveal the simultaneously racist and sexist dimensions of the law.

Through an interdisciplinary socio-legal contextual analysis, the article illuminates the normative power and wide-ranging negative effects of the Islamic face-covering prohibitions on French women. Understanding these harms is crucial for the future development of intersectional discrimination jurisprudence, and moving towards a Europe, a USA and a world in which patriarchal practices are recognized and combatted, and women of color are no longer subject to discriminatory laws.
When the Body Is a Weapon: An Intersectional Feminist Analysis of HIV Criminalization in Louisiana

Rachel Brown†

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INTRODUCTION

The female body has long been a battleground in the fight to control
women’s lives.1 Patriarchal constructions of gender prescribe how women must
look and behave, categorizing which bodies are female within Western society’s
gender binary.2 Underlying these constructions of gender are heteronormativity,
class exploitation, and white supremacy.3 Such constructions of women’s bodies
create boundaries between genders, delineating what behavior is worthy and
acceptable, and what bodies deserve ostracization and punishment.4 Women
whose bodies fail to conform to these artificial standards are subject to violence,

1. ROSE WEITZ, THE POLITICS OF WOMEN’S BODIES: SEXUALITY, APPEARANCE, AND
BEHAVIOR 3 (2003).
2. Id. at 20.
3. JOEY L. MOGUL, ANDREA J. RITCHIE, & KAY WHITLOCK, QUEER (IN)JUSTICE: THE
CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 24 (2011); Cathy J. Cohen,
PUNKS, BALDAGGERS, AND WELFARE QUEENS: THE RADICAL POTENTIAL OF QUEER POLITICS?, 3 GLQ
437, 452-57 (1997); Berch Berberoglu, CLASS, RACE AND GENDER: THE TRIANGLE OF OPPRESSION,
2 RACE, SEX & CLASS 69 (1994) (describing how patriarchal divisions of gender reinforce
capitalist class exploitation); see ANGELA DAVIS, WOMEN, RACE & CLASS 5 (1st ed. 1981)
(finding “slave women may as well have been genderless” as they were thought of as “units
of labor,” not women).
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5. Id. at 85. Mogul, supra note 3, at 24.

6. See Darren Rosenblum, “Trapped” in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism, 6 Mich. J. Gender & L. 499, 540 (2000) (“as one commentator noted, ‘[r]ead AI DS as the outward and visible sign of an imagined depravity of will, AIDS commentary deftly returns us to a premodern vision of the body, according to which heresy and sin are held to be scored in the features of their voluntary subjects by punitive and admonitory manifestations of disease’”).

7. Carolyn M. Audet, Catherine C. McGowan, Kenneth A. Wallston, & Aaron M. Kipp, Relationship between HIV Stigma and Self-Isolation among People Living with HIV in Tennessee, 8 PLOS ONE 1, 5-6 (2013).


9. Id.; Mogul, supra note 3, at 34-36.
I. UNDERSTANDING HIV/AIDS

This section provides background on HIV/AIDS to elucidate the numerous medical inaccuracies promulgated by Louisiana’s intentional exposure statute. Human immunodeficiency virus (HIV) is a virus that can lead to acquired immune deficiency syndrome (AIDS). The virus attacks and destroys cells in the immune system, making it difficult for the body to defend itself from opportunistic infections and certain cancers. The illness has several stages, all of which have varying levels of contagiousness. The first phase, acute HIV infection, may last for several weeks, during which the person living with HIV (PLHIV) has a high viral load, i.e. has a high “viral load,” making them extremely contagious. The second phase, clinical latency, may last for several decades during which the PLHIV will likely be asymptomatic and significantly less contagious. The final stage is the development of AIDS, at which point the individual experiences recurrent and severe illness, has a gravely compromised immune system, and is highly contagious. HIV is only transmitted through certain behaviors. The most common means of transmission are sharing syringes and anal or vaginal sex. Only blood, semen, pre-semenal fluid, rectal fluid,
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vaginal fluid, and breast milk can transmit HIV. Although HIV is incurable, medical advancements like antiretroviral therapy (ART) allow PLHIV to live longer, healthier lives. By adhering to an ART regimen, PLHIV can suppress their viral load to an undetectable level at which they have “effectively no risk of sexually transmitting HIV to their HIV negative partner.” Therefore, HIV treatment is a form of prevention. Pre-exposure prophylaxis (PrEP), an oral medication that can reduce the risk of HIV infection from sex by 99%, is another form of prevention.

A. Demographics of HIV Prevalence

Anyone can contract HIV regardless of their gender, age, race, or sexual orientation. However, certain social, economic, and demographic factors influence the prevalence of HIV within different communities.

Geographically, those living in the Southern United States face an increased risk of contracting HIV. Despite making up only one third of the population, these states account for over one-half of all new HIV diagnoses nationwide. In Louisiana, HIV affects the lives of over 20,000 people, with over one thousand

18. Id.
20. Id.
21. Id. Achieving viral suppression requires that a person is aware of their HIV status, has been prescribed ART, and consistently adheres to their ART. Id.
22. PrEP, CTRS. FOR DISEASE CONTROL & PREVENTION, https://perma.cc/CJQ4-8S2Y (last visited Nov. 1, 2018). PrEps reduce the risk of HIV from sex by up to 99% and by at least 74% for those using intravenous drugs. Id. Despite PrEps effectiveness, usage rates remain low in Louisiana, especially for women. Kam Stromquist, HIV rates still high, but Louisiana ranks 24th in use of disease-preventing medication, THE ADVOCATE (Mar. 6, 2018), https://perma.cc/92MD-XX76. Interestingly, although the FDA approved PrEP in 2012, fears that the drug would encourage “irresponsible behavior” caused years of delay for marketing the drug. Andrea Gallo, Once-a-day pill can help prevent HIV; why aren’t more in Baton Rouge taking it?, THE ADVOCATE (Mar. 25, 2017), https://perma.cc/H96G-XZ2R. One study found that only 48% of Louisianans were aware that PrEP could be used to prevent HIV transmission. People Living with HIV Needs Assessment, LA. DEP’T. OF HEALTH & HOSPS. 8 (Sept. 2015), https://perma.cc/MS6Y-BKEQ. Further, in an emergency, post-exposure prophylaxis (PEP) can also be used to prevent infection. PEP, CTRS. FOR DISEASE CONTROL & PREVENTION, https://perma.cc/R76V-K6QB (last visited Jul. 23, 2018). PEP can be administered in an emergency room after an accidental exposure, such as a needle prick or sexual assault. Id.
26. Id. The South makes up 52% of new HIV diagnoses in the US. Id. Further, while other regions of the US saw a decline in HIV diagnosis from 2012 to 2016, the South remained stable. Id.
new diagnoses presenting annually. This represents one of the highest rates of HIV in the nation. The state’s capital, Baton Rouge, ranks as the city with the highest rate of HIV in the country.

Gender also plays a role in HIV prevalence. Nationwide, the majority of people living with HIV are men. Of this group, men who have sex with men account for the majority of HIV infections. Nationally, women account for 19% of new HIV diagnoses, and heterosexual contact account for the large majority of these diagnoses. Significantly, in Louisiana, 27% of new HIV diagnoses occur in women. Additionally, HIV disproportionately impacts transgender people, who receive new HIV diagnoses at over three times the national average. Further, over half of these new diagnoses stem from transgender people living in the South. Of trans-people living with HIV, the vast majority are trans-women. Nationwide, an estimated 14% of all trans-women live with HIV.

In addition to gender and geography, race plays a large role in determining HIV risk. Nationally, African Americans account for a higher proportion of all new HIV diagnoses, rates of people living with HIV, and people who have ever received an HIV diagnosis as compared to other races and ethnicities. While African Americans only comprise 13% of the nation’s population, African Americans account for 43% of HIV diagnoses. In Louisiana, the disparity is even more dramatic: African Americans constitute over 68% of PLHIV. Moreover,

28. HIV in the United States by Region, Ctrs. for Disease Control & Prevention (Sept. 9, 2019), https://perma.cc/SU3K-Y5U7. This rate is calculated by rates of HIV diagnosis per 100,000 people. Id.
31. Id.
32. HIV Among Women, Ctrs. for Disease Control & Prevention (Jul. 5, 2018), https://perma.cc/WFB4-8K5Q.
35. Id.
36. Id. 84% of HIV positive transgender people are trans women. Id.
37. Id.
38. HIV Among African Americans, Ctrs. for Disease Control & Prevention (Jul 5, 2018), https://perma.cc/8PV3-2SMU.
39. Id.
40. Id.
41. 2016 STD/HIV Surveillance Report, supra note 33. In Baton Rouge, the city with the highest HIV rate in the nation, 85% of all HIV diagnoses are within the Black community. Gallo, supra note 22.
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where race intersects with other marginalized identities, the disparities grow. For example, black men who have sex with men are the group most impacted by HIV nationwide. Likewise, Black women constitute 59% of all women who have received a new HIV diagnosis. For Black trans women, estimates are even more dire; the CDC estimates around half of all Black trans women may be living with HIV. In Louisiana, an estimated 80% of transgender people living with HIV are African American.

Other populations also face disproportionate impacts. For instance, HIV is more prevalent among poor people in urban areas. Sex workers, although difficult to study, are also believed to face an increased risk of HIV transmission. In addition, individuals who inject drugs face an increased risk of HIV exposure, accounting for 9% of new HIV diagnoses nationally.

Popular media has frequently relied on racist, classist, homophobic, and transphobic tropes to explain the disparities in HIV prevalence. However, social determinants and structural barriers to HIV care, not individual behavior, are responsible for transmission disparities. Moreover, the same racism, classism, homophobia, sexism, and transphobia underlying these stereotypes fuel HIV stigma and drive disparate rates of transmission. The rest of this section illustrates how stereotypes and structural barriers help explain disproportional HIV prevalence among Black women, trans women, sex workers, and Southern women.

42. *HIV Among African Americans*, supra note 38.
43. *HIV Among Women*, supra note 32.
44. *HIV and Transgender People*, supra note 34.
50. Id. DEBRAN ROWLAND, THE BOUNDARIES OF HER BODY: THE TROUBLING HISTORY OF WOMEN’S RIGHTS IN AMERICA 471 (2004) (“Communities at increased risk are defined not just by a single, clearly identifiable risk behavior—for example, men having sex with men or intravenous drug users sharing needles—but by much broader social and economic structures within which these behaviors occur, such as geography, race, social institutions (such as prostitution), and economic class.”).
1. Black Women

Women and girls are disproportionately vulnerable to HIV because of “their unequal cultural, social and economic status in society.” Multiple levels of racism influence Black women’s reproductive health, including HIV transmission. Structural racism, defined as “the macrolevel systems, social forces, institutions, ideologies, and processes that interact with one another to generate and reinforce inequities among racial and ethnic groups,” influences the health of people of color and contributes to health inequity, including HIV rates. Structural racism results in poverty, stigma, and poor health outcomes, all of which increase HIV risk. Other forms of racism include institutional racism, personally mediated racism, and internalized racism. Institutional racism, defined as the practices of large organizations or governments that negatively affect access to health services, results in differences in the quality of healthcare for Black women. Personally mediated racism occurs where healthcare providers’ internal biases influence their provision of care, and it can lead to substandard healthcare for racial minorities. Finally, internalized racism, which involves “the embodiment and acceptance of stigmatizing messages from society by racially oppressed groups,” further influences reproductive health, including HIV. In the case of Black women, the unique vulnerabilities of gender and racism collide, making Black women especially vulnerable to HIV. Importantly, Black women have fewer sexual partners than other populations and are more likely to use condoms, further proving that structural barriers, not individual behavior, spur HIV disparities. Moreover, despite Black women’s disproportionate risk of HIV,

52. Women and Girls, HIV and AIDS, AVERT (June 19, 2010), https://perma.cc/2J6J-KCJJ. Factors such as women’s biological susceptibility to HIV through heterosexual vaginal sex, poverty, domestic and sexual violence, and poverty all exacerbate women’s vulnerability to HIV. HIV Among Women, supra note 32; Jenny A. Higgins, Susie Hoffman, & Shari L. Dworkin, Rethinking Gender, Heterosexual Men, and Women’s Vulnerability to HIV/AIDS, 100 AM. J. PUB. HEALTH 435, 436 (2010).
56. Prather et al., supra note 53, at 665.
57. Id.
58. Id.
59. Id.
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there are few prevention programs specifically tailored to target Black women.62

Mass incarceration also exacerbates the spread of HIV infection among women of color.63 Mass incarceration, which predominantly targets Black men, disrupts communities and alters sex ratios between men and women.64 In some communities, it is estimated that there are only 6 to 8 Black men for every 10 Black women.65 This imbalance alters sexual behavior and “has been associated with concurrency of partnerships, which can foster the transmission of HIV . . . and can undercut [women’s] power to negotiate partner monogamy and condom use.”66

2. Trans Women67

Transgender people experience extreme and pervasive discrimination because of their gender identities, including physical violence,68 employment and housing discrimination, and harassment in school.69 Transphobic discrimination and victimization negatively impacts the mental health and economic stability of transgender individuals,70 resulting in increased substance use, school dropout rates, engagement in unprotected sex,71 and participation in the “underground economy,” such as drug sales and sex work.72 The social marginalization,

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62. See El-Bassel et al., supra note 55, at 997.
64. Id.
65. Id.
66. Id. Louisiana has the second highest incarceration rates in the country. Adam Gleb & Elizabeth Compa, Louisiana No Longer Leads Nation in Imprisonment Rate: New Data Show Impact of 2017 Criminal Justice Reforms, PEW CHARITABLE TRUSTS (July 10, 2018), https://perma.cc/8TN3-LUFB.
67. “Transgender women are one of the most highly impacted groups in the HIV epidemic to date, yet they are disproportionately under-researched.” Jae Sevelius, Transgender Issues in HIV: Providers Need Accurate, Current Information to Provide Optimal Care, HIV SPECIALIST 30, 31 (Dec. 2013). “Often, transgender women are not even ‘seen’ because they are combined incorrectly into other categories, such as men who have sex with men.” Trans Women Living with HIV, WELL PROJECT (Aug. 21, 2018), https://perma.cc/V7GK-LQWG.
69. 2015 U.S. Transgender Survey, supra note 68, at 11-13. Trans women also face unique challenges as they are more likely to be misgendered by society, making them more vulnerable to negative interactions. Id. at 50.
70. Id. at 197.
71. Id. at 31, 115.
72. Id. at 157. Furthermore, the intersection of structural racism with transphobia results in increased rates of economic hardship and marginalization. Samantha LaMartine et al.,
stigmatization, isolation, and discrimination faced by trans women in particular increases their HIV vulnerability.73

3. Sex Workers

Similarly, sex workers’ heightened HIV risk stems from their economic vulnerability, marginalization, increased risk of sexual violence, and reduced ability to negotiate consistent condom use.75 Women engaging in sex work “may have a history of homelessness, unemployment, incarceration, mental health issues, violence, emotional/physical/sexual abuse, and drug use,” all of which heighten HIV risk.76 Additionally, heterosexual vaginal sex and receptive anal sex pose a greater biological risk for HIV infection, leaving sex workers more biologically susceptible.77 Furthermore, federal legislation such as SESTA and FOSTA, which makes online platforms liable for the content posted by users, diminishes sex workers’ ability to maintain agency over their work, which in turn causes an increased risk of HIV.78 The enactment of SESTA and FOSTA demonstrate an increasingly hostile environment that leaves sex workers increasingly vulnerable.79

73 Tonia Poteat, Sari L. Reisner, & Anita Radix, HIV Epidemics Among Transgender Women, 9 CURRENT OP. HIV AIDS 168, 169 (2014). “The purported relationship between exposure to stigma and health risk behaviors among transgender women is consistent with Meyer’s (2003) minority stress model. According to this model, individuals who belong to socially devalued groups are vulnerable to chronic exposure to stigma and discrimination, which over time can compromise psychological coping resources and lead to mental, behavioral, and physical health challenges.” Don Operario, Mei-Fen Yang, Sair L. Reisner, Mariko Iwamoto, & Tooru Nemoto, Stigma and the Syndemic of HIV-Related Health Risk Behaviors in a Diverse Sample of Transgender Women, 42 J. CMYT. PSYCHOL. 544, 546 (2014); see also LaMartine, et al., supra note 72; Transgender People, HIV and AIDS, AVERT (2018), https://perma.cc/9999-UJFT. In addition to these factors, transgender women who have sex with men “often engage in receptive anal intercourse – an efficient route for acquisition of HIV.” Poteat, et al., supra note 73, at 169; see also Operario, et al., supra note 73, at 553-54.


76 HIV Risk Among Persons Who Exchange Sex for Money or Nonmonetary Items, supra note 47.


79 Ketchum & LeMoon, supra note 78.
4. Southern Women

Structural barriers such as poverty, racism, and poor healthcare cause higher HIV rates amongst Southern women. Stigma and misinformation surrounding HIV and sexuality also contribute to geographic HIV disparities. In one study, participants throughout the Deep South reported a dearth of information regarding HIV apart from information transmitted by word of mouth. In the same study, Southern participants were found to be less likely to trust the medical system, government, and health providers. As a result, they were more likely to view public health campaigns with suspicion and were less likely to get tested for HIV, increasing their vulnerability to transmitting or contracting HIV. Southerners’ negative stigma surrounding sex and HIV, in part due to heightened religious conservativism in the region, also contributes to HIV transmission rates.

In conclusion, women with multiple and overlapping marginalized identities are at a dramatically increased risk of contracting HIV. A complex web of structural barriers and societal factors—not deviant or morally blameworthy behavior—explain disparities in HIV prevalence. Moreover, the same factors that influence certain populations of women’s susceptibility to HIV also exacerbates those women’s experiences of living with HIV.

B. HIV’s Impact on Women’s Lives

The following section will examine the lived experiences of women living with HIV (“WLHIV”). Understanding the unique challenges faced by WLHIV - related to their health, personal relationships, and socioeconomic status - is necessary in order to understand the additional burden that HIV criminalization has on the lives of WLHIV.

First, HIV uniquely impacts women’s health. WLHIV may suffer different HIV symptoms and react differently to HIV treatments than men. Importantly,
stigma related to HIV also has a unique impact on women’s mental and physical health. Physically, stigma compromises [WLHIV]’s access to HIV treatment and care and reduces ART adherence. Psychologically, internalized stigma undermines WLHIV mental health and fosters feelings of rejection, isolation, poor self-image, hopelessness, loss of control, and depression. This detrimental impact of this stigma is more severe for women with multiple co-occurring devalued social identities, such as Black women and trans women, especially those living in certain communities. In socially and religiously conservative Southern states like Louisiana, WLHIV face increased stigma because HIV is often associated with promiscuity, social deviance, and immorality. This leaves WLHIV in Louisiana especially vulnerable to the detrimental physical and psychological impacts of HIV stigma.

Structural barriers, including lack of financial resources, transportation, caretaking responsibilities, and lack of healthcare, also prevent some women from accessing HIV treatment, leaving some women sicker than others. In addition, trans women experience unique challenges engaging in and adhering to HIV care. For example, trans women often avoid healthcare settings due to stigma and past negative experiences; and when trans women do try to access care, they often face challenges accessing culturally competent healthcare.

WLHIV of color also experience increased barriers to HIV treatment,

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90. Audet, supra note 7, at 5-6. That is not to say that all women living with HIV are depressed or unhealthy or feel that way all the time. Online resources like the blog A Girl Like Me share the multitude of experiences of WLHA. A Girl Like Me, WELL PROJECT (Dec 8, 2018), https://perma.cc/Y52G-B2B7.
91. See Rao et al., supra note 8 (finding that “perceived and experienced stigma resulting from multiple co-occurring devalued social identities pushes many to keep their statuses hidden, plac[ing] Black women at increased risk of HIV infection, and forces them to stay at home rather than engage in services along the HIV care continuum.”); see also Rice et al., supra note 60 at 15 (studying intersectional stigma among women living with HIV).
92. Audet, supra note 7, at 5-6.
94. Sevelius, supra note 67, at 31.
95. Id.
96. Id.
such as stigma and lack of access to affordable care. Further, socioeconomic class is also connected to treatment adherence. Successful treatment adherence requires WLHIV to orient their lives around their often complex treatment regimen. For women living in poverty, stressful life events such as food insecurity, lack of transportation, and general “life chaos,” makes treatment adherence especially difficult.

In addition to the negative impacts of HIV/AIDS stigma on women’s health, that stigma can harm their relationships with family and friends. For example, WLHIV surveyed in one public health study reported experiencing painful stigma from family members, such as family members avoiding physical contact with them or suggesting that WLHIV were not fit to care for their own children. Additionally, even when women felt that their families were supportive, WLHIV often felt isolated by their diagnosis. HIV may also influence women’s relationships with romantic partners. For example, studies have found that women experience declines in sexual activity, function, satisfaction and pleasure following HIV diagnosis. HIV disclosure can also result in violence, rejection, and abandonment by romantic partners. For WLHIV experiencing domestic violence, navigating HIV and abuse can be especially challenging. Where HIV and domestic violence intersect, abusers may use WLHIV’s status as a tool of power and control.

97. Toth et al., supra note 93, at 613.
99. Id. at 862.
102. Id. at 351.
103. Jill N. Peltzer, Elaine W. Domian & Cynthia S. Teel, Infected Lives: Lived Experiences of Young African American HIV Positive Women, 38(2) WESTERN J. OF NURSING RESEARCH 216, 221 (2014). Participants in one study reported feeling that friends and family members could not fully understand the experience of living with HIV, and thus felt alone. Id. at 226.
105. Id. at 780.
107. Id. at 1161.
disclosure.\(^{108}\)

For many women, HIV has the power to change women’s relationships with their children and their experiences as parents.\(^{109}\) Mothers may transmit HIV to child in utero, via childbirth, or through breastfeeding, creating unique concerns for WLHIV.\(^{110}\) Even though mother-to-child transmission is preventable and WLHIV may still safely have children, the fear and misinformation surrounding transmission can affect the mother-child relationship.\(^{111}\) Public health studies show that living with HIV burdens mothers with additional stress and maternal anxiety as they manage their own illness, parent their children,\(^{112}\) contemplate disclosing their status to their children,\(^{113}\) and even plan for their children’s future in the case that they die from HIV.\(^{114}\)

In addition to impacting women’s health and interpersonal relationships, HIV has a significant impact on women’s socioeconomic status.\(^{115}\) First, maintaining employment can be challenging for PLHIV due to HIV’s impact on physical and mental functioning, as well as HIV-related stigma and workplace discrimination.\(^{116}\) Second, many PLHIV experience housing insecurity and homelessness, which in turn exacerbates their involvement in high-risk behaviors like drug use and creates challenges to maintaining a strict ART regimen.\(^{117}\) When negative socioeconomic impacts of HIV intersect with gender discrimination, the harm WLHIV experience amplifies.\(^{118}\) WLHIV experience unique socioeconomic

\(^{108}\) Id. at 1161, 1170.


\(^{111}\) You can have a healthy pregnancy if you are HIV positive, CATIE (Dec. 8, 2018), https://perma.cc/SYV2-RLMS.

\(^{112}\) Id.

\(^{113}\) Murphy, supra note 109, at 448.


\(^{115}\) HIV/AIDS and Socioeconomic Status, AM. PSYCHOL. ASS’N (Dec. 8, 2018), https://perma.cc/4SEU-R6FK.

\(^{116}\) Id; Ying Liu, Kelli Canada, Kan Shi & Patrick Corrigan, HIV-related stigma acting as predictors of unemployment of people living with HIV/AIDS, 24 AIDS CARE 129 (2012). Despite being prohibited by federal law, employment discrimination against PLWHIV is still prevalent. Annamarya Scaccia, Stigma Drives Workplace Discrimination Against Workers Living With HIV (May 7, 2014), https://perma.cc/FgY2-5AWF. In addition, WLHIV may need to rely on disability benefits to be able to afford HIV treatment, which in turn prevents them from working or earning above a certain amount of income. David Martin, et al., Working with HIV, AM. PSYCHOL. ASS’N (Jul. 2011), https://perma.cc/65LW-L8WK.


\(^{118}\) Elise D. Riley, Monica Gandhi, C. Hare, Jennifer Cohen & Stephen Hwang, Poverty, Unstable Housing, and HIV Infection Among Women Living in the United States, 4 CURRENT HIV/AIDS
barriers that stem from the intersection of race, class, and gender. For example, WLHIV lacking economic resources may be more likely to turn to sex work, placing them at risk for criminalization, further stigmatization, and violence.\(^{119}\)

Homeless WLHIV also face physical and sexual violence on the street,\(^{120}\) and homeless mothers with HIV face additional unique challenges and health risks, such as subordinating their health needs for the needs of their children.\(^{121}\)

Understanding the unique challenges faced by Louisiana women as a result of their HIV status contextualizes how harmful HIV criminalization can be. While WLHIV can and do lead happy, healthy, and fulfilling lives, they also face unique challenges when their HIV status intersects with other factors like race, class, and gender expression. For WLHIV in Louisiana, these issues are even more complex due to heightened stigma toward HIV in the South.\(^{122}\) Simply living with HIV, especially in the Deep South, is hard enough without the added burden of HIV criminalization.

## II. HIV Criminalization’s Historical Context: A Feminist Perspective

The following section will provide historical background of HIV criminalization through the lens of gender in both the U.S. and Louisiana, elucidating the outdated science, hysteria, racism, homophobia, and sexism underling Louisiana’s HIV criminalization statute. This background will inform the article’s discussion of the discriminatory enforcement of HIV criminalization and its impact on marginalized groups.

### A. National Origins of HIV Criminalization

In the United States, “women were nearly invisible at the beginning of the HIV/AIDS epidemic.”\(^{123}\) HIV was first reported in the Center for Disease Control’s 1981 Morbidity and Mortality Weekly Report, and health officials initially believed it only affected gay men.\(^{124}\) However, the CDC discovered cases of HIV infection among women by 1982,\(^{125}\) and by 1983, it was reported that...
female heterosexual sexual partners were contracting the virus.\textsuperscript{126} Despite the early understanding that HIV affected both men and women, lawmakers, activists, and the medical community largely excluded women from the national conversation surrounding the HIV epidemic, choosing instead to focus on gay white men.\textsuperscript{127} Moreover, what limited resources did exist at the time were organized mainly by, and for, gay white men.\textsuperscript{128}

Misinformation from the CDC and media outlets fueled the nation’s denial surrounding HIV risk.\textsuperscript{129} That denial led to targeted stigmatization. For example, the CDC inaccurately confined HIV transmission risk to already stigmatized groups such as gay men, which led many women and their medical providers to mistakenly believe women were not at risk.\textsuperscript{130} For women who were HIV positive, the initial misrepresentation of HIV caused them to suffer extreme stigma.\textsuperscript{131} During this time, HIV researchers also systematically blocked women, especially minority women, from their work by delaying research, delaying treatment and testing of women, and excluding women from clinical trials.\textsuperscript{132} Excluding women from society’s initial response to HIV had catastrophic results, and by 1988, “in certain geographic areas of the US (for example New York and New Jersey), AIDS had become the leading cause of death for African American women between the

\textsuperscript{126} CDC, Epidemiologic Notes and Reports Immunodeficiency among Female Sexual Partners of Males with Acquired Immune Deficiency Syndrome (AIDS), 21 MMWR 52 (Jan. 7, 1983).

\textsuperscript{127} See Angela Perone, From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization that Departs from Penalizing Marginalized Communities, 24 HASTINGS WOMEN’S L.J. 363, 370–71 (2013). For example, women struggled for years to have cervical cancer added to the list of AIDS defining conditions. Rahel G. Ghebre, Surbhi Grover, Melody J. Xu, Linus T. Chuang & Hannah Simonds, Cervical Cancer Control in HIV-infected Women: Past, Present and Future, 21 GYNECOLOGY&ONCOLOGY REPORTS 101 (2017). Similarly, people of color were repeatedly excluded from HIV studies and conferences. See Gretchen Gavett, Timeline: 30 Years of AIDS in Black America, FRONTLINE (July 10, 2012), https://perma.cc/6HHM-T5FM.


\textsuperscript{129} See Women and the Ryan White HIV/AIDS Program, supra note 125, at 1. As late as 1988, popular women’s magazine, Cosmopolitan, published an article declaring that women could have safe unprotected sex with male partners who were HIV positive. Jeff Cohen and Norman Solomon, Cosmo’s Deadly Advice to Women About AIDS, THE SEATTLE TIMES (Jul. 31, 1993), https://perma.cc/4X52-AZUM.

\textsuperscript{130} Women and the Ryan White HIV/AIDS Program, supra note 125, at 1.

\textsuperscript{131} Id. at 2.

\textsuperscript{132} Ramani Durvasula, A History of HIV/AIDS in Women: Shifting Narrative and a Structural Call to Arms, AM. PSYCHOL. ASS’N (Mar. 2018), https://perma.cc/3MWJ-E43D. For example, “The National Institutes of Health (NIH) rejected women centered grants in HIV and felt that it was unnecessary to understand co-factors of HIV in low income ethnic minority women — assuming that a risk was a risk” Id.
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ages of 15 and 44.”

As HIV continued to spread and was increasingly recognized outside of the gay and intravenous drug-using communities, hysteria surrounding the disease also increased. The public attitude towards HIV quickly shifted from denial to blame, and then to hate. PLHIV and even the doctors treating them were denied housing, medical treatment, and even burial rights. Myths about AIDS left people afraid to touch, share silverware with, or even swim in the same pool as PLHIV. Inaccurate information exacerbated the hysteria. For example, the now repudiated story of “Patient Zero,” a flight attendant maliciously spreading HIV around the country, created lasting fears of “promiscuous sociopath[s] intending to infect numerous unsuspecting victims.”

Even as social hysteria mounted, the conservative Reagan administration failed to respond to the burgeoning epidemic. For example, President Reagan notoriously declined to use the word AIDS in public until 1985, at which point over 12,000 people had already died from the disease. Fueled by the religious right and “Moral Majority,” the Reagan administration’s denial of HIV quickly turned into open hostility towards PLHIV. For example, Reagan’s

133. Rowland, supra note 50, at 472.
136. In 1983, Dr. Sonnabend, an AIDS researcher and physician was threatened with eviction for his AIDS work, this would later become the first AIDS discrimination lawsuit. Durvasula, supra note 132.
139. Jefferson, supra note 135; Phillip Boffey, Reagan Defends Financing for Aids, N.Y. TIMES (Sept. 18, 1985), https://perma.cc/BW9Y-HRGU. One haunting example of the administration’s indifference to the crisis occurred in 1982 when a reporter asked if the President had a statement related to what was then over 600 cases of AIDS. Caitlin Gibson, A disturbing new glimpse at the Reagan administration’s indifference to AIDS, WASH. POST (Dec. 1, 2015), https://perma.cc/Z3HU-XB6E. Chilling audio from the documentary “When AIDS Was Funny,” showed that Press Secretary Larry Speakes appeared dumbfounded by the question, and then began cracking homophobic jokes about “gay plague” as the pressroom erupted in laughter. Footage shows that these jokes in the pressroom persisted for years despite HIV’s rising death toll. Id.
140. Jefferson, supra note 135, at 2. When President Reagan did finally address HIV, his attitude was moralizing. Gerald Boyd, Reagan Urges Abstinence for Young to Avoid AIDS, N.Y. TIMES (Apr. 2, 1987), https://perma.cc/5CT7-PR5R (When urging the public to prevent HIV transmission through abstinence, President Reagan stated, “After all, when it comes to preventing AIDS, don’t medicine and morality teach the same lessons?”).
Communications Director Pat Buchanan notoriously argued that AIDS is “nature’s revenge on gay men.”

This animus towards PLHIV stunted the administration’s response by preventing research and led to lasting devastating consequences for PLHIV.

The controversy surrounding Ryan White finally forced leaders to confront AIDS as a national epidemic. White was a white, middle-class, thirteen-year-old boy who had contracted HIV through contaminated blood products. White received national attention in 1985 when his middle school barred him from attending because of his HIV status. The discrimination against White inspired a national outcry, and his story illustrated that HIV and the harmful effects of stigma surrounding the virus could affect anyone – including the white and the affluent.

President Reagan formed the Presidential Commission on the Human Immunodeficiency Virus Epidemic in 1987. The thirteen-member Commission produced a report promulgating a national strategy to address HIV. One of the strategies the report recommended was the “Criminalization of HIV Transmission.” The report reasoned that “extending criminal liability to those who knowingly engage in behavior which is likely to transmit HIV is consistent with the criminal law’s concern with punishing those whose behavior results in harmful acts.” The report justified the criminalization of HIV by arguing that (1) PLHIV should be “held accountable for their actions,” (2) criminal penalties would “deter HIV-infected individuals from engaging in high-risk behavior,” and

142. See id. For example, Dr. C. Everett Koop, Reagan’s Surgeon General, reported that any discussion of HIV was restricted by the administration due to the disease’s association with gay men and drug users. Id.
143. See David Jefferson, supra note 135. PLHIV were often thought of as “guilty” or “innocent.”
144. Watkins, supra note 135, at preface xxv. “Persons who contracted HIV perinatally or through blood transfusions were thought to be blameless and deserving of sympathy. But those who contracted HIV through sex or sharing drug-injection equipment were reviled and censured for their illness.” Id. Having contracted HIV through a blood transfusion, Ryan White was able to become a posterchild for the “innocent” victims of AIDS epidemic. See id.
149. Watkins, supra note 148, at 130.
150. Id.
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(3) existing criminal law was inadequate to address HIV.\(^{151}\) Although the report recommended states pass HIV-specific legislation, it cautioned that states should only sanction “behavior which is scientifically established as mode of transmission” and that criminalization should not be used a substitute for public health measures or employed at the expense of public health or civil actions.\(^{152}\)

The report further suggested that states enact criminal statutes that “(1) clearly identified illegal behavior (2) punished only for the failure to comply with the affirmative duties to disclose status, obtain consent, and use precautions” (3) strongly protect confidentiality (4) and consult with public health officials before initiating any criminal case.\(^{153}\)

Two years after the commission released the report, Congress passed the Ryan White Care Act.\(^{154}\) The Act was the largest federal funded program addressing HIV/AIDS to date and mandated that states certify the adequacy of their criminal laws to address HIV exposure.\(^{155}\) By the time this provision of the Act was eliminated in 2000, every state had already codified criminal laws prosecuting HIV exposure.\(^{156}\)

B. History of HIV Criminalization in Louisiana

Louisiana was one of the first states in the country to pass HIV-specific criminal legislation and thus lacked the advantage of the report’s guidance.\(^{157}\) In 1987, Representative Kernan “Skip” Hand of Jefferson Parish first introduced House Bill No. 1728, which created the crime of intentional exposure to the “AIDS virus.”\(^{158}\) Representative Hand asserted during debate in the state senate that the purpose of the bill was to “deter those who are infected with the AIDS virus from remaining sexually active in the community.”\(^{159}\) Despite warnings that the bill might disincentivize HIV testing, the legislature passed the bill in 1987.\(^{160}\) In its original form, the statute only criminalized exposure via sexual contact,\(^{161}\) but in 1993, the state amended it to expand the elements of the crime to include other

151.  Id.
152.  Id.
153.  Id. at 130–32; Hayley H. Fritchie, Burning the Family Silver: A Plea to Reform Louisiana’s Antiquated HIV-Exposure Law, 90 Tul. L. Rev. 209, 218 (2015). Ryan White Care Act continues to provide care to approximately 53% of all PLHIV in the US through providing medical care and support services to PLHIV who are uninsured or underinsured. About the Ryan White HIV/AIDS Program, HRSA, (Oct. 2016), https://perma.cc/W85G-QZKC.
155.  Id.; Fritchie, supra note 153, at 218.
156.  Perone, supra note 127, at 372.
159.  Fritchie, supra note 153, at 219.
160.  Id.
means of exposure, including “spitting, biting, stabbing with an AIDS contaminated object, or throwing of blood or other bodily substances.” The amendment also added additional penalties to the intentional exposure of HIV to a police officer.

The law remained in effect until the 2018 legislative session. In 2018, the Louisiana Legislature made some positive advancements in the law, including amending previous medically inaccurate language within the bill conflating HIV and AIDS and removing some language which criminalized behavior that posed a negligible risk of HIV transmission. The 2018 amendment also created several affirmative defenses. The next section will explain the structure and content of the law’s latest iteration.

III. THE CURRENT LAW - LOUISIANA REVISED STATUTE § 14:43.5: INTENTIONAL EXPOSURE TO HIV

Louisiana’s HIV criminalization statute, “Intentional Exposure to HIV,” is part of the Louisiana Criminal Code under subpart C, “Rape and Sexual Battery.” The statute states that it is unlawful for a PLHIV who is aware of their status to “intentionally expose” another person to HIV through sexual contact, without the other person’s “knowing and lawful consent.” Second, it is unlawful

163. Id.
165. Until 2018, the statute was named “Intentional Exposure to the AIDS Virus.” As explained earlier, this language is medically inaccurate as AIDS is not a virus, but a stage with HIV infection. In 2018 the word AIDS was eliminated from the statute altogether, and replaced with “Human Immunodeficiency Virus” or “Human Immunodeficiency.” 2018 La. Sess. Law Serv. Act 427 (H.B. 275) (West). However, media coverage of intentional exposure arrests subsequent to the amendment, continues to use the “intentional exposure to AIDS” language. Baker Parish Bookings, The Advocate (June 5, 2019), theadvocate.com/baton_rouge/news/communities/baker/article_789835ee-85b4-11e9-8250-5fae4cd46c9e.html.
166. 2018 La. Sess. Law Serv. Act 427 (H.B. 275) (West). The amendment removed language in the statute which criminalized “spitting, biting, . . . or throwing of blood or other bodily substances.” Id. Again, these actions pose a negligible threat of HIV infection. See Creswell supra note 16; HIV Risk Behaviors, CDC (Nov. 13, 2019), https://perma.cc/7TBA-24BJ.
169. LA. STAT. ANN. § 14:43.5 (2018). However, despite this language, case law illustrates that neither intent to expose another to HIV nor actual transmission of the virus is required under the law. See HIV Criminalization in the United States, A Sourcebook on State and Federal HIV Criminal Law and Practice: Louisiana, CTR. FOR HIV LAW & POLICY, 1 (2017) (hereafter, HIV Sourcebook). Moreover, the statute fails to define what constitutes sexual contact. Id. For example in State v. Gamberella, the state attempted to clarify the statute’s meaning by defining sexual contact as “numerous forms of behaviors involving use of the sexual organs of one or more of the participants involving other forms of physical contact for the purpose of satisfying or gratifying the sexual desire of one of the participants.” 633 So. 2d 595, 603 (La. Ct. App. 1993). However, this does little to clarify the meaning of the statute. See HIV Sourcebook at
for a PLHIV who is aware of their status to “intentionally expose” another person to HIV by “any means or contact” without the other person’s knowing and lawful consent. However, the statute fails to elaborate on what these other “means or contact” could be. Until the law was amended in 2018, “any means or contact” was defined as “spitting, biting, stabbing with an AIDS contaminated object, or throwing blood or other bodily substances.” While the 2018 amendment eliminated this language from the statute, the ambiguity of the statutory language leaves space for continuing criminalization of these acts, despite science showing their lack of transmission power. Moreover, this language “suggests that oral sex or other sexual activities posing no or very low risk of HIV transmission are encompassed within the scope of the law.” Third, the law further specifies that it unlawful to intentionally expose a “first responder” to HIV through any means of contact without the first responder’s knowing and lawful consent. Notably, actual transmission of HIV is not required by the statute.

Finally, the 2018 amendment enumerated the following affirmative defenses:

1. It is an affirmative defense, if proven by a preponderance of the evidence, that the person exposed to HIV knew the infected person was infected with HIV, knew the action could result in infection with HIV, and gave consent to the

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1. For example, under this definition sexual acts that do not involve the exchange of bodily fluids or penetration could be prosecuted. Id. at 2.

170. L.A. STAT. ANN. § 14:43.5(B) (2018). The statute fails to distinguish between different levels of culpability. Fritchie, supra note 153, at 224. PLHIV who maliciously, unintentionally, or negligently expose another to HIV are all treated the same under the statute. Id.


172. 2018 La. Sess. Law Serv. Act 427 (H.B. 275) (WEST). This previous language was highly problematic for several reasons. First, it criminalized behavior which poses no risk of infection. For example, in State v. Roberts, the Fourth Circuit Court of Appeals of Louisiana convicted a PLHIV under the statute when they bit a woman while raping her. 844 So. 2d 263, 265 (La. App. 4 Cir. 3/26/03). Secondly, this language is also dangerously vague, as “bodily substances” is not defined. Thus, throwing saliva, urine, sweat or other substances, which pose no risk of infection, could result in criminal prosecution. HIV Sourcebook, supra note 169, at 4. Numerous PLHIV have been arrested for spitting under the statute. Id. Legislators reliance on vague terms like “bodily substances” is not new. In fact, the government’s use of terms like “body fluids” when describing HIV dates back to the 1980s. See Emma Mustich, A History of AIDS Hysteria, SALON (Jun. 5, 2011), https://perma.cc/7LPP-NQAB. The government’s choice to use vague terminology contributed to misinformation about the disease and discrimination against PLHIV. Id.

173. HIV Sourcebook, supra note 169, at 1.

174. L.A. STAT. ANN. § 14:43.5(C) (2018). The statute defines “first responder” as law enforcement officers, probation officers, emergency medical service providers, firefighters, etc. Id.

175. HIV Sourcebook, supra note 169, at 4.

176. 2018 La. Sess. Law Serv. Act 427 (H.B. 275) (West). However, the majority of intentional exposure cases are non-prosecutable. See Emily Lane, US: Louisiana “AIDS Exposure” Law is Outdated and Perpetuates Stigma, HIV JUSTICE NETWORK (May 17, 2017), https://perma.cc/T6KW-YR4L. Consequently, the amended affirmative defenses will not benefit the majority of PLHIV arrested under the statute.
action with that knowledge.

2. It is also an affirmative defense that the transfer\textsuperscript{177} of bodily fluid, tissue, or organs occurred after advice from a licensed physician that the accused was noninfectious, and the accused disclosed his HIV-positive status to the victim.

3. It is also an affirmative defense that the HIV-positive person disclosed his HIV-positive status to the victim, and took practical means to prevent transmission as advised by a physician or other healthcare provider or is a healthcare provider who was following professionally accepted infection control procedures.\textsuperscript{178}

All of these defenses are contingent upon the PLHIV disclosing their status.\textsuperscript{179} However, whether disclosure occurs comes down the PLHIV’s word against their “victims.” For example, in State v. Gamberella, conflicting testimony regarding a PLHIV’s disclosure resulted in the PLHIV being convicted under the statute and given a ten-year prison sentence.\textsuperscript{180} Also significant is the fact that having an undetectable viral load or using protection such as condoms or PrEP are not considered affirmative defenses in and of themselves, but still predicated on disclosure.

A. Penalties

The harsh legal consequences associated with HIV exposure illustrate lawmakers’ contempt for PLHIV. Under La. Stat. Ann. § 14:43.5, intentionally exposing another person to HIV without that person’s consent is punishable by a fine of up to $5,000 and ten years in prison—with or without hard labor.\textsuperscript{181} “Intentionally expos[ing]” a first responder can yield up to eleven years in prison and a fine of up to $6,000.\textsuperscript{182}

Those convicted under this statute must also register as sex offenders, a status that imposes obstacles and penalties beyond fines and jail time.\textsuperscript{183}

\textsuperscript{177} “Transfer” is not defined and does not appear anywhere else in the statute. La. Stat. Ann. § 14:43.5 (2018). Presumably, the term “is intended to encompass activities such as blood or organ donation, but can also be interpreted more generally to include various forms of exposure to bodily fluids.” HIV Sourcebook, supra note 169, at 2.

\textsuperscript{178} See HIV Sourcebook, supra note 169, at 1.

\textsuperscript{179} See also Teresa Wiltz, HIV Crime Laws: Historical Relics or Public Safety Measures?, Pw (Sep. 6, 2017), https://perma.cc/V5X7-3RG6.

\textsuperscript{180} Gamberella, 633 So. 2d at 598-99. There, the PLHIV testified that they had worn condoms during sex and disclosed their status, while their sexual partner claimed they had not. Their firsthand accounts were the only evidence available regarding the alleged disclosure. Id.; see also Teresa Wiltz, HIV Crime Laws: Historical Relics or Public Safety Measures?, Pw (Sep. 6, 2017), https://perma.cc/V5X7-3RG6.


\textsuperscript{182} Id.

\textsuperscript{183} La. Rev. Stat. Ann. §§ 15:541–15:553 (2018). This requires the PLHIV to register as a sex offender in the parishes and municipalities in which they reside and are employed. If they are
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Registering as a sex offender would require PLHIV to provide extensive personal information to law enforcement. Registration also entails additional fines and must be completed within strict deadlines. If the offender does not fulfill these strict requirements, they may face further prosecution. Registered sex offenders must also notify their neighbors and landlords, nearby schools and businesses, and provide multiple forms of notification to local law enforcement. Importantly, notification requires sex offenders to disclose the crime for which they were convicted, forcing PLHIV convicted under § 14:43.5 to publicly disclose their HIV status. Registered sex offenders are not eligible for reduced sentences for good behavior, nor are they eligible for probation, parole, or suspension of their sentences. Sex offenders are also prohibited from certain types of employment.

B. Alternate Forms of HIV Criminalization: Enhanced Sentences, Attempted Murder

In addition to the “Intentional Exposure to HIV” statute, Louisiana law criminalizes HIV status in several other ways. First, HIV status has been used to enhance the sentencing of other crimes. For example, in State v. Richmond, the Louisiana Court of Appeal upheld a trial judge’s decision to increase a woman’s sentence for the charge of prostitution because of her HIV status. The trial judge reasoned that the sentence was warranted because the woman’s HIV status “could mean a death sentence to someone else.”

Despite the existence of statutes criminalizing HIV exposure, Louisiana has
occasionally prosecuted PLHIV with attempted murder, a far more serious crime. For example, in *State v. Caine*, the Louisiana Court of Appeal affirmed an attempted second-degree murder conviction of a PLHIV who stabbed a store clerk with a syringe and shouted, “I’ll give you AIDS.” The court reasoned that because police observed the PLHIV’s “track marks,” which are indicative of intravenous drug use, the syringe was likely infected with HIV. The court further reasoned that because “AIDS is a fatal disease,” when the PLHIV told the victim he would give her AIDS, “it could only mean that he had specific intent to kill her.” The PLHIV was sentenced to fifty years of hard labor.

**IV. LOUISIANA HIV CRIMINALIZATION’S MOTIVES AND FUNCTION**

Traditionally, criminal law is justified via utilitarian or retributivist penological rationales. At its inception, HIV criminalization was justified using both theories. This section will deconstruct both rationales, while analyzing how the law is currently enforced. Ultimately, it becomes clear that the statute does not advance any retributivist or utilitarian goal and this lack of penological rationale exposes the discriminatory animus behind the law’s continued enforcement.

**A. Deconstructing Retributivist Rationales**

Retribution is an ancient penological principle that asserts punishment is justified because it is deserved. HIV criminalization was and continues to be justified using this retributivist rationale. For example, the 1988 Presidential Commission Report reasoned:

Just as other individuals in society are held responsible for their actions outside the criminal law’s established parameters of acceptable behavior, HIV infected

194. 652 So. 2d 611, 615, 617 (La. App. 1 Cir. 3/3/95).

195. Id. at 616.

196. Id. at 617.

197. Id. at 612.


199. *Commission Report, supra* note 148, at 131. Interestingly, the authors of the Commission Report acknowledged that HIV criminalization’s penological rationale was debatable and would receive pushback from HIV activists. *Id.* (The Report acknowledges concerns over the utilitarian function of the law by stating that there may be “concern that criminal sanctions will undermine public health goals,” and that some may view “criminal sanctions [as] primarily punitive rather than preventive,” and that such sanctions would be seen as “intrusive policing of private sexual activity and danger of selective prosecution and misuse of criminal law to harass unpopular groups.”).

200. *Cyndi Banks, Criminal Justice Ethics Theory and Practice*, 109 (6th Ed. 2017). For example, retribution was explained in the Bible as “an eye for an eye.” *Id.*
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individuals who knowingly conduct themselves in ways that pose a significant risk of transmission to others must be held accountable for their actions.  

This subsection will discuss why HIV criminalization cannot be legitimately justified under retributivist penological principles.

1. HIV is Not a Crime

Implicit in retributivist theory is that a certain behavior is morally blameworthy, and that perpetrators of that behavior need to be held accountable for their actions.  

Pro-HIV criminalization arguments are rooted, whether implicitly or explicitly, in the idea that HIV is a criminally significant harm. However, living with HIV is not a crime. As one legal scholar explains, “we need not, and should not, treat HIV – an environmental phenomenon that inhabits some people and not others – as something that is abnormal in any morally significant sense.” However, HIV criminalization hinges on the dehumanization of PLHIV, “the construction of non-disclosers as a distinct category of individuals (a people category), and the typification of individuals who fall within this category as villains.” As author Erica R. Speakman explains, typifying PLHIV in this way is rooted in several strategies of vilification - all of which are artificially constructed by society and reflected in non-disclosure laws. First, vilification hinges on HIV being considered a great harm. For example, HIV is consistently framed as “a death sentence,” thereby constructing the bodies of PLHIV as murder weapons. This construction is reflected by the extreme penalties non-disclosure

203. Pro HIV criminalization arguments are both implicitly and explicitly rooted in the idea that HIV is a criminally significant harm. Matthew Weait, CRIMINALIZING CONTAGION, HIV AND THE MEANING OF HARM 20 (Catherine Stanton & Hannah Quirk eds., 2016).
204. Id. at 21. Weait argues that, “if the human body is conceived of . . . as simply the environment in which HIV is able to exist, as the biosphere is for the bodies which the virus inhabits, then what, precisely, is it that justifies the allocation to it of a normative quality, to wit ‘harmfulness’?” Id. at 27.
205. Erica R. Speakman, Constructing an “HIV-Killer”: HIV Non-Disclosure and the Techniques of Vilification, 38 DEVIANT BEHAVIOR 392, 396 (2017). This construction is especially relevant to women, especially women of color, trans women, and sex workers, as vilification regularly exploits stereotyping based on race, gender, sexuality, and class. Id. at 398. Moreover, the vilification of HIV non-disclosers, requires the assumption that non-disclosers have nefarious motives or are callously indifferent to the individuals they allegedly expose. Id.
206. See id. at 396-99.
207. See id. at 396. This framing magnifies the harm caused by exposure to HIV, while minimizing the actual experiences of those living with and managing their HIV. Id.
208. Id. Media outlets like the National Post have run headlines with phrases such as “When AIDS Becomes a Murder Weapon.” Id.; See also, Kim Shayo Buchanan, When Is HIV a Crime? Sexuality, Gender and Consent, 99 MINN. L. REV. 1231, 1244 (2015); Richmond, 708 So. 2d
laws impose. But, advances in treatment mean that HIV is now a chronic yet manageable illness.\footnote{Speakman, supra note 205, at 396; Buchanan, supra note 208, at 1244.}

Vilification is also rooted in framing the failure to disclose as a decision made knowingly and with callous indifference to the individuals allegedly exposed.\footnote{See Speakman, supra note 205, at 398-99.} Again, this assumption is codified in non-disclosure laws, which fail to distinguish between levels of criminal culpability, and thereby assume that all non-disclosure is malicious. Moreover, this construction, and the non-disclosure laws predicated upon it, ignore the nuances and power dynamics involved in sex.\footnote{Aziza Ahmed & Beri Hull, Sex and HIV Disclosure, AM. BAR ASS’N - HUMAN RIGHTS MAG. (April 1, 2011), https://perma.cc/9JQN-9CH3.} To some WLHIV, disclosure of their diagnosis could result in violence. For example, 4\% of WLHIV reported experiencing violence following an HIV status disclosure.\footnote{Intersection of Intimate Partner Violence and HIV in Women, CTRS. FOR DISEASE CONTROL & PREVENTION 3 (2014), https://perma.cc/6GXB-7833; see also Rashida Richardson & Catherine Hanssens, Ignorance, Domestic Violence, and HIV Disclosure: A Fatal Combination, THE CTR. FOR HIV LAW & POL. (Sep. 14, 2012), https://perma.cc/N38L-YPG8 (describing a woman who was murdered after disclosing her HIV status).} For WLHIV in abusive relationships, this threat is even greater.\footnote{Intersection of Intimate Partner Violence and HIV in Women, supra note 212.}

Put differently, for many women, the motivation behind not disclosing their HIV status is fear, not disregard for their sexual partner’s health. By forcing women to disclose their HIV status, even in the face of violence, non-disclosure laws at best ignore this risk and at worst sanction violence against WLHIV by forcing them into dangerous situations. Furthermore, not only is this typification of WLHIV artificial, it is also impermanent.\footnote{Alana Klein, Feminism and the Criminalisation of HIV Non-disclosure, CRIMINALIZING CONTAGION 175, 176 (Catherine Stanton & Hannah Quirk eds., Cambridge University Press 2016).} The definition of certain behavior as either a medical or criminal problem alternates—“what is attacked as criminal today may be seen as sick next year and fought over as a possibly legitimate by the next generation.”\footnote{Trevor Hoppe, From Sickness to Badness: The Criminalization of HIV in Michigan, 101 SOC. SCI. & MED. 139, 146 (2014) (defining HIV as a criminal, rather than medical, problem requires the artificial assignment of blame and victimhood.)}

2. Proportionality Problems

HIV criminalization further fails to satisfy retributivist rationale because the law’s penalties are not proportional to the crime. Proportionality, “the notion that the punishment should fit the crime—"is inherently a concept tied to the penological
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goal of retribution." Here, the penalties of Louisiana’s HIV criminalization statute are vastly disproportionate to any alleged harm caused by non-disclosure.

Critically, Louisiana’s HIV criminalization statute does not penalize transmission of HIV but rather exposure to the virus. One does not need to actually infect another individual with HIV to be convicted under the statute. In fact, a PLHIV does not even have to have sex with another person in order to be charged under the statute. Moreover, even if transmission did result from exposure to the virus, advancements in HIV care mean that HIV is now a chronic illness, not the death sentence it once was, further demonstrating the law’s disproportionately punitive penalties. Despite advancements in medical care and the lack of harm from exposure without transmission, HIV non-disclosure and subsequent exposure legally continues to be equated to a great harm worthy of extreme criminal penalties.

This disproportionality is even more striking when compared to other criminal penalties in Louisiana. For example, crime that results in the death of another person are subject to dramatically lower penalties than a violation of § 14:43.5. The penalty for “Intentional Exposure to HIV” can be up to eleven years in prison, yet the penalty for negligent homicide is only up to five years in prison. Proportionality problems also arise out of the law’s failure to distinguish between varying levels of culpability. The law treats people who have committed malicious, unintentional, or low-risk exposure equally. The failure to address varying levels of hypothetical criminal culpability elucidates lawmakers desire to simply punish PLHIV for their HIV status alone and not for any perceived crime.

218. This is not to suggest that if the law required transmission that the law would be acceptable or less harmful. Further, the law cannot be analogized to other criminal threats, as § 14:43.5 does not require any malicious intent.
221. Robert McClendon, ‘Saved from her life on the streets, only to be branded ‘sex offender’, THE TIMES-PICAYUNE (Jan. 28, 2016), https://perma.cc/XK4K-JXV5 (WLHIV was convicted of intentional exposure when she had only sexually propositioned the “victim.”).
222. See Speakman, supra note 205, at 396–97. See also State v. Turner, 103 So. 3d 1258, 1261 (La. Ct. App. 3 Cir. 12/5/12) (noting the trial judge’s reasoning that an HIV-positive sex worker had “probably sentenced two other people to the death sentence”).
223. See Speakman, supra note 205, at 396.
225. LA. STAT. ANN. § 14:32. Louisiana law also dictates a sentence of not more than five years for assault by drive by shooting, and not more than five years for simple kidnapping. §§ 14:37.1, 14:45.
226. See Fritchie, supra note 153, at 224-25.
227. Id.
In conclusion, HIV criminalization fails to serve a legitimate retributivist rationale. Living with HIV, including failing to disclose one’s HIV status, is not a morally blameworthy act deserving of punishment. The construction of non-disclosure as morally blameworthy is predicated on the vilification of people living with HIV and ignores the realities of sexual politics. The extreme proportionality issues that arise between HIV non-disclosure statutes and other crime like homicide further undermine the statute’s retributivist legitimacy.

B. Deconstructing Utilitarian Rationales

Utilitarian theories of criminal punishment focus on “how punishment will affect future actions and (increase) society’s future aggregate happiness.” The goal of utilitarian theories of criminal punishment are deterrence and the prevention of future crime. Theories of prevention, deterrence, rehabilitation, and incapacitation fold into utilitarian theories of punishment.

The 1988 Presidential Commission Report initially couched HIV criminalization under utilitarian punishment principles. The Report reasoned that “establishing criminal penalties for failure to comply with clearly set standards of conduct can also deter [emphasis added] HIV-infected individuals from engaging in high-risk behaviors, thus protecting society against the spread of the disease.” This section deconstructs the many reasons why HIV criminalization fails to serve any utilitarian function, including prevention, deterrence, rehabilitation, and incapacitation.

1. Prevention and Deterrence Rationale

Proponents of HIV criminalization argue that criminal prosecution prevents the spread of HIV. However, non-disclosure laws like Louisiana’s do not prevent HIV transmission and can actually exacerbate the spread of HIV. In many cases, people may not know that HIV-related criminal laws exist; and therefore, they do not alter their behavior. Even when people know about HIV

229. See Banks, supra note 200, at 211.
232. Id.
233. Id.; see also Donald H. J. Hermann, Criminalizing Conduct Related to HIV Transmission, 9 ST. LOUIS U. PUB. L. REV. 351, 352–53 (1990) ( “[T]here is a social objective to prevent conduct likely to spread HIV in order to prevent further transmission of HIV to uninfectected persons; and there is a social goal to educate the public about conduct likely to spread HIV and to reinforce social norms against behavior likely to result in HIV transmission.”).
234. See Weait, supra note 203, at 18.
criminalization laws, studies have found that the law does not impact individual behavior.\textsuperscript{236} Punishing PLHIV for failing to disclose their HIV status does not deter non-disclosure, nor does it deter PLHIV from engaging in “sexual contact.”\textsuperscript{237}

The criminalization of HIV exacerbates HIV transmission in three ways, because as the law is written, PLHIV have only committed a crime if they are aware of their HIV status.\textsuperscript{238} This may disincentivize people from testing for HIV.\textsuperscript{239} A person who does not know their status, and therefore does not receive treatment, is likely to take fewer precautions, be more contagious, and exacerbate transmission rates.\textsuperscript{240} As the Dean of the Rutgers University School of Public Health explains, the law rewards the contagious person while “the positive person who knows their status, who is doing the right thing, who is probably in care and in treatment can get prosecuted. It makes no sense.”\textsuperscript{241}

Even when PLHIV have chosen and have the ability to get tested and become aware of their status, studies show that HIV criminalization does not influence these individuals’ behaviors or rates of disclosure.\textsuperscript{242} Other research posits that the law may actually increase HIV risk behavior and decrease rates of disclosure\textsuperscript{243} because HIV criminalization increases stigma surrounding HIV, which in turn discourages PLHIV from disclosing their status for fear of discrimination or

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\textsuperscript{237} See supra note 235.

\textsuperscript{238} Id.


\textsuperscript{240} See supra note 235; see also Edwin Bernard, HIV Criminalization Discourages HIV Testing, Creates Disabling and Uncertain Legal Environment For People With HIV In U.S., HIV JUSTICE NETWORK (Jul. 2012), https://perma.cc/7WB3-4N7D; Maya Kesler, et al., Prosecution of non-disclosure of HIV status: Potential Impact on HIV testing an transmission among HIV-Negative Men Who Have Sex With Men, 13 PLOS ONE 1 (2018) (finding that HIV criminalization can reduce HIV testing by 7% which in turn correlates to an 18.5% increase in community HIV transmission).

\textsuperscript{241} See supra note 235.

\textsuperscript{242} Id.

\textsuperscript{243} See Keith Horvath, Craig Meyer & B.R. Simon Rosser, Men Who Have Sex With Men Who Believe That Their State Has A HIV Criminal Law Report Higher Condomless Anal Sex Than Those Who Are Unsure Of The Law In Their State, 21 AIDS BEHAV. 51 (2017). This is because the law confuses people into thinking such laws “are effective in discouraging HIV-infected persons from engaging in condomless anal sex. As a result, these men may engage in higher risk behavior because they perceive that they are at low risk for HIV infection, protected in part by state law.” Id. at 57.
violence. Furthermore, the law fails to recognize the power dynamics embedded in sexual relationships. Because women utilize healthcare systems more frequently than men, “they are likely to learn their HIV status before male partners and as a result, may be prosecuted more often despite potential transmission from their current male partner.”

Finally, non-disclosure laws undermine HIV-related public health initiatives combating HIV. The law places the legal burden of preventing HIV transmission exclusively on PLHIV. Consequently, this “undermines the most basic public health message concerning sexual health: everyone should take responsibility for their own protection.” This framing undermines public health initiatives, including the use of PrEP. PrEP empowers everyone, including HIV negative individuals, to take responsibility for prevention, whereas HIV criminalization shifts the prevention burden to PLHIV.

HIV criminalization laws also “run counter to the current public health paradigm for the prevention and treatment of HIV in the U.S., namely the HIV Care Continuum.” The HIV Care Continuum is a public health model comprised of sequential steps from diagnosis to treatment designed to ensure viral suppression. Fundamental to the Continuum’s success is the idea that people believe HIV testing is in their best interest. HIV criminalization undermines this concept by disincentivizing testing. HIV criminalization also ignores other methods of HIV prevention such as condom usage, having an undetectable viral load, or using PrEP. Central to today’s public health initiatives is the concept that “Undetectable=Untransmittable.” By receiving treatment and achieving an undetectable viral load, PLHIV can no longer transmit the disease, even without condom use. Put differently, treatment functions as a form of prevention. Non-disclosure statutes like Louisiana, fail to account for these biomedical and public health breakthroughs. By disincentivizing testing and further stigmatizing HIV,

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245. Perone, supra note 127, at 391.


247. Fritchie, supra note 153, at 229.


249. Id.


251. What is the HIV Care Continuum, HIV.GOV (Dec. 2016), https://perma.cc/6S35-7SSH.


253. Id. at 2.

254. Id. at 2-4.

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HIV criminalization undermines this model.\textsuperscript{257} Moreover, non-disclosure laws punish virally suppressed PLHIV for behavior that has literally no risk of harm or alleged moral imperative to disclose.\textsuperscript{258}

2. **Rehabilitation Rationale**

Criminalizing HIV also fails to further any rehabilitative function. Ironically, rehabilitationist penological theories “regard crime as the symptom of a social disease and see the aim of rehabilitation as curing that disease through treatment.”\textsuperscript{259} Of course, in the context of HIV criminalization, the disease is not metaphorical. Rehabilitationist theories imply not only that an HIV diagnosis is morally blameworthy and that punishment would help a PLHIV, but that HIV is somehow curable. Public health research disproves this theory and demonstrates that incarcerating PLHIV only makes them sicker.\textsuperscript{260} Incarceration is repeatedly linked to poor health outcomes among PLHIV because it leads to economic, employment, and housing instability, which in turn creates barriers to receiving HIV treatment.\textsuperscript{261} As Dr. Anne Spaulding, an associate professor at Emory University and national expert on HIV in corrections explains, “of all the life events that knock people out of HIV care, going to jail is one of the biggest disruptors.”\textsuperscript{262} The longer a PLHIV goes without treatment, the higher their viral load and the more contagious they become. Thus, rather than rehabilitating PLHIV, HIV criminalization only endangers the health of the individuals convicted under the statute, as well as the communities to which those individuals belong upon release.

3. **Incapacitation Rationale**

Traditional penological theory has justified imprisonment by reasoning that incapacitating criminals “protect[s] the public from the chance of future offending.”\textsuperscript{263} HIV criminalization fails to achieve this incapacitation rationale. HIV criminalization does not affect rates of HIV disclosure,\textsuperscript{264} but rather is deleterious to both PLHIV’s health and the public at large.\textsuperscript{265}

\textsuperscript{257} Halkitis, supra note 239, at 2.
\textsuperscript{258} Id. at 4.
\textsuperscript{259} Banks, supra note 211, at 169.
\textsuperscript{261} Id.; see generally Ginny Shubert, Mass Incarceration, Housing Instability and HIV/AIDS: Research Findings and Policy Recommendations (Feb. 2013).
\textsuperscript{263} Banks, supra note 200, at 171.
\textsuperscript{264} Harsono, supra note 239.
\textsuperscript{265} Halkitis, supra note 239.
Quarantining PLHIV in prisons similarly fails to protect PLHIV or the public. Louisiana prisons frequently fail to provide adequate treatment to PLHIV. While incarcerated, Louisiana prisoners are denied regular HIV testing, and treatment is regularly delayed, interrupted, or denied. Moreover, even if care is available, many prisoners avoid disclosing their HIV status to prison officials for fear of discrimination and harassment by guards and other inmates. Additionally, while imprisoned, PLHIV can continue to transmit HIV through unprotected consensual sexual intercourse or rape, tattooing, and intravenous drug use.

While many experts believe that HIV transmission in prison and jails is rare, “transmission of HIV during incarceration is a concern given the potential ‘perfect storm’ in many correctional systems of relatively high prevalence of HIV infection coupled with policies that ban condom use and clean injecting equipment.”

C. Where the Rubber Meets the Road: Examining Enforcement of HIV Criminalization in Louisiana

If Louisiana’s HIV non-disclosure statute is to exist legitimately, it must be enforced equally. However, an examination of available case law and arrest records reveal a pattern of discriminatory enforcement. Notably, the law’s enforcement is dependent on the status of the alleged “victim,” with the law functioning as a means of quarantining HIV within marginalized or politically unpopular populations. The law’s discriminatory enforcement refutes any legitimate penological justification of the law. Rates of HIV non-disclosure are consistent across PLHIV. Therefore, the demographics of HIV arrests and prosecutions should resemble the demographics of PLHIV in Louisiana. However, this is not the case.

266. Paying the Price, supra note 262.
267. Id. Cost is a huge barrier for parish jails in administering HIV treatment. Medicaid does not cover prisoners, and no state or federal funding exists to defray HIV treatment, which costs $50,000 a year on average.
268. Id. These fears are not unfounded. HIV positive prisoners report extreme HIV related discrimination and stigma such as being placed in solitary confinement or being forced to use segregated toilets by other inmates; Courtenay Sprague, Michael L. Scanlon, Bharathi Radhakrishnan & David W. Pantalone, The HIV Prison Paradox: Agency and HIV-Positive Women’s Experiences in Jail and Prison in Alabama, 27 QUALITATIVE HEALTH RESEARCH 1427, 1434 (2016). Similarly, female inmates in Alabama reported experiencing similar forms of extreme harassment and stigma. One woman surveyed reported that prison officials disclosed her HIV status to her children without her permission; another woman reported that guards failed to break up fights where inmates were HIV positive.
271. Buchanan, supra note 208, at 1306.
272. Id. at 1174.
273. Id. at 1308.
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First, there is a discrepancy between the conduct PLHIV are arrested for under the law and the most common categories of HIV transmission. Police do not arrest PLHIV for conduct that is most likely to transmit HIV. The vast majority of HIV transmissions in Louisiana arise from male-to-male sexual contact. However, only a minority of HIV criminalization arrests involve this type of conduct. Another common category of transmission, intravenous drug use, is also not reflected in arrest rates. Instead, a large proportion of arrests are made for conduct that is extremely unlikely, or impossible, to transmit HIV. For example, PLHIV have repeatedly been arrested/convicted of non-disclosure for biting, spitting, defecating, or fighting. Secondly, a discrepancy exists between the demographics of those arrested or charged under the statute and the statewide demographics of PLHIV. For example, cis and transgender women are underrepresented in HIV non-disclosure arrests/convictions. Only 15% of arrests/convictions involved a female perpetrator, while approximately 30% of PLHIV in Louisiana are women. Intravenous drug users are also underrepresented.

In addition, clear patterns emerge regarding the alleged “victims” of HIV exposure. Populations who are most at risk of contracting HIV, including trans women, men who have sex with men, sex-workers, and intravenous drug users, are underrepresented as “victims.” Meanwhile, other populations are overrepresented as “victims,” including police officers, first responders, women engaged in heterosexual sex, and children. Where the victim is a member of a marginalized group, the law is likely to be underenforced. But, where a victim is engaged in heteronormative social behavior and is a first-responder or a sympathetic figure – arrest and prosecution is over-represented.

Under-enforcement of criminal laws may indicate indifference or disdain towards politically unpopular or vulnerable groups. Under-enforcement sends an unofficial but powerful signal about which crimes matter and which are

274. *Local Data: Louisiana, supra note 27.*
275. Of the 21 examples of arrests/convictions for non-disclosure involving sexual contact, only three involved male-to-male sexual contact. *See appendix.*
276. Only one arrest involved contact from a syringe used for intravenous drug use. *See id.*
277. *See appendix.* As discussed, biting and spitting cannot transmit HIV. *Cresswell, supra note 16,* at 1.
278. *Id.*
279. *See appendix; Local Data: Louisiana, supra note 27.* No trans women were arrested/convicted of non-disclosure, despite representing a significant population of PLHIV. However, it is possible that some trans women are been misgendered by police.
280. *See Local Data: Louisiana, supra note 27.*
281. *Id.; see appendix.* Unfortunately, I was unable to analyze potential racial disparities in policing related to HIV exposure. Most newspaper articles and decisions do not reference race.
282. *Id.*
283. *Id.*
285. *Id.* at 1307.
dismissed and devalued.\textsuperscript{286} Here, patterns of policing indicate that individuals such as those engaged in heteronormative sex or the police matter, while those most at risk of contracting HIV, including women and people of color, do not. Under-enforcement also elucidates official attitudes towards what behavior is considered normal and what behavior is considered intolerable within certain communities.\textsuperscript{287} Here, the selective enforcement of HIV non-disclosure indicates that the exposure of politically favorable groups to HIV is not normal and intolerable, while the spread of the disease within disfavored groups is acceptable.\textsuperscript{288} In other words, patterns of enforcement show that lawmakers only find HIV criminalization laws worth enforcing where HIV threatens to invade heteronormative communities or politically favorable groups.\textsuperscript{289}

These policing patterns shed light on the animus underlying the law’s enactment and continued enforcement and further disprove any of the law’s retributivist or utilitarian legitimacy. Again, retributivist theory is premised on the belief that certain behavior is morally blameworthy and deserving of punishment.\textsuperscript{290} Here, policing patterns show that the perceived blameworthy and punishable crime is not just the act of non-disclosure of HIV, it is the non-disclosure and subsequent exposure of HIV to a politically favorable individual. Again, only where the “victim” is seen as worthy is the behavior treated as criminal. This nuance further delegitimizes Louisiana’s law and reveals the animus motivating its enforcement.

Likewise, governments officials’ purported desire to serve a utilitarian goal of preventing HIV is also disproved. Rather than protecting all Louisianans from HIV, patterns of policing reveal that officials are exclusively interested in preventing HIV from spreading outside of marginalized communities. Again, the desire to quarantine HIV within certain communities demonstrates an intent to sabotage public health initiatives and a choice to allow those communities to remain sick, and thus exposes lawmakers’ animus towards those communities.

\textbf{D. Pulling it All Together: Stigma, Transphobia, Sexism, and Racism Collide}

HIV criminalization is unjustifiable under any penological rationale. The law is discriminatorily enforced and can exacerbate the spread of HIV. In light of the law’s failure to achieve any utilitarian or retributivist goals, this paper posits that the law’s continued existence coupled with the disparate enforcement is

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 1749-50. “Underenforcement can also have a devastating normative impact on those who live in underenforcement zones.”
\item \textit{See id.} Here, marginalized populations constitute the law’s “underenforcement zone.”
\item \textit{See id.}
\end{enumerate}
\end{footnotesize}
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evidence of the state’s discriminatory animus towards the populations most impacted by HIV.

In criminalizing HIV, Louisiana lawmakers have made a conscious decision to define a medical problem as criminal.\textsuperscript{291} Criminal law distinguishes deviant and non-deviant behavior through coercion, control, repression, and punishment.\textsuperscript{292} In the HIV criminalization context, the state artificially assigns blame and victimhood to HIV positive and negative people. This assignment is contingent on the vilification of PLHIV.\textsuperscript{293}

This vilification is rooted in the archetype that the populations most affected by HIV - people of color, LGBT people, poor people, etc. - are dangerous “disease spreaders.”\textsuperscript{294} Initial constructions of PLHIV presented men who have sex with men, people of color, and drug users as “groups who bore responsibility for their infections and were, therefore, undeserving of sympathy.”\textsuperscript{295} This paradigm persists today.\textsuperscript{296}

Analyzed through a feminist lens, the disease spreader archetype is explained as a collision of institutional racism, patriarchy, and class exploitation.\textsuperscript{297} These systems work in concert to construct a “cult of true [white] womanhood,” defined by sexual purity, heteronormativity, wealth, and whiteness.\textsuperscript{298} WLHIV, especially WLHIV with co-occurring marginalized identities, fall outside these boundaries and are therefore seen as dangerous and deviant “vectors of disease.”\textsuperscript{299} Under the disease spreader archetype, WLHIV whose identities are outside the “cult of womanhood” are therefore seen as

\begin{itemize}
\item \textsuperscript{291} Hoppe, supra note 215, at 140. The definition of certain behavior as either a medical or criminal problem alternates—“What is attacked as criminal today may be seen as sick next year and fought over as a possibly legitimate by the next generation.” Id.
\item \textsuperscript{292} Stanton, supra note 225, at 195.
\item \textsuperscript{293} Speakman, supra note 205, at 400, 402; Hoppe, supra note 215, at 146.
\item \textsuperscript{294} Mogul, supra note 3, at 34; see also Rosenblum, supra note 6, at 540 (noting that “[r]eading AIDS as the outward and visible sign of an imagined depravity of will, AIDS commentary deftly returns us to a premodern vision of the body, according to which heresy and sin are held to be scored in the features of their voluntary subjects by punitive and admonitory manifestations of disease.”).
\item \textsuperscript{295} Speakman, supra note 205, at 394.
\item \textsuperscript{296} For example, rates of HIV infection among Black heterosexual women are blamed on narratives that Black women are “sexually aggressive” and “promiscuous” and/or are in relationships with duplicitous and hypersexual Black men “on the down low.” Mogul, supra note 3, at 24-25, 35.
\item \textsuperscript{297} HIV criminalization lies at the intersection of institutional racism, patriarchy, and class exploitation in that it defines who is expendable and deserving of punishment. Cohen, supra note 3, at 448.
\item \textsuperscript{298} Mogul, supra note 3, at 24-25.
\item \textsuperscript{299} Lisa M. Keels, "Substantially Limited:" the Reproductive Rights of Women Living with HIV/AIDS, 39 U. BALT. L. REV. 389, 394 (2010); “Women were viewed as vectors, with their needs ranked secondary to those of their fetuses or their male clients and those clients’ other partners.” Higgins, supra note 52, at 435; Cristina Velez, The Continued Marginalization of People Living with HIV/AIDS in U.S. Immigration Law, 16 CUNY L. REV. 221, 229-30 (2013) (finding that HIV is associated with death, punishment, crime, horror and otherness and that HIV is perceived as punishment for deviant behavior).
\end{itemize}
unworthy, a threat to moral order, and ultimately criminal.\textsuperscript{300} Their behavior and bodies are interpreted as threats to conventional notions of morality and sexual conformity, and are consequently in need of policing.\textsuperscript{301} HIV criminalization responds to this threat through erecting barriers between socially acceptable HIV negative individuals and “deviant” WLHIV.\textsuperscript{302}

In conclusion, in the absence of any legitimate penological justification, Louisiana’s continued criminalization of HIV is an enduring product of the “disease spreader” archetype. The statute originated in a time of misunderstanding, hysteria, and overt homophobia. While inexcusable then, the law’s continued use today is even more disturbing. Lawmakers can no longer feign ignorance about the disease, nor can they purport that the law is justified under any legitimate rationale. In light of the reasons outlined in the previous sections, there is no other explanation for the state’s continued commitment to HIV criminalization other than discriminatory animus against PLHIV. Implicit within that animus is institutionalized contempt towards the populations most affected by HIV and a desire to moralize, police, and pathologize the bodies and behaviors of those populations.

V. IMPLICATIONS OF ILLEGITIMACY: THE IMPACT OF HIV CRIMINALIZATION ON WOMEN IN LOUISIANA

HIV criminalization in Louisiana has profound and unique consequences on the lives and welfare of women, regardless of their HIV status.\textsuperscript{303} First, HIV criminalization exacerbates rates of HIV transmission, which endangers all women.\textsuperscript{304} Secondly, for WLHIV, HIV criminalization poses different threats to different populations of women, such as women experiencing domestic violence, trans women, women of color, and sex workers. Third, for WLHIV convicted or charged under the statute, HIV criminalization has devastating and prolonged consequences. Finally, HIV criminalization works in conjunction with other prohibitions on harm reduction methods to create a paradox that prevents HIV negative women from protecting themselves from HIV transmission while simultaneously criminalizing women when they do contract the virus.

\textsuperscript{300} Mogul, supra note 3, at 25.
\textsuperscript{301} Id. at 51. The state’s attitude that PLHIV are reviled and sexually deviant is also evidenced by the statute’s requirement that those convicted under the statute must register as sex offenders.
\textsuperscript{302} Id. at 35.
\textsuperscript{303} Again, this article has chosen to highlight the unique challenges HIV criminalization has specifically on women’s lives. This is not to suggest that the law does not negatively impact men.
\textsuperscript{304} Moreover, HIV criminalization does not protect HIV negative women from coercion of violence which is frequently responsible for HIV transmission. 10 Reasons Why Criminalization of HIV Exposure or Transmission Harms Women, ATHENA NETWORK, 3, https://perma.cc/Z2HR-49UL.
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A. Impact on Women Living with HIV/AIDS

First, criminalization increases stigma against WLHIV, damaging women’s health and quality of life.\(^{305}\) HIV stigma compromises WLHIV’s engagement with healthcare.\(^{306}\) As discussed, stigma also results in discrimination that can harm women’s socioeconomic welfare, interpersonal relationships, and mental health. Increased stigma also puts women at risk of violence and vigilantism.\(^{307}\)

HIV criminalization also compromises WLHIV’s privacy and sexual autonomy. The same groups most impacted by HIV are also disproportionately policed and incarcerated.\(^{308}\) HIV criminalization, in turn, further polices these women’s lives, putting WLHIV at risk of further harassment, violence, and exacerbated tension with police.\(^{309}\)

HIV criminalization also has a unique impact on WLHIV in relationships, especially relationships where domestic violence is present.\(^{310}\) Nationwide, many HIV criminalization charges occur during “bad break-ups.”\(^{311}\) The law easily allows disgruntled consensual sexual partners to accuse a WLHIV of intentional exposure, even if the WLHIV disclosed her status.\(^{312}\) For WLHIV experiencing domestic violence, HIV criminalization is used by abusers as a weapon to maintain...
power and control, and can impede women’s access to justice. For example, abusers may threaten to falsely report non-disclosure. In addition, the stigma created by HIV criminalization means that WLHIV may experience discrimination by judges or juries in court proceedings because of their HIV status. HIV stigma may also prevent domestic violence survivors from fully testifying about HIV related abuse for fear of publicizing their HIV status.

B. Impact on Women Arrested or Convicted Under the Law

For the women arrested or convicted under the law, the repercussions are life altering. First, arrest can mean harassment or violence by police. Second, arrests are especially burdensome on mothers living with HIV, who are already under increased parenting stress due to their HIV status. The arrest of a parent majorly disrupts families. An arrest is traumatizing for children, and may result in children being placed in foster care, family instability, and economic hardship. An arrest may also cause a WLHIV to lose her job, which can be especially onerous given the lower socioeconomic status occupied by many WLHIV. An arrest may also publicize a WLHIV’s HIV status, which may result in stigma or violence. Time spent in pretrial detention also hurts WLHIV’s health by separating them from their current HIV treatment regimen.

Second, because intentional exposure to HIV is a felony, it carries exorbitant bail that many WLHIV cannot pay. Consequently, WLHIV may spend weeks

313. Stoever, supra note 106, at 1161.
315. Stoever, supra note 106, at 1191.
316. Id. at 1189-90.
317. Murphy et al., supra note 109, at 1449 (finding that parental HIV infection can lead to maternal stress and an impact parenting skills).
318. Yvonne Humenay Roberts et al., Children Exposed to the Arrest of a Family Member: Associations with Mental Health, 23 J. CHILD FAM. STUD. 214 (2014) (finding that children’s exposure to arrest is associated with negative emotional and behavioral outcomes); Steve Christian, Children of Incarcerated Parents, NATIONAL CONFERENCE OF STATE LEGISLATURES (Mar. 2009), https://perma.cc/6XJ5-KMZU.
319. Id.
321. Arrests for intentional exposure are regularly publicized in town police blotters and list the full name of the arrestee as well as the crime they were arrested for. See appendix. For example, in one case a police officer informed a PLHIV’s consensual sexual partner of the person’s HIV status and asked if they wanted to file charges, exposing his status. Samantha Morgan, Man arrested for intentional exposure of the AIDS virus, WAFB (Aug. 8, 2014), https://perma.cc/262A-YMEW.
322. Paying the Price, supra note 262.
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in jail awaiting the resolution of their case. Despite the trauma and disruption that an intentional exposure arrest may cause, the “vast majority of cases involving the crime [are] non-prosecutable.” Even if the prosecution drops the charges, the damage caused by the arrest remains. Furthermore, because of the high bail, the severity of sentencing, and the desire to avoid a trial about their HIV status, WLHIV are likely to plead out. If WLHIV are convicted of intentionally exposing someone to HIV, they may face up to eleven years in prison. While incarcerated, women may not have access to adequate HIV treatment and may also experience deplorable conditions, and separation from their families and children.

Once convicted, WLHIV face the harm of being added to the sex offender registry. Sex offender status has serious economic consequences for WLHIV who may already experience the adverse socioeconomic consequences of HIV stigma and a criminal records. First, registering as a sex offender and completing

324. One man charged under the statute was unable to pay the $6,500 bail and waited in jail for over 100 days before a judge ordered his release. Bethencourt, supra note 323.


327. LA. STAT. ANN. § 14:43.


329. Sprague, supra note 268, at 1427; see generally Paying the Price, supra note 262; Rosenblum, supra note 6, at 541 (describing how a prisoner living with HIV was forced to keep her laundry and silverware separate from those of other inmates and faced bathroom restrictions due to her health status).


331. LA. STAT. ANN. § 14:43.5.
the required notification process is costly. If WLHIV fail to pay, they may be penalized further. Second, WLHIV labeled as sex offenders may be denied housing and employment. Further, being listed on the sex offender registry makes WLHIV more vulnerable to further stigma and ostracism. Finally, sex offender registration mandates that WLHIV will not be eligible for probation, parole, or suspension of sentences. This has a disproportionate impact on many WLHIV who are more likely to be discriminatorily policed due to their gender identity, race, or engagement in sex work or drug use.

C. Aaliyah’s Story

One WLHIV’s story illustrates the immense harm caused by Louisiana’s HIV criminalization. Aaliyah was living with HIV and working as a sex worker when Louisiana state troopers arrested her for prostitution. Because of her HIV status, Aaliyah was also charged with intentional exposure to AIDS under § 14:43.5. The only evidence against her was that she agreed to have sex with an undercover police officer, she was not carrying condoms, and she was HIV positive. Aaliyah never had sex with the man who hired her and was arrested.

332. In addition to paying fees to register as a sex offender, offenders bear the cost of making required community notifications, which can be upwards of $580. State v. Jones, 182 So. 3d 1218, 1223 (La. App. 5 Cir. 12/23/15); see also State v. Cooper, 260 So. 3d 594, 597 (La. App. 1 Cir. 9/24/18) (noting that a sex offender was required to pay a $60 registration fee in addition to $585 for flyers and $110 for newspaper notifications). Worse, Louisiana courts have been unforgiving of sex offenders who fail to meet their registration and notification requirements due to an inability to pay. See State v. Jones, 182 So. 3d at 1222; State v. Mouton, 219 So. 3d 1244, 1259 (La. App. 5 Cir. 4/26/17); State v. Cooper, 260 So. 3d at 599. Sex offender registries are also extremely costly to the state, which must devote resources to tracking sex offenders and maintaining the registry. Alan Greenblatt, States Struggle To Control Sex Offender Costs, NPR (May 28, 2010), https://perma.cc/5YY6-ARPD.


334. See Platt, supra note 333, at 759-60; Serena Solomon, The Sex Offender Registry Leaves Female Sex Offenders Open to Abuse (Oct. 24, 2017), https://perma.cc/7SBT-93DP (describing sexual harassment women who were labeled sex offenders experienced from employers and strangers who sent sexually explicit mail after seeing women’s names and personal information on sex offender registries).

335. L.A. STAT. ANN. § 14:43.5.

336. Robert McClendon, 'Saved’ from her Life on the Streets Only to be Branded a Sex Offender’, NOLA.COM (Oct. 20, 2016), https://perma.cc/A7E5-KMBP. Ironically, the arrest was part of a human trafficking sting; however, police were inexplicably unconvinced that Aaliyah was being trafficked. In fact, the sting operation, which resulted in 23 arrests, only arrested two pimps. See id.

337. See id.

338. See id. Whether Aaliyah was carrying condoms is disputed, with Aaliyah claiming she was
immediately after agreeing to accept money in exchange for sex. She could have intended to disclose her HIV status later in the encounter.\textsuperscript{339} Unable to pay bail, Aaliyah opted to plead guilty in a crowded courtroom, exposing her HIV status to the world.\textsuperscript{340} What she did not understand at the time was that in doing so, the words “sex offender” would be branded on her driver’s license for years to come.\textsuperscript{341} Because of her sex offender status, Aaliyah has suffered countless indignities. On Halloween, police officers called to remind her that she could not trick-or-treat or wear a costume.\textsuperscript{342} She must send postcards to hundreds of her neighbors explaining both her HIV and sex offender statuses.\textsuperscript{343} When Aaliyah applied for work at a clothing store, the store owner told her that she was denied the job because “kids come in here.”\textsuperscript{344} Aaliyah has struggled to find a job and stable housing and to pay the sex offender registration and notification fees.\textsuperscript{345} An advocate at a homeless shelter who has been helping Aaliyah describes her situation as “unconscionable.”\textsuperscript{346} Unfortunately, Aaliyah’s story is just one example of the devastating impact HIV criminalization has on the lives of WLHIV in Louisiana.

D. Harm Reduction Paradox

Louisiana’s prohibition and restriction of strategies for harm reduction and safe sex is another way in which HIV criminalization impacts women’s lives in Louisiana. These policies create a paradox that denies women full access to HIV prevention methods while simultaneously penalizing them in the event that they do contract HIV.

1. Syringe Service Program Provision in Louisiana

HIV may be spread through injection drug use.\textsuperscript{347} Opioid use, which is often associated with injection drug use, is prevalent in Louisiana, thus placing Louisianans at an increased risk of contracting HIV.\textsuperscript{348} In 2016, intravenous drug carrying multiple condoms. See id.

\textsuperscript{339} See id.
\textsuperscript{340} See id.
\textsuperscript{341} See id.
\textsuperscript{342} Id.
\textsuperscript{343} Id; see supra footnotes 186-187 and accompanying text.
\textsuperscript{344} Id.
\textsuperscript{345} See id.
\textsuperscript{346} Id.
\textsuperscript{347} See Injection Drug Use and HIV Risk, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 9, 2018), https://perma.cc/LB94-2HUP.
\textsuperscript{348} Louisiana Opioid Summary, NAT. INSTITUTE ON DRUG ABUSE (Feb. 2018), https://perma.cc/D7DJ-3WWB; Louisiana’s Opioid Response Plan A Roadmap to Decreasing the Effects of the Opioid Epidemic, LA. DEP’T OF HEALTH STEERING COMM. at 3, https://perma.cc/JPX4-WTB5. For example, the number of opioid related deaths in Louisiana was “184\% times higher in 2018 than in 2012.” Id. Moreover, while opioid prescription rates
use accounted for 6% of new HIV transmissions in Louisiana. The CDC recognizes syringe service programs (SSP), which provide injection drug users (IDU) with sterile needles, as playing an important role in reducing HIV risk. SSPs are recognized as an “effective component” of comprehensive HIV prevention programming and are successful in reducing the transmission of blood borne diseases. Despite the benefits of SSPs, Louisiana law makes SSPs difficult to operate.

Louisiana law currently defines hypodermic syringes as drug paraphernalia and criminalizes the possession of drug paraphernalia for nonmedical purposes. In 2017, lawmakers clarified that existing laws should not “prohibit the establishment and implementation of a needle exchange program within the jurisdiction of a local governing authority . . . upon the express approval of the local governing authority [emphasis added].” While the new clarifying law removes some barriers from the operation of SSPs, IDUs may still be criminalized for possessing syringes. This in turn “push[es] people to avoid carrying new syringes, forcing them to share injection equipment and risk exposure to . . . HIV.” IDUs may be punished with up to a $2,500 fine and two years in prison under this law. Additionally, the law passes enforcement down and shifts responsibility to local municipalities to ultimately determine whether to permit their jurisdiction to operate an SSP. As a result, only New Orleans and Baton Rouge operate SSPs, denying the rest of the state the benefit of access to clean syringes. In 2018, lawmakers proposed a bill eliminating this loophole, but the

have decreased in Louisiana, residents are still prescribed opioids at a higher average rate than the rest of the country. Id. at 4.

349. 2016 STD/HIV Surveillance Report, supra note 33, at 26. Sharing needles to inject drugs can spread HIV, as needles may be contaminated with HIV-positive blood. See Injection Drug Use and HIV Risk, supra note 347. Drug use may also lead to HIV transmission because when people are high, they are more likely to engage in risky sexual activity like not using condoms. See id.

350. See Syringe Services Programs, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 30, 2018), https://perma.cc/7QVK-2FBV.

351. See id.


356. Id.


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bill failed.360

2. Prohibitions on Safe Sex Practices

Laws that interfere with women’s ability to have safe and informed sex, including during sex work, also contribute to Louisiana’s HIV epidemic and evidence Louisiana lawmakers’ indifference towards HIV prevention among key populations. For example, UNAIDS recommends decriminalizing sex work entirely to prevent HIV transmission and improve treatment outcomes.361 Not only does Louisiana criminalize sex work, but the law also subjects sex workers to draconian penalties and increasingly invasive policing.362 The New Orleans Police Department also uses condoms as evidence of sex work.363 This practice disincentivizes trans women, a group already at increased risk of contracting HIV, from carrying condoms, leaving them at even greater risk.364

In addition to prohibitions on sex work, Louisiana lawmakers also restrict access to sexual health service providers like Planned Parenthood, limiting women’s ability to access free condoms and HIV testing.365 Further, Louisiana lawmakers regularly oppose legislation that would provide comprehensive sexuality education that would teach young people how to prevent HIV.366


362. See La. Stat. Ann. §§ 14:82-86. Penalties for sex work in Louisiana can range from six months to fifty years in prison. Id. at § 14:82; see e.g., Kevin Litten, Some French Quarter Strip Clubs Cited for Prostitution, Lewd Acts, Drugs: Police, NOLA.(Jan. 31, 2018), https://perma.cc/8UV7-7FKJ (discussing crackdowns on sex work in New Orleans); Kevin Litten, Women’s Groups, Strip Club Owners Join Forces to Change Stripper Age Bill, NOLA, (Mar. 10, 2017), https://perma.cc/PK3T-GXFX (detailing legislators’ attempts to increase the minimum age requirement to work at strip clubs, a measure opposed by sex worker’s rights groups).


364. See id. For example, one trans woman surveyed by Human Rights Watch explained: “In the French Quarter I was at [a bar] with a man and the cops asked only the trans women to go outside and they searched us. If we had condoms we got arrested for attempted solicitation.”


Louisiana law also prohibits schools from dispensing contraceptives. These policies work in conjunction with HIV criminalization to create an atmosphere that stigmatizes sex and prevents women from fully controlling their sexual health and bodily autonomy, while simultaneously punishing women who do contract HIV.

**CONCLUSION**

HIV criminalization in Louisiana is unjustifiable. The statute criminalizing intentional transmission of HIV is devoid of any justifiable penological rationale and is inconsistently and discriminatorily enforced. Moreover, extensive public health research shows that HIV criminalization statutes like Louisiana’s hurt the public’s health by discouraging HIV testing, increasing stigma, and ultimately increasing rates of HIV transmission. Louisiana lawmakers’ continued commitment to HIV criminalization, despite the absence of any penological rationale, is evidence of the statute’s discriminatory animus towards the marginalized populations most affected by HIV, including women of color, trans women, poor women, sex workers, and women who use drugs. The public policy and health implications of this animus are catastrophic for all Louisiana women, regardless of their HIV status.

Louisiana lawmakers must repeal § 14:43.5 to ensure justice and to protect the public health and safety of Louisiana women.

**APPENDIX**

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Beyond Detention-as-Protection for Child Sex Trafficking Victims

Veena Subramanian†

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INTRODUCTION

When Gina\(^1\) walked into the public defender office at the youth detention center in a large East Coast city, she immediately appeared out of place. Barely twelve years old, Gina looked to be only eight, and was so petite that even the smallest uniforms had to be tied together to stay on. Initially, she refused to eat, as she missed her mother’s food and could not understand why she was being detained.

The juvenile court had determined that Gina was a Person in Need of Supervision, or a “PINS” youth. She had excessive absences from school and she had been found roaming the streets at night. As additional details of Gina’s life were revealed, it became clear to the judges and the youth advocates that Gina was a victim of child sex trafficking. They learned that she was the target of rival gangs, each of whom wanted Gina to be their “girl.” Despite Gina’s involvement in the court system, the pimps continued their pursuit of Gina and enticed her with promises of safety, love, and familiarity.

The juvenile courts struggled to fulfill their duty to protect Gina from further victimization, and when Gina cut off her GPS ankle monitor, the prosecutor seized upon the opportunity to bring Gina deeper into the justice system. Now that Gina could be charged with destruction of government property for cutting off her ankle monitor, she could be identified as a “delinquent” and detained in a secure facility. The court had finally found a way to “protect” her by locking her up. Unfortunately, by detaining Gina, the state only further traumatized a girl who had already experienced horrific forms of abuse and victimization.

Gina’s story is not unique. Faced with difficult decisions about how to protect victims of trafficking, judges “reported that they feel forced to send some girls to detention because they have no other treatment options, even though they know that the girls present no danger to the public and would be better off in the community.”\(^2\) Girls like Gina often first enter the child-welfare or juvenile-justice

\(^1\) Name changed to preserve anonymity.
\(^2\) Megan Anitto, Consent, Coercion, and Compassion: Emerging Legal Responses to the
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systems as “status offenders” or “PINS” youth when, because of their age, behaviors such as truancy or running away bring them under the purview of government systems. Once in the system, traffickers often exploit the girls’ more vulnerable status and promise them a sense of belonging. Many of these children “ran away from home or were abandoned by family members; many are homeless and known as youth who have been ‘thrown away.’”

Under the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA), judges cannot order status offenders to secure detention facilities. Because of this restriction, prosecutors encounter a devastating choice. Instead of releasing a girl to the community where she may face serious risks, prosecutors may “bootstrap” a delinquency charge to bring the child into the juvenile justice system. They can now “keep her safe” and hopefully out of the reach of the traffickers. Although proponents argue that detention is “the only option available,” it is a “practice that pulls the victim deeper into the juvenile justice system, re-victimizes [the young person], and hinders access to services.”

Though these cases frequently arise across American cities, they do not garner the same attention as international trafficking scandals. The young children, often no more than eleven or twelve, are victims under international and federal law. They are neither offenders nor delinquents, and juvenile courts must not treat them as such. The Trafficking Victims Protection Act of 2000 (TVPA) defines sex trafficking as “the recruitment, harboring, transportation, provision, or obtaining . . . of a person for the purposes of a commercial sex act,” in which the “commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age.” The TVPA is clear that all children who experience trafficking are victims and that, by virtue of their age, they do not need to show force, fraud, or coercion to come under the purview of the law. As victims, girls like Gina should receive appropriate services and individualized treatment, rather than detention and further trauma.

This article explores the deep harm caused by detaining victims of child sex trafficking in the name of protection and argues that communities should instead adopt a public health approach to child sex trafficking. Part I describes the scope of the child sex trafficking problem and outlines the major risk factors of child sex trafficking, while Part II describes the legal landscape for victims of child sex trafficking and the increasing prevalence of the detention-as-treatment model.

3. Cassi Feldman, Report Finds 2,000 of State’s Children are Sexually Exploited, Many in New York City, N.Y. TIMES, April 24, 2007, at B6 (describing a study that found that 85% of commercially sexually exploited children in New York State had had contact with the child welfare system).
However, as shown in Parts III and IV, both detention and its most commonly cited alternative—the child welfare system—do not adequately address the needs of trafficking victims. Detention exacerbates trauma, undermines trust in the justice system, and imposes lasting collateral consequences. Though it does not cause the same harms as detention, the child-welfare system is also not viable for supporting trafficked youths, as demonstrated by the fact that many trafficked youths are repeatedly brought into the system. Instead of relying on detention or the child-welfare system, Part V argues that communities should adopt a public health approach, targeting the root causes of child trafficking and preventing court involvement. Programs such as universal childcare, afterschool programs, mental-health services, and client-driven housing options can more holistically and appropriately address the needs of youth at risk of entering or engaged in trafficking.

I. THE PROBLEM OF CHILD SEX TRAFFICKING

When the issue of child sex trafficking first rose to the public’s attention at the turn of the twentieth century, the trafficking networks existed in brothels and concentrated neighborhood areas. Sexually exploited children were easily identifiable, and children’s rights advocates rushed to help these youth. The developing child-welfare movement, in part a response to these brothels and other harmful practices, attempted to eliminate them. However, child sex trafficking did not disappear. Rather, it was pushed underground. Today, the commercial sexual exploitation of children has a dramatically different character than it did at the beginning of the twentieth century. The hidden nature of the problem makes identifying victims and providing appropriate services immensely challenging.

In the most comprehensive study of child sex trafficking, Richard Estes and Neil Alan Weiner estimated that more than 244,000 youth in the United States were at risk of becoming victims of trafficking. Estes and Weiner used reports of runaway youth and calls to national youth hotlines to develop their estimate. However, this 2001 study occurred before the proliferation of technology and

7. Richard J. Estes & Neil A. Weiner, The Commercial Sexual Exploitation of Children in the U.S., Canada, and Mexico 39 (2001). Although previous studies had provided estimates of the scope of child sexual exploitation, the Estes and Weiner study is the most widely-cited. Their 27-month study included interviews with trafficking survivors, key stakeholders, and law enforcement agencies across 17 cities in the United States. One of the major shortcomings of previous studies is their use of varying definitions of sexually exploited youth, which may over- or under-estimate the scope of the problem.

8. Id.

9. Id.

10. Id.; see also Nat’l Research Council & Inst. of Medicine, Confronting Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States 42 (Ellen W. Clayton, Richard D. Krugman, and Patti Simon eds., 2013) [hereinafter Confronting Commercial Sexual Exploitation].

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before the influx of unaccompanied youth seeking asylum in the United States. These two factors suggest that current estimates of the child trafficking problem may be significantly higher than previously noted.

Several factors contribute to the lack of exact available data about the number of youth subject to commercial sexual exploitation. Victims and survivors are difficult to identify due to the illegal and underground nature of the activity. Therefore, scholars use proxies or risk factors to estimate the level of exploitation. Additionally, victims of trafficking may not self-identify as such due to the stigma surrounding sex work. Lastly, many victims may be arrested for other “survival” behaviors, including petit larceny and trespassing, and their status as victims is often obscured by their arrest.

Although the demographics of victims of child exploitation vary by region, there are a few unifying characteristics. Mirroring the racial disparities among court-involved youth generally, minorities are disproportionately represented among trafficked youth, as are LGBT youth. Additionally, the “average age of a minor’s first involvement in sexual exploitation is 12 [to] 14, while some are forced into sex trafficking as early as age 10.” Arguments about the underlying risk factors and causes of child sex trafficking, outlined below, may help explain and contextualize these statistics.

Society has not reached a consensus on how to discuss the issue of child trafficking. A variety of terms have emerged out of this confusion: child prostitute, child sex trafficking victim, and commercially sexually exploited child (CSEC). The first term focuses on the actions of the youth engaging in delinquent behavior. This attaches fault to the child for participating in sex work, and assumes the youth’s full control over their actions. On the other hand, “child sex trafficking victim” and “commercially sexually exploited child” comport with emerging social science and international law recognizing the status of these youth as victims and survivors. This paper will use the latter terms to describe the status

13. See Barry C. Feld, Violent Girls or Relabeled Status Offenders?: An Alternative Interpretation of the Data, 55 CRIME & DELINQ. 241, 244 (2009).
of these youth.

There is no single factor or circumstance that predicts a youth’s vulnerability to commercial exploitation. However, following interviews with CSEC youth, scholars have identified three levels through which to describe risk factors: individual-level factors, family-level factors, and community-level or macro factors.\(^{19}\) This section will outline each of these levels in turn. Although the three-part ecological framework identifies specific risk factors, most of these factors are not discrete, but rather interact to make youth susceptible to trafficking.

**A. Individual-Level Risk Factors**

On the individual youth level, perhaps the most highly correlated characteristic was a history of running away.\(^{20}\) A history of abscondence, whether from home or from a congregate care or foster care setting, raises questions about the underlying causes of runaway behavior. Scholars argue that certain experiences in the home push youth out to the streets, including prior physical or sexual abuse, mental health concerns, and substance abuse issues.\(^{21}\)

First, many trafficked youth previously experienced physical or sexual abuse.\(^{22}\) The harmful effects of childhood sexual abuse are well-known, ranging from severe mental health issues to stunted brain development. Survivors of childhood sexual abuse are “less likely to be able to protect themselves from sexual exploitation, less likely to recognize the inappropriateness of the sexual activity involved in being prostituted, and at high risk of developing into easy prey for a predatory child trafficker.”\(^{23}\) Many youth reported abuse by family members or their parents’ partners.\(^{24}\) In such cases, a child may choose to run away from home, believing that life on the streets would be better than life at home.

Second, chronic runaways may also struggle with mental health and substance abuse needs. The landmark study by Estes and Weiner noted that a significant proportion of the runaway population suffers from mental illnesses, many of which go untreated.\(^{25}\) Subsequent studies have corroborated these findings, adding that many trafficked youth suffer from chronic depression and

\(^{19}\) See Barnert, *supra* note 12, at 326.

\(^{20}\) See *id.* (“Studies of runaway/homeless youth document rates of commercial sexual activity in the range of 9% to 28%.”).

\(^{21}\) *Id.*

\(^{22}\) Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, **6** U. S. T. HOMAS L.J. **96**, 111 (2008) (“A recent study found that up to 40 percent of girls and 30 percent of boys who are victims of commercial sexual exploitation have also been victims of physical or sexual abuse at home.”)

\(^{23}\) Reid, *supra* note 18, at 218.

\(^{24}\) See *Estes & Weiner, supra* note 7, at 6.

\(^{25}\) *Id.* at 63 (“Nearly 66% of street youth studied in Seattle, for example, were diagnosed with disruptive behavior disorders, attention deficit disorders, mania, schizophrenia, or post-traumatic stress syndrome.”).
low self-esteem. Commercial sexual exploitation further compounds these feelings of loss of control over their lives, and many youth turn to drugs and alcohol to cope. Mental illnesses and substance abuse work in tandem to make a child more vulnerable to trafficking by a pimp or by peers.

Furthermore, developmental psychology provides valuable insight into the particular vulnerabilities of youth, which childhood sexual abuse, mental illness, and substance abuse only exacerbate. As recent Supreme Court decisions noted, youth are especially vulnerable to outside influences and struggle with impulse control. Brain scans show that the prefrontal cortex, which controls executive function and decision-making, continues to develop to maturity through the age of 25. Teenagers respond more to short-term outcomes and pleasures than to considerations of long-term consequences, often leading to poor decisions. Promises of material goods or pleasurable experiences capitalize on this immaturity in brain development and render youth exceptionally vulnerable to the deceit and manipulation of a trafficker. These conditions are amplified for survivors of abuse, who may seek affection and approval from individuals attempting to take advantage of them.

Whether due to mental illness, previous sexual abuse, or substance use issues, chronic runaways face significant hardship on the streets. Extreme vulnerability and desperation lead some youth to turn to traffickers and other forms of sex work as a means of survival. Many perceive survival sex as among their limited range of options to support themselves, as “sex is a commodity that they trade for the most basic of needs because it is all they perceive that they have to offer.” Traffickers exploit a runaway’s lack of basic needs with promises of shelter, food, and a sense of belonging.

27. See id.
28. See id. (“It is not clear whether behavioral risk factors were antecedents to or outcomes of trafficking, as antecedents to or outcomes of experiencing or being exposed to violence and trauma before trafficking.”).
32. See Reid, supra note 18, at 214.
33. Id. at 215.
34. See Hanna, supra note 17, at 13.
35. Id.
36. Id.
B. Family-Level Risk Factors

The significant overlap between chronic runaways and commercially sexually exploited youth suggests that youth are running away from something; family-level factors may clarify the roots of the behavior. Scholars have examined a number of family environment factors for possible correlates to exploitation, including domestic violence, family conflict, parental substance abuse, single-parent homes, death of a parent, and abuse and neglect. As with the individual-level factors, many of the family-level indicators increase the risk that the youth may run away or be forced out of their home.

A history of unresolved domestic and family violence may be one of the strongest predictors of vulnerability to trafficking. As with childhood sexual abuse, histories of physical violence may lead youth to believe that any situation is better than staying at home. Youth may run away from home or be “thrown away” by their caregivers. Although parents may push their children out of the home, this phenomena of “throwaway” youth often occurs among foster youth and youth in congregate care settings.

Family disruption contributes to complex trauma and impacts psychosocial development. Emerging social science research reveals the biological effects of trauma on a child’s brain and the child’s ability to control her behavior. As with the individual-level factors noted above, exposure to family-level factors has detrimental effects on a child’s brain development and increases the risk that the youth will be subject to commercial sexual exploitation. The final level of the ecological framework, community factors, interacts with the individual- and family-level factors to raise a child’s susceptibility to exploitation.

C. Community-Level Risk Factors

Although the exact causes of trafficking may be unique to each youth, there are certain community-level factors that increase the risk of exploitation. Estes and Weiner found that, though not an exclusive cause of trafficking, poverty creates the “context that contributes to the sexual exploitation of many poor

37. Choi, supra note 26, at 71.
38. Hanna, supra note 17, at 22.
39. See CONFRONTING COMMERCIAL SEXUAL EXPLOITATION, supra note 10, at 86.
42. See Bernice B. Donald & Erica Bakies, A Glimpse Inside the Brain’s Black Box: Understanding the Role of Neuroscience in Criminal Sentencing, 85 FORDHAM L. REV. 481, 486 (2016).
43. Id.; see also Choi, supra note 26, at 71.
children.\textsuperscript{44} Socioeconomic status strongly correlates with exploitation among children living in urban areas, those residing in public housing, and families who lost welfare benefits after welfare reform. Poverty at the family level may result in cramped living spaces for whole families, parents struggling to make ends meet with multiple jobs, and inadequate supervision of youth while parents are at work. Without appropriate supervision, youth have a higher risk of exposure to and exploitation by traffickers. They may seek activities to occupy themselves, and they may fall victim to false promises of material goods.\textsuperscript{45}

Community-level poverty also raises questions about the provision of services and the adequacy of the education system. Studies have long shown the correlation between school performance and community socioeconomic status. If a child cannot receive appropriate services in school or does not feel engaged in schoolwork, they are more likely to drop out. A study of the CSEC population revealed that “dropping out of school and low educational attainment were correlated with victimization.”\textsuperscript{46} Similar to the rationale behind the risk of inadequate supervision, the dearth of afterschool programs in underserved communities makes youth susceptible to inducements by traffickers.\textsuperscript{47}

All of the risk factors described here, both community-level and individual, are interrelated. Issues related to individual mental health are inextricable from histories of abuse or family violence, and the perceived lack of alternatives may stem from intense poverty within a family and throughout the community. Furthermore, other factors may also heighten the risk of exploitation, including “the presence of large numbers of unattached and transient males in communities... and the recruitment of children by organized crime units for sex trafficking.”\textsuperscript{48} Although studies have found strong correlations between trafficking and these factors, identification of one or more risk factor does not necessarily dictate that a child will fall victim to sex trafficking and other forms of trafficking.\textsuperscript{49} Addressing these vulnerabilities is neither simple nor reducible to one solution. Therefore, responses to child sex trafficking must be interdisciplinary and must focus on the interrelated root causes of exploitation.

\textbf{II. The Existing Legal Framework}

To understand the “detention-as-protection” phenomenon that marked Gina’s experience in the juvenile justice system, it is important to first

\begin{itemize}
\item \textsuperscript{44} ESTES \& WEINER, supra note 7, at 41.
\item \textsuperscript{45} CONFRONTING COMMERCIAL SEXUAL EXPLOITATION, supra note 10, at 94 (noting that “deterrents to engaging in high-risk behaviors may not exist without adequate parental or adult supervision, and as a result, adolescents may make decisions about such behaviors without being cognitively prepared to do so”).
\item \textsuperscript{46} Choi, supra note 26, at 68.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} FINKLEA ET AL., supra note 5, at 3.
\item \textsuperscript{49} See id.
\end{itemize}
acknowledge the legal framework from which this problem arises. Following the development of the modern-day juvenile court system in the 1960s, reformers advocated for the advancement of due process rights for juveniles. In the subsequent decades, Congress and state legislatures responded with new laws and procedures, including the comprehensive juvenile justice law, the Juvenile Justice and Delinquency Prevention Act.

The limitations of the JJDPA have led to constant tension between public safety advocates, prosecutors, and youth advocates. The result of these tensions has been the proliferation of safe harbor laws and the use of new “bootstrapping” techniques by judges and prosecutors. Safe harbor laws aim to immunize youth from prosecution for child prostitution, instead diverting youth to community-based programs. On the other hand, “bootstrapping” involves charging youth with delinquent acts other than prostitution, such as simple assault or petit larceny, in order to keep the youth in the delinquency system.

A. The Juvenile Justice and Delinquency Prevention Act of 1974

The Juvenile Justice and Delinquency Prevention Act of 1974, heralded as a landmark law, aimed to protect the rights of youth in the juvenile justice system. The law provided for greater due process protections, ordered that states reduce their detention rates, and granted funding for the development of community-based programs aimed to treat youth. One of the JJDPA’s most celebrated provisions is the deinstitutionalization mandate for status offenders who have not been charged with or adjudicated for a delinquency offense. Prior to this law, status offenders were processed through the delinquency system, and often detained in the same facilities as those accused of delinquent or criminal behavior. Through the JJDPA, Congress recognized that “social service [and] community-focused interventions were more effective and less costly means of responding to runaways, truants, and disobedient youth,” and asked states to develop social service programs that more appropriately targeted the needs of this population.

Underlying the JJDPA’s mandate against institutionalization was the belief that detention may be particularly harmful for juvenile status offenders. Advocates for deinstitutionalization had argued that commingling status offenders with delinquent youth exposed them to criminal tendencies that would increase the risk

52. See id.
53. See id. at 9.
54. See Feld, supra note 13, at 244.
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of future violent behavior.\textsuperscript{56} Additionally, they worried commingling would stigmatize the young people by labeling them as delinquents for actions that would not be criminal if committed by an adult.\textsuperscript{57} Advocates had also argued that detention did not address the underlying reasons why a young person may repeatedly skip school, run away from home, or use drugs or alcohol.\textsuperscript{58} If a goal of the juvenile justice system was to rehabilitate and treat young people to ensure their future success in society, leaving the underlying causes of behavior untreated would undermine any efforts toward this goal. Reformers recognized the benefits of individualized treatment services, which keep youth in the community and offer the necessary programs to youth who may be at risk of being trafficked.\textsuperscript{59}

Although the JJDPA required states to reduce their use of detention and develop community-based programs, states struggled to develop adequate treatment services without guidance from the federal government or from experts. However, state judges were still bound by the JJDPA’s prohibition on detaining status offenders. Therefore, judges would send these youth home, with no services, and the youth would promptly abscond from their home.\textsuperscript{60}

Frustrated with the problem of chronic runaways, juvenile justice agencies across the country petitioned Congress to amend the JJDPA in 1980 to carve out an exception for the secure detention of status offenders.\textsuperscript{61} This exception, which became known as the “valid court order” (VCO) exception, allows judges to order detention of status offenders who violate a court order.\textsuperscript{62} Under the VCO exception, a status offender who runs away from home in violation of a judge’s order to remain at home may be detained in a secure facility.\textsuperscript{63}

The VCO exception ushered in a new period of high detention rates of youth for noncriminal behavior. However, using many of the same arguments that prompted the deinstitutionalization of status offenders, a few states, including Connecticut and Texas, have considered eliminating the VCO exception from their state statutes and returning to the prohibition of detention under the original JJDPA.\textsuperscript{64} Other states, such as New York, have unsuccessfully sought to expand the valid court order exception.\textsuperscript{65} Despite the continuing debate over the VCO

\begin{itemize}
\item[57.] See Shubik and Kendall, supra note 55, at 385.
\item[58.] See Adelson, supra note 22, at 111; see also THE ANNIE E. CASEY FOUNDATION, NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION (2011).
\item[59.] Shubik & Kendall, supra note 55, at 384.
\item[60.] Id. at 388.
\item[61.] Id. at 389.
\item[62.] See id.
\item[63.] See id.
\item[64.] Id.
\item[65.] See id.
\end{itemize}
exception, youth advocates in a number of states have petitioned for laws specific to sexually exploited children, ultimately leading to the proliferation of “Safe Harbor” laws.66

B. Safe Harbor Laws

While the JJDPA addresses the detention of status offenders generally, a number of states have since adopted laws – known as Safe Harbor laws – that target the specific treatment of youth engaging in prostitution.67 These laws reject the idea that children can legally engage in prostitution and restrict the circumstances under which a child may be prosecuted for commercial sexual activity. The impetus for these laws is the inconsistency between statutory rape laws and prostitution charges.68 Under many statutory rape statutes, a fourteen-year-old girl is unable to consent to sex. However, that same girl could be prosecuted for prostitution if any money was exchanged. Safe Harbor laws aim to reconcile this discrepancy and protect young people from prosecution in the juvenile justice system. Most of these provisions are statutory, though judicial decisions have also insulated young girls from prosecution.69

Safe Harbor laws have three main goals: to “immunize children from prosecution for prostitution,” to “divert children away from the juvenile justice system and put them in places to help them,” and to “make sure that those who deal in sex trafficking are harshly punished.”70 Although specific state statutes vary, the enforcement mechanisms remain fairly consistent. A young person arrested for prostitution will be brought before a judge, diverted from prosecution, and referred to social services programs.71 Their immunity from prosecution is often contingent on compliance with services, including counseling, compulsory attendance in school, and a curfew. For example, New York’s Safe Harbor for Sexually Exploited Minors Act initially diverts minors to the probation system under the jurisdiction of the juvenile court.72 Courts may order participation in

67. See NATIONAL CONFERENCE OF STATE LEGISLATURES, SAFE HARBOR: STATE EFFORTS TO COMBAT CHILD SEX TRAFFICKING 5 (2017) (noting that, as of 2017, at least twenty-nine states and the District of Columbia have adopted some form of a safe harbor provision).
69. In re B.W., 313 S.W.3d 818 (Tex. 2010) (The Texas Supreme Court held that children under the age of fourteen, who cannot legally consent to sex, should not at the same time be charged with prostitution).
71. See id.
services as a condition for dismissal of the charge. In Alameda County, California, diversion through the safe harbor program is conditioned on witness cooperation. Only upon participating in the prosecution of pimps and traffickers are girls able to access safe houses and other treatment services.

Although the Safe Harbor laws are rooted in the understanding that these girls are victims, their coercive nature renders these laws far from victim-centered and may in fact prevent young people from accessing all necessary services. Access to services may be conditioned on full cooperation with prosecutors, but the realities of child sex trafficking may hinder full compliance with court conditions. These girls have experienced severe trauma and, often, may have been abandoned by their families. After leaving a court hearing, the girls may return to the only familiar person they know—their trafficker. They may not be able to attend school every day and may be isolated from the community before they can attend counseling services. The response to the reality of child sex trafficking should not be an impossible burden, but an individually-tailored and compassionate approach conscious of the child’s circumstances.

C. “Bootstrapping”

Even though both the JJDPA and Safe Harbor laws were passed to end the detention of status offenders and victims of trafficking, judges and juvenile justice agencies sometimes engage in bootstrapping to detain victims of trafficking “for their own protection” without violating the JJDPA or Safe Harbor laws. Presented with a status offender who may face significant risk of trafficking in the community, a prosecutor may opt to charge the young person with a delinquency offense, most often simple assault, to bring them within the purview of the delinquency system. Once in the delinquency system, the deinstitutionalization requirements of the JJDPA and the immunity for prostitution offenses under Safe Harbor laws no longer dictate the detention options for that youth. The court may legally order the child to be detained in a secure facility while those charges are

73. Id. at 1332.
74. See id. at 1335.
75. See Conner, supra note 66, at 90-91; see also Butler, supra note 72, at 1335.
76. See Annitto, supra note 2, at 9.
77. Sarah Wasch, Debra Schilling Wolfe, Elizabeth H. Levitan, Kara Finck, An Analysis of Safe Harbor Laws for Minor Victims of Commercial Sexual Exploitation: Implications for Pennsylvania and Other States, U. PA. FIELD CTNS. 7 (2016); see also Rosemary Killian & Loretta M. Young, Human Trafficking: A Primer, 34 DEL. LAW 8, 9 (2016) (“Unfortunately, for some victims, ‘the life’ may be their first experience of ‘family’ and belonging.”); see also Kimberly Mehlman-Orozco, What Happens After a Human Trafficking Victim is ‘Rescued’? The Hill, (July 29, 2016), https://perma.cc/B68Y-N5W9 (“Given the trauma bond that often exists between victims and offenders, it is common for sex trafficking survivors to return to their victimizer, especially when adequate services are absent.”).
78. See Feld, supra note 13, at 242; see also Conner, supra note 66, at 83-84 (victims of child sex trafficking may also be charged with “proxy” or “masking” charges, “alternative charge[s] brought against youth engaging in sex trades.”).
pending. In Gina’s case, once the prosecutor charged Gina with “destruction of
government property” for cutting off her ankle monitor, Gina had a formal
delinquency case, allowing the judge to detain her in the secure facility.

The high number of girls charged with simple assault demonstrates the
prevalence of bootstrapping. A 2009 study found that girls are increasingly
charged with simple assault, often for disputes with parents and other family
members. These statistics lend credence to the fear that girls may be charged
with simple assault to bring them into the delinquency system and to unlock the
possibility of detention. They also stand in contrast to the deinstitutionalization
mandate of the JJDPA and state Safe Harbor laws.

III. DETENTION FAILS TO MEET THE NEEDS OF TRAFFICKED CHILDREN

Although the justification for detaining child victims of sex trafficking is for
their protection and to provide access to services, detention is immensely harmful
to young people—both during detention and following release. From stigmatizing
youth to increasing the risk of re-arrest, detention inflicts additional trauma on
adolescents who have already endured horrific forms of abuse. Though the justice
system routinely detains youth in the name of protection, detention actually causes
more harm to victims and undermines broader interests in public safety.

A. Harms During Detention: Trauma and Erosion of Trust

Trafficked youth have experienced significant trauma when they come into
contact with the justice system. A majority of those youth endured severe abuse
prior to running away from home. Detention as protection only exacerbates that
trauma, rendering the practice more harmful than helpful. Furthermore, detention
strips youth of agency over their own lives, reinforcing their sense of a loss of
control and undermining their trust in the justice system.

1. Detention Exacerbates Trauma

First, the very experience of being prosecuted, of having their life put on
display before the court, forces the young person to relive the trauma of their
experiences. Standing before a judge, a prosecuted youth must listen to others
describe their experiences and their status as a victim. The child must then attempt
to reconcile their status as a victim with the decision to detain them, a tension that
is fundamentally counterintuitive. Once in the detention facility, the placement can
be retraumatizing and can mimic their trafficking experience. Their every move
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is closely monitored and restricted, they have no control over their basic needs, like food consumption, and young girls are particularly vulnerable to additional abuse.\textsuperscript{82} The detention facility begins to mimic the lockdown setting of life with the trafficker.\textsuperscript{83}

Furthermore, youth in detention often suffer significant abuse while in detention facilities.\textsuperscript{84} Studies show that girls disproportionately experience sexual misconduct and abuse by staff members in facilities.\textsuperscript{85} The Supreme Court grappled with the utility and potential harms of detention of youth in the 1980s. In the landmark case \textit{Schall v. Martin}, the Court upheld the use of preventive detention of youth as a way to protect both the youth and the community.\textsuperscript{86} In his lengthy dissent, Justice Marshall criticized the practice, analogizing the harms of juvenile facilities to those of adult jails.\textsuperscript{87} He argued that detaining youth makes courts liable to be exposing these youngsters to all sorts of things. They are liable to be exposed to assault, they are liable to be exposed to sexual assaults. You are taking the risk of putting them together with a youngster that might be much worse than they, possibly might be, and it might have a bad effect in that respect.\textsuperscript{88}

Additionally, studies have linked detention with the aggravation of mental illness, including with severe depression. One psychologist found a nexus between the onset of depression and the point of incarceration.\textsuperscript{89} Another study suggests that “poor mental health, and the conditions of confinement together conspire to make it more likely that incarcerated teens will engage in suicide and self-harm.”\textsuperscript{90} In fact, one study found that the suicide rate for incarcerated youth is two to four times the suicide rate of youth in the community.\textsuperscript{91} Without appropriate services, youth already struggling with mental health issues will suffer unnecessarily in detention.

Although the decision to detain youth in secure facilities, separate from

\textsuperscript{82} See Jennifer Musto, \textit{Domestic Minor Sex Trafficking and the Detention-to-Protection Pipeline}, 37 DIALECTICAL ANTHROPOLOGY 257, 268 (2013) (noting that “such habits of institutionalization are punctuated by a parallel track record of exposing youth to gendered forms of victimization while institutionalized”).

\textsuperscript{83} \textit{Id.}; see Hardy, supra note 15, at 15.

\textsuperscript{84} \textsc{Francine T. Sherm\textsc{n}, G\textsc{irls’ Justice Initiative, G\textsc{irls in the Juvenile Justice System: Perspectives on Services and Conditions of Confinement} 14 (2003); see also Musto, supra note 82, at 268.}

\textsuperscript{85} See Godsoe, \textit{supra} note 80, at 1334.

\textsuperscript{86} 467 U.S. 253 (1984).

\textsuperscript{87} \textit{Id.}

\textsuperscript{88} \textit{Id.} at 290 (citing J. Quinones a Family Court Judge).

\textsuperscript{89} See Holman, \textit{supra} note 56, at 2 (referencing studies by Kashani et al. and Mace et al.).

\textsuperscript{90} \textit{Id.}

\textsuperscript{91} \textit{Id.} at 9.
adults, was inspired by the desire to create a distinction between adults and children in the criminal justice system, it effectively entrenched the idea that juvenile offenders were “different” and did not fit within the broader community. This “othering” is precisely the argument traffickers use to exploit a girl’s vulnerability. Furthermore, detention and punishment send the message that these girls are culpable for their exploitation and that they are responsible for their victimization and the crime committed against them. Detention conveys that the youth are “no longer worthy of the legal protection provided through child abuse or statutory rape laws.”

2. Detention Undermines the Legitimacy of the Justice System

When law enforcement officers arrest victims of child sex trafficking, many hope to prosecute the traffickers, or whomever is responsible for the youth’s victimization. To do so, they rely on information from the child. Law enforcement officers believe that identification and prosecution of the traffickers can better ensure a youth’s safety in the community. However, many victims of trafficking fear repercussions from their traffickers for working with the police. Due to trauma bonding between a youth and her pimp, she may also believe that her pimp is the only person who can protect her. Therefore, she may not readily share information with law enforcement.

In response to this lack of compliance, law enforcement officials and judges detain children subject to cooperation, or they condition services on collaboration with the police. Coercing a child to testify against her trafficker forces her to relive the trauma of the trafficking experience. In some cases, law enforcement officials also condition receipt of critical mental health services on cooperation with law enforcement. This completely undermines the protection justification for detention. Ultimately, coercing cooperation leads to distrust of law enforcement officials. Victims of trafficking begin to view police as participants in a system working against them, rather than as people who desire to help and empower them. After detention, youth are less likely to seek assistance from police in times of need and are more likely to return to their traffickers out of

92. See Shubik & Kendall, supra note 55, at 385; see also Godsoe, supra note 80, at 1335 (“These girls suffer from low self-esteem, worthlessness, and guilt, which are likely exacerbated by the inherent message in prosecution that they are culpable for their exploitation.”).
93. Reid, supra note 18, at 210.
94. See Wasch, supra note 77, at 7.
95. Sapiro, supra note 41, at 101.
96. Musto, supra note 82, at 270 (noting the failings of processes that are “enforcement centric” because the end goal is not services for the child, but prosecution of the perpetrator).
97. See id.
98. See id.
99. See id.
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From inflicting additional trauma to undermining the legitimacy of law enforcement, detention of child sex trafficking victims causes irreparable, lifelong harm. At almost every turn, “carceral protectionism” fails to protect youth and ultimately undermines overall public safety. As Professor Cynthia Godsoe notes, “sanctioning prostituted children utterly fails to protect them—the cure is indeed worse than the disease.”

B. After Detention: Stigma and Collateral Consequences of Detention

Detaining young people carries immense consequences for their future. In addition to suffering significant trauma in the detention facility, a young person marked as “delinquent” will likely experience significant stigma once they are released into the community. The potential consequences of detention extend to many areas of formerly detained youths’ lives, including their prospects for education, employment, and housing.

First, youth with a delinquency adjudication on their records face discrimination by other systems and programs. Anti-commingling regulations prohibit delinquent youth from residing with other youth in the child-welfare system. For some youth, this means that, once they are adjudicated delinquent, they cannot return to their former foster care placements or other group home settings. Essentially, the stigma of the delinquency adjudication ruptures some of the few stable relationships many of these youth may have.

Furthermore, while incarcerated, youth receive extremely poor education, if any at all. They lose valuable credits during the school year and are not given appropriate special education services to facilitate learning while detained. Naturally, when youth return to the community, many experience frustration at having fallen behind. They may never receive credit for the time spent in the detention facility’s school, and some find it difficult to catch up on credit hours after release. Therefore, many youth do not return to school after detention.

The high dropout rate among detained youth has significant ripple effects, worsening employment prospects and health outcomes. Students who drop out of high school “face higher unemployment ..., and earn substantially less than youth

100. See Godsoe, supra note 80, at 1333.
101. Id. at 1335.
102. See, e.g., D.C. CODE § 16-2313 (2019).
103. See Katherine Twomey, The Right to Education in Juvenile Detention under State Constitutions, 94 VA. L. REV. 765, 771 (2008) (“For example, detention centers often only provide short, infrequent classes, and even these are often not based around a meaningful curriculum.”).
104. See id. at 772.
106. See THE ANNIE E. CASEY FOUNDATION, supra note 58, at 11.
who do successfully return and complete school.” 107 The lack of engagement in school and loss of employment prospects further exacerbates the circumstances that made the youth vulnerable to trafficking in the first place, including low incomes and poor housing conditions. 108

IV. Child Welfare as an Alternative and its Limitations

Recognizing that detention does not alter the underlying circumstances that may have pushed the youth into a trafficking situation, advocates worked for interventions that provide an alternative to the detention-as-protection model. The most common of these alternative interventions is foster care placement and services. However, despite its significant advantages over the juvenile justice system, the child welfare system has significant limitations. These include the lack of specialized services and the net-widening effects of child protection, which may bring more families under state supervision. As a result, involving trafficked youth in the child welfare system frequently does not address the root causes of trafficking and instead risks severing important family relationships.

A. Advantages of Child Welfare Intervention

Despite critiques by youth advocates, the child welfare system offers numerous advantages over the juvenile delinquency system. First, the child welfare system offers youth more treatment resources, including mental health and medical care, which are often not available in detention centers. Additionally, youth in the child welfare system may not experience the same level of stigma as do youth in the delinquency system due to perceptions of culpability and control.

Treatment through the child welfare system provides children with access to professional medical care, including mental health care. Service providers aim to engage the youth in treatment options that are cognizant of the youth’s ability. In its ideal form, the child welfare system would employ holistic practices to create individualized service plans for each youth. 109 By engaging the entire family in services, the child welfare system may be able to remedy some of the circumstances that initially made the youth vulnerable to trafficking, such as physical abuse, domestic violence, and family conflict. 110

Perhaps the most important advantage is that the child welfare system carries less stigma and imposes fewer collateral consequences for the youth than the delinquency system. For example, foster youth are not labeled delinquents, and

108. See id.
109. Kate Brittle, Child Abuse By Another Name: Why the Child Welfare System is the Best Mechanism In Place to Address the Problem of Juvenile Prostitution, 36 Hofstra L. Rev. 1339, 1375 (2008).
110. See Choi, supra note 26, at 71.
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are instead treated as victims of abuse or neglect.\textsuperscript{111} For victims of child sex trafficking, this distinction “conveys the unequivocal message to these girls and the public at large that prostituted girls are victims, not culpable for their own exploitation.”\textsuperscript{112} While the delinquency system and subsequent detention penalize young girls for their victimization, the child welfare system attempts to intervene to provide services.

In addition to lesser stigma for the youth, the child welfare system reduces the stigma and distrust the youth associate with law enforcement. Though this may still be a concern with the child welfare system, the degree of distrust may be muted. Foster youth may be more likely to request help or seek out protection in the face of troubling circumstances.\textsuperscript{113}

\section*{B. Limitations of Child Welfare Intervention}

Despite its potential advantages over detention, the child welfare system is an over-burdened and under-resourced system, which leads to significant consequences for victims of trafficking. First, many trafficked youth are either currently or were previously involved with the child welfare system, demonstrating its earlier failure to protect them from trafficking.\textsuperscript{114} One study of commercially sexually exploited youth in the United States “estimated that between fifty and eighty percent of exploited youth have had contact with the child welfare system,” whether in foster homes, groups homes, or residential facilities.\textsuperscript{115} This phenomenon is particularly salient for youth aging out of foster care, who are at an increased risk of homelessness and unemployment.\textsuperscript{116}

There are several potential explanations for the apparent revolving door between the child welfare system and sex trafficking. Congressman Dave Reichert from Washington, the principal sponsor behind the Preventing Sex Trafficking and Strengthening Families Act, noted that “we have unintentionally isolated kids in foster care from their families, peers, and communities,” which may increase their vulnerability to pimps.\textsuperscript{117} Traffickers prey on this isolation and vulnerability,

\begin{thebibliography}{99}
\bibitem{111} See Godsoe, \textit{supra} note 80, at 1380.
\bibitem{112} Id.
\bibitem{114} Id. at 1369.
\bibitem{115} Phillips, \textit{supra} note 14, at 1649; see also Speckman, \textit{supra} note 113, at 392-93 (“The FBI reported that more than 60\% of US children recovered from [sex trafficking] incidents in 2013 had previously been living in foster care or group homes. 85\% of girls involved in sex trades were previously in homes involved in the child welfare system . . . Connecticut reported in 2012 that 86 of 88 minors identified as [sex trafficking] victims were involved in the child welfare system and most reported that they suffered abuse while in foster care placements or residential facilities.”).
\end{thebibliography}
promising love, protection, and material goods.\textsuperscript{118} For an abused or neglected child who may not feel loved or safe in their foster home, the pimp’s promises are all too enticing. Moreover, foster homes can themselves be abusive, forcing youth to run away for lack of better alternatives.\textsuperscript{119} As previously noted, once on the streets, youth are particularly vulnerable to exploitation, whether by pimps or by means of survival sex.\textsuperscript{120}

Additionally, youth advocates have noted that the child welfare system may not be able to provide for the particular needs of trafficked youth. This failure “may be due to inadequate training, insufficient resources, high caseloads, and the perception that victims should be handled in the juvenile justice system.”\textsuperscript{121} Given the particular harms that trafficking inflicts on youth, services must acknowledge their unique characteristics and vulnerabilities. Due to resource constraints and a lack of specialized training, youth are often ordered to engage in general services, such as substance abuse or group counseling, which do not necessarily provide the therapeutic elements required to be effective.\textsuperscript{122}

Lastly, like detention, the child welfare system strips youth of any agency over their own lives and choices. Services are imposed upon the youth and family, often without genuine engagement of the family unit in the decision-making process.\textsuperscript{123} The predominant model of protective services has “positioned children and youth as passive recipients of services and not active decision-makers in their own lives.”\textsuperscript{124} Foster youth rarely have the ability to decide where they live, which school they attend, and which activities to join.\textsuperscript{125} This system denies youth agency over their lives and normalizes the idea that others can make decisions for the child, deepening the risk of exploitation and vulnerability to trafficking. Any use of the protective model must strike a balance between an adolescents’ right to protection from sexual exploitation and their right to participate in decisions impacting their lives.\textsuperscript{126}

C. Unintentional Consequences of Turning to the Child Welfare System

In addition to the functional limitations of the child welfare system noted in the previous section, an intervention that strictly relies on the child welfare system

\begin{enumerate}[118.]
\item See Speckman, supra note 113, at 409.
\item See id.
\item See id. (“[C]hildren who run away are more likely to be approached by traffickers and solicited for prostitution or other forms of exploitation within the first forty-eight hours.”).
\item FINKLEA ET AL., supra note 5, at 30.
\item See Sapiro, supra note 41, at 102.
\item Id.
\item See Speckman, supra note 113, at 415.
\item See Sapiro, supra note 41, at 102.
\end{enumerate}
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carries significant risks, including dangerous net-widening and deterrent effects. These risks stem from the legal justification needed to bring youth victims of trafficking within the child welfare system, a decision which is often predicated on finding that children have been harmed by their parent or guardian. When a parent facilitates the trafficking of their child, there is a clear route for the child welfare system to take custody of the child; however, the child welfare system’s jurisdiction is less apparent when a parent is not responsible for the trafficking, particularly when the child may have run away from home prior to their victimization.127 In these situations, children often enter the child welfare system after courts find that parents have neglected the child due to “failure to protect” or a lack of supervision, findings that can be grounds for removing some or all of the children from parents’ custody.128 Additionally, in most states, these are two independent grounds for neglect commonly referred to as “conditions injurious” or “harmful environment.”129 These concepts often have corollaries in criminal law, so a finding of neglect in the child welfare context can raise the possibility of criminal prosecution.130

The risk that they may be prosecuted or have their other children removed from the home can make parents less likely to reach out for help with the child being trafficked. The child welfare system’s treatment of domestic violence victims illustrates some of these problems. A victim of severe domestic violence can be brought into the child welfare system on the grounds that they failed to protect their child from witnessing the domestic violence.131 Failure-to-protect charges can then develop into criminal charges.132 Studies have shown that

127. See Brittle, supra note 109, at 1355-56 (“[T]he parents of prostituted youth would be guilty of failing to protect their child from abuse if they knew or should have known that their child was prostituting.”).

128. See id. at 1355.

129. See, e.g., CONN. GEN. STAT. § 46b-120(i)(2)(B)(4) (2018) (“A child may be found neglected who . . . is being permitted to live under conditions, circumstances or associations injurious to the well-being of the child.”); D.C. CODE § 16-2301(9)(A)(i-ii) (“The term ‘neglected child’ means a child: . . . whose parent, guardian, or custodian has failed to make reasonable efforts to prevent the infliction of abuse upon the child; . . . who is without proper parental care or control, subsistence, education, or other care or control necessary for his or her physical, mental, or emotional health . . . ”); N.Y. FAM. CT. ACT § 1012(f)(i)(B) (“Neglected child means a child younger than age 18 whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his or her parent or other person legally responsible for his or her care to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship . . . ”).


131. See Fugate, supra note 130, at 280 (“Many times the woman is abused herself, and courts may determine that a battered woman is guilty of failure to protect because her abuse at the batterer’s hands ought to have alerted her to the batterer’s tendency to violence.”).

132. Id. at 278 (“Every state has a statute imposing some form of criminal liability for passive child abuse, with classifications ranging from a misdemeanor, or a felony with a maximum sentence of up to five years, to the possibility, in child fatality cases, of a murder or manslaughter charge if the person has the requisite mens rea.”).
“women who fear prosecution (or a family court proceeding severing ties with their children) may not take the positive steps of reporting abuse, seeking medical care, or pursuing civil or criminal remedies to stop the abuse.”

In the trafficking context, the potential consequences of becoming involved with the child welfare system raises similar concerns and could mean that a parent will not seek specialized services for their child or reach out to law enforcement for assistance in locating a missing child.

Another critique of the use of the child protection system to provide services to victims of child sex trafficking is their gendered application. Historically, individuals charged with failure to protect are female. The domestic violence context again provides a helpful illustration. Women who “fail to protect” their children from witnessing domestic violence are sorted into the category of “bad mothers” who are responsible for their own victimization and “deserve to be punished.”

This narrative obscures the complicated situations rife with issues of control, poverty, and trauma, in which domestic violence, like trafficking, often occurs. Failure-to-protect laws rely on gendered stereotypes that penalize mothers for “not sacrificing everything, not knowing enough about her children, and leaving her children while she works.” They may force mothers who want services for their children to make the impossible choice between providing for their children economically and risking prosecution or child welfare intervention. This is hardly a sustainable choice for mothers hoping to protect their children from trafficking, and one that must be addressed without thrusting women into the criminal justice system.

V. A Public Health Approach to Trafficking

Although both the juvenile justice and child welfare systems aim to protect youth from sex trafficking, their limitations render them not only imperfect but, in many cases, actively harmful. Youth may return home from detention facilities having suffered additional trauma and perhaps more vulnerable to return to trafficking. On the other hand, the child welfare interventions may present an “oversimplified picture of youth involved in [domestic minor sex trafficking] as child victims of adult criminals, [which] obscures the many tensions, ambiguities, and uncertainties inherent in this work.” Under-resourced child welfare systems are not able to provide the necessary therapeutic and specialized services.

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133. Id. at 307-08.
134. Id. at 279-82 (comparing decades of liability for women failing to protect children from male abusers with relatively recent application of the same laws to abusive women with male partners).
135. Id. at 290.
136. See id. at 293 (discussing issues of lack of housing, financial support, fear, and an unsupportive criminal justice system as compounding factors in abusive situations).
137. Id. at 300.
138. Sapiro, supra note 41, at 108.
appropriate intervention must account for and reflect the varied circumstances that make youth vulnerable to trafficking and the various experiences that sustain the involvement. A public health approach can both provide these varied services to victims, and, ideally, contribute to the prevention of trafficking.

A public health approach to child sex trafficking requires child-facing systems that validate the experiences of the communities from which trafficked youth come, and address their needs through holistic services. This section suggests some specific programs communities can implement to both provide services to victims and work to prevent trafficking. It also highlights existing programs that serve youth at risk of and engaged in commercial sex work while embodying the principles of a public health approach to trafficking.

A. Public Health and Child Sex Trafficking

A public health approach to social issues involves understanding the problem from a holistic perspective and recognizing that there is no single solution to a social ill. Rather, recommendations must address individual and societal factors that contribute to the issue. A public health approach “de-emphasizes criminal sanctions and focuses on reshaping societal views and social behaviors. Law remains a critical tool, but its value is not limited to serving as a vehicle for punishment, and criminal law, while still necessary, is no longer the primary tool for preventing harm.” Previously employed in the HIV/AIDS context and currently advocated for in the opioid epidemic, a public health approach can help fill the gaps where the criminal justice system fails.

In the context of child sex trafficking, a public health framework would highlight the underlying causes of trafficking in the community to facilitate earlier interventions aimed at prevention and harm reduction. As described above, many youth engage in trafficking behavior due to exploitation or as a means of

139. See Marcus, supra note 40, at 243 (“[W]e fear that TVPA may undermine itself by creating a chasm between social service and law enforcement authorities and the many young sex workers and their third parties who could be the eyes and ears of antitrafficking in illicit and semiclandestine sex markets.”).
141. Id. (“At its roots, public health aims to identify potential harms to populations and ‘move upstream’ to identify the causes of these harms and prevent the harms from occurring in the first place.”).
142. Id. at 452-53.
143. See id. at 480-81 (“While a law-enforcement centric model is built on the assumption that criminal law sanctions provide a deterrent and will prevent further exploitation of certain individuals, research shows that criminal law is not the most effective tool for changing behavior. In a best-case scenario, a criminal law approach still deals with human trafficking only after the harm occurs.”).
144. See id. at 485 (“Addressing the root causes of trafficking—including poverty, lack of economic and social rights, discrimination, and other factors—is essential to making meaningful progress in preventing human trafficking.”).
survival.\textsuperscript{145} Whether a youth is initiated into trafficking by a pimp or exercises their agency to enter into sex work, they often do so for a perceived lack of alternatives.\textsuperscript{146} Effective services must create these alternatives and support youth, in a variety of ways, until they truly have a choice. Unlike detention, a public health approach prioritizes services for trafficking victims that alleviate constraints on the youth’s agency.

Studies show that effective interventions for trafficked children “must recognize their dignity and autonomy.”\textsuperscript{147} The goal should be returning to trafficking victims and retaining for all youth the power to make decisions about their bodies and their lives “without policing, punishment, or violence.”\textsuperscript{148} A common maxim in the public health and social work fields is that individuals are experts in their own lives. Services and government agencies should provide the basic foundation so that youth can access and act on that expertise.

Additionally, public health campaigns must engage community partners and leverage the knowledge of affected communities.\textsuperscript{149} This fundamental principle recognizes that affected communities have expertise about the forms of services and interventions that will work to prevent harm.\textsuperscript{150} Engaging communities ensures that programs will be culturally appropriate and will build on existing social and community networks to enable buy-in and participation.\textsuperscript{151} This kind of collaboration must occur at all levels of a decision-making structure and across multiple disciplines, incorporating law enforcement, child welfare agencies, community partners, schools, and families.

\textbf{B. Specific Recommendations}

Targeting the root causes of child sex trafficking requires individuals to think creatively about services and prevention. Advocates must not rely on the traditional juvenile justice and child welfare infrastructure to protect youth from sex trafficking. As the primary goal of a public health approach would be to intervene before youth are pulled into the trafficking system, communities must offer programs beginning when children are young and continuing into their teenage years. Such programs include universal childcare, therapeutic housing options, and trauma-informed counseling programs.

\textsuperscript{145} See Hanna, \textit{supra} note 17, at 13.
\textsuperscript{146} See id. (“Often, sex is a commodity that [trafficked children] trade for the most basic of needs because it is all they perceive that they have to offer.”).
\textsuperscript{147} Marcus, \textit{supra} note 40, at 243.
\textsuperscript{148} Phillips, \textit{supra} note 14, at 1673 (citing \textsc{Young Women’s Empowerment Project, Girls Do What They Have to Do to Survive: Illuminating Methods Used by Girls in the Sex Trade and Street Economy to Fight Back and Heal} 8 (2010), https://perma.cc/B5CH-ZDBY).
\textsuperscript{149} See Todres, \textit{supra} note 140, at 493.
\textsuperscript{150} See \textit{id.} at 494.
\textsuperscript{151} \textit{Id.} at 495.
3. Universal Childcare and Afterschool Programs

When Gina first entered the public defender office at the detention facility, she explained that her mother worked afternoons and nights, and that Gina and her two younger siblings would be left at home, either under Gina’s care or her aunt’s care. This was a makeshift solution, and one that was unsustainable for a twelve-year-old. It was a solution out of necessity and not one that her mother would have freely chosen. Her mother was torn between trying to earn enough money to put food on the table and supervising her children. Gina’s family’s story is the story of many low-income families. To prevent other parents from having to make another impossible choice, states should institute a universal childcare program for younger children and afterschool programs for older youth.

A study by Child Care Aware of America, an advocacy organization for childcare services, found that the average yearly cost of childcare in the United States is between $9000 and $9600 per child. For families with multiple children or families living under the federal poverty line, the high costs are simply prohibitive. Families may turn to informal care networks, which could be inconsistent and temporary, or to older siblings as caregivers. As a result, many children may fall through the cracks, making them more vulnerable to exploitation by traffickers. Universal childcare, or at a minimum expanded funding for child care for low-income families, can ensure that parents can work without fear, and that children are not left unsupervised and unengaged.

For older youth, cities should institute free afterschool programs close to youths’ homes. These programs should not simply warehouse youth until the evening, but must be engaging so that youth want to participate in the program. Programs where youth are paid a small stipend for consistent attendance at afterschool programs offer a model other cities can follow. These are tailored


154. See id. at 11.


156. See GEORGIA HALL, LAURA ISRAEL, JOYCE SHORTT, NATIONAL INSTITUTE ON OUT-OF-SCHOOL TIME, IT’S ABOUT TIME! A LOOK AT OUT-OF-SCHOOL TIME FOR URBAN TEENS 7 (2004) (The After School Matters (ASM) program in Chicago, Illinois offers an apprenticeship program for high school students. The program “strives to prepare youth for jobs, in addition to providing health and fitness oriented clubs. Youth who participate in ASM apprenticeships receive a 10-week stipend.”); see also LAURA HARRIS, NATIONAL GOVERNOR’S ASSOCIATION FOR BEST PRACTICES REDUCING DROPOUT RATES THROUGH EXPANDED LEARNING OPPORTUNITIES 4 (2011) (“Students with just one supportive relationship with a caring adult early in high school are more likely to be doing well in terms of health, economic security, and community involvement at the end of high school. Qualified ELO program staff can help motivate students who may feel isolated, disconnected, and unsuccessful during the
to youth’s interests and include more programming than just academic or homework assistance. Studies found that out-of-school programs, such as the After School Matters program in Chicago, can help raise the high school graduation rate and can provide additional supports to students who are at risk of dropping out. Through improved afterschool programming, communities can prevent youth from turning to high-risk and exploitative opportunities traffickers may offer.

Older youth can also benefit from mentoring. One study found that “youths with a mentor are 53 percent more likely to advance to the next level of education than are youth who do not have a mentor.” Additionally, mentoring programs reduce exposure to high-risk behaviors and negative relationships. The relationships youth develop through mentoring programs can help them stay in school and serve as an example of a positive relationship.

4. Trauma-Informed Programs

Trauma interacts cyclically with child sex trafficking: prior trauma makes a youth more vulnerable to trafficking and trafficking only imposes additional trauma on the youth. Both preventive services under a public health framework and protective services after the harm has occurred must be trauma-informed. This means that services, whether relating to substance abuse, mental health, or parenting, must be cognizant of the experiences of trafficking victims. More specifically, they must be aware of the specific developmental needs and barriers for this population, such as challenges children face when forming healthy relationships and bonds. Trauma-informed services must be client-centered, “highlighting the client’s right to self-determination in her recovery process, emphasizing the client’s strength and resilience, recognizing the cultural uniqueness of each client, and consistently involving the client in a collaborative relationship.” Although trauma-informed practices originated in the mental health sphere, the core principles may be applied to various types of services for

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158. See Harris, *supra* note 156, at 5 (“A recent study found that that while attending a high-quality preschool alone boosts the graduation rate for disadvantaged students from 41 percent to 66 percent, investing in additional supports as these children age can raise the graduation rate from 66 percent to 91 percent.”). Harris further observes that participants in the ASM program had lower dropout rates and missed fewer days of school than those who did not participate. See *id.* at 8.
159. Todres, *supra* note 140, at 483.
160. See *id.*
trafficking victims.

Sociologists have drawn parallels between sex trafficking and substance abuse issues, noting that the process of exiting or leaving an exploitative situation may take many iterations and attempts. Service providers should understand this concept of the “revolving door as a reality of providing services to this population and not as an indictment of a program’s success or failure.” Instead of pushing youth out of the program for noncompliance, trauma-informed services will instead acknowledge that disruption as part of the process.

One of the most important services that must be offered to youth at-risk of or engaged in trafficking is counseling and mental health care. Mental health services must be tailored to the particular needs of each individual youth, instead of a generic referral to counseling programs. That is, the choice of modality of therapy, whether Cognitive Behavioral Therapy (CBT), Multisystemic Therapy (MST), or Functional Family Therapy (FFT), must be cognizant of the youth’s needs, strengths, and available resources. Whether working with youth struggling with difficult home environments or with youth who have already left their homes and been subjected to trafficking, counseling services must be appropriate for each child’s situation. For some youth, this may be individual psychotherapy, while other youth may benefit from group sessions involving peer counseling. Youth often prefer to seek advice from peers rather than from adults, who may talk down to them. Peer counseling sessions can incorporate mental health services while also encouraging positive relationships with youth who have endured similar hardships. These programs help further the goal of empowerment by helping youth retain control over and participate in decisions made about them.

Lastly, the physical space for these services must be tailored to the needs of this population. Services must be accessible and inviting, located within the community and staffed by community members. A successful program is one where “kids are enriched and educated and comfortable and are not locked off in the world but are integrated back into it—holding anyone in a facility just to hold them [does not] do anything.” As explored above, one of the issues with detention facilities is that they mimic the experience of being trafficked—locked in one place and isolated from the community, with every minute controlled. Youth must be free to come and go, and the space should be comforting and warm.

163. See Sapiro, supra note 41, at 105.
164. Id.
165. See id. (One component of a trauma-informed practice is an outcome or success metric that takes into account the specific nature of the trafficking phenomena. Specifically, that youth may initially seek services and return to the trafficking situation through the “revolving door.” However, this is not an indictment of the program, but the reality of the trafficking problem.).
167. Sapiro, supra note 41, at 106.
Providers may elect to have hygiene facilities and hot meals for youth who may not be able to return home, or for those youth may have previously turned to sex work as a means of survival.

5. Therapeutic Safe Houses for Youth Unable to Return Home

Realistically, there are going to be some cases when youth cannot remain in their homes, whether due to abuse or neglect, death of parents or guardians, or other reasons. Under those circumstances, the child welfare system will likely intervene due to mandatory reporting laws and other legal obligations. Traditional congregate care settings, or placements such as group homes that house multiple youth, are ill-suited to the particular needs of youth who have been trafficked, and may in many ways resemble detention. Child welfare systems must offer therapeutic safe houses for youth victims of sex trafficking. These safehouses, which should not have lockdown capacity, may be best positioned to provide the “most efficient solution to the services problem.”

Placements can offer all necessary services either in the facility or close to the facility to ensure that youth have access to the services. Youth can receive around-the-clock support and intensive mental health services from staff and providers who visit the placement. In some circumstances, these placements may serve as a temporary respite from potentially harmful family dynamics. Not only do these placements offer critical assistance, but they address the housing concerns that may lead justice systems to detain youth.

6. Responding to Critiques

The most common critique is that such specialized services and programs are expensive and would require significant investment from the government or from private foundations and donors. According to a 2014 study by the Justice Policy Institute, the average cost of detaining an individual child in the United States is $407.58 per day, with the highest daily cost in New York of $966.20 and the lowest daily cost in Louisiana of $127.84. The report also listed the average yearly cost per child as $148,767, which is significantly higher than localities

169. See, e.g., What are the outcomes for youth placed in congregate care settings?, CASEY FAMILY PROGRAMS (Feb. 5, 2018), https://perma.cc/LNZ2-9QTD; see also “Reducing Congregate Care,” ANNIE E. CASEY FOUNDATION (Apr. 4, 2012), https://perma.cc/7FNA-TTTF (“According to Casey data, congregate care placements cost child welfare systems three to five times the amount of family-based placements.”).

170. Brittle, supra note 109, at 1372.

171. See id.

172. JUSTICE POLICY INST., STICKER SHOCK: CALCULATING THE FULL PRICE TAG FOR YOUTH INCARCERATION 11 (2014) (In Gina’s case in the District of Columbia, detaining a youth costs the government $761.00 per day ($277.765 per year). In California, the cost is $570.79 per day ($208,338 per year)).
spend on education per pupil.\textsuperscript{173} If the juvenile justice system were to cease its practice of detaining victims of sex trafficking, that money could be repurposed to cover the costs of specialized preventive services. Those funds must be channeled toward providing housing and services that actually address the particularized needs of this population.

C. Model Programs

A public health framework requires that each program or intervention be specifically tailored to fit the needs of the particular community. Each city may adopt a different set of priorities depending on the specific risk factors associated with that community. Nevertheless, child advocates and survivors of child sex trafficking have developed successful community programs and drop-in centers in major US cities. Each of these programs described below incorporates survivors and youth into their programming, and each program promises a safe and comfortable environment not conditioned on compliance with law enforcement.

First, Courtney’s House, a drop-in center for commercially sexually exploited children in Washington, D.C., was founded by Tina Frundt, a leading advocate for CSEC youth and a survivor herself. In addition to offering a comfortable space for youth to spend time, Courtney’s House provides “survivor-focused, trauma-informed holistic services.”\textsuperscript{174} Although the program receives some referrals from the child welfare and juvenile justice systems, it provides an individualized assessment at intake.\textsuperscript{175} Courtney’s House does not require that clients are referred through a court-based program. In fact, Courtney’s House staff travel to high-risk areas on Friday and Saturday nights to offer information about the survivor hotline to potentially trafficked youth.\textsuperscript{176} Courtney’s House has been widely recognized, most notably by President Obama, for its nonjudgmental atmosphere and its tailored services.\textsuperscript{177} With additional funding, Courtney’s House could reach more survivors.

In California, two organizations have garnered national attention for their innovative and nonjudgmental programs. The first, Children of the Night in Los Angeles focuses on emergency interventions to pull youth from dangerous trafficking situations whenever they request assistance, no questions asked.\textsuperscript{178} The program then continues to work with the youth through intensive, individualized case management services including mental health services, benefits assistance,
transitional housing, and referrals to legal aid providers.\textsuperscript{179} Second, Larkin Street Services in San Francisco targets the broader population of homeless and runaway youth, offering both a drop-in center and transitional shelter housing.\textsuperscript{180} The case management staff work with each youth to develop individualized plans for permanent housing, employment, and educational goals.\textsuperscript{181} Empowerment is at the core of both of these programs, as youth drive the service planning process and decide for themselves their goals and level of engagement.\textsuperscript{182}

In Chicago, the Young Women’s Empowerment Project (YWEP) is an entirely youth-run cooperative organization focused on harm reduction and peer education.\textsuperscript{183} All staff were formerly involved in sex work and are between the ages of twelve and twenty-four.\textsuperscript{184} YWEP offers weekly drop-in hours for any female-identifying youth to pick up free clothing, clean syringes, or condoms.\textsuperscript{185} For youth interested in job-placement and education programs, YWEP will refer the young girls to trusted service providers.\textsuperscript{186} YWEP does not interact with law enforcement or the court systems, instead offering young girls the freedom to engage with other survivors without any fear of justice-system involvement.\textsuperscript{187}

Lastly, Girls Educational & Mentoring Services (GEMS) in New York is widely applauded for their “Victim, Survivor, Leader (VSL)” model of services.\textsuperscript{188} Under this model, young girls are trained to be mentors and leaders in their own communities.\textsuperscript{189} Services are survivor-led, strengths-based, and trauma-informed, ensuring that each young girl receives programming most appropriate for her. Unlike YWEP, however, GEMS provides crisis-care services, including transitional housing and court advocacy, in addition to the peer leadership program.\textsuperscript{190}

Central to each of these programs are youth empowerment and nonjudgmental, trauma-informed services. Not only do young people have the ability to decide their own service engagements, but they are also empowered to participate in system-wide advocacy. They are not treated as offenders or victims in need of pity, but as experts in their lives, entitled to respect and dignity. Access to these programs is not conditioned on compliance with services or with law enforcement. Rather, they evince the trauma-informed principles, recognizing the unique needs of child trafficking victims. These programs, if sufficiently funded

\textsuperscript{181}. \textit{Id}.
\textsuperscript{182}. \textit{Id}.
\textsuperscript{183}. \textit{About, YOUNG WOMEN’S EMPOWERMENT PROJECT}, https://perma.cc/9QZ3-Y953.
\textsuperscript{184}. \textit{Id}.
\textsuperscript{185}. \textit{Id}.
\textsuperscript{186}. \textit{Our Values, YOUNG WOMEN’S EMPOWERMENT PROJECT}, https://perma.cc/7NGP-SSHK.
\textsuperscript{187}. \textit{Id}.
\textsuperscript{188}. GIRLS EDUCATIONAL & MENTORING SERVICES, https://perma.cc/XY8P-J6KL.
\textsuperscript{189}. \textit{Id}.
\textsuperscript{190}. \textit{Id}.
and replicated, could eliminate the need for drastic detention-as-protection practices. Jurisdictions should learn from model organizations to appropriately support currently and formerly commercially exploited youth.

**CONCLUSION**

While the problem of commercial sexual exploitation of children is highly complex, it is clear that neither detaining youth in secure facilities to “protect them” nor placing them in the custody of the child welfare system is the solution. Youth who have already experienced significant trauma and abuse should not be subjected to additional abuse in detention simply because judges feel as if they have no other option. The child welfare system, while an improvement over the juvenile justice system, still falls short of its promise to protect youth, as many trafficking victims had previously been in the child welfare system.

Instead, governments should use a public health framework to address trafficking. This framework does not fault youth or their parents for trafficking, but instead targets its root causes. At a fraction of the cost of detaining a young person, programs such as universal childcare, mentoring and afterschool programs, and trauma-informed mental health services can fill the gap left by the criminal justice system. By listening to affected communities and understanding their true needs, jurisdictions can help mitigate the risk factors that make youth vulnerable to trafficking. The 2018 reauthorization of the Juvenile Justice and Delinquency Prevention Act, titled the “Juvenile Justice Reform Act of 2018,” is a small step in the right direction, requiring juvenile justice agencies to screen for human trafficking concerns. But there is significant work still to be done, beginning with removing the valid court order exception and providing funding for creative, preventive services for youth at risk of trafficking.

Stories like Gina’s are not unique. There are many circumstances where children are detained because society believes it has no better options. Runaway youth are arrested and detained oftentimes to protect them from the street. In each of these situations, children are fleeing from something, knowing that the possibility of trafficking and detention may be better than where they came from. However, the harms of detention are too serious for it to be used as a form of protection. Governments must instead invest in survivor-led, community-based alternatives proven effective at addressing the underlying vulnerabilities of victims.

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191. KRISTIN FINKLEA & MATTHEW W. NESVET, CONG. RESEARCH SERV., IN11076, JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT (JJDPA) FORMULA GRANT REAUTHORIZATION 1 (2019).
The First Amendment and the Future of Conversion Therapy Bans in Light of National Institute of Family and Life Advocates v. Harris

James Hampton

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INTRODUCTION

“I was told that my faith community rejected my sexuality; that I was the abomination we had heard about in Sunday school; that I was the only gay person in the world; that it was inevitable I would get H.I.V. and AIDS.”¹ These were just some of the harsh words Sam Brinton, head of advocacy and government affairs at the Trevor Project, endured from a conversion therapy counselor when he was a middle-schooler in Florida.² Brinton was not only subjected to talk-therapy sessions, but also strapped to a table and ordered to have “ice, heat and electricity applied to [his] body.”³ “[He] was forced to watch clips on a television of gay men holding hands, hugging and having sex. [He] was supposed to associate those images with the pain [he] was feeling to once and for all turn into a straight boy.”⁴ Brinton’s family belonged to the Southern Baptist Church and believed that conversion therapy could cure his sexuality.⁵ It did not cure him, but it did cause a “permanent tear” in his relationship with his parents.⁶

Conversion therapy is a practice used on LGBTQ people to try to “alter same-sex attractions or an individual’s gender expression with the specific aim to promote heterosexuality as a preferable outcome.”⁷ Many medical organizations in the United States, including the American Psychiatric Association, the American Academy of Child & Adolescent Psychiatry, and the American Psychiatric Association Commission on Psychotherapy by Psychiatrists have condemned the practice, finding no scientific evidence to support therapies premised on the idea that “sexual orientation, gender identity, and/or gender expression is pathological.”⁸ In fact, many of these organizations have found that conversion therapy is harmful when used on adolescents and can be life threatening.⁹ In response to new studies being conducted on the effects of conversion therapy, cities and states have started passing legislation prohibiting practicing conversion therapy on minors.

On June 26, 2018, the United States Supreme Court issued its opinion in National Institute of Family & Life Advocates v. Becerra (“NIFLA”), which struck down a California law requiring clinics that provide pregnancy services to publicize certain notices on the grounds that the ordinance violated those clinics’ First Amendment right to freedom of speech.¹⁰ The Ninth Circuit had previously

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2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
8. Id.
9. Id. at 2.
10. 585 U.S. __, 138 S. Ct. 2361 (2018). Licensed clinics were required to disclose to clients that they provide services such as abortions and contraceptives. Unlicensed clinics were required
upheld the law, finding that it regulated a category of speech called “professional speech,” and was thus only entitled to intermediate scrutiny. The court defined professional speech as speech that occurs between a professional and their client “in the context of their professional relationship.” As such, the court only analyzed the statute under intermediate scrutiny, as opposed to strict scrutiny. The Supreme Court criticized the Ninth Circuit’s opinion for holding that all speech uttered by a professional is always entitled to intermediate scrutiny. In reaching its decision, the Supreme Court noted that other circuit courts have reviewed professional speech under intermediate scrutiny. Of those circuit court decisions, two involved the constitutionality of conversion therapy laws.

The \textit{NIFLA} decision raises serious questions regarding the constitutionality of conversion therapy bans: Do laws banning conversion therapy violate the First Amendment? And what level of scrutiny applies when deciding this question? This Article concludes that conversion therapy bans should be reviewed under intermediate scrutiny and are constitutional. In reaching this conclusion, this Article first discusses the history of conversion therapy and the current legal landscape for such laws. Next, it breaks down the \textit{NIFLA} decision and examines other existing precedent on conversion therapy bans. This Article then examines a split in the United States District Courts of Florida to show how courts are examining conversion therapy laws in light of \textit{NIFLA}. Lastly, this Article explains the implications of the pending litigation and why intermediate scrutiny is the correct standard of review.

\textbf{I. A Brief History of Conversion Therapy}

In this Section, I will describe the origins of conversion therapy and how members of the medical community have used it on members of the LGBTQ community. I will further describe academic studies that have been conducted on conversion therapy and the findings of those studies.

\textbf{A. The Origins of Conversion Therapy and How it is Used Today}

During the late 1800s, doctors and other medical professionals in Europe began examining and conducting studies on gender-nonconforming individuals, focusing on both their gender and their sexuality. Richard von Krafft-Ebing, a psychiatry professor at the University of Vienna, began treating gay men in 1888 to disclose to clients that they were not a licensed clinic. \textit{Id.} at 2368–70.


12. \textit{Harris}, 839 F.3d at 839.


14. \textit{Id.} at 2371.

15. \textit{Id.} See King v. Governor of the State of New Jersey, 767 F.3d 216, 232 (3rd Cir. 2014), \textit{abrogated by Becerra, 138 S. Ct. at 2361; Pickup v. Brown, 740 F.3d 1208, 1228 (9th Cir. 2014), abrogated by Becerra, 138 S. Ct. at 2361.}
using “hypnotic suggestion therapy.” Krafft-Ebing considered homosexuality to be a “degenerative disorder” or a “psychiatric disorder” despite his belief that one might be born gay. Krafft-Ebing’s work, and the work of other psychiatric physicians, sparked a movement suggesting that homosexual behavior could be cured, framing it as an illness rather than a criminal offense. At the time of these psychiatrists’ work, most countries, including the United States, had anti-sodomy laws and treated homosexual acts as criminal. Homosexuality began to be categorized as pathological: that “some internal defect or external pathogenic agent causes homosexuality” whose symptoms needed to be attended to by mental health professionals. By the mid-1900s, this view of homosexuality made its way to the United States and prominent figures in the medical field began using conversion therapy.

The psychological framework for understanding homosexuality came to the United States in part through the work of Sandor Rado, a Hungarian émigré. Rado believed that “heterosexuality was the only biological norm and reconceptualized homosexuality as a ‘phobic’ avoidance of the other sex caused by inadequate parenting.” This idea, however, contradicted the work of Sigmund Freud. Freud believed that everyone was born bisexual and people became homosexual due to conditioning rather than disease. He urged against attempts to “cure” homosexuality. Nonetheless, members of the psychiatric community in the United States began conducting experiments where they tried to cure people of their homosexual tendencies. In the 1950s, Samuel Hadden, a professor at the University of Pennsylvania and a psychiatrist, attempted to use group psychotherapy to cure homosexuality. Hadden claimed that the experiments were a success, reporting that over four to eight years, his patients “shared and interpreted each other’s dreams, cast aside their ‘flamboyant’ clothes and manners, worked through their hostilities and neuroses, and began dating women.”

This conception of homosexuality—as a disease that should be cured—was further entrenched by the publication of the Diagnostic and Statistical Manual (“DSM”). In 1952, the American Psychiatric Association published its first DSM which listed all of the conditions psychiatrists considered to be mental disorders. With growing support from the medical community that homosexuality could be

18. It was not until the 2003 Lawrence v. Texas decision that anti-sodomy laws were declared unconstitutional. 539 U.S. 653 (2003).
19. Drescher, supra note 17, at 566.
20. Id. at 569.
22. Id.
23. Id.
24. Drescher, supra note 17, at 569.
cured, the American Psychiatric Association classified homosexuality as a “sociopathic personality disturbance.”

In the 1960s, psychologists and psychiatrists began using different types of “treatments” to try to change an individual’s sexual orientation. Therapists would use “a variety of aversion treatments, such as inducing nausea, vomiting, or paralysis; providing electric shocks; or having the individual snap an elastic band around the wrist when the individual became aroused to same-sex erotic images or thoughts.” Aversion therapy was used to condition someone to dislike same-sex attraction by pairing a certain stimulus, such as a picture of a same-sex couple kissing, with an unpleasant stimulus, such as electric shocks or induced vomiting. Other commonly used methods included “covert sensitization, shame aversion, and orgasmic reconditioning.” Some psychiatrists went as far as subjecting their patients to lobotomies. Robert Galbraith Heath, a prominent psychiatrist in New Orleans, pioneered a technique that involved shocking his patients through electrodes implanted directly in the brain.

After the Stonewall Riots in 1969, the nascent movement to remove homosexuality from the DSM gained strength. In 1973, the American Psychological Association (“APA”) did an internal evaluation of its publications on homosexuality and voted to remove homosexuality as a psychiatric disorder. The APA also made a public statement of support for protections for the gay community in “employment, housing, public accommodation, and licensing, and the repeal of all sodomy laws.” A year later, the American Psychiatric Association affirmed the APA’s resolution and stated that “homosexuality per se implies no impairment in judgment, stability, reliability, or general social and vocational capabilities.” Concurrent with the APA’s stance against conversion therapy, members of the medical community began to question whether

25. Id.
27. Id.
28. Id.
29. Robert Colville, The ‘gay cure’ experiments that were written out of scientific history, MOSAIC (July 4, 2016), https://www.permca.cc/Z32T-VD5Z.
30. Id.
31. AM. PSYCHOL. ASS’N TASK FORCE, supra note 26, at 23. On Tuesday, June 24, 1969, New York City police raided the Stonewall Inn, a gay club, to pull out employees, bar patrons and neighborhood residents. After the raid, word spread and people from across the country came to protest at the Stonewall Inn. The protests lasted for six days and involved flights between police and protesters in front of Stonewall and around neighboring streets. Emanuella Grinberg, How the Stonewall riots inspired today’s Pride celebrations, CNN (June 28, 2019), https://perma.cc/UE7Y-9RBW.
32. AM. PSYCHOL. ASS’N TASK FORCE, supra note 26, at 23.
33. Id.
34. Id. at 24.
conversion therapies were “inappropriate, unethical, and inhumane.”\textsuperscript{35} Overall, the removal of homosexuality from the DSM dramatically decreased the belief among scientific communities that an individual’s sexual orientation could be cured. This shift was further hastened by the fact that empirical evidence showed that conversion therapy simply did not work.\textsuperscript{36}

B. Conversion Therapy is Ineffective and Harmful

In 2009, the APA created a taskforce to review conversion therapy practices, articles, and studies done on conversion therapy from 1960 to 2007.\textsuperscript{37} The taskforce concluded that “enduring change[s] to an individual’s sexual orientation [are] uncommon and that a very small minority of people in these studies showed any credible evidence of reduced same-sex attraction.”\textsuperscript{38} In addition, some participants in conversion therapy reported that they were harmed by the practice. There were reports of losing “all sexual feeling,” experiencing severe depression, and suicidal ideations.\textsuperscript{39} Other participants reported difficulty with social and emotional intimacy, anxiety, and sexual dysfunction.\textsuperscript{40}

Despite the condemnation of conversion therapy by the APA, the voice of mainstream psychological practice in America, conversion therapy is still practiced by politically and religiously conservative organizations that refuse to accept or tolerate LGBTQ people.\textsuperscript{41} In some conservative religious groups, if a member has same sex desires, the group encourages the member to “[renounce] their homosexuality and seek ‘healing’ or change” rather than expelling or removing the member.\textsuperscript{42} Churches and religious groups have developed programming targeted at distressed individuals whose families hold negative views of homosexuality.\textsuperscript{43} These programs include Homosexuals Anonymous, Metanoia Ministries, and Love in Action.\textsuperscript{44} In addition to these religious organizations, some psychologists and family therapists with no religious affiliation also continue to practice conversion therapy.\textsuperscript{45}

\textsuperscript{35} Id.
\textsuperscript{36} Id at 27-28.
\textsuperscript{37} AM. PSYCHOL. ASS’N TASK FORCE, supra note 26, at 2.
\textsuperscript{38} Id. at 43.
\textsuperscript{39} Id. at 41-42.
\textsuperscript{40} Id. at 42.
\textsuperscript{41} Id. at 25.
\textsuperscript{42} AM. PSYCHOL. ASS’N, supra note 26, at 25.
\textsuperscript{43} Id.
\textsuperscript{45} For example, David Pickup, LMFT, a “Reintegrative Therapist,” whose personal website is available at https://www.davidpickuplmft.com/ [https://www.perma.cc/Z769-XCG9].
II. The Statutory Landscape of Conversion Therapy Laws

In this Section, I will describe state and federal laws that have been passed that limit the practice of conversion therapy. Based on the research done by the APA and the stance the APA and other psychiatric organizations have taken against conversion therapy, sixteen states and the District of Columbia have passed laws that ban conversion therapy practices on minors. These laws vary in their scope, both in terms of who is covered and which acts are prohibited. New York is one of the most recent states to prohibit conversion therapy and its law is paradigmatic. The law states:

[It is] professional misconduct for any mental health professional to engage in sexual orientation change efforts upon any patient under the age of eighteen years, and any mental health professional found guilty of such misconduct . . . shall be subject to the penalties [described in the statute].

Delaware’s law goes a step further by making it a crime for an in-state medical professional to even refer a patient to someone out-of-state for conversion therapy services. Connecticut and Rhode Island also prohibit the expenditure of state funds for conversion therapy. Finally, the District of Columbia expands on other conversion therapy bans by banning conversion therapy against adults “for whom a conservator or guardian has been appointed.”

However, conversion therapy bans typically contain a broad religious exemption. Most conversion therapy bans do not apply to “religious or spiritual advisors” who practice conversion therapy “within their pastoral or religious capacity.” This means that anyone “(including licensed professionals) may

46. California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington and Massachusetts. These state bans are directed at therapists, rather than punishing parents for voluntarily or involuntarily taking their children to conversion therapy.
47. See Conn. Gen. Stat. Ann. § 19a-907a (2018) (no health care provider may practice conversion therapy); N.H. Rev. Stat. Ann. § 332-L:2(1) (2018) (anyone who is licensed to provide professional counseling, “including, but not limited to, a nurse, physician assistant, physician, psychologist, clinical social worker, clinical mental health counselor, marriage and family therapist, or licensed alcohol and drug counselor, or a person who performs counseling as part of the person’s professional training for any of these professions, may not practice conversion therapy”).
52. These exemptions have been confirmed by courts. See Pastors Protecting Youth v. Madigan, 237 F. Supp. 3d 746, 750 (N.D. Ill. 2017) (holding pastors lacked standing to challenge the constitutionality of Illinois’ conversion therapy ban because the law only applies to “mental health professionals or those who deceptively advertise conversion therapy for commercial purposes”).
engage in conversion therapy as long as they are acting as clergy or religious counselors and they do not hold themselves out as acting pursuant to a professional license.”54 Additionally, in states whose law only bans providing conversion therapy for payment, religious or spiritual advisors may provide conversion therapy as long as they are acting within their religious capacity and “do not accept payment for their services.”55

Despite the increasing state interest in conversion therapy bans and growing research on the harms of conversion therapy, thirty-five states still have no law banning conversion therapy. However, some cities and counties within these states have enacted local ordinances that ban the practice on minors. For example, in 2019, Denver became the first city in Colorado to pass a conversion therapy ban. The Denver ban makes it “[u]nlawful for any provider to provide conversion therapy or reparative therapy to a minor, regardless of whether the provider receives compensation in exchange for such services.”56

Penalties for violation of the ordinance range from a $150 to $999 fine.57 Mayor Michael Hancock stated that the ordinance “is aimed at state-licensed therapists, operating their practice in the city, who are falsely claiming that being gay or transgender is a mental illness, and therefore taking advantage of parents and harming vulnerable youth.”58

Even Congress has moved to end conversion therapy, albeit unsuccessfully. On April 25, 2017, Senator Patty Murray introduced the Therapeutic Fraud Prevention Act of 2017 in the Senate.59 The act would have made it illegal for any individual or entity to receive compensation for providing or “knowingly assist[ing] or facilitat[ing] the provision of conversion therapy.”60 Because it did not differentiate between a religious advisor and a licensed professional, the act would have been the first piece of federal legislation to place an outright ban on conversion therapy, although it would not have barred people from providing conversion therapy services for free.61 There were thirty-four cosponsors of the bill, but it did not make it out of committee.62

Since the Therapeutic Fraud Prevention Act of 2017, there have been several other efforts to ban conversion therapy at the federal level. On March 28, 2019, Representative Sean Maloney introduced the Prohibition of Medicaid Funding for Conversion Therapy Act, which would amend title XIX of the Social Security Act

54. Id.
55. Id.
56. DENVER ORDINANCE SEC. 28-257(a) (2019).
57. Id.
60. Id. § 4(a)(3).
61. Id. §§ 4(a), 4(a)(1).
62. Id.
and prohibit all payments under Medicaid for conversion therapy. The bill was referred to the Committee on Energy and Commerce and no action has been taken since. Senator Murray also re-introduced the Therapeutic Fraud Prevention Act on June 27, 2019 and it was referred to the Senate Committee on Commerce, Science, and Transportation. Representative Ted Lieu introduced a companion bill on the same day, which was referred to the House Committee on Energy and Commerce. While these attempts at federal bans on conversion therapy are just at their beginning stages, a number of state bans have already faced court challenges.

III. Pre-NIFLA Litigation

In this Section, I describe the general precedent of the First Amendment right to free speech in the commercial and medical context because that is the constitutional frameworks the courts have been using to analyze conversion therapy bans. I then describe several important cases where the courts examined the constitutionality of conversion therapy bans prior to the Supreme Court’s case in NIFLA. Finally, I analyze the constitutional frameworks used and explain the different outcomes the courts reached.

A. The First Amendment Right to Free Speech in the Professional Context

The First Amendment to the United States Constitution, incorporated to apply to the states through the Fourteenth Amendment, prohibits any state from passing a law that abridges the freedom of speech. Under existing First Amendment jurisprudence, when a state passes a law that limits speech based on its content, it is presumed to be unconstitutional. In most cases, the only way that such a law will be upheld is if the state that passed the law proves it survives strict scrutiny, which is that the law must be “narrowly tailored to serve a compelling state interest.” But when the state passes a law that regulates the speech of professionals, the constitutional framework changes.

Essentially, courts have examined laws that regulate the speech of professionals on a continuum. At one end of the continuum are laws that regulate
professionals’ public dialogue. These laws are reviewed under the strict scrutiny standard described above. In the middle of the continuum are laws regulating professionals’ speech within the confines of a professional relationship, which are reviewed under intermediate scrutiny. Intermediate scrutiny requires speech restrictions to “directly advance a substantial government interest and is not more extensive than is necessary to serve that interest” in order to be constitutional. At the far end of the continuum are laws that regulate professional conduct and whose effects on speech are only incidental. At this end of the continuum, laws are reviewed under the rational basis test and will be upheld if they “bear[] a rational relationship to a legitimate state interest.” The cases below give a more in-depth analysis of professional speech and how each court determined what constitutes professional speech in the context of conversion therapy bans.


In Pickup v. Brown and Welch v. Brown, groups of plaintiffs who wanted to provide or receive conversion therapy filed suit in two separate cases in the Eastern District of California challenging the constitutionality of California’s ban on conversion therapy. Both sets of plaintiffs argued the statute was a violation of their First Amendment rights. In Welch v. Brown, the district court granted the plaintiffs’ motion for a preliminary injunction, holding that plaintiffs would suffer irreparable harm in the absence of an injunction. In Pickup v. Brown, the district court denied the plaintiffs’ motion for the same relief, holding that they were unlikely to succeed on any of their claims. On appeal, the cases were heard together before the Ninth Circuit.

The Ninth Circuit reversed Welch and affirmed Pickup, holding that California’s conversion therapy ban regulated professional conduct and thus did not violate the plaintiffs’ right to free speech. The Ninth Circuit held that California’s conversion therapy ban was the “regulation of professional conduct, where the state’s power is great, even though such regulation may have an incidental effect on speech.” The Ninth Circuit reasoned that the California statute banned a form of medical treatment on minors, and that “the fact that speech may be used to carry out those therapies does not turn the prohibitions of conduct into prohibitions of speech.” The Ninth Circuit also noted that talk
therapy does not receive special First Amendment protection just because it is carried out through speech, and thus the California statute had only an incidental effect on plaintiffs’ free speech rights.82

After determining that the conversion therapy ban regulated conduct rather than speech, the Ninth Circuit held that the California statute was only subject to rational basis review and “must be upheld if it “bear[s] . . . a rational relationship to a legitimate state interest.”83 Accordingly, the Ninth Circuit held that California had a legitimate interest in protecting the physical and mental well-being of minors.84 When deciding whether the California Legislature had acted rationally, the Court noted that it relied on the reports and recommendations of many professional organizations such as the Task Force of the APA, the American Academy of Pediatrics, and the American Psychoanalytic Association, all of which oppose the use of conversion therapy on minors.85 Because there was a plausible reason for California to enact the conversion therapy ban, the Ninth Circuit ruled that the statute did not violate plaintiffs’ right to free speech.86

C. King v. Governor of the State of New Jersey

In King v. Governor of the State of New Jersey, individuals and organizations that provided conversion therapy services challenged New Jersey’s ban on conversion therapy.87 The plaintiffs alleged that the ban violated their First Amendment rights to freedom of speech and free exercise of religion and sought an injunction to prevent enforcement of the conversion therapy ban.88 The trial court rejected both claims and held that, as in Pickup v. Brown, the conversion therapy ban regulated conduct, not speech, and thus was not a violation of the plaintiffs’ right to free speech.89

The Third Circuit affirmed the district court’s decision but disagreed with its analysis. The Third Circuit, unlike the Ninth Circuit in Pickup, held that New Jersey’s conversion therapy ban did regulate speech and was thus subject to stricter scrutiny than the rational basis test employed by the district court.90 The court reasoned that those who provide conversion therapy are using speech to provide a specialized service designed to alter client’s behaviors and thoughts, and

82. Id. at 1056.
83. Id. (quoting NAAP v. Cal. Bd. of Psychology, 228 F.3d 1034, 1049 (9th Cir. 2000)).
84. Pickup, 728 F.3d at 1057.
85. Id.
86. Id.
87. 767 F.3d 216, 220 (3d Cir. 2014).
88. Id. at 222.
89. Id. at 223. The State tried to argue that because conversion therapy or “talk therapy” was being used as a treatment, it became conduct. The Court of Appeals disagreed and noted that the State lacked any authority from the Supreme Court that “characterized verbal or written communications as ‘conduct’ based on the function these communications served.”
90. Id. at 235.
thus it fell under the category of professional speech.\textsuperscript{91} 

In analyzing the protection that professional speech is entitled to, the court compared professional speech to commercial speech, which is “truthful, non-misleading speech that proposes a legal economic transaction.”\textsuperscript{92} The court examined previous commercial speech cases which held that commercial speech is entitled to some degree of protection under the First Amendment because it encourages the “free flow of commercial information” where the general public has a strong interest.\textsuperscript{93} However, that protection is diminished because commerce is an area that is “traditionally subject to government regulation” and the state has the duty to protect its citizens from harmful, dangerous, and deceptive products.\textsuperscript{94} Similar to commercial speech, the Third Circuit held that professional speech was entitled to some protection under the First Amendment because professionals “have access to a body of specialized knowledge” and professional speech serves as a channel for that knowledge to be communicated to the public.\textsuperscript{95} However, especially in the context of the medical profession, states have broad authority to regulate professions to protect the public from “harmful or ineffective professional services.”\textsuperscript{96} The court went on to note that the state’s power to regulate a licensed professional’s speech was not always limited but “warrants lesser protection only when it is used to provide personalized services to a client based on the professional’s expert knowledge and judgment.”\textsuperscript{97} 

The Court ended its analysis of the plaintiffs’ freedom of speech claim by finding that intermediate scrutiny was the proper standard of review, meaning that New Jersey’s statute would only survive if it furthered a substantial state interest and was “no more extensive than necessary to serve that interest.”\textsuperscript{98} The Court held that strict scrutiny was not triggered even though the statute “discriminates on the basis of content” because (1) the New Jersey Legislature passed the statute based on evidence that conversion therapy is “ineffective and potentially harmful to clients,” and (2) the statute does not prevent the plaintiffs from expressing their viewpoint that same-sex attractions can be eliminated through conversion therapy.\textsuperscript{99} Applying intermediate scrutiny, the Court held that the statute did not violate the plaintiffs’ right to free speech because the State has a substantial interest in protecting minors from harmful professional practices, and the statute was targeted only at efforts to change someone’s sexual orientation, gender

\textsuperscript{91} King, 767 F.3d at 233.  
\textsuperscript{92} Id. (citing Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447 (1978)).  
\textsuperscript{93} Id. (citing Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447 (1978)).  
\textsuperscript{95} Id. at 234.  
\textsuperscript{96} Id.  
\textsuperscript{97} King, 767 F.3d at 232.  
\textsuperscript{98} Id. at 233.  
\textsuperscript{99} Id. at 236–37.
THE FIRST AMENDMENT AND CONVERSION THERAPY BANS

identity, or gender expression.100

IV. NIFLA

Despite the Ninth and Third Circuits’ rulings, the Supreme Court’s decision in NIFLA has revived the question of whether conversion therapy bans violate the First Amendment. Although the Court’s decision had nothing to do with conversion therapy laws, it dealt with professional speech. As described above, the case stemmed from a California statute requiring crisis pregnancy centers to make certain disclosures about their services.101 Licensed clinics had to disclose to clients that they provide services such as abortions and contraceptives.102 Unlicensed clinics were required to disclose to clients that they were not licensed.103 The plaintiffs, crisis pregnancy centers, alleged that the California statute violated their First Amendment right to free speech.104 After the Southern District of California denied the plaintiffs’ motion for a preliminary injunction, the plaintiffs appealed to the Ninth Circuit Court of Appeals.

In this Section, I will describe the procedural history of the NIFLA case and how each of the lower courts analyzed the constitutionality of the California law. In discussing each court’s decision, I will explain the role that professional speech had when reviewing crisis pregnancy center laws under the First Amendment. Lastly, I will discuss and explain the Supreme Court’s holding in NIFLA and the impact it has on conversion therapy bans. Because the Supreme Court’s analysis of the licensed clinic involves professional speech, I will only be focusing on the holding for the licensed notice.

A. The Southern District of California’s Decision

In NIFLA v. Harris, two non-profit pro-life pregnancy centers filed suit against various California state officials alleging that the Reproductive FACT Act would, among other civil rights violations, violate their First Amendment right to free speech.105 As stated above, the plaintiffs alleged that the Act violated their right to freedom of speech because the licensed notice required them to speak against their pro-life views and say that the state of California provides services

100. Id. at 238–41. The Court noted the evidence the New Jersey Legislature relied on was from “reputable professional and scientific organizations,” including the American Psychological Association and the American Psychiatric Association.
101. Crisis pregnancy centers are “pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center.” Becerra, 138 S. Ct. at 2368.
102. Id. at 2369.
103. Id.
104. Id. at 2370.
such as abortions and contraceptives.\textsuperscript{106} The plaintiffs argued that the Act discriminated on the basis of viewpoint by specifically targeting “crisis pregnancy centers that aim to discourage and prevent women from seeking abortions” and thus should be reviewed under strict scrutiny.\textsuperscript{107}

The state, however, relied on the holding in \textit{Pickup} to defend the Act. The state argued that, as in \textit{Pickup}, the Act did not concern expressive activity, but instead dealt solely with the “delivery of pregnancy-related health care services.”\textsuperscript{108} The state further argued that even if the notice was considered compelled speech, it was still only subject to rational review because the notice contains “only pure factual and incontrovertible information that simply provides notice about the full spectrum of pregnancy-related health services.”\textsuperscript{109}

The district court ruled in favor of the state, following the state’s lead by relying heavily on the \textit{Pickup} holding. The court reasoned that, as with the statute at issue in \textit{Pickup}, the licensed notice still allowed the clinics to discuss their opinions and viewpoints about abortion and only required them to inform their patients about the various types of pregnancy treatments so patients were fully informed when making decisions regarding their pregnancies.\textsuperscript{110} Ultimately, the court held that the licensed notice was professional conduct subject to rational basis review and that the state has a “legitimate interest in ensuring pregnant woman are fully advised of their rights and treatment options when making reproductive health care decisions.”\textsuperscript{111} The court went on to state that even if speech was implicated, \textit{Pickup} held that professional speech is not entitled to the full protection of the First Amendment, suggesting that intermediate scrutiny would be the appropriate standard.\textsuperscript{112} The court analyzed the Act under intermediate scrutiny as well and held that it survived because the “disclosure requirement directly advances the government’s substantial interest in ensuring pregnant woman are fully advised of their rights and available services when making reproductive health care decisions.”\textsuperscript{113}

\textbf{B. The Ninth Circuit’s Decision}

The plaintiffs appealed the district court’s decision to grant summary judgment in favor of the state to the Ninth Circuit.\textsuperscript{114} The Ninth Circuit affirmed

\textsuperscript{106} \textit{Harris}, 2016 WL 3627327 at *7.
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Id.} at *5.
\textsuperscript{109} \textit{Id.} at *6.
\textsuperscript{110} \textit{Id.} at *7.
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Harris}, 2016 WL 3627327 at *8.
\textsuperscript{113} \textit{Id.} The court also held that the law was not broad, content-based discrimination because clinics could still inform patients of non-abortion options, express their disagreement with the notice, and the California act did not expressly adopt pro-life over pro-choice. \textit{Id.}
\textsuperscript{114} Nat’l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823 (9th Cir. 2016), rev’d and remanded sub nom. Becerra, 138 S. Ct. 2361.
the district court’s decision, holding that the act permissibly regulated professional speech. In reaching its decision, the court also relied on its reasoning in *Pickup.* The court noted that the licensed notice fell at the midpoint of the *Pickup* continuum. It found that the notice requirements were speech within the professional-client relationship that can be regulated because the “purpose of the relationship is to advance the welfare of the clients rather than to contribute to public debate.” 115 The court reasoned that the licensed notice was professional speech because it contained information about “professional services offered by the clinics” and was contained to within the walls of the clinic. 116 As such, the court held that because professional speech is not entitled to the highest level of protection of the First Amendment, intermediate scrutiny should be applied.” 117

Applying intermediate scrutiny, the Ninth Circuit held that the California law did not violate the plaintiffs’ right to free speech. The Ninth Circuit found that the state had a substantial interest in ensuring that its citizens have access to “adequate information about constitutionally-protected medical services like abortion.” 118 In addition, the Ninth Circuit held that the statute was sufficiently narrowly tailored because the licensed notice only informed the client of “the existence of publicly-funded family-planning services.” 119 Because notice did not encourage, endorse, or imply that women should or must use these state-funded services, the statute was not broader than necessary to achieve the state’s goal. 120

### C. The Supreme Court’s Decision

The Supreme Court overturned the Ninth Circuit’s decision, stating that the Court has never recognized a broad category of professional speech that is always entitled to intermediate scrutiny. 121 Instead, the Court identified only two instances where it had not afforded professional speech the full protections of the First Amendment: “laws that require professionals to disclose factual, noncontroversial information in their commercial speech,” and the regulation of “professional conduct, even though that conduct incidentally involves speech.” 122 The Court found the California act fell into neither of these categories because clinics communicating that they provide contraceptive services and abortions is “anything but an ‘uncontroversial’ topic” and the licensed notice “is not tied to a procedure at all.” 123 The Supreme Court did not agree that the act was a regulation of professional conduct, instead finding that the act regulated speech not conduct,

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115. *Id.* at 839.
116. *Id.* at 840.
117. *Id.*
118. *Id.* at 841.
119. *Id.* at 842.
120. *Id.*
121. *Becerra,* 138 S. Ct. at 2371.
122. *Id.* at 2372.
123. *Id.* at 2372–73.
because the notice applied to all interactions in a clinic and other facilities that provided the same services, such as general practice clinics, were not required to provide the notice.\footnote{124}

\textbf{V. POST-NIFLA CONVERSION THERAPY BAN LITIGATION}

In this section, I will first examine an Eleventh Circuit decision regarding professional speech. I will examine this case first because it plays a critical role in two district court cases that are currently reviewing conversion therapy laws under \textit{NIFLA}. I will then examine two district court cases following the \textit{NIFLA} decision, how they have examined conversion therapy bans in light of the Supreme Court’s reasoning, and how they both came to different conclusions. Lastly, I will discuss the possible implications if the Eleventh Circuit affirms or reverses either of these decisions.

\textbf{A. Wollschlaeger v. Governor}

While \textit{Wollschlaeger v. Governor} was decided prior to \textit{NIFLA}, the decision is binding precedent on the two district courts in Florida that are currently reviewing the constitutionality of conversion therapy laws. This case is particularly important because it involves examining speech in the medical profession. In \textit{Wollschlaeger}, physicians and medical organization sued various Florida state officials after the passage of the Florida’s Firearms Owners’ Privacy Act (FOPA).\footnote{125} FOPA had three provisions which the plaintiffs argued were a violation of their First Amendment right to freedom of speech:

\begin{quote}
the record-keeping provision . . . states that a doctor or medical professional may not intentionally enter any disclosed information concerning firearm ownership into a patient’s medical record if he or she knows that such information is not relevant to the patient’s medical care or safety, or the safety of others. The inquiry provision . . . states that a doctor or medical professional should refrain from making a written inquiry or asking questions concerning the ownership of a firearm or ammunition by the patient or by a family member of the patient, or the presence of a firearm in a private home” unless he or she in “good faith believes that this information is relevant to the patient’s medical care or safety, or the safety of others. The anti-discrimination provision . . . states that a doctor or medical professional “may not discriminate against a patient based solely” on the patient’s ownership and possession of a firearm.\footnote{126}
\end{quote}

FOPA thus essentially prevented all medical professionals from asking any of their patients whether they own a firearm and prevented them from recording

\footnote{124. \textit{Id.} at 2373–74.}
\footnote{125. \textit{Wollschlaeger v. Governor}, 848 F.3d 1293, 1300 (11th Cir. 2017).}
\footnote{126. \textit{Id.} at 1302–03.
any answers to such questions. The court began its analysis by stating that the law expressly limited the ability of medical professionals to speak and write about a certain topic, in this case gun ownership. Because FOPA applied only to speech regarding gun ownership, the court held that it was a content-based regulation. As such, the court reasoned that the law must be analyzed under First Amendment jurisprudence.

After the court decided that FOPA was a content-based regulation of speech, it then moved on to decide what the appropriate standard of review was under the First Amendment. The state attempted to argue that FOPA did not regulate speech, rather, it regulated professional conduct and any effect on speech was merely incidental. The court disagreed, stating that “saying that restrictions on writing and speaking are merely incidental to speech is like saying that limitations on walking and running are merely incidental to ambulation.” In its analysis, the court also noted plaintiffs’ reliance on Pickup and indicated that it had serious doubts as to whether the Ninth Circuit was correct. The court also stated that the Supreme Court had never adopted a “rational basis standard to regulations which limit the speech of professionals to clients based on content.”

But the court did not explicitly say which standard it adopted. The court simply said that because the regulations would not even survive intermediate scrutiny, it did not “need to decide whether strict scrutiny should apply.” However, the court still analyzed the law under strict scrutiny, first examining whether there was a “fit between the legislature’s ends and the means chosen to accomplish those ends.” The court found none of the interests asserted by the state compelling enough to satisfy strict scrutiny. The state asserted that it was protecting its citizens’ Second Amendment right to bear arms, but the state provided no evidence that medical professionals were taking away patients’ guns or infringing on their Second Amendment rights in any way. Another interest that the state asserted was its interest in its citizens’ privacy, but the court also found this uncompelling because other Florida laws already placed “significant limits on the disclosure of a patient’s confidential medical records.”

127. Id. at 1307.
128. Wollschlaeger, 848 F.3d at 1307.
129. Id.
130. Id. The court held that the anti-harassment provision also regulated speech because the limiting language “during an examination” was read to “refer to questions or advice to patients concerning the subject of firearm ownership.” Id.
131. Id. at 1308.
132. Id.
133. Wollschlaeger, 848 F.3d at 1309.
134. Id. at 1310.
135. Id. at 1311.
136. Id. at 1312.
137. Id. at 1312–17.
139. Id. at 1314.
Furthermore, the state had no evidence that medical professionals were disclosing patients’ gun ownership information. The state asserted two other interests, but the court was unconvinced. The court was very critical of the Florida legislature for only relying on six anecdotes and nothing more when deciding to pass FOPA. Therefore, the court concluded that the “record-keeping, inquiry, and anti-harassment provisions” of the Florida law violated the First Amendment.

B. Vazzo v. Tampa

Two lower courts have addressed challenges to conversion therapy bans since the Supreme Court decided NIFLA. The first dealt with a ban passed by the city of Tampa in 2017. The ordinance prohibited any provider from practicing conversion therapy on a minor, with penalties ranging from $1,000 to $5,000. Later that year a Christian ministry group, Liberty Counsel, and several individual conversion therapists filed a lawsuit in the Middle District of Florida challenging the ordinance. The plaintiffs claimed that the ordinance violated their First Amendment right to free speech and religious freedom. In 2019, a magistrate judge, in a decision that was later affirmed by the district court, granted-in-part and denied-in-part the plaintiffs’ request for a preliminary injunction. The ruling upheld the ban with regard to aversive practices such as electroshock therapy but prevented the city from enforcing the ban with regard to “non-coercive, non-aversive” conversion therapy counseling “that consists entirely of speech or ‘talk therapy.’”

The district court found that the plaintiffs were likely to succeed on their content-based regulation claim and gave an overview of recent cases which addressed conversion therapy bans. If the court had followed Pickup or King, the distinction between talk therapy and conduct-based conversion therapy would not have mattered because the court would have found that conversion therapy

140. Id.
141. Id. The state also asserted that the law was passed to ensure access to adequate health care without discrimination or harassment and that the law was needed to regulate the medical profession to protect the public. Id.
142. Id. at 1312.
143. Id. at 1318.
144. Kate Bradshaw, As Tampa unanimously passes anti-gay conversion “therapy” ban, St. Pete laws groundwork for its own, CREATIVE LOAFING: TAMPA BAY (Apr. 7, 2017, 11:00 AM), https://perma.cc/QG79-FT3S.
146. Among the plaintiffs is David Pickup, a licensed marriage and family therapist who was the main plaintiff in Pickup.
149. Id. at *37.
150. Id. at *21.
happens within the context of a professional relationship and is therefore only entitled to intermediate scrutiny. However, the court agreed with NIFLA’s rejection of the analyses in King and Pickup, and held that taking Pickup, King, Wollschlaeger, and NIFLA together, strict scrutiny was the appropriate standard of review.\textsuperscript{151} The court agreed with King that conversion therapy bans do not regulate conduct, but believed the conversion therapy ban was analogous to Wollschlaeger because conversion therapy bans involve doctor-patient communications about a specific subject.\textsuperscript{152} This, combined with the NIFLA holding that “traditional First Amendment analyses apply to professional speech that is neither commercial nor incidentally affected by a law regulating conduct,” is how the court reached its decision that strict scrutiny was the appropriate standard.\textsuperscript{153} The City tried to rely on the holdings in Pickup and King, but the district court noted that the NIFLA Court expressly rejected Pickup and King which recognized “‘professional speech’ as a separate category of speech subject to different constitutional analysis.”\textsuperscript{154} The district court determined that strict scrutiny applied in this case, although it noted that the NIFLA Court applied intermediate scrutiny to the California law requiring clinics to give certain notices because the law could not even survive intermediate scrutiny.\textsuperscript{155} After determining strict scrutiny was the appropriate standard, the court found that the conversion therapy ban failed to survive this standard.\textsuperscript{156} The court began its analysis by stating that protecting the physical and psychological well-being of minors was a compelling interest.\textsuperscript{157} However, the court believed that the plaintiffs were likely to show that the conversion therapy ban was not narrowly tailored enough to protect minors.\textsuperscript{158} The court noted that the City had not considered any lesser restrictions and did not present evidence showing it considered lesser alternatives to a complete ban on conversion therapy.\textsuperscript{159} Whereas the plaintiffs had presented evidence of alternatives to a complete ban on conversion therapy, such as a ban on involuntary conversion therapy and banning only “aversive conversion therapy techniques, like electroshock therapy.”\textsuperscript{160} Therefore, the court found that the plaintiffs were likely to succeed on their claim that the conversion therapy ban was an unconstitutionally content-based restriction of speech.\textsuperscript{161}

\textsuperscript{151} Id. at *25.  
\textsuperscript{152} Vazzo, No. 8:17-CV-2896-T-02AAS at *25.  
\textsuperscript{153} Id.  
\textsuperscript{154} Id. at *24.  
\textsuperscript{155} Id. at *24–25.  
\textsuperscript{156} Id. at *29.  
\textsuperscript{157} Vazzo, No. 8:17-CV-2896-T-02AAS at *27.  
\textsuperscript{158} Id.  
\textsuperscript{159} Id. at *28.  
\textsuperscript{160} Id. at *28–29.  
\textsuperscript{161} Id.
C. Otto, et al., v. Boca Raton

In a different Florida case, two licensed marriage and family therapists challenged the City of Boca Raton’s and Palm Beach County’s conversion therapy bans. The city and county passed ordinances in the fall of 2017 that prohibited licensed providers of conversion therapy from engaging in any practice seeking to change a minor’s sexual orientation or gender identity. The plaintiffs filed suit on June 13, 2018 in the Southern District of Florida, claiming the ordinances violated their First Amendment rights to free speech and seeking to enjoin the enforcement of the ordinances. In 2019, a district court judge denied the plaintiffs’ motion, holding that they did not sufficiently demonstrate with a substantial likelihood they would succeed on the merits. This is the opposite of the Vazzo holding, and the Otto court appears to be the first to rely on NIFLA to uphold the constitutionality of conversion therapy bans.

The court began its reasoning with the basic premise that while freedom of speech is fundamentally important, First Amendment case law also recognizes it “must occasionally be restricted or limited to accommodate . . . important governmental interest.” The court noted that the constitutionality of conversion therapy bans was a matter of first impression in Florida and in the Eleventh Circuit, but recognized that similar bans have survived in other districts, specifically in the Third and Ninth Circuits in Pickup and King. The court went on to note that since these cases were decided, the Supreme Court had issued its decision in NIFLA and the Eleventh Circuit Court of Appeals issued its decision in Wollschlaeger, both of which are binding precedent on the court. In Wollschlaeger, the Eleventh Circuit also disagreed with Pickup’s analysis, but did not decide whether strict scrutiny or intermediate scrutiny should have been applied. The Otto court also noted that in NIFLA the Supreme Court did not state what level of review should be applied, just that the California statute would not even survive intermediate scrutiny.

The Otto plaintiffs argued that NIFLA abrogated the professional speech doctrine and therefore strict scrutiny should be applied when reviewing conversion therapy laws. The court noted that in NIFLA, the Supreme Court left open the possibility that “[s]tates may regulate professional conduct, even though that conduct incidentally involves speech.” Thus, the court believed that Otto was

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163. Id. at 1243–45.
164. Id. at 1245.
165. Id. at 1270.
166. Id. at 1248.
168. Id. at 1249.
169. Id. at 1255.
170. Id.
171. Id.
more related to the Supreme Court’s decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, where the Court addressed whether required disclosures by doctors about abortion services and pregnancy implicated the First Amendment, than it was to *NIFLA*.\(^{173}\) In *Casey*, the Court concluded that doctors’ First Amendment rights “were only implicated as part of the practice of medicine, subject to reasonable licensing and regulation by the State.”\(^{174}\) Likewise, the *Otto* court reasoned that in the case of conversion therapy “plaintiffs are essentially writing a prescription for a treatment that will be carried out verbally.”\(^{175}\) Because of this, the court held that conversion therapy could be regulated like the practice of medicine, which is “subject to reasonable licensing and regulation.”\(^{176}\) For this reason, the court believed that while rational basis was too low of a standard, strict scrutiny would be too high.\(^{177}\)

Because the court found that speech could be regulated in the context of conversion therapy, it moved to the question of what level of scrutiny to use when examining the ban. The court believed that rational basis review was inadequate, but case law suggested that a lower standard of review than strict scrutiny would be appropriate, leaving the court with intermediate scrutiny.\(^{178}\) However, the court ended its analysis by concluding it is “unclear what standard of review should apply to this case.”\(^{179}\) The court did not announce what level of scrutiny should be applied, but was “unconvinced that strict scrutiny is necessarily the appropriate standard of review, when the ordinances apply to a licensed provider’s treatment of a patient.”\(^{180}\) The court believed intermediate scrutiny should apply because it “strike[s] the appropriate balance between recognizing that doctors maintain some freedom of speech within their offices, and acknowledging that treatments may be subject to significant regulation under the government’s police powers.”\(^{181}\)

The court, however, evaluated the ordinance under the main principles found in all three levels of review: the government interest and how tailored the law was toward that interest.\(^{182}\) First, the court examined the governments’ interest in the ordinance, noting that both Boca Raton and Palm Beach County examined research done by the American Academy of Pediatrics, the American Psychiatric Association, and seven other organizations who found that conversion therapy “can cause harm, including depression, self-harm, self-hatred, suicidal ideation, and substance abuse.”\(^{183}\) Based on this research, the court agreed that the city and

\(^{173}\) Id. at 1256.

\(^{174}\) Id. at 1254 (citing *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 838 (1992)).

\(^{175}\) Id. at 1256.

\(^{176}\) Id. at 1256.

\(^{177}\) Id.

\(^{178}\) *Otto*, 353 F. Supp. 3d at 1256–57.

\(^{179}\) Id. at 1258.

\(^{180}\) Id. at 1270.

\(^{181}\) Id. at 1256.

\(^{182}\) Id. at 1258.

\(^{183}\) *Otto*, 353 F. Supp. 3d at 1260.
county had a substantial interest in protecting “the physical and psychological well-being of minors and in protecting minors against exposure to serious harms caused by sexual orientation and gender identity change efforts.” 184

Second, the court examined the relationship between the ordinance and the governments’ interest. After determining the scope of both ordinances, the court looked at the alternative means the governments could have used to achieve its interest. 185 The court emphasized that the county and city had adopted nearly identical ordinances and statutes as other governments to address conversion therapy harms. 186 The court also rejected the plaintiffs’ arguments that the city and county could have only banned coerced conversion therapy or aversive techniques such as induced vomiting or shock therapy. 187 In doing so, the court relied heavily on the studies that the city and county cited when passing the ordinances which concluded that conversion therapy in general, regardless of the method used or whether consent was obtained, is ineffective and harmful to minors. 188

The court concluded its analysis of the plaintiffs’ free speech claim by stating that, if reviewed under intermediate scrutiny, the ordinances are likely narrowly drawn enough as to not violate the plaintiffs’ rights to free speech. 189 Under strict scrutiny, the court stated that it was unclear whether these ordinances were the “least restrictive means.” 190 The court again cited the numerous documents and testimony on which the city and country relied and held that for now, it is sufficient to conclude that the plaintiffs failed to meet their burden of showing a substantial likelihood of success. 191

VI. WHAT NIFLA MEANS FOR PENDING CONVERSION THERAPY LITIGATION

So, what conclusions can be drawn about the implications of the NIFLA case for the constitutionality of conversion therapy bans? First, it is still unclear what standard of review applies when reviewing the constitutionality of conversion therapy bans. NIFLA and Wollschlaeger, which are both binding precedent on the Florida district courts, did not decide the appropriate standard of review for conversion therapy ban cases. Second, it is unclear whether all forms of

184. Id. at 1258.
185. Id. at 1264–67. The court determined that the scope of both ordinances was applicable only to prohibiting conversion therapy on minors and did not limit the plaintiffs’ ability to advocate for or express their opinions on conversion therapy. Id.
186. Id. at 1265.
187. Id. at 1266–67.
188. Otto, 353 F. Supp. 3d at 1266–67. In addition to relying on evidence from the American Academy of Pediatrics and the American Psychiatric Association, the county heard testimony from various practitioners, including therapists, social workers, and psychologists who all practice in the county. All of the practitioners stated there are no benefits to conversion therapy, only serious health risks.
189. Id. at 1267.
190. Id.
191. Id. at 1268.
THE FIRST AMENDMENT AND CONVERSION THERAPY BANS

conversion therapy, including talk therapy, can be banned or whether only aversion therapy practices can be banned. But these questions could be answered soon because the plaintiffs in Otto have appealed the district court’s decision to the Eleventh Circuit.192 If Tampa appeals, then the Eleventh Circuit will have to address the two conflicting opinions.

Based on the Eleventh Circuit’s opinion in Wollschlaeger and the Supreme Court’s opinion in NIFLA, I believe the court will decide that intermediate scrutiny applies. First, the Eleventh Circuit will likely affirm both Vazzo and Otto’s holdings that the rational basis test does not apply when reviewing conversion therapy bans.193 As described above, the Supreme Court and the Eleventh Circuit were critical of the Ninth Circuit’s decision in Pickup, which held that conversion therapy bans regulate conduct even though the bans cover speech.194 The Eleventh Circuit used the language in Pickup to affirm its approach that a doctor’s communications with a patient about medical treatment receive “substantial First Amendment protection.”195 Therefore, it is likely that the Eleventh Circuit will have to analyze which level of heightened scrutiny applies.

Second, the court will likely determine that intermediate scrutiny, rather than strict scrutiny, applies. The Eleventh Circuit will look to NIFLA, which held that States may regulate professional conduct that incidentally involves speech.196 In NIFLA, the Supreme Court cited its decision in Casey, which is analogous to conversion therapy bans.197 In Wollschlaeger and NIFLA, the statutes at issue either prohibited or forced doctors to engage in specific dialogues with their patients about topics that were not tied to treatment.198 In contrast, conversion therapy bans involve doctors essentially writing a prescription for treatment that will be administered through speech. This line of reasoning falls into line with one of the categories described in NIFLA where the court has not given professional speech the full protections of the First Amendment: professional conduct that incidentally involves speech.199

The court in Vazzo failed to evaluate whether the ordinances regulate professional conduct that incidentally involves speech. Rather, the court

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194. Wollschlaeger, 848 F.3d at 1309.
195. Pickup, 728 F.3d at 1053.
197. Id. The Supreme Court upheld a Pennsylvania law that required doctors to give women certain information as part of obtaining consent before an abortion. Conversion therapy are similar under the Court’s reasoning in Casey because conversion therapy banned regulated speech “as part of the practice of medicine.” See Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992). Conversion therapy bans are only tied to the practice of trying to change someone’s sexual orientation or gender identity. Whereas in Becerra, the notice requirement was not tied to a procedure at all and applied to “all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed.” Becerra, 138 S.Ct. at 2373.
198. Id. at 2369; Wollschlaeger, 848 F.3d at 1302–03.
199. Id. at 2373.
determined the ordinances were content-based laws that prohibited speech based on the topic expressed and were subject to strict scrutiny.\textsuperscript{200} The Supreme Court in \textit{NIFLA} was critical of the fact that the California CPC law required that a notice be given to all of a clinic’s clients, regardless of whether a procedure was performed or sought.\textsuperscript{201} That is not the case with conversion therapy bans. Typically, the bans only prohibit conversion therapy in the doctor-patient relationship where the goal is to ‘treat’ someone’s sexual orientation or gender identity.\textsuperscript{202} Conversion therapy statutes do not prohibit therapists and psychiatrists from expressing their views or opinions about the practice or providing any sort of counseling that helps someone accept their sexual orientation or gender identity.\textsuperscript{203} Therefore, the Eleventh Circuit should hold that intermediate scrutiny should be applied when reviewing anti-conversion therapy laws.

Under intermediate scrutiny, the conversion therapy bans will likely be upheld. First, the Eleventh Circuit will likely agree with both \textit{Vazzo} and \textit{Otto} that the government has a substantial interest in protecting the physical and mental well-being of minors. Second, the Eleventh Circuit will have to determine whether the means chosen by the cities are not more extensive than necessary to serve that interest. This is where the court will likely distinguish \textit{Otto} from \textit{Vazzo}. In \textit{Wollschlaeger}, the Eleventh Circuit was critical that the Florida Legislature only relied on “six anecdotes” to show “real, and not merely conjectural” harms that would be resolved by enacting Florida’s Firearm Owners’ Privacy Act.\textsuperscript{204} Similarly, in \textit{Vazzo}, the city did not consider any lesser restrictions when adopting its conversion therapy ban.\textsuperscript{205} The court agreed with the plaintiffs that the city and county could have banned involuntary conversion therapy or conversion therapy that involved aversive techniques. Thus, the court held that the city failed to show evidence that these less restrictive means would prevent harm to minors.\textsuperscript{206}

In \textit{Otto}, however, the city and county relied on the research and publications of nine major psychiatric organizations that all concluded there is no evidence that attempts to change someone’s sexual orientation or gender identity are effective.\textsuperscript{207} This evidence confirmed that all forms of conversion therapy,

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\textsuperscript{200} \textit{Vazzo}, No. 8:17-CV-2896-T-36AAS, at *26.
\textsuperscript{201} \textit{Becerra}, 138 S. Ct. at 2373.
\textsuperscript{202} See Conn. Gen. Stat. Ann. § 19a-907a(1) (2018) (“Conversion therapy’ means any practice or treatment administered to a person under eighteen years of age that seeks to change the person’s sexual orientation or gender identity.…”).
\textsuperscript{203} See Nev. Rev. Stat. Ann. § 629.600 (West 2018) (stating that conversion therapy does not include providing assistance to someone undergoing gender transition or “[providing] acceptance, support and understanding of a person or facilitates a person’s ability to cope, social support and identity exploration and development, including, without limitation, an intervention to prevent or address unlawful conduct or unsafe sexual practices that is neutral as to the sexual-orientation of the person receiving the intervention and does not seek to change the sexual orientation or gender identity of the person receiving the intervention”).
\textsuperscript{204} \textit{Wollschlaeger}, 848 F.3d at 1312.
\textsuperscript{205} \textit{Vazzo}, No. 8:17-CV-2896-T-36AAS, at *28.
\textsuperscript{206} Id.
\textsuperscript{207} \textit{Otto}, 353 F. Supp. 3d at 1237.
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regardless of whether talk therapy or aversion therapy methods were used, put youth in serious danger of depression, substance abuse, and even suicide.\(^{208}\) The county heard testimony from various practitioners, including therapists, social workers, and psychologists, who all stated that there are no benefits to conversion therapy, only serious health risks.\(^{209}\) The county considered other alternatives to its ordinance, but rejected them all at the public hearings.\(^{210}\)

Furthermore, Otto addressed the effectiveness of informed consent requirements, stating that a minor’s desire to change their sexual orientation or gender identity mostly comes from their parents and they are likely unable to give full consent.\(^{211}\) The studies relied on by the city and county established that regardless of whether minors consent to or voluntarily undergo conversion therapy, it is still harmful.\(^{212}\) Regardless of whether the city and county’s ordinances are the perfect solution, intermediate scrutiny only requires a law “whose scope is in proportion to the interest served.”\(^{213}\) Therefore, it is likely that the Eleventh Circuit will affirm the holding in Otto.

**CONCLUSION**

Although NIFLA appears to undermine prior cases holding that conversion therapy bans are constitutional by possibly changing the standard of review that they are entitled to, conversion therapy bans likely remain constitutional. Conversion therapy bans likely fall under one of the exceptions reaffirmed in NIFLA; that a State may regulate professional conduct, even though it incidentally involves speech. Within this exception, laws regulating speech receive intermediate scrutiny, and it is likely that conversion bans would survive such scrutiny. States have a substantial interest in protecting the physical and mental well-being of minors. Conversion therapy bans are not more extensive than necessary to serve this interest because all forms of conversion therapy, regardless of whether consent is given, have been scientifically proven to be harmful. In addition, medical professionals are still able to give their opinion about conversion therapy and talk about it publicly. Otto should be closely watched as it goes before the Eleventh Circuit because it could have national implications. Regardless of whether the court upholds or rejects the conversion therapy ban, it could provide a blueprint for governments defending such bans across the country.

\(^{208}\) Id.
\(^{209}\) Id.
\(^{210}\) Id.
\(^{211}\) Otto, 353 F. Supp. 3d at 1237.
\(^{212}\) Id.
\(^{213}\) Id. (quoting Board of Tr. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)).