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Crisis at the Pregnancy Center: Regulating Pseudo-Clinics and Reclaiming Informed Consent

Teneille R. Brown†

ABSTRACT: Crisis Pregnancy Centers (CPCs) adopt the look of medical practices—complete with workers in scrubs, ultrasound machines, and invasive physical exams—to deceive pregnant women into thinking they are being treated by licensed medical professionals. In reality, CPCs offer exclusively Bible-based, non-objective counseling. Numerous attempts to regulate CPCs have faced political roadblocks. Most recently, in NIFLA v. Becerra, the Supreme Court held that state efforts to require CPCs to disclose that they are not medically licensed are unconstitutional violations of CPCs’ First Amendment right to free speech. In the wake of that decision, pregnant women in crisis—a disproportionate percentage of whom are low-income women, minority women, or women in vulnerable or dangerous situations—continue to be subject to CPCs’ ideological marketing, masquerading as medical advice.

This Article employs tort law to offer a novel way to regulate CPCs’ deceptive practices. It proposes that women who submit to physical exams or ultrasounds under CPCs’ false pretenses could successfully raise a battery claim. The intimate touching of a woman would most certainly be considered objectively offensive, and while the woman might technically consent to the touching, this consent is meaningless if it is based on misrepresentations. Contrary to popular understanding, the touching need not be intentionally malicious or result in physical injury to the plaintiff.

This Article makes two contributions to the literature. First, it provides a practicable, novel solution to an urgent and timely issue. By relying on private causes of action, this Article’s proposal sidesteps the collective action problems and political willpower obstacles that have long hampered larger-scale attempts to regulate CPCs. It places the injured woman in the driver’s seat and allows her to be compensated for the dignitary harm imposed when CPCs use deception to

† Teneille R. Brown is a Professor of Law at the S.J. Quinney College of Law and an adjunct Professor of Internal Medicine at the University of Utah. This research was made possible, in part, through generous support from the Albert and Elaine Borchard Fund for Faculty Excellence.

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gain access to her body. Second, this Article contributes to robust literatures in torts, informed consent, and medical ethics by reinforcing an increasingly blurry line between medicine and pseudo-medicine. Informed consent means something; it is not merely a vehicle through which ideology can be shoehorned. Where CPCs are not licensed, they should be sued for battery, which honors the individual’s dignity and is not deferential to an industry standard of care. Physicians should be allowed to have political voices. So, too, should pro-life activists. But each should have their policy debates, and win or lose them, in the political sphere. It does violence to the physician-patient relationship, and the trust that it requires, when this relationship is leveraged for ideological gains.

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INTRODUCTION

Crisis Pregnancy Centers (CPCs) are nonprofit agencies that purport to provide free services to women who are considering terminating their pregnancies. However, their “paramount, and typically undisclosed, mission is to convince women not to have abortions.”1 CPCs engage in deliberate efforts to mislead pregnant women.2 They hold themselves out as secular medical

2. “False and misleading advertising by clinics that do not provide abortions, emergency contraception, or referrals to providers of such services has become a problem of national importance. This issue has been the subject of a congressional report and proposed federal legislation . . . . The congressional report found that certain pregnancy resource centers ‘frequently fail to provide medically accurate information’ and that ‘the vast majority of pregnancy centers’ contacted during the investigation misrepresented the medical consequences of abortion. The report further concluded that while ‘[t]his tactic may be effective in frightening pregnant teenagers and women and discouraging abortion[,] it ‘denies [them] vital health information, prevents them from making an informed decision, and is not an accepted public health practice.’” See First Resort, Inc. v. Herrera, 860 F.3d 1263, 1268 (9th Cir. 2017). See also B. Jessie Hill, Casey Meets the Crisis Pregnancy Centers, 43 J.L. MED. & ETHICS 59, 64 (2015) (“Numerous reports have indicated that some CPCs use deceptive tactics to dissuade women from
providers, claiming in their advertising to counsel pregnant women on the full range of their reproductive options. CPCs buy Google ad-words like “abortion services” to direct people to their facilities. Their websites feature images of nurses wearing scrubs and standing in front of ultrasound equipment. When you visit the CPC, its lobby resembles that of a health clinic. CPCs have names like “Obria Medical Clinics” or the “Bakersfield Pregnancy Center.” The exam rooms resemble those of doctors’ offices. Before you see a volunteer, you are asked to fill out paperwork, channeling the procedure you would experience before seeing a doctor. To complete the presentation that this is a medical facility, some CPCs even refer to those who seek their services as “patients.”

Given this quite deliberate staging, one would be forgiven for thinking that CPCs are ordinary medical clinics. However, CPCs have a different purpose, which is primarily to counsel against abortion. They are different in terms of the training and licensure their staff is required to receive, which is usually none. They are different in terms of the privacy and safety standards that are imposed upon them by law, which are few. As of June 2018, they are different in terms

choose abortion, such as providing false information about the risks and effects of abortion, providing false information about the law and availability of abortion, and telling women that their pregnancies are more advanced than they really are."


4. “Well, they are advertising themselves. I looked at one -- a few of them. An exemplary of this is the Fallbrook Pregnancy Resource Center website. And it’s -- I’m fairly sophisticated -- there is a woman on the home page with a uniform that looks like a nurse’s uniform in front of an ultrasound machine. It shows an exam room. The text of the page titled ‘Abortion’ says Fallbrook will educate clients about different abortion methods available, and describe in medical terms different abortion procedures. The website also says clients will be evaluated by nurses and that they follow all HIPAA regulations, which if they’re not a medical provider, they don’t have to follow if a reasonable person could look at this website and think that you’re giving medical advice, would the unlicensed notice be wrong?” Oral Argument at 13:33, Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (No. 16-1140), https://www.oyez.org/cases/2017/16-1140 [https://perma.cc/4HRK-9JQO].


7. “[Alternatives Women’s Center] refers to those who seek its services as ‘patients.’” A Woman’s Friend Pregnancy Res. Clinic v. Harris, 153 F. Supp. 3d 1168, 1187 (E.D. Cal. 2015), aff’d, 669 F. App’x 495 (9th Cir. 2016).


9. Most CPCs are unlicensed facilities and are staffed by volunteers who are not licensed medical professionals. Beth Holtzman, Have Crisis Pregnancy Centers Finally Met Their Match? California’s Reproductive FACT Act, 12 NW. J. L. & SOC. POL’Y 78, 83 (2017).

10. Given that CPCs are not considered professional medical providers, they would not be subjected to medical malpractice, and held to a professional standard of care, for their negligence. Instead
of the First Amendment protection they are afforded, which is considerably more than that afforded to medical clinics. And, because of all of this, they are different in terms of their lack of accountability when they injure women. Actual medical clinics have safety, training, and compelled disclosure requirements that do not apply to pseudo-clinics like CPCs.

CPCs are typically funded by Christian organizations as well as state and local governments. In some cases, CPCs are subsidized by federal block grants that were developed to aid poor families. The counseling CPCs provide is exclusively pro-life and “Bible-based.” Many CPC volunteers see their job as a religious ministry or calling to do whatever is necessary to convince women to carry their pregnancy to term.

There have been several investigations of CPCs—some from the ivory halls of Congress and some from the glossy pages of Cosmopolitan magazine—revealing widespread deceptive CPC practices. In one instance, after asking a pregnant woman to submit urine for a pregnancy test, the staff then spent 45 minutes going over Bible verses, adoption options, and inaccurate descriptions of the embryo’s development in ways that would humanize the fetus. The pregnant woman recounted how “[t]he nurse really, really slowed down during the fetal pain part. She said, ‘[h]ere are the fingertips. The baby feels everything you’re feeling . . . .’” During the sonogram, the nurse said the images were not

they would be held to the lower, “ordinary” negligence standard. Additionally, the many state and local safety ordinances that apply to health clinics—that regulate facilities, licensure, and staffing—do not apply to CPCs. Finally, the Health Insurance Portability and Accountability Act requires that health care providers receive authorization before sharing protected health information with a non-covered entity. See 45 C.F.R. § 164.500 (West 2018). Given that CPCs are not “covered entities,” the privacy protections HIPAA affords would not protect pregnant women who visit CPCs, unless the CPC voluntarily complies with HIPAA (which could not be enforced by the U.S. government).


15. Winter, supra note 11. There is no evidence that a 6-8 week fetus can feel pain. María J. Mayorga-Buiza, Letter to the Editor, Can Fetuses Feel Pain in the Second Trimester? Lessons Learned from a Sentinel Event, 34 CHILD NERVOUS SYSTEM 195, 195 (2018). Even so, CPCs share this inaccurate information with pregnant women.
clear and she needed to do a transvaginal ultrasound. According to the woman, the nurse “didn’t explain anything or say, ‘We’re going to stick this cone inside you.’”  

In another instance, a Manhattan CPC kept delaying the return of a pregnant woman’s laboratory results. The CPC insisted she return week after week for various and vague reasons. When this woman became agitated about the delays, she was incorrectly told “not to worry because she could get an abortion in New York at any time.” She eventually went to an obstetrician in severe distress, seeking a late-term abortion that was no longer legal and no longer possible. She sobbed with her obstetrician, who felt powerless to help her.

While these instances may constitute fraud, in many cases the counseling takes on a subtler form of deception. Staff are instructed to use fear tactics and to provide medically unsound information, such as claiming that undergoing an abortion heightens the risk of breast cancer or decreases a woman’s fertility. In some states, legislatures have cooperated with pro-life organizations to create mandatory disclosure “informed consent” laws that require physicians, but not CPCs, to provide clinically inaccurate information (such as the above comment that in the first trimester “the baby feels everything you’re feeling.”). These informed consent statutes have been referred to as targeted regulation of abortion providers, or “TRAP” laws.

Informed consent TRAP laws have been largely upheld as constitutional regulations on professional speech. One of the key issues that this Article will address is the disparate treatment of licensed and unlicensed medical providers in the context of abortion. While physicians can be compelled to provide medically inaccurate or misleading information to patients because they are professionals, CPCs cannot be so compelled, because they are not professionals. This paradoxical treatment leaves pregnant women vulnerable to harm and obscures the distinction between medicine and pseudo-medicine.

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16. Id.
17. Dr. Anne Davis, MD, Remarks at Medical and Legal Aspects of Targeted Regulation of Abortion Providers (TRAP) Laws Symposium (Dec. 1, 2017), https://www.youtube.com/watch?v=leH4_ODKoLA [https://perma.cc/5X64-5AQC] (last visited Nov. 19, 2018) (speaking about a patient she saw in New York, who was repeatedly told that she could “get an abortion at any time in New York, and to keep coming back to the CPC.”).
18. “[One study found] that approximately 87% of the centers contacted provided false or misleading information about the health effects of an abortion, including information about a link between abortion and breast cancer, the effect of abortion on future fertility, and the mental health effects of abortion. The second report cited was a January 2008 report by the NARAL Pro-Choice Maryland Fund. NARAL sent volunteers into [CPCs] in Maryland, including Centro Tepeyac, and found that every center visited provided false or misleading information, including ‘false information about abortion risks, misleading data on birth control, and emotionally manipulative counseling.’” Tepeyac v. Montgomery Cty., 5 F. Supp. 3d 745, 749 (D. Md. 2014).
To be sure, not every woman is tricked by CPC tactics. At some point, a woman may realize the advice she is receiving is peculiar: it is not balanced, secular, or objective, as it should be. She might then conclude that this “clinic” is really an elaborate theatrical set for deception. However, because CPCs target under-insured, under-educated, and low-income women, they often encounter women who are not as equipped to ferret out the pseudo-clinical from the clinical. Indeed, low-income women of color might be particularly familiar with the public social judgment that has come with many of their life “choices.”

These women unfortunately may be accustomed to receiving patronizing and directive counseling from someone who should be unbiased and neutral. It makes sense then, that undercover investigations have documented that many pregnant women who visit CPCs actually think that the advice they are receiving is medical and measured against an industry standard of care.

The consequences of this misinformation for the pregnant woman’s health are astronomical, as the CPC postpones necessary clinical treatment. Treatment during pregnancy is extremely time-sensitive, and “[p]rompt obstetric interventions are crucial to prevent intrapartum-related fetal hypoxic injury and maternal morbidity and mortality associated with obstetric emergencies.”

Pregnant women can have significant health risks that, if undetected, can lead to the death of the woman, the fetus, or both. Of course, receiving pseudo-clinical

20. “This is B.S., Nicole kept thinking, but you’re trying to make me think it’s true . . . . Some women arrive at those centers in search of Christian counseling or free diapers, but the vast majority are looking for professional advice to help them navigate unplanned pregnancies.” Winter, supra note 11. (emphasis in original).


23. “[P]oor women’s private lives are made available for state surveillance and problematization . . . private information about women’s health and economic statuses is gathered and recorded. Their diets are quantified and censured. Their histories with substance abuse, sexual abuse, public assistance, and any form of contact with the state are considered significant and relevant. In essence, a poor, pregnant woman’s privacy interest—that is, her interest in preventing the government from intruding into her personal, intimate affairs—has been violated.” Khiara M. Bridges, Poor Women and the Protective State, 63 HASTINGS L.J. 1619, 1622–23 (2012).


25. Andrew Healy et al., Early Access to Prenatal Care: Implications for Racial Disparity in Perinatal Mortality, 107 OBSTET. & GYN. 625, 625 (2006) (“The establishment of regularly scheduled medical visits for pregnant women represents one of the most important advances in obstetric care in the past century, and its role in reducing fetal death is well established.”). See also Pregnancy and Prenatal Care, CRS. FOR DISEASE CONTROL & PREVENTION (Sept. 15, 2017), https://www.cdc.gov/healthcommunication/toolstemplates/entertainmented/tips/PregnancyPrenatalCare.html [https://perma.cc/2DC L-XXN9] (last visited Nov. 19, 2018) (“Each year, reports of approximately 500 women who died as a result of a pregnancy-related complication are received by the Division of Reproductive Health at CDC.
care also jeopardizes a woman’s trust and confidence in the larger healthcare establishment, as the clinic is no longer exclusively a place for objective health information. This can negatively affect her relationship with medical providers for the rest of her life.

The explosion of CPCs has been attributed to Birthright International, a CPC network organization that was founded in 1968 and has over 400 chapters on three continents.\(^26\) Most CPCs in the United States are linked with an umbrella organization such as Birthright, Care Net, Heartbeat International, or the National Institute of Family and Life Advocates (“NIFLA”). These umbrella organizations are Christian and provide leadership and support to thousands of CPCs. NIFLA, for example, states on its website that it is a Christian ministry that seeks to glorify God by proclaiming the sanctity of human life, both born and unborn. Through the provision of legal resources and counsel to charitable faith-based Pregnancy Resource Centers (PRCs) and Pregnancy Medical Clinics (PMCs), NIFLA seeks to develop a network of life-affirming ministries in every community across the nation.\(^27\)

While these websites eventually disclose the religious mission of the CPCs, in-person visits often do not provide the same transparent disclosure.

There are thousands of CPCs in the United States.\(^28\) This is a national, large-scale campaign. Heartbeat International, a Christian organization that started out as a telephone hotline and developed into a system of CPCs, currently “serves 1,800 affiliated pregnancy help locations, maternity homes, and non-profit adoption agencies on all 6 inhabited continents.” In the United States, CPCs now outnumber abortion clinics 3-to-1, though this number is likely an underestimate.\(^30\) In some states, the ratio is more like 10-to-1.\(^31\)

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\(^28\) Laura Bassett, What Are ‘Crisis Pregnancy Centers,’ And Why Does The Supreme Court Care About Them?, HUFFINGTON POST (Nov. 13, 2017), https://www.huffingtonpost.com/entry/crisis-pregnancy-centers-supreme-court_us_5a09f40ae4b0e648a0d13a2 [https://perma.cc/4ZZZ-QNM3].


\(^30\) Jenny Kutner, How Crisis Pregnancy Centers are Using Taxpayer Dollars to Lie to Women, SALON (July 14, 2015), https://www.salon.com/2015/07/14/how_crisis_pregnancy_centers_are_using_taxpayer_dollars_to_lie_to_women/ [https://perma.cc/6ZQD-4X7A] (last visited Nov. 19, 2018). This number is difficult to confirm, given that many CPCs operate without a license. The number of CPCs is likely even higher in many states.

While the stated missions of these organizations appear charitable, and women benefit from the CPCs’ provision of free diapers or pregnancy tests, their practices are quite deceptive. Film documentaries, non-profit investigations, investigative journalism, and a 2006 Congressional report, commissioned by Senator Waxman (the “Waxman Report”), have demonstrated that the aim of CPCs is to lure vulnerable, under-insured or uninsured women away from abortion clinics. Given the ideological importance of their mission, CPC staff openly endorse misleading women if it means that fewer abortions will be performed. The success of CPCs depends on how many women they can persuade to carry their pregnancies to term.

To further confuse pregnant women, CPCs are typically located just a few blocks from clinics that do counsel on and provide abortions. Some CPCs have bought the exact real estate where PlannedParenthoods were located after aggressive TRAP laws forced the Planned Parenthood clinics to close their doors. However, unlike the Planned Parenthood clinics, which are licensed and thoroughly regulated as medical clinics, CPCs are often not so licensed. Recognizing that many states could close the CPCs under statutes that require health facilities and their staff to be licensed, NIFLA has assisted over 700 CPCs in their conversion into licensed medical clinics. These conversions are a step in the right direction, as additional safeguards come from the CPCs being licensed. However, licensure has not completely halted the deceptive practices

32. See MINORITY STAFF OF H. COMM. ON GOV. REFORM, FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS 6 (July 2006) (prepared for Rep. Henry A. Waxman). At the Congressmans request, the Special Investigations Division evaluated twenty-three CPCs through anonymous telephone interviews and also reviewed website tactics and advertising methods.


34. “If you don’t hook her right away, she hangs up on you. When she calls and she says ‘Do you do abortions?’ I say ‘Are you calling for yourself or are you calling for your friend?’...and we engage in conversation. Because if she calls and says ‘Do you do abortions?’ and I say ‘No,’ click. [The CPC director pantomimes hanging up the phone]. I’m trying to get her in the door. Take control of the conversation... . I don’t mind the criticisms of taking control. ‘That doesn’t sound fair. Well too bad!’” 12th & DELAWARE (Home Box Office 2010). See also JACKSON (Girl Friday Films 2016).

35. In another scene from 12th and Delaware, a CPC director conducts a training for volunteers in which she emphasizes the value of proximity to a clinic that provides abortions. She tells volunteers: “Clearly our competition is the abortion clinic. We are actually on opposite sides of the street.... They’re not always sure who they’re calling anyway.” 12th & DELAWARE (Home Box Office 2010). See also Holtzman, supra note 9, at 86.

36. These laws impose stringent requirements on abortion clinics that dictate such things as the width of hallways, lighting requirements, square footage requirements for exam space, admitting privileges for physicians at area hospitals, etc. Many clinics have had to close in the wake of these laws, which was the intended effect. See Caitlin E. Borgmann, Borrowing from Dormant Commerce Clause Doctrine in Analyzing Abortion Clinic Regulations, 26 HEALTH MATRIX 41, 45 (2016); see also Rachel Suppé, A Right in Theory but Not in Practice: Voter Discrimination and Trap Laws As Barriers to Exercising A Constitutional Right, 23 AM. U. J. GENDER SOC. POL’Y & L. 107, 130 (2014). Following Whole Women’s Health v. Hellerstedt, 136 S. Ct. 2292 (2016), many of these TRAP laws might be struck down, but much damage in terms of patient access has already been done.

of CPCs. And, while many of the women who obtain services from CPCs assume they are getting treated by health care professionals who are subject to all that comes with that perception, the CPCs that remain unlicensed are not subjected to the numerous health, safety, and privacy regulations that attend to the regular practice of medicine. There is a great mismatch between the way CPCs present themselves to the public and the way they have presented themselves to the courts.

This Article will proceed in four parts. The first Section will discuss how legislators have attempted to thwart deceptive CPC practices through mandatory disclosure laws, and how these statutes have been successfully challenged on First Amendment grounds. While state consumer protection statutes provide fantastic avenues for correcting CPCs’ deception, they have been bafflingly underutilized due to political pressure in conservative states. Local prosecutors are not motivated to bring these consumer protection lawsuits against CPCs. Therefore, the second Section makes the primary argument for a private remedy in tort law. Rather than rely on under-enforced or constitutionally vulnerable consumer protection regulation, this Article advocates for the use of the private, intentional tort of battery to provide redress for the women who have been physically touched by the CPCs and injured by their deceptive practices. There are many advantages to this approach, which puts many injured women in the driver’s seat, offers them money damages, and does not require legislative or political cooperation. In Sections III and IV, this Article discusses how states could, but do not, prosecute CPCs for the unlawful practice of medicine without a license, or for the use of FDA-approved devices in unapproved ways. Again, due to the lack of political will to enforce these options, they are not likely to provide an adequate remedy to most American women. The Article then concludes with some forward-looking concerns about the ways that medical informed consent has been hijacked by the pro-life movement. Contrasting how the First Amendment protects CPCs’ deceptive speech but is quite limited in its protection of the free speech rights of licensed medical providers, the Article explores some concepts rooted in medical ethics. Namely, this Article acknowledges and articulates a worrying trend in reproductive jurisprudence which blurs the medical with the ideological, shoehorning politics through the mouths of licensed medical providers and doing violence to the physician-patient relationship.

38. In order to avoid state fines for the unauthorized practice of medicine, some CPCs have begun requiring that their nurses and medical directors maintain active medical licenses.
I. REGULATING CPCs THROUGH LEGISLATIVELY-COMPelled DISCLOSURES

A. Legislators Pass Disclosure Requirements to Curb the Documented, Deceptive Practices of CPCs

City and county legislators were understandably upset when the Waxman Report and other local investigations revealed the extent to which pregnant women were being misled by CPCs.39 Many cities and counties have passed ordinances attempting to curb the deception of CPCs through mandatory disclosure requirements.40 Typically, these ordinances required notices to be placed in the CPC waiting rooms indicating that the clinic is not licensed, or (more constitutionally infirm) stating that the CPC does not refer anyone to abortion services.41 These types of disclosure requirements have been struck down by the Fourth Circuit and, most recently, by the Supreme Court, for requiring speech that is not narrowly tailored or necessary to fulfill a compelling state interest.42 Given how much the recent Supreme Court opinion, NIFLA v. Becerra, limits future restrictions on CPCs’ speech, it will be discussed in some detail below.

40. Campbell, supra note 22, at 84.
41. Id.
42. Holtzman, supra note 9, at 79.
B. CPCs Challenge Disclosures as Violations of Free Speech

The First Amendment, applicable to the states through the Fourteenth Amendment, prohibits the enactment of laws “abridging the freedom of speech.” 43 Consequently, government has “no power to restrict expression because of its message, its ideas, its subject matter, or its content.” 44 Laws that require speakers to communicate a particular message (“content-based” laws) “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” 45 However, the Court has held that this does not apply when the government seeks to regulate the commercial or professional speech of participants in the public marketplace. 46 In the past, the Supreme Court “has been wary of claims that regulation of business activity, particularly health-related activity, violates the Constitution.” 47 The key question for regulating CPCs under the First Amendment, therefore, is whether the CPC’s speech is ideological, commercial, or professional.

An ordinance passed by Baltimore’s city council required CPCs to disclose that “the center does not provide or make referral for abortion or birth-control services,” and the disclosure must be “written in English and Spanish,” “easily readable,” and “conspicuously posted in the center’s waiting room or other area where individuals await service.” 48 This was thus a content-based regulation, and if the speaker were ideological, as opposed to commercial or professional, the ordinance would need to satisfy strict scrutiny. A Baltimore CPC and the Catholic archbishop of Baltimore challenged this disclosure requirement as violating their free speech. A federal court in Maryland enjoined enforcement of the ordinance after the Fourth Circuit remanded, demanding greater discovery. 49 Baltimore County appealed this decision, but the appellate court has not yet ruled on the matter.

In Centro Tepeyac v. Montgomery County, a CPC challenged the Maryland county’s requirement that CPCs warn women that “the Center does not have a licensed medical professional on staff” and “the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed

43. U.S. CONST. amend. I.
44. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972).
46. More will be said infra, at Section I.B.3 about the application of the Zauderer precedent to CPCs speech. See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 650–53 (1985).
49. The district court’s hasty decision cannot be excused by its ruling that any commercial speech regulated by the Ordinance “is inextricably intertwined with otherwise fully protected speech,” thus triggering strict scrutiny. Id. at 287.
health care provider.” Despite acknowledging that “context matters” and courts must look to “the effect of the compelled statement [on the listener],” the district court emphasized that the speech that was being regulated occurred not on websites or through advertising, but in the CPC’s waiting room, and “within Centro Tepeyac’s four walls, much closer to their ideological message.” They then struck down the ordinances as violating the CPC’s free speech rights. The Fourth Circuit found that, as content-based compelled speech, the county ordinance failed to pass strict scrutiny.

California’s Reproductive FACT Act (“the FACT Act”) fared better in the lower federal courts, in part because it technically applied to all non-profit community clinics offering pregnancy counseling offices, rather than just those that are unlicensed or pro-life. In addition, the statute did not include any language about the state’s preference regarding where women received their pregnancy care, or that they were encouraged to see a licensed provider. The stated aims were clearer as well: to make sure California women were apprised of state-funded reproductive services in a timely fashion, and were made aware of how to access them. The legislative findings acknowledged that “pregnancy decisions are time sensitive,” and so the state must supplement their public health education with materials placed in the clinic offices.

50. 5 F. Supp. 3d 745, 748 (D. Md. 2014).
51. Id. at 758.
52. Id. at 760.
54. CAL. HEALTH & SAFETY CODE §§ 123470-123473 (Deering 2018).
55. The Act did have exemptions for certain facilities, which, if not included, may have proved fatal to the Act. The first exemption was for clinics operated by a federal agency, and was included so the Act was not federally pre-empted. The second exemption was for clinics that participated in California’s “Family Planning, Access, Care, and Treatment Program” (Family PACT program). Id. § 123471(c). To participate in the Family PACT program, a clinic must provide “the full scope of family planning . . . services specified for the program,” CAL. WELF. & INST. CODE § 24005 (Deering 2018), including sterilization and emergency contraceptive pills. Id. § 24007.
56. It does seem odd, however, that the state interest in protecting women’s health would not allow states to encourage women to see a licensed medical provider for their pregnancy care. Pregnancy is a medical condition, with significant risk of complication and even death. It seems like an entirely legitimate use of the states’ public health police power to encourage women to be seen by someone who was professionally trained and licensed.
57. “The legislature was concerned with women who may not be aware that certain health options are available to them, and wanted to ensure women in California are informed of the full range of free and low-cost services available to them when they make their reproductive decisions. In this way, the Act more closely resembles informed consent cases than deceptive advertising cases.” See A Woman’s Friend Pregnancy Res. Clinic v. Harris, 153 F. Supp. 3d 1168, 1209 (E.D. Cal. 2015), aff’d, 669 F. App’x 495 (9th Cir. 2016), cert. granted, judgment vacated sub nom. See also CAL. HEALTH & SAFETY CODE § 123470 (Deering 2018).
58. A Woman’s Friend Pregnancy Res. Clinic v. Harris, 153 F. Supp. 3d 1168, 1208 (E.D. Cal. 2015), aff’d, 669 F. App’x 495 (9th Cir. 2016), cert. granted, judgment vacated sub nom. See also CAL. HEALTH & SAFETY CODE § 123470(a)-(c) (Deering 2018), which provide in part, “(a) All California women, regardless of income, should have access to reproductive health services . . . (c) Because pregnancy decisions are time sensitive, and care early in pregnancy is important, California must supplement its own efforts to advise women of its reproductive health programs. In California, low-
1. NIFLA v. Becerra in the Ninth Circuit

The Act contained two critical parts. The first part required any pregnancy counseling center that was not licensed as a medical facility to conspicuously place a notice in the entrance of the facility, at least 8.5 inches by 11 inches in size and written in no less than 48-point type font, that stated that the facility “was not licensed as a medical facility and had no licensed medical provider.” They were also required to post this statement on billboards and any advertising materials for the CPC. Failure to comply resulted in a $500 fine for the first offense, and $1,000 fines thereafter. This part of the Act will be referred to hereinafter as the “unlicensed disclosure” provision.

The second part of the Act required licensed facilities to disclose that California has free or low-cost state-funded family planning options. Specifically, covered clinics must post in their waiting rooms, in printed materials, or digitally at check-in that “California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].” The stated reason for the Act was California’s desire that women have immediate access to California’s “comprehensive family planning services and pregnancy-related care through the Medi-Cal and the Family PACT programs.” This part of the Act will be referred to as the “licensed disclosure” provision.

A handful of California CPCs petitioned for an injunction, to prevent the state of California from enforcing either part of the statute. They claimed that both provisions violated their rights to free speech under the U.S. Constitution. The district courts and Ninth Circuit denied the injunctions.

Given the state’s consumer and health protection reasons for passing the law, the Ninth Circuit held that the unlicensed disclosure survived strict scrutiny and was viewpoint neutral. As for the licensed disclosure, the Ninth Circuit agreed

income women can receive immediate access to free or low-cost comprehensive family planning services and pregnancy-related care through the Medi-Cal and the Family PACT programs. However, only Medi-Cal providers who are enrolled in the Family PACT program are authorized to enroll patients immediately at their health centers.”

59. CAL. HEALTH & SAFETY CODE § 123472(b)(1) (Deering 2018).
60. CAL. HEALTH & SAFETY CODE § 123473 (Deering 2018).
61. CAL. HEALTH & SAFETY CODE § 123472(g)(1) (Deering 2018).
62. “Because pregnancy decisions are time sensitive, and care early in pregnancy is important, California must supplement its own efforts to advise women of its reproductive health programs. In California, low-income women can receive immediate access to free or low-cost comprehensive family planning services and pregnancy-related care through the Medi-Cal and the Family PACT programs.” CAL. HEALTH & SAFETY CODE § 123470 (Deering 2018).
64. A few district courts found the licensed disclosure to be a regulation of professional, not ideological speech, and therefore subject to heightened, but not strict, constitutional review. See Mountain
that this provision regulated professional speech, and thus was subject to (and survived) intermediate scrutiny. As the Ninth Circuit was only applying intermediate scrutiny to this part of the Act, it held that the compelled speech need not be the least restrictive means necessary, and “[the notice] does not contain any more speech than necessary, nor does it encourage, suggest, or imply that women should use those state-funded services. The Licensed Notice is closely drawn to achieve California’s interests . . . “65 According to the Court of Appeals, the petitioners could not demonstrate likely success on the merits of their First Amendment free speech claims for either part of the Act, so the injunction was denied.66

The CPCs petitioned the Supreme Court for review, and in 2017, certiorari was granted in NIFLA v. Becerra.67 The Court certified the question of whether the Act’s compelled speech requirements violate CPCs’ right to free speech under the First Amendment to the U.S. Constitution. The case would resolve the conflict between the Fourth and Ninth Circuits as to how to classify the relevant speech and the appropriate level of scrutiny to apply. Oral arguments were heard in the spring of 2018, and the opinion was issued in June of 2018.

2. The Supreme Court Protects CPCs’ Right to Deceive by Holding that They Are Not Medical Providers

The Supreme Court had a different interpretation of both the applicable precedent and the statute itself. The majority granted the CPCs’ injunction, prohibiting enforcement of the Act.68 Justice Thomas wrote for the majority, finding that both parts of the Act “likely violated” the CPCs’ right to free speech.69 The Court achieved this result by making a series of creative but disingenuous moves. Each of these moves rested on the factually inaccurate and easily disprovable assumption that the CPCs are not practicing medicine or providing medical services.

Right to Life, Inc. v. Becerra, 692 F. App’x 807, 808 (9th Cir. 2017); Livingwell Med. Clinic, Inc. v. Harris, 669 F. App’x 493, 493-95 (9th Cir. 2016); A Woman’s Friend Pregnancy Res. Clinic v. Harris, 153 F. Supp. 3d 1168, 1199 (E.D. Cal. 2015); aff’d, A Woman’s Friend Pregnancy Res. Clinic v. Harris, 669 F. App’x 495 (9th Cir. 2016). See also Centro Tepeyac v. Montgomery Cty., 722 F.3d 184, 189 (4th Cir. 2013) (“The court observed that content-based speech regulations ordinarily are subject to strict scrutiny, but that lesser degrees of scrutiny may apply where the speech at issue is, inter alia, commercial or professional.”).

65. Nat’l Inst. of Family & Life Advocates, 839 F.3d at 842.
66. “California has a substantial interest in the health of its citizens, including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion. The California Legislature determined that a substantial number of California citizens may not be aware of, or have access to, medical services relevant to pregnancy.” Nat’l Inst. Of Family & Life Advocates v. Harris, 839 F.3d 823, 841 (9th Cir. 2016).
69. Id. at 2380.
The cornerstone of petitioner’s argument was that CPCs were not medical providers and what they do is not considered a medical intervention. There is a mismatch, then, between how CPCs present themselves before the Supreme Court, and how they are presenting themselves to the public. It was this mismatch that the state of California sought to rectify with its Act, by requiring CPCs to disclose their true unlicensed nature. And, given that the case was resolved at the preliminary injunction phase, without much fact-finding, it is this very mismatch that the CPCs successfully exploited before the Supreme Court to deem their speech more protected than that of a licensed physician.

Consider this telling exchange between NIFLA’s attorney, Michael Farris, and Justice Ginsburg. Justice Ginsburg was evidently trying to understand why the state of California could not compel a CPC to offer accurate and non-misleading medical information to pregnant women, something constitutionally permissible under Planned Parenthood of Southeastern Pennsylvania v. Casey.70

Justice Ginsburg: “But why isn’t this also informed consent? . . . So—so that the patient will know what are the array of services available to her?”

Michael Farris: “Your Honor, the services provided by our licensed centers are not medical interventions.”71

Petitioner’s attorney conceded that if the state of California considered CPCs to be practicing medicine, they could prosecute them for the unauthorized practice of medicine.72 However, NIFLA’s attorney also stated that they do not think they are practicing medicine or providing medical interventions, despite their stated compliance with HIPAA requirements that only apply to medical covered entities, or their provision of pregnancy tests, counseling, exams, or ultrasounds, any of which would constitute the practice of medicine in any state.73 To reiterate, what the CPCs advertise themselves as providing, and what they actually provide, should be considered medical services, interventions, and the practice of medicine in every single U.S. state. The CPCs’ definition of “the practice of medicine” finds no support under any existing state law.

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a. Is the CPC Speaking as a Commercial, Ideological, or Medical Entity?

The classification of the speech is central for First Amendment analyses. This is a particularly difficult task in the present case, as CPCs demonstrate aspects of all three types of speech: commercial, professional, and ideological. It is therefore no surprise that there was a conflict between the district courts about how to classify the speech of CPCs. While the distinctions between each type are not as clear as they once were, federal precedent has mostly assumed that these categories were mutually exclusive.

If the CPCs were engaged in purely commercial speech, the statutes in question would traditionally be subject to mere rational basis review. Under rational basis, the state need only offer a plausible basis for the legislation that is minimally connected to the Act. In effect, this means the CPCs would not be given First Amendment protection when they are misleading consumers or when the compelled speech serves to ensure the provision of accurate information. The main objective in the analysis of compelled commercial speech is “the protection of the consumer’s interest in the free flow of truthful commercial information.”

The Supreme Court has recently complicated these traditional distinctions a bit, however, offering greater protection to some forms of commercial speech. In Sorrell v. IMS, the Court applied “heightened” scrutiny to a Vermont consumer protection statute that prohibited data-miners and pharmaceutical manufacturers from selling or using a doctor’s prescribing information. Understanding the information disclosure objective of commercial speech regulation helps to explain Sorrell, where the Court found that restrictions on commercial speech (rather than the more typical compelled speech) violated the First Amendment. In this same case, Justice Breyer reminded the majority that the courts should exercise caution before applying heightened scrutiny “whenever such a program burdens speech” as this would frustrate separation of powers and “distort or undermine legitimate legislative objectives.” Even though Sorrell was about restricting rather than compelling speech, this case can be read as signaling an erosion of the typical deference afforded to state consumer-protection statutes.

In the case of California’s FACT Act, federal courts applied the traditional framework for commercial speech. In First Resort v. Herrera, the Ninth Circuit

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74. A Woman’s Friend Pregnancy Res. Clinic v. Harris, 153 F. Supp. 3d 1168, 1199 (E.D. Cal. 2015), aff’d, 669 F. App’x 495 (9th Cir. 2016).
75. The Central Hudson test informs the proper regulation of commercial speech.
77. 564 U.S. 552 (2011).
78. Id. at 564.
79. Id. at 584-85 (Breyer, J., dissenting).
held that whether speech is commercial “does not hinge solely on whether the [CPCs have] an economic motive.”80 Under this view, even speech that is provided by volunteers can be classified as commercial as it is spoken in a “marketplace” for reproductive services. And if it is commercial, the Act would be a permissible regulation on the dissemination of false or misleading statements.81

Professional speech, on the other hand, has traditionally been afforded intermediate review. This was justified because professionals, “through their education and training, have access to a corpus of specialized knowledge that their clients usually do not” and that clients put “their health or their livelihood in the hands of those who utilize knowledge and methods with which [they] ordinarily have little or no familiarity.”82 Intermediate review meant that the regulation need not be the least restrictive necessary to further a compelling state interest. As the Act applied both to licensed and unlicensed facilities, there was at least some argument that the speech is not professional, particularly when it is compelled by CPCs that have no professional or licensed staff.83 But given that the CPCs presented themselves as medical providers, and did offer some professional services such as diagnosing pregnancies and offering ultrasounds, there was also an argument that they were engaged in professional speech. The Ninth Circuit adopted this latter argument, finding the CPCs to be engaged in professional speech.84

The Fourth Circuit disagreed even further and found CPCs’ speech to be ideological due to their pro-life agenda.85 This interpretation was bolstered by the fact that the CPCs offered free services and products. Ideological speech is afforded the greatest First Amendment protection. It is assumed that the state’s purpose in compelling this speech is the most suspicious. Given this, restrictions on ideological speech are subjected to strict scrutiny, and absent compelling state interests, and a statutory scope that is narrowly tailored to address those state interests, the restriction will fail.

The problem, of course, and the reason for the disparate treatment among federal courts, is that CPCs exhibit aspects of commercial, professional, and ideological speech. To the outside layperson, they appear to be a medical clinic,

80. First Resort, Inc. v. Herrera, 860 F.3d 1263, 1273 (9th Cir. 2017).
81. Id. at 1273-74.
but to the sophisticated courts and attorneys, who have access to much more information about the mission and funding of CPCs, they are obviously ideological. And while they usually do not charge for their services, they are still at least partially commercial in that they are competing with licensed medical providers in the marketplace to offer a reproductive service.

b. The Supreme Court Classifies CPC Speech as Ideological

While the classification was far from obvious, then, the Supreme Court decided to treat CPCs’ speech as ideological. It did so by largely ignoring the way CPCs hold themselves out to the public and ignoring that much of what they do is a professional service. It also distinguished between speech and conduct, holding that precedent allowing greater regulation of professionals was targeted at professional speech that is incident to a professional service. This proved pivotal, as it allowed the Court to distinguish precedents upholding TRAP laws and other compelled disclosures in the marketplace of licensed physicians.

3. The Unlicensed Disclosure Provision

Given that CPCs advertise to the public for services, the unlicensed disclosure provision should have been uncontroversial. States have long recognized an interest in promoting consumer protection and regulating commerce to promote public health and safety. More specifically, the Supreme Court has also recognized the importance of ensuring that consumers know whether they are visiting a licensed medical provider. The state’s interest has been considered stronger than the individual practitioner’s freedoms.

Even if CPCs were not considered medical providers, regulations on professional speech have often been upheld to protect consumers. The Court has recognized that professionals can be required to provide “purely factual and uncontroversial information about the terms under which . . . services will be available.” In Zauderer, the Court upheld a requirement that attorneys disclose their contingency-fee payment structure to potential clients. The Court reasoned that the constitutionally protected interest in not providing any particular factual information in his advertising is minimal . . . [and] warning[s] or

87. Id.
disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.99

In NIFLA, the majority stated that the Zauderer precedent did not apply because Zauderer applied only to purely factual information. Here, the Court stated that “information about state-sponsored services—including abortion, [are] hardly an ‘uncontroversial’ topic.”90 But this is where they reveal their category error and confuse the speaker (ideological, controversial pro-life group) with the speech (which is purely factual and should not itself be considered controversial).91 The Court then claimed that even if Zauderer did apply, however, the Act still failed, as the disclosures were “unjustified or unduly burdensome,”92 especially as applied to a CPC’s advertising materials.93 They did so by focusing on the cost of compliance to CPCs.

Even though the majority classified the speech as ideological and unduly burdensome, it did not stop there. It decided to go further, and rejected the distinction between professional and non-professional speech, questioning lower-court analyses to the extent they applied an intermediate level of scrutiny. The Court reasoned that professional speech is “a difficult category to define with precision.”94 By imposing a licensure requirement, this “gives the States unfettered power to reduce a group’s First Amendment rights.”95

Perhaps the most puzzling part of the majority’s opinion was the asymmetrical finding by the Court that the harm to pregnant women from CPCs’ deception was imaginary, and the harm to the CPCs by enforcing the Act was very real. In finding that the licensed disclosure provision was perhaps responding to a “purely hypothetical harm,”96 the Court ignored the briefing by the state and its legislative findings in passing the Act, which documented the extent to which women were being misled by CPCs. The legislature had provided ample evidence of harm, which the Court ignored.97

89. Id. at 651.
91. Previously, the Court had acknowledged that different types of content might be treated differently, even if still content-based and all subjected to strict scrutiny.
93. Id. at 2373-76.
94. Id. at 2375.
95. Id.
96. Id. at 2377.
97. In finding that the harm here may be “purely hypothetical,” and the disclosure unnecessary, the Court seems to be considering the availability of other state options for curbing deceptive practices, such as the ability of the state to prosecute for the unlawful practice of medicine or under general state consumer protection laws. However, the bill specified the harm the Reproductive FACT Act was meant to address, namely that “In 2012, more than 2.6 million California women were in need of publicly funded family planning services. More than 700,000 California women become pregnant every year and one-half of these pregnancies are unintended. In 2010, 64.3 percent of unplanned births in California were publicly funded. Yet, at the moment they learn that they are pregnant, thousands of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery. Because pregnancy decisions are time sensitive, and care
In contrast, the harm to the CPCs from having to comply with the Act was considered by the Court to be “unjustified or unduly burdensome.” The Court then reasoned that “[e]ven if the State had presented a nonhypothetical justification, the FACT Act unduly burdens protected speech,” as “[i]t imposes a government-scripted, speaker-based disclosure requirement” that applies regardless of whether the CPCs disclose their non-licensed status on their website. Of course, this assumes that everyone has access to these advertisements before entering the CPC.

4. The Majority Places Much Consumer Protection Law at Constitutional Risk

By describing the disclosure in this way, the Court cast too wide of a net, rendering many consumer protection statutes unconstitutional. As Breyer’s dissent correctly points out, this aspect of NIFLA has the potential for sweeping impact outside of the abortion context, as “virtually every disclosure law could be considered ‘content based,’ for virtually every disclosure law requires individuals to speak a particular message.”

The majority responds that “[c]ontrary to the suggestion in the dissent, we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.” But if the FACT Act is not considered a regulation to protect health and safety, it is hard to imagine what would be. The majority’s opinion offers no guidance on this score. Why is the Act not directed at protecting public health?

The Court’s confusing reasoning could invalidate many state regulations, of such things as cigarettes, securities, guns, or environmental pollutants, on First Amendment grounds. States typically do not require non-polluters to state that they are non-polluting, or that non-cigarettes do not contain nicotine. If passing legislation that targets the deceivers is considered impermissible “government-scripted” content discrimination, then much regulation of controversial products or industries would be unconstitutional. And the majority’s general disclaimer that this is not what they meant “seem[s] more likely to invite litigation than to provide needed limitation and clarification.”

early in pregnancy is important, California must supplement its own efforts to advise women of its reproductive health programs. In California, low-income women can receive immediate access to free or low-cost comprehensive family planning services and pregnancy-related care through the Medi–Cal and the Family PACT programs.” See 2015 Cal. Stat. Ch. 700. 98. Nat’l Inst. of Family & Life Advocates, 138 S. Ct. at 2372 (quoting Zauderer, 471 U.S. at 651). 99. Id. at 2377 100. Id. at 2380 (Breyer, J., dissenting). “[M]uch, perhaps most, human behavior takes place through speech and because much, perhaps most, law regulates that speech in terms of its content, the majority’s approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation.” Id. 101. Id. at 2376. 102. Id. at 2381 (Breyer, J., dissenting).
This holding is quite disturbing and far-reaching. CPCs create deceptive advertising, and then cannot be required to correct it. Imagine if a gun manufacturer misled consumers to believe that a gun could do things that it could not do, or was safer than it was. Then, imagine the state passing a law requiring the manufacturer to correct this deception. Under the Supreme Court’s opinion in *NIFLA*, the statute could be presumptively unconstitutional, as the subject matter is controversial (guns) and the disclosure might cost the gun manufacturers money. This would, of course, ignore the fact that it was the actions of the gun manufacturers that created the deception in the first place. This paradoxical outcome should be alarming to anyone concerned about deceptive advertising.

5. *The Licensed Disclosure Provision*

The Supreme Court also found that the second part of the Act likely violated the CPCs’ right to free speech. As with the unlicensed disclosure, the bulk of the constitutional work was done when it classified the CPCs’ speech as ideological rather than professional. Recall that in *Zauderer*, professional speech could be regulated for consumer protection.103

a. To Distinguish *Casey*, CPCs Deemed To Not Be Providing Medical Services, and the Licensed Disclosure was Not Informed Consent

The Court made it clear that the licensed disclosure is not “an informed consent requirement or any other regulation of professional conduct.”104 This is because it is not tied to the provision of a “medical procedure,” and applies to all interactions between a CPC and a pregnant woman.105 Of course, this is a very narrow reading of informed consent doctrine, as licensed doctors can be and have been required to provide information to women that is disconnected from a medical procedure. For example, when physicians provide information about the likely side effects of medications, something they are legally required to do, this disclosure would not be part of medical informed consent under the *NIFLA* framework. Likewise, outside of the health care context, employers can be required to post safety notices in their break-rooms that do not directly apply to their employee’s immediate conduct, and restaurants that serve alcohol can be required to post notices about the risks of drinking alcohol, regardless of whether a patron orders any alcoholic beverages. Never before have health disclosures

105. *Id.*
needed to be immediately tied to the speaker’s conduct to pass First Amendment scrutiny.

The requirement that the health and safety disclosure be limited to those instances where a “medical procedure” is immediately to be performed also reflects a very narrow, and incorrect, reading of what it means to practice medicine. Under this definition, pediatricians, geriatricians, general practitioners, infectious disease doctors, and many other specialties rarely practice medicine. These are considered “cognitive” specialties where procedures are not typically performed, and instead health care is discussed and monitored, and referrals are made. These physicians would almost certainly dispute the idea that medical services are only rendered, and informed consent is only required, when a procedure is about to be performed. To say that only “procedures” amount to medical services is bizarre and incorrect. It is also dismissive of the large majority of health care providers, who never perform, or bill for, any procedures, and yet who are still legally required to maintain a license to practice medicine. Further, if a CPC provides medical services at any point, which they do when diagnosing a pregnancy, conducting physical exams, or performing ultrasounds, it should be deemed a medical clinic. There is no such thing as a part-time or fractional medical clinic. After all, just because a physician fills out forms for patients who want to play sports or paperwork for insurance billing, these non-procedure activities do not render the clinic a non-clinic. It is completely at odds with the concept of the “practice of medicine” to think of a medical clinic as only providing medical services when a physician is cutting open a patient.

Of course, there was more to this rhetorical move than merely dodging Zauderer. It was critical to find that CPCs were not practicing medicine in order to distinguish the informed consent precedent specific to abortion. Casey made it quite clear that the state could require providers to offer non-misleading and accurate information as part of informed consent to abortion, and that this requirement would not violate due process or free speech.106 But because the Supreme Court did not view the CPCs as medical providers, they did not apply Casey. The FACT Act disclosures, they reasoned, could be made in the lobby of the pseudo-clinic, before any medical procedures were technically provided. There was no medical procedure being performed yet, and because the CPCs are not medical providers, there may never be any medical service provided. Apparently, to the NIFLA majority, informed consent is only triggered moments before an abortion procedure is about to be performed—and not as part of general reproductive counseling.107 In oral argument, Justice Sotomayor recognized the problem with this, asking “how’s [what a CPC does] different from what a doctor

107. This is surprising, as courts have held that providing women counseling and prenatal vitamins constitutes the practice of medicine, to which regular tort law informed consent would attach.
does? When you go in for a pregnancy, you see the doctor, and the doctor will describe, hopefully, the benefits of a pregnancy and perhaps its risk because, depending—not all pregnancies are without complications. So this is consulting about a medical condition. How is that any different than Casey? You come in to talk to an—a doctor about abortion.”  

NIFLA’s attorney responded that this was different because Casey applied to doctors, and NIFLA is not a medical provider. Justice Sotomayor responded, “now you’re redefining medicine.” Indeed.

If the Court had focused on the reasonable perspective of the listener, and analogized the CPCs to medical providers, it would have been fairly simple for the Court to allow the disclosures as part of the proper regulation of medicine and/or professional speech. It is patently unjust to allow CPCs to deceive women, and then not allow states to correct this deception through disclosure requirements that target the deception where it occurs.

With Zauderer and Casey out of the way, the Court still needed to demonstrate that the regulation was not narrowly tailored. Here, the Court missed a step by suggesting (but not finding) that the Act discriminated based on viewpoint and interpreting any evidentiary ambiguity in favor of NIFLA. While “the Government bears the burden of proof on the ultimate question [of the statute’s] constitutionality,” the Court was overly dismissive of California’s evidence regarding the need for tailoring its statute in the way that it did. Namely, the Court dismissed the evidence that a public outreach campaign would be ineffective and would leave many women vulnerable to the CPC’s deceptive practices.

NIFLA argued that the Act discriminated based on viewpoint because it exempted facilities that enroll patients in state-funded reproductive programs, which include abortion. By exempting these clinics, they argued, “the statute unnecessarily imposes a disproportionate burden upon facilities with pro-life views, the very facilities most likely to find the statute’s references to abortion
morally abhorrent.” But, as Breyer points out in his dissent, the evidentiary record was insufficient on this score. The district court found that the exemption made sense because the exempted clinics “provide the entire spectrum of services required of the notice.” Absent discovery, there was no evidence that the Act disproportionately and unfairly impacted CPCs. True, poor pregnant women might visit exempt clinics, and they might benefit from the disclosure that the state offers low-cost or free reproductive options. But there was nothing in the record to suggest that the exempt clinics were not already providing this information, as respondents claimed.

The Court reasoned that if the state interest was in informing women that state-funded public health options were available, California should have required all clinics to disclose this availability, and not just those that fail to offer the relevant services. In oral argument, the state’s attorney attempted to argue that it limited the compelled speech to only those speakers necessitating the disclosure. The Act could have been deemed over-inclusive if it had required clinics providing abortion and contraception to advertise the availability of state-funding for the same, without any evidence that this disclosure was necessary. Indeed, in discussing the unlicensed disclosure, the NIFLA Court recognized that “disclosures [must] remedy a harm that is ‘potentially real not purely hypothetical’ and the remedy must extend ‘no broader than reasonably necessary.’” The state of California argued that it targeted the CPCs because that is where the deception existed, as there was no documented failure to inform women of state-funded reproductive services by private clinics offering general obstetric services. Regardless, the appearance of regulating a pro-life perspective

113. See Nat’l Inst. of Family & Life Advocates v. Harris, No. 15CV2277 JAH(DHB), 2016 WL 3627327, at *10 (S.D. Cal. Feb. 9, 2016), aff’d, 839 F.3d 823 (9th Cir. 2016), cert. granted in part sub nom. Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 464, 199 L. Ed. 2d 328 (2017), and rev’d and remanded sub nom. Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018), and rev’d in part, vacated in part sub nom. Nat’l Inst. of Family & Life Advocates v. Becerra, 902 F.3d 900 (9th Cir. 2018). For defendants’ arguments on this point, see also Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction at 24-25, Nat’l Inst. of Family & Life Advocates v. Kamala Harris, 2015 WL 13649183 (S.D. Cal. Nov. 13, 2015) (No. 3:15-cv-02277-JAH-DHB). “The notice requirement is also narrowly tailored to the stated interest of ensuring that pregnant women are aware of the full spectrum of pregnancy-related health care services in California because the specific language of the notice speaks to that entire spectrum. In other words, the notice does not simply mention ‘abortion.’ Rather, the notice inclusively refers to ‘comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women.’ § 123472(a)(1). To put it another way, the notice does not express a particular opinion or view, or make a specific recommendation. It simply conveys the objective range of information—no more.” Id.
led the Court, and Justice Kennedy in his concurrence,116 to find that this part of the legislation was probably viewpoint discrimination, and, at the very least, was “wildly underinclusive,”117 and thus failed strict scrutiny.118

C. NIFLA Allows Ideological Speakers to Deceive

The problem with classifying the speech of CPCs is that they are less deceptive in the disclosures they provide online. After requiring several clicks, the CPC website will state that they do not provide abortions and they counsel from a pro-life, Christian perspective. However, many of the women seeking a CPC’s services might never visit its website. If they do, they might not read the fine print in the online disclaimers, or successfully click through the pseudoclinical content to get to their ideological disclosures. This disparity allows CPCs to advertise as medical clinics but be regulated as ideologues.

In finding that the CPCs are ideological speakers, the Court ignored the perspective of the listener. As one scholar explained, “the state’s regulatory authority may be triggered by the fact that an individual holds herself out as a professional, whether she is actually a professional or not.”119 This suggests that the clandestine intent of the speaker should not control. If the listener reasonably believes, based on the objective manifestations of the speaker, that the speaker is professional, then the speaker’s private, secretive ideology should not provide for greater First Amendment protection. This view makes abundant sense if the state’s interest in passing the disclosure ordinance was to protect consumers. Unfortunately, this is not the approach that the majority took in NIFLA.

Given how politicized access to abortion has become, it is no surprise that the First Amendment has protected politicized speech around abortion services. However, the NIFLA opinion goes further than necessary to protect deception. In so doing, the opinion signals to legislatures that consumer protection statutes cannot provide an effective remedy against CPCs’ deceptive practices. Even if California gathered sufficient evidence that demonstrated the need to correct CPC’s deceptive practices, the state would still face the hurdle of this speech being considered purely ideological. Further, the current Court sent strong

116. Id. at 2379 (Kennedy, J., concurring) (“It does appear that viewpoint discrimination is inherent in the design and structure of this Act.”).
117. Id. at 2375 (quoting Brown v. Entm’t Merchs. Ass’n, 564 U.S. 786, 802 (2011)).
118. Id. at 2375-76.
119. Hill, supra note 2 at 62 (“In Low, the investment adviser had been de-registered and therefore was no longer technically a licensed professional, but neither Justice White nor Justice Stevens, writing for the majority, seemed to consider this fact relevant to whether he was engaged in professional speech. Similarly, the Fourth Circuit, in considering whether a county could require fortune tellers to have permits and pay fees in order to operate, applied professional speech standards, although the notion of including fortune tellers in the same category as doctors and lawyers may, at first glance, seem to be a stretch. In placing this label on the fortune-teller’s speech, the court emphasized the personalized nature of the client relationship and the special need for consumer protection, which meant that the state could require her speech to be licensed.”).
signals that they would dismiss public health state interests as not being sufficiently compelling. This indicates a tremendous amount of judicial deference to the CPCs’ speech. If states want to effectively curb CPCs’ deceptive practices, they will need to pursue other avenues.

II. REGULATING CPCs THROUGH TORT LAW

A. Legal Tools Discussed Thus Far Require the Political Will of Elected Officials

There are myriad legal tools in the arsenal of the state attorneys general or legislators who would like to eliminate the misleading practices of pseudo-clinics, such as CPCs.

The biggest disadvantage to the public consumer protection statutes that will be discussed, infra, at Section IV, is that each requires the political will of elected officials to prosecute CPCs. A private individual cannot prosecute a CPC that deliberately misleads women, engages in the unauthorized practice of medicine, or promotes unapproved uses of an FDA-approved device. Unfortunately, elected officials, including county or state prosecutors, frequently choose not to champion the rights of women or support women’s reproductive choices. This means that private women, especially those who live in conservative states, cannot rely on these consumer protection statutes and regulations to challenge the CPCs. Without a legal remedy, the rights these measures seek to protect are meaningless.

B. Tort Law Puts the Injured Party in the Driver’s Seat

It is in this space, where something is either under-regulated or regulations are under-enforced, that the law of torts does its best and most useful work. This Article advocates that individual women should sue CPCs in tort law for the intentional tort of battery. While this approach presents its own challenges related to the emotional and financial burdens of litigation, as well as the fact that the litigation comes after the harm has occurred, it still has significant advantages over passively waiting for prosecution under consumer protection statutes. Tort law puts the injured party in the driver’s seat. In contrast to public actions, which typically involve the remedy of injunctions, a battery lawsuit allows the plaintiff to receive some compensation from the CPCs, which might include punitive damages. Finally, it does not in any way undermine public officials’ ability to enforce deceptive CPC practices through other means. Tort law can work in tandem with public efforts to minimize the deceptive and harmful practices of CPCs. But, when officials sit on their hands and allow consumers to be deceived, torts are a terrific remedy.
A tort claim would function something like the following. Any time that a woman is touched by a CPC staff member, if the touching is only consented to through deception by the CPC, she should be able to prevail on a civil battery claim. Battery honors the individual’s dignity and is not deferential to an industry standard of care, unlike a case for medical malpractice, which would apply only if the CPCs were licensed, professional health care providers.

Before explaining why the battery tort is such a great tool for women who have been injured by a CPC to seek redress, this Article will discuss the history and purpose behind this old intentional tort, and the ways in which TRAP laws have perverted the doctrine of battery and informed consent. The use of battery in this context might help redefine and reclaim this doctrine, to challenge the frequent pro-life blurring of the medical with the ideological. Informed consent means something; it is not merely a vehicle through which to shoehorn ideology.

C. The History of Battery and its Elements

The battery cause of action is one of the oldest torts, and has deep roots in our common law’s desire to protect the personal dignity of individuals and their ability to decide how, by whom, and under which circumstances they are touched. This is one of the most basic rights in our common law. To make out a civil claim of battery, a plaintiff must prove that each of these elements is more likely than not to have occurred: (1) the defendant intentionally touched the plaintiff (2) in a way that was objectively harmful or offensive and (3) the plaintiff did not consent to the touching, nor was it privileged (say, as part of a lawful police arrest).  

Pregnant women who were misled about the purpose of their visit to the CPC may bring battery claims against the CPC staff who touched them in offensive ways, violating their personal dignity. A pregnant woman who is examined by a CPC volunteer and physically touched—including having her pulse taken, but especially undergoing a vaginal exam or ultrasound—could rather easily make out a battery claim if she reasonably finds the touching offensive because she consented to the touching under false pretenses. The minority of women who are not touched by CPC staff, perhaps because they came in for counseling and left before being seen by one of their volunteers, would not be able to bring a battery claim. However, it is the physical touching and examination of pregnant

120. 6 AM. JUR. 2D Assault and Battery § 85 (2018).
121. W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 9, 41 (5th ed. 1984) (“The element of personal indignity involved always has been given considerable weight. Consequently, the defendant is liable not only for contacts which do actual physical harm, but also for those relatively trivial ones which are merely offensive and insulting.”); RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 101 (AM. LAW INST., Tentative Draft No. 1, 2014).
122. Campbell, supra note 22, at 75 (“The nurse attempted an external ultrasound, but because she claimed that the images were unclear, the nurse told Nicole she needed to perform a transvaginal scan instead, without explaining the intricacies of the procedure.”).
women that leads to the dangers this Article seeks to prevent, as the pregnancy evaluations and exams are the pseudo-medical activities that create the false sense that the pregnant women are being seen by licensed physicians. Where women are only receiving pamphlets, there is less of a risk that they will delay obtaining proper medical care as a result.

1. **Plaintiffs Do Not Need to Prove the CPCs Physically Injured Them**

Contrary to popular understanding, the intentional touching need not bruise or physically injure the plaintiff if the claim is for *offensive* touching.\(^{123}\) The “grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body.”\(^ {124}\) Examples of offensive touching include spitting in someone’s face,\(^ {125}\) removing someone’s hat,\(^ {126}\) or tackling someone too aggressively in a junior-high football league.\(^ {127}\)

Further, the plaintiff need not even be aware at the time that a battery took place. The insult to the plaintiff’s integrity “is as keenly felt by one who only knows after the event that an indignity has been perpetrated upon him as by one who is conscious of it while it is being perpetrated.”\(^ {128}\) Thus, a surgeon who examines an anesthetized person without her consent could be liable for a battery. So too could a man who kisses a woman, without waking her, while she is asleep.\(^ {129}\)

2. **Plaintiffs Do Not Need to Prove that the CPC Had Malicious Intent**

To satisfy the intentional component of the battery claim, courts merely require that the touching was voluntary and the defendant intended to make contact with someone’s person. This just means that the actor’s movement cannot be the result of an automatic reflex, such as a knee-jerk reaction, epileptic seizure, or coercion.\(^ {130}\) There is no required intent to injure or offend, and there is no need to prove that the actor was “inspired by any personal hostility.”\(^ {131}\) Indeed, even a friendly practical joke can lead to a battery claim.\(^ {132}\) While courts continue to bungle this standard, it remains the black letter common law,

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124. RESTATEMENT (SECOND) OF TORTS § 18 (AM. LAW INST. 1965).
125. Alcorn v. Mitchell, 63 Ill. 553 (1872); Draper v. Baker, 21 N.W. 527 (1884).
128. RESTATEMENT (FIRST) OF TORTS § 18 (AM. LAW INST. 1934).
129. Id.
131. RESTATEMENT (SECOND) OF TORTS § 13 (AM. LAW INST. 1965).
132. Id. § 19; see also id. § 20 (1965); Fuerschbach v. Southwest Airlines, 439 F.3d 1197, 1209 (Cal. 2006).
endorsed by the Restatement of Torts, that defendants need not intend to cause a harmful touching.\textsuperscript{133} They need merely intend to touch the plaintiff, in a way that \textit{turns out to be} harmful or offensive.\textsuperscript{134}

3. \textit{Plaintiffs Must Prove the Touching Was Objectively Offensive}

To be objectively offensive, the touching must offend a community standard of what is considered appropriate. It is not enough that the individual herself be subjectively offended. Thus, a hug might not be objectively offensive, so long as it was not accompanied by other inappropriate language or intimidation. Touching someone’s shoulder in a crowded subway would likely also fail to be objectively offensive. The context matters greatly, and courts factor in the “usages of a decent society,” “polite manners,” and touching that is “customary . . . in the course of life.”\textsuperscript{135} The factfinder should consider any power imbalance, exploitation, or subordination in determining whether the touching is offensive.

There is nothing customary or polite about allowing a stranger to touch your body, assess your medical situation, and offer personal reproductive advice—all under false pretenses. No one could say that it is unreasonable to be offended by such things. When we agree to the \textit{most intimate} form of examination, and the most intimate form of counseling, it is not unreasonable to only do so when we think the person touching us is a licensed medical provider. A reasonable jury could easily find the touching by CPC staff offensive, even if a few pregnant women testified for the defense that they were not personally offended by fraudulent touching at the pseudo-clinics.\textsuperscript{136} Just as it does not matter whether one person might not find an uninvited kiss, or blowing smoke in one’s face, offensive, it does not matter whether a minority of women find the touching unobjectionable. The question for the courts is whether it is \textit{objectively reasonable} for this plaintiff to be offended by the violation of her personal dignity, once she realizes the real motivation of the CPC.

It is hard to imagine a touching that could be more offensive—asking a woman to expose her belly or submit to a vaginal exam, revealing private information about a pregnancy or a fetus that is growing inside of her (and possibly information about miscarriage or anatomical defects). If the woman agrees to this, it is almost always because she considers this to be a clinical

\begin{itemize}
\item \textsuperscript{133} \textit{Restatement (Third) of Torts: Intentional Torts to Persons} § 101 (Am. Law Inst., Discussion Draft, 2014).
\item \textsuperscript{134} “The fact that the Wagners allege that Mr. Giese could not have intended to harm her, or understood that his attack would inflict injury or offense, is not relevant to the analysis of whether a battery occurred. So long as he intended to make that contact, and so long as that contact was one to which Mrs. Wagner had not given her consent, either expressly or by implication, he committed a battery.” Wagner v. Utah Dep’t of Human Servs., 122 P.3d 599, 610 (Utah 2005).
\item \textsuperscript{135} \textit{Id.} at 609 (“[F]or example, someone who shakes his hand against his silent wishes has not committed a harmful or offensive contact.”).
\item \textsuperscript{136} Glover v. Oppleman, 178 F. Supp. 2d 622, 641 (W.D. Va. 2001).
\end{itemize}
encounter, and not an ideological one. If the CPC’s deceptive touching is not a violation of one’s dignity and right to control who gets to touch oneself, then it is hard to see what would be. The only way a judge could find that this sort of unconsented-to touching was not a battery would be by misapplying the common law of civil battery for political ends. Indeed, the CPCs must know that women would not otherwise consent to such touching, or they would not work so hard, and fight all the way up to the Supreme Court, to deceive women in their advertising practices. Why do the CPCs try to take control of the conversation and mislead women about the nature of their services? Because they know that without the misleading tactics, they would not be granted access to pregnant women’s bodies.

4. Misrepresentations Vitiate Consent

In some states, the plaintiff needs to prove that the touching was not consented to, while in other states this is an affirmative defense the defendant must raise. Either way, if it is shown that the plaintiff reasonably misunderstood the purpose of the touching, due to misrepresentations by the defendant, then consenting to the medical exam or procedure will not bar her claim. Courts have long recognized that a plaintiff might have technically consented to a blood draw, for example, but thought the blood draw was for medical purposes. If the blood draw were instead for law enforcement purposes, the consent is invalid.\(^\text{137}\)

The “crux of a battery claim is an absence of consent on the part of the plaintiff.”\(^\text{138}\) Consent is contextual. A famous Torts treatise even uses a medical example to make this point. It states: the “plaintiff who consents to manipulation of her body in the belief that it is for medical purposes, when in fact it is only for the sexual gratification of the defendant,” can have a cause of action for battery.\(^\text{139}\) You could substitute “sexual gratification” for “attempting to do God’s work” and the same premise holds. The action for battery recognizes that the individual has a right to exclude others from touching her and to control the way they do so. Full stop.

There are four different types of consent applicable to our facts, and satisfying the criteria for any of them would preclude liability: actual consent; apparent or implied consent; constructive consent; and the emergency doctrine.\(^\text{140}\) However, none of these categories of consent apply to preclude liability for the CPCs. First, there is no actual (express or implied) consent in the


\(^{140}\) RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 111 (AM. LAW INST., Discussion Draft, 2014).
case where a pregnant woman is never explicitly told that the medically
costumed volunteer is in fact unlicensed. 141

Likewise, the CPC cannot rely on “reasonably apparent consent,” or implied
consent. 142 While a patient might consent to “ordinary physical contacts that are
medically necessary” when she visits her doctor for her annual physical, consent
to the CPC cannot be inferred from the facts. In the oft-cited case of O’Brien v.
Cunard S.S. Co., 143 the evidence that plaintiff held out her arm to be vaccinated,
in a line of people exiting a ship, demonstrated not only that the defendant
reasonably believed that she consented, but also that she did consent. This sort
of implied consent is not present here; the pregnant woman is not implicitly
consenting to a medical exam by the CPC. She is consenting to an exam by a
different person and in a different context.

While a defendant would not be liable for battery if a reasonable person in
the position of the actor believes that the would-be plaintiff consented to the
actor’s otherwise tortious conduct, 144 it would be unreasonable for a CPC staff
member to believe that the pregnant woman had truly consented, given the
CPC’s ideological agenda. As mentioned above, 145 CPC staff are trained in
applying deceptive practices to persuade women to carry the fetus to term. CPCs
take advantage of these women’s relative lack of education, money, and
insurance to deceive them into thinking they are receiving medical, as opposed
to ideological, care. Given their deceptive playbook, and the fact that they do not
tell pregnant women who appear at their clinics that they are unlicensed medical
providers who do not provide the full range of reproductive services, consent to
the touching cannot be inferred or apparent from the facts. Indeed, given how
CPCs deliberately locate very near Planned Parenthoods and adopt clinically-
sounding names, the very reasonable and clear intention of CPCs is to gain
access to women’s bodies through deception, not informed consent.

Further, as discussed above under the “objectively offensive” element
of battery, there is no constructive consent either. Several courts have recognized
that “in a crowded world, a certain amount of personal contact is inevitable, and
must be accepted. Absent expression to the contrary, consent is assumed to all
those ordinary contacts which are customary and reasonably necessary to the

141. “Express consent may be given by words or affirmative conduct and implied consent may be
manifested when a person takes no action, indicating an apparent willingness for the conduct to
occur. The consent must be to the ‘defendant’s conduct, rather than to its consequences.’ A
plaintiff’s consent is not effective if “the consenting person was mistaken about the nature and quality

142. “If words or conduct are reasonably understood by another to be regarded as consent, they
constitute apparent consent and are as effective as consent in fact... In determining whether conduct would
be understood by a reasonable person as indicating consent, the customs of the community are to be taken

143. 28 N.E. 266 (Mass. 1891).

144. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 115 (AM. LAW INST.,
Discussion Draft, 2014).

145. See supra note 35 and accompanying text.
common intercourse of life.” Examples of this include touching someone while hastily exiting a building during a fire alarm or brushing up against someone on a crowded bus. In those circumstances, there is something like a social necessity argument, as affordable public transportation requires “minor contact between passengers.” Commuters are thought to consent to this touching, as they are aware of the crowded nature of most public transit and nonetheless agree to this mode of transportation. But there is no such social consent in the present case. Pregnant women are not agreeing to a certain amount of battery in order to take advantage of a public good.

Finally, emergency consent is not applicable. The emergency consent doctrine “reflects a narrow set of circumstances in which the actor reasonably believes that plaintiff would have consented, if he or she had the opportunity to do so, and in which it is imperative not to wait to see whether plaintiff really does consent.” In the kinds of cases contemplated here, there is plenty of time to obtain the pregnant woman’s consent. Failure to do so is not because there is an urgent, life-threatening clinical need that prevents asking the woman. The only reason the consent is not explicit is because the CPCs appreciate that they will lose access to women’s bodies if they are transparent about their ideological purpose.

Thus, CPCs cannot avail themselves of any of the relevant types of consent to preclude their liability. CPCs that misled a woman into thinking that the purpose of the exam was to diagnose a pregnancy, or to offer medical counseling or advice, when the real purpose is to counsel the woman on pro-life, Christian ideology, would most certainly be liable in battery. To reiterate, where the consent to a procedure or touching is premised on fraud or misrepresentations, there is no valid consent.

5 Battery Claims Do Not Balance the Rights to Batter Against the Right Not to Be Battered

Contrary to the First Amendment analysis in NIFLA or the structure of consumer protection or even medical malpractice laws, which might give too much deference to the defendant’s viewpoints or purpose, here, the reasons why

147. Id. The Restatement adds, “Minor contact between passengers is reasonably necessary to achieve that [affordable and efficient public transit] social value.” Id.
148. Id. § 118.
149. “The plaintiff’s purported consent is ineffective to bar her claim if it is induced by misrepresentation or is given under a material mistake of which the defendant is or should be aware. The mistake is frequently though not always induced by the defendant’s fraud or misrepresentation. Many cases decided in many settings summarize the point by saying that ‘fraud vitiates consent’ or that consent is ineffective if given as a result of fraud, meaning that the plaintiff in such a case can recover.” Dobbs et al., supra note 139.
the defendant battered the plaintiff are largely irrelevant.\textsuperscript{150} When the touching is not consented to, courts do not balance the interests of the batterer against the interests of the battered. The battery cause of action is about protecting the inviolate dignity of the individual person. In keeping with this, battery is not a paternalistic or ideological doctrine. The defendant cannot argue that they failed to disclose a material fact about the procedure in order to avoid any psychological harm to the plaintiff.\textsuperscript{151} Where the First Amendment may be interpreted in a way that protects misleading practices by CPCs, battery does not spare defendants who deliberately mislead.

D. The Relationship Between Battery and Informed Consent

In recent years, many states have passed special informed consent laws that are exclusive to the abortion context. These Targeted Regulation of Abortion Provider (TRAP) laws require abortion providers to say specific things to pregnant women as part of the informed consent process. Given that informed consent as a legal and ethical doctrine developed from the tort of battery, it will be useful to discuss how this occurred, in order to understand how these TRAP laws pervert the very notion of informed consent.

Historically, informed consent suits began as intentional torts for unconsented-to touching by physicians, even where the care received was not negligent. One of the first cases to recognize the trespass to persons against a surgeon who operated on someone without her consent was \textit{Schloendorff v. Society of New York Hospital}.\textsuperscript{152} In this 1914 case, the plaintiff claimed that the hospital staff removed her stomach tumor while she was under anesthesia, despite her explicit requests that they not do so.\textsuperscript{153} In deciding that the hospital could be liable for a battery, if not for negligence, Judge Cardozo famously stated that “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent, commits an assault, for which he is liable in damages.”\textsuperscript{154} A 1913 Oklahoma case further recognized that the skillful removal of a patient’s bone could constitute a battery, where the patient had not consented

\begin{thebibliography}{99}
\item 150. “\textit{M}any torts that are classified as intentional differ from torts of negligence not so much because they represent a more serious degree of fault, but because they exhibit a type of fault not appropriately governed by the ‘reasonable care’ paradigm: They focus on protection of carefully defined interests (such as freedom from confinement, and choice about medical treatment or other physical touchings), while they limit legal protection to the most deliberate kinds of intrusions on these interests.” Kenneth W. Simons, \textit{A Restatement (Third) of Intentional Torts?}, 48 ARIZ. L. REV. 1061, 1100 (2006).
\item 153. Id.
\item 154. Id.
\end{thebibliography}
to its removal. 155 Thus, even where there is not negligence, there can be a medical battery.

In the medical context, the intentional tort has morphed into a negligence cause of action in all but a few states. 156 This is because enough of a norm has developed through medical ethics and practice to say that the failure to provide relevant medical information to a patient, about the purpose and risks of their treatment, is now a breach of the professional standard of care. The American Medical Association has issued an ethics opinion, which states that “informed consent to medical treatment is fundamental in both ethics and law.” 157 For medical professionals, what started as a battery is now considered medical malpractice. Where CPC facilities and staff are licensed as medical providers in their states, then, pregnant women should sue them for ordinary negligence and medical malpractice. Because it is recognized that medical providers should inform women of the purpose of their care, as well as the risks and benefits of any procedures, an informed consent claim should be easy to demonstrate. Importantly, while the Supreme Court declared in NIFLA that CPCs are not practicing medicine, and therefore the informed consent requirements of Casey did not apply, it is up to the states, and not federal courts, to determine whether entities are practicing medicine and subjected to professional malpractice claims under state law. 158

Canterbury v. Spence, one of the early cases to describe the tort of informed consent, stated that “[t]he true consent to what happens to one’s self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each.” 159 Today, making out a case for informed consent requires proving that the defendant breached a standard of care in terms of what reasonable physicians would share with a patient, or what prudent patients would find material to their decision to elect or

158. The joint opinion in Casey explained that the law regulated speech only “as part of the practice of medicine, subject to reasonable licensing and regulation by the State.” Casey, 505 U.S. at 884. (emphasis added). Indeed, the requirement that a doctor obtain informed consent to perform an operation is “firmly entrenched in American tort law.” Cruzan v. Dir., Mo. Dept’ of Health, 497 U. S. 261, 269 (1990). See, e.g., Schloendorff v. Society of N.Y. Hospital, 105 N.E. 92, 93 (N.Y. 1914) (explaining that “a surgeon who performs an operation without his patient’s consent commits an assault.”).
forego treatment.\textsuperscript{160} The former standard asks what information a reasonable physician would provide, and reflects the idea that physicians cannot read patients’ minds to know what each would subjectively want to know. The latter “prudent patient” standard is applied in a slight minority of states, and focuses on the “risks, benefits, and options that a reasonable patient would want to know in reaching a treatment decision.”\textsuperscript{161} It is rooted in patient autonomy, and recognizes that while the physician may have expertise in clinical decision-making, she is not an expert in what reasonable patients would want to have disclosed.

1. TRAP Laws Pervert the Doctrine of Informed Consent

Ironically, an article about abortion access could not address battery and informed consent without recognizing the absurd turns the doctrine has taken under states’ TRAP laws. TRAP laws are

part of anti-abortion activists’ strategy to chip away at the legal availability of abortion . . . by heavily regulating the practice of providing abortions. These laws are examples of abortion exceptionalism, in which abortion is singled out for more restrictive government regulation as compared to other, similar procedures.\textsuperscript{162}

Legislators often justify these TRAP laws as being necessary for true informed consent, and many TRAP laws are placed in sections of the state code that apply to medical informed consent generally. A majority of states have such laws, which place requirements on abortion providers “that are more demanding than for any other medical procedure.”\textsuperscript{163} Occasionally, these TRAP laws pervert the legal and ethical doctrine of informed consent.

For example, under the guise of “informed consent,” many states require physicians to provide specific, and sometimes misleading, information to women. An analysis of the mandatory pre-abortion informed consent materials in 23 states revealed that 45 percent of the statements about first trimester fetal development were medically inaccurate.\textsuperscript{164} Examples of inaccuracies included

\begin{itemize}
\item \textsuperscript{160} In slightly over half the states, the legal standard for disclosure to patients is that which a ‘reasonable medical practitioner’ would provide. This professionally defined standard is often that of the locality in which the practitioner works, or a similar locality. The disclosure standard in most other jurisdictions is that which would be sought by a prudent or reasonable patient, a standard that emphasizes the value of patient autonomy over that of professional judgment.” Peter H. Schuck, \textit{Rethinking Informed Consent}, 103 YALE L.J. 899, 916 (1994).
\item \textsuperscript{161} Dolgin, supra note 156, at 49-50.
\item \textsuperscript{162} Ian Vandewalker, \textit{Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics}, 19 MICH. J. GENDER & L. 1, 2-3 (2012).
\item \textsuperscript{163} Id. at 13.
\item \textsuperscript{164} Cynthia Daniels, et al., \textit{Informed or Misinformed Consent, Abortion Policy in the United States}, 41 J. OF HEALTH POL., POL’Y & L. 181, 193 (2016).
\end{itemize}
statements such as “brain activity can be recorded” at four-weeks’ gestation, or other statements that reported “baby-like” behaviors before they could be seen.165

In addition to misinformation related to the development of the fetus, Missouri requires that the physician inform the pregnant woman that “[t]he life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being.”166 Of course this blurs objective clinical information with religious ideology. It is ethically unsound to ask physicians to deliver propaganda for conservative legislators, shrouded in the veil of professional judgment. In any event, this uses the legitimate and professional voices of physicians as shoehorns for ideology, by erroneously treating it like other forms of medical informed consent.

In Texas, women must be incorrectly told that having an abortion “may make it difficult or impossible to become pregnant in the future or carry a pregnancy to term.”167 In South Dakota, women are given information that abortion increases the risk of infertility, without making it clear that only a highly unlikely complication will increase this risk.168 Indiana provides some caveats, but the informed consent materials nonetheless leave the reader with the impression that abortion carries with it an increased risk of infertility and complications with future pregnancies.169 Of course, this depends greatly on the gestational age of the fetus. Unqualified statements about abortion causing infertility are medically inaccurate, and yet physicians are required to share this false data in at least four states.170 In Indiana, pregnant women must be told that the fetus must be either buried in an “established cemetery” or “cremated” by the abortion clinic.171

In thirteen states, women must be instructed on the ability of a fetus to feel pain.172 In Utah, physicians must share with pregnant women the puzzling statement that “substantial medical evidence” has shown that the “fetus is capable of feeling pain,” and thus anesthesia must be provided if the abortion is

165.  Id. at 191, 195.
171.  IND. STATE DEP’T OF HEALTH, supra note 169, at 11.
performed after 20 weeks’ gestation. First, there is no substantial evidence of this, and second, providing anesthesia would impose a significant risk on the pregnant woman and the fetus that may not be clinically justified. Requiring anesthesia after 20 weeks, for every pregnancy, violates norms of professional ethics, as the physician should not do harm to the patient that is not balanced by some corresponding benefit.

The presence of these “fetal pain” laws is even more confounding given that full-term, natural childbirth can be very painful for the baby. Objectively, this is a stressful event. Their 40 week skulls are compressed, their heart rate increases, and their bodies are mangled—but there is no requirement that a vaginal delivery be preceded by anesthesia in Utah or elsewhere. The discrepancy between the requirement that physicians administer anesthesia during abortions at 20 weeks, but not at full-term vaginal deliveries, reveals the true purpose behind these laws—to discourage women’s reproductive choices. Requiring a doctor to deliver this message again blurs the line between the clinical and the ideological. This is quite dangerous in a society predicated on secular delivery of health care and freedom of religious exercise. Indeed, the informed consent laws of Missouri are presently being challenged by a religious group that claims that in their view, human life does not begin at conception, and the informed consent materials violate the Establishment Clause by endorsing Christian ideology.

2. TRAP Laws Ignore Casey’s Dicta on Informed Consent

The 1992 Supreme Court case Planned Parenthood of Southeastern Pennsylvania v. Casey made it clear that states can require physicians to inform women seeking abortion about the physiological development of the fetus or the risks of the abortion procedure. However, this was conditioned on the information being truthful and non-misleading, and allowing the physician to use her judgment to customize the information to the particular patient. The Casey Court made their reasoning explicit: it was not to add extraordinary informed consent in the abortion arena, but to place informed consent on equal footing with other areas of medicine. The message was that informed consent in abortion should be “no different” and the doctor-patient relation was “entitled to the same solicitude it receives in other contexts.” Further, in recognizing that previous abortion informed consent laws had been struck down, the Court distinguished those in Casey by stating that Pennsylvania’s laws were not “designed to dissuade the woman from having an abortion” and did not “impose a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient.” In NIFLA, the Court narrowed the holding of Casey so that it only applied to licensed medical providers immediately before providing an abortion procedure.

Legislators who have passed TRAP laws that require physicians to provide medically inaccurate or misleading information have ignored this important dicta from Casey. The part of Casey getting more attention is the general requirement that a TRAP law not place an “undue burden” on the exercise of the woman’s right. Casey’s undue burden test holds that “a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion.” The Circuits were somewhat split in terms of

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177. Casey, 505 U.S. at 882.
178. Id.
179. “Critical to our decisions in Akron and Thornburgh to invalidate a governmental intrusion into the patient-doctor dialogue was the fact that the laws in both cases required all doctors within their respective jurisdictions to provide all pregnant patients contemplating an abortion a litany of information, regardless of whether the patient sought the information or whether the doctor thought the information necessary to the patient’s decision.” Rust v. Sullivan, 500 U.S. 173, 203 (1991).
180. Casey, 505 U.S. at 884.
181. Id. at 882.
182. Indeed, following Whole Women’s Health v. Hellerstedt, these types of TRAP laws will be under greater scrutiny. Given that Whole Women’s Health stated that courts can look to common sense and the actual effects of TRAP laws on a woman’s constitutional rights, as opposed to speculating about whether the state’s interests are narrowly tailored, it will be crucial to collect data on how TRAP laws unduly burden the right to terminate. See Whole Women’s Health v. Hellerstedt, 136 S. Ct. 2292, 2317 (2016) (“Courts are free to base their findings on commonsense inferences drawn from the evidence.”).
183. Casey, 505 U.S. at 878. However, as John Robertson has pointed out, “finding an improper purpose to stop abortion or burden women will be rare, given the legitimate fetal-protection, health, and autonomy concerns that might motivate legislators . . . .” John A. Robertson, Science Disputes in Abortion Law, 93 Tex. L. Rev. 1849, 1852 (2015). Instead, as the Supreme Court recognized in Whole Women’s
how to interpret this language and how much deference to give to empirical evidence to demonstrate an undue burden. However, the Supreme Court in *Whole Women’s Health* offered guidance, stating that “[c]ourts are free to base their findings on commonsense inferences drawn from the evidence.”

Regardless of how future courts interpret this important test, however, legislators have deliberately ignored it, and *Casey’s* dicta on informed consent, when fashioning pro-life TRAP laws. This is perhaps because they were setting up legal challenges to *Casey* itself, anticipating the replacement of Justice Kennedy on the Supreme Court.

Informed consent is not some slippery placeholder that means whatever you want it to mean. It has a history and specific content. Informed consent means that accurate, relevant information will be shared with a competent patient, who will have adequate time to process it, understand it, and then use this information to make a voluntary medical decision. According to the American Medical Association’s Opinion on this matter, “[s]uccessful communication in the patient-physician relationship fosters trust and supports shared decision making,” and thus physicians must “[p]resent relevant information accurately and sensitively, in keeping with the patient’s preferences for receiving medical information.” The pregnant woman’s decision can be neither voluntary nor informed if it is based on misrepresentations. But this is precisely what many TRAP laws, and deceptive CPCs, do.

As Judith Daar correctly points out, the “informed consent” TRAP laws blur ethical clinical judgment with legislative ideology. According to Professor Daar, informed consent is not well supported when TRAP laws “foist a scripted message displaying the state’s moral repugnance to the proposed treatment

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*Health*, the second prong of the undue burden test may be met with empirical, common sense data on the actual effect these laws have on women’s access to abortion.


185. For a recent example, see the 2018 proposed bill in the Utah state legislature making abortion illegal at any point in the pregnancy, if the purpose is to terminate a fetus with Trisomy 21. The legislators were advised by the state’s legislative advisory committee that this bill would violate *Casey*, but the sponsors pursued it nonetheless. See Luke Ramseth, *Here’s What You Need to Know About Utah’s Proposed Down Syndrome Abortion Ban*, Salt Lake Trib. (March 4, 2018), https://www.sltrib.com/news/health/2018/03/04/heres-what-you-need-to-know-about-utahas-proposed-down-syndrome-abortion-ban/ [https://perma.cc/KSN2-G89G].

186. While not the focus of this article, the replacement of Justice Kennedy with Justice Kavanaugh, nominated by President Trump, is likely to move the Supreme Court in a significantly more conservative direction as it relates to reproductive rights. Justice Kennedy had three times affirmed the basic holding of *Roe v. Wade*—by signing on to the majority of *Casey*; by assuming it was controlling in the *Carhart* opinion that he wrote; and in signing on to the opinion in *Whole Women’s Health*. For a brief summary of Justice Kavanaugh’s position on reproductive rights, and *Roe v. Wade*, see Clare Foran & Joan Biskupic, *Where Brett Kavanaugh Stands on Key Issues*, CNN (Oct. 6, 2018), https://www.cnn.com/2018/07/09/politics/kavanaugh-on-the-issues/index.html [https://perma.cc/LDC5-UDK4]; see also Ian Millhiser, *The Supreme Court Just Gave Us Its First View of How It Will Handle Abortion in the Kavanaugh Era*, THINKPROGRESS (Dec. 10, 2018), https://thinkprogress.org/supreme-court-abortion-kavanaugh-05ac30d8b22a/ [https://perma.cc/UKZ4-KGJD].


Ethics and Law Collide

Scholars in medical ethics have generally agreed that this requires physicians to “commit an untenable ethical and professional wrong—deceiving their patients by providing false information and withholding empirically derived, evidence-based clinical data.” Even so, as Jessie Hill points out, “courts tend to be highly permissive” of TRAP laws, while “they have often been more skeptical of disclosure requirements imposed on [CPCs].” It is this federal First Amendment jurisprudence protecting CPC deception that begs for a private, state tort remedy.

E. The Practical Advantages of Battery Over Negligence Claims

Battery places the victim of the harm in the driver’s seat, allowing her to decide whom to sue and for how much. Battery also entitles the plaintiff to potential punitive damages, in addition to any damages for her pain and suffering or dignitary harm. While punitive damages are rare, they are more likely to be awarded in intentional tort cases where there is willful misconduct, malice, or reckless disregard for the rights of others. If the jury finds that the particular CPC defendant willfully misled the plaintiff in order to get her to carry her pregnancy to term, then punitive damages might be warranted. This could make the lawsuit more attractive for plaintiffs’ attorneys to take on a contingency basis, which might improve access to justice for low-income women.

Given that most states follow the physician-standard for informed consent, these cases will often require expert testimony as to what the physician should have disclosed. It can often be difficult for plaintiffs to find a physician who will testify against another local physician in this regard. Further, even under the patient-standard, in order to prove the causation element of negligence the plaintiff needs to prove that, had she been adequately informed, she would have chosen to do something different. It is often difficult to prove causation, even where the patient could prove that some information was negligently withheld. Will the jury believe the claim that the patient would have chosen differently?

191. Hill, supra note 2, at 60 (“Thus, in contrast to the strict scrutiny that applies to compelled speech in the context of what may be called ‘public discourse,’ the Court implied that only rational basis review is applicable to restrictions and speech requirements in the professional speech context, at least where, as in Casey, the speech is found to be truthful, nonmisleading, and relevant to the woman’s decision.”).
192. See RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 46 (AM. LAW. INST. 2012) (“An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm.”); Kohlman, supra note 123.
In these respects, a battery claim is easier to prove. The battery plaintiff need not prove that the physician had a duty to disclose anything, that the failure was a breach of a professional standard of care, or that she would have chosen not to have the exam had she known its true nature.\footnote{See Kohoutek v. Hafner, 383 N.W.2d 295, 299 (Minn. 1986).} The battery cause of action is much more protective of the physical integrity of the plaintiff and does not balance this interest against the rights of the defendant. In a battery claim, there is no deference to the community or industry practices of defendants.

Given that the petitioner in \textit{NIFLA} claimed that it was not providing medical care, a civil plaintiff could cite this when arguing that an informed consent claim would be inappropriate for a plaintiff who is seen at an unlicensed CPC. But, more appropriately, the problem with an informed consent claim is that the defendant CPC is not a medical provider, and the elaborate ethical canons that have developed for physicians do not apply to unlicensed CPCs. The CPC plaintiff is not technically a patient, even if she thinks that she is. It is the unique position of the physician, and the sanctity of the physician-patient relationship, that has led to the development of informed consent as a claim. You cannot bring an informed consent-style claim against your auto-mechanic or plumber, nor can you bring one against a CPC. Instead, you would need to prove battery or ordinary negligence by the defendant. Under ordinary negligence, given that the plaintiff would be arguing that inadequate information was shared, this claim would be framed as a “failure to warn” type of claim.

Failure to warn claims are notoriously difficult to win. This is because the common law does not impose affirmative duties to protect or warn on just any defendant; there must be a special relationship between the parties. Historically, the special relationship has been one where there is a power imbalance between the plaintiff and defendant, where the defendant is a fiduciary of the plaintiff, or where the plaintiff puts her safety or person in the custody of the defendant. The classic “special relationship” that give rise to a duty to warn are landlord/tenant, doctor/patient, and business/customer relationships.

The CPC facility, in taking on a pseudo-clinical function and holdings its doors open to the public to provide counseling services, would quite likely be considered in a “special relationship” with the pregnant woman. Thus, the CPC would likely be under a duty to protect and warn the women it sees in its pseudo-clinic, even when it is unlicensed. This could create obvious duties to provide accurate and complete information to the woman. However, this argument would depend on the judge and her notions of what makes for good public policy. The judge makes decisions about whether there is a duty by looking to a long list of factors. Given the political context in which abortion cases are decided, and the
historical inability for judges to treat abortion as unexceptional in tort, the negligence cause of action against CPCs is not as desirable as a battery claim.

Moreover, damages in a negligence or informed consent case might be modest. Typically, negligence damages are awarded to pay for economic expenses and pain and suffering that result as a consequence of the breach. However, many states limit the amount of pain and suffering damages that can be awarded and might limit the economic damages if they are framed as caring for a healthy, unwanted, child. Such claims are unfortunately referred to as “wrongful birth” claims.

If the negligence case is framed as a failure to provide adequate information that resulted in the birth of a child, some states prohibit this type of claim because, in their view, the birth of a child can never be an injury. States are about evenly split on whether they will allow for some recovery for the cost of raising a child when the traditional negligence elements are met. Some states will only allow for compensatory damages for child-rearing expenses when the child that is born has severe disabilities. This makes “wrongful birth” claims exceptional, when in reality calculating the damages from child care and medical expenses are quite ordinary, but courts have struggled with the philosophical implications of allowing the birth of a child to be an injury. If, instead, the claim is brought as a battery claim, the plaintiff will dodge this philosophical bullet. However, depending on the jurisdiction, the plaintiff may not be able to receive damages for regular child-rearing expenses.

IV. REGULATING CPCs AS PRACTICING MEDICINE WITHOUT A LICENSE

A. Medical Licensing Laws Protect the Public and Have Been Deemed Constitutional

NIFLA teaches states they will need to pursue other non-pregnancy-specific options if they want to protect their citizens from deceptive CPC practices. The next option that will be explored is the prosecution of CPCs for the unlicensed practice of medicine. Even the petitioners in NIFLA acknowledged this possibility, though they seemed confident that they were not practicing medicine. Assuming, arguendo, that NIFLA does not practice medicine under a free speech

195. Judges struggle to apply basic tort concepts about compensatory damages to wrongful birth cases, given that the successful wrongful birth claim requires the parents to argue that they would have had an abortion had the physician informed them of material clinical information. See generally Kassama v. Magat, 792 A.2d 1102, 1117 (Md. 2002); Procanik v. Cillo, 478 A.2d 755, 763 (N.J. 1984); Turpin v. Sortini, 643 P.2d 954, 958 (Cal. 1982).

196. CHARLES KRAUSE, ALFRED GANS & MONIQUE LEAHY, 2A AM. L. OF TORTS §§ 9:27-28 (2018) (“The major obstacle to an infant plaintiff’s claim in such a case is the determination of damages.”).

197. Id. § 9:27.

analysis, many states would likely disagree that CPCs are not practicing medicine. In a bit of a taunt, NIFLA’s attorney granted that “[i]t’s illegal to pretend to practice medicine without a license,” so “[i]f that’s what’s going on here, surely California would have found a way to [prosecute CPCs] before now.” Of course, this is a different remedy, with different applicable standards and constitutional review, but it is something California, and other states, could and should do.

Every state prohibits the unauthorized practice of medicine, and then defines what constitutes the “practice of medicine” for that state. New York has a representative law, which defines the practice of medicine as “diagnosing, treating, operating or prescribing for any human disease, pain, injury, deformity or physical condition.” In some states, like Ohio, “holding out of one’s self as being engaged in the practice of medicine shall be regarded as practicing the same,” such that advertising or claiming to the public “to be a practitioner of medicine and surgery, or any of its branches” would be a violation. Thus, CPCs’ diagnostic reproductive services and counseling would violate Ohio’s statute. Of course, the state licensing board and local prosecutors would have to decide that they wanted to bring such a claim, as there is not a private right of action. This requires the political will of elected officials. But enforcing these statutes does not pose any First Amendment challenges. Even an extremely conservative and anti-regulation Supreme Court would struggle to wiggle out from established precedent that permits this kind of regulation.

In 1889, in *Dent v. West Virginia*, the Supreme Court upheld a West Virginia statute that made it a misdemeanor to practice, or attempt to practice, medicine without being qualified or a graduate of a reputable medical college.

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200. In the mid 1970s, several state courts upheld convictions of acupuncture practitioners for the unauthorized practice of medicine, as the insertion of needles was considered minor surgery and the use of needles to reduce pain constituted the practice of medicine. See People v. Amber, 349 N.Y.S.2d 604 (Sup. Ct. 1973); State v. Won, 528 P.2d 594 (Or. Ct. App. 1974); State v. Wilson, 528 P.2d 279 (Wash. Ct. App. 1974). A Washington state court easily found that acupuncturists practiced medicine under the plain language of the statute, as they “offer services to people with various afflictions and tell them they can help them feel better.” See State v. Pac. Health Ctr., Inc., 143 P.3d 618, 626 (Wash. Ct. App. 2006). Chiropractors have also been prosecuted for failing to comply with state licensing regulations when their practice exceeded the scope of their permit or they used the title “physician” or “doctor,” which implied graduation from an allopathic, accredited medical school. See State v. Rich, 339 N.E.2d 630, 632 (Ohio 1975).

201. N.Y. EDUC. LAW § 6521 (McKinney 2018).


204. 129 U.S. 114 (1889).

The punishment for each offense could include a $5,000 fine, or a 12-month imprisonment in the county jail. The prohibition on practicing medicine without a proper degree or license was considered by the Supreme Court to be within the state’s power to protect its citizens from the “consequences of ignorance and incapacity, as well as of deception and fraud.” Medical licensing laws have also survived most constitutional challenges, specifically claims of unconstitutional limitation of the free exercise of religion and violations of due process. There are limits on regulation of the medical profession. However, requiring medical licensure for clinics engaged in medical services would almost certainly be upheld. The key, of course, would be in making the threshold determination that CPCs are practicing medicine without a license.

The penalties imposed for violating modern regulations vary from state to state. In California, any person who practices “any system or mode of treating the sick or afflicted” or who “diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person” without a required certificate may be liable for a fine of up to $10,000, imprisonment for a period of up to one year, or both. In New Hampshire, on the other hand, violations may be penalized by receiving a cease and desist order or a fine of up to $50,000. In Utah, practicing medicine without a license would generate a meager civil money penalty of not more than $5,000, which again reflects the weak political will of the state in enforcing these practices. Some of these fines are modest enough that they might be easy for the CPCs to pay. Alternatively, the state could pursue imprisonment in some states, like California, but this is politically very unpopular and therefore quite unlikely. Given the type of remedies involved, it is unsurprising that California has not yet chosen to prosecute CPCs for the unlawful practice of medicine. The action is not likely to yield meaningful consumer protection where CPCs can merely pay the fine or obtain a medical license and continue to mislead.

207. Id. at 122.
208. Smith v. People, 117 P. 612 (Colo. 1911).
210. A North Carolina law that required physicians to present pregnant women with a sonogram of their fetus and describe the fetus in real-time, even if the woman actively “avert[s] her eyes” and “refus[es] to hear,” was found to go beyond the extent permitted for reasonable regulation of the medical profession, while simultaneously threatening harm to the patient’s psychological health, interfering with the physician’s professional judgment, and compromising the doctor-patient relationship. Stuart v. Caminitz, 774 F.3d 238, 242-45 (4th Cir. 2014) (holding that the North Carolina ultrasound law violated the First Amendment).
211. For an overview, see 118 AM. JUR. PROOF OF FACTS 3d 215 (2018).
212. CAL. BUS. & PROF. CODE § 2052 (Deering 2018).
214. Id.
Unlicensed CPCs may run afoul of the medical licensing laws of the state, as the diagnosis of pregnancy, the discussion of prenatal care, and the use of ultrasound imaging will easily constitute the practice of medicine. While CPCs might employ volunteer nurses and physicians, they would need to be licensed and in good standing in each state, and the facility itself would need to be licensed as a medical facility.

B. New York Investigates CPCs for the Unauthorized Practice of Medicine

In May of 2013, the Attorney General of New York issued a subpoena on Evergreen Association, which operates twelve CPCs in the New York City area. The purpose of the investigatory subpoena was to determine whether the CPCs were engaged in the unauthorized practice of medicine. A series of public hearings conducted in 2010 and 2011 by the New York City Council found that Evergreen “engaged in conduct which could constitute the unauthorized practice of medicine, including evaluating fetal health and requesting the medical history of clients.” Meanwhile, a televised news segment reported that “Evergreen made diagnoses of gestational age and situated its centers in medical buildings making them appear like medical offices.” The subpoena was meant to uncover whether the CPCs should be fined, as they did not appear to have any licensed medical staff.

Evergreen attempted to quash the subpoena as a politically motivated attack on their constitutional right to advocate against abortion. It claimed that the Attorney General lacked a factual basis for issuing the subpoena. In June 2017, the Appellate Division of the Supreme Court of New York found that the Attorney General had “amply demonstrate[d]” that a “legitimate factual basis existed for the Attorney General to conduct his investigation and issue the subpoena to determine whether Evergreen is engaged in the unauthorized practice of medicine,” as he had adduced evidence “that Evergreen’s centers were set up to look like medical offices, staff members were dressed in scrubs or lab coats, a medical history was taken from clients, diagnoses of pregnancies, ectopic pregnancies, and gestational age were made, and medical advice was given, including false advice.”

The investigation could proceed, but, because Evergreen is a CPC with ideological roots, the court had to make sure the organization’s freedom of speech and association were not unduly chilled. Therefore, the court limited the scope of the document requests to ensure they were narrowly tailored to target

218. Id.
219. Id. at 142.
V. REGULATING CPCs BY CHALLENGING THE USE OF FDA-APPROVED DEVICES IN UNAPPROVED WAYS

A. The Co-Opting of the Ultrasound Device

In theory, FDA enforcement could also provide a means for curbing CPCs’ deceptive practices. One of the chief ways that CPCs deceive pregnant women is by advertising that they provide free ultrasounds. This is a major selling point, especially for low-income women who seek their services. And given that the biggest risk factor in failing to receive adequate prenatal care is poverty and lack of insurance, this was precisely why California passed the FACT Act, requiring disclosure of California’s state-funded pregnancy treatment options. Recognizing that their niche market was the underinsured, a CPC trainer advised trainees to tell callers asking about abortion care that, while the CPC does not offer abortion services, it provides free ultrasounds that the woman will need to have before she can get abortion care. From the pro-life perspective, providing a guided ultrasound is “crucial to the explicit task of persuading the woman not to abort.” The idea is based in part on an unproven premise that women who abort their fetuses are doing so thoughtlessly. Once the woman sees,
via ultrasound, the heartbeat and perhaps the head, fingers, and toes of her fetus, she will be forced to emotionally confront the life she is about to terminate and will change her mind.

Pro-life advocates have relied heavily on the persuasive power of the ultrasound. Twenty-six states have enacted some form of legislation that requires a woman to obtain an ultrasound before terminating her pregnancy. Similar bills have been introduced in many other states.225 In Kentucky, Louisiana, Texas, and Wisconsin, state law requires that the abortion provider show the woman the image on the ultrasound and describe it to her, even if she does not want to see it.226 North Carolina passed a law that required physicians performing abortions to display and describe the image during the ultrasound, even if the woman actively “avert[s] her eyes” and “refus[es] to hear.”227 This “real-time view” aspect of the law was challenged by physicians as compelled speech that violated their First Amendment rights (and professional ethics). The Fourth Circuit agreed that the “real-time view” part of the statute did not survive intermediate scrutiny.228 It was critical to the Court’s holding that the North Carolina law not allow physicians to deviate from the required disclosures or timing, even if, in the physician’s professional judgment, she thought it was best to do so. Doctors in Kentucky are likewise challenging their state’s informed consent to abortion statute on similar First Amendment grounds.229 It will be interesting to see what level of scrutiny the federal courts apply, in light of NIFLA and the Court’s dismissal of intermediate review for professional speech. Either way, state informed-consent laws that provide for the physician to deviate from the content of the required disclosure and timing if it is in her best medical judgment to do so, seem much more likely to be upheld.230 Given that ultrasound is becoming a prerequisite to obtaining an abortion, it is necessary to see what the FDA has to say about its use in nonclinical settings, such as CPCs.

B. Ultrasounds are FDA-Approved Devices that Should Not Be Used in Pseudo-Clinical Ways

Ultrasound is a medical technology that is regulated by the FDA. Ultrasound provides a window into the anatomy of a fetus in utero, by sending sound waves through soft tissue such as the pregnant belly. The sound waves bounce off the

225 See State Ultrasound Requirements in Abortion Procedures, KAISER FAMILY FOUNDATION, https://www.kff.org/womens-health-policy/state-indicator/ultrasound-requirements/?currentTimeframe=0&sortModel=%7B%22colId%22:22%22Location%22:22%22sort%22:%22asc%22:%22%7D [https://perma.cc/76CN-5UJN].
226 Id.
228 Stuart v. Camnitz, 774 F.3d 238, 256 (4th Cir. 2014).
230 See Stuart, 774 F.3d at 254.
tissue and render images of the size and structure of these organs and tissues, including any abnormalities in fetal development. Ultrasound has become a very important tool in obstetrics to confirm pregnancy, diagnose ectopic and molar pregnancies, and reveal fetal disfigurement, fetal movements, and uterine cysts or other abnormalities. Modern ultrasound technology employs higher frequency sound waves that can show a moving 3-D image of the wiggling fetus.

While the technology is generally considered safe, prolonged non-clinical exposure may have negative health effects. Ultrasound waves can heat the tissues and produce small pockets of gas in body fluids or tissues. The long-term consequences of these effects are still unknown. Out of concern for the negative health effects on the fetus, organizations such as the American Institute have advocated for “prudent use” of ultrasound during pregnancy, and have discouraged it from being used off-label. In addition to the biological effects of ultrasound on the pregnant woman and fetus, there are also health risks from inadequately trained staff or poorly maintained equipment.

Even with the 3-D advancements, ultrasound images require skill to be interpreted correctly and meaningfully. This is especially true in early pregnancy, when capturing the correct angles is difficult and the rendered images may be quite ambiguous to the untrained eye. Given the skill required to capture and interpret the images, it is shocking that many CPCs lack trained or licensed radiological technicians. The lack of training of CPC staff can harm pregnant women and their fetuses.

The most obvious potential harm is that women assume, incorrectly, that their babies are healthy after having the ultrasound performed. This risk was first identified when “keepsake ultrasound” studios such as Fetal Fotos opened in malls around the country. Women assumed the photographer would tell them if they saw something abnormal in the image. However, some photographers boldly announced that “they will ignore fetal abnormalities even if a fetus has three legs.”

231. 75 AM. JUR. TRIALS 55 Ultrasound (Sonography) § 49 (2018).
232. Sanger, supra note 224, at 369.
233. See Information for Patients including Expectant Mothers, U.S. FOOD & DRUG ADMIN. (Aug. 29, 2018), https://www.fda.gov/Radiation-EmittingProducts/RadiationEmittingProductsandProcedures/MedicalImaging/ucm115357.htm#industry [https://perma.cc/GZR4-Y2VY] (“While ultrasound is generally considered to be safe with very low risks, the risks may increase with unnecessary prolonged exposure to ultrasound energy, or when untrained users operate the device.”).
235. See Information for Patients including Expectant Mothers, supra note 233.
238. Id.
In one instance, a woman went to a keepsake imaging studio and left believing her baby was healthy. She later discovered at her OB/GYN clinic that her baby had significant fetal anomalies that were consistent with Trisomy 18 and Smith-Lemli-Opitz Syndrome. These abnormalities were visible earlier, but went undetected or unreported by the operator at the fetal keepsake studio. Ignoring these defects and not reporting them seems cruel, until you realize that the photographers are probably not very experienced in reading these images and are also trying to insulate themselves from claims of medical malpractice or the unauthorized practice of medicine. There are many instances of clinicians being sued for medical malpractice over improper capture or interpretation of ultrasound images. Whatever line remains between keepsake studios and clinical practice must be defended by these businesses.

If the keepsake imaging studio were held to a medical standard of care, it could be liable for negligence for failure to report significant clinical findings. However, given that these entities are purely commercial and make no claims about diagnosing disorders, the consumers are poorly protected from the false sense of security they receive. There is significant risk of psychological injury, as well as the potential to neglect more rigorous clinical follow-up if they assume the fetus is healthy. Unfortunately, we will probably never know the extent of the harm done by these keepsake ultrasound studios, as they are unlikely to report their findings to any public health agencies.

While the practices at keepsake ultrasound studios are troubling, the risk that the consumer will misinterpret the nature of the ultrasound is much more profound at a pseudo-clinic, such as a CPC. If you are visiting a strip mall and realize you are paying for a “fun” and “novel” ultrasound experience in an obviously non-clinical setting, your expectations differ significantly from the expectations of women entering a CPC. As discussed previously, CPCs deliberately mislead women into thinking they are seeing a nurse or doctor at a proper health clinic. Given the heightened risk of misperception, it is much less ethical for CPCs to employ ideological and unlicensed staff to interpret ultrasound images.

C. States and the FDA Could Prohibit the Use of Ultrasound by Unlicensed CPCs

Louisiana has attempted to eliminate off-label, non-clinical ultrasound screening by defining them as an unauthorized practice of medicine under

239. Id. at 7.
240. LaRose v. Washington University, 154 S.W.3d 365 (Mo. Ct. App. 2004); see also 75 AM. JUR. TRIALS 55 (2018).
Louisiana law.\textsuperscript{242} California already protects somewhat against the use of ultrasound technology for non-approved uses. In 2009, the California legislature passed a bill that requires certain disclosures before ultrasound is used for non-clinical purposes. Specifically, the consumer must be told “that the FDA has determined the use of medical ultrasound equipment for reasons other than medical purposes or without a physician’s prescription is an unapproved use of medical technology.”\textsuperscript{243} Unfortunately, despite their ability to do so, state and federal regulatory agencies have not enforced any actions against keepsake ultrasound studios or CPCs based on their provision of ultrasounds.\textsuperscript{244}

FDA discourages the use of ultrasound in a non-clinical setting by those who are not trained in its use or interpretation. While off-label uses of devices may be allowed under the supervision of a physician and within tight statutory conditions, the use by non-clinicians such as unlicensed CPCs or keepsake studios is clearly an unapproved off-label use.\textsuperscript{245} In addition to regulating how the device may be used, the FDA has also deemed the promotion of unapproved uses of a device to be a violation of FDA regulations, and the training of CPC staff for an unapproved use would be “illegal promotional activity.”\textsuperscript{246} FDA could require that CPCs employ trained ultrasound technicians and comply with clinical guidelines. Ultimately, the FDA has the authority to shut keepsake-imaging studios down. However, given the limited resources available for enforcement at the FDA, senior agency officials appear to have opted to focus their attention on more high-risk devices.\textsuperscript{247}

**CONCLUSION: RECLAIMING INFORMED CONSENT IN THE ABORTION CONTEXT**

By suggesting that women bring battery causes of action against unlicensed CPCs, this Article advocates for returning informed consent law to its ethical and legal roots. Informed consent doctrine surrounding abortion has been perverted by state TRAP laws, which have blurred the lines between ideology and medicine. The majority opinion in \textit{NIFLA} exacerbates this troubling trend. When

\textsuperscript{242} Under the bill as proposed, any person who administers an ultrasound upon a pregnant woman without an order or referral shall be guilty of a Class A misdemeanor. The bill included an exception for individuals who are licensed to practice medicine, as well as licensed advanced practice nurses and licensed physician assistants. See La. State Bd. of Med. Exam’rs, \textit{Statement of Position, Self-Referred Diagnostic Ultrasound Screening} (Oct. 25, 2000), \url{https://www.lsbme.la.gov/sites/default/files/documents/Statements%20of%20Position/UltrasoundScreening.pdf} [last visited Nov. 19, 2018].

\textsuperscript{243} Uhles, supra note 236, at 270.

\textsuperscript{244} Alexander, supra note 237, at 9-10.

\textsuperscript{245} The allowed “off-label” uses assume that a “health care practitioner” will be prescribing the legally marketed device “to a patient” for a disease or condition “within a legitimate health care practitioner-patient relationship.” 21 U.S.C. § 396 (2018).

\textsuperscript{246} \textsc{James T. O’Reilly and Katharine A. Van Tassel}, \textsc{2 Food & Drug Admin. § 18.94} (4th ed., 2018).

\textsuperscript{247} \textsc{Id.} § 18.1.
physicians are required to share misinformation with their patients seeking abortion, or when CPCs exploit the medical model, this does violence to the sanctity of the physician-patient relationship.\textsuperscript{248} It erodes trust and sullies the professional reputation of all physicians. Even where abortion providers follow up the mandatory disclosures with disclaimers that “I only shared that information because I have to by law, not because I believe it,” there is still confusion. Does the physician speak for the government, or can she be trusted to protect her patients’ best interests? What does it mean if the physician is telling the patient things that she herself does not believe? Is anything objective in medicine, or is it all up for debate?

CPCs are exploiting the professional respect of physicians and the existing framework of informed consent to shoehorn ideology through medicine. Through TRAP laws and the deceptive practices of CPCs, the pro-life community is eroding the distinction between a clinic and a pseudo-clinic, and between politics and patient care. This could have sweeping negative impacts on the practice of medicine, and also on women’s health. Women who visit CPCs may delay being seen by actual doctors and might assume incorrectly that the CPC staff are held to a professional standard of care. This could impose significant health risks both on the pregnant woman and the fetus.

In the context of physician-assisted suicide, the Supreme Court has recognized that states have an interest in protecting the integrity and ethics of the medical profession.\textsuperscript{249} This should also be true in the context of abortion providers. Recall that the \textit{Casey} plurality stated that “the doctor-patient relation here is entitled to the same solicitude it receives in other contexts.”\textsuperscript{250} This message has sadly been lost on many state legislators, eager to pass TRAP laws that pervert the ethical principles of patient autonomy, beneficence, non-maleficence, and justice. Physicians should be allowed to have political voices. So, too, should pro-life activists. But each should have their policy debates, and win or lose them, in the political sphere. The sacred relationship between the physician and patient should not be leveraged for ideological gains.

At present, the law is lopsided. The First Amendment protects the CPCs’ deceptive practices not in spite of but \textit{because} they are pseudo-clinics, motivated not by commercial or professional interest but by ideology. Indeed, an automechanic or plumber, and certainly a licensed health care facility, is legally prohibited from deceiving customers in the way that the CPCs do. And yet

\textsuperscript{248} “The relationship between a patient and physician is based on trust, which gives rise to physicians’ ethical responsibility to place patients’ welfare above the physician’s own self-interest or obligations to others, to use sound medical judgments on patients’ behalf, and to advocate for their patients’ welfare.” \textit{See} Code of Medical Ethics Opinion 1.1.1, AM. MED. ASS’N, https://www.ama-assn.org/delivering-care/patient-physician-relationships [https://perma.cc/2XDC-8ATB] (last visited Nov. 19, 2018).


\textsuperscript{250} \textit{Casey}, 505 U.S. at 884.
precisely because the clinic is not a clinic at all, its deceptive practices are afforded the greatest possible protection as ideological free speech. This is an absurd outcome, given how underhanded CPCs are about revealing their ideological underpinnings.

To correct this imbalance, it would have been wise for the Supreme Court to adopt the perspective of the objective listener of the compelled disclosures when determining how to classify CPCs’ speech. This would have been a better way to balance the free speech rights of organizations against the public’s need to understand who exactly is speaking to them. Political organizations such as CPCs should not be allowed to hide behind their ideology to deceive unsuspecting individuals. Unfortunately, at present this is not a practical solution. It is not reasonable to expect injured women to wait until the Supreme Court revisits or overrules its NIFLA precedent.

There are already tools at the disposal of our prosecutors and agency regulators which can help to provide some protection for pregnant women. Consumer protection statutes could restrict the deceptive advertising practices of CPCs. State laws prohibiting the unauthorized practice of medicine could be enforced, as New York’s attorney general is attempting to do. FDA enforcement actions could chip away at the CPC’s use of FDA-approved medical devices in non-approved ways. But each of these existing tools requires the political will of elected and appointed officials. And so far, there are very few of these leaders who are willing to spend the political capital to protect pregnant women from deceptive CPCs. This has left the injured pregnant women with very little recourse.

Following basic tort remedies of compensatory damages, these injured pregnant women should be compensated for their pain and suffering, any resulting lost wages or income, and any other reasonable financial damages that stem from the battery, such as increased medical expenses from delayed diagnosis of pregnancy complications, or even wrongful death if the CPC’s conduct results in the unwanted death of the fetus. Additionally, where the CPCs deliberately defrauded these women to gain access to their bodies, these women would also be good candidates for punitive damages, which would help to fund the litigation and attorney’s fees.

We must fight to reclaim informed consent. It is not a meaningless tool to shoehorn ideology through. It is not an amorphous concept, which allows a pseudo-clinic to make a woman think she is being treated medically, when she is actually being persuaded to submit to a religious ideology. By returning to the roots of the informed consent doctrine, suing for the intentional tort of battery,

251. For the same reasons discussed above related to “wrongful birth” claims, supra notes 196-198 and accompanying text, states are not likely to allow for damages from the resulting birth of a child, even where the CPC’s deceptive practices led a woman to delay receiving an abortion until after it is prohibited by the state.
victims of the misleading practice of CPCs can obtain personal redress. In the absence of proper public enforcement, tort law emerges as our last and best resort. And while tort law is scattershot and *ex post*, it can nonetheless provide meaningful and necessary regulation of CPCs’ deceptive behavior.
Gender, Race & the Inadequate Regulation of Cosmetics

Marie Boyd†

ABSTRACT: Scholars and other commentators have identified failures in the regulation of cosmetics—which depends heavily on voluntary industry self-regulation—and called for more stringent regulation of these products. Yet these calls have largely neglected an important dimension of the problem: the current laissez-faire approach to the regulation of cosmetics disproportionally places women, and particularly women who are members of other excluded groups, at risk. This Article examines federal cosmetics law and regulation through a feminist lens. It argues that cosmetics law and regulation have lagged behind that of the other major product categories regulated by the Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act of 1938 because cosmetics are a gendered product and industry. In addition, conflicting views of the meaning of cosmetics among self-identified feminists, and differences in women’s relationships to cosmetics, mean that reform efforts must confront opposition and tension both within and outside of feminism. Ultimately, this Article questions the legitimacy of the current approach to cosmetics law and regulation. It concludes with several recommendations about how to address some of the failures of cosmetics law and regulation.

† Assistant Professor, University of South Carolina School of Law. Thanks to Lewis A. Grossman for inviting me to present a draft of this Article at the American University Washington College of Law and Food and Drug Law Institute Conference, FDA: Past, Present, and Future, and to the conference participants and audience members for their questions, comments, and conversations. Thanks also to Jacqueline R. Fox and Benjamin Means for their feedback and comments on this project, to Jaime R. Harrison for his feedback and comments on drafts of this Article, to Candle M. Wester, Clermon Acklin, Tiffany Pons, and Mary Stamato for their research assistance, and to Vanessa McQuinn for her administrative support.

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The excessive use of lipstick has greatly increased the world’s troubles. Lipstick is not healthful for women. It is not safe for men.1

The approximately fifty billion-dollar American cosmetics and beauty product industry is a gendered industry,2 “created and maintained by women.”3 Whether this industry “is a harmful, objectifying creation or a source of strength and independence for women” has been described as “one of the most contentious debates in American feminisms.”4 Regardless of whether cosmetics are viewed as oppressive, liberating, or something else, many women use or are otherwise exposed to cosmetics.5 For example, 86 percent of women “use some


2. See ANYA COHEN, IBISWORLD INDUSTRY REPORT 32562: COSMETIC & BEAUTY PRODUCTS MANUFACTURING IN THE US 4 (Mar. 2018). The “cosmetic and beauty product industry” definition is not entirely coterminous with the FDCA’s definition of “cosmetics.” Compare id. at 2, with FDCA § 201(i), 21 U.S.C. § 321(i) (2012); see also infra Section I.A (discussing the FDCA’s definition of cosmetics).


4. Clifford, supra note 3, at 111; see, e.g., FREEDMAN, supra note 3, at 53, 231 (“Cosmetic strategies do help to normalize women, but they insidiously confirm female deviance even while counterbalancing it.”); id. at 231 (“If women don’t want to be regarded as decorative dolls, can they still delight in self-display? Is the ultimate goal to be accepted for oneself—uncoiffed, unadorned, and therefore, in the eyes of many, unkempt? . . . When are cosmetic transformations a negative act of self-rejection, and when are they a positive act of self-enhancement? . . . Many feminists have difficulty finding personal answers to such questions, for they, too, experience the conflict between conviction and convention, between the utopian ideal of natural beauty that includes all, and the actual ideal of cultured beauty that excludes so many.”); NAOMI WOLF, THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN 113 (1992) (discussing the cosmetics industry and stating that “[w]asting women’s money is the calculable damage; but the damage this fraud does women through its legacy of the dread of aging is incalculable”); BELL HOOKS, BLACK LOOKS: RACE AND REPRESENTATION (1992).

5. This exposure may not be voluntary. For example, employers may have dress codes that require female employees to wear makeup. See Jespersen v. Harrah’s Operating Co., 444 F.3d 1104 (9th Cir. 2006). Many women are exposed to cosmetics in their workplaces. For example, according to industry estimates, 96% of the workforce in nail salons and other personal care services in the United States is women. CENTERS FOR DISEASE CONTROL & PREVENTION, NAT’L INST. FOR OCCUPATIONAL SAFETY AND HEALTH (NIOSH), NAIL TECHNICIANS’ HEALTH AND WORKPLACE EXPOSURE CONTROL (internal citation omitted), https://www.cdc.gov/niosh/topics/manicure/default.html [https://perma.cc/F7AH-H94U] [hereinafter NIOSH, NAIL TECHNICIANS’ HEALTH]. There is also debate over whether or not cosmetics use can
type of make-up” and women comprise 92.6 percent of hairdressers, hairstylists, and cosmetologists—jobs that often involve exposure to cosmetics. 6

The Food and Drug Administration (FDA) regulates “cosmetics” under the Federal Food, Drug, and Cosmetic Act (FDCA). Since enacting the FDCA in 1938, Congress has significantly changed and strengthened the Act’s provisions for the other major product categories that were present in the original 1938 Act (i.e., food, drugs, and medical devices). However, the cosmetics provisions—which span less than two pages of the approximately 500-page amended FDCA—have remained largely unchanged for the past eighty years.7

Accordingly, there is a substantial divide between the law and regulation for cosmetics and that for the other major product categories.8 Cosmetics are the least regulated of the major product categories within FDA’s jurisdiction.9 The Director of FDA’s Office of Cosmetics and Colors has stated, for example, that FDA does not “know the number of manufacturers [of tattoo inks (a type of cosmetic)], who they are, where they are, and what they make.”10 The Director has also indicated that FDA is “just seeing the tip of the iceberg” in terms of the reporting of adverse events related to cosmetics in the voluntary reporting system.11

The cosmetics industry has argued that “[c]osmetics are the safest products that FDA regulates.”12 Yet this does not mean that cosmetics are safe, given the ever be truly voluntary given societal pressures. See, e.g., FREEDMAN, supra note 3, at 48 (discussing beauty routines and the “strong human need to conform to social norms”); PEISS, supra note 3, at 4.


8. See infra Section II.C.2.e. (discussing how cosmetics law and regulation lag behind that of other product categories.)


11. FDA, Adverse Event Reports, supra note 10.

large number of people that foodborne illnesses, medications, and tobacco products kill and injure each year.\textsuperscript{13} Indeed, there is much uncertainty about the safety of cosmetics, and some may not be safe.\textsuperscript{14} Yet the current approach to cosmetics law and regulation, rather than helping to assess these claims, hinders meaningful evaluation of the safety of the industry.

This Article examines federal cosmetics law and regulation from a feminist perspective.\textsuperscript{15} Specifically, it asks the “woman question” about cosmetics law and regulation in order to “identify the gender implications” of this regulatory system, “which might otherwise appear to be neutral or objective.”\textsuperscript{16} The association between cosmetics and femininity is so strong that some readers may question whether there is even a need to ask the “woman question” about cosmetics law and regulation. But as this Article argues, the relationship between the under-regulation of cosmetics and their association with women is both strong and complex. Cosmetics law and regulation have been deprioritized for many reasons, including as a result of differences in women’s usage of cosmetics, the longstanding and close association of cosmetics with femininity and women, and the debate among self-described feminists regarding cosmetics. Explicitly considering how cosmetics law and regulation fail to account for the needs and experiences of women and members of other excluded groups is necessary if these omissions are to be remedied.

\textsuperscript{13} There are an estimated “106,000 deaths/year from nonerror, adverse effects of medications” in the United States. Barbara Starfield, Commentary, \textit{Is US Health Really the Best in the World?}, 284 JAMA 483, 484 (July 26, 2000). In addition, the Centers for Disease Control and Prevention estimates that “about 48 million people (1 in 6 Americans) get sick, 128,000 are hospitalized, and 3,000 die each year from foodborne diseases.” FDA, \textit{FOOD SAFETY MODERNIZATION ACT (FSMA), INSPECTION & COMPLIANCE}, https://www.fda.gov/food/guidanceregulation/fsma/ucm257978.htm [https://perma.cc/3E-FM-LMAW]. About “16 million Americans are living with a disease caused by smoking” and “cigarette smoking is responsible for more than 480,000 deaths per year in the United States.” Centers for Disease Control & Prevention, \textit{Fast Facts: Diseases and Death}, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm [https://perma.cc/A2AA-4JVC].

\textsuperscript{14} See also infra Section II.B (discussing potential risks and harms of cosmetics).


This Article proceeds as follows: Part I defines several key terms and introduces the “woman question” as a feminist legal method. Part II examines cosmetics as a gendered product and industry, and highlights several ways that product use and exposure may be shaped by the intersection of gender, race, and class. It then discusses the safety of cosmetics and explains why women, and particularly women who are members of other excluded groups, may be disproportionately impacted by the failures of cosmetics law and regulation. Part II then provides an overview of cosmetics law and regulation, with a focus on how they have lagged behind that of the other major product categories in the FDCA. Against this backdrop, Part III argues that cosmetics law and regulation have been deprioritized as a result of their longstanding and close association with femininity and women, as well as women’s exclusion from political participation and representation. It also argues that cosmetics law and regulation have been deprioritized as a result of the debate among self-described feminists over the meaning of cosmetics, as well as differences in women’s relationships to and perspectives on cosmetics. Part IV considers the implications of this analysis for reform. Ultimately, this Article uses a feminist lens to question the legitimacy of the current approach to cosmetics law and regulation and strives to make readers do the same.17

I. TERMINOLOGY & METHODOLOGY

Before turning to a discussion of the gendered and racialized impact of the contemporary regulation of cosmetics in Part II, the current Part discusses several important terms and provides a discussion of the method employed in later sections. In particular, this Article uses an expanded version of “the woman question,” which analyzes “gender . . . within the contexts of multiple identities” to ask how cosmetics law and regulation “leave out or disadvantage women and members of other excluded groups.”18

A. Defining “Cosmetics”

This Article focuses on “cosmetics” as defined under the FDCA. The FDCA defines “cosmetics” to mean “articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the

17. See Allison M. Blackman, Manufactured Home Displacement and Its Disparate Impact on Low-Income Females: A Violation of the Fair Housing Act in Boise, Idaho?, 4 THE CRIT: CRITICAL STUD. J. 67, 68-69 (2011) (“Thus, the underlying goal of this article is to challenge and provoke—to raise awareness about involuntary manufactured home displacement, and ultimately to make readers question the legitimacy of ‘fair housing’ laws in their status quo operation.”).

appearance.” The definition includes components of such articles but excludes soap, which FDA has defined narrowly. For example, cosmetics include hair products (e.g., hair dyes, permanent waves, relaxers, cleansing shampoos, and conditioners), makeup (e.g., eye products, lipstick, novelty makeup, permanent makeup, and tattoo ink), nail products (e.g., fingernail polishes and artificial nails), perfumes, deodorants, and skin moisturizers.

Because the subject of this Article is cosmetics law and regulation, this Article focuses on products that FDA regulates as cosmetics, not as cosmetics and another product category (i.e., products with dual classification). It is important to note, however, that “cosmetics” may also meet the definition of one of the FDCA’s other product categories. For example, a “cosmetic” may also be a “drug,” which includes articles intended for therapeutic use and “articles . . . intended to affect the structure or any function of the body of man.” The intended use of a product is central to determining whether it is a cosmetic or a drug or both. The classification of a product determines the scope of FDA’s authority over it and the requirements that the manufacturer must meet. If a product is a drug or a drug and a cosmetic, it is subject to the requirements for

20. Id. The FDA has interpreted the term “soap” to mean articles where “[t]he bulk of the nonvolatile matter . . . consists of an alkali salt of fatty acid and the detergent properties . . . are due to the alkali-fatty acid compounds” and articles that are “labeled, sold, and represented only as soap.” 21 C.F.R. § 701.20 (2018).
22. Cosmetics may include ingredients that are regulated as “color additives;” however, these are distinct regulatory categories with distinct regulatory requirements. See FDCA § 201(t), 21 U.S.C. § 321(t) (2012) (“color additive”); FDCA § 301(i), 21 U.S.C. § 321(i) (2012) (“cosmetic”); FDCA § 721, 21 U.S.C. § 379e (2012) (Listing and Certification of Color Additives for Foods, Drugs, Devices, and Cosmetics). Unlike “cosmetics,” “color additives” have to be listed (i.e., approved) for a particular use before being so used. Id. Perhaps most importantly for the purposes of the current analysis, “color additives” are not limited to use in cosmetics. Id. FDA may approve a color additive for use in or on food, drugs, and devices—product categories that unlike cosmetics do not have a long gendered-history. See infra Section II.A.
23. See 21 U.S.C. § 359 (stating that the drugs and devices subchapter of FDCA “shall not apply to any cosmetic unless such cosmetic is also a drug or device”); see also FDA, IS IT A COSMETIC, A DRUG, OR BOTH? (OR IS IT SOAP?), https://www.fda.gov/cosmetics/guidanceregulation/lawsregulations/ucm074201.htm [https://perma.cc/UX3X-2N3A].
25. See FDCA § 201(g), (i), 21 U.S.C. § 321(g), (i) (2012); see also Laura A. Heymann, The Cosmetic/Drug Dilemma: FDA Regulation of Alpha-Hydroxy Acids, 52 FOOD & DRUG L.J. 357, 358 (1997) (stating that the answer to the question of whether a product is a cosmetic or a drug under most interpretations of the FDCA is “rooted not in the chemical composition or physiological effect of AHAs but rather in how the manufacturer has positioned the product and the promises made as to its effects”). But see PETER BARTON HUtt ET AL., FOOD AND DRUG LAW: CASES AND MATERIALS 118 (4th ed. 2014) (“FDA has manifested an inclination to categorize articles containing pharmacologically active ingredients as drugs even when their manufacturers make only cosmetic claims.”). The cosmetics industry uses the term cosmeceutical to “refer to cosmetic products that have medicinal or drug-like benefits,” but neither FDCA nor FDA recognize this term. FDA, COSMECEUTICAL, https://www.fda.gov/cosmetics-labeling/claims/ucm127064.htm [https://perma.cc/RHV7-X36X].
drugs, which are much more stringent than those for cosmetics. For example, FDA must approve a “new drug” before it can be lawfully sold, whereas no approval is needed for a cosmetic.

Because cosmetics law and regulation lag so far behind the law and regulation of the other major product categories, there is a lot riding on a product’s classification and it is a significant source of tension: indeed, one commentator wrote that this tension “has been the primary feature of the evolution of cosmetic law in the last fifty years.”

Finally, because some of the literature and sources cited in this Article use terms such as personal care products, beauty products, beauty supplies, and toilet preparations, it is important to note that while these terms may include “cosmetics,” they are not coterminous with the legal definition of cosmetics. For example, these terms may include products that fall within another product category under the FDCA (e.g., drugs, devices, or dietary supplements) or outside of its reach entirely (e.g., consumer products).

B. The “Woman Question” as a Feminist Legal Method

This Section begins by defining feminism. It then discusses the “woman question” as a feminist legal method—including the method’s strengths and limitations—and how this Article employs the method to examine federal cosmetics law and regulation.

26. See infra Section II.C.2.e.
29. Greff, supra note 27, at 243.
31. See Bartlett, supra note 16.
1. Defining Feminism

The term “feminism” is “troublesome”: it is “confusing and difficult” and even the notion of “defining” feminism is controversial."32 It has been defined both narrowly and broadly, and is not static.33 Despite the many definitions of feminism, feminism does have boundaries.34 It “takes gender as a central category of analysis.”35 One definition of feminism is “the movement for social, political, and economic equality of men and women.”36 Feminism according to this definition consists of a movement with goals for change, “[a]nd implicit in these goals is access to sufficient information to enable women to make responsible choices.”37 Although having the benefits of being concise, this definition is not unproblematic, as like other short definitions it “reduce[s] the subtle complexity of a messy field of knowledge to [a] neat slogan.”38

In her article, Feminist Critical Theories, Deborah L. Rhode identifies several common features of the critical feminist theories that she examines.39 Specifically, she states that (1) “they seek to promote equality between women and men;” (2) they “make gender a focus of analysis” and “aim . . . to reconstitute legal practices that have excluded, devalued, or undermined women’s concerns;” and (3) they “aspire to describe the world in ways that correspond to women’s experience and that identify the fundamental social transformations necessary for full equality between the sexes.”40 While the approach of feminist theory differs from other critical approaches, like critical legal studies and critical race scholarship, it also overlaps and often draws upon these approaches.41 The general goal of these theories, “to challenge existing distributions of power,” is one which this Article shares.42

32. CHRISS BEASLEY, WHAT IS FEMINISM? AN INTRODUCTION TO FEMINIST THEORY ix, xi (1999).
33. Id. at xiv, xiii, 25-48.
34. Id. at xv.
37. Id.
38. See BEASLEY, supra note 32, at 26 (noting that despite the benefits of short definitions of feminism, such definitions “are of limited value if you want to grasp the character of the term, feminism, more fully and appreciate its heterogenous forms”).
40. Id. at 619.
41. Id. at 618–19.
42. Id.
2. Asking the “Woman Question”

In *Feminist Legal Methods*, Katharine T. Bartlett describes the “woman question” as a set of questions “designed to identify the gender implications of rules and practices which might otherwise appear to be neutral or objective.”43 She phrases these questions as: “[H]ave women been left out of consideration? If so, in what way; how might that omission be corrected? What difference would it make to do so?”44 This inquiry “helps to demonstrate how social structures embody norms that implicitly render women different and thereby subordinate.”45

The “woman question” has been used to “examin[e] how the law fails to take into account the experiences and values that seem more typical of women than of men . . . or how existing legal standards and concepts might disadvantage women.”46 There is a long history of feminist scholarship asking the “woman question” about diverse areas of the law.47 For example, it has been asked in some form about voting limitations, legal inequities associated with marriage, and birth control.48 It has also been asked about the Restatement (Third)’s standard for medical product defect claims,49 pharmacist refusal clauses,50 health care reform,51 and how the legal system has responded to HIV infection.52

This Article adds to the existing literature by asking the “woman question” about federal cosmetics law and regulation. Cosmetics are a highly gendered product and industry. This Article uses the “woman question” to argue that by allowing cosmetics law and regulation to lag behind that of the other traditional

44. *Id.* While different scholars have framed the questions somewhat differently, there is substantial overlap in how they have done so. See, e.g., Heather Ruth Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN’S L.J. 64, 72-76 (1985) (discussing seven questions, the first four of which “help . . . to identify how law and existence is gendered by patriarchy” and the last three of which “involve the challenge of inventing, of imagining a world for which [there are] no givens”); see also Lydia A. Clougherty, *Feminist Legal Methods and the First Amendment Defense to Sexual Harassment Liability*, 75 NEB. L. REV. 1, 8 (1996) (discussing the essential features of the “woman question” and providing examples of questions that have been asked).
46. *Id.* at 837.
47. See *id.* at 838; see also Clougherty, *supra* note 44, at 3 n.7 (listing law review articles that apply the “woman question” to different areas of the law).
52. Breanne Sergent, Comment, To Include or to Exclude? The Policy Question Plaguing Women’s Role in Clinical Trials, 34 J. LEGAL MED. 235 (2013); Mary Anne Bobinski, Women and HIV: A Gender-Based Analysis of a Disease and Its Legal Regulation, 3 TEX. J. WOMEN & L. 7, 56 (1994). And although not explicitly identified as such, it has been asked about FDA’s drug approval process and women’s representation in clinical trials. Christina Cole, Comment & Note, Women and the FDA: Remedy the Past and Preserving the Future, 7 HOU. L. HEALTH L. & POL’Y 127 (2006).
product categories that FDA regulates under the FDCA and by failing to adequately regulate cosmetics, Congress and FDA have left women—and their needs and experiences—out of consideration, thereby jeopardizing their health. However, at the same time that this Article asks the “woman question,” it also recognizes that this method is not without its limitations and has been the subject of critique.\footnote{53}

First, using “women” as a category is problematic.\footnote{54} It is too general in that it obscures the fact that women and their experiences are not monolithic and undifferentiated, and thus risks essentialism.\footnote{55} Focusing on women as a category of analysis, without recognizing that women’s experiences are shaped by other factors such as race, ethnicity, sexual orientation, and class, which intersect and interact with gender and shape women’s experiences, excludes women who are burdened on more than one dimension.\footnote{56} For example, Kimberlé Crenshaw has argued with respect to black women that “[b]ecause the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.”\footnote{57} Of particular relevance to the current analysis, Angela P. Harris has argued that “[t]he relation of black women to the ideal of white beauty is not a more intense form of white women’s frustration: It is something other, a complex mingling of racial and gender hatred . . . .”\footnote{58} These other factors do not simply magnify the effects of gender, but intersect and interact with gender to mold women’s experiences. The result of essentialism, Harris has argued, “is not only that some voices are silenced in order to privilege others . . . but that the voices that are silenced turn out to be the same voices silenced by the mainstream legal voice . . . among them, the voices of black women.”\footnote{59} Indeed, one longstanding critique of mainstream feminism and feminist legal thought is that they privilege already “race- and class-privileged

\footnote{53. See Bartlett, supra note 16, at 837-49. As Bartlett notes, some may question whether the “woman question” is really just “a mask for something else, such as legal substance, or politics.” Id. at 843-44. Just because the method shapes substance, however, does not mean that it is substance. Id. Indeed, this is not a distinguishing feature of the “woman question” as a legal method as “all legal methods shape substance.” Id. at 844-45.}


55. See e.g., Bartlett, supra note 16, at 872-73; Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 615 (1990) (arguing “that gender essentialism is dangerous to feminist legal theory because in the attempt to extract an essential female self and voice from the diversity of women’s experience, the experiences of women perceived as ‘different’ are ignored or treated as variations on the (white) norm”).


57. Crenshaw, supra note 56, at 140.

58. Harris, supra note 55, at 597-98.

59. Id. at 585.
There is also a risk that the use of “woman” as a category may “reinstate . . . the isolation and stigmatization of women.”

In the context of the current analysis, the use of “women” as a category is problematic because factors other than gender likely impacted the development of cosmetics law. For example, many of the prominent advocates of reform were white middle- and upper-class women who brought their respective values to their reform work. The use of “women” is also problematic because different women use and are exposed to cosmetics in different and particular ways, and the risks that this exposure poses are shaped by a variety of factors; therefore, the inadequate regulation impacts them in different and particular ways. Race, ethnicity, sexual orientation, age, socio-economic status, and other factors impact women’s experiences with and exposure to cosmetics and how the limitations of current cosmetics law and regulation impact them. For example, the risks to an African American woman who uses chemical relaxers and deep conditioners; a Vietnamese immigrant woman who works in a nail salon; a white woman who uses dark hair dyes may differ. Yet all of these women may be exposed to risks from cosmetics.

Because “factors other than gender victimize women,” it is necessary to ask about other excluded groups. Bartlett suggests recasting the “woman question”


61. See Bartlett, supra note 16, at 835.

62. Kay, supra note 3, at 15, 17, 31; see also id. at 31-33 (discussing “morality of visible makeup”); Peiss, supra note 3, at 7, 41 (discussing “morality of visible makeup” and racial attitudes towards cosmetics).


64. See Rhode, Feminist Critical Theories, supra note 35, at 622; Harris, supra note 55, at 587.


67. Llanos et al., supra note 65.

as the “Question of the Excluded,” asking how “women and members of other excluded groups” have been left out or disadvantaged.\textsuperscript{69} Thus, in considering the “woman question” in the context of cosmetics law, this Article considers how “factors other than gender victimize women” and asks about other excluded groups since “analysis of gender must occur not apart from but within the contexts of multiple identities.”\textsuperscript{70} In addition, this Article tries to specify the women to which it refers.\textsuperscript{71} Yet even the more specific categories which this Article uses may be too general in that they risk other forms of essentialism.\textsuperscript{72} As Harris has remarked in critiquing gender essentialism by focusing on black women, “her aim is not to establish a new essentialism . . . based on the essential experience of black women.”\textsuperscript{73} Similarly, the aim of this Article is not to replace gender essentialism with other forms of essentialism.

Using “women” as a category for analysis, however, is also too specific. Men also use and are exposed to cosmetics.\textsuperscript{74} The dangers and risks to human health that cosmetics may pose cannot be controlled by only focusing on women.\textsuperscript{75} The reforms that this Article proposes in the final Part are likely to have broader benefits in terms of understanding and assessing the risks of cosmetics.

Asking about how cosmetics law and regulation impact “women” creates the illusion of a binary world—woman or man, female or male, feminine or masculine—which fails to account for the complexities of sex and gender.\textsuperscript{76}

\textsuperscript{69} Id. at 831, 847-48.
\textsuperscript{70} Id. at 847.
\textsuperscript{71} See id. at 848 (stating that “any analysis using the general category of woman is itself exclusionary” and discussing E. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988), which, according to Bartlett, “suggests that in speaking of ‘women,’ the speaker should name explicitly which women she means”).
\textsuperscript{72} See Harris, supra note 55, at 585; Bartlett, supra note 16, at 848 (“Any category, no matter how narrowly defined, makes assumptions about the remaining characteristics of the group that fail to take account of members of the group who do not have those characteristics.”); see also Harris, supra note 55, (“My suggestion is only that we make our categories explicitly tentative, relational, and unstable. . . .”).
\textsuperscript{73} See Harris, supra note 55, at 585.
\textsuperscript{75} See Minow, supra note 54, at 2.
\textsuperscript{76} See, e.g., Sara R. Benson, Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed, 12 CARDozo J.L. & GENDER 31 (2005) (discussing the rights of intersexed people and “[t]he gender binary model [which] posits that only two sexes exist and that every person must fit easily into the category of male or female” and arguing for a right to gender identity, which would recognize “a variable spectrum of gender induced identities”); Katie Reineck, Note, Running from the Gender Police: Recategorizing Gender to Ensure Protection for Non-Binary People, 24 MICH. J. GENDER & L. 265, 266 (2017) (noting that “non-binary people—who do not identify within the accepted gender binary as men or women. . . . may present in a way typically associated with women, by wearing makeup, keeping their hair long, or wearing clothing sold in the women’s section; in a way typically associated with men, by keeping their hair short, growing facial hair, or wearing clothing sold in the men’s section; or may present androgynously by mixing elements of the two”).
Although sex and gender have often been conflated in the law, many have argued that these should be distinguished, as sex is not gender, but “merely one component” of it. Especially relevant to the current analysis is the fact that transgender and non-binary individuals use cosmetics and thus are impacted by the state of cosmetics law and regulation.

Despite the limitations of the “woman question,” it is a useful frame of analysis and “it still makes sense to talk about ‘women.’” First, imperfect as these categories are, analyzing cosmetics law and regulation using categories—including “women”—helps to illuminate the shortcomings of the current regulatory approach. Second, the current analysis is constrained by the limitations of the existing data, information, and scholarship that it examines. Many of these sources use “women” as a category and reflect a binary understanding of gender. Nuanced gender information is often unavailable and sources addressing cosmetics, their use, and the people that influenced early reform efforts largely do so within a binary framework. There is a need for explicit examination of how cosmetics law and regulation have impacted and continue to impact transgender and gender non-conforming individuals. As the cosmetics industry is beginning to explicitly recognize, many transgender and gender non-conforming individuals use cosmetics.
This information deficit relates to another feature of the “woman question” that should be acknowledged from the outset. As a legal method the “woman question” “neither guarantees a particular result nor even the right result.” Accordingly, it “does not require decision in favor of a woman,” but rather seeks to expose “interests and concerns that otherwise may be, and historically have been, overlooked.” Accordingly the reforms that this Article suggests in the final Part are aimed at providing additional information in order to better assess the risks that the current regulatory approach poses. This Article proceeds mindful of the limitations of its chosen method.

II. THE GENDERED & RACIALIZED IMPACT OF THE CONTEMPORARY APPROACH TO THE REGULATION OF COSMETICS

This Part begins by discussing the gendered nature of cosmetics in the United States. Although men use cosmetics, cosmetics are strongly associated with women and femininity, and, on average, women use more cosmetics. Cosmetics use is also shaped by factors other than gender, including race, ethnicity, socioeconomic status, and age. This Part also discusses the risks to women’s health that cosmetics may pose and how such risks may be shaped by factors other than gender. It argues that because cosmetics are a highly gendered product and industry, failures in cosmetics law and regulation may disproportionately jeopardize the health of women, particularly women who are members of other excluded groups. This Part then provides an overview of the cosmetics provisions of the Federal Food, Drug, and Cosmetic Act of 1938 (FDCA), which largely remain unchanged. Finally, it examines current cosmetics law and regulation and how they lag behind the law and regulation for other major product categories regulated under the FDCA.

A. Gender, Race, Class & Cosmetics

Cosmetics are a highly gendered product and industry. On average, women use more cosmetics than men. For example, one survey found that “[t]he...
average woman uses 12 products containing 168 unique ingredients every day,” whereas the average man “use[s] 6 products daily with 85 unique ingredients.”\textsuperscript{87} Another poll found that 54 percent of male respondents indicated that they use no “skin care and styling products (such as moisturizers, hair styling products, and makeup) . . . to get ready in the morning on a typical day” whereas only 16 percent of female respondents indicated they use no products.\textsuperscript{88} A larger portion of women than men indicated that they use three or more products (45 percent vs. 11 percent).\textsuperscript{89} And as noted earlier, most women (86 percent) use makeup—a type of cosmetic.\textsuperscript{90}

Cosmetics use may not be voluntary for women. For example, employers may have gendered employee dress codes that require female—but not male—employees to wear makeup.\textsuperscript{91} And even when employers do not require women to use cosmetics, women may face other pressures to do so.\textsuperscript{92} For example, cosmetics use can impact how people perceive themselves and are perceived by others and may have significant effects on both interpersonal relationships and economic opportunities.\textsuperscript{93}

Women also may be exposed to cosmetics through their employment. Women are significantly more likely than men to hold certain jobs that often involve exposure to cosmetics as beauty work is often done for women by

\begin{thebibliography}{99}
\bibitem{} EWG, \textit{Exposures Add Up}, supra note 74.
\bibitem{} \textit{Id.} The number of products used varied by other factors including age, race, and education. \textit{Id.}
\bibitem{} \textit{COLOR COSMETICS, supra} note 6; FDCA § 201(i), 21 U.S.C. § 321(i).
\bibitem{} See Jespersen v. Harrah’s Operating Co., 392 F.3d 1076 (9th Cir. 2004). Jespersen v. Harrah’s Operating Co. was a case that involving a female bartender who was fired for refusing to wear makeup in violation of her employer’s appearance standards. \textit{Id.} Her case was not successful. \textit{Id.} The Ninth Circuit Court of Appeals affirmed the grant of summary judgment to the employer; it held that the employee failed to establish a prima facie case of gender discrimination under Title VII of the Civil Rights Act of 1964. \textit{Id.} Employer dress codes may have class implications.
\bibitem{} Beauty serves as a “proxy for status and ability.” Nancy L. Etcoff et al., \textit{Cosmetics as a Feature of the Extended Human Phenotype: Modulation of the Perception of Biologically Important Facial Signals}, 6 PLOS ONE e25656 (Oct. 2011), http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0025656#pone.0025656-Etcoff2 [https://perma.cc/6HK5-8YMS]. However, beauty is malleable. Lauren Silverio, \textit{Makeup’s Effects on Self-Perception} (Old Dominion Univ., STEM Educ. & Prof’l Stud., OTS Master’s Level Projects & Papers 49, 2010), https://digitalcommons.odu.edu/cgi/viewcontent.cgi?article=1048&context=ots_masters_projects [https://perma.cc/4JPT-HKEJ]. For example, one study found that study participants “[w]hen inferring trustworthiness, likeability, or competence from an image” of a woman, were “influenced significantly” not only by inherited features “but by the effects of . . . makeup.” Etcoff, supra.
\end{thebibliography}
women. For example, in 2017, 92.6 percent of hairdressers, hairstylists, and cosmetologists were women. In addition, 90.5 percent of the people employed in beauty salons were women, as were 73.9 percent of those in nail salons and other personal care services.

Factors other than gender also impact cosmetics use and exposure. Cosmetics usage and exposure differ among women of different racial and ethnic groups. For example, African Americans’ spending on personal care products as a portion of the total market, according to one estimate, exceeds their portion of the U.S. population, which “suggest[s] that they buy and use more such products.” Another study similarly found that African American women spend 80% more than the general market on cosmetics, and two times that of other ethnic groups on hair products.

Indeed, there may be racial differences in the types of cosmetics women use. For example, many African American girls have chemical relaxers applied to their hair for the first time during childhood and “African American . . . women are more likely [than white women] to use a greater number and variety of hair products, and to have their hair chemically or professionally treated.” In addition, “Black women are more likely . . . to use vaginal douches as well as other fragranced feminine cleansing products such as sprays and wipes.”

94. Peiss, supra note 3; Kay, supra note 3. While the economic opportunities in the cosmetics industry provide should not be minimized, it is important to recognize that these opportunities may be accompanied by workplace exposure to the cosmetics and associated risks. See infra Section II.B.

95. BLS, DETAILED OCCUPATION, supra note 6. Of those 76.7% were white, 16.3% Hispanic/Latina, 13.5% black, and 5.6% Asian. Id.

96. BUREAU OF LABOR STATISTICS, EMPLOYED PERSONS BY DETAILED INDUSTRY, SEX, RACE, AND HISPANIC OR LATINO ETHNICITY tbl.18 https://www.bls.gov/cps/cpsaat18.htm [https://perma.cc/D5XD-TBBB] [hereinafter BLS, DETAILED INDUSTRY].

97. Zota & Shamasunder, supra note 63, at 418–20 (noting that “[w]orkers in the beauty industry, who are predominately women of color and immigrant women, can . . . face occupational health hazards from chemicals in professional cosmetic products”).


100. Dark-skinned women of various races may disproportionately use skin lightening creams, which have several potential adverse outcomes. See Zota & Shamasunder, supra note 63, at 419 (table); see also Imani Perry, Buying White Beauty, 12 CARDOZO J.L. & GENDER 579, 590-91 (2006) (discussing skin-bleaching creams and stating that “[t]he whitening of the world’s wealthy is a much safer affair than that of its poorer, and blacker, populations”).

101. Zota & Shamasunder, supra note 63, at 419.

102. Id. at 420.
There also may be significant racial differences in employment in certain jobs that involve the use of cosmetics. For example, while 76.7 percent of hairdressers, hairstylists, and cosmetologists are white and 5.6 percent are Asian, only 44.8 percent of people employed in “nail salons and other personal care services” are white and 46.3 percent are Asian.

Furthermore, there may be class differences between beauty workers and customers. For example, in The Managed Hand: Race, Gender, and the Body in Beauty Service Work, Milian Kang “explore[s] commonalities and differences” among Asian immigrant women in the nail salon industry in the United States. She discusses how nail salons bring “women who usually would not find themselves in the same social circles” into close physical contact and how these interactions “demonstrate how women inhabit bodies differently as well as how women’s bodies are differentially valued and employed.” Kang explores how gender, race, and class interact in nail salons through “three different forms of body labor at Asian-owned nail salons: ‘pampering body labor’ in nail art salons serving mostly white upper-[ ]and middle-class women; ‘expressive body labor’ in nail art salons serving mostly black working-and lower-middle-class women; and ‘routinized body labor’ at discount nail salons serving racially and socioeconomically mixed customers."

B. Cosmetics Safety

The cosmetics industry and FDA have stated that “[c]osmetics are the safest products that FDA regulates.” But even if cosmetics are the safest products that the agency regulates, cosmetics are not necessarily safe, as the harms caused by other products that FDA regulates are well-documented.

103. BLS, DETAILED OCCUPATION, supra note 6.
104. BLS, DETAILED INDUSTRY, supra note 96.
106. Id. at 11-12.
107. Id. at 16.
While a comprehensive review of the literature on cosmetics safety is beyond the scope of this Article, there is reason to be concerned about the potential hazards that cosmetics may pose. Other legal scholars and commentators have discussed the potential risks of a host of cosmetics products, ingredients, and contaminants, including phthalates, permanent hair relaxers, spray tan solutions, tattoos and micropigmentation inks, henna (and henna containing PPD and lead), nail salon products, nanoparticles, and chemicals that have the potential to disrupt the human endocrine system. The potential hazards that the literature discusses vary, and include severe scalp burns, early puberty in girls, premature delivery, adverse effects on male reproductive development, and cancer.

Women may be disproportionately impacted due to differences in exposure. As noted earlier, on average, women use more cosmetics than men and are exposed to more chemicals than men through this use. Women may also be exposed to cosmetics through their work, as “beauty work” is often done by women. Women also may be uniquely vulnerable to potential health harms from chemical exposure. For example, women’s bodies may “store chemicals cumulatively more effectively then men’s bodies, placing women at greater

(110) The focus of this Article is on physical risks, but cosmetics may pose economic harms as well. See Bryan A. Liang & Kurt M. Hartman, It’s Only Skin Deep: FDA Regulation of Skin Care Cosmetics Claims, 8 CORNELL J.L. & PUB. POL’Y 249, 250 (1999) (“However, the FDA’s focus on physical safety, and its attempted designation of skin care cosmetics as drugs, has ignored the significant responsibility of the agency to protect the public against highly questionable efficacy claims by certain cosmetics manufacturers.”); Amity Hartman, FDA’s Minimal Regulation of Cosmetics and the Daring Claims of Cosmetic Companies That Cause Consumers Economic Harm, 36 W. ST. U. L. REV. 53, 54 (2008) (“The current regulatory scheme does not always give consumers adequate economic protection.”).


118. See, e.g., Shah & Taylor, supra note 99, at 211–18.

119. See supra Section II.A.

120. PEISS, supra note 3; KAY, supra note 3; supra note 69 and accompanying text; supra Section II.A.
risk.\textsuperscript{121} Women of reproductive age and their offspring may be at particular risk from these exposures, as “preconception and prenatal exposure to toxic environmental agents can have a profound and lasting effect on reproductive health across the life course.”\textsuperscript{122}

Women who are members of other excluded groups may be at even greater risk. These women may use or otherwise be exposed to more cosmetics, including particular types of cosmetics, as cosmetics usage and work are not only gendered, but also differ by race.\textsuperscript{123}

The cosmetics that women who are members of other excluded groups are exposed to also may be more hazardous. For example, Imani Perry suggests that “the availability of technological resources is higher for those who are already privileged” and that this may reinforce existing hierarchies: “[i]f one can afford to . . . purchase the gentler products, the odds are that the person is already closer to the [beauty] ideal.”\textsuperscript{124} One analysis found that “[a] smaller share of hair and beauty products marketed to Black women scored low in potentially harmful ingredients than products aimed at the general public.”\textsuperscript{125} Cosmetics have been associated with health hazards in women of color.\textsuperscript{126} For example, one study found an association between using hair dye more than twice a year, use of dark hair dye shades, and salon application of hair dyes and the risk of estrogen-positive breast cancer in African American women.\textsuperscript{127}

Some women may have greater exposure to toxic environmental chemicals due to a variety of factors. A report by the Committee on Health Care for Underserved Women of the American College of Obstetricians and Gynecologists notes that “harmful environmental exposure is inequitably and unequally distributed, which leaves some populations, including underserved

\textsuperscript{121} De Paz, supra note 117, at 341.
\textsuperscript{122} Id.; Shah & Taylor, supra note 99, at 209. One analysis found that women ages eighteen to thirty-four—women of reproductive age—are more likely to be “the heaviest buyers of cosmetics.” Millennial Women Key to Growth in Cosmetics Industry, TABS ANALYTICS BLOG (Jan. 20, 2016), https://www.tabsanalytics.com/blog/millennial-women-key-to-growth-in-cosmetics-industry [https://perma.cc/Y2NX-S7WP]; see also AM. COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS COMM. ON GYNECOLOGIC PRAC., COMMITTEE OPINION, NUMBER 589, FEMALE AGE-RELATED FERTILITY DECLINE (Mar. 2014 reaffirmed 2018), https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Gynecologic-Practice/Female-Age-Related-Fertility-Decline [https://perma.cc/M4HU-YF75] (discussing age and fertility).
\textsuperscript{123} See Perry, supra note 100, at 588; see also Zota & Shamasunder, supra note 63.
\textsuperscript{124} Perry, supra note 100, at 595.
\textsuperscript{125} PESTANO ET AL., supra note 98.
\textsuperscript{126} See, e.g., Lauren A. Wise et al., Hair Relaxer Use and Risk of Uterine Leiomyomata in African-American Women, 175 AM. J. EPIDEMIOLOGY 432, 435 (2012) (finding “increased risks of uterine leiomyomata in association with ever use of hair relaxers, duration of use, frequency of use, and total number of burns experienced during use”); Jasmine A. McDonald et al., Hair Product Use, Age at Menarche and Mammographic Breast Density in Multiethnic Urban Women, 17 ENVIRON. HEALTH 1, 8 (2018) (concluding that “childhood hair product use is associated with earlier age at menarche, an established risk factor for breast cancer”).
\textsuperscript{127} Llanos et al., supra note 65, at 888. The study also found an association between certain hair products and breast cancer in white women. Id. The study noted that there are differences in product use among African American and white women. Id.
women, more vulnerable to adverse reproductive health effects than other populations.\textsuperscript{128} The exposure sources listed for some of the chemicals linked to negative reproductive or developmental health effects in the report include cosmetics and personal care products.\textsuperscript{129} “[B]eauty product use may be one way that structural discrimination becomes biologically embedded,” as racial discrimination can influence product use and “[t]argeted racial/ethnic marketing can influence product use and related health inequities.”\textsuperscript{130}

Some workplaces may expose the women who work in them to high levels of potentially toxic chemicals from cosmetics.\textsuperscript{131} For example, one study of Vietnamese women working in nail salons in California noted that “[n]ail technicians handle solvents, glues, polishes, and other agents on a daily basis exposing them to numerous chemicals, many of which are known or suspected to cause cancer, allergies, and respiratory, neurologic, and reproductive harm.”\textsuperscript{132} The study measured levels of total volatile organic compounds that exceed the Environmental Protection Agency’s recommended levels and were “in the range . . . at which discomfort is expected and complaints of health symptoms, including headaches and irritations of the eyes, nose, and throat, are common.”\textsuperscript{133}

Because of differences in usage, exposure, and biology, women may be subject to greater risk from exposure to toxic chemicals in cosmetics than men are. As a result, any regulatory failure to control these risks may disproportionately impact women. Furthermore, because of differences in usage and exposure, women who are members of other excluded groups may be at particular risk. This Article now turns to the shortcomings of cosmetics law and regulation.

\section*{C. Cosmetics Law & Regulation}

Despite significant changes in the law with respect to the other major product categories under FDA’s jurisdiction, the FDCA’s cosmetics provisions have remained largely unchanged since the Act was passed in 1938. This Section begins with an overview of the 1938 Act. It then discusses the current laws and regulations with an emphasis on the changes since the FDCA was enacted. It also discusses the cosmetics industry’s self-regulatory measures and how FDA

\begin{thebibliography}{99}
\bibitem{128} \textit{Exposure to Toxic Agents}, \textit{supra} note 63, at 1.
\bibitem{129} \textit{Id.} at 3-4 tbl.2.
\bibitem{130} \textit{Zota & Shamasunder, supra} note 63, at 419.
\bibitem{131} Women who receive services in these locations may also be exposed to potentially toxic chemicals although likely for shorter time periods than workers. Cosmetics intended for professional use only are less regulated than those intended for consumer use, which may also lead to differences in exposure. \textit{See supra} Section II.2.d–e.
\bibitem{133} \textit{Id.} at S274.
\end{thebibliography}
regulates cosmetics in this environment. This Section ends by highlighting several significant differences between how cosmetics and other products are regulated. It argues that the divide between cosmetics law and regulation and the law and regulation of the other major product categories defined in the FDCA has grown since the 1938 Act was first enacted. These changes have deprioritized the regulation of cosmetics, the product category most closely associated with women. The limitations of cosmetics law and regulation hinder the ability to meaningfully assess the safety of cosmetics.


The 1938 FDCA created the first federal law for the regulation of cosmetics. As discussed in Section I.A, cosmetics are “articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance,” including articles intended to be a component of those articles, but not soap.

The FDCA prohibited certain acts related to the misbranding and adulteration of cosmetics as well as the causing of those acts provided that certain interstate commerce connections were met. The FDCA provided that a cosmetic is adulterated if it “contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the [its] labeling . . . or under such conditions of use as are customary or usual,” but it excepted coal-tar hair dyes that comply with certain labeling requirements. The FDCA also provided that a cosmetic that “consists in whole or in part of any filthy, putrid, or decomposed substance” or that “has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health,” is adulterated. A cosmetic’s container could also render the cosmetic adulterated if the “container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health.” The FDCA also provided that a cosmetic other than a hair dye containing a coal-tar color that had not been properly batch certified is adulterated.

135. Id. § 201(i). The definition of cosmetics in the original Act has remained unchanged. Compare id., with FDCA § 201(i), 21 U.S.C. § 321(i) (2012).
136. FDCA § 301 (1938).
137. Id. § 601(a).
138. Id. § 601(b)-(c).
139. Id. § 601(d).
140. Id. § 601(e).
The FDCA also provided that a cosmetic with labeling that “is false or misleading in any particular” is misbranded.141 A packaged cosmetic is also misbranded if it does not bear a label with “the name and place of business of the manufacturer, packer, or distributor,” and “an accurate statement of the quantity” of contents.142 Other misbranding provisions addressed the prominence of required information and misleading containers.143

2. Current Law & Regulation

a. The Federal Food, Drug & Cosmetic Act of 1938 as Amended

Since 1938, the FDCA’s cosmetics provisions have changed little. The FDCA has grown from about 10 pages to nearly 500,144 yet the cosmetics provisions remain less than two pages.145 As in the original act, the current cosmetics provisions focus on prohibiting the certain acts related to the adulteration and misbranding of cosmetics,146 and like the original act, they except coal-tar hair dyes from the adulteration provision for cosmetics containing any poisonous or deleterious substance.147

141. Id. § 602(a).
142. Id. § 602(b).
143. Id. § 601(c)-(d).
146. The FDCA provides that a cosmetic that “contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the [product’s] labeling . . . or under such conditions of use as are customary or usual” or that contains an “unsafe” color additive as defined in FDCA § 721 (21 U.S.C. § 379e(a)) is adulterated, although it excepts coal-tar hair dyes. FDCA §§ 301, 601, 21 U.S.C. §§ 331, 361 (2012). A cosmetic’s container can also render the cosmetic adulterated if the “container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health.” Id. Finally, the FDCA also provides that a cosmetic that “consists in whole or in part of any filthy, putrid, or decomposed substance” or that “has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health,” is adulterated. Id. In addition, the FDCA provides that a cosmetic the labeling of which “is false or misleading in any particular” is misbranded. FDCA § 602(a), 21 U.S.C. § 362(a); see also 21 C.F.R. § 1.21 (2018) (failure to reveal material facts); 21 C.F.R. pt. 701 (2018) (Cosmetic Labeling). A cosmetic in packaged form the label of which does not contain “the name and place of business of the manufacturer, packer, or distributor,” “an accurate statement of the quantity” of contents, or the required ingredient declarations is also misbranded. FDCA § 602(b), 21 U.S.C. § 362(b); 15 U.S.C. § 1456 (2012); 21 C.F.R. § 701.3 (2018). Other misbranding provisions address the prominence of required information, misleading containers, color additives that don’t conform to packaging and labeling requirements, and violations of regulations issued pursuant to the provisions of the Poison Prevention Packaging Act of 1980 regarding special packaging standards for household substances to protect children from serious injury or illness and noncomplying packages (21 U.S.C. §§ 1472-1473). FDCA § 601(c)-(f), 21 U.S.C. § 362(c)-(f) (2012). There are also requirements for cosmetics under other laws. For example, under the Federal Trade Commission Act, false, misleading, or deceptive advertising claims for cosmetics are prohibited. Federal Trade Commission Act, 15 U.S.C. § 41-58; see also Jason Rea, “Actual Results May Vary”: Toward Fiercer National Regulation of Digitally Manipulated Cosmetics Advertisements, 19 WM. & MARY J. WOMEN & L. 161, 163 (2012).
The adulteration and misbranding provisions have been amended to reflect the changes in how color additives are regulated: the adulteration provisions now refer to unsafe color additives instead of uncertified coal-tar colors in the provision providing that a cosmetic—other than a hair dye—that contains an unsafe color additive is adulterated. The misbranding provisions also have been amended to add a provision providing that a cosmetic that is a color additive is misbranded if its packaging and labeling do not conform with the regulations for that color additive. The misbranding provisions have also been amended to provide that a cosmetic is misbranded “if its packaging or labeling is in violation of an applicable regulation issued pursuant to [the Poison Prevention Packaging Act (PPPA) (15 U.S.C. 1473-73)]. Also, intentionally added plastic microbeads in wash-off cosmetics have been banned due to environmental concerns about microbead pollution.

b. FDA Regulations

Until 1972, FDA lacked a formal regulatory program for cosmetics, instead taking “regulatory action on a case-by-case basis.” In the years since, FDA has promulgated regulations specifically for cosmetics under the authority granted to it by Congress under the FDCA, the PPPA, and the Fair Packaging & Labeling Act. Many of FDA’s cosmetics regulations set forth labeling requirements. For example, cosmetics that are marketed to consumers are required to have a list of ingredients, although there are exceptions for fragrances and flavors, which may be listed as such. FDA has also restricted or prohibited the use of eleven ingredients or types of ingredients in cosmetics due to safety concerns. It requires warnings on

149. FDCA § 602(e), 21 U.S.C. § 362(e) (2012). Colors that “are marketed and intended for use only in or on hair dyes” are excepted. Id.
152. See, e.g., Sarah Kettenmann, Nationwide Ban on Plastic Microbeads in Cosmetics, NAT. RESOURCES & ENV’T, Summer 2016, at 58.
153. GAO, HRD-78-139, supra note 9, at iii.
155. See 21 C.F.R. § 701 (2018). There are also regulations related to the approval of color additives for specific uses in cosmetics.
156. FDCA § 601, 21 U.S.C. § 361; 15 U.S.C. § 1456 (2012); 21 C.F.R. § 701.3; see also FDA AUTHORITY OVER COSMETICS, supra note 21 (noting that “[t]his requirement does not apply to cosmetics distributed solely for professional use, institutional use (such as in schools or the workplace), or as free samples or hotel amenities”). Cosmetics that do not have the required ingredient list are deemed misbranded. See FDCA § 601, 21 U.S.C. § 361; 21 C.F.R. § 701.3 (2018).
157. FDCA § 602(a), 21 U.S.C. § 362(a); 21 C.F.R. § 701.3(a).
c. FDA Staff & Resources

Cosmetics are the only major product category that does not have its own center within FDA; instead, cosmetics are regulated by FDA’s Center for Food Safety and Applied Nutrition (CFSAN).\(^{161}\) Within the CFSAN, FDA’s Office of Cosmetics and Colors is responsible for both the oversight of cosmetics regulation\(^ {162}\) as well as the color additive certification program.\(^ {163}\) In a 2008 report prepared by Peter Barton Hutt for the Science Review Subcommittee of the FDA Science Board, he noted that FDA was unable to separate the funding and personnel numbers for cosmetics from the numbers for CFSAN, a difficulty that he indicated others had encountered as well.\(^ {164}\) Nevertheless, Hutt determined that between 1977 and 2007, funding and staff levels for cosmetics regulation decreased to a total of fourteen staff at CFSAN—which he described as “clearly insufficient”—and $3.5 million—which he described as “minimal.”\(^ {165}\)

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\(^{159}\) Id.
\(^{161}\) FDA, About FDA, CFSAN—What We Do, https://www.fda.gov/AboutFDA/CentersOffices/OfficeofFoods/CFSAN/WhatWeDo/default.htm [hereinafter FDA, CFSAN]; Greff, supra note 27, at 248.
\(^{163}\) Id.
\(^{164}\) Id. at 460-61.
\(^{165}\) Id. at 460-61. FDA’s operating plan for fiscal year 2018, indicates a total of 11.7 million dollars in budget authority funding for cosmetics activities (8.106 million for the center, 3.414 for the field, and 0.18 for the National Center for Toxicological Research).
d. Industry Measures

FDA relies heavily on voluntary industry measures for cosmetics. FDA has created a voluntary registration program for cosmetics establishments. It also has created a voluntary filing program for cosmetics ingredient composition statements. These voluntary programs exclude cosmetics that are for professional use only and those that are not for sale. The cosmetics industry supported these voluntary programs as a way “to demonstrate the industry’s willingness to supply information to FDA and to discourage Congressional legislation.”

The cosmetics industry has undertaken other voluntary measures. For example, the Cosmetic Ingredient Review (CIR) reviews the safety of cosmetics ingredients. The Personal Care Products Council (PCPC), “the leading national trade association representing the global cosmetic and personal care products industry,” created and funds the review. As of March 2017, CIR had done safety assessments of 4,740 ingredients—“4,611 [were] determined to be safe as used or safe with qualifications, 12 [were] determined to be unsafe, and 117 [were] ingredients for which the information is insufficient to determine
safety.\textsuperscript{172} The CIR is limited in that “it generally focuses on the ingredients’ potential to cause short-term dermatological reactions . . . not their potential to cause long-term health problems.”\textsuperscript{173} Also, because the CIR is a voluntary industry measure, companies are not required to follow it.\textsuperscript{174} It often finds insufficient data to “substantiate safety”\textsuperscript{175} and a significant amount of information is not available to FDA and the public due to trade secret and fragrance exceptions to public review.\textsuperscript{176}

e. How Cosmetics Law & Regulation Lag Behind that of Other Product Categories

While the FDCA has been amended to give FDA greater authority over the other major product categories under its jurisdiction and strengthen its regulation of those product categories, as discussed above, the cosmetics provisions have remained largely unchanged. Accordingly, cosmetics are the least regulated of the major product categories within the Food and Drug Administration’s (FDA) jurisdiction.\textsuperscript{177} This Section highlights some of the ways cosmetics law and regulation are less stringent than the law and regulation for other product categories.

As discussed in Section II.B, even if cosmetics are the safest product category, they are not necessarily safe. The shortcomings of current cosmetics law and regulation are particularly problematic because they hinder the ability to

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175. Hartman, supra note 110, at 64; EWG, FDA Fails to Protect, supra note 173.


177. Paradise & Fitzpatrick, supra note 9, at 70; see also GAO/HRD-90-58, supra note 9; STATEMENT OF GREGORY J. AHART, supra note 9; GAO, HRD-78-139, supra note 9; see also supra note 161 and accompanying text (noting that cosmetics are the only major product category that does not have its own center devoted to their regulation).
\end{footnotesize}
accurately assess the safety of cosmetics, which in turn hinders the development of an appropriate regulatory system for cosmetics, leaving consumers at risk.

While drug, device, and tobacco product establishments and food facilities must register with FDA,\textsuperscript{178} FDA has no mandatory registration requirement for cosmetics.\textsuperscript{179} Instead, FDA’s registration program for consumer cosmetics products is voluntary.\textsuperscript{180} As a result, FDA may not “know the number of manufacturers, who they are, where they are, and what they make.”\textsuperscript{181} Since the Voluntary Cosmetics Registration Program was established in 1972, there have been 3,260 active cosmetics establishment registrations,\textsuperscript{182} but because registration is voluntary and only covers products marketed to consumers, this does not represent “the total number of companies manufacturing or marketing cosmetics in this country.”\textsuperscript{183}

Import and industry data suggest that the number of cosmetics establishments eligible for registration may be much higher than the number who have registered. Based on import records, FDA estimates that there are 29,000 foreign companies that manufacture cosmetics for or export cosmetics to the United States,\textsuperscript{184} and IBISWorld estimates that there are 4,055 cosmetics and beauty product manufacturers in the United States.\textsuperscript{185}

Furthermore, unlike drug registrants, which are required to list with FDA drugs for commercial distribution and provide the name of each ingredient,\textsuperscript{186} cosmetics manufacturers are not required to report the ingredients in their cosmetics products to FDA. FDA “estimate[s] that only one-third of cosmetics

\begin{itemize}
  \item See FDA, Voluntary Cosmetic Registration Program, supra note 169; Landa Statement, supra note 158, at 4–5; 9; COHEN, supra note 2, at 35.
  \item FDA, Voluntary Cosmetic Registration Program, supra note 169; see also Landa Statement, supra note 158, 4-5; COHEN, supra note 2, at 35.
  \item FDA, Adverse Event Reports, supra note 10.
  \item FDA, Registration Reports, https://www.fda.gov/Cosmetics/RegistrationProgram/RegistrationReports/default.htm [https://perma.cc/CR62-8CXH]; see also Landa Statement, supra note 158 (stating that in 2012 the Voluntary Cosmetics Registration Program “had almost 1,600 domestic and foreign registered cosmetics establishments”).
  \item FDA, Registration Reports, supra note 182; FDA, Voluntary Cosmetic Registration Program, supra note 169 (“About VCRP”).
  \item COHEN, supra note 2, at 4; see also supra Section I.A (discussing definition of cosmetics).
While food manufacturers generally do not need to notify or otherwise inform FDA of all of the ingredients that they use in food, this has been the subject of significant critique. See, e.g., Martha Dragich, GRAS-Fed Americans: Sick of Lax Regulation of Food Additives, 49 IND. L. REV. 305, 311 (2016).
manufacturers voluntarily file ingredient statements for their products” through the Voluntary Cosmetic Registration Program,\(^\text{187}\) which, as noted above, only includes consumer cosmetics.\(^\text{188}\) And unlike drugs and foods, which are generally required to have ingredient labeling regardless of whether the product is intended for consumer or professional use,\(^\text{189}\) only cosmetics intended for retail sale are required to have ingredient labeling under the Fair Packaging and Labeling Act (FLPA) and FDA’s regulations.\(^\text{190}\) Cosmetics intended for professional use only are not required to have ingredient labeling.\(^\text{191}\)

Accordingly, both the identity and number of ingredients used in cosmetics is unknown. And consumers and workers may be unaware that the cosmetic intended for professional use only contains a potentially harmful ingredient.\(^\text{192}\)

The number of ingredients used in cosmetics is likely higher than the number of ingredients voluntarily reported by the cosmetics industry.\(^\text{193}\) The number of ingredients that the industry has submitted to the Voluntary Cosmetic Registration Program and the number of ingredients in the International Cosmetic Ingredient Dictionary, however, may give some indication of the number of ingredients used in cosmetics. The industry has submitted about “6,000 ingredients used in 81 product categories” to the Voluntary Cosmetic Registration Program.\(^\text{194}\) The International Cosmetic Ingredient Dictionary and Handbook “lists over 21,000 individual ingredients that were once used, are currently used, or are merely a supplier’s hope for future use,” and one review of the CIR process estimates that about “30% may be excluded from . . . review” and about “32% are currently in use.”\(^\text{195}\) FDA estimated at one point that there were “[a]bout 12,500 different cosmetic ingredients and a similar number of fragrance ingredients . . . being used by the cosmetic industry.”\(^\text{196}\)

Concerns about cosmetics manufacturers failing to voluntarily register their establishments and products and file ingredient statements are not new. In a 1978 report, the United States General Accounting Office (GAO) recommended that

\(^{187}\) Landa Statement, \textit{supra} note 158.

\(^{188}\) See \textit{supra} note 180 and accompanying text.

\(^{189}\) FDCA § 403(i), (q), 21 U.S.C. § 343(i), (q) (2012); FDCA § 502(e), 21 U.S.C. § 352(e) (2012).


\(^{192}\) See, e.g., Sharon E. Jacob et al., \textit{Commentary, p-Phenylenediamine in Black Henna Tattoos: A Practice in Need of Policy in Children}, ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 790, 791 (2008).

\(^{193}\) See Boyer et al., \textit{supra} note 172.

\(^{194}\) \textit{Id.} at 7S.

\(^{195}\) \textit{Id.} at 7S, 10S.

Congress give FDA the authority to require cosmetics establishment and product registration and the filing of ingredient statements.\textsuperscript{197}

The infrequency of cosmetics establishment inspections is also cause for concern. While the frequency of inspection for food, drug, device, and tobacco product establishments is specified by law, there are no comparable requirements for cosmetics establishments.\textsuperscript{198} For example, the FDCA provides that domestic food facilities must be inspected, depending on their risk classification, once every three or five years.\textsuperscript{199} The FDCA has also directed FDA to inspect drug and device establishments according to a risk-based schedule established by regulation.\textsuperscript{200}

Given the lack of statutory mandate for cosmetics establishment inspection and the FDA’s limited resources, it is not surprising that cosmetics establishments are inspected infrequently. In 2016, FDA inspected a total of 136 cosmetics establishments—133 domestic and 3 foreign.\textsuperscript{201} The lack of required establishment registration may also complicate inspection efforts, as FDA may be unaware of some cosmetics establishments.\textsuperscript{202} The low inspection rate for cosmetics establishments is not new. In 1978, FDA’s Cosmetics Director noted that “[a]t FDA’s fiscal 1979 levels, a cosmetic plant would be inspected without special circumstances every 20 to 25 years.”\textsuperscript{203}

Furthermore, the scope of FDA’s inspection authority for cosmetics is limited compared to drugs, certain devices, tobacco products, and foods. For example, if FDA has a reasonable belief that a food is adulterated and presents a threat of serious adverse health consequences or death, it may access records related to the food.\textsuperscript{204} FDA may also inspect records bearing on whether “prescription drugs, nonprescription drugs intended for human use, restricted devices, or tobacco products” are adulterated.\textsuperscript{205}

\begin{footnotes}
\item \textsuperscript{197} See GAO, HRD-78-139, \textit{supra note 9}, at 133.
\item \textsuperscript{198} See FDCA § 510(h), 21 U.S.C. § 360(h); FDCA § 421, 21 U.S.C. § 350j; FDCA § 905(g), 21 U.S.C. § 387e(g).
\item \textsuperscript{199} FDCA § 421, 21 U.S.C. § 350j.
\item \textsuperscript{200} FDCA § 510, 21 U.S.C. § 360(h).
\item \textsuperscript{202} See GAO, HRD-78-139, \textit{supra note 9}; see also GAO, HRD-78-139, \textit{supra note 9}, at v (stating that in the mid-1970s FDA “identified about 1,000 additional manufacturers, which it had never inspected because they had been unknown to the agency”).
\item \textsuperscript{203} 2 JAMES T. O’REILLY & KATHARINE A. VAN TASSELL, FOOD AND DRUG ADMINISTRATION § 17:9 (2018) (citing Address by Eiermann, FDA Cosmetics Director, to Society of Cosmetics Chemists (Sept. 27, 1978)).
\item \textsuperscript{205} FDCA § 704, 21 U.S.C. § 374.
\end{footnotes}
In contrast, FDA’s inspection authority for cosmetics is generally restricted to certain establishments and vehicles and does not extend to records. Accordingly, manufacturers “have refused Food and Drug Administration inspectors access to manufacturing records.” This may prevent FDA from, for example, effectively enforcing its requirement “that labeling of cosmetics that have not been adequately tested for safety including a warning to that effect,” as the law doesn’t require that manufacturers “make their test results available to the agency.” This may also limit FDA’s ability to investigate safety issues potentially associated with cosmetics.

While FDA has promulgated quality systems regulations, known as Current Good Manufacturing Practice regulations, for foods, drugs, and devices, it has only issued non-binding draft guidance and guidelines for cosmetics. This may hinder FDA’s ability to adequately regulate cosmetics as Good Manufacturing Practice regulations would provide “criteria to determine whether adequate methods, facilities, and controls are used in all phases of manufacturing and distribution of cosmetics.”

The lack of mandatory reporting of adverse events to FDA is another area where cosmetics lag behind. While dietary supplement, drug, and device manufacturers must report certain adverse events and food manufacturers must report reportable foods, there are no comparable mandatory requirements for cosmetics. FDA relies on voluntary measures for cosmetics. Without

206. Id.
207. GAO, HRD-78-139, supra note 9, at iii.
208. Id.
213. FDA, COSMETIC GOOD MANUFACTURING PRACTICES, supra note 168; Landa Statement, supra note 158; see also Greff, supra note 27, at 246. The FDCA requires FDA to promulgate regulations regarding tobacco product manufacturing practice regulations. See FDCA § 906, 21 U.S.C. § 387f(e); see also FDA, Tobacco Product Manufacturing Practice; Request for Comments, 82 Fed. Reg. 55,613 (Nov. 22, 2017).
214. GAO, HRD-78-139, supra note 9, at v.
217. See FDA, Adverse Event Reports, supra note 10.
218. Daum, supra note 171. CFSAN has an adverse event report system where consumers, manufacturers, and health care professionals can voluntarily report adverse events associated with regulated products including cosmetics. See FDA, Adverse Event Reports, supra note 10; Michael Kwa et al., Research Letter, Adverse Events Reported to the US Food and Drug Administration for Cosmetics and Personal Care Products, Research Letter, 177 JAMA INTERNAL MED. 1202 (Aug. 2017).
mandatory reporting for cosmetics, as the Director of FDA’s Office of Cosmetics and Colors recently stated in an interview, “often . . . [FDA is] just seeing the tip of the iceberg in [the adverse event reporting system].” For example, as of November 15, 2016, FDA had received 1,386 consumer “reports of reactions reported to be associated with” certain cosmetics cleansing conditioners: “When . . . FDA inspected the manufacturing and distribution facilities for these products, [it] learned that consumers had reported reactions in more than 21,000 complaints submitted to . . . the companies that market and manufacture the products.” Under the current law, the companies are not required to report these complaints. At one point, FDA had regulations for a voluntary program for the filing of cosmetics product experiences by cosmetics manufacturers, but these regulations were revoked.

Finally, cosmetics do not require FDA approval prior to sale. In every other major product category included in the 1938 FDCA, at least some products now must be approved before they can be lawfully sold. Under the FDCA, the policing of the adulteration and misbranding of “cosmetics” as a category takes place after a violation occurs. And in a judicial action to enforce the Act, the burden is on the government to prove that the product is adulterated or misbranded, rather than on the manufacturer to show that it is safe.

219. FDA, Adverse Event Reports, supra note 10.
220. FDA, Information About WEN, supra note 209.
221. Id.
222. Id.
223. See 21 C.F.R. § 730 (1997) (Voluntary Filing of Cosmetic Product Experiences); FDA, Food and Cosmetic Labeling; Revocation of Certain Regulations, 62 Fed. Reg. 43,071, 43,073 (reoking 21 C.F.R. pt. 730); FDA, Adverse Event Reports, supra note 10. In the notice proposing to revoke the Voluntary Cosmetic Reporting Program regulations, FDA noted that the program suffered from “serious limitations”: industry participation was “very limited and selective, the reports lack[ed] sufficient details to be useful, and annual reports are sent in long after the occurrence of an adverse reaction.” FDA, Food and Cosmetic Labeling; Revocation of Certain Regulations; Opportunity for Comment, 61 Fed. Reg. 29,708, 29,710 (June 12, 1996) (proposed rule). FDA also noted its “budgetary constraints.” Id.
224. See FDA, Voluntary Cosmetic Registration Program, supra note 169.
225. See FDCA § 409, 21 U.S.C. § 348 (food additives); FDCA § 505, 21 U.S.C. § 355 (new drugs); FDCA §§ 513, 515, 21 U.S.C. §§ 360e(a), 360e (class III devices). As noted earlier, “color additives” have to be approved for a particular use before being so used. See supra note 22.
228. See, e.g., GAO, HRD-78-139, supra note 9.
This Part argues that cosmetics law and regulation have been deprioritized as a result of their longstanding and close association with femininity and women, and women’s exclusion from political participation and representation. The 1906 Pure Food and Drugs Act did not explicitly address cosmetics. While the 1938 Federal Food, Drug and Cosmetic Act did, women were excluded from full participation during the consideration of both Acts, and consideration of the later Act was marred by the biases of some of the male participants. This Part also argues that cosmetics law and regulation have been deprioritized as a result of their longstanding and close association with women and femininity, which have often been devalued. Finally, this Part argues that cosmetics law and regulation have been deprioritized as a result of debate among self-described feminists regarding the meaning of cosmetics and differences in women’s relationships to and views of cosmetics more generally.

A. Cosmetics Law & Regulation Have Been Deprioritized as a Result of Women’s Exclusion from Political Participation & Representation, as well as their Longstanding & Close Association with Femininity & Women

1. The Pure Food & Drugs Act of 1906

The Pure Food and Drugs Act of 1906 did not regulate cosmetics. Historian Gwen Kay describes the omission of cosmetics from the 1906 act as an economic and political decision. While earlier bills defined “drug” to include “cosmetics,” in 1900, cosmetics were dropped from the legislation, apparently in exchange for the support of the National Pure Food and Drug Congress. At that time, the cosmetics industry’s scope was limited: the 1899 manufacturing census put the value of “perfumery and cosmetic” industry...

229. See Federal Food & Drugs Act, 34 Stat. 768 (June 30, 1906) [hereinafter Pure Food and Drugs Act].
231. See, e.g., S. 4144, 55th Cong. (1898); H.R. 9154, 55th Cong. (1898).
232. Oscar E. Anderson, Jr., Pioneer Statute: The Pure Food and Drugs Act of 1906, 13 J. PUB. L. 189, 195 (1964); CHARLES O. JACKSON, FOOD AND DRUG LEGISLATION IN THE NEW DEAL 4 (1970); KAY, supra note 3, at 15. The National Pure Food and Drug Congress was convened to support a food and drug law and was to be comprised of delegates “embrac[ing] as far as possible every interest involved in the production, manufacturer, and sale of food, drugs and liquor products,” as well as “Scientists and Health Departments,” and “those who have charge of local laws in the various States and Territories.” 1898 J. PROC. OF THE NAT’L PURE FOOD & DRUG CONGRESS 4, https://ia801404.us.archive.org/21/items/journalprocedi00unkgoog/journalprocedi00unkgoog.pdf. Proposed language from the 1898 proceedings of the National Pure Food and Drug Congress included cosmetics within the definition of drug. Id. at 36.
products at about seven million dollars, and in 1904 the value was about eleven million dollars.233

Gender—as well as race, ethnicity, and class—likely contributed to the failure of Congress to include cosmetics in the 1906 Pure Food and Drugs Act. Unlike food and drugs—which had problems that generated broad public outrage and which were included in the 1906 Pure Food and Drugs Act234—cosmetics, while not without their hazards,235 “were extremely easy to overlook.”236 The industry was relatively small,237 and cosmetics were “purchased and consumed by only half the population”: women.238 In addition, many women made their own cosmetics at home.239 Even among women who used what today would be considered cosmetics, many may have sought to hide this use as “[a]mong white women . . . popular concern centered on the morality of visible makeup,” which was “associated with prostitutes and actresses.”240 Indeed, the “[w]omen applying dangerous lead-based whitening lotions . . . [who] began to appear in medical case records after the Civil War . . . [went] to great lengths to conceal their cosmetics use.”241

The use and advertising of cosmetics also reflected racial and ethnic tensions, including white concerns about maintaining existing racial hierarchies.242 At the time, “the standard of beauty inherently assumed a northern European face.”243 Skin whiteners—which were marketed to both white and black women—“remained the most popular cosmetic throughout the nineteenth century.”244 Cosmetics “reinforced a noxious racial aesthetic,” in which “[n]otions of Anglo-American beauty . . . were continually asserted in relation

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235. See, e.g., PEISS, supra note 3, at 41-42.

236. KAY, supra note 3, at 30.

237. See supra note 68 and accompanying text.

238. KAY, supra note 3, at 30.

239. Id. at 10–12.

240. Id. at 32–33; PEISS, supra note 3, at 7.

241. PEISS, supra note 3, at 41.

242. Id. at 40–43.

243. KAY, supra note 3, at 31.

244. PEISS, supra note 3, at 40.
to people of color” and “[s]kin whiteners and hair straighteners were tokens in a heated debate” about beauty standards among black women.

While women’s organizations played an important role in the enactment of the 1906 Pure Food and Drugs Act, cosmetics do not appear to have been a central focus of many of these groups. This may have been because “[t]he women who belonged to many of these groups, upper-class and white, would most likely not have worn (visible) cosmetics at the beginning of the century because “women who visibly wore cosmetics in the last third of the nineteenth century were [considered] morally suspect and liable to criticism.” These groups may have “unconsciously applied middle- and upper-class morals and solutions to the food and drug problem.” Indeed, one history of the push for pure food and drug laws, which focuses on the role of women, makes scant mention of cosmetics, noting only in passing that in 1898, a proposed definition of “drug” included cosmetics, and that in 1905 the National Consumers’ Leagues’ Pure Food Committee included in their goals that “agencies should ensure cosmetics were safe and properly labeled.” But because cosmetics were included within the proposed definition of drugs until 1900, it’s difficult to distinguish early general support for drug legislation from support for cosmetic legislation.

Women’s lack of representation in the legislative process during the consideration and passage of the 1906 Pure Food and Drugs Act may have also contributed to the exclusion of cosmetics, as women did not have the right to vote nationwide until approximately 14 years after the Act was signed into law. When the Pure Food and Drugs Act passed in 1906, no woman had ever served in the United States House of Representatives or Senate. It would be

245. Id. at 31, 34 (stating that “[f]or white Americans, sustaining a visual distinction between white and black masked an uncomfortable truth, that Africans and Europeans were genealogically mixed” and “[i]n advice manuals and formula books, white fears of losing their superior racial identity underwrote old anxieties about cosmetic artifice”.
248. KAY, supra note 3, at 15, 17.
249. Id. at 31.
250. Id. at 15, 17.
252. See Anderson, supra note 232, at 195.
253. U.S. CONST. amend. XIX.
254. JENNIFER E. MANNING & IDA A. BRUDNICK, CONG. RESEARCH SERV., RL30261, WOMEN IN CONGRESS, 1917-2018: SERVICE DATES AND COMMITTEE ASSIGNMENTS BY MEMBER, AND LISTS BY STATE AND CONGRESS (2018), https://fas.org/sgp/crs/misc/RL30261.pdf [https://perma.cc/VMN3-KBQN]. The lack of diversity was not limited to gender. There were also no African American, Asian American, Native American, or Hispanic American senators. Ethnic Diversity in the Senate, UNITED STATES SENATE, https://www.senate.gov/senators/EthnicDiversityintheSenate.htm [https://perma.cc/XZK9-AEN8]. The Asian Americans and Hispanic Americans in the House of Representatives were all non-
over a decade until the first woman served in the House and even longer until a woman served in the Senate.\textsuperscript{255} As one commentator noted, “the undeniable reality of women’s political impotence in 1906 surely constituted a major factor in the exclusion of cosmetics from the 1906 Act.”\textsuperscript{256}

2 The Federal Food, Drug & Cosmetic Act of 1938

While a comprehensive examination of the history of the cosmetics provisions of the 1938 FDCA is beyond the scope of this Article, portions of that history provide examples of how gender shaped consideration of bills to strengthen the law. Between the enactment of the Pure Food and Drugs Act of 1906 and the passage of the 1938 FDCA, it became more socially acceptable for women to use cosmetics, and the cosmetics industry grew substantially. At the same time, a number of women were seriously injured by cosmetics that federal law was powerless to address and there were growing concerns about the safety of cosmetics. The history of cosmetics and the development of cosmetics law during the period preceding the 1906 Pure Food and Drugs Act through the enactment of the 1938 FDCA illustrates the gendered roots of cosmetics law.\textsuperscript{257} This history is particularly important because this law has changed little in the intervening eighty years. The 1938 Act, with few modifications, remains the basis of cosmetics law and regulation, and women still fall far short of equal representation in the United States Senate and House of Representatives.\textsuperscript{258}

a. Cosmetics Growth & Change, 1906-1938

In the years after the enactment of the 1906 Pure Food and Drugs Act, the cosmetics industry grew rapidly.\textsuperscript{259} By 1920, the toilet goods industry was "one of the largest . . . in the United States, behind food, clothing, and automobiles."\textsuperscript{260} In 1933, the U.S. Census Bureau reported that the value of

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\item MANNING & BRUDNICK, supra note 254.
\item Daum, supra note 171.
\item The Author plans to more fully examine legislative history of the cosmetics provisions of the FDCA and the role of women in future scholarship.
\item See 1921 MANUFACTURES CENSUS, supra note 233, at 745, 746 tbl.623; see also GILBERT VAIL, A HISTORY OF COSMETICS IN AMERICA 137 (1947) (listing statistics from the reports of the United States Census Bureau). In 1929, the value of the industry was approximately $193 million. It then declined to $153 million in 1931. VAIL, supra, at 137.
\item See 1921 MANUFACTURES CENSUS, supra note 233, at 745, 746 tbl.623; see also GILBERT VAIL, A HISTORY OF COSMETICS IN AMERICA 137 (1947) (listing statistics from the reports of the United States Census Bureau). In 1929, the value of the industry was approximately $193 million. It then declined to $153 million in 1931. VAIL, supra, at 137.
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cosmetics industry production was about 97 million dollars.\textsuperscript{261} That same year Senator Royal S. Copeland introduced a bill, S. 1944, to strengthen the 1906 Pure Food and Drugs Act,\textsuperscript{262} by, among other things, extending the Act to prohibit the adulteration, misbranding, and false advertisement of cosmetics. During a hearing on the bill in December of 1933, the Secretary of Agriculture testified that “[t]he cosmetic industry ha[d] become of first importance,” whereas it had been “in its infancy” when the 1906 Act was written.\textsuperscript{263} By 1937—the year before the enactment of the Federal Food, Drug, and Cosmetic Act of 1938—the value of cosmetics industry production was about 132 million dollars.\textsuperscript{264}

The tremendous growth of the industry was accompanied by a shift in the acceptability of cosmetics use. Cosmetics use became more broadly acceptable for women: for example, a 1915 article in McClure’s referred to cosmetics as “affording much legitimate daily comfort.”\textsuperscript{265} “[W]omen from across the country, from different social classes and racial-ethnic groups, enthusiastically embraced cosmetics—especially makeup—in the early twentieth century,” although “[a]ge, marital status, economic class, ethnic origins, and residence influenced women’s relationship to the new mass market.”\textsuperscript{266}

Cosmetics, particularly makeup, had a multitude of meanings.\textsuperscript{267} For example, women used cosmetics “to play the lady or the hussy, to look older or younger, to signify common identities as ‘American’ and ‘respectable,’ or to invoke class and ethnic distinctions.”\textsuperscript{268} But despite these differences and contradictions, in the 1920s and 1930s, “[m]akeup was a true expression of feminine identity”\textsuperscript{269} and by the 1930s, “had become an aesthetic expression woven deeply into women’s daily life.”\textsuperscript{270}

At the same time, workplace appearance requirements “became increasingly regimented,” both requiring that women wear cosmetics and regulating women’s cosmetics use.\textsuperscript{271} And the growth of the beauty industry opened up new employment opportunities for women, e.g., as beauticians, product demonstrators, and drugstore clerks.\textsuperscript{272} Entrepreneurs brought beauty culture and

\textsuperscript{261} VAIL, supra note 259, at 137.

\textsuperscript{262} See DUNN, supra note 1, at 37, 39, 42, 45-46 (S. 1944).

\textsuperscript{263} DUNN, supra note 1, at 1049 (Statement of the Honorable Henry A. Wallace, Secretary of Agriculture).

\textsuperscript{264} See VAIL, supra note 259, at 137 (listing statistics from the reports of the United States Census Bureau).

\textsuperscript{265} KAY, supra note 3, at 39.

\textsuperscript{266} PEISS, supra note 3, at 6, 168.

\textsuperscript{267} Id. at 6, 190.

\textsuperscript{268} Id. at 190.

\textsuperscript{269} Id. at 166. Conversely, “[c]osmetics were not readily reconciled with a heterosexual masculine identity.” Id.

\textsuperscript{270} Id. at 200.

\textsuperscript{271} See id. at 193.

\textsuperscript{272} Id. at 5.
cosmetics to customers and “many of the most successful were immigrant, working-class, or black women.”

b. The Failures of the 1906 Pure Food and Drugs Act & Consideration of Reform

Concerns about the safety of cosmetics and the limitations of the 1906 Act accompanied the growth of the industry. These concerns reflect the gendered state of cosmetics. In the 1930s, there were numerous reports of cosmetics seriously injuring women, which the Pure Food and Drugs Act could not prevent.

Several books highlighted the dangers of cosmetics and the lack of protections for consumers: for example, in 1933, Arthur Kallet and F.J. Schlink, who founded Consumers Union and Consumers’ Research Inc., published the influential book 100,000,000 Guinea Pigs. The book devotes a chapter to “[d]anger [i]n [c]osmetics,” which begins with a statement about the dangerous “path followed by women of all times and of all countries in search of the beauty promised by magic and mysterious potions.” The book noted that “[t]he purchaser of cosmetics has no protection whatever” and discussed women injured by cosmetics and cosmetic procedures. In 1934, Mary Catherine Phillips, also of Consumers’ Research, published Skin Deep: The Truth about Beauty Aids—Safe and Harmful in response to “numerous women readers” who requested advice on cosmetics brands. In Skin Deep, Phillips was even more explicit than Kallet and Schlink about who cosmetics consumers were: she stated that “the feminine consumer has little, if any protection against dangerous poisons in the form of cosmetics.” Phillips also stated that for some cosmetics “little research has been done of a scientific, disinterested nature that can be used

273. Id. at 5, 64-70 (discussing the entrepreneurial successes of Elizabeth Arden, Annie Turnbo Malone, Helena Rubinstein, Madam C.J. Walker); see also Perry, supra note 100, at 580.
274. These were not the first concerns about or injuries caused by cosmetics. A number of cosmetics in the mid-nineteenth century, for example, contained mercury, lead, and arsenic. See, e.g., Peiss, supra note 3, at 21.
275. See, e.g., Ruth DeForest Lamb, American Chamber of Horrors: The Truth About Food and Drugs viii (1936); Pure Food and Drugs Act, supra note 229.
276. Arthur Kallet & F.J. Schlink, 100,000,000 Guinea Pigs: Dangers in Everyday Foods, Drugs, and Cosmetics (1933). Id. at 78.
277. Id. at 78, 82–84, 89, 94.
278. Id. at 78, 82–84, 89, 94.
280. Id. at 9.
or relied on by consumers.”

And in 1936, Ruth deForest Lamb, FDA’s first Chief Education Officer, published American Chamber of Horrors, which discussed the limits of the 1906 Act and FDA’s lack of authority over cosmetics. Like the authors of the other two books discussed above, she provided examples of cosmetics that seriously injured women. The book was based on an FDA-sponsored exhibit that was “so shocking” that a reporter accompanying First Lady Eleanor Roosevelt to see the exhibit, “dubbed [it] the ‘American Chamber of Horrors.’”

These works also reflect the important role women played in bringing attention to the problems of cosmetics and their regulation. In fact, Lamb dedicated her book to the “gallant group of women . . . holding the front-line trenches in the consumers’ war for pure foods, drugs and cosmetics.” Women and women’s organizations played a central role in the push for the federal regulation of cosmetics in the first part of the 20th century and the passage of the 1938 Federal Food, Drug, and Cosmetic Act. As Gwen Kay observes in her book, Dying to Be Beautiful: The Fight for Safe Cosmetics, “[t]he leading proponents for inclusion of cosmetics in a new law . . . were mostly women’s organizations and consumer groups.”

In 1933, Senator Copeland introduced S.1944, the “original bill leading to the enactment of the [FDCA].” FDA’s Annual Report that same year noted that federal law was “wholly without jurisdiction over cosmetics, except in those

281. Id. at xi.


283. LAMB, supra note 275, at 15–39.


285. See LAMB, supra note 275; PHILLIPS, supra note 279; KALLET & SCHLINK, supra note 276.

286. LAMB, supra note 275, at Dedication.

287. KAY, supra note 3, at 3; see, e.g., Foods, Drugs, and Cosmetics: Hearing Before a Subcommittee of the Committee on Interstate and Foreign Commerce on H.R. 6906, H.R. 8805, H.R. 8941 and S. 5, Before the Subcomm. of the Comm. on Interstate and Foreign Commerce, 74th Cong. 1 (1935) [hereinafter 1935 Hearing] (stating that the Director of the Bureau of Foods, Drugs, and Hotels of the Kentucky Health Department in her testimony stated that she did not have to tell the committee “that the woman consumer is very definitely interested in cosmetics”).

288. See DUNN, supra note 1, at 24, 29-30.
rare instances when the labeling bears medicinal claims.” S. 1944 would have extended the Pure Food and Drugs Act of 1906 to prohibit the manufacture, shipment, and sale of adulterated or misbranded cosmetics and the false advertisement of cosmetics.

In testimony on the proposed legislation, FDA’s chief, W.G. Campbell, referenced “Koremlu Cream” and “Lash Lure,” two products that caused a series of injuries to women and illustrated the limits of existing law. Koremlu was a depilatory that used “thallium acetate, an ingredient commonly found in rat poison, to destroy and remove hair.” The cosmetic, which “was applied mostly to women’s lips,” caused “loss of axial or pubic hair; baldness; temporary or long-term paralysis; and optic nerve damage.” FDA cited Koremlu Cream as an example of a product the federal government lacked authority over under the 1906 Act, writing that the product was only removed from the market when “the manufacturer was forced into bankruptcy by accumulation of damage suits.”

“Lash Lure,” which was used for dying eyebrows and eyelashes, “contained paraphenylenediamine (PPD), an aniline dye that repeatedly achieved the rating of ‘most dangerous’ in the list of hair dyes.” It resulted in injuries ranging from “temporary nausea, discomfort, or vision problems” to blindness and

289. Id. at 26 (reproducing portions of FDA’s 1933 Annual Report).
290. Id. at 30, 31, 33; S. 1944, 73rd Cong., § 2(c), 5, 6, 9.
291. DUNN, supra note 1, at 1122.
292. KAY, supra note 3, at 70. Koremlu is discussed in 100,000,000 Guinea Pigs, and both Koremlu and Lash Lure are discussed in Skin Deep and American Chamber of Horrors. See KALLET & SCHLINK, supra note 276; PHILLIPS, supra note 279; LAMB, supra note 275.
293. KAY, supra note 3, at 70. See, e.g., Hillick v. Edwards & Son, 143 Misc. 277 (N.Y. 1932) (actions of three plaintiffs each alleging that she suffered injuries from the use of Koremlu Cream); Smith v. Denholm & McKay Co., 192 N.E. 631 (Mass. 1934) (action by plaintiff alleging that she suffered peripheral neuritis from thallium poisoning from Koremlu Cream); Greengard v. Odorano Co., 235 A.D. 806 (N.Y. 1932) (action by plaintiff alleging she developed severe skin poisoning from Odorono which was advertised for use in “eliminating perspiration”). But see DUNN, supra note 1, at 1041 (statement of American Medical Association representative) (noting “case of child swallowing Odorono,” containing “dangerous lead acetate”). In the United States, the use of thallium in rat poison has been banned “due to its toxicity from accidental exposure.” CDC NIOSH, Thallium: Systemic Agent, https://www.cdc.gov/niosh/ershdb/emergencyresponsecard_29750026.html [https://perma.cc/R6VB-DY5H].
294. KAY, supra note 3, at 71.
295. DUNN, supra note 1, at 26 (reproducing portions of FDA’s 1933 Annual Report). In a 1934 Senate hearing, the FDA chief noted that Koremlu contained a rat poison “for which no antidote has . . . been found” and that it removes the hair not just from the site of application, but from the entirety of the body. DUNN, supra note 1, at 1154.
296. KAY, supra note 3, at 71.
death.\textsuperscript{297} Lash Lure was still on the market when the FDA chief first testified about it.\textsuperscript{298}

Koremlu and Lash Lure were not alone in injuring women. The legislative history of the FDCA indicates that “extremely toxic substances” such as certain coal-tar dyes and metals like lead, arsenic, mercury and thallium” in “a number of preparations . . . caused serious impairment in the health of users.”\textsuperscript{299}

While the debate over the cosmetics provisions of legislation intended to address shortcomings of the 1906 Act mentioned that men used cosmetics “too,”\textsuperscript{300} much of the focus was on women.\textsuperscript{301} Despite this, women’s direct participation in the legislative proceedings appears to have been relatively limited and debate of the cosmetics provisions of bills reflected the perspectives—and biases—of the male participants.

Senator Hattie W. Caraway, the sole woman Senator at the time, was present for subcommittee hearings on the legislation.\textsuperscript{302} Women also testified on the legislation before the subcommittee.\textsuperscript{303} Both Senator Caraway’s membership on the subcommittee and the testimony of women were of sufficient note that during a December 1933 subcommittee hearing, “Mrs. William Dick Sporborg of Port Chester, [New York]” remarked on them.\textsuperscript{304} She stated that she was “the first woman . . . permitted to appear” at the hearing and that “all . . . men” had testified before her that day and the day before.\textsuperscript{305} She also remarked that she

\textsuperscript{297} Id. at 72; see also Clyde E. Harner, Dermato-Ophthalmitis Due to the Eyelash Dye Lash-Lure, 101 JAMA 1558-59 (1933) (reporting three cases of women injured by Lash Lure); Oliver P. Bourdon, Severe Eye Symptoms Due to Dying the Eyelashes, 101 JAMA 1559 (1933) (reporting case of woman injured by an eyelash dye, Larieuse); R. C. Jamieson, Eyelash Dye (Lash-Lure) Dermatitis with Conjunctivitis, 110 JAMA 1560 (1933) (reporting case of woman injured by Lash-Lure); A. W. McCally et al., Corneal Ulceration Following Use of Lash-Lure, 110 JAMA 1560 (1933) (reporting case of woman injured by Lash-Lure); Sigmund S. Greenbaum, Dermatoconjunctivitis Due to Lash-Lure, An Eyelash and Eyebrow Dye, 101 JAMA 363 (1933) (reporting case of woman injured by Lash-Lure); S. B. Forbes & W. C. Blake, Fatality Resulting from the Use of Lash-Lure on the Eyebrow and Eyelashes, 103 JAMA 1441 (1934) (reporting fatality after using Lash-Lure). American Chamber of Horrors stated that there were at least 17 cases of Lash Lure injuries reported in the Journal of the American Medical Association, but there was no way to know how many women in total were so injured. LAMB, supra note 275, at 19.

\textsuperscript{298} DUNN, supra note 1, at 1154-55; see also LAMB, supra note 275, at 22.

\textsuperscript{299} DUNN, supra note 1, at 115-16; see also id. at 160; id. at 484; id. at 572 (quoting Congressman Virgil Chapman as stating, “Many harmful and dangerous cosmetics have been sold to the public and used by unsuspecting women so as to result in their permanent disfigurement and impairment of their health”); id. at 256; Virgil Munday Chapman, History, Art & Archives, U.S. House of Representatives, http://history.house.gov/People/Listing/C/CHAPMAN,-Virgil-Munday-(C000317)/ [https://perma.cc/J8J P-PW33]; see also DUNN, supra note 1, at 256.

\textsuperscript{300} See DUNN, supra note 1, at 156.

\textsuperscript{301} See, e.g., 1935 Hearing, supra note 287, at 165 (quoting Congressman Virgil Chapman as stating that “the committee realizes that women use cosmetics externally, internally, and eternally”).

\textsuperscript{302} DUNN, supra note 1, at 150; at 96, 269-70, 597, 969; MANNING & BRUDNICK, supra note 254, 96-97. She later served as a conferee for the Senate. DUNN, supra note 1, at 597, 969. The 1930 Census identified Senator Caraway as white. FIFTEENTH CENSUS, supra note 282.

\textsuperscript{303} See, e.g., Hearings Before a Subcommittee of the Committee on Commerce on S. 1944, 73rd Cong. (1933) [hereinafter 1933 Hearings]; 1935 Hearing, supra note 287.

\textsuperscript{304} 1933 Hearings, supra note 303, at 339. The 1930 Census identified Mrs. William Sporborg as white. FIFTEENTH CENSUS, supra note 282 (listing Constance Sporborg).

\textsuperscript{305} Id. at 339, 340.
was “glad to see a woman on th[e] Senatorial Committee whose decisions and recommendations will effect so many women who are users of drugs, cosmetics, and foods.”

The Senate debate reflected the male Senators’ attitudes towards women. During Senate debate, male Senators referred to a “beautiful girl” who “lost her eyes” and her vision after use of an eyelash dye. The “beautiful girl,” who remains nameless through the debates, appears to have been a social worker who was injured before a dinner to honor her civic activity by an eyelash dye that contained “a poison.” The woman was likely Hazel Fay Brown (Musser), whose injuries from Lash-Lure are described in detail (with before and after photographs) in American Chamber of Horrors.

During the debate, the woman is largely reduced to the subject of the male Senator’s viewing. Senator Copeland appeared to joke about submitting “the photograph of a beautiful young woman” to Senator James Hamilton Lewis, promoting objections about other Senators experiencing “envy” and “the suspension of proper senatorial activities,” as well as laughter. Senator Copeland responded by stating that he would “give [the photograph] to the Senate . . . so that there may be no feeling of discrimination.” Senator Lewis, in an apparent reference to the photograph, “object[ed] to the exhibits which have caused trouble.” And, Senator Matthew M. Neely expressed concern about Senator Copeland “absorbing the entire attention of the Senate in the photographs of the beautiful girl.”

Discussion of the cosmetics provisions of the proposed legislation was punctuated by laughter: Senator Copeland after remarking on the manufacture, sale, and use of cosmetics, prompted laughter when he joked about Senator Lewis having “no doubt . . . been a profound student in the fields involved.” There was also laughter after Senator Neely stated that lipstick “is not safe for men,” and again after Senator Copeland asked whether Senator Neely would like to “testify on the subject at any great length.”

306. Id. at 344.
307. DUNN, supra note 1, at 156-57, 279.
308. Id. at 156, 279.
309. LAMB, supra note 275, at 15-18; KAY, supra note 3. The 1930 Census identified Hazel Fay Musser as white. FIFTEENTH CENSUS, supra note 282.
310. FDA’s chief, W.G. Campbell appears to have shown a photograph of the injured woman during a 1934 Senate hearing. See DUNN, supra note 1, at 1154-55.
312. Id.
313. DUNN, supra note 1, at 156.
314. Id.; SENATORS OF THE UNITED STATES, supra note 312, at 56.
315. DUNN, supra note 1, at 156.
316. Id.
The debate also reflected the male Senators’ judgments about women’s use of cosmetics: for example, Senator Neely remarked that he’d be “very much more enthusiastic about the bill if it” “contain[ed] an inhibition against the excessive use of the abominable lipstick.”317 And Senator Connally remarked that “[i]t seems ... the more solemn [women] are, the less cosmetics they use.”318 In contrast, Senator Copeland, who led the push for new legislation, remarked that the woman who was blinded after using the eyelash dye was “preparing herself, as she properly should for an occasion so important to her.”319 And that he was “glad to say there” that the bill did not prohibit the use of lipstick.320 Senator Copeland remarked that he viewed “it as the solemn duty of every woman to be as beautiful as she can be” and that he did “not blame any woman for using cosmetics if they tend in the direction of making her more attractive.”321 In explaining what he meant by solemn duty, he later stated, “I mean, of course, it is my solemn duty to help them to be as beautiful as they can be.”322

In the course of the legislative debate, Senator Copeland referenced the “fair woman” becoming fairer as a result of cosmetic use.323 Given racialized notions of beauty,324 this may have had racial undertones. Senator Copeland went on to state that the Senate’s “respect for [the fair woman] is such that [they] desire that whatever she uses may be safe to use.”325 Who the law was intended to protect was at times described in limited terms. For example, Senator Copeland remarked, “I want all women, in whom I have an interest, to be guarded and protected against the use of things which may be damaging.”326 Copeland also appealed to his fellow male senators, stating that “[e]very Senator having in mind the welfare of his wife, his children, his grandchildren, and his great-children if there be such, is interested in having the measure enacted into law because of what it will do—promote their welfare, maintain their health, and extend their lives.”327

3 Devaluation of Cosmetics & Cosmetics Law & Regulation

Food is life-sustaining and everyone must eat. Drugs may treat serious illness and can be lifesaving. In contrast to those traditional product categories

317. Id.
318. Id. at 278.
319. Id. at 156.
320. Id.
321. Id. at 278.
322. Id.
323. Id. at 279.
324. See KAY, supra note 3; PEISS, supra note 3.
325. DUNN, supra note 1, at 694.
326. Id. at 278 (emphasis added).
327. Id. at 185 (emphasis added). But see id. at 155 (quoting Senator Copeland as stating that the “bill is intended to safeguard the men and women, the boys and girls, and the babies of this country”).
in the FDCA, cosmetics are often viewed as frivolous or trivial. The trivialization of cosmetics may be reinforced by the very meaning of the word “cosmetic,” as one common definition is “superficial.”

While cosmetics have different meanings for different women—and these meanings are shaped by factors including race and socio-economic status—cosmetics are closely associated with femininity. In particular, cosmetics are associated with a “deeply-ingrained American cultural definition of femininity denoted as a particular kind of commercialized feminine beauty.” Indeed, cosmetics use has been shown to significantly impact impressions of femininity.

At the same time that cosmetics are closely associated with femininity, traits and qualities associated with women or femininity have been devalued. For example, Mary Anne C. Case has noted “the continuing devaluation, in life and in law, of qualities deemed feminine.” And as Deborah Zalesne has observed, in Jespersen v. Harrah’s Operating Co., Inc.—a case that unsuccessfully challenged the firing of a female bartender for failing to comply with her employer’s appearance standards, which required female employees to wear makeup—“the court failed . . . to consider the fact that the makeup, hair, and dress requirements are deeply rooted in traditional notions of how men and women should look and are based on stereotypes that deride feminine traits and marginalize individuals who possess such traits.”

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328. See, e.g., POUCHER’S PERFUMES, COSMETICS AND SOAPS (Hilda Butler ed., 10th ed. 2000); Dellinger & Williams, supra note 93, at 153; WOLF, supra note 4, at 9.
331. See, e.g., Richard Russell, A Sex Difference in Facial Contrast and Its Exaggeration by Cosmetics, 28 PERCEPTION 1211, 1217 (2009) (suggesting that “an important function of cosmetics may be to increase the apparent femininity, and hence attractiveness, of the female face by increasing facial contrast”); Jane E. Workman & Kim K.P. Johnson, The Role of Cosmetics in Impression Formation, 10 CLOTHING & TEXTILES RES. J. 63 (1991) (stating that “[r]esults support the use of cosmetics as a cue in forming impressions of another’s . . . femininity”); Cathryn L. Cox & William H. Glock, Resume Evaluations and Cosmetics Use: When More Is Not Better, 14 Sex Roles 51, 51, 56 (1986) (noting that “[c]osmetics use has been traditionally used by women to control their physical appearance” and finding “that cosmetics tend to enhance the perceived attractiveness and femininity of women”).
333. Case, supra note 332, at 3.
FDA is not immune to sociopolitical influences. Thus, the association with women and femininity may have contributed to cosmetics law and regulation being deprioritized. Others have argued that “FDA has been an inadequate protector of women’s health” and that “FDA action [has] directed the health of large numbers of women on more than one occasion.”

FDA’s guidelines—Considerations for the Clinical Evaluation of Drugs—for many years “largely excluded women of childbearing potential from clinical trials,” a position that many viewed as “reflect[ing] gender stereotyping more than concerns about good science.”

Gender gaps in clinical research may also impact the study—and regulation—of cosmetics safety. Medicine “generally has paid more attention to the risks and benefits of new drugs with a male model in mind, rather than a female” and “knowledge concerning the effects of various treatments on women and their unique needs remains sparse and underdeveloped.” Current knowledge of the effects of cosmetics, a highly gendered product, on women’s health, is similarly underdeveloped. For example, one epidemiologist at the Harvard T.H. Chan School of Public Health stated that “[f]or decades we’ve been studying what’s in the air that you breathe and the water you drink. But you wake up in the morning . . . and you may use a shampoo or a conditioner, and a

335. See Mara Sanders, Sex, Drugs, and Advisory Committees: An Analysis of Pharmaceutical Industry Manipulation of FDA Vulnerability to Sociopolitical Influences on Matters of Women’s Health, 48 COLUM. HUM. RTS. L. REV. 149, 150 (2017) (arguing that FDA “displays a number of biases that distort scientific analysis, from normative judgments about women’s sexuality to a patronizing sense that women require heightened protection against the risks posed by otherwise effective drugs”).

336. Thomas Koenig & Michael Rustad, His and Her Tort Reform: Gender Injustice in Disguise, 70 WASH. L. REV. 1, 51 (1995); see also Pub. Citizen Health Research Grp. v. Comm’r, Food & Drug Admin., 724 F. Supp. 1013, 1021 (D.D.C. 1989) (holding that “a more than seven year delay in issuing a regulation impacting on women’s health is certainly an unreasonable delay”); Amanda L. Allen, A Plan C for Plan B: A Feminist Legal Response to the Ways in Which Behind-the-Counter Emergency Contraception Fails Women, 11 N.Y. CITY L. REV. 401, 411 (2008) (arguing that “[a]t the very least, the ways in which the FDA decision [regarding Plan B, an emergency contraceptive] privileged antiquated views about women’s and girls’ sexuality along with the ideological agenda of a conservative presidential administration over science, medicine, and women’s health offers support for the feminist critique of the law as an inherently patriarchal institution”); Vicki Lawrence MacDougall, Medical Gender Bias and Managed Care, 27 OKLA. CITY U. L. REV. 781, 786 (2002) (“rais[ing] the haunting question whether managed care has the built-in propensity to perpetuate—if not sanction and encourage—medical gender bias to the detriment of the health of women enrolled in managed care plans”); Rebecca Weisman, Reforms in Medical Device Regulation: An Examination of the Silicone Gel Breast Implant Debacle, 23 GOLDEN GATE U. L. REV. 973, 982 (1993) (discussing silicone gel breast implants, diethylstilbestrol (DES), and the Dalkon Shield and arguing that “failed to act responsibly when dealing with products affecting women’s health and safety”).


338. See, e.g., Rothenberg, supra note 337, at 1208.


340. Rothenberg, supra note 337, at 1203.
toothpaste, and cosmetics, and they all contain many different chemicals. And we pretty much never thought about them.”

B. Reform of Cosmetics Law & Regulation Must Confront Tensions Resulting from the Debate Among Feminists Regarding the Meaning of Cosmetics & Economic Opportunities in the Cosmetics Industry

The debate among self-described feminists regarding the meaning of cosmetics and differences among women with respect to cosmetics may complicate reform efforts. As discussed earlier, the use of, exposure to, and meaning of cosmetics may differ as a result of the intersections between gender, race, and class. In addition, the economic and entrepreneurial opportunities that cosmetics may provide may create tensions that may further complicate efforts to reform cosmetics law and regulation.

1. The Debate Among Self-Described Feminists

There is substantial debate among feminists over the meaning of cosmetics and the cosmetics industry. This debate is part of a larger debate about beauty and appearance. In her essay, Appearance as a Feminist Issue, Rhode describes an “increasingly fragmented” feminist movement in which “different subcultures have differed sharply on matters of appearance.”

Some feminists are concerned about the costs of appearance norms, including financial costs, health risks, discrimination, “the devaluation and sexualization of women,” and the exacerbation of economic, racial, and gender inequalities. For example, Naomi Wolf argues that images of female beauty” are used “as a political weapon against women’s advancement” and that cosmetics and the cosmetics industry contribute to this “beauty myth,” pressuring women to adhere to unrealistic beauty standards and hence constraining them. Other feminists have focused on “[a]ppearance [a]s an

342. See supra Sections II.A & B. They may also differ based on other characteristics including sexual orientation, ethnicity, socio-economic status, and age.
343. See Deborah L. Rhode, Appearance as a Feminist Issue, 69 SMU L. REV. 697, 697 (2016) (stating that “as the feminist movement has grown increasingly fragmented, different subcultures have differed sharply on matters of appearance” and that “[w]hen it comes to appearance, what women want is not always the same or always compatible”); see also SUSAN BROWNMILLER, FEMININITY 157-61 (1984) (discussing the feminism and the tensions over makeup).
344. Rhode, supra note 343, at 699; see also Craig, supra note 330.
345. Id. at 699-704.
opportunity for self-expression and self-determination,” albeit with limits.\textsuperscript{347} For example, Jennifer Baumgardner and Amy Richards have argued that “[u]sing makeup isn’t a sign of our sway to the marketplace and the male gaze; it can be sexy, campy, ironic, or simply decorating ourselves without the loaded issues.”\textsuperscript{348}

However, regardless of how one views cosmetics use, the current state of cosmetics law and regulation is concerning because many women use or are exposed to cosmetics. If cosmetics use generally is oppressive, then the current state of cosmetics law and regulation reinforces this because it disproportionally puts women’s health at risk. If cosmetics use is liberating, then the current state of cosmetics law and regulation is troubling because cosmetics use is not liberating if it comes with unknown and, thus, unaccepted risks.

2. Cosmetics, Entrepreneurship & Economic Opportunity

Women’s divergent interests may also hinder the development of cosmetics law and regulation. As discussed in Section II.B, cosmetics use and exposure may have negative health effects. But cosmetics are also big business,\textsuperscript{349} and it is important to recognize the economic opportunities that the cosmetics industry has provided and continues to provide women, including women who are members of other excluded groups. Women’s economic interests and considerations will likely impact any potential reforms.

There is a long history of the cosmetics industry providing economic opportunities for diverse women. For example, Peiss writes that while “beauty culture mainly offered women low-wage work, it became one of a handful of occupations . . . to sustain female entrepreneurship and ownership” and “[w]omen . . . became inventors, manufacturers, and distributors of beauty products.”\textsuperscript{350}

The women entrepreneurs came from different classes (although many were poor), were of different races, and were both immigrants and native-born.\textsuperscript{351} For example, Annie Turnbo Malone and Sarah Breedlove (known as Madam C.J. Walker) were two black women entrepreneurs who built thriving businesses selling hair care products,\textsuperscript{352} an industry that has “long been one of the few sites of success for black women entrepreneurs.”\textsuperscript{353} Florence Nightingale Graham,

\begin{itemize}
\item \textsuperscript{347} Rhode, supra note 343, at 705–07.
\item \textsuperscript{348} Jennifer Baumgardner & Amy Richards, Feminism and Femininity: Or How We Learned to Stop Worrying and Love the Thong, in ALL ABOUT THE GIRL: CULTURE, POWER, AND IDENTITY 59, 60 (Anita Harris ed., 2004).
\item \textsuperscript{349} See supra note 2 and accompanying text.
\item \textsuperscript{350} PEISS, supra note 3, 62-63.
\item \textsuperscript{351} Id. at 63–64, 96.
\item \textsuperscript{352} Id. at 67–70.
\item \textsuperscript{353} Monica C. Bell, The Braiding Cases, Cultural Deference, and the Inadequate Protection of Black Women Consumers, 19 YALE J.L. & FEMINISM 125, 128, 133 (2007) (arguing that “state legislators
who grew up in poverty in Canada, established Elizabeth Arden. And Helena Rubinstein, who came from “a middling Jewish family” and moved to New York from Europe after World War I started, began a cosmetics company bearing her name. All four of these women built “business empires.” Although there is some debate over whether Malone or Breedlove was the first black female millionaire in the United States, both women were among the first.

Beauty work, including that involving the use of cosmetics, is still often done by women, and women comprise the majority of workers in many jobs that involve such work. According to the chief scientist of the Personal Care Products Council, “[w]omen and people of color account for nearly 74% of all employment in the personal care products sector and 61.2% of management positions.” As a result, many women have an economic interest in cosmetics, which may be impacted by changes in cosmetics law and regulation. For example, in 2012, Deborah May testified at a Congressional hearing about the economic contributions that the handcrafted soap and cosmetic industry makes. She stated that the “industry is over 200,000 small businesses hand producing small batches of soaps and cosmetics,” of which 95% “are women-owned” and urged exemptions for small businesses from if FDA were to be given new authority over cosmetics. Accordingly, any reform efforts may confront opposition from those with divergent interests.
Finally, this Article considers how asking the woman question and the excluded group question could inform reform efforts. It is mindful of the fact that the method that it employs does not lead to a particular end. It does, however, reveal the gendered roots of cosmetics law and regulation, and highlight the need to further investigate how cosmetics and the current state of cosmetics law and regulation impact women, including members of excluded groups. It is not enough to simply claim that cosmetics are the safest product category that FDA regulates, as the current state of cosmetics law and regulation hinders the ability to meaningfully assess the safety of cosmetics. This Article suggests several changes to begin to reform cosmetics law and regulation to better account for women’s experiences, safety, and needs.

A number of scholars and other commentators have proposed or supported reforms to cosmetics law and regulations. In addition, the General Accounting Office has studied and issued recommendations on cosmetics law and regulation, and members of Congress have introduced bills to strengthen cosmetics law. While many of these proposals and bills suggest fairly broad cosmetics reforms, the reforms that this Article argues for are more limited in scope. This is not to say that additional reforms are not needed—they very well may be. As an initial matter, however, this Article argues for reforms that facilitate the collection of information to more accurately assess the safety of cosmetics and the risks that they may pose to human health, including that of diverse women. The reforms that this Article suggests would also begin to narrow the gap between the regulation of cosmetics—a highly gendered product—and that of the other major product categories, which lack the same gendered history and associations.

First, Congress and FDA should require that establishments involved in the production and distribution of cosmetics intended for use in the United States register with the FDA, just as food, drug, device, biologics, and tobacco product...

Second, Congress and FDA should require that cosmetics establishments also be required to provide FDA with a listing of ingredients used in cosmetic products intended for use in the United States. As noted above, filing ingredient statements for each cosmetic product is currently voluntary.\footnote{See Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Voluntary Cosmetic Registration Program, 73 Fed. Reg. 76,360 (Dec. 16, 2008).} In response to a comment requesting that FDA make the program mandatory, FDA stated that it “has no statutory authority to require mandatory cosmetic product reporting.”\footnote{73 Fed. Reg. 76,361.} Together, establishment registration and product listing requirements would provide FDA with information about “the locations, business trade names, and types of activity (manufacturing or packaging) of cosmetic product establishments,” and help facilitate the distribution of regulatory information and the conduct of inspections.\footnote{See Reducing Regulation and Controlling Regulatory Costs, 69 Fed. Reg. 9,339, 9,339 (Feb. 3, 2017).}

Third, Congress and FDA should require that cosmetics manufacturers and distributors report certain adverse events to the agency. As noted above, there is no requirement that such events be reported, which hampers FDA’s ability to monitor the safety of cosmetics. The required adverse event reporting should include demographic information, including sex, race, and ethnicity, for the person who experienced the event.

Fourth, Congress should extend FDA’s authority over cosmetics to allow the agency to inspect records under certain circumstances.\footnote{FDCA § 704, 21 U.S.C. § 374 (2012).} As noted above, under the FDCA, FDA’s general inspection authority with respect to cosmetics is limited to certain establishments and vehicles.\footnote{See FDCA § 704(a), 21 U.S.C. § 374; see also FDCA §§ 801-802, 21 U.S.C. §§ 381-382; 21 C.F.R. § 1.101 (2018) (recordkeeping requirements for certain cosmetics exports).}

Fifth, Congress and FDA should collect and publish data on FDA’s regulatory activities and budget for cosmetics in an easily accessible format. As noted above, such information is not currently readily available, and without this...
information it is difficult to fully assess the adequacy of FDA’s cosmetics regulation.\footnote{374}{See supra Section II.C.2.c.}

Finally, Congress and FDA should encourage more research into the potential hazards that cosmetics may pose to women’s health, including to members of other excluded groups, such as racial and ethnic minorities.

The proposals in this Section are not intended to serve as a comprehensive fix, but rather to serve as first steps designed to provide the information needed to more fully assess the current state of cosmetics law and regulation and the safety of cosmetics.

CONCLUSION

Examining cosmetics law and regulation through a feminist lens demonstrates how the shortcomings of current regulatory approach disproportionately jeopardize women’s health. Cosmetics are closely associated with cultural constructs of femininity and womanhood, and are a highly gendered product and industry. While women use more cosmetics than men and are the majority of workers in the cosmetics industry,\footnote{375}{See supra Section II.A.} cosmetics law and regulation have largely neglected women’s diverse experiences and needs. These omissions impact women differently and may vary as a result of many factors, including race and socio-economic status.\footnote{376}{See Rothenberg, supra note 337, at 1207.} Recognizing the failure of current cosmetics law and regulation for women is a precursor to remedying these injustices.\footnote{377}{See David Stowman, Getting to Know Ourselves, BENCH & B. MINN. 5 (Feb. 2005).} The impact of these shortcomings, however, is not limited to women who use cosmetics, either personally or at work. Men and children also use cosmetics, and everyone, regardless of whether they use cosmetics or not, may be exposed to cosmetics. Thus, cosmetics law and regulation should be strengthened in order to more accurately assess the risks that cosmetics may pose to human health.
White Slavery and the Crisis of Will in the Age of Contract

Sherally Munshi†

**ABSTRACT:** Recognizing human freedom is never as simple as acts of legal pronouncement might suggest. Liberal abstractions like freedom and equality; legal formulations of personhood, free will, and contract; the constructed divisions between public and private, self and other, home and market on which the former are predicated—these are often inadequate to understanding, let alone realizing, the shared aspirations they supposedly define. By the same token, the dense and dynamic relations of power that characterize any liberal society overwhelm and exceed our critical vocabulary. “Racism,” “sexism,” and “capitalism” powerfully name structures of inequality, but they fail to capture the full spectrum of social relations, practices, and exchanges that reproduce inequality—deep structures of feeling, unspoken common sense, the stories we tell ourselves about the world and our places in it. Focusing on an early twentieth-century case involving an immigrant convicted of “white slavery,” accused of “mesmerizing” his secretary, this Article explores the ways in which the white slave panic and spiritualist practices reflect a set of anxieties about the nature of agency and consent obscured by the universalizing and formalist abstractions of contract law and theory. Through a close reading of competing narratives surrounding the case, this Article seeks to investigate some of the ways in which the rhetorical distortions of law affect the lives of its most vulnerable subjects.

† Associate Professor of Law, Georgetown University Law Center. I am grateful to Mathilde Cohen, Anne Cheng, Saidiya Hartman, Marianne Hirsch, Betsy Kuhn, Andrew Lang, Samantha Pinto, Jothi Raja, Kate Stanley, Kendall Thomas, Julia Tomasetti, and Patricia Williams for their helpful comments on earlier versions of this essay. I owe a special debt to Allegra McLeod for her brilliance and generosity. And I am extremely grateful to the insightful, meticulous, and patient editors at *Yale Journal of Law and Feminism*, Leanne Gale, Scott W. Stern, Kath Xu, and especially Kathryn Pogin. Any and all errors are my own.

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INTRODUCTION

Late one evening in the summer of 1925, Dinshah Ghadiali was walking back to his hotel room in Portland, Oregon when he had the distinct feeling that he was being followed. He had just completed a demonstration of his invention before a small audience. Ghadiali was the inventor of a popular healing system. Any disease, he claimed, could be cured by simply casting colored lights on the body. His invention, a therapeutic light box, had been a phenomenal success, though it attracted voluble skeptics. That night, Ghadiali dragged his unsold instruments back to his hotel room without the assistance he needed—his young secretary having disappeared the day before. At his hotel room, he was met by a federal officer pointing a gun. Several other officers flooded the room. One ordered him to strip. Ghadiali spent the night in jail. It wasn’t until the following morning that he learned he had been arrested for the crime of “white slavery.”

The White Slave Traffic Act of 1910, better known as the Mann Act, criminalized interstate travel with white women for “any immoral purpose.” The

1. Dinshah P. Ghadiali, Railroading a Citizen 84-85 (1926).
2. White Slave Traffic Act, 36 Stat. 825. (June 25, 1910). Though the phrase “white slavery” may sound odd, insensitive, or unsettling to contemporary readers, I use the phrase—usually to refer to forced prostitution among white women—because it was the phrase used to shape so many aspects of social life in the late nineteenth and early twentieth centuries, including apprehensions of race, gender, freedom and coercion. Six years before it made its way into U.S. federal legislation, the phrase appeared in the title of the International Agreement for the Suppression of White Slavery, a treaty signed by more than twenty countries. The U.S. law itself was spurred by a massive investigation undertaken by a Congressional Commission (though the Commission itself found little evidence of the phenomenon). Katherine Benten-Cohen, Inventing the Immigration Problem and Its Legacy 151-158 (2018). However exaggerated, concerns about white slavery played an extraordinary role in expanding the capacities of what is now the Federal Bureau of Investigation. Jessica R. Pliley, Policing Sexuality: The Mann Act and the Making of the FBI 1-8 (2014). The white slave panic found expression in print media and popular film, including one of the first, and most successful, feature-length films. In other words, “white slavery” was everywhere.

Quotation marks around words like “white slavery” or “mulatto” variously signal historical authenticity, epistemic doubt, rhetorical embarrassment, or shared skepticism. Quotation marks were once used to add emphasis or signal authority; lately, writers use them more often to signal a break from ordinary language, to disclaim or disavow certain language or ideas. See Marjorie Garber, “” (Quotation Marks), Critical Inquiry 653, 662 (1999). In the remainder of this Article, rather than enclose white
express purpose of the law was to protect white women from being forced into prostitution. Its notoriously expansive wording, though, allowed police and prosecutors to selectively punish men—especially black and brown men—in all manner of consensual behavior with white women. Ghadiali was accused of having sex with his secretary, a twenty-three-year-old woman named Geraldine McCann, on three occasions: once while vacationing with Ghadiali and his family in Atlantic City, New Jersey; and twice, while traveling cross-country to promote his inventions. At Ghadiali’s trial, when his attorneys asked McCann why she continued to work for Ghadiali, why she didn’t quit or run away after the first alleged incident, the young woman testified that she had been mesmerized.3

Ghadiali immigrated to the United States from India in 1910. He became a citizen in 1917, the same year that Congress barred further immigration from all of Asia. He had been arrested several times during his career for violating laws regulating the practice of medicine, but it was after he married a white woman, in 1923, that he became the target of increasingly racialized persecution. In his voluminous autobiographical writing, much of it devoted to documenting his many encounters with police officers and prosecutors, Ghadiali boasts that he was a mesmerist, as well as a theosophist, metaphysician, telepathist, and “spellbinding speaker.”4 He, like many others at the turn of the century, found in spiritualist counterpublics a form of entertainment, a community of free thinkers, opportunities to investigate capacities of the mind and interpersonal exchange. And like many others excluded from the more respectable professions—women, immigrants, black Americans—Ghadiali found in spiritualist circuits a way to earn a living.

Ghadiali first met McCann in 1924, when she and her aunt attended one of his scientific demonstrations in Portland, Oregon. According to the prosecuting attorney, Ghadiali lured the young woman away from the protective gaze of her family by promising exciting work and a good salary. Ghadiali asked her to sign what the prosecutors referred to as a “curious contract,” before inviting her to live and work with his family at their Institute in New Jersey. As soon as Ms. McCann arrived, the prosecutor argued, Ghadiali brought her “under his mental domination.”5 “He absorbed her personality until he addicted her will.” 6

During their cross-examination of her, Ghadiali’s attorneys reminded McCann that her employer had given her a bicycle; he taught her how to drive;
the two had travelled by rail together all over the country. If she wanted to escape her employer’s control, why didn’t she flee when she had the opportunity? McCann insisted that she had been “under some trance”—during the entire eleven months of her employment:

I had no will power of my own, and somehow or other, whenever I had the desire to get away, I felt that something was drawing me back. I did not have any will power to act and stand on my own feet. All my personality was gone. I felt a weak feeling, as if I had no control over my movements. Somebody else was controlling me.\(^7\)

Evidently persuaded by McCann’s testimony, the Oregon jury concluded that Ghadiali had transported the young woman in interstate commerce “for the purpose of prostitution,” in violation of the White Slave Traffic Act. He was sentenced to five years in prison.

Ghadiali appealed his conviction, arguing that the evidence presented at his trial could not possibly support the jury’s finding. Much of the testimony offered by his accuser remained entirely uncorroborated. Ghadiali argued that the trial had been so rushed that he himself had been given no opportunity to prepare an adequate defense.\(^8\) So many miles from home, the only witnesses he was able to bring forward—his wife and daughter—were discredited as conspiring procurers. Only after the trial was he able to collect some fifty affidavits contradicting his accuser’s testimony, which he later reproduced in a self-published book about his trial, *Railroading a Citizen* (1926).

The Ninth Circuit upheld the conviction. Deferring to the jury’s finding of fact, Judge Neterer explained that the jury was better positioned to evaluate the credibility of witnesses, “to observe their demeanor, the reasonableness of the story,” and to determine “where the truth in the case lay”; “[i]f there is any evidence upon which rational minds might arrive at a like conclusion,” he concluded, “this court cannot reverse the finding.”\(^9\) There is nothing particularly extraordinary about this recitation of the court’s standard of review. But it leaves unanswered the question: how could so many rational minds arrive at such a conclusion, “the defendant exercised an influence over the girl, which, in effect, if not in fact, amounted to mesmeric control,” that Ghadiali exercised supernatural power?\(^10\) What about the contract between Ghadiali and his secretary seemed so unusual, so “curious” that jurors concluded that the contract memorialized not consent, but its opposite?

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7. Ghadiali v. United States, 17 F.2d 236, 238 (9th Cir. 1927).
9. Ghadiali, 17 F.2d at 237.
10. Id.
These, at least, are some of the questions that motivate my reading of Ghadiali’s case and prompt a broader inquiry into the ways legal discourse often betrays how law is lived. Patricia Williams has observed that law operates within a broader “system of formalized distortion of thought,” arguing that law preserves its own sense of rationality and fairness by sustaining practices of epistemic exclusion, historical amnesia, and affective denial—all of which tend to obscure the law’s violent effects, suffered disproportionately by racialized others, women, and the poor. Taking cues from Williams, this Article examines the relationship between the abstracting habits of legal discourse—its universalizing mythologies, its partializing constructions of human experience, its repression of historical knowledge—and the complex social worlds that law sets in motion, worlds that become all the more difficult to apprehend with only the conceptual resources found in legal discourse. Liberal abstractions like freedom and equality, legal formulations of personhood, agency and consent, and the conceptual divisions of public and private, self and other, the home and the market—these are wholly inadequate to understanding how law is lived, particularly by its most vulnerable subjects. By the same token, the dense and dynamic relations of power that characterize any society, and have always frustrated the United States’ realization of its self-image, often exceed our critical vocabulary. Words like “racism,” “sexism,” and “capitalism” powerfully name species of structural inequality but fail to capture the full spectrum of social relations, habits, and exchange that reproduce and entrench inequality. They invoke the “monumental social architecture” of inequality, but do not describe the deep structures of feeling, the inarticulate common sense of embodied knowledge accrued by moving through landscapes that shape our varying notions of what is or is not true, what may or may not be possible, the stories that we tell ourselves about our world and our place in it.

This Article begins by exploring the role that theories of contract law have played in creating a capitalist economy that remains thoroughly racialized and gendered—the abstracting and universalizing rhetoric of ‘contractual freedom’ notwithstanding. In the aftermath of the Civil War and Emancipation, the idea of contractual freedom had become charged with the promise of ushering in a new era of freedom and equality. But during the same period, that promise was soon betrayed by a style of legal formalism which, in the name of ‘contractual freedom,’ advanced the interests of expanding markets, often at the expense of the working class, women, and racialized others. Writing of the formalism that revised contract law principles at the turn of the century, Lawrence Friedman


observes, “contract law is an abstraction—what is left in the law relating to agreements when all the particularities of persons and subject matter are removed,” rendering real persons and their real grievances extrinsic to legal analysis.\(^{13}\) As he and other critics have argued, contractual form would come to evacuate and replace the very agency and autonomy that the contract was supposed to represent and protect. Slavery, decades after it was abolished, would continue to shape legal and public conceptions of contract and consent, perversely, in that almost any agreement—absent obvious coercion, fraud, or duress—was recognized as willing consent.

If the recent memory of slavery and the failed promise of contract law raised anxieties about the nature of free will, autonomy, and consent, these anxieties seemed to find expression in popular spiritualist practices.\(^{14}\) In the early twentieth century, spiritualist practices (séances, mesmerism, etc.) and contract theory engaged a common set of questions—about the nature of human agency, the fragility of mutual exchange, and the elusive forces that bind us to one another. In his autobiographical writing, Ghadiali proudly confessed to being a mesmerist, “well known,” interested in experimenting with powers of perception and influence. But “mesmerism” enters the narrative of his trial more darkly as a metaphor for the contract itself—or its failure—appearing at times as a critique of the employment contract, at times as a parody of the marriage contract, always conjuring the specter of anti-will that haunts the modern contract.\(^{15}\)

This Article then turns to track the figure of the white slave in its movement across the landscape of nineteenth and twentieth century American history. The term first appeared during the antebellum period to describe the horrors of mistaken identity, racial instability, and the anxiety that the violence of slavery could never be contained, demographically or morally. The white slave panic of the early twentieth century—the widespread but unfounded fear that white women were forced into prostitution, often by black and brown men—synthesized a set of anxieties about emerging forms of social violence and coercion. Labor activists used the term to characterize the exploitation authorized by the labor contract; feminists, to disenchant the unequal relationship sanctioned by the marriage contract; and others, as the white slave panic itself suggests, to decry the erosion of traditional distinctions of race and gender before the leveling forces of the market economy.

In the second half of this Article, we return to Ghadiali’s narrative. Ghadiali’s case, unlike most white slavery cases, \textit{did} involve a kidnapping, but in his account, it was not Ghadiali who kidnapped his secretary.

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15. See Williams, \textit{On Being the Object of Property}, supra note 11, at 5, 13-16.
In the United States in the late nineteenth century, the idea of contract had become charged with the promise of delivering the nation from its history of slavery and ushering in a new era of freedom and equality. As Amy Dru Stanley has observed, after the abolition of slavery in the United States, “contract was above all a metaphor of freedom,” representing a release from the old bonds of dominion and dependence.16 In the second half of the nineteenth century, what Brooks Thomas has called the “the age of contract,”17 the liberatory potential of contract was associated with Henry Maine’s famous declaration: “the movement of the progressive societies has hitherto been a movement from Status to Contract.”18 In traditional societies, the argument went, individual obligations were determined by inherited status; in modern societies, they were more freely assumed through negotiation and exchange. And where status-bound societies perpetuated formal hierarchy, conceived as “natural” and unchanging, contractual societies were continuously remade to reflect the collective desires of free and equal individuals. A social order determined by free exchange among equals would be dynamic rather than static, continuously improving. This promise, Thomas writes, “radically conceived,” is one of an “immanent, rather than transcendental ordering of society.”19

After the Civil War, promises of freedom and equality were announced more boldly in the Thirteenth and Fourteenth Amendments, which abolished the status of enslavement and extended to black Americans the rights of citizenship, including due process and equal protection. But by the early twentieth century, those same protections had been eroded by a Court that elevated contractual freedom to a right of sacred inviolability and routinely struck down laws intended to protect workers. In *Lochner v. New York*, for instance, the Court struck down a labor law limiting the number of hours bakers were required to stand on their feet, finding the regulation an “unreasonable” and “artificial” interference with the individual autonomy, or “freedom of contract,” guaranteed by the due process clause of the Fourteenth Amendment.20 At the same time, the Court invested contract with extraordinary power, not only to express the shared intentions of employer and employee, but to transform social unequals into formal equals. “The right of a person to sell his labor,” the Court explained in a subsequent case, “is in its essence, the same right as the right of the purchaser of

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18. HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 141 (1861).
19. Id. at 3.
20. 198 U.S. 45, 56 (1905).
labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. In other words, by trick of formalism, employer and employee were rendered equal through their exercise of an equivalent right—the right to contract without legislative interference. Contemporary observers railed at the Court for appealing to an abstract and largely “illusory” form of equality while shielding plainly unequal and increasingly exploitive relationships from judicial scrutiny.

The equalizing promise of contract notwithstanding, residues of status would persist in the form of naturalized difference—gender and race. The *Lochner* Court routinely struck down state laws that interfered with the “contractual freedom” of laborers and their employers. But one remarkable exception to pattern involved a law limiting the number of hours women were permitted to work. In *Muller v. Oregon*, the Court upheld the law, though it interfered with contractual autonomy, finding that the state had a legitimate interest in protecting the reproductive health of women:

That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious . . . . By abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

The Court distinguished its ruling in *Lochner* from its ruling in *Muller* in terms of sex difference: “the difference between the sexes [justifies] a different rule.”

In *Plessy v. Ferguson* (1896), similarly, it was racial difference that rendered a Louisiana law requiring “separate but equal” accommodations consistent with constitutional guarantees. The Court acknowledged that the Thirteenth Amendment abolished both slavery and its correlate markers of legal status, but not racial distinction—“a distinction which is found in the color of the two races and which must always exist.” Likewise, the Court reasoned, the object of the Fourteenth Amendment “was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social [equality],

24. Id. at 421.
25. Id. at 419.
or a commingling of the two races.”

Racial distinctions, abstracted from histories of subordination, expropriation, and enforced separation is reified simply as the appearance of color, “physical difference,” and “racial instinct.”

The equalizing promise of contract, even as it failed the working classes, was never intended to eliminate rank of race or gender.

The contractual ideal celebrated by the Lochner Court, in other ways, seemed to have come loose from the practical and everyday administration of contract law, as Morton Horwitz argues. When the Court struck down laws aimed at improving the working conditions of laborers and equalizing the employment relation, it did so by appealing to the notion that employment contracts expressed the free will of the employer as well as employee. Contract law drew its political legitimacy and claim to economic rationality from the notion that contracts represented individual desires and the shared intentions of consenting parties. According to the nineteenth-century “will theory,” a contract was enforceable because it represented the shared intentions of free individuals. A contract represented a convergence of will, a “meeting of the minds.” As long as contracts were freely entered into, without evidence of fraud or coercion, enforcing judges were merely carrying out the intentions of contracting parties.

But judges and juries can never really determine whether a contractual exchange is accompanied by an actual “meeting of the minds.” If a cunning buyer knows the real value of a piece of jewelry sold by a naïve seller, how can a judge determine that the buyer and seller have reached an agreement not only with respect to the price of the jewelry, but its value, or the nature of the thing itself? The idealism of the will theory—its sensitivity to the idiosyncrasies of individual intent and the essential fragility of consent—was ultimately strained by its practical administration. The will theory demanded that judges and juries search the minds of others to determine their true intentions. But this was an impossible task. Consequently, the will theory was quickly unraveled by a paradox: will, or intention, resides in the inner recesses of the individual, but is known to others only through the world of social forms. As the will theory gave way to contractual formalism, the power and privilege invested in the contractual form came to displace and evacuate the very agency, will, and consent that it was supposed to represent.

In his canonical essay, Consideration and Form, Lon Fuller argued that judges should abandon the metaphysical search for a meeting of the minds and instead apply “a simple and external test” to determine whether an agreement

27. Id. at 544.
28. Id. at 551.
31. Id. at 35. See also Buccafusco, supra note 14, at 9.
had been reached. He argued that judges were more likely to honor “private autonomy” of contracting parties by enforcing, without too much meddling, the explicit terms of a carefully constructed agreement. Fuller enumerated the administrative and pedagogical virtues of a formalist approach to contractual enforcement: a well-formalized contract supplies the judge with evidence of the exchange; besides memorializing agreement, the formal contract also “channels” or encourages the parties to exercise precaution before taking “inconsiderate action.” As Fuller recognized, form, like language itself, stabilized communication and exchange—but not without sacrificing authenticity, spontaneity, and something of a human character. The trend towards formalism required that disputes over the meaning of contractual terms be resolved not through a judicial refereeing of discrepant views, but increasingly, with reference to an impersonal “reasonableness” standard. Contract, in Fuller’s account, should play an important role, not merely in realizing the intentions of free and equal people, but in disciplining rational market actors participating in a rapidly expanding economy.

Thus, in the late nineteenth century, Horwitz demonstrates, contract law took a turn away from an earnest inquiry into parties’ “subjective” or real intentions and towards an “objective” interpretation of parties’ formalized agreements. This general shift—from substance to form, from subjective to objective—was part of a “broader tendency to create formal, general theories that would provide uniformity, certainty, and predictability of legal arrangements” to a growing industrial economy. After the Civil War, formalism and objectivism tended to standardize commercial transactions, facilitating the expansion and national integration of labor and consumer markets. Notwithstanding its promises to promote freedom and equality, the emerging regime of contract often sacrificed an “individualized sense of justice” to the smooth functioning of an increasingly ruthless economy. As judicial enforcement veered away from entertaining the eccentric understanding of individual actors, it tended to recognize the real intentions of individuals only insofar as they seemed to reproduce a set of economic norms or conform to a set of market conventions. Though it was the free will of individuals that supposedly animated the machine of industrial capitalism, the machine itself had begun to operate independently of individual will.

Legal realists at the time protested that these developments were not the result of any natural progression or inevitable self-correction. Instead, they were

32. Lon L. Fuller, Consideration and Form, 41 COLUM. L. REV. 799, 801 (1941).
33. Id. at 806-10.
34. Id. at 800-01.
36. HORWITZ, supra note 29, at 42-45.
37. Id. at 36.
38. Id.
an imposition of highly motivated proponents of a particular economic theory. In his dissent from the decision in \textit{Lochner}, for instance, Justice Oliver Wendell Holmes, Jr. complained that his colleagues were pushing an “economic theory that a large part of the country does not entertain.”\textsuperscript{39} Likewise, a young Felix Frankfurter complained of a mechanical jurisprudence, by which courts had come to base their decisions upon “a priori theories” and “abstract assumptions,” in wild disregard for the “actualities of modern life.”\textsuperscript{40} Roscoe Pound argued that Henry Maine’s famous maxim had no place in the Anglo-American tradition which, in his view, was “progressing backward.”\textsuperscript{41} The notion that liberty of contract promoted equality, he argued, was entirely illusory. “Why then,” he asked, “do courts persist in this fallacy? Why do so many of them force upon legislation an academic theory of equality in the face of practical conditions of inequality? . . . Why is the legal conception of the relation of employer and employee so at variance with the common knowledge of mankind?”\textsuperscript{42}

\textbf{Spiritualism and the Convergence of Will}

The questions posed by legal realists were remarkably resonant with the speculations of spiritualists during the same period. Pound and others observed that a powerful set of economic abstractions had begun to transform not only the material conditions of life and labor, but the conceptual means by which those conditions were understood or apprehended. Spiritualism provided ordinary men and women opportunities to explore the “common knowledge” to which Pound seemed to refer—a common knowledge shared by the alienated and dispossessed, one routinely obscured by economic theory and liberal invocations of freedom and equality.

By the late nineteenth century, spiritualism—and associated experiments in mesmerism, hypnotism, mediumship, and electro-biology—had become an enormously popular pastime in Europe and the United States, perhaps because it offered ordinary men and women alternative vocabularies and rituals with which to make sense of their lives. Popular forms of spiritualism—from theatrical displays of mesmerism or somnambulism before mass audiences to the séances held in the intimacy of respectable homes—allowed men and women of every rank to explore the limits of free will, their capacity for inter-personal influence and exchange, and the experiences of both powerlessness and control.\textsuperscript{43}

\begin{itemize}
  \item \textsuperscript{39} \textit{Lochner}, 198 U.S. at 75.
  \item \textsuperscript{40} Felix Frankfurter, \textit{Hours of Labor and Realism in Constitutional Law}, 29 Harv. L. Rev. 353, 364 (1916).
  \item \textsuperscript{41} Pound, \textit{supra} note 22 at 219.
  \item \textsuperscript{42} Id. at 454.
  \item \textsuperscript{43} See, e.g., \textit{Rus\textsc{s} Castronovo, Necro Citizenship: Death, Eroticism, and the Public Sphere in the Nineteenth Century United States} (2001); \textit{R. Laurence Moore, In Search of White Crows: Spiritualism, Parapsychology, and American Culture} (1977); \textit{Alex Owen, The}
\end{itemize}
Spiritualism thus seemed to address the failed promise of contract law by encouraging people to undertake their own investigations into the character of agency, the various media through which we communicate our intentions, and the forces that bind us to one another. As individuals found themselves adrift in increasingly automated economies of exchange, spiritualism would offer its enthusiasts more vital opportunities for exploring the contours of individual agency and the possibilities of concerted action.

Spiritualism owed something of its appeal to the social upheavals which had begun to transform American life beginning in the mid-nineteenth century: a deadly war, increased social mobility, urbanization and industrialization, and the arrival of new immigrants. It also addressed a growing crisis of faith among its enthusiasts who, wearied of sectarian division and overweening stricture, found in spiritualism a set of practices that were affirming of personal experience, amateurism and experimentation, on the one hand, and defiant of existing forms of authority, expertise, and hierarchy, on the other. Ghadiali’s color therapy—a compelling blend of spiritualism, popular science, and franchise entrepreneurship—was embraced by more than ten thousand Americans during the half century before it was finally suppressed. His practitioners consisted mostly of working class men and (especially) women—people denied entry to the medical profession and alienated by the impersonality of the emerging medical marketplace. Student-practitioners often treated themselves and their family members and were encouraged to think of themselves as scientific researchers, create communities, and collaborate in their investigations. Ghadiali’s enemies in the American Medical Association and federal Food and Drug Administration pursued him for decades, recognizing him as a threat to the medical establishment and its culture of expertise.

The egalitarian and experimental ethos of spiritualist counter-publics attracted a number of creative thinkers and activists, as respectable as William Lloyd Garrison and George Bernard Shaw. For the same reason, it had become aligned with the radical edge of social movements on both sides of the Atlantic—movements to abolish slavery, reform marriage, and end imperialism, among
others. Of course, not all spiritualists were interested in social reform. Many found in spiritualist demonstrations a form of entertainment; others, hoping sincerely to communicate with the dead, sought consolation after the loss of a loved one. But as Russ Castronovo insists, “[w]rapped up with any communication with the dead … are questions about the relation of the present to the past, specifically ones involving a politics of memory that incorporates and represses New World racial encounters.”

Dead presidents were frequent guests at séances, but so were vanished Indians and the ghosts of mulatto girls, all returning to attest to historic crimes. In the American South, where law was invested with the extraordinary power to turn people into things, it might not have been difficult to imagine that things, in turn—tipping tables and tambourines—might be animated by aggrieved spirits.

For others, drawn to what they conceived of as the more “philosophical” or even “scientific” aspects of spiritualism, experiments with mesmeric mind control were part of a much broader inquiry into the nature of individual agency and inter-personal exchange. Anton Mesmer, the eighteenth-century physician who originated mesmerism, claimed to have discovered an invisible force that emanates from and surrounds the body of every living creature. This universal substance, which he called “animal magnetism,” connected living creatures with other natural processes. Through it, individuals could pass thoughts and sensations from one to another. Other spiritualists attributed similar effects to “magnetic fluids” or “electro-biology,” but they generally shared an intuition that influence was a substantive rather than transcendental phenomenon. The discovery that a universal medium was the source of interpersonal connectivity, many spiritualists believed, had implications for understanding the ways in which individuals were bound to one another. In the words of one American spiritualist, for instance, humanity was bound together

by a thousand silken cords girded around by a magnetic belt of subtle sensibilities—which communicate an injury done to or by the remotest person to all other members of the living whole.

50. Braude, supra note 45, at 117-141; Viswanathan, supra note 45, at 1-4.


53. Id.


Thus, spiritualists entertained an understanding of reciprocal obligation that radically differed from those held by proponents of contractual freedom. For William Graham Sumner, nineteenth century social scientist and exponent of classical liberalism, “free man in a free democracy has no duty whatever to men of the same rank and social standing except courtesy, respect, and good-will.”  

He distinguished modern contractual societies from traditional status-bound societies by arguing that, in contractual societies, “the free man cut off all the ties that might pull him down, [and] severed also all the ties by which might have made others pull him up.”  

Sumner’s image of freedom is independence from others. Sumner’s “free man” is an “isolated man,” loosened from the burdens and benefits of mutual obligation. Only by entering into contractual arrangements with others does the free man forfeit his original freedom to assume any obligation towards others. Spiritualists, by contrast, by abandoning fantasies of perfect independence and focusing instead on the “substance”—material conditions, historical embeddedness, inescapable interdependence—recognized freedom to reside not in self-sovereign isolation but in the shared realm of experience. Unlike the contracting agent of classical liberalism, the mesmerist and his subject are born already swimming in the substance and circumstance of others.

Mesmerists, in their efforts to activate the “chemistries” that connect human beings, experimented with the power of collective action. The twentieth-century political philosopher Hannah Arendt locates the source of individual freedom not in a mythic state of nature but the “phenomenal space created by men.” This power is not the natural property of any individual but a collective achievement, the fragile culmination of a plurality of actors achieving momentary consensus. In The Human Condition, Arendt writes, “the only indispensable material factor in the generation of power is the living together of people . . . . Whenever people gather together, it is potentially there, but only potentially, not necessarily and not forever.” The generative power that Arendt ascribes to collective action in public, or what she calls the “space of appearance,” is perhaps easier to recognize in the legacies of those who moved beyond their flirtation with spiritualism to devote themselves to focused political reform—in Victoria Woodhull’s campaign for marital reform, in Annie Besant’s challenge to British imperialism, in Mohandas Gandhi’s satyagraha, or movements of truth-force—than in the practices of commercial spiritualists. But even in the average mesmeric demonstration or table-turning exercise, ordinary men and women suspended

56. WILLIAM GRAHAM SUMNER, WHAT SOCIAL CLASSES OWE TO EACH OTHER 34 (1974).
57. Id.
58. Id. at 34.
59. HANNAH ARENDT, ON REVOLUTION 155 (2d ed. 1965).
60. HANNAH ARENDT, THE HUMAN CONDITION 199 (2d ed. 1998).
61. Braude, supra note 45, at 191-192; Viswanathan, supra note 45, at 3.
disbelief, in trust of one another, to experiment with the potentialities of collective power.

Part of what drew social reformers to spiritualism in the late nineteenth century was the notion that a universal substance, however described, flowed among human beings without regard to status, or distinctions of race, class, or gender. But scholars suggest that the egalitarianism of popular spiritualism was perhaps less radical than appearances might lead us to believe.  

Russ Castronovo argues, for instance, that the imagined equality of the spirit world, in which social differences are dissolved in a universal medium, too closely resembles the well-worn fantasies of liberal universalism, within which equality is imaginable only among abstract, disembodied, and ahistorical “persons.”  

Castronovo’s persuasive critique notwithstanding, spiritualist practices seem to have engaged and troubled the impulses of liberal audiences, invoking the essential sameness among people by presencing their material differences.  

The thrill and scandal of the mesmeric demonstration was the spectacle of role reversal: accented foreigners made puppets of well-born women; illiterate girls held forth before juries of learned men.  

Writing of spiritualism in colonial India, Gauri Viswanathan observes that in spiritualist counter-publics, colonizer and colonized could participate in reimagining colonial relations in terms that were non-hierarchical, though nonetheless racialized.  

Ghadiali’s scientific demonstrations, similarly, offered participants opportunities to test social boundaries and imagine alternative arrangements, as doctors and surgeons submitted to his authority, referring to him as “master,” and white women bared their shoulders so that he could paint their skin with colored lights.  

Thus, spiritualism engaged another tension constitutive of the contractual ideal—the tension between freedom and embodiment. Within the liberal imaginary, the contract drew its authority from the perfect freedom individuals supposedly enjoyed in the state of nature. But this imagined freedom is essentially a disembodied freedom. Freedom confers legitimacy upon the contractual bond, but freedom itself terminates in the contract. A factory girl, for instance, expresses her freedom by consigning her body to work. In her case, the abstract and immaterial self, the subject of contractual rights, makes itself known only by binding the body.  

Popular demonstrations of mesmerism and hypnotism seemed to mock this predicament by spectacularizing forms of contractual mastery and possession. In a typical demonstration, a powerful mesmerist would overcome the will of his subject, replacing his intentions with hers, evidenced by his control over her

62. See Castronovo, supra note 51; Moore, supra note 44; Viswanathan, supra note 45.  
63. See Castronovo, supra note 51, at 51.  
64. Terry M. Parssinen, Mesmeric Performers, 21 VICTORIAN STUD. 87, 102 (1977).  
65. WINTER, supra note 43, at 2; Moore, supra note 44 at 200.  
67. Telephone interview with Darius Dinshah, Dinshah Ghadiali’s son (Oct. 10, 2010).
body. Before mesmerism became a form of popular entertainment in American cities, Emily Ogden has shown, it was proffered as a technique for controlling laborers, conditioning their bodies to the rhythms and rigors of automated factory work. Factory girls were assumed to be especially susceptible to mesmeric techniques. Charles Poyen, the owner of a Caribbean sugar plantation credited with introducing mesmerism to the United States, first recommended the techniques to northern factory owners seeking to improve the efficiency of their work. Poyen claimed to have known many “rich and intelligent planters” who made use of certain powers to control enslaved Africans. Mesmerism was never adopted in the manner Poyen had suggested, but to turn-of-the-century audiences, the spectacle of a woman being puppeted by a mesmerist may have appeared as a kind of satire, throwing up for amusement a mode of subordination already familiar to workers and wives. The sight of a person reduced to a body without will also more darkly conjures the specter of anti-will that connects slavery, rape, and modern contract law.

SPECTERS OF WHITE SLAVERY

In the early twentieth century, various anxieties about the loss of freedom and control seemed to converge in the phantasmic figure of the white slave. Most scholars agree that, global panic notwithstanding, there was no real “traffic” in white women. The Mann Act was passed for the purported purpose of protecting white women from forced prostitution, but the broad wording of the law allowed police and prosecutors to selectively punish men involved in all manner of consensual behavior, especially black and immigrant men who enjoyed premarital, extramarital, and cross-racial intimacy with white women. But here, rather than review the notorious record of racist enforcement, I want to suggest that the figure of the white slave appears as the specter of anti-will that would continue to haunt the institution of contract in the early twentieth century, decades after the Emancipation Proclamation. In the return of this figure we can

69. Id. at 830. Not surprisingly, around the same time in the early nineteenth century, British mesmerists claimed to have honed their discoveries in colonial India, where experimental subjects succumbed easily to the influence of Western physicians. Winter, infra note 43, at 187-93.
71. Soon after the law’s passage, black and brown men in sexual relationships with white women were the primary targets of enforcement. Jack Johnson, the first black heavyweight boxing champion and perceived threat to male white supremacy, was one of the first person to be prosecuted under the Act. See Barbara Holden-Smith, Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era, 8 Yale J. of L. & Feminism 31, 33 (1996); Teresa Runstedler, Jack Johnson: Boxing in the Shadow of the Global Color Line 132-163 (2018).
trace the itineraries of racialized form and sexual discipline that elude or are routinely effaced by the language and idiom of “contractual freedom.”

Through much of the nineteenth century, as one scholar observes, the figure of the white slave moved across the American landscape like “a restless, aggrieved ghost, a fugitive symbol, a reminder that slavery was not morally or even physically containable.”

During the antebellum period, the figure of the white slave circulated, primarily as hyperbole, to describe the degraded condition of indentured immigrants or poor women fallen into prostitution. But it also spoke of another set of anxieties: in these early narratives, whiteness appeared to be an unreliable safeguard against the dehumanizing forces of the marketplace, as the racial identity of the kidnapped person was itself transformed by the loss of paperwork or by his or her entry into the stream of commerce. The transformation was not merely figurative, as the confessions of a nineteenth-century slave catcher would suggest. Slavery had unleashed a violence that could break and liquidate anyone: “Just catch a stray Irish or German girl and sell her . . . She turns into a n— at once . . .”

White slavery figured powerfully in abolitionist rhetoric, often to elicit the horrors of mistaken identity. The abolitionist Henry Beecher rose to celebrity in 1848 after staging a mock auction of two mulatto girls, daughters of an enslaved mother and white master who had escaped a slave dealer in New Orleans. Before a congregation of New Yorkers, he asked, “[s]hall this girl—almost as white as you are—be sold for money to the first comer to do as he likes with?” The girls’ complexion presumably invited an identification which the darker appearance of most other enslaved children presumably foreclosed. Underscoring Beecher’s appeal was a sentimentality that played upon a sense of both patriarchal and racial duty, to protect daughters not only from the sexual whims of white masters but from contamination by black men. Writing about the trials of fugitive slaves, Ariela Gross has shown that fugitive women often succeeded in claiming that they had been mistakenly captured and remanded to slavery—the cost of erroneously enslaving a white woman was evidently unbearable to juries of white men.

If the sight of an enslaved white woman confronted spectators with the unbearable thought of miscegenation, then the changing pallor of the enslaved surely confronted white Americans with the repressed knowledge that slavery was itself perpetuated through sexual violence—that the Southern plantation was also a harem. Moreover, the appearance of the pale slave undermined the supposed certainty and stability of racial identity in general, after more than a

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74. Id. at 51.
hundred years of illicit intimacy, voluntary and coerced, had blurred the color line, often rendering black and white virtually indistinguishable.

During the antebellum period, Southerners defended the institution of black bondage by arguing that, as an economic arrangement, it was preferable to the white slavery practiced in the industrial North. Labor advocates in the North, in turn, adopted the phrase to challenge triumphalist narratives of emancipation and the market conditions under which “free labor” was exchanged. By comparing the conditions of industrial wage labor to slavery, labor advocates insisted that working conditions were not merely coercive and exploitive, but racially degrading. For instance, one labor advocate argued that vagrancy laws, which were used to force unemployed men into penal servitude, had reduced to “white slavery an army of men who do not belong to a servile race.”

Thus, labor advocates recognized the double-edged danger introduced by the ideology of ‘free labor.’ ‘Free labor’ was contrasted with enslaved labor. But the abstraction of ‘free labor,’ with its partializing recognition of human beings as commodified labor, was itself a vestige of slavery, one that, after emancipation, facilitated the absorption of black, immigrant, and women workers into an expanding industrial economy. ‘Free labor’ lacked individuality and was infinitely interchangeable. But because it was so indifferent to status, the market for ‘free labor’ augured a loss of status for white men.

Feminists also appealed to the rhetoric of white slavery. Feminists advocating for marriage reform often argued that the marriage contract reduced women to a form of bondage. Elizabeth Cady Stanton argued, “If the contract be equal, whence come the terms ‘marital power,’ ‘marital rights,’ ‘obedience and restraint,’ ‘dominion and control’? . . . According to man’s idea, as set forth in his creeds and codes, marriage is a condition of slavery.” Radical feminists like Charlotte Perkins Gilman and Emma Goldman sought to disenchant the institution of marriage by describing it as a form of sexual commerce. As Gilman wrote, “She gets her living by getting a husband. He gets his wife by getting a living. It is to her individual economic advantage to secure a mate. It is to his individual sex-advantage to secure economic gain. The sex-functions have to become economic functions.”

76. STANLEY, supra note 16, at 86.
77. For instance, in an essay published in 1886, one such advocate wrote, “They say slavery is abolished in the United States now, but I say no. True, the colored people are free, but how many thousands of white slaves are there all over the country? What do you call men, women, and children that work in a mill or factory fourteen and fifteen hours a day?” Id.
78. Id. at 121. Stanley suggests that “race sometimes figured into the imagery,” but “the dominant metaphor was not white slavery but wage slavery.” Id. While labor advocates may have used the word “wage” more than “white,” the word “slavery” cannot be so easily disentangled from either race and or its associations with servitude.
79. Id. at 122.
80. Id. at 176.
“primarily an economic arrangement, an insurance pact.” A prostitute differs from a wife only in that a prostitute “sells her body out of wedlock.” While radical feminists argued that marriage was no different from any other form of commercial exchange, bourgeois reformers sought to rectify marriage by heightening the division between the home and the market. In the words of one Progressive Era reformer, “[T]he highest form of human relationship is the association of one man with one woman on a basis of loyalty and love within the circle of a family that they have created, developing intimate and individual life in contrast with a larger world [and] unsubmerged by it.”  

While metaphors of white slavery failed to advance the causes of labor activists and feminists, as Amy Dru Stanley has shown, the term ‘white slavery’ eventually became synonymous with the prostitution of white women. Stanley writes,

[W]ith slavery’s downfall prostitution came to appear as a singularly wrong sale of self—a form of bondage as peculiar as the Old South’s had been, one that validated wage labor and marriage as falling within the bounds of contract freedom despite the dispossession of self entailed in these relations. Not labor but sex represented the human essence whose sale as market commodity transformed its owners from free persons to slaves.  

The limits of contractual freedom were marked not by labor exploitation or the formal subordination of women. Instead, the absolute limit of contractual freedom was represented by prostitution—specifically, paid sex with white women.

The white slave panic of the early twentieth century also had a global dimension. Before it reached the United States, it had already seized much of Western Europe, reflecting anxieties about unregulated intimacies and exchange in the colonies. By the early twentieth century, prostitution had become a regular feature of colonial outposts across the globe. When the United States, through its acquisition of Spanish territories in 1898, joined the community of modern empires, its military established “tolerance zones” in Cuba, Puerto Rico, and the Philippines, where prostitution was regulated. In the United States, as in parts

82. Id.  
83. Id.  
84. Id. at 89.  
85. STANLEY, supra note 16, at 263.  
of Europe, these regulatory projects quickly gave rise to abolition movements, led by coalitions of feminists and anti-imperialists.\textsuperscript{88} The principal motivation for reform was not concern for the colonized women who were engaged in prostitution, but imperial stability, threats of racial contamination, and the growing realization that a number of white women were apparently drawn to the sex trade in colonial outposts. Paul A. Kramer writes that U.S. officials were increasingly alarmed by the “cosmopolitan harlotry” gathering at ports in the American Philippines at the start of the twentieth century. The largest number of foreign prostitutes in the Philippines were from Japan, but they were joined by women from the United States, Spain, Italy, Russia, and Australia.\textsuperscript{89} Writing about the British imperial context, Philippa Levine suggests that white women’s participation in the colonial sex trade presented officials with a particular embarrassment.\textsuperscript{90} Colonial officials believed prostitution among Asians to be determined by a patriarchal despotism, endemic to the East, and the essential slavish character of Asian women.\textsuperscript{91} A British official in Singapore, for instance, suggested that “Chinese and probably Malay women . . . are regarded by men as inferior beings and . . . do not exercise any independence of will.”\textsuperscript{92} The essential willlessness of Asian women provided justification for the regulation of prostitution and colonial domination more broadly. But white women who left home to become prostitutes in the colonies could not have been understood in the same terms, as so essentially slavish. White women involved in colonial prostitution, Levine suggests, were instead seen as either criminal entrepreneurs or victims of coercion.\textsuperscript{93}

In the United States, too, the white slavery panic synthesized a broad set of anxieties generated by varieties of cross-racial intimacy made possible by colonial settlement and new migration. Critics have long recognized the twentieth-century narrative of sexual coercion to reprise colonial-era captivity narratives.\textsuperscript{94} Curiously, the notoriously expansive wording of the White Slave Traffic Act, banning interstate travel with women for “any immoral purpose,” appeared decades earlier in the Page Act of 1875, a federal law restricting immigration from “China, Japan, or any Oriental country,” to individuals

\textsuperscript{89} Kramer, supra note 86, at 370.
\textsuperscript{90} Philippa Levine, The White Slave Trade and the British Empire, in CRIME, GENDER, AND SEXUALITY IN CRIMINAL PROSECUTIONS 133, 140-41 (Louis A. Knafla ed. 2002).
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
traveling of their “free and voluntary consent.”\textsuperscript{95} The express purpose of the law was to prevent “involuntary migration” of two categories of people: contract laborers (generally men) and prostitutes, or anyone entering the country for “lewd or immoral purpose” (generally women).

The ban on contract labor did little to stop the flow of male laborers; the ban on prostitution, however, was so vigorously enforced that it prevented most wives from joining their husbands.\textsuperscript{96} As scholars have shown, through the late nineteenth century, many Asian women migrating to the Pacific Northwest \textit{were} prostitutes, finding work among the predominantly male ‘bachelor’ communities at the frontier.\textsuperscript{97} But they were not forced into prostitution, as lawmakers implied. Rather, immigration restrictions, which produced a gender imbalance within Asian communities, together with anti-miscegenation laws, which discouraged Asian men from sharing intimacy with white women, effectively created the flourishing market for Asian prostitution.\textsuperscript{98} Thus, while the Page Act, through its uneven enforcement, played a role in promoting prostitution in the Pacific Northwest, rhetorically, it transformed a practice of consensual commercial exchange into a species of coercion.

Enforcement of the ban on Asian prostitutes also confronted legislators and immigration officials with the sort of category crisis into which radical feminists had thrown the institution of marriage. How would immigration officials distinguish between a “real” wife and a prostitute passing for one? In 1907, under pressure from nativist groups, Congress convened a committee to investigate, among other things, “The Importation and Harboring of Women for Immoral Purposes.”\textsuperscript{99} The Dillingham Commission, as it was called, generated a report describing the various difficulties immigration officials encountered while administering the prostitution ban. One problem was that a woman might enter the country as a prostitute then marry her pimp or procurer. “The detection of these frauds is extremely difficult,” according to the report; but, in fact, the problem of passing into marriage discloses the fluidity between prostitution and marriage, and the reality that marriage itself houses all manner of coercive and

\textsuperscript{95} Page Act, 18 Stat. 477 (1875).

\textsuperscript{96} The number of Chinese men entering the United States during the period of Page Act enforcement exceeded that of any over seven-year period before the passage of the Chinese Exclusion Act in 1882. \textit{Eithne Luibheid, Entry Denied: Controlling Sexuality at the Border} 31-54 (2002). See also \textit{George Peffer, If They Don’t Bring Their Women Here: Chinese Female Immigration Before Exclusion} 72 (1999); \textit{Roland Tatakji, Strangers from a Different Shore: A History of Asian Americans} 40 (rev. ed. 1998).


\textsuperscript{98} Abrams, \textit{id.} at 653-656.

illiberal conduct.100 Another problem identified by the report: Chinese women
often entered the country “appearing as wives or daughters of the Chinese men .
. . are then sold to keepers of houses.”101 Given the difficulty of enforcing
immigration laws restricting entry of prostitutes, the Dillingham Commission
recommended continued surveillance of Chinese women after entry. The
commission report includes not only cases of immigration officials finding that
women traveling as “wives” and “nieces” were really prostitutes, but also cases
of immigration officials embarrassed to have mistaken virtuous women and
wives for prostitutes.

The difficulties associated with detection were not limited to problems of
passing or mistaken identity, but of distinguishing between a respectable
marriage and “slavish” sexual arrangements. The marital customs of Chinese and
Japanese immigrants in particular seemed to confront United States officials with
this particular challenge. The Dillingham Commission regarded the marital
customs of Asian immigrants—inter-marriage generally, arranged marriages,
and especially the traffic in Japanese “picture brides”—with suspicion, as these
seemed to blur the line between intimacy and commerce, romantic love and
convenience. If these boundary disturbances struck at an ambivalence already at
the heart of the modern institution of marriage, the ban on “oriental” prostitution
would allow Americans to resolve that ambivalence by distinguishing their own
sexual progressivism from the slavishness of others, and projecting the origins
of the disturbance far beyond their own borders.

UNVEILING NARRATIVES

In December of 1925, Dinshah Ghadiali stood by his attorneys as the jurors
filed into the Oregon courtroom, the judge took his seat, and the clerk began
reading the verdict. The jury had found Ghadiali guilty as charged. He was
sentenced to prison for a term of five years. Several local newspapers, having
followed his trial with bemused horror, reported the verdict on their front page,
in tall headlines. From The Portland News:

Col. Dinshah convicted on all 6 counts. Zoroastrian Religion, used as a
cloak against his victims, revolts jurors.... His face immutable as the
Sphynx, Colonel Dinshah Ghadiali, Parsee, head of the Spectro-Chrome
Institute at Malaga, N.J., heard a federal jury Wednesday pronounce him
guilty of all six counts of an indictment charging Mann Act violations.
This means imprisonment in a federal penitentiary, but Colonel
Ghadiali’s gaze, riveted on the clerk who read his fate, did not waver.102

100. S. Doc. No. 61-196, at 10.
101. Id. at 19.
102. GHADIALI, supra note 1, at 202.
The Oregon Journal contrasted the highly-charged performance of the other courtroom actors with the apparent impassivity of the defendant: “As the clerk, in slow tones, read the world ‘guilty’ after each count, not a muscle in the weazened little dark-skinned face of the defendant moved . . . . He showed no sign of emotion.” The Portland Telegram observed that “the stoical Colonel Ghadiali received the blow without batting an eye.”

The reporters, perhaps like the others who filled the balustrades, searched Ghadiali’s appearance for signs of guilt or innocence, shame or indignation at having been accused of committing the most infamous crime. Not only did Ghadiali fail to produce any intelligible or sympathetic response, but in the eyes of his observers, his “impassivity” seemed to read as a kind of insolence and intransigence. Ghadiali’s apparent opacity revealed to his observers not the limits of their own hermeneutic, but a form of racial concealment—“Zoroastrian religion used as a cloak,” “face as immutable as the Sphinx.”

For reasons never made entirely clear to Ghadiali, the Oregon federal court in which he was tried provided no court reporter and no stenographer. Ghadiali usually represented himself in court, but this time he relied on the representation of two court-appointed attorneys. At the beginning of the trial, they recommended to Ghadiali that he remove his topi, his religious head-covering, to avoid “prejudice.” Ghadiali reflected, “I could have done everything to please them and the judge and the jury to avoid this specter of ‘prejudice’ but how could I change my face? That was the biggest ‘prejudice.’” Ghadiali’s attorneys, apparently well-meaning individuals, agreed and recommended that perhaps Ghadiali should avoid facing the judge and jury altogether, lest anyone mistake his gaze for more “mesmerizing.” For much of the trial, Ghadiali would keep his head down anyway, taking meticulous notes of arguments and testimonies presented before the jury. Ghadiali’s attorneys worried that even note taking would attract prejudice, but Ghadiali insisted on maintaining a record of “the terrible insults and perjuries” hurled against him.

The result of Ghadiali’s obstinacy is his two-volume Railroading a Citizen, an aggressive counter-narration of the events leading up to his conviction for white slavery. If the features of his life had been distorted and deranged to conform to the lurid imagination of jurists, yellow journalists, and the promoters of the white slave panic, then in his counter-narrative, Ghadiali would strenuously try to set things right. He meticulously cross-references versions of events, interrupts transcriptions of testimony to declare perjuries, and appeals to

103. Id.
104. Id.
105. Id. at 126.
106. Id.
107. Id.
108. Id.
his readers to arrive at a better judgment. *Railroading*, in this sense, reads as the defense Ghadiali was never able to present to the Oregon jury: an extra-judicial appeal.

In legislative reports, journalistic exposés, popular literature, and film, the white slave panic took the form of a standard narrative in which white women, leaving the protective gaze of their families to find employment in large urban centers, found themselves suddenly abducted by men—often immigrant men, assumed to be the agents of international sex-trafficking syndicates.109 Tropes of veiling and unveiling had been made conventional in legal cases as well as popular film in the 1910s.110 In the film, *Traffic in Souls* (1913), for instance, what appears to be a winning suitor is unveiled to be a kidnapper; what appears to be a Swedish benevolent society turns out to be a brothel; and what appears to be a progressive anti-vice campaigner turns out to be the leader of a vast network of pimps and prostitutes.111 The prosecutors in Ghadiali’s case made great use of this plot device, insinuating that Ghadiali was not merely an inventor but a criminal seducer, that this home in New Jersey was, in fact, a “harem.” His wife and daughter, the only witnesses he was able to produce at his hurried trial, were discredited as co-conspiring prostitutes and pimps.112

In his counter-narrative, Ghadiali also exploited the trope of unveiling made so conventional in white slave narratives. For instance, early in Ghadiali’s counter-narrative, a few suspicious characters begin to show up at his lectures. He suspects some of them to be Klansmen. Another eventually reveals himself to be the author of an unflattering story about Ghadiali, published in the *Dearborn Independent*, known to reflect anti-Semitic and xenophobic leanings of its owner, Henry Ford.113 Soon after that, Ghadiali’s home is visited by a woman claiming to sell hosiery, while inquiring about the women in his household and inspecting his bookshelves. She is later revealed to be an Agent of the Department of Justice.114 Ghadiali would use the trope of unveiling to dramatic effect, but also to undermine the authority of standard social and legal

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109. See, e.g., *Traffic in Souls* (Universal Film Manufacturing Co. 1913).
110. For instance, the Dillingham Commission Report reported a number of cases in which supposed prostitutes were able to slip past immigration authorities by disguising themselves as respectable people. In its report, the Commission noted: “It is often extremely difficult to prove the illegal entrance of either women or procurers. The inspector has to judge mainly by their appearance and the stories they tell.” MARTHA GARDNER, *THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP*, 1870-1965, at 70 (2005) (citing U.S. IMMIGRATION COMM’N, *supra* note 99, at 19.).
111. See *Traffic in Souls*, *supra* note 109.
112. The prosecution called a witness, one of Ghadiali’s former students, who testified that Indian men kept many wives to improve “vitality.” GHADIALI, *supra* note 1, at 61, 128.
114. According to Ghadiali, she testified that she had seen copies of the Quran in Ghadiali’s library. He observed wryly, “Of all the books on Religion, Business Law, Glass-Blowing, Obstetrics, and so on, her eyes settled on this one.” *Id.* at 61, 125.
scripts and to assert his own.\textsuperscript{115} In moments, it reads as a pedagogical text, teaching white Americans to become better interpreters of their worlds, recognize racist hermeneutics, bear witness and responsibility. By explaining to his readers that he avoided the gaze of courtroom observers, Ghadiali confirms that what the reporters recognized to be a form of emotional withholding was precisely that. But his apparent impassivity was not a reflection of inner indifference, as the reporters suggested, but their own “prejudice.” What the newspapermen saw in Ghadiali’s demeanor was their own projection.

RACE, GENDER, AND CONTRACTUAL FORM

In the opening sections of Railroading a Citizen, Ghadiali offers a sketch of his early life, devoting considerable energy to describing his two marriages—the first to an Indian woman named Manek, the second to an American woman named Irene Grace. Both of these marriages, Ghadiali is at great pains to characterize as consensual.

From the beginning, Ghadiali writes, he was “American at heart.”\textsuperscript{116} As a young man, he was eager to escape the parochialism of his parents’ home to “establish a separate domicile where I could be free to work as I pleased.”\textsuperscript{117} By taking on odd jobs, he was able to rent an apartment and quietly pursue the “scientific research” of which his father, a humble watch repairman, disapproved. When Ghadiali’s landlord offered him a daughter for marriage, Ghadiali “declined it with thanks.”\textsuperscript{118} He writes, “I had not seen the girl, but I was informed she was beautiful.”\textsuperscript{119} Ghadiali does not explicitly disapprove of arranged marriages—which opponents to Indian immigration and independence described as evidence of slavishness—but suggests that he was simply too busy.\textsuperscript{120} He spent the next several years traveling to the United States and Europe with the British Merchant Marine.\textsuperscript{121} But amazingly, nearly a decade later, he ended up marrying the very same woman his landlord had first offered. This time the young woman, Manek, had been introduced to Ghadiali by his friend.

I saw her . . . There was the girl and she was the one I had declined in 1895 without seeing her. I fell in love with her. She was certainly a beautiful personality. On November 22, I married her, without any

\textsuperscript{116} GHADIALI, supra note 1, at 16.
\textsuperscript{117} Id.
\textsuperscript{118} Id
\textsuperscript{119} Id.
\textsuperscript{120} See KATHERINE MAYO, MOTHER INDIA: SELECTIONS FROM THE CONTROVERSIAL 1927 TEXT (Miralini Sinha ed. 2000); GHADIALI, supra note 1, at 16.
\textsuperscript{121} GHADIALI, supra note 1, at 8.
dowry. For my nation, it was a novelty, but I was born at heart an American. I just married her.¹²²

In this tale of startling coincidence, Ghadiali recasts what might have otherwise appeared to be a traditionally arranged marriage—a trade in women, brokered among men—as something more romantic, modern, and essentially “American.” He uses the language of contract to emphasize, besides their shared commitment to vegetarianism and temperance, social equality and mutuality of exchange: “I gave Manek the total abstinence pledge against meat-eating and alcohol; she shared my views of non-slaughter and mercy. She became my constant pal and we planned a glorious life ahead.”¹²³

Ghadiali’s opening declarations of independence and companionate marriage conjure what Brook Thomas describes as the “radical promise” of contractual freedom—the abandonment of old hierarchies in pursuit of associational freedom. But Ghadiali’s account of his own marriage is far more equivocal in that, although Ghadiali fashions himself a romantic hero moved only by his own desire, his desire happens to coincide rather neatly with the original brokered arrangement. Ghadiali seems to have avoided an arranged marriage, only to enter into something like a twice-arranged marriage—arranged the second time by some transcendent power. Ghadiali writes that, while visiting Madras in 1894, an “astrologer had sketched the kind of wife I would have.”¹²⁴ The sketch happened to reveal the face of Manek. As if by an alignment of the stars, an old Indian tradition is made to converge with a modern American mystification of marriage. Less the agent of his own romance, the hero is a servant of fate; less freely-chosen than preordained, Ghadiali’s first marriage gestures not at the open-ended proliferation of romantic freedom, but more modestly at his own willingness to yield to naturalized order.

In 1910, Ghadiali came to the United States with his wife and their two children. He eventually established a home and a business in rural New Jersey. In 1917, he became a naturalized citizen. But that same year, for reasons left somewhat opaque in Ghadiali’s account, Manek left the United States to return to India, alone.¹²⁵ Five years later, after Ghadiali had divorced his first wife, he married a 19-year-old woman of “Germanic decent” named Irene Grace.¹²⁶

This second marriage would generate its own representational dilemma. By marrying Irene Grace, Ghadiali entered the fold of white middle-class respectability, gaining membership in the extended American family. But his marriage also raised the dreaded specter of miscegenation. In Railroading,
Ghadiali does not rhapsodize about the beauty or fateful meeting of his second wife. In his brief and muted descriptions of Irene Grace, he is careful to distance her from the image of the flapper, the ‘new woman,’ white women who flouted social convention, consorted freely with ‘colored men,’ and generally threatened social order. (Ghadiali would associate that sort of recklessness with his secretary, Geraldine McCann.127) As he wrote of his first meeting with Irene, it was her “simplicity in dress, non-following of the foolish fashions . . . so dear to the average flapper [that] were so to my liking that I began to consider her qualifications as a wife.” As with his first marriage, Ghadiali was insistent that the marriage was based on equality, mutuality, and companionship:

That civil marriage of March 14, 1923, was unique in its simplicity. There was no ceremomial farce, no fuss, no false ‘obey’ or ‘bestow’ promise, no useless expense, no foolish paraphernalia. Not a gift was exchanged, not even the usual old ring, which I look upon as a sign of subordination of the bride. We were joined not only in the material, but in true companionship, eternal friendship and cordial affection, engendered by mutual respect and admiration for one another.128

Notwithstanding Ghadiali’s insistence upon the consensual nature of his marriage, he and his wife must have been met with suspicion. As Lon Fuller understood, consent is critical to the legitimacy of contract, but consent is essentially elusive.129 Inner will, intention, can be made known only by expression or externalization. But in Ghadiali’s experience, even ordinary attempts to make himself known, to clarify his intentions, were clouded by his external appearance. As Ariela Dubler has shown, the institution of marriage has long been held to sanctify the most unequal of bargains and to “cure” the most sordid of arrangements.130 But in Ghadiali’s case, marriage did not lend his ordinary arrangement the sheen of respectability. Instead, it only confirmed the overwhelming power of his “malevolent influence.”131

For Ghadiali, marriage lent no safety of form.132 He avoided the exchange of rings to avoid any “sign of subordination of the bride,” but felt compelled to formalize his marriage—not just with a civil filing, but, a few months after their marriage, with a pair of notarized affidavits.133 His wife signed an affidavit attesting that she had both married Ghadiali and converted to his religion.

127. Id. at 69-71, 78.
128. Id. at 39.
129. See Fuller, supra note 32.
130. See Dubler, supra note 99, at 756-7.
131. GHADIALI, supra note 1, at 123.
133. GHADIALI, supra note 1, at 48.
Zoroastrianism, “of my own free will and accord.”\footnote{DINSHAH P. GHADIALI, DINSHAH NATURALIZATION CASE CLEARING CONTESTED CITIZENSHIP 35 (1944).} Ghadiali signed an affidavit attesting that he was Zoroastrian and “white.”\footnote{Id.}

Ghadiali makes no mention of the affidavits at his trial, perhaps because the prosecution had argued that Ghadiali’s extravagant use of legal forms displayed, rather than mutuality of intent, excess of control. But he submitted the affidavits into evidence at his denaturalization trial to prove that he was ‘white’ and thus eligible for citizenship. As he argued then, “my wife is a White woman; if I were a Hindu, she would never have married me.”\footnote{Id. at 45.} Referring the judge to the affidavit, Ghadiali argued, “what must have been in our mind was affirmed at that time before a Philadelphia Notary Public.”\footnote{Id.}

The affidavit and accompanying testimony evidence not just racial identity, as Ghadiali argued, but the understanding that, no matter how exhaustively Ghadiali and his wife documented the mutuality of their intentions, their relationship was shadowed by doubt: how could a white Christian woman have chosen to marry an Indian immigrant without having succumbed to some malevolent influence?

Though the prosecution focused on the suspicious character of the employment contract into which Ghadiali and McCann entered—the “curious contract”—neither the prosecution nor the defense submitted the actual contract into evidence. Instead, in his self-published account, Ghadiali explained that he simply wanted to reach an understanding with his new secretary.

Before hiring McCann, Ghadiali had fired two previous secretaries. The first, he fired in 1923, while touring the west coast. As Ghadiali writes, “we gathered from her inadvertent remarks the real motive of her signing with us—she was aiming for Hollywood—she would have left us flat in California!”\footnote{Id. at 45.} (The “us” referred to here, includes Ghadiali’s new wife, Irene Grace, his teenaged daughter, Kashmira, and his driver, Harry Saunders.)\footnote{GHADIALI, supra note 1, at 43.} Ghadiali, having made promises to the secretary’s mother, had the unpleasant duty of sending her back home. He paid for her train ticket.\footnote{Id.}

A few days later, in Seattle, Ghadiali placed an advertisement for a new secretary.\footnote{Id.} To his surprise several young women responded. But none of these agreed to follow his family’s strict regimen—no cigarettes, meat, alcohol, hosiery, or perfume. Eventually, he hired a young woman, “approaching 30, had
served in the war, was an expert stenographer.”142 But she, too, proved to be a disappointment. As Ghadiali wrote,

We told her [on the morning of our departure] that she should leave all paints, powders, rouges, and similar artificialities at home prior to joining us, as she would be with my daughter and we would not have anything like that on our premises. It was all according to the agreement and there could be no misunderstanding. She comprehended thoroughly all the service requirements.143

But the next evening, Kashmira complained that the secretary had smuggled into the hotel room they shared “all forbidden odorous paraphernalia.”144 Ghadiali, with regret, fired her, too.

After his lecture in Portland, Geraldine McCann and her aunt, Mary Hayes, approached Ghadiali. Mrs. Hayes introduced herself as a Theosophist, spiritualist, and “deep student of the occult . . . dissatisfied with the worldly life she was leading.”145 Her niece, McCann, ambitious and eager to travel, asked if she might join Ghadiali and his family as a traveling secretary. Mrs. Hayes granted her niece permission.146 It was then that Ghadiali’s wife, Irene Grace, drafted the “curious contract” that McCann signed. As Ghadiali wrote,

We explained the reasons for each clause. Why the supervision over the mail? Because of my bad experience with the less trustworthy people and my fights with the Medical Trust. Why the cap? Because of the effects of higher power electrical oscillations, chemical vapors, sunlight and the like on the head; we lived in a laboratory atmosphere. Why the vegetarian diet? Because of the practicing what I preach: mercy, healthfulness and consistency of principle. Why no gifts or presents? Because of our absolute graftlessness to maintain strict integrity. There was nothing kept back.147

In one sense, there was nothing unusual about the contract. Then, as now, courts routinely enforce contractual terms that limit the communication of employees for the purpose of protecting an employer’s trade secrets and reputational interests. Ghadiali may have been unusually paranoid about scrutiny from the medical establishment, but he was probably not unlike most other inventors and patent physicians at the time who thrived within the medical marketplace by keeping their practices secret. And suspicions about the postal

142. Id.
143. Id.
144. Id.
145. Id. at 48.
146. Id.
147. Id.
service might not have been entirely misplaced: the United States postal service played a critical role in eventually removing Ghadiali’s inventions from the stream of interstate commerce.\(^\text{148}\)

The contract was perhaps “curious,” though, in that it was not limited to terms of employment but rather seemed to embrace more personal sartorial and dietary restraints. The contract was less concerned with the exchange of value for labor than it was in compelling recognition, if not respect, for his way of life. In Ghadiali’s account, he had invited McCann to become not just his employee but a member of his household, his family. But having failed to compel her predecessors to respect his household customs, he demanded as much by having her sign a contract. Above all else, it seems, he wanted her to cover her head—probably for religious reasons as well as hygienic—and to observe vegetarianism.\(^\text{149}\)

During the trial, McCann maintained that she had been in a “trance” during the eleven months of her employment, drained of will.\(^\text{150}\) Her characterization of work resonates with that of labor advocates, who argued that modern industrial labor often reduced individuals to somnambulists and automatons—bodies without will. But the suspended animation that McCann describes also reflected the legal status of women in marriage. The traditional marriage contract was different from the employment contract in that, by entering into a marriage, freely contracting parties were returned to status-like positions—husband and wife. According to Blackstone’s famous account of the doctrine of marital unity, “by marriage, the husband and wife are one... the very being or legal existence of the woman is suspended during the marriage.”\(^\text{151}\) The doctrine of marital unity rendered rape an impossibility, as a woman who agrees to marry “hath given up herself in this kind unto her husband, which she cannot retract.”\(^\text{152}\) Laws expanding the right of married women to control property gradually undermined the doctrine of “marital unity,” but even until the mid-twentieth century, in many parts of the United States, by agreeing to marry, a woman seemed to agree to

\(^\text{148}\) Ghadiali’s was not the only color therapy device on the market in early twentieth century, but his seemed to have been singled out for investigation. Christopher Turner writes of the great lengths to which FDA went to pursue Ghadiali in 1938:

> FDA agents tracked down newspaper advertisements placed by people selling secondhand Spectro-Chromes, in order to try and identify dissatisfied customers. Agents posed as patients; doctors conducted independent trials. The post office provided the addresses of every Spectro-Chrome consignee, whom FDA agents visited and interviewed (their names, collected in the McCarthy era, read something like a blacklist: Walter Chandler, Anna Cabaj, Dorothy Westphol, Stella Hitekowsk.) Finally, in October 1946, Ghadiali appeared in court charged with introducing a misbranded article into interstate commerce, a violation of the criminal code.


\(^\text{149}\) *Id.* at 42.

\(^\text{150}\) Ghadiali v. United States, 17 F.2d 236, 238 (9th Cir. 1927).

\(^\text{151}\) 1 WILLIAM BLACKSTONE, COMMENTARIES 442 (1765).

everything else—to have sex with her husband as he desired, bear his children, and otherwise do as he willed.

What the prosecution referred to as the “curious contract” thus returns us to the tension between autonomy and embodiment that nags at the claim of contractual freedom. In Ghadiali’s case, the question that seemed to overshadow the curious contract was this: did a woman’s consent mean the same thing in marriage as it did in the marketplace?

**RECAPTURING WHITE WOMEN**

Proponents of the Mann Act claimed to be concerned about protecting innocent white women from the corrupting influences of the marketplace and the predations of traffickers. Ghadiali himself was suspicious of the myth of pure white womanhood, observing that American women seemed eagerly complicit in transforming themselves into sexual commodities. In Ghadiali’s narrative, the primary threats to feminine virtue were not black or brown men, but intemperance, consumerism, powders and perfumes, which he regarded as unwelcome intrusions of the marketplace into the home, and commercialization of the body.153 Ghadiali also resisted the bourgeois distinction between “women” and “ladies.” Complaining of his difficulty finding a good secretary, Ghadiali wrote:

One after another, various types and temperaments came to work for the Spectro-Chrome Institute and our household. It was difficult to retain any longer because of our vegetarian diet, hard business life and aloofness from social tanglements…. Our night work extended into the next morning, and it was very difficult to find coworkers. The girls expected us to treat them like ‘ladies.’ We bluntly told them there were no ‘ladies’ in America, only workers and women.154

An improvement over previous secretaries, McCann seemed to accommodate herself to Ghadiali’s terms of employment. As Ghadiali wrote, his young secretary “went to work in earnest and grew in confidence.”155 McCann herself seemed eager to shed the restraints of sentimentalized female incapacity. McCann arrived at Ghadiali’s institute wearing “ordinary female clothes,” but asked if she could wear the more mannish uniform worn by Ghadiali’s wife and daughter.156

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153. **Ghadiali, supra** note 1, at 45.
154. **Id.** at 38.
155. **Id.** at 42.
156. **Id.** at 52.
At her own request, they bought for her knickerbockers until proper
serge suits might be tailored. Miss McCann liked the smart, comfortable
and business-like serge suits of coat and breeches worn all the year
round by my wife and daughter and persuaded them to have her
similarly outfitted. 157

In Ghadiali’s account, McCann seemed to enjoy her new independence and
discovering her capacity for work. And Ghadiali, in turn, seemed to identify with
McCann as a fellow traveler, eager to leave behind the conscriptions of origin.
McCann did often travel with Ghadiali and his family because she wanted to. 158

McCann began writing for Ghadiali’s newsletter. 159 As a number of students
explained, in testimonials collected by Ghadiali, McCann spoke before
Ghadiali’s classes, at times, offering surprisingly eloquent testimonials. 160 After
the birth of the Ghadiali’s new son, Geraldine assumed new responsibility and
“became attached [to the baby] like a mother.” Ghadiali describes his institute,
like his home, as a collaborative venture, absorbing and uplifting others on the
move, including his own wife and daughter, his black driver and his wife,
entrepreneurial young women. 161 But Ghadiali’s terrifically irregular enterprise,
even as it seemed to epitomize the radical promise of contractual freedom, drew
constant scrutiny.

His home was visited by an officer inquiring into the well-being of the
women in his home. 162 Then came a series of letters, one after another, imploring
McCann to come home. From her Aunt Hayes: “since your mother is very ill and
you are actually needed at home with the children [McCann’s nieces and
nephews], I am now asking you on both your mother’s behalf and mine to come
at once.” 163 McCann replied,

I certainly will not be held back in career for the whims of my relatives.
I send mother a check of $30.00 every month. I can do nothing more for
her than I am doing. In my position I am happy, contented, well taken
care of and respected by the public and I do not intend to leave my
duties. 164

At his trial, the government argued that McCann’s refusals to return home
evidenced nothing of her own intention, only Ghadiali’s overwhelming
influence.

157  Id.
158  Id. at 53, 59.
159  Id. at 65.
160  Id.
161  Id.
162  Id. at 54, 61.
163  Id. at 83.
164  Id.
McCann received a more agitated letter from her Aunt, expressing worry of an Uncle Mickey’s “plan of putting your mother into a home or back into an asylum again... Now I think it’s a crime for you & Mickey to do that to your darling mother. I hate to ask you to give up your career, if there is one there for you, but your mother is first.” ¹⁶⁵ Then, McCann’s brother sent a letter reminding McCann that the cost of becoming a career girl was loss of domestic privilege.

Don’t forget the kiddies are growing older and the longer you are away the easier it is to forget and no one wants that to happen after what you did for them when they were young... regarding your giving up your position, of course it is perfectly natural that you should not want to do so, but in my estimation a daughter’s first consideration is her mother. ¹⁶⁶

According to Ghadiali, McCann remained entirely unmoved by her family’s entreaties. ¹⁶⁷

Then Ghadiali himself received an alarming letter from a former student and “well-wisher” in Oregon, reporting that McCann’s relatives had begun spreading malicious rumors about Ghadiali in Portland. ¹⁶⁸ The letter read:

She started in by saying that you were running a Harem, and that you had schemed for her niece to go away with you under the pretext of acting as your private secretary... That you lied when you said the two ladies you had here with you were your wife and daughter... asserted that she had proof they were your prisoners and part of your Harem... Claimed to have reason that you were an impostor and a man of the lowest type of the underworld—snaring innocent girls into your ‘Harem’ and holding them prisoners on a 30 acre farm at Malaga out of hearing and reach of every one.... That you resorted to bringing them under your power by hypnotic means and satisfying your devilish desires in a most horrid unnatural way. ¹⁶⁹

Incredibly, none of this seemed to alarm Ghadiali who ignored the letters and retreated into the quiet of his laboratory. So close, he was, to completing his latest invention—the It-is-o-meter—a medical instrument designed to locate in any sufferer precisely what the disorder is, where it is, and how to correct it. “If I could do it,” Ghadiali reflected, “I would be taking the longest stride of any in the Healing Arts.” ¹⁷⁰ He seemed to have missed the clear signs of coming

¹⁶⁵. Id. at 87.
¹⁶⁶. Id. at 60.
¹⁶⁷. Id.
¹⁶⁸. Id. at 58.
¹⁶⁹. Id. at 60.
¹⁷⁰. Id. at 75.
disaster, having fallen under the spell of a machine that promised to render visible every hidden source of misery.

A few months later, in the summer of 1925, Ghadiali began planning another tour—this time, to promote his new invention. McCann offered to accompany Ghadiali as his travelling secretary. She even outfitted herself in her new naval uniform. Ghadiali gave a polite nod of approval, but, as he explained in his own writing, he was extremely reluctant to bring her along. McCann persisted—he had promised, she had been so dutiful, it wasn’t fair to punish her for the actions of her relatives, and yet wouldn’t it be a great opportunity to visit them—and Ghadiali, against his better judgment, relented.171

McCann proved to be a more vexing travel companion than Ghadiali had anticipated. She sang loudly in the parlor car and drew strangers into suggestive games of “I spy.” Ghadiali begged McCann to behave herself and otherwise kept his eyes trained on his beloved instruments.172

If it was a challenge for someone of Ghadiali’s complexion to travel by train in the era of *Plessy*, Ghadiali does not expressly say. But he took a few telling precautions. At his trial, Ghadiali submitted into evidence letters he sent to train companies, explaining his situation—that he was traveling not with family, but with a secretary, and that he hesitated to engage a private drawing room, but was arranging to do nonetheless so because it was impossible to travel with “delicate electrical apparatus” otherwise.173 For the convenience of his co-traveler, he asked that the train companies “supply the necessary curtains to insure her privacy and at the same time give me the convenience of leaving the door wide open day and night.”174 He added, “If you will do anything to smooth my above stated situation so that I may not have any probable complication or legal trouble, I shall feel it a personal favor.”175

Finally, after the two had arrived in Portland, Ghadiali sensed that something was amiss. “Being trained to a life of highly concentrative meditation and accustomed to mental absorption in research work, I am prone to feel human etheric oscillations like a tuned radio.”176 Indeed, by the next morning, Ghadiali discovered that McCann had vanished.

Ghadiali made his usual progress through the long day. He concluded his lecture late in the evening and dragged his instruments back to his hotel.177 As he wrote, he had the unmistakable impression that he was being followed. As Ghadiali unlocked the door to his room, a man lunged behind. Ghadiali raced for

171. *Id.* at 71, 74.
172. *Id.* at 93.
173. *Id.* at 84.
174. *Id.* at 84-85.
175. *Id.*
176. *Id.* at 97.
177. *Id.* at 100.
his revolver.178 (Having been threatened before, Ghadiali always slept with a loaded revolver.) Ghadiali claimed he had no intention of shooting, but was prepared to defend himself against the unpardonable intrusion. When Ghadiali raised his gun, the other man did the same, shouting, “Federal Officer. Put down your gun.”179 Then the room filled with armed men. “I’ve been following you for three years,” one of them said. Another ordered him to strip. Ghadiali protested but removed his clothes, as told. One of the officers laughed, another stepped on Ghadiali’s toes, and another prodded his genitals with the barrel of his gun. Ghadiali writes,

My blood tingled in my ears. Such an obscene monstrosity would have been resented any other time, but I was in their clutches, I was undefended, I was among strangers, I had no physical means to secure help—there I was standing naked before five huskies all armed with guns and apparently meaning no good to me.180

Ghadiali spent the night in jail. McCann had been dragged home by her family.181

At the trial, the government adopted Mary Hayes’ lurid image of Ghadiali and his household—characterizing Ghadiali as a seducer, his wife and daughter as procurers, his home as a harem.182 In Ghadiali’s counter-narrative, the letters from Mary Hayes and McCann’s brother suggest the real motivation underlying the charge of white slavery. As Ghadiali writes of the brother’s letter, “Aha! Here was an industrious sister working her way in life; there was a less industrious brother trying to trample on his sister’s career, because he wanted her to drudge as a housekeeper.”183 Apart from petty rivalry, what the McCann family’s letters reveal is sudden regret about losing the value of Geraldine’s domestic labor and family prerogative. In Ghadiali’s narrative, the charge of white slavery was the device families used to remand ambitious women to household drudgery.

POSTSCRIPT: INCREDULITY

We can never really know what happened between Dinshah Ghadiali and Geraldine McCann. In retelling the story of Ghadiali’s arrest and conviction, I have relied, in great measure, on his own reporting.

In his Lives of Infamous Men, Michel Foucault observes that the historical archives are full of obscure figures, unimportant men and women who, but for

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178. Id.
179. Id.
180. Id. at 100-1.
181. Id. at 99.
182. Id. at 127.
183. Id.
one fateful encounter with the law, would have followed the billions of others who leave the world without a trace of their existence. The irony, for Foucault, is that these odd individuals enter the archive only to announce their infamy; in the worst cases, these lives enter the historical record just as they are extinguished by power. Having come across so many “singular lives,” reduced to “strange poems,” Foucault explains, he felt compelled to make a study of them.

I considered the texts in their dryness, trying to determine their reason for being... seeking to understand why it had suddenly been so important in a society like ours to ‘stifle’ (as one stifles a cry, smothers a fire, or strangles an animal) a scandalous monk or a peculiar and inconsequential usurer.

Why, we might wonder, in twentieth-century America, was it so important to contain someone like Ghadiali? The appearance of infamous men in the historical archives, Foucault suggests, tells us less about the individuals themselves than the societies that struck them down.

Rarely do individuals with Ghadiali’s life experience enter the historical record; even more rarely do they enter legal scholarship. When they do, their stories are generally told by others, often enemies or adversaries, often to justify their suppression. Rarely are the stories of such individuals told by themselves, in their own voices. When they are, we should listen. Not because those who have been historically silenced or subordinated have special access to ‘what really happened’, or ‘the truth’, but because they have the potential to disrupt the regimes of silencing, subordination, and truth-making that reinforce one another. When we listen to the voices of the historically silenced and subordinated, we begin to reshape public meaning, our shared institutions, and the narratives that hold us in place.

Those are some of the reasons that I have chosen to take seriously Ghadiali’s counter-narrative of the events leading to his conviction. For separate reasons, I have been inclined to believe Ghadiali’s account over the prosecutor’s. Scholars agree that the overwhelming purpose of the Mann Act, as I suggested above, was to restrict the sexual freedom and social movement of white women in an era of unprecedented change. Black and brown men were routinely figured as the primary threat to the status quo, which in turn, had become conflated with

185. Id. at 158.
186. Id.
188. See supra notes 70-1 and accompanying text.
preserving the purity of white womanhood.\textsuperscript{189} The prosecution’s case against Ghadiali follows that familiar script.

Moreover, Ghadiali’s life story, which he wrote and rewrote compulsively, is one of continuously outrunning false scripts and racist misrepresentation. Before he was arrested for violating the Mann Act, Ghadiali was accused of violating laws governing the practice of medicine—laws intended to police the boundaries of an emerging profession that would remain segregated, and condone segregation, until the civil rights era.\textsuperscript{190} Ghadiali’s was not the only color therapy device sold in the United States in the first half of the twentieth century, but his seemed to become the target of obsessive scrutiny among defenders of the medical establishment.\textsuperscript{191} Their attempts to discredit Ghadiali often assumed a racist tone.\textsuperscript{192} After he was released from prison, the federal government sought to cancel Ghadiali’s citizenship, asserting that he was racially ineligible.\textsuperscript{193}

And still, I remain uncertain. Victims of racial violence are also capable of committing acts of gendered violence. The prosecution’s theory—that Ghadiali mesmerized women, that he forced them into prostitution—seems both incredible and disingenuous. But the particular events that anchor both the prosecution’s narrative and Ghadiali’s counter-narrative may be entirely consistent with a pattern of sexual abuse. The isolation from family, the imposition of rules, the surveillance of letters—all of it might be consistent with what survivors of sexual abuse and their advocates describe as grooming, gaslighting, Stockholm syndrome, and trauma. Both the prosecution and Ghadiali reference encounters between Geraldine and others which raise more questions than they answer.\textsuperscript{194} Moreover, in Ghadiali’s two-volume narrative,
McCann is never really allowed to speak for herself. Ghadiali argues that McCann’s testimony is not really her own, that the prosecution uses her—but perhaps Ghadiali does, too.

Uncertainty weighs more heavily as I draft this postscript, a few days after the Senate concluded a pair of confirmation hearings by advancing a man who was credibly accused of sexually assaulting at least one woman to a seat on the Supreme Court. Christine Blasey Ford first contacted her representatives and the Washington Post earlier this summer, soon after she learned that the person who had assaulted her decades before was now being considered for a vacancy on the Supreme Court.195 “Brett Kavanaugh physically and sexually assaulted me during high school in the early 1980s,” she wrote in a letter addressed to a member of the Senate Judiciary Committee.196 Her story was corroborated by session notes kept by her therapist and conversations recalled by her husband.197 She passed a polygraph test.198 Though she wished to remain anonymous, once reporters learned of her identity, Ford felt she had no choice but to make her accusations public.199

Immediately overwhelmed by both public support and death threats, a reluctant Ford agreed to testify before Congress, but asked that the Senate Judiciary Committee order an FBI investigation first, to “ensure that the crucial facts and witnesses in this matter are assessed in a non-partisan manner, and that the Committee is fully informed before conducting any hearing or making any decisions.”200 Refusing to order a thorough FBI investigation, to subpoena other witnesses, or even to slow down the pace of events, the Senate Judiciary

exploiting anti-black racism to direct suspicion away from himself and towards others. GHADIALI, supra note 1, at 123, 135-37.


198. Id.


Committee effectively orchestrated the very “he said, she said” they denounced as pointless.\textsuperscript{201}

In late September, Ford offered her account of the incident.\textsuperscript{202} In the summer of 1982, when she was fifteen years old, she attended a house party in suburban Maryland. She left the company of her friends to go to the bathroom upstairs. Upstairs, she was pushed into a bedroom by two boys, obviously drunk. Kavanaugh, as she recalled, pushed her onto a bed, pinning her there with the weight of his body, grinding and groping; while Kavanaugh’s friend, Mark Judge, watched and laughed. Struggling to breathe as he covered her mouth, Ford worried that Kavanaugh might inadvertently kill her. When Judge jumped onto the bed, toppling the other two, she managed to leave the room and then the party. Ford delivered her testimony with earnest cooperation, restrained emotion, disarming candor—careful to acknowledge what she could and could not recall thirty years later. When asked how she could be so certain that it was Kavanaugh and not someone else who attacked her, Ford, a professor of psychology, explained that certain details might be seared in one’s memory even as others faded away. When asked what she remembered most clearly about that night, Ford recalled the pleasure the boys took in her humiliation. “Indelible in the hippocampus is the laughter . . . the uproarious laughter between the two . . . I was . . . underneath one of them, while the two laughed.”\textsuperscript{203}

Kavanaugh’s testimony, which followed later in the afternoon, consisted of howling accusations, implausible denials, willful dissembling, and petty insults aimed at Senators who dared question him. Hardly addressing Ford’s claims, he implied that they were the conjury of some political conspiracy.\textsuperscript{204} He boasted of his academic achievements, as though elite schooling and good grades should insulate individuals against accusations of wrongdoing.\textsuperscript{205} Where her testimony was meticulous, his was petulant. Where she was compliant, he was rageful. While it is obvious that both Kavanaugh and Blasey Ford suffered terribly through the public ordeal, she suffered death threats, loss of privacy, and the pain of publicly reliving a humiliating memory with heroic composure. In contrast, he suffered death threats, loss of reputation, and calls to accountability with tears of self-pity. A number of times over the course of his testimony, Kavanaugh, who certainly knows the difference, characterized others’ lack of recollection as

\textsuperscript{201} Burgess Everett & Elana Schor, Trump Says He’s OK with the FBI Interviewing Kavanaugh, POLITICO (Oct. 1, 2018), https://www.politico.com/story/2018/10/01/mitchell-ford-kavanaugh-accusations-854433 [https://perma.cc/6JPA-5US3]


\textsuperscript{203} Id.

\textsuperscript{204} Id.

\textsuperscript{205} Id.
refutations.\textsuperscript{206} The explanations that Kavanaugh offered under oath for the language he had written in his own high school page—“ralph,” “boofed,” “devil’s triangle,” “Renate alumnus”—were so incredible that they prompted several former classmates to come forward, expressing fresh doubt about Kavanaugh’s fitness as a judge.\textsuperscript{207}

Here, too, we can never really know what happened. It is impossible to determine with any certainty what did or did not happen in a suburban home in Maryland some thirty-six years ago. But it is also clear that the confirmation hearings were never really about determining what did or did not happen. By agreeing to participate in the committee’s proceedings, Ford bound herself to the committee’s unyielding authority to control meaning, to determine what did or did not happen.\textsuperscript{208} Before the Ford-Kavanaugh hearing, Senator Mitch McConnell promised a room full of supporters, “we’re going to plow right through.”\textsuperscript{209} Before hearing her, Senator Lindsey Graham announced that Ford’s testimony would not change his vote: “I’m not going to ruin Judge Kavanaugh’s life over this.” He went on to say, incredibly, that Ford should nonetheless “have her say, she will be treated respectfully.”\textsuperscript{210} One reporter in the room during the hearing observed that Republican committee members, with one exception, avoided looking Ford in the eyes as she spoke.\textsuperscript{211}

To so many of us who watched, the fair hearing that Ford had been promised quickly became a public demonstration of willed ignorance. Twenty-eight years ago, during the Anita Hill-Clarence Thomas hearings, a committee, composed of all white men, attacked the woman who accused the nominee of sexual


\textsuperscript{208} I am indebted to Kathryn Pogin for these words and insights.


harassment, relentlessly challenging her credibility. Careful to avoid the same mistakes this time around, many Republicans on the committee—still composed largely of white men—acknowledged that Ford seemed credible. While Hill was discredited as a liar, Ford was discounted as “pleasing” but perhaps confused. Kavanaugh’s supporters seemed to converge upon the same unlikely theory: something terrible happened to poor Ford, but Kavanaugh had nothing to do with it. Of course, the mistaken identity theory is the one theory that would allow Senators to reconcile her apparent credibility with his aggressive denials. There is at least one other possibility: he did it, but he could not remember, either because he was too drunk—as many former classmates publicly assumed—or because what she experienced as terror was, for him, another unremarkable night of fun.

President Donald Trump, who was voted into office after he was caught boasting of sexual assault in a recorded conversation, was among the few who dared to suggest that Ford might be making a false accusation. “And you know why?” he explained at a press conference. “Because I’ve had a lot of false charges made against me.” More than a dozen women have accused Trump of sexual impropriety; Trump has dismissed them as opportunists taking advantage of famous and powerful men. He later added, “My whole life, I’ve heard, ‘you’re innocent until proven guilty,’ but now you’re guilty until proven innocent. It’s a very scary time for young men in America when you can be guilty of something that you may not be guilty of.” Of course, as some were quick to point out, there is indeed a long history of false accusation in this country. But it’s not famous white men who have been particularly vulnerable to false accusations, presumptions of guilt, and lack of due process, but black and brown men. Trump has shown far more concern for the “due process” rights of famous and powerful men.

215. Id.
216. Id.
of a judge who stands only to lose a seat on the Supreme Court than, for instance, the Central Park Five, black and brown men wrongly convicted and imprisoned for raping a white woman when they were teenagers.\textsuperscript{219} In 2016, Trump announced his campaign for the presidency by calling (all but “some”) Mexican immigrants rapists and murders.\textsuperscript{220} As President, he has shamelessly exploited the same racist fantasies, defining of white slave panic, to promote anti-black and anti-immigrant policies.

We can never really know what happened in either case, but Kavanaugh was given the benefit of a far more searching standard than Ghadiali—and perhaps most criminal defendants. Before and after the hearings, Kavanaugh’s supporters, like Trump, insisted that the judge was entitled to a presumption of innocence.\textsuperscript{221} Judicial confirmation hearings are job interviews, not criminal trials, as many pointed out.\textsuperscript{222} His supporters complained about a lack of “due process,” but voting against a Supreme Court nominee is not the same as convicting him of a crime.\textsuperscript{223} A negative vote would have sent Kavanaugh not to prison, but back to the D.C. Circuit.

The Kavanaugh controversy was often framed in terms of evidence, matters of fact, what can or cannot be proven. But the real division exposed by the controversy has less to do with what actually happened than with who decides—who is authorized to participate in shaping public meaning and the norms of social exchange; who is accountable to whom and for what; who gets to decide what we collectively recognize as consent, as violence, as right or wrong. This became clear soon after Kavanaugh began to testify. Republicans on the committee had hired a “female assistant,” a federal prosecutor, to question Ford, but quickly dispensed with her and her questioning.\textsuperscript{224} Instead, they took turns bellowing at their Democratic counterparts, accusing them of turning the hearings into a political circus.\textsuperscript{225} To Kavanaugh, they assured, you don’t have to answer to this. What the rest of us were made to witness that afternoon was a

\begin{thebibliography}{99}
\bibitem{221} Arnold, supra note 217.
\bibitem{222} See e.g., Dvorak, supra note 218.
\bibitem{225} Kavanaugh Hearing, supra note 202.
\end{thebibliography}
closing of ranks. If, in the past decades, historically subordinated communities—black people, immigrants, sexual minorities, women—had been asserting their collective power to reshape public meaning and shared institutions, then a handful of white men would stop it. Not by appealing to good faith, reason, or credulity, but by wielding power.
It’s Still Me: Safeguarding Vulnerable Transgender Elders

Sarah Steadman†

ABSTRACT: Transgender individuals have many reasons to be concerned about their welfare in the current political and legislative climate. Transgender elders are especially vulnerable. They are more likely to be disabled than the general elder population. Moreover, transgender elders profoundly fear a future when they must rely on others to maintain and protect their gender identity and dignity. This fear is alarmingly realistic because if a transgender elder becomes incapacitated or requires institutional care, they are likely to face discrimination and other harms by their caretakers. In addition, transgender elders who are incapacitated are particularly at-risk if a non-affirming guardian is appointed to make decisions for them. Before the courts become involved, transgender individuals can take steps, described in this Article, to protect themselves from an unsuitable surrogate. If a court becomes involved, there are actions it can take to ensure that a transgender person is served by a surrogate who will protect their health, welfare, and identity.

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† Assistant Professor of Law, University of New Mexico School of Law. My deep thanks to Julie Sakura and Scott England for their generous support and invaluable suggestions for improvement. Many thanks also to James Grieco, my stellar research assistant.

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INTRODUCTION

An 84-year-old transgender¹ man named George² had advanced dementia and was placed in a nursing home. Assuming he lived in a hostile environment for transgender elders, he hid his gender identity³ from other residents and isolated himself. But George could not hide from the staff who bathed and dressed him in clothes that did not match who he was and had been for years. The staff and residents called him “she” and, rather than respond as someone else, he became unresponsive. When he had lived in his community, he had been a vibrant and charming man who engaged others with a sharp wit and keen observations about life and people. After a few weeks in the nursing home, however, he became unrecognizable to those who knew him—listless, completely withdrawn, sleeping through the day and no longer taking care of his basic hygiene or dressing himself. He stopped eating because he refused to go to the dining hall, not wishing to eat and socialize with others. The medical staff

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1. “Transgender is a broad term that can be used to describe people whose gender identity is different from the gender they were thought to be when they were born.” Understanding Transgender People: The Basics, NAT’L CTR. FOR TRANSGENDER EQUALITY (July 9, 2016), https://transequality.org/issues/resources/understanding-transgender-people-the-basics [https://perma.cc/Q4FW-XUW9]. See also WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSGENDER, TRANSSEXUAL, AND GENDER-NONCONFORMING PEOPLE 97 (7th ed. 2012) [hereinafter STANDARDS OF CARE] (defining transgender as “a diverse group of individuals who cross or transcend culturally defined categories of gender. The gender identity of transgender people differs to varying degrees from the sex they were assigned at birth.”). Although the focus of this article is on transgender individuals, other individuals whose gender identity is non-conforming (people whose gender expression differs from conventional expectations of masculinity and femininity) and those who are gender fluid (a person who at any time may identify as male, female, other, or a combination of identities) should also be afforded the protections and advocacy described, and supported in their gender identity when faced with incapacity.

2. George’s story is based generally on a client the Author represented as an attorney in private practice.

3. STANDARDS OF CARE, supra note 1, at 96 (defining gender identity as “a person’s intrinsic sense of being male (a boy or a man), female (a girl or woman), or an alternative gender.”).
diagnosed him with “failure to thrive.”

However, a court had declared him to be legally incapacitated and unable to make decisions about where he lived. So, even had he been capable of arranging to move out of that nursing home, he did not have the legal authority to do so. Fortunately, the court had appointed him a suitable guardian—transgender-aware and -affirming. With the advocacy of a culturally responsive attorney, the guardian identified a transgender-affirming caretaker with a private residence and moved George there. After only a few weeks of true caretaking, he became himself again and thrived—eating, bathing, dressing with care in his own style, and making those around him laugh and become inescapably fond of him. It is profound that even when his memory and other cognitive capacities were severely impaired, his identity remained key to his survival. And when he was no longer invisible, he no longer needed to hide. Instead, he was acknowledged and known for who he was, and so he responded. It proved, in his case, to be the difference between life and death. After his move “home,” surrounded by people who knew and saw him, he remained engaged and himself through his final days. George was fortunate, but how many others in similar situations are failing to thrive or will be without advocacy and reform?

George’s story demonstrates what studies have already found: that feeling compelled to conceal one’s gender identity is significantly connected to depression for transgender people.7 Moreover, “[a] real concern of many transgender people is that they will be misgendered in the event that they become reliant on others for care, especially if those carers have not been accepting of their gender identity or are uninformed about such matters.”

A sample of poignant statements by elder transgender individuals illustrates their fears as they

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5. Statutory definitions of “incapacity” vary, see, e.g., COLO. REV. STAT. § 15-14-102 (5) (2016) (“‘Incapacitated person’ means an individual other than a minor, who is unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance.”).


contemplate a potential future when they are unable to make their own decisions or care for themselves and must rely on others, and may require institutional care. A 61-year-old transgender woman spoke of her anxiety about long-term care placement: “my biggest fear right now, [is] not having the freedom to control my dignity.”

Others have said that they worry about: “people . . . attempt[ing] to force me into being the wrong gender”; “[h]aving caregivers shave my face and put me in a dress because I have not had lower surgery”; “[h]aving genitals that don’t fit my external appearance and being abused, mistreated or neglected as a result”; “I have realistic concerns that I will not be treated as I would like when I am dependent on others”; “[t]he day I need a caregiver, I will implement my end of life suicide plan.”

A majority of LGBT people in mid-life anticipate receiving care that does not respect their gender identity. This concern is alarmingly realistic because the incidence of discrimination, ignorance, and bias towards transgender persons by those who serve the elderly is well documented.

Further, a study of the physical and mental health of transgender elders reports that they are more likely to experience poorer health outcomes, including mental and/or physical disabilities, than the non-transgender LGB elder population. Strikingly, the United States Transgender Survey (USTS), a national study of transgender and gender nonconforming persons, found that 39 percent of respondents reported a disability, compared to 15 percent of the U.S. population. Given those statistics, some transgender persons will likely require others to care for them at some point. One such disability that affects the general elderly population in disproportionate numbers is dementia. In its later stages, dementia leads to


10. ALZHEIMER’S AUGL., supra note 8, at 6.


12. Id. at 212.

13. ALZHEIMER’S AUGL., supra note 8, at 6.

14. Id. at 8.


profound incapacity that requires caretaking and, often, decision-making by
others who act as surrogates.

If a transgender elder with dementia-related incapacity requires a surrogate
decision-maker, that surrogate might not be knowledgeable about the
individual’s unique concerns, needs, and vulnerabilities related to their gender
identity. In addition, the surrogate might not be comfortable with or supportive
of the individual’s gender identity and its external expression. The attendant bias
could result in decisions that are harmful to the elder’s well-being. Such a
scenario would realize the fears expressed by transgender elders contemplating
incapacity and caretaking by others.

Accordingly, it is vital that a transgender elder who is incapacitated select
or be appointed a decision-maker who will treat them with dignity and intervene
when others do not; one who will affirm and assist them in maintaining their
identity, commit to educating themselves and others about transgender elders’
unique needs; and one who will make decisions as the transgender individual
would have when they had capacity. Equally vital is a decision-maker who will
advocate zealously on their behalf for transgender-affirming care with medical
and other service providers. Such an outcome requires both preventative and
proactive legal measures and reforms.

Professor Nancy J. Knauer has identified distinct issues impacting LGBT
people who require guardians.19 This Article addresses transgender individuals’
unique concerns and explores in depth the societal and legal challenges
transgender elders confront when faced with incapacity and guardianship.
Transgender elders must protect their self-determination, identity, and welfare
by predetermining a surrogate decision-maker prior to incapacity. One who will,
for example, make health care decisions that safely maintain their gender
identities by addressing their particular health care needs. Alternatively, if a
transgender elder becomes incapacitated and has not previously chosen a
surrogate decision-maker—and, upon incapacity, cannot express a preference for
who would serve in that role—a court should appoint a suitable decision-maker
to ensure the well-being of the elder. That is, one who is culturally
knowledgeable and respectful, an advocate, and who would make transgender-
affirming health care and other decisions on the elder’s behalf.

Part I of this article describes the current generation of transgender elders
through demographic data, health status, and health care concerns. Part II
identifies preventative legal measures that should be taken while a transgender
person has capacity. It notes the challenges in identifying an appropriate
surrogate decision-maker, and the need for protective language to be added to a
transgender individual’s health care power of attorney and advance directive to
honor their gender identities. Last, it presents the range of state standards of

19. Nancy J. Knauer, LGBT Issues and Adult Guardianship, in COMPARATIVE PERSPECTIVES ON
decision-making for health care agents appointed by individuals—from protective of the individual’s self-determination to insufficiently protective.

Part III provides an overview of a typical guardianship proceeding for adults alleged to be incapacitated. It discusses the need to identify the gender identity of persons for whom a guardian is to be appointed. Next, it proposes measures courts can take to identify and appoint transgender-affirming guardians, and recommends that the courts monitor the decisions made by the guardians on the transgender elder’s behalf. This Part concludes by identifying certain circumstances that require zealous advocacy by guardians, to protect the transgender individuals they serve.

I. A DEMOGRAPHIC PICTURE OF TRANSGENDER ELDERS, THEIR HEALTH, AND HEALTH CARE

The lack of empirical research regarding the current transgender elder population impedes an accurate description of this group. Similarly, it is challenging to reliably estimate the number of transgender elders in the United States because, among other factors, national population surveys omit questions about gender identity. And transgender individuals who are members of more than one marginalized group—such as transgender people of color—underreport. However, the most recent estimate is that transgender adults

20. GARY J. GATES, THE WILLIAMS INST., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 2-3 (2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf [https://perma.cc/3BRQ-DLNU]. See also Knauer, supra note 16, at 9 (“The absence of empirical evidence is particularly acute in the case of transgender elders.”). See generally MARK E. WILLIAMS, & PAT A. FREEMAN, TRANSGENDER HEALTH: IMPLICATIONS FOR AGING AND CAREGIVING 104 (2008) (“Scholarly research regarding aging and the transgender community remains very limited. Much of what has been written about transgender aging issues is again based on extrapolation from research examining heterosexual and LGB elders.”); Nancy A. Orel, Investigating the Needs and Concerns of Lesbian, Gay, Bisexual, and Transgender Older Adults: The Use of Qualitative and Quantitative Methodology, 61 J. HOMOSEXUALITY 53, 60 (2014) (“One of the most challenging tasks in conducting any research with LGBT older adults is actually being able to locate this population in order to recruit their participation for specific research projects.”).


22. JAIME M. GRANT, NAT'L GAY & LESBIAN TASK FORCE, OUTING AGE 2010: PUBLIC POLICY ISSUES AFFECTING LESBIAN, GAY, BISEXUAL AND TRANSGENDER ELDERS 138 (2010), https://static1.squarespace.com/static/566c7f0c2399a3bdabb57553/t/566cb65a25981d5723b7ed00/1449965146749/2010-NGLTF-Outing-Age-Report-Public-Policy-Issues-Affecting-LGBT-Elders.pdf [https://perma.cc/L65M-Z9Y9] (“[G]iven the fact that there is currently little to no research that samples transgender people in the general population, and the reality that highly vulnerable LGBT people—including a percentage of gender-nonconforming/trans people, people of color, immigrants, non-English speakers, undocumented and low-income people—are unlikely to identify as LGBT on even an anonymous
represent 0.6 percent of the United States’ population, or approximately 1.4 million persons. Moreover, although older adults are less likely than younger adults to identify as transgender, 0.5 percent (or 217,050 of adults) aged 65 and older identify as transgender. The number of older transgender adults is expected to increase—paralleling the growth of the American elder population in general. By 2030 one in five Americans will be 65 years of age or older, and those 85 or older will constitute a much greater percentage of the elder population by 2040.

This nation’s aging trend is significant, in part, because approximately one in ten people age 65 and older has Alzheimer’s dementia. That number increases to thirty-two percent of persons who are 85 or older. The risk for Alzheimer’s and other dementias rises significantly at age 65 and older. Accordingly, as the American population ages, the number of those with Alzheimer’s will mirror this growth. Among those with Alzheimer’s (and other types of dementias) will be elders who are transgender and have particular needs and vulnerabilities when they become incapacitated.

Compared to the general U.S. population, more American transgender adults are persons of color, primarily Hispanic or Latino and African-American. Notably, rates of Alzheimer’s and other dementias among Hispanic and African-American elders are significantly higher than those of their non-Hispanic white peers. Regarding general well-being, for transgender elders of color “the combination of anti-transgender bias and persistent, structural racism [is] especially devastating. People of color in general fare worse than white participants across the board, with African-American transgender respondents faring worse than all others ...”

questionnaire, we believe that the [estimated LGBT population figures] significantly undercount the community.”

23. FLORES ET AL., supra note 21, at 3.
24. Id. at 5.
25. Fredriksen-Goldsen et al., supra note 7, at 489.
27. ALZHEIMER’S ASS’N, 2018 ALZHEIMER’S DISEASE FACT AND FIGURES 17 (2018), https://www.alz.org/media/HomeOffice/Facts%20and%20Figures/facts-and-figures.pdf [https://perma.cc/WV9T-Z3FU] [hereinafter ALZHEIMER’S DISEASE] (“Alzheimer’s disease is a degenerative brain disease and the most common cause of dementia. Dementia is also caused by other diseases and conditions. It is characterized by a decline in memory, language, problem-solving and other cognitive skills that affects a person’s ability to perform everyday activities.”).
28. Id. at 17.
30. ALZHEIMER’S DISEASE, supra note 27, at 21 (“Most studies indicate that African-Americans are about twice as likely to have Alzheimer’s and other dementias as older whites. Some studies indicate Hispanics are about one and one-half times as likely to have Alzheimer’s and other dementias as older whites.”).
31. JAIME M. GRANT ET AL., WASHINGTON NAT’L CTR. FOR TRANSGENDER EQUALITY AND NATIONAL GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL
A. Health and Access to Health Care

“[T]ransgender individuals are among the most stigmatized and medically underserved groups, facing barriers at every phase of accessing care, from getting into the doctor’s office to paying for care.”32 Like the rest of the elder population, transgender elders use health care services more often than the younger population. But their access to and the sufficiency of those services is significantly compromised because of discrimination.33 In general, transgender individuals face an elevated risk of disability and have poorer health outcomes.34 Compared to 5 percent of the general U.S. population, 30 percent of respondents to a National Transgender Discrimination Survey (NTDS)35 reported significant difficulty concentrating, remembering, or making decisions due to a physical, mental or emotional condition.36

For transgender persons of color, racial discrimination is an additional barrier to health care access, and, as a group, they have even poorer health outcomes.37 Transgender persons with disabilities are particularly vulnerable, having higher rates of suicide attempts than the non-disabled transgender population.38 Notably, at 48 percent, the prevalence of depression is also significantly greater for transgender older adults39 compared to the approximately 1 percent rate of depression among the general older population.40 Depression is associated with cognitive decline and is a significant risk factor for dementia.41 In one study, depression almost doubled the risk of dementia and


33. INST. OF MED. OF THE NAT’L ACAD., supra note 15, at 273. See also, GRANT ET AL., supra note 31, at 72 (“Access to health care is a fundamental human right that is regularly denied to transgender and gender nonconforming people.”). See also, JAMES ET AL., supra note 18, at 93.

34. See, e.g., Fredriksen-Goldsen et al., supra note 7, at 494. See also JAMES ET AL., supra note 18, at 57 (“39% of respondents indicated that they had one or more disability . . . compared to 15% of the general population”); see also SERVICES & ADVOCACY FOR LGBT ELDERS (SAGE), SIX THINGS EVERY LGBT OLDER ADULT SHOULD KNOW ABOUT CARDIOVASCULAR DISEASE AND HYPERTENSION (2014), https://www.lgbtagingcenter.org/resources/pdfs/6thingscardiovascular.pdf [https://perma.cc/SHAW-53W6] (“LGBT older adults and people of color are especially vulnerable to cardiovascular disease and hypertension, due to poorer health outcomes.”).

35. GRANT ET AL., supra note 31.

36. GRANT ET AL., supra note 31, at 57.

37. GRANT ET AL., supra note 31, at 72.


Alzheimer’s. Given the higher rates of disability, depression, and poor health among transgender elders, it is reasonable to assume a corresponding higher rate of cognitive impairment, including dementia—a disease that is chronic and progressive and eventually results in incapacity and death.

Furthermore, addressing stigma and victimization against transgender persons is vital to decrease the health risks faced by that population. Significant threats to the health of transgender elders include fear of accessing health services and concealment of gender identity. Troublingly, the NTDS revealed that up to 24 percent of transgender respondents reported having been denied medical care due to their transgender or gender non-conforming status. Further, up to 28 percent had postponed medical care due to discrimination, and 33 percent delayed or did not seek preventive health care. The refusal to provide medical care is especially concerning because the rate of suicide attempts by those denied treatment was an alarming 60 percent. Again, transgender people of color experience more obstacles to health care access than their transgender peers. The [double] jeopardy of racism . . . [and] transphobia has been shown to create more significant barriers to care for LGBT people of color, including a higher percentage who are denied medical treatment.

A study on the health of transgender elders found evidence of anti-transgender bias in medical settings: one quarter or more of participants had encountered discrimination by a physician. Such discrimination results in transgender individuals hiding their gender identity from providers—which is a double threat to their health and welfare. First, fear-based identity concealment by transgender elders is linked to increased depression and stress. Second, they

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42. Id.
43. The Author found no research specifically on numbers of transgender elders with dementia or that included cognitive impairment among the disabilities cited. Research needs to be done to learn the extent of incapacity among transgender elders and the population-specific risk factors.
44. Fredriksen-Goldsen et al., supra note 7, at 488-90.
45. Id. at 7-8, 31.
46. GRANT ET AL., supra note 31, at 6, 73 (24 percent of transgender women and 20 percent of transgender men reported having been refused medical care.). See also id. at 73 (“Denial of health care and multiple barriers to care are commonplace in the lives of transgender and gender non-conforming people. Respondents in our study seeking health care were denied equal treatment in doctor’s offices and hospitals (24%), emergency rooms (13%), mental health clinics (11%), by EMTs (5%) and in drug treatment programs.”)
47. Id. at 76.
49. JAMES ET AL., supra note 18, at 10 (“One-third of those who saw a health care provider in the past year reported having at least one negative experience related to being transgender, such as being refused treatment, verbally harassed . . . having to teach the provider about transgender people in order to get appropriate care, with higher rates for people of color and people with disabilities.”)
50. GRANT, supra note 22, at 72.
51. GRANT ET AL., supra note 31, at 73. See also, JAMES ET AL., supra note 18, at 97 (noting that American Indian respondents (50 percent) reported the highest level of negative experiences, and rates among Middle Eastern (40 percent) and multiracial (38 percent) respondents were also higher).
52. Fredriksen-Goldsen et al., supra note 7, at 489.
53. Id. at 7.
are more likely to avoid seeking medical care at all—which includes not receiving necessary (for many) gender transition-related medical care.\textsuperscript{54} Moreover, transgender elders face bias on multiple fronts if they belong to other marginalized groups, such as racial and ethnic minorities.\textsuperscript{55} Further, if they are gay, lesbian, or bisexual, their sexual orientation compounds the potential for bias by health care providers and institutions.\textsuperscript{56} Disturbingly, when medical providers learn that a patient is transgender, the incidence of discrimination and abuse against them increases.\textsuperscript{57} This underscores the critical need for advocacy by surrogates in health care settings.

This population also faces the additional burden that medical providers generally are ignorant about transgender-specific health care needs. Fifty percent of NTDS and twenty-four percent of USTS respondents reported having had to teach their medical providers about transgender appropriate care.\textsuperscript{58} For example, medical providers may not realize that male-to-female transgender persons still need to be screened for prostate cancer and for breast cancer, and female-to-male transgender persons need pap smears to screen for cervical cancer. For transgender elders seeking health care, the necessity of educating their medical providers first raises issues of trust and competency regarding those providers. Second, it requires that they be medically knowledgeable consumers and assert their needs in a system that is often intimidating for the general population (the doctor knows best). It is troubling and unfair that they must meet this additional educational and advocacy threshold to get their health care needs met. Third, it is unrealistic for many who are already daunted by the potential for bias if they disclose their gender identity. These burdens compound the anxiety the transgender individual may feel about their health status generally, and any specific health conditions or concerns.

\textsuperscript{54} Id. at 10-11; see also, JAMES ET AL., supra note 18, at 98 (“[N]early one-quarter (23%) of respondents reported that they avoided seeking health care they needed in the past year due to fear of being mistreated as a transgender person.”); see also, Mark E. Williams & Pat A. Freeman, Transgender Health: Implications for Health and Caregiving, 18 J. GAY & LESBIAN SOC. SERV. 93, 98 (2008) (“[H]ormone therapy has the potential for many drug interactions . . . .”).

\textsuperscript{55} Sexual orientation is separate from gender identity and describes a person’s sexual and romantic attraction to other people. Transgender individuals may be heterosexual, lesbian, gay, bisexual, asexual or other.

\textsuperscript{56} “[M]any LGBT persons are also members of other groups that face substantial discrimination. These groups have had to navigate multiple instances of discrimination based on race, ethnicity, language, degree of physical ability, geographic location, etc.” Orel, supra note 20, at 15, 61. See also Guidelines for Psychological Practice With Transgender and Gender Nonconforming People, 70 Am. Psychologist 832, 838 (2015); Williams & Freeman, supra note 54, at 98 (“Transgender people of color may be the most at risk for inadequate health care and health insurance coverage due to compounding sources of stigmatization and discrimination related to racism, transphobia and poverty.”).

\textsuperscript{57} GRANT ET AL., supra note 31, at 75.

\textsuperscript{58} Id. at 76; JAMES ET AL., supra note 18, at 96.
B. Transgender-Specific Health Care

Typically, transgender persons lack access to care that is trans-affirmative. As the authors of the NTDS noted:

Access to health care is a fundamental human right that is regularly denied to transgender and gender non-conforming people. Participants in our study reported barriers to care whether seeking preventive medicine, routine and emergency care, or transgender-related services. These realities, combined with widespread provider ignorance about the health needs of transgender and gender non-conforming people, deter them from seeking and receiving quality health care.

Transitioning refers to the period when a person begins to live and present themselves according to their gender identity, rather than the gender they were assigned at birth. It often includes changing one’s appearance, dress, name, and pronouns. A majority of transgender people who transition seek transition-related treatment, primarily counseling and hormone therapy. Most individuals who transition gender do so when they are young or middle-age adults. Transitioning may also include other forms of physical modification or surgery. A review of the literature on transition-related hormone therapy reveals that patients who received trans-affirmative care experienced an improved quality of life, decreased gender dysphoria, and “a reduction in negative psychological symptoms.” That finding shows the importance of trans-affirmative care to the well-being of transgender individuals.

59. See Fredriksen-Goldsen et al., supra note 7, at 497; Guidelines for Psychological Practice, supra note 56, at 835; see also id. at 839 (“Although the landscape is beginning to change with the recent revision of Medicare policy and changes to state laws, many TGNC people are still likely to have little to no access to TGNC-related health care as a result of the exclusions in their insurance.”).
60. Grant et al., supra note 31, at 72.
61. James et al., supra note 18, at 40.
62. Id.
63. Grant et al., supra note 31, at 78 (noting that 84 percent of transgender respondents receive transition-related counseling, especially to qualify for transition-related medical care, and that 76 percent of transgender respondents accessed hormone therapy); see also id. at 180 (noting that hormone therapy is “[t]he administration of hormones to facilitate the development of secondary sex characteristics as part of a medical transition process. Those medically transitioning from female to male may take testosterone while those transitioning from male to female may take estrogen and androgen blockers.”).
65. Id. at 83 (“[A]lthough the majority reported wanting to ‘someday’ be able to have surgery. The high costs of gender-related surgeries and their exclusion from most health insurance plans render these life changing (in some cases, life-saving) and medically necessary procedures inaccessible to most transgender people.”).
67. Guidelines for Psychological Practice, supra note 56, at 846.
Transgender-specific, affirming medical care is necessary health care "for a vulnerable population that is uniquely dependent on medical treatments to realize their identities and to live healthy, authentic lives." For example, transgender elders who have received cross-gender hormones for long periods may be at increased risk of complications associated with other common health care problems of the elderly, such as cardiac or pulmonary conditions and drug interactions. Abruptly stopping hormones results in “a high likelihood of negative outcomes such as . . . depressed mood, dysphoria, and/or suicidality.” In addition, cross-gender hormone therapy may increase the risk of some chronic diseases, such as diabetes. Also, given the elevated prevalence of depression, disability, and suicide attempts by those who are disabled, it is essential to monitor the mental health status of elderly transgender individuals who are at risk and, if indicated, engage them in mental health treatment. Further, transgender persons need a mix of traditionally gender-specific disease prevention screenings.

C. Bias in Institutional Care

Older adults who are incapacitated, such as by advanced Alzheimer’s dementia, may require institutionalization at later stages of the disease when round the clock supervision and medical care become necessary. Similar to their experience with health care systems, transgender elders face bias and mistreatment in institutional settings.

Shelly, a trans woman has recently moved into a residential care facility. She has been on gender affirming hormones for decades. Since moving into residential care she has not received her hormones. Staff have noticed that Shelly has become depressed and withdrawn and she has begun saying that she wants to end her life.

A survey of LGBT elders placed in long-term care revealed that only 22 percent of respondents felt they could be open about their LGBT identities with facility staff, 89 percent predicted that staff would discriminate based on their

68. See Grant et al., supra note 31, at 85. See generally Standards of Care, supra note 1.
70. Williams & Freeman, supra note 54, at 98-99.
71. Standards of Care, supra note 1, at 68.
72. Grant, supra note 22, at 79.
73. Baker & Cray, supra note 69, at 5.
74. Alzheimer’s Austl., supra note 8, at 3.
sexual orientations and/or gender identities, and 43 percent reported instances of mistreatment.\textsuperscript{75}

Because of the incongruence between genital anatomy and the gender expression\textsuperscript{76} of many transgender older adults,\textsuperscript{77} when personal care such as bathing is required, concealing their nonconforming gender identity is not an option.\textsuperscript{78} Others may be outed due to the visible effects of surgery, such as scars. And institutional staff are largely uninformed about the particular needs of transgender residents.\textsuperscript{79} This may include not maintaining their gender expression, such as hairstyle, or dressing them in gender identity-incongruent clothing.\textsuperscript{80} Because the risk of discrimination by medical providers increases with the revelation of a patient’s transgender status, that threat likely similarly exists among care providers in institutional settings.

**II. ADVANCE PLANNING: PROTECTIVE LEGAL MEASURES TO BE TAKEN PRIOR TO INCAPACITY**

Due to the potential for anti-transgender bias and ignorance by caregivers, it is crucial for a transgender elder—while still retaining capacity—to select a transgender-affirming surrogate decision-maker who would make decisions upon that individual’s incapacity. Those decisions would honor the individual’s preferences and advocate for their welfare and transgender health care and other needs. This Part describes the difficulty in identifying suitable surrogate decision makers for a transgender person, and, accordingly, the preventative legal measures that transgender persons should take or be assisted with completing while having capacity. I provide a context for the importance of those preventative measures by noting the unreliable range of state standards of decision-making for health care agents appointed by individuals.

**A. Issues in Identifying a Suitable Surrogate Decision-Maker**

Transgender and LGB elders face particular challenges in finding culturally competent care and caregivers.\textsuperscript{81} Consequently, they can find it difficult to identify a decision-maker who will make transgender-affirming decisions in


\textsuperscript{76}. See GRANT ET AL., supra note 31, at 180 (“How a person presents or expresses his or her gender identity to others, often through manner, clothing, hairstyles, voice or body characteristics.”).


\textsuperscript{78}. JUSTICE IN AGING, supra note 75, at 15.

\textsuperscript{79}. GRANT, supra note 22, at 97.

\textsuperscript{80}. ALZHEIMER’S AUTH., supra note 8, at 4.

\textsuperscript{81}. GRANT, supra note 22, at 86.
their stead. Most elders who need caregivers, including decision-makers, look to their spouses and children to serve in those roles.\textsuperscript{82} However, LGBT elders are single and live alone at twice the rate of non-LGBT elders.\textsuperscript{83} “[T]hese realities place older LGBT people at high risk of finding themselves without care when they need it.”\textsuperscript{84} Further, the national transgender surveys found that relationships were ended for 27 to 45 percent of transgender adults who came out to their spouses or partners.\textsuperscript{85} The rate of relationship severance was considerably higher for male-to-female transgender individuals, than for female-to-male.\textsuperscript{86} And, significantly for purposes of this Article, those age 65 and older experienced rejection due to being transgender at two times the rate of younger transgender respondents.\textsuperscript{87}

Additionally, as noted, a minority of transgender adults are parents. Further, 21 percent of USTS respondents and 30 percent of NTDS respondents reported having been rejected by one or more of their children when they came out as transgender.\textsuperscript{88} The number rejected rose for those who lived as their preferred gender continuously and for those who had undergone medical treatment to aid their transition.\textsuperscript{89} Twenty-one percent of USTS respondents who were parents reported having been rejected by one or more of their children after coming out to them.\textsuperscript{90} Compared to female-to-male transgender parents, male-to-female transgender parents reported being rejected by their children significantly more often.\textsuperscript{91}

Yet, transgender elders are more likely than LGB adults to have children,\textsuperscript{92} and the National Transgender Discrimination Survey found that 70 percent of respondents with children continued to have relationships with them after coming out as transgender.\textsuperscript{93} Thus, in theory, this could mean that transgender adults who are parents—a minority—would potentially have a family member willing to serve as a guardian or power of attorney. However, this would only suffice if the child intended to be a transgender-affirming surrogate for their parent, and if the child would be the transgender parent’s preference to serve in

\textsuperscript{82} Services & Advocacy for LGBT Elders (SAGE), Social Isolation (2018), https://www.sageusa.org/your-rights-resources/social-isolation/ [https://perma.cc/YJW8-XAGD].
\textsuperscript{83} Id.
\textsuperscript{84} Grant, supra note 22, at 87.
\textsuperscript{85} Grant et al., supra note 31, at 95.
\textsuperscript{86} Grant et al., supra note 31, at 95; see also, James et al., supra note 19, at 67.
\textsuperscript{87} James et al., supra note 18, at 67.
\textsuperscript{88} Id. at 69; see also, Grant et al., supra note 31, at 99.
\textsuperscript{89} Grant et al., supra note 31, at 99 (noting that 37 percent of those who lived as their preferred gender all of the time reported being rejected, and 35 to 37 percent of those who had received medical interventions to transition).
\textsuperscript{90} Id. at 69; Grant et al., supra note 31, at 99.
\textsuperscript{91} Fredriksen-Goldsen et al., supra note 7, at 493.
\textsuperscript{92} Fredriksen-Goldsen et al., supra note 7, at 493.
\textsuperscript{93} Grant et al., supra note 31, at 88.
that role. Nonetheless, it does lend some hope to an otherwise seemingly bleak set of circumstances.

Further, identifying a suitable and willing surrogate decision-maker among other family members may not be an option because 57 percent of NTDS respondents and 44 percent of USTS respondents experienced family rejection when they came out as transgender.\(^94\) “[T]ransgender individuals, even more so than LGB individuals, face rejection from family and community members, who therefore may not be available or appropriate as caregivers.”\(^95\) A report on LGBT aging and health found that LGBT elders were much less likely to receive care from a family member than their non-LGBT peers, with only 3 percent receiving care from an adult child and only eight percent from another relative.\(^96\) Moreover, identifying an appropriate surrogate may be more difficult for transgender persons of color, who tend to be more socially isolated.\(^97\) Consistent with that finding, transgender persons of color, especially American Indian, report higher rates of family rejection.\(^98\)

Alternatively, for some transgender elders, an appropriate surrogate decision-maker might be identified from among their social network, if no family member was identified or preferred.\(^99\) But some studies have found that transgender adults have limited social support, even lower than LGB adults who do not identify as transgender.\(^100\) In contrast, another study found that they have larger social networks in comparison.\(^101\) In an adaptive response to rejection by biological family, close, family-like peer relationships are a common phenomenon among LGBT adults. These relationships are referred to as “[c]hosen families—single-generation cohorts of intimate friends and loved ones—[and] have long provided LGBT people a foundation for surviving intense societal neglect, stigmatization and abuse, thus supporting health and self-actualization across the lifespan.”\(^102\) For example, one study found that 42 percent of LGBT caregivers care for friends, neighbors, or others who are not members of their biological families.\(^103\) Another reported that 46 percent of LGBT elders are caregivers to members of their biological families or families

\(^94\) Id. at 7; JAMES ET AL., supra note 18, at 70.

\(^95\) Inst. of Med., supra note 77 at 267.

\(^96\) FREDRIKSEN-GOLDSSEN ET AL., supra note 17, at 45-47.

\(^97\) GRANT, supra note 22, at 92 (“Extrapolating from studies on poverty in the general population, it is likely that the risk of social isolation may be particularly high for . . . LGBT elders of color . . . .”).

\(^98\) GRANT ET AL., supra note 31, at 94. See also, JAMES ET AL., supra note 18, at 76.

\(^99\) FREDRIKSEN-GOLDSSEN ET AL., supra note 17, at 48 (“[A]mong LGBT older adults, friends play a much greater role in caregiving.”).

\(^100\) Fredriksen-Goldsen et al., supra note 7, at 494.

\(^101\) Elena A. Erosheva et al., Social Networks of Lesbian, Gay, Bisexual, and Transgender Older Adults, 38 RESEARCH ON AGING 98, 114-15 (2016).

\(^102\) GRANT, supra note 22, at 31.

\(^103\) Id. at 87. Although the study reported that research on caregiving by transgender elders is lacking. Id. at 89.
of choice.\textsuperscript{104} Therefore, a chosen family member may be identified to serve as a transgender-affirming surrogate decision-maker.\textsuperscript{105}

B. \textit{Appointing an Agent for Decision-Making: Powers of Attorney and a Guardian Preference}

A majority of transgender people reportedly do not complete advance health care directives and other estate planning, and do not have a power of attorney for health care decisions.\textsuperscript{106} In a national report on LGBT aging, only 37 percent of transgender elders had completed a durable power of attorney for health care—a much lower rate than their LGB peers.\textsuperscript{107} Transgender elders should protect their welfare and health by appointing a surrogate health care decision-maker and nominating a preferred guardian prior to incapacity.\textsuperscript{108} Those actions would prevent the imposition of a biased surrogate who could make potentially harmful decisions, or fail to make sound ones. A transgender advocate’s guide for advance planning goes further, by recommending specific language to be included in a transgender individual’s health care power of attorney.\textsuperscript{109} The suggested language grants the agent the authority to instruct health care providers to honor the transgender adult’s gender identity and expression:

The Agent has the authority . . . to direct any healthcare provider, medical staff, or other person to address me by my name and gender pronouns of choice, and to preserve to the fullest extent possible an appearance consistent with my gender identity.\textsuperscript{110}

In addition, advance health care directives, which instruct medical providers on the principal’s medical treatment preferences, can be written to include language instructing that medical care shall include, for example, continued cross-gender hormone therapy (as long as it is not medically contraindicated due

\begin{itemize}
\item \textsuperscript{105} See Knauer, \textit{supra} note 6, at 20. Knauer argues that guardian preference provisions in adult guardianship laws “should include non-marital partners regardless of gender and provide a mechanism for the recognition of chosen family.”
\item \textsuperscript{107} Fredriksen-Goldsen \textit{et al.}, \textit{supra} note 17, at 39 (The majority of LGBT respondents who had not completed a durable power of attorney for health care reported that “they do know someone that they would be comfortable with acting in this role.”)
\item \textsuperscript{108} Durable powers of attorney for health care remain valid when the principal (the person who appointed the agent) becomes incapacitated. See, e.g., N.M. STAT. ANN. § 24-7A-2(B) (West 1995).
\item \textsuperscript{110} Id. at 2.
\end{itemize}
to health conditions or status). Additionally, the transgender advocate’s guide suggests the following language:

During any period of treatment, if I am unable to personally maintain my [preferred gender] appearance, I direct [my physician and all medical personnel] to do so to the extent reasonably possible, irrespective of whether I have obtained a court-ordered name change, changed my gender [marker] on any identification document, or undergone any transition-related medical treatment.\textsuperscript{111}

Durable powers of attorney for health care should also be used to nominate the person a transgender elder would choose to serve as their guardian\textsuperscript{112} should the elder become legally incapacitated—i.e., determined by a court to be unable to manage her or his personal and financial affairs.\textsuperscript{113} However, completing durable powers of attorney for health care and property obviates the need, in many cases, for a guardianship because a surrogate can act for the principal without court appointment.\textsuperscript{114} Powers of attorney are also considered less restrictive alternatives to guardianship, because voluntarily granting another decision-making authority does not equate to a court’s involuntary removal of a person’s self-determination and fundamental civil liberties. Further, powers of attorney restrict the authority of the surrogate to powers specifically granted in the document.

\textsuperscript{111} Id. at 3.
\textsuperscript{112} Many advance directive forms include a provision designating who the principal wants to have appointed as their guardian if circumstances require one. See, e.g., N.M. STAT. ANN. § 24-7A-4, 5 (West 2015). See also Sally Hurme & Erica Wood, Introduction, 2012 UTAH L. REV. 1157, 1191 (“[A] guardian means a “person or entity appointed by a court with the authority to make some or all personal decisions on behalf of an individual the court determines lacks capacity to make such decisions.””).
\textsuperscript{113} Statutory definitions of incapacity vary by state, see, e.g., COLO. REV. STAT. ANN. § 15-14-102(5) (West 2016) (“‘Incapacitated person’ means an individual other than a minor, who is unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance.”); DEL. CODE ANN. tit. 12, § 3901(a)(2) (West 2014) (“[I]n the case where a guardian of the person is sought, such person is in danger of substantially endangering person’s own health, or of becoming subject to abuse by other persons or of becoming the victim of designing persons”).
\textsuperscript{114} But the scope of authority of powers of attorney do not include decisions regarding custody, placement or residence—authority that may be needed if the incapacitated elder has to be moved, and is unable to make or communicate an informed, safe and responsible choice of where to reside, including an institutional setting.
C. Statutory Standards of Health Care Decision-Making for Agents

“Health care agents . . . act as an extension of that individual’s voice.”115 This ethical surrogate decision-making standard ensures that an individual’s wishes, self-determination, and autonomy are preserved and protected. State laws that are protective of an individual’s wishes and autonomy require a health care agent to make decisions for the individual, called the principal, based on the decision the principal would have made had she retained capacity; or, for advance health care directives, based on the principal’s written instructions.116 For example, “An agent shall make a health-care decision in accordance with the principal’s individual instructions, if any, and other wishes to the extent known to the agent.”117 Only when the principal’s wishes are not known should an agent make decisions according to the agent’s subjective assessment of the principal’s best interests. And ethics require that the agent base a best interests evaluation on the values of the principal they serve, not on the agent’s values. Finally, the agent should be required to follow the principal’s values in determining their best interests, rather than merely “consider” them as allowed by states that require the agent to only contemplate the principal’s values.118

North Dakota’s statutory optional health care directive form is ideal for a transgender person to educate their agent about their concerns regarding health care, and to state their transgender-affirming preferences regarding health care decisions made for them by their agent.119 In the section of the form in which the principal gives the agent instructions for health care, there is a section titled, “These are my beliefs and values about [health care].”120 It begins with this statement: “I want you to know these things about me to help you make decisions about my health care,” then includes space to write “My goals for my health care” and “My fears about my health care.”121

Conversely, an advance directive statute that is not protective of a transgender person’s wishes regarding maintaining their gender expression (such as through continued cross-gender hormone therapy) provides: “[I]f the

116. See, e.g., N.J. STAT. ANN. § 26:2H-61(f) (West 1991) (“[T]he health care representative shall seek to make the health care decision the patient would have made had he possessed decision making capacity under the circumstances . . . .”); N.M. STAT. ANN. § 24-7A-2(E) (West 2016).
118. See, e.g., id. (“Otherwise, the agent shall make the decision in accordance with the agent’s determination of the principal’s best interest. In determining the principal’s best interest, the agent shall consider the principal’s personal values to the extent known to the agent.”) (emphasis added). See also CAL. PROB. CODE § 4684 (West 2000). But see N.J. STAT. ANN. § 26:2H-61(f) (West 1991) (not requiring the consideration of the principal’s values in a best interests decision-making determination).
119. N.D. CENT. CODE § 23-06.5-17 (West 2017).
120. Id.
121. Id.
principal’s wishes are unknown, [the agent shall make health care decisions] in accordance with the agent’s . . . assessment of the principal’s best interests and in accordance with accepted medical practice.”122 If an agent is uncomfortable with and biased against transgender identity and expression, then their subjective “assessment” of the principal’s best interests may not be transgender-affirming health care. For transgender persons who do not conform to society’s norms, a socially subjective standard of best interests is rife with the risk that what is best for that person is to conform. And, most concerning, “accepted medical practice” and providers are often biased against trans-affirmative treatment.

Statutory language that also risks exposing a transgender elder who is incapacitated to negligence by not maintaining their gender identity includes a Missouri statute that reads: “An attorney in fact who elects to act under a power of attorney is under a duty to act in the interest of the principal.”123 That language does not require the agent to follow the wishes and values of the transgender principal regarding the principal’s health care. Rather, the agent’s subjective assessment of the “interest” of the principal or the medical provider’s assessment of that interest could easily result in a failure to obtain or provide transgender affirmative medical care.

The above nonprotective statutory language illustrates the importance of a transgender adult carefully choosing a trans-affirmative health care agent to represent them. Further, written instructions to an agent to make transgender-affirming health care decisions are the best way to protect a transgender person’s health care needs. We place excessive and dangerous reliance on an agent’s ability and willingness to advocate for a transgender elder in a health care system often biased against transgender persons by not requiring an agent to make decisions based on the principal’s wishes. Also dangerous is requiring the agent to merely consider that person’s values, while making subjective decisions based on a best interests assessment. Similarly, if the agent is required to merely consider that person’s values while making subjective decisions based on a best interests assessment, then there is no actual protection of or deference to the transgender individual’s preferences, and the agent is free to substitute their values when making decisions.

III. PROTECTIVE LEGAL MEASURES UPON INCAPACITY

This Part first provides a brief overview of a typical adult incapacity guardianship proceeding. Second, I describe the complexity and necessity of identifying a suitable guardian for a transgender elder who is incapacitated, and who did not nominate a guardian prior to incapacity. I propose measures courts
can take to identify and appoint a transgender-affirming guardian. Third, I recommend ways courts can monitor the decisions made by the guardian on the transgender elder’s behalf to protect the elder’s well-being. Finally, I identify contexts that require zealous advocacy by guardians to protect the transgender individuals they serve.

A. Brief Overview of an Adult Guardianship Proceeding

A guardianship involves a court removing an incapacitated person’s fundamental civil rights to make their own decisions, such as medical treatment, and to manage their personal and, in some instances, their financial affairs. The individual’s rights are transferred to a third party, called a guardian. Because an individual’s essential autonomy is involved, considerable due process protection is most often required throughout the proceeding. The due process required varies from state to state based on each state’s adult guardianship laws, which are often found in the probate code. The protections typically include a clear and convincing standard of proof, a hearing, notice to the allegedly incapacitated person of the proceeding and the hearing, the right to a jury trial, representation of the individual by counsel, the right to attend all hearings, to examine witnesses, present evidence, and to appeal the court’s adjudication of incapacity.

The procedure begins with the filing of a petition or similar pleading, typically by the person seeking to be appointed as guardian, requesting the appointment and stating the nature and degree of the incapacity necessitating a guardianship. An evaluation of capacity by a qualified professional is often required to be submitted to the court to inform it of the allegedly incapacitated person’s functioning, abilities, and impairments. The state’s laws may provide for the appointment of a court investigator, usually called a court visitor, whose duties might include interviewing the proposed guardian and the allegedly incapacitated individual, reporting to the court on the allegedly incapacitated person’s needs, and making a recommendation regarding the suitability of the proposed guardian. At the hearing, the court considers the evidence to determine whether the individual is incapacitated, and, in a majority of states, the individual is represented by counsel. If the court finds that the individual is incapacitated to some or to a full extent, it will appoint a guardian. The court

127. See generally id.
may limit the guardian’s authority, if it determines that the individual is capable of exercising some rights, guided by the principle that the guardianship should be the least restrictive measure available and to ensure the individual as much autonomy as is safely possible.\textsuperscript{128}

\textbf{B. Identifying an Allegedly Incapacitated Person as Transgender}

If a transgender individual in a guardianship proceeding has lived openly as transgender, that person can be identified to the court as transgender at the start of the process through the initial court pleading which contains identifying information.\textsuperscript{129} Alternatively, the disclosure may occur during the process by the transgender individual’s voluntary disclosure, gender expression, or through investigation by their counsel or a court investigator.

The court and the counsel’s ability to learn of the individual’s gender identity may be complicated on several fronts. First, this generation’s transgender elders grew up during a time that, due to social stigma and the risk of hostility and a lack of acceptance, they were likely to hide their identities.\textsuperscript{130} Second, many elders do not identify or label themselves as transgender even after they transition.\textsuperscript{131} But they still have the same needs as those who do identify as transgender for trans-affirmative treatment and medical care. Third, “in the case of dementia, people progressively lose their most recent memories. For a transgender person this could mean only remembering living in another gender, including not remembering having had gender affirmation procedures or surgery.”\textsuperscript{132} Fourth, courts and attorneys are not likely to ask about or investigate an allegedly incapacitated elder’s gender identity because they assume that people conform to societal norms regarding gender identity. And the courts and attorneys may be biased against nonconforming gender identities. “Most transgender people have previously experienced misunderstanding or hostility from . . . the legal system.”\textsuperscript{133} The NTDS confirmed this disconcerting trend: “12% [of respondents were] denied equal treatment or harassed or disrespected by judges or court officials.”\textsuperscript{134} Eight percent were denied equal treatment by


\textsuperscript{129} Such as through information gathered and presented in the petition for the appointment of a guardian, the initial pleading that begins the guardianship proceeding.


\textsuperscript{131} WITTEN & EYLER, supra note 64, at 200.

\textsuperscript{132} Id.


\textsuperscript{134} GRANT ET AL., supra note 31, at 5.
legal services clinics and six percent were harassed or disrespected.\textsuperscript{135} “In the area of judges, courts, and legal services clinics, [male-to-female transgender respondents] reported consistently higher rates of mistreatment than [female-to-male transgender] respondents.”\textsuperscript{136} Considering the link between a transgender individual’s welfare and stigma free environments,\textsuperscript{137} it is critical that courts are a safe, unbiased environment for a person to reveal themselves, or to be known, as transgender. Fear-based concealment affects transgender persons’ emotional and mental health—already likely compromised by incapacity.

Therefore, as Knauer notes, it is essential to educate adult guardianship courts about nonconforming gender identities.\textsuperscript{138} Those courts could then serve a crucial protective role by requiring that the counsel and court visitor inquire into a person facing guardianship’s gender identity. If counsel or the court visitor learns that the person is transgender, the court must then ensure that the person’s best interests are served by appointing a suitable guardian.

\textbf{C. Appointing a Transgender-Affirming Guardian}

As is true with health care agents and care providers, a transgender-affirming guardian is essential to the health and well-being of transgender elders who are incapacitated. “[Transgender] people who receive social support about their gender identity and gender expression have improved [psychological and health] outcomes and quality of life.”\textsuperscript{139} As illustrated through George’s story at the beginning of this Article, such support is potentially lifesaving.\textsuperscript{140}

If a transgender elder who becomes incapacitated has not expressed in writing a preference regarding who would serve as their guardian, then a court is left to identify and appoint one. State laws typically prioritize family members to serve as guardians, but many also grant the court discretion to act in a person’s best interests in selecting a guardian.\textsuperscript{141} Because acceptance rather than stigmatization of transgender individuals is crucial to their health and emotional

\begin{footnotesize}
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\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} \textit{Id.} at 133.
\item \textsuperscript{137} Fredriksen-Goldsen et al., \textit{supra} note 7, at 497 (“[B]oth discrimination from health care providers and internalized stigma can exacerbate chronic stress . . . . Stigma reduction strategies for health care professionals and improved education about gender identity and aging are essential to reduce stigma and discrimination in health care setting for transgender older adults . . . . [C]reating environments whereby transgender older adults do not possess stigmatized identities and do not feel the need to conceal their gender identity is critically important.”).
\item \textsuperscript{138} Knauer, \textit{supra} note 19, at 312.
\item \textsuperscript{139} \textit{Guidelines for Psychological Practice}, \textit{supra} note 56, at 846.
\item \textsuperscript{140} See also Knauer, \textit{supra} note 6, at 14 (“As Dr. Melinda Lantz, chief of geriatric psychiatry at Beth Israel Medical Center in New York explains, closeted older LGBT people face ‘a faster pathway to depression, failure to thrive and even premature death.’”).
\item \textsuperscript{141} See, e.g., N.M. STAT. ANN. §§ 45-5-311(B)-(C) (West 2018).
\end{itemize}
\end{footnotesize}
welfare, courts must take steps to ensure that they appoint transgender-affirming guardians.

One way to accomplish this is for statutes to require representation by counsel for allegedly incapacitated adults—especially those, like transgender adults, who are among the most marginalized and vulnerable populations because of their nonconformance to societal norms. A majority of states, thirty-eight, mandate by statute that an allegedly incapacitated adult is entitled to counsel in guardianship proceedings. That counsel serves in one of two different lawyer roles. One role is as a standard zealous advocate—the role lawyers typically assume when representing their client’s position and defending their rights. The other role is as a guardian ad litem, whose duties may include presenting their client’s position on guardianship and preferences to the court, reporting to the court on the client’s best interests, advocating for their client’s best interests, and informing the client about their rights and explaining the proceeding.

Some statutes allow the allegedly incapacitated adult to have both a zealous advocate and a court appointed guardian ad litem. Because transgender elders face potential stigmatization and bias from the courts and have a potentially higher risk of an allegation, if not a finding, of incapacity, a zealous advocate is necessary. Moreover, I suggest that before a court appoints a guardian ad litem, if an alleged incapacitated individual is known to be transgender, or is revealed as such during the proceeding, the court needs to inquire into the proposed counsel’s attitude towards transgender persons, to ensure that attorney is not biased towards those individuals. And that the attorney must educate themselves about how to effectively engage with and represent their transgender client—a requirement for competent representation.

142. See, e.g., Guidelines for Psychological Practice, supra note 56, at 835 (“Respecting and supporting TGNC people in authentically articulating their gender identity and gender expression, as well as their lived experience, can improve TGNC people’s health, well-being, and quality of life.”). See also Knauer, supra note 6, at 14.
143. A.B.A. COMM’N ON LAW AND AGING, supra note 115.
144. See, e.g., ALASKA STAT. ANN. 13.26.246 (West 2018); D.C. CODE ANN. 21-2033(b) (West 2018).
145. See, e.g., N.M. STAT. ANN. § 45-1-201(A)(22) (West 2012) (defining a guardian ad litem as “a person appointed by the district court to represent and protect the interests of a minor or an incapacitated person in connection with litigation or any other court proceeding.”).
146. See, e.g., 755 ILL. COMP. STAT. 5/11a-10(a) (West 2018); TENN. CODE ANN. 34-1-107(d)(1) (West 2018) (“The guardian ad litem owes a duty to the court to impartially investigate the facts and make a report and recommendations to the court. The guardian ad litem serves as an agent of the court, and is not an advocate for the respondent or any other party.”).
147. NEB. REV. STAT. § 30-2619(b) (West 2013).
148. See, e.g., 755 ILL. COMP. STAT. 5/11a-10(a) (West 2018); MICH. COMP. LAWS ANN. § 700.5305(1) (West 2018); 33 R.I. GEN. LAWS § 33-15-7(c) (West 2017).
149. A.B.A. COMM’N ON LAW AND AGING, supra note 115.
In guardianship proceedings, a court visitor, investigator, or court representative are other potential sources for informing an allegedly incapacitated person about the proceeding. The court visitor is also a conduit to the court for that person to express their preferences, including who they wish to serve as their guardian. However, only 14 states require the appointment of a court visitor or similar appointee. It is critical that states require a thorough investigation of the allegedly incapacitated individual’s identity and corresponding needs either by a court visitor or a guardian ad litem. An inquiry that includes interviewing friends and family and reviewing medical records may be the only way to identify the gender identity of an alleged incapacitated individual.

Some states’ adult guardianship laws include a statement of the statute’s purpose. For example, some assert that the purpose is “to promote and to protect the well-being of the person” for whom guardianship applies. It is antithetical to that purpose to appoint an anti-transgender biased guardian for a transgender person. To accomplish the statute’s purpose, a court must inquire into whether the proposed guardian would promote and protect the transgender elder’s gender identity, and, thus, well-being. However, such an inquiry is not required by enough states. By contrast, a state may require merely that the guardian agrees to serve or is “eligible,” hardly a standard that ensures a transgender person’s well-being and best interests.

Some statutes, at least according to their language if not in practice, require or appear to require the court to vet the guardian’s willingness and intent to protect and promote the incapacitated person’s well-being. Those statutes state that the guardian should be “suitable,” “qualified,” or “appropriate” to serve in that role. An anti-transgender biased and non-affirming guardian would be inherently unsuitable, unqualified, and inappropriate to serve a transgender person.

Also, an investigation into a guardian’s suitability should not be left to the court’s discretion through language merely suggesting that the court may
consider it. Instead, there must be a procedural provision requiring that inquiry. Evidence of a guardian’s suitability should be a required finding by the court at the hearing on the appointment of the guardian. A finding establishes that evidence must be presented and assessed, and a critical burden of proof met. Typically, the evidentiary standard in guardianship proceedings is clear and convincing. That standard already pertains to required findings by the court that a person is indeed incapacitated, and that a guardianship is necessary. Under New Mexico’s adult guardianship statute, for example, the court is required to find that the proposed guardian is both qualified and suitable. Because no less than the physical, emotional, and mental health of a transgender individual is at stake, the court should be required by law, through a finding, to appoint a transgender-affirming guardian.

If their role is investigative, a guardian ad litem or a court visitor may be in the best position to inquire into and make a recommendation to the court regarding a proposed guardian’s suitability. Some states do require such an investigation and recommendation by one or both of those court appointees. However, most states do not provide for such appointees. Therefore, the burden falls on the court or the allegedly incapacitated person’s counsel to conduct a sufficient inquiry. Guardianship law reform efforts should press legislatures to adopt a required finding regarding a proposed guardian’s suitability, if not already mandated by the state’s laws. Arkansas’ guardianship statute is an example of expressly requiring proof of a guardian’s suitability, stating that before a court appoints a guardian it “must be satisfied that,” among other things, “the person to be appointed guardian is qualified and suitable to act as such.”

Evidence of suitability should include the proposed guardian’s willingness and intent to (1) learn about transgender identity, needs, vulnerabilities, including the harmful effects of stigma and increased risk of suicide attempts; (2) make gender identity-affirming decisions on behalf of the person under guardianship, such as obtaining transgender-specific health and mental health care; (3) support and enable the maintenance of the person’s gender expression, such as by providing gender-congruent clothing and enabling access to gender-affirming grooming services; and (4) educate and advocate for transgender-affirming care by medical and institutional providers. The court’s inquiry into whether the proposed guardian is suitable to serve must include whether the guardian intends to advocate for their well-being, including the ongoing maintenance of their gender identity and expression.

159. A.B.A. COMM’N ON LAW AND AGING, supra note 115.
161. See, e.g., Idaho Code Ann. §§ 15-5-315(1)-(2); NEB. REV. STAT. ANN. § 30-2619.03(4); N.M. STAT. ANN. § 45-5-303(E); N.D. CENT. CODE ANN. § 50.1-28-03(6)(j)(2).
162. ARK. CODE ANN. § 28-65-210(3) (West 2018). See also N.M. STAT. ANN. § 45-5-304(C)(5) (West 2009) (findings required by the court to appoint a guardian include that “the proposed guardian is both qualified and suitable.”).
If a court finds that the guardian does not intend to defend the person under guardianship’s gender identity and meet their corresponding needs, then the appointment should be denied and an alternative guardian must be identified and appointed.163 Regardless, but especially if no suitable alternative guardian is available, through its order appointing the guardian164 the court should include language requiring the guardian to educate themselves about transgender identity, needs, and vulnerabilities.165 The court should also order the guardian to make transgender-affirming decisions, such as transgender-specific health care decisions. The guardian can refer to the World Professional Association for Transgender Health standards of care,166 and identify transgender-safe and -affirming health care providers (such as through a local transgender advocacy group’s referral lists). If an institutional placement is necessary, the guardian must determine that any proposed institution is transgender safe and affirming before placement. Alternatively, the guardian must advocate for staff and providers to be trained in culturally responsive transgender care.

D. Ongoing Monitoring of the Guardianship by the Court

Guardianship procedure reform efforts emphasize the need for courts to continually monitor the welfare of the person under guardianship and the actions of the guardian. “The court should monitor the well-being of the person . . . on an ongoing basis, including, but not limited to: . . . ensuring the well-being of the person . . . improving the performance of the guardian, and enforcing the terms of the guardianship order.”167 A majority of state laws require a guardian to complete and file an annual report with the court, which maintains supervisory jurisdiction over adult guardianship cases.168 The reports typically require the guardian to describe the health status and welfare of the person under

163. Most state statutes have a provision prioritizing those who can be appointed as a guardian, including those closely related by blood or marriage. However, such statutes typically allow the court the discretion to appoint someone with a lesser priority based on various factors, including the allegedly incapacitated person’s best interests. See e.g., MINN. STAT. ANN. § 524.5-309(b) (West 2010); MONT. CODE ANN. § 72-5-312(3) (West 2009); NEB. REV. STAT. § 30-2627(c) (West 2015). Nancy Knauer has described well the LGBT-specific concerns regarding statutory provisions prioritizing who is eligible to be appointed as guardian. Knauer, supra note 19, at 300; 308-309.

164. Hurme & Wood, supra note 112, at 1200 (“[T]he court should issue orders that . . . maximize the person’s right to self-determination and autonomy.” However, courts should go further, and issue orders that maximize the person’s right to have their identity and dignity defended.)

165. Id. (“[T]he court . . . should ensure that guardians, court and court staff, evaluators, and others involved in the guardianship process receive sufficient ongoing, multifaceted education to achieve the highest quality of guardianship possible.”)

166. STANDARDS OF CARE, supra note 1.


guardianship and major decisions, such as medical and placement, made on their behalf. The reports are intended to allow the court to monitor the welfare of the person under guardianship.

Statutes should go further to protect an incapacitated individual’s self-determination and known preferences by requiring that the reports to the court include occurrences when the guardian has, for example, accessed transgender-specific health care on the incapacitated person’s behalf. Possible additions may include a sworn statement that the guardian made decisions, when possible, according to the person’s known preferences and in a gender-identity-affirming manner. The guardian could also be required to alert the court if the guardian encounters barriers, such as the denial of services, to transgender-specific, affirming health care or respectful institutional care. The court could then, for example, appoint a guardian ad litem to advocate for the person under guardianship.

Notably, Florida recently passed legislation that includes a provision suspending the decision-making authority of an agent appointed by an adult prior to incapacity through a power of attorney if it is proved during the guardianship proceeding that “[t]he agent’s decisions are not in accord with the alleged incapacitated person’s known desires.”169 Similar statutory provisions should be enacted to provide for the suspension of an appointed guardian’s authority upon a finding that the guardian has not made transgender-affirming decisions in accord with the person under guardianship’s known preferences. The court could then either remove the guardian and transfer the guardianship to another person or hold the guardian accountable to make decisions that conform to the transgender person’s preferences, such as through a detailed court order or by setting ongoing status hearings to monitor the guardian’s conduct.

E. Advocacy by the Guardian

As discussed above, anti-transgender bias by medical and institutional providers requires that the guardian be a zealous advocate for the transgender person who is incapacitated—and so is presumably unable to advocate adequately for themselves. The guardian should be aware that “LGBT older adults who came of age before the gay liberation movement of the 1970s have lived largely in the context of extremely hostile social, medical and mental health systems, making self-advocacy within aging services agencies or institutional settings overwhelmingly difficult for many of these elders.”170 However, the guardian must also respect and protect a transgender person’s wish for privacy,

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169. FLA. STAT. ANN. § 744.3203 (West 2015).
170. GRANT, supra note 22, at 16.
if expressed or known, and not “out” them regarding their gender identity unless it is necessary for their health and welfare.

Under the standards of practice required of guardians by the National Guardianship Association, guardians must “identify and advocate for the person’s goals, needs, and preferences.” Transgender incapacitated adults have ongoing health care needs. For example as noted, discontinuing hormone treatment can be harmful to the health of those who have taken hormones long term. Moreover, “[c]ollaboration across disciplines can be crucial when working with [transgender and gender nonconforming] people because of the potential interplay of biological, psychological, and social factors in diagnosis and treatment.” Accordingly, a guardian should advocate for and coordinate trans-affirmative care across disciplines to best meet the person under guardianship’s needs.

Because a majority of transgender people have to teach their medical providers about transgender-specific care, the guardian must first educate themselves in order to educate the providers about those needs. Next, because transgender individuals are at risk of being refused care and many have experienced discrimination by care providers, guardians must advocate for access to treatment, and for respectful and nondiscriminatory care by providers. That means, for example, attending all medical appointments and regularly monitoring the care by institutional providers, such as by participating in treatment team meetings and reviewing the institution’s records on the resident.

Further, to address the fears of transgender adults when contemplating institutionalization, state laws dictating the duties of a court-appointed guardian should include a provision like the progressive and protective measure recently passed in Florida which requires a guardian to “[a]dvocate on behalf of the ward in institutional and other residential settings ....” That advocacy should include that institutional staff be trained regarding knowledge and understanding of transgender persons and caring for them effectively. Guardians must exhibit heightened scrutiny and protectiveness when serving transgender persons of

172. INST. OF MED., supra note 77, at 265.
173. GUIDELINES FOR PSYCHOLOGICAL PRACTICE, supra note 56, at 850 (internal citations omitted).
174. FLA. STAT. ANN. § 744.361(13)(g) (West 2015). Other states should follow Florida’s lead by recognizing that guardians have a duty to advocate on behalf of their protected persons (including those who are transgender) in institutional settings. Until more states enact similar advocacy measures, transgender persons in those settings are at risk of harm due to bias.
175. Transgender advocacy groups and resource centers, such as the Transgender Resource Center of New Mexico, offer free transgender cultural competency or literacy trainings to organizations and groups and the Transgender Training Institute. Additionally, online trainings are available from various national transgender advocacy organizations such as webinars by the Transgender Health, NAT’L LGBT HEALTH CTR. (2018), https://www.lgbthealtheducation.org/topic/transgender-health/ [https://perma.cc/XSM2-J776].
color because they are most at risk of discrimination and mistreatment by institutional care providers.

**CONCLUSION**

Transgender elders who are incapacitated are particularly vulnerable to harm if a non-transgender-affirming guardian is appointed to make decisions for them. Before the courts become involved, transgender individuals can take steps, described in this Article, to protect themselves from an unsuitable surrogate. If a court becomes involved, it can help to ensure that a transgender person is served by a surrogate who will protect their health, welfare, and identity. Courts can, therefore, address the realistic and profoundly disturbing concern of many aging transgender individuals who fear becoming dependent and being denied dignity, respect and, for some, losing the will to live.
\textbf{Wal-Mart v. Dukes: The Feminist Case Against Individualized Adjudication}

Lisset M. Pino†

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\textbf{INTRODUCTION}


† Yale Law School, J.D., expected 2020; Cornell University, B.A., 2017. I would like to thank William Eskridge for inspiring me to write about feminist theory in civil procedure. Many thanks also to Isabelle Hanna, Celina Scott-Büchler, and Jennifer Mosquera for reading early drafts of this Comment, and to the Yale Journal of Law & Feminism editing team.
encouraging women who had been sexually harassed or assaulted to tweet #MeToo, this movement acquired a name. The #MeToo movement has sparked widespread story-sharing on social media, and (to some degree) has resulted in the firing or forced resignations of powerful men in the entertainment industry and in politics. #MeToo has even implicated the judiciary, as evidenced by the sexual harassment scandal that preceded the resignation of former Ninth Circuit judge Alex Kozinski. The #MeToo movement almost certainly increased the weight given to the sexual assault allegations that arose during Justice Kavanaugh’s confirmation.

56-FQCR]. Larry Nassar is reported to have victimized at least 332 women. Rex Santus, Larry Nassar’s 332 Victims Are Getting $425 Million from Michigan State, VICE (May 16, 2018), https://news.vice.com/en_us/article/9k8yp/larry-nassars-332-victims-are-getting-dollar425-million-from-michigan-state [https://perma.cc/HS6N-JPB4]. Though most of these allegations have involved male sexual violence against women, it is important to acknowledge that not all the survivors who have spoken out since the rise of #MeToo are women. Kevin Spacey has been accused of sexual assault and other types of sexual misconduct by fifteen men. Maria Puente, Kevin Spacey Scandal: A Complete List of the 15 Accusers, USA TODAY (Nov. 7, 2017), https://www.usatoday.com/story/life/2017/11/07/kevin-spacey-scandal-complete-list-13-accusers/835739001/ [https://perma.cc/RRU8-CFCZ].


However, only a few of the most prominent #MeToo cases—involving Larry Nassar, Bill Cosby, and Harvey Weinstein—have resulted in legal action.

These recent examples demonstrate the importance (and powerful impact) of scores of women acting in numbers. They can also help contextualize a recent, unsuccessful women-led movement—the class action brought by 1.5 million female Wal-Mart employees that was denied certification in Wal-Mart v. Dukes. Unsurprisingly, much of the literature on Dukes has focused on evaluating the decision from a jurisprudential standpoint. However, Dukes also illustrates the normative implications of the American legal focus on individualized (rather than collective) adjudication.

As Frances Olsen points out, classical liberal thought has tended to structure thinking into seemingly opposing dichotomies, many of which are gendered: “rational/irrational,” “objective/subjective,” and “principled/personalized” are only a few. One dichotomy that is particularly prominent in discussions of civil procedure is the “individual/group” distinction: discussions of due process often focus on individualizing trials in order to provide persons an opportunity to be heard. In keeping with this traditional understanding, Justice Scalia’s majority


11. As of Feb. 1, 2018, Wal-Mart’s legal name has been changed to Walmart. Walmart Changes its Legal Name to Reflect How Customers Want to Shop, WALMART (Dec. 6, 2017), https://news.walmart.com/2017/12/05/walmart-changes-its-legal-name-to-reflect-how-customers-want-to-shop [https://perma.cc/EXRS-6JFJ]. However, since Dukes uses Walmart’s former legal name, this Comment refers to Walmart as “Wal-Mart” for the sake of clarity.


opinion in *Dukes* described class actions as “‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’”

The “usual rule” of individualized adjudication, however, makes it much more difficult for the American legal system to adequately evaluate claims of widespread discrimination. When such claims arise from the behavior of numerous bad actors operating within an institutional context, the adjudicative focus on individuality tends to obscure how oppressive institutional dynamics have made the discrimination possible. These dynamics often only become evident when individual experiences are considered in the aggregate, in two key ways. First, as the #MeToo movement shows, aggregation of claims results in *believability*: one woman accusing a powerful man of sexual misconduct can be easily dismissed, but hundreds of accusers are more difficult to ignore. Second, aggregating claims can often demonstrate the *institutional dimension* of discrimination, proving that discriminatory behavior is not due to a single bad actor, but rather has been enabled by institutional structures that must be changed to prevent the behavior from recurring.

A case brought by one individual against another, then, simply cannot carry the “unique and powerful” symbolic importance of a class action. As the feminist cry that “the personal is political” demonstrates, experiences that appear singular are often manifestations of widespread systemic oppression. As Patricia Hill Collins wrote, “[w]hile my individual experiences with institutionalized racism [as a black woman] will be unique, the types of opportunities and constraints that I encounter on a daily basis will resemble those confronting African Americans as a group.” As a legal mechanism that facilitates the aggregation of claims, class actions have incredible potential for imbuing individual, personal harms with group, political meaning.

Some of the benefits of class actions have long been recognized: they increase access to the courts, making actions more efficient and cheaper. Moreover, there is currently no other practicable way for very large groups to resolve issues in a single litigation. But, as the above discussion illustrates,


18. On the origins and significance of this phrase, see KERRY T. BURCH, DEMOCRATIC TRANSFORMATIONS: EIGHT CONFLICTS IN THE NEGOTIATION OF AMERICAN IDENTITY ch. 8 (2012).


21. The federal rules gives federal courts the ability to break up one case into multiple actions “[f]or convenience, to avoid prejudice, or to expedite and economize.” FED. R. CIV. P. 42(b). A judge faced with a large group of plaintiffs who were not united as a class would likely exercise this power. Moreover, even smaller numbers of plaintiffs might struggle to bring collective actions under Rule 20(a)(1), which allows Permissive Joinder of Parties. *Id.* 20(a)(1). While there is technically no limit on how many
class actions are also uniquely able to increase certain plaintiffs’ believability, and the ability to uncover and provide redress for the institutional dimensions of discrimination in a single action. By heightening the “commonality” requirement for class action certification, then, *Dukes* has not merely decreased access to the courts in certain cases. It has also made it exponentially more difficult for the legal system to evaluate and redress claims brought by groups that are negatively impacted by institutional discrimination.

Part I of this Comment explains how *Dukes* raised the bar that plaintiffs must meet in order to have “commonality” for the purposes of class certification. Part II illustrates the stakes of this discussion by describing a class action that would be barred under *Dukes’* heightened commonality standard, and arguing that alternative legal avenues fail to similarly increase the plaintiffs’ believability and ability to show the institutional dimensions of bad behavior as much as a class action. This Part focuses on an ongoing harm committed against a particularly vulnerable group of women: the federal government’s consistent under-investigation of sexual assaults against Native American women who live on reservations. Part III discusses the limited legal avenues for collective adjudication of gender discrimination claims post-*Dukes*.

I. BACKGROUND: *WAL-MART V. DUKES*

Federal Rule of Civil Procedure 23(a) establishes several prerequisites for class action certification, one of which is that “there are questions of law or fact common to the class.”22 Prior to *Dukes*, lower courts disagreed over the application of the commonality requirement in cases where employees claimed that their employers’ policy of allowing managers to base decisions (such as hiring or promotion) on their subjective evaluations of employees facilitated or caused discrimination by allowing managers to abuse their authority.23 The Supreme Court had last addressed the commonality requirement in *General

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22. *Fed. R. Civ. P. 23(a)(2).* The other requirements are numerosity, typicality, and adequacy. *See id.* (“One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.”).

Telephone Co. of the Southwest v. Falcon.\textsuperscript{24} In a famous footnote, the Falcon Court suggested that commonality could be satisfied by “[s]ignificant proof that an employer operated under a general policy of discrimination . . . [that] manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.”\textsuperscript{25}

Without additional guidance on this notoriously ambiguous footnote,\textsuperscript{26} the lower courts split: some courts found that this type of subjective decisionmaking policy supported a finding of commonality, while others concluded that the inherently individual application of subjective decisionmaking meant putative class members could not meet the commonality requirement for allegations of discriminatory employment practices.\textsuperscript{27}

Wal-Mart v. Dukes entered this contested landscape as the largest employment class action lawsuit in American history.\textsuperscript{28} Female employees\textsuperscript{29} claimed that Wal-Mart’s policy of subjective decisionmaking by individual store managers denied women equal pay and promotions in violation of Title VII.\textsuperscript{30} Because Wal-Mart was aware that its policy disadvantaged female employees, the plaintiffs argued that its refusal to limit managers’ authority constituted disparate treatment under Title VII of the Civil Rights Act of 1964.\textsuperscript{31} Plaintiffs

\textsuperscript{24} 457 U.S. 147 (1982).
\textsuperscript{25} Id. at 159 n.15.
\textsuperscript{26} See, e.g., Klein, supra note 23, at 138 (referring to Falcon’s footnote fifteen as “oracular”).
\textsuperscript{27} Id. at 133-34.
\textsuperscript{29} This Comment focuses primarily on the gendered nature of the discrimination against the female employees in Wal-Mart. However, it is important to acknowledge that this discrimination was facilitated by the fact that female Wal-Mart employees were disadvantaged along other axes of oppression. For instance, named plaintiff Betty Dukes, a black woman, was described by her niece upon her death as “a voice fighting for equal rights and against racial and gender discrimination in the workplace.” Michael Corkery, Betty Dukes, Greeter Whose Walmart Lawsuit Went to Supreme Court, Dies at 67, N.Y. Times (July 18, 2017) (emphasis added), https://www.nytimes.com/2017/07/18/business/betty-dukes-dead-walmart-worker-led-landmark-class-action-sex-bias-case.html [https://perma.cc/RDX6-YMBX]. Named plaintiff Cleo Page, also a black woman, described her struggle to remain afloat financially after being unfairly passed over for promotions in favor of male applicants: without savings, she lost her house and the foster children for whom she had been caring. Ritu Bhatnagar, Dukes v. Wal-Mart as a Catalyst for Social Activism, 19 Berkeley Women’s L.J. 246, 246-47 (2004). Dukes’ and Page’s experiences are not unique: Wal-Mart workers are overwhelmingly low-income—50 percent of Wal-Mart’s workforce is composed of part-time workers, who receive lower pay and fewer benefits than full-time workers. Nandita Bose, Half of Walmart’s Workforce are Part-Time Workers: Labor Group, Reuters (May 25, 2018), https://www.reuters.com/article/us-walmart-workers/half-of-walmarts-workforce-are-part-time-workers-labor-group-idUSKCN1JQ295 [https://perma.cc/RU92-XXLB]. Wal-Mart employees are among the largest groups on food stamp subsidies. Id. According to Wal-Mart, 43 percent of its domestic “associates” are people of color and 55 percent are women. (Wal-Mart does not break down racial statistics by gender). WALMART, Road to Inclusion: 2017 Culture, Diversity, and Inclusion Report 10, https://cdn.corporate.walmart.com/110d/f9289df649049a38c14bdea2b99/2017-cdi-report-web.pdf [https://perma.cc/T3D6-7EZZ].
\textsuperscript{30} Dukes, 564 U.S. at 343. The Court in Dukes also held that claims where monetary relief is not incidental to the injunctive or declaratory relief could not be certified under Rule 23(b)(2), id. at 360, but that portion of the holding is not relevant to this discussion. For more on this aspect of the opinion, see Malveaux, supra note 17, at 45-52.
\textsuperscript{31} Dukes, 564 U.S. 338 at 345 (citing 42 U.S.C. § 2000e-2(a)).
further claimed that “a strong and uniform ‘corporate culture’” was part of what allowed bias against women to infect managers’ decisionmaking, “thereby making every woman at the company the victim of one common discriminatory practice.”

In an opinion by Justice Scalia, the Dukes Court held that the plaintiffs failed to provide “significant proof” that Wal-Mart “operated under a general policy of discrimination.” Plaintiffs had provided the testimony of a sociological expert that conducted a social framework analysis of Wal-Mart’s culture, but the Court found the testimony insufficiently robust, and potentially inadmissible. The Court was similarly unconvinced by statistics showing gender disparities in pay and promotions, as well as 120 affidavits by female Wal-Mart employees reporting discrimination.

The Court further reasoned that Wal-Mart’s choice to allow managers’ subjective decisionmaking over employment matters was “just the opposite of a uniform employment practice that would provide the commonality needed for a class action,” since it was “a policy against having uniform employment practices.” Under a subjective decisionmaking system, the Court wrote, “demonstrating the invalidity of one manager’s use of discretion would do nothing to demonstrate the invalidity of another’s,” since each individual manager was entirely free to make decisions based on (1) sex-neutral performance-based criteria, (2) general aptitude tests or educational achievements that produce disparate impact, or (3) intentional discrimination against women. In short, the Court held that “[m]erely showing that Wal-Mart’s policy of discretion had produced an overall sex-based disparity” was insufficient to meet Rule 23(a)(2)’s commonality requirement.

In explaining its reasoning, the Court noted that the commonality requirement is met when claims . . . depend upon a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

32. Id.
33. Id. at 353.
34. Id.
35. Id. at 358. As Malveaux points out, “by analyzing each type of evidence in isolation to determine whether it provided ‘significant proof’ of a general discriminatory policy, the Court diminished the overall import of plaintiffs’ evidence.” Malveaux, supra note 17, at 39 (emphasis added). For a critique of the majority’s treatment of the plaintiffs’ evidence, see id. at 39-43.
37. Id. at 356.
38. Id. at 357.
39. Id. at 350.
In other words, class certification depends not on “the raising of common ‘questions,’” but on “the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.”\textsuperscript{40} This holding has been roundly criticized for incorporating the Rule 23(b)(2) “predominance requirement” into the 23(a)(2) commonality analysis.\textsuperscript{41}

Some commentators have nevertheless interpreted \textit{Dukes} narrowly as holding that “a system of delegated decision-making that produces large statistical disparities cannot furnish the requisite commonality to support a class action, even where the corporate culture is infected by gender stereotypes.”\textsuperscript{42} However, the principle that commonality exists only when the outcome of a class action turns on claims having the same answers (i.e., is “capable of a classwide resolution”),\textsuperscript{43} has implications that reach far beyond subjective decisionmaking class actions.

As Roger Reinsch and Sonia Goltz have noted, \textit{Dukes}’s heightened commonality requirement is most likely to negatively impact cases that involve second-generation discrimination.\textsuperscript{44} Unlike first-generation discrimination, which “involves easily recognizable, blatant discrimination,” such as “the exclusionary sign on the door,”\textsuperscript{45} second-generation discrimination “cannot be reduced to a single, universal, or simple theory of discrimination.”\textsuperscript{46} Second-generation discrimination is “subtler and involves patterns of interaction that exclude certain groups over time... [It is] structural, situational, and hard to identify.”\textsuperscript{47} The company policy the plaintiffs challenged in \textit{Dukes} is a “classic”\textsuperscript{48} example of second-generation discrimination.

It is highly unlikely that \textit{Dukes} will make cases involving first-generation discrimination more difficult. Imagine, for instance, a company that sends out a memo telling all supervisors that women could not be promoted to managerial positions because they are too emotional. Adjudicating these employees’ claim of discrimination would clearly involve a common contention the truth or falsity of which would resolve an issue that is central to each of the claims in one stroke.\textsuperscript{49}

\textsuperscript{40} Id. (quoting Richard A. Nagareda, \textit{Class Certification in the Age of Aggregate Proof}, 94 N.Y.U. L. REV. 97, 132 (2009)).


\textsuperscript{42} Tippett, supra note 28, at 434.

\textsuperscript{43} \textit{Dukes}, 564 U.S. 338 at 350.


\textsuperscript{45} Id. at 281 (quoting Susan Sturm, \textit{Second Generation Employment Discrimination: A Structural Approach}, 101 COLUM. L. REV. 458, 473 (2011)).

\textsuperscript{46} Id. at 281.

\textsuperscript{47} Id.

\textsuperscript{48} Id.

\textsuperscript{49} \textit{Dukes}, 564 U.S. 338 at 350.
Second-generation discrimination is more subtle and likely to manifest in a variety of different ways, making it unlikely that such claims will meet Dukes’s stringent commonality standard. And yet, as the next Part argues, it is claims of second-generation discrimination that benefit most from aggregation. Alone, a claim of second-generation discrimination can be easily dismissed as caused by other factors, such as singular bad actors or the existence of larger societal factors disadvantaging a particular group. However, when numerous claims of second-generation discrimination are placed together, it becomes clear that the problem is not only driven by a few bad actors, but also enabled by institutional structures.

II. THE IMPOSSIBLE CLASS ACTION

Consider the problem of sexual violence against Native American women on reservations. According to the Department of Justice, 35 percent of American Indian and Alaska Native women have experienced sexual violence with penetration. Native women are thus 1.7 times more likely than non-Hispanic White women to be victims of sexual violence. The complicated legal relationship between the U.S. government and Native tribes means that the task of prosecuting sexual assaults on reservations typically falls on the federal government, and there is some evidence suggesting that the federal government systematically under-enforces sexual assault laws on Native American reservations. Federal prosecutors decline to prosecute 26 percent of cases filed in federal court, but decline to prosecute sexual assaults against Native women on tribal reservations 65 percent of the time. This is likely because federal agents are reluctant to take on such cases. As former U.S. Attorney Margaret Chiara observes, Assistant U.S. Attorneys “want to do big drug cases, white-collar crimes, and conspiracy,” while federal judges “look at these Indian Country cases and say, ‘What is this doing here? I could have stayed in state court if I wanted this stuff.’”

Imagine that Native women who have been victims of rape wish to sue the federal government for consistently failing to adequately investigate sexual assault on the reservation in which they live. Such a lawsuit would not be entirely unprecedented—in *Cole v. Oravec*, the families of two Native murder victims sued an FBI investigator for consistently under-investigating murder cases.

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51. Id.
53. Id. at 512
54. Id. at 511.
involving Native American victims.\footnote{465 Fed. Appx. 687 (9th Cir. 2012). The suit was a Bivens action seeking damages for equal protection violations under the Fifth Amendment Due Process Clause. Id. at 688. For a detailed description of the case, see Adrian Jawort, Parents in Crow Reservation Death Still Seeking Justice, LAST BEST NEWS (Jan. 19, 2017), http://lastbestnews.com/2017/01/parents-in-crow-reservation-death-still-seeking-justice/ [https://perma.cc/GY2P-YYB9].} Because a class action is more efficient and less expensive than individual lawsuits, the impacted women seek 23(b)(2) certification.\footnote{Their attorney decides the predominance requirement in Rule 23(b)(3) is best avoided—if the class action is won, monetary damages can be sought on a case-by-case basis.}

After the Supreme Court’s decision in \textit{Dukes}, it is difficult to see how such a class could ever be certified. \textit{Dukes} construes the 23(a)(2) requirement that there be “questions of law or fact common to the class” extremely narrowly. Since the women would likely be alleging discriminatory under-investigation by several officials (much as the women in \textit{Dukes} alleged employment discrimination by different supervisors), the class would likely fail the commonality requirement. In a case such as this, as in \textit{Dukes}, each official could argue that their behavior was motivated by permissible (rather than discriminatory) reasons. Thus, as the Court held in \textit{Dukes}, a class-wide proceeding could not generate a “common answer.”\footnote{Id. (quoting Richard A. Nagareda, \textit{Class Certification in the Age of Aggregate Proof}, 94 N.Y.U. L. REV. 97, 132 (2009)).}

Certainly, one of the impacted Native women could file a lawsuit asserting the same claims against an individual investigator, as occurred in \textit{Oravec}. However, the focus of the trial would center on the decisionmaking of the specific federal investigator that investigated the woman’s claim. Such a case likely would not bring to light any evidence that the federal government as an institution consistently fails to adequately investigate and prosecute sexual assault on Native American reservations.

Sexual assaults against Native women in the U.S. have been committed with impunity for centuries, and there is great historical significance in “the ongoing rape [of Native women] and [the] colonization of their tribes.”\footnote{Owens, supra note 52, at 503.} One lawsuit against a single federal prosecutor for failing to pursue a Native woman’s rape case can be dismissed as an isolated instance of discrimination, or as justified by the facts of that woman’s assault. In contrast, a class action lawsuit brought by Native women against the federal government would not only make the problem of systematic under-enforcement of their sexual assaults impossible to ignore, but also situate this problem within the broader history of American exploitation of and violence towards Native tribes.

By privileging individual over group adjudication, \textit{Dukes}’ heightened commonality requirement has stripped class actions of much of this symbolic potential, and reduced their ability to hold institutions (rather than merely individuals) accountable for discriminatory conduct. Thus, \textit{Dukes} greatly
abridged one mechanism through which marginalized groups could assert their rights, limiting the degree to which collective storytelling can challenge the “normal,” “objective,” “individualistic” focus of adjudication.

III. MOVING FORWARD: OPTIONS FOR COLLECTIVE ADJUDICATION POST-

DUKES

Commentators are split on the real-world impact of Dukes. On the one hand, Title VII “pattern or practice claims” like that brought in Dukes can still be brought by the Equal Employment Opportunity Commission, which is exempt from class action certification requirements. Moreover, class actions the size of Dukes are extremely rare. On the other hand, the plaintiffs’ theory of liability in Dukes is fairly common, raising concerns that judges may use Dukes to require “a stronger causal connection between an employer’s discretionary decisionmaking policy and a disparity or adverse employment action,” making it more difficult for employees relying on this theory to act collectively.

While Dukes would seem to make it quite difficult to seek redress based on the discretionary actions of multiple individuals within an organization, not all hope is lost. For one, some courts have read the case fairly narrowly. Approximately 2,000 plaintiffs alleging gender discrimination in pay and promotions at Goldman Sachs were recently awarded partial class certification. District Judge Analisa Torres distinguished Dukes because that case lacked a “common . . . evaluation procedure” used to discriminate against the plaintiffs, whereas the Goldman Sachs plaintiffs were all subject to common “360 review,” “quartiling,” and “cross-ruffling” evaluation processes.

Moreover, multiple plaintiffs remain able to hold institutions accountable, though to a lesser degree. In the #MeToo context, three women have filed a class action suit on behalf of themselves and others similarly situated against Harvey

60. See e.g., Tippett, supra note 28, at 443 (explaining that Title VII “pattern or practice claims” like that brought in Dukes can still be brought by the Equal Employment Opportunity Commission, which is exempt from class action certification requirements). But see Malveaux, supra note 17, at 37 (noting that “government agencies—burdened by budgetary and political constraints—often cannot fill the gap left by the lack of private enforcement”).
61. Malveaux, supra note 17, at 44.
62. Id. at 44-45.
63. See supra Parts I & II.
66. Id. at 27.
Weinstein and the company he owned, Miramax. Because the complaint primarily brings claims against the company for knowingly enabling a single bad actor, it poses a question that determines the claims of all class members: namely, what did Miramax executives know about Weinstein’s actions, and when did they acquire this knowledge? Thus, this class action likely does meet the *Dukes* standard.

All in all, then, avenues for change remain open for those seeking to challenge institutional discrimination. Even in the wake of *Dukes*, there are non-legal mechanisms through which institutions can be held accountable for discriminatory conduct. Google recently ended its practice of forced arbitration for claims of sexual harassment or assault after 20,000 employees walked out in protest. However, *Dukes*’s prioritization of individualized adjudication has come at a cost. Those who seek to bring claims of second-generation discrimination against institutions have lost some of the key benefits of a class action—increases in efficiency, access to the courts, believability, and the ability to prove institutional dimension of discrimination.

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