BOSTON UNIVERSITY
PUBLIC INTEREST LAW JOURNAL

VOLUME 33 SUMMER 2024 NUMBER 2

CONTENTS

BOSTON UNIVERSITY
PUBLIC INTEREST LAW JOURNAL

VOLUME 33 SUMMER 2024 NUMBER 2

Editorial Purpose and Policy

Published twice per year, Boston University School of Law's *Public Interest Law Journal* (PILJ) is a non-partisan publication dedicated to constitutional law, criminal law, and family law issues as well as legal ethics, the environment, education, and civil rights. The Editors broadly define these areas, though they are particularly interested in submissions that combine theory and practical application. PILJ is interdisciplinary, and contributions from non-lawyers are encouraged. Manuscripts should be submitted electronically to pilj@bu.edu in Microsoft Word or PDF format. Submissions may also be sent to: Editor-in-Chief, The Public Interest Law Journal, Boston University School of Law, 765 Commonwealth Avenue, Boston, Massachusetts, 02215.

Subscription and Back Issues

Subscriptions are payable in advance and are $25 per year. Subscriptions and single issues may be ordered by emailing pilj@bu.edu. Alternatively, send a written request to: Administrative Editor, The Public Interest Law Journal, Boston University School of Law, 765 Commonwealth Avenue, Boston, Massachusetts 02215. Back issues can also be found electronically on HeinOnline: http://www.heinonline.org.

Non-Discrimination Policy

Boston University prohibits discrimination against any individual on the basis of race, color, religion, sex, age, national origin, physical or mental disability, sexual orientation, or because of marital, parental, or veteran status. This policy extends to all rights, privileges, programs, and activities, including housing, employment, admissions, financial assistance, and educational and athletic programs, as is required by federal law, including Title IX of the Educational Amendments of 1972, and § 504 of the Rehabilitation Act of 1973, and the regulations promulgated thereunder. For more information on Boston University's Non-Discrimination Policy, please visit http://www.bu.edu/eoo/.

BOSTON UNIVERSITY
SCHOOL OF LAW

Administrative Officers

KENNETH FREEMAN, B.S.B.A., M.B.A., *President Ad Interim*
ANGELA ONWUACHI-WILLIG, B.A., J.D., M.A., M.PHIL., PH.D., *Dean; Ryan Roth Gallo & Ernest J. Gallo Professor of Law*
MAUREEN A. O'ROURKE, B.S., J.D., *Dean Emerita; Professor of Law; Michaels Faculty Research Scholar*
JULIE A. DAHLSTROM, B.A., J.D., *Associate Dean for Experiential Education; Clinical Associate Professor of Law*
ANNA DI ROBILANT, LL.B., LL.M., PH.D., S.J.D., *Associate Dean for Academic Affairs; Professor of Law; Law Alumni Scholar*
GARY S. LAWSON, B.A., J.D., *Associate Dean for Intellectual Life; Philip S. Beck Professor of Law*
GERALDINE M. MUIR, B.A., M.S., J.D., *Associate Dean of Student Affairs*
CHRISTOPHER ROBERTSON, B.A., M.A., PH.D., J.D., *Associate Dean for Graduate & International Programs; Professor of Law; Professor of Health Law, Policy & Management, Boston University School of Public Health*
JASMINE GONZALES ROSE, B.A., J.D., *Associate Dean for Equity, Justice & Engagement; Professor of Law; Class of 1960 Scholar*
RONALD E. WHEELER, B.A., M.L.I.S., J.D., *Associate Dean, Fineman & Pappas Library; Associate Professor of Law & Legal Research*
JILL A. COLLINS, B.A., J.D., *Assistant Dean for Student Affairs*
ZACH DUBIN, B.A., M.B.A., *Assistant Dean for Development & Alumni Relations*
ELLEN FRENTZEN, B.A., M.L.I.S., J.D., LL.M., *Assistant Dean for Administration*
MANDIE LEBEAU, B.A., J.D., *Assistant Dean for Career Development & Public Service*
ALISSA R.E. LEONARD, A.B., *Assistant Dean for Admissions & Financial Aid*
JYOTHI NANDAKUMAR, *Assistant Dean for Finance*
CHRISTINA RICE, B.A., LL.M., J.D., *Assistant Dean for Graduate, International & Online Programs; Lecturer*
JOANNE A. THOMAS, B.S., M.A., *Assistant Dean for Marketing, Communications & Graduate Admissions*
ADAM KRUECKEBERG, B.A., M.A., M.B.A, *Vice Dean for Administration*

Emeriti Faculty

MICHAEL S. BARAM, B.S., LL.B., *Professor of Law Emeritus*
MARY C. CONNAUGHTON, B.A., M.S.W., J.D., *Professor of Law Emerita*
KENT A. COIT, A.B., M.A., PH.D., J.D., *Professor of Law Emeritus*
STANLEY Z. FISHER, B.A., LL.B., *Professor of Law Emeritus*
TAMAR FRANKEL, DIPLOMA, LL.M., S.J.D., *Professor of Law Emerita*
WENDY J. GORDON, B.A., J.D., *Professor of Law Emerita*
MICHAEL C. HARPER, A.B., J.D., *Professor of Law Emeritus; Barreca Labor Relations Scholar*
NEIL S. HECHT, B.A., J.D., LL.M., J.S.D., *Professor of Law Emeritus*
WENDY KAPLAN, A.B., J.D., *Clinical Professor of Law Emerita*
SUSAN P. KONIAK, B.A., J.D., *Professor of Law Emerita*
PNINA LAHAV, LL.B., LL.M., J.S.D., M.A., *Professor of Law Emerita*
DAVID B. LYONS, B.A., M.A., PH.D., *Professor of Law Emeritus, Professor of Philosophy, Boston University College & Graduate School of Arts*
PEGGY MAISEL, B.A., M.A., J.D., M.A.T., *Professor of Law Emerita*
FRANCES H. MILLER, A.B., J.D., *Professor of Law Emerita*
EVA S. NILSEN, B.A., J.D., LL.M., *Clinical Associate Professor of Law Emerita*
DAVID ROSSMAN, B.A., J.D., *Professor of Law Emeritus*
LARRY W. YACKLE, A.B., J.D., LL.M., *Professor of Law Emeritus*

Faculty

AZIZA AHMED, B.A., M.S., J.D., *Professor of Law; N. Neale Pike Scholar, Co-Director, Boston University Law Program in Reproductive Justice*
ZOHRA AHMED, B.A., M.PHIL,. J.D., *Associate Professor of Law*
SUSAN M. AKRAM, B.A., J.D., M.ST., *Clinical Professor of Law*
GEORGE J. ANNAS, A.B., J.D., M.P.H., *Professor of Law; Chairman & William Fairfield Warren*

Distinguished Professor of Health Law, Bioethics & Human Rights, Boston University School of Public Health; Professor of Socio-Medical Sciences, Boston University School of Medicine

JACK M. BEERMANN, B.A., J.D., *Philip S. Beck Professor of Law; Harry Elwood Warren Scholar*

JADE BROWN, B.S., J.D., *Clinical Associate Professor of Law*

CONSTANCE A. BROWNE, B.A., J.D., *Clinical Associate Professor of Law*

DANIELA CARUSO, LL.B., LL.M., PH.D., *Professor of Law; Jean Monnet European Union Professor*

MADISON CONDON, B.S., M.A., J.D., *Associate Professor of Law*

LAURA E. D'AMATO, B.A., J.D., *Director of Lawyering; Senior Lecturer*

STEVEN DEAN, B.A., J.D., *Professor of Law; Paul Siskind Research Scholar*

STACEY L. DOGAN, B.S., J.D., *Professor of Law; Law Alumni Scholar*

JONATHAN FEINGOLD, B.A., J.D., *Associate Professor of Law*

ALAN L. FELD, B.A., J.D., *Professor of Law; Maurice Poch Faculty Research Scholar*

JAMES E. FLEMING, A.B., A.M., J.D., PH.D., *The Honorable Paul J. Liacos Professor of Law*

LISA FREUDENHEIM, B.A., J.D., *Associate Professor of Law*

WOODROW HARTZOG, B.A., J.D., LL.M., PH.D., *Professor of Law; Class of 1960 Scholar*

SCOTT HIRST, B.COMM., LL.B., LL.M., S.J.D., *Associate Professor of Law*

NICOLE HUBERFELD, B.A., J.D., *Professor of Law; Professor of Health Law, Ethics & Human Rights, Boston University School of Public Health*

ILANA HURWITZ, B.A., LL.B., J.D., LL.M., *Professor of Law*

KEITH N. HYLTON, B.A., J.D., PH.D., *William Fairfield Warren Distinguished Professor; Professor of Law*

SEAN J. KEALY, A.B., M.G.A., J.D., *Clinical Associate Professor of Law*

STEVEN ARRIGG KOH, A.B., M.PHIL., J.D., *Associate Professor of Law; Gordon Butler Scholar in International Law*

GERALD F. LEONARD, A.B., PH.D., J.D., *Professor of Law; Law Alumni Scholar*

KAREN PITA LOOR, B.S., J.D., *Clinical Professor of Law; Michaels Faculty Research Scholar*

TRACEY MACLIN, B.A., J.D., *Professor of Law; Joseph Lipsitt Faculty Research Scholar*

NAOMI M. MANN, B.A., J.D., *Clinical Associate Professor of Law; Executive Director, Civil Litigation & Justice Program*

WENDY K. MARINER, B.A., J.D., LL.M., M.P.H., *Professor of Law; Edward R. Utley Professor of Health Law, Bioethics & Human Rights, Boston University School of Public Health; Professor of Medicine, Boston University School of Medicine*

STEPHEN G. MARKS, B.A., M.A., J.D., PH.D., *Professor of Law; Class of 1960 Scholar*

LINDA C. MCCLAIN, B.A., A.M., J.D., LL.M., *Robert Kent Professor of Law; Professor in the Women's, Gender & Sexuality Studies Program, Boston University College of Arts & Sciences*

JENNIFER TAYLOR MCCLOSKEY, B.A., J.D., Director, *Advocacy Program; Lecturer*

LIZ MCCUSKEY, B.A., J.D., *Professor of Health Law, Policy & Management*

MADELINE H. METH, B.A., J.D., *Clinical Associate Professor*

MICHAEL J. MEURER, S.B., S.B., J.D., PH.D., *Professor of Law; Abraham & Lillian Benton Scholar*

NANCY J. MOORE, B.A., J.D., *Professor of Law; Nancy E. Barton Scholar*

MARIA O'BRIEN, A.B., J.D., *Professor of Law; Paul Siskind Scholar*

NGOZI OKIDEGBE, B.A., B.C.L., LL.B., LL.M., *Moorman-Simon Interdisciplinary Career Development Associate Professor of Law; Assistant Professor of Computing & Data*

KEVIN OUTTERSON, B.S., J.D., LL.M., *Professor of Law; Austin B. Fletcher Professor of Law; Executive Director, CARB-X*

WILLIAM W. PARK, B.A., J.D., M.A., *Professor of Law; R. Gordon Butler Scholar in International Law*

PORTIA PEDRO, B.A., J.D., PH.D., *Associate Professor of Law*

DANIELLE PELFREY DURYEA, B.A., M.A., J.D., LL.M., *Director, Compliance Policy Clinic; Clinical Instructor; Lecturer*

ANGELO PETRIGH, B.A., J.D., *Clinical Associate Professor*

BENJAMIN DAVID PYLE, B.A., M.A.E., J.D., PH.D., *Associate Professor of Law*

VICTORIA SAHANI, A.B., J.D., *Associate Provost for Community & Inclusion; Professor of Law*

DAVID J. SEIPP, A.B., B.A., LL.B., J.D., *Professor of Law; Law Alumni Scholar*

ANDREW SELLARS, B.S., J.D., Director, *Technology Law Clinic; Clinical Associate Professor of Law*

SARAH R. SHERMAN-STOKES, B.A., J.D., *Associate Director, Immigrants' Rights & Human Trafficking Clinic; Clinical Associate Professor of Law*

JED HANDELSMEN SHUGERMAN, B.A., J.D., PH.D., *Professor of Law; Joseph Lipsitt Scholar*

KATHARINE B. SILBAUGH, B.A., J.D., *Professor of Law; Law Alumni Scholar*

JESSICA SILBEY, B.A., J.D., PH.D., *Professor of Law; Yanakakis Faculty Research Scholar*

THEODORE S. SIMS, A.B., J.D., PH.D., *Professor of Law*

ROBERT D. SLOANE, B.A., J.D., *Professor of Law; R. Gordon Butler Scholar in International Law*

MAYA STEINITZ, LL.B., LL.M., J.S.D., *Professor of Law; R. Gordon Butler Scholar in International Law*
JOHN D. SULLIVAN, B.A., M.B.A., A.M., PH.D., *Associate Professor & Chair of Administrative Sciences at MET*
ROBERT L. TSAI, B.A., J.D., *Professor of Law; Law Alumni Scholar*
FREDERICK TUNG, A.B., J.D., *Professor of Law; Howard Zhang Faculty Research Scholar*
MICHAEL ULRICH, B.S., J.D., M.P.H., *Assistant Professor of Health Law, Ethics & Humans Rights, Health Law Policy & Management, Boston University School of Public Health*
RORY VAN LOO, B.A., J.D., PH.D., *Professor of Law; Michaels Faculty Research Scholar*
DAVID I. WALKER, B.E., J.D., *Professor of Law; Maurice Poch Faculty Research Scholar*
JAY D. WEXLER, B.A., M.A., J.D., *Professor of Law; Michaels Faculty Research Scholar*
DAVID H. WEBBER, B.A., J.D., *Professor of Law; Paul M. Siskind Scholar*
KATHRYN ZEILER, B.S., M.S., M.S., J.D., PH.D., *Professor of Law; Nancy E. Barton Scholar*

ARTICLE

THE GOVERNMENT PENSION IDENTITY CRISIS

T. LEIGH ANENSON, J.D., LL.M., PH.D. [*]
AND HANNAH R. WEISER, J.D., M.B.A.[††]

[*] Professor of Business Law, University of Maryland; Associate Director, Center for the Study of Business Ethics, Regulation, and Crime; President, Academy of Legal Studies in Business; Of Counsel, Reminger Co., L.P.A; lanenson@umd.edu. Thanks to Jim Ely and Dana Muir for review and feedback on an earlier draft of this paper and to participants at the Annual Conferences of the Academy of Legal Studies in Business and the Great Lakes Academy of Legal Studies in Business for their comments and critique. The research was made possible by a grant from the Robert H. Smith School of Business. Some of this discussion will be published in THE NATIONAL PENSION CRISIS AND THE CONSTITUTION (forthcoming Cambridge University Press).

[††] Assistant Professor of Law, Bentley University; Founder, Weiser Consulting; J.D., George Washington University Law School; M.B.A., University of Massachusetts, Amherst.

ABSTRACT

The Contract Clause once dominated the docket of the Supreme Court. But now the clause belongs to the museum of constitutional law. This artifact, however, is gaining new life in ongoing litigation over public pension reform that significantly impacts the financial benefits of government workers such as teachers, firefighters, and even judges. Unlike private sector workers, public servants do not have a federal safety net in the form of insurance should their pension plans become insolvent. In analyzing the major doctrines and principles of a government pension contract, along with the themes and theories that ground them, this Article exposes a government pension identity crisis. It emphasizes the thinness of legal scholarship that coalesces around otherwise common areas of study like contracts, trusts, employment, and constitutional law. It further clarifies how the ill-defined image of a public pension contract is complicated by its common law character that has consequences for changing constitutional contract law and reforming government pensions.

INTRODUCTION

Runaway pension liabilities have become a legislative priority, making news headlines across the country.[1] State and local governments are raising taxes, reducing government services like education, and issuing bonds in response to burgeoning pension debt.[2] With limited recourse in the wake of continuing budget crises, government employers are also trimming the pensions of new and

---

[1] *See* Aaron Brown, *Time Bomb of Public Pension Funding Ticks Louder*, WASH. POST (Feb. 14, 2023), https://www.washingtonpost.com/business/energy/time-bomb-of-public-pension-funding-ticks-louder/2023/02/13/a9cbcfae-ab94-11ed-b0ba-9f4244c6e5da_story.html; Sam Sutton, *State pension plans were hammered in 2022. Next year will be worse*, POLITICO (Dec. 28, 2022), https://www.politico.com/news/2022/12/28/newsom-democrat-governors-pension-recession-00075279; Steven Malanga, *Public Pensions' Lost Decade*, CITY J. (July 28, 2022), https://perma.cc/XXE8-RT9J (noting that a number of "public pension systems holding the retirement funds of millions of government employees are now below sixty percent funded").

[2] *See* T. Leigh Anenson, Alex Slabaugh & Karen Eilers Lahey, *Reforming Public Pensions*, 33 YALE L. & POL'Y REV. 1, 6 (2014) [hereinafter *Reforming Public Pensions*] (explaining that governments will raise taxes if unable to lower the cost of pension benefits); Steve Forbes, *Pension Crisis: Are Your Taxes Going To Go Up?*, FORBES (Oct. 12, 2021), https://www.forbes.com/sites/steveforbes/2021/10/12/the-public-pension-crisis-are-your-taxes-going-to-go-up/?sh=4245efe56a59; Mary Williams Walsh, *To Plug a Pension Gap, This City Rented Its Streets. To Itself.*, N.Y. TIMES (Feb. 16, 2021), https://www.nytimes.com/2021/02/16/business/dealbook/pension-borrowing-retirement.html?auth=login-email&login=email (reporting on California and Arizona cities that are issuing bonds to pay for the growing pension debt); *see also* T. Leigh Anenson et al., *Constitutional Limits on Public Pension Reform: New Directions in Law and Legal Reasoning*, 15 VA. L. & BUS. REV. 337, 378–79 (2021) [hereinafter *Constitutional Limits on Public Pension Reform*] (explaining that California pension costs have caused states to cut essential government services like education).

existing employees (and retirees).[3] In fact, cutting pension benefits has become synonymous with public pension reform.[4]

Government workers, however, are challenging these reforms in court.[5] Ongoing legal battles seek to invalidate reforms by claiming pension cuts impair government workers' contract rights under the Contract Clause.[6] The U.S. Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."[7] Most state constitutions contain similar provisions.[8] These clauses raise key issues of whether and when government pension are contracts. The contract assessment is multi-faceted, ranging from when a contract begins to what obligations it protects.[9] Courts neither agree nor are (necessarily) consistent on these issues.[10] Because a principled philosophy will enable a more cohesive treatment of government pension reform, the foregoing examination explores the development and reception of ideas about public pensions as contracts.

This Article summarizes the convergence (and divergence) of differing state regimes for government pension contracts.[11] Diagramming the dimensions of a pension contract is not only necessary for the rational development of doctrine, but also for a deeper understanding of contract theory and its place within private and public law. To be sure, litigation about restructuring pension obligations reveals that public pensions are undergoing an identity crisis.

The concept of a government pension contract sits at the intersection of the well-mined fields of contract, employment, and constitutional law.[12] Yet these connections are unfamiliar to most scholars and essentially ignored in the law school curriculum.[13] Trust law plays a prominent role in the management of pension assets, with academic interest focused on the federal regulation of

---

[3] *See Reforming Public Pensions*, *supra* note 2, at 12–14 (surveying reforms from 2011–14 across thirteen states); T. Leigh Anenson & Jennifer K. Gershberg, *The Legal and Ethical Implications of Public Pension Reform: Analyzing the New Constitutional Cases*, 36 NOTRE DAME J.L. ETHICS & PUB. POL'Y 101, 118–19 n.6 (2021) [hereinafter *Pension Law and Ethics*] (surveying almost fifty cases from 2014–19 across twenty-two states); Amy B. Monahan, *State Fiscal Constitutions and the Law and Politics of Public Pensions*, 2015 U. ILL. L. REV. 117, 174–75 (compiling reforms from 2001–2012 across eight states).

[4] *See Reforming Public Pensions*, *supra* note 2, at 2, 11 ("The gravity of the current crisis has pushed pension reform . . . to the front of the public policy agenda in each state capital.").

[5] *Constitutional Limits on Public Pension Reform*, *supra* note 2, at 340–41.

[6] *See id.*

[7] U.S. CONST. art. I, § 10.

[8] *See, e.g.*, CAL. CONST. art. I, § 9 ("A . . . law impairing the obligation of contracts may not be passed."); ME. CONST. art. I, § 11 ("The Legislature shall pass no bill of attainder, ex post facto law, nor law impairing the obligation of contracts . . ."); UTAH CONST. art. I, § 18 ("No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed.").

[9] *See infra* Part I.

[10] *See infra* Part I.

[11] *See infra* Part I.

[12] *See infra* Part II.

[13] *See infra* Part II.

employee benefits (including private pensions).[14] The prevailing intellectual fog contributes to the diversity of judicial opinions about public pension contracts.

The main goal of this Article is to expose this conceptual crisis and consider its consequences. This Article additionally criticizes current law and makes recommendations for what legislatures (or the people through constitutional change) might do to improve it. Given that most pension contract law is judge-made, perspectives on the patterns and practices of decision-making correspondingly offer courts a sound footing to reach the right (reasonable) decisions.

The Article proceeds in three parts. Part I maps public pension contract law to illustrate its uncertainty and incoherence. Part II explains a reason for the confusion that places the blame (in part) on academia. Part III underscores why a better picture of government pensions matters. This Article concludes by arguing that taking stock of the contract question—descriptively, functionally, and normatively—assists in solving the public pension problem that has become a focus of national attention.

I. THE DIMENSIONS OF A GOVERNMENT PENSION CONTRACT

The last decade of judicial decisions that determined the validity of public pension reforms under state and U.S. Contract Clauses have depended almost exclusively on the contract condition.[15] Over time, it might be expected that repeat resolutions would yield clarity and consistency on one or more contractual issues. But judicial opinions have proven far from predictable.[16] The uncertainty is no doubt complicated by the fact that determinations about contracts cut across state courts and state laws. Undeniably, the law on government pension contracts is muddled, with no concrete theory, doctrine, or policy to discern whether a contract exists or to identify its terms.[17] The outcomes vary along four dimensions that include: (1) a contract's existence, (2) the point of formation, (3) its duration, and (4) its terms.[18] The following discussion explains the doctrinal architecture of government pension contracts to better enable a clear vision as to their future design.

A. *Contract Existence*

In some states, constitutional provisions and statutes expressly declare that pension benefits constitute contractual agreements.[19] Most jurisdictions lack

---

[14] *See infra* Part II.

[15] *Constitutional Limits on Public Pension Reform*, *supra* note 2, at 341.

[16] *See id.* at 343–44 (explaining that there is no uniform concept of a government pension contract and reporting conflicting decisions on its dimensions).

[17] *See id.* at 343.

[18] We have examined these dimensions in an earlier work that we draw from in this part. *See* T. Leigh Anenson & Hannah Weiser, *Top Trends in Public Pension Litigation*, N.Y.U. REV. EMP. BENEFITS & EXEC. COMP. 6–11 (2023) [hereinafter *Top Trends*].

[19] *See* JAMES W. ELY, JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY (2016); BENJAMIN F. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 334 n.136 (1938) (listing

such explicit provisions though, meaning that judges must analyze the statutory language to determine whether a legally binding agreement exists by implication.[20] Typically, statutory silence on the creation of a pension contract advantages governments and disadvantages government workers attempting to invalidate reforms that negatively affect their benefits.[21] Not even mandatory language such as "shall" is usually sufficient to constitute a contract.[22] Moreover, other evidence of intent like reservation clauses, employee handbooks, and even the amendment of the legislation over time has been relied upon to invalidate workers' contract claims and uphold pension reform.[23] Judicial decisions from other jurisdictions have also been impactful.[24]

In reading pension statutes that are silent on the contract existence issue, courts in several states employ a presumption against any such agreement.[25] Historically referred to as the unmistakability doctrine,[26] this interpretative technique has been called the "no contract" canon by emphasizing its effect on the meaning of statutory language.[27] Dating to the Founding Era and refined by state and federal courts in the early nineteenth century,[28] the "no contract" canon of construction is a special rule of government contracting that the yielding of sovereign authority by the legislature must appear in unmistakable terms.[29]

---

three states with statutes declaring that participation in a retirement system is a contract and seven states with constitutional provisions protecting public pensions). The Texas Constitution expressly protects the accrued retirement benefits of most non-statewide plans. *See* Eddington v. Dall. Police & Fire Pension Sys., 589 S.W.3d 799, 799–800 (Tex. 2019) (citing TEX. CONST. art. XVI, § 66).

[20] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 359–68. Some decisions delineate that contractual existence depends on whether participation is compulsory. *See* Haverstock v. State Pub. Emps. Ret. Fund, 490 N.E.2d 357, 360–61 (Ind. Ct. App. 1986) (distinguishing between voluntary plans that are contractual and compulsory plans that are gratuities); *cf.* McNamee v. State, 672 N.E.2d 1159, 1162 (Ill. 1996) (noting that Illinois amended its constitution to negate the "traditional classification" in which only optional plans are contractually protected).

[21] *See Top Trends, supra* note 18, at 6–7; *Constitutional Limits on Public Pension Reform*, *supra* note 2, at 374.

[22] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 360 n.129 (citing cases).

[23] *See id*. at 375.

[24] *Id*. at 368–69.

[25] *See* T. Leigh Anenson & Jennifer K. Gershberg, *Clashing Canons and the Contract Clause,* 54 U. MICH. J.L. REFORM 147, 215–16 (2020) [hereinafter *Clashing Canons*] (showing overwhelming majority of courts applied the "no contract" canon to presume statutes providing benefits are not contracts in survey of pension reform litigation from 2014–19).

[26] *See id.* at 150 (noting that the most common substantive canon applied in Contract Clause cases contesting public pension reform is the unmistakability doctrine).

[27] *Id.* at 171.

[28] *Id.* at 172–73 (citing cases). The U.S. Supreme Court grounded the modern unmistakability doctrine in an opinion by Chief Justice Marshall. *See id.* at 172 (citing United States v. Winstar Corp., 518 U.S. 839, 873–74 (1996) (plurality) (citing Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810))).

[29] *Id.* at 171; *see id.* at 155 ("[M]any courts require the legislature to speak directly and unmistakably before treating legislatively-created pensions as contracts.").

A rationale for the presumption against statutes as legally binding agreements is based on the idea that legislatures make policy.[30] Policies, unlike contracts, can be changed and do not bind future legislatures.[31] The canon is thus grounded in basic governance principles supporting the separation of powers.[32] Corresponding to the same reason that statutes do not generally create contracts, the "no contract" canon has likewise been couched in terms of legislative intent.[33]

Alternatively, in certain jurisdictions, judges fill statutory gaps by inferring that a contract exists. For instance, California courts employ a near automatic classification of pensions as contracts to the extent that benefits are part of the employment relationship.[34] California's judge-made rule has deep roots, yet it is less clear whether it forms a coherent and justifiable doctrine.[35] In earlier works, we explained how blind adherence to precedent misses the mark and pointed out the absence of reasoning in past precedent that continues to the present day.[36] As such, the authority, while well-established, is not entirely satisfactory from a logical point of view.[37]

This is not the place for an exhaustive analysis of these complex concepts, though we have recently urged the Supreme Court of California to renounce the rule regarding government pensions in part and rehabilitate the remainder.[38] The main point of this section is to highlight that the existence or non-existence of a pension contract is neither easy nor clear. Ultimately, the contract's existence is subject to precedent, the presence of contractual language in statutes or constitutional provisions, and the judge's interpretative discretion.

Furthermore, courts' considerations of whether the public pension benefits altered through reform legislation were part of a pre-existing contract no longer turn only on a contract's existence. Decisions ruling on the constitutionality of reforms have been grounded on other contractual matters as well.

---

[30] *See id.* at 179.

[31] *See id.*

[32] *See id.* at 180–81.

[33] *Id.* at 179–80. *See Top Trends*, *supra* note 18, at 19–30 (identifying an interpretative turn to formalism in judicial reasoning about public pension contracts).

[34] *See* T. Leigh Anenson & Jennifer K. Gershberg, *Stare Decisis and the Status of California's Super Pension Contract*, 56 LOY. L.A. L. REV. 727, 776 (2022) [hereinafter *California's Super Pension Contract*] (explaining that the California Supreme Court acknowledged the "no contract" canon for pension benefits but created an exception to it in the government employment setting so long as the benefits are connected to compensation).

[35] *See id.* at 763–75 (providing an in-depth examination of California's public pension law); T. Leigh Anenson, *The Argonauts: One Hundred Years of the California Rule*, 38 ABA J. LAB. & EMPL. L. (forthcoming 2024) [hereinafter *The Argonauts*], https://ssrn.com/abstract=4438648.

[36] *See California's Super Pension Contract*, *supra* note 34, at 737 (noting that the Supreme Court of California "has never fully explained itself").

[37] *See id.* at 738–40.

[38] *See id.* at 793–96; *infra* Part I.C.

B. *Contract Formation*

Another contractual issue raised in government pension reform litigation is the moment at which a contract is formed. Assuming a contractual relationship is established, judicial determinations of *when* the contract takes effect vary significantly.[39] And as many as ten jurisdictions have not provided any guidance on the issue of contract formation.[40] In those that do, the time frame spans from the first day of work to the last, and even at points during the period of employment.[41]

Courts in many states pronounce pensions contractually binding from the first day of employment. The first-day rule is the most common approach to pension protection.[42] Although protecting pensions upon hiring is not the only feature of California law,[43] the concept is associated with the "California Rule" because of the state's early adoption of that rule and resulting influence on other jurisdictions.[44]

In contrast, certain state courts hold that pension contracts are formed on an employee's last day of employment corresponding with retirement.[45] Taking an intermediate position, some courts find the contract formed somewhere throughout the length of the employee's career.[46] A common arrangement is employee satisfaction of the vesting (minimum service) requirements of the retirement system.[47] Another middle ground approach is to protect benefits once *both* minimum age and service requirements are met.[48] The result is a patchwork of start dates that yield distinct ramifications for a government's ability to reduce pensions and for protecting the benefits of public servants from different states with the same jobs.

---

[39] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 375; *Legal Protections for State Pensions and Retiree Health Benefits*, PEW CHARITABLE TR. 5–6 figs. 2 & 3 (May 2019), https://perma.cc/KW66-GWNP [hereinafter PEW CHARITABLE TR.].

[40] *See* PEW CHARITABLE TR., *supra* note 39, at 5 (listing ten states).

[41] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 375–76.

[42] *See* PEW CHARITABLE TR., *supra* note 39, at 5 (counting twenty-two states that protect accrued benefits from the moment employees begin participating in the plan).

[43] *See supra* Part I.A; *infra* Part I.C.

[44] *See* Alexander Volokh, *Overprotecting Public Employee Pensions: The Contract Clause And The California Rule*, FEDERALIST SOC'Y 4, 5 (Dec. 31, 2013), https://perma.cc/5CFB-EXS3 (estimating that the California Rule covers one-quarter of the U.S. population); *see generally* Amy B. Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform*, 97 IOWA L. REV. 1029, 1036, 1071 (2012) [hereinafter Monahan, *The California Rule*] (tracing the history of California public pension law and other states that follow it).

[45] *See* PEW CHARITABLE TR., *supra* note 39, at 5 (listing Iowa, Ohio, and Virginia).

[46] *See Reforming Public Pensions*, *supra* note 2, at 27–29 (discussing different intermediate approaches in which pensions are protected pre-retirement eligibility and post-hiring).

[47] *See* Me. Ass'n of Retirees v. Bd. of Trs. of Me. Pub. Emps. Ret. Sys., 758 F.3d 23, 27 (1st Cir. 2014).

[48] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 400 diagram 7; PEW CHARITABLE TR., *supra* note 39, at 5 (counting four states in this category).

C. *Contract Duration*

Apart from the timing of contract initiation, the question of whether a pension arrangement constitutes a single lifelong contract or a series of contracts corresponding to daily work performed also varies among jurisdictions.[49] States fall along opposite ends of this spectrum with little examination of the durational aspect of contracts.[50]

Overlooked until recently in employment law,[51] it is perhaps not surprising that assessing contract length is new in the law of public pensions.[52] It is difficult to overstate the importance of the issue because the contract period resolves whether government pension contracts prevent reforms that operate prospectively.[53] Because most reform legislation binds future actions upon enactment, the career-long contract duration decree bars *any* benefit reductions unless another dimension of contract law moderates this result (or reforms are justified under other elements of the Contract Clause).[54]

Many jurisdictions follow the federal regulation of private pensions to protect only past and not future accruals.[55] California law diverges by safeguarding future accruals as well.[56] This means that in California, courts protect pensions not only upon hiring, but also restrict any reduction from the first day of employment *onward*.[57] Preserving the level of pension benefits effectively

[49] *Constitutional Limits on Public Pension Reform*, *supra* note 2, at 384–85.

[50] *The Argonauts*, *supra* note 35, at 6; *see also California's Super Pension Contract*, *supra* note 34, at 740 (discussing how the one career-long contract idea was inadvertent and unfortunate attribute of California law); *id*. at 754–55 (focusing on contract length); *Constitutional Limits on Public Pension Reform, supra* note 2, at 384–85 (discussing issue of pension contract duration for the first time).

[51] *See* Rachel S. Arnow-Richman & J. H. Verkerke, *Deconstructing Employment Contract Law*, 75 FLA. L. REV. 897, 899–900 (2023) (arguing that employment should be seen as a single bilateral contract); *cf.* 19 RICHARD A. LORD, 19 WILLISTON ON CONTRACTS § 54:52 (4th ed. 2019) (citing cases demonstrating that discharged employees have a right to a proportionate or pro rata share of benefits, including pensions, for work performed); Rachel Arnow-Richman, *Foreword: Symposium on the Role of Contract in the Modern Employment Relationship*, 10 TEX. WESLEYAN L. REV. 1, 3 (2003) (explaining the traditional view that "the execution of each unit of work by the employee marks the commencement of a new agreement under new terms").

[52] *See Top Trends*, *supra* note 18, at 8 (explaining that the issue of contract duration is new and "has not been noticed among courts or pension scholars"); *see generally* T. Leigh Anenson & Hannah Weiser, *Public Pension Contract Minimalism*, 61 AM. BUS. L.J. (forthcoming 2024) (on file with authors) (arguing for the adoption of a multiple contract approach to pensions for descriptive and normative reasons).

[53] *See California's Super Pension Contract*, *supra* note 34, at 742 (explaining that safeguarding past accruals validates reforms that operate prospectively and safeguarding future accruals invalidates those same reforms).

[54] *See supra* Part I.B. and *infra* Part I.D.; *see also Top Trends*, *supra* note 18, at 11–16 (analyzing Contract Clause elements of substantial impairment and intermediate scrutiny).

[55] *See California's Super Pension Contract*, *supra* note 34, at 769; PEW CHARITABLE TR., *supra* note 39, at 5 (listing twenty-two states); *cf*. *id.* at 5 fig. 2 (showing that eighteen states protect past accruals after the first day).

[56] *California's Super Pension Contract*, *supra* note 34, at 742.

[57] *Id.* at 758.

prevents them from decreasing during an employee's career.[58] Another judge-made rule of implied consent has validated increases in benefits and protected them from cuts.[59] Effectively, California law sets a floor and not a ceiling for public pension benefits.[60]

While a dozen states have adopted California law in protecting pensions upon hiring,[61] it is unclear how many jurisdictions have also incorporated this other extreme part of the rule concerning a career-long contract.[62] Courts in some jurisdictions that embraced all of California's government pension contract law have since withdrawn from it.[63] And states that adhere to every aspect of the so-called California Rule have not revisited the ruling since the pension crisis.[64]

We recently argued that the California Supreme Court should adopt a daily contract interval to safeguard past and not future accruals.[65] We illustrated how precedent on which the career-long contract concept purportedly stands is shaky. In particular, the initial decision determined the issue inadvertently and later decisions never offered any (let alone a reasonable) rationale.[66] Besides weak (erroneous) precedent, failing to follow an earned-each-day outlook undermines jurisprudential coherence and causes undesirable (or unjust) effects.[67] Disparate outcomes include government pension case law that is contrary to judicial approaches to at-will employment and the Contract Clause, along with favoring public sector pensions over private sector pensions concerning plan changes.[68] For these reasons, we contended that the Supreme Court of California should move from a single contract position to a multiple contracts position by modifying precedent to protect pensions on a pro rata basis as a compromise between employee interests in securing some contract protection and the government's interest in fixing pension shortfalls.[69]

---

[58] *Id.* at 741–42. Contractual obligations can survive constitutional scrutiny to the extent they are justified under other elements of the Contract Clause test. *See* discussion *infra* Part III. The justification component has proven difficult to establish until recently. *See* Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Emps.' Ret. Ass'n, 470 P.3d 85, 93 (Cal. 2020) (finding public pension reform eliminating pension abuse was justified despite government's contractual obligation).

[59] *See* Volokh, *supra* note 44, at 12–13 (citing cases and emphasizing the "ratchet effect" of the California Rule).

[60] *Constitutional Limits on Public Pension Reform*, *supra* note 2, at 372.

[61] *See* Monahan, *The California Rule*, *supra* note 44, at 1071.

[62] *See California's Super Pension Contract*, *supra* note 34, at 767.

[63] *See id.* at 767–68 (detailing shifts in doctrine in Massachusetts, Colorado, and Oregon).

[64] *See id.* at 768 (counting six states).

[65] *See id.* at 796; *The Argonauts*, *supra* note 35, at 3.

[66] *See California's Super Pension Contract*, *supra* note 34, at 739–40, 793 (noting the absence of reasons for the prospective accrual rule amounting to one career-long contract); *see also id.* at 739–40 (noting that the idea that public pensions were contracts at all and that they were protected on the first day of employment arose from dicta).

[67] *See id.* at 793–96.

[68] *See id.* at 763–67.

[69] *Id.* at 796.

Whereas only a minority of states protect future accruals like California (and not all of them pursuant to their respective Contract Clauses),[70] this part of the law is critical to pension solvency because it restricts legislative reform.[71] At the very least, courts should pay attention to contract duration (protecting prospective accruals versus accrued benefits) in considering the constitutionality of pension reform.

D. *Contract Obligation*

Whether pension benefits are actually contract terms is a frequently litigated question in recent reform litigation.[72] Assuming a contract exists, that it starts during a time frame impacted by reforms, and that the contract interval influences the benefit structure, a court must still determine if the challenged reform impairs an obligation of the pension contract.

As a practical matter, deciding whether reforms breach contractual terms circumvent precedent setting high levels of pension protection along other contractual dimensions.[73] As discussed previously, precedent in some states sets a lengthy (single) contract duration or mandates contract formation on the first day of employment.[74] Conventional wisdom signifies that either or both doctrinal rules would block reforms under the Contract Clause. In these same states, nonetheless, courts have ruled that reforms are not within the terms of the pension contract and are open to modification.[75] Concentrating on the pension agreement's obligations allows judges to show fidelity to decisional law while being simultaneously supportive of the legislative enterprise.

In summary, there are differing degrees of contract protection for pension benefits across the nation. The myriad approaches encompass issues such as if and when a contract begins, its duration, and the extent of the obligations it safeguards. The next section reveals the role of scholarly specialization in the emerging decisional law that lacks a coherent picture of government pension contracts.

---

[70] *Id.* at 769.

[71] *Id.* at 772.

[72] *See Pension Law and Ethics*, *supra* note 3, at 123–40 (analyzing cases); *Constitutional Limits on Public Pension Reform*, *supra* note 2, at 378–82 (illustrating phenomenon through recent decision).

[73] *See Top Trends*, *supra* note 18, at 10 (noting that courts negating reforms as contractual obligations makes it conceivable that public pension reforms will withstand constitutional scrutiny in a seemingly non-political way even in jurisdictions with high levels of public pension benefit protections).

[74] *See supra* Parts I.B., I.C.

[75] *See Reforming Public Pensions*, *supra* note 2, at 125–26 (discussing cases from Colorado, Maine, Massachusetts, and New Mexico); *Constitutional Limits on Public Pension Reform*, *supra* note 2, at 378–82 (citing Cal Fire Loc. 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433 (Cal. 2019)) (analyzing the reasoning in California Supreme Court's decision in *Cal Fire* which found that so-called "airtime" credit was not an obligation of California's pension contact).

II. THE IMPACT OF SCHOLARLY SPECIALIZATION

Extensive economics and finance scholarship measures existing government pension debt,[76] yet few legal scholars devote attention to solving associated legal problems.[77] Even fewer focus their consideration on constitutional barriers to pension reform. The scope of any project analyzing constitutional obstacles to public pension reform stands at the intersection of five legal literatures: constitutional law (Contract Clause), contracts, employment, trusts, and pensions (including employee benefits more specifically). Scholars writing in these domains tend to be siloed. As such, addressing the pension problem necessitates connecting discussions from areas that have had very little communication.

Because of parallels between private and public pension law, public pension literature is primarily authored by professors who study the federal statutory law of the Employee Retirement Income Security Act (ERISA).[78] Much of this legislation is founded upon the law of trusts.[79] With the ongoing dialogue deliberating the fiduciary duties of pension fund management, the applicability of the trust paradigm on pension law is not complete or foolproof.[80] ERISA scholars have stressed the traditional mismatch of trust law roles and responsibilities in the pension space when applying (translating) trust law to

---

[76] *See* Nathan H. Jeppson et al., *Defining and Quantifying the Pension Liabilities of Government Entities in the United States*, 29 J. CORP. ACCT. & FIN. 98, 98 (2018) (estimating public defined benefit pension liabilities to be more than $5 trillion). Studies from an economics perspective have been historically devoted to private pension funding as compared to public pension funding. *See* Stephen P. D'Arcy et al., *Optimal Funding of State Employee Pension System*, 66 J. RISK & INS. 345, 346–47 (1999).

[77] *See Pension Law and Ethics*, *supra* note 3, at 120 (noting that legal scholarship about government pensions is incomplete because scholars write on it infrequently).

[78] *See* Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001–1461 (2000). ERISA expressly excludes government pension plans. 29 U.S.C. § 1003(b) (2012) ("The provisions of this subchapter shall not apply to any employee benefit plan if (1) such plan is a governmental plan."); *see generally* Amy B. Monahan, *State Fiscal Constitutions and the Law and Politics of Public Pensions*, 2015 U. ILL. L. REV. 117 (2015).

[79] *See* H.R. REP. No. 93-1280, at 295 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5076 (commenting that the final version of ERISA incorporated the "rules and remedies similar to those under traditional trust law"); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 169 (1997) (noting that "ERISA's legislative history makes clear that Congress meant to track the common law of trusts.").

[80] *See* Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. LAB. & EMP. L. 391, 393–94 (2000); *see also* Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1107 (1988) (noting that the exclusive benefit rule of ERISA's fiduciary law "misdescribes the reality of the modern pension and employee benefit trust"). Because state and local governments codified (and sometimes constitutionalized) customary trust duties of loyalty and prudence for public pension trustees, scholarship on public pension governance concentrates on how trust law informs fiduciary duties. *See* T. Leigh Anenson, *Public Pensions and Fiduciary Law: A View From Equity*, 50 U. MICH. J.L. REF. 251, 269–71 (2017) [hereinafter *Public Pensions and Fiduciary Law*].

pension governance.[81] And private trust law does not provide a definitive answer to hot button issues involving the revocation and amendment of government pension plans.[82] Small wonder that none of the pension reform decisions in the last decade reference trust law to determine the effect of silence on that issue.[83]

Contract scholars have not applied their expertise to the public pension problem. They also tend to treat employment contracts as a separate species. Thus, even these two areas of private law are disconnected.[84] What is more, critics from each domain blame the other for inciting errors and sowing confusion that continue to flow along the stream of stare decisis.[85] Contract is a richly theorized concept—employment contracts less so. Employment scholars can, but rarely do, address pension law.[86] The doctrine of employment-at-will that is germane to pension modification law is a tiny field in comparison to nondiscrimination, labor, and the myriad other laws involving the world of work. The incoherence within employment modification law is relevant to pension reform and the imprecise picture of pension contracts.[87]

Moreover, the purposes of contract and employment overlap. Both sets of laws are designed to prevent breach and opportunism between the parties as well as to preserve freedom of choice (autonomy).[88] Nevertheless, general contract law's assumption of commercial dealing on equal footing does not necessarily hold in the employment context. The social setting in which these contracts arise is

---

[81] *See* Natalya Shnitser, *Trusts No More: Rethinking the Regulation of Retirement Savings in the United States*, 2016 B.Y.U. L. REV. 629, 669 (2016) ("Structuring the governance of public pension plans by analogy to private gratuitous trusts ignores the economic realities of the relevant parties.").

[82] There is a split of authority. The majority view presumes that the maker (settlor) of the trust has no power to revoke it while the minority view codified in the Uniform Trust Code allows revocation or modification unless explicitly negated. *See* 76 AM. JUR. 2d *Trusts* § 76, Westlaw (database updated May 2023); *see also* UNIF. TRUST CODE § 602 cmt. (UNIF. L. COMM'N 2000). Presumptions prevail under the Restatement (Third) of Trusts as well depending on whether the settlor retains an interest in the trust. RESTATEMENT (THIRD) OF TR. § 63 cmt. c (AM. L. INST. 2003). Extrinsic evidence can be used to rebut or reinforce the presumption. *Id*. at cmt. b.

[83] *Pension Law and Ethics*, *supra* note 3, at app. (referencing cases from 2014–2019). Case research through 2024 conducted on Westlaw.

[84] *See generally* Arnow-Richman & Verkerke, *supra* note 51 (arguing to merge employment and contract law as a doctrinal matter); Hanoch Dagan & Michael Heller, *Can Contract Emancipate? Contract Theory and the Law of Work*, 24 THEORETICAL INQUIRIES L. 1, 49–73 (2023) (noting disconnect between contract and employment law and attempting to reunite them in theory).

[85] *See* Arnow-Richman & Verkerke, *supra* note 51, at 899.

[86] *See* Paul M. Secunda, *Litigating for the Future of Public Pensions*, 2014 MICH. ST. L. REV. 1353, 1358; Paul M. Secunda, *Constitutional Contracts Clause Challenges in Public Pension Litigation*, 28 HOFSTRA LAB. & EMP. L.J. 263, 266–67 (2011).

[87] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 343; Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV. 427, 434 (2016).

[88] *See* Aditi Bagchi, *The Employment Relationship as an Object of Employment Law*, at 361, 362–63, *in* OXFORD HANDBOOK OF THE NEW PRIVATE LAW (Andrew S. Gold et al. eds., 2020).

different. Employment contracting occurs in relatively close-knit communities with social norms of respect and reciprocity.[89]

Due to the more familiar relationship between contracting parties in an employment relationship, one scholar also sees private employment law as evidencing an anti-domination principle that limits power by employers over employees.[90] With government contracts, however, the tradeoff between choice and tyranny gets more complicated.[91] Public interests are at stake beyond the employer-employee relationship, including taxpayers, society, and even other (newer) employees that may disproportionately bear the economic shortfall in their own pension benefits.[92] There are detrimental results to non-contracting third parties as well.[93] If pension law is impervious to change, state residents will suffer from increased taxes and decreased government services.[94]

The retirement security of government employees may similarly suffer if cuts are too deep or, alternatively, if plans fail because changes are blocked by legal obstacles. State and local employees are especially vulnerable to reductions if they lack Social Security.[95] And, unlike private sector workers, no federal safety net exists in the form of insurance should plans become insolvent.[96] Additionally, with government employment there is the moral hazard problem of political rent-seeking that suggests employees may have gotten a pension windfall in the first place.[97] How the theory of contract—along with other ideas

---

[89] *See* Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. CIN. L. REV. 517, 549–50 (2004) (explaining the idea of relational contracts originally espoused by Ian Macneil in the context of employment contracts); Arnow-Richman & Verkerke, *supra* note 51, at 958 (calling employment a "hyper-relational setting"). The employment relationship is even more closely connected with defined benefit plans because they incentivize employees to stay by earning higher benefits later in their careers. *See* Karen Eilers Lahey & T. Leigh Anenson, *Public Pension Liability: Why Reform is Necessary to Save the Retirement of State Employees*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 307, 323 (2007); *Pension Law and Ethics*, *supra* note 3, at 148 (explaining the extended forfeiture periods of public pension plans have encourage long service to a degree not seen in the private sector).

[90] *See* Bagchi, *supra* note 88, at 361–64.

[91] *See* Alan W. Mewett, *The Theory of Government Contracts*, 5 MCGILL L.J. 222, 222 (1959) (noting there is no separate government contract concept in the common law as there is in the civil law).

[92] *See Public Pensions and Fiduciary Law*, *supra* note 80, at 269–71; *Pension Law and Ethics*, *supra* note 3, at 32–41.

[93] *See* Wendy N. Epstein, *Contract Theory and the Failures of Public-Private Contracting*, 6 CARDOZO L. REV. 2211, 2256–57 (2013) (arguing that members of the public should be considered third party beneficiaries who can sue to enforce the public interest for government service contracts); *see also* Bargo v. Rauner, 715 Fed. App'x. 548 (7th Cir. 2018) (finding citizens had no standing to sue Illinois on Equal Protection Clause grounds for increasing taxes to pay for public pensions costs).

[94] *See Pension Law and Ethics*, *supra* note 3, at 150, 152–53.

[95] *Reforming Public Pensions*, *supra* note 2, at 57.

[96] *See Public Pensions and Fiduciary Law*, *supra* note 92, at 254.

[97] *See* Booth v. Sims, 456 S.E.2d 167, 183 (W. Va. 1994) ("It is a recurrent problem of government that today's elected officials curry favor with constituents by promising benefits that must be delivered by tomorrow's elected officials."); Jack M. Beermann, *The Public Pension Crisis*, 70 WASH. & LEE L. REV. 3, 3 (2013); Maria O'Brien Hylton, *Combating Moral*

and policies specific to government or employment contracts—should be expressed for a rational development of doctrine remains to be seen.

We offered preliminary reflections previously (and in other literature) on the making and parameters of a public pension contract.[98] Collectively, these recommendations sought to resolve tensions across a range of doctrines and locate the contract concern within a jurisprudential framework.[99] Absent some measure of debate about this largely undiscussed matter, one must not expect a compelling account to be forthcoming.

To make matters worse, there are few constitutional scholars who study the Contract Clause.[100] Literature on the clause tends to follow from U.S. Supreme Court decisions that have been almost non-existent since the early twentieth century.[101] Plus, academic writing highlights federal law and not the diffuse and chaotic state law that is a central barrier to reforming government pensions.[102] The Contract Clause was one of the most litigated provisions of the Constitution after the founding of the federal government.[103] It then went dormant.[104] Now the clause is making a comeback in the context of government pensions.[105]

Furthermore, many areas of state law have had the support of a dedicated group of scholars working to summarize and synthesize the law. These efforts usually result in uniform acts or Restatements to facilitate harmonization and

---

Hazard: The Case for Rationalizing Public Employee Benefits, 45 IND. L. REV. 413, 413 (2012); *see also* Epstein, *supra* note 93, at 2254–55 (arguing that a mandatory duty to further the public interest should be imposed on parties to government contracts).

[98] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 358-75; *Clashing Canons*, *supra* note 25, at 200–13; *supra* Part I; *see generally Reforming Public Pensions*, *supra* note 2 (suggesting a decision-making framework for thinking about public pension reform).

[99] *See California's Super Pension Contract*, *supra* note 34, at 791–96.

[100] *See generally* ELY, JR., *supra* note 19 (omitting state court decisions).

[101] *See* Naomi Cahn, Response, Sveen v. Melin*: The Retro View of Revocation on Divorce Statutes*, GEO. WASH. L. REV. ON DOCKET (June 23, 2018), https://perma.cc/2ZGN-FQJS.

[102] *See generally* Thomas Halper, *The Living Constitution and the (Almost) Dead Contracts Clause*, 9 BRIT. J. AM. LEGAL STUD. 387 (2020) (focusing on the Supreme Court's interpretation of the federal Contract Clause); Richard E. Levy, *Escaping* Lochner*'s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329 (1995) (analyzing federal Contract Clause jurisprudence in the context of other constitutional protections of economic rights); *see also* ELY, JR., *supra* note 19, at 3 (noting that an earlier book ignored state courts and state Contract Clause jurisprudence).

[103] *See* ELY, JR., *supra* note 19, at 58, 249 (commenting that the Contract Clause was among "the most litigated provisions of the Constitution" throughout the nineteenth century); *see also Constitutional Limits on Public Pension Reform*, *supra* note 2, at 369 (citing Dodge v. Bd. of Educ. of Chi., 302 U.S. 74 (1937) (noting that the Supreme Court has not heard a Contract Clause case involving public pension benefits for more than eighty years)).

[104] *See* ELY, JR., *supra* note 19, at 1.

[105] *See id.* at 2–3 ("[S]teps by state and local governments to trim the benefits of public-sector employees have spawned numerous contract clause challenges in both federal and state courts.").

understanding.[106] Government pension law has not had this advantage.[107] Its contract-centric concentration also means that there are potentially fifty distinctive versions of constitutional contract doctrine despite similarities in the language of the Contract Clauses themselves.[108] Without a Restatement or any unifying legislation, there is no comprehensive and uncontroversial definition.

Still the challenge is not simply synthesis; it is integration. To what extent should public pension law absorb the ancillary areas of employment, contract, trusts, private pensions, and employee benefits? Put differently, how much fusion is appropriate? When analogous areas treat the same issues differently, which law should be borrowed (or ignored) and why? In the fast-paced field of litigation, judges do not have the luxury of time to contemplate the niceties of untangling the general from the many specific (albeit related) laws of contract.[109] Courts are likewise dependent on the attorneys who practice before them. The practicing bar, without sustained and substantial scholarly discourse (and a narrow jurisdictional-based context), lacks a deeper and wider perspective on these thorny pension contract issues. Along with the sweeping nature of state and local law, the absence of devoted study has contributed to a hodge-podge of doctrinal rules.[110] Some rules have been made without apparent justification, yielding a constitutional law that is indeterminate and ambiguous.[111]

Suffice it to say that government pension contracts are undergoing an identity crisis.[112] Suffering from neglect due to distinct disciplinary domains, these contracts have been overlooked and under-conceptualized notwithstanding a

---

[106] *See* T. Leigh Anenson, *Announcing the "Clean Hands" Doctrine*, 51 U.C. DAVIS L. REV. 1827, 1835 (2018) (discussing history and purpose of the American Law Institute and resulting Restatements of Law).

[107] *See Pension Law and Ethics*, *supra* note 3, at 120 (explaining that "[s]cholars from fields like tax, employee benefits, and even employment may take up the subject [of public pension reform] on a one-time or limited-time basis"). Even the comparison of state and local pension systems is a challenge. *See Public Pensions and Fiduciary Law*, *supra* note 92, at 275–77 (discussing the diversity in governance among the state pensions). There was a uniform act attempted in 1997, but few states have enacted it. *See* Lahey & Anenson, *supra* note 89, at 329–31 (advocating for more states to adopt the legislation). The National Conference of Commissioners on Uniform State Laws approved the Uniform Management of Public Employees Retirement Systems Act (UMPERSA) to promote transparency and uniformity of public pension systems. *See id*. at 329–30.

[108] PEW CHARITABLE TR., *supra* note 39, at 2 (surveying legal protection for public pension across fifty states). The New Hampshire Constitution does not have a Contract Clause per se, yet its courts have read the prohibition against retroactive laws to include contracts. *See* American Federation of Teachers v. State, 111 A.3d 63, 69 (N.H. 2015) (citing N.H. CONST. pt. I, art. 23).

[109] *See* BRIAN H. BIX, CONTRACT LAW: RULES, THEORY, AND CONTEXT 147–62 (2012).

[110] *See supra* Part I.

[111] California public pension law is a prime example. *See California's Super Pension Contract*, *supra* note 34, at 737 (critiquing the California Rule as a historical accident that has not been justified by reason); *id.* at 793 (describing the rule as "born in secret and clothed in dicta").

[112] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 344 n.27 ("Pension law is part of employee benefits law, which is a subset of employment law that is an aspect of contract law. Not all of these legal dimensions are completely connected and congruent.").

major financial impact to many stakeholders. In advancing a nascent legal field, future research should help to explain what these contracts are and why these contracts exist. These thoughts can then be brought to bear on the pension modification dilemma that has been dogging state legislative agendas.[113] Meanwhile, new cases challenging pension reform are cropping up daily in state and federal courts.[114] Existing decisions are dispersed, riddled with mistakes, and provide faulty (or no) rationales.[115]

The goals of this section are simply to show that much of the chaos can be attributed to a limited interest in the controversial concept of a government pension contract and to encourage academic efforts that intersect at multiple fields. Especially in jurisdictions without definitive determinations, another objective is to widen the horizons of lawmakers (including courts) by demonstrating that the present predicament is neither natural nor inevitable. An additional aspiration is to inform the public pension community of the current law and to raise awareness of the roads not taken.

III. THE CONSTITUTIONAL LAW OF JUDGES

Judges (primarily) make constitutional contract law so the lack of concern from the academic community undermines an appreciation of the protections afforded public pension benefits and policymakers' ability to reform them. For constitutional scholars, the fact that constitutional law is fundamentally a judicial creation is not new. The sparse wording of the federal and many state constitutional clauses virtually guarantees a common law of constitutional interpretation.

In assessing whether pension reform violates the Contract Clause, courts typically employ a three-part test: (1) whether there is a contractual obligation; (2) whether the legislation imposes a substantial impairment of the contract; and (3) whether the legislation is nonetheless reasonable and necessary to serve an important public purpose.[116]

Two of these elements of a Contract Clause claim—substantial impairment and intermediate scrutiny—have no textual basis. Not surprisingly, perhaps, both elements receive their fair share of criticism that are not the focus of this paper.[117] Concerning the first element, the United States and state Contract

---

[113] *See Reforming Public Pensions*, *supra* note 2, at 12–14 (enumerating statutory reform measures); *Pension Law and Ethics*, *supra* note 3, at 141 (analyzing several kinds of reform measures and their success in surviving constitutional challenges).

[114] *See Pension Law and Ethics*, *supra* note 3, at 102 (surveying almost fifty cases in the last six years including several landmark state supreme court decisions).

[115] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 343–44.

[116] *Reforming Public Pensions*, *supra* note 2, at 122; *Pension Law and Ethics*, *supra* note 3, at 122.

[117] *See* Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 526 (1987) (arguing that an original understanding of the Contract Clause would require invalidation of all retrospective modifications of contractual obligations); Nila M. Merola, *Judicial Review of State Legislation: An Ironic Return to Lochnerian Ideology when Public Sector Labor Contracts*

Clauses *do* specify protection for contracts.[118] But "contract" is not defined in the constitutional text either. Therefore, the nature and extent of the contractual duty is necessarily committed to courts.[119]

The U.S. Supreme Court has instructed that state law informs the federal definition of contract—at least up to a point.[120] How far states can push the contract concept has never been tested. And state courts can simply rest their conclusions on their own state constitutions should they create a higher level of contractual protection than federal law.[121] State Contract Clause jurisprudence (generally) assumes ordinary contract principles control.[122] Except some states' contract rules are honored more in the breach (pun intended) likely due to an identity crisis outlined previously and the extent of fusion of the common law of contract and employment.[123]

Complicating matters further is that another source of law—legislation—is often involved as well. Hence, understanding what benefits are protected requires the consideration of three sources of law: constitution, common law, and statute (or ordinance). The ensuing analysis examines the anatomy of a government pension contract and its implications for political alteration.

A. *Anatomy of a Government Pension Contract*

In typical Contract Clause cases, the state or local legislature (or government-controlled entity) has made a promise and subsequent government action has abrogated that commitment. In the employment law of government pensions, the original promise enumerates a certain kind and amount of pension or related benefits. The source of the promise (and its repudiation) can be specified in an

---

are Impaired, 84 ST. JOHN'S L. REV. 1179, 1211 (arguing for strict scrutiny rather than intermediate scrutiny of government labor contracts because employees deserve the highest protection).

[118] *See* U.S. CONST. art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts."); CAL. CONST. art. I, § 9 ("A . . . law impairing the obligation of contracts may not be passed.").

[119] The variety of contractual issues raised by widespread pension reform has already been analyzed. *See supra* Part I (explaining the diversity of judicial opinions on that the subject of contract as applied to pension benefits).

[120] The issue of whether there is a contract is one of federal and not state law under the U.S. Constitution *See* Me. Ass'n of Retirees v. Bd. of Trs. of the Me. Pub. Emps. Ret. Sys., 758 F.3d 23, 29 (1st Cir. 2014) (citing Parella v. Ret. Bd. of R.I. Emps.' Ret. Sys., 173 F.3d 46, 60 (1st Cir. 1999)). Federal courts "accord respectful consideration and great weight to the views of the State's highest court." Gen. Motors Corp. v. Romein, 503 U.S. 181, 187 (1992) (quoting Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938)).

[121] *See* ELY, JR., *supra* note 19, at 58 (advising that some states read state Contract Clauses above the floor set by federal law); *see also Constitutional Limits on Public Pension Reform*, *supra* note 2, at 347 n.315 (noting that courts have not been precise in specifying whether decisions rest on state or federal Contract Clause grounds).

[122] *See, e.g.*, Moro v. State, 351 P.3d 1, 24–27 (Or. 2015) (citing treatises by Corbin and Williston, as well as the Restatement of Contract Law).

[123] *See California's Super Pension Contract*, *supra* note 34, at 765 (noting that California Contract Clause doctrine for public pensions differs from its other Contract Clause jurisprudence and employment at will); *supra* Part II.

actual contract, such as a collective bargaining agreement.[124] Outside of unionized areas of public employment, the benefit itself is usually provided by statute or ordinance.[125]

It bears repeating that state and local legislation may explicitly affirm that pension benefits are contracts.[126] Most laws, however, do not. There are even state constitutional clauses that specify pensions are contracts as well.[127] Again, though, many constitutions contain no such pension-is-a-contract clause.[128] So whether a government pension benefit constitutes a contractual obligation is a matter of statutory interpretation left to the courts.[129] Judges determine the effect of silence on this crucial contract issue.[130] Concomitantly, in the improbable event that constitutions or statutes expressly announce pensions as contracts, there are still multiple other outcome-determinative contractual issues of scope that involve terms, duration, and the like that courts ultimately determine and control.[131] Hence, the contract's existence alone does not negate the fact that judges are writing the pension protection story. Courts are the main rule creators in pension contract law leading to workplace benefits that are promised yet unpredictable.

The law's court-centeredness may be surprising in the private sector world of employee benefits. Private pensions are regulated by federal statutory law where more issues are pinned down by legislation.[132] Indeed, an open question in public

---

[124] *See Reforming Public Pensions*, *supra* note 2, at 19–20, 20 n.112 (also explaining that collective bargaining agreements can constitute contracts).

[125] *See Clashing Canons*, *supra* note 25, at 150 (noting that state statutes are the most common sources of contract rights along with ordinances and state constitutional provisions).

[126] *See* discussion *supra* Part I.A. In *Schwegel v. Milwaukee County*, the Supreme Court of Wisconsin upheld a statutory modification that limited the County's obligation to reimburse Medicare Part B premiums at retirement to employees retiring by certain dates. 859 N.W.2d 78, 90 (Wis. 2015) (claiming contract right as explicitly provided for in pension legislation).

[127] *See* ILL. CONST. art. XIII, § 5 ("Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.").

[128] *See Clashing Canons*, *supra* note 25, at 150; T. Leigh Anenson & Kevin J. McGarry, *Pension and Contract: A Tale of Two Constitutional Clauses*, at 6 (working paper) (on file with author) (studying state pension clauses).

[129] *See* Cal Fire Loc. 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 455 n.1 (Cal. 2019) (Kruger, J., concurring) (clarifying that the statute itself is not the offer to contract that an employee can accept but the offer makes the statute relevant in providing the contract terms) (citing Moro v. State, 351 P.3d 1, 21 (Or. 2015)); JOHN E. MURRAY, MURRAY ON CONTRACTS § 8, at 17 (3d ed. 1990) (explaining that a contract exists independent of the writing to memorialize it).

[130] *See Reforming Public Pensions*, *supra* note 2, at 20 n.112 ("Because most state statutes do not expressly create a contract, the central judicial inquiry is whether such a contract may be implied from the circumstances.").

[131] *See* discussion *supra* Part I.A.

[132] *See* Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391, 402–04 (1999) (tracing the historical events leading to the enactment of ERISA and Congress' concern that private pension plan failures will harm Social Security).

pension litigation about whether plans can be modified prospectively is settled (and allowed).[133]

Accordingly, while government pension contracts are of constitutional concern, questions of contract are found almost entirely in cases. Pension contract rights are (for the most part) not positive edicts; they emerge from hundreds of decentralized decisions. Judicial interpretations of public pension legislation have supplanted statutes as the source of governing norms for adjudication.[134] As a result, case outcomes will likely depend on the unwritten (decisional) law and not the written law.[135]

B. *Implications for Changing Constitutional Common Law*

The limited written law (and essentially unlimited unwritten law) has implications for policymakers seeking to modify pension benefits. Recall that most public pension law is judge-made, determining a few integral issues: whether a contract exists, the scope of the contract, and variations on when the contract is formed.[136] And jurisdictions take conflicting approaches to whether government pensions are even contracts at all.[137] Depending on a state's pension contract precedent, along with the type of reform, the source of law needed to change or reverse judicial action will differ.

Stare decisis, naturally, is not cast in stone.[138] But courts rarely change course quickly or acknowledge when they do.[139] The reality is that courts have limited capacity to correct errors or change directions even when judges view constitutional precedents as weaker than judicial rulings interpreting statutes.[140]

---

[133] *See* ERISA § 204(g), 29 U.S.C.A. § 1054 (West) (prohibiting reduction in accrued benefits by plan amendment even if not yet vested); *see also* Dana M. Muir, *An Agency Costs Theory of Employee Benefit Plan Law*, 43 BERKELEY J. EMP. & LAB. L. 361, 368 (advising the agreement of commentators and the federal courts agree on the deferred compensation concept of private pension law); *supra* Part I.C.

[134] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 344–46 (discussing the difficulty and importance of analyzing public pension reform decisions).

[135] Cases are called unwritten law because once upon a time decisions were considered evidence of the law and not the law itself. *See* Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 104 (2000). A judge's job was to discover the law and not to make it. *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 660 (1999) (discussing the declaratory theory of law).

[136] *See supra* Part I.

[137] *Id.*

[138] *See California's Super Pension Contract*, *supra* note 34, at 743, 792 (noting that American stare decisis doctrine was never as rigid as in England).

[139] *See id*. at 784 (criticizing the California Supreme Court in creating confusion by avoiding whether to reaffirm or repudiate the super pension contract); *see also Constitutional Limits on Public Pension Reform*, *supra* note 2, at 387 (commenting that the judge-made nature of the contract rules means that they can change more readily than resorting to a constitutional amendment).

[140] *See California's Super Pension Contract*, *supra* note 34, at 792 (noting that in California and other states, precedent has less force when the decisional rule has constitutional implications).

So, the most meaningful reforms will come from the political branches either through legislation or constitutional amendments. Voters in some states can similarly drive constitutional change through direct democracy initiatives.[141] Because "reforms" presumably aim to cut benefits to government employees, these changes will diminish pension contract rights potentially guaranteed under state and U.S. Contract Clauses (and sometimes Pension Protection Clauses).[142]

The California Rule, for example, protects the level of benefits offered on the first day of employment.[143] The controversial rule not only sets a baseline below which benefits cannot fall, but it also prohibits any reduction in benefits through retirement.[144] The doctrinal protection of future accruals is a constitutional matter since it identifies the parameters of the pension contract under the state Contract Clause.[145] Because of the constitutional barrier, statutory changes to the terms of any agreement validly apply only to new hires. The restricted reach of legislation will hardly solve California's government pension problem.[146]

Despite doctrinal impediments, the California Supreme Court has been agile enough to uphold recent legislative reforms without undertaking a major overhaul of its pension precedent. The court determined in consecutive cases that changes were either not a term of the contract or otherwise justified.[147] Unless the Supreme Court has the opportunity to make further changes to its pension contract doctrine soon though (such as moving from safeguarding prospective to accrued benefits earned daily) a constitutional amendment may be needed.[148]

In fact, in Arizona, voters passed constitutional amendments to allow cost of living adjustment ("COLA") changes in certain retirement systems after the state supreme court struck down public pension reform.[149] Arizona courts follow

---

[141] *See* Neal Devins & Nicole Mansker, *Do Judicial Elections Facilitate Popular Constitutionalism: Can They?*, 111 COLUM. L. REV. SIDEBAR 27, 30–31 (2011); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2088–93 (2010) (recognizing direct democracy responses to unpopular court rulings).

[142] *See Pension Law and Ethics*, *supra* note 3, at 5–23 (cataloguing public pension reform cases); ILL. CONST. art. XIII, § 5.

[143] *See California's Super Pension Contract*, *supra* note 34, at 737.

[144] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 372; *supra* Part I.C.

[145] *See* Cal Fire Loc. 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 443–44 (Cal. 2019).

[146] *See California's Super Pension Contract*, *supra* note 34, at 772 (discussing grave consequences unless the California Rule is modified).

[147] *See Cal Fire Loc. 2881*, 435 P.3d at 444–45; Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Emps.' Ret. Ass'n, 470 P.3d 85, 93 (Cal. 2020); *California's Super Pension Contract*, *supra* note 34, at 741 (reviewing the cases).

[148] *See* CAL. CONST. art. XVIII, § 4 (declaring that an amendment to the state constitution can be passed by a majority of voters in a California election); *see also The Argonauts, supra* note 35, at 3 (arguing that the California Supreme Court should partially overrule the California Rule to protect only accrued benefits); *supra* Part I.C.

[149] *See* Hall v. Elected Offs.' Ret. Plan, 383 P.3d 1107, 1117–19 (Ariz. 2016) (striking down increases to employee contribution rates and changes to the benefit calculation and COLAs); *see also* Fields v. Elected Offs.' Ret. Plan, 320 P.3d 1160, 1166 (Ariz. 2014) (striking down

California's first-day-until-forever pension doctrine that freezes future accruals.[150] Consequently, voter initiatives compelling constitutional change were necessary.[151]

States with pension precedent protecting accrued (as opposed to prospective) benefits have fewer legal obstacles to legislative pension reform even if courts construe the contract as created upon the commencement of employment. By protecting benefits earned each day, statutory benefit cuts operate prospectively once enacted and apply to current employees. In short, there are no constitutional contract repercussions to these benefit modifications.

State sources of law can, of course, raise pension contract protection as a state constitutional matter even when the federal Contract Clause has been interpreted with less protection.[152] Courts were the primary actors in transforming gratuities into pension rights in the first place.[153] And state legislatures can always increase pension protection in response to the judicial reading of benefit statutes without corollaries under the Contract Clause.[154] Although raising benefits and protections would be unusual in this post-pandemic era of enormous pension liabilities.[155]

---

public pension modifications on state Pension Clause grounds); *see generally* Walsh, *supra* note 2 (noting pension debt struggles of Arizona cities).

[150] *See Fields*, 320 P.3d at 1166.

[151] The constitutional amendments allowed changes to COLAs for active members and retirees in three retirement systems comprising corrections officers, elected officials, and public safety personnel. *See* ARIZ. CONST. art. XXIX, § 1(D); *see generally* Arizona Pension Laws: Infographic, EQUABLE (Nov. 20. 2021), https://perma.cc/FQ9T-2YNK (summarizing amendments).

[152] *See* Me. Ass'n of Retirees v. Bd. of Trs. of the Me. Pub. Emps. Ret. Sys., 758 F.3d 23, 29 (1st Cir. 2014) (citing Parella v. Ret. Bd. of R.I. Emps.' Ret. Sys., 173 F.3d 46, 60 (1st Cir. 1999)); *supra* note 121 and accompanying text.

[153] *See* Note, *Public Employee Pensions in Times of Fiscal Distress*, 90 HARV. L. REV. 992, 994–1003 (1977) (tracing the transition from the gratuity to the contract approach); Note, *Contractual Aspects of Pension Plan Modification*, 56 COLUM. L. REV. 251, 255–63 (1956) (tracing the transition from the gratuity to contract approach); *see generally* Robert L. Clark et al., *The Evolution of Public Sector Pensions in the United States, in* THE FUTURE OF PUBLIC EMPLOYEE RETIREMENT SYSTEMS 239–70 (Olivia S. Mitchell ed., 2003).

[154] For instance, the Maine legislature amended its pension statute to say precisely when a contract is formed after a court read statutory silence to mean that public pensions were not protected from change until retirement. *See* Me. Ass'n of Retirees, 758 F.3d at 28–29 (citing Parker v. Wakelin, 123 F.3d 1, 7 (1st Cir. 1997)). It adopted clear language declaring that the contract commenced (pension benefits protected) when the member satisfied the service requirement. *See id.*

[155] *See* Oliver Giesecke & Joshua D. Rauh, *Trends in State and Local Pension Funds*, 15 ANN. REV. FIN. ECON. 221, 221 (Nov. 2023) (calculating the total reported unfunded liabilities of state and local U.S. plans is $1.076 trillion with the market value of the unfunded liability at approximately $6.501 trillion as of fiscal year 2021).

CONCLUSION

The Contract Clause once dominated the docket of the Supreme Court. But now the clause belongs to the museum of constitutional law.[156] This artifact, however, is gaining new life in ongoing litigation over public pension reform with extensive effects on workers and the economy.[157]

This Article provided an overview of the major doctrines and principles of a government pension contract while also looking at the themes and theories that ground them. It exposed a government pension identity crisis, emphasizing the thinness of legal scholarship that coalesces around otherwise common areas of study like contracts, trusts, employment, and constitutional law. It further clarified how the ill-defined image of a public pension contract is complicated by its common law character that has consequences for changing constitutional contract law and reforming government pensions.

---

[156] ELY, JR., *supra* note 19, at 238; Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 890 (1987) (noting that the Contract Clause is mostly a "dead letter").

[157] *See generally* Note, *The Contract Clause Reawakened in the Age of Covid-19*, 136 HARV. L. REV. 2130, 2142–44, 2146 (2023) (discussing two other new issues involving potential Contract Clause constraints on state health measures pursuant to the pandemic and the clause's actionability under 42 U.S.C. § 1983).

NOTES

JUSTIFYING THE ABORTION RIGHT DURING AN AGE OF EXPANDING SELF-DEFENSE

GANNON PALMITER*

* J.D. Boston University School of Law, 2024; B.A., Government, Cornell University, 2020. I would like to thank the Public Interest Law Journal, for their support on this note; Professor James Fleming, for his tremendous aid on this note and modeling the best that the law can be; Elisabeth Costanzo Stewart, for opening my eyes to a world that can exist when I pick up a pen; my family, whose love and undying support enables me to stand; and my mother, for loving every part of me into existence. All errors are my own.

INTRODUCTION

For much of the last fifty years, the abortion debate in the United States centered around where and how one should draw the line concerning when a fetus becomes a person.[1] On one side of the debate, a pregnant person's interest in personal privacy or liberty always trumps any state interest and the state may not infringe upon the individual's right to terminate their pregnancy.[2] On the other side, either upon the moment of conception or once the fetus is determined to be "viable," then the state may prevent the pregnant person from having an abortion.[3]

This viability argument, which utilizes Supreme Court decisions, prioritizes the humanity of the fetus, rather than a pregnant person's agency to control their body.[4] In other words, the pregnant person loses their right to control what happens to their bodies because the fetus *is* a potential life.[5] Instead, the abortion debate should focus on what the fetus *does* to the pregnant person; the fetus "causes pregnancy by implanting itself in a woman's body and maintaining that implantation for nine months."[6] This implantation occurs during every pregnancy and every currently living person implanted on their birthing parent during their parent's pregnancy.[7] However, the implantation justifies expulsion of the fetus when one vital component is missing: the consent of the birthing parent.[8]

The state forcing an individual to sacrifice their body to accomplish state goals (i.e., preserving the life of the fetus) infringes upon the general notion that an individual can use force to secure their bodily autonomy.[9] In her famous essay, *A Defense of Abortion*, Judith Jarvis Thomson likened the state forcing a nonconsenting pregnant person to retain an intruder within their body to the state forcing an individual to use their body to sustain a famous violinist:

---

[1] *See* Judith Jarvis Thomson, *A Defense of Abortion*, *reprinted in* INTERVENTION AND REFLECTION: BASIC ISSUES IN MEDICAL ETHICS 69 (Ronald Munson et al. eds., 5th ed. 1996) ("We are asked to notice that the development of a human being from conception through birth into childhood is continuous; then it is said to draw a line, to choose a point in this development and say 'before this point the thing is not a person, after this point it is a person' is to make an arbitrary choice . . .").

[2] *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851–52 (1992).

[3] *See id.* at 870; Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[4] *See* EILEEN L. MCDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT 5 (Oxford University Press 1996) ("The state's protection of what the fetus is as human life . . . reflects a general tendency in the abortion debate to assume that women's rights to an abortion and to abortion funding stand or fall on the human status of the fetus.").

[5] *See id.*

[6] *Id.* at 5–6.

[7] *See id.*

[8] *See id.* at 6.

[9] *See id.* at 8 ("Just as the state's protection of born people stops short of allowing them to intrude upon the bodies and liberties of others, whatever might be their need or kinship relations to others, so, too, must the state's protection of fetuses stop short of allowing them to intrude upon the bodies and liberties of women without consent.").

> . . . let me ask you to imagine this. You wake up in the morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. The director of the hospital now tells you, "Look, we're sorry the Society of Music Lovers did this to you—we never would have permitted it if we had known. But still, they did it, and the violinist is now plugged into you. To unplug you would be to kill him. But never mind, it's only for nine months. By then he will have recovered from his ailment[] and can safely be unplugged from you. . . . All persons have a right to life, and violinists are persons. Granted you have a right to decide what happens in and to your body, but a person's right to life outweighs your right to decide what happens in and to your body. So[,] you cannot ever be unplugged from him."[10]

The conviction that the state should permit someone to unplug the violinist is analogous to the notion that the state should permit someone to terminate a pregnancy.[11] This analogy is ripe based upon both the changing abortion debate in the Supreme Court and the individual states' evolving self-defense doctrine. For the sake of argument, this formulation concedes many attitudes and arguments of pro-life/conservative individuals in justifying the pro-choice end goal of protecting abortion.[12] This formulation will begin with the legal background underlying the abortion debate;[13] then show the growing protection of self-defense emerging out of the individual states;[14] and finally it will show how utilizing self-defense principles may justify a person's right to secure an abortion at a time when the Supreme Court has rejected substantive due process justifications for the right.[15] Eventually, it will be argued that states must protect the right to have an abortion just as they protect every other self-defense right.[16]

Preliminarily, a note on the use of language. Many of the references and decisions only refer to a pregnant *woman's* ability to have an abortion,[17] and not more accurately to pregnant persons generally. While it may track the language understanding of the various judicial and legislative bodies that will be discussed

---

[10] Thomson, *supra* note 1, at 69.
[11] *Id.*
[12] *Id.*
[13] *See infra* Part I: Legal Background: Abortion.
[14] *See infra* Part II: Legal Background: Self-Defense.
[15] *See infra* Part IV: Pregnancy as an Injury.
[16] *See infra* Part IV: Pregnancy as an Injury.
[17] *See* Roe v. Wade, 410 U.S. 113 *passim* (1973).

to refer only to pregnant "women," this note will speak of the right pregnant "persons" have to an abortion because it better encompasses the population whose rights are affected by the abortion debate.[18]

I. LEGAL BACKGROUND: ABORTION

In *Roe v. Wade*, the Supreme Court of the United States established for the first time that the right to have a pre-viability abortion must be protected within the notion of "substantive due process" contained within both the Fifth and Fourteenth Amendments of the US Constitution (i.e., "the protection of substantive liberties such as privacy and autonomy under the Due Process Clauses of the US Constitution").[19] While the Court found that the right to have an abortion is protected by the Constitution, it did not go further by finding a constitutional right for a pregnant person to receive funding for an abortion, to be provided facilities or personnel assistance for an abortion, or to be given information regarding an abortion.[20] Instead of more affirmatively settling the abortion debate, the Supreme Court's decision resulted in greater political conflict.[21]

Faced with heightened political backlash, the Supreme Court in 1992 reaffirmed the central holding of *Roe* in *Planned Parenthood v. Casey*, holding that the Due Process Clause of the Fourteenth Amendment secured the right for a pregnant person to obtain an abortion prior to viability of the fetus.[22] In *Casey*, the Court analyzed a Pennsylvania law that technically did not prohibit a pregnant person from securing an abortion, but required (1) a person seeking an abortion to give informed consent, (2) a minor seeking an abortion to obtain parental consent or a judicial waiver, (3) a married and pregnant woman to notify her husband of her planned abortion, and (4) that clinics must provide a pregnant person with certain information and wait twenty-four hours before performing the abortion.[23] The Court held that a state may not impose an "undue burden" on a person's ability to secure an abortion prior to the fetus's viability (i.e., up to that point the person's interest in bodily autonomy outweighs any state interest).[24] An undue burden does not mean that a state cannot burden the right

---

[18] *NIH Style Guide: Inclusive and Gender-Neutral Language*, NAT'L INST. OF HEALTH (Nov. 24, 2023), https://www.nih.gov/nih-style-guide/inclusive-gender-neutral-language.

[19] *Roe*, 410 U.S. at 113; JAMES E. FLEMING, CONSTRUCTING BASIC LIBERTIES 1–2 (University of Chicago Press, 2022); *see* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."); U.S. CONST. amend. XIV § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .");.

[20] *See* MCDONAGH, *supra* note 4, at 1.

[21] *See generally* Linda Greenhouse & Reva B. Siegal, *Before (and After)* Roe v. Wade*: New Questions about Backlash*, 120 YALE L.J. 2028 (2011).

[22] Planned Parenthood of Southeastern Pa. v. Casey*,* 505 U.S. 833, 871 (1992) ("The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.").

[23] *See id.* at 833.

[24] *See id.* at 874.

at all, nor are states prohibited from trying to persuade the pregnant person to not go through with an abortion; it simply means that states are only prohibited from presenting a "substantial obstacle" to getting an abortion.[25] The Court concluded that the only provision of the Pennsylvania law that constituted an undue burden was the requirement that a pregnant woman must inform her husband of the planned abortion.[26]

After the fetus becomes viable, the Court explicitly found that the State may burden, or even fully restrict, a person's right to obtain an abortion (except where it is necessary for the preservation of the life or health of the pregnant person).[27] The Court found that, at the point of viability, the State's legitimate interests (such as "protecting the health of the woman and the life of the fetus that may become a child") outweigh the pregnant person's interest in bodily autonomy.[28] The Court draws this line through their adherence to *Roe*—because of stare decisis and their belief that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban."[29]

The Court abandoned the trimester approach found in *Roe* because it proved to be too "rigid" and because medical developments since *Roe* affected the precise point of viability, potentially pushing the point of viability earlier than the third trimester.[30] Instead, the Court defined the point of viability as when there is "a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection . . ."[31]

Over the course of the next generation, the abortion debate centered around the Supreme Court's definition of what constituted "viability" of a fetus.[32] Pro-life proponents focused on protecting the rights and the personhood of the fetus; whereas pro-choice proponents stressed the rights of the pregnant person, while

---

[25] *Id.* at 877 (holding that an undue burden is a "substantial obstacle to the woman's exercise of the right to choose"); *see* Roe v. Wade, 410 U.S. 113 164–65 (1973) ("subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.").

[26] *See* Casey*,* 505 U.S. at 893–94 ("[spousal notification] does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle.").

[27] *See id.* at 846; *Roe*, 410 U.S. at 163–64.

[28] *Casey,* 505 U.S. at 846.

[29] *Id.* at 860; *see generally Roe*, 410 U.S. at 113.

[30] *See Casey,* 505 U.S. at 870; *see also* Randy Beck, *Gonzales, Casey, and the Viability Rule*, 103 NW. U. L. REV. 249, 250 (2009).

[31] *Casey,* 505 U.S. at 870.

[32] *See* Paul Stark, *The Supreme Court's (Nonexistent) Argument for the Viability Standard*, MN CITIZENS CONCERNED FOR LIFE (Jan. 4, 2017), https://perma.cc/J76A-DLNP; Ariana Eunjung Cha & Rachel Roubein, *Fetal Viability is at the Center of Mississippi Abortion Case. Here's Why.*, WASH. POST (DEC. 1, 2021), https://www.washingtonpost.com/health/2021/12/01/what-is-viability/; Richard J. Lyus, *Viability Is Probably Irrelevant*, NAT'L LIB. MED., https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2071977/.

also arguing that an abortion does not kill a human being.[33] Both sides deployed arguments in areas such as normative assessment, politics, science, religion, and ethics in trying to establish when "viability" is realized.[34] Because the Supreme Court centered the scope of the abortion debate and subsequent litigation around "viability" of a fetus, the next thirty years focused not on the rights of the pregnant person, but on "the primacy of the humanity of the fetus as the principle that determines a women's right to an abortion."[35]

All of this changed on June 24, 2022, when the Supreme Court issued a decision in *Dobbs v. Jackson Women's Health Org.*[36] In that case, the conservative-majority Supreme Court considered a restrictive abortion law from Mississippi that banned abortions after fifteen weeks of pregnancy (i.e., before the point viability of the fetus established in *Casey*) and held the following: first, that the right to have an abortion is not protected by the notion of substantive due process found in the Fourteenth Amendment (directly overturning *Roe* and *Casey*); second, that stare decisis does not prevent the Court from overturning *Roe* and *Casey* because of the "demonstrable" error behind those cases; and third, all future state abortion procedures will be subject only to rational basis review by the Court (rather than the "undue burden" standard found in *Casey*).[37] Through these holdings, the *Dobbs* court rendered the "viability" debate that began with *Roe* and *Casey* obsolete because individual rights do not outweigh any cognizable state interest.[38] *Dobbs* leaves abortion rights in the hands of subsequent state and federal legislation.[39]

This sudden change in a nearly fifty-year practice prompted individuals to seek new avenues to ground a person's right to have an abortion.[40] Post-*Dobbs*, twelve states have banned all abortions while thirty-two states have banned abortions after a specified point in pregnancy.[41] Without a federal right to

---

[33] *See* Sara Bizarro, *Abortion—An Ethical Discussion*, MEDIUM (Apr. 8, 2020), https://sarabizarro.medium.com/abortion-an-ethical-discussion-b76337703f4a.

[34] *See* Emma Green, *Science is Giving the Pro-life Movement a Boost*, ATLANTIC (Jan. 18, 2018), https://www.theatlantic.com/politics/archive/2018/01/pro-life-pro-science/549308/; Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 YALE L. J. 1318, 1322 (2009).

[35] MCDONAGH, *supra* note 4, at 5.

[36] *See* Martha F. Davis, *The State of Abortion Rights in the US*, 159 INT'L J. OF GYNECOLOGY & OBSTETRICS 324 (2022); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 215 (2022).

[37] *Dobbs*, 597 U.S. at 230; *see* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 833 (1992); Roe v. Wade, 410 U.S. 113, 113 (1973); U.S. CONST. amend. XIV.

[38] *See Dobbs*, 597 U.S. at 300–01 ("These legitimate interests [that could justify a state's abortion law under rational basis review] include respect for and preservation of prenatal life at all stages of development . . . the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability."); *Casey*, 505 U.S. at 877.

[39] *See* Jessica Arons, *With Roe Overturned, What Comes Next for Abortion Rights?*, AM. C.L. UNION (Jun. 24, 2022), https://perma.cc/WWJ4-5478 .

[40] *See id.*

[41] *See Abortion in the United States*, ABORTIONFINDER.ORG, https://perma.cc/99WS-6WMF; *Abortion Regulations by State*, BALLOTPEDIA.ORG,

abortion provided either by the Supreme Court (found within the Constitution) or through Congress, about half of the states are expected to enact some degree of an abortion ban.[42]

In an attempt to find other sources for the right, scholars have argued that abortion might be protected within the Equal Protection Clause of the Fourteenth Amendment,[43] the Privileges or Immunities Clause of the Fourteenth Amendment,[44] or the prohibition of involuntary servitude within the Thirteenth Amendment.[45] Congress itself has named numerous grounds they might have to pass legislation—either protecting or prohibiting abortion—including: the Commerce Clause, the Spending Clause, and Section Five of the Fourteenth Amendment.[46]

However, federal solutions to overcome *Dobbs* are presently unlikely. On one hand, the Supreme Court contains a conservative-supermajority that not only appear to be unwilling to protect abortion through other bases in the Constitution, but also appear likely to continue to strip Americans of currently held constitutional rights through their use of originalist interpretations of the Constitution.[47] Furthermore, Congress appears unable to pass substantive protections on the right to abortion because of how polarized Americans are on the issue.[48] For example, even when the Democrats controlled the Presidency,

---

https://web.archive.org/web/20240318034441/https://ballotpedia.org/Abortion_regulations_by_state (providing a more in-depth review of each state's abortion practices).

[42] *See* Arons, *supra* note 39.

[43] *See* FLEMING, *supra* note 19, at 173 ("With substantive due process cases . . . rewriters [of those cases] commonly [argue] . . . that the Court should have grounded the right in the Equal Protection Clause (equality) instead of the due process clause (liberty)."); *see generally* Reva Siegel et al., *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside the Abortion Context*, 43 COLUM. J. OF GENDER & THE LAW 67 (Feb. 4, 2023).

[44] *See* David H. Gans, *OP-ED: No, Really, the Right to an Abortion is Supported by the Text and History of the Constitution*, CON. ACCOUNTABILITY CTR., https://perma.cc/RM9H-KJD5; Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 240 (2022), 597 U.S. at 240 (Thomas, J., concurring).

[45] *See* Andrew Koppelman, *Forced Labor: Why the Thirteenth Amendment Protects Abortion Rights*, WASH. MONTHLY (Jan. 12, 2023), https://perma.cc/LS9K-6LBY.

[46] *See generally* CONG. RSCH. SERV., *Congressional Authority to Regulate Abortion* (July 8, 2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10787.

[47] *See* Bernadette Meyler, Dobbs *and the Supreme Court's Wrong Turn on Constitutional Rights*, BLOOMBERG L. (June 24, 2022), https://news.bloomberglaw.com/us-law-week/the-supreme-courts-wrong-turn-on-constitutional-rights ("Adhering narrowly to the historical application of constitutional rights leads to an entrenchment of discrimination against historically disadvantaged groups. It will also result in an ad hoc vision of the scope of constitutional rights . . .").

[48] *See, e.g.*, Amanda Seitz & Colleen Long, *Biden's Efforts to Protect Abortion Access Hit Roadblocks*, ASSOCIATED PRESS (Dec. 6, 2022), https://apnews.com/article/abortion-us-supreme-court-health-travel-government-and-politics-c503469ac075698dee8fd951b067b967 ("The Biden administration is still actively searching for ways to safeguard abortion access . . . [i]n reality, though, the administration is shackled by a ban on federal funding for most abortions, a conservative-leaning Supreme Court inclined to rule against abortion rights and a split Congress unwilling to pass legislation on the matter."); Amanda Becker, *Why Didn't Congress Codify Abortion Rights*, THE 19TH (Jan. 26, 2022),

the House of Representatives, and the Senate, they did not have sufficient votes in the Senate to overcome the filibuster and pass substantive protections for abortion.[49]

With the new limited judicial review on legislation related to abortion, it appears that the next steps to protect the abortion right will have to be state driven.[50] Pro-choice scholars have begun to search for avenues to protect the right in conservative-majority state legislatures in order to secure the right for those most vulnerable to abortion laws (i.e., people who are disproportionally more likely to need abortion care and are less able to travel out-of-state to secure the medical procedure in states where it is permitted) in areas that are both economically disadvantaged and contain a higher proportion of people of color.[51]

For those pro-choice scholars, envisioning abortion as a right to self-defense might help them in conservative-majority states that have shown an expansion of that right.[52]

II. LEGAL BACKGROUND: SELF-DEFENSE

While each state has its own self-defense doctrine, the traditional approach involves (1) a perpetrator attacking an individual; and (2) that individual responding with the amount of force reasonably necessary to fend off the attacker (after the individual has satisfied whatever duty of retreat that they may have).[53] The force reasonably necessary may be lethal when the individual reasonably believes that the perpetrator's force will result in their death or serious bodily injury.[54]

The notion, and the right, of an individual lawfully using force to protect themselves (and others) from the illicit use of force extends beyond America's

---

https://19thnews.org/2022/01/congress-codify-abortion-roe/ (indicating that Congress has repeatedly tried to codify *Roe* in the fifty years since the decision); Alice Miranda Ollstein & Marianna Levine, *Senate Fails To Pass Abortion Rights Bill—Again*, POLITICO (May 11, 2022), https://www.politico.com/news/2022/05/11/senate-doomed-vote-roe-abortion-rights-00031732, (showing that the most recent abortion rights bill failed to get a Senate majority when the Democrats held the House and the Senate).

[49] *See generally* Mary Clare Jalonick et al., *Senate Democrats Fell Short on Enshrining Abortion Access as Federal Law*, PBS NEWS HOUR (May 11, 2022), https://www.pbs.org/newshour/politics/senate-fell-short-on-enshrining-abortion-access-as-federal-law.

[50] *See Building Protections for Reproductive Autonomy*, CTR. FOR REPROD. RTS. https://perma.cc/3229-XUG4 ("Not only do state courts and constitutions offer stronger and expanded legal grounds for protecting abortion rights, they also shield access to abortion in highly restrictive parts of the country.").

[51] *See* Kierra B. Jones, *Expanding Access and Protections in States Where Abortion is Legal*, CTR. FOR AM. PROGRESS (Jul. 25, 2022), https://perma.cc/4KGC-SNC7.

[52] *See generally* MCDONAGH, *supra* note 4, at 7.

[53] *See* Lauren Baldwin, *"Stand Your Ground": New Trends in Self-Defense Law*, CRIM. DEF. LAW., https://perma.cc/YVL5-TSRQ.

[54] *See id.*

founding and is rooted in ancient English common law principles.[55] William Blackstone—whom the majority in *Dobbs* invoked repeatedly—remarked the following regarding eighteenth-century English common law:

> The defense of one's self, or the mutual and reciprocal defense of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace, which happens, is chargeable upon him only who began the affray. For the law, in this case, respects the passions of the human mind; and . . . makes it lawful in him to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say, to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.[56]

While there are significant differences between England's conception of self-defense and the contemporary doctrine in the United States,[57] hundreds of years of precedent supports the notion that "[i]f an aggressor attacks an innocent third-party, then that party may . . . be licensed in returning the force."[58] An individual's right to self-defense, or their right to bodily autonomy, is rooted in two principles: (1) the right to self-sovereignty and (2) the right to consent to the effects a person may have on the individual's bodily autonomy.[59]

States have been expanding what they consider to be a lawful return of force, and this includes the forty-six states that have enacted some version of an

---

[55] *See* Liz Mineo, *The Loaded History of Self-Defense,* HARV. GAZETTE (Mar. 7, 2017), https://perma.cc/6DA6-32ZF.

[56] 3 WILLIAM BLACKSTONE, COMMENTARIES, *2–3; *see also* Fritz Allhoff, *Self-Defense Without Imminence*, 56 AM. CRIM. L. REV. 1527, 1527–28 (2019).

[57] *See* Mineo, *supra* note 55.

[58] Allhoff, *supra* note 56, at 1529.

[59] *See* Eileen McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, 62 ALB. L. REV. 1057, 1061 (1999) [hereinafter McDonagh, *My Body, My Consent*]; David Wasserman, *Justifying Self-Defense*, 16 PHIL. & PUB. AFFAIRS 356, 362 (1987) ("The aggressor's conduct appears to justify the victim's action more directly, by triggering a basic and unmediated right to defend himself."); *see also* Cruzan v. Director, Mo. Dep't of Health*,* 497 U.S. 261, 287 (1990) (O'Connor, J., concurring) ("Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the [Supreme] Court has often deemed state incursions into the body repugnant . . .").

exception to the duty to retreat: the Castle Doctrine.[60] The Castle Doctrine was originally a common law doctrine that allowed an individual, when they are in their abode (states differ in what constitutes an "abode" as some allow for the doctrine in more than just the individual's home but also in their car or their place of work), to not have a duty to retreat before lawfully defending themselves from harm.[61] Certain jurisdictions have even expanded the Castle Doctrine to the area beyond an individual's home—such as the individual's curtilage (i.e., the area immediately surrounding one's home).[62]

The origin of the rule stems from the broader common law doctrine of self-defense in the home.[63] The ability to use deadly force in the home is not limited to external attacks (i.e., when someone trespasses into one's abode), but also for internal attacks (i.e., when the need for deadly force arises from inside one's home).[64] In other words, deadly force is permitted under the Castle Doctrine anytime the threat of deadly force arises in (or nearby) one's home, even if the aggressor was not a trespasser.[65]

There are numerous rationales behind the Castle Doctrine and each of the forty-six state legislatures deploy their own justifications.[66] However, many of the rationales seem to reflect two primary justifications. First, one's home is sacred and private.[67] William Blackstone echoes the importance of the home in one of his eighteenth-century publications, concluding that "[s]o great moreover is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the community."[68] Second, a person should not have to retreat while in their home. As the Court of Appeals of New York stated as early as 1914, "[i]f assailed [in one's home], he may stand his ground and resist the attack . . . [h]e is under no duty to take to the fields and highways, a fugitive in his own home."[69]

Numerous states have extended the realm in which an individual does not have a duty to retreat and have created their own version of a Stand-Your-Ground

---

[60] *See* MARK RANDALL & HENDRIK DEBOER, CONN. OFF. LEGIS. RSCH., THE CASTLE DOCTRINE AND STAND-YOUR-GROUND LAW (Apr. 24, 2012), https://www.cga.ct.gov/2012/rpt/2012-r-0172.htm.

[61] *See id.*

[62] *See, e.g.,* State v. Blue, 356 N.C. 79, 89 (N.C. 2002) (extending the Castle Doctrine to the "porch of a dwelling . . ."); State v. Bonano, 59 N.J. 515, 518–19 (N.J. 1971) (indicating that there is no duty to retreat in the area immediately outside the front door); Jones v. State, 398 So.2d 360, 363 (Ala. Crim. App. 1981) (extending the Castle Doctrine to the entire curtilage of an individual's home).

[63] *See* Catherine L. Carpenter, *Of the Enemy Within, The Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 665–67 (2003).

[64] *See id.*

[65] *See id.* at 668.

[66] *See* Wyatt Holliday, *"The Answer to Criminal Aggression is Retaliation": Stand-Your-Ground Laws and the Liberalization of Self-Defense*, 43 U. TOL. L. REV. 407, 414 (2012).

[67] *See* Carpenter, *supra* note 63, at 667.

[68] 2 WILLIAM BLACKSTONE, COMMENTARIES *139.

[69] People v. Tomlins, 213 N.Y. 240, 243 (1914) (stating that retreating from one's home is unnecessary because "[f]light is for sanctuary and shelter, and shelter, if not sanctuary, is in the home.").

law.[70] While each state's version may vary, the doctrine traditionally enables an individual, when facing an illicit use of force—wherever the individual rightfully happens to be—to not retreat before protecting themselves and others with reasonably proportional force.[71] Stand-Your-Ground laws (sometimes called "make my day"[72] or "shoot first"[73] laws) further expanded the zone where an individual is justified in repelling force outside of their own home.[74]

In addition to the rationales supporting the Castle Doctrine, Stand-Your-Ground laws rely on two additional normative justifications. First, by allowing an individual to potentially use deadly force without mandating any duty to retreat, these laws implicitly suggest that an individual's body is as sacred as their home.[75] Second, the notion of a broad self-defense jurisprudence has historical roots in the "True Man" doctrine (a uniquely American and masculine notion that a true man is one who is able to repel his attackers and it has roots in the nineteenth century South and West).[76] For example, the Supreme Court of Ohio endorsed this chauvinistic understanding of self-defense doctrine in 1876, suggesting that:

> A man may repel force by force in defense of his person against any one who manifestly intends, or endeavors by violence of surprise, feloniously to kill him. And he is not obliged to *retreat*, but may pursue his adversary until he has secured himself from all danger; and if he kill him in doing so, it is *justifiable self-defense* . . . a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm.[77]

---

[70] *See* RANDALL & DEBOER, *supra* note 60; Fla. Ch. 776 § 102 ("A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force is he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.").

[71] *See* Adeel Hassan, *What Are 'Stand Your Ground' Laws and When Do They Apply?*, N.Y. TIMES (Apr. 19, 2023), https://www.nytimes.com/2023/04/19/us/stand-your-ground-laws-states.html.

[72] *See* NAT'L CONF. OF STATE LEGIS., *Self-Defense and 'Stand Your Ground'* (Mar. 1, 2023), https://www.ncsl.org/civil-and-criminal-justice/self-defense-and-stand-your-ground.

[73] *See* GIFFORDS L. CTR., *Stand Your Ground*, https://perma.cc/CU3C-TWL3.

[74] *See* Daniel Sweeney, *Standing Up to "Stand Your Ground" Laws: How the Modern NRA-Inspired Self-Defense Statutes Destroy the Principle of Necessity, Disrupt the Criminal Justice System, and Increase Overall Violence*, 64 CLEV. ST. L. REV. 715, 722–23 (2016).

[75] *See id.*

[76] *See id.*

[77] Erwin v. The State of Ohio, 29 Ohio St. 186, 198–200 (Ohio 1876).

Florida has applied these additional rationales to the Castle Doctrine, creating a presumption that any attack, no matter the severity, in one's home is sufficient for the homeowner to repel the attack with deadly force.[78]

Despite many dissenters[79] and a dubious statistical background regarding their effectiveness,[80] the Castle Doctrine and the Stand-Your-Ground laws show no sign of declining in the states.[81] Since 2005, most of the United States (thirty-six states) have adopted some version of a Stand-Your-Ground law, including many of the more liberal states.[82] This growing change reflects an emerging focus of the states to strengthen legal protections for law-abiding citizens who protect themselves from harm.[83] More states might be joining the thirty-six as their legislatures consistently face ongoing proposals for bills implementing some version of the Stand-Your-Ground law.[84]

Additionally, the proliferation of these laws is based on four normative rationales: first, expanding self-defense doctrine saves lives; second, individuals facing death or serious injury are under such severe emotional distress that their capacity for rational deliberation is hampered and so they should be permitted to defend themselves; third, fairness dictates that a person need not succumb or retreat when faced with potentially deadly force; and fourth, the laws recognize the desire to protect the life of an individual who is not responsible for creating the need for lethal force.[85] The right of a person to protect themself from harm is so significant that it might even be secured under the notion of substantive due process— because it is so rooted in the Nation's history and tradition and may be inherent in the concept of ordered liberty.[86] In essence, there has long been a

[78] *See* Sweeney, *supra* note 74, at 725.

[79] *See* Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as Male Privilege*, 68 U. MIAMI L. REV. 1099 (2014).

[80] *See* Katie Gleason, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence?*, JOURNALIST'S RES. (July 15, 2013), https://perma.cc/F5WT-PMHS.

[81] *See Castle Doctrine States 2023*, WORLD POPULATION REV., https://perma.cc/9PKR-FQWL.

[82] *See* Alexa R. Yakubovich et al., *Effects of Laws Expanding Civilian Rights to use Deadly Force in Self-Defense on Violence and Crime: A Systematic Review*, 111AM. J. PUB. HEALTH no. 4, 2021, at 1.

[83] *See id.* at 2.

[84] *See* Michelle Degli Esposti et al., *Analysis of "Stand Your Ground" Self-defense Laws and Statewide Rates of Homicides and Firearm Homicides*, 5 JAMA NETWORK OPEN no. 2, 2022.

[85] *See* Cynthia V. Ward, *"Stand Your Ground" and Self-*Defense, 42 AM. J. CRIM. L. 89, 104–07 (2015).

[86] *See* Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1819 (2007) ("Founding-era sources call defending life a natural right. Blackstone wrote that the right to prevent 'any forcible and atrocious crime,' even with lethal force, was 'justifiable by the law of nature.' St. George Tucker, a leading early American commentator, described '[t]he right of self defense' as 'the first law of nature,' and Thomas Cooley, the leading American constitutional law commentator of the late 1800s, wrote that 'liberty' in the Due Process Clause protected 'the right of self-defense against unlawful violence.'"); *see also* FLEMING, *supra* note 19, at 44 ("And so, continuing our practice of substantive due process, exercising reasoned judgment in building

recognized right in the United States for an individual to defend themself with lethal force, even it means killing the attacker when their life, body, or liberties are being attacked.[87]

Despite significant evidence suggesting otherwise,[88] some conservative scholars have posited that the self-defense justifications underpinning Stand-Your-Ground laws specifically benefit women.[89] These scholars argue that enabling women to secure their physical safety goes hand-in-hand with their political empowerment.[90] In addition, while many Stand-Your-Ground laws no longer use this as a justification, the very first Stand-Your-Ground-type law was proposed in 1994 by a Utah Democrat, specifically as a means to provide additional legal protections for targets of domestic violence.[91] Women are more likely than men to be subjected to the kind of harm that would justify deadly self-defense.[92] This includes the harm a fetus may cause a pregnant person.[93] Therefore, a chief advantage pregnant people may find within self-defense doctrine is a protected right to have an abortion.[94]

III. SELF-DEFENSE AND THE ABORTION RIGHT

The growth of the Castle Doctrine, and self-defense more broadly, in the states and the *Dobbs* decision make now an opportune time to revive the argument first posed by Judith Jarvis Thomson and later elaborated by Eileen L. McDonagh: that abortion should be protected as a self-defense right.[95] To make the connection between abortion and self-defense, it is vital to establish that pregnancy is a type of intrusion and attack upon a person that justifies lethal force in self-defense (i.e., through having an abortion).[96] This formulation focuses on how the lack of consent between a pregnant person and a fetus permits a pregnant person to protect themself from the serious bodily harm of a fetus.[97] McDonagh

---

out our rational continuum of ordered liberty, we should interpret the Constitution to secure the basis liberties that are significant preconditions for personal self-government.").

[87] *See* Volokh, *supra* note 86, at 1815.

[88] *See generally* Deborah Dinner, *Seeking Liberty, Finding Patriarchy: The Common Law's Historical Legacy*, 61 B.C. L. REV. E-SUPPLEMENT I.-89 (2020) (critiquing the notion that common law doctrine broadly, including related to self-defense, holds minimal relevance and helpfulness for women's rights today); Franks, *supra* note 79, at 1099.

[89] *See* Matthew Wills, *How American Women First Learned Self-Defense*, JSTOR DAILY (Mar. 29, 2021), https://daily.jstor.org/how-american-women-first-learned-self-defense/.

[90] *See id.*

[91] *See* Jonathan Jones et al., *Stand Your Ground Laws Are Proliferating. And More People Are Dying*, REVEAL (Sep. 21, 2022), https://perma.cc/YL6L-MFQC.

[92] *See National Statistics*, NAT'L DOMESTIC VIOLENCE HOTLINE, https://perma.cc/77QN-FUBA.

[93] *See infra* Part IV.

[94] *See* MCDONAGH, *supra* note 4, at 7.

[95] *See* Thomson, *supra* note 1, at 69; MCDONAGH, *supra* note 4, at 5.

[96] *See* MCDONAGH, *supra* note 4, at 7.

[97] *See id.*

succinctly expresses this self-defense argument as a "consent-to-pregnancy justification:"

> The consent-to-pregnancy justification for abortion requires the expansion of the continuum we use to depict pregnancy. On the positive end of the spectrum is the symbiotic union of mother and child, epitomizing love and bonds of care. On the negative end is the serious legal injury that occurs when pregnancy is imposed upon the woman without her consent. While a consent-to-pregnancy approach to abortion may appear to focus too narrowly on the negative end of the pregnancy spectrum, the reality is that abortion terminates, rather than sustains, the pregnancy relationship between a woman and a fetus. The fetus's massively coercive imposition upon a woman can transform the bonds of love into a form of bondage, which justifies the use of deadly force. Rather than dehumanizing the pregnancy experience, therefore, abortion as self-defense does just the opposite.[98]

IV. PREGNANCY AS AN INJURY

Black's Law Dictionary defines a physical injury as "damage to a person's body."[99] In addition, it defines a direct injury as one that "comes from the immediate result of the violation of a right . . ."[100] State statutes define serious bodily injury as an injury that "creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ."[101] Furthermore, "[s]tate statutes and the Model Penal Code establish three categories of injury that justify the use of deadly force to stop the perpetrator of those injuries: absolute injuries causing death, quantitative injuries causing serious bodily harm, and qualitative injuries imposing severe restrictions upon one's liberty."[102] Pregnancy meets all three categories.

The law has readily acknowledged that pregnancy is a serious bodily injury when imposed upon a person without their consent.[103] For example, the Supreme

---

[98] *See id.* at 12.

[99] *Physical Injury*, BLACK'S LAW DICTIONARY (2nd ed. 2023).

[100] *Direct Injury*, BLACK'S LAW DICTIONARY (2nd ed. 2023).

[101] 18 PA. CONS. STAT. § 2602 (1997).

[102] McDonagh, *My Body, My Consent*, *supra* note 59, at 1075; *see* MODEL PENAL CODE § 3.04(2)(b) ("[Deadly force is not justifiable] unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping, or sexual intercourse compelled by force or threat.").

[103] *See* MCDONAGH, *supra* note 4, at 85; Wasserman, *supra* note 59, at 361 ("[S]elf-defense has one of the characteristic features of a right: it 'trumps' ordinary calculations of utility and social value"); *see generally* Lauren Hoyson, *Rape is Tough Enough Without Having Someone Kick You from the Inside: The Case for Including Pregnancy as Substantial Bodily Injury*, 44 VAL U. L. REV. 565 (2010).

Court has stated that pregnancy comes with severe anxieties and physical constraints.[104] Individual states also frequently use a resulting pregnancy to aggravate an assailant's sentence in sexual assault cases (i.e., sexual assault becomes aggravated sexual assault) and some even include pregnancy within their definition of substantial bodily injury.[105] For example, Nebraska defines serious personal injury as "great bodily injury or disfigurement, extreme mental anguish or mental trauma, *pregnancy*, disease, or loss or impairment of a sexual or reproductive organ."[106] Therefore, pregnancy caused by rape results in an increased prison sentence for the perpetrator—similar to a rape with violent circumstances (such as one committed with a gun).[107]

This understanding of abortion as an injury has seeped into other areas of law as well. For example, in *Michael M. v. Superior Court of Sonoma County*, the Supreme Court upheld a California statute that made it a crime for an individual to have sex with a minor female, but not a minor male, after acknowledging that the extra protections for women were justified because women may experience substantial harm as a result of sex that men do not (pregnancy).[108] Nearly every jurisdiction has established that a physician's failure to properly sterilize a partner in a relationship that produces a pregnancy is serious medical malpractice.[109] Furthermore, physicians who work with individuals who are seeking to become pregnant must give those individuals informed consent regarding the risks of pregnancy.[110]

In essence, pregnancy may be understood as a mental and emotional injury as well as a physical injury.[111] This is because of what happens to a pregnant person's body when they become pregnant, as the conditions may range from mere inconvenience to death.[112] The areas of a pregnant person's body that undergo change (and may be negatively affected forever) include, along with their reproductive system, their endocrine system;[113] thyroid;[114] abdomen;[115]

---

[104] *See* Planned Parenthood of Southeastern Pa. v. Casey*,* 505 U.S. 833, 852 (1992).

[105] *See* Hoyson, *supra* note 103, at 586.

[106] 28 NEB. REV. STAT. § 318(4) (2012) (emphasis added).

[107] *See* Khiara M. Bridges, *When Pregnancy is an Injury: Rape, Law, and Culture*, 65 STAN. L. REV. 457, 457–58 (2013).

[108] Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 471–73 (1981).

[109] *See* MCDONAGH, *supra* note 4, at 85.

[110] *See id.* at 86.

[111] *See* Bridges, *supra* note 107, at 471.

[112] *See* MCDONAGH, *supra* note 4, at 28.

[113] *See* Aarushi Khan, *Maternal Adaptions in Pregnancy*, TEACHMEPHYSISIOLOGY, https://perma.cc/RQ9A-5Y2D (indicating that a pregnant person's progesterone and estrogen significantly increase during pregnancy).

[114] *See* Pietro Cignini et al., *Thyroid Physiology and Common Diseases in Pregnancy: Review of Literature*, 6 PRENATAL MED. no. 4, 2012, at 64, https://www.ncbi.nlm.nih.gov /pmc/articles/PMC3530964 (showing that the pregnant person's thyroxine and triiodothyronine levels increase 30-100% during pregnancy).

[115] *See* Priya Soma-Pillay et al., *Physiological Changes in Pregnancy*, 27 CARDIOVASC. J. AFR. no. 2, 2016, at 89, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4928162 ("As pregnancy progresses, mechanical changes in the alimentary tract also occur, caused by the

cardiovascular system;[116] breasts;[117] respiratory system;[118] body temperature;[119]integumentary system (i.e., hair, skin, and nails);[120] urinary system;[121] legs;[122] feet;[123] musculoskeletal system;[124] and others.[125] Pregnant people also experience a host of psychological pains both during and after pregnancy, most notably post-partum-depression.[126] Eileen L. McDonagh details at length what a fetus does to a pregnant person's body as the following:

> When the fertilized ovum first "adheres to the endometrium," or tissue lining of the uterus, its "cells secrete an enzyme which enables" it "to literally eat a hole in the luscious endometrium

growing uterus. The stomach is increasingly displaced upwards, leading to an altered axis and increased intra-gastric pressure.").

[116] *See Heart Conditions and Pregnancy: Know the Risks*, MAYO CLINIC, https://perma.cc/CDA2-EJDK ("Pregnancy makes the heart and blood vessels work harder. During pregnancy, blood volume increases by 30% to 50% to nourish the growing baby. The heart also pumps more blood each minute, and the heart rate increases. Labor and delivery add to the heart's workload too.").

[117] *See Breast Changes During Pregnancy*, AM. PREGNANCY ASS'N, https://perma.cc/PVB9-BZF4 (indicating that a pregnant person's breasts will significantly enlarge, become increasingly sensitive, will darken, and may start leaking a substance called colostrum).

[118] *See* Priya Soma-Pillay et al., supra note 115 ("There is a significant increase in oxygen demand during normal pregnancy. This is due to a 15% increase in the metabolic rate and a 20% increased consumption of oxygen. There is a 40–50% increase in minute ventilation, mostly due to an increase in tidal volume, rather than in the respiratory rate.").

[119] *See* Korin Miller, *What is a Normal Pregnancy Temperature*, THEBUMP (Apr. 13, 2020), https://perma.cc/FK89-8L2C (indicating that a pregnant person's body temperature will rise during pregnancy "due to the increase in your body's blood volume to meet the demands of your growing baby").

[120] *See Pregnancy and Skin Changes*, JOHNS HOPKINS MED., https://perma.cc/76SB-G8B2 (indicating that pregnant people will experience a wide variety of positive or negative changes to their acne, dark spots, and stretch marks).

[121] *See* Esra Uzelpasaci et al., *Trimester-based changes in urogenital symptoms and their impact on the quality of life in pregnant women: A preliminary report,* 15 CURRENT UROLOGY no. 3, 2021, at 167, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8451322/ ("Urgogenital symptoms associated with urinary incontinence such as frequency, urgency, and stress incontinence were found to be increased over the course of the three trimesters of the pregnancy and the quality of life was negatively affected.").

[122] *See Pregnancy stages and changes*, VICT. DEP'T OF HEALTH, https://perma.cc /3XNK-6N4T (indicating that pregnant people routinely experience swollen legs, ankles, feet, and hands; often develop restless legs; and an increase in leg craps).

[123] *See id.*

[124] *See* Felicia Fiat et al., *The Main Changes in Pregnancy - Therapeutic Approach to Musculoskeletal Pain,* 58 MEDICINIA no. 8, 2022, 1115, https://www.ncbi.nlm.nih.gov /pmc/articles/PMC9414568/ ("Pregnancy produces major changes in the musculoskeletal system, from the straining of ligaments and the decrease in range of motion to an increase in muscle tension, causing pain.").

[125] *See How Your Body Changes During Pregnancy*, AM. PREGNANCY ASS'N, https://perma.cc/2SBP-LPXT/.

[126] *See generally* Emma L. Hodgkinson et al., *Women's Experiences of Their Pregnancy and Postpartum Body Image: A Systematic Review and Meta-Synthesis*, 14 BMC PREGNANCY & CHILDBIRTH 330 (2014).

> and become completely buried within it." The "erosive implantation" of the fertilized ovum . . . allows it "to readily absorb nutrients" from the woman's endometrial glands and blood vessels. . . . During the early weeks of gestation, the cells of the fertilized ovum "stream out," "penetrate," and "extensively colonize" areas of the woman's uterus. Its cells also "destroy and replace the endothelium [lining] of the maternal vessels" and then "invade the [woman's] media with resulting destruction of the medical elastic and muscular tissue." The end result of the fertilized ovum's "invasion of, and attack on" the woman's blood vessels is that her "thick-walled muscular spinal arteries are converted" into flaccid vessels, "which can passively dilate in order to accommodate the greatly augmented blood flow through this vascular system which is required as pregnancy progresses." Around the eleventh day, the "advancing" fertilized ovum "penetrates a maternal capillary and initiates a flow of blood" into a primitive placenta.[127]

This transformation occurs within the first few days of the pregnancy and continues as the fetus transforms the pregnant person's body throughout the entire nine months of the pregnancy.[128] To name just a few of those changes that occur over the nine month period: a pregnant person's blood plasma and cardiac volume increase forty percent, their heart rate increases fifteen percent, stroke volume increases thirty percent, peripheral resistance increases twenty-five percent, and diastolic blood pressure increases fifteen percent.[129] Furthermore, each of the above results of pregnancy assumes that the pregnant person is otherwise healthy; any other negative health factors can easily result in the dangerous consequences of pregnancy being dramatically worsened.[130]

These profound dangers pale in comparison to the potential harm of childbirth. Childbirth is the process of a pregnant person's body removing the fetus and it may occur through a variety of methods.[131] Twenty-three out of every 100,000 births in the United States will result in the death of the pregnant person.[132]

---

[127] *See* MCDONAGH, *supra* note 4, at 70.

[128] *See generally* Hodgkinson et al., *supra* note 126, at 330.

[129] *See id.*

[130] *See* Vera Wolters et al., *Management of Pregnancy in Women with Cancer*, 31 INT'L J. GYNECOLOGICAL CANCER 314, 314 (2021).

[131] *See* Robert Rich, Jr., *Dealing with Pain During Childbirth*, AM. ACAD. OF FAM. PHYSICIANS (Aug. 18, 2022), https://perma.cc/L24D-XPG4.

[132] *See Pregnancy Complications Tied to Higher Risk of Death As Long As 50 Years Later*, PENN. MED. NEWS (Mar. 14, 2023), https://perma.cc/FFU8-N4KW; *Women's Right to Know: Pregnancy Risks*, LA. DEP'T. OF HEALTH, https://perma.cc/YU9S-JPL6?type=image (stating that the most common causes for death during childbirth are emboli, eclampsia, heavy bleeding, sepsis, cerebral vascular accidents, and anesthesia-related complications); Whole Women's Health v. Hellerstedt, 579 U.S. 582, 618 (2016) ("Nationwide, childbirth is 14 times more likely than abortion to result in death . . .").

Furthermore, the childbirth process is painful for almost all pregnant people as they experience both visceral (uterine contractions that produce significant pressure on the cervix, causing stretching and distension) and somatic pain (stretching of the perineum and the vagina) before and during the birthing process.[133] In addition to the pain, pregnant people have a significant risk of developing the following during the delivery window, all of which can cause further pain: eclampsia; cardiomyopathy; embolism; heart attack; respiratory distress; sepsis; the need for transfusions; shock; uterus rupture; shoulder dystocia; umbilical cord prolapse; and other injuries.[134]

These substantial risks are expected to grow as the number of pregnant people increases as a result of *Dobbs*, with twenty-five states (at the time of publication) enacting some sort of pre-viability bans on abortion.[135] For example, a national survey of OBGYNs published after *Dobbs* illustrates that 64% of OBGYNs believe that *Dobbs* has worsened pregnancy-related mortality, 70% of them believe it worsened the racial and ethnic inequities in maternal health, and 55% of them believe that fewer professionals will want to become OBGYNs as a result of *Dobbs*.[136]

The potentially negative effects of pregnancy continue after a child is born. In the weeks after childbirth, formerly-pregnant people will undergo physiological, reproductive, lactation, endocrine, renal, hematologic, cardiovascular, gastrointestinal, and other changes as a direct result of childbirth—which results in their "[h]uman physiology [being] significantly altered . . . in the postpartum period."[137] Formerly pregnant people will continue to have a higher risk of cardiovascular disease, infection, excessive bleeding, and death for the rest of their lives as a result of childbirth.[138]

Aside from the life-long physical effects of childbirth, the birthing parent will have to decide what to do with the child. They will have two options: raise the child themselves (with or without a partner or additional support systems) or put the child up for adoption.[139] In the first instance, the birthing parent's life is forever changed as they must take care of their child.[140] For example, parents are responsible for providing children with a safe living environment, protecting

---

[133] *See* Simona Labor & Simon Maguire, *The Pain of Labour*, 2 REV. PAIN no. 2, 2008, at 15–16.

[134] *See Trends in Pregnancy and Childbirth Complications in the U.S.*, BLUECROSS BLUESHIELD (June 17, 2020), https://perma.cc/9QPL-JTG2.

[135] *See* Rebecca Goldman, *Abortion Rights and Access One Year After Dobbs*, LEAGUE OF WOMEN VOTERS (Aug. 2, 2023), https://perma.cc/34QH-FY5T.

[136] Britti Frefériksen et al., *A National Survey of OBGYNs' Experience After Dobbs*, KFF, (June 21, 2023), https://perma.cc/MD8J-7SU9.

[137] Gaurav Chauhan & Prasanna Tadi, *Physiology, Postpartum Changes*, NAT'L LIB. OF MED. (Nov. 14, 2022), https://www.ncbi.nlm.nih.gov/books/NBK555904/.

[138] *See Postpartum Complications: What You Need to Know*, MAYO CLINIC: HEALTHY LIFESTYLE (Dec. 3, 2021), https://perma.cc/3FNX-PC7W; *see Pregnancy Complication Tied to Higher Risk of Death as Long As 50 Years Later*, *supra* note 132.

[139] *See Parenting vs. Adoption [4 Things to Consider]*, AM. ADOPTIONS, https://perma.cc/ZVF6-BWLJ.

[140] *See id.*

them from harm, paying child support (if necessary), fulfilling their basic needs, disciplining them, investing in their education, supporting their interests, and spending quality time with them.[141] At minimum, the parent must provide "shelter, food, [and] medical attendance" in order to avoid criminal liability.[142] This minimum care is expensive; "[w]hile it can vary due to geography and the cost of childcare, $310,605 is the average amount spent on raising a child born in 2015 to age 17."[143]

Should the birth parent choose to put their child up for adoption, the parent will often experience a host of negative psychological effects, in addition to experiencing all of the aforementioned physical effects.[144] For example, a study from the Melbourne Institute of Family Studies showed that "[o]ver half of the 213 respondents in [the study] of Australian birth mothers rated the adoption of their child as the *most stressful* experience of their life. The psychological functioning of these mothers was significantly worse than a matched sample of women who had not had a child adopted."[145] Because birth parents who put their children up for adoption experience significant loss, they will often experience significant negative psychological effects their entire lives.[146]

Almost all of these risks are heightened for pregnant people of color, particularly Black people. For example, Black pregnant people, when compared to their white counterparts, are: (1) more than three times as likely to die during childbirth;[147] (2) more likely to experience issues with health insurance during their pregnancy period;[148] (3) more likely to have preexisting conditions that pose a risk to themselves and their child during pregnancy and childbirth;[149] (4) continuing to experience increasing, rather than decreasing, birth rates;[150] (5) more likely to experience economic difficulties as a result of the pregnancy;[151] and (6) more likely to experience inequities in the medical field generally.[152] Furthermore, these racial disparities are expected to grow post-*Dobbs* as "[o]ver four in ten (43%) of women between [the] ages [of] 18–49 living in states where

---

[141] *See Parental Rights & Parental Responsibilities: Know Yours*, CUSTODY X CHANGE, https://perma.cc/CG8D-5TTL.

[142] 40 C.J.S. HOMICIDE § 138, Westlaw (database updated Mar. 2024).

[143] Tim Parker, *How Much Does It Cost to Raise a Child in the U.S.*, INVESTOPEDIA (May 3, 2023), https://perma.cc/Q572-K4NB (pricing does not include higher education and assumes that the child does not have any additional physical or mental needs).

[144] *See generally* Elsbeth Neil, *Helping Birth Parents in Adoption*, DEUTSCHES JUGENDISTITUT 7, 2017, https://perma.cc/WY33-ZM29.

[145] *Id.* at 12 (citing Robin Winkler & Margaret van Keppel, *Relinquishing Mothers In Adoption: Their Long Term Adjustment*, 3 INST. OF FAM. STUD.: MELBOURNE (1984)).

[146] *See id.* at 10.

[147] *See Women's Right to Know*, *supra* note 132**.**

[148] *See* Latoya Hill et al., *Racial Disparities in Maternal and Infant Health: Current Status and Efforts to Address Them*, KFF (Nov. 1, 2022), https://perma.cc/96VT-WQHM.

[149] *See id.*

[150] *See id.*

[151] *See id.*

[152] *See id.*

abortion has become or will likely become illegal are women of color."[153] *Dobbs*, and the subsequent state action, embodies the continued ignorance of the particular issues people of color face in the abortion debate,[154] and highlights the need to find other legal avenues to protect the abortion right.[155]

What is clear is that every step of pregnancy results in a transformation and colonization of the pregnant person's body. If an individual were to do something similar to another person's body, the law would readily protect that victim's right to terminate the invasive relationship. [156]

As previously mentioned, the arguments on both sides surrounding if, and at which point during the pregnancy, a fetus constitutes a "life" originated because of the viability debate inspired by *Roe* and *Casey*.[157] Both *Roe* and *Casey* resulted in surging disagreement across American culture and the legal community regarding where to draw the line of a fetus's personhood.[158] However, this disagreement now is legally superfluous because of *Dobbs*.[159]

This formulation does not seek to rehash old debates or establish at which point life begins, but rather concedes, for the sake of the argument, that even if life begins at conception, the right to abortion is still justified.[160] This argument

[153] Samantha Artiga et al., *What are the Implications of the Overturning of Roe v. Wade for Racial Disparities*, KFF (Jul. 15, 2022), https://perma.cc/HX7A-PLVM?type=image.

[154] *See* Michele Goodwin, *Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and The Thirteenth Amendment*, 2022 U. CHI. LEGAL F. 191, 208 (2023) ("Thus, what the Supreme Court majority in *Dobbs* strategically overlooks, legal history reminds us with stunning clarity, specifically the terrifying practices of American slavery, including the stalking, kidnapping, confinement, coercion, rape[,] and torture of Black women and girls. Sexual violence and pregnancy were common markers of Black women's enslavement throughout the United States, especially associated with the American South as reported in newspapers and autobiographies, including those written by slaveholders.").

[155] *See id.* at 218–19 ("Mandated, forced or compulsory pregnancy contravenes enumerated rights in the Constitution, namely the Thirteenth Amendment's prohibition against involuntary servitude and protection of bodily autonomy as well as the Fourteenth Amendment's defense of privacy and freedom. This Supreme Court demonstrates a selective and opportunistic interpretation of the Constitution and legal history, which disregards the intent of the Thirteenth and Fourteenth Amendments, specifically framed to abolish slavery and all its vestiges. It ignores the campaign of the abolitionist Framers, especially their concerns about Black women's bodily autonomy, liberty, and privacy which extended beyond freeing them from labor in cotton fields to shielding them from rape and forced reproduction.").

[156] *See* 32 MO. PRAC., *Missouri Criminal Law* § 20:9 (2d ed.), Westlaw (database updated Dec. 2023) ("Self-defense is a defense to a charge of kidnapping second degree or kidnapping third degree . . .").

[157] *See* Madeleine Carlisle, *Fetal Personhood Laws Are a New Frontier in the Battle Over Reproductive Rights*, TIME (June 28, 2022), https://time.com/6191886/fetal-personhood-laws-roe-abortion/; *see generally* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 833 (1992); Roe v. Wade, 410 U.S. 113, 113 (1973).

[158] *See* Stephen G. Gilles, *Why the Right to Elective Abortion Fails* Casey*'s Own Interest-Balancing Methodology—and Why It Matters*, 91 NOTRE DAME L. REV. 691 (2015); *see generally Casey*, 505 U.S. at 833; *Roe*, 410 U.S. at 113.

[159] *See* Carlisle, *supra* note 157.

[160] *See* Randy Alcorn, *Scientists Attest to Life Beginning at Conception*, NAT'L ASS'N FOR THE ADVANCEMENT OF PREBORN CHILD., https://perma.cc/7QEN-8RDC; *see generally* MCDONAGH, *supra* note 4.

equates a pregnant person's right to prevent a fetus from imposing harm upon them to ways the law would protect their ability to prevent any other person from causing them harm (i.e., traditional self-defense doctrine).[161]

It might be argued that pregnancy, and the subsequent personhood of the fetus, is a natural consequence of consensual sex and so the pregnant person consents to the ovum's imposition of their body whenever they consent to sex. However, this argument fails to understand that the fetus, not sex, is the cause of pregnancy.[162] Reproduction involves two distinct relationships: (1) the sexual relationship and (2) the pregnancy relationship, which is solely between the pregnant person and the fetus.[163] The sexual relationship can be characterized as a sexual encounter between two, or more, people.[164] This relationship is where the physical act of sex occurs (ending when the physical act is complete).[165] Notably, the act does not end when an individual becomes pregnant (i.e., the future-pregnant person's body is not pregnant at the end of the encounter).[166] Only the pregnancy relationship, when the fertilized ovum implants itself in the pregnant person's uterus, can transform the not yet-pregnant person into a pregnant person.[167] Simply because one relationship *typically* precedes the other does not mean that they are the same.[168] In other words, the pregnancy relationship is always the but-for cause of pregnancy, but the sexual relationship is not; it is instead only an indicator of pregnancy (semen in a person's system does not always lead to pregnancy whereas a fertilized ovum always will).[169] Consider a person who becomes pregnant through artificial insemination. There has been no sexual relationship between two partners, just a pregnancy relationship that began when the ovum implanted itself in the uterus, independent of the source of the semen.[170] In that circumstance, and generally speaking, the pregnancy relationship alone is the "legal cause" of the pregnancy because it is the proximate cause of the injury.[171] That is why the medical cause of pregnancy is not recognition of the sexual relationship, but rather when the ovum implants itself to the uterus.[172]

There is a species of arguments against the self-defense justification that seeks to force the full spectrum of pregnancy onto pregnant people through a species of tort liability. For example, one might argue any of the following: a pregnant person implicitly consents to pregnancy because pregnancy is a reasonably

---

[161] *See* MCDONAGH, *supra* note 4, at 10.
[162] *See id.* at 40.
[163] *See id.*
[164] *See id.*
[165] *See id.*
[166] *See id.*
[167] *See id.*
[168] *See id.*
[169] *See id.* at 41.
[170] *See generally* , *Infertility and Artificial Insemination*, WEBMD (Aug. 1, 2021), https://perma.cc/EFL7-TSMP.
[171] *See* MCDONAGH, *supra* note 4, at 41; *Causation in Personal Injury Cases*, JUSTIA (Oct. 2023), https://perma.cc/2H83-XFE3.
[172] *See* MCDONAGH, *supra* note 4, at 46.

foreseeable consequence of consensual sex; a pregnant person consents to pregnancy by not using the most effective contraceptives available; and others.[173] In other words, one might apply theories of assumption of risk ("AoR") to justify their pro-life views.[174] These arguments suffer from three primary flaws: (1) the difficulty of ensuring that an individual is having the safest sex possible; (2) that AoR arguments would force a pregnant person to become a good Samaritan; and (3) that the pregnancy relationship, not the sexual relationship, is the true cause of pregnancy.

First, finding and affording the proper contraceptives for a given scenario is extremely challenging.[175] Individuals must balance the following when considering a contraceptive: cost; effectiveness of each method; possible side effects; ease of use; their own general health/health of their partner(s); lifestyle/relationships; safety/risks; whether someone wants to get pregnant; and the effort/time involved.[176] In addition, an affirmative choice to not use contraceptives does not equal implicit consent to pregnancy because contraceptives play too limited a role in the pregnancy calculation to establish constructive consent.[177] As McDonagh states:

---

[173] *See id.* at 43; McDonagh, *My Body, My Consent*, *supra* note 59, at 1092.

[174] *See Contributory Negligence*, LEGAL INFO. INST. (Jul. 2022), https://perma.cc/6NBN-AQK4 ("Contributory negligence is a common law tort rule which bars plaintiffs from recovering from the negligence of others if they too were negligent in causing the harm."); *Assumption of Risk*, LEGAL INFO. INST. (Jun. 2022), https://perma.cc/46VN-W2FG ("Assumption of risk is a common law doctrine that refers to a plaintiff's inability to recover for the tortious actions of a negligent party in scenarios where the plaintiff voluntarily accepted the risk of those actions.").

[175] *See, e.g.*, *Minors' Access to Contraceptive Services*, GUTTMACHER INST. (Aug. 30, 2023), https://perma.cc/TJG6-XYY8 ("Over the past 30 years, states have expanded minors' authority to consent to health care, including care related to sexual activity. . . . [M]any minors will remain sexually active but not seek services if they have to tell their parents. As a result, confidentiality is vital to ensuring minors' access to contraceptive services."); *Contraception—choices*, VICT. DEP'T OF HEALTH, https://perma.cc/4NJA-BWYA ("When choosing a method of contraception that is right for you, it is important to have accurate information. If you have a partner/s talk openly about your options. Issues you may like to consider include: how well each method works; why you need to use contraception . . . possible side effects; ease of use; cost; your general health . . . your lifestyle and relationships; your safety and risk of getting a sexually transmissible infection (STI); whether you want to get pregnant; whether you can stop the method yourself or need to see a health practitioner; the effort and time involved."); *Why Contraception Fails—and How to Choose a Method that Works*, HEALTHDIRECT (Oct. 25, 2018), https://perma.cc/J4LQ-PZ8D ("No method of contraception is 100% effective. Some methods are referred to as 98% or 99% effective—meaning that for every 100 couples that use the method, only 1 or 2 will experience a pregnancy.").

[176] *See Contraception—choices*, *supra* note 175.

[177] *See* Kenneth W. Simons, *The Conceptual Structure of Consent in Criminal Law: The Logic of Consent: The Diversity and Effectiveness of Consent as a Defense to Criminal Conduct*, 9 BUFF. CRIM. L. REV. 578, 618 (2006) (indicating the constructive consent, the notion that an individual consents to x when they voluntarily participate in a practice that may include x, is a legal fiction because "although [the individual] consents to [the activity], he does not consent to its elements; [for example, a sports fan may consent] to watch sporting events [without consenting to] any risk of physical contact from fellow fans.").

> [The argument that not taking contraceptives equals consent] is flawed, however, because people have different reasons for maximizing or minimizing the risk that a condition will ensue after an action, and only some of those reasons are grounds for assuming a person's implied consent to a subsequent condition. For example, a person who chooses to smoke a cigarette brand high in nicotine, when other brands lower in nicotine are available, maximizes the risk that lung cancer will ensue after smoking. Yet we cannot infer from a person's choice of a high nicotine cigarette that the person implicitly consents to lung cancer.[178]

In essence, because of the difficulties of establishing the safest sex possible, it may be difficult to establish that a pregnant person assumed any significant risk of pregnancy.

All that being said, however, pro-life individuals would unlikely be persuaded by this argument alone. After all, the best way an individual can make sure they do not end up pregnant is to not have sex in the first place. That leads to the second flaw in the AoR arguments, AoR cannot force someone to become a good Samaritan.

Even if pregnancy was reasonably foreseeable from a sexual relationship, American law refuses to justify the invasion of one's body to save the life of another no matter the relationship status.[179] There is a general rule that, absent a specific duty otherwise, there is no duty to act on another's behalf.[180] While there is no recognized duty that a prospective parent owes a fetus, there is a parent-child duty to act in safeguard of the child.[181] Even assuming that a court would determine that prospective parent-fetus relationship is similar to a parent-child relationship, courts routinely do not find a duty to invade one's body to save another's no matter the relationship.[182] Doing so would violate an individual's due process right to privacy and bodily autonomy.[183]

---

[178] McDonagh, *My Body, My Consent*, *supra* note 59, at 1092.

[179] *See* David S. Lockemeyer, *At What Cost Will the Court Impose a Duty to Preserve the Life of a Child?*, 39 CLEV. ST. L. REV. 577, 589 (1991).

[180] *See, e.g.*, DeShaney v. Winnebago Cnty. Dept. of Soc. Serv., 489 U.S. 189, 198 (1989) (holding that the state has no duty to protect a child from harm); Harris v. McRae, 448 U.S. 297, 317–18 (1980) (holding that the government has no obligation to fund abortions or other medical services); Lindsey v. Normet, 405 U.S. 56, 74 (holding that there is no obligation to provide housing).

[181] *See* Peter Clarke, *Duty to Act*, LEGALMATCH (May 15, 2018), https://perma.cc/H9S6-RKPE .

[182] *See* Lockemeyer, *supra* note 179, at 588–89 ("In analyzing the duty of parents to their children in organ donation situations . . . [c]ourts have generally refused to justify the invasion of one's body to save the life of another."); Elle Beau, *Bodily Autonomy Is Protected by The Constitution*, MEDIUM (May 27, 2019), https://medium.com/inside-of-elle-beau/body-autonomy-is-protected-by-the-constitution-ede4fb256ebb.

[183] *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965); *In re* Farrell, 529 A.2d 404 (N.J. 1987).

In *McFall v. Shimp*, a Pennsylvania state court confronted a request from a victim of a rare bone marrow disease to compel the defendant, the only possible compatible donor, to undergo a bone marrow transplant.[184] In other words, the Court was confronting "[t]he question . . . that, in order to save the life of one of its members by the only means available, may society infringe upon one's absolute right to his 'bodily security'?"[185] The Court answered the question in the negative, substantiating the defendant's liberty.[186] In denying the request, the Court stated:

> The common law has consistently held to a rule which provides that one human being is under no legal compulsion to give aid or to take action to save another human being or to rescue. A great deal has been written regarding this rule which, on the surface, appears to be revolting in a moral sense. Introspection, however, will demonstrate that the rule is founded upon the very essence of our free society. . . . Our society, contrary to many others, has as its first principle, the respect for the individual, and that society and government exist to protect the individual from being invaded and hurt by another. . . . In this case, the chancellor is being asked to force one member of society to undergo a medical procedure which would provide that part of the individual's body would be removed from him and given to another so that the other could live. Morally, this decision rests with defendant, and, in the view of the court, the refusal of the defendant is morally indefensible. For our law to *compel* defendant to submit to an intrusion on his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits . . . . For a society which respects the rights of *one* individual, to sink its teeth into the jugular vein or neck of one of its members and suck from it sustenance for *another* member, is revolting to our hard-wrought concepts of jurisprudence. . . . Such would raise the specter of the swastika and the inquisition, reminiscent of the horrors this portends.[187]

---

[184] 10 Pa. D. & C.3d 90 (Allegheny Cnty. Ct. 1978).

[185] *Id.* at 90–91.

[186] *See id.* at 92.

[187] *Id.* at 91; *see also* Stallman v. Youngquis, 531 N.E.2d 355, 359 (Ill. 1988) ("It is clear that the recognition of a legal right to begin life with a sound mind and body on the part of a fetus which is ascertainable after birth against its mother would have serious ramifications for all women and their families, and for the way in which society views women and women's reproductive abilities. The recognition of such a right by a fetus would necessitate the recognition of a legal duty on the part of a woman who is the mother; a legal duty, as opposed to a moral duty . . . [such a] legal duty to guarantee the mental and physical health of another has never before been recognized in law.").

In essence, forcing a pregnant person to consent to a fetus that causes them genuine physical harm is to go above and beyond any duty of care required by the law in any other context, even when reasonably foreseeable.[188] Not to mention the equal protection issues in forcing a different set of obligations and consequences for sex on one sexual partner over the other.[189]

Finally, the chief defect with the AoR arguments is that a pregnant person does not assume the risk for pregnancy during the sexual relationship, but rather consent-to-pregnancy can only occur during the pregnancy relationship. The ovum is a separate entity that binds itself to the pregnant person at the onset of the pregnancy relationship.[190] While missing conscious intent to do so, the moment it latches onto the uterus, the ovum is only serving its own interests at the expense of the pregnant person.[191] AoR theories traditionally do not apply when the perpetrator of the harm causes the harm intentionally.[192] For example, in tort law, responsibility imposed from an assumption of risk would arise if a victim walked in the middle of traffic and was accidentally hit by a perpetrator, but victim responsibility would not be present if the perpetrator hit the victim with her car on purpose, regardless of the behavior of the victim.[193] The ovum is much more like the latter perpetrator than the former. It subsists off of the pregnant person, utilizing their body for its own life-sustaining interest.[194] The fetus' lack of a mens rea does not make the harm any less intentional and self-serving; there is still liability for torts caused by children even without a conscious mens rea.[195] "Since the harm the fetus imposes presumably would be intentional . . . [m]en and women who engage in sexual intercourse, therefore, cannot be held as contributing to the harm imposed on a woman by a fertilized ovum making her pregnant without consent."[196] To summarize, abortion is justified despite any sexual relationship because of the separateness of the pregnancy relationship from the sexual relationship.

A pregnant person may very well choose to maintain the connection between themself and the fetus in order to produce life— but it must be their choice to consent to act as a good Samaritan.[197] Consent requires a *voluntary* and *willful* choice that is free from *coercion*.[198] The existence of that choice is the essential

---

[188] *See* MCDONAGH, *supra* note 4, at 78.

[189] *See generally* Shari Motro, *The Price of Pleasure*, 104 NW. U. L. REV. 917 (2010).

[190] *See* MCDONAGH, *supra* note 4, at 44.

[191] *See id.*

[192] *See* Barry A. Lindahl, 1 MODERN TORT LAW: LIABILITY AND LITIGATION § 10:20 (2d ed.), Westlaw (Database updated 2023) ("The doctrine of contributory negligence is not applicable where an intentional tort is involved.").

[193] *See* MCDONAGH, *supra* note 4, at 44.

[194] *See id.*

[195] *See generally* Stephen A. Brunette, *Cause of Action Against Parent at Common Law for Injury Caused by Child*, 18 CAUSE OF ACTION 113, § 4 (2023).

[196] *See* MCDONAGH, *supra* note 4, at 44.

[197] *See id.* at 81.

[198] *See Consent,* LEGAL INFO. INST. (Aug. 2022), https://perma.cc/85MN-L33P ("Consent can be divided into express and implied. Express consent is the consent given directly, either

component necessary to legitimize the objective harms a fetus does to a pregnant person.[199] State action forcing a pregnant person to carry a fetus to term, when the pregnant person would otherwise not choose to do so, is coercion.[200] Only when a pregnant person freely chooses to bear the weight of pregnancy and childbirth, not because a state forces them to do so, can pregnancy result in a beautiful and positive relationship.

V. WHERE DO WE GO FROM HERE? POLITICAL FEASIBILITY AND NEXT STEPS

In *Wrigley v. Romanick*, the Supreme Court of North Dakota found that the North Dakota Constitution affords a right to obtain an abortion "to preserve the woman's life or health."[201] The Court found the right in Article One of the North Dakota Constitution, which states that: "[a]ll individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness . . ."[202] The Court first tracked North Dakota's history, stating that "[p]rior to statehood, North Dakota . . . criminalized abortions but explicitly provided an abortion was not a criminal act if the treatment was done to preserve the life of the woman."[203] Next, the Court cited a medical journal from 1914 for the proposition that "[t]here are not infrequently cases in which an abortion is imperative . . ."[204] Finally, the Court used this formulation to uphold an injunction on an outright ban on abortions in the state.[205] The Court did not establish a broad right to have an abortion pre-viability, but rather limited the right to only to preserve the life and health of the pregnant person.[206]

Notably, the North Dakota constitution contains a similar provision as the Due Process Clause in the Federal Constitution.[207] However, likely inspired by *Dobbs*, the Court did not root their decision in due process. Instead, the Court emphasized that "'life or health' need not be understood more broadly than its application to the right of self-defense."[208]

That is the inherent irony underlying the self-defense justification for abortion. Conservatives are less likely to substantiate a pregnant person's right to autonomy/abortion absent an affirmation of their own rights (here, their right self-defense). For example, as of June 2023, twenty-one states have some sort

verbally or in writing. Implied consent is the consent that can be inferred by actions, signs or facts, or even by inaction or silence.").

[199] *See id.*

[200] *See id.*

[201] Wrigley v. Romanick, 2023 ND 50, 988 N.W.2d 231, 238–40 (N.D. 2023).

[202] *Id.* at 240 (alteration in original) (quoting N.D. CONST. art. I, § 1).

[203] *Id.* (citing Compiled Laws of Territory of Dakota, Penal Code, § 6538 (1887)).

[204] *Id.* at 241 (citing *Criminal Abortions*, 34 JOURNAL-LANCET 81, 82 (1914)).

[205] *See id.* at 234.

[206] *See id.* at 240.

[207] *See id.* at 238 (quoting N.D. CONST. art. 1, § 12).

[208] *Id.* at 245 (Tufte, J., concurring).

of pre-viability abortion ban in place post-*Dobbs*.[209] Of those twenty-one states, all but one have enacted some form of a Stand-Your-Ground Law since 2005.[210]

This irony necessitates that pro-choice individuals in those twenty-one states engage with autonomy arguments and posit that states should protect abortion the same way they protect other aspects of self-defense.[211] It may even be argued that this formulation of abortion requires protection of the right under substantive due process or equal protection.[212]

Perhaps the most difficult parts of advancing this argument are the normative and cultural assumptions about the value of non-consented pregnancy.[213] For instance, one may intellectually agree with the premises provided above, but just feel that abortion is different than other subjects of self-defense jurisprudence because of the societal good promoted by pregnancy (i.e., a potential human life should change our self-defense jurisprudence because of its importance).[214] The Supreme Court in *Roe* somewhat justified their holding on those grounds, suggesting that "[t]he pregnant woman cannot be isolated in her privacy" because the right to have an abortion "is inherently different than marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner* and *Pierce* and *Meyer* were respectively concerned."[215]

While the Court is correct in asserting that abortion reflects a relationship and a pregnant person's choice to have an abortion harms the fetus, they erroneously give no apparent weight to the fact that the fetus's existence requires an intrusion upon, and injury to, the pregnant person.[216] The right is not akin to one's right to travel interstate (for example), but is more similar to one's right to prevent oneself from being kidnapped.[217] Recall Judith Jarvis Thomson's analogy mentioned at the onset of this note: it is indisputable that someone has the right to free themself from the violinist no matter the violinist's thoughts, feelings, innocence, rights, promise, skill, or potential and no matter what the individual tied to the violinist might have done beforehand.[218] To require one to sustain the

[209] *See* Oriana Gonzáles, *Where Abortion Has Been Banned Now that Roe v. Wade is Overturned*, AXIOS (Aug. 23, 2023), https://www.axios.com/2022/04/16/abortion-ban-red-states-tracking-roe-supreme-court (listing those states as Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin).

[210] *See* Cara Tabachnick, *What Do "Stand Your Ground" Laws Allow For—and Which States Have Them?*, CBS NEWS (Apr. 19, 2023), https://www.cbsnews.com/news/ralph-yarl-shooting-andrew-lester-stand-your-ground-laws/ (indicating that every state, except Arkansas, that has a pre-viability abortion restriction also has a stand-your-ground law).

[211] *See* Thomson, *supra* note 1, at 75.

[212] *See* MCDONAGH, *supra* note 4, at 107–54.

[213] *See* Michael M. v. Superior Ct., 450 U.S. 464, 471–73 (1981); *see generally* Bridges, *supra* note 107, at 457–58.

[214] *See* MCDONAGH, *supra* note 4, at 110–11.

[215] Roe v. Wade, 410 U.S. 113, 159 (1973).

[216] *See* MCDONAGH, *supra* note 4, at 111.

[217] *See id.*

[218] *See* Thomson, *supra* note 1, at 73.

violinist for nine months would go far beyond any cognizable duty required by the law, because an individual does not have a right to secure their life at the cost of the liberty and bodily security of another.[219] A pregnant person who is forced to carry a fetus to term without their consent is more than a "good Samaritan."[220] They instead become a "captive Samaritan," someone whose body is seized without consent to accomplish state goals.[221]

Pregnant people deserve the same rights to self-defense, and to be free from capture, as the rest of the public.[222] Any rejection of the rights of pregnant people to protect their bodies from harm not only relies on many of the fallacies discussed previously (e.g., that sex causes pregnancy, not the fetus), but also relies on one-dimensional, sexist notions of what a pregnancy is.[223] Pregnancy is often framed as a wholesome and profoundly nurturing experience through the course of a symbiotic relationship between birthing parent and child.[224] While this may be the reality for millions, this conception of pregnancy is typically the product of a patriarchal society that readily limits pregnant people's ability to control and protect their own bodies.[225] It is the duty of all those who would utilize this, or similar arguments, to establish the nuance of the pregnancy experience (i.e., that not all pregnant people want to be pregnant) in order to establish pregnant people's autonomy and equal status to decide what is best for themselves—instead of subjugation in service of the assumption that pregnancy is always good.[226] This argument does not require construing pregnancy as an inherent "bad," just nuanced.[227] Pregnancy requires consent of the pregnant person in order for it to be the beautiful and societally rewarding experience that many opponents of abortion assume it to be.

Once the cognitive shift that pregnancy requires consent is realized, the next step requires inquiry into what contours of the right should be protected.[228] Is it the duty of a state not to criminalize abortion because it recognizes the right to abortion on grounds of self-defense (i.e., akin to an individual not being criminally punished when they respond to threat of deadly force by using deadly force)? Or must a state do more and affirmatively provide funding and facilities to secure a pregnant person's right to have an abortion?[229] It could be argued that the state must refrain from intruding on a pregnant person's right to choose an abortion, or that the American legal system should develop a body of common law to both protect a pregnant person from governmental intrusion and to enable

---

[219] *Id.*

[220] *See* Brian West & Matthew Varacallo, *Good Samaritan Laws*, NAT'L LIBR. OF MED. (Sept. 12, 2022), https://www.ncbi.nlm.nih.gov/books/NBK542176/.

[221] *See* MCDONAGH, *supra* note 4, at 172–73.

[222] *See id.*

[223] *See id.* at 82.

[224] *See id.*

[225] *See id.* at 81–82.

[226] *See id.* at 83.

[227] Michael M. v. Superior Ct., 450 U.S. 464, 471–73 (1981); *see* Bridges, *supra* note 107, at 475.

[228] *See* MCDONAGH, *supra* note 4, at 99–100.

[229] *See id.*

them to secure an abortion.[230] Moreover, it could be argued that abortion should be a positive right, making a state's refusal to provide adequate abortion resources akin to their sanction of the fetus imposing serious harm upon a non-consenting pregnant person.[231] However, one must consider the makeup of the Supreme Court and *Dobbs* before counting on the federal legal system to pursue such arguments. Moreover, states often operate within a more expansive right-based constitution than the federal constitution and have greater latitude to establish rights through their legislatures than Congress.[232] In any case, pro-choice individuals must expand their arguments in order to protect an individual's right to an abortion.

CONCLUSION

Roe and *Casey* are gone and—given the present make-up of the Supreme Court—probably will not be revived within the next generation.[233] Pro-choice individuals should widen the scope of the abortion debate by conceding certain pro-life principles in arguing for a pro-choice conclusion.[234] States have been expanding their self-defense jurisprudence consistently since *Casey* and appear to do so despite all the statistical evidence suggesting that expanding self-defense jurisprudence may not effectively protect individuals.[235] States are making a policy choice to expand the rights of individuals to protect themselves from harm.[236] Pro-choice advocates should utilize this growing trend to reshape the abortion debate into being about self-defense.[237] The law in the states protects an individual who protects herself from harm, it should recognize that non-consented pregnancy requires the same protection as other types of harms.[238]

---

[230] *See id.* at 102.

[231] *See id.* at 112.

[232] *See* David Schultz, *State Constitutional Provisions on Expressive Rights*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV. (Feb. 18, 2024), https://perma.cc/N3KC-BM9N.

[233] *See* Josh Gerstein & Alexander Ward, *Supreme Court has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2023), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473; Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 843 (1992); Roe v. Wade, 410 U.S. 113, 116 (1973); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 223 (2022).

[234] *See generally* MCDONAGH, *supra* note 4.

[235] *See* Randall & DeBoer, *supra* note 60; *Casey*, 505 U.S. at 843.

[236] *See Self Defense and 'Stand Your Ground'*, NAT. CONF. STATE LEGIS. (Mar. 1, 2023), https://perma.cc/AX4U-K53K.

[237] *See generally* MCDONAGH, *supra* note 4.

[238] *See generally id.*

TIME'S NOT UP YET: HOW THE THREAT OF DEFAMATION WEAKENS NEW YORK'S ADULT SURVIVORS ACT

CHRISTINA FREITAS*

* J.D. Boston University School of Law, 2024; B.A., Political Science, University of California, Los Angeles, 2018. I would like to thank the Public Interest Law Journal for their tireless editing and development efforts and my advisor Professor Aziza Ahmed for her insightful suggestions. All errors are my own.

INTRODUCTION

In the spring of 2022, social media exploded with hashtags and clips of testimony from the year's hottest celebrity trial—*Depp v. Heard*.[1] The jury found that Amber Heard defamed her ex-husband, beloved actor Johnny Depp, in her 2018 Washington Post opinion piece.[2] They awarded Depp fifteen million dollars in damages and Heard with a mere two million.[3] Some observers lamented the jury's verdict as a stunning blow to the #MeToo movement and both domestic violence and sexual assault survivors.[4] "[T]he court of social media" seemed to declare Depp the premature winner of the case, prompting one expert to suggest that Depp's widespread public support was due to the "worry that the Me Too movement didn't represent male victims as much as it did female victims."[5] Others opined that the verdict "is as much as to say that anyone who says the phrase 'I was abused' can be sued as a liar, and is highly likely to have a chilling effect on other victims of domestic violence who might want to step forward."[6] In her op-ed, Heard invoked the #MeToo movement, calling to support women who share their experiences with sexual and domestic violence.[7] She paid the price for speaking out.[8] Was this the beginning of the end of the #MeToo movement?

---

[1] 102 Va. Cir. 324 (2019) (No. CL-2019-0002911); Kalhan Rosenblatt, *Social Media Flooded with Johnny Depp Support Amid Defamation Case Against Amber Heard*, NBC NEWS (Apr. 22, 2022, 12:21 PM), https://www.nbcnews.com/pop-culture/pop-culture-news/johnny-depp-amber-heard-social-media-defamation-tiktok-case-rcna25430 ("Some TikTokers will give play-by-plays of the day in court, recounting the latest testimony or evidence presented. Others suggest unproven conspiracy theories . . . .").

[2] *See* Judgment Order at 2, *Depp v. Heard*, 102 Va. Cir. 324 (2019) (No. CL-2019-0002911); Amber Heard, Opinion, *I Spoke Up Against Sexual Violence — And Faced Our Culture's Wrath. That Has to Change.*, WASH. POST (Dec. 18, 2018, 5:58 PM), https://www.washingtonpost.com/opinions/ive-seen-how-institutions-protect-men-accused-of-abuse-heres-what-we-can-do/2018/12/18/71fd876a-02ed-11e9-b5df-5d3874f1ac36_story.html.

[3] Judgment Order, *supra* note 2, at 2; Holly Honderich, *Amber Heard Settles Defamation Case Against Johnny Depp*, BBC (Dec. 19, 2022), https://www.bbc.com/news/world-us-canada-64031252.

[4] *See* Anne Marie Tomchak, *Amber Heard Has Called Out the 'Unfair' Role of Social Media in the Defamation Case–Here's How Algorithms Shaped Our Views During The Trial*, GLAMOUR, (June 13, 2022), https://perma.cc/HG6J-7BE8 ("When large numbers of people are seeking to discredit or mock a woman talking about her experience of alleged abuse so publicly, concerns survivors may have about not being believed will be amplified . . . .")

[5] Rosenblatt, *supra* note 1.

[6] Constance Grady, *The Me Too Backlash is Here*, VOX (June 2, 2022, 12:50 PM), https://perma.cc/XE9E-YY6B.

[7] *See* Heard, *supra* note 2. ("I want to ensure that women who come forward to talk about violence receive more support.").

[8] Heard was ordered to pay Depp fifteen million of dollars, but later settled, agreeing to pay one million. *See* Judgment Order, supra note 2, at 2; Honderich, *supra* note 3. She was also widely ridiculed and villainized on social media—#AmberTurd and #MePoo even trended on Twitter. *See* Michelle Goldberg, Opinion, *Amber Heard and the Death of*

The hashtag MeToo originally went viral in October 2017 in response to reports of Harvey Weinstein's widespread sexual abuse.[9] The movement highlighted the prevalence of sexual assault and harassment, particularly in the workplace, and exposed how powerful men silenced survivors to keep sexual assault claims out of the press and courts.[10] What began as a viral hashtag soon developed into real-world consequences when credible allegations of workplace sexual assault and harassment ousted several men across various industries from their powerful positions.[11] In the absence of laws that adequately protected sexual assault survivors, public accusations, rather than formal legal claims, became "one of #MeToo's distinctive features . . . ."[12] Indeed, repercussions for abusers frequently came from the public and employers rather than the judicial system.[13] This prompted feminist legal scholar Aya Gruber to opine: "Raging against sexual harm has become the preferred weapon of those attacking heterogenous power differentials."[14]

However, America's pervasive rape culture led #MeToo survivors to be "treated with skepticism and even hostility, while perpetrators [were] shown empathy and imbued with credibility . . . ."[15] It can often take "three to four

---

#MeToo, N.Y. TIMES (May 18, 2022), https://www.nytimes.com/2022/05/18/opinion/amber-heard-metoo.html.

[9] *See* Carrie N. Baker, *#MeToo Five Years Later*, MS. MAG. (Oct. 27, 2022), https://msmagazine.com/2022/10/27/me-too-five-years-sexual-harassment-assault/. Tarana Burke, a Black woman, originally created the Me Too movement several years earlier. Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html (explaining how actress Alyssa Milano used Burke's "me too" language to amplify sexual assault survivors' voices resulting in October 2017's viral #MeToo movement); *see also* Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 4:21 PM), https://twitter.com/alyssa_milano/status/919659438700670976?lang=en ("If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet.").

[10] *See* Baker, *supra* note 9 ("Wealthy abusers like Weinstein bought their victim's silence with nondisclosure clauses in settlements."); Annalisa Quinn, *In 'Catch And Kill,' Ronan Farrow Offers a Damning Portrait of a Conflicted NBC*, NPR (Oct. 11, 2019, 12:15 PM), https://perma.cc/K3SQ-8A63 (in a review of Farrow's book, Quinn writes that "institutions can find strength in legacy, reputation and numbers or use their substantial power to diffuse guilt and protect the powerful.").

[11] *See* Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 29, 2018), https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html (noting men who lose their powerful jobs over #MeToo allegations include Les Moonves, President, Chairman, and Chief Executive of CBS, Al Franken, former US Senator representing Minnesota, and Kevin Spacey, *House of Cards* actor).

[12] Jessica A. Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. 37, 45 (2019).

[13] JoAnne Sweeney, *The #MeToo Movement in Comparative Perspective*, 29 AM. UNIV. J. GENDER, SOC. POL'Y & L. 33, 48 (2020).

[14] Aya Gruber, *Sex Wars as Proxy Wars*, 6 CRITICAL ANALYSIS L. 102, 102 (2019).

[15] *See* Christina Pazzanese, *How Rape Culture Shapes Whether a Survivor is Believed*, HARV. GAZETTE (Aug. 25, 2020), https://perma.cc/89QK-XTRQ. Rape culture is a set of social attitudes that normalize and/or minimize the harm of sexual assault, resulting in victims often being "disbelieved or blamed." *See* Gruber, *supra* note 14; Susanne Schwarz et

women testifying that they had been violated by the same man in the same way to even begin to make a dent in his denial. That ma[kes] a woman, for credibility purposes, one quarter of a person."[16] As the #MeToo movement gained momentum, there was almost an immediate backlash from men and women alike as they worried men were being wrongly accused of sexual misconduct.[17] It became apparent that the abuser's "personal and political" value and reputation outweighed the accuser's value and reputation.[18]

Because rape culture created a set of social attitudes where survivors are met with skepticism or outright disbelief, an unintended consequence of public #MeToo allegations has been powerful men bringing defamation suits to defend their tarnished reputation.[19] Many lawyers have "seen a spike in defamation lawsuits in recent years" as abusers have retaliated against #MeToo victims for speaking out.[20] Thus, while #MeToo thrusted the open-secret of widespread sexual assault into the spotlight, those accused of sexual misconduct capitalized on abuser-sympathetic cultural attitudes and used defamation lawsuits to "scare survivors into silence."[21] The filing of frivolous defamation lawsuits is intended "to prevent people from speaking out about matters of public interest." [22] These lawsuits are known as SLAPP ("Strategic Lawsuits Against Public Participation").[23] As of September 2023, thirty-four jurisdictions in the United States passed anti-SLAPP laws to protect victims against "punitive suits"

---

al., *(Sex) Crime and Punishment in the #MeToo Era: How the Public Views Rape*, 44 POL. BEHAV. 75, 75 (2020).

[16] Catharine MacKinnon, *Where #MeToo Came From, and Where It's Going*, ATLANTIC (Mar. 24, 2019), https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/.

[17] *See* Sweeney, *supra* note 13, at 44–45.

[18] *See* MacKinnon, *supra* note 16 ("Even when she was believed, nothing he did to her mattered so much as what would be done to him if his actions were taken seriously. His value, personal and political, outweighed hers. His career, his reputation, his mental and emotional serenity, his family—all his assets counted. Hers did not.").

[19] *See* Madison Pauly, *She Said, He Sued*, MOTHER JONES, https://perma.cc/6H7R-7VRZ; Pazzanese, *supra* note 15; *see also* Complaint at 1–5, Depp v. Heard, 102 Va. Cir. 324 (2019) (No. CL-20190002911).

[20] *See* Bruce Johnson, *Worried About Getting Sued for Reporting Sexual Abuse? Here Are Some Tips*, ACLU (Jan. 22, 2018), https://perma.cc/YRU2-KC2S ("The #MeToo movement has drawn an outpouring of testimony by the victims of sexual harassment and sexual abuse. In response, there has been a surge in retaliatory defamation lawsuits by their abusers. Many lawyers say they've seen a spike in defamation lawsuits in recent years. And in the past two months, I have received more than a half-dozen calls from women who were threatened for telling their stories."); Haley Forrestal & Christina Zuba, *What Sexual Assault Survivors Should Know About Defamation*, CHI. ALL. AGAINST SEXUAL EXPLOITATION (June 7, 2022), https://perma.cc/865H-3A55 ("Perpetrators sometimes use defamation lawsuits as a tool to further harm victims.").

[21] *See* Chelsey N. Whynot, *Retaliatory Defamation Suits: The Legal Silencing of the #MeToo Movement*, 94 TUL. L. REV. 1, 3 (2020); Schwarz et al., *supra* note 15, at 78 ("[W]e identify four key, measurable features of rape culture: victim blaming, empathizing with perpetrators, assuming the victim's consent, and questioning the victim's credibility.").

[22] Pauly, *supra* note 19.

[23] *Id.*

brought to silence them.[24] While anti-SLAPP laws protect all speakers from retaliatory defamation suits, they are "particularly applicable" to sexual assault survivors who are "chilled from free exercise of their First Amendment rights when their reports are met with responsive defamation lawsuits."[25] Without anti-SLAPP protections, "survivors may feel coerced into settling" when faced with a retaliatory defamation claim.[26]

In addition to Johnny Depp's highly publicized defamation victory, music producer Dr. Luke won a defamation suit in New York County Court against music artist Kesha, who privately accused him of rape.[27] If people with money and resources like Heard and Kesha are held liable for defaming their accused abuser, is anyone immune from countersuit? How does the threat of being sued for defamation impact the success of remedial legislation designed to make it easier for victims to sue their abusers in the wake of #MeToo?

Recently, New York enacted two laws allowing victims of sexual abuse to bring a civil suit, even if the statute of limitations on their claim previously expired.[28] In 2019, New York passed the Child Victims Act ("CVA"), establishing a one-year window where adult survivors of child sexual abuse were permitted to file civil actions.[29] The CVA "open[s] the doors of justice to the thousands of survivors of child sexual abuse in New York State . . . ."[30] "[F]our months into [the CVA's] revival window, over 1,300 civil suits [were] filed against alleged abusers, on behalf of at least 1,700 survivors."[31] Ultimately, over 10,000 cases were filed during the CVA's revival window.[32]

Three years later, in 2022, New York passed the Adult Survivors Act ("ASA"), which "create[d] a one-year window for the revival of otherwise time-barred civil claims arising out of sexual offenses committed against people who were 18 or

---

[24] *See id.*; Dan Greenberg & David Keating, *Anti-SLAPP Statutes: A Report Card*, INST. FOR FREE SPEECH (Nov. 21, 2023), https://perma.cc/4LYW-7238.

[25] *See* Whynot, *supra* note 21, at 23; Greenberg & Keating, *supra* note 24.

[26] *See* Pauly, *supra* note 19.

[27] *See* Judgment Order, *supra* note 2, at 2; Decision and Order on Motion at 9, Gottwald v. Sebert, 63 N.Y.S.3d 818 (N.Y. Sup. Ct. 2020) (No. 653118/2014); Gene Maddaus, *Dr. Luke Scores Big Victory in Ongoing Defamation Battle with Kesha*, VARIETY (Feb. 6, 2020, 5:17 PM), https://variety.com/2020/biz/news/dr-luke-kesha-ruling-defamation-1203495957/.

[28] *See* Child Victims Act, N.Y. C.P.L.R. 214-g (MCKINNEY 2019); Adult Survivors Act, N.Y. C.P.L.R. 214-j (MCKINNEY 2022).

[29] Child Victims Act, N.Y. C.P.L.R. 214-g (MCKINNEY 2019); S.B. S2440, 2019-2020 Legis. Sess. (N.Y. 2020). The window was later extended an additional year to give survivors more time to file. S.B. S7082, 2019-2020 Legis. Sess. (N.Y. 2020). Child victims were permitted to file pursuant to the CVA from August 14, 2019 until August 14, 2021. Press Release, Anna M. Kaplan, Senator, N.Y. Senate, Sen. Kaplan Applauds Child Victims Act Extension, Urges Survivors to Seek Justice (Aug. 3, 2020), https://web.archive.org/web/20230607134848/https://www.nysenate.gov/newsroom/press-releases/anna-m-kaplan/senator-kaplan-applauds-child-victims-act-extension-urges.

[30] S2440 Sponsor Memo, Child Victims Act, S.B. S2440, 2019-2020 Legis. Sess. (N.Y. 2019).

[31] S7082 Sponsor Memo, S.B. S7082, 2019-2020 Legis. Sess. (N.Y. 2020).

[32] *Statute of Limitations Reform Serves the Public Interest: A Preliminary Report on the New York Child Victims Act*, CHILD USA 4 (Aug. 23, 2021), https://perma.cc/QCQ6-572G.

older at the time of the conduct."[33] Under the Act, adult survivors may file a civil claim relating to a sexual offense between November 24, 2022 and November 24, 2023, regardless of when their assault occurred.[34] The ASA's sponsor memo stated: "[t]hose who have had justice denied them [sic] as a result of New York's formerly insufficient statutes of limitations should be given the opportunity to seek civil redress against their abuser or their abuser's enablers in a court of law."[35] While the New York legislature passed the ASA to allow survivors to bring cases previously barred by earlier statutes of limitations, survivors still face several obstacles in bringing their cases.[36]

Throughout this Note, I will argue that defamation suits threaten to silence survivors, frustrating the ASA's goal of enabling survivor voices to be heard while holding abusers accountable.[37] Part II discusses defamation as defined and interpreted in New York, explains how both alleged abusers and survivors bring defamation claims to defend their reputations, and analyzes New York's anti-SLAPP laws.[38] Part III discusses how New York can mitigate the threat of defamation to enable adult survivors suing under the ASA to bring their claims and publicly share their stories without subjecting themselves to defamation liability.[39] Ultimately, Part III suggests New York can protect ASA plaintiffs by enacting shield laws, creating a defamation per se exemption for ASA claims, and strengthening anti-SLAPP statutes.[40]

I. LEGAL BACKGROUND

New York's defamation laws have enabled abusers to effectively silence their victims.[41] Part A begins to untangle how abusers weaponize defamation and

---

[33] S66A Sponsor Memo, S.B. S66A, 2021-2022 Legis. Sess. (N.Y. 2022); *see* Adult Survivors Act, N.Y. C.P.L.R. 214-j (MCKINNEY 2022).

[34] *See id.*; Roberta Kaplan, et al., *N.Y. Adult Survivors Act Renews Claims for Sexual Assault Survivors*, BLOOMBERG LAW, (June 21, 2022), https://www.bloomberglaw.com/bloomberglawnews/us-lawweek /X6H90R3S000000?bna_news_ filter=us-law-week#jcite.

[35] S66A Sponsor Memo, S.B. S66A, 2021-2022 Legis. Sess. (N.Y. 2022).

[36] For example, adult survivor Gary Greenberg explained that many survivors could not get counsel if their abuser has no money. Natasha Vaughn-Holdridge, *Survivors Renew Call to Amend Child Victims Act*, HUDSON VALLEY 360 (Feb. 24, 2022), https://www.hudsonvalley360.com/news/nystate/survivors-renew-call-to-amend-child -victims-act/article_5699c174-3320-5b80-b054-28fdbe1739e9.html. Adult survivors of childhood sexual abuse worry the ASA will present similar obstacles to adult survivors seeking to bring suit. *Id.*

[37] *See* Press Release, Kathy Hochul, Governor, N.Y., Governor Hochul Signs Adult Survivors Act (May 24, 2022), https://perma.cc/3J99-4PKV (quoting Governor Hochul: "Today, we take an important step in empowering survivors across New York to use their voices and hold their abusers accountable."); S66A Sponsor Memo, S.B. S66A, 2021-2022 Legis. Sess. (N.Y. 2022).

[38] *See* discussion *infra* Part II.

[39] *See* discussion *infra* Part III.

[40] *See* discussion *infra* Part III.

[41] *See* discussion *infra* Part II.

defines defamation in New York state. Part B then discusses how sexual assault survivors and perpetrators in New York both use defamation to protect against reputational harm. Lastly, Part C surveys New York's current anti-SLAPP laws that are designed to guard against retaliatory defamation lawsuits.

A. *Defamation in New York*

Defamation is broadly defined as the making of "false written or oral statement[s]" to a third person that "damages another's reputation."[42] Defamation includes both libel and slander, which are false written statements and false spoken statements, respectively.[43] In New York, defamation is: (1) a false statement that tends to expose a person to public contempt; (2) published to a third party without the person's privilege or authorization; (3) either causing harm or constituting defamation per se.[44] While public figures bringing defamation claims must show the alleged defamer acted with actual malice to prevail, private actors do not need to show this.[45] To sufficiently claim defamation, a private plaintiff must identify: (1) the "particular words" that allegedly constitute defamation; (2) who made the statement; (3) when and where the statement was made; and (4) to whom it was made.[46] Because a claim cannot be defamatory if it is true, truth is an absolute defense and a question of fact for the jury to decide.[47] However, statements made "in the course of litigation,"

---

[42] *Defamation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[43] *See* Goldman v. Reddington, 417 F. Supp. 3d 163, 171 (E.D.N.Y. 2019); *Libel*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Slander*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[44] *See* Elias v. Rolling Stone, LLC, 872 F.3d 97, 104 (2d Cir. 2017) (citing Stepanov v. Dow Jones & Co., 987 N.Y.S.2d 37, 41 (N.Y. App. Div. 2014)). (applying New York law). Defamation per se is a statement that is "defamatory in and of itself and is not capable of an innocent meaning." *Defamation*, BLACK'S LAW DICTIONARY (11th ed. 2019). Each prong of defamation is discussed *infra* pages 190–93.

[45] *See* N.Y.Times Co. v. Sullivan, 376 U.S. 254, 283 (1964); Shulman v. Hunderfund, 905 N.E.2d 1159, 1161 (N.Y. 2009) (applying *Sullivan*'s actual malice standard).

[46] *See* N.Y. C.P.L.R 3016(a) (MCKINNEY 2022) ("In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally."); Nowak v. EGW Home Care, Inc., 82 F.Supp.2d 101, 113 (W.D.N.Y 2000) (dismissing complaint because of plaintiff's failure to allege the particular defamatory words); Curti v. Girocredit Bank, No. 93 Civ. 1782 (PKL), 1994 WL 48835, at *3 (S.D.N.Y. Feb. 14, 1994) (dismissing complaint for lack of details regarding the circumstances of the alleged defamatory statement); Reeves v. Continental Equities Corp., 767 F. Supp. 469, 473 (S.D.N.Y.1991) (dismissing complaint for failure to identify details regarding who made and heard the alleged defamatory statements).

[47] *See* Guccione v. Hustler Magazine, Inc., 800 F.2d 298, 301 (2d Cir. 1986) ("Under New York law . . . [truth] is an absolute unqualified defense to a civil defamation action.") (internal citations omitted) (jury found statement was false and therefore libelous); Gottwald v. Sebert, No. 653118/2014, 2020 N.Y. Misc. LEXIS 564, at *12 (N.Y. Sup. Ct. Feb. 6, 2020) ("If the jury ultimately finds that the statements Kesha and her agents made are not false, she cannot be liable for defamation under any circumstances . . . .").

including statements in affidavits and complaints, "are privileged and cannot form the basis of a defamation claim."[48]

1. False Statement

A defamation plaintiff must show that the statement about them is false by identifying "*how* the defendant's statement is false" and "plead[ing] facts that . . . would allow a reasonable person to consider the statement false."[49] Because a statement must be false to be actionable, the alleged defamatory words must be a statement that can be found factually true or false.[50] Opinions are not actionable because they cannot be proven true or false.[51] Thus, to evaluate a defamation claim, New York courts must determine, as a threshold matter of law, whether a statement is fact or opinion.[52]

To determine if a statement is a fact or opinion, the court considers "what the average person hearing or reading the communication would take [the statement] to mean."[53] Some factors courts may consider in making this determination include:

> (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.[54]

---

[48] *See* Front, Inc. v. Khalil, 28 N.E.3d 15, 18 (N.Y. 2015) ("[I]t is well settled that statements made in the course of litigation are entitled to absolute privilege . . . ."); Tacopina v. O'Keefe, 675 Fed. App'x. 7, 8 (2d Cir. 2016) (statements made in an affidavit filed in court are privileged and cannot form the basis for a defamation claim).

[49] *See* Goldman v. Reddington, 417 F.Supp.3d 163, 171–72 (E.D.N.Y. 2019) (emphasis added); Harding v. Dorilton Capital Advisors, LLC, 635 F. Supp.3d 286, 306 (S.D.N.Y. 2022) ("To establish defamation under New York state law, a plaintiff must prove . . . [an] applicable level of fault on the part of the speaker . . . .").

[50] *See* Gross v. N.Y. Times Co., 623 N.E.2d 1163, 1167 (N.Y. 1993) ("Since falsity is a necessary element of a defamation cause of action and only 'facts' are capable of being proven false, it follows that only statements alleging facts can properly be the subject of a defamation action . . . .") (internal quotes omitted); *see also* Gottwald v. Sebert, 148 N.Y.S.2d 37, 47 (N.Y. App. Div. 2021) (finding Kesha's statements that Dr. Luke drugged and raped her were actionable statements, not opinions, because "they can be found to be factual as a matter of law.").

[51] Steinhilber v. Alphonse, 501 N.E.2d 550, 552 (N.Y. 1986) ("[E]xpression of pure opinion is not actionable.").

[52] *See id.* at 552–53.

[53] Davis v. Boeheim, 2 N.E.2d 999, 1004 (N.Y. 2014) (quoting *Steinhilber*, 501 N.E.2d at 553) (reversing a motion to dismiss defamation claims regarding accusations of sexual misconduct).

[54] *Id.* at 1005 (quoting Mann v. Abel, 885 N.E.2d 884, 885–86 (N.Y. 2008)).

Further, minor inaccuracies are insufficient to support a finding of a false statement.[55] As such, if the statement at issue is found "substantially true," a plaintiff's defamation claim will fail.[56]

Some opinions must receive further analysis. Mixed opinions are actionable but pure opinions are not. [57] Mixed opinions are opinions that either: (1) imply they are "based on facts which justify the opinion but are unknown to those reading or hearing it . . ." or (2) are accompanied by false or "gross distortion or misrepresentation" of facts.[58] On the other hand, a pure opinion is "a statement of opinion which either is accompanied by . . . facts upon which it is based, or . . . does not imply that it is based upon undisclosed facts" and is not actionable.[59]

Plaintiffs may also sue under a theory of defamation by implication, which does not require an expressly defamatory statement.[60] Rather, "[d]efamation by implication is premised . . . on false suggestions, impressions and implications arising from otherwise truthful statements."[61] Further, defamatory statements need not name the defamed individual directly—it is sufficient that a "plaintiff can make out that [they] are the person" the statement is about.[62] In proving that the alleged defamatory statement is about the plaintiff, the plaintiff must show that it is "reasonable to conclude" that the words refer to them.[63] If the plaintiff relies on extrinsic facts, she must prove those extrinsic facts were known by those who read or heard the statement.[64]

2. Published to a Third Party

The second prong, publication to a third party, is more straightforward. A defamatory statement does not become actionable until it is read or heard by a

---

[55] Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991) ("Minor inaccuracies do not amount to falsity.").

[56] Guccione v. Hustler Magazine, Inc., 800 F.2d 298, 291 (2d Cir. 1986) (dismissing plaintiff's defamation claim because, in part, the "statement as issue was substantially true . . . .")).

[57] *Davis*, 22 N.E.2d at 1004 (quoting *Steinhilber*, 501 N.E.2d at 552–53).

[58] *Id.* (quoting *Steinhilber*, 501 N.E.2d at 553) (internal quotations omitted); Silsdorf v. Levine, 449 N.E.2d 716, 719–721 (N.Y. 1983) (finding opinions may be defamatory if plaintiff can prove the falsity of the opinion and "convince the triers of fact that that the factual disparities would affect the conclusions drawn by the average reader . . . .").

[59] *Davis*, 22 N.E.2d at 1004. (quoting *Steinhilber*, 501 N.E.2d at 553.

[60] *See* Armstrong v. Simon & Schuster, Inc., 649 N.E.2d 825, 829 (N.Y. 1995).

[61] *Id.* at 829–31(finding plaintiff's claim not one of defamation by implication because it need not be "stretched and extrapolated by subjective interpretations in order to find any possible falsity.") (internal quotes omitted).

[62] Elias v. Rolling Stone, LLC, 872 F.3d 97, 105 (2d Cir. 2017) (quoting Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980)) (finding that an ultimately false gang rape story published in *Rolling Stone* magazine was sufficiently "of and concerning" plaintiffs bringing suit even when their names were not explicated mentioned because the facts in the article sufficiently identified them as the alleged gang rapists).

[63] *Id.* (quoting Chicheria v. Cleary, 616 N.Y.S.2d 647, 648 (N.Y. App. Div. 1994)).

[64] *Id.* (quoting *Chicheria*, 616 N.Y.S.2d at 648).

third party.[65] Publication or communication to even one person other than the defamed is sufficient.[66] The original speaker is not, however, responsible for the repetition of their statement if the repetition was done without the original speaker's "authority or request by others over whom he has no control."[67] This creates a limitation on the speaker's liability.[68]

3. Causing Harm or Constituting Defamation Per Se

Defamation causes harm if it injures the defamed individual's reputation.[69] However, New York law recognizes four categories of defamation per se in which damage is presumed and need not be proven.[70] Statements: (1) tending to injure a person's business or profession; (2) accusing someone of having a "loathsome disease;" (3) imputing "unchastity to a woman;" or (4) accusing someone of a serious crime, such as rape, theft, or bribery, constitute defamation per se.[71] A crime is considered serious under defamation law if it is: (1) punishable by imprisonment, or (2) "regarded by public opinion as involving moral turpitude."[72] However, a statement of someone's criminality may not be actionable if the reasonable reader or listener would regard the statement as a "mere hypothesis."[73] In this situation, it is up to the court to consider "the communication as a whole" to determine if a reasonable listener or reader would consider the statement "an assertion of provable fact."[74]

Defamation per se does not reach accusations of petty crime, such as traffic violations, because such accusations would do little, if any, harm to a person's

---

[65] *See id.* at 104 (quoting Stepanov v. Dow Jones & Co., 987 N.Y.S.2d 37, 41–42 (N.Y. App. Div. 2014).

[66] Lentlie v. Egan, 462 N.E.2d 1185, 1186 (N.Y. 1984) ("[T]he law of defamation requires but one communication to a single person . . . .") (citing Ostrowe v. Lee, 175 N.E. 505, 505 (N.Y. 1931)).

[67] Geraci v. Probst, 938 N.E.2d 336, 342–43 (N.Y. 2010) (quoting Schoepflin v. Coffey, 56 N.E.2d 502, 504 (N.Y. 1900)) (finding defendant was not liable for the publication of a letter he wrote in a newspaper where: (1) there was no evidence he induced the paper to print his letter; (2) the paper did not contact him regarding the story; and, (3) he had no control over its publication).

[68] *See Schoepflin*, 56 N.E.2d at 504; Gottwald v. Sebert, 148 N.Y.S.3d 37, 46 (N.Y. App. Div. 2021).

[69] Jacob v. Lorenz, 626 F. Supp. 3d 672, 686 (S.D.N.Y 2022) (applying New York law).

[70] Liberman v. Gelstein, 605 N.E.2d 344, 347–48 (N.Y. 1992).

[71] *See* Stern v. Cosby, 645 F. Supp. 2d. 258, 273 (S.D.N.Y. 2009) (applying New York law) (quoting *Liberman*, 605 N.E.2d at 347–48); Goldman v. Reddington, 417 F. Supp. 3d 163, 173 (E.D.N.Y 2019) (applying New York law to find "[r]ape is a sufficiently 'serious' crime to support a claim for defamation *per se*."); Sheindelin v. Brady, 597 F. Supp. 3d 607, 637 (S.D.N.Y. 2009) (applying New York law to find the accusation that defendant stole $1.7 million dollars imputes a serious crime, constituting defamation per se) (denied reconsideration Sept. 25, 2009); *Liberman*, 605 N.E.2d at 348 (holding "the statement '[t]here is a cop on the take from Liberman' charges a serious crime-bribery.").

[72] Solstein v. Mirra, 488 F. Supp. 3d 86, 102 (S.D.N.Y. 2019) (applying New York law) (quoting Conti v. Doe, No. 17-CV-9268, 2019 WL 952281, at *7 (S.D.N.Y. Feb. 27, 2019)).

[73] Gross v. N.Y. Times Co., 623 N.E.2d 1163, 1169 (N.Y. 1993).

[74] *Id.*

reputation.[75] Further, determining whether a statement is defamatory per se depends on the defamed's community and current public opinion, "among other factors."[76] Thus, what constitutes defamation per se can "evolve from one generation to the next" and findings of defamation per se are not strictly limited to the above-mentioned categories.[77] Lastly, whether a statement constitutes defamation per se is a question of law.[78]

B. *Defamation in Sexual Assault Cases*

Defamation is a tool both abusers and survivors can use to protect their reputations.[79] Section B(i) explores how those accused of sexual misconduct can use defamation to silence their victims, while section B(ii) briefly explores the interplay between defamation and false accusations. Lastly, section B(iii) explores how victims can use defamation to defend against accusations that they are lying about their assault.

1. Defamation as a Tool for Alleged Abusers

Depp v. Heard will not be the last celebrity case in which an alleged abuser accuses their purported victim of defamation in response to sexual assault allegations.[80] In *Gottwald v. Sebert*, music producer Dr. Luke sued singer Kesha in New York County Court for defamation on the same day Kesha accused him of rape in a separate California lawsuit.[81] Kesha ultimately withdrew from the California action and counterclaimed sexual assault and battery in New York.[82] In the New York case, Dr. Luke claimed that Kesha defamed him when she texted Lady Gaga that he raped both her and Katy Perry.[83] While Kesha's statements that Dr. Luke raped her were questions of fact for the jury that could not be resolved on summary judgment, New York County Court found that

---

[75] *Liberman*, 605 N.E.2d at 348.

[76] *Stern*, 645 F.Supp.2d. at 273 (quoting Mencher v. Chesley, 75 N.E.2d 257, 259 (N.Y. 1947)).

[77] *Id.* at 273–74, 288–90 (applying New York law to find accusations of homosexuality do not constitute defamation per se because, in part, of the lack of "widespread disapproval of homosexuality in New York.").

[78] Moraes v. White, 571 F. Supp. 3d 77, 95 (S.D.N.Y. 2021) (applying New York law).

[79] *See* Depp v. Heard, 102 Va. Cir. 324, 324 (2019); Gottwald v. Sebert, 148 N.Y.S.3d 37, 37 (N.Y. App. Div. 2021) (defamation cases alleged abusers brought against their victims); *see also* Davis v. Boeheim, 22 N.E.3d 999 (N.Y. 2014); Giuffre v. Maxwell, 165 F. Supp. 3d 147 (S.D.N.Y. 2016) (defamation cases victims brought against their alleged abusers).

[80] *Depp*, 102 Va. Cir. at 324.

[81] No. 653118/2014, 2020 N.Y. Misc. LEXIS 564, at *7–8 (N.Y. Sup. Ct. Feb. 6, 2020); Katie Shepard, *Kesha Defamed Her Producer in a Text Message to Lady Gaga, Judge Rules*, WASH. POST (Feb. 7, 2020, 6:35 AM), https://www.washingtonpost.com/nation/2020/02/07/kesha-luke-defamation.

[82] *See* Answer and Counterclaim at 31, Gottwald v. Sebert, 2020 N.Y. Misc. LEXIS 564 (N.Y. Sup. Ct. Nov. 18, 2014) (No. 653118/2014), NYSCEF Doc. No. 252; *Gottwald*, 2020 N.Y. Misc. LEXIS 564, at *7–8.

[83] *See* Shepard, *supra* note 81.

Kesha's statement that Dr. Luke raped Katy Perry was defamatory.[84] Because publication to one person is sufficient to support a defamation claim, her statement could constitute defamation even though the text was only sent to one person.[85] The Court found Kesha's text defamatory as a matter of law because Katy Perry testified in her deposition that Dr. Luke did not rape her, Kesha presented no evidence to the contrary, and accusations of rape constitute defamation per se.[86] Not only did Dr. Luke succeed on his defamation claim, Kesha's sexual assault counterclaims were dismissed because they were time-barred and the Court lacked subject matter jurisdiction.[87]

Here, even a famous white woman with considerable resources could not prevail on a defamation claim brought by her alleged abuser, a powerful man in her industry.[88] *Gottwald v. Sebert* demonstrates how defamation can silence survivors.[89] Some of the risks assault survivors face when bringing a defamation suit include: reliving the trauma of the assault throughout the litigation process, risking being subjected to retaliation, potentially facing their abuser in court and taking on serious financial burdens—not to mention the psychological trauma and emotional suffering of being disbelieved.[90] Because of these risks, "there is no question that defamation suits are being used to mute survivors."[91] Thus, without defamation protections, the same fate is likely for ASA plaintiffs.

Even alleged abusers who lack Dr. Luke and Johnny Depp's notoriety have weaponized defamation suits when accused of rape.[92] In *Goldman v. Reddington*, a male college student sued his accuser, arguing she "embarked on a campaign of defamation in a systematic process of publicly and falsely

---

[84] *Gottwald*, 2020 N.Y. Misc. LEXIS 564, at *6, *9, *21–22 (finding Kesha's statement defamatory per se, in part, because Katy Perry denied the rape in a deposition).

[85] *See id.* at *24; Sweeney, *supra* note 13, at 51.

[86] *Gottwald*, 2020 N.Y. Misc. LEXIS 564, at *23, *29–30. The lower court's finding was upheld on appeal. Gottwald v. Sebert, 148 N.Y.S.3d 37, 47 (N.Y. App. Div. 2021) ("Kesha's text message to Lady Gaga, that Gottwald had raped another singer, was defamatory per se.") (citation omitted).

[87] *Gottwald*, 2020 N.Y. Misc. LEXIS 564, at *9.

[88] White, privileged voices have dominated the #MeToo conversation and been the most likely to be believed, leading to the exclusion of women of color and LGBT folks. *See* Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L. J. F. 105, 107 (2018); Sweeney, *supra* note 13, at 50–51.

[89] *See* Sweeney, *supra* note 13, at 50–52 ("Kesha's case shows the risks of accusing an alleged harasser.").

[90] *See id.* at 51; Pauly, *supra* note 19, at 3 ("[T]he threat of being sued, and the expense of mounting a legal defense, has deterred many survivors who seek to speak out—not to mention the stress of rehashing traumatic events in court."); *see also* Forrestal & Zuba, *supra* note 20, at 2 ("Survivors involved in a defamation battle may even be asked invasive questions under oath about what happened by attorneys representing their perpetrators, which can resurface painful memories and further traumatize them. There is also the financial cost of legal defense and payment of damages if the plaintiff wins the case."); MacKinnon, *supra* note 16, at 4 ("Many survivors realistically judged reporting to be pointless or worse, predictably producing retaliation.").

[91] Whynot, *supra* note 21, at 14.

[92] *See* Goldman v. Reddington, 417 F. Supp. 3d 163, 163 (E.D.N.Y. 2019).

branding him a rapist."[93] Her public accusations on social media and to their university resulted in his expulsion.[94] The Eastern District of New York found his defamation claim was well-pled and allowed the lawsuit to move forward.[95]

2. Defamation and False Accusations

Some alleged abusers bring defamation suits because they were falsely accused.[96] Unfortunately, researchers estimate that between two and eight percent of sexual assault accusations are false.[97] In *Elias v. Rolling Stone, LLC*, prominent members of the Phi Kappa Psi fraternity at the University of Virginia sued *Rolling Stone* magazine after it published a false story alleging that a gang rape occurred at their fraternity.[98] Because the men suing were recognizable from the story, despite not being explicitly named, the Court found that their complaint was sufficient to begin formal defamation proceedings.[99] *Elias* demonstrates that defamation lawsuits can function as designed—to protect reputations against false allegations.[100] The legitimacy of some defamation claims involving false accusations of sexual misconduct, even if infrequent, remains an uncomfortable fact that feminist advocates must grapple with.

3. Defamation as a Tool for Survivors

However, alleged abusers do not exclusively bring defamation lawsuits. Survivors of sexual assault have also filed defamation claims when their alleged abusers have publicly denied their sexual assault allegations.[101] Victims argue public denials of their accusations that either explicitly or implicitly accuse them of lying are defamatory because the denials both damage their reputation and are false.[102] These public denials are actionable because the jury decides whether

---

[93] *Id.* at 169 (citation omitted) (internal quotation marks omitted).

[94] *Id.* at 168.

[95] *Id.* at 170. The matter is currently stayed pending the Second Circuit's decision in Coleman v. Grand, 523 F. Supp. 3d 244 (E.D.N.Y. 2021). Status Report Order, Goldman v. Reddington, No. 1:18-cv-03662 (E.D.N.Y. Feb. 6, 2024).

[96] *See* Elias v. Rolling Stone, LLC, 872 F.3d 97, 105 (2d Cir. 2017) (discussed *infra* Section I.B.3.).

[97] *False Reporting*, NAT. SEXUAL VIOLENCE RES. CTR. 2–3, https://perma.cc/YBU4-AK7P.

[98] 872 F.3d at 97, 103–04 ("Jackie . . . had fabricated the account of gang rape and its aftermath . . . . Plaintiffs commenced this action . . . claiming defamation for the statements made in the online and print editions" and on a podcast).

[99] *Id.* at 105 (finding that two plaintiffs showed that the defamatory statements were "of and concerning" them and that "the complaint plausibly alleged that all Plaintiffs were defamed as members of Phi Kappa Psi under a theory of small group defamation.").

[100] *See id.* at 104 (defining defamation under New York law); Megan Moshayedi, *Defamation by Docudrama: Protecting Reputations from Derogatory Speculation,* U. CHI. LEGAL F. 331, 337 (1993) ("Defamation law attempts to protect individuals from speakers who harm their reputations by alleging significant and negative false facts about them.").

[101] *See, e.g.*, Giuffre v. Maxwell, 165 F. Supp. 3d 147 (S.D.N.Y. 2016); Carroll v. Trump, 498 F. Supp. 3d 422 (S.D.N.Y. 2020); Davis v. Boeheim, 22 N.E.3d 999 (N.Y. 2014).

[102] *See Giuffre*, 165 F. Supp. 3d at 150; *Davis*, 22 N.E.3d at 1002–03.

the sexual assault occurred.[103] Thus, if a jury finds that the alleged sexual assault occurred, then the accusation that the survivor is lying would be a false statement damaging the survivor's reputation and is, therefore, defamatory.[104]

For example, E. Jean Carroll sued former President Trump in the Southern District of New York "minutes after the Adult Survivors Act took effect" for both battery (when he raped her) and for defamation (when he denied her accusations).[105] Carroll first publicly alleged that Trump raped her in her book in 2019.[106] Carroll claimed Trump's Truth Social post calling her accusations are "a complete con job" and accusing her of "not telling the truth," defamed her.[107] The jury awarded Carroll 83.3 million dollars in compensatory and punitive damages.[108] Here, defamation became a weapon for the survivor, not for the abuser.[109]

Private citizens lacking notoriety may also be sued for defamation if they claim a purported victim of sexual assault is lying. In *Davis v. Boeheim*, two men sued Syracuse University basketball coach, James Boeheim, for statements made in response to their allegations that the team's associate head coach, Bernie Fine, molested them as children.[110] In statements to the media, Boeheim said that the plaintiffs were liars, motivated by financial gain, and claimed that he had never "seen or suspected anything."[111] Plaintiffs alleged that Boeheim saw Davis, as a pre-teen, lying on Fine's bed during the 1987 Final Four.[112] The New York Court

---

[103] *See* Gottwald v. Sebert, No. 653118/2014, 2020 N.Y. Misc. LEXIS 564, at *12 (N.Y. Sup. Ct. Feb. 6, 2020) ("If the jury ultimately finds that statements Kesha and her agents made are not false, she cannot be liable for defamation under any circumstances . . . .").

[104] *See id.*

[105] Jennifer Hassan & Andrea Salcedo, *Writer E. Jean Carroll Sues Trump Under New N.Y. Sexual Assault Law*, WASH. POST (Nov. 25, 2022, 10:49 AM), https://www.washingtonpost.com/nation/2022/11/25/e-jean-carroll-sues-donald-trump-rape/. Because the ASA created a window for civil actions relating to sexual offenses, Carroll could bring both her battery and defamation claims under the ASA. *See* Adult Survivors Act, N.Y. C.P.L.R. 214-j (MCKINNEY 2022); Dan Berman, *Trial in One of E. Jean Carroll's Rape Defamation Cases Against Trump is Delayed*, CNN (Mar. 20, 2023, 5:52 PM), https://perma.cc/K745-8URQ ("Carroll brought that lawsuit against Trump last November, after New York passed the Adult Survivors Act, which allows adults alleging sexual assault to bring civil claims years after the attack.").

[106] *See* Hassan & Salcedo, *supra* note 105.

[107] Complaint at 10–11, Carroll v. Trump, 650 F. Supp. 3d 213 (S.D.N.Y. 2023) (22-cv-10016). Truth Social is a social media app that the Trump Media and Technology Group created. *See* Brian X. Chen, *Truth Social Review: Trump's Uncensored Social App Is Incomplete*, N.Y. TIMES (Apr. 27, 2022), https://www.nytimes.com/2022/04/27/technology/personaltech/truth-social-review-trump.html.

[108] Ximena Bustillo, *Jury Orders Trump to Pay $83 million for Defaming Columnist E. Jean Carroll*, NPR (Jan. 26, 2024, 7:37 PM), https://perma.cc/2692-BH7K.

[109] *See* Giuffre v. Maxwell, 165 F. Supp. 3d 147 (S.D.N.Y. 2016); *Carroll*, 650 F. Supp. 3d at 213 (S.D.N.Y. 2023).

[110] 22 N.E.3d 999, 1000 (N.Y. 2014). Unfortunately, rape cases involving male survivors are often "significantly less believed" than cases involving female survivors. Pazzanese, *supra* note 15 (citing Schwarz et al., *supra* note 15).

[111] *Davis*, 22 N.E.2d at 1002.

[112] *Id.* at 1001.

of Appeals found the men's complaint sufficiently pleaded defamation because Boeheim's statements were easily understood by the public, capable of being proven true or false, and the broader circumstances of the statements signaled that Boeheim was stating facts, not giving his opinion.[113] Ultimately, the case was settled before going to trial for an undisclosed amount.[114] Overall, both survivors and abusers turn to defamation to defend their reputations as the consequences of sexual assault allegations play out.

C. *New York's Anti-SLAPP Laws*

New York's anti-SLAPP statutes, which strengthen protection for defamation defendants, apply to "legal actions 'involving public petition and participation.'"[115] These legal actions were narrowly defined to only apply to "plaintiffs seeking public permits, zoning changes, or other entitlements from a government body."[116] But, in November 2020, former Governor Cuomo signed legislation expanding New York's anti-SLAPP statutes by "covering speech (or other First Amendment conduct) related to an issue of public interest."[117] The legislature clarified that issues of "public interest sh[ould] be construed broadly."[118] However, a "purely private matter" would not qualify for anti-SLAPP protections even under a broad construction of public interest.[119] These amendments apply retroactively to pending litigation.[120] Senator Brad Hoylman-Sigal, a sponsor of the legislation, explained: "This legislation would protect the First Amendment rights of New Yorkers and prevent the rich and powerful from abusing our legal system to silence their critics."[121]

Because public interest is broadly constructed, the legal community expects that the statutes will reach "political and social discussions."[122] Under New York common law, matters of public concern have "generally included 'matter[s] of political, social or other concern to the community.'"[123] Courts have found that political elections, "improper business practices," and accusations of sexual

---

[113] *Id.* at 1001, 1007.

[114] *Syracuse, Jim Boeheim Settle Slander Lawsuit Brought by Former Basketball Boys*, ESPN (Aug. 6, 2015, 5:30 PM), https://perma.cc/CR9E-GMAZ .

[115] *New York*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/anti-slapp-guide/new-york/; *see* N.Y. CIV. RIGHTS LAW § 70-a (MCKINNEY 2020).

[116] REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 115.

[117] *See* Press Release, Brad Hoylman-Sigal, Senator, N.Y. Senate, Free Speech 'SLAPP's Back: Governor Signs Hoylman/Weinstein Legislation To Crack Down on Meritless Lawsuits Used to Silence Critics (Nov. 10, 2022) [hereinafter Hoylman-Sigal, Free Speech 'SLAPP's Back], https://perma.cc/NNR4-P7PT?type=image .

[118] N.Y. CIV. RIGHTS LAW § 76-a(d) (MCKINNEY 2020).

[119] *See id.*; REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 115.

[120] Palin v. N.Y. Times Co., 510 F. Supp. 3d 21, 29 (S.D.N.Y. 2020) (applying New York law).

[121] *See* Press Release, Hoylman-Sigal, Free Speech 'SLAPP's Back, *supra* note 117.

[122] Theresa M. House, *New York's New and Improved Anti-SLAPP Law Effective Immediately*, ARNOLD & PORTER (Nov. 17, 2020), https://perma.cc/9HVU-L3DE.

[123] Lindberg v. Dow Jones & Co., No. 20-cv-8231, 2021 WL 3605621, at *8 (S.D.N.Y. Aug. 11, 2021) (quoting Abbott v. Harris Publ'ns, Inc., No. 97-cv-7648, 2000 WL 913953, at *7 (S.D.N.Y. July 7, 2000)).

misconduct all constitute matters of public interest.[124] In fact, the Eastern District of New York, applying state law, found that a November 2017 letter alleging sexual misconduct was sent "against the backdrop" of the #MeToo movement and that allegations of "sexual impropriety and power dynamics in the music industry, as in others, were indisputably an issue of public interest."[125] Thankfully, because of the 2020 amendments, New York's anti-SLAPP laws can be interpreted to apply to defamation defendants in sexual assault cases if the case is one of public interest.[126] But, ASA plaintiffs may be vulnerable to abusers arguing that New York's anti-SLAPP laws do not apply because the litigation is a private matter, rather than one of public interest.[127]

Further, the amended law requires courts "to consider anti-SLAPP motions to dismiss based on the pleadings and 'supporting and opposing affidavits . . . .'"[128] If a defamation defendant files an anti-SLAPP motion to dismiss, then the court must stay all proceedings pending a ruling on the motion.[129] At the subsequent anti-SLAPP motion hearing, the defamation plaintiff must show by clear and convincing evidence that "the defendant made the statement knowing it was false or 'with reckless disregard' as to whether it was false."[130] Thus, New York effectively codified the *New York Times v. Sullivan* actual malice standard and applied it to both private and public figures for lawsuits "involving matters of public interest."[131]

New York's new anti-SLAPP laws also require the awarding of attorney's fees if the court grants a motion to dismiss.[132] Additional compensatory and punitive damages may be recovered upon the defendant showing the litigation was "for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech . . . ."[133] In 2021, Senator Hoylman-Sigal proposed an additional bill clarifying that the expanded anti-SLAPP laws apply retroactively to cases pending at the time of its passage, but his proposed amendments have not made it out of committee.[134]

---

[124] Khalil v. Fox Corp., 630 F. Supp. 3d 568, 584 (S.D.N.Y. 2022) (applying New York law) (finding the 2020 presidential election was "clearly a matter of public interest . . . ."); *Lindberg*, 2021 WL 3605621, at *8 (applying New York law) (finding improper business practices a matter of public interest); Coleman v. Grand, 523 F. Supp. 3d 244, 259 (E.D.N.Y. 2021) (applying New York law).

[125] *Coleman*, 523 F. Supp. 3d at 259.

[126] *See* N.Y. CIV. RIGHTS LAW § 76-a (MCKINNEY 2020).

[127] *See* N.Y. Civ. Rights Law § 70-a (MCKINNEY 2020).

[128] *See Letter to Clients and Friends: Recent Developments in New York's Amended Anti-SLAPP Law*, GIBSON DUNN 1 (June 1, 2022), https://perma.cc/T24F-NXKY (quoting S.B. S52A, 2019-2020 Legis. Sess. (N.Y. 2019)).

[129] *See id.*

[130] REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 115 (quoting N.Y. CIV. RIGHTS LAW § 76-a(2) (MCKINNEY 2020)).

[131] *Id.*

[132] *See* GIBSON DUNN, *supra* note 128.

[133] N.Y. CIV. RIGHTS LAW § 70-a (MCKINNEY 2020).

[134] *See* GIBSON DUNN, *supra* note 128; S.B. S9239, 2021-2022 Legis. Sess. (N.Y. 2021).

II. DISCUSSION

#MeToo sexual assault accusations are actionable under defamation law.[135] A false sexual assault accusation can constitute defamation per se because it imputes serious criminal behavior.[136] Yet, the Adult Survivors Act in its current form does not exempt survivors from defamation liability.[137] As such, adult survivors suing under the Act may unintentionally subject themselves to defamation lawsuits. Because the ASA provides a civil remedy for sexual assault survivors, ASA plaintiffs may be more likely to sue wealthy individuals and institutions who can pay damages as restitution for their harm and suffering.[138] Because the ASA created employer liability, more companies and institutions are expected to be sued during the ASA lookback window than the CVA window.[139] Legal observers expect numerous cases will be brought against employers, holding them liable for an employee's sexual misconduct at work.[140] Thus, because those same individuals and institutions that have the resources to pay damages also have the power and ability to countersue, I suspect there will be an increase in retaliatory defamation claims against survivors as they file their sexual assault claims during the ASA's revival window.

---

[135] *See* Gottwald v. Sebert, No. 653118/2014, 2020 N.Y. Misc. LEXIS 564, at *24–25 (N.Y. Sup. Ct. Feb. 6, 2020); Stern v. Cosby, 645 F. Supp. 2d. 258, 273 (S.D.N.Y. 2009) (holding a statement accusing someone of a serious crime constitutes defamation per se under New York law).

[136] *See* RESTATEMENT (SECOND) OF TORTS § 571 cmt. g (AM. L. INST. 1977); *Gottwald*, 2020 N.Y. Misc. LEXIS 564, at *11.

[137] N.Y. Adult Survivors Act, N.Y. C.P.L.R. 214-j (MCKINNEY 2022).

[138] *See* Edward Helmore, *Flood of Sexual Abuse Lawsuits Expected in New York as New Law Takes Effect*, GUARDIAN (Dec. 4, 2022, 5:00 AM), https://perma.cc/F2UX-DYJA ("Some legal experts think the money issue could come to prominence as the floodgates open. 'The only question now is does the lawyer think the client is telling the truth and does the defendant have any money . . . .'"); *see also* Vaughn-Holdridge, *supra* note 36 (discussing how lawyers refused to take on Child Victims Act plaintiffs if their abuser did not have money to pay damages). While many survivors may want to sue individuals or institutions who cannot compensate them for their harm, these victims will likely struggle to find counsel. *See id.*

[139] *Employers Will Likely Face New Litigation Challenges As New York Passes 'Adult Survivors Act'*, FISHER PHILLIPS (June 8, 2022), https://perma.cc/K7HA-NZ45?type=image ("The ASA allows employees to initiate civil lawsuits against not only the alleged abuser, but also the companies that employed them under a vicarious liability or negligence standard, for example . . . ."); *see* Adult Survivors Act, S.B. S66A, 2021-2022 Legis. Sess. (N.Y. 2022). During the CVA revival window, institutions like Boy Scouts of America, the Catholic church, and several universities faced numerous lawsuits. Sean Leahman, et. al., *Child Abuse Survivors Wait for Justice, Healing as CVA Deadline Passes with Nearly 10k Lawsuits Filed*, DEMOCRAT & CHRON. (Aug. 13, 2021, 5:02 AM), https://perma.cc/5C5G-6Q4W.

[140] Ashely Cullins, *As New York Suspends Time Constraints on Sexual Abuse Claims, a Wave of Lawsuits Arrive in Courts*, HOLLYWOOD REP. (Jan. 13, 2023, 4:03 PM), https://perma.cc/C92U-8HXD ("What's unique about the ASA, and how it will be different from the CVA, is there will be a lot of cases against employers who will have liability as a result of managers and senior-level people . . . .") (internal quotation marks omitted).

The ASA leaves sexual assault victims vulnerable to legal attack, with potentially dire financial and reputational consequences.[141] The New York legislature can protect ASA litigants from defamation liability by enacting shield laws, defamation per se exemptions, and stronger anti-SLAPP legislation. Employing these legal strategies will help the state reach the ASA's goal of "empowering survivors across New York to use their voices and hold their abusers accountable . . . and creat[ing] an environment that makes survivors feel safe."[142] Until the New York legislature enacts defamation protections, New Yorkers will struggle to legally hold their abusers accountable because the looming threat of defamation may silence them.

A. *Shield Laws*

The first way to protect survivors from defamation liability is to amend the ASA to shield ASA plaintiffs from defamation suits. Shield laws protect specific groups of people from certain legal outcomes or rules that would otherwise apply to them.[143] There are shield laws for journalists, abortion providers, and rape victims.[144] Many of these shield laws already exist in New York and were passed as recently as 2022.[145] For example, New York passed several laws to shield New York abortion providers from criminal liability for performing abortions on residents from anti-abortion states.[146] Further, New York has had a rape shield law since 1975, protecting victims from the introduction of evidence regarding their sexual history in criminal court proceedings.[147] New York also has one of

---

[141] *See* Goldberg, *supra* note 8 (opinion piece describing Heard as enduring "industrial-scale bullying" that has "sullied her name."); Forrestal & Zuba, *supra* note 20 ("Defending against a defamation case can be costly, and not just financially.").

[142] *See* Press Release, Kathy Hochul, *supra* note 37; N.Y. Adult Survivors Act, N.Y. C.P.L.R. 214-j (MCKINNEY 2022).

[143] *See Shield Law*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining shield law as a law that protects certain classes of people, specifically referencing shield laws for reporters and rape victims); *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://perma.cc/VY6Q-6XAZ ("Interstate shield laws protect abortion providers and helpers in states where abortion is protected and accessible from civil and criminal consequences stemming from abortion care provided to an out-of-state resident.").

[144] *See Shield Law*, *supra* note 143; *After Roe Fell: Abortion Laws by State*, *supra* note 143.

[145] *See* N.Y. CRIM. PROC. LAW § 60.42 (MCKINNEY 2024) (New York rape shield statute); N.Y. CIV. RIGHTS LAW § 79-h (MCKINNEY 2024) (New York shield law for reporters); S.B. S9077A, 2021-2022 Legis. Sess. (N.Y. 2022); S.B. S9080B, 2021-2022 Legis. Sess. (N.Y. 2022); S.B. S9079B, 2021-2022 Legis. Sess. (N.Y. 2022) (abortion-related shield laws passed in 2022).

[146] *New York*, CTR. FOR REPROD. RTS., https://perma.cc/S4DV-EKSB (citing S.B. S9077A, 2021-2022 Legis. Sess. (N.Y. 2022); S.B. S9080B, 2021-2022 Legis. Reg. Sess. (N.Y. 2022); S.B. S9079B, 2021-2022 Legis. Sess. (N.Y. 2022)).

[147] *See* N.Y. CRIM. PROC. LAW § 60.42 (MCKINNEY 2024) (New York rape shield statute); Robert A. Barker & Vincent C. Alexander, *§ 4:66. New York*, *in* NEW YORK PRACTICE SERIES—EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS (2023), Westlaw (database updated Nov. 2023) (discussing New York's rape shield).

the strongest shield laws for journalists in the country.[148] In passing this shield law, the legislature created for reporters "an absolute privilege from being forced to reveal information obtained or received in confidential source."[149]

Clearly, the state legislature has the authority and power to enact a shield law to protect distinct groups of people from particular legal consequences.[150] While opponents to this shield law could argue it is a content-based regulation of speech, violating the First Amendment, proponents could counter that New York has a compelling interest in empowering survivors of sexual assault to hold their abusers accountable, and that the shield law is narrowly tailored to meet that objective.[151] Therefore, I see no reason why the New York legislature could not pass a shield law specifically to protect ASA litigants from defamation liability.[152] Because both the Child Victims Act and Adult Survivors Act were passed in the last four years, and Governor Hochul enthusiastically supported the legislation, New York should have the political willpower and ability to amend the ASA.[153] Presumably the sponsors of the ASA, Senator Brad Hoylman-Sigal and Assemblymember Linda Rosenthal, would be open to improving their legislation.[154]

---

[148] *See* Barry A. Bohre, *The Reporters's Privilege in New York: A Protected Class, in* NEW DEVELOPMENTS IN EVIDENTIARY LAW IN NEW YORK: LEADING LAWYERS ON UNDERSTANDING RECENT CASES AND TRENDS IN EVIDENTIARY LAW (2014), Westlaw 2014 WL 2344831, at *3 ("The Shield Law is interpreted to provide expansive protection to reporters from being compelled to reveal information in any action, proceeding or hearing. It has been recognized as 'the strongest in the nation . . . .'").

[149] *Id.* at *4.

[150] *See* N.Y. CONST. art. III, § 1 (West, Westlaw current through 2024) ("The legislative power of this state shall be vested in the senate and assembly."); N.Y. CIV. RIGHTS LAW § 79-h (MCKINNEY 2022) (New York shield law for reporters).

[151] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech."); U.S. CONST. amend. XIV, § 1 (incorporating the Bill of Rights to the states); Simon & Schuster v. Members of N.Y. State Crime Victims Bd. 502 U.S. 105, 118 (1991) (requiring a New York content-based regulation of speech to be narrowly tailored to a compelling government interest to comply with the First Amendment). Proponents could also advance Justice Frankfurter's argument that the courts should be deferential to legislative regulation of speech. Dennis v. U.S., 341 U.S., 494, 551 (Frankfurter, J., concurring) (advocating for deferring to Congressional determinations of constitutionality by asking: "Can we then say that the judgment Congress exercised was denied it by the Constitution? Can we establish a constitutional doctrine which forbids the elected representatives of the people to make this choice?").

[152] *See* N.Y. CONST. art. III, § 1 (West, Westlaw current through Nov. 2023 amendments); *see also* S.B. S9077A, 2021-2022 Legis. Sess. (N.Y. 2022); S.B. S9080B, 2021-2022 Legis. Sess. (N.Y. 2022); S.B. S9079B, 2021-2022 Legis. Sess. (N.Y. 2022) (various shield laws protecting New Yorkers from out-of-state legal proceedings relating to abortion care).

[153] *See* Child Victims Act, N.Y. C.P.L.R. 214-g (MCKINNEY 2019); N.Y. Adult Survivors Act, N.Y. C.P.L.R. 214-j (MCKINNEY 2022); *see also* Michelle L. Price, *Kathy Hochul Wins Governor's Race in New York*, PBS (Nov. 9, 2022, 1:08 AM), https://perma.cc/7243-Q23R; Press Release, Kathy Hochul, *supra* note 37.

[154] *See* Press Release, Hoylman-Sigal, Senator, N.Y. Senate, NY Senate Passes Adult Survivors Act Sponsored by Senator Hoylman (June 3, 2021), https://perma.cc /BZ7V-CFWB?type=image (identifying Senator Hoylman-Sigal and Assembly Member Linda B. Rosenthal as the sponsors of the Adult Survivor Act).

Below, I propose a shield law for ASA plaintiffs, bearing in mind the rights and interests of both parties and balancing the "competing social interests" of protecting one person's reputation and another's First Amendment free speech rights.[155] My suggested language protects those bringing truthful sexual assault claims from bad faith defamation claims or attempts by powerful people or institutions to silence them. Importantly, my suggested language specifically targets out of court statements because statements made in a complaint and other formal court documents cannot constitute a basis for a defamation claim.[156] My proposed shield law also preserves ASA plaintiffs' ability to sue abusers who publicly accuse them of lying by only shielding ASA plaintiffs from defamation liability.

Further, those wrongly accused of sexual assault will still have an avenue to sue an ASA plaintiff for defamation by meeting the requirements in section (c).[157] While I believe that an overwhelming majority, if not all, ASA claims will be truthful, I drafted section (c) to preserve the defamation cause of action for those wrongly accused. Section (c) creates additional procedures before an ASA defendant can counterclaim defamation. These additional procedures along with a heightened standard of review preserve a wrongly accused ASA defendant's ability to sue, while protecting ASA plaintiffs from retaliatory, meritless claims.

Therefore, I suggest that the New York legislature amend the ASA to adopt the following language:

> An Act to amend the civil practice laws and rules, in relation to claims brought during the one-year lookback window established by the Adult Survivors Act. The civil practice laws and rules are amended by adding the section below to the Adult Survivors Act as follows:
>
> (a) Definitions. As used in this section, the following definitions apply:
>
> a. "Adult Survivors Act plaintiff[s]": One who files a claim during the one-year lookback window pursuant to the provisions of the Adult Survivors Act.
>
> b. "Defamation": Includes all statutory and common law understandings of defamation in New York

---

[155] *See* LOUIS R. FRUMER ET AL., 11 PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES § 46.01, LEXIS (database updated Feb. 2023) ("[T]he law of defamation balances two competing societal interests: protecting the individual's reputation and encouraging free and open communication. Although defamation is primarily governed by state law, the First Amendment's safeguards of freedom of speech and press limit state law.").

[156] *See* Front, Inc. v. Khalil, 28 N.E.3d 15, 18 (N.Y. 2015) ("[I]t is well settled that statements made in the course of litigation are entitled to absolute privilege . . . .").

[157] Researchers believe between two and ten percent of sexual assault accusations are false. NAT'L SEXUAL VIOLENCE RES. CTR., *supra* note 97.

state.

(b) Exemption for Adult Survivors Act plaintiffs from defamation liability: Adult Survivors Act plaintiffs who sufficiently plea pursuant to common law, statutory requirements, New York Civil Practice Laws & Rules, and any and all other applicable rules, shall not be subject to defamation liability for their underlying claims. Adult Survivors Act plaintiffs who publicly share the allegations in their filed complaint will be exempt from all statutory and common law defamation liability. An Adult Survivors Act litigant may not be sued for defamation for any other claims arising from the same underlying event alleged in the complaint, even if the litigant makes additionally or varying claims not directly alleged in the filed complaint. A defendant in an Adult Survivors Act litigation may not sue the plaintiff for any public comments directly relating to their underlying sexual assault claim under a theory of defamation.[158]

(c) An Adult Survivors Act defendant may move to file a defamation counterclaim pursuant to their procedures below. An Adult Survivors Act defendant must include an affidavit stating that he or she believes the plaintiff's claims are untrue, frivolous, and/or brought in bad faith. The Adult Survivors Act defendant's affidavit must be supported by evidence. The Adult Survivors Act defendant may submit additional affidavits by other persons with first-hand knowledge of the incident, documentary, and/or physical evidence. If a judge finds by a preponderance of the evidence that the underlying Adult Survivors Act claim is untrue, frivolous or brought in bad faith, he or she may grant the Adult Survivors defendant's motion. Once the Adult Survivors Act defendant's motion is granted the counterclaim may move forward and the Adult Survivors Act plaintiff may be susceptible to defamation liability. Defamation claims brought by Adult Survivors Act defendants are subject to the statute of limitations.

Defamation law is designed to hold others accountable for purposeful, false reputational harm.[159] Thus, the ASA shield law should be narrow enough to

[158] I drafted this language to enable survivors to publicly share their stories. Because statements made in court proceedings are not actionable, I wanted to ensure that survivors can speak publicly about their sexual assault without subjecting themselves to a retaliatory defamation suit. *See Front, Inc.*, 28 N.E.3d at 18.

[159] *See Defamation*, BLACK'S LAW DICTIONARY (11th ed. 2019); FRUMER ET AL., *supra* note 155 ("The law of defamation protects an individual's interest in reputation, that is, the

protect ASA plaintiffs from punitive defamation suits, while protecting those wrongfully accused and preserving an ASA plaintiff's ability to sue their abuser for defamation. While New York could pass a shield law without section (c), my proposed language acknowledges defamation law's nuances and complexities, while creating greater protections for ASA plaintiffs. Overall, if New York wishes to ensure that survivors' voices are heard and abusers are held accountable, the legislature should enact a shield law similar to the one above to protect ASA plaintiffs from defamation liability.

B. *Defamation per se exemption*

If legislators are hesitant to completely shield ASA plaintiffs from defamation liability, they could instead pass a shield law that only protects ASA plaintiffs from defamation per se liability. Defamation per se presumes the alleged defamatory statement harmed the plaintiff's reputation and does not require the plaintiff to prove it.[160] Because accusations of sexual assault impute criminal conduct, they constitute defamation per se under New York common law.[161]

By exempting ASA survivors from defamation per se liability, the New York legislature can limit the threat of defamation by making it more difficult for an ASA defendant to be sued for defamation. If ASA plaintiffs were protected from defamation per se liability, then ASA defendants would be required to show how the accusation harmed their reputation.[162] By taking a defamation per se claim off the table, the exemption may temper the impulses of wealthy individuals and/or institutions to retaliate by filing a defamation suit. While creating a defamation per se exemption for ASA plaintiffs will not eliminate the threat of defamation entirely, it will increase ASA defendants' burden by requiring them to prove reputational injury to successfully plea defamation.[163] Implementing a defamation per se exemption would also increase the cost of suing because attorneys will have one more element to prove. Thus, such an exemption would make it marginally more difficult for accused abusers to weaponize defamation.

While exempting ASA plaintiffs from defamation per se liability may appear to do little to protect survivors from being sued, it could potentially have a positive impact. For example, Johnny Depp and Dr. Luke both raised defamation

interest in one's good name."); *see also* BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 35:41 (2d ed.), Westlaw (database updated May 2023) ("Damage to one's reputation is the essence and gravamen of an action for defamation: It is reputation which is defamed, reputation which is injured, reputation which is protected by the laws of libel and slander.") (internal quotations omitted).

[160] Liberman v. Gelstein, 605 N.E.2d 344, 347–48 (N.Y. 1992).

[161] *See* Stern v. Cosby, 645 F.Supp.2d. 258, 273 (S.D.N.Y. 2009) (applying New York law).

[162] *See Liberman*, 605 N.E.2d at 347–48 (explaining that slander per se, a form of defamation, "presumes that [reputational] damages will result, and they did not be alleged or proven.").

[163] *See Stern*, 645 F.Supp.2d. at 272 (defining defamation in New York as requiring "injury to plaintiff" except "where a statement is so egregious that it is presumed to cause serious harm, the statement is defamatory per se – and plaintiff need not prove special damages . . . .").

per se arguments in their defamation lawsuits against Amber Heard and Kesha.[164] Dr. Luke succeeded in winning his defamation per se claim on summary judgment, while a jury returned a verdict in favor of Johnny Depp on all three of his defamation counts.[165] Further, defamation per se is not a tool only available to the wealthy and famous. *Goldman v. Reddington* was an action between private citizens without fame or notoriety in which the plaintiff raised a defamation per se argument because the defendant had accused him of rape.[166] All this to say, both famous and unknown abusers use defamation per se lawsuits to retaliate against their victims.

Below, is a proposed amendment to the ASA, removing defamation per se liability for ASA plaintiffs:

> An Act to amend the civil practice laws and rules, in relation to claims brought during the one-year lookback window established by the Adult Survivors Act. The civil practice laws and rules are amended by adding the section below to the Adult Survivors Act as follows:
>
> (a) Definitions. As used in this section, the following definitions apply:
> a. "Adult Survivors Act plaintiff[s]": One who files a claim during the one-year lookback window pursuant to the provisions of the Adult Survivors Act.
> b. "Defamation": Includes all statutory and common law understandings of defamation in New York state.
>
> (b) Exemption for Adult Survivors Act plaintiffs from defamation per se liability: Adult Survivors Act plaintiffs who sufficiently plea pursuant to common law, statutory requirements, New York Civil Practice Laws & Rules, and any and all other applicable rules, shall not be subject to defamation per se liability for any statements directly related to their underlying claims. An Adult Survivors Act

---

[164] *See* Complaint, *supra* note 19, at 23, 26, 28 ("Ms. Heard's false statements are defamation per se because they impute Mr. Depp the commission of a crime . . . ."); Gottwald v. Sebert, 148 N.Y.S.3d 37, 42 (N.Y. App. Div. 2021) ("[P]laintiffs moved for partial summary judgment arguing that: (1) Kesha's text to Lady Gaga was defamation per se . . . .").

[165] Decision and Order on Motion, *supra* note 27, at 31–32("Kesha made a false statement to Lady Gaga about Gottwald that was defamatory per se . . . ."); Judgment Order, *supra* note 2, at 2 ("[T]he jury returned a verdict in favor of Mr. Depp on all three remaining defamation counts . . . ."). It is unclear if the jury found Ms. Heard's statements defamatory per se, or if they found her statements harmed Mr. Depp's reputation. Regardless, Mr. Depp's lawsuit was successful. *See id.*.

[166] *See* Goldman v. Reddington, 417 F.Supp.3d 163, 173 (E.D.N.Y. 2019) ("[T]he complaint plausibly alleges defamation per se.").

> litigant may not be sued under a theory of defamation per se for any other claims arising from the same underlying event alleged in the complaint, even if the litigant makes additional or varying claims not directly alleged in the filed complaint. A defendant in an Adult Survivors Act litigation may not sue the plaintiff for any public comments made relating to the litigation under a theory of defamation per se.

Because defamation per se is frequently alleged in defamation suits litigating accusations of sexual misconduct, the ASA should attempt to limit its impact on survivors by exempting ASA plaintiffs from defamation per se liability. Doing so will make it marginally more difficult for an ASA defendant to prove their defamation claim without completely preventing them from bringing the cause of action. Removing defamation per se liability will not prevent ASA defendants who believe they are wrongfully accused from suing—it would simply require them to prove reputational harm. Thus, this exemption would help mitigate the threat of defamation, reduce ASA defendants' impulse to frivolously sue for defamation, and help protect survivor voices.

C. *Stronger Anti-SLAPP Laws*

New York's anti-SLAPP statutes are designed to protect defendants in legal actions involving "public petition and participation."[167] By increasing plaintiff's burden of proof and creating special procedures to enable defamation defendants to challenge the merits of the case, New York makes it more difficult for powerful people to silence critics by improperly weaponizing defamation.[168] SLAPP defendants can recover attorney fees and damages if they show the plaintiff sued to harass or intimidate them.[169]

Because accusations of sexual assault, especially those involving men in positions of power, can be construed to be an issue of public interest, scholars believe that strong anti-SLAPP litigation can protect "defamation defendants in sexual assault cases."[170] Anti-SLAPP statutes may help survivors access legal counsel because they can recover attorney fees for litigating the predatory defamation claim and "nip[ ] costly litigation in the bud . . . ."[171] Further, strong anti-SLAPP laws can help survivors dismiss the defamation claim quickly, limiting the trauma of reliving their sexual assault.[172] Therefore, New York can

---

[167] *See* N.Y. CIV. RIGHTS LAW § 70-a (MCKINNEY 2022); REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 115.

[168] *See* N.Y. CIV. RIGHTS LAW § 70-a (MCKINNEY 2022); REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 115.

[169] *See* N.Y. CIV. RIGHTS LAW § 70-a (MCKINNEY 2022); REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 115.

[170] Whynot, *supra* note 21, at 25.

[171] *Id.*

[172] *See id.* ("It also allows defamation defendants to have suits against them dismissed swiftly, so they can move on from these traumatizing events."); Forrestal & Zuba, *supra* note

mitigate the threat of defamation for ASA plaintiffs by amending its anti-SLAPP laws to explicitly state that civil claims made during the ASA's one-year lookback window constitute "an issue of public interest," triggering anti-SLAPP protections.[173] Including this explicit language would mitigate the risk of ASA survivors becoming defamation defendants and shield them from the emotional and financial burden of defending themselves in a defamation suit.[174]

Additionally, New York can mitigate the threat of defamation for ASA plaintiffs by passing Senator Hoylman-Sigal's bill, S.B. S9239, that further amends New York's current anti-SLAPP laws.[175] Specifically, the suggested amendment to paragraph (d) of § 76-a would greatly aid ASA plaintiffs turned defamation defendants.[176] This section would broaden the definition of "public interest" to include: "any subject relating to any matter of political, social, or other concern to the community; or . . . any subject that is of legitimate news interest; that is, a subject of general interest and of value and concern to the public."[177] This broad language would help protect ASA plaintiffs and others filing sexual assault claims because allegations of sexual assault, especially accusations branded as #MeToo allegations, are typically a matter of political and/or social concern to the community and are a legitimate news interest.

Further, adopting the language "subject of general interest . . . to the public" can also help protect ASA plaintiffs suing wealthy, powerful people or institutions because the public would likely be interested and/or concerned in the outcome of the litigation.[178] A pertinent example is E. Jean Carroll's suit against former President Trump.[179] If, theoretically, Trump were to sue Carroll for defamation in retaliation for her rape allegations, she would be able to bring an anti-SLAPP motion to dismiss.[180] Her motion would be protected by New York's anti-SLAPP laws because it would be a matter of both political and general interest to the public.[181] Thus, by amending § 76-a, New York's anti-

---

20 ("Defending against a defamation claim can be costly, and not just financially. It can be a form of extended abuse as it drags through the legal system . . . Survivors involved in a defamation battle may even be asked invasive questions under oath about what happened by attorneys representing their perpetrators, which can resurface painful memories and further traumatize them.").

[173] *See* N.Y. CIV. RIGHTS LAW § 76-a(a)(1) ("An 'action involving public petition and participation' is a claim based upon: (1) any communication . . . in connection with an issue of public interest.").

[174] *See* Forrestal & Zuba, *supra* note 20 (describing the negative impact defamation litigation can have on sexual assault survivors' emotional and financial wellbeing).

[175] *See Senate Bill S9239,* 2021-2022 Legis. Sess. (N.Y. 2022); N.Y. CIV. RIGHTS LAW §§ 70-a, 71, 76-a, (MCKINNEY 2022).

[176] *See* S.B. S9239, 2021-2022 Legis. Sess. (N.Y. 2022).

[177] *Id.*

[178] *Id.*

[179] Discussed *supra* part II.B.

[180] *See* N.Y. C.P.L.R. 3211(g)(2) (MCKINNEY 2022) (outlining proceedings for a motion to dismiss in cases "involving public petition and participation.").

[181] *See id.*; N.Y. CIV. RIGHTS LAW § 76-a(a)(1) (MCKINNEY 2022).

SLAPP laws would apply to ASA plaintiffs and limit retaliatory defamation lawsuits against sexual assault survivors.[182]

However, because defamation is a tool wielded by both survivors and abusers, some may wonder if New York's anti-SLAPP laws could negatively impact Carroll's ability to sue Trump for defamation if he accuses her of lying about the rape. While Trump could file a motion to dismiss Carroll's defamation claims under a theory that the action involves "public petition and participation," as long Carroll shows her lawsuit has "a substantial basis in fact and law," her case will not be dismissed.[183] Thus, the success of New York's new anti-SLAPP laws may largely depend on how courts interpret this substantial basis standard in the context of sexual assault cases.[184]

To avoid court interpretation of the substantial basis standard that would weaken a sexual assault survivor's ability to sue their abusers, New York should adopt Senator Hoylman-Sigal's proposed amendment that defines substantial bias and explicitly adopts it as the pleading standard in sexual assault defamation suits.[185] The bill clearly defines substantial bias as: "A heightened pleading burden, greater than that of plausibility, cognizability, [sic] or reasonableness and requiring a demonstration of a probability in prevailing on the claim."[186] Adopting this definition would mean defamation plaintiffs must demonstrate that they can likely prove their claim.[187] Research suggests New York state courts would essentially "demand to be presented with a factual backdrop supported by persuasive evidence" when applying this standard at an anti-SLAPP motion hearing.[188] Adopting this definition of the substantial basis standard would increase the risk of suing an ASA plaintiff for defamation by making it more

---

[182] *See* N.Y. CIV. RIGHTS LAW §§ 76-a, (MCKINNEY 2022); S.B. S9239, 2021-2022 Legis. Sess. (N.Y. 2022).

[183] *See* S.B. S9239, 2021-2022 Legis. Sess. (N.Y. 2022); *see also* REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 115.

[184] *See* Daniel Novack & Christina Lee, *What is a "Substantial Basis" under New York's Anti-SLAPP Law?,* N.Y. L. J. 3 (Nov. 17, 2020), https://www.law.com/newyorklawjournal/2020/11/17/what-is-a-substantial-basis-under-new-yorks-anti-slapp-law/?slreturn=20240321133557 ("On Nov. 10, 2020, New York enacted legislation intended to strengthen free speech protections by modifying its nearly 30-year-old Anti-SLAPP law. But the vitality of these new protections will depend heavily on how courts interpret a key concept in the statute—whether a plaintiff's case has a 'substantial basis.'"); *see also* N.Y. CIV. RIGHTS LAW § 70-a.

[185] S.B. S9239, 2021-2022 Leg. Sess. (N.Y. 2022).

[186] S.B. S9239 § 76-a (e), 2021-2022 Legis. Sess. (N.Y. 2022). Here, substantial basis refers to the basis of the defamation lawsuit. REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 115 ("A defendant may file a motion to dismiss demonstrating that the legal action involves "public petition and participation," and then the burden shifts to the plaintiff to show that the lawsuit "has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law.") (citing N.Y. C.P.L.R. 3211(g)(1) (MCKINNEY 2022)).

[187] *Cf.* N.Y. C.P.L.R. 3013 (MCKINNEY 2022).

[188] *See* Novack & Lee, *supra* note 184, at 5 (arguing New York state courts already demand to be presented with factual evidence at the anti-SLAPP motion to dismiss hearing).

difficult to survive a motion to dismiss and proceed to discovery.[189] Further, as long as sexual assault survivors' defamation lawsuits are based on facts, and courts consider the legislative intent of New York's amended anti-SLAPP statutes—"protecting New Yorkers' free speech from vindictive bullies"—their defamation suits should not be dismissed pursuant to New York's strengthened anti-SLAPP laws.[190] Therefore, sexual assault survivors, including Carroll, could still sue their abusers for defamation and should not be negatively impacted by Senator Hoylman-Sigal's proposed amendment defining substantial basis as a heightened pleading standard.[191]

The last proposed amendment that would strengthen protections for ASA plaintiffs is Senator Hoylman-Sigal's suggestion that the anti-SLAPP statutes apply retroactively "to actions and proceedings pending or filed on or after such effective date."[192] If this bill were passed, all ASA plaintiffs would benefit from anti-SLAPP protections because the laws would apply to pending proceedings.[193] Interestingly, Kesha, the sexual assault survivor and defamation defendant discussed earlier in this Note, is currently trying to raise this issue to the New York Court of Appeals.[194] Senator Hoylman-Sigal even moved to submit an amicus brief asserting it was the legislature's intention for the law to have a retroactive effect.[195] Although this Note focuses on protecting ASA plaintiffs specifically from defamation, clearly, the strengthening of New York's anti-SLAPP statutes would have the effect of increasing protections for all sexual assault survivors seeking justice. Strengthening New York's anti-SLAPP laws would help create a legal system that protects survivors, rather than leaving them vulnerable to further trauma, humiliation, and stress.[196]

---

[189] *See* REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 115 ("The updated law makes it easier for a defendant to obtain dismissal of a SLAPP suit.").

[190] *See* Press Release, Hoylman-Sigal, Free Speech 'SLAPP's Back, *supra* note 117 (illustrating a legislative intent to hold the wealthy and powerful accountable for abusing the legal system).

[191] *See* S.B. S9239, 2021-2022 Legis. Sess. (N.Y. 2022).

[192] *Id.*

[193] *See id.*; Kaplan et al., *supra* note 34.

[194] *See* GIBSON DUNN, *supra* note 128.

[195] *Id.* Unfortunately, his motion to file an amici brief was denied. Gottwald v. Sebert, No. 2023-43, 2023 WL 2576855 (N.Y. Mar. 21, 2023).

[196] *See* Whynot, *supra* note 21, at 25 ("Most importantly, these [anti-SLAPP] statutes help to ensure that survivors of sexual misconduct do not become victims of the legal system that is meant to protect them."); Forrestal & Zuba, *supra* note 20 ("Perpetrators sometimes use defamation lawsuits as a tool to further harm victims. Defending against a defamation claim can be costly, and not just financially. It can be a form of extended abuse as it drags through the legal system. Lawsuits take up time and energy. They require the defendant's attention and often cause stress. Survivors involved in a defamation battle may even be asked invasive questions under oath about what happened by attorneys representing their perpetrators, which can resurface painful memories and further traumatize them.").

CONCLUSION

Adult survivors of sexual assault are vulnerable to defamation counterclaims if they bring suit under New York's Adult Survivors Act. As American society grapples with the implications and consequences of the #MeToo movement, courts and legislators are scrambling to make tangible legal changes to address the civil and criminal issues arising from widespread sexual misconduct. The Adult Survivors Act shows New York recognizes how the previous statute of limitations effectively silenced survivors by forcing them to bring claims within too narrow of a window. Because politicians lauded this Act as a victory for survivors' rights and appear to be amenable to helping survivors, I believe the legislature would be open to strengthening the ASA to enable more survivor voices to be heard. Unfortunately, so long as the threat of defamation looms, adult survivors will be discouraged from speaking out. Thus, if New York were to exempt ASA plaintiffs from defamation per se liability or pass a shield law completely protecting ASA plaintiffs from defamation liability, while simultaneously strengthening the state's anti-SLAPP laws, New York could help ensure those who wish to bring sexual assault claims are given their rightful day in court. Once survivors are protected from defamation lawsuits, we will finally be able to say to abusers: time's up.