

# Indiana Int'l & Comp. Law Review

Volume 33

Number 2

2023

## SYMPOSIUM

### TRANSCRIPT

#### WELCOME REMARKS & WOMEN AND HEALTH PANEL

>>>>9:34 a.m.

**Lizzie Ford:** Good morning, everyone. I am glad you all could be here to start Women's History Month out with this symposium. My name is Lizzie Ford, and I have the pleasure to welcome you to this symposium. I am the Current Live Symposium Editor for Indiana International and Comparative Law Review, and today we are going to present our topic: Where We are Now, and Where We Need to Go: The Status of Gender Equality Since the Creation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Throughout this panel we are going to be talking with several experts, both legal experts and practitioners and professors in academia on the status of gender equality and areas such as health, education, and employment. We will also have a Keynote speaker who will focus on international trafficking of women and issues related to that topic. Before we go on. I have a few thank yous: I would first like to thank Gabriela Ocampo, who is the Executive Publication Editor of the Symposium for our Law Review and she's been assisting me with planning this event. I would also like to like our Editor-in-Chief Jessie Walker for assisting with this event and running the law review in general. I would like to thank the members of the Office of External Affairs especially Barbara Beeker and Elizabeth Allington, for their assistance in planning this throughout the past year. I would also like to thank our Dean Karen Bravo for helping us find speakers and plan this event, as well as introducing our keynote speaker later today. Finally, I would like to thank all of our panelists. our moderators, and our keynote speaker, for taking their time to prepare their presentations, and be here today to make this symposium happen. With that I like to turn it over to Jessie Walker, who is Editor-in-Chief of Indiana International Comparative Law Review for her remarks.

**Jessie Walker:** Good morning, everyone. As Lizzie said, my name is Jessie Walker, and I am the current Editor-in-Chief of the Indiana International and Comparative Law Review. I also had a few thank yous I wanted to say, before we start this event. I want to thank Lizzie Ford and Gabriela Ocampo for their amazing work, putting together the symposium. They've done a wonderful job putting this event together, and I know you will all enjoy it. I also want to thank the numerous people at McKinney Law who have helped in the coordination of

this year's event. We know that we could not do it without you, and we really appreciate your contributions. I want to thank our panelists and moderators who are lending their expertise to important conversations on women's rights. We are so thrilled to have each of you here today. We are really glad that you have all chosen to attend the event. Before we begin, I have some important information to discuss regarding C.L.E. credits. We are aware that many of our attendees today wish to obtain continuing legal education credit for those participants interested in earning C.L.E. hours. Please note the following: to obtain C.L.E. credit, we must be able to monitor your participation and engagement throughout the duration of today's presentation. As a result, you cannot earn C.L.E. credit by joining the webinar by old-fashioned audio phone, so please tune in via computer or the zoom app on your smartphone. To monitor engagement, there will be several polls administered throughout the event. Please pay attention when these pop up and answer the poll questions. For questions related to C.L.E. credits please contact Barbara Beeker at the email address on your webinar screen: bbeeker@iu.edu. During the presentation today, we welcome your questions to our speakers and invite you to use the Q&A feature on the bottom of your screen to engage with our presenters. We will reserve time for Q&A at the end of each session, and the moderators will facilitate them by reading some of the questions that come in. Now, with the procedural issues out of the way, again, I am very pleased to welcome you. We will now begin with our first panel.

**Lizzie Ford:** I am now going to introduce our first moderator for our first panel today. It is Brittany Kelly. She is an alumni of I.U. McKinney School of Law, a social worker, and an attorney, and currently the deputy Director of Indiana, Judges and Lawyers assistance program, or JLAP. Hi Brittany.

>>> 9:40 a.m.

**Brittany Kelly:**

Hi Lizzie. Thank you so much for having me, and I am so thrilled to get to moderate this first panel today for this great event. With that, I am going to introduce our first panelists on the women and health panel, who is Professor Benjamin Davis. Professor Ben Davis is a retired professor from the University of Toledo, former chair of the A.B.A. Section on dispute resolution and a former consultant for projects in France and several African countries. That is a very shortened version of this incredibly impressive bio. But with that, Professor Davis, I hand it over to you.

**Professor Benjamin Davis:** Well, thank you very much, Brittany. I am really honored to be here, and I thank you all for all the work that you've put together for this conference. So, my topic is in the health area, and I start from the Dobbs opinion that just was rendered last term where the was the overturning of *Roe v. Wade*. My paper is actually called *Sanctimonious Barbarity: The Forced Pregnancy Alito Dobbs Opinion*. So, I will talk about 4 topics. One is just an

introduction, a second is the *Dobbs* opinion, as an affront to human dignity, comparative law, and finally, international law. Understand that in making the presentation, I am very much focused on the international level of things as opposed to the domestic. And there is a number of, I think lawyers out there who think, “oh, international law doesn’t even exist.” I was reminded of a line from a Stevie Nick’s song of Fleetwood Mac Fame called Silver Spring, which I changed a little and said, “International law will follow you down until the sound of its voice will haunt you. You will never get away.” So, let me start out with the Intro. *Dobbs v. Jackson Women’s Health Organization*. As you know, everyone has heard so much about is going to encourage what I call forced pregnancies. Pregnancies where the individuals affected by the decision in various situations such as unwanted pregnancies, rape, incest pregnancies, compelled to continue against medical advice. All those kinds of things are happening. I just saw this morning that Walmart has announced that it is not going to be providing some of the *legal* abortion pills in its stores, because of the threats that have been put against Walmart. So, it is having a dramatic effect on women, and I should mention that since some transgender persons can be getting pregnant, I would use the term women generally, but trying to cover pregnant persons. Also. Okay? The basic approach of *Dobbs* is to leave that to the State legislatures, which is to basically put people in a kind of whack-a-mole situation depending on what state they’re in, and what the particular regime is in that place. In addition, some of the rules are set up basically to suck away the possibility of medical treatment for women, certainly abandoning abortions by not criminalizing the woman, but criminalizing everybody who does everything to make it safe.

So, the de facto effect is to reduce women’s health in those settings with risks for infant and women’s mortality. So, this is really one of the things that is coming out of what’s going on there. And of course, there is more in on the way with proposed rules and including a national ban on abortion. So, first, I will talk as to the area of this affront to human dignity. If you look at the Universal Declaration of Human Rights. It says that all human beings are *born* free and equal in dignity and rights. Notice that there is not a word about fetus rights or things like that which is part of the discourse that you will hear in the in the context of the discussions inside the United States; the idea of the human rights being focused on people who are more free and equal in dignity and rights, and I think that the God’s opinion undermines this because one of the things it does, is a selective version of the history of this country in a manner—that is, where things are ignored or dismissed. One of the things about the post-1607 review is that it doesn’t really mention slavery. Now, please understand that since an enslaved woman was property, she did not have the capacity to consent—so that every enslaved woman who was had a child was raped. Whether it was by a master or by another slave who would be designated to mate with her. So, you have 250 years of rape and forced pregnancy—because there were certain places of breeders—that is completely ignored. In addition, during slavery, a lot of the

tools that are used on [a person] when [they go to a gynecologist] were developed by Dr. Sims, who did it on enslaved women without their consent. So, there is a very dark, dark, history with regards to forced pregnancy, and of abuse of women, that is there. In addition, one of the things that's also not really being discussed is that there are these complex gender, race, and class issues that were going on all through these periods with regards to the status of women. My view is that women were not really having an opportunity to have meaningful participation in the process of making the various laws that he discusses until 1920 at the earliest when the Nineteenth Amendment was passed. That's when women got the right to vote. Before that, it is all speculation about whether somebody talked to their husband or boyfriend. To me, the clearest thing is that the Nineteenth Amendment was really the first time that women could be participating in the selection of those would make decisions about them. The second thing that I would say is that you could even argue farther that it is really only in 1965, with the Voting Rights Act that women of color, particularly black women were given more meaningful rights to participate. So that really, any part of the cases that are looked at prior to 1965, I think, are not a very strong basis on which to try to determine some kind of "ordered liberty" or "traditions." I would go even further, and say to you, for example, in my own family I have the ancestors. You know who are my ancestors? I will tell you. Dilsia who was a concubine. Who was she a concubine for? William Henry Harrison, the ninth President of the United States. She was an enslaved woman at the time. She was an enslaved woman at the time. She could not consent. I know...they had... something happened, because her son Oliver Harrison who's another one of my ancestors, who—there is a long story I could go into, but I don't have time.

But, the point I am just trying to make is that the history going back to the founders and framers is something that is a bit skeptical for the reasons of the way that women were marginalized on gender grounds. The race issue still, and there were class issues, too, between those who were the planter class or not in that setting. So, let's take a look at the next section on comparative law. In the Comparative Law is a look at the United States versus France. I lived in France for 17 years; I adopted 2 children in France when who are now up in their thirties. So, with regards to the United States, basically right now, one of the things that I was kind of curious in the *Dobbs* setting was that there was a submission to argue that the Equal Rights Amendment had come into force since the oral argument, and before the decision came out. Mysteriously, that submission made to the Supreme Court has disappeared from the Supreme Court website. It was there for a while, but it has now disappeared. I always wondered "what happened about that?" That might have been a whole new debate. So, somewhat like with *Brown* when they had to have two sessions to discuss a particular matter, that could have been addressed because the Equal Rights Amendment obviously would have had a potentially significant effect on all those people who were trying to focus on traditions of ordered liberty. That's

one thing. But now that the constitutional basis has been eliminated, we now go to the State level solutions, and you know, there is a hodge-podge of those around the country. At the federal level, there is an effort to codify *Roe* which, by the way, does not include transgender persons, I pointed out. And there is an effort to impose a federal ban on abortion. The thing about the federal ban on abortions, in addition to all the complications is that it doesn't take into account the mental health of the woman. It specifically excludes the mental health of the woman, with concern and with regards to an abortion. Which is insane, quite honestly, it is insane. Compared to France, over in France, pretty much, abortion started out limited, and it has been expanded. And of course, there is universal health care and all the rest of that. And really the focus is between the woman and the doctor. Now, as you move farther along in the time period of the pregnancy, then the concerns become about the health of the fetus, as well as the health of the mother. But that includes both mental and physical health of the mother, which I think is really important, and the process, obviously, gets a little bit more "deliberative." If I could say it like that—in terms of having teams that evaluate abortions after, around, 15 or 16 weeks. But none of the kind of oppression that I describe in the laws that are here in those States that have a problem with abortion seem to be operating. Turning to international law. So, there is the Convention—I will call it CEDAW, for short here. So, with CEDAW and also the U.N. Convention on the Rights of the Child. There is recognition that criminalization of abortion, and denial or delay of safe abortion and/or denial of post abortion care, and of course, continuation of pregnancy, are forms of—and this is very important—gender-based violence. There is violence going on right now, all across this country against women. And this tends to degrade, and amounts to torture, cruel or inhuman or degrading treatment on the U.N. Convention on the Rights of the Child. GIRLS, GIRLS, GIRLS, are being subjected to this violence too. In those places that are not providing the proper sexual health and access to sexual health and reproductive rights development. Further, it is a criminal matter under the Statute of the International Criminal Court, which does define forced pregnancy, but it also says that States have powers with regards to making their laws with regards to reproductive matters. Of course, they should have powers to do that. The point is, is, are they doing so in a way that amounts to forced pregnancy, or is creating unnecessary suffering? And my view is that the kinds of things that we are hearing about—while heavily anecdotal—but granted, terrible, horrible things are happening to people in this country, women all over this country, that is unnecessary suffering, and it is forced pregnancy.

Finally, I go with the Convention Against Torture and other Cruel and Human or Degrading Treatment or Punishment, and it is clear to me that this is amounting to, at least, cruel, inhumane or degrading treatment, and I would argue that it is torture for every woman who is called in a situation of a force pregnancy. So, to summarize, I am just saying to you that from an International—Oh, sorry, I forgot one, excuse me. I am terribly sorry—the

Convention on Racial Discrimination. Given that this proportion of effect on African American women as a particular group, too. That's a further aspect of what's wrong with this. So, I would end there by just summarizing that the results of this decision is a sanctimonious barbarity. I would add one phrase, which is, that I was particularly upset by the citation in the article—I am sorry—in the opinion, to a brief which ran into what we call the “black genocide trope.” It is offensive as a matter of international law, because if anyone knows what happened when the U.S. was presented with the Genocide Convention, it was the Southern political leaders who wanted the United States not to sign it because they're worried about what it would do to what was the Southern way of life at the time. So, the genocide—the flipping of the genocide argument was just repugnant to me. Thank you very much.

**Brittany Kelly:** Thank you so much, Professor Davis. That was such a new, powerful discussion, and I really look forward to talking with you more during the Q&A session at the end of this panel. So, audience members, please be putting your questions for Professor Davis and any of our panelists in the Q&A box, so that we can continue that discussion during that time.

All right. Next, we have Dr. Kimi Chernoby. Dr. Kimi Chernoby was the first graduate of the University of Florida's MD/JD program and is currently Counsel for the Reproductive Rights and Health at the National Women's Law Center. We are thrilled to have Dr. Chernoby here with us. With that I will let you take it away.

**Dr. Kimi Chernoby:** Excellent! Can you see my screen okay? ...I am going to take that as a yes.

**Brittany Kelly:** Yes!

**Dr. Kimi Chernoby:** I am Kimi Chernoby and I am here to talk to you today about discrimination against women in the Post-*Dobbs* era. So, to begin, I have no disclosures, but will clarify that I am here in my own capacity, and so anything I say is not representative of the views of my employers. The objectives today are to discuss relevant provisions of the Convention (CEDAW) to examine State restrictions on reproductive health that have been recently enacted both pre- and post-*Dobbs*, and then to look at the effect these restrictions are having on patients. So, the two parts of the convention that I wanted to bring your attention to were first Article 12, which talks about the States' obligation to make sure that there is no discrimination against women in the field of health care—I should clarify that I am a practicing physician. So that's the perspective that I am bringing to this—and it specifically names that they have to have access to family planning services. The other provision is Article 16 that says that there can be no discrimination against women in issues related to marriage and family relations, and this means that they can choose the number and

spacing of their children, and that they have to have the ability to exercise these rights. It should be noted that, in some instances in other countries, this has been interpreted to protect a right to abortion access.

So, there are some laws that are relevant in the United States that have been enacted around *Dobbs*. We will start with S B 1, because it is probably most relevant to most people who are tuning in. This was the first categorical ban on abortions that a State adopted after *Dobbs*, and that has very limited restrictions. It should be noted that is currently under litigation and is not being enforced. But there is abortion rights only up to age 12 weeks for rape or incest, and then 22 weeks for fetal anomaly. And I will note that for pregnant patients who are undergoing their anatomy scan, which is the ultrasound that you get to detect fetal anomalies. The age is generally 18 to 22 weeks, and so, if you have your scan at 21 weeks and 5 days. This really doesn't allow time to exercise the right to abortion in that time scheme.

The next is a law that was adopted in Idaho. This was actually adopted pre-*Dobbs*, but enforcement has changed after *Dobbs*, and this was a prohibition on abortion related activities at public universities or other public schools. But you'll know, even though it is called an abortion ban, or a ban on abortion-related activities, part D actually bans the dispensation of emergency contraception at school clinics. So, this is a ban on birth control. You may have seen in the news that after *Dobbs*, the Attorney General in some views went a little overboard, and others do not interpret this law in the same way, but he interpreted other parts of this law as banning all forms of contraception on college campuses. So, even condoms, they said, could no longer be made for the purpose of contraception on college campuses, only for STI prevention. The law that probably most of you are familiar with, and obviously this went into effect pre-*Dobbs*, was Texas' ban on abortion after the detection of a fetal heartbeat. I say "heartbeat" because there is no heart in a fetus at 6 weeks it is actually just an electrical impulse that we can measure by ultrasound. So, I wanted to clarify that. And it has an exception for a medical emergency. But that's kind of ambiguous and is different from federal law. So, that's why you have seen in the news that there are these lawsuits about how this interfaces with our federal law, called EMTALA (Emergency Medical Treatment and Labor Act). So, what do these restrictions mean? Well, it means that patients—Oh, I will go back to the Idaho one, and just show you that it also says that there is a ban on counseling in favor of abortion. So, these restrictions across states are meaning that women in our country are having limited access to information which is in contravention to the articles that I highlighted, right? Because those say that all women need to have access to full information around family planning to make their decisions. We have seen that these laws mean limiting access to contraception, right? And that's in contravention of our right or our duty to make sure that women have the ability to determine how many children they want to have; if they want to get pregnant; how many times; and what the spacing is; in limiting access to abortion. And because these laws are big, like the Texas law, it means

that there is limited access to therapeutic abortion, because abortion is health care, and in medicine we use abortion to treat certain medical conditions. But with these laws patients are not able to get the lifesaving abortions that they need in a timely fashion. So, we are seeing the consequences to this.

So, what are the benefits of reproductive choice? Right? What is at stake here? Well, there was a study in St. Louis that was done about 2010, and they essentially gave access to free birth control to anyone who qualified. So, it was women of reproductive health age who did not want to get pregnant in a year. And these women, by and large, chose long-acting, reversible contraception. So, that means the implant that goes in your arm or IUDs. And in the study, the unintended pregnancy rate around patients who opted for birth control was less than 1%. And when you compare the abortion rates in this study it was actually less than half of the regional and national rate. And this is not to say that birth control and abortion should be conflated, right? We do not think of birth control as having the purpose of reducing abortion rates. But what it does tell us is that when patients have access to birth control without any barriers, they are able to make the decisions that they need or want to make, about the spacing of their children, and they do not have to subsequently get an abortion.

So, what are the consequences of these abortion bans? Like I said, in Texas, this law has been interpreted so that patients cannot get therapeutic abortions until it is at the very end, and their life is really in danger, and they meet the criteria of this exception of “the life of the mother.” There was a study done in Texas, and it looked at women who presented with a medical condition that would normally be treated with abortion between 6 and 22 weeks. And they said: what was the morbidity to women before *Dobbs* when they could get the abortion? And what is the morbidity to women after *Dobbs* when they can no longer get the abortion? When they are just sent home, or kept in the hospital to do expected management, which is, you wait and watch until their life becomes in jeopardy, and then-only then-can you intervene. And they saw almost a doubling in the rate of morbidity to the moms—it went from 33 to 57%. So, this is not some theoretical harm to women, this is an actual harm that we are seeing where women are having increase morbidity. And we know that the United States is already at the bottom of industrialized countries when it comes to maternal morbidity and mortality.

So, in conclusion, under the Convention, States have an obligation to make sure that women have access, that they have the freedom to make choices about the number and spacing of their pregnancies, that they have access to information, and that they can exercise those rights. In the United States, in light of *Dobbs* we are seeing that there are increased restrictions on access to reproductive health, and so the women cannot exercise these rights that they should have, and that the results of these are real threats to women’s health and the right to life.



**Brittany Kelly:** Thank you so much, Dr. Chernoby, that was really insightful, and I look forward to talking with you more during the Q&A portion. Okay. Next, we have Anamika Krishnan, and Anamika is an L.L.M student at McKinney, studying health law policy and bioethics. She is the founder of the Global Bioethics Collective, and her work has been published in the Netherlands, Hungary, and Indonesia. Welcome, thank you.

**Anamika Krishnan:** Good morning, everyone, I am Anamika Krishnan, and today, I will be talking about how caste discrimination impacts access to reproductive health services in India, especially with respect to women. So, I have heard some scholars addressing this discrimination in health care as a “hidden apartheid.” But, when your caste and gender determine your average lifespan, access to public health amenities; when there are places where you will be turned down as a patient due to your caste and gender, in a democracy, I refuse to tone down and dilute the term that I use to address this gross injustice. So, today, I will be talking about an open medical apartheid.

Whenever I use the word “woman” I am using it inclusively. Defining a person as a man or woman based on their biological organs is nothing but the commodification of human beings. So, I start off my presentation with this very basic acknowledgment—let all those individuals who identify themselves as women be called women. Initially, we need to define the terms “apartheid” and “caste system,” and figure out, are these terms, are these distinct concepts even related? Or are these concepts even distinct in the first place? Looking at the definition of apartheid it is a system or practice that separates people as per their race ethnicity or caste. It emerged as a rigid policy to separate non-white population from the white population. So, what about the caste system? As you can see from the screen, it is a form of social stratification which involves a system of hierarchically round, closed strata. When I use the term “closed” it means you are immobile within the system, and as I am focusing on the South Asian perspective, the concept of caste system emerged under Hindu system of slaves. And there are multiple terms that they used to acknowledge these classes of people who are marginalized; there are some who use the term “dalit,” but some people find it offensive, as well. So, to be politically correct I will be using the term “depressed classes” which were used by the forefathers of the Indian constitutional history. At the same time, accountability starts with language—are these merely oppressed people or communities or should we call them “systemically oppressed” and institutionally marginalized populations? Some food for thought here.

Now, we are going to draw parallels between apartheid and the caste system. Both of these concepts are founded on the belief that certain categories of people are inferior to the majority population. Both of these are graded inequalities, and it stops people from accessing basic public health and amenities, and both of these are human rights violations. So, how are these concepts really distinct? When we use the term medical apartheid, it emerged into popularity when this

book was published by Harriet A. Washington. A medical apartheid enforces untouchability in medicine and medical myths surrounding how people of color are a distinct species and you blame them for their diseases. If you look at the caste metrics and public health system in India, look at the statistics of the health of the first classes. Mortality of these kids is 76% higher than the rest of the population and look at the public health amenity access: there are only 3.89% of these classes have access to pipe-water supply or even clean drinking water. When we look at the intersectionality between women's caste and health, again, it is problematic and disturbing. Look at the statistics here. The average lifespan of a woman belonging to a depressed class is just 39.5 years. While women belonging to other communities have at least 54 years which is again, lower, but still look at their disparity. And one in four women suffers from anemia. And there is a dark deep history of sterilizations in India. There are health care professionals and hospitals where women belonging to oppressed classes are turned down as bogus patients. Just imagine the adverse impact on the mental health of these women. Even if they try to gain access to mental health services, they are again turned down, or they're even told that "the caste discrimination is just your inferiority complex, and it doesn't exist in the 21<sup>st</sup> century." But the statistics prove otherwise. Talking about caste and reproductive health, briefly—the first question that these women have is: "are we safe?" Women belonging to these depressed classes are more prone to sexual and gender-based violence. When abortion rights were attacked across the world during the pandemic, Indian scholars applauded "oh yeah we have the right to abortion!" Really? We need to determine and identify if all women have equitable access to reproductive health services—not yet. There are trained nurse-midwives who turned down or even refuse to assess to these women, and there is a higher maternal mortality among the classes. There is no education, no awareness and there is a complete lack of access to family planning services. As you can see, the news clip that I have shared on the screen is again disturbing. So, looking at the CEDAW principles these two articles were earlier mentioned by the panelists, and there have been numerous general recommendations made by different committees within the United Nations to address the intersectionality between caste, gender, and access to health. But none of these have been yet operationalized. But don't get disheartened. Is CEDAW applicable in India? Definitely, because if you ratify the convention in 1993 and the Indian Constitution, which is the largest written constitution in the entire world, shows the basic principles and enshrined in the convention, and the Indian judiciary has taken a proactive role to assist the applicability of the principles in the Convention to the judicial decisions. I have compiled a set of judicial decisions over here. I would say that the landmark decision came out in 1997 even though the principles had tried and said they were applied before as well. In *Vishaka & Ors vs. State of Rajasthan & Ors*, the Ethics Court of India applied the guidelines and principles enshrined in the convention, and asked the union government, which is the equivalent of Federal government, the institute a legal framework

for combating sexual harassment in the workplace. Take a look at these cases, the most recent one being in 2018. There, the Ethics Court took a [...] to eradicate stigmatization based on menstruation. So there have also been statutes instituted by the federal government to apply the principles in practice. And I would say that, in my experience, the Protection of Women from Domestic Violence Act has been the most effective so far.

If you ask me, what is the way ahead? First of all, stop the silence, if people tell you, discrimination is a thing of the past, tell them that caste discrimination is real. Laws should address the intersectionality, and we need to redefine medical education. We need to combat the medical apartheid that exists in the country [India]. We need to ensure cultural competency of health care professionals, and the health delivery system. Even though we have a universal health care, we need to ensure equitable access to system as such. Whenever you hear the word “morality,” what morality are we talking about? It is not based on religious or moral values of distinct sectors of people—we are talking about the morality instituted by the constitution in India. To conclude, with the code by the father of Indian Constitution “you cannot build anything upon the foundations of caste you cannot build up a nation you cannot build that a morality anything that you will build on the foundations of caste will crack and never be whole.” Thank you and have a good day.

**Brittany Kelly:** Thank you so much for that great discussion. Next, we have our final panelist from this session, and that is Dr. Amber Comer. Dr. Amber Comer, received a J.D. From I.U. McKinney School of Law, and a Ph.D. in health policy from Indiana University. She is an Associate Professor of Health Sciences and Medicine in the Indiana University School of Health and Human Sciences, and the Department of Health Sciences, and the School of Medicine Department of Medicine. Take it away Dr. Comer.

**Dr. Amber Comer:** Hello, everyone. It is so lovely to have the opportunity to be able to speak with you today. So, today, I am going to talk to you about gender differences in withholding and withdrawing life, sustaining treatments. What I want to begin with is talking about what withholding is and what is the difference between withholding and withdrawing life, sustaining treatments, because what we find is that legally and ethically these can both be distinct. So, withholding treatments denotes not beginning a therapy. So, for example, foregoing the use of a ventilator in a patient. While withdrawing therapy denotes stopping interventions when, but for the use of the intervention, the patient would die in natural death. In the United States the majority ethics opinion is that there is no distinction between withholding or withdrawing treatments. However, people do tend to struggle more with the concept of withdrawing treatments rather than withholding. And we’ll see throughout this lecture that historically, we have gotten those rights legally at different times. So, this is a really important topic, because most people who die in the hospital-including

90% of patients who die in the ICU-die from a decision to withhold or withdraw life-saving treatments.

And so, just to go through a brief history of the legal and ethical right to make medical decisions, including the right to make decisions at end of life, is that the outside of Western medical practice, physicians made patient decisions for patients, and as we move throughout the ages, physicians held the final decision-making authority for medical decisions. In fact, in the Middle Ages, if medical treatments did not work, the physician was not to blame, but rather the patient was actually recommended to get right with God. And for a long period of time in the United States, "head and master laws", otherwise known as coverture, were the norm. Under these laws women were not considered separate from their husbands, and therefore husbands were responsible for their medical decisions if there was a decision to be made because we were still practicing under for paternalistic medicine.

In fact, the practice of physicians making decisions for patients was the norm until the 1970s. When we started to see the pendulum shift towards autonomy from paternalism. And although in the West we allow patients to make their decisions even now, including women, this is not the accepted practice throughout the world. So, what makes the practice of patients being allowed to make their own end of life decisions so phenomenal is that women played a pivotal role in progressing the legal and ethical right for all patients to make decisions at the end of life. The shift towards autonomy really began in the 1970s. There were many things happening within the United States which helped to shift the transition of medical decision making from paternalism to autonomy, including the ending of both coverture laws, and for sterilization which interestingly, the last State to ban for sterilization didn't occur until the 1970s. Also, we have the Supreme Court ruling and *Roe v. Wade*.

In regard to the right to make medical decisions for patients at end-of-life women played a pivotal role in progressing the legal and ethical right for all patients. And so, I want to talk about these women, and what role they played, and how their legacy still continues today. First in *Schroendorf v. Society of New York*, we have Miss Schroendorf, who did consent to go into an examination of a tunnel tumor under anesthesia. However, she made it clear that she did not want the tumor removed. While she was incapacitated, the doctor removed the tumor against her wishes, and Miss Schroendorf suffered gangrene in her arm, which resulted in the amputation of several fingers. Miss Schroendorf case resulted in the statement that every human being of adult years and sound mind has the right to determine what shall be done with his own body. This was the beginning of the legal right to informed consent in medicine, a right to informed consent which we will see developed throughout World War II, with the Nuremberg Trials and the Nuremberg Code, and that we won't really see...come into full...we won't see the right to make medical decisions come into full practice until the 1970s. So, while we started with this right to be told what would be happening to us, we still didn't really have the right to make

certain decisions when it came to our own medical care. That was until 1976, when Miss Quinlan suffered cardiac arrest with the anoxic brain injury, and while she was not brain dead, she was in a persistent, vegetative state, meaning that her condition was unlikely to improve. Miss Quinlan was dependent on mechanical ventilation to sustain her life, and Miss Quinlan's parents had to actually sue the hospital in order to remove the ventilator, because this was one of the first cases of its kind. So, this case resulted in the legal right to withdraw medical interventions. One important aspect of this case is that the court in this case based the right for patients to withdraw mechanical inhalation on the right to privacy found in *Roe v. Wade*. And it was not until the *Cruzan* case in the 1990s, that the court determined the right to refuse or withhold medical treatments came under the due process clause— something that now, under the *Dobbs* decision, we are really grateful for that transition in the court's thinking.

So, now that we had the right to withdraw treatments, we had to fight for the right to withhold treatments. And so, Miss Bouvia was born with cerebral palsy, and she required a feeding tube in order to obtain the necessary nutrition and hydration to sustain life. Miss Bouvia sued for the right to withhold artificial nutrition and hydration, stating that her quality of life was tremendously diminished, and that she no longer wished to receive medical interventions. This case resulted in the legal right for patients to withhold medical treatments or interventions with the court, stating "a patient has the right to refuse any medical treatment, even that which may save, or prolong her life." So, in this case Miss Bouvia did win the right to remove her feeding tube, to withhold her feeding tube, and she actually decided to live, and actually went on to continue to fight for patient rights and be an advocate for patients.

That brings us to 1990 where we have Ms. Nancy Cruzan. Miss Cruzan, was in a car crash that resulted in her being left in a persistent vegetative state, and while she was not dependent on mechanical ventilation, like Miss Quinlan, she did require a feeding tube to receive the necessary nutrition and hydration to sustain life. As Miss Cruzan lacked capacity to make her own medical decisions, her family sued for the right to make medical decisions on her behalf. This case was—the result of this case was this concept of surrogate health care consent, or the right of a surrogate to uphold a patient's autonomy through making medical decisions on their behalf.

So, it was not until the 1980s that we first started seeing States make laws about health care consent, meaning who can make a decision for a patient who is incapacitated, and in 1990 we had a Supreme Court ruling, which gave us the right that, under certain circumstances, a surrogate may act for the patient in electing to withdraw hydration and nutrition. During this panel you've heard many areas where women are facing inequity, and I am happy to report that at least in the area of end of life, care, women are receiving of their own volition higher quality, care than men. Women choose to receive less aggressive interventions at end of life, including CPR, surgery, artificial, such as nutrition, and are more likely to consider palliative care, comfort, measures and hospice

at end of life. Although women are leading men and quality of care at end of life, most people do not actually receive high quality end of life care. For instance, men and women both have a low prevalence of goals, of care, conversations at the end of life, surrounding their preferences, values and goals of medical treatments, and men and women both have an extremely low prevalence of advance directives and health care, representatives and power of attorney forums to help direct their medical decisions and preserve their autonomy. And despite all of the efforts that we've made, and most patients reporting that they would rather die at home, we still see most patients die in hospitals under a decision to withhold or withdraw life-sustaining interventions.

So, the takeaway is that while women have paved our path forward, and women are receiving higher quality, end of life care we still have a high need for better serious-illness and end of life care for all patients. Thank you.

**Brittany Kelly:** Thank you so much, Dr. Comer, for that really engaging discussion. This has been an incredibly powerful panel. I've really enjoyed it. I know our audience has as well because there are many, many questions in the Q&A box. We are at 10:25 a.m., and I want to not go over the time that we are supposed to get our next panel started, which is 10:30 a.m., and we are also going to work in hopefully a minute for you to take a break. So, that said, I am sure our panelists welcome you to reach out to them with questions after today. For now, let us dive here shallowly into the Q&A box. I think the most overarching question we received was the one that asks about the application of international law, given that this is an international and comparative law review, and it feels like an appropriate way to wrap up the session. So, I would like to hear from any and all panelists that have a 30 second or so word to share with us.

Where are we at given the U.S.'s reluctance to ratify treaties and to recognize international law as binding authority? How realistic is it that we might expect policymakers and legislators in the U.S. to apply them? Are there any examples that we can pull from here?

**Professor Benjamin Davis:** I can start if you would like.

**Brittany Kelly:** Please, start us off, Professor Davis.

**Professor Davis:** OK. So, for treaties that the U.S. is a member of— human rights treaties— there is a periodic review that is done every 4-5 years, and as members of civil society you can make shadow reports about the specific articles in that, and whether the U.S., at whatever level is compliance—local, state, or national, and those reports that come out which are the conclusions of these committees, do carry some weight inside the United States—they are basically saying “the whole world is watching” and that can help with the internal work. Beyond that, the second thing I would point out is that the reason

the U.S. is so hostile to human rights treaties is that the United States—basically a deal cut by Eisenhower which was “please pass the genocide convention and I promise not to bring forward any human rights treaties.” Back in the day because of the worries about the southern way of life “type of stuff.” So, this is not something that is generic from some...you know, it did not come down from the sky. There is a conscious decision to protect segregation, basically. So, if you can understand that issue, then you realize that of course, this is not necessarily anything that is, is dramatic, and that it should actually...we should adopt these treaties.

**Brittany Kelly:** Thank you, Professor Davis, especially for that actionable item that you gave us there. With another minute or two left, I would like to open it up to Dr. Comer, Anamika, Kimi Chernoby. Where did we go from here? You know, in 30 seconds—this is a very broad question, but where do we go from here? What kind of takeaways or action items would you like the audience to leave with today?

**Dr. Comer:** I would just like to say that the action item is that we need to work as a society to accept the concept that we are all going to face the end of our life at one point or another, and that we need to work towards having better end of life care for all patients, and that includes care, not just hospice care for those who are actively dying, but for those who are facing serious illness. So that would be one takeaway. And the really important thing is, we have talked about international law and other areas which would be very applicable, but when it comes to making decisions for patients who are facing serious illness there is no one answer that fits all patients. Every person has different preferences, values, opinions, and goals, and people’s religion and their ethnicity, where they are from, their community, all plays a role in what they would find to be acceptable treatments for themselves. Which is why this concept of autonomy is so important. So, if we were going to have any one national precedent or international precedent, even in regards to end of life, it would be that people should have the right to autonomous medical decision making for themselves. Thank you.

**Brittany Kelly:** Thank you. Any other thoughts from our panelists that we wrap up?

**Anamika Krishnan:** I just wanted to add one command with respect to all the questions that I received regarding the resurgence of Hindu nationalism in India, and how it how it fosters caste discrimination in India. So, I just wanted to say that, you know, an analysis of Indian philosophy is more than an antiquarian curiosity right now. Without this inevitable inquiry we will remain helpless pawns in the grand political game instituted by far-right forces across the world. Not just in India, just to make sure. So, you know, we need to discard all the

thoughts and ideas that are not founded on secularism, rationalism, and scientific knowledge. Thank you.

**Brittany Kelly:** Thank you so much. Dr. Chernoby, I would love to hear from you as well.

**Kimi Chernoby:** Yeah, I would just reiterate that access to abortion is a part of routine, health care, and that without access to full spectrum, reproductive health care we cannot eliminate discrimination against women, and that there are real repercussions to the health and well-being of people in this country with these restrictions. In light of *Dobbs*, so, in this post-*Dobbs* era, it becomes more and more of a State issue, and so we need to continue working at the State level to protect those rights and access.

**Brittany Kelly:** What great closing thoughts that you all left us with. I really appreciate that this has been an incredibly engaging panel. I appreciate the opportunity to moderate it, and I look forward to the rest of our day being just as engaging and productive. So, thank you to everyone who shared with us, and I will hand it back over to our student leaders.

**Lizzie Ford:** Hi, everyone! Thank you so much to our presenters and our moderator from this past Women and Health panel. We will now take a break, and we will come back at 10:40 a.m. for Women and Education.

#### WOMEN AND EDUCATION PANEL

>>> 10:40am

**Lizzie Ford:** Hi, everyone! Welcome back. We are now going to move into our second panel women and education, and I am here to introduce the moderator, Dr. Courtney Jarrett, who I'm lucky enough to call friend. Dr. Jarrett is the current Director of Disability Services at Ball State University in Indiana, where she currently assists students in getting access and opportunity-over 3,500 students with disabilities to be exact. She has also authored a book called *Not Your Mom's Feminism*, which is used to teach undergraduate women and gender studies courses.

**Dr. Courtney Jarrett:** Thank you very much, Lizzie. I am very excited to be with you all today. It's my pleasure to introduce our first presenter in the Women and Education Panel. Nancy Cantalupo is a Professor at Wayne State University Law School and a nationally recognized scholar and expert on Title IX sexual harassment and gender-based violence in education. So, Professor Cantalupo, we are looking forward to hearing from you this morning.



**Nancy Chi Cantalupo 甘念齊 (she/her):** Thank you so much, and my thanks to the Indiana International and Comparative Law Review for inviting me to speak today and especially to Lizzie Ford for her tireless work on this symposium. So, as Dr. Jarrett indicated, I am most known for my research and writing on Title IX-the US civil rights statute that was passed in 1972. I also have actually done a bunch of work related to international Women's Human Rights Law, including teaching a course on it and taking, I think, three classes of students to the People's Republic of China to engage in what I used to refer to as human rights factfinding-light, because with the authoritarian government in China, it's not really safe to do full on human rights factfinding. But I did bring three classes of law students to the PRC to engage in that kind of research and report writing. So, this panel nicely brings together a number of different things that I've done in the past. So, I'm going to kind of flip between the two in my remarks today.

So, Title IX is just a few years older than the Women's Convention, but as I first laid out in an article that I published in 2012, they are similar in several key ways when it comes to sexual harassment and gender-based violence. First, and most importantly, both prohibit sex discrimination. Title IX, when that discrimination takes place by US schools, and CEDAW by Nation States, of course, covers a much broader set of explicitly stated substantive areas in which sex discrimination is prohibited. But education is one of those areas. So, a second commonality between the two is that they both explicitly deal with equal educational opportunities and environments. Third, Title IX and CEDAW did not originally conceive of sexual harassment and gender-based violence as forms of sex discrimination. Neither say anything explicitly about either harassment or violence. Indeed, both had to be interpreted in such a way that recognize sexual harassment and gender-based violence as forms of sex discrimination. Those interpretations started in the 1990s. In CEDAW's case, that happened with General Recommendation 19, which was issued by the Committee, and in Title IX's case, both the US Supreme Court and the US Department of Education confirmed that Title IX had it applied to. Sorry, I just got a pop up asking if I was still with you. I'm not sure what to do with this. But can everyone still hear me?

**Dr. Courtney Jarrett:** Yup, you're good, Nancy.

**Nancy Chi Cantalupo 甘念齊 (she/her):** All right. So, I think I was saying in Title IX's case, both the US Supreme Court and the US Department of Education confirmed that Title IX applied to sexual harassment and gender-based violence late in the decade. Ultimately, as a substantive matter, both CEDAW and Title IX recognize sexual harassment and gender-based violence. As forms of sex discrimination, because of how they are, they are intertwined with gender inequality and its perpetuation. So, indeed, as the United Nations General Secretary articulated over a decade ago, gender-based violence is both

a cause and a consequence of gender inequality and we can see an example of how sexual harassment and gender-based violence are a consequence of gender inequality in the persistent sex stereotyping that women and girls in particular face that they lie about being harassed and abused. This leads to heightened vulnerability to being sexually harassed and victimized because of users know that victims will not be believed, and therefore, can be abused with relative impunity on the flip side sexual harassment and gender-based violence cause gender inequality by, for instance, causing trauma that brings about in the case of students, a drop in grades which leads to both short term and long term economic losses like wasted tuition and decreased future earning potential

Fourth, and finally, but finally only for today, as I could go on and on, if I had unlimited time, Title IX and CEDAW are both expansive and apply to many more forms of gender inequality than sexual harassment and gender-based violence. Moreover, such expansion of this kind of expansiveness goes beyond the text of each of the statutes and shows how greater equality in one place leads to greater equality in other places. So, for example, Title IX was first, and arguably is still best, known for equalizing athletic opportunities in school. Although that equalization process is far from having been fully achieved, we can often see its successes when we compare US women athletes to other countries' women's athletes. Both logic and research, have shown us women would not have won so many world cups, for instance, without title IX, but the benefits of Title IX don't just stop with those victories. The US Women's World Cup team identified the inequities that they face once they were playing professionally and won a groundbreaking pay equity lawsuit that is sure to benefit US women as a whole, and all of that is aside from the ways in which athletic participation helps girls develop leadership skills, and has many other positive effects on their lives. All of which brings me to the where we need to go part of my remarks.

As we all know, international human rights treaties like CEDAW are critically important in prompting States to act and to take steps to ensure that their people are not only equally protected from State abuses, but also have equal access to social and economic rights, such as education. We also know that the most effective way of fulfilling those international commitments is through domestic action. And the US experience with Title IX, even as partial as its successes have been, is a model worth considering by other countries. So, I don't have time to get into much detail with regard to such an idea, so I will simply mention the most important of the reasons why I make this suggestion. Along with families, schools, play can play, and should play, basically the greatest role of any societal institution in shaping the lives of almost every person in a country and throughout the world. And as we see in both the case of the US Women's World Cup champions and in the case of the millions of us students who deal with sexual harassment and gender-based violence, schools have tremendous power to advance equality and to intervene in inequality. But they too rarely do either, if they're not prompted to do so by law. Schools are also institutions

sometimes, but often not, state run, and they have the power, the kind of power and control over their students' lives that is almost state-like in its nature, and that's regardless of whether they are private or public. So, like with states themselves, we need a mechanism to get schools to promote equality and to stop discrimination. Title IX and other US civil rights laws provide those kinds of models, and, you know, give us a way to guide schools as institutions in the right direction. They also guide schools in a way that works with the unique qualities of educational institutions which are different from, yet share, characteristics with other institutions like for-profit businesses, other nonprofit enterprises, and States themselves.

So, I fully believe that State adoption of Title IX-like laws would significantly advance CEDAW's goals and States' commitments under CEDAW. So, I think that such passage is a worthy goal for where we should all try to take CEDAW in the future I believe it's time, and I thank you again.

**Dr. Courtney Jarrett:** Thank you so much, Nancy. I thoroughly enjoyed, especially the part about the US Women's team, because I know that the Canadian Women's Soccer Team is going through the same thing. And so, I hope there really is a trickle-down effect, which is great. So, thank you. So, before I introduce our next presenter, I'll just quickly say, if you haven't seen in the chat, the CLE questions will pop up. And so, in case you see that, don't worry, we can still hear you, and everything is all good. So just a quick reminder for that. But our next presenter in the Women and Education panel is Jonathan D. Glater, who is a Professor of Law at the University of California, Berkeley School of Law. He has written extensively for law reviews on Higher Education opportunity, frequently exploring the implications of rising student indebtedness. So, Professor Glater, I'll let you take it away.

**Jonathan Glater (he/him):** Thank you so much, and thank you to the organizers for inviting me to participate, and apologies to the for the panicked puppy here you might hear in the background. I'm hoping we won't hear from him over the course of my remarks. So again, my name is Jonathan Glater. I teach at University of California, Berkeley School of Law, and I often write about higher education, access, and equity and my goal here in the next 10 min, because I'm told. I need to stick to 10 min, and I have 10 slides, so if I keep to one slide per minute we'll be on track. My goal is to give a kind of an overview of the place of women in higher in the higher education universe today, and the theme of my remarks, is really duality. The position of women in higher education in 2023 is both remarkable in historical context, and also precarious, given the costs and risks of higher education. So, 10 min, 10 slides. Let me start sharing.

Okay, slide number one. So, the percentage of women in higher education. The number of women in higher education has increased dramatically, especially since the Higher Education Amendments of 1972, that Professor

Cantalupo already alluded to. That gave us Title IX, which in turn required greater equity and access to higher education, opportunity for women, and of course it's more complicated than just increasing numbers, even numbers that are exceeding the number of men in higher education. It's not just gender diversity, which is a term that means a good deal more now than it did in 1972. But that's really beyond the scope of my remarks. Today, if you consider other aspects of identity. You see that the distribution of higher education opportunity is not the same for all women or all men. And so, this is one of the dualities. Two things are true. Women enjoy much greater access than they have historically, but also within the population that we categorize as women there are disparities along lines of race, there are disparities along lines of class, that are not captured in this graph that are evident. Okay, which means when we talk about educational opportunity for women and educational achievements for women, we need to be a little more nuanced in our thinking.

You can see that more precisely here some of those differences within racial and ethnic subgroups. Within each group you can see that the percentage of women of traditional college age who are enrolled in higher education is higher than the percentage of men. Indeed, there's increasing study and popular concern about who has access, and what, as a matter of policy we should be worried about. That's also beyond the scope. But it's probably something that folks want to talk about in the Q&A, what does it mean that the priorities seem to evolve as access seems to improve. Okay.

The differences are also evident in the fields of study. This is undergraduate, and I'm going to show you graduate and professional schools on the next slide. And I show this slide not to make a normative argument that there should be any particular mix of people in any particular field of study. That's not what I'm trying to say. But in showing this slide, I do want to suggest that there's something going on in the selection and self-selection process, who pursues which fields of setting. Whether you're concerned probably depends on what idea you have of how people should be distributed across these different fields of study, or perhaps how they would be distributed, how we would be distributed in the absence of a history of discrimination and exclusion of women in particular fields disproportionately right. In other words, this snapshot has to be placed in a historical context. So, then we can begin to think about? Is it problematic that the distribution looks this way? What potential vestiges of an overtly exclusive regime are behind the disparities that that we see? Okay, so here the graduate and professional school statistics as promised, and you can see disparities here as well. A lot of law is right around 50-50, and has been for several years. And we can. We can speculate about why one of the arguments for higher education generally is increasing socioeconomic opportunity and security. I don't have a chart for that. But it's been well-documented that higher education leads to a significantly higher lifetime income relative to students who have who are only high school graduates. But it's also the case that higher education is expensive, and the cost has grown more quickly than incomes

consistently for decades. That means that students have to borrow, especially if they're pursuing advanced education, right? But going beyond undergraduate education, students who borrow, right, tend to be students who have less money. This is a logical, right? A logical result. So, borrowing, then, is a regressive instrument to promote educational opportunity. So, it's families who have less money-families who might be a recent immigrants, first generation students. These are the ones who have to borrow, who disproportionately have to borrow enough to borrow larger amounts. Also, women who overall borrow more than men. And here again we see differences across racial and ethnic groups. That is a constraint on the benefits of higher education. Right? You might earn more if you complete your program of study, but you also, then have to repay this debt, obligation that you've incurred along the way.

Further, the prospect of debt may put off the decision to pursue higher education entirely, and this is something that's incredibly difficult to study the idea of debt aversion that there are students who don't want to borrow, and therefore, do not pursue higher education. To get at that you would have to survey people and ask them why they did not do what they did not do, and it's hard to find the people who did not do something so that you can ask them why they didn't do it because maybe they were never going to do it anyway.

So, this data version is real. You don't have to have a lot of conversation with undergrads or law school applicants to hear concerns about the debt burden, but there is a debt burden. And to the extent that students of other lifetime response life responsibilities that they are also weighing, you can imagine that those who are disproportionately caretakers might be more debt averse than people who are not, okay. That is risky and stressful even though it puts higher education opportunity within reach. This is another one of those dual dualities that that I want to emphasize, emphasize for you debt burdens don't affect everybody the same way among those who borrow, okay. It takes longer to repay. The risk of a painful default experience is greater for women and people of color, and this study made a media splash because of just how stark the differences are, right. The fact that there are so many subgroups who end up owing more than the original balance 12 years after repayment, remembering that the standard repayment term for a federal student loan is 10 years. That's a striking finding. Okay.

But in the big picture oh, a survey just popped up in the big picture. In a big picture sense this is not surprising, because wage differences lead to differential abilities to repay loans. So now, we're implicating not just a difficult to measure concept like that aversion. We're also learning that labor market patterns are affecting higher education, opportunity. This is part of the story about what women have been able to achieve, and what the potential risks are of their pursuing higher education. More women are working, but receiving lower wages than their colleagues who are men. Okay. Oops. All right. I need to make the survey go away in order to get to the next slide. Okay. Difficulty and repayment is also related to the type of institution attended. So, women are

disproportionately attending for profit schools which have worse graduation rates and worse repayment rates among their borrowers. Of course, women also are disproportionately carrying the burdens of care for others in their families, and those burdens can interfere with school completion and failure to complete, undermines the socioeconomic benefit that students should otherwise receive.

As a result of obtaining the higher education, I want to touch on the pandemic, and perhaps we can talk about that more in the discussion or Q&A stage. But the pandemic has distinct and disproportionate effects on women as well, right in terms of workforce participation rates, but also because of that caregiving role that disproportionately affects women. Okay.

What this means is opportunities for women overall in higher education and the potential benefits. Excuse me, and the achievements and getting to this point are tremendous, right. But at the same time higher education- access exacts a cost, and it's an increasing cost that is not nearly as significant in decades past as it is now. This, so the challenges confronting women and people of color, and those who are both, make plain the connections between current opportunity and past exclusion. The connections between educational experiences today, and workforce experiences and opportunities between formal economic responsibilities and also informal right responsibilities within the family. And fairness and higher education opportunity going forward is going to require attention to all of these facets of the higher education experience well beyond the classroom, and you can see that schools increasingly recognize this in that they are expanding the scope of student support services to deal with, to provide support with all of the needs and challenges that students face in addition to academics. So, thank you again. It's really an honor and privilege to be here, and I look forward to the conversation.

**Dr. Courtney Jarrett:** Thank you. So, I want to be mindful of Lizzie and Gabriela's planning skills for this event, and so we just have a quick minute to wrap up the conversations. But I, Jonathan, I'm so pleased that you included the research from the AU, because the longevity of what they've put together about debt is, is really important. So, I think, for both panelists there are questions in the Q&A, and if those of you that have asked those if we don't get to those, and you want to reach out, I'm sure both Nancy and Jonathan would be happy to continue the conversations. But I think perhaps, if we could ask one question to each of you about what particularly is an action item that folks that are here with us today could take away from each of your topics. We're in many different fields. Some of us are in higher ed, some of us are practicing lawyers, some of us are in social work. And so, if each of you might think about that and speak on it for a minute, I think that would be great. So, Jonathan, would you like to start us off with that?

**Jonathan Glater (he/him):** Sure, I can try. I think one lesson is that the implications of a whole host of policies are important and relevant to higher

education opportunity. So, I already mentioned disparities in wages. That's one, right? So, pursuit of policies that promote equity at the institutional level, as well as at the policy level, are incredibly important to promote equity and educational opportunity overall. It also means that policies that are very much in public discussion right now. I'm thinking of debt cancellation and the Supreme Court arguments that we just heard this week over debt cancellation, which all of my friends have been very, very excited about. And so were my students strangely. That is a policy debate and a legal doctrinal argument with potentially profound gendered effects, because who holds more of the debt, who takes longer to repay the debt right? So, there are policy choices that both put higher education within reach, but extract a penalty, right, in terms of what the nature of that opportunity is, or what the implications of the obligation to repay afterward are that that may not look like. They're about gender equity or racial equity, but very much are. And so, I think one lesson we can all take from that is, be thinking about fairness in context, where perhaps at first blush, it doesn't look like that's the driver or the dominant concern.

**Dr. Courtney Jarrett:** Thank you. Nancy, what would you like to say? Maybe your one action item is for your topic.

**Nancy Chi Cantalupo 甘念齊 (she/her):** Well, so I would say, for those who have access to international contexts, or who regularly are, you know, having interactions, or go to other countries and do work in other countries, I would refer you to my earlier remarks about, you know, creating Title IX laws in other places. For those who are working more domestically, I encourage you to, so the American Bar Association Commission on Domestic and Sexual Violence, some time ago created a set of comprehensive recommendations for how schools should be dealing with, particularly investigations of complaints of sexual harassment and gender-based violence at their institutions, and the recommendations are incredibly comprehensive, and I've experienced lots of attorneys who want to get involved in some way in, you know, helping particularly sexual harassment and gender-based violence victims in these kinds of cases. And so, I refer you to those recommendations because they are an excellent resource for getting involved in all kinds of different ways in that process.

**Dr. Courtney Jarrett:** Great. Thank you. Well, again, I want to say thank you to both of our presenters, and thank you again to the organizers of this event, and I'm going to hand it off to Lizzie, for I think our next thing. So, thank you all very much.

**Lizzie Ford:** Thank you, Courtney. We're going to take just a few minutes for a break again. We'll come back at 11:15 for our next panel, Women and Employment.

## WOMEN AND EMPLOYMENT PANEL

>>> 11:15am

**Gabriela Ocampo:** All right, everybody. Welcome back. Thank you for staying with us. Our next panel is going to be Women and Employment. It's a really fun panel, and our moderator is David Fleischhacker. David has been the Indiana Civil Rights Commission Deputy Director and a General Counsel since 2021, and he also is a graduate of the IU McKinney School of Law. So, David, please take it away.

**David Fleischhacker:** Alright, Thank you, Gabriela. Good morning and welcome everyone to the women in employment panel, where you'll hear three presentations. Please put any questions you might have in the Q&A function, not the chat function, as we plan to have some time for questions at the end of the presentations. So let's get started. Our first panelists for the Women and Employment panel is Dr. Jennifer A. Drobac who is the Samuel R. Rosen Professor of Law at the Indiana University, Robert H. McKinney School of Law. She holds her J.S.D and J.D. Degrees from Stanford Law School. Professor Drobac, the virtual floor is yours.

**Jennifer Drobac:** Okay, thank you so much, and let me just quickly share my screen here, and we'll get into our presentation. I want to thank the organizers for inviting me and all the participants out there. And now we can. I think, okay, let's start that over. Go into what I'm calling the elements of the, okay, so I'm going to end this show. Excuse me for a second, and there we go. All right. Let's start again. My apologies to everyone. Alright, so I was in the middle of trying to give a shout out to all of my former students out there. So, hello to everyone.

Alright, so "Title VII Sexual Harassment Cases Still Crazy After all These Years." And I want to say that this exploration is specifically with respect to whether or not we need to look at Title VII, and even Title IX, judging from the prior panel, with new eyes, and maybe make some recommendations. I have some basic questions to start with. First of all, sexual harassment and assault survivors display common responses to their abuse. But I would argue that they are not crazy, nutty, slutty, or gold diggers, as has historically been argued, and we're kind of going too fast here. I don't know why, but our US sexual harassment, rape, and anti-discrimination laws aren't consistent with the science about what target survivors experience, and I'll use those names interchangeably. My thesis is that these laws, including Title VII and Title IX and their elements thwart prosecution and recovery by target survivors.

Okay, so let's start with a comparison. I want to make a comparison between groups of survivors, and I'll start by pointing out the Stockholm Syndrome, which was used to describe common responses to abduction or traumatically imprisoned victims. Now the Stockholm Syndrome has been, is, a contested



illness, but whether or not it exists formally as described, it has some elements that are similar in some ways to PTSD. PTSD is a Posttraumatic Stress Disorder is sometimes associated with sexual harassment and assault. And so, the question that I ask is, does the science confirm that a common response occurs with severe, persistent sex-based abuse and harassment, something that I'm calling the Mann Effect.

So, let's look at the Mann Effect so generally defined. The Mann Effect is a descriptor for a not fully defined, yet set of responsive behaviors to sex-based abuse and harassment. The manifest and the requirements of anti-discrimination law may explain why harassment targets, survivors may be disabled from fully prosecuting their legal case against perpetrators or organizations, and I'll start here with Jessica Mann. She accused Harvey Weinstein of a 2013 rape, and she was a key witness in his 2020 conviction. and she displayed common behavior seen in other rape and harassment targets. But she didn't complain until 2017, four years after the alleged rape, and in the interim she wrote him flattering notes, and so the question is, was she a willing participant or a model of the Mann Effect?

Alright, so let's look into the elements of the Mann Effect. First, I argue that the target experiences a traumatic sexual assault or series of abusive sex-based behaviors by more and more, one or more people in positions of relative power. Second, the survivor fears for her physical, psychological, social, professional, and or financial safety, and we can remember back to Christine Blasi Ford, and the fear she expressed not only in the moment, but later, with respect to whether Brett Kavanaugh, now Justice on our Supreme Court was going to rape her. I had many clients who experienced this, including one Jane Eschemia, who was worried, afraid that she was going to be raped, and was, in fact, sexually assaulted in a wooded property. The third element is that the survivor occasionally experiences a dear in the headlights moment in which she is frozen or numb, as one of my former clients described it, and cannot defend or assert herself. Lady Gaga explained on being raped, "I felt numb. Excuse me, I felt full on pain, then I felt numb then. I was sick for weeks." This is not an uncommon response. The fourth element is that, excuse me. The fourth element is that the survivor understands that if she complains about the more powerful perpetrator's misconduct and illegal behavior, she will probably suffer retaliation and other undesirable consequences. Therefore, the survivor experiences fear or negative response not only during the abuse, but after it the fear or anxiety or negative response can continue for long after the abuse has purportedly ended. Number five. Many Mann Effect survivors experience what we've known throughout history as a retaliation against women who protest sexual abuse, and this causes some women, including, for example, Anita Hill, to continue seemingly cordial relationships with their abusers. They may even admire their abusive mentors even as they dislike them for their abuse of conduct.

So, I want to draw another comparison again as we talk about, why, the Mann Effect might be important. For example, if we required that all persons in wheelchairs access the ballot box upstairs, we would be effectively denying them the right to vote, a fundamental right. Do we effectively deny targeted abuse survivors, their civil rights and the right to sue for their relief under anti-discrimination laws by ignoring or denying the effects of their sex-based abuse? Now I get to CEDAW and here-oh, goodness gracious! Here, Article 11 of CEDAW requires that we eliminate discrimination against women in their field of employment. And in particular item three notes. The protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific knowledge and technological knowledge and shall be revised, repealed, or extended as necessary. This presentation is a call for the revision and extension of Title VII, Title XI, and other anti-discrimination laws in the US, despite the fact that the US has not adopted CEDAW. It's just good policy and a good idea.

Alright, so let's look at Title VII in particular, and see why first there are defenses within Title VII that say an employee who, and now I'm getting a pop up. So okay, then, an employee who unreasonably fails to avail herself, or otherwise take advantage of preventive or corrective opportunities could experience a block in her ability to sue in the form of an affirmative defense by an employer. In other words, she has to basically complain or engage in this responsive behavior within 180 days of the last incident of discrimination that gets extended to 300 days by certain provisions of State law in combination with Federal law, not really a logical reason for extending the statute of limitations. But, as we know from Jessica Mann others, it can take even years before they are able to recover sufficiently from their trauma or get over the fear of retaliation for them to complain, or fully prosecute their cases. This is also true within Title IX, where a complainant has to give actual notice, and this is a complainant who may be a minor. And so, excuse me again. The statute of limitations. Again, we're looking at 180 days, and so these provisions within Title IX are what are thwarting individuals from prosecuting their cases coming forward and receiving relief.

Alright, so, mandatory arbitration has been another problem in Title IX. While some states are revisiting the notion of arbitration, many employers still require arbitration in their employment contracts and waiver of rights to sue under anti-discrimination law. This can create a whole plethora of problems, including difficulty in securing council when the only avenue for relief is arbitration. It also affords minimal protections from abusive discovery and evidentiary tactics. So that's just you know, another problem in Title IX we could also look at capped damages which haven't been raised since the 1991 amendments.

So, my argument is that anti-discrimination laws in the United States are the next glass ceiling. And in order to secure rights to fair employment, we have to be able to sue under anti-discrimination laws, or have anti-discrimination laws

that would take into consideration the science and effects on the targeted population. And these laws basically don't do that. So again, my apologies for my technological problems. But I want to say thank you again to you all, and we can think outside the box, and I will leave questions for the very end, and I will stop sharing now.

**David Fleischhacker:** Alright thank you, Professor Drobac, for your look at Title VII. I'm very interested in the further research in this area that I think you call for. We'll now turn to our next presentation, where you'll hear from a trio of panelists. Naomi Khan is a Professor of Law at the University of Virginia School of Law. June Carbone is the Inaugural Holders of the Robina Chair of Law, Science, and Technology at the University of Minnesota School of Law. and Nancy Levit is the Associate Dean for Faculty and the Curator's and Edward D. Ellison Professor of Law at the University of Missouri-Kansas City School of Law. Professors, take it away.

**Naomi Cahn:** Thank you so much. We are absolutely delighted to be here and our presentation. We plan this so well. Our presentation follows up quite nicely with Professor Glater's, which provided some of the gender-based gaps in earnings and looked back at gender debt issues and on Professor Jennifer Drobac's on sexual harassment and CEDAW Article 11, of course, to which we will also be referring as well as US states' discrimination laws. We are US focused. But I should mention that I've taught international and comparative gender rights, and I worked on gender issues when I lived in the Congo for two years. But this presentation is very much US focused. The three of us are writing a book. There's a title, *Fair Shake-How Women Lose in a Winner Take All World*, and we're gonna end with-are we moving towards a new era of gender theory and equality? We started by looking at how the gender pay gap in the US has hit a glass ceiling with a long-standing pay disparity between the genders, improving somewhat in the immediate decade after CEDAW came into force, but then barely improving since then, and indeed getting worse for those at the top. And so, our question was: why is the gender gap wage gap stalling? And why is it getting worse for those at the top? And we found, although we'll talk a little bit about Title VII, that Title VII simply is not equipped to deal with the shift in Corporate America from the Organization Man. And yes, we are using gender terms from the Organization Man to the Winner Take all economy, and to a new boys club which is currently reigning. So, we actually started by looking at a series of legal complaints. Most of them brought under Title VII, and we found initially, there was some improvement in the gender wage gap in the first decade after CEDAW came into force. But the question is, and we will get to this in the next set of slides, as I turn it over to my co-authors. What has changed? Why is it that women are, in fact, losing now? Thanks, June. you're muted.

**June Carbone:** I will talk fast and answer questions later. There's a lot on the slides. I'm not going to go through them individually. But let me give you our short answer. I like to explain the difference this way. Imagine George Romney and compare him to his son Mitt Romney. Both ran for President. Both were governors of Major States, both bragged about their accomplishments as businessmen. In George's case that accomplishment was the health of American Motors. In Mitt's case, it's how much money he had in the Cayman Islands with the OP ED Pages of the Wall Street Journal, saying: "If you were really a good businessman, he would have more than 200 billion dollars." And so, the conclusion we've got is if you look at what the Organization Man was: nearer portals of entry with secure career ladders and distrust of anybody who is out for themselves. What's the new model? The new model is Jack Welch and can be summarized in terms of shareholder primacy. But we want to argue the secret is the bonus systems. What this new system does is a system that could be called CEO primacy, in the sense that it gives the people at the top an ability to manipulate the system for their own benefit. The key is internal competition that keeps everybody insecure, allowing the system to be used to extract. Well, here's the difference in CEO pay versus average pay, but I want to emphasize that the commonalities in this system run across the economy. So, yet Welch became famous for earnings management. What do you do? Over the course of his tenure GE earnings went up something like 300, 400, but share price went up 4,000. What he did, and Welsh emphasized with the right bonus system, you can incentivize anything. And you don't have to look too closely at the details of how people accomplish their numbers. "Well, I give them freedom so long as they hit their numbers."

What are the numbers? How do you beat expected earnings every quarter which also happens to be securities fraud? Okay? Or, if we focus on short termism. You could do it the legal way: 80% of executives say they would cut investment training, advertising research labs, employees, if it would boost your term earnings and share price today. The legal way to do it is stock buybacks. Here's what happened to GE: we will tell you the story of what happened to Shafer, who filed a sex discrimination complaint. But the bottom line was it changes what you look for in employees. She has a traditional case of employment discrimination, what was really going on? Her boss wanted what he called a big time GC. What does that mean? It means somebody who could figure out a way not to comply with the SEC Order on securities fraud. What we want to argue the common denominator in a lot of the companies we look at. I'm going to give you more detailed examples in a minute is what Michael Cohen described it was like to work for Donald Trump: dangle big bonuses for those who produce the right numbers. Don't ask questions about where the numbers come from. Internal competition keeps everyone off balance. It neutralizes the opposition, and virtually every study shows whether it's merit, pay for teachers, or finance, it produces increased gender disparities greater in

group favoritism, more politicized decision making. It's bad for women and everyone else.

So, I want to give you some examples of how this worked out for women where we have good data. Walmart is one of the most telling examples. You have a nationwide class action goes to the Supreme Court in 2011 in 5-4 decision. Justice Scalia says Walmart decentralized decision making, how can you give it class treatment? Well, all the policies were. In that case, we wondered about select for store managers who will agree to move on short notice. Don't hire from the hourly employees at the same store, have a bonus system tied to the suppression of labor costs, and have an understanding on your staffing long and unpredictable hours. Don't advertise the positions. No criteria. And B and C Students are preferred to A students. These are all policies bad for women. They produce huge gender disparities. The not advertising positions are given as evidence of discretionary decision making. Why does Walmart do it? Because plausible deniability? Walmart is number one in the country in wage theft, having paid a billion and a half dollars in wages and hours violations over a course of 15 years. It is hiring, and it micromanages everything from Bentonville except personnel matters. Why? Because this allows the suppression of labor costs through a variety of methods, many of which are illegal and it does so with plausible deniability. The people at the top don't have their fingerprints on the outcome, and so, if you have managers who will move, you can take the effective wage suppression tactics in one place and move them someplace else.

Bottom line-the system. High-stakes reduction bonus metrics tied to looking the other way at unscrupulous practices also produces gender disparities. What about Wells Fargo? Wells Fargo is a fraud run by women. They're not designed by women, I might add, but the critical fine disparities have to do with who is fired. So, you will recall Wells Fargo had a scandal based on fake accounts. But there's a fascinating study coming out of Herbert Business School that shows for finite financial advisors nationwide, 1/13 have a record of misconduct, a rather high number for any profession. Men are three times more likely to engage in misconduct, twice as likely to be repeat offenders. They commit offenses that are 20% costly to their employees, but women are 20% more likely to lose their jobs as a result of misconduct, 30% less likely to find new ones compared to the men. The study came out before the Wells Fargo scandal, and then the authors of the study went back to look at Wells Fargo specifically, and found it had the biggest gender disparities in the country. Let me emphasize-this does not just mean women to commit misconduct are more likely to be fired. It also means women who are whistleblowers are more likely to be fired because of reporting misconduct in an environment in which almost everybody is guilty of something. It's one of the reasons women are fired for more minor offenses than men sometimes. That's not the real reason for the termination, but it is almost impossible to fight in a gender discrimination claim, and we've got lots of stories of that. So, with this I am going to turn it over to Nancy.

**Nancy Levit:** Thank you so much for inviting us. Luckily, Jennifer did much of our work for us, so I will be very brief. The types of discriminatory behavior that Naomi framed and June described are virtually unreachable through legal doctrines in the United States employment discrimination realm. As Jennifer said, Title VII applies to employers with 15 or more employees. Even if state anti-discrimination laws reach smaller employers, almost all these laws are inapplicable to gig workers. There are short statutes of limitation, even if plaintiffs make it to court, and what do they get? Damage caps that have remained unchanged since 1991. The total amount of compensatory and punitive for employers up to a 100 employees is \$50,000. These kinds of suits are not worthwhile for lawyers to take regarding employment discrimination law, and these kinds of behaviors lead to the fraud.

We see the first leg of this sort of oppressive triad is that principally men are succeeding through narcissistic, self-interested behaviors and corporations are handsomely rewarding characteristics that are the upside of narcissism: the ability to influence people, to manipulate, to risk, take. And you can't sue people for being asshats for risk-taking and for being equal opportunity backstabbers. When women are acting atypically for their gender, as June said, in Mark Egan's study, women are substantially more likely to be fired from misconduct and less likely to be rehired. The retaliatory terminations for misconduct, using disparate impact to reach lower wages, documented disparities in promotional practices with the background of fraud is problematic. The competitive promotional practices are justified as business necessity.

So, what can be done about what we call the "winner take all economy" and this sort of triple bind for women? We believe the first step is to make the injustices of the WTA economy visible. But the MeToo movement was galvanizing, and it has trended to 85 countries. The extra-legal MeToo movement gains power from the fact that it doesn't rely on the courts to right injustice. The sexual harassment is ugly wherever it occurs, but making it visible will shine a spotlight on perpetrators, and make it possible for victims to organize interestingly, as we say in our book. MeToo, served as a form of jujitsu. It turned the power of celebrated men to act with impunity as a weapon against them, and use their very celebrity to topple them.

We have a number of other suggestions for what might work, but let me end with one that is particularly relevant to the heart of this conference, and that is the CEDAW. We think it is incredibly important to strengthen the rule of law because the Winner Take all Economy, disproportionately benefits people who can break the rules and get away with it. Article 11 of the CEDAW provides the right to the same employment opportunities, including the application of the same criteria in matters of employment. That would be a much better beginning point for law. We thank you for your attention. Sorry. We ran a couple of minutes long, and we welcome questions. We hope that, if there is an effort to engage in the practices on the last slide, this will empower someone who is

coded feminine. The Organization Woman doesn't have to actually be a girl to punch through and break the glass ceiling.

**David Fleischhacker:** All right. Well, thank you, Professors Cahn, Carbone, and Levitt. I look forward to reading this book and learning more about what you've discussed today. Now to wrap things up. We will now hear from our last panelists Deborah Pollack-Milgate. Ms. Pollack-Milgate is a partner at Barnes and Thornburg, LLP, where she focuses her practice on intellectual property litigation matters, including at an international level. Ms. Pollack Milgate, the floor is yours.

**Deborah Pollack-Milgate:** Thank you very much. I'm delighted to be here. I'm seeing now whether I can share my screen, so give me just one moment for that. Alright, it looks like that's coming through, alright. So, one thing I have to tell you that I'm really especially thrilled about at the moment is that I do think that my talk is sort of the, I hope it's the right end to this conversation, because it dovetails very nicely with the bad news we've heard. There's a lot of bad behavior out there. What are things that we can do about that? And that's really what I want to focus on today.

So, I am in my day job a partner at Barnes and Thornburg, but I've become increasingly involved in engagement over the last several years, in addition to having some very, very strong interest early on in my career in feminist jurisprudence, and I've been co-hosting a podcast for the last two years with a woman who is similarly committed and similarly engaged. And our podcast is really focused on talking about concretely: what can we do because the problems are so vast? We just found we were very motivated to see what we could do, and at three different levels. So, we talk in our podcast a lot about what an organization can do, what allies can do, and also what women can do. But frankly, with the third focus on women, because women are doing a lot of things already. It's really the rest of us who need to come. It's everyone else who needs to come along for something to change.

So, with that, let me go into first of all talking about what is corporate culture. There are really, for those who care, for those who want to have a corporate culture that really does support women, there are solutions out there. So, what is corporate culture? It's the tacit social order of an organization, and actually, in the best case, it's also articulated, so people know what it is, so it's clear; it's not ambiguous, and if it's communicated well, the research shows that it can actually increase performance of the employees by 20 to 30. So, as it turns out, if employees know why they're working somewhere, and they know what that culture is, it makes them happier.

Now, what's interesting when we started engaging in some of this research. And, by the way, this is based on one of our episodes from season one. So, I've adapted it from there is that we picked up one book by someone. Her name is Diane Primo, and the book is called the *ALL REPORT*, and it's at the end of my

presentation here, and one thing that was interesting here was she polled a bunch of different women and underrepresented groups from the workplace, and what they said was, they really believed that the companies actually know how to fix the problem, and they're just not doing it. So, if they were focused on, for example, you know, diversity efforts as much as they were focused on the bottom line, we would have no more problem. So, it was very interesting. A compilation of different surveys to survey women and underrepresented groups in the law in particular and other industries, to see, okay, what do they think is going wrong? So again, we all think we can, they think that we can fix it. I tend to think we can fix it, too, at least in a lot of a lot of situations.

So, where do you have to fix it if you're looking at your organization? Where is this corporate culture? Where is it really? Where does it come through for people? And we've identified three different places where it comes through. Most evidently in a corporate culture. First of all, it's how do you speak to people? When do you speak to people? And that is all of your inside communications. That's all of your outside communications as well. Second area where this comes through is the decision-making process. Who is involved in that decision-making process? Do people have the opportunity to weigh in, and what decisions are made? Where does the company put its money, for example? Where is that money invested? And so, for example, you know what is really important to with respect to corporate culture, and I'll talk about this just a little bit more, is that decision making process, and where you invest your money speaks louder than some other things. So, if you say you're really engaged, and you're focused on, you are focused on diversity, but you don't put any resources toward it, then that speaks louder than anything, and there's nothing worse than having a corporate culture that's actually inconsistent with what you say it to be. The third thing there is, people practices, and I think the other speakers have really touched on this nicely as well. If there's transparency in the HR Processes, if you have diversity at different levels of the organization, you have employee support, and you know how these decisions are made, that is also going to be a big driver in communicate communicating your corporate culture.

So, since we like to come up with phrases that are easy to remember, we've come up with this with this, which stands for SIGNPOSTS, which are here, the things that you can look for to determine whether there is actually a healthy culture in place, that as a worker you might want to be part of.

The first one is the suggestion box and that is organizations should have real suggestion boxes that are really a culture of continuous improvement. So, the best organizations are open to change, especially in today's world, where we know that changes are imperative.

The second part of it is that individuals matter. The organization should allow for autonomy, not micromanaging. and you should also be considering employees assignments when you give, when you dole out those assignments. That's a really important element. Growth Opportunities Organizations need to



create a flexible structure with opportunities for equitable growth and advancement and super important one. When it comes to the corporate culture, no one person can dominate the culture. And as you can imagine, this comes through in a couple of different ways. One is a book that I love, just maybe because it was the title I read a few years ago, which is called the *No Asshole Rule*. If you have that person who takes over the culture, that's going to get in the way of fostering the culture that is going to be openly inclusive to all. This can happen, and another example is in meetings. For example, if you have the meeting where one person is allowed to dominate the meeting and talks the whole time. That is another instance in which you have someone dominating the culture. So there has to be a process in place to try to deal with these instances, so that no one is able to take over and undermine the culture.

The P stands for the purpose of the organization is clear and mission driven, and it's a mission that aligns with your personal values you hope as a worker, otherwise the worker is not going to stick around. And what's again important to emphasize in connection with this point is, if you communicate, this is really what the studies show. If you communicate one thing, but you act in the opposite way, there is nothing that is more detrimental to a culture, a corporate culture, a clear, proper culture than that.

The O stands for open communications, and these should be communications that are frequent. They're respectful. They're consistent, and they're gender neutral, and that's a really, really important one. And obviously it doesn't have to just do with being gender neutral. It also can include any sort of thing that communicates a bias to your employees. Karen Catlin, who's the author of *Better Allies*, has some great catch phrases that are just off-limits, because they really communicate to someone who belongs to one of these underrepresented groups that they are not welcome there, I can tell you for sure I hate getting emails that are addressed to me still with "Dear, Sir."

The S for signpost stands for safety, and that is obviously this culture needs to your culture, needs to have a safe environment for employees to offer their ideas and to offer the input. If people don't feel safe, they won't speak up.

And then T in some ways is the most important in a way. You have a transparent process for hiring, for firing, for compensation, for review, for promotions. And there are all kinds of resources out there that can tell you from start to finish. How do I make sure I have a diverse pool of applicants? How do I make sure I have a process in place, so that I am not just arbitrarily promoting someone because he's my buddy. And what is the process for compensation again being transparent, so that everybody understands what the rules of the game are? We certainly do not claim to have the answers to all of these. But if you'd like to dive into each one of these categories in a little more depth. We'd absolutely love it if you'd listen to our podcast. Because again, my message here is yes, we have lots of bad actors out there, but we also have lots of solutions, and if we can get people to pay attention to the solutions, because frankly, I'm not sure law can fix it at this level. Well, as I tell people, they never want to be

in the accident. It's a personal injury accident where they actually need a lawyer. Right? We'd rather have the culture that everyone can respond to, to begin with in a positive manner.

So, the parity prescription, I'll just say briefly, stop trying to change women, create diverse teams, recognize unconscious bias, intentionally include and partner with men as allies, and talk about the issues. And there are lots of good resources out there. I've mentioned both of these, most of these already. One other one is the good culture which is the *Leader's Guide to a Workplace that Doesn't Suck*. I just like picking out the fun titles. So, thanks very much. It's an honor to be again. Really an honor to be among this group today.

**David Fleischhacker:** Thank you, Ms. Pollack-Milgate. Great insight on how our workplace can be more conducive environment for equitable success, and I look forward to checking out some of your podcasts, as well as some of the books that you mentioned. Interesting titles, indeed. It looks like we have a couple of minutes for questions. I know that Professor Drobac and others have been in answering some of the questions that have been posed in the Q&A, and our panelists will continue to do so. I wanted to pose one question to the panelists. So, I'm at the Civil Rights Commission, where we have a limited jurisdiction and focus on enforcing the laws as passed by the Indiana General Assembly. But we have, you know, practitioners, students, and others who are listening. What are what are one or two actions that they could take to help kind of break down some of these systemic barriers especially, and move the needle toward greater gender equality in this employment area? We'll go with Professor Drobac first.

**Jennifer Drobac:** Yeah, I'd love to respond to that. The Indiana Code has a provision that specifies that if someone who believes that they've been discriminated against in employment, if they want to avail themselves of the Indiana Civil Rights Act, they have to get the employer to agree in writing to be sued. Guess what, no employers agree to be sued in writing. I mean, that's crazy. And so, the Legislature needs to retract that provision. It stops all use of the Indiana Civil Rights Act. The Indiana Civil Rights Act hasn't kept pace with Title VII for the provision of damages, we're back in the 1964 damage provisions in Indiana. In essence, the Indiana Civil Rights Act is completely meaningless with respect to employment discrimination, and is a joke. You have to use Title VII. If they want a good model they could go to sister states, and a really good one is California's Government Code Section 12, 9, 48. And so, I would encourage Indiana to make haste to demonstrate its dedication to the people who make this economy work.

**David Fleischhacker:** Alright, Thank you. Any of the other professors or you want to chime in?

**Deborah Pollack-Milgate:** I think I gave my answer already. Read, educate yourselves. Answers are out there. People just need to educate themselves and execute. It turns out that's not really hard.

**David Fleischhacker:** Absolutely.

**Nancy Levit:** I'll go ahead. I think you're hearing from the three, of us from Jennifer, from Deborah, from Naomi and June and me, if you want to cap power, if you want to limit the ability of people to rig the system, that requires transparency. It requires establishing the rules of the game in clear and in consistent ways. You know what? When we look back in history we can go even further back than you, Jennifer. When you look back in history to like 1929, it was a remarkable period of relative economic equality. The New Deal came in, because when for Franklin Roosevelt took office, he was discrediting the finance czars, who'd produced the stock market crash of 1929, and you know what opened their eyes. It was revelation of the outside pay of a million dollars a year in 1929. That's what generated the shockwaves across America, if we have to route the sort of revelation of the disparities between CEO and average worker pay, and it would be really interesting to do that. If that that deep dive in Indiana, what are your statistics? I think that can also galvanize attention.

**David Fleischhacker:** Absolutely, absolutely. Alright. Well, that concludes our time for the women and employment panel. Participants will have access to the PowerPoint slides sometime after today's event has concluded. Thank you, Professors Drobac, Cahn, Carbone, and Levit, and Ms. Pollack-Milgate for your insightful informative and timely information today, and thank you to all the participants who joined us today. I'll now turn it back over to Gabriela.

**Gabriela Ocampo:** Thank you so much, David. What a powerful house of a panel! We're gonna take a 5-minute break and we'll be back by 12:00. Thank you, everyone.

DEAN KAREN BRAVO AND KEYNOTE SPEAKER

>>> 12:05 PM

**Gabriela Ocampo:** Alright everybody, welcome back. Right now, we're going to start our keynote Speaker, and Dean Bravo, the Dean of the IU McKinney School of Law, will be introducing her. Dean Bravo is also the Gerald L. Bepko Professor of Law. Dean Bravo, take it away, please.

**Dean Bravo:** Thank you, Gabriela. Good afternoon, everyone. I'm Karen Bravo, the Dean of IU McKinney School of Law and the Gerald L. Bepko Professor of Law. As a scholar of international law, I have studied and published several articles and book chapters on the subject of human trafficking. My work

in this area has shown me the need for more public awareness of various issues surrounding human trafficking. For this reason, I'm very excited to introduce the symposium's keynote Speaker: Julie Dahlstrom.

Professor Dahlstrom is a Clinical Associate Professor and Director of the Immigrants' Rights and Human Trafficking Program at Boston University School of Law. She founded the Human Trafficking Clinic, the second law school clinic in the United States to represent trafficking victims. In 2014, that clinic was recognized by Pre-law Magazine as one of the Nation's top 25 most innovative clinical programs. Her research looks at the evolution of human trafficking law in the United States exploring the ways in which litigators have mobilized human trafficking law in different contexts. Her articles have been published in leading journals, including the *California Law Review*, *UC Davis Law Review*, and *UC Irvine Law Review*. Professor Dahlstrom teaches in the areas of immigration, human trafficking, public interest, and gender-based violence. She speaks nationally on the topic of human trafficking, including for the National Association of Attorneys General, the National Sexual Violence Conference, the Massachusetts Victim Assistance Advanced Academy, and the National Attorney General Training and Research Institute. She is a thought leader on issues of human trafficking and immigration reform, and has published opinion pieces in *The Hill*, *Cognoscenti*, and the *Los Angeles Times*, among other publications. I hope that you will find her presentation, "The Anti-Trafficking Cause: The Evolution, and Limitations of Legal Responses to Trafficking and Women," to be both thought provoking and informative. Welcome, Professor Dahlstrom.

**Julie Dahlstrom (BU Law, she/her):** Thank you so much, Dean Bravo! It is wonderful to see all of you, and I just want to thank Dean Bravo specifically for all of her contributions in the field. It means so much to have her introducing me and to be a part of this really important symposium. So, I'm gonna go ahead and start by sharing my slides and also for sharing. Thanks again to the Indiana International and Comparative Law Review, and specifically the tremendous organizers that you have already heard from today: Jessie Walker, Lizzie Ford, Gabriela Ocampo, and Hannah Rarick. And thanks to the many panelists for this rich discussion. I know that I've already learned a lot.

So, before I get into the substance of the remarks today, I want to tell you how I came to this work of representing trafficking survivors which I've been doing for about the past 15 years. I have to say, I embarked on this practice a bit by accident. At the time, I was a practicing immigration lawyer representing clients and humanitarian claims, and I started to see human trafficking cases in my day-to-day practice that were left unidentified. In fact, one day a teacher brought in a young woman who was a domestic worker and didn't have access to her passport or other documents. And naively, I thought there are robust legal protections in this area, perhaps unlike other areas of immigration or other in

areas of law generally, and the pathway to immigration relief should be relatively straightforward.

And that misconception started off my journey into trafficking law, where I found that this survivor, like many sense, would instead face tremendous challenges, especially when navigating the interconnected systems designed to “protect her.” From the law enforcement officers who interrogated her, to the labor officials who sought to calculate her wages, to also the immigration officials who adjudicated her application for a special T-Visa that is designed for trafficking survivors. She faced pervasive misconceptions, stigma, and bias that would punctuate her journey to legal relief. It would ultimately take years for her rights to be vindicated and that was with access to a lawyer and many other resources that which many are never afforded.

Since that first case in teaching and in practice, I’ve thought deeply about trends about best practices, and also about the evolving meaning of trafficking, and I hope to share a little bit about that today, and to learn from all of you throughout this conference. So, today my talk will focus on trafficking of women and girls internationally, particularly using the term female broadly to refer to those who identify as female. It reflects on CEDAW’s prohibition against trafficking in women and girls which is enshrined in Article Six and the continued commitment by the CEDAW Committee to combat trafficking and also to refine legal approaches. In 2020 decades after CEDAW was a was adopted, the committee made this important statement. The committee indicated it advances a life free from being traffic, and that that must be recognized as a human right. States Parties, they said, must pursue all appropriate means to eradicate trafficking and exploitation of prostitution, to ensure that laws systems regulations and funding are in place to make the realization of that right effective rather than illusory.

So, initially, the statement may seem relatively straightforward and uncontroversial. But stepping back, one might find it a bit strange. Looking at the state of both international and domestic legal efforts to address trafficking in 2020. You might observe that while anti- trafficking efforts are admittedly uneven and imperfect, there is a relatively developed international, and for many countries domestic, legal framework. There’s substantial international and domestic funding aimed at eradicating trafficking. And there’s also almost uniform condemnation from international bodies and world leaders. Yet, trafficking persists and proliferates with rights of trafficking survivors often is this quote states they illusory.

So, my talk today will examine why. Why does trafficking persist in the right rights of trafficking survivors remain often unrealized, despite persistent attention by the international community? How does trafficking manifest now, and what are some of the most pressing legal concerns? And, finally, what are the limits in international and domestic law in addressing this global problem? These are incredibly difficult questions, incapable of comprehensive answers in the time we have together. So, my hope is just to highlight a few key tensions

and themes, and if you take away anything from my talk, I hope you take 2 lessons. First, it is that legal responses continue to evolve thank thankfully. And I think you've seen that throughout today's conference, and that current law students and future lawyers can and will have an important role in continuing to re-envision and refine anti trafficking responses. And, second, we need intersectional responses, like those embodied in this very conference, that grapple deeply with the underlying structural routes of trafficking and openly connect discussion about gender-based violence with questions of access to education, reproductive justice, work and rights. Symposiums like this are an important step forward, and I'm so delighted that we're here today.

So, I'm gonna start by clarifying terminology. What is trafficking? The term human trafficking may seem pretty self-evident. We see images of trafficking in the popular media quite a lot, and most people think they have a sense of what trafficking is. A few examples in the United States context. Trafficking includes the conduct of Raymond Jeffries. For almost 10 years Jeffries and others trafficked women and minor girls throughout Massachusetts and neighboring States. They targeted girls and women, including those who lacked financial resources, were unhoused, and had substance abuse issues. And eventually he and others were convicted and sentenced to 20 years for sex trafficking offenses. It is the labor, trafficking conduct of a couple in a gated community in Stockton, California, who brought a domestic worker from India to the to the United States, and made her work 18 hours per day, paying her no money, threatening to deport her if she stepped forward. These allegations only came to light when she suddenly managed to appear at the Stockton police department. And the employers were later, after many years, convicted of forced labor charges, and imprisoned, convicted, and sentenced to 188 months in prison. And it is, of course, the conduct of Jeffrey Epstein. Now infamous financier here, who recruited young women to provide commercial sex. So, these are examples in the US context, but we see the trafficking over 20 years after it was defined internationally, which we'll speak about in just a minute, persist in global proportions. It often thrives amidst war and conflict, UN special representative, Pramila Patten, in 2022 pointed out how Russia's war has created a "human trafficking crisis". She called it a crisis within a crisis, calling for a coordinated regional approach to address trafficking. Many news outlets have highlighted the proliferation of sexual exploitation involving Ukrainian refugees, and others have noted how Ukrainians, both within and outside of Ukraine, especially those from marginalized groups, are vulnerable to labor exploitation, particularly women and girls. In reporting from the PBS News hour, Regina described how she received an online offer of rent, free accommodation in exchange for housework and sex with the host, and she says she feels the fear and discomfort of objectification in daily life. Another refugee, Tatiana explained that weeks after weeks, month after month, "I was waiting for payment, but they paid me just a small part of what I was owed, and in the end, it was all empty promises". The company thinks that they can fool us just because we are Ukrainian.

Other new forms of trafficking have proliferated, fueled by the Internet. A recent undercover investigation by BBC News Arabic found that domestic workers, many from Northern Africa were bought and sold online using apps by well-known media technology companies in a booming black market to employers in Kuwait and elsewhere, where their passports were taken, and many were subject to abuse. Some of this was taken out, was carried out on Facebook's own Instagram where posts had been promoted via algorithmic boosted hashtags. And looking at culpability international organizations pointed not only to the perpetrators but also to the technology companies themselves.

Urmila Bhoola said, "What they are doing is promoting an online slave market," calling for accountability against companies like Google. Increased migration also continues to facilitate vulnerability to trafficking. For example, a report by the international organization on migration highlighted the prolific trafficking in women and girls from Nigeria to Italy estimating that about 80% of Nigerian women and girls arriving by sea in Italy in 2016 and forward are likely survivors of sex trafficking. The report also highlighted the prolific challenges for women seeking to leave exploitation where fear of deportation, debt, or stigma prevents them often from seeking help.

One representative story from the report described what Precious, who was 17 years of age when encountered, noting that she contacted a Nigerian woman who is waiting for her in Italy, so that she could find employment in her beauty salon. But, contrary to what she was promised, precious was forced into prostitution when she saw law enforcement agents approaching her, she called her trafficker, asking her what to do. The latter urged her to run to avoid repatriation.

So, we know that trafficking persists globally, and while it can impact anyone, including men, statistics indicate that it disproportionately impacts those who identify as women: women, girls, transgender women, and also LGBTQ+ individuals. Now, estimates are difficult and often unreliable, but the international labor organization estimated that the number of individuals in quote modern slavery has risen in the last 5 years with 49.6 million people in modern slavery in 2021, 27.6 million in forced labor and 22 million in forced marriage. So, we know that trafficking continues to be prevalent despite profound, almost uniform, condemnation of the conduct.

Feminist organizer and scholar, Catharine MacKinnon, in describing the often-conflicting feminist viewpoints on trafficking noted, "no one defense trafficking there's no pro-sex trafficking position any more than there is a public pro slavery position for labor these days." And little has changed. President Biden in January 2023 unequivocally spoke out about human trafficking, noting that "around the world, human trafficking has stripped nearly 25 million people of their safety, dignity, and liberty, disproportionately affecting historically underserved and marginalized communities. And world leaders have similarly condemned trafficking and offered strong opposition, opposition that often is bipartisan in the United States.

But what exactly are world leaders condemning? First, what is trafficking? The meaning of trafficking despite this consensus has not always been apparent, and, in fact, has been historically contested. Slavery has been a concept since the beginning of time, but trafficking is a relatively new legal concept and has been the source of feminist battles with dominance feminists and others advocating for broader definitional frameworks to trafficking, opposed by intersectional or choice feminists who sought to distinguish sex work from more limited conceptions of trafficking. And indeed, efforts to eradicate trafficking in the twentieth century often emerge from a quite racialized and gendered legacy with advocates in the early twentieth century, often connecting concerns about trafficking to discourse about white slavery and centering narratives of white or Western European women in commercial sex, and coupling them with popularized narratives of kidnapping violence, rescue, and escape. Ultimately trafficking was defined in 2000 in international law, through the trafficking protocol, in gender neutral terms, and since then many countries have come to criminalize it and define it in slightly different ways. Regardless of how these lines are drawn, the concept now includes both labor and sex trafficking. And contrary to what many do think, the trafficking does not require transportation. Instead, it really refers to this unique form of exploitation, whether in the context of commercial sex, or more broadly, in various types of labor markets ranging from domestic work, nannies and housekeepers and domestic workers to carnivals, restaurants and factories.

Efforts to define and combat trafficking took a number of forms internationally. It was the address by a range of international instruments in the 1900s, again focusing primarily on white slavery and sex trafficking of women and girls. Then addressed in distinct conventions relevant for today CEDAW and the Conventions on the Rights of the Child. In Article 6 of CEDAW, those drafters called for States parties to take all appropriate measures, including legislation, to suppress all forms of trafficking in women. But finally, trafficking was not defined until 2000 under the protocol to prevent, suppress, and punish trafficking in persons, especially women and children, which supplemented the UN Convention on the transnational, organized crime. This solidified the approach of trafficking as one embedded in efforts to address crime, and some argued, not in efforts to address this as a human rights issue, and also in solidified a prosecutorial approach that continues to this day.

So, what does trafficking mean? Just briefly. In the in the trafficking protocol, Section 3(a) lays out the definition of trafficking, providing a very broad framework focusing on actions, so, you see here, recruitment, transportation, transfer, harboring, means which can include such diffuse means as the abuse of power or position of vulnerability, and the purpose of exploitation which itself was not defined concretely in the protocol. So, the Protocol has been subject to some critique for lacking a concrete human rights enforcement mechanism, and instead encouraging States parties to enact legislation, and also for providing a broad, often ambiguous in some spaces,



legal framework. However, many agree that it has had an important, tremendous effect, promoting a shared understanding of trafficking, and also pushing States parties to adopt domestic legislation. As legal scholar Anne Gallagher has noted, “Without the Protocol, it is likely that the human rights system would have continued its shameful tradition of sidelining issues of forced labor, forced sex, forced marriage, and the ritual exploitation of migrant workers through debt.” Most critically, the Protocol provided the impetus and the template for a series of legal and political developments that overtime have served to ameliorate some of its greatest weaknesses, including the lack of human rights protections and of a credible oversight mechanism. As a result of the protocol, the international community’s response to trafficking has grown more pronounced with many countries and regions, adopting legislation, protocols to address trafficking, adding texture and substance to these provisions designed to provide rights to Survivors.

Navi Pillay, in 2010, noted, “over the past decade, human trafficking has moved from the margins to the mainstream of international concern as we witness the rapid development of a comprehensive legal framework that comprises both international and regional treaties, as well as a broad range of soft law Instruments related to trafficking. These represent a fundamental shift that has taken place in how the international community thinks about human exploitation.” And that is indeed true. These legal developments have had tremendous value which have been greatly uneven in different countries. But I’ll focus on the United States as an example.

In the US, since 2000 we have seen legislation, and passed reauthorizations acts as well, that have criminalized forms of sex and labor trafficking that have established a broad civil remedy for survivors of trafficking including fairly generous provisions around third-party liability. All 50 States have now passed anti-trafficking legislation, some much more comprehensive than their federal counterparts and States have passed statutes to vacate or expunge criminal convictions related to trafficking and provide for affirmative defenses. There have also been proactive efforts to expand victim compensation, criminal restitution, and proactive efforts, especially in in California, to address supply chain issues and think about and promote transparency among other provisions. So, I’ve written about how these provisions in many ways have provided groundbreaking rights to survivors of trafficking. As one example in the United States, legal responses have permitted survivors to file new groundbreaking civil lawsuits, not only against perpetrators, but also against a wide range of third parties, that knowingly benefit from trafficking.

As an example of one of these lawsuits, in 2022, a Federal Jury in Texas awarded a Cambodian woman 1.76 million after finding a Rockport couple illegally trafficked her to the United States and forced her to work in a donut shop. Council for the survivor, Jones Yvonne, marveled at how many people don’t believe the trafficking can exist in the United States. But this this is why

it is tremendously important that survivors are able to step forward and claim their rights and compensation. She's not alone.

Civil lawsuits have risen dramatically in the United States under trafficking statutes. According to the trafficking, Human Trafficking Legal Center, the number of federal civil trafficking lawsuits has increased steadily each year from 2003 to 2021, with the exception of 2020, with where there was a brief drop, and as of 2021 plaintiffs had brought a total of 539 Federal cases under the federal private right of action, and they had also filed 13 times as many cases in 2021 than they had in in 2004. Similar lawsuits have been filed against third parties like hotel chains, private detention centers, and others. According to the Legal Center, the number of cases brought against corporate defendants has continued to increase as of 2021. The vast majority of federal civil anti trafficking cases have included at least one corporate defendant with many defendants, including universities, website staffing agencies, and other corporate entities. And apart from these wins, and in the context of civil litigation advocates, advocates and survivors have celebrated other important victories which I'm happy to talk about in Q.& A. They've charted out avenues for immigration, relief for immigrant survivors, and also important remedies for survivors who are charged with crimes.

However, profound challenges remain in this space, as in the others described by the panelists. And many scholars and advocates have critiqued the ongoing and evolving trafficking legal framework. So, while there are a myriad of critiques, I'm just going to focus on two primary concerns in my remarks. One is the danger of an expansive, trafficking framework which Professor Janie Chuang has dubbed "exploitation creep" and the persistence of a prosecutorial approach which censors criminal legal responses and often disproportionately can penalize women of color and LGBTIQ individuals. So, alongside the development of the international framework embodied in that trafficking protocol scholars have critiqued the broad, definitional framework of trafficking. Professor Janie Chuang, in her 2014 law review article, argued that the expansive definition has led to what she calls "exploitation creep," which she is defined as quote efforts to expand previously narrow legal categories, at least in terms of rhetoric and policy, but in some cases, also in hard law, in a strategic bid to subject a broader range of practices to a greater amount of public. She's observed that the expansion of trafficking can include, in her estimations, inclusion of forced labor, more subtle forms of a of psychological coercion, and noted how it now does not require transportation. But since she published this article in 2014, we've seen new examples in practice of this widening. An example is trafficking statutes, reaching new third parties, including hotels and others. State legislation in some States, including Massachusetts where I'm located, to include all commercial sex as trafficking and to provide for harsh criminal penalties in that context. and legal efforts aimed at expanding, trafficking, to subsume other forms of sexual assault and domestic violence.

And there is a great value to widening interpretations, but there's also some collateral consequences that are important to consider as the standard evolves. So, it's true that the previously narrow legal categories often constrain who receives protections or rights. In fact, you know, I run a clinic. We're often representing clients to advocate for a broadening of legal standards and interpretations. It allows litigators and survivors to benefit from moral condemnation associated with trafficking generous provisions around civil damages and other benefits, and it prompts action sometimes, which has been lacking or slow. But it's also important to acknowledge and mitigate some of the risks of broadening trafficking approaches.

As the concept of trafficking expands, there are also challenges. First, the concept can be more easily manipulated by politicians and policymakers in instrumental ways to promote anti-migration or other enforcement initiatives that can harm survivors. This was borne out under the Trump administration, as President Trump threatened to bring the full force of the US Government to address "trafficking concerns" defined broadly and used his power to engage in immigration enforcement efforts that often ultimately made non-citizens more vulnerable to abuse and exploitation. Also, as trafficking widens, there is a risk that broad statutes and trap the very victims they seem they seek to assess.

So, one example of this broadening or state efforts in the US, as I mentioned, that have broad sex trafficking statutes, and while these do in bold and prosecutors to build cases without cumbersome you know, victim testimony, and without survivors having to step forward, they also allow prosecutors to charge survivors themselves with trafficking crimes and vest tremendous discretion at the hands of prosecutors. And ultimately some of the moves to broaden and expand trafficking are responding to some of the mentions earlier about anti-discrimination claims not being as generous, and litigators are moving to invoke the trafficking frame. But I argue that we also need to look at those frames, the claims that aren't moving forward in other contexts, and address those legal barriers as well.

So, alongside the broadening trafficking framework is also a question about the efficacy of a predominantly still prosecutorial approach to trafficking, which many find has displaced focus on structural causes of trafficking. Kate Mogulescu and Abigail Swenson persuasively have observed that common calls to action around human trafficking continue to urge greater law, enforcement, action, and attention increased to rest of traffickers and more prosecutions. In many instances the prosecution-based model reveals itself as antithetical to principles of human and civil rights, ignores the reality that many trafficking survivors confront, and redirects the conversation away from important critique and reform. It's true that the focus on criminal outcomes as "success" in the anti-trafficking cause has often encouraged arrest and conviction with less attention to survivor autonomy, and also addressing the underlying structural causes.

And I'll provide a brief example from our work. I'm going to share a story largely based on a client who we represented. I've changed some key aspects to

protect confidentiality. She also gave me her permission to use this story because she wanted others to understand the true challenges that survivors may face in accessing their rights. Melissa was a child when she entered the United States. She lived with extended family, but everything changed when she received news that her father had been killed abroad. She was in middle school. After his death, she found it difficult to focus on school, started to hang out with different kids, and was a victim of sexual abuse. Things started to become more difficult, and she found herself unhoused.

Although her family had immigration papers, she didn't have family support, or a lawyer to navigate that process. She had no way to support herself, and later her young child. She started engaging in sex for money to support herself, and as time went on, she found a boyfriend, who ended up being violent and made her work with him. One day she was targeted by a trafficking raid. She was arrested and detained. Her boyfriend had always made her fear immigration, and it was coming true. She was terrified that she would be deported. She was eventually referred to our program and came into our office, and we told her about these immigration protections, about avenues to vacate convictions. But she was insistent: "I'm not a victim. I'm not going to work with law enforcement." She told us about the systems with which she had engaged in the past, and how they had failed her. The police, the "child protection system," the immigration system, and she wanted no part in these systems, but she also didn't want to be deported.

Although her family had gotten immigration papers, she did not have an attorney to work on her case. We had to address outstanding warrants and other jurisdictions, engage with barriers to get her stable housing, consider how to regain custody of her children, and prioritize her desire not to participate in the criminal prosecution. At times it sounded like that was not going to be possible, despite the fact of these systems that were designed to provide her with benefits. As an example, even though she qualified for the immigration benefit, we received a request indicating that she needed to show why discretion should be exercised on her behalf despite countless letters and evidence in her file. Remarkably, years later, she now has immigration status, she's out of deportation proceedings, and has been a survivor advocate helping others. But this was despite the odds, and often, despite those systems that were enacted to protect her.

And her story is not unique. It highlights continued challenges the proliferation of systems, of solutions that are embedded in the criminal system, the fact that survivors remain often criminalized and often do not self-identify, and the profound systemic barriers that individuals face when exiting out of exploitation, and of relevance to this symposium, the lack of intersectionality, and responses to the fact that survivors often have to navigate multiple legal systems where they encounter stigma, discrimination, and more. And so, what does that mean for the future of anti-trafficking reform? It means that much more is needed for the legal system to function for survivors, and to offer viable

options for exit. In the next wave of reform, there's a need for more nuanced intersectional responses to trafficking once the decenter criminal responses and ensure non-criminal criminalization. Also, there's also a need to prioritize survivor-centered remedies like civil litigation, compensation, restitution. Thankfully, CEDAW, the CEDAW Committee, and Recommendation 38 has reinforced those approaches. The committee notes that criminal law is alone unable to address or redress the crime of trafficking, due to uneven harmonization of laws, including the definition of trafficking both between countries and within countries. The complexity of financial operations, and the powerlessness of justice systems. An effective anti-trafficking response relies on ensuring that women and girls are able to exercise their fundamental rights. And this is no doubt true. Unfortunately, often criminal legal responses have ensnared victims.

Let's return to the beginning of the presentation and the case that I mentioned. In this case, what you didn't see is that there were two survivors deemed defendants who are charged alongside Jeffrey's in this case. And this is also important for us to realize what sex trafficking looks like. These two survivors, according to Court pleading, were both subject to violence and coercion, had children with the defendant, and yet, were charged with trafficking. Charges that, because of the lack of any system for federal vacature in the United States, will never be erased from their record, or at least, not for now. Charges that did nothing to address the root causes of trafficking they experienced and instead will deepen the stigma and vulnerability that they experience as they navigate their lives. And unfortunately, this isn't, common.

According to a recent study from the UN office of drugs and crime, women, and girls represent a majority of human trafficking survivors. But they also make up a large portion of those prosecuted for trafficking related crimes. The study notes, for example, that while most countries report female offenders accounted for less than 15% of total crimes charged, 30% of trafficking cases involve female defendants. And the report also found that traffickers themselves use survivors to shield themselves from prosecution. But there is good news on the horizon. International legal responses are evolving to incorporate these principles, especially around non criminalization. The High Commissioner for Human Rights recently recommended principles and guidelines outlining this concept and calling on States to consider, "ensuring that legislation prevents traffic persons from being prosecuted, detained, or punished."

What does this mean further, in the United States and elsewhere? It means providing for more expansive duress or coercion defenses for a wide range of crimes not just for sex, for fee, or related issues. It means expanding post-conviction relief for trafficking survivors, including the right to federal vacature. It also means, as the CEDAW Committee has noted, ensuring that innocent women and girls, this is in quotes, "are not arbitrarily arrested, abused, or falsely charged including in trafficking raids." It means that Melissa should not have been arrested in the trafficking sting. In fact, she should not have been arrested

at all. It means that she should have been able to vacate her existing criminal record related to trafficking. It also means that she should not have been held in immigration detention and should have had easy access to immigration relief. She should be able to reunify with her children, and she should have access to victim compensation and civil remedies. And the CEDAW committee adds substance to that framework.

So where do we go from here? As you've seen, early efforts importantly focused on defining the problem of trafficking and encouraging domestic anti trafficking legislation. Efforts that essentially were very important in a in developing a shared consensus of the problem. Yet now anti-trafficking legal advocates, scholars, and law students in the audience today have to do more. They have to address the legacy of these imperfect legal responses. They have to refine existing remedies and bolster intersectional responses. And finally, many have pointed to the need for an approach that centers education, labor rights, anti-discrimination, principles, and reproductive rights, and an approach that has yet to be fully realized, but it's embodied in the structure and the aspirations of CEDAW. Those efforts are incredibly important to ensure that anti trafficking responses themselves don't reinforce a subordination or vulnerability. So, I'll end with the quote that began this presentation. Much is needed for us to ensure that the right to be free from exploitation is effective and not illusory. What we need now is not a hammer, but more nuanced legal tools, and a recognition too of where the limits of the law may be, of areas where access to housing work, economic rights, are key to fill in these gaps, and admittedly, much time is passed in CEDAW, but returning to the aspirations behind it, are key to this endeavor. And I'm excited with many of you in this room, to begin to answer those difficult questions, and to see what your role is in sort of re-envisioning these answers. So, thank you very much.

**Lizzie Ford:** Thank you, Professor Dahlstrom. We're going to move into a Q&A portion, and I'll be assisting with the Q&A. So, we have some questions in the Q&A. The first question is "How do you suggest that the global community make global trafficking laws enforceable in countries where the domestic legal regime is not necessarily as focused on trafficking as in the United States?"

**Julie Dahlstrom (BU Law, she/her):** This is a great question. So much of as I mentioned, much of the work internationally is focused on in acting domestic legislation. I think you know many countries there is an effort. If there isn't already anti-trafficking laws, there is some nascent enforcement of trafficking laws. There have been organizations that have worked abroad like the Trafficking Institute in bolstering those approaches and providing training to prosecutors when there is trafficking statute already, but perhaps it's being underused or under prosecuted. I also think we need to rely one of the exciting parts of the anti-trafficking movement is that survivor led initiatives have been

tremendously successful. And so, I think you know, part of this also is engaging in those communities with survivors, with how they see solutions impacting them, and how statutes or criminalization might impact them as well to build consensus around new ways forward.

**Lizzie Ford:** Sounds like you had quite the examples for that question. You were ready to go with that. My next question says, “Prior to your presentation, I wrongfully assumed that violence has to be involved in human trafficking, or the human trafficking victims are limited to foreign nations or immigrants. Since the Trafficking Victims Protection Act of 2000 includes both US citizens and foreign nationals, do you feel that this more inclusive definition, while broad, has had the desired effect on protecting human victims?”

**Julie Dahlstrom (BU Law, she/her):** Yes, so I do think you make an important point. So, trafficking can impact US citizens, non-citizens. And the framework in the US, which we didn’t talk as much about was also passed in 2000 when the trafficking protocol occurred, the Trafficking Victims Protection Act, and it applies to US citizens and non-citizens. I think that’s tremendously important. Trafficking is an issue that does impact a wide variety of people, and it’s important that it does recognize subtle forms of coercion which it does both in the sex and the labor trafficking context. So those things are important. I think we still want to watch at the edges of about the expansion of the kind concept as it’s assuming other legal concepts and sort of blocking or obscuring where reform is needed. But great to point that out too.

**Lizzie Ford:** Thank you. Our next question. It says you mentioned remedies for those women convicted of trafficking offenses. Can you give an example of what that might look like?

**Julie Dahlstrom (BU Law, she/her):** This is a great question. So, in many, many states of past statutes, to either vacate, expunge, or seal criminal convictions that were related to the trafficking because we know that survivors of sex trafficking or labor trafficking may be criminalized at different stages. They may be charged with crimes. They might relate to the underlying commercial sex, but they might not. I think we’re also seeing that individuals may be charged with larceny, or even more serious offenses. And so many States have passed statutes to allow those individuals to go into court and to vacate or expunge, to erase essentially that criminal record. That is not the case currently for federal offenses, so there is no federal right to vacate offenses. There have been efforts, though to do that, and I think it’s tremendously important because for the individuals I mentioned, although ultimately, they were charged with trafficking, they were not convicted of trafficking. They pleaded down to other offenses, but that trafficking charge will remain on their record, and will impact likely access to employment to other benefits.

**Lizzie Ford:** Kind of going off of that talking about how those federal offenses stay with those convicted of trafficking offenses, even though they might have been victims in the situation themselves in their own ways. Do you think there might be like some recidivism back into trafficking because they feel stuck?

**Julie Dahlstrom (BU Law, she/her):** Great question, you know, I think I referenced earlier in the talk language that often emerges in the trafficking discourse around rescue or escape, or that views the conduct, as you know, is one point of sort of where an individual is able to exit out, and often there's not a linear path, because, unless we address the underlying structural barriers that are in place, like access to education, work, I mean many of the issues that this conference is discrimination, you know, is addressing, then that that underlying vulnerability remains.

**Lizzie Ford:** Yeah, it definitely sounds like it's kind of a loop that people can get stuck in. My next question you talked about the positive aspects of having kind of a broad definition of trafficking. But at the same time, I think there's this movement of, you know, recognizing consensual sex work as not crime or something to be ashamed of and can be very empowering. How does the law reconcile those? The broad definition but still allowing consensual sex work.

**Julie Dahlstrom (BU Law, she/her):** Yes, it's interesting, I mean, in some ways trafficking law has grappled with this from its inception with different feminist advocates having different conceptions of what trafficking should look like, should trafficking include any engagement and commercial sex? Or is it a more limited form of relief for particular type of exploitation and separated from sex work as you, as you mentioned. Currently in the US, in most jurisdictions, engaging commercial sex is criminalized. There is definitely a movement, both in terms of reducing stigma, but also to decriminalize, and that is a foot, but often that would not. Well, it depends, and it depends on different jurisdictions, but that might not displace federal trafficking laws which still exist.

**Lizzie Ford:** Yes. I think that's a good thing to keep in mind, and a good way to approach the framework, because I know for me kind of listening to your presentation, I was like well, how would that work? So, I appreciate that you've really thought of the nuances of that.

**Julie Dahlstrom (BU Law, she/her):** Well, if I could just add one thing that that your question brings up that, I think is quite interesting in this context is as the example I gave. Often individuals are navigating these complex legal systems but also legal systems that embody these disparate tendencies. So, in immigration law, yes, we say you could get it T-Visa if you are a survivor of trafficking, but we also there's an in a ground of inadmissibility that you can't



get a benefit if you've been engaged in commercial sex, and both of those tendencies remain embedded in the law. There are ways to reconcile them, but we see that in criminal law, too, right trafficking is a crime, and yet commercial sex is still criminalized even for those who may be survivors. So, I think there is very much a need to reconcile those challenges embedded in the law.

**Lizzie Ford:** Yeah, definitely. The next question I have. I have someone from the audience who says: "I am curious about your thoughts on the international responsibility of the United States, for how immigration policies affect trafficking in other countries."

**Julie Dahlstrom (BU Law, she/her):** Effect of trafficking in other countries? Yes. Well, this is interesting. I would love to say more about the even, the how the US. Think about immigration and its intersection with trafficking domestically, which I'll just say what we briefly what we have seen over the last period of years is increased denial rates for survival immigrant survivors of trafficking within the United States. We just recently published a report on that trend, and noting why that might be happening, so happy to share more on that. So, that's a note just to say that we are doing this work, we aren't necessarily always the model in certain aspects. But in terms of how we think about this issue abroad, the US does publish a trafficking persons reports where they comment about the status of trafficking and trafficking prosecution, prevention, and protection efforts abroad. Those reports have also been subject to critique the question of, you know, is the US in the position to provide that commentary. But those do provide an overlay to how trafficking efforts are going, and they also place individuals in different tiers and that does impact diplomacy efforts as well.

**Lizzie Ford:** It's interesting that you say that it's kind of and we're kind of unsure if the US is in a place to really give an opinion on that commentary, can you talk about you know arguments for and against whether the US would be in a good position to do that?

**Julie Dahlstrom (BU Law, she/her):** Yeah. I mean, I think, as I mentioned in the in the presentation, in many ways there is this robust legal framework in the US which is a model. Yes, there are still profound challenges in terms of how that model is applied, and the persistence of trafficking. And so, you know, while well, I think we want to see, for example, civil legal remedies developed in other countries, or become more robust there are also aspects of the US. Policy that we probably do not want to see replicated abroad like the arrest of survivors, or, you know, being charged with trafficking crimes.

**Lizzie Ford:** And do you think that if we were to, we as United States, are a party to a lot of international treaties, but we don't ratify a lot of them. Do you

think that ratifying the treaties like CEDAW and the other treaties you mentioned might assist us in being more of a leader in in this area of combatting trafficking?

**Julie Dahlstrom (BU Law, she/her):** What a great way to end this conference! I mean absolutely. I think, that, you know it would be nice for the for the United States to take a leadership role, and to also acknowledge in the context of CEDAW the interconnected nature of aspects of discrimination work and you know, employment all of these pieces that we've spoken about today to trafficking to gender-based violence. This is not an issue where we're going to be able to, you know, criminalize it, and it will go away right. We need really intersectional responses, and we need to be a leader in that space.

**Lizzie Ford:** Yeah, yeah, I think that's the hard part of looking at how we handle treaties and with our government, and just kind of trying to reconcile that and reconcile kind of all the different views on the issue. Well, that is what I have for the Q&A section. Thank you so much again, Professor Dahlstrom, for presenting and talking about this very important topic.

**Julie Dahlstrom (BU Law, she/her):** Many thanks to you and the organizers for this excellent symposium.

**Lizzie Ford:** Well, thank you. That brings us to the end of our symposium. We ended just a few minutes early, but we hope you all enjoyed it.

>>> 12:56 PM