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WHO NEEDS LEGISLATORS? DISCRIMINATION AGAINST SEX WORKERS IS SEX DISCRIMINATION UNDER TITLE VII

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ABSTRACT

Over the last several years, public discourse around sex work has dramatically increased. New York State and Washington, D.C. have both introduced legislation to decriminalize prostitution during the 2019 legislative sessions; the California public voted down Proposition 60 in 2016, which would have opened up egregious civil liability to adult film performers; and countless civil society organizations have recently, and publicly, committed to ending the human rights violations that those involved in the sex trade experience. Despite this attention towards legal reform, sex workers have—and will continue to—experience rampant discrimination in non-sex work employment. This Note argues that discrimination against sex workers is sex discrimination under Title VII. Specifically, because most sex workers are women, any policy of refusing to hire or retain sex workers will have a disparate impact based on sex and is, therefore, an impermissible employment practice under federal law.

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I. INTRODUCTION

N'jaila was studying communications as an undergraduate student at Rutgers University in Newark.[1] Paying for school on her own, she worked for a local bookstore to help with some of the mounting debt. She was personable with customers, sold more books than any other sales representative, and performed her job well. Yet when N'jaila applied for an assistant manager position her employer laughed and told her, "people know what you do."[2] The reference, obvious to N'jaila, was about her second job as an exotic dancer.

Even after earning her university degree, N'jaila continued to perform sex work out of necessity. N'jaila felt consistently exploited by many non-sex work employers as they took advantage of her labor without proper compensation and worked her beyond capacity, in part because of the sexism and racism she experienced as a Black and Asian woman. Jobs in the communications field were often not enough to support herself and pay back the debt from her undergraduate degree, so she supplemented her income by working as an exotic dancer, a phone sex operator, and an adult web-camera performer.

When N'jaila found jobs in the communication field that she was passionate about, she would apply, often overqualified for the position. Her interview would go without a hitch—until they performed a

1. Telephone Interview with N'jaila Rhee, Exec. Comm. Member, N.J. Red Umbrella All. (Dec. 29, 2018). The New Jersey Red Umbrella Alliance is New Jersey's only sex worker rights organization. *See* N.J. RED UMBRELLA ALLIANCE, https://njrua.org (last visited Feb. 21, 2019).

2. Telephone Interview with N'jaila Rhee, *supra* note 1.

background check and found all her prior employment with the web-camera and phone-sex operator companies. After that point, it was always silence. She could not get a job because of sex work, but she also could not survive without it.

Even if she tried to be open about her experiences, it ultimately came back to harm her. While working as a consultant as an out sex worker, N'jaila tried to convince a comic book shop owner to stop selling bootlegged pornography because it harms the sex workers that performed in the videos; in response, the owner told her, "I can't believe I'm getting an ethics lesson from a whore," and terminated the contract with her.[3] In another position working in the corporate world, N'jaila discovered a co-worker had also done sex work and hoped to find solidarity with this discovery. Instead, that person ended up perpetuating some of the most harmful forms of anti-sex work discrimination because that person was so afraid of being outed as a sex worker.[4] As N'jaila put it, "It's ironic that sex work put me through college and gave me all the credentials I need so that [non-sex work] jobs can shit on me."[5]

N'jaila's story is far too common. In Houston, a news reporter for the Houston Chronicle was outed as an exotic dancer and fired.[6] A middle school teacher in California lost her job because her employer found out she performed in adult films.[7] In Michigan, school officials attempted to rescind a teacher's tenure after learning about her prior work as an exotic dancer, despite the teacher working in that school district for twenty

3. *Id.*; *see also* Casey Quinlan, *Why You Should Pay for Porn*, BITCHMEDIA (Apr. 29, 2015, 7:27 PM), https://www.bitchmedia.org/post/why-you-should-pay-for-porn-feminist-porn-report (making the moral and ethical case for why people should pay for the porn that they consume).

4. Societal stigma tends to become internalized, and in some cases, like here, results in a stigmatized person perpetuating the same stigma. *See* Paula Abrams, *Abortion Stigma: The Legacy of* Casey, 35 WOMEN'S RTS. L. REP. 299, 304 (2014) (discussing stigma broadly and in the context of those who sought abortions); Emily Smith, *Sex Work Has a Class Problem*, BUZZFEED NEWS (Jan. 26, 2018, 1:31 PM), https://www.buzzfeednews.com/article/emilysmith/sex-work-class (defining internalized stigma based on class among sex workers as the "whore-archy").

5. Telephone Interview with N'jaila Rhee, *supra* note 1.

6. Rene Lynch, *Texas Stripper (and Reporter) Fights Newspaper Firing*, L.A. TIMES (May 11, 2012, 12:00 AM), http://articles.latimes.com/2012/may/11/nation/la-na-nn-stripper-reporter-lawsuit-20120511.

7. Alex Dobuzinskis, *California Teacher Fired for Porn Films Loses Appeal to Keep Job*, REUTERS (Jan. 26, 2013, 5:55 PM), https://www.reuters.com/article/us-usa-teacher-california/california-teacher-fired-for-porn-films-loses-appeal-to-keep-job-idUSBRE90F1LP20130116; *see also* EJ Dickson, *Fired for Doing Porn: The New Employment Discrimination*, SALON (Oct. 1, 2013, 3:00 AM), https://www.salon.com/2013/09/30/fired_for_doing_porn_the_new_employment_discrimination/ (discussing the employment discrimination people who have been in adult films experience).

years.[8] A sheriff's officer in New Jersey was fired because she refused to apologize for appearing in bondage films and working as a dominatrix.[9] A human trafficking survivor was fired from a non-profit providing services for victims of human trafficking after the organization discovered the person had also consensually done sex work.[10] The New Jersey Red Umbrella Alliance and Best Practices Policy Project, two sex worker's rights organizations, are in the process of conducting a needs assessment about New Jersey sex workers.[11] So far, the findings show that over a quarter of the community have been denied a job outside of the sex trade because of their experience in sex work.[12]

These experiences persist with little repercussion. Without sex work included as an express class under employment non-discrimination laws, it is believed employers will continue to discriminate.[13] Because of this discrimination, N'jaila commented, "people are put in a position where people are afraid to talk about their past employment, but they are also afraid to lie. This all affects work performance."[14] This result could change, however, if discrimination against sex workers fell under the protections prohibiting sex discrimination.

This Note argues that an employer discriminating against an employee for experience in the sex trade is sex discrimination under Title

8. John Tunison, *Teacher Discusses Past as Stripper: 'I Never Anticipated the Backlash'*, GRAND RAPIDS PRESS (Dec. 22, 2010), https://www.mlive.com/news/grand-rapids/2010/12/teacher_discusses_her_past_as.html.

9. David Moye, *New Jersey Cop Fired for Being Dominatrix Says She Was Just Acting*, HUFFPOST (Feb. 14, 2018, 4:38 PM), https://www.huffingtonpost.com/entry/kristen-hyman-dominatrix-cop_us_5a848fc5e4b0058d556575cd.

10. *See* Laura LeMoon, *The Groups "Rescuing" Sex Trafficking Victims Are as Bad as the Pimps*, WEAR YOUR VOICE (Apr. 28, 2017), https://wearyourvoicemag.com/more/social-justice/sex-trafficking-rescue-industry.

11. E-mail from Penelope Saunders, Exec. Dir., Best Practices Policy Project, to Derek Demeri (Feb. 28, 2019, 6:39 EST) (on file with author).

12. *Id.* Participants, in answering this question, stated, "Someone recognized me from a strip club and told my would-be employer" and "[the o]wner of [the] shop saw me at the Club and denied me work." *Id.* Another participant stated, "I was fired when an organization was told by a colleague that I was a sex worker. The organization was the sponsor of my visa (I paid for the visa) and they called immigration 'for their own protection.'" *Id.*

13. *See, e.g.*, Kari Paul, *Why It's Perfectly Legal for Airbnb to Discriminate Against Sex Workers*, VICE (July 18, 2016, 2:00 PM), https://www.vice.com/en_us/article/gvzzkx/why-its-perfectly-legal-for-airbnb-to-discriminate-against-sex-workers ("One major barrier the sex worker rights movement has is that occupation is not a protected category for discrimination . . . . You can be discriminated against based on your occupation."); psalyer, Comment to *I Got Fired for Being a Sex Worker… Is that Right?*, REDDIT, https://www.reddit.com/r/SexWorkers/comments/9xhjlp/i_got_fired_for_being_a_sex_worker_is_that_right/ (last visited Feb. 23, 2019) ("Sex workers are not a protected class and therefore they can fire you for it.").

14. Telephone Interview with N'jaila Rhee, *supra* note 1.

VII's theory of disparate impact. First, Part II of this Note will define sex work and provide a brief overview of what it means to be a sex worker. Part III will then explore the passage of Title VII and provide a basic foundation of the law. Part IV will review how courts have examined sex work under Title VII. Next, Part V will show how discrimination against sex workers has a disparate impact under Title VII's prohibition on sex discrimination.[15] Finally, Part VI will discuss available remedies for showing disparate impact under Title VII and the implications of proving that discrimination against sex workers has a disparate impact based on sex.

II. WHAT IS SEX WORK?

The term "sex work" was first used by activist Carol Leigh in 1978 as a way to describe the myriad of ways people engage in erotic labor.[16] However, the type of work included in the definition of sex work has resulted in some considerable debate.[17] This Note will define sex work as the exchange of sexual services for something of value. This broad definition includes, but is not limited to: prostitution,[18] escorting, domination/submission,[19] sugar babying,[20] adult film performance, exotic

15. Discrimination against sex workers likely also has a disparate impact based on race, as some statistics referenced will suggest. *See generally* Jasmine Sankofa, *From Margin to Center: Sex Work Decriminalization Is a Racial Justice Issue*, AMNESTY INT'L, https://www.amnestyusa.org/from-margin-to-center-sex-work-decriminalization-is-a-racial-justice-issue/ (last visited Oct. 29, 2019).

16. Mattilda Bernstein Sycamore, *"Sex Worker's Unite," by Melinda Chateauvert*, SF GATE (Jan. 10, 2014, 3:42 PM), https://www.sfgate.com/books/article/Sex-Workers-Unite-by-Melinda-Chateauvert-5132503.php.

17. *See, e.g.*, Andrew Poitras, *What Constitutes Sex Work?*, HOPES&FEARS, http://www.hopesandfears.com/hopes/now/question/216863-what-constitutes-sex-work (last visited Feb. 21, 2019) ("[T]here's no such thing as . . . universal labels agreed upon by [the sex trades'] various communities."); *see also infra* note 84.

18. In general, the term "prostitution" should only be understood as a legal term for a crime and use of the term "prostitute" should be replaced with the term "sex worker." *See, e.g.*, EJ Dickson, *Should the AP Stylebook Change 'Prostitute' to 'Sex Worker?'*, THE DAILY DOT (Oct. 15, 2014, 9:30 AM), https://www.dailydot.com/irl/ap-style-guide-sex-worker/.

19. *Cf.* Madeira Darling, *What It's Actually Like Being a Dominatrix (According to One Dominatrix)*, THOUGHT CATALOG (July 14, 2014), https://thoughtcatalog.com/madeira-darling/2014/07/what-its-actually-like-being-a-dominatrix-according-to-one-dominatrix/ (describing her profession as a dominatrix as "hitting, humiliating, dressing up, verbally attacking and otherwise fulfilling men's . . . fantasies about being dominated").

20. *Cf.* Anahita Pardiwalla, *Sugaring: A New Kind of Irresistible*, HUFFPOST (Apr. 20, 2016, 3:13 PM), https://www.huffingtonpost.com/anahita-pardiwalla/post_10274_b_9683356.html (describing sugar babying as the exchange of "riches" for companionship).

dancing, web-camera performance,[21] phone sex operation, and erotic massage. From this definition, a "sex worker" will be defined throughout this Note as a person who has engaged, presently or in the past, in sex work.[22]

Sex workers experience discrimination in a variety of contexts traditionally covered by federal, state, and local anti-discrimination laws, including public housing,[23] healthcare,[24] banking services,[25] and public accommodations.[26] Sex workers are also likely to encounter issues in custody battles[27] and professional licensing boards.[28] In personal

21. *Cf.* Natasha Bertrand, *How Webcam Models Make Money*, BUS. INSIDER (Nov. 18, 2014, 10:15 AM), https://www.businessinsider.com/heres-how-webcam-models-make-money-2014-11 (describing the "camming" industry as people performing sexual acts, from a computer camera, and streaming them through a virtual live chat room in exchange for monetary tips).

22. It is important to note that "sex worker" is in a lot of ways also a term of identity—meaning people can choose not to identify with that label. *See* Nicole Pasulka, *The Dangerous Catch-22 of Coming Out as a Sex Worker*, SPLINTER (Jan. 5, 2019, 9:07 AM), https://splinternews.com/the-dangerous-catch-22-of-coming-out-as-a-sex-worker-1793853893 (discussing an interview with one person who trades sex for money but who "does not identify as a sex worker").

23. *See, e.g.*, Alyssa Jeong Perry, *Nuisance Eviction Ordinance Changes Regarding Sex Workers Upset Advocacy Groups*, OAKLAND NORTH (Dec. 3, 2014), https://oaklandnorth.net/2014/12/03/nuisance-eviction-ordinance-amends-upset-advocacy-groups-due-to-its-vague-language/ (discussing the impact Oakland, California's nuisance eviction ordinance had on sex workers).

24. *See, e.g.*, Lou Chibbaro, Jr., *Acclaimed Trans Activist Sharmus Outlaw Dies*, WASH. BLADE (July 11, 2016, 10:06 AM), https://www.washingtonblade.com/2016/07/11/acclaimed-trans-activist-sharmus-outlaw-dies/ (memorializing the life and work of a transgender, sex worker rights activist who focused on healthcare and issues impacting people who are living with HIV).

25. *See, e.g.*, Timaree Schmit, *Why Sex Workers Have Serious Concern Over Proposed Bill that Targets Human Trafficking*, PHILA. WEEKLY (July 18, 2018), http://www.philadelphiaweekly.com/columns/sex/why-sex-workers-have-serious-concern-over-proposed-bill-that/article_9e061e72-8a7e-11e8-94fc-7f67f54a5c32.html (providing a brief overview of how sex workers are excluded from banks and other financial services).

26. *See, e.g.*, Paul, *supra* note 13 (detailing how an Airbnb representative explained the company uses "behavioral analysis to target sex workers, and did not deny that a sex worker can be removed [and banned] from the app even if they are not actively using it to host sex-work-related services").

27. *See, e.g.*, *Victims of Domestic Violence Are Not Criminals*, N.J. RED UMBRELLA ALLIANCE (Nov. 11, 2015), https://njrua.org/press-releases (describing how a family court judge found a domestic abuser a more fit parent than a mother who had done sex work).

28. *See, e.g.*, David Foster, *Prostitute Applies to Become Homemaker Aide, NJ Says Hell No*, TRENTONIAN (Nov. 10, 2017), https://www.trentonian.com/news/prostitute-applies-to-become-homemaker-aide-nj-says-hell-no/article_c495ce42-6d31-5ce2-a33b-840ad06c8ff7.html (reporting that the New Jersey State Board of Nursing denied a sex worker a professional license); *Criminal Conviction Policy*, NCBTMB (Feb. 2015), https://www.ncbtmb.org/ncbtmb-policies/criminal-conviction-policy/ ("[A]ny [National Cert-

relationships, sex workers also experience discrimination from family[29] and intimate partners.[30]

Income and financial stability are frequently cited as the primary reasons to engage in sex work.[31] However, people's involvement in sex work is best understood along a spectrum, landing somewhere between a dream job and the result of physical force.[32] The reality is that most peoples' experiences lie somewhere in between based on the circumstances of their lives—not unlike people in other forms of labor.[33] Some sex workers choose sex work because they find the work personally fulfilling.[34] People can use sex work to fund their true passions, such as art or political work.[35] If a person is transgender or disabled, it might be the only job where they[36] experience minimal employment

ification Board for Therapeutic Massage & Bodywork] applicants with a history of [prostitution] shall be denied certification in all cases.").

29. *See, e.g.*, Samantha Howard, *Sex Workers Describe the Moment They Told Friends and Family What They Do*, VICE (Mar. 16, 2017, 4:00 PM), https://www.vice.com/en_us/article/9amna7/sex-workers-describe-the-moment-they-told-friends-and-family-what-they-do (detailing ways sex workers are ostracized from family members over their work).

30. *See, e.g.*, Rose Lewenstein, *What It's Like to Date as a Sex Worker*, VICE (Apr. 27, 2016, 10:15 AM), https://www.vice.com/en_us/article/exv934/sex-workers-talk-about-their-dating-lives-876 (discussing social issues sex workers generally experience while dating in their personal lives); Tyler Austin, *The Complicated Sex and Dating Lives of Gay Male Porn Stars*, THEM. (Feb. 8, 2019), https://www.them.us/story/gay-male-porn-star-sex-dating ("Dating in any stressful career isn't easy, but the particular stigma surrounding sex work can complicate matters for some."). In regard to the intersection of sex work and domestic violence, see generally Sarah, *Tactics of Abuse that May Affect Sex Workers*, NAT'L DOMESTIC VIOLENCE HOTLINE (Aug. 15, 2017), https://www.thehotline.org/2017/08/15/safety-planning-with-sex-workers/.

31. Lynsey G., *15 Sex Workers on Why—and How—They Got into the Business*, GLAMOUR (Dec. 6, 2017), https://www.glamour.com/story/15-sex-industry-workers-in-their-own-words.

32. danah boyd, *What Anti-Trafficking Advocates Can Learn From Sex Workers: The Dynamics of Choice, Circumstance, and Coercion*, HUFFPOST (Aug. 16, 2012), https://www.huffingtonpost.com/danah-boyd/what-anti-trafficking-advocates-can-learn-from-sex-workers_b_1784382.html.

33. *Id.*

34. *See, e.g.*, Mark Smith, *I'm a Sex Worker Who Makes Hundreds a Day – Now Rich and Patronising Feminists Want to 'Save Me'… By Taking Away My Job*, THE SUN (June 25, 2019, 4:39 PM), https://www.thesun.co.uk/news/9062338/amsterdam-red-light-district-exxpose/ ("I make a lot of people very happy and it's rewarding in lots of ways. It's not just the money.").

35. *See, e.g.*, Sarah Hotchkiss, *The Hustle: An Artist and Sex Worker Taking Charge of Her Business*, KQED (Mar. 22, 2018), https://www.kqed.org/arts/13827641/the-hustle-an-artist-and-sex-worker-taking-charge-of-her-business (stating "I just want to be able to make my art" when discussing work as a sex worker).

36. Throughout this Note, the Author intentionally uses they as a singular pronoun. Despite objections that this violates understood rules of grammar, its use dates back as early as the 1300s and, with the modern legal recognition of gender identities other than male or female, is the most accurate pronoun to use when the gender of the object is not

discrimination.[37] If the person is living in poverty, it can be reluctant employment as a means to survive.[38] Ultimately, every person's reason for being in sex work is extremely varied and personal.

In political and cultural discourse, sex work is frequently used synonymously with sex trafficking.[39] While some sex workers have been trafficked, not all are, and the conflation has led to significant harm in policy approaches to the sex trades.[40] In reaction, some advocates define sex work in a way that does not include people who have been trafficked

described. *See, e.g.*, *Singular 'They'*, MERRIAM-WEBSTER, https://www.merriam-webster.com/words-at-play/singular-nonbinary-they (last visited Feb. 24, 2019).

37. *See, e.g.*, Sarah Hagi, *For Trans Women of Color, Safe Employment Is a Matter of Life and Death*, VICE (Nov. 23, 2016, 4:13 PM), https://broadly.vice.com/en_us/article/9k9w73/for-trans-women-of-color-safe-employment-is-a-matter-of-life-and-death (discussing how many transgender women of color need to rely on sex work because they are often excluded from non-sex work employment); Hayley Jade, *I'm a Disabled Sex Worker, and this Is What I Want You to Know*, HUFFPOST (June 11, 2018, 8:30 AM), https://www.huffpost.com/entry/disabled-sex-worker-destigmatize-sex-work_n_5b16d7a5e4b0734a99382480 ("When I was 27, I started escorting. My disability payments didn't provide me with much left for extras and savings, and I was lonely at home without a job to go to."). *See generally* BEST PRACTICES POLICY PROJECT & DESIREE ALL., NOTHING ABOUT US, WITHOUT US: SEX WORK HIV POLICY ORGANIZING (2015), http://www.bestpracticespolicy.org/wp-content/uploads/2015/10/NOTHINGABOUTUS_REPORT_COLOR_2015.pdf (providing detailed interviews with transgender policy leaders throughout the country on how the transgender community is impacted by sex work and HIV laws and policies).

38. *See, e.g.*, Jordan DeLoach, *Decriminalizing Sex Work Is a Matter of Survival*, TRUTHOUT (Mar. 2, 2019), https://truthout.org/articles/decriminalizing-sex-work-is-a-matter-of-survival/ ("[M]any survival sex workers are Black and Brown women, queer, trans and gender nonconforming people.").

39. *See, e.g.*, DEP'T OF COMMERCE, STATE OF WASH., STATEWIDE COORDINATING COMMITTEE ON SEX TRAFFICKING: REPORT ON COMMITTEE ACTIVITIES AND PLAN TO ADDRESS SEX TRAFFICKING (RCW 43.280.091) 13 (2014) ("We cannot make a clear distinction between prostitution and sex trafficking. . . ."); *FACT: Prostitution Is Inherently Violent*, NORDIC MODEL NOW!, https://nordicmodelnow.org/facts-about-prostitution/fact-prostitution-is-inherently-violent/ (last visited Jan. 15, 2019) (stating "at its core, prostitution is violent" and arguing agency can never be involved in selling sexual services). In fact, many laws aimed at reducing human trafficking end up only making the problem worse. *See, e.g.*, Susie Steimle, *New Laws Forced Sex Workers Back on SF Streets, Caused 170% Spike in Human Trafficking*, CBS SF BAY AREA (Feb. 3, 2019, 11:41 PM), https://sanfrancisco.cbslocal.com/2019/02/03/new-laws-forced-sex-workers-back-on-sf-streets-caused-170-spike-in-human-trafficking/ (noting how laws aimed at reducing sex trafficking only "seems to have had the opposite effect").

40. *See, e.g.,* Tara Burns, *Sex Trafficking: A Media Guide*, TITS & SASS (Mar. 24, 2016) https://titsandsass.com/sex-trafficking-a-media-guide/ (examining media faux pas on failing to distinguish between sex work and sex trafficking); Mari Ramsawakh, *We Need to Stop Confusing Sex Work with Human Trafficking*, MEDIUM (Aug. 29, 2018) https://medium.com/shareyournuance/we-need-to-stop-confusing-sex-work-with-human-trafficking-6ba7897fd3cd (discussing harm caused to migrant sex workers by the misguided conflation).

so as to avoid this conflation.[41] As the definition of sex work is used here however, it purposely defines sex work based on the labor involved, rather than the mindset or agency of the person.[42] This distinction is made because whether someone is voluntarily engaged in the labor of sex work does not, and should not, affect access to rights under Title VII or any other anti-discrimination law.[43]

III. OVERVIEW OF TITLE VII

By 1963, the Civil Rights Movement had garnered the attention of the nation. The Birmingham Campaign for desegregation was well underway, civil rights activists Medgar Evers and William L. Moore had been murdered, the March on Washington had occurred, and terrorists had bombed the 16th Street Baptist Church killing four young girls.[44] At the University of Alabama, violence broke out over the Northern District of Alabama's order for desegregation and President John F. Kennedy, in his public address, called on Congress to enact legislation protecting the civil rights of Black Americans.[45] Under pressure from "a rising tide of discontent that threaten[ed] the public safety," President Kennedy again called on Congress to act, this time specifically on the issue of employment discrimination.[46]

One year later, after the longest debate in its history, Congress passed the Civil Rights Act of 1964.[47] The legislation prohibits

41. *See, e.g.*, Melissa Ditmore, *Sex Work, Trafficking: Understanding the Difference,* REWIRE NEWS (May 6, 2008, 5:35 AM), https://rewire.news/article/2008/05/06/sex-work-trafficking-understanding-difference/ ("[T]he key distinction [between sex work and sex trafficking] is that [sex workers] do it voluntarily.").

42. *See supra* text accompanying notes 17–22.

43. Drawing a sharp line between sex workers and trafficking victims may also have serious implications for those who are both. *See, e.g.*, Laura LeMoon, *It's Time to Talk About the Erasure of Violence in Sex Workers Rights Activism*, MEDIUM (Dec. 11, 2017), https://medium.com/@lauralemoon/its-time-to-talk-about-the-erasure-of-violence-in-sex-workers-rights-activism-4fdce1975bf0 ("I live in the ether between force and free will, between violence and freedom, between trafficking survivor and sex worker. I have LIVED this erasure, this discomfort . . . . There are better ways for us to rally and come together against outside criticism than just to agree 'not to talk about it.'").

44. *Civil Rights Act of 1964*, NAT'L PARK SERV., https://www.nps.gov/articles/civil-rights-act.htm (last visited Feb. 24, 2019).

45. *Televised Address to the Nation on Civil Rights*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, https://www.jfklibrary.org/learn/about-jfk/historic-speeches/televised-address-to-the-nation-on-civil-rights (last visited Oct. 29, 2019).

46. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 432 (1966).

47. *Milestones in the History of the U.S. Equal Employment Opportunity Commission: 1964*, EEOC: 35TH ANNIVERSARY, https://www.eeoc.gov/eeoc/history/35th/milestones/1964.html (last visited Feb. 23, 2019).

discrimination against protected classes in areas such as public accommodations, government services, and education.[48] Employment, another area of protection, is covered under what is known as Title VII.[49] The law regulates private employment practices and created the Equal Employment Opportunity Commission ("EEOC") to investigate unlawful employment practices.[50]

Title VII only applies under specific circumstances. First, "employer" is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person," and excludes some government entities and private membership clubs.[51] "Industry affecting commerce" is defined within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 and includes government activity.[52]

At the center of this Note is Title VII's prohibition on unlawful employment practices. Title VII makes unlawful any employment practice by an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[53]

Title VII also maintains similar prohibitions on actions by employment agencies and labor organizations.[54] Additionally, Title VII's only effect on state law is to counteract any law that authorizes employment practices contrary to Title VII, thereby allowing states to expand on the rights protected by it.[55]

The provision of Title VII banning discrimination "because of . . . sex" was not a part of the original bill and only came later through

48. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 243–48.
49. Title VII, 78 Stat. 241, 253–57.
50. *Id.* at 255–58.
51. Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (2012). However, many government positions are protected from discrimination on the basis of protected classes under another provision. *See* Government Employee Rights Act of 1991, 42 U.S.C. § 2000e-16 (2012).
52. *Id.* § 2000e(h).
53. *Id.* § 2000e-2(a).
54. *Id.* § 2000e-2(b)–(c).
55. *See id.* § 2000e-7.

amendment.[56] Early—and some modern—commentators and courts interpreting Title VII's sex provision have attempted to diminish its value by suggesting that the sex amendment was added at the last minute by a Congressperson opposed to the Civil Rights Act, as a way to derail the entire bill.[57] However, a closer examination of the legislative history of the sex amendment, as detailed by Professor Vicki Schultz, shows intentional lobbying, activism, and adoption by Congress of the sex amendment.[58] Regardless of how Title VII's prohibition on sex discrimination came to force, it has been the law of the land for over fifty years.

There are two primary avenues for proving sex discrimination under Title VII: disparate treatment and disparate impact.[59] Disparate impact, which will be discussed in further detail, is essentially when an employer policy that is facially non-discriminatory results in a discriminatory effect on a protected class.[60] Disparate treatment, however, is when an employee is treated differently because of their protected class and requires proving an employer's discriminatory intent by either direct or circumstantial evidence.[61] Two examples of disparate treatment under Title VII are gender stereotyping and work place sexual harassment.[62] Gender stereotyping, discrimination based on an employer's expectation of gender roles, has been recognized under Title VII since the Supreme Court's holding in *Price Waterhouse*.[63] In another landmark case specific to sexual harassment, the Supreme Court in *Oncale* found that sexual

56. Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1016 (2015).

57. *Id.* at 1014–16. Some have even been as crass as to refer to the amendment as a "joke." *Id.*

58. *Id.* at 1016–20; *see also* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1317–29 (2012) ("Contrary to what courts have suggested, there was no consensus among legislators in the mid-1960s [about the meaning of 'because of sex.']").

59. AMERICAN BAR ASS'N, EEO LAW BASICS 5–7 (2006), http://apps.americanbar.org/labor/annualconference/2007/materials/data/papers/v1/008.pdf.

60. *See infra* Part V.

61. AMERICAN BAR ASS'N, *supra* note 59, at 6.

62. Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297, 1313, 1315–16 (2012).

63. *Id.* at 1313–14; *see* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In *Price Waterhouse*, evidence emerged that a highly qualified woman was passed over for partnership because of traits that would not have mattered had she been a man. *Price Waterhouse*, 490 at 234–36. For example, the employee was told she would increase her chances for partnership if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235.

harassment by male employees against other male employees also falls within Title VII's prohibition on discrimination "because of sex."[64]

IV. SEX WORK AND TITLE VII

There has been little judicial guidance on how sex work fits into Title VII's prohibition on sex discrimination. While part of this silence can be attributed to the legal community's failure to effectively engage with sex workers,[65] it can also be attributed to the lack of resources available to advance the rights of sex workers.[66] Before any new concepts can be developed under Title VII related to sex work, it is important to review existing law on the topic.

In sex work employment contexts, when a sex worker is specifically hired to perform sex work labor, the question of whether Title VII applies often turns on whether the sex worker is considered an employee or independent contractor.[67] Classifying sex workers as independent contractors instead of employees is a widely known issue among exotic dancers, but could also become an issue for escorts, brothel workers, and other sex workers in a decriminalized setting.[68]

When an exotic dancer's club qualifies as an employer under Title VII, courts have applied Title VII's prohibition on sex discrimination. For example, in *Berry v. Great Am. Dream, Inc.*, an exotic dancer alleged she was fired from her dance club for getting pregnant, and the court denied the employer's motion for summary judgment after finding a genuine issue of material fact on whether Title VII's "because of sex" provision

64. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 78, 82 (1998). The employee in *Oncale* was "forcibly subjected to sex-related, humiliating actions . . . in the presence of the rest of the crew. [Employees] physically assaulted Oncale in a sexual manner, and [] threatened him with rape." *Id.* at 77.

65. *See, e.g.*, Lux Alptraum, *An Online Legal Group Is Protecting Sex Workers from Predatory Lawyers*, MOTHERBOARD (June 1, 2016, 11:05 AM), https://motherboard.vice.com/en_us/article/3daaw8/an-online-legal-group-is-protecting-sex-workers-from-predatory-lawyers (noting how a significant number of lawyers sexually harass or discriminate against clients that are sex workers).

66. RED UMBRELLA FUND ET AL., FUNDING FOR SEX WORKER RIGHTS: OPPORTUNITIES FOR FOUNDATIONS TO FUND MORE AND BETTER 9 (2014), https://www.redumbrellafund.org/wp-content/uploads/2017/10/Report_funding-sex-worker-rights_FINAL_WEB.pdf ("The United States is notable for a relative lack of funding for domestic sex worker-led organizations.").

67. *See, e.g.*, Dana Meepos, *The Purgatory of Pole Dancing*, 19 UCLA WOMEN'S L.J. 213, 244–45 (2012).

68. *Id. See generally* Reducing Criminalization of Commercial Sex Amendment Act of 2019, B. 318, Council (D.C. 2019) (amending D.C. Official Code §§ 22-2701) (seeking to decriminalize sex work in the District of Columbia).

was violated for the pregnancy discrimination.[69] However, courts have also held that sex discrimination can be a bona fide occupational qualification in employment settings that require sexual gratification and can therefore be a defense to disparate treatment.[70]

Addressing sexual harassment in sexualized working environments has been—oftentimes unjustifiably—challenging for legal commentators.[71] Some have gone as far as to argue that people working in positions that require selling sexual appeal have consented to all forms of sexual harassment.[72] Professor Ann C. McGinley examined four categories of women working in sexualized industries (blackjack dealers, casino cocktail waitresses, exotic dancers, and Nevada brothel sex workers) and concluded that workers could bring sexual harassment claims in all of these categories because it is "the context in which behavior occurs [that] is relevant to determining whether an illegal hostile work environment exists."[73] Even in the context of brothel workers, Professor McGinley notes:

> [Sex workers] should have the right to agree to the scope of certain sexual behavior with individual [clients]. Because these agreements are negotiated up front between a [sex worker] and [their client] and both agree on the specific acts to be performed, these negotiations should establish the terms or conditions of the [sex worker's] employment.[74]

On claims of sex discrimination based on sexual harassment in non-sex work employment, courts have generally refused to find that someone's experience in sex work per se undermines a prima facie claim of discrimination under Title VII. In *Samuels v. Two Farms, Inc.*, the District of Maryland denied in part an employer's motion for summary judgment, which argued that a supervisor's sexual harassment of an employee who worked part-time as an exotic dancer was not because of

69. 88 F. Supp. 3d 1378, 1378–81 (N.D. Ga. 2015).

70. *See, e.g.*, Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147, 157 (2004).

71. *See, e.g.*, Sheerine Alemzadeh, *Baring Inequality: Revisiting the Legalization Debate Through the Lens of Strippers' Rights*, 19 MICH. J. GENDER & L. 339, 354–57 (2013) (criticizing arguments that sexual harassment protections should not apply to exotic dancers).

72. *See id.* at 354–56.

73. Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J.L. & FEMINISM 65, 95 (2006) (citing Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81–82 (1998)).

74. *Id.* at 105.

her sex.[75] In *Dreshman v. Villa*, the Western District of Pennsylvania granted in part an employer's motion for summary judgment where the employee, a male nurse and former exotic dancer, did not present sufficient evidence that the sexual harassment targeting his past as an exotic dancer was severe and pervasive, but denied the employer's motion for summary judgment on the question of retaliation for reporting the harassment.[76]

In an unpublished opinion, the Fifth Circuit rejected an argument that disparate treatment of someone based on sex work was because of sex.[77] In this case, the plaintiff argued she was fired from her job as a pathologist contrary to Title VII's prohibition on sex discrimination.[78] As evidence of disparate treatment, the plaintiff pointed to a comment her supervisor made to the employer's human resource manager saying the plaintiff had a reputation for being a "streetwalker"—a reference to sex workers who trade sex through the streets.[79] The Fifth Circuit found the statement failed to show discriminatory intent towards women because the supervisor was not suggesting that *all* women are sex workers.[80] Even if it did show discriminatory intent, the court held, it was only circumstantial evidence and the plaintiff still failed to prove a prima facie case of discrimination under Title VII.[81]

No court has yet to examine sex work under Title VII's theory of disparate impact. Only one plaintiff, the journalist from Houston that was fired for being an exotic dancer,[82] has ever argued that firing an employee for experience in sex work is sex discrimination based on disparate impact.[83] However, the journalist's sex discrimination

75. No. DKC 10-2480, 2012 U.S. Dist. LEXIS 9771, at *21–22 (D. Md. Jan. 27, 2012).

76. 733 F. Supp. 2d 597, 601–02 (W.D. Pa. 2010); *see also* McLeod v. Jewish Guild for the Blind, 864 F.3d 154, 156 (2d Cir. 2017) (remanding on the question of pro se plaintiff's Title VII complaint, which alleged sexual harassment and complained of "sexually suggestive remarks . . . insinuating that [plaintiff] worked part-time as a prostitute or stripper," because of procedural issues).

77. Brockie v. AmeriPath, Inc., 273 F. App'x 375, 378 (5th Cir. 2008).

78. *Id.* at 376.

79. *Id.* at 377.

80. *Id.* at 378. This is the same—dangerous—logic that has been used to justify excluding LGBTQ+ workers from employment protection. *See* Brief for Federal Respondent Supporting Reversal at 50, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (2019) (No. 18-107) ("To prevail, like any other plaintiff suing under [the Title VII] provision, a transgender plaintiff must plead and prove that the employer did or would treat members of the plaintiff 's sex less favorably than similarly situated members of the other sex.").

81. *Brockie*, 273 F. App'x at 379.

82. Lynch, *supra* note 6.

83. Gloria Allred, *Gloria Allred: Sarah Tressler*, YOUTUBE, https://www.youtube.com/watch?v=151ARuaRAVc (last visited Feb. 24, 2019).

complaint settled in mediation before the Equal Employment Opportunity Commission could issue a right to sue letter.[84] Without any precedent on this issue, arguing that discrimination against sex workers is sex discrimination based on disparate impact will be an issue of first impression for the court. Nonetheless, as the Supreme Court stated, what Congress required with the passage of Title VII was "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of . . . impermissible classification[s]."[85]

V. SHOWING DISPARATE IMPACT FROM DISCRIMINATION AGAINST SEX WORKERS

In the landmark case *Griggs v. Duke Power Co.*, the Supreme Court opened the door to disparate impact claims when proving unlawful employment practices.[86] In *Griggs*, the employer openly segregated Black and white employees prior to Title VII, but, once the civil rights law came into effect, the employer instituted high school diploma and aptitude test requirements for positions primarily held by white employees.[87] The Supreme Court reversed the lower court findings that there was no racial discrimination and noted "[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[88] The Supreme Court found the high school diploma requirement and aptitude tests had no relationship to job performance because the record indicated that employees who did not meet the educational requirements performed just as well as employees who did meet the requirements.[89]

Twenty years after *Griggs*, Congress codified the disparate impact theory of recovery by amending the Civil Rights Act of 1964.[90] To recover under disparate impact: (1) the plaintiff must demonstrate: (a) the employer has an employment practice (b) which causes (c) a disparate impact (d) on a protected class; (2) the employer must fail to demonstrate that the employment practice is related to the employment position or is

84. Telephone Interview with Sarah Tressler (Nov. 27, 2018). Sarah also wanted me to make clear that she sees exotic dancing and sex work as two very distinct things and that she does not identify as a sex worker. Telephone Interview with Sarah Tressler (Sept. 22, 2019); *see also supra* note 22.

85. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

86. *See id.*

87. *Id.* at 426–28.

88. *Id.* at 431, 436.

89. *Id.* at 431.

90. Civil Rights Act of 1991, Pub. L. No. 102-166, Sec. 105, 105 Stat. 1071, 1071.

consistent with business necessity; and (3) if the employer demonstrates the practice is related and necessary, the plaintiff must identify an alternative employment practice that does not have the same discriminatory effect.[91] "Demonstrates" is defined by the statute to mean "meet[ing] the burdens of production and persuasion."[92]

This Part will show how discrimination against sex workers has a disparate impact under Title VII's prohibition on sex discrimination.[93] Specifically, it will explain how discrimination against sex workers meets the definition of employment practice, how it demonstrates a disparity, and how discrimination against sex workers is not consistent with any business necessity and is not job related.[94]

A. The Employment Practice

To prove a prima facie case, a plaintiff first has the burden of proving that an employer has "a particular employment practice."[95] As the Supreme Court noted, and failed to clarify, "employment practice" is not defined anywhere; rather, the Court implied employment practice should be broadly understood as any policy an employer uses.[96] Generally, an isolated, single decision by an employer does not constitute a practice eligible for disparate impact analysis.[97]

Offering evidence of an employer policy that discriminates *because of* one's status as a sex worker would therefore satisfy the requirement of pointing to an employment practice. Whether a practice is selectively

91. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(A).

92. *Id.* § 2000e(m).

93. There is an open question regarding the impact advancing this theory will have on male and other non-female sex workers. In my opinion, this comes down to an issue of standing. *See infra* note 193.

94. Others have argued that discrimination against victims and survivors of domestic violence are also protected under Title VII's theory of disparate impact for similar reasons that are raised in this Note. *See* Maria Amelia Calaf, *Breaking the Cycle: Title VII, Domestic Violence, and Workplace Discrimination*, 21 L. & INEQ. 167, 168 (2003); Denise R. J. Finlay, *Employment Discrimination Against Domestic Violence Survivors: Strengthening the Disparate Impact Theory*, 88 N.D. L. REV. 989, 992–93 (2012).

95. 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see also* Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 656 (1989) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988)) ("The plaintiff must begin by identifying the specific employment practice that is challenged.").

96. Lewis v. City of Chicago, 560 U.S. 205, 212 (2010).

97. *Compare* Coe v. Yellow Freight Sys., Inc., 646 F.2d 444, 451 (10th Cir. 1981) (holding an employer's decision to abolish a job is not a policy or practice), *with* Council 31, Am. Fed'n of State, Cty. & Mun. Empls. v. Ward, 978 F.2d 373, 377 (7th Cir. 1992) (holding the employer's round of layoffs, although the result of a single and isolated decision, affected a large group of individuals making it ripe for disparate impact analysis).

enforced has no bearing on finding a policy is an employment practice.[98] Evidence of an employment practice can be as simple as getting a representative of the company on record saying the company does not employ sex workers. For example, when N'jaila was not promoted at the bookstore to the position of assistant manager, the goal would be to get the manager to state that the store does not put exotic dancers in managerial positions.[99]

Even without an explicit employer practice excluding sex workers, discretionary employment practices that discriminate because of sex work would also satisfy this burden for disparate impact based on the Supreme Court's holding in *Watson v. Fort Worth Bank & Trust*.[100] In *Watson*, supervisors repeatedly passed over the plaintiff, a Black woman, while filling managerial vacancies with white employees.[101] The lower courts concluded that disparate impact did not apply because discretionary employment practices should only be analyzed under disparate treatment.[102] The Supreme Court remanded and found the legal issues between disparate treatment and disparate impact were never meant to be different and that disparate impact would "largely be nullified" if the line of cases did not apply to discretionary employment practices as well.[103] The Court further noted that allowing disparate impact in these cases would address subconscious stereotypes and prejudices, "a lingering form of the problem that Title VII was enacted to combat."[104] In the context of this Note, disparate impact's coverage of discretionary employment practices will be particularly important for situations like that of N'jaila's—when employers lose interest in hiring or retaining an individual after discovering prior experience in sex work.[105]

Once a plaintiff establishes an employer practice or policy of discriminating against sex workers, that practice will then be used to show its disparate impact based on sex. Without evidence of an employer

98. *See, e.g.*, Bradley v. Pizzaco of Neb., Inc., 939 F.2d 610, 613 (8th Cir. 1991) (citing Dothard v. Rawlinson, 433 U.S. 321, 330 (1977)) ("There is no requirement that disparate impact claims must always include evidence that actual job applicants were turned down for employment because of the challenged discriminatory policy.").

99. *See supra* text accompanying note 2. If the employer is asked "What did you mean when you told N'jaila that she was not getting promoted because 'people know what you do,'" and the manager responds that it was in regard to her sex work experience, these circumstances would tend to show that this response is an employer policy.

100. 487 U.S. 977, 999 (1988).

101. *Id.* at 982.

102. *Id.* at 983–84.

103. *Id.* at 987–89.

104. *Id.* at 990.

105. *See* discussion *supra* Part I.

practice or policy, a claim will not be eligible for disparate impact analysis—however, it may still be eligible for disparate treatment analysis.[106]

B. Demonstrating a Disparate Impact

A plaintiff has the burden to prove that the employer's practice causes "a disparate impact."[107] The Supreme Court has described this burden as being met if the practice creates a discriminatory pattern that is statistically significant.[108]

1. What Statistics Can Be Used?

Statistics used for comparison depend in large part on the employment practice being challenged.[109] While disparate impact is traditionally thought of in the context of intelligence and aptitude tests, where an applicant would not know how they score until completing the test, employers can also have employment practices based on fixed disqualifications. This would include employment practices such as a position's height or age requirement, bans on anyone with a violent criminal record or a history of drug use, or a no-beard policy. The distinguishing feature between these categories of employment practices is that an applicant can self-identity if they are disqualified prior to applying for that employment position.

An employment practice that discriminates against sex workers can be categorized as a fixed disqualification because the employment practice disqualifies people based solely on their experience in sex work and is something that an applicant can self-identify. The categorization is particularly salient when sex workers rely on each other for support

106. This Note does not address how discrimination against sex workers is applied under claims of disparate treatment under Title VII. Nonetheless, powerful arguments can be made with regard to gender stereotyping and sexual harassment. *See generally supra* notes 61–64.

107. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

108. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653 (1989); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

109. *Compare Wards Cove*, 487 U.S. at 650–51 (holding the proper point of statistical comparison, where the challenged employment practice was racial disparities between the company's skilled and unskilled workforce, is "[between] qualified persons in the labor market and the persons holding at-issue jobs"), *with Moody*, 422 U.S. at 425 (holding the proper point of statistical comparison, where the challenged employment practice is a hiring test, is if "the tests in question select applicants for hire or promotion in a racial pattern significantly different from the pool of applicants").

and safety,[110] and knowledge that a company discriminates against sex workers is likely to spread within a community. *Dothard v. Rawlinson*[111] and *New York City Transit Authority v. Beazer,*[112] two cases decided by the Supreme Court, provide the most useful insight on using statistics to prove that an employment practice against sex workers has a disparate impact based on sex.

Derived from *Dothard*, statistics about sex workers do not need to include specific demographic data about sex workers employed in the company, or even regional statistics, but can be statistics looking at sex workers nationally. In *Dothard*, the Alabama Board of Corrections refused to hire a female applicant because it required prison guards to be at least five feet and two inches tall and weigh at least 120 pounds.[113] The district court found the plaintiff established a prima facie case of sex discrimination because the Board of Corrections' policy had the effect of excluding about 41% of the United States female population but only 1% of the United States male population.[114] On review, the Supreme Court affirmed the lower court's holding and held there was no requirement that disparate impact *must* be shown through analysis of actual applicants.[115] The Court rationalized that the application process would not accurately reflect the applicant pool if applicants self-recognized they were disqualified from the position.[116] Further, the Court noted that use of national demographic data is not misplaced if there is no reason to suggest the local population in question is somehow different from the national data.[117]

However, an indication that the statistics about sex workers are somehow different from the pool of qualified applicants undermines their

110. *See, e.g.*, Gaby Dunn, *"LinkedIn Doesn't Care if We're Assaulted": Sex Workers Speak Out*, DAILY DOT (May 20, 2013), https://www.dailydot.com/society/sex-workers-linkedin-prostitution/ (discussing how sex workers rely on each other for information and safety).

111. 433 U.S. 321 (1977).

112. 440 U.S. 568 (1979).

113. 433 U.S. at 323–24.

114. *Id.* at 329–30.

115. *Id.* at 330–31.

116. *Id.* at 330.

117. *Id.*; *see also, e.g.*, Bradley v. Pizzaco of Neb., Inc., 939 F.2d 610, 612 (8th Cir. 1991) (finding a national pizza franchise's no-beard policy had a disparate impact based on race because the EEOC introduced evidence that 25% of all Black men experience a skin condition that prevents them from shaving); Kozlowski v. Fry, 238 F. Supp. 2d 996, 1014–16 (N.D. Ill. 2002) (denying employer's motion for summary judgment where general statistics showed public defenders who are women advanced in their careers at a lower rate than their male counterparts).

usefulness in proving disparate impact.[118] In *Beazer*, the New York City Transit Authority had a drug policy with the effect of excluding from employment anyone who uses drugs, and the plaintiff challenged this policy specifically as applied to methadone users.[119] The district court concluded, affirmed by the Second Circuit, that the policy had a discriminatory impact on people of color because: (1) 81% of Transit Authority employees suspected of violating the drug policy were Black or Hispanic and (2) between 62% and 65% of persons in New York City who were publicly administered methadone were also Black or Hispanic.[120] The Supreme Court reversed and criticized the lower court's reliance on the statistics because they did not show those suspected of violating the drug policy were specifically methadone users or what the racial composition of private methadone clinics were.[121] The Court held, even if the respondents established a prima facie case of disparate impact, the transit authority effectively demonstrated the drug policy was job related.[122] Ultimately, the Supreme Court's criticisms focus on the failure of the statistics to show the violation *as alleged*.[123]

The point of comparison is between those affected and those unaffected by a facially neutral policy, not the percentage of people working for the employer who belong to the protected class.[124] In *Muhammad v. New York City Transit Authority*, a Muslim woman was demoted, and ultimately terminated, for wearing a head scarf and failing to comply with the transit authority's uniform policy.[125] The Transit Authority moved for summary judgment on her disparate impact claim, arguing only four people out of 10,000 employees were negatively impacted by this policy.[126] The district court rejected these arguments after finding that, although the policy only affected four women, 100% of Muslim women were transferred because of the policy while no non-Muslim women were transferred—satisfying a prima facie showing of disparate impact.[127]

118. This does not mean the statistics must be undisputed. *See, e.g.*, Bouman v. Block, 940 F.2d 1211, 1224 (9th Cir. 1991) (rejecting an employer's argument that the statistics used to prove disparate impact must be uncontroverted).

119. 440 U.S. 568, 571–72, 576–77 (1979).

120. *Id.* at 579.

121. *Id.* at 584–86.

122. *Id.* at 587.

123. This is a great example of the power that plaintiffs in disparate impact suits have to frame a complaint in the light most favorable to them—and that includes tying the statistics that will be used into the language of the complaint.

124. 52 F. Supp. 3d 468, 486 (E.D.N.Y. 2014).

125. *Id.* at 474–75.

126. *Id.* at 486.

127. *Id.* at 485–86.

Additionally, an employer showing that it employs a significant number of women without sex work experience does not impact the statistical analysis. This argument is known as focusing on the "bottom-line" result, and is expressly forbidden by the Supreme Court.[128] In *Connecticut v. Teal*, about 54% of Black people passed a test for promotion to supervisor compared to 68% of white people.[129] However, final promotion decisions had to be made through an affirmative-action program that resulted in a 170% promotion rate of Black people compared to whites.[130] The Supreme Court rejected the employer's contention that the bottom-line result acted as a defense to the prima facie showing of a Title VII violation because "Title VII guarantees these individual respondents the *opportunity* to compete equally."[131]

2. Showing a Disparity

There is no settled approach on how to determine statistical significance for disparate impact. In *Albemarle Paper Co. v. Moody*, the Supreme Court held the disparity had to be "significantly different," while in *Griggs* the Court simply said the disqualification rate had to be "substantially higher" for the minority applicant.[132] As described by Justice O'Connor for a plurality of the Supreme Court: "Nor has a consensus developed around any alternative mathematical standard. Instead, courts appear generally to have judged . . . on a case-by-case basis . . . . [W]e believe that such a case-by-case approach properly reflects our [understanding]."[133]

Many courts have moved towards tests typically used by social scientists in statistical analysis.[134] For example, some courts have held that a disparity is shown if the standard deviation[135] is greater than two.[136] This has also been referred to as significance at the 5% level because there is 95% confidence the disparity is not due to chance.[137]

128. Connecticut v. Teal, 457 U.S. 440, 442 (1982).

129. *Id.* at 443.

130. *Id.* at 444 n.6.

131. *Id.* at 451.

132. 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971).

133. Watson v. Fort Worth Bank & Tr., 487 U.S. 997, 995 n.3.

134. For a better understanding on how to use statistics in the law, see generally MICHAEL O. FINKELSTEIN & BRUCE LEVIN, STATISTICS FOR LAWYERS (Springer ed., 3d ed. 2015).

135. Standard deviations are calculations based on how far data deviates from an expected average. *See* Carla J. Rozycki & Patricia A. Bronte, *A Game of Numbers: ADEA Compliance and Litigation*, 18 LAB. L. 203, 210 (2002).

136. *See, e.g.*, McClain v. Lufkin Indus., 519 F.3d 264, 279–80 (5th Cir. 2008) (finding a disparity of 2.02 standard deviations statistically sufficient for disparate impact).

137. *See* Smith v. Xerox Corp., 196 F.3d 358, 366 (2d Cir. 1999).

Other courts have used the Chi-Square Test[138] or the Fisher Exact Test[139] to find disparate impact.[140]

Another test used to show disparity is the EEOC's "four-fifths rule." Generally, if the selection rate for the protected class is less than four-fifths (or 80%) of the group with the highest selection rate, then the EEOC will assume a disparity.[141] However, the rule has been considered nothing more than a benchmark for courts as overreliance on the rule can lead to unusual results.[142] Recognizing this limitation, the rule goes on to state that there can still be a disparity if "[an employer's] actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group."[143] Ultimately, regardless of the statistical method used, showing the usefulness of the statistics used "depends on all of the surrounding facts and circumstances."[144]

3. Statistics on Sex Work and the Need for More

Generally, reliable and holistic statistics about sex workers are extremely limited, but that should not stop a zealous advocate from proving disparate impact. In Nevada, researchers conducted one of the most comprehensive population studies of sex workers and noted "the majority of sex workers are female."[145] The researchers also analyzed exotic dancers who advertised through the phonebook in Las Vegas and

138. The Chi-Square Test measures an "association" between variables and is particularly useful with small sample sizes. *See* Black Law Enf't Officers Ass'n v. Akron, No. C84-2974A, 1986 U.S. Dist. LEXIS 30160, at *73 (N.D. Ohio Jan. 23, 1986).

139. The Fischer Exact Test is another preferred statistical test of significance when the sample size is small. *See* Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 137 n.235 (2010).

140. *See, e.g.*, Stevenson v. City & Cty. of San Francisco, No. C-11-4950, 2016 U.S. Dist. LEXIS 819, *20 (N.D. Cal. Jan. 5, 2016) (finding Chi-Square significance sufficient for disparate impact); Bridgeport Guardians, Inc. v. City of Bridgeport, 735 F. Supp. 1126, 1132 (D. Conn. 1990) (noting the Fisher Exact Test's "utility and sensitivity" in giving exact results).

141. 29 C.F.R. § 1607.4(D).

142. *See, e.g.*, Jones v. City of Boston, 752 F.3d 38, 51–52 (1st Cir. 2014) (discussing a hypothetical where an employer lays off only Black employees, but the rate at which Black employees avoided termination was 82%, thus avoiding disparate impact under the four-fifths rule).

143. 29 C.F.R. § 1607.4(D) (2018).

144. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 340 (1977).

145. JENNIFER HEINEMAN, RACHEL T. MACFARLANE & BARBARA G. BRENTS, SEX INDUSTRY AND SEX WORKERS IN NEVADA 10 (Dmitri N. Shalin ed., 2012), https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=1047&context=social_health_nevada_reports.

concluded that between 10 and 15% were not cisgender women.[146] Examining the legal brothel industry in the state, the researchers also noted that *all* sex workers in the brothel industry have been female, except for one male sex worker who was briefly employed in 2010.[147]

In a national randomized study of unmarried women, 33.3% reported staying in an intimate relationship because of economic considerations, with Black women more likely to be engaged in "transactional sex" than white women.[148] The Federal Bureau of Investigation's Uniform Crime Reporting gives an annual breakdown of those arrested for prostitution-related crimes by sex and state, as self-reported by local police departments.[149] In 2014, about 66% of those arrested in the United States for prostitution-related crimes were reported as women, but the number is likely higher because local police departments frequently misgender transgender women as men and because the statistic includes the arrests of clients and third-party market facilitators.[150]

One study examining the global prevalence of sex workers in various countries reported that female sex workers made up between 0.1% and 7.4% of the general population depending on the region.[151] Foundation

146. *Id.* at 6–7. However, how people advertise themselves as sex workers does not always correspond to the sex worker's gender identity. *See, e.g.*, Jane Way, *What It's Like to Be a Genderfluid Sex Worker*, VICE (Apr. 13, 2017, 10:50 AM ET), https://www.vice.com/en_uk/article/mgyax8/what-its-like-to-be-a-genderfluid-sex-worker ("My best clients, when they write me reviews, they ask me what pronouns I would like to use and are really respectful and want to talk about it. If I want to educate a client [about my gender identity], I would do it on my time as opposed to their time.").

147. HEINEMAN ET AL., *supra* note 145, at 7–9. This is, in part, because sex workers with a penis were barred from working in the brothel industry. *See* Jasmin Tuffaha, *Nevada Gives 'Green Light' to Its First Male Brothel*, CBC (Jan. 7, 2010, 3:58 PM ET), https://www.cbc.ca/news/world/nevada-gives-green-light-to-its-first-male-brothel-1.909477.

148. Kristin L. Dunkle et al., *Economically Motivated Relationships and Transactional Sex Among Unmarried African American and White Women: Results from a U.S. National Telephone Survey*, 125 PUB. HEALTH REP. 90, 90–91 (2010) (defining transactional sex as "economically motivated sexual relationships and encounters").

149. *Arrest Data Analysis Tool*, BUREAU OF JUST. STAT., https://www.bjs.gov/index.cfm?ty=datool&surl=/arrests/index.cfm# (last visited Oct. 28, 2019).

150. *Id.* (follow "National Estimates"; then "Annual Tables" and search "2014" and "Offense By Age for Females," then "Offense By Age for Females"); Lucas Waldron & Ken Schwencke, *Deadnamed*, PROPUBLICA (Aug. 10, 2018, 5:00 AM), https://www.propublica.org/article/deadnamed-transgender-black-women-murders-jacksonville-police-investigation. The Federal Bureau of Investigation defines prostitution-related crimes as including "soliciting customers or transporting persons for prostitution purposes; owning, managing, or operating a dwelling or other establishment for the purpose of providing a place where prostitution is performed; or otherwise assisting or promoting prostitution." *See Arrest Data Analysis Tool, supra* note 149 (follow "Terms & Definitions").

151. *See* J Vandepitte et al., *Estimates of the Number of Female Sex Workers in Different Regions of the World*, 82 SEXUALLY TRANSMITTED INFECTIONS iii18, iii23 (2006) (stating data was unavailable for North America).

Scelles estimates that about forty-two million people are engaged in "prostitution" around the world and that 80% of them are women.[152] The Swedish Government came to a similar conclusion in its report on prostitution, finding that about 10 to 20% were male sex workers.[153] A group of researchers focused on studying male sex workers estimated that there were about 25,000 male escorts in the United States in 2017.[154] If these numbers are correct, then there are likely between 125,000 and 250,000 female escorts in the United States—not including exotic dancers, adult film performers, street-based sex workers, and other sex workers who are not escorts.

At the time of writing, the Supreme Court has yet to decide *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, leaving unsettled whether discrimination against transgender individuals is sex discrimination under Title VII.[155] Regardless of the outcome, judges who examine the theory advanced by this Note could be reluctant to accept statistics that group together cisgender and transgender women.[156] Based on data from the largest demographic study of transgender individuals in the country, 14.9% of transgender women self-reported participating in the sex trade while 7.4% of transgender men self-reported participating in the sex trade.[157] Looking at transfeminine people broadly,[158] they were also twice as likely to participate in the sex trade compared to transmasculine people.[159] The same study also found transgender people of color were four times as likely to be engaged in sex work as compared to their white

152. Gus Lubin, *There Are 42 Million Prostitutes in the World, and Here's Where They Live*, BUS. INSIDER (Jan. 17, 2012, 1:55 PM), https://www.businessinsider.com/there-are-42-million-prostitutes-in-the-world-and-heres-where-they-live-2012-1.

153. Victor Minichiello & John Scott, *Research Shows Distribution of Online Male Escorts, by Nation*, QUEENSLAND UNIV. OF TECH.: ME, US & MALE ESCORTING (Nov. 1, 2017), https://research.qut.edu.au/aboutmaleescorting/2017/11/01/number-of-online-male-escorts-by-nation-2/?fbclid=IwAR3fmpWKzQAO1DmMVTd7lxHCLQHi-qnugA2SHVwVyyLO4tmeVac6-ZP0OWE.

154. *Id.*

155. 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019).

156. Broadly speaking, cisgender means a person's gender identity is the same as the sex that was assigned to them at birth while transgender means a person's gender identity is different from the sex they were assigned at birth. *See* Katy Steinmetz, *This is What 'Cisgender' Means*, TIME (Dec. 23, 2014), http://time.com/3636430/cisgender-definition/.

157. ERIN FITZGERALD ET AL., MEANINGFUL WORK: TRANSGENDER EXPERIENCES IN THE SEX TRADE 13 (2015), https://www.transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf.

158. Transfeminine describes people who are assigned male at birth and identify more with femininity but may not necessarily identify as female. MK, *What Does Transmasculine and Transfeminine Mean?*, ALL ABOUT GENDER (July 8, 2018), https://allaboutgender.com/2018/07/08/what-does-transmasculine-and-transfeminine-mean/.

159. FITZGERALD ET AL., *supra* note 157.

counterparts, with Black transgender people six times as likely to be in sex work compared to their white counterparts.[160]

Given what currently exists, there is a strong need for more demographic statistics, both in quantity and quality, to advance the concept that discrimination against sex workers is sex discrimination. In many instances, studies are likely to be under-inclusive as population estimates. One reason is the continual conflation of sex work with sex trafficking.[161] Since how sex work is defined can vary,[162] some studies' definition of sex work may include only a fraction of the population as defined by this Note. Additionally, the stigmatization and criminalization of sex work likely makes sex workers reluctant to identify as such with researchers.[163] As noted by the Global Network of Sex Workers Projects, "[mapping and population size estimates] are becoming more common and are often used in ways that negatively impact upon the safety, confidentiality and well-being of sex workers."[164]

Furthermore, data is sometimes collected using skewed sample populations and manipulated as a dramatization factor—actions likely incentivized by the non-profit grant business.[165] If a study about sex workers is done, the focus is usually almost exclusively on women with little effort to examine the needs of male sex workers;[166] for disparate

160. *Id.* at 14.

161. *See supra* text accompanying notes 39–43. For example, an often-cited statistic that the average age of entry into prostitution is thirteen has been repeatedly proven as false yet continues to be widely shared in reports as a known fact. Chris Hall, *Is One of the Most-Cited Statistics About Sex Work Wrong?*, ATLANTIC (Sept. 5, 2014), https://www.theatlantic.com/business/archive/2014/09/is-one-of-the-most-cited-statistics-about-sex-work-wrong/379662/.

162. *See supra* text accompanying note 17.

163. *See generally* MEREDITH DANK ET AL., ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR US CITIES 23–24 (2014), https://www.urban.org/sites/default/files/publication/22376/413047-estimating-the-size-and-structure-of-the-underground-commercial-sex-economy-in-eight-major-us-cities.pdf (generally discussing issues with producing data about underground economies).

164. GLOB. NETWORK OF SEX WORK PROJECTS, MAPPING AND POPULATION SIZE ESTIMATES OF SEX WORKERS: PROCEED WITH EXTREME CAUTION 1 (2015), https://www.nswp.org/sites/nswp.org/files/Mapping%26Population%20Size%20Estimates%20Policy%20Brief%2C%20NSWP%20-%20November%202015_0.pdf.

165. *See, e.g.*, Glenn Kessler, *Are 68,000 People a Day 'Trafficked Right in Front of Our Eyes'? Nope.*, WASH. POST (Oct. 11, 2018, 3:00 AM), https://www.washingtonpost.com/politics/2018/10/11/are-people-day-trafficked-right-front-our-eyes-nope/ ("We've done a lot of work debunking faulty, misleading or bogus statistics concerning the horrific crime of human trafficking . . . ."); Maggie McNeill, *Lies, Damned Lies and Sex Work Statistics*, WASH. POST (Mar. 27, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/03/27/lies-damned-lies-and-sex-work-statistics/?utm_term=.d0a2757cdcbc (discussing in depth the issues with sex work statistics).

166. *See* GLOB. NETWORK OF SEX WORK PROJECTS, THE NEEDS AND RIGHTS OF MALE SEX WORKERS 2–3 (2014), https://www.nswp.org/sites/nswp.org/files/Male%20SWs.pdf.

impact, this means there are limited points of comparison to show statistical significance.

In summary, there is a need for more statistics on sex workers. However, the statistics that do exist show sex work is inherently gendered, and there are enough statistics for advocates to make an argument that discrimination against sex workers has a disparate impact based on sex.

C. (Un)related and (In)consistent with Any Business Necessity

A defense to a successful prima facie showing that an employment practice of discriminating against sex workers creates a disparate impact based on sex is that the policy is job related and consistent with business necessity. Title VII states that disparate impact is proven only if an employer "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[167] Therefore, if an employer fails to meet this burden of persuasion, then the plaintiff's prima facie showing of disparate impact will prevail.[168]

Interpretation of the precise meaning of this defense varies by Circuit. The Third Circuit in *NAACP v. N. Hudson Reg'l Fire & Rescue*, after finding that the Civil Rights Act of 1991 was a legislative repeal of the Supreme Court's interpretation of the defense in *Wards Cove*, interpreted the language to mean "employers may not use criteria which have a discriminatory effect unless those criteria define the minimum qualifications necessary to perform the job."[169] The Second Circuit in *Gulino v. N.Y. State Educ. Dep't* relied on the Supreme Court's interpretation in *Moody* and interpreted the statute to mean an employer has a defense if the policy is "shown, by professionally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."[170] Regardless of the defense's true meaning, an employer must demonstrate with some

There are a number of reasons why male sex workers may be ignored, but some of it can be attributed to patriarchal desires to "save" cisgender female sex workers, heterosexism, and the conditions of available funding for data collection on sex workers. *Id.*

167. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

168. *See* Lewis v. City of Chicago, 560 U.S. 205, 213 (2010) (stating that the burden rests with the defendant to show business necessity).

169. 665 F.3d 464, 477 n.9 (3d Cir. 2011) (citing Lanning v. Se. Pa. Transp. Auth., 181 F.3d 478, 481, 489 (3d Cir. 1999)).

170. 460 F.3d 361, 383 (2d Cir. 2006) (citing *Moody*, 422 U.S. at 431).

heightened level of weight that its discriminatory policy bears a relationship to the employee's ability to perform the job.[171]

Accordingly, what an employer argues as its defense here will depend in large part on the position in question and caselaw available in that jurisdiction. However, there are several arguments an employer is likely to make based on stereotypes of sex workers. The employer may seek to demonstrate that discrimination against sex workers is job related and a business necessity because sex work: (1) is criminalized, (2) is immoral, (3) affects social aspects of a job, (4) is unrelated to the position in question, (5) affects the trustworthiness of the employee, and (6) implicates the employer's ban on drug use.

The argument an employer is most likely to make is that sex work is criminalized, so the policy is therefore a business necessity to exclude criminal behavior.[172] However, to have a policy that excludes all sex workers, rather than a blanket policy that targets those actually arrested or convicted of sex work-related crimes,[173] would always be overly inclusive and likely unjustified to meet the burden of business necessity. Not only are there many legal forms of sex work, but many sexually-related activities that people assume are criminalized under prostitution laws are often not. As stated by United States Attorneys for the Western District of Washington during their investigation into Backpages.com:

> Upon closer analysis of the adult web market, it is clear that there are many adult services which come very close to prostitution, but which are lawful. For instance, it is legal to advertise to pay actors to have sex in a film . . . . It is also legal to

171. *But see* Spurlock v. United Airlines, Inc., 475 F.2d 216, 219–20 (10th Cir. 1972) (stating the higher the skill level a position requires, the lower the defendant's burden to prove business necessity).

172. All jurisdictions in the United States criminalize the crime of "prostitution" in one way or another, including Nevada, which criminalizes prostitution except as allowed through the heavily regulated brothel system. *See* Sienna Baskin, Aziza Ahmed & Anna Forbes, *Criminal Laws on Sex Work and HIV Transmission: Mapping the Laws, Considering the Consequences*, 93 DENV. L. REV. 355, 358–59, 359 n.17 (2016). However, how prostitution is defined in criminal codes is in no way uniform and varies by state. *Id.* ("In some states, simply offering to buy or sell sex is considered prostitution. Other states vaguely allude to 'sexual conduct,' leaving what activities are and are not criminal up to city criminal court judges.").

173. Sex work-related crimes will vary from state to state. *Id.* at 358–60. Taking New Jersey as an example, the following sex work-related activities are criminalized: N.J. STAT. ANN. § 2C:34-1(a)(4)(a) (maintaining a house of prostitution), *id.* § 2C:34-1(a)(4)(c) ("[e]ncouraging" someone to engage in prostitution), *id.* § 2C:34-1(a)(4)(d) (soliciting a person to patronize someone engaged in prostitution), *id.* § 2C:34-1(b)(2) ("promot[ing]" prostitution), *id.* § 2C:34-1(b)(1) (patronizing someone engaged in prostitution), *id.* § 2C:34-1.1 (loitering in a public space for the purpose of prostitution), and several other activities.

> offer or solicit sex, so long as it is not in exchange for money. Thus, Backpage permitted express references to sexual acts in its adult personal section. It is also legal to offer to be a 'sugar daddy' [and] likewise, strippers or escorts may be paid to simulate sex for a fee, to dance or perform solo sex acts, to provide companionship, and to give 'sensual' massages. There are no rules which prohibit strippers or genuine escorts from posing in sexually explicit positions or from giving hands-on therapy. While someone who has little experience with the adult services market may readily conclude that Backpage's escort advertisements offer prostitution services, such a conclusion is not so plain after one recognizes how much sexually explicit commercial conduct is lawful.[174]

As such, an employer's position that a discriminatory policy against sex workers is a business necessity is unlikely to satisfy its evidentiary burden when it is so overly inclusive and not actually tailored to those who have been arrested or convicted of sex work-related crimes.[175]

Conceptions of morality are often used to justify discrimination against sex workers and is likely to arise for the defense of business necessity. Morality concerns can arise because an employer finds the sexual activity that a sex worker engages in morally reprehensible and degrading.[176] While there is little caselaw on the use of morality as a business necessity, the use of morality against sex workers is

174. Elizabeth Nolan Brown, *Secret Memos Show the Government Has Been Lying About Backpage All Along*, REASON (Aug. 26, 2019, 12:48 PM), https://reason.com/2019/08/26/secret-memos-show-the-government-has-been-lying-about-backpage/ (quoting W. DIST. OF WASH., DEP'T OF JUSTICE, DOJ-BP-0004573689, BACKPAGE.COM INVESTIGATION UPDATE 9 (2017), https://www.documentcloud.org/documents/6345276-Backpage-DOJ-2013-Memo.html).

175. If an employer has a policy that *only* targets people who have actually been arrested or convicted of a sex work-related crime, then the statistics used and defense of job related and business necessity would be different. This would also implicate a plethora of local and state laws regarding employment discrimination against those who have been arrested or convicted of crimes. Nonetheless, the argument can likely still be made that the policy would have a disparate impact based on sex. For further discussion on how actual arrest or convictions can be used as an employment policy, see U.S. EQUAL EMP. OPPORTUNITY COMM'N, No. 915.002, EEOC ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), https://www.eeoc.gov./laws/guidance/arrest_conviction.cfm.

176. *See, e.g.*, Julie Bindel, *Prostitution Is Not a Job. The Inside of a Woman's Body Is Not a Workplace.*, GUARDIAN (Apr. 30, 2018), https://www.theguardian.com/commentisfree/2018/apr/30/new-zealand-sex-work-prostitution-migrants-julie-bindel (using moral apprehension to sex work as a justification to discriminate against sex workers and keep the sex trades criminalized).

comparable, in some respects, to the use of morality to deny contraception to employees. As some legal commentators have noted, a policy that denies contraception to employees under otherwise comprehensive healthcare coverage is likely to have Title VII disparate impact implications.[177] Similarly, upon a prima facie showing of disparate impact for a discriminatory sex work policy, an employer's defense is only viable if they can show business *necessity* rather than a mere business preference.

An employer is also likely to argue an employee's engagement in sex work disqualifies them from the position because it affects performance in sales, networking, or some other social aspect of the job.[178] However, while it is possible that some employees might be treated differently by customers or clients upon discovering their status as a sex worker, it is unlikely that an employer would be able to satisfy the burden necessary to show the policy is consistent with business necessity. This would require evidence of an actual impact on some social aspect of the position in question and, without it, the employer fails to show a business necessity to discriminate against sex workers.

Furthermore, an employer might argue that the labor of sex work is inherently different from the position in question, and the policy is necessary because it is job related. This view would be argued, however, because many people presume that the only labor involved in sex work is sex, but this presumption is rarely true.[179] Most sex work involves developing client networks, negotiating sales, maintaining client relationships, controlling for transaction externalities, developing advertising campaigns, and other skills needed to manage a small business.[180] When most hiring recruiters suggest showcasing the transferability of skills earned in one industry when moving to

177. *Compare* Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 374–76 (1998) (focusing on "otherwise comprehensive coverage" to show disparate impact), *and* Cooley v. DaimlerChrysler Corp., 281 F. Supp. 2d 979, 986 (E.D. Mo. 2003) (finding a disparate impact claim based on an employer's denial of contraception), *with* Standridge v. Union Pac. R.R. Co., 479 F.3d 936, 944–45 (8th Cir. 2007) (finding no Title VII violation for denial of contraception because health coverage was not comprehensive and did not include male contraceptive methods).

178. For example, the Houston Chronicle told Sarah Tressler that she could not work as a journalist because nobody would want to be interviewed by an exotic dancer. Telephone Interview with Sarah Tressler (Nov. 27, 2018); *see also* Lynch, *supra* note 6.

179. *See* Jessie Sage, *There's Much More Work Than Sex in Sex Work*, PITTSBURGH CITY PAPER (Jan. 2, 2019), https://www.pghcitypaper.com/pittsburgh/theres-much-more-work-than-sex-in-sex-work/Content?oid=12912604.

180. *See id*.

another,[181] there is no reason to believe skills earned while engaging in sex work somehow disappear when that person is no longer in sex work. Not only is a discriminatory policy unrelated to most job qualifications, its effect would be to exclude a workforce whose qualified skills were earned through sex work.

Additionally, an employer may argue that the ability to trust an employee is a business necessity and that discrimination against sex workers is necessary because sex workers cannot be trusted. This argument is based on deep-rooted stereotypes that sex workers are manipulative, liars, and untrustworthy.[182] Without disputing the business necessity of being able to trust employees, this is another instance where the employer should be challenged to demonstrate under its burden that this is actually a true characterization of sex workers.

Another stereotype about sex workers is that they all engage in drug use.[183] Correspondingly, an employer might argue that discrimination against sex workers is a business necessity because they cannot employ any people who use drugs.[184] However, not only is there no evidence that all sex workers use drugs, but most research shows the two issues as distinct concepts where there is *sometimes* overlap.[185] By introducing evidence that the employer has failed to demonstrate discrimination against sex workers is necessary to enforce a ban on drug use, the employer's burden on showing business necessity is not met and the challenge to disparate impact would survive.

In the case of Stacie Halas, the middle school teacher fired for performing in pornography films, the Administrative Law Commission focused particularly on immorality and dishonesty as the justifications to

181. *See, e.g.*, Elizabeth Bacchus, *Changing Your Career: How to Identify Your Transferable Skills*, GUARDIAN (June 29, 2010), https://www.theguardian.com/careers/careers-blog/changing-your-career-how-to-identify-your-transferable-skills.

182. *See* AVAREN IPSEN, SEX WORKING AND THE BIBLE 104–06 (2009) (discussing representation of sex workers in the Bible as liars).

183. *See, e.g.*, Malini Basu & Christine Swartz, *Cities and Towns See Surge in Prostitution in Surprising Places Across State*, BOSTON 25 NEWS (Jan. 10, 2019, 4:32 AM), https://www.boston25news.com/news/cities-and-towns-see-surge-in-prostitution-in-surprising-places-across-state/901849298?fbclid=IwAR0tlVaGVTHJPHXgbRqP_bG5i_V7jpcdjAYdwx-sM5u56S_CzGeGzOojiAw ("[M]any communities all over the state are seeing an uptick in prostitution, in part because of the opioid epidemic . . . .").

184. Since *Beazer*, some lower courts have interpreted employment bans based on drug use as a legitimate business necessity. *See, e.g.*, Jones v. City of Boston, 845 F.3d 28, 33–34, 37 (1st Cir. 2016) (affirming the lower court's finding that a drug hair test was related and consistent with a business necessity but remanding on the question of whether there was a reasonable alternative to the test).

185. *See, e.g.*, MELISSA HOPE DITMORE, WHEN SEX WORK AND DRUG USE OVERLAP: CONSIDERATIONS FOR ADVOCACY AND PRACTICE 13 (2013), https://www.hri.global/files/2014/08/06/Sex_work_report_f4_WEB.pdf.

terminate her contract.[186] Although not in a Title VII context, this example is illustrative of how these stereotypes against sex workers can arise in employment-related legal proceedings. The Commission repeatedly referred to appearing in pornography as immoral and went as far as to say, "[The] pornographic scenes may demonstrate for viewers a lack of respect for herself and may send a message that she endorses the degradation of women and deviant sexual behavior."[187] Additionally, the Commission said Ms. Halas' "duplicity" about her involvement in the adult film industry impacted her credibility.[188] While actual evidence of dishonest character is always relevant to determine a witness's credibility, the Commission ignored in its analysis on "aggravating circumstances" reasons a person might lie about their involvement in sex work—reasons such as social discrimination and lack of employment protection for starters—and instead doubled down on how inexcusable it was for someone to lie about being in adult films.[189] The Commission then audaciously went on to state that the most credible statement that Ms. Halas made was in one of her adult films and called it "[i]ronic[]."[190] As can be seen through this case, common stereotypes about sex workers are almost sure to arise when a person's status as a sex worker is at issue.

Any arguments against the stance that discrimination against sex workers is job related and a business necessity will largely depend on the position(s) that the employer makes. In most cases it will rely on stereotypes about sex workers with little evidence to back up the claims being made. A prima facie showing of disparate impact based on discrimination against sex workers should be able to survive the employer's defense that it is related and consistent with business necessity.

VI. REMEDIES AND IMPLICATIONS

Available remedies are a critical piece of assessing a potential discrimination claim. If a court finds an employer "is intentionally engaging in an unlawful employment practice," then a wide range of relief is available including injunctive relief, reinstatement or hiring of the employee, back or front pay, punitive damages, compensatory damages, attorney's fees, and other forms of equitable relief.[191] Courts

186. Stacie Halas, OAH No. 2012051091, at 36 (Cal. Office of Admin. Hearings Jan. 2013); *see supra* note 7.

187. *Stacie Halas*, at 38–39.

188. *Id.* at 27–28.

189. *Id.* at 41–42.

190. *Id.* at 43.

191. *See* 42 U.S.C. § 2000e-5(g)(1) (2012).

have noted that the requirement of intent in the remedy statute does not preclude relief for claims based on disparate impact because the statute is simply requiring that the employer "intend" the actions that cause disparate impact.[192]

Showing that discrimination against sex workers has a disparate impact in violation of Title VII's ban on sex discrimination is particularly appealing in light of the fact that it provides protections for all sex workers regardless of their gender. Challenging discrimination against sex workers on the basis of disparate treatment will require analysis examining gender stereotypes that are likely to vary depending on the gender identity of the employee in question. However, an employer practice that discriminates against sex workers, regardless of the gender of to whom it is applied, will always have a disparate impact based on sex.[193]

Getting the courts to recognize Title VII as prohibiting discrimination against sex workers has wide implications beyond the federal employment context. The Federal Fair Housing Act, also known as Title VIII, allows disparate impact as an avenue of proving a violation of its ban on housing discrimination and closely mirrors Title VII caselaw.[194] The Equal Credit Opportunity Act, which prohibits discrimination on the basis of sex in areas of credit transactions, also uses disparate impact as an avenue of proving liability.[195] Additionally, state and other anti-discrimination regulatory agencies follow developments in

192. *See, e.g.*, Crum v. Alabama, 198 F.3d 1305, 1315 n.13 (11th Cir. 1999) ("The statutory requirement that the court find that the employer has 'intentionally engaged' in the unlawful employment practice does not mean that this remedial provision is only applicable in disparate treatment or pattern or practice cases.").

193. *See supra* Part V. There is a question of standing on whether a male sex worker or other non-female sex worker can advance this legal theory. *Compare* Christine Coyne, Anjelino v. New York Times Co.*: Granting Men Standing to Fight Against Injuries Received as a Result of Sexual Discrimination Towards Female Co-Workers*, 45 VILL. L. REV. 651, 662–63 n.50 (2000) (noting that many courts do not grant standing for a male plaintiff injured by an employment practice that has a disparate impact on women), *with* Anjelino v. New York Times Co., 200 F.3d 73, 92 (3d Cir. 1999) ("Because the male appellants here have pled specific facts to demonstrate a concrete injury as well as a nexus between the alleged injury and the sex-based discrimination, even though that discrimination was aimed in the first instance at others, we conclude that they have established standing.").

194. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2525 (2015); *see also supra* text accompanying note 23. Unfortunately, there is a push among conservative groups to eliminate this avenue of proving discrimination. *See, e.g.*, Chris Arnold, *A New Trump Rule Could Weaken a Civil Rights Era Housing Discrimination Law*, NPR (July 31, 2019, 5:20 PM), https://www.npr.org/2019/07/31/747006108/a-new-trump-rule-could-weaken-a-civil-rights-era-housing-discrimination-law.

195. *Equal Credit Opportunity Act (ECOA)*, CFPB CONSUMER LAWS & REG. (June 2013), https://files.consumerfinance.gov/f/201306_cfpb_laws-and-regulations_ecoa-combined-june-2013.pdf; *see also supra* text accompanying note 25.

Title VII, suggesting a possible expansion of rights for sex workers on the local level if there is development at the federal level.[196]

In a groundbreaking case, the plaintiff in *Gililland v. Southwestern Oregon Community College District* filed a Title IX complaint for discrimination she experienced in her nursing study program because of her prior career in the adult film industry.[197] The plaintiff was a student enrolled in the college's nursing program when instructors at the school discovered the plaintiff used to be an adult film performer.[198] As a result, instructors created a hostile learning environment, such as by making comments about the "quality of a woman a nurse should be," imposing last-minute assignments only for plaintiff, and by arbitrarily lowering plaintiff's grades.[199] The college's conduct ultimately led the plaintiff to become depressed and to attempt suicide.[200] The complaint alleged that the policies and practices "constituted disparate treatment of females and had a *disparate impact* on female students including Plaintiff."[201] At the time of this Note's writing, the court has yet to make any ruling on the merits but will offer valuable insight into the viability of advancing the theory of this Note.

VII. CONCLUSION

Congress enacted Title VII as a means to an end—or to at least minimize—discrimination in the workplace on the basis of certain protected classes. Unfortunately, when sex workers do try to enter non-sex work employment, they consistently experience discrimination. When sex workers are overwhelmingly women, having employment practices that discriminate against sex workers has a disparate impact based on sex and violates Title VII. Waiting for legislators and other

196. *See, e.g., Interpretive Statement 2018-1 Regarding the Meaning of "Sex" in the Elliott-Larsen Civil Rights Act (Act 453 of 1976)*, MICH. CIV. RTS. COMM'N (2018), https://www.michigan.gov/documents/mdcr/MCRC_Interpretive_Statement_on_Sex_05212018_625067_7.pdf (recognizing development in Title VII as a reason to interpret Michigan's ban on discrimination because of sex to include sexual orientation and gender identity); *Resolution 104C*, AM. B. ASS'N (June 29, 2018) https://www.americanbar.org/news/reporter_resources/annual-meeting-2018/house-of-delegates-resolutions/104c/ (urging an interpretation of the Affordable Care Act's ban on sex discrimination to include sexual orientation and gender identity so as to be consistent with interpretations under Title VII).

197. Complaint at ¶ 31, Gililland v. Sw. Or. Cmty. Coll. Dist. (D. Or. 2019) (No. 6:19-cv-00283-AA). Title IX prohibits discrimination on "the basis of sex" in educational programs that receive federal funding. *Title IX and Sex Discrimination*, U.S. DEPT. EDUC. (Apr. 2015), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

198. Complaint, *supra* note 197, at ¶ 12, 14.

199. *Id.* at ¶ 15–18.

200. *Id.* at ¶ 26.

201. *Id.* at ¶ 37 (emphasis added).

policy makers to add sex work as a protected class under anti-discrimination protections would of course solve this issue. However, until protecting sex workers becomes a politically viable option, another solution is to, correctly, recognize that discrimination against sex workers is sex discrimination.