"Because of Sex": Title VII's Failures Leave Legal Sex Workers Unprotected*

Society's views towards sex, sexual expression, and gender roles are shifting, as is the public's perception of sex work. Movements calling for the decriminalization of prostitution are gaining attention, and individuals are increasingly taking advantage of online platforms to participate in both the creation and consumption of legal sex work. However, one side effect of the growing opportunities to engage in legal sex work online is the resulting decrease in anonymity. By working on well-known platforms such as PornHub or OnlyFans, sex workers increase their risk of being recognized by clients, coworkers, employers, family, or friends. This decrease in anonymity has led to an influx of stories detailing the discrimination legal sex workers face in their "traditional" jobs. While discrimination against sex workers is nothing new, its increasing visibility raises an important question: Should individuals have to choose between their sexual autonomy and their ability to obtain—and keep—their "traditional" employment without fear of discrimination? Further, what protections exist when an employer takes an adverse employment action against an individual for their decision to participate in legal sex work outside of their "traditional" job?

Currently, there is no recognized remedy for sex workers who face employment discrimination from their non-sex-work employment because of their choice to participate in legal sex work. However, that remedy should exist under a law that is already in place: Title VII of the Civil Rights Act of 1964. Historically, Title VII's prohibition of discrimination "because of sex" has been read very narrowly to focus on a strict male-versus-female dichotomy that severely limited its application. Today, however, courts are increasingly willing to expand Title VII to protect the legal rights that are based on, and extensions of, an individual's sex. Given that Title VII's purpose is to provide for equality in the workplace, discrimination based on one's decision to engage in legal sex work appears to be in line with the very type of discrimination Title VII was intended to prevent.

This Comment argues that Title VII's definition of sex should either be correctly interpreted or expanded so that Title VII's prohibition of employment discrimination protects employees who choose to engage in legal sex work. The current narrow interpretation of "because of sex" severely limits its application and leaves individuals who choose to engage in legal sex work without adequate protection. Discrimination against an individual for choosing to participate in sex work is discrimination "because of sex," and correctly interpreting, or

expanding, that definition would allow Title VII to better provide the protection its text guarantees.

INTRODUCTION

On December 12, 2020, the *New York Post* published an article titled "NYC Medic Helped 'Make Ends Meet' With Racy OnlyFans Side Gig,"[1] which shared a story about Lauren Kwei, a twenty-three-year-old New York City paramedic who started an OnlyFans[2] account to post explicit photos in order to

1. Dean Balsamini & Susan Edelman, *NYC Medic Helped "Make Ends Meet" with Racy OnlyFans Side Gig*, N.Y. POST (Dec. 12, 2020, 12:26 PM), https://nypost.com/2020/12/12/nyc-medic-helped-make-ends-meet-with-racy-onlyfans-side-gig/ [http://perma.cc/A5C2-ZB7E].

2. See *infra* notes 45–52 and accompanying text for an explanation of OnlyFans and its connection to sex work.

support herself during the COVID-19 pandemic.[3] The article was published against her wishes and in an attempt to shame her.[4] The story publicized highly personal information, including details about her current employer, and Kwei immediately feared the article would put both her job and reputation at risk.[5] Surprisingly, social media communities supported Kwei and condemned the *New York Post* for doxing someone just for trying to earn extra money to pay her expenses.[6] Kwei advocated for herself and others like her, asserting, "as long as you're not hurting anybody or hurting yourself, do what you want. Mind your business."[7] Further, she pointed out that "this was a really easy way to capitalize off of men who were going to be looking at porn anyways."[8]

While Kwei did not lose her job as a paramedic,[9] her story is more of an exception than the general rule. In February of 2020, Kristen Vaughn was fired from her job as an auto mechanic after her male coworkers discovered her OnlyFans account and viewed her pornographic content while at work.[10] Similarly, the "list of porn performers blacklisted by their professional communities reads like an endless scroll."[11] People like Stacie Halas, Julia Pink, Kevin Hogan, Tera Myers, Shawn Loftis, Gauge, and Belle Knox were all harassed, fired from their "traditional" jobs, or prevented from even entering the nonporn workforce because of their past or present engagement in legal sex work.[12] And if employers would not fire employees for viewing pornography,

3. EJ Dickson, *Meet the Paramedic Whose OnlyFans Was Outed by the 'New York Post*,' ROLLING STONE (Dec. 17, 2020, 2:31 PM), https://www.rollingstone.com/culture/culture-news/onlyfans-medic-lauren-kwei-new-york-post-interview-1104943/ [https://perma.cc/A9UD-DH82].

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Otillia Steadman, *Her Colleagues Watched Her OnlyFans Account at Work. When Bosses Found Out, They Fired Her.*, BUZZFEED NEWS (Apr. 25, 2020, 12:44 PM), https://www.buzzfeednews.com/article/otilliasteadman/mechanic-fired-onlyfans-account-indiana [http://perma.cc/9TLL-W4M5]. While Vaughn took some of her photographs on her employer's property and in her uniform, her story nevertheless illustrates the increasing concern over employment discrimination against legal sex workers. *See* Emily Jashinsky, *How BuzzFeed Botched a Story About an Indiana Mechanic Fired After Posting Porn from Work*, FEDERALIST (Apr. 28, 2020), https://thefederalist.com/2020/04/28/how-buzzfeed-botched-a-story-about-an-indiana-mechanic-fired-after-posting-porn-from-work [http://perma.cc/WVU9-YE3Q]. Vaughn's employer insisted she was fired for violating company policy, likely related to inappropriate conduct in the workplace. *Id.* Notably, while Vaughn may have been appropriately terminated for engaging in legal sex work while at her place of employment, her male coworkers who found and watched her videos while also on company property and during their shifts were not punished. Steadman, *supra*. This appears to be exactly the type of sex discrimination Title VII sought to prohibit.

11. Isabelle Kohn, *Former Porn Stars Explain How Porn Screwed Up Their Lives*, ROOSTER (Dec. 12, 2017), https://therooster.com/blog/how-much-does-doing-porn-actually-affect-your-future [http://perma.cc/FZD9-HQ9V].

12. *Id.* For a definition of legal sex work, see *infra* text accompanying notes 31–32.

why should they punish others for simply providing it? These stories raise an important question: Should an individual have to choose between their sexual autonomy and their ability to obtain—and keep—gainful "traditional" employment without fear of discrimination?

To make matters worse, employment discrimination cases involving sex workers are very hard to win.[13] What protections exist when an employer takes an adverse employment action against an individual for their decision to participate in legal sex work outside of their "traditional" employment? As sex work increasingly moves to online platforms such as PornHub[14] and OnlyFans,[15] the answer to that question becomes all the more important.

The answer is a difficult one. Currently, there is not a recognized remedy for legal sex workers who are fired from their non-sex-work employment because of their participation in legal sex work. However, that remedy should be available under a law that already exists: Title VII. While Title VII is meant to protect women and minorities against workplace discrimination, Title VII's prohibition of discrimination "because of sex" is read very narrowly[16] and does not cover legal, logical extensions of an individual's sex.[17] However, discrimination based on an individual's decision to engage in legal sex work appears to be in line with the very type of discrimination Congress aimed to

13. Kohn, *supra* note 11.

14. Pornhub is one of the largest pornography sites in the world, where official content partners or members of its model program can upload content for others to view, either for free or through paid accounts. Samantha Cole, *Pornhub Just Purged All Unverified Content from the Platform*, VICE (Dec. 14, 2020, 7:00 AM), https://www.vice.com/en/article/jgqjjy/pornhub-suspended-all-unverified-videos-content [https://perma.cc/9QW5-7J89]. In 2019, the site hosted 115 million users per day. Curtis Silver, *Pornhub 2019 Year in Review Report: More Porn, More Often*, FORBES (Dec. 11, 2019, 10:00 AM), https://www.forbes.com/sites/curtissilver/2019/12/11/pornhub-2019-year-in-review-report-more-porn-more-often/?sh=6521cb464671 [https://perma.cc/XE78-JTN4 (dark archive)].

15. *See infra* notes 45–52 and accompanying text. Notably, on August 19, 2021, OnlyFans announced that they would begin to "prohibit the posting of any content containing sexually explicit conduct" in October 2021 upon "the requests of [their] banking partners and payout providers." Tina Horn, *OnlyFans May Have Rescinded Their Sexual Content Ban, But Sex Workers Remain Skeptical*, ROLLING STONE (Aug. 25, 2021, 10:50 AM), https://www.rollingstone.com/culture/culture-features/onlyfans-explicit-content-ban-response-1216466/ [https://perma.cc/AZ3R-JY5H] (quoting OnlyFans' August 19, 2021, statement). A week later, the company rescinded the policy after facing immense backlash, including claims of hypocrisy—after all, the platform built its reputation on the adult content it provides and gained notoriety and financial success through such content. *Id.* Despite OnlyFans' decision to abandon its proposed policy change, the legal sex workers who use the platform face uncertainty yet again, explaining that OnlyFans "is just another example in a long, long line of websites building their entire brands on [sex workers' labor, bodies, and influence], and then turning their backs on [sex workers] as soon as it might benefit them financially." *Id.* (quoting Lydia Caradonna, a sex worker and founding member of Decrim Now, a group that campaigns for the decriminalization of sex work in the United Kingdom). This further emphasizes the increasing need for protections for sex workers.

16. *See infra* notes 65–72 and accompanying text.

17. *See infra* Section IV.A.

prevent.[18] And while Title VII does provide some limited protections for employees supplementing their income through engaging in legal sex work,[19] by applying its narrow definition of "because of sex," courts fail to provide these individuals with the protection against employment discrimination that the Act guarantees. This Comment argues that Title VII's definition of sex should either be correctly interpreted or expanded so that Title VII's central prohibition of employment discrimination protects an employee's engagement in legal sex work.

Part I of this Comment provides background information on legal sex work. Part II provides an overview of Title VII and the different frameworks courts apply to Title VII claims. Additionally, it demonstrates the ways in which Title VII jurisprudence has evolved since the Act's passage. Part III illustrates potential protections currently available for legal sex workers under Title VII. However, these available protections contain gaps and limitations that largely preclude them from offering legal sex workers any real safeguards against employment discrimination. As such, Part IV argues that discrimination against legal sex workers is discrimination "because of sex," which is forbidden by Title VII. The purpose of Title VII, the scant legislative history, and recent Supreme Court decisions all support a broader definition of "because of sex" that would provide individuals with protection from employment discrimination based on their decision to engage in legal sex work. Additionally, Part IV illustrates the impact a broadened definition of sex that includes legal sex work would have on Title VII sex discrimination claims and addresses the implications of such a shift. While this Comment seeks to demonstrate that sex work is already included under Title VII, and thus an act of Congress is not needed to confirm this, Part IV also outlines two alternative solutions to provide legal sex workers with the protection Title VII guarantees. In sum, this Comment argues that individuals like Lauren Kwei should not have to choose between their legal right to engage in sex work and their right to employment free from sex discrimination.

I. AN OVERVIEW OF LEGAL SEX WORK

The term "sex work" describes commercial sex, or "the provision of sexual services for money or goods."[20] Activist Carol Leigh coined the term in 1978 to describe a wide range of activities, both legal and illegal, including prostitution,

18. *See infra* Section IV.A.

19. *See infra* Part III.

20. CHERYL OVERS, SEX WORKERS: PART OF THE SOLUTION 2 (2002), https://www.who.int/hiv/topics/vct/sw_toolkit/115solution.pdf [https://perma.cc/4PRM-F78H]; *see also Understanding Sex Work in an Open Society*, OPEN SOC'Y FOUNDS., https://www.opensocietyfoundations.org/explainers/understanding-sex-work-open-society [https://perma.cc/2J87-35QZ] (Apr. 2019) [hereinafter *Understanding Sex Work*].

pornography, phone sex, webcam modeling, stripping, and other forms of exotic labor and performances.[21] Individuals engage in sex work for a variety of reasons: some believe it is the best option they have to make ends meet, some do so for the high pay and flexible working conditions, and others do so to "explore and express their sexuality."[22] Critics of sex work argue that it is immoral, illegal, and unworthy of any form of protection, whether through the law or through social support for the individuals involved in the sex work industry.[23] While the morality of sex work has long been debated,[24] advocates for the decriminalization of sex work counter critics' arguments by emphasizing that engaging in legal sex work is a choice that can provide economic empowerment,[25] and that the criminalization of sex work further endangers "sex workers' health and safety by driving sex work underground."[26] Evidence demonstrates that laws criminalizing consensual sex work "often make sex workers less safe and provide impunity for abusers with sex workers often too scared of being penalized to report crime to the police."[27] Furthermore, consensual or legal sex work is often conflated with illegal sex trafficking, child sex abuse, and rape.[28] While there is some overlap, equating legal sex work with human rights violations is dangerous. Not only does it lead to the further stigmatization of sex workers, but it also precludes them from receiving legal protections guaranteed to the rest of society.

21. Mattilda Bernstein Sycamore, *'Sex Workers Unite,' by Melinda Chateauvert*, SFGATE (Jan. 10, 2014), https://www.sfgate.com/books/article/Sex-Workers-Unite-by-Melinda-Chateauvert-5132503.php [https://perma.cc/F76S-T7XK].

22. *Understanding Sex Work*, *supra* note 20.

23. Chris Herlinger, *The Worldwide Debate About Sex Work: Morality Meets Reality*, GLOB. SISTERS REP. (July 27, 2017), https://www.globalsistersreport.org/news/trafficking/worldwide-debate-about-sex-work-morality-meets-reality-48216 [https://perma.cc/X5DA-CBYQ].

24. *Id.*

25. *Id.*

26. *Understanding Sex Work*, *supra* note 20.

27. *Amnesty International Publishes Policy and Research on Protection of Sex Workers' Rights*, AMNESTY INT'L (May 26, 2016, 12:00 AM), https://www.amnesty.org/en/latest/news/2016/05/amnesty-international-publishes-policy-and-research-on-protection-of-sex-workers-rights/ [https://perma.cc/FK4K-6Z34].

28. Jasmine Garsd, *Should Sex Work Be Decriminalized? Some Activists Say It's Time*, NPR (Mar. 22, 2019, 2:43 PM), https://www.npr.org/2019/03/22/705354179/should-sex-work-be-decriminalized-some-activists-say-its-time [https://perma.cc/NAL5-ZJTX] ("The debate about sex and sex work always gets linked to trafficking."); Ravishly, *Is Sex Work Empowering or Enslaving? 12 Experts Weigh In*, HUFFPOST, https://www.huffpost.com/entry/is-sex-work-empowering-or-enslaving_b_5825882 [http://perma.cc/4CF5-D4M2] (Dec. 6, 2017). There is sometimes overlap between consensual sex work and illegal sex trafficking because some sex workers do experience sex trafficking. *See* YALE GLOB. HEALTH JUST. P'SHIP, SEX WORK VS SEX TRAFFICKING: HOW THEY ARE DIFFERENT AND WHY IT MATTERS *1–2 (2020), https://law.yale.edu/sites/default/files/area/center/ghjp/documents/issue_brief_sex_work_vs_trafficking_v2.pdf [https://perma.cc/PVX7-NX6U] (describing the importance of keeping sex work and sex trafficking analytically distinct and explaining the implications of maintaining that boundary). However, not all sex workers are trafficked, and as such, this conflation does not accurately reflect the reality of sex work. *Id.*

While scholars and activists disagree over what exactly is included in the term "sex work,"[29] many of the individuals who engage in such work see this term as less "demeaning and stigmatizing" and prefer it over the term "prostitution," which implies criminality or immorality.[30] Thus, this Comment divides sex work into two distinct categories: legal and illegal. Legal sex work involves a consensual transaction between adults that does not violate human rights or existing laws, including webcamming, phone sex, stripping, and pornography.[31] It is a logical extension, or expression, of an individual's sexuality that can provide individuals with "an arena of sexual freedom where [an individual] is encouraged to explore [their] sexuality without shame or stigma."[32] Illegal sex work, on the other hand, involves sexual transactions that violate human rights or existing laws, including prostitution[33] and nonconsensual acts such as child pornography, human trafficking, revenge pornography, or rape.[34] Focusing on legal and consensual sex work precludes its conflation[35] with illegal sex work, which can be harmful and dangerous to the individuals involved, and highlights the fact that legal sex work is a choice that deserves protection.

Individuals who have engaged, or currently engage, in sex work face "exclusion from health, legal, and social services,"[36] all while confronting discrimination in numerous contexts. This Comment argues Title VII should be correctly interpreted to include protection against employment discrimination for *legal* sex workers, not sex work in general. Such a distinction precludes employers' arguments that they are prohibiting illegal conduct as a basis for adverse employment decisions rather than because of sex discrimination. Existing gender stereotypes "explain why women and

29. *See* Andrew Poitras, *What Constitutes Sex Work?*, HOPES & FEARS, http://www.hopesandfears.com/hopes/now/question/216863-what-constitutes-sex-work [https://perma.cc/LL5H-ZAGT].

30. *Understanding Sex Work*, *supra* note 20.

31. *Id.*

32. Alissa C. Perrucci, *The Transformative Power of Sex Work*, 24 HUMAN. & SOC'Y 323, 325 (2000).

33. While prostitution is currently illegal in most of the United States, movements arguing for the decriminalization of prostitution have been gaining traction and attention. The decriminalization of sex work "means removal of criminal and administrative penalties that apply specifically to sex work, creating an enabling environment for sex worker health and safety." *Understanding Sex Work*, *supra* note 20; *see also* Anna North, *The Movement To Decriminalize Sex Work, Explained*, VOX (Aug. 2, 2019, 7:30 AM), https://www.vox.com/2019/8/2/20692327/sex-work-decriminalization-prostitution-new-york-dc [https://perma.cc/JJ2E-MLJH]. Other countries have removed criminal penalties for prostitution, and in 2016 Amnesty International called for the global decriminalization of sex work. *Id.*

34. Ravishly, *supra* note 28. Additionally, it is important to note that although sex work and sex trafficking are often treated as one and the same, the conflation of the two activities is "harmful and counterproductive." *Understanding Sex Work*, *supra* note 20. For purposes of this Comment, they will be treated separately.

35. *See supra* notes 28–34 and accompanying text.

36. *Understanding Sex Work*, *supra* note 20.

minorities are more likely to suffer harm in the job market," and reflect the fact that discrimination against individuals who engage in sex work stems not from valid concerns but from society's judgment that such behavior is immoral.[37] Thus, when employers discriminate against an individual based on their choice to engage in legal sex work, such discrimination is in line with the very discrimination Title VII was passed to protect against.[38]

Due to the "digital revolution," sex work is increasingly transitioning from the streets and strip clubs to online platforms.[39] In 2018, the online porn industry was estimated to have earned annual revenues as high as $97 billion; this number is staggering, especially when compared with the earnings of corporate heavy hitters like Netflix, which earned an estimated $11.7 billion in the same timeframe.[40] Notably, MindGeek, "the largest adult entertainment operator globally," owns and operates some of the largest porn sites on the internet, including PornHub, Brazzers, RedTube, YouPorn, and numerous others.[41] Currently, MindGeek generates more internet traffic and is responsible for more bandwidth consumption than Amazon, Facebook, or Twitter, and closely trails Google and Netflix.[42] On its own, PornHub draws over 120 million visitors each day and around 3.5 billion users each month.[43] As of December 2020, PornHub alone boasts a net worth of $1.5 billion.[44]

This shift to online platforms has been exacerbated by COVID-19, and the platform OnlyFans has emerged as an industry giant that enables creators, who are largely women, to provide subscription access to pornographic content to users, who are largely men.[45] Subscribers, or "fans," pay a fee ranging from

37. Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1928 (2019).

38. *See infra* Section IV.A.

39. Louise Perry, *How OnlyFans Became the Porn Industry's Great Lockdown Winner—and at What Cost*, NEW STATESMAN, https://www.newstatesman.com/science-tech/social-media/2020/11/how-onlyfans-became-porn-industry-s-great-lockdown-winner-and-what [https://perma.cc/F4MQ-DES9] (July 1, 2021, 12:14 PM).

40. Aisha Hassan, *Porn Sites Collect More User Data Than Netflix or Hulu. This Is What They Do with It*, QUARTZ, https://qz.com/1407235/porn-sites-collect-more-user-data-than-netflix-or-hulu-this-is-what-they-do-with-it/ [https://perma.cc/68D6-SSGZ] (Dec. 26, 2018).

41. Smita M, *Who Owns Pornhub's Parent Company MindGeek? Net Worth and Everything About Montreal Pornography Conglomerate*, MEAWW, https://meaww.com/porn-hub-parent-company-mind-geek-net-worth-everything-about-montreal-based-pornography-conglomerate [https://perma.cc/C5GW-9NLZ] (Dec. 16, 2020, 4:10 PM).

42. *Id.*

43. *Id.* Comparatively, Twitter has 192 million daily active users. Ying Lin, *10 Twitter Statistics Every Marketer Should Know in 2021 [Infographic]*, OBERLO (Jan. 25, 2021), https://www.oberlo.com/blog/twitter-statistics#:~:text=There%20are%20330%20million%20monthly,daily%20active%20users%20on%20Twitter [https://perma.cc/J9BC-5FQU].

44. M, *supra* note 41.

45. Perry, *supra* note 39; *see also* Jacob Bernstein, *How OnlyFans Changed Sex Work Forever*, N.Y. TIMES (Feb. 9, 2019), https://www.nytimes.com/2019/02/09/style/onlyfans-porn-stars.html [https://www.perma.cc//B682-C7MQ (dark archive)] (describing the implications of the way OnlyFans "put X-rated entertainment in the hands of its entertainers").

five to fifty dollars per month, and are allowed to "tip" the creator for personalized content.[46] As COVID-19 stay-at-home orders went into effect in March 2020, OnlyFans reported 3.5 million new sign-ups, or roughly 150,000 new users every twenty-four hours.[47] The total number of "fans" surged from twenty million users in February 2020[48] to roughly ninety million by December 2020,[49] and from 120,000 creators in 2019 to over one million as of December 2020, the majority of whom post some form of explicit content.[50] Such a surge in content creators was likely due to a combination of "loneliness, boredom and a need for extra cash,"[51] as COVID-19 restrictions forced those already engaged in sex work to shift their businesses online, and caused others to lose their jobs and look for additional ways to make ends meet.[52] And OnlyFans is not the only platform of its kind—there are numerous similar platforms that have either launched or increased in popularity in response to COVID-19.[53] This demonstrates that not only are more people participating in both the creation and consumption of legal sex work, but more spaces are becoming available where individuals can choose to engage in legal sex work.

Although more convenient, this shift to online platforms is creating additional problems for sex workers.[54] One notable issue is the increased

46. *What Is OnlyFans and How Has This Site Changed the Adult Industry?*, FIGHT NEW DRUG (Aug. 27, 2020), https://fightthenewdrug.org/what-is-onlyfans-and-how-has-this-site-changed-the-adult-industry/ [https://www.perma.cc/3VVE-3XAC] [hereinafter *What Is OnlyFans?*].

47. *Id.*

48. *Id.*

49. Gillian Friedman, *Jobless, Selling Nudes Online and Still Struggling*, N.Y. TIMES, https://www.nytimes.com/2021/01/13/business/onlyfans-pandemic-users.html?action=click&module=News&pgtype=Homepage [https://perma.cc/DTP9-H9SF (dark archive)] (Oct. 21, 2021).

50. *Id.* Congress has defined "sexually explicit conduct" as "actual or simulated" sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or "lascivious exhibition of the anus, genitals, or pubic area of any person." 18 U.S.C. § 2256(2)(A). However, content shared on OnlyFans is not limited to sexually explicit conduct; other creators, including celebrities and influencers, use OnlyFans to promote new music, connect with fans, and give followers an inside look at their everyday lives. *See* Joshua Espinoza, *OnlyFans Explained: What You Need To Know About the NSFW Site*, COMPLEX (Sept. 20, 2021), https://www.complex.com/life/what-is-onlyfans-explainer [https://perma.cc/D34U-KEP6]. For example, the tourism board for Vienna, Austria, has created an OnlyFans account in an effort to share artwork depicting nudity and to protest other online platforms' censorship of such works. *See* Elle Hunt, *Vienna Museums Open Adult-Only OnlyFans Account To Display Nudes*, GUARDIAN (Oct. 16, 2021, 3:00 PM), https://www.theguardian.com/artanddesign/2021/oct/16/vienna-museums-open-adult-only-onlyfans-account-to-display-nudes [https://perma.cc/77YV-ZASC].

51. *What Is OnlyFans?*, *supra* note 46.

52. *Id.*

53. *See 10 Best OnlyFans Alternatives To Make Money in 2021*, CAM MODEL AGENCY, https://cammodelagency.com/onlyfans-alternative/ [https://perma.cc/2L5U-D5CK].

54. For an explanation of "[s]ome of the risks OnlyFans poses to individuals, relationships, and society," see *What Is OnlyFans?*, *supra* note 46.

visibility and decreased anonymity.[55] As more sex workers move to well-known online platforms, they increase the likelihood of being recognized by clients, employers, coworkers, family, and friends. On sites like PornHub or OnlyFans, many explicit content creators post under fake names, locations, and handles or screen names, or hide their faces in an attempt to remain anonymous.[56] However, as Lauren Kwei and many other cases[57] illustrate, remaining anonymous in today's digital world is not always possible,[58] and content creators face the danger that their choice to engage in legal sex work will adversely impact their daily lives and ability to obtain and keep more "traditional" employment. And as this shift towards the internet will continue to increase, it is becoming even more important that Title VII is interpreted in a way that provides the level of protection its statutory text guarantees for all law-abiding workers. Only then can Title VII ensure that legal sex workers are not discriminated against based on their legal choice and right to express their sexuality by participating in legal sex work.

II. AN OVERVIEW OF TITLE VII

Congress passed Title VII of the Civil Rights Act in 1964[59] for the purpose of "improv[ing] the economic and social conditions of minorities and women by providing equality of opportunity."[60] Further, Congress clarified that "[t]hese conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life."[61] Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person" and includes exceptions for some government entities.[62] Thus, Title VII's central prohibition establishes:

> It shall be an unlawful employment practice for 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

55. *See* Sofia Barrett-Ibarria, *Here's How Much It Really Costs To Be an Online Sex Worker*, HUFFPOST (Apr. 13, 2020, 9:00 AM), https://www.huffpost.com/entry/online-sex-work-cam-only-fans-covid-19_n_5e8de205c5b6359f96d0c2d4 [https://perma.cc/H852-39FP].

56. *What Is OnlyFans?*, *supra* note 46.

57. *See* Kohn, *supra* note 11.

58. *See* Dickson, *supra* note 3.

59. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

60. 29 C.F.R. § 1608.1(b) (2021).

61. *Id.*

62. 42 U.S.C. § 2000e(b).

> 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*.[63]

The statute further provides an important exception for employment practices that draw distinctions "on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[64] Thus, unless such a "bona fide occupational qualification" exists, employers are not permitted to make employment decisions on the basis of an individual's sex.

However, "sex" was only included as a protected classification in the statute at the last moment, when Virginia Congressman Howard W. Smith proposed adding "sex" as a class in what many commentators believe was an effort to prevent Title VII from being enacted.[65] This effort was unsuccessful, and after only a few additional hours of discussion, Title VII passed in the House by a vote of 168–133 with the amendment adding "sex" as one of the five protected classes.[66] This late addition of "sex" as a protected class had two important implications for the analysis of Title VII sex discrimination claims. First, "[i]t is a commonplace in employment discrimination law that Title VII's prohibition of sex discrimination has no legislative history."[67] Second, "sex" was left undefined by the statute.[68] As a result, courts have little guidance from either legislative history or statutory text when interpreting what falls within the classification of "sex." This, in turn, resulted in courts historically applying a narrow, "traditional concept" of sex—which "divide[s] men and women into two perfectly sex-differentiated groups"[69]—to conclude that many claims fell outside the statute's scope.[70] But as society's views towards "sex" continue to

63. *Id.* § 2000e-2(a) (emphasis added).

64. *Id.* § 2000e-2(e)(1).

65. Teresa Shulda, *Does Discrimination "Because of Sex" Cover Sexual Orientation and Gender Identity Discrimination?: The Evolution of Title VII*, 87 J. KAN. BAR ASS'N 54, 55 (2018); Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1318 (2012).

66. 110 CONG. REC. 2584 (1964).

67. Franklin, *supra* note 65, at 1317.

68. § 2000e. This section defines many of the statute's terms. *See, e.g.*, § 2000e(a) ("person"); § 2000e(b) ("employer"); § 2000e(f) ("employee"); § 2000e(g) ("commerce"); § 2000(j) ("religion"). Notably, the terms "sex" and "discrimination" were left out of the definitions. The phrases "because of sex" or "on the basis of sex" were defined with the enactment of the Pregnancy Discrimination Act of 1978, which amended Title VII by adding § 2000e(k). Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

69. *See* Franklin, *supra* note 65, at 1308. Franklin asserts Title VII was initially constrained to protect "traditional gender norms and sexual conventions," and to preserve and regulate "men's and women's sex and family roles." *Id.* at 1325, 1380.

70. *See id.* at 1319.

change and the "traditional concept" of sex becomes more archaic,[71] it appears that a more dynamic method of interpreting "sex" under Title VII is in line with the statute's stated purpose.[72]

A. *Title VII Sex Discrimination*

To protect women and minorities against employment discrimination, Title VII provides two distinct types of employment protections: prohibition against status-based discrimination of protected classes, which includes both disparate treatment and disparate impact theories,[73] and prohibition against retaliation.[74] However, even these broad categories of protections leave much room for improvement when applied in cases involving discrimination "because of sex." While the focus of this Comment is on disparate treatment claims, understanding how these Title VII protections work together highlights the Act's shortcomings in providing legal sex workers with any real safeguards.

1. Disparate Treatment Claims

Disparate treatment claims occur when an employer "treat[s a] particular person less favorably than others because of" a protected trait and requires that the employee, as plaintiff, prove that the employer, as defendant, took an adverse employment action because of "a discriminatory intent or motive."[75] The Supreme Court established a framework for analyzing disparate treatment claims in *McDonnell Douglas Corp. v. Green*.[76] For a disparate treatment claim,

71. *Id.* at 1377–78. Extending "protections to gay and transgender workers is the result of developments not in formal logic, but in social logic; courts . . . are beginning to develop new understandings of the ways in which discrimination against sexual minorities can reflect and reinforce gendered conceptions of sex and family roles." *Id.* This reflects that as society's views about gender, gender roles, and sex shift, so do courts' normative judgments regarding "how far the law should go in disrupting the enforcement of gender norms in the workplace." *Id.* at 1333. Social norms historically shaped Title VII jurisprudence, and "socially inflected judgments continue to determine the law's parameters today." *Id.* at 1373; *see also* Marc Chase McAllister, *Sexual Orientation Discrimination as a Form of Sex-Plus Discrimination*, 67 BUFF. L. REV. 1007, 1008–09 (2019) (stating that "[t]imes, and judicial interpretations [of Title VII], are changing" as courts expand sex discrimination to include sexual orientation).

72. *See supra* notes 60–61 and accompanying text.

73. § 2000e-2; Ricci v. DeStefano, 557 U.S. 557, 577 (2009). Originally, Title VII only prohibited disparate treatment and did not expressly apply to disparate impact theories of discrimination. *Ricci*, 557 U.S. at 577. However, in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court interpreted Title VII to include a disparate impact theory. *Id.* at 430–31. This was further solidified with the passage of the Civil Rights Act of 1991, which added a provision to Title VII prohibiting disparate impact discrimination. Pub. L. No. 102-166, 105 Stat. 1071.

74. § 2000e-3(a). *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 347–52 (2013) (describing the scope of Title VII).

75. Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 985–86 (1988); § 2000e-2(a)(1).

76. 411 U.S. 792, 802–04 (1973). In this case, an African American civil rights activist protested when he was laid off, arguing that his discharge and his employer's hiring practices were racially motivated. *Id.* at 794. He reapplied for the position but was rejected because of his involvement in the

courts employ the *McDonnell Douglas* burden-shifting test: (1) the plaintiff must first establish a prima facie case of discrimination based on a protected class, after which (2) the employer must "articulate some legitimate, nondiscriminatory reason" for its actions, and (3) the plaintiff must then show that discrimination occurred.[77] In order to establish a prima facie case of discrimination, a plaintiff must show that: (1) the employee is a member of a protected class; (2) the employer knew of the employee's protected class; (3) the employer took adverse action against the employee; and (4) others outside of the protected class who are similarly situated were not subject to the same adverse treatment or were treated more favorably.[78]

Under the third prong of the *McDonnell Douglas* test, the plaintiff must ultimately show that discrimination occurred. This is typically done by providing evidence demonstrating that the employer's proffered reason for its allegedly discriminatory action is merely pretext.[79] A plaintiff's evidence of pretext can include the employer's previous treatment of the employee during their term of employment, the employer's "general policy and practice with respect to minority employment," or the employer's favorable treatment of similarly situated employees outside of the plaintiff's protected group.[80] Thus, if an employment practice or policy treats male and female employees in the same role differently, then that could illustrate that the employer's proffered reasons for its actions were merely pretext for gender discrimination. Claims for sexual harassment[81] and gender stereotyping are included under this disparate treatment theory.[82]

Further, there are two possible ways to prove the employer engaged in intentional discrimination under the third prong of the *McDonnell Douglas* test: by showing "but-for" causation or by using a "mixed-motive" analysis. The

protests. *Id.* at 796. The employee then filed a petition with the Equal Employment Opportunity Commission and ultimately brought a Title VII suit. *Id.* at 796–97.

77. *Id.* at 802–04.

78. *Id.* at 802. The elements for proving a prima facie case of discrimination "will vary in Title VII cases" depending on the "differing factual situations." *Id.* at 802 n.13. The *McDonnell Douglas* burden-shifting framework "was never intended to be rigid, mechanized, or ritualistic." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). Instead, the elements required will vary in cases involving hiring, promotion, discharge, and other factual scenarios. *See id.*

79. *McDonnell Douglas Corp.*, 411 U.S. at 804. An employer will not automatically face liability under Title VII if the employee merely proves pretext. Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 148 (2000). The employee must ultimately present evidence that discrimination did in fact occur. *Id.*

80. *McDonnell Douglas Corp.*, 411 U.S. at 804–05.

81. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (recognizing that sexual harassment that creates an abusive or hostile working environment is a cognizable claim under Title VII); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998) (recognizing Title VII extends to same-sex sexual harassment).

82. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

"but-for" analysis first assumes a factor, such as gender, was present at the time of the employment decision, and then considers whether the decision would have been the same even if that factor was absent.[83] Thus, a plaintiff in a disparate treatment case can succeed when they demonstrate that, but-for their gender, the employer's decision would have been different. Under a "mixed-motive" analysis, the plaintiff must show that intentional discrimination was a motivating factor for the employer's adverse action. The employer then has an opportunity for an affirmative defense: the employer would have made the same adverse action even absent their unlawful motivation to discriminate based on a protected class.[84] Thus, where a plaintiff can show that its employer's decision was motivated in part by an illegitimate and unlawful reason, such as gender, they can succeed in demonstrating disparate treatment.[85] However, unlike the but-for analysis, the mixed-motive analysis allows the employer to affirmatively assert that they would have made the same decision even in the absence of this discriminatory reason.

2. Disparate Impact Claims

Conversely, a disparate impact claim covers facially neutral employment practices that cause a disparate impact on the basis of a protected class and does not require that plaintiffs prove discriminatory intent.[86] Title VII establishes a similar burden-shifting framework for disparate impact cases: (1) the plaintiff must demonstrate that the employer has a facially neutral practice or policy that has a disparate impact on a protected class; (2) after a discriminatory effect is shown, the employer "may defend against liability by demonstrating that the practice is 'job related for the position in question and consistent with business necessity;'" and (3) if the employer meets that burden, the plaintiff must show that "the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs."[87]

83. *Id.* at 240.

84. *Id.* at 252.

85. *Id.* at 258.

86. 42 U.S.C. § 2000e-2(k)(1)(A)(i); Ricci v. DeStefano, 557 U.S. 557, 577 (2009) (explaining that disparate impact claims apply to "practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities").

87. *Ricci*, 557 U.S. at 578 (quoting § 2000e-2(k)(1)(A)(i)). While the Civil Rights Act of 1964 did not originally include an express prohibition against disparate impact, the Supreme Court first interpreted the Act to prohibit policies that created a disparate impact in *Griggs*. 401 U.S. 424, 431 (1971). The Civil Rights Act of 1991 later codified this prohibition against disparate impact discrimination and the burden-shifting framework used in analyzing such cases. *Ricci*, 557 U.S. at 577–78.

3. Retaliation Claims

Finally, Title VII provides for a cause of action for retaliation. Title VII establishes that it is an unlawful employment practice for an employer to discriminate against a potential or existing employee because that individual "has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII.[88] To demonstrate a prima facie case of retaliation, (1) the plaintiff must have engaged in a protected activity, including either participation in a Title VII investigation, proceeding, or hearing, or opposition to unlawful employment practices; (2) the employer must have imposed an adverse employment action; and (3) the plaintiff's protected activity must have been a but-for cause of the alleged adverse action.[89]

B. *The Evolution of Title VII Sex Discrimination*

Early cases applied a strict and narrow definition of what qualified as impermissible sex discrimination under Title VII, finding violations only where "the offensive conduct . . . perfectly and clearly differentiate[d] between *all* women and *all* men."[90] For example, in *General Electric Company v. Gilbert*,[91] the Supreme Court held that an employer's disability benefits plan that did not cover pregnancy-related disabilities did not violate Title VII.[92] The Court reasoned that despite the fact that pregnancy-related disabilities impacted women more than men, the scheme did not have a gender-based discriminatory effect because the plan provided equally for men and women alike.[93] Similarly, courts relied on this men-versus-women distinction to determine that Title VII did not preclude no-marriage employment rules,[94] policies excluding working mothers,[95] and workplace sexual harassment.[96] As a result, for roughly the first

88. § 2000e-3(a).

89. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013).

90. Shulda, *supra* note 65, at 56.

91. 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

92. *Id.* at 145–46.

93. *Id.* at 138–40.

94. Cooper v. Delta Air Lines, Inc., 274 F. Supp. 781, 783 (E.D. La. 1967) (holding that the airline's requirement that female stewardesses be unmarried did not violate Title VII); Stroud v. Delta Air Lines, Inc., No. 76-2130, 1977 WL 25929, at *2 (5th Cir. Feb. 23, 1977) (unpublished table decision) (same).

95. Phillips v. Martin Marietta Corp., 411 F.2d 1, 4–5 (5th Cir. 1969), *vacated*, 400 U.S. 542 (1971) (finding the company's policy prohibiting mothers, but not fathers, of preschool-aged children from employment in certain positions did not violate Title VII).

96. Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163–64 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977) (unpublished table decision) (holding that sexual harassment by supervisor was not prohibited by Title VII).

decade after Title VII's enactment, the meaning of sex was severely limited in its application and relied on "traditional concepts" of sex, generally in terms of a binary distinction between men and women. As such, claims of sex discrimination were similarly limited to only protecting against discrimination that treated the general class of women differently from that of men.

However, over time, Congress, the Equal Employment Opportunity Commission ("EEOC"), and the courts began to expand Title VII and apply sex discrimination to a wider range of conduct. In 1978, Congress amended Title VII by passing the Pregnancy Discrimination Act,[97] which expressly provides that the prohibition against sex discrimination includes discrimination based on pregnancy, childbirth, or related medical conditions.[98] Notably, this amendment provides that "[t]he terms 'because of sex' or 'on the basis of sex' include, *but are not limited to*, because of or on the basis of pregnancy, childbirth, or related medical conditions."[99] This language is significant in that the phrase "not limited to" recognizes the possibility of future expansions of Title VII's definition of sex discrimination. Further, the text makes it clear that women cannot be treated differently for employment purposes based on their pregnancy status.[100] Becoming pregnant is not only a legal right, but it is also a choice, as not all women become pregnant. And that choice—whether or not to become pregnant—is inextricably linked to an individual's sex. The expansion of Title VII to include discrimination based on a woman's choice to become pregnant recognizes the possibility that in the future, interpretation of Title VII could further expand to include other legal expressions of an individual's sex.

Later court opinions further established that Title VII prohibited the previously permissible no-marriage rules,[101] policies barring working mothers,[102] and workplace sexual harassment.[103] Similarly, in *Price Waterhouse v. Hopkins*,[104] the Supreme Court held that gender stereotyping can qualify as prohibited sex

97. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

98. § 2000e(k).

99. *Id.* (emphasis added).

100. *Id.* ("Women affected by pregnancy . . . shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.").

101. Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1199 (7th Cir. 1971) (finding that the airline's no-marriage policy for female stewardesses violated Title VII).

102. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (remanding to the district court to determine whether the employer could establish "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" to support the policy prohibiting mothers of preschool-aged children from holding certain positions, which would preclude Title VII liability).

103. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986) (holding that "hostile environment" sexual harassment is a cognizable Title VII claim).

104. 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

discrimination under Title VII.[105] And in *Oncale v. Sundowner Offshore Services, Inc.*,[106] the Court held that Title VII's prohibitions against workplace sexual harassment extended to same-sex sexual harassment.[107]

A recent Title VII case further expanded the scope of what constitutes sex, looking beyond the "traditional concepts" of sex to include both sexual orientation and gender identity. In *Bostock v. Clayton County*,[108] the Supreme Court considered "whether an employer can fire someone simply for being homosexual or transgender."[109] The Court explained that Title VII's language prohibiting discrimination "because of" sex[110] includes but-for causation and the mixed-motives analysis.[111] Thus, even where other factors contributed to an employer's decision, as long as the employee's sex was one but-for cause, Title VII applies.[112] Therefore, the Court held that "an employer who intentionally treats a person worse because of sex . . . discriminates against that person in violation of Title VII."[113] Further, the Court clarified that "if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred."[114] The Court found that Title VII's definition of "because of sex" was more broadly applicable than past precedent provided. It does not just protect gender classes as a group; it also protects against discrimination based on a particular individual's sexual identity.

These decisions demonstrate courts' increasing willingness to expand Title VII to protect legal extensions of an individual's sex. They protect an individual's legal right to get married, to be a working parent, and to work free from sexual harassment. Additionally, these decisions protect an individual's right to express themselves in ways that do not fit neatly into society's defined gender stereotypes and categories.[115] Finally, these legal rights are extensions of an individual's sex in that they go beyond the mere classification of male or female and involve additional elements that are related to, but not confined to, biological sex.[116] As such, courts are moving away from the strict male-versus-

105. *See id.* at 251; *see also infra* notes 157–60 and accompanying text.

106. 523 U.S. 75 (1998).

107. *Id.* at 79–80; *see infra* notes 161–62 and accompanying text.

108. 140 S. Ct. 1731 (2020).

109. *Id.* at 1737.

110. 42 U.S.C. § 2000e-2(a).

111. *Bostock*, 140 S. Ct. at 1739.

112. *Id.*

113. *Id.* at 1740.

114. *Id.* at 1741.

115. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998); *Bostock*, 140 S. Ct. at 1740.

116. *Sex and Gender Identity*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity [https://perma.cc/26XQ-BJQ8] (describing the differences between biological sex, gender, and gender identity).

female dichotomy for Title VII's definition of "sex" and towards a more dynamic interpretation of "sex" to include the protection of legal rights that are closely related extensions of the individual's sex.

III. CURRENT TITLE VII PROTECTIONS FOR LEGAL SEX WORKERS

Title VII, as it is currently interpreted, may provide legal sex workers with limited protections under existing theories of disparate impact, sexual harassment, and retaliation. Unfortunately, though, these protections often contain significant gaps because they provide unequal protection for male and female sex workers and operate only after unlawful acts have occurred, instead of requiring employers to establish policies and practices that prevent discriminatory practices from the beginning. As a result of these limitations, sex workers are often left largely unprotected.

A. *Potential Disparate Impact Protection*

Under the burden-shifting framework for disparate impact claims,[117] consider a facially neutral company practice or policy against employing current or former legal sex workers that applies equally to both male and female employees. A plaintiff would first need to demonstrate that a policy has a disparate impact based on sex. The Supreme Court has held that statistical proof on its own can be sufficient to demonstrate that a practice or policy creates a disparate impact.[118] In such cases, the "proper comparison [is] between the . . . composition of [the at-issue jobs] and the . . . composition of the qualified . . . population in the relevant labor market."[119] While statistical data on legal sex workers is sparse,[120] the majority of sex workers are women, with some studies suggesting that women make up over eighty percent of the sex worker population.[121] As such, it may be possible for a plaintiff to demonstrate that the policy has a disparate impact based on sex by using statistical data. Importantly,

117. *See supra* Section II.A.2.

118. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (citing Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307–08 (1977)); Int'l Bd. of Teamsters v. United States, 431 U.S. 324, 339–40 (1977) ("We have repeatedly approved the use of statistical proof . . . to establish a prima facie case . . . in proving employment discrimination. We caution only that statistics are not irrefutable . . . . [T]heir usefulness depends on all of the surrounding facts and circumstances.").

119. *Hazelwood Sch. Dist.*, 433 U.S. at 308.

120. Garsd, *supra* note 28.

121. *See* Justin Lehmiller, *Nearly One in Five Sex Workers Are Men*, VICE (Feb. 21, 2018, 12:00 PM), https://www.vice.com/en/article/evm5vw/nearly-one-in-five-sex-workers-are-men [https://perma.cc/N7XL-MY58] (estimating up to twenty percent of sex workers worldwide are men); Timothy Bancroft-Hinchey, *Scelles Foundation: 42 Million People Worldwide Are Prostitutes*, PRAVDA.RU (Jan. 28, 2014, 7:37 PM), https://english.pravda.ru/society/126700-prostitutes/ [https://perma.cc/F76S-T7XK] (estimating that "42 million people prostitute themselves in the world today, [and] the vast majority (75%) of [them are] women between 13 and 25 years [old]").

the EEOC has adopted an eighty percent rule of thumb, whereby disparate impact "is normally indicated when one selection rate [in employment decisions] is less than 80% of the other."[122] A second part of this analysis is determining what "the relevant labor market" is for comparison, which adds another layer of difficulty to the already sparse data that currently exists for sex workers. The burden would then shift to the employer to prove that the policy is related and necessary for the job at issue. Such a demonstration would vary based on the position in question, but could include arguments based on morality, trustworthiness, or negative reflections on the employer.[123] However, unless the employer can show the policy is job-related and consistent with a business necessity, and not just a preference, these defenses will fail.[124] Because the majority of sex workers are women, under the "traditional" definition of sex, female sex workers might be able to demonstrate that they are treated differently than men in their relevant labor market. Consequently, one limitation of this approach is that it only protects female, and not male, sex workers.

B. *Potential Harassment Protection*

Similarly, Title VII may protect an individual who faces sexual harassment at work because of their involvement in legal sex work. Sexual harassment claims generally require a showing that: (1) the conduct at issue is because of the plaintiff's sex; (2) the harassment is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'"; (3) the behavior is "unwelcome"; and (4) there is a basis for employer liability.[125] An employer's liability depends on "the harasser's status—as the victim's supervisor or co-worker—and whether the harasser's actionable harassment also culminated in a 'tangible employment action.'"[126] When an employee is harassed at work after their coworkers learn they are engaged in

122. U.S. EQUAL EMP. OPPORTUNITY COMM'N, 6570-06-M, QUESTIONS AND ANSWERS TO CLARIFY AND PROVIDE A COMMON INTERPRETATION OF THE UNIFORM GUIDELINES ON EMPLOYMENT SELECTION PROCEDURES (1979).

123. The *Bostock* dissent argued against reading Title VII to include sexual orientation and transgender status because when Title VII was enacted, society believed that "homosexual conduct was . . . morally culpable and worthy of punishment." Bostock v. Clayton County, 140 S. Ct. 1731, 1769–72 (2020) (Alito, J., dissenting). Justice Alito highlighted religious organizations and schools and warned that the Court's decision "may undermine the school's 'moral teaching'" and allow teachers to file Title VII claims despite the employer's morality argument. *Id.* at 1781.

124. *See generally* Derek J. Demeri, Note, *Who Needs Legislators? Discrimination Against Sex Workers Is Sex Discrimination Under Title VII*, 72 RUTGERS U. L. REV. 247 (2019) (providing a more detailed examination of Title VII's disparate impact theory as applied to sex work).

125. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67–69 (1986) (quoting Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)).

126. CHRISTINE J. BACK & WILSON C. FREEMAN, CONG. RSCH. SERV., R45155, SEXUAL HARASSMENT AND TITLE VII: SELECTED LEGAL ISSUES 8 (2018).

legal sex work, the employee will be protected under Title VII if the employee can demonstrate that the sexual harassment because of his or her sex was "sufficiently severe or pervasive," unwanted, and that there is a basis for the employer's liability. Again, "sex" here is typically read under the limited definition of male-versus-female, thus limiting the scope of this protection.

Nevertheless, plaintiffs pursuing sexual harassment claims under Title VII have had some success. For example, in *Samuels v. Two Farms, Inc.*,[127] the district court denied the defendant's motion for summary judgment and held that the plaintiff, an exotic dancer, was able to set forth a prima facie case for sexual harassment under both the quid pro quo[128] and hostile environment theories.[129] The plaintiff was employed by the defendant, where she was responsible for working at his store's cash register and deli.[130] The defendant began making unwanted comments and advances towards her, and when she asked him to leave her alone, he "drastically" reduced her working hours.[131] As a result, she began working as an exotic dancer to make up for this lost income.[132] Once the defendant found out about her part-time job, the harassment became "more frequent and more aggressive."[133] The court rejected the defendant's argument that his actions were because she had taken on a second job as an exotic dancer and not because of her gender, finding that the defendant's conduct towards the plaintiff "likely occurred 'because of [her] sex.'"[134] Thus, while sexual harassment claims may protect legal sex workers, this protection is somewhat limited in that it protects against harassment after it occurs but does not necessarily preclude the employer from taking an adverse employment action against the employee upon discovering he or she engages or has engaged in legal sex work. This is because, while both Title VII discrimination and sexual harassment claims allow for injunctive relief after a violation has occurred, Title

127. No. DKC 10-2480, 2012 WL 261196 (D. Md. Jan. 27, 2012).

128. Under the quid pro quo theory of sexual harassment, a plaintiff must establish five elements in order to show a prima facie case:

> (1) she belongs to a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) her reaction to the harassment affected tangible aspects of compensation, terms, conditions, or privileges of employment; and (5) the employer knew or should have known of the harassment and took no effective remedial action.

Id. at *7.

129. *Id.* Under a hostile environment theory, a plaintiff must establish four elements to demonstrate a prima facie case of sexual harassment: "(1) she was subjected to unwelcome conduct; (2) the unwelcome conduct was based on sex; (3) the conduct was sufficiently pervasive or severe to alter the conditions of employment and to create a hostile work environment; and (4) some basis exists for imputing liability to the employer." *Id.*

130. *Id.* at *1.

131. *Id.*

132. *Id.*

133. *Id.* at *2.

134. *Id.* at *7–8.

VII attempts to prevent discrimination from occurring in the first place; Title VII requires nondiscriminatory employment practices, while sexual harassment claims function to remedy unlawful treatment after it has already taken place.[135]

C. *Potential Retaliation Protection*

Finally, Title VII's prohibition of retaliation may provide limited protection for legal sex workers facing employment discrimination. Retaliation claims require a showing that: (1) the plaintiff engaged in protected participation in any Title VII investigation, proceeding, hearing, or opposition to any unlawful employment practice; (2) the employer imposed an adverse employment action in response to such participation; and (3) the plaintiff's protected activity was a but-for cause of the alleged adverse action.[136]

If a plaintiff were able to show that they opposed their employer's unlawful employment practices, such as sexual harassment in the workplace, and that the employer took an adverse employment action against them in response, they may have a cognizable Title VII retaliation claim. For example, in *Crawford v. Metropolitan Government of Nashville*,[137] the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro"), began investigating rumors of sexual harassment by an employee, Gene Hughes.[138] During the course of this investigation, Metro asked another employee, Vicky Crawford, whether she had observed Hughes acting inappropriately on any occasion, after which she outlined instances of his sexually harassing behavior.[139] Upon completion of the investigation, Metro declined to take action against Hughes but fired Crawford along with two other accusers.[140]

The Supreme Court explained that under Title VII retaliation, "nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination . . . when her boss asks her a question."[141] Thus, the Supreme Court held that under Title VII retaliation, actionable opposition includes both affirmatively initiating a discussion as well as responding to questions during an already existing investigation.[142] As such, the Court found that Crawford did have a cognizable claim for retaliation under Title VII stemming from Hughes's sexual harassment investigation.[143] A contrary ruling, the Court stated, would "undermine" Title VII's primary objective of protecting employees from

135. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 77–78 (1986) (Marshall, J., concurring).
136. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352, 362 (2013).
137. 555 U.S. 271 (2009).
138. *Id.* at 273–74.
139. *Id.* at 274.
140. *Id.*
141. *Id.* at 277–78.
142. *See id.*
143. *Id.* at 280.

harmful discriminatory behavior.[144] Thus, if an individual who is engaged in legal sex work experienced and reported sexual harassment in the workplace, he or she would likely be protected from retaliation after either directly opposing or questioning this harassment or participating in any investigation.

This provides legal sex workers with somewhat broader protection in that it protects both male and female employees. However, this protection is still limited because it first requires the employee face discrimination, then it requires the employee to act in some way in response to that discrimination, and finally, it requires the employer to take a tangible adverse employment action against the employee. As with sexual harassment claims, retaliation claims operate on an individual level of protection that only goes into effect after harmful or unlawful activity occurs. As such, retaliation claims, unlike Title VII discrimination claims, do not require the employer to establish practices and policies that prevent unlawful discrimination against a protected class.

Taken together, Title VII, as it is currently interpreted and applied, may provide legal sex workers with limited protection through disparate impact, sexual harassment, and retaliation claims. However, these protections contain significant gaps and limitations: they provide unequal protections for male and female sex workers, and they operate only after unlawful acts have occurred rather than trying to eliminate discriminatory practices from the start. As such, a shift in Title VII jurisprudence is needed to ensure Title VII's purpose—to encourage employers to make employment decisions based on job qualifications and not on protected classifications[145]—is properly effectuated. Such a shift towards a broader definition of "because of sex" would align with the scant legislative history of Title VII's prohibition on sex discrimination, would follow the current trend of a broader interpretation of sex discrimination, and would provide individuals with protection from sex discrimination based on their choice to engage in legal sex work.

IV. DISCRIMINATION AGAINST LEGAL SEX WORKERS IS DISCRIMINATION "BECAUSE OF SEX"

The Court's narrow interpretation of "because of sex" historically focused on "traditional concept[s]" of sex that "sorted men and women into two perfectly sex-differentiated groups in order to preserve the traditional gendered organization of the workplace."[146] Further, the "parameters of Title VII's prohibition of sex discrimination have always been determined by normative

144. *Id.* at 279.

145. *See* 110 CONG. REC. 7247 (1964); Price Waterhouse v. Hopkins, 490 U.S. 228, 243 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971).

146. Franklin, *supra* note 65, at 1308.

judgments . . . that reflect and reinforce conventional understandings of sex and family roles."[147] However, courts are increasingly rejecting this strict male-versus-female dichotomy and are instead willing to expand Title VII to protect people not just from discrimination based solely on an individual's sex but also legal rights that are based on, and are extensions of, an individual's sex.[148] As normative judgments around the definitions of sex and gender shift, courts have broadened their interpretation of Title VII to protect individuals against discrimination stemming from pregnancy, marriage status, sexual harassment, gender stereotyping, sexual orientation, and gender identity.[149] Given that Title VII's stated purpose is to provide equality in the work place, especially for minorities and women,[150] discrimination based on one's decision to engage in legal sex work appears to be in line with the very type of discrimination Title VII was intended to prevent. Thus, courts' interpretation of "because of sex" needs to be broadened to prohibit employment discrimination against an employee based on the individual's engagement in legal sex work.

A. *Legal Support for a Broader Definition of "Because of Sex"*

Title VII was meant to balance an employee's right to be free from discrimination based on protected characteristics and an employer's freedom of choice in its employment decisions.[151] In passing Title VII, Congress hoped employers "would focus on the qualifications of the applicant or employee" rather than on protected characteristics when making employment decisions.[152] The relatively nonexistent legislative history surrounding the addition of sex as a protected class under Title VII has left courts with little to rely on when interpreting sex discrimination.[153] As a result, the narrow, "traditional concept" of sex seems to be an "invented tradition," whereby courts claim to rely on historical tradition to support the interpretation of Title VII sex discrimination as "refer[ring]—always and only—to practices that divide men and women into two groups perfectly differentiated along biological sex lines."[154] Thus, courts relied on the meager legislative history to limit Title VII's definition of "because of sex."[155] But it is at least equally likely that this lack of legislative history allows courts to take a more dynamic,[156] expansive view of "because of sex" when

147. *Id.*

148. *See supra* Section II.B.

149. *Id.*

150. 29 C.F.R. § 1608.1(b) (2021).

151. Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

152. *Id.* at 243; 110 CONG. REC. 7247 (1964).

153. *See* Shulda, *supra* note 65, at 55–56; Franklin, *supra* note 65, at 1312, 1317.

154. Franklin, *supra* note 65, at 1308, 1313.

155. *Id.* at 1319.

156. *Id.* at 1318.

applying Title VII to reach the level of protection the statute guarantees. Three sex discrimination cases demonstrate the Supreme Court's increasing willingness to adopt a broader understanding of "because of sex" in analyzing Title VII disparate treatment claims.

In *Price Waterhouse*, the Supreme Court held that gender stereotyping is prohibited sex discrimination under Title VII.[157] The Court explained that employers could no longer rely on stereotypes in assessing an employee's job performance insofar as they embody the stereotypes associated with their gender. This is because by precluding sex discrimination in the first place, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[158] The Court noted that "[a]n employer who objects to aggressiveness in women but whose position requires this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not."[159] Title VII therefore aims to resolve that dilemma. Thus, the Court looked beyond mere categorization of an employee as biologically male or female, and instead protected the right to express oneself free from the confines of strict stereotypes of gender and sexuality. Because "gender play[s] a motivating part" in employment decisions based on an individual's failure to conform to gender stereotypes, the Court held that such decisions are prohibited by Title VII.[160]

Similarly, in *Oncale*, the Supreme Court held that same-sex sexual harassment is prohibited by Title VII and that protection against sex discrimination covers both men and women.[161] While the Court acknowledged that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII," it nevertheless determined that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."[162] This reflects the Court's willingness to look beyond the limited legislative history behind Title VII's congressional history when interpreting "because of sex."

Finally, in *Bostock*, the Supreme Court held that "because of sex" was not just limited to "traditional concepts" of the strict male-versus-female dichotomy, but instead included both sexual orientation and gender identity.[163] The Court explained that Title VII does not "care if an employer treats men and women comparably as groups; an employer who fires both lesbians and gay

157. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

158. *Id.* (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

159. *Id.*

160. *Id.* at 250, 258.

161. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

162. *Id.*

163. Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020).

men equally doesn't diminish but doubles its liability."[164] Notably, the Court rejected the employer's and the dissent's argument that "because few in 1964 expected today's *result*, we should not dare to admit that it follows ineluctably from the statutory text."[165] The Court noted that Title VII's language *is* expansive,[166] and as a result, "many, maybe most, applications of Title VII's sex provisions were 'unanticipated' at the time of the law's adoption. In fact, many now-obvious applications met with heated opposition early on, even among those tasked with enforcing the law."[167] However, the Court explained that Congress's focus on holding employers liable for discrimination against individuals overall rather than just precluding discrimination between classes of individuals "virtually guaranteed that unexpected applications would emerge over time."[168] Further, the Court stated that nothing in the Act's limited legislative history requires that it should be read narrowly.[169] Instead, the Court seems willing to broaden its interpretation of "because of sex" in ways that, while potentially unexpected, do follow from the text.[170] Thus, the Court recognized that "because of sex" is not strictly limited to what Congress would have expected at the time Title VII was written and that the limited legislative history likely supports a broader interpretation of "because of sex."

Together, these three cases illustrate the Court's increased willingness to expand its interpretation of Title VII's definition of "because of sex." Instead of relying on the limited legislative history, the Court is taking a broader understanding of "because of sex" to protect legal rights that are logical extensions of an individual's sex, such as its protections for sexual orientation and gender identity. Given the close relationship between an individual's sexuality and the choice to engage in legal sex work, society's changing attitudes towards sex,[171] and the increasing availability of spaces to participate in legal sex work,[172] there is some support for a broader definition of "because of sex" enabling Title VII to protect against discrimination based on that decision. Further, such an expanded definition would better serve Title VII's goal of ensuring employers focused on actual qualifications, rather than protected characteristics, when making employment decisions.[173]

164. *Id.* at 1748.

165. *Id.* at 1750.

166. *Id.* at 1752 (quoting Franklin, *supra* note 65, at 1338).

167. *Id.*

168. *Id.* at 1753.

169. *Id.* at 1752.

170. *Id.* at 1750.

171. *See supra* notes 69–71 and accompanying text.

172. *See supra* notes 40–58 and accompanying text.

173. Price Waterhouse v. Hopkins, 490 U.S. 228, 243 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; 110 CONG. REC. 7247 (1964).

B. *Title VII Disparate Treatment Claims Under a Broader Definition of "Because of Sex"*

A broadened interpretation of "because of sex" would follow the Court's path of providing increased protections to individuals who, through their choices, do not fit neatly within prescribed gender roles and stereotypes. It would also allow Title VII to better protect individuals who face discrimination based on decisions related to their sex. Specifically, such an interpretation would protect an individual's right to make choices that are legal extensions of their sex, including an individual's choice to engage in legal sex work; such a decision is permitted by law and is a mode of self-expression inextricably linked to an individual's sex. Rather than cabining Title VII sex discrimination jurisprudence to protect only against practices that explicitly distinguish between men and women based on biological sex, this broader interpretation would reflect the actual text of the statute. Thus, discrimination against legal sex workers could be properly viewed as discrimination "because of sex." This would impact future Title VII discrimination claims by eliminating the existing gaps and limitations in the current sex discrimination jurisprudence.

Title VII disparate treatment claims follow the *McDonnell Douglas* burden-shifting framework,[174] and courts have held that discrimination based on an individual's current or former employment in legal sex work "is not the kind of discrimination that Title VII . . . [was] designed to protect against."[175] Further, comparative evidence is often the strongest evidence in disparate treatment cases, but this requires sex discrimination plaintiffs to produce opposite-sex comparators, which "has a devastating effect on plaintiffs' ability to win sex-based Title VII claims, as adequate comparators are rarely available in the contemporary workplace."[176] Consequently, this requirement all but precludes legal sex workers from filing disparate treatment claims.

Conversely, moving away from the male-versus-female dichotomy and instead embracing a broader definition of "because of sex" that includes legal expressions or extensions of an individual's sex would make Title VII sex discrimination claims more available to legal sex workers. In making out a prima facie case of discrimination under the *McDonnell Douglas* test, legal sex workers would be able to demonstrate that they are part of a protected class under this expanded definition of "because of sex." Because the decision to engage in legal sex work is a legal choice directly related to an individual's sex,[177] it would be

174. *See supra* Section II.A.1.

175. *See, e.g.*, Hettler v. Intrepid Detective Agency, Inc., No. 17cv1646, 2019 WL 2267286, at *1–2 (M.D. Pa. May 28, 2019) (rejecting the plaintiff's gender stereotyping claim that she faced sex discrimination based on her prior employment as an exotic dancer).

176. Franklin, *supra* note 65, at 1311.

177. *See supra* Part I.

protected as "because of sex," and, therefore, those who engage in legal sex work would be part of a Title VII protected class.

In meeting the second element of the *McDonnell Douglas* test, the individual would simply need to show that their employer knew they were part of that protected class—that is, that they knew the employee was engaged in legal sex work. This would include situations in which the employee told their employer directly that they engaged in legal sex work, or where the employer found out through other means.[178] Next, the individual would need to show that their employer took adverse employment action against them. This could include, among other things, being rejected in a hiring decision or being fired.[179]

Finally, the individual would need to demonstrate that others outside of the protected class—in this instance, those who do not engage in legal sex work—who are otherwise similarly situated were not subject to the same adverse treatment. Under this broadened definition of "because of sex," the comparator issue would largely be alleviated.[180] Instead of having to rely on demonstrating opposite-sex comparator evidence as currently required by Title VII, a plaintiff would be able to provide comparator evidence by comparing those who engage in legal sex work against those who do not. Instead of requiring a comparison between women who engage in sex work versus men who engage in sex work—which is unlikely to be available for most employment practices—this application would leave plaintiffs with a better chance of proving actual discrimination by broadening the requirement for comparator

178. For example, see Lauren Kwei's case, *supra* notes 1–9 and accompanying text.

179. Title VII does not define what constitutes an "adverse employment action," resulting in much confusion as courts analyze whether specific practices violate Title VII. *See* Esperanza N. Sanchez, Note, *Analytical Nightmare: The Materially Adverse Action Requirement in Disparate Treatment Cases*, 67 CATH. U. L. REV. 575, 578–79 (2018). *See generally* Rosalie Berger Levinson, *Parsing the Meaning of "Adverse Employment Action" in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should Be Actionable Wrongdoing?*, 56 OKLA. L. REV. 623 (2003) (exploring how this confusion creates yet another barrier to equal opportunities promised by Title VII). Determining whether an employer's action rises to the level of an actionable adverse employment action is a nuanced and fact-specific determination which presents additional Title VII barriers beyond the scope of this Comment. For a broader discussion of the adverse employment action analysis, see Levinson, *supra*.

180. Already, the EEOC and Congress have both rejected the assertion that comparators are required to establish sex discrimination under Title VII. *See* Franklin, *supra* note 65, at 1369–72. "[H]istory does not compel the rule that plaintiffs cannot win Title VII claims in the absence of comparator evidence." *Id.* at 1372. Similarly, courts are increasingly rejecting the need for comparators in sex stereotyping cases. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; Chadwick v. Wellpoint, Inc., 561 F.3d 38, 44 (1st Cir. 2009); Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 122 (2d Cir. 2004); *see also* Bostock v. Clayton County, 140 S. Ct. 1731, 1737–48 (2020) ("Title VII's plain terms and our precedents don't care if an employer treats men and women comparably as groups."). Instead, when an employer makes an adverse employment decision in which "sex plays a necessary and undisguisable role," that employer violates Title VII. *Bostock*, 140 S. Ct. at 1737.

evidence. This, in turn, would provide a higher level of protection for women, men, and minorities engaged in sex work than Title VII currently provides.

Once the plaintiff has demonstrated a prima facie case of sex discrimination, the burden shifts to the employer to provide a legitimate, nondiscriminatory reason for its adverse action. The employer's proffered nondiscriminatory reasons would depend on the specific facts of each case but would likely include either that moonlighting[181] distracts the employee from their job or that legal sex work is immoral.[182] Once the employer has provided nondiscriminatory reasons, the burden then shifts back to the plaintiff to prove that those reasons were pretext for the adverse action and that discrimination occurred.

In the event that the employer attempts to argue that engaging in legal sex work, or moonlighting, diminishes an employee's focus on their more "traditional" job or reduces their availability to work, it would not be difficult to demonstrate this is merely pretext for discrimination. Employees often undertake multiple jobs to help make ends meet,[183] including engaging in legal sex work.[184] Thus, to show the proffered reason is pretext, the plaintiff would need to demonstrate that other employees in similar jobs at that company also have additional jobs to earn supplemental income. This demonstration could include, for example, babysitting, working as a waitress, or driving for Uber. Showing that the employer permitted employees to participate in many other secondary jobs but fired an individual for engaging in sex work as a second source of income would indicate that the employer's adverse action was "because of sex" in violation of Title VII, rather than because of a nondiscriminatory, legitimate business need to keep employees focused on work.

A second argument employers will likely make is that legal sex work is immoral and that, by taking an adverse action, they were acting on their

181. Moonlighting is a term that refers to working multiple jobs. *Glossary*, U.S. DEP'T LAB., https://www.dol.gov/general/aboutdol/history/glossary [https://perma.cc/UB7P-VHTN]. As of September 2021, roughly 4.6% of workers (7.045 million) held multiple jobs at the same time, with 4.8% of employed women (3.502 million) holding multiple jobs, compared to a rate of 4.3% of employed men (3.530 million). BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., USDL-21-1799, THE EMPLOYMENT SITUATION—SEPTEMBER 2021 tbl.A-9, tbl.A-16 (2021), https://www.bls.gov/news.release/pdf/empsit.pdf [https://perma.cc/NN96-EC44].

182. Because this is limited to *legal* sex work, an illegality argument would not be available here. *See supra* Part I. Additionally, companies may also argue that employing a legal sex worker will harm their reputation and may result in financial losses. For a rejection of this argument, see *infra* Section IV.C.2.

183. Roughly thirteen million workers in the United States have more than one job, and women are more likely than men to have multiple jobs. *See* Julia Beckhusen, *About 13M U.S. Workers Have More Than One Job*, U.S. CENSUS BUREAU (June 18, 2019), https://www.census.gov/library/stories/2019/06/about-thirteen-million-united-states-workers-have-more-than-one-job.html [https://perma.cc/D4EX-HTWQ].

184. *See supra* notes 45–53 and accompanying text.

company's morality requirement for employment.[185] This, too, is likely to fail because it is not even pretext—it is discrimination in and of itself. Such an argument relies on gender stereotypes and the traditional concept of "female chastity; . . . the immorality of treating a person as a commercial sex object; and . . . alleged specific empirical harms to the prostitute or patron."[186] By relying on gender stereotypes to make a morality argument, the employer would be in violation of *Price Waterhouse*, and any adverse actions against an individual based on his or her decision to engage in legal sex work would be a violation of Title VII.[187] Further, the EEOC has instructed that "to the extent that either [a] law or [a] contract conflicts with Title VII, it will not constitute an adequate defense" and that any contract requirements or workplace rules must not be "enacted, used, or employed in such a manner that they discriminate on the basis of . . . sex."[188] As a result, any morality clauses or similar contract requirements or rules that contravene Title VII will likely be deemed invalid, and will not provide an employer with a defense for sex discrimination.

Thus, by broadening the interpretation of "because of sex" to include sexual expression and one's choice to engage in legal sex work, successful disparate treatment claims under Title VII would be available to individuals who engage in legal sex work—including men, women, and sexual minorities—and, as such, would better serve Title VII's asserted purpose.

C. *Implications of a Broader Definition of "Because of Sex"*

Broadening the definition of "because of sex" would better provide individuals with the level of protection against sex discrimination Title VII guarantees[189] but would likely face three important challenges: the at-will employment doctrine, social arguments from employers, and concerns that this would begin a "slippery slope" for the degradation of Title VII jurisprudence.

185. For a general discussion of Judge Posner's Moral Revitalization Theory, which asserts that statutory interpretation should permit judges to account for shifts in moral and social attitudes when interpreting Title VII, see generally Charles J. Ureña, Comment, *Reading Sexual Orientation Protections into Title VII: A Moral Revitalization Theory of Statutory Interpretation*, 2018 WIS. L. REV. 1031 (advocating for the Moral Revitalization Theory).

186. *See* David A.J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195, 1250 (1979).

187. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. Further, the Supreme Court has held that morality alone was not a sufficient basis for legislation. Lawrence v. Texas, 539 U.S. 558, 582 (2003). As such, it is unclear whether a morality argument alone would be a permissible defense for discrimination.

188. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1982-3, CM-613 TERMS, CONDITIONS, AND PRIVILEGES OF EMPLOYMENT (1982).

189. While the focus of this Comment is on protecting legal sex workers, such a broadened definition of "because of sex" would also protect those who engage in sexual behavior who do not receive payment, but who face similar moral or judgment-based discrimination based on their choices to engage in promiscuous or "objectionable" sexual expression.

1. Social and Economic Implications of a Broader Definition of "Sex"

Since the passage of Title VII in 1964, employers and legislators have been concerned that a broader definition of sex "would have sweeping implications for the way that gender and the family were regulated in the United States."[190] These concerns still exist and dominate the discussion surrounding whether to expand Title VII's definition of sex.[191] As such, critics of Title VII are often focused on maintaining the rigid traditional gender norms that were reinforced and protected by Title VII's "traditional concept" of sex as a binary division between men and women.[192] They also seek to reinforce the existing gender stereotypes and related regulations that rely on the limited definition of what it means to be a man or woman. And they are not wrong—broadening the definition of "sex" under Title VII would have significant social and economic implications.

Expanding Title VII's definition of sex would necessarily lead to an array of social, legal, and economic implications stemming from redefining traditional norms and the way the United States regulates both gender and the family. Gender identity, sexual orientation, and sexuality have always been hotly debated subjects both in politics and in society. Those views, in turn, have shaped and controlled the laws and regulations that rely on such limited definitions of sex. This fact has not been lost on the Supreme Court, which has discussed these opposing views at length.[193]

Employers raise a litany of concerns when confronted with the expansion of Title VII, including that this broader definition of sex will impact the way other federal, or even state, laws define and regulate sex, gender, and the family. For example, the dissent in *Bostock* warned that broadening the definition of sex under Title VII would "threaten freedom of religion, freedom of speech, and personal privacy and safety."[194] In particular, the dissent expressed its concern that broadening the definition of sex would affect a number of issues: an employer's freedom of decision; Title IX's regulations surrounding bathrooms, locker rooms, housing, and women's sports; Title VII's regulation of professional sports; employment decisions by religious organizations; healthcare regulation under the Affordable Care Act; freedom of speech concerns surrounding the use of preferred pronouns; and the availability of

190. Franklin, *supra* note 65, at 1380.

191. *See, e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731, 1769–72 (2020) (Alito, J., dissenting).

192. Franklin, *supra* note 65, at 1380.

193. *See, e.g.*, *Bostock*, 140 S. Ct. at 1769–72. While the majority focuses on the broad language of the statute to determine that it protects gender identity and homosexuality, the dissent instead focuses on the social beliefs surrounding sex and gender norms at the time of the statute's enactment to argue against expanding its current definition. *Id.*

194. *Id.* at 1778.

Equal Protection Clause claims.[195] In confronting these arguments, it is important to note that Title VII already provides exceptions for making adverse action decisions based on legitimate business necessities[196] and religion.[197] As for the other arguments, this Comment maintains that the interpretation of Title VII's definition of sex needs to be expanded. As the Court in *Bostock* explained, "[w]hether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases."[198] However, as society's beliefs surrounding gender identity, sexuality, and sexual orientation continue to expand, the law must keep pace.[199]

Engaging in legal sex work is not only a choice, but a right. It is no different than the choices to work as a waitress, to have children, or to get married. It should not be up to the employer to police employees' behavior after they clock out. There are some things all individuals might like to keep private, whether it be their smoking habits, medical conditions, or relationships. People deserve to have some degree of separation between work and their personal lives. And as long as their actions do not prevent them from getting the job done, people should be allowed to make their own choices without having to be afraid they might get fired for doing so. Further, both society and the courts have shown an increasing willingness to protect an individual's sexual expression.[200] Thus, under a broader definition of sex under Title VII, three key arguments employers might raise—the at-will employment doctrine, morality, and slippery slope arguments—will likely fail.

2. Analysis of the At-Will Employment Doctrine, Morality, and Slippery Slope Arguments Under an Expanded Definition of Sex

Employers will likely argue that an expanded definition of "because of sex" protecting legal sexual expressions under Title VII impermissibly interferes with the at-will employment doctrine, is immoral, or creates a slippery slope that could lead to unintended consequences in the future. The at-will employment doctrine allows employers to fire employees at any time, for any

195. *Id.* at 1778–83.

196. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

197. *Id.* § 2000e-2(e). For additional discussion of why religious arguments fail, see *Bostock*, 140 S. Ct. at 1754.

198. *Bostock*, 140 S. Ct. at 1753.

199. *See supra* notes 71–72 and accompanying text.

200. *See supra* Section II.B.

reason or for no reason at all.[201] This right ends, however, when it intersects with Title VII: "In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."[202] Further, "Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice" and serves as a "balance between employee rights and employer prerogatives."[203] Thus, an employer still has broad discretion in making employment decisions; however, if those decisions are in any way based on an employee's sex, the employer would be in violation of Title VII regardless of the potential economic or social impacts this may have on the employer. As a result, under an expanded interpretation of the definition of sex, if an employer were to fire an employee upon discovering he or she has engaged, or currently engages, in legal sex work, the at-will employment doctrine would not be a permissible defense. Because Congress has already deemed sex-based employment decisions to be impermissible, basing employment decisions on an individual's sexual expression would be covered by the language "because of sex" in Title VII and would be a limitation on the at-will employment doctrine. This in turn would further Title VII's purpose of protecting against sex discrimination and ensuring employment decisions are based not on protected characteristics, but instead on the individual's qualifications and ability to perform the job at issue.

Another defense employers will likely assert in cases brought under this expanded interpretation of Title VII's "because of sex" is a variant of a social argument against hiring or employing legal sex workers. One facet of this argument may be that sex work is immoral,[204] and that employing legal sex

201. *See* Chuck Henson, *In Defense of McDonnell Douglas: The Domination of Title VII by the At-Will Employment Doctrine*, 89 ST. JOHN'S L. REV. 551, 556 (2015) (providing an in-depth analysis of the intersection between Title VII and the at-will employment doctrine). Further, all fifty states and Washington, D.C., are currently at-will employment states with varying degrees of protection and exceptions. *At Will Employment States 2021*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/at-will-employment-states [https://perma.cc/SJ3L-99ET]; *At Will Employment States: Everything You Need To Know*, UPCOUNSEL, https://upcounsel.com/at-will-employment-states#at-will-employment-states [https://perma.cc/5JV5-NT4B]. Montana is the only state that limits the doctrine to allow discharge without good cause only during a probationary period. Josh Kirkpatrick, Michelle Gomez & Michael Wilson, *Montana Makes Significant Changes to State Employment Laws*, SHRM (June 1, 2021), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/montana-makes-significant-changes-to-state-employment-laws.aspx [https://perma.cc/5W74-MM7H].

202. Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

203. *Id.*

204. *See supra* notes 185–88 and accompanying text (discussing the limitations of the morality argument).

workers would reflect negatively on the employer. This argument, however, is unlikely to succeed. As with the argument based on the at-will employment doctrine, Title VII protects against employment decisions made "because of sex," and the potential economic or social impacts of requiring an employer to employ legal sex workers are irrelevant. Because legal sex work would be covered under the broader interpretation of "because of sex," the fact that employing a legal sex worker may reflect negatively on the employer's reputation is insufficient to overcome Title VII.[205]

Finally, employers are likely to make a slippery slope argument against applying the broader definition of "because of sex," arguing that "undesirable policy consequences would follow" and that there would be no limiting factor and no clear line for where Title VII sex discrimination would end.[206] However, the Supreme Court rejected both of these arguments in *Bostock*, noting that while Title VII's sex discrimination provision may be "difficult to control . . . nothing in the meager legislative history of this provision suggests it was meant to be read narrowly."[207] The Court stated that, when interpreting statutes, "[the Court's] role is limited to applying the law's demands as faithfully as we can in the cases that come before us . . . . And the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them."[208] As such, it is not up to the courts to draw lines that do not already exist within Title VII; instead, they must apply Title VII as it was written and leave decisions for creating limitations to its application to Congress. Further, one important limitation would exist in that this protection would be limited to *legal* sex work, which would guard against concerns for "undesirable policy consequences" by confining Title VII protection of sex work to those activities that society has already determined to be permissible.[209] Thus, as in *Bostock*, such a slippery slope argument would be unpersuasive in preventing a broader interpretation of "because of sex" in Title VII sex discrimination cases.

D. *Alternative Recommendations*

Although the focus of this Comment is on the interpretation of the "because of sex" language in Title VII, there are two additional possible

205. It is not difficult to imagine a business in a small town facing disapproval from its citizens for employing a legal sex worker. However, this argument was likely made at many points throughout Title VII's history in the context of employing women in a "man's role," or employing members of racial minorities, and in those circumstances Title VII prevailed over prejudice and discrimination.

206. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1752–53 (2020).

207. *Id.* at 1752.

208. *Id.* at 1753.

209. *See id.* Notably, this would not protect individuals involved in prostitution or human trafficking. However, if prostitution were to be decriminalized, this broadened interpretation of "because of sex" would protect individuals engaged in prostitution as well.

methods for providing broader protection for legal sex workers. While the legislative history and recent cases support a broadened interpretation of "because of sex,"[210] such an expansion would be a significant shift in Title VII jurisprudence. Thus, two potential alternatives that would require congressional action, rather than judicial interpretation, are worth assessing.

The first alternative would be to amend Title VII to include protection not just for the narrow status-based definition of sex, but also for sexual expression. This could mirror Title VII's religious protections, which extend to "all aspects of religious observance and practice, as well as belief."[211] Thus, just as Title VII protects both an individual's religious beliefs and actions taken to practice those beliefs, Title VII could be amended to protect not just an individual's sex, but actions taken to express one's sex. While Congress clearly knew how to provide such protection when enacting Title VII and chose not to, the religious protection demonstrates that providing protection not just for a status but also for expression of that status is not completely foreign and could have support within Title VII itself. Further, society's views towards sexuality have shifted significantly since Title VII was enacted in 1964.[212] This is reflected in the shifts in Title VII sex discrimination jurisprudence and courts' increasing willingness to expand "because of sex" to include not just the male-versus-female dichotomy but also legal extensions of sex.[213] As such, it is possible that Congress would be more willing to amend Title VII to protect both the status aspect of sex as well as the expressive elements of sex.

A second alternative would be for Congress to enact a more generic, off-the-clock privacy protection separate from Title VII that prohibits lifestyle discrimination. Lifestyle-discrimination statutes[214] currently exist in a number of states.[215] These statutes typically protect employees from being fired for engaging in lawful conduct, such as smoking, drinking, or risky behavior, while

210. *See supra* Section IV.A.

211. 42 U.S.C. § 2000e(j).

212. *See supra* Part I.

213. *See supra* Section II.B.

214. *See* Marisa Anne Pagnattaro, *What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 640–70 (2004) (describing existing state lifestyle-discrimination laws).

215. *Legislative Briefing Kit: Lifestyle Discrimination in the Workplace*, ACLU, https://www.aclu.org/other/legislative-briefing-kit-lifestyle-discrimination-workplace [https://perma.cc/3VAN-9JTD] (describing lifestyle discrimination laws in general and existing state lifestyle discrimination laws, and providing a model federal law). Currently, twenty-one states have passed some form of lifestyle-discrimination statute: Virginia, Oregon, Tennessee, Kentucky, Colorado, South Carolina, Rhode Island, South Dakota, New Mexico, North Dakota, Mississippi, Indiana, Oklahoma, New Hampshire, Nevada, Maine, Connecticut, Arizona, New Jersey, Louisiana, and Illinois. *See id.*

both off-duty and off-premises.[216] However, a federal statute would provide even more protection and would further Title VII's goal of ensuring that employment decisions are made based on actual qualifications. While a federal law may face opposition from state governments arguing that it impermissibly impedes on their authority, it is possible that such arguments will be rejected given other federal statutes that protect other aspects of employees' personal lives.[217] A federal lifestyle-discrimination statute would provide broader protection against employment decisions being made based on off-duty conduct, including sexual expression and an individual's decision to engage in legal sex work.[218] This, in turn, would provide a higher level of protection for legal sex workers than what currently exists under Title VII.

CONCLUSION

In passing Title VII, Congress sought to "provid[e] equality of opportunity,"[219] and "to promote [employment decisions] on the basis of job qualifications, rather than on the basis of [protected classifications]."[220] However, the current narrow interpretation of "because of sex" under Title VII severely limits the statute's ability to provide the protection its text guarantees and leaves individuals who, like Lauren Kwei, choose to engage in legal sex work without adequate protection from sex discrimination in employment. While Title VII could be amended to provide clarification that legal extensions and expressions of an individual's sex are protected, the better option is to instead read the statute and apply it as it is. Discriminating against an individual for his or her choice to engage in legal sex work is discrimination "because of sex," and, by accurately interpreting Title VII's language, courts will be able to better fulfill Title VII's intended purpose. As Kwei astutely pointed out, "as long as

216. Jean M. Roche, *Why Can't We Be Friends?: Why California Needs a Lifestyle Discrimination Statute To Protect Employees from Employment Actions Based on Their Off-Duty Behavior*, 7 HASTINGS BUS. L.J. 187, 198 (2011).

217. *See* Pagnattaro, *supra* note 214, at 670–77 (describing federal employment laws that protect aspects of employees' personal lives, including the Immigration Reform and Control Act, the Fair Credit Reporting Act, Title VII, the Employment Polygraph Protection Act, the Americans with Disabilities Act, and the Health Insurance Portability and Accountability Act of 1996 and proposing a federal lifestyle discrimination statute that would balance employees' reasonable privacy rights with the employers' needs).

218. For a discussion of lifestyle discrimination, see generally NAT'L WORKRIGHTS INST., LIFESTYLE DISCRIMINATION: EMPLOYER CONTROL OF LEGAL OFF DUTY EMPLOYEE ACTIVITIES, https://www.workrights.org/images/issue_PDFs/ld_Employer_Control.pdf [https://perma.cc/M5US-29AP] (providing examples of lifestyle discrimination); Stephen D. Sugarman, *"Lifestyle" Discrimination in Employment*, 24 BERKELEY J. EMP. & LAB. L. 377 (2003) (discussing employer interests in regulating off-duty conduct).

219. 29 C.F.R. § 1608.1(b) (2021).

220. *See* 110 CONG. REC. 7247 (1964); Price Waterhouse v. Hopkins, 490 U.S. 228, 243 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971).

you're not hurting anybody or hurting yourself, do what you want. Mind your business."[221]

LAUREN BOONE[**]

221. Dickson, *supra* note 3.

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