Fashioning Worker Protections to Combat the Thin Ideal’s Cost on Fashion Models and Public Health

Abstract

Studies linking thin-obsessed media consumption to poor health outcomes for women have permeated the medical literature for years. The pressures female fashion models face to sacrifice their health for their jobs are perhaps even more disturbing. These harrowing issues are symptoms of the “thin ideal,” the social norm glorifying a female body type so thin it is unattainable for most women. Despite the clear harm imposed by the thin ideal, the United States has done little to combat its effect on the working conditions of fashion models and on public health more generally. This Note suggests that the US fashion industry currently lacks incentives to change its practices for the better. Thus, the United States should follow the lead of other major players in the international fashion industry and should incentivize its fashion industry members to avoid practices that result in extremely thin models.

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“[Victoria’s Secret] fashion show Tuesday. lol at my self esteem.”
-@GirlCodeAPage

Caption for a single piece of spinach on a plate: “Girls lunch after watching #VSfashionshow”
-@STASHLIT

“5 minutes into the [Victoria’s Secret] fashion show and I already wanna kill myself.”
-@happyIarry

Every year, the Victoria’s Secret fashion show inspires a flurry of alarming social media reactions ranging from complaints about self-esteem to jokes about anorexia and suicide. This commentary reflects a pervasive and circular public health issue in our society known as the “thin ideal.”

The thin ideal is the socially constructed concept of an ideal female body so thin that it is unattainable for most women. This

3. #1 Sam Kerr Stan (@happyIarry), TWITTER (Dec. 8, 2015, 7:05 PM), https://twitter.com/happyIarry/status/67442458326149280 [https://perma.cc/D4XM-3DK9].
4. See, e.g., #1 Sam Kerr Stan, supra note 3; Girl Code, supra note 1; STASH, supra note 2.
ideal imposes a variety of physical and mental health costs across members of our society.\textsuperscript{7} Harms imposed by the thin ideal primarily include body dissatisfaction, negative moods, low self-esteem, depression, eating disorder symptoms, and suicide.\textsuperscript{8}

Much of the academic literature on the thin ideal focuses on the harm experienced through a process termed “internalization.”\textsuperscript{9} Internalization occurs when an individual experiences the thin ideal as a social norm and, in turn, “cognitively ‘buys into’ socially defined ideals of attractiveness and engages in behaviors designed to produce an approximation of these ideals.”\textsuperscript{10} In cases of internalization, the drive to be thin is ingrained in the individual herself.\textsuperscript{11}

However, the thin ideal can also have a harmful impact via external pressures.\textsuperscript{12} In such a scenario, an outside party pressures an individual to lose weight or change her body shape.\textsuperscript{13} Scholars note common examples of this type of pressure in employer-employee relationships, particularly in industries in which the pressured employee is visible to clients, customers, or consumers.\textsuperscript{14} While existing laws protect employees from many types of employer

\begin{itemize}
\item \textsuperscript{7} See id.
\item \textsuperscript{9} See, e.g., Helga Dittmar & Sarah Howard, Thin-Ideal Internalization and Social Comparison Tendency as Moderators of Media Models’ Impact on Women’s Body-Focused Anxiety, 23 J. Soc. & Clinical Psychology 768, 770 (2004); Thompson & Stice, supra note 6, at 181.
\item \textsuperscript{10} See Thompson & Stice, supra note 6, at 181 (citing J. KEVIN THOMPSON ET AL., EXACTING BEAUTY: THEORY, ASSESSMENT, AND TREATMENT OF BODY IMAGE DISTURBANCE (1999)).
\item \textsuperscript{11} Id.
\item \textsuperscript{13} See id.
\end{itemize}
discrimination, minimal protection exists for weight-based discrimination.

This Note specifically focuses on the negative impacts of the thin ideal caused by external pressures placed on fashion models. Fashion agencies and designers require the majority of models to maintain an incredibly thin physique, which often leads to eating disorders and has even led to multiple deaths in the industry. However, the negative health impact on the models themselves is not the only reason that fashion industry pressures are an important issue. By requiring models to be incredibly thin, the fashion industry continues to contribute to the internalization of the thin ideal among the general public.

Thus, there is a two-fold argument for protecting models from industry demands of extreme thinness. Protection for models from pressures to maintain an incredibly thin body type can advance the rights and well-being of the models themselves while also tackling a pervasive public health issue.

This Note addresses the current state of the fashion industry and the physical and mental harm it imposes on models, the resulting secondary harms on public health, the potential protections and remedies available to models, and an analysis of the most effective of the available options. Part I describes the effect of the thin ideal on fashion models and the general public in detail by presenting scientific studies that provide evidence of the frequency and severity of body image–related health issues. Part II explores recent developments in the fashion industry—including high-profile deaths of models from anorexia—and different progressive responses to these occurrences among the international fashion community. Part III analyzes existing worker protections in the United States and highlights features of each that are relevant to their ability to protect fashion models. Part IV examines the feasibility of implementing these worker protections for fashion models, suggests that legislation is the most promising of these options, and discusses potential characteristics of an ideal legislative response.

16. RHODE, supra note 14, at 118; Elizabeth Kristen, Comment, Addressing the Problem of Weight Discrimination in Employment, 90 CALIF. L. REV. 57, 60 (2002).
I. THE THIN IDEAL’S COST

This Note begins by addressing the types and extent of harms caused by the thin ideal and identifying the parties most affected by the thin ideal. Understanding these harms is necessary in order to accurately estimate the benefits that protecting models could provide.

A. Types of Harm Caused by the Thin Ideal

Harm from the thin ideal manifests itself through a variety of outcomes, many of which the American Psychological Association (APA) categorizes as eating disorders.19 The Diagnostic and Statistical Manual of Mental Disorders (the “DSM-5”) defines eight categories of eating disorders, only four of which are pertinent to those attempting to lose weight20: anorexia nervosa, bulimia nervosa, other specified eating or feeding disorders, and unspecified eating or feeding disorders.

The DSM-5 defines anorexia nervosa (anorexia) through the following symptoms: (i) restriction of energy intake, which leads to a “significantly low body weight” after accounting for age, sex, developmental trajectory, and physical health; (ii) an intense fear of weight gain or persistent behavior designed to avoid weight gain; and (iii) a disturbance in body perception, excessive influence placed on body shape and weight in self-evaluation, or a persistent failure to perceive the seriousness of the current low body weight.21

Bulimia nervosa (bulimia) shares many DSM-5 symptoms with anorexia, including similar body perception and self-evaluation distortions. In contrast to anorexia, the defining characteristic of bulimia is binge eating combined with compensatory behaviors such as self-induced vomiting, a misuse of laxatives or similar medications, fasting, or excessive exercising.22

The DSM-5 characterizes other specified feeding or eating disorders (OSFEDs) as “presentations in which symptoms characteristic of a feeding and eating disorder that cause clinically significant distress or impairment in social, occupational, or other important areas of functioning predominate but do not meet the full

20. See id. The four remaining disorders—binge eating disorder, pica, rumination disorder, and avoidance/restrictive food intake disorder—are considered unrelated to attempted weight loss for this Note’s purposes.
21. Id. at 338–39.
22. See id. at 345.
criteria for any of the disorders in the feeding and eating disorders diagnostic class.”

Unspecified feeding and eating disorders (UFEDs) are similar to OSFEDs but occur in situations in which the “clinician chooses not to specify the reason that the criteria are not met for a specific feeding and eating disorder, and includes presentations in which there is insufficient information to make a more specific diagnosis.”

In addition, the thin ideal causes harmful outcomes outside of eating disorders. An individual can experience unhealthy weight control behaviors (UWCBs) without being diagnosed with a full-blown eating disorder. Further, studies link the thin ideal to general negative body image and depression. Throughout the remainder of this Note, the term “eating disorders” describes the four diseases mentioned above as defined by the DSM-5. The Note uses the term “UWCBs” to describe any form of unhealthy weight control, including eating disorders as well as conditions that fall short of an eating disorder diagnosis, such as unhealthy dieting habits and substance use to control weight.

Experts estimate that 0.9 percent and 1.5 percent of US women experience anorexia and bulimia, respectively, within their lifetime. Eating disorders are especially common for young women, with anorexia being the third most common chronic illness among adolescents. For instance, 2.7 percent of adolescents suffer from an eating disorder, with female adolescents being twice as likely as their male peers to suffer from an eating disorder. Some studies find an even higher prevalence of UWCBs, ranging upwards of 30 percent among adolescents.

23. Id. at 353.
24. Id. at 354.
26. See McCarthy, supra note 8, at 205.
30. See Grigg, Bowman & Redman, supra note 25, at 751 (reporting that 36 percent of adolescents surveyed had engaged in an “extreme” form of dieting within the past month).
Anorexia has the highest mortality rate of any mental disorder, with estimated mortality rates ranging between 10 and 20 percent for diagnosed individuals.\(^{31}\) Equally as alarming is the fact that the suicide rate for women suffering from anorexia is estimated to be up to fifty-seven times higher than that of the female general population of the same age.\(^{32}\) While anorexia is clearly associated with negative health outcomes for the female population as a whole, it is especially harmful to young female adolescents.\(^{33}\) A 1995 meta-analysis\(^{34}\) of adolescent mortality found alarming outcomes for girls ages fifteen to twenty-four who suffer from anorexia. For these girls, the mortality rate associated with anorexia is twelve times higher than the mortality rate from all other causes of death combined, with a suicide rate two hundred times higher than the general population.\(^{35}\)

Less severe UWCBs cause health consequences as well. For instance, yo-yo dieting—a phenomenon describing cyclical weight loss and gain, which is common to dieters—is linked to clogged arteries, loss of bone density, and congestive heart failure, with over fifteen studies associating yo-yo dieting with increased mortality.\(^{36}\) Obsession with the thin ideal can further lead to unhealthy decisions. For instance, some women begin smoking to suppress their appetite in order to lose weight.\(^{37}\) Others refuse to quit smoking for fear of weight gain. One study found that three-quarters of female smokers are unwilling to put on more than five pounds as a result of quitting, while almost half would not accept any weight increase.\(^{38}\) Thus, a drive to be thin both creates female smokers and prevents them from

\(^{31}\) Rhode, supra note 14, at 40.

\(^{32}\) Id.


\(^{34}\) A meta-analysis is a research method that systematically combines data from previously published studies in order to develop a conclusion with greater statistical power than any single study. Study Design 101, Geo. Wash. U., https://himmelfarb.gwu.edu/tutorials/studydesign101/metaanalyses.html [https://perma.cc/5KLU-CZ4R] (last updated Nov. 2011).

\(^{35}\) Sullivan, supra note 33, at 1074.

\(^{36}\) Rhode, supra note 14, at 40–41; see also Kelly D. Brownell & Judith Rodin, Medical, Metabolic, and Psychological Effects of Weight Cycling, 154 Archives Internal Med. 1325, 1329 (1994).

\(^{37}\) Simone A. French et al., Weight Concerns, Dieting Behavior, and Smoking Initiation Among Adolescents: A Prospective Study, 84 Am. J. Pub. Health 1818, 1820 (1994) ("[A]dolescent girls who diet or who are concerned about their weight initiate smoking at higher rates than nondieters or those with fewer weight concerns."); Robert C. Klesges & Lisa M. Klesges, Cigarette Smoking as a Dieting Strategy in a University Population, 7 Int'l J. Eating Disorders 413, 416 (1988) (finding that 39 percent of female smokers studied used smoking as a weight loss strategy).

\(^{38}\) Rhode, supra note 14, at 40.
quitting, increasing their risk of lung cancer and other negative smoking-related health outcomes.\textsuperscript{39}

\textbf{B. Parties Affected by the Thin Ideal}

This Note models the dissemination of the thin ideal as follows:

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1}
\caption{Figure 1.}
\end{figure}

Pressures placed on fashion models to maintain an unhealthily low body weight have a two-fold impact. First, these pressures directly impact the models’ health. A recent survey of fashion models found that 62 percent of survey respondents were asked by their agencies to lose weight within the past year.\textsuperscript{40} This result is especially alarming given that the median body mass index (BMI) of the survey respondents was 17.41, with 81 percent of respondents classified as underweight according to standards set by the World Health Organization (WHO).\textsuperscript{41} Most importantly, the study found a high


\textsuperscript{40} Rachel F. Rodgers et al., Results of a Strategic Science Study to Inform Policies Targeting Extreme Thinness Standards in the Fashion Industry, 50 INT’L J. EATING DISORDERS 284, 287 (2017).

\textsuperscript{41} Id. at 286–87; Body Mass Index—BMI, WORLD HEALTH ORG., http://www.euro.who.int/en/health-topics/disease-prevention/nutrition/a-healthy-lifestyle/body-
correlation between being asked to lose weight by an agency and engaging in UWCBs. The study elicits the conclusion that the thin ideal creates direct pressure on fashion models to obtain or maintain an unhealthily low body weight. One can also infer that in order to achieve these goals, models take extreme measures that exact a toll on their bodies and their mental health.

Second, pressures placed on fashion models to be thin impact the image of the ideal female body presented to consumers. This can cause internalization of the thin ideal and negative health outcomes for consumers beyond the fashion industry itself. Below, Parts I.B.1 and I.B.2 discuss in detail the thin ideal’s primary impact on fashion models and secondary impact on consumers.

1. Primary Effects: The Models Themselves

Some models may possess the ability to achieve the extreme body weight required by their agencies through a mixture of genetics, healthy diet, and exercise. This group of individuals likely bears few to none of the costs of the thin ideal. However, there is evidence that many turn to eating disorders, unhealthy dieting habits, or substance use to lose weight, all of which have a negative impact on an individual’s physical and mental health.

While well-established anecdotal evidence suggests that UWCBs run rampant within the fashion industry, the first large-scale empirical study to examine this phenomenon was not published until January 2017. The study was a collaboration between researchers from two universities and the Model Alliance, a group that engages in advocacy for models’ well-being. The researchers designed and administered a survey that included

mass-index-bmi [https://perma.cc/R2MC-S7VF] (last visited Mar. 9, 2018) (defining those with a BMI below 18.5 as underweight).

42. See Rodgers et al., supra note 40, at 287–88.
44. See, e.g., Elan, supra note 12.
46. Reports, supra note 45.
subjects aged eighteen or older who walked in New York Fashion Week (NYFW). 48

The researchers designed this collaborative study with three goals in mind. First, the study aimed to determine rates of UWCBs among models. 49 Next, it sought to determine whether there was a correlation between UWCBs and pressures from models’ agencies to lose weight. 50 Finally, the survey asked models about the perceived feasibility and effectiveness of different potential policy measures designed to protect them. These measures are discussed in Part IV. 51

The study covered a range of weight and shape control methods, asking models about whether they engaged in behaviors such as “skipping meals (56%), dieting (71%), fasts/cleanses/detoxes (52%), using weight-loss supplements or diet pills (23%), self-induced vomiting (8%), and using stimulants such as Ritalin (16%) or cocaine (7%), or using intravenous drips (2%)” 52 Importantly, DSM-5 does not necessarily classify any of these behaviors alone as eating disorders, nor does dieting singlehandedly reflect a UWCB; rather, some of these behaviors could be a reflection of a healthy method of weight control. However, given that 81 percent of these models are underweight by WHO standards, 53 it would be difficult to consider any behavior meant to further decrease body weight among this population a healthy method of weight control.

From a policy perspective, perhaps the most significant finding of this study was a high correlation between those subjects asked to lose weight by an agency and those engaging in weight- or shape-controlling behaviors. 54 Of all the behaviors listed above, the study showed that only self-induced vomiting and use of intravenous drips failed to correlate with pressure from an agency to lose weight. 55

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49. Rodgers et al., supra note 40, at 289.

50. Id.

51. See id. at 290.

52. Id. at 287.

53. Id. at 289; see Body Mass Index—BMI, supra note 41.

54. See Rodgers et al., supra note 40, at 287–88.

55. See id.
2. Secondary Effects: The Public Health Impact

The secondary impact of the thin ideal manifests itself through the general public’s internalization of the thin ideal. Importantly, only part of the causation of eating disorders may be attributed to the thin ideal, as there is strong evidence that genetics are a risk factor for developing many forms of eating disorders.\footnote{Allie Bidwell, Researchers Find Genes Linked to High Risk of Eating Disorders, U.S. NEWS, (Oct. 8, 2013, 5:31 PM), https://www.usnews.com/news/articles/2013/10/08/researchers-find-genes-linked-to-high-risk-of-eating-disorders [https://perma.cc/NEL9-76XR].} However, a number of studies show internalization of the thin ideal as a strong predictor of eating disorders and UWCBs generally. Thus, while diminishing the dissemination of the thin ideal will not eliminate all UWCBs, it will almost certainly have a positive impact.

Researchers use a variety of methods to show the causal link between thin-obsessed culture and problematic health outcomes.\footnote{See, e.g., Amy L. Ahern, Kate M. Bennett & Marion M. Hetherington, Internalization of the Ultra-Thin Ideal: Positive Implicit Associations with Underweight Fashion Models Are Associated with Drive for Thinness in Young Women, 16 EATING DISORDERS 294, 297–301 (2008); Dittmar & Howard, supra note 9, at 769–70; Grabe, Ward & Hyde, supra note 5, at 463–69; Thompson & Stice, supra note 6, at 181.} One study provides the most intuitive example of this link.\footnote{See Anne E. Becker et al., Eating Behaviours and Attitudes Following Prolonged Exposure to Television Among Ethnic Fijian Adolescent Girls, 180 BRIT. J. PSYCHIATRY 509, 509 (2002).} In 1995, a rural community in Western Fiji acquired television access, exposing those in the community to the thin-obsessed Western media for the first time.\footnote{Id.} Researchers conducted surveys of adolescent girls in the community both immediately after the introduction of television, in 1995, and then again three years later, in 1998.\footnote{Id.} The surveys consisted of a modified twenty-six-item eating attitudes test (the “EAT-26”), questions about television viewing, and measurements of height and weight.\footnote{The EAT-26 is a “standardized self-report measure of symptoms and concerns characteristic of eating disorders.” Eating Attitudes Test, EAT-26, https://www.eat-26.com [https://perma.cc/ARB9-MMRP] (last visited Mar. 10, 2018). Individuals with a score of 20 or more on the EAT-26 should be referred to a mental health professional for a diagnostic evaluation. Id.} The 1998 survey included additional narrative responses.\footnote{Becker et al., supra note 58, at 509–10.}

These narrative responses provide insight into the minds of these adolescent girls. One survey participant stated:

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57. See, e.g., Amy L. Ahern, Kate M. Bennett & Marion M. Hetherington, Internalization of the Ultra-Thin Ideal: Positive Implicit Associations with Underweight Fashion Models Are Associated with Drive for Thinness in Young Women, 16 EATING DISORDERS 294, 297–301 (2008); Dittmar & Howard, supra note 9, at 769–70; Grabe, Ward & Hyde, supra note 5, at 463–69; Thompson & Stice, supra note 6, at 181.
58. See Anne E. Becker et al., Eating Behaviours and Attitudes Following Prolonged Exposure to Television Among Ethnic Fijian Adolescent Girls, 180 BRIT. J. PSYCHIATRY 509, 509 (2002).
59. Id.
60. Id.
63. Id. at 510.
When I look at the characters on TV, the way they act on TV and I just look at the body, the figure of that body, so I say, “look at them, they are thin and they all have this figure”, so I myself want to become like that, to become thin.64

With respect to empirical results, the researchers found two significant between-sample differences. In 1995, immediately after television was introduced, 0 percent of survey respondents reported engaging in self-induced vomiting.65 This percentage rose to 11.3 percent in the 1998 wave of the survey.66 Further, the proportion of girls who scored above twenty on the EAT-26—considered a high score—rose from 12.7 percent in 1995 to 29.2 percent in 1998.67

Finally, the second wave of the survey found that respondents who lived in a household with a television were three times more likely to score higher than twenty on EAT-26 than those who did not have a household television.68 This study’s findings, among countless others, provide evidence causally linking exposure to Western media and thin-obsessed cultural norms with UWCBs and negative body image.69

II. FASHION MODELS AND THE THIN IDEAL: A BRIEF HISTORY

Conversations about the negative impact of the thin ideal began to circulate among academics in the early 1990s.70 However, the thin ideal and fashion models’ well-being became a hot-button issue in the mainstream media in 2006, when two fashion models succumbed to anorexia within a three-month period.71 Luisel Ramos, an Uruguayan fashion model, died of anorexia-related heart failure during a runway show in August 2006.72 Ana Carolina Reston, a twenty-one-year-old Brazilian model, died three months later of anorexia complications.73 The close proximity and clear causation of these two deaths sparked a public outcry.74

64. Id. at 513.
65. Id. at 510 & tbl.1.
66. Id.
67. Id.
68. Id. at 511.
69. See id. at 510.
70. See, e.g., McCarthy, supra note 8, at 205.
71. Taber, supra note 17.
73. See Taber, supra note 17.
to the issue was the 2007 death of Luisel’s sister Eliana, who worked as a fashion model and also passed away from suspected malnutrition.75

A number of players in the international fashion community reacted swiftly to these high-profile deaths. The Spanish and Italian governments prompted industry change without passing a formal law on the matter. Under pressure from the Spanish government, the Association of Fashion Designers of Spain banned models with a BMI below eighteen from walking in Madrid’s fashion week.76 Soon after, the city government of Milan and Milan’s fashion industry reached an agreement that banned models under the age of sixteen and those with a BMI under 18.5 from walking during its fashion week.77

Another high-profile model death in 2010 brought eating disorders back into the public eye when Isabelle Caro, a former model who began an anorexia awareness campaign, died from her illness.78 Since Caro’s death, two countries passed formal laws designed to combat the thin ideal and protect fashion models from weight loss pressures.79 Israel was the first country to take action, passing a law in 2012 that bans fashion agencies from employing models with a BMI lower than 18.5.80 The law also requires advertisers to mark advertisements in which they used Photoshop to distort models’ body shapes or sizes.81 France passed a similar law in 2016, with one major difference: instead of requiring a minimum BMI, France requires models to provide a doctor’s certificate stating that the model is a healthy weight, accounting for the model’s size, shape, and age.82 Similar to Israel’s Photoshop-disclaimer requirement, France mandated that any image where Photoshop or similar technology

75. Beckford, supra note 72.
79. Id.
81. Id.
alters a model’s body must receive a label designating the image a retouched photograph.\(^{83}\)

Despite the clear danger to models, reactions from other countries, and studies demonstrating that media portrayals of extremely thin women increase an array of poor public health outcomes, the response within the United States has been strikingly limited. The only action taken in the wake of these events was a set of voluntary guidelines published by the Council of Fashion Designers of America (CFDA), known as the CFDA Health Initiative.\(^{84}\) The CFDA is a nonprofit trade association consisting of more than five hundred US fashion designers.\(^{85}\) The CFDA’s guidelines serve as an “underwhelming” response to the problem of underweight models.\(^{86}\) Given the outcomes of the survey of models discussed above, it seems apparent that these voluntary guidelines are ineffective. The time for the United States to assess its options and pursue another course of action in order to protect its models and its impressionable adolescents is now.

III. EXISTING WORKER PROTECTIONS

Workers’ welfare is an important topic, particularly given the amount of time Americans spend working. Indeed, for the population aged twenty-five to fifty-four, Americans spend more time on work-related activities than on any other activity—except “personal care,” which includes sleeping.\(^{87}\) The United States generally values the well-being of its workers, as evidenced by laws designed to protect

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84. Samantha Critchell, Guidelines Target Thin Models, OKLAHOMAN (Jan. 21, 2007, 12:00 AM), http://newsok.com/article/3000996 [https://perma.cc/7HRG-RUS8].
86. Cassandra A. Soltis, Dying to Be a Supermodel: Can Requiring a Healthy BMI Be Fashionable?, 26 J. CONTEMP. HEALTH L. & POL’Y 49, 50 (2009). Of the last four annual reports from the CFDA, only three mention the CFDA Health Initiative. See CFDA, ANNUAL REPORT 2013, at 42 (2014); CFDA, ANNUAL REPORT 2014, at 32 (2015); CFDA, ANNUAL REPORT 2016, at 52 (2017); see also CFDA, ANNUAL REPORT 2015 (2016) (making no mention of the CFDA Health Initiative). Of the three annual reports that do discuss the CFDA Health Initiative, none directly discuss efforts to curb disordered eating among models or attempts to generally reduce pressure to be thin within the industry. See CFDA, ANNUAL REPORT 2013, supra, at 42; CFDA, ANNUAL REPORT 2014, supra, at 32; CFDA, ANNUAL REPORT 2016, supra, at 52.
87. See Average Hours Per Day Spent in Selected Activities by Age, BUREAU LAB. STAT., https://www.bls.gov/charts/american-time-use/activity-by-age.htm [https://perma.cc/429P-BQNB] (last visited Mar. 10, 2018) (select the age ranges “25 to 34 years” and “45 to 54 years” in addition to the default selections).
workers and by the government entities tasked with promoting their welfare. For instance, the Department of Labor seeks to “foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights.”

The goal of worker protections is not to eliminate all health and safety risks in the workplace. Not only is it impossible to eliminate all risks, but it is undesirable to do so. This concept is best illustrated through an analogy. Consider the risks presented by traveling in an automobile. This is a fairly risky activity, with the average lifetime risk of death by car accident for the US population equal to 1:645. We could eliminate this risk by outlawing automobiles or greatly diminish the risk by reducing the speed limit to ten miles per hour. However, we value the convenience that cars provide and are willing to accept the trade-off of risk for accessibility.

The same concept applies to worker safety. Willingness to pay for a product creates a market for that product, which in turn requires workers to produce it. It may be impossible or incredibly costly to eliminate risks for workers in certain jobs. Thus, workers must determine what level of risks they are willing to accept for a certain wage. Within this framework, we want to incentivize employers to provide an efficiently safe work environment and encourage employees to take efficient levels of precaution.

Unfortunately, the current health risks that fashion models face in the course of their employment are undesirable from both economic and values-based standpoints. The thin ideal creates
negative externalities;\textsuperscript{98} not only are fashion models suffering health consequences from pressures to be thin, but the end product of their labor is generally harmful to the public that consumes it.\textsuperscript{99} Further, extreme bargaining power disparities within the fashion industry have created a situation in which models feel they must either risk their health or lose their job.\textsuperscript{100} Given the current indefensible level of health risk in the fashion industry, this Note next attempts to determine what form of intervention is appropriate.

Economists John Leeth and Nathan Hale provide a helpful description of systems that act to enhance workers’ welfare.\textsuperscript{101} They describe four separate pillars that provide protection to US workers: the labor market, workers’ compensation, the legal system, and regulation through the Occupational Safety and Health Administration (OSHA).\textsuperscript{102} This Part provides background on each pillar, with a specific focus on elements that are relevant to each’s ability to function as protection for fashion models.

One concept that reverberates throughout three of the four pillars is the concept of employee versus independent contractor classification.\textsuperscript{103} In the case of the legal system, workers’ compensation, and OSHA regulation, classification as an independent contractor often acts as an insurmountable hurdle to obtaining workplace protections.\textsuperscript{104}

The fashion industry currently classifies its models as independent contractors.\textsuperscript{105} This practice stems from the triangular relationship between fashion models, their agencies, and clients who purchase the models’ services.\textsuperscript{106} Clients purchase fashion models’ services through the models’ agencies without any sort of direct

\textsuperscript{98} See discussion infra Part III.A.

\textsuperscript{99} See supra Part I.

\textsuperscript{100} See infra Part IV.A–B.


\textsuperscript{102} Id. at 1.

\textsuperscript{103} See infra Part III.B–D.


\textsuperscript{106} See Sodomsky, supra note 104, at 289–90.
contract with the model.  This setup creates a classic diffusion-of-responsibility problem and a workers’ rights nightmare. Neither modeling agencies nor their clients are willing to claim models as their employees due to the tax costs, legal implications, and other monetary consequences.

Due to the potential hurdles created by the structure of fashion models’ employment relationships, this Part additionally advances a fifth pillar of worker protection: innovative lawmaking.

A. The Labor Market

The private labor market is the first line of defense against unsafe workplaces and practices that are detrimental to workers’ well-being. Economic theory and empirical studies suggest that workers bargain with potential employers for a safe workplace and demand higher wages in order to accept workplace risks. Thus, employers face a trade-off between investing in workplace safety and offering higher wages, providing an incentive for employers to diminish workplace hazards. However, in some scenarios, the labor market produces undesirable outcomes for workers. Two instances of such scenarios include negative externalities and bargaining power disparities, which are particularly applicable to the current state of the fashion industry.

Negative externalities occur when a third party is harmed due to a transaction to which she is not a party. A simple example of a negative externality is noise pollution. Friends enjoying a party may disturb their neighbor. If the partygoers are not held accountable for


108. See Sodomsky, supra note 104, at 290.


111. Id. Other forces—such as asymmetric information—may lead to undesirably unsafe workplaces as well, but are not discussed due to lack of relevance in the fashion industry. Id. at 137.

the disturbance to the neighbor, they may choose to make a suboptimal level of noise by playing their music too loud.

Negative externalities provide the economic justification for various types of regulation but are less commonly discussed as an impediment to worker safety and health.\textsuperscript{113} Often, employer-worker relations do not affect anyone outside of the labor transaction.\textsuperscript{114} However, this Note argues that in the case of the fashion industry, models’ public visibility creates a negative externality due to the general public’s internalization of the thin ideal.\textsuperscript{115}

The market itself can solve negative externalities through private negotiations if the costs of bargaining are low enough.\textsuperscript{116} However, in cases where bargaining costs are high, some form of outside intervention is typically justified.\textsuperscript{117}

Bargaining power disparities in which an employer has the upper hand may also lead to undesirable outcomes for workers.\textsuperscript{118} Scholars have characterized this issue from opposing perspectives\textsuperscript{119} but generally seem to agree that at the very least, inequity in bargaining power can lead to wages and working conditions that society deems unacceptable from a values-based standpoint.\textsuperscript{120} The typical solution for bargaining power disparities is the formation of unions, which allow workers to bargain collectively rather than individually for a more equitable outcome.\textsuperscript{121} Collective bargaining increases the power that workers hold in the bargaining dynamic, allowing them to demand, among other things, safer workplaces.\textsuperscript{122}

Finally, employers may choose to engage in workplace safety collectively through industry self-regulation in the context of the labor market.\textsuperscript{123} However, economic rationality suggests that

\begin{itemize}
\item \textsuperscript{113} See Lambert, supra note 91, at 1015–18; see also Stemler, supra note 112, at 127–28 (discussing the implications of negative externalities with respect to self-employed “microentrepreneurs”).
\item \textsuperscript{114} See Lambert, supra note 91, at 1016–17.
\item \textsuperscript{115} See infra Part IV.A.
\item \textsuperscript{117} SHALEV, supra note 116, at 87, 92–94.
\item \textsuperscript{118} See Schwab, supra note 110, at 139–42.
\item \textsuperscript{120} GUY DAVIDOV, A PURPOSEFUL APPROACH TO LABOUR LAW 52 (2016).
\item \textsuperscript{121} Susan Hayter, Unions and Collective Bargaining, in LABOUR MARKETS, INSTITUTIONS AND INEQUALITY: BUILDING JUST SOCIETIES IN THE 21ST CENTURY 95, 95 (Janine Berg ed., 2015).
\item \textsuperscript{122} See id.
\item \textsuperscript{123} Cynthia Estlund, Rebuilding the Law of the Workplace in an Era of Self-Regulation, 105 COLUM. L. REV. 319, 323 (2005).
\end{itemize}
self-regulation is rarely effective without the threat of state-based sanctions. In the specific context of workplace health and safety, factors that predict voluntary self-regulation include (i) low prevention costs, (ii) high likelihood the firm will have to pay for damages, (iii) pressure from consumers, (iv) high likelihood that workers will demand a wage premium, and (v) clear and widespread social norms that promote worker protection. In other words, a successful self-regulatory regime is highly unlikely to materialize absent some outside incentives.

B. Workers’ Compensation

Many states began adopting workers’ compensation systems in the early nineteenth century to provide compensation for work-related injuries, largely due to a perception that the labor market and the common law afforded inadequate protections to workers. All states implemented some form of workers’ compensation laws by 1949. These programs operate separately from the legal system and act as a strict liability mechanism by providing compensation for workers who are injured on the job, regardless of employer negligence. Compensation includes both a portion of lost wages during the period that the individual is unable to work and costs of medical care due to the injury.

Workers’ compensation systems serve two purposes. First and most obvious is the ex post function of compensating workers who have suffered a harm in order to alleviate their loss. Second, workers’ compensation systems are thought to improve efficient safety measures because they shift the cost of workplace injuries to employers. In the sense that employers must either pay out workers’ compensation claims or pay experience-rated premiums for

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124. See Ian Ayres & John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate 19 (1992); see also Eslund, supra note 123, at 323.
127. 82 AM. JUR. 2D Workers’ Compensation § 1 (2018).
128. Darling-Hammond & Knesner, supra note 126, at x.
130. See id.
131. Id. at 3.
132. Workers’ Compensation, supra note 127, §§ 10, 11.
133. Id. § 14.
workers’ compensation insurance, they have an incentive to invest in a safer workplace in order to avoid such claims.\textsuperscript{134} The construction and implementation of workers’ compensation vary from state to state.\textsuperscript{135} Notably, workers’ compensation benefits are limited to employees in all states, but states vary in their definition of the term “employee.”\textsuperscript{136} Both New York and California, the two largest hubs of the fashion industry in the United States, use a variation of the multifactor \textit{Darden} test\textsuperscript{137} to differentiate between employees and independent contractors.\textsuperscript{138} In both states’ multifactor test, the worker’s right to control the work determines a worker’s classification.\textsuperscript{139}

\textbf{C. The Legal System}

The legal system acts in a manner similar to workers’ compensation: it provides ex post compensation to workers who suffer harm in the workplace while also incentivizing employers to invest in workers’ welfare.\textsuperscript{140} The ability of laborers to bring claims against their employers stems from a variety of statutes and common law. Notably, the availability of workers’ compensation often preempts the ability of employees to bring claims against their employers for physical harm.\textsuperscript{141} Thus, legal claims of employees against their employers are largely limited to those involving either nonphysical harm or, on the opposite end of the spectrum, death. Causes of action

\begin{itemize}
\item \textsuperscript{134} See \textit{id.}
\item \textsuperscript{135} Workers’ Compensation Law—State by State Comparison, NATL FED’N INDEP. BUS. (June 7, 2017), https://www.nfib.com/content/legal-compliance/legal/workers-compensation-laws-state-by-state-comparison-57181/ [https://perma.cc/P5L9-XKD5].
\item \textsuperscript{136} Workers’ Compensation, supra note 127, § 117.
\item \textsuperscript{137} See Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323–24 (1992) (holding that the hiring party’s right to control the work determines whether a hired party is an employee, along with other relevant factors, including “the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party” (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989))).
\item \textsuperscript{139} Lara, 105 Cal. Rptr. 3d at 772; State Ins. Fund, 721 N.Y.S.2d at 719.
\item \textsuperscript{141} Id.
specific to employer-employee relationships include Title VII of the Civil Rights Act (Title VII),\textsuperscript{142} the Fair Labor Standards Act,\textsuperscript{143} the Age Discrimination in Employment Act,\textsuperscript{144} and the Family and Medical Leave Act.\textsuperscript{145} Wrongful death, intentional torts, fraud, and defamation provide more general causes of action.

Similar to workers’ compensation, relief for many legal claims is statutorily limited to employees; independent contractors cannot bring claims under any of the above-listed specific employer-employee causes of action.\textsuperscript{146} Thus, many forms of discrimination go unchecked in the workplace in cases of independent contractors. One such example can be found in the fashion industry itself. Due to their independent contractor status, models have not been able to bring claims for sexual harassment despite the prevalence of such harassment in the industry.\textsuperscript{147}

The willingness of injured workers to bring a claim is just as important as their actual ability to do so.\textsuperscript{148} In cases where employees are unwilling or unable to bring claims against their employers, employers will not be incentivized to avoid worker-harming behavior.

In some instances, the surrounding circumstances drastically affect a worker’s inclination to bring a lawsuit against her employer.\textsuperscript{149} One study examined an incident in which workers with a well-grounded legal claim were unwilling to bring employment discrimination suits against their employers.\textsuperscript{150} The study’s authors surveyed a group of casino workers about their willingness to bring suit after a relevant development in appellate case law. The case,


\textsuperscript{146} Coverage, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/employers/coverage.cfm [https://perma.cc/2CVA-VN9F] (last visited Mar. 12, 2018) (“People who are not employed by the employer, such as independent contractors, are not covered by the anti-discrimination laws.”); see also Chelsea Fitzgerald, Note, When Tech Startups Outgrow the 1099 Model: Moving Firms out of the Kiddie Pool, 18 VAND. J. ENT. & TECH. L. 629, 630–31 (2016) (listing various employment rights that are provided for “employees” but not for independent contractors).

\textsuperscript{147} See Friedman, supra note 107.


\textsuperscript{149} Id.

\textsuperscript{150} Id. at 696–723.
Jesperson v. Harrah’s Operating Co., indicated in dicta that casino cocktail waitresses could likely win a sex discrimination case against their employers based on questionable employee dress codes. However, the authors found that almost no casino workers were willing to bring such a suit. The authors hypothesized potential reasons for this, such as high wages (including tips) that casino industry workers make, the information-sharing mechanisms of the casinos, the nature of the legal market, the absence of a highly developed class action bar, the strength of the unions, the possibly low level of education of the workforce, and the lack of a significant Equal Employment Opportunity Commission (EEOC) office.

D. OSHA Regulations

Congress created OSHA through the Occupational Safety and Health Act of 1970 (OSH Act). The OSH Act additionally created the National Institution for Occupational Safety and Health (NIOSH), which is tasked with performing the research necessary for OSHA regulation. OSHA describes its mission as “assur[ing] safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance.” The justification for OSHA regulation is similar to that of other regulatory agencies: it intervenes to remedy a perceived market failure, specifically the failure of the labor market, legal system, and workers’ compensation programs to adequately protect laborers.

OSHA expands the protection available to workers by creating ex ante standards that employers must comply with. Both workers’ compensation and the legal system act as ex post systems in which

151. Id. at 701–03. Notably, Jespersen lost her case due to her failure to adduce sufficient evidence of sex stereotyping. Jespersen v. Harrah’s Operating Co., 444 F.3d 1104, 1112–13 (9th Cir. 2006) (en banc). However, the Ninth Circuit articulated for the first time that disparate standards of grooming policies constituted sex discrimination. See id.
152. George, Gulati & McGinley, supra note 148, at 715.
153. Id. at 734.
156. About OSHA, supra note 154.
158. Id.
workers who have been injured are compensated. In contrast, OSHA attempts to prevent injuries from happening in the first instance by setting standards, inspecting workplaces, and issuing penalties for noncompliant employers.

While OSHA possesses relatively broad authority pursuant to the OSH Act, OSHA traditionally only promulgates rules pertaining to employment relationships in industrial sectors. While OSHA rarely promulgates regulations applying to nonindustrial employers, NIOSH investigates and provides reports on a number of workplace safety issues in nonindustrial settings.

Similar to workers’ compensation and the legal system, OSHA’s authority is formally limited to regulations that apply to employees. However, the Supreme Court has yet to define the term “employee” within the OSHA context, and it is unclear what test applies in an OSHA setting. Thus, OSHA may be reluctant to pass a regulation in which employment status is uncertain.

Lack of resources also limits OSHA’s effectiveness at protecting workers. For instance, the ratio of OSHA inspectors to workers in the United States is 1:59,000. Commentators note that noncompliance

159. Id.
163. See OSHA Law & Regulations, supra note 160.
164. See id.
168. The OSHA rule addressing this question vaguely describes a multifactor test and cites Loomis Cabinet Co. v. Occupational Safety & Health Review Commission, 20 F.3d 938 (9th Cir. 1994) as its source. See Occupational Injury and Illness Recording and Reporting Requirements, 66 Fed. Reg. 5916, 6038 (Jan. 19, 2001) (to be codified at 29 C.F.R. pts. 1904, 1952). However, the commission in Loomis Cabinet Co. applied an economic realities test while stating that the plaintiff also would have succeeded under the Darden test, leaving the proper test unclear. Loomis Cabinet Co., 20 F.3d at 941–42.
is rampant with respect to OSHA regulations, largely due to low inspection rates and insufficient penalties, which fail to punish violations effectively given the rarity of inspections.¹⁷⁰

E. Innovative Lawmaking

When Congress or state legislatures determine that other forms of worker protections are insufficient, they may choose to pass legislation aimed at providing specific and novel worker protections. Such intervention may take the form of federal legislation, state laws, or city ordinances.

1. Federal Legislation

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA)¹⁷¹ provides an example of federal regulation directly aimed at protecting a specific class of workers.¹⁷² In the 1960s, the US public became aware of the deplorable working conditions of the nation’s migrant farm workers, largely through a CBS investigative report titled “Harvest of Shame.”¹⁷³ In response, Congress took action through the Farm Labor Contractor Registration Act of 1963,¹⁷⁴ later repealed and replaced by the MSPA. While well intentioned, the MSPA has proved largely ineffective.¹⁷⁵ In contrast, Congress indirectly affected performance-enhancing steroid use in Major League Baseball (MLB).¹⁷⁶ Beginning in the late 1980s, many MLB players began using steroids in order to

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¹⁷⁰ See Eustlund, supra note 123, at 360–61; Shapiro & Rabinowitz, supra note 125, at 108–09.
¹⁷⁵ Matthew Webster, “Jobs Americans Won’t Do”: Our Farming Heritage, Hazardous Harvests, and a Legislative Fix, 29 Law & Ineq. 249, 263 (2011); Holly, supra note 173.
enhance performance.\textsuperscript{177} Congress visited this issue several times, taking actions such as banning specific substances altogether\textsuperscript{178} and considering a bill that would have set minimum standards for professional athletic steroid testing.\textsuperscript{179} While Congress never passed a law that specifically applies to professional athletes, the MLB now implements fairly rigorous drug testing, and the MLB steroid epidemic is commonly considered an era of the past.\textsuperscript{180}

2. State Legislation and Local Ordinances

Compared with federal legislation, state legislation comes with additional built-in limitations. The “race to the bottom” theory predicts that state-based protective measures are unlikely to prove effective when strong interstate competition exists.\textsuperscript{181} Applying the theory to worker protections, if one state passes a particularly restrictive law, employers will have an incentive to shift their business to other states in order to avoid higher costs. Similar logic applies to city ordinances. A city could potentially pass an ordinance requiring strict worker protection. In most scenarios, this is unlikely to occur due to fear that if worker protection costs are high enough, employers will pursue business in other cities where they incur lower costs.

However, lack of competition makes this less of a concern in industries where employers are limited to primarily operating in specific cities or states, such as the US fashion industry, which is largely confined to New York City and Los Angeles.\textsuperscript{182}

IV. POTENTIAL SOLUTIONS

This Part discusses the feasibility of implementing various protections and remedies for fashion models. Mirroring the discussion of available protections and remedies, this Part discusses five

\textsuperscript{177} The Steroids Era, ESPN (Dec. 5, 2012, 4:23 PM), http://www.espn.com/mlb/topics/_/page/the-steroids-era [https://perma.cc/C76Q-LXYG].

\textsuperscript{178} See DeIuliis & DeIuliis, supra note 176, at 5.

\textsuperscript{179} Id. at 10.

\textsuperscript{180} See The Steroids Era, supra note 177 (“[T]here is no defined start or end time to ‘the steroids era,’ though it is generally considered to have run from the late ’80s through the late 2000s.”).


\textsuperscript{182} See DEMOCRATIC STAFF OF JOINT ECON. COMM., 114TH CONG., THE ECONOMIC IMPACT OF THE FASHION INDUSTRY 1 (Comm. Print 2016) (noting that over two-thirds of US fashion designers are based in either Los Angeles or New York City).
categories: the labor market, workers’ compensation, the legal system, OSHA regulation, and innovative lawmaking.

Given the numerous protections that the United States affords its workers, it is somewhat surprising that models have fallen through the cracks. One explanation may be that eating disorders traditionally fall under the umbrella of psychological disorders rather than physical illnesses, even though eating disorders manifest many physical symptoms. Despite all of the protections discussed in this Part, the United States has generally been more reluctant to compel protections or assistance to those with mental illness than to those with physical illness.

Perhaps the greatest impediment to providing better worker protections is the fashion industry practice of classifying models as independent contractors rather than employees. Many worker protections and other benefits available to employees are notoriously unavailable to independent contractors. Below follows a discussion of barriers that models’ status as independent contractors places on their ability to receive sufficient legal protection. Given the novel nature of providing protection related to mental health and models’ current status as independent contractors, this Note suggests that innovative lawmaking provides the most promising protection for fashion models.

183. See AM. PSYCHIATRIC ASSOC., supra note 19, at 329. All of the National Institute of Health’s information on eating disorders is contained on the National Institute of Mental Health’s website, supporting the conclusion that eating disorders are primarily considered a mental illness in the United States. See Eating Disorders, NAT’L INST. MENTAL HEALTH, https://www.nimh.nih.gov/health/topics/eating-disorders/index.shtml [https://perma.cc/TS2Z-HLDP] (last updated Feb. 2016).

184. See AM. PSYCHIATRIC ASSOC., supra note 19, at 329; see also id. at 329–54 (listing symptoms).


186. Ellis & Hicken, supra note 105.

187. See supra Part III.

188. See infra Part IV.B.
A. The Labor Market: Bargaining Power Disparity, Negative Externalities, and Self-Regulatory Failure

Currently, the labor market fails to provide models with health-related protections. Bargaining power disparity, exacerbated by a lack of unionization among fashion models, and a lack of effective self-regulation have created a situation in which models feel that pressures to lose weight must be accommodated. ¹⁸⁹ The negative externalities associated with the thin ideal further suggest that protection against weight-loss pressures needs to be either bargained for or provided by the government.

One reason for this bargaining power disparity is the perceived desirability of a career as a fashion model, leading to an imbalance in model supply and employer demand. ¹⁹⁰ There are very few modeling jobs available in the fashion industry but many aspiring models. ¹⁹¹ The same imbalance exists throughout the entertainment industry. ¹⁹² However, in contrast to fashion, the rest of the entertainment industry is predominantly unionized. ¹⁹³ There is currently no union for fashion models. ¹⁹⁴ Given the success of unions in other entertainment


sectors,\textsuperscript{195} model unionization could combat industry pressure to achieve a dangerously low weight while also potentially alleviating unfair wages and other discriminatory workplace concerns of fashion models.

The negative externalities created by the fashion industry mirror those created by both the MLB steroid epidemic and the use of chewing tobacco among MLB players, given the prominent roles of both models and MLB players in popular culture.\textsuperscript{196} MLB players’ steroid and chewing tobacco use created a negative externality to the extent that young baseball players’ idolization of MLB athletes led to concerns that these young players might emulate professional athletes’ unhealthy behaviors.\textsuperscript{197}

Evidence that extremely thin fashion models impact the mental health of young women is much more extensive than the evidence that steroid use among MLB players influenced young male athletes,\textsuperscript{198} yet action regarding eating disorders is incredibly limited compared to the persistent congressional interventions directed at the MLB steroid epidemic.\textsuperscript{199}

Given the consensus that self-regulation is rarely effective without outside intervention or monitoring,\textsuperscript{200} it is reasonable to infer that congressional action led to the MLB’s adoption of a rigorous antisteroid policy. Beyond a lack of state action, effective self-regulation is less likely in the fashion industry for another reason: the fashion industry consists of many competitors, while the MLB essentially functions as a monopoly.\textsuperscript{201} The MLB does not have to worry about losing players or consumers when it implements a


\textsuperscript{197} See Williams, supra note 196, at 154.

\textsuperscript{198} Many medical journals have published studies showing a causal link between consuming thin-obsessed media and poor health outcomes. See supra Part I.B.2. To the Author’s knowledge, there are no published studies on the causal effect of professional steroid use on adolescent steroid use.

\textsuperscript{199} See Delulisi & Delulisi, supra note 176, at 4–5; supra Part II.

\textsuperscript{200} See Estlund, supra note 123, at 325.

self-regulatory policy, as it is the monopoly power in US professional baseball. For example, when the MLB banned chewing tobacco, it did not have to worry that players who objected to this policy would leave to play in another professional league, as there is no comparable one. However, if a particular fashion designer or agency pledges to implement a policy designed to protect models, it may worry that it will lose consumers to its competitors.

The fashion industry experimented with the idea of self-regulation with the recent LVMH-Kering Charter, which committed all brands of LVMH and Kering—two French luxury fashion conglomerates—to banning size zero models from the runway. Notably, however, LVMH and Kering are both French companies and they signed the charter after France implemented a law requiring models to provide a doctor’s note certifying a healthy body weight. Thus, it is possible that this “self-regulation” is more of a public relations effort than a bona fide intervention, as it is unlikely the LVMH-Kering Chater will have much, if any, effect outside of France’s preexisting law.

While this Note ultimately suggests that implementing statutory protections is the best way to pursue change in the fashion industry, pressuring the industry to self-regulate could potentially be just as effective.

202. See id.


207. Id.
B. The Legal System, Workers’ Compensation, and OSHA Regulation: An Issue of Employment Status

As mentioned above, the fashion industry widely classifies models as independent contractors rather than employees, a classification that has yet to be successfully challenged. Thus, unless courts move toward a consensus that models are misclassified as independent contractors, many protections offered by the legal system, workers’ compensation, and OSHA are unavailable to models.

Tests for employment vary by context but typically consist of some variation of the Darden factors. The linchpin of the Darden factors is the amount of control the employer exhibits over the worker. As mentioned above, both California and New York employ a variation of the Darden factors in inquiries into employment status for workers’ compensation purposes. There is a good argument that the industry misclassifies models as independent contractors due to the strict control that designers and photographers exhibit over models’ entire physical presence, including their clothing, posture, facial expressions, makeup, and hair. This leaves models with essentially no control over their experience backstage, on the runway, or in front of a camera. Despite the possibility that a court could determine models are misclassified as independent contractors, the looming uncertainty may be enough to deter models from bringing legal claims or attempting to collect workers’ compensation and to prevent OSHA from promulgating regulations.

Beyond uncertainty surrounding employment classification, legal claims and OSHA regulation face additional specific barriers to success. In order to successfully implement change through the legal system, a model would need to identify a cause of action and be willing to bring a claim, all amid uncertainty that her classification as an independent contractor will not bar her claim.

208. See Ellis & Hicken, supra note 105.
209. See supra Part III.B–D.
212. See supra Part III.B.
The most likely causes of action for effecting change in this area include Title VII sex discrimination and wrongful death claims. A model could possibly bring a Title VII claim under the argument that the standards required by agencies and designers cause physical and mental harm to female models but not male models. While male models are also subject to appearance pressures, they typically are not expected to achieve dangerously low body weights but instead are expected to be lean and muscular.

With respect to the legal system, it is entirely possible that even if models were considered employees and could bring claims against designers or their agencies, they may be unwilling to do so. Many of the situational issues that the casino worker study identified also exist among fashion models, making it questionable that a fashion model would be willing to bring a lawsuit. One of the most significant factors the study pinpointed as leading to an unwillingness to bring suits was high wages among casino workers. However, this factor does not necessarily turn on high wages alone—high wages act as a proxy for the desirability of a job. While the majority of models may not make particularly high wages, their jobs are seen as desirable, leading to a low likelihood of bringing a claim.

A claim for wrongful death would not run up against these same barriers. However, it seems unwise to wait for another death in the industry to begin promoting change. Further, many anorexia-related deaths are ultimately ruled suicides, likely negating liability.

The likelihood of successful OSHA regulation is limited on two fronts. First, OSHA is stretched thin—limited by its resources and criticized for the rates of noncompliance with its regulations.
Second, while OSHA has the statutory authority to regulate the type of harm that models suffer, it rarely promulgates regulations outside of the industrial sector.\textsuperscript{223} Thus, it is unlikely that OSHA would invest in developing a questionable regulatory structure—due to the uncertainty of models’ employment status—that is also removed from the agency’s traditional regulatory focus.

\textit{C. Innovative Legislation}

City governments, state legislatures, or Congress can—and should—sidestep all the above-mentioned barriers faced by fashion models in obtaining workplace protections by passing a version of Israel’s or France’s recent laws. This legislation may serve not only to protect models through formal sanctions but also to effectuate a change in broader social norms. Even short of passing a new law, serious discussion about such regulations may help prompt industry self-regulation.\textsuperscript{224}

1. State Legislation and Local Ordinances

State-based legislation could be an effective means of protecting fashion models if both California and New York were to adopt similar protections for fashion models. Concerns regarding loss of business due to state-based legislation are relatively limited in the US fashion industry because of its high concentration in Los Angeles and New York City.\textsuperscript{225}

California Assembly Member Marc Levine introduced a bill in February 2016 that attempted to provide protections to fashion models.\textsuperscript{226} The proposed bill stated that models would be considered employees of those who directly used their services, which essentially translated to fashion designers and photographers.\textsuperscript{227} It further tasked the California Occupational Safety and Health Standards Board with establishing a standard that would protect fashion models.

\textsuperscript{223} See OSHA Law & Regulations, supra note 160.


\textsuperscript{225} See DEMOCRATIC STAFF OF JOINT ECON. COMM., supra note 182, at 1 (noting that over two-thirds of US fashion designers are employed in either Los Angeles or New York City).


\textsuperscript{227} Id. § 1.
from pressures to achieve unhealthily low bodyweights.\textsuperscript{228} Despite Levine’s efforts, this bill died in the appropriations committee.\textsuperscript{229} In a similar vein, the New York state legislature briefly considered a law in 2013 that explicitly defined a narrow category of models who would be considered independent contractors.\textsuperscript{230} This bill died in the assembly committee.\textsuperscript{231}

While it is unclear why the New York and California bills did not ultimately pass, one likely reason is lobbying from fashion agencies and designers. Both bills attempted to drastically narrow the class of models who could be considered independent contractors,\textsuperscript{232} which would have yielded drastic financial consequences for fashion agencies and designers.\textsuperscript{233} A hypothetical bill that does not attempt to classify fashion models as employees may face less opposition than those that died in the California and New York legislatures.

Moreover, it is possible to craft a bill that protects models’ health without classifying them as employees. In October 2017, New York State Assemblywoman Nily Rozic announced her intent to introduce an amendment to New York’s antidiscrimination law that would close a loophole making it impossible for models to bring work-related sexual harassment claims due to their status as independent contractors.\textsuperscript{234} This proposal does not attempt to classify models as employees for all purposes but rather simply proposes to afford protections in the realm of workplace discrimination and sexual harassment.\textsuperscript{235} A weight-based law could benefit from this strategy of a narrow focus rather than attempting to reclassify model employment status in a single sweep. Perhaps this specific New York bill proposal could even include protection against weight-based discrimination.

2. Federal Legislation

Federal legislation provides a viable alternative to state or local lawmaker. However, one counterargument to creating

\textsuperscript{228} See id.
\textsuperscript{232} See Assemb. B. 2539, § 1; Assemb. B. 5263, §§ 2, 4, 6.
\textsuperscript{233} See Sodomsky, supra note 104, at 289.
\textsuperscript{234} See Friedman, supra note 107.
\textsuperscript{235} Id.
legislation to protect fashion models is the possibility that such legislation may prove ineffective and costly. Such an argument is potentially supported by the failure of the MSPA to materially improve conditions for migrant agricultural workers. Notably, however, important differences exist between migrant agricultural workers and fashion models, specifically the number of laborers affected by the MSPA as compared to legislation directed at fashion models. There are an estimated 4,800 fashion models working in the United States currently. While estimates of the number of migrant farmworkers are sparse, one 1993 study estimated that there were more than three million migrant farmworkers in the United States at the time. Despite uncertainty in this number, it is safe to say that the number of migrant farmworkers inordinately exceeds the 4,800 US fashion models. Thus, the monetary resources needed to enforce a law pertaining to fashion models would fall magnitudes below the level of resources needed to enforce the MSPA. Further, problems with specific inspection mechanisms and exemptions in the MSPA caused problems and could be addressed with careful legislative drafting.

With respect to the MLB, Congress successfully effectuated industry self-regulation by placing pressure on the league. Congress could take similar action in the fashion industry without actually passing a law directly protecting fashion models.

3. Characteristics of Innovative Laws

One can imagine two categories of potential laws that protect models. The first involves providing ex ante protections similar to OSHA regulations, which would provide enforcement mechanisms independent of the legal system. This system would penalize industry actors for perpetuating demand for unhealthily thin fashion models and would not require any specific legal action on the part of fashion models. The second type would provide ex post legal remedies to fashion models who experience pressure to achieve extreme thinness or retaliation for refusing to do so.

236. See Webster, supra note 175, at 263; Holly, supra note 173.
237. Models, supra note 191.
239. See Webster, supra note 175, at 263, 270–75; Holly, supra note 173.
240. See supra Part III.E.1.
Israel’s and France’s laws both model ex ante solutions.\textsuperscript{241} There, the enforcement mechanism is the requirement that models obtain a certificate of health, with agencies subjected to fines if they employ a model without such a certificate.\textsuperscript{242} In this sense, the requirement acts similarly to a licensing mechanism.\textsuperscript{243} Industry actors working with local governments in Milan and Madrid implemented similar measures, prohibiting unhealthily thin models from walking in their iconic fashion weeks.\textsuperscript{244}

In contrast, an ex post solution would likely mimic employment discrimination laws. Here, if a model could prove that her employer pressured her to sacrifice her health to lose weight or discriminated against her for refusing to do so, she could recover damages in a lawsuit. Given the above discussion about willingness to bring legal claims, the ex ante solution pursued by the Israeli and French governments and Milan and Madrid industry actors makes more sense than implementing an ex post solution.\textsuperscript{245}

France’s law requires models to obtain a certificate of health every two years.\textsuperscript{246} However, models’ health and weight can fluctuate drastically in that time period.\textsuperscript{247} In order to be effective, a health certificate system would need to require more frequent certification or a different design. Perhaps the most cost-effective design would require fashion models to obtain a certificate of health before walking in NYFW or major fashion shows generally. A more expansive design could require fashion models to obtain a health certificate every six months, providing protection for more than just runway models and sending a stronger signal.

Other important considerations building off a basic ex ante structure include setting a standard with which agencies or models must comply, determining which industry player to hold accountable, choosing a method of policing, and constructing an efficient penalty scheme.

Other countries use either a BMI-exclusive standard or a standard that requires a certification of overall health.\textsuperscript{248} While a BMI-exclusive standard would be easier to police and would provide a

\textsuperscript{241} See supra Part II.
\textsuperscript{242} See supra Part II.
\textsuperscript{244} See supra Part II.
\textsuperscript{245} See supra Parts II, IV.B.
\textsuperscript{246} See Friedman, supra note 83.
\textsuperscript{247} See generally supra note 36 and accompanying text.
\textsuperscript{248} See supra Part II.
bright-line rule, a standard assessing overall health could be more successful at differentiating between those who actually engage in UWCBs and those who are naturally extremely thin. A BMI standard would provide more benefits on the negative externality side of the thin ideal, as it would move the public spotlight away from all excessively thin models. In contrast, an overall health standard might be considered less discriminatory—as well as less prone to First Amendment criticisms—as it would not penalize those with a naturally low BMI. Also entering the equation is the fact that a health professional must perform an overall health evaluation, while a BMI evaluation could be performed by anyone proficient in using a scale and tape measure.

Notably, the models surveyed in the Rodgers et al. study expressed the belief that an overall health standard would have a larger positive impact and prove more feasible than a BMI standard. One alternative to an overall health standard would be to set a minimum BMI so low that no one could be considered healthy who had such a BMI.

Lawmakers would likely want to target modeling agencies as the accountable industry actor. Agencies have long-term relationships with the models they represent, while designers’ and clients’ relationships with models are transitory in nature. Further, designers and clients typically only interact with the model indirectly through the agency. While a designer may indirectly contribute to weight-based pressures by requesting models of a certain size, the modeling agency acts as the perpetrator when it comes to pressuring an individual model to lose weight.

Lastly, lawmakers need to consider methods of enforcement. Lawmakers should not ignore the possibility of fraud, especially if utilizing a potentially subjective standard that assesses overall health, and should task a neutral party with enforcing the legislation. With respect to penalties imposed on violators, lawmakers should follow general principles of economics and ensure that the likelihood of being caught violating the law multiplied by the expected penalty outweighs

249. See infra Part IV.C.A.


251. See Rodgers et al., supra note 40, at 290.

252. See Sodomsky, supra note 104, at 290.


254. Id.

255. See, e.g., Rodgers et al., supra note 40, at 284; Elan, supra note 12.
the benefit from violating the law. Finally, lawmakers may also want to consider creating an EEOC- or OSHA-style complaint line through which models could anonymously report agencies pressuring engagement in UWCBs. This would allow for more targeted investigations into industry law violators. Economies of scale suggest that the best solution may be for Congress to create a small enforcement agency—perhaps as a branch of the EEOC—to investigate, report, and assess penalties related to this legislation.

4. First Amendment Considerations

Fashion is widely considered an art, and thus many of the decisions that factor in to the ultimate presentation of a model on the runway or in a photograph would likely be considered artistic expressions for First Amendment purposes. Some may argue that the legislation proposed above would violate the First Amendment rights of designers, photographers, or even fashion models themselves via the doctrine of prior restraint. A court analyzing this claim would apply either strict scrutiny or the more relaxed Central Hudson test, depending on whether fashion is considered public discourse or commercial speech.

In the vast majority of cases, there would be only a weak argument that this legislation would restrict the First Amendment rights of fashion models, as they exhibit little to no control over the artistic expressions presented during the course of their work. However, in the rare context in which a model is sufficiently renowned in the industry and controls her own work, she may have a claim that


261. See supra Part IV.B.
such legislation would restrict her right to express herself. But such legislation could likely survive even strict scrutiny in this context, which requires the regulation to be narrowly tailored to a compelling government interest. Here, the compelling government interest is the ability to protect fashion models from severe health risks. It is narrowly tailored, moreover, in the sense that the licensing system is meant to solely prohibit models who are suffering from UWCBs, either by setting a BMI so low that it could not be considered healthy under any circumstance or by requiring a certification of overall health based on objective measures.

The claim that the proposed legislation infringes upon designers’ or photographers’ free speech rights is even weaker. These claims would likely be analyzed in a manner similar to a recent Massachusetts case evaluating the First Amendment’s protection of speech that encourages or assists suicide. In Commonwealth v. Carter, the court held that speech having a direct, causal link to a victim’s suicide is not protected by the First Amendment. Expressions of fashion involving incredibly thin models in photographs and on the runway almost certainly qualify as having a “direct, causal effect” on models’ negative health outcomes. Admittedly, eating disorders are not always life threatening in the same way that suicide attempts are, but similar logic would apply and likely lead to such legislation surviving even a strict scrutiny test.

5. The Expressive Value of Law

One final benefit of pursuing innovative legislation is found in the “expressive function of law.” A law may act as a signal of social values, which can lead to modifications of individual preferences and social norms. Beyond limiting the ability of agencies to pressure models into UWCBs, creating a law expressing an attempt to do so could directly reduce the thin ideal by changing social norms. Such a law would send a signal to the public that society deems the thin ideal undesirable, thus potentially reducing internalization of the thin ideal.

264. Id.
266. Id. at 586.
V. CONCLUSION

While there is no way to immediately eliminate the thin ideal, the United States lags far behind the rest of the world with respect to progressing toward improvement. As predicted by self-regulation theorists, government attention and pressure spurred progress toward protecting models from body-weight pressures in other countries. Until someone—whether it be government actors, unionized models, or consumers—gives the US fashion industry an incentive to improve, it will continue perpetuating the thin ideal to the detriment of fashion models and the public at large.

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