Gender Justice – Fall 2017
Columbia Law School
Professor Katherine Franke

I. The Body As A Gender Justice Project (Continued from Reader 1)

October 2nd - The Pregnant Body

- *Trubeck v. Ullman*, 147 Conn. 633 (1960)
- Brief of ACLU in *Griswold v. Connecticut*
- Litigation: Connecticut, in Before Roe v. Wade: Voices that Shaped the Abortion Debate Before the Supreme Court's Ruling (2d edition, 2012) pp. 163-184

October 4th - Nancy Rosenbloom, Director of Legal Advocacy, National Advocates for Pregnant Women

October 9th - Criminalizing Pregnancy

- Tara Culp-Ressler, *Tennessee Arrests First Mother Under Its New Pregnancy Criminalization Law*, ThinkProgress, July 11, 2014
- Andrew Murphy, *A Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses*, 89 Ind. L.Rev. 847 (2014)

OPTIONAL READINGS

- "The Shackling Of Incarcerated Pregnant Women: A Human Rights Violation Committed Regularly In The United States," (2013) - **optional**
- Dorothy Roberts, *Unshackling Black Motherhood*, 95 Mich. L. Rev. 938 (1997) – **optional**

II. Gender, Sex, and Sexual Orientation

October 11th - Is Sexual Orientation Discrimination a Form of Sex Discrimination?

- Brian D. Prowel v. Wise Business Forms, Inc., 579 F.3d 285 (3rd Cir. 2009)
- Hively v Ivy Tech Community College of Indiana, 853 F.3d 339 (7th Cir. 2017)

October 16th - Is Transgender Discrimination a Form of Sex Discrimination?

- Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984)
- Macy v. Department of Justice, EEOC Appeal No. 0120120821 (April 20, 2012)
- G.G. v. Gloucester County School Board, brief of the ACLU (Filed February 23rd, 2017)

[12, 13] Under Practice Book § 155, argument of the applicable law in support of a claim for the admission or exclusion of evidence is permitted only if the court requests it. Especially when difficult or unusual evidential problems involving material rulings are encountered, a court is well advised to avail itself of all proper assistance which competent counsel can give. Here, while the court allowed counsel to state, as required by Practice Book § 155, the ground on which he claimed the question concerning the payment of the fine was admissible, the court refused to permit argument of the claim of admissibility. The court was technically within its rights in refusing to permit any argument at all. Since, as already pointed out, the answer clearly would have been inadmissible, no argument, even had argument ben permitted, could have been of assistance to the court.

There is no error.

In this opinion the other Judges concurred.

147 Conn. 633

David M. TRUBEK et al.

v.

Abraham S. ULLMAN, State's Attorney.

Supreme Court of Errors of Connecticut.

Nov. 1, 1960.

Action for declaratory judgment determining the constitutionality of legislation forbidding the use and prescription of contraceptive devices, brought to the Superior Court in New Haven County, where a demurrer to the complaint was sustained, Elmer W. Ryan, J., and the plaintiffs failing to plead further, judgment was rendered in favor of the defendant, from which the plaintiffs appealed. The Supreme Court of Errors, Mellitz, J., held that statutes are valid as a proper exercise of the police power and do not invade rights granted by Fourteenth Amendment to Federal Constitution, as applied to a husband and wife who wish to obtain from a reputable physician information on proper methods of preventing conception and thereby avoiding the possibility that children will be conceived before the plaintiffs are prepared psychologically or economically for the duties and obligations of parenthood.

No error.

1. Abortion ⇦1

Constitutional Law ⇦274

Statutes prohibiting use of contraceptives, or the counseling or abetting of such use, are valid as a proper exercise of police power and do not invade rights guaranteed by Fourteenth Amendment to Federal Constitution, as applied to a husband and wife who wished to obtain from a reputable physician information on proper methods of preventing conception and thereby avoiding the possibility that children will be conceived before husband and wife are prepared psychologically or economically for the duties and obligations of parenthood. C.G.S.A. §§ 53–32, 54–196.

Catherine G. Roraback, Canaan, for appellants (plaintiffs).

Raymond J. Cannon, Asst. Atty. Gen., with whom, on the brief, was Albert L. Coles, Atty. Gen., for appellee (defendant).

Before BALDWIN, C. J., and KING, MURPHY, MELLITZ and SHEA, JJ.

MELLITZ, Associate Justice.

[1] The plaintiffs brought this action for a declaratory judgment to determine the constitutionality of §§ 53–32 and 54–196 of the General Statutes [1] as applied to the facts set forth in the complaint. A demurrer to the complaint was sustained on a number of grounds, among them, that the rights and jural relations of parties in the situation of the plaintiffs have been conclusively determined in previous decisions, and that the complaint does not set forth any substantial question or issue which has not been previously determined and requires settlement. The plaintiffs not having pleaded over, judgment was rendered in favor of the defendant. The plaintiffs have appealed.

[2, 3] The statutes were recently involved in litigation before us in which their constitutionality was sustained. Buxton v. Ullman, and three companion cases, 147 Conn. 48, 156 A.2d 508.

The allegations of the complaint are as follows: The plaintiffs are husband and wife and have lived together in New Haven since their marriage in June, 1958. Both are law students, Mrs. Trubek being twenty-one years old and her husband twenty-three years old. In March, 1959, they consulted a physician to obtain information and medical service as to the best and safest methods for the prevention of conception. They have a desire to raise a family but first wish an opportunity to adjust, mentally, spiritually and physically, to each other so as to establish a secure and permanent marriage before they become parents. A pregnancy at this time would mean a disruption of Mrs. Trubek's professional education. When they are economically and otherwise prepared to have children, the plaintiffs desire to have as

1. "Sec. 53–32. Use of Drugs or instruments to prevent conception. Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

"Sec. 54–196. Accessories. Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

many "as may be consistent with their resources, so as to insure adequate provision for each and all of them." The plaintiffs believe that they have a moral responsibility to have only as many children as they feel they can provide with the optimum individual care, attention and devotion. The physician consulted by them has refused to give them information and advice on the manner and means of preventing conception on the ground that such action on his part may be claimed by the defendant, the state's attorney, to constitute a violation of §§ 53–32 and 54–196 of the General Statutes.

The claim of the plaintiffs is that they are deprived by those statutes of rights guaranteed by the fourteenth amendment to the federal constitution. The same claim was advanced and considered in Buxton v. Ullman, supra. Likewise, the validity of § 53–32 as a proper exercise of the police power was determined in State v. Nelson, 126 Conn. 412, 11 A.2d 856. The essential difference between the facts here and those in the earlier cases is that no claim is made here that information relating to the employment of contraceptive measures is essential for the purpose of safeguarding the health of the plaintiff wife. The central point of the factual situations of the other cases was that, in the absence of such information, normal marital relations between the husband and the wife were fraught with danger either because a pregnancy would jeopardize the life or health of the wife or because of the likelihood that any children born would be defective. The essential feature of the factual situation here is a concept of the marriage relationship as one in which the plaintiffs are entitled, under the fourteenth amendment to the federal constitution, to be protected from the operation of statutes which prevent them from obtaining from a reputable physician information on proper methods of preventing conception and thereby avoiding the possibility that children will be conceived before the plaintiffs are prepared psychologically or economically for the duties and obligations of parenthood. We find nothing in the concept advanced by the plaintiffs, or in the facts recited in the complaint in connection therewith, which would warrant a conclusion that the rights and jural relations of parties in the situation of the plaintiffs have not been concluded by previous decisions.

There is no error.

In this opinion the other Judges concurred.

1965 WL 115616 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Estelle T. GRISWOLD and C. Lee Buxton, Appellants,
v.
CONNECTICUT.

No. 496.
October Term, 1964.
February 25, 1965.

Appeal from the Supreme Court of Errors of Connecticut

Motion for Leave to File Brief for the American Civil Liberties Union and the Connecticut Civil Liberties Union as Amici Curiae and Brief Amici Curiae

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BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE CONNECTICUT CIVIL LIBERTIES UNION AS *AMICI CURIAE*

Statutes Involved

General Statutes of Connecticut, Revision of 1958:

Section 53-32. Any person who uses any drug, medical article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or both fined and imprisoned.

Statement of the Case

Appellant C. Lee Buxton is a physician, licensed to practice in the State of Connecticut and Chairman of the Department of Obstetrics and Gynecology at the Yale Medical School (R. 17). He is an author in the field of his specialty and a leader in professional organizations concerned with that field (R. 17).

Appellant Estelle T. Griswold is Executive Director of the Planned Parenthood League of Connecticut (R. 17).

On November 1, 1961, following the decision of this Court in *Poe v. Ullman,* 367 U. S. 497 (1961), the Planned Parenthood Center of New Haven was opened (R. 16-7). The purpose of the Center was to provide information, instruction and medical advice to married persons as to the means of preventing conception, and to educate married persons generally as to such means (R. 17).

The Center occupied eight rooms of the building in which it was situated (R. 17). Dr. Buxton was Medical Director of the Center (R. 17). Mrs. Griswold was Acting Director of the Center in charge of its administration and its educational program (R. 17).

During the period of its operation, from November 1 to November 10, the Center made information, instruction, education and medical advice on birth control available to married persons who sought it (R. 17).

With respect to a woman who came to the Center seeking contraceptive advice the general procedure was to take her case history and explain to her various methods of contraception. She was then examined by a staff doctor, who prescribed the method of contraception selected by her unless it was contraindicated. The patient was furnished with the contraceptive device or material prescribed by the doctor, and a doctor or nurse advised her how to use it. Fees were charged on a sliding scale, depending on family income, and ranged from nothing to $15 (R. 18-9).

Dr. Buxton, as Medical Director, made all medical decisions with respect to the facilities of the Center, the procedure to be followed, the types of contraceptive advice and methods available, and the selection of doctors to staff the Center (R. 18). In addition, on several occasions, as a physician he examined and gave contraceptive advice to patients at the Center (R. 18). Mrs. Griswold on several occasions interviewed persons coming to the Center, took case histories, conducted group orientation sessions describing the methods of contraception and, on one occasion, gave a patient a drug or medical article to prevent conception (R. 20).

Among those who went to the Center seeking contraceptive advice were three married women. They followed the procedure described above, were given contraceptive material prescribed by the doctor, and subsequently used the material for the purpose of preventing conception (R. 20-2).

On November 10, 1961, after Dr. Buxton and Mrs. Griswold were arrested, the Center closed (R. 18).

Both appellants were subsequently tried and convicted for aiding and abetting the violation of Section 53-32.

ARGUMENT

I.

Section 53-32 on its face violates the right to privacy guaranteed by the due process clause of the Fourteenth Amendment.

The right to privacy is protected against invasion by the States through the Fourteenth Amendment. *Wolf v. Colorado;* 338 U. S. 25 (1949); *Mapp v. Ohio,* 367 U. S. 643 (1961). In *Wolf* the Court held that "The security of one's privacy against arbitrary intrusion by the police--which is at the core of the Fourth Amendment--is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." 338 U. S. at 27.

It was Mr. Justice Brandeis' view that privacy was the keystone of the Constitution. Dissenting in *Olmstead v. United States,* 277 U. S. 438, 478 (1928), he said:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feeling and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the 4th Amendment."

Although the Court has often considered cases arising out of the application of the search and seizure provision of the Constitution to both the federal and state governments, it has not had occasion to consider a case raising the question of the extent of the right to privacy in circumstances, which touch the marrow of human behavior as presented in this case.

It can be safely observed that marriage and the family are the foundations of our culture, and the focal points about which individual lives revolve.[1] That certain aspects of marriage and family life are subject to the reasonable exercise of the police power is not in dispute, but that power is generally restricted to assuring minimum standards of care and education.[2] The incidents of marriage and family life that are the private concern of the family itself, and consequently beyond the reach of the government, are numerically overwhelming.

Among those inviolable incidents of marriage, and the human love on which it is based, is the right to express that love through sexual union, and the right to bear and raise a family. No other rights are entitled to greater privacy than that normally bestowed upon the acts of intercourse and procreation. Nonetheless, Connecticut presumes to assert the power to regulate the conduct of its citizens by notifying them that although the State will tolerate sexual intercourse between spouses, it will declare such intercourse to be criminal unless they abstain from the use of devices for effectively regulating the frequency of pregnancy. They must, says Connecticut, forbear from planning the size of their family regardless of their physical condition, their desires or their means.

It is unnecessary to expatiate upon the nature of the liberty which Connecticut has arbitrarily denied to husband and wife. It is a private expression of love which should properly be beyond invasion or abridgment by the government. "This court has more than once said that the liberty guaranteed by the Fourteenth Amendment embraces 'the right of the citizen to be free in the enjoyment of all his faculties,' and 'to be free to use them in all lawful ways.' *Allgeyer v. Louisiana,* 165 U. S. 578; *Adair v. United States,* 208 U. S. 161, 173." *Berea College v. Kentucky,* 211 U. S. 45, 67-69 (1908) (Harlan *J.,* dissenting).

This case is not unlike *Rochin v. California,* 342 U. S. 165 (1952). There, police officers, having some information that Rochin was selling narcotics, broke into his house, entered the bedroom, where he was sitting partially dressed on the side of his bed and upon which his wife was lying, and attempted unsuccessfully to extract some capsules he had put in his mouth when the police entered the room. They then took Rochin to a hospital, had his stomach pumped and retrieved the capsules which proved to contain morphine. The capsules were admitted at trial over petitioner's objections.

This Court reversed the conviction, finding that the conduct of the police "shock[ed] the conscience," offended "a sense of justice" and violated "decencies of civilized conduct,"[3] and therefore violated the due process clause of the Fourteenth Amendment. The power asserted by Connecticut to withdraw from its citizens the right freely to use effective means of contraception and thereby limit the size of their family in accordance with their personal choice, evokes the same quality of outrage to civilized sensibilities as did the power asserted in *Rochin.* The shocking nature of the assertion of state power is, perhaps, greater here than in *Rochin.*

The women to whom appellants provided services in the clinic want only to enjoy their matrimonial love and affection without any interference by the State. Their right to do so intrudes not at all upon any valid interest or conflicting right of their fellow citizens. It is a right which "may not be submitted to vote * * * [and] depend[s] on the outcome of no elections."[4] In short, they want legislators as well as policemen to stay out of their bedrooms.

II.

Section 53-32 on its face violates the due process clause of the Fourteenth Amendment because it bears no reasonable relation to a proper legislative purpose.

1. Section 53-32 violates the liberty protected by the Fourteenth Amendment.

Prior decisions of this Court have held family matters peculiarly within the ambit of the personal liberty guaranteed by the Fourteenth Amendment.

In *Meyer v. Nebraska,* 262 U. S. 390 (1923), a statute forbidding foreign languages to be taught in primary schools within the state was held arbitrary and in violation of the Fourteenth Amendment. In the course of its opinion the court described the "liberty" guaranteed by the Fourteenth Amendment as follows:

"Without doubt it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage

in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." 262 U. S. at 399.

In *Pierce v. Society of the Sisters of the Holy Names,* 268 U. S. 510 (1925), this Court struck down as contrary to the due process clause of the Fourteenth Amendment, a state statute which required children between the ages of eight and sixteen to attend public schools. The Court said:
"We think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the up-bringing and education of children under their control. * * * The fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U. S. at 534-35.

In *Skinner v. Oklahoma,* 316 U. S. 535, 541 (1942), this Court, in striking down a sterilization statute, said:

> "We are dealing here with legislation that involves one of the basic civil rights of man."

Meyers, Pierce and *Skinner* sustain the conclusion that the law, to a large extent, regards marriage and the family as the ultimate repository of personal freedom, and that the power vested in husband and wife to conduct the affairs of their family free of state interference is virtually plenary. The relatively narrow area of control left to the government[5] may not be exercised arbitrarily. As stated in *Pierce,* when that power is exercised it must have a "reasonable relation to some purpose within the competency of the state."[6]

2. Section 53-32 bears no reasonable relation to its legislative purpose.

a. The statute's purpose is to regulate morality.

The Connecticut statute was one of many statutes enacted as part of the religious-moral zealotry generated by Anthony Comstock. *Poe v. Buxton,* 367 U. S. 497, 520 n. 10 (Douglas, *J.* dissenting). Other than the general history of the Comstockian rampage, there seems to be no specific legislative history in connection with Connecticut's enactment, but there is no doubt as to its general purpose, for the State of Connecticut has admitted that its purpose is "to protect the moral welfare of its citizenry."[7] The same general purpose has been enunciated by a series of Connecticut court decisions upholding the law as valid. For example, in *State v. Nelson,* 126 Conn. 412, 425, 11 A. 2d 856 (1940), the court below adopted the purpose of a similar Massachusetts statute as enunciated by the Massachusetts Supreme Judicial Court:

" '[The statute's] plain purpose is to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus engender ... a virile and virtuous race of men and women' ".[8]

b. The statute bears no relation to its avowed purpose.

Not only does the State admit that the purpose of Section 53-32 is to promote public morality, but there is no hiding the fact that it was inspired by a zealot who believed that "anything remotely touching on sex" was obscene.[9] However, this Court, reflecting the overwhelming national sentiment, has explicitly rejected that theme:

"... [S]ex and obscenity are not synonymous....

Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and concern." *Roth v. U. S.,* 354 U. S. 476, 487 (1957).

It is perfectly obvious that a statute whose terms forbid even married couples to use contraceptive devices, has no bearing whatsoever on morality. We suggest that the Court may judicially notice this fact.

On the other hand, it has been established that the interdiction of contraceptive devices affirmatively endangers health and stable family relations. See Brief of Planned Parenthood Federation, *amicus curiae,* Appendix B. Indeed, there are numerous medical disorders in which life itself can be jeopardized by a prohibition against effective contraceptive devices.
"These case histories spell out two of the medical conditions, lung disease and heart trouble, which dictate the use of contraception, or in some instances sterilization, depending on whether the prevention of pregnancy is to be temporary or permanent.

Some of the other common medical conditions making birth control advisable, either temporarily or permanently, include kidney disease resulting in decreased function of that organ; advanced diabetes of such chronicity and severity that the patient shows evidence of blood vessel damage; cancer of the breast, thyroid or other organ which has been removed surgically less than three years before, so that there is insufficient time to determine whether it is likely the malignancy was entirely eliminated; and a host of nervous afflictions such as multiple sclerosis and Parkinson's dissease."[10]

The court below, in *Tileston v. Ullman,* 129 Conn. 84, 26 A. 2d 582 (1942), in upholding Section 53-32, concluded that the statute made no exception on grounds of health. It declared that "absolute abstention" was a "reasonable, efficacious and practicable" alternative. That alternative, though it may do honor to Comstock, cannot survive better authority.

> "In the close relationship of married life the effect of prolonged abstinence is usually harmful to mental health and balance and to the marriage relationship and a risk to fidelity. As a birth control measure for recommendation by the physician abstinence is negligible."[11]

There is no doubt that the statute, as interpreted by the State's highest court to explicitly preclude contraceptive devices from being used in circumstances where life is actually endangered, runs afoul of the Fourteenth Amendment. To forbid the use of effective contraceptive devices under such conditions requires married couples either to abstain from sexual intercourse or to play Russian roulette with less effective contraceptive methods. But this is choice which the state may not impose on its citizens. *Meyer v. Nebraska, supra; Pierce v. Society of Sisters, supra; Skinner v. Oklahoma, supra.*

III.

Section 53-32 violates the equal protection clause of the Fourteenth Amendment.

In *Skinner v. Oklahoma, supra,* this Court held that a law requiring the sterilization of some criminals, but not others who had committed essentially the same offense, failed to meet the requirements of the equal protection clause of the Fourteenth Amendment. Mr. Justice Douglas, writing for the Court, stated:

> "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. Yick Wo v. Hopkins, 118 U. S. 356; Gaines v. Gaines, 305 U. S. 337."

In *Yick Wo v. Hopkins,* 118 U. S. 356, 375 (1885), this Court held:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Both the *Skinner* doctrine and the *Yick Wo* doctrine apply here. In view of the basic liberty involved, the State's classification, subjected to the same "strict scrutiny" as in *Skinner,* fails for three reasons.

First, a classification which makes the use of a contraceptive device illegal, but excludes contraceptive methods which do not employ devices, is unreasonable. The statute does not make illegal the use of contraception, but merely that kind of contraception which is achieved by means of a "device". The law imposes no sanction on other methods of contraception--for example, the rhythm method and withdrawal. This distinction is arbitrary, for the successful use of any of the contraceptive methods will have the identical result. If the purported legislative purpose is to be realized, the State must prohibit withdrawal and the rhythm method as well as "devices".

Second, the "right of the individual to engage in any of the common occupations ...," as the Court in *Meyer v. Nebraska, supra,* put it, applies to women as well as to men.

In contemporary times, the liberty of "establishing a home" encompasses not only the right of parents to raise children, but includes the wife's right to order her childbearing according to her financial and emotional needs, her abilities, and her achievements. No citation of authority is required to support the fact that in addition to its economic consequences, the ability to regulate child-bearing has been a significant factor in the emancipation of married women. In this respect, effective means of contraception rank equally with the Nineteenth Amendment in enhancing the opportunities of women who wish to work in industry, business, the arts, and the professions. Cf. *Trubeck v. Ullman,* 147 Conn. 633, 65 A. 2d 158 (1960). Thus, the equal protection clause protects the class of women who wish to delay or regulate child-bearing effectively.

Lastly, even if we were to concede some reasonable relation between contraception and the legislative purpose, which we do not, the legislature, by enacting a prohibition against users of devices, without barring their manufacture and sale within the State, are discriminating against certain individuals, "without rhyme or reason". *Goesaert v. Cleary,* 335 U. S. 464 (1948). The law lays an "unequal hand" on those who have committed "intrinsically the same quality of offense". In this respect, the case at bar comes within the holding of *Skinner,* where the Court held that the State of Oklahoma could not select for sterilization those who had thrice committed grand larceny, and give immunity to embezzlers. In this case, the State of Connecticut has sought to promote morality via the regulation of contraceptive devices. The selection of the *users* of the devices, as the sole target of this criminal statute, with immunity to the manufacturers and sellers, is that sort of "invidious discrimination" prohibited in *Skinner*.

The equal protection clause "requires that the classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary." *Walters v. City of St. Louis,* 347 U. S. 231 (1954).[12]

CONCLUSION

For the reasons stated above, the judgment of the Court below should be reversed.

Footnotes

[*] Adopted from appellants' brief.

[1] The late Mr. Justice Frankfurter, commemorating Judge Learned Hand's fifty years of federal judicial service, said of Judge Hand that "he has achieved the one thing in life that makes all the rest bearable--a happy marriage." 264 F. 2d 21 (foreword).

[2] See, e.g., Connecticut General Statutes, Revision of '1958: §17-32 et seq. (Dependent and Neglected Children); §53-304 (Non-support); §53-309 (Abandonment) ; §10-184 (School Attendance, Duties of Parents).

[3] 42 U. S. at 172, 173.

[4] *West Virginia v. Barnette,* 319 U. S. 624, 638 (1943).

[5] See, e.g., note 2, *supra.*

[6] 268 U. S. at 535.

[7] *Poe v. Ullman,* 367 U. S. at 545 (Harlan, *J.* dissenting). Likewise, the court below described Section 53-32 as relating to "the public safety and welfare, including health and morals ..." (R. 63). The Appellate Division in this case had suggested that another purpose of the statute was "for the perpetuation of the race and to avert ... perils of extinction" (R. 49). This justification was properly ignored by the Supreme Court of Errors.

[8] *Commonwealth v. Gardner,* 300 Mass. 372, 375-376 (1938).

[9] *Poe v. Ullman,* 367 U. S. at 520 n. 10.

[10] Guttmacher, Alan, M.D., *Babies by Choice or by Chance* (Avon Books, 1961), pp. 18-19.

[11] Dickinson, *Techniques of Conception Control* (3d ed. 1950), p. 40.

[12] It may also be noted that prohibition against the use of contraceptive devices, and allowance of contraception without any device, is a distinction created and maintained by religious dogma, notably Orthodox Jewry and Roman Catholicism. Guttmacher, Alan, M.D., *Babies by Choice or by Chance* (Avon Books, 1961), pp. 79-86. A statute enacted pursuant to a Puritan theology, which believed that idiocy, epilepsy and damnation were the fruits of sexual activity, and which is supported in this century largely by other religious dogmas, breeches the wall of separation between church and state, and violates the First Amendment. See, for example, *Engel v. Vilale,* 370 U. S. 421 (1962); *Abington School Dist. v. Schempp,* 374 U. S. 203 (1963). Undoubtedly the state can legislate in the field of morals, but it cannot seek to impose on all its diverse citizenry a morality which is preached and pursued only in the dogmas of some religions.

BEFORE ROE v. WADE

Voices that shaped the abortion debate before the Supreme Court's ruling

WITH A NEW AFTERWORD

Linda Greenhouse and Reva B. Siegel

Yale Law School

ISBN: 978-0-615-64821-7

we become social outcasts by bearing children. Those of us who are poor and live on welfare know that opponents of welfare want to limit the size of our families. We are pressured to use contraceptives or be sterilized; each time we have another child the meager allowance per child gets even smaller. Population control advocates tell us that overpopulation is the reason our environment is polluted. They imply that unless women everywhere stop having babies, thousands of children in underdeveloped countries will starve, and all people will be deprived of clean air, pure water, and space in which to live.

We want control over our own bodies. We are tired of being pressured to have children or not to have children. It's our decision.

But control over our bodies is meaningless without control over our lives. Women must not be forced into personal and economic dependence on men or on degrading jobs in order to assure adequate care for the children they bear. Our decisions to bear children cannot be freely made if we know that aid in child care is not forthcoming and that we will be solely responsible for the daily care of our children.

We are a group of women associated with Women's Liberation who want to bring suit to challenge Connecticut's abortion law. For the past several months we have been meeting regularly to talk about abortion, population control, health care, and our lives as women. We have decided to act to change some of the oppressive realities of our lives.

We believe that women must unite to free themselves from a culture that defines them only as daughters, wives, and mothers. We must be free to be human whether or not we choose to marry or bear children.

We believe it is wrong for this society to put the economic needs of corporations first and human needs second. These corporations rob Third World countries of resources with which their populations could be fed. At home, they make their profits by exploiting workers and polluting the environment. We think the issue is not control of the world's population but control of the world's resources. The question is not how many children but what proportion of the world's resources each child receives.

We believe all people have a right to meaningful work, an adequate income, access to good health care, and parent-controlled child care. We believe children have a right to be born into a world where many adults will be able to love and care for them according to their needs.

We don't expect these things to be given to us; we will have to fight for them. The abortion suit is just a beginning. If we succeed in changing the law, we will

still have to fight to make abortions cheap enough so all women can afford them. We will have to struggle to prevent abortion from being used as a weapon against women who want to have children. We will have to fight to create a health care system controlled by those who use and work in it. And we know there are many other struggles ahead.

We are women committed to working together for these changes. Join us!

Betsy Gilbertson Wilhelm, Gretchen Goodenow,
Michele Fletcher, Ann Freedman, Sasha Harmon,
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WOMEN VERSUS CONNECTICUT

We are initiating a suit to try to get Connecticut's abortion law declared unconstitutional.

Under present Connecticut law, abortions are only legal if they are necessary to preserve the life of the mother. Women who have abortions as well as anyone who either performs them or helps women arrange to get them can be imprisoned and/or fined. The abortionist can be fined $1000 and imprisoned up to five years; the woman who had the abortion can be fined $500 and imprisoned up to two years; anyone who helped her arrange the abortion can be fined $500 and imprisoned for up to one year.

The law is used. Dr. Morris Sullman, a doctor in New London, was recently convicted of performing an abortion. There have been a number of arrests of those suspected of performing and arranging illegal abortions in the New Haven area in the past few months. (The woman who had the abortion rarely gets arrested. The usual pattern is for police or medical personnel to threaten women who are desperately ill following botched abortions with prosecution unless they agree to reveal the name of their abortionist.)

Women vs. Connecticut has not chosen to try and change the law because we believe in the power of the law to bring about the liberation of women, or even because we are convinced that once the law is declared unconstitutional all women who need them will be able to get abortions in Connecticut.

We see changing the law only as a necessary first step toward making those things possible.

As long as the law is on the books, doctors and hospitals can always hide behind it. Hospitals which choose not to do abortions have an iron-clad defense;

hospitals like Yale-New Haven which do some abortions are protected from community pressure to do more by the argument that if their current practices are publicized they will be forced to stop doing any.

And as long as the law makes obtaining an abortion a criminal act, we will continue to be forced to behave like—and thus to feel like—criminals.

We doubt that our troubles will be over once the law is changed. We suspect that hospitals will be reluctant to reallocate their priorities to make giving abortions to thousands of women possible; that doctors will not want to spend much of their valuable time doing this brief, uninteresting (and possibly unlucrative) procedure. But we will never get to this stage without first getting rid of the law.

Connecticut's abortion law was enacted in 1821 and amended in 1860. Many states have laws similar to Connecticut's, although in the past few years nine states have enacted "reform" laws which make abortion legal under several categories of circumstances: if the mother's mental health is threatened, if there is evidence indicating the child will be born with a deformity, if the child is the product of rape or incest, etc. However, a recent study indicates that only 15% of all women who have abortions do so for reasons covered by "reform" laws—and expense prevents many eligible women from getting them.

During the past year there have been some important legal changes. A Federal court in Washington, D.C. has declared the abortion law there unconstitutional because it is too vague (it specifies that abortions are legal to preserve the life and health of the mother). The Wisconsin abortion law, which is similar to Connecticut's, has been found unconstitutional by a Federal three-judge panel which found that the police power of the state did not entitle it to deny to women the right to decide for themselves whether or not to bear a child. Hawaii (which has a 90-day residency requirement) and New York (no residency requirement) have passed new laws which make abortion legal when performed in a hospital by a doctor. The New York legislature appears to have been favorably influenced by four suits—one brought by several hundred women, the others by a minister, a group of doctors, and several women for whom childbearing presented special burdens—which were pending before a Federal three-judge panel in New York at the time of passage of the new law.

These changes in other states create a favorable climate for change in Connecticut. There are a couple of ways the Connecticut law could be changed: by getting a new law—like New York's for example—passed by the legislature, or by bringing a suit which asks the courts to find Connecticut's abortion law unconstitutional.

Getting a new law that we would approve of through Connecticut's heavily Catholic legislature seems unlikely. Previous efforts to introduce even moderate reform measures have been unsuccessful. Asking the courts to find Connecticut's abortion law unconstitutional seems more apt to succeed.

What it means to "ask the courts to find Connecticut's abortion law unconstitutional:"

1. In every state there are two sets of courts—state courts and Federal courts. State courts make decisions about cases that result from violation of state law. Federal courts make decisions about cases that arise from violations of Federal law and about conflicts between state law and the Federal Constitution.

2. There are two ways we could go about asking the courts to make a decision on the constitutionality of the Connecticut abortion law.

   A. We could get arrested under the law—one way to do this might be to set up a flagrantly public referral service—and if we were convicted we could appeal through the state courts, hoping eventually to win in the U.S. Supreme Court. The problems with this approach are these: we would be unlikely to get the law declared unconstitutional by Connecticut courts since they are subject to the same political pressures as the legislature; it takes a long time and a lot of money to go from the lowest state court to the U.S. Supreme Court; some of us would have to get arrested and might go to jail.

   B. We could go into Federal court and ask for a declaratory judgment. This means that we would ask the U.S. District Court of Connecticut to analyze the Connecticut abortion law in terms of the U.S. Constitution and find the law unconstitutional. This amounts to asking the Federal court to use its power as interpreter of the Constitution to make a ruling on a state law which is ordinarily the territory of the state courts. To do this, no one has to get arrested. Those of us who want the law declared unconstitutional become plaintiffs in a civil action. The attorney general of Connecticut, who represents the state judicial system, is the defendant.

Advantages of this approach are that it takes less time and costs less than bringing a test case by getting arrested; no one has to risk jail; the suit is a positive statement of our position, instead of a defense to criminal charges.

Any group or combination of groups that feel themselves "irreparably harmed" by the law can be plaintiffs in this type of suit. All women fit in this category. We

have planned in terms of a women's suit, in which the plaintiffs would be as many women as possible single, married, professional, laywomen—all those who feel the law denies them their constitutional rights. Twelve hundred New Jersey women are bringing such a suit there. In New York, where a group of women brought a similar suit, the plaintiffs included professionals—like doctors and ministers who are frequently asked to give abortions or information about abortion. Any woman who feels she might be in the position to advise another woman about abortion is welcome to join our suit.

Since the constitutionality of abortion laws is being challenged in a number of states, many of the legal arguments we are apt to use have already been set forth in briefs written for other states. The legal arguments we plan to use are outlined in the next section of this pamphlet.

Because the legal system is so chauvinist—only 4% of lawyers are women, less than 1% of judges, and the law has been slow to recognize the rights of women—the idea of bringing a women's suit which demands that the legal system recognize women's rights is particularly appealing.

LEGAL ARGUMENTS

The legal arguments we are making to show that Connecticut's abortion law violates women's rights under the United States Constitution are summarized as follows:

1. Right to Privacy

The Connecticut abortion law violates a woman's right to privacy, because it denies her the right to control over her own body and the right to make her own decisions in intimate personal matters related to marriage, family, and sex. It is every woman's decision, not the State's decision, as to whether she wants to bear a child. It is a personal decision, made in privacy and not to be interfered with by the State.

2. Right to Life, Liberty, and Property

A woman's right to life is jeopardized by the abortion law in that childbirth carries with it a risk to the life and health of the woman. This risk is higher than the risk involved in getting an abortion in the early stages of pregnancy.

In Connecticut, the actuality of an unwanted pregnancy, or the possibility of such a pregnancy, severely limits a woman's liberty and freedom to engage in the political process, to choose her own profession, and to fulfill herself in any way which does not relate to the bearing and raising of children. Unmarried women

who become pregnant and are forced to bear children against their will suffer an extreme deprivation of liberty and human dignity by the social stigma placed on them as unwed mothers.

Women also suffer loss of property in that they are denied jobs solely on the basis of possible pregnancy, or motherhood. Pregnant women are forced to leave their jobs without compensation and without any guarantee of returning to work after they give birth.

Women who are forced to bear children they cannot support suffer extreme economic hardship. Because there are few facilities for child care outside the home, these women are effectively excluded from seeking employment and are forced to rely on welfare or charities to help in raising their children, at a loss to their liberty and independence in economic matters.

3. Right to Equal Protection (Right of Rich and Poor Alike to Get Abortions)

Rich women in Connecticut can afford to travel to London or Puerto Rico for abortions. They also have greater opportunity to learn of private New York hospitals that perform abortions for out-of-state women at fees of $500–600. Thus, Connecticut's abortion law places a much heavier burden on poor women, who cannot afford the prices charged by hospitals in New York for therapeutic abortions, nor can they afford a trip out of the country.

4. The Abortion Law Imposes a Cruel and Unusual Punishment on Women by Forcing Them to Bear Children

Forcing a person to give up his citizenship and to leave the country has been called a cruel and unusual punishment by the U.S. Supreme Court. We are arguing that forcing a woman, who does not want a child, to carry a pregnancy to term imposes on her the highest form of mental cruelty, as well as the physical hardship of pregnancy and childbirth and the economic burden of supporting a child for 21 years. Obviously, women who want children do not see pregnancy and childbirth as punishment. But for women who are forced to have children against their will, the abortion law creates a devastating torture of body and mind and often turns a woman's life into hell.

5. Connecticut's Abortion Law Is Unconstitutionally Vague

A criminal law, like the abortion law, must be worded so that the people affected by it know what is being forbidden. The words, "necessary to preserve the life of

the mother," which are used in the state abortion law do not meet the standard, because the terms "necessary," "preserve" and "life" are ambiguous. They could mean that an abortion is not permitted unless the woman will die in pregnancy or childbirth or if she attempts suicide during her pregnancy; it could also mean that a woman's health will be injured in childbirth so that her life span will be shortened; it could also mean that a woman's quality of life will be changed for the worse, if she has a child. If no one is clear about the meaning of the law, how can it be enforced?

6. Right to Freedom of Religion

The Connecticut abortion law is kept on the books by people who hold the religious belief that human life begins at the moment of conception and that abortion means killing a person. They are imposing their religious views on all the other people who do not think abortion is murder, and who have the constitutional right to hold their beliefs without interference by state laws, such as the abortion law.

7. Right to Free Speech

People who want to help women get abortions can be prosecuted under the Connecticut abortion law. This violates their right to freedom of expression, to give out information on how to do abortions, who will do abortions and where they can be obtained.

8. The State Has No Justification for Its Abortion Law

When the abortion law was passed in the nineteenth century, the State was worried about the health hazards of performing abortions. At that time, even the most minor operation was dangerous. The State also showed an interest in protecting the morals of women, and keeping them out of the hands of scurrilous men, who would force them to risk their lives getting abortions. Times have changed—medically, abortion under proper conditions is now a safe minor operation, and the law intended to protect women now forces them to depend on racketeers and profiteers for dangerous illegal abortions.

9. Women's Rights

Two other arguments we have yet to develop are:

a) The abortion law violates the Nineteenth Amendment, which women fought for to give them equal footing with men in the public sphere. As long as women are forced to have and raise children, they are denied that equal footing guaranteed by the Nineteenth Amendment.

b) The Thirteenth Amendment forbids involuntary servitude. We think forced pregnancies are definitely a form of slavery against a woman's will.

Legal information for plaintiffs—

WHO CAN BE PLAINTIFFS:

1. Any woman who is living in Connecticut and is of childbearing age and who does not wish to bear a child at this time.
2. Women medical workers, such as doctors or nurses, who have been or may be asked to perform or help perform an abortion.
3. Women, especially in a professional position of counselor, clergywoman, social worker, or doctor, who have been asked or may be asked to advise or refer persons about abortions.

Named plaintiffs will be representing all other persons in Connecticut in similar situations. The decision that the Court makes about the validity of the abortion statute will affect everyone in the state. The list of hundreds of named plaintiffs, plus their personal participation in various public activities and the hearings could have an important influence on the outcome.

RESPONSIBILITIES AND OPPORTUNITIES OF PLAINTIFFS

In this type of lawsuit you will not face any kind of fines or sentence, or be restricted from leaving the state.

Plaintiffs may have to answer written or oral questions about the subject matter or the suit. This is a formal procedure available to the defendants (who will be the state's attorneys representing Connecticut). To present such questions would be costly and time-consuming for them and it seems unlikely that they will do so. Attendance in court at the preliminary hearings and eventually at the trial will not be compelled, but is strongly urged. A packed courtroom will be important and it is your right to know what is happening.

A brief questionnaire will be given each plaintiff. Your answers will help establish particular reasons needed to claim the right to be in court at all. This material will only be for the use of your lawyers and their assistants and it will not be turned into the court.

You will need to sign a statement authorizing your attorney to represent you.

Women under 21 may be plaintiffs if one of their parents is willing to sign as guardian. If not, we are hoping to make arrangements for one of the over 21 plaintiffs to act as "guardian ad litem" (guardian for the purpose of this suit).

Memorandum of Decision, *Abele v. Markle* I (April 18, 1972)

On March 2, 1971, Women versus Connecticut filed a complaint in federal court on behalf of 858 women. The lawsuit, captioned Abele v. Markle, *alleged that "[t]he Connecticut abortion laws compel women of childbearing age, doctors, and other medical personnel and those who counsel or assist women to procure an abortion, to forego their constitutional rights to life, liberty and property, to freedom of speech and expression, to privacy, against cruel and unusual punishments, against involuntary servitude and to due process of law and equal protection of the laws." The case challenged socioeconomic inequality in access to abortion and emphasized the need for abortion in cases where pregnancy endangers a woman's health. But the value animating many of its claims on the Constitution was women's right to equal freedom with men. The lawsuit argued that the state, through its abortion laws, "classifies]...women not as full and equal citizens but as limited and inferior persons—persons denied the right to choose a life style or an occupation other than one consistent with bearing all the children they conceive" and that the abortion ban unconstitutionally "discriminate[s] against women by forcing a woman to bear each child she conceives without imposing like burdens on the man for the child whom he has helped create." The lawsuit also claimed that Connecticut's abortion laws impermissibly infringed upon the rights of doctors and counselors, but these claims were secondary to those concerning the indignity and injuries the abortion ban inflicted on women.*

On April 18, 1972, a federal court held Connecticut's abortion laws unconstitutional, with two judges supporting the decision and one dissenting. Each of the three judges who heard the case wrote a separate opinion.

Judge Joseph Edward Lumbard (1901–1999), named to the federal appeals court in New York by President Dwight D. Eisenhower in 1955, based his decision clearly and unequivocally on the constitutional arguments advanced by the women's movement. In Abele, *Judge Lumbard responded to women's testimony about the injuries and indignities that laws criminalizing abortion imposed on them and recognized that laws criminalizing abortion inflicted constitutionally cognizable harms on women,*

and not doctors only, as earlier judgments had found. He reasoned that constitutional protection for women's decision whether to abort a pregnancy was warranted because of changing social views about women's "status" and "roles." He cited the Nineteenth Amendment's conferring on women the right to vote; Reed v. Reed, *the first equal protection sex-discrimination decision; federal employment-discrimination law; and the Equal Rights Amendment, which had just been sent to the states. In striking down Connecticut's 19th-century statute, he recognized that the nation's understanding of women had changed since the law was first enacted, emphasizing that "society now considers women the equal of men." Women, therefore, "are the appropriate decisionmakers about matters affecting their fundamental concerns." The state's interest in protecting the fetus, he continued, is insufficient to abridge a woman's constitutional right "to determine within an appropriate period after conception whether or not she wishes to bear a child."*

Judge Jon O. Newman, a Yale Law School graduate named to the federal district court in Connecticut months earlier by President Richard M. Nixon, concurred but based his decision on narrower grounds, emphasizing the uncertain legislative history of the state's abortion law. Judge Newman reasoned that in the 19th century, the legislature criminalized abortion either to protect pregnant women from dangerous surgery—an interest made obsolete by improvements in medical technology—or to preserve a woman's morals; that is, to deter her from engaging in nonmarital, nonprocreative sex. Neither rationale offered sufficient reason to restrict women's decisionmaking in the 20th century. Judge Newman left open the question of whether the state could criminalize abortion in order to protect the unborn, explaining that he saw no evidence that this was the state's purpose in passing its 1860 abortion law.

Judge T. Emmet Clarie (1913–1997), a former chairman of the Connecticut State Liquor Commission named to the district court by President John F. Kennedy, was the dissenter. He would have held that Connecticut's abortion laws were not, in fact, unconstitutional. Rather, any intrusion upon a woman's privacy that they cause is justified by the state's compelling interest in protecting the unborn. His opinion gives voice to movement concerns about protecting human life and traditional family roles.

Although the Abele *case has, until now, been largely forgotten, it was one of many cases to address the abortion conflict in the years preceding* Roe. Abele *presented several of the most prominent legal arguments being made at the time that* Roe *was decided—arguments emphasizing far-reaching changes in women's legal status, in sexual mores, and in medical science as reasons to reconsider the constitutionality of criminal laws adopted a century earlier.*

LUMBARD, CIRCUIT JUDGE.

In Connecticut, statutes prohibit all abortions, all attempts at abortion, and all aid, advice and encouragement to bring about abortion, unless necessary to preserve the life of the mother or the fetus....We think that by these statutes Connecticut trespasses unjustifiably on the personal privacy and liberty of its female citizenry. Accordingly we hold the statutes unconstitutional in violation of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment.

The decision to carry and bear a child has extraordinary ramifications for a woman. Pregnancy entails profound physical changes. Childbirth presents some danger to life and health. Bearing and raising a child demands difficult psychological and social adjustments. The working or student mother frequently must curtail or end her employment or educational opportunities. The mother with an unwanted child may find that it overtaxes her and her family's financial or emotional resources. The unmarried mother will suffer the stigma of having an illegitimate child. Thus, determining whether or not to bear a child is of fundamental importance to a woman.

The Connecticut anti-abortion laws take from women the power to determine whether or not to have a child once conception has occurred. In 1860, when these statutes were enacted in their present form, women had few rights. Since then, however, their status in our society has changed dramatically. From being wholly excluded from political matters, they have secured full access to the political arena. From the home, they have moved into industry; now some 30 million women comprise forty percent of the work force. And as women's roles have changed, so have societal attitudes. The recently passed equal rights statute and the pending equal rights amendment demonstrate that society now considers women the equal of men.

The changed role of women in society and the changed attitudes toward them reflect the societal judgment that women can competently order their own lives and that they are the appropriate decisionmakers about matters affecting their

fundamental concerns. Thus, surveying the public on the issue of abortion, the Rockefeller Commission on Population and the American Future found that fully 94% of the American public favored abortion under some circumstances and the Commission itself recommended that the "matter of abortion should be left to the conscience of the individual concerned." Similarly, the Supreme Court has said, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird (1972); Griswold v. Connecticut (1965).

The state has argued that the statutes may be justified as attempts to balance the rights of the fetus against the rights of the woman. While the Connecticut courts have not so construed the statutes,[1] we accept this characterization as one fairly drawn from the face of the statutes. Nevertheless we hold that the state's interest in striking this balance as it has is insufficient to warrant removing from the woman all decisionmaking power over whether to terminate a pregnancy.

The state interest in taking the determination not to have children from the woman is, because of changing societal conditions, far less substantial than it was at the time of the passage of the statutes. The Malthusian specter, only a dim shadow in the past, has caused grave concern in recent years as the world's population has increased beyond all previous estimates. Unimpeachable studies have indicated the importance of slowing or halting population growth. And with the decline in mortality rates, high fertility is no longer necessary to societal survival. Legislative and judicial responses to these considerations are evidenced by the fact that within the last three years 16 legislatures have passed liberalized abortion laws and 13 courts have struck down restrictive anti-abortion statutes similar to those of Connecticut. In short, population growth must be restricted, not enhanced, and thus the state interest in pronatalist statutes such as these is limited.

Moreover, these statutes restrict a woman's choice in instances in which the state interest is virtually nil. The statutes force a woman to carry to natural term a pregnancy that is the result of rape or incest. Yet these acts are prohibited by the

[1] The statutes, infrequently considered by the Connecticut courts, have been construed as advancing two distinct legislative goals: inhibition of promiscuous sexual relationships by prohibiting escape from unintentional pregnancy, and the protection of pregnant women from the dangers of nineteenth century surgery. However laudable a purpose the goal of reducing the frequency of promiscuous sexual relationships may have been considered one hundred years ago, it does not amount to a compelling interest today in the face of changed moral standards. Moreover, advances in medical science since 1860 have made abortion in the early stages of pregnancy no more dangerous than childbirth. Only a narrowly drawn statute prohibiting abortions endangering the life of the pregnant woman would be justified in light of a legislative intent to protect the woman's health.

state at least in part to avoid the offspring of such unions. Forcing a woman to carry and bear a child resulting from such criminal violations of privacy cruelly stigmatizes her in the eyes of society. Similarly, the statutes require a woman to carry to natural term a fetus likely to be born a mental or physical cripple. But the state has less interest in the birth of such a child than a woman has in terminating such a pregnancy. For the state to deny therapeutic abortion in these cases is an overreaching of the police power.

Balancing the interests, we find that the fundamental nature of the decision to have an abortion and its importance to the woman involved are unquestioned, that in a changing society women have been recognized as the appropriate decisionmakers over matters regarding their fundamental concerns, that because of the population crisis the state interest in these statutes is less than when they were passed and that, because of their great breadth, the statutes intrude into areas in which the state has little interest. We conclude that the state's interests are insufficient to take from the woman the decision after conception whether she will bear a child and that she, as the appropriate decisionmaker, must be free to choose. What was considered to be due process with respect to permissible abortion in 1860 is not due process in 1972.

The essential requirement of due process is that the woman be given the power to determine within an appropriate period after conception whether or not she wishes to bear a child. Of course, nothing prohibits the state from promulgating reasonable health and safety regulations surrounding abortion procedures.

In holding the statutes unconstitutional, we grant only declaratory relief to this effect as there is no reason to believe that the state will not obey our mandate.

NEWMAN, DISTRICT JUDGE (CONCURRING IN THE RESULT)

I fully agree with Judge Lumbard's conclusion that the plaintiffs are entitled to a judgment declaring the Connecticut abortion statutes unconstitutional, but my reasons for reaching that conclusion cover somewhat less ground. Moreover, having found the statutes unconstitutional, I would grant plaintiff Doe injunctive relief.

...[T]he question to be faced is whether the state interests being advanced in 1860 are today sufficient to justify the invasion of the mother's liberty. I agree with Judge Lumbard that protecting the mother's health, which plainly was a state interest in 1860 and may well have provided a valid state interest for these statutes when enacted, will not furnish a subordinating state interest today, when the mother's life is exposed to less risk by abortion than by childbirth.

The second justification advanced by the state, protecting the mother's morals, may well have been an objective in 1860. This justification apparently proceeds from the premise that if abortion is prohibited, the threat of having to bear a child will deter a woman from sexual intercourse. Protecting the morals of the mother thus turns out to mean deterring her from having sexual relations. But the Supreme Court has decided that such a purpose cannot validate invasion of a woman's right to privacy in matters of family and sex. Griswold v. Connecticut (1965); Eisenstadt v. Baird (1971).

That leaves the state's third justification, protecting the life of the unborn child. Judge Lumbard is willing to assume this was a purpose of the 1860 legislature and finds it constitutionally insufficient. Judge Clarie concludes it was in fact a purpose of the 1860 legislature and finds it constitutionally sufficient. With deference, I am persuaded that protecting the life of the unborn child was most likely not a purpose of the 1860 legislature. At a minimum it has not been shown with sufficient certainty that this was the legislature's purpose as to warrant a weighing of this purpose against the mother's constitutionally protected rights. Whether a fetus is to be considered the sort of "life" entitled to the legal safeguards normally available to a person after birth is undeniably a matter of deep religious and philosophical dispute. If the Connecticut legislature had made a judgment on this issue and had enacted laws to accord such protection to the unborn child, the constitutionality of such laws would pose a legal question of extreme difficulty, since the legislative judgment on this subject would be entitled to careful consideration. Compare with Byrn v. New York City Health & Hospitals Corporation (N.Y. 1972).... Since that legislative determination has not been shown to have been made, I think it is inappropriate to decide the constitutional issue that would be posed if such a legislative justification was before us.

Because I believe the only interests which the 1860 legislature was seeking to advance are not today sufficient to justify invasion of the plaintiff's constitutionally protected rights, I join with Judge Lumbard in holding these statutes unconstitutional.

....

CLARIE, DISTRICT JUDGE (DISSENTING):

I respectfully disagree and accordingly dissent from the majority opinion. This Court's bold assumption of judicial-legislative power to strike down a time-tested

Connecticut Statute constitutes an unwarranted federal judicial intrusion into the legislative sphere. The state legislature long ago made a basic choice between two conflicting human values. It chose to uphold the right of the human fetus to life over a woman's right to privacy and self-determination in sexual and family matters. The legislature has repeatedly refused to alter this decision to the present date.

The majority has reached out and grasped at the nebulous supposition that the protection of fetal life is not the purpose of the Connecticut anti-abortion laws. This assumption is unwarranted. The history of these statutes indicates that they were designed to protect fetal life.

....

PRIOR TO 1860, the Connecticut statutes concerned only abortions performed upon a woman "quick with child." This indicates a legislative determination that human "life" began at that point. The statute of 1860 amended that law to forbid abortion at any stage of fetal development. This amendment reflected a legislative judgment that fetal life at any stage merited the protection of the law. If the primary purpose of the anti-abortion laws was to protect the woman from the dangers of 19th century surgical techniques, as the majority suggests, it is impossible to understand why the original law prohibited abortions only after quickening. Certainly, the risk of infection caused by unsterilized instruments was as great before the fetus had quickened.

....

THE CASE OF *GRISWOLD*, which is relied upon by the majority, decided that the state could not, consistent with the zone of privacy emanating from the Bill of Rights, completely prohibit the use of contraceptives. The Court ruled that prohibiting contraceptives served no compelling state purpose. However, this decision is not applicable to the facts of the present case. It is one thing to prevent the impregnation of the ovum by the spermatozoa, and quite another to deliberately destroy newly formed human life. Different values are invoked. While the marital privacy referred to in *Griswold* limits itself to the personal conjugal relationship of only two people, abortion projects itself far beyond the bounds of personal intimacy. It is directed against an innocent victim, a third human being endowed with unique genetic characteristics....

The majority cite as an extreme illustration that the Connecticut law proscribes abortions, even in situations where the pregnancy is the result of incest or rape, or where there is a likelihood that the child will be born with a serious mental or physical defect. While it is conceded that such pregnancies and births are often fraught with personal hardship, the proper forum in which to present

Tennessee Arrests First Mother Under Its New Pregnancy Criminalization Law

TARA CULP-RESSLER
JUL 11, 2014, 3:01 PM

https://thinkprogress.org/tennessee-arrests-first-mother-under-its-new-pregnancy-criminalization-law-ca39513ba69a/

At the beginning of July, 26-year-old Mallory Loyola gave birth to a baby girl. Two days later, the state of Tennessee charged her with assault. Loyola is the first woman to be arrested under a new law in Tennessee that allows the state to criminally charge mothers for potentially causing harm to their fetuses by using drugs.

The legislation, which officially took effect about a week ago, stipulates that "a woman may be prosecuted for assault for the illegal use of a narcotic drug while pregnant, if her child is born addicted to or harmed by the narcotic drug." However, this may not actually apply to Loyola's case. So far, there's no evidence the young woman either used a narcotic drug or caused harm to her newborn child.

According to local news reports, Loyola tested positive for methamphetamine and admitted that she smoked that drug several days before giving birth. Meth is not considered to be a narcotic, which is a legal class of drugs that refers to opiateslike heroin and prescription painkillers. Tennessee's new law was passed specifically in response to fears about babies being exposed to opiates in utero, something that can lead to "Neonatal Abstinence Syndrome."

"This law was sold as if it were just about illegal narcotics. But sure enough, the first case has nothing to do with illegal narcotics — and nothing actually to do with harm to anybody," Lynn Paltrow, the executive director of National Advocates for Pregnant Women (NAPW), one of the groups that's firmly opposed to laws that criminalize drug use during pregnancy, told ThinkProgress. "There's no injury. There's just a positive drug test."

The opposition to the new state law, which is the first of its kind in the country, isn't driven solely by Paltrow's group. Every major medical organization — including the American Medical Association, the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, and the American Public Health Association — has come out against efforts to arrest pregnant women who use drugs. A diverse coalition of reproductive rights and criminal justice groups in Tennessee launched a huge campaign against the proposed legislation, called "Healthcare Not Handcuffs," to point out that threatening women with criminal charges dissuades them from coming forward to get the medical help they need.

“These punitive measures are proven to be ineffective, and yet our state chooses to waste tax dollars locking up women instead of getting them the health care they need,” Rebecca Terrell, the chair of Healthy and Free Tennessee, one of the groups involved in the opposition campaign, told ThinkProgress via email. “We are already receiving reports of women seeking out non-licensed health providers to avoid having a medical record and risking arrest. This is extremely dangerous.”

It’s not uncommon for women to be arrested for testing positive for drugs either while pregnant or shortly after giving birth. This particular criminal approach is animated by the 1980s era image of the “crack baby.” However, there’s no scientific evidence that being exposed to illegal drugs in the womb actually causes long-lasting health issues in young children. In fact, studies have found that exposing fetuses to cocaine, meth, and opiates is about as harmful as exposing them to cigarettes.

Although medical professionals would obviously prefer that pregnant women don’t use drugs, advocacy groups like NAPW argue that charging them with criminal negligence for doing so is a gross overreach — and one that strips women of their fundamental rights once they become pregnant.

“This view of pregnant women essentially means that as soon as you’re carrying a fertilized egg, you’ve lost your medical privacy and your right to make medical decisions,” Paltrow pointed out. “But all matters concerning pregnancy are health care matters. Pregnancy, like other health issues, should be addressed through the public health system and not through the criminal punishment system or the civil child welfare system.”

Plus, the criminalization of pregnant women disproportionately impacts low-income women of color who often end up losing custody of their children. The vast majority of cases that NAPW has tracked involve African American mothers.

The American Civil Liberties Union of Tennessee is currently seeking plaintiffs to challenge the state’s new law. “This dangerous law unconstitutionally singles out new mothers struggling with addiction for criminal assault charges,” the group notes in a statement, encouraging people who are concerned about the impact that the measure will have on their families to get in touch.

#HEALTH, **#REPRODUCTIVE RIGHTS**, **#TENNESSEE**

Indiana Law Journal

Volume 89
Issue 2 4/15/2014

Article 8

Spring 2014

A Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses

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A Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses

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> [I]f a woman is quick with child, and, by a potion or otherwise, kills it in her womb . . . this, though not murder, . . . [is] a heinous misdemeanour.[1]

INTRODUCTION

Every year, approximately one million people attempt suicide in the United States.[2] The vast majority of these individuals—some 96% of them—survive their attempts to take their own lives.[3] Unsuccessful suicide attempts nonetheless can permanently alter the course of an individual's life, including as a result of serious injuries that may have long-term effects on health, financial stability, and general well-being.[4] Only in rare circumstances, however, do individuals face the risk of criminal prosecution for attempting suicide. All fifty states have abandoned the common-law practice of criminalizing attempted suicide,[5] though it can be punished under the Uniform Code of Military Justice.[6] Many states also explicitly allow for the criminal prosecutions of those who accidentally cause the death of a third party while attempting suicide.[7]

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* J.D., 2013, Indiana University Maurer School of Law; B.A., 2009, The University of Texas of the Permian Basin. I am very grateful to Professor Dawn Johnsen, whose feedback throughout the writing and revising processes has helped me to improve this Comment tremendously. I am also grateful to Julie Smith, Farah Diaz-Tello, and Professor Stephen Conrad for their thoughts on a preliminary draft of this Comment. Finally, I am grateful to the staff of the *Indiana Law Journal*—particularly to Jim Spangler, Aaron Pettis, and Rich Culbert—for their helpful suggestions, and also for their terrific editing and proofreading assistance. Any remaining errors or infelicities are my own.

1. 1 WILLIAM BLACKSTONE, COMMENTARIES *129–30.

2. *See* John L. McIntosh & Christopher W. Drapeau, *U.S.A. Suicide: 2010 Official Final Data*, AM. ASS'N SUICIDOLOGY (Sept. 20, 2012), http://www.suicidology.org/c/document_library/get_file?folderId=248&name=DLFE-618.pdf.

3. *See id.*

4. *See Understanding Suicide*, CDC.GOV (2012), http://www.cdc.gov/ViolencePrevention/pdf/Suicide_FactSheet_2012-a.pdf.

5. *See* Washington v. Glucksberg, 521 U.S. 702, 774 n.13 (1997) (Souter, J., concurring); Thea E. Potanos, Note, *Dueling Values: The Clash of Cyber Suicide Speech and the First Amendment*, 87 CHI.-KENT L. REV. 669, 676–77 (2012).

6. *See* United States v. Caldwell, 70 M.J. 630 (N-M. Ct. Crim. App. 2010) (affirming the conviction under 10 U.S.C. § 934 of a soldier who tried to commit suicide by slitting his wrists), *rev'd on other grounds*, 72 M.J. 137 (C.A.A.F 2013) (finding it unnecessary to resolve the issue of whether a service member may incur criminal liability on the basis of a bona fide suicide attempt alone).

7. *See* John H. Derrick, Annotation, *Criminal Liability for Death of Another as Result of Accused's Attempt to Kill Self or Assist Another's Suicide*, 40 A.L.R. 4TH 702 (1985 & Supp. 2013).

No individual who has survived a recent suicide attempt has been threatened with possible criminal penalties greater than those faced by an Indianapolis woman named Bei Bei Shuai. In December 2010, Shuai attempted to commit suicide by ingesting rat poison.[8] Shuai was thirty-three weeks pregnant at the time, and the Indianapolis prosecutor eventually charged her with the murder and attempted feticide of her then-unborn (but viable) fetus,[9] which was delivered via emergency caesarian section eight days after Shuai ingested the rat poison.[10] Because Indiana law presumes bail should be denied in murder cases,[11] Shuai spent over a year in prison awaiting trial before the Court of Appeals of Indiana decided, on interlocutory appeal, that Shuai had offered sufficient evidence to rebut the presumption against bail.[12]

In the face of tremendous public pressure against the prosecution,[13] and after the court hearing the case granted Shuai's motion in limine to suppress evidence important to the prosecution's case, the prosecutor eventually dropped the murder and attempted feticide charges against Shuai in exchange for her agreement to plead guilty to misdemeanor criminal recklessness.[14] For approximately two-and-a-half years, however, Shuai faced the possibility of spending up to sixty-five years in prison for attempting suicide while pregnant,[15] even though attempting suicide is not in itself a crime in the State of Indiana.[16]

Shuai's case quickly became something of a *cause célèbre* for public health advocates[17] and was covered widely by both foreign and domestic media.[18]

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8. Brief of Appellee at 3, Shuai v. State, 966 N.E.2d 619 (Ind. Ct. App. 2012) (No. 49A02-1106-CR-486) [hereinafter Shuai Appellee's Brief].

9. For the sake of simplicity, this Comment—unless otherwise specified—uses the term "fetus" to refer to all stages of prenatal development, including the first two months when "embryo" is the correct term.

10. Shuai Appellee's Brief, *supra* note 8, at 2, 4.

11. *Shuai*, 966 N.E.2d at 623 (citing Bozovichar v. State, 103 N.E.2d 680, 683 (Ind. 1952), *abrogated on other grounds by* Fry v. State, 990 N.E.2d 429 (Ind. 2013)).

12. *Id.* at 625. To be precise, Shuai spent 435 days in jail before she was allowed to post bail. Dave Stafford, *The Case Against Bei Bei Shuai*, IND. LAW., Aug. 17–30 2012, at 1, 1. Shuai's release predated a 2013 Indiana Supreme Court case that contradicted nearly a century and a half of case law by holding that the burden of proving that an individual accused of murder should be denied bail must be placed on the State. *Fry*, 990 N.E.2d at 433. Presumably, Shuai would have had an easier time obtaining bail had she been arrested after June 2013.

13. More than 100,000 people ultimately signed a petition on Change.org to "Free Bei Bei!" *See Protect Pregnant Women: Free Bei Bei!*, CHANGE.ORG, http://www.change.org/petitions/protect-pregnant-women-free-bei-bei. In addition, dozens of medical, public health, civil liberties, and reproductive rights organizations have expressed support for her cause through amicus curiae briefs that were filed on her behalf in the Court of Appeals of Indiana. *See infra* note 17 and accompanying text.

14. Diana Penner, *Shuai Freed on Guilty Plea*, INDIANAPOLIS STAR, Aug. 3, 2012, at A1; *see also infra* notes 91–93 and accompanying text.

15. *See* IND. CODE § 35-50-2-3(a) (2008).

16. *Shuai*, 966 N.E.2d at 630 (citing Prudential v. Rice, 52 N.E.2d 624, 626 (Ind. 1944)).

17. The following organizations each signed on to one of several amicus curiae briefs, submitted to the Court of Appeals of Indiana on Shuai's behalf: American Association of Suicidology, American Congress of Obstetricians and Gynecologists, American Medical

Although the circumstances of Shuai's case were remarkable, she is far from the only woman to face the threat of criminal liability for allegedly causing the death her fetus. In fact, "[s]ince abortion was legalized in 1973, *hundreds* of women across the country have been arrested for harming their fetuses, with charges ranging from child endangerment to first-degree murder."[19] As more states pass more laws granting more legal protections to fetuses,[20] the potential for fetal rights to conflict with maternal rights is likely to increase as well.[21]

While any subjugation of maternal rights to fetal rights will necessarily involve weighty constitutional and public policy considerations,[22] this Comment focuses primarily on those statutes that could be used to charge pregnant women with various crimes of homicide—including murder, negligent homicide, and manslaughter—for killing their own fetuses. Specifically, this Comment surveys the fetal homicide statutes[23] of the fifty states and finds that many states do not

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Women's Association, American Nurses Association, American Society of Addiction Medicine, Association of Reproductive Health Professionals, Baron Edward de Rothschild Chemical Dependency Institute, Child Welfare Organizing Project, Depression and Bipolar Support Alliance, HealthRight International, International Mental Disability Law Reform Project, Mental Health America, Mental Health America of Indiana, National Alliance on Mental Illness, National Alliance on Mental Illness–Indiana, National Asian Pacific American Women's Forum, National Association of Nurse Practitioners in Women's Health, National Association of Social Workers, the Indiana Chapter of the National Association of Social Workers, National Coalition for Child Protection Reform, National Institute for Reproductive Health, National Latina Institute for Reproductive Health, National Perinatal Association, National Women's Health Network, Society for Maternal-Fetal Medicine, the Women's Therapy Centre Institute, Postpartum Support International, Indiana National Organization for Women, Law Students for Reproductive Justice, National Women's Law Center, SisterSong Women of Color Reproductive Justice Collective, the Indiana Perinatal Network, Legal Voice, The MISS Foundation, and Open Arms Perinatal Services. In addition, numerous doctors, lawyers, academics, and advocates joined the briefs in their individual capacities.

18. *See, e.g.*, Ada Calhoun, *Mommy Had to Go Away for a While*, N.Y. TIMES, Apr. 29, 2012, at MM30; Ed Pilkington, *Indiana Prosecutor Accused of Silencing Chinese Woman on Murder Charge*, GUARDIAN (July 15, 2012, 10:45 AM EDT), http://www.guardian.co.uk /world/2012/jul/15/indiana-abortion; Stafford, *supra* note 12.

19. Calhoun, *supra* note 18 (emphasis added); *see also* Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299 (2013) (providing the first ever systematic survey of these sorts of cases). The Paltrow and Flavin article "report[s] on 413 cases from 1973 to 2005 in which a woman's pregnancy was a necessary factor leading to attempted and actual deprivations of a woman's physical liberty." *Id.* at 299. As the authors explain, however, the 413 cases they analyze represent a "substantial undercount" of all such cases. *Id.* at 303.

20. *See infra* Part III.

21. *Cf.* Lynn Paltrow, Exec. Dir., Nat'l Advocates for Pregnant Women, Reproductive Justice and the Indiana Case of Bei Bei Shuai, Address at Indiana University Maurer School of Law (Mar. 29, 2013), *available at* http://www.youtube.com/watch?v=_5NPldYYLic, at 33:55–35:56.

22. *See* Dawn E. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 614–15 (1986).

23. For convenience, this Comment refers to all statutes that define embryos and fetuses as potential victims of homicide (including feticide) as "fetal homicide statutes."

explicitly exempt pregnant women from homicide prosecution for causing the death of their own fetuses. While others have previously surveyed fetal homicide statutes in academic articles,[24] and various organizations maintain websites that monitor changes in the relevant laws,[25] these sources generally do not focus on the question of whether or not the laws might be used to prosecute pregnant women for harming their own fetuses.[26] Given that fetal homicide statutes tend to be most controversial when applied to pregnant women with respect to their own fetuses,[27] a survey that focuses on that particular controversial application of the statutes is warranted.

This Comment proceeds in four parts. Part I provides a brief historical account of how fetal protective statutes have developed in this country. Part II discusses three prominent cases—*Shuai v. State*,[28] *State v. Ashley*,[29] and *State v. McKnight*[30]—that illustrate different methods by which pregnant women might encounter criminal liability for causing the death of their own fetuses. With the context provided by Parts I and II, Part III surveys the fetal homicide laws of the fifty states, paying particular attention to whether these statutes are susceptible to being interpreted to provide the basis for the prosecution of pregnant women for causing the deaths of the fetuses they carry. Part III also discusses some alternative ways states might protect fetal life, as well as how the fetal homicide statutes on the books relate to the Supreme Court's abortion jurisprudence. Part IV argues that even though fetal homicide statutes should probably not be interpreted as applying to pregnant women with respect to their own fetuses, states that have not already done so should consider amending their fetal homicide statutes to add an explicit "maternal exception." The Comment concludes with an appendix of state authorities recognizing fetuses as potential victims of violent crimes.

As the cases discussed in Part II demonstrate, courts should avoid interpreting state fetal homicide statutes as protecting fetuses from the women who carry them, but these cases also indicate that legislative action may be needed in this area because litigation has so far proven to be a very unsatisfactory method for determining to whom these statutes apply. Even if courts ultimately decide that the statutes do not apply to pregnant women who harm their own fetuses, those

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24. *See, e.g.*, Sandra L. Smith, Note, *Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application*, 41 WM. & MARY L. REV. 1845 (2000).

25. *See, e.g.*, *Fetal Homicide Laws*, NAT'L CONF. ST. LEGISLATURES (Feb. 2013), http://www.ncsl.org/issues-research/health/fetal-homicide-state-laws.aspx#resources; *State Homicide Laws That Recognize Unborn Victims*, NAT'L RIGHT TO LIFE COMMITTEE (May 24, 2013), http://www.nrlc.org/federal/unbornvictims/statehomicidelaws092302/.

26. *See, e.g.*, Marka B. Fleming, *Feticide Laws: Contemporary Legal Applications and Constitutional Inquiries*, 29 PACE L. REV. 43, 72–73 (2008) (containing a page-and-a-half discussion about "The Difficulty of Feticide Legislation that Protects the Fetus from Its Mother"); Carolyn B. Ramsey, *Restructuring the Debate over Fetal Homicide Laws*, 67 OHIO ST. L.J. 721, 734–37 (2006) (containing a three page discussion on "Abortion and Maternal Liability Exceptions").

27. *See infra* Part IV.A.

28. 966 N.E.2d 619 (Ind. Ct. App. 2012).

29. 701 So. 2d 338 (Fla. 1997) (per curiam).

30. 576 S.E.2d 168 (S.C. 2003).

decisions will often come far too late to fully protect the rights of women like Bei Bei Shuia, who must invest significant time and resources defending themselves against the most serious of criminal charges.

I. A BRIEF HISTORY OF FETAL PROTECTIVE LEGISLATION

For thousands of years, governments have prescribed various punishments for causing the loss of a pregnancy, and typically these punishments have been substantially less severe than those prescribed for causing the death of those "born alive." For example, as early as the eighteenth or nineteenth century BCE, the Code of Hammurabi provided that "[i]f a man strike[s] a free-born woman so that she lose[s] her unborn child, he shall pay ten shekels for her loss."[31] A similar commandment can be found in the Bible's book of Exodus.[32] While the ancients recognized the loss of a pregnancy as a legally cognizable injury, they generally did not punish feticide the same as they punished homicide, which—like many other crimes—was usually punishable by death.[33]

Consistent with this tradition, the common law of England generally did not consider the destruction of a fetus to be homicide.[34] According to the so-called born alive rule, most famously articulated by Lord Coke in the seventeenth century:

> If a woman be quick with child, and by a Potion or otherwise killeth it in her womb; or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great [misdemeanor], and

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31. THE CODE OF HAMMURABI ¶ 209 (L.W. King trans., Forgotten Books ed. 2007). In contrast, if the man caused the death of the woman herself, the attacker's daughter was to be put to death. *See id.* ¶ 210.

32. *Exodus* 21:22–23 (King James) ("If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow: he shall be surely punished, according as the woman's husband will lay upon him; and he shall pay as the judges determine. And if any mischief follow, then thou shalt give life for life."). These two verses have traditionally been interpreted as demonstrating that "the fetus did not have the same status as the mother in ancient Hebrew law." Roy Bowen Ward, *The Use of the Bible in the Abortion Debate*, 13 ST. LOUIS U. PUB. L. REV. 391, 396 (1993) (citing JOHN R. CONNERY, ABORTION: THE DEVELOPMENT OF THE ROMAN CATHOLIC PERSPECTIVE 11 (1977)). In the aftermath of *Roe v. Wade*, 410 U.S. 113 (1973), some conservative Protestants have interpreted these verses as requiring fines for causing premature birth and the death penalty for causing either miscarriage *or* the death of the mother. *See, e.g.*, H. Wayne House, *Miscarriage or Premature Birth: Additional Thoughts on* Exodus *21:22–25*, 41 WESTMINSTER THEOLOGICAL J. 108, 112 (1978). However, this alternative interpretation seems to have been unconvincing to most of those outside the pro-life community. *See, e.g.*, Carlton W. Veazey & Marjorie Brahms Signer, *Religious Perspectives on the Abortion Decision: The Sacredness of Women's Lives, Morality and Values, and Social Justice*, 35 N.Y.U. REV. L. & SOC. CHANGE 281, 296 (2011); Ward, *supra*, at 396–97.

33. *See, e.g.*, Charles F. Horne, *Introduction* to THE CODE OF HAMMURABI, *supra* note 31, at 1 ("[A]ll the heavier crimes [were] made punishable with death."); *Exodus* 21:12 (King James) ("He that smiteth a man, so that he die, shall be surely put to death.").

34. *See* Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?,* 17 N.Y.L.F. 335, 338 (1971), *cited with approval in* Commonwealth v. Cass, 467 N.E.2d 1324, 1328 (Mass. 1984).

> no murder: but if the child be born alive, and dieth of the Potion, Battery or other cause, this is murder: for in Law it is accounted a reasonable creature, *in rerum natura* [in existence], when it is born alive.[35]

In other words, although the common law sometimes criminally punished those that caused the death of "quick" fetuses,[36] the common law did not equate feticide with murder unless the fetus was born alive and survived independently of its mother before succumbing to its prenatal injuries. In part, this is because the relatively unsophisticated state of medical technology, until recently, made it difficult to prove that the fetus was alive when the accused committed the allegedly harmful act.[37] Common law jurists were evidently willing to impose misdemeanor liability in circumstances in which it was difficult to determine whether a defendant's actions actually caused the death of the fetus, but they refused to impose murder liability on a defendant unless the fetus survived long enough for the cause of its death to be reasonably clear. Due to a "confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins," the common law simply did not impose *any* punishment on those who caused the death of fetuses before quickening.[38]

Although the common law embraced the born alive rule for centuries, general acceptance of the born alive rule has declined significantly in the last few decades. Just thirty years ago, the rule was embraced by every American jurisdiction that had considered the question of whether killing a fetus constituted murder.[39] In 1984, however, the Supreme Court of Massachusetts concluded in *Commonwealth v. Cass* that advances in medicine had largely undermined one of the primary rationales for the born alive rule.[40] Consequently, the court rejected the rule and held that, under Massachusetts law, the "infliction of prenatal injuries resulting in the death of a viable fetus, before or after it is born, is homicide."[41] Since 1984, thirty-six additional states have legislatively defined fetuses as potential victims of homicide.[42]

After support for the born alive rule began dwindling at the state level, Congress in 2004 enacted the so-called Unborn Victims of Violence Act, which amended the United States Code and the Uniform Code of Military Justice to "protect unborn

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35. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 50 (1680). For the definition of *in rerum natura*, see BLACK'S LAW DICTIONARY 865 (9th ed. 2009).

36. At common law, "quickening" was "[t]he first motion felt in the womb by the mother of the fetus, [usually] occurring near the middle of the pregnancy." BLACK'S LAW DICTIONARY, *supra* note 35, at 1367.

37. *See Cass*, 467 N.E.2d at 1328 (citing Means, *supra* note 34).

38. Roe v. Wade, 410 U.S. 113, 132–33 (1973). The *Roe* Court was most interested in the common law's approach to abortion regulations, but its explanation of why the common law did not criminalize the abortion of fetuses before quickening is pertinent to an understanding of the common law's approach to other types of fetal injuries as well.

39. *See Cass*, 467 N.E.2d at 1328 n.5.

40. *See id.* at 1328.

41. *Id.* at 1329.

42. *See infra* Part III.

children from assault and murder."[43] Among other provisions, the Act provided that "[w]hoever engages in conduct that violates [certain enumerated federal statutes] and thereby causes the death of, or bodily injury . . . to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense."[44] Although many pro-choice groups opposed the Act, fearing—perhaps rightly—that it was part of a multifront campaign to justify further restrictions on abortion,[45] the Act did include what might be called a "maternal exception."[46] Specifically, the Act provided that "[n]othing in [the Act] shall be construed to permit the prosecution . . . of any woman with respect to her unborn child."[47] Thus, as the Act's alternate title, "Laci and Conner's Law,"[48] makes clear, the Act was intended to protect fetuses from crimes of violence committed against pregnant women by third parties, not to protect fetuses against those who carry them.

The Unborn Victims of Violence Act, like the 2004 murder case that motivated its passage, provided additional motivation for even more states to pass legislation protecting fetal life.[49] Many of these state statutes, like the federal statute, included an express maternal exception.[50] However, many states with fetal homicide statutes have not explicitly exempted pregnant women from prosecution under the statutes.[51] As a result, women in some of these states may now be at risk for criminal prosecution because some prosecutors have proved willing to advocate for a broad interpretation of the statutes.

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43. Unborn Victims of Violence Act of 2004, 18 U.S.C. § 1841, 10 U.S.C. § 919a (2012).

44. 18 U.S.C. § 1841(a)(1).

45. *See, e.g.*, *The So-Called "Unborn Victims of Violence Act" Does Not Protect Women or Children*, NAT'L ADVOCATES FOR PREGNANT WOMEN (Mar. 5, 2004), http://advocatesforpregnantwomen.org/issues/unborn_victims_of_violence_act/the_socalled_unborn_victims_of_violence_act_does_not_protect_women_or_children_1.php; *see also* Joanne Pedone, Note, *Filling the Void: Model Legislation for Fetal Homicide Crimes*, 43 COLUM. J.L. & SOC. PROBS. 77, 95 (2009) ("Opponents also feared that laws like the UVVA would promote the concept of a fetus having its own right to life and health, and, even if they did not directly undermine abortion rights, they would at least create situations where the government would increasingly interfere with the woman's freedom to assure the well-being of her fetus.").

46. Legislation that would presumably close this exception has been proposed from time to time. *See, e.g.*, Sanctity of Human Life Act, H.R. 212, 112th Cong. (2011).

47. 18 U.S.C. § 1841(c)(3).

48. This is a reference to the much-discussed 2004 case in which Scott Peterson was convicted in California of murdering his wife, Laci, and her viable fetus. People v. Peterson, No. 1056770 (Cal. Super. Ct. 2004). Peterson was convicted on two counts of violating section 187 of the California Penal Code, which defined murder as "the unlawful killing of a human being, or a fetus, with malice aforethought."

49. Fleming, *supra* note 26, at 51–52.

50. *See infra* Table 1. Some of the state statutes even incorporated the language of the federal Act's maternal exception. *Compare, e.g.*, GA. CODE ANN. § 16-5-80(f) (2007), *with* 18 U.S.C. § 1841(c).

51. *See infra* Table 1.

II. THREE REPRESENTATIVE CASES INVOLVING PROSECUTIONS OF PREGNANT WOMEN FOR CAUSING HARM TO THEIR OWN FETUSES

Bei Bei Shuai's prosecution represented "the first time in Indiana's history . . . [that] the State decided to prosecute a woman for murder of her child based on her conduct *during* her pregnancy."[52] However, prosecutors in other states have brought various criminal charges against pregnant women for causing harm to their own fetuses.[53] This Part examines two additional cases that contribute to an understanding of how states should (and should not) approach such issues. In *State v. Ashley*,[54] the Florida Supreme Court faced a situation somewhat factually similar to the *Shuai* case, but interpreted Florida's fetal homicide statute as not applying to pregnant women with respect to their own fetuses. Both *Shuai* and *Ashley* illustrate situations in which—in the absence of a maternal exception—prosecutors might attempt to use fetal homicide statutes to impose criminal liability on pregnant women who harm their fetuses. The final case discussed in this Part—*State v. McKnight*[55]—illustrates that fetal homicide statutes are by no means the only tool creative prosecutors may use to bring charges against women who engage in various self-destructive behaviors during their pregnancies. As explained in Part III, all three cases support the argument that courts should not read criminal penalties as reaching pregnant women absent express statements to that effect, and ideally legislatures should include an explicit maternal exception to prevent prosecutors from seeking to use fetal homicide statutes in unintended ways.

A. Attempted Suicide: Shuai v. State

In December 2010, Bei Bei Shuai was eight months pregnant with a fetus that was the result of a sexual relationship she had with a man named Zhiliang Guan. A week before Christmas, Guan—who had previously indicated he was happy about Shuai's pregnancy—broke off his relationship with Shuai[56] and expressed doubts about whether he was responsible for the pregnancy.[57] On December 23, Shuai "wrote Guan, saying she felt she and the fetus were a burden on Guan, she had resolved to kill herself, and she was 'taking [the] baby . . . with [her].'"[58] After ingesting multiple packages of rat poison, Shuai called Guan to tell him about what she had done.[59] She then "laid down to die alone in her apartment."[60] Responding

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52. Shuai v. State, 966 N.E.2d 619, 634 (Ind. Ct. App. 2012) (Riley, J., concurring in part and dissenting in part) (emphasis in original).

53. *See supra* note 19 and accompanying text.

54. 701 So. 2d 338 (Fla. 1997) (per curiam).

55. 576 S.E.2d 168 (S.C. 2003).

56. Shuai Appellee's Brief, *supra* note 8, at 3.

57. *Id.*

58. Shuai v. State, 966 N.E.2d 619, 622 (Ind. Ct. App. 2012) (second alteration in original).

59. Shuai Appellee's Brief, *supra* note 8, at 3.

60. Brief of Appellant at 6, *Shuai,* 966 N.E.2d 619 (No. 49A02-1107-CR-00590) [hereinafter Shuai Appellant's Brief].

to an anonymous tip (presumably provided by Guan), the police went to Shuai's apartment, but Shuai told the police she was fine.[61]

When the poison failed to kill her, Shuai went to visit a friend.[62] After Shuai admitted she had ingested the rat poison, she was taken to the hospital for treatment.[63] Over the course of the next week, "Ms. Shuai's mental state stabilized, . . . she began to express shock and disbelief at her suicide ideations, and she began planning for her child's future as well as her own."[64] However, on New Year's Eve, one of the doctors attending Shuai "observed . . . an unusual fetal heart rate and advised Ms. Shuai that she should agree to immediate caesarean surgery for the protection of the anticipated newborn."[65] Shuai consented to the procedure, and the doctor delivered a premature infant, whom Shuai named Angel.[66]

Angel was immediately transferred to the hospital's neonatal intensive care unit, where it was discovered that her blood would not clot and that she was hemorrhaging.[67] Angel's condition steadily declined over the next few days, and "[o]n January 3, 2011, Shuai consented to removing [Angel] from life support."[68] Angel subsequently died of what the coroner's report described as "intracerebral hemorrhage due to maternal [rat poison] ingestion."[69] Shuai was treated in the hospital's psychiatric unit until February 4, 2011.[70]

On March 14, 2011, the Indianapolis prosecutor charged Shuai with murder and attempted feticide, and Shuai turned herself in that day.[71] Shuai filed a motion for bail and a motion to dismiss the charges against her, both of which were denied by the trial court.[72] On August 15, 2011, the Court of Appeals of Indiana agreed to hear Shuai's interlocutory appeal of the trial court's decision on the two motions, and on February 8, 2012, the court issued an opinion reversing the trial court's decision to deny bail to Shuai, but affirming the trial court's decision to deny Shuai's motion to dismiss.[73] This ruling was thus a mixed success for Shuai—it allowed her to be released on bail pending trial, but it did not stop the prosecution against her.[74]

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61. *Shuai*, 966 N.E.2d at 622.
62. *Id.*
63. *Id.*
64. Shuai Appellant's Brief, *supra* note 60, at 6.
65. *Id.* at 7.
66. *Id.*
67. *Shuai*, 966 N.E.2d at 622.
68. *Id.* at 622–23.
69. *Id.* at 623 (footnote omitted). Shuai contested the reliability of the coroner's conclusion that Angel died of maternal rat poison ingestion and succeeded in convincing the judge hearing the case that the coroner's report should not be admitted at trial. *See* Charles Wilson, *Bei Bei Shuai Trial: Rat Poison Link to Newborn's Death 'Unreliable,' Judge Rules*, HUFFINGTON POST, Jan 23, 2013, http://www.huffingtonpost.com/2013/01/24/bei-bei-shuai-pregnant-rat-poison-unreliable-_n_2541222.html.
70. *Shuai*, 966 N.E.2d at 623.
71. *Id.*
72. *Id.*
73. *See id.* at 632.
74. *See* Stafford, *supra* note 12. Shuai was also required to wear an electronic ankle monitor while awaiting trial. *See* Diana Penner, *Shuai Freed on Guilty Plea*, INDIANAPOLIS STAR, Aug. 3, 2013, at A1.

In affirming the trial court's decision to deny Shuai's motion to dismiss, the appellate court held, among other things, that (1) the murder and feticide statutes applied to Shuai, and (2) the common law did not afford Shuai immunity from prosecution.[75] Regarding the first issue, the court acknowledged that "[t]he question whether the murder and feticide statutes can be applied to a woman in Shuai's situation [was] one of first impression in Indiana,"[76] but the court ultimately found the relevant statutes to be unambiguous and dispositive. The murder statute provides that "[a] person who: . . . knowingly or intentionally kills a fetus that has attained viability . . . commits murder."[77] Similarly, the feticide statute provides that, outside the context of a legal abortion, "[a] person who knowingly or intentionally terminates a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus commits feticide, a Class B felony."[78] The *Shuai* court found that because nothing in the text of either statute indicates the legislature did not intend them to apply to pregnant women who harm their fetuses, the State "should be given the opportunity to [prove its case] without the intervention of a reviewing court prior to trial."[79]

The court essentially ignored Shuai's arguments for why the murder statute was unconstitutional as applied to her. In a footnote, the court explained:

> As we may resolve the issue based on the plain language of the statute, we need not address her constitutional arguments. *See Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135, 139 (Ind. 1999) ("If a statute is unambiguous, then 'courts must apply the plain language . . . despite perhaps strong policy or constitutional reasons to construe the statute in some other way.'") (quoting *Brownsburg Area Patrons Affecting Change v. Baldwin*, 943 F. Supp. 975, 986 (S.D. Ind. 1996)).[80]

This explanation makes little sense in light of Shuai's actual constitutional argument. The crux of that argument was that even if the court concluded that

> the Indiana Legislature enacted homicide laws that do apply to a pregnant woman and the fetus she carries, those laws would violate numerous rights and protections provided to Ms. Shuai by both the federal and state constitutions, including rights of due process both as a matter of notice and vagueness, privacy, equal protection, and the prohibition against cruel and unusual punishment.[81]

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75. *Shuai*, 966 N.E.2d at 628–29, 631. The court also held that the information used to charge Shuai was not defective and that Shuai was not being improperly prosecuted for attempting suicide. *Id.* at 627, 630.

76. *Id.* at 628.

77. IND. CODE § 35-42-1-1(4) (2008).

78. IND. CODE § 35-42-1-6 (Supp. 2012).

79. *Shuai*, 966 N.E.2d at 629 n.15.

80. *Id.*

81. Shuai Appellant's Brief, *supra* note 60, at 36.

The court's explanation for why it declined to address these arguments is an explanation for why the court rejected Shuai's interpretation of a supposedly unambiguous statute. However, it is not an explanation for why the court declined to address Shuai's argument that the interpretation of the statute the court actually chose to adopt rendered the statute unconstitutional as applied to Shuai.

As to whether Shuai enjoyed a common law immunity from prosecution for causing the death of her fetus, the court found that although "[o]ther states have advanced this common law immunity for pregnant women, [they] have not cited a specific English common law supporting their positions."[82] Consequently, the court cited Lord Coke's articulation of the born alive rule[83] for the proposition that women at common law did not enjoy complete immunity from prosecutions for harm they caused to their own fetuses.[84] It therefore rejected Shuai's argument that the legislature would have had to "expressly include pregnant women as possible perpetrators in the elements of the murder and feticide statutes" before those laws could be applied in such cases.[85]

Although the members of the three-judge panel that heard the case unanimously agreed that the trial court abused its discretion by denying Shuai's request for bail, Judge Patricia A. Riley dissented from the part of the court's opinion that affirmed the trial court's decision to deny Shuai's request to dismiss the charges against her. Judge Riley first disagreed with the majority's opinion that the information used to charge Shuai was legally sufficient for that purpose.[86] According to Judge Riley, because Angel was born alive and because "[t]he State did not present any evidence that Shuai did anything to endanger [Angel] after her birth," "the State [had] failed to establish the essential element of that crime, *i.e.*, that [Angel] was a viable fetus."[87]

On the attempted feticide charge, Judge Riley concluded: "In light of Indiana's long-standing statutory and case law history, . . . it was never the intention of the legislature that the feticide statute should be used to criminalize prenatal conduct of a pregnant woman."[88] She warned that the majority's interpretation of the statute "might lead to a slippery slope whereby the feticide statute could be construed as covering a full range of a pregnant woman's behavior."[89] In the end, Judge Riley failed to convince the majority, but her dissent was persuasive enough to compel the majority to acknowledge that "[a]s illustrated from this panel's diverging opinions, it is possible the language of the statute could lead to many possibly absurd outcomes."[90]

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82. *Shuai*, 966 N.E.2d at 630. The primary authority the court cited for the proposition that "[o]ther states have advanced this common law immunity for pregnant women" was the Florida Supreme Court's *State v. Ashley* opinion. *Id.*; *see infra* Part II.B.

83. *See* text accompanying *supra* note 35.

84. *See Shuai*, 966 N.E.2d at 631.

85. *See id.* at 630–31.

86. *See id.* at 635 (Riley, J, concurring in part and dissenting in part).

87. *Id.* at 634–35.

88. *Id.* at 635–36.

89. *Id.* at 636.

90. *Id.* at 629 n.15 (majority opinion).

After Shuai's partial success in the Court of Appeals of Indiana, she was scheduled for trial in September 2013.[91] After the trial court accepted her motion to exclude certain evidence important to the prosecutor's case, however, the prosecutor agreed to drop the murder and feticide charges in exchange for Shuai's guilty plea to criminal recklessness, a misdemeanor.[92] After accepting her plea, the court sentenced her to less than time served.[93]

B. Self-Abortion: State v. Ashley

Another way a pregnant woman might violate state fetal homicide statutes is by performing—or attempting to perform—an illegal abortion on herself. The somewhat bizarre 1997 *State v. Ashley* case illustrates this situation. Although the facts of this case are quite atypical of most criminal abortion cases, a brief review of the case is warranted here because the Florida Supreme Court's *Ashley* opinion provides support for Judge Riley's *Shuai* dissent.

In *Ashley*, an unwed teenager named Kawana Ashley, who was between twenty-five and twenty-six weeks pregnant at the time, shot herself with .22 caliber firearm, critically injuring her fetus.[94] Unlike Shuai, Ashley did not shoot herself because she wanted to end her own life. Apparently, Ashley merely wanted to terminate her pregnancy and believed she would be unable to obtain a legal abortion.[95] In this desire, she was successful. The bullet struck the fetus's wrist, and the fetus died of immaturity fifteen days after being removed during surgery.[96]

To be sure, "the concept of a self-induced abortion via .22 caliber bullet is dubious in itself and is highly questionable as a procedure intended to be regulated by" Florida's criminal abortion act,[97] but Ashley was nonetheless charged with alternative counts of felony murder and manslaughter, with Ashley's alleged violation of the criminal abortion act serving as the underlying offense for the two charges.[98] The trial court dismissed the murder charge against Ashley but allowed the State to proceed with the manslaughter charge.[99] The District Court of Appeal affirmed and certified two questions for review by the Florida Supreme Court: "1. May an expectant mother be criminally charged with the death of her born alive child resulting from self-inflicted injuries during the third trimester of pregnancy?" and "2. If so, may she be charged with manslaughter or third-degree murder, the

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91. *Bei Bei Shuai Pleads Guilty in Baby's Death*, HUFFINGTON POST, Aug. 2, 2013, http://www.huffingtonpost.com/2013/08/02/bei-bei-shuai-guilty_n_3698383.html. Shuai had previously filed a petition for transfer to the Supreme Court of Indiana to further challenge the legality of the prosecution against her, but the court unanimously denied the petition on May 11, 2012. *See* Shuai v. State, 967 N.E.2d 1035 (table).

92. *See Bei Bei Shuai Pleads Guilty in Baby's Death*, *supra* note 91.

93. *See id.* Shuai was sentenced to 178 days time served, *see id.*, but she had previously served 435 days in jail while her case was on interlocutory appeal, *see supra* note 12 and accompanying text.

94. State v. Ashley, 701 So. 2d 338, 339 (Fla. 1997) (per curiam).

95. *See id.* at 340.

96. *See id.* at 339.

97. *Id.* at 341–42.

98. *See id.* at 339–40.

99. *See id.* at 340.

underlying predicate felony being abortion or attempted abortion?"[100] The Florida Supreme Court answered the first question in the negative, mooting the second question.[101]

In concluding that pregnant women could not be charged with murder for causing harm to a fetus that lives briefly after being born, the *Ashley* court, unlike the *Shuai* court, accepted the idea that the common law provided women in such situations immunity from prosecution. According to a 1904 Connecticut Supreme Court case the *Ashley* court quoted:

> At common law an operation on the body of a woman quick with child, with intent thereby to cause her miscarriage, was an indictable offense, but it was not an offense in her to so treat her own body, or to assent to such treatment from another; and the aid she might give to the offender in the physical performance of the operation did not make her an accomplice in his crime. The practical assistance she might thus give to the perpetrator did not involve her in the perpetration of his crime. *It was in truth a crime which, in the nature of things, she could not commit.*[102]

In other words, according to the *Ashley* court, the criminal law has traditionally differentiated between acts committed by a third party and acts committed by the pregnant woman herself because "the criminal [abortion] laws were intended to protect, not punish" pregnant women.[103]

Because the court accepted this view that pregnant women enjoyed immunity from prosecutions from self-abortions at common law, and because nothing in the statutes Ashley was charged under stated unequivocally that the legislature intended to alter the common law rule, the court concluded that "the legislature did not abrogate the common law doctrine of immunity for the pregnant woman."[104] However, both the court and even Ashley herself seemed to acknowledge that the legislature could have criminalized Ashley's conduct if the legislature had enacted a criminal abortion or fetal homicide statute that unambiguously targeted pregnant women who harm their own fetuses (though such statutes would have to satisfy constitutional limits, of course).[105]

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100. *Id.* at 339.

101. *Id.*

102. *Id.* at 340 (emphasis added) (quoting State v. Carey, 56 A. 632, 636 (Conn. 1904)).

103. *See id.* at 341 (citing Gaines v. Wolcott, 167 S.E.2d 366, 370 (Ga. Ct. App. 1969)).

104. *Id.*

105. *See id.* at 343 (Harding, J., specially concurring). Historically, some American jurisdictions did criminalize attempts to obtain an illegal abortion. For example, during the nineteenth century, "the legislatures of fifteen states declared that a woman who solicited or submitted to an abortion had committed a criminal act. However no reported cases reflect the actual enforcement of these provisions against women." Samuel W. Buell, Note, *Criminal Abortion Revisited*, 66 N.Y.U. L. REV. 1774, 1785 (1991) (footnote omitted). Generally speaking, to the extent that the various states criminalized abortion, they focused on the culpability of the abortion provider, not the woman receiving the abortion. *See id.* at 1783–95. In part, this is because, as a practical matter, "it was a nearly impossible task to convict an abortionist without the testimony of the woman." Ashley Gorski, Note, *The Author of Her Trouble: Abortion in Nineteenth- and Early Twentieth-Century Judicial*

C. Drug Use: State v. McKnight

For several years, various commentators and medical professionals have warned that "prosecuting as child abusers or even murderers the thousands of American women who carry pregnancies to term despite their drug addictions not only fails to further the states' goal of protecting fetal health, but also violates the constitutional rights of pregnant women."[106] Nevertheless, over the course of the last thirty years, hundreds of women, particularly poor women of color, have been civilly confined or criminally prosecuted for using drugs during their pregnancies[107]—even though a growing body of medical research indicates that drug abuse during pregnancy is not as harmful to prenatal development as was once believed.[108]

South Carolina has been particularly aggressive at prosecuting women who abuse drugs during their pregnancies.[109] In 1997, in *Whitner v. State*, [110] a sharply divided (3–2) South Carolina Supreme Court affirmed the conviction of a mother who pled guilty to criminal child neglect after she gave birth to a baby with cocaine metabolites in its system. In so doing, the court held that "the *plain* meaning of 'child' as used in [the child endangerment] statute includes a viable fetus,"[111] making it the first state supreme court to uphold a criminal child abuse conviction based on a woman's substance abuse during pregnancy.[112]

In 2003, another divided South Carolina Supreme Court (again 3–2) affirmed the twenty-year prison sentence imposed on Regina McKnight after she was convicted of homicide by child abuse in connection with a stillbirth that was attributed to McKnight's use of crack cocaine during her pregnancy.[113] In reaching this result, the court specifically held, among other things, that (1) the *Whitner* case

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Discourses, 32 HARV. J.L. & GENDER 431, 443 (2009). Although *Roe v. Wade* and its progeny have significantly limited the extent to which states may criminalize abortion prior to viability, criminal abortion statutes may be constitutional as applied to pregnant women who illegally abort their *viable* fetuses, provided that such criminal statutes do not impose an undue burden on women seeking legal abortions. *See infra* Part III.C.

106. Julie B. Ehrlich, *Breaking the Law by Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women*, 32 N.Y.U. REV. L. & SOC. CHANGE 381, 382 (2008); *see also, e.g.*, Dawn Johnsen, *From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After* Webster, 138 U. PA. L. REV. 179, 214–15 (1989); Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to* Roe v. Wade, 62 ALB. L. REV. 999, 1044–54 (1999).

107. *See* Ehrlich, *supra* note 106, at 381–82.

108. *See id.* at 388–89.

109. For example, as early as 1988, Charleston obstetrics patients suspected of using drugs were routinely subjected to urine tests without their knowledge or consent pursuant to a policy developed by a local hospital in collaboration with local law enforcement. Ferguson v. City of Charleston, 532 U.S. 67, 70–73 (2001). Those women who tested positive for drugs were referred to the authorities for prosecution. *Id.* at 72–73. The *Ferguson* Court found this practice a violation of the patients' Fourth Amendment rights against unreasonable searches. *Id.* at 84–86.

110. 492 S.E.2d 777 (S.C. 1997).

111. *Id.* at 785 (emphasis in original).

112. *See State Policies in Brief: Substance Abuse During Pregnancy*, GUTTMACHER INST. (Dec. 1, 2013), http://www.guttmacher.org/statecenter/spibs/spib_SADP.pdf.

113. State v. McKnight, 576 S.E.2d 168 (S.C. 2003). To be specific, "McKnight was sentenced to twenty years, suspended to service of twelve years." *Id.* at 171.

had put McKnight on notice that her conduct was proscribed, so the prosecution did not violate due process; (2) the prosecution did not violate McKnight's right to privacy; and (3) the twenty-year prison sentence McKnight had received did not constitute cruel and unusual punishment.[114]

In a powerful dissent with which one other justice concurred, Justice James E. Moore explained why the majority was incorrect to conclude that the South Carolina legislature intended for the state's criminal child abuse to be applied to women like McKnight:

> Once again, I must part company with the majority for condoning the prosecution of a pregnant woman under a statute that could not have been intended for such a purpose. Our abortion statute . . . carries a maximum punishment of two years or a $1,000 fine for the intentional killing of a viable fetus by its mother. In penalizing this conduct, the legislature recognized the unique situation of a feticide by the mother. I do not believe the legislature intended to allow the prosecution of a pregnant woman for homicide by child abuse under [the child abuse statute] which provides a disproportionately greater punishment of twenty years to life.
>
> As expressed in my dissent in *Whitner v. State*, it is for the legislature to determine whether to penalize a pregnant woman's abuse of her own body because of the potential harm to her fetus. It is not the business of this Court to expand the application of a criminal statute to conduct not clearly within its ambit. To the contrary, we are constrained to strictly construe penal statutes in the defendant's favor.[115]

As Justice Moore pointed out, the majority's interpretation of the criminal child abuse statute is extraordinarily harsh compared with the state's criminal abortion statute. It hardly seems possible that the legislature could have intended for a woman who causes the death of her viable fetus through neglect or indifference to be punished *at least* ten times more severely than a woman who intentionally kills her viable fetus.[116] Furthermore, to the extent there remains any ambiguity with respect to the intended applicability of the statutes to pregnant women who cause the deaths of their own fetuses, the so-called rule of lenity should require courts to resolve that ambiguity in favor of the accused.[117]

Five years after affirming Regina McKnight's conviction, a unanimous South Carolina Supreme Court granted McKnight's request for postconviction relief based on ineffective assistance of counsel.[118] Although the court found McKnight's attorney's performance deficient in several respects, the court seemed particularly concerned about the fact that McKnight's attorney had failed to present available evidence rebutting the State's allegations regarding the supposed link between

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114. *Id.* at 168.

115. *Id.* at 179–80 (Moore, J., dissenting) (footnote omitted) (citation omitted).

116. The statute under which McKnight was prosecuted provided for a sentence between twenty years and life. *Id.* at 177 (majority opinion).

117. *Cf.* United States v. Bass, 404 U.S. 336, 347 (1971).

118. *See* McKnight v. State, 661 S.E.2d 354 (S.C. 2008).

cocaine use and stillbirth.[119] However, the court did not address the constitutionality of McKnight's prosecution itself, and the court specifically rejected McKnight's equal protection argument.[120] Thus, while the decision seems to represent an acknowledgement by the court that drug use during pregnancy may not be as harmful to developing fetuses as was once believed,[121] the court did not actually reverse its earlier decisions regarding the appropriateness of prosecuting pregnant women for child abuse when those women cause harm to their fetuses by using drugs during their pregnancies.

In construing its child endangerment statute so broadly, South Carolina has become something of an outlier. A number of state supreme courts have explicitly held that various criminal statutes do not apply to pregnant women who expose their fetuses to controlled substances during pregnancy.[122] However, seventeen states—Arkansas, Colorado, Florida, Illinois, Indiana, Iowa, Louisiana, Minnesota, Nevada, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Wisconsin—consider substance abuse during pregnancy child abuse for purposes of their civil child welfare statutes, and four states—Minnesota, Oklahoma, South Dakota, and Wisconsin—consider it grounds for civil commitment.[123] Additionally, when drug abuse is suspected, several states require health professionals to report to the state, test for prenatal drug exposure, or both.[124]

In January 2013, Alabama became the second state to explicitly allow pregnant drug users to be charged with criminal child abuse when the Supreme Court of Alabama affirmed a decision by the Alabama Court of Criminal Appeals, holding that a viable fetus is a "child" for purposes of the state's criminal statute prohibiting the chemical endangerment of a child.[125] A similar case is also winding its way through the Mississippi court system, where Rennie Gibbs faces a "depraved heart murder" charge in connection with a stillbirth she had shortly after her sixteenth birthday.[126] As in the previous cases, prosecutors allege the stillbirth was caused by

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119. *See id.* at 357–61.

120. *See id.* at 363–65.

121. *See* Lynn Paltrow & Kathrine Jack, *Pregnant Women, Junk Science, and Zealous Defense*, CHAMPION, May 2010, at 30, 30–31.

122. *See, e.g.*, State v. Aiwohi, 123 P.3d 1210, 1225 (Haw. 2005) (manslaughter); Commonwealth v. Welch, 864 S.W.2d 280, 285 (Ky. 1993) (child abuse); State v. Stegall, 828 N.W.2d 526, 533 (N.D. 2013) (child endangerment); State v. Gray, 584 N.E.2d 710, 713 (Ohio 1992) (child endangerment).

123. *See* OKLA. STAT. ANN. tit. 63, § 1-546.5 (West Supp. 2013); GUTTMACHER INST., *supra* note 112.

124. *See* GUTTMACHER INST., *supra* note 112.

125. *See Ex Parte* Ankrom, Nos. 110176 & 1110219, 2013 WL 135748, at *1 (Ala. Jan. 11, 2013).

126. *See* Gibbs v. State, 2010-IA-00819-SCT (Miss. 2011) (dismissing Rennie Gibbs's interlocutory appeal as improvidently granted); Calhoun, *supra* note 18. The Supreme Court of Mississippi recently affirmed the dismissal of a "fatally flawed" indictment of a woman named Nina Buckhalter who was charged with similar conduct as Rennie Gibbs. *See* State v. Buckhalter, 2012-CA-00725-SCT (¶¶ 1, 16) (Miss. 2013), 119 So. 3d 1015, 1019. However, the court declined to address the merits of Ms. Buckhalter's constitutional arguments against the prosecution. *See id.*

Ms. Gibbs's use of crack cocaine during her pregnancy.[127] If convicted, Ms. Gibbs could receive a life sentence.[128]

III. USING STATE FETAL HOMICIDE STATUTES TO PROSECUTE WOMEN FOR CAUSING HARM TO THEIR OWN FETUSES

As the cases discussed above illustrate, some states—despite the objections of the nation's leading medical associations and public health experts[129]—have used a variety of means to prosecute pregnant women who engage in various self-destructive behaviors during their pregnancies. Most states that have brought criminal prosecutions against pregnant women for harming their own fetuses have done so under their child abuse or child endangerment laws,[130] but the *Shuai* case raises the possibility that prosecutors in other states may try to use fetal homicide statutes to prosecute pregnant women who cause the deaths of their own fetuses.

As the *Shuai* case also illustrates, the mere fact that prosecutors have not used their states' fetal homicide statutes in precisely that way in the past does not provide any guarantee that they will not do so in the future.[131] Unless a state's fetal homicide statute contains an explicit maternal exception like that contained in the Unborn Victims of Violence Act, a pregnant woman of that state may, like Bei Bei Shuai, find herself the subject of a type of prosecution previously unheard of in her jurisdiction—at least until a court intervenes on her behalf.[132] Indeed, some prosecutors might be more willing to bring such a prosecution now that they can point to the Indiana Court of Appeal's opinion for persuasive authority for the proposition that women like Bei Bei Shuai can be prosecuted under their states' fetal homicide statutes.

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127. *Gibbs*, 2010-IA-00819-SCT, ¶ 5 (King, J., objecting to the order with separate written statement).

128. MISS. CODE ANN. § 97-3-21 (West Supp. 2013).

129. *See* April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 147, 154 (2007) ("[T]he nation's leading medical associations, including the American Medical Association, the American Academy of Pediatrics, and the American Public Health Association, have all opposed punitive measures against pregnant women who use drugs. Their opposition is due in part to their understanding that such measures will deter women from accessing much needed prenatal care and that the absence of such care certainly will have deleterious consequences for both maternal and fetal health.").

130. Paltrow & Flavin, *supra* note 19, at 321.

131. Recall that the prosecution against Bei Bei Shuai represents "the first time in Indiana's history . . . [that] the State decided to prosecute a woman for murder of her child based on her conduct *during* her pregnancy." Shuai v. State, 966 N.E.2d 619, 634 (Ind. Ct. App. 2012) (Riley, J., concurring in part and dissenting in part) (emphasis in original).

132. *Cf.* Kilmon v. State, 905 A.2d 306, 311–12 (Md. 2006) (finding that, in seeking to determine whether a woman could be charged with reckless endangerment of a child for ingesting cocaine during a pregnancy, "criminal liability would depend almost entirely on how aggressive, inventive, and persuasive any particular prosecutor might be").

A. A Survey of State Fetal Homicide Statutes

Thirty-six states currently have statutes recognizing embryos or fetuses as potential victims of homicide and other violent crimes.[133] Although criminal defendants charged under the statutes have challenged them on a variety of grounds (e.g., the fact that the criminal defendant may not have known that the mother was pregnant), the courts that have heard challenges to the statutes by third-party defendants have generally upheld them.[134] Some courts have even upheld the application of fetal homicide laws to situations in which criminal defendants alleged they acted with the consent of the pregnant woman whose fetus was harmed.[135]

Although a strong majority of those states with fetal homicide statutes—twenty-five of them—proscribe harming fetuses or embryos at any stage of development, some states only apply their fetal homicide statutes to fetuses that have reached a certain gestational age.[136] California and Virginia only protect "fetuses" (as distinct from embryos),[137] while other states require that the fetus must be "quick" (Michigan, Nevada, Rhode Island, and Washington)[138] or "viable" (Florida and Maryland).[139] "Viability" is also the point at which fetuses are protected under Massachusetts common law.[140]

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133. *See infra* Table 1. The states that have not enacted such laws are Colorado, Connecticut, Delaware, Hawaii, Massachusetts, Maine, Montana, New Hampshire, New Jersey, New Mexico, New York, Oregon, Vermont, and Wyoming. *See id.* The District of Columbia does not have such a law either. *Id.* However, some of these states, by operation of their state common law, protect viable fetuses and/or fetuses that are born alive. *See supra* text accompanying notes 40–41; *infra* note 225. Some of them also protect fetuses by imposing extra penalties for attacking pregnant women. *See* statutes cited *infra* notes 174–76 and accompanying text.

134. *See, e.g.*, State v. Cotton, 5 P.3d 918, 925 (Ariz. 2000); People v. Taylor, 86 P.3d 881, 886 (Cal. 2004); Brinkley v. State, 322 S.E.2d 49, 53 (Ga. 1984). *See generally* Douglas S. Curran, Note, *Abandonment and Reconciliation: Addressing Political and Common Law Objections to Fetal Homicide Laws*, 58 DUKE L.J. 1107, 1139–41 (2009).

135. *See, e.g.*, Mary Beth Hickcox-Howard, Note, *The Case for Pro-Choice Participation in Drafting Fetal Homicide Laws*, 17 TEX. J. WOMEN & L. 317, 338–39 (2008) (discussing a Texas case in which a man claimed his girlfriend asked him to assault her to end her pregnancy after she had been told that her pregnancy was too far advanced for her to be able to obtain a legal abortion).

136. *See infra* Table 1. Some states provide explicitly that the statutes apply "at any stage of development," but a number of states provide that the statutes apply after "fertilization" or "conception." *Id.* Although the state definitions sometimes differ from the accepted medical definition of those terms, *see infra* note 228, the important point is that most states' fetal homicide statutes protect the unborn at *very* early stages of development.

137. *See* CAL. PENAL CODE § 187(a) (West 2008); VA. CODE ANN. § 18.2-32.2 (2009); People v. Davis, 872 P.2d 591 (Cal. 1994). Although the plain language of the Virginia statute seems to indicate that it only applies during the postembryonic stage of development, the statute has not yet been interpreted by the Supreme Court of Virginia. *See Ex parte* Ankrom, Nos. 1110176 & 1110219, 2013 WL 135748, at *21 n.17 (Ala. Jan. 11, 2013).

138. *See* MICH. COMP. LAWS ANN. §§ 750.322–.323 (2004); NEV. REV. STAT. ANN. § 200.210 (LexisNexis 2012); R.I. GEN LAWS § 11-23-5 (2002); WASH. REV. CODE ANN. § 9A.32.060 (West 2009).

139. *See* FLA. STAT. ANN. § 316.193 (West 2006 & Supp. 2013); §§ 782.071, .09 (West 2007); MD. CODE ANN., CRIM. LAW § 2-103 (LexisNexis 2012).

140. *See supra* text accompanying notes 40–41.

In a few states, the gestational age at which a fetus or embryo is protected depends on the specific crime with which the defendant has been charged. Although one cannot be prosecuted for homicide in Arkansas for causing the death of a fetus before it reaches twelve weeks of development, it appears that one can be prosecuted for battering a fetus or embryo during any stage of gestational development.[141] Similarly, in Indiana, a defendant cannot be prosecuted for the manslaughter or murder of a previable fetus, but a defendant can be charged with feticide for causing the death of an embryo or fetus during any period of gestational development.[142] Unlike Indiana, Iowa does not allow a defendant to be prosecuted for feticide until the fetus reaches the third trimester, but Iowa does allow one who causes "serious injury to a human pregnancy" to be prosecuted regardless of the stage of the pregnancy.[143]

Like the Federal Unborn Victims of Violence Act, a majority of state fetal homicide statutes expressly do not apply to pregnant women with respect to their own fetuses.[144] For example, the Georgia feticide statute provides that:

> Nothing in this Code section shall be construed to permit the prosecution of: (1) Any person for conduct relating to an abortion for which the consent of the pregnant woman, or person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law; (2) Any person for any medical treatment of the pregnant woman or her unborn child; or (3) Any woman with respect to her unborn child.[145]

Twenty-four of the thirty-six states that have passed statutes recognizing embryos and fetuses as potential victims of violent crimes have included similar language to their statutes expressly exempting pregnant women from being prosecuted for causing injury to their own fetuses.[146] However, in a few instances, the statutory protection such clauses afford to pregnant women may be incomplete. For example, while Arkansas expressly exempts pregnant women from being prosecuted for the homicide of their own fetuses, the state does not expressly exempt such women from prosecution for the battery of their fetuses.[147]

Although some states have failed to expressly exempt pregnant women from being prosecuted for crimes against their own fetuses, at least a few of these states seem to have foreclosed the possibility of such prosecutions because of the way the statutes are drafted. For example, the Michigan Penal Code provides that "[t]he

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141. *Compare* ARK. CODE ANN. § 5-1-102(13) (2006 & Supp. 2013), *with* § 5-13-201.

142. *Compare* IND. CODE § 35-42-1-1 (2008) (murder), § 35-42-1-3 (voluntary manslaughter), *and* § 35-42-1-4 (involuntary manslaughter), *with* § 35-42-1-6 (feticide).

143. *Compare* IOWA CODE ANN. § 707.7 (West 2003 & Supp. 2013) (feticide), *with* § 707.8 (serious injury to a human pregnancy).

144. *See infra* Table 1.

145. GA. CODE ANN. § 16-5-80(f) (2007).

146. These states are Alabama, Arkansas, Alaska, Arizona, California, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Nebraska, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, and West Virginia. *See infra* Table 1.

147. *Compare* ARK. CODE ANN. § 5-1-102(13) (2006 & Supp. 2013), *with* § 5-13-201.

wilful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter."[148] Since a mother could not be criminally prosecuted for murder if she caused her own death through self-injury, the language of the statute would seem to imply that it does not apply to pregnant women with respect to their own fetuses. For similar reasons, pregnant women probably cannot be prosecuted under the relevant Nevada,[149] Virginia,[150] and Washington[151] statutes.

A number of states—including Indiana,[152] Iowa,[153] Mississippi,[154] Missouri,[155] Rhode Island,[156] and Wisconsin[157]—are simply silent on the issue of whether a pregnant woman can be prosecuted for various crimes of violence against their own fetuses.[158] In addition, while it appears that women in Michigan cannot be prosecuted for manslaughter under section 750.322,[159] it is less clear whether they

148. MICH. COMP. LAWS ANN. § 750.322 (West 2004).

149. *See* NEV. REV. STAT. ANN. § 200.210 (LexisNexis 2012) ("A person who willfully kills an unborn quick child, by any injury committed upon the mother of the child, commits manslaughter . . . ."). An unusually determined prosecutor could theoretically argue that the statute should be interpreted as allowing prosecutions against women who intentionally kill their quick fetuses through self-injury. However, interpreting the statute this way would produce an absurd result—a woman would be perfectly free to kill her fetus so long as she do so without injuring herself, but would face manslaughter charges if she did happen to injure herself in the process.

150. *See* VA. CODE ANN. § 18.2-32.2 (2009) ("Any person who unlawfully, willfully, deliberately, maliciously and with premeditation kills the fetus *of another* is guilty of a Class 2 felony." (emphasis added)).

151. *See* WASH. REV. CODE ANN. § 9A.32.060 (West 2009) ("A person is guilty of manslaughter in the first degree when: . . . He intentionally and unlawfully kills an unborn quick child by inflicting any injury upon the mother of such child."); *see also supra* note 149 (explaining why a similar statute should not be interpreted as applying to a pregnant woman who harms her own fetus).

152. *See* IND. CODE §§ 35-42-1-1, -3, -4, -6 (2008).

153. *See* IOWA CODE ANN. §§ 707.7, .8 (West 2003 and Supp. 2013).

154. *See* MISS. CODE ANN. §§ 97-3-19, -37 (West 2011).

155. Although Missouri law provides that no cause of action shall accrue "against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care," the statute could be interpreted as leaving open the possibility that pregnant women could be criminally liable for harming their fetuses, at least in situations in which they willfully harm their fetuses. *See* MO. ANN. STAT. § 1.205(4) (West 2000).

156. *See* R.I. GEN LAWS § 11-23-5 (2002).

157. Wisconsin does not allow women to be prosecuted under its criminal abortion statute, but it is silent with respect to the question of whether a pregnant woman could be prosecuted for various other crimes. *See infra* Table 1. However, in light of the statutory protection the women of that state enjoy from prosecutions under the criminal abortion statute, interpreting the state's other statutes as allowing those same women to be prosecuted for more serious crimes seems even more unreasonable—and less likely to be advocated for—than it is in states without such a statutory exception. However, the *McKnight* case indicates that it is not impossible that the state would adopt a seemingly unreasonable interpretation of the statute. *See supra* notes 115–16 and accompanying text.

158. *See infra* Table 1.

159. *See* MICH. COMP. LAWS ANN. § 750.322 (West 2004); *see also* text accompanying note 148.

can be prosecuted under section 750.323, Michigan's criminal abortion law.[160] The fact that some of these states have already brought prosecutions against pregnant women for harming their own fetuses[161] provides a reason to suspect that prosecutors in some of the other states may—rightly or wrongly—consider their states' silence on this issue as providing a basis for arguing that the relevant statutes could be applied more broadly than they have been in the past.

In addition, the statutes of a handful of states seem to expressly authorize prosecutions of pregnant women who harm their own fetuses, at least in certain situations. Utah provides that "[a] woman is not guilty of criminal homicide of her own unborn child if the death of her unborn child: (a) is caused by a criminally negligent act or reckless act of the woman; and (b) is not caused by an intentional or knowing act of the woman."[162] Although the statute prohibits pregnant women from being charged with negligently or recklessly causing the death of their own fetuses, the *plain language* of the statute would seem to allow homicide prosecutions of women who intentionally or knowingly cause the death of their own embryos or fetuses. Similarly, Oklahoma expressly allows a pregnant woman to be charged with homicide if she commits "a crime that caused the death of the unborn child."[163] Although this language is somewhat ambiguous, it was apparently aimed at allowing pregnant women to be charged when they commit some acts outside of legal abortions that lead to the deaths of their fetuses.[164]

B. Alternatives to Fetal Homicide Statutes

Fetal homicide statutes generally recognize embryos or fetuses or both as potential victims of violent crimes either by defining them as "persons" for purposes of the state's existing criminal laws or by creating new offenses. There are, however, other means by which states can protect fetuses. One alternative approach—albeit a rather extreme one—is to enact a state constitutional amendment giving the unborn all of the rights and privileges of citizenship from the moment of conception.[165] These so-called personhood amendments have been proposed in many states, but have—so far—been rejected by the voters of every

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160. *See* MICH. COMP. LAWS ANN. § 750.323 (West 2004) ("Any person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall, in case the death of such child or of such mother be thereby produced, be guilty of manslaughter."). Although the Michigan legislature may not have intended for "any person" to include the pregnant women to whom the statute refers, it does seem conceivable that the statute could be interpreted that way.

161. *See supra* Part II.

162. UTAH CODE ANN. § 76-5-201(4) (LexisNexis 2012).

163. OKLA. STAT. ANN. tit. 21, § 691 (West 2004).

164. *See* TRENT H. BAGGET, LEGISLATIVE UPDATE 2006, at 10–11, *available at* http://www.digitalprairie.ok.gov/cdm/compoundobject/collection/stgovpub/id/1621/rec/229.

165. *See generally* Valena Elizabeth Beety, *Mississippi Initiative 26: Personhood and the Criminalization of Intentional and Unintentional Acts by Pregnant Women*, 81 MISS. L.J. SUPRA 55 (2011).

state in which the initiatives have appeared on the ballot.[166] Additionally, because of the obvious conflict between such initiatives and the Supreme Court's abortion jurisprudence,[167] one state supreme court has refused to even permit a proposed personhood amendment to appear on the ballot.[168]

A somewhat less extreme alternative is to recognize fetuses as potential victims of crimes, but to impose less substantial penalties when a pregnant woman harms her own fetus. For example, New York, a state generally regarded as one of the more progressive states when it comes to reproductive rights,[169] has two pre-*Roe* statutes making an "unjustified" "self-abortion" a class A or a class B misdemeanor, depending on whether the fetus has achieved a gestational age of twenty-four weeks.[170] According to one commentator:

> With respect to a self-committed abortional act within the 24-week period, the most sensible [post-*Roe*] construction of the [statute]—though not the literal one, is that such act is not criminal. After the 24-week period, the woman could be guilty of self-abortion if she did not act on the advice of a physician that such act was necessary to preserve her life.[171]

To be sure, these statutes may be largely a product of their time and seem to have been used only a handful of times since 1980.[172] Nevertheless, the laws remain

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166. *See* Maya Manian, *Lessons from Personhood's Defeat: Abortion Restrictions and Side Effects on Women's Health*, 74 OHIO ST. L.J. 75, 79–81 (2013); Grace Wyler, *Personhood Movement Continues to Divide Pro-Life Activists*, TIME (July 24, 2013), http://www.nation.time.com/2013/07/24/personhood-movement-continues-to-divide-pro-life-activists/.

167. *See* Manian, *supra* note 166, at 86–89. Although it is true that the Supreme Court upheld personhood-type language in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), the relevant statute did not actually impose any practical obstacles to a woman's exercise of her right to obtain a legal abortion. *Id.* at 505–06.

168. *See In re* Initiative Petition No. 395, State Question No. 761, 286 P.3d 637, 637–38 (Okla. 2012) (holding that a proposed personhood initiative was "clearly unconstitutional pursuant to *Planned Parenthood v. Casey*"), *cert. denied*, Personhood Okla.v. Barber, 133 S. Ct. 528 (2012) (mem.). In March 2013, several news outlets reported, somewhat misleadingly, that North Dakota had become the first state to enact a fetal personhood amendment. *See, e.g.*, Laura Bassett, *North Dakota Personhood Measure Passes State House*, HUFFINGTON POST (Mar. 22, 2013, 4:02 PM EDT), http://www.huffingtonpost.com/2013/03/22/north-dakota-personhood_n_2934503.html. However, the amendment is currently pending voter approval in November 2014. *See id.* If approved, it would be the first such amendment successfully enacted into law. *See id.*

169. *See* NARAL PRO-CHOICE AM. & NARAL PRO-CHOICE AM. FOUND., WHO DECIDES?: THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES 66 (22d ed. 2013), *available at* http://www.prochoiceamerica.org/assets/download-files/2013-who-decides.pdf (giving New York a grade of "A-" in its 2013 Report Card on Women's Reproductive Rights).

170. *See* N.Y. PENAL LAW §§ 125.50, .55 (McKinney 2009).

171. William C. Donnino, *Practice Commentary*, *in* N.Y. PENAL LAW § 125.40, at 59, 60 (McKinney 2009) (citations omitted) (internal quotation marks omitted).

172. *See* Anemona Hartocollis, *After Fetus Is Found in Trash, a Rare Charge of Self-Abortion*, N.Y. TIMES, Dec. 2, 2011, at A32 (indicating that between 1980 and 2011 only five women had been charged for violating one of the statutes).

on the books, and one was used as recently as December 2011 to charge a woman after her fetus was found in a New York City dumpster.[173]

Another way some states seek to protect fetal life is to provide additional penalties for causing injuries to a pregnant woman. For example, although Colorado does not recognize fetuses as separate victims of violent crimes, Colorado does consider the intentional killing of a pregnant woman with the knowledge that she was pregnant to be an aggravating factor for purposes of determining whether to impose the death penalty on a criminal defendant.[174] The state also provides that certain intentional crimes against pregnant women must be punished more harshly than would be required if the woman had not been pregnant (or if the defendant had lacked knowledge of the pregnancy).[175] Similarly, an "assault of a pregnant woman resulting in termination of pregnancy" is a class A felony in Connecticut, making it the most serious assault crime recognized under Connecticut law.[176]

This approach is favored by those who fear that "[b]y granting fetuses victim status, the UVV and similar state laws sever the interests of fetus and pregnant woman, ultimately furthering an agenda of control over women's bodies and lives."[177] This approach also unambiguously excludes pregnant women who harm their own fetuses from the class of persons potentially subject to the extra penalties. Since a woman could never be prosecuted merely for causing an injury to herself, there is no way a woman could be subject to the extra penalties that the state would impose upon a third-party attacker. Consequently, pregnant women in states with such laws are in no danger of being prosecuted under those laws for harming their own fetuses.

C. State Fetal Homicide Statutes and the Supreme Court's Abortion Jurisprudence

Of course, the mere fact that these fetal homicide laws exist does not mean that they are enforceable as applied to pregnant women who harm their own fetuses. After all, fourteen states have laws providing near total criminal bans on abortion.[178] Such

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173. *See id.* Those charges were ultimately dropped, but not until the woman's name—and the circumstances of her alleged self-abortion—had been widely reported in the mainstream media, severely undermining any right to privacy the woman may have had in choosing to abort what was likely a previable fetus. *See DA Drops Self-Abortion Case Vs. NYC Woman*, HUFFINGTON POST, Jan. 31, 2012, http://www.huffingtonpost.com/2012/01/04/da-drops-self-abortion-ca_n_1183152.html.

174. *See* COLO. REV. STAT. ANN. § 18-1.3-1201 (West 2013).

175. *See id.* §§ 18-1.3-401(13), -501(6).

176. *See* CONN. GEN. STAT. ANN. § 53a–59c (West 2012).

177. Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L.J. 667, 696 (2006).

178. NARAL PRO-CHOICE AM. FOUND., *supra* note 169, at 10. These states are Alabama, Arizona, Arkansas, Colorado, Delaware, Louisiana, Massachusetts, Michigan, Mississippi, New Mexico, Oklahoma, Vermont, West Virginia, and Wisconsin. *Id.* Although most of these criminal bans were enacted before *Roe v. Wade*, Louisiana's criminal abortion ban was not enacted until 1991. *Id.* Other criminal bans enacted after *Roe* have been struck down on constitutional grounds. *See, e.g.*, Leavitt v. Jane L., 518 U.S. 137, 138–39 (1996) (per curiam) (holding that the unconstitutional portion of a Utah statute purporting to ban abortions prior to twenty weeks of gestation in all but five enumerated circumstances was severable from a similar constitutional provision that applied to abortions after twenty weeks of gestation).

laws are clearly unconstitutional under *Roe v. Wade*[179] but might become enforceable in the event that *Roe* is overturned.[180] Thus, it is certainly possible that, as a matter of state or federal constitutional law,[181] some state fetal homicide statutes are unconstitutional as applied to pregnant women who harm their own fetuses.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[182] the Court reaffirmed *Roe v. Wade*'s "recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."[183] But *Casey* also reaffirmed and even strengthened the "principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."[184] Unfortunately, the U.S. Supreme Court's current abortion jurisprudence is not entirely clear with regard to whether and to what extent it is constitutionally permissible for a state to criminally prosecute a pregnant woman for causing injury to her own fetus. *Casey* stands for the proposition that states may not impose an undue burden on a woman's right to obtain a previability abortion from a healthcare professional,[185] but the Court's abortion cases do not directly address the question of whether a woman has any sort of fundamental right to take actions to abort a pregnancy on her own or to take other actions during pregnancy that risk harm to the development of the embryo or fetus she carries.[186]

Although the Supreme Court has not expressly addressed these issues, "self-abortions [are] currently being practiced in the United States," and "the danger they pose to both the women and the fetuses is real."[187] For example, the U.S. Court of Appeals for the Ninth Circuit recently heard a case—*McCormack v. Hiedeman*[188]—involving an Idaho woman who had been charged under Idaho's 1973 criminal abortion statute after she used medication purchased over the Internet to induce an abortion, due to the high cost of obtaining a legal abortion in rural Idaho.[189] If convicted, Jennie Linn McCormack faced a possibility of up to

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179. 410 U.S. 113 (1973).

180. NARAL PRO-CHOICE AM. FOUND., *supra* note 169, at 10. Indeed, four states—Louisiana, Mississippi, North Dakota, and South Dakota—have enacted criminal abortion bans explicitly contingent upon this eventuality. *See id.*

181. Sixteen states—Arkansas, Arizona, California, Connecticut, Florida, Illinois, Indiana, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, Oregon, Tennessee, Vermont, and West Virginia—have interpreted their state constitutions as being somewhat more protective of abortion rights than the federal constitution. *Id.* at 29.

182. 505 U.S. 833 (1992).

183. *Id.* at 846.

184. *Id.*

185. *See, e.g.*, *id.* at 878 ("As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.").

186. *See* Suzanne M. Alford, Note, *Is Self-Abortion a Fundamental Right?*, 52 DUKE L.J. 1011, 1012 (2003).

187. *Id.* For example, recall that Kawana Ashley shot herself for the express purpose of inducing an abortion. *See supra* notes 94–96 and accompanying text.

188. 694 F.3d 1004 (9th Cir. 2012).

189. *Id.* at 1007–08.

five years of imprisonment for violating the statute.[190] However, the court found, among other things, that the statute imposed an undue burden on McCormack's right to have an abortion.[191]

Although the *McCormack* court stated in dicta that the Supreme Court's abortion cases "in no way recognize, permit, or stand for the proposition that a state may prosecute a pregnant woman who seeks an abortion in a manner that may not be authorized by the state's statute,"[192] the court cited a number of specific factors that contributed toward its finding that the law violated *Casey*'s undue burden test. These included (1) the fact that the statute required women to "police their provider's compliance with Idaho's regulations" in order to avoid criminal liability,[193] (2) the fact that the FDA-approved medicine used to induce the abortion had been prescribed by a physician,[194] and (3) the fact that it would have been quite difficult for McCormack to obtain a legal abortion.[195]

The *McCormack* case indicates that state laws imposing criminal liability on pregnant women for causing harm to their own fetuses may violate *Casey's* undue burden test, and this analysis presumably applies to so-called fetal homicide statutes just as it does to criminal abortion statutes. It seems plausible to think that the court might have reached a different result under a different set of facts, particularly if the statute had only placed restrictions on McCormack's ability to "self-abort" a viable fetus. Because states have a compelling interest in promoting the life or potential life of the unborn and also in protecting the health of pregnant women,[196] imposing criminal liability on pregnant women who terminate their fetuses without obtaining a legal abortion may be consistent with the Supreme Court's abortion jurisprudence in certain situations—particularly once the fetuses obtain viability. However, as will be explained below, state legislators should be wary about exercising any constitutional authority they may have to punish pregnant women who harm their own fetuses at any stage of pregnancy.

IV. A CALL FOR REFORM

The proliferation of state fetal homicide statutes indicates that the statutes are generally popular due to widespread condemnation of violence against pregnant women.[197] Most women who lose pregnancies due to the actions of third parties feel, understandably, that they have suffered a serious wrong, and when these statutes are used as intended, there is no danger that the statutes could be used to infringe upon the reproductive rights of the pregnant women the statutes were designed to protect.[198]

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190. *See id.* at 1007.
191. *See id.* at 1014.
192. *Id.* at 1013.
193. *Id.* at 1015.
194. *Id.* at 1018.
195. *Id.* at 1017.
196. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871 (1992) (O'Connor, Kennedy & Souter, JJ.).
197. *See* Curran, *supra* note 134, at 1119.
198. *Cf.* Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569, 580–81 (1992) ("Traditionally, the law did not treat

However, when state fetal homicide statutes are used to prosecute the very women they were designed to protect, the statutes raise serious constitutional and public policy concerns. Furthermore, the consensus among medical experts is that the best way to protect fetal life is to provide pregnant women with treatment, not punishment, when they engage in self-destructive or risky behaviors that ultimately put their fetuses at risk.[199] Consequently, courts should be quick to grant motions to dismiss such prosecutions, and state legislators who have not done so should seriously consider adding language to their state's fetal homicide statutes clarifying that the statutes do not apply to pregnant women who harm their own fetuses.

A. Why Fetal Homicide Statutes Should Not Be Used to Prosecute Pregnant Women Who Harm Their Own Fetuses

As the public outcry that has erupted over the *Shuai* case indicates,[200] many people who might otherwise support fetal homicide statutes feel strongly that it is inappropriate to use such statutes to prosecute pregnant women who harm their own fetuses. Further, not only pro-choice and women's rights advocates but some pro-life groups have joined medical and public health associations in expressing concerns about the unintended consequences of interpreting the statutes too broadly.[201] Even if one believes it is morally wrong for a woman to harm her own fetus, there are several reasons why one might also believe it is unwise to prosecute such a woman for murder under existing fetal homicide statutes.

Among women who know they are pregnant, the miscarriage rate is about fifteen to twenty percent, and it is often difficult to determine with certainty what caused a particular miscarriage.[202] As a result, the criminal justice system would often encounter difficulties in reliably determining whether a miscarriage is the result of a specific action by a pregnant woman that is worthy of criminal penalty.[203] It may sometimes be difficult to determine whether the actions of a third party caused a miscarriage, but in the typical case involving a violent attack on a pregnant woman, the connection between the third party's actions and the fetal harm is usually pretty obvious. By way of contrast, because many miscarriages cannot be attributed to a particular cause,[204] prosecuting a pregnant woman for

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the fetus as a separate entity in contexts that would create an adversarial relationship between a pregnant woman and the fetus within her. Rather, the law recognized the fetus as a legal entity only for carefully defined purposes, with a view toward protecting and promoting the interests of women as well as their children.").

199. *See, e.g.*, Brief Submitted in Support of Appellant Bei Bei Shuai by Amici Curiae Am. Ass'n of Suicidology et al. at 18–22, Shuai v. State, 966 N.E.2d 619 (Ind. Ct. App. 2012) (No. 49A02-1106-CR-486), 2011 WL 3892890 [hereinafter Shuai AAS Brief].

200. *See supra* note 13 and accompanying text.

201. *See* Eleanor J. Bader, *Criminalizing Pregnancy: How Feticide Laws Made Common Ground for Pro- and Anti-Choice Groups*, TRUTHOUT (June 14, 2012, 11:18 AM), http://www.truth-out.org/news/item/9772-criminalizing-pregnancy-how-feticide-laws-made-common-ground-for-pro-and-anti-choice-groups.

202. *See Miscarriage*, MEDLINEPLUS, http://www.nlm.nih.gov/medlineplus/ency/article/001488.htm (last updated Oct. 31, 2013). "A miscarriage is the spontaneous loss of a fetus before the 20th week," while the loss of a pregnancy after that point is a "preterm delivery." *Id.* Accordingly, the statistic above describes losses of preterm fetuses only.

203. *See* Beety, *supra* note 165, at 61–62.

204. *See id.*

allegedly causing her own miscarriage runs a substantial risk of punishing her for an act outside her control. Given this risk and the severe emotional distress many women experience after a miscarriage,[205] it seems insensitive to even investigate whether a woman did something to cause her miscarriage.

Applying fetal homicide statutes to pregnant women who harm their own fetuses also fails to distinguish a violent attack against a pregnant woman from the actions of the pregnant woman herself.[206] This distinction is important because "[t]he woman has a constitutionally protected right to bodily autonomy, but the third party has no right to terminate the woman's pregnancy."[207] Reasonable minds may disagree regarding whether a woman who intentionally causes the death of a fetus deserves criminal punishment, but in light of these constitutional and policy considerations, it would seem that the pregnant woman, at a minimum, is less deserving of punishment than the third party. Consequently, it makes little sense to charge both the pregnant woman and the third party attacker with the same offense.

In addition, applying fetal homicide statutes to pregnant women with respect to their own fetuses "raises a number of policy, social, moral, and legal implications" and "under our form of government, the appropriate place for those issues to be resolved is in the legislature."[208] However, these special concerns were not resolved by the legislatures that passed the existing fetal homicide statutes because the fetal homicide statutes were generally enacted to protect pregnant women from crimes of violence, not to protect fetuses from the women who bear them.[209] Indeed, given the widespread popular support for both fetal homicide statutes and continued access to abortion,[210] it is entirely possible that some of the existing fetal homicide statutes would not have been enacted if it had been known at the time that they could be used to prosecute pregnant women with respect to their own fetuses.[211] To the extent that state legislators believe it is appropriate to impose criminal liability on pregnant women who harm their own fetuses, they should say so explicitly so that opponents of such a policy have an opportunity to raise their concerns.

Most importantly, perhaps, the consensus of medical and public health associations is that pregnant women who engage in self-destructive behavior should receive treatment, not punishment. To the extent such punishments are intended to protect unborn life, they actually have the opposite effect. As dozens of medical organizations and individual doctors explained in amicus briefs they filed on Shuai's behalf in the Court of Appeals of Indiana:

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205. In one influential study, "[20%] of the patients who had miscarried showed a grief reaction, 12% showed a depressive reaction, and 20% responded with a combined depressive and grief reaction." Manfred Beutel, Rainer Deckardt, Michael von Rad & Herbert Weiner, *Grief and Depression After Miscarriage: Their Separation, Antecedents, and Course*, 57 PSYCHOSOMATIC MED. 517, 517 (1995).

206. *See* Ramsey, *supra* note 26, at 765–68.

207. Alison Tsao, Note, *Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights?*, 25 HASTINGS CONST. L.Q. 457, 459 (1998).

208. State v. Ashley, 701 So. 2d 338, 343 (Fla. 1997) (Harding, J., specially concurring).

209. *See* text accompanying *supra* note 197.

210. *See* Ramsey, *supra* note 26, at 725, 729–30.

211. *See* Smith, *supra* note 24, at 1876–77.

> When prosecutors adopt a policy of criminal punishment for pregnant women whose actions are believed to threaten fetal welfare, the prosecutors actually make it *less* likely that fetal welfare will be promoted. . . . Severely depressed women in Indiana now know that if their physician or other health care provider finds out about any behavior that might be construed as a suicide attempt, they could be charged with attempted homicide or attempted feticide. . . . If trying to commit suicide can trigger criminal charges because of the potential for harm to the fetus, so can drinking alcohol or using other drugs. Instead of getting care for their alcoholism or drug addiction, pregnant women will try to avoid detection by physicians or other health care providers. As a result, physicians, nurses, psychologists and others are less able to provide the kinds of treatment that could address the woman's medical condition and help avert fetal harm.[212]

These harmful effects are not theoretical: in South Carolina, infant mortality has *increased* in the years following *Whinter v. State*, when the South Carolina Supreme Court first held that women who use drugs during pregnancy can be charged with criminal child abuse.[213]

Similarly, using fetal homicide statutes to prosecute pregnant women who harm their own fetuses could create perverse incentives for those women to abort unwanted pregnancies to avoid criminal prosecution.[214] If pregnant women who are addicted to drugs and alcohol know that they can be prosecuted for fetal homicide or attempted fetal homicide, they will have to choose between having an abortion and risking criminal prosecution.[215] Those who support prosecutions against women like Regina McKnight probably do not intend to encourage these women to obtain abortions, but that is the likely unintended result of imposing severe criminal liability on women who might otherwise seek treatment for their drug and alcohol abuse.

B. Why It Is Important for Fetal Homicide Statutes to Contain Explicit Maternal Exceptions Notwithstanding the Fact That Any Ambiguity in the Statutes Should Be Resolved in Favor of Pregnant Women Charged Under the Statutes

Although pro-choice groups have tended to oppose fetal homicide statutes,[216] some commentators have argued that this approach is mistaken: "[I]nstead of opposing fetal homicide laws, pro-choice groups should work to ensure that proposed fetal homicide laws have adequate exemptions for abortion, because poorly written fetal homicide laws are far more threatening to the right to choose

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212. *See* Shuai AAS Brief, *supra* note 199, at 20–21 (emphasis in original) (footnote omitted).

213. Am. Coll. of Obstetricians & Gynecologists Comm. on Ethics, Comm. Op. No. 321, *Maternal Decision Making, Ethics, and the Law*, 106 OBSTETRICS & GYNECOLOGY 1127, 1134 (1995). *See generally* text accompanying *supra* notes 109–11 (describing *Whitner*).

214. *See* Shuai AAS Brief, *supra* note 199 (citing AMA Bd. of Tr., *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2667 (1990)).

215. *See id.*

216. *See, e.g.*, NAT'L ADVOCATES FOR PREGNANT WOMEN, *supra* note 45.

than are well-designed fetal homicide laws."[217] Particularly in light of prosecutions of women like Bei Bei Shuai,[218] it seems critical that those who oppose such prosecutions not simply oppose the enactment of fetal homicide statutes, but engage with their proponents to ensure any law enacted is not susceptible to use by prosecutors against women for actions during pregnancy that may harm embryonic or fetal development.

To the extent that state legislators did not intend for their states' fetal homicide statutes to be used against pregnant women with respect to their own fetuses, it may make sense for them to resolve any ambiguity in the statutes legislatively before the courts attempt to resolve that ambiguity on their own. At the very least, legislators in states that may enact such statutes in the future should take care in how they draft the statutes. As the cases discussed in this Comment illustrate, even if prosecutions against women like Bei Bei Shuai are ultimately unsuccessful, the prosecutions themselves infringe upon the liberty of the women involved.[219] Shuai spent over a year in prison *before she was convicted of anything*.[220] Although it is not uncommon for persons accused of murder to be incarcerated pending trial,[221] Shuai's pretrial detention was especially problematic due to the strong constitutional arguments in support of the proposition that what she was accused of doing was no crime at all.

Further, even though the murder charges against Shuai were ultimately dropped, her privacy was severely invaded by the prosecution and the worldwide coverage it received.[222] The case generated a huge amount of legal fees as well. The lawyers representing Shuai donated over two million dollars in pro bono legal work to Shuai's defense.[223] Shuai did not bear those costs directly, but she certainly had to contribute a significant amount of her time and energy helping to prepare an adequate defense. Given that prosecutors who have brought charges against pregnant women for harming their own fetuses have tended to disproportionately target poor women of color,[224] it is also unlikely that many women targeted for such prosecutions would be able to mount the type of sophisticated legal defense that eventually succeeded in obtaining a dismissal of the murder and feticide charges against Shuai.

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217. Hickcox-Howard, *supra* note 135, at 322.

218. *See supra* Part II.A.

219. *See* Johnsen, *supra* note 198, at 600 ("In the Massachusetts case, *Commonwealth v. Pellegrini*, the court described the level of governmental intrusion into a woman's life entailed by such a prosecution: 'In order to prosecute Ms. Pellegrini, the commonwealth must intrude into her most private areas, her inner body.' It also noted that 'the level of state intervention and control over a woman's body required by the prosecution' would set a dangerous precedent for numerous other pregnancy related restrictions on women.") (footnotes omitted) (quoting Commonwealth v. Pellegrini, No. 87970, slip op. at 6, 9 (Mass. Super. Ct. Oct. 15, 1990), *rev'd*, 608 N.E.2d 717 (Mass. 1993)).

220. *See supra* Part II.A.

221. *See supra* notes 11–12 and accompanying text.

222. *See supra* text accompanying note 18.

223. Dave Stafford, *Shuai Case Resolved, Thorny Legal Issues Remain*, IND. LAW., Aug. 14–27, 2013, at 1.

224. *See* Paltrow & Flavin, *supra* note 19, at 311.

CONCLUSION

Prosecuting pregnant women for harming their own fetuses raises serious constitutional questions, and it is bad public policy because it actually undermines the goal of protecting fetal life. Although it seems likely that such prosecutions will be rare, the prosecutions will profoundly affect the lives of women unfortunate enough to be targeted for them. Judges hearing such cases should be quick to dismiss them, but state legislators can protect women like Shuai from such prosecutions by resolving any ambiguity in the intended scope of the statutes. As cases from Alabama and South Carolina illustrate, such legislation would need to cover all of the potentially relevant statutes to avoid merely redirecting prosecutorial attention to different statutes. Nevertheless, a maternal exception like the kind included in many fetal homicide laws likely would have prevented the Indianapolis prosecutor from charging Bei Bei Shuai. Therefore, to the extent that state legislators did not intend for their state fetal homicide statutes to allow for prosecutions of women in Shuai's situation, those legislators that have not done so should consider adding language to their fetal homicide statutes clarifying that they do not apply to pregnant women with respect to their own fetuses.

APPENDIX

Table 1. State Authorities Recognizing Fetuses as Potential Victims of Violent Crimes[225]

State	Authorities	Gestational Age Required	Maternal Exception?
Alabama	ALA. CODE § 13A-6-1(a)(3) (LexisNexis 2005) (defining "person" as including the unborn for purposes of the state's murder, manslaughter, criminally negligent homicide, and assault statutes).	Any stage of development	Yes
Alaska	ALASKA STAT. § 11.41.150 (LexisNexis 2012) (murder of an unborn child); § 11.41.160 (manslaughter of an unborn child); § 11.41.170 (criminally negligent homicide of an unborn child); § 11.41.180 (applicability); § 11.41.280 (assault of an unborn child in the first degree); § 11.41.282 (assault of an unborn child in the second degree); § 11.81.900(b)(62) (definitions).	Any stage of development	Yes
Arizona	ARIZ. REV. STAT. ANN. § 13-1101 (West 2010) (definitions); § 13-1102 (negligent homicide); § 13-1103 (manslaughter); § 13-1104 (second-degree murder); § 13-1105 (first-degree murder).	Any stage of development	Yes
Arkansas	ARK. STAT. ANN. § 5-1-102(13) (2006 & Supp. 2013) (defining "person" and "unborn child" for purposes of the state's capital murder, first-degree murder, second-degree murder, manslaughter, and negligent homicide statutes); § 5-13-201 (battery in the first degree).	Twelve weeks for the homicide statutes; none provided for battery	Yes for the homicide statutes; none provided for battery

225. This table surveys those state criminal statutes that define fetuses as a potential victim of a violent crime. It does not include every state law governing the legal rights of fetuses, nor does it necessarily include every state statute proscribing punishments for violent crimes that result in fetal harm. For example, it does not include those statutes that provide extra penalties for crimes of violence committed against pregnant victims. *See, e.g.*, COLO. REV. STAT. ANN. § 18-1.3-401(13)(a) (West 2013) (providing a certain range of punishments for crimes of violence if "(I) [t]he victim of the offense was pregnant at the time of commission of the offense; and (II) [t]he defendant knew or reasonably should have known that the victim of the offense was pregnant."). Because such statutes recognize the pregnant woman herself—and not her fetus—as the victim of the offense, no pregnant woman could possibly be prosecuted under such a statute for harming her own fetus. For similar reasons, this table does not survey cases from those states that still adhere to the born alive rule. *See, e.g.*, State v. Courchesne, 998 A.2d 1 (Conn. 2010). At least in modern times, the born alive rule has never been interpreted as applying to pregnant women with respect to their own fetuses because doing so would create a very bizarre situation: a woman could avoid criminal prosecution entirely if she made sure the fetus died before birth, but she might be charged with murder if she allowed her doctors to do what they could to save the fetus.

Table 1 (*continued*)

State	State Authorities Recognizing Fetuses as Potential Victims of Violent Crimes	Gestational Age Required	Maternal Exception?
California	CAL. PENAL CODE § 187(a) (West 2008) (defining murder as "the unlawful killing of a human being, or a fetus, with malice aforethought").	Post-embryonic[226]	Yes
Colorado	None	—	—
Connecticut	None	—	—
Delaware	None	—	—
District of Columbia	None	—	—
Florida	FLA. STAT. ANN. § 316.193 (West 2006 & Supp. 2013) (DUI manslaughter); § 782.071 (West 2007) (vehicular homicide); § 782.09 (murder & manslaughter).	Viability	Yes for manslaughter; implied for the others[227]
Georgia	GA. CODE ANN. § 16-5-20 (2007) (simple assault); § 16-5-28 (assault of an unborn child); § 16-5-29 (battery of an unborn child); § 16-5-80 (feticide and voluntary manslaughter of an unborn child); § 40-6-393.1 (feticide by vehicle); § 52-7-12.3 (West, WestlawNext through 2013 reg. sess.) (feticide by vessel).	Any stage of development	Yes
Hawaii	None	—	—
Idaho	IDAHO CODE ANN. § 18-4001 (2004) (murder); § 18-4006 (Supp. 2013) (manslaughter); § 18-4016 (2004) (definitions).	In utero	Yes
Illinois	720 ILL. COMP. STAT. ANN. § 5/9-1.2 (West Supp. 2013) (intentional homicide of an unborn child); § 5/9-2.1 (West 2002) (voluntary manslaughter of an unborn child); § 5/9-3.2 (involuntary manslaughter and reckless homicide of an unborn child); § 5/12-3.1 (West Supp. 2013) (battery and aggravated battery of an unborn child).	Post-fertilization	Yes

226. People v. Davis, 872 P.2d 591, 599 (Cal. 1994).

227. Additionally, in light of the Florida Supreme Court's *Ashley* decision, it seems highly unlikely that the court would interpret these statutes as applying to pregnant women with respect to their own fetuses, even if the statutes were somewhat ambiguous on that point. *See supra* Part II.B.

Table 1 (*continued*)

State	State Authorities Recognizing Fetuses as Potential Victims of Violent Crimes	Gestational Age Required	Maternal Exception?
Indiana	IND. CODE § 35-42-1-1 (2008) (murder); § 35-42-1-3 (voluntary manslaughter); § 35-42-1-4 (involuntary manslaughter) § 35-42-1-6 (feticide).	Manslaughter and murder require viability; feticide requires only a pregnancy	No
Iowa	IOWA CODE ANN. § 707.7 (West 2003 & Supp. 2013) (feticide); § 707.8 (2003) (serious injury to a human pregnancy).	Third trimester for feticide; injury to a pregnancy requires only a pregnancy	No for feticide; yes for injury to pregnancy
Kansas	KAN. STAT. ANN. § 21-5419 (Supp. 2012) (defining an "unborn child" as a potential victim of capital murder, first-degree murder, second-degree murder, voluntary manslaughter, involuntary manslaughter, vehicular homicide, and battery).	Post-fertilization	Yes
Kentucky	KY. REV. STAT. ANN. § 507A.010 (LexisNexis 2008) (definitions); § 507A.020 (first-degree fetal homicide); § 507A.030 (second-degree fetal homicide); § 507A.040 (third-degree fetal homicide); § 507A.050 (fourth-degree fetal homicide).	Conception[228]	Yes
Louisiana	LA. REV. STAT. ANN. § 14:2 (Supp. 2013) ("unborn child"); § 14:32.5 (2007) (definition of feticide); § 14:32.6 (first-degree feticide); § 14:32.7 (second-degree feticide); § 14:32.8 (Supp. 2013) (third-degree feticide).	Fertilization and implantation	Yes
Maine	None	—	—
Maryland	MD. CODE ANN., CRIM. LAW § 2-103 (LexisNexis 2012) (defining "viable fetuses" as potential victims of murder and manslaughter).	Viability	Yes

228. The Kentucky statute provides that the term "'[u]nborn child' means a member of the species homo sapiens in utero from conception onward, without regard to age, health, or condition of dependency." KY. REV. STAT. ANN. § 507A.010(1)(c) (LexisNexis 2008). The statute seems to use "conception" as a synonym for "fertilization." However, this definition of "conception" is contrary to the medical definition of the term, which defines it as a synonym for "implantation." *See* Johnsen, *supra* note 106, at 182 n.13 (citing OBSTETRIC-GYNECOLOGIC TERMINOLOGY 229, 327 (Edward C. Hughes ed., 1972)). Many of the statutes surveyed in this Appendix also create a legal definition of "conception" that is at odds with the medical definition of the word.

Table 1 (*continued*)

State	State Authorities Recognizing Fetuses as Potential Victims of Violent Crimes	Gestational Age Required	Maternal Exception?
Massachusetts	Commonwealth v. Lawrence, 536 N.E.2d 571, 571 (Mass. 1989) (holding that a viable fetus is considered a human being for purposes of common law murder); Commonwealth v. Cass, 467 N.E.2d 1324, 1324 (Mass. 1984) (holding that a viable fetus is considered a person for purposes of the state's vehicular homicide statute).	Viability	No
Michigan	MICH. COMP. LAWS ANN. § 750.322 (West 2004) (criminalizing willful killing of unborn child by injury to the mother); § 750.323 (death of unborn child by use of medicine or instrument).	Quickening	No for death of unborn child by use of medicine; implied for willful killing by injury to mother
Minnesota	MINN. STAT. ANN. § 609.21 (West 2009) (criminal vehicular homicide and injury); § 609.266 (definitions); § 609.2661 (murder of unborn child in the first degree); § 609.2662 (murder of unborn child in the second degree); § 609.2663 (murder of unborn child in the third degree); § 609.2664 (manslaughter of unborn child in the first degree); § 609.2665 (manslaughter of unborn child in the second degree); § 609.267 (assault of unborn child in the first degree); § 609.2671 (assault of unborn child in the second degree); § 609.2672 (assault of unborn child in the third degree); § 609.268 (injury or death of unborn child in commission of crime).	Conception	Yes
Mississippi	MISS. CODE ANN. § 97-3-19 (West 2011) (defining an "unborn child" as a potential victim of murder); § 97-3-37 (defining an "unborn child" as a potential victim of numerous enumerated crimes of violence).	Any stage of development	No
Missouri	MO. ANN. STAT. § 1.205 (West 2000) (granting the "unborn child" "all the rights, privileges, and immunities available to other persons, citizens, and residents").[229]	Conception	No

229. This statute is clearly unconstitutional to the extent that it conflicts with the Supreme

Table 1 (*continued*)

State	State Authorities Recognizing Fetuses as Potential Victims of Violent Crimes	Gestational Age Required	Maternal Exception?
Montana	None	—	—
Nebraska	NEB. REV. STAT. ANN. § 28-389 (LexisNexis 2009) (definitions); § 28-390 (applicability); § 28-391 (murder of an unborn child in the first degree); § 28-392 (murder of an unborn child in the second degree); § 28-393 (manslaughter of an unborn child); § 28-394 (LexisNexis 2009 & Supp. 2013) (motor vehicle homicide of an unborn child); § 28-397 (LexisNexis 2009) (assault of an unborn child in the first degree); § 28-398 (assault of an unborn child in the second degree); § 28-399 (assault of an unborn child in the third degree).	Any stage of development	Yes
Nevada	NEV. REV. STAT. ANN. § 200.210 (LexisNexis 2012) (willful killing of unborn child).	Quickening	Implied
New Hampshire	None	—	—
New Jersey	None	—	—
New Mexico	None	—	—
New York	None	—	—
North Carolina	N.C. GEN. STAT. ANN. § 14-23.1 (definition of "unborn child") (West Supp. 2012); § 14-23.2 (murder of an unborn child); § 14-23.3 (voluntary manslaughter of an unborn child); § 14-23.4 (involuntary manslaughter of an unborn child); § 14-23.5 (assault inflicting serious bodily injury on an unborn child); § 14-23.6 (battery on an unborn child); § 14-23.7 (applicability).	Any stage of development	Yes
North Dakota	N.D. CENT. CODE § 12.1-17.1-01 (2012) (definitions); § 12.1-17.1-02 (murder of an unborn child); § 12.1-17.1-03 (manslaughter of an unborn child); § 12.1-17.1-04 (negligent homicide of an unborn child).	Conception	Yes

Court's abortion jurisprudence. Although this statute was the subject of *Webster v. Reproductive Health Services*, the Supreme Court expressly declined to rule on the statute's constitutionality. *See* 492 U.S. 490, 505–06 (1989); *see also supra* note 167 and accompanying text.

Table 1 (*continued*)

State	State Authorities Recognizing Fetuses as Potential Victims of Violent Crimes	Gestational Age Required	Maternal Exception?
Ohio	OHIO REV. CODE ANN. § 2903.01 (LexisNexis 2010) (aggravated murder); § 2903.02 (murder); § 2903.03 (voluntary manslaughter); § 2903.04 (involuntary manslaughter); § 2903.041 (reckless homicide); § 2903.05 (negligent homicide); § 2903.06 (aggravated vehicular homicide); § 2903.09 (definitions).	Fertilization	Yes
Oklahoma	OKLA. STAT. ANN. tit. 21, § 652 (West 2002 & Supp. 2013) (discharging firearms and assault and battery); tit. 21, § 691 (West Supp. 2013) (defining an "unborn child" as a potential victim of homicide); tit. 63, § 1-730 (West 2004 & Supp. 2013) (definitions).	Fertilization	Partial
Oregon	None	—	—
Pennsylvania	18 PA. CONS. STAT. ANN. § 2603 (West 1998) (criminal homicide of unborn child); § 2604 (murder of unborn child); § 2605 (voluntary manslaughter of unborn child); § 2606 (aggravated assault of unborn child); § 2608 (applicability); § 3203 (definitions).	Fertilization	Yes
Rhode Island	R.I. GEN. LAWS § 11-23-5 (2002) (willful killing of unborn quick child).	Quickening	No
South Carolina	S.C. CODE ANN. § 16-3-1083 (Supp. 2012) (death or injury of child in utero due to commission of violent crime).	Any stage of development	Yes
South Dakota	S.D. CODIFIED LAWS § 22-1-2 (2006) (definitions); § 22-16-1 (defining "homicide" for purposes of the state's homicide statutes); § 22-16-1.1 (fetal homicide); § 22-16-15 (manslaughter); § 22-16-41 (vehicular homicide).	Fertilization	Yes
Tennessee	TENN. CODE. ANN. § 39-13-107 (Supp. 2012) (defining embryos and fetuses as potential victims for purposes of the assault statutes); § 39-13-214 (Supp. 2013) (defining embryos and fetuses as potential victims for purposes of the homicide statutes).	Any stage of development	Yes
Texas	TEX. PENAL CODE ANN. § 1.07 (West Supp. 2012) (defining "individual" for purposes of the entire penal code); § 19.06 (applicability of homicide statutes); § 22.12 (applicability of assault statutes).	Fertilization	Yes

Table 1 (*continued*)

State	State Authorities Recognizing Fetuses as Potential Victims of Violent Crimes	Gestational Age Required	Maternal Exception?
Utah	UTAH CODE ANN. § 76-5-201 (LexisNexis 2012) (criminal homicide).	Any stage of development	Partial
Vermont	None	—	—
Virginia	VA. CODE ANN. § 18.2-32.2 (2009) (killing a fetus).	Postembryonic	Implied
Washington	WASH. REV. CODE ANN. § 9A.32.060 (West 2009) (manslaughter in the first degree).	Quickening	Implied
West Virginia	W. VA. CODE ANN. § 61-2-30 (LexisNexis 2010) (defining embryos and fetuses as potential victims of certain enumerated crimes of violence).	Fertilization	Yes
Wisconsin	WIS. STAT. ANN. § 940.01 (West 2005) (first-degree intentional homicide); § 940.02 (West 2005) (first-degree reckless homicide); § 940.03 (West 2005 & Supp. 2012) (felony murder); § 940.04 (abortion) (West 2005 & Supp. 2012); § 940.05 (West 2005) (second-degree intentional homicide); § 940.06 (second-degree reckless homicide); § 940.08 (West 2005 & Supp. 2012) (homicide by negligent handling of dangerous weapons, explosives, or fire); § 940.09 (West 2005 & Supp. 2012) (homicide by intoxicated use of vehicle or firearm); § 940.10 (2005) (homicide by negligent operation of a vehicle); § 940.13 (abortion exception); § 940.195 (battery and aggravated battery to an unborn child).	Conception	Yes for abortion; no for the rest
Wyoming	None	—	—

THE SHACKLING OF INCARCERATED PREGNANT WOMEN: A HUMAN RIGHTS VIOLATION COMMITTED REGULARLY IN THE UNITED STATES

An Alternative Report to the Fourth Periodic Report of the United States of America Submitted Pursuant to the International Covenant on Civil and Political Rights

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August 2013

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ACLU National Prison Project
The National Prison Project of the ACLU Foundation (NPP) was established in 1972 to protect and promote the civil and constitutional rights of prisoners. Since its founding, the Project has challenged unconstitutional conditions of confinement and over-incarceration at the local, state and federal level through public education, advocacy and successful litigation.

International Human Rights Clinic, University of Chicago Law School
The International Human Rights Clinic (Clinic) works with non-governmental organizations to design and implement human rights cases and projects. Students learn human rights lawyering skills by working on these cases and projects, all of which are supervised by the director of the Clinic. The Clinic uses international human rights laws and norms to draw attention to human rights violations, develop practical solutions to those problems using interdisciplinary methodologies, and promote accountability on the part of state and non-state actors.

We are grateful to the following individuals and organizations for providing us information for this Report: ACLU Foundation of Florida, Arkansas Voices for the Children Left Behind, Diana Claitor, Correctional Association of New York, Human Rights Project For Girls (rights4girls.com), Legal Aid Society, NARAL Pro-Choice America, National Women's Law Center, Pennsylvania Prison Society, Maggie Jo Poertner, Prisoner's Rights Project, Rachel Roth, and the Texas Jail Project.

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I. EXECUTIVE SUMMARY

The international human rights community has repeatedly expressed concern about the shackling of pregnant women deprived of their liberty in the United States. The federal government has adopted an anti-shackling policy and some states have passed laws or policies restricting shackling. Despite these positive developments, shackling of women prisoners continues to occur in violation of U.S. and international law.

Shackling pregnant women increases the substantial medical risks of childbirth. Shackling of pregnant women is a harmful, painful, and demeaning practice that is rarely necessary to preserve safety. Most female prisoners are non-violent offenders, and women who are pregnant, in labor, or in postpartum recovery are especially low flight and safety risks.

Both international law and U.S. constitutional law prohibit shackling during certain stages of pregnancy, childbirth, and post-partum recovery. Article 10 of the International Covenant on Civil and Political Rights (the "ICCPR") guarantees that persons deprived of their liberty be treated with dignity and respect. Article 7 prohibits torture, or cruel, inhuman, or degrading treatment or punishment. The Eighth Amendment to the U.S. Constitution prohibits cruel or unusual punishments, which some Federal courts have interpreted to prohibit the shackling of pregnant prisoners during childbirth.

While the U.S. federal government has adopted an anti-shackling policy that applies to federal prisons and 24 states have adopted policies limiting (to varying degrees) shackling of pregnant prisoners, legislation enacted by state legislatures is preferable to the adoption of an administrative policy by the executive. Indeed, 18 state legislatures in the United States have in fact passed legislation restricting shackling, but many such laws contain broad exceptions or are not adequately implemented.

We recommend that the UN Human Rights Committee (the "Committee") that monitors compliance with the ICCPR ask and encourage the United States to 1) enact a federal law banning the practice of shackling prisoners during pregnancy, covering, at a minimum, the third trimester, transport to medical facilities, labor, delivery and postpartum recovery, 2) take appropriate measures to ensure that those 32 states that do not have anti-shackling laws to enact comprehensive laws, including training of correctional officers, 3) to review existing state anti-shackling laws and policies to ensure that they are comprehensive and fully-implemented, and 4) to conduct an empirical study to determine the scope of shackling in U.S. prisons and to understand why the practice of shackling pregnant women persists.

II. METHODOLOGY

In conducting research for this Report, the authors: A) undertook desk research, B) gathered information from advocates around the United States who work on anti-shackling efforts, and C) contacted prison officials around the country to obtain information on state level anti-shackling policies. Below is a more detailed description of the research undertaken by the authors.

A. Desk Research: The authors of this Report conducted research to find anti-shackling laws and policies in all 50 U.S. states. Additionally, the authors reviewed legal, medical,

social science books and journals, non-government organization reports, and media reports.

B. Information from Advocates: The authors contacted by email and phone, numerous NGOs, advocacy groups, and experts in the United States that have worked on or are working on anti-shackling advocacy work. Feedback, comments, and information were sought on the current status of the law or policies in the relevant jurisdictions, as well as on the implementation of such laws and policies. In addition, this Report includes information presented at an expert meeting on women in prison convened by the International Human Rights Clinic at The University of Chicago Law School on behalf of Rashida Manjoo, the UN Special Rapporteur on Violence against Women held on May 14, 2013.

C. Information from State officials: In states where anti-shackling polices were not publicly available, the authors contacted the departments responsible for the operation of the prison system. The authors requested the departments to provide copies of any anti-shackling policies they have adopted. The authors received several responses; the information is included in the Appendix.

III. THE HUMAN RIGHTS COMMITTEE HAS IDENTIFIED SHACKLING AS A HUMAN RIGHTS PROBLEM IN THE UNITED STATES

In response to the U.S. government's Second and Third Periodic Report submitted to the Committee pursuant to the ICCPR in 2006, the Committee raised questions about the shackling of pregnant women deprived of their liberty in the United States.[1] The Committee also expressed concern about "the shackling of detained women during childbirth" in its Concluding Observations on United States' Second and Third Periodic Report.[2] Specifically, the Committee recommended, that the United States "prohibit the shackling of detained women during childbirth."[3]

In its Fourth Periodic Report to the Committee, submitted at the end of 2011, the U.S. government stated that the Bureau of Prisons, which oversees the operation of federal prisons, "would no longer engage in the practice of shackling pregnant women during transportation, labor and delivery, except in the most extreme circumstances."[4] The Fourth Periodic Report also states that many U.S. states have restricted the use of restraints on incarcerated pregnant women in state prisons,[5] and that there is a "significant trend toward developing explicit

[1] *List of Issues to Be Taken Up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America* ¶ 21, UN Human Rights Council, 86th session (Apr. 26, 2006), UN Doc CCPR/C/USA/Q/3, online at http://www.ushrnetwork.org/sites/ushrnetwork.org/files/list_of_issues_-_us-2006.pdf (visited Aug 23, 2013).

[2] *Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee* ¶ 33, UN Human Rights Committee, 2395th mtg (July 27, 2006), UN Doc CCPR/C/SR.2395, online at http://www1.umn.edu/humanrts/usdocs/hruscomments2.html (visited Aug 23, 2013).

[3] Id.

[4] *Consideration of reports submitted by States parties under article 40 of the Covenant, Fourth periodic report: United States of America* ¶ 231, UN Human Rights Committee (May 22, 2012), UN Doc CCPR/C/USA/4, online at http://www.refworld.org/docid/5146fe622.html (visited Aug 23, 2013).

[5] Id at ¶ 232.

policies" banning the practice of shackling pregnant inmates.[6]

At its 107th session in March 2013, the Committee released its List of Issues in connection with the Fourth Periodic Report of the United States and requested further clarification as to "whether the State party intends to prohibit the shackling of detained pregnant women during transport, labor, delivery and post-delivery, under all circumstances."[7] The U.S. government responded to these questions in a manner similar to its statements in the Fourth Periodic Report, highlighting those federal and state anti-shackling laws and policies that are in compliance the ICCPR.[8]

IV. SHACKLING IS HARMFUL AND UNJUSTIFIED

A. Background on Shackling

The women's prison population has skyrocketed in the United States during the last few decades.[9] A disproportionate number of these women are African American and Latina.[10] About 6% of incarcerated women are pregnant.[11] Many incarcerated women are shackled during labor, childbirth, or recovery even in places where policies or laws prohibit such shackling.[12] The practice of shackling includes placing shackles or handcuffs around a woman's ankles or wrists and sometimes chains around her stomach.[13] Evidence that the practice continues throughout the United States is demonstrated by the fact that in recent years both individual plaintiffs and class

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[6] Id at ¶ 233.

[7] *List of issues in relation to the fourth periodic report of the United States of America* ¶ 16, UN Human Rights Committee, 107th session (Apr 29, 2013), UN Doc CCPR/C/USA/Q/4, online at http://www.ushrnetwork.org/sites/ushrnetwork.org/files/official_usa_iccpr_list_of_issues_-2013.pdf (visited August 23, 2013).

[8] *United States Responses to Questions from the United Nations Human Rights Committee Concerning the Fourth Periodic Report of the United States on the International Covenant on Civil and Political Rights* ¶ 85, UN Human Rights Committee, 109th session (Apr 29, 2013), UN Doc CCPR/C/USA/Q/4/Add.1, online at http://www2.ohchr.org/english/bodies/hrc/hrcs109.htm (visited Aug 23, 2013).

[9] There are almost 110,000 women in state and federal correctional facilities in the United States, and nearly another 100,000 in county and city jails. U.S. Bureau of Justice Statistics, *Prisoners in 2012 - Advance Count* at 2, Table 1 (July 2013), NCJ 242467, online at http://www.bjs.gov/content/pub/pdf/p12ac.pdf (visited Aug 23, 2013); U.S. Bureau of Justice Statistics, *Jail Inmates at Midyear 2012 - Statistical Tables* at 5, Table 2 (May 2013), NCJ 241264, online at http://www.bjs.gov/content/pub/pdf/jim12st.pdf (visited Aug 23, 2013).

[10] The Sentencing Project Fact Sheet at 2 (September 2012), online at http://www.sentencingproject.org/doc/publications/cc_Incarcerated_Women_Factsheet_Sep24sp.pdf (visited Aug 23, 2013).

[11] Ginette Gosselin Ferszt, *Giving Birth in Shackles: It's time to stop restraining pregnant inmates during childbirth*, 110(2) American J Nursing 11 (2010); American College of Nurse-Midwives, *Position Statement: Shackling/Restraint of Pregnant Women Who Are Incarcerated* at 1, online at http://www.midwife.org/ACNM/files/ACNMLibraryData/UPLOADFILENAME/000000000276/Anti-Shackling%20Position%20Statement%20June%202012.pdf (visited Aug 23, 2013).

[12] See *Brawley v. State of Washington*, 712 F Supp 2d 1208 (WD Wash 2010); *Zaborowski v. Dart*, WL 6660999 (ND Ill. 2011).

[13] See Women's Prison Association: Institute on Women & Criminal Justice, *Laws Banning Shackling During Birth Gaining Momentum Nationwide* at 1, online at http://www.wpaonline.org/pdf/Shackling%20Brief_final.pdf (visited Aug 23, 2013).

action groups have brought claims involving shackling in Arkansas, Illinois, Tennessee, Washington, and the District of Columbia.[14]

Some observers argue that the practice of shackling pregnant women deprived of their liberty became common as an unexpected consequence of the adoption of gender-neutral policies in criminal justice systems.[15] Male inmates were placed in restraints when hospitalized for check-ups or treatment. These same policies were then advanced for women without regard to women's particular circumstances. Others have argued that shackling occurs because of the "unthinking" importation of prison rules into the hospital settings.[16] A recent article asserts that both "race and gender are at the heart of the practice of shackling female prisoners during labor and childbirth."[17] It further notes that shackling "appears as a manifestation of the punishment of 'unfit' or 'undesirable' women for exercising the choice to become mothers."[18]

> *"As I was close to delivering my baby, I was in a lot of pain and I was screaming for the nurse…. The sheriff didn't give me any sympathy or any privacy. He left the handcuff shackled to the bed and the leg iron shackled to the stirrup while I was delivering my baby.*
>
> - Melissa Hall, arrested for the possession of a controlled substance in 2006 in Illinois. Melissa's left ankle and left wrist were shackled during pregnancy and labor. Recently, a federal district court approved a $4.1 million settlement for a class action of which Ms. Hall is a member.
>
> [Source: Testimony before Illinois Senate, October 2011]

B. Shackling is Harmful to the Health of the Woman and the Child

Incarcerated women often experience high-risk pregnancies due to a lack of adequate prenatal nutrition and care in prisons. Shackling increases the risks associated with pregnancy, labor and delivery.[19] Major national medical and correctional associations have explicitly opposed the practice.[20] Medical professionals have articulated several arguments against the shackling of pregnant women:

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[14] *Nelson v Corr Med Servs*, 583 F 3d 522, 533 (8th Cir 2009); *Zaborowski*, WL 6660999; *Villegas v Metro Gov't of Nashville*, 709 F 3d 563 (6th Cir 2013); *Brawley*, 712 F Supp 2d 1208; *Women Prisoners of DC v District of Columbia*, 93 F.3d 910 (DC Cir 1996).

[15] See Claire Louise Griggs, *Birthing Barbarism: The Unconstitutionality of Shackling Pregnant Prisoners*, 20(1) Am U J Gender Soc Pol & L 247, 250 (2011); Colleen Mastony, *Childbirth in Chains*, News (Chicago Tribune July 18, 2010), online at http://articles.chicagotribune.com/2010-07-18/news/ct-met-shackled-mothers-20100718_1_shackles-handcuffs-labor (visited Aug 23, 2013).

[16] Dana L. Sichel, *Giving Birth in Shackles: A Constitutional and Human Rights Violation,* 16 Am U J Gender Soc Pol & L. 223, 235 (2008).

[17] Pricilla A. Ocen, *Race, Punishing Prisoners: Incarceration, and the Shackling of Pregnant Prisoners*, 100 Cal L Rev 1239, 1243 (2012).

[18] Id at 1244.

[19] See American College of Obstetricians and Gynecologists, Women's Health Care Physician: Committee on Health Care for Underserved Women, *Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females* at 3 (Committee Opinion Number 511, Nov 2011), online at http://www.acog.org/~/media/Committee%20Opinions/Committee%20on%20Health%20Care%20for%20Underserved%20Women/co511.pdf?dmc=1&ts=20130725T1738421657 (visited Aug 23, 2013).

[20] See, for example, Id; American Medical Association, *Issue Brief: Shackling of pregnant prisoners* (2011); American College of Nurse-Midwives, *Position Statement* (cited in note 11); American Correctional Health Services Association, *Position Statement: Use of Shackles on Pregnant Inmates* (Aug 10, 2009), online at

1. Assessment of physical conditions: Physical restraints frustrate the ability of physicians to adequately assess and evaluate the conditions of the mother and the fetus during labor and delivery.[21] Relatively common but nonetheless serious complications such as hypertensive disease, which accounts for 17.6% of maternal deaths in the United States, and vaginal bleeding are more difficult to diagnose and treat if a woman is shackled[22] Additionally, it is not possible to conduct diagnostic tests required to determine the source of abdominal pains associated with pregnancy when a woman is shackled.[23]

2. Labor: Current research shows that walking, changing positions, or otherwise moving about can reduce both the duration and painfulness of labor.[24] Women who are shackled to a bed are unable to move and thus experience longer and more painful labor than is necessary.[25] Shackling also restricts childbirth positions such as squatting that some consider more effective than traditional positions.[26]

"Being shackled in transport to give birth was a demoralizing, uncomfortable and frightening experience. I was at Dwight [Correctional Facility] when I went into labor. I was placed in handcuffs, had a heavy chain across my belly that my hands were attached to, along with leg irons on my ankles. I was scared to walk because of the restrictive leg irons…

When I got to the hospital, I felt the cold, hard stares of people as I was escorted into the lobby of the hospital. People were whispering and pointing at me and the receptionist was very rude. Birthing my child should have brought joy to me, but instead I remember the alienation and the looks of disgust I got. No one saw me as a woman – I was hidden away in the last room like someone's dirty little secret. I have never committed a violent crime – I am minimum security, but I was treated like I was a murderer."

- LaDonna Hopkins, an Illinois resident, was charged for a nonviolent crime in 2011. She was shackled during transport to the hospital while in labor.

[Source: Testimony before Illinois House of Representatives, March 2011]

3. Emergency procedures: Reduced mobility due to shackling may also cause undue delay in the event that an emergency operation is necessary. For instance, in the event of an emergency caesarian delivery, even a short delay may result in permanent brain damage for the baby.[27] Shackling also compromises the physician's ability to perform necessary

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http://www.achsa.org/position-statements/ (visited Aug 23, 2013); Association of Women's Health, Obstetric and Neonatal Nurses, *Position Statement: Shackling Incarcerated Pregnant Women*, 40(6) J Obstretric Gynecologic & Neonatal Nursing 817 (2011).

[21] American College of Obstetricians and Gynecologists, *Health Care for Pregnant and Postpartum Incarcerated Women* at 3 (cited in note 19).

[22] Id.

[23] Id.

[24] Association of Women's Health, Obstetric and Neonatal Nurses, *Position Statement* at 817 (cited in note 20).

[25] Id at 817-818.

[26] See Jason Gardosi, Noreen Hutson, Chris B-Lynch, Randomised, *Controlled Trial of Squatting in the Second Stage of Labour*, 334 The Lancelet 74-77 (July 8, 1989).

[27] Amnesty International USA, *Women in Custody* at 30, online at http://www.amnestyusa.org/pdf/custodyissues.pdf (visited Aug 23, 2013).

procedures in the event of other complications during delivery, such as hemorrhages, a decrease in fetal heart tones, and preeclampsia.[28]

4. Risk of fall: The pregnant uterus shifts a woman's center of gravity. Shackles may throw a pregnant woman off-balance or make walking more difficult, which may increase her risk of falling.[29] During a fall, a shackled woman is unable to use her arms to protect herself and her abdomen, which may result in harm to the mother and the baby.[30]

5. Postpartum recovery and bonding: Restricting mobility during the postpartum stage places the woman at a substantial risk of thromboembolic disease and postpartum hemorrhage.[31] Shackling also limits the mother's ability to breastfeed and bond with her newborn.[32] A mother's contact with her newborn is critical to establishing an appropriate mother-child attachment necessary for optimal child development.[33]

C. Justifications for Shackling are Unpersuasive

Supporters of shackling offer several justifications for its continued use. First, they argue that shackling prevents pregnant inmates from harming themselves and others. Steve Patterson of the Cook County Sheriff's Office in Illinois explained that the practice of shackling continues to exist because "[w]e have to bring inmates to the same area that the general public comes to."[34] Patterson further emphasized the need to consider the interests of the other patients in the hospital. He stated, "if you're laying [sic] in hospital bed, and in the next hospital bed is a woman who's in on a double murder charge, because she's pregnant she shouldn't be handcuffed to the side of the bed – I think if you're the person laying [sic] in bed next to her you might disagree."[35]

Second, some supporters justify shackling on the basis that it prevents pregnant inmates from attempting to escape. As one department of corrections officer said: "Basically, we don't want them to escape – that's the bottom line."[36] Moreover, Patterson claimed that in 1998, a pregnant inmate escaped from the hospital during a medical visit and was caught on hospital grounds.[37]

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[28] Id. See also American College of Obstetricians and Gynecologists, *Health Care for Pregnant and Postpartum Incarcerated Women* at 3 (cited in note 19).
[29] American College of Obstetricians and Gynecologists, *Health Care for Pregnant and Postpartum Incarcerated Women* at 3 (cited in note 19).
[30] Id.
[31] American College of Nurse-Midwives, *Position Statement* at 1 (cited in note 11).
[32] Id; American College of Obstetricians and Gynecologists, *Health Care for Pregnant and Postpartum Incarcerated Women* at 3 (cited in note 19).
[33] See Marshall Klaus, Richard Jerauld, Nancy Kreger, Willie McAlpine, Meredith Steffa, John Kennel, *Maternal Attachment — Importance of the First Postpartum Days*, 286(9) New Engl J Med 460 (Mar 2, 1972).
[34] Andrea Hsu, *Difficult Births: Laboring and Delivering in Shackles*, All Things Considered (NPR July 16, 2010), online at http://www.npr.org/templates/story/story.php?storyId=128563037 (visited Aug 23, 2013).
[35] Id.
[36] iHealth Beat, *Legislation Would Ban Use of Restraints on Female Prisoners While in Labor* (Aug 1, 2005), online at: http://www.ihealthbeat.org/california-healthline/articles/2005/8/1/legislation-would-ban-use-of-restraints-on-female-prisoners-while-in-labor?view=print (visited Aug 23, 2013).
[37] See Hsu, *Difficult Births* (cited in note 34).

The vast majority of women in U.S. prisons are non-violent offenders, and therefore pose a low security risk.[38] Among states that have restricted the shackling of pregnant women, none have reported any subsequent instances of women in labor escaping or causing harm to themselves, the public, security guards, or medical staff.[39] For example, since New York City and Illinois implemented anti-shackling laws in 1990 and 2000, respectively, there have been no incidents of inmates admitted to birthing centers or hospitals attempting to escape or harming officers or staff.[40] Given the physical and mental rigors of labor and childbirth, it should be unsurprising that incarcerated women in these jurisdictions have not attempted to escape or cause harm to themselves or others during labor, delivery, or postpartum recovery. Moreover, in most cases pregnant prisoners do not share delivery rooms with other patients, particularly if they have committed serious offences.[41]

A Physician's view

"In response to a question, Dr. Cookingham indicated that neither she nor members of the staff have ever feared for their safety. Most of the patients receive epidurals, which hampers their ability to move swiftly or run out of the labor room. For those who do not have an epidural, the pain restricts them from going too far or harming the people taking care of them."

[Source: Excerpt from Arizona House of Representatives Committee Minutes, February 29, 2012]

In rare cases where safety or flight concerns are legitimate, measures are already in place to safeguard the public and medical staff. In most cases, armed guards accompany pregnant women into the delivery room or are stationed immediately outside.[42] In addition, exceptions to prohibitions on shackling, which allow pregnant women to be shackled for legitimate safety reasons, provide sufficient safeguards against flight and security risks.

V. INTERNATIONAL LAW AND U.S. CONSTITUTIONAL LAW PROHIBIT SHACKLING

A. Shackling Violates International Law

The practice of shackling pregnant women contravenes multiple international human rights treaties that the United States has ratified, including the ICCPR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "CAT"). Shackling violates Article 7 of the ICCPR, which states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Shackling also implicates Article 2 and Article 26 of the ICCPR, both of which enshrine the right to equality and to be free

[38] ACLU Reproductive Freedom Project and ACLU National Prison Project, *ACLU Briefing Paper: The Shackling of Pregnant Women & Girls in U.S. Prisons, Jails & Youth Detention Centers* at 5, online at https://www.aclu.org/files/assets/anti-shackling_briefing_paper_stand_alone.pdf (visited Aug 23, 2013).
[39] Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, National News (NY Times March 2, 2006), online at http://www.nytimes.com/2006/03/02/national/02shackles.html?_r=0 (visited Aug 26, 2013).
[40] ACLU Reproductive Freedom Project and ACLU National Prison Project, *Preventing Shackling of Pregnant Prisoners and Detainees: A Legislative Toolkit* at 26 (2011), online at http://womenincarcerated.org/media/legislativetoolkit.pdf (visited Aug 23, 2013).
[41] Correspondence from August 19, 2013 with Gail Smith of Chicago Legal Advocacy for Incarcerated Mothers, regarding her conversation with Catherine D. Deamant, MD from John H. Stroger Jr. Hospital in Chicago, Illinois, on file with authors.
[42] ACLU, *Briefing Paper* at 5 (cited in note 38).

from discrimination. Shackling pregnant prisoners infringes the right to be free from discrimination because it disproportionately impacts women of color, who are overrepresented in U.S. prisons.[43] Shackling of pregnant women deprived of the liberty also infringes Article 10 of the ICCPR, which provides that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

When the United States ratified the ICCPR, it did so with the following reservation: "That the United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States."[44] This reservation, however, does not change the applicability of Article 7 because the practice of shackling is inconsistent with the Eighth Amendment of the U.S. Constitution, as discussed in the Section V.B. (*Shackling Violates the United States Constitution*). The United States did not provide a reservation, declaration or understanding in relation to Article 10 of the ICCPR.

Shackling of pregnant prisoners contravenes the CAT, which prohibits States from applying torture and cruel, inhuman or degrading treatment or punishment.[45] The committee that monitors the implementation of the CAT has expressed concern about the shackling of pregnant prisoners.[46] The UN Special Rapporteur on torture and the UN special Rapporteur on violence

"According to Nelson's orthopedist, the shackling injured and deformed her hips, preventing them from going 'back into the place where they need to be.' In the opinion of her neurosurgeon the injury to her hips may cause lifelong pain, and he therefore prescribed powerful pain medication for her. Nelson testified that as a result of her injuries she cannot engage in 'ordinary activities' such as playing with her children or participating in athletics. She is unable to sleep or bear weight on her left side or to sit or stand for extended periods. Nelson has also been advised not to have any more children because of her injuries."

- Shawanna was shackled during the final stages of labor. She was a non-violent offender imprisoned for writing bad checks.

[Source: Opinion in *Nelson v Corr Med Servs*, 583 F.3d 522, 526 (8th Cir. 2009)]

[43] Dana Sussman, *Bound by Injustice: Challenging the Use of Shackles on Incarcerated Pregnant Women*, 15 Cardozo J L & Gender, 477, 482 (2008), online at http://www.cardozolawandgender.com/uploads/2/7/7/6/2776881/15-3_sussman.pdf (visited Aug 28, 2013); Ocen, 100 Cal L Rev at 1250-1251 (cited in note 17).

[44] U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights ¶ I(3), in 138 Cong Rec S4781-01 (daily ed., April 2, 1992), online at http://www1.umn.edu/humanrts/usdocs/civilres.html (visited Aug 26, 2013).

[45] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, General Assembly, Meeting no. 93 (Dec 10, 1984), UN Doc A/RES/39/46, online at http://www.un.org/documents/ga/res/39/a39r046.htm (visited Aug 28, 2013).

[46] *Conclusions and recommendations of the Committee against Torture, United States of America* ¶ 33, Committee against Torture (May 2006), UN Doc CAT/C/USA/C/2, online at http://www1.umn.edu/humanrts/cat/observations/usa2006.html (visited Aug 26, 2013).

against women have both also identified the practice as problematic.[47] The UN Special Rapporteur on violence against woman specifically recommended that the United States: "Adopt legislation banning the use of restraints on pregnant women, including during labor or delivery, unless there are overwhelming security concerns that cannot be handled by any other method."[48]

Shackling of pregnant prisoners also raises concerns under the UN Standard Minimum Rules for the Treatment of Prisoners, which prohibits the use of restraints as a form of punishment and outside of well-defined exceptions.[49] The recently adopted UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders—also known as the Bangkok Rules—explicitly states: "Instruments of restraint shall never be used on women during labour, during birth and immediately after birth."[50]

B. Shackling Violates the United States Constitution

Several U.S. federal courts that have considered the shackling of pregnant women deprived of their liberty and held that the practice contravenes the Eighth Amendment's prohibition on cruel and unusual punishment.[51] In 2013, the Federal Court of Appeals for the Sixth Circuit held that the shackling of pregnant detainees while in labor poses a substantial risk of serious harm and "offends contemporary standards of human decency such that the practice violates the Eighth Amendment's prohibition against the 'unnecessary and wanton infliction of pain'—i.e., it poses a substantial risk of serious harm."[52] The United States' understanding that Article 7 of the ICCPR extends only so far as the Eighth Amendment is therefore not a limitation on its obligation to prohibit shackling, but rather a confirmation.

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[47] *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development* ¶ 41, Human Rights Council, 7th session (Jan 15, 2008), UN Doc A/HRC/7/3, online at http://www.refworld.org/pdfid/47c2c5452.pdf (visited Aug 26, 2013); *Report of the mission to the United States of America on the issue of violence against women in state and federal prisons* ¶¶ 53-54, Commission on Human Rights, 55th session (Jan 4, 1999), UN Doc E/CN.4/1999/68/Add.2, online at http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/7560a6237c67bb118025674c004406e9 (visited Aug 26, 2013).

[48] *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo: Mission to the United States of America* ¶ C(h), Human Rights Council, 17th session (June 6, 2011), UN Doc A/HRC/17/26/Add.5, online at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/138/26/PDF/G1113826.pdf (visited Aug 28, 2013).

[49] *Standard Minimum Rules for the Treatment of Prisoners* ¶ 33, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Aug 30, 1966), UN Doc A/CONF/611, annex I, ESC res. 663C, 24 UN ESCOR Supp. (No. 1) at 11, UN Doc E/3048 (1957), amended ESC res 2076, 62 UN ESCOR Supp. (No. 1) at 35, UN Doc E/5988 (1977), online at http://www1.umn.edu/humanrts/instree/g1smr.htm (visited Aug 26, 2013).

[50] *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)* rule 24, General Assembly, Third Committee, 65th session (Oct 6, 2010), UN Doc A/C.3/65/L.5, online at http://www.ihra.net/files/2010/11/04/english.pdf (visited Aug 26, 2013).

[51] *Women Prisoners of DC*, 844 F Supp 634; *Brawley*, 712 F Supp 2d 1208; *Nelson*, 583 F 3d at 533. For a discussion of shackling and the Eighth Amendment, see Griggs, 20(1) Am U J Gender Soc Pol & L at 259 (cited in note 15).

[52] *Villegas*, 709 F 3d at 574 (remanded to resolve whether the plaintiff presented a legitimate flight risk).

VI. FEDERAL AND STATE LAWS, GAPS, AND IMPLEMENTATION

A. *Federal Level*

The U.S. government adopted an anti-shackling policy in 2008. This is an encouraging development; however, the policy only applies to prisons and detention centers operated by the federal government, and does not reach state and local facilities.[53] Moreover, the policy was enacted by the Executive, not the U.S. Congress. Legislation is preferable to policies for the reasons discussed below, in Section VI.B.2 (*States should adopt laws rather than policies*.)

The U.S. Department of Justice has also convened a task force to develop a best practices guide to be disseminated nationwide at the end of 2013.[54] This federal effort is laudable, but in order to be effective the guide must be used to affect real policy change at the state and local level throughout the United States.

B. *State Level*

Beginning with Illinois in 2000, several U.S. states have introduced laws and policies that restrict the practice of shackling pregnant inmates, particularly during labor. According to our research as of August 2013:

- 18 states have laws that restrict the use of restraints on pregnant inmates;
- 24 states limit the use of restraints on pregnant inmates only by policies; and
- 8 states have no laws or policies or any other form of regulation addressing the use of restraints on pregnant inmates.

Among the 24 states that regulate the use of restraints only at the policy level, 5 have policies that do not meaningfully limit their use and 6 have not made their policies publicly available, or have done so only in redacted or summarized form. For these 6 policies, we have relied on summary information provided by the state agencies. The table in the Appendix provides a summary of the status of laws and policies addressing the shackling of pregnant prisoners in the 50 U.S. states.

1. *Some state laws and policies contain broad exceptions or lack key provisions*

The adoption of anti-shackling laws and policies by 18 U.S. states represents considerable progress. However, not all of the current laws and policies restricting the use of restraints provide comprehensive protection against shackling. As a result, even in states where laws and policies restricting shackling of pregnant women are in place, the practice continues.

The following are provisions that a comprehensive anti-shackling law should include:

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[53] ACLU, *Bureau of Prisons Revises Policy on Shackling of Pregnant Inmates* (Daily Kos Oct 20, 2008), online at http://www.dailykos.com/story/2008/10/20/636336/-Bureau-of-Prisons-Revises-Policy-RE-Shackling-of-Pregnant-Inmates-in-Federal-Prisons (visited Aug 26, 2013).

[54] National Resource Center on Justice Involved Women, *Newsletter* (Dec 2012), online at http://cjinvolvedwomen.org/sites/all/Newsletters/NRCJIWDecember2012Newsletter.html (visited Aug 26, 2013); Email correspondence from July 30, 2013 with Yasmin Vafa of Rights4Girls on record with authors.

i. Prohibition on the Use of Restraints: Women or girls known to be pregnant should not be shackled, including, at a minimum, during their third trimester, transport to medical facilities, labor, delivery, or postpartum recovery.[55]

Some polices do not contain explicit prohibitions. For example, the Montana Department of Corrections policy states: "Facilities that house female offenders will establish restraint procedures for the transport of pregnant offenders based on mutually-approved security and medical considerations."[56] This policy does not prohibit shackling and gives too much discretion to each individual facility.

Additionally, a number of state anti-shackling laws only provide protection to prisoners during some stages of childbirth. For example, Idaho's law only limits the use of restraints during labor and delivery, but not postpartum recovery.[57] Laws such as these should be improved by extending protection to postpartum recovery.

ii. Exception in Extraordinary Circumstances: Exceptions to the prohibition on the use of restraints during pregnancy should only be allowed when there is a (1) serious flight risk that cannot be prevented by other means, and (2) immediate and serious threat of harm to self and others that cannot be prevented by other means.[58] However, restraints should *never* be used during labor or childbirth.[59]

iii. Type of Restraint: If restraints must be used in extraordinary circumstances, only the least restrictive restraints necessary to ensure safety and security should be used.[60] In most cases, therapeutic (soft) restraints will suffice for these purposes. Waist and leg restraints should never be used.[61] A qualified health service staff must prescribe the necessary precautions, including decisions about the manner in which the pregnant woman is to be restrained.[62] In these circumstances, a qualified health professional should have the final authority as to whether restraints may be used at all.

Specifying the types of restraint that are permissible in exceptional situations protects against the use of dangerous and painful restraints. For example, the law in Rhode Island prohibits the use of waist and leg shackles during labor and delivery under any

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[55] See 61 Pa Stat § 5905(b)(1) for an example of a good general provision, online at http://www.legis.state.pa.us/WU01/LI/LI/CT/HTM/61/00.059.005.000..HTM (visited Aug 26, 2013).
[56] Montana Department of Corrections Policy Directive 3.1.12 at IV(F)(4), online at http://www.cor.mt.gov/content/Resources/Policy/Chapter3/3-1-12.pdf (visited Aug 26, 2013).
[57] Idaho Code §§ 20-902, 20-903 (2011), online at http://legislature.idaho.gov/legislation/2011/H0163.pdf (visited Aug 28, 2013).
[58] See, for example, 55 ILCS 5/3-15003.6, online at http://www.ilga.gov/legislation/ilcs/fulltext.asp?DocName=005500050K3-15003.6 (visited Aug 26, 2013); NY Correction Law § 611, online at http://codes.lp.findlaw.com/nycode/COR/22/611 (visited Aug 26, 2013).
[59] See, for example, Hawaii Rev Stat § 353-122(b) (2011), online at https://law.justia.com/codes/hawaii/2011/division1/title20/chapter353/353-122/ (visited Aug 26, 2013).
[60] See, for example, Nev Rev Stat §209.376 (2011), online at http://law.justia.com/codes/nevada/2011/chapter-209/statute-209.376 (visited Aug 26, 2013).
[61] See, for example, 55 ILCS 5/3-15003.6 (cited in note 58) ("Leg irons, shackles or waist shackles shall not be used on any pregnant or postpartum prisoner regardless of security classification").
[62] See, for example, Minnesota Department of Corrections Policy 301.081 (2012), online at http://www.doc.state.mn.us/DocPolicy2/html/DPW_Display_TOC.asp?Opt=301.081.htm (visited Aug 26, 2013).

circumstances.[63] This specific prohibition protects the mother and child from dangerous shackling even when the woman may be a flight risk. In contrast, Nevada's law requires the use of the least restrictive restrains necessary, but does not specify which types of restraints are permitted or prohibited.[64]

iv. Notice: Female prisoners[65] and medical professionals[66] should be notified of both the law restricting shackling and the policies developed to give effect to the law.

For example, the law in California requires that "[u]pon confirmation of an inmate's pregnancy, she shall be advised, orally or in writing, of the standards and policies governing pregnant inmates, including, but not limited to, the provisions of this chapter."[67] Several states, including Nevada, New York, and West Virginia, however, do not have notice requirements in their anti-shackling laws.[68]

v. Training: Correctional officers should be required to undergo classroom and hands-on training on the use of restraint equipment and physical restraint techniques. Officers should also be trained to identify when a woman enters into labor and to understand precisely what constitutes an "extraordinary circumstance" permitting an exception to the ban on shackling.

Strong training requirements are necessary to ensure correctional officers correctly implement the law and to avoid the improper use of restraints. For example, a policy in Minnesota requires correctional officers to be trained to properly use restraint equipment when it is necessary to do so.[69] Only adequate training policies will ensure that correctional officers correctly implement the law.

vi. Medical Staff Input: Medical staff input provisions require correctional officers to comply with the requests of medical professionals not to apply restraints or to remove them if they have already been applied. Correctional officers should be required to immediately honor requests to remove restraints from attending doctors, nurses, or other medical professional.[70]

For instance, the law in Illinois states: "The corrections official shall immediately remove all restraints upon the written or oral request of medical personnel."[71]

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[63] RI Gen Laws Chapter 42-56.3-3(b)-(d), online at http://webserver.rilin.state.ri.us/Statutes/title42/42-56.3/42-56.3-3.HTM (visited Aug 26, 2013).
[64] Nev Rev Stat § 209.376 (cited in note 60).
[65] See, for example, Cal Penal Code § 3407(e), online at http://www.leginfo.ca.gov/cgi-bin/displaycode?section=pen&group=03001-04000&file=3400-3409 (visited Aug 26, 2013); Fla Stat § 944.241(5) (2012), online at http://www.flsenate.gov/Laws/Statutes/2012/944.241 (visited Aug 26, 2013).
[66] 11 Del Code Ann § 6604(c), online at http://delcode.delaware.gov/title11/c066/index.shtml (visited Aug 26, 2013).
[67] Cal Penal Code § 3407(e) (cited in note 65).
[68] Nev Rev Stat § 209.376 (cited in note 60); NY Correction Law § 611 (cited in note 58); W Va Code § 25-1-16 (2012), online at http://www.legis.state.wv.us/WVCODE/Code.cfm?chap=25&art=1 (visited Aug 26, 2013).
[69] Minnesota Department of Corrections Policy 301.081 (cited in note 62).
[70] See, for example, Idaho Code Sec 20-902(2)(a) (cited in note 57); 55 ILCS 5/3-15003.6(b) (cited in note 58).
[71] 55 ILCS 5/3-15003.6(b) (cited in note 58).

vii. Reporting: Correctional officers should be required by law to submit written reports when restraints are used on pregnant women deprived of their liberty. The report should include (1) the reasons the officer determined extraordinary circumstances existed requiring the use of restraints, (2) the kind of restraints used, (3) the reasons those restraints were considered the least restrictive and most reasonable under the circumstances, and (4) the duration of the use of restraints. The report should be submitted as soon as possible following the use of restraints and reviewed by a supervisory officer or official.[72] It is also recommended that annual reports be submitted that describe all instances of shackling.[73] These reports should be made available for public inspection.[74]

Pennsylvania,[75] Arizona,[76] and Illinois[77] promote accountability by including a reporting provision in their laws. This ensures that whenever restraints are wrongfully used the officer responsible can be held accountable, learn from his or her mistake, and be penalized for it if circumstances warrant. In contrast, California's law has no reporting requirement.[78] Correctional officers in the state who wrongfully restrain pregnant women may therefore never be held accountable or have their behavior corrected.

2. States should adopt laws rather than policies.

While it is laudable that agencies in many states have adopted anti-shackling policies, 24 states have only policies (and no state-wide legislation). Legislation is preferable to such policies. Legislation is democratically enacted and publicly available. As noted above, state agencies may have internal policies restricting the use of restraints on pregnant women, but they are sometimes not available to the public, rendering true accountability and effective transparency impossible.

Anti-shackling legislation is also more likely to be durable than a policy. Comprehensive legislation must be repealed or amended by an action of the state legislature. The same cannot be said of policies, which may be changed pursuant to internal department rule-making procedures and without any public scrutiny.

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[72] Some laws specify a time limit for reporting. See, for example, Fla Stat § 944.241(3)(b)(2) (cited in note 65) (calling for reports within ten days of the use of restraints).
[73] ACLU, *Legislative Toolkit* at 9-10 (cited in note 40).
[74] Id at 10.
[75] 61 Pa Stat § 5905(d) (cited in note 55).
[76] Ariz Rev Stat Ann § 31-601(C)(2), online at http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/31/00601.htm&Title=31&DocType=ARS (visited Aug 26, 2013).
[77] 55 ILCS 5/3-15003.6(c) (cited in note 58).
[78] Cal Penal Code § 3407 (cited in note 65); Cal Penal Code § 3423, online at http://law.onecle.com/california/penal/3423.html (visited Aug 28, 2013).

Finally, anti-shackling legislation protects women across broader geographic areas. In most instances, policies only apply to prisons and correctional departments that adopt them. State-level legislation, on the other hand, applies to all correctional facilities within the state, requiring facilities that have not implemented policies to cease the practice of shackling.

3. Some states have not adequately implemented anti-shackling laws and polices

Even in states that have enacted anti-shackling laws or policies, the practice of shackling often persists. A plaintiff in a federal case, for example, was shackled during labor despite the existence of a Washington Department of Corrections policy prohibiting the practice.[79] In Illinois, a class action was brought by female prisoners who were shackled despite the existence of a clear state law prohibiting the practice.[80] According to research conducted by the Texas Jail Project and NARAL Pro-Choice America, the passage of an anti-shackling law in Texas has not had a meaningful impact on practices in the state's 247 county jails, where women continue to report inadequate medical treatment and there is little indication of serious effort at either oversight or training and education of correctional officers on the use of restraints.[81] These cases and others demonstrate that laws and policies prohibiting the use of restraints on pregnant women must be fully implemented and enforced to be effective.

Shackling Law and Practice in Illinois

Illinois became the first state in the U.S. to ban the use of restraints on women in labor through legislation that became effective January 1, 2000, covering state prisons, Cook County Jail, and all downstate county jails.

In 2008, women in pretrial detention in Cook County reported that they were being placed in restraints during transport to the hospital to give birth, and were shackled to their hospital beds throughout labor. They reported that officers remained present inside the delivery room, which is prohibited under the statute. Women in other Illinois county jails have reported shackling during labor as well. In 2010, women in custody of the Illinois Department of Corrections reported that they were placed in full restraints, including leg irons and belly chains, during labor when they were taken to the hospital to give birth.

On January 13, 2012, Public Act 097-0660 was enacted to strengthen protection against shackling for pregnant women in custody of Cook County.

In 2011 Illinois Department of Corrections Director Salvador Godinez and senior officials agreed to implement an administrative directive providing similar protection against shackling women prisoners throughout pregnancy and for six weeks postpartum. The directive is being implemented but is in the process of formal approval.

[Source: Chicago Legal Advocacy for Incarcerated Mothers]

In states with anti-shackling laws or policies, the continued practice of shackling may be due in part to the inadequate training of correctional officers. Training correctional officers on the existence and scope of applicable laws and policies would be a positive step towards full implementation and enforcement.

[79] *Brawley*, 712 F Supp 2d at 1221.
[80] *Zaborowski*, WL 6660999.
[81] Correspondence from Aug 5, 2013 with Diana Claitor of the Texas Jail Project and Maggie Jo Poertner of NARAL Pro-Choice America, on file with authors.

VII. SUGGESTED QUESTIONS FOR THE UNITED STATES

We request the Committee members to ask the following questions during the review of the United States' Fourth Periodic Report in October 2013:

1. Does the United States intend to enact a Federal law prohibiting the shackling of detained and incarcerated women during pregnancy, including, at a minimum, the third trimester, transport to medical facilities, labor, delivery and postpartum recovery?

2. How does the United States intend to encourage those U.S. states that do not have legislation anti-shackling laws in place to enact comprehensive anti-shackling legislation?

3. Does the United States intend to review existing state laws or policies to review to ensure that they are comprehensive and do not contain broad exceptions and are fully implemented?

4. Does the United States intend to conduct research to determine why the practice of shackling pregnant women prisoners and detainees continues despite its ban in many States?

VIII. RECOMMENDATIONS

Recommendation #1: The United States should replace its current federal policy with federal legislation.

Recommendation #2: The United States should instruct those 32 states where no anti-shackling laws exist at the state-level to enact comprehensive laws (as described in Section VI.B.1), including training of correctional officers.

Recommendation #3: The United States should review existing state anti-shackling laws and policies to ensure that they are comprehensive (as described in Section VI.B.1) and are fully implemented.

Recommendation #4: The United States should undertake an empirical study to determine the scope of shackling in both federal and state prisons and to understand why pregnant women deprived of their liberty continue to be shackled, including in states where anti-shackling bans are in place.

APPENDIX

The table below contains information obtained through a survey of the laws and policies in the 50 U.S. states that regulate the use of restraints on pregnant women deprived of their liberty. A state was considered to have a law or policy regulating the use of restraints if the relevant provision directly addressed the use of restraints on pregnant inmates, even if the law or policy was not comprehensive. The comment column below provides information about policies that do not adequately limit the use of restraints, that are not publicly available or could not be located, and that are only available in redacted or summarized form. States with legislation that has been introduced, but had not yet been enacted at the time of publication, have also been noted in the comment column.

State	Law	Policy	Comment	Source
Alabama	No	Yes		Julia Tutwiler Prison for Women Standard Operating Procedures 9-14[1]
Alaska	No	Yes		Policy and Procedure 1208.22 and1208.15[2]
Arizona	Yes	Yes		Arizona Revised Statutes Annotated § 31-601; Arizona Department of Corrections Order 705.10[3]
Arkansas	No	Yes		Arkansas Department of Community Correction Admin. Directives 00-02 and 00-01; Arkansas Department of Corrections 04-08[4]
California	Yes	Yes		California Penal Code §§ 3407, 3423; Department of Corrections and Rehabilitation Operations Manual,

[1] Online at http://www.asca.net/system/assets/attachments/2648/AL%20Response%20to%20Rebecca%20Report%20-%203-16-11%202.pdf?1301075514.
[2] Online at http://www.asca.net/system/assets/attachments/2375/Alaska_Pregnant_Female_Policy.pdf?1299251457.
[3] Online at http://www.azcorrections.gov/policysearch/700/0705.pdf.
[4] Available at http://www.dcc.arkansas.gov/policy/Documents/prenatalcare.pdf, http://www.dcc.arkansas.gov/policy/Documents/userestraints.pdf, and http://www.asca.net/system/assets/attachments/2360/AR_Pregnant_Inmate_Policies.pdf?1299168426.

State	Law	Policy	Comment	Source
				Chapter 5, Article 1, Section 54045.11[5]
Colorado	Yes	Yes	The policy is not publicly available.	Colorado Revised Statutes 17-1-113.7; Policy[6]
Connecticut	No	Yes		Administrative Directive 6.4 – 14(a)(3)[7]
Delaware	Yes	Yes		Delaware Code Annotated Title 11, § 6601-6605; Department of Corrections Policy Number I-01.2[8]
Florida	Yes	Yes		Florida Statutes § 944.24; Florida Department of Corrections Rule 33-602.211[9]
Georgia	No	No	Legislation introduced (House Bill 653).	
Hawaii	Yes	Yes	The policy could not be located, but is presumed to exist pursuant to Hawaii law.	Hawaii Revised Statutes § 353-122
Idaho	Yes	Yes	A redacted version of policy is publicly available.	Idaho Code §§ 20-902, 20-903; Policy 307.02.01.001[10]
Illinois	Yes	Yes		55 ILCS 5/3-15003.6 (2012), 730 ILCS 125/17.5 (2000), 730 ILCS 5/3-6-7 (2000); Department of Corrections Policy 05.03.130[11]
Indiana	No	No		
Iowa	No	Yes	The policy was promulgated during consideration of a law placing strict limits	

[5] Online at http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/DOM%20Ch%205-Printed%20Final.pdf.
[6] Summary available at http://www.asca.net/system/assets/attachments/2477/CO_Response_to_Rebecca.pdf?1300295754.
[7] Online at http://www.ct.gov/doc/LIB/doc/PDF/AD/ad0604.pdf.
[8] Available at http://www.asca.net/system/assets/attachments/2445/DE_Use_of_Restraints_for_Pregnant_Offenders.pdf?1299868196.
[9] Online at https://www.flrules.org/gateway/RuleNo.asp?ID=33-602.211.
[10] Available at http://www.idoc.idaho.gov/content/policy/598.
[11] Online at http://www.asca.net/system/assets/attachments/2212/Illinois_Restraints_Policy.pdf?1297282663.

State	Law	Policy	Comment	Source
			on the use of restraints on pregnant prisoners.[12] A redacted version of the policy was made available to lawmakers at the time.[13] The law was not passed and the policy is not publicly available.	
Kansas	No	No		
Kentucky	No	Yes	The policy does not adequately limit the use of restraints.	
Louisiana	Yes	Yes		LSA-R.S. 15 §§ 744.2-744.8; Policy 3-01-021[14]
Maine	No	No		
Maryland	No	No	Legislation proposed (House Bill 829).	
Massachusetts	No	Yes	Legislation proposed (Senate Bill 1171).	521.05-521.07[15]
Michigan	No	Yes	The policy does not adequately limit the use of restraints.[16]	
Minnesota	No	Yes		Policy 301.081[17]
Mississippi	No	Yes		Summary of MDOC SOP 16-15-01 on record with authors.
Missouri	No	Yes	The policy is not publicly available.	Email on record with authors.
Montana	No	Yes	The policy charges facility administrators with developing their own policies and does not adequately limit the use of restraints.	Policy No. Department Of Corrections 3.1.12[18]
Nebraska	No	No		
Nevada	Yes	Yes		Nevada Revised Statutes §209.376; Department of Corrections

[12] Jason Noble, *Iowa House backs off legislation restricting use of shackles on pregnant inmates*, Des Moines Register, Feb. 20, 2013, online at http://blogs.desmoinesregister.com/dmr/index.php/2013/02/20/iowa-house-backs-off-legislation-restricting-use-of-shackles-on-pregnant-inmates/article?gcheck=1.
[13] Id.
[14] Online at http://www.asca.net/system/assets/attachments/2336/LA_Policy_Restraints_on_Pregnant_Inmates.pdf?1298919405.
[15] Summary available at http://www.asca.net/system/assets/attachments/2481/MA_Response_to_Rebecca_and_Policy_Restraints.pdf?1300295850.
[16] Summary online at http://www.asca.net/system/assets/attachments/2482/MI_Director_Response_Mothers_Behind_Bars_3-9-11.pdf?1300295870.
[17] Online at http://www.doc.state.mn.us/DocPolicy2/html/DPW_Display_TOC.asp?Opt=301.081.htm.
[18] Online at http://www.cor.mt.gov/content/Resources/Policy/Chapter3/3-1-12.pdf.

State	Law	Policy	Comment	Source
				Administrative Regulation 407[19]
New Hampshire	No	Yes		Policy and Procedure Directive 6.19[20]
New Jersey	No	Yes	The policy CUS.006.002 indicates that another policy not publicly available (CUS.006.RES.001) provides more detailed treatment on the use of restraints. Legislation proposed in February 2012.	CUS.006.002s[21]
New Mexico	Yes	Yes	The policy could not be located, but is presumed to exist pursuant to New Mexico law.	New Mexico Statutes § 33-1-4.2
New York	Yes	Yes		New York Correction Law § 611; Department of Correctional Services Directive 4916[22]
North Carolina	No	Yes		"Managing the Pregnant Inmate at North Carolina Correctional Institution for Women"[23]
North Dakota	No	Yes		Southwest Multi-County Correctional Center: Policies and Procedures Manual[24]
Ohio	No	Yes	The policy is not publicly available. Based on a summary of the policy, it does not adequately limit the use of restraints.[25]	
Oklahoma	No	Yes		Department of Corrections Female Offender Health Services Operating Procedures 140145[26] and 040114[27]

[19] Online at http://www.doc.nv.gov/sites/doc/files/pdf/ar/AR407.pdf.
[20] Online at http://www.nh.gov/nhdoc/Policies/documents/6-19b.pdf.
[21] Online at http://www.asca.net/system/assets/attachments/2220/New_Jersey_Restraints_Policy.pdf?1297282835.
[22] Online at http://www.asca.net/system/assets/attachments/2338/NY_Transporting_Pregnant_Inmates_and_Inmate_Mothers_with_Babies.pdf?1298919510.
[23] Online at http://www.asca.net/system/assets/attachments/2484/NC_Pregnant_Policy.pdf?1300295925.
[24] Online at http://www.asca.net/system/assets/attachments/2488/ND_Policy_Restraints_on_Pregnant_IMS.pdf?1300296438.
[25] Online at http://www.asca.net/system/assets/attachments/2227/Ohio_DRC_Restraints_Language.pdf?1297283146.
[26] Online at http://www.ok.gov/doc/documents/op140145.pdf.
[27] Online at http://www.ok.gov/doc/documents/op040114.pdf.

State	Law	Policy	Comment	Source
Oregon	No	Yes	Legislation proposed in 2013.	Department of Corrections Policy 40.1.1[28]
Pennsylvania	Yes	Yes		61 Pennsylvania Consolidated Statutes §§ 1104, 1758, 5905; Department of Corrections Policy 6.3.1 §§ 22,33,37[29]
Rhode Island	Yes	Yes		Rhode Island General Laws 42-56.3-3; Department of Corrections Policy 9.17[30]
South Carolina	No	No		
South Dakota	No	Yes		South Dakota Women's Prison Operational Memorandum 4.3.D.6[31]
Tennessee	No	Yes		Administrative Policies and Procedures 506.07 (Section VI D)[32]
Texas	Yes	No		Texas Government Code Annotated § 501.066 (Vernon); Human Resources Code § 244.0075 (Vernon); Texas Loc. Government Code Annotated § 361.082 (Vernon)[33]
Utah	No	No		
Vermont	Yes	Yes	The policy is not publicly available.[34]	28 Vermont Statutes Annotated § 801a[35]
Virginia	No	Yes	A policy was adopted modeled on proposed legislation HB 1488, which did	

[28] Online at http://www.oregon.gov/DOC/GECO/docs/rules_policies/40.1.1.pdf.
[29] Online at http://www.asca.net/system/assets/attachments/2223/Pennslvania_Restraints_Policy.pdf?1297282929.
[30] Online at http://www.doc.ri.gov/documents/administration/policy/9.17.pdf.
[31] Online at http://www.asca.net/system/assets/attachments/2466/SD_Restraints_Pregnant_Special_Needs_Inmates_1_-1.pdf?1300120099.
[32] Email providing policies is on record with the authors.
[33] Online at http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.501.htm.
[34] Summary online at http://www.asca.net/system/assets/attachments/2489/VT_Pregnant_Inmates.pdf?1300296461.
[35] Online at http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=28&Chapter=011&Section=00801a.

State	Law	Policy	Comment	Source
			not become law. The policy is not publicly available and based on a summary of the policy it does not adequately limit the use of restraints.[36]	
Washington	Yes	Yes	The policy is not publicly available.	Washington Revised Code §§ 72.09.651, 70.48.500[37]; Department of Corrections Policy 420.250[38]
West Virginia	Yes	Yes		West Virginia Code 25-1-16; 31-20-30a; West Virginia Department of Corrections Policy Directive 307.00[39]
Wisconsin	No	Yes	The policy is not publicly available.	Wisconsin Department of Corrections Division of Adult Institutions Policy 306.00.02[40]
Wyoming	No	Yes	The policy is not publicly available.	Wyoming Department of Corrections Policy and Procedure 3.001[41]

[36] Summary online at http://www.arlnow.com/2011/08/18/va-prisons-to-ban-the-shackling-of-pregnant-inmates/.
[37] Online at http://apps.leg.wa.gov/rcw/default.aspx?cite=72.09.651 http://apps.leg.wa.gov/rcw/default.aspx?cite=70.48.500.
[38] Summary online at http://www.asca.net/system/assets/attachments/2487/WA_Response_to_Rebecca.pdf?1300295996.
[39] Online at http://www.asca.net/system/assets/attachments/2342/WV_Restraints.pdf?1298919686.
[40] Online at http://www.asca.net/system/assets/attachments/2225/Wisconsin_Restraints_Policy.pdf?1297282963.
[41] Online at http://www.asca.net/system/assets/attachments/2345/WY_Use_of_Restraints_on_Pregnant_IMs.jpg?1299009090.

UNSHACKLING BLACK MOTHERHOOD

*Dorothy E. Roberts**

When stories about the prosecutions of women for using drugs during pregnancy first appeared in newspapers in 1989, I immediately suspected that most of the defendants were Black women. Charging someone with a crime for giving birth to a baby seemed to fit into the legacy of devaluing Black mothers.[1] I was so sure of this intuition that I embarked on my first major law review article based on the premise that the prosecutions perpetuated Black women's subordination.[2] My hunch turned out to be right: a memorandum prepared by the ACLU Reproductive Freedom Project documented cases brought against pregnant women as of October 1990 and revealed that thirty-two of fifty-two defendants were Black.[3] By the middle of 1992, the number of prosecutions had increased to more than 160 in 24 states.[4] About 75% were brought against women of color.[5]

In *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy,*[6] I argued that the prosecutions

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1. The prosecutions are based in part on a woman's pregnancy and not on her drug use alone. The legal rationale underlying the criminal charges depends on harm to the fetus rather than the illegality of drug use. Prosecutors charge these defendants with crimes such as child abuse and distribution of drugs to a minor that only *pregnant* drug users could commit. Moreover, pregnant women receive harsher sentences than drug using men or women who are not pregnant. Because a pregnant addict can avoid prosecution by having an abortion, it is her decision to carry her pregnancy to term that is penalized.

2. *See* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy,* 104 HARV. L. REV. 1419 (1991).

3. *See* Lynn Paltrow & Suzanne Shende, State by State Case Summary of Criminal Prosecutions Against Pregnant Women and Appendix of Public Health and Public Interest Groups Opposed to These Prosecutions (Oct. 29, 1990) (unpublished memorandum to ACLU Affiliates and Interested Parties) (on file with author). I confirmed the race of some of the defendants by telephone calls to their attorneys. *See* Telephone Interview with Joseph Merkin, Attorney for Sharon Peters (Jan. 7, 1991); Telephone Interview with James Shields, North Carolina ACLU (Jan. 7, 1991); Telephone Interview with Patrick Young, Attorney for Brenda Yurchak (Jan. 7, 1991); *see also* Gina Kolata, *Bias Seen Against Pregnant Addicts,* N.Y. TIMES, July 20, 1990, at A13.

4. *See* Lynn M. Paltrow, *Defending the Rights of Pregnant Addicts,* CHAMPION, Aug. 1993, at 18, 19.

5. *See id.* at 21.

6. Roberts, *supra* note 2.

could be understood and challenged only by looking at them from the standpoint of Black women. Although the prosecutions were part of an alarming trend toward greater state intervention into the lives of pregnant women in general, they also reflected a growing hostility toward poor Black mothers in particular. The debate on fetal rights, which had been waged extensively in law review articles and other scholarship, focused on balancing the state's interest in protecting the fetus from harm against the mother's interest in autonomy. My objective in that article was not to repeat these theoretical arguments, but to inject into the debate a perspective that had largely been overlooked. It seemed to me impossible to grasp the constitutional injury that the prosecutions inflicted without taking into consideration the perspective of the women most affected. Nor could we assess the state's justification for the prosecutions without uncovering their racial motivation.

Taking race into account transformed the constitutional violation at issue. I argued that the problem with charging these women with fetal abuse was not that it constituted unwarranted governmental intervention into pregnant women's lifestyles — surely a losing argument considering the lifestyles of these defendants.[7] Instead I reframed the issue: the prosecutions punished poor Black women for having babies.[8] Critical to my argument was an examination of the historical devaluation of Black motherhood.[9] Given this conceptualization of the issue and the historical backdrop, the real constitutional harm became clear: charging poor Black women with prenatal crimes violated their rights both to equal protection of the laws and to privacy by imposing an invidious governmental standard for childbearing.[10] Adding the perspective of poor Black women yielded another advantage. It confirmed the importance of expanding the meaning of reproductive liberty beyond opposing state restrictions on abortion to include broader social justice concerns.

Most women charged with prenatal crimes are pressured into accepting plea bargains to avoid jail time.[11] When defendants have appealed their convictions, however, they have been almost uni-

7. *See id.* at 1459.

8. *See id.* at 1445-50.

9. *See id.* at 1436-44.

10. *See id.* at 1471-76.

11. *See* CENTER FOR REPRODUCTIVE LAW & POLICY, PUNISHING WOMEN FOR THEIR BEHAVIOR DURING PREGNANCY: A PUBLIC HEALTH DISASTER 2 (1993).

formly victorious. With only one recent exception,[12] every appellate court to consider the issue, including the highest courts in several states, has invalidated criminal charges for drug use during pregnancy. Yet none of these courts has based its decision on the grounds that I argued were critical. Most decisions centered on the interpretation of the criminal statute in the indictment. These courts have held that the state's laws concerning child abuse, homicide, or drug distribution were not meant to cover a fetus or to punish prenatal drug exposure. The Supreme Court of Florida, for example, overturned Jennifer Johnson's conviction in 1992 on the ground that the state legislature did not intend "to use the word 'delivery' in the context of criminally prosecuting mothers for delivery of a controlled substance to a minor by way of the umbilical cord."[13] Other courts rejected the prosecutions on constitutional grounds, finding that the state had violated the mothers' right to due process or to privacy.[14] The defendants' race, however, has not played a role in the courts' analyses.[15]

Thus, attorneys have successfully challenged the prosecutions of prenatal crimes in appellate courts without relying on arguments about the race of the defendants. But failing to contest society's devaluation of poor Black mothers still has negative consequences. Renegade prosecutors in a few states continue to press charges against poor Black women for exposing their babies to crack.[16] Many crack-addicted mothers have lost custody of their babies following a single positive drug test.[17] The continuing popular support for the notion of punishing crack-addicted mothers leaves open the

12. *See* Whitner v. South Carolina, No. 24468, 1996 WL 393164 (S.C. July 15, 1996).

13. Johnson v. State, 602 So. 2d 1288, 1290 (Fla. 1992).

14. *See, e.g.*, People v. Morabito, 580 N.Y.S.2d 843, 844-47 (Geneva City Ct. 1992); Commonwealth v. Pellegrini, No. 87970 (Mass. Super. Ct. Oct. 15, 1990).

15. *See, e.g., Johnson*, 602 So. 2d, at 1288 (reversing a conviction for the delivery of drugs to a minor on the ground that the criminal statute did not encompass drug use during pregnancy); State v. Gray, 584 N.E.2d 710 (Ohio 1992) (holding that a mother could not be convicted of child endangerment based on prenatal substance abuse); State v. Osmus, 276 P.2d 469 (Wyo. 1954) (refusing to apply a criminal neglect statute to a woman's prenatal conduct).

16. *See, e.g.*, David Crosby, *"Crack" Baby's Mom Faces Trial on Endangering Life of Fetus*, COM. APPEAL (Memphis), July 18, 1995, at A1, *available in* 1995 WL 9356413; Telephone Interview with David Crosby (Nov. 22, 1996).

17. *See* Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 520-21 (1992) (observing that states such as Illinois revoke maternal custody "immediately upon receipt of a report of a positive toxicology screen in a newborn"); Rorie Sherman, *Keeping Babies Free of Drugs*, NATL. L.J., Oct. 16, 1989, at 1, 28 ("In some jurisdictions, women whose newborns' urine tests positive for drugs immediately lose custody for months until they can prove to a court that they are fit mothers."); Joe Sexton, *Officials Seek Wider Powers To Seize Children in Drug Homes*, N.Y. TIMES, Mar. 12, 1996, at B1.

possibility of a resurgence of prosecutions and the passage of punitive legislation. In this essay, I want to explore the strategies that lawyers have used on behalf of crack-addicted mothers to evaluate the importance of raising issues of race. Some lawyers and feminist scholars have tried to avoid the degrading mythology about Black mothers by focusing attention on issues other than racial discrimination and by emphasizing the violation of white, middle-class women's rights. I argue, however, that we should develop strategies to contest the negative images that undergird policies that penalize Black women's childbearing.

I. THE SOUTH CAROLINA EXPERIMENT

Despite the fact that most prosecutors renounce a punitive approach toward prenatal drug use, South Carolina continues to promote a prosecutorial campaign against pregnant crack addicts. The state bears the dubious distinction of having prosecuted the largest number of women for maternal drug use.[18] Many of these cases arose from the collaboration of Charleston law enforcement officials and the Medical University of South Carolina (MUSC), a state hospital serving an indigent, minority population. In August 1989, Nurse Shirley Brown approached the local solicitor, Charles Condon, about the increase in crack use that she perceived among her pregnant patients.[19] Solicitor Condon immediately held a series of meetings, inviting additional members of the MUSC staff, the police department, child protective services and the Charleston County Substance Abuse Commission, to develop a strategy for addressing the problem. The MUSC clinicians may have intended to help their patients, but larger law enforcement objectives soon overwhelmed the input of the staff. The approach turned toward pressuring pregnant patients who used drugs to get treatment by threatening them with criminal charges. As Condon expressed it: "We all agreed on one principle: We needed a program that used not only a carrot, but a real and very firm stick."[20] Condon also pressed the position that neither the physician-patient privilege nor

18. *See* LYNN M. PALTROW, CRIMINAL PROSECUTIONS AGAINST PREGNANT WOMEN: NATIONAL UPDATE AND OVERVIEW at i, 24 (1992).

19. *See* Barry Siegel, *In the Name of the Children: Get Treatment or Go to Jail, One South Carolina Hospital Tells Drug-Abusing Pregnant Women*, L.A. TIMES, Aug. 7, 1994, Magazine, at 14.

20. Charles Molony Condon, *Clinton's Cocaine Babies: Why Won't the Administration Let Us Save Our Children?*, POLY. REV., Spring 1995, at 12.

the Fourth Amendment prevented hospital staff members from reporting positive drug tests to the police.[21]

Within two months MUSC instituted the "Interagency Policy on Cocaine Abuse in Pregnancy" ("Interagency Policy"), a series of internal memos that provided for nonconsensual drug testing of pregnant patients, reporting results to the police, and the use of arrest for drug and child abuse charges as punishment or intimidation.[22] Although the program claimed "to ensure the appropriate management of patients abusing illegal drugs during pregnancy,"[23] its origin suggests that it was designed to supply Condon with defendants for his new prosecutorial crusade. The arrests had already begun by the time the hospital's board of directors officially approved the new policy. Hospital bioethicists later criticized the hasty process orchestrated by Condon for neglecting the careful internal deliberation one would expect of a program affecting patient care.[24] Condon personally broadcast the new policy in televised public service announcements that advised pregnant women, "not only will you live with guilt, you could be arrested."[25]

During the first several months, women were immediately arrested if they tested positive for crack at the time they gave birth. Then the Interagency Policy set up what Condon called an "amnesty" program: patients who tested positive for drugs were offered a chance to get treatment; if they refused or failed, they would be arrested. Patients who tested positive were handed two letters, usually by Nurse Shirley Brown: one notified them of their appointment with the substance abuse clinic; the other, from the solicitor, warned that "[i]f you fail to complete substance abuse counselling, fail to cooperate with the Department of Social Services in the placement of your child and services to protect that child, or if you

21. *See* Plaintiffs' Memorandum in Support of Their Partial Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment at 16, Ferguson v. City of Charleston, No. 2:93-2624-2 (D.S.C. Oct. 1995) [hereinafter Plaintiffs' Memorandum]; Philip H. Jos et al., *The Charleston Policy on Cocaine Use During Pregnancy: A Cautionary Tale,* 23 J.L. MED. & ETHICS 120, 121-22 (1995). On January 8, 1997, the jury in *Ferguson* rejected the plaintiffs' claims that the state had violated their Fourth Amendment and Fourteenth Amendment rights. The judge in the case has yet to rule on three related claims alleging violations of Title VI, the right to procreate, and the right to privacy. *See South Carolina Jury Rejects Claims That Hospital Policy Violated Rights of Pregnant Women,* REPRODUCTIVE FREEDOM NEWS (Center for Reproductive Law & Policy, New York, N.Y.), Jan. 17, 1997, at 4.

22. *See* Plaintiffs' Memorandum, *supra* note 21, at 10-11.

23. Medical University of South Carolina, Policy II-7 Management of Drug Abuse During Pregnancy (Oct. 1989), *quoted in* Jos et al., *supra* note 21, at 120.

24. *See* Jos et al., *supra* note 21, at 122.

25. Siegel, *supra* note 19, at 16.

fail to maintain clean urine specimens during your substance abuse rehabilitation, you *will* be arrested by the police and prosecuted by the Office of the Solicitor."[26]

The policy offered no second chances. Women who tested positive for drugs a second time or who delivered a baby who tested positive were arrested and imprisoned.[27] Depending on the stage of pregnancy, the mother was charged with drug possession, child neglect, or distribution of drugs to a minor. Uncooperative women were arrested based on a single positive test.

The Interagency Policy resulted in the arrests of forty-two patients, all but one of whom were Black.[28] Disregarding the sanctity of the maternity ward, the arrests more closely resembled the conduct of the state in some totalitarian regime. Police arrested some patients within days or even hours of giving birth and hauled them to jail in handcuffs and leg shackles.[29] The handcuffs were attached to a three-inch wide leather belt that was wrapped around their stomachs. Some women were still bleeding from the delivery. One new mother complained, and was told to sit on a towel when she arrived at the jail.[30] Another reported that she was grabbed in a chokehold and shoved into detention.[31]

At least one woman who was pregnant at the time of her arrest sat in a jail cell waiting to give birth.[32] Lori Griffin was transported weekly from the jail to the hospital in handcuffs and leg irons for prenatal care. Three weeks after her arrest, she went into labor and was taken, still in handcuffs and shackles, to MUSC. Once at the hospital, Ms. Griffin was kept handcuffed to her bed *during the entire delivery.*[33]

I opened *Punishing Drug Addicts Who Have Babies* with the recollection of an ex-slave about the method slave masters used to

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26. Plaintiffs' Memorandum, *supra* note 21, at 18-19 n.25.

27. *See* Jos et al., *supra* note 21, at 121.

28. *See* Plaintiffs' Memorandum, *supra* note 21, at 32. Nurse Brown noted on the chart of the sole white woman arrested that her boyfriend was Black. *See* Plaintiffs' Memorandum, *supra* note 21, at 33.

29. *See* Plaintiffs' Memorandum, *supra* note 21, at 26; CENTER FOR REPRODUCTIVE LAW & POLICY, PUNISHING WOMEN FOR THEIR BEHAVIOR DURING PREGNANCY: AN APPROACH THAT UNDERMINES WOMEN'S HEALTH AND CHILDREN'S INTERESTS 4 (1996); Philip J. Hilts, *Hospital Is Accused of Illegal Drug Testing,* N.Y. TIMES, Jan. 21, 1994, at A12.

30. *See* Lynn M. Paltrow, *When Becoming Pregnant Is a Crime,* CRIM. JUST. ETHICS, Winter/Spring 1990, at 41, 41.

31. *See* Siegel, *supra* note 19, at 16.

32. *See* Plaintiffs' Memorandum, *supra* note 21, at 27; Siegel, *supra* note 19, at 16.

33. *See* Plaintiffs' Memorandum, *supra* note 21, at 27.

discipline their pregnant slaves while protecting the fetus from harm:

> A former slave named Lizzie Williams recounted the beating of pregnant slave women on a Mississippi cotton plantation: "I[']s seen nigger women dat was fixin' to be confined do somethin' de white folks didn't like. Dey [the white folks] would dig a hole in de ground just big 'nuff fo' her stomach, make her lie face down an whip her on de back to keep from hurtin' de child."[34]

Thinking about an expectant Black mother chained to a belt around her swollen belly to protect her unborn child, I cannot help but recall this scene from Black women's bondage. The sight of a pregnant Black woman bound in shackles is a modern-day reincarnation of the horrors of slavemasters' degrading treatment of their female chattel.

II. The *Whitner* Setback

In a dramatic reversal of the trend to overturn charges for prenatal drug use, the Supreme Court of South Carolina recently affirmed the legality of prosecuting pregnant crack addicts.[35] The case involved twenty-eight-year-old Cornelia Whitner, who was arrested for "endangering the life of her unborn child" by smoking crack while pregnant. On the day of her hearing, Whitner met briefly in the hallway with her court-appointed attorney, Cheryl Aaron, for the first time. Aaron advised Whitner to plead guilty to the child neglect charges, promising to get her into a drug treatment program so that she could be reunited with her children. At the April 20, 1992, hearing before Judge Frank Eppes, Whitner pleaded for help for her drug problem.[36] Aaron explained that her client was in a counseling program and had stayed off drugs since giving birth to her son, who was in good health. She requested that Whitner be placed in a residential treatment facility. Turning a deaf ear, Judge Eppes simply responded, "I think I'll just let her go to jail."[37] He then sentenced Whitner to a startling eight-year prison term.[38]

Whitner had been incarcerated for nineteen months before a lawyer from the local ACLU contacted her about challenging her conviction. Whitner's lawyers filed a petition for postconviction re-

34. Roberts, *supra* note 2, at 1420.

35. *See* Whitner v. South Carolina, No. 24468, 1996 WL 393164 (S.C. July 15, 1996).

36. *See* Transcript of Record at 5, South Carolina v. Whitner, No. 92-GS-39-670 (S.C. Ct. Gen. Sess. Apr. 20, 1992) [hereinafter Whitner Transcript].

37. Whitner Transcript, *supra* note 36, at 5.

38. *See* Whitner Transcript, *supra* note 36, at 5.

lief that claimed that the trial court lacked jurisdiction to accept a guilty plea for a nonexistent offence. They argued that the relevant criminal statute punished the unlawful neglect of a *child,* not a fetus. On November 22, 1993, Judge Larry Patterson invalidated the conviction and released Whitner from prison.[39]

On July 15, 1996, the South Carolina Supreme Court, in a three to two decision, reinstated Whitner's conviction, holding that a viable fetus is covered by the child abuse statute.[40] The court based its conclusion on prior case law that recognized a viable fetus as a person. South Carolina courts allowed civil actions for the wrongful death of a fetus and had upheld a manslaughter conviction for the killing of a fetus.[41] According to the court, these precedents supported its interpretation of the child abuse statute: "[I]t would be absurd to recognize the viable fetus as a person for purposes of homicide and wrongful death statutes but not for purposes of statutes proscribing child abuse."[42] Moreover, punishing fetal abuse would further the statute's aim of preventing harm to children. The court reasoned that "[t]he consequences of abuse or neglect after birth often pale in comparison to those resulting from abuse suffered by the viable fetus before birth."[43]

The *Whitner* holding opens the door for a new wave of prosecutions in South Carolina, as well as in other states that wish to follow its lead. Condon, who had been elected Attorney General in a landslide victory, declared: "This is a landmark, precedent-setting decision. . . . This decision is a triumph for all those who want to protect the children of South Carolina."[44] As the state's chief law enforcement officer, Condon may have visions of replicating his Charleston experiment in other hospitals across South Carolina.

III. Shackling Black Motherhood

Not only did South Carolina law enforcement agents brutally degrade Black mothers and pregnant women at the Charleston hospital with little public outcry, but the state's highest court essentially sanctioned the indignity. How could judges ignore this

39. *See* Whitner v. State, No. 93-CP-39-347 (S.C. Ct. Comm. Pleas Nov. 22, 1993) (vacating the sentence), *revd.*, No. 24468, 1996 WL 393164 (S.C. Jul. 15, 1996).

40. *See* Whitner v. South Carolina, No. 24468, 1996 WL 393164 (S.C. July 15, 1996).

41. *See Whitner,* 1996 WL 393164, at *2.

42. *Whitner,* 1996 WL 393164, at *3.

43. *Whitner,* 1996 WL 393164, at *3.

44. John Heilprin, *Drug Users Face Fetal Abuse Charge,* Post & Courier (Charleston), July 16, 1996, at A1, *available in* LEXIS, News Library, Papers File.

blatant devaluation of Black motherhood? State officials repeatedly disclaim any racial motivation in the prosecutions, and courts routinely accept their disclaimer. Everyone continues to pretend that race has nothing to do with the punishment of these mothers.

The blatant racial impact of the prosecutions can be overlooked only because it results from an institutionalized system that selects Black women for prosecution and from a deeply embedded mythology about Black mothers. These two factors make the disproportionate prosecution of Black mothers seem fair and natural, and not the result of any invidious motivation. These factors also make it more difficult to challenge the prosecutions on the basis of race. As the Black poet Nikki Giovanni recently observed: "In some ways, the struggle is more difficult now. I'd rather take what we did — if we were killed or beaten, you knew you were fighting the system."[45] Giovanni explained that the battle for racial justice is more complicated today than in the 1960s, because "racism is more sophisticated and insidious than segregated drinking fountains."[46]

Prosecutors like Condon do not announce that they plan to single out poor Black women for prosecution. Rather, they rely on a process already in place that is practically guaranteed to bring these women to their attention. The methods the state uses to identify women who use drugs during pregnancy result in disproportionate reporting of poor Black women.[47] The government's main source of information about prenatal drug use comes from hospital reports of positive infant toxicologies to child welfare authorities. This testing is implemented with greater frequency in hospitals serving poor minority communities. Private physicians who serve more affluent women are more likely to refrain from screening their patients, both because they have a financial stake in retaining their patients' business and securing referrals from them, and because they are socially more similar to their patients.[48]

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45. Felicia R. Lee, *Defying Evil, and Mortality,* N.Y. TIMES, Aug. 1, 1996, at C9.

46. *Id.*

47. *See* Molly McNulty, Note, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses,* 16 N.Y.U. REV. L. & SOC. CHANGE 277, 318 (1988); Bonnie I. Robin-Vergeer, Note, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention,* 42 STAN. L. REV. 745, 753, 782 n.157 (1990); Gina Kolata, *Bias Seen Against Pregnant Addicts,* N.Y. TIMES, July 20, 1990, at A13.

48. *See* Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida,* 322 NEW ENG. J. MED. 1202, 1205 (1990); Carol Angel, *Addicted Babies: Legal System's Response Unclear,* L.A. DAILY J., Feb. 29, 1988, at 1 (noting that reports from doctors serving upper income patients are rare).

Hospitals administer drug tests in a manner that further discriminates against poor Black women. One common criterion triggering an infant toxicology screen is the mother's failure to obtain prenatal care, a factor that correlates strongly with race and income.[49] Worse still, many hospitals have no formal screening procedures, and rely solely on the suspicions of health care professionals. This discretion allows doctors and hospital staff to perform tests based on their stereotyped assumptions about the identity of drug addicts.[50] Women who smoke crack report being abused and degraded by hospital staff during the delivery.[51] Their experiences suggest that staff often harbor a deep contempt for these women born at least partly of racial prejudice. A twenty-four-year-old woman from Brooklyn, "K," recounted a similar experience:

> Bad . . . they treat you bad. . . . That was like I had my daughter, when the nurse came, and I was having the stomach pain and my stomach was killing me. I kept callin and callin and callin. She just said you smokin that crack, you smoke that crack, you suffer.[52]

Accordingly to court papers, Nurse Brown, the chief enforcer of the Charleston Interagency Policy, frequently expressed racist views about her Black patients to drug counselors and social workers, including her belief that most Black women should have their tubes tied and that birth control should be put in the drinking water in Black communities.[53] It is not surprising that such nurses would turn their Black patients over to the police.

A study published in the prestigious *New England Journal of Medicine* discussed possible racial biases of health care professionals who interact with pregnant women.[54] Researchers studied the results of toxicologic tests of pregnant women who received prenatal care in public health clinics and in private obstetrical offices in Pinellas County, Florida. The study found that little difference existed in the prevalence of substance abuse by pregnant women along either racial or economic lines, and that there was little significant difference between patients at public clinics and private of-

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49. *See* Robin-Vergeer, *supra* note 47, at 798-99.

50. *See* Chasnoff et al., *supra* note 48, at 1206; Linda C. Mayes et al., *The Problem of Prenatal Cocaine Exposure,* 267 JAMA 406 (1992); Robin-Vergeer, *supra* note 47, at 754 & n.36.

51. *See* Lisa Maher, *Punishment and Welfare: Crack Cocaine and the Regulation of Mothering, in* THE CRIMINALIZATION OF A WOMAN'S BODY 157, 180 (Clarice Feinman ed., 1992); Siegel, *supra* note 19, at 16.

52. Maher, *supra* note 51, at 180 (alteration in original).

53. *See* Plaintiffs' Memorandum, *supra* note 21, at 33-34.

54. *See* Chasnoff et al., *supra* note 48.

fices.[55] Despite similar rates of substance abuse, however, Black women were *ten times* more likely than whites to be reported to government authorities.[56] Both public health facilities and private doctors were more inclined to turn in Black women than white women for using drugs while pregnant.[57]

Just as important as this structural bias against Black women is the ideological bias against them. Prosecutors and judges are predisposed to punish Black crack addicts because of a popular image promoted by the media during the late 1980s and early 1990s. News of an astounding increase in maternal drug use broke in 1988 when the National Association for Perinatal Addiction Research and Education (NAPARE) published the results of a study of babies in hospitals across the country. NAPARE found that at least eleven percent of women admitted in labor in hospitals across the country would test positive for illegal drugs.[58] In several hospitals, the proportion of drug-exposed infants was as high as twenty-five percent.[59] Extrapolating these statistics to the population at large, some observers estimated that as many as 375,000 drug-exposed infants are born every year.[60] This figure covered all drug exposure nationwide and did not break down the numbers based on the extent of drug use or its effects on the newborn.

The media parlayed the NAPARE report into a horrific tale of irreparable damage to hundreds of thousands of babies. A review of newspaper accounts of the drug exposure data reveals a stunning instance of journalistic excess. Although NAPARE's figures referred to numbers of infants *exposed* to, not *harmed* by, maternal drug use, the *Los Angeles Times* wrote that about 375,000 babies were "tainted by potentially fatal narcotics in the womb each year."[61] The NAPARE figure did not indicate the extent of maternal drug use or its effects on the fetus. In fact, the nature of harm, if

55. *See id.* at 1204.

56. *See id.*

57. *See id.*

58. *See* Jean Davidson, *Drug Babies Push Issue of Fetal Rights*, L.A. TIMES, Apr. 25, 1989, at 1.

59. *See id.*

60. *See* Kathleen Nolan, *Protecting Fetuses from Prenatal Hazards: Whose Crimes? What Punishment?*, CRIM. JUST. ETHICS, Winter/Spring 1990, at 13, 14 ("Over 350,000 infants are exposed prenatally to some form of illicit drug each year."); Douglas J. Besharov, *Crack Babies: The Worst Threat Is Mom Herself*, WASH. POST, Aug. 6, 1989, at B1 (recognizing the "most widely cited estimate" that "up to 375,000 fetally exposed [crack] babies" are born each year, but observing that this estimate is "much too high").

61. Jean Davidson, *Newborn Drug Exposure Conviction a 'Drastic' First*, L.A. TIMES, July 31, 1989, at 1.

any, caused by prenatal drug use depends on a number of factors, including the type and amount of drugs ingested, the pregnant woman's overall health, and the baby's environment after birth.[62] Some articles attributed all 375,000 cases to cocaine,[63] although experts estimate that 50,000 to 100,000 newborns are exposed specifically to cocaine each year.[64] In one editorial the figure ballooned to 550,000 babies who have "their fragile brains bombarded with the drug."[65] The *Los Angeles Times* implied in a front-page story that crack was the *only* drug used by pregnant women, writing, "Crack was even responsible for the creation of an entirely new, and now leading, category of child abuse: exposure of babies to drugs during pregnancy."[66] Of course, babies had been exposed prenatally to dangerous amounts of alcohol, prescription pills, and illicit drugs long before crack appeared in the 1980s.

The pregnant crack addict was portrayed as an irresponsible and selfish woman who put her love for crack above her love for her children.[67] In news stories she was often represented by a prostitute, who sometimes traded sex for crack, violating every conceivable quality of a good mother.[68] The chemical properties of crack were said to destroy the natural impulse to mother. "The most remarkable and hideous aspect of crack cocaine use seems to be the undermining of the maternal instinct," a nurse was quoted as observing about her patients.[69] The pregnant crack addict, then, was

62. *See* Barry Zuckerman, *Effects on Parents and Children, in* WHEN DRUG ADDICTS HAVE CHILDREN: REORIENTING CHILD WELFARE'S RESPONSE 49, 49-50 (Douglas J. Besharov ed., 1994).

63. *See, e.g., Cocaine Babies' Mom Convicted in Drug Trial,* MIAMI HERALD, July 14, 1989, at 1A, *available in* DIALOG.

64. *See* OFFICE OF EVALUATION & INSPECTIONS, DEPT. OF HEALTH AND HUMAN SERVICES, CRACK BABIES (1990); Lou Carlozo, *Moms' Arrests Rekindle Issue of Drug Babies,* CHI. TRIB., Jan. 27, 1995, Metro Lake Sec., at 1.

65. *Ignoring Wails of Babies,* ROCKY MOUNTAIN NEWS (Denver), July 1, 1995, at 58A, *available in* 1995 WL 3200263.

66. Rich Connell, *The Hidden Devastation of Crack,* L.A. TIMES, Dec. 18, 1994, at A1 (beginning a series entitled "The Real Cost of Crack").

67. *See* CYNTHIA R. DANIELS, AT WOMEN'S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS 116-17 (1993); Melissa Fletcher Stoeltje, *Backing Away from the Edge,* HOUS. CHRON., Jan. 21, 1996, Lifestyle Sec., at 1, *available in* 1996 WL 5577982.

68. *See, e.g.,* Charles Anzalone, *Small Miracles: Michelle Spikes Lost Herself When She Lost Her Mother. Now She Is Finding Herself In Her Child,* BUFF. NEWS, May 14, 1995, Magazine, at M6, *available in* 1995 WL 5475335; Davidson, *supra* note 58; Wendy Kurland, *Crack Stronger than Mother's Love,* TENNESSEAN, Oct. 29, 1995, at 1A, *available in* 1995 WL 11683478; Clare Ulik, *An Addict from the First Breath: Mothers' Drug Use Dooms Infants to Excruciating Odds,* ARIZ. REPUBLIC/PHOENIX GAZETTE, May 18, 1994, Northwest Community Sec., at 1, *available in* 1994 WL 6362475.

69. Cathy Trost, *Born to Lose: Babies of Crack Users Crowd Hospitals, Break Everybody's Heart,* WALL ST. J., July 18, 1989, at A1.

the exact opposite of a mother: she was promiscuous, uncaring, and self-indulgent.

By focusing on maternal *crack* use, which is more prevalent in inner-city neighborhoods and stereotypically associated with Blacks,[70] the media left the impression that the pregnant addict is typically a Black woman.[71] Even more than a "metaphor for women's alienation from instinctual motherhood,"[72] the pregnant crack addict was the latest embodiment of the bad *Black* mother.

The monstrous crack-smoking mother was added to the iconography of depraved Black maternity, alongside the matriarch and the welfare queen. For centuries, a popular mythology has degraded Black women and portrayed them as less deserving of motherhood. Slave owners forced slave women to perform strenuous labor that contradicted the Victorian female roles prevalent in the dominant white society.[73] One of the most prevalent images of slave women was the character of Jezebel, a woman governed by her sexual desires, which legitimated white men's sexual abuse of Black women.[74] The stereotype of Black women as sexually promiscuous helped to perpetuate their devaluation as mothers.

This devaluation of Black motherhood has been reinforced by stereotypes that blame Black mothers for the problems of the Black family, such as the myth of the Black matriarch — the domineering female head of the Black family. White sociologists have held Black matriarchs responsible for the disintegration of the Black family and the consequent failure of Black people to achieve success in America.[75] Daniel Patrick Moynihan popularized this theory in his 1965 report, *The Negro Family: The Case for National Action,* which claimed, "At the heart of the deterioration of the

70. *See* JAMES A. INCIARDI ET AL., WOMEN AND CRACK-COCAINE 1-13 (1993); Elijah Gosier, *Crack Deals Cross Boundaries of Race,* ST. PETERSBURG TIMES, July 30, 1989, at 1B, *available in* 1990 WL 5387265; Syl Jones, *On Race, Local Media Deserves Euthanasia,* STAR-TRIB. (Minneapolis-St. Paul), June 21, 1990, at 23A, *available in* 1989 WL 6793740; Andrew H. Malcolm, *Crack, Bane of Inner City, Is Now Gripping Suburbs,* N.Y. TIMES, Oct. 1, 1989, § 1, at 1.

71. *See, e.g.,* Kathleen Schuckel, *Aims of Home for Pregnant Addicts Include Reducing Infant Mortality,* INDIANAPOLIS STAR, Nov. 30, 1995, at C9, *available in* 1995 WL 3095246 (associating drug use during pregnancy with high *Black* infant mortality rate).

72. DANIELS, *supra* note 67, at 116.

73. *See* ANGELA Y. DAVIS, WOMEN, RACE AND CLASS 5 (1983); DEBORAH GRAY WHITE, AR'N'T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH 16, 27-29 (1985).

74. *See* WHITE, *supra* note 73, at 28-29, 61.

75. *See* PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 325-35 (1984); BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM 70-83 (1981); ROBERT STAPLES, THE BLACK WOMAN IN AMERICA: SEX, MARRIAGE, AND THE FAMILY 10-34 (1973).

fabric of Negro society is the deterioration of the Negro family."[76] Moynihan blamed domineering Black mothers for the demise of their families, arguing that "the Negro community has been forced into a matriarchal structure which, because it is so out of line with the rest of the American society, seriously retards the progress of the group as a whole."[77]

The myth of the Black Jezebel has been supplemented by the contemporary image of the lazy welfare mother who breeds children at the expense of taxpayers in order to increase the amount of her welfare check.[78] This view of Black motherhood provides the rationale for society's restrictions on Black female fertility. It is this image of the undeserving Black mother that also ultimately underlies the government's choice to punish crack-addicted women.

The frightening portrait of diabolical pregnant crack addicts and irreparably damaged crack babies was based on data that have drawn criticism within the scientific community.[79] The data on the extent and severity of crack's impact on babies are highly controversial. At the inception of the crisis numerous medical journals reported that babies born to crack-addicted mothers suffered a variety of medical, developmental, and behavioral problems.[80] More recent analyses, however, have isolated the methodological flaws of these earlier studies.[81]

The initial results were made unreliable by the lack of controls and the selection of poor, inner-city subjects at high risk for unhealthy pregnancies. Maternal crack use often contributes to underweight and premature births. This fact alone is reason for

76. OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEPT. OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 5 (1965).

77. *Id.* at 29.

78. *See* Wahneema Lubiano, *Black Ladies, Welfare Queens, and State Minstrels: Ideological War by Narrative Means, in* RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 323, 332 (Toni Morrison ed., 1992); Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate,* 22 FORDHAM URB. L.J. 1159 (1995).

79. *See* Linda C. Mayes et al., Commentary, *The Problem of Prenatal Cocaine Exposure: A Rush to Judgment,* 267 JAMA 406 (1992); Barry Zuckerman & Deborah A. Frank, Commentary, *"Crack Kids": Not Broken,* 89 PEDIATRICS 337 (1992); Robert Mathias, *"Crack Babies" Not a Lost Generation, Researchers Say,* NIDA NOTES (Natl. Inst. on Drug Abuse, Rockville, Md.), Jan.-Feb. 1992, at 16.

80. *See* Ira J. Chasnoff et al., *Temporal Patterns of Cocaine Use in Pregnancy: Perinatal Outcome,* 261 JAMA 1741 (1989); Mark G. Neerhof et al., *Cocaine Abuse During Pregnancy: Peripartum Prevalence and Perinatal Outcome,* 161 AM. J. OBSTETRICS & GYNECOLOGY 633 (1989); Diana B. Petitti & Charlotte Coleman, *Cocaine and the Risk of Low Birth Weight,* 80 AM. J. PUB. HEALTH 25 (1990).

81. *See* Mayes et al., *supra* note 79; Zuckerman & Frank, *supra* note 79; Mathias, *supra* note 79.

concern. But many of the problems seen in crack-exposed babies are just as likely to have been caused by other risk factors associated with their mothers' crack use, such as malnutrition, cigarettes, alcohol, physical abuse, and inadequate health care. Researchers cannot determine authoritatively which of this array of hazards actually caused the terrible outcomes they originally attributed to crack, or the percentage of infants exposed to crack in the womb who actually experience these consequences.[82] In addition, the claim that prenatal crack use causes irreparable neurological damage leading to behavioral problems has not been fully substantiated.[83] An article by a team of research physicians concluded that "available evidence from the newborn period is far too slim and fragmented to allow any clear predictions about the effects of intrauterine exposure to cocaine on the course and outcome of child growth and development."[84]

The medical community's one-sided attention to studies showing detrimental results from cocaine exposure added to the public's misperception of the risks of maternal crack use.[85] For a long time, journals tended to accept for publication only studies that supported the dominant view of fetal harm. Research that reported no adverse effects was published with less frequency, even though it was often more reliable.[86]

The point is not that crack use during pregnancy is safe, but that the media exaggerated the extent and nature of the harm it causes. News reports erroneously suggested, moreover, that the problem of maternal drug use was confined to the Black community. A public health crisis that cuts across racial and economic lines was transformed into an example of *Black* mother's depravity that warranted harsh punishment. Why hasn't the media focused as much attention on the harmful consequences of alcohol abuse or cigarette smoking during pregnancy,[87] or the widespread devastation that

82. *See* Marvin Dicker & Eldin A. Leighton, *Trends in the US Prevalence of Drug-Using Parturient Women and Drug Affected Newborns, 1979 through 1990,* 84 AM. J. PUB. HEALTH 1433 (1994); Mayes et al., *supra* note 79.

83. *See* Mayes et al., *supra* note 79; Zuckerman & Frank, *supra* note 79.

84. Mayes et al., *supra* note 79.

85. *See* Gideon Koren et al., *Bias Against the Null Hypothesis: The Reproductive Hazards of Cocaine,* LANCET, Dec. 16, 1989, at 1440.

86. *See id.*

87. *See* DANIELS, *supra* note 67, at 128; Barry Zuckerman, *Marijuana and Cigarette Smoking during Pregnancy: Neonatal Effects, in* DRUGS, ALCOHOL, PREGNANCY AND PARENTING 73 (Ira J. Chasnoff ed., 1988); Elisabeth Rosenthal, *When a Pregnant Woman Drinks,* N.Y. TIMES, Feb. 4, 1990, § 6 (Magazine), at 30.

Black infants suffer as a result of poverty?[88] In *Punishing Drug Addicts Who Have Babies,* I suggested an answer:

> [T]he prosecution of crack-addicted mothers diverts public attention from social ills such as poverty, racism, and a misguided national health policy and implies instead that shamefully high Black infant death rates are caused by the bad acts of individual mothers. Poor Black mothers thus become the scapegoats for the causes of the Black community's ill health. Punishing them assuages any guilt the nation might feel at the plight of an underclass with infant mortality at rates higher than those in some less developed countries. Making criminals of Black mothers apparently helps to relieve the nation of the burden of creating a health care system that ensures healthy babies for all its citizens.[89]

Additional medical studies demonstrate the perversity of a punitive approach. Some researchers have found that the harmful effects of prenatal crack exposure may be temporary and treatable.[90] A Northwestern University study of pregnant cocaine addicts, for example, found that "comprehensive prenatal care may improve [the] outcome in pregnancies complicated by cocaine abuse."[91]

Research has also discovered dramatic differences in the effects of maternal alcohol abuse depending on the mother's socioeconomic status. Heavy drinking during pregnancy can cause fetal alcohol syndrome, characterized by serious physical malformations and mental deficiencies.[92] Although all women in a study drank at the same rate, the children born to low-income women had a 70.9% rate of fetal alcohol syndrome, compared to a 4.5% rate for those of upper-income women.[93] The main reason for this disparity was the

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88. *See* SARA ROSENBAUM ET AL., CHILDREN'S DEFENSE FUND: THE HEALTH OF AMERICA'S CHILDREN 4 & tbl. 1.1 (1988); Lorna McBarnette, *Women and Poverty: The Effects on Reproductive Status, in* TOO LITTLE, TOO LATE: DEALING WITH THE HEALTH NEEDS OF WOMEN IN POVERTY 55 (Cesar A. Perales & Lauren S. Young eds., 1988).

89. *See* Roberts, *supra* note 2, at 1436.

90. *See* BONNIE BAIRD WILFORD & JACQUELINE MORGAN, GEORGE WASHINGTON UNIVERSITY, FAMILIES AT RISK: ANALYSIS OF STATE INITIATIVES TO AID DRUG-EXPOSED INFANTS AND THEIR FAMILIES 11 (1993); Ira J. Chasnoff et al., *Cocaine/Polydrug Use in Pregnancy: Two-Year Follow-up,* 89 PEDIATRICS 337 (1992); Mathias, *supra* note 79, at 14.

91. *See* Scott N. MacGregor et al., *Cocaine Abuse During Pregnancy: Correlation Between Prenatal Care and Perinatal Outcome,* 74 OBSTETRICS & GYNECOLOGY 882, 885 (1989) (finding that comprehensive prenatal care can improve the outcome, but also finding that perinatal morbidity associated with cocaine abuse "cannot be eliminated solely by improved prenatal care"). Black women face financial, institutional, and cultural barriers to receiving adequate prenatal care. *See* Marilyn L. Poland et al., *Barriers to Receiving Adequate Prenatal Care,* 157 AM. J. OBSTETRICS & GYNECOLOGY 297, 297, 301-02 (1987); Ruth E. Zambrana, *A Research Agenda on Issues Affecting Poor and Minority Women: A Model for Understanding Their Health Needs,* 12 WOMEN & HEALTH, Nos. 3/4, at 137 (1988); Philip J. Hilts, *Life Expectancy for Blacks in U.S. Shows Sharp Drop,* N.Y. TIMES, Nov. 29, 1990, at A1.

92. *See* Rosenthal, *supra* note 87.

93. *See* Nesrin Bingol et al., *The Influence of Socioeconomic Factors on the Occurrence of Fetal Alcohol Syndrome,* 6 ADVANCES IN ALCOHOL & SUBSTANCE ABUSE 105 (1987).

nutrition of the pregnant women. While the wealthier women ate a regular, balanced diet, the poorer women had sporadic, unhealthy meals. Admittedly, crack is not good for anyone, and we need effective policies to stem crack use by pregnant women. Yet these studies about fetal alcohol syndrome and prenatal crack exposure suggest that crack's harmful consequences for babies may be minimized, or even prevented, by ensuring proper health care and nutrition for drug-dependant mothers. The best approach for improving the health of crack-exposed infants, then, is to improve the health of their mothers by ensuring their access to health care and drug treatment services. Yet prosecuting crack-addicted mothers does just the opposite: it drives these women away from these services out of fear of being reported to law enforcement authorities.[94] This result reinforces the conclusion that punitive policies are based on resentment toward Black mothers, rather than on a real concern for the health of their children.

The medical profession's new information regarding the risks of prenatal crack exposure has had little impact on the public's perception of the "epidemic." The image of the crack baby — trembling in a tiny hospital bed, permanently brain damaged, and on his way to becoming a parasitic criminal — seems indelibly etched in the American psyche. It will be hard to convince most Americans that the caricature of the crack baby rests on hotly contested data.

IV. Strategies for Unshackling Black Motherhood

Given the mountain of structural and ideological hurdles that pregnant crack addicts must surmount, their attorneys have a difficult task in presenting them as sympathetic parties. One strategy in opposing a punitive approach to prenatal drug use is to divert attention away from these women and the devaluing racial images that degrade them.

A. *Diverting Attention from Race*

Attorneys and scholars have suggested three alternative issues to replace attention to the racial images that make their clients so unpopular — concern for the health of the babies exposed to prenatal drug use, the potential expansion of state interference in pregnant women's conduct, and claims of middle-class white women who have been prosecuted for using drugs during pregnancy.

94. *See* Roberts, *supra* note 2, at 1448-50; *infra* notes 95-99 and accompanying text.

1. *Concern for Babies' Health*

One of the greatest assets on the defendants' side is the opinion of major medical and public health organizations about the health risks created by the prosecution of substance-abusing mothers. Most leading medical and public health organizations in the country have come out in opposition to the prosecutions for this very reason.[95] In 1990, the American Medical Association issued a detailed report on legal interventions during pregnancy, stating its concern that "physicians' knowledge of substance abuse . . . could result in a jail sentence rather than proper medical treatment."[96] It concluded that "criminal penalties may exacerbate the harm done to fetal health by deterring pregnant substance abusers from obtaining help or care from either the health or public welfare professions, the very people who are best able to prevent future abuse."[97] According to the American Academy of Pediatrics, "[p]unitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health."[98] The American College of Obstetricians and Gynecologists, the March of Dimes, the National Council on Alcoholism and Drug Dependence, and other groups have also issued policy statements denouncing the criminalization of maternal drug use.[99]

Attorneys have taken advantage of this support by assembling an impressive array of medical experts at trial and amicus briefs on appeal. In the *Whitner* appeal, for example, major medical, public health, and women's organizations, including the American Medical Association and its South Carolina affiliate, the American Public Health Association, the National Council on Alcoholism and Drug Dependence, and NOW Legal Defense and Education Fund, joined in amicus briefs opposing prosecution of women for prenatal drug use.

Lynn Paltrow, Director of Special Litigation at the Center for Reproductive Law and Policy ("the Center") and the leading advo-

95. *See* CENTER FOR REPRODUCTIVE LAW & POLICY, *supra* note 29, at 11-12; DANIELS, *supra* note 67, at 102; Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569, 572 & n.12 (1992).

96. Board of Trustees, American Medical Association, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2667 (1990).

97. *Id.* at 2669.

98. Committee on Substance Abuse, American Academy of Pediatrics, *Drug-Exposed Infants*, 86 PEDIATRICS 639, 641 (1990).

99. *See* CENTER FOR REPRODUCTIVE LAW & POLICY, *supra* note 29, at 11-12; Plaintiffs' Memorandum, *supra* note 21, at 14 n.18.

cate for women charged with prenatal crimes, has described the focus on the prosecutions' medical hazards as a way of diverting attention from her unpopular clients. A lengthy article in *The Los Angeles Times Magazine* discussed Paltrow's rationale:

> [Paltrow] knows that, as impressive as the intellectual arguments might be in favor of women's reproductive rights, they pale for many in the face of a sickly newborn twitching from a cocaine rush. She knows she'd lose support, even among those committed to women's rights, if people felt forced to choose between pregnant substance abusers and their babies.
>
> The medical community's policy statements provide Paltrow with a way to avoid this perilous choice. "Even if you care only about the baby, even if you don't give a damn about the mother, you should still oppose Charleston's policy," Paltrow finds herself able to argue.[100]

According to this view, a strategy that seeks to avoid the disparaging images of poor Black mothers is more likely to prevail than one that attempts to discredit them.

2. *The Parade of Horribles*

A second avoidance tactic is to steer attention to more sympathetic middle-class white women. A common criticism of the prosecution of drug-addicted mothers is that the imposition of maternal duties will lead to punishment for less egregious conduct. Commentators have predicted government penalties for cigarette smoking, consumption of alcohol, strenuous physical activity, and failure to follow a doctor's orders.[101]

If harm to a viable fetus constitutes child abuse, as the *Whitner* court held, then an endless panoply of activities could make pregnant women guilty of a crime. After the *Whitner* decision, Lynn Paltrow pointed out that:

> There are not enough jail cells in South Carolina to hold the pregnant women who have a drug problem, drink a glass of wine with dinner, smoke cigarettes . . . or decide to go to work despite their doctor's advice that they should stay in bed. Thousands of women are now child neglecters.[102]

I concur in the objective of demonstrating that the prosecution of pregnant crack addicts should be the concern of all women. It may be a more effective tactic to convince affluent women that such

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100. Siegel, *supra* note 19, at 17.

101. *See, e.g.*, Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278, 288-89 (1990); Dawn E. Johnson, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 606-07 (1986).

102. Lisa Greene, *Court Rules Drug Use is Fetal Abuse*, THE STATE, July 16, 1996, at A1.

government policies also jeopardize their lifestyles. Although valid, this argument tends to ignore the reality of poor Black women who are currently abused by punitive policies. The reference to a parade of horribles to criticize the fetal rights doctrine often belittles the significance of current government action. It seems to imply that the prosecution of Black crack addicts is not enough to generate concern and that we must postulate the prosecution of white middle-class women in order for the challenge to be meaningful.

In fact, it is very unlikely that South Carolina will pursue thousands of pregnant women on child neglect charges. It is hard to imagine police raiding private hospitals and hauling away middle-class women for fetal abuse. Instead, the state will escalate its crusade against the women it has prosecuted in the past — poor Black women who smoke crack.

3. *Relying on White Women's Claims*

Feminist strategists have also suggested that challenging the charges brought against white drug users will benefit Black defendants. In her insightful book, *At Women's Expense: State Power and the Politics of Fetal Rights,* Cynthia Daniels stresses the strategic advantages of connecting the charges brought against Black and white middle-class drug users:

> While the threat of prosecution is not shared equally by women of different races and classes, it is critically important to see that the threat is still shared by all women: no woman is exempt from the threat to self-sovereignty posed by the idea of fetal rights. The successful prosecution of a poor black woman for fetal drug abuse has set legal, political, and social precedents that have been used to prosecute white women of privilege. When a prosecutor in Michigan was confronted with allegations that he was targeting only poor black women addicted to crack, he brought similar charges against Kim Hardy, a white woman lawyer who was addicted to cocaine.
>
> This strategy can have unintended results, however. The cultural, economic, and political power that women of privilege use to resist attempts to prosecute them — or to force them to have surgery, or to keep them out of good-paying jobs — can result in critical precedents for the defense of poor women's rights as well. Kim Hardy, for instance, defended herself successfully in court; the precedent set by her case can now be used to defend women of lesser economic means. . . . The disproportionate privilege of some women, rather than hope-

> lessly dividing rich from poor or white women from women of color, can be used to defend the rights of all women.[103]

This view, while recognizing the special injury to women of color, also proposes a strategy of challenging governmental intrusion in women's reproductive decisions by demonstrating how they thwart the liberties of middle-class women. Again, the rationale is that calling attention to the harm to privileged women is more likely to generate change than decrying the harm to poor minority women. It is based on the hope that the benefit of establishing a strong theory of reproductive liberty for middle-class white women will trickle down to their poor, less privileged sisters.

But this strategy also has limited potential for liberating Black women. The restraints on Black women's reproductive freedom have *trickled up* to white women. Protections afforded white middle-class women, on the other hand, are often withheld from Black women. Medical and social experiments are tested on the bodies of Black women first before they are imposed on white women. Norplant, for example, was developed to curtail the fertility of poor Third-World women,[104] and then was marketed to white women in this country. As Daniels recognizes, the prosecution of Black women for smoking crack during pregnancy has set a precedent for regulating the conduct of pregnant women in the middle-class. Welfare "family caps" gained popularity as a means of reducing the numbers of Black children on public assistance, but they will throw thousands of white children into poverty. At the same time, the ideology that devalues Black mothers and perpetuates a racial division among women continues to thwart the universal application of

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103. DANIELS, *supra* note 67, at 134-35. Daniels mistakenly identifies Kim Hardy as the white Michigan attorney prosecuted for exposing her fetus to cocaine. In fact, Kimberly Hardy was a *Black* woman prosecuted by Muskegon County prosecutor Tony Tague for smoking crack during pregnancy. The white defendant was named Lynn Bremer. *See* PALTROW, *supra* note 18, at 18-19. Kim Hardy was angered by the racial disparity she saw in the court's disposition of the two cases:

> It came as a shock . . . and then I was pretty angry. Addiction is a medical problem. You wouldn't put a heart patient in jail for having a heart attack. And you wouldn't prosecute an epileptic for having a seizure. . . . It's been a nightmare! . . . My baby was taken away from his mother for the first ten months of his life . . . . And one more thing, after all the publicity in my case, the prosecutor later prosecuted a thirty-six year old white woman lawyer to show he wasn't prejudiced; but the judge dismissed her case quick.

Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers,* 39 BUFF. L. REV. 737, 737 (1991) (quoting Kim Hardy). The trial judge denied Hardy's motion to quash the charge based on delivery of drugs to a minor. The Michigan Court of Appeals, however, reversed that decision and quashed the drug delivery charge. *See* Michigan v. Hardy, 469 N.W.2d 50 (Mich. Ct. App. 1991).

104. *See* BETSY HARTMANN, REPRODUCTIVE RIGHTS AND WRONGS: THE GLOBAL POLITICS OF POPULATION CONTROL 119 (South End Press 1995) (1987); JANICE G. RAYMOND, WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM 15-19 (1993).

gains achieved by white, professional women. Theories of reproductive freedom must start with the lives of the women at the bottom, not at the top.

B. *Focusing on Race*

After winning a number of state court victories, Lynn Paltrow decided to take the offensive. In October 1993, the Center filed in federal district court a class action lawsuit against the City of Charleston and MUSC on behalf of two Black women who had been jailed under the Interagency Policy.[105] The plaintiffs demanded three million dollars for violations of a number of constitutional guarantees, including the right to privacy in medical information, the right to refuse medical treatment, the right to procreate, and the right to equal protection of the laws.

The plaintiffs' papers identify no less than five discrete aspects of the policy that have a racially discriminatory impact:

> (1) the choice to apply the Policy only at MUSC where the patient population is disproportionately African American by comparison with the community at large; (2) the choice to apply the policy within MUSC, only to patients of the obstetrics clinic where the patient population is even more disproportionately African American, even by comparison with MUSC as a whole; (3) the choice not to test babies or their mothers treated at MUSC but born at other hospitals in Charleston, where a greater proportion of the patient population was white; (4) the choice to use non-medically indicated criteria for testing, including failure to obtain prenatal care, which arose disproportionately in the African-American community; and (5) the choice to arrest only for the use of cocaine, a drug that defendants concede is used disproportionately by African American women.[106]

The response to the lawsuit demonstrates the strength of derogatory images about Black mothers. Despite the overwhelming evidence that the policy was intended to punish Black women alone, South Carolina officials dismissed the race discrimination claim. Condon tried to explain away the program's blatant racial targeting as the innocent result of demographics. He conceded that "[i]t is true that most of the women treated were black. The hospital serves a primarily indigent population, and most of the patient population is black."[107] Condon did not believe he had to explain why he had singled out MUSC as the lone site for the punitive program.

105. *See* Ferguson v. City of Charleston, No. 2:93-2624-2 (D.S.C. filed Oct. 5, 1993).

106. Plaintiffs' Reply Memorandum in Support of Their Cross-Motion for Partial Summary Judgment at 17-18, Ferguson v. City of Charleston, No. 2:93-2624-2 (D.S.C. Nov. 10, 1995) (citations omitted).

107. Condon, *supra* note 20, at 14.

Surely hospitals with a white clientele also had pregnant patients who abused drugs. But the image of the pregnant crack addict justified in many people's minds this disparate treatment. Federal Judge C. Weston Houck refused to halt the program pending trial, explaining that " 'the public is concerned about children who, through no fault of their own . . . are born addicted.' "[108]

An editorial in Denver's *Rocky Mountain News* applauded Houck's decision and made light of the allegations of racial discrimination. "[T]he hospital serves mostly black clients, so naturally most participants were black. And the center talked as though black junkies were being harmed rather than weaned from a hellish habit. A federal judge dismissed the suit for the hogwash it was."[109] The CBS Evening News presented a similar view on a 1994 Eye on America segment on the South Carolina policy.[110] Co-anchor Connie Chung set the stage by framing the policy as an answer to the "national tragedy" of cocaine use during pregnancy: "Every day in America thousands of pregnant women take cocaine, endangering the health of their children. Now one state is trying to stop women from doing that by threatening to throw them in jail."[111] Correspondent Jacqueline Adams reported that "nurse Shirley Brown says race has nothing to do with it. She believes cocaine is so powerful, mothers need the threat of jail before they'll change their ways."[112]

Paltrow was also afraid that the discriminatory intent requirement would make it hard to establish an equal protection claim.[113] She nevertheless believed that alleging racial bias would bolster the other claims: "[E]ven if the race discrimination claim is not successful, bringing the racially discriminatory pattern to the court's attention in the main or an *amicus* brief may sensitize the court and create additional pressure to dismiss the charges on the other grounds presented."[114] I believe that there are additional reasons to focus on the defendants' race rather than avoid it.

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108. *Controversial Drug Treatment Program Won't Be Suspended,* HERALD ROCK HILL (South Carolina), Feb. 17, 1994, at 11B, *available in* 1994 WL 7030385.

109. *Ignoring Wails of Babies,* ROCKY MOUNTAIN NEWS (Denver), July 1, 1995, at 58A, *available in* 1995 WL 3200263.

110. *See Profile: Eye on America; Controversial Program in South Carolina Cracks Down on Pregnant Women Doing Cocaine* (CBS Evening News television broadcast, Mar. 10, 1994), *available in* WL 3302176.

111. *Id.*

112. *Id.* at *2.

113. *See* Paltrow, *supra* note 4, at 21.

114. *Id.*

1. *Telling the Whole Story*

The diversionary strategy might be worth the neglect of Black women's particular injuries if it presented the only feasible route to victory. Yet this tactic has other disadvantages that weaken its power to challenge policies that devalue Black childbearing. By diverting attention from race, this strategy fails to connect numerous policies that degrade Black women's procreation. In addition to the prosecutions, for example, lawmakers across the country have been considering schemes to distribute Norplant to poor women, as well as measures that penalize welfare mothers for having additional children.[115] Viewed separately, these developments appear to be isolated policies that can be justified by some neutral government objective. When all are connected by the race of the women most affected, a clear and horrible pattern emerges.

Lynn Paltrow recently stated, " 'for the first time in American history . . . what a pregnant woman does to her own body becomes a matter for the juries and the court.' "[116] Paltrow is correct that the criminal regulation of pregnancy that occurs today is in some ways unprecedented.[117] Yet it continues the legacy of the degradation of Black motherhood. A pregnant slave woman's body was subject to legal fiat centuries ago because the fetus she was carrying already belonged to her master. Over the course of this century, government policies have regulated Black women's reproductive decisionmaking based on the theory that Black childbearing causes social problems.[118] Although the prosecution of women for prenatal crimes is relatively recent, it should be considered in conjunction with the sterilization of Black welfare mothers during the 1970s and the promotion of Norplant as a solution to Black poverty.

2. *Telling Details about Black Women's Lives*

I recently heard on a radio program portions of the audio-taped diary of a Mexican teenager who had migrated across the Rio

115. *See* Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931, 933-34 (1995); Madeline Henley, Comment, *The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Norplant*, 41 BUFF. L. REV. 703, 747-58 (1993).

116. *Rivera Live* (CNBC television broadcast, July 16, 1996), *available in* 1996 WL 7051755, at *3 (interviewing Lynn Paltrow).

117. *See* Janet Gallagher, *Collective Bad Faith: "Protecting" the Fetus, in* REPRODUCTION, ETHICS, AND THE LAW 343, 346-52 (Joan C. Callahan ed., 1995) (discussing developments during the 1980s that led to prosecutions for prenatal crimes).

118. *See* Roberts, *supra* note 2, at 1442-44; Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1961-77 (1993).

Grande River into Texas.[119] One day as he was looking at the river he saw the body of a dead man who looked Mexican floating downstream. The youth, breathing heavily and noticeably shaken by the scene, commented into his tape recorder that he was thinking about the man's family back in Mexico. This dead man, he thought, was probably the father of a poor family that was counting on him for their sustenance. It appeared that he had tried to forge the river in search of work so that he could send money back to them. How would they learn about his awful fate? How would his family survive without him? As the teenager told the story, the man in the river was transformed from the popular image of a "wetback" trying to sneak illegally into the United States into a hero who valiantly had risked his life for the sake of his family. The program impressed upon me how telling a story from a different perspective changes the entire meaning of a set of events.

Although the image of the monstrous crack-addicted mother is difficult to eradicate, it will be hard to abolish the policies that regulate Black women's fertility without exposing the image's fallacies. Describing the details of these women's lives may help. Crystal Ferguson, for example, was arrested for failing to comply with Nurse Brown's order to enter a two-week residential drug-rehabilitation program. Her arrest might appear to be justified without knowing the circumstances that led to her refusal. Ferguson requested an outpatient referral because she had no one to care for her two sons at home and the two-week program provided no childcare. Ferguson explained in an interview that she made every effort to enroll in the program, but was thwarted by circumstances beyond her control:

> I saw the situation my kids were in. There was no one to take care of them. Someone had stolen our food stamps and my unemployment check while I was at the hospital. There was no way I was going to leave my children for two weeks, knowing the environment they were in.[120]

3. *Highlighting the Abuse of Black Women's Bodies*

The Center also attacked the South Carolina policy by filing a complaint with the National Institutes of Health alleging that the Interagency Policy constituted research on human subjects, which MUSC had been conducting without federally mandated review

119. *See All Things Considered: Teenage Diaries — Juan's Story* (Natl. Pub. Radio, Aug. 5, 1996), *available in* 1996 WL 12726136.

120. Siegel, *supra* note 19 (quoting Crystal Ferguson).

and approval.[121] It argued that the hospital had embarked on an experiment designed to test the hypothesis that threats of incarceration would stop pregnant women from taking drugs and improve fetal health. Yet MUSC had never taken the required precautions to ensure that patients were adequately protected; indeed, it had surreptitiously collected confidential information about them and given it to the police. The strategy proved effective: the NIH agreed that MUSC had violated the requirements for human experimentation. In October 1994, five years after the policy's inception, MUSC dropped the program as part of a settlement agreement with the Department of Health and Human Services, which had commenced its own investigation of possible civil rights violations. Under threat of losing millions of dollars in federal funding, the hospital halted its joint venture with the solicitor's office and the police.

One advantage of the complaint was that it made the Black mothers claimants rather than defendants. Instead of defending against charges of criminality, they affirmatively demanded an end to the hospital's abusive practices. Instead of fending off a host of negative images, claimants can accuse the government of complicity in a legacy of medical experimentation on the bodies of Black women without their consent.[122]

In past centuries, doctors experimented on slave women before practicing new surgical procedures on white women. Marion Sims, for example, developed gynecological surgery in the nineteenth century by performing countless operations, without anesthesia, on female slaves purchased expressly for his experiments.[123] In the 1970s, doctors coerced hundreds of thousands of Black women into agreeing to sterilization by conditioning medical services on consent to the operation.[124] More recently, a survey published in 1984 found that 13,000 Black women in Maryland were screened for sickle-cell anemia without their consent or the benefit of adequate counseling.[125] Doctors have also been more willing to override

121. *See* Philip J. Hilts, *Hospital Put on Probation Over Tests on Poor Women,* N.Y. TIMES, Oct. 5, 1994, at B9.

122. I elaborate this point in Dorothy E. Roberts, *Reconstructing the Patient: Starting with Women of Color, in* FEMINISM AND BIOETHICS: BEYOND REPRODUCTION 116 (Susan M. Wolf ed., 1996).

123. *See* G.J. BARKER-BENFIELD, THE HORRORS OF THE HALF-KNOWN LIFE: MALE ATTITUDES TOWARD WOMEN AND SEXUALITY IN NINETEENTH-CENTURY AMERICA 101 (1976).

124. *See* Roberts, *supra* note 2, at 1442-43.

125. *See* Mark R. Farfel & Neil A. Holtzman, *Education, Consent, and Counseling in Sickle Cell Screening Programs: Report of a Survey,* 74 AM. J. PUB. HEALTH 373, 373 (1984).

Black patients' autonomy by performing forced medical treatment to benefit the fetus.[126] A national survey published in 1987 in the *New England Journal of Medicine* discovered twenty-one cases in which court orders for cesarean sections were sought, and petitions were granted in eighteen of these cases.[127] Eighty-one percent of the women involved were women of color; all were treated in a teaching-hospital clinic or were receiving public assistance.

Given the durability of disparaging images of Black mothers, particularly those who smoke crack, it is understandable that lawyers would search for ways to avoid these images altogether. One strategy, then, is to try to make judges forget that the prosecutions of prenatal crimes are targeted primarily at crack-addicted mothers. But I believe that leaving these images unchallenged will only help to perpetuate Black mothers' degradation. A better approach is to uproot and contest the mythology that propels policies that penalize Black women's childbearing. The medical risks of punitive policies and their potential threat to all women only enhance an argument that these policies perpetuate Black women's subordination.

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126. *See* Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 500-01, 520-22 (1993); Lisa C. Ikemoto, *Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women*, 59 TENN. L. REV. 487, 510 (1992).

127. *See* Veronika E.B. Kolder et al., *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192 (1987).

firmed the reasonableness of the fee request. Additionally, the District Court's analysis of the *Gunter* factors was well-reasoned and thorough and therefore further supports the conclusion that the District Court's award of fees was not an abuse of discretion.

IV. Conclusion

For the reasons set forth above, we will affirm the orders of the District Court granting final approval of the Zurich Settlement and the Gallagher Settlement and approving the motion for an award of attorneys' fees in the Zurich Settlement.

Brian D. PROWEL, Appellant,

v.

WISE BUSINESS FORMS, INC., Appellee.

No. 07–3997.

United States Court of Appeals, Third Circuit.

Argued Oct. 1, 2008.

Filed: Aug. 28, 2009.

Background: Former employee brought action against former employer under Title VII and the Pennsylvania Human Relations Act alleging harassment and retaliation based on sex and religion. The United States District Court for the Western District of Pennsylvania, Terrence F. McVerry, J., 2007 WL 2702664, granted summary judgment in favor of employer. Employee appealed.

Holdings: The Court of Appeals, Hardiman, Circuit Judge, held that:

(1) issue of material fact existed as to whether alleged harassment suffered by male employee was because of his homosexuality or because of his effeminacy, and

(2) employee's religious harassment claim was based entirely on his status as a gay man.

Affirmed in part, vacated in part, and remanded.

Before: FISHER, CHAGARES and HARDIMAN, Circuit Judges.

OPINION OF THE COURT

HARDIMAN, Circuit Judge.

Brian Prowel appeals the District Court's summary judgment in favor of his former employer, Wise Business Forms, Inc. Prowel sued under Title VII of the Civil Rights Act of 1964 and the Pennsylvania Human Relations Act, alleging that Wise harassed and retaliated against him because of sex and religion. The principal issue on appeal is whether Prowel has marshaled sufficient facts for his claim of "gender stereotyping" discrimination to be submitted to a jury. We also consider whether the District Court erred in granting summary judgment to Wise on Prowel's religious discrimination claim.

II.

Prowel began working for Wise in July 1991. A producer and distributor of business forms, Wise employed approximately 145 workers at its facility in Butler, Pennsylvania. From 1997 until his termination, Prowel operated a machine called a nale encoder, which encodes numbers and organizes business forms. On December 13, 2004, after 13 years with the company, Wise informed Prowel that it was laying him off for lack of work.

A.

Prowel's most substantial claim is that Wise harassed and retaliated against him because of sex. The theory of sex discrimination Prowel advances is known as a "gender stereotyping" claim, which was

first recognized by the Supreme Court as a viable cause of action in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

Prowel identifies himself as an effeminate man and believes that his mannerisms caused him not to "fit in" with the other men at Wise. Prowel described the "genuine stereotypical male" at the plant as follows:

> [B]lue jeans, t-shirt, blue collar worker, very rough around the edges. Most of the guys there hunted. Most of the guys there fished. If they drank, they drank beer, they didn't drink gin and tonic. Just you know, all into football, sports, all that kind of stuff, everything I wasn't.

In stark contrast to the other men at Wise, Prowel testified that he had a high voice and did not curse; was very well-groomed; wore what others would consider dressy clothes; was neat; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot "the way a woman would sit"; walked and carried himself in an effeminate manner; drove a clean car; had a rainbow decal on the trunk of his car; talked about things like art, music, interior design, and decor; and pushed the buttons on the nale encoder with "pizzazz."

Some of Prowel's co-workers reacted negatively to his demeanor and appearance. During the last two years of his employment at Wise, a female co-worker frequently called Prowel "Princess." In a similar vein, co-workers made comments such as: "Did you see what Rosebud was wearing?"; "Did you see Rosebud sitting there with his legs crossed, filing his nails?"; and "Look at the way he walks." [1]

Prowel also testified that he is homosexual. At some point prior to November 1997, Prowel was "outed" at work when a newspaper clipping of a "man-seeking-man" ad was left at his workstation with a note that read: "Why don't you give him a call, big boy." Prowel reported the incident to two management-level personnel and asked that something be done. The culprit was never identified, however.

After Prowel was outed, some of his co-workers began causing problems for him, subjecting him to verbal and written attacks during the last seven years of his tenure at Wise. In addition to the nicknames "Princess" and "Rosebud," a female co-worker called him "fag" and said: "Listen, faggot, I don't have to put up with this from you." Prowel reported this to his shift supervisor but received no response.

At some point during the last two years of Prowel's employment, a pink, light-up, feather tiara with a package of lubricant jelly was left on his nale encoder. The items were removed after Prowel complained to Henry Nolan, the shift supervisor at that time. On March 24, 2004, as Prowel entered the plant, he overheard a co-worker state: "I hate him. They should shoot all the fags." Prowel reported this remark to Nolan, who said he would look into it. Prowel also overheard conversations between co-workers, one of whom was a supervisor, who disapproved of how he lived his life. Finally, messages began to appear on the wall of the men's

1. In its brief, Wise notes that Prowel's affidavit included incidents of harassment that were not mentioned during Prowel's deposition. Wise argued to the District Court that these incidents should not be considered because they contradicted Prowel's prior sworn testimony in violation of *Hackman v. Valley Fair*, 932 F.2d 239, 241 (3d Cir.1991). Although the District Court disagreed with Wise's argument in this regard, it nevertheless held that these facts did not create a genuine issue of material fact on Prowel's gender stereotyping claim.

bathroom, claiming Prowel had AIDS and engaged in sexual relations with male co-workers. After Prowel complained, the company repainted the restroom.

C.

Prowel alleges that his co-workers shunned him and his work environment became so stressful that he had to stop his car on the way to work to vomit. At some point in 2004, Prowel became increasingly dissatisfied with his work assignments and pay. Prowel believed he was asked to perform more varied tasks than other nale encoder operators, but was not compensated fairly for these extra tasks, even though work piled up on his nale encoder.

In April 2004, Prowel considered suing Wise and stated his intentions to four non-management personnel, asking them to testify on his behalf. Prowel allegedly told his colleagues that the lawsuit would be based on harassment for not "fitting in"; he did not say anything about being harassed because of his homosexuality. These four colleagues complained to management that Prowel was bothering them.

On May 6, 2004, General Manager Jeff Straub convened a meeting with Prowel and supervisors Nolan and John Hodak to discuss Prowel's concern that he was doing more work for less money than other nale encoder operators. Prowel's compensation and workload were discussed, but the parties did not reach agreement on those issues. Straub then asked Prowel if he had approached employees to testify for him in a lawsuit, and Prowel replied that he had not done so. Prowel has since conceded that he did approach other employees in this regard.

On December 13, 2004, Prowel was summoned to meet with his supervisors, who informed him that he was terminated effective immediately for lack of work.

IV.

In evaluating Wise's motion for summary judgment, the District Court properly focused on our decision in *Bibby v. Philadelphia Coca Cola Bottling Co.,* 260 F.3d 257 (3d Cir.2001), wherein we stated: "Title VII does not prohibit discrimination based on sexual orientation. Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation." *Id.* at 261 (citations omitted). This does not mean, however, that a homosexual individual is barred from bringing a *sex discrimination* claim under Title VII, which plainly prohibits discrimination "because of sex." 42 U.S.C. § 2000e–2(a). As the District Court noted, "once a plaintiff shows that harassment is motivated by sex, it is no defense that it may also have been motivated by anti-gay animus." Dist. Ct. Op. at 6 (citing *Bibby,* 260 F.3d at 265). In sum, "[w]hatever the sexual orientation of a plaintiff bringing a same-sex sexual harassment claim, that plaintiff is required to demonstrate that the harassment was directed at him or her because of his or her sex." *Bibby,* 260 F.3d at 265.

Both Prowel and Wise rely heavily upon *Bibby.* Wise claims this appeal is indistinguishable from *Bibby* and therefore we should affirm its summary judgment for the same reason we affirmed summary judgment in *Bibby.* Prowel counters that reversal is required here because gender stereotyping was not at issue in *Bibby.* As we shall explain, *Bibby* does not dictate the result in this appeal. Because it guides our analysis, however, we shall review it in some detail.

John Bibby, a homosexual man, was a long-time employee of the Philadelphia Coca Cola Bottling Company. *Id.* at 259. The company terminated Bibby after he sought sick leave, but ultimately reinstated him. *Id.* After Bibby's reinstatement, he alleged that he was assaulted and harmed by co-workers and supervisors when he was subjected to crude remarks and derogatory sexual graffiti in the bathrooms. *Id.* at 260.

Bibby filed a complaint with the Philadelphia Commission on Human Relations (PCHR), alleging sexual orientation discrimination. *Id.* After the PCHR issued a right-to-sue letter, Bibby sued in federal court alleging, *inter alia,* sexual harassment in violation of Title VII. *Id.* The district court granted summary judgment for the company because Bibby was harassed not "because of sex," but rather because of his sexual orientation, which is not cognizable under Title VII. *Id.* at 260–61.

2. Prowel did not oppose Wise's motion for summary judgment with regard to his termination claims or his PHRA claims.

3. The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 2000e–5(f)(3). We have jurisdiction pursuant to 28 U.S.C. § 1291.

On appeal, this Court affirmed, holding that Bibby presented insufficient evidence to support a claim of same-sex harassment under Title VII. Despite acknowledging that harassment based on sexual orientation has no place in a just society, we explained that Congress chose not to include sexual orientation harassment in Title VII. *Id.* at 261, 265. Nevertheless, we stated that employees may—consistent with the Supreme Court's decision in *Price Waterhouse*—raise a Title VII *gender stereotyping* claim, provided they can demonstrate that "the[ir] harasser was acting to punish [their] noncompliance with gender stereotypes." *Id.* at 264; *accord Vickers v. Fairfield Med. Ctr.,* 453 F.3d 757, 762 (6th Cir.2006); *Nichols v. Azteca Rest. Enters., Inc.,* 256 F.3d 864, 874 (9th Cir.2001); *Higgins v. New Balance Athletic Shoe, Inc.,* 194 F.3d 252, 259 (1st Cir.1999). Because Bibby did not claim gender stereotyping, however, he could not prevail on that theory. We also concluded, in dicta, that even had we construed Bibby's claim to involve gender stereotyping, he did not marshal sufficient evidence to withstand summary judgment on that claim. *Bibby,* 260 F.3d at 264–65.

In light of the foregoing discussion, we disagree with both parties' arguments that *Bibby* dictates the outcome of this case. *Bibby* does not carry the day for Wise because in that case, the plaintiff failed to raise a gender stereotyping claim as Prowel has done here. Contrary to Prowel's argument, however, *Bibby* does not require that we reverse the District Court's summary judgment merely because we stated that a gender stereotyping claim is cognizable under Title VII; such has been the case since the Supreme Court's decision in *Price Waterhouse.* Instead, we must consider whether the record, when viewed in the light most favorable to Prowel, contains sufficient facts from which a reasonable jury could conclude that he was harassed and/or retaliated against "because of sex."

Before turning to the record, however, we must revisit *Price Waterhouse,* which held that a woman who was denied a promotion because she failed to conform to gender stereotypes had a claim cognizable under Title VII as she was discriminated against "because of sex."

In *Price Waterhouse,* Ann Hopkins had been denied partnership in an accounting firm because she used profanity; was not charming; and did not walk, talk, or dress in a feminine manner. 490 U.S. at 235, 109 S.Ct. 1775. A plurality of the Supreme Court concluded that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250, 109 S.Ct. 1775. The plurality also noted: "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' " *Id.* at 251, 109 S.Ct. 1775 (quoting *L.A. Dep't of Water & Power v. Manhart,* 435 U.S. 702, 707 n. 13, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978)) (some internal quotations omitted). Thus, the Supreme Court held that Title VII prohibits discrimination against women for failing to conform to a traditionally feminine demeanor and appearance.

Like our decision in *Bibby,* the Supreme Court's decision in *Price Waterhouse* provides the applicable legal framework, but does not resolve this case. Unlike in *Price Waterhouse*—where Hopkins's sexual orientation was not at issue—here there is

no dispute that Prowel is homosexual. The difficult question, therefore, is whether the harassment he suffered at Wise was because of his homosexuality, his effeminacy, or both.

[1] As this appeal demonstrates, the line between sexual orientation discrimination and discrimination "because of sex" can be difficult to draw. In granting summary judgment for Wise, the District Court found that Prowel's claim fell clearly on one side of the line, holding that Prowel's sex discrimination claim was an artfully-pleaded claim of sexual orientation discrimination. However, our analysis—viewing the facts and inferences in favor of Prowel—leads us to conclude that the record is ambiguous on this dispositive question. Accordingly, Prowel's gender stereotyping claim must be submitted to a jury.

Wise claims it laid off Prowel because the company decided to reduce the number of nale encoder operators from three to two. This claim is not without support in the record. After Prowel was laid off, no one was hired to operate the nale encoder during his shift. Moreover, market conditions caused Wise to lay off 44 employees at its Pennsylvania facility between 2001 and September 2006, and the company's workforce shrank from 212 in 2001 to 145 in 2008. General Manager Straub testified that in determining which nale encoder operator to lay off, he considered various factors, including customer service, productivity, cooperativeness, willingness to perform other tasks (the frequency with which employees complained about working on other machines), future advancement opportunities, and cost. According to Wise, Prowel was laid off because: comments on his daily production reports reflected an uncooperative and insubordinate attitude; he was the highest paid operator; he complained when asked to work on different machines; and he did not work to the best of his ability when operating the other machines.

Prowel asserts that these reasons were pretextual and he was terminated because of his complaints to management about harassment and his discussions with co-workers regarding a potential lawsuit against the company. In this respect, the record indicates that Prowel's work compared favorably to the other two nale encoder operators. Specifically, Prowel worked on other equipment fifty-four times during the last half of 2004 while a co-worker did so just once; Prowel also ran more jobs and impressions per hour than that same co-worker; and Prowel's attendance was significantly better than the third nale encoder operator. Finally, although Wise laid off forty-four workers between 2001 and 2006, it laid off no one in 2003, only Prowel in 2004, and just two in 2005. Although Prowel is unaware what role his sexual orientation played in his termination, he alleges that he was harassed and retaliated against not because of the quality of his work, but rather because he failed to conform to gender stereotypes.

The record demonstrates that Prowel has adduced evidence of harassment based on gender stereotypes. He acknowledged that he has a high voice and walks in an effeminate manner. In contrast with the typical male at Wise, Prowel testified that he: did not curse and was very well-groomed; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot "the way a woman would sit." Prowel also discussed things like art, music, interior design, and decor, and pushed the buttons on his nale encoder with "pizzazz." Prowel's effeminate traits did not go unnoticed by his co-workers, who commented: "Did you see what Rosebud was wearing?"; "Did you see Rosebud sitting there with

his legs crossed, filing his nails?"; and "Look at the way he walks." Finally, a coworker deposited a feathered, pink tiara at Prowel's workstation. When the aforementioned facts are considered in the light most favorable to Prowel, they constitute sufficient evidence of gender stereotyping harassment—namely, Prowel was harassed because he did not conform to Wise's vision of how a man should look, speak, and act—rather than harassment based solely on his sexual orientation.

To be sure, the District Court correctly noted that the record is replete with evidence of harassment motivated by Prowel's sexual orientation. Thus, it is possible that the harassment Prowel alleges was because of his sexual orientation, not his effeminacy. Nevertheless, this does not vitiate the possibility that Prowel was also harassed for his failure to conform to gender stereotypes. *See* 42 U.S.C. § 2000e–2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that ... sex ... was a motivating factor for any employment practice, even though other factors also motivated the practice."). Because both scenarios are plausible, the case presents a question of fact for the jury and is not appropriate for summary judgment.

In support of the District Court's summary judgment, Wise argues persuasively that every case of sexual orientation discrimination cannot translate into a triable case of gender stereotyping discrimination, which would contradict Congress's decision not to make sexual orientation discrimination cognizable under Title VII. Nevertheless, Wise cannot persuasively argue that *because* Prowel is homosexual, he is precluded from bringing a gender stereotyping claim. There is no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not. As long as the employee—regardless of his or her sexual orientation—marshals sufficient evidence such that a reasonable jury could conclude that harassment or discrimination occurred "because of sex," the case is not appropriate for summary judgment. For the reasons we have articulated, Prowel has adduced sufficient evidence to submit this claim to a jury.[4]

4. The District Court correctly reasoned that Prowel's retaliation claim was derivative of his gender stereotyping claim. Since Prowel is entitled to a jury trial on that claim, it follows *a fortiori* that Prowel is entitled to put his retaliation claim before the jury as well.

Kimberly HIVELY, Plaintiff-Appellant,

v.

IVY TECH COMMUNITY COLLEGE OF INDIANA, Defendant-Appellee.

No. 15-1720

United States Court of Appeals,
Seventh Circuit.

Argued November 30, 2016

Decided April 4, 2017

Background: Part-time adjunct professor brought action against community college, alleging she was denied full-time employment and promotions based on sexual orientation in violation of Title VII. The United States District Court for the Northern District of Indiana, No. 3:14-cv-1791, Rudy Lozano, J., dismissed complaint, and professor appealed. The Court of Appeals, 830 F.3d 698, affirmed. Rehearing en banc was granted, 2016 WL 6768628.

Holding: The Court of Appeals, Wood, Chief Judge, held that person who alleges that she experienced employment discrimination on basis of her sexual orientation has put forth case of sex discrimination for Title VII purposes; overruling *Doe v. City of Belleville, Ill.*, 119 F.3d 563, *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058, *Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701, *Spearman v. Ford Motor Co.*, 231 F.3d 1080.

Reversed and remanded.

Posner, Circuit Judge, concurred and filed opinion.

Flaum, Circuit Judge, concurred and filed opinion in which Ripple, Circuit Judge, joined.

Sykes, Circuit Judge, dissented and filed opinion in which Bauer and Kanne, Circuit Judges, joined.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division. No. 3:14-cv-1791—**Rudy Lozano**, *Judge*.

Gregory R. Nevins, Attorney, Lambda Legal Defense & Education Fund, Atlanta, GA, Jon W. Davidson, Attorney, Lambda Legal Defense And Education Fund, Inc., Los Angeles, CA, Omar Gonzalez-Pagan, Attorney, Lambda Legal Defense & Education Fund, New York, NY, for Plaintiff–Appellant.

Adam Lee Bartrom, Jason T. Clagg, Attorneys, Barnes & Thornburg LLP, Fort Wayne, IN, John Robert Maley, Attorney, Barnes & Thornburg LLP, Indianapolis, IN, for Defendant–Appellee.

Shannon Price Minter, Attorney, National Center for Lesbian Rights, San Francisco, CA, for Amicus Curiae National Center for Lesbian Rights.

Mary Lisa Bonauto, Attorney, Gay & Lesbian Advocates & Defenders, Boston, MA, for Amicus Curiae GLBTQ Legal Advocates & Defenders.

Gail S. Coleman, Attorney, Equal Employment Opportunity Commission, Washington, DC, for Amicus Curiae Equal Employment Opportunity Commission.

Ria Tabacco Mar, Attorney, American Civil Liberties Union, New York, NY, for Amicus Curiae America Civil Liberties Union.

Evan Chesler, Attorney, Cravath, Swaine & Moore, New York, NY, for Amicus Curiae Five Members of Congress.

Before WOOD, Chief Judge, and BAUER, POSNER, FLAUM, EASTERBROOK, RIPPLE, KANNE, ROVNER, WILLIAMS, SYKES, and HAMILTON, Circuit Judges.

WOOD, Chief Judge.

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers subject to the Act to discriminate on the basis of a person's "race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a). For many years, the courts of appeals of this country understood the prohibition against sex discrimination to exclude discrimination on the basis of a person's sexual orientation. The Supreme Court, however, has never spoken to that question. In this case, we have been asked to take a

fresh look at our position in light of developments at the Supreme Court extending over two decades. We have done so, and we conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination. We therefore reverse the district court's judgment dismissing Kimberly Hively's suit against Ivy Tech Community College and remand for further proceedings.

I

Hively is openly lesbian. She began teaching as a part-time, adjunct professor at Ivy Tech Community College's South Bend campus in 2000. Hoping to improve her lot, she applied for at least six full-time positions between 2009 and 2014. These efforts were unsuccessful; worse yet, in July 2014 her part-time contract was not renewed. Believing that Ivy Tech was spurning her because of her sexual orientation, she filed a pro se charge with the Equal Employment Opportunity Commission on December 13, 2013. It was short and to the point:

> I have applied for several positions at IVY TECH, fulltime, in the last 5 years. I believe I am being blocked from full-time employment without just cause. I believe I am being discriminated against based on my sexual orientation. I believe I have been discriminated against and that my rights under Title VII of the Civil Rights Act of 1964 were violated.

After receiving a right-to-sue letter, she filed this action in the district court (again acting pro se). Ivy Tech responded with a motion to dismiss for failure to state a claim on which relief can be granted. It argued that sexual orientation is not a protected class under Title VII or 42 U.S.C. § 1981 (which we will disregard for the remainder of this opinion). Relying on a line of this court's cases exemplified by *Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000), the district court granted Ivy Tech's motion and dismissed Hively's case with prejudice.

Now represented by the Lambda Legal Defense & Education Fund, Hively has appealed to this court. After an exhaustive exploration of the law governing claims involving discrimination based on sexual orientation, the panel affirmed. *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698 (7th Cir. 2016). It began its analysis by noting that the idea that discrimination based on sexual orientation is somehow distinct from sex discrimination originated with dicta in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984). *Ulane* stated (as if this resolved matters) that Title VII's prohibition against sex discrimination "implies that it is unlawful to discriminate against women because they are women and against men because they are men." *Id.* at 1085. From this truism, we deduced that "Congress had nothing more than the traditional notion of 'sex' in mind when it voted to outlaw sex discrimination. . . ." *Doe v. City of Belleville, Ill.*, 119 F.3d 563, 572 (7th Cir. 1997), *cert. granted, judgment vacated sub nom. City of Belleville v. Doe*, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998), *abrogated by Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).

Later cases in this court, including *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058 (7th Cir. 2003), *Hamner*, and *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000), have accepted this as settled law. Almost all of our sister circuits have understood the law in the same way. See, *e.g., Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285,

290 (3d Cir. 2009); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997). A panel of the Eleventh Circuit, recognizing that it was bound by the Fifth Circuit's precedent in *Blum*, 597 F.2d 936, recently reaffirmed (by a 2–1 vote) that it could not recognize sexual orientation discrimination claims under Title VII. *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1255–57 (11th Cir. 2017). On the other hand, the Second Circuit recently found that an openly gay male plaintiff pleaded a claim of gender stereotyping that was sufficient to survive dismissal. The court observed that one panel lacked the power to reconsider the court's earlier decision holding that sexual orientation discrimination claims were not cognizable under Title VII. *Christiansen v. Omnicom Group, Inc.*, No. 16-748, 852 F.3d 195, 2017 WL 1130183 (2d Cir. Mar. 27, 2017) (per curiam). Nonetheless, two of the three judges, relying on many of the same arguments presented here, noted in concurrence that they thought their court ought to consider revisiting that precedent in an appropriate case. *Id.* at 198–99, 2017 WL 1130183 at *2 (Katzmann, J., concurring). Notable in its absence from the debate over the proper interpretation of the scope of Title VII's ban on sex discrimination is the United States Supreme Court.

That is not because the Supreme Court has left this subject entirely to the side. To the contrary, as the panel recognized, over the years the Court has issued several opinions that are relevant to the issue before us. Key among those decisions are *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). *Price Waterhouse* held that the practice of gender stereotyping falls within Title VII's prohibition against sex discrimination, and *Oncale* clarified that it makes no difference if the sex of the harasser is (or is not) the same as the sex of the victim. Our panel frankly acknowledged how difficult it is "to extricate the gender nonconformity claims from the sexual orientation claims." 830 F.3d at 709. That effort, it commented, has led to a "confused hodge-podge of cases." *Id.* at 711. It also noted that "all gay, lesbian and bisexual persons fail to comply with the sine qua non of gender stereotypes—that all men should form intimate relationships only with women, and all women should form intimate relationships only with men." *Id.* Especially since the Supreme Court's recognition that the Due Process and Equal Protection Clauses of the Constitution protect the right of same-sex couples to marry, *Obergefell v. Hodges*, —— U.S. ——, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), bizarre results ensue from the current regime. As the panel noted, it creates "a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act." 830 F.3d at 714. Finally, the panel highlighted the sharp tension between a rule that fails to recognize that discrimination on the basis of the sex with whom a person associates is a form of sex discrimination, and the rule, recognized since *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), that discrimination on the basis of the race with whom a person associates is a form of racial discrimination.

Despite all these problems, the panel correctly noted that it was bound by this court's precedents, to which we referred

earlier. It thought that the handwriting signaling their demise might be on the wall, but it did not feel empowered to translate that message into a holding. "Until the writing comes in the form of a Supreme Court opinion or new legislation," 830 F.3d at 718, it felt bound to adhere to our earlier decisions. In light of the importance of the issue, and recognizing the power of the full court to overrule earlier decisions and to bring our law into conformity with the Supreme Court's teachings, a majority of the judges in regular active service voted to rehear this case en banc.

II

A

The question before us is not whether this court can, or should, "amend" Title VII to add a new protected category to the familiar list of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Obviously that lies beyond our power. We must decide instead what it means to discriminate on the basis of sex, and in particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex.[1] This is a pure question of statutory interpretation and thus well within the judiciary's competence.

Much ink has been spilled about the proper way to go about the task of statutory interpretation.

1. For present purposes, we have no need to decide whether discrimination on the basis of ''gender'' is for legal purposes the same as discrimination on the basis of ''sex,'' which is the statutory term. Many courts, including the Supreme Court, appear to have used ''sex'' and ''gender'' synonymously. Should a case arise in which the facts require us to examine the differences (if any) between the terms, we will do so then.

B

[3] Hively offers two approaches in support of her contention that "sex discrimination" includes discrimination on the basis of sexual orientation. The first relies on the tried-and-true comparative method in which we attempt to isolate the significance of the plaintiff's sex to the employer's decision: has she described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way? The second relies on the *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), line of cases, which she argues protect her right to associate intimately with a person of the same sex. Although the analysis differs somewhat, both avenues end up in the same place: sex discrimination.

1

[4] It is critical, in applying the comparative method, to be sure that only the variable of the plaintiff's sex is allowed to change. The fundamental question is not whether a lesbian is being treated better or worse than gay men, bisexuals, or transsexuals, because such a comparison shifts too many pieces at once. Framing the question that way swaps the critical characteristic (here, sex) for both the complainant and the comparator and thus obscures the key point—whether the complainant's protected characteristic played a role in the adverse employment decision. The counterfactual we must use is a situation in which Hively is a man, but everything else stays the same: in particular, the sex or gender of the partner.

Hively alleges that if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her. (We take the facts in the light most favorable to her, because we are here on a Rule 12(b)(6) dismissal; naturally nothing we say will prevent Ivy Tech from contesting these points in later proceedings.) This describes paradigmatic sex discrimination. To use the phrase from *Ulane*, Ivy Tech is disadvantaging her *because she is a woman*.

Nothing in the complaint hints that Ivy Tech has an anti-marriage policy that extends to heterosexual relationships, or for that matter even an anti-partnership policy that is gender-neutral.

Viewed through the lens of the gender non-conformity line of cases, Hively represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual. Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all. Hively's claim is no different from the claims brought by women who were rejected for jobs in traditionally male workplaces, such as fire departments, construction, and policing. The employers in those cases were policing the boundaries of what jobs or behaviors they found acceptable for a woman (or in some cases, for a man).

[5] This was the critical point that the Supreme Court was making in *Hopkins*. The four justices in the plurality and the two justices concurring in the judgment recognized that Hopkins had alleged that her employer was discriminating only against women who behaved in what the employer viewed as too "masculine" a way—no makeup, no jewelry, no fashion sense.[2] And even before *Hopkins*, courts had found sex discrimination in situations where women were resisting stereotypical roles. As far back as 1971, the Supreme Court held that Title VII does not permit an employer to refuse to hire women with pre-school-age children, but not men. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (1971). Around the same time, this court held that Title VII "strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes," *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971), and struck down a rule requiring only the female employees to be unmarried. In both those instances, the employer's rule did not affect every woman in the workforce. Just so here: a policy that discriminates on the basis of sexual orientation does not affect every woman, or every man, but it is based on assumptions about the proper behavior for someone of a given sex.[3] The discriminato-

2. The dissent correctly points out that *Hopkins* was a plurality opinion, but that fact is of no moment in understanding what we are to take from the plurality's discussion of sex stereotyping. On the critical issue—whether the conduct about which Hopkins complained could support a finding of sex discrimination for purposes of Title VII—at least six justices were in agreement that the answer was yes. Justice Brennan's opinion for the four-person plurality was clear: "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." 490 U.S. at 250, 109 S.Ct. 1775. Justice White, concurring in the judgment, stated that he agreed that an unlawful motive was a substantial factor in the adverse employment action Hopkins suffered. *Id.* at 259, 109 S.Ct. 1775. Justice O'Connor, also concurring in the judgment, "agree[d] with the plurality that, on the facts presented in this case, the burden of persuasion should shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision concerning Ann Hopkins' candidacy absent consideration of her gender." *Id.* at 261, 109 S.Ct. 1775. Justice Kennedy's dissenting opinion did not need to dwell on this point, because he found that Hopkins could not prove causation.

3. The dissent questions in its conclusion what a jury ought to do in the hypothetical case in which Ivy Tech hired six heterosexual women for the full-time positions. But, as we note, the Supreme Court has made it clear that a policy need not affect *every* woman to constitute sex discrimination. What if Hively had been heterosexual, too, but did not get the job because she failed to wear high heels, lipstick,

ry behavior does not exist without taking the victim's biological sex (either as observed at birth or as modified, in the case of transsexuals) into account. Any discomfort, disapproval, or job decision based on the fact that the complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex. That means that it falls within Title VII's prohibition against sex discrimination, if it affects employment in one of the specified ways.

The virtue of looking at comparators and paying heed to gender non-conformity is that this process sheds light on the interpretive question raised by Hively's case: is sexual-orientation discrimination a form of sex discrimination, given the way in which the Supreme Court has interpreted the word "sex" in the statute? The dissent criticizes us for not trying to *rule out* sexual-orientation discrimination by controlling for it in our comparator example and for not placing any weight on the fact that if someone had asked Ivy Tech what its reasons were at the time of the discriminatory conduct, it probably would have said "sexual orientation," not "sex." We assume that this is true, but this thought experiment does not answer the question before us—instead, it begs that question. It commits the logical fallacy of assuming the conclusion it sets out to prove. It makes no sense to control for or rule out discrimination on the basis of sexual orientation if the question before us is *whether* that type of discrimination is nothing more or less than a form of sex discrimination. Repeating that the two are different, as the dissent does at numerous points, also does not advance the analysis.

2

[6] As we noted earlier, Hively also has argued that action based on sexual orientation is sex discrimination under the associational theory. It is now accepted that a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits. This line of cases began with *Loving*, in which the Supreme Court held that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." 388 U.S. at 12, 87 S.Ct. 1817. The Court rejected the argument that miscegenation statutes do not violate equal protection because they "punish equally both the white and the Negro participants in an interracial marriage." *Id.* at 8, 87 S.Ct. 1817. When dealing with a statute containing racial classifications, it wrote, "the fact of equal application does not immunize the statute from the very heavy burden of justification" required by the Fourteenth Amendment for lines drawn by race. *Id.* at 9, 87 S.Ct. 1817.

In effect, both parties to the interracial marriage were being denied important rights by the state solely on the basis of their race. This point by now has been recognized for many years. For example, in *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986), the Eleventh Circuit considered a case in which a white man (Parr) married to an African-American woman was denied employment by an insurance company because of his interracial marriage. He sued under Title VII, but the district court dismissed the complaint on the ground that it failed to describe discrimination on the basis of race. The court of appeals reversed. It held that "[w]here a plaintiff

or perfume like the other candidates? A failure to discriminate against all women does not mean that an employer has not discriminated against one woman on the basis of sex.

claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race." *Id.* at 892. It also rejected the employer's somewhat bizarre argument that, given the allegation that it discriminated against all African-Americans, Parr could not show that it would have made a difference if he also had been African-American. *Id.* The court contented itself with describing that as a lawsuit for another day.

The Second Circuit took the same position two decades later in *Holcomb v. Iona Coll.*, 521 F.3d 130 (2d Cir. 2008), in which a white former employee of the college sued, alleging that it fired him from his job as associate coach of the men's basketball team because he was married to an African-American woman. The court held "that an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race." *Id.* at 132. It stressed that the plaintiff's case did not depend on third-party injury. To the contrary, it held, "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race." *Id.* at 139. Had the plaintiff been African-American, the question whether race discrimination tainted the employer's action would have depended on different facts.

We have not faced exactly the same situation as that in *Parr* and *Holcomb*, but we have come close. In *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878 (7th Cir. 1998), we encountered a case in which white employees brought an action under Title VII on the theory that they were being subjected to a hostile working environment and ultimately discharged because of their association with African-American co-workers. Because the defendant conceded that an employee can bring an associational race discrimination claim under Title VII, we had no need to say much on that point. Instead, we assumed for the sake of argument that an associational race discrimination claim is possible, and that the key inquiries are whether the employee has experienced discrimination and whether that discrimination was because of race. *Id.* at 884. This is consistent with *Holcomb*.

The fact that we now accept this analysis tells us nothing, however, about the world in 1967, when *Loving* reached the Supreme Court. The dissent implies that we are adopting an anachronistic view of Title VII, enacted just three years before *Loving*, but it is the dissent's understanding of *Loving* and the miscegenation laws that is an anachronism. Thanks to *Loving* and the later cases we mentioned, society understands now that such laws are (and always were) inherently racist. But as of 1967 (and thus as of 1964), Virginia and 15 other states had anti-miscegenation laws on the books. *Loving*, 388 U.S. at 6, 87 S.Ct. 1817. These laws were long defended and understood as non-discriminatory because the legal obstacle affected *both* partners. The Court in *Loving* recognized that equal application of a law that prohibited conduct only between members of different races did not save it. Changing the race of one partner made a difference in determining the legality of the conduct, and so the law rested on "distinctions drawn according to race," which were unjustifiable and racially discriminatory. [4]

4. The dissent seems to imply that the discrimination in *Loving* was problematic because the miscegenation laws were designed to maintain the supremacy of one race—and by extension that sexual orientation discrimination is not a problem because it is not designed to maintain the supremacy of one sex. But while this was certainly a repugnant fea-

Loving, 388 U.S. at 11, 87 S.Ct. 1817. So too, here. If we were to change the sex of one partner in a lesbian relationship, the outcome would be different. This reveals that the discrimination rests on distinctions drawn according to sex.

The dissent would instead have us compare the treatment of men who are attracted to members of the male sex with the treatment of women who are attracted to members of the female sex, and ask whether an employer treats the men differently from the women. But even setting to one side the logical fallacy involved, *Loving* shows why this fails. In the context of interracial relationships, we could just as easily hold constant a variable such as "sexual or romantic attraction to persons of a different race" and ask whether an employer treated persons of different races who shared that propensity the same. That is precisely the rule that *Loving* rejected, and so too must we, in the context of sexual associations.

The fact that *Loving*, *Parr*, and *Holcomb* deal with racial associations, as opposed to those based on color, national origin, religion, or sex, is of no moment. The text of the statute draws no distinction, for this purpose, among the different varieties of discrimination it addresses—a fact recognized by the *Hopkins* plurality. See 490 U.S. at 244 n.9, 109 S.Ct. 1775. This means that to the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate. No matter which category is involved, the essence of the claim is that the *plaintiff* would not be suffering the adverse action had his or her sex, race, color, national origin, or religion been different.

III

Today's decision must be understood against the backdrop of the Supreme Court's decisions, not only in the field of employment discrimination, but also in the area of broader discrimination on the basis of sexual orientation. We already have discussed the employment cases, especially *Hopkins* and *Oncale*. The latter line of cases began with *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), in which the Court held that a provision of the Colorado Constitution forbidding any organ of government in the state from taking action designed to protect "homosexual, lesbian, or bisexual" persons, *id.* at 624, 116 S.Ct. 1620, violated the federal Equal Protection Clause. *Romer* was followed by *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), in which the Court found that a Texas statute criminalizing homosexual intimacy between consenting adults violated the liberty provision of the Due Process Clause. Next came *United States v. Windsor*, —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), which addressed the constitutionality of the part of the Defense of Marriage Act (DOMA) that excluded a same-sex partner from the definition of "spouse" in other federal statutes. The Court held that this part of DOMA "violate[d] basic due process and equal protection principles applicable to the Federal Government." *Id.* at 2693. Finally, the Court's decision in *Obergefell*, *supra*, held that the right to marry is a fundamental liberty right, protected by the Due Process

ture of Virginia's law, it was not the basis of the holding in *Loving*. Rather, the Court found the racial classifications to be at odds with the Constitution, "even assuming an even-handed state purpose to protect the 'integrity' of all races." *Loving*, 388 U.S. at 11 n.11, 87 S.Ct. 1817.

and Equal Protection Clauses of the Fourteenth Amendment. 135 S.Ct. at 2604. The Court wrote that "[i]t is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality." *Id.*

It would require considerable calisthenics to remove the "sex" from "sexual orientation." The effort to do so has led to confusing and contradictory results, as our panel opinion illustrated so well.[5] The EEOC concluded, in its *Baldwin* decision, that such an effort cannot be reconciled with the straightforward language of Title VII. Many district courts have come to the same conclusion. See, *e.g.*, *Boutillier v. Hartford Pub. Sch.*, No. 3:13-CV-01303-WWE, 221 F.Supp.3d 255, 2016 WL 6818348 (D. Conn. Nov. 17, 2016); *U.S. Equal Emp't Opportunity Comm'n v. Scott Med. Ctr., P.C.*, No. CV 16-225, 217 F.Supp.3d 834, 2016 WL 6569233 (W.D. Pa. Nov. 4, 2016); *Winstead v. Lafayette Cnty. Bd. of Cnty. Comm'rs*, 197 F.Supp.3d 1334 (N.D. Fla. 2016); *Isaacs v. Felder Servs., LLC*, 143 F.Supp.3d 1190 (M.D. Ala. 2015); see also *Videckis v. Pepperdine Univ.*, 150 F.Supp.3d 1151 (C.D. Cal. 2015) (Title IX case, applying Title VII principles and *Baldwin*). Many other courts have found that gender-identity claims are cognizable under Title VII. See, *e.g.*, *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (claim for sex discrimination under Equal Credit Opportunity Act, analogizing to Title VII); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000) (relying on Title VII cases to conclude that violence against a transsexual was violence because of gender under the Gender Motivated Violence Act); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004); *Fabian v. Hosp. of Cent. Conn.*, 172 F.Supp.3d 509 (D. Conn. 2016); *Schroer v. Billington*, 577 F.Supp.2d 293, 308 (D.D.C. 2008).

This is not to say that authority to the contrary does not exist. As we acknowledged at the outset of this opinion, it does. But this court sits en banc to consider what the correct rule of law is now in light of the Supreme Court's authoritative interpretations, not what someone thought it meant one, ten, or twenty years ago.[6] The

5. The dissent contends that a fluent speaker of the English language would understand that ''sex'' does not include the concept of ''sexual orientation,'' and this ought to demonstrate that the two are easily distinguishable and not the same. But this again assumes the answer to the question before us: how to interpret the statute in light of the guidance the Supreme Court has provided. The dissent is correct that the term ''sexual orientation'' was not defined in the dictionary around the time of Title VII's enactment, but neither was the term ''sexual harassment''—a concept that, although it can be distinguished from ''sex,'' has at least since 1986 been included by the Supreme Court under the umbrella of sex discrimination. See WEBSTER'S NEW COLLEGIATE DICTIONARY (7th ed. 1963) (lacking an entry for ''sexual harassment'' or ''sexual orientation''); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1969) (same). The dissent postulates that it is implausible that a reasonable person in 1964 could have understood discrimination based on sex to include sexual orientation discrimination. But that reasonable person similarly may not have understood it to include sexual harassment (and, by extension, not male-on-male sexual harassment). As *Oncale* said, we are concerned with the provisions of the law, not the principal concerns of those who wrote it. 523 U.S. at 80, 118 S.Ct. 998. The approach we have taken does just that.

6. The dissent criticizes us for this approach, but we find nothing surprising in the fact that lower courts may have been wrong for many years in how they understood the rule of law supplied by a statute or the Constitution. Exactly this has happened before. For example, in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994), the Supreme Court disapproved a rule of statutory

logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line.

interpretation that all eleven regional courts of appeals had followed—most for over three decades. When the Court decided *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 132 S.Ct. 1997, 182 L.Ed.2d 903 (2012) (deciding that the provision for compensating interpreters in 28 U.S.C. § 1920(6) does not include costs for document translation), it rejected the views of at least six circuits with regard to the proper reading of the statute. 566 U.S. at 577, 132 S.Ct. 1997 (Ginsburg, J., dissenting). See also *Milner v. Dep't of the Navy*, 562 U.S. 562, 585, 131 S.Ct. 1259, 179 L.Ed.2d 268 (2011) (Breyer, J., dissenting) (noting that the Court's decision rejected the interpretation of Exemption 2 to the Freedom of Information Act that had been consistently followed or favorably cited by every court of appeals to have considered the matter over a 30-year period). It would be more controversial to assert that this is one of the rare statutes left for common-law development, as our concurring colleague does. In any event, that common-law development, both for the antitrust laws and any other candidates, is the responsibility of the Supreme Court. See *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) (recognizing that only the Supreme Court could jettison the *per se* rule against maximum pricefixing). All we can do is what we have done here: apply the relevant Supreme Court decisions to the statute to the best of our ability.

7. Indeed, in contrast to cases in which a religious employer may be exempted from Title VII liability because they have a bona fide need to discriminate on the basis of a protected characteristic, we note that Ivy Tech's position does not seem to reflect any fundamental desire to be permitted to engage in discrimination on the basis of sexual orientation. To the contrary, Ivy Tech maintains that it has its own internal policy prohibiting such discrimination. It could repeal that policy tomorrow, however, and so we will not look behind its decision to contest Hively's claim.

POSNER, Circuit Judge, concurring.

I agree that we should reverse, and I join the majority opinion, but I wish to explore an alternative approach that may be more straightforward.

It is helpful to note at the outset that the interpretation of statutes comes in three flavors. The first and most conventional is the extraction of the original meaning of the statute—the meaning intended by the legislators—and corresponds to interpretation in ordinary discourse. Knowing English I can usually determine swiftly and straightforwardly the meaning of a statement, oral or written, made to me in English (not always, because the statement may be garbled, grammatically intricate or inaccurate, obtuse, or complex beyond my ability to understand).

The second form of interpretation, illustrated by the commonplace local ordinance which commands "no vehicles in the park," is interpretation by unexpressed intent, whereby we understand that although an ambulance is a vehicle, the ordinance was not intended to include ambulances among the "vehicles" forbidden to enter the park. This mode of interpretation received its definitive statement in Blackstone's analysis of the medieval law of Bologna which stated that "whoever drew blood in the streets should be punished with the utmost severity." William Blackstone, *Commentaries on the Laws of England* *60 (1765). Blackstone asked whether the law should have been interpreted to make punishable a surgeon "who opened the vein of a person that fell down in the street with a fit." (Bleeding a sick or injured person was a common form of medical treatment in those days.) Blackstone thought not, remarking that as to "the effects and consequence, or the spirit and reason of the law . . . the rule is, where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them." *Id.* *59–60. The law didn't mention surgeons, but Blackstone thought it obvious that the legislators, who must have known something about the medical activities of surgeons, had not intended the law to apply to them. And so it is with ambulances in parks that prohibit vehicles.

Finally and most controversially, interpretation can mean giving a fresh meaning to a statement (which can be a statement found in a constitutional or statutory text)—a meaning that infuses the statement with vitality and significance today. An example of this last form of interpretation—the form that in my mind is most clearly applicable to the present case—is the Sherman Antitrust Act, enacted in 1890, long before there was a sophisticated understanding of the economics of monopoly and competition. Times have changed; and for more than thirty years the Act has been interpreted in conformity to the modern, not the nineteenth-century, understanding of the relevant economics. The Act has thus been updated by, or in the name of, judicial interpretation—the form of interpretation that consists of making old law satisfy modern needs and understandings. And a common form of interpretation it is, despite its flouting "original meaning." Statutes and constitutional provisions frequently are interpreted on the basis of present need and present understanding rather than original meaning—constitutional provisions even more fre-

quently, because most of them are older than most statutes.

Title VII of the Civil Rights Act of 1964, now more than half a century old, invites an interpretation that will update it to the present, a present that differs markedly from the era in which the Act was enacted. But I need to emphasize that this third form of interpretation—call it judicial interpretive updating—presupposes a lengthy interval between enactment and (re)interpretation. A statute when passed has an understood meaning; it takes years, often many years, for a shift in the political and cultural environment to change the understanding of the statute.

Hively, the plaintiff, claims that because she's a lesbian her employer declined to either promote her to full-time employment or renew her part-time employment contract. She seeks redress on the basis of the provision of Title VII that forbids an employer "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 ... sex...." 42 U.S.C. § 2000e-2(a)(1).

The argument that firing a woman on account of her being a lesbian does *not* violate Title VII is that the term "sex" in the statute, when enacted in 1964, undoubtedly meant "man or woman," and so at the time people would have thought that a woman who was fired for being a lesbian was not being fired for being a woman unless her employer would not have fired on grounds of homosexuality a man he knew to be homosexual; for in that event the only difference between the two would be the gender of the one he fired. Title VII does not mention discrimination on the basis of sexual orientation, and so an explanation is needed for how 53 years later the meaning of the statute has changed and the word "sex" in it now connotes both gender *and* sexual orientation.

It is well-nigh certain that homosexuality, male or female, did not figure in the minds of the legislators who enacted Title VII. I had graduated from law school two years before the law was enacted. Had I been asked then whether I had ever met a male homosexual, I would have answered: probably not; had I been asked whether I had ever met a lesbian I would have answered "only in the pages of *À la recherche du temps perdu*." Homosexuality was almost invisible in the 1960s. It became visible in the 1980s as a consequence of the AIDS epidemic; today it is regarded by a large swathe of the American population as normal. But what is certain is that the word "sex" in Title VII had no immediate reference to homosexuality; many years would elapse before it could be understood to include homosexuality.

A diehard "originalist" would argue that what was believed in 1964 defines the scope of the statute for as long as the statutory text remains unchanged, and therefore until changed by Congress's amending or replacing the statute. But as I noted earlier, statutory and constitutional provisions frequently are interpreted on the basis of present need and understanding rather than original meaning. Think for example of Justice Scalia's decisive fifth vote to hold that burning the American flag as a political protest is protected by the free-speech clause of the First Amendment, provided that it's your flag and is not burned in circumstances in which the fire might spread. *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *United States v. Eichman*, 496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990). Burning a flag is not speech in the usual sense and there is no indication that the framers or ratifiers of the First Amendment thought that the

word "speech" in the amendment embraced flag burning or other nonverbal methods of communicating.

Or consider the Supreme Court's holding that the Fourth Amendment requires the issuance of a warrant as a precondition to searching a person's home or arresting him there. E.g., *Johnson v. United States*, 333 U.S. 10, 13–14, 68 S.Ct. 367, 92 L.Ed. 436 (1948). There is nothing in the amendment about requiring a warrant *ever*. All that the amendment says about warrants is that general warrants, and warrants that are vague or issued without probable cause, are invalid. In effect the Supreme Court rewrote the Fourth Amendment, just as it rewrote the First Amendment in the flag-burning cases, and just as it rewrote the Sherman Act, and just as today we are rewriting Title VII. We are Blackstone's heirs.

And there is more: think of how the term "cruel and unusual punishments" has morphed over time. Or how the Second Amendment, which as originally conceived and enacted was about arming the members of the state militias (now the National Guard), is today interpreted to confer gun rights on private citizens as well. Over and over again, old statutes, old constitutional provisions, are given new meaning, as explained so eloquently by Justice Holmes in *Missouri v. Holland*, 252 U.S. 416, 433–34, 40 S.Ct. 382, 64 L.Ed. 641 (1920):

> When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. *We must consider what this country has become in deciding what that amendment has reserved* (emphasis added).

So by substituting Title VII for "that amendment" in Holmes's opinion, discrimination on grounds of "sex" in Title VII receives today a new, a broader, meaning. Nothing has changed more in the decades since the enactment of the statute than attitudes toward sex. 1964 was more than a decade before Richard Raskind underwent male-to-female sex reassignment surgery and took the name Renée Richards, becoming the first transgender celebrity; now of course transgender persons are common.

In 1964 (and indeed until the 2000s), and in some states until the Supreme Court's decision in *Obergefell v. Hodges*, —— U.S. ——, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), men were not allowed to marry each other, nor women allowed to marry each other. If in those days an employer fired a lesbian because he didn't like lesbians, he would have said that he was not firing her because she was a woman—he would not have fired her had she been heterosexual—and so he was not discriminating on the basis of sex as understood by the authors and ratifiers of Title VII. But today "sex" has a broader meaning than the genitalia you're born with. In *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), our court, anticipating *Obergefell* by invalidating laws in Indiana and Wisconsin that forbade same-sex marriage, discussed at length whether homosexual orientation is innate or chosen, and found that the scientific literature strongly supports the proposition that it is biological and innate, not a choice like deciding how to dress. The position of a woman discriminated against

on account of being a lesbian is thus analogous to a woman's being discriminated against on account of being a woman. That woman didn't choose to be a woman; the lesbian didn't choose to be a lesbian. I don't see why firing a lesbian because she is in the subset of women who are lesbian should be thought any less a form of sex discrimination than firing a woman because she's a woman.

But it has taken our courts and our society a considerable while to realize that sexual harassment, which has been pervasive in many workplaces (including many Capitol Hill offices and, notoriously, Fox News, among many other institutions), is a form of sex discrimination. It has taken a little longer for realization to dawn that discrimination based on a woman's failure to fulfill stereotypical gender roles is also a form of sex discrimination. And it has taken still longer, with a substantial volume of cases struggling and failing to maintain a plausible, defensible line between sex discrimination and sexual-orientation discrimination, to realize that homosexuality is nothing worse than failing to fulfill stereotypical gender roles.

It's true that even today if asked what is the sex of plaintiff Hively one would answer that she is female or that she is a woman, not that she is a lesbian. Lesbianism denotes a form of sexual or romantic attraction; it is not a physical sex identifier like masculinity or femininity. A broader understanding of the word "sex" in Title VII than the original understanding is thus required in order to be able to classify the discrimination of which Hively complains as a form of sex discrimination. That broader understanding is essential. Failure to adopt it would make the statute anachronistic, just as interpreting the Sherman Act by reference to its nineteenth-century framers' understanding of competition and monopoly would make the Sherman Act anachronistic.

We now understand that homosexual men and women (and also bisexuals, defined as having both homosexual and heterosexual orientations) are normal in the ways that count, and beyond that have made many outstanding intellectual and cultural contributions to society (think for example of Tchaikovsky, Oscar Wilde, Jane Addams, André Gide, Thomas Mann, Marlene Dietrich, Bayard Rustin, Alan Turing, Alec Guinness, Leonard Bernstein, Van Cliburn, and James Baldwin—a very partial list). We now understand that homosexuals, male and female, play an essential role, in this country at any rate, as adopters of children from foster homes—a point emphasized in our *Baskin* decision. The compelling social interest in protecting homosexuals (male and female) from discrimination justifies an admittedly loose "interpretation" of the word "sex" in Title VII to embrace homosexuality: an interpretation that cannot be imputed to the framers of the statute but that we are entitled to adopt in light of (to quote Holmes) "*what this country has become*," or, in Blackstonian terminology, to embrace as a sensible deviation from the literal or original meaning of the statutory language.

I am reluctant however to base the new interpretation of discrimination on account of sex in Title VII on such cases as *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), a case of sexual harassment of one man by other men, held by the Supreme Court to violate Title VII's prohibition of sex discrimination. The Court's opinion is rather evasive. I quote its critical language:

> As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal

> evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

Id. at 79–80, 118 S.Ct. 998.

Consider the statement in the quotation that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately *the provisions of our laws* rather than the principal concerns of our legislators by which we are governed" (emphasis added). That could be thought "originalism," if by "provisions" is meant statutory language. Consider too the statement in *Oncale* that "Title VII prohibits 'discriminat[ion] . . . because of . . . sex' in the 'terms' or 'conditions' of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements." Although "of any kind" signals breadth, it is narrowed by the clause that follows: "that meets the statutory requirements." So we're back to the essential issue in this case, which is whether passage of time and concomitant change in attitudes toward homosexuality and other unconventional forms of sexual orientation can justify a fresh interpretation of the phrase "discriminat[ion] . . . because of . . . sex" in Title VII, which fortunately however is a half-century-old statute ripe for reinterpretation.

Another decision we should avoid in ascribing present meaning to Title VII is *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which Hively argues protects her right to associate intimately with a person of the same sex. That was a constitutional case, based on race. It outlawed state prohibitions of interracial marriage. It had nothing to do with the recently enacted Title VII.

The majority opinion in the present case states that "Ivy Tech is disadvantaging [Hively] *because she is a woman*," not a man, who wants to have romantic attachments with female partners (emphasis in original). In other words, Ivy Tech is disadvantaging her because she is a woman who is not conforming to its notions of proper behavior. That's a different type of sex discrimination from the classic cases of old in which women were erroneously (sometimes maliciously) deemed unqualified for certain jobs. That was the basis on which fire departments, for example, discriminated against women—an example of discrimination plainly forbidden by the language of Title VII.

The most tenable and straightforward ground for deciding in favor of Hively is that while in 1964 sex discrimination meant discrimination against men or women as such and not against subsets of men or women such as effeminate men or mannish women, the concept of sex discrimination has since broadened in light of the recognition, which barely existed in 1964, that there are significant numbers of both men and women who have a sexual orientation that sets them apart from the heterosexual members of their genetic sex (male or female), and that while they constitute a minority their sexual orientation is not evil and does not threaten our society. Title VII in terms forbids only sex discrimination, but we now understand discrimination against homosexual men and women to be a form of sex discrimination; and to paraphrase Holmes, "*We must con-*

sider what this country has become in deciding what that [statute] has reserved."

The majority opinion states that Congress in 1964 "may not have realized or understood the full scope of the words it chose." This could be understood to imply that the statute forbade discrimination against homosexuals but the framers and ratifiers of the statute were not smart enough to realize that. I would prefer to say that theirs was the then-current understanding of the key word—sex. "Sex" in 1964 meant gender, not sexual orientation. What the framers and ratifiers understandably didn't understand was how attitudes toward homosexuals would change in the following half century. They shouldn't be blamed for that failure of foresight. *We* understand the words of Title VII differently not because we're smarter than the statute's framers and ratifiers but because we live in a different era, a different culture. Congress in the 1960s did not foresee the sexual revolution of the 2000s. What our court announced in *Doe v. City of Belleville*, 119 F.3d 563, 572 (7th Cir. 1997), is what Congress had declared in 1964: "the traditional notion of 'sex.' "

I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of "sex discrimination" that the Congress that enacted it would not have accepted. This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch. We should not leave the impression that we are merely the obedient servants of the 88th Congress (1963–1965), carrying out their wishes. We are not. We are taking advantage of what the last half century has taught.

SYKES, Circuit Judge, with whom BAUER and KANNE, Circuit Judges, join, dissenting.

Any case heard by the full court is important. This one is momentous. All the

more reason to pay careful attention to the limits on the court's role. The question before the en banc court is one of statutory interpretation. The majority deploys a judge-empowering, common-law decision method that leaves a great deal of room for judicial discretion. So does Judge Posner in his concurrence. Neither is faithful to the statutory text, read fairly, as a reasonable person would have understood it when it was adopted. The result is a statutory amendment courtesy of unelected judges. Judge Posner admits this; he embraces and argues for this conception of judicial power. The majority does not, preferring instead to smuggle in the statutory amendment under cover of an aggressive reading of loosely related Supreme Court precedents. Either way, the result is the same: the circumvention of the legislative process by which the people govern themselves.

Respect for the constraints imposed on the judiciary by a system of written law must begin with fidelity to the traditional first principle of statutory interpretation: When a statute supplies the rule of decision, our role is to give effect to the enacted text, interpreting the statutory language as a reasonable person would have understood it at the time of enactment. We are not authorized to infuse the text with a new or unconventional meaning or to update it to respond to changed social, economic, or political conditions.

In a handful of statutory contexts, Congress has vested the federal courts with authority to consider and make new rules of law in the common-law way. The Sherman Act is the archetype of the so-called "common-law statutes," but there are very few of these and Title VII is not one of them. *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95–97, 101 S.Ct. 1571, 67 L.Ed.2d 750 (1981); *id.* at 98 n.42, 101 S.Ct. 1571. So our role is interpretive only; we lack the discretion to ascribe to Title VII a meaning it did not bear at its inception. Sitting en banc permits us to overturn our own precedents, but in a statutory case, we do not sit as a common-law court free to engage in "judicial interpretive updating," as Judge Posner calls it,[1] or to do the same thing by pressing hard on tenuously related Supreme Court opinions, as the majority does.

Judicial statutory updating, whether overt or covert, cannot be reconciled with the constitutional design. The Constitution establishes a procedure for enacting and amending statutes: bicameralism and presentment. *See* U.S. CONST. art. I, § 7. Needless to say, statutory amendments brought to you by the judiciary do not pass through this process. That is why a textualist decision method matters: When we assume the power to alter the original public meaning of a statute through the process of interpretation, we assume a power that is not ours. The Constitution assigns the power to make and amend statutory law to the elected representatives of the people. However welcome today's decision might be as a policy matter, it comes at a great cost to representative self-government.

I

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Sexual orientation is not on the list of forbidden categories of employment discrimination,

1. He describes this method of statutory interpretation throughout his opinion and gives it the name "judicial interpretive updating" on page 353.

and we have long and consistently held that employment decisions based on a person's sexual orientation do not classify people on the basis of sex and thus are not covered by Title VII's prohibition of discrimination "because of sex." *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984). This interpretation has been stable for many decades and is broadly accepted; all circuits agree that sexual-orientation discrimination is a distinct form of discrimination and is not synonymous with sex discrimination. *See* Majority Op. at pp. 341–42 (collecting cases).

Today the court jettisons the prevailing interpretation and installs the polar opposite. Suddenly sexual-orientation discrimination *is* sex discrimination and thus is actionable under Title VII. What justification is offered for this radical change in a well-established, uniform interpretation of an important—indeed, transformational—statute? My colleagues take note of the Supreme Court's "absence from the debate." *Id.* at p. 342. What debate? There is no debate, at least not in the relevant sense. Our long-standing interpretation of Title VII is not an outlier. From the statute's inception to the present day, the appellate courts have unanimously and repeatedly read the statute the same way, as my colleagues must and do acknowledge. *Id.* at pp. 341–42. The Supreme Court has had no need to weigh in, and the unanimity among the courts of appeals strongly suggests that our long-settled interpretation is correct.

Of course there *is* a robust debate on this subject in our culture, media, and politics. Attitudes about gay rights have dramatically shifted in the 53 years since the Civil Rights Act was adopted. Lambda Legal's proposed new reading of Title VII—offered on behalf of plaintiff Kimberly Hively at the appellate stage of this litigation—has a strong foothold in current popular opinion.

This striking cultural change informs a case for legislative change and might eventually persuade the people's representatives to amend the statute to implement a new public policy. But it does not bear on the sole inquiry properly before the en banc court: Is the prevailing interpretation of Title VII—that discrimination on the basis of sexual orientation is different in kind and not a form of sex discrimination—*wrong as an original matter*?

Advice of Rights" form was not executed until 10:30–10:35 p.m., approximately 30–35 minutes after the search of the suitcase, and approximately an hour and 15 minutes after his arrival at the airport. Judge Steckler's opinion looked at the facts carefully, noting inconsistencies as to what discussions took place and their placement in time vis-a-vis the signing of the forms—the "Interrogation, Advice of Rights" form and the "Constitutional Rights Warning: Search by Consent" form. The evidence supports his conclusion that before the consent and the search, the detention had matured into a seizure of Verrusio's person following which there was not a timely nor clearly proved giving of the *Miranda* warning.

[2] On review our role is to accept the district court's factual findings unless they are clearly erroneous. *United States v. Santucci*, 674 F.2d 624 (7th Cir.1982); *United States v. Conner*, 478 F.2d 1320 (7th Cir.1973). The determination of whether the consent to search was free and voluntary must be made with reference to the totality of the circumstances and not merely with regard for whether one form or another was signed. *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

The trial judge has the opportunity to observe the demeanor of the witnesses and to assess their credibility. It was peculiarly within the scope of his responsibilities to weigh any conflicts in the evidence. His discussion of these conflicts bears witness to his performance of that responsibility. His decision that Verrusio had not been given all of his rights before his personal seizure further matured into an evidentiary seizure is amply supported by the evidence and in particular by the time notation on the "Interrogation, Advice of Rights" form. The judge's decision reflects what appear from the record to have been a lack of credibility on the part of the agents and irreconcilable inconsistencies between the narrations of events by Agent McGivney and Officer Leske. Finally, the propriety of this decision collaterally was corroborated by an exhibit the judge admitted into evidence. It was a government report excluded from discovery by Agent McGivney. This report stated that the government initially declined prosecution based on Assistant United States Attorney Kennard Foster's decision that the evidence could not be used because the search of Verrusio's suitcase was faulty.

We find that the district court approximately granted the defendant's motion to suppress. Accordingly, the decision is affirmed.

AFFIRMED.

Karen Frances ULANE, Plaintiff-Appellee,

v.

EASTERN AIRLINES, INC., a Delaware corporation, Defendant-Appellant.

No. 84–1431.

United States Court of Appeals, Seventh Circuit.

Argued June 5, 1984.

Decided Aug. 29, 1984.

Rehearing and Rehearing In Banc Denied Nov. 16, 1984.

Transsexual brought suit alleging that employer airline violated Title VII by discharging her from her position as pilot. The United States District Court for the Northern District of Illinois, 581 F.Supp. 821, John F. Grady, J., ruled in favor of employee on count alleging that she was discriminated against as employee and on count alleging that she was discriminated against as transsexual, and employer ap-

pealed. The Court of Appeals, Harlington Wood, Jr., Circuit Judge, held that: (1) Title VII does not protect transsexuals, and (2) even if transsexual was considered female, trial judge made no factual findings necessary to support conclusion that employer discriminated against her on this basis.

Reversed.

Dean A. Dickie, Sachnoff, Weaver & Rubenstein, Ltd., Chicago, Ill., for plaintiff-appellee.

David M. Brown, Gambrell & Russell, Atlanta, Ga., for defendant-appellant.

Before CUMMINGS, Chief Judge, WOOD, Circuit Judge, and DUMBAULD, Senior District Judge.*

HARLINGTON WOOD, Jr., Circuit Judge.

Plaintiff, as Kenneth Ulane, was hired in 1968 as a pilot for defendant, Eastern Air Lines, Inc., but was fired as Karen Frances Ulane in 1981. Ulane filed a timely charge of sex discrimination with the Equal Employment Opportunity Commission, which subsequently issued a right to sue letter. This suit followed. Counts I and II allege that Ulane's discharge violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2000e–17 (1982): Count I alleges that Ulane was discriminated against as a female; Count II alleges that Ulane was discriminated against as a transsexual. The judge ruled in favor of Ulane on both counts after a bench trial.[1] 581 F.Supp. 821. The court awarded her[2] reinstatement as a flying officer with full seniority and back pay, and attorneys' fees. This certified appeal followed pursuant to Federal Rule of Civil Procedure 54(b).

FACTUAL BACKGROUND

Counsel for Ulane opens their brief by explaining: "This is a Title VII case brought by a pilot who was fired by Eastern Airlines for no reason other than the fact that she ceased being a male and became a female." That explanation may give some cause to pause, but this briefly is the story.

Ulane became a licensed pilot in 1964, serving in the United States Army from that time until 1968 with a record of combat missions in Vietnam for which Ulane received the Air Medal with eight clusters. Upon discharge in 1968, Ulane began flying for Eastern. With Eastern, Ulane progressed from Second to First Officer, and

* The Honorable Edward Dumbauld, Senior District Judge of the United States District Court for the Western District of Pennsylvania, is sitting by designation.

1. Counts III through IX, which allege violations of 42 U.S.C. §§ 1985(3), 1986, 18 U.S.C. § 371 (conspiracy), and 45 U.S.C. § 184 (Railway Labor Act), defamation, and intentional or reckless causing of emotional and mental distress, have not yet been tried.

2. Since Ulane considers herself to be female, and appears in public as female, we will use feminine pronouns in referring to her.

also served as a flight instructor, logging over 8,000 flight hours.

Ulane was diagnosed a transsexual[3] in 1979. She explains that although embodied as a male, from early childhood she felt like a female. Ulane first sought psychiatric and medical assistance in 1968 while in the military. Later, Ulane began taking female hormones as part of her treatment, and eventually developed breasts from the hormones. In 1980, she underwent "sex reassignment surgery."[4] After the surgery, Illinois issued a revised birth certificate indicating Ulane was female, and the FAA certified her for flight status as a female. Ulane's own physician explained, however, that the operation would not create a biological female in the sense that Ulane would "have a uterus and ovaries and be able to bear babies." Ulane's chromosomes,[5] all concede, are unaffected by the hormones and surgery. Ulane, however, claims that the lack of change in her chromosomes is irrelevant.[6] Eastern was not aware of Ulane's transsexuality, her hormone treatments, or her psychiatric counseling until she attempted to return to work after her reassignment surgery. Eastern knew Ulane only as one of its male pilots.

3. Transsexualism is a condition that exists when a physiologically normal person (*i.e.*, not a hermaphrodite—a person whose sex is not clearly defined due to a congenital condition) experiences discomfort or discontent about nature's choice of his or her particular sex and prefers to be the other sex. This discomfort is generally accompanied by a desire to utilize hormonal, surgical, and civil procedures to allow the individual to live in his or her preferred sex role. The diagnosis is appropriate only if the discomfort has been continuous for at least two years, and is not due to another mental disorder, such as schizophrenia. *See* Testimony of Dr. Richard Green, expert witness for plaintiff, trial transcript for Sept. 26, 1983, 10:00 a.m., at 35–37; *see generally* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* § 302.5x (3d ed. 1980); Edgerton, Langman, Schmidt & Sheppe, *Psychological Considerations of Gender Reassignment Surgery,* 9 Clinics in Plastic Surgery 355, 357 (1982); Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma,* 7 Conn.L. Rev. 288, 288 n. 1 (1975); Comment, *Transsexualism, Sex Reassignment Surgery, and the Law,* 56 Cornell L.Rev. 963, 963 n. 1 (1971).

To be distinguished are homosexuals, who are sexually attracted to persons of the same sex, and transvestites, who are generally male heterosexuals who cross-dress, *i.e.*, dress as females, for sexual arousal rather than social comfort; both homosexuals and transvestites are content with the sex into which they were born. *See Diagnostic and Statistical Manual of Mental Disorders* § 302.30; Wise & Meyer, *Transvestism: Previous Findings and New Areas for Inquiry,* 6 J. of Sex & Marital Therapy 116, 116–20 (1980); Comment, 7 Conn.L.Rev., *supra,* at 292; Comment, 56 Cornell L.Rev., *supra,* at 963 n. 3.

4. Sex reassignment surgery for male-to-female transsexuals "involves the removal of the external male sexual organs and the construction of an artificial vagina by plastic surgery. It is supplemented by hormone treatments that facilitate the change in secondary sex characteristics," such as breast development. Comment, 56 Cornell L.Rev., *supra* note 3, at 970 n. 37 (citations omitted); *see also* Jones, *Operative Treatment of the Male Transsexual,* in Transsexualism and Sex Reassignment 313, 314–16 (R. Green & J. Money eds. 1969); Stoller, *Near Miss: "Sex Change" Treatment and Its Evaluation,* in Eating, Sleeping, and Sexuality 258, 259 (M. Zales ed. 1982); Shaw, *Sex-change Capital: Surgeon is Town's Top Draw,* Chicago Tribune, Aug. 14, 1984, § 5, at 1, 3, col. 3.

5. The normal individual has 46 chromosomes, two of which designate sex. An XX configuration denotes female; XY denotes male. These chromosome patterns cannot be surgically altered. Wise, *Transsexualism: A Clinical Approach to Gender Dysphoria,* 1983 Medic.Trial Tech.Q. 167, 170.

6. Biologically, sex is defined by chromosomes, internal and external genitalia, hormones, and gonads. Wise, *supra* note 5, at 169. Chromosomal sex cannot be changed, and a uterus and ovaries cannot be constructed. This leads some in the medical profession to conclude that hormone treatments and sex reassignment surgery can alter the evident makeup of an individual, but cannot change the individual's innate sex. *See, e.g.,* Wise, *supra* note 5, at 170; Stoller, *supra* note 4, at 273; Comment, Cornell L.Rev., *supra* note 3, at 970 n. 37. Others disagree, arguing that one must look beyond chromosomes when determining an individual's sex and consider factors such as psychological sex or assumed sex role. Comment, 7 Conn.L.Rev., *supra* note 3, at 290–91 & n. 6, 292 (psychological sex may be most important factor); Comment, Cornell L.Rev., *supra* note 3, at 965. These individuals conclude that post-operative male-to-female transsexuals do in fact qualify as females and are not merely "facsimiles." *E.g.,* Testimony of Dr. Richard Green, expert witness for plaintiff, trial transcript for Sept. 27, 1983, 10:35 a.m., at 226 & 252.

LEGAL ISSUES

A. *Title VII and Ulane as a Transsexual.*

[1] The district judge first found under Count II that Eastern discharged Ulane because she was a transsexual, and that Title VII prohibits discrimination on this basis.[7] While we do not condone discrimination in any form,[8] we are constrained to hold that Title VII does not protect transsexuals, and that the district court's order on this count therefore must be reversed for lack of jurisdiction.

Section 2000e–2(a)(1) provides in part that:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to ... discharge any individual ... because of such individual's ... sex ....

Other courts have held that the term "sex" as used in the statute is not synonymous with "sexual preference." *See, e.g., Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir.1982) (per curiam); *De Santis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327, 329–30 (9th Cir.1979); *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325, 326–27 (5th Cir.1978); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir.1977); *Voyles v. Ralph K. Davies Medical Center*, 403 F.Supp. 456, 457 (N.D.Cal.1975), *aff'd mem.*, 570 F.2d 354 (9th Cir.1978). The district court recognized this, and agreed that homosexuals and transvestites do not enjoy Title VII protection, but distinguished transsexuals as persons who, unlike homosexuals and transvestites, have sexual *identity* problems; the judge agreed that the term "sex" does not comprehend "sexual preference," but held that it does comprehend "sexual identity." The district judge based this holding on his finding that "sex is not a cut-and-dried matter of chromosomes," but is in part a psychological question—a question of self-perception; and in part a social matter—a question of how society perceives the individual.[9] The district judge further supported his broad view of Title VII's coverage by recognizing Title VII as a remedial statute to be liberally construed. He concluded that it is reasonable to hold that the statutory word "sex" literally and scientifically applies to transsexuals even if it does not apply to homosexuals or transvestites.[10] We must disagree.

Even though Title VII is a remedial statute, and even though some may define "sex" in such a way as to mean an individual's "sexual identity," our responsibility is to interpret this congressional legislation and determine what Congress intended when it decided to outlaw discrimination based on sex. *See United States Department of Labor v. Forsyth Energy, Inc.*, 666 F.2d 1104, 1107 (7th Cir.1981). The district judge did recognize that Congress manifested an intention to exclude homosexuals from Title VII coverage. Nonetheless, the judge defended his conclusion that Ulane's broad interpretation of the term "sex" was reasonable and could therefore

7. Not all of the experts who testified agreed that Ulane is a transsexual. (Although doctors attempt to perform sex reassignment surgery only on transsexuals—as opposed, for example, on transvestites or schizophrenics, that an individual has undergone such surgery is not determinative of whether he or she is a true transsexual. *See supra* note 3 and sources cited therein.) If Ulane is not a transsexual, then she is a transvestite. Even in the trial judge's view, transvestites are not covered by Title VII.

8. Eastern presented a substantial amount of testimony and evidence at trial to prove that Ulane's discharge was not due to discrimination against her either as a transsexual or as a female, but we need not reach that issue.

9. The judge did recognize that there may be some argument in the medical community about the definition of sex that he adopted. *See, e.g., supra* notes 5 & 6.

10. Judge Grady explained:

> I have no problem with the idea that the statute was not intended and cannot reasonably be argued to have been intended to cover the matter of sexual preference, the preference of a sexual partner, or the matter of sexual gratification from wearing the clothes of the opposite sex. It seems to me an altogether different question as to whether the matter of sexual identity is comprehended by the word, "sex."

be applied to the statute by noting that transsexuals are different than homosexuals, and that Congress never considered whether it should include or exclude transsexuals. While we recognize distinctions among homosexuals, transvestites, and transsexuals, we believe that the same reasons for holding that the first two groups do not enjoy Title VII coverage apply with equal force to deny protection for transsexuals.

[2] It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning. *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979). The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born. The dearth of legislative history on section 2000e-2(a)(1) strongly reinforces the view that that section means nothing more than its plain language implies.

When Congress enacted the Civil Rights Act of 1964 it was primarily concerned with race discrimination. "Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate." *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir.1977) (citations omitted); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv.L.Rev. 1109, 1167 (1971). This sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added to the statute's prohibition against race discrimination. *See Bradford v. Peoples Natural Gas Co.*, 60 F.R.D. 432, 434–35 & n. 1 (W.D.Pa.1973).

The total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex. Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate. There is not the slightest suggestion in the legislative record to support an all-encompassing interpretation.

Members of Congress have, moreover, on a number of occasions, attempted to amend Title VII to prohibit discrimination based upon "affectational or sexual orientation." [11] Each of these attempts has failed. While the proposed amendments were directed toward homosexuals, *see, e.g., Civil Rights Act Amendments of 1981: Hearings on H.R. 1454 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 97th Cong., 2d Sess. 1–2 (1982) (statements of Rep. Hawkins, chairman of subcommittee, and Rep. Weiss, N.Y., author of bill); *Civil Rights Amendments Act of 1979: Hearings on H.R. 2074 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 96th Cong., 2d Sess. 6 (1980) (statements of Rep. Hawkins, chairman of subcommittee, and Rep. Weiss, N.Y., coauthor

11. *E.g., 94th Congress:* H.R. 166, 94th Cong., 1st Sess. (1975); H.R. 2667, 94th Cong., 1st Sess. (1975); H.R. 5452, 94th Cong., 1st Sess. (1975); *95th Congress:* H.R. 451, 95th Cong., 1st Sess. (1977); H.R. 775, 95th Cong., 1st Sess. (1977); H.R. 2998, 95th Cong., 1st Sess. (1977); H.R. 4794, 95th Cong., 1st Sess. (1977); H.R. 5239, 95th Cong., 1st Sess. (1977); H.R. 8268, 95th Cong., 1st Sess. (1977); H.R. 8269, 95th Cong., 1st Sess. (1977); *96th Congress:* H.R. 2074, 96th Cong., 2d Sess. (1980); *97th Congress:* H.R. 1454, 97th Cong., 2d Sess. (1982).

of bill), their rejection strongly indicates that the phrase in the Civil Rights Act prohibiting discrimination on the basis of sex should be given a narrow, traditional interpretation, which would also exclude transsexuals. Furthermore, Congress has continued to reject these amendments even after courts have specifically held that Title VII does not protect transsexuals from discrimination. *Compare* H.R. 1454, 97th Cong., 2d Sess. (1982) (hearing held on Jan. 27, 1982) *with Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. Jan. 8, 1982) (per curiam); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir.1977); *Powell v. Read's, Inc.*, 436 F.Supp. 369, 371 (D.Md.1977); *Grossman v. Board of Education*, 11 Fair Empl. Prac. Cas. (BNA) 1196, 1199 (D.N.J.1975), *aff'd mem.*, 538 F.2d 319 (3d Cir.), *cert. denied*, 429 U.S. 897, 97 S.Ct. 261, 50 L.Ed.2d 181 (1976); *Voyles v. Ralph K. Davies Medical Center*, 403 F.Supp. 456, 457 (N.D.Cal.1975), *aff'd mem.*, 570 F.2d 354 (9th Cir.1978); *see also United States v. PATCO*, 653 F.2d 1134, 1138 (7th Cir. 1981) (Congress is presumed to know the law and judicial interpretations of it); *United States v. Ambrose*, 740 F.2d 505 at 514 (7th Cir.1984) (Wood, J., concurring and dissenting) (same).

[3] Although the maxim that remedial statutes should be liberally construed is well recognized, that concept has reasonable bounds beyond which a court cannot go without transgressing the prerogatives of Congress. In our view, to include transsexuals within the reach of Title VII far exceeds mere statutory interpretation. Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating. *See Gunnison v. Commissioner*, 461 F.2d 496, 499 (7th Cir.1972) (it is for the legislature, not the courts, to expand the class of people protected by a statute). This we must not and will not do.

Congress has a right to deliberate on whether it wants such a broad sweeping of the untraditional and unusual within the term "sex" as used in Title VII. Only Congress can consider all the ramifications to society of such a broad view. We do not believe that the interpretation of the word "sex" as used in the statute is a mere matter of expert medical testimony or the credibility of witnesses produced in court. Congress may, at some future time, have some interest in testimony of that type, but it does not control our interpretation of Title VII based on the legislative history or lack thereof. If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide. Until that time, however, we decline in behalf of the Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation.

Our view of the application of Title VII to this type of case is not an original one. *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir.1982) (per curiam), and *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir.1977), the only two circuit court cases we found that have specifically addressed the issue, both held that discrimination against transsexuals does not fall within the ambit of Title VII.[12] In *Sommers*, Budget Marketing fired an anatomical male who claimed to be female once Budget Marketing discovered that he had misrepresented himself as female when he applied for the job. In *Holloway*, Arthur Andersen, an accounting firm, dismissed the plaintiff after he informed his superior that he was undergoing treatment in preparation for sex

12. For examples of district courts that have refused transsexuals Title VII protection, see *Terry v. EEOC*, 25 Empl.Prac.Dec. (CCH) ¶ 31,638, at 19,732–33 (E.D.Wis.1980); *Powell v. Read's, Inc.*, 436 F.Supp. 369, 371 (D.Md.1977); *Grossman v. Board of Education*, 11 Fair Empl.Prac.Cas. (BNA) 1196, 1199 (D.N.J.1975), *aff'd mem.*, 538 F.2d 319 (3d Cir.), *cert. denied*, 429 U.S. 897, 97 S.Ct. 261, 50 L.Ed.2d 181 (1976); *Voyles v. Ralph K. Davies, Medical Center*, 403 F.Supp. 456, 457 (N.D.Cal.1975), *aff'd mem.*, 570 F.2d 354 (9th Cir.1978).

change surgery. We agree with the Eighth and Ninth Circuits that if the term "sex" as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress.

B. *Title VII and Ulane as a Female.*

[4] The trial judge originally found only that Eastern had discriminated against Ulane under Count II as a transsexual. The judge subsequently amended his findings to hold that Ulane is also female and has been discriminated against on this basis. Even if we accept the district judge's holding that Ulane is female, he made no factual findings necessary to support his conclusion that Eastern discriminated against her on this basis. All the district judge said was that his previous "findings and conclusions concerning sexual discrimination against the plaintiff by Eastern Airlines, Inc. apply with equal force whether plaintiff be regarded as a transsexual or a female." This is insufficient to support a finding that Ulane was discriminated against because she is *female* since the district judge's previous findings all centered around his conclusion that Eastern did not want "[a] *transsexual* in the cockpit" (emphasis added).

Ulane is entitled to any personal belief about her sexual identity she desires. After the surgery, hormones, appearance changes, and a new Illinois birth certificate and FAA pilot's certificate, it may be that society, as the trial judge found, considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case. If Eastern had considered Ulane to be female and had discriminated against her because she was female (*i.e.*, Eastern treated females less favorably than males), then the argument might be made that Title VII applied, *cf. Holloway v. Arthur Andersen*, 566 F.2d at 664 (although Title VII does not prohibit discrimination against transsexuals, "transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII") (dicta), but that is not this case. It is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual [13]—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.

Since Ulane was not discriminated against as a female, and since Title VII is not so expansive in scope as to prohibit discrimination against transsexuals, we reverse the order of the trial court and remand for entry of judgment in favor of Eastern on Count I and dismissal of Count II.

REVERSED.

13. Because of our holding in section A, however, we need not and do not decide whether Eastern did actually discriminate against Ulane because of her transsexuality.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

Mia Macy,
Complainant,

v.

Eric Holder,
Attorney General,
Department of Justice,
(Bureau of Alcohol, Tobacco, Firearms and Explosives),
Agency.

Appeal No. 0120120821

Agency No. ATF-2011-00751

DECISION

On December 9, 2011, Complainant filed an appeal concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission finds that the Complainant's complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII and remands the complaint to the Agency for further processing.

BACKGROUND[1]

Complainant, a transgender woman, was a police detective in Phoenix, Arizona. In December 2010 she decided to relocate to San Francisco for family reasons. According to her formal complaint, Complainant was still known as a male at that time, having not yet made the transition to being a female.

Complainant's supervisor in Phoenix told her that the Bureau of Alcohol, Tobacco, Firearms and Explosives (Agency) had a position open at its Walnut Creek crime laboratory for which the Complainant was qualified. Complainant is trained and certified as a National Integrated Ballistic Information Network (NIBIN) operator and a BrassTrax ballistics investigator.

Complainant discussed the position with the Director of the Walnut Creek lab by telephone, in either December 2010 or January 2011, while still presenting as a man. According to Complainant, the telephone conversation covered her experience, credentials, salary and

[1] The facts in this section are taken from the EEO Counselor's Report and the formal complaint of discrimination. Because this decision addresses a jurisdictional issue, we offer no position on the facts themselves and thus no position on whether unlawful discrimination occurred in this case.

benefits. Complainant further asserts that, following the conversation, the Director told her she would be able to have the position assuming no problems arose during her background check. The Director also told her that the position would be filled as a civilian contractor through an outside company.

Complainant states that she talked again with the Director in January 2011 and asked that he check on the status of the position. According to Complainant in her formal complaint, the Director did so and reasserted that the job was hers pending completion of the background check. Complainant asserts, as evidence of her impending hire, that Aspen of DC ("Aspen"),[2] the contractor responsible for filling the position, contacted her to begin the necessary paperwork and that an investigator from the Agency was assigned to do her background check.[3]

On March 29, 2011, Complainant informed Aspen via email that she was in the process of transitioning from male to female and she requested that Aspen inform the Director of the Walnut Creek lab of this change. According to Complainant, on April 3, 2011, Aspen informed Complainant that the Agency had been informed of her change in name and gender. Five days later, on April 8, 2011, Complainant received an email from the contractor's Director of Operations stating that, due to federal budget reductions, the position at Walnut Creek was no longer available.

According to Complainant, she was concerned about this quick change in events and on May 10, 2011,[4] she contacted an agency EEO counselor to discuss her concerns. She states that the counselor told her that the position at Walnut Creek had not been cut but, rather, that someone

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[2] It appears from the record that Aspen of DC may be considered a staffing firm. Under the Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997), we have recognized that a "joint employment" relationship may exist where both the Agency and the "staffing firm" may be deemed employers. The Commission makes no determination at this time as to whether or not a "joint employment" relationship exists in this case as this issue is not presently before us.

[3] On March 28, 2011, Complainant received an e-mail from the contractor asking her to fill out an application packet for the position. It is unclear how far the background investigation had proceeded prior to Complainant notifying the contractor of her gender change, but e-mails included in the record indicate that the Agency's Personnel Security Branch had received Complainant's completed security package, that Complainant had been interviewed by a security investigator, and that the investigator had contacted Complainant on March 31, 2011 and had indicated that he "hope[d] to finish your investigation the first of next week."

[4] In the narrative accompanying her formal complaint, Complainant asserts she contacted the Agency's EEO Counselor on May 5, 2011. However, the EEO Counselor's report indicates that the initial contact occurred on May 10, 2011.

else had been hired for the position. Complainant further states that the counselor told her that the Agency had decided to take the other individual because that person was farthest along in the background investigation.[5] Complainant claims that this was a pretextual explanation because the background investigation had been proceeding on her as well. Complainant believes she was incorrectly informed that the position had been cut because the Agency did not want to hire her because she is transgender.

The EEO counselor's report indicates that Complainant alleged that she had been discriminated against based on sex, and had specifically described her claim of discrimination as "change in gender (from male to female)."

On June 13, 2011, Complainant filed her formal EEO complaint with the Agency. On her formal complaint form, Complainant checked off "sex" and the box "female," and then typed in "gender identity" and "sex stereotyping" as the basis of her complaint. In the narrative accompanying her complaint, Complainant stated that she was discriminated against on the basis of "my sex, gender identity (transgender woman) and on the basis of sex stereotyping."

On October 26, 2011, the Agency issued Complainant a Letter of Acceptance, stating that the "claim alleged and being accepted and referred for investigation is the following: Whether you were discriminated against based on your gender identity sex (female) stereotyping when on May 5, 2011, you learned that you were not hired as a Contractor for the position of [NIBIN] Ballistics Forensic Technician in the Walnut Creek Lab, San Francisco Field Office." The letter went on to state, however, that "since claims of discrimination on the basis of gender identity stereotyping cannot be adjudicated before the [EEOC], your claims will be processed according to Department of Justice policy." The letter provided that if Complainant did not agree with how the Agency had identified her claim, she should contact the EEO office within 15 days.

The Department of Justice has one system for adjudicating claims of sex discrimination under Title VII and a separate system for adjudicating complaints of sexual orientation and gender identity discrimination by its employees. This separate process does not include the same rights offered under Title VII and the EEOC regulations set forth under 29 C.F.R. Part 1614. See Department of Justice Order 1200.1, Chapter 4-1, B.7.j, found at http://www.justice.gov/jmd/ps/chpt4-1.html (last accessed on March 30, 2012). While such complaints are processed utilizing the same EEO complaint process and time frames – including an ADR program, an EEO investigation and issuance of a final Agency decision – the Department of Justice process allows for fewer remedies and does not include the right to request a hearing before an EEOC Administrative Judge or the right to appeal the final Agency decision to the Commission.

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[5] The Counselor's Report includes several email exchanges with various Agency officials who informed the counselor of the circumstances by which it was decided not to hire Complainant.

On November 8, 2011, Complainant's attorney contacted the Agency by letter to explain that the claims that Complainant had set forth in the formal complaint had not been correctly identified by the Agency. The letter explained that the claim as identified by the Agency was both incomplete and confusing. The letter noted that "[Complainant] is a transgender woman who was discriminated against during the hiring process for a job with [the Agency]," and that the discrimination against Complainant was based on "separate and related" factors, including on the basis of sex, sex stereotyping, sex due to gender transition/change of sex, and sex due to gender identity. Thus, Complainant disagreed with the Agency's contention that her claim in its entirety could not be adjudicated through the Title VII and EEOC process simply because of how she had stated the alleged bases of discrimination.

On November 18, 2011, the Agency issued a correction to its Letter of Acceptance in response to Complainant's November 8, 2011 letter. In this letter, the Agency stated that it was accepting the complaint "on the basis of sex (female) and gender identity stereotyping." However, the Agency again stated that it would process only her claim "based on sex (female)" under Title VII and the EEOC's Part 1614 regulations. Her claim based on "gender identity stereotyping" would be processed instead under the Agency's "policy and practice," including the issuance of a final Agency decision from the Agency's Complaint Adjudication Office.

CONTENTIONS ON APPEAL

On December 6, 2011, Complainant, through counsel, submitted a Notice of Appeal to the Commission asking that it adjudicate the claim that she was discriminated against on the basis of "sex stereotyping, sex discrimination based gender transition/change of sex, and sex discrimination based gender identity" when she was denied the position as an NIBIN ballistics technician.

Complainant argues that EEOC has jurisdiction over her entire claim. She further asserts that the Agency's "reclassification" of her claim of discrimination into two separate claims of discrimination - one "based on sex (female) under Title VII" which the Agency will investigate under Title VII and the EEOC's Part 1614 regulations, and a separate claim of discrimination based on "gender identity stereotyping" which the Agency will investigate under a separate process designated for such claims -- is a "de facto dismissal" of her Title VII claim of discrimination based on gender identity and transgender status.

In response to Complainant's appeal, the Agency sent a letter to the Commission on January 11, 2012, arguing that Complainant's appeal was "premature" because the Agency had accepted a claim designated as discrimination "based on sex (female)."

In response to the Agency's January 11, 2012 letter, Complainant wrote to the Agency on February 8, 2012, stating that, in light of how the Agency was characterizing her claim, she wished to withdraw her claim of "discrimination based on sex (female)," as characterized by the Agency, and to pursue solely the Agency's dismissal of her complaint of discrimination

based on her gender identity, change of sex and/or transgender status. In a letter to the Commission dated February 9, 2012, Complainant explained that she had withdrawn the claim "based on sex (female)" as the Agency had characterized it, in order to remove any possible procedural claim that her appeal to the Commission was premature.

Complainant reiterates her contention that the Agency mischaracterized her claim and asks the Commission to rule on her appeal that the Agency should investigate, under Title VII and the EEOC's Part 1614 regulations, her claim of discriminatory failure to hire based on her gender identity, change of sex, and/or transgender status.

ANALYSIS AND FINDINGS

The narrative accompanying Complainant's complaint makes clear that she believes she was not hired for the position as a result of making her transgender status known. As already noted, Complainant stated that she was discriminated against on the basis of "my sex, gender identity (transgender woman) and on the basis of sex stereotyping." In response to her complaint, the Agency stated that claims of gender identity discrimination "cannot be adjudicated before the [EEOC]." See Agency Letters of October 26, 2011 and November 18, 2011. Although it is possible that the Agency would have fully addressed her claims under that portion of her complaint accepted under the 1614 process, the Agency's communications prompted in Complainant a reasonable belief that the Agency viewed the gender identity discrimination she alleged as outside the scope of Title VII's sex discrimination prohibitions. Based on these communications, Complainant believed that her complaint would not be investigated effectively by the Agency, and she filed the instant appeal.

EEOC Regulation 29 C.F.R. §1614.107(b) provides that where an agency decides that some, but not all, of the claims in a complaint should be dismissed, it must notify the complainant of its determination. However, this determination is not appealable until final action is taken on the remainder of the complaint. In apparent recognition of the operation of §1614.107(b), Complainant withdrew the accepted portion of her complaint from the 1614 process so that the constructive dismissal of her gender identity discrimination claim would be a final decision and the matter ripe for appeal.

In the interest of resolving the confusion regarding a recurring legal issue that is demonstrated by this complaint's procedural history, as well as to ensure efficient use of resources, we accept this appeal for adjudication. Moreover, EEOC's responsibilities under Executive Order 12067 for enforcing all Federal EEO laws and leading the Federal government's efforts to eradicate workplace discrimination, require, among other things, that EEOC ensure that uniform standards be implemented defining the nature of employment discrimination under the statutes we enforce. Executive Order 12067, 43 F.R. 28967, § 1-301(a) (June 30, 1978). To that end, the Commission hereby clarifies that claims of discrimination based on transgender

status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition, and may therefore be processed under Part 1614 of EEOC's federal sector EEO complaints process.

We find that the Agency mistakenly separated Complainant's complaint into separate claims: one described as discrimination based on "sex" (which the Agency accepted for processing under Title VII) and others that were alternatively described by Complainant as "sex stereotyping," "gender transition/change of sex," and "gender identity" (Complainant Letter of Nov. 8, 2011); by the Agency as "gender identity stereotyping" (Agency Letter Nov. 18, 2011); and finally by Complainant as "gender identity, change of sex and/or transgender status" (Complainant Letter Feb. 8, 2012). While Complainant could have chosen to avail herself of the Agency's administrative procedures for discrimination based on gender identity, she clearly expressed her desire to have her claims investigated through the 1614 process, and this desire should have been honored. Each of the formulations of Complainant's claims are simply different ways of stating the same claim of discrimination "based on . . . sex," a claim cognizable under Title VII.

Title VII states that, except as otherwise specifically provided, "[a]ll personnel actions affecting [federal] employees or applicants for employment ... shall be made free from any discrimination *based on ...sex ....*" 42 U.S.C. § 2000e-16(a) (emphasis added). *Cf.* 42 U.S.C. §§ 2000e-2(a)(1), (2) (it is unlawful for a covered employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of such individual's . . . sex*") (emphasis added).

As used in Title VII, the term "sex" "encompasses both sex—that is, the biological differences between men and women—and gender." See Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); see also Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination."). As the Eleventh Circuit noted in Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011), six members of the Supreme Court in Price Waterhouse agreed that Title VII barred "not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender." As such, the terms "gender" and "sex" are often used interchangeably to describe the discrimination prohibited by Title VII. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (emphasis added) ("Congress' intent to forbid employers to take *gender* into account in making employment decisions appears on the face of the statute.").

That Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the

statute's protections sweep far broader than that, in part because the term "gender" encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity.

In Price Waterhouse, the employer refused to make a female senior manager, Hopkins, a partner at least in part because she did not act as some of the partners thought a woman should act. Id. at 230-31, 235. She was informed, for example, that to improve her chances for partnership she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Id. at 235. The Court concluded that discrimination for failing to conform with gender-based expectations violates Title VII, holding that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." Id. at 250.

Although the partners at Price Waterhouse discriminated against Ms. Hopkins for failing to conform to stereotypical gender norms, gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms. "What matters, for purposes of . . . the Price Waterhouse analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim." Schwenk, 204 F.3d at 1201-02; see also Price Waterhouse, 490 U.S. at 254-55 (noting the illegitimacy of allowing "sex-linked evaluations to play a part in the [employer's] decision-making process").

"Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a 'bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise.'" Price Waterhouse, 490 U.S. at 242 (quoting 42 U.S.C. § 2000e-2(e)). Even then, "the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.'" See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (Marshall, J., concurring). "The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her." Price Waterhouse, 490 U.S. at 242.[6]

When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment "related to the sex of the victim." See Schwenk, 204 F.3d at 1202. This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not

[6] There are other, limited instances in which gender may be taken into account, such as is in the context of a valid affirmative action plan, see Johnson v. Santa Clara County Transportation Agency, 480 U.S. 616 (1987), or relatedly, as part of a settlement of a pattern or practice claim.

like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision." Price Waterhouse, 490 U.S. at 244.

Since Price Waterhouse, courts have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination "on the basis of sex" in many scenarios involving individuals who act or appear in gender-nonconforming ways.[7] And since Price Waterhouse, courts also have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination "on the basis of sex" in scenarios involving transgender individuals.

For example, in Schwenk v. Hartford, a prison guard had sexually assaulted a pre-operative male-to-female transgender prisoner, and the prisoner sued, alleging that the guard had

[7] See, e.g., Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1041 (8th Cir. 2010) (concluding that evidence that a female "tomboyish" plaintiff had been fired for not having the "Midwestern girl look" suggested "her employer found her unsuited for her job . . . because her appearance did not comport with its preferred feminine stereotype"); Prowel v. Wise Business Forms, Inc., 579 F.3d 285 (3rd Cir. 2009) (an effeminate gay man who did not conform to his employer's vision of how a man should look, speak, and act provided sufficient evidence of gender stereotyping harassment under Title VII); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (involving a heterosexual female who alleged that her lesbian supervisor discriminated against her on the basis of sex, and finding that "a plaintiff may satisfy her evidentiary burden [under Title VII] by showing that the harasser was acting to punish the plaintiff's noncompliance with gender stereotypes"); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874-75 (9th Cir. 2001) (concluding that a male plaintiff stated a Title VII claim when he was discriminated against "for walking and carrying his tray 'like a woman' – i.e., for having feminine mannerisms"); Simonton v. Runyon, 232 F.3d 33, 37 (2d Cir. 2000) (indicating that a gay man would have a viable Title VII claim if "the abuse he suffered was discrimination based on sexual stereotypes, which may be cognizable as discrimination based on sex"); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (analyzing a gay plaintiff's claim that his co-workers harassed him by "mocking his supposedly effeminate characteristics" and acknowledging that "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity"); Doe by Doe v. City of Belleville, 119 F.3d 563, 580-81 (7th Cir. 1997) (involving a heterosexual male who was harassed by other heterosexual males, and concluding that "a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he . . . does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex"), vacated and remanded on other grounds, 523 U.S. 1001 (1998).

violated the Gender Motivated Violence Act (GMVA), 42 U.S.C. § 13981. 204 F.3d at 1201-02. The U.S. Court of Appeals for the Ninth Circuit found that the guard had known that the prisoner "considered herself a transsexual and that she planned to seek sex reassignment surgery in the future." Id. at 1202. According to the court, the guard had targeted the transgender prisoner "only after he discovered that she considered herself female[,]" and the guard was "motivated, at least in part, by [her] gender"—that is, "by her assumption of a feminine rather than a typically masculine appearance or demeanor." Id. On these facts, the Ninth Circuit readily concluded that the guard's attack constituted discrimination because of gender within the meaning of both the GMVA and Title VII.

The court relied on Price Waterhouse, reasoning that it stood for the proposition that discrimination based on sex includes discrimination based on a failure "to conform to socially-constructed gender expectations." Id. at 1201-02. Accordingly, the Ninth Circuit concluded, discrimination against transgender females - i.e., "as anatomical males whose *outward behavior and inward identity* [do] not meet social definitions of masculinity" - is actionable discrimination "because of sex." Id. (emphasis added); cf. Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215-16 (1st Cir. 2000) (finding that under Price Waterhouse, a bank's refusal to give a loan application to a biologically-male plaintiff dressed in "traditionally feminine attire" because his "attire did not accord with his male gender" stated a claim of illegal sex discrimination in violation of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f).

Similarly, in Smith v. City of Salem, the plaintiff was "biologically and by birth male." 378 F.3d at 568. However, Smith was diagnosed with Gender Identity Disorder (GID), and began to present at work as a female (in accordance with medical protocols for treatment of GID). Id. Smith's co-workers began commenting that her appearance and mannerisms were "not masculine enough." Id. Smith's employer later subjected her to numerous psychological evaluations, and ultimately suspended her. Id. at 569-70. Smith filed suit under Title VII alleging that her employer had discriminated against her because of sex, "both because of [her] *gender non-conforming conduct* and, more generally, because of [her] *identification* as a transsexual." Id. at 571 (emphasis added).

The district court rejected Smith's efforts to prove her case using a sex-stereotyping theory, concluding that it was really an attempt to challenge discrimination based on "transsexuality." Id. The U.S. Court of Appeals for the Sixth Circuit reversed, stating that the district court's conclusion:

> cannot be reconciled with Price Waterhouse, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against [the plaintiff] in Price Waterhouse who, in sex-stereotypical terms, did not act like a woman. Sex

> stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual" is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination.

Id. at 574–75.[8]

Finally, as the Eleventh Circuit suggested in Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011), consideration of gender stereotypes will inherently be part of what drives discrimination against a transgendered individual. In that case, the employer testified at his deposition that it had fired Vandiver Elizabeth Glenn, a transgender woman, because he considered it "inappropriate" for her to appear at work dressed as a woman and that he found it "unsettling" and "unnatural" that she would appear wearing women's clothing. Id. at 1320. The firing supervisor further testified that his decision to dismiss Glenn was based on his perception of Glenn as "a man dressed as a woman and made up as a woman," and admitted that his decision to fire her was based on "the sheer fact of the transition." Id. at 1320–21. According to the Eleventh Circuit, this testimony "provides ample direct evidence" to support the conclusion that the employer acted on the basis of the plaintiff's gender non-conformity and therefore granted summary judgment to her. Id. at 1321.

In setting forth its legal reasoning, the Eleventh Circuit explained:

> A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. "[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007); *see also* Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality,* 101 Colum. L.Rev. 392, 392 (2001) (defining transgender persons as those whose "appearance, behavior, or other personal characteristics differ from traditional gender norms"). There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.

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[8] See also Barnes v. City of Cincinnati, 401 F.3d 729, 741 (6th Cir. 2005) (affirming a jury award in favor of a pre-operative transgender female, ruling that "a claim for sex discrimination under Title VII . . . can properly lie where the claim is based on 'sexual stereotypes'" and that the "district court therefore did not err when it instructed the jury that it could find discrimination based on 'sexual stereotypes'").

> Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.

Glenn v. Brumby, 663 F.3d 1312, 1316-17 (11th Cir. 2011).[9]

There has likewise been a steady stream of district court decisions recognizing that discrimination against transgender individuals on the basis of sex stereotyping constitutes discrimination because of sex. Most notably, in Schroer v. Billington, the Library of Congress rescinded an offer of employment it had extended to a transgender job applicant after the applicant informed the Library's hiring officials that she intended to undergo a gender transition. See 577 F. Supp. 2d 293 (D.D.C. 2008). The U.S. District Court for the District of Columbia entered judgment in favor of the plaintiff on her Title VII sex discrimination claim. According to the district court, it did not matter "for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual." Id. at 305. In any case, Schroer was "entitled to judgment based on a Price-Waterhouse-type claim for sex stereotyping . . . ." Id.[10]

To be sure, the members of Congress that enacted Title VII in 1964 and amended it in 1972 were likely not considering the problems of discrimination that were faced by transgender individuals. But as the Supreme Court recognized in Oncale v. Sundowner Offshore Services, Inc.:

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[9] But see Etsitty v. Utah Trans. Auth., No. 2:04-CV-616, 2005 WL 1505610, at *4-5 (D. Utah June 24, 2005) (concluding that Price Waterhouse is inapplicable to transsexuals), aff'd on other grounds, 502 F.3d 1215 (10th Cir.2007).

[10] The district court in Schroer also concluded that discrimination against a transgender individual on the basis of an intended, ongoing, or completed gender transition is "*literally* discrimination 'because of . . . sex.'" Schroer, 577 F. Supp. 2d at 308; see also id. at 306-07 (analogizing to cases involving discrimination based on an employee's religious conversion, which undeniably constitutes discrimination "because of . . . religion" under Title VII). For other district court cases using sex stereotyping as grounds for establishing coverage of transgender individuals under Title VII, see Michaels v. Akal Security, Inc., No. 09-cv-1300, 2010 WL 2573988, at * 4 (D. Colo. June 24, 2010); Lopez v. River Oaks Imaging & Diag. Group, Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); Mitchell v. Axcan Scandipharm, Inc., No. Vic. A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); Doe v. United Consumer Fin. Servs., No. 1:01 CV 111, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001).

> [S]tatutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in . . . employment. [This] . . . must extend to [sex-based discrimination] of any kind that meets the statutory requirements.

523 U.S. at 79-80; see also Newport News, 462 U.S. at 679-81 (rejecting the argument that discrimination against men does not violate Title VII despite the fact that discrimination against women was plainly the principal problem that Title VII's prohibition of sex discrimination was enacted to combat).

Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination. Title VII prohibits discrimination based on sex whether motivated by hostility,[11] by a desire to protect people of a certain gender,[12] by assumptions that disadvantage men,[13] by gender stereotypes,[14] or by the desire to accommodate other people's prejudices or discomfort.[15] While evidence that an employer has acted based on stereotypes about how men or women should act is certainly one means of demonstrating disparate treatment based on sex, "sex stereotyping" is not itself an independent cause of action. As the Price Waterhouse Court

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[11] See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (recognizing that sexual harassment is actionable discrimination "because of sex"); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) ("A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.").

[12] See Int'l Union v. Johnson Controls, 499 U.S. 187, 191 (1991) (policy barring all female employees except those who were infertile from working in jobs that exposed them to lead was facially discriminatory on the basis of sex).

[13] See, e.g., Newport News, 462 U.S. at 679-81 (providing different insurance coverage to male and female employees violates Title VII even though women are treated better).

[14] See, e.g., Price Waterhouse, 490 U.S. at 250-52.

[15] See, e.g., Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908, 912 (7th Cir. 2010) (concluding that "assignment sheet that unambiguously, and daily, reminded [the plaintiff, a black nurse,] and her co-workers that certain residents preferred no black" nurses created a hostile work environment); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (a female employee could not lawfully be fired because her employer's foreign clients would only work with males); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants as justification for discrimination against male applicants).

noted, while "stereotyped remarks can certainly be *evidence* that gender played a part" in an adverse employment action, the central question is always whether the "employer actually relied on [the employee's] gender in making its decision." Id. at 251 (emphasis in original).

Thus, a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations. These different formulations are not, however, different claims of discrimination that can be separated out and investigated within different systems. Rather, they are simply different ways of describing sex discrimination.

For example, Complainant could establish a case of sex discrimination under a theory of gender stereotyping by showing that she did not get the job as an NIBIN ballistics technician at Walnut Creek because the employer believed that biological men should consistently present as men and wear male clothing.

Alternatively, if Complainant can prove that the reason that she did not get the job at Walnut Creek is that the Director was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman—she will have proven that the Director discriminated on the basis of sex. Under this theory, there would actually be no need, for purposes of establishing coverage under Title VII, for Complainant to compile any evidence that the Director was engaging in gender stereotyping.

In this respect, gender is no different from religion. Assume that an employee considers herself Christian and identifies as such. But assume that an employer finds out that the employee's parents are Muslim, believes that the employee should therefore be Muslim, and terminates the employee on that basis. No one would doubt that such an employer discriminated on the basis of religion. There would be no need for the employee who experienced the adverse employment action to demonstrate that the employer acted on the basis of some religious stereotype—although, clearly, discomfort with the choice made by the employee with regard to religion would presumably be at the root of the employer's actions. But for purposes of establishing a prima facie case that Title VII has been violated, the employee simply must demonstrate that the employer impermissibly used religion in making its employment decision.

The District Court in Schroer provided reasoning along similar lines:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only 'converts.' That would be a clear case of discrimination 'because of religion.' No court would take seriously the notion that 'converts' are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a change of religion.

577 F. Supp. 2d at 306.

Applying Title VII in this manner does not create a new "class" of people covered under Title VII—for example, the "class" of people who have converted from Islam to Christianity or from Christianity to Judaism. Rather, it would simply be the result of applying the plain language of a statute prohibiting discrimination on the basis of religion to practical situations in which such characteristics are unlawfully taken into account. See Brumby, 663 F.3d at 1318-19 (noting that "all persons, whether transgender or not" are protected from discrimination and "[a]n individual cannot be punished because of his or her perceived gender non-conformity").

Thus, we conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination "based on . . . sex," and such discrimination therefore violates Title VII. [16]

CONCLUSION

Accordingly, the Agency's final decision declining to process Complainant's entire complaint within the Part 1614 EEO complaints process is **REVERSED**. The complaint is hereby **REMANDED** to the Agency for further processing in accordance with this decision and the Order below.

[16] The Commission previously took this position in an amicus brief docketed with the district court in the Western District of Texas on Oct. 17, 2011, where it explained that "[i]t is the position of the EEOC that disparate treatment of an employee because he or she is transgender is discrimination "because of . . . sex" under Title VII." EEOC Amicus Brief in *Pacheco v. Freedom Buick GMC Truck*, No. 07-116 (W.D. Tex. Oct. 17, 2011), Dkt. No. 30, at page 1, 2011 WL 5410751. With this decision, we expressly overturn, in light of the recent developments in the caselaw described above, any contrary earlier decisions from the Commission. See, e.g., Jennifer Casoni v. United States Postal Service, EEOC DOC 01840104 (Sept. 28, 1984); Campbell v. Dep't of Agriculture, EEOC Appeal No. 01931703 (July 21, 1994); Kowalczyk v. Dep't of Veterans Affairs, EEOC Appeal No. 01942053 (March 14, 1996).

No. 16-273

IN THE

Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,

Petitioner,

—v.—

G.G., by his next friend and mother, DEIRDRE GRIMM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Gloucester County School Board's policy, which prohibits school administrators from allowing boys and girls who are transgender to use the restrooms that other boys and girls use, constitutes "discrimination" "on the basis of sex" under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)?

2. Whether the Department of Education's conclusion that 34 C.F.R. § 106.33 does not authorize schools to exclude boys and girls who are transgender from the restrooms that other boys and girls use—as set forth in an opinion letter, statement of interest, and amicus brief—is entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997)?

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INTRODUCTION

Gavin Grimm ("Gavin") is a 17-year-old boy who is a senior at Gloucester High School in Gloucester, Virginia. He is transgender and has been formally diagnosed with gender dysphoria. In accordance with his prescribed medical treatment, Gavin has received testosterone hormone therapy and undergone chest reconstruction surgery. He has legally changed his name, and he has a Virginia ID card and an amended birth certificate stating that he is male. He appears no different from any other boy his age and uses the men's restrooms at restaurants, shopping malls, the doctor's office, the library, movie theaters, and government buildings.

When Gavin came out as a boy, administrators at his school agreed he should use the boys' restrooms, just as he does outside of school. With their support, Gavin did so for almost two months without incident. But in response to complaints from some adults in the community, the Gloucester County School Board (the "Board") overruled its own administrators and enacted a new policy targeting students it deemed to have "gender identity issues." The policy's purpose, design, and inevitable effect was to treat Gavin differently from other boys and exclude him from the restrooms that all other boys use. JA 69.

Under the Board's policy, Gavin is excluded from the common restrooms and publicly stigmatized as unfit to use the same restrooms as all other students. That discriminatory treatment has far-reaching consequences for Gavin, interfering with his ability to access the educational opportunities of high school more generally. At school, at work, or in

society at large, limiting a person's ability to use the restroom limits that person's ability to participate as a full and equal member of the community.

Title IX and its regulations allow schools to provide restroom facilities "on the basis of sex," 34 C.F.R. § 106.33, but those restrooms must be equally available to all boys and all girls, including boys and girls who are transgender. The only way Gavin can access those restrooms is if he uses the same common restrooms as other boys. That is the only option that provides restrooms on the basis of sex without "subject[ing]" Gavin "to discrimination." 20 U.S.C. § 1681(a). It is, therefore, the only option that complies with Title IX.

STATEMENT OF THE CASE

A. Factual Background.[1]

When Gavin was born, the hospital staff identified him as female, but from a young age, Gavin knew that he was a boy. JA 65. Like other boys, Gavin has a male gender identity. JA 61.

Everyone has a gender identity. JA 86. It is an established medical concept, referring to "a person's deeply felt, inherent sense of being a boy, a man, or male; a girl, a woman, or female." *See* Am. Psychological Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832, 862

[1] The uncontroverted facts alleged in the Complaint and declarations must be taken as true on both a motion to dismiss and a motion for preliminary injunction. *See Schindler Elev. Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 404 n.2 (2011); *Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976).

(Dec. 2015) ("APA Guidelines"), https://goo.gl/JJ98l3. Most people have a gender identity that matches the sex they are identified as at birth. But people who are transgender have a gender identity that differs from the sex they are identified as at birth.[2]

Like many transgender students, Gavin succeeded at school until the onset of puberty, when he began to suffer debilitating levels of distress. JA 65. By the end of his freshman year of high school, Gavin's distress became so great that he was unable to attend class. *Id.* Gavin came out to his parents as a boy and, at his request, began seeing a psychologist with experience counseling transgender youth. *Id.*

The psychologist diagnosed Gavin with gender dysphoria, a condition marked by the persistent and clinically significant distress caused by incongruence between an individual's gender identity and sex identified at birth. Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders, 5th edition (302.85) (5th ed. 2013). Although gender

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[2] Guidelines from the American Psychological Association no longer use the term "biological sex" when referring to sex identified at birth, usually based on a cursory examination of external anatomy. *See* APA Guidelines at 861-62. "Biological sex" is an inaccurate description of a person's sex identified at birth because there are many biological components of sex "including chromosomal, anatomical, hormonal, and reproductive elements, some of which could be ambiguous or in conflict within an individual." *Radtke v. Misc. Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund,* 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012). In addition, research indicates that gender identity has a biological component. *See* AAP Amicus. When the components of sex do not all align as typically male or typically female, individuals live their lives according to gender identity. *See* interACT Amicus.

dysphoria is a serious medical condition, it "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." Am. Psychiatric Ass'n, *Position Statement on Discrimination Against Transgender & Gender Variant Individuals* (2012), at https://goo.gl/iXBM0S.

There is a medical and scientific consensus that the proper treatment for gender dysphoria is for boys who are transgender to live as boys and for girls who are transgender to live as girls.[3] That includes using names and pronouns consistent with one's identity, and grooming and dressing in a manner typically associated with that gender. When medically appropriate, treatment also includes hormone therapy and surgery. JA 88.[4] The goal of

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[3] *See, e.g.*, Am. Acad. of Pediatrics, Comm. on Adolescents, *Policy Statement: Office-Based Care for Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 132 Pediatrics 198 (July 2013) ("AAP Policy"), https://goo.gl/Fk3fZ5; Am. Med. Ass'n, *Resolution H-185.950: Removing Financial Barriers to Care for Transgender Patients* (2016), https://goo.gl/lG50xS; Am. Psychiatric Ass'n, *Position Statement on Access to Care for Transgender and Gender Variant Individuals* (2012), https://goo.gl/U0fyfv; Am. Psychological Ass'n, *Transgender, Gender Identity, & Gender Expression Non-Discrimination*, 64 Am. Psychologist 372-453 (2008), https://goo.gl/8idKBP; Wylie C. Hembree, et al., *Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline*, 94(9) J. Clinical Endocrinology & Metabolism 3132-54 (Sept. 2009) ("Endocrine Society Guidelines"), https://goo.gl/lOroQj.

[4] Under widely accepted standards of care, chest reconstruction surgery is authorized for 16-year-olds but genital surgeries are generally not recommended for minors. *See* World Prof. Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* at 21 (7th ed. 2012), https://goo.gl/WiHTmz.

treatment is to eliminate the debilitating distress. *Id*. If left untreated, gender dysphoria can lead to anxiety, depression, self-harm, and even suicide. JA 93. When gender dysphoria is properly treated, transgender individuals experience profound relief and can go on to lead healthy, happy, and successful lives. *See* Am. Acad. of Pediatrics Amicus ("AAP Amicus"); Dr. Ben Barnes Amicus (describing life experiences of transgender Americans).

The ability of transgender individuals to live consistently with their identity is critical to their health and well-being. JA 89-90; Am. Acad. of Pediatrics, Comm. on Adolescents, *Policy Statement: Office-Based Care for Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 132 Pediatrics 198, 201 (July 2013)("AAP Policy"); APA Guidelines at 846-47. Because so much of their daily lives takes place at school, transgender students' activities at school have a particularly significant impact on their ability to thrive. *See* Am. Psychological Ass'n & Nat'l Ass'n of Sch. Psychologists, *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools* (2015) ("APA & NASP Resolution"), https://goo.gl/AcXES2.

As part of treatment for Gavin's gender dysphoria, Gavin's psychologist helped him begin living as a boy and referred him to an endocrinologist to be evaluated for hormone therapy. JA 66-67. The psychologist also gave Gavin a "treatment documentation letter" confirming that he was receiving treatment for gender dysphoria and stating that he should be treated as a boy in all respects, including when using the restroom. JA 66. Based on his treatment protocol, Gavin legally changed his

name to Gavin and began using male pronouns. JA 67. He wore his clothing and hairstyles in a manner typical of other boys and began using the men's restrooms in public venues, including restaurants, libraries, and shopping centers, without encountering any problems. *Id.*

In August 2014, before beginning his sophomore year, Gavin and his mother met with the high school principal and guidance counselor to explain that Gavin is transgender and, consistent with his identity and medical treatment, would be attending school as a boy. JA 67-68. At that time, the Board did not have policies addressing transgender students. *See* App. 2a. Gavin initially requested to use a restroom in the nurse's office, but soon felt stigmatized and isolated using a different restroom from everyone else. JA 68.

After a few weeks of using the restroom in the nurse's office, Gavin sought permission to use the boys' restrooms. On October 20, 2014, with the principal's support, Gavin began using the boys' restrooms, and he did so for seven weeks without incident. *Id.* The principal and superintendent informed the Board but otherwise kept the matter confidential. *Id.*; App. 3a.[5]

Some adults in the community, however, learned that a boy who is transgender was using the boys' restrooms at school. JA 68. They contacted the Board to demand that the student (who was not publicly identified as Gavin until later) be barred

[5] Gavin uses a home-bound program for physical education and, therefore, does not use the school locker rooms. JA 68.

from the boys' restrooms. JA 68-69. The Board has not disclosed the nature or source of the complaints.

The Board considered the matter at a private meeting and took no action for several weeks. App. 3a-4a. Apparently unsatisfied with the results of the private meeting, one Board member alerted the broader community by proposing a policy for public debate at the Board's meeting on November 11, 2014. JA 69. The policy's operative language stated:

> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Id. The policy categorically prohibits administrators from allowing any boy who is transgender to use any boys' restroom (or allowing any girl who is transgender to use any girls' restroom). The policy does not define "biological gender."[6]

The school gave Gavin and his parents no notice that the Board would discuss his restroom use at its meeting. JA 70. After learning about the meeting through social media, Gavin and his parents decided to speak against the proposed policy. JA 69-70. Gavin told the Board:

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[6] Petitioner sometimes refers to genital characteristics, Pet. Br. 11, sometimes to chromosomes, *id.* at 28, sometimes to reproductive organs, *id.*, and sometimes to characteristics that "subserve biparental reproduction," *id.* at 32.

> I use the restroom, the men's public restroom, in every public space in Gloucester County and others. I have never once had any sort of confrontation of any kind.
>
> . . .
>
> All I want to do is be a normal child and use the restroom in peace, and I have had no problems from students to do that—only from adults.
>
> . . .
>
> I did not ask to be this way, and it's one of the most difficult things anyone can face.
>
> . . .
>
> I am just a human. I am just a boy.

Recorded Minutes of the Gloucester Cty. Sch. Bd., Nov. 11, 2014, at 25:00 – 27:22 ("Nov. 11 Minutes"), https://goo.gl/dXLRg7. The Board deferred voting on the policy until its next meeting. JA 71.

Before its next meeting, the Board issued a press release announcing plans for "adding or expanding partitions between urinals in male restrooms, and adding privacy strips to the doors of stalls in all restrooms." App. 3a. In addition, the press release announced "plans to designate single stall, unisex restrooms . . . to give all students the option for even greater privacy." *Id.* The Board also acknowledged that it had reviewed guidance from the Department of Education advising schools that transgender students should generally be treated consistently with their gender identity. App. 1a-2a.

Speakers at the December Board meeting nonetheless demanded that Gavin be excluded from the boys' restrooms, and they threatened to vote Board members out of office if they refused to pass the new policy. JA 72. With Gavin in attendance, several speakers pointedly referred to Gavin as a "young lady." *Id.* One speaker called Gavin a "freak" and compared him to a person who thinks he is a "dog" and wants to urinate on fire hydrants. *Id.* "Put him in a separate bathroom if that's what it's going to take," said another. Recorded Minutes of the Gloucester Cty. Sch. Bd., Dec. 9, 2014, at 58:56 ("Dec. 9 Minutes"), https://goo.gl/63Vi4Q.

The Board passed the policy by a 6-1 vote. JA 72. The dissenting Board member warned that the policy conflicted with guidance and consent agreements from the Department of Justice and the Department of Education. *See* Dec. 9 Minutes at 2:07:02.

The Board subsequently converted a faculty restroom and two utility closets into single-user restrooms. JA 73. Although any student is allowed to use those restrooms, no one actually does so. JA 73-74; Pet. App. 151a. Everyone knows they were created for Gavin. JA 74; Pet. App. 151a. The converted single-user restrooms are located far away from Gavin's classes and the restrooms used by his classmates. JA 73; Pet. App. 150a-151a.

Using the single-stall restrooms would also be demeaning and stigmatizing. They signal to Gavin and the world that he is different, and they send a public message to all his peers that he is not fit to be treated like everyone else. JA 74, 91-92; Pet. App. 151a. In the words of one of the policy's supporters,

the separate restrooms divide the students into "a thousand students versus one freak." Dec. 9 Minutes at 1:22:53.

Of course, the prospect of using the girls' restrooms is unimaginable for Gavin. JA 73-74. It would not only be humiliating; it would also conflict with Gavin's treatment for gender dysphoria, placing his health and well-being at risk. JA 73-74, 90. The girls' restrooms are just as untenable for Gavin as they would be for any other boy.

Gavin does everything he can to avoid using the restroom at school. JA 74. As a result, he has developed painful urinary tract infections and is distracted and uncomfortable in class. *Id.* If Gavin has to use the restroom, he uses the nurse's restroom, but he feels ashamed doing so. *Id.* Everyone who sees Gavin enter the nurse's office knows he is there because he has been barred from the restrooms other boys use. *Id.*; Pet. App. 151a-152a. It makes him feel "like a walking freak show" and "a public spectacle" before the entire community. Pet. App. 150a-151a.

Any teenager, whether transgender or not, would be harmed by being singled out and shamed in front of his peers. JA 90-93; AAP Amicus. But transgender students are particularly vulnerable. JA 90-91. Preventing transgender students from living in a manner that is consistent with their gender identity puts them at increased risk of debilitating depression and suicide. *See id.*; AAP Amicus. According to a nationally recognized expert in the treatment of gender dysphoria who evaluated Gavin, the policy "places him at extreme risk for

immediate and long-term psychological harm." JA 74-75, 94.[7]

The Board's policy has been in place since December of Gavin's sophomore year; he is now a senior, scheduled to graduate in June 2017.[8] During that time, Gavin has continued to receive treatment for gender dysphoria. In December 2014, Gavin began hormone therapy, which has altered his physical appearance and deepened his voice. JA 67. In June 2015, Gavin received an ID card from the Virginia Department of Motor Vehicles identifying him as male. JA 80-82. In June 2016, Gavin had chest reconstruction surgery. Following that surgery, the Virginia courts issued an order legally changing his gender under state law, and the Virginia Department of Health issued an amended birth certificate listing Gavin's sex as male.[9]

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[7] The preliminary injunction record was compiled in July 2015, after Gavin's sophomore year. On remand, Gavin will present evidence of the continued harm he has endured under the policy. For example, Gavin's distress under the policy was so severe that he spent several months taking online courses at an off-site facility so as to avoid being stigmatized in front of his classmates at school. Gavin has also been unable to attend school events where there are no accessible single-user restrooms for him to use.

[8] After graduation, Gavin will remain subject to the policy for purposes of any alumni activities or attendance at school events.

[9] On review of a motion to dismiss, this Court may take judicial notice of these documents as public records. *See Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986); Wright & Miller, *et al.*, 5B Fed. Prac. & Proc. Civ. § 1357 (3d ed. 2004). On January 28, 2017, respondent filed a request to lodge these documents with the Court.

Despite all this, the Board continues to exclude Gavin from the common boys' restrooms.[10]

B. Experience of Other Transgender Students.

Boys and girls who are transgender are attending schools across the country. While transgender students have long been part of school communities, it is only in the last couple decades that there has been more widespread access to the medical and psychological support that they need. *See* AAP Amicus. Beginning in the early 2000s, as a result of advances in medical and psychological care, transgender youth finally began to receive the treatment necessary to alleviate the devastating pain of gender dysphoria and live their lives in accordance with who they really are. *See* Endocrine Society Guidelines at 3139-40.

With hormone blockers and hormone therapy, transgender students develop "physical sexual attributes," Pet. Br. 20, typical of their gender identity—not the sex they were identified as at birth. Hormone therapy affects bone and muscle structure,

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[10] The Board's position is even more extreme than the controversial North Carolina statute challenged in *Carcaño v. McCrory*, No. 1:16-CV-236, 2016 WL 4508192 (M.D.N.C. Aug. 26, 2016), which establishes a concept of "biological sex" defined as the sex "stated on a person's birth certificate." N.C. Gen. Stat. Ann. § 143-760. Under the North Carolina statute, "transgender individuals may use facilities consistent with their gender identity—notwithstanding their birth sex and regardless of whether they have had gender reassignment surgery—as long as their current birth certificate has been changed to reflect their gender identity, a practice permitted in some States." *Carcaño*, 2016 WL 4508192, at *6 n.13.

alters the appearance of a person's genitals, and produces secondary sex characteristics such as facial and body hair in boys and breasts in girls. *See* Endocrine Society Guidelines at 3139-40. Transgender children who receive hormone blockers never go through puberty as their birth-designated sex. *Id.* at 3140-43. For example, a boy who is transgender and receives hormone blockers and hormone therapy will develop the height, muscle mass, and bone structure typical of other boys. He will be exposed to the same levels of testosterone as other boys as he goes through puberty. *Id.*

Many transgender students begin school without classmates and peers knowing they are transgender. Many others transfer to a new school after transitioning. Requiring these students to use separate restrooms forces them to reveal their transgender status to peers or to constantly make up excuses for using separate restrooms. *See, e.g.*, *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 2:16-CV-524, 2016 WL 5372349, at *2-3 (S.D. Ohio Sept. 26, 2016), *appeal docketed*, No. 16-4107 (6th Cir. Sept. 28, 2016) (recounting testimony from a girl who is transgender in elementary school that "when other students line up to go to the restroom, she leaves the line to go to a different restroom, and other kids say, 'Why are you going that way? You're supposed to be over here.'" (internal quotation marks and brackets omitted)); *see also* Transgender Student Amicus; School Administrators Amicus.

When excluded from the common restrooms, transgender students often avoid using the restroom entirely, either because it is too stigmatizing or too

difficult to access. They suffer infections and other negative health consequences as a result of avoiding urination. JA 90. The exclusion also increases their risk of depression and self-harm. *Id.*; *Highland*, 2016 WL 5372349, at *2-3 (suicide attempt by fourth-grader); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 WL 5239829, at *1 (E.D. Wis. Sept. 22, 2016), *appeal docketed*, No. 16-3522 (7th Cir. Sept. 26, 2016) (suicidal ideation, depression, migraines, attempts to avoid urination).

In addition to the documented medical harms, limiting transgender students to single-user restrooms has practical consequences. In many schools, the single-user restrooms (if they exist at all) are far away and difficult to access. With only a few minutes between classes, and long distances to travel, transgender students frequently have trouble using the restroom and attending class on time. *See Highland*, 2016 WL 5372349, at *3 (for fourth-grade girl who is transgender to use staff restroom, "a staff member had to walk her to the restroom, unlock the door, wait outside, and escort her back to class"); *Whitaker*, 2016 WL 5239829, at *2 (boy who is transgender could not use single-user restrooms because they "were far from his classes and because using them would draw questions from other students"); *see also* Transgender Student Amicus.

In light of these harms, the American Psychological Association and the National Association of School Psychologists have adopted resolutions calling upon schools to provide transgender students "access to the sex-segregated facilities, activities, and programs that are consistent with their gender identity." APA & NASP Resolution.

The National Association of Secondary School Principals, the National Association of Elementary School Principals, and the American School Counselor Association have taken the same position. *See* Gender Spectrum, Transgender Students and School Bathrooms: Frequently Asked Questions (2016), https://goo.gl/Z4xejp; Nat'l Ass'n of Secondary Sch. Principals, *Position Statement on Transgender Students* (2016) ("NASSP Statement"), https://goo.gl/kcfImn.

Those recommendations are consistent with policies that already exist across the country. Institutions ranging from the Girl Scouts[11] and Boy Scouts[12] to the United States military[13] to the Seven Sisters colleges[14] to the National Collegiate Athletic Association[15] already recognize boys who are transgender as boys and recognize girls who are transgender as girls.

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[11] *See* Girl Scouts, *Frequently Asked Questions: Social Issues*, https://goo.gl/364fXI ("[I]f the child is recognized by the family and school/community as a girl and lives culturally as a girl, then Girl Scouts is an organization that can serve her in a setting that is both emotionally and physically safe.").

[12] *See* Boy Scouts of America, *BSA Addresses Gender Identity* (Jan. 30, 2017), https://goo.gl/WxNoGY.

[13] *See* Dep't of Def. Instruction No. 1300.28: In-Service Transition for Transgender Service Members (June 30, 2016), https://goo.gl/p9xsaB.

[14] *See* Susan Svrluga, *Barnard Will Admit Transgender Students. Now All 'Seven Sisters' Colleges Do.*, Wash. Post (June 4, 2015), https://goo.gl/g0rALA.

[15] Nat'l Collegiate Athletic Ass'n, *NCAA Inclusion of Transgender Student-Athletes* (2011), https://goo.gl/V2Oxb2.

C. Title IX and 34 C.F.R. § 106.33.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

Pursuant to Congress's delegation of authority, the Department of Health, Education, and Welfare ("HEW") promulgated implementing regulations, which were subsequently adopted by the Department of Education (the "Department"), the agency with primary responsibility for enforcing Title IX.[16] The regulations state, as a general matter, that schools may not, on the basis of sex, "provide aid, benefits, or services in a different manner" or "[s]ubject any person to separate or different rules of behavior, sanctions, or other treatment." 34 C.F.R. § 106.31. In certain narrow circumstances, the regulations permit differential treatment on the basis of sex, but only so long as the differential treatment does not subject anyone to discrimination in violation of the statute. One of those regulations authorizes schools to "provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.[17]

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[16] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52858-01.

[17] There is no statutory exception for single-sex restrooms. Petitioner mistakenly asserts that the restroom regulation

The restroom regulation was enacted in 1975. Thereafter, as a growing number of transgender students began to medically and socially transition, schools sought guidance regarding which restrooms these students should use. App. 10a.

In 2010, the Department began soliciting information from schools about the experience of transgender students. App. 10a. In 2013, after several years of study, the Department concluded that the only way to ensure that transgender students are not "subjected to discrimination" prohibited under Title IX is to allow transgender students to use the same common restrooms as other students, in keeping with their gender identity. App. 13a-14a. The Department also concluded that transgender students could be integrated into common restrooms while accommodating the privacy of all students in a non-stigmatizing manner. *Id.*

Since 2013, the Department has advised schools that they may not, consistent with Title IX and 34 C.F.R. § 106.33, discriminate against students who are transgender. In 2013 and 2014, the Department resolved two enforcement actions against school districts to protect transgender

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implements one of Title IX's statutory exceptions, Pub. L. 92-318 § 907 (codified at 20 U.S.C. § 1686), which authorizes schools to provide "separate living facilities." Pet. Br. 8. That statutory provision is implemented by a different regulation, 34 C.F.R. § 106.32, which is titled "Housing" and specifically references Pub. L. 92-318 § 907 as a source of authority. In contrast, the restroom regulation does not reference the statutory exception for living facilities.

students' access to common restrooms that match their identity. Pet. App. 124a. In 2014, the Department also advised schools in a guidance document that "a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." Pet. App. 100a-101a.

After the Board adopted its new policy, the Department issued an opinion letter—which petitioner refers to as the "Ferg-Cadima letter"—reaffirming the Department's position that the restroom regulation does not authorize schools to exclude boys who are transgender from the boys' restrooms or girls who are transgender from the girls' restrooms. Pet. App. 121a-125a. The next month, the United States filed a statement of interest elaborating on its interpretation of Title IX in *Tooley v. Van Buren Pub. Sch.*, No. 2:14-CV-13466 (E.D. Mich. Feb. 20, 2015). App. 62a. The United States filed an additional statement of interest before the district court in this case, Pet. App. 160a-82a, and an amicus brief before the Fourth Circuit, App. 40a-67a.

The Department's interpretation of the statute and regulation is consistent with the interpretations of other agencies that enforce statutory protections against sex discrimination, including interpretations promulgated after extensive notice-and-comment rulemaking. Pet. App. 24a.[18]

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[18] *See* Discrimination on the Basis of Sex, Final Rule, RIN 1250-AA05, 81 Fed. Reg. 39,108-01 (June 15, 2016) (to be codified at

D. Proceedings Below.

The day after the 2014-15 school year ended, Gavin filed a complaint and motion for preliminary injunction against the Board, arguing that the Board's new policy discriminates against him on the basis of sex, in violation of Title IX and the Equal Protection Clause. JA 1, 61-79. The Complaint seeks injunctive relief and damages for both claims. JA 78.

The district court denied Gavin's motion for a preliminary injunction and granted the Board's cross-motion to dismiss the Title IX claim. Pet. App. 82a-117a. The Board's cross-motion to dismiss the Equal Protection claim is still pending. Pet. App. 13a n.3.

Gavin appealed the denial of a preliminary injunction and asked the Fourth Circuit to exercise pendent appellate jurisdiction over the dismissal of his Title IX claim. Pl.'s C.A. Br. 1. The Fourth Circuit reversed the dismissal of the Title IX claim and vacated the denial of a preliminary injunction. Pet. App. 7a.

Applying *Auer v. Robbins*, 519 U.S. 452 (1997), the court determined that the Department's

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41 C.F.R. pt. 60-20); Family Violence Prevention and Services Programs, Final Rule, 81 Fed. Reg. 76,446 (Nov. 2, 2016) (to be codified at 45 C.F.R. pt. 1370); Nondiscrimination in Health Programs and Activities, Final Rule, RIN 0945–AA02, 81 Fed. Reg. 31,376 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92); Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs, Final Rule, 81 Fed. Reg. 64,763, 64,779 (Sept. 21, 2016) (to be codified at 22 C.F.R. pt. 5).

interpretation of 34 C.F.R. § 106.33 was not plainly erroneous or inconsistent with the regulation's text. Pet. App. 13a-24a. The court also concluded that the Department's interpretation reflected its fair and reasoned judgment and was not a post-hoc litigating position. Pet. App. 23-24a.

The court noted that privacy interests of other students regarding nudity would not be implicated by "[Gavin's] use—or for that matter any individual's appropriate use—of a restroom." Pet. App. 25a-26a n.10. Students who want even greater privacy, the court noted, may also use one of the new single-stall restrooms. Pet. App. 37a-38a (Davis, J., concurring).

Senior Judge Davis concurred and emphasized that "[t]he uncontroverted facts before the district court demonstrate that as a result of the Board's restroom policy, [Gavin] experiences daily psychological harm that puts him at risk for long-term psychological harm." Pet. App. 37a.

Judge Niemeyer dissented. Pet. App. 40a-60a. He did not identify any privacy concerns raised by the facts of this case and acknowledged that "the risks to privacy and safety are far reduced" in the context of restrooms. Pet. App. 53a. Judge Niemeyer instead focused on transgender students' use of locker rooms and potential exposure to "private body parts" in that setting. Pet. App. 52a.

After the Fourth Circuit's ruling, the Department of Education and Department of Justice issued a "Dear Colleague letter" providing guidance to school districts on how to provide transgender students equal access to school resources, as required by Title IX. Pet. App. 126a-142a. The Department

also provided examples of school policies from across the country that integrate transgender students into single-sex programming and facilities.[19]

On remand, the district court entered a preliminary injunction allowing Gavin to use the boys' restrooms at school, Pet. App. 71a-72a, and the district court and Fourth Circuit denied the Board's request to stay the injunction pending appeal, Pet. App. 73a-81a.

On August 3, 2016, this Court granted the Board's application to stay and recall the mandate and stay the preliminary injunction pending disposition of the Board's petition for certiorari. *Gloucester Cty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (2016).[20]

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[19] U.S. Dep't of Educ. Office of Elementary & Secondary Educ., *Examples of Policies and Emerging Practices for Supporting Transgender Students* at 1-2, 7-8 (May 2016) ("*Examples of Policies*"), https://goo.gl/lfHtEM.

[20] Following this Court's stay, an additional five district courts have evaluated whether the Department's interpretation of 34 C.F.R. § 106.33 is entitled to deference. All but one agreed with the Fourth Circuit. *See Whitaker*, 2016 WL 5239829, at *3; *Highland*, 2016 WL 5372349, at *18; *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *18 (N.D. Ill. Oct. 18, 2016) (report and recommendation); *see also Carcaño*, 2016 WL 4508192, at *13 (following *G.G.* as binding precedent). *But see Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016), *appeal docketed*, No. 16-11534 (5th Cir. Oct. 21, 2016).

Two of those courts issued preliminary injunctions to transgender students based both on *Auer* deference and the courts' independent interpretation of Title IX and the Equal Protection Clause. *See Highland*, 2016 WL 5372349, at *8-19;

SUMMARY OF ARGUMENT

I. Under the plain text of Title IX, Gavin has stated a claim on which relief can be granted. Under the Board's policy, Gavin is "subjected to discrimination" at, "excluded from participation in," and "denied the benefits of" Gloucester High School "on the basis of sex." 20 U.S.C. § 1681(a). Gavin simply asks the Court to apply the statute as written.

A. The Board's policy discriminates against Gavin by excluding him from the common boys' restrooms. Gavin cannot use the girls' restrooms. To do so would be deeply stigmatizing, impossible as a practical matter, and it would be directly contrary to his medical treatment for gender dysphoria. His only other option is to use the nurse's office or separate single-user restrooms that no other student is required to use.

Whitaker, 2016 WL 5239829, at *3-4. The Sixth and Seventh Circuits denied the school districts' motions to stay those injunctions pending appeal. *See Dodds v. U.S. Dep't of Educ.*, No. 16-4117, 2016 WL 7241402, at *2 (6th Cir. Dec. 15, 2016); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-3522, ECF 19 (7th Cir. Nov. 10, 2016).

Lower courts have also held that excluding men who are transgender from men's restrooms and women who are transgender from women's restrooms violates Title VII. *See Mickens v. Gen. Elec. Co.*, No. 3:16-CV-00603-JHM, 2016 WL 7015665, at *3 (W.D. Ky. Nov. 29, 2016); *Roberts v. Clark Cty. Sch. Dist.*, No. 2:15-CV-00388-JAD-PAL, 2016 WL 5843046, at *1 (D. Nev. Oct. 4, 2016).

By forcing Gavin, and Gavin alone, to use these separate facilities, the Board's policy humiliates and stigmatizes Gavin in front of his peers and marks him as unfit to use the same restrooms as everyone else. This discriminatory treatment has far-reaching consequences. According to experts in child health and welfare, singling out transgender students and excluding them from common restroom facilities has a devastating impact on their physical and mental well-being and their ability to thrive in school.

B. The Board's discriminatory treatment of Gavin is "on the basis of sex." The policy uses the undefined criterion of "biological *gender*" to target students who are transgender and exclude them from common restrooms. The sole purpose and effect of the policy is to single out Gavin for different treatment from other boys. By targeting Gavin in this manner, the policy discriminates against him because of the sex-based characteristics that make him transgender. And the policy treats him differently because his transgender status contravenes sex-based stereotypes and assumptions, a long-recognized form of sex discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).[21] Accordingly, the Board's discriminatory treatment of Gavin as a boy who is transgender is "on the basis of sex."

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[21] This Court looks to its Title VII precedents when interpreting Title IX. *See Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992). To the extent there are differences between the two statutes, Title IX is broader. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005).

C. Petitioner argues that Title IX provides no relief to Gavin because the legislators who passed the statute were "principally motivated to end discrimination against women," Pet. Br. 6, not sex discrimination against transgender individuals. But "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Although Congress may not have had a boy like Gavin in mind, the statute's literal terms protect all persons from all sex-based discrimination.

D. The restroom regulation, 34 C.F.R. § 106.33, does not authorize the Board's discriminatory policy. While the regulation authorizes *differential* treatment on the basis of sex, it cannot—and does not purport to—authorize *discrimination*. Accordingly, the regulation authorizes schools to provide separate restrooms for boys and girls, but it does not allow schools to use additional sex-based criteria to exclude transgender students from those common restrooms. By singling out transgender students and excluding them from the common restrooms, the Board's policy does what the statute forbids.

II. Petitioner seeks to justify its discriminatory policy by speculating about "obvious and intractable problems of administration." Pet. Br. 36. But administrative concerns cannot justify discrimination forbidden by the statute. And, in any event, the actual experience of schools, colleges, athletic organizations, and other institutions across the country shows that schools can integrate transgender individuals without any of these

speculative concerns arising. Petitioner's allegedly intractable problems have simple solutions, and none of them is actually relevant to Gavin and his use of the restroom.

A. Gavin has never argued that the Board should accept his "mere assertion" that he is transgender. He has provided ample corroboration from his doctors, his parents, and his state identification documents. He is following a treatment protocol from his healthcare providers in accordance with widely accepted standards of care for treating gender dysphoria. If school administrators have legitimate concerns that a person is pretending to be transgender, a letter from the student's doctor or parent can easily provide corroboration.

B. Schools need not—and cannot—discriminate in order to protect the privacy interests of students. Gavin's use of the restrooms does not implicate any privacy concerns related to nudity, especially in light of the simple urinal dividers and privacy strips the Board installed. Difference can be discomfiting, but it cannot justify discrimination based on "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

C. Petitioner's speculation about locker rooms and sports teams is similarly unfounded. School districts across the country have addressed these issues without categorically banning transgender students. Indeed, school athletic associations—including the National Collegiate Athletic Association and the Virginia High School

League—*already* allow boys who are transgender to play on boys' teams and allow girls who are transgender to play on girls' teams.

III. The Department agrees that its regulation does not authorize the Board's discriminatory policy, and its interpretation provides an additional reason for rejecting the Board's argument. None of petitioner's arguments for withholding *Auer* deference withstands scrutiny.

IV. Finally, the doctrine of constitutional avoidance cannot support the Board's interpretation of Title IX and the restroom regulation. *Pennhurst* does not apply to Gavin's claims for injunctive relief, and the Board has long been on notice that it is potentially liable for any form of intentional discrimination under the statute.

The Fourth Circuit's decision reinstating the Title IX claim should be affirmed, and the stay of the preliminary injunction should be dissolved.

ARGUMENT

Although the Fourth Circuit based its ruling on principles of *Auer* deference, this Court may affirm "the judgment on any ground supported by the record." *Bennett v. Spear*, 520 U.S. 154, 166 (1997). Even if the Department's guidance documents are withdrawn by the new administration, *see* Pet. Br. 25, the meaning of Title IX and 34 C.F.R. § 106.33 will remain the same. Respondent agrees with petitioner that this Court can—and should—resolve the underlying question of whether the Board's policy violates Title IX.

I. THE BOARD'S POLICY VIOLATES THE PLAIN TEXT OF TITLE IX.

The "starting point in determining the scope of Title IX is, of course, the statutory language." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520 (1982). Under the plain text of the statute, Gavin has stated a claim on which relief can be granted: He has been "subjected to discrimination" at, "excluded from participation in," and "denied the benefits of" Gloucester High School "on the basis of sex." 20 U.S.C. § 1681(a).

A. The Board's Policy Subjects Gavin To Discrimination.

Before the Board adopted its new policy, Gavin was treated the same as other boys. But because he is transgender, the Board's new policy singles Gavin out for different treatment and bars him from using the common restrooms for boys. Instead, he is relegated to single-stall facilities that no other student uses. He, and only he, must use restrooms that humiliate him in front of his peers and stigmatize him as unfit to use the same restrooms as others. He, and only he, is "subjected to discrimination" "on the basis of sex" under the policy. 20 U.S.C. § 1681(a).

1. Forcing Gavin to use the girls' restrooms subjects him to discriminatory treatment.

Gavin is recognized as a boy by his family, his medical providers, the Virginia Department of Health, and the world at large. He has medically and socially transitioned, and he interacts with his teachers and peers as the boy that he is.

Additionally, he is receiving hormone therapy, has had chest reconstruction surgery, and changed his sex to male both on his state-issued identification card and his birth certificate. To confirm his medical care, he also supplied school administrators with a "treatment documentation letter" from his psychologist.

Although petitioner asserts that Gavin is permitted to use the girls' restrooms, Pet. Br. 39, petitioner does not explain how Gavin could actually do so. He can no more use a girls' restroom than could any other boy at Gloucester High School. If Gavin attempted to enter the girls' restrooms, he would create a disturbance and possibly a confrontation with other students or staff who would (accurately) perceive him as a boy intruding upon the girls' restrooms. Additionally, sending Gavin to the girls' restrooms would contravene his medical treatment and stigmatize him as unfit to use the common restrooms all other boys use.

By excluding Gavin from the boys' restrooms, the Board's policy therefore excludes Gavin from using *any* common restrooms. And the Board's policy recognizes this fact. It is premised on the understanding that students "with gender identity issues" will be provided "an alternative . . . facility," JA 69—not that boys who are transgender would use the girls' restrooms. Placing Gavin in the girls' restrooms would undermine the very privacy expectations regarding single-sex restrooms that the Board claims to be protecting.

2. Forcing Gavin to use single-stall restrooms subjects him to discriminatory treatment.

Forcing Gavin into the single-stall restrooms stigmatizes him as unfit to use the same restrooms as others and undermines his medical treatment. No other student is required to use the separate restrooms, and no other student does so. JA 73-74.

The single-stall restrooms are not an accommodation for Gavin as petitioner suggests. Pet. Br. 21. Rather, they were designed to "[p]ut him in a separate bathroom," away from other students. Dec. 9 Minutes at 58:56. The Board's policy sends a message to Gavin and the entire school community that Gavin is unacceptable and not fit to use the same restrooms as others. *Cf. J.E.B. v. Alabama*, 511 U.S. 127, 142 (1994) (explaining that when a juror is excluded based on sex "[t]he message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified"); *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (explaining that refusal to recognize marriages of same-sex couples "tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition"). Using separate restrooms makes Gavin feel like "a public spectacle" and "a walking freak show." Pet. App. 150a-151a.

Our laws have long recognized the "daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969); *cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 625

(1984). "[D]iscrimination itself, . . . by stigmatizing members of the disfavored group[,] . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984).

Title IX, which protects the equal dignity of all students, regardless of sex, requires courts to take these social realities into account. *Compare Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (claiming that assumption that racial segregation "stamps the colored race with a badge of inferiority" exists "solely because the colored race chooses to put that construction upon it"); *with Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (recognizing that racial segregation of students "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone"). *See also* NAACP LDF Amicus. By any objective measure, the Board's policy subjects Gavin to discrimination.

3. The Board's policy deprives Gavin of equal educational opportunity.

Under Title IX, "[s]tudents are not only protected from discrimination, but also specifically shielded from being 'excluded from participation in' or 'denied the benefits of'" educational programs and activities on the basis of sex. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (quoting 20 U.S.C. § 1681(a)). These specific prohibitions "help give content to the term 'discrimination' in [the educational] context." *Id.* Here, as elsewhere, "discriminatory treatment exerts a pervasive

influence on the entire educational process." *Norwood v. Harrison*, 413 U.S. 455, 469 (1973).

"The most obvious example" of a Title IX violation is "the overt, physical deprivation of access to school resources." *Davis*, 526 U.S. at 650. At work or at school, access to a restroom is a basic necessity of life. The Occupational Health and Safety Administration has long recognized that "adverse health effects . . . can result if toilets are not available when employees need them."[22]

When boys who are transgender are not allowed to use the boys' restrooms and girls who are transgender are not allowed to use the girls' restrooms, they often avoid using restrooms altogether because the restrooms they are allowed to use are either too stigmatizing or too difficult to access. This can lead to significant health problems and interfere with a student's ability to learn and focus in class. *See* School Administrators Amicus; Transgender Student Amicus. It is also common for the exclusions to increase students' risk of depression and self-harm. *See Highland*, 2016 WL 5372349, at *2-3 (suicide attempt by fourth-grader); *Whitaker*, 2016 WL 5239829, at *1 (depression, migraines, suicidal ideation, attempts to avoid urination).

According to experts in mental health, education, and child welfare, the humiliation of being forced to use separate restrooms significantly interferes with transgender students' ability to participate and thrive in school. It disrupts their

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[22] Memorandum on the Interpretation of 29 C.F.R. 1910.141(c)(1)(i): Toilet Facilities (Apr. 6, 1998), https://goo.gl/86s5IC.

course of medical treatment; it can compromise their privacy and "out" them as transgender to community members and peers; and it impairs their ability to develop a healthy sense of self, peer relationships, and the cognitive skills necessary to succeed in adult life. *See* JA 91-92; AAP Amicus. Developing these skills is a fundamental part of the educational process for all adolescents. *See* GLSEN Amicus.

In addition to the policy's harmful stigma, the limited number of single-stall restrooms at Gloucester High School also has practical consequences for Gavin's access to the school's educational benefits. Because the single-stall restrooms and the nurse's office are located far from Gavin's classes, being forced to use separate restrooms means that he is physically unable to take a restroom break between classes without being late and unable to take a restroom break during class without missing a significant amount of class time. Pet. App. 150a-151a. Transgender students in other cases have encountered similar problems. *See Highland*, 2016 WL 5372349, at *3; *Whitaker*, 2016 WL 5239829, at *2.[23]

These harms have been recognized before. "For more than a decade the women of Harvard Law had to sprint across campus to a hastily converted basement janitors' closet." Deborah L. Rhode, *Midcourse Corrections: Women in Legal Education*,

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[23] Although forcing Gavin to use separate facilities would stigmatize him and undermine his medical treatment no matter how many facilities were installed, this is not a case in which every set of boys' and girls' restrooms is accompanied by an equally accessible single-user facility. Pet. App. 150a-51a.

53 J. Legal Educ. 475, 479 (2003). Similarly, women entering previously all-male work environments "often discover[ed] that the facilities for women [were] inadequate, distant, or missing altogether." *DeClue v. Cent. Ill. Light Co.*, 223 F.3d 434, 437 (7th Cir. 2000) (Rovner, J., dissenting). This disparity could "affect their ability to do their jobs in concrete and material ways," even if it sometimes struck men as "of secondary, if not trivial, importance." *Id.* *See also* Justice Sandra Day O'Connor, "'Out Of Order' At The Court: O'Connor On Being The First Female Justice," NPR (March 5, 2013), https://goo.gl/4llXNV ("In the early days of when I got to the court, there wasn't a restroom I could use that was anywhere near that courtroom.").

At school, at work, or in society at large, limiting a person's ability to use the restroom limits that person's ability to participate as a full and equal member of the community. *See* Transgender Student Amicus; Dr. Ben Barnes Amicus.

B. The Board's Discrimination Is "On The Basis of Sex."

The Board's discriminatory treatment of Gavin is explicitly "on the basis of sex." The Board's policy states that restrooms "shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility." JA 69. The policy adopts an undefined criterion of "biological gender"—a facially sex-based term—for the purpose of excluding transgender students from the restrooms that everyone else uses.

The express purpose and sole effect of the Board's policy is to target Gavin because he is transgender. The preface to the policy recites that "some students question their gender identities," and the only function of the policy is to move those students out of the common restrooms and into "an alternative . . . facility." JA 69. The policy was passed as a direct response to Gavin's use of the boys' restrooms, and the goal of the policy was to "[p]ut him in a separate bathroom." Dec. 9 Minutes at 58:56.

The change in policy had no effect on other students, all of whom continue to use the same restrooms they used before. Transgender students are the only students who are affected. *Cf. City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015) ("The proper focus of the . . . inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").[24]

By targeting Gavin for different treatment because he is transgender, the policy impermissibly discriminates "on the basis of sex."[25]

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[24] As discussed *infra* II.A., the Board does not have any generally applicable "objective physiological criteria" for defining what it calls "biological gender," Pet. Br. 39, and cannot explain how the term applies to people who are not transgender.

[25] The vast majority of lower courts have already recognized that discrimination against transgender individuals is discrimination "on the basis of sex." As Senior Judge Davis noted in his concurrence, "[t]he First, Sixth, Ninth, and Eleventh Circuits have all recognized that discrimination

A person's transgender status is an inherently sex-based characteristic. Gavin is being treated differently because he is a boy who was identified as female at birth. The incongruence between his gender identity and his sex identified at birth is what makes him transgender. Treating a person differently because of the relationship between those two sex-based characteristics is literally discrimination "on the basis of sex." *Cf.* interACT Amicus (describing intersex conditions).

Similarly, discrimination against people because they have undergone a gender transition is inherently based on sex. By analogy, religious discrimination includes not just discrimination against Jews and Christians, but also discrimination against people who convert from Judaism to Christianity. *Cf. Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 (1987) (refusing to adopt interpretation of Free Exercise Clause that would "single out the religious convert for different, less favorable treatment"). Similarly, sex discrimination includes not just discrimination against boys and girls, but also discrimination against boys who have undergone a gender transition from the sex identified for them at birth. *Cf. Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008) (making same analogy).

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against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution." Pet App. 78a (Davis, J., concurring). *See* App. 52a (collecting cases); Impact Fund Amicus.

In addition, discrimination against transgender people is sex discrimination because it rests on sex stereotypes and gender-based assumptions. By definition, transgender people depart from stereotypes and overbroad generalizations about men and women. Indeed, "a person is defined as transgender precisely because" that person "transgresses gender stereotypes." *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011). Unlike other boys, Gavin had a different sex identified for him at birth. He therefore upsets traditional assumptions about boys, and the Board has singled him out precisely because of that discomfort.

Discriminating against Gavin for upsetting those expectations is sex discrimination. As this Court recognized in *Price Waterhouse*, "assuming or insisting that [individual men and women] match[] the stereotype associated with their group" is discrimination because of sex. 490 U.S. at 251 (plurality).[26] Sex discrimination is prohibited by Title IX and other statutes precisely because "[p]ractices that classify [students] in terms of . . . sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978).

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[26] *Price Waterhouse* thus "eviscerated" earlier lower court decisions that wrongly limited sex discrimination to discrimination based on biological characteristics. *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (discussing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084-85 (7th Cir. 1984)).

These protections are not limited to "myths and purely habitual assumptions," but also apply to generalizations that are "unquestionably true." *Id.* at 707. To be sure, most boys are identified as boys at birth. It is only a small group of boys for whom this is not true. But generalizations that are accurate for most boys cannot justify discrimination against boys who "fall outside the average description." *Cf. United States v. Virginia*, 518 U.S. 515, 550 (1996). "Even a true generalization about the class is an insufficient reason" to discriminate against "an individual to whom the generalization does not apply." *Manhart*, 435 U.S. at 708.

Thus, discriminating against Gavin because he is a boy who is transgender discriminates against him on the basis of sex. The fact that the sex discrimination is targeted exclusively at students who are transgender does not change it from discrimination on the basis of sex to a distinct form of discrimination on the basis of being transgender. This Court's precedents make clear that sex discrimination does not have to affect *all* boys or *all* girls the same way in order to be "on the basis of sex." *See Price Waterhouse*, 490 U.S. at 257-58 (discrimination against women who are "macho" and "abrasive" is based on sex); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) (discrimination against women with children is based on sex); *cf. Connecticut v. Teal*, 457 U.S. 440, 455 (1982) (Title VII does "not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her . . . sex were [not injured].").

The same is true here. The Board's discrimination against Gavin because he is a boy who is transgender is discrimination on the basis of sex, even if no other boy is affected.

C. Title IX's Broad Text Cannot Be Narrowed By Assumptions About Legislative Intent.

Relying heavily on assumptions about legislative intent, petitioner argues that Gavin's claim falls outside the scope of Title IX because the legislators who passed the statute were "principally motivated to end discrimination against women." Pet. Br. 6. But this Court long ago rejected that approach to statutory interpretation. As Justice Scalia explained on behalf of a unanimous Court in *Oncale*: "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." 523 U.S. at 79.

Here, too, the legislators who passed Title IX may have been "principally motivated to end discrimination against women," Pet. Br. 6, but they wrote a broad statute that protects all "person[s]" from discrimination "on the basis of sex." 20 U.S.C. § 1681(a). The statute is not limited to discrimination against women and extends to sex discrimination "of whatever kind." *Oncale*, 523 U.S. at 80. Indeed, this Court has repeatedly instructed courts to construe Title IX broadly to encompass "a wide range of intentional unequal treatment." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Sex-based discrimination that harms transgender individuals is a "reasonably comparable evil" that

falls squarely within the statute's plain text. *Oncale*, 523 U.S. at 79; s*ee* Impact Fund Amicus; Nat'l Women's Law Ctr. Amicus.

There is no question that our understanding of transgender people has grown since Congress passed Title IX. But "changes, in law or in world" may "require [a statute's] application to new instances," *West v. Gibson*, 527 U.S. 212, 218 (1999), and a broadly written statute "embraces all such persons or things as subsequently fall within its scope," *De Lima v. Bidwell*, 182 U.S. 1, 217 (1901). *See Massachusetts v. EPA*, 549 U.S. 497, 532 (2007); *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980); *Browder v. United States*, 312 U.S. 335, 339 (1941).

For example, Title IX protects students from sexual harassment even though, when Congress enacted the statute, "the concept of 'sexual harassment' as gender discrimination had not been recognized or considered by the courts." *Davis*, 526 U.S. at 664 (Kennedy, J., dissenting). "If Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators." *Barr v. United States*, 324 U.S. 83, 90 (1945).

Petitioner argues that sex discrimination against transgender people is implicitly excluded from Title IX because Congress passed unrelated statutes in 2009 and 2013 that explicitly protect individuals based on "gender identity." *See* Pet. Br. 34 (citing 18 U.S.C. § 249(a)(2) and 42 U.S.C. § 13925(b)(13)(A)). This "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth*

LLC, 562 U.S. 223, 242 (2011). Congress's use of the term "gender identity" in 2009 and 2013 says little about what Congress intended in 1972. "When a later statute is offered as an expression of how the Congress interpreted a statute passed by another Congress a half century before, such interpretation has very little, if any, significance." *Bilski v. Kappos*, 561 U.S. 593, 645 (2010) (internal quotation marks and ellipses omitted).

Failed proposals to add language explicitly to protect transgender individuals are even less probative. *See United States v. Craft*, 535 U.S. 274, 287 (2002). "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001). *Cf. Massachusetts*, 549 U.S. at 529-30 ("That subsequent Congresses have eschewed enacting binding emissions limitations to combat global warming tells us nothing about what Congress meant . . . in 1970 and 1977.").

By 2010, when Congress first considered the Student Non-Discrimination Act, which included express protection for gender identity, lower courts had already held that transgender individuals are protected by existing statutes prohibiting sex discrimination. *See Glenn*, 663 F.3d at 1317-19 (collecting cases). In this context, "another reasonable interpretation of that legislative non-history is that some Members of Congress believe that . . . the statute requires, not amendment, but only correct interpretation." *Schroer*, 577 F. Supp. at 308. *See* Members of Congress Amicus.

D. The Restroom Regulation Does Not Authorize The Board's Discriminatory Policy.

Petitioner argues that its discriminatory policy is authorized by 34 C.F.R. § 106.33. Pet. Br. 21. The Board assumes that as long as it can show that its new policy assigns restrooms based on "sex," the policy is authorized no matter how discriminatory or harmful it may be.

But a regulation cannot authorize what the statute it implements prohibits. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 62 (2011). The restroom regulation must be read "with a view to [its] place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (internal citation and quotation marks omitted). Unlike the statutory exemptions in 20 U.S.C. § 1681(a), the restroom regulation does not state that the statute's ban on sex-based discrimination "shall not apply" to restrooms. To the contrary, the regulation specifically states that single-sex restrooms may be provided *only* if the facilities are "comparable" for all students. 34 C.F.R. § 106.33. Interpreting the regulation to authorize sex-based distinctions that are discriminatory, as petitioner suggests, would go beyond the regulation's plain text and bring the regulation into conflict with Title IX.

As the Department explained in its amicus brief below, the regulation authorizes schools to provide separate restrooms for boys and girls because it is a social practice that "does not disadvantage or stigmatize any student." App. 60a n.8. This *differential* treatment is authorized as long as it is truly comparable; *discriminatory* practices that deny

equal treatment to all students are not. Gavin does not challenge the provision of separate restrooms. It is not the existence of sex-separated restrooms that harms Gavin, but the Board's new policy that is designed solely to prevent him from using those restrooms.

Before it passed its new policy, the Board provided access to common restrooms in a manner that was consistent with the statute. The Board then abandoned that nondiscriminatory practice and adopted a new policy designed to exclude transgender students from restrooms used by other students. That new policy does what the statute forbids. It "subject[s] [Gavin] to discrimination," "exclude[s] [him] from participation," and "denie[s] [him] the benefits" of school. 20 U.S.C. § 1681(a).

Petitioner wrongly asserts that the regulation permits schools to adopt any restroom policies they wish so long as the criteria are based on sex in any way. But the Board makes a concession that underscores the flaw in its argument. The Board admits that if it created a policy that limited access to restrooms based on "behavioral peculiarities" related to sex—that is, admitting only boys who behaved in stereotypically masculine ways to the boys' restrooms and only girls who behaved in stereotypically feminine ways to the girls' restrooms—that would violate Title IX's statutory language under *Price Waterhouse*. See Pet. Br. 31-32 n.11.

This concession illustrates the error in petitioner's argument that it can create any policy for restroom access as long as it uses some dictionary's definition of the word sex. As petitioner

acknowledges, a policy assigning restrooms based on sex stereotypes would impermissibly discriminate on the basis of sex by denying certain students access to the common single-sex restrooms, thereby violating Title IX. Similarly, by singling out Gavin for different treatment because he is a boy who is transgender, the Board's policy provides restrooms on the basis of sex in a discriminatory manner.

Accordingly, petitioner's focus on various dictionary definitions of "sex" is beside the point. The regulation does not authorize schools to discriminate against a group of students on the basis of sex, regardless of which dictionary definition the school chooses.

Even if the scope of "sex" in the regulation were relevant here, petitioner's argument about the meaning of "sex" in 1972, Pet. Br. 20, misapprehends history, this Court's precedents, and how the Board's own policy operates.

First, the plain meaning of sex in 1972 extended beyond physical characteristics such as anatomy or chromosomes. The term "sex" referred to men and women in general, including both physical differences and cultural ones. *See* "sex, n., 4a," OED Online, Oxford University Press (defining sex as "a social or cultural phenomenon, and its manifestations" and collecting definitions dating back to 1651).[27]

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[27] In 1972 there was no common distinction between "sex" and "gender." At the time, the term "gender" was used primarily as a grammatical classification, not as a term to describe people. *See* "gender, n., 3a," OED Online, Oxford University Press; *see also* Am. Heritage Dictionary 1187 (1973) (defining sex to

Second, this Court has made clear that the statutory term "sex" is not limited to physical traits, but extends to behavioral and social characteristics. *See Price Waterhouse*, 490 U.S. at 251; *cf. Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (discussing "mutually reinforcing" stereotypes about the roles of men and women). Petitioner offers no explanation for why the term "sex" should be interpreted more narrowly in the regulation than in the statute. Indeed, petitioner argues that the two terms should be interpreted identically. Pet. Br. 47.

Third, as a factual matter, the Board's policy does not assign restrooms based on "physiological sex." Pet. Br. 27. Many transgender individuals, including Gavin, have physiological and anatomical characteristics typically associated with their identity, not the sex identified for them at birth. *See* Endocrine Society Guidelines at 3140-43. Due to his medical treatment, Gavin has a typically male chest, facial hair, and testosterone circulating in his body. Petitioner assumes that HEW would have wanted Gavin to use the girls' restrooms, but that is hardly self-evident.

Gavin is recognized by his family, his medical providers, the Virginia Department of Health, and the world at large as a boy. Allowing him to use the

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include "psychological differences that distinguish the male and the female"); Webster's Seventh New Collegiate Dictionary 795 (1970) (defining sex to include "behavioral peculiarities" that "distinguish males and females"); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 526 (D. Conn. 2016) (collecting definitions).

same restrooms as other boys is the only way to provide him single-sex restrooms without discrimination. It is, therefore, the only way to do so that is consistent with the regulation and the underlying requirements of Title IX.

II. PETITIONER'S POLICY ARGUMENTS DO NOT JUSTIFY ITS DISCRIMINATION AGAINST GAVIN.

Petitioner justifies its sweeping policy by speculating about "obvious and intractable problems of administration." Pet. Br. 36. But policy arguments and administrative convenience cannot override Title IX's unqualified prohibition of sex-based discrimination. In any event, petitioner's speculations conflict with the reality that school districts, women's colleges, the military, and the Boy Scouts and Girl Scouts already treat boys and girls who are transgender the same as other boys and girls. *See supra* nn.11-15. Petitioner's "intractable problems" have simple solutions, and in any event, are not applicable to Gavin and his use of restrooms.

A. Allowing Gavin To Use The Same Restrooms As Other Boys Does Not Require The Board To Accept A Student's "Mere Assertion" Of Gender Identity.

Petitioner asserts that allowing Gavin to use the boys' restrooms would mean that any student could gain access to a restroom "simply by announcing their gender identity." Pet. Br. 37. Gavin has never asked the Board to allow him to use the restrooms based on a "mere assertion" that he is a boy. Gavin supplied school administrators a

"treatment documentation letter" from his psychologist. He has legally changed his name, is undergoing hormone therapy, had chest reconstruction surgery, and received a state ID card and birth certificate stating that he is male. His status as a transgender boy is not in dispute.

Petitioner's speculation about "obvious and intractable problems" caused by individuals falsely claiming to be transgender "for less worthy reasons," Pet. Br. 37, is unfounded, and, indeed, contradicted by the actual experiences of school districts across the country. *See* School Administrators Amicus; *Cf. Carcaño*, 2016 WL 4508192, at *5 (evidence shows that "transgender individuals have been quietly using facilities corresponding with their gender identity"); *Students & Parents for Privacy*, 2016 WL 6134121, at *39 (evidence shows that transgender students used restrooms for three years without other students noticing or complaining).

Transgender students do not gain access to the restrooms for the day by "simply announcing their gender identity." Pet. Br. 37. Usually, students and their parents meet with school administrators to discuss the student's transgender status and plan a smooth social transition, just as Gavin and his mother did here. *See* School Administrators Amicus; NASSP Statement, *supra*. Allowing Gavin to use the same restrooms as other boys does not mean "that any person could demand access to any school facility or program based solely on a self-declaration of gender identity or confusion." *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 607 (Me. 2014); *accord Students & Parents for Privacy*, 2016 WL 6134121, at *26 (rejecting same argument).

Nor does allowing Gavin to use the same restrooms as other boys require school administrators to guess a student's gender identity based on sex stereotypes. Pet. Br. 39. If a school has a legitimate concern that a student is falsely claiming to be transgender, a letter from a doctor or parent can easily provide corroboration. *See* School Administrators Amicus; U.S. Dep't of Educ. Office of Elementary & Secondary Educ., *Examples of Policies and Emerging Practices for Supporting Transgender Students* at 1-2 (May 2016) ("*Examples of Policies*"), https://goo.gl/lfHtEM (discussing additional ways to confirm a person's transgender status).[28]

In truth, it is the Board's policy that raises intractable administrative problems. *See* interACT Amicus. How will the policy apply if a student is not known to be transgender in the school community, either because he transitioned before entering school or because he moved from another district? As the Fourth Circuit noted, without "mandatory verification of the 'correct' genitalia before admittance to a restroom," the Board must "assume 'biological sex' based on appearances, social expectations, or explicit declarations." Pet. App. 24a n.8 (internal quotation marks omitted).[29]

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[28] Although Gavin was able to amend his birth certificate, that is not possible for transgender youth in states that require genital surgery or provide no mechanism for changing the gender listed on a birth certificate. *See Love v. Johnson*, 146 F. Supp. 3d 848, 851 (E.D. Mich. 2015) (discussing "onerous and in some cases insurmountable obstacles" for some transgender individuals seeking to amend their birth certificates).

[29] In support of its assertions regarding "practical problems," petitioner cites to an amicus brief from McHugh & Mayer. Pet.

Nor does the Board appear to have "objective physiological criteria" for defining what it calls "biological gender." Pet. Br. 39; *see Carcaño*, 2016 WL 4508192, at *15 (agreeing that "the Board policy in *G.G.* did not include any criteria for determining the 'biological gender' of particular students"). Petitioner continues to equivocate about how it would define the "biological gender" of a person who has had genital surgery. Pet. Br. 30-31 n.9. Petitioner also cannot say how it would define the "biological gender" of individuals with intersex traits who may have genital characteristics, chromosomes or internal reproductive organs that are neither typically male nor typically female. Pet. Br. 30-31 n.9; *see* interACT Amicus. To be sure, such circumstances are rare, but so is being transgender. *See* Williams Institute Amicus.

B. Allowing Gavin To Use The Same Restrooms As Other Boys Does Not Violate The Privacy Of Other Students.

There are no privacy concerns related to nudity implicated by the facts of this case. As the Fourth Circuit explained, Gavin's "use—or for that matter any individual's appropriate use—of a restroom will not involve the type of intrusion present" in cases involving nudity. Pet. App. 25a n.10. Even the dissent below acknowledged that "the

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Br. 41 n.17. The assertions in that amicus brief have been rejected by the mainstream medical community as reflected in the AAP amicus brief. To the extent that there is any dispute about these facts, they must be resolved in favor of respondent.

risks to privacy and safety are far reduced" in the context of restrooms. Pet. App. 53a (Niemeyer, J., dissenting). *Accord Highland*, 2016 WL 5372349, at *17 (rejecting argument that transgender student's use of restrooms would violate privacy of others); *Whitaker*, 2016 WL 5239829, at *6 (same); *cf. Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing woman who is transgender to use women's restrooms created hostile work environment for non-transgender woman in the absence of an allegation of "any inappropriate conduct other than merely being present").

The Board has also taken steps "to give all students the option for even greater privacy." App. 3a. It has installed partitions between urinals and privacy strips for stall doors. All students who want greater privacy for any reason may also use one of the new single-stall restrooms. Pet. App. 11a; *accord* Pet. App. 37-38a (Davis, J., concurring).[30]

Petitioner attempts to draw support from *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996), but the case only undermines petitioner's argument. The parties in *Virginia* agreed that including women in the Virginia Military Institute would require adjustments such as "locked doors and coverings on windows." *Id.* at 588. This Court

[30] Excluding transgender students from the common restrooms instead of making these sorts of minor adjustments would be "unreasonable and discriminatory." *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 412-13 (1979) (interpreting similar language in Rehabilitation Act of 1973); *see also Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 612 (1999) (Kennedy, J., concurring in the judgment).

concluded that these minor changes to provide "privacy from the other sex" would not disrupt the essential nature of the program and could not justify excluding women from admission. *Id.* at 550 n.19. The teaching of the case is not that privacy justifies discrimination. It is that privacy interests, where actually implicated, must be accommodated in a manner that does not exclude individuals from equal educational opportunity. *See id.* at 555 n.20. The same is true here.

Moreover, if the goal of the policy is to promote privacy, that goal is not advanced by placing Gavin in the girls' restrooms. As noted above, many students transition before entering a particular school and are not known to be transgender. And even when they are known by their friends to be transgender, students at large high schools, colleges, or universities will often use restrooms in which no one else knows them, much less their transgender status. A boy who is transgender will be far more disruptive to expectations of privacy if he is forced to use the girls' restrooms than if he uses the same restrooms as other boys.

Difference can be discomfiting, but there are ways to respond to that discomfort without discrimination. Gloucester High School has installed additional privacy protections and provides a private restroom for anyone uncomfortable using the same restroom as Gavin (or any other student). Schools have many ways to accommodate privacy, but Title IX does not permit them to categorically exclude transgender students from common restrooms based on "some instinctive mechanism to guard against people who appear to be different in some respects

from ourselves." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). *Cf. Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 283 n.9 (1987) (recounting how students with disabilities were excluded from school because their appearance allegedly "produced a nauseating effect" on classmates); *see also* NAACP LDF Amicus.[31]

C. The Board's Speculation About Other "Intractable Problems" Is Unfounded.

1. Locker rooms.

The dissent below focused primarily on the specter of nudity in locker rooms, Pet. App. 53a, but this case involves only access to restrooms, which do not implicate such concerns. Even in the context of locker rooms, the dissent's speculations about inevitable exposure to nudity do not reflect the actual experience of students in many school districts. *See* School Administrators Amicus. In many schools, students preparing for gym class change into t-shirts and gym shorts without fully undressing. They often do not shower; at Gloucester High School, there are

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[31] Religiously affiliated schools may exempt themselves from Title IX. 20 U.S.C. § 1681(a)(3). Petitioner's *amici* raise concerns that students at secular schools may have religious objections to sharing restroom facilities with transgender students. Those objections can be accommodated by providing additional privacy options, but "when that sincere, personal opposition becomes" official school policy, "the necessary consequence is to put the imprimatur of the [school] itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

no functional showers at all. *See* Dec. 9 Minutes at 2:12:37; *see also Students & Parents for Privacy*, 2016 WL 6134121, at *28 (transgender students and non-transgender students used same locker rooms without ever seeing "intimate parts" of one another's bodies); Transgender Student Amicus.[32]

In any event, schools across the country already include transgender students in locker rooms while accommodating the privacy of all students in a non-stigmatizing manner. *See* School Administrators Amicus; *Examples of Policies* at 7-8. Experience has shown that there are many ways to address privacy concerns without a "blanket ban that forecloses any form of accommodation for transgender students other than separate facilities." *Carcaño*, 2016 WL 4508192, at *15. *See Students & Parents for Privacy*, 2016 WL 6134121, at *29 (privacy accommodations prevented any risk of "involuntary exposure of a student's body to or by a transgender person assigned a different sex at birth").

Moreover, although petitioner argues that it would be absurd for a girl who is transgender to use the girls' locker room, petitioner does not attempt to argue it would be appropriate for such a girl—who may have undergone puberty as a girl, developed breasts and be indistinguishable from any other girl—to use the boys' locker room. The only logical conclusion from petitioner's arguments is that transgender students are inherently incompatible

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[32] Transgender students have their own sense of modesty and often go to great lengths to prevent exposure of any anatomical differences between themselves and other students. *See* GLSEN Amicus; School Administrators Amicus.

with common facilities and must be excluded from those facilities entirely. Indeed, the policy is premised on the understanding that transgender students will use "an alternative . . . facility," away from everyone else. JA 69.

2. Athletic teams.

Petitioner also asserts that transgender students could not plausibly participate on sports teams consistent with their gender identity because doing so would give them a competitive advantage. But athletic associations—including the NCAA and the Virginia High School League—*already* allow boys who are transgender to play on boys' teams and allow girls who are transgender to play on girls' teams without requiring genital surgery. *See* Nat'l Collegiate Athletic Ass'n, *NCAA Inclusion of Transgender Student-Athletes* (2011), https://goo.gl/V2Oxb2; Va. High Sch. League, Criteria for VHSL Transgender Rule Appeals, https://goo.gl/fgQe2l.

III. THE DEPARTMENT'S INTERPRETATION OF 34 C.F.R. § 106.33 SHOULD RECEIVE *AUER* DEFERENCE.

Although the Fourth Circuit based its ruling on principles of *Auer* deference, this Court may affirm "the judgment on any ground supported by the record." *Bennett v. Spear*, 520 U.S. 154, 166 (1997). In any event, none of the Board's arguments for withholding deference withstands scrutiny.

A. The Department's Interpretation Includes More Than The "Ferg-Cadima Letter."

Petitioner argues that deference is unwarranted when an agency interpretation comes from a low-level official or is issued in response to ongoing litigation. Pet. Br. 60-61. It is true that *Auer* deference is not warranted when an opinion letter does not reflect the fair and reasoned judgment of the agency or is a post hoc rationalization to defend past agency action under attack. *Auer*, 519 U.S. at 462.

But this is not a case about a lone opinion letter, and the Department's view was not developed in the context of a challenge to agency action. The Ferg-Cadima letter was neither the first time, nor the last time, that the Department explained its interpretation of 34 C.F.R. § 106.33. *See* App. 14a-23a (summarizing enforcement actions and guidance). It also thoroughly explained its interpretation in two statements of interest and in an amicus brief before the Fourth Circuit. Pet. App. 160a-82a; App. 40a-67a. The Fourth Circuit specifically relied upon the amicus brief as a basis for its decision. Pet. App. 16a-19a, 23a-24a. And these amicus briefs are independently entitled to deference under *Auer*. *See Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 214 (2011). Thus, petitioner's assertion that the Department's interpretation was "issued for the first time in an effort to affect the outcome of a specific judicial proceeding" is inaccurate. Pet. Br. 60.

B. The Restroom Regulation Is Not A "Parroting" Regulation.

The mere fact that the regulation and the statute both use the term "sex" does not turn the regulation into a "parroting regulation" that "does little more than restate the terms of the statute itself." *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). *See* Pet. Br. 46-49. There is no statutory analog to 34 C.F.R. § 106.33. The decision to permit differential treatment in the context of restrooms is "a creature of the Secretary's own regulations." *Gonzales*, 546 U.S. at 256.

Moreover, the Fourth Circuit did not allow the Department to define "sex" as gender identity throughout the statute, as petitioner suggests. *See* Pet. Br. 48-49. Rather, it deferred to the Department's judgment that, in the context of providing access to common restrooms, the only way to provide restrooms on the basis of sex in a nondiscriminatory manner is to let transgender students use restrooms that match their gender identity.

C. The Department Appropriately Interpreted The Regulation In Light Of Changed Circumstances.

Petitioner discounts the Department's interpretation as a newfound position. Pet. Br. 53. But this is not a situation in which "an agency's interpretation of a . . . regulation . . . conflicts with a prior interpretation" and is thus "entitled to considerably less deference." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994). The Department has not reversed earlier guidance

indicating that the exclusion of transgender students is permitted. Instead, the "issue in these cases did not arise until recently," once transgender students became able to medically and socially transition at school. *Talk Am.*, 564 U.S. at 64. The agency's position has been consistent from the outset.

Petitioner argues that *Auer* deference should extend only to interpretations that "would have been foreseeable at the time the regulation was promulgated." Pet. Br. 53. But the purpose of regulatory guidance is to interpret regulations in light of new circumstances. For example, in *Talk America*, this Court deferred to the FCC's "novel interpretation of its longstanding interconnection regulations," explaining that "novelty alone is not a reason to refuse deference." 564 U.S. at 64. It was appropriate for the FCC to interpret the regulations to address an issue "that did not arise until recently." *Id.* The same is true here.

Nor is this a situation in which the Department's interpretation would "impose potentially massive liability on [a party] for conduct that occurred well before that interpretation was announced." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012). There is no risk of "massive liability" because, under *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985), the Department lacks power to seek disgorgement of funds disbursed before it issued its interpretation. And under *Barnes v. Gorman*, 536 U.S. 181 (2002), private parties may not seek punitive damages. Moreover, even if there were insufficient notice for damages, lack of notice does not relieve parties of their prospective obligation to

"conform their conduct to an agency's interpretations once the agency announces them." *Christopher*, 132 S. Ct. at 2168.[33]

D. Petitioner's Procedural Arguments Are Foreclosed By *Perez*.

In arguing that the Department failed to follow proper procedures, petitioner repeats the same arguments that this Court rejected in *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015). *See* Pet. Br. 55-63. Like petitioner here, the respondent in *Perez* argued that "because an agency's interpretation of its own regulations may be entitled to deference under *Auer*," those interpretations "have the force of law" and should require notice-and-comment rulemaking. *Perez*, 135 S. Ct. at 1208 n.4. This Court rejected that argument, explaining that "[e]ven in cases where an agency's interpretation receives *Auer* deference . . . it is the court that ultimately decides whether a given regulation means what the agency says." *Id.* at 1208. *Auer* deference does not transform an agency's informal interpretation of its regulations into binding law.

Petitioner also argues that "members of the public would have wanted to comment on this 'novel' question." Pet. Br. 53. Again, *Perez* rejected the same argument: "Beyond the APA's minimum requirements, courts lack authority to impose upon an agency its own notion of which procedures are

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[33] As explained in respondent's opposition to the motion for divided argument, West Virginia's arguments based on *Nat'l Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566, 2601 (2012), have never been briefed by the parties or addressed by any court.

best or most likely to further some vague, undefined public good." *Perez*, 135 S. Ct. at 1207 (internal quotation marks and brackets omitted).

IV. PETITIONER HAS NOT BEEN DEPRIVED OF FAIR NOTICE UNDER *PENNHURST*.

Finally, the Board cannot bolster its interpretation by resorting to *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and the doctrine of constitutional avoidance. Pet. Br. 41-43. For Title IX's private cause of action, *Pennhurst* affects only the availability of "money damages," not "the scope of the behavior Title IX proscribes." *Davis*, 526 U.S. at 639; *accord Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) ("Our central concern . . . is with ensuring that the receiving entity of federal funds has notice that it will be liable for a monetary award." (internal quotation marks and brackets omitted)).

Pennhurst thus provides no defense to Gavin's claim for injunctive relief or subsequent enforcement actions by the Department to terminate future funding. "[A] court may identify the violation and enjoin its continuance or order recipients of federal funds prospectively to perform their duties incident to the receipt of federal money," and then "the recipient has the option of withdrawing and hence terminating the prospective force of the injunction."

Guardians Ass'n v. Civil Serv. Comm'n of City of N.Y., 463 U.S. 582, 596 (1983) (White, J.).[34]

Moreover, even with respect to money damages, the plain terms of Title IX put funding recipients on notice that the statute covers all forms of intentional discrimination, including in the context of restrooms. Any reader of the statute and regulations can see that restrooms are not included in the list of statutory exceptions to Title IX's prohibition on "discrimination." Consistent with that statutory prohibition, the regulation authorizes certain differential treatment for purposes of restrooms but does not override the statute's prohibition on discrimination.

But even if the regulation were ambiguous on that point, there is no inconsistency between requiring Congress to speak with a clear statement under *Pennhurst* and deferring to an agency's interpretation of its own regulations under *Auer*. In *Bennett v. Kentucky Department of Education* this Court made clear that *Pennhurst* does not require Congress to "prospectively resolve every possible ambiguity concerning particular applications of the requirements." 470 U.S. at 669. Rather, in the context of an ongoing program, notice is provided "by the statutory provisions, regulations, and other guidelines provided by the Department at t[he] time" each disbursement of funds is received. *Id.* at 670. The recipient is not required to disgorge funds

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[34] Gavin's claims for injunctive relief will not become moot when he graduates in June 2017 because he will remain subject to the Board's policy when attending alumni events or school events.

already received, but agency guidelines can clarify ambiguities for any future disbursements. *Id.*

That distinction is critical. As alleged in the Complaint, the Board was made aware of the Department's interpretation of the regulation before it enacted the policy at issue in this case. JA 71. When it chose to disregard that interpretation, the Board proceeded at its own risk.

Arlington Central School District Board of Education v. Murphy, 548 U.S. 291 (2006), did not overturn these settled principles. In *Arlington*, the Court interpreted the scope of remedies available under the Individuals with Disabilities in Education Act, which allows prevailing plaintiffs to recover "reasonable attorneys' fees as part of the costs" of a lawsuit. 20 U.S.C. § 1415(i)(3)(B). *Arlington* held that the terms "costs" and "attorneys' fees" did not put recipients on notice that they would be liable for expert fees. 548 U.S. at 297.

Arlington thus applied *Pennhurst* in the context of assessing particular financial penalties. It did not apply *Pennhurst* to narrow the scope of the underlying statute. For that question, the controlling precedent is *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005)—a decision that *Arlington* did not limit or overrule.

Jackson reaffirmed a long line of cases holding that recipients of Title IX funding have been put on notice that they are subject to money damages for all forms of intentional discrimination. *Id.* at 181-83. Even though Title IX does not explicitly mention retaliation, *Jackson* held that the statutory text prohibits retaliation because it is a form of

intentional sex discrimination and therefore prohibited. *See id.* The Board has thus been put on notice that it may be liable for damages if found to have engaged in intentional discrimination that violates the statute. Because the discrimination here is indisputably intentional and violates the statute's plain terms, *Pennhurst* poses no barrier.

CONCLUSION

The Fourth Circuit's decision reinstating the Title IX claim should be affirmed, and the stay of the preliminary injunction should be dissolved.

Respectfully Submitted,

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Dated: February 23, 2017