WMST GU4506
Gender Justice
Professor Katherine Franke
Columbia University
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Course Reader – Volume 2

I. The Body as a Gender Justice Project

February 25th: Dress Codes

- *Jesperson v. Harrah's Operating Co.*, 392 F.3d 1096 (9th Cir. 2004) (edited)
- National Women's Law Center, *Dress Coded: Black Girls, Bodies, and Bias in D.C. Schools* (2018)
- Letter of Complaint Against Mystic Valley Regional Charter School, May 2017
- Pavlakis, A. & Roegman, R., *How Dress Codes Criminalize Males And Sexualize Females Of Color*, *Phi Delta Kappan*, *100* (2), 54-58 (2018).

March 4th: 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

March 11th: Criminalizing Pregnancy

- "When Prosecutors Jail a Mother for a Miscarriage," *New York Times*, December 28, 2018
- "Federal Court of Appeals Decision Prevents Pregnant Woman's Challenge to Wisconsin's 'Unborn Child Protection Act'." *National Advocates for Pregnant Women.* June 18, 2018
- "Arkansas Court of Appeals Overturns Criminal Conviction for Concealing a Birth." *National Advocates for Pregnant Women.* March 14, 2018
- *Anne O'Hara Bynum v. State of Arkansas*. Arkansas Court of Appeals. Opinion Delivered, March 14, 2018
- Concurrence in *Anne O'Hara Bynum v. State of Arkansas*. Arkansas Court of Appeals. Opinion Delivered, March 14, 2018

II. Gender, Sex, and Sexual Orientation

March 25th: 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)

Darlene JESPERSEN, Plaintiff–Appellant,

v.

HARRAH'S OPERATING COMPANY, INC., Defendant–Appellee.

No. 03–15045.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 3, 2003.

Filed Dec. 28, 2004.

Background: Female bartender at casino terminated for refusing to wear makeup sued employer for sex discrimination under Title VII, alleging both disparate treatment and disparate impact, and asserted claims under state law. On employer's motion for summary judgment, the United States District Court for the District of Nevada, Edward C. Reed, Jr., J., 280 F.Supp.2d 1189, granted motion in part. Employee appealed.

Holding: The Court of Appeals, Tashima, Circuit Judge, held that bartender failed to establish that grooming policy imposed greater burden on female bartenders than on male bartenders.

Affirmed.

Thomas, Circuit Judge, dissented and filed opinion.

2. Civil Rights ⇨1177

Female bartender at casino who was terminated for refusing to wear makeup,

Before: TASHIMA, THOMAS, and SILVERMAN, Circuit Judges.

TASHIMA, Circuit Judge:

Plaintiff Darlene Jespersen, a bartender at Harrah's Casino in Reno, Nevada, brought this Title VII action alleging that her employer's policy requiring that certain female employees wear makeup discriminates against her on the basis of sex. The district court granted summary judgment for Harrah's, holding that its policy did not constitute sex discrimination because it imposed equal burdens on both sexes. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I.

The following facts are undisputed. Darlene Jespersen was a bartender at the sports bar in Harrah's Casino in Reno, Nevada, for nearly 20 years. She was an outstanding employee. Over the years, Jespersen's supervisors commented that she was "highly effective," that her attitude was "very positive," and that she made a "positive impression" on Harrah's guests. Harrah's customers repeatedly praised Jespersen on employee feedback forms, writing that Jespersen's excellent service and good attitude enhanced their experience at the sports bar and encouraged them to come back.

Throughout the 1980s and '90s Harrah's encouraged its female beverage servers to wear makeup, but wearing makeup was not a formal requirement. Although Jespersen never cared for makeup, she tried wearing it for a short period of time in the 1980s. But she found that wearing makeup made her feel sick, degraded, exposed, and violated. Jespersen felt that wearing makeup "forced her to be feminine" and to become "dolled up" like a sexual object, and that wearing makeup actually interfered with her ability to be an effective bartender (which sometimes required her to deal with unruly, intoxicated guests) because it "took away [her] credibility as an individual and as a person." After a few weeks, Jespersen stopped wearing makeup because it was so harmful to her dignity and her effectiveness behind the bar that she could no longer do her job. Harrah's did not object to Jespersen's choice not to wear makeup and Jespersen continued to work at the sports bar and receive positive performance reviews for over a decade.

In February 2000, Harrah's implemented its "Beverage Department Image Transformation" program at 20 Harrah's locations, including its casino in Reno. The goal of the program was to create a "brand standard of excellence" throughout Harrah's operations, with an emphasis on guest service positions. The program imposed specific "appearance standards" on each of its employees in guest services, including heightened requirements for beverage servers. All beverage servers were required to be "well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform." In addition to these general appearance standards applicable to both sexes, there were gender-specific standards for male and female beverage servers. Female beverage servers were required to wear stockings and colored nail polish, and they were required to wear their hair "teased, curled, or styled." Male beverage servers were prohibited from wearing makeup or colored nail polish, and they were required to maintain short haircuts and neatly trimmed fingernails.[1]

1. The text of the appearance standards provides, in relevant part, as follows:

> All Beverage Service Personnel, in addition to being friendly, polite, courteous and responsive to our customer's needs, must possess the ability to physically perform the essential factors of the job as set forth in the standard job descriptions. They must be well groomed, appealing to the eye, be firm and body toned, and be comfortable with

Harrah's called its new appearance standards the "Personal Best" program. In order to enforce the "Personal Best" standards, Harrah's required each beverage service employee to attend "Personal Best Image Training" prior to his or her final uniform fitting. At the training, "Personal Best Image Facilitators" instructed Harrah's employees on how to adhere to the standards of the program and tested their proficiency. At the conclusion of the training, two photographs (one portrait and one full body) were taken of the employee looking his or her "Personal Best." Each employee's "Personal Best" photographs were placed in his or her file and distributed to his or her supervisor. The supervisors used the "Personal Best" photographs as an "appearance measurement" tool, holding each employee accountable to look his or her "Personal Best" on a daily basis. Jespersen acknowledged receipt of the policy and committed to adhere to the appearance standards for her position as a beverage bartender in March 2000.

Shortly thereafter, however, the "Personal Best" standards were amended such that in addition to the existing appearance standards, all female beverage servers (including beverage bartenders) were required to wear makeup.[2] As before, male beverage servers were prohibited from wearing makeup. Because of her objection to wearing makeup, Jespersen refused to comply with the new policy. In July 2000, Harrah's told Jespersen that the makeup requirement was mandatory for female beverage service employees and gave her 30 days to apply for a position that did not require makeup to be worn. At the expiration of the 30–day period, Jespersen had not applied for another job, and she was terminated.

After exhausting her administrative remedies with the Equal Employment Opportunity Commission, Jespersen brought this action alleging that Harrah's makeup requirement for female beverage servers constituted disparate treatment sex discrimination in violation of 42 U.S.C. § 2000e–2(a) ("Title VII"). The district

maintaining this look while wearing the specified uniform. Additional factors to be considered include, but are not limited to, hair styles, overall body contour, and degree of comfort the employee projects while wearing the uniform.

* * *

Beverage Bartenders and Barbacks will adhere to these additional guidelines:

Overall Guidelines (applied equally to male/female):

- Appearance: Must maintain Personal Best Image portrayed at time
- Jewelry, if issued, must be worn. Otherwise, tasteful and simple jewelry is permitted; no large chokers, chains or bracelets.
- No faddish hairstyles or unnatural colors are permitted.

Males:

- Hair must not extend below top of shirt collar. Ponytails are prohibited.
- Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.
- Eye and facial makeup is not permitted.
- Shoes will be solid black leather or leather type with rubber (non skid) soles.

Females:

- Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions.
- Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.
- Nail polish can be clear, white, pink or red color only. No exotic nail art or length.
- Shoes will be solid black leather or leather type with rubber (non skid) soles.

2. The amended policy required that "[m]ake up (foundation/concealer and/or face powder, as well as blush and mascara) must be worn and applied neatly in complimentary colors," and that "[l]ip color must be worn at all times."

court granted Harrah's motion for summary judgment, holding that the "Personal Best" policy did not run afoul of Title VII because (1) it did not discriminate against Jespersen on the basis of "immutable characteristics" associated with her sex, and (2) it imposed equal burdens on both sexes. Jespersen timely appealed from the judgment.

III.

[1] Title VII prohibits employers from discriminating against "any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e–2(a)(1). In order to prevail on a Title VII disparate treatment sex discrimination claim, an employee need only establish that, but for his or her sex, he or she would have been treated differently. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 200, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991) (citing *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978)). Although the employee must prove that the employer acted intentionally, the intent need not have been malevolent. *Id.* at 199, 111 S.Ct. 1196 ("Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.").[3]

[2] Pursuant to the "Personal Best" program, women are required to wear makeup, while men are prohibited from doing so. Women are required to wear their hair "teased, curled, or styled" each day, whereas men are only required to maintain short haircuts. We must decide whether these standards are discriminatory; whether they are "based on a policy

3. Even if intentional discrimination is shown, an employer can escape liability if sex "is a bona fide occupational qualification ["BFOQ"] reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e–2(e)(1). There is no BFOQ issue on this appeal.

which on its face applies less favorably to one gender . . . ." *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602, 608 (9th Cir. 1982). If so, then Harrah's would have discriminated against Jespersen "because of . . . sex." 42 U.S.C. § 2000e–2(a)(1); *see id.*

We have previously held that grooming and appearance standards that apply differently to women and men do not constitute discrimination on the basis of sex. In *Baker v. Cal. Land Title Co.*, 507 F.2d 895 (9th Cir.1974), employees challenged their employer's rule banning men, but not women, from having long hair. *Id.* at 896. We concluded that grooming and dress standards were entirely outside the purview of Title VII because Congress intended that Title VII only prohibit discrimination based on "immutable characteristics" associated with a worker's sex. *Id.* at 897 ("Since race, national origin and color represent immutable characteristics, logic dictates that sex is used in the same sense rather than to indicate personal modes of dress or cosmetic effects."); *see also Fountain v. Safeway Stores Inc.*, 555 F.2d 753, 755 (9th Cir.1977) ("It is clear that regulations promulgated by employers which require male employees to conform to different grooming and dress standards than female employees is not sex discrimination within the meaning of Title VII."). Because grooming and dress standards regulated "mutable" characteristics such as hair length, we reasoned, employers that made compliance with such standards a condition of employment discriminated on the basis of their employees' appearance, not their sex.

Our later cases recognized, however, that an employer's imposition of more stringent appearance standards on one sex than the other constitutes sex discrimination even where the appearance standards regulate only "mutable" characteristics such as weight. *Gerdom*, 692 F.2d at 605–06. In *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir.2000) (en banc), a class of female flight attendants challenged their employer's weight restrictions as a violation of Title VII because women were held to more strict weight limitations than were men. The employer insisted that all employees maintain a weight that corresponded to the "desirable" weight for their height as determined by an insurance company table, but women were required to maintain the weight corresponding to women of "medium" build, whereas men were permitted to maintain the weight corresponding to men of "large" build. *Id.* at 848. Citing *Fountain*, the employer argued that because the weight restrictions were mere "appearance" standards, they were not subject to Title VII. *Id.* at 854. We rejected the employer's argument, holding that "[a] sex-differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment that must be justified as a BFOQ." *Id.* at 855; *see also Carroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028, 1032 (7th Cir.1979) (holding that employer's policy requiring female employees to wear uniforms but permitting male employees to wear "appropriate business attire" of their choosing was sex discrimination in violation of Title VII). Although employers are free to adopt *different* appearance standards for each sex, they may not adopt standards that impose a greater burden on one sex than the other. *Frank*, 216 F.3d at 855.

Although in *Frank* we characterized the weight standards at issue as "appearance standards," *id.*, we have, as yet, had no occasion to apply the "unequal burdens" test to gender-differentiated dress and grooming requirements. In *Frank* and *Gerdom*, we were called upon only to compare the relative burdens of different weight limitations imposed on male and female employees. In those cases our task

was simple because it was apparent from the face of the policies at issue that female flight attendants were subject to a more onerous standard than were males. *See Frank*, 216 F.3d at 854; *Gerdom*, 692 F.2d at 608.

In order to evaluate the relative burdens the "Personal Best" policy imposes, we must assess the actual impact that it has on both male and female employees. In doing so we must weigh the cost and time necessary for employees of each sex to comply with the policy. Harrah's contends that the burden of the makeup requirement must be evaluated with reference to all of the requirements of the policy, including those that burden men only, such as the requirement that men maintain short haircuts and neatly trimmed nails. Jespersen contends that the only meaningful appearance standard against which the makeup requirement can be measured is the corresponding "no makeup" requirement for men. We agree with Harrah's approach. Because employers are permitted to apply different appearance standards to each sex so long as those standards are equal, our task in applying the "unequal burdens" test to grooming and dress requirements must sometimes involve weighing the relative burdens that particular requirements impose on workers of one sex against the distinct requirements imposed on workers of the other sex.[4]

Jespersen contends that the makeup requirement imposes "innumerable" tangible burdens on women that men do not share because cosmetics can cost hundreds of dollars per year and putting on makeup requires a significant investment in time. There is, however, no evidence in the record in support of this contention. Jespersen cites to academic literature discussing the cost and time burdens of cosmetics generally, but she presents no evidence as to the cost or time burdens that must be borne by female bartenders in order to comply with the makeup requirement. Even if we were to take judicial notice of the fact that the application of makeup requires *some* expenditure of time and money, Jespersen would still have the burden of producing some evidence that the burdens associated with the makeup requirement are greater than the burdens the "Personal Best" policy imposes on male bartenders, and exceed whatever "burden" is associated with ordinary good-grooming standards. Because there is no evidence in the record from which we can assess the burdens that the "Personal Best" policy imposes on male bartenders either, Jespersen's claim fails for that reason alone.

Jespersen cites *United States v. Seschillie*, 310 F.3d 1208, 1212 (9th Cir.2002), for the proposition that "a jury can make determinations requiring simple common sense without specific supporting evidence." But *Seschillie* involved the entirely different question of whether jurors in a criminal case could draw common-sense inferences from the evidence without the aid of expert testimony. *Id.* It cannot be construed as relieving Jespersen of her burden of production at the summary judgment stage in a civil case. As the non-moving party that bore the ultimate burden of proof at trial, Jespersen had the burden of producing admissible evidence that the "Personal Best" appearance stan-

4. Because the question is not presented on this record, we do not need to define the exact parameters of the "unequal burdens" test, as applied to personal appearance and grooming. We do note, however, that this is not an exact science yielding results with mathematical certainty. We further note that any "burden" to be measured under the "unequal burdens" test is only that burden which is imposed beyond the requirements of generally accepted good grooming standards.

dard imposes a greater burden on female beverage servers than it does on male beverage servers. *See Anderson,* 477 U.S. at 248, 106 S.Ct. 2505. She has not met that burden.

Jespersen also contends that even if Harrah's makeup requirement survives the "unequal burdens" test, that test should be invalidated in light of the Supreme Court's decision in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). In *Price Waterhouse,* the Supreme Court held that an employer may not force its employees to conform to the sex stereotype associated with their gender as a condition of employment. *Id.* at 250–51, 109 S.Ct. 1775. When evaluating a female associate's candidacy for partnership in an accounting firm, decision makers referred to her as "macho" and suggested that she "overcompensated for being a woman" by behaving aggressively in the workplace. *Id.* at 235, 109 S.Ct. 1775. The associate was advised that her partnership chances would be improved if she learned to behave more femininely, wear makeup, have her hair styled, and wear jewelry. *Id.* Noting that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group," the Court held that the employer's discrimination against the associate because of her failure to conform to a traditional, feminine gender stereotype was sex discrimination in violation of Title VII. *Id.* at 251, 109 S.Ct. 1775.

Following *Price Waterhouse,* we have held that sexual harassment of an employee because of that employee's failure to conform to commonly-accepted gender stereotypes is sex discrimination in violation of Title VII. In *Nichols v. Azteca Restaurant Enter., Inc.,* 256 F.3d 864 (9th Cir.2001), a male waiter at a restaurant sued his employer under Title VII for sexual harassment. The waiter contended that he was harassed because he failed to conform his behavior to a traditionally male stereotype. *Id.* at 874. Noting that *Price Waterhouse* "sets a rule that bars discrimination on the basis of sex stereotypes," we concluded that the harassment and abuse was actionable under Title VII because the waiter was systematically abused for failing to act "as a man should act" and for walking and carrying his tray "like a woman." *Id.* at 874–75. Similarly, in *Rene v. MGM Grand Hotel, Inc.,* 305 F.3d 1061 (9th Cir.2002) (en banc), we held that a man stated a claim for sexual harassment under Title VII where he alleged that he was the victim of assaults "of a sexual nature" by his co-workers because of stereotypical assumptions. *Id.* at 1068.

Although *Price Waterhouse* held that Title VII bans discrimination against an employee on the basis of that employee's failure to dress and behave according to the stereotype corresponding with her gender, it did not address the specific question of whether an employer can impose sex-differentiated appearance and grooming standards on its male and female employees. Nor have our subsequent cases invalidated the "unequal burdens" test as a means of assessing whether sex-differentiated appearance standards discriminate on the basis of sex. Although the precise issue was not before us, we declined to apply *Price Waterhouse* to grooming and appearance standards cases when we rendered our decision in *Nichols,* 256 F.3d at 875 n. 7 ("Our decision does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards."). And while a plurality of judges in *Rene* endorsed an independent claim for gender-stereotyping sexual harassment, such a claim is distinct from the claim Jespersen advances here. She has presented no evidence that she or

any other employee has been sexually harassed as a result of the "Personal Best" policy. In short, although we have applied the reasoning of *Price Waterhouse* to sexual harassment cases, we have not done so in the context of appearance and grooming standards cases, and we decline to do so here. We thus disagree with the dissent's assertion that "Jespersen has articulated a classic case of *Price Waterhouse* discrimination. . . ." Dissent at 1084.

Finally, we note that we are, in any event, bound to follow our en banc decision in *Frank*, in which we adopted the unequal burdens test. *Price Waterhouse* predates *Frank* by more than a decade and, presumably, the *Frank* en banc court was aware of it when it adopted the unequal burdens test. Thus, *Price Waterhouse* does not qualify as an "intervening decision" which could serve as a basis for overruling *Frank*. *See EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 744 n. 1 (9th Cir.2003) (en banc) (explaining that "[a] three-judge panel can overrule a prior decision of this court [only] when an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point") (internal quotation marks and citations omitted).

IV.

We hold that under the "unequal burdens" test, which is this Circuit's test for evaluating whether an employer's sex-differentiated appearance standards constitute sex discrimination in violation of Title VII, Jespersen failed to introduce evidence raising a triable issue of fact as to whether Harrah's "Personal Best" policy imposes unequal burdens on male and female employees.

The judgment of the district court is **AFFIRMED.**

Ayiana Davis
Beatrice
Elisha Peacock
Fatimah
Samaria Short
Jill
Christine Marhone
Rosalie Ngatchou
Nasirah Fair
Samantha O'Sullivan
Phina Walker
Essence Kendall
Kristine Turner
Nadiyah W
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Catharine G
Ceon DuBose
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DRESS CODED

Black girls, bodies, and bias in D.C. schools

NATIONAL WOMEN'S LAW CENTER

Black girls in District of Columbia schools, like girls across the country, miss out on crucial class time simply because of the clothes they wear or the style of their hair or makeup. Again and again, they are suspended for tight pants, sent to the office for shoes that aren't quite the right color, and told they must "cover up" before they can learn. Strict dress, uniform, and grooming codes do nothing to protect girls or their classmates' learning. Rather, these codes needlessly interrupt their educations.

Summary of Findings

While all students disciplined for dress code violations face these interruptions, Black girls face unique dress and hair code burdens. For example, some schools ban styles associated with Black girls and women, like hair wraps. Black girls also face adults' stereotyped perceptions that they are more sexually provocative because of their race, and thus more deserving of punishment for a low-cut shirt or short skirt. Girls who are more physically developed or curvier than their peers also may be viewed as more promiscuous by adults, which can lead to them being punished more often for tight or revealing clothing.

Dress codes also communicate to students that girls are to be blamed for "distracting" boys, instead of teaching boys to respect girls, correct their behavior and be more responsible. This dangerous message promotes sexual harassment in schools.

The costs of dress codes are known all too well by students, but are rarely considered a matter of important education policy. In order to demonstrate the impact of dress codes, the National Women's Law Center undertook a city-wide exploration into young people's real experiences alongside 21 Black girls who attend or recently attended schools in D.C. These girls represent 12 different public schools, including charter schools and traditional public schools (known as "District of Columbia Public Schools," or DCPS).

Our findings are cause for grave concern. Plain and simple, D.C. dress codes promote race and sex discrimination and pull students out of the classroom for no good reason—often through illegal suspensions. As a result, Black girls fall behind in school, which threatens their long-term earning potential while also exacerbating longstanding and widespread racial and gender inequalities.

In this report, we present some common problems with D.C. schools' dress codes, how these rules affect Black girls, and ideas for how schools and lawmakers can do better by all girls—but especially the Black girls who make up the majority of female students in D.C. schools. We hope that our findings will serve as a call to action for D.C. educators and policymakers to support Black girls in school.

Methodology

NWLC conducted one-on-one and small group interviews with Black girls who are or have previously been enrolled in a D.C. public middle or high school. Prior to the interviews, the girls were given a written and verbal project description and also given the opportunity to opt in or out of participating in the project. During the interviews, girls were asked about their views, experiences, and suggestions related to dress codes and asked to provide feedback on policy proposals developed by NWLC. Every interview session was recorded and then transcribed. Not all interview participants chose to become co-authors. In addition to the interviews, the girls were given the opportunity to provide written accounts of their experiences. Each girl was given the chance to confirm or edit her transcribed account. Co-authors determined how they would be identified, including what names they preferred and whether they wanted their ages and schools listed. This report only includes accounts confirmed by the co-authors. All co-authors were given a small stipend for their time and thoughtful engagement in this report. One middle school student co-author's confirmation was delayed because she was sent home for wearing a dirty uniform the day of a scheduled meeting.

The girls range in age from 12 to 18. Some students self-identified as lesbian or queer, some self-identified as straight, and some did not disclose their sexual orientation. Per recommendations from partners, NWLC did not ask students whether they were transgender or cisgender but one participant self-identified as transgender during her interview.

Additionally, NWLC conducted a qualitative and quantitative analysis of D.C.'s public high schools' written dress code policies. This analysis was of the most recent dress code policies posted on the school's website. Three high schools did not have student or family handbooks posted online. As a result, this analysis does not include information on McKinley Technology High School, Benjamin Banneker Academic High School, or Anacostia High School beyond information provided directly by students in confirmed accounts.

The photographs in this report are pictures of six co-authors in the clothing they get in trouble for wearing at school.

Common Problems with D.C. School Dress Codes

Dress and grooming codes in D.C. schools, as well as their enforcement patterns, share a number of common problems. These include:

Problems with Rules

- Rules that are overly strict
- Rules that require expensive purchases
- Rules that punish kids for dressing for the weather
- Rules based in racial stereotypes
- Rules based in sex stereotypes
- Unclear rules

Problems with Enforcement

- Discriminatory enforcement
- Enforcement that promotes rape culture
- Enforcement through physical touching by adults, including school police
- Shame-based punishments
- Overly harsh and illegal punishments

Problems with Rules

Overly Strict Rules

Many D.C. public schools have detailed dress codes that ban forms of student expression that pose no threat to classmates' safety or ability to learn. Many of these rules target "revealing" or "tight" clothing most often worn by girls, like halter tops and miniskirts. Of D.C. high schools with publicly accessible dress codes:

- 81 percent require a uniform
- 65 percent regulate the length of skirts
- 58 percent prohibit tank tops
- 42 percent ban tights and/or leggings
- 45 percent require students to wear belts (and many specify the belts must be black)

"In middle school, I had a dress code and they always dress coded people. Sometimes, they made you miss class because you didn't have the right shoes or right sweater. That's the downside to school dress codes."
— Beatrice

"One time, I came into school with jeans that had holes in them, and as soon as I walked in at the metal detector they told me to go to the principal's office. I was like, they're just holes. You can't see anything." — Kristine Turner, 16

"A teacher made a girl put on her jacket because her school jersey was a tank top." — Eliska, 15

- Students must wear appropriately sized tan or khaki pants, shorts,or skirts.
- Skirts and shorts must be worn no more than two (2) inches above the knee.
- Belts must be worn if there are belt loops on the student's pants, shorts, or skirts. . . .

The Following Are Prohibited:

- Pants, shorts, or skirts that have patterns, lace, polka dots, stripes, holes, or words.
- Brightly colored tights, leg-warmers, knee-high socks or fishnet stockings . . .
- Undershirts that have patterns, lace, polka dots, stripes, holes, or words.
- Sleeveless or cut-off shirts, blouses, dresses, or tank tops.

— Kipp DC College Preparatory Dress Code Policy

Expensive Rules

Some supporters of dress codes claim that uniforms hide students' financial differences. Some even argue that uniforms are less expensive for families. However, D.C. public schools' policies often require kids and their parents to purchase expensive clothing that puts a strain on families already struggling to make ends meet.

"At my middle school, we had to go to Campus Outfitters to buy the required uniform. I thought the uniforms were horrible. It consisted of an ugly plaid skirt and these dreadful red sweaters. Campus Outfitters sold many different school uniforms and I thought their prices were expensive. Altogether, my family paid approximately $300 for the entire uniform." — Catherine G., 16, Phelps A.C.E. High School

"I got to pay $25 dollars for a sweater, $20 dollars for each shirt I get, that's like $100 dollars for four shirts." — Phina Walker, 17, Thurgood Marshall Academy

"The school dress codes are unfair because people can't afford to keep buying expensive special shirts and khaki pants. They could just let us wear a regular t-shirt and some red pants. My mom was mad because it's too much money. My brother goes to Sousa Middle School, too. And each shirt costs $15 online. That's too much. And you have to pay to 'dress down' on Fridays—to not wear the uniform. You have to pay $2 for one dress down pass. One day. One day. The school should let us wear regular clothes throughout the school. Why do you have to pay someone to actually wear clothes that we want to?" — Kamaya, 12, Sousa Middle School

Weather-Defiant Rules

Many dress codes do not account for the weather. Students are required to "cover up" during hot summer months and are prohibited from wearing coats or out-of-uniform sweaters during the winter—even when the school building is inadequately heated. Forty-two percent of D.C. public high schools with publicly accessible dress code policies ban outerwear, like jackets and sweaters, in school. Others place restrictions on the kinds of outerwear students may wear.

"We were not permitted to wear outerwear like jackets or coats inside the school. When we went through the metal detectors all outerwear had to be removed. The principal expelled one boy for having a coat on. It was considered a security violation."
— Catherine G., 16, Phelps A.C.E. High School

"During the summer, they always harass girls and make us change."
—Nasirah Fair, 17, Wilson High School

"We can't wear ... any outside coats [inside] but the school is freezing."
*— Ceon DuBose, Phelps A.C.E. High School**

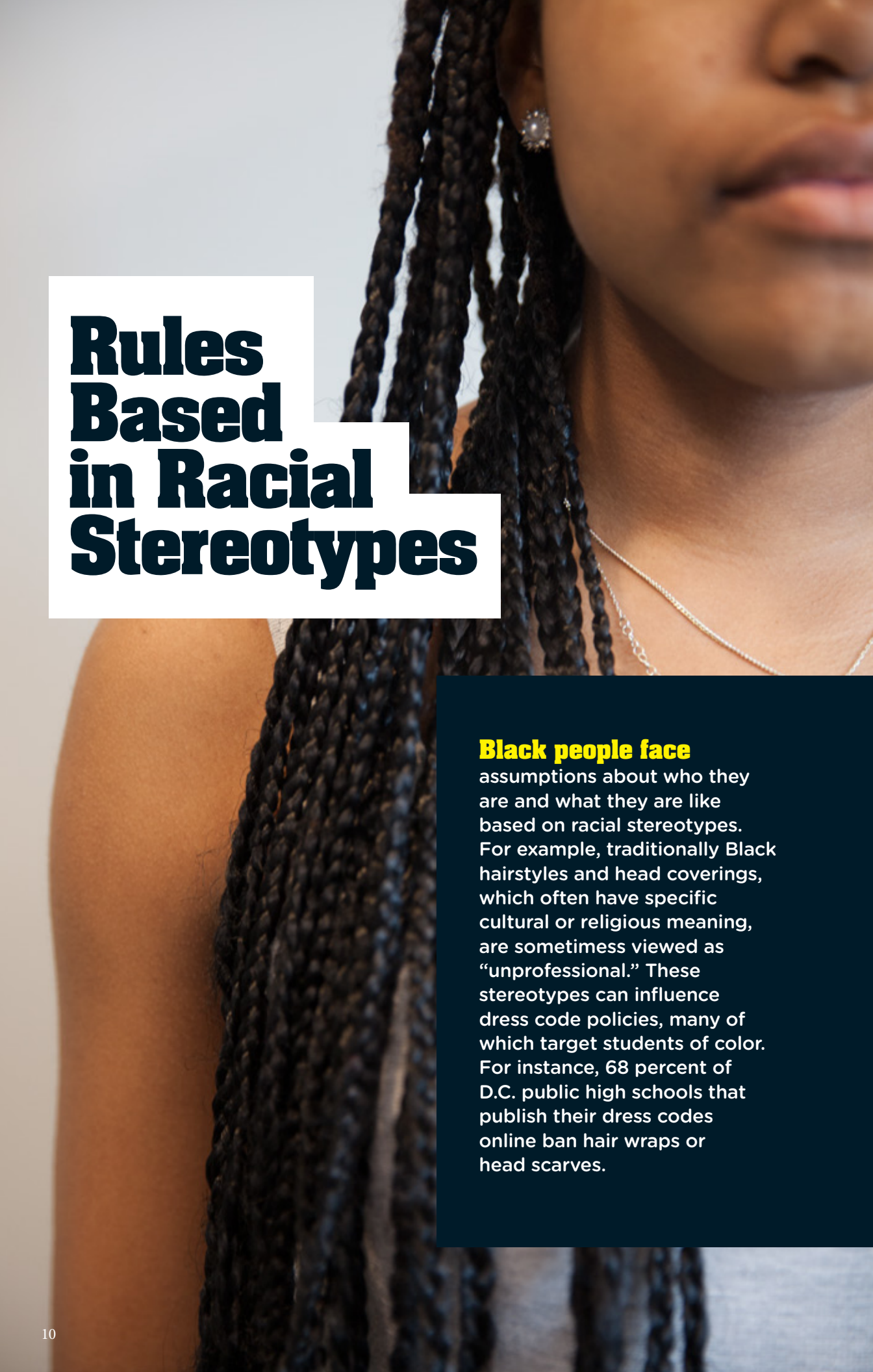
"Outerwear cannot be worn during school hours. Administration discretion can waive this rule based on extenuating circumstances." — Cardozo Education Campus Dress Code

*Phelps' formal dress code indicates students can wear a uniform school jacket with the Phelps logo, available for purchase at additional cost, indoors.

“You should be able to show your shoulders when it’s hot. What’s so attractive about shoulders?”
— Rosalie Ngatchou, 15, D.C. International School

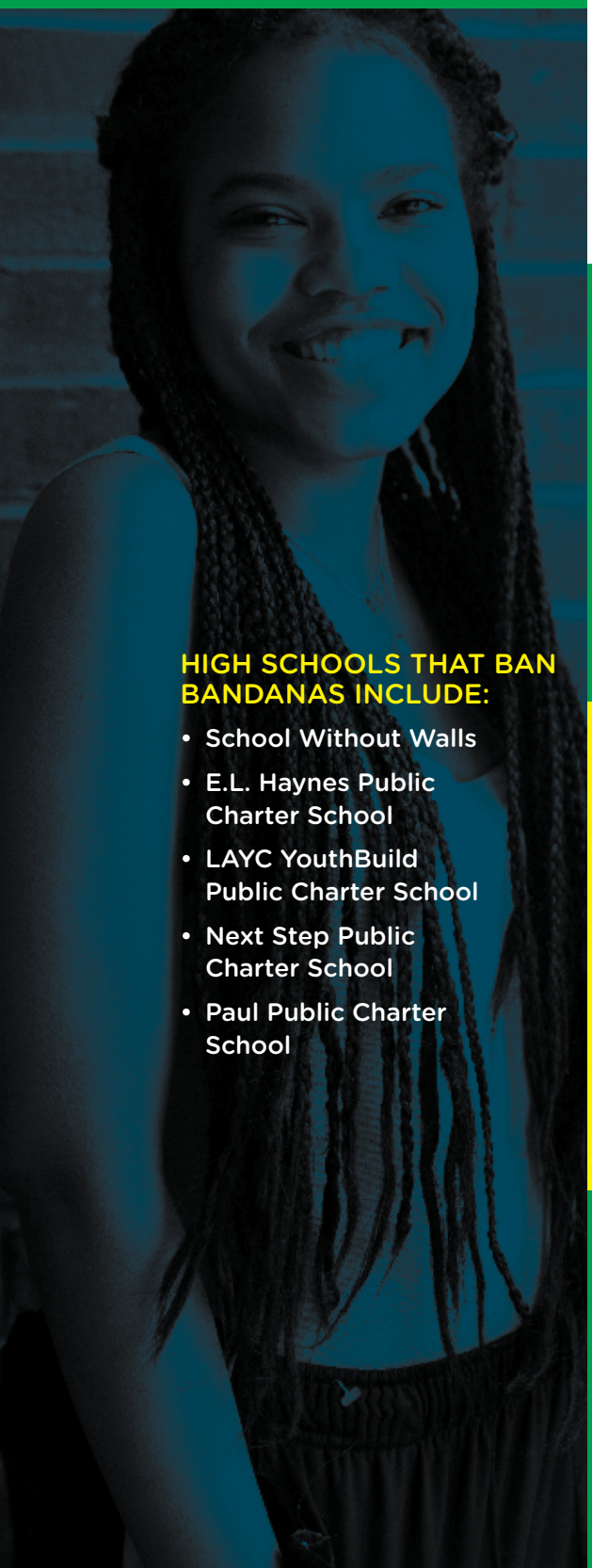
“Last year, when we were in a temporary building, we had to transfer from academic to arts block, so we had to wait for buses. It was really hot that day and I took off my jean jacket because since we were outside; inside, I was wearing a jacket. Since the shirt I had on underneath was strapless, I got dress coded and I was told that I couldn’t wear that. But I was outside and it was really hot. What do you expect?”
— Ayiana Davis, 16, Duke Ellington School of the Arts

“OVERSIZED COATS, JACKETS, AND OTHER OUTER-WEAR /GARMENTS ARE NOT ALLOWED TO BE WORN IN THE CLASSROOM. NO EXCEPTIONS!”
— Cardozo Education Campus flyer on school dress code



Rules Based in Racial Stereotypes

Black people face assumptions about who they are and what they are like based on racial stereotypes. For example, traditionally Black hairstyles and head coverings, which often have specific cultural or religious meaning, are sometimess viewed as "unprofessional." These stereotypes can influence dress code policies, many of which target students of color. For instance, 68 percent of D.C. public high schools that publish their dress codes online ban hair wraps or head scarves.



HIGH SCHOOLS THAT BAN BANDANAS INCLUDE:

- School Without Walls
- E.L. Haynes Public Charter School
- LAYC YouthBuild Public Charter School
- Next Step Public Charter School
- Paul Public Charter School

"At my sister's school, black girls are told that they shouldn't wear headwraps." — Nasirah Fair, 17, Wilson High School

"The following clothing and/or personal items are not permitted in Ellington's professional educational environment: . . . No do-rags or baseball caps in the building at any time for males or females. No combs in hair." — Duke Ellington School of the Arts Dress Code Policy

"Apparently we cannot wear headwraps unless it's for religious purposes.* Because all my friends who are Muslims are allowed to wear their hijabs but because it's a cultural [rather than religious] thing we're not allowed to do that. And so a lot of students are upset because they said that's being culturally insensitive. I agree." — Fatimah, 17, School Without Walls High School

*While School Without Walls' formal dress code does ban bandanas, the policy does not include an explicit ban on headwraps. Many schools enforce rules that are not memorialized in official policies.

Rules Based in Sex Stereotypes

Many schools across the country have different dress codes for girls and boys based on sex stereotypes (i.e., notions about how people "should" act based on their gender). For example, such stereotypes may presume that girls should wear feminine skirts, while boys should be active and athletic in pants. These rules also can present obstacles for transgender students whose schools do not respect their gender identity, as well as nonbinary and gender fluid students.* While DCPS formally prohibits sex-specific rules, 35 percent of D.C. public high schools with publicly accessible policies—including some DCPS schools—have specific dress code requirements for students based on their gender.

"NOTE – boys are not allowed to wear earrings to school. Gentlemen with earrings will be asked to remove their earring(s) prior to entering the building. NO EXCEPTIONS" — Achievement Prep Wahler Middle School Dress Code Policy

"All boys must wear belts. Pants may never sag." — KIPP D.C. College Preparatory School Dress Code Policy

*A non-binary person is someone who does not identify as a man or a woman. A genderfluid person's gender identity varies over time.

Even dress codes that are the same for boys and girls may nonetheless rely on—and reinforce—sex stereotypes. Often dress codes enforce backward ideas about what makes a girl feminine or "ladylike."

"The dress code is targeted towards girls, such as [rules requiring] fingertip-length bottoms and no shoulders showing. However, boys are allowed to wear whatever they please." — Fatimah, 17, School Without Walls

"We're not allowed to wear shorts, but we're allowed to wear skirts." — Phina Walker, 17, Thurgood Marshall Academy

School rules that ban "revealing" or tight clothing are also based in sex stereotypes that girls should be modest. Often, these rules are unclear, allowing administrators to enforce their own ideas about how much skin girls should show. Rules prohibiting makeup and nail polish are also based in a narrow vision of how a "good" girl presents herself.

"For trans students and non-binary students, dress codes are just another form of restriction. They also normalize cisgender and traditional roles and views. It's traumatizing to be forced into clothes that don't match your identity." — Sage Grace Dolan-Sandrino, 17

"They told us at the beginning of the year that we need to wear bras, which was gross."
— Nasirah Fair, 17,
Wilson High School*

"NOT permitted: make-up, lipstick, colored-gloss, etc."
— Jefferson Middle School Academy Uniform Policy

Ten percent of D.C. public high schools that publish their dress code policies ban students from wearing makeup.

"No face makeup . . . allowed."
— Friendship Collegiate Academy Charter School Dress Code Policy

"You can't have a certain length of fingernails. This girl would come in with long cat nails and our dean would say, 'You gotta take the nails off.' She would come through and at the end her nails would be gone. The middle school tutor used to tell us we couldn't wear lipstick, I guess because we were in middle school. We were kinda young, you know, trying weird lipstick and stuff, but it's not that serious. You can't tell us what lipstick we can and cannot wear. She tried to say we couldn't wear no lipstick at all. Administrators try to be like your parent or something, but I don't go home with you at the end of the day. They said the lipstick was distracting. The nails were just considered too grown. And they'd say really short skirts were distracting. You get in trouble for that."
— Kristine Turner, 16

*Wilson High School's formal dress code policy does not mention required bras.

Unclear Rules

Unclear rules promote discrimination. Because they are open to interpretation, they create too much room for unfair enforcement. They are also hard for students to follow.

"Dyed hair or a hairstyle that serves as a distraction—as determined in the sole discretion of the school—is not permitted. . . . Clothing must be sized appropriately to fit the Scholar. Clothes may not be too big or too small. What is too big or small is determined in the sole discretion of Achievement Prep administration." — Achievement Prep Dress Code Policy

"Clothes that are inappropriate in size (too tight) or see-through or expose undergarments may not be worn. Other inappropriate items determined by a Thurgood Marshall Academy administrator will not be allowed. Staff members will determine whether a student's attire complies with the dress code and will report any violations to the Dean of Students. The Dean's decision regarding dress code is final." — Thurgood Marshall Academy Dress Code Policy

Problems with Enforcement

Discriminatory Enforcement

Black girls are 20.8 times more likely to be suspended from D.C. schools than white girls. One reason for this disproportionate punishment is that adults often see Black girls as older and more sexual than their white peers, and so in need of greater correction for minor misbehaviors like "talking back" or wearing a skirt shorter than permitted.[1] Race- and sex-based stereotypes result in unequal enforcement of rules.

"At my school the dress code is more enforced on the girls than boys. The girls get in trouble more often for ripped jeans and tank tops but the boys usually don't."
— Christine Marhone, 16, D.C. International School

"Yes, they really enforce their dress code especially towards the girls. You never hear a boy [say], 'Oh, y'all got dress coded today, bro.' I mean at Banneker, no, it's not about race, but it is by body type. Like the little skinny girls can just wear what they want. I'm just being honest. And then the girls with curves, like really curvy, they just [say], 'Oh, you're showing too much, you're revealing so much.' I have this friend she has no breasts, no butt. She wears crop tops, mini skirts. It doesn't matter. They don't care." — Essence Kendall, 18, Charles Herbert Flowers High School, previously attended Banneker High School

Three words to describe your school's dress code:

"Unequally enforced, bothersome, eh" — Eliska, 15

"Strict, ugly, extra" — Kristine Turner, 16

"Racist, sexist, unfair" — Samantha O'Sullivan, 17

"Silly, uncomfortable, expensive" — Samaria Short, 13, Sousa Middle School

“We have a dress code but it’s more of a casual [thing]. Basically you’re not supposed to wear anything shorter than like your fingertip, so you can wear shorts and skirts, but they have to be longer than your fingertips and you’re not supposed to wear crop tops or spaghetti straps. People wear it all the time and the biggest problem is that they enforce it based on your body type basically. So what, two people be wearing the same thing and then like if you, if you’re like curvier then they’ll tell you to change because it looks inappropriate.” — Samantha O’Sullivan, 17

“I feel like when it comes to girls they’re like, ‘Oh, where’s your belt, where’s your belt?’ I’ve seen boys that were in front of me they didn’t even ask where his belt was. It was just let him go through.” — Phina Walker, 17, Thurgood Marshall

"I don't get why no one says anything to the boys when the boys come to school without their uniforms. But when the girls do it, they say something. They let the boys slide and it's not fair."
— Kamaya, 12, Sousa Middle School

"Boys can walk around shirtless outside during lunch, sag their pants, wear shirts objectifying women and aren't reprimanded at all." — Nasirah Fair, 17, Wilson High School

"I think the rules are usually enforced depending on your body type a lot. That's often how it's enforced. I don't know, like I'm pretty skinny and small so people usually don't notice when I break the rules. But when people who are curvier wear short shorts or a skirt then I see them get dress coded. Race has to do with it sometimes. Often times I see a lot of white females wearing stuff that is just, like, I don't follow the dress code but my mother would never let me walk to school like that. Just like, backs out, really short crop tops or like really short shorts. Nobody ever says anything to them, but my friends will wear something the same or not even as bad and they'll get dress coded or have to change clothes."
— Fatimah, 17, School Without Walls

"I've noticed how my friends have gotten dress coded on stuff because they have bigger hips, bigger breasts, or bigger butts, yet I have worn similar things but I did not get dressed coded because I'm skinnier and it is less noticeable on me. That kind of thing teaches girls to be ashamed of their bodies."
— Ayiana Davis, 16, Duke Ellington School of the Arts

"Many of the Caucasian girls wear things against the dress code without getting into trouble, while girls of color would get into trouble."
— Eliska, 15

Enforcement That Promotes Rape Culture

Too many schools make clear that girls need to cover up their bodies so as not to "distract" or "tempt" boys. That enforcement sends the clear message that boys are not responsible for their bad behavior. By blaming boys' misconduct on girls' choices, schools promote an environment where sexual harassment is excused. Students may think it is appropriate to comment on girls' bodies because they see their teachers do it, too, when they enforce the dress code.

"The adults at this school say that if girls wear tight stuff, the boys think that it's okay to touch them. I think everyone should keep their hands to themselves, no matter what anybody is wearing." — Samaria Short, 13, Sousa Middle school

"One teacher at Banneker did not like the girls for some reason. One day she told me that I had on ripped jeans, but I had gym shorts to cover it. She was like, 'You know why I don't like holes above the knee? Because a boy can put [his] finger up there.' And I'm just like, 'Wait, what?' Why would you even say something like that to a student? And she said,'So, your mom let you walk from the station to your to school like that?' I'm like, 'Yeah, sure.' She wanted you to be covered." — Essence Kendall, 18, Charles Herbert Flowers High School, previously attended Banneker High School

Enforcement Through Physical Touching

Teachers, administrators, and even security guards and school police unnecessarily touch girls without their consent when enforcing a dress code. In doing so, these adults send the message to girls (and their classmates) that their bodies are not their own.

"Well, today, so this girl she had on some brown Uggs. And she didn't have no other shoes at home because some people cannot afford all black shoes… [The teacher] grabbed her shirt. She told her to come, come on. And so the girl had to get up and the girl had to change her shoes to these orthopedic shoes."

— Phina Walker, 17, Thurgood Marshall Academy

Shame-Based Punishments

Too many schools punish students who break the dress code, or even other rules, by shaming them with attention-grabbing clothing "fixes." In doing so, the schools distract and upset students and undermine young people's trust in educators.

"[If you break dress code] you get sent home. Or they give you like a big shirt, or big pairs of pants or like big shoes on purpose."
— Phina Walker, 17, Thurgood Marshall Academy

"I've heard about other girls having to wear jerseys and gym clothes from the school after being dress coded."— Eliska, 15

"If you have rips above your thighs (especially if you're a girl) then they put duct tape on the holes. So if you arrive to Banneker and have rips above the knee, they'll put duct tape on the rips to cover it up or you'll have wear gym shorts over top of your pants. They will also give you a big t-shirt that says 'help the homeless' if you have on a crop top or something and they'll call your parent as well."
— Essence Kendall, 18, Charles Herbert Flowers High School, previously attended Banneker High School

Overly Harsh and Illegal Punishments

74 percent of D.C. public high school dress codes authorize disciplinary action that can lead to missed class or school.

As the Washington Post exposed in 2017, D.C. public schools have a problem with illegal "send homes," where students are excluded from school without formal suspensions, allowing schools to artificially reduce their suspension rates.[2] While DCPS policy forbids out of school suspensions for dress code violations, many students report they are nonetheless sent home for violations. These suspensions do not follow required procedures and are likely not recorded.

"[If you break the dress code], they either send you home or make you sit in the office."
— Ceon DuBose, 16, Phelps ACE High School

"If you break the dress code, the school will say 'You gotta go to the office,' or, 'Oh, you gotta go home.' Last time I got dress coded, I almost had to go all the way home. I live far. I have to catch two buses and get up at 6:00 in the morning just to get to school on time. They almost made me go all the way back home, just to change my uniform pants, because my uniform pants were dirty. I said, 'I can't go home, 'cause there's no one there and it takes a long time for me to get home and get back here.' So, they made me come try on all these different pants they had. Some of them were small, and some were too big. They told me to go home because none of the pants fit me. That wasn't right. Not everybody is the same size. Some people are big, some people are skinny. . . . [Once] they sent me to ISS—in school suspension. They give you work. They tell you to get work from your teachers but sometimes that's hard because you don't know what to do. So you end up doing the wrong thing and you have to do it over again."
— Samaria Short, 13, Sousa Middle School

"To enforce the uniform policy, scholars would have to sit in the office all day if you wore the wrong shoes. Or they'll send you home to strongly emphasize the importance of obeying the school uniform dress code."
— Catherine G., 16, Phelps A.C.E. High School

"Students who report to school not in uniform will either:

- **Return home to change**
- **Receive loaner clothes if available**
- **Remain in ISS until parent brings clothes to school**

***Students who routinely report to school out of uniform are subject to school disciplinary action"— Dunbar High School Dress Code**

While charter schools are not, at the time of publication, subject to the same regulations as DCPS, many of their punishments for dress code violations also exclude students from the classroom in ways that are educationally harmful.

"*They make you go through the metal detector.* And the security guards have little wands. Once I got in trouble for a belt I wasn't wearing. The Administration called my mother and said I had detention and I said 'Mama, I ain't going to no detention over some belt that I'm not wearing.'"— Chrissy, 15, IDEA Public Charter School

"We got to wear uniform. And if we don't wear the right uniform, they send us home."
— Angel, 15, Friendship Collegiate Academy Public Charter School

Impact of Dress Codes on Black Girls

Across the city, Black girls are missing out on class time because of dress and grooming codes. Some are suspended, while others are pulled out of the classroom informally. Both formal and informal classroom removals cause these girls to lose out on the opportunity to learn. Harsh and discriminatory school discipline leads to pushout, lost future earnings, poorer health outcomes and increased likelihood of living in poverty.[3] For example, a girl who misses three or more days of school in a month can fall a year behind her peers.[4] And even short, informal removals—like when a student is sent to the front office to "cover up" with a sweatshirt from the lost and found box—can add up to hours of lost instruction.

Suspensions put students at risk for not graduating and going to college. This exclusionary discipline threatens girls' long-term earning potential. Black women without a high school degree made $7,631 less annually than Black women who graduated from high school, and $25,117 less each year than Black women with a college degree.[5]

Even apart from lost class time, discriminatory dress codes and unfair enforcement change how Black girls see themselves and how their classmates see them, too. Studies show school practices that draw distinctions between students cause young people to form biases based on how different groups of students are treated.[6] Dress codes create distinctions both through different rules for girls and boys and through different enforcement based on race, sex, and body type. In these ways, dress codes are not only rooted in stereotypes, but also reinforce them.

These biases have negative academic, social, and emotional effects on students. **And Black girls, of course, live at the intersection of damaging race- and sex-based stereotypes.**

> "When you are made to feel uncomfortable in your clothes and with your body, it's hard to focus on learning and expanding your mind. Or even just getting good grades."
> — Sage Grace Dolan-Sandrino, 17

Research shows that Black students' performance and well-being are undermined by race-based stereotypes. Racial bias undermines Black students self-confidence.[7] Many studies confirm that Black students who are reminded of racist stereotypes—even in very subtle ways—perform worse on academic exams, often because they are afraid of conforming to a negative stereotype about Black people.[8] This phenomenon, known as "stereotype threat," drives racial disparities in school performance.[9]

Girls who believe gender stereotypes are more likely to have low self-esteem, including negative feelings about their bodies.[10] This trend is reinforced by adults' comments that girls wearing tight or revealing clothing are "asking for it." Stereotype threat also leads to disparities between boys and girls. Studies even show that girls who wear gender-specific clothing perform worse in math and science.[11] Practices that put pressure on students to conform to sex stereotypes are especially damaging for girls who do not conform to gendered expectations, like girls who prefer wearing traditionally masculine clothes,[12] as well as transgender students of all genders and students who are genderfluid or nonbinary.

> **"I mean, we already struggling with grades at school right now, and people not attending school. So if you all want kids at school, why would you all put them out of school? And if you all want us to have good grades, why would you all not allow us in school?" — Ceon DuBose, 16, Phelps A.C.E. High School**

Dress codes also can encourage sexual harassment. Boys who believe in sex stereotypes like those promoted by many school rules are more likely to harass girls.[13] Adults also promote harassment when they focus on girls' bodies over their minds. When students see girls sent out of the classroom because they are out of dress code, they learn that how a girl looks is more important than her thoughts and actions. When students see educators talking about girls' bodies, they learn to "sexualize" young women and view them as objects meant for others' pleasure rather than full human beings. Plus, when educators say girls are "distracting" boys or "asking for it," students get the message that boys are not responsible for how they behave, and girls who wear certain clothes or makeup deserve harassment and violence. Such viewpoints underlie a 2017 NWLC study that found that 1 in 5 girls ages 14-18 has been kissed or touched without her consent.[14] In addition to perpetuating harassment, adults who exclude girls from class to avoid "distracting" their male classmates prioritize boys' educations over girls'.

"When it comes between an item of clothing and a child's education, the child's education should always reign supreme."

— Beatrice

For all these reasons, discriminatory dress codes not only interrupt individual students' education but can compound race and gender inequalities. Every time a school sends a Black girl home because of what she is wearing, it risks exacerbating sharp race- and sex-based disparities in graduation rates, college enrollment rates, employment rates, and future wages.

- In D.C., white students are 1.3 times more likely to graduate from high school than Black students.[15]
- Nationally, white girls are 1.2 times more likely to be enrolled in a postsecondary program than Black girls.[16]
- Nationally, Black women who do not graduate from high school are 2.2 times more likely to be unemployed than white, non-Hispanic women.[17]
- Black women in D.C. who do find employment and who work full time, year round, are paid 52 cents for every dollar paid to white, non-Hispanic men.[18] This amounts to more than $1.8 million dollars in lifetime losses.

"In high school, you're taught that you need to hide everything. Deciding that some people can't wear certain shirts because their breasts are too big, it's not really doing anything, and it just causes insecurities. It teaches you to hide your body."

— Ayiana Davis, 16, Duke Ellington School of the Arts

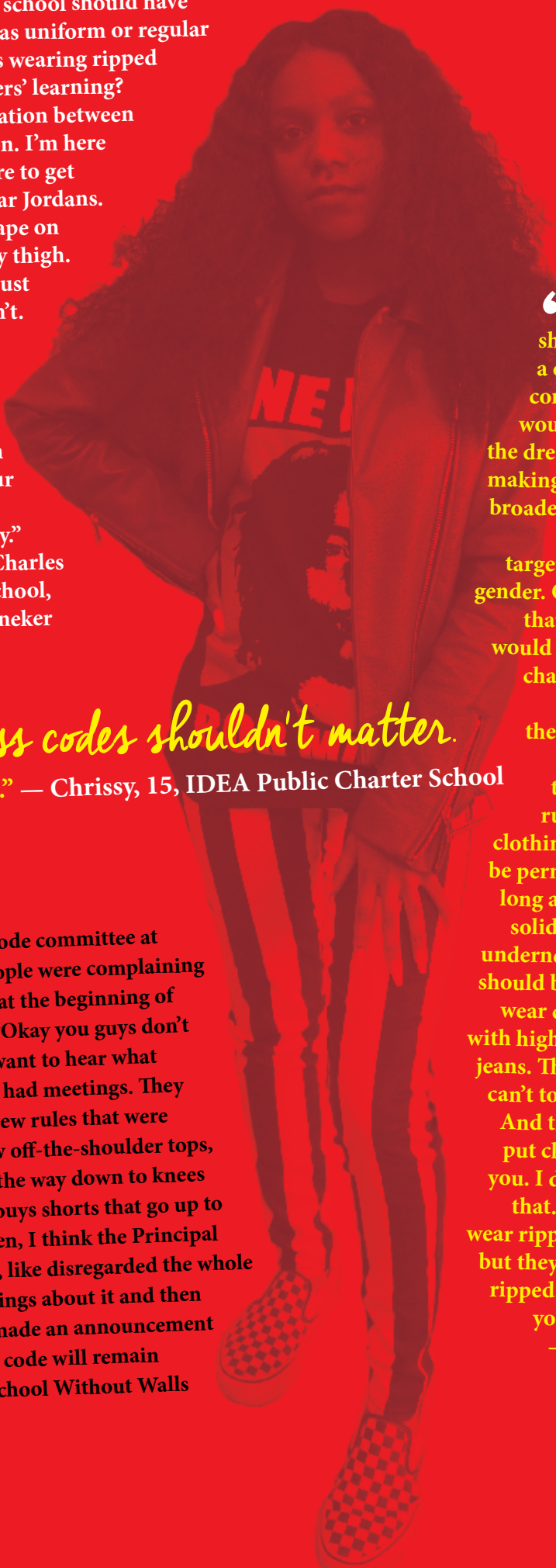
Girls Have Answers

"If the purpose of a dress code is to teach professionalism, I feel like there should be like business week or one Friday out of the month, you have business casual attire. Then, the teachers and staff can give feedback on how to dress in a more professional way." — Ayiana Davis, 16, Duke Ellington High School of the Arts

"They're just clothes. They should never result in a student being removed from the classroom or losing out on learning time, or starting a big issue. A classmate's absence is more of a distraction to the classroom than a piece of clothing." — Sage Grace Dolan-Sandrino, 17

"Boys need to be taught respect. Security guards shouldn't be able to touch you... Admin can't make remarks about students' bodies. Teach girls how to love their bodies and boys how to respect it." — Nasirah Fair, 17, Wilson High School

"If I were in charge of the dress code, I would loosen it up or at least equally enforce it. Definitely allow religious things, code enforcers should not touch any students or their belongings without consent, don't publicly embarrass anyone, let students contribute to the dress code." — Eliska, 15



"I don't think that any school should have a dress code, whether it was uniform or regular clothes because what does wearing ripped jeans have to do with others' learning? Like I don't see the correlation between a dress code and education. I'm here for education. I'm not here to get teased because I don't wear Jordans. I'm not here to get duct tape on my rips because it's on my thigh. It's just no correlation. I just don't understand it. I don't. Come as you please because your clothes shouldn't define you or your learning. There is no correlation between the way you look and your education. What I wear shouldn't bother anybody." — Essence Kendall, 18, Charles Herbert Flowers High School, previously attended Banneker High School

"Dress codes shouldn't matter. Education does." — Chrissy, 15, IDEA Public Charter School

"We actually have a dress code committee at our school because a lot of people were complaining about the dress code. And so, at the beginning of the year, the Principal is like, 'Okay you guys don't think the dress code is fair. I want to hear what your thoughts are.' And so we had meetings. They met, and they came up with new rules that were more fair towards girls. Allow off-the-shoulder tops, allow shorts that don't go all the way down to knees —because I don't know who buys shorts that go up to their knees anymore. And then, I think the Principal looked at them and then just, like disregarded the whole thing. They had several meetings about it and then nothing ever happened. He made an announcement one time. He said, 'The dress code will remain the same.'" — Fatimah, 17, School Without Walls

"Schools should have a dress code committee. I would change the dress code by making the rules broader, and not primarily targeted at one gender. One thing that I know I would definitely change is the 'no off the shoulder shirts or tank tops' rule. Sheer clothing should be permitted, as long as there is solid clothing underneath. You should be able to wear crop tops with high-waisted jeans. The school can't touch you. And they can't put clothes on you. I don't like that. You can wear ripped jeans but they can't be ripped beneath your butt." — Jill, 17

A Better Way

Research and stories from students show that most school dress code policies hurt students, and specifically hurt Black girls. Dress codes often create an educational environment where the focus is on appearance rather than learning. When students are punished for violating dress code rules and are asked to leave the classroom, they are missing valuable class time and are prevented from having a school experience like their peers'. Plenty of schools (including high schools and colleges in D.C.) do not have dress codes and are able to educate students without distraction. **For these reasons, NWLC and many student partners believe schools should not have dress code policies at all.**

However, if a school insists on maintaining dress code policies, the policies should follow these guidelines:

Policies

- ◯ All schools should begin their dress codes with an equity policy.

"Evanston Township High School's student dress code supports equitable educational access and is written in a manner that does not reinforce stereotypes and that does not reinforce or increase marginalization or oppression of any group based on race, sex, gender identity, gender expression, sexual orientation, ethnicity, religion, cultural observance, household income or body type/size." — Excerpt from student dress code at Evanston Township High School, Evanston, IL

- ◯ Schools should celebrate expressions of diverse cultures. For example, schools should permit students to wear any religiously, ethnically, or culturally specific head coverings or hairstyles, such as hijabs, yarmulkes, headwraps, braids, dreadlocks, and cornrows.
- ◯ Schools should also celebrate body diversity. Students of different sizes and abilities should all feel equally welcome in school. The same shirt style might look very different on students with different bodies, and that's great.

- ◯ Dress code policies should maintain gender neutrality. Students of all genders should be subject to the same rules. For example, if a school allows boys to wear pants, all students should be allowed to wear pants. If a school allows girls to wear skirts, all students should be allowed to wear skirts.
- ◯ Students should have the freedom to express themselves! Any rules should give students the space to be creative and show off what makes them unique.
- ◯ School rules should be clear and specific, avoiding subjective terms like "distracting," "provocative," or "inappropriate."

Fair Consequences

- ◯ Students should never be forced to leave school or the classroom for violating the dress code.
- ◯ Parents and students should know what the consequences for not following the dress code will be. Consequences should never exceed those guidelines.
- ◯ Schools should require all members of the school community who have the power to enforce the dress code to participate in bias and anti-harassment training at least once a year.
- ◯ School police should not be allowed to enforce the dress code.
- ◯ Adults should not touch students or their clothing to correct dress code violations, and should not require students to undress in public spaces.

Community Engagement

- ◯ Schools should maintain data transparency when it comes to dress code enforcements. In annual reports, schools should publish statistics on how often students are punished for dress code violations and for what specific violation. Schools should disaggregate and cross-tabulate those statistics by race and ethnicity, sex, disability, English language learner status, and sexual orientation to the extent possible while respecting student privacy.
- ◯ Schools should also conduct annual anonymous climate surveys to hear directly from students about how school policies like dress code affect them.
- ◯ Based on data and climate surveys, schools should facilitate self-audits to assess whether or not their policies are disproportionately impacting specific student populations.
- ◯ Students should be integral to the process of writing the dress code. Schools should convene dress code committees to ensure students have the opportunity to shape these policies. A collaborative process will not only result in better but also stronger relationships and opportunities to model and build social-emotional skills.

D.C. Can Lead the Way

Here's the good news: D.C. can do better. And students have the solutions. Here are some ways educators and policymakers should take action to ensure students do not miss out on the chance to learn because of dress codes:

School-level leaders, like principals, should:

- Revise their discipline codes to remove dress and grooming rules. If they will not do that, they should:
  - Reform their rules and practices in accordance with the checklist above—and avoid the common problems listed in this report.
  - Take affirmative steps to make sure they and their staff are following the law.
  - Monitor how the dress code affects school climate.
  - Provide washing machines in school, dry cleaning vouchers, and free uniforms multiple times per year to ensure dress codes do not pose an obstacle to families struggling to make ends meet.

District-level administrators should:

- Create policies that ensure no student misses class time because of a dress or grooming code.
- Enforce existing rules about when and how schools discipline students.
- Check in with parents and students to learn what's happening in school.

The Office of the State Superintendent of Education should provide guidance to schools about avoiding the risks dress and grooming codes pose to student learning and self-esteem.

D.C. Councilmembers should pass a new law to ban schools from removing students from the classroom due to a dress or grooming code violation.

"Schools should teach girls how to love their bodies. Vice versa. Boys how to love their bodies. And how to respect each other because you should feel confident. 'Cause my objective is to learn."
— Nasirah Fair, 17, Wilson High School

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Acknowledgments

ABOUT THE NATIONAL WOMEN'S LAW CENTER The National Women's Law Center is a non-profit organization that has worked for more than 45 years to expand opportunities for women and girls, focusing on on education and workplace justice, reproductive rights and health, and income security for families, with particular attention to the needs of women and girls of color and low-income women.

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LET HER LEARN

NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

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May 22, 2017

Mr. Alex Dan
Interim School Director
Mystic Valley Charter School
4 Laurel Street
Malden, MA 02148

Massachusetts Board of Elementary and Secondary Education
75 Pleasant Street
Malden, MA 02148-4906

RE: Discriminatory Policies at Mystic Valley Regional Charter School

Dear Mr. Dan and Members of the Massachusetts Board of Education:

Below please find our letter prepared for the Mystic Valley Regional Charter School Board in advance of yesterday's emergency meeting. While we understand that the Board has suspended its hair policy for the remainder of the school year, the concerns we have remain, as do the remedies we seek for the Cook children and all Black students attending the school.

Sincerely,

American Civil Liberties Union of Massachusetts
Anti-Defamation League
Lawyers' Committee for Civil Rights and Economic Justice
Mystic Valley Branch of the NAACP
NAACP Legal Defense and Educational Fund, Inc.
National Women's Law Center
(The letter's authoring organizations)

Contact: Matt Cregor, Education Project Director
Lawyers' Committee for Civil Rights and Economic Justice
617-988-0609, mcregor@lawyerscom.org

Updated May 22, 2017

Mr. Alex Dan
Interim School Director
Mystic Valley Charter School
4 Laurel Street
Malden, MA 02148

Massachusetts Board of Elementary and Secondary Education
75 Pleasant Street
Malden, MA 02148-4906

RE: Discriminatory Policies at Mystic Valley Regional Charter School

We, the undersigned civil rights and education organizations, write to express our strong concern about Mystic Valley Regional Charter School's Hair/Make-Up policy and the school's recent and historical enforcement of it. We were deeply disturbed to learn that the school is disciplining several Black girls, including sisters Deanna and Mya Cook, for wearing their hair in braids with extensions.[i] We were equally disturbed to learn that the school forced a Muslim student to remove henna from her hands during Eid, despite the fact that it was applied in adherence with religious tradition. Mystic Valley's actions in each of these instances suggest that its Hair/Make-Up policy and its enforcement of it are unlawful and discriminatory. Apparently, to Mystic Valley, braids with extensions are "drastic," "unnatural" and/or "distracting" and the religiously motivated practice of applying henna to one's hands runs afoul of the rule prohibiting students from "writ[ing] or draw[ing] on themselves." Mystic Valley's policy, both as written and as applied, discriminates against students of color and burdens religious expression. It must be changed.

Mystic Valley's student handbook includes a number of unjustifiable restrictions on student dress and grooming. Among these is a general ban on hair extensions, pursuant to which Deanna and Mya were disciplined, despite the widespread and well-known use of hair extensions in braids worn by Black women and girls and a lack of pedagogical basis for the policy. As a result of this discriminatory policy, the Cook girls have been given numerous detentions and are currently not allowed to participate in after-school activities, including sports – which may affect their eligibility

for both college and scholarships – and the Prom. Moreover, some of their Black peers have been suspended for failing to adhere to this policy.

Mystic Valley's justifications for its application of this policy to the Cook sisters, and others, are deeply flawed. The school claimed that such policies are necessary to reduce evidence of economic inequality amongst its students, citing the costs of extensions. However, the assumption that wearing braids with extensions constitutes a marker of wealth is erroneous for two reasons: (1) braids with extensions cost less than other hair styles that are permitted under the policy – including relaxed hair – and (2) the cost of the extensions and braids themselves can range in price from hundreds of dollars to next to nothing. Meanwhile, the school imposes significant costs for participation in athletic activities, which may limit participation in school-related activities to those who can pay to play. In addition, it is clear that the policy itself has been inconsistently enforced, raising more questions as to the discriminatory nature of Mystic Valley's actions.

Most disturbingly, Mystic Valley claims hairstyles like Deanna and Mya's are "distracting." Let us be clear: braids and hair extensions are not distractions; rather, they are basic forms of grooming and expression adorned primarily by Black women and have deep historical and cultural roots. In addition, as Mystic Valley employs at most one Black educator on its staff of 160,[ii] the fact that Mystic Valley considers braids with extensions distracting further demonstrates a severe lack of cultural sensitivity in the school.

We know that Deanna and Mya are not the only Black students targeted by Mystic Valley's discriminatory practices. Data collected by the Massachusetts Department of Elementary and Secondary Education reveal that Black students at Mystic Valley are nearly three times more likely to be suspended than white students, and for longer periods of time.[iii] The disparities are even more dramatic for Black girls at Mystic Valley: according to the most recent data from the U.S. Department of Education, every girl suspended by the school in the 2013-14 school year was Black.[iv]

Mystic Valley's policies and practices clearly violate the civil rights laws that prohibit discrimination against students based on race and sex, including Title VI of the 1964 Civil Rights Act and Title IX of the 1972 Education Amendments.[v] The policies under which Deanna and Mya were punished discriminate against Black girls by directly targeting a culturally traditional hairstyle and grooming choice. On top of its prohibition on hair extensions, the Mystic Valley code also states that "hair more than 2 inch [sic] in thickness or height is not allowed."[vi] Under such a policy, most white students who wear their hair naturally would face no penalty, while most Black students and students of other ethnicities in which tightly curled hair is common could face daily discipline for doing the same. The policy deploys harmful stereotypes about what a "good student" looks like and sends the message to children of color that only students who adhere to a narrow, Eurocentric aesthetic are acceptable. Further, a quick review of the school's yearbooks shows that white girls in the school wear extensions and/or dye their hair in violation of the Hair/Make-Up policy, suggesting the school's grooming policy is disproportionately applied to Black girls.

We call upon Mystic Valley to amend their school policies to be inclusive of all students and prioritize student learning over student appearance. To remedy the harm its policies have already caused, and to prevent future discrimination, Mystic Valley must retract the current disciplinary infractions imposed because of violations of the "Hair/Make-Up" policy, remove all mention of relevant disciplinary action in students' records, and issue an apology to all affected students, including the Cook sisters. Mystic Valley must also agree to stop punishing students for wearing extensions in their braids, change its hair policies to permit all appearances that do not pose a threat to health, safety, or cleanliness, and institute mandatory cultural competence and anti-discrimination training for all staff. To the extent that Mystic Valley is unwilling to make these necessary reforms, we call upon the Massachusetts Board of Elementary and Secondary Education, which authorized Mystic Valley's charter, to use the full extent of its oversight authority to remedy this matter and ensure that similar policies and practices are not employed by other schools under its purview.

Creating safe, inclusive schools requires educators, students, and the communities to understand what happens when bias goes unchecked. If Mystic Valley is truly interested in providing an opportunity for a world class education, they should focus on the development of an inclusive culture and respectful school climate, and not spend any more of their students' time splitting hairs.

Sincerely,

(In alphabetical order)
Advancement Project
African American Juvenile Justice Project
Alliance for Educational Justice
American Association of University Women
American Civil Liberties Union of Massachusetts
Anti-Defamation League
Center for Collaborative Education
Center for Law and Education
Citizens for Juvenile Justice
Civil Rights Project at UCLA
Clearinghouse on Women's Issues
Education Law Center
The Evoluer House
FECT
Futures Without Violence
Institute for Compassion in Justice
Lawyers' Committee for Civil Rights and Economic Justice

Maryland Multicultural Coaltion
Massachusetts Advocates for Children
Massachusetts Appleseed Center for Law & Justice
Massachusetts Jobs with Justice
Massachusetts Women of Color Coalition
Mental Health Legal Advisors Committee
Mystic Valley Branch of the NAACP
NAACP Legal Defense and Educational Fund, Inc.
National Alliance for Partnership in Equity (NAPE)
National Organization for Women
National Women's Law Center
National Women's Political Caucus
New England Regional Conference of the NAACP (NEAC)
Power of Self Education (POSE) Inc.
Public Counsel
Public Justice
Schott Foundation for Public Education
Texas Appleseed
Victim Rights Law Center
Youth On Board
(Updated to reflect additional signatures since the Mystic Valley Regional Charter School Board's meeting on Sunday, May 21, 2017)

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[i] Kay Lazar, *Black Malden Charter Students Punished for Braided Hair Extensions*, Boston Globe (May 12, 2017) *at* https://www.bostonglobe.com/metro/2017/05/11/black-students-malden-school-who-wear-braids-face-punishment-parents-say/stWDlBSCJhw1zocUWR1QMP/story.html

[ii] While Mystic Valley Charter School reported employing only one Black educator to the Massachusetts Department of Elementary and Secondary Education this school year, the families are unaware of any Black educators at Mystic Valley Charter School. *See,* Mass. Dep't of Elementary and Secondary Education, Staffing Data by Race, Ethnicity, Gender by Full-time Equivalents (2016-17), *at:* http://profiles.doe.mass.edu/profiles/teacher.aspx?orgcode=04700105&orgtypecode=6&leftNavId=817&

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[iv] U.S. Dep't. of Educ., *2013-14 Civil Rights Data Collection* (2016) *at* http://ocrdata.ed.gov/.

[v] These laws apply to all schools that receive federal funding, including charter schools. Acknowledging that students may face discrimination on the basis of the intersection of their sex and race, federal courts and the U.S. Department of Education have also recognized joint claims under Title IX and Title VI. Prohibited forms of discrimination include disciplinary policies that target students based on their sex and/or race as well as facially neutral policies that are disproportionately applied to students on the same bases. Research shows that discrimination is often rooted in impermissible sex- and race-based stereotypes that have no place in classrooms.

[vi] Mystic Valley Regional Charter School, *Parent/Student Handbook* 17 (2017), *at:* http://www.mvrcs.com/pdf/2016-2017%20Student%20Parent%20Handbook.pdf.

Phi Delta Kappan
The professional journal for educators

How dress codes criminalize males and sexualize females of color

Alyssa Pavlakis and Rachel Roegman

September 24, 2018

Too often, school dress codes are enforced in ways that disproportionately impact students of color — both male and female.

"I am aware of what makes me feel uncomfortable. If what I wear bothers someone else, it says more about them than me."
— Tyra, a multiracial female student

"When you have a Black girl and a White girl walking down the hall, and the Black girl gets called out, I mean, that's the issue."
— Emma, a White female teacher

Dress codes have always been a point of contention in public schools. Teachers, students, parents, and administrators struggle, often against each other, to determine what is appropriate for school and who should get to decide. Recent headlines in the popular press highlight stories of girls and young women who were forced to wear a sweatshirt over a tank top during a heat wave, put tape over their nipples if they were not wearing a bra, or remove hair extensions. In the era of Black Lives Matter and #MeToo, these news stories highlight ways that seemingly neutral school policies may inequitably impact students based on their gender and race.

When students are disciplined because of how they are dressed, they lose class time — for a five-minute hallway lecture, 20 minutes to search through a bin of "appropriate" clothes to wear, an hour-long trip home, or even a full-day suspension. Perhaps even worse than losing out on instructional time, they also receive the message — whether explicit or implicit — that there is something wrong with their clothing choices or their bodies. Such messages create unwelcome and potentially even hostile school climates for students

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whose choice of dress goes against established norms. And students are taking notice and speaking out. A group of New Jersey students, for example, created the hashtag #Iamnotadistraction to push against dress codes that required female students to cover their bodies, implicitly blaming them for distracting males from learning (Krischer, 2018).

Despite this growing attention, schools continue to enforce dress codes that are explicitly gendered and implicitly aimed at minority cultural groups. The National Women's Law Center (2018) recently reported that although many dress codes in the Washington, D.C., area included race-neutral language, they specifically banned styles mostly worn by Black girls and women, such as hair wraps. While research on school discipline and its disproportionate impact on Black males has abounded (e.g., Fergus, 2016), the research on racialized effects of dress codes is still emerging. To further investigate this phenomenon, we looked at one high school's dress code and its differential impact on students.

A dress code in action

Lincoln High School (a pseudonym) serves 1,200 students in a small Midwestern urban community. Lincoln's student body is about 40% White, 35% Black, 10% Latino, and 10% multiracial; about two-thirds of the students are classified as economically disadvantaged. In response to school and community members' concerns about racial inequities in the local schools, a Social Justice Task Force was formed to investigate the problem and develop strategies to address it. This included trainings for all school employees at which they discussed issues at their schools where race may be a factor, implicitly or explicitly. When a task force member informally asked students what issues fit this description, their immediate response was, "The dress code!"

To better understand the students' concern, we surveyed all Lincoln High School students (receiving 384 responses) and randomly sampled 13 teachers to interview. The survey asked students about the frequency with which they followed the dress code, the degree to which they were disciplined about their dress, and their opinions about the dress code more generally. Teacher interviews focused on their beliefs about the dress code, in general, and in relation to race and gender. Ultimately, we hoped to answer the question: To what degree, if at all, does Lincoln High School's dress code disproportionately affect students based on their gender and/or race?

> A different type of dress code is needed that helps schools and students to challenge dominant narratives of who they are or could be.
>
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Disproportionate enforcement by race and gender

Lincoln's dress code forbids clothing that administrators deem too revealing, with specific bans on spaghetti straps and tube tops, visible midriffs or cleavage, and dresses, skirts, and shorts that do not extend past the middle knuckle when arms are straight down. Undergarments (including bra straps) should not be visible, and leggings are prohibited. Head coverings that are not for religious purposes are also not allowed.

In most cases, students reported similar frequencies of dress code infractions, with White females and Black males reporting slightly higher rates and White males slightly lower rates. This would lead one to expect that dress code infractions would line up with their representation within the school. However, when we look at the likelihood of students being "coded" (i.e., having a school adult ask them to remove or cover a clothing item), we see a different picture (see Figure 1). Black males, Black females, and multiracial females stand out as students who reported being disproportionately coded. On the other hand, White females and White males were much less likely to report being coded. Essentially, survey responses showed that students of color are more likely to be coded for breaking the dress code even if they do so at a similar rate to White students. The disproportionality is even more striking when looking at which students report being disciplined, which may

February 6, 2019

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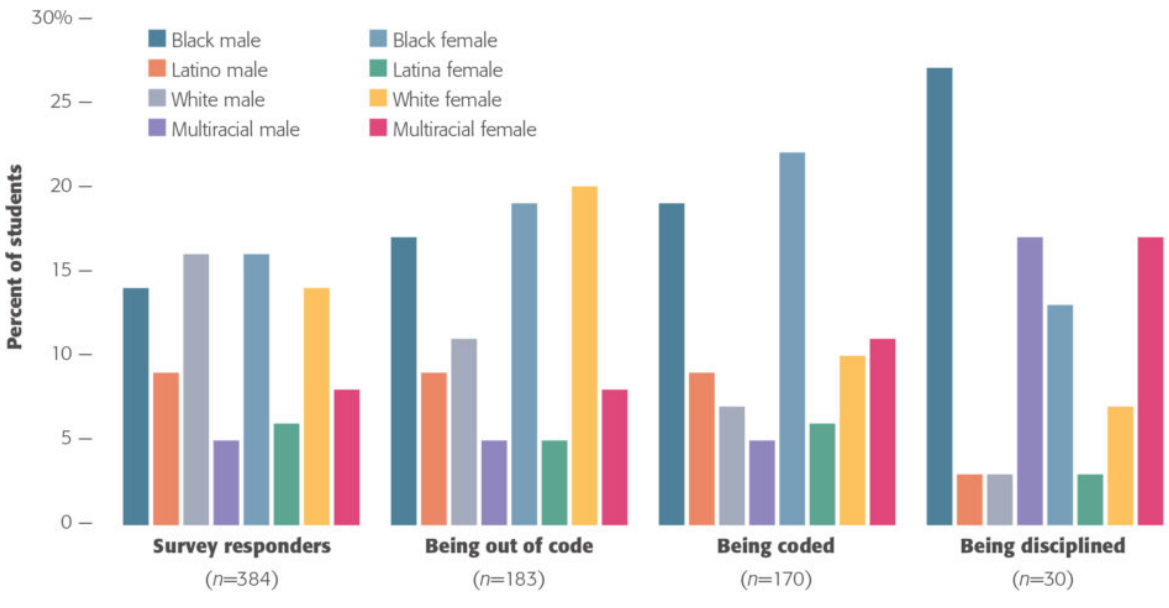
January 21, 2019

involve a suspension, detention, or being sent home. While only 30 of the 384 survey participants reported being disciplined, they were overwhelmingly Black and multiracial, male and female.

Another way to look at these data is through the concept of relative risk, or the probability of an event occurring for one subgroup in comparison to that of the group at large. A relative risk score of 1.0 means that there is no difference in terms of the probability of the event occurring to an individual in the subgroup versus in the group at large. Looking at the data through this lens clearly shows that Black males and females and multiracial females report a greater risk of being coded and that Black and multiracial males and multiracial females report a greater risk of being disciplined (see Figure 2).

Looking at Lincoln High School's dress code from the perspectives of students and teachers, it quickly becomes clear that racial and gender narratives are at play in students' experiences of the dress code. Students' and teachers' perspectives illustrate two narratives about how students of color are affected differently by the seemingly neutral policy. For males of color, the dress code and the ways it is enforced are related to the larger U.S. narrative that criminalizes them. On the other hand, females of color are sexualized by the dress code and blamed for creating a negative school climate.

FIGURE 1.
Percentage breakdown by gender and race of survey respondents reporting dress code violations and disciplinary actions



Criminalization of males of color

Students and teachers of all genders and racial/ethnic backgrounds reported that males of color were most likely to be coded, even if White males had similar dress code infractions. Several males of color said they believed the school was positioning them as criminals or potential criminals. One Black male student thought the rule against hoods was because teachers and administrators were worried that students might "have a weapon in our hoods." Another male of color, who liked to wear a do-rag to school, said he was always told to "take it off 'cause the cameras can't recognize me." He wondered how a do-rag could prevent security personnel from recognizing him when the head covering "doesn't even cover nothing but my haircut."

Teachers said that there was a need to be able to identify students from the cameras or from a distance, with one sharing an example of a time when a few individuals (not enrolled students) entered the school to start a fight with students. Students, however, found that the targeting of males of color for the head covering rule weakened this argument. If only males of color are coded, while White males wear hats or hoods without comment, then it is clear, to them, that the rule is not about safety and that

> The dress code as enforced treated males of color as potential threats who needed to be watched over and disciplined.

the issue is not about consistency of enforcement. Rather, the dress code as enforced treated males of color as potential threats who needed to be watched over and disciplined.

Sexualization and blame of females of color

Female students consistently reported that the dress code sexualized them, treating common U.S. clothing options, such as a spaghetti strap tank top, as though they were revealing, alluring outfits that distracted male students from learning. Samantha Parsons (2017), who developed a dress code advocacy guide based on her experiences advocating for a gender-neutral policy in her own community, found that dress codes across the country promote narratives of females as objects and potential victims of harassment, assault, and rape because of their clothing choices (and not the actions of their perpetrators).

FIGURE 2.
Relative risks of being coded and disciplined

	Relative risk of being coded	Relative risk of being disciplined
Black male	1.44	2.18
Latino male	1.11	0.37
White male	0.18	0.18
Multiracial male	0.90	3.64
Black female	1.47	0.78
Latina female	1.14	0.57
White female	0.66	0.43
Multiracial female	1.54	2.45

Lincoln's female students believed that they were coded more often partly because of the number of specific rules related to clothing items traditionally worn by young women in the United States, such as skirts and certain styles of shirts. The large number of rules about what they wear, however, did not mean that females of all races were similarly affected, as females of color, especially those who were Black or multiracial, were disproportionately represented in reports of being coded and formally disciplined. When females of color, breaking the dress code at similar rates to White students, get coded more often, it suggests that teachers and administrators see their clothing as too "revealing," while White female clothing is acceptable. In other words, females of color may be seen as sexual and thus a problem, where White females are not. This experience of females of color presents an example of what Kimberlé Crenshaw has called intersectionality, a way to understand how racism and sexism interact. According to Crenshaw (1989), the "intersectional experience is greater than the sum of racism and sexism" (p. 140) because racism and sexism are compounded, creating a system of structural oppressions whose effects are particularly intense for women of color.

Body type may also be a factor in who is disciplined for dress code violations. One teacher noted, "Dresses are a little touch and go because of girls' shapes. Typically if you are much smaller, it doesn't look as risqué." In other words, two girls could be wearing the same exact piece of clothing, but depending on their body type, one would be out of dress code — and in most cases, those being identified as out of dress code, according to students and teachers, were females of color.

> By insisting that female bodies are the problem, and focusing specifically on female bodies of color, the school perpetuates the mentality that their bodies are primarily sexual.

One teacher reflected on this, sharing that he does not code female students because, "If I ask a girl to change . . . I am afraid of the perception that will put on me as a male teacher. I don't want to be accused of being a pervert." However, this teacher may be an outlier, as overall the teachers and administrators at Lincoln High School did not express concerns

about sexualizing females of color. Yet by insisting that female bodies are the problem, and focusing specifically on female bodies of color, the school perpetuates the mentality that their bodies are primarily sexual.

Moving forward

While several teachers acknowledged concerns about the dress code, some continued to believe the primary issue was not about race, gender, or their intersections, but an issue of inconsistent enforcement. This belief seems to be prevalent across the United States, as Lincoln High School's dress code is pretty typical. However, Lincoln's students, and students across the country, recognize that the inconsistency is not a result of random chance but of teachers and administrators' beliefs about children — that boys of color are potential criminals and that girls of color are sexual beings. Instead of tinkering with specific rules or training teachers to enforce this dress code better, a different type of dress code is needed that helps schools and students to challenge dominant narratives of who they are or could be.

This work is already underway in several districts across the country, including San José Unified School District (SJUSD) in California and Portland Public Schools (PPS) in Oregon. SJUSD administrators are addressing the ways school dress codes sexualize female students by eliminating gender-specific language in their schools' dress codes. Instead of calling out specific garments typically worn by girls, such as spaghetti straps or tube tops, SJUSD's new dress code (2018) states that "Clothing must cover the chest, torso, and lower extremities." In addition, the district's written policy begins with the statement that "the responsibility for the dress and grooming of a student rests primarily with the student and his or her parents or guardians and that appropriate dress and grooming contribute to a productive learning environment." And, importantly, the policy recognizes that asking students to change their clothes takes away from learning time, and it asks administrators to be attentive to how their decisions negatively impact students' educational opportunities.

Portland Public Schools, meanwhile, has taken steps to allow head coverings while also making it possible for security personnel to easily identify students. Their dress code states, "Hats and other headwear must allow the face to be visible and not interfere with the line of sight to any student or staff. Hoodies must allow the student face and ears to be visible to staff" (PPS, 2018). This type of rule allows males of color to wear do-rags or baseball caps, which many students at Lincoln High School preferred to do to cover up their hair, while still enabling school personnel to easily identify them.

Any adoption of a dress code must involve open discussions about how different individuals interpret subjective concepts such as "professional," "distracting," and "good taste." Adults need to be aware of their beliefs about children and young adults and how their beliefs influence their practice: Which students do they call out? Whom do they see as criminals? Whom do they see as distracting? Which infractions do they choose to not see? If a school community fails to ask these questions, female and male students of color will most likely continue to be sexualized or criminalized at the expense of their education.

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Citation: Pavlakis, A. & Roegman, R. (2018) How dress codes criminalize males and sexualize females of color. *Phi Delta Kappan, 100* (2), 54-58.

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One Comment

Donna Lynch September 28, 2018

This article regarding dress codes points to several complex issues regarding the clothing choices school children make, often with little parental or guardian involvement. I understand the problem of dress codes facing public schools as well as the students. I would be interested to learn if charter schools and private schools face the exact same issues, and if not, what accounts for this difference.

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[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.

LITIGATION: CONNECTICUT

Women vs. Connecticut, "Some Thoughts on Strategy" (Circa February 1970)

Whereas the abortion debate in New York was largely—though, as we have seen, by no means exclusively—focused on the legislature, in Connecticut the legislature resisted efforts to reform the state's abortion law, a factor that led advocates for change to focus on the courts instead.

Under Connecticut's 19th-century statute, a woman could be imprisoned for seeking or receiving an abortion, as could anyone who performed an abortion or helped a woman procure one, unless it was necessary for the life of the woman or her fetus. Neither a 1967 bill to add rape as an exception to the abortion law, nor a 1969 bill that would permit therapeutic abortion, ever made it out of committee. There was, however, a deep normative divide between the legislature and many doctors and clergy in the state. As the materials in Part I show, many in the state believed in repeal and counseled women on obtaining legal abortions, in and out of state.

When a group of women's liberation activists organized to challenge Connecticut's statute in the early 1970s, they looked for new pathways of change. The group considered organizing a referral service (with or without the assistance of clergy seeking repeal) in order to increase access to abortion, educate women, and mobilize support for change, and, eventually, to force the question of the law's constitutionality. In ultimately deciding to file a lawsuit arguing that Connecticut's abortion law was unconstitutional, their goal was not only—or perhaps even primarily—to repeal the law. On their list of objectives, "get[ting] rid of Connecticut's law" was third, behind "educat[ing] the world and bring[ing] the subject into the open more..." and "involv[ing] women (lots of them) in a winning fight about an issue that is peculiarly theirs."

I. Objectives

A. To educate the world and bring the subject into the open more (along with questions about women's health care generally);

B. To involve women (lots of them) in a winning fight about an issue that is peculiarly theirs;

C. To get rid of Connecticut's law;

D. To enable as many women as possible to get abortions when they want them.

II. Referral

A. To meet various objectives, this service would have to

1. be efficient and capable of dealing with perhaps hundreds of women a month;

2. be clandestine (to avoid arrests, which would frustrate objective D at least) and therefore involve considerable security consciousness (which would limit our ability to attain objectives A and possible B and D); OR

3. be provocatively public (which would meet objectives A and B and D until the bust and possibly A, B and C after the bust);

4. involve sensitive and sophisticated counseling and other related support services.

B. Arguments for a clandestine service

1. It is needed. We already get calls. The only other organized service is run mostly by men (CCS).

2. We could involve a more or less limited number of women in doing something that's needed for themselves and for their sisters.

3. It would be educational (but in a limited way).

C. Arguments against clandestine service

1. We could only serve a limited number of women and involve a limited number of women in working.

2. If we were seriously worried about getting busted, we would have to be very security conscious. That would be nerve-wracking and possibly destructive to the proper spirit of women's organizing.

3. Our educational and propaganda impact would be minimal.
4. We would be fitting our institutions to meet a stupid law and have less chance of dumping the law altogether.

D. Arguments for a public referral service

1. It could put as much emphasis on education and propaganda as on its basic service. Education is more effective in the context where the subject counts.
2. It could involve lots of women in a public fight for a while.
3. We would be challenging Connecticut to enforce or dump its law. If we were busted we would have a more urgent and perhaps better case (First Amendment rights, too) then in a civil suit.
4. We could see that more women got helped because they would know about us.

E. Arguments against a public referral service

1. We might not be in business long enough to accomplish anything.
2. We might not be able to control who got busted. We would be risking things for women coming to us for help and for doctors. Getting busted is a drag; someone could even end up serving time.
3. Doctors and women might not come or cooperate for fear of the stuff mentioned in number (2) above.
4. We would be prosecuted in Connecticut rather than federal courts; in other words, in courts less likely to react positively to our arguments.
5. The demand might be greater than we (or the "profession") could handle. We might find we do more servicing than educating or organizing.

III. Law suit

A. We have a couple ways of doing it:

1. We can join up with the clergy and Doug Schrader, their lawyer, in one federal suit (not a class suit) involving clergy, women, and possibly doctors all together; OR
2. We can try to do our "own" strictly women's suit in the style of the now-moot New York suit.

B. To meet various objectives we would have to
   1. Involve as many plaintiffs and witnesses as possible and/or get women working on publicity, demonstrations and other aspects of the suit;
   2. Make a lot of noise about it all;
   3. Be willing to press on up to the Supreme Court, which means time, among other things;
   4. Press the basic issues of women's rights rather than vagueness arguments which are more likely to win.

C. Arguments for a suit in general
   1. Without risking our necks we might succeed in getting rid of Connecticut's law.
   2. We cannot really wait for the NY suit because it is nullified by the new NY law.
   3. It is a convenient vehicle for publicity (otherwise known as education or propaganda).
   4. It could be done in various ways—with greater or smaller numbers of people involved and more or less devotion of our resources. In other words, it could be grand scale or just one of several more modest projects.

D. Arguments against a suit in general
   1. The Law is pretty remote from most people and difficult to get people meaningfully involved in.
   2. For all our energy and time, it might not work. We might not win.

E. Arguments about going in with the clergy rather than doing our own
   1. They would supply money, lawyers, respectability.
   2. There would be more kinds of plaintiffs and thus more issues to be raised.
   3. We could supply as many women plaintiffs and women's issues as we could come up with.
   4. They will probably go ahead without us and before we get going on our own suit if we do not join. They would get ACLU support. That would all be wasted resources.

5. BUT A lot of things would be at their initiative ("they" being mostly men).
6. We might not have time to muster maximum publicity and support for the women's part.

IV. General agitation

(We have never discussed this possibility but probably should. Some women in Washington State had demonstrations of 2000 + people in the state capital. Washington is now one state with a bill for abortion on demand before its legislature.)

V. Doing nothing

(The tide of history seems to be running in our direction. Is this the time for us to get involved or the time to become the vanguard in some less popular cause?)

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Women vs. Connecticut Organizing Pamphlet (Circa November 1970)

Women versus Connecticut, as the group came to be called, presented a new model of abortion activism. Abortion reform during the 1960s initially sought to protect women; Women versus Connecticut sought to empower them. Once the group decided to mount a challenge to Connecticut's law, only women, and as many as possible, were to be the plaintiffs, lawyers, organizers, and experts.

What follows is an organizing pamphlet used by Women versus Connecticut to recruit plaintiffs for the lawsuit. The signatories to the document included members of the New Haven women's liberation group, which drew on the students of Yale Law School and the surrounding community. The organizing pamphlet sets forth the group's arguments, explains the process of bringing a lawsuit, and then sets out the grounds of the group's constitutional arguments. Once the group had decided to sue, it was determined to make clear that Women versus Connecticut's effort to legalize abortion was part of a larger struggle for equal voice and equal citizenship. As in New York, the movement recruited hundreds of women as plaintiffs in the case. When filed, there were 858 women named in the complaint; as the suit progressed, that number reached 1,700. Lawyers for the group included Nancy Stearns of the Center for Constitutional Rights,

who played a key role in the Abramowicz *case in New York, and Catherine Roraback (1920–2007), a graduate of Yale Law School who had worked with Professor Thomas Emerson in challenging Connecticut's ban on birth control, which the Supreme Court ruled unconstitutional in the* Griswold *case.*

FOREWORD

About fifteen women came together in February, 1970 because we wanted to do something about abortion. Most of us were also in Women's Liberation; about half had had abortions; most of us had been contacted by women desperate to obtain abortions. As we talked, we began to discover that "the abortion issue" is inseparable from many other dimensions of our lives as women—we just think of it as separate because society has isolated it by making it a crime. In our meetings we began to understand that it was important for us to figure out how abortion connected to the rest of our lives and couch our action in those terms.

At the end of eight months of discussion of our experiences, and research we did on abortion and health care, we decided to try to reach all the women in Connecticut who wanted to work with us to abolish Connecticut's law against abortion. We decided that bringing a lawsuit against Connecticut's anti-abortion law was an important first step toward a decent health care system and women's control over their bodies.

We wrote the statement which follows to summarize for ourselves and new people our thoughts about the relationships we came to see after long discussion and struggle. Newer members need not agree with all of what we now believe, and we expect that the newly expanded group which has decided to call itself Women versus Connecticut will probably evolve its own position. We present it as an introduction because it is the basic stance from which the suit was initiated.

As women in this society, we lack control over our own bodies.

For years women have been under constant pressure to have children. Our culture teaches us that we are not complete women unless we have children. Our husbands and boyfriends encourage us to bear children as proof of their masculinity. Contraception is almost always our responsibility. Contraceptives that are known to be safe are not always effective; contraceptives that are known to be effective are not always safe. Abortion is illegal, and women who get abortions often risk their lives.

Other pressures compel some of us not to have children. If we are unmarried,

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,
Marione Cobb, Jill Hultin, Harriet Katz, Ann Hill,
Gail Falk, Joan Gombos, Nancy Greep

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).

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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, "classif[ies]...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 stat-

utes 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

and test such concerns is the legislature....

The people, acting through their legislature, have in effect decreed that this new life is an innocent victim, not an unjust aggressor.

....

CERTAINLY, THE REPEATED failure of the successive attempts to repeal or liberalize the anti-abortion laws can be attributed realistically, only to a legislative determination to protect fetal life. As recently as December 10, 1968, the Legislative Council recommended to the legislature that no legislative action should be taken on the proposal to liberalize our present laws on abortion. At page 10 in this report, it stated:

> The Council feels that should an unborn child become a thing rather than a person in the minds of people, in any stage of its development, the dignity of human life is in jeopardy. The family, too, which is the very basis of our society, would be minimized or perhaps destroyed.

The aforesaid conclusion by the legislative leaders leaves no room to question, but that their real concern was the protection of fetal life.

....

IT SHOULD BE NOTED that the majority decision leaves the State of Connecticut with no law or control in this area of human relationships. It invites unlimited foeticide (the murder of unborn human beings), as a way of life, in a state long known as the land of steady habits. The Connecticut legislature has historically, consistently, and affirmatively expressed its determination to safeguard and respect human life. The action of the majority constitutes an unwarranted federal judicial intrusion into the legislative sphere of state government. The judiciary was never intended nor designed to perform such a function. I would uphold the constitutionality of the challenged state statutes and deny relief.

Excerpted from *Abele v. Markle,* 351 F. Supp. 224, United States District Court for the District of Connecticut (1972).

Connecticut Legislative Hearing Testimony

Soon after the court declared Connecticut's abortion laws unconstitutional—and just one day before Governor Rockefeller vetoed the New York legislature's attempt to repeal the state's 1970 liberal abortion statute—Connecticut's governor Thomas Meskill called for the legislature to enact a new law. The new abortion bill, introduced in a special ses-

When Prosecutors Jail a Mother for a Miscarriage
NYT Magazine
A Woman's Rights: Part I
BY THE EDITORIAL BOARD

12/28/2018

https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-pregnancy-pro-life.html

The statutes granting personhood rights to fetuses are never more pernicious than when they criminalize acts of God.

Stomach pains woke Keysheonna Reed late one night last December. She climbed into the bathtub, hoping she would not wake any of the other nine people living in her small home in eastern Arkansas. Within minutes, she'd delivered twins, a boy and a girl. Both babies were born dead, the medical examiner would later determine. Their mother — 24 and already the mother of three — panicked. She found an old purple suitcase, put the bodies inside and got into her car. She "began to pray and just drove," she said, according to a court affidavit, eventually leaving the suitcase on the side of County Road 602.

This personal tragedy was soon heightened by a legal one: When the suitcase was found several weeks later, the Cross County Sheriff's Office, understandably, began an investigation and asked the public for information.

Ms. Reed turned herself in. An autopsy was performed, confirming that the babies had died in the womb. No illegal substances were found in their bodies. "Please pray for all the officers and people involved," the sheriff, J.R. Smith, asked in a statement. Ms. Reed was charged with two counts of abuse of a corpse, a felony in Arkansas carrying a minimum sentence of three years and up to a decade in prison. A judge set bail at $50,000, a sum more than twice the per capita income for Cross County. Ms. Reed still awaits trial.

Few reasonable people could read the statute under which she is charged and not believe she is guilty of violating it — "A person commits abuse of a corpse if, except as authorized by law, he or she knowingly … physically mistreats or conceals a corpse in a manner

offensive to a person of reasonable sensibilities." But sending this young woman to prison for even three years, and denying her living children a mother, can serve no public good.

It's hard to find a compelling reason for prosecuting pregnancy loss. Nearly one million known pregnancies end in miscarriage or stillbirth annually, according to government statistics, and, despite improvements in prenatal care and medical technologies, the rate of early stillbirths has stayed stubbornly the same over the past 30 years. The cause is rarely, if ever, definitively found.

The involvement of law enforcement only compounds these traumas. It may deter pregnant women who are miscarrying — and even those with unremarkable pregnancies — from seeking medical help, and it forces health care providers who ought to be caring for their patients to collect evidence. Time and time again, it also jeopardizes the well-being of children left behind when their mothers are jailed.

So what motivates these prosecutions? The reality is that, in many cases, these women are collateral damage in the fight over abortion. As the legal debate over a woman's right to terminate her pregnancy has intensified, so too has the insistence of anti-abortion groups that fertilized eggs and fetuses be granted full rights and the protection of the law — an extreme legal argument with little precedent in American law before the 1970s.

Frustrated by the Roe v. Wade decision that legalized abortion, many in the anti-abortion movement hope for a sweeping rollback under a conservative Supreme Court — one that would block access to abortion even in states that protect women's access to such health services.

"We need to end this," Matt Sande, legislative director for Pro-Life Wisconsin, told Time magazine in 2013. "We need to end surgical abortion, without exception, without compromise, without apology. And that's what personhood does."

THE REALITY IS THAT, IN MANY CASES, THESE WOMEN ARE COLLATERAL DAMAGE IN THE FIGHT OVER ABORTION.

If a fetus were counted as a person under the Constitution, some legal theorists believe, there could be no legal abortion anywhere. Justice Harry Blackmun noted as much in his majority opinion in Roe. "If this suggestion of personhood is established, [Roe's] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [14th] Amendment." Justice Blackmun went on to suggest there is no legal precedent for that stance.

Such a finding would go far beyond restricting abortion. Some common forms of birth control could become illegal if personhood becomes accepted law. And, for many anti-abortion activists, that's the goal.

In 2013, when Senator Rand Paul, a Republican from Kentucky and a physician, introduced the Life at Conception Act to ban abortion and grant the unborn all the legal protections of the 14th Amendment beginning at "the moment of fertilization," he insisted that it would not curtail access to birth control, including the so-called morning-after pill. Tony Perkins of the Family Research Council disagreed, tweeting: "W/due respect to @SenRandPaul, Plan B isn't 'basically' birth control. Its function is to create conditions hostile to human life in utero." Though Plan B is, in fact, birth control — it prevents pregnancy from occurring — Mr. Paul got in line.

Republicans have made several attempts to advance the premise of fetal personhood in both state and federal law, including in a proposed version of President Trump's tax bill passed by Congress last December. Last month Alabama voters approved a ballot initiative to change the State Constitution to read, "Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion," and to say it is public policy to "recognize and support the sanctity of unborn life and the rights of unborn children." A federal appeals court upheld a similar Tennessee measure earlier this year.

These activists are as unapologetic about pressuring prosecutors to treat miscarriage as murder, if it serves the cause of ending abortion. The fact that they're targeting women who had no intention of aborting their fetuses — and who are often deeply grieving for a lost pregnancy — is a societal price they appear willing to accept. Provided someone else pays

it. The vehicles for these prosecutions tend to be ancient statutes that were enacted for entirely different purposes.

Arkansas, where Keysheonna Reed is being charged, is one of several states that have outlawed the abuse of a corpse for decades. Most likely, the original intention of such regulations was to curb necrophilia or to have legal recourse when a murderer destroyed a body. Today, however, prosecutors consistently turn to them to punish pregnancy loss.

Abusing a corpse is only one example — the twin laws of concealing a birth and concealing a death are also felonies in Southern states like Arkansas and Virginia (and a misdemeanor in several more). It's no coincidence that women until the 1850s were put to death for these crimes. While courts have ruled that to be cruel and unusual punishment, these laws are now frequently deployed as a workaround for anti-abortion vigilantes.

Katherine Dellis felt dizzy one day in 2016, passed out and woke up on her bathroom floor to find her stillborn fetus beside her. The baby's lungs had never been exposed to air, a medical examiner in Virginia's Franklin County later concluded, meaning the fetus, about 30 to 32 weeks along, had died up to three days before. Ms. Dellis cut the umbilical cord, wrapped the remains in her bath mat, which she then put in a garbage bag, and sought medical care. Unaware of the bag's contents, her father disposed of it in a public dumpster.

After a doctor raised the alarm, a local prosecutor tried Ms. Dellis, 25, and convicted her of concealing a dead body. She was sentenced to five months in jail. Her appeal, which argued that the "fetus was never alive" so it "cannot be dead," generated interest in the case from both opponents and proponents of abortion rights.

Gov. Ralph Northam of Virginia pardoned Ms. Dellis this past June, though not before an appellate court upheld the decision, making the argument that anti-abortion activists wanted: that under the law a stillborn fetus is the dead body of a person.

Women facing these harrowing situations have few advocates beyond a handful of scholars and lawyers, with one nonprofit group, National Advocates for Pregnant Women, frequently organizing their defense.

SOME COMMON FORMS OF BIRTH CONTROL COULD BECOME ILLEGAL IF PERSONHOOD BECOMES ACCEPTED LAW. AND, FOR MANY ANTI-ABORTION ACTIVISTS, THAT'S THE GOAL.

Even New York is no stranger to these types of prosecutions. In 2008, a car driven by a 28-year-old woman named Jennifer Jorgensen crossed the double-yellow line of Whiskey Road in Ridge, on Long Island. The head-on collision that ensued cut three lives short. The driver of the car Ms. Jorgensen hit, Robert Kelly, 75, died at the scene; his wife, Mary Kelly, 70, died of her injuries three weeks later. The infant that Ms. Jorgensen, eight months pregnant, delivered via emergency cesarean section shortly after the accident died five days later.

In 2012, a Suffolk County jury acquitted Ms. Jorgensen of two counts of second-degree manslaughter in the deaths of the Kellys, one count of operating a motor vehicle while under the influence of drugs and alcohol, and one count of aggravated vehicular homicide.

The jury found Ms. Jorgensen guilty of a single manslaughter charge, holding that she recklessly caused the death of her daughter because she had not been wearing a seatbelt. She was sentenced to up to nine years in prison.

New York's highest court threw out the conviction three years later, ruling that the state's law doesn't hold women criminally responsible in such cases. If it did, a pregnant woman who ignored doctor's orders to stay in bed, took prescription or illegal drugs, shoveled snow or carried groceries could be charged with manslaughter if those acts resulted in the premature birth and death of the fetus, wrote Judge Eugene Pigott Jr. for the court's majority.

"The imposition of criminal liability upon pregnant women for acts committed against a fetus that is later born and subsequently dies … should be clearly defined by the Legislature, not the courts," Judge Pigott wrote. "It should also not be left to the whim of the prosecutor."

That ruling sent a strong signal to Empire State prosecutors but, of course, has no effect outside the state's borders. In this matter, however, the rule in New York should be the rule for the country. Legislatures and courts around the nation should make it clear that women

who miscarry or accidentally harm their fetuses should be treated as grieving parents, not criminals.

Federal Court of Appeals Decision Prevents Pregnant Woman's Challenge to Wisconsin's "Unborn Child Protection Act"

June 18, 2018 - Today a three-judge panel of the U.S. Court of Appeals for the Seventh Circuit vacated a well-reasoned decision by a federal district court that had struck down Wisconsin's Unborn Child Protection Act (Act 292) as unconstitutional. The appeals court panel avoided grappling with Act 292's numerous constitutional problems by ruling that the woman challenging it, Tamara Loertscher, could not continue to do so because she had moved out of Wisconsin.

Lynn M. Paltrow, Executive Director of National Advocates for Pregnant Women said "As a result of this decision, women in Wisconsin who are pregnant and seek health care must continue to fear that the government will detain them, force them into treatment, and even send them to jail if they use - or even disclose past use of - alcohol or a controlled substance."

This is the second time that a federal court has relied on "mootness" grounds to prevent a Wisconsin woman from challenging Act 292. In the first case, a federal court held that because Alicia Beltran was no longer being forced to submit to treatment, she did not have standing to challenge the law. Nancy Rosenbloom, Director of Legal Advocacy at National Advocates for Pregnant Women explained that "The decision today demonstrates that it is extremely difficult for a woman to get justice in the federal courts when a law deprives her of her constitutional rights because she is pregnant."

The federal trial court decision that is vacated as a result of the 7th Circuit decision had concluded that Act 292 is a vaguely worded law that violates the U.S. Constitution's guarantee of due process of law. That court explained that Act 292 "affords neither fair warning as to the conduct it prohibits nor reasonably precise standards for its enforcement." As a result, the district court concluded, "erratic enforcement, driven by the stigma attached to drug and alcohol use by expectant mothers, is all but ensured."

Ms. Loertscher's own experience confirmed this conclusion. As a result of her seeking health care for a thyroid condition and to confirm pregnancy -- what the federal district court described as "her commitment to having a healthy baby and to take care of herself"-- the government seized her, ordered her into forced treatment and jailed her pursuant to Act 292. As the district court explained, "her history of modest drug and alcohol use, which she self-reported while seeking medical care," became the basis for Taylor County's claim that she "habitually lacked self-control" and a court hearing to determine whether she could be deprived of her freedom.

Under Act 292 Ms. Loertscher had no right to legal counsel appointed at that first hearing, but a lawyer was immediately appointed to represent her 14-week fetus. Following the hearing at which she was not represented, she essentially had the choice between being forcibly detained indefinitely in unnecessary residential drug treatment, or going to jail for 30 days. Ms. Loertscher ended up incarcerated in a county jail for weeks, where she was also held in solitary confinement for several days because she declined to take a pregnancy test.

Today's appeals court opinion does not address any of the evidence presented and ruled on by the district court. It ignores fundamental questions of whether Act 292 is constitutional in its wording, procedures, or in authorizing the state to lock up pregnant women who are not represented by counsel and without requiring any diagnosis or qualified medical evidence. The opinion merely denies this particular woman the opportunity to bring the challenge, despite her having diligently pursued three and one-half years of litigation and presented an extensive record showing how Act 292 strips pregnant women of their constitutional rights.

Nancy Rosenbloom explained, "In vacating on supposed mootness, the 7th Circuit opinion suggests that Act 292 is both clear and benign. It is neither. For example it omits the facts that Ms. Loertscher was not diagnosed with a substance use disorder and that she did not use any substances after confirming that she was pregnant. The opinion ignores that the doctor whose testimony was used to order unnecessary forced treatment admitted she was not an expert on the effects of drugs and had no idea her testimony would be used as a basis for jailing a pregnant woman."

Sarah Burns of the NYU School of Law Reproductive Justice Clinic said, "Competent, confidential, patient-centered prenatal care, above all else, is the greatest guarantee of a healthy pregnancy. Ms. Loertscher voluntarily sought that and the government took that away from her. The state violated her confidentiality, ordered her into a treatment facility that did not provide prenatal care, and

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incarcerated her in a county jail designed to hold suspected criminals, which also did not provide prenatal care."

National Advocates for Pregnant Women, the NYU School of Law Reproductive Justice Clinic, and the Perkins Coie law firm in Madison, Wisconsin represent plaintiff Tamara Loertscher.

For more information, please contact Shawn Steiner, Media and Communications Manager SCS@AdvocatesforPregnantWomen.org | 212.255.9252 | 917.497.3037

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Arkansas Court of Appeals Overturns Criminal Conviction for Concealing a Birth

March 14, 2018

The Arkansas Court of Appeals has issued a unanimous ruling reversing Anne Bynum's conviction for "concealing a birth" that resulted in a sentence of six years in prison. The criminal charge and conviction stemmed from the state's claims about Ms. Bynum's actions after she experienced a stillbirth at home in 2015. The three-judge panel found that the trial court in Drew County had abused its discretion by allowing the jury to consider evidence about Ms. Bynum's past pregnancies and outcomes including abortion, that "clearly prejudiced" the verdict in the case.

It is rare to have a conviction overturned on the grounds of "abuse of discretion." As the court found in throwing out Ms. Bynum's conviction, the trial court here "act[ed] improvidently, thoughtlessly, or without due consideration." Because the prosecutor introduced and the trial court allowed prejudicial evidence, the Court of Appeals remanded the case back to the trial level, which allows the prosecutor to choose whether to retry Ms. Bynum on the same charge.

National Advocates for Pregnant Women (NAPW) Director of Legal Advocacy Nancy Rosenbloom said, "The appeals court did not rule on several constitutional challenges to the law and how it was used, finding that the original trial attorney did not preserve those issues for appellate review. If the prosecutor opts to bring Ms. Bynum to trial again, constitutional claims will be raised."

Ms. Bynum, an Arkansas mother, was arrested and charged with abuse of a corpse and concealing a birth after she had a pregnancy that ended with a stillbirth at home. After the stillbirth, Ms. Bynum safeguarded the fetal remains and several hours later brought those remains to a hospital, asking to see a doctor. Ms. Bynum was arrested five days later on charges of "concealing a birth," a felony carrying a potential six-year prison sentence and fine of up to $10,000, and "abuse of a corpse," a felony carrying a sentence of up to 10 years in prison and a fine of up to $10,000. Local law enforcement alleged that Ms. Bynum took a number of pills to induce an abortion, after which her pregnancy ended with a stillbirth. In fact, as the Court of Appeals recognized, Ms. Bynum had planned to give birth and have her baby adopted.

After a motion made by defense counsel, the trial court dismissed the abuse of a corpse charge before the case went to the jury. The jury, however, convicted her of concealing a birth. This law has only been used rarely and only in cases where people attempted to conceal the fact of a birth altogether. In this case the prosecutor argued that the jury should convict Ms. Bynum – an adult in her 30's - for concealing a birth because she had not told her mother she was pregnant and because she temporarily placed the stillborn fetus in her car for several hours before going to the hospital. He made this claim despite the evidence that established she notified many people about her pregnancy, contacted several people after the stillbirth, and then went to the hospital with the fetal remains. Notably, in the decision, the court recognizes that the Arkansas concealing birth law, which "does not provide for any exceptions, including a 'grace period' for concealment," is "harsh." NAPW Executive Director Lynn M. Paltrow said, "The concealing birth law and this prosecution will leave pregnant women in Arkansas with extreme confusion about what to do when they have a stillbirth or miscarriage at home. If a woman waits even one minute before calling the authorities, she could potentially be charged with concealing a birth."

Paltrow continued, "Pregnant women should not have to endure the threat of criminal prosecution for pregnancy or for failing to guarantee a healthy pregnancy outcome."

NAPW represented Ms. Bynum on the appeal. Consulting attorney Daniel Arshack argued for NAPW in front of a three-judge panel in January. The National Perinatal Association offered a friend of the court (amicus) brief in support of Ms. Bynum in this case, which the court did not accept without explaining why. Pending the final outcome of the case, Ms. Bynum has been home with her young son.

For more information, please contact Shawn Steiner, Media and Communications Manager, NAPW: SCS@AdvocatesforPregnantWomen.org | 212.255.9252 | 917.497.3037

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ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-16-879

ANNE O'HARA BYNUM APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** March 14, 2018 APPEAL FROM THE DREW COUNTY CIRCUIT COURT [NO. 22CR-15-58] HONORABLE SAM POPE, JUDGE REVERSED AND REMANDED

DAVID M. GLOVER, Judge

Anne O'Hara Bynum was charged in Drew County Circuit Court with the offenses of concealing birth and abuse of a corpse. The circuit court granted Bynum's motion for directed verdict as to the offense of abuse of a corpse.[1] A jury, after deliberating for only four minutes, convicted Bynum of concealing birth, a Class D felony, and sentenced her to the maximum sentence of six years in prison. Bynum appeals, arguing the circuit court (1) erred in denying her motion to dismiss, timely renewed as a motion for directed verdict, both as a matter of statutory construction and constitutional law; (2) abused its discretion in allowing discussion of abortion, evidence of her abortion history, and evidence she ingested medication before giving birth; and (3) erred in allowing evidence of her purported admission during a pretrial competency exam when competency was not an issue at trial.

[1] The State cross-appealed the circuit court's grant of Bynum's directed-verdict motion for this offense but makes no argument on appeal regarding this issue. Therefore, the State has abandoned its cross-appeal.

We find merit in Bynum's argument that the circuit court abused its discretion in allowing the discussion of prior abortions, evidence of her abortion history, and evidence that she ingested medication prior to giving birth; therefore, we reverse and remand.

Factual Summary

There are no factual disputes. In early 2015, Bynum, a 37-year-old divorced woman living with her mother, stepfather, brother, and four-year-old son, T.B., outside of Monticello, discovered she was pregnant. She believed her mother would not allow her and T.B. to continue living in her home if her mother learned Bynum was pregnant; therefore, Bynum did not tell her mother about the pregnancy. However, Bynum told friends, her attorneys, and her priest about the pregnancy and of her intent to put the child up for adoption when it was born.

On March 27, 2015, when Bynum was more than thirty weeks pregnant, she traveled to a hotel in Little Rock and met her friends, Andrea Hicks and Karen Collins (the person whom she wanted to adopt her baby), the next day. Driving to Little Rock, Bynum ingested 44 casings from the drug Arthrotec, which contained the drug Misoprostol; she believed the Misoprostol would induce labor. Bynum's reasoning was it was becoming more difficult to lie all the time, she was getting larger, she was becoming attached to the baby, and she was concerned she would not be able to give the baby up if she carried it much longer. She claimed she was not trying to hurt the baby but was just trying to safely deliver it. Her plan was for Collins to take the baby to Children's Hospital after delivery; however, Bynum did not go into labor while in Little Rock. She returned home to Monticello, where she ingested eight more Arthrotec casings. Then, on March 31, 2015,

she learned from her attorneys, Sara Hartness and Sandra Bradshaw, that Collins would not be able to adopt her child due to domestic-abuse issues concerning her own children and her ex-husband; that information did not dissuade Bynum from pursuing other adoption alternatives with another family.

Bynum went into labor in the middle of the night on April 1, 2015, at her mother's mobile home. By herself, she delivered the fetus, which was still in its intact amniotic sac, in the bathroom after 3:00 a.m.[2] She said although she called for her brother, who was sleeping in the living room, he did not answer, and she did not awaken any other person in the house. According to Bynum, the baby did not move or cry, and she concluded the baby was deceased. In her third interview with Deputy Tim Nichols of the Drew County Sheriff's Department, Bynum stated she placed the baby in plastic sacks, put the bundle on a towel, cleaned up the bathroom, and took the baby to her vehicle, where she placed it on the front seat. She admitted she took those actions to keep her mother from finding out about the birth. Bynum stated she would have left the fetal remains in the bathroom if she had "felt like getting kicked out of the house immediately"; further, she placed the baby in the front seat of her vehicle because her vehicle was parked in front of the house and her mother always went out the back door.

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[2] Bynum had been pregnant with twins, but one fetus died earlier in the pregnancy, at an estimated gestational age of 16 weeks, while the second fetus died at an estimated gestational age of 33 weeks. The fact there were two fetuses was unknown to Bynum until the fetal remains were examined by a medical examiner. While there were two fetuses, Bynum was charged with only one count of concealing birth, and for the purposes of this opinion, we will refer to a single fetus.

Bynum's recall of events was that she became lightheaded after placing the baby in her vehicle, and she knew she could not drive; so she went back inside and went back to bed. Her mother awakened her a little after 6:00 a.m. Bynum got T.B. dressed, and her mother took him to school. Bynum ate a bowl of cereal and texted Hartness, who advised her to go see a doctor. Bynum had to wait until 8:00 a.m., when the doctor's office opened, to make an appointment; she attempted to see two doctors, but was unable to secure an appointment for that day with either of them. In the meantime, Hartness called a funeral home and was advised to have Bynum take the fetal remains to the hospital. Bynum arrived at Drew Memorial Hospital at approximately 10:40 a.m. on April 1. The fetal remains were subsequently examined by a medical examiner at the Arkansas State Crime Lab, where it was determined that the fetus was stillborn.

Sufficiency of the Evidence

On appeal, a motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Stearns v. State*, 2017 Ark. App. 472, 529 S.W.3d 654. Our court views the evidence in the light most favorable to the State and affirms if there is substantial evidence to support the verdict; only evidence supporting the verdict will be considered. *Id.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Kauffeld v. State*, 2017 Ark. App. 440, 528 S.W.3d 302. Our court does not weigh the evidence presented at trial or assess the credibility of the witnesses, as those are matters for the fact-finder. *Id.* The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Mercouri v. State*, 2016 Ark. 37, 480 S.W.3d 864.

When reviewing a sufficiency-of-the-evidence challenge, appellate courts consider evidence both properly and improperly admitted. *Means v. State*, 2015 Ark. App. 643, 476 S.W.3d 168.

Arkansas Code Annotated section 5-26-203(a) (Repl. 2013) provides that a person commits the offense of concealing birth "if he or she hides the corpse of a newborn child with purpose to conceal the fact of the child's birth or to prevent a determination of whether the child was born alive."

Bynum argues Arkansas Code Annotated section 5-26-203(a) cannot apply to the facts of this case because the statute "does not criminalize a woman's choice to withhold the fact of pregnancy or a stillbirth from her own mother," and the State "presented no proof of hiding or prevention of the determination of whether there was a live birth." Bynum argues she did not conceal the delivery of her stillborn child, as she disclosed the fact she had delivered the child by contacting her attorney via text, seeking medical assistance, and taking the fetal remains to the hospital within hours after the delivery, thereby facilitating the determination that it was a stillbirth. Bynum contends this statute seeks to punish people who seek to permanently conceal a birth, not those who do not immediately tell their mothers about a stillbirth. She alleges that section 5-26-203(a) does not include a requirement to report a stillbirth, much less prescribe a time limit for doing so.

We hold that sufficient evidence supports Bynum's conviction under the statute. To support a conviction under this statute, the State must prove that a person hid a newborn's corpse with purpose (1) to conceal the fact of the child's birth; or (2) to prevent a

determination of whether the child was born alive.[3] One's intent or purpose at the time of an offense, being a state of mind, can seldom be positively known by others. *Turner v. State*, 2018 Ark. App. 5, ___ S.W.3d ___. Since intent cannot ordinarily be proved by direct evidence, jurors are allowed to draw on their common knowledge and experience to infer intent from the circumstances. *Id.* Because of the difficulty in ascertaining a person's intent, a presumption exists that a person intends the natural and probable consequences of his or her acts. *Id.*

Here, Bynum admitted she hid her stillborn child from her mother when she wrapped the child in plastic sacks, laid the bundle on a towel, placed it in the front seat of her vehicle, and locked the car. Bynum testified she knew her mother would not see the stillborn child because her mother left the house through the back door, not the front door, and Bynum's vehicle was parked in front of the house. The statute does not specify how long a newborn's corpse must be concealed to be found guilty of this offense, nor does it provide for the prospect that a person can conceal a birth by hiding the corpse temporarily but then can be exempt from the statute's dictates if he or she reveals the birth to a person a few hours later.

Viewing the evidence in the light most favorable to the State, as we must, we hold that the jury, as the finder of fact and the assessor of witness credibility, could, on the evidence presented, determine that Bynum purposely concealed the fact of the child's birth

[3] The evidence shows medical personnel were able to determine that the child was stillborn; therefore, the second purpose for concealing the birth—to prevent the determination of whether the child was born alive—does not apply in this case.

when she hid the corpse of her stillborn child in her vehicle, thus committing the offense of concealing birth. Therefore, we affirm on this point.

Constitutional Arguments (Void for Vagueness)

In her motion to dismiss, Bynum argued Arkansas Code Annotated section 5-26-203 is void for vagueness because "it lacks ascertainable standards of guilt such that persons of average intelligence must necessarily guess at its meaning and differ as to its application." (citing *Booker v. State*, 335 Ark. 316, 984 S.W.2d 16 (1998)). She argues a person of reasonable intelligence "could not have known that experiencing a stillbirth at home at 3 a.m. and not telling her mother, but telling her lawyer, physicians, and medical authorities and bringing the unaltered fetal remains to a hospital within eight hours constitutes a crime." Bynum further contends the statute is vague because it encroaches upon a defendant's fundamental constitutional privacy rights and infringes on a defendant's due-process rights to liberty and privacy under the Fourteenth Amendment.

Preclusion. First, we must determine if Bynum can make a constitutional argument on appeal. The State argues Bynum cannot raise a challenge regarding the constitutionality of section 5-26-203 because she failed to notify the Attorney General of her intent to mount a constitutional challenge. Arkansas Code Annotated section 16-111-111 (Repl. 2016) (formerly codified at Arkansas Code Annotated section 16-111-106), provides, "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. . . . [I]f [a] statute is alleged to be unconstitutional, the Attorney General of the State shall also be served with a copy of the proceeding and be

entitled to be heard." The purpose of notifying the Attorney General of constitutional attacks on statutes is to prevent a statute from being declared unconstitutional in a proceeding that might not be a complete and fully adversarial adjudication. *In re Guardianship of A.M.*, 2012 Ark. 278. We disagree with the State's argument that Bynum's arguments regarding the constitutionality of section 5-26-203, if preserved, cannot be heard for failure to notify the Attorney General. The cases cited by the State in support of this contention are civil matters, not criminal matters. In a criminal trial, the prosecutor, who is the person who determines what criminal charges to bring against a defendant, is necessarily a party to the matter and is available to provide a complete and fully adversarial adjudication of the matter of the constitutionality of a criminal statute. As the State was a party to the proceedings and had the opportunity to fully defend against the constitutional challenge, we hold the State's preclusion argument must fail.

Encroachment. Even though Bynum is not precluded from making constitutional arguments on appeal, we nevertheless hold that her arguments that the statute is vague due to encroachment on a defendant's privacy rights and is a violation of due-process rights to liberty and privacy under the Fourteenth Amendment are not preserved for our review. These arguments were mentioned in passing to the circuit court; no substantial argument was presented. In criminal cases, issues raised, including constitutional issues, must be presented to the circuit court to preserve them for appeal; the circuit court must have the benefit of the development of the law by the parties to adequately rule on the issues. *Gooch v. State*, 2015 Ark. 227, 463 S.W.3d 296. We will not consider an argument raised for the first time on appeal or that is fully developed for the first time on appeal. *Id.* Furthermore,

a party cannot change his or her grounds for an objection or motion on appeal but is bound by the scope of arguments made at trial. *Id.*

Fair Notice. Bynum next argues that finding the concealing-birth statute to be constitutional is an impermissible judicial expansion of the law and makes the statute too vague to give any pregnant woman and newly delivered mother clear notice of what constitutes concealment of birth. While this argument was preserved for appellate review, we cannot agree with Bynum's contention.

There is a presumption of validity attending every consideration of a statute's constitutionality that requires the incompatibility between it and the constitution to be clear before the statute is held to be unconstitutional; if possible, the appellate courts will construe a statute so that it is constitutional. *Anderson v. State*, 2017 Ark. 357, 533 S.W.3d 64. Any doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality, and the heavy burden of demonstrating the unconstitutionality is on the one attacking the statute. *Id.* As statutes "are presumed to be framed in accordance with the Constitution, they should not be held invalid for repugnance thereto unless such conflict is clear and unmistakable." *Bowker v. State*, 363 Ark. 345, 355, 214 S.W.3d 243, 249 (2005). "Invalidating a statute on its face is, manifestly, strong medicine that has been employed sparingly and only as a last resort." *Anderson*, 2017 Ark. 357, at 3, 533 S.W.3d at 67.

A law is unconstitutionally vague under due-process standards if it does not give a person of ordinary intelligence fair notice of what is prohibited, and it is so vague and standardless that it allows for arbitrary and discriminatory enforcement. *Bowker, supra.* The constitutionality of a statutory provision being attacked as void for vagueness is determined

by the statute's applicability to the facts at issue. *Id.* When challenging the constitutionality of a statute on grounds of vagueness, the person challenging the statue must be one of the "entrapped innocent" who has not received fair warning; if, by his or her action, that individual clearly falls within the conduct proscribed by the statute, he cannot be heard to complain. *Id.*

Concealment. A person conceals a birth if the corpse of a newborn child is hidden for the purpose of either concealing the fact of the child's birth or preventing a determination of whether the child was born alive. The portion of the statute at play in this case is whether the child was hidden to conceal the child's birth. Bynum argues she could not have known that experiencing a stillbirth at home at 3 a.m. and not telling her mother, but telling her attorney, physicians, and medical authorities later in the morning and taking the fetal remains to a hospital eight hours later constitutes a crime. Bynum further argues that the statute was impermissibly expanded by the circuit court from a statute prohibiting an intentional action—concealing—to effectively mandating specific actions—reporting within a time frame. We cannot agree.

There is no question Bynum hid the stillborn fetus by placing it in her vehicle, where only she knew of it. Furthermore, as discussed above, the jury was tasked, as the finder of fact, to decide why Bynum had placed the stillborn fetus in her vehicle, and the jury determined it was to conceal the fact of the birth. This statute does not provide for any exceptions, including a "grace period" for concealment, nor does it require the concealment be permanent. A jury could determine that the offense was committed when Bynum hid the fetus in her vehicle. While harsh, this statute is clear enough to survive Bynum's

constitutional challenge. Bynum cannot, in other words, successfully claim to be an "entrapped innocent," as her actions fell within the conduct proscribed by the statute. We affirm on this point.

Evidentiary Issues

Bynum next argues the trial court abused its discretion by allowing discussion of abortion, Bynum's abortion history, and evidence that Bynum had ingested medication prior to giving birth. We agree that the trial court abused its discretion in allowing this information to be presented to the jury; therefore, we reverse and remand on this issue.

A circuit court has broad discretion in evidentiary rulings, and the appellate courts will not reverse an evidentiary ruling absent an abuse of that discretion. *Jefferson v. State*, 2017 Ark. App. 536, 532 S.W.3d 593. Abuse of discretion is a high threshold that does not simply require error in the circuit court's decision but requires the circuit court act improvidently, thoughtlessly, or without due consideration. *Id.* Furthermore, we will not reverse absent a showing of prejudice, as prejudice is not presumed. *Id.*

Bynum filed a motion in limine on August 10, 2015, seeking to prohibit the State from referencing or introducing evidence she had ingested pharmaceutical substances prior to her delivery of the stillborn fetus and to prevent any mention of abortion. She argued there was no contention pharmaceutical drugs had caused the stillbirth; therefore, evidence of such ingestion was not probative of any element of the offense charged and was therefore not relevant. She further argued that even if there was some relevance, prejudice would outweigh any probative value. The State opposed the motion, arguing her plan to achieve concealment was to take the labor-inducing drugs to induce premature delivery in secret,

and such actions were proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The State claimed it was entitled to present evidence that explained the act, provided a motive for acting, or illustrated the accused's state of mind. After a hearing on the motion on February 16, 2016, the circuit court denied Bynum's motion, holding that the State bore the burden of showing the purpose to conceal, and proof of a plan or motive was helpful and made the motive or plan admissible.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence." Ark. R. Evid. 401. Rule 402 of the Arkansas Rules of Evidence provides, "All relevant evidence is admissible, except as otherwise provided by statute or by these rules or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible." Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ark. R. Evid. 403. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ark. R. Evid. 404(b).

Bynum makes a passing argument that constitutional due process guarantees "fundamental fairness," which the State argues is not preserved for appellate review because it was not made below. The State is correct; no constitutional argument was made to the circuit court. Appellate courts will not consider an issue raised for the first time on appeal. *Gooch*, *supra*.

The State argues that Bynum failed to object to the admission of the three recorded statements she gave to the sheriff's department, and that this court should not address her expanded arguments that are raised for the first time on appeal. We do not agree with the State's assertion. Bynum made a motion in limine to exclude evidence of her ingestion of the pharmaceutical substances prior to delivery and to exclude any discussion of abortion. The circuit court denied her motion. Therefore, Bynum has properly preserved this issue for appellate review.

The State argues the circuit court properly admitted evidence of abortion, Bynum's Arthrotec consumption, and her abortion history under Rule 404(b) of the Arkansas Rules of Evidence because, even though it did not speak directly to an element of the charges against her, it was relevant to demonstrate proof of her motive to induce labor through abortion-related drugs and then conceal the birth. Bynum counters that the evidence was not relevant and served only to support the State's theory that she had intended to have an abortion rather than an early delivery. She further argues such evidence inflamed the jurors' passions and encouraged them to deliver a guilty verdict in four minutes on the improper basis of her abortion history and ingestion of Arthrotec.

We find merit in Bynum's argument and hold that the circuit court abused its discretion in admitting this evidence. The elements of the offense of concealing birth that must be proved by the State are that the corpse of a newborn child is hidden with purpose (1) to conceal the fact of the child's birth or (2) to prevent a determination of whether the child was born alive. It is undisputed that the child was not born alive. Neither whether Bynum had taken pharmaceutical drugs prior to delivery nor any evidence of abortions (or

the number of them) she had previously undergone is relevant to the charge that she had committed the offense of concealing birth; they did not tend to make it more or less probable Bynum had hidden her newborn's corpse with purpose to conceal the birth. Even if they could be deemed relevant, their probative value was substantially outweighed by the danger of unfair prejudice. No evidence was presented to show Bynum's ingestion of Arthrotec was the reason the child was stillborn, and rightly so, as Arkansas Code Annotated section 5-61-102(c) (Repl. 2016), the statutory provision addressing unlawful abortion, provides, "Nothing in this section shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero." Therefore, Bynum could not be charged with, or convicted of, a criminal offense in the death of her stillborn child; yet the State was allowed—through the introduction of the evidence of Bynum's prior abortion history and that she had taken medication prior to delivery of her stillborn child that might induce early labor—to imply Bynum's "[M]otive or plan" was to have another abortion. Bynum's attorney rhetorically asked at oral argument, "motive or plan to do what?" The only evidence of plan or motive was that Bynum intended to have her baby adopted, that she had taken substantial steps to do just that by contacting an adoption attorney, that she was attempting to have one of her friends adopt the child, and when that was not possible, that she pursued alternative adoptive placements. Bynum was clearly prejudiced by the introduction of this irrelevant evidence, as shown by the four-minute verdict and maximum prison sentence allowed by law.

Purported Admission During Pretrial Competency Examination

In her last argument, Bynum contends the circuit court abused its discretion in allowing her purported admission during a pretrial competency exam, when competency was not an issue at trial. Prior to trial, Bynum's defense counsel requested an evaluation of Bynum's mental competence at the time of her alleged conduct, and the circuit court ordered a competency exam. Dr. Myeong Kim performed the mental evaluation, determining Bynum was competent at the time of the offense and was competent to stand trial. Dr. Kim noted in his report that Bynum was advised of the nature and purpose of the exam, the exam was voluntary and not confidential, a report would be made to the circuit court, and the examiner might be required to testify. Having been apprised of these parameters, Bynum agreed to be interviewed. Over Bynum's objection, Dr. Kim was called as a witness for the State at trial, and his testimony was that Bynum had told him she was guilty of concealing birth but not guilty of abusing a corpse. Bynum argues it was error for that statement to be admitted.

A circuit court's decision to admit expert testimony is reviewed for an abuse of discretion. *Miller v. State*, 2010 Ark. 1, 362 S.W.3d 264. To show that a circuit court abused its discretion, it must be established the circuit court acted improvidently, thoughtlessly, or without due consideration, thereby causing prejudice. *Id.*

Bynum argues that even though there was no issue raised at trial regarding her competency, the circuit court nevertheless, over her objection, allowed Dr. Kim to testify about statements she allegedly made during the competency exam. Dr. Kim was declared to be an expert in the field of forensic psychological examinations. He testified to, and

included in his report, his recollection that Bynum told him during her examination that she was guilty of concealing birth but not guilty of abusing a corpse.

Bynum argues admission of this statement violated her federal constitutional rights to due process and against self-incrimination. In support of her argument, Bynum cites *Porta v. State*, 2013 Ark. App. 402, 428 S.W.3d 585, in which our court held it was error for the circuit court to allow a forensic psychologist to testify about incriminating statements made by Porta during the mental-health examination during the State's case-in-chief because allowing the incriminating statements placed Porta in a situation that required him to sacrifice one constitutional right (exercising his Fifth Amendment right to not incriminate himself) in order to claim another (his due-process right to seek out available defenses).

We cannot reach the merits of Bynum's constitutional arguments because these specific arguments were never made to the circuit court. Even constitutional arguments must be first raised in the circuit court to preserve them for appellate review. *Gooch, supra.*

Bynum next argues that allowing her statement to Dr. Kim that she had committed the offense of concealing birth violated the physician-patient privilege under Rule 503 of the Arkansas Rules of Evidence. Arkansas Code Annotated section 5-2-307 provides that a statement made by a person during an examination is admissible as evidence only to the extent permitted by the Arkansas Rules of Evidence and if the statement is constitutionally admissible. Arkansas Rule of Evidence Rule 503(d)(2) provides, "If the court orders an examination of the physical, mental, or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule

with respect to the particular purpose for which the examination is ordered unless the court orders otherwise."

Like her constitutional arguments, Bynum has raised the violation of evidentiary rules for the first time on appeal. Because she did not make this argument to the circuit court, it is not preserved for appellate review. *Gooch, supra.*

Bynum's last argument is that Dr. Kim's testimony regarding her statements made during her competency exam amount to a legal conclusion. We do not agree. A legal conclusion is opinion testimony that "tells the jury what to do." *Marts v. State*, 332 Ark. 638, 642, 968 S.W.2d 41, 48 (1998). As the State points out, Dr. Kim did not offer any opinion testimony about whether Bynum was guilty of concealing birth; he merely reported that Bynum made the statement during her examination that she was guilty of concealing birth. He did not testify whether he believed Bynum was guilty of concealing birth. Dr. Kim provided a factual account of Bynum's admission; this recitation alone did not make the statement become Dr. Kim's opinion. It was not an inadmissible legal conclusion. We affirm on this point.

Reversed and remanded.

GRUBER, C.J., agree.

HARRISON, J., concurs.

ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-16-879

	Opinion Delivered March 14, 2018
ANNE O'HARA BYNUM APPELLANT	APPEAL FROM THE DREW CIRCUIT COURT [NO. 22CR-15-58]
V.	HONORABLE SAM POPE, JUDGE
STATE OF ARKANSAS APPELLEE	CONCURRING OPINION

BRANDON J. HARRISON, Judge

I join my colleagues' thorough opinion in every respect except one point of dictum. The majority cites Ark. Code Ann. § 5-61-102(c) and states that Bynum could not have been charged with or convicted of a criminal offense in the death of her stillborn child. The statement is made in the context of explaining why a prejudicial evidentiary error was injected into the case. My concern is that this statute is not at issue in this case because Bynum was not charged with committing a crime under it, and the jury was not instructed to return a verdict on such a charge. In its entirety, that statute states:

> (a) It is unlawful for any person to administer or prescribe any medicine or drug to any woman with child with the intent to produce an abortion or premature delivery of any fetus before or after the period of quickening or to produce or attempt to produce the abortion by any other means.
>
> (b) Any person violating a provision of this section is guilty of a Class D felony.
>
> (c) Nothing in this section shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero.

Ark. Code Ann. § 5-61-102 (Repl. 2016).

First, the statute appears to be at war with itself: is subsection(a) not in conflict with subsection(c)? If not, why not? Whatever the answers, the main hang-up for me is that the parties did not brief the role that section -102 had in the case, the circuit court never made any decisions based on it, and the jury was not tasked to return a verdict on whether section -102 had been violated. I therefore prefer to express no view on the statute's potential application or scope.

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*.

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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*?