# WISCONSIN JOURNAL OF

# LAW, GENDER & SOCIETY

VOLUME XXXV, NUMBER 2 FALL 2020


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## STATEMENT OF PURPOSE

The *Wisconsin Journal of Law, Gender & Society*, originally the *Wisconsin Women's Law Journal*, grew out of two traditions: the University of Wisconsin Law School's "law in action" approach and the interdisciplinary design of gender studies. Through "law in action" we look beyond the statutes and cases to study the practical effects of the law on both individuals and communities. The interdisciplinary approach offers different perspectives through which to expand and challenge our understanding of the law.

The Journal, one of the earliest in the nation devoted to the study of women and the law, has strived to contribute insightful scholarship to this evolving field of study. Recognizing that women are a diverse group with differing beliefs and interests, and moreover that gender stereotyping of any kind inhibits each individual's full equality under the law, we encourage articles that examine the intersection of law and gender with issues of race, ethnicity, socioeconomic status, and sexual orientation.

We look forward to your contributions for it is through our discussions and debates that we fulfill the motto of the state of Wisconsin by moving "Forward."


# WISCONSIN JOURNAL OF LAW, GENDER & SOCIETY

Fall 2020

# LGBTQ+ EMPLOYMENT PROTECTIONS: THE U.S. SUPREME COURT'S DECISION IN *BOSTOCK V. CLAYTON COUNTY, GEORGIA* AND THE IMPLICATIONS FOR PUBLIC SCHOOLS

*John Dayton, J.D., Ed. D., † Micah Barry, J.D**



## INTRODUCTION

Employment is an essential part of life in the United States. At the American founding, the U.S. Declaration of Independence famously recognized unalienable rights to "Life, Liberty and the pursuit of Happiness."[1] But the reality for most persons in the U.S. has always been that, without employment, even their life was not secure.[2] Without steady income from employment, they may be unable to obtain food, shelter, and other necessary items.[3] Because medical insurance is tied to employment in the U.S., they may be unable to obtain life-sustaining health care and medications.[4] Employment is the necessary

† John Dayton is a professor of education law at the University of Georgia.
* Micah Barry is part-time faculty at the University of North Georgia, owner and attorney at the Law Office of Micah Barry, and PhD candidate and graduate assistant at the University of Georgia.

1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

2. *See Remembering Those Lost to Homelessness*, NAT'L COAL. FOR THE HOMELESS (Dec. 21, 2018), https://nationalhomeless.org/category/mortality ("People who experience homelessness have an average life expectancy of around 50 years of age, almost 20 years lower than housed populations") [https://perma.cc/5NTS-Z3QP].

3. *See* Lorena Mongelli, *How Job Loss, Illness and Eviction Drove this Family to Homelessness*, N.Y. POST (Feb. 12, 2019), https://nypost.com/2019/02/12/how-job-loss-illness-and-eviction-drove-this-family-to-homelessness [https://perma.cc/2CBT-PUN9].

4. When U.S. citizens lose their jobs, they also commonly lose their access to health care. *See, e.g.*, Jeneen Interlandi, Opinion, *Employer-Based Health Care, Meet Massive*

source of income for most people in the U.S. Further, for many people, their jobs are an important part of their self-esteem and social standing in their communities.[5] For all of these reasons, loss of employment can have a devastating impact on people's lives, the lives of their children, family members, and others who depend on them for food, shelter, financial support, medical care, etc.[6]

In recognition of the central role employment plays in people's lives in the U.S., and the history of using employment discrimination to marginalize and harm vulnerable groups, the Civil Rights Act of 1964 included protections against discrimination in employment.[7] Specifically, Title VII prohibits discrimination in employment based on "race, color, religion, sex, or national origin."[8]

LGBTQ+ persons have been an especially vulnerable group, with laws in many states treating their LGBTQ+ status as a lawful basis for dismissal from employment.[9] Even if they were otherwise model employees, they could be fired simply for their LGBTQ+ status.[10] The impacts of dismissal on their lives could be devastating. Being fired not only ended their prior employment, it also made it harder to find new employment.[11] Like all persons working to earn their living, LGBTQ+ employees had to work to survive. But they were being severely limited in their abilities to work because of their sexual orientations and gender

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*Unemployment: The Coronavirus Pandemic is Exposing a Central Flaw in America's Health Care System*, N.Y. TIMES (June 29, 2020), https://www.nytimes.com/2020/06/29/opinion/coronavirus-medicare-for-all.html [https://perma.cc/QP5B-3QPL].

5. *See Unemployment and Mental Health,* INST. FOR WORK & HEALTH (2009), https://www.iwh.on.ca/summaries/issue-briefing/unemployment-and-mental-health ("There is clear evidence that becoming unemployed has a negative impact on mental health") [https://perma.cc/8DEP-PBHP].

6. *See* Allison McClelland, *Effects of Unemployment on the Family*, 11 ECON. & LAB. REL. REV. 198 (2000).

7. 42 U.S.C. § 2000e.

8. *Id.* at § 2000e-2(a)(1).

9. In the year prior to the Court's decision in *Bostock*, only 21 states and less than 300 cities and counties prohibited workplace discrimination against LGBT employees. *See* Russ Bynum & Angeliki Kastanis, *AP Analysis: Most States Lack Laws Protecting LGBT Workers*, A.P. NEWS (Oct. 15, 2019), https://apnews.com/8b5086b09b9042bf808d82108b7d925c [https://perma.cc/M5T3-JUKN].

10. *Id*.

11. Employment applications and interviews commonly ask why applicants left their prior employment. When the answer is termination from employment for lawful cause, the employer is likely to prefer applicants who were not terminated for cause. If that lawful cause was the employee's LGBTQ+ status that information could further stigmatize the applicant in states and communities hostile to LGBTQ+ persons. LGBTQ+ employees who had done nothing wrong and admirably performed their work duties could still be fired, stigmatized, and severely limited in employment opportunities simply because of their LGBTQ+ status. Further, when asked about the reason for leaving their prior position, they were forced to either falsify their applications, an independent cause for dismissal, or "out" themselves as LGBTQ+ which was also a lawful cause for dismissal in many states.

identities, i.e., who they were as individuals, unrelated to their abilities to perform required work duties.[12]

This article examines the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, concerning whether LGBTQ+ employees are protected under Title VII's prohibition against employment discrimination based on "sex."[13] This article provides a brief history of LGBTQ+ discrimination in U.S. communities and schools to place the case in historical context; a review of the Court's decision in *Bostock*, including the majority opinion and dissenting opinions; and a discussion of the implications of the Court's decision in *Bostock* for employment law generally and specifically for public educational institutions. Public educational institutions are commonly a key battleground in legal/culture wars battles,[14] and the Court's decisions on these issues generally have significant implications for public educational institutions.[15]

## A BRIEF HISTORY OF LGBTQ+ DISCRIMINATION IN U.S. COMMUNITIES AND SCHOOLS

To understand the full gravity and meaning of the Court's decision in *Bostock v. Clayton County, Georgia*, it is necessary to understand the broader historical context preceding the case.[16] There is a long history of discrimination against LGBTQ+ persons[17] in society generally and certainly in schools.[18] LGBTQ+ children and adults have been unmercifully bullied, harassed, publicly humiliated, demonized, arrested, prosecuted,[19] and even killed because of anti-LGBTQ+ bigotry and hate.[20] LGBTQ+ activists and allies fought back against

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12. *See generally*, CHRISTINE MICHELLE DUFFY, GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE (2014).

13. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

14. *See, e.g.*, West Virginia v. Barnett, 319 U.S. 624 (1943); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Engel v. Vitale, 370 U.S. 421 (1962); Tinker v. Des Moines, Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Lee v. Weisman, 505 U.S. 577 (1992).

15. *See* cases cited *supra* note 14. Generally the term "public educational institutions" in this article is intended to refer to all public educational institutions including public K-12 and public higher education institutions. For a discussion of the legal distinctions among public and private educational institutions, and K-12 and higher education institutions, see John Dayton, HIGHER EDUCATION LAW xiv-xv (2015).

16. *Id.*; *see* sources cited *supra* note 15.

17. *Bostock v. Clayton County* directly addressed gay and transgender employees, *Bostock*, 140 S. Ct. 1731, but the reasoning extends to the broader spectrum of the LGBTQ+ community. *See, e.g.*, Bea Mitchell, *How Has the LGBTQ+ Acronym Evolved?* (Nov. 6, 2017), https://www.pinknews.co.uk/2017/11/06/how-has-the-lgbt-acronym-evolved [https://perma.cc/M6VA-CG2B].

18. *See* JASON CIANCIOTTO & SEAN CAHILL, LGBT YOUTH IN AMERICA'S SCHOOLS (2012) (providing a comprehensive social science review of LGBT students' experiences in schools).

19. *See* JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES (Michal Bronski ed., 2012).

20. *See, e.g.*, Erin Donaghue, *"Horrific Spike" in Fatal Violence Against Transgender Community*, CBS NEWS (July 14, 2020, 2:17 PM), https://www.cbsnews.com/news/transgender-community-fatal-violence-spike ("At least 21

this persecution through, e.g., the Stonewall Riots,[21] the political activism of Harvey Milk and countless others,[22] the formation of support groups,[23] and strategic legal battles.[24]

Attacks on the LGBTQ+ community, including exclusion from employment, have ebbed and flowed over time in the United States. However, "[m]any scholars have concluded that the most egregious levels of discrimination against [LGBTQ+ persons] in U.S. history took place from the 1940s through the 1960s,"[25] including characterizing LGBTQ+ persons as dangerous deviants and the literal "McCarthyism" of "Senator Joseph McCarthy's persistent effort to characterize 'homosexuals' as a paramount threat to U.S. security."[26] Attacks on LGBTQ+ persons were commonly justified based on moral and religious grounds that generally blamed the victims of LGBTQ+ bigotry.[27] LGBTQ+ teachers were an especially vulnerable group because of the culture of close community scrutiny of teachers' conduct and the tradition of treating teachers as "moral exemplars" for children and the community even in their off-duty private lives.[28]

Teachers were commonly denied employment or fired because of their LGBTQ+ status. A well-known and documented case occurred in *Gaylord v. Tacoma School District*.[29] As in other cases where educators were fired solely

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transgender or gender non-conforming people have been killed so far in 2020 . . . .") [https://perma.cc/LDU7-PYBL].

21. *See* MARC STEIN, THE STONEWALL RIOTS: A DOCUMENTARY HISTORY (2019); MATTHEW TODD, PRIDE: THE STORY OF THE LGBTQ EQUALITY MOVEMENT (2020).

22. *See* RAYMOND A. SMITH & DONALD P. HAIDER-MARKEL, GAY AND LESBIAN AMERICANS AND POLITICAL PARTICIPATION: A REFERENCE HANDBOOK (2002).

23. *See, e.g.*, GSA NETWORK, https://gsanetwork.org (last visited Nov. 26, 2020) [https://perma.cc/F7KM-L5H8]; PFLAG, https://pflag.org (last visited Nov. 26, 2020) [https://perma.cc/FL77-ZN6K]; TRANS LIFELINE, https://www.translifeline.org (last visited Nov. 26, 2020) [https://perma.cc/CS3W-N6F6]; GENDER SPECTRUM, https://www.genderspectrum.org (last visited Nov. 26, 2020) [https://perma.cc/Q6QM-XGR5].

24. *See, e.g.*, Lambda Legal, https://www.lambdalegal.org (last visited Nov. 26, 2020) [https://perma.cc/7M9F-CFA4].

25. Stuart Biegel, *Unfinished Business: The Employment Non-Discrimination Act (ENDA) and the K-12 Education Community*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 357, 381 (2011).

26. *Id.* at 382; *see also* DAVID K. JOHNSON, THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT (paperback ed. 2006).

27. *See, e.g.*, *Homosexual Agenda* BEREAN RSCH., https://bereanresearch.org/homosexual-agenda (last visited July 21, 2020) ("The goals and means of [the homosexual agenda] include indoctrinating students in public school, restricting the free speech of opposition, obtaining special treatment for homosexuals, distorting Biblical teaching and science, and interfering with freedom of association. Advocates of the homosexual agenda seek special rights for homosexuals that other people don't have . . . .") [https://perma.cc/UL8K-HDHD].

28. *See, e.g.*, John Martin Rich, *The Teacher as an Exemplar*, 75 HIGH SCH. J. 94, 95 (1991) (discussing how teachers' dating behavior was carefully observed by community members and in some communities forbidden).

29. Gaylord v. Tacoma Sch. Dist. No. 10, 535 P.2d. 804 (Wash. 1975).

because of their LGBTQ+ status, evidence suggested that James Gaylord had been an excellent teacher.[30] He remained in good standing as an employee until school officials learned that Mr. Gaylord was a homosexual.[31] Gaylord appealed his dismissal seeking damages and reinstatement.[32] The trial court had found:

> There is no allegation or evidence that James Gaylord has ever committed any overt acts of homosexuality. The sole basis for his discharge is James Gaylord's status as a homosexual. [Gaylord] argues to this court that expert testimony showed overwhelmingly that, even if knowledge of his status as a homosexual became public, he would be able to function efficiently as a teacher without risk of harm to the school or to the pupils. The school district, on the other hand, presented testimony at trial by its administrative staff that when knowledge of appellant's status as a homosexual became known to the students and their parents, the resulting complaints would affect appellant's teaching efficiency and injure the school.[33]

Mr. Gaylord's dismissal, based solely on his status as being gay, and not his work performance, was upheld by the Supreme Court of Washington.[34]

But as devastating as the loss of employment can be for individuals and their families, loss of employment was not even close to the worst-case scenario for LGBTQ+ persons. LGBTQ+ persons have been targeted by police, arrested, prosecuted, and imprisoned for private consensual relationships between adults in the privacy of their own homes.[35] In *Bowers v. Hardwick*, for example, in 1986, the U.S. Supreme Court reviewed a case in which Michael Hardwick had been arrested in his home under just such circumstances.[36] Mr. Hardwick challenged the Georgia "sodomy" statute he was arrested under as unconstitutional.[37] The U.S. Supreme Court, in a 5-4 decision, upheld the constitutionality of state sodomy statutes.[38]

It took 17 years, but in 2003, in a 6-3 decision in *Lawrence v. Texas*, the U.S. Supreme Court finally reversed its decision in *Bowers v. Hardwick* and invalidated as unconstitutional the sodomy statutes in the remaining 13 states that still had sodomy statutes in 2003.[39] Nonetheless, even after *Lawrence*, some states continued their open hostility toward LGBTQ+ persons.[40] After *Lawrence*,

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30. *Id.* at 805.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 806.

35. *See* JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES (2012).

36. Bowers v. Hardwick, 478 U.S. 186 (1986).

37. *Id.*

38. *Id.*

39. Lawrence v. Texas, 539 U.S. 558 (2003).

40. *See, e.g.*, Merrit Kennedy, *North Carolina Reaches Settlement in Long Battle Over Bathrooms and Gender Identity*, NPR (July 23, 2019, 2:36 PM),

sodomy statutes were no longer a lawful option for persecuting LGBTQ+ persons. But there were still many options, including simply refusing to acknowledge that LGBTQ+ persons were entitled to equal protection of the laws in employment, health care, public accommodations, housing, etc.[41]

It is uncertain how many LGBTQ+ persons were denied employment, harassed, and fired simply for their status as LGBTQ+ persons, because most incidents were never documented.[42] In the states with cultures most hostile to LGBTQ+ persons, LGBTQ+ employees had no legal protections and therefore no lawful documented means of defending themselves from discrimination.[43] Further, even in states that provided some legal protections, "LGBT employees sometimes [did] not file complaints in order to avoid 'outing' themselves further. Public school educators also may not have [had] the resources to engage in costly litigation."[44]

Once lauded as a world leader in human rights,[45] the U.S. lagged behind other developed nations in legal protections for LGBTQ+ persons.[46] As noted above, the U.S. Supreme Court did not invalidate criminal sanctions for "sodomy" until 2003 in *Lawrence v. Texas*.[47] Same sex marriages were not nationally recognized in the U.S. until the Court's decision in *Obergefell v. Hodges* in 2015.[48] Nonetheless, although justice has been delayed and denied to LGBTQ+ persons, recognition of equality was always the obvious and necessary end.[49]

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https://www.npr.org/2019/07/23/744488752/north-carolina-reaches-settlement-in-long-battle-over-bathrooms-and-gender-ident ("While this part of the court fight may be ending, so much urgent work remains as long as people who are LGBTQ are denied basic protections from violence and discrimination simply because of who they are") [https://perma.cc/5NKR-TQ99].

41. *See, e.g.*, *"Religious Liberty" and the Anti-LGBT Right*, S. POVERTY L. CTR., https://www.splcenter.org/sites/default/files/splc_religious_liberty_and_anti-lgbt_right.pdf (last visited July 21, 2020) [https://perma.cc/3RFD-C33E]; *Our Work*, LAMBDA LEGAL, https://www.lambdalegal.org/our-work (last visited July 21, 2020) (addressing a broad spectrum of civil liberties and LGBT discrimination in those areas) [https://perma.cc/4JYS-BREM].

42. Elizabeth Kristen & David Nahmias, *The Writing on the Wall: The Future of LGBT Employment Antidiscrimination Law in the Age of Trump*, 39 BERKELEY J. EMP. & LAB. L. 89, 102 (2018).

43. *Id.* at 92, 100.

44. Suzanne E. Eckes, *The Legal "Rights" of LGBT Educators in Public and Private Schools*, 23 TEX. J. ON C.L. & C.R. 29, 36 (2017).

45. *See, e.g.*, Justin Wise, *Jimmy Carter: U.S. Has Lost Its Commitment to Human Rights*, HILL (July 25, 2018, 8:16 AM), https://thehill.com/homenews/398728-jimmy-carter-us-has-lost-its-commitment-to-human-rights [https://perma.cc/E7W4-LYQF].

46. *See, e.g.*, Alex Gray, *What You Need to Know About LGBT Rights in 11 Maps*, WORLD ECON. F. (Mar. 1, 2017), https://www.weforum.org/agenda/2017/03/what-you-need-to-know-about-lgbt-rights-in-11-maps [https://perma.cc/WA6W-CQ3A].

47. Lawrence v. Texas, 539 U.S. 558 (2003).

48. Obergefell v. Hodges, 576 U.S. 644 (2015).

49. *See, e.g.*, David Lampo, *Why Gay Rights Are Civil Rights—and Simply Right*, AM. CONS. (July 8, 2013, 12:07 PM), https://www.theamericanconservative.com/articles/why-gay-rights-are-civil-rights-and-simply-right [https://perma.cc/BN8X-U3AT].

Under the principle of equal protection of the laws, LGBTQ+ citizens are entitled to the same civil rights and legal protections as all persons.[50] Under equal laws, discrimination and harassment aimed at LGBTQ+ persons must be treated as unlawful to the same extent it would for any other protected characteristic or trait. Employment discrimination must be treated as employment discrimination. As part of the systematic legal strategy to secure the necessary legal protections, LGBTQ+ legal advocates argued that Title VII employment protections extended to all sex-based discrimination, including discrimination based on LGBTQ+ status.[51]

Prior to the Trump Administration, the legal position adopted by the U.S. Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing Title VII, was that Title VII protected LGBTQ+ persons from employment discrimination based on sex.[52] In the absence of adequate legal protections, LGBTQ+ employees were commonly subjected to harassment and discrimination in the workplace.[53] The frequency and severity of discrimination against transgender persons was especially troubling. In response, on December 15, 2014 Attorney General Holder issued a memorandum concerning: "Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964."[54] Attorney General Holder noted: "Following the Supreme Court's decision in *Price Waterhouse v. Hopkins*, courts have interpreted Title VII's prohibition of discrimination because of 'sex' as barring discrimination based on a perceived failure to conform to socially constructed characteristics of males and females."[55] The memorandum declared:

> In 2012, the Equal Employment Opportunity Commission ruled that discrimination on the basis of gender identity is discrimination on the basis of sex. *Macy v. Holder*, Appeal No. 0120120821 (EEOC April 20, 2012). More recently, [President Obama] announced that discrimination based on gender identity is prohibited for purposes of

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50. *See, e.g.*, William N. Eskridge Jr., *Original Meaning and Marriage Equality*, 52 HOUS. L. REV. 1067, 1091-93 (2015) (arguing that the Equal Protection Clause means at its core that the state cannot designate a caste of persons, i.e., LGBTQ+ persons, as outside of the protections of the laws recognized for other persons).

51. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737-38 (2020).

52. Elizabeth Kristen & David Nahmias, *supra* note 42, at 93 ("In 2012, the EEOC inaugurated a new era for LGBT employees with its 2013-2017 Strategic Enforcement Plan. Within its national priority of 'Addressing Emerging and Developing Issues,' the EEOC included 'coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions' . . . Shortly thereafter, the EEOC embarked on an active campaign on behalf of transgender employees.").

53. *See* Christiana Silva, *Almost Every Transgender Employee Experiences Harassment or Mistreatment on the Job, Study Shows*, Newsweek (Nov. 29, 2017, 6:44 PM), https://www.newsweek.com/transgender-employees-experience-harassment-job-726494 [https://perma.cc/G7TU-RMP2].

54. Off. of the Att'y Gen., *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, DEP'T OF JUST. 1, 1-2 (Dec. 15, 2014), https://www.justice.gov/file/188671/download [https://perma.cc/HRM4-B6ME].

55. *Id.* (citing 490 U.S. 228 (1989)).

> federal employment and government contracting. *See* Executive Order 13672 (July 21, 2014); *see also* U.S. Dep't of Labor Directive 2014-02 (August 19, 2014). After considering the text of Title VII, the relevant Supreme Court case law interpreting the statute, and the developing jurisprudence in this area, I have determined that the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status.[56]

On October 4, 2017, however, on behalf of the Trump Administration, Attorney General Sessions issued a memorandum stating:

> Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status. Therefore, as of the date of this memorandum, which hereby withdraws the December 15, 2014, memorandum, the Department of Justice will take that position in all pending and future matters.[57]

That was the status of the law when the U.S. Supreme Court took up this issue in *Bostock v. Clayton County*.[58] As legal commentators noted, under the Trump Administration's interpretation of Title VII, LGBTQ+ employees had a legal right to be married on Sunday,[59] but they could be lawfully fired on Monday for their gender nonconforming marriage in states that did not provide legal protections for LGBTQ+ employees, including in public schools.[60]

## BOSTOCK V. CLAYTON COUNTY, GEORGIA

The Court's decision in *Bostock v. Clayton County* directly addressed the question of whether Title VII protects LGBTQ+ employees from employment discrimination.[61] In *Bostock*, the U.S. Supreme Court heard three consolidated cases, *Bostock v. Clayton County*,[62] *Zarda v. Altitude Express*,

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56. *Id.*

57. Off. of the Att'y Gen., *Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, DEP'T OF JUST. 1, 2 (Oct. 4, 2017), https://www.justice.gov/ag/page/file/1006981/download [https://perma.cc/3XXP-YSVT].

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

59. Eckes, *supra* note 44, at 29.

60. *Id.* at 29, 31.

61. *Bostock*, 140 S. Ct. at 1731, 1737.

62. Bostock v. Clayton County, No. 116CV001460ODEWEJ, 2016 WL 9753356 (N.D. Ga. Nov. 3, 2016), *aff'd sub nom.*, 723 F. App'x 964 (11th Cir. 2018), *rev'd and remanded sub nom.*, 140 S. Ct. 1731 (2020), *and rev'd and remanded sub nom.*, 819 F. App'x 891 (11th Cir. 2020).

*Inc.*,[63] and *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc*.[64] In all three of these cases, an LGBTQ+ employee had been dismissed because of the employee's LGBTQ+ status.[65]

In *Bostock v. Clayton County*, Gerald Bostock had completed a decade of successful work performance as a county child welfare services coordinator assigned to the juvenile court of Clayton County, Georgia.[66] Under Bostock's leadership, Clayton County's child welfare department won national awards for its service.[67] After Mr. Bostock joined a gay softball team, however, influential community members began making disparaging remarks about his sexual orientation and his participation in a gay athletic team.[68] Mr. Bostock was subsequently fired for conduct "unbecoming" a county employee.[69] Bostock filed suit alleging employment discrimination under Title VII based on sexual orientation.[70] The district court dismissed the suit, finding Title VII did not protect employees against discrimination based on sexual orientation.[71] The Eleventh Circuit Court of Appeals affirmed the dismissal.[72]

In *Zarda v. Altitude Express*, *Inc.*, Donald Zarda had worked as a tandem skydiving instructor which required him to be tightly strapped to clients, including females.[73] In an attempt to mitigate the discomfort he sensed from some women about being tightly strapped to a man, Zarda would sometimes inform them of his sexual orientation.[74] A male partner complained to Zarda's employer, informing the employer of Zarda's sexual orientation.[75] Zarda was fired.[76] Zarda filed suit in federal court under Title VII, claiming employment discrimination based on sexual orientation.[77] The district court granted summary judgment to the employer holding that Zarda was not protected by Title VII against discrimination based on sexual orientation, under a theory of sex

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63. Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018), *cert. granted sub nom.*, 139 S. Ct. 1599 (2019), *and aff'd sub nom.*, 140 S. Ct. 1731 (2020).

64. Equal Emp. Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *cert. granted in part sub nom.*, 139 S. Ct. 1599 (2019), *and aff'd sub nom.*, 140 S. Ct. 1731 (2020).

65. *Bostock*, 140 S. Ct. at 1737.

66. *Id.*

67. *Id.*

68. *Id.* at 1737-38.

69. *Id.* at 1738.

70. *Id.* at 1733.

71. Bostock v. Clayton County, No. 116CV001460ODEWEJ, 2016 WL 9753356 (N.D. Ga. Nov. 3, 2016), *aff'd sub nom.*, 723 F. App'x 964 (11th Cir. 2018), *rev'd and remanded sub nom*., 140 S. Ct. 1731 (2020), *and rev'd and remanded sub nom.*, 819 F. App'x 891 (11th Cir. 2020).

72. *Id.*

73. Zarda v. Altitude Express, Inc., 883 F.3d 100, 108 (2d Cir. 2018), *cert. granted sub nom.*, 139 S. Ct. 1599 (2019), *and aff'd sub nom.*, 140 S. Ct. 1731 (2020).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 109.

stereotyping.[78] The Second Circuit Court of Appeals, however, held that Zarda was entitled to bring a Title VII claim for discrimination based on sexual orientation.[79]

In *EEOC v. R.G. & G.R. Harris Funeral Homes*, *Inc.*, the EEOC brought suit on behalf of a former funeral director/embalmer Aimee Stephens asserting that the employer fired Stephens in violation of Title VII because Stephens was transgender; transitioning from male to female; and/or did not conform to the employer's sex/gender-based preferences, expectations, or stereotypes.[80] Stephens had been fired shortly after the employer learned that Stephens was transgender; was transitioning from male to female; and, as a transgender female, she would be dressing and presenting herself as female, including during working hours.[81] The employer, which is not affiliated with any church, cited religious objections to justify firing Stephens.[82] The district court ruled in favor of the EEOC, holding that Stephens asserted a valid sex-stereotyping gender-discrimination claim under Title VII.[83] The Sixth Circuit Court of Appeals affirmed, in relevant part, holding that the employee was entitled to bring a claim under Title VII for being fired for transgender or transitioning status, and that the employer's assertion of religious objections under the ministerial exception to Title VII did not bar the claim.[84]

In addressing these three consolidated cases in *Bostock*, the Court stated:

> Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status.[85]

All three employees challenged their dismissals as violations of Title VII's prohibition against employment discrimination based on "sex" under Title VII. As noted above, U.S. Courts of Appeals had reached different results on this issue, with the Second Circuit holding that sexual orientation discrimination violated Title VII,[86] and the Sixth Circuit ruling similarly that employment

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78. *Id.*

79. *Id.* at 108.

80. Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 100 F. Supp. 3d 594, 596 (E.D. Mich. 2015*), rev'd and remanded*, 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom*, 140 S. Ct. 1731 (2020).

81. *Id.*

82. Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 568-69 (6th Cir. 2018).

83. Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc, 100 F. Supp. 3d 594 (E.D. Mich. 2015).

84. Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc, 884 F.3d 560 (6th Cir. 2018).

85. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

86. Zarda v. Altitude Express, Inc., 883 F.3d 100, 107 (2d Cir. 2018).

discrimination based on transgender status violated Title VII.[87] The Eleventh Circuit, however, held that "the law does not prohibit employers from firing employees for being gay and so [Mr. Bostock's] suit could be dismissed as a matter of law."[88]

Because U.S. citizens' rights under federal law should not be dependent on their location in the U.S., resolving conflicts among the circuits is a key function of the U.S. Supreme Court.[89] In resolving this question under Title VII, the Court in a 6-3 opinion written by Justice Gorsuch, and joined by Chief Justice Roberts and Justices Ginsberg, Breyer, Sotomayor, and Kagan, stated:

> Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.[90]

The Court majority stated: "Title VII's message is 'simple but momentous': An individual employee's sex is 'not relevant to the selection, evaluation, or compensation of employees.'"[91] The Court also noted: "The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions."[92] Therefore, according to the Court: "When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex. And that is all Title VII has ever demanded to establish liability."[93] To assure there was no ambiguity about the decision, the Court declared directly: "An employer who fires an individual merely for being gay or transgender defies the law."[94]

### JUSTICE ALITO'S DISSENTING OPINION

Justice Alito began his dissenting opinion: "There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive."[95]

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87. Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 571 (6th Cir. 2018).

88. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020).

89. *See* Sup. Ct. R. 10(a) ("The following… indicate the character of the reasons the Court considers: … a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter….").

90. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

91. *Id.* at 1741 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (plurality opinion)).

92. *Id.*

93. *Id.* at 1744.

94. *Id.* at 1754.

95. *Id.* at 1754 (Alito, J., dissenting).

Justice Alito's opinion was joined by Justice Thomas, but notably not by the third dissenting Justice, Justice Kavanaugh, who wrote separately.[96]

In his dissenting opinion, Justice Alito noted the history of discrimination against the LGBTQ+ community, but as support for why Title VII, passed in 1964, could not have been intended to protect LGBTQ+ employees from discrimination.[97] Although not directly at issue in the case, Justice Alito referenced the culture wars of bathrooms and locker rooms, claiming "the position that the Court now adopts will threaten freedom of religion, freedom of speech, and personal privacy and safety."[98] Although none of the cases under review by the Court were education cases, Justice Alito recognized that *Bostock* has direct implications for schools. Justice Alito expressed alarm at the majority's holding protecting LGBTQ+ employees from discrimination:

> This problem is perhaps most acute when it comes to the employment of teachers. A school's standards for its faculty "communicate a particular way of life to its students," and a "violation by the faculty of those precepts" may undermine the school's "moral teaching." Thus, if a religious school teaches that sex outside marriage and sex reassignment procedures are immoral, the message may be lost if the school employs a teacher who is in a same-sex relationship or has undergone or is undergoing sex reassignment. Yet today's decision may lead to Title VII claims by such teachers and applicants for employment.[99]

Concerning employers' claims of religious freedom Justice Alito asserted that the ministerial exception to Title VII may provide an affirmative defense for religious institutions objecting to protecting the rights of LGBTQ+ employees, but he complained that the exception was too narrow.[100] Concerning free speech, Alito argued that the Court's decision in *Bostock* could infringe on a free speech right to refuse to use LGBTQ+ employees' chosen names and pronouns: "After today's decision, plaintiffs may claim that the failure to use their preferred pronoun violates one of the federal laws prohibiting sex discrimination."[101] Alito further argued that: "The Court's decision may also pressure employers to suppress any statements by employees expressing disapproval of same-sex relationships and sex reassignment procedures."[102]

The most inflammatory part of Justice Alito's dissent, however, involved his assertion that recognizing equal rights for LGBTQ+ employees under Title VII somehow threatened public safety and morality with Alito stating

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96. *Id.*
97. *Id.* at 1769-72.
98. *Id.* at 1778.
99. *Id.* at 1781.
100. *Id.*
101. *Id.* at 1782.
102. *Id.* at 1783.

"is it plausible that Title VII prohibits discrimination based on any sexual urge or instinct and its manifestations? The urge to rape?"[103] In conclusion, Justice Alito argued that the majority was substituting current social views for legislative interpretation:

> The updating desire to which the Court succumbs no doubt arises from humane and generous impulses. Today, many Americans know individuals who are gay, lesbian, or transgender and want them to be treated with the dignity, consideration, and fairness that everyone deserves. But the authority of this Court is limited to saying what the law is.[104]

### JUSTICE KAVANAUGH'S DISSENTING OPINION

Justice Kavanaugh's dissenting opinion arguably reflected a more moderate tone than Justice Alito's, with the focus on statutory interpretation and judicial deference and less on culture wars issues.[105] Justice Kavanaugh stated:

> Like many cases in this Court, this case boils down to one fundamental question: Who decides? Title VII of the Civil Rights Act of 1964 prohibits employment discrimination "because of" an individual's "race, color, religion, sex, or national origin." The question here is whether Title VII should be expanded to prohibit employment discrimination because of sexual orientation. Under the Constitution's separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court.[106]

Justice Kavanaugh concluded:

> Notwithstanding my concern about the Court's transgression of the Constitution's separation of powers, it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans. Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit—battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today's result. Under the Constitution's separation of powers, however, I believe that it was Congress's role, not this Court's, to

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103. *Id.* at 1766.
104. *Id.* at 1783-1784.
105. *See id.* at 1822-34 (Kavanaugh, J., dissenting).
106. *Id.* at 1822.

> amend Title VII. I therefore must respectfully dissent from the Court's judgment.[107]

## DISCUSSION

*Bostock v. Clayton County, Georgia* was a case about the scope of Title VII protections.[108] For many, however, *Bostock* became yet another culture wars battle fought in the U.S. Supreme Court by political groups supporting and opposing LGBTQ+ equality.[109] It is an unfortunate reality of our time that the nation's highest Court, charged with providing equal justice under the laws, is increasingly viewed in partisan terms and divisions, i.e., with Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh forming the right-leaning block, and Justices Ginsberg, Breyer, Sotomayor, and Kagan forming the left-leaning block at the time.[110]

From a Court that is expected to lean right, however, many were surprised to see a 6-3 opinion in favor of LGBTQ+ equality, with Chief Justice Roberts and Justice Gorsuch siding with the left-leaning block, and Justice Gorsuch writing the majority opinion.[111] This may reflect that, like other civil rights issues on which a broad public consensus emerged, the issue of LGBTQ+ equality is beginning to transcend some prior partisan assumptions and is increasingly becoming a mainstream view in the U.S.[112]

For decades, LGBTQ+ equality has been a core issue in the culture wars, especially among "Religious Right" voters who continue to bitterly oppose LGBTQ+ equality.[113] This intense political opposition, presented as moral and

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107. *Id.* at 1837.

108. *Id.* at 1783 (majority opinion).

109. *See, e.g.*, Chris Damian, *Taking Freedom Too Far: U.S. Bishops Prioritize Culture Wars over Theology*, LA CROIX INT'L (July 15, 2020), https://international.la-croix.com/news/religion/taking-freedom-too-far/12747.

110. This is, sadly, a common perception supported by some notable evidence. *See*, *cf.*, Bush v. Gore, 531 U.S. 98 (2000). *See also*, Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407 (2001). With the death of Justice Ginsburg and appointment of Justice Barrett, this concern is only elevated for the future.

111. *See, e.g.*, Robert Barnes, *Neil Gorsuch? The Surprise Behind the Supreme Court's Surprising LGBTQ Decision*, WASH. POST (June 16, 2020), https://www.washingtonpost.com/politics/courts_law/neil-gorsuch-gay-transgender-rights-supreme-court/2020/06/16/112f903c-afe3-11ea-8f56-63f38c990077_story.html.

112. *See, e.g.*, Juhie Bhatia, *Global Acceptance of LGBTQ On the Rise*, U.S. NEWS (June 25, 2020), https://www.usnews.com/news/best-countries/articles/2020-06-25/lgbtq-acceptance-growing-in-us-and-other-countries-over-time.

113. *See* Biegel, *supra* note 25, at 16 n.17 (showing that the Cold War period saw a steep rise in anti-LGBTQ+ bigotry). But as the nation was beginning to become more tolerant of LGBTQ+ citizens, the "Religious Right" emerged to fan the flames of intolerance. The Religious Right continues as a leading anti-LGBTQ+ political force. *See, e.g.*, SOUTHERN POVERTY LAW CENTER, "RELIGIOUS LIBERTY" AND THE ANTI-LGBT RIGHT: THE HARDLINE GROUPS PROMOTING "RELIGIOUS FREEDOM" TO JUSTIFY ANTI-GAY DISCRIMINATION (2016); Kyle C. Velte, *Why the Religious Right Can't Have its (Straight Wedding) Cake and Eat it Too*, 36 LAW & INEQ. 67, 73 (2018) ("As the 1960s faded into the 1970s, the Religious Right became a potent political force.").

religious objections, delayed the recognition of LGBTQ+ rights when prior to *Bostock* "half of the American LGBT population [lived] in states that [did] not outlaw sexual orientation or gender identity discrimination in private sector employment."[114] While the nation generally has been increasingly supportive of LGBTQ+ equality,[115] regional differences emerged, mostly along "red state" and "blue state" lines.[116] Demonstrating how politically polarized LGBTQ+ equality had become in the U.S., "every state without complete LGBT antidiscrimination protections voted for Trump in the 2016 election."[117]

Political opposition to LGBTQ+ equality by the Religious Right had a clear impact on U.S. politics and resulting federal policy.[118] While the federal government has historically taken a leading role on civil rights issues, it has lagged behind other developed nations as well as many state and local governments and private employers on LGBTQ+ rights.[119] Even without federal leadership, however, many businesses and state and local governments recognized both the moral imperative of LGBTQ+ equality, and the economic benefits of non-discrimination.[120] Discrimination is not only unjust, it is costly.[121] Forward-thinking businesses and governments recognized the benefits of diversity and non-discrimination in the workplace.[122]

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114. Elizabeth Kristen & David Nahmias, *The Writing on the Wall: The Future of LGBT Employment Antidiscrimination Law in the Age of Trump*, 39 BERKELEY J. EMP. & LAB. L. 89, 100 (2018).

115. *See Broad Support for LGBT Rights Across All 50 States,* PUB. RELIGION RSCH. INST. (Apr. 14, 2020), https://www.prri.org/research/broad-support-for-lgbt-rights [https://perma.cc/82B4-XKS7].

116. *See generally Electoral Map: Blue or Red States Since 2000*, 270 TO WIN, https://www.270towin.com/content/blue-and-red-states (last visited July 26, 2020).

117. *See* Kristen & Nahmias, *supra* note 112, at 100-01.

118. *See, e.g.*, Clyde Haberman, *Religion and Right-Wing Politics: How Evangelicals Reshaped Elections*, N.Y. TIMES (Oct. 28, 2018), https://nyti.ms/2CLhICl [https://perma.cc/BE3U-N4BQ].

119. *See, e.g.*, Adam Nagourney, *Political Shifts on Gay Rights Lag Behind Culture*, N.Y. TIMES (June 28, 2009), https://www.nytimes.com/2009/06/28/us/28stonewall.html [https://perma.cc/7FFB-HUPY].

120. *See, e.g.*, *id.*; Jessica Shortall, *Why Many Businesses Are Becoming More Vocal in Support of LGBTQ Rights*, HARV. BUS. REV. (March 7, 2019), https://hbr.org/2019/03/why-many-businesses-are-becoming-more-vocal-in-support-of-lgbtq-rights [https://perma.cc/9RVC-HHT4].

121. DEENA FIDAS, HUM. RTS. CAMPAIGN FOUND., THE COST OF THE CLOSET AND THE REWARDS OF INCLUSION (2014), https://assets2.hrc.org/files/assets/resources/Cost_of_the_Closet_May2014.pdf?_ga [https://perma.cc/8X9H-X674].

122. *See generally*, *Lesbian, Gay, Bisexual, and Transgender Workplace Issues: Quick Take*, CATALYST (Jun 15, 2020), https://www.catalyst.org/research/lesbian-gay-bisexual-and-transgender-workplace-issues [https://perma.cc/A2AL-3NC3]. Workplace discrimination prevents the hiring, retention, and promotion of the most highly qualified employees, resulting in loss of productivity and causes public relations problems, increased workplace conflict, and disruption. *See* DEENA FIDAS, HUM. RTS. CAMPAIGN FOUND., A WORKPLACE DIVIDED: UNDERSTANDING THE CLIMATE FOR LGBTQ WORKERS NATIONWIDE (2018), https://hrc-prod-

The Court's opinion in *Bostock* appears to reflect the growing consensus for LGBTQ+ equality, with support for LGBTQ+ equality across a broad spectrum of ideologies on the Court. In varied degrees, all Justices expressed support for LGBTQ+ equality in *Bostock*.[123] The Court's opinion was unequivocal in deciding whether an employer may fire an employee simply for being homosexual or transgender: "The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex . . . exactly what Title VII forbids."[124] The Court further stated: "The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions."[125] The Court declared: "An employer who fires an individual merely for being gay or transgender defies the law."[126]

Some legal scholars accurately predicted the result in this case.[127] That it was ultimately a 6-3 decision supporting LGBTQ+ rights written by Justice Gorsuch, however, no doubt surprised many Court watchers, especially those in the Religious Right.[128] But given the Court's decision, and the growing consensus on LGBTQ+ equality, [129] the core issue of LGBTQ+ employment discrimination appears to be settled. After *Bostock*, it is now well-established law that it is generally unlawful to discriminate against LGBTQ+ persons in employment.[130]

The Court decided the case based on statutory interpretation and did not address broader constitutional questions.[131] This is, of course, a longstanding judicial practice in federal courts, to avoid broader constitutional questions when

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requests.s3-us-west-2.amazonaws.com/files/assets/resources/AWorkplaceDivided-2018.pdf?mtime=20200713131850&focal=none [https://perma.cc/Z2U9-QJRN]. .

123. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020); *id.* at 1783-84 (Alito, J., dissenting) ("Today, many Americans know individuals who are gay, lesbian, or transgender and want them to be treated with the dignity, consideration, and fairness that everyone deserves."); *id.* at 1837 (Kavanaugh, J., dissenting) ("[I]t is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans.").

124. *Id.* at 1737 (majority opinion).

125. *Id.* at 1741.

126. *Id.* at 1754.

127. *See, e.g.*, Michael T. Zugelder, *Toward Equal Rights for LGBT Employees: Legal and Managerial Implications for Employers*, 43 OHIO N. UNIV. L. REV. 193, 217 (2017) ("Employers should also understand that, aside from being good for business and the right thing to do, fair and equal treatment of LGBT employees has never been more popular with the American people and may soon be the law of the land.").

128. *See,* e.g., Sarah Pulliam Bailey, *Christian Conservatives Rattled After Supreme Court Rules Against LGBT Discrimination*, WASH. POST (July 15, 2020), https://www.washingtonpost.com/religion/2020/06/15/bostock-court-faith-conservatives-lgbt [https://perma.cc/P5J9-L9GS].

129. *See, e.g.*, *Attitudes on Same-Sex Marriage*, PEW RESEARCH CENTER (May 14, 2019), https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage ("Support for same-sex marriage has steadily grown over the past 15 years . . . Based on polling in 2019, a majority of Americans (61%) support same-sex marriage.") [https://perma.cc/P4T4-8J2R].

130. *Bostock,* 140 S. Ct. 1731.

131. *See id.*

the case may be resolved without reaching a constitutional question.[132] Further, the core constitutional questions had already been addressed in *Lawrence v. Texas*,[133] *United States v. Windsor*,[134] and *Obergefell v. Hodges*.[135]

Because the Court was interpreting a statute, and not the Constitution, Congress has the ability to legislatively reverse the Court's decision in *Bostock* through statutory amendment.[136] Given the growing consensus on LGBTQ+ equality, however, political support for a reversal is unlikely.[137] And even if Congress did reverse *Bostock* by amending Title VII, the Court would then likely be faced with a constitutional challenge to Title VII as inconsistent with the constitutional precedents in *Lawrence*, *Windsor*, and *Obergefell*. The Court avoided the constitutional question in *Bostock* because it was unnecessary to resolve the case. Federal legislation overturning *Bostock*, however, could make addressing the constitutional question necessary, and the likely result would be reinstating the same holding in *Bostock* but based on constitutional rather than statutory grounds.[138]

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132. *See* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1004 (1994) ("The 'last resort rule' dictates that a federal court should refuse to rule on a constitutional issue if the case can be resolved on a nonconstitutional basis.") (citing Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.")).

133. Lawrence v. Texas, 539 U.S. 558 (2003) (holding state sodomy statutes unconstitutional).

134. United States v. Windsor, 570 U.S. 744, 770 (2013) (holding that DOMA was unconstitutional and that the "guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group").

135. Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that the right to marry is a fundamental right and that under the due process and equal protection clauses same sex couples may not be deprived of that fundamental right).

136. While the Court is the final arbiter in interpreting the Constitution, Marbury v. Madison, 5 U.S. 137 (1803), Congress controls the statutory process and the Court's statutory interpretations may be overridden through statutory amendments by Congress, U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States.").

137. *See* Daniel Greenberg, Emma Beyer, Maxine Najle, Oyindamola Bola & Robert P. Jones, *Americans Show Broad Support for LGBT Nondiscrimination Protections*, PUB. RELIGION RSCH. INST. (Mar. 12, 2019), https://www.prri.org/research/americans-support-protections-lgbt-people [https://perma.cc/9HXD-3HF8].

138. Even with the passing of Justice Ginsberg, a five Justice majority of the *Bostock* Court remained. 140 S. Ct. 1731. Further, it is possible that Justice Kavanaugh, who objected to what he saw as the Court's intrusion on separation of powers and not the result of the case, might side with Chief Justice Roberts and Justice Gorsuch on a constitutional question. *See id.* at 1837 (Kavanaugh, J., dissenting) ("Notwithstanding my concern about the Court's transgression of the Constitution's separation of powers, it is appropriate to acknowledge the important victory achieved today . . . Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. . . . They have advanced powerful policy arguments and can take pride in today's result. Under the Constitution's separation of powers, however, I believe that it was Congress's role, not this Court's, to amend Title VII. I therefore must respectfully dissent from the Court's judgment.").

*Bostock* settled the core legal question concerning whether Title VII protects LGBTQ+ employees: Title VII protects LGBTQ+ employees.[139] Among the issues that will be litigated further after *Bostock* are precisely who is protected by *Bostock* and under what circumstances they are protected.[140] Although definitive resolutions of any remaining open legal issues will require litigation, in many cases the likely outcomes are already clear based on the Court's interpretations of Title VII, the Equal Protection Clause, and logical extrapolations.[141]

Concerning who is protected, Title VII is not aimed at only certain politically favored groups.[142] If it was, in drafting Title VII Congress could have designated the specific groups it intended to protect, or named the groups it did not intend to protect.[143] As evidenced by Title VII's expansive terms, however, Title VII is aimed at discrimination in employment in broad general terms, i.e., "race, color, religion, sex, or national origin."[144] The terms of Title VII were written broadly, requiring that they be interpreted broadly to advance the Act's purpose of rooting out irrational discrimination in the workplace, i.e., disparate treatment based on irrelevant and prejudicial factors.[145]

In *Bostock*, the Court recognized that LGBTQ+ discrimination is among the broad types of employment discrimination Title VII seeks to address:

> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the

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139. *Bostock*, 140 S. Ct. 1731.

140. *See id.* at 1753 ("Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases.").

141. *See* JOHN DAYTON, LEGAL RESEARCH, ANALYSIS, AND WRITING 99 (2020) (on inductive legal analysis).

142. *Bostock*, 140 S. Ct. at 1751 ("[A]pplying protective laws to groups that were politically unpopular at the time of the law's passage—whether prisoners in the 1990s or homosexual and transgender employees in the 1960s—often may be seen as unexpected. But to refuse enforcement just because of that, because the parties before us happened to be unpopular at the time of the law's passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms.").

143. The Court directly addressed the argument that if Congress did not expressly include a category for protection under Title VII, then that category must be excluded from protection: "Nor is there any such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule." *Id.* at 1747.

144. 42 U.S.C. § 2000e-2(a)(1).

145. *Bostock*, 140 S. Ct. at 1747.

> express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.[146]

Although the employee/plaintiffs in *Bostock* happened to be gay males and a transgender woman,[147] it cannot be credibly argued that this means lesbians and transgender men are not protected by *Bostock*. Extending this same logic, it cannot be credibly argued that bisexual, queer, questioning, pansexual, intersex, or asexual employees are not protected by *Bostock*. For all of these individuals, their individual sexual orientations and identities are irrelevant to their status as employees. Discrimination against these individuals based on their sexual orientations and identities is the same type of discrimination that the Court ruled unlawful in *Bostock*.[148]

In *Bostock*, the Court emphasized that Title VII protects individuals and not groups.[149] Therefore, it cannot be that Title VII only protects some groups in the broader LGBTQ+ continuum rather than all individuals against discrimination based on sex. The Court noted that Title VII:

> [T]ells us three times—including immediately after the words 'discriminate against'—that our focus should be on individuals, not groups: Employers may not 'fail or refuse to hire or . . . discharge any *individual*, or otherwise . . . discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* . . . sex."[150]

If, as the Court declares, "[a]n individual's homosexuality or transgender status is not relevant to employment decisions. . . . because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex,"[151] it must be equally true that other LGBTQ+ individuals' sexual orientation and/or gender nonconformity is equally irrelevant to employment decisions. The Court emphasized that regardless of the employer's labels, intentions, or motivations, Title VII liability turns on whether the individual employee was treated differently because of sex.[152] The Court concluded: "Title VII prohibits all forms

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146. *Id.* at 1737.

147. *Id.* at 1737-38.

148. *See id.*

149. *Id.* at 1740-41.

150. *Id.* at 1740 (citing 42 U.S.C. § 2000e–2(a)(1)). In an illustrative example, the Court addressed employment discrimination based on non-conformity to gender stereotypes: "an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in both cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it." *Id.* at 1741.

151. *Id.* at 1741.

152. *Id.* at 174546 ("[N]othing in Title VII turns on the employer's labels or any further intentions (or motivations) for its conduct beyond sex discrimination.").

of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them."[153]

Concerning under what circumstances LGBTQ+ employees are protected, *Bostock* makes it clear that equal employment protections apply to LGBTQ+ employees in all the aspects of employment covered by Title VII.[154] Title VII does not provide different levels of protections for different groups. For all individuals protected under Title VII, including LGBTQ+ individuals, Title VII prohibits discrimination in hiring, evaluation, discharge, compensation, terms of employment, or other conditions and privileges of employment.[155]

Given the scope of the victory, and the benefits it will bring to the workplace and the broader society, *Bostock* was a historic case. But not everyone cheered the Court's decision in *Bostock*. The Religious Right took particular offense at the decision written by Justice Gorsuch.[156] Many presumed Justice Gorsuch owed his allegiance to the Religious Right after they supported his appointment, leaving them feeling betrayed in their fight against LGBTQ+ equality.[157]

Those objecting to recognizing Title VII protections for LGBTQ+ employees would likely find Justice Alito's opinion a strong defense of their views.[158] Those agreeing with the majority, however, and those advocating LGBTQ+ equality more generally, will find much to object to in Justice Alito's dissenting opinion. Justice Alito's opinion seems out of step with both the broader international consensus among developed nations, and the emerging U.S. consensus on LGBTQ+ rights.[159] Justice Alito's criticisms of the LGBTQ+ community are unlikely to age well given the direction of cultural change globally and in the U.S.[160]

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153. *Id.* at 1747.

154. *Id.*

155. 42 U.S.C. § 2000e-2.

156. *See, e.g.*, Peter Wehner, *The Cost of the Evangelical Betrayal*, THE ATL. (July 10, 2020), https://www.theatlantic.com/ideas/archive/2020/07/white-evangelicals-gambled-and-lost/613999 [https://perma.cc/5V3N-F7NP].

157. *See, e.g.*, *id.* ("Trump may be a flawed character, [evangelicals] argued, but at least he appointed Neil Gorsuch to the Supreme Court. And then came *Bostock v. Clayton County, Georgia.*").

158. *Bostock*, 140 S. Ct. at 1754-84 (2020) (Alito, J., dissenting).

159. *See, e.g.*, Adam Howard, *UN Passes Resolution on Behalf of LGBT Citizens Around the Globe*, MSNBC (Sept. 26,2014, 4:32 PM), http://www.msnbc.com/msnbc/un-passes-resolution-behalf-lgbt-citizens-around-the-globe [https://perma.cc/K5BA-ZB8N].

160. Like the last remaining open segregationists frantically warning of the dangers of "race mixing" Alito's dissenting opinion repeats antiquated and all too familiar parades of horribles based on bigoted caricatures of LGBTQ+ persons as socially deviant, sexually perverse, and dangerous to mainstream culture, privacy, and safety. Although Alito's core objections are generally cast in terms of protecting religious freedoms, as Professor Eckes noted: "Some of these religious freedom arguments were also commonly espoused during the desegregation movement in the 1950s; many Southern schools relied on religious beliefs to keep black students and black teachers segregated from white students." Eckes, *supra* note 44, at 45.

Justice Alito appears to have won, however, on the issue of more broadly exempting religious institutions from Title VII protections.[161] While the scope of institutions covered by Title VII is broad, it is not without limits. In *Hosanna-Tabor Evangelical Lutheran Church v. EEOC* the Court recognized a "ministerial exception" that may act as an affirmative defense to claims of employment discrimination in religious institutions.[162] In *Bostock* Justice Alito complained that this ministerial exception had been defined too narrowly.[163] Justice Alito may have been signaling something he already knew, however, because three weeks later, in *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court issued a 7-2 decision that expanded the ministerial exception in an opinion authored by Justice Alito.[164]

It is important to note, however, that even if this affirmative defense to Title VII may be available to a private religious school, the ministerial exception is unavailable for public schools.[165] Public institutions, including public educational institutions, are constitutionally mandated to remain neutral concerning religion, and therefore they cannot claim any ministerial exception based on religion.[166] Employment protections for LGBTQ+ employees under *Bostock* apply with full force in public schools.[167]

Justice Alito raised concerns about the Court's decision in *Bostock* infringing on free speech rights by requiring use of LGBTQ+ employees' names and pronouns,[168] and limiting expressions of "disapproval of same-sex relationships and sex reassignment procedures."[169] But employers already commonly have workplace anti-harassment policies that do not allow employees to engage in workplace conduct that is harassing, insulting, or demeaning on the basis of sex.[170] Further, no one can reasonably argue that harassing, insulting, or demeaning persons on the basis of "race, color, religion, sex, or national origin" would be protected speech in a workplace.[171] *Bostock* extended those same

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161. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

162. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171 (2012).

163. *Bostock*, 140 S. Ct. at 1781 (Alito, J., dissenting).

164. *Our Lady of Guadalupe*, 140 S. Ct. 2049 (2020).

165. *See id.*

166. John Dayton, Karen Bryant & Jami Berry, *Protected Prayer or Unlawful Religious Coercion?*, 358 EDUC. L. REP. 673, 673 (2018) ("For over a half-century the U.S. Supreme Court has clearly and consistently held that the U.S. Constitution's Establishment Clause mandates religious neutrality by public school personnel when they are acting in their official capacities . . . .").

167. *See, e.g.*, JOHN DAYTON, EDUCATION LAW 395 (2019) ("Under federal law private schools are prohibited from employment discrimination by Title VII, and public schools are prohibited from employment discrimination both by the Constitution and Title VII, 42 U.S.C. § 2000e-2.").

168. *Bostock*, 140 S. Ct. at 1782 (Alito, J., dissenting).

169. *Id.* at 1783 (Alito, J., dissenting).

170. *See* JoAnna Suriani, *"Reasonable Care to Prevent and Correct": Examining the Role of Training in Workplace Harassment Law*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 801 (2018).

171. 42 U.S.C. § 2000e-2(a)(1).

workplace protections to LGBTQ+ persons.[172] Workplace conduct that is discriminatory and harassing to LGBTQ+ persons is no more acceptable or legally protected than other workplace conduct that is discriminatory and harassing on the basis of "race, color, religion, sex, or national origin."[173]

As an employer subject to Title VII, public educational institutions cannot discriminate or tolerate discrimination against LGBTQ+ employees in hiring, discharge, compensation, terms of employment, or other conditions and privileges of employment.[174] Employers subject to Title VII cannot knowingly tolerate employee conduct that violates Title VII without potential liability for tolerating that unlawful conduct.[175] Accordingly, there is no right for on-duty public employees to engage in conduct that is unlawful under Title VII, and there is no free speech right to discriminate or harass persons on the basis of sex in public educational institutions, including LGBTQ+ persons.[176]

Finally, in a deeply troubling comment, as noted above, Alito rhetorically questioned, "is it plausible that Title VII prohibits discrimination based on any sexual urge or instinct and its manifestations? The urge to rape?"[177] Reducing the lives and equal rights of LGBTQ+ persons to "sexual urge[s]" and equating their personal identities to criminal deviance and sexual assault repeats a long history of dehumanizing and demonizing LGBTQ+ persons that provided excuses for persecution and hate crimes against LGBTQ+ persons.[178] It is likely that Alito's words will be quoted in the future as illustrative of the type of bigotry and baseless hate Title VII now protects members of the LGBTQ+ community against. Also troubling was that, while Justice Kavanaugh did congratulate gay and lesbian advocates for their victory in *Bostock*,[179] Kavanaugh conspicuously did not mention transgender persons, although *Bostock* expressly applies to transgender persons equally.[180] At best, this is a startling oversight by a Supreme Court Justice,[181] or worse, a troubling erasure of transgender persons from the victory in *Bostock*.

As noted above, public educational institutions are commonly a key battleground in legal/culture wars battles, and the Court's decisions on these

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172. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

173. 42 U.S.C. § 2000e-2(a)(1).

174. *Bostock*, 140 S. Ct. 1731 (2020).

175. 42 U.S.C. § 2000e-2(a)(1); *see also* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

176. 42 U.S.C. § 2000e-2(a)(1); *see also, e.g.*, Jennie Randall, Comment, *Don't You Say That!: Injunctions Against Speech Found to Violate Title VII are not Prior Restraints*, 3 U. PA. J. CONST. L. 990 (2001).

177. *Bostock*, 140 S. Ct. at 1766 (Alito, J., dissenting).

178. *See* Gail B. Murrow & Richard Murrow, *A Hypothetical Neurological Association Between Dehumanization and Human Rights Abuses*, 2 J. L. & BIOSCIENCES 336 (2015).

179. *Bostock*, 140 S. Ct. at 1837 (Kavanaugh J. dissenting).

180. *Id.* at 1737 (majority opinion).

181. *See, e.g.*, JOHN DAYTON, LEGAL RESEARCH, ANALYSIS, AND WRITING 140 (2020) ("Words are the tools of lawyers. Among good lawyers writing is a precise craft . . . Precision in word selection and clarity in statement are essential in legal writing."). The opinion of a U.S. Supreme Court Justice is not a random and un-vetted statement.

issues generally have significant implications for public educational institutions.[182] Public educational institutions are commonly the venue through which the Court's decisions on controversial culture wars issues become reality for most people.[183] Concerning the impact of *Bostock* on public educational institutions, *Bostock* makes it clear that as an employer subject to Title VII public educational institutions cannot discriminate against LGBTQ+ employees in hiring, discharge, compensation, terms of employment, or other conditions and privileges of employment.[184] As a matter of law, the long history of lawfully denying employment to LGBTQ+ persons in public educational institutions is over.[185] LGBTQ+ administrators, faculty, and staff should no longer need to live in fear of legally permissible employment discrimination.

Ultimately, the decision in *Bostock* is likely to reach further than employment law and likely impact interpretations of Title IX.[186] If LGBTQ+ employees are protected from discrimination, *a fortiori*, why shouldn't LGBTQ+ students under compulsory attendance laws in those same schools also be similarly protected?[187] In fact, only weeks after the U.S. Supreme Court's decision in *Bostock*, the U.S. Eleventh Circuit Court of Appeals, which had previously ruled against Gerald Bostock and protections for LGBTQ+ persons under Title VII[188], was compelled to follow the *Bostock* precedent in interpreting Title IX in *Adams v. School Board of St. Johns County*.[189]

*Adams* was a case about the rights of transgender children under Title IX, and the first such case after the Court's decision in *Bostock*.[190] The plaintiff, Drew Adams, was a transgender boy and public high school student.[191] In addition to having to manage the many challenges of his gender transition, school officials imposed significant harm on Drew by refusing to allow Drew to use restroom facilities consistent with his gender identity as requested by Drew, his family, and healthcare providers.[192] As the court noted "Mr. Adams . . . suffered harm because he was separated from his peers in single-stall restroom facilities. Mr. Adams explained it felt like a 'walk of shame' when he had to walk past the

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182. *See, e.g.*, cases cited *supra* note 14.

183. *See, e.g.*, cases cited *supra* note 14.

184. *Bostock*, 140 S. Ct. 1731.

185. *Id.* at 1754.

186. *See* Devon Sherrell, *A Fresh Look: Title VII's New Promise for LGBT Discrimination Protection Post*-Hively, 68 EMORY L.J. 1101, 1133 (2019) ("Because Congress passed Title IX eight years after Title VII had been in effect, most courts explicitly adopt Title VII precedent to interpret Title IX.").

187. *See* Chan Tov McNamarah, *On the Basis of Sex(ual Orientation or Gender Identity): Bringing Queer Equity to School with Title IX*, 104 CORNELL L. REV. 745, 761-70 (2019).

188. Bostock v. Clayton Cnty. Bd. of Comm'rs, No. 17-13801, 723 Fed. Appx. 964 (Mem) (11th Cir. 2018), *rev'd*, 140 S. Ct. 1731 (2020).

189. Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286 (11th Cir. 2020).

190. *Id.*

191. *Id.* at 1291.

192. *Id.* at 1291-92.

communal restrooms for a single-stall, gender-neutral restroom. It heightened the stigma he felt for being transgender."

In finding the school's conduct in violation of Title IX the court declared: "A public school may not punish its students for gender nonconformity. Neither may a public school harm transgender students by establishing arbitrary, separate rules for their restroom use. The evidence at trial confirms that Mr. Adams suffered both these indignities."[193]

Although school district officials attempted to argue standard culture wars-based defenses —e.g., transgender students were invading the privacy of others and posed a danger to other students — concerning the asserted harms of allowing transgender students to use restrooms consistent with their gender identities, the court found school officials' defenses factually baseless.[194] The court declared:

> There is only one dispute about Mr. Adams's Title IX claim: whether excluding Mr. Adams from the boys' bathroom amounts to sex discrimination in violation of the statute. We conclude that this policy of exclusion constitutes discrimination. First, Title IX protects students from discrimination based on their transgender status. And second, the School District treated Mr. Adams differently because he was transgender, and this different treatment caused him harm. Finally, nothing in Title IX's regulations or any administrative guidance on Title IX excuses the School Board's discriminatory policy . . . With *Bostock*'s guidance, we conclude that Title IX, like Title VII, prohibits discrimination against a person because he is transgender, because this constitutes discrimination based on sex . . . The record leaves no doubt that Mr. Adams suffered harm from this differential treatment. Mr. Adams introduced expert testimony that many transgender people experience the "debilitating distress and anxiety" of gender dysphoria, which is alleviated by using restrooms consistent with their gender identity, among other measures . . . Mr. Adams testified that, because of the policy, "I know that the school sees me as less of a person, less of a boy, certainly, than my peers." [195]

The court noted: "Every court of appeals to consider bathroom policies like the School District's agrees that such policies violate Title IX"[196] and recognized "*Bostock* confirmed that workplace discrimination against transgender people is contrary to law. Neither should this discrimination be tolerated in schools."[197] The court found that "[t]he School Board's bathroom policy, as applied to Mr. Adams, singled him out for different treatment because

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193. *Id.* at 1310.

194. *Id.* at 1297-1301; *id.* at 1301 ("[T]he School Board failed to raise genuine, non-hypothetical justifications for excluding Mr. Adams from the boys' restroom.").

195. *Id.* at 1304-05, 1307.

196. *Id.*

197. *Id.* at 1310.

of his transgender status. It caused him psychological and dignitary harm."[198] The Eleventh Circuit Court of Appeals, relying on the Court's Title VII decision in *Bostock*, held that transgender students have a legal right to use public facilities consistent with their gender identities.[199] *Bostock* will continue to have broad legal ramifications for educational institutions under both Title VII and Title IX, broadly protecting the equal rights of LGBTQ+ persons.[200]

Legal rights mean little, however, unless they are effectively translated from theory into practice. Assuring non-discrimination for all LGBTQ+ persons in schools will require educational and cultural changes in schools, changes that are long overdue.[201] Public school officials would be wise to implement appropriate training and education programs for employees and students concerning LGBTQ+ rights and inclusion to assure legal compliance and that public schools are safe and welcoming places for everyone.[202]

The legal victory in *Bostock* was historic. But part of the power of *Bostock* is its symbolic message of equal treatment and respect.[203] That message has to be broadly heard to effect the kind of cultural shift that can help reduce discrimination. For example, evidence suggests that awareness of protective workplace legislation decreases interpersonal discrimination against LGBTQ+ persons.[204] School officials must assure legal compliance, but school officials may also improve school culture by promoting equal rights and equal respect for all people.[205]

To ensure legal compliance, public school officials should examine existing policies and practices to ensure that they do not adversely impact LGBTQ+ employees. This includes use of gender based language in institutional policies; dress and grooming policies; use of facilities policies; policies

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198. *Id.*

199. *Id.* at 1310-11.

200. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020); *Adams*, 968 F.3d 1286 (11th Cir. 2020).

201. *See* MICHAEL SADOWSKI, SAFE IS NOT ENOUGH: BETTER SCHOOLS FOR LGBTQ STUDENTS (2016).

202. *See* JoAnna Suriani, *"Reasonable Care to Prevent and Correct": Examining the Role of Training in Workplace Harassment Law*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 801 (2018).

203. *See* Sherrell, *supra* note 186, at 1129 ("By illegalizing discrimination, legislation sends a strong social signal that discrimination is unacceptable.").

204. *See, e.g.*, Laura G. Barron & Michelle Hebl, *The Force of Law: The Effects of Sexual Orientation Antidiscrimination Legislation on Interpersonal Discrimination in Employment*, 19 PSYCH. PUB. POL'Y & L. 191, 201 (2013) ("[T]he effect of legislation on interpersonal measures of discrimination is particularly notable, because unlike formal, more blatant discrimination, interpersonal discrimination cannot readily be legally enforced. . . . [T]he mere fact that discrimination is labeled as illegal (without the threat of enforcement) may be sufficient to create a symbolic effect in changing community norms regarding the acceptability of prejudice and discrimination.").

205. *See, e.g.*, E. Gary Spitko, *A Reform Agenda Premised upon the Reciprocal Relationship Between Anti-LGBT Bias in Role Model Occupation and the Bullying of LGBT Youth*, 48 CONN. L. REV. 71, 95 (2015).

concerning institutional uses of names, genders, and pronouns; etc.[206] Public school policies must protect freedom of speech, but also recognize that free speech is not a license to harass LGBTQ+ employees in the workplace.[207] Policies must protect freedom of religion, but recognize that public school employees must refrain from harassment based on sex and generally remain neutral concerning religion while acting in their official capacities.[208] Employers, including public school employers, should review pay equity practices and other benefits and conditions of employment to assure nondiscrimination.[209] To effectively implement policy changes, public schools should provide adequate training and professional development for all employees, especially for those in leadership positions, concerning laws, policies, and professional ethics related to LGBTQ+ issues and inclusion.[210]

## CONCLUSION

*Bostock* was a historic civil rights victory for LGBTQ+ employees.[211] The Court's decision in *Bostock* definitively declared that Title VII protects LGBTQ+ employees from discrimination.[212] After *Bostock*, public schools and other institutions subject to Title VII cannot lawfully discriminate in employment against LGBTQ+ persons in hiring, evaluations, assignments, dismissals, pay, or any other terms, conditions, or privileges of employment.[213]

Public educational administrators are responsible for administering the law and ensuring legal compliance in their schools.[214] Accordingly, they must ensure that legally compliant policies are established, administered, and respected in their schools.[215] This includes compliance with the Court's decision

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206. *See Transgender Inclusion in the Workplace: Recommended Policies and Practices*, THE HUM. RTS. CAMPAIGN FOUND., https://www.thehrcfoundation.org/professional-resources/transgender-inclusion-in-the-workplace-recommended-policies-and-practices (last visited July 27, 2020) [https://perma.cc/7TTF-PNNS].

207. *See, e.g.*, Elizabeth Olsen, *Verbal Hate Crimes in the Workplace: The Effect of Mental and Emotional Injury of the LGBT Community on the Commerce Clause*, 27 J. L. & POL'Y 500, 523-25 (2019).

208. *See* Marilyn Gabriela Robb, *Pluralism at Work: Rethinking the Relationship Between Religious Liberty and LGBTQ Rights in the Workplace*, 54 HARV. C.R.-C.L. L. REV. 917, 921, 927, 931-32, 940 (2019).

209. Sherrell, *supra* note 186, at 1104 (citing BRAD SEARS & CHRISTY MALLORY, DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE 1-2 (2011)) ("[S]tudies show gay men are paid less on average than their straight peers and transgender individuals face significantly higher unemployment rates and poverty rates than all groups surveyed.").

210. Biegel, *supra* note 25, at 404 ("Professional development for both teachers and school site administrators is one of the most important steps a school district can take to combat peer harassment and discriminatory discipline practices . . . .").

211. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

212. *Id.* at 1754.

213. *Id.*

214. Dayton, *supra* note 166, at 26.

215. *Id.*

in *Bostock*, as an employer who discriminates against LGBTQ+ employees based on their sexual orientation or gender identity "defies the law."[216] Further, those responsible for administering the law should be alert that the Court's interpretation of Title VII in *Bostock* will impact interpretations of Title IX concerning students.[217] Although much remains to be done, the days of lawful discrimination against LGBTQ+ persons are thankfully coming to a close as the equal rights of LGBTQ+ persons are recognized and protected.[218]

The Court noted that some issues remained unresolved in *Bostock* because those issues were not before the Court.[219] Until these issues are resolved by courts, however, public education officials would be wise to err in favor of protecting equality for all persons and acting to prevent discrimination against LGBTQ+ employees and students.[220] Until any remaining issues are definitively resolved, those responsible for legal compliance may avoid liability generally by ensuring equal rights, equal respect, and inclusion for all people, creating a relative legal safe harbor and taking a step toward cultural progress.[221] Further, practicing equal rights, equal respect, and inclusion for all people is consistent with professional ethical standards and helps to model respect, equality, and inclusion for students and the community, improving the culture and the quality of life for everyone in educational institutions and in the community.[222]

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216. Bostock, 140 S. Ct. 1731, 1754 (2020).

217. Sherrell, *supra* note 186, at 1133.

218. Bostock, 140 S. Ct. 1731 (2020).

219. *Id.* at 1753 ("The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.").

220. *See* Leonore F. Carpenter, *The Next Phase: Positioning the Post*-Obergefell *LGBT Rights Movement to Bridge the Gap Between Formal and Lived Equality*, 13 STAN. J. C.R. & C.L. 255 (2017).

221. *See, e.g.*, KRYSS SHANE, THE EDUCATOR'S GUIDE TO LGBT+ INCLUSION (2020).

222. *See, e.g.*, Craig Konnoth, *The Protection of LGBT Youth*, 81 U. PITT. L. REV. 263, 285-286 (2019) ("LGBT children are among the most vulnerable individuals in our society. While we have made advances on LGBT rights in courts, the barometer of true progress in hearts and minds lies in how much we protect LGBT children and how much we convince others that growing up gay is acceptable for children. To achieve this, the law cannot just reverse its past persecution but must affirmatively reach out to protect, even celebrate LGBT youth.").

# STRIPPED FROM SUNSCREEN, BUT FINE FOR FOUNDATION: HOW THE REGULATORY DICHOTOMY OF TOPICALLY APPLIED SKIN PRODUCTS ENDANGERS WOMEN

*Emily Jones*†



## INTRODUCTION

The distinctive smell of formaldehyde often evokes memories of high school biology dissections. While formaldehyde is a well-known preservative with many commercial and industrial uses, in 2011 the National Toxicology Program labeled formaldehyde a known human carcinogen.[1] The National Academy of Sciences and the National Institute of Environmental Health Sciences (a subsidiary of the National Institutes of Health) subsequently confirmed and adopted this label.[2] Despite its status as a known harmful

† Graduate of the University of Wisonsin School of Law.

1. *Formaldehyde*, NAT'L INST. OF ENV'T HEALTH SCIS., https://www.niehs.nih.gov/health/topics/agents/formaldehyde/index.cfm (last updated Jan. 17, 2020) [https://perma.cc/KNH8-EYEW].

2. *Id.*

chemical, formaldehyde is not banned from use in any cosmetics products by the Food and Drug Administration (FDA), the federal agency charged with regulating cosmetics.[3] As a result, formaldehyde's presence in cosmetics is extensive. One chemical formulation of formaldehyde appears in more than 135 cosmetics products ranging from shampoo to lotion to face wash.[4]

Formaldehyde is just one example of how federal agencies dichotomously regulate ingredients. While some agencies have updated research and regulation of formaldehyde, cosmetics regulation is not such an area. The FDA has not passed new cosmetics regulations since 1938 – the same year a gallon of gas cost 10 cents,[5] Superman made his first appearance in a comic book,[6] and mercury was considered a go-to acne treatment.[7] This dated regulatory system is insufficient for the plethora of ingredients and innovations that pervade today's cosmetics market.

Government regulations are meant to protect.[8] However, the FDA's regulatory scheme fails to protect consumers. FDA-regulated products used similarly – topical application – are regulated dissimilarly[9] based on manufacturer-identified purpose, not the risks posed to consumers. Such arbitrary distinctions ease the road to market for manufacturers while endangering consumers, most commonly women. A reformed regulatory scheme based on the hazards products pose because of their means of usage will better protect consumers and fulfill the regulatory goal of protection. Part I of this note will explore the history of the FDA and its organic act, the Food, Drug & Cosmetics Act ("FDCA"). Part II will establish that sunscreen and foundation are applied similarly and pose similar harms to consumers. Part III will evaluate the dichotomous regulation of sunscreen and foundation despite the similar harms they pose. Part IV will propose opportunities for cosmetics reform based

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3. *Cosmetics Safety Q&A: Prohibited Ingredients*, FDA, https://www.fda.gov/cosmetics/resources-consumers-cosmetics/cosmetics-safety-qa-prohibited-ingredients (last updated Feb. 22, 2018) [https://perma.cc/58GR-DPVP].

4. *DMDM Hydantoin (Formaldehyde Releaser)*, EWG'S SKIN DEEP, https://www.ewg.org/skindeep/ingredients/702196-dmdm-hydantoin-formaldehyde-releaser (last visited Feb. 29, 2020) [https://perma.cc/XRP7-WSSM]. There are many possible chemical formulations of formaldehyde. *Formaldehyde, Compound Summary*, NAT'L CTR. FOR BIOTECHNOLOGY INFO., https://pubchem.ncbi.nlm.nih.gov/compound/Formaldehyde (last visited March 5, 2020) [https://perma.cc/5QXW-F79Z].

5. *What Happened in 1938 Important News and Events, Key Technology and Popular Culture*, THE PEOPLE HIST., http://www.thepeoplehistory.com/1938.html (last visited Feb. 29, 2020) [https://perma.cc/PC8L-7A6A].

6. *Id.*

7. Alix Tunell, *Forget Cadillacs, These Beauty Consultants Want Political Change*, REFINERY29, https://www.refinery29.com/en-us/beautycounter-political-action (last updated March 15, 2018) [https://perma.cc/Q8WB-VDJZ].

8. *See* Kenneth B. Malmberg, *The Role of Government Regulation and Leadership in Increasing Sustainability*, AM. SOC'Y FOR PUB. ADMIN., https://patimes.org/role-government-regulation-leadership-increasing-sustainability/ (last visited Feb. 29, 2020) [https://perma.cc/6Q7W-D8BK].

9. *Compare* 21 U.S.C. §§ 360fff – 360fff-4 (2012), *and* 21 U.S.C. §§ 360ff-6 – 360fff-7 (2012), *with* 21 U.S.C. §§ 361-63 (2012).

on progress seen in sunscreen regulation and other market-based opportunities in order to better protect consumers.

## PART I: BACKGROUND

Congress frequently passes laws without explaining how the laws will be implemented and followed.[10] Laws empower agencies to promulgate regulations filling in necessary details around compliance and enforcement.[11] These details allow laws to better serve their purposes.[12] This combination of laws and agency regulations create the existing federal regulatory environment. The existing regulatory environment impacts nearly every aspect of Americans' daily lives.[13]

Food, drugs, and cosmetics were not federally regulated until the 20th century. Food and drug regulation in the U.S. is often traced to Upton Sinclair's *The Jungle*, published in 1905.[14] Sinclair publicized concerns about unsanitary food-production conditions, which spurred public outrage and prompted passage of the 1906 Pure Food and Drugs Act (PFDA),[15] ending 25 years of failed attempts to regulate the food industry.[16] This Act created the Food and Drug Administration (FDA), the nation's first consumer protection agency.[17]

The PFDA sought to protect consumers from the misbranded and adulterated food and drug industries.[18] However, in practice, the legislation merely codified the existing common law prohibition of fraudulent conduct and expanded its coverage to the food and drug industries.[19] The overall effect of the Act on consumer protection was weak.

The rise of advertising and radio in the 1920s enabled producers to increasingly make unsubstantiated claims about their products and mislead

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10. *See The Basics of the Regulatory Process*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/laws-regulations/basics-regulatory-process (last updated Jul. 22, 2020) [https://perma.cc/XL8B-Y9GF].

11. *Id.*

12. *Id.*

13. *Why You Should Care About Regulatory Science*, FDA, https://www.fda.gov/consumers/consumer-updates/why-you-should-care-about-regulatory-science (last updated Dec. 8, 2017) [https://perma.cc/SZ3E-ZY7Y].

14. *Historical Highlights: The Pure Food and Drug Act*, HIST., ART & ARCHIVES U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Historical-Highlights/1901-1950/Pure-Food-and-Drug-Act/ (last visited Feb. 29, 2020) [https://perma.cc/R4NH-8BZ6].

15. *Id.*

16. Valerie J. Watnick, *The Missing Link: U.S. Regulation of Consumer Cosmetic Products to Protect Human Health and the Environment*, 31 PACE ENVTL. L. REV. 595, 599 (2014).

17. *When and Why Was FDA Formed?,* FDA, https://www.fda.gov/about-fda/fda-basics/when-and-why-was-fda-formed (last updated March 28, 2018) [https://perma.cc/SUW2-KQ8E]; The Pure Food and Drug Act, U.S. CAPITOL VISITOR CTR., https://www.visitthecapitol.gov/exhibitions/congress-and-progressive-era/pure-food-and-drug-act (last visited Oct. 1, 2020) [hereinafter The Pure Food and Drug Act] [https://perma.cc/6UVY-TVQZ].

18. The Pure Food and Drug Act, *supra* note 17.

19. Watnick, *supra* note 16, at 599.

consumers.[20] Enforcing the PFDA against these claims and harms was challenging and not consistently successful.[21] Again, authors publicly highlighted the need for stronger regulation.[22] Publications criticized the weak regulation of food, drugs, and cosmetics, as well as the legal limitations of the Pure Food and Drugs Act.[23] These books became popular and catalyzed public outrage.[24] The increased public awareness the books facilitated hastened passage of the 1938 Food, Drug and Cosmetics Act (FDCA).[25] In addition to her book, Ms. Lamb engaged women in creating the FDCA, which continues to guide the FDA today.[26] The FDCA charges the FDA with protecting the public health by ensuring the safety of drugs, biological products, medical devices, and more.[27]

The FDCA brought cosmetics under FDA regulation for the first time in 1938.[28] Cosmetics were not included in the PFDA for a number of societal reasons.[29] First, the cosmetics industry in 1906 was relatively small, and cosmetics were only used by women.[30] Further, in 1906, women did not have the right to vote and no woman had ever served in either house of Congress.[31] Finally, visible makeup was morally egregious, associated with prostitutes and actresses, leading many women, particularly women of privilege, to conceal cosmetics use.[32] By 1938, however, cosmetics usage was more socially acceptable, and the market was worth more than 50 million dollars.[33] Widely publicized, serious injuries from cosmetics accompanied this growth, and

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20. *Ruth deForest Lamb: FDA's First Chief Educational Officer*, FDA, https://www.fda.gov/about-fda/virtual-exhibits-fda-history/ruth-deforest-lamb-fdas-first-chief-educational-officer (last updated March 28, 2018) [hereinafter *Ruth deForest Lamb*] [https://perma.cc/8PHC-626N].

21. *Id.*; *Part I: The 1906 Food and Drugs Act and Its Enforcement*, FDA, https://www.fda.gov/about-fda/fdas-evolving-regulatory-powers/part-i-1906-food-and-drugs-act-and-its-enforcement (last updated April 24, 2019) [https://perma.cc/R9ZE-UV8P].

22. *Ruth deForest Lamb, supra* note 20.

23. For example, the Act regulated labeling but the advent of radio led to false claims over the air that never would be allowed on a written label. Further innovations uncovered by the FDCA included cosmetics and medical devices. *Id.*

24. *Id.*

25. *Id.*

26. *See Ruth deForest Lamb, supra* note 20.

27. *What We Do*, FDA, https://www.fda.gov/about-fda/what-we-do (last updated March 28, 2018).

28. Part II: 1938, Food, Drug, Cosmetic Act, FDA, https://www.fda.gov/about-fda/fdas-evolving-regulatory-powers/part-ii-1938-food-drug-cosmetic-act (last updated Nov. 27, 2018) [https://perma.cc/FJ9U-EDEZ].

29. Marie Boyd, *Gender, Race & the Inadequate Regulation of Cosmetics*, 30 YALE J.L. & FEMINISM 275, 308 (2018).

30. *Id.*

31. *Id.* at 309-10.

32. *Id.* at 308-309.

33. *See, e.g.*, *id.* at 310; Roseann B. Termini & Leah Tressler, *Analyzing the Laws, Regulations, and Policies Affecting FDA-Regulated Products: American Beauty: An Analytical View of the Past and Current Effectiveness of Cosmetic Safety Regulations and Future Direction*, 63 FOOD & DRUG L.J. 257, 258 (2008).

victims had no regulatory recourse because the PFDA did not cover cosmetics.[34] These injuries included blistering, face ulcers and blindness following the use of an eyelash dye, paralysis and nerve damage caused by a hair removal cream, and blackened gums caused by a mercury-laden skin cream.[35]

While the FDCA brought the cosmetics industry under federal regulation, it did so in a more limited scope than either food or drugs. To this day, the FDCA merely bans misbranded and/or adulterated cosmetics, both of which are definitionally limited.[36] The Senate initially attempted to broaden the definition of adulteration, covering both anything that could be injurious under usual or prescribed conditions of use and cosmetics containing any "poisonous or deleterious ingredient" limited or prohibited by the agency.[37] However, that definition was met with resistance.[38] A narrower definition ultimately passed, focused only on the composition of the cosmetic.[39] An adulterated cosmetic is any that either contains or is packaged in a poisonous or deleterious substance that could be injurious to users under directed use, contains any "filthy, putrid or decomposed substance," or is prepared or packaged in insanitary conditions.[40] This definition, as opposed to the initial proposed definition, links the poisonous or deleterious substance in the cosmetic to the injury, as opposed to regulating both the ingredient composition *and* any injury.[41]

A cosmetic also violates regulations if it is misbranded.[42] Misbranding covers labeling: labeling cannot be false or have missing information, specifically about a color additive, and the container may not be misleading.[43] These statutory definitions (adulterated, misbranded) from 1938 remain completely unchanged today and provide the primary regulatory recourse against cosmetics.[44]

### *The FDCA Today*

Though the core definitions have not changed, there have been minor modifications to cosmetics regulation since the FDCA was first passed.[45]

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34. Some victims were able to successfully sue producers, but the federal government and FDA were unable to act. Kat Eschner, *Three Horrifying Pre-FDA Cosmetics*, SMITHSONIAN MAG. (June 26, 2017), https://www.smithsonianmag.com/smart-news/three-horrifying-pre-fda-cosmetics-180963775/ [https://perma.cc/ZC89-YFPD].

35. *Id.*; Boyd, *supra* note 29, at 310; Rajiv Shah & Kelly E. Taylor, *Concealing Danger: How the Regulation of Cosmetics in the United States Puts Consumers at Risk*, 23 FORDHAM ENV'T. L. REV. 203, 215 (2012).

36. 21 U.S.C. §§ 361-362 (2018); Watnick, *supra* note 16, at 601.

37. Laura A. Heymann, *The Cosmetic/Drug Dilemma: FDA Regulation of Alpha-Hydroxy Acids*, 52 FOOD & DRUG L.J. 357, 362 (1997).

38. *Id.*

39. *Id.*

40. 21 U.S.C. § 361 (2018).

41. Heymann, *supra* note 37, at 362.

42. 21 U.S.C. § 331(b) (2018).

43. 21 U.S.C. § 362 (2012).

44. Watnick, *supra* note 16, at 602.

45. *See* Termini & Tressler, *supra* note 33, at 261-65.

First, the Delaney Clause brought color additives found to cause cancer in animals or humans under federal regulation.[46] Such color additives may not be considered Generally Recognized as Safe (GRAS) by the FDA.[47] This is currently a zero-tolerance standard,[48] with a narrow exception for coal-tar hair dyes, despite coal-tar dyes being a recognized carcinogen as early as the 1970s.[49]

The second general revision to the FDCA required that labels state ingredients.[50] These revisions came from FDCA-specific revisions, as well as the Fair Packaging and Labeling Act and the Poison Prevention Packaging Act.[51] Though present-day consumers are accustomed to ingredient labels on personal care products, it was not part of the original Act. These labeling requirements maintain an exception for ingredients the manufacturer considers a trade secret;[52] they may be listed just as "and other ingredients."[53]

The most recent FDCA updates in 2012 covered nanotechnology and nanoparticles. These updates allow the FDA to "intensify and expand activities related to enhancing scientific knowledge regarding nanomaterials" in regulated products.[54] These updates were triggered by Executive Order 13563.[55] However, their impact is limited. The FDA issued non-binding guidance on the use of nanomaterials in cosmetics, but the scope of the guidance relies on the same safety considerations that were recommended prior to any revisions.[56] While it

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46. *Id.* at 261; *see also Pub. Citizen v. Young*, 831 F.2d 1108, 1114 (D.C. Cir. 1987) (further discussing the Delaney Clause).

47. Materials must be GRAS to be used in a regulated product. Termini & Tressler, *supra* note 33, at 261.

48. 21 C.F.R. § 70.3(u) (2019); Termini & Tressler, *supra* note 33, at 261-62.

49. Elmer B. Staats, *Cancer and Coal Tar Hair Dyes: An Unregulated Hazard to Consumers*, GOV'T ACCOUNTABILITY OFF. (Dec. 6, 1977), https://www.gao.gov/assets/130/120763.pdf [https://perma.cc/DE5C-LPPT]. Although technically allowed under existing regulations, most manufacturers no longer use coal-tar hair dyes. 21 C.F.R. § 70.3(u); Termini & Tressler, *supra* note 33, at 261-62. This is an example of how public perception pushes manufacturers when regulations don't. This is expanded on further in Part IV.

50. *See* Watnick, *supra* note 16, at 603.

51. Watnick, *supra* note 16, at 603-04.

52. 21 C.F.R. § 20.61(a) (2020) ("A trade secret may consist of any commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort. There must be a direct relationship between the trade secret and the productive process.").

53. Termini & Tressler, *supra* note 33, at 263.

54. Watnick, *supra* note 16, at 604.

55. Exec. Ord. No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review [https://perma.cc/NTF5-FQFK]; *FDA's Approach to Regulation of Nanotechnology Products*, FDA, https://www.fda.gov/science-research/nanotechnology-programs-fda/fdas-approach-regulation-nanotechnology-products (last updated Mar. 23, 2018) [https://perma.cc/CLL9-3DGK].

56. "We consider the current framework for safety assessment sufficiently robust and flexible to be appropriate for a variety of materials, including products containing nanomaterials." *Guidance for Industry: Safety of Nanomaterials in Cosmetic Products*, FDA,

is notable that revisions occurred so recently, the practical impact of the 2012 updates is minimal.

The dichotomous regulation of sunscreen and foundation highlights the FDCA's categorical limitations. The FDCA classifies products as food, tobacco, drugs and devices, or cosmetics.[57] The category of a product determines the regulations that apply to that product.[58] Categorization is based on the product's purpose, not its method of use; thus, products used similarly—via topical application, for example—could be regulated as either a drug or a cosmetic depending on the manufacturer-identified purpose.[59] Sunscreen is considered a drug,[60] while foundation is considered a cosmetic.[61] As a result of this classification, the FDA's power to regulate ingredients in sunscreen (a drug) and foundation (a cosmetic) is very different.[62]

What constitutes a drug is defined broadly in the FDCA,[63] and tends to be construed broadly by the Supreme Court.[64] Drugs include articles and components of articles "intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and . . . intended to affect the structure or any function of the body of man or other animals."[65] Prescription and over-the-counter (OTC) drugs are regulated as distinct subcategories based on the perceived safety risks to self-medicating consumers.[66] Labeling requirements for OTC drugs are stricter because consumers self-select and administer them, whereas prescription drug usage is guided by a doctor who bears the duty to select the dosage and instruct the patient on use.[67] Most drugs are first introduced as prescription-only and later become available OTC.[68]

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§ III B (June 2014), https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-safety-nanomaterials-cosmetic-products#III.B [https://perma.cc/23WF-UTLP].

57. *Laws Enforced by FDA: Federal Food, Drug, and Cosmetic Act (FD&C Act)*, FDA, https://www.fda.gov/regulatory-information/laws-enforced-fda/federal-food-drug-and-cosmetic-act-fdc-act (last updated March 29, 2018) [https://perma.cc/E4VZ-44KK].

58. *Is It a Cosmetic, a Drug, or Both? (Or Is It Soap?)*, FDA, https://www.fda.gov/cosmetics/cosmetics-laws-regulations/it-cosmetic-drug-or-both-or-it-soap (last updated Aug. 24, 2018) (hereinafter *Cosmetics, Drugs, or Soap?*) [https://perma.cc/M95J-Y9TD].

59. *See Cosmetics, Drugs, or Soap?*, supra note 58.

60. 21 C.F.R. § 201.327 (2020); *Cosmetics, Drugs, or Soap?*, *supra* note 58.

61. 21 U.S.C. § 321(i) (2018).

62. *See Cosmetics, Drugs, or Soap?*, supra note 58.

63. 21 U.S.C. § 321(g)(1) (2018).

64. United States v. An Article of Drug Bacto-Unidisk, 394 U.S. 784, 793 (1969); Heymann, *supra* note 37, at 364-65.

65. 21 U.S.C. § 321(g)(1).

66. Holly M. Spencer, *The Rx-to-OTC Switch of Claritin, Allegra, and Zyrtec: An Unprecedented FDA Response to Petitioners and the Protection of Public Health*, 51 AM. U. L. REV. 999, 1014 (2002).

67. *Id.* at 1014-15.

68. Lars Noah, *Treat Yourself: Is Self-Medication the Prescription for What Ails American Health Care?*, 19 HARV. J.L. & TECH. 359, 365-66 (2006).

Comparatively, cosmetics are limited by definition to items or components of items "intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance."[69] There are no distinctions between type or gradation of regulation within cosmetics that would implicate different labeling or oversight requirements as is seen in drug regulation.

The difference in FDCA classification is relevant because differently classified products receive different oversight and approval. The primary differences between drug and cosmetics regulations are: (1) premarket approval, (2) manufacturing requirements, (3) registration requirements, and (4) labeling requirements.

First, drugs are subject to pre-market or monograph approval by the FDA; cosmetics are not.[70] Pre-market approval involves the New Drug Application (NDA) Process.[71] Before approving an NDA, the FDA determines whether existing data is adequate to prove safety, and whether benefits of the drug outweigh the risks.[72] NDAs are typically used for newer products or prescription products. Alternatively, drugs may be approved via monograph.[73] Monographs provide an alternative to NDA approval by categorically establishing standards for safety of OTC drugs.[74] Monographs state requirements on what ingredients may be used and for what purpose.[75] New products that fall under a monograph can come to market through monograph compliance instead of NDAs.[76] This is a less intensive process. Examples of OTC products regulated by monographs include dandruff shampoos and sunscreens.[77]

Second, drugs are under strict manufacturing *requirements*, while cosmetics are merely under manufacturing *guidelines*.[78] Specific regulations enumerate Good Manufacturing Practice requirements for drugs;[79] failure to adhere to these makes a drug adulterated.[80] Meanwhile, Good Manufacturing Practice Guidelines for cosmetics are just that – guidelines, not required

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69. 21 U.S.C. § 321(i) (2018).
70. *Cosmetics, Drugs, or Soap?*, *supra* note 58.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Over-the-Counter (OTC) Drug Monograph Process*, FDA, https://www.fda.gov/drugs/current-good-manufacturing-practices-cgmp-drugs-reports-guidances-and-additional-information/over-counter-otc-drug-monograph-process (last updated Sept. 3, 2020) [https://perma.cc/2RT5-PXXX].
75. *Id.*; *Cosmetics, Drugs, or Soap?*, *supra* note 58.
76. *Cosmetics, Drugs, or Soap?*, *supra* note 58.
77. *Id.*
78. *Id.*
79. 21 C.F.R. §§ 210 – 211 (2020).
80. 21 U.S.C. § 351(a)(2)(B) (2018).

regulations, meaning they are not legally enforceable.[81] Thus, these practices are suggested or recommended, but not required.[82]

Third, drug firms must register and list their products with the FDA,[83] while cosmetics firms are not required to register nor list product formulations with the FDA.[84] Because registration is not required, the FDA has no true conception of the cosmetics industry's size or scope. In fact, it is entirely possible to produce and retail cosmetics in the United States without involving the FDA.

Finally, labeling requirements diverge between the two categories.[85] OTC drug labeling must enumerate the drug's title, active ingredients, purpose, uses, warnings regarding ingestion, allergies, flammability, directions, and inactive ingredients, just to name a few.[86] Cosmetics labeling must only be truthful and not misleading.[87] Thus, consumers receive significantly more information about the contents of their sunscreens than their foundations – despite the fact that both are applied and absorbed topically.

While FDCA classifications create numerous regulatory differences between drugs and cosmetics, the FDCA's broad preemption provisions apply equally to both categories. It appears logical for consumers aggrieved by product ingredients to bring a tort suit, enforcing their rights through litigation in lieu of stronger legislation or regulation. However, the FDCA requires all proceedings enforcing the Act be by and in the name of the United States.[88] This means there is no individual or private cause of action under the FDCA; only the FDA may enforce the FDCA. This preempts most individual tort claims. Claims related to FDCA-regulated products may avoid preemption only if the conduct would have given rise to recovery regardless of the FDCA.[89] These claims cannot advance a true goal of privately enforcing the FDCA[90] because there is no private cause of

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81. *Draft Guidance for Industry: Cosmetic Good Manufacturing Practices*, FDA (June 2013), https://www.fda.gov/regulatory-information/search-fda-guidance-documents/draft-guidance-industry-cosmetic-good-manufacturing-practices [https://perma.cc/Y982-KFLA]; *Cosmetics, Drugs, or Soap?*, *supra* note 58.

82. *Draft Guidance for Industry: Cosmetic Good Manufacturing Practices*, *supra* note 81.

83. 21 C.F.R. § 207 (2020).

84. 21 C.F.R. §§ 710, 720 (2020); *Cosmetics, Drugs, or Soap?*, *supra* note 58.

85. *Cosmetics, Drugs, or Soap?*, *supra* note 58.

86. 21 C.F.R. § 201.66 (2020).

87. *Cosmetics Labeling*, FDA, https://www.fda.gov/cosmetics/cosmetics-labeling (last updated March 6, 2018) [https://perma.cc/4492-EWPQ].

88. 21 U.S.C. § 337 (2018).

89. *In re* Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig., 701 F. Supp. 2d 356 (E.D.N.Y. 2010) (finding consumer allegations of consumer protection law violations not preempted because the conduct was recoverable regardless of the FDCA). *See also* Borchenko v. L'Oréal USA, Inc., 389 F. Supp. 3d 769, 772 (C.D. Cal. 2019) ("In order to escape preemption by the FDCA, '[t]he plaintiff must be suing for conduct that violates the FDCA . . ., but the plaintiff must not be suing because the conduct violates the FDCA (such a claim would be impliedly preempted under *Buckman* [*Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 350, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001)]).'").

90. Borchenko v. L'Oréal USA, Inc., 389 F. Supp. 3d 769, 773 (C.D. Cal. 2019) (citing PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1113 (2d Cir. 1997)).

action under the Act. The FDA alone is responsible for investigating and enforcing potential FDCA violations.[91] This leaves consumer protection at the will of an agency with vastly dichotomous power depending on manufacturer-friendly classifications.

## PART II: SUNSCREEN AND FOUNDATION ARE USED SIMILARLY, POSING SIMILAR HARMS TO CONSUMERS.

While the regulatory schemes for sunscreen and foundation differ as a result of FDA classification, the products pose similar harms to consumers because of their similar usage. Both sunscreen and foundation are applied topically to the skin, leading to dermal absorption of product ingredients. The harm caused by exposure to carcinogenic or toxic ingredients in either category of product is the same. Sunscreen is regulated more strictly because it is classified as a drug, but the chemicals used in sunscreen are absorbed through the skin just as chemicals in foundation are. Research to update the sunscreen monograph revealed that some common sunscreen ingredients are, in fact, endocrine-disrupting. Regulations are evolving to better protect sunscreen consumers. However, the same harmful chemicals appear in foundation, where their use is not regulated, despite the knowledge within the agency of their potential harm via dermal absorption.

The endocrine system consists of glands that produce and secrete hormones used for many functions including respiration, metabolism, reproduction, sexual development, and growth.[92] Endocrine disrupting chemicals negatively affect the function of the endocrine system by blocking or altering the effect of naturally occurring hormones.[93] Endocrine disruptors particularly affect women, given their impairment of reproductive functions and link to reproductive cancers.[94]

Oxybenzone, a common sunscreen ingredient, is believed to be an endocrine disruptor.[95] Oxybenzone is found in products topically applied.[96] Recent research indicates oxybenzone is absorbed through the skin to a much greater extent than previously believed.[97] This chemical has appeared in human breast milk, amniotic fluid, urine, and blood plasma.[98] However, oxybenzone

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91. Perez v. Nidek Co., 711 F.3d 1109, 1119 (9th Cir. 2013).

92. *The Endocrine System*, HORMONE HEALTH NETWORK, https://www.hormone.org/what-is-endocrinology/the-endocrine-system (last visited Feb. 29, 2020) [https://perma.cc/M7HL-QCUX].

93. Watnick, *supra* note 16, at 607.

94. Kelly Horvath, *Indecent Exposures: EDCs and Women's Health*, ENDOCRINE NEWS (July 2015) https://endocrinenews.endocrine.org/july-2015-indecent-exposures-edcs-and-womens-health-fix/ [https://perma.cc/DDL9-HFXD].

95. Watnick, *supra* note 16, at 615.

96. *Products Containing Oxybenzone*, EWG'S SKIN DEEP, https://www.ewg.org/skindeep/browse/ingredients/704372-OXYBENZONE (last visited Dec. 22, 2020) (2/3 of the listed products containing oxybenzone are sunscreens or include SPF).

97. Sunscreen Drug Products for Over-the-Counter Human Use, 84 Fed. Reg. 6204, 6206 (proposed Feb. 26, 2019) (to be codified at 21 C.F.R. pts. 201, 310, 347, 352).

98. *Id.* The FDA generally considers oxybenzone widely available. *Id.*

does not naturally occur in any of these bodily fluids. Its presence is due to dermal absorption.[99] Many personal care products contain oxybenzone, and most products containing oxybenzone can be classified as sunscreens.[100] As recently as 2018, the Personal Care Product Council (PCPC), responsible for substantiating the safety of cosmetics ingredients, noted that oxybenzone is safe.[101] However, in promulgating required regulations following the Sunscreen Innovation Act (SIA), the FDA acknowledged a lack of data evaluating the full extent of the absorption potential of oxybenzone, and thus a lack of data regarding the safety of the chemical.[102] As of February 2019, oxybenzone is under review for safety as an approved sunscreen ingredient under the in-process updates to the sunscreen monograph.[103] Additional research regarding chemical absorption from topical sunscreens is ongoing,[104] as is research regarding absorption from differing formulations of sunscreen (cream versus lotion versus spray).[105] However, there is no restriction on oxybenzone's use in cosmetics despite the concerns with and prohibition of oxybenzone's use in sunscreens.

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99. Theresa M. Michele & David Strauss, *Shedding More Light on Sunscreen Absorption*, FDA, https://www.fda.gov/news-events/fda-voices/shedding-more-light-sunscreen-absorption (last updated Jan. 21, 2020) [https://perma.cc/UZK3-XMQN]; *Biomonitoring Summary: Benzophenone-3 (BP-3)*, CTRS. FOR DISEASE CONTROL AND PREVENTION NAT'L BIOMONITORING PROGRAM, https://www.cdc.gov/biomonitoring/Benzophenone-3_BiomonitoringSummary.html (last accessed Dec. 22, 2020).

100. *Products Containing Oxybenzone*, *supra* note 96 (2/3 of listed personal care products containing oxybenzone are sunscreens or are categorized as including SPF).

101. *Statement by Alexandra Kowcz, Chief Scientist Personal Care Products Council in Response to the Environmental Working Group's 2018 Guide to Sunscreens*, PERS. CARE PRODS. COUNCIL (May 31, 2018), https://www.personalcarecouncil.org/statement/statement-by-alexandra-kowcz-chief-scientist-personal-care-products-council-in-response-to-the-environmental-working-groups-2018-guide-to-sunscreens ("Oxybenzone, unjustly criticized every year by EWG, is one of the few FDA-approved ingredients that provides safe and effective broad-spectrum protection from UV radiation, and has been approved for use since 1978. According to the American Academy of Dermatology (AAD), available peer-reviewed scientific literature, and regulatory assessments from national and international bodies around the world, there is no link between oxybenzone in sunscreen and hormonal alterations or any other significant health issues in humans.") [https://perma.cc/F3VX-C399]

102. Sunscreen Drug Products for Over-the-Counter Human Use, 84 Fed. Reg. at 6206.

103. Sunscreen Drug Products for Over-the-Counter Human Use, 84 Fed. Reg. 6204, 6206 (proposed Feb. 26, 2019) (to be codified at 21 C.F.R. pts. 201, 310, 347, 352); *FDA Advances New Proposed Regulation to Make Sure That Sunscreens are Safe and Effective*, FDA (Feb. 21, 2019), https://www.fda.gov/news-events/press-announcements/fda-advances-new-proposed-regulation-make-sure-sunscreens-are-safe-and-effective [https://perma.cc/TT4M-F248].

104. Janet Woodcock & Theresa M. Michele, *Shedding New Light on Sunscreen Absorption*, FDA, https://www.fda.gov/news-events/fda-voices-perspectives-fda-leadership-and-experts/shedding-new-light-sunscreen-absorption (last updated May 6, 2019) [https://perma.cc/CU5F-R576].

105. Aaron E. Carroll, *How Safe Is Sunscreen*, N.Y. TIMES (June 10, 2019), https://www.nytimes.com/2019/06/10/upshot/how-safe-is-sunscreen.html (a 2019 study found safe absorption thresholds passed by all products except the cream on the first day of a thirty-day study) [https://perma.cc/U3LD-3UHP].

Another dichotomously regulated chemical is triclosan. Triclosan is used as a preservative and antimicrobial in cosmetics including soaps, bodywashes, and toothpastes.[106] Triclosan is registered as a pesticide with the Environmental Protection Agency.[107] In 2016, the FDA issued a rule concluding triclosan was not safe for everyday use in OTC drug products.[108] However, it is still considered safe for use in cosmetics according to its 2010 Cosmetic Ingredient Review (CIR) by the PCPC.[109] The CIR report on triclosan finds it safe, "even were all products types to contain triclosan and [be] used concurrently, on a daily basis."[110] The same report noted mouse studies which showed statistically significant increases in liver cancers related to triclosan dosage, and found that triclosan is an endocrine disruptor.[111] Further, triclosan affects human breast tissue,[112] creates conditions favorable for liver tumors, and promotes general cancerous growth.[113] Canada, Japan, and the EU all restrict triclosan usage,[114] but the United States does not restrict its usage in cosmetics, despite its known harms and restricted use in drugs and soaps.[115]

While sunscreen ingredients are now evaluated based on absorption into the bloodstream,[116] concerns regarding ingredients in cosmetics tend to focus on short-term harms (i.e., tendency to trigger rashes and allergies) rather than

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106. *5 Things to Know About Triclosan*, FDA, https://www.fda.gov/consumers/consumer-updates/5-things-know-about-triclosan (last updated May 16, 2019) [https://perma.cc/FXJ3-AZNL].

107. *Triclosan Facts*, ENV'T PROT. AGENCY, https://archive.epa.gov/pesticides/reregistration/web/html/triclosan_fs.html (last updated March 2010) [https://perma.cc/95A4-SYMJ].

108. *Triclosan*, COSMETICS INFO, https://cosmeticsinfo.org/ingredient/triclosan-0 (last visited Feb. 29, 2020) [https://perma.cc/E8WZ-SAE4].

109. *Id.*

110. F. Alan Andersen, *Final Report - Triclosan*, COSMETIC INGREDIENT REV. (Dec. 14, 2010), https://cir-safety.org/ingredients (search Triclosan, select "Triclosan", select "Final Report").

111. *Id.*

112. Watnick, *supra* note 16, at 615.

113. Lisa M. Weatherly & Julie A. Gosse, *Triclosan Exposure, Transformation, and Human Health Effects*, 20 J. OF TOXICOLOGY & ENV'T. HEALTH, PART B: CRITICAL REV. 447 (ISSUE) 8 (2017).

114. The European Union banned usage of triclosan in biocidal products in 2017. *Commission Implementing Decision (EU) 2016/110 of 27 January 2016 not approving triclosan as an existing active substance for use in biocidal products for product-type 1*, EUR-LEX, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016D0110 (last visited Oct. 2, 2020) [https://perma.cc/8JCC-JDK9]. Canada restricts the concentration of triclosan in cosmetic products to equal to or less than .3%. *Triclosan – information sheet*, GOV'T CANADA (last updated Nov. 24, 2018), https://www.canada.ca/en/health-canada/services/chemical-substances/fact-sheets/chemicals-glance/triclosan.html [https://perma.cc/VU3C-JTFF]. Japan restricts triclosan to .10 per 100 grams in all cosmetics. *Standards for Cosmetics Products*, MINISTRY HEALTH & WELFARE https://www.mhlw.go.jp/english/dl/cosmetics.pdf (last visited Oct. 2, 2020) [https://perma.cc/WX9A-9W9Q].

115. *Triclosan*, COSMETICS INFO, https://cosmeticsinfo.org/ingredient/triclosan-0 (last visited Feb. 29, 2020).

116. Woodcock & Michele, *supra* note 104.

longer-term impacts.[117] However, ingredients of topically-applied foundations absorb into the skin,[118] just as ingredients of topically-applied sunscreens do, and ingredients in cosmetics are known endocrine disrupters just as sunscreen ingredients are.[119]

The FDA's dichotomous regulation of drugs and cosmetics is illogical and gambles with women's health. Drugs, soaps and cosmetics all may be topically applied and dermally absorbed.[120] FDA classifications distinguish products based on the purpose a manufacturer designates for its use[121] – not the harm a product poses to a consumer. The result of this distinction is that cosmetics are *significantly* less safe for consumers than other FDA-regulated categories. The FDA does not dispute that they have a responsibility to regulate cosmetics.[122] But, under current FDA regulations, ingredients deemed unsafe for topical application in a drug are fine for topical application in a cosmetic. However, the chemicals in these products are absorbed the same way no matter the reason for application. It is unacceptable that what is a known danger in sunscreen, a gender-neutral seasonal product, is allowed without regulation in foundation, a cosmetic used daily by many women. While the mission of the FDA is to ensure the safety of our nation's cosmetics,[123] they systematically fail to do so. The victim is the consumer – most likely a female consumer.

The average woman is exposed to more than 200 chemicals each day through twelve or more products.[124] 82% of women use skincare products

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117. *How Cosmetics are Regulated in the U.S.*, COSMETICS INFO, https://cosmeticsinfo.org/cosmetic-regulation-us (last visited Feb. 29, 2020) [https://perma.cc/6ZKB-JY4T].

118. *Myths on Cosmetics Safety*, EWG'S SKIN DEEP, https://www.ewg.org/skindeep/contents/myths (last visited Feb. 29, 2020). Dermal absorption of chemicals leads to chemicals entering the body and bloodstream. It occurs via diffusion, molecules spreading from areas of higher to lower concentration. Thus, molecules applied to the skin would be the high concentration, and diffusing through the skin and into the body creates the lower concentration. *Skin Exposures & Effects*, NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH (NIOSH), https://www.cdc.gov/niosh/topics/skin/default.html (updated July 2, 2013) [https://perma.cc/36T4-A9T5].

119. Watnick, *supra* note 16, at 607.

120. *Dermal Exposure*, INTER-ORGANIZATION PROGRAMME FOR THE SOUND MGMT. OF CHEMICALS – WORLD HEALTH ORG., 34, 40, https://www.who.int/ipcs/publications/ehc/ehc_242.pdf (last visited Dec. 22, 2020).

121. *See supra* text accompanying notes 57-59.

122. *Voluntary Cosmetic Registration Program*, FDA, https://www.fda.gov/cosmetics/voluntary-cosmetic-registration-program (last updated Sept. 20, 2018) [https://perma.cc/QL7H-NPWL].

123. *What We Do*, FDA, https://www.fda.gov/about-fda/what-we-do (March 28, 2018) [https://perma.cc/W32F-75L4].

124. Lauren Zanolli, *Pretty Hurts: Are Chemicals in Beauty Products Making Us Ill?*, THE GUARDIAN (May 23, 2019), https://www.theguardian.com/us-news/2019/may/23/are-chemicals-in-beauty-products-making-us-ill [https://perma.cc/5XMC-EWVW]; Julia Calderone, *Beauty Products May Cause Health Risks in Women of Color, Researchers Warn*, CONSUMER REPS. (Aug. 23, 2017), https://www.consumerreports.org/beauty-personal-care/beauty-products-may-cause-health-risks-in-women-of-color-researchers-warn [https://perma.cc/85K2-6SDS].

(regulated as cosmetics) multiple times per week, while only 64% of men use skincare products multiple times per week.[125] Women use more products more frequently and suffer higher cumulative chemical exposure at the hands of the cosmetics industry.[126] Further, this exposure is heightened for women of color. For example, particularly dangerous cosmetics include skin-lightening creams, and hair straightening and relaxing treatments - products more commonly marketed to and used by women of color.[127] The majority of FDA complaints about beauty products involve hair relaxers and straighteners, products used almost exclusively within the African American community.[128] Fewer products made without hazardous ingredients are marketed toward women of color.[129] Further, women and particularly women of color are the predominant labor source within the beauty industry.[130] For example, 94% of working hairstylists are women,[131] and in California, 59% of nail technicians were Vietnamese.[132] Those working in the beauty industry suffer additional chemical exposure from professional cosmetics products.[133] As a result of this additional cumulative exposure, women and women of color have higher concentrations of chemicals occurring in their bodies because of exposure through cosmetics.[134]

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125. Alexander Kunst, *Beauty and Personal Care Products Used by Consumers Daily or Several Times a Week in the United States as of May 2017, by Gender*, STATISTA, https://www.statista.com/statistics/716384/beauty-personal-care-products-most-used-by-consumers-us-by-gender (last updated Dec. 20, 2019) [https://perma.cc/5KDR-TY8U].

126. Nneka Lelba & Paul Pestano, *Study: Women of Color Exposed to More Toxic Chemicals in Personal Care Products,* ENV'T WORKING GRP. (Aug. 17, 2017), https://www.ewg.org/enviroblog/2017/08/study-women-color-exposed-more-toxic-chemicals-personal-care-products.

127. *Id.*

128. Teniope A. Adewumi-Gunn, Esmeralda Ponce, Nourbese Flint & Wendie Robbins, *A Preliminary Community-Based Occupational Health Survey of Black Hair Salon Workers in South Los Angeles*, 20 J. IMMIGRANT & MINORITY HEALTH 164 (Feb. 2018).

129. Lelba & Pestano, *supra* note 126.

130. Ami R. Zota & Bhavna Shamasunder, *The Environmental Injustice of Beauty: Framing Chemical Exposures from Beauty Products as a Health Disparities Concern*, 217 AM. J. OBSTETRICS & GYNECOLOGY 418, 418 (2017).

131. Adewumi-Gunn et al., *supra* note 128.

132. Thu Quach et al., *Characterizing Workplace Exposures in Vietnamese Women Working in California Nail Salons*, 101 AM. J. PUB. HEALTH, S271-S276 (Supplement) 1 (2011). Nail salon workers suffer heavy exposure to volatile compounds linked to adverse neurologic, reproductive and endocrine-disrupting effects. *Id.*

133. Zota & Shamasunder, *supra* note 130, at 418.

134. Zanolli, *supra* note 124.

## PART III. DESPITE IDENTICAL TOPICAL APPLICATION, SUNSCREENS AND COSMETICS ARE REGULATED DRAMATICALLY DIFFERENTLY DUE TO THE FDA'S ARBITRARY CLASSIFICATIONS.

*Current Sunscreen Regulation*

Until recently, both cosmetics and sunscreen faced stagnant regulation.[135] The existing FDA approval process for sunscreen began in the 1970s, when the agency chose to regulate sunscreens as OTC drugs, triggering dosage and labeling restrictions.[136] While, over time, new molecules were approved for use in sunscreens in Europe, those same molecules were not approved for use in the United States.[137]

In response, the FDA determined in 2002 they would approve new sunscreen ingredients within 180 days of receiving applications if the ingredient had five years of safe usage in another country (the Time and Extent Application, also known as TEA).[138] However, this change triggered no additional approvals. No new sunscreen ingredients were approved from 1999-2013.[139] Frustrated companies joined with cancer prevention organizations, sunscreen formulators and consultants to establish the Public Access to SunScreens (PASS) coalition.[140] PASS' lobbying focused on the danger and preventability of skin cancer, tying better prevention to better protection.[141] PASS lobbied Congress and the Sunscreen Innovation Act (SIA) passed in 2014.[142]

The SIA supplements TEA and requires the FDA streamline approval of new ingredients in OTC sunscreen, including expediting the timeline to evaluate

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135. The Editorial Board, Opinion, *Do You Know What's in Your Cosmetics?*, N.Y. TIMES (Feb. 10, 2019), https://www.nytimes.com/2019/02/09/opinion/cosmetics-safety-makeup.html [https://perma.cc/W2E3-ZEL6]; Rebecca Dancer, *The FDA Just Announced a Sunscreen Safety Proposal with Big Implications*, ALLURE (Feb. 25, 2019), https://www.allure.com/story/fda-sunscreen-regulations-proposal [https://perma.cc/XUH3-LSAV].

136. Marc S. Reisch, *After More than a Decade, FDA Still Won't Allow New Sunscreens*, CHEM. & ENG'G NEWS (May 18, 2015), https://cen.acs.org/articles/93/i20/Decade-FDA-Still-Wont-Allow.html [https://perma.cc/J7U5-N88T].

137. *See id.*

138. *Id.*

139. Edward Hale, *Bringing Sunscreen into the 21st Century*, REGUL. REV. (May 27, 2019), https://www.theregreview.org/2019/05/27/hale-sunscreen-regulation-proposed-rule/ [https://perma.cc/6R6Q-EL2L].

140. Reisch, *supra* note 136.

141. PUB. ACCESS TO SUNSCREENS COAL., http://www.passcoalition.com (last visited Feb. 29, 2020) ("[O]ne person dies from melanoma almost every hour, and 9,500 individuals are diagnosed with skin cancer every day. Skin cancer, however, is one of the most preventable forms of cancer – but that isn't possible if Americans don't have access to the best possible protection.") [https://perma.cc/NX6A-CDA2].

142. Reisch, *supra* note 136; *Sunscreen Innovation Act (SIA)*, FDA, https://www.fda.gov/drugs/guidance-compliance-regulatory-information/sunscreen-innovation-act-sia (last updated Nov. 22, 2016) [https://perma.cc/65B7-8LBR].

whether an ingredient is safe and effective.[143] Anyone may request review of active sunscreen ingredients for safety.[144] These requests must be reviewed for eligibility within 60 days and then reviewed by the advisory committee within 300 days.[145] The ultimate outcome of a request is an order identifying whether the ingredients are generally recognized as safe and effective, meaning they may be introduced into commerce.[146]

The SIA required the FDA update the sunscreen monograph by November 2019.[147] In pursuit of this goal, the FDA issued notice of a new rule in February 2019[148] to bring sunscreens up-to-date with the latest science "to better ensure consumers have access to safe and effective preventative sun care options."[149] Currently, only two active ingredients used in sunscreens on the market are deemed as safe to use – zinc oxide and titanium dioxide.[150] Neither of these ingredients is absorbed into the body,[151] so no further safety research was needed. The FDA requested additional safety data on 12 sunscreen ingredients to better understand bodily absorption following topical application.[152]

In announcing the new sunscreen regulations, the Commissioner of the FDA acknowledged that "[s]ince the initial evaluation of these products, we know much more about … sunscreen's absorption through the skin. Sunscreen usage has changed, with more people using these products more frequently and in larger amounts."[153]

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143. Hale, *supra* note 139.

144. Sunscreen Innovation Act, Pub. L. No. 113-195, § 586A, 128 Stat. 2035 (2014) (codified as amended in scattered sections of 18 U.S.C.).

145. *Id.* §§ 586B(a)(1), 586C(a)(1)

146. *Id.* § 586C(e)(1)(A); *Bringing an Over-the-Counter (OTC) Drug to Market: Regulation Overview – GRASE*, FDA, https://www.accessdata.fda.gov/scripts/cder/training/OTC/topic3/topic3/da_01_03_0040.htm (last visited Mar. 1, 2020) [https://perma.cc/VJ86-JR3M].

147. Sunscreen Drug Products for Over-the-Counter Human Use, 84 Fed. Reg. 6204 (proposed Feb. 26, 2019) (to be codified at 21 C.F.R. pts. 201, 310, 347, 352).

148. *Id.*

149. *FDA Advances New Proposed Regulation to Make Sure That Sunscreens are Safe and Effective*, FDA (Feb. 21, 2019), https://www.fda.gov/news-events/press-announcements/fda-advances-new-proposed-regulation-make-sure-sunscreens-are-safe-and-effective [hereinafter *FDA Advances New Proposed Sunscreen Regulation*] [https://perma.cc/5PF9-G52N].

150. Dancer, *supra* note 135.

151. Kristina Liu, *Keep Using Sunscreen While FDA Updates Recommendations on Safety of Sunscreen Ingredients*, HARV. HEALTH PUBL'G: HARV. HEALTH BLOG (July 31, 2019, 10:30 AM), https://www.health.harvard.edu/blog/keep-using-sunscreen-while-fda-updates-recommendations-on-safety-of-sunscreen-ingredients-2019073117377 [https://perma.cc/3H9C-SNVF].

152. Woodcock & Michele, *supra* note 104. This is the same rulemaking discussed above in which the FDA determined oxybenzone is unsafe. *See supra* text accompanying notes 95-105.

153. *FDA Advances New Proposed Sunscreen Regulation*, *supra* note 149.

Despite the SIA mandate, the updated monograph was still not released as of March 2020.[154] The CARES Act, passed in March 2020, eliminated the November 2019 deadline for an updated monograph, and instead required the FDA issue a proposal to revise the sunscreen order by September 27, 2021.[155] As of June 2020 there remained no plan or time frame to meet these requirements.[156]

*Current Cosmetics Regulation*

While advances in technology and product development pushed sunscreens into updated regulation, cosmetics regulation has seen no such modernization despite comparable technological advancement, product development and similar ingredients and usage. The general public believes federal cosmetics regulations protect human health, but the reality is that there is functionally no prohibition on the usage of known carcinogens, endocrine disruptors or other toxins in cosmetics products marketed and sold in the United States.[157]

The cosmetics industry is functionally self-regulated.[158] The Cosmetic Ingredient Review Expert Panel (hereinafter, "Panel"), an independent, non-profit body established in 1976 at the suggestion of the FDA, is the primary source of substantiation for cosmetic ingredient safety.[159] The Personal Care Product Council, the leading trade association for cosmetic and personal care product companies, initiated the Panel and funds it.[160] The Panel primarily studies individual chemical compounds as used in cosmetics products.[161] This review structure, applied to sunscreens, would be akin to allowing the sunscreen manufacturers to organize a panel to self-determine what was safe and acceptable

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154. *Regulatory Policy Information | Sunscreen Innovation Act*, FDA, https://www.fda.gov/drugs/guidance-compliance-regulatory-information/regulatory-policy-information-sunscreen-innovation-act (last updated Aug. 18, 2020) [https://perma.cc/37UU-58RN].

155. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-572, OVER-THE-COUNTER DRUGS INFORMATION ON FDA'S REGULATION OF MOST OTC DRUGS 8 (2020), https://www.gao.gov/assets/710/708474.pdf [https://perma.cc/53V8-9HVK]. Further discussion of the scope of the CARES Act on the SIA and FDA regulation is beyond the scope of this article.

156. *Id.* at n.42.

157. Watnick, *supra* note 16, at 596.

158. Priyanka Narayan, *The cosmetics industry has avoided strict regulation for over a century. Now rising health concerns has FDA inquiring*, CNBC (Aug. 2, 2018, 10:08 a.m.), https://www.cnbc.com/2018/08/01/fda-begins-first-inquiry-of-lightly-regulated-cosmetics-industry.html.

159. *Cosmetic Ingredient Review*, PERS. CARE PRODS. COUNCIL, https://www.personalcarecouncil.org/science-safety/cosmetic-ingredient-review (last visited Mar. 1, 2020) [https://perma.cc/8NMJ-MLAS]; *About the Cosmetic Ingredient Review*, COSM. INGREDIENT REV., https://www.cir-safety.org/about (last visited March 1, 2020) [https://perma.cc/844T-LRYK].

160. *See About Us*, PERS. CARE PRODS. COUNCIL, https://www.personalcarecouncil.org/about-us (last visited March 1, 2020); *Cosmetic Ingredient Review*, *supra* note 159; *About the Cosmetic Ingredient Review*, *supra* note 159.

161. *How Does CIR Work?*, COSM. INGREDIENT REV., https://www.cir-safety.org/how-does-cir-work (last visited March 1, 2020) [https://perma.cc/FQ6P-NAFZ].

for use in their products. As discussed above, the sunscreen regulatory scheme is nowhere near this permissive and involves significantly more oversight.[162]

Further, cosmetics manufacturers are not required to register with the FDA. They are encouraged to register through the Voluntary Cosmetics Registration Program (VCRP), however there is no requirement to do so or penalty for not registering.[163] The VCRP is the primary way the FDA is aware of cosmetics products, ingredients, frequency of use, and the businesses engaged in the manufacture and distribution of cosmetics.[164] The Panel establishes priorities based on information gathered by the VCRP.[165] However, as the program is definitionally voluntary, there exists no mechanism for putting all cosmetics manufacturers on the FDA's radar.[166] It is entirely possible – and legal – for manufacturers to create, market and sell cosmetics across the United States entirely off the FDA's radar.

Additionally, while the FDA inspects cosmetics facilities, it only inspects facilities registered with the VCRP. This arguably disincentivizes registering in the VCRP. However, failing an inspection results only in a voluntary recall, as seen recently from tween-retailer Claire's after asbestos was found in its eyeshadow products.[167] Products under voluntary recall because of a failed inspection are simply posted as a consumer advisory notice on the FDA's website.[168] Beyond possible lost product, should a manufacturer execute a voluntary recall, there are no meaningful penalties for inspection violations. In contrast, failed inspections of drug manufacturing facilities may result in voluntary action, advisory action, or legal sanctions.[169]

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162. See *supra* text accompanying notes 70-87 for a discussion regarding drug regulation.

163. 21 C.F.R. §§ 710, 720 (2020); *Voluntary Cosmetic Registration Program*, *supra* note 122.

164. 73 Fed. Reg 76360 (Dec. 16, 2008); 69 Fed. Reg. 9339 (Feb. 27, 2004); *Voluntary Cosmetic Registration Program*, *supra* note 122.

165. 73 Fed. Reg 76360; *Voluntary Cosmetic Registration Program*, *supra* note 122.

166. Boyd, *supra* note 29, at 302.

167. Madison Park, *Asbestos Found in Claire's Cosmetics, FDA Says*, CNN (Mar. 11, 2019 8:02 PM), https://www.cnn.com/2019/03/05/health/claires-asbestos-fda-cosmetics/index.html [https://perma.cc/4B9A-C3T7]; *FDA Advises Consumers to Stop Using Certain Cosmetic Products*, FDA (June 6, 2019), https://www.fda.gov/cosmetics/cosmetics-recalls-alerts/fda-advises-consumers-stop-using-certain-cosmetic-products [https://perma.cc/W3YM-YQKY].

168. *Cosmetics Recalls & Alerts*, FDA, https://www.fda.gov/cosmetics/cosmetics-compliance-enforcement/cosmetics-recalls-alerts (last updated Feb. 27, 2020).

169. Denise DiGiulio, Facility Reviewer, U.S. Food and Drug Admin., Presentation at Regulatory Education for Industry: Focus on CGMPs and FDA Inspections: What to Expect When Being Inspected 46 (July 15, 2015), https://www.fda.gov/media/92857/download [https://perma.cc/ZJM6-G2CW].

What power the FDA has over cosmetics regulation primarily covers labeling, and is only post-market,[170] not pre-market.[171] Post-market regulations require that labeling include a warning that product safety is undetermined, unless ingredients are "adequately substantiated for safety prior to marketing"; however the responsibility to substantiate safety is entirely on the manufacturer.[172] Additionally, even if the safety of an ingredient is questioned, as long as the ingredient has been previously adequately substantiated, no warning is required.[173] There is no regulatory requirement as to recency of safety substantiation. The result is cosmetics packaging that communicates little useful ingredient safety information.

While the FDCA contains serious enforcement penalties, they do not apply to cosmetics violations.[174] Debarment, one of the most serious penalties, prohibits an actor previously in violation of the FDCA from assisting in further developments and submissions under the Act.[175] However, this penalty is only available for drug or food import violations.[176] Similarly, civil penalties under the FDCA are also limited to drug violations.[177] Finally, there is no private right of action under the FDCA; individuals cannot bring suit for violations of the Act.[178]

The penalties for cosmetics violations are weak. If a cosmetic is brought to market and found to be adulterated or misbranded – currently the only two ways to violate FDCA cosmetics regulation – it can be charged as libel of information, which results in the product being seized and condemned.[179] There are no further penalties.

These penalties illustrate the FDA's minimal regulatory power over cosmetics. There are a few potential explanations for this weak grant of power.

One likely cause of the FDA's weak regulatory power over cosmetics is poor representation. The FDA has received little additional power over its history. When the FDCA passed, women had minimal power in government or business. However, still today, women, the common end users of cosmetics, are disproportionately not represented in leadership of the companies placing cosmetics on the market and in the bodies regulating the industry. Of the top five international cosmetics manufacturers based on beauty sales, only one company

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170. *Does FDA Approve Cosmetics Before They Go on the Market?*, FDA, https://www.fda.gov/industry/fda-basics-industry/does-fda-approve-cosmetics-they-go-market (last updated Feb. 1, 2016) [https://perma.cc/KDX3-CAA3].

171. *Voluntary Cosmetic Registration Program*, *supra* note 122.

172. 21 C.F.R. § 740.10 (2019).

173. *Id.*

174. 21 U.S.C. § 335a (a)-(b) (2012).

175. *Id.*

176. *Id.*

177. 21 U.S.C. § 335b (2012).

178. Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 811 (1986) ("Congress did not intend a private federal remedy for violations of the statute that it enacted.").

179. 21 U.S.C. §§ 334(a)-(b) (2012).

is led by a woman.[180] While there is slightly more representation within the government, there certainly is not parity. Within the FDA itself, 13 of 30 leaders are women.[181] The House Committee for Energy and Commerce – Health Subcommittee (hereinafter Health Subcommittee), the body responsible for reviewing updated legislation that would amend the FDCA, has 33 total members, 9 of whom are female [8 Democrats; 1 Republican].[182]

Another possible cause for persistently weak regulation is the hidden danger most chemicals in cosmetics pose. While there is proof from lab studies of the dangers ingredients pose, there is not wide-ranging linkage of individual product formulations to specific adverse results to the extent that may spur action. Indeed, the initial addition of cosmetics to the FDCA as it replaced the PFDA was caused in part by a mascara brand causing wide-ranging blindness,[183] among other specific, public, clearly caused, adverse events. However, the harms most likely from modern cosmetics are not as splashy nor obvious as blindness and face ulcers.[184] Further, general knowledge about chemicals used in cosmetics and the harms they pose is low. One more visible adverse event caused by cosmetics ingredients is cancer. From 2004 to 2017, cancer-related reports constituted 41% of all reported adverse cosmetics events.[185] However, until 2016,

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180. Perry Romanowski, *The 20 Biggest Cosmetic Companies in the World*, CHEMISTS CORNER (Apr. 6, 2018), https://chemistscorner.com/the-20-biggest-cosmetic-companies-in-the-world [https://perma.cc/M2VL-WJQK]; *Composition of the Board of Directors*, L'ORÉAL, https://www.loreal.com/group/governance/the-board-of-directors (last visited March 1, 2020) [https://perma.cc/6DB5-34XE]; *Unilever CEO Announcement: Paul Polman to retire; Alan Jope appointed as successor*, UNILEVER (Nov. 29, 2018), https://www.unilever.com/news/press-releases/2018/unilever-ceo-announcement.html [https://perma.cc/W7B9-BFDR]; *Executive Leadership*, ESTĒE LAUDER COS., https://www.elcompanies.com/en/who-we-are/leadership/executive-leadership (last visited March 1, 2020) [https://perma.cc/AB22-88ZR]; *Leadership*, P&G, https://us.pg.com/leadership-team (last visited March 1, 2020) [https://perma.cc/72DH-C4QU]; *Coty Names SUE Y. NABI Chief Executive Officer*, COTY, https://www.coty.com/in-the-news/press-release/coty-names-sue-y-nabi-chief-executive-officer (July 2, 2020) [https://perma.cc/A2L3-9XVS]. Nabi was Coty's fourth CEO named in 2020, succeeding three men who were named to or held the role in the same year. Ben Miller, *Coty announces a new CEO, its fourth this year*, N.Y. BUS. J. (July 2, 2020, 1:27 PM), https://www.bizjournals.com/newyork/news/2020/07/02/coty-announces-a-new-ceo-its-fourth-one-this-year.html [https://perma.cc/UQ2Z-9KU7].

181. *FDA Leadership Profiles*, FDA, https://www.fda.gov/about-fda/fda-organization/fda-leadership-profiles (last updated Sept. 29, 2020) [https://perma.cc/CAG6-BVQK].

182. *Health*, HOUSE COMM. ON ENERGY & COM., https://energycommerce.house.gov/subcommittees/health-116th-congress (last visited March 1, 2020) [https://perma.cc/Q73F-XG75].

183. Boyd, *supra* note 29, at 314.

184. *Cf. supra* text accompanying notes 34-35, 117-120.

185. Saya L. Jacob, Erika Cornell, Michael Kwa, William E. Funk & Shuai Xu, *Cosmetics and Cancer: Adverse Event Reports Submitted to the Food and Drug Administration*, 0 JNCI J. NAT'L CANCER INST. 2 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6649728/pdf/pky012.pdf [https://perma.cc/Z9WT-ZDS8].

adverse cosmetics events reported to the FDA were not public.[186] While this information is now released, 95% of released cancer reports redact individual product names.[187] So, despite growing proof of harm, consumers cannot identify which products are receiving adverse reports, and the FDA cannot act against the manufacturers of these products unless they are adulterated or misbranded. Consumers are in a dangerous position with little recourse. Reform is essential.

## PART IV: OPPORTUNITIES FOR REFORM

*Legislative reform modeled after the SIA*

In looking at possible solutions to improve cosmetic safety regulation, regulatory and legislative progress are the best options as opposed to litigation due to FDCA preemption provisions.

Consumers concerned about ingredient usage under the current regulatory scheme generally cannot vindicate their rights through litigation due to the FDCA's preemption provisions. Only if a consumer has a claim that would have given rise to recovery without the FDCA can they possibly avoid preemption. Realistically, few claims meet this profile.

Further, even if there is an un-preempted claim, many tort claims alleging issues with cosmetics ingredients fail on the required element of proof of injury-in-fact. It is challenging to link exposure to one or more chemicals as the identifiable and substantial cause of the injury the plaintiff seeks redress for as is required by the tort system.[188] Consumers cannot effectively seek redress through the torts system for exposure to carcinogenic or endocrine-disrupting chemicals in cosmetics; no clearly caused harm leaves no cause of action. This leaves regulatory progress through legislation or shifting social norms as the primary means for safer cosmetics ingredient usage.

There are reasons to be hopeful for regulatory progress, despite the lack of progress thus far. First, the Health Subcommittee is led by a woman and has strong support for cosmetics reform. This likely played a role in the December 2019 hearing the Health Subcommittee held on "Building Consumer Confidence by Empowering FDA to Improve Cosmetic Safety."[189] However, there remain dramatically more men than women making decisions about what is safe for women to use on their bodies. As the recent House hearing indicates, there have been and still are attempts at legislative reform in Congress. In the House, both the Safe Cosmetics and Personal Care Products Act of 2019 and the Cosmetic Safety Enhancement Act of 2019 have been introduced.[190] Rep. Frank Pallone

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186. *Id.* at 1-2.

187. *Id.* at 2.

188. *See, e.g.*, Koronthaly v. L'Oreal USA, Inc., 374 F. App'x 257 (3d Cir. 2010); Frye v. L'Oreal USA, Inc., 583 F. Supp. 2d 954 (N.D. Ill. 2008).

189. Jacqueline Laurean Yates, *Woman Makes Powerful Plea at House Hearing on Historic Bill to Regulate Cosmetics, Personal Care Products*, GOOD MORNING AMERICA (Dec. 4, 2019), https://www.goodmorningamerica.com/style/story/woman-makes-powerful-plea-house-hearing-historic-bill-67491449 [https://perma.cc/PF9V-UV93].

190. *Id.*

(D-NJ) chairs the Committee on Energy and Commerce, which oversees the Health Subcommittee.[191] Rep. Pallone introduced the Cosmetic Safety Enhancement Act,[192] and has also publicly chided the FDA's weak inspections of imported cosmetics and requested data sets to be used in drafting cosmetics legislation.[193]

Perhaps most notably, the Personal Care Products Safety Act (PCPSA) is up again in the Senate. It is one of the more well-known attempts at Cosmetics reform, first introduced in 2015 and 2017 before being introduced again in 2019.[194] There is no clear evidence as to why the PCPSA has yet to succeed and an analysis of such is beyond the scope of this article. As of September 2020, the PCPSA had been referred to the Senate Committee on Health, Education, Labor, and Pensions.[195] Introduced by Sen. Dianne Feinstein, there are 11 cosponsors – 9 Democrats, 1 Republican (Sen. Susan Collins) and 1 Independent.[196]

The 2015 PCPSA suggested a number of strong modifications to cosmetics regulation. First, it would require cosmetics companies register their facilities with the FDA and submit ingredient statements to the FDA.[197] Second, it would give the FDA the power to prohibit the distribution of cosmetics that have a reasonable probability of causing serious health issues.[198] Third, it would require the FDA review at least 5 cosmetics ingredients each year and would allow the FDA to establish safe use limits on labels.[199] Finally, it would require the FDA implement cosmetic manufacturing standards, recall cosmetics likely to cause health issues, and allow the FDA to inspect the cosmetic safety records of companies.[200] These reforms would all make significant progress towards safer

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191. *Pallone Requests Updated Information on FDA's Inspections of Imported Cosmetic Products*, HOUSE COMM. ON ENERGY & COM. (June 26, 2019), https://energycommerce.house.gov/newsroom/press-releases/pallone-requests-updated-information-on-fda-s-inspections-of-imported [hereinafter *Pallone Requests Updated Information*] [https://perma.cc/6S45-5TCE].

192. Ryan Nelson, *House Energy & Commerce Chair Pallone Highlights Proposed Reform Bills Ahead of Cosmetics Hearing*, HBW INSIGHT (Dec. 3, 2019), https://hbw.pharmaintelligence.informa.com/RS149487/House-Energy—Commerce-Chair-Pallone-Highlights-Proposed-Reform-Bills-Ahead-Of-Cosmetics-Hearing [https://perma.cc/D9DV-EWE7]. The Cosmetic Safety Enhancement Act is considered the House-related version of the Senate's Personal Care Product Safety Act, discussed shortly.

193. *Pallone Requests Updated Information*, *supra* note 191.

194. *S. 726: Personal Care Products Safety Act*, GOVTRACK, https://www.govtrack.us/congress/bills/116/s726 (last visited March 1, 2020) [https://perma.cc/3U8N-V3V8].

195. *S. 726 – Personal Care Products Safety Act*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/senate-bill/726 (last visited Oct. 2, 2020) [https://perma.cc/RTS5-4VM6].

196. *Id.*

197. *S.1014 – Personal Care Products Safety Act, 114th Congress (2015-16)*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/senate-bill/1014 (last visited March 1, 2020) [https://perma.cc/XWP4-SD7V].

198. *Id.*

199. *Id.*

200. *Id.*

cosmetics. The PCPSA has received solid industry support from market leaders across many corners of the beauty industry.[201] Further, many of these reforms bring cosmetic regulation more in line with drug regulation, meaning there is existing regulatory infrastructure that could be utilized to quickly and efficiently reform cosmetic regulation.

Passage of the SIA offers a few insights on the possible success of the PCPSA. A notable difference between the two reform environments is that it does not appear that cosmetics companies are hurting from the current regulatory state, as sunscreen manufacturers were. On the contrary, their full autonomy and self-regulation makes their lives easier and better, not harder. This makes it unlikely cosmetics manufacturers will band together with health experts to lobby Congress for updated cosmetics regulations, as was seen with the SIA.

Further, the PCPSA and SIA's changes are likely perceived differently. The SIA was not seen as stricter regulation, but different regulation. The PCPSA – or any meaningful regulatory revisions in cosmetics for that matter, is undoubtedly stricter regulation, as the existing regulation is so weak. The primary reforms in sunscreen regulation were seen as *different* standards, bringing more ingredients to market. New compounds used in sunscreen were already on the market internationally, and the lack of updates in the U.S. hurt manufacturers. These updates then bring more products to market, benefitting both manufacturers and consumers. It is unlikely meaningfully reformed cosmetics regulation would bring more ingredients to market; it would likely instead restrict ingredients, creating obstacles for, rather than benefiting, manufacturers.

Despite this, there are indicators that "Big Beauty" companies are amenable to regulatory reform. This is notable because industry support was key in SIA passage. Johnson & Johnson, Estee Lauder, Procter & Gamble, Unilever, and L'Oréal are on record supporting the PCPSA.[202] Johnson & Johnson has its own cosmetics reform website claiming long-time support for modernization of FDA regulatory authority over cosmetics and personal care products.[203] They outline specifically what they support, communicate how they ensure safety despite the weak regulatory state, and offer consumers suggested actions to help advance the cause of stronger personal care product regulation.[204] Most of what Johnson &

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201. *See, e.g.*, *Beautycounter – the Leader in Clean Beauty – Endorses the Personal Care Products Safety Act*, PR NEWSWIRE (March 7, 2019), https://www.prnewswire.com/news-releases/beautycounter—the-leader-in-clean-beauty—endorses-the-personal-care-products-safety-act-300808967.html [https://perma.cc/YQ5S-2KPZ]; *"Personal Care Products Safety Act" Supporting Organizations*, U.S. SENATOR FOR CAL. DIANNE FEINSTEIN (July 29, 2019), https://www.feinstein.senate.gov/public/_cache/files/8/2/82a8a4c8-1a8e-4465-8f45-e38fec04b3d6/EC533C19F7D7FCE2736CE2496211A090.updated-7.29.19-supporters-personal-care-products-116-bill.pdf [https://perma.cc/6KJC-YXCC].

202. *"Personal Care Products Safety Act" Supporting Organizations*, *supra* note 201.

203. *Consumer Confidence is More than a Formula*, JOHNSON & JOHNSON SAFETY & CARE COMMITMENT, https://www.cosmeticsreform.com (last visited Mar. 1, 2020) [https://perma.cc/4Q7Z-CBXP].

204. *Id.*

Johnson directly supports are the exact reforms proposed in the PCPSA.[205] Sunscreen companies were key in pressuring Congress for regulatory progress; it is unclear if these personal care companies can or will go so far as to pressure Congress for reform, which would require action further than just stamping their names in support of the PCPSA.

The Sunscreen Innovation saga also offers a note of caution. The SIA's passage and stagnant progress shows that even when bills can get through, the road to meaningful regulatory reform is still long and uncertain. While the bill passed and progress was made, the ultimate end-goal has not been achieved. The forces moving behind the scenes are murky, and it can be challenging to understand what is actually happening. Even manufacturer and producer support for a regulatory update does not guarantee timely progress. Progress, when made, can be rolled back in an instant.[206] While the PCPSA seems impactful, there could be a world where it is passed, but meaningful enforcement by the FDA as a consumer protection agency remains far away.

*Intra-industry reform: "clean beauty" is good business*

Until Congress passes stronger cosmetics regulations, increased manufacturer compliance and transparency are the best solutions to protect consumers – at least to protect consumers willing to do the legwork in selecting their products based on ingredients. The benefit of the currently weak regulatory scope is that manufacturers are not restricted in how they may formulate products, making the road to improvement simple in that way.

There is evidence of hope in voluntary industry improvement. For example, triclosan, the unsafe drug ingredient registered as a pesticide but still considered safe for use in cosmetics, is now rarely used in cosmetics because of increased knowledge about its safety (or lack thereof).[207] Similarly, though coal tar is still allowed in hair dyes, it is rarely used. Additionally, major retailers including Sephora[208] and Target[209] have created "clean" beauty indicators. These indicators signal the absence of certain ingredients chosen by the retailer. These ingredients are typically fairly well-documented chemicals, often more heavily regulated in markets like the EU, Japan, or Canada. Sephora launched the "Clean at Sephora"

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205. *Compare Consumer Confidence is More than a Formula*, *supra* note 203, *with S.1014 – Personal Care Products Safety Act, supra* note 197 (showing the overlap between the reforms offered by Johnson & Johnson and those offered by the PCPSA).

206. See note 155 for reference to the revisions to the SIA via the CARES Act.

207. *See Products Containing Triclosan*, BEYOND PESTICIDES, https://www.beyondpesticides.org/programs/antibacterials/triclosan/products-containing-triclosan (last visited March 1, 2020) [https://perma.cc/4XAN-BRXC].

208. Leah Prinzivalli, *Sephora Just Expanded Its "Clean at Sephora" Program List of Banned Ingredients in Beauty Products*, ALLURE (July 15, 2019), https://www.allure.com/story/clean-at-sephora-category-filter-by-ingredient-expanded-list [https://perma.cc/2FSB-P4B7].

209. *How the New Target Clean Icon Simplifies Shopping for Essential and Personal Care Products*, TARGET (March 12, 2019), https://corporate.target.com/article/2019/03/target-clean [https://perma.cc/T7MH-SKTA].

category in response to consumer demand.[210] Sephora began by acknowledging products lacking 13 ingredients as clean, and expanded about a year into the program to require products lack 50 plus ingredients to be considered "clean."[211] Ingredients on the updated "No" list include Coal Tar, Formaldehydes, Lead, and Talc.[212] It is not just retailers getting in on clean beauty: manufacturers including Lush and CVS replaced ingredients with safer alternatives following studies linking certain ingredients to cancer, while others like Procter & Gamble worked with environmental groups to completely overhaul certain product lines.[213]

Clean beauty is good business, as it is a rapidly growing market. Personal Care, Beauty, and Anti-Aging comprised about a quarter of the global wellness economy in 2017.[214] The global wellness economy grew at roughly double the global economic growth rate from 2015-2017.[215] Clean beauty is projected to generate nearly $22 billion globally in 2024, a two-fold increase from its $11 billion in 2016.[216]

*Key elements to change*

As we see progress in the private industry and some energy in Congress for stronger regulation, it is worthwhile to consider the elements essential to meaningful reform. First, mandatory cosmetic manufacturer registration would ensure the scope of the industry is known by the FDA. This would also better enable the FDA to have mandatory recalls for non-compliant products. Second, research and knowledge on the effects of ingredients should be shared inter-agency and inter-classification – what is a known carcinogen in one product should be labeled similarly on other products. Finally, a path for a private cause of action should be considered.

Mandatory cosmetic manufacturer registration would help ensure that the size and scope of the cosmetic industry is known by the FDA. This already exists for drug manufacturers, so there is a scalable infrastructure and approach. Although drugs and cosmetics cause different harms to consumers, the reality is that both cause harm, and both cause some of the same harms. Because the use

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210. *Sephora Just Launched a Clean-Beauty Seal – Here's Why That's a Big Deal (and our 8 Faves to Shop Now)*, WELL + GOOD (June 3, 2018), https://www.wellandgood.com/good-looks/sephora-clean-beauty-seal [https://perma.cc/7DWR-7MBT].

211. Prinzivalli, *supra* note 208.

212. Alexandra Engler, *How Sephora Became the Unlikely Leader of Clean Beauty*, MINDBODYGREEN (Oct. 16, 2019), https://www.mindbodygreen.com/articles/how-sephora-became-unlikely-leaders-of-clean-beauty [https://perma.cc/X5A6-TEYA].

213. Bryan Pearson, *Clean Beauty Can Be a Dirty Business: Beautycounter, Sephora and P&G are Changing That*, FORBES (Jan. 21, 2019, 12:14 PM), https://www.forbes.com/sites/bryanpearson/2019/01/21/clean-beauty-can-be-a-dirty-business-beautycounter-sephora-and-pg-are-changing-that/#6993b0c23de4 [https://perma.cc/3LMC-M8YE].

214. *Wellness Industry Statistics & Facts*, GLOB. WELLNESS INST., https://globalwellnessinstitute.org/press-room/statistics-and-facts (last visited March 1, 2020) [https://perma.cc/SL35-HPTU].

215. *Id.*

216. Pearson, *supra* note 213.

of one is for health purposes and the use of the other is tied to appearance does not mean that it is acceptable for one to be significantly less safe than the other. Use is use and harm is harm. This is particularly true because the harms caused by weak cosmetics regulation disproportionately harm women, not men. Further, there are many consumers who, while they do not take medicine daily, do use cosmetics products daily. Frequency of use is an important factor to consider. The cosmetics industry is too large and too prolific to be completely unmapped by the FDA. Having mandatory registration would also give the FDA structure to exert mandatory recall power over cosmetics. While the agency currently does not have this power, they should; but they cannot without mandatory registration. When products are found to have dangerous ingredients, suggesting a recall does not empower the agency to fulfill their protective duty. Having a clear sense of the scope of the cosmetics industry is a necessary first step for stronger future regulation.

Second, the FDA needs a universal ingredient database sharing research and setting the same standard for ingredients applied topically to the skin regardless of purpose. It should not be the case that nearly ten years after one agency determined an ingredient carcinogenic, another agency fails to regulate its pervasive use. Allowing arbitrary distinctions to harm consumers is unacceptable. This would remove the impact of FDA's classification on ingredient regulation while allowing other necessary regulatory differentiations via classification.

Third, consumers should have a private cause of action against manufacturers of cosmetics. While the above changes would strengthen the FDA regulation of the cosmetics industry, the FDA has not proven it can or will reliably enforce the Act in regard to cosmetics. For example, the FDA inspects only a small portion of imported cosmetics products despite a strong increase in the quantity of imported cosmetics and common violations found when imports are inspected.[217] As such, there may be a consensus within the industry that regulations will not be enforced, so the regulations must not be followed either. Allowing a private cause of action would give another pathway to hold manufacturers accountable to standards, as well as take some enforcement off the plate of the FDA. The harm these ingredients cause is not always externally quantifiable, so there needs to be a path outside of tort law to enforce.

Another benefit of a private cause of action is speed. Courts and consumers can act more quickly than regulators bound by process; this would be an efficient way to ensure compliance as the industry continues to evolve with the advent of new technology and other tools. While there are valid concerns about the encroachment of the judicial branch into areas of agency expertise under the executive branch, when the executive branch agencies are not effectively using their power to enforce their duty, another path is necessary. It is disempowering to consumers, who increasingly seek healthful options, to leave legislative action or industry compliance as the only way to advocate for their own health. While

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217. Eric Lipton, *F.D.A. Has 6 Inspectors for 3 Million Shipments of Cosmetics*, N.Y. TIMES (Aug. 2, 2017), https://www.nytimes.com/2017/08/02/us/politics/fda-has-6-inspectors-for-3-million-shipments-of-cosmetics.html [https://perma.cc/9JRQ-MNPU].

the best option would be stronger regulatory oversight, it is also important to give the people whose lives and health are impacted by these products the choice to act if companies are not complying and the FDA is not enforcing.

The PCPSA is a strong step in the right direction. It includes mandatory manufacturer registration, as well as recall power and manufacturing standards. The PCPSA also enjoys industry support, which should be maximized. While it leaves some other details by the wayside, it deserves support as a step in the right direction. It is progress worth pursuing for the FDA best fulfill their consumer protection role for all consumers – not just those who don't use cosmetics.

## CONCLUSION

The FDA fails to meet their duty to protect consumers due to their weak power over cosmetics regulation. Research increasingly shows the dangers posed by ingredients used regularly in cosmetics. These dangers are known and consumers are protected from their usage in products classified as drugs, but not in products classified as cosmetics. However, the harm the ingredients pose is not defined nor limited by the purpose a consumer is using a product for. The FDA's classifications based on purpose, not harm, leaves consumers – specifically female consumers – at risk. There is meaningful progress in voluntary industry improvements – both in ingredients used and transparency available to consumers. However, voluntary industry evolution is a reliable avenue for consumer protection. Given the roadblocks to consumer litigation, legislative reform is needed to close loopholes benefitting manufacturers at the expense of women's health. What is safe in topical application in sunscreen should be what is safe for topical application in foundation; any other distinction is short-sighted and gambles with women's well-being.

# THE COCAINE MOM LAW: HOW WISCONSIN'S CIVIL COMMITMENT OF PREGNANT WOMEN VIOLATES THE FOURTEENTH AMENDMENT

*Kathryn Hayes†*



## INTRODUCTION

On August 1, 2014, Tammy Loertscher went to a Wisconsin social services office to seek help for depression and suicidal thoughts.[1] Loertscher's struggle started months before when she began self-medicating with marijuana and amphetamines so she could get out of bed in the morning.[2] By July, Loertscher suspected that she was pregnant and quit using drugs, but sought help when she still struggled with depression and suicidal thoughts.[3] Loertscher sought

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† Graduate of the University of Wisconsin School of Law.

1. Ada Calhoun, *Jailed for Using Drugs While Pregnant*, ATLANTIC (Oct. 12, 2015), https://www.theatlantic.com/politics/archive/2015/10/a-win-against-prenatal-protection-laws-in-wisconsin/410131 [https://perma.cc/N4AL-YS6A].

2. *Id.*

3. *Id.*

treatment at the Mayo Clinic in Eau Claire, Wisconsin.[4] Hospital staff asked Loertscher about her medical history, to which she disclosed that she used drugs before becoming pregnant.[5] This disclosure raised concerns among hospital staff about the health of her baby.[6] A subsequent ultrasound revealed Loertscher's baby was perfectly healthy.[7] Relieved her child was healthy and now on medicine to treat an underlying thyroid condition, Loertscher looked forward to returning home.[8] However, due to her self-reported history of drug use and a positive drug test, the hospital reported Loertscher to Social Services and refused to discharge her from the hospital.[9]

The hospital called Social Services to report Loertscher's violation of Wisconsin's "Cocaine Mom" law.[10] Passed by lawmakers who likened prenatal drug use to child abuse, the Cocaine Mom law seeks to control the activity of pregnant women.[11] Under the law, juvenile courts may treat a fetus as a child in need of protection if an expectant mother's "habitual lack of self-control" in the use of drugs or alcohol, "'exhibited to a severe degree, [poses] a substantial risk' of harm to her unborn child."[12] Treatment can be medical, psychological, substance abuse treatment, or other services that the court finds necessary.[13]

After the hospital reported Loertscher's drug use, a judge conducted a hearing by phone.[14] The court appointed a lawyer—not to assist Loertscher—but rather to represent her unborn child in the proceedings against her.[15] At the hearing, the judge ordered that Loertscher begin court-ordered drug treatment.[16] Believing attending treatment "would require her to admit that she was an addict," Loertscher refused to go to drug treatment.[17] In response to Loertscher's refusal, the court found her in contempt of court and sent her to jail for eighteen days.[18] At the county jail, Loertscher was denied prenatal care and placed in

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4. *Id.*
5. *Id.*
6. *See id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *See id.*
11. *See* Erik Eckholm, *Case Explores Rights of Fetus Versus Mother*, N.Y. TIMES (Oct. 23, 2013), https://www.nytimes.com/2013/10/24/us/case-explores-rights-of-fetus-versus-mother.html ("Bonnie Ladwig, a retired state representative who helped write the law, called it an appropriate effort to prevent harm. 'It's the same as abuse of a child after it's born,' she said. 'If the mother isn't smart enough not to do drugs, we've got to step in.'") [https://perma.cc/F7D5-U67Z].
12. Loertscher v. Anderson, 259 F. Supp. 3d 902, 905-06 (W.D. Wis. 2017), *vacated*, 893 F.3d 386 (7th Cir. 2018) (citing WIS. STAT. § 48.193 (2017-18)).
13. WIS. STAT. § 48.02(17m) (2017-18).
14. Calhoun, *supra* note 1.
15. *Id.*
16. *Id.*; *Loertscher*, 259 F. Supp. 3d at 911.
17. Calhoun, *supra* note 1.
18. *Id.*

solitary confinement when she refused to submit to a pregnancy test.[19] Eventually, Loertscher received a public defender.[20] Under advice of counsel, she signed a consent decree to resolve the pending protective services proceedings against her.[21] Loertscher agreed to undergo an assessment for drug addiction, comply with any recommended treatment, submit to drug testing on a weekly basis at her own expense, and sign any releases requested by the Department of Health Services.[22] After signing the consent decree, the court released her from jail.[23]

Loertscher's case is not unique.[24] Instead, her story is just one of the estimated 3,326 reports of unborn child abuse between 2005 and 2014 under Wisconsin's Cocaine Mom law [25] and one of the many women subjected to laws across the United States that penalizes the behavior of pregnant women.

This comment will cover Wisconsin's Cocaine Mom law along with recent case law concerning the Cocaine Mom law and constitutional concerns. Part I of this note will examine Wisconsin's Cocaine Mom law and the forces that encouraged the legislature to enact this measure. Part II will address how the courts have recently treated the Cocaine Mom law. Part III argues that the Cocaine Mom law should be held unconstitutional under the Fourteenth Amendment. A woman's substantive due process right to privacy is not outweighed by a compelling state interest in enforcing the Cocaine Mom law, and the Cocaine Mom law violates the Equal Protection Clause by providing a lesser right to counsel than other forms of civil commitment in Wisconsin provide.

## I. BACKGROUND

### *A. The Cocaine Mom Law*

In 1998, the Wisconsin legislature passed the Unborn Child Protection Act, which became known colloquially as the Cocaine Mom law.[26] The law allows a court to order a pregnant woman to receive treatment, including in-patient treatment, when the court determines that treatment is in the best interests of the

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19. *Id.*; *Loertscher*, 259 F. Supp. 3d at 912.

20. *Loertscher*, 259 F. Supp. 3d at 912.

21. *Id.*

22. *Id.*

23. *Id.*

24. Eckholm, *supra* note 11 (A woman named Alicia Beltran was also subject to the Cocaine Mom law. She was forced into inpatient treatment located two hours away from her home after she told a doctor that she had been successful in overcoming her dependence on painkillers. Even though she tested negative for drugs, she was still forced into drug treatment by the court.)

25. *Loertscher*, 259 F. Supp. 3d at 908.

26. 1998 Wis. Legis. Serv. Act 292 (1997 A.B. 463); *see also* Shamane Mills, *Opponents Of Wisconsin's 'Cocaine Mom' Law Continue Fight*, WPR (Aug. 1, 2018, 2:45 PM), https://www.wpr.org/opponents-wisconsins-cocaine-mom-law-continue-fight [https://perma.cc/S8YX-BHKA].

unborn child.[27] This occurs when "an expectant mother of an unborn child suffers from a habitual lack of self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree."[28] While "habitual lack of self-control" and "severe degree" are left undefined by the statute, the legislature defined "unborn child" as "a human being from the time of fertilization to the time of birth."[29] This means that the law can apply to any woman at the moment she becomes pregnant whether or not she knows she is pregnant. Treatment the court may order includes "medical, psychological, or psychiatric treatment, alcohol or other drug abuse treatment or other services which the court finds necessary and appropriate."[30]

Additionally, this law circumvents the protected privilege between a doctor and a pregnant patient.[31] Typically, a patient has a right to refuse disclosure of communication made during a doctor's diagnosis or treatment.[32] Under the Cocaine Mom law, "[t]here is no privilege in situations where the examination of the expectant mother of an abused unborn child creates a reasonable ground for an opinion of the physician . . . that the physical injury inflicted on the unborn child was caused by the habitual lack of self-control of the expectant mother of the unborn child in the use of alcohol beverages, controlled substances . . . exhibited to a severe degree."[33]

Furthermore, an adult pregnant woman may be taken into custody if there is probable cause to believe that the expectant mother is within the court's jurisdiction and to believe that the woman "is refusing or has refused to accept any alcohol or other drug services offered to her."[34] Additionally, the court may appoint a guardian ad litem to advocate and make recommendations based on the unborn child's best interests at each proceeding.[35]

Child Protective Services usually initiates proceedings under the Cocaine Mom law.[36] When someone makes an allegation of child abuse, the agency must make a screening decision to pursue or dismiss the allegations.[37] There must be three factors present for the agency to screen in an expectant mother. First, there must be a reasonable suspicion that the woman is pregnant. [38] Second, her conduct must show a habitual lack of self-control in the use of drugs or alcohol

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27. WIS. STAT. § 48.01(am) (2017-18).

28. *Id.*

29. WIS. STAT. § 48.02(19) (2017-18).

30. WIS. STAT. § 48.02(17m) (2017-18).

31. *See* Kenneth A. DeVille & Loretta M. Kopelman, *Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy*, 27 J.L. MED. & ETHICS 332, 333 (1999).

32. *Id.*

33. WIS. STAT. § 905.04(4)(e)3 (2017-18).

34. Loertscher v. Anderson, 259 F. Supp. 3d 902, 907 (W.D. Wis. 2017), *vacated*, 893 F.3d 386 (7th Cir. 2018) (citing WIS. STAT. § 48.205(1m) (2017-18)).

35. *Id.*

36. *Id.* at 908.

37. *Id.*

38. *Id.*

to a severe degree.[39] Third, the agency must believe that the substance abuse could cause physical harm to the fetus or a risk of serious harm to the child when born.[40] After the agency screens in an allegation of substance use by a pregnant woman, the county assigns an initial assessment worker to investigate the allegation and decide whether the county will take action.[41]

### *B. Origins of the Law*

The Cocaine Mom law exists as part of a more significant trend of legislation that limits the behavior of pregnant women. Many other states have adopted measures like the Cocaine Mom law as well as laws that go even further to restrict the activities of pregnant women. Additionally, this law is a result of the movements from the 1980s and 1990s that sought to limit the rights of women in order to enhance the rights of an unborn child. Primarily, ideology from the War on Drugs and the Pro-Life Movement contributed to the enactment of the Cocaine Mom law.

#### i. The Criminalization of Pregnancy

Wisconsin's Cocaine Mom law is part of a more extensive patchwork of legislation intended to protect children from a wide array of prenatal behavior. Some laws, like the Cocaine Mom law, are civil commitment laws while others impose criminal liability on pregnant women. Thirty-eight states have adopted standard measures that include fetal homicide laws.[42] Such laws can criminally charge a mother if her baby dies because the fetus is considered a separate person from the mother.[43] In one case, prosecutors charged a woman with manslaughter after someone shot her and she miscarried after the shooting.[44] In some states, the infant does not need to die for a pregnant woman to be charged with a crime.[45] Other laws penalize women for abusing their fetuses.[46] These laws can apply even when the mother is not engaged in illegal activity.[47] Some cases of pregnant women accused of abusing their fetuses include a pregnant woman who fell down stairs, a woman who ate a poppy seed bagel and failed a drug test before

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39. *Id.*
40. *Id.*
41. *Id.*
42. Sarah Mervosh, *Alabama Women Who Was Shot While Pregnant Is Charged in Fetus's Death*, N.Y. TIMES (June 27, 2019), https://www.nytimes.com/2019/06/27/us/pregnant-woman-shot-marshae-jones.html [https://perma.cc/W4ME-BAAE].
43. Editorial Board, Opinion, *A Woman's Rights*, N.Y. TIMES (Dec. 28, 2018), https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html [https://perma.cc/88FX-HH4F].
44. Mervosh, *supra* note 42.
45. Editorial Board, *supra* note 43.
46. *Id.*
47. *Id.*

giving birth, and a woman who took legal drugs prescribed to her by a doctor during pregnancy.[48]

Moreover, many states have laws like Wisconsin's Cocaine Mom law that specifically penalize prenatal substance abuse.[49] Some states use civil commitment laws with a focus on mothers using drugs.[50] For instance, 23 states consider prenatal drug use to be child abuse under child-welfare statutes.[51] Three other states, like Wisconsin, consider prenatal substance use to be grounds for civil commitment.[52] Some states, like Minnesota, have passed laws that make it easier to identify prenatal drug use by requiring health care workers to report suspected drug use of pregnant women.[53] Additionally, courts in both Alabama and South Carolina have upheld convictions for prenatal substance abuse, finding that drug use while pregnant constitutes criminal child abuse.[54] A Tennessee law enacted between 2014 and 2016 took this a step further and made it a crime to give birth to a baby with symptoms of drug exposure.[55] The nationwide use of laws that seek to control pregnant women show that this is not solely an issue in Wisconsin but a national problem.

### ii. The War on Drugs

The Cocaine Mom law is also the result of social movements of the 1980s and 1990s. One of the movements that led to the enactment of national laws aimed at protecting a fetus from the actions of its pregnant mother was the War on Drugs. Specifically, substance abuse during pregnancy "became an issue for public health debate in the mid-1980s" when the price of cocaine decreased and "crack," the smokable form of cocaine, became more widely available.[56] Around the same time, research emerged that showed adverse prenatal effects of fetal alcohol syndrome as well as the consequences of opiate addiction in pregnant women.[57] These studies hypothesized that unborn children became addicted to the drugs in the womb and had negative withdrawal effects after birth.[58] One prominent study found that infants of mothers who used crack were "smaller,

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48. *Id.*

49. Guttmacher Inst., *Substance Use During Pregnancy* (Oct. 1, 2020), https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy [https://perma.cc/UF6Y-ZYP6].

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in the USA*, AMNESTY INT'L (May 23, 2017), https://www.amnestyusa.org/reports/criminalizing-pregnancy-policing-pregnant-women-use-drugs-usa [https://perma.cc/9W9M-Y49K].

56. Barry M. Lester et al., *Substance Use during Pregnancy: Time for Policy to Catch Up with Research*, 1 HARM REDUCTION J., Apr. 20, 2004, at 2, https://harmreductionjournal.biomedcentral.com/track/pdf/10.1186/1477-7517-1-5 [https://perma.cc/9657-CE64].

57. *Id.*

58. *Id.*

sicker and less social than other infants."[59] Labeling these children as "crack babies," public health officials thought that there was an epidemic of prenatal crack cocaine use.[60]

Relying on the studies and research about "crack babies," the crack epidemic became highly publicized by the media.[61] Many newspapers sounded the alarm on the future consequences of a generation of "crack babies." Among newspapers reporting on the "crack baby" generation, it was wrongly reported that drug addicted mothers were giving birth to "a generation of neurologically damaged children" who would bankrupt schools and social services once they became adults.[62] One editorial argued that it would cost more than 700 million dollars to prepare fewer than 20,000 "crack babies" for school in Florida.[63]

Much of this debate was racially charged and focused on black mothers using crack cocaine.[64] Since a disproportionate number of black people were users of crack, black women were targeted for criminal prosecution of prenatal drug use.[65] From 1989 to 1992, seventy to eighty percent of those arrested for prenatal drug use were from minority groups.[66] The discriminatory nature of the outcry concerning prenatal substance abuse is especially apparent considering that there are other substances actually known to be harmful to babies, but the fervor singled out crack cocaine, a drug "racialized as black."[67]

Fear sparked by the media over a generation of children damaged by prenatal drug use led to calls to limit the rights of women and increase the rights of fetuses in the spirit of protecting both children and society.[68] Soon the fervor called for legislators to take charge and create laws to stem the perceived tide of "crack babies."[69] The fears over a generation of "crack babies" were codified in Wisconsin by the Cocaine Mom law. This is evident as the stated purpose of the law is:

> [t]o recognize the compelling need to reduce the harmful financial, societal and emotional impacts that arise and the tremendous burdens . . . on the health care, social services, educational and criminal justice

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59. Editorial Board, *A Woman's Rights: Part 4 Slandering the Unborn*, N.Y. TIMES (Dec. 28, 2018), https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html [https://perma.cc/P5MP-8HNN].

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 817 (2020).

66. *Id.*

67. *Id.* at 819.

68. Editorial Board, *supra* note 59.

69. *Id.*

> systems as a result of the habitual lack of self-control of expectant mothers in the use of . . . controlled substances . . . .[70]

Eventually, state legislatures acted by passing legislation relating prenatal substance abuse during the 1980s and 1990s to "fight" the War on Drugs.[71] While new research has since debunked the idea of "crack babies," these laws remain on the books.[72] This raises questions about why these laws are still in place as the "crack baby" generation failed to materialize. The continued enforcement of these laws also poses questions as to how states will use these laws to respond to the current opioid crisis and the legalization of marijuana, especially as more pregnant women report recreational prenatal drug use.[73]

### iii. The Pro-Life Movement

The Cocaine Mom law was also a product of the push by pro-life groups to establish legal protections for a fetus.[74] State intervention protecting fetuses has increased dramatically over the past few decades, especially after *Roe v. Wade*, which held that a fetus is not legally a person separate from the mother.[75] In response, groups have pushed state legislatures to recognize the personhood of a fetus.[76] One such group that pushed for the Cocaine Mom law was the pro-life group Wisconsin Right to Life, which holds the position that the law helps both mother and child.[77] Through the expansion of fetal rights under state law, anti-abortion activists also argue that the Fourteenth Amendment "should similarly recognize the reality of fetal personhood."[78]

The anti-abortion fight to recognize a fetus as a separate person with fundamental rights came to a head in Wisconsin in *State ex rel. Angela M.W. v. Kruzicki*.[79] In *Kruzicki*, the Wisconsin Supreme Court found that a fetus was not a "child" under the Children's Code of the Wisconsin Statutes.[80] In this case, Angela's obstetrician suspected Angela M.W. used cocaine, and a blood test later confirmed that suspicion.[81] The doctor reported Angela's drug use to authorities

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70. WIS. STAT. § 48.01(ap) (2017-18).

71. Editorial Board, *supra* note 59; Lester, *supra* note 56, at 12.

72. Editorial Board, *supra* note 59; Guttmacher Inst., *supra* note 49.

73. *See* Loertscher v. Anderson, 259 F. Supp. 3d 902, 913 (W.D. Wis. 2017), *vacated*, 893 F.3d 386 (7th Cir. 2018) ("In Wisconsin, approximately 1,600 women tested positive for alcohol, opioid, heroin, or marijuana at the time of delivery in 2014, compared to 600 cases in 2009."); *More Pregnant Women are Using Cannabis, Research Shows*, NPR (Oct. 28, 2019), https://www.nprillinois.org/post/more-pregnant-women-are-using-cannabis-research-shows#stream/0 [https://perma.cc/3DGA-A67Q].

74. Eckholm, *supra* note 11.

75. Erin N. Linder, *Punishing Prenatal Alcohol Abuse: The Problems Inherent in Utilizing Civil Commitment to Address Addiction*, 2005 UNIV. ILL. L. REV. 873, 875 (2005).

76. Eckholm, *supra* note 11.

77. *Id.*

78. *See* DeVille & Kopelman, *supra* note 31, at 335.

79. State *ex rel.* Angela M.W. v. Kruzicki, 209 Wis. 2d 112, 561 N.W.2d 729 (1997).

80. *Id.* at 137-38.

81. *Id.* at 116-17.

in Waukesha county.[82] The report prompted the Waukesha County Department of Health and Human Services to place Angela M.W.'s unborn fetus into protective custody.[83] Before the motion was granted, Angela voluntarily entered drug treatment.[84] Despite this voluntary entry into treatment, the court ordered Angela to stay at the treatment center and threatened to place her at a local hospital if she attempted to leave.[85] Angela then challenged the court's order and argued that the application of protective services was illegal because the Children's Code did not apply to a viable fetus.[86] The Wisconsin Supreme Court agreed and found that a fetus was not within the scope of the Children's Code.[87]

The majority also noted that whether the state could detain a pregnant woman for endangering her unborn baby was a question that the legislature should answer.[88] The legislature responded only two months later and introduced what would become the Cocaine Mom law (or the Unborn Child Protection Act of 1998), despite opposition from the Wisconsin Division of Children and Family Services, the Division of Public Health's substance abuse bureau, and the City of Milwaukee Health Department.[89] Overriding the decision in *Kruzicki*, the legislature made prenatal drug use a ground for civil commitment while also granting personhood rights to a fetus by protecting it from child abuse.[90]

## II. LOERTSCHER V. ANDERSON

One of the most significant recent legal developments surrounding the Cocaine Mom law is the case *Loertscher v. Anderson*, which resulted in the courts temporarily halting the enforcement of the Cocaine Mom law due to constitutional concerns.[91]

Even though Tammy Loertscher signed the consent order to receive treatment under the Cocaine Mom law, she did not give up her fight against the law.[92] Loertscher sued Wisconsin, alleging several constitutional violations.[93] She argued that the Cocaine Mom law was unconstitutionally vague.[94] She also argued that the Cocaine Mom law violated her substantive due process rights, procedural due process rights, First Amendment rights, Fourth Amendment rights, and right to equal protection.[95] She ultimately sought for the court to find

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82. *Id.* at 117.
83. *Id.*
84. *Id.* at 118.
85. *Id.*
86. *Id.* at 119-20.
87. *Id.* at 138.
88. *Id.* at 134-35.
89. Loertscher v. Anderson, 259 F. Supp. 3d 902, 907 (W.D. Wis. 2017), *vacated*, 893 F.3d 386 (7th Cir. 2018).
90. *See* WIS. STAT. § 48.01(am) (2017-18).
91. *Loertscher*, 259 F. Supp. 3d at 922.
92. *Id.* at 906.
93. *Id.*
94. *Id.*
95. *Id.*

the Cocaine Mom law unconstitutional, to stop the law's enforcement, and for money damages against Taylor County for enforcing the Cocaine Mom law against her.[96]

The district court declined to respond to most of the constitutional claims brought by Loertscher, but instead focused on two issues.[97] First, the court considered whether the law was void for vagueness, thus violating due process under the Constitution.[98] The court concluded that the law was void for vagueness and stopped the future enforcement of the law by issuing an injunction.[99] Second, the court decided that Taylor County was not liable because Loertscher did not show that the county enforced the Cocaine Mom law and thus refused to award monetary damages.[100]

### *A. Void for Vagueness*

The district court concluded that the Cocaine Mom Law was void for vagueness after finding that ambiguities in the language of the statute were not "amenable to reasonably precise interpretation."[101] "Due process requires that a law clearly define its prohibitions. . . . First, a statute must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'"[102] If a statute does not do this, then it is unconstitutionally vague.[103]

For its analysis of the language, the court split the law into two elements: (1) the mother "severely and habitually lack[s] self-control" in the use of alcohol or drugs; and (2) the lack of self-control must pose a "substantial risk" that the child's health will be seriously affected or endangered.[104]

First, the court examined the phrase: "severely and habitually lack self-control."[105] Examining the word "severe," the court could not determine what degree of drug use is severe.[106] Citing the multiple doctors that testified in the case, various members of the medical community defined "severe" use of alcohol and drugs to mean as little as any use to as much as heavy prenatal drug use.[107] "Habitually" also failed in an analysis similar to that of "severe" as "habitually" is a term of degree.[108] The statute does not indicate how much use results in a

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96. *Id.*
97. *Id.*
98. *Id.* at 915-22.
99. *Id.* at 906, 922.
100. *Id.* at 906, 922-26.
101. *Id.* at 906.
102. *Id.* at 915 (citation omitted) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).
103. *Id.*
104. *Id.* at 918.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*

habit.[109] Due to this ambiguity, the court noted, "[t]his introduces the possibility that the [Cocaine Mom law] could be enforced against any drug or alcohol-dependent woman who was pregnant, because her history of substance abuse could be invoked to demonstrate the requisite lack of self-control, regardless of whether she actually used controlled substances while pregnant."[110] Consequently, the court decided that the phrase "severely and habitually lack self-control" did not provide notice of how much drug or alcohol use the law required.[111]

The court then turned to the second element of the statute which requires a "substantial risk" to the physical health of the unborn child.[112] The court found that this phrase was also vague due to ambiguities in the language.[113] The court noted the term "substantial risk" was also a matter of degree, as the statute did not quantify the risk required.[114] After hearing testimony from the medical community, the court found that none of the experts could agree how much prenatal drug use puts a fetus at risk or when a *substantial* risk results from prenatal drug use.[115] The court summed up the lack of certainty, saying, "the expert evidence here makes one thing abundantly clear: current medical science cannot tell us what level drug or alcohol use will pose a substantial risk of serious damage to an unborn child."[116]

The court also found that the statute did not provide a "reasonably comprehensible standard" due to the ambiguities in the two elements of substantial risk to the physical health of the unborn child and severe and habitual lack of self-control by the expectant mother. [117] The court based its decision on the fact that a pregnant woman would not know when she was subject to the law.[118] The court said that an expectant mother would have no way to know what type of behavior would be severe enough to trigger enforcement of the act.[119] Additionally, she would not know whether behavior prior to pregnancy was sufficient to elicit the Act's control over her once she conceived.[120]

The court concluded that not only would the mother not know whether she violated the act, but enforcers would also not know when to apply the law.[121] The court thought enforcers would struggle to apply the law because the statute did not give meaningful definitions to address ambiguities in the language of the

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109. *Id.* at 918-19.
110. *Id.* at 919.
111. *Id.* at 920-21.
112. *Id.* at 918-19.
113. *Id.* at 919.
114. *Id.* at 920.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 920-21.
119. *Id.* at 921.
120. *Id.*
121. *Id.*

statute.[122] Overall, the court found the statute was too vague based on the ambiguities in the meanings of "severe," "habitually," and "substantial risk."[123] After concluding that the law was vague, the court granted summary judgment in favor of Loertscher and ordered an injunction to halt the enforcement of the act.[124]

Yet the district court did not have the last word on the injunction: the State appealed both the order for summary judgment and the injunction.[125] First, the State asked the Seventh Circuit to lift the injunction while it reviewed the summary judgment entered by the district court.[126] The Seventh Circuit refused to remove the injunction.[127] In response, Wisconsin's Attorney General asked the U.S. Supreme Court to vacate the injunction, arguing that the injunction was a threat to the lives and wellbeing of unborn children.[128] Citing no reason for doing so, the Supreme Court vacated the injunction, noting that Justices Ginsburg and Sotomayor would have denied the request for a stay.[129]

### *B. The Seventh Circuit Weighs In*

On appeal to the Seventh Circuit, the State challenged the district court's order granting summary judgment.[130] However, the Seventh Circuit never reached the merits of the case; instead, it found the case moot because Loertscher had moved away from Wisconsin, and thus outside the court's jurisdiction.[131]

Pushing back, Loertscher argued that her case fell within an exception to mootness that allows cases to survive that are "capable of repetition, yet evading review."[132] To be "capable of repetition, yet evading review," the challenged action must be too short to be fully litigated prior to its end.[133] Additionally, there must be a reasonable expectation that the party will be subjected to the same action again.[134] While not considered by the court, the first prong would be presumably met because women are only pregnant for nine months—making it difficult for women to challenge the law in that timeframe. However, the Seventh Circuit rejected Loertscher's claim based on the second prong.[135] The court found

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122. *Id.*

123. *Id.*

124. *Id.* at 906.

125. *See* Andrew Chung, *Supreme Court Lifts Block on Wisconsin 'Cocaine Mom' Law During Appeal*, REUTERS (July 7, 2017, 4:10 PM), https://www.reuters.com/article/us-usa-court-cocaine-idUSKBN19S2YX [https://perma.cc/5LTW-9BLR].

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. Loertscher v. Anderson, 893 F.3d 386, 388 (7th Cir. 2018).

131. *Id.* at 388, 393.

132. *Id.*

133. *Id.* at 394-5 (citations omitted) (quoting U.S. v. Sanchez-Gomez, 138 S. Ct. 1532, 1540 (2018)).

134. *Id.*

135. *Id.* at 395.

that because Loertscher no longer resided in Wisconsin with no intention of returning, she had "no reasonable expectation" that she would be in Wisconsin "at a time when she [was] both pregnant and under the influence of drugs or alcohol to a severe degree."[136] Based on Loertscher's move, the court vacated the district court's order for summary judgment and remanded the case back to the district court with instructions to dismiss the case.[137]

Consequently, the Seventh Circuit sidestepped the issue and left many questions unresolved surrounding the Cocaine Mom law. Significantly, it remains undecided whether the law passes constitutional muster, especially considering other constitutional claims besides void for vagueness. In light of the recognized rights to privacy and equal protection, Wisconsin's Cocaine Mom law should also be unconstitutional under the Fourteenth Amendment.

## III. CONSTITUTIONAL CONCERNS

The Cocaine Mom law should be held unconstitutional under the Fourteenth Amendment as a violation of the right to privacy and equal protection. When evaluating these constitutional concerns, the court must weigh the rights of the individual against the interests of the state in enforcing the law.[138] One right that the law implicates is the right to privacy. Regarding the right to privacy, Wisconsin does not have a legitimate state interest because there is no compelling evidence that prenatal drug use has a substantial effect on unborn children. Even if Wisconsin does have an interest in upholding the Cocaine Mom law, the legislature could tailor the law more narrowly to protect the liberty of pregnant women.

The Cocaine Mom law also likely violates the Equal Protection Clause of the Fourteenth Amendment. Compared to two other forms of civil commitment in Wisconsin—the Mental Health Act and the Sexually Violent Persons Act—the Cocaine Mom law does not provide an equal right to counsel. The right to counsel under the Cocaine Mom law is not equal to the other forms of civil commitment because it applies at a later stage in the proceedings, has more requirements before counsel can be appointed, and can result in the indefinite detention of an expectant mother.

### *A. The Right to Privacy*

Wisconsin's interest in enforcing the Cocaine Mom law does not outweigh an individual's right to privacy. The right to privacy ensures that each individual has the right to "'independence [when] making certain kinds of important decisions,' particularly in matters regarding the course of his or her life."[139] The right to privacy protects personal decisions relating to marriage, family

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136. *Id.*

137. *Id.* at 396.

138. James Drago, *One for My Baby, One More for the Road: Legislation and Counseling to Prevent Prenatal Exposure to Alcohol*, 7 CARDOZO WOMEN'S L. J. 163, 170 (2001).

139. *Id.* at 166 (citing Whalen v. Roe, 429 U.S. 589, 599-600 (1977)).

relationships, raising children, contraception, and whether to have a child.[140] Encompassed within the right to privacy is the right to protect one's bodily autonomy from government interference.[141] For example, medical decisions are protected under the right to privacy, even when that decision could harm the patient.[142]

Within the past century, courts have decided how far a woman's right to bodily control during pregnancy extends.[143] The right to privacy was first recognized to include the right to make reproductive decisions in *Griswold v. Connecticut*.[144] In *Griswold*, the Supreme Court held that married couples' right to privacy protects contraceptive decisions.[145] Griswold also established that the Court will view state action that impairs the right of privacy under strict scrutiny review, which requires the state to show that it has a compelling interest that is "narrowly drawn in relation to that interest."[146]

The Supreme Court further expanded the right to privacy to include the right to have an abortion without interference from the state in the landmark case *Roe v. Wade*.[147] However, the right to privacy is not absolute. In *Roe*, the Supreme Court held that the right to an abortion is qualified, and it must be weighed against the important state interests in regulating abortion.[148] The Supreme Court further qualified the right to privacy in *Planned Parenthood v. Casey*.[149] In *Casey*, the Court upheld many of *Roe*'s principles, but allowed the state to regulate abortions as long as there was not an "undue burden" on a woman seeking an abortion.[150] *Casey* indicates that the state has an interest in protecting fetuses, but this must be weighed against an individual's right to privacy.[151]

To overcome an individual's right to privacy, the state must exhibit "a compelling state interest."[152] The state must meet three requirements for the state to have a compelling state interest.[153] First, the state interest must be important and legitimate.[154] Second, the regulation must be substantially related to the state's goal.[155] Finally, the regulation must be the least intrusive means to achieve

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140. Planned Parenthood v. Casey, 505 U.S. 833, 834 (1992).
141. Drago, *supra* note 138, at 168.
142. *Id.*
143. *See id.* at 167-169.
144. *Id.* at 167.
145. *Id.*
146. G. Sidney Buchanan, *The Right of Privacy: Past, Present, and Future*, 16 Ohio N.U. L. Rev. 403, 435 (1989).
147. Drago, *supra* note 138, at 169.
148. *Id.*
149. *See id.* at 169-70.
150. *Id.*
151. *Id.* at 170.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*

that end.[156] In addition to these three requirements, "the behavior to be regulated must be clearly linked to the harm that the state is trying to prevent, and the harm must be likely and great."[157]

i. The Cocaine Mom law is not substantially related to Wisconsin's goal of protecting unborn children.

Wisconsin does not have a compelling state interest in the enforcement of the Cocaine Mom law because the regulation is not substantially related to the state's goal. Wisconsin passed the Cocaine Mom law to protect unborn children from the substance abuse of their mothers.[158] However, medical science has not definitively shown that babies face significant harm from prenatal drug use, nor determined how much drug use results in the law's required element of "substantial risk" to unborn children.[159] Since there is no clear link between prenatal drug use and harm to fetuses, the Cocaine Mom law cannot be shown to protect fetuses.

Recent studies undermine common presumptions surrounding the negative effect of drug use during pregnancy.[160] For example, research shows limited evidence that prenatal opioid use adversely affects a fetus.[161] When exposed to opioids during pregnancy, babies are at risk for developing Neonatal Abstinence Syndrome.[162] Symptoms of Neonatal Abstinence Syndrome include excessive crying and irritability, but these symptoms are short-term.[163] Neonatal Abstinence Syndrome does not have any long-term effects.[164] Rather, studies found that children exposed to heroin in utero functioned in the normal range of mental and motor development.[165] Moreover, most opioids do not carry an increased risk of birth defects.[166]

Furthermore, fears about prenatal use of cocaine have never been realized.[167] Studies indicate that prenatal cocaine use does not have a negative effect on a child's weight, length, or head circumference and have not shown

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156. *Id.*

157. *Id.*

158. WIS. STAT. § 48.01 (2017-18) (Wisconsin's Cocaine Mom Law was passed "[t]o recognize that unborn children have certain basic needs which must be provided for, including the need to develop physically to their potential and the need to be free from physical harm due to the habitual lack of self-control of their expectant mothers in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree.").

159. *See generally* Cortney E. Lollar, *Criminalizing Pregnancy*, 92 IND. L. J. 947 (2017), https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=11252&context=ilj [https://perma.cc/Q3P8-VXYS].

160. *Id.* at 950.

161. *See id.* at 971.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 972.

166. *Id.*

167. *Id.* at 968.

consistent negative impacts on cognitive development including memory, motor development, or language skills.[168] In fact, medical experts believe stressful or unstable home environments can have a more significant effect on children than the actions taken by the mother while the child is in utero.[169]

On the other hand, there is evidence that prenatal alcohol use has negative effects on a fetus, but the amount of alcohol required to create a substantial risk of injury to a child is unknown.[170] Fetuses exposed to alcohol during pregnancy can develop Fetal Alcohol Syndrome (FAS).[171] FAS can lead to physical damage like facial abnormalities, low body weight, and small head size.[172] FAS can also lead to cognitive problems, including speech and language delays, learning disabilities, and difficulty with attention.[173] FAS results from a high level of alcohol use during pregnancy, but it is unknown how much alcohol use during pregnancy is a high enough level to result in FAS.[174] According to recent studies, only 5% to 10% of women who use alcohol during pregnancy give birth to a child showing symptoms of FAS.[175] Moreover, high alcohol use alone does not lead to FAS; other factors, including poor nutrition and genetics, also affect the development of FAS.[176] Thus, prenatal alcohol use does not always lead to harm to a child, and it is unknown how much alcohol during pregnancy creates a substantial risk of injury as required by the Cocaine Mom law.

Additionally, laws like the Cocaine Mom law could actually create more risk to the fetus. For example, forced withdrawal may be more dangerous to an unborn child, as research shows that withdrawal from opioids can lead to miscarriage in the first trimester of pregnancy.[177] Withdrawal from opioids can also result in premature labor or stillbirth in the third trimester.[178] There is not much data on effects of alcohol withdrawal in pregnancy, but some evidence suggests that pregnant women experiencing alcohol withdrawal may be uniquely vulnerable to effects of withdrawal.[179] Thus, in some circumstances, forced withdrawal could put both the mother and the child at higher risk than the actual substance use.[180]

Moreover, many medical organizations oppose laws that punish pregnant women for drug and alcohol use because the reporting requirements may deter

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168. *Id.*

169. *See id.* at 968-69.

170. *Id.* at 973-75.

171. *Id.* at 973.

172. *Basics about FASDs*, CENTERS FOR DISEASE CONTROL (May 7, 2020), https://www.cdc.gov/ncbddd/fasd/facts.html [https://perma.cc/7PR6-HDWH].

173. *Id.*

174. Lollar, *supra* note 159, at 973-74.

175. *Id.* at 974.

176. *Id.*

177. *Id.* at 971.

178. *Id.*

179. Jeffrey DeVido et al., *Alcohol Use Disorders in Pregnancy*, 23(2) HARV. REV. PSYCHIATRY 112 (2015).

180. *See* Lollar, *supra* note 159, at 971-72.

some women from seeking care.[181] According to the American College of Obstetricians and Gynecologists, "incarceration and threat of incarceration have proved to be ineffective in reducing the incidence of alcohol or drug abuse and that mandated testing and reporting [by doctors] lead women to avoid prenatal care."[182] This is especially troubling because prenatal care can help reduce the effects of substance abuse and other risk factors during pregnancy.[183] Additionally, the American Academy of Pediatrics, which is committed to the health and wellbeing of children,[184] opposes laws like the Cocaine Mom law because they are not "rooted in science and evidence-based medicine."[185]

ii. The Cocaine Mom law is not the least intrusive means for protecting unborn children.

Not only does the state not have a compelling interest because of the lack of evidence suggests the law is not substantially related to the state's goal, but the Cocaine Mom law also is not the least intrusive means of achieving the state's objective. The Cocaine Mom law broadly applies to a woman at any stage in her pregnancy.[186] Under the Cocaine Mom law, the term "unborn children" includes fertilized eggs, embryos, and fetuses, which makes it extend to any pregnant woman no matter the stage of the pregnancy.[187] However, the Supreme Court has held that states do not have a compelling interest in a fetus before viability.[188] Thus, because the Cocaine Mom law extends to a fetus at any stage of the pregnancy despite viability, Wisconsin should not have a compelling interest in protecting the fetus from its own mother.

Even if Wisconsin does have a compelling interest in enforcing the Cocaine Mom law, the legislature could more narrowly tailor the law. Currently, the law applies to pregnant women before they even know they are pregnant.[189] One way to the legislature could protect women using drugs while pregnant is to add a *scienter* element to the statute. By adding intent to the statute, only women who know they are pregnant, but still choose to engage in prenatal substance abuse,

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181. Sara Finger, *Women Are Treated Shamefully Under Wisconsin's 'Cocaine Mom' Law*, HUFFINGTON POST (Apr. 19, 2017), https://www.huffpost.com/entry/wisconsins-dirty-secret-about-the-treatment-of-pregnant_b_58efdd88e4b0156697224d94 [https://perma.cc/HH8Z-K2J2].

182. *Id.* (quoting AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist* (Jan. 2011), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2011/01/substance-abuse-reporting-and-pregnancy-the-role-of-the-obstetrician-gynecologist [https://perma.cc/52Z6-VRB3].

183. *Id.*

184. *About the AAP*, AMERICAN ACADEMY OF PEDIATRICS, https://www.aap.org/en-us/about-the-aap/Pages/About-the-AAP.aspx (last visited Oct. 31, 2020) [https://perma.cc/9YACN4FP].

185. Finger, *supra* note 181.

186. *See* WIS. STAT. § 48.02(19) (2017-18).

187. *Id.*

188. Planned Parenthood v. Casey, 505 U.S. 833, 835-36 (1992).

189. *See* WIS. STAT. § 48.02(19).

could be subject to the Cocaine Mom law. Intent would also add another element to the statute that the state would have the burden of proving and therefore provide another hurdle to subjecting women to the intrusive law.

In addition to adding an element of intent to the law, the legislature could restore the doctor-patient privilege for expectant mothers with substance abuse problems. This way, expectant mothers would not be afraid to seek prenatal care and would receive the medical treatment that both the mother and child need during pregnancy. Allowing a privilege between the patient—the expectant mother—and the doctor would also provide the expectant mother greater privacy as well. Therefore, the legislature could amend the Cocaine Mom law to provide greater protection to pregnant women.

### *B. Equal Protection*

The Cocaine Mom law offends not only the right to privacy but also the Fourteenth Amendment's Equal Protection Clause. The Equal Protection Clause requires that "all persons similarly circumstanced shall be treated alike."[190] However, under the Cocaine Mom law, women do not receive the same right to counsel as people confined under the two other forms of civil commitment in Wisconsin, the Mental Health Act[191] and commitments for "sexually violent persons" (hereinafter referred to as a Chapter 980 commitment).[192] Arguably, while different treatment is provided under each respective civil commitment (though the Mental Health Act also provides substance abuse treatment), all three affect a personal liberty interest and should be treated alike. Unlike the other two forms of civil commitment in Wisconsin, women confined under the Cocaine Mom law receive counsel at a later time, are forced to overcome more hurdles to obtain counsel, and can be detained without counsel for a potentially indefinite time-period.[193]

First, The Cocaine Mom law provides an unequal right to counsel because the Act provides for counsel at a later stage in the proceedings than either the Mental Health Act or a Chapter 980 commitment. The Cocaine Mom law says, "If a petition under s. 48.133 is contested, no expectant mother may be placed outside of her home unless the expectant mother is represented by counsel at the

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190. Plyer v. Doe, 457 U.S. 202, 216 (1982) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

191. WIS. STAT. § 51.001-.95 (2017-18). The Mental Health Act provides for involuntary and voluntary admission, treatment, and rehabilitation of individuals with mental illness, drug dependency, or alcoholism. Brief for Amicus Curiae National Coalition for a Civil Right to Counsel in Support of Plaintiff-Appellee at 9, Loertscher v. Anderson, 893 F.3d 386 (7th Cir. 2018) (No. 17-1936).

192. WIS. STAT. § 980.01-.14 (2017-18). Chapter 980 provides for civil commitment procedures to detain sex offenders adjudicated to be "sexually violent persons" indefinitely after they serve a criminal sentence for a sex crime. *See generally* Juliet M. Dupuy, *The Evolution of Wisconsin's Sexual Predator Law*, 79 MARQ. L. REV. 873 (1996).

193. Brief for Amicus Curiae National Coalition for a Civil Right to Counsel in Support of Plaintiff-Appellee at 4, Loertscher v. Andereson, 893 F.3d 386 (7th Cir. 2018) (No. 17-1936).

fact-finding hearing and subsequent proceedings."[194] This means that the mother's right to counsel does not begin until a fact-finding stage, or even later in the case if the expectant mother does not contest the petition.[195] By the time a fact-finding hearing occurs, the pregnant women is already detained and offered a preliminary hearing within forty-eight hours of being placed into custody—without the opportunity to discuss her situation with counsel.[196] This is especially egregious considering that the Cocaine Mom law requires the court to appoint a guardian ad litem for the fetus as soon as a court takes jurisdiction over a pregnant women.[197] As a result, the law grants a fetus counsel before the mother receives counsel.[198]

In contrast, the Mental Health Act, which provides the most similar kind of treatment to the Cocaine Mom law, requires the appointment of counsel as soon as the commitment process begins.[199] The Mental Health Act says that as soon as an individual arrives at a facility for treatment, the facility must inform the committed individual of his or her right to have an attorney provided by the state.[200] Thus, people committed under the Mental Health Act receive assistance of counsel much earlier in the proceedings than women committed under the Cocaine Mom law.

Similarly, a Chapter 980 commitment also provides counsel at a much earlier point than the Cocaine Mom law, as an individual that qualifies for a public defender under Chapter 980 has a right to counsel at any hearing.[201] This means that an individual subject to civil commitment under the Mental Health Act or a Chapter 980 commitment does not have to wait for the fact-finding hearing like a woman subjected to the Cocaine Mom law.[202]

Second, when compared to the right to counsel in both the Mental Health Act and Chapter 980, the right to counsel under the Cocaine Mom law has more requirements that must be met before the court must appoint an expectant mother counsel. Under the Cocaine Mom law, a pregnant woman will only actually receive assistance of counsel if she meets two requirements: (1) the woman is "ultimately placed outside of her home" and (2) she can prove that she is indigent."[203]

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194. WIS. STAT. § 48.23(2m)(b) (2017-18).

195. WIS. STAT. § 48.23(4) (2017-18). If the woman does not contest the petition, the statute provides that an expectant mother may not be placed outside of her home unless represented by counsel at the hearing during which placement is determined. *Id.* This indicates counsel is not appointed if the woman is not facing commitment outside of her home.

196. Brief for Amicus Curiae National Coalition for a Civil Right to Counsel in Support of Plaintiff-Appellee at 6, Loertscher v. Anderson, 893 F.3d 386 (7th Cir. 2018) (No. 17-1936).

197. *Id.* at 5.

198. *Id.*

199. *Id.* at 9. The Mental Health Act is set forth in WIS. STAT. §§ 51.01–51.95 (2017–18).

200. *Id.* (citing WIS. STAT. § 51.15 (9)).

201. *Id.* at 10 (citing WIS. STAT. § 980.03(2) (2017-18)).

202. *See id.* at 9-10.

203. *Id.* at 7 (emphasis omitted) (quoting WIS. STAT. § 48.23(2m)(b) (2017-18)).

Like the Cocaine Mom law, a Chapter 980 commitment also requires the individual to prove indigency before appointment of counsel.[204] However, a commitment under Chapter 980 provides more protection by attaching the right to counsel even when the individual is only threatened with commitment, regardless of whether the court actually orders commitment.[205] Therefore, it is easier to receive counsel in a commitment under Chapter 980 than the Cocaine Mom law because the right to counsel does not depend on what outcome the state seeks for the committed individual.[206]

Furthermore, the Mental Health Act has even fewer requirements that must be met before the court can appoint counsel.[207] Under the Mental Health Act, the court shall refer the individual to the state public defender at the time of the filing of the commitment petition.[208] The public defender service is then to appoint counsel without a determination of indigency.[209] The Mental Health Act does not require the person threatened with commitment to meet indigency requirements and does not depend on the ultimate result that is sought by the state.[210] The result is that the Mental Health Act provides a broader right to counsel than the Cocaine Mom law. Even though both the Mental Health Act and the Cocaine Mom law can commit individuals for drug treatment, the Mental Health Act does not provide as many barriers to counsel as the Cocaine Mom law does.[211]

Finally, the Cocaine Mom law could lead to indefinite detention without counsel, unlike the Mental Health Act or a Chapter 980 commitment. The Cocaine Mom law does not state when the court must have a fact-finding hearing if the expectant mother is in custody.[212] The only guidance the act provides is that the expectant mother can specifically request a hearing.[213] If the detained pregnant woman requests a hearing, the court must schedule the hearing within 30 days of her request.[214] However, because an expectant mother subjected to the Cocaine Mom law is not appointed counsel until a fact-finding hearing, she may not be aware of her right to demand a fact-finding hearing.[215] Thus, a pregnant woman could be held in custody indefinitely because she could be unaware of her right to request a hearing, and counsel will not be appointed in time to advise of this possibility.[216]

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204. *Id.* at 10 (quoting WIS. STAT. §§ 980.03(2), .04(5)).
205. *Id.* at 10-11.
206. *See id.* at 7-8, 10-11.
207. *See id.* at 9.
208. *Id.* (citing WIS. STAT. § 51.60(1) (2017-18)).
209. *Id.* (citing WIS. STAT. § 51.60(1)).
210. *Id.*
211. *See id.* at 9-10.
212. *Id.* at 8.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*

In contrast, both the Mental Health Act and a Chapter 980 commitment require a set timetable of when those detained must have a hearing.[217] Under the Mental Health Act, the court must conduct a final hearing within 14 days after the state committed the individual.[218] Chapter 980 provides that if there is to be a trial, the court must hold the trial within 90 days following the probable cause hearing.[219] On the other hand, under the Cocaine Mom law, the state could hold expectant mothers indefinitely by delaying the appointment of counsel.[220] This provides a stark contrast to Wisconsin's other two forms of civil commitments, both of which set a specific timeframe for the fact-finding hearing or trial and provide counsel at a much earlier stage than the Cocaine Mom law.[221]

The Cocaine Mom law offends the Equal Protection Clause. The Cocaine Mom law does not provide the same right to counsel as either the Mental Health Act or a Chapter 980 commitment, even though all three forms of civil commitment have a physical liberty interest at stake.[222] Since the Cocaine Mom law implicates the right to privacy, the state must have a compelling state interest to overcome a violation of the Equal Protection Clause.[223] In order to be a compelling state interest, the state interest must be important and legitimate as well as substantially related to the state's goal.[224] Here, Wisconsin would not have a compelling state interest because delaying the right to counsel until a fact-finding hearing does not further Wisconsin's interest in protecting the fetus from harm. Rather, the lack of appointment of counsel harms pregnant women—who are carrying the child—by leaving them to fend for themselves without counsel until a fact-finding hearing. Wisconsin could still achieve its goal and protect the rights of pregnant women by providing them increased access to counsel. Furthermore, there is no legitimate reason that women, facing a deprivation of their liberty, should wait longer for counsel and face additional obstacles getting a lawyer, especially considering other forms of civil commitment provide greater access to counsel. Therefore, it is likely that Wisconsin lacks a compelling state interest to overcome the violation of the Equal Protection Clause caused by the lesser right to counsel provided under the Cocaine Mom law.

## CONCLUSION

Tammy Loertscher is just one of the thousands of women social services reported for prenatal drug use, even though she was seeking medical help.[225]

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217. *Id.* at 10-11.

218. *Id.* at 10.

219. *Id.* at 11.

220. *Id.* at 8.

221. *Id.* at 10-11.

222. *Id.* at 11.

223. *Id.* at 12 (citing Att'y Gen. of New York v. Soto-Lopez, 476 U.S. 898, 904 (1986); Plyler v. Doe, 457 U.S. 202, 216-17; Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 258 (1974)).

224. Drago, *supra* note 138, at 170.

225. Loertscher v. Anderson, 259 F. Supp. 3d 902, 909-12 (W.D. Wis. 2017), *vacated*, 893 F.3d 386 (7th Cir. 2018).

Despite the court order to place Loertscher in jail without the opportunity for prenatal care and forced drug treatment under the Cocaine Mom law, Loertscher delivered a healthy baby boy in January 2015.[226]

Although the Seventh Circuit's decision saved the law, this is only because the case became moot after Loertscher left the state.[227] Constitutional concerns remain. As the Western District of Wisconsin found, the law is vague.[228] It also implicates the right to privacy. Wisconsin does not have a compelling state interest because the law is not tailored narrowly, and the medical evidence does not support the stated purpose of the law.

Additionally, the Cocaine Mom law is not consistent with the Equal Protection Clause because the right to counsel is a weaker right under this law than the other types of civil commitments.[229] The two other forms of civil commitment provide that the court must appoint counsel before the fact-finding stage. When women are provided counsel under the Cocaine Mom law, there must be a finding of indigency and the state must seek to place the expectant mother outside of her home for counsel to be appointed. There is also no timetable for the fact-finding hearing, which could leave an expectant mother detained indefinitely without counsel.[230] As long as Wisconsin's Cocaine Mom law remains law, women, like Tammy Loertscher, will continue to find themselves subjected to forced drug treatment to protect a fetus at the expense of her fundamental rights.

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226. Calhoun, *supra* note 1.

227. 893 F.3d at 388.

228. 259 F. Supp. at 922.

229. Brief for Amicus Curiae National Coalition for a Civil Right to Counsel in Support of Plaintiff-Appellee at 7, 9-11, Loertscher v. Anderson, 893 F.3d 386 (7th Cir. 2018) (No. 17-1936).

230. *Id.* at 8.

# WHEN LOOPHOLES ALLOW RAPE: AN ANALYSIS OF STATES WHOSE STATUTES AND CASE LAW ALLOWED POST-PENETRATION RAPE AND HOW WISCONSIN COMPARES

*Manuel Sanchez-Moyano†*



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† Graduate of the University of Wisconsin School of Law.

## INTRODUCTION

Amy Guy was home one evening when her estranged husband showed up at her door.[1] He demanded that Guy have intercourse with him that night.[2] Guy's husband had been violent towards her in the past; considering that, Guy consented to intercourse.[3] During intercourse, Guy's husband became violent so Guy told him to stop.[4] Instead, he continued.[5]

Guy took a difficult and brave step and reported what occurred.[6] However, the prosecutor's office pointed to a 1979 state supreme court ruling that held that continuing sex after revocation of consent was not rape.[7] As a result, Guy's husband pled to a lesser charge of misdemeanor assault rather than a potential rape conviction.[8]

What happened to Amy Guy is one example too many of the legal reality in North Carolina from 1979 until December 2019. During that period, sexual intercourse that began with consent but where consent was revoked post-penetration did not constitute rape or sexual assault under North Carolina criminal law, according to the 1979 state supreme court ruling in *State v. Way*.[9] What happened to Guy is known as "post-penetration rape/sexual assault," a specific subset of rape/sexual assault. Post-penetration rape/sexual assault refers to encounters that begin consensually but become not consensual after one partner revokes consent and the other party continues the interaction despite the lack of continuing consent.[10]

Sexual assault and rape have unfortunately been present in society in some form or another throughout human history. In both ancient times and in more recent common law tradition, women were considered the property of husbands or fathers; as such, rape was a crime against a man's property.[11] Under English common law, rape was defined as "carnal knowledge of a woman forcibly and against her will," and included the elements of intercourse, force, and lack of

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1. Molly Redden, *'No Doesn't Really Mean No': North Carolina Law Means Women Can't Revoke Consent for Sex*, THE GUARDIAN (June 24, 2017, 7:00 AM), https://www.theguardian.com/us-news/2017/jun/24/north-carolina-rape-legal-loophole-consent-state-v-way [https://perma.cc/923R-LZXN].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *See id.*

7. *Id.*

8. *Id.*

9. *See, e.g.*, Redden, *supra* note 1; Carla Herreria Russo, *North Carolina Passes Bill Closing Legal Loopholes on Sexual Assault*, HUFFPOST POLITICS (Oct. 31, 2019, 11:12 PM), https://www.huffpost.com/entry/north-carolina-bill-loophole-sexual-assault_n_5dbb49dfe4b057bf506f01cd [https://perma.cc/SL6A-8XJN].

10. Sarah O. Parker, Note, *No Means No…Sometimes: Developments in Postpenetration Rape Law and the Need for Legislative Action*, 78 BROOK. L. REV. 1067, 1068 (2013).

11. *Id.* at 1070-71.

consent.[12] Merriam-Webster defines rape as "unlawful sexual activity and usually sexual intercourse carried out forcibly or under threat of injury against a person's will,"[13] and sexual assault as "illegal sexual contact that usually involves force upon a person without consent."[14] The specifics of what activities or types of contact are unlawful under the umbrella of sexual assault law are determined on a state-by-state basis; however, as common dictionaries have come to reflect, a lack of consent is generally considered one element of criminalized rape or sexual assault.[15]

Whether post-penetration rape/sexual assault is criminalized and how explicitly it is criminalized varies by state. Currently, the laws of only two states — Illinois and North Carolina — explicitly prohibit post-penetration rape/sexual assault.[16] North Carolina is a recent addition; until late 2019, valid precedent (i.e. *State v. Way*) in North Carolina held that post-penetration rape was not a crime.[17] The courts in nine states have criminalized post-penetration rape/sexual assault.[18]

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12. Matthew R. Lyon, Comment, *No Means No?: Withdrawal of Consent During Intercourse and the Continuing Evolution of the Definition of Rape*, 95 J. CRIM. L. & CRIMINOLOGY 277, 281 (2004).

13. *Rape*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/rape (last visited Jan. 31, 2020) [https://perma.cc/RPX3-PXHB].

14. *Sexual Assault*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/sexual%20assault (last visited Jan. 31, 2020) [https://perma.cc/KX6N-2JLV].

15. *See supra* text accompanying notes 12-14.

16. *See, e.g.*, 720 ILL. COMP. STAT. 5/11-1.70 (2019); *see also, e.g.*, Parker, *supra* note 10, at 1068, Lyon, *supra* note 12, at 279; Marjorie A. Shields, Annotation, *Offense of Rape After Withdrawal of Consent*, 33 A.L.R. 6th 353 (2008); *see* Press Release, North Carolina Office of the Governor, Gov. Cooper Signs Bill to Protect Children and Close Consent Loophole (Nov. 17, 2019), https://governor.nc.gov/news/gov-cooper-signs-bill-protect-children-and-close-consent-loophole [https://perma.cc/ZC9Y-BCLC].

17. *See* Carolina Public Press Collaboration, *Questions of Consent Can Make NC Sexual Assault Cases Tough to Prosecute*, NEWS & OBSERVER (May 22, 2019, 9:21 AM), https://www.newsobserver.com/news/state/north-carolina/article228006114.html [https://perma.cc/H4SK-R44L]; *see also* Redden, *supra* note 1; Parker, *supra* note 10, at 1069; Shields, *supra* note 16. In November 2019, the Governor of North Carolina signed SB 199 into law, which closed the post-penetration loophole created in *State v. Way*. Press Release, North Carolina Office of the Governor, Gov. Cooper Signs Bill to Protect Children and Close Consent Loophole (Nov. 17, 2019), https://governor.nc.gov/news/gov-cooper-signs-bill-protect-children-and-close-consent-loophole [https://perma.cc/ZC9Y-BCLC].

18. *See, e.g.*, McGill v. State, 18 P.3d 77, 84 (Alaska Ct. App. 2001); *In re* John Z., 60 P.3d 183, 185-86 (Cal. 2003); State v. Siering, 644 A.2d 958, 961, 964 (Conn. App. Ct. 1994); State v. Bunyard, 133 P.3d 14, 28, 31 (Kan. 2006); Commonwealth v. Sherman, 116 N.E.3d 597, 605-06 (Mass. 2019); State v. Robinson, 496 A.2d 1067, 1070 (Me. 1985); State v. Baby, 946 A.2d 463, 486 (Md. 2008); State v. Crims, 540 N.W.2d 860, 865 (Minn. Ct. App. 1995); State v. Jones, 521 N.W.2d 662, 672 (S.D. 1994). Some other state courts seem to agree with the aforementioned cases, although the holdings are less explicit. *See, e.g.*, Davenport v. Vaughn, No. Civ. A. 00-5316, 2005 WL 856912, at 4 (E.D. Pa. Apr. 14, 2005), *aff'd sub nom.* Davenport v. Diguglielmo, 215 F. App'x. 175 (2007) (applying Pennsylvania law) (rejecting "the Petitioner's assertion that only the initial act of penetration counts as penetration under the rape statute, so a withdrawal of consent after sexual intercourse has begun is not rape unless the man withdraws and then 'penetrates' again"); State v. Crain, 946 P.2d 1095, 1102 (N.M. Ct. App. 1997) (noting "that other jurisdictions have questioned the legal validity of the

Whether post-penetration rape/sexual assault is criminalized under existing statute is an issue of first impression in the remaining states, Wisconsin included.[19]

This Comment proceeds in four parts. Part I identifies similarities or differences in state sexual assault statutes that could be used to help predict future outcomes in states like Wisconsin, where courts have not addressed whether post-penetration rape/sexual assault is prohibited by current statutes. It does so by examining first the relevant cases and statutes of the three states whose courts held that post-penetration rape/sexual assault was not prohibited by statute, second, the cases that overturned two of the three original decisions in those states, and third, a state case where post-penetration rape/sexual assault was found to be criminalized by statute.

Part II first overviews Wisconsin's current sexual assault statute and relevant definitional understanding of sexual intercourse/assault. Then, it analyzes Wisconsin's sexual assault statute in light of the statutes and prior court decisions discussed in Part II. Doing so highlights foreseeable future outcomes when Wisconsin courts are inevitably tasked to decide whether post-penetration sexual assault is a crime under Wisconsin law.

Part III of this Comment considers two paths forward for Wisconsin on this issue – judicial or legislative – and concludes that the legislature needs to amend the state's sexual assault statutes in order to avoid unfavorable statutory interpretation by Wisconsin courts. It also briefly provides potential models for legislation as found in Illinois and North Carolina's current sexual assault statutes.

## I. STATE SEXUAL ASSAULT STATUTES AS INTERPRETED BY STATE COURTS

From 1979 to 2019, post-penetration rape/sexual assault was explicitly not criminalized in North Carolina, due to the Supreme Court of North Carolina's 1979 holding in *State v. Way*.[20] North Carolina was not always an outlier; courts in both California and Maryland held similarly, in 1985 and 1980, respectively, before eventually overturning those decisions. This Part first highlights what the Supreme Court of North Carolina considered in *Way* and then examines the relevant aspects of North Carolina's statutes in light of *Way*. In an effort to identify any statutory commonalities that could be used to predict court behavior in other states, this Part proceeds by comparing the sexual assault statutes of California and Maryland in 1985 and 1980, respectively, to North Carolina's, as well as the relevant case holdings. Finally, this Part contrasts these three negative holdings with the findings of the California and Maryland courts overturning

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proposition that there can be no rape . . . if the victim's consent is withdrawn after penetration has begun[,] [but] [n]oting the questionable legal validity of the withdrawal-of-consent theory in other jurisdictions and the evidence presented at trial, we do not find that Defendant's trial counsel acted unreasonably in declining to present or rely upon this novel theory."). *See also* Shields, *supra* note 16.

19. *See supra* notes 16, 18, and accompanying text. *See also* Shields, *supra* note 16.

20. *See* State v. Way, 254 S.E.2d 760, 761-62 (N.C. 1979) (the North Carolina legislature amended its statutes in 2019, effectively overturning this precedent).

them and also considers Minnesota's analogous statutes,[21] a state where, when first confronted with the issue, courts held that post-penetration sexual assault was included within state law. The statutory analysis focuses primarily on two main factors: (1) how the statute addresses consent and (2) how it treats the timing of consent.

### *A. In North Carolina, Where There's No Will, There Was Way: State v. Way and North Carolina's Section 14-27.22*

*State v. Way* ultimately prevented post-penetration rape from being considered a crime; in it, however, the court considered simply whether the trial court's instruction to the jury regarding withdrawal of consent was in error.[22] At trial, the victim contended that what began as a date in the company of friends quickly turned otherwise; once the parties were alone, the defendant unsuccessfully attempted to remove the victim's pants, threatened the victim, hit her, and then threatened her again until she undressed.[23] At that point, he forced the victim to have anal intercourse and threatened to kill her in order to force her to perform oral intercourse on him.[24] Then, despite the victim begging him not to, the defendant forced her to have vaginal intercourse.[25] While forcing the victim to have vaginal intercourse, the defendant became scared when the victim began complaining of severe stomach pains; at that point, he stopped penetrating the victim and called the victim's friend, and together the defendant, the victim's friend, and another male took the victim to the hospital.[26] The victim reported the rape at the hospital.[27]

The defendant told a very different story. Throughout trial, the defendant claimed that the victim took off her clothes first, that he followed suit, and that they then had sexual intercourse.[28] He stated that the victim began to have stomach pains while they were having intercourse, so he called the victim's friend and together they took her to the hospital.[29] The defendant denied allegations that he had hit the victim and that he forced her to have intercourse with him.[30]

The issue ultimately in front of the state supreme court related to the submitted charge and the accompanying jury instructions. At trial in the Mecklenburg Superior Court, the judge submitted the charge of second-degree

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21. As noted in note 18 and the accompanying text, several state courts have criminalized post-penetration rape/sexual assault; out of these, Minnesota was chosen over others for analysis primarily for its geographic proximity to Wisconsin.

22. State v. Way, 254 S.E.2d 760, 761 (N.C. 1979).

23. *Id.* at 760.

24. *Id.*

25. *Id.* at 760-61.

26. *Id.* at 761.

27. *Id.*

28. *Id.*

29. *Id.*

30. *See id.*

rape.[31] During deliberations, the jury asked the trial judge if consent could be withdrawn.[32] The judge responded that "consent initially given could be withdrawn and if the intercourse continued through use of force or threat of force and that the act at that point was no longer consensual this would constitute the crime of rape."[33] Following this response, the jury convicted the defendant.[34] Upon review, the North Carolina Court of Appeals found no errors with the trial or the jury instruction.[35]

However, the Supreme Court of North Carolina disagreed with both lower courts. On discretionary review, the Supreme Court of North Carolina granted the defendant a new trial after holding that the trial judge's jury instructions were erroneous.[36] In an extremely short opinion, the court found that "[i]f the actual penetration is accomplished with the woman's consent, the accused is not guilty of rape."[37] Elucidating its interpretation of second-degree rape law, the court reasoned: "[u]nder the [trial] court's instruction, the jury could have found the defendant guilty of rape if they believed [the victim] had consented to have intercourse with the defendant and in the middle of That [sic] act, she changed her mind. This is not the law."[38] The court provided little analysis to support this conclusion. The court did, however, acknowledge that consent can be withdrawn, but held that the concept of withdrawing consent "ordinarily" applies in cases in which more than one act of intercourse occurs between the victim and the defendant.[39] This short opinion stood for 40 years, preventing the prosecution of perpetrators of post-penetration rape/sexual assault.[40]

The short *Way* opinion considers consent and also focuses on the moment of penetration as key to the consent analysis. North Carolina law addresses these ideas in section 14-27.22,[41] second-degree forcible rape, and section 14-27.27, second-degree forcible sexual offense.[42] Specifically, section 14-27.22 states that "[a] person is guilty of second-degree forcible rape if the person engages in vaginal intercourse with another person: (1) [b]y force and against the will of another person."[43] Both rape and sexual offense must be "against the will of another person;"[44] put another way, the perpetrator must lack consent from the victim. Additionally, the statute makes clear that the sexual assault is completed

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31. *Way*, 254 S.E.2d at 760.
32. *Id.* at 761.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 762.
37. *Id.*
38. *Id.* at 761-62.
39. *Id.* at 761.
40. *See supra* notes 7, 17, and accompanying text.
41. N.C. GEN. STAT. § 14-27.22 (formerly cited as § 14-27.3) (1979).
42. N.C. GEN. STAT. § 14-27.27 (formerly cited as § 14-27.5) (1979).
43. N.C. GEN. STAT. § 14-27.22 (formerly cited as § 14-27.3) (1979).
44. N.C. GEN. STAT. §§ 14-27.22, 14-27.27 (formerly cited as §§ 14-27.3, 14-27.5) (1979).

upon the act of penetration; seminal emission is not an element of the crime.[45] "[T]he offense shall be completed upon proof of penetration only. Penetration, however slight, is vaginal intercourse or anal intercourse."[46]

The construction of North Carolina's statutes regarding consent and the timing of consent allowed the court in *Way* to conduct minimal analysis, yet reach a long-lasting and impactful decision. The statute's discussion of consent was limited to an element of the crime; beyond indicating that lack of consent was necessary, the statute provided no additional guidance on when consent was needed and if it could be revoked. Additionally, by indicating that rape will be completed upon proof of penetration and that any penetration is intercourse, the statute invites a court, like the *Way* court did, to focus on the moment of penetration as the correct moment in time to analyze whether consent is present. The statutes in California and Maryland contain elements similar to North Carolina's old statute; this, along with some other elements, allowed courts in California and Maryland to make rulings similar to *Way.*

### *B. California's Penal Code Sections 261 and 263 as Applied in People v. Vela in 1985*

The wording of California's rape/sexual assault statutes, like North Carolina's old statutes, is ambiguous with regard to consent revocation and timing. This permitted California's 5th District Court of Appeals to foreclose, just like the *Way* court, the possibility of California law criminalizing post-penetration sexual assault in the 1985 case *People v. Vela*.

California Penal Code section 261 defines rape as: "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . (2) [w]here it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another."[47] Stated more simply, rape in California is nonconsensual sexual intercourse.[48] The legislature defined consent as "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."[49] Section 263 adds that any sexual penetration, even slight penetration, "is sufficient to complete the crime."[50] In addition, this section states that "[t]he essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape."[51] However, beyond these sections, California statutory law appears to be silent on the matter of consent revocation and how that impacts the incident at issue.

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45. N.C. GEN. STAT. § 14-27.36 (formerly cited as § 14-27.10) (1979).

46. *Id.*

47. CAL. PENAL CODE § 261 (Westlaw through Ch. 372 of 2020 Reg. Sess.).

48. People v. Vela, 218 Cal. Rptr. 161, 164 (Cal. Ct. App. 1985) (citing People v. Key, 203 Cal. Rptr. 144, 148 (Cal. Ct. App. 1984)), *overruled in part by In re* John Z., 60 P.3d 183, 188 (Cal. 2003).

49. CAL. PENAL CODE § 261.6 (Westlaw through Ch. 372 of 2020 Reg. Sess.).

50. CAL. PENAL CODE § 263 (Westlaw through Ch. 372 of 2020 Reg. Sess.).

51. *Id.*

There are similarities between California's statutes and North Carolina's at the time of *Way*. While California does provide an expanded definition of consent, like North Carolina, California's statutes did not clearly state whether consent could be withdrawn after intercourse and did not make clear at which point in an interaction consent is required. These ambiguities surface in *People v. Vela* and the court interprets them like the *Way* court did, preventing the prosecution of post-penetration rape by statute.

The Court of Appeal in *People v. Vela* assessed the validity of a given jury instruction and whether it was in error.[52] Here, defendant was charged with the forcible rape of the victim[53] and found guilty by the jury.[54] The victim's testimony, along with the rest of the prosecution's evidence, was sufficient to support the jury's guilty verdict of forcible rape.[55] However, the defendant's statement and other evidence in the case, if believed, also supported a jury finding that the victim initially consented, subsequently changed her mind during sexual intercourse and revoked her consent, after which the defendant continued sexual intercourse without the victim's consent and by force but without the interruption of penetration.[56] During its deliberations, the jury asked the court: "Once penetration has occurred with the female's consent, if the female changes her mind does force from that point (where she changes her mind) constitute rape?"[57] The court initially responded affirmatively,[58] indicating that sexual intercourse begun with consent but continued by force after the revocation of consent constituted rape. However, the court later backtracked, telling the jury that it did not have a definitive answer and that the jury must decide the case without the court's previous instruction.[59] Ultimately, the Court of Appeal held that the trial court made a prejudicial error in its failure to respond in the negative to the jury's question.[60]

In arriving at this conclusion, the court focused on consent and what constitutes the crucial moment of the crime of rape.[61] After review of "scant authority" from other jurisdictions, the court concluded that the presence or absence of consent *at initial penetration* seemed to be the key moment in the crime of rape.[62] Interestingly, the authorities considered were North Carolina's *State v. Way*, discussed above in Part I A., and Maryland's *Battle v. State*, discussed below in Part I C.[63] As examples, the court pointed out that sexual intercourse without consent at the moment of penetration is still rape even if the

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52. *Vela*, 218 Cal. Rptr. at 162.
53. *Id.*
54. *Id.* at 163.
55. *Id.* at 162.
56. *Id*.
57. *Id.* at 162-63
58. *Id.* at 163.
59. *Id.*
60. *Id.* at 165.
61. *See id.* at 163-65.
62. *Vela*, 218 Cal. Rptr. at 163-64.
63. *Id.*

victim gives consent after penetration, and that if a victim gave consent during preparatory acts but withdrew consent prior to penetration, the intercourse that followed would be rape, regardless of the consent given during the preparatory acts.[64]

The court supported this finding with California's statutes and case law. The court pointed out that Penal Code section 263[65] stated that any sexual penetration, even slight, completed the crime of rape and that the "essential guilt of rape consists in the outrage to the person and feelings of the female."[66] The court considered a California Supreme Court ruling that also relied on Penal Code section 263, *People v. Stanworth*, where the court held that a dead victim could not be raped because there was no outrage to the feelings of the dead victim at the moment of initial penetration.[67] Using this framework, that the moment of initial penetration is the key moment and that the essence of rape is in the victim's outrage, this Court of Appeal held that rape is lacking where consent is revoked post-penetration.[68] Indeed, the court reasoned that while a victim might feel outrage if sexual intercourse continued without interruption after the revocation of consent, this outrage could "hardly be of the same magnitude as that resulting from an initial nonconsensual violation."[69]

### *C. Another Battle: Maryland's Initial Interpretation of Criminal Code Art. 27 § 461 and §462 in Battle v. State*

Similarly, in *Battle v. State*, the Maryland Court of Appeals remanded a first-degree rape case for a new trial based on confusion stemming from a jury question and the trial judge's subsequent answer.[70] The court considered whether Maryland's first-degree rape law, then codified as Article 27, § 462, treated post-penetration rape as a rape criminalized by statute.[71] The court held that post-penetration rape was not rape under its statutes; if consent was withdrawn subsequent to penetration, "there [was] no rape."[72]

Maryland's rape/sexual assault statutes at the time of *Battle* were also similar to California and North Carolina's. Maryland law defined first-degree rape, in relevant part, as "vaginal intercourse with another person by force against the will and without the consent of the other person."[73] Like North Carolina and California, the statutes do not provide guidance on whether consent can be revoked after penetration, nor do they detail at which moments in an encounter consent is legally required. The definitions section of the code,

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64. *Id.* at 164.

65. CAL. PENAL CODE § 263 (Westlaw through Ch. 372 of 2020 Reg. Sess.).

66. *Vela*, 218 Cal. Rptr. at 164-65 (quoting CAL. PENAL CODE § 263 (West 1979)).

67. *Id.*

68. *Id.* at 165.

69. *Id.*

70. Battle v. State, 414 A.2d 1266, 1271 (Md. 1980).

71. *Id.* at 1268-71.

72. *Id.* at 1270.

73. MD. CODE ART. 27, § 462(a) (1980) (repealed 2002 and replaced "without substantive change" by MD. CODE ANN., CRIM. LAW § 3-303(a)(1) (West 2002)).

however, does note that "vaginal intercourse" includes penetration, however slight, and occurs whether or not semen is emitted.[74]

In *Battle*, the jury asked the judge the following: "When a possible consensual sexual relationship becomes non-consensual for some reason, during the course of the action can the act then be considered rape?"[75] The judge responded that a consensual encounter could become non-consensual, but then quoted Hazel v. State, 221 Md. 464, 157 A.2d 922 (1960), which said that "it is true, of course, that however reluctantly given, consent to the act at any time prior to penetration deprives the subsequent intercourse of its criminal character."[76] By quoting *Hazel*, the judge seemed to suggest that only consent prior to penetration mattered, that post-penetration rape could not criminally be prosecuted.

Analyzing whether this jury instruction was sufficiently confusing to warrant a retrial, the Court of Appeals sought to determine if Maryland law prohibited post-penetration rape/sexual assault.[77] It first noted that the case quoted by the trial judge occurred prior to the enactment of statutory laws on sexual assault; it occurred under the common law of rape.[78] However, the court proceeded to note that the statutory law since enacted was "an outgrowth of the definitions of rape at common law as set forth in *Hazel*."[79] This would seem to suggest, as *Hazel* had said, that consent to sexual intercourse prior to penetration "deprives the subsequent intercourse of criminal character."[80]

During its analysis, the court discovered little prior discussion on the issue of post-penetration rape/sexual assault.[81] However, the court pointed to ample law that did indicate that consent must occur prior to penetration to be valid.[82] The court held that even if a woman initially consented to a sexual encounter, if that consent was withdrawn before penetration the subsequent sexual act would not be consensual.[83] It then held that post-penetration revocation of consent was legally invalid, saying, "ordinarily if she consents prior to penetration and withdraws the consent following penetration, there is no rape."[84]

Like the *Vela* and *Way* courts, the court in *Battle* interpreted ambiguous statutes in a way that prevented the criminal prosecution of post-penetration rape/sexual assault. Maryland statutes were not clear whether consent matters at penetration only or throughout the encounter, or whether consent could be withdrawn during the encounter. As such, the *Battle* court was able to interpret

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74. MD. CODE ART. 27, § 461(g)(1)-(2) (1980) (repealed 2002 and replaced "without substantive change" by MD. CODE ANN., CRIM. LAW § 3-301(g) (West 2002)).

75. *Battle*, 414 A.2d at 1268.

76. *Id.*

77. *Id.* at 1268-71.

78. *Id*. at 1269.

79. *Id.*

80. *Id.* at 1268 (quoting Hazel v. State, 221 Md. 464, 469, 157 A.2d 922, 925 (1960)).

81. *Id.* at 1270.

82. *Id.*

83. *Id*.

84. *Id.*

the statutes to hold initial penetration as the key moment for consent; consent provided before penetration could not be revoked after. However, state courts ultimately overturned both *Vela* and *Battle*.

### *D. Course Correction Begins: California's Penal Section 261 and Section 263 as Applied in In re John Z in 2003*

The *Vela* precedent did not go unchallenged; subsequent California appellate courts disagreed with *Vela*. The state supreme court ultimately resolved the split in *In re John Z*.[85] While the individual facts in *John Z* differed from *Vela*,[86] the ultimate question was the same: whether the crime of forcible rape (Penal Code section 261) is committed when the victim consents to initial penetration by the defendant and then revokes consent during an act of intercourse but the defendant continues the act without consent.[87] The Supreme Court of California answered yes,[88] focusing its analysis on the statutory elements of rape.

First, the court disagreed with the *Vela* court's analysis that a victim would be less outraged after suffering a post-penetration rape than one where consent was never given,[89] noting there is no way to measure a victim's outrage accurately in each scenario.[90] The *John Z*. Court focused on Penal Code section 261,[91] which provides the elements of rape, over section 263.[92] The court noted that nothing in Penal Code section 261 "conditions the act of rape on the degree of outrage of the victim."[93] Additionally, it indicated that no California case had previously held that victim outrage, as mentioned in Penal Code section 263, was a required element of rape.[94]

Focusing on the elements of rape as defined by Penal Code section 261, the California Supreme Court held that:

> [F]orcible rape occurs when the act of sexual intercourse is accomplished against the will of the victim by force or threat of bodily injury and *it is immaterial at what point the victim withdraws her consent, so long as that withdrawal is communicated to the male and he thereafter ignores it*.[95]

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85. *In re* John Z., 60 P.3d 183, 184 (Cal. 2003).

86. *See John Z*., 60 P.3d at 184-85; People v. Vela, 218 Cal. Rptr. 161, 162-63 (Cal. Ct. App. 1985), *overruled in part by In re* John Z., 60 P.3d 183, 188 (Cal. 2003).

87. *John Z*., 60 P.3d at 184.

88. *Id.* at 186-87.

89. *See supra* note 69 and accompanying text.

90. *John Z*., 60 P.3d at 186.

91. CAL. PENAL CODE § 261 (Westlaw through Ch. 372 of 2020 Reg. Sess.). "Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . (2) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." *Id.*

92. CAL. PENAL CODE § 263 (Westlaw through Ch. 372 of 2020 Reg. Sess.). "The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime." *Id.*

93. *John Z*., 60 P.3d at 186.

94. *Id*.

95. *Id*. (emphasis added).

In holding that moment of consent revocation is immaterial to the crime of rape, so long as consent withdrawal is communicated to the other party and the other party ignores it, the court illustrated how *Vela*'s argument was flawed: *Vela* appeared to suggest that a victim's objections must be made or the defendant must apply force before the moment of initial penetration.[96] The court here pointed out easily imaginable scenarios where a defendant penetrates a victim before the victim can attempt to resist or express objection and that, in these scenarios, the act would still surely meet the elements of rape[97] if the victim subsequently objected and the defendant ignored the victim and forcibly continued the act.[98]

It is important to note that the result in *John Z.* does not stem from statutory changes; the statutory language did not drastically change from the time of *Vela.* Ultimately, the court was reinterpreting California statutes. The ambiguous way the statutes are written allowed for diametrically opposed results. As the statutes did not state anything about consent revocation or provide guidance around timing, the *John Z.* court was free to hold that the timing of consent revocation was immaterial and to find that post-penetration rape/sexual assault could be prosecuted under statute.

### *E. A New Battle Ground: Maryland's Interpretation of § 3-303 and § 3-304 in State v. Baby*

The *Battle* decision discussed above was revisited by Maryland courts in *State v. Baby*. In *State v. Baby* the Court of Appeals of Maryland answered the following question: "[i]f a woman initially consents to vaginal intercourse, withdraws consent after penetration, and then is forced to continue intercourse against her will, is she a victim of rape?"[99] In other words, the state's highest court was asked whether post-penetration rape/sexual assault was a criminal act under Maryland law. In its court opinion, the Maryland Court of Special Appeals (the intermediate appellate court in Maryland) relied upon the high court's holding in *Battle*[100] as well as its own interpretation of English common law; thus, the court—consistent with the *Battle* court—held that post-penetration rape/sexual assault was not prosecutable under Maryland rape/sexual assault laws.[101] The defendant in *Baby* argued that "if [a woman]…consents prior to penetration and withdraws the consent following penetration, there is no rape,"

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96. *Id*. at 187.

97. CAL. PENAL CODE § 261 (Westlaw through Ch. 372 of 2020 Reg. Sess.). "Rape is an act of *sexual intercourse* accomplished with a person not the spouse of the perpetrator . . . (2) Where it is *accomplished against a person's will by means of force*, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." *Id.* (emphasis added).

98. *John Z.*, 60 P.3d at 187.

99. State v. Baby, 946 A.2d 463, 473 (Md. 2008). This question was posed by the State of Maryland, in response to a lower court opinion, to the Court of Appeals of Maryland in a Petition for a Writ of Certiorari. *Id.*

100. *See supra* text accompanying notes 72, 84.

101. *Baby*, 946 A.2d at 472-73.

– language drawn from *Battle*[102] – was valid law and that the Court of Special Appeals decided the case correctly.[103]

Rather than acknowledge its statement in *Battle* as a prior holding and reverse it, the Court of Appeals here held that its pronouncement in *Battle* had been dicta and would not be afforded precedential weight.[104] To support its conclusion that its old holding was not actually a holding but was instead dicta, the court noted that the issue before it in *Battle* was different; it said *Battle* focused on withdrawal of consent *before* initial penetration, while the question before the court in *Baby* centered on withdrawal of consent *after* initial penetration.[105] The court also emphasized that its decision in *Battle* did not depend on the statement in question and that the language appeared tacked on as illustrating the converse of the court's prior statement. Additionally, the court pointed to its own failure to further analyze the statement in *Battle*—that consent withdrawal after penetration could not lead to rape—as support for its argument.[106] By holding the *Battle* statement to be dicta,[107] the court was able to change its position on whether post-penetration rape/sexual assault was criminalized by statute without acknowledging any fault or remorse for the 28 years that passed between *Battle* and *Baby,* during which *Battle* had arguably discouraged victims of post-penetration rape/sexual assault from seeking relief through the criminal court system.

Having declared the relevant part of *Battle* as dicta, the court focused on certain Maryland statutes to hold that state law does indeed criminalize the act of penetration persisting after withdrawal of consent; that a victim can withdraw consent for intercourse after initial penetration occurred; and that, if intercourse continues without consent by force or threat of by actual force, this may constitute criminal rape.[108] Specifically, the court considered Section 3-301 subd. (g)(2),[109] which states that "'[v]aginal [i]ntercourse' includes penetration, however slight, of the vagina."[110] The court noted that nowhere did the state's statutory definitions of rape or intercourse establish that intercourse ended with penetration; rather, the definition of "vaginal intercourse" merely established a minimum level of contact required to prove the offense.[111] Further, the court concluded that absurd results not contemplated by the legislature would result if it accepted the concept that the act of penetration constituted the end of sexual intercourse.[112] Examining English common law, the court ultimately found no

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102. Battle v. State, 414 A.2d 1266, 1270 (Md. 1980).

103. *Baby*, 946 A.2d at 474.

104. *Id.* at 478.

105. *Id.* at 478-79.

106. *Id.* at 478.

107. *Id.*

108. *Id.* at 484-86.

109. *See id.* at 484-85.

110. MD. CODE ANN., CRIM. LAW § 3-301(g)(2) (Westlaw through 2020 Reg. Sess. of the General Assembly).

111. *See Baby*, 946 A.2d at 484-86.

112. *See id.*

convincing support for the interpretation that initial penetration completes intercourse.[113]

Again, the ambiguity of the state statute allowed Maryland's high court to reach diametrically opposed conclusions while the governing statute remained essentially the same. Both the *Battle* and *Baby* courts considered how the state statute defined intercourse as including even slight penetration of the vagina. However, the *Battle* court took this to conclude that the criminal act occurs upon even the slightest penetration, forgoing the consideration of intercourse as a continual act that would require consent throughout the act. Conversely, the *Baby* court looked at this section and considered it a minimum level of contact for an offense, not an indication of completion of the act.

### *F. Minnesota Nice or Minnesota Justice? Minnesota's § 609.341 and § 609.344 as Applied in State v. Crims*

In contrast to North Carolina's old statutes, as well as California's and Maryland's current statutes, Minnesota's statutes provide more clarity and definition around consent, allowing the Minnesota Court of Appeals to hold that "rape includes forcible continuance of initially-consensual sexual relations."[114] In Minnesota, a person can be guilty of criminal conduct if they engage in "sexual penetration" and use force or coercion to accomplish the act.[115] "Sexual penetration," as defined, requires a lack of consent, does not require seminal emission, and considers intercourse and "intrusion however slight" as separate acts.[116] Consent requires "words or overt actions" that indicate a freely given agreement, at the present time, to perform a specific sexual activity with an individual.[117]

In *State v. Crims*, the defendant argued that the trial court erred by failing to tell the jury that "rape becomes a legal impossibility after a victim has initially consented to penetration."[118] In its holding, the court soundly rejected the defendant's argument.[119]

The court took care to point out that the state legislature's definition of "penetration"[120] defined it as *both* "the initial intrusion into the body of another

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113. *Id.* at 486.

114. State v. Crims, 540 N.W.2d 860, 865 (Minn. Ct. App. 1995).

115. *See* MINN. STAT. § 609.344 subdiv. 1(c) (Westlaw through 2020 Reg. Sess. and 1st through 7th Special Sess.).

116. MINN. STAT. § 609.341 subdiv. 12 (Westlaw through 2020 Reg. Sess. and 1st through 7th Special Sess.). "'Sexual penetration' means any of the following acts committed without the complainant's consent . . ., whether or not emission of semen occurs: (1) sexual intercourse, cunnilingus, fellatio, or anal intercourse; or (2) any intrusion however slight into the genital or anal openings: (i) of the complainant's body by any part of the actor's body or any object used by the actor for this purpose." *Id.*

117. MINN. STAT. § 609.341 subdiv. 4(a) (Westlaw through 2020 Reg. Sess. and 1st through 7th Special Sess.).

118. *Crims*, 540 N.W.2d at 865.

119. *Id.*

120. *Id.*

*and* as the act of sexual intercourse."[121] Comparing to *Vela*, *Battle*, and *Way*, the court here pointed out that Minnesota's laws provided a broader reference point than the moment of initial intrusion, however slight; indeed, the act of sexual intercourse itself also constituted penetration.[122] This difference in the structure of the statute made clear to the court that slight intrusion was enough to constitute rape/sexual assault, but that sexual intercourse as a whole was different than simple insertion. This construction made clear that consent could be withdrawn and still result in a rape conviction, as that would constitute sexual intercourse without consent, even if the initial penetration occurred with consent.

## II. POST-PENETRATION SEXUAL ASSAULT AND WISCONSIN

Wisconsin's sexual assault statutes have both promising and concerning elements when compared to the statutes of states whose courts have excluded or included post-penetration rape/sexual-assault within the scope of their statutes. This section first overviews current Wisconsin rape/sexual assault statutes. Then, it compares Wisconsin statutes to the statutes and cases discussed in Part I to highlight potential future outcomes if and when Wisconsin courts are faced with the question of whether the act of post-penetration rape/sexual assault is in fact criminal under state law.

### *A. Wis. Stat. § 940.225*

Under Wisconsin state law, individuals can be found guilty of sexual assault if they have sexual intercourse with someone without that person's consent.[123] Factors such as use of a weapon, use of violence or threat of violence, or the level of and type of damage caused to the victim can aggravate the assault and result in a higher degree of sexual assault.[124] Consent is defined as "words or overt actions" which indicate freely given agreement to sexual intercourse.[125] The statute makes clear that sexual intercourse does not require emission of semen

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121. *Id.*

122. *Id.* The court further supported its statutory interpretation by looking at other Minnesota statutes, such as the subdivision defining "physically helpless" for purposes of sexual assault statutes. It noted that the subdivision was clarified by the legislature in 1994 to define one type of physically helpless person as someone who cannot withhold or cannot withdraw consent. *Id.* By corollary, this implied that it is possible to withdraw consent and still commit a crime, which is consistent with the court's holding.

123. *See* WIS. STAT. § 940.225 (Westlaw through 2019 Act 186).

124. WIS. STAT. §§ 940.225(1)-(3) (Westlaw through 2019 Act 186).

125. WIS. STAT. § 940.225(4) (Westlaw through 2019 Act 186). The definition of consent is "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact." *Id.* The section also notes that someone who is unconscious or unable to physically communicate unwillingness to an act is presumptively incapable of consent. WIS. STAT. § 940.225(4)(c) (Westlaw through 2019 Act 186).

and includes any intrusion, even if slight, of any object or body part into the genital or anal opening of the victim.[126]

### *B. The Framework for Judicial Interpretation of Post-Penetration Sexual Assault Under Wisconsin Statute § 940.225*

Wisconsin courts have yet to rule on whether sexual intercourse or penetration, subsequent to the initial penetration and following the withdrawal of consent, constitutes sexual assault pursuant to state law.[127] This section analyzes Wisconsin's sexual assault statutes in light of existing decisions about post-penetration rape/sexual assault in other states to highlight foreseeable future outcomes when Wisconsin courts are faced with this issue.

#### i. Elements of Wis. Stat. § 940.225 That Lean Toward Recognizing Post-Penetration Sexual Assault as a Crime

Wisconsin's sexual assault statutes contain some elements that could permit a Wisconsin court to decide that post-penetration sexual assault is prohibited under the state's statutory scheme. First, while Wisconsin statutes make clear that *any intrusion* of a body part, "*however slight,*" constitutes sexual intercourse,[128] the statutes also appear to construe what constitutes sexual intercourse more broadly. One of the factors the *Crims* court used in holding post-penetration rape was prohibited by existing criminal statutes was the statutes' broad construal of sexual intercourse. Sexual intercourse in Wisconsin, as defined, includes acts that do not necessarily require the intrusion of a body part, or at the very least acts that do not include penetration in the manner typical of vaginal intercourse.[129] A Wisconsin court might view this statutory definition of sexual intercourse in a fashion similar to the Minnesota Court of Appeals in *Crims,* holding that state law provides a broader reference point than only the moment of slightest intrusion when determining if a crime has been committed.[130]

Second, Wisconsin statutes focus more on consent than North Carolina's did. Unlike North Carolina, Wisconsin actually provides a definition of consent.[131] The simple inclusion of a definition for consent, along with the requirement that the individual giving consent be competent to do so, seems to indicate that Wisconsin believes consent is important to the question of whether a sexual assault has occurred. Wisconsin also has a separate crime, third degree

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126. WIS. STAT. § 940.225(5)(c) (Westlaw through 2019 Act 186); WIS. STAT. § 939.22(36) (Westlaw through 2019 Act 186). Section 939.22 (36) notes that sexual intercourse requires only vulvar penetration. § 939.22 (36) (Westlaw through 2019 Act 186). Section 940.225(5)(c) also includes cunnilingus, fellatio, or anal intercourse within the definition of sexual intercourse. § 940.225(5)(c) (Westlaw through 2019 Act 186).

127. Shields, *supra* note 16.

128. WIS. STAT. § 940.225 (5)(c) (Westlaw through 2019 Act 186) (emphasis added).

129. *Id.* (Namely cunnilingus and fellatio).

130. State v. Crims, 540 N.W.2d 860, 865 (Minn. Ct. App. 1995).

131. WIS. STAT. § 940.225 (4) (Westlaw through 2019 Act 186).

sexual assault, which penalizes any instance of sexual intercourse without consent, regardless of whether or not force was used.[132] The existence of a separate crime for sexual intercourse without consent, without use of force, is telling, particularly in light of the legislature's decision to provide a consent definition. These factors suggest that the Wisconsin legislature considers consent an important feature, which would help a court hold that post-penetration rape is covered by statute.

If a Wisconsin court faced a case with facts similar to *Way*, the aforementioned features of Wisconsin's statutes might help it decide that post-penetration rape/sexual assault is covered by existing statute. Although nothing in Wisconsin's sexual assault statutes explicitly includes post-penetration rape/sexual assault,[133] the manner in which "sexual intercourse" is defined, the presence of a definition of consent, and the clear separation between the concepts of force or threat of force being used and lack of consent could result in a holding like the *Crims*. A Wisconsin court might take guidance from these elements and focus its review on the concept of consent. Using *Way's* facts as an example, a court focused on consent concepts as laid out in Wisconsin's statutes might not find any error in a trial judge's instruction that "consent initially given [can] be withdrawn and if the intercourse continued through use of force or threat of force and that the act at that point was no longer consensual this would constitute the crime of rape."[134] Nothing in Wisconsin's definition of consent would appear to preclude the ability to withdraw consent after it is initially given.[135] In fact, consent under Wisconsin statutes requires "freely given agreement to have sexual intercourse."[136] In examining the trial judge's jury instruction in light of this definition, a Wisconsin court might conclude that once "freely given agreement" to sexual intercourse no longer exists, consent no longer exists. Such an interpretation would then include post-penetration rape/sexual-assault within Wisconsin's current statutes. However, given the ambiguity in the statutes, such a holding by Wisconsin courts would be far from guaranteed.

### ii. Wis. Stat. § 940.225 Allows the State Judiciary Not to Recognize the Crime of Post-Penetration Sexual Assault

Although a Wisconsin court could hold that post-penetration rape/sexual assault is included in existing statutes, it also could hold the opposite. The court could decide, like the Maryland Court of Appeals in *Battle v. State*, that Wisconsin statutes are an "outgrowth of the definitions of rape at common law,"[137] and thus that there is no rape if consent initially given is withdrawn after

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132. WIS. STAT. § 940.225 (3) (Westlaw through 2019 Act 186).
133. *See* WIS. STAT. § 940.225 (Westlaw through 2019 Act 186).
134. State v. Way, 254 S.E.2d 760, 761 (N.C. 1979).
135. *See* WIS. STAT. § 940.225(4) (Westlaw through 2019 Act 186).
136. *Id.*
137. Battle v. State, 414 A.2d 1266, 1269 (Md. 1980).

penetration occurs.[138] Given the lack of consensus amongst the states,[139] it could be additionally desirable for the court to go with this type of approach, as it would absolve it of the need to judicially interpret Wisconsin statute and it would force the legislature to make statutory changes.

The Wisconsin statutes, as written, also share the same ambiguities that North Carolina's old statutes and California and Maryland's statutes have. Wisconsin statutes are unclear on the revocation of consent and the key moment or moments consent is required. These ambiguities could lead a Wisconsin court to side with the approach taken by the Supreme Court of North Carolina in *Way* or by the California Court of Appeal in *Vela*. One main issue is that Wisconsin statutes clarify that "sexual intercourse" does not require emission of semen and that any intrusion of a body part, however slight, into a person's genital or anal opening constitutes sexual intercourse.[140] On its face, this definition of sexual intercourse appears to permit greater prosecution of sexual assaults, as criminal prosecution could be available for acts besides vaginal intercourse. However, by clarifying that seminal emission is not required and that any intrusion, however slight, is sexual intercourse, Wisconsin statutes leave too much room for the court to place its focus on the 'any intrusion' language and make a decision like *Way* or *Vela*.

Like the *Vela* court, a Wisconsin court could decide that the crucial consent moment is the moment that the act begins.[141] If it did this, it could then conclude that no sexual assault occurred if a victim withdraws consent after an initial, consensual penetration. The court would look to the definition of sexual intercourse and see that the act began at the slightest intrusion of any body part. The court would then find that consent to sexual intercourse had been freely given at the time of the slightest intrusion of a body part. Accordingly, since consent had been given at the time the act began, sexual assault would not be possible without a new instance of sexual intercourse. Given the ambiguities in Wisconsin statutes on the key issues of timing and revocation when it deals with consent, either decision seems equally likely.

## III. LEGISLATION IS THE CORRECT PATH FORWARD FOR WISCONSIN ON POST-PENETRATION SEXUAL ASSAULT

There are two main paths forward for Wisconsin to address the question of whether post-penetration rape/sexual assault is within the scope of the state's sexual assault statutes: judicial and legislative. This Part first discusses each in turn and ultimately suggests that while the legislative path does have potential hurdles, it is superior to the judicial path, because the former promises more potential for predictable progress and is likely quicker. Finally, this Part

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138. *Id.* at 1270.

139. *See supra* notes 16-19 and accompanying text. Fifteen states have, either through courts or through modifications to criminal statutes, included post-penetration rape/sexual-assault as a crime and for the remainder it is basically an issue of first impression. *Id.*

140. WIS. STAT. § 940.225(5)(c) (Westlaw through 2019 Act 186).

141. People v. Vela, 218 Cal. Rptr. 161 (Cal. Ct. App. 1985), *overruled in part by In re* John Z., 60 P.3d 183, 188 (Cal. 2003).

recommends that Wisconsin legislature model a new state statute after Ill. 5-11/1.0(c) or N.C. Gen. Stat. § 14-27.20(1a)(b) to proactively address the gap left by current state law.

*A. The Judicial Path*

The judicial path would leave to the courts the decision of whether post-penetration rape/sexual assault is included in existing state statutes. If a favorable decision were almost guaranteed, the judicial path could be more compelling. However, as Part II of this Comment suggests, there is virtually no guaranteed outcome if the Supreme Court of Wisconsin were asked to determine whether post-penetration rape/sexual assault is within the scope of the state's statutory scheme.[142] Many different options are on the table: Wisconsin courts, if tasked with the question today, could hold desirably and find, like the courts in *Crims*, *John Z*, and *Baby*, that the statutory scheme as written includes cases of post-penetration rape/sexual assault; courts could find a way to punt the issue to the legislature; or, courts could hold undesirably and find that consent cannot be withdrawn subsequent to penetration.[143]

A negative holding in Wisconsin state courts would be very damaging to victims and society. In North Carolina, forty-one years passed without the state court reversing the decision in *Way*,[144] and it took five years of repeated filing of legislation for the North Carolina legislature to pass SB 199 and close the *Way* 'loophole.'[145] In Maryland, language that was later found to be merely *dicta* excluded post-penetration rape/sexual assault from the state's criminal statutes for twenty-eight years.[146]

Besides preventing some measure of justice or preventing a potential outlet and closure for victims, holdings like these also harm society by making it even more difficult for prosecutors to pursue rape/sexual assault charges.[147] For example, in 2017 in North Carolina, one victim began a consensual sexual encounter but revoked consent after the aggressor began tearing out the victim's hair.[148] Detectives asked the victim if a new act of penetration occurred after consent was revoked, noting that this was an important detail, given the *Way* precedent.[149] Ultimately, the aggressor was never arrested or charged.[150] While it is unclear if the *Way* ruling was solely responsible for this, the *Way* ruling made

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142. *See supra* Part II.

143. *See supra* Part II.

144. *Way* was decided in 1979. As of 2020, no decision had overturned *Way*.

145. Carla Herreria Russo, *North Carolina Passes Bill Closing Legal Loopholes on Sexual Assault*, HUFFPOST POLITICS (Oct. 31, 2019, 11:12 PM), https://www.huffpost.com/entry/north-carolina-bill-loophole-sexual-assault_n_5dbb49dfe4b057bf506f01cd [https://perma.cc/Z8M9-DMUT].

146. 28 years is the amount of time between the decision in *Battle*, 1980, and *Baby*, 2008.

147. *See, e.g.*, Redden, *supra* note 1.

148. *Id.*

149. *Id.*

150. *Id.*

prosecuting the victim's case much more difficult, as the State would have had to prove that penetration occurred after consent revocation, not just before.[151] Moreover, a decision that consent once given for intercourse cannot be revoked subsequent to penetration would likely discourage reporting of sexual assaults and would further muddle the meaning and applicability of consent for the layperson in Wisconsin.[152]

Regardless of the ultimate decision that a Wisconsin court might reach, another downside of the judicial path is time. In order to obtain a decisive ruling on the post-penetration rape/sexual assault issue in Wisconsin, a case presenting that question would need to make its way up to the Supreme Court of Wisconsin. This would take a long time simply as a matter of procedure, as the trial level court would need to rule first, then the appellate court, and finally the state supreme court, each with its own case-filled docket. Besides these procedural time considerations, it is unknown how long it might take for an appropriate case to raise the question at hand before the courts. Compared to other crimes, sexual assault reporting is low, charging is low, and convictions are low.[153] Reporting of post-penetration rape/sexual assault would be a subset of those numbers. Low reporting might explain, in part, why this question remains one of first impression in Wisconsin and most other states.[154]

### *B. The Legislative Path*

Considering the above-mentioned flaws to addressing the gap in Wisconsin's laws via a judicial path, a legislative path forward is preferable. Although this path also contains potential hurdles, it is desirable due to its potential for speed, ability to provide clarity in the law, and added flexibility. Compared to the judicial option, the legislature has the capacity to move much quicker. For example, Illinois's legislature passed a post-penetration statute specifically to avoid lengthy litigation in the courts on the issue of post-penetration rape/sexual assault, having seen the prolonged legal battles taking place in other states.[155] Quicker action first and foremost carries the benefit of

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151. *Id.*

152. Consider the mixed signals Wisconsin statutes and case law would send to a layperson: on the one hand, the statutes are clear that sexual intercourse without someone's consent constitutes criminal sexual assault, yet on the other hand case law would tell one that consent is not actually that important, since it cannot be revoked at any time.

153. The Bureau of Justice Statistics estimated that more than 75% of rapes and sexual assaults in 2016 were not reported. RACHEL E. MORGAN & GRACE KENA, BUREAU OF JUST. STAT., CRIMINAL VICTIMIZATION, 2016: REVISED 7 (Table 4) (2018). After analyzing figures from the Justice Department from 2010-2014, The Washington Post estimated that only 5.7% of rapes reported resulted in arrest, with just over 1% referred to a prosecutor and less than one percent convicted of a felony. Andrew Van Dam, *Less than 1% of rapes lead to felony convictions*, THE WASH. POST, Oct. 6, 2018, https://www.washingtonpost.com/business/2018/10/06/less-than-percent-rapes-lead-felony-convictions-least-percent-victims-face-emotional-physical-consequences. In comparison, the conviction rate in U.S. district courts for all crimes in 2016 was over 90%. MARK MOTIVANS, BUREAU OF JUST. STAT., FEDERAL JUSTICE STATISTICS, 2015-2016, 9 (Table 6) (2019).

154. Shields, *supra* note 16.

155. Parker, *supra* note 10, at 1083-84.

making it clear sooner rather than later that post-penetration rape/sexual assault is included within the criminal code, thus clarifying to victims that they do have recourse via the criminal justice system, while also making it clear to law enforcement and prosecutors the importance of consent throughout an entire sexual encounter. Additionally, quicker action would avoid potentially lengthy litigation, which would pose not only fiscal burdens but also temporal burdens on an already-burdened system.

The legislative option also allows for more flexibility and clarity in the statutory scheme. Judicially addressing the gap in Wisconsin law would depend on the facts of the specific case, the issues raised on appeal, and the procedural posture of the case; the legislature simply needs to agree on the changes to be made. Through debate, the state legislature could decide how best to make clear that sexual intercourse continued after consent is revoked could be criminally chargeable, or, for example, if it would be better to create entirely new crimes specific to post-penetration revocation of consent, potentially even with different penalties. This flexibility in drafting criminal statutes or amending existing ones allows the legislature to develop law that will work best for Wisconsin.

Regardless of the chosen structure of new or amended language, the legislature option allows for straightforward language that makes clear that continued sexual intercourse after post-penetration withdrawal of consent is included within criminal statutes. The language does not need to be hidden behind case facts, procedural arguments, or other potentially confusing elements often a part of appellate opinions. The legislative option would not allow for confusion over whether something was a valid holding or was dicta instead. Additionally, the potential publicity that and reporting that could come with such a bill would help the message reach the Wisconsin public.

### *C. Proposing Illinois or North Carolina State Law as a Model for a Post-penetration Rape/Sexual Assault Criminal Statute in Wisconsin*

For the foregoing reasons, a legislative path forward is the preferred option. I offer Illinois's post-penetration statute, the first one of its kind, as a potential model for Wisconsin changes: "A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct."[156] This language could be used with very minimal revisions, namely changing "sexual penetration" to "sexual intercourse" and "sexual conduct" to "sexual contact" to match with the language used overall by the state statutory scheme.[157] With these revisions made, the modified Illinois statute interacts easily with each of the four degrees of sexual assault in Wisconsin. First-, second-, and third-degree sexual assault statutes penalize sexual intercourse or sexual contact without consent while fourth-degree penalizes sexual contact. If the legislature passed the modified Illinois statute, it would become clear for each of the four classes that

156. 720 ILL. COMP. STAT. 5/11-1.70(c) (Westlaw through P.A. 101-651).

157. *See* WIS. STAT. § 940.225 (Westlaw through 2019 Act 186).

initial consent given does not preclude the possibility that a sexual assault could occur, as initial consent would not mean the entire encounter was consensual.

The legislature could also imitate North Carolina's 2019 statutory changes. To close the *Way* loophole, North Carolina changed how it defined one of the required elements of rape, that it be "against the will of the other person."[158] That phrase is now defined as being either "(a) Without consent of the other person," or "(b) After consent is revoked by the other person, in a manner that would cause a reasonable person to believe consent is revoked."[159] Adding language like (b) to Wisconsin's consent definitions would also be a step in the right direction.

Wisconsin's legislature should focus on passing a bill that clarifies that post-penetration rape/sexual assault is included within state criminal statutes – be it a modified version of Illinois's statute or North Carolina's or something different – and should do so quickly. The Illinois and North Carolina statutes are by no means perfect; both lack a clear standard for determining whether or not consent has been withdrawn subsequent to penetration, which can result in very case-specific, fact-dependent results.[160] While North Carolina attempts to provide some standard – a "reasonable person" standard – it does not provide any more detailed guidance or factors a court or jury should consider in making a determination of whether consent was successfully revoked. A clear standard and important consideration factors would be helpful if added by the legislature; the legislature could make clearer the means in which a revocation should be communicated, whether the reasonableness of the revocation is based on an objective or subjective evaluation of the facts, or the level of evidence required to prove consent revocation or continuation of intercourse after revocation. That said, this approach would also require more consideration or modification of other sections of the statute, such as the definition of consent. Regardless, the legislature should act to foreclose the possibility that what once was the *Way* loophole becomes known as the Wisconsin loophole.

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158. N.C. GEN. STAT. § 14-27.22(a)(1) (Westlaw through S.L. 2020-97 of the 2020 Reg. Sess. of the General Assembly).

159. N.C. GEN. STAT. § 14-27.20(1a) (Westlaw through S.L. 2020-97 of the 2020 Reg. Sess. of the General Assembly).

160. Parker, *supra* note 10, at 1079-80.