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INSTITUTIONALIZING CONSENT MYTHS IN GRADE SCHOOL

SHAWN E. FIELDS*

Scholars and advocates have long decried antiquated notions of consent in the criminal law of rape and sexual assault. Significant progress has been made to redefine consent in criminal codes and in our collective consciousness as freely given, informed, enthusiastic, explicit, revocable, and to be considered from the perspective of the consenting party. But despite this progress, the criminal justice apparatus continues to fixate on details irrelevant to the consent calculus, such as the victim's dress, when making evaluations about consent. This obsession with the victim's clothing reflects a troubling willingness to imply consent or, alternatively, blame the victim for provocatively "asking for it." Significant scholarship has demonstrated the corrosive impact of this fixation, resulting in a "credibility discount" of women making sexual violence allegations, the acquittal of defendants engaged in clearly criminal sexual conduct, and a concomitant reluctance of female victims of sexual violence to even engage with the criminal justice system.

None of the foregoing is new or particularly controversial. But while this unfortunate reality has been well examined, this Article reflects upon a lesser-explored, early root cause of the status quo: the hard wiring of consent myths in grade school through gendered dress codes and the gendered messaging these dress codes institutionalize about consent. Increasingly pervasive, increasingly sex-obsessed dress codes feed narratives at an early age that girls are sexual objects who are responsible for the assaultive behavior of perpetrators and who "ask for" any unwanted sexual attention their dress may attract.

This Article highlights the dangerous, highly sexualized justification often given by school administrators for gendered dress codes: a desire to create a "distraction-free learning environment" for boys. This messaging sexualizes underage girls, forces them to become hyper-cognizant about their physical identity, and signals a male entitlement to act inappropriately

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towards the female body for which the female will be punished. At root, these dress codes, and the justifications behind them, normalize and excuse sexually predatory behavior as a natural “distracted” reaction while blaming the victim for provoking the unwanted behavior. This institutionalization—which continues to grow—naturally feeds corrosive narratives that persist in criminal sexual assault adjudications, including implied consent, the requirement of a “perfect victim,” and the myth of the “unstoppable male.”

I. Introduction

In 2015, a dress code policy at Woodford County High School in Versailles, Kentucky received national media attention when a student who appeared to be dressed appropriately was nevertheless sent home because her collarbone was exposed.¹ A photo of the student wearing the outfit in question soon went viral on the internet and led to confusion about the nature of her offense (see Figure 1).² According to the school, her clothing amounted to a technical violation of its facially gender neutral dress code, which prohibited skirts and shorts that fall above the knee and shirts that extend below the collarbone.³

The rationale behind the dress code and the enforcement of this technical violation—“that certain articles of girls’ attire should be prohibited because they ‘distract’ boys”—led students at the school to take action.⁴ After finding that “[g]irls were disciplined disproportionately” and were unilaterally singled out for causing a distraction to the opposite sex, several students led an online campaign to protest what they viewed as sexist dress

1. See Ashley Lewis, *Kentucky High School Students, Parents Fight Strict Dress Code That Requires Girls to Cover Collarbone*, N.Y. DAILY NEWS (Aug. 17, 2015, 3:36 PM), <https://www.nydailynews.com/news/national/female-student-reprimanded-showing-collarbone-article-1.2328582>.

2. *Id.* (“The angry parent posted a picture of the offending outfit – a creme tank top with a white cardigan – which was shared nearly 40,000 times.”).

3. Esther Crain, *Teen’s Exposed Collarbone Sets Off Dress Code Controversy*, YAHOO! NEWS (Aug. 18, 2015), <https://news.yahoo.com/teens-exposed-collarbone-sets-off-dress-code-127004652707.html>.

4. Li Zhou, *The Sexism of School Dress Codes*, ATLANTIC (Oct. 20, 2015), <https://www.theatlantic.com/education/archive/2015/10/school-dress-codes-are-problematic/410962/>.



Figure 1

codes.⁵ “Many of these protests have criticized the dress codes as sexist in that they unfairly target girls by body-shaming and blaming them for promoting sexual harassment.”⁶

This episode illustrates the many ways so-called “modesty-based” dress codes⁷ institutionalize myths about sex and consent. Dress codes disproportionately target and affect girls for their inherently dangerous and

5. *Id.*; see also Rachael Krishna, *Young Women Are Protesting Against Dress Codes With #IAmMoreThanaDistraction*, BUZZFEED NEWS (Sept. 4, 2015, 12:01 PM ET), <https://www.buzzfeednews.com/article/krishrach/young-women-are-protesting-against-dress-codes-with-iammoret>.

6. Zhou, *supra* note 4.

7. Deborah M. Ahrens & Andrew M. Siegel, *Of Dress and Redress: Student Dress Restrictions in Constitutional Law and Culture*, 54 HARV. C.R.-C.L. L. REV. 49, 76 (2019) (summarizing the harms of “imposing modesty-based dress restrictions on female students”).

distracting bodies.⁸ They sexualize minor female bodies, place the onus on girls to take steps to prevent being objectified, and then place blame on girls for the sexually predatory actions of others.⁹ In addition, the dress codes excuse boys for improper conduct because they simply cannot resist certain temptations.¹⁰ Finally, the dress codes reinforce the notion that girls who dress a certain way impliedly consent to otherwise unwanted behavior and are less deserving of society's protection.

The problem is pervasive and growing. Written, mandatory dress codes exist in approximately sixty percent of the public schools in the United States, up from just under forty percent in 1990.¹¹ Many of these dress codes explicitly set different standards for boys and girls, often requiring only girls to prevent showing collarbones or shoulders, underwear, or cleavage or bra straps.¹² Many other facially neutral dress codes disproportionately affect girls, including prohibiting spaghetti strap tank

8. Meredith Johnson Harbach, *Sexualization, Sex Discrimination, and Public School Dress Codes*, 50 U. RICH. L. REV. 1039, 1043 (2016) (“[M]any dress codes are explicitly gender-specific . . . or are at least selectively enforced such that they impact female students disproportionately.”); see also Jolie Lee, *Dress Code Crackdown: N.Y. School Hands Out 200 Detentions*, USA TODAY (Sept. 15, 2014, 10:25 AM ET), <https://www.usatoday.com/story/news/nation-now/2014/09/15/dress-code-tottenville-high-school-new-york/15657299/> (recalling the imposition of a new dress code at Tottenville High School in Staten Island where “90% of the [dress code-related] detentions went to female students”).

9. See Harbach, *supra* note 8, at 1058 (placing gendered dress codes in “a broader cultural setting that too frequently sexualizes females and blames them for unwanted sexual attention”); Zhou, *supra* note 4 (“[O]ne of the key concerns is the implication that women should be hypercognizant about their physical identity and how the world responds to it.”); see also *id.* (quoting a female high school student who claimed, “My principal constantly says that the main reason for [it] is to create a ‘distraction-free learning zone’ for our male counterparts.”).

10. See Harbach, *supra* note 8, at 1044.

11. See Ahrens & Siegel, *supra* note 7, at 61 n.58; Zhou, *supra* note 4; see also *Fast Facts: School Uniforms*, NAT’L CTR. FOR EDUC. STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=50> (last visited May 28, 2020) (“From 1999-2000 to 2015-16, the percentage of public schools reporting that they required students to wear uniforms increased from 12 to 21 percent.”).

12. Judith Valente, *Kingsley Junior High Dress Code Targeting ‘Bra Straps, Cleavage’ Unleashes Backlash*, WGLT.ORG (Apr. 28, 2017), <https://www.wglt.org/post/kingsley-junior-high-dress-code-targeting-bra-straps-cleavage-unleashes-backlash#stream/0> (quoting message to parents from principal regarding dress code) (“Shorts should cover students’ entire bottoms, there should be no bare shoulders, no visible bra straps and no midriff showing. Shirts that show excessive cleavage are also not appropriate for school.”).

tops, shorts above the knee, or the showing of midriffs.¹³ Constitutional challenges to these dress codes have largely been unsuccessful, as courts have found legitimate justifications based on fostering a productive learning environment.¹⁴ But recent compelling evidence showing that dress-code-violating girls are disproportionately punished compared to their dress-code-violating male counterparts may offer a future avenue for these claims, particularly given the significant disruption to the educational experience brought by forcing a violator to remedy a dress code infringement.¹⁵

Beyond litigation, this Article draws on the obvious and troubling parallels between school dress code enforcement and criminal sexual assault adjudication to explore how seemingly innocuous modesty-based dress codes perpetuate a male-centric system of implied consent and general entitlement to sexual conduct. By confronting the shocking ways children internalize myths about male sexual entitlement, morally inferior victims, and excusable predatory urges, this Article contends that needed change can, and should, take place more urgently both in the schoolhouse and the courthouse.

II. A Brief History of School Dress Codes

Formal school dress codes, including the adoption of school uniform policies, are a surprisingly recent phenomenon in American public

13. See Steve Nelson, *Dress Codes in Schools: Spaghetti Straps, Midriffs; Adults' Need for Control*, HUFFPOST (May 31, 2016, 12:55 PM ET), https://www.huffpost.com/entry/dress-codes-in-schools-sp_b_10223596.

14. See, e.g., *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 392, 393 (6th Cir. 2005) (rejecting First Amendment challenges to modesty-based dress codes in part because teachers claimed the dress code “led to fewer ‘disruptions and distractions from students wearing revealing, distracting, and inappropriate clothing’”); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir. 2001) (“While Parents may have a fundamental right in the upbringing and education of their children, this right does not cover the Parents’ objection to a public school Uniform Policy.”); see also *Goss v. Lopez*, 419 U.S. 565, 578 (1975) (finding that issues of public education are generally “committed to the control of state and local authorities”).

15. For a discussion of the disproportionate impact of school dress code enforcement on girls, see *infra* Part II. See also *Jeldness v. Pearce*, 30 F.3d 1220, 1229–30 (9th Cir. 1994) (explaining that under Title IX, “once plaintiffs have shown that a facially neutral practice has a disparate impact, defendant[s] may still prevail by proving a business or educational necessity for the practice”) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)).

schools.¹⁶ This Part provides context for the evolution of dress code policies, from an informal system of heteronormative assimilation to increasingly formal authoritative attempts to address political protests, “countercultural” expressions, gang and other violence, and the purported rise of child sexualization.

The United States has a largely unwritten history of public school dress norms and restrictions. “As best as scholars have been able to determine, dress norms and expectations were ubiquitous in American education up until the late 1960s, but formal dress codes were surprisingly rare and public school uniforms were almost—perhaps entirely—unheard of.”¹⁷ “Despite the persistent use of dress and appearance norms to stifle the cultural expression of minority groups and to foster assimilation throughout American society,” little record exists of formal policies mandating such uniformity in public schools prior to the period of cultural upheaval defining the 1960s and 1970s.¹⁸

A. Pre-Tinker: Counterculture, Vietnam, and Free Expression

Child psychologists have long observed that the adolescent period marks an important moment for children to find individuality in their expressive selves, separate from the adults around them.¹⁹ The “Baby Boom” generation reached adolescence at roughly the same time the United States began fracturing along cultural and political lines, highlighted most prominently by the civil rights movement and the war in Vietnam.²⁰ Not surprisingly, students in this period “adopted new clothing styles and

16. See Ahrens & Siegel, *supra* note 7, at 61.

17. *Id.* at 55 (“Styles and expectations for dress were typically set by students’ peers and the larger community, turned on material availability, reinforced gender and class norms, and reflected broader cultural values.”).

18. See *id.* at 55–56; see also Deanna J. Glickman, *Fashioning Children: Gender Restrictive Dress Codes as an Entry Point for the Trans* School to Prison Pipeline*, 24 AM. U.J. GENDER SOC. POL’Y & L. 263, 284 (2015); Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 965 (2019) (discussing adverse impacts of rise in gendered dress codes on trans and gender-queer students).

19. See Maria Piacentini & Greig Miler, *Symbolic Consumption in Teenagers’ Clothing Choices*, 3 J. CONSUMER BEHAV. 251, 261 (2004); MORRIS ROSENBERG, *SOCIETY AND THE ADOLESCENT SELF-IMAGE* 3–4 (1965).

20. TODD GITLIN, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* 18 (1987); see James Wright, *The Baby Boomer War*, NY TIMES (Apr. 11, 2017), <https://www.nytimes.com/2017/04/11/opinion/the-baby-boomer-war.html?auth=login-email&login=email>.

grooming habits—chosen in part to intentionally differentiate themselves from older generations and established cultural norms.”²¹

In response, “representatives of those generations and norms pushed back, adopting increasingly formal and specific guidelines for student dress, hair length, and facial hair.”²² These guidelines arose not from a concern about school safety or a desire to protect the sanctity of the learning environment, but from a fracturing of established norms and a stated desire to maintain assimilative notions of white, male, heteronormative, and inherently conservative uniformity.²³

This overt attempt to mandate such cultural uniformity, however, was short-lived. During a decade of litigation contesting these dress codes on First Amendment expression and substantive due process grounds, students won a string of victories in state and federal court recognizing the constitutional right of students to express themselves through their presentation and to retain a zone of autonomy in the dress and presentation choices they made.²⁴ Reflecting the general attitude of courts at the time—an attitude that seems positively foreign in today’s educational climate—one California court expressed not only “great skepticism as to whether uniform policies were legal [but] great confusion as to why a district would feel the need or authority to adopt one.”²⁵

The most famous and enduring decision from this period, *Tinker v. Des Moines Independent Community School District*,²⁶ laid down the parameters still in use today for determining the constitutionality of a school dress code provision. The United States Supreme Court considered First Amendment challenges to a school’s suspension of students for wearing black armbands

21. Ahrens & Siegel, *supra* note 7, at 56.

22. *Id.*; see also *Karr v. Schmidt*, 460 F.2d 609, 610 (5th Cir. 1972) (en banc) (“This is another of the multitude of lawsuits which have recently inundated the federal courts attacking hair length regulations promulgated by local public school authorities.”).

23. *Cf.* Ahrens & Siegel, *supra* note 7, at 55 (explaining that dress codes were persistently used to encourage adherence to cultural norms).

24. See, e.g., *Massie v. Henry*, 455 F.2d 779, 783 (4th Cir. 1972) (finding that the hair length regulation lacked justification for infringing on the student’s rights); *Richards v. Thurston*, 424 F.2d 1281, 1286 (1st Cir. 1970) (concluding that the suspension of a student for wearing his hair too long violated his constitutional personal liberties). *But see Jackson v. Dorrier*, 424 F.2d 213, 218 (6th Cir. 1970) (upholding hair length regulation).

25. Ahrens & Siegel, *supra* note 7, at 57; see *Noonan v. Green*, 80 Cal. Rptr. 513, 515 (Cal. Ct. App. 1969).

26. 393 U.S. 503 (1969).

in protest of the Vietnam War.²⁷ The Court famously explained that “[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” finding that schools can only restrict such conduct if it would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”²⁸ Applying this standard, the Court invalidated the school suspensions as they were motivated by “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”²⁹

Courts following *Tinker* interpreted the Court’s language as requiring some hard evidence, rather than mere conjecture, that a restriction on expression was necessary to allow a school “to carry out [its] educational mission.”³⁰ Few opportunities existed to test this new stringent approach, however, as formal school dress codes began to disappear from public school handbooks shortly after the 1969 *Tinker* decision.³¹

B. Post-Tinker: The Rise of Formal Dress Code Policies

After nearly a generation of relative silence, school dress codes became a topic of concern once again in the 1990s. Only this time, dress codes were heralded as a potential solution to the purported scourge of gang violence infecting public schools.³² This cultural and political shift reflected the

27. *Id.* at 504–05.

28. *Id.* at 506, 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

29. *Tinker*, 393 U.S. at 509.

30. *See, e.g.*, *Bishop v. Colaw*, 450 F.2d 1069, 1075 (8th Cir. 1971) (determining that under the circumstances it was not “necessary to infringe on the students’ right to carry out the educational mission of the school”); *Wallace v. Ford*, 346 F. Supp. 156, 162 (E.D. Ark. 1972) (explaining that students possess broad freedoms “subject [only] to the right of the school authorities to establish [necessary] regulations”).

31. *See generally* Larry D. Bartlett, *Hair and Dress Codes Revisited*, 33 EDUC. L. REP. 7, 7–8 (1986); *see also* Ahrens & Siegel, *supra* note 7, at 59 (“The Supreme Court failed to decide a case involving more general student dress or appearance restrictions before those cases dried up due to the disappearance of such restrictions.”).

32. Alison Mitchell, *Clinton Will Advise Schools on Uniforms*, N.Y. TIMES (Feb. 25, 1996), <https://www.nytimes.com/1996/02/25/us/clinton-will-advise-schools-on-uniforms.html> (“‘If it means that teen-agers will stop killing each other over designer jackets,’ the President said in his weekly radio address, ‘then our public schools should be able to require their students to require school uniforms. . . . If it means that the schoolrooms will be more orderly, more disciplined, . . . and that our young people will learn to evaluate themselves by what they are on the inside instead of what they’re wearing on the outside, then our public schools should be able to require their students to wear school uniforms.’”).

nation's larger cultural commitment to solving societal problems through increased emphasis on "law and order," zero tolerance policies, and punishment.³³ The post-civil rights "law and order" era "spawned an entire culture oriented around the values . . . of policing," and "law enforcement became the paradigm through which American society identified problems and conceptualized solutions."³⁴ Unsurprisingly, as this cultural shift produced a racially-tinged mass incarceration epidemic among adults, increasingly draconian and racially-tinged dress codes led to rapid increases in enforcement against children in public schools.³⁵

President Clinton twice advocated for school dress codes and uniform policies in successive State of the Union addresses, and officials in the Clinton Administration adopted policies encouraging the use of uniform policies and strict dress codes.³⁶ A 1996 "Manual on School Uniforms"

33. See Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 *STUD. AM. POL. DEV.* 230, 230 (2007); see also Ann Scott Tyson, *Schools Fight Gang Colors by Pushing Uniform Gray*, *CHRISTIAN SCI. MONITOR* (Apr. 12, 1996), <https://www.csmonitor.com/1996/0412/12031.html> (describing use of armed police officers by one high school on the south side of Chicago to enforce dress designed to prevent students from wearing gang colors, even if the codes have a disproportionate impact on African American youth wearing designer basketball sneakers).

34. Ahrens & Siegel, *supra* note 7, at 69; see also JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 3–5 (2009) ("Americans have built a new civil and political order structured around the problem of violent crime.").

35. Weaver, *supra* note 33, at 230; see also Mark Peffley & Jon Hurwitz, *The Racial Components of "Race-Neutral" Crime Policy Attitudes*, 23 *POL. PSYCHOL.* 59, 67 (2002); Julia Azari, *From Wallace to Trump, the Evolution of "Law and Order,"* *FIVETHIRTYEIGHT* (Mar. 13, 2016, 5:41 PM), <https://fivethirtyeight.com/features/from-wallace-to-trump-the-evolution-of-law-and-order/> ("In the 1980s and 1990s, the politics of crime turned distinctly punitive and remained racially coded."); Nadra Nittle, *How Kids' Obsession with Air Jordans Helped Lead to School Uniforms and Stricter Dress Codes*, *VOX* (Oct. 10, 2018, 4:50 PM EDT), <https://www.vox.com/the-goods/2018/10/10/17961124/air-jordans-sneaker-violence-black-youth-school-dress-codes-school-uniforms> (connecting declines in school dress codes in the early 1980s with a rise in conservative "preppy" dress that administrators found more appealing, and the concomitant rise in dress codes in the late 1980s with the increased popularity of basketball sneakers) ("The press largely painted sneakerheads as violent and materialistic[.]").

36. President William Jefferson Clinton, *State of the Union Address* (Jan. 23, 1996), <https://clintonwhitehouse2.archives.gov/WH/New/other/sotu.html> ("[O]ur public schools should be able to require their students to wear school uniforms."); [Bill Clinton], *1997 State of the Union Address*, *WASH. POST* (Feb. 4, 1997), <http://www.washingtonpost.com/wp-srv/politics/special/states/docs/sou97.htm> ("And we must continue to promote order and discipline; supporting communities that introduce school uniforms, impose curfews, enforce

published by the Department of Justice Office of Elementary and Secondary School Education³⁷ explained in its second sentence that communities were adopting school uniform policies specifically “[i]n response to growing levels of violence in [American] schools.”³⁸ Remarking that a “safe and disciplined learning environment is the first requirement of a good school”³⁹ (as opposed to a nurturing, stimulating, or intellectually challenging environment), the manual noted that strict dress codes offer the following benefits:

- *decreasing violence and theft . . . among students over designer clothing and expensive sneakers;*
- *helping prevent gang members from wearing gang colors and insignia at school;*
- *instilling students with discipline;*
- *helping parents and students resist peer pressure;*
- *helping students concentrate on their school work; and*
- *helping school officials recognize intruders who come to the school.*⁴⁰

Other Clinton administration guidelines regarding school dress codes reminded districts to respect religious and political expression and to avoid using unconstitutionally vague and overbroad language, but otherwise proceeded on the assumption that any dress code policy rationally connected to safety, discipline, or “helping students concentrate on their [school] work” would survive judicial scrutiny.⁴¹ That assumption appears to have proven correct in hindsight, as virtually all challenges to school dress code policies since that time—at least ones premised on broad,

truancy laws, remove disruptive students from the classroom, and have zero tolerance for guns and drugs in schools.”).

37. OFFICE OF ELEMENTARY & SECONDARY EDUC., U.S. DEP’T OF JUSTICE, MANUAL ON SCHOOL UNIFORMS (1996), <https://files.eric.ed.gov/fulltext/ED387947.pdf>. The fact that this manual on educational dress was published by the Department of Justice and not the Department of Education further illustrates the punitive purposes behind dress code and uniform policies of the time.

38. *Id.* at 3.

39. *Id.*

40. *Id.*

41. *Id.*; see also Ahrens & Siegel, *supra* note 7, at 62.

constitutional rights to free expression and substantive autonomy—have failed.⁴²

The combination of presidential promotion and judicial permissiveness of school dress codes helped usher in the current era of pervasive dress code policies. “In the two decades since the Clinton administration encouraged American public schools to experiment with school uniforms and strict dress codes, such restrictions have become a common—though not quite omnipresent—feature of American public education.”⁴³ Today, as many as sixty percent of all public school students attend schools with strict dress code policies, and another twenty-five percent wear school uniforms.⁴⁴ Restrictions on, severity of, and legislative authorization to enforce dress codes vary widely across the country. At least twenty-two states expressly grant local school districts the power to establish dress codes, while school districts in other states do so with the tacit consent of the state.⁴⁵ Some states, like Arkansas, have state-wide public school dress codes, portions of which specifically target only students with female anatomy.⁴⁶

These dress restrictive policies have faced several narrow legal challenges, but the few broad constitutional challenges “have run into a wall of judicial skepticism and have been rejected nearly uniformly, often without thorough consideration.”⁴⁷ While many lower courts have rejected the Supreme Court’s early formulations that dress itself has protected expressive value, even courts willing to entertain free expression claims rarely require schools to provide support for their proffered justifications that dress policies are necessary.⁴⁸ Particularly problematic, in the hyper-

42. See *infra* Part III.

43. Ahrens & Siegel, *supra* note 7, at 61.

44. *Id.*; see also *infra* note 46.

45. See Zhou, *supra* note 4; see also Jocelyn Gecker, *California City Is Latest to Redo “Sexist” School Dress Code*, CBS DENVER (Sept. 19, 2018, 9:56 AM), <https://denver.cbslocal.com/2018/09/19/sexist-dress-code-half-shirts-school/> (“Dress codes and their severity vary widely nationwide. Twenty-four states have policies that give local school districts the power to adopt their own dress codes or uniform policies, according to the Education Commission of the States, a nonprofit that tracks education policy.”).

46. Gecker, *supra* note 45 (explaining that Arkansas’ statewide policy requires districts “to prohibit the wearing of clothing that exposes underwear, buttocks, or the breast of a female”).

47. Ahrens & Siegel, *supra* note 7, at 62.

48. *Id.* at 63; see also *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388 (6th Cir. 2005) (rejecting claim that clothing itself has any expressive content for First Amendment

sexualized gendered dress code context, courts rarely treat a district's "lack of distraction" justification as anything other than self-evidently weighty,⁴⁹ or deserving of substantial deference as a matter of order, discipline, and pedagogy.⁵⁰

While the explicit enforcement of dress codes spans only a few decades, its recent addition to the school regulatory machinery springs from well-entrenched and antiquated notions of feminine acquiescence to white, male, heteronormative, and inherently conservative uniformity. Originally justified as tools to create safe learning environments free from violence and distractions, these policies have more sinisterly manifested a fascination on gender in minor students.

III. The Growing Obsession with Sex: Gendered (and "Gender Neutral") Dress Codes

"While research on dress codes remains inconclusive regarding the correlation between their implementation with students' academic outcomes, many educators agree that they can serve an important purpose: helping insure a safe and comfortable learning environment"⁵¹ Banning clearly disruptive attire like T-shirts with racial epithets or explicit language, or physically disruptive clothing like hats with built-in strobe lighting, promotes a productive learning environment by avoiding material and substantial disruptions.⁵²

But what is offensive and inappropriate? That answer can be difficult even with arguably racist symbols such as Confederate flags or "MAGA"

purposes unless the clothing "conveys a particular[] message" (quoting *Spence v. Washington*, 418 U.S. 405, 411 (1974)); *Inturri v. City of Hartford*, 365 F. Supp. 2d 240, 245 (D. Conn. 2005) (observing plaintiffs' concession that "their spider web tattoos are not conveying any speech or message, but merely are related to personal appearance").

49. See, e.g., *Blau*, 401 F.3d at 397–98 (listing arguments in support of student dress restrictions and treating them as largely self-evident); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 286 (5th Cir. 2001) ("Improving the educational process is undoubtedly an important and substantial interest of Forney and the school board.").

50. See, e.g., *Littlefield*, 268 F.3d at 287 ("As has been well recognized, federal courts should defer to school boards to decide, within constitutional bounds, what constitutes appropriate behavior and dress in public schools.").

51. Zhou, *supra* note 4; see also EDUC. P'SHIPS, INC., RESEARCH BRIEF: STUDENT DRESS CODES AND UNIFORMS (2009), <https://files.eric.ed.gov/fulltext/ED537953.pdf>.

52. Zhou, *supra* note 4.

hats.⁵³ Moreover, the answer becomes much more subjective when one considers the “offensiveness” not of language but of one’s own body. Nevertheless, in recent years, supporters of strict public school dress restrictions have focused heavily on the “disruption” caused by the adolescent female body.⁵⁴ Some argue that this increased focus derives from “complicated trends in sexuality and gender relations that have sexualized young women and girls of an ever-decreasing age.”⁵⁵ But dress codes labeling girls’ bodies as “disruptive” because of their inherently sexual nature does the opposite of preventing sexualization, particularly when the codes punish those same young people for the power and dangers supposedly implicit in that imputed sexuality.⁵⁶

Numerous scholars have convincingly explained how media, advertising, and other influences have pressed upon both young women and men of all ages an inherently sexualized account of female adolescence.⁵⁷ Some, like mass advertising critic Jean Kilbourne, have used this reality to justify strict “modesty-based” dress code bans.⁵⁸ Kilbourne, author of the book *So Sexy So Soon: The New Sexualized Childhood*, has expressed the view that school dress codes help “take away some of the pressures that girls feel to don sexy outfits.”⁵⁹

53. Dave Urbanski, *Law Professor Blasts Student’s MAGA Hat as “Undeniable Symbol of White Supremacy,”* BLAZE (July 10, 2019), <https://www.theblaze.com/news/law-professor-blasts-students-maga-hat-as-undeniable-symbol-of-white-supremacy> (quoting professor Jeffrey Omari, who claimed that a student’s “shiny red MAGA hat was like a siren spewing derogatory racial obscenities at me for the duration of the one hour and fifteen-minute class”).

54. Hayley Krischer, *Is Your Body Appropriate to Wear to School?*, NY TIMES (Apr. 17, 2018), <https://www.nytimes.com/2018/04/17/style/student-bra-nipples-school.html> (recounting story of female high school student who declined to wear a bra to school because of a painful sunburn she suffered and who was forced by the administration to place Band-Aids on her nipples to remove any distraction her body might cause to other students).

55. Ahrens & Siegel, *supra* note 7, at 76; *see also* Harbach, *supra* note 8, at 1044 (suggesting that educators believe that simply obscuring the female body will diffuse sexual tension).

56. Zhou, *supra* note 4 (“[O]ne of the key concerns is the implication that women should be hypercognizant about their physical identity and how the world responds to it.”); Harbach, *supra* note 8, at 1044.

57. *See* Harbach, *supra* note 8, at 1042.

58. *See generally* DIANE E. LEVIN & JEAN KILBOURNE, *SO SEXY SO SOON: THE NEW SEXUALIZED CHILDHOOD AND WHAT PARENTS CAN DO TO PROTECT THEIR KIDS* (2008).

59. Ellen Friedrichs, *4 Lies About School Dress Codes That Cover Up Their Oppressive Effects*, EVERYDAY FEMINISM (Dec. 11, 2014), <https://everydayfeminism.com/2014/12/school-dress-code-myths/> (“As [Kilbourne] said in an interview on the matter, ‘Girls

But imposing modesty-based dress restrictions on female students often is counterproductive. In fact, in many ways, such dress codes are actively harmful in institutionalizing myths about a girl's inherent sexuality, the dangerousness of her body, and her responsibility to protect others from their own lurid sexual stares and advances. This harmful messaging reinforces the consent myth that provocative dress implies consent to be objectified, or worse.

A. *Obsessing Over Sex*

What Ms. Kilbourne and others promoting this pseudo-protective justification for dress codes often miss is that the enforcement of the dress code itself unnecessarily and harmfully injects sexualization into an otherwise innocent school day. In 2015, an elementary school in Houston sent home a five-year-old kindergarten student for wearing her favorite rainbow dress “because spaghetti straps are against the rules.”⁶⁰ This admittedly extreme example nevertheless highlights several problems with sex-obsessed dress codes. First, the facially gender neutral dress code at issue contained several provisions targeting clothing only sold for and worn by those who identify as female: Shirts could not expose the chest, midsection, or torso;⁶¹ skirts and sun dresses needed to be kept at mid-thigh length or longer;⁶² and cleavage and bra straps could not be shown.⁶³

Second, it defies common sense to suggest that a five-year-old girl's sundress exposing her shoulders could possibly cause a “material and substantial disruption” to her classmates, most of whom are at least a decade away from becoming sexually mature and active. Instead, the enforcement of this implicitly gendered dress code required an adult administrator charged with protecting elementary school students to sexualize a five-year-old girl and remove her from her educational experience as a result.

these days are really pressured to dress in a very provocative way. All of their role models – celebrities and pop stars – dress that way. For them, sexy and attractive is defined in a very cliched and stereotypical way.”).

60. Jef Rouner, *The Apparently Immoral Shoulders of My Five-Year-Old Daughter*, HOUS. PRESS (Apr. 22, 2015, 6:00 AM), <https://www.houstonpress.com/arts/the-apparently-immoral-shoulders-of-my-five-year-old-daughter-7372634>.

61. CYPRESS-FAIRBANKS I.S.D., STUDENT HANDBOOK: 2019-2020, at 44 (2019), http://www.cfsd.net/download_file/517811526.

62. *Id.*

63. *Id.*

Third, enforcing this dress code violation forced the parents of a five-year-old girl to decide whether to have an honest yet premature conversation about sex and objectification of women's bodies or mislead their daughter when she asks why she had to leave school. This unnecessary injection of sex was only made possible because dress codes like those promoted by Ms. Kilbourne—ones purportedly designed to protect girls from sexual objectification—exist.⁶⁴

B. Consent Implications of Modesty-Based Dress Codes

Gender-based critiques of school dress codes focus not only on explicitly gendered differences in such codes, but also on facially neutral codes that have a disproportionate impact on female students. These critiques draw public attention to the fact that most of the restrictions in public school dress codes apply exclusively or disproportionately to female attire.⁶⁵ The stated (and implicit) purposes of these dress codes, the objectification of girls' bodies required to enforce the codes, and the harmful disproportionate impact of these codes entrench and institutionalize myths around female body ownership and sexual consent at a dangerously young age.

1. Stated and Implicit Purposes of Sex-Obsessed Dress Codes

Modesty-based dress codes reinforce the message that girls' bodies are inherently dangerous to men and boys, and that they are responsible for any unwanted attention they receive. Gendered dress codes ask girls "to curtail their self-expression not for their own benefit but for the benefit of young

64. One particularly offensive Pennsylvania high school dress code reflects the failure of the strict dress code system to protect girls:

Ladies:

.....

... **Choose modest attire.** No bellies showing, keep "the girls" covered and supported, and make sure that nothing is so small that all your bits and pieces are hanging out. Please remember as you select an outfit . . . that we don't want to be looking at "sausage rolls" As you get dressed, remember that you can't put 10 pounds of mud in a five-pound sack.

Taylor Pittman, *High School Dress Code Letter Advises Girls to Cover Their "Sausage Rolls,"* HUFFPOST (May 29, 2015, 1:26 PM ET), https://www.huffpost.com/entry/biglerville-high-school-dress-code-sausage-rolls_n_7463576.

65. Zhou, *supra* note 4; *see also* Galen Sherwin, *5 Things Public Schools Can and Can't Do When It Comes to Dress Codes*, ACLU (May 30, 2017, 4:00 PM), <https://www.aclu.org/blog/womens-rights/womens-rights-education/5-things-public-schools-can-and-cant-do-when-it-comes>.

men who are allegedly distracted by sharing public space with women.”⁶⁶ This “lack of distraction” rationale—that the uncovered bodies of female students are so disruptive that they impede male students’ ability to learn—has been repeated numerous times by school administrators defending these codes.⁶⁷ As one high school student told a reporter in 2017, “My principal constantly says that the main reason for it is to create a ‘distraction-free learning zone’ for our male counterparts.”⁶⁸

Even more troubling than the rationale itself, administrators fault not the male student who gazed sexually at a classmate and failed to pay attention in class; instead, “the girl he was distracted by holds all the responsibility.”⁶⁹ This messaging—that girls are responsible for the lurid and sexual temptations of boys—institutionalizes the corrosive notion that girls’ “bodies are always sexualized and bad, and that they must cover them up to appear decent.”⁷⁰ It diminishes and shames a part of someone’s personhood—the body—of which growing girls and boys should be proud, teaching girls that, to at least half of the world’s population, their bodies are both (1) dangerous, and (2) the only thing most men and boys see.⁷¹

66. Ahrens & Siegel, *supra* note 7, at 99.

67. Emily Miller, *Dress Code Sexism*, HER CAMPUS (Apr. 24, 2017, 11:50 PM), <https://www.hercampus.com/school/akron/dress-code-sexism> (“Dress codes are enforced for the comfort and ‘lack of distraction’ for male students. Girl[s]’ bodies apparently pose an inconvenience for the teenage boy. If not properly covered, a male student might become so entranced with a female student’s shoulder that he could completely miss out on all the information in class. And whose fault is that? According to schools, the girl he was distracted by holds all the responsibility.”).

68. Zhou, *supra* note 4 (“[A] group of high-school girls from South Orange, New Jersey . . . launched a campaign last fall, #IAMMoreThanADistracted, which exploded into a trending topic on Twitter and gleaned thousands of responses from girls sharing their own experiences.”).

69. Miller, *supra* note 67; *see also* Zhou, *supra* note 4 (“[M]any districts across the country . . . justify female-specific rules with that logic, and effectively, . . . place the onus on girls to prevent inappropriate reactions from their male classmates.”).

70. Miller, *supra* note 67; *see also* Catherine McCall, *The Sexualization of Women and Girls*, PSYCHOL. TODAY (Mar. 4, 2012), <https://www.psychologytoday.com/us/blog/overcoming-child-abuse/201203/the-sexualization-women-and-girls> (explaining the psychological consequences of sexualizing girls in school).

71. Friedrichs, *supra* note 59 (“[A]ny confidence and pride she might take in her appearance is automatically stripped from her when she is told that she is dressing inappropriately.”); *see also* Zhou, *supra* note 4 (“‘The dress code makes girls feel self-conscious, ashamed, and uncomfortable in their own bodies.’”). And by placing blame on the female student for tempting boys with their bodies, schools institutionalize the message

Obsessing over girls' bodies in student dress codes harmfully places the focus on physical appearance over physical abilities, mental capabilities, or emotional development, perpetuating the troubling message that women exist for the consumption of society.⁷²

"Educators and sociologists, too, have argued that dress codes grounded in such logic amplify a broader societal expectation: that women are the ones who need to protect themselves from unwanted attention and that those wearing what could be considered sexy clothing are 'asking for' a response."⁷³ One sociologist concluded that "dress codes normalize certain forms of girlhood, problematize others, and suggest girls' responsibility for the school's moral climate."⁷⁴

This rationale also communicates harmful and dangerous methods to both boys and girls regarding consent. It tells boys that it is "the girl's responsibility to cover up, and if she doesn't it's her fault he got distracted."⁷⁵ It gives carte blanche for boys to lean into the myth that "they are incapable of controlling their own urges."⁷⁶ Conversely, it tells girls that they are responsible for preventing this irresistible urge of the opposite sex, and that it is their fault for dressing so provocatively if boys gaze, leer, whistle, catcall, or touch. As one dress code critic noted, this approach serves as a microcosm of "a culture that's so used to looking at issues of harassment and assault through the wrong end of the telescope," directed at "girls' own clothing" rather than the kind of sexually predatory behavior directed at girls.⁷⁷ Or, as another critic put it more bluntly, "[r]ather than teaching boys that looking up girls' skirts is wrong—no matter how

that the only truly relevant part of the girl's personhood is a dangerous weapon that must be kept under wraps. *Id.*

72. Ahrens & Siegel, *supra* note 7, at 99 (contending that gendered dress codes tell girls that "[t]heir permission to enter the public space is conditioned on acquiescence to a state-sanctioned gaze that draws attention to their bodies and conceptualizes them as potential sexual objects rather than equal members of a learning community").

73. Zhou, *supra* note 4.

74. Friedrichs, *supra* note 59.

75. Miller, *supra* note 67.

76. *Id.*; see also Zhou, *supra* note 4 ("Often they report hearing phrases like, 'boys will be boys,' from teachers."); Mieke Eerkens, *When Judges Assume That Men Cannot Control Their Own Sexual Urges*, ATLANTIC (July 17, 2013), <https://www.theatlantic.com/sexes/archive/2013/07/when-judges-assume-that-men-cannot-control-their-own-sexual-urges/277880/> (recalling Iowa Supreme Court case upholding dismissal of female employee because her male employer found her too irresistibly attractive).

77. Zhou, *supra* note 4.

convenient the angle might be—they enforce a rule that punishes a high school girl for being sexualized by her peers.”⁷⁸

This distorted view of responsibility holds obvious and disturbing parallels in criminal sexual assault cases. School dress codes tell girls that their permission to enter public school is conditioned on an adult’s determination that those around her can control themselves.⁷⁹ And this entire narrative reinforces scripts and assumptions about gender and sexuality that misplace responsibility for sexual violence on its victims.⁸⁰

2. Objectification and Enforcement

The enforcement of these modesty-based dress codes requires the literal gaze of adult school officials (mostly male⁸¹) who are required to view young women sexually in order to assess their compliance with dress restrictions. In other words, dress codes designed to prevent sexualization of girls require the very type of objectification the rules are purportedly designed to prevent.⁸²

78. Miller, *supra* note 67; see also Rebecca Klein, *High School Student Accuses School of “Shaming Girls for Their Bodies” With Dress Code*, HUFFPOST (June 2, 2014, 1:52 PM ET), https://www.huffpost.com/entry/lindsey-stocker-dress-code_n_5432687 (explaining that one Quebec high school student hung a sign stating, “Don’t humiliate her because she is wearing shorts. It’s hot outside. Instead of shaming girls for their bodies, teach boys that girls are not sexual objects”).

79. Friedrichs, *supra* note 59 (“[This view] assumes that the sexualization is the fault of the girl, and not the person sexualizing her.”) Since “[a] teen may simply be trying to dress fashionabl[y],” the fault ought to lie with the adult sexualizing her. *Id.*

80. See Miller, *supra* note 67 (“This plays right into rape culture. . . . What is a question that is so commonly and despicably asked in rape cases? You guessed it: ‘What was she wearing?’”).

81. Robert Maranto et al., *Boys Will Be Superintendents: School Leadership as a Gendered Profession*, PHI DELTA KAPPAN (Sept. 24, 2018), <https://kappanonline.org/maranto-carroll-cheng-teodoro-school-leadership-gender/> (“[U]sing data on more than 7,500 public school principals from the U.S. Department of Education 2011-12 Schools and Staffing Survey and additional published sources, we recently found that while 90% of elementary teachers are women, only 66% of elementary principals are women. In secondary schools, meanwhile, women make up 63% of teachers but just 48% of principals.”).

82. Friedrichs, *supra* note 59 (“Really, claiming that dress codes prevent ‘sexualization’ of girls seems more like a paternalistic excuse given by people who are uncomfortable admitting that some teen girls may choose to express their sexuality through their appearance, or by others who themselves draw sexual conclusions about teens in certain outfits.”); see also Suzannah Weiss, *5 Ways School Dress Codes Reinforce Rape Culture, Because Women Aren’t a “Distraction,”* BUSTLE (Feb. 23, 2016), <https://www.bustle.com>.

The enforcement of dress code violations by men through a predominantly male lens as a result of predominantly male sexualization parallels troublingly with the experience of criminal sexual assault victims. Women reporting their own rapes and sexual assaults to police officers regularly express frustration with the “credibility discount” they encounter from predominantly male police officers in believing their stories.⁸³ A 2016 Department of Justice report on the prosecution of sex crimes in the United States found substantial and pervasive problems with male police officers expressing skepticism about the veracity of rape allegations.⁸⁴ In addition, even when cases do make it to court, judges continue to express confusion regarding consent.⁸⁵

Just as male-centric enforcement of a minor female’s dress misplaces responsibility for the sexualization of young girls and misrepresents the notion of consent to sexual attention, criminal sexual assault adjudication utilizes archaic societal attitudes about “sexual autonomy and gender roles in sexual relations.”⁸⁶ When school administrators communicate that girls are responsible for any sexual attention they may receive from their classmates or teachers, it should come as little surprise that “jurors,

com/articles/143604-5-ways-school-dress-codes-reinforce-rape-culture-because-women-arent-a-distraction.

83. Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 33 (2017) (“The typical law enforcement investigation is guilt-presumptive (and potentially problematic for that reason). In sexual assault cases, this presumption is flipped.”).

84. Soraya Chemaly, *How Police Still Fail Rape Victims*, ROLLING STONE (Aug. 16, 2016, 8:29 PM ET), <http://www.rollingstone.com/culture/features/how-police-still-fail-rape-victims-w434669> (“One officer in the [Baltimore P.D.] sex crimes unit explained, ‘In homicide, there are real victims; all our rape cases are bullshit.’”).

85. See Shawn E. Fields, *Debunking the Stranger-in-the-Bushes Myth: The Case for Sexual Assault Protection Orders*, 2017 WIS. L. REV. 429, 441 (2017) (recalling rape case in which one judge asked a nineteen-year-old victim who was raped over a bathroom sink, “Why couldn’t you just keep your knees together? . . . Why didn’t you just sink your bottom down into the basin so he couldn’t penetrate you? . . . If you were frightened, you could have screamed.”). “Judge Camp also wondered aloud during the trial ‘why she allowed the sex to happen if she didn’t want it,’ and that ‘she certainly had the ability, perhaps learnt from her experience on the streets, to tell (him) to f--- off.’” *Id.* (alterations in original).

86. Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 468 (2005).

prosecutors and police are confused about the boundary line between sex and rape.”⁸⁷

3. *The Disproportionate Impact on Female Students*

Modesty-based dress codes subject young women “to more specific limitations on their expression than young men. They are required to spend more time and emotional energy on ensuring compliance with state appearance standards than young men.”⁸⁸ This reality tangibly harms girls’ educations at rates disproportionate to their male counterparts, and once again communicates that girls and women are less deserving of the resources available in the public domain than boys and men.

Consider the following common dress code provision: “Clothing and accessories must not be disruptive to teaching and learning. . . . [N]o low-cut blouses, tube/halter tops, midriff tops. No short-shorts, mini-skirts. All shorts/skirts must be at relaxed hand level. . . . No visible undergarments.”⁸⁹ This facially neutral dress code restricts clothing in a way that functionally affects only girls. “Boys shorts are made longer, their tank tops have thicker straps, and they have no bra straps or cleavage to hide.”⁹⁰

These gendered dress codes, even if facially neutral, have the effect of “focus[ing] a disproportionate amount of female students’ attention on policing their own appearance and sexuality.”⁹¹ At Tottenville High School on Staten Island, a study found that its dress code banning clothes like tank tops and mini-skirts led to over one hundred disciplinary actions per month—with more than ninety percent of those actions taken against girls.⁹²

87. Fields, *supra* note 85, at 441 (quoting Seidman & Vickers, *supra* note 86, at 468) (“The vast majority of people—including law enforcement personnel, judges and potential jurors—remain conflicted about what constitutes ‘consensual’ sex. They are ambivalent about placing criminal sanctions on ‘non-violent’ sexual assault or, for that matter, anything short of violent penetration that results in physical injuries.”).

88. Ahrens & Siegel, *supra* note 7, at 99; Miller, *supra* note 67 (“Policies are almost always directed strictly toward girls; some even specify for girls only.”).

89. TOTTENVILLE HIGH SCH., FAMILY STUDENT HANDBOOK 32 (2014), https://web.archive.org/web/20150322064140/http://www.tottenvillehs.net/www/ud00/6/6baff98e0b934e299f3d3025021920bd/Personal_Documents/Family.Student%20Handbook%202014.pdf.

90. Miller, *supra* note 67 (“Dress codes are clearly written for girls. No one is monitoring the length of any guy’s cargo shorts, but someone is always watching for a dress that comes up a little too short.”).

91. Ahrens & Siegel, *supra* note 7, at 104.

92. Ryan Broderick, *This High School’s “Sexist” Dress Code Has Caused 200 Detentions in Just the Last Two Weeks*, BUZZFEED NEWS (Sept. 16, 2014, 12:50 PM ET),

The disruption and humiliation attendant with enforcing these dress codes also bear mention. “Frequently, students are openly called out in the middle of class, told to leave and change, and sometimes, to go home and find a more appropriate outfit. In some instances, girls must wear brightly colored shirts that can exacerbate the embarrassment, emblazoned with words like ‘Dress Code Violator.’”⁹³ In short, “who has to dress a certain way to make sure their body is covered? Who will be asked to change if they don’t follow this rule? Who will be taken out of class or even sent home if their clothes are deemed to be too distracting? Girls.”⁹⁴

The purpose, enforcement, and disproportionate impact of modesty-based dress codes all institutionalize harmful myths and stereotypes that almost uniformly hurt young girls. “They are grounded in patriarchal assumptions about the dangers of the female body [and] the primacy of male claims to public space and services”⁹⁵ They reinforce the false narrative that women are responsible for protecting themselves and altering their behavior to serve male interests, and they highlight the “state’s unwillingness to take responsibility for protecting women from physical and sexual assault.”⁹⁶

C. Legal Challenges to Sex-Obsessed Dress Codes

While the primary purpose of this Article is not to lay groundwork for new legal challenges to school dress, it bears reflecting on recent failed attempts to challenge sex-obsessed dress codes on constitutional and Title IX grounds. These failures, in the face of compelling arguments, reinforce the unwillingness of state and federal district courts to take seriously the threats to girls and women through patriarchal institutions like gendered dress codes.

Broad-based challenges to dress codes have focused on substantive due process rights to autonomy, First Amendment rights to free expression,

<https://www.buzzfeednews.com/article/ryanhatethis/tottenville-high-school-dress-for-success>.

93. Zhou, *supra* note 4 (“That’s crazy they’re caring more about two inches of a girl’s thigh being shown than them being in class.”).

94. Miller, *supra* note 67 (“Because a female student’s body might pose a distraction to a male student’s education, her education is interrupted and put on hold until she can find something more suitable for the classroom.”).

95. Ahrens & Siegel, *supra* note 7, at 104.

96. *Id.*

Equal Protection challenges based on gender, and Title IX challenges as applied to disruptions to female education.

1. *Substantive Due Process*

Modern substantive due process formulations consider the zone of individual autonomy to which individuals deserve protection absent overriding state justification. As decisions within the zone of autonomy become more personal, important, and central to the development of individual identity, government action requires a more substantial justification. Some decisions, according to modern Supreme Court jurisprudence, are made free from the “compulsion of the State.”⁹⁷

The importance of dressing oneself as a decision worthy of constitutional autonomous protection has undergone significant redefinition since *Tinker*. While courts throughout the 1970s acknowledged the importance of dress and presentation as a central component of individual liberty,⁹⁸ more recent decisions blithely refer to students’ right to “look nice” or wear clothes they “feel good in.”⁹⁹ For example, in a leading case from the Sixth Circuit, the court trivialized a student’s substantive due process claim as resting on a purported right to wear blue jeans rather than any truly important liberty interest worthy of constitutional protection.¹⁰⁰

This liberty interest, when framed so narrowly, is doomed to give way to the admittedly important interest of public educators to provide a safe and productive learning environment for the nation’s children. But the showing required for this government justification has undergone radical transformation since *Tinker* as well. As discussed previously, courts in the immediate wake of *Tinker* read that decision as requiring an actual showing by the government—through empirical evidence or otherwise—not only that a proposed dress code action was rationally related to the stated objective but actually did further that objective.¹⁰¹ This stringent

97. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of life.”).

98. *See, e.g., Richards v. Thurston*, 424 F.2d 1281, 1286 (1st Cir. 1970) (finding “within the commodious concept of liberty” the right to “wear one’s hair as he wishes”) (“The Founding Fathers wrote an amendment for speech and assembly; even they did not deem it necessary to write an amendment for personal appearance.”).

99. *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388–89 (6th Cir. 2005).

100. *Id.* at 389.

101. *See, e.g., Bishop v. Colaw*, 450 F.2d 1069, 1075–76 (8th Cir. 1971) (rejecting school dress code policy that was not necessary “to carry out the educational mission of . . .

requirement led, at first, to judicial override of hair length codes, and later, to the decline in school dress codes generally.¹⁰²

Contemporary courts take a far different approach, accepting at face value the bare assertions of schools that dress codes further the various goals of order, discipline, safety, and fostering a productive learning environment.¹⁰³ While granting deference to the expertise of school administrators in choosing how best to operate their schools may make sense, limits to that deference must exist. Some less inherently problematic dress code policies, such as prohibitions on clothing with cartoon characters, may help foster a less distracting learning environment for younger children. But courts should require at least a minimal showing that such a prohibition is required. That scrutiny should be all the more exacting when the policy at issue directly or indirectly affects a group of students on the basis of sex or gender. Indeed, the entire body of our liberty-based due process jurisprudence rests on the ability of the Court to probe the importance of a stated government objective and the connection of that objective to the challenged action. Those limits appear lacking in the school dress code context.

2. First Amendment

Broad First Amendment challenges to school dress codes have also failed, but for slightly different reasons. One reason concerns the ambiguity in First Amendment jurisprudence itself regarding nonverbal expression. First Amendment law recognizes that the freedom of expression encompasses a wide variety of conduct intended to communicate political and social ideas. Here, the conduct of “styling one’s appearance and determining how to present oneself for public consumption in a public school setting is inherently richly communicative.”¹⁰⁴

the school”); *see also* *Stevenson v. Bd. of Educ.*, 426 F.2d 1154, 1158 (5th Cir. 1970) (upholding hair length restriction only after school provided evidence of disruption in the classroom arising from hair length).

102. *See Richards*, 424 F.2d at 1286.

103. *See Blau*, 401 F.3d at 392 (upholding school dress code when only evidence presented was “affidavits from three teachers who agreed that the dress code had a positive impact on the Highlands learning environment”).

104. Ahrens & Siegel, *supra* note 7, at 102; *see also* G. Q. Vicary, *The Signs of Clothing*, in *CROSS-CULTURAL PERSPECTIVES IN NONVERBAL COMMUNICATION* 291, 299 (Fernando Poyatos ed., 1988) (“Clothing is basic to definition of self. It is impossible to discuss clothing, even as distant history, and ignore disquieting inner questions such as ‘what do the clothes I am wearing say about me?’”).

However, courts have expressed confusion over the extent to which the First Amendment covers such generalized expression as “dress,” or whether it covers it at all.¹⁰⁵ As recently explained by academics,¹⁰⁶ the source of the confusion appears to be whether the type of nuanced messaging in self-styling is itself a source for protection under the Free Speech Clause, or whether the styling is merely connected to other values protected by the First Amendment.¹⁰⁷

To the extent courts have been forced to decide this issue, they have uniformly rejected First Amendment challenges to broad dress codes. Much of the reasoning appears again connected to the narrow framing of what self-styling actually means to a child as a form of expression, which itself renders it less deserving of protection in the face of countervailing government objectives.¹⁰⁸ It remains to be seen how the analysis might change if a court with a more expansive view of the communicative nature of dress faces this issue.

3. Equal Protection

Perhaps more relevant to the subject of this Article are gender-based challenges under the Equal Protection Clause of the Fourteenth Amendment. Dress codes with explicitly gendered differences are automatically suspect and require an “exceedingly persuasive justification” to withstand constitutional challenge.¹⁰⁹ These codes are subjected to the Court’s intermediate scrutiny framework, requiring that the gender

105. See Ahrens & Siegel, *supra* note 7, at 103.

106. See generally MARK V. TUSHNET, ALAN K. CHEN & JOSEPH BLOCHER, *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* (2017).

107. See *id.* at 34–41 (detailing these free speech arguments as related to instrumental music, which is another form of nonverbal self-styling).

108. *Blau*, 401 F.3d at 391 (doubting whether the desire to dress oneself generally garners First Amendment protection, but nonetheless rejecting the claim because of the existence of “important governmental interests” such as “bridg[ing] socio-economic differences between families,” “focus[ing] attention on learning,” [and] “enhanc[ing] school safety”); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 285–86 (5th Cir. 2001) (assuming “without deciding that the First Amendment applies to expressive conduct implicated in the mandatory Uniform Policy,” but upholding the policy because “improving the educational process is undoubtedly an important and substantial interest”).

109. See *United States v. Virginia*, 518 U.S. 515, 524 (1996) (holding that government actions that facially classify on gender violate the Equal Protection Clause unless the government can provide an “exceedingly persuasive justification” for gender-specific action).

classification (1) serve “important governmental objectives” and (2) be “substantially related to the achievement of those objectives.”¹¹⁰

Many school dress codes—including those discussed in this Article—are so poorly written and facially discriminatory that they would likely fail under a straightforward application of this test. Indeed, the Supreme Court has regularly expressed skepticism with “regulatory regimes that impose broad, differential burdens on the civil participation of women . . . [and] for the ad hoc justifications states use to rationalize such regimes.”¹¹¹

Surprisingly few Equal Protection challenges have been brought against explicitly gendered dress codes, but one such challenge recently succeeded in North Carolina. In *Peltier v. Charter Day School*,¹¹² three students sued a charter school, challenging a policy that required girls to wear “skirts, skorts, or jumpers” and prohibited them from wearing shorts or pants.¹¹³ The students argued that the policy “subject[ed] them to archaic stereotypes about what constitutes appropriate behavior and conduct for girls.”¹¹⁴ In turn, the students maintained that the code “reinforc[ed] the notion that girls, but not boys, must dress and behave modestly, that they are less physically active than boys and that they should behave and dress in a manner that is otherwise traditionally considered appropriately feminine.”¹¹⁵

The court observed that “the caselaw in this specific area is not well developed,” acknowledging that most “dress code cases are claims based on the First Amendment.”¹¹⁶ Further, the court acknowledged that “[c]ourts traditionally have and should refrain from regulating the day-to-day issues presented in local schools.”¹¹⁷ However, the court ultimately found that the skirt requirement violated the Equal Protection Clause:

110. *See* *Nguyen v. INS*, 533 U.S. 53, 60 (2001); *Craig v. Boren*, 429 U.S. 190, 197 (1976).

111. Ahrens & Siegel, *supra* note 7, at 104; *see Virginia*, 518 U.S. at 557 (“Virginia . . . has closed [VMI] to its daughters and, instead, has devised for them a ‘parallel program’ with faculty less impressively credentialed and less well paid, more limited course offerings, fewer opportunities for military training and for scientific specialization.”).

112. 384 F. Supp. 3d 579 (E.D.N.C. 2019).

113. *Id.* at 584.

114. Erin Buzuvis, *Title IX Dress Code Case Survives Motion to Dismiss*, TITLE IX BLOG (Apr. 4, 2017, 9:24 AM), <https://title-ix.blogspot.com/2017/04/title-ix-dress-code-case-survives.html> (quoting complaint).

115. *Id.*

116. *Peltier*, 384 F. Supp. 3d at 595–96.

117. *Id.* at 595.

While this court recognizes that certain sex-differentiated standards consistent with community norms may be permissible, the skirts requirement in this case is not consistent with community norms. Women (and girls) have, for at least several decades, routinely worn both pants and skirts in various settings, including professional settings and school settings. Females have been allowed to wear trousers or pants in all but the most formal or conservative settings since the 1970s. . . . [M]ost public school dress codes across the country allowed girls to wear pants or shorts by the mid-1980s. . . . [C]ommunity standards which may account for the differences in standards applied to men and women, girls and boys, do not remain fixed in perpetuity.

While defendants argue the skirts requirement is based on the traditional values approach of the school as a whole and is in place to instill discipline and keep order, defendants have shown no connection between these stated goals and the requirement that girls wear skirts.¹¹⁸

This hopeful ruling certainly represents a step in the right direction, but it also rested on the explicitly gendered nature of the dress code. Most school dress codes are facially neutral as to gender, even if they work in form and function to target and are disproportionately enforced against girls. Lacking explicit discrimination, any Equal Protection challenge will require proof of purposeful sex discrimination to succeed.¹¹⁹ That evidentiary showing is difficult, complicated, and in the area of sex discrimination, rarely successful.¹²⁰

118. *Id.* at 596.

119. *See* *Pers. Adm'r v. Feeney*, 442 U.S. 256, 274–75 (1979) (analogizing race-discrimination cases to find that a law having a disparate impact on a historically disadvantaged gender group did not violate the constitution absent a showing of purposeful discrimination).

120. *See* Mary Anne Case, *The Very Stereotype the Law Condemns: Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1466 (1999); *see also* *Long v. Bd. of Educ.*, 121 F. Supp. 2d 621, 627–28 (W.D. Ky. 2000) (subjecting the school's imposition of a sex-neutral, uniform-type dress code to the *Feeney* test and finding the code was rationally related to the legitimate purpose of ensuring student safety and fostering school order).

4. Title IX

Absent evidence of purposeful sex discrimination, Title IX claims against facially neutral school dress codes could, theoretically, provide relief. Title IX provides: “No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹²¹ Unlike Equal Protection challenges to facially neutral government action, plaintiffs bringing Title IX claims can “show[] that a facially neutral practice has a disparate impact” to carry their prima facie burden.¹²² However, the government can rebut that prima facie showing “by proving a business or educational necessity for the practice,” which may foreclose relief for plaintiffs suing school districts in courts that grant substantial deference to amorphous justifications such as order, discipline, and preventing distractions.¹²³

The larger hurdle, at least currently, appears to be the Department of Education. In *Peltier*, the same court that granted plaintiffs summary judgment on their Equal Protection claim granted defendants summary judgment on their Title IX claim.¹²⁴ In doing so, the court cited recent administrative guidance from the Department of Education that Title IX permits “issues involving codes of personal appearance [to] be resolved at the local level.”¹²⁵ It is important to note, however, that this setback came in a case bringing a facial challenge to a gendered dress code. As empirical evidence such as that highlighted in this Article becomes more prevalent regarding the disproportionately adverse impacts such dress codes have on female education, an as-applied challenge in the Title IX context may have greater chances of success in the future.

121. 20 U.S.C. § 1681(a) (2018).

122. *Jeldness v. Pearce*, 30 F.3d 1220, 1229–30 (9th Cir. 1994).

123. *Id.*

124. *Peltier v. Charter Day School*, 384 F. Supp. 2d 579, 590 (E.D.N.C. 2019).

125. *Id.* at 589–90 (internal quotation omitted) (“Title IX does not directly speak to the ‘precise question’ of school uniform policies or appearance codes, suggesting that Congress left this matter to the agency’s discretion. Additionally, in thirty-five years, Congress has never overridden ED’s interpretation of the statute. ED has provided an answer, interpreting Title IX to ‘permit[] issues involving codes of personal appearance to be resolved at the local level.’”).

IV. Institutions, Messaging, and Consent

The foregoing discussion highlights the parallels between the shaming and victim-blaming central to enforcement of sexualized dress code policies and the shaming and victim-blaming so often central to rape and sexual assault adjudications. Just as a girl's choice of clothing is scrutinized for sexual communication to those around her in determining whether she has invited "distracting" attention, a sexual violence victim's clothing is scrutinized for sexual communication to the perpetrator to determine whether she impliedly invited the altercation. This is evident by the question "what was she wearing?", which remains a part of the defense attorney's lexicon in rape cases, and one can hardly blame the attorney when judges and juries remain persuaded that a rape victim's fashion choices are relevant to the issue of consent.¹²⁶

This concluding Part explores the implications of that parallel more directly with respect to certain pervasive, troubling myths in criminal sexual assault adjudication: (A) the notion of implied general consent to sexual activity (or, framed differently, the false narrative of "worthiness" in prosecution); (B) the myth of the perfect victim; and (C) the myth of the unstoppable male.

A. Implied General Consent to Sexual Contact

Many modesty-based dress code critics observe that girls often wear short skirts or spaghetti straps simply to stay cool or because the clothing is fashionable, not to appear sexy.¹²⁷ Undoubtedly, that is true. But one should ask a more basic question here: what if high school girls want to feel and look sexy? What, exactly, is wrong with that level of self-expression and agency? If we want girls (and boys) to be confident in their own skin, to feel proud of their own identities and individuality, to have positive body images, then what precisely is inappropriate about a girl choosing to feel and look sexy?

126. Hannah Brenner, Kathleen Darcy, Gina Fedock & Sheryl Kubiak, *Bars to Justice: The Impact of Rape Myths on Women in Prison*, 17 *GEO J. GENDER & L.* 521, 540 (2016) (explaining that questions designed to perpetuate the rape myth that a woman was "asking for it" based on her behavior include "Was she drinking alcohol or using drugs at the time of the assault?" "What was she wearing?" and "Was she walking alone?").

127. Klein, *supra* note 78 (showing picture of a makeshift sign posted outside of a school classroom, stating in part, "It's hot outside. Instead of shaming girls for their bodies, teach boys that girls are not sexual objects.").

The answer, apparently, is that expressing oneself sexually may attract attention, for which the one expressing herself must be held accountable. Rather than acknowledging that a girl can dress how she wants and others are responsible for their own responses, schools preemptively shut down that form of confident self-expression because other people may respond inappropriately.¹²⁸

To put a finer point on it, a school-age girl may in fact want to dress provocatively to attract attention from a particular person, be it a boyfriend or girlfriend, or simply a love interest. Inviting a consensual response from that singular individual, however, does not mean that she has granted general consent to all people in the public sphere. Dressing oneself is the responsibility of that person; the response to that dress is everyone else's responsibility, and nothing about the nature of one's dress does or can grant implied general consent to make sexual advances.

Likewise, a woman has every right to dress provocatively (i.e., "don sexy outfits"¹²⁹) in public with the purpose of attracting attention and, perhaps, a sexual companion. Her clothing may even communicate that desire, as dress is inherently communicative and expressive.¹³⁰ But just because the general public can see that communication does not mean the person wearing those clothes has granted implied general consent for all to make sexual advances. So often lacking in public discourse around dress and consent is the basic fundamental recognition that a person's dress cannot, by itself, communicate consent for *anyone* to do *anything*. There simply exists no general implied consent to engage sexually or otherwise with a sexily dressed woman. Neither does there exist any specific implied consent for a particular person to engage sexually with a sexily dressed woman, even if that woman has consented to converse or otherwise interact with that person.¹³¹

These basic premises should be noncontroversial; as formulated, they likely are. But they also contradict the messaging behind placing responsibility on the girl to dress modestly, lest she arouse a response from

128. *See supra* Part II.

129. Friedrichs, *supra* note 59.

130. *See* Vicary, *supra* note 104, at 323.

131. *Cf.* H.M. Malm, *The Ontological Status of Consent and Its Implications for the Law on Rape*, 2 *LEGAL THEORY* 147, 148 (1996) (exploring various societal understandings of "implied" or "tacit" consent as "consent given by *refraining* from an act rather than performing an act," but admonishing against applying a sliding scale of tacit consent too easily in high-stakes situations like rape).

a boy. That messaging institutionalizes the notion that, even if the girl who wore short shorts did not specifically want boys to stare at her and make lewd comments, she impliedly “asked for it” because she “should have known better” than to dress that way. Similarly, when a rape investigation focuses on whether the victim’s dress was “too provocative”—or, for that matter, whether she was “out too late,”¹³² “in the wrong part of town,”¹³³ or too “intoxicated”¹³⁴—it communicates that she impliedly “asked for it” because she “should have known better.”¹³⁵

Therefore, to disrupt the notion that it is proper to project general implied consent onto any individual based on how they are dressed, reformers must look to the source of this belief—early-life modesty-focused dress codes—and rectify the message it sends.

B. The Perfect Victim

At its core, these victim-blaming messages communicate a societal judgment that girls and women who behave in a certain way are less deserving of protection from sexual violence because they engage in behavior of which we disapprove. Some express this disapproval through the lens of burden sharing and risk prevention.¹³⁶ Women ought to take

132. Jessica Valenti, *In Rape Tragedies, the Shame Is Ours*, NATION (Apr. 17, 2013), <https://www.thenation.com/article/archive/rape-tragedies-shame-ours/> (“[W]hen we blame a woman for being attacked—when we speculate about what she was wearing, suggest she shouldn’t have been drinking or that she stayed out too late—we’re making the world safer for rapists.”).

133. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 254–55 (1975) (“Women have been raped by men . . . for behavior no more provocative than walking down the wrong road at night in the wrong part of town . . .”).

134. Valenti, *supra* note 132.

135. *State v. Neal*, 120 P.3d 366, 374 (Kan. Ct. App. 2005) (summarizing trial court transcript in rape case in which defense counsel wondered aloud if rape victim “should have known better when she was at the Kwik Shop, because by that time Patrick Neal was already putting his hands on her”).

136. See, e.g., Jeannie Sclafani Rhee, *Redressing for Success: The Liability of Hooters Restaurant for Customer Harassment of Waitresses*, 20 HARV. WOMEN’S L.J. 163, 167 (1997) (explaining a “risk acceptance theory of non-liability” for women who dress provocatively and are later sexually harassed); Kelly C. Timmons, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims*, 48 VAND. L. REV. 1107, 1123–24 (1995) (suggesting that “dress[ing] provocatively” demonstrates an assumption of risk that harassment might follow); cf. Joshua Burstein, *Testing the Strength of Title VII Sexual Harassment Protection: Can It Support a Hostile Work Environment Claim Brought by a Nude Dancer*, 24 N.Y.U. REV. L. & SOC. CHANGE 271, 307–08 (1998) (discussing consent-based defenses such as perceived “welcomeness”

simple safety precautions (that men do not have to take), make smarter decisions (expending mental energy not required of men), or not put themselves “in the wrong place at the wrong time” (places and times that are not off limits to men). In short, women ought to work diligently not to get raped.¹³⁷

This type of victim-blaming mentality derives from the myth of the “perfect victim,”¹³⁸ the pure, virginal, modest woman who did nothing to

stemming from nonverbal cues like dress).

137. See, e.g., Charlotte Hilton Andersen, *How to Teach Girls How Not to Get Raped*, GREAT FITNESS EXPERIMENT (Jan. 10, 2013, 10:15 AM), <http://www.thegreatfitnessexperiment.com/2013/01/how-to-teach-girls-how-not-to-get-raped.html> (describing a self-defense class in a which the teacher told young girls to report any attempted assault or rape “[b]ecause if you don’t report it—what if your best friend comes walking along that same path 2 weeks later and gets raped? If you don’t report it then it’s your fault if other girls get hurt,” and offering suggestions for teaching prevention of sexual assault in ways that would not shift responsibility to victims); KATHERINE ANNE ROIPHE, *THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS* 9 (1993) (describing the first week of college for a female student, where “there are fliers and counselors and videotapes telling us how not to get AIDS and how not to get raped, where not to wander and what signals not to send”); cf. Zerlina Maxwell, *Stop Telling Women How to Not Get Raped*, EBONY (Jan. 14, 2012), <https://www.ebony.com/news/stop-telling-women-how-to-not-get-raped/> (“No more ad campaigns and public service announcements targeted at women to teach them how to avoid rape. . . . We need anti-rape campaigns that target young men and boys.”); Chris Linder, *Telling Women How Not to Get Raped Won’t Stop Sexual Violence on Campus*, GUARDIAN (Aug. 2, 2018, 2:30 PM EDT), <https://www.theguardian.com/higher-education-network/2018/aug/02/telling-women-how-not-to-get-raped-wont-stop-sexual-violence-on-campus> (recommending that universities shift focus from sobering statistics about how many women are sexually assaulted and “teaching [those] women how not to get raped” to the fact that “one in 10 men studying at university have committed sexual violence” and “teaching [those] perpetrators not to rape”).

138. This use of the phrase “perfect victim” does not refer to the mythical “perfect rape victim” who responds to unwanted sexual advances in the manner preferred by judges and juries—by screaming, offering forcible physical and verbal resistance, and by immediately calling the police and submitting to a medical examination. See Kelly Alison Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims’ Attorneys*, 65 DRAKE L. REV. 293, 352 (2017) (describing the “harmful rape myth . . . of ‘the perfect victim,’ promoting the idea that real victims of sexual assault respond to trauma in one uniform manner”). As used here, the phrase also does not include a “perfect victim” from the perspective of the perpetrator to identify and target vulnerable individuals for predation. It is poignant, and perhaps ironic, however, that often perpetrators identify “perfect victims” in part based on the target’s perceived credibility issues. See *People v. Fortson*, 421 P.3d 1236, 1253 (Colo. App. 2018) (Berger, J., concurring) (discussing expert testimony at a child sexual assault trial describing the “perfect victim” as one with “developmental or credibility issues, [who is] thus less likely to be believed”).

provoke or invite her attack, and who is thus morally blameless.¹³⁹ Despite the #MeToo Movement's attempts to direct attention to the nuances of sexual assault, and particularly the nuances of victim responses in vulnerable, coercive settings, society still identifies "the image of the 'victim' [as] a blameless, pure stereotype, with whom all can identify."¹⁴⁰ A "victim" is "an elderly person robbed of her life savings, an 'innocent bystander' injured or killed during a holdup, or a brutally ravaged rape victim. 'Victims' are not prostitutes beaten senseless . . . drug addicts mugged and robbed . . . or misdemeanants raped by cellmates."¹⁴¹

The moral superiority expressed against these "imperfect victims" of crimes exists in the messaging institutionalized in modesty-based dress codes. A girl who wears a short skirt may very well fall victim to boys attempting to look up it, which is a form of sexual predation. But according to school administrators, she is not a perfect victim or innocent bystander because of her morally questionable choices; as such, she will receive discipline rather than protection.¹⁴² Only this kind of sexist moral purity test can explain why in one high school a girl was "dress coded . . . for wearing shorts" just as a male classmate walked by wearing a T-shirt graphically depicting a sex act with the phrase "good girls swallow" emblazoned across the front.¹⁴³ The boy received no punishment.¹⁴⁴

The fallacy of the "perfect victim" is thus both factually flawed and fundamentally dangerous. Nothing exists in our criminal law to provide

139. See Martha Chamallas, *Lucky: The Sequel*, 80 IND. L.J. 441, 442 (2005) (describing the mythical "'perfect' [rape] victim, who is young, white, and a virgin"); see also Brenner et al., *supra* note 126, at 540 ("Rape myths inform the 'ideal victimhood' requirement that a victim be 'carrying out a respectable project' and is 'not to be blamed.'").

140. Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 951 (1985).

141. *Id.*

142. See Miller, *supra* note 67 (quoting school officials who "sent home 70 students for the way they were dressed. Girls who wore skirts that were 'too short' . . . were sent home . . . [because] boys would be able to 'peer up the girl's skirts while they climbed the stairs' . . . [instead of] teaching boys that looking up girl[s] skirts is wrong—no matter how convenient the angle might be—they enforce a rule that punishes a high school girl for being sexualized by her peers.").

143. Laura Bates, *How School Dress Codes Shame Girls and Perpetuate Rape Culture*, TIME (May 22, 2015, 8:00 AM EDT), <https://time.com/3892965/everydaysexism-school-dress-codes-rape-culture/> ("I walked past another student wearing a shirt depicting two stick figures: the male holding down the female[']s head in his crotch and saying "good girls swallow." Teachers walked right past him and didn't say a thing.").

144. *Id.*

sliding scale protection for victims of rape or sexual assault based on the perceived moral innocence of the victim. Yet the perpetuation of the myth that only virginal, modest girls and women can be raped creates license for the very types of modesty-based and shame-based regulations reinforcing a culture of impunity for predatory behavior.

C. *The Unstoppable Male*

School administrators place the onus on girls to cover up their bodies, because boys “simply cannot help themselves,” “cannot resist the temptation,” or “simply cannot resist the urge” to make unwanted sexual advances. These dangerous claims take the “boys will be boys” trope a step further by claiming an instinctual, primal urge within boys to sexualize girls absolves boys from responsibility when they do so.¹⁴⁵

Absolving boys from responsibility, or at least mitigating their culpability, finds parallels in criminal sexual assault adjudication as well. Even if a factfinder refuses to imply consent to engage in a sexual act from the victim’s provocative dress, it may nevertheless mitigate the punishment imposed because it is “reasonable” or “understandable” for the perpetrator to behave the way he did given the primal irresistibility of the situation. This approach represents a subtle reframing of the “perfect victim” myth. Instead of concluding that a scantily clad rape victim is less deserving of society’s protection, the factfinder concludes that the rape perpetrator is less deserving of society’s condemnation because of his innate primal desire to have sexual contact with a scantily clad female.¹⁴⁶

This “primal urge” theory finds currency in another, perhaps less clearly analogous set of cases: revoked consent or “post-penetration rape” cases.¹⁴⁷ Until 2003, no state recognized a revocation of consent as valid once a sex

145. Linda R. Hirshman, *Was There Sex Before Calvin Klein*, 53 WASH. & LEE L. REV. 929, 937 (1996) (“Sociobiologists would say that nothing is to be done. Boys will be boys; they will rape and pillage and abandon their offspring. . . . Boys will be boys, unless women will be slaves.”).

146. Christine Chambers Goodman, *Protecting the Party Girl: A New Approach for Evaluating Intoxicated Consent*, 2009 B.Y.U. L. REV. 57, 95–96 (“In evaluating the reasonableness of expressions of dissent . . . ‘we need to know the baseline of the person to judge when a state of affairs is an evil or benefit for them’ to help us decide whether silence should constitute consent.”).

147. See generally Amanda O. Davis, Comment, *Clarifying the Issue of Consent: The Evolution of Post-Penetration Rape Law*, 34 STETSON L. REV. 729 (2005).

act began.¹⁴⁸ In other words, once a consensual act of sexual intercourse began, neither party had a legal right to change their mind and stop the act.¹⁴⁹ Female victims bringing rape charges against men who ignored their post-penetration revocations of consent were regularly met with the “uncontrollable male” defense, articulated by the defendant in *In re John Z*:

By essence of the act of sexual intercourse, a male’s primal urge to reproduce is aroused. It is therefore unreasonable for a female and the law to expect a male to cease having sexual intercourse immediately upon withdrawal of consent. It is only natural, fair and just that a male be given a reasonable amount of time in which to quell his primal urge¹⁵⁰

Citing this “myth of the unstoppable male,” “the defendant disclaimed both control over and responsibility for his actions, and denied legal culpability for imposing sex on an unwilling partner.”¹⁵¹ This defense claims that men, “by their very natures, would be biologically incapable of abiding by a law that required them to listen and respond when their partners withdrew consent for sex.”¹⁵² While the California Supreme Court ultimately ruled against the perpetrator, it left the “unstoppable male” myth intact, holding instead that the perpetrator had “ample time” to quell his desires.¹⁵³ Fortunately, following the outcry from this case and a growing recognition of the need to fix this crazy loophole, states began enacting statutes expressly making post-penetration rape a crime.¹⁵⁴ Currently, only

148. Erin G. Palmer, Recent Development, *Antiquated Notions of Womanhood and the Myth of the Unstoppable Male: Why Post-Penetration Rape Cases Should Be a Crime in North Carolina*, 82 N.C. L. REV. 1258, 1277 (2004) (“[O]n July 25, 2003, [Illinois] became the first state to enact a statute expressly making post-penetration rape a crime.”).

149. See, e.g., *Battle v. State*, 414 A.2d 1266, 1270 (Md. 1980) (“[I]f th[e] consent is withdrawn prior to the act of penetration, then it cannot be said that she has consented to sexual intercourse. On the other hand, ordinarily if she consents prior to penetration and withdraws consent following penetration, there is no rape.”).

150. 60 P.3d 183, 187 (Cal. 2003).

151. Palmer, *supra* note 148, at 1276.

152. *Id.*

153. *In re John Z*, 60 P.3d at 187.

154. Mary Huff, *The “New” Withdrawal of Consent Standard in Maryland Rape Law: A Year After Baby v. State*, MODERN AM., Fall 2009, at 14, 15 (vol. 5, no. 2), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1024&context=tma> (describing pace of legislative and judicial progress across the country); Molly Redden, ‘No Doesn’t Really Mean No’: North Carolina Law Means Women Can’t Revoke Consent for Sex, GUARDIAN (June 24, 2017, 7:00 AM EDT), <https://www.theguardian.com/us-news/>

North Carolina fails to recognize the validity of post-penetration consent revocation.¹⁵⁵

Admittedly, a boy leering at a girl's body in school after being told to stop differs significantly from a man continuing to have sex with a woman after being told to stop. But the myth justifying diminished culpability in both situations is similar: boys and men have primal urges to sexualize and have sex with girls and women, they biologically cannot be expected to resist these urges, and thus legally they will not be held fully responsible for their nonconsensual actions. This male-centric, hetero-normative accommodation is insulting to men and does incredible harm to women, and yet finds a home in school policies governing our children.

V. Conclusion

Stephanie Hughes, the Woodford High School student pictured at the beginning of this Article, missed hours of instruction waiting in the principal's office for her mother to leave work and bring clothing to cover her exposed collarbone.¹⁵⁶ Her mother gave her the scarf pictured below, which brought Stephanie into compliance with the school's dress code (see Figure 2).¹⁵⁷

However, the principal deemed the scarf "inappropriate" attire for school and sent Stephanie home for the rest of the day.¹⁵⁸ This episode led to widespread protests at the school, eventually culminating in the creation of a documentary by one of Stephanie's classmates entitled *Shame: A Documentary on School Dress Code*.¹⁵⁹ The outcry over Woodford High's policies, and the documentary itself, helped place greater pressure on public

2017/jun/24/north-carolina-rape-legal-loophole-consent-state-v-way (explaining that North Carolina law "prevented prosecutors from charging" rape in post-penetration withdrawal of consent cases and state senator Jeff Jackson failed in his efforts to introduce legislation to fix this "loophole").

155. Redden, *supra* note 154 (quoting Senator Jackson) ("North Carolina is the only state in the country where no doesn't really mean no. We have a clear ethical obligation to fix this obvious defect in our rape law.").

156. Lewis, *supra* note 1.

157. *Id.*

158. *Id.*

159. *Id.*

schools across the country to revisit existing dress code policies.¹⁶⁰ Yet the prevalence and problematic messaging of these modesty-based dress codes persist today.



Figure 2

This Article presents a descriptive parallel between these two worlds—the schoolhouse and the courthouse—and a normative reflection on the corrosive impacts of the messaging sent in each world when we obsess over the sexual nature of a woman’s clothing. It does not provide any empirical data, or even anecdotal proof, of a direct link between increasingly sexualized school dress codes and rape victim credibility discounts in criminal law. That research, to the extent it is possible to conduct, would represent a welcome and helpful next step in this discussion. Until then, these short remarks provide a useful lens through which to critically examine the continued desire to police but failure to protect girls’ and women’s bodies.

160. *Cf. id.* (describing public support for students’ proposed dress code).