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Editor's Introduction

Welcome to the Fifteenth Volume of *Journal of Law and Social Deviance* (*LSD Journal*), an independent, peer-reviewed journal. *LSD Journal* encourages submissions from a wide range of professionals, researchers, and scholars in a variety of fields. Within our broader interest in social deviance and the law, we are particularly interested in how law creates, inhibits, or challenges deviant behavior, especially as it evolves from, responds to, or inspires the animal kingdom, art, design, structure, pop culture, hate, religion, sex, illness, drugs, terrorism, and youth.

Volume Fifteen is about boundaries. These articles delineate effects of society, culture, and law with regard to insiders and outsiders. Age, sexuality, body shape, class, marital status, and mental health may be targeted to maintain greater protection for insiders than those outside the norm. Exceptions for diverse minds and physicalities are questioned in this volume, which seeks to protect minors, persons with mental illness, racial minorities, and students. Volume Fifteen draws solutions using traditional mentalities and *avant garde* ideologies. It confronts sexual exploitation of minors, student domestic violence, problems with felony murder, and xenophobic feminism. *LSD Journal* remains committed to publishing articles,

essays, and book reviews that strongly represent the journal's niche and offer readers important, substantive, and useful literature.

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Re: Submissions, Subscriptions, and Comments

Submissions for publication, whether articles, book reviews, essays, notes, or research, should be made electronically to Submission@LSD-Journal.net. All attachments must be Microsoft Word compatible. Please use Times New Roman 9 pt, single-spaced, superscripted footnotes, and use Times New Roman 12 pt, double-spaced text in the body. The editors will referee all submissions. Occasionally, outside expertise may be sought.

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THE "COSMO GIRL" INVADES MIDDLE SCHOOLS: GROOMING GIRLS FOR DISEASE AND DEPRESSION

Judith A. Reisman, Ph.D.[1];

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I. INTRODUCTION

Popular culture has largely displaced parents' guidance of youth's sexual behavior.[2] While parents typically had educated youth with factual information about the responsibilities and consequences of unmarried sexual activity, commercialized culture portrays sex as harmless fun, essential to being popular with your peers.[3]

[1] Judith A. Reisman, Ph.D., Research professor at Liberty University School of Law and Director of the Child Protection Institute; Mary E. McAlister, Esq. Senior Litigation Counsel for Liberty Counsel.
[2] *See* The 2012 Princeton Lectures on Youth, Church and Culture, PRINCETON THEOLOGICAL SEMINARY (2012), *available at* http://www.ptsem.edu/lectures/?action=tei&id=youth-2012-04.
[3] Dr. Leonard Sax, GIRLS ON THE EDGE: THE FOUR FACTORS DRIVING THE NEW CRISIS FOR GIRLS—SEXUAL IDENTITY, THE CYBERBUBBLE, OBSESSIONS, ENVIRONMENTAL TOXINS (2011); Dr. Leonard Sax, BOYS ADRIFT: THE FIVE FACTORS DRIVING THE GROWING EPIDEMIC OF UNMOTIVATED BOYS AND UNDERACHIEVING YOUNG MEN (2016).

Media presentations that glorify casual sex for preteen, teen, and young adult women proclaim to be empowering them, but in fact are prematurely sexualizing them and instilling a perspective of women as sex objects.[4] Foremost among the outlets pushing this cavalier attitude about sex onto young girls is *Cosmopolitan* magazine.[5]

Originally published as a literary magazine more than 100 years ago, under the management of Helen Gurley Brown (1965-1997), *Cosmopolitan*[6] ("*Cosmo*") became for women what *Playboy*[7] was for men. Brown was hired after the release of her book, *Sex and the Single Girl*, in 1963, which introduced young women to the idea of sex as recreation—untethered from love or procreation.[8] Just as Hugh Hefner unleashed the sexual revolution into the hearts and minds of Joe College

[4] *See* Sax, GIRLS ON THE EDGE; Dr. Elayne Bennett, DAUGHTERS IN DANGER: HELPING OUR GIRLS THRIVE IN TODAY'S CULTURE (2014).
[5] *See* Sax, GIRLS ON THE EDGE at 25.
[6] COSMOPOLITAN magazine, *available at* http://www.hearst.com/magazines/cosmopolitan.
[7] PLAYBOY, published by Playboy Enterprises, *available at* www.playboy.com.
[8] Sue Ellen Browder, SUBVERTED HOW I HELPED THE SEXUAL REVOLUTION HIJACK THE WOMEN'S MOVEMENT, 11 (2015).

with *Playboy* in December 1953,[9] Brown unleashed the sexual revolution into the minds and hearts of American women with her remake of *Cosmopolitan* in 1965.[10]

Those "sexual revolution[s]" were triggered by the fraudulent sexual "science" of Alfred Kinsey,[11] which both Hefner[12] and Brown[13] fully embraced. Kinsey's books, *Sexual Behavior in the Human Male* and *Sexual Behavior in the Human Female*, burst onto the scene in 1948 and 1953, respectively, amid a costly media frenzy that proclaimed a new era of sexual freedom without consequences.[14] Hefner, Brown, and hundreds of newspapers and magazines touted Kinsey as an objective, married "scientist."[15] However, forty years later, Kinsey's biographers revealed that, in fact, he was a bi/homosexual, sadomasochist, pedophilic,

[9] *See* Judith A. Reisman, "SOFT PORN" PLAYS HARDBALL, 24-46 (1991).
[10] *Id.* at 10-11.
[11] Alfred Kinsey, *et. al.*, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948); Alfred Kinsey, *et. al.*, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953).
[12] Reisman, "SOFT PORN" PLAYS HARDBALL, at 25.
[13] Helen Gurley Brown, SEX AND THE SINGLE GIRL, 68 (2003).
[14] *See*, Reisman, "SOFT PORN" PLAYS HARDBALL, at 36-37.
[15] Judith Reisman, SEXUAL SABOTAGE, 68 (2010).

pornography and masturbation addict.[16] What neither Hefner nor Brown acknowledged, although it was hidden in plain sight in Kinsey's books, was that Kinsey's "research" was based upon the sexual abuse of hundreds of infants and children.[17]

This abuse was documented in five detailed tables, listing subjects as young as two months old with records of the frequency of "orgasms" over various periods of time, including several 24-hour on-going tests.[18] Based upon this "data," Kinsey and his colleagues penned the mantra that "children are sexual from birth."[19] Coupled with Kinsey's claims that his interviews with 4,441 women found none harmed by sexual assault,[20] the "children are sexual from birth" meme became the rallying cry for fundamental transformation of society, echoed

[16] James H. Jones, ALFRED KINSEY: A PUBLIC PRIVATE LIFE 603-610 (1997); Jonathan Gathorne-Hardy, SEX, THE MEASURE OF ALL THINGS A LIFE OF ALFRED C. KINSEY, 87-88 (1998).
[17] Kinsey, SEXUAL BEHAVIOR IN THE HUMAN MALE, at 171-180, tables 30-35.
[18] *Id.*
[19] Judith Reisman, STOLEN HONOR, STOLEN INNOCENCE 136-39 (2013) (quoting Kinsey's co-author Paul Gebhard).
[20] *Id.* at 230.

by media, laws, and public policy.[21] Hefner and Brown led the media, becoming, in Hefner's words, "Kinsey's pamphleteer[s]."[22]

This Article focuses on Brown's public campaign, her pamphleteering activities, beginning with the birth of the "fun, fearless, female" known as the "*Cosmo* girl," and documents its dangerous, even deadly consequences for girls and young women. This Article then outlines how *Cosmo* has effectively used targeted marketing to lure tweens and teens (ages ten to seventeen) to the magazine, and its toxic consequences. Finally, the Article offers strategies for protecting tweens and teens from *Cosmo*'s toxic effects.

II. THE BIRTH OF THE COSMO GIRL

Notably, in the pre-Helen Gurley Brown days, *Cosmopolitan* was skeptical of Kinsey's claims.[23]

[21] *See generally id.* at 187-261.
[22] Reisman, SEXUAL SABOTAGE, at 162; Browder, SUBVERTED, at 13.
[23] Cristen Conger, *Cosmo to Kinsey: You're a Hack*, STUFF MOM NEVER TOLD YOU, January 19, 2011, *available at* http://www.stuffmomnevertoldyou.com/blog/cosmo-to-kinsey-youre-a-hack.

Cosmopolitan featured Kinsey's *Female* report on its cover in September 1953, but the review inside revealed that even *Cosmo* did not buy into the proclamation of harmless sexual freedom for women.[24] Social scientist Amram Scheinfeld attended a "sneak peek" of the *Female* volume for *Cosmo*, and was skeptical of its scientific bona fides:

> It boldly attacks many of our existing sex standards with blistering arguments plainly slanted against chastity and in favor of what used to be called free love. But for the most part, it is a technical treatise offering little that is startlingly new and much that is doubtful. It definitely does not measure up to the expectations of a shattering blast that was to upset all our sex thinking and change the whole pattern of our lives. [25]

Scheinfeld was also critical of the underlying assumptions apparent in the report:

> Kinsey's most biting comments are reserved for the 'frigid spinsters'

[24] *Id.*
[25] *Id.*, citing the *Cosmopolitan* story.

> who, not understanding what sex is, attempt to restrict the sex behavior of others. Referring to the more than a quarter of the unmarried older Kinsey females including many teachers, directors of youth organizations, club leaders, physicians, and political figures who never had climax, the report warns of the damage that may be done by such 'sexually unresponsive, frustrated females' in the 'guidance of our youth' and the dictation of public policies and legislation governing sex. An implication is that the better mentors of sex might be 'the other half to two-thirds' of the unmarried Kinsey females 'who did understand the significance of sex and were not living the blank or sexually frustrated lives which our culture, paradoxically, had expected them to live.'[26]

However, less than a decade later, *Cosmopolitan* hired Brown and joined the Kinsey club.[27] Brown promptly refashioned what had been a literary magazine into a no-holds-barred Kinseyan sexual adventure magazine for women, recognized as the

[26] I*d.*
[27] Browder, SUBVERTED, at 11.

hottest women's magazine in the country in the late 1960s and early 1970s.[28]

Key to its success was Brown's "*Cosmo* Girl," who she touted as a role model for young single women, a "persona that a single girl [would] turn herself into [to become] the object of men's sexual fantasies."[29] Like *Playboy, Cosmopolitan*'s writers were urged to fake "experts" to invent hot anecdotes about ordinary single women, which were then quoted as true-life stories to readers.[30] Young women believed and mimicked those tall tales, eager to become sexual adventurers "having sex like barnyard animals," all in the name of what Brown called true womanhood.[31] By 2009, *Cosmopolitan* had a readership of more than 100 million in more than 100 countries in 36 languages.[32]

Cosmopolitan not only exposes young girls to explicit sexual stimuli, discussed *infra*, but presents

[28] *Id.*, at 10.
[29] *Id.* at 37.
[30] *Id.* at 37-40.
[31] *Id.* at 44-45.
[32] *Id.* at 44.

what they present as factual information that is itself dangerously false, pushing sexual experimentation to the detriment of health and safety. For example, in the January 1988 issue, *Cosmopolitan* claimed sexually adventurous women had little reason to worry about contracting HIV.[33] The author asserted that unprotected sex with an HIV-positive man did not put women at risk of infection.[34] It also stated that "most heterosexuals are not at risk," and that it is impossible to transmit HIV in the missionary position.[35] The information was blatantly, dangerously false, lulling women into a false sense of security that they were not at risk of HIV if they had intercourse with HIV-positive men when medical research had not determined that to be the case.

[33] Jeff Cohen & Norman Solomon, *Cosmo's Deadly Advice to Women About AIDS*, SEATTLE TIMES, July 31, 1993, http://community.seattletimes.nwsource.com/archive/?date=19930731&slug=1713646.
[34] *Id.*
[35] *Id.*

III. THE *COSMO* GIRL LIFESTYLE IS MARKETED TO TWEENS AND TEENS

In keeping with Kinsey's mantra that children are "sexual from birth,"[36] *Cosmopolitan* began targeting and marketing to young girls, offering them the chance to be "fun, fearless, females."[37] From 1999 to 2008, tweens and teens were awarded their own version of *Cosmopolitan* called *CosmoGirl!*[38] While not as obviously salacious as *Cosmopolitan*, it nevertheless groomed minors to be "fun and fearless" females ready for sexual adventures, as documented by child development experts writing about the dangers of early sexualization.[39] For example, at an eight year-old's birthday party, a mother overheard the girls talking

[36] Judith Reisman, STOLEN HONOR, STOLEN INNOCENCE 136-39 (quoting Kinsey co-author Paul Gebhard).
[37] "Fun fearless females" is COSMOPOLITAN's slogan and the name that the magazine has given to annual awards it gives to women it believes exemplifies the slogan. *See,* http://www.hearst.com/magazines/cosmopolitan.
[38] Nat Ives, *Hearst Closes CosmoGirl,* ADVERTISING AGE, October 10, 2008 http://adage.com/article/media/hearst-closes-cosmogirl/131628/.
[39] Diane E. Levin, Ph.D & Jean Kilbourne, Ed.D., SO SEXY SO SOON, THE NEW SEXUALIZED CHILDHOOD AND WHAT PARENTS CAN DO TO PROTECT THEIR KIDS, 25 (2008).

about how boys liked a girl wearing a midriff-bearing top that most girls are not allowed to wear.

> [One girl] boasted 'that she had seen a copy of the magazine *CosmoGIRL!* at her teenage cousin's house. It showed really skinny models wearing really short, bellybutton shirts that were '*soooo* cool.' There was even an article on dieting. This led Tessa [the eight year-old birthday girl] to pipe up, proudly announcing that she was on a diet and that she was going to be really skinny. The other girls said they were going to go on diets too.[40]

CosmoGirl! ceased publication in 2008—its content was absorbed by *Seventeen*[41]—but the "*Cosmo* Girl" seduction of tweens and teens continues as sex-centric *Cosmopolitan* targets youngsters. When announcing that it was ceasing publication of *CosmoGirl!*, the publisher stated explicitly that she expected teens would gravitate to

[40] *Id.*
[41] Ives, *Hearst Closes CosmoGirl.*

Cosmopolitan.[42] "Teenagers, she said, are either going to the Web, or 'they're turning toward books that are not so teen-oriented, so they'll turn to a *Cosmopolitan* or a *Glamour* or a *Vogue*.'"[43]

What do tweens and teens see when they view *Cosmopolitan*? Covers featuring favorite Disney, film, and television stars juxtaposed with "*21 Mind Blowing Sex Moves*," "*Best Sex Ever*," "*23 Sweet & Sexy Moves Orgasm Guaranteed*," and "*63 Secrets to Better Orgasm*:"

> This ***Cosmopolitan*** headline slapped me in the face as I stood innocently in line at Food Lion….Are things now really so ridiculous?...But this headline is so wrong on so many levels….
>
> First, how freaking inappropriate is this? (Yes, I catch the irony that I am also talking about it.) Isn't this a personal topic? Pity the poor parent who must answer their child who wants to know why there are '63 secrets to better organisms.' Does

[42] Stephanie Clifford, *Hearst to Close CosmoGirl*, NEW YORK TIMES, October 10, 2008, B2, *available at* http://www.nytimes.com/2008/10/11/business/media/11cosmo.html.
[43] *Id.*

one correct the child? ‘No, sweetie, that’s ‘orgasm,’ not ‘organism.’’ Certainly children deserve the truth on healthy bodily functions. But really, is the checkout line at the grocery store the place to discuss it?

The media have already dumped a mountain of garbage on young girls. They must be pretty, stylish and SKINNY. Do they really need to grow up wondering if their orgasm is as good as it could be? Do any of us? Who grades them? Do we teach for the test?

If you feel the need to explore this issue, as an adult, seek a professional. Just don’t give females another reason to question themselves or be competitive. ‘My orgasm is better than yours!’ ‘Is not!’ ‘Is too! Na na na na na!’

And just what does this lovely headline say about our society? While women all over the world work tirelessly just to survive, we are so privileged we get to worry about the quality of our orgasms?! Forget starvation, death and destruction, let’s go for multiple orgasms, baby!…

> Is there a trophy for the woman who sees the most fireworks and hears trumpets blaring and would swear the earth moved? Why does anyone need a better orgasm? What's wrong with the ones you have now? Who the heck came up with 63 ways to improve it? Doesn't that seem like an awfully large number? (No, I will not buy the magazine to find out.)
>
> Don't misunderstand me. Everyone is entitled to enjoy sex. (That is if you are married and your sexual partner is your spouse.) I'm sure Adam and Eve enjoyed some fun romping around the Garden of Eden. And we may presume their sons and their wives…oops. Never mind. Anyway, sex is normal and there is nothing sinful about orgasms. It's the 63 ways to a better one that has me tickled and miffed.[44]

In other words, rather than encouraging young girls to seek empowerment through education, vocation, and social justice, *Cosmopolitan* is encouraging them to seek empowerment through sexual prowess

[44] Carol Bradfield, *Orgasms in the Checkout Line*, Davidsonnews.net, March 16, 2015, *available at* http://corneliusnews.net/blog/2015/03/16/orgasms-in-the-checkout-line.

and experimentation. This is hardly the kind of empowerment that the founders of the feminism movement were seeking.[45]

As parents and child development experts have documented, tweens and teens, who see these teasers in the checkout line, not only pick up the magazine to "read all about it," but they turn to *Cosmopolitan*, not their parents, as a trusted resource to answer questions about sexuality.[46]

> A 13-year-old girl, "Lizzie, was lying on her bed reading *Cosmopolitan*. She was learning about how to give a great blow job. Her best friend, Rachel, had gone to a party on Saturday night and told Lizzie all about it. The most popular girl in their class had gone down on three of the football players. Lizzie thought it sounded gross, but Rachel said it was cool. Lizzie didn't think she'd know how to do it and she didn't want to ask Rachel, but she'd found the answer in *Cosmo*. It did sound gross, though.[47]

[45] Browder, SUBVERTED, at 59-80.
[46] Levin, SO SEXY SO SOON, at 139.
[47] *Id.*

What other advice do tweens and teens receive from *Cosmopolitan?* The May 2013 print edition, featuring CW "Hart of Dixie" star, Rachel Bilson, on the cover with teasers such as "23 Sweet and Sexy Moves Orgasm Guaranteed" and "Stuff You Think He Wants in Bed but Really Doesn't," offered children the following information:

- *Break out of the Orgasm Rut*
- *What Finally Did It for Me: Six Women Share the Moves That 'Got Their Toes to Curl'*
- *When You Want More Sex Than He Does*
- A feature story on a male-to-female transgender rock star and his life with his biologically female wife and their biological daughter.

In the August 2013 edition, with Disney star and X Factor judge Demi Lovato on the cover with teasers including, "Best Sex Ever: 42 New Tips," tweens and teens learned:

- "I want to try anal sex, but I'm scared. Be honest…will it hurt?" featuring two wooden males and female dolls explicitly posed with one partner bent over at the waist. *Cosmopolitan* recommended using

good silicone lube and working up to it; but, informed readers that "You may just have a back door that you prefer not to use for guests."
- Tips on how to talk dirty; what to do long distance, such as watching each other "do their thing" on Skype; bath sex; and vibrating undies.

In the September 2013 edition, with CW "Vampire Diaries" star, Nina Dobrew, on the cover and the teaser "21 Mind Blowing Sex Moves, Crazy Sex Obsessions," tweens and teens also learned:

- "Your Passport to Hotter Sex," starring a nude male covered by an ill-placed globe; and another picture with a strategically placed beer stein amid a list of "naughty" foreign phrases
- "Sex Abroad Confessions" and "Kinkiest Trends around the World"

They also learned the answers to the following questions from their fellow tweens and teens:

- What positions will make my boyfriend's smallish penis feel larger?
- Why does my boyfriend sometimes lose his erection during sex?

- Sex with my boyfriend has become meh. How can I talk to him about improving it?

Cosmo's answer? Cosmo's Kinky Sex.

In the April 2015 edition, with former Disney star Hillary Duff ("Lizzy McGuire") on the cover with the teasers, "63 Secrets to Better Orgasms, Go over the Edge," & "I Like High-End Sex Parties, and I'm Not a Weirdo," tween and teens were taught:

- All about sex positions that can be used despite lack of energy, including explicit illustrations. At the bottom of the page is a story about the rise in anal and colon cancers among young people, attributing it to obesity, poor diet, and inactivity. The lifestyle magazine deliberately hid the fact that anal sex, HPV, or other sexually transmitted diseases (STDs) may result from sexual experimentation.
- Excerpts, "Cosmo Kama Sutra the Sex Deck: 99 Sex Positions That'll Blow Your Mind" and "69 Shades of Cosmo Kinky Sex Games Edition," which includes a bondage-discipline-sadomasochism (BDSM) cord, teased with "Why Settle for 50 When

> You Can Get 69 Shades of COSMO!"

In addition, tweens and teens viewing the online version on April 7, 2015 saw the article, "10 Disney Songs to Have Sex to, Reviewed," which recounted one incident involving "Colors of the Wind" (from *Pocahontas*). '"This is so messed up,' he mumbled. 'Can we at least have butt sex?' 'No.' 'Can you go down on me?' 'OK, yeah.' Conclusion: Unless you have a Disney fetish, not recommended, would not do again. If anyone has suggestions for nice things to do for boyfriends, hit me up."[48]

Tweens and teens, who follow *Cosmopolitan* on Facebook and Twitter, receive regular, similar seduction lines throughout the day, in school, on the bus, and even on their portable devices. A recent example is a tweet that directs viewers to a story about a "great new feature" from Porn Hub that "finally" permits them to use animated "emojis" to

[48] Jenny Brett, *10 Disney Songs to Have Sex to, Reviewed,* COSMOPOLITAN.COM April 7, 2015, *available at* http://www.cosmopolitan.com/sex-love/news/a38776/disney-songs-to-have-sex-to-reviewed/.

order pornography.[49] Considering the appeal of these animated images, as with other cartoon figures, to children, the new feature is likely to attract a lot of attention in the middle school and high school hallways.[50]

What happens to the tweens and teens who pick up *Cosmopolitan* or click on the tweets to follow the story? As described in the next section, they do not enter into a sexual utopia.

IV. THE *COSMO* GIRL LIFESTYLE HAS DESTRUCTIVE AND DEADLY CONSEQUENCES FOR TWEENS AND TEENS

Contrary to the messages portrayed in the onslaught of information provided to tweens and teens, the *Cosmo* Girl lifestyle is not the freeing

[49] Lane Moore, *Now You Can Finally Use Emojis To Order Porn, The Future is Now*, COSMOPOLITAN.COM April 20, 2016, *available at* http://www.cosmopolitan.com/sex-love/news/a57180/pornhub-emoji-order/.

[50] In fact, courts have recognized the power of cartoon images by finding that cartoons can be included in the definition of obscene material in federal law, including the PROTECT Act. *See* Carmen M. Cusack, *Busting Patriarchal Booby Traps: Why Feminists Fear Minor Distinctions in Child Porn Cases, An Analysis of Social Deviance within Gender, Family, or the Home (Etudes 4)*, 39 S. U. L. REV. 43, 52-53 (2011).

sexual adventure paradise that they portray. This is particularly true for children; they are still physically, mentally, and emotionally immature; and traumatically process sexually explicit messages.[51] For its child consumers, *Cosmo*'s emphasis on frequent recreational sex is anything but harmless fun.

A. Traumatic sexual images and activity endanger physical and mental health

Pediatrician Meg Meeker documents the devastating consequences that the *Cosmo* Girl lifestyle has had on a whole generation of young women.[52] In 2002, she reported startling statistics regarding tweens and teens and sexually transmitted diseases:

[51] Sarah Spink, The Teenage Brain Is aWork in Progress, Interview with Dr. Jay Giedd Frontline: Inside the Teenage Brain, Boston, WGBH January 31, 2002, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html.

[52] Meg Meeker, M.D., EPIDEMIC: HOW TEEN SEX IS KILLING OUR KIDS, 11-13 (2002).

- Two to four million teenagers have STDs, with many having more than one[53]
- Teenagers account for 25 percent of newly reported STD infections[54]
- Nearly 50 percent of African-American teens have genital herpes[55]
- One in ten teenage girls has chlamydia, with one-half of all new cases occurring in girls from 15 to 19years old[56]
- One in five children over the age of 12 tests positive for herpes type two
- 50 percent of ninth to 12th graders have had sexual intercourse, with many more having engaged in oral or anal sodomy or mutual masturbation, which they do not regard as "having sex."[57]

The Centers for Disease Control and Prevention (CDC) has released its data for 2014, which is even more startling. CDC reports 1.4 million cases of chlamydia in 2014, the highest number of annual

[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*

cases of any condition ever reported to the CDC.[58] The highest rates of infection from chlamydia and other STDs are young women from ages 15 to 24 (i.e., the target audience for *Cosmo*).[59]

- In 2014, there were 948,102 reported cases of chlamydial infection among persons 15 to 24 years old, representing 66 percent of all reported chlamydia cases.
- In 2014, women from 20 to 24 years old had the highest rate of chlamydia (3,651.1 cases per 100,000 females) compared with any other age and sex group.
- In 2014, women ages 15 to 19 years old had the second highest rate of gonorrhea (430.5 cases per 100,000 females), compared with other females.
- In 2014, women ages 20 to 24 years old had the highest rate of gonorrhea (533.7 cases per 100,000 females), compared with any other age or sex group.

[58] National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention, Centers for Disease Control and Prevention, CDC FACT SHEET *Reported STDs in the United States 2014 National Data for Chlamydia, Gonorrhea, and Syphilis*, 1 (November 2015).
[59] Centers for Disease Control and Prevention. *Sexually Transmitted Disease Surveillance 2014*. U.S. Department of Health and Human Services (November 2015), *available at* http://www.cdc.gov/std/stats.

- The rate of reported primary and secondary syphilis cases among women ages 15 to 19 years old increased from 2013 to 2014 by 31.6 percent, to two and one-half cases per 100,000 females.
- In 2014, women ages 20 to 24 years old had the highest rate of primary and secondary syphilis (four and one-half cases per 100,000 females), compared with other female age groups during the 2013–2014 period, and the rate for women in this age group increased 15.4 percent.

In the 1960s, there were two known STDs, gonorrhea and syphilis, and they were commonly curable with penicillin.[60] Today, there are as many as 80 to 100 types of STDs, many incurable and some with therapies that are much more complex than a shot of penicillin.[61] In many cases, STDs go undetected for years and lead to pelvic inflammatory disease, which can require a radical hysterectomy or cause death.[62] Human papilloma virus (HPV) has gone from being rare in the 1980s

[60] Meeker, at 11-13, 32.
[61] *Id*.
[62] *Id.* at 32, 51-61.

to, as of 2002, becoming the most prevalent STD, affecting at least 20 million people.[63] HPV is a leading cause of cervical cancer, which in a 20-year period, has gone from being a disease primarily affecting post-menopausal women, to one that is most prevalent in young women under 25 years old.[64] HPV can also cause vaginal, vulvar, uterine, and penile cancers.[65] Because many children have been encouraged to engage in oral and anal sex to avoid getting pregnant, HPV also now causes anal cancer, and cancers in the throat, head, and neck.[66]

Dr. Meeker states that young women are at greater risk of developing cancer from HPV infections than are older women, due to the relative immaturity of their immune systems.[67] Also, tween and teen bodies are more susceptible to infections due to their immaturity.[68] In particular, teen vaginas contain mucosae that hold a virus more than older

[63] *Id.* at 32.
[64] *Id.*
[65] *Id.* at 32-33.
[66] Meeker, at 37.
[67] *Id.* at 34-37.
[68] *Id.*

women.[69] The child's immature cervical cells are, therefore, more receptive to viral infections.[70] A young girl's cervix develops slowly and differs physiologically from the mature women's cervix. Thus, young girls are more susceptible to STDs.[71] A girl's cervix is attractive to viruses, bacteria, and other pathogens, which results in a higher risk for pelvic inflammatory diseases than experienced by adult women.[72]

The physical ravages of STDs are not the only consequences of early experimental sex. Dr. Meeker calls the alarming increase in teen depression and suicides "[e]motional STDs," likely more devastating than HPV, chlamydia, or other STDs.[73] Her years of treating youth have shown that early sexual activity creates trauma, emotional turmoil, and psychological distress during a developmental stage when minors are already experiencing intense

[69] *Id.*
[70] *Id.*
[71] Meeker, at 175-76.
[72] *Id.*
[73] *Id.* at 63-73.

and confusing emotions and hormonal changes.[74] Over one-third of the adolescent population has thought about killing themselves.[75] One in eight teenagers is clinically depressed.[76] The rate of suicide increased 200 percent between 1992 and 2002.[77] "Sexual freedom causes most [teenagers] tremendous pain."[78]

Dr. Meeker's observations are supported by the brain sciences, which have tracked the development of the human brain from infancy to adulthood. National Institute of Mental Health neuroscientist Dr. Jay Giedd has studied the development of the adolescent brain using magnetic resonance imaging for more than 20 years.[79] These decades of imaging work have led to "remarkable insight and a more than a few surprises."[80] Among the insights are revelations that the portion of the brain that controls

[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] Meeker.
[78] *Id.* at 65.
[79] National Institute of Mental Health, National Institutes of Health, *Development of the Young Brain*, May 2, 2011, *available at* http://www.nimh.nih.gov/news/media/2011/giedd.shtml.
[80] *Id.*

risk-taking, curbs inhibitions, and permits the processing of complex emotions does not fully develop until the early 20s.[81] Until a young person is about 25 years old, he or she is subject to "continuous neurological developments[,] increased preferences for risky behavior[,] and novelty seeking," which promotes the development of addictive behaviors, be it nicotine, alcohol, drugs or sex.[82] Dr. Giedd explains:

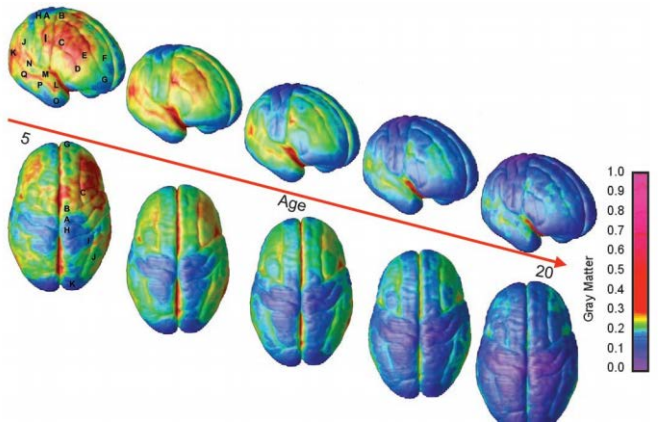
> At different ages of life[,] certain parts of the brain have much more dynamic growth than at other times….[V]ery early in life[,] we have our five senses where our visual system and audio system [are] getting established and optimized for the world around us. In adolescents, the key changes are in the frontal part of the brain involved in controlling our impulses, long range planning, judgment, [and] decision making.

[81] Mary Beckman, *Crime, Culpability, and the Adolescent Brain*, 305 SCIENCE 596 (July 30, 2004).
[82] Sarah Spink, The Teenage Brain Is a Work in Progress, Interview with Dr. Jay Giedd Frontline: Inside the Teenage Brain, Boston, WGBH January 31, 2002, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html.

> The most surprising thing has been how much the teen brain is changing. By age six, the brain is already 95 percent of its adult size. But the gray matter, or thinking part of the brain, continues to thicken throughout childhood….[T]his process of thickening of the gray matter peaks at about age 11 in girls and age 12 in boys, roughly about the same time as puberty.
>
> [A]nother part of the brain--the cerebellum, in the back of the brain--is not very genetically controlled….is very susceptible to the environment….[I]nterestingly, it's a part of the brain that changes most during the teen years. This part of the brain has not finished growing well into the early 20s, even.[83]

[83] Sarah Spink, The Teenage Brain Is a Work in Progress, Interview with Dr. Jay Giedd Frontline: Inside the Teenage Brain, Boston, WGBH January 31,2002, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html.

The maturation of the brain from ages five to 20 is seen below in images taken from Dr. Jay Giedd's MRI studies of adolescent brain development.[84]



Consequently, prior to their early 20s, young people, and even adults, are unable to process sexual stimuli received while reading or viewing sexually explicit words and images, let alone the emotions accompanying sexual activity.[85] For this

[84] Nitin Gogtay, et. al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROCEEDINGS OF THE NAT'L ACADEMY OF SCIENCES 8174, fig. 3 (May 25, 2004).
[85] Sarah Spink, The Teenage Brain Is a Work in Progress, Interview with Dr. Jay Giedd Frontline: Inside the Teenage Brain, Boston, WGBH January 31,2002, *available at*

reason, sexually explicit images and language were illegal in the United States until the late 1950s.[86] The human brain, especially the immaturely or undeveloped brain, is traumatized, overwhelmed by the imagery, causing long-term damage to mental and emotional development.[87] As Dr. Meeker found, if the teens act on what they read and find that it does not lead to the kind of freedom and joy promised, then the trauma is increased and can lead to Post Traumatic Stress Disorder (PTSD) as well as depression and suicidal ideation.[88]

B. What They Don't Know Can Hurt or Kill Them

Even more dangerous than what is contained in the *Cosmo* girl message to children (i.e., tweens and teens) is what is omitted. As discussed above, in the January 1988 *Cosmo*, girls were falsely told that they could not get HIV from the old-fashioned

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http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html.

[86] Judith Reisman, STOLEN HONOR, STOLEN INNOCENCE, 2013.

[87] *Id.*

[88] Meeker, at 68-78. *See* Carmen M. Cusack, PORNOGRAPHY AND THE CRIMINAL JUSTICE SYSTEM (2014).

missionary position for heterosexual sex, even if they did not use a condom.[89] From that time to the present, *Cosmo* girls have been told that if they insist that their male sexual partners use condoms, then they will be protected from STDs during their sexual adventures.[90] However, as with the HIV tall-tales, these representations are dangerously false.

First, our analysis found that no condom has ever been Food and Drug Administration (FDA)-approved for anything other than vaginal sex.[91] Therefore, the years of talking about "safe sex," and of anal sex being a good alternative since it will not lead to pregnancy, has lured unsuspecting young girls and boys into sodomy that, as discussed *supra*,

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[89] Jeff Cohen & Norman Solomon, *Cosmo's Deadly Advice To Women About Aids*, SEATTLE TIMES, July 31, 1993, http://community.seattletimes.nwsource.com/archive/?date=19930731&slug=1713646.

[90] *See e.g.*, Paisley Gilmour, *How to Put a Condom on the "Right" Way*, COSMOPOLITAN.COM, August 8, 2017, *available at* http://www.cosmopolitan.com/uk/love-sex/sex/a11647453/how-to-put-a-condom-on/; Paisley Gilmour, *9 Common Condom Mistakes You're Probably Making*, COSMOPOLITAN.COM, July 22, 2017, *available at* http://www.cosmopolitan.com/uk/love-sex/sex/a10333593/condom-mistakes-youre-probably-making/.

[91] Judith Reisman, *Condoms Never FDA Approved for Sodomy*, WND March 14, 2014, *available at* http://www.wnd.com/2014/03/condoms-never-fda-approved-for-sodomy/#hfIEk05xkbZStU9d.99.

has resulted in epidemic oral and rectal STDs among adolescents and young adults.[92]

Second, even with vaginal intercourse, condoms are not effective against many STDs.[93] Condoms have been shown to reduce the risk of sexually transmitted HIV infections in men and women.[94] Studies regarding condom use and gonorrhea reviewed by the National Institutes of Health showed a reduction in infection in men of up to 87 percent with inconclusive results for women.[95] Other studies showed a reduction of only about 50 percent for both men and women.[96] However, these figures are applicable only if condoms are used properly 100 percent of the time, which is not realistic, particularly for teens.[97] A study of teens

[92] Meeker, at 61.
[93] National Institute of Allergy and Infectious Diseases, National Institutes of Health, Department of Health and Human Services, *Workshop Summary: Scientific Evidence on Condom Effectiveness for Sexually Transmitted Disease (STD) Prevention*, July 20, 2001, *available at* https://chastityproject.com/wp/wp-content/uploads/2013/05/NIH-Condom-Report.pdf
[94] Meeker, at 105-06.
[95] *Id.*
[96] *Id.*
[97] Larry K. Brown, et. al, *Condom Use Among High-Risk Adolescents: Anticipation of Partner Disapproval and Less Pleasure*

and condom use found that nearly two-thirds of adolescents did not use condoms at the time of last intercourse and adolescents reported a mean of 15.5 unprotected intercourse occasions in the past 90 days.[98] The reasons given included the perception that condoms reduce sexual pleasure; perception that partners will not approve of condom use; and less discussion with partners about condoms.[99]

Third, there appear to be no publicized, controlled condom tests using girls and boys (i.e., minors)—since such experimentation would be ethically prohibited. There is insufficient evidence regarding whether condoms are effective in preventing other STDs,[100] although the epidemic rates of infection strongly suggest either failure of condoms or nonuse.[101] This is particularly troubling because some STDs, including HPV and herpes, are transmitted from one person to another through skin contact, not merely through transmission of bodily

Associated with Not Using Condoms, 123 PUB. HEALTH REPORTS 601-607 (September/October 2008).
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*

fluids.[102] Therefore, wearing a condom may only avoid transmission from contact with some bodily fluids and the skin of the genitals.[103] However, if tweens and teens engage in oral sex or mutual masturbation, then there is no protection from certain STDs, confirmed by the skyrocketing rates of HPV, herpes infections, and cancers in the throat and mouth.[104] These statistics have never been reported in mainstream news outlets, let alone in sodomy promotions such as *Cosmo*, which leave *Cosmo* Girls of all ages at risk. However, the risk is greater for tweens and teens, who are more likely to engage in "safe" risky behavior and more likely to engage in non-vaginal intercourse because of pleas from partners for sexual contact and also fear of pregnancy.[105]

Fourth, a danger posed by many of the activities promoted by *Cosmo* is leaving youth prey for sexual predators. The Federal Bureau of Investigation (FBI) and other law enforcement agencies

[102] Meeker at 105-112.
[103] *Id.*
[104] *Id.*
[105] *Id.* at 143-60.

determined that predators engage in grooming of their victims by introducing them to various types of contacts and lowering their inhibitions until they are primed for sexual assault.[106] Many of the predators use social media to pose as desirable young men, lure the girls, and then force them to engage in acts via video conferencing or Skype.[107] If tweens and teens have already read in *Cosmo* about using social media to have long-distance sex with boyfriends, then they are already on the fast track to victimization via grooming.[108]

V. *COSMO* USES ALCOHOL, TOBACCO, AND JUNK FOOD STRATEGIES TO MARKET SEX TO CHILDREN

Cosmopolitan's use of celebrities from Disney and other media outlets frequented by tweens and

[106] Ken Lanning, FBI, "Child Molesters: A Behavioral Analysis," The Office of Juvenile Justice and Delinquency Prevention, at 26-28 (2010), *available at* http://www.missingkids.com/en_US/publications/NC70.pdf.
[107] Angela Hatcher, *Navy Fighter Pilot Accused of Online Sex Crimes with Bedford Co. Girl Now Faces Federal Charges*, WSET-TV April 30, 2014, *available at* http://www.wset.com/story/25395727/navy-fighter-pilot-accused-of-online-sex-crimes-with-bedford-co-girl-now-faces-federal-charges.
[108] CUSACK (2014).

teens, along with emojis and cartoons (described *infra*), echoes the marketing and advertising strategies of other industries to lure tweens and teens to their products. Manufacturers of junk food, alcohol, tobacco, and others have used child-centric advertising for years, in some cases so blatantly that it led to the banning of their advertisements from certain media frequented by children.[109] While "mainstream" pornography such as *Playboy*, *Penthouse*, and *Hustler* have been removed from the sight of children and their sale restricted to those over 18 years old,[110] *Cosmopolitan* can be purchased by all ages at the checkout stands, despite having content that rivals *Playboy*.

For many years, marketers claimed that they did not target children because all of our customers are

[109] William A. Ramsey, *Rethinking Regulation of Advertising Aimed at Children*, 58 FED. COMM. L.J. 361 (2006)

[110] Some of these restrictions were put in place after the release of Dr. Judith Reisman's report, *Images of Children, Crime & Violence in Playboy, Penthouse & Hustler*, U.S. Department of Justice, Juvenile Justice and Delinquency Prevention, Grant No. 84-JN-AX-K007, 1989, *available at* www.drjudithreisman.com/archives/2013/05/images_of_child_2.html.

adults.[111] However, researchers have dispelled that myth and shown that, in fact, children are increasingly the target of marketing efforts because **"**the firm must have a secret source of new customers only it knows about."[112] In the late 1990s, children influenced about $187 billion of the $932 billion in sales of consumer products, and their influence was climbing at a rate of 15 percent per year.[113] The 2004 Harris Interactive/Kid Power Poll of Youth Marketers revealed that professionals, who work in youth-related fields, believe it is appropriate to begin marketing to children at age seven.[114] That is more than two years before the professionals believe that most young people can view advertising critically (average age nine), or can effectively separate fantasy from reality in

[111] James U. McNeal, Ph.D., THE KIDS MARKET: MYTHS AND REALITIES, 99 (1999).
[112] *Id.*
[113] *Id.* at 93-94.
[114] PR Newswire, *Youth Marketers Feel It Is Appropriate to Begin Marketing to Kids at Age Seven* , April 20, 2004, *available at* http://www.prnewswire.com/news-releases/youth-marketers-feel-it-is-appropriate-to-begin-marketing-to-kids-at-age-seven-72559802.html.

media and advertising (average age nine).[115] Youth marketers believe it is appropriate to target marketing to children almost five years before most young people can allegedly make intelligent choices as consumers (average age 11.7).[116] This poll shows that youth marketers are pressured by a sense of urgency to reach kids early so that brands will be familiar to them when they do reach an age where they make or influence purchase decisions, said John Geraci, Vice President of Youth Research at Harris Interactive.[117]

The youth-directed marketing includes not only direct advertising, but also indirect marketing in the form of celebrity endorsements and stories, cartoons, and young models. This is particularly true for alcohol, tobacco, and pornography, which cannot be sold or directly advertised to children, but which is stealthily marketed by cartoon characters in advertisements.[118] Indeed, many companies

[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] William A. Ramsey, *Rethinking Regulation of Advertising Aimed at Children*, 58 FED. COMM. L.J. 361 (2006)

currently use characters from popular children's television in their ads.[119] This widespread use of these characters in advertising indicates that companies realize the persuasive effect that these characters have over children.[120] Studies also show that the use of cartoon characters or celebrities increases commercials' influence over children.[121] Children recognize and retain images of cartoon characters—even those that do not appear in children's shows—used in advertisements.[122] A 1996 study revealed that nine- and ten-year-olds could identify the Budweiser frogs nearly as often as they were able to identify Bugs Bunny.[123] This fact is even more significant when one considers that these frogs do not even appear in commercials aimed at children. Thus, at least in theory, children should not have significant exposure to these commercials. Similarly, a 1991 study showed that as many six-year-olds could identify Joe Camel, the

[119] *Id.* at 387.
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.* at 387.

cartoon camel formerly used by Camel cigarettes, as could identify the Disney Channel logo.[124] Considering the evidence of the influence that cartoons and celebrities hold over children, several British broadcasters have banned such advertising in food commercials aimed at children to fight that country's problem with childhood obesity.[125]

Cartoons have a pull beyond commercials, often drawing children into stealth content not meant for them. [C]hildren who view television without parental supervision may view significant amounts of television not aimed at them. Cartoons such as Fox's 'The Family Guy,' Comedy Central's 'South Park,' or cartoons that are part of The Cartoon Network's 'Adult Swim,' are not aimed at children. However, children may simply come across these shows and watch them because they are cartoons.[126]

Likewise, tweens and teens, who pick up *Cosmo*, will come across cartoons such as the "9 Hilarious, Completely Spot-on Feminist Sex

[124] *Id.*
[125] *Id.* at 386-87.
[126] *Id.* at 379.

Positions,"[127] and be attracted to them because they are cartoons.[128] Children picking up a copy at the newsstand or seeing it on the computer screen would be attracted to the colorful graphics. Moreover, at *Cosmo*'s explicit urging, they will want to try what is presented as fun, fearless, and empowering.[129] Unfortunately, as described *supra*, what they will find instead is a life-threatening infection, infertility, or an early death.[130] Scores of scientific studies confirm the obvious, that cartoons and celebrities attract and seduce children's attention, and thus, their brains, minds, memories, and behaviors. Children affectionately embrace the cartoons that adults put in their way, from Mickey Mouse to Joe Camel and the *Playboy* bunny. As one

[127] Liz Miele, *9 Hilarious, Completely Spot-on Feminist Sex Positions Click through to See How You Can Be a Boss in the Bedroom. Get it Girl*, COSMOPOLITAN.COM, April 15, 2015, *available at* http://www.cosmopolitan.com/sex-love/positions/news/g4712/feminist-sex-positions/
[128] Ramsey, at 379.
[129] *Id.* Note the subhead encourages viewers to click through and "get it girl."
[130] Meeker, at 32, 51-61 *See also*, Michelle Cretella, M.D., *Why Cosmopolitan, Youth, and Sexual Health Don't Mix*, BREITBART.COM, April 18, 2015, *available at* http://www.breitbart.com/big-journalism/2015/04/18/why-cosmopolitan-youth-and-sexual-health-dont-mix/.

British commentator remarked on the *Playboy* invasion of the toddler market, "[R]aunch culture and its bed partner, a sexualised consumerism [are] apparently determined to turn tots into spendthrift tarts…[H]ow many *Playboy* pencil cases; pole dancing classes[;] and push-up bras does a girl, small, medium or large, actually need?"[131] *Cosmopolitan* is perpetuating this phenomenon with its Disney star cover models, cartoons, and countless ads selling multiple name brands of sexy make-up, perfumes, shampoos, hair dyes, clothing, nail polish, shoes, stockings, bras and panties, and creams and lotions amid stories about celebrities, orgasms, and orgies.

[131] Yvonne Roberts, *Raunch-elegy on a G-string?*, THE GUARDIAN, June 22, 2006, *available at* http://www.guardian.co.uk/commentisfree/2006/jun/22/raunchelegyonagstring.

VI. SOCIETY ACTED TO PROTECT CHILDREN FROM DANGEROUS, ADDICTIVE MATERIALS AND SHOULD DO SO AGAIN WITH *COSMO*

Society has frequently acted to protect children from the dangerous effects of toxic substances, including tobacco and alcohol that have been consciously or intuitively marketed to such children.[132] This has been extended to unhealthy foods such as sugary sodas and cereals with some governments calling for bans of advertisements or placement of such unhealthy products in ways or places that are attractive to children.[133] Similar action should be taken to protect children, tweens and teens from toxic, early exposure to the sexually explicit messages and images in *Cosmo*.

In 2000, a one-year study of 700 12- and 13-year-olds found that decades of nicotine addiction

[132] *See, e.g.*, U.S. Department of Health and Human Services, Be Tobacco Free, *available at* http://betobaccofree.hhs.gov/campaigns/.
[133] Jon Leibowitz, *Childhood Obesity and the Obligations of Food Marketers or Whether or Not You Are Part of the Problem, You Need to Be Part of the Solution*, FTC– HHS Forum on Childhood Obesity "Weighing in: A Check-Up on Marketing, Self-Regulation & Childhood Obesity," July 18, 2007, *available at* http://www.ftc.gov/speeches/leibowitz/070718Child_Obesity_Speech.pdf.

could begin within days of inhaling a first cigarette.[134] The study director, Dr. Joseph R. DiFranza, reported that children, who start that young, "have an extremely hard time quitting compared to 18-year-olds" for there is "no safe level of use with tobacco," even if use starts at an older age.[135] "You're never old enough to smoke."[136] Nicotine exposure "can modify crucial brain development during the teen years."[137] Such modification occurs "particularly in areas like decision-making abilities."[138] Based on these studies, federal regulators significantly curtailed cigarette advertising and instituted widespread campaigns to stop smoking, and in particular, to

[134] Dulcie Leimbach, *For Teenagers, a Tweak on 'Just Say No.'* NY TIMES, June 20, 2005, *available at* http://www.nytimes.com/2005/06/20/health/menshealth/20leimbach.html?_r=1&pagewanted=print&oref=slogin. *See also* https://www.nicotinedependenceclinic.com/English/teach/SiteAssets/Pages/Smoking-Fact-Sheets2/Adolescent%20Brain%20Development%20and%20Smoking%20Fact%20Sheet%20for%20Healthcare%20Providers.pdf
[135] Leimbach (2005).
[136] *Id.*
[137] *Id.*
[138] *Id.*

stop smoking in the vicinity of children.[139] Cigarettes cannot be sold to anyone under 18 years old; smoking is becoming less accepted in public places; and smoking is taught to be harmful in schools because of its toxic effects.[140]

Studies regarding alcohol consumption have similarly led to campaigns to prevent under-age drinking.[141] A national survey of 43,093 adults found that 47 percent who "begin drinking alcohol before the age of 14 become alcohol dependent at some time in their lives, compared with nine percent of those who wait at least until age 21."[142] One of the authors of the study said: "We definitely didn't know five or ten years ago that alcohol affected the teen brain differently….Now there's a

[139] *See, e.g.*, U.S. Department of Health and Human Services, Be Tobacco Free, *available at* http://betobaccofree.hhs.gov/campaigns/.
[140] Salim Surani, *et. al.*, *Ill Effects of Smoking: Baseline Knowledge among School Children and Implementation of the "AntE Tobacco" Project*, 2011 INTERNATIONAL JOURNAL OF PEDIATRICS, 1 (January 19, 2011).
[141] *See, e.g.*, Substance Abuse and Mental Health Services Administration (SAMHSA), Talk, They Hear You, Underage Drinking Prevention, *available at* http://www.samhsa.gov/underage-drinking.
[142] Katy Butler, *Alcohol Harder on Teen Brains Than Thought/ Studies Note Neurological Degradation*, SFGATE, July 9, 2006, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/07/09/BAGVBJPHHM1.DTL.

sense of urgency. It's the same place we were in when everyone realized what a bad thing it was for pregnant women to drink alcohol."[143] Alcohol also appears to damage more severely the frontal areas of the adolescent brain crucial for controlling impulses and thinking through consequences of intended actions—capacities many addicts and alcoholics of all ages lack.[144] These brain areas directing control, motivation and goal setting are "heavily remolded and rewired, as teenagers learn . . . . how to exercise adult decision-making skills, like the ability to focus, to discriminate, to predict and to ponder questions of right and wrong."[145] "Alcohol creates disruption in parts of the brain essential for self-control, motivation and goal setting, and can compound existing genetic and psychological vulnerabilities . . . . Early drinking is affecting a sensitive brain in a way that promotes the progression to addiction."[146]

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[143] *Id.*
[144] *See supra* Sections IV and V.
[145] *Id.*
[146] *Id.*

Sugar-laden foods have also caught the attention of those trying to protect children from unhealthful, life-shortening substances.[147] "The proportion of overweight children ages six to 11 years old has increased almost fivefold in a generation, growing from four percent in the early 1970s to 19 percent by 2004."[148] Federal regulators stated that childhood obesity threatens to overwhelm the healthcare system, potentially producing "the first generation of American children with shorter life spans than their parents."[149] Regulators warned that marketing junk food to children is a public health hazard to the point that should obesity rates continue, government intervention might be necessary.[150] Researchers reported that one study

[147] Jon Leibowitz, *Childhood Obesity and the Obligations of Food Marketers or Whether or Not You Are Part of the Problem, You Need to Be Part of the Solution*, FTC– HHS Forum on Childhood Obesity "Weighing in: A Check-Up on Marketing, Self-Regulation & Childhood Obesity," July 18, 2007, *available at* http://www.ftc.gov/speeches/leibowitz/070718Child_Obesity_Speech.pdf.
[148] *Id.*
[149] *Id.*
[150] *Id.*

found a daily sugar drink increased obesity by 60 percent for that child.[151]

If placing tobacco, alcohol, or even junk food in the hands of children is a public health hazard,[152] then how much more dangerous is marketing experimental sex in *Cosmopolitan*? The Utah Legislature has declared that "pornography is a public health hazard leading to a broad spectrum of individual and public health impacts and societal harms."[153] Among the statements made in the concurrent resolution signed by Utah's governor was a recognition that "pornography is contributing to the hyper-sexualization of teens, and even prepubescent children, in our society."[154] *Cosmo*'s targeted marketing is a stark example of deliberate teen and prepubescent hyper-sexualization currently allowed by society. The public health consequences

[151] Jess Alderman, et. al, *Application of Law to the Childhood Obesity Epidemic*. Northeastern University Public Law & Legal Theory Research Paper No. 17-2007, J. L., MED. & ETHICS, May 2007, *available at* http://ssrn.com/abstract=972136.
[152] Id.
[153] Utah S.C.R. 9 Concurrent Resolution on the Public Health Crisis, *available at* https://le.utah.gov/~2016/bills/static /SCR009.html. March 29, 2016.
[154] *Id.*

of the *Cosmo* Girl lifestyle pose an even greater potential public health risk than smoking, drinking alcoholic beverages, or eating junk food. Unlike cigarettes, liquor, or junk food, which can require multiple exposures to affect health, it only takes one instance of trying out the *Cosmo* Girl lifestyle (i.e., "fun, fearless" sex) to infect a child with a traumatic, life-threatening disease.[155]

In recognition of the harmful effects that sexually explicit materials have on children's mental, physical, and emotional health, state legislatures have enacted laws prohibiting the dissemination of materials deemed "harmful to minors."[156] These laws establish criminal sanctions

[155] Meeker at 12, Cretella, *Why Cosmopolitan, Youth, and Sexual Health Don't Mix*, BREITBART.COM, April 18, 2015.
[156] Alaska Stat. §11.61.128; Ariz. Rev. Stat. §13-3506; Cal. Penal Code §§313.1; Colo. Rev. Stat. § 18-7-502; Del. Code §1362; D.C. Code §22-2201; Fla. Stat. §847.012; Ga. Code, §16-12-103; Hawaii Rev. Stat. §§ 712-1215; Idaho Code §§18-1515; Ind. Code §§35-49-2-1, 35-49-3-1-35-49-3-3; Iowa Code §728.2; Kan. Stat. §21-6401; Kentucky Rev. Stat. §531.030; La. Rev. Stat. §14:106; 17 Maine Rev. Stat. §2911; Maryland Code, Criminal Law, §11-203; Minn. Stat. §617.293; Mo. Ann. Stat. §573.040; Mont. Code §45-8-201; N.H. Rev. Stat. §650:2; N.J. Stat. 2C:34-3; N.M. Stat.1978, §30-37-2; N.Y. Penal Law §235.15; N.C. Gen. Stat. §14-190.15; N.D. Century Code §12.1-27.1-03.1; Oklahoma. Stat. §1040.76; Ore. Rev. Stat. §167.080; 18 Penn. Consolidated Stat. §5903; R.I. Gen. Laws §11-31-10; S.C. Code §16-15-385; S.D. Codified Laws §22-24-28; Tenn.

for exposing children to material that, while perhaps not obscene or indecent for adults under contemporary community standards, is obscene or indecent, and therefore harmful to children.[157] Materials that are "harmful to minors" are described, *inter alia,* as "[p]ictures, photographs, drawings, sculptures or other visual representations," and "books, magazines, paperbacks, pamphlets or other written or printed matter" that "depict[] nudity, sexual conduct, sexual excitement or sado-masochistic abuse which is harmful to minors"[158] The following content in *Cosmopolitan* fits that definition, as at least one prosecuting attorney has determined: "I want to try anal sex, but I'm scared. Be honest…will it hurt?" featuring two wooden dolls posed engaging in the act; *Cosmopolitan*'s recommendation of working up

Code §39-17-902; Tex. Penal Code §43.24; Utah Code Ann. §76-10-1206; 13 Vt. Stat. Ann. §§2802, 2804b; W. Va. Code §61-8A-2; Wis. Stat. §944.21(4)(b).

[157] *Id.*

[158] Sample definitions of materials that are "harmful to minors" from Colo. Rev. Stat. §18-7-502(1), D.C. Code § 22-2201(b), Fla. Stat. §847.012(3), Ga. Code §16-12-103(a), Idaho Code §18-1515, Minn. Stat. §617.293(1), N.M. Stat., §30-37-2, Va. Stat. §2804b, Vt. Stat. §2802.

to sodomy using good silicone lube, although "[y]ou may just have a back door that you prefer not to use for guests;" tips on how to talk dirty; long distance voyeurism, exhibitionism, and self-molestation (i.e., "do their thing") via Skype; bath sex; and vibrating undies.[159] In other words, even if the material is not considered obscene under contemporary community standards for adults,[160] and therefore protected by the First Amendment, it is considered "harmful" or obscene under contemporary community standards for children. That means that while the sexual depictions cannot be banned entirely, *Cosmopolitan's* display and sale must be restricted to those over the age of 18.[161]

VII. CONCLUSION

Efforts to stop *Cosmo*'s stealth campaign to groom, lobby, and hypersexualize teens and

[159] Amy Weirich, advisory letter to retailers regarding *Cosmopolitan*, November 7, 2016 *available at* https://www.cosmohurtskids.com/news/2016/12/9/office-of-the-district-attorney-general
[160] *Miller v. California*, 413 U.S. 15 (1973).
[161] *See* statutes listed in note 149.

prepubescent tweens (*Cosmo* Girls!) should exceed the efforts to curb childhood obesity and smoking. As has been done with tobacco and alcohol (i.e., restricted until ages 18 and 21), the sale of sex-centric *Cosmo* should be seriously and vigorously restricted, and access granted only to those over age 18, to protect the health and well-being of the next generation. Shelby County, Tennessee, District Attorney General Amy Weirich has demonstrated to other prosecutors that laws designed to protect children may be used to delimit access to *Cosmo.* Weirich sent a letter dated November 7, 2016 to all retailers in Shelby County informing them that *Cosmopolitan* contains materials harmful to minors and advising them that they needed to take measures to keep the magazine out of sight of children. Her efforts are a model for how society should respond to *Cosmo* to protect children.

DISSECTING THE FELONY MURDER RULE AND THE MENTALLY ILL DEFENDANT

Nadine W. Mathieu

I. INTRODUCTION

Imagine being told that if you did not participate in a felony, you or one of your family members would be killed. Should you participate in the felony due to the threat of being harmed? In the following scenario, imagine being intimidated and threatened into being the getaway driver for a group of individuals involved in an armed bank robbery. One of those individuals then shot and killed a security guard during the commission of the robbery. Even though the getaway driver was coerced into participating in the robbery and did not know or have the intention to cause a death, the driver would also be held liable for the murder of the security guard under the felony murder rule. Under the felony murder rule, anyone who commits

a homicide during the commission or attempted commission of a felony would be found guilty of murder, regardless of whether the person was coerced into participating in the felony.[1] This doctrine is not only limited to those deaths that are foreseeable.[2] The felony murder doctrine also applies to unforeseeable and unexpected deaths because the felon is held strictly liable for all killings committed during the course of the felony.[3]

Because anyone, regardless of whether the person was the primary actor or just an accomplice, can be found guilty of murder if a homicide is committed during a felony, the felony murder rule is often heavily criticized.[4] What if the defendant was mentally ill at the time the felony was committed and could not distinguish between right and wrong? This Article analyzes the felony murder doctrine in Florida and how it affects mentally ill defendants and defendants who plea affirmative

[1]. J. Rafael Rodriguez, Column, Criminal Law: Attempted Felony Murder—An Improbable Legal Fiction Meets Its Demise, 69 FLA. B.J. 63, 63 (1995).
[2]. People v. Stamp, 82 Cal. Rptr. 598, 603 (Ct. App. 1969).
[3]. *Id*.
[4]. Rodriguez, supra note 1, at 63.

defenses, such as insanity and duress.[5] Section II introduces the many criticisms of the felony murder rule.[6] Section III examines how the felony murder rule came into existence and introduces its many limitations and restrictions, such as the inherently dangerous felony limitation, the independent felony limitation, the agency approach, and the proximate causation approach.[7] Section III also analyzes the felony murder doctrine and its purpose.[8] In Section IV, the insanity defense is analyzed, including the several different methods for defining legal insanity.[9] Section V examines the court cases of Anthony A. Hall, Calvin Carlos Campbell, and Ivonne Rosso, and how the insanity defense is considered in each of their convictions.[10] Section VI provides a comparison of how juvenile defendants are affected by the felony murder doctrine and how

[5]. Hall v. State, 568 So. 2d 882, 883 (Fla. 1990) (per curiam); Campbell v. State, 227 So. 2d 873, 875 (Fla. 1969); Rosso v. State, 505 So. 2d 611, 612 (Fla. 3d Dist. Ct. App. 1987) (per curiam).
[6]. Rodriguez, supra note 1, at 63.
[7]. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 522-33 (5th ed. 2009).
[8]. *Id*.
[9]. DRESSLER, supra note 7, at 346.
[10]. Hall, 568 So. 2d at 883; Campbell, 227 So. 2d at 875; Rosso, 227 So. 2d at 612.

the mental capacity of a juvenile can be compared to a mentally ill defendant.[11] Section VII considers the role of the duress defense in felony murder. In Section VIII, the constitutionality of the felony murder rule is examined.[12] Then in Section IX, a conclusion is provided on whether the felony murder doctrine should be abolished in Florida.

II. DEFINING THE FELONY MURDER DOCTRINE

Under common law, the felony murder doctrine establishes that anyone who committed a homicide during the commission or attempted commission of a felony would be found guilty of murder.[13] This is also known as the felony murder rule.[14] The felony murder rule is one of the most controversial doctrines in the United States justice system

[11]. Steven A. Drizin & Allison McGowen Keegan, The Aftermath of the Lionel Tate Case: Abolishing the Use of the Felony-Murder Rule When the Defendant Is a Teenager, 28 NOVA L. REV. 507, 529 (2004).
[12]. DRESSLER, supra note 7, at 345.
[13]. *Id*. at 521; see also Jennifer DeCook Hatchett, Comment, Kansas Felony Murder: Agency or Proximate Cause?, 48 U. KAN. L. REV. 1047, 1047 (2000).
[14]. DRESSLER, supra note 7, at 521.

because a felony murder conviction does not carry the same *mens rea* requirement as a murder conviction.[15] For a murder conviction, the prosecution must prove that the defendant carried the necessary *mens rea*, or actual intent, to kill another human being and that the killing was premeditated, deliberate, or was caused by gross negligence.[16] However, for a felony murder conviction, the prosecution does not need to prove that the defendant had the actual intent to kill another human being.[17] The prosecution only needs to prove that the defendant carried the necessary *mens rea* to commit the felony and that the criminal act caused the death of another.[18] Therefore, the defendant will be found guilty of felony murder regardless of whether he or she had the actual intent to kill another human being.[19]

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[15]. Douglas Van Zanten, Note, Felony Murder, the Merger Limitation, and Legislative Intent in State v. Heemstra: Deciphering the Proper Role of the Iowa Supreme Court in Interpreting Iowa's Felony-Murder Statute, 93 IOWA L. REV. 1565, 1567 (2008).
[16]. *Id.*
[17]. *Id.*
[18]. *Id.*
[19]. *Id.*; see also People v. Stamp, 82 Cal. Rptr. 598, 603 (Ct. App. 1969) (stating that a felon is held strictly liable for any and all

Under Section 189 of the Model Penal Code of the felony murder rule, a murder committed in either the commission of, or attempted commission of, any felony is:

> [M]urder of the first degree. This is true whether the killing is willful, deliberate and premeditated, or merely accidental or unintentional, and whether or not the killing is planned as a part of the commission of the robbery [or felony]. . . . There is no requirement that the killing occur, 'while committing' or 'while engaged in' the felony, or that the killing be 'a part of' the felony, other than that the few acts be a part of one continuous transaction. Thus the homicide need not have been committed 'to perpetrate' the felony.[20]

One of the most contentious factors of the felony murder rule is that a defendant cannot raise certain affirmative defenses for the murder conviction.[21] A defendant convicted of felony

killings committed by the individual or by an accomplice during the course of the felony).

[20]. Stamp, 82 Cal. Rptr. at 602.

[21]. People v. Aaron, 299 N.W.2d 304, 317 (Mich. 1980).

murder can only raise affirmative defenses pertaining to the mental element of the felony, such as mental illness or insanity, but cannot raise affirmative defenses to the mental element of the murder like a defendant convicted of premeditated murder can.[22] Thus, a defendant convicted of felony murder cannot raise defenses such as self-defense, duress, or unintentional accident even though these defenses are permitted for defendants charged with first degree murder.[23] Felony murder and first degree murder are essentially the same and should be treated by the justice system equally.[24]

The independent act doctrine is one accepted legal defense to a felony murder conviction that some states recognize.[25] However, even though Florida allows this doctrine to be introduced, there are some problems that occur when trying to invoke the defense.[26]

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[22]. *Id.*
[23]. *Id.*
[24]. *Id.*
[25]. David Brener, Florida's Felony Murder Rule Sweeps with a Broad Brush, AVVO (Feb. 26, 2011), https://www.avvo.com/legal-guides/ugc/floridas-felony-murder-rule-sweeps-with-a-broad-brush.
[26]. *Id.*

> Florida recognizes a defense to felony murder if the homicide was not committed by the defendant, the defendant did not intend for the homicide to occur, and the killing was not part of the plan and not a reasonably foreseeable consequence of the plan to commit the underlying felony. This last part . . . is where the problem lies, and where the litigation has centered. Some authorities suggest that when the defendant is aware that firearms are involved in the underlying felony, then the independent act defense is unavailable, even if the defendant did not carry. Thus, the getaway driver and the guy who planned the robbery but stayed home, can be charged and convicted of murder even though violence was not supposed to occur, and are precluded from presenting an independent act defense, if the evidence shows knowledge of a substantial risk of violence.[27]

[27]. *Id.*

III. THE ORIGIN AND HISTORY

Although the origin of the felony murder doctrine can be traced back to the 16th century in England, application of the rule cannot be traced back to one specific case.[28] For its origin, historians often cite to the case of *Lord Dacres*[29] from 1535 and the case of *Herbert*[30] from 1558 as the first formal statements of the felony murder rule.[31] In *Lord Dacres*, all the defendants were convicted of murder and hanged even though not all the members were present at the time a gamekeeper was killed during an illegal hunt.[32] The court held that "Lord Dacres and his companions were [not] guilty of murder because they had joined in an unlawful hunt in the course of which a person was killed, but rather that those not present physically at the killing were held liable as principals on the

[28]. Van Zanten, supra note 15, at 1569; see also Aaron, 299 N.W.2d at 307 (stating historians and scholars have determined that the felony murder rule is of "questionable origin." *Id*.).
[29]. Aaron, 299 N.W.2d at 307.
[30]. *Id*. at 308.
[31]. *Id*. at 307–08.
[32]. *Id*. at 308.

theory of constructive presence."[33] Therefore, this case established that an accomplice or co-conspirator can be held liable for the actions of another even if the accomplice was not present at the time the offense occurred.[34]

Herbert was decided after *Lord Dacres* as another example of the felony murder rule.[35] In *Herbert*, a large group of members collectively went to an individual's house under false pretenses as law enforcement to take items, and it resulted in the unintentional death of an unarmed woman.[36] The entire group was found guilty of murder.[37] The court held that "if one deliberately performed an act of violence to third parties, and a person not intended died, it was murder regardless of any mistake or misapplication of force."[38] The dissenting opinion, however, found that the accident should have been manslaughter because the

[33].*Id*.
[34].Aaron, 299 N.W.2d at 308.
[35].*Id*.
[36].*Id*.
[37].*Id*.
[38].*Id*.

criminal act was not intended toward the woman who died.[39]

Even though the felony murder rule has common law roots from England, England abolished the doctrine in 1957 due to its controversial nature.[40] Section 1 of England's Homicide Act of 1957 establishes that a death that occurs during the commission of a felony does not constitute a murder unless malice aforethought is present.[41] England recognized that the defendant's mental state of mind, or *mens rea*, is an essential element for a murder conviction and, therefore, should be a required element for felony murder. For these reasons, England abolished the doctrine and the rule never came into existence in France or Germany.[42] Kentucky and Hawaii have also abolished the doctrine.[43] Hawaii's reason for abolishing the doctrine is stated in its murder statute which reads: "It is not sound principle to convert an

[39].Aaron, 299 N.W.2d at 308.
[40].*Id*. at 312.; see also DRESSLER, supra note 7, at 521.
[41].Aaron, 299 N.W.2d at 312.
[42].DRESSLER, supra note 7, at 521.
[43].Aaron, 299 N.W.2d at 314.

accidental, negligent, or reckless homicide into a murder simply because, without more, the killing was in furtherance of a criminal objective of some defined class."[44]

Although some states, such as Michigan, Kentucky, Hawaii, and Ohio, have abolished the felony murder rule like England, the doctrine still stands in some form throughout the United States today.[45] Due to the rule's controversial nature, most states have adopted limited forms of the rule, such as: the inherently dangerous felony limitation, the independent felony or merger limitation, the agency approach and the proximate causation approach.[46] States such as New York, Alaska, Utah, Pennsylvania, and Louisiana have all reduced felony murder to second degree murder, and seven

[44].*Id*.
[45].Van Zanten, supra note 15, at 1572.
[46].Aaron, 299 N.W.2d at 315 (stating that the limitations of the felony murder rule include restrictions on the underlying felony which require that the death be a proximate cause of the felony, that the underlying felony be violent, forceful, or extremely dangerous to human life, that the felon or co-felon actually caused the death, that the death be a probable or reasonably foreseeable result of the felony, and that the victim is not one of the co-felons); see also DRESSLER, supra note 7, at 522-33.

states have limited and downgraded its punishment.[47]

A. The Inherently Dangerous Felony Limitation

Because anyone involved in the commission of a felony can be held liable if a death occurs, many states, including Florida, adopted the inherently dangerous felony limitation to the felony murder rule.[48] This means that only homicides that occur while perpetrating or attempting certain felonies that are inherently dangerous to human life are considered.[49] Pursuant to Section 782.04 of the *Florida Statutes*, some of these inherently dangerous felonies are trafficking, arson, sexual battery, robbery, burglary, kidnapping, aggravated child abuse, aggravated abuse of the elderly, and carjacking.[50]

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[47].Aaron, 299 N.W.2d at 315.
[48].FLA. STAT. §782.04(4) (2016).
[49].DRESSLER, supra note 7, at 526.
[50].FLA. STAT. §782.04(4) (2016); Green v. State, 680 So. 2d 1067, 1068 (Fla. 3d Dist. Ct. App. 1996) (stating that a person will be found guilty of felony murder if he or she caused a death during the commission of any one of ten established dangerous felonies).

Courts often consider the elements of the crime instead of the actual facts of the case in the abstract to determine whether an offense is an inherently dangerous felony.[51] The Supreme Court of California in *People v. Burroughs*[52] reasoned that an offense is inherently dangerous if the crime, "by its very nature, . . . cannot be committed without creating a substantial risk that someone will be killed."[53] This means that there would need to be a "high probability that death will result"[54] in the crime in order to characterize the offense as an inherently dangerous felony.[55] Under this test, crimes like petty theft and false imprisonment are not considered inherently dangerous even if a death occurs during the perpetration of these crimes.[56]

On the other hand, many states only consider the facts and the surrounding circumstances of the specific case to determine whether an offense is an

[51].DRESSLER, supra note 7, at 526.
[52].678 P.2d 894 (Cal. 1984), overruled in part by People v. Blakeley, 999 P.2d 675 (Cal. 2000).
[53].*Id.* at 900; see also Dressler, supra note 7, at 526.
[54].DRESSLER, supra note 7, at 526.
[55].*Id.*
[56].*Id.*

inherently dangerous felony.[57] The Supreme Court of Rhode Island in *State v. Stewart*[58] held that "the facts and circumstances of the particular case [should] determine if such felony was inherently dangerous in the manner and the circumstances in which it was committed, rather than have a court make the determination by viewing the elements of a felony in the abstract."[59]

B. The Independent Felony Limitation

Under the independent felony limitation, or collateral felony limitation, a person could be found guilty of murder if the felony committed is "independent of, or collateral to, the homicide."[60] Some states, such as New York, adopted this limitation to the felony murder rule and have held that the felony murder rule can only apply if the felony committed was separate and independent

[57].*Id*. at 527.
[58].663 A.2d 912 (R.I. 1995).
[59].*Id*. at 919.
[60].DRESSLER, supra note 7, at 527.

from the homicide.[61] Florida, however, refuses to adopt this approach because it can be interpreted that a homicide committed during the commission of any felony would be considered felony murder instead of the specified limited dangerous felonies.[62]

C. The Agency Approach

Under the agency approach of the felony murder rule, an accomplice or co-felon of an offense can be held liable for a homicide committed by another even though the individual was just a secondary actor or an agent of the felon.[63] This approach applies regardless of whether or not the accomplice or co-felon formed the intent or *mens rea* necessary for murder because, under the felony murder rule, the intent the felon formed to commit the offense is transferred to the homicide.[64] "[T]he identity of the

[61].Robles v. State, 188 So. 2d 789, 792 (Fla. 1966).
[62].*Id*.
[63].DRESSLER, supra note 7, at 532; see also Hatchett, supra note 13, at 1051.
[64].State v. Amaro, 436 So. 2d 1056, 1059–60 (Fla. 2d Dist. Ct. App. 1983) (holding that the intent formed does not need to be the intent to

killer becomes the threshold requirement for finding liability under the felony-murder doctrine."[65] The doctrine's purpose is to "relieve the state of the burden of proving premeditation and malice because these elements are supplied by the underlying felony."[66] Therefore, malice aforethought is presumed on the basis of the commission or attempted commission of the felony.[67]

In *People v. Stamp*,[68] the Court of Appeal held that "no intentional act is necessary [under the rule] other than the attempt to or the actual commission of the robbery itself. When a robber enters a place with a deadly weapon with the intent to commit robbery, malice is shown by the nature of the crime."[69] Therefore, a defendant could be found

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commit murder. Only the intent to participate in the underlying offense is necessary for a felony murder conviction); see also DRESSLER, supra note 7, at 525.

[65].Hatchett, supra note 13, at 1051 (alteration in original).

[66].*Id.* at 1056.

[67].People v. Stamp, 82 Cal. Rptr. 598, 602 (Ct. App. 1969). Malice aforethought and premeditation is imputed from the underlying felony in order to support a murder conviction under the felony murder doctrine. Hatchett, supra note 13, at 1047.

[68].82 Cal. Rptr. 598 (Ct. App. 1969).

[69].*Id.* at 602.

guilty of felony murder if a co-conspirator killed an innocent person just for participating in the underlying offense.[70] Many courts, including Florida, have held accomplices and those who aid and abet responsible for the crimes committed by their co-felons.[71] The defendant does not even need to be present at the time the homicide is committed.[72] In *State v. Amaro*,[73] the Second District Court of Appeal upheld the felony murder rule and stated that even though the death of the police officer was not premeditated, the homicide was still felony murder because the death occurred during a felony.[74] The court also held that "one who participates with others in a common criminal scheme is liable for all offenses committed in furtherance of the scheme, regardless of whether or

[70].DRESSLER, supra note 7, at 532.
[71].State v. Amaro, 436 So. 2d 1056, 1060 (Fla. 2d Dist. Ct. App. 1983).
[72].*Id.* at 1061; Mills v. State, 407 So. 2d 218, 222 (Fla. 3d Dist. Ct. App. 1981) (holding that the fact that the appellant was not present during the murder does not matter). "Appellant's presence during the actual killings is simply irrelevant for the purposes of this issue; the critical fact is his participation in the underlying felony." Mills, 407 So. 2d at 222.
[73].436 So. 2d (Fla. 2d Dist. Ct. App. 1983).
[74].*Id.* at 1061.

not the individual physically participates in the commission of the additional crime."[75]

Additionally, courts have often found that any homicide committed during, a part of, or in the furtherance of a felony is felony murder.[76] This means that homicides committed while fleeing from the scene of a crime are still considered to be a part of the underlying felony.[77] In *Mills v. State*,[78] it was held that "[i]n the absence of some definitive break in the chain of circumstances beginning with the felony and ending with the killing, the felony, although technically complete, is said to continue to the time of the killing."[79] The underlying felony continues to occur even if one of the accomplices is still in active flight from the scene of the crime and most of the other suspects have been arrested and

[75].*Id*. at 1060.
[76].*Id*. at 1061.
[77].*Id*.; see also State v. Hacker, 510 So. 2d 304, 306 (Fla. 4th Dist. Ct. App. 1986) (stating that the robbery was not completed until the car stopped, therefore, the murder that occurred while the defendants were fleeing is considered felony murder).
[78].407 So. 2d 218 (Fla. 3d Dist. Ct. App. 1981).
[79].*Id*. at 221; see also State v. Williams, 776 So. 2d 1066, 1070 (Fla. 4th Dist. Ct. App. 2001) (stating "what the Supreme Court calls 'a break in the chain of circumstances' between the killing and the underlying felony, courts focus on the time, distance, and causal relationship between the underlying felony and the killing).

are detained because the co-felon's participation in the felony is still ongoing.[80]

Felons are also liable for deaths that are unforeseeable.[81] Suppose during a bank robbery, one of the bank tellers had a massive heart attack and died after the robbery. The bank robbers would be liable for the death even though the health of the victim was unknown and unforeseen at the time. This distinction also applies if the felons leave the scene of a crime and cause a car crash during the escape. The felons would be held liable for the deaths that resulted from the unexpected car accident. The defendants in *Stamp* were convicted of felony murder after one of the victims died twenty minutes after the robbery.[82] The victim was an obese elderly man with a history of heart disease and had an advance case of atherosclerosis, which is a fatal disease.[83] Even though the victim had a history of bad health and a fatal disease, the

[80].State v. Amaro, 436 So. 2d 1056, 1060 (Fla. 2d Dist. Ct. App. 1983).
[81].People v. Stamp, 82 Cal. Rptr. 598, 603 (Ct. App. 1969).
[82].*Id.* at 601.
[83].*Id.*

defendants were responsible for the death because it occurred during the commission of the felony.[84]

D. The Proximate Causation Approach

There are only a small number of states that follow the proximate causation approach of the felony murder rule.[85] Under the proximate causation approach, a person could be found guilty of murder for any death that occurs as a direct result of the felony, regardless of whether the death was caused by a co-felon or a third party such as a police officer or innocent bystander.[86] Therefore, if a police officer shot and killed one of the suspects of a bank robbery, the other suspect can be found liable for the death of the co-conspirator even though the accomplice was not the shooter and did not do the actual killing. The same applies if the shooter was a victim of an attempted burglary. Any accomplice to the underlying felony can be found

[84].*Id*.
[85].DRESSLER, supra note 7, at 533; see also Hatchett supra note 13, at 1052 (stating only a minority of states follow the proximate cause approach).
[86].DRESSLER, supra note 7, at 533.

guilty of felony murder due to the death that was a direct result of the felony.[87]

There are some cases in Florida that have followed the proximate causation approach and have held defendants responsible for deaths that have occurred by third parties.[88] Examples of such cases are when the victims were police officers or bystanders killed by other police officers.[89] The reasoning for this approach is:

> [W]hen a felon's attempt to commit a forcible felony sets in motion a chain of events which were or should have been within [the felon's] contemplation when the motion was initiated, [the felon] should be held responsible for any death which by direct and almost inevitable sequence results from the initial criminal act.[90]

[87].All participants are held liable for any and all deaths caused by others during the commission of the felony. Hatchett supra note 13, at 1051.
[88].State v. Williams, 254 So. 2d 548, 549 (Fla. 2d Dist. Ct. App. 1971).
[89].*Id*.
[90].DRESSLER, supra note 7, at 533.

For example, in *Mikenas v. State*,[91] the Florida Supreme Court affirmed a felony murder conviction after the defendant's co-felon was killed by a police officer.[92] The court reasoned that the Florida second degree felony murder statute does not preclude applying the felony murder rule to situations where the death is a co-conspirator.[93] Since the statute states when "a person is killed,"[94] the "person" in the statute refers to "any person" and not just "innocent" persons.[95]

IV. THE INSANITY DEFENSE

In order to raise the affirmative defense of insanity, the defendant has the burden of proving his or her mental condition at the time the offense was committed and must provide evidence that he

[91].367 So. 2d 606 (Fla. 1978) (per curiam).
[92].*Id.* at 607.
[93].*Id.* at 609.
[94].*Id.* at 608.
[95].*Id.* The statute "provides that one who perpetrates a felony commits murder if 'a person' is killed — without limitation on the term 'person'—the court upheld the felony-murder conviction." Hatchett supra note 13, at 1065.

or she suffers from a mental disease or defect.[96] In Florida, the defendant has the burden of proving insanity by clear and convincing evidence.[97] "Clear and convincing evidence is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief, without hesitation, about the matter in issue."[98] If the defendant is able to prove insanity, in some instances, he or she can be excused of the crime and will not be convicted.[99]

A mental disease or defect is "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls."[100] In order to determine a person's legal culpability, there are three main types of tests used to determine insanity: The *M'Naghten* test; the irresistible impulse test; and the product test.[101]

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[96].DRESSLER, supra note 7, at 344.
[97].FLA. STAT. § 775.027 (2016).
[98].Rodriguez v. State, 172 So. 3d 540, 542 (Fla. 5th Dist. Ct. App. 2015).
[99].DRESSLER, supra note 7, at 345.
[100].*Id*. at 349.
[101].*Id*. at 346.

A. The *M'Naghten* Test

There are currently seventeen states, including Florida and the federal government, that follow the *M'Naghten* test, which is a cognitive-based test, to determine if a person is legally insane.[102] Under the *M'Naghten* test of insanity, "an accused is not criminally responsible if, at the time of the alleged crime, the defendant, by reason of a mental disease or defect, (1) does not know of the nature or consequences of his or her act; or (2) is unable to distinguish right from wrong."[103]

In regards to the right and wrong element of the *M'Naghten* test, whether or not a person actually believed his or her actions were morally wrong is not important, rather, whether he or she "knowingly violated societal standards of morality" is evaluated.[104] Therefore, the defendant is not insane

[102].*Id*. at 350.
[103].Rodriguez, 172 So. 3d at 543; see also DRESSLER, supra note 7, at 350 (stating a person is deemed legally insane if he or she was suffering from a mental disease and he or she: "(1) did not know the nature and quality of the act that she was doing; or (2) if she did know it, . . . did not know the difference between right and wrong" at the time the act was committed).
[104].DRESSLER, supra note 7, at 351.

if he or she "commits an offense that [he or] she knows society will condemn, even if (as a result of mental illness) [he or] she is personally convince[d] [his or] her conduct is morally proper."[105]

B. The Irresistible Impulse Test

Currently, there are only three states that follow the irresistible impulse test to determine insanity.[106] The irresistible impulse test adds a volitional element to the *M'Naghten* test.[107] Under this test, a person is deemed legally insane if, at the time the offense was committed, he or she:

> (1) acted from an irresistible and uncontrollable impulse; (2) lost the *power to choose* between right and wrong, and to avoid doing the act in question; . . .or (3) the [defendant's] will . . . has been otherwise than voluntarily so completely destroyed that [her] actions are not subject to it, but are beyond [her] control[108]

[105].*Id*.
[106].*Id*. at 353.
[107].*Id*.
[108].*Id*. (alteration in original).

C. The Product Test

The product test, also known as the Durham Rule, was first introduced in New Hampshire in *Durham v. United States*.[109] Under the product test, the defendant would not be held criminally responsible for his or her criminal acts, if the "unlawful act was the product of a mental disease or defect."[110] Therefore, if the fact finder determines that the defendant had a mental disease or defect at the time the offense was committed, and his or her acts were the result of the mental disease or defect, then the defendant would not be convicted of the crime.[111]

New Hampshire is the only state that currently follows the product test because this test is heavily criticized by the courts.[112] When the test was first implemented, the essential element that required the defendant to have a mental disease or defect was

[109].214 F.2d 862 (D.C. Cir. 1954), overruled by United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972); see also DRESSLER, supra note 7, at 355.
[110].DRESSLER, supra note 7, at 355.
[111].*Id.*
[112].*Id.*

never defined.[113] The uncertainty in the meaning of the phrase left many inconsistencies in case decisions because the fact finder had to rely solely on mental health professionals and expert witnesses to determine whether the defendant was insane.[114]

D. The Standard in Florida

In Florida, the insanity defense can be raised if the defendant had a mental disease or defect that caused the defendant to either not know what he or she was doing at the time the act was committed, or "kn[o]w what he or she was doing and its consequences, [but]…not know that what he or she was doing was wrong."[115] This evaluation is the *M'Naghten* test.[116] Because Florida only recognizes

[113].*Id*.
[114].*Id*. at 355–56.
[115].FLA. STAT. § 775.027 (2016). A person is legally insane if: He or she "had a mental infirmity, disease, or defect [and b]ecause of this condition, [he] [she] did not know what [he] [she] was doing or its consequences or although [he] [she] knew what [he] [she] was doing and its consequences, [he] [she] did not know it was wrong." Rodriguez v. State, 172 So. 3d 540, 542 (Fla. 5th Dist. Ct. App. 2015) (alteration in original).
[116].The M'Naghten test has "long been the legal test in Florida for determining insanity in criminal cases." Rodriguez, 172 So. 3d at 543.

a cognitive-based test for insanity and does not recognize the volitional element of the irresistible impulse theory, many defendants do not get a fair opportunity to be heard.[117]

In *Van Eaton v. State*,[118] the defendant, Richard Van Eaton, was convicted of murder even though he had "a sociopathic personality disturbance."[119] Sociopathic personality disturbance is a mental illness that causes the person to disrespect societal standards because he or she cannot abide by the rules and regulations society sets.[120] The defendant's psychiatrist testified that a person with sociopathic personality disturbance may know the difference between right and wrong and can plan and facilitate murder, but the person cannot control his or her actions due to the mental disease.[121] Even though the defendant knew the difference between right and wrong, and is therefore deemed legally sane under the *M'Naghten* test, Van Eaton was

[117].Van Eaton v. State, 205 So. 2d 298, 303 (Fla. 1967).
[118].205 So. 2d 298 (Fla. 1967).
[119].*Id.* at 302.
[120].*Id.*
[121].*Id.*

incapable of controlling his actions due to the mental disease.[122] Van Eaton would be considered legally insane under the irresistible impulse test if Florida applied this standard of insanity instead of the *M'Naghten* test.[123] However, because Florida does not recognize the impulse theory, the defendant was found guilty of murder.[124] The court stated:

> [T]his Court was urged to abandon the 'right or wrong' test (the rule in *M'Naghten*) in favor of the 'irresistible impulse' or 'moral insanity' test adopted by New Hampshire and the similar rule adopted by the [C]ourt of [A]ppeal for the District of Columbia . . . [W]e have not been convinced that the *M'Naghten* rule is not the best available rule for measuring the mental condition of the individual in terms of accountability for criminal acts. We therefore adhere to the Rule in *M'Naghten's* case as do all other

[122].*Id.*
[123].Van Eaton v. State, 205 So. 2d 298, 302–03 (Fla. 1967).
[124]."The irresistible impulse rule, however, has never been followed in this jurisdiction; therefore, the language of the Second District . . . which could be construed as approving the irresistible impulse rule is hereby disapproved." *Id.* at 304.

> jurisdictions except the two above mentioned.[125]

Consequently, the *M'Naghten* test is often heavily criticized because it is outdated and not current with the continuously changing modern rules of insanity.[126] The *M'Naghten* test is outdated because it bases insanity solely on the mental element of the mental disease and does not take into account the person's uncontrollable actions that can be a result of the mental disease.[127] "A cognitive disorder is one that undermines a person's ability to perceive reality accurately. [Whereas a] volitional disorder is one that undermines a person's ability to control her conduct."[128]

A person, who cannot control his or her actions due to a legitimately classified mental illness, should be able to raise the insanity defense even though he or she may be able to distinguish between right and wrong because the individual's actions

[125].*Id*. at 303.
[126].*Id*.; see also DRESSLER, supra note 7, at 352.
[127].DRESSLER, supra note 7, at 352.
[128].*Id*. at 345 n.40.

were beyond that person's control.[129] Punishing a defendant who is incapable of controlling his or her actions because of a mental illness is highly inappropriate and morally wrong.[130]

In *Rodriguez v. State*,[131] the defendant, Jason Rodriguez, was charged with first degree murder for a shooting spree he committed that left five employees of the defendant's former place of employment wounded and one killed.[132] Rodriguez raised the insanity defense at trial and provided seven expert witnesses who all testified that the defendant was a paranoid schizophrenic suffering from hallucinations and delusions.[133] The expert witnesses also testified that Rodriguez was legally insane under the *M'Naghten* test because he could not distinguish between right and wrong during the time the shooting spree occurred.[134] However, the

[129].*Id*. at 352–53.
[130].*Id*. at 352.
[131].172 So. 3d 540 (Fla. 5th Dist. Ct. App. 2015).
[132].*Id*. at 542.
[133].*Id*.
[134].*Id*.

prosecution requested to introduce a jury instruction on hallucinations instead.[135]

The Fifth District Court of Appeal held that the trial court erred in allowing the hallucinations instruction in the defendant's trial because only the *M'Naghten* test can be used in Florida to determine insanity.[136] The Court also held that "even if the hallucinations instruction was applicable and if the jury found Rodriguez insane under the *M'Naghten* instruction, the hallucinations instruction could not be used by the State to suggest or argue that Rodriguez should nevertheless be found sane."[137] The defendant was only required to prove that he could not distinguish between right and wrong for a jury to find him "not guilty by reason of insanity."[138] "No further 'critical element or evaluation' was required."[139]

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[135].*Id*. at 543.
[136].Rodriguez, 172 So. 3d at 545. "Pursuant to [S]ection 775.027, any issue of insanity is to be determined solely under the M'Naghten Rule." *Id*. at 543 (emphasis added).
[137].*Id*. at 546.
[138].*Id*.
[139].*Id*.

V. CASE STUDIES OF THE MENTALLY ILL

A. Anthony A. Hall

In *Hall v. State*,[140] the defendant, Anthony A. Hall, and three other individuals devised a plan to stop a car in the middle of the road to rob and steal that person's vehicle.[141] They posed as hitchhikers, and when a vehicle stopped, they attacked the driver, bound his wrists, mouth, head, and ankles with tape, and placed him in the trunk of the car.[142] The gang later drove the car into the woods where one of the individuals, Bunny Dixon, performed what Hall described as a "satanic ritual"; and carved a cross on the victim's chest and stomach.[143] The others, including Hall, then shot and killed the victim seven times.[144] Hall was subsequently arrested and found guilty of both felony and premeditated murder.[145]

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[140].568 So. 2d 882 (Fla. 1990) (per curiam).
[141].*Id*. at. 883.
[142].*Id*.
[143].*Id*. at 883–84.
[144].*Id*. at. 883.
[145].Hall, 568 So. 2d at 883.

During his trial, the trial court refused to allow expert witness testimony that would have supported Hall's claim that he was insane at the time the felony was committed because the court did not recognize his defense.[146] According to Hall's expert witnesses, Hall was temporarily insane at the time the murder was committed and was "under the influence of both Satan and/or Bunny Dixon and therefore [was] robbed of his free will."[147] He also could not distinguish between right and wrong under the *M'Naghten* test of insanity at the time the offense was committed.[148]

Finding that the trial court erred in refusing to allow Hall to present his defense of insanity, the Florida Supreme Court reversed his conviction and remanded the case to the trial court for a new trial.[149] The Supreme Court held that even though the trial court holds the discretion on determining whether to allow expert testimony, the trial court clearly erred by refusing to allow the testimony

[146].*Id*.
[147].*Id*. at 884.
[148].*Id*.
[149].*Id*. at 883.

because one of Hall's expert witnesses was significantly qualified to produce testimony pertaining to Hall's mental state, and it was clearly relevant to the case.[150] Hall's expert witness was a clinical psychologist specialized in interpreting a person's mental state of mind.[151] The psychologist was able to determine that Hall "displayed characteristics of individuals with schizophrenic disorders and that, on the day of the shooting, Hall was operating with a state of altered consciousness brought on by extreme stress."[152] Therefore, Hall was not able to distinguish right from wrong at the time the murder was committed and should not have been convicted of felony murder.[153]

B. Calvin Carlos Campbell

In *Campbell v. State*,[154] the appellant, Calvin Carlos Campbell, was convicted of first-degree murder without recommendation of mercy after a

[150].Hall, 568 So. 2d at 884.
[151].*Id.*
[152].*Id.* at 885.
[153].*Id.*
[154].227 So. 2d 873 (Fla. 1969).

police officer was shot and killed.[155] After robbing a bank in Kingsland, Georgia, Campbell fled the scene in a rented vehicle and a chase by law enforcement officials from both Georgia and Florida ensued.[156] During pursuit by law enforcement officials, Campbell lost control of his car and crashed into a dich.[157] The officer in pursuit ordered the appellant out of the car and attempted to detain him in handcuffs, when Campbell overpowered the officer, took the gun from the officer's holster, and shot the officer twice.[158] Campbell then continued to escape in the officer's patrol car when he was later apprehended at a road block.[159]

Campbell pled not guilty by reason of insanity and denied having the intent to shoot the officer.[160] Campbell also pleaded with the court to consider the irresistible impulse test, as opposed to the *M'Naghten* "right or wrong" test, to determine his

[155].*Id*. at 875.
[156].*Id*.
[157].*Id*.
[158].*Id*.
[159].Campbell, So. 2d at 875.
[160].*Id*.

mental state of mind and whether Campbell was legally insane at the time the offense was committed.[161] However, Campbell was prevented from introducing expert testimony that he "had little control over his impulsive behavior," and was not able to "conform his acts to the requirements of the law"[162] because Florida only follows the *M'Naghten* test to determine insanity.[163]

Campbell was convicted of first-degree murder because the Florida Supreme Court determined that the robbery offense was not yet completed at the time the officer was killed.[164] The felony continued from the time the robbery was committed and for the duration of the escape, until Campbell was finally apprehended at the roadblock.[165] The Supreme Court held that "[a]lthough separated by time and space from the original felony, . . . it is

[161].*Id*. at 877.
[162].*Id*.
[163].See Van Eaton v. State, 205 So. 2d 298, 302 (Fla. 1967) (stating that the M'Naghten test of insanity has been implemented in the State of Florida for over one hundred years). The M'Naghten test is the best test for determining whether a defendant is legally culpable for his or her criminal acts. Campbell, So. 2d at 877.
[164].Campbell, So. 2d at 878.
[165].*Id*.

clear that, in the circumstances, the death of [the officer] was the inevitable result of and an integral part of the same transaction, i.e., the robbery."[166] Even though Campbell was found guilty, Campbell should have been allowed the opportunity to raise his defense of insanity and produce his expert witness in the matter of justice and due process.

C. Ivonne Rosso

In *Rosso v. State*,[167] the defendant, Ivonne Rosso, was convicted of attempted first degree murder, second degree murder, and unlawful possession of a firearm during the commission of a criminal offense for shooting her roommate and her fifteen year old neighbor.[168] Although the roommate survived the attack, the fifteen year old did not, and later died.[169] Rosso introduced two expert witnesses during the trial, who testified that Rosso cannot be held criminally responsible

[166].*Id.*; see also State v. Hacker, 510 So. 2d 304, 306 (Fla. 4th Dist. Ct. App. 1986).
[167].505 So. 2d 611 (Fla. 3d Dist. Ct. App. 1987) (per curiam).
[168].*Id.*
[169].*Id.*

because Rosso suffered from a mental illness at the time the offense occurred.[170]

In the prosecution's opening and closing arguments, the prosecutor continuously criticized and belittled Rosso's insanity defense.[171] The prosecutor criticized the insanity defense by making statements that denounced the defense as just a means for getting away with murder even though Rosso was able to provide evidence that she was legally insane at the time the murder was committed under the *M'Naghten* Rule.[172] During the prosecution's closing argument, the prosecutor made demeaning comments and defined the insanity defense with the following statement: "The defense by which a person comes into [c]ourt and says, 'I murdered a 15 year old girl and almost murdered my best friend and blew her eye away, and I get to walk. I get to get off. I am not legally guilty. I am not responsible.'"[173]

[170].*Id.*
[171].*Id.* at 612.
[172].Rosso, 505 So. 2d at 611–12.
[173].*Id.* at 612.

The District Court of Appeal agreed with the defense that the prosecution's statements were improper and reversed the conviction for a new trial.[174] The court held that the "statements were derogatory of both Rosso's failure to testify and her legitimate insanity defense."[175] The court also found that the "prosecutor's statements were of such magnitude as to achieve fundamental error, thus rendering this error amenable."[176] Because the prosecutor's statements were improper, the Third District correctly remanded the case for a new trial. False statements such as the ones the prosecutor made, are considered to be prosecutorial misconduct because they deny the defendant the unmistakable right to a fair trial.[177]

[174].*Id*. at 616.
[175].*Id*. at 612.
[176].*Id*. at 613. "While [a] prosecutorial comment in reference to the defense generally as opposed to the defendant individually cannot be 'fairly susceptible' of being interpreted by the jury as referring to the defendant's failure to testify, . . . the comments here were specifically directed toward Rosso individually and toward her personal insanity defense." Rosso, 505 So. 2d at 613 (alteration in original).
[177].*Id*.

VI. THE FELONY MURDER RULE'S EFFECT ON JUVENILE DEFENDANTS—A COMPARISON

Considering the fact that one of the main reasons why the felony murder doctrine is so controversial is because the required element of proving criminal intent is not necessary,[178] it is particularly clear that this doctrine should not be applied to juvenile defendants. Instead, juveniles should be charged for their crimes within the juvenile justice system. Based on the infancy defense, it is presumed that juveniles between the ages of seven and fourteen are unable to form the necessary criminal intent required for criminal culpability.[179] "The common law infancy defense can be stated as 'children under the age of seven are conclusively presumed to be without criminal capacity, [while] those who have reached the age of fourteen are treated as fully responsible, . . . those between the ages of seven and fourteen [are given] a rebuttable presumption of criminal

[178].Van Zanten, supra note 15, at 1567.
[179].Drizin & Keegan, supra note 11, at 529.

incapacity.'"[180] This defense demonstrates the law's "unwillingness to punish those thought to be incapable of forming criminal intent."[181]

Additionally, the felony murder rule should not be applied to juvenile defendants because longstanding developmental and psychological research has proven that juveniles under the age of fourteen lack the cognitive capacity necessary to complete these crimes,[182] which is similar to mentally ill defendants, who lack the cognitive capacity to commit some of their crimes. Proven research studies have established that children under the age of fifteen are more susceptible to coercion and influence, such as peer pressure; are more impulsive; and are less equipped to realize future consequences of their actions than adults.[183]

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[180].*Id*.
[181].*Id*.
[182].*Id*. at 508. "This research reveals that many pre-adolescents and adolescents are not competent to stand trial, [are] incapable of understanding the legal proceedings against them, and [are] unable to meaningfully assist in their own defense." *Id*. (footnote omitted).
[183].*Id*.; see also Christie Thompson, Charged with Murder Without Killing Anyone: The Paradox of "Felony Murder" Laws, THE MARSHALL PROJECT, https://www.themarshallproject.org/2015/09/24/a-person-can-be-charged-with-murder-even-if-they-haven-t-killed-anyone#.qyot4Iv52

Research also shows that juveniles react differently and go through different decision-making processes than adults.[184] The inability to control certain impulses and the psychological disadvantages compared to that of an adult, make the felony murder rule particularly unfair to apply to juveniles—especially when it comes to unintentional crimes.

In 2012, the Supreme Court in *Miller v. Alabama*[185] held that mandatory life sentences without the possibility of parole for juvenile defendants were unconstitutional.[186] Supreme Court Justice Stephen Breyer stated in his concurring opinion that "'the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither

(last visited Mar. 3, 2017) ("Felony murder laws are especially controversial when it comes to children because, lawyers and advocates claim, they can be easily manipulated into playing a role in an older offender's crime.").

[184].Drizin & Keegan, supra note 11, at 508. "[E]merging research from the field of neuroscience, using MRIs and other technologies which scan the brain, suggests that differences in the organic structure and function of the teenage brain extend these disabilities in impulse control and decision-making into the late teens and early twenties." *Id*. at 509.

[185].132 S.Ct. 2455 (2012).

[186].*Id*. at 2469; Thompson supra note 184.

kills nor intends to kill the victim.'"[187] There are many cases that demonstrate the unjustness of the felony murder rule when applied to juvenile defendants. In 2005, a report conducted by Human Rights Watch and Amnesty International reported that out of all the juvenile defendants sentenced to life without parole, 26% had been convicted of felony murder.[188]

A. Corey Rocker

At the age of sixteen, Corey Rocker was arrested and convicted for felony murder and was sentenced to life in prison for being at the wrong place at the wrong time.[189] After 18 year old Brennon Darvane Days was shot and killed by Mitterrio D. Banks in his car, Rocker was arrested along with Banks, and served more than eight years

[187].Miller, 132 S.Ct. at 2476; Thompson supra note 184.
[188].Thompson, supra note 184.
[189].Craig Pittman, Judge Tosses Out Felony Murder Conviction for Man Who Never Touched Gun, TAMPA BAY TIMES (Sept. 30, 2016), available at http://www.tampabay.com/news/courts/criminal/judge-tosses-out-felony-murder-conviction-for-man-who-never-touched-gun/2295971.

in prison simply for being affiliated with Banks.[190] During his trial, it was determined that Banks fired the bullet that killed the 18 year old, and Rocker had never even seen or held the gun.[191] "[N]o witness saw Rocker at or near [the victim's] car during the shooting [and] 'Rocker was not carrying the pistol, and made no demand for money.'"

Nonetheless, Rocker was convicted under Florida's felony murder rule and served eight years in prison until an appellate court realized the harshness of his conviction and threw it out.[192] "[T]he appellate court ruled that without proof he was committing one of the designated felonies, he could not be convicted of murder, much less sent to prison for the rest of his life."[193] The state later appealed, but the Florida Supreme Court refused to hear the case.[194]

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[190].*Id*.
[191].*Id*.
[192].*Id*.
[193].*Id*.
[194].Pittman, supra note 190.

B. Curtis Shuler

Curtis Shuler was only 16 years old when he was charged with attempted burglary and first-degree felony murder for the death of Larry Steven Tyler during a four day shooting spree in Hines City, Florida in 1998.[195] Shuler was convicted of murder even after eye witness testimony revealed he was not present during the shooting.[196] Additionally, one of the other perpetrators of the shooting spree later recanted his testimony that Shuler was involved in the burglary, and testified that Shuler was not present during the murder.[197] However, the jury still convicted Curtis Shuler of first-degree felony murder even though the jury found him not guilty for the murder due to the

[195].Melissa Higgins, Eliminate Florida's Felony Murder Rule, CHANGE.ORG, https://www.change.org/p/eliminate-florida-s-felony-murder-rule, (last visited Mar. 3, 2017); Jeff Scullin, Jury Finds Shuler Guilty of Murder, THE LEDGER (Mar. 29, 2003), available at http://www.theledger.com/news/20030329/jury-finds-shuler-guilty-of-murder.
[196].Higgins, supra note 196; Scullin, supra note 196.
[197].Higgins, supra note 196.

felony murder rule.[198] After his trial, Shuler's attorney, Gil Colon Jr., was stunned by the verdict and stated, "'[i]t's a little puzzling because the jury, on their own, rejected [the prosecution's and the defense's] theory. They obviously did not believe he was the shooter,' but thought he was there."[199]

Shuler maintained his innocence and refused to accept a plea deal from the state after prosecutors offered him a 12 year sentence as opposed to a life sentence in prison.[200] Had Shuler accepted the plea agreement, he would have only had to serve five additional years of that sentence due to the time he already served in prison.[201] Shuler refused to accept the plea deal, and refused to plead guilty to a murder that he did not commit.[202] "'This young man gambled a life sentence for what was a few years,' Colon said. '(But) he says he's not guilty . . . . Obviously, he's not happy with the verdict. He's

[198].*Id.* "[T]he felony murder doctrine allowed the courts to give [Shuler] the maximum sentence possible: life without any possibility of parole." *Id.*
[199].Scullin, supra note 196.
[200].*Id.*
[201].*Id.*
[202].*Id.*

not happy with the sentence. Now, if the appeal fails, he's going to die in prison.'"[203]

VII. THE ROLE OF THE DURESS DEFENSE IN FELONY MURDER

The felony murder rule is also often condemned because it prohibits defenses such as self-defense and duress.[204] Duress, which is similar to coercion, excuses criminal actions "where 'the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law' . . . 'unless that crime consists of *intentionally* killing an innocent third person."[205] The duress defense can be established by proving that the defendant was under an "immediate threat

[203].*Id*. (alteration in original).
[204]."[T]he defense of duress is not available, as a matter of law, to a charge of killing a person in the course of a bank robbery, sometimes informally called federal felony murder." United States v. Johnson, 416 F.3d 464, 466 (6th Cir. 2005).
[205].Steven J. Mulroy, The Duress Defense's Uncharted Terrain: Applying It to Murder, Felony Murder, and the Mentally Retarded Defendant, 43 SAN DIEGO L. REV. 159, 164 (2006); see also Hunt v. State, 753 So. 2d 609, 613 (Fla. 5th Dist. Ct. App. 2000) (emphasis added).

of death or serious bodily injury,"[206] there was "a well-grounded fear that the threat would be carried out,"[207] and there was "no reasonable opportunity to avoid the threatened harm."[208]

In order to establish a claim of duress, the defendant must provide sufficient evidence to establish the six required elements of the defense:

1. the defendant reasonably believed that a danger or emergency existed that he did not intentionally cause;

2. the danger or emergency threatened significant harm to himself or a third person;

3. the threatened harm must have been real, imminent, and impending;

4. the defendant had no reasonable means to avoid the danger or emergency except by committing the crime;

[206].*Id*. at 165.
[207].*Id*.
[208].*Id*.

5. the crime must have been committed out of duress to avoid the danger or emergency; and

6. the harm the defendant avoided outweighs the harm caused by committing the crime.[209]

In *Cawthon v. State*,[210] a case of first impression in Florida involving the duress defense for murder, the First District Court of Appeal held that "coercion [or duress] does not excuse or justify the murder or attempted murder of an innocent third party."[211] The appellant testified that the sole reason the appellant shot and killed the victim was because members of his immediate family were being threaten with harm.[212] However, the court refused to allow a coercion instruction because "the evidence did not show that the danger was imminent or impending within the meaning of the

[209].Mickel v. State, 929 So. 2d 1192, 1196 (Fla. 4th Dist. Ct. App. 2006).
[210].382 So. 2d 796 (Fla. 1st Dist. Ct. App. 1980).
[211].*Id*. at 797; see also Hunt v. State, 753 So. 2d 609, 613 (Fla. 5th Dist. Ct. App. 2000) (stating duress is not a defense to an intentional homicide).
[212].Cawthon, 382 So. 2d at 797.

case law [and] the availability of the defense should not be extended to the commission of, or the attempted commission of, homicide."[213]

The Third District Court of Appeal in *Wright v. State*[214] also held that the defendant was not entitled to an instruction on duress because the duress defense is not an acceptable defense for a murder charge.[215] Duress is only available as a defense to other crimes in Florida.[216] The court reasoned that "a reflection that the rule that duress will never justify the killing of an innocent third party accords with the mores of our society. [This Court] unhesitatingly adopt the rule that duress is not a defense to an intentional homicide."[217]

In *Hunt v. State*,[218] the defendant was convicted of first-degree murder for shooting and killing a victim who was tied to a tree.[219] The defendant testified that at the time the murder was committed,

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[213].*Id*.
[214].402 So. 2d 493 (Fla. 3d Dist. Ct. App. 1981).
[215].*Id*. at 497.
[216].*Id*.
[217].*Id*. at 498; see also Hunt v. State, 753 So. 2d 609, 613 (Fla. 5th Dist. Ct. App. 2000).
[218].753 So. 2d 609 (Fla. 5th Dist. Ct. App. 2000).
[219].*Id*. at 611.

her boyfriend had a rifle pointed at her head and demanded that she shoot the victim, or else she would be killed.[220] The defendant also testified that the only reason she killed the victim was because she was under the direct control of her boyfriend.[221] Evidence was introduced at trial to show the continuing pattern of abuse, threat, and intimidation the defendant endured, "which ultimately deprived [the defendant] of the ability to even resist, let alone disobey" her boyfriend.[222] The defendant also introduced testimony from expert witnesses, who testified that the defendant's boyfriend continuously preformed sadistic rituals on the defendant such as cutting her with knives and razors, burning her flesh with cigarettes, sucking her blood, and several other acts of torture, causing the defendant to be entirely dependent on her boyfriend due to her mental illness.[223] Even after the evidence of torture and intimidation was presented, the court still disagreed with the defendant's claim of duress and affirmed

[220].*Id.*
[221].*Id.*
[222].*Id.* at 611–12.
[223].Hunt, 753 So. 2d at 611.

the conviction.[224] The court held that coercion was not an acceptable excuse to murder and the defendant made a "conscious decision" to kill the victim.[225]

The idea that duress cannot be a valid defense to felony murder is unreasonable because the general rule does not consider circumstances when the actual killing was caused by a co-felon or was unforeseen. Suppose the defendant was coerced and threaten into kidnapping a person for the principal offender and the principal offender then shot and killed the individual, the defendant who was coerced into kidnapping the victim would not be able to raise the defense of duress because an innocent third person was killed. In instances when the defendant is merely present due to coercion or assisting a co-felon during a crime, the defendant also cannot raise the duress defense if a murder

[224].Common law has "refused to recognize any compulsion, even the threat of death, as sufficient to excuse taking the life of another." Wright v. State, 402 So. 2d 493, 498 (Fla. 3d Dist. Ct. App. 1981) (quoting Jackson v. State, 558 S.W.2d 816, 820 (Mo. Ct. App. 1977); see also Hunt, 753 So. 2d at 613.
[225].Hunt, 753 So. 2d at 616.

occurs from the underlying felony.[226] Additionally, under the utilitarian perspective of deterrence, there is no relevant evidence that supports the idea that prohibiting the duress defense in felony murder and murder convictions actually deters an individual from killing another if he or she is under the immediate threat of harm and there is no reasonable means to escape the danger.[227]

VIII. SHOULD THE FELONY MURDER RULE BE UNCONSTITUTIONAL?

The felony murder rule was first established when essentially every felony was punishable by death.[228] Therefore, during early common law, it did not matter whether the defendant was punished for the underlying felony or whether the defendant was punished for the death that occurred during the course of the felony.[229] Now, however, the purpose of the doctrine is to "protect the public from

[226].Mulroy, supra note 214, at 206.
[227].*Id*. at 175.
[228].People v. Aaron, 299 N.W.2d 304, 310 (Mich. 1980).
[229].*Id*. at 311.

inherently dangerous situations caused by the commission of the felony."[230]

The rule was also established to deter gross negligent and accidental deaths by making everyone involved in the felony strictly liable for any and all deaths that occur during the commission or attempted commission of the felony.[231] The deterrence approach consists of two parts: "(1) the felony-murder rule deters a felon from acting negligently or accidentally during the commission of the felony; and (2) the felony-murder rule deters people from taking part in dangerous felonies in the first place."[232] The deterrence theory is accomplished by creating a "deterrent to the commission of [inherently dangerous] felonies by substituting the mere intent to commit those felonies for the premeditated design to effect death which would otherwise be required in first degree murder if someone were killed in the commission

[230].State v. Hacker, 510 So. 2d 304, 306 (Fla. 4th Dist. Ct. App. 1986); State v. Williams, 776 So. 2d 1066, 1069 (Fla. 4th Dist. Ct. App. 2001).
[231].DRESSLER, supra note 7, at 523.
[232].Van Zanten, supra note 15, at 1570; see also Hatchett supra note 13, at 1048.

thereof."[233] In reality, however, this deterrence approach fails because a felon cannot be deterred from committing an accidental or unforeseen act.[234] Although the felon has the intention to commit the underlying felony, the resulting death is often unintended and cannot be deterred.[235]

The felony murder rule can also be justified under the retribution theory.[236] Under the retributive approach, "[h]e whose felonious act is the proximate cause of another's death is criminally responsible for that death and must answer to society for it . "[237] This is explained by the just deserts theory.[238] Because a crime in which a death occurs is far more serious than one in which a death does not occur, the felon deserves a more serious punishment for the death.[239] Therefore, under this approach, the defendant should be held criminally

[233].Hacker, 510 So. 2d at 306.
[234].Van Zanten, supra note 15, at 1570.
[235].*Id*.
[236].*Id*. at 1571; Hatchett supra note 13, at 1048.
[237].Van Zanten, supra note 15, at 1570; see also Hatchett supra note 13, at 1048 (stating "a crime during which an individual is killed 'should be punished more severely than the same crime that does not [result] in death.") (alteration in the original).
[238].Hatchett supra note 13, at 1050.
[239].*Id*.

liable and punished for his or her actions regardless of whether the death was accidental or negligent.

Criticisms of both approaches of the felony murder doctrine, the utilitarian theory and the retributivism theory, reveal that punishment for defendants with mental illnesses is pointless.[240] Under the utilitarian perspective, defendants with a mental disease or defect cannot be deterred from felony murder because, most of the time, the mental illness causes the person to act against the person's own free will and the individual cannot distinguish between right and wrong. If the purpose of the utilitarian approach is to deter future crimes, this has no effect on defendants with mental illnesses. Punishment under the retributivism perspective is also pointless for defendants who are mentally ill because the purpose of retribution is for the punishment to be proportional to the crime. Punishing someone for actions caused that are a result of a mental disease or illness can be the equivalent of punishing a child for crying too much

[240].DRESSLER, supra note 7, at 345.

or punishing a puppy for having an accident in the house.[241] This is morally wrong because the individual cannot control his or her behavior. The United States Court of Appeals in *Holloway v. United States*[242] held, "[t]o punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or an animal. A man who cannot reason cannot be subject to blame. Our collective conscience does not allow punishment where it cannot impose blame."[243]

The felony murder rule is heavily criticized and is often considered unconstitutional due to the strict liability the rule imposes.[244] In *Aaron*, the Supreme Court of Michigan held that "[t]he felony-murder doctrine is unnecessary and in many cases unjust in that it violates the basic premise of individual moral culpability upon which our criminal law is based."[245] It is also viewed as unconstitutional

[241]."To blame such an individual for her acts is much like blaming a sick person for sneezing or an infant for dropping her glass of milk." *Id*. at 346.
[242].148 F.2d 665 (D.C. Cir. 1945).
[243].*Id*. at 666–67; see also DRESSLER, supra note 7, at 346.
[244].People v. Stamp, 82 Cal. Rptr. 598, 603 (Ct. App. 1969).
[245].People v. Aaron, 299 N.W.2d 304, 328 (Mich. 1980).

because it presumes malice aforethought and the intent to kill as opposed to requiring proof of such intent to kill as required for murder. In most states, the punishment for first-degree felony murder that resulted from an accidental death is more severe than the punishment for second degree murder which requires the intent to kill or cause grave bodily harm.[246]

IX. CONCLUSION

Aside from the fact that England fundamentally created the felony murder rule and then later renounced it, the doctrine still thrives throughout the United States today with only a few states

[246].*Id.* at 317.
Florida's felony murder rule applies to not only the killer, but the killer's co-participants in the underlying felony. That is the purpose of this law–to hold people responsible for a homicide which they did not commit because they took the risk associated with committing the underlying crime. The fact that a person did not intend for the homicide to occur, and did not know that someone, be it co-perpetrator or police officer, was going to kill, is no defense. This results in an extremely harsh application of the law, and one that really does not treat people who kill differently than those who do not. It is for this reason that the country which invented felony murder, England, has abolished it, and why a number of states, unlike Florida, have severely limited its application.
Brener, supra note 25.

abolishing the rule.[247] A petition on Change.org was created in 2014 to eliminate the felony murder rule in Florida and gained 1,599 supporters.[248] States, such as Michigan and Iowa, no longer recognize the rule, and have refused to allow the required mental state of murder to be inferred from the intent to commit the underlying felony.[249] The courts in New Mexico have held that "the presumption that the defendant has the requisite *mens rea* to commit first-degree murder 'is a legal fiction [the court] no longer can support.'"[250]

More states should follow England's path in abolishing the rule or should significantly limit its application because felony murder is easier to prove than murder.[251] For a felony murder conviction, the prosecution only needs to prove that the underlying

[247].Van Zanten, supra note 15, at 1572; see also People v. Aaron, 299 N.W.2d 304, 312 (Mich. 1980) (citing that the felony murder rule has been constantly revised and restricted in England, "the country of its birth," until it was finally abolished in 1957 by Parliament).
[248].Higgins, supra note 196.
[249].Aaron, 299 N.W.2d at 328–29. The Iowa Supreme Court held that the malice aforethought required for a murder conviction cannot be demonstrated by the intent to commit the underlying felony. *Id*. at 314. Three states now require proof of a mental element beyond the intent to commit the felony. *Id*. at 315.
[250].*Id*. at 314.
[251].Hatchett supra note 13 at 1049.

offense was committed and it resulted in a death.[252] The prosecution does not need to prove the elements of the intent to kill or malice aforethought as required for a murder conviction.[253] Because felony murder is easier to prove, a felony murder conviction by a jury is easier to achieve, and the state is relieved from the burden of having to prove premeditation.[254] This is one of the many reasons why the felony murder rule is heavily criticized and disfavored.[255]

The purpose of the doctrine, which is to deter felons from committing inherently dangerous felonies, has also been disproven because a person cannot be deterred from committing an accidental or unintentional act.[256] Therefore, a felon cannot be deterred from committing an accidental or negligent murder. Additionally, the reasons and purpose behind the doctrine when it was first created in

[252].*Id*. at 1048.
[253].*Id*.
[254].*Id*. at 1056.
[255].*Id*. at 1049.
[256].Hatchett supra note 13, at 1049.

common law, no longer exist today because the doctrine is extremely inconsistent and unjust.[257]

When applied to juvenile defendants, the Supreme Court held that mandatory life sentences without the possibility of parole for juvenile defendants were unconstitutional because they violate the Eighth Amendment's prohibition against cruel and unusual punishment.[258] Additionally, due to longstanding developmental and psychological research which has proven that juveniles under the age of fourteen lack the cognitive capacity necessary to complete these crimes, the felony murder rule especially should not be applied.[259] Children under the age of fifteen are more impulsive and are more susceptible to coercion, influence, and have different decision-making capabilities than adults.[260] Similarly, mentally ill defendants, who lack the cognitive capacity to commit some of their crimes, should not be held

[257].Aaron, 299 N.W.2d at 328.
[258].Miller v. Alabama, 132 S.Ct. 2455, 2469 (2012); Thompson supra note 184.
[259].Drizin & Keegan, supra note 11, at 508.
[260].*Id.*; see also Thompson supra note 184.

accountable for their impulsive and unintentional crimes.

Although a defendant should be held liable for his or her actions and for his or her participation in the underlying felony, holding a defendant liable for murder due to unintended or accidental results goes against the core values of the United States justice system.[261] In situations where the death was purely accidental or participation in the underlying felony was coerced, applying the felony murder rule is unjust. For defendants with mental illnesses, applying the felony murder rule seems particularly unjust because, in most cases, the defendant is incapable of controlling his or her actions and cannot distinguish between right and wrong. "While it is understandable that little compassion may be felt for the criminal whose innocent victim dies, this does not justify ignoring the principles underlying our system of criminal law."[262]

[261].Drizin & Keegan, supra note 11, at 318.
[262].*Id.*

EXPANDING DOMESTIC VIOLENCE LAWS TO INCLUDE DORMS AND SHARED SPACES ON COLLEGE CAMPUSES

Karen DeSoto

I. INTRODUCTION

Every year, ten million people are victims of domestic abuse.[1] Most domestic violence victims are college-age women.[2] Approximately 47.9% of female and 44.1% of male domestic violence victims experience this abuse between ages 18 and 24, when many young adults are living at college.[3] Additionally, 11.2% of all college students are

[1] *See* M.C. Black, Kathleen C. Basile, Matthew J. Breiding, Sharron G. Smith, Mikel L. Walters, Melissa T. Merrick, Jieru Chen, & M. Stevens. *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* (2011). Centers for Disease Control and Prevention (CDC). *Available at* http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.
[2] Jennifer L. Truman & Rachel E. Morgan, *Nonfatal Domestic Violence, 2003-2012*, Bureau of Justice Statistics (BJS) (2014). *Available at* http://www.bjs.gov/content/pub/pdf/ndv0312.pdf.
[3] Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization — National Intimate Partner and Sexual Violence Survey, United States, CDC (2011).

sexually assaulted "through physical force, violence, or incapacitation."[4]

This Article discusses the violence and sexual assault problems facing campuses, and how the broadening of the New Jersey Prevention of Domestic Violence Act of 1991 ["PDVA"] can protect students.[5] Section II details New Jersey's approach to restraining orders and compares New Jersey's approach to other states.[6] Section III examines the issues surrounding policies and procedures for reporting violence on college campuses.[7] Section IV explains the role of campus law enforcement in campus violence.[8] Section V makes recommendations for improving schools' responses to sexual harassment claims.[9]

[4] Rape, Abuse, and Incest National Network (RAINN). Campus Sexual Violence: Statistics (2015), *Available at* https://www.rainn.org/statistics/campus-sexual-violence (last visited Apr. 5, 2017).
[5] N.J. Stat. Ann. § § 2C:25-17 *et seq.*
[6] *See infra* notes xx - xx.
[7] *See infra* notes xx - xx.
[8] *See infra* notes xx - xx.
[9] *See infra* notes xx - xx.

II. NEW JERSEY'S APPROACH TO RESTRAINING ORDERS

Restraining orders are issued by courts to protect victims of domestic violence.[10] Restraining orders are governed by the New Jersey PDVA, which states that:

> [D]omestic violence is a serious crime against society…[T]here are thousands of persons in this State who are regularly beaten, tortured and in some cases even killed by their spouses or cohabitants….It is therefore, the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide.[11]

The Act also notes that:

> [P]revious societal attitudes concerning domestic violence have affected the response of our law enforcement and judicial systems, resulting in these acts receiving

[10] New Jersey Courts. The Prevention of Domestic Violence Act: A Guide to the Most Frequently Asked Questions, (2016). *Available at* https://www.judiciary.state.nj.us/prose/11253_dv_act.pdf (last visited Apr. 5, 2017).
[11] N.J. Stat. Ann. § 2C:25-18.

> different treatment from similar crimes when they occur in a domestic context. The Legislature finds that battered adults presently experience substantial difficulty in gaining access to protection from the judicial system, particularly due to that system's inability to generate a prompt response in an emergency situation.[12]

The PDVA's protection applies to anyone over the age of 18 "who has been subjected to domestic violence by a spouse, former spouse, or any other person who is a present household member or was at any time a household member."[13] The PDVA does not further define "household member," however, recent case law has broadened the term beyond the traditional family household setting.[14]

In 2012, the Appellate Division of the Superior Court of New Jersey ruled that neighbors in a boarding house were considered "household member" under the PDVA.[15] In 2008, the plaintiff,

[12] N.J. Stat. Ann. § 2C:25-18.
[13] N.J. Stat. Ann. § 2C:25-19.
[14] *Id.*
[15] *See* S.P. v. Newark Police Dep't, 52 A.3d 178 (App. Div. 2012).

S.P., lived on the third floor of a boarding house in Newark.[16] The only other resident on the third floor was Louis Alfredo Santiago, Jr.[17] S.P. and Santiago had separate bedrooms, but shared a bathroom.[18]

On February 17, 2008, Santiago groped S.P. in the hallway and told her that he wanted to have sex, so she pushed him away and locked herself in her bedroom.[19] When Santiago tried to enter S.P.'s bedroom, S.P. called the police.[20] When the police officers arrived, S.P. told them what happened, and Santiago confirmed that he had touched S.P.[21] The officers advised Santiago to leave S.P. alone and left the premises.[22] Officer Bernal, who responded to the scene, later testified that he did not arrest Santiago because there were "no grounds of domestic violence [and] no physical signs of injury," and that Santiago and S.P. "did not have any dating relationship ... live under the same roof

[16] *Id.* at 180.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 181.
[22] *Id.*

[and] [t]hey're renting rooms."[23] Therefore, based on his training and experience, the officer determined that the incident was not domestic violence.[24]

The next morning, S.P. encountered Santiago in the hallway again, where Santiago punched, choked, and raped S.P..[25] Police arrested Santiago that day.[26] S.P. obtained a Temporary Restraining Order (TRO) on February 21, 2008.[27] The TRO listed S.P. and Santiago as "household members."[28] S.P. sued the Newark Police Department in 2010, alleging that they failed to properly arrest and remove Santiago from the building pursuant to the PDVA.[29] The Appellate Division found that S.P. and Santiago were "household members."[30]

The Appellate Division stated that the definition of "household member" should be applied on a case by case basis with consideration of five factors:

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[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at 181.
[28] S.P. v. Newark Police Department, 52 A.3d at 181.
[29] *Id.*
[30] *Id.* at 182.

> (1) constancy of the relationship; (2) over-night stays at each other's residence; (3) personal items such as jewelry, clothing; and personal grooming effects stored at each other's residences; (4) shared property arrangements, such as automobile usage, access to each other's bank accounts and one mailing address for billing or other legal purposes; and (5) familiarity with each other's siblings and parents socially in dining and/or entertainment activities together, and/or attendance together at extended family functions such as weddings.[31]

The court held that

> [W]e are satisfied the particular factual circumstances of this case gave rise to a finding that S.P. and Santiago were members of the same household within the intendment of the PDVA and the broad and flexible interpretation of 'household member' articulated in the case law.[32] Additionally, the court observed that "this housing arrangement of close living quarters

[31] *Id.* at 187.
[32] *Id.*

> with shared common areas placed S.P. in a more 'susceptible position for abusive and controlling behavior in the hands of [Santiago].'"[33]

The court also based its decision on the Superior Court of New Jersey's Chancery Division's holding in *Hamilton v. Ali*.[34] In that case, the plaintiff and defendant were suite mates in a nine-person suite on a college campus.[35] The plaintiff and defendant were involved in a physical altercation in which the plaintiff was injured, and the plaintiff eventually obtained a restraining order against the defendant.[36] The court upheld the issuance of the restraining order because the plaintiff and the defendant were considered "household members" under the PDVA.[37] The court reasoned that "each ha[d] separate sleeping quarters but must interact on a frequent basis," which left the plaintiff vulnerable to the defendant's abuse.[38] Additionally, in *S.Z. v.*

[33] *Id.*
[34] *S.P. v. Newark Police Department*, 52 A.3d at 188.
[35] *Hamilton v. Ali*, 795 A.2d 929, 929 (Ch. Div. 2001).
[36] *Id.* at 929-30.
[37] *Id.* at 934.
[38] *Id.*

M.C, the Superior Court found that the definition of "household member" applied to a man, who was temporarily living with the plaintiff for seven months.[39] The court found that "[d]efendant's alleged invasion of plaintiff's privacy in furtherance of a sexual relationship began when they were living in the same home and resulted in defendant's eviction from that home."[40] These combined rulings expand the availability of restraining orders to students living in dormitories.[41]

Restraining order availability to non-family members varies among states.[42] For example, under New York's narrow statute, restraining orders are only available against "[a] person related to the victim by blood or affinity, current or former spouse, [or] person who has a child with the

[39] *S.Z. v. M.C.*, 417 N.J. Super. 622, 623, 11 A.3d 404, 405 (App. Div. 2011).
[40] *Id.* at 407.
[41] See *infra* notes xx - xx.
[42] American Bar Association, Domestic Violence Civil Protection Orders (CPOs) (2014), http://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/statutorysummarycharts/2014%20CPO%20Availability%20Chart.authcheckdam.pdf (last visited Apr. 7, 2017).

victim."[43] Connecticut's statute allows a restraining order for"[a]nyone who has been subjected to a continuous threat of present physical pain or physical injury by another family/household member or a current or former dating partner."[44] Thirty states allow restraining orders against household members, however, the definitions are open to varying interpretations and confusion for law enforcement.[45]

III. SEXUAL VIOLENCE ON CAMPUSES

Sexual assault reporting on college campuses is governed by Title IX of the Civil Rights Act of 1964.[46] Title IX requires that every school have a Title IX coordinator, who "ensures schools are compliant with Title IX, coordinates the investigation and disciplinary process, and looks for patterns or systematic problems with compliance to

[43] *Id.* at 20.
[44] CONN. GEN. STAT. §46B-15(a) (2013).
[45] *Id.*
[46] Title IX - Know Your IX, Know Your IX, http://knowyourix.org/title-ix/title-ix-in-detail/ (last visited Apr. 5, 2017).

ensure schools fulfill all their federal obligations."[47] Title IX and subsequent guidance from the Department of Education also require sex assault response training for certain school employees, "prompt" handling of sex assault complaints, and "equitable" resolution of such complaints.[48]

Under the Clery Act, a consumer protection law aimed to foster campus safety, schools must create and distribute an Annual Security Report (ASR), detailing crime statistics and the school's security policies.[49] The Clery Act also requires schools to provide comprehensive sexual assault education and include a summary of such educational programs in the ASR.[50] The Act also details the information schools are required to provide to individuals, who report sexual assault.[51] Victims must be informed of their right to call the police, available mental health services, and resources for changing classes

[47] *Id.*
[48] *Id.*
[49] Campus Sexual Assault Victims' Bill of Rights, Jeanne Clery Act (2016), http://www.cleryact.info/campus-sexual-assault-victims--bill-of-rights.html (last visited Apr. 5, 2017).
[50] *Id.*
[51] *Id.*

or living situation.[52] Schools also must have internal disciplinary procedures for sexual assault, disclose possible outcomes after a final determination, and afford both the victim and the accused the same opportunity to call witnesses.[53] Schools that fail to abide by the mandates of the Clery Act are subject to financial penalties.[54]

However, despite the protections of Title IX and the Clery Act, reporting sexual assault to the school alone can unfortunately open the door to schools mishandling assault and misreporting sexual assault statistics.[55] A recent investigation by 31 senators indicates that many schools underreport sexual assault statistics.[56] The Senators delivered a letter to former United States Attorney General Loretta Lynch and former United States Department of

[52] *Id.*
[53] *Id.*
[54] Clery Act Reports, Federal Student Aid, https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports (last visited Apr. 21, 2018).
[55] "Why schools handle sexual violence reports - Know Your IX," Know Your IX, http://knowyourix.org/why-schools-handle-sexual-violence-reports/ (last visited Apr. 5, 2017).
[56] VAWA-Clery-Anniversary-Letter, Documentcloud.org (2016), https://www.documentcloud.org/documents/2938057-VAWA-Clery-Anniversary-Letter.html (last visited Apr. 5, 2017).

Education Secretary John B. King, Jr.[57] Their report found that schools were grossly underreporting sexual assault statistics, stating that

> 91 percent of schools reported no incidents of domestic violence or dating violence. These directly conflict with the [Department of Justice (DOJ)] and [Centers for Disease Control and Prevention (CDC)] data on sexual assault, and strongly suggest that schools are either not taking the reporting obligation seriously or are not creating an environment where students feel comfortable coming forward to report, and are vastly underreporting these crimes.[58]

Some specific instances of underreporting or misreporting are William and Mary University, which failed to report a sexual assault and hate crime assault, and Georgetown, which mischaracterized a forced fondling as a "Burglary — No Force."[59] Additionally, Georgetown University

[57] *Id.*
[58] *Id.*
[59] Clery Act Reports, Federal Student Aid, https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports (last visited Apr. 21, 2018).

was cited for requiring students to sign a non-disclosure agreement prior to accessing judicial proceeding outcomes and sanctions.[60] Oklahoma State University professor John Foubert observed that "too many institutions are looking to protect their institutional brand by saying 'rape doesn't happen here.'"[61]

Furthermore, despite the educational mandate of the Clery Act and government funding for educational programs, many schools fall short regarding education on violence, assault, and sexual assault.[62] Many schools simply offer online courses that contain a 30-minute introductory program regarding sexual assault.[63] Studies have shown that introductory programs on sexual assault do not have long term benefits and can even help assailants

[60] Clery Act Reports, Federal Student Aid, https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports (last visited Apr. 21, 2018.
[61] Allie Bidwell, *Campus Sexual Assault: More Awareness Hasn't Solved Root Issues*. U.S. NEWS & WORLD REPORT (2015), *available at* https://www.usnews.com/news/articles/2015/05/20/sexual-assault-on-college-campuses-more-awareness-hasnt-solved-underlying-issues (last visited Apr. 5, 2017).
[62] *See infra* notes 64 - 66.
[63] *Id.*

avoid detection.[64] Professor Foubert remarked, describing Oklahoma State University, that "[t]hey're getting up to a bare minimum level."[65]

Unfortunately, the Clery Act has not led to a decrease in the incidence of violence and sexual assault on campuses, but rather an increase in the number of incidents.[66] Sexual assaults on campus have risen from approximately 4,000 in 2012 to 5,000 in 2015.[67] A report by a group of Senators released in May 2015 indicated that an increase from 3,264 sexual assaults reported in 2009 to 6,016 reported in 2013.[68] Rutgers University has the eighth highest incidence of rape reporting of universities in the United States.[69]

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[64] *Id.*
[65] *Id.*
[66] *See* Bureau of Justice Statistics, National Center for Education Statistics, Indicators of School Crime and Safety: 2015 (2015), *available at* https://www.bjs.gov/content/pub/pdf/iscs15.pdf (last visited Apr. 5, 2017).
[67] *Id.*
[68] New Data Indicates a Rise in Sexual Assault Allegations Despite Decreasing Campus Crime Numbers, Generation Progress (2016), *available at* http://genprogress.org/voices/2016/05/26/43612/new-data-indicates-rise-sexual-assault-allegations-despite-decreasing-campus-crime-numbers/ (last visited Apr. 5, 2017).
[69] Tom Davis, *Rutgers' Reported Rapes Are Eighth Most In U.S., New Data Shows*, NEW BRUNSWICK PATCH(June 7, 2016), *available at* http://patch.com/new-jersey/newbrunswick/rutgers-among-us-

Increased media attention on school mishandling of sexual assault cases may contribute to colleges improving their practices.[70] In 2012, a fellow student, Paul Nungesser, sexually assaulted Columbia University student Emma Sulkowicz in her dorm room.[71] Emma filed a complaint with Columbia in 2013 and a hearing was held, where Paul was found not responsible.[72] Emma appealed the decision but her appeal was denied.[73] Emma then went to the local police, but found the interaction "so upsetting" that she did not pursue charges.[74] Emma maintained that Columbia's investigation and hearing processes were flawed

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colleges-most-rapes-new-report-finds. This can also indicate a higher incidence of reporting rather than a higher incidence of rape itself. *Id.*

[70] *See* Emily Bazelon, *Have We Learned Anything from the Columbia Rape Case?* NEW YORK TIMES (2014), *available at* https://www.nytimes.com/2015/05/29/magazine/have-we-learned-anything-from-the-columbia-rape-case.html (last visited Apr. 5, 2017).

[71] Roberta Smith, *In a Mattress, a Lever for Art and Political Protest,* NEW YORK TIMES (2014), *available at* https://www.nytimes.com/2014/09/22/arts/design/in-a-mattress-a-fulcrum-of-art-and-political-protest.html?_r=0 (last visited Apr. 5, 2017).

[72] *Id.* Paul continues to deny the allegations and sued Columbia in April in 2015 for allowing him to be harassed in the wake of the hearing and during Emma's protest. *Id.*

[73] *Id.*

[74] *Id.*

because of the evidence that was admitted and the inappropriate questions asked during the hearing.[75]

In protest of Columbia's handling of her case, Emma carried her mattress around campus and on graduation day.[76] In 2014, Columbia changed its sexual assault practices.[77] Students involved in sexual assault hearings may have an attorney present at the hearing, and a student will be provided an attorney if he or she cannot afford one.[78] Additionally, Columbia overhauled its investigators and staff, revamped its training, and launched the Sexual Respect Initiative.[79] The Sexual Respect Initiative aims to:

> [i]ncrease your knowledge of key concepts related to sexual respect, including healthy and problematic behaviors, and the methods and potential impact of bystander

[75] Emily Bazelon, *Have We Learned Anything from the Columbia Rape Case?* NEW YORK TIMES (2014), *available at* https://www.nytimes.com/2015/05/29/magazine/have-we-learned-anything-from-the-columbia-rape-case.html (last visited Apr. 5, 2017).
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*

> intervention; [i]ncrease awareness of University resources and community values; and [p]rovide opportunities to dispel myths about sexual violence, learn more about the link between gender stereotypes, harassment and violence, and foster awareness about sexual violence within our community and broader society.[80]

The grassroots advocacy of Emma Sulkowicz is a hopeful example of students' ability to publicly expose schools' mishandling of sexual assault and force schools to enact policies to protect students.

IV. ROLE OF CAMPUS POLICE

Reporting sexual assault to campus authorities provides benefits that are not available from police.[81] Primarily, school reporting procedures provide an avenue for victims who may not want to

[80] Sexual Respect and Community Citizenship Initiative 2016, Sexual Respect (2016), Columbia University, *available at* https://sexualrespect.columbia.edu/sexual-respect-and-community-citizenship-initiative-2016 (last visited Apr. 5, 2017).
[81] "Why schools handle sexual violence reports - Know Your IX," Know Your IX, http://knowyourix.org/why-schools-handle-sexual-violence-reports/ (last visited Apr. 5, 2017).

go to the police for fear of retaliation, the fact of reliving assault at a trial, or the result of not being believed.[82] Furthermore, campus authorities are the only avenue for men in states where sexual assault on a man may not be a crime.[83] Additionally, schools are required to offer victim services that police do not offer, such as "academic accommodations, dorm and class transfers, and mental health support."[84] Finally, campus proceedings move faster than court proceedings, offering quicker resolution to all parties involved.[85]

Even though flaws exist in campus policing of sexual assault, both campus police and universities try to warn students about sexual assault. For example, the Rutgers University Health Services website advises students on the definitions of "sexual assault" and "consent;" what to do if they are assaulted; and links to an incident report form

[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*

for on-campus crime.[86] The website advises students to go to the emergency room. and "[i]f [they] have been injured, or feel unsafe now, if on campus, call police, 973-353-5581 (x5581); if off-campus dial 911 (emergency) immediately."[87] The school also operates a sexual assault hotline.[88] With respect to interpersonal violence, the website contains the definition of dating violence and advises students to call campus police or 911.[89]

The New Jersey State Police website also contains information defining sexual assault and advising victims regarding what to do in the event of assault.[90] The New Jersey State Police advise individuals to contact their county's Sexual Violence Agency "for emotional support, information and to learn about your options", seek medical attention, then "[h]ave your Sexual Assault

[86] Rutgers University Health Services, http://health.newark.rutgers.edu/sexual-assault-interpersonal-violence-services/sexual-assault (last visited Apr. 5, 2017).
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] New Jersey State Police. Sexual Violence Information, *available at* http://www.njsp.org/division/operations/sexual-violence-info.shtml (last visited Apr. 6, 2017).

Response Team (SART) activated if you wish to have forensic evidence collected by calling your local police department or dialing 911."[91]

Although school assault policies contain common threads, they also differ in ways that can have consequences for student reporting.[92] Only a few schools provide amnesty for victims who were under the influence when an incident of assault occurs.[93] Some schools impose time limits for reporting.[94] Many policies mention education and prevention efforts, but none require them, which one commentator observed "may show that the federal government and institutions value compliance over prevention education."[95] These flaws in campus policies underscore the need for broader restraining order protections under the law.[96]

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[91] *Apr. Id.*
[92] Amy Beyer, An Investigation into Title IX Compliance at Land Grant Institutions 43 (2015), *available at* http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1247&context=cehsedaddiss (last visited Apr. 6, 2017).
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*

V. CONCLUSION

Considering the problems facing schools and students regarding sexual assault prevention and handling, extending restraining orders to dormitories similar to in New Jersey could help reduce violence and sexual assault in other states, both by protecting students and deterring further violence.[97] Involving law enforcement in campus violence incidents increases the options for victims and provides increased resources for investigation.[98]

The added remedy of a restraining order is in the event of violence or assault; however, this will only protect students if they are aware of this option. Schools in New Jersey should educate students about the availability of this option should they choose to involve the police. Although fear of reporting an internal bias may still be factors deterring students from seeking help after a sexual assault, the added protection of including the police

[97] *See S.P. v. Newark Police Dep't*, 52 A.3d 178 (App. Div. 2012).
[98] American Association of University Professors (AAUP), Campus Sexual Assault: Suggested Policies and Procedures, *available at* https://www.aaup.org/report/campus-sexual-assault-suggested-policies-and-procedures (last visited Apr. 14, 2017).

at schools can still reduce assault and increase awareness.[99]

An additional solution proffered by John Banzhaf, a law professor at George Washington University, is to establish an independent organization funded and shared by schools in a given area. [100] This organization would consist of trained sexual assault experts and an independent arbitration panel.[101] Professor Banzhaf stated that these organizations

> could afford . . . to keep on staff two or three or four people because they are covering 30 to 40 colleges. They would have the training, they would have the expertise, to interview the victims fairly and properly, to get and preserve the evidence, and to do so in a completely impartial way.[102]

[99] "Why schools handle sexual violence reports - Know Your IX," Know Your IX, http://knowyourix.org/why-schools-handle-sexual-violence-reports/ (last visited Apr. 5, 2017).
[100] Tierney Sneed, *Is This the Solution to the Campus Rape Conundrum?* U.S. NEWS & WORLD REPORT (2015), *available at* https://www.usnews.com/news/articles/2015/03/16/is-this-the-solution-to-the-campus-rape-conundrum (last visited Apr. 12, 2017).
[101] *Id.*
[102] *Id.*

The assistance of trained, independent mediators to handle sexual assault cases would improve the process for all parties and could avoid situations akin to the Emma Sulkowicz mattress case by removing the potential biases of schools and police from the fact-finding and punishment equation. Mediation offers all of the damages available in litigation and arbitration, but in a flexible, customizable, and confidential format that is ideal for sensitive matters such as sexual assault.[103] Additionally, the parties are not hampered by the rules of evidence, and are thus more freely able to express their side of the story in a way that is more sensitive to sexual assault cases.[104]

Mediation has a high success rate, with conflicts resolved in approximately eighty-five percent of cases, and parties satisfied in approximately

[103] *See* Carrie Bond, Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace, 65 Fordham Law Review 2512 (1997).
[104] Carrie Bond, Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace, 65 Fordham Law Review 2515 (1997).

seventy-seven percent of cases.[105] Parties have increased flexibility to control the damages and outcome, including customized non-monetary damages, which would be ideal in cases of campus assault, where the parties may have to continue to coexist on campus.[106] For example, damages have included a personal apology, which can be integral in helping a victim gain closure.[107] Mediation has already been successfully implemented in workplace sexual harassment cases, and would be beneficial to all parties if implemented in college sexual assault cases.[108]

In sum, New Jersey's expansion of restraining order availability to more college students is a step in the right direction to curtail campus sexual

[105] Carrie Bond, Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace, 65 Fordham Law Review 2511, 2513 (1997).
[106] Carrie Bond, Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace, 65 Fordham Law Review 2514, 2516 (1997).
[107] Carrie Bond, Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace, 65 Fordham Law Review 2517 (1997).
[108] Carrie Bond, Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace, 65 Fordham Law Review 2514, 2516 (1997).

assault.[109] However, schools still need to go further to comply with existing laws and protect their students.[110] Increasing media attention and student mobilization should put a spotlight on schools and incentivize them to abide by existing laws to reduce sexual assault on campuses.[111] Furthermore, mediation should be implemented on campuses to resolve sexual assault disputes because it would ensure a more individualized, flexible and confidential resolution process that would protect the interests of both the victim and the accused from the intersecting interests of schools and the police.[112]

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[109] *See S.P. v. Newark Police Dep't*, 52 A.3d 178 (App. Div. 2012).
[110] *See* VAWA-Clery-Anniversary-Letter, Documentcloud.org (2016), https://www.documentcloud.org/documents/2938057-VAWA-Clery-Anniversary-Letter.html (last visited Apr. 5, 2017); *see also* Allie Bidwell, *Campus Sexual Assault: More Awareness Hasn't Solved Root Issues*, U.S. NEWS & WORLD REPORT (2015), *available at* https://www.usnews.com/news/articles/2015/05/20/sexual-assault-on-college-campuses-more-awareness-hasnt-solved-underlying-issues (last visited Apr. 5, 2017).
[111] *See* Emily Bazelon, *Have We Learned Anything from the Columbia Rape Case?* NEW YORK TIMES (2014), *available at* https://www.nytimes.com/2015/05/29/magazine/have-we-learned-anything-from-the-columbia-rape-case.html (last visited Apr. 5, 2017).
[112] Carrie Bond, Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace, 65 Fordham Law Review 2518 (1997).

BOOK REVIEW: *ILLICIT SEX WITHIN THE JUSTICE SYSTEM* BY CARMEN M. CUSACK

Jessica T. Bracho

Religion, tradition, sex, laws, and the justice system. Carmen M. Cusack, Ph.D., J.D., in *Illicit Sex Within the Justice System*, paints a detailed mural of how these four categories blend in, sometimes seamlessly, with each other. Cusack's book begins with an exploration of how laws are created by society's standards and are based off tradition and religion; both of which have been intertwined through time. She discusses that although times and society have changed, laws are not adapting and, in turn, are affecting the justice system.

Cusack's book highlights how morality comes from tradition, the backbone to the laws currently set in place. Although things have changed, some laws remain, as they are heavily saturated by morality and tradition. She specifically addresses

the role sex has played throughout time and place. She describes how traditions have progressed, but, yet the laws and the justice system have struggled to keep up. Because of society adopting certain norms, it is experiencing some negative effects from certain old-school mentalities. Cusack's book explains that the justice system's inability to adapt, to reflect the current times, has led to moral deviance, specifically sexual deviance, which has disoriented society's moral compass.

A timely, yet, still controversial topic, this book adds descriptive examples of how sex is viewed and used on all sides of the justice system. Cusack begins by laying out a foundation and discussing the essential role religion and tradition played (and still plays) in legislating and regulating. She describes both how the justice system is reliant on power and how power is achieved through many things, but particularly sex. She explains how sex is a commonly used tool and how morality has been used to suppress some while helping others advance. Cusack lays out vivid examples of this

throughout the justice system—from prisoners to judges, from police officers to federal agents. She elaborates on how civilians and officials both react to power and sex, leading to possible deviant behavior and leadership.

Cusack's book presents the urgency to end hypocrisy. Actions deemed to be immoral and/or illegal are being punished by those with authority. Yet, those with authority are also violators of such immoral and/or illegal acts. One broad example, which Cusack returns to frequently in her book, is adultery. In some states, adultery is illegal, yet, some of the authoritative officials enforcing, punishing, policing, or enacting such laws have been a party to said crime. Cusack further examines and expands on the negative effects this double standard causes. From victims of domestic violence not speaking up because of fear of being caught breaking the law to the population's loss of faith in the system or government.

Although Cusack suggests that laws and the justice system adapt to the times, she acknowledges

that society's moral compass has been cracked and needs to be replaced. Without certain laws set in place to protect women, men, homosexuals, etc., society will continue to morally decay. Cusack suggests that society's morals have evolved and the justice system is falling behind. Thus, the justice system is failing society, causing distrust, and leading to moral deviance. She holds that for society to function there must be trust in the justice system, which must lead by example.

Cusack's book is not for the faint of heart or the close-minded. It is a book begging for change; change that is necessary to appreciate each other's individuality without fear, for government to regain society's trust, and for our moral compass to be reset. Cusack, so wisely, proposes interaction between the justice system's members with authoritative power (e.g., officials and agents) and the civilian world to understand each other, identify, and come to terms with the new norm.

FOOT BINDING: A FEMINIST POINT OF VIEW[1]

Carmen M. Cusack

I. INTRODUCTION

To symbolize and communicate grace, elegance, and refinement, women begin at a young age to subject their feet to "a battery of injuries: black nails, purpling flesh, growths galore," "black" "feet," "numb[ness]," "joint" "inflammation," "aggravating" bone fragments," "broken bones and stress fractures," "bruised toenails," "cracked" "toenails," "broken toenail[s]," "blisters, bunions," "corns," "bits of hard skin between…toes," "infections," "hard skin that splits at the joints of…toes," "sprain[s]," "pain," "damaged" "tendon[s]," "surgery," "twisted ankle[s]," "ulcers between" "toes," "removing a nail," "cramp[s], and

[1] Many thanks to Bows, who gives me courage to fight oppression. This is dedicated to white tigers. Joelle Lejano, "Mary Jane Shoes-Fergie," YOUTUBE.COM, July 24, 2008, *available at* https://www.youtube.com/watch?v=MrWuBiF2Hac.

"swell[ing]."[2] These women are ballet dancers.[3] Male dancers suffer similar injuries, including "ankle and muscular injuries."[4] "[S]elf-treatment is the norm. Some is benign: wrapping feet in tape" or "covering their feet in glue and other chemicals."[5] "More dangerously still, many attack their feet with scissors and razor blades."[6] "The culture of popping painkillers is widespread."[7] Dancers circulate brands to maintain medications' effectiveness.[8]

These injuries are acceptable to society.[9] For example, parents are unlikely to be arrested for requiring their children to perform.[10] Discomfort and injuries are normal for many amateur and

[2] Emma John, "I Was Doing a Solo and I Heard My Foot Crack," THE GUARDIAN, September 5, 2006, *available at* https://www.theguardian.com/stage/2006/sep/05/dance.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] John, THE GUARDIAN (2006).
[9] *Id.*
[10] Leah McLaren, "Leah McLaren: If I Want My Son to Respect Women, I Need to Teach Him to Embrace the 'Girlish,'" THE GLOBE AND MAIL, April 14, 2016, *available at* https://www.theglobeandmail.com/life/parenting/why-im-teaching-my-son-to-embrace-girly-things/article29629855/.

professional dancers, as well as for other athletes.[11] Majority cultural condonation distinguishes these lawful activities from sanctionable practices.[12] Although the law may not directly discriminate against a group of people based on ethnicity, it may be used to castigate minorities' cultural practices.[13]

Foot binding is a cultural tradition that has been portrayed in terms of feminism and subjugation of women.[14] Generally, in the United States, it is not *per se* illegal.[15] Arguments against it, which have not persuaded the law, but have infiltrated culture,

[11] *Id.*
[12] *Id.*
[13] O.C.G.A. § 16-5-27 (2017). Yick Wo v. Hopkins, 118 U.S. 356 (1886).
[14] Shoes generally may convey classes. Shoes hanging on utility wires can symbolize patriarchy or matriarchy at work. Utility wires sometimes represent oppression and neglect. On any given utility pole, the top wire is likeliest to be the power company (e.g., Gulf Power). The middle wire is likely a cable/internet company (e.g., Cox). The bottom wire is likely to be a phone wire (e.g., AT&T). Companies (i.e., Cox) may be reluctant to remove shoes when annoyed residents do not have accounts (i.e., nonhuman) or individuals (i.e., account holders) occupying dwellings nearest to the shoes neglect to report the problem. Symbolic oppression with shoes of certain members of society is ongoing, albeit in different forms that foot binding. Carmen M. Cusack, Advocacy to utility companies for humans and birds in Pensacola, FL (2017).
[15] *See, e.g.*, Minn. Stat. §§ 146B.01-146B.10(c) (2018). Piercing minors' tongues is lawful with parental consent. *Id.* Minn. Stat. § 146B.07(2)(3)(c) (2018). Tongue bifurcation on minors is illegal. *Id.*

appear to be xenophobic or bigoted.[16] Section II of this Article examines some historical notes about foot binding in China and describes cultural input from Christians. Section III analyzes relevant law, which may be used to deter foot binding activities. Section IV compares ballet shoes and other western forms of body modification to Chinese foot binding. Section V criticizes feminist cultural attacks on foot binding. Section VI concludes that foot binding is an acceptable form of cultural expression.

II. TRADITION AND CONTEMPORARY COMPARISON

A. Chinese History

Foot binding was protested in China during the mid-nineteenth century by Christian Chinese women.[17] Christianity in China correlated with gender disparity (e.g., sex-segregated education).[18]

[16] *See infra* Sections II-V.
[17] Mary Szto, *Gender and the Chinese Legal Profession in Historical Perspective: from Heaven and Earth to Rule of Woman?*, 18 TEX. J. WOMEN & L. 195, 227 (2009).
[18] *Id.*

Foot binding pronounced class differences more than gender disparities, but not misogyny.[19] Christian women insisted on separating women from men.[20] They allowed the poor to have access to education previously reserved for wealthy women.[21] The alleged purpose of education was to train women in Biblical studies and to be wives.[22] However, the majority of missionaries in China were single women.[23] Using queer studies as a lens through which to analyze this era, it may seem as if some missionaries intended to infiltrate the home.[24] Some lower class individuals, including homosexuals and heterosexuals, may have conducted class warfare by claiming gender liberation.[25] Poor women gained access to new

[19] Our Last Night, "Fantasy Land," SELECTIVE HEARING (2018), *available at* https://www.youtube.com/watch?v=b-4TdBvpxEw. "Perfect on the outside. Broken on the inside." *Id.* "We display split personalities out on our trophy shelves to erase the parts of us that we don't want to face." *Id.* "It's like we're living in fantasy land, burying our heads in the sand, running from the dark, covering our flaws." *Id.* "Stuck in utopia, a fabrication, screaming out for help so silently." *Id.*
[20] Szto, 18 TEX. J. WOMEN & L. 195 (2009).
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] Paul Oremland, 100 MEN (2017).
[25] Szto, 18 TEX. J. WOMEN & L. 195 (2009).

ideas and were exposed to new ideologies.[26] Wealthy women may have been paternalized by Chinese law and Christianity.[27]

In retrospect, feminists may claim that laws intruding into upper class rituals benefited women, but, in fact, such laws were to women's detriment because they suffered from a loss of privilege that had insulated them from poverty—a detriment to any woman.[28] "In one generation, some [women] went from seclusion and immobility to being political[ly] revolutionary."[29] Some scholars have justified prejudice against wealthy women by pointing to a few examples of middle class foot binding.[30] Women subjected to physical labor due

[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] Szto, 18 TEX. J. WOMEN & L. 195, 227 (2009).
[30] Janice A. Lee, *Family Law of the Two Chinas: A Comparative Look at the Rights of Married Women in the People's Republic of China and the Republic of China,* 5 CARDOZO J. INT'L & COMP. L. 217 (1997). "Foot binding was not only practiced by the wealthy. Many middle and lower class families had their women's feet bound only for the chance for their daughters to be married or to seek work as a prostitute." *Id.* at 226, n. 62.

to disadvantage were never permitted or encouraged to foot-bind.[31]

In China, foot binding was performed on infants.[32] Fathers allegedly bound infant daughters' feet using swaths of cloth to constrict growth and to shape the bones, ligaments, and muscle structure.[33] Foot binding may be performed on adult females.[34] Feet are malleable and may be shaped by shoes and other gear, including swaths of cloth.[35] Cultural intolerance for foot binding did not correlate with the female's capacity or incapacity to assent. The practice was totally abhorred.[36]

B. Comparison

Adult women may modify their bodies, for example with breast implants and rhinoplasty.[37] Baby daughters may not be prevented from

[31] Anna M. Han, *Holding-Up More Than Half the Sky: Marketization and the Status of Women in China*, 11 J. CONTEMP. LEGAL ISSUES 791 (2001).
[32] Szto, 18 TEX. J. WOMEN & L. 195 (2009).
[33] *Id.*
[34] *Id.*
[35] John, THE GUARDIAN (2006).
[36] Szto, 18 TEX. J. WOMEN & L. 195 (2009).
[37] Minn. Stat. § 146B.03(3)(a) (2018).

walking, but some attorneys have argued that foot binding on daughters rises to the level of child abuse.[38] Yet, some children are subjected to body modifications even before they can assent.[39] For example, non-religious, routine circumcision of male children is not prohibited in the United States; and yet, medical and legislative evidence shows that it may alter the form and function of the erect and flaccid male sex and excretory organ.[40] Girls and boys may be suited with orthodontic braces for strictly cosmetic corrections.[41] They may be ushered into ballet classes and fitted for toe shoes,

[38] *See* Lee, 5 CARDOZO J. INT'L & COMP. L. 217 (1997).
[39] Minn. Stat. §§146B.07 2(1), 3(2) (2018).
[40] Jennifer Medina, *Efforts to Ban Circumcision Gain Traction in California*, THE NEW YORK TIMES, June 4, 2011, *Available at* https://www.nytimes.com/2011/06/05/us/05circumcision.html. Claudia Otto & Hilary McGann, *Iceland's Proposed Ban on Male Circumcision Upsets Jews, Muslims*, CNN, February 20, 2018, *available at* https://www.cnn.com/2018/02/20/health/iceland-circumcision-ban-reaction-intl/index.html. Stephen Evans, *German Circumcision Ban: Is It a Parent's Right to Choose?*, BBC NEWS, July 13, 2012, *available at* www.bbc.com/news/magazine-18793842, xbrook2, "The Zohan, Dangerous Feet," YOUTUBE.COM, August 17, 2008, *available at* https://www.youtube.com/watch?v=60qBoHrwYH4.
[41] Jay Rivera, *Child Support and Orthodontic Expenses*, LEGAL MATCH, May 26, 2010, *Available at* https://lawblog.legalmatch.com/2010/05/26/child-support-and-orthodontic-expenses/. Barret v. Kantz, No. 2506-09-1 (VA Ct. App., April 20, 2010).

which change the shape of the feet.[42] They are permitted to wear high heels, and no law prevents them from electively or forcibly wearing any shoe that alters their foot shape, spinal health, and ligamentous and tendinous structures, and affects their status as independent or gender-neutral beings.[43] They are given and, in some instances, required by law to wear restrictive garbs, which constrict, damage, shape, and may harm their breasts.[44] Breast cancer, for example, has been linked to use of braziers.[45] Laws, customs, and processes determining female children and adults' physical health culturally vary within sociolegal contexts.[46]

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[42] John, THE GUARDIAN (2006).
[43] Neal M. Blitz, *How Young Is Too Young For High Heels?*, HUFFINGTON POST, August 6, 2011, *available at* https://www.huffingtonpost.com/neal-m-blitz/girls-high-heels_b_919484.html
[44] C. Hsieh & Dimitrios Trichopoulos, *Breast Size, Handedness and Breast Cancer Risk*, 27 EUR. J. OF CANCER 131 (1991). "Premenopausal women who do not wear bras had half the risk of breast cancer compared with bra users." *Id.*
[45] *Id.*
[46] Jay Rivera, *Child Support and Orthodontic Expenses*, LEGAL MATCH, May 26, 2010, *Available at* https://lawblog.legalmatch.com/2010/05/26/child-support-and-orthodontic-expenses/.

III. DETERRENCE

In Genesis 22:1-24, God commands Abraham, the patriarch, to bind and sacrifice his son, Isaac.[47] Binding is a portion of the restriction; incapacitation is the essential result that God requires.[48] This example is instructive.[49] Binding may be treated as a crime or viewed in context as being part of a greater harm.[50]

Battery is a generalizable example.[51] Elements typically require harm or damage, yet may require offense.[52] In Louisiana, simple battery results from nonconsensual battery.[53] Parents may be deterred from foot binding by battery laws because the government could allege that foot binding causes damage and infants cannot consent or assent to such treatment.[54]

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[47] Genesis 22:1-24.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Infra* note.
[52] *See also* O.C.G.A. § 16-5-20 (2017).
[53] La. R.S. § 14:35 (2017).
[54] *Id.*

Numerous counterarguments demonstrate that this allegation may be unfair (e.g., male circumcision,[55] ear piercing,[56] corporal punishment,[57] and gender correction[58]). Cultural nuisances may impassion the government to pursue nontraditional forms of parenting.[59] On one extreme, parents in Utah legislated a right to allow children to be home alone despite risk of harm; whereas parents in Georgia legislated a fetus's right, at any stage, to be free from simple battery.[60] These differences could yield dramatically different results when proving elements, such as "harm" in a court of law.[61]

Under child cruelty statutes, prosecution and conviction is just if foot binding causes "excessive pain" that is not normally experienced by children

[55] O.C.G.A. § 16-5-27 (2017).
[56] O.C.G.A. § 16-5-71.1 (2017).
[57] Carmen M. Cusack, *White Tigers and Corporal Discipline of Minors* (2017).
[58] O.C.G.A. § 16-5-71 (2017).
[59] Cusack, *White Tigers and Corporal Discipline of Minors* (2017).
[60] Angelica Lai, "A State Just Made It Legal to Leave Your Kids Home Alone," MSN, March 23, 2018, *Available at* https://www.msn.com/en-us/lifestyle/whats-hot/a-state-just-made-it-legal-to-leave-your-kids-home-alone/ar-BBKIG3y?ocid=spartanntp#image=1. O.C.G.A. § 16-5-29 (2017).
[61] O.C.G.A. § 16-5-23 (2017).

within the jurisdiction.[62] For example, foot binding may cause pain similar to when playing a sport such as football or softball; and therefore, should not be prosecuted.[63] Foot binding may result in abnormalities, which correlate with extreme pain, but are relatively common among children within the jurisdiction, such as for gymnasts, ballerinas, and ice skaters.[64]

California's law indicates how sensitive this government may be toward foot binding.[65]

> Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering….shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.[66]

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[62] O.C.G.A. § 16-5-70 (2017).
[63] *Id.*
[64] Aliya Mustafina, "Mustafina back from Injury, Eyes Gymnastics Gold in London," YOUTUBE.COM, April 23, 2012, *Available at* https://www.youtube.com/watch?v=H3sXcutIzQ8.
[65] *Infra* note.
[66] Cal Pen Code § 273a (2017).

This statute may evenly apply to parents permitting their children to bind their breasts, wrists, ankles, or any other body part for any reason (e.g., sports and art).[67]

In Tennessee, aggravated child abuse laws may deter many parents.[68] "A person commits the offense of aggravated child abuse, aggravated child neglect or aggravated child endangerment, who commits child abuse…; child neglect…; or child endangerment…and…[t]he act of abuse, neglect or endangerment results in serious bodily injury to the child."[69] "'Serious bodily injury to the child' includes, but is not limited to… a fracture of any bone, ...subdural…bleeding, ….injuries to the skin that involve severe bruising or the likelihood of permanent or protracted disfigurement."[70] A parent's defense is that the statute is intended to protect children from physical abuse; and, foot binding does not abuse a child.[71] Foot binding

[67] *Id.*
[68] Tenn. Code Ann. § 39-15-402 (a)(1)(d) (2018).
[69] *Id.*
[70] *Id.*
[71] *Id.*

formulates or beautifies a child without humiliation or damage.[72] Such treatment may be comparable with putting a toddler in constricting dress shoes or excessively overloading a child's knapsack to the point of causing the child to slump and experience neck pain.[73] A child provided without a prescription a back brace affecting the shape of a crooked spine may be labeled a victim under this statute if it is applicable to foot binding.[74]

Exaggerated and biased responses are unjust.[75] Foot binding should be analyzed objectively in comparison to other similar activities and impacts on children.[76] Subjectively, foot binding ought to be considered in connection to the process, pain, or suffering, if any, experienced by a particular child.[77] Pain and suffering could relate to a child's

[72] *Id.*
[73] Blitz, HUFFINGTON POST (2011).
[74] Rivera, *Child Support and Orthodontic Expenses* (2010). *Barret* (VA Ct. App., 2010).
[75] Tenn. Code Ann. § 39-15-402 (a)(1)(d) (2018).
[76] *Id.*
[77] Rivera, *Child Support and Orthodontic Expenses* (2010). *Barret* (VA Ct. App., 2010).

willingness to undergo the procedure and to a child's maturity and age.[78]

IV. BALLET

Ballet is an exemplary comparison to foot binding because gender-specific pointe shoes cause injuries, bunions, and deformities.[79] Dancers wear ballet shoes, including pointe shoes, not to beautify their skeletons, but to adorn their feet and perform the art of ballet.[80] One effect of wearing pointe shoes includes the injuries resulting from the pressure of landing on the pointe shoe toe "box."[81] These injuries may be compared to injuries correlating with other athletic footwear, such as cleats (e.g., anterior cruciate ligament (ACL) injury).[82]

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[78] Tenn. Code Ann. § 39-15-402 (a)(1)(d) (2018).
[79] John, THE GUARDIAN (2006).
[80] *Id.*
[81] Bryan W. Cunningham, Andrea F. DiStefano, Natasha A. Kirjanov, Stuart E. Levine & Lew C. Schon, *A Comparative Mechanical Analysis of the Pointe Shoe Toe Box. An In Vitro Study*, 26 THE AM. J. SPORTS MED. 555 (1998).
[82] Humans' election to wear shoes for art and sport may be differentiable from implementations used to correct or protect, for example orthopedic shoes or horseshoes.

Wearing pointe shoes is like foot binding because the shape and mechanism of the shoe results in bone deformities, not solely permanent bunions, hammer toe,[83] claw toe, mallet toe, curly toe, corns, and fractures.[84] Dancers' joints, ligaments, tendons, skeletons, organs, and muscles are affected.[85]

> [A dancer] may beg[] the chiropodist not to remove the thick layers of dead skin,…[because] they're the only thing preventing her from getting too many blisters. For most dancers, blisters, bunions and corns are the norm, the inevitable result of feet compressed into unforgiving pointe shoes (with blocks built up using layer upon layer of hessian triangles, paper and glue) that give the illusion of dancing on tiptoe.[86]

With constant wear, the kind of minor ailments that most people would find merely irritating

[83] MovieClips, "Boomerang (1/9) Movie CLIP - Hammertime Feet (1992) HD," YOUTUBE.COM, May 23, 2012, *available at* https://www.youtube.com/watch?v=NP7_SIRfo-c.
[84] Nancy Kadel, Mark Boenisch, Carol Teitz, & Elly Trepman, *Stability of Lisfranc Joints in Ballet Pointe Position*, 26 FOOT & ANKLE INT'L 394 (2005).
[85] John, THE GUARDIAN (2006).
[86] *Id.*

become self-perpetuating agonies.[87] Corns develop sinuses and become ulcers; nails thicken and grow hard skin underneath; and dancers, compensating for one kind of pain, risk putting undue stress elsewhere, causing new injuries.[88]

Amateur and hobby dancers must train for several years before wearing pointe shoes.[89] Only a small portion of elite dancers rely on this specialized occupational tool.[90] Some podiatrists report that pointe shoes are as likely as any other shoe to worsen deformities or cause bunions and other painful conditions (e.g., lesions); however,

[87] *Id.*
[88] *Id.*
[89] Stephen J. Pearson & Alison F. Whitaker, *Footwear in Classical Ballet: A Study of Pressure Distribution and Related Foot Injury in the Adolescent Dancer*, 16 J. DANCE MED. & SCI. 51 (2012). Carol C. Teitz, Richard M. Harrington, & Hannah Wiley, *Pressures on the Foot in Pointe Shoes*, 5 FOOT & ANKLE 216 (1985). Selina Shah, *Determining a Young Dancer's Readiness for Dancing on Pointe*, 8 CURRENT SPORTS MED. REP. 295 (2009). Natasha Nunes, Jesse J. Haddad, Doreen J. Bartlett, & Katherine D. Obright, *Musculoskeletal Injuries among Young, Recreational, Female Dancers Before and after Dancing in Pointe Shoes*, 14 PEDIATRIC PHYSICAL THERAPY 100 (2002). Helen Day & Lucas Lundgren, *Ballet Shoes*, 14 PODIATRY NOW 48 (2011).
[90] Helen Day & Lucas Lundgren, *Ballet Shoes*, 14 PODIATRY NOW 48 (2011).

dancing on pointe is likelier than most activities (e.g., sitting at an office desk)[91] to deform feet.[92]

Feminists may agree that high heels, an alleged symbol of patriarchy, contribute to deformation (e.g., Barbie Feet Syndrome) associated with oppression (e.g., "strain injuries").[93] Yet, many bra-burners may wear pointy boots,[94] rock climbing shoes, or other uncomfortable and possibly damaging footwear.[95] Dancers, feminists, and other women may allow pedicurists to use foot-shaping razor blades; or they may use them on their own feet.[96] Thus, among non-feminists and feminists,

[91] Nathan Ensmenger, *'Beards, Sandals, and Other Signs of Rugged Individualism:' Masculine Culture within the Computing Professions*, 30 OSIRIS 38, 39 (2015). Office attire is inherently feminine. *Id.*
[92] Denton, J. (1997). Overuse foot and ankle injuries in ballet. *Clinics in Podiatric Medicine and Surgery*, *14*(3), 525-532.
[93] Neil Cronin, *Barbie Feet from Wearing High Heels?* WhereIsMyDoctor.com. Feb. 2, 2012. *Available at* http://www.whereismydoctor.com/news/barbie-feet-from-wearing-high-heels_5049.
[94] HectorSovage, "Harry Crumb: Black Belt In Aikido And The Boots To Match with a TOUCHDOWN," YOUTUBE.COM, October 22, 2010, *Available at* https://www.youtube.com/watch?v=d4reL9AmhVg.
[95] Hsieh & Trichopoulos, 27 EUR. J. CANCER (1991).
[96] *See, e.g.*, Board of Cosmetology and Barber Examiners, State regulators warn against credo blades during pedicures, December 14, 2010, *available at* https://pr.mo.gov/cosbar-pressrelease.asp.

some forms of foot shaping seem to be acceptable.[97] Blatant disdain for the Chinese custom correlates with cultural importation of Christianity and religious conversion, not women's liberation.[98] Therefore, feminists should broadly recognize parallels between Chinese foot binding and Western strictures to accurately contemplate any feminist implications of foot binding on women, minors, or infants.[99]

V. ANTI-FOOT BINDING FEMINISM

Chinese foot binding has been criticized by some women liberationists as an oppressive practice embodying patriarchal subjugation of women.[100] However, such feminists overlook their own interests in disciplining, shaping, coursing, and altering their own bodies (e.g., cosmetic orthodontic

[97] *Id.*
[98] Szto, 18 TEX. J. WOMEN & L. 195 (2009).
[99] Hsieh & Trichopoulos, 27 EUR. J. CANCER (1991).
[100] Foot binding may correlate with employment. Therefore, it may be protected under the First Amendment and the Contract Clause. U.S. Const. Art. 1, Sec. 10, Cl. 1. In conjunction with nonharmful sexual conduct, it may be protected under the Fifth and Fourteenth Amendments.

braces).[101] They may also ignore similarities between foot binding and activities that they support (e.g., feminist ballet).[102] The result is bigoted analyses.[103] Unfair analyses directly or indirectly may contribute to a loss of protection for harmless activities, including, but not limited, to foot binding.[104]

Feminism has thrived; however, with its immense power, some "bums" thrive on "embody[ing]" the ethos while turning it against other women, who are not in danger or under oppression.[105] Feminist "bums" feasting on feminism's potency without contributing compassion and self-honesty exhibit "the

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[101] Season Five Episode 1, ORANGE IS THE NEW BLACK (2017). A riot breaks out and an administrator is robbed of her purse.
Inmate 1: Should we take the shoes too?
Inmate 2: Maybe to use the heels for weapons, but not to wear. They represent the patriarchy and the oppression of women; and they hurt like fuck. *Id.*

[102] "Feminist Ballet," THE OXFORD DICTIONARY OF DANCE, *available at* www.oxfordreference.com/view/10.1093/oi/authority.20110803095814210; McLaren, *Leah McLaren: If I Want My Son to Respect Women, I Need to Teach Him to Embrace the 'Girlish'* (2016).

[103] McLaren, *Leah McLaren: If I Want My Son to Respect Women, I Need to Teach Him to Embrace the 'Girlish'* (2016).

[104] *Id.*

[105] Ensmenger, 30 OSIRIS 38, 39 (2015).

dehumanizing effects of pursuing" political "power as an end rather than a means; deceived by the illusion of omniscience associated with mastery of this powerful" network, "these wasted young" women and "men" behave "not [as] scientists uncovering new truths about the universe, or engineers building useful products to benefit society, but mere junkies in search of a fix."[106] They are unable to analogize procedures, such as abortion and breast reconstruction, with elective beautification, such as foot binding and hair dying.[107] "That such myopic and socially maladjusted tinkerers" seek to harness "influential" ideologies "in the construction of the essential structures of" contemporary "society" may have "dangerous and disturbing consequence[s]."[108] "[R]eckless" bigotry could cast doubts on "imperative[s]" "entrusted" to those unlocking closed doors using the "keys to the increasingly"

[106] *Id.*
[107] Rivera, *Child Support and Orthodontic Expenses* (2010). *Barret* (VA Ct. App., 2010).
[108] Ensmenger, 30 OSIRIS 38, 39 (2015).

integrated, accepting, and mutually tolerant society.[109]

Feminists isolate women and withdraw feminism from the mainstream when they distinguish liberated from unliberated women according to aesthetic and culture.[110] If women choose to modify their bodies (e.g., piercings, tattoos, or foot binding), then feminists should acknowledge their independence from patriarchy, which would steal away women, subject them to domestic servitude, and prevent them from tampering with their property.[111] Femininized feminists may not weaken the appearance or philosophy of feminism, but may smuggle feminism into otherwise politically neutral or traditional environments.[112] Feminists should acknowledge foot-binders as individuals, who each have distinct

[109] *Id.*
[110] THE OXFORD DICTIONARY OF DANCE, *available at* www.oxfordreference.com/view/10.1093/oi/authority.20110803095814210.
[111] Brenda R. Weber, *Masculinity, American Modernity, and Body Modification: A Feminist Reading of American Eunuchs*, 38 SIGNS 671.
[112] McLaren, *Leah McLaren: If I Want My Son to Respect Women, I Need to Teach Him to Embrace the 'Girlish'* (2016).

motives, environments, and philosophical perspectives that may or may not include feminism, but may effectuate it.[113] Feminist societies enforce equality for women, which generally means that—like men—they have rights to "life, liberty, and the pursuit of happiness."[114] Control over one's body is a fundamental tenet of feminism; and foot-binders, who can assent to treatment, may be happy when they control their bodies.[115] Feminists should include diversity in their analyses and positions, particularly when analyzing women's consensual activities in cultural and social contexts.[116]

VI. CONCLUSION

Foot binding is a relevant concept explored by art, politics, sports, and commerce.[117] Performance

[113] *Id.*
[114] UNITED STATES DECLARATION OF INDEPENDENCE. Ensmenger, 30 OSIRIS 38 (2015).
[115] *Id.*
[116] *Id.*
[117] Remy Martin Remy Red, ADFORUM.COM, *available at* https://www.adforum.com/creative-work/ad/player/41874. Remi Martin's ad depicting a woman's foot in restrictive foot attire alleviated New Yorkers post 9-11. The advertisement, displayed inside subway trains above passengers' heads, suggested that the

imposes on and alters the body.[118] Distinctions between male and female genders are relevant throughout the world in light of foot attire and the politics of dress.[119] Performers and businesses

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essence of looking down is to establish one's self. After 9-11, city people believed that they should look up to be successful—to overcome harm. Remi Martin established their brand to defy newness at a time when the fundamental viability of looking down had been lost. Looking up transformed the world to a place that promised deviance; it did not lead attention to despair (i.e., looking down into eternal depths of damnation) or admonish dark deeds done for fun. *Id.*

[118] Britney Spears, "Selfish," Britney: Piece of Me, Las Vegas, NV, October 23, 2015. Popstar Britney Spears sings a relevant stanza. "The shoe is going on the other foot tonight. I'm about to turn you...You think you got me where you want me. I'm 'a show you tonight that I'm a girl." *Id.*

[119] *See, e.g.*, Harjant Gill, MILIND SOMAN MADE ME GAY (2007). In a Tuff shoe advertisement, Bollywood star Milind Soman appears with a woman fully nude. The two Bollywood stars are only wearing running shoes. Their genitals appear to be touching as they stand together with their bare profiles facing viewers. A snake slithers. The serpent actor does not appreciate their intimacy or his or her position in the photo; but, appreciates the work and opportunity to be in close proximity with Bollywood stars. Perhaps the documentarian becomes homosexual to save the snake from an uncomfortable scene. By becoming gay and insinuating himself in an intimate scene with the actor, he takes away the photoshoot and photo. If he is there, then she was never cast, the snake was not placed in contact with her, and the shoot did not happen. Furthermore, such an unappealing scenario would turn-away interest from those, who would gaze upon a snake in such an unappealing context. Foot binding may be comparable with enclosing animals in uncomfortable habitats and subjecting them to dissimilar environments.
Appearing nude in public was classified as obscenity and corrupting public morals; yet use of an animal in this scenario also offended the eye. However, the role of footwear was the main message, and likely contributed to the establishment's appall. It may have been banned because they believed such electric, sensual contact could transform a

explore, capitalize on, and comment on their observation of emboldened men wearing comfortable shoes and women performing while traditionally, loudly, and tightly dressing their feet.[120] Powerful effects of footwear in conjunction with attraction to a human figure is evident.[121]

Humans' attitudes toward using footwear to complement performance, not only supersedes gender, it is evident in their compassionate treatment of animals (e.g., horseshoes).[122] Although concerns about gendered traditions seem to apply to foot binding, the practice cannot be criticized in a

perfectly heterosexual male into practicing a gay sexuality because he doubts that the woman wants the male subject of the photos and wants her so badly that he is overcome and resigns himself to wanting the male and not the female as to not compete. This type of thinking correlates with gender norms for foot attire, including those imposed by feminists. "After 10 years the Maharashtra government dropped the obscenity charges filed against him." *Id.* "You hear the rhythms of the feet, they are telling you the stories and it puts together all these different sensual elements in one place." *Id.* "Particularly in Indian dance a man can portray several different characters within the framework of one dance. Within one dance you can be a god, a goddess, a demon, a woman, a man, a child," or an animal. *Id.*

[120] *Id.*

[121] *Id.*

[122] "Eenie, meanie, miney, moe. Catch a tiger by the toe. If he hollers, let him go. Eenie, meanie, miney, moe." White Tigers at the Secret Garden of Siegfried and Roy, YOUTUBE.COM, October 4, 2014, *Available at* https://www.youtube.com/watch?v=WkL6LXGFfS4. THE WIZARD OF OZ (1939).

vacuum.[123] It ought to be compared and contrasted with other forms of foot binding involving a variety of genders, classes, sexualities, religions, cultures, epochs, species, and uses of the body.[124] Therefore, feminist critiques of foot binding, which are unbiased and broad, may be relevant to current discussions about the welfare of the human body and human standards for gender exploration and body modification.[125] Thorough analyses holistically contribute to society, and therefore, should influence legislation.[126]

[123] *See supra* Sections II-IV.
[124] *Id.*
[125] Kylo-Ren, INSIDE EDITION, *Available at* https://www.youtube.com/watch?v=KIY_MNqsGuQ. Holly Cooper, *Two More Arrested in Michigan in First FGM Prosecution in the US*, Equality Now, April 20, 2017, *Available at* http://www.equalitynow.org/blog/two-more-arrested-michigan-first-fgm-prosecution-us?utm_source=email_04262017&utm_medium=text&utm_campaign=FGM_summit.
[126] *See supra* Sections II-IV.