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From Hester Prynne to Crystal Chambers: Unwed Mothers, Authentic Role Models, and Coerced Speech

Rachael Knight†

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"[Among the crowd standing before the prison] there was very much the same solemnity of demeanour on the part of the spectators; as befitted a people amongst whom religion and law were almost identical, and in whose

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character both were so thoroughly interfused, that the mildest and the severest acts of public discipline were alike made venerable and awful. Meagre, indeed, and cold, was the sympathy that a transgressor might look for, from such bystanders at the scaffold . . .”

“What do we talk of marks and brands, whether on the bodice of her gown, or the flesh of her forehead?” cried [a spectator] the ugliest as well as the most pitiless of these self-constituted judges. “This woman has brought shame upon us all, and ought to die. Is there not law for it? Truly there is, both in the Scripture and the statute-book. Then let the magistrates, who have made it of no effect, thank themselves if their own wives and daughters go astray!”

*The Scarlet Letter*, Nathaniel Hawthorne

“It is precisely in the lives of those considered most deviant that we will be able to discern a vision of liberation.”


**INTRODUCTION**

This Comment investigates how the judicial system actively upholds cultural norms and traditional notions of identity and acceptable behavior through decisions based more on moral judgment and value-assertion than precedent. Through an examination of cases that deal with employment discrimination by groups and institutions whose primary function is the education and mentoring of children, this Comment addresses the following questions: Who is allowed to be a role model? Who is allowed to work with youth in a leadership capacity? How narrowly are the bounds of appropriate role model behavior defined? The corresponding set of cases is an acutely focused lens; the morals and virtues expressly endowed upon children are a particularly salient means through which to look at the values and identity assumptions that society condones and condemns.

By looking at courts’ treatment of cases involving discriminatory employment actions taken towards “deviants” working in schools, libraries, youth groups and recreational clubs, this Comment demonstrates how courts have cloaked their moral judgments in a far more ominous legal analysis. In these cases, the courts have established a dangerous precedent: when an unmarried, pregnant woman does not want to hide or “cover” her status or identity, the employer organization’s First Amendment right of expressive association trumps the employee’s Title VII claim. The courts draw their reasoning in these cases from a line of sexual orientation employment discrimination cases. However, while homosexuals are not a protected class under Title VII, pregnant women’s civil rights are expressly protected under the 1978 Pregnancy Discrimination Act, incorporated into Title VII. By turning a discriminatory employment action into protected First Amendment action, and
then using thinly-veiled moral reasoning to decide that the employer’s free speech right takes precedence over the employee’s Title VII right, courts are creating a body of law that could be used to further undermine the force of civil rights legislation in the United States. I argue in this Comment that courts should not use freedom of association claims to excuse discriminatory employment actions that explicitly violate Title VII protections.

This Comment is divided into the following four parts. In Part I, I discuss the place of role models in our society and how courts’ and legislatures’ ideas about appropriate role models have furthered social control and the internalization of majoritarian cultural norms. I then investigate how these cultural norms are in turn used to pressure “deviant” individuals to “cover” by suppressing mutable characteristics that might identify them as deviant.

In Part II, I apply these theoretical constructs to an analysis of how the judicial system, while slowly moving towards increased protection for homosexuals, has nonetheless upheld discriminatory actions taken against homosexuals who refuse to “cover”—individuals who choose to not hide their identity and instead to advocate actively for the rights of homosexuals in society. Explicit in the courts’ rationale of these cases is a focus on “coerced speech.” While none of the defendants in the three cases considered have expressly made coerced speech claims, the courts focused on the right of employers/organizations to be free from forced public approval of “deviant” conduct and identity. The courts argued that by publicly advocating for homosexual rights, the various plaintiffs tried to “coerce” their employers/organizations to support their politics—action that, in the judges’ opinion, is an imposition that justifies discriminatory sanctions. These arguments effectively preference First Amendment rights over the right to be free from discrimination. This conflict of rights is complicated by the fact that homosexuals are not yet a federally protected group under Title VII.

However, Title VII does protect pregnant women. Thus, in Part III, I apply the theoretical and juridical analyses from Parts I and II to cases involving unmarried, pregnant women who work with children in a role model capacity. A deeper look at these cases shows how courts have uniformly upheld women’s Title VII rights when those women “covered” by getting married immediately, living with their parents, or actively trying to conceal their unmarried status from the children for whom they were responsible. In contrast, the courts have ruled in favor of employers’ discriminatory hiring and firing practices when unmarried pregnant women have declined to “cover” by adamantly refusing to get married or by presenting themselves as positive role models of alternative lifestyles.

Like homosexuality, extra–marital sexual behavior is concealable—at least until a woman becomes visibly pregnant. I argue that becoming pregnant is analogous to the act of “coming out;” pregnancy forces private “deviant” behavior into the public sphere. In this way, both identities are action–based. Like the homosexual who has publicly self–identified, the pregnant woman has come to personally embody her sexual actions. In both sets of cases, the essential
rhetoric of the courts’ decisions is identical: those who refuse to hide their non-normative identities are coercing their employers to appear as though they accept and support such behavior. While the courts’ legitimization of discrimination is unjustified in the context of decisions pertaining to sexual orientation, it is even more pernicious when applied to a Title VII protected trait. I argue that the courts are primarily concerned with the appearance of morality and the women’s silent complicity in the organizations’ maintenance of a morally upright public image. To this end, courts have echoed the reasoning of the homosexuality cases and have consistently held that an employer’s First Amendment right of expressive association trumps an employee’s right not to be discriminated against. Although discrimination is not a protected First Amendment right, the courts have held that when an individual’s behavior threatens to tarnish its employer’s public reputation, discriminatory employment actions are warranted, because inaction would be equated with support for deviant behavior.

In Section IV, I explore the Supreme Court’s holdings in Roberts v. Jaycees\(^1\) and Board of Directors of Rotary International v. Rotary Club of Duarte\(^2\) which ruled that the right of expressive association does not extend so far as to allow for discrimination. Roberts and Duarte concluded that the states’ legitimate purpose of combating discrimination is strong enough to justify some infringement of a private organization’s freedom of expressive association. In applying the Court’s rational in these cases to an analysis of the unwed pregnancy cases, I find that these decisions clearly establish that rulings that preference an employer’s right of expressive association over a woman’s Title VII right should not be given authority.

The Comment concludes in Section V by questioning whether freedom of expressive association claims should predominate over Title VII claims in employment actions. I argue that, as articulated by the Supreme Court in Roberts and Duarte, the government’s compelling interest in ending discrimination overrides an organization’s freedom of expressive association. To find otherwise is to hold that discrimination is a protected form of speech.\(^3\)

I. **THEORETICAL OVERVIEW**

A. **Role Models and Social Control**

In 1790, Noah Webster, the creator of the first American dictionary, wrote: “The only practicable method to reform mankind is to begin with children; to

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3. This argument was put forth by the dissent in Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000). See Part II.B. below.
banish, if possible, from their company, every low bred, drunken, immoral character... The great art of correcting mankind therefore, consists in prepossessing the mind with good principles."

Echoing such sentiments, the Supreme Court held in *Ambach v. Norwick* that New York’s law forbidding non-citizens from teaching in public schools furthered a legitimate state interest. The Court reasoned that since public schools “prepare individuals for participation as citizens, and...[preserve] the values on which our society rests,” public school teachers may be regarded as performing a task “that [goes] to the heart of representative government.” Through both “the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen’s social responsibilities. This influence is crucial to the continued good health of a democracy.” Under this reasoning, teachers are the means through national/patriotic ideals are passed from generation to generation. Elaborating, the Court explained that “A teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values... Certainly a State also may take account of a teacher’s function as an example for students, which exists independently of particular classroom subjects.” Thus, for the Court, a teacher’s job is not only to educate students, but to represent a model of upstanding citizenship.

The Supreme Court has used the idea of role modeling in contradictory ways. The Court’s inconsistent uses of the role model ideal in *Ambach* and *Wygant v. Jackson Board of Education,* elucidate the manner in which the Court has employed the role model ideal to both insure homogeneity and to inhibit diversity and heterogeneity. In *Ambach,* the Court used a role model rationale to legitimate the politics of difference as a justification for excluding non-citizen teachers from New York public school classrooms. Yet in *Wygant* the Supreme Court found role model theory too amorphous to be a sufficient defense of affirmative, identity-based hiring and firing practices. It held: “The role model theory employed by the District Court has no logical stopping point. The role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose.”

In his dissent, Stevens argues that in the context of public education, a school board might conclude that:

An integrated faculty will be able to provide benefits to the student body

*NOAH WEBSTER, A COLLECTION OF ESSAYS AND FUGITIVE WRITINGS (1790).*
*441 U.S. 68 (1979).*
*Id. at 76.*
*Id. at 79.*
*Id. at 78–80.*
*476 U.S. 267 (1986).*
*441 U.S. 68.*
*Wygant,* 476 U.S. at 275.*
that could not be provided by an all–white, or nearly all–white faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural and national backgrounds that have been brought together in our famous “melting pot” do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only “skin deep”; it is far more convincing to experience that truth on a day–to–day basis during the routine, ongoing learning process.12

The underlying premise of Steven’s dissent is identical to the Court’s rationale in Ambach: teachers and schools help to establish the morals, beliefs and ideals held by children and the adults they become and thus should personally embody those ideals. Yet the majority’s opinion does not seem to carry Ambach’s rationale over into Wygant. Rather, it appears as though the Court uses a role model theory to exclude, and finds it to have “no logical stopping point” when the same reasoning could be used for inclusionary purposes.

Commenting on the court’s paradoxical treatment of role modeling rationales, Adeno Addis asserts that the role model ideal is used not as a method of empirical analysis, but as a way of making and challenging normative claims about appropriate activities.13 He writes: “[T]he courts embrace the term as jurisprudentially meaningful and precise when the issue involves the exclusion of marginal groups from political and social life. When minority claimants invoke this rhetoric to support normative positions that do not correspond with the horizons of significance of members of the court, however, courts debunk the rhetoric as amorphous and jurisprudentially suspect.”14

Since Ambach, the rhetoric and moral debate surrounding conceptions of appropriate role models for our nation’s children has only intensified. As the rigid social norms of the 1950s and early 1960s eroded and collapsed, allowing for greater expression of identity and individualism, a simultaneous rising tide of “moral panic”15 swelled up. Who we allow to teach, mentor, and influence our children has become a central point around which this anxiety rages. The debate about who we allow to shape the minds of our children continues today, as evidenced by the discussion surrounding the Employment Non–Discrimination Act of 1997 (ENDA), which missed passage in the Senate by one vote. ENDA was intended to protect individuals against employment discrimination on the basis of sexual orientation. Many of the concerns senators raised during the ENDA debate focused on the potential impact of increased protective rights for

12. Id. at 315.
14. Id. at 1381, 1387, 1455.
homosexual schoolteachers upon students. Asserting that the presence of a homosexual teacher would disrupt the psychological and moral development of students during their adolescence, Senator John Ashcroft argued that the years when "young men ... move from boyhood to manhood ... are critical times when role models are very important." Rooting his argument against the ENDA in the idea that homosexuals are not appropriate role models for the nation's youth, he declared: "In hiring schoolteachers, or camp counselors, or those who deal with young people, you never just hire a teacher. You are always hiring more than a teacher. You are hiring a role model."

Elaborating upon Ashcroft's points, Senator Don Nickles argued that the ENDA would allow gay and lesbian schoolteachers to proselytize in the classroom, allowing no recourse for local school boards to control in-classroom speech. He asked the Senate, "What about a school board making decisions ... in Alabama where maybe this small community says we do not think we should have avowed open homosexual leaders, gay activists, as teachers in the fifth grade?"

Explicit in the debate about appropriate role models is the idea that to be deemed an appropriate role model, and to be allowed to advise, mentor, or teach children, an employee must outwardly conform to societal standards of acceptable behavior. Richard Delgado writes that "To be a good role model, you must be an assimilationist ... You are expected to conform to prevailing ideas of beauty, politeness, grooming, and above all responsibility." Being a role model, then, is often less about mastering a body of knowledge or signifying the possibilities of accomplishment than it is about becoming an emblem for a set of values that society deems worthy of replication.

Indeed, as the Supreme Court stated so baldly in Ambach, role models play a critical part in the maintenance, continuation, and replication of certain social


17. Id. at 25 (citing 42 Cong. Rec. 59986, 510,000 (daily ed. Sept. 6, 1996) (Statement of Sen. Ashcroft)).

18. Id.


21. As such, women and ethnic/racial minorities who assume positions as "role models" are often "tokenized"—made into two-dimensional examples proof of the ways in which women and ethnic/racial minorities can succeed, as long as they conform to societal notions of success and appropriate outward identity. Moreover, becoming or being made into a role model for a minority group often serves a second purpose: proving that financial/political/creative success is available to those groups that the role models are supposed to represent and inspire. Addis writes: "Serving as a role model ... is about the politics of recognition. ... He or she signals that the [society] does not continue to devalue the lives of these groups. He or she provides a counter-narrative intended to destabilize the narrative of exclusion that accompanied the marginalization and devaluation of members of those groups. ..." Adeno, supra note 13, at 1410.
values. Nanette Davis and Bo Anderson write that “there are two fundamental ways of controlling people’s social behavior: one controls them morally by having them internalize certain norms, the other controls them externally through positive and negative sanctions.” Social control is defined as “those policies, practices, and institutional arrangements that a society designs in order to deal with groups or social situations that are referred to as ‘problematic,’ ‘troublesome,’ or ‘deviant.’” Effective social control uses both carrots and sticks to accomplish its ends. Role models provide proof that if a person plays by the rules and works hard, she will become successful, famous, rich, happy, and/or respected. The flipside of this is stigmatization: if a person refuses to strive towards a standard set of “American” ideals and norms, she is branded as deviant, lacking, and immoral. In his book, Stigma, Erving Goffman writes that “[t]he stigmatization of those with a bad moral record can clearly function as a means of formal social control; the stigmatization of those in certain racial, religious, and ethnic groups has apparently functioned as a means of removing these minorities from various avenues of [society].”

The enforcement of social control is often located in “institutionalized organizations and occupations that are specifically mandated to carry out control tasks: police, psychiatrists, social workers, and so forth.” I would add the justice system to this list, as inherent in the enforcement of social norms is an institutionalized system—grounded in political power—which decides those norms. The legal system both defines and enforces normative cultural values through its decisions.

B. Covering

Deviance can be defined generally as the condition of being different from an established norm. It can also be construed as the act of refusing to become who you are “supposed to” become, or refusing to confine yourself within the norms that societal institutions have established through various mechanisms of social control. Alternatively, deviance is the condition of being stigmatized and refusing to “cover.”

As defined by Goffman, “covering,” is the process of making one’s stigmatized trait—be it race, gender, sexuality, ethnicity, national origin, disability, or some other characteristic—as invisible and unobtrusive as possible. Covering is distinct from “passing,” which is the practice of actively concealing one’s stigmatized trait from society and pretending to be what one is not. On the

23. Id.
25. Id. at 139.
other hand, while the coverer at once openly acknowledges that she has a trait that is deemed to be “deviant” from a norm, she makes efforts to minimize this trait by acting in ways that neutralize the trait’s prominence in others’ experience of her. Goffinan explains that “Passing and covering are . . . [ways in which] the individual exerts strategic control over the image of himself . . . that others glean from him.” Implicit in this process is a form of “tacit cooperation” between the stigmatized and the non–stigmatized: “the deviator can afford to remain attached to the norm because others are careful to respect his secret, pass lightly over its disclosure, or disattend evidence which prevents a secret from being made of it.” In turn, those without stigmatizing traits “can afford to extend this tactfulness because the stigmatized will voluntarily refrain from pushing claims for acceptance much past the point the normal finds comfortable.”

Kenji Yoshino argues that homosexuals, racial minorities, and women cover, and are often asked to cover, particularly in the workplace. Deviants cover in a variety of ways:

The African–American woman who stops wearing cornrows to succeed at work may be covering. The native Hawaiian broadcaster who mutes his accent to retain his broadcasting job may be covering. The Latino venireperson who denies knowledge of Spanish to remain on a jury may be covering. . . . The female scholar who eschews feminist topics may be covering. The woman who strives to be as aggressive or tearless as the stereotypical man may be covering. In all these instances, the individual is not attempting to change or hide her identity. Nonetheless, she is assimilating by making a disfavored trait easy for others to disattend.

Covering is a kind of performance, and a taxing one at that. Yoshino cites a non–fiction book, *The Good Black*, as an example of an African–American man who spent his entire life trying to assimilate into “white” society and the behavioral, aesthetic, and professional norms that go along with it. Commenting on the emotionally destructive effects of this approach, the book’s protagonist described: “I was bending over backward all the time to avoid making white people uncomfortable.”

However, the demands made by those who refuse to cover – that society accept them as they are – are oftentimes viewed as outrageous and self–centered. Citing Goffman’s idea that the emotional distress and actualized experience of stigmatization is based less on moral or physical “imperfection” and “deformity” than on the patterns of behavior inherent in “able–ist society,” Lennard Davis

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27. *Id.*
28. *Id.*
30. *Id.* at 779–780.
32. *Id.* at 885.
33. *Id.*
concludes that a disabled individual's demand for society to accept him as he is and make certain accommodations necessary for that acceptance is viewed by the society as a whole, and by the judicial system in particular, as "narcissistic self-inflation." When special workplace accommodations are required and demanded by disabled employees, "judges [have seen] the disabled plaintiff as first and foremost narcissistic and egoistic." As a result, this tendency has "eviscerate[d] any notion that stigma can ever be lessoned or neutralized because employers would be forced to such lengths of bending over backwards [to accommodate an employee's disability] that they would end up virtually upside down.

Who, then, should do the bending—the deviant, through arduous covering, or the employer, through accommodating the deviant's assertion that it is not he who is "wrong" but society?

II.

COURTS' TREATMENT OF HOMOSEXUALS WHO REFUSE TO COVER

A. Homosexuality, Covering, and the "Realm Where Status and Expression are Manifestations of One Another"

1. The Mutability of Homosexuality

In his article entitled, Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of 'Don't Ask, Don't Tell,' Kenji Yoshino argues that the Supreme Court's extension of heightened scrutiny to classifications made on the basis of immutable, visible characteristics—race, sex, alienage, national origin, and illegitimacy—is pernicious. Basing strict scrutiny on immutable, visible characteristics creates an incentive for groups with mutable, invisible characteristics to assimilate into the political mainstream when faced with
discriminatory legislation.

The underlying rationale for applying strict scrutiny to classifications based on immutable characteristics is that these groups are visibly marked as different and are “locked into” a status, and thus cannot ever fully assimilate. The invidious corollary to this is that those groups that can blend in are expected to do so; groups with mutable characteristics and identities who have faced a history of discrimination can engage in self-help through assimilation—masking, passing, hiding, and covering to evade discrimination. As a result, the courts, when faced with discrimination based on mutable characteristics, have “empathy failure.”

Yoshino references Leo Bersani’s argument that homophobia is energized precisely because of the perceived mutability of sexual orientation. For Bersani, the perceived immutability of race means that “not even racists could ever fear that blacks will seduce them into becoming black . . . [however] to let gays be open about their gayness, to give them equal rights, to allow them to say who they are and what they want, is to risk being recruited.” As if by suggestion alone, or like a highly contagious disease, homosexuality may pass from the non-covering homosexual to the innocent bystander—or the student in a classroom. “Here again,” writes Yoshino, “the empathy failure that is homophobia seems to be excited, not quieted, by the perceived mutability of the underlying trait.”

2. Courts’ Treatment of Covering and Non-Covering Homosexuals

Because sexual orientation is mutable, or easily “covered,” cases focused on the expression of a litigant’s homosexuality are an excellent lens through which to view the courts’ treatment of deviants who cover versus deviants who refuse to cover and the manner with which the courts justify their decisions. The following set of cases illustrate how courts’ decisions have increasingly come to focus on the public behavior of homosexuals as grounds for ruling against their

40. Id. at 490.
41. Id. at 512. Yoshino explains: “The perception that immutable groups cannot change [their outward] identity gives an air of futility to social attempts to make them do so. That perception also generates the related normative claim that it is morally abhorrent to penalize persons for what they cannot control. Immutability thus garners immunity even for conditions that would be condemned if mutable.” Id. at 516.
42. Id. at 514 (citing LEO BERSANI, HOMOS 27 (1995)).
43. Yoshino, Assimilationist Bias, supra note 38, at 514.
44. Id.
45. In his exploration of cases involving employment discrimination against homosexuals, Yoshino discovered “[i]nstance after instance in which legal actors predicated an entitlement on whether a gay or lesbian individual covered. Individuals whose homosexuality, even if avowed, was ‘discreet,’ or ‘private,’ kept their jobs or children. Those whose homosexuality was ‘open and notorious,’ or ‘flagrant,’ were not so fortunate. Distinctions regarding covering detected in the cultural sphere recurred with a vengeance in the legal one.” Yoshino, Covering, supra note 29, at 850.
discrimination claims.

In *Norton v. Macy*, the D.C. Circuit ruled that the Civil Service Commission could not fire an employee merely because he was homosexual, as due process mandates that a dismissal not be “arbitrary and capricious,” but rather “made for cause.” Because this “cause” must have a “rational basis,” the Commission needed to show that Norton’s conduct would impair “efficiency of service.” This case marked a shift in the courts’ reasoning: previously, for an employee to keep his job, he was required to “pass” as straight; thereafter, mere covering was sufficient. Yoshino writes:

Under Norton, [the statement that one was homosexual], standing alone, was insufficient. The historical line between the “good” heterosexual employee and the “bad” homosexual employee had shifted, now distinguishing between the “good” heterosexual or covering homosexual employee on the one hand and the “bad” non-covering homosexual employee on the other. . . . The public employer is irrational when embarrassed by a covering homosexual, but rational when embarrassed by a flaunting one.

Two cases, *Singer v. United States Civil Service Commission* and *McConnell v. Anderson*, further demonstrate this point.

In *Singer*, plaintiff John Singer had informed his employer, the Equal Employment Opportunity Commission (EEOC), that he was a homosexual when he applied and was hired for a clerical job in 1971. Yet, less than a year after being hired, Singer was fired on the grounds that he had engaged in “immoral and notoriously disgraceful conduct.” As it issued his dismissal, the EEOC declared: “Your activities in these matters are those of an advocate for a socially repugnant concept.” For the EEOC, the egregiousness of his conduct was based less on his homosexuality and more on the grounds that Singer “openly profess[ed] that [he was] homosexual and... ha[s] received wide-spread publicity in this respect in at least two states.”

In finding for the EEOC, the Ninth Circuit applied the balancing test from *Pickering v. Board of Education of Township High School District* as a means to “arrive at the proper balance between the interests of the employee, as a citizen, and the interest of the Government, as an employer, ‘in promoting the

46. 417 F.2d 1161 (D.C. Cir. 1969).
47. *Id.* at 1164.
49. *Id.* at 851.
50. 530 F.2d 247 (9th Cir. 1976).
51. 451 F.2d 193 (8th Cir. 1971).
53. *Id.* at 250.
54. *Id.*
efficiency of the public service it performs through its employees," and found that the Commission could properly conclude that the interest of the government "in promoting the efficiency of the public service" outweighed Singer's due process and equal protection interests. The court concluded that Singer "was not terminated because of his status as a homosexual or because of any private acts of sexual preference." Rather, it found that the EEOC had a rational basis for firing Singer—namely, his practice of "openly and publicly flaunting his homosexual way of life and indicating further continuance of such activities while identifying himself as a member of a federal agency." The court reasoned:

In determining that [Singer's] employment will not promote the efficiency of the service, the Commission has considered such pertinent factors as the potential disruption of service efficiency because of the possible revulsion of other employees to homosexual conduct and/or their apprehension of homosexual advances and solicitations; the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, particularly among youth; the possible use of Government funds and authority in furtherance of conduct offensive to the mores and law of our society; and the possible embarrassment to, and loss of public confidence in, your agency and the Federal civil service.

The case of McConnell v. Anderson is similar. In May, 1970, the University of Minnesota offered the position of "University Librarian" to James Michael McConnell, a homosexual man. In the period between when the University offered McConnell the job and the date he was to begin working, McConnell and his male partner appeared at the county clerk's office and made a formal application for a marriage license. The local press reported on the event, resulting in four separate news reports. In reaction to both McConnell's actions and the media coverage, the University Board's Faculty, Staff and Student Affairs Committee voted to revoke McConnell's proposed appointment. Soon thereafter, the University contacted McConnell and informed him that as a result of his actions, it was withdrawing the offer of employment.

In response, McConnell filed suit, claiming equal protection and due process violations. His complaint asserted that the Board's resolution to revoke its offer of employment was premised on the fact of his homosexuality and his intent to publicly profess his belief "that homosexuals are entitled to privileges equal to those afforded heterosexuals." The trial court entered judgment for

56. Singer, 530 F.2d at 256 (citing Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, 391 U.S. 563 (1968)).
57. 530 F.2d at 256.
58. Id. at 255.
59. Id.
60. Id. at 250 (emphasis added).
62. Id. at 194.
McConnell and enjoined the Board from refusing to employ him "solely because... he is a homosexual and that thereby 'his personal conduct, as presented in the public and University news media, is not consistent with the best interest of the University.'"63

On appeal, the Eighth Circuit found that the board "reasonably could conclude that the appointment would not be consistent with the best interests of the University."64 The court rejected McConnell's reliance on precedent that used balancing tests to weigh government employees' right to freedom of expression against the State's interest in promoting efficient public services,65 and instead based its decision upon its own general conviction that:

This is not a case involving mere homosexual propensities on the part of a prospective employee. Neither is it a case in which an applicant is excluded from employment because of a desire clandestinely to pursue homosexual conduct. It is, instead, a case in which something more than remunerative employment is sought; a case in which the applicant seeks employment on his own terms; a case in which the prospective employee demands, as shown both by the allegations of the complaint and by the marriage license incident as well, the right to pursue an activist role in implementing his unconventional ideas concerning the societal status to be accorded homosexuals and, thereby, to foist tacit approval of this socially repugnant concept upon his employer, who is, in this instance, an institution of higher learning.66

The court went on to assert that it "know[s] of no constitutional fiat or binding principle of decisional law which requires an employer to accede to such extravagant demands" and was therefore "unable fairly to categorize the Board's action here as arbitrary, unreasonable or capricious."67

In Singer and McConnell, the courts' reasoning is based on the plaintiffs' public performance of their sexual orientation. Both Singer and McConnell not only refused to cover, but also made public gestures of love towards other men and personally advocated for increased rights for homosexuals. The courts construed such public performances of deviant identity, as actions that "flaunted," "broadcast," "foisted" and "demanded." Their actions were an imposition of ideals and philosophies that created a sense of "revulsion," and were "repugnant" and "offensive to the mores of society." The courts felt that the men were asking for a privilege above and beyond the freedom to "clandestinely pursue homosexual conduct," which at the time was considered the "upper limit" of homosexual liberty. By taking their sexual orientation out of appropriately

64. McConnell, 451 F.2d at 196.
67. Id.
“clandestine” spaces and bringing it into the company cafeteria, the office, and the public media, these men were transgressing boundaries that they should not have transgressed. And as a result, they were forcing “tacit approval” onto the organizations that employed or were about the employ them.

B. Coerced Speech and Expressive Association

At risk for the courts in Singer and McConnell is public opinion of the defendant organizations. By “flaunting” their homosexual identities in public, Singer and McConnell endangered the public perception of their employers by creating embarrassment and the possible loss of public confidence in the eyes of society. The central thrust of both these decisions is that if these organizations had continued to employ the plaintiffs, it would have created the impression that they approved of and supported the men’s identities and actions. McConnell’s and Singer’s public homosexual actions, if not responded to with negative employment consequences, would have coerced tacit approval upon the defendant employers.

This idea is made explicit in the case of Boy Scouts of America v. Dale.68 Dale is not an employment case, but rather a case about expressive association. However, as in McConnell and Singer, the arguments in the Boy Scouts’ brief and oral arguments, which were adopted without appropriate investigation by the Supreme Court, hinge on the public performance of homosexuality. As such, all three cases turn on the right of “expressive association.”

James Dale had been involved with the Boy Scouts of America since age eight. He began as a Cub Scout, became a Boy Scout, and, in his later adolescence, was promoted to Eagle Scout, a great honor within the organization. After he graduated from high school, he remained involved with the Boy Scouts by serving as an assistant scoutmaster for a local troop near Rutgers University, where he attended college. However, he came out as gay during college, eventually becoming co–president of the Rutgers Lesbian/Gay Alliance. In July 1990, a local newspaper published an article which included a statement by Dale concerning his advocacy of homosexual teenagers’ need for gay role models and identified him as a member of the Lesbian/Gay Alliance. Within weeks, Dale received a letter from the Boy Scouts local council revoking his adult membership. When Dale inquired as to the reason for his dismissal, he was informed that “the Boy Scouts specifically forbids membership to homosexuals.”69 Dale filed suit, alleging that by revoking his membership on the grounds of his sexual orientation, the Boy Scouts had violated New Jersey’s public accommodations statute that specifically prohibits discrimination against homosexuals.70

69. Id. at 645.
70. Id.
The Supreme Court ruled that the Boy Scouts' right to engage in expressive association overrode Dale's right not to be discriminated against, finding that the forced inclusion of Dale would significantly affect the Boy Scouts' ability to advocate its viewpoints to the public.  

The Court began its analysis by reviewing relevant precedent:

Implicit in the right to engage in activities protected by the First Amendment is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational religious and cultural ends..." This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas... Government actions that may unconstitutionally burden that freedom may take many forms, one of which is intrusion into internal structure, or affairs of an association" like a "regulation that forces the group to accept members it doesn't desire..." Forcing a group to accept certain members may impair the ability of that group to express those views, and only those views, that it intends to express. Thus, "freedom of association plainly presupposes a freedom not to associate"... The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate private or public viewpoints... But the freedom of expressive association, like many freedoms, is not absolute. We have held that the freedom could be overridden by "regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."  

Yet the Court went on to assert that an analysis of the facts overrode New Jersey's compelling interest in preventing discrimination against homosexuals. The Court found that the Boy Scout's general mission—"to instill values in young people"—was clear, and that "[t]he Boy Scouts seek to instill these values by having its adult leaders spend time with the youth members...[during which] the scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts' values—both expressly and by example." On the basis of these findings, the Court concluded that the Boy Scouts' assertion that homosexual conduct was inconsistent with values embodied in Scout Oath and Law was entitled to deference, for purposes of evaluating their claim that forced inclusion of homosexual assistant scoutmaster would violate their right of expressive

71. The Boy Scouts argued that homosexuality was contrary to the organization's mission statement and purpose. The Boy Scouts' formal position statement regarding homosexuality states: "We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts." The Scouts argued that as Dale's homosexuality rendered him neither "morally straight" nor "clean," he was not an appropriate Boy Scouts member. Id. at 649-650, 652.

72. Id. at 647-648 (emphasis added) (internal citations omitted).

73. Id. at 649.
association. The majority reasoned:

As we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression... That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But... Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior... The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster’s uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment right to choose to send one message but not the other.

The Court’s opinion was based on the premise that Dale’s continued inclusion in the Boy Scouts would unfairly “force” the organization to send the message that they approve of his conduct/identity. Consequently, it found that the Boy Scouts’ freedom of association should override New Jersey’s compelling interest in ending discrimination against homosexuals.

Although the cases were argued on widely different legal grounds, the courts’ underlying analysis in Dale, McConnell, and Singer is identical: when an individual’s deviant behavior and identity is at odds with the values and message of an organization, institution, or group, the organization has the right to silence it. As “freedom of association plainly presupposes a freedom not to associate,” the right of free speech presupposes the right not to speak. James Madigan writes:

The Scouts’ contended, ‘The very service of an openly gay person as a role model would convey a message with which Boy Scouting does not wish to be associated... So it is with coerced speech complaints (such as the Scouts’) based on an unwelcome person’s status or reputation rather than his speech: the content of the [group’s] message is wholly within the control of the person or group complaining... Put abstractly, he exists in a realm where status and expression seem to be manifestations of one another. From the Scouts’ perspective, James Dale embodies the notion that ‘gay is good,’ if only because: (1) he is gay and (2) he participates in an organization whose members purport to be good. The question left open by the Court... is whether a person does in fact embody a message.

By coming out, Dale was not just identifying himself, he was taking

74. Id. at 651–52.
75. Id. at 653, 656 (emphasis added) (internal citations omitted).
76. Id. at 647.
77. See Madigan, supra note 37.
78. Id. at 80, 88, 94
homosexual action. He was refusing to cover. Like Singer and McConnell, Dale made public statements identifying himself not only as gay, but as a gay rights advocate—in his case, for the need for more gay role models. Dale's job as an assistant Scoutmaster was to be a role model for young boys, and in this capacity he was personally embodying his own message. Because the Boy Scouts, like the military, do not "make an effort to discover the sexual orientation of any person," a member's refusal to cover or pass is an affirmative act and self-identifying speech is homosexual conduct.

At oral argument, counsel for the Boy Scouts, analogizing the situation to Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., claimed that Dale "put a banner around his neck" when his sexual orientation became known to the Scouts. By coming out as gay and hoping to remain a Boy Scout member, Dale had asked the Boy Scouts to take that banner and stretch it around the whole organization.

For the Boy Scouts, Dale's public self-identification was an act of forcing "tacit acceptance" upon the entire organization. In Singer, McConnell, and Dale, the courts have remained adamant that such a request is unacceptable, and as in Hurley, their decisions "boil down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."

Taylor Flynne argues that "by re-characterizing the Boy Scouts' exclusion of Dale as based on his expression rather than on his status," the majority makes discrimination a protected form of expression. The dissent in Dale asserts this clearly, stating, "Surely there are instances in which an organization that truly aims to foster a belief at odds with the purposes of a State's..."

79. Similarly, the military's "Don't Ask, Don't Tell" policy, states, at 10 U.S.C. § 654 (15)(b) (2004): "A member of the armed forces will be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made: (1) That a member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act... (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect... (3) That the member has married or attempted to marry a person known to be of the same biological sex.

80. See Madigan, supra note 37 (citing Petitioner's Brief at 23–24, Boy Scouts of Am. v. Dale (No. 99–699)).

81. 515 U.S. 557 (1995). In this case, the Irish-American Gay, Lesbian and Bisexual Group of Boston sued the organizers of the Boston St. Patrick's Day Parade for excluding them from marching in the parade on the grounds that their message was inconsistent with the organizers' beliefs. The Court ruled that "[t]he parade organizers may object to unqualified social acceptance of gays and lesbians but whatever their reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." Id. at 575.

82. Id. at 575.


84. Id.
antidiscrimination laws will have a First Amendment right to association that precludes forced compliance with those laws. *But that right is not a freedom to discriminate at will,* nor is it a right to maintain an exclusionary membership policy simply out of fear of what the public reaction would be if the group’s membership were opened up.*

For the dissent, organizations should not use first amendment claims to veil discriminatory policies. Moreover, when an organization’s declared public message is served by explicit discrimination, it is inappropriate for courts to accept that message without question. Stevens writes:

> If this Court were to defer to whatever position an organization is prepared to assert in its briefs, there would be no way to mark the proper boundary between genuine exercises of the right to associate, on the one hand, and sham claims that are simply attempts to insulate nonexpressive private discrimination, on the other hand. Shielding a litigant’s claim from judicial scrutiny would, in turn, render civil rights legislation a nullity, and turn this important constitutional right into a farce.

Stevens concludes that “unless one is prepared to turn the right to associate into a free pass out of antidiscrimination laws,” courts must make independent investigations into the validity of an organization’s need to take discriminatory actions when espousing its message.

In sum, the decisions in *Singer, McConnell* and *Dale* make clear that it is less a homosexual’s identity that is problematic, and more the public actions he takes to express that identity. The holdings clearly establish that such actions, even if made in no connection to an employee’s/member’s organization, are valid grounds for dismissal/exclusion, as they will be interpreted by the courts as coercive acts of “forced speech” that impede an organization’s ability to transmit its mission to the public. By ruling in this manner, courts have created a body of case law that, as the dissent in *Dale* warned, establishes First Amendment rights of association as a legitimate justification for discrimination.

### III.

**FROM HESTER PRYNNE TO CRYSTAL CHAMBERS: OUT-OF-WEDLOCK PREGNANCY AND APPROPRIATE ROLE MODELS**

The moral outrage generated by women having children out of wedlock is not new. Hester Prynne, the much maligned heroine of *The Scarlet Letter,* was the colonial foremother to the myriad women who have been punished for physically representing—with the un-concealable outward protrusion of their abdomens—the immoral behavior of engaging in sexual intercourse outside of marriage.

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85. 530 U.S. 640 at 686.
86. *Id.* at 687.
87. *Id* at 688.
Hester Prynne was branded with a large “A” and cast from society. Today, employers occasionally engage in a similar kind of banishment, firing their unwed pregnant employees or forcing them to take a leave of absence for the duration of their pregnancy. In the following discussion, I show how the theoretical and legal constructs explored above apply to the courts’ rulings on employment discrimination claims stemming from actions taken in response to out-of-wedlock pregnancy. Common to all these cases are individuals who are seen as declining voluntarily and openly to accept the social place accorded them, and who act irregularly and somewhat rebelliously in connection with our basic institutions—the family, the age-grade system, the stereotyped role-division between the sexes, legitimate full-time employment involving maintenance of a single governmentally ratified personal identity, and segregation by race and class . . . . These are the folk who are considered to be engaged in some kind of collective denial of the social order. They are perceived as failing to use available opportunity for advancement in the various approved runways of society . . . . Social deviants, as defined, flaunt their refusal to accept their place. 88

Like homosexuality, extra-marital sexual behavior is mutable or concealable until a woman becomes visibly pregnant. Becoming visibly pregnant, therefore, is analogous to the act of “coming out;” pregnancy forces private “deviant” behavior into the public sphere. In this way, both “identities” are action-based. Like the homosexual who has publicly self-identified, the pregnant woman has come to personally embody her actions; she is no longer privately having sex, she has become “A Pregnant, Unwed Woman.” Her private actions become her public identity.

While homosexuality is not a protected trait under Title VII of the Civil Rights Act, pregnancy is. Yet in both sets of cases, the essential rhetoric of the courts’ decisions is identical: those who refuse to cover coerce their employers to appear as though they accept and support such behavior.

A. The Anti-Discrimination Legal Framework

Title VII of the Civil Rights Act of 1964 89 provides that: “It shall be an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his

88. Goffman, supra note 24, at 143–45.
status as an employee, because of such individual’s race, color, religion, sex, or national origin.  

Title VII was amended in 1978 to specifically include pregnancy as a protected status. Known as the “Pregnancy Discrimination Act,” the amendment includes discrimination based on pregnancy within the definition of discrimination “based on sex.”

However, legislators built into the 1964 Civil Rights Act various mechanisms for balancing employers’ rights against the rights of employees. The affirmative defenses of “Bona Fide Occupational Qualification” and “Business Necessity,” as well as the chance for employers to articulate a “Legitimate Non–Discriminatory Reason” for their employment action, are meant to safeguard employers’ prerogative to establish the rules and conditions of their organization.

The “Legitimate Non–Discriminatory Reason” excuse is a procedural step in litigation centered on a plaintiff’s claim of disparate treatment. After the plaintiff has met the burden of proving a prima facie case of discriminatory treatment, the employer must articulate a legitimate, non–discriminatory reason as an affirmative defense. Once the employer has made this showing, the burden then shifts back to the plaintiff to prove that the articulated legitimate, nondiscriminatory reason was merely pretextual, a false excuse of the discriminatory treatment.

For claims of facially discriminatory employment practices (in which an employee or potential employee was fired or not hired explicitly because of a personal characteristic or trait) after the plaintiff has made a prima facie showing of discrimination under Title VII, the employer must articulate why the characteristic upon which it is discriminating is a bona fide occupational qualification. The bona fide occupational qualification standard, as articulated in Dothard v. Rawlinson, requires that the contested business practice be related to “the essence of the business.” The Court has construed the bona fide occupational qualification defense to apply to situations when the “central

91. The Pregnancy Discrimination Act reads: “The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment–related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e–2(h) of this title shall be interpreted to permit otherwise. 42 U.S.C. §200e (k).
92. The “Bona Fide Occupational Qualification” exception, 42 U.S.C. § 2000e–2(e) (1982) mandates that: “Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .” 42 U.S.C. § 2000e–2(e).
94. Id. at 332–337.
mission of the employer's business" would be “undermined” without the challenged employment practice. Moreover, the Court in Dothard ruled that the practice must be critical to the “safe and efficient performance” of the job; lower courts have held that a bona fide occupational qualification only applies when “safe and efficient performance of the job would [not] be possible without the challenged employment practice.” In the case of UAW v. Johnson Controls, the Supreme Court defined the term “occupational” as indicating “objective, verifiable requirements [that] concern job–related skills and aptitudes.” In Johnson Controls, the Court held that a rule’s beneficent purpose is irrelevant; the bona fide occupational qualification must affect the employees’ ability to do their job. Significantly, while a bona fide occupational qualification cannot be based on customer preference, role modeling may be an appropriate bona fide occupational qualification in specific therapeutic situations, as in Healey v. Southwood Psychiatric Hospital.

For claims that an employment practice has a disparate impact on a particular protected group, employers can rebut the plaintiff’s prima facie case with a showing of business necessity. A business necessity defense can be established if the employer can prove that the challenged employment practice has “a manifest relationship to the employment in question.” If the employer successfully accomplishes this, the burden then shifts back to the plaintiff to establish a less discriminatory alternative. The business necessity standard was defined in Griggs v. Duke Power Company. In Griggs, the Supreme Court held that regardless of employer intent, if an employment practice disparately affects members of a protected group, the practice is prohibited unless it can be proven to be “related to job performance.” Since then, this has been interpreted to mean that a business practice that has a disparate impact may be legitimated by business necessity if it is “necessary to safe and efficient job performance” or is “significantly related to business goals of safety and efficiency,” and affects “skills necessary to effective performance on the

96. Dothard, 433 U.S. at 333.
97. Id. at 332.
98. Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir. 1971); Weeks v. South. Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).
100. Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981).
103. Griggs, 401 U.S. at 431.
104. Id.
job."\textsuperscript{107}

B. Courts' Treatment of Unwed Mothers in the Workforce

In light of these exceptions, an inquiry into the various situations in which courts have ruled that firing an unmarried woman who has become pregnant is a business necessity, bona fide occupational qualification, or legitimate nondiscriminatory reason illuminates how courts' notions of normative morality are used to justify discriminatory employment actions. By far the most famous of these cases is \textit{Chambers v. Omaha Girl's Club},\textsuperscript{108} I join an analysis of this case with three similar cases, \textit{Hollenbaugh v. Carnegie Free Library},\textsuperscript{109} \textit{Harvey v. Young Women's Christian Association},\textsuperscript{110} and \textit{Boyd v. Harding Academy of Memphis}.\textsuperscript{111} In these cases, the courts uphold Title VII violations by either 1) eschewing a thorough investigation of the employers' defenses in favor of discriminatory reasoning, 2) using the flexibility inherent in role model rationales and in the defenses' definitions of "the essence of the business" as a conduit for arguing that the plaintiffs' behavior was inappropriate and worthy of sanction, or 3) using coerced speech claims to legitimate firing an employee for her private choices, simply because the defendant sees those private choices as transmitting a public message of its own morality.

I then contrast these decisions with three cases in which courts refused to accept an employer's proffered affirmative defense: \textit{Ponton v. Newport News School Board},\textsuperscript{112} \textit{Andrews v. Drew Municipal Separate School District},\textsuperscript{113} and \textit{Vigars v. Valley Christian Center of Dublin, CA}.\textsuperscript{114} Through an investigation into these cases, I show how courts have condoned the behavior of women who have expressly tried to cover for their status as unwed mothers, again using reasoning grounded in coerced speech and role model rationales.

All seven cases involve women who became pregnant while unmarried. All seven also involve women who work with children in the capacity of teacher, mentor, role model, or children's librarian. A closer look at why courts protected some of these women and not others points to a subtle but insidious moral concern that goes beyond condemnation of extra-marital sex to a deeper fear of societal moral degradation. I argue that in deciding these cases, courts were primarily concerned with the \textit{appearance} of morality and the women's silent complicity in the organizations' maintenance of a morally upright public image.

\textsuperscript{108} 834 F. 2d 697 (8th Cir. 1987).
\textsuperscript{110} 533 F. Supp. 949 (D.C.N.C. 1982).
\textsuperscript{111} 88 F. 3d 410 (6th Cir. 1996).
\textsuperscript{113} 507 F.2d 611 (5th Cir. 1975).
\textsuperscript{114} 805 F. Supp. 802 (N.D. Ca. 1992).
This concern has created a pernicious body of precedent that has been used to assert that organizational rights of expressive association should trump a woman's Title VII right to be free from discriminatory employment actions when pregnant.

1. "Sexual Libertines": Deviants Who Refuse to Cover...

Hollenbaugh v. Carnegie Free Library\(^\text{115}\) set the stage for the following three cases. The issue for the court was not expressly about pregnancy, as Title VII had not yet been amended to include that protection, but rather, the case turned on the employer's concern with the public's perception of its continued employment of the plaintiffs. As in McConnell, Singer, and Dale, the court unquestioningly deferred to that concern. I include it in this section because it explicitly took the courts' rationale in the homosexuality cases described above and applied it to a pregnancy out-of-wedlock situation.

In this case, Ms. Hollenbaugh and Mr. Philburn both worked for the Carnegie Town Library, she as a librarian and he as a custodian, when they entered into an extra-marital affair. Ms. Hollenbaugh was divorced, but Mr. Philburn was married and lived with his wife. When Ms. Hollenbaugh became pregnant she requested a leave of absence from the library, and was granted it. The library did not comment on the relationship or take any action until, after the birth of their child, Mr. Philburn left his wife and began living with Ms. Hollenbaugh. Then, the library's Board of Trustees, in response to "complaints from community members" who were aware of the affair, attempted to dissuade plaintiffs from continuing to live together, threatening them with termination.\(^\text{116}\) Mr. Philburn and Ms. Hollenbaugh refused. The Board of Trustees then changed their tactic, indicating to the couple that if they "normalized"\(^\text{117}\) their relationship through marriage, the Board would let them keep their jobs. They again refused, and, as a result, were fired from their respective positions at the library. Ms. Hollenbaugh and Mr. Philburn sued, alleging that their dismissals violated their constitutional rights of privacy and equal protection as there was no rational connection between their private life and their professional ability to perform their jobs.

The court prefaced its opinion with a caveat, conceding that "[i]t is not the Court's function to impose its views of morality on the defendant Board of Trustees. . . . [rather, its role] is to determine only if the discharges of the plaintiffs violated the law."\(^\text{118}\) A review of the evidence presented at trial led the court to suggest that "the sole reason for their discharges was that they were

\(^{116}\) Id. at 1329.
\(^{117}\) Id.
\(^{118}\) Id. at 1332.
living together in 'open adultery.'” Yet, despite its caveat, the court ruled that the Board of Trustees’ decision to terminate Hollenbaugh’s and Philburn’s employment contracts was warranted.

The court deemed Hollenbaugh’s daily interaction with children to be a relevant factor in the Board’s decision. That she was “dealing with children” seemed particularly unsavory to the court—as if by merely helping children to locate books she would somehow be exerting a corrupting or inappropriate influence upon them. Furthermore, the court seemed to be rationalizing the Board’s decision in light of community complaints. The court concluded that “[w]here plaintiffs are employed in a library and have direct contact with the community on a regular basis, the Court is not willing to call the Board’s decision to dismiss an arbitrary, unreasonable, or capricious one. Citing McConnell, the court analogized that even though the plaintiffs “have not attempted to force their life style on the community” the community is nevertheless “well aware of their living arrangement” and thus, “[l]ike the Board of Regents in McConnell, therefore, the defendants could reasonably conclude that by retaining plaintiffs as employees they would be giving “tacit approval” to their conduct.”

The court then ruled that that the library’s discharge of the couple on the grounds that they were living together in “open adultery” did not violate their constitutional right to privacy or equal protection.

While Hollenbaugh’s “out-of-wedlock” pregnancy was one of various factors considered outrageous by the Board (whose primary concern seemed to be the couple’s unwed cohabitation) the court’s analytical focus is similar to the courts’ treatment of the homosexuality cases explained above: because the couple refused to “normalize” their relationship through marriage, or eliminate any outward appearance of aberrant behavior by ceasing to live together, the library had no choice but to fire them. Indeed, the court in Hollenbaugh found that the plaintiffs’ continued employment at the library would have created the impression in the eyes of the community that the Board of Trustees condoned the behavior; the Board’s inaction would have been an affirmative expression of approval. By refusing to hide their adultery, the couple was forcing their beliefs upon the library as an institution, in effect tarnishing the library’s upstanding reputation in the community through their personal decisions. The court’s decision indicated that the Board of Trustees had no choice but to fire them or become implicated in their immoral behavior.

Like the men who were fired for publicly acting out their sexual orientation, Hollenbaugh was fired for openly—and with little concern for public opinion—having a child and living with a man to whom she was not married. For the courts, the very fact that these plaintiffs were brazenly expressing their “deviant” identities and lifestyles was grounds enough to terminate their employment in

119. Id. at 1330–1331.
120. Id. at 1333.
government/community institutions. The holding of Hollenbaugh was cited as precedent in support of the courts’ decisions in the following three cases.

The court in Chambers v. Omaha Girls Club121 protected an employer’s discriminatory policy by maintaining that its “role model rule” was a bona fide occupational qualification. Crystal Chambers was a young, single, African American woman employed at the Omaha Girls Club as an arts and crafts instructor.122 The Omaha Girls Club is a private, non-profit corporation that provides classes and programs designed to “assist young girls between the ages of eight and eighteen to maximize their life opportunities.”123

Toward these ends, the Club explicitly trained its staff members to “act as role models for the girls, with the intent that the girls will seek to emulate their behavior.”124 This strategy was one of the hallmarks of the Club’s operations, and all staff/club member interactions were specifically structured so as to provide positive role modeling. As a matter of policy, the Club required its staff to be committed to the Club’s values so as to convey credibly those values to Club members. The club’s “role model rule” expressly banned single parent pregnancies among its employees in conjunction with its goal of reducing teenage pregnancy among Club members.125 The staff rules explicitly stated: “The following are not permitted and such acts may result in immediate discharge: . . . Negative role modeling for Girls Club Members . . . include[s] such things as single parent pregnancies.”126

While teaching at the Omaha Girls Club, Chambers became pregnant and was immediately fired. She filed suit, alleging sex and race discrimination under Title VII. In defense of its decision to fire Chambers, the Club argued that its express purpose was to “serve young girls between the ages of eight and eighteen and to provide these women with exposure to the greatest number of available positive options in life.”127 The Girls Club asserted “that teenage pregnancy is contrary to this purpose and philosophy”128 and “that it honestly believed that to permit single pregnant staff members to work with the girls would convey the impression that the Girls Club condoned pregnancy for the girls in the age group it serves.”129 The Club maintained that its policy of terminating women who became pregnant out of wedlock was not based upon a morality standard, but rather upon its conviction that teenage pregnancy severely limits the

121. 834 F.2d 697 (8th Cir. 1987).
122. Roughly 80 percent of the club’s members are African American, as are almost all of its non-administrative personnel. Id. at 698–699 (8th Cir. 1987).
123. Id. at 698.
124. Id.
125. Id.
126. Id. at 698–699.
127. Id. at 702.
128. Id.
129. Id. at 701.
opportunities available to young women.\textsuperscript{130}

The Club argued that "[w]hile a single pregnant working woman may, indeed, provide a good example of hard work and independence, the same person may be a negative role model with respect to the Girls Club's objective of diminishing the number of teenage pregnancies."\textsuperscript{131} Moreover, the Club maintained that, because it hires its staff not only to teach classes but to act as role models for club members, its role model rule, including the definition of what attributes role models should portray, was a bona fide occupational qualification inextricably tied into the duties and responsibilities it places on its employees. Crystal Chambers' job was not only to instruct, but also to put herself forward as a role model for young girls.

At both the district court and appellate level, the courts passed over the Club's lack of empirical evidence that employing single, pregnant women would "convey the impression that the club condoned pregnancy for the girls in the age group it serves."\textsuperscript{132} Both courts deferred to the Club's declaration that the "role model rule" was a justified by business necessity as well as a bona fide occupational qualification, because "a manifest relationship exists between the Girls Club's fundamental purpose and its single pregnancy policy."\textsuperscript{133} The Eighth Circuit majority held that the role model rule was a valid bona fide occupational qualification "reasonably necessary" to the Club's operation, based the Club's honest belief that to permit single pregnant staff members to work with the girls would undermine its mission and purpose.\textsuperscript{134}

The dissent maintained that the district court failed to apply actually the business necessity and bona fide occupational qualification tests. By not requiring the Club to "demonstrate a reasonable relationship between teenage pregnancy and the employment of single pregnant women, the district court accepted the beliefs and assumptions of [Club] board members" at face value.\textsuperscript{135} The dissent argued that without empirical evidence to back up its assertions, an employer's "sincere belief" that a discriminatory employment practice is necessary to the accomplishments of its goals is insufficient to establish a bona fide occupational qualification or business necessity defense.\textsuperscript{136} It concluded: "The fact that the goals are laudable and the beliefs sincerely held does not substitute for data which demonstrate a relationship between the discriminatory practice and the goals."\textsuperscript{137} Such reasoning echoed the dissent in \textit{Dale}, which argued:

The majority insists that we must 'give deference to an association's

\begin{footnotes}
\item[130] Id.
\item[132] Chambers, 834 F.2d at 698-699.
\item[133] Id. at 702.
\item[134] Id.
\item[135] Id. at 708 (citing Chambers v. Omaha Girls Club, 629 F. Supp. 925, 951 (D. Neb. 1986)).
\item[136] Id. at 708.
\item[137] Id.
\end{footnotes}
assertions regarding the nature of its expression’ and ‘we must also give
deerence to an association’s view of what would impair its expression’...[The majority ruled that] once an organization ‘asserts’ that it engages in
particular expression, ‘[w]e cannot doubt’ the truth of that assertion.’ This
is an astounding view of the law. I am unaware of any previous instance in
which our analysis of the scope of a constitutional right was determined by
looking at what a litigant asserts in his or her brief and inquiring no further...

In both dissenting opinions, the Justices argue that courts should not merely
accept a defendant organization’s assertions about its expression—which will
undoubtedly, during litigation, evoke the need for the discriminatory action at
issue—but rather demand evidence to prove such assertions. In both Dale and
Chambers, because the employers’ values are normative, the courts accepted
them without question; established standards of evidentiary proof were ignored in
the face of employers’ “honest beliefs.” In light of the lack of evidence proffered
by the Boy Scouts and the Girls Club, the courts’ decisions seem to hold that an
organization’s asserted right of expressive association is sacrosanct—even when
furthered by discriminatory action—and needs not be substantiated with social
science data.

Moreover, since Chambers and Dale deviated from the role of “model,” as
defined by their employers, the courts considered a dismissal from that role to be
a logical consequence. In her article, Sapphire Bound! Regina Austin asserts:

[Crystal Chambers’] skills and natural behavior were not particularly valued
by the people running the Club. Rather than being a role model by virtue of
doing her job and living her own life, Chambers was supposed to perform
the role of model, play a part that was not of her own design. She was a
model in the sense that a model is “something made in a pliable material
(such as clay or wax) that is intended to serve as a pattern of an object of
figure to be made in a more permanent material.” When she deviated from
the Club’s philosophy and engaged in a practice that was common to the
community of black women from which she and the members came, she
was fired.

139. In an astute commentary on the case, Austin writes:
"Firing a young unmarried, pregnant black worker in the name of protecting other young black
females from the limited options associated with early and unwed motherhood is ironic, to say
the least. The Club managed to replicate the very economic hardships and social biases that,
according to the district court, made the role model rule necessary in the first place....
Crystal Chambers was not much older than some of the Club members and her financial and
social status after being fired was probably not that much different from what the members
would face if they became pregnant at an early age, without the benefit of a job or the
assistance of a fully employed helpmate. On the other hand, she was in many respects better
off than many teen mothers. She was in her early twenties and had a decent job. Chambers'
condition became problematic because of the enforcement of the role model rule.”
Regina Austin, Sapphire Bound!, 1989 WIS. L. REV. 539, 553 (1989) [hereinafter "Austin"].
140. Austin, supra note 139, at 574 (emphasis added).
Chambers was supposed to be "an accomplice in regulating the sexuality of other young black females, in much the same way that she was expected to tolerate the regulation of her own."\textsuperscript{141} Like Dale, Chambers was valued less for who she actually was than for her outward performance of normative values.

In \textit{Harvey v. Young Women's Christian Association}, the court ruled that Harvey's stated intent to "offer herself as a role model of an 'alternative lifestyle'"\textsuperscript{142} legitimated the YWCA's decision to fire her when she became pregnant out of wedlock. The Young Women's Christian Association (YWCA) of Charlotte, North Carolina is a "non-profit community service organization that sponsors or directs educational, recreational, social, and religious programs for young women and girls in the Charlotte community."

In 1974, the YWCA hired Paula Rebecca Harvey to plan, manage, and teach informal education classes for young women and girls in cooking, dancing, and gardening. At the time she was hired, Harvey was a twenty-two year old, unmarried, African-American woman. When Ms. Harvey accepted the position at the YWCA, she signed an agreement to take "individual responsibility for the achievement of the [YWCA's] purpose."\textsuperscript{144} The YWCA's purpose includes the elimination of racism, the propagation of the Christian faith "as known in Jesus and nourished by the resources of that faith,"\textsuperscript{145} and the drawing together "into responsible membership women and girls of diverse experiences and faiths, that their lives may be open to new understandings and deeper relationships and that together they may join in the struggle for peace and justice, freedom and dignity for all people."\textsuperscript{146}

After one year of successful teaching and class management, Harvey requested permission to initiate a program in which she would work with groups of teenage girls in the girls' homes or at a local church for educational and recreational activities.\textsuperscript{147} After the program's successful inception, Harvey discovered that she was pregnant. When she notified the YWCA administrators about her condition, they questioned her about whether she could continue in her work with teenagers. She replied that she could "offer herself to the teenagers in the condition of her unwed pregnancy as a role model of an alternative lifestyle."\textsuperscript{148} Unhappy with her suggested plan, the YWCA fired her on the grounds that her stated intent was "completely incompatible with the goals of the YWCA" and would undermine YWCA's purpose.\textsuperscript{149} Harvey sued, claiming sex
and race discrimination under Title VII.

Defending their decision before the court, the YWCA argued that “[Harvey] was fired not because of her race and not because of her pregnancy, but rather because she wished to advocate an alternative lifestyle of unmarried parenthood to her community youth groups and such conduct would be contrary to the purpose and functions of the YWCA in its service to young women and girls.” The YWCA contended that Harvey’s intent to “offer herself as an alternative lifestyle role model” to the teenage girls she had been working with in the community, placed the YWCA in a very difficult position.

The court maintained that it was hard to believe that a woman working for a woman-run and woman-centered non-profit organization would have a viable claim of sex discrimination. It reasoned that, “considering the nature of the YWCA as an organization of females working to provide for the social, educational, recreational, and religious needs of females, it is difficult to conceive of a cognizable claim of sex discrimination being made against it by a female employee.” It asserted, “Obviously if the defendant had a policy to exclude employees from employment because of their sex or pregnancy, very few women would be eligible to be employed by this female organization, be they wed or unwed.”

In so reasoning, the court managed to ignore the fact that women often seek to define the contours of acceptable femininity and create an appropriate/inappropriate dichotomy that serves to reign in behaviors that fall outside the bounds of what deemed socially acceptable. This phenomenon, referred to as “the pursuit of ‘respectability’” is “a descriptive term for how the dominant group secures its position of dominance” by positioning groups on the margins in “hierarchical relation to one another.” That is, “[t]he structure of dominance we have been calling respectability shows us how, as women, we... secure our own toehold on respectability by disavowing other women.” Characterizations based on race, ethnicity, age, disability, socio-economic class, and sexual behavior are primary factors in this hierarchy of respectability.

The court then went on to evaluate the validity of Harvey’s claim that she was fired because she became pregnant. Although it conceded that she established a prima facie case for sex discrimination, the court found that the YWCA met its burden of showing a legitimate, non-discriminatory reason for firing Harvey. It held that the decision to fire Harvey was premised upon her stated “intent to offer herself, in her condition of unwed pregnancy, as an

150. Id. at 952.
151. Id.
152. Id. at 954.
153. Id. at 952.
155. Id.
‘alternative lifestyle’ role model to the young women and girls in her community project. As seen by her employer, this course of conduct and philosophy was contrary to the ‘Purpose’ and philosophy of the YWCA and violated plaintiff’s agreement to espouse these principles in her employment.”

Referencing McConnell and Hollenbaugh, the court held that:

The present case is not simply a matter of an employer making a moral judgment regarding an unmarried pregnant employee. It is a case in which the employee sought to remain in the employment of the defendant on her own terms; a case in which the employee intended to pursue an activist role in implementing her unconventional ideas concerning societal status to be accorded unmarried mothers and thereby to foist tacit approval of this status upon an organization to which such conduct is contrary to its goals and principles; in this instance, the Young Women’s Christian Association. The Court is not aware of any constitutional fiat or binding principle of decisional law which requires an employer such as the defendant to accede to such demands.

The court repeatedly underscored this point, declaring that it was “not willing to require that an organization such as the YWCA, which according to the evidence is a movement rooted in the Christian faith, and which has ideals and goals to which the plaintiff apparently does not subscribe, to employ a person to teach teenagers in a program under its auspices ‘an alternative lifestyle,’ which is abhorrent to the ideals and goals of the defendant YWCA.” The court found that the YWCA had a legitimate nondiscriminatory reasons for rejecting Harvey’s offer to put herself forward as a role model of an alternative lifestyle which was sufficient to rebut her prima facie case of sex discrimination, and ruled in its favor.

Throughout its opinion, the court was particularly incensed that Harvey deigned to “demand” that the YWCA employ her “on her own terms” and forced the YWCA to lend “tacit approval” to her decision to have a child while unmarried. In Harvey and in Chambers, of primary significance to the courts was the notion that absence of a termination of the women’s contracts would be considered an affirmative act contrary to the organizations’ central values. Both the Omaha Girls Club and the YWCA, with the support of the courts, argued that if they had allowed these women to continue working—as their pregnancies became more and more apparent—such decisions would have appeared to condone what the organizations, and much of society, deemed inappropriate behavior.

Boyd v. Harding Academy of Memphis made explicit that the condemned behavior—the out-of-wedlock sex—was less of an issue than the inescapable

156. Harvey, 533 F. Supp. at 954–955.
157. Id. at 956 (emphasis added).
158. Id. at 955.
159. 88 F. 3d 410 (6th Cir. 1996).
physical manifestation of that behavior and the deviant identity that accompanied it. Andrea Boyd, a young, single, white woman, was hired to be a preschool teacher at Harding Academy, a religious institution affiliated with the Church of Christ. When she began working, she was given a handbook which articulated the school’s hiring criteria: “Christian character, as well as professional ability, is the basis for hiring teachers at Harding Academy. Each teacher at Harding is expected in all actions to be a Christian example for the students.”

When Boyd first became pregnant outside of wedlock, she miscarried and, explaining her situation, requested a brief medical leave. In response to this request, the director of the preschool granted it sympathetically, telling Boyd that “she would pray for her.” The director testified that she had thought to herself at the time that “if Boyd had been pregnant, she would have had to terminate her.” However, she did not report the incident to the president of the Academy.

Nine months later, Boyd became pregnant outside of wedlock for a second time. When the director of the preschool discovered this, she and the president of the Academy fired Boyd on the grounds that her pregnancy “would establish that she had engaged in extramarital sexual intercourse,” conduct which was contrary to the Christian principles held by the school. They told Boyd that “because she was pregnant and unwed, she set a bad example for the students and parents and would therefore have to be terminated.” However, they offered that if Boyd “were to marry the father of the child, she would be eligible for re-employment.” During the meeting, the preschool director and the Academy’s president explained that in the past there had been others teachers who had been fired for becoming pregnant out of wedlock and who had been rehired after their marriage to their children’s fathers. Boyd sued, alleging sex discrimination in violation of Title VII.

At trial, the district court held that the Academy’s articulated legitimate, non-discriminatory reason—that it fired Boyd not for becoming pregnant, but rather for having sex outside of marriage (a violation of the school’s code of conduct)—was not a pretext for sex discrimination. Rather, the court found that because the Academy had once fired a man for “sexual immorality” and had not fired six married women who became pregnant, the school’s reason was a valid defense.

Boyd argued on appeal that the district court failed to take into account 1) that when firing her, her supervisors had repeatedly used the phrase “pregnant

160. Id. at 411.
161. Id. at 412.
162. Id.
163. Id.
164. Id.
165. Id.
166. Id.
and unwed;" 2) that the director of the pre-school had not taken disciplinary action when Boyd reported that she had miscarried, and thus, the concern was less about the extra-marital sex than the extra-marital pregnancy; and 3) that the Academy had not made an inquiry as to the duration, extent, or continuing nature of the extramarital sex. However, the court found none of these points compelling, ruling against them without explanation. In its brief, four-page decision, the court rationalized its holding only by asserting that "Boyd's action violated the code of conduct that Harding teachers are required to follow . . . [a] code of conduct . . . applied equally to both sexes.

Despite the district court's lack of explanation, the Sixth Circuit affirmed the district court's reasoning. That the court took the Academy's legitimate, non-discriminatory reasoning at face value was particularly unjust given the fact that the Academy did not fire Boyd when she miscarried (as much evidence of extra-marital sex as pregnancy) but did dismiss her when she had successfully conceived. Thus, Boyd is a clear example of how the performance of morality is of utmost importance both to employers and to courts. As long as Boyd did not bodily represent extramarital sex, her behavior was silently condoned and no negative employment actions were taken.

In these cases, what was at stake was a conflict between appropriate role model behavior (as defined by the defendant organizations and supported by the courts) and a women's right to maintain employment while pregnant and unmarried. In their decisions, the courts framed the employer's right to not employ staff members who pursue lifestyle choices contrary to organizational ideology in a manner similar coerced speech and freedom of expressive association claims outlined in McConnell and Dale. In doing so, the courts upheld narrow definitions of appropriate role model behavior while establishing that an employer's professed associational expression can trump an employee's Title VII rights.

2. . . . Versus "Sexual Neophytes" Striving Towards Normative Identities

In contrast, many courts have held that termination of a woman's employment on the basis of her unmarried pregnancy was not justifiable upon any grounds. In the following cases the courts ruled that the employers' actions violated Title VII, as well as these women's constitutional rights to privacy and equal protection.

However, a close reading of the cases demonstrates that in all of these instances, the women were either 1) intent upon hiding the facts surrounding their pregnancy from the public, or 2) eagerly working towards marrying the fathers of

167. Id. at 414.
168. See also Cline v. Catholic Diocese of Toledo, 206 F.3d 651 (6th Cir. 1999); Thompson v. Southwest Sch. Dist., 483 F. Supp. 1170 (W.D. Mo. 1980).
their babies. While the courts argued on behalf of the women’s right to be free from discrimination, they simultaneously legitimized their decisions by emphasizing that the children with whom the women worked were not at risk of moral corruption, particularly because the women had taken pains to ensure that the children were not aware that they had become pregnant while single. Because this set of plaintiffs covered, having no desire to be seen as stepping outside the bounds of socially accepted behavior, the courts were free to rule in their favor. In these cases, the courts found that the plaintiffs’ conduct presented no conflict between freedom of expressive association rights and individual Title VII rights, because the plaintiffs in these actions made no efforts to challenge the organizations’ messages.

The most explicit example of this second narrative can be found in Ponton v. Newport News School Board. In this case, Pamela Brown Ponton, an unmarried home economics teacher in the Newport News School system, was forced to take a leave of absence when she alerted the school that she had become pregnant. At first, her superiors questioned her about getting married, and then suggested that she speak with the district’s personnel department, who informed Ponton that the Newport School system handled “such situations” by giving unmarried, pregnant teachers three options: get married, take a leave of absence, or resign. The school district personnel department further informed Ponton that she would not be allowed to teach while she was single and pregnant, as such a situation would “set a bad example for [her] students.”

Ponton chose to take a leave of absence, but the terms of her leave qualified that upon her return to teaching, she would not be guaranteed her former job, but would rather be placed in any teaching position for which she was qualified “when such a vacancy appears.” In contrast, married teachers taking a leave of absence for the duration of their pregnancy were offered a different category of leave, one that allowed them to work until they were physically unable to continue working, and that guaranteed that their teaching positions would remain open (having been filled by a temporary or substitute teacher) for them to assume upon their return. This second, preferable category of leave was explicitly open to married teachers going on maternity leave, but not to unmarried teachers. Left with no other choice, Ponton accepted the terms of the leave offered to her. On December 15, 1983, Ponton gave birth to a son; fifteen days later, she married the child’s father. She then requested that the Newport school system reinstate her in a teaching position. However, it was not until October 1985 that a position for which Ponton was qualified became available.

In this case, the court found a clear violation of Title VII as well as Ponton’s

171. Id.
172. Id.
173. Id.
constitutional rights to privacy and equal protection. It held that “[Ponton] had a constitutional right to bear a child while unmarried. It is undisputed that plaintiff’s exercise of this right was the reason she was forced to take a leave of absence, for if she had been either married and pregnant or single and non-pregnant she would not have been forced to take the leave.”

Applying a balancing test developed by the Supreme Court in *Connick v. Meyers* and *Pickering v. Board of Education* to determine when the state may legitimately discharge a public employee for the exercise of her constitutional rights, the court weighed Ponton’s interest in exercising her constitutional rights against the state’s interest in promoting the efficiency of the public services it performs. The court declared that in this case, “the particular state interest which has been alleged is that of protecting schoolchildren from exposure to a single, pregnant teacher.”

The court expressed doubt that such a concern was a legitimate state interest, and ruled that given this doubt, “such a concern does not outweigh plaintiff’s interest in exercising her constitutional right to bear a child out of wedlock.” In explaining its rationale, the court asserted:

> It has not been alleged that the fact that plaintiff became pregnant out of wedlock indicated some moral defect in plaintiff which made her unfit to teach. Nor has it been alleged that plaintiff intended to openly advocate the virtues of pregnancy out of wedlock. . . . Rather, the sole allegation is that the mere sight of an unmarried, pregnant teacher would have a sufficiently undesirable influence on schoolchildren to justify excluding the teacher from the classroom. The Court finds this allegation to be meritless, for the effect on students of the mere sight of a single, pregnant teacher would be negligible, at best . . . It is unclear whether plaintiff’s students would have even been aware that plaintiff was unmarried . . . There was no evidence that plaintiff intended to proselytize her students regarding the issue of unwed pregnancy. Plaintiff’s pregnancy would not have affected the School Board’s authority to prescribe the curriculum for plaintiff’s students, nor would it have affected plaintiff’s ability to implement this curriculum in her classes. Finally, there was no danger that plaintiff’s single, pregnant status could in any way be perceived as representing a School Board–sponsored statement regarding the desirability of pregnancy out of wedlock; rather, such status could only be viewed as representing a personal decision made by plaintiff in her private capacity.

Furthermore, the court underscored the fact that “[i]t has not been alleged
that the fact that [Ponton] became pregnant out of wedlock indicated some moral defect in [Ponton] which made her unfit to teach. Indeed, evidence establishes that [she] was both desirous and anxious to marry her child’s father.\endnote{180}

The logic made explicit in these statements is clear: Ponton did not have a “moral defect” because she was “desirous and anxious to marry the child’s father.” Moreover, Ponton was not a danger because she would not have proselytized, advocated, or in any way forced the facts of her specific situation upon the children she taught. The court was not worried that Ponton’s presence in the classroom would have corrupted young children primarily because they would not have known that she was pregnant and unmarried. The children would not have been at risk because Ponton had no plan or intention to “advocate the virtues of pregnancy out of wedlock.” Moreover, because she was content—indeed “anxious”—to remain silent, normalize her status, and allow students to believe that she was a married woman throughout her pregnancy, the danger that the School Board would be seen as approving of pregnancy out of wedlock was minimal. Because Ponton would have remained complicit in the school board’s efforts to hush up the scandal of unwed pregnancy, she did not pose a threat to either the moral values of young children or the public perception of the school board’s beliefs and principles. The court was therefore free to rule in her favor.

A second example of a court’s protection of the rights of women who became pregnant while unmarried is \textit{Andrews v. Drew Municipal Separate School District}.\endnote{181} In this case, the superintendent of the school district issued an unwritten mandate that being the parent of an illegitimate child would automatically disqualify an individual from employment within the school system. The school board, although originally unaware of the rule, eventually ratified it. The rule, as practiced, adversely affected only unwed mothers, and not unwed fathers.\endnote{182}

Plaintiff Lestine Rogers had been hired as a teacher’s aide before the initiation of the policy and had stated on her application that she was an unmarried parent of a child born out of wedlock. When the rule went into effect, school district administrators informed her that her contract would not be renewed for the following year. Plaintiff Katie Mae Andrews applied for a position after the superintendent issued the rule, and, aware of the rule, did not indicate on her application that she was the mother of a child born out of wedlock. When school administrators investigated her application, they discovered that she had indeed borne a child out of wedlock and refused to consider her application further. One administrator expressly noted on the application that “this applicant would have been hired ... if I had not received

\begin{footnotes}
\item[180] Id. at 1062 (emphasis added).
\item[181] 507 F.2d 611 (5th Cir. 1975).
\item[182] Id. at 613–614.
\end{footnotes}
The two women filed suit, alleging Title VI violations, Equal Protection violations, and violations of §§ 1981 and 1983.

The district court found that no rational relation existed between the policy and legitimate educational objectives, and ruled in favor of the plaintiffs, finding not only equal protection violations, but due process violations as well. In affirming the judgment, the Fifth Circuit looked to the school district’s three proffered objectives for implementing the rule: “1. unwed parenthood is prima facie proof of immorality; 2. unwed parents are improper communal role models, after whom students may pattern their lives; 3. employment of an unwed parent in a scholastic environment materially contributes to the problem of school-girl pregnancies.” Although the Fifth Circuit agreed that the creation of a “scholastic environment which was conducive to the moral development as well as the intellectual development of the students ... [was] certainly [an] objective ... not without legitimacy ... [as] schools have the right, if not the duty, to create a properly moral scholastic environment,” it rejected the school district’s rationale for its “no unwed mothers” rule.

Addressing the school district’s first proffered explanation, that “unwed parenthood is prima facie proof of immorality,” the Fifth Circuit quoted the district court’s reasoning at length, the crux of which is embodied in the following statement: “The rule makes no distinction between the sexual neophyte and the libertine.” Essentially, the district court held that the rule was overly inclusive, in that it swept women who have been raped, women who became pregnant while engaged and whose fiancés then died, and women who had subsequently married the fathers of their children all into the same category along with “libertines”—sexually promiscuous women of doubtful moral character.

Next, the Fifth Circuit investigated the argument that “unwed parents are improper communal role models, after whom students may pattern their lives.” The school district had argued that the dispositive issue is “whether the open and notorious existence of the [plaintiff’s] status ... would injure the affected students.” In an interesting leap of logic, the court refuted this argument by finding that “the record before [the court] contains no evidence of proselytizing of pupils by the plaintiffs and reveals instead that each plaintiff, along with her

183. Id. at 613.
184. The plaintiffs made these claims because Title VII had not yet been amended to explicitly include pregnancy as a protected status.
185. Id. at 614.
186. Id.
187. Id.
189. Id. at 614.
190. Id. at 616 (internal citations omitted).
illegitimate offspring, is living under the same roof as her parents, brothers and sisters."

The court found that "it would be a wise child indeed who could infer knowledge of either plaintiff’s unwed parent status based on the manner of the plaintiffs’ existence." It quoted the district court, concurring that:

In the absence of overt, positive stimuli to which children can relate, we are convinced that the likelihood of inferred learning that unwed parenthood is necessarily good or praiseworthy, is highly improbable, if not speculative. We are not at all persuaded by defendants’ suggestions... that students are apt to seek out knowledge of the personal and private family life-styles of teachers or other adults within a school system (i.e. whether they are divorced, separated, happily married or single, etc.) and, when known, will approve of and seek to emulate them.

The court made a cursory dismissal of the school district’s third rationale that “employment of an unwed parent in a scholastic environment materially contributes to the problem of school-girl pregnancies" by pointing to the lack of empirical evidence on the record in support of such an idea.

Unlike the cases explored above, both Andrews and Rogers had been pregnant and given birth long before the school district took action against them. Their out-of-wedlock pregnancies were far in the past; no tangible, physical evidence of the women’s status of single motherhood was discernable to the students they were teaching. The court placed heavy emphasis on the notion that the students could not possibly infer knowledge of the women’s status as mothers of children born out of wedlock from their behavior in the classroom. Both Rogers and Andrews were quiet about the fact that they had had children out of wedlock, with Andrews even taking pains to hide her child’s existence from the district so as to be hired for a job for which she was otherwise qualified. Because they did not outwardly manifest/perform their status as unwed mothers, the court found no danger that the women would corrupt the children with whom they worked.

Moreover, the court considered the fact that each woman had remained sheltered in her parents’ nuclear family as evidence of a certain moral uprightness. Intriguingly, the court found that the fact that each woman was living with her parents and siblings was further proof of the women’s lack of intent to influence the morals and ethics of her students. A more useful inquiry into each woman’s intent to influence children would have been to look at Rogers’ conduct as a teaching aide while working for the school district, or at Andrews’ desire to hide her child’s existence from the school administration. Furthermore, while the court rightly based its decision upon a finding of clear violations of the Due Process and Equal Protection clauses of the Constitution, it

191. Id. at 616.
192. Id.
193. Id. at 616 (citing 371 F. Supp. 27 at 35).
194. Id. at 614.
explained that it was free to do so because the women were not "fore[ing] tacit approval of this socially repugnant concept" upon the school district by openly advertising their status or actively trying to influence the morals and ethics of their students.195

In *Vigars v. Valley Christian Center of Dublin*,196 the plaintiff was fired from her job at a religious school, The Valley Christian Center, for becoming pregnant while in the midst of divorcing her first husband and marrying her second, the father of her baby. Janelle Vigars sent her children to the Center's school and worked in its library as a librarian. As an employee of the Center, she was required to sign a statement of faith, declaring that she was a "born-again believer living a consistent and practical Christian life," committing herself to the church's mission of instilling fundamentalist Christian values in its congregation, and pledging to live a fundamentalist Christian lifestyle in emulation of the life of Jesus Christ. When Vigars became an employee, she received a handbook that detailed how she was expected to further the Center's mission by taking on the responsibility of serving as a mentor and role model for students. Moreover, as the mother of children attending to parochial school, every year she signed an agreement in which she vowed that she and her children would be bound by the moral values, doctrines, and beliefs of the church.197

Aside from working with children in the library, Vigars also taught physical education classes, was a teacher's aide in various classrooms, and spent some time working as a child care provider for the church.198 Vigars' conduct at her job was fully within the parameters of Church moral policy. Yet when she informed the Center that she had begun the process of having her first marriage annulled while simultaneously planning to marry another man with whose child she was pregnant, the Center immediately fired her. The Center initially fired her for the "sin" of becoming pregnant out of wedlock; her termination letter expressly stated that the reason for her termination was that she was "pregnant without the benefit of marriage." However, later, in its motion for summary judgment, the Center alleged that she was actually fired for being involved in an adulterous affair—having sexual relations with her husband-to-be while still legally married to her first husband.199

The Center argued at trial that "whether or not plaintiff's pregnancy was the precipitating event which led to her termination, the underlying decision to fire the plaintiff was a religious one, based upon a widely recognized and sincerely held belief that extramarital sex is a sin."200 It argued that its decision to fire
Vigars was justified by both business necessity and bona fide occupational qualification defenses; in her capacity as a librarian, Vigars served as a role model for the students with whom she worked, and therefore, her status as a woman pregnant outside of wedlock violated the bona fide occupational qualification that her behavior embody the values and beliefs of the fundamentalist Christianity preached by the Center.\textsuperscript{201}

In finding for Vigars, the court summarily dismissed the Center’s argument that as a religious institution it was exempt from various anti-discrimination statutes. Distinguishing Chambers, the court reasoned that while Chambers’ explicit function was to be a role model for the young girls with whom she worked, Vigars job was not expressly to be a role model, but first and foremost to be a librarian. The court held:

In order to assert the defenses, the person’s job must depend upon the discriminatory characteristic. In the present case, plaintiff acknowledges that she was required to work closely with the students and to practice a lifestyle which modeled the mission of the church to the students, and that she understood that the school stressed the importance of modeling moral values and religious doctrine to the students. However, there is serious disagreement about how central her moral life was to her job as librarian, whether or not she was truly expected to act as a role model in the Chambers sense, and what impact her pregnancy truly had on her ability to perform either of those functions.\textsuperscript{202}

Vigars and Hollenbaugh are similar in many ways. Both Vigars and Hollenbaugh were librarians who worked with children and both women became pregnant while having an affair with men to whom they were not married. Yet, by the time Vigars’ child was born, she had attained a divorce from her first husband and married the father of her child. Interestingly, while the library Hollenbaugh worked for was a public institution, the Center where Vigars worked was a private religious organization. That the courts upheld employment discrimination by a public town library but not by a private institution invoking a religious exemption in its defense is remarkable. Again, however, this divergence points to the manner in which the women were manifesting their adulterous behavior and out-of-wedlock pregnancy. Hollenbaugh refused to marry her child’s father, preferring to live openly with him even while he had not yet divorced his wife, while Vigars was speedily working toward marrying her baby’s father.

\textsuperscript{201} Id. at 808.
\textsuperscript{202} Id. at 808–09.
IV.
THE RIGHT TO EXPRESSIVE ASSOCIATION AND THE TITLE VII PROTECTIONS

In the cases discussed above, the idea of protecting children from immoral influences is tightly intertwined with the idea of protecting institutions from being forced to transmit messages with which they disagree. In fact, I argue that the rhetoric of protecting children from corruption is merely a pretext for the project of protecting adults' rigid senses of morality and appropriate behavior. Role models seem to be used more as a means of social control than as a way of inspiring and motivating youth.

While courts can disregard homosexuals' rights through the invocation of coerced speech rationales without creating any legal conflicts, when they apply these rationales to cases involving sex discrimination, they essentially hold that First Amendment rights trump Title VII protections. Discrimination is not a protected First Amendment right, yet in the cases explored above, the courts ruled that when an individual's behavior threatens to tarnish her employer's public reputation, discriminatory employment actions are warranted, as inaction would be equated with support for deviant behavior. Of primary significance to the courts is the notion that not terminating the women's contracts would be considered an affirmative act contrary to the organizations' central values. In this way, expressive association and the "essence of the business" standard seem to overlap; courts use them both to legitimize an organization's right to define the contours of its public message. The courts' holdings suggest that a woman's public performance of "deviancy" effectively gives her employer a coerced speech claim that will weigh heavier in the balance of rights.

This set of cases, taken together with the line of homosexuality cases outlined in Part II, creates an invidious precedent: when an employee's actions could be construed as expression contrary to an employer's or a group's chosen public image, message, or mission, that organization or employer's First Amendment right of expressive association is at risk. Even when employers have not expressly articulated this First Amendment right in their defense of a discriminatory employment action, the court makes the argument for them, using "coerced speech" or forced "tacit approval" analyses.

Is this line of cases analytically correct? Should First Amendment rights of expressive association override Title VII protections? Does Title VII unconstitutionally infringe upon constitutional rights? When you have two rights in opposition, why should the scales tip in favor of Title VII? The answer is grounded in the Supreme Court's holdings in *Roberts v. Jaycees* and *Board of Directors of Rotary International v. Rotary Club of Duarte*. Within the text of

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these decisions is direct opposition to the idea that discrimination can be a protected form of associational expression.

In Roberts, the nonprofit organization United States Jaycees threatened to revoke the charters of two of its Minnesota chapters that disobeyed organizational rules by admitting women to their groups. Jaycees brought suit against Minnesota state officials, alleging that the state’s interest in prohibiting discrimination on the basis of gender violated their constitutional rights of free speech and association. In finding against Jaycees, the Supreme Court ruled that the state’s compelling interest in eradicating discrimination against its female citizens justified a limitation of the group’s freedom of expressive association. The Court found no basis in the record to support the conclusion that admission of women as full voting members in the organization would impede Jaycees’ ability to engage in these protected activities or to disseminate its preferred views. The Court ruled:

Even if enforcement of . . . [Minnesota’s public accommodations] Act causes some incidental abridgment of the Jaycees’ protected speech, that effect is no greater than is necessary to accomplish the State’s legitimate purposes. As we have explained, acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection. In prohibiting such practices, the Minnesota Act therefore “responds precisely to the substantive problem which legitimately concerns” the State and abridges no more speech or associational freedom than is necessary to accomplish that purpose. Duarte, fortifying this reasoning, held that the nonprofit organization Rotary International could not exclude women from membership. Plaintiffs, members of a Rotary International chapter that admitted women, claimed that the organization’s ban on female membership violated California’s Unruh Civil Rights Act. In defense, Rotary argued that as it was not a business establishment, it was not subject to the Unruh Act’s mandate against gender discrimination. Finding that indeed Rotary International was a business establishment to which the Unruh Act applied, the Supreme Court held that even though the Act did infringe upon the organization’s right of expressive association, such an infringement was justified by the state’s compelling interest in prohibiting discrimination against women. The Court held:

205. Roberts, 468 U.S. at 627.
206. Id. at 628–629.
208. Duarte, 481 U.S. at 549.
Even if the Unruh Act does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women. On its face the Unruh Act, like the Minnesota public accommodations law we considered in Roberts, makes no distinctions on the basis of the organization's viewpoint. Moreover, public accommodations laws "plainly serv[e] compelling state interests of the highest order . . ." In Roberts we recognized that the State's compelling interest in assuring equal access to women extends to the acquisition of leadership skills and business contacts as well as tangible goods and services . . . The Unruh Act plainly serves this interest. We therefore hold that application of the Unruh Act to California Rotary Clubs does not violate the right of expressive association afforded by the First Amendment.209

Roberts and Duarte could not be clearer: when government has a compelling interest in prohibiting a certain form of protected expression, that compelling interest limits organizational rights of expressive association. A lurking question, however, is that since the majority of expressive association cases pertain to situations where the expressive organization is a private group or club, how do these rulings apply when the right is being invoked in employment cases, as explored herein?

O'Connor's concurrence in Roberts offers a solution. In its analysis, the majority ruled that the balancing-of-interests test should hinge on whether an organization has satisfied proof of a membership-message connection. O'Connor argues that such a test may have the effect of "rais[ing] the possibility that certain commercial associations, by engaging occasionally in certain kinds of expressive activities, might improperly gain protection for discrimination."210 She asserted that "[w]hether an association is or is not constitutionally protected in the selection of its membership should not depend on what the association says or why its members say it."211 O'Connor reasoned:

On the one hand, an association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members. Protection of the message itself is judged by the same standards as protection of speech by an individual. . . . On the other hand, there is only minimal constitutional protection of the freedom of commercial association. There are, of course, some constitutional protections of commercial speech . . . But the State is free to impose any rational regulation on the commercial transaction itself. The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State. A shopkeeper has no

209. Id. (internal citations omitted).
210. 468 U.S. at 632.
211. Id. at 633.
O'Connor offered a second rationale for why civil rights should not be displaced by an organization's right of expressive association: a state's prerogative to impose "time, place and manner" restrictions on an organization's actions. She asserted:

The dichotomy between rights of commercial association and rights of expressive association is also found in the more limited constitutional protections accorded an association's recruitment and solicitation activities and other dealings with its members and the public. Reasonable, content-neutral state regulation of the time, place, and manner of an organization's relations with its members or with the State can pass constitutional muster, but only if the regulation is "narrowly drawn" to serve a "sufficiently strong, subordinating interest" "without unnecessarily interfering with First Amendment freedoms."213

O'Connor concluded by asserting that a commercial organization enjoys only minimal constitutional protection in its recruitment, training and solicitation activities. When these activities are conducted in a discriminatory manner, state interests in ending employment and consumer discrimination trump the commercial organization's right of expressive association.214 Such a rationale could be extended to encompass employment discrimination cases like those discussed above.

CONCLUSION

In the cases explored herein, the courts' rulings are more concerned with the performance of normative morality than with its actuality. Not only do these cases establish an erroneous precedent that preferences organizations' expressive association rights over Title VII rights, they also serve to entrench normative notions of acceptable role model behavior. As long as the women covered by keeping their status a secret, marrying the fathers of their children, or living at home with their parents, their employers were deemed irrational when firing them. Like the "good" covering homosexual and the "bad" flaunting homosexual, any assertions of pride or self-acceptance by these women were seen as dangerous, particularly because they were supposed to be serving as role models for the children with whom they worked. For as role models, these women were "exerting a subtle but important influence over [students'] perceptions and values."215

Such rulings point to the legal system's complicity in the project of rigidly defining who may be an appropriate role model for children and exerting social

212. Id. at 633–634 (emphasis added).
213. O'Connor bases this reasoning on Supreme Court precedent. Id. at 634–35 (citing cases).
214. Id. at 635.
215. Ambach, 441 U.S. at 78–79.
control over the representation of normative morality. Those individuals who are 
pride of their deviancy from societal norms and “decline voluntarily and openly 
to accept the social place accorded them”\textsuperscript{216} are cast out of their positions as role 
models. In such a way, then, are role models as defined by courts really models of 
anything but compliance with hegemonic ideals of respectability? As our 
society evolves and increasingly breaks free from modernist constructions of “the 
way things are supposed to be,” who will serve as our role models?

In her article, \textit{Cultural Dissent},\textsuperscript{217} Madhavi Sunder suggests that “cultures 
now more than ever are characterized by cultural dissent: challenges by 
individuals within a community to modernize, or broaden, the traditional terms of 
cultural membership . . . Not satisfied to choose between tradition and modernity, 
people in the modern world want both. They want culture, but on their own 
terms.”\textsuperscript{218} In response, however, those fighting to keep their cultures “pure” and 
“traditional” (i.e. rigidly rooted in the past, in a modernist sense of clearly defined 
boundaries and borders) increasingly look to law to stifle internal debate and to 
preserve increasingly artificial cultural categories. The law’s response has been 
to hold tightly to the notion of culture as fixed and stable, and through a process 
of “unreflectively defer\{ing\} to a culture’s leaders”\textsuperscript{219} has helped to silence 
internal debate “by exiling cultural dissenters in the hope of restoring cultural 
associations back to some glorious, homogeneous past.”\textsuperscript{220}

Although it explicitly refers to the idea of deviance within discrete cultures, 
i believe that this idea can be applied to “deviant” lifestyle choices usually 
hemmed in by “American” standards of what is normative. Sunder’s general 
promise is that while anthropologists and sociologists have increasingly come to 
realize that culture is not fixed or stagnant, the American legal system has 
retained this view of culture as a rigid, static entity. By siding with a culture’s 
elites—be they church officials or leaders of the Boy Scouts—the legal system 
effectively silences dissenters, banishing those who would like to push the 
boundaries of what it means to be a member of a culture and exiling individuals 
who would “challenge power relationships within a culture.”\textsuperscript{221} Moreover, 
courts’ unhesitant acceptance of employers “honest beliefs” about the actions 
necessary to profess their organization’s message serves only to validate and 
entrench an organization’s discriminatory behaviors. As a result of the judicial 
system’s tendency to support leaders’ inflexible defense of the status quo, the 
courts have “paved the way for the rise of a new right to exclude, not from an 
association’s membership, but rather, from an association’s meaning.”\textsuperscript{222} As

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\item 216. Goffman, supra note 24, at 143.
\item 218. Id. at 497.
\item 219. Id. at 552.
\item 220. Id. at 523.
\item 221. Id. at 503.
\item 222. Id. at 542.
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shown by the cases explored above, the result is a dramatic narrowing of possible expression, as “difference is rooted out, if not by the force of culture, than at least by the force of law.”

Can and should the law protect the choices and actions of professionals who choose not to cover? I believe that it should. How, then, can we escape the rigidity outlined in the legal decisions examined above, and instead present a variety of appropriate, strong, positive role models for children who espouse a spectrum of views and represent a wide variety of lifestyles? Austin suggests that we should read Chambers’ story as an example of how “young, single, sexually active, fertile, and nurturing black women . . . have the temerity to attempt to break out of the rigid economic, social, and political categories that a racist, sexist, and class-stratified society would impose upon them.”

Thus, it is necessary to allow room for Chambers and other similarly-situated women to be held up as real, authentic role models who truly do embody the struggle to break down traditional notions of identity and propriety.

One way that room for such role models could be made is by establishing an evidentiary burden on employers and organizations claiming that an employee’s action goes against their associational expression. As articulated by the dissents in Dale and Chambers, courts have condoned discriminatory employment actions after taking a defendant organization’s professed mission, goals and views at face value. Necessitating empirical proof of an organization’s asserted expression may help to allow for the diversity of opinions that coexist within any given institution and organization.

Moreover, the holdings in Roberts and Duarte, and not Dale or McConnell, should extend to those situations where courts are balancing an organization’s First Amendment freedom of expression rights against an individual’s Title VII rights. While constitutional protections are of the highest order, these cases have clearly established that in certain circumstances, a government’s compelling interest in ending discrimination should trump discriminatory forms of freedom of expression.

223. Id. at 544.
224. Id.
225. For Adeno, role models are most productive for society when they break out of the rigid norms and ideals that they are supposed to personify and instead “wage a transformative battle by re-inscribing and redefining the role that he or she supposedly occupies and represents to others.” Adeno, supra note 13, at 1467. Rather than merely being “passive and mechanical role occupants,” authentic role models are “individuals who can actively redefine their positions using the very cultural resources and horizons of significance that have been excluded from the process of role-constitution.” Id. at 1466. Adeno sees this kind of role model as an exemplary guide who could equip “marginal groups with the vocabulary, the voice, and the imagination to provide an effective counternarrative to the dominant narrative of exclusion and devaluation.” Id. at 1467.