NEW YORK UNIVERSITY
LAW REVIEW

VOLUME 99 NOVEMBER 2024 NUMBER 5

ARTICLES

DISCRIMINATION ON THE BASIS OF CONSENSUAL SEX

ALEXANDRA BRODSKY*

The last decade has seen renewed debate, much of it between feminists, about workplace and school regulation of sexual conduct. Those debates proceed on the assumption that institutions distinguish permissible sex from impermissible sex based on whether it is consensual or, in civil rights parlance, "welcome." The person at greatest risk of punishment by an employer or school, it would then appear, is the heterosexual man who seeks sex with women and who, allegedly, transgresses the bounds of their consent. This story, though, is incomplete. Workplaces and schools have long punished workers and students for having sex that is indisputably consensual but nonetheless undesirable to the institution. This sanctioned conduct includes premarital sex, commercial sex, "kinky" sex, sex with colleagues, and sex on work or school premises. And case law and public accounts suggest those punished for at least some of these offenses disproportionately include women, girls, and queer people, some of whom have filed sex discrimination lawsuits.

This Article argues that both litigants and critics would benefit from situating these modes of punishment within the broader regime of gendered sexual regulation by workplaces and schools. For litigants, that context may open new doctrinal pathways to challenge sanctions for consensual sex under sex discrimination laws. It illuminates, for example, that the reasons defendants give to defend the punishments they levy—essentially, that they object to plaintiffs' conduct, in putative contrast to

 I am very grateful to the readers and interlocutors who made this Article stronger, including Ian Ayres, Dana Bolger, Meghan Brooks, Elizabeth Deutsch, Michele Gilman, Doug NeJaime, Alex Johnson, Marcy Karin, Laurie Kohn, Tammy Kuennen, Cristina Rodriguez, Noah Rosenblum, Alec Schierenbeck, Reva Siegel, Brenda Smith, Roseanna Sommers, Emily Suski, Daniel Wilf-Townsend, and Kate Wood. Thanks also to Leah Fessler and Margo Darragh for excellent research assistance, and to Rebecca Delaney, Lily Foulkes, Katie LaMattina, Ian Leach, Alexandra Origenes, Samuel Orloff, Lydia Schiller, and the other excellent editors of the *New York University Law Review*.

their protected characteristics—are sometimes themselves discriminatory. And for critics of institutional sexual regulation, consideration of these forms of punishment would serve a clarifying and corrective function, promoting a more accurate vision of gendered power and highlighting nuance in the relationship between sex equality and punishment.

INTRODUCTION

For the last decade, everyone has been talking about the role of workplaces and schools in disciplining sexual conduct. Much of this conversation has been spurred by two feminist movements that identified punishment as one tool, among others, to combat sexual harassment within these contexts. The first was the campus sexual assault movement, which began to gather steam in 2011 and, by 2017, ran into a cultural backlash codified into new regulations by the Trump administration.[1] The second was the Me Too movement that surged in fall 2017—a reckoning with sexual abuse, primarily in the workplace, sparked by the *New York Times*' reporting about Harvey Weinstein's serial sexual abuse.[2] These efforts, and their shortcomings, have reenergized debate, both among feminists and about them, concerning sexual regulation by workplaces and schools.[3]

These conversations broadly assume that the dividing line between permissible and impermissible sex in the eyes of workplaces and schools is whether the sex is consensual or, in civil rights parlance, "welcome." In part for this reason, these conversations focus primarily on the regulation of heterosexual men. The story goes like this: Men seek sex from women, and their employers or schools punish them for it, rightly or wrongly, under anti-harassment codes. The primary inquiry is whether institutional regulation of these men is unjust—whether the codes are overbroad, whether they are applied in procedurally sound ways, and the like.[4]

These are important questions. But this debate largely ignores the fact that straight men are not the only people, or even the primary people, whose sexual conduct has been policed by workplaces and schools. And it misses that putatively nonconsensual sex is not the only conduct these institutions have forbidden. Workplaces and schools

1 *See infra* notes 292–302 and accompanying text.
2 *See infra* notes 303–08 and accompanying text.
3 *See infra* Section IV.A.
4 *See infra* notes 314–20 and accompanying text.

have long expressly forbidden forms of *consensual* sex and have done so in distinctly discriminatory ways.[5] That practice continues today. For example, workers and students are punished for having premarital sex, for past or present extracurricular involvement in sex work, for "kinky" sex, for sex with colleagues, and for sex on work or school grounds.[6] Case law and public accounts suggest those disciplined for at least the first three of these types of consensual sex are likely to be disproportionately women, girls, and queer people.[7] Among the explanations for these disparities are deep-rooted stereotypes, including assumptions that good women (but not good men) are "passionless," and that queer people are threats to children.[8] Some institutional prohibitions are also prone to discriminatory enforcement because violations by certain populations, such as women and girls capable of pregnancy, are more easily discovered.[9]

The failure to conceive of this punishment as part of a broader schema of sexist, homophobic, and often racist sexual regulation has come at a cost to plaintiffs challenging these practices under sex discrimination laws, including Title VII of the Civil Rights Act[10] and Title IX of the Education Amendments of 1972.[11] By and large, courts and plaintiffs have conceived of punishment for consensual sex as presumptively legitimate, and only troublesome insofar as it is doled out

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5 Although these prohibitions are absent from debates about schools and workplaces as the "sex police," some forms of this regulation have received scholarly attention. *See, e.g.*, Lauren Boone, *"Because of Sex": Title VII's Failures Leave Legal Sex Workers Unprotected*, 100 N.C. L. Rev. 883, 884–86 (2022) (discussing employers punishing workers for engaging in sex work); Deborah L. Brake & Joanna L. Grossman, *Reproducing Inequality Under Title IX*, 43 Harv. J. L. & Gender 171, 188–89 (2020) (highlighting regulation of students' premarital sex); Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 Colum. L. Rev. 573, 592–95 (2016) [hereinafter *Murray, Rights and Regulations*] (documenting state regulation of consensual non-marital sex by public employees); *cf.* Melissa Murray, *Consequential Sex: #MeToo,* Masterpiece Cakeshop*, and Private Sexual Regulation*, 113 Nw. U. L. Rev. 825, 859–72 (2019) (reviewing forms of sexual regulation by private actors).

6 *See infra* Part I.

7 *See infra* Sections II.A–B.

8 *See infra* Sections II.B.1–2.

9 *See infra* Section II.D.1.b.

10 42 U.S.C. § 2000e; *see, e.g.*, Crisitello v. St. Theresa Sch., 299 A.3d 781, 795–97 (N.J. 2023) (holding a school did not violate state anti-discrimination law when it fired an unmarried pregnant schoolteacher putatively for having premarital sex); Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 414–15 (6th Cir. 1996) (alleging discrimination for termination on the basis of a pregnancy arising outside of marriage). A disclosure: The author's spouse previously represented New Jersey as amicus in *Crisitello*.

11 20 U.S.C. § 1681; *see, e.g.*, Samantha Cole, *How a Former Porn Performer Sued Her School for Discrimination—and Won*, Vice (July 25, 2022, 9:00 AM), https://www.vice.com/en/article/93ab8d/former-porn-performer-sued-her-school-for-discrimination [https://perma.cc/957P-Y579] (recounting loss on Title IX claim despite victory on breach of contract claim of student who previously worked as a porn performer).

differently to men and women, or straight and gay people.[12] With some exceptions, then, plaintiffs have been able to succeed only insofar as they might be able to establish that any workplace or school rule—even one with nothing to do with sex, and with no inherent risk of disparately gendered enforcement—was applied in a discriminatory manner.[13] For example, women have established claims when they were punished for sexual conduct they could prove their male colleagues engaged in without consequence;[14] absent such an identifiable male comparator, female plaintiffs have often failed, even when the method by which their employer learned of their conduct—their pregnancy—was distinctly gendered.[15] This Article demonstrates how cases challenging workplace and school punishment for consensual sex would benefit from recognition of the larger context of sexual regulation as a tool to oppress and exclude women and sexual minorities, especially people of color. A richer understanding of that ongoing history, and attendant stereotyping, illustrates that much sexual regulation is inherently discriminatory in its roots, its effects, or both. With that in mind, new doctrinal doors may appear.

The Article also argues that the broader contemporary conversation about how workplaces and schools discipline sexual conduct would benefit from consideration of workplace and school regulation of consensual sex. These practices are an important and consistently overlooked part of a larger scheme of sexual regulation by these institutions.[16] By highlighting the stakes of sexual regulation for people historically and currently marginalized along lines of gender and sexuality—not only those who have wielded gendered power[17]—these cases invite a more accurate accounting of both the facts and power

12 *See infra* notes 209–23, 229, 233 and accompanying text.

13 *See infra* Section III.A.

14 *See, e.g.*, Collins v. Koch Foods Inc., No. 2:18-CV-00211-ACA, 2019 WL 4599972, at *9–10 (N.D. Ala. Sept. 23, 2019) (holding that jury could find plaintiff's sex was a reason she was terminated because her employer fired her, but not the male colleague she was dating, for violating its anti-fraternization policy), *aff'd*, No. 20-13158, 2022 WL 1741775 (11th Cir. May 31, 2022); *see also* Pfeiffer *ex rel.* Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 785–86 (3d Cir. 1990) (holding that evidence that a school treated a male student who had premarital sex differently than a female student who had premarital sex could indicate sex discrimination), *abrogated on other grounds by* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 582 (2009).

15 *See infra* Section II.B.1.

16 *See infra* Part I; *see also supra* note 5 (providing examples of these practices).

17 In using the term "gendered power," this Article refers to an instantiation of power flowing from, and reinforcing, heteropatriarchal domination and inequality—power that can manifest in varied ways. *See, e.g.*, Chris Diffee, *Going Offshore: Horseplay, Normalization, and Sexual Harassment*, 24 Colum. J. Gender & L. 302, 323 (2013) (presenting leading scholars' varied visions of gendered power in the context of harassment law).

dynamics of sexual regulation. Holding women, girls, and queer people as the objects of concern brings to the fore the irony of sexual regulation and sex equality: Sexual regulation is both a threat to and necessary for sex equality. After all, the very same people most threatened by workplace and school policing of sex are also those most in need of protections from harassment.[18]

This Article proceeds in four parts. Part I introduces the reader to five illustrative forms of institutional prohibitions (formal and de facto) on consensual sex: prohibitions on premarital sex, prohibitions on past or ongoing participation in sex work, prohibitions on "kinky" sex, prohibitions on sex with colleagues, and prohibitions on sex on work or school premises. Part II explores the stakes of these regulations for sex equality. It provides historical context and explains the gendered narrative scripts that drive much of this punishment, as well as the likelihood that joint sex-race stereotyping will render women, girls, and queer people of color particularly vulnerable to punishment. Drawing from this analysis, this Part identifies two "red flags" that characterize forms of consensual sexual regulation prone to exacerbating inequalities, and two "green flags" indicative of better policy regulating consensual sex. Part III discusses how plaintiffs might benefit from greater attention to the broader context of gendered sexual regulation, which illuminates the roots and effects of much challenged punishment—and theories of liability that may follow. Part IV considers contemporary critiques of workplace and school sexual regulation, which focus on men punished for putatively nonconsensual sex. This Part maps the terrain of this current debate and discusses what critics, including feminist critics, might gain from incorporating regulation of consensual sex into their analysis.

A final introductory note: It may be helpful to acknowledge from the start what this Article is not about. This Article is not about cases where the punished person insists the sex at issue was consensual and the regulating institution determines it was not—either in good faith or as pretext for punishment motivated by other objections to the worker or student.[19] The Article is also not about cases that test the meaning of welcomeness, such as putatively consensual relationships between bosses and subordinates or professors and students.[20] The questions

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[18] *See infra* Section II.D.2; notes 366–68 and accompanying text.

[19] *See, e.g.*, Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2158–63 (2003) (documenting how employers can use allegations of sexual harassment as pretext for punishment).

[20] *See* Amia Srinivasan, *Sex as a Pedagogical Failure*, 129 YALE L.J. 1100, 1138–46 (2020) (considering whether consensual sex between a student and professor should be considered sexual harassment or sex discrimination). Cases involving sex between minors understood

raised by those cases are important, but separate from cases where the workplace or school punishes a person for what everyone agrees was consensual sex and the institution labels as such. This Article does not discuss cases in which workers or students are punished for the status of being lesbian, gay, or bisexual, as distinct from punishment for having same-sex sex, though this Article does discuss how the status/conduct distinction has been drawn in the past, and how it may proceed after *Bostock v. Clayton County*.[21]

Finally, this Article is not about religious exemptions. Some of the defendants in the cases discussed below are, or purport to be, religious institutions, and some of these have sought to call on religious exemptions to anti-discrimination laws. To date, those defenses have mostly failed.[22] But that strategy may be more successful moving forward given recent developments, such as the Supreme Court's expansion of the ministerial exemption to permit religious institutions to discriminate against a broader class of employees[23] and the Court's expanding vision of private companies as entities capable of religious beliefs.[24] As a result, theories of liability mapped below will likely be unavailable for some employees

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to be too young to consent, and thus prohibited by schools, might also test this limit—a limit this Article does not address.

[21] 590 U.S. 644 (2020) (holding discrimination against gay or transgender employees is sex discrimination within the meaning of Title VII).

[22] *See, e.g.*, Cline v. Cath. Diocese of Toledo, 206 F.3d 651, 658–59 (6th Cir. 2000) (holding Title VII's limited statutory exemption for religious organizations would not foreclose liability for a religious school's pregnancy discrimination); Redhead v. Conf. of Seventh-Day Adventists, 440 F. Supp. 2d 211, 221 (E.D.N.Y. 2006) (rejecting defendant's ministerial exception argument in case brought by a teacher at a Seventh-day Adventist school whose duties were primarily secular); Dolter v. Wahlert High Sch., 483 F. Supp. 266, 269 (N.D. Iowa 1980) (concluding that Title VII's limited statutory exemption for religious organizations did not exempt religious schools from Title VII liability for discrimination based upon race, color, sex, or national origin); *see also* Darian B. Taylor, Annotation, *Validity, Construction, and Application of Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e-1(a), 2000e-2(e)(2)) Exempting Activities of Religious Organizations from Operation of Title VII Equal Employment Opportunity Provision*, 6 A.L.R. Fed. 3d Art. 6 §§ 18–19 (2015) (collecting cases). *But see* Crisitello v. St. Theresa Sch., 299 A.3d 781, 786 (N.J. 2023) (holding that state law religious tenets exception foreclosed liability in case brought by teacher fired when she became pregnant while unmarried).

[23] *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2063–66 (2020) (outlining standard for determining whether an employee is a minister, and holding that Catholic school teacher-plaintiffs qualified); Meghan McCarthy, Our Lady of Guadalupe School v. Morrissey-Berru*: A Broadening of the "Ministerial Exception" to Employment Discrimination in Religious Institutions*, 47 Am. J.L. & Med. 131, 134–36 (2021) (tracing the Supreme Court's recent expansion of the ministerial exemption).

[24] *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 712–13 (2014) (recognizing for-profit corporations as capable of religious beliefs protected by law); *see also* Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914, 919–20, 937–38 (5th Cir. 2023) (same, and permitting corporations to discriminate based on their employees' sexual orientation and gender identity on that basis).

of religious defendants. That topic would require its own article-length treatment, perhaps a future contribution to the extensive and growing literature on religious exemptions.[25] And, despite the obstacles posed by religious exemptions, the question posed in this Article may still be fruitful. Litigation strategies explored later in these pages will be available to some potential plaintiffs, and earlier cases brought against religious defendants remain illuminating, even if the result would likely be different today. Where liability proves illusory, there still is a benefit to recognizing discrimination for what it is.

I
Surveying Workplace and School Punishment for Consensual Sex

Employers and schools play dominant roles in most Americans' lives. Sometimes these employers and schools—including employer-schools—punish workers and students for violating rules against consensual sex. Five fact patterns provide a non-exhaustive introduction to this kind of sexual regulation.[26]

A. Five Patterns of Sexual Regulation

1. Prohibitions on Premarital Sex

Unmarried female workers, many of them teachers at religious schools, have been fired, putatively, for having premarital sex, when their employers discovered they were pregnant. "Putatively" is important here because, as discussed below, some of these teachers have sued saying they were fired for separate, discriminatory reasons.[27] Such litigation stretches back decades.[28] And it continues today. For example,

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[25] *See generally* Kenji Yoshino, *Rights of First Refusal*, 137 Harv. L. Rev. 244 (2023); Adrianne M. Spoto, *Fostering Discrimination: Religious Exemption Laws in Child Welfare and the LGBTQ Community*, 96 N.Y.U. L. Rev. 296 (2021); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516 (2015).

[26] These categories, as noted, are not exhaustive. For example, some employers forbid adultery. *See* Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 622–23 (N.D. Tex. 2021), *aff'd in part, rev'd in part sub nom.* Braidwood Mgmt., Inc., 70 F.4th at 914; Gosche v. Calvert High Sch., 997 F. Supp. 867, 869 (N.D. Ohio 1998); Murray, *Rights and Regulation*, *supra* note 5, at 592–95.

[27] *See infra* Section III.A.

[28] *E.g.*, Hamilton v. Southland Christian Sch., 680 F.3d 1316, 1320 (11th Cir. 2012); Cline v. Cath. Diocese of Toledo, 206 F.3d 651, 656–57 (6th Cir. 2000); Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 412 (6th Cir. 1996); Redhead v. Conf. of Seventh-Day Adventists, 440 F. Supp. 2d 211, 215 (E.D.N.Y. 2006); Ganzy v. Allen Christian Sch., 995 F. Supp. 340, 344 (E.D.N.Y. 1998); Dolter v. Wahlert High Sch., 483 F. Supp. 266, 267–68 (N.D. Iowa 1980).

a recent lawsuit in the Middle District of Tennessee was brought by an administrative assistant at a financial consultancy who was fired for engaging in premarital sex when she disclosed that she was pregnant and began preparing for parental leave.[29] And the New Jersey Supreme Court recently decided *Crisitello v. St. Theresa School*, a case concerning a teacher's discrimination claims against her former employer, a Catholic school, for discharging her after she became pregnant.[30] The school asserted that its reason for firing Ms. Crisitello was that "carrying a child in an unmarried state . . . necessarily meant that she had in engaged in sex outside of marriage," and so had "violate[d] the tenets of the Catholic church" and school policy.[31] (The New Jersey Supreme Court ruled for the school, holding the plaintiff presented no evidence she was discriminated against based on her pregnancy or marital status.[32])

Similarly, girls have been punished by their schools putatively for having premarital sex. Most notably, in a series of cases from the 1980s and 1990s, girls sued after they were excluded from their schools' chapter of the National Honor Society (NHS), ostensibly because their premarital sexual activity—revealed by their pregnancy—violated the NHS's morality provisions.[33] Students have been disciplined in analogous ways in more recent years. An exemplary student-athlete with a 4.0 GPA at a Christian college, for example, was banned from graduation when the school learned, likewise from her pregnancy, that she had engaged in sex before marriage.[34] When a student at another religious college reported that she had been raped, the man she accused of the assault told the school she had slept with an ex-boyfriend; the

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[29] Compl., O'Connor v. Lampo Grp., LLC, No. 3:20-CV-00628 (M.D. Tenn. July 20, 2020), ECF No. 1; *see* Brinley Hineman, *Can You Be Fired over Your Sex Life? Dave Ramsey Thinks So*, Tennessean (Mar. 28, 2021), https://www.tennessean.com/story/news/local/williamson/2021/03/29/can-you-fired-over-sex-life-dave-ramsey-thinks-so/6980891002 [https://perma.cc/2UT6-UEN5].

[30] Crisitello v. St. Theresa Sch., 299 A.3d 781, 787 (N.J. 2023).

[31] Crisitello v. St. Theresa Sch., No. A-1294-16T4, 2018 WL 3542871, at *2 (N.J. Super. Ct. App. Div. July 24, 2018) (ruling on the same case at trial court level).

[32] *Crisitello*, 299 A.3d at 796.

[33] *See, e.g.*, Pfeiffer *ex rel.* Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 782 (3d Cir. 1990) (describing how a pregnant, unmarried high school student was excluded from its NHS chapter on the basis that "premarital sex appeared to be contrary to the qualities of leadership and character essential for membership"); Deborah L. Brake & Joanna L. Grossman, *Reproducing Inequality Under Title IX*, 43 Harv. J. L. & Gender 171, 188–90 (2020) (collecting cases); *see also* Hall v. Lee Coll., Inc., 932 F. Supp. 1027, 1030 (E.D. Tenn. 1996) (recounting the factual background of a case brought by a female student suspended from her college after it discovered, due to her pregnancy, that she had engaged in premarital sex).

[34] Sheryl Gay Stolberg, *Pregnant at 18. Hailed by Abortion Foes. Punished by Christian School.*, N.Y. Times (May 20, 2017), https://www.nytimes.com/2017/05/20/us/teen-pregnancy-religious-values-christian-school.html [https://perma.cc/8K6L-QJX3].

school refused to investigate the alleged rape but started a disciplinary inquiry into her sexual conduct.[35]

2. *Prohibitions on Sex Work*

Students and workers have been punished after their schools or employers discovered they had engaged in commercial sex.[36] In many publicly reported cases, institutions have discovered pornography featuring the student or worker—nearly always a woman, or a man appearing in gay porn—and then taken adverse action against them.[37] Citing a morality clause, a Florida school fired a substitute teacher after discovering he had performed in, as well as produced, gay pornography.[38] In *Gililland v. Southwestern Oregon Community College District*, a student at an Oregon nursing school was docked grades and singled out for disciplinary charges by instructors who disapproved of her past work in adult films.[39] One instructor told her "it takes a classy woman to be a nurse, and unclassy women"—here she pointed at the plaintiff—"shouldn't be nurses."[40]

Several recent instances of workers and students punished for sex work concern the amateur pornography website OnlyFans. One 24-year-old, reportedly "on track to become the first woman master technician at [a car] dealership in Fort Wayne[,] . . . was abruptly let go from her job after colleagues discovered her account on OnlyFans."[41]

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35 Tyler Kingkade, *She Told Her Christian College She Was Raped. Then She Was Banned from Campus.*, NBC News (Apr. 29, 2022), https://www.nbcnews.com/news/us-news/visible-music-college-rape-complaint-rcna26418 [https://perma.cc/74TG-JG9L].

36 *See, e.g.*, Boone, *supra* note 5, at 884–85.

37 *See, e.g.*, Emme Witt, *Teachers Who Do Sex Work on the Side Are Usually Fired. Will They Ever Be Able to Claim Employment Discrimination?*, Cashmere Magazine (Nov. 1, 2022), https://cashmeremag.com/teachers-sex-work-employment-discrimination-1256516 [https://perma.cc/88DV-P4R4]; Kyle Munzenrieder, *Florida High School Student Suspended for Starring in Bareback Gay Porn*, Mia. New Times (Jan. 21, 2014), https://www.miaminewtimes.com/news/florida-high-school-student-suspended-for-starring-in-bareback-gay-porn-6552476 [https://perma.cc/24KG-XUBV]; James Michael Nichols, *Robert Marucci, Gay Porn Star, Will Return to High School Following Suspension*, Huffington Post (Jan. 21, 2014), https://www.huffpost.com/entry/gay-porn-star-suspended_n_4638725 [https://perma.cc/3BPB-MKTR].

38 Gus Garcia-Roberts, *Ex-Porn Star Shawn Loftis on Miami-Dade Schools Refusing to Reinstate Him: "They're Going to Have a Lawsuit on Their F*#king Hands"*, Mia. New Times (Mar. 13, 2012), https://www.miaminewtimes.com/news/ex-porn-star-shawn-loftis-on-miami-dade-schools-refusing-to-reinstate-him-theyre-going-to-have-a-lawsuit-on-their-f-king-hands-6548687 [https://perma.cc/JQ4G-G4U4].

39 Gililland v. Sw. Or. Cmty. Coll. Dist., No. 6:19-cv-00283-MK, 2021 U.S. Dist. LEXIS 231873, at *3–6 (D. Or. Dec. 3, 2021).

40 *Id*. at *2.

41 Otillia Steadman, *Her Colleagues Watched Her OnlyFans Account at Work. When Bosses, Found Out, They Fired Her*, BuzzFeed (Apr. 25, 2020), https://www.buzzfeednews.

Meanwhile, her male colleague faced no repercussions after appearing on his girlfriend's OnlyFans account.[42] A nurse posted on TikTok that she had been fired when her colleagues discovered her OnlyFans account, which they watched at work.[43] Her supervisor told the nurse she "could not fire someone for doing what you do," but that she was firing her anyway because the nurse's colleagues were distracted at work watching her site.[44] Those colleagues were not terminated for watching pornography on the job.[45]

3. Prohibitions on "Kinky" Sex

Some workers have also been punished putatively for participation in transgressive sex[46]—what one might call "kink."[47] For example, an American weapons inspector was pushed out of his United Nations job after the *Washington Post* reported that he was "a leading member of several sado-masochistic sex rings," one of which was "pansexual."[48] A survey by the National Coalition for Sexual Freedom collected anecdotes from other workers who had been terminated for engaging in kink, and those who lived in fear of similar consequences if "outed" at work.[49]

Such punishment has made its way into (limited) case law. Ronald Savoie was a long-time teacher at the Lawrenceville School, a boarding school in New Jersey.[50] In 2002, school building staff entered Mr. Savoie's home, without first notifying him, to address an emergency leak and went down to his basement.[51] Those staff members later

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com/article/otilliasteadman/mechanic-fired-onlyfans-account-indiana [https://perma.cc/JS3Q-BM8H].

[42] *Id*.

[43] Emily Lefroy, *Nurse on OnlyFans Fired Due to Co-Workers Watching Her Videos at Work*, N.Y. Post (Sept. 16, 2022), https://nypost.com/2022/09/16/nurse-on-onlyfans-fired-due-to-coworkers-watching-her-videos-at-work [https://perma.cc/TS3W-8Z65].

[44] @NurseNeq, Twitter (Sept. 17, 2022, 10:23AM), https://twitter.com/NurseNeq/status/1571142743732391937 [https://perma.cc/6BFP-RTCW].

[45] *Id*.

[46] Jillian Keenan, *Can You Really Be Fired for Being Kinky? Absolutely.*, Slate (Oct. 28, 2014), https://slate.com/human-interest/2014/10/the-jian-ghomeshi-case-echoes-many-kinksters-worst-fears-being-outed-and-fired.html [https://perma.cc/8N7D-SDF4].

[47] *Kink*, Merriam-Webster, https://www.merriam-webster.com/dictionary/kink [https://perma.cc/A633-XTWE] (defining "kink" as "unconventional sexual taste or behavior").

[48] David Rennie, *UN Weapons Inspector Is Leader of S&M Sex Ring*, Telegraph (Nov. 30, 2022), https://www.telegraph.co.uk/news/worldnews/northamerica/usa/1414825/UN-weapons-inspector-is-leader-of-SandM-sex-ring.html [https://perma.cc/7F88-LJT3].

[49] *See* Keenan, *supra* note 46.

[50] Savoie v. Lawrenceville Sch., No. A-0288-10T1, 2013 N.J. Super. Unpub. LEXIS 833, at *1 (N.J. Super. Ct. App. Div. Apr. 12, 2013).

[51] *Id.*

"gave varying descriptions of the things they saw in the basement."[52] Reported contents included "four pieces of apparatus hanging from the ceiling on chains," "a table and chairs," "a bed with mirrors," "a tripod without a camera," "latex gloves," "diapers," and "sex toys."[53] After receiving this information, school leadership concluded without investigation that Mr. Savoie was engaged in "fisting" and "group sex . . . in [the] basement," and "had transmitted sexual images over the internet."[54] Upon questioning, the teacher "acknowledg[ed] that he had sex in his basement, owned a camera, and had taken sexual images, but emphatically denied that students or other faculty members had participated in any sexual activity," or that he had disseminated the photos.[55] Nonetheless, Lawrenceville feared that Mr. Savoie's activities threatened "the name and reputation of the school" and it forced him to resign.[56] When Mr. Savoie tried to withdraw his resignation, the dean of faculty refused, saying Mr. Savoie had failed to act as a role model for students.[57]

4. Prohibitions on Sex with Colleagues

The most well-known form of workplace regulation of consensual sex is probably anti-fraternization policies. These rules forbid consensual sexual relationships between coworkers of different ranks, or, less frequently, sex among coworkers of any kind, or with clients or competitors.[58]

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[52] *Id.*

[53] *Id.* at *7–10.

[54] *Id.* at *12–13.

[55] *Id.*

[56] *Id.* at *12.

[57] *Id.* at *17. The facts here are taken from the appellate court's opinion, though Mr. Savoie's lawyers later complained that the appellate division got the facts of the case wrong. *See Week Ending 4/12/13:* Savoie v. The Lawrenceville School, Schorr & Assoc., P.C. (Apr. 15, 2013), https://www.schorrlaw.com/week-ending-41213-savoie-v-the-lawrenceville-school-2 [https://perma.cc/6TVG-26XL] (observing that "the Appellate Division did not do a good job accurately stating the facts" and that the opinion is "replete with factual inaccuracies and mistakes").

[58] *See, e.g.*, Arthur H. Kohn, Jenifer Kennedy Park & Armine Sanamyan, *Companies' Anti-Fraternization Policies: Key Considerations*, Harv. L. Sch. F. on Corp. Governance (Jan. 26, 2020), https://corpgov.law.harvard.edu/2020/01/26/companies-anti-fraternization-policies-key-considerations [https://perma.cc/YN4A-TUK2] (describing different types of anti-fraternization policies); Gary M. Kramer, *Limited License to Fish off the Company Pier: Toward Express Employer Policies on Supervisor-Subordinate Fraternization*, 22 W. New Eng. L. Rev. 77, 78 (2000) (describing anti-fraternization policies that prohibit relationships between "supervisor-subordinate relationships"); Jay M. Zitter, Annotation, *Wrongful Discharge Based on Employer's Fraternization Policy*, 71 A.L.R. 5th 257 § 2[a] (describing types and frequency of anti-fraternization rules); Anna M. DePalo, *Antifraternizing Policies and At-Will Employment: Counseling for a Better Relationship*, 1996 Ann. Surv. Am. L. 59, 59–60 (1996) (same). One might characterize anti-fraternization policies as rules regulating indisputably consensual sex—and so properly within the scope of this Article—or, instead, as

Anti-fraternization policies are often justified as necessary to avoid workplace conflicts, such as those deriving from perceived favoritism.[59] Some employers also use anti-fraternization policies as a prophylactic against sexual harassment or other sex discrimination litigation.[60] A consensual sexual relationship between workers might turn unwelcome, or a third party may feel the relationship sexualizes the workplace.[61]

5. Prohibitions on Sex on Work or School Premises

Employers and schools also prohibit consensual sex physically within the workplace or campus.[62] For example, five Tennessee police

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prophylactics against sexual harassment, and so of a different kind than the policies at issue here. *See* Kramer, *supra*, at 77 (noting "office romances" between employees "on different hierarchical levels" may trigger "perceptions of . . . sexual harassment" and "frequently result in sexual harassment litigation"). One might also object to the inclusion of anti-fraternization policies within this Article's scope because they might be understood to forbid romantic relationships, not sexual conduct. *See* 71 A.L.R. 5th 257 § 2[a] (describing anti-fraternization policies as targeting "employees who are dating, living together, and the like").

[59] *See, e.g.*, Barbee v. Household Auto. Fin. Corp., 113 Cal. App. 4th 525, 532 (2003) (noting various cases in which "courts have approved of restrictions on intimate relationships between employees of an organization or entity where such relationships presented potential conflicts of interests," including those stemming from actual or perceived favoritism); Crosier v. United Parcel Serv., Inc., 150 Cal. App. 3d 1132, 1140 (1983) (observing that the employer in question and the public have interests in avoiding the appearance of workplace favoritism), *disapproved of on other grounds by* Foley v. Interactive Data Corp., 47 Cal. 3d 654 (1988); Kohn, *supra* note 58 (observing that a positive effect of implementing an anti-fraternization policy is that it can help avoid difficult workplace situations such as those stemming from actual or perceived favoritism); Kramer, *supra* note 58, at 77 (same).

[60] *Barbee*, 113 Cal. App. at 532–33 (noting "[c]ourts have also recognized that managerial-subordinate relationships present issues of potential sexual harassment," militating against a supervisor's privacy right to an intimate relationship with a subordinate); *Crosier*, 150 Cal. App. 3d at 1140 (holding anti-fraternization policy was motivated by "legitimate[] concern[s]" including "possible claims of sexual harassment"); Kohn, *supra* note 58 (explaining one reason for a company to adopt an anti-fraternization policy is to "send[] a message against sexual harassment"); Kramer, *supra* note 58, at 77–78 (noting "[s]upervisor-subordinate relationships . . . frequently result in sexual harassment litigation against the company by the participants or third parties," and that the company adopt anti-fraternization policies in part for that reason).

[61] A number of third parties have challenged "paramour preferences" accorded to their colleagues—that is, preferences extended by supervisors to subordinates with whom they are sexually or romantically involved—as sex discrimination, but those suits have usually failed when based on no more than the existence of a sexual relationship between workers. *See, e.g.*, Alaniz v. Robert M. Peppercorn, M.D., Inc., No. 205-CV-2576, 2007 WL 1299804, at *4–5 (E.D. Cal. May 3, 2007) (collecting cases).

[62] *See, e.g.*, Hart v. Farmers Ins. Exch., No. 4:14-CV-00160, 2015 WL 1578927, at *4 (E.D. Ark. Apr. 9, 2015) (describing employee fired for having "sex in his office . . . with a customer"); Kirnon-Emas v. Am. Mgmt. Ass'n, No. 00 CIV 3960 (JGK), 2002 WL 523368, at *6 (S.D.N.Y. Apr. 5, 2002) (describing employee putatively fired for having sex in the workplace); A.P. v. Fayette Cnty. Sch. Dist., No. 21-12562, 2023 WL 4174070, at *4 (describing Rule 28 of the Fayette County student code of conduct, which prohibits the "commission of an act of sexual contact" on school property).

offers were fired after their department discovered they had engaged in consensual sexual conduct on department property while on the clock.[63] Schools can be just as harsh. One recent Eleventh Circuit decision, for example, arose from a Georgia school's expulsion of a high school student for allegedly violating the portion of its disciplinary code prohibiting "'sexual improprieties' in the school building."[64] New York City Public Schools, the largest school district in the country,[65] similarly prohibits "[e]ngaging in sexual conduct on school premises or at a school-related function."[66] Punishments may include a suspension of up to twenty days.[67]

II
The Sex Equality Stakes of Workplace and School Punishment for Consensual Sex

Workplaces and schools have good reasons to regulate some kinds of consensual sex, as discussed below.[68] Few would defend a vision of labor or learning as a sexual free-for-all. But case law and public accounts, imperfect data sets that they are, nevertheless suggest some forms of punishment for consensual sex may be wielded disproportionately against women, girls, and queer people—not just by happenstance but *because* they are women, girls, or queer.[69] In particular, as may be

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[63] Daniel Smithson, *5 Officers Fired in Sex Investigation in Tennessee*, WSAZ (Jan. 10, 2023), https://www.wsaz.com/2023/01/10/5-officers-fired-sex-investigation-tennessee [https://perma.cc/WM59-DMTF].

[64] *A.P.*, 2023 WL 4174070 at *4. The parties in this case disputed whether the policy in question prohibited only consensual sex on school grounds. *See id.* at *8. The author of this Article provided feedback on briefing and helped moot the appellant's attorney in this case.

[65] Nat'l Ctr. for Educ. Stats., Table 215.30: Enrollment, Poverty, and Federal Funds for the 120 Largest School Districts, by Enrollment Size in 2017: 2016–17 and Fiscal Year 2019 (2019), https://nces.ed.gov/programs/digest/d19/tables/dt19_215.30.asp [https://perma.cc/NL8Q-NNSG].

[66] New York City Department of Education, Citywide Behavioral Expectations to Support Student Learning Grades 6–12 38 (Sept. 2019), https://www.schools.nyc.gov/docs/default-source/default-document-library/discipline-code-grades-6-12 [https://perma.cc/H2NB-4JYK].

[67] *Id.*

[68] *See infra* Section II.D.2 (discussing "green flags").

[69] This Article uses the term "queer" to refer expansively to people who are gay, lesbian, or bisexual, among other non-heteronormative sexualities. *But see* Laurie Rose Kepros, *Queer Theory: Weed or Seed in the Garden of Legal Theory?*, 9 L. & Sexuality 279, 282 (2000) ("'Queer' escapes definition . . . ."). Most examples of queer people subject to sexual regulation at school or work involve gay men; as such, there is a risk in relying on those perspectives to speak to a more universal "queer" experience rather than a specifically gay male experience. That said, there are examples of other queer people facing similar forms of stereotyping and other discrimination, and reason to fear that this discrimination may be more common than case law and public accounts reflect. Accordingly, this Article uses the term queer as a term that is broader and more inclusive than "gay."

clear from the descriptions of publicly known cases, prohibitions on premarital sex, commercial sex, and kinky sex appear to target these groups.[70] Some regulations, such as rules against premarital sex, pose obvious risks of disparate enforcement given biology: Women and girls' capacity for pregnancy makes it easier for employers and schools to detect their sexual activity.[71] But much enforcement also reveals discriminatory motives, including sex stereotypes and joint sex-race stereotypes, that likely inform the creation and enforcement of these prohibitions. That should hardly be a surprise given the context in which the punishment emerges.

This Part first provides some brief historical background to contemporary regulation of consensual sex. It discusses the ways in which stereotypes toward women, girls, and queer people may inform and motivate some institutional prohibitions on consensual sex, and points to the ways intersectional sex-race stereotypes may render women, girls, and queer people of color particularly vulnerable to this punishment. Finally, this Part identifies two "red flags" that characterize the types of prohibitions on consensual sex most prone to exacerbating gender and sexual inequalities, and two "green flags" that characterize less discriminatory policies.

A. Historical Accounting of Sexual Regulation

Institutions have long policed women's, girls', and queer people's sexualities, both literally and figuratively.[72] This regulation has been

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[70] *See supra* Part I (outlining work and school punishments for consensual sex).

[71] *See* Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 667 (2000) (describing the problem of a school relying only on teachers' pregnancies to discover their premarital sexual activity, since that leads to punishment of women alone). Trans men and nonbinary people can also become pregnant. Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 954 (2019). But, despite a paucity of data, it is safe to assume they do so in far fewer numbers than women and girls, if for no other reason than population size. *See, e.g.*, Anna Brown, *About 5% of Young Adults in the U.S. Say Their Gender is Different from Their Sex Assigned at Birth*, PEW RSCH. CTR. (June 7, 2022) (surveying the number of U.S. adults who identify as transgender or nonbinary), https://www.pewresearch.org/short-reads/2022/06/07/about-5-of-young-adults-in-the-u-s-say-their-gender-is-different-from-their-sex-assigned-at-birth [https://perma.cc/G6LX-EC65].

[72] *See generally* JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA (2012); WILLIAM N. ESKRIDGE, DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003, at 84–107 (2008) (discussing topics including but not limited to the civil rights argument opposing consensual sodomy laws, police raids on and liquor license revocations of queer bars, and reform from 1961–69); Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* CULTURE, SOCIETY AND SEXUALITY: A READER 150, 150–53 (Richard Parker & Peter Aggleton eds., 2007) (discussing historical criminalization of sex, including sex by "homosexuals and prostitutes"); *see also* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1188–91 (2023) (discussing how

rooted in stereotypes about women, girls,[73] and queer people[74]—that is, expectations about how these groups should, or do, behave sexually.[75] This historical context has gone close to entirely unrecognized in case law about workplace and school regulation of sex, and that absence affects case outcomes.

Ganzy v. Allen Christian School District stands out as a rare but cogent exception to this broad failure to recognize the historical context of contemporary sexual regulation. In this 1998 case—similar to others involving educators who were terminated due to a premarital pregnancy that was discovered when the individual in question became pregnant[76]—the late Judge Weinstein of the Eastern District of New York wrote a lengthy, academic meditation on the relationship between women's sexuality and workplace participation.[77] Judge Weinstein recognized that to understand why the plaintiff had been fired, one would have to understand historical regulation of women's sexuality and its impact on workplace participation.

First, under the ambitious heading "Sexuality of Women," Judge Weinstein wrote a short history of the sexual regulation, and repression, of women. His account began with the Roman Empire's adoption of Christianity as its official religion in the Fourth Century.[78] He traced early American social control of women's premarital sexuality, highlighting that a "single woman who engaged in coital sex outside of marriage was, in a crude phrase, 'damaged goods.'"[79] That "damage" was not only social but legal: *Ganzy* might have noted that premarital promiscuity rendered women, but not men, too untrustworthy to testify.[80]

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anti-abortion advocates of the nineteenth century championed their policies as effective means to "enforce women's roles"). *But see* Joseph J. Fischel, *Toward a Democratic Hedonism*, Bos. Rev. (May 20, 2019) (identifying the danger of analogizing school regulation of sex to the criminal legal punishment of sex), https://www.bostonreview.net/articles/joseph-j-fischel-toward-democratic-hedonism [https://perma.cc/7VJX-CL25].

73 D'Emilio & Freedman, *supra* note 72, at 57, 77–84, 94–96 (2012).

74 *E.g.*, Eskridge, *supra* note 72, at 40, 76, 79–84 (2008) (discussing anti-gay stereotypes and animus that drove regulation).

75 For a discussion of the substance and function of sex stereotyping, and the role of anti-stereotyping principles in sex discrimination law, see generally Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83 (2010).

76 *See supra* note 28 and accompanying text.

77 Ganzy v. Allen Christian Sch., 995 F. Supp. 340, 350–59 (E.D.N.Y. 1998).

78 *Id.* at 351.

79 *Id.* (quoting Grant Dillman, *Girdle, Milkman Becoming Part of Bygone Days*, The Plain Dealer Archives (Jan. 12, 1995), https://cleveland.newsbank.com/search?text=Girdle%2C%20Milkman%20Becoming%20Part%20of%20Bygone%20Days&content_added=&date_from=&date_to=&pub%5B0%5D=CPDB [https://perma.cc/7NZN-C75E]).

80 Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 Geo. Wash. L. Rev. 51, 72–80 (2002). As the Supreme Court of Missouri stated in 1895, it was "a matter of common knowledge that the bad character

Moving forward in time, Judge Weinstein charted the rise of the sexual revolution[81]—marked in part by a discarding of historical expectations that good women be "passionless" and engage in sex as duty rather than for their own pleasure[82]—as well as a then-recent retrenchment of conservative sexual politics.[83] Judge Weinstein then turned to his second topic: "Women in the Workforce."[84] He noted that much discrimination against working women has historically been, and continues to be, rooted in expectations about women's reproductive role: A woman should be a mother, constrained to her husband's home, rather than an independent, liberated worker.[85]

Judge Weinstein's conclusion was practical: "[I]f all employers refused to hire women who engaged in sex outside of wedlock, the effects on society, the economy, the economics of the household, and individual women and their children would be devastating."[86] Even putting "[m]orality and legality aside, the practical effects of barring sexually active unmarried women from the workforce in the American modern world would be unacceptably destructive to our society and economy."[87]

Absent from *Ganzy*'s policy assessment, but implicit in its historical account, is the impact not just on "individual women" but on women as a class—on sex equality.[88] *Ganzy*'s unstated warning is that excluding women who have premarital sex from the workplace would exclude most women from the workplace.[89] Obviously, such an exclusion would banish women from public life, diminish their political force as a class, and obstruct their ability to build financial independence from men.

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of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman." State v. Sibley, 33 S.W. 167, 171 (Mo. 1895).

81 *See* Ganzy, 995 F. Supp. at 351–52.

82 *See id.*; *see also* Estelle B. Freedman, *Sexuality in Nineteenth-Century America: Behavior, Ideology, and Politics*, 10 Revs. Am. Hist. 196, 201 (1982) (discussing nineteenth century "ideal" of "innate passionlessness on the part of women").

83 *See Ganzy*, 995 F. Supp. at 352–54 (noting the prevalence of premarital sex in the 1990s as well as efforts to push back against growing norms of promiscuity and non-traditional sex).

84 *Id.* at 354.

85 *See id.* at 354–57.

86 *Id.* at 358–59.

87 *Id.* at 359. Judge Weinstein was particularly concerned about the effect on schools, since "the overwhelming majority of teachers are female." *Id*.

88 *Id.* at 358.

89 *See id.* at 358 (noting data suggests "a large proportion of employed unmarried women are engaging in sexual activities"); Lawrence L. Wu, Steven P. Martin & Paula England, *Reexamining Trends in Premarital Sex in the United States*, 38 Demographic Rsch. 727, 733 (2018) (concluding that roughly 86 percent of women born in the 1960s and 1970s engaged in premarital sex).

The natural result of that banishment may be to push many women into otherwise undesired marriages, almost surely to men, either because a wedding ring would protect them from termination or because, as a result of workforce exclusion, they would be unable to amass the resources to live independently.

Given the misogynistic thread through historical social regulation of women's sexuality, it is hard not to wonder if this is, in fact, the point. *Ganzy* never says the inequalities caused by these policies are their purpose—that institutions tightly regulate and sanction sexual conduct in order to maintain women's social and political subordination. But Judge Weinstein's history, provided as a preface to his legal assessment, quietly suggests as much.

A similar historical recounting might be told about the relationship between sexual regulation of queer people and their exclusion from public life. It is hard not to read a case like *Savoie* and think about the long history of express criminalization of gay and lesbian sex—a history that, in the United States, ended (on paper) only twenty years ago,[90] and may yet reemerge.[91] Indeed, Mr. Savoie started teaching at Lawrenceville only four years after New Jersey repealed its sodomy law that criminalized gay sex.[92] As Gayle Rubin explained in her canonical essay *Thinking Sex*, these "[s]tate prohibition[s] of same-sex contact . . . ma[de] homosexuals a criminal group denied the privileges of full citizenship. . . . Even when the laws [were] not strictly enforced, which [was] usually the case, the members of criminalized sexual communities remain[ed] vulnerable to the possibility of arbitrary arrest," and they were kept "afraid, nervous, and circumspect."[93]

Much criminalization of gay sex was rooted in unfounded stereotypes of queer people as threats to children.[94] Bill Eskridge has mapped how, after World War I, "[t]he homosexual" was recast "not just [as] a disgusting person or a gender-bending rebel," but also as "a creature whose uncontrollable libido posed a momentous social danger

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[90] *See* Lawrence v. Texas, 539 U.S. 558 (2003) (striking down a Texas statute that prohibited sexual conduct between members of the same sex); ESKRIDGE, *supra* note 72, at app.

[91] *See* Amanda Hopluch, *The Supreme Court Struck Down Sodomy Laws 20 Years Ago. Some Still Remain.*, N.Y. TIMES (July 21, 2023), https://www.nytimes.com/2023/07/21/us/politics/state-anti-sodomy-laws.html [https://perma.cc/5BW4-D7YP] (highlighting concerns that several state anti-sodomy laws across the nation could be revived if the Supreme Court were to overturn *Lawrence*).

[92] ESKRIDGE, *supra* note 72, at app.

[93] *Id.*

[94] *See* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 40 (1999) (noting that society in the 1920s demonized queer people as putative threats to children).

to children's budding sexuality."[95] The state adopted, or co-opted, these attitudes, pursuing varied pathways to punish and exclude queer people, "all in the name of protecting children from a dangerous force threatening their development into heterosexuals."[96] The criminalization of gay sex took the form of anti-sodomy statutes and targeted enforcement of other misdemeanors, such as "loitering near a public toilet or schoolyard," disorderly conduct, or lewd vagrancy.[97]

Stereotypes of queer people as child predators resonated uniquely in schools, infecting forms of regulation beyond criminal law.[98] During and around the 1970s, gay teachers were fired for fear that they might abuse their students or might be "contagious," infecting their students with same-sex desire and gender deviance.[99]

As these historical antecedents demonstrate, stereotyping takes different forms and causes an array of different harms. Stereotypes that women should be passionless and that queer people are child predators function in different ways to restrict individual freedom and to promote systemic inequality. But one theme in long-standing stereotypes motivating regulation of consensual sex is that many function as what social psychologists call "narrative scripts": They "set up predictable roles and actions that, in turn, offer clear indicators of what is most likely to follow from them."[100] Under one such gendered script, an observer is primed to extrapolate from a woman's premarital sexual activity that she cannot be trusted and that she is, for both public and private purposes, broadly morally deficient; the same conduct by a man does not trigger the same expectations about his conduct and character.[101] This is the

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95 *Id.* at 14.

96 *Id.* at 40 ("Inspired by such attitudes, the state . . . sought to control and punish the psychopathic homosexual, to harass and drive underground homosexual communities and their expression, and to exclude homosexuals from citizenship—all in the name of protecting children from a dangerous force threatening their development into heterosexuals.").

97 *Id.* at 43. Other examples of these misdemeanor charges include "indecent exposure, lewd or lascivious conduct, indecent liberties with minors, . . . [and] sexual solicitation." *Id.*

98 *See, e.g.*, Melissa Murray, *Sex and the Schoolhouse*, 132 HARV. L. REV. 1445, 1467 (2019) (reviewing JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND (2019)) (discussing the Washington Supreme Court's upholding of a teacher's discharge because his "status as a homosexual 'impair[ed] his efficiency as a teacher'").

99 *See id.* at 1467 (explaining that firings of gay teachers were "undergirded by various suspicions that LGBTQ persons were sexual predators who would engage in sex with students, 'recruit' them to homosexuality, or, more simply, fail to model appropriate gender roles and moral conduct"); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 802 (2002) (discussing "'contagion model' of homosexuality," including in context of schools).

100 Franklin D. Gilliam, Jr., *The 'Welfare Queer' Experiment: How Viewers React to Images of African-American Mothers on Welfare*, 53 NIEMAN REPS. 49, 49–50 (1999).

101 *See supra* note 79 and accompanying text.

old refrain of "she's a slut, he's a stud" recognized in *Ganzy*.[102] Similarly, a queer person's participation in consensual sex with adults triggers expectations that they will pursue nonconsensual sexual opportunities with children,[103] in a manner a straight adult's sexual conduct does not. Each script instructs the observer what to expect from an individual based on a combination of that person's sexual conduct and their sex-based identity.

B. Blurring the Divide Between Sex-as-Conduct and Sex-as-Identity

Contemporary cases about workplace and school sexual regulation demonstrate that these narrative scripts and similar biases live on today. Familiar sex-based stereotypes continue to motivate, at least in part, contemporary institutional objections to sexual conduct. That is not to say that workplaces and schools are driven by sex stereotypes *rather than* views about appropriate sexual conduct, but instead that the two sets of beliefs are often inextricably connected. As discussed below in more detail, most plaintiffs who have challenged such punishments as sex discrimination have sought to prove that they were not really punished for having sex, but rather for a different, distinguishable reason: their sex-based identity.[104] Female teachers argue they were fired because they were pregnant, not because they had engaged in premarital sex;[105] Mr. Savoie argued Lawrenceville fired him because he was gay, rather than because of his sexual activity in his basement.[106] But the stereotypes built into sexual expectations complicate that dichotomy. After all, rules against, and moralistic expectations about, consensual sex may be shaped by sex stereotypes and other discriminatory motives, even if those rules are the real reason the plaintiff was punished.

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102 *See* Ganzy v. Allen Christian Sch., 995 F. Supp. 340, 350 (E.D.N.Y. 1998) (describing double standard for judgment of men and women's extra-marital sex); *see also, e.g.*, Panteá Farvid, Virginia Braun & Casey Rowney, *"No Girl Wants to be Called a Slut!": Women, Heterosexual Casual Sex and the Sexual Double Standard*, 26 J. Gender Stud. 544, 545–46 (2017) (finding that having a sexual reputation is socially damaging for women while it is generally beneficial for men); Jessica Valenti, He's a Stud, She's a Slut, and 39 Other Double Standards Every Woman Should Know 14–18 (2008) (noting that women are often derided for their sexual activity while men "aren't judged like women are when it comes to sexuality").

103 *See supra* notes 94, 96 (highlighting anti-gay decisions and policies made to protect children).

104 *See infra* Section III.A.

105 *See infra* notes 208–16, 220–22 and accompanying text.

106 *See* Savoie v. Lawrenceville Sch., No. A-0288-10T1, 2013 WL 1492859, at *13 (N.J. Super. Ct. App. Div. Apr. 12, 2013).

1. Pregnant Conduct

That is clearest in a case like *Gililland*, in which the nursing school instructor articulated her objection to the sexual conduct at issue by explicitly calling on stereotypes—that "it takes a classy woman to be a nurse," and women with histories in pornography are "unclassy" and so "shouldn't be nurses."[107] In doing so, the instructor drew on assumptions about professional competence based on her student's past, unrelated sexual conduct. A similar dynamic—in which the institution's objection to conduct is inextricably tied to sex-based reasoning—is apparent, if more subtle, in some of the premarital sex cases (even though courts often overlook it). In *Ganzy*, for example, the defendant-school insisted Ms. Ganzy was fired due to her premarital sexual activity rather than her pregnancy. But its own explanation demonstrated the porousness of those bases: Its lawyer said Ms. Ganzy was dismissed "'in order that Plaintiff *not set a bad example to students,*' who 'are taught that abstinence is the acceptable course of conduct with respect to sexual activity outside of wedlock.'"[108] The school's real objection, then, appeared to be not pregnancy alone, or the teacher's premarital sex alone, but that her pregnancy revealed the fact of her sexual activity to her students and, in doing so, revealed her to be unworthy of her students' emulation.

That urge to push a visibly pregnant, and so visibly sexual, teacher out of the school is "not anomalous."[109] The defendants in a similar Sixth Circuit appeal[110] and *Crisitello*,[111] the recent New Jersey Supreme Court case, offered similar justifications.[112] And Professor Melissa Murray notes that, throughout the twentieth century, female "pregnant school teachers [were] shooed out of the classroom when they began 'to show,' . . . [when] the visibility of the teacher's pregnancy would . . .

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107 *See* Gililland v. Sw. Or. Cmty. Coll. Dist. by & through Bd. of Educ., No. 6:19-CV-00283-MK, 2021 WL 5760848, at *1 (D. Or. Dec. 3, 2021).

108 Ganzy v. Allen Christian Sch., 995 F. Supp. 340, 345 (E.D.N.Y. 1998) (emphasis added).

109 Murray, *supra* note 98, at 1463.

110 *See* Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 412 (6th Cir. 1996) (noting that the defendants fired the plaintiff "because she was pregnant and unwed" and "set a bad example for the students and parents").

111 *See* Response from Raymond W. Fisher to EEOC Charge from St. Theresa School, Charge No. 524-2014-00452, at 2 (June 13, 2014) (contained in *Crisitello* appendix to Supreme Court at 112a) (arguing that Crisitello's premarital sex runs counter to the school's philosophy of developing student's "spiritual" and "moral . . . growth").

112 *See also* Vigars v. Valley Christian Ctr. of Dublin, Cal., 805 F. Supp. 802, 808 (N.D. Cal. 1992) (assessing defendants' argument "that plaintiff served as a role model for the students at the school, and thus that her moral character and 'non-pregnant out of wedlock' status was a BFOQ").

make obvious to students the teacher's own sexual activity, perhaps compromising her status as a model of female virtue for students."[113]

Regardless of whether an institution understands itself as tasked with providing such a model to its pupils, visible pregnancy may trigger an animus toward pregnant people as sexually obscene rather than "passionless." That animus lurks behind often more explicit stereotypes of pregnant workers and students as unreliable because they are distracted from their duties by their familial commitments.[114] And that animus is a manifestation of the sexualization of pregnancy often seen in pregnancy harassment cases.[115] To one employer, a worker's pregnancy may be pleasantly titillating, spurring inappropriate overtures. To another, it is a grotesque billboard that she has had sex and might even have liked it. A pregnant woman might then simultaneously conform to sex stereotypes (by fulfilling her biological destiny of reproduction) and defy sex stereotypes (by revealing her capacity for desire). Punishing pregnancy and punishing the sex that led to it may be indistinguishable.

In this way, fear of a pregnant teacher is like fear of a queer teacher. Both are sexualized, whether they like it or not, and then demonized as overly sexual. That sexualization is seen in historical and contemporary efforts to force queer educators out of the classroom based on concerns they will "groom" and recruit their students into queerness, as though their sexual orientation inevitably sexualizes their relationships with students.[116] Some view the mere acknowledgment of homosexuality—even in a manner as simple as a gay teacher showing students a photo of her female fiancée—as inherently sexualizing the classroom (in ways, of course, that a straight teacher mentioning her husband would not).[117] Against that backdrop, it would be remarkable if Lawrenceville's putative fear that Mr. Savoie had proven himself a bad role model to

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113 Murray, *supra* note 98, at 1463–64.

114 *See, e.g.*, Equal Emp. Opportunity Comm'n, Enforcement Guidance on Pregnancy Discrimination and Related Issues, 915.003 (2015), https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#IA1b [https://perma.cc/49ND-EMQU] ("Adverse treatment of pregnant women often arises from stereotypes and assumptions about their job capabilities and commitment to the job.").

115 *See, e.g.*, Varlesi v. Wayne State Univ., 909 F. Supp. 2d 827, 835 (E.D. Mich. 2012) (recounting supervisor's comments to pregnant employee "that men at [work] may find Plaintiff's pregnancy sexually exciting or stimulating," so she should "wear looser-fitting clothing and . . . stop rubbing her stomach"); Glunt v. GES Exposition Servs., Inc., 123 F. Supp. 2d 847, 853 (D. Md. 2000) (recounting employer's repeated requests for pregnant worker "to lift up her shirt so that [he] could see her stomach").

116 *See supra* notes 98, 99 and accompanying text.

117 *See, e.g.*, Bailey v. Mansfield Indep. Sch. Dist., 425 F. Supp. 3d 696, 707–8 (N.D. Tex. 2019) (recounting parental complaints that teacher had shown students "sexually inappropriate images" when she showed them a photo of her "future wife," although straight colleagues regularly mentioned and displayed photos of their partners).

students—despite a lack of evidence that his private conduct was likely to be revealed publicly[118]—*did not* have anything to do with the fact that the teacher was gay.

2. *Revisiting* Savoie *and Queer Sex Conduct*

Other stereotypes about queer people may blur the line between animus toward their sexual orientation and animus toward their sexual activity. Consider, again, *Savoie*.[119] In permitting Mr. Savoie's sexual orientation discrimination suit against Lawrenceville to go forward, a New Jersey appellate court seemed to recognize that the way school staff and administrators reacted to his basement was inextricably intertwined with their beliefs about his sexuality—or, at least, that a jury could believe so, foreclosing summary judgment for the school.[120] For one thing, as the court noted, after receiving reports from building staff, Lawrenceville leaped to assumptions about Mr. Savoie's sexual practices that it did not bother to investigate or otherwise confirm.[121] Those leaps appear attributable to administrators' narrative scripts about gay men's sexuality. After all, "a table and chairs" in a basement does not always call to mind "group sex."[122]

But what if Mr. Savoie did not dispute parts of the reports? Say there was no dispute about what, exactly, happened in that basement. Lawrenceville's quick outrage at Mr. Savoie's sexual conduct might still be hard to extricate from its views of his sexuality, and of gay men in general. In *Kerrigan v. Commissioner of Public Health*, the Connecticut Supreme Court described "virulent homophobia" as "rest[ing] on . . . feelings of revulsion toward gay persons *and* the intimate sexual conduct with which they are associated."[123] That is, judgment of the sex acts that gay people engage in, or are imagined engaging in, is a constitutive part of anti-gay animus. And, as the New Jersey Appellate Division noted, discovery of Mr. Savoie's basement forced Lawrenceville administrators "for the first time . . . to consider the *details* of homosexual sex."[124] That may have been too much for

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118 *See* Savoie v. Lawrenceville Sch., No. A-0288-10T1, 2013 WL 1492859, at *11 n.7 (N.J. Super. Ct. App. Div. Apr. 12, 2013) (noting dispute of fact—resolved in the plaintiff's favor at summary judgment—as to whether Savoie had shared any identifiable images of conduct in his basement).

119 *See id*.

120 *See id.* at *13–14.

121 *See id.* at *13 (stating that Lawrenceville officials "reli[ed] on innuendo and twice removed hearsay" instead of conducting an investigation).

122 *Id.* at *3–4.

123 Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 445 (2008) (emphasis added).

124 *Savoie*, 2013 WL 1492859 at *14 (emphasis added).

the administrators to bear. Perhaps it was one thing to employ a gay teacher whose sexuality administrators could mostly ignore—one dean testified that, before the basement discovery, she had never before thought about whether Mr. Savoie and his live-in partner were sexually intimate[125]—but it was another thing to employ a gay teacher who, the school had to acknowledge, *acted* on his desires.[126]

The specific nature of the sex in which Mr. Savoie allegedly engaged may have exacerbated that animus. Lawrenceville might have been willing to tolerate public association with Mr. Savoie and believed him to be an acceptable role model for students, for as long as he roughly conformed to traditional heterosexual relationship norms—cohabitating with a single, consistent, presumed monogamous partner for a decade. But perhaps it could not bear being associated with, and connecting their students to, a gay man engaged in (rightly or wrongly) queer-coded sexual practices, such as kink and non-monogamy.[127] Animus toward the conduct and animus toward Mr. Savoie's sexual identity are, again, hard to disaggregate. The same sex acts might carry different meaning in the context of a different narrative script. For example, a straight couple's edgy sex life might have read, to administrators, as a surprising if admirable effort to keep the spark alive, rather than a mark of deviance that threatened to lead students astray.[128] Indeed, assessments of what

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[125] *See id.* at *4. It is hard to know whether to credit the dean's testimony. But whether she actually never entertained the possibility that two gay men living together had sex or she felt incapable of admitting to the impure thought, both explanations appear rooted in her general discomfort with queerness, underscoring the connection between discomfort with a gay identity and discomfort with gay sex: Mr. Savoie's partner testified that, years earlier, the same administrator had told him she did not "approve of [his] lifestyle." *Id.* at *1.

[126] Lawrenceville's response here might be understood to be related to a demand that a gay person "cover"—that she "modulate her conduct to make her difference easy for those around her to disattend her known stigmatized trait." Yoshino, *supra* note 99, at 837.

[127] *See, e.g.*, Kim Parker & Rachel Minkin, *Public Has Mixed Views on the Modern American Family*, Pew Rsch. 28 (Sept. 14, 2023), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2023/09/ST_2023.09.14_Modern-Family_Report.pdf [https://perma.cc/R4KQ-6L8U] ("Lesbian, gay or bisexual adults are far more likely than straight adults to say open marriages are acceptable . . . ."); Megan Speciale & Dean Khambatta, *Kinky & Queer: Exploring the Experiences of LGBTQ+ Individuals Who Practice BDSM*, 14 J. LGBT Issues Counseling 341, 348–49 (2020) (discussing "the kink community as a space liberated from the oppressive sexual and gender scripts of heteronormativity"). In noting perceived connections between kink, non-monogamy, and queerness, this Article neither accepts the sexual practices Mr. Savoie allegedly engaged in as essentially queer nor disclaims any relationship in such a way as to hold queerness above kink and non-monogamy.

[128] An employer's assessment of a worker's non-normative sex might also turn on his role—for example, in sex characterized as BDSM (bondage, discipline, sadism, and masochism), whether he prefers to play a dominant or submissive role. Empirical research suggests that straight people prefer gay men who like to "top" rather than "bottom" or play both roles. *See* Ian Ayres & Richard Luedeman, *Tops, Bottoms, and Versatiles: What Straight Views of Penetrative Preferences Could Mean for Sexuality Claims Under* Price Waterhouse,

sex counts as kinky may be shot through with stereotypes: Those judging workers' and students' sex from the outside may generally view queer sex as kinkier than straight sex, and may judge straight sex as deviant when the participants subvert traditional gender roles.[129] For example, a woman penetrating a man may seem kinky where a man penetrating a woman would appear "normal."[130]

Notable, also, is Lawrenceville's choice of solution. Although Mr. Savoie was a respected, long-term educator, and no students or members of the public had found the pornographic images Lawrenceville administrators allegedly believed he had sent over the internet, the school gave him no chance to change his conduct and remain a teacher. The swiftness of its termination might reflect a lack of faith that Mr. Savoie *could* change his behavior, perhaps reflecting an inaccurate and deeply harmful narrative script of gay men as "addicted" to risky sexual practices.[131]

3. Sex-as-Identity After Bostock

For these reasons, among others, there is every reason to think that rules against consensual sex will be disproportionately enforced against queer people, though case law arising from such fact patterns is still slim. There is no shortage of public accounts of and lawsuits filed by queer workers and students who have been punished, expressly, for the status of being queer.[132] Most notable of these is *Bostock v. Clayton County*, where the plaintiff was fired when his employer learned he had joined a gay softball league.[133] Yet with exceptions like *Savoie*,

123 Yale L.J. 714, 740–41 (2013). These preferences may reflect sex stereotypes that men should dominate their partners, and women should be dominated. *See id.* at 735–36.

129 *Cf.* Jules Vivid, Eliot M. Lev & Richard A. Sprott, *The Structure of Kink Identity: Four Key Themes Within a World of Complexity*, 6 J. Positive Sexuality 75, 83–84 (2020) (noting relationship between kink and subversion of "traditional gender roles").

130 *Cf.* Pompi Banerjee, Raj Merchant & Jaya Sharma, *Kink and Feminism – Breaking the Binaries*, 6 Socio. & Anthropology 313, 314 (2018) (noting that a "male submissive female dominant can be read as an inversion of traditional roles"); Jade Aguilar, *Pegging and the Heterosexualization of Anal Sex: An Analysis of* Savage Love *Advice*, 2 Queer Studs. Media & Popular Culture 275, 281, 285–86 (2017) (tying women's penetration of male partners to kink and inversion of gender roles).

131 *See generally* Elizabeth J. Levy, *Animus in the Closet: Outing the Addiction Parallels in Anti-Gay Legal Rhetoric*, 3 U.C. Irvine L. Rev. 151 (2013) (detailing the various pseudoscientific arguments that anti-gay advocates have made—and courts have sometimes accepted—analogizing homosexuality to addiction).

132 *See, e.g.*, Murray, *supra* note 98, at 1466 (collecting cases filed by workers); Sarah Warbelow & Remington Gregg, Human Rights Campaign, Hidden Discrimination: Title IX Religious Exemption Putting LGBT Students at Risk 13–15 (2015), https://assets2.hrc.org/files/assets/resources/Title_IX_Exemptions_Report.pdf [https://perma.cc/PH2M-ZW3F] (collecting stories of students punished for being LGBTQ).

133 590 U.S. 644, 649–56 (2020).

there are few anti-discrimination lawsuits brought by queer workers or students punished for sexual conduct itself—that is, for having gay sex rather than being gay.[134] That might be because, until *Bostock*, it was presumptively legal in much of the country to discriminate against a worker or student on the basis of their sexual orientation or gender identity.[135] Employers and schools, then, would have had no need to dress up their animus as "neutral" regulation of sexual conduct: They could simply fire an employee or exclude a student because he was gay. Post-*Bostock*, we may see an increase in queer people punished for consensual sex because those rules offer a new justification for the same discrimination—what Reva Siegel has called "preservation through transformation."[136]

C. Intersectional Sex-Race Stereotyping

It seems likely, too, that these rules will be applied differently based on not only sex and sexual orientation but race as well, with women and queer people of color at the crosshairs of intersectional stereotyping. This punishment may pose a particular threat to demographics stereotyped as hypersexual, including Black and Latina people.[137] It is not difficult to imagine, for example, that an employer might tolerate a white worker's history in sex work as reflective of his economic vulnerability but read a Black worker's similar history as evidence of deviance requiring correction.

Fears of racially disparate institutional enforcement are not speculative. Data from criminal law enforcement of rules against consensual sex, including sex work, lend credence to that prediction.[138]

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134 Some plaintiffs have challenged public employer or military punishment for same-sex sex as a constitutional due process violation. *See* Murray, *Rights and Regulation*, *supra* note 5, at 596–97.

135 It is notable that Mr. Savoie brought his claims under New Jersey state anti-discrimination law, which explicitly forbade sexual orientation discrimination.

136 Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996) (describing how when "the legitimacy of a status regime is successfully contested, lawmakers and jurists will . . . find[] new rules and reasons to protect such status privileges as they choose to defend").

137 *See, e.g.*, Katherine E. Leung, *Microaggressions and Sexual Harassment: How the Severe or Pervasive Standard Fails Women of Color*, 23 TEX. J. ON C.L. & C.R. 79, 93 (2017) (discussing stereotypes regarding Latinas' sexualities); Darci E. Burrell, *Myth, Stereotype, and the Rape of Black Women*, 4 UCLA WOMEN'S L.J. 87, 89 (1993) (discussing stereotypes of "the sexually savage African-American man" and "'chronically promiscuous' African-American woman").

138 *E.g.*, *Race, Sex Work, and Stereotyping*, DECRIMINALIZE SEX WORK (Dec. 27, 2022), https://decriminalizesex.work/why-decriminalization/briefing-papers/race-sex-work-and-stereotyping [https://perma.cc/YZ42-A6SB] (collecting statistics reflecting racial disproportionality in arrests and convictions for "selling" and "purchasing" commercial sex

And similar inequalities have played out in workplace and school sexual regulation. For example, over the last decade, a number of public reports and lawsuits have described schools punishing girls under rules forbidding sex on school grounds—the sex in question having come to the schools' attention when the girls reported it as rape.[139] Black and Latina students appear to be overrepresented among these punished victims.[140] The same stereotypes of hypersexuality described above may explain this disparity. Administrators may not only perceive Black and Latina girls as less credible victims[141] but also view their sexual conduct as more threatening, compulsive, and uncontrollable than a white girl's. Against that backdrop, a disciplinarian may be quick to assume a Black or Latina girl will recidivate absent a sharp punishment, where the same official might let a white classmate go with a mere warning. Similar stereotypes also likely contribute to the continued racial disparities among those punished for allegedly nonconsensual sex.[142]

Recent historical accounts offer additional data points. Intersectional claims about stereotypes of, and animus toward, Black women specifically were at the fore of two cases about policies excluding unmarried workers who were pregnant or had a child—closely related,

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in New York City); Joshua Kaplan & Joaquin Sapien, *NYPD Cops Cash in on Sex Trade Arrests With Little Evidence, While Black and Brown New Yorkers Pay the Price*, ProPublica (Dec. 7, 2020), https://www.propublica.org/article/nypd-cops-cash-in-on-sex-trade-arrests-with-little-evidence-while-black-and-brown-new-yorkers-pay-the-price [https://perma.cc/4SRG-SGWK] (documenting racial disparities in arrests related to sex work in New York); FBI Uniform Crime Reporting, Crime in the United States 2015 tbl.43 (2016), https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-43 [https://perma.cc/GQQ9-4CXY] (reflecting that 39.9% of adults arrested for "prostitution and commercialized vice" in 2015 were Black).

139 *E.g.*, A.P. v. Fayette Cnty. Sch. Dist., No. 21-12562, 2023 WL 4174070, at *1 (11th Cir. June 26, 2023); Emily Suski, *Institutional Betrayals as Sex Discrimination*, 107 Iowa L. Rev. 1685, 1687 (2022); Tyler Kingkade, *Schools Keep Punishing Girls – Especially Students of Color – Who Report Sexual Assaults, and the Trump Administration's Title IX Reforms Won't Stop It*, 74 (Aug. 6, 2019), https://www.the74million.org/article/schools-keep-punishing-girls-especially-students-of-color-who-report-sexual-assaults-and-the-trump-administrations-title-ix-reforms-wont-stop-it [https://perma.cc/4FB6-YANK]. This Article's author was part of the legal team who represented the plaintiff in the case described by Emily Suski.

140 *See* Kingkade, *supra* note 35.

141 *See, e.g.*, Mikah K. Thompson, *Just Another Fast Girl: Exploring Slavery's Continued Impact on the Loss of Black Girlhood*, 44 Harv. J.L. & Gender 57, 85–90 (2021); Jessica C. Harris, *Centering Women of Color in the Discourse on Sexual Violence on College Campuses*, *in* Intersections of Identity and Sexual Violence on Campus: Centering Minoritized Students' Experiences 42, 49–51 (Jessica C. Harris & Chris Linder eds., 2017) (noting how stereotypes about Black women's sexuality lead to them being judged as more "blameworthy" for their own assaults).

142 *See* Alexandra Brodsky, Sexual Justice: Supporting Victims, Ensuring Due Process, and Resisting the Conservative Backlash 178–81 (2021) (discussing statistics concerning potential racial disparities in punishment of students under sexual harassment rules).

though not identical, to the bans on sex itself discussed in this Article. These cases, and courts' handling of them, provide more reason to fear that similar stereotypes may inform punishment for sex of which institutions disapprove.

Take the experience of Crystal Chambers, an employee of the Girls Club of Omaha, a non-profit that provided services to local girls.[143] The club's staff members were "trained and expected to act as a role model and . . . required, as a matter of policy, to be committed to the Girls Club philosophies so that the messages of the Girls Club can be conveyed with credibility."[144] This being the 1980s, "[o]ne such philosophy embraced by the Girls Club is that teenage pregnancy limits life's options for a young woman."[145] In a putative attempt to discourage such pregnancies, the Girls Club created a policy, known as "the Negative Role Model Policy," under which "single persons who become pregnant or cause a pregnancy would no longer be permitted to continue employment at the Girls Club."[146] The policy did not ban pre-marital sex itself—as the policies at the heart of this Article do—but banned the result of it.

After she was fired under that policy, Ms. Chambers sued the club, and the district court construed her Title VII claims as alleging both disparate impact and disparate treatment on the basis of her race and "sex/pregnancy."[147] Ms. Chambers contended that the Negative Role Model Rule was "a cover up for the Girls Club's 'morality standard' which disapproves of black single mothers," though the district court said little about the content of that disapproval in its opinion.[148] After a trial, the court rejected Ms. Chambers's claim that the policy was rooted in stereotype-based moralizing rather than the defendants' articulated justification for the rule, discouraging teenage pregnancy—a reason the court determined was "legitimate" and "nondiscriminatory."[149] The Eighth Circuit affirmed on slightly different grounds: It held that even if the practice constituted both disparate treatment and disparate impact, the rule was a business necessity and went to a bona fide occupational

143 Chambers v. Omaha Girls Club, Inc., 629 F. Supp. 925, 928 (D. Neb. 1986), *aff'd sub nom*. Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (8th Cir. 1987).

144 *Id.*

145 *Id.*

146 *Id.* at 929.

147 *See id.* at 930–31, 945.

148 *Id.* at 947.

149 *Id.* at 947–48. While the district court found that the policy did have a disparate impact on Black women, given "the significantly higher fertility rate among black females" in the surrounding area, the court held that the policy was a business necessity, thus excusing the disparate impact. *Id.* at 949.

qualification—and thus the discrimination was permissible.[150] Judge McMillian, the first Black judge on the court,[151] dissented.[152]

Like in other cases discussed in this Article, the putatively non-discriminatory justification in *Chambers* is hard to extricate from the suspected stereotype-based reason. After all, why is it that the Girls Club believed that exposure to unmarried pregnant employees would encourage teenage girls to become pregnant? As the Eighth Circuit acknowledged, the Girls Club was not able to provide any data supporting its instinct that the two were related.[153] And there is reason to doubt a causation analysis would stand up here without stereotype-based reasoning. One disconnect between the policy and the putative problem—teenage pregnancies—is that being unmarried is not the same thing as being a teenager. Ms. Chambers, for one, was in her early twenties when she was fired.[154] It is far from apparent, then, why "a single pregnant working wom[a]n" would "be viewed by teenage women as a 'tacit' approval of the Girls Club of *teenage* pregnancies."[155] The logic might rely on a stereotype of single pregnant women—a stereotype particularly acute for Black single pregnant women—as no more responsible, mature, nor capable than an impulsive teenager.[156] It also requires overlooking record evidence presenting a counter-narrative of these same women as hard-working and independent.[157]

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150 *See* Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 704–05 (8th Cir. 1987).

151 Karen L. Tokarz, *Judge Theodore McMillian: Beacon of Hope and Champion for Justice*, 67 Wash. U. J.L. & Pol'y 359 (2022).

152 *Chambers*, 834 F.2d at 705 (McMillian, J., dissenting) ("I believe that Crystal Chambers alleged and proved discrimination based on race under a disparate impact theory and discrimination based on pregnancy under a disparate treatment theory . . . .").

153 To the majority, it was enough that the Girls Club had an apparently sincere belief that such a connection existed, though Judge McMillian in dissent noted that was hard to square with existing case law demanding that defendants demonstrate discrimination is necessary to solve a real problem. *Id.* at 706–09 (McMillian, J., dissenting).

154 *See Chambers*, 629 F. Supp at 928–29.

155 *Id.* at 951 (emphasis added).

156 *See, e.g.*, Renee Mehra, Lisa M. Boyd, Urania Magriples, Trace S. Kershaw, Jeannette R. Ickovics & Danya E. Keene, *Black Pregnant Women "Get the Most Judgment": A Qualitative Study of the Experiences of Black Women at the Intersection of Race, Gender, and Pregnancy*, 30 Women's Health Issues 484, 487–88 (2020) (describing assumptions made about Black pregnant women).

157 *See Chambers*, 629 F. Supp at 951. A similar critique might be made of the reasoning of Boy Scouts of America v. Dale, 530 U.S. 640 (2000). There, the U.S. Supreme Court held that the New Jersey Supreme Court's ruling that state antidiscrimination law forbade the Boy Scouts from expelling adult gay members violated the Boy Scouts' "First Amendment right to expressive association." *Id.* at 644. The Boy Scouts disapproved of "homosexual conduct" as inconsistent with the organization's values, which conflated being "morally straight" with being, well, sexually straight. *See id.* at 649–52. Accepting the sincerity of the Boy Scouts' view, the Court had to "determine whether [a gay man's] presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not 'promote homosexual conduct as a

Similar stereotypes were at play in *Andrews v. Drew Municipal Separate School District*.[158] There, two Black female workers brought a challenge to a public school's unwritten 1972 policy that forbade "employment of school personnel who [were] unwed parents."[159] "[T]he rationale of the rule was founded upon a considered opinion that . . . the bearing of an illegitimate child, no matter when it took place, or under what circumstances, is conclusive proof of the parent's immorality or bad moral character," thus rendering the teacher a bad role model for students.[160] The plaintiffs contended that the policy was "violative of equal protection because it create[d] an unconstitutional classification to both race and sex."[161] The court agreed on sex, and declined to determine whether the rule discriminated on the basis of race as well.[162] But race—and, specifically, stereotyping about Black women—was an inextricable part of the story. As Professor Murray notes, "[m]eaningfully, *Andrews* arose in the charged political climate of post-*Brown* Mississippi, where unmarried black mothers were routinely decried as morally lax welfare scourges eager to bear children for the purpose of increasing public assistance benefits."[163] And as Serena Mayeri has documented, anti-Blackness was at the heart of the Drew Municipal Separate School District's identity and litigation strategy: The District "had mightily resisted desegregation," its lawyer was the

legitimate form of behavior.'" *Id.* at 653. The Court decided it would, but failed to interrogate how and why, exactly, the presence of a gay adult in a leadership position would actually send the message that it's ok to be gay—especially when the Boy Scouts had no issue with straight adults voicing their disagreement with the Boy Scouts' homophobic policy. *Id.* at 655–56. Without any satisfying explanation of why the Boy Scouts were right that the inclusion of gay men in troops would promote homosexuality, it is hard not to wonder if the Court was implicitly relying on stereotypes of gay men as threats to children because they will "recruit" kids into homosexuality, perhaps through sexual abuse. *See supra* notes 94–97 and accompanying text.

158 371 F. Supp. 27 (N.D. Miss. 1973), *aff'd*, 507 F.2d 611 (5th Cir. 1975).

159 *Id.* at 28–29.

160 *Id.* at 30.

161 *Id.* at 28.

162 *Id.* at 31. Although *Andrews* analogized to *Frontiero v. Richardson*, 411 U.S. 677 (1973), a disparate treatment case, the court's reasoning on the sex discrimination claim sounds in disparate impact. *See Andrews*, 371 F. Supp. at 35–36. Accordingly, there is some question as to whether it survives *Washington v. Davis*, decided three years later. 426 U.S. 229 (1976) (requiring plaintiffs show proof of discriminatory intent to succeed an equal protection claim).

163 Murray, *supra* note 98, at 1464. Murray describes how, in testifying before the court in *Andrews*, different plaintiffs navigated their relationship to these stereotypes in different ways. Two tried to comport with the norms of respectability politics, presenting themselves as "churchgoing Sunday school teachers who had become parents because of ignorance or inability to access birth control." *Id.* at 1465. But "other plaintiffs were unapologetic in asserting their rights to sexual and reproductive freedom." *Id.*

son of a segregationist senator, and one of its experts was "a once-prominent defender of racial segregation."[164]

Perhaps unsurprisingly, then, as in *Chambers*, the defendant's role model theory did not make much sense. About a third of Drew students, if not more, "were born to unmarried parents,"[165] so the student body was hardly unfamiliar with the idea that a woman might have children outside of marriage. And Drew could not explain why students would interpret their teacher's out-of-wedlock child-rearing in a manner consistent with racist and sexist stereotypes of "welfare scourges," rather than appreciating, and being inspired by, "single mothers' courage, fortitude, and moral character" and "their valiant efforts to obtain education and employment against all odds."[166] Against that backdrop, the school's stated reason for the policy—its assumption that all unwed parents are immoral and bad role models—appears to be a direct result of sex-race stereotypes.[167]

D. Distinguishing Good Policy from Bad

So, some workplace and school rules regulating consensual sex reflect stereotyping and animus based on sex. But none of this is to say that all institutional prohibitions on consensual sex share these same origins, or that all are equally likely to be applied in discriminatory ways. There is no scientific method to determine exactly how rife with inequality each workplace or school policy is. But consideration of how often various policies are successfully challenged on sex discrimination grounds, and how often gendered inequalities appear in public accounts, suggests that some prohibitions, including those on premarital, commercial, and kinky sex, may be more likely to exacerbate inequalities than others, such as anti-fraternization rules. Rules against sex on premises appear to sit somewhere in between.

Two characteristics of the more troubling regulations raise red flags for likely discrimination, either in motivation or enforcement. And, conversely, two characteristics of the less troubling regulations offer potential green flags that indicate a policy may be equitable. In identifying these flags, this Article does not purport to provide a complete blueprint for institutional policy. The absence or presence of these characteristics cannot serve as definitive proof that a policy is

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164 Serena Mayeri, *Intersectionality and the Constitution of Family Status*, 32 CONST. COMMENT. 377, 389 (2017).

165 *See id*. (noting that, thanks to post-*Brown* white flight, eighty percent of Drew students were Black, and nearly forty percent of those students "were born to unmarried parents").

166 *Id.* at 392–93.

167 *Cf. Andrews*, 371 F. Supp. at 33 (discussing the irrationality of the rule).

discriminatory or non-discriminatory, either on its face or in any given application. The costs and benefits of any given policy will depend on the context of the institution and its membership; there is no "one size fits all" model. That said, these red and green flags might still be useful—for advocates, for policymakers, and perhaps for judges—in distinguishing good policies from bad policies. And, combined, they offer a rough outline of an affirmative vision of how workplaces and schools should regulate consensual sex.

1. Red Flags

a. Moralistic Motives

The first red flag is when a prohibition on consensual sex is rooted in a moralistic judgment about sex. On their face, these judgments—premarital sex is bad, commercial sex is bad, kinky sex is bad—might appear facially neutral. But as discussed above, traditional sexual morality is deeply interwoven with sex stereotypes and animus.[168] Judgment of premarital sex, as Judge Weinstein noted in *Ganzy*, has long reflected more harshly on women than men.[169] Disapproval of commercial sex or kinky sex, too, is hard to extricate from sex stereotypes. Those stereotypes may include, among many others, expectations that "classy women" do not engage in sex work, as in *Gililland*;[170] heteronormative expectations of what "normal" sex looks like, as in *Savoie*;[171] and expectations that good women have sex to reproduce, not for pleasure,[172] and so would not engage in sexual practices—perhaps like kink—that suggest the existence of personal sexual desires. It may be unsurprising, then, that rules rooted in schools' or employers' judgments of what sex is good and what sex is bad are more prone to inequalities than rules rooted in other considerations. These rules may be so inescapably gendered that they are bound to be enforced in inequitable ways. It may also be true that employers and schools who see fit to impose their moralistic judgments on their workers and students are more likely to be sexist and homophobic.

Consider, by contrast, the creation and enforcement of anti-fraternization policies, which case law and public accounts suggest are less ripe with gendered inequality.[173] That may be because, as discussed

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168 *See supra* Section II.A.

169 *See supra* notes 76–85 and accompanying text.

170 *See supra* notes 39–45 and accompanying text; *see also infra* notes 259–61 and accompanying text (discussing "double stereotyping" of sex workers).

171 *See supra* notes 127–29 and accompanying text.

172 *See supra* note 82.

173 *But see* Collins v. Koch Foods Inc., No. 2:18-CV-00211-ACA, 2019 WL 4599972, at *9 (N.D. Ala. Sept. 23, 2019) (holding material dispute of fact remained as to whether female employee's termination for violation of anti-fraternization policy was sex discrimination

briefly above[174] and in more detail below,[175] those rules are often based in considerations beyond sexual morality, such as avoiding perceptions of favoritism.[176] Accordingly, while an employer's own ethics might of course seep in, the rules are not rooted in justifications burdened by millennia of gendered baggage. And those rules might be equally embraced by a sex-positive employer dedicated to an equitable, non-hierarchical workplace and by a conservative employer who thinks sex should only happen between a married woman and man. The same goes for rules against sex on school or workplace grounds. There are plausible reasons, rooted in non-moralistic motives, for not wanting students to have sex in the cafeteria, or workers to have sex in the break room.[177]

That is not to say that these rules are immune to stereotyped enforcement. For example, what counts as sex at all may turn on stereotypes. It is not hard to imagine, say, a school viewing a teenage girl and boy kissing during lunch as an expression of chaste young love, but two boys kissing as engaged in sexual conduct—and punishing the boys as a result.

b. Discoverability Problems

The second red flag is what this Article will call a "discoverability problem": The rule is designed such that violations by marginalized people are more likely to be discovered than violations by others. A clear example is a prohibition on premarital sex, which will be more easily discovered in women and girls because of their capacity for pregnancy.[178] Regardless of the school or employer's motive, the capacity for inequitable enforcement is obvious. And its obviousness, in turn, reflects poorly on the institution: Adopting a policy so prone to discriminatory results indicates, at best, a lack of concern for sex equality.[179]

Not all rules present this same problem, or at least not to the same degree and for all gender and sexual minorities. Capacity for pregnancy, for example, will make it easier to discover the fact that women and

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because male comparators who violated the same policy were treated more favorably), *aff'd*, No. 20-13158, 2022 WL 1741775 (11th Cir. May 31, 2022).

174 *See supra* notes 58–61 and accompanying text.

175 *See infra* notes 184–85 and accompanying text.

176 *See supra* note 59. Another reason anti-fraternization policies are not, seemingly, imposed in obviously gendered ways is that the most common rules target supervisors who have sex with their subordinates, *see supra* note 58, and men are overrepresented in the higher echelons of workplace hierarchies.

177 *See infra* Section II.D.2.

178 *See supra* note 71.

179 *See infra* Part III (elaborating why the enforcement of "neutral" policies while disregarding clear risks to women and queer people constitutes sex discrimination).

girls have had sex, but not where they had sex, with whom, or of what kind. Anti-fraternization rules, rules against sex on premises, and rules against kink may not, then, pose discoverability problems with respect to women and girls.

A potential concern, however, for rules against sex on premises is that, because women and girls are more likely to be raped than their male counterparts,[180] they may be more likely to need to reveal the facts of nonconsensual sexual conduct to institutional authorities in order to seek protections within the workplace or school—and may, after doing so, be wrongly punished for that conduct under rules prohibiting consensual sex. That is, after all, the fact pattern alleged in the cases, discussed above, of girls punished under rules prohibiting sex on school grounds after they had reported they had been raped.[181]

Some rules may pose unique discoverability problems for queer people. Andrew Gilden has recently written about how and why queer people are more likely to attend and have sex in public sexual spaces, such as public festivals like the Folsom Street Fair, bathhouses, nightclubs, and "cruising" spots.[182] Gilden notes that the publicity of this sex may be both liberatory and also render queer people vulnerable to "revenge porn" and other practices by which their sexual activity may be revealed to their employers.[183] Without overgeneralizing queer sexual practices, it may be that, at a macro level, queer workers' or students' sexual conduct is more likely to occur outside private bedrooms than their straight counterparts', and so is more likely to be discovered—and punished—by their workplace or school.

2. Green Flags

a. Protecting Opportunities to Work and Learn

Discriminatory workplace and school rules against consensual sex tend to be rooted in moralistic ideas about sex. Better rules are generally motivated by a pragmatic desire to ensure workers and students can do what they are there to do: work or learn. As noted above, employers may implement anti-fraternization policies as a tool to avoid workplace conflict.[184] It is not hard to imagine how, say, a team of three workers

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[180] *See* Dana Bolger, Alexandra Brodsky & Sejal Singh, *A Tale of Two Title IXs: Title IX Reverse Discrimination Law and Its Trans-Substantive Implications for Civil Rights*, 55 U.C. Davis L. Rev. 743, 761 n.84 (2021) (noting that nearly half of women and one in four men experience sexual violence in their lifetimes).

[181] *See supra* note 139.

[182] *See* Andrew Gilden, *The Queer Limits of Revenge Porn Laws*, 64 B.C. L. Rev. 801, 834–37 (2023).

[183] *See id.* at 839.

[184] *See supra* notes 58–60.

may devolve after two start sleeping together—or after they stop. So, an employer might reasonably adopt an anti-fraternization policy based on the conclusion that sexual relationships between members of the same workplace team undermine group cohesion and collaboration, and so may require that employees either refrain from such relationships or agree to internal transfers. An employer might also categorically ban sex between bosses and workers given the near-inevitable concerns about favoritism that will arise, and the risk of resultant discord.[185]

Similarly, sex at work or school may pose a distraction to the participants or their peers. To use an extreme example: It would be hard for teenagers to focus on math class if their classmates were having sex in the back of the room. The same may be true in a more realistic scenario, in which better-hidden sex at school is so frequent that students find themselves regularly distracted from classroom instruction by the prospect of a hook-up next period. Conversely, students who find exposure to sex uncomfortable, rather than exciting, may also be distracted by its presence at school, if for different reasons. Similar problems may arise for workers in a hypersexual environment. Accordingly, despite the real risk that rules against sex on school or workplace grounds may be weaponized, there are also good reasons for those prohibitions—a tension that, perhaps, explains these rules' intermediate status on a scale of discrimination.

One primary reason this green flag may correlate to a lower risk of sex discrimination is that justifications rooted in legitimate concern for the work or school environment are less likely to boil down to discrimination than are the moralistic motives described above. This green flag also draws attention to considerations related to privacy and intimate association. A policy tailored to regulate only sex that directly threatens the workplace as workplace, or school as school, is less likely to extend its tentacles deep into the private lives of individuals. Only public schools and employers are subject to substantive due process restrictions, stemming from cases like *Griswold v. Connecticut*[186] and *Lawrence v. Texas*,[187] on their ability to meddle in workers' and students' sexual conduct.[188] But, regardless of the scope of legal protections, all students and workers may have practical and ethical interests in

185 *See supra* note 59 (discussing concerns about favoritism).

186 Griswold v. Connecticut, 381 U.S. 479 (1965).

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

188 *See, e.g.*, Matthew W. Green, Jr., Lawrence*: An Unlikely Catalyst for Massive Disruption in the Sphere of Government Employee Privacy and Intimate Association Claims*, 29 Berkeley J. Emp. & Lab. L. 311, 315–21 (2008) (tracing the development of the constitutional rights to privacy and intimate association and explaining how those rights offer government employees some protection from being sanctioned for an intimate relationship).

preserving a private life, including a private sex life, beyond the reach of their school or employer. These privacy interests are important in their own right. And, as is clear from the substantive due process case line—which prominently features disputes concerning reproductive freedom and same-sex intimacy—those interests implicate gender justice as well.[189]

With that said, a word of warning is warranted: Any consideration of whether a policy satisfies this green flag must bring a critical eye to the given justification, since considerations about conflict or distraction may be used to launder biases. Consider the nurse (putatively) fired because her OnlyFans posed a distraction to her colleagues, who repeatedly viewed her account at work.[190] Even taking as true that her colleagues were, in fact, distracted, that distraction stemmed from their own inappropriate and arguably harassing conduct. The remedy, then, was for the employer to prohibit colleagues from visiting the nurse's OnlyFans while on the job, almost certainly a violation of existing rules that would forbid pornography at work. The employer's decision not to do so—like the workers' insistence on viewing their colleague's naked photos in her workplace—reflects a belief that sex workers forfeit their right to respect and privacy by engaging in morally blameworthy conduct. Repacking that bias as "distraction" makes it no more acceptable.

b. Promoting Sex Equality

Despite all the threats sexual regulation may pose to sex equality, some of the better institutional policies regulating consensual sex seek to promote sex equality. Anti-fraternization policies and policies against sex on school or workplace grounds may serve as a prophylactic to sexual harassment.[191] A consensual relationship between a boss and subordinate may sour, leaving the latter forced to choose between continuing an unwelcome relationship or risking professional consequences. A high school with limitless tolerance for sex on campus maybe increase the chances that students spend their class time receiving sexual overtures, some of which will be unwelcome.

Sex that is consensual between the parties may also create an unwelcome, hyper-sexualized environment for third parties. This is most obvious where the sex in question occurs within the school or

189 *See* Katherine Watson, *When Substantive Due Process Meets Equal Protection: Reconciling* Obergefell *and* Glucksberg, 21 Lewis & Clark L. Rev. 245, 253–68 (2017) (tracing equality principles animating development of substantive due process case law).

190 *See supra* note 43.

191 *See supra* notes 60–61 and accompanying text (explaining that some courts view managerial-subordinate relationships to be gateway to sexual harassment).

workplace—a more extreme version of the kind of hostile environment that can arise when workers are confronted by pornography in the workplace.[192] But one can also imagine circumstances where fully extracurricular sexual activities may sexualize a school or workplace despite geographic and practical distance. Perhaps it is widely known that a coach begins sexual relationships with former students once they graduate. Perhaps outside-of-work sex between colleagues is so frequent that the break room starts feeling like a singles' bar. Or perhaps that sex creates the impression, accurate or not, of favoritism, such that workers come to believe significant professional advantages accrue to those who have sex with senior colleagues. One might expect the sexualization to impose unique injuries on women, whose role as workers or learners—rather than primarily as potential sexual partners—may be in dispute in ways their male counterparts' role is not.[193]

Policies designed to prevent these harms and promote sex equality may be less likely to exacerbate gendered inequalities. As the discussed problems with policies against sex on school grounds demonstrate,[194] even well-meaning rules can be applied in discriminatory ways. And it is not hard to imagine a workplace or school co-opting the rhetoric of equality to justify rules with more troubling motives. Yet a rule designed with sex equality in mind is likely to be a better one.

III
Litigating Against Punishment for Consensual Sex

This Part describes common theories of liability in past cases and recommends two alternative strategies emerging from a more critical consideration of school and workplace regulation of consensual sex. Given that much (if not all) institutional regulation of consensual sex is ripe for discrimination, it is no wonder a number of workers and students have brought sex discrimination claims. But, putting aside exceptions

192 *See, e.g.*, Patane v. Clark, 508 F.3d 106, 114 (2d Cir. 2007) (citing Wolak v. Spucci, 217 F.3d 157, 160–61 (2d Cir. 2000) ("This Court has specifically recognized that the mere presence of pornography in a workplace can alter the 'status' of women therein and is relevant to assessing the objective hostility of the environment.")).

193 *See* Miller v. Dep't of Corr., 115 P.3d 77, 80 (2005) (noting a female employee may be able to make out a hostile environment claim when "sexual favoritism in a workplace is sufficiently widespread [that] . . . the demeaning message is conveyed to female employees that they are viewed by management as 'sexual playthings' or that the way required for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or [] management"); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 Stan. L. Rev. 691, 766 (1997) (explaining that an employee's "supervisor reinforced traditional gender norms by regarding her not as a valued employee, but principally as a sex object who was in the workplace to satisfy his sexual needs.").

194 *See supra* notes 62–71 and accompanying text.

like *Ganzy*,[195] the cases do not tether themselves to a broader pattern of inequitable sexual regulation. In the cases' accounts, institutional regulation of workers' and students' sex lives is untroubling unless it is used to carry out a distinct discriminatory purpose, as any rule might be. That uncritical approach has come at a cost to plaintiffs, and to public understanding of these gendered policies.

For this Part, a brief doctrinal primer may be useful. Broadly speaking, discrimination suits come in two common types: disparate treatment claims, which argue that the plaintiff was treated differently because of their protected characteristic, and disparate impact claims, which argue that the defendant's policy or practice disproportionately and negatively affects those of a certain gender or sexual orientation.[196] In disparate treatment cases, plaintiffs may establish discrimination using either direct or circumstantial evidence.[197] Direct evidence usually comes in the form of "smoking gun" evidence, such as, in one Eighth Circuit case, a decisionmaker calling an employee a "woman in a man's job"—a job he told witnesses "a woman can't handle"—before firing her.[198] Cases relying on circumstantial evidence often focus on how the plaintiff was treated in comparison to similarly situated "comparators,"[199] and present the question of whether the non-discriminatory reason the defendant gives for its adverse action—for example, its reason for firing the plaintiff—is its real reason or mere pretext.[200] A plaintiff may also, or instead, prove discrimination by demonstrating the defendant's action is a result of sex stereotyping, a type of disparate treatment.[201]

Disparate impact suits are available under Title VII[202] and some state and local laws,[203] but not under the Equal Protection Clause,[204] and,

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195 Ganzy v. Allen Christian Sch., 995 F. Supp. 340, 350–59 (E.D.N.Y. 1998) ("Religious institutions . . . may not . . . use pregnancy as a surrogate for job discrimination.").

196 *See, e.g.*, Jennifer C. Braceras, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 Vand. L. Rev. 1111, 1140–41 (2002).

197 *E.g.*, Hutt v. AbbVie Prods. LLC, 757 F.3d 687, 691 (7th Cir. 2014).

198 Simmons v. New Pub. Sch. Dist. No. Eight, 251 F.3d 1210, 1213 (8th Cir. 2001), *abrogated on other grounds by* Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011).

199 *See infra* Section III.A (describing use of comparators in anti-discrimination litigation).

200 Demonstrating pretext is the third step of the commonly used *McDonnell Douglas* test for assessing discrimination claims. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973); C.R. Div., U.S. Dep't of Just., *Title VI Legal Manual*, Dep't of Just. § VI at 19, https://www.justice.gov/crt/fcs/T6Manual6 [https://perma.cc/8PN9-P6YZ].

201 Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

202 Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 986–87 (1988).

203 *See, e.g.*, Cannizzaro v. City of New York, 82 Misc. 3d 563, 578 (N.Y. Sup. Ct. 2023) (New York disparate impact claim); Rosenfeld v. Abraham Joshua Heschel Day Sch., Inc., 226 Cal. App. 4th 886, 893 (2014) (California disparate impact claim).

204 Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 272–74 (1979). *But see* Laura Portuondo, *Effecting Free Exercise and Equal Protection*, 72 Duke L.J. 1493, 1552–57 (2023) (describing doctrinal case law for reviving effects-based equal protection doctrine).

since the Supreme Court's decision in *Alexander v. Sandoval*, probably not under Title IX.[205] Where available, disparate impact suits "usually focus[] on statistical disparities" resulting from a defendant's policies or practices.[206] Demonstrating a disparity, however, is not always enough to establish liability. Under Title VII, for instance, a policy or practice with a disparate impact is nonetheless permissible if the defendant can demonstrate a "business necessity"—that is, that "the policy or practice in question is demonstrably related to a significant, legitimate employment goal."[207]

A. Previous Sex Discrimination Litigation Challenging Punishments for Consensual Sex

As mentioned above, most plaintiffs bringing sex discrimination claims have filed disparate treatment claims using a familiar strategy: They have challenged their employers' and schools' given reasons as pretextual.[208] The real reason they were sanctioned, plaintiffs argue, is sex discrimination, *not* the consensual sex with which the defendants purport to take issue.

Sometimes this strategy works. In *Hamilton v. Southland Christian School*, for instance, the Eleventh Circuit held that a fired woman had "presented evidence that, in making the decision to fire her, [the school] was more concerned about her pregnancy and her request to take maternity leave than about her admission that she had premarital sex."[209] This evidence included testimony that, "after she told [administrators] about her pregnancy but before she told them she had conceived before getting married, [one] 'put his head back and he said, we feared something like this would happen.'"[210] The same administrator "told her that she was going to have to 'take the

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205 532 U.S. 275, 285–86, 293 (2001) (holding that Title VI of the Civil Rights Act of 1964 does not provide a private right of action for disparate impact claims). Title IX was modeled after Title VI. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 694–96 (1979) ("The drafters of Title VI explicitly assumed that it would be interpreted and applied as Title VI had been"). Accordingly, lower courts have largely assumed disparate impact claims are not unavailable. *See* Bolger, Brodsky & Singh, *supra* note 180, at 748. Some, however, have argued that *Sandoval* should not apply to Title IX because of its differences from Title VI. Mary Ann Mason & Jaclyn Younger, *Title IX and Pregnancy Discrimination in Higher Education: The New Frontier*, 38 N.Y.U. Rev. L. & Soc. Change 269, 297 (2014).

206 *Watson*, 486 U.S. at 987.

207 C.R. Div., U.S. Dep't of Just., *supra* note 200 § VII at 32 (citations omitted).

208 *See supra* note 28 (listing cases where plaintiffs argue that the sanction was the result of sex discrimination, not consensual sex).

209 680 F.3d 1316, 1320 (11th Cir. 2012).

210 *Id.*

year off' because replacing a teacher taking maternity leave after the school year had started was hard to do."[211] This evidence was enough to survive summary judgment.[212]

In *Pfeiffer ex rel. Pfeiffer v. Marion Center Area School District*, a case brought by a girl excluded from her school's NHS chapter, the Third Circuit accepted, uncritically, that schools might properly exclude students from honors positions based on their "sexual immorality," and that punishing a student for having sex was different from punishing a student for being pregnant.[213] But it was swayed by evidence that a young man, who had been a member of the same NHS chapter, had been allowed to remain after he got his partner pregnant before they were married.[214] For good reason, the Third Circuit determined the evidence could "possibly be relevant to . . . whether [the decisionmakers'] explanation for their actions was pretextual."[215] The young man functioned as a classic "comparator," a mainstay of anti-discrimination litigation: a person who is similarly situated to the plaintiff except for a difference in a protected characteristic, and who is treated more favorably than the plaintiff.[216]

Mr. Savoie also relied successfully on a comparator—a straight administrator who had been caught having an affair—to convince the New Jersey appeals court to allow his claim to go forward.[217] The court also identified other evidence of pretext; it noted, for example, that a jury could find that administrators had jumped to conclusions without a proper investigation.[218] Plus, there was separate evidence of one high-ranking official's homophobia, including a previous comment she had made about disapproving of a gay colleague's "lifestyle."[219]

Not all plaintiffs have been so successful, including in cases that raise alarms. Ms. Crisitello, in her suit against St. Theresa School, was unsuccessful in trying to demonstrate pretext by comparing the school's treatment of her to its treatment of other employees, including divorced

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211 *Id.*

212 *Id.* at 1321.

213 917 F.2d 779, 784 (3d. Cir. 1990) ("Pfeiffer was dismissed not because she was pregnant but because she had engaged in premarital sexual activity. This is an important distinction . . . . Regulation of conduct of unmarried . . . members is within the realm of authority of the National Honor Society given its emphasis on leadership and character.").

214 *Id.* at 785–86.

215 *Id.* at 785.

216 *See* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 745–49 (2011).

217 Savoie v. Lawrenceville Sch., No. A-0288-10T1, 2013 WL 1492859, at *7, *13 (N.J. Super. Ct. App. Div. Apr. 12, 2013).

218 *Id.* at *13.

219 *Id.*

employees, who ran afoul of the school's sexual expectations.[220] In *Boyd v. Harding Academy of Memphis, Inc.*, the Sixth Circuit rejected a teacher's use of herself as her own comparator: Her school fired her for premarital sex it discovered as a result of her pregnancy, but it had not taken similar action when, previously, and still unwed, she had disclosed a miscarriage.[221] The Sixth Circuit dismissed this evidence as meaningless in light of Ms. Boyd's inability to identify *other* teachers who engaged in proscribed sexual conduct but were not punished.[222] Perhaps because of losses like these, lawyers and experts have publicly characterized lawsuits challenging punishment for consensual sex as, at best, an uphill battle, or at worst doomed to failure.[223]

Although the vast majority of cases concerning punishment for consensual sex have considered whether the defendant's given reason is pretextual, at least one has asked whether that reason is itself discriminatory. In *Gililland*, the nursing student punished by her instructors for her past work in pornography sued her school for sex discrimination and breach of contract—the contract in question being the school's own anti-discrimination policy.[224] On summary judgment, the primary issue was not whether the instructors had targeted Ms. Gililland because of some other, non-discriminatory reason, but instead whether the instructors' reason for disapproving of her professional history was itself discriminatory.[225] The college insisted that "employment history is not a protected characteristic," and so discrimination on that basis

220 *See* Crisitello v. St. Theresa Sch., 299 A.3d 781, 795–97 (N.J. 2023) (holding school did not discriminate on the basis of prenancy or sex when it fired teacher, putatively for premarital sex revealed by her pregnancy); Crisitello v. St. Theresa Sch., 242 A.3d 292, 297 (N.J. App. Div. 2020) (describing, at earlier juncture of same case, the teacher's discovery of information reflecting school's treatment of colleagues who had violated its ethics code, such as divorced teachers), *rev'd*, 299 A.3d 781 (N.J. 2023); Crisitello v. St. Theresa Sch., No. A-1294-16T4, 2018 WL 3542871, at *3, *5, *9 (N.J. Super. Ct. App. Div. July 24, 2018) (holding, at an earlier stage of the same case, that teacher was entitled to discovery into school's treatment of colleagues who violated other school rules related to sexual morals, including divorced employees).

221 *See* Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 414 (6th Cir. 1996).

222 *Id.*

223 *See, e.g.*, Boone, *supra* note 5, at 886 ("[E]mployment discrimination cases involving sex workers are very hard to win."); Jillian Keenan, *Can You Really Be Fired for Being Kinky? Absolutely.*, Slate (Oct. 28, 2014), https://slate.com/human-interest/2014/10/the-jian-ghomeshi-case-echoes-many-kinksters-worst-fears-being-outed-and-fired.html [https://perma.cc/9H5B-VUSK] (recounting experts' assessments that employees punished for kinky sex have no legal recourse); *see also* Brinley Hineman, *Can You Be Fired over Your Sex Life? Dave Ramsey Thinks So.*, Tennessean (Mar. 28, 2021), https://www.tennessean.com/story/news/local/williamson/2021/03/29/can-you-fired-over-sex-life-dave-ramsey-thinks-so/6980891002 [https://perma.cc/RQ2D-S43C] (discussing the relevance of *Chambers* to pending case against private company that fired worker putatively for premarital sex).

224 Gililland v. Sw. Or. Cmty. Coll. Dist. *ex rel* Bd. of Educ., No. 6:19-CV-00283-MK, 2021 WL 5760848, at *1, *7–8 (D. Or. Dec. 3, 2021).

225 *Id.* at *6.

was not actionable.[226] But the professor's "comment about 'unclassy women,'" the district court explained, "advanced a stereotype about the kind of woman appropriate for the nursing profession. . . . The heart of this analysis is not Plaintiff's employment history, but rather the kind of *woman* . . . that [the professor] perceived Plaintiff to be *because* of her employment history."[227]

But *Gililland* is an outlier avoiding a pretext analysis at summary judgment. And, as described, a pretext-based strategy has met mixed results.[228] As a general matter, plaintiffs' success has been limited to circumstances in which a plaintiff could establish any institutional rule—even one free of gendered baggage—discriminates. That is, they must identify similarly situated comparators, provide smoking gun statements by the disciplinarian indicating the given reason is pretextual, or otherwise meet one of the difficult doctrinal tests to plead and prove discrimination.[229] That is a difficult standard to meet, especially given the nature of the evidence plaintiffs would have to present. The facts that will render a colleague or classmate similarly situated will, generally, be private or hard to ascertain: that individual's sexual conduct and the potential defendant's knowledge (or lack thereof). Such intimate information may be significantly harder for a prospective plaintiff to discover—especially prior to discovery—than other kinds of facts often used to establish comparators, such as salaries, grades, or sanctions.

B. Critical Litigation Strategies

A demand for comparators and similar evidence might seem unremarkable. Surely not all punishment for consensual sex is sex discrimination,[230] and so plaintiffs and courts search for other indicia of bias. The focus on pretext and comparators flows from courts' and litigants' assumption that there is nothing troubling about a workplace or school punishing people for consensual sex of which the institution disapproves.[231] Sometimes, the assumed legitimacy of such punishment

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226 *Id.*

227 *Id.*

228 *See supra* notes 209–23 and accompanying text.

229 *See supra* notes 209–23 and accompanying text.

230 *See infra* Section IV.B.2.

231 A potential related explanation in some cases—which might speak less to courts' and litigants' failure to bring a critical eye to these policies—is that courts are hesitant to dissect the justifications given by religious defendants. Some of the cases where courts are quick to assume legitimacy, like *Pfieffer*, are against secular defendants. But plenty are against religious institutions. *See supra* notes 27–28 and accompanying text. And the law is unclear as to whether the First Amendment prohibition on courts' assessing "the truthfulness or validity of religious beliefs," DeMarco v. Holy Cross High Sch., 4 F.3d 166, 170 (2d Cir. 1993), also

is explicit, as in *Pfeiffer*, where the Third Circuit accepted that "[r]egulation of conduct of unmarried high school student members is within the realm of authority of the National Honor Society given its emphasis on leadership and character," and wholly distinct from pregnancy discrimination.[232] In other cases, the assumption of legitimacy is implicit when courts seek, at plaintiffs' urging, to determine whether the sexual conduct cited by the defendant was the "real" reason—a distinction that would only matter if the given reason was itself legitimate.[233]

There is a direct line, then, from uncritical approaches to institutional sexual regulation to high litigation standards. A more skeptical view, and one attuned to the "red flags" discussed above,[234] might serve plaintiffs well. A litigant or court primed to recognize the deeply gendered nature of workplace or school punishment for consensual sex might stop to ask: *Well, why do you want to punish the plaintiff for that? And is it worth the costs?* That approach might illuminate more plaintiff-friendly doctrinal doors. First, plaintiffs may be able to make out claims for discrimination based on direct evidence—such as facially discriminatory justifications for punishment—rather than relying on comparators. This argument roughly tracks the first "red flag" identified above: Some prohibitions on consensual sex are rooted in moralistic judgments about sex that are hard to extricate from sex-based stereotypes and animus.[235] Second, plaintiffs may be able to rely on the effects of sexual regulations with "discoverability problems," such as by using explicit disparate impact claims.

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requires courts to accept, uncritically, policies of religious institutions that are themselves discriminatory. For example, if a church said its religious tenets forbid it from hiring Black people, must a court treat that as a legitimate reason beyond the reach of Title VII? In the cases concerning punishment for consensual sex at issue in this Article, almost no courts have addressed this question head on. But *Ganzy*, at least, seemed to assume it was required to accept the school's given reason uncritically as a result of its religious nature, and could only consider whether the reason was "applied equally to both sexes." Ganzy v. Allen Christian Sch., 995 F. Supp. 340, 348–49 (E.D.N.Y. 1998). By contrast, in one case where the plaintiff was fired expressly for being pregnant out of marriage—and where the court addressed head-on whether religious institutions' belief-based policies are beyond reproach—a judge on the Northern District of California held "that defendants' dislike of pregnancy outside of marriage stems from a religious belief . . . does not automatically exempt the termination decision from Title VII scrutiny." Vigars v. Valley Christian Ctr., 805 F. Supp. 802, 808 (N.D. Cal. 1992).

232 Pfeiffer *ex rel.* Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 784 (3d Cir. 1990), *abrogated by* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 251 (2009) (holding that Title XI and § 1983 are both mechanisms to redress gender discrimination in schools).

233 *See supra* Section III.A.

234 *See supra* Section II.D.1.

235 *See supra* Section II.D.1.a.

1. Claims Based on Direct Evidence

For starters, plaintiffs should be able to make claims based on what is often called "direct evidence"—evidence that "proves the fact [of discriminatory intent] without inference or presumption."[236] As discussed above, when a plaintiff possesses such evidence, they do not need to provide comparators or engage with the burden-shifting *McDonnell Douglas* framework; the direct evidence, on its own, proves discrimination.[237]

As discussed above, a critical approach to institutional sexual regulation—one that does not take for granted that this regulation is reasonable or good—reveals that workplace and school objections to sexual conduct are sometimes expressly rooted in discriminatory stereotypes and animus, often intertwined with moralistic judgments about sex.[238] Put another way, some defendants' given reasons for punishing plaintiffs are direct evidence of discrimination. For example, in at least three cases—*Ganzy*, *Crisitello*, and *Boyd*— the employer fired an unmarried teacher because it believed her pregnancy rendered her a bad role model for students by broadcasting her premarital sexual activity.[239] These three employers, then, fired the plaintiffs not just because they had premarital sex, or just because they were pregnant, but because of both.

In all three cases—two of which failed—the central dispute concerned pretext.[240] But with facts like these described above, a court or jury should not need to ask whether the defendant's given reason is the real one, since it is, itself, discriminatory. Rather, the plaintiff should be able to establish a claim for facial discrimination on the basis of pregnancy. At the very least, such conduct should give rise to a mixed-motive claim that establishes discriminatory animus as a motivating factor of the challenged action, regardless of whether it is the but-for cause. Title VII expressly provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a

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[236] C.R. Div., U.S. Dep't of Just., *supra* note 200, § VI at 6 (quoting Coghlan v. Am. Seafoods Co., 413 F.3d 1090, 1095 (9th Cir. 2005)).

[237] *See* C.R. Div., U.S. Dep't of Just., *supra* note 200, § VI at 6–9 (describing how plaintiffs can establish anti-discrimination claims based on direct evidence); *supra* notes 197–98 and accompanying text (same).

[238] *See supra* Section II.D.1 (describing in more detail the way sexual regulations can be rooted in discriminatory stereotypes and animus).

[239] For a more in-depth discussion of these cases, see *supra* notes 108, 110–11.

[240] Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 411–12 (6th Cir. 1996); Crisitello v. St. Theresa Sch., 299 A.3d 781, 796–97 (N.J. 2023); Ganzy v. Allen Christian Sch., 995 F. Supp. 340, 360 (E.D.N.Y. 1998).

motivating factor for any employment practice, even though other factors also motivated the practice."[241] And such a claim is likely cognizable under Title IX.[242]

A critical consideration of defendants' given reasons as perhaps facially discriminatory may have made a particularly dramatic difference in a case like *Boyd*.[243] There, a school administrator was so bold as to identify its reason for firing the teacher as the fact that she was "pregnant and unwed."[244] If primed for a more critical assessment, the Sixth Circuit and district court might have been less quick on summary judgment to dismiss that justification as merely unartful phrasing of an objection to premarital sex, rather than an admission of cognizable discrimination.[245] Instead, those courts might have recognized that when the administrator said "pregnant," maybe he really meant pregnant—a more than plausible inference given historical exclusions of pregnant women from public life, rooted in distinctly sex-based animus and stereotypes.[246] This approach may also have been outcome determinative in *Crisitello*; the key question, left open by the New Jersey Supreme Court, would be whether its state religious exemption applies to employment decisions made in part based on the employer's religious tenets and in part based on another, potentially discriminatory, reason.[247]

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241 Title VII expressly provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (explaining a plaintiff may establish a Title VII claim where "gender played a motivating part in an employment decision," with qualifications); Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (holding Title VII forbade employers from refusing to hire women, but not men, with "pre-school-age children," though it would hire women without pre-school-age children); *see also* Bostock v. Clayton County, 590 U.S. 644, 662 (2020) (discussing *Philips v. Martin Marietta* and similar cases).

242 *See, e.g.*, Doe v. Univ. of Denver, 1 F.4th 822, 829 (10th Cir. 2021) (requiring sex be a "motivating factor" of adverse action in Title IX case); Doe v. Purdue Univ., 928 F.3d 652, 667 (7th Cir. 2019) (Barrett, J.) (same); Doe v. Columbia Univ., 831 F.3d 46, 53 (2d Cir. 2016) (citing Yusuf v. Vassar Coll., 35 F.3d 709, 715 (2d Cir. 1994)) (same); *see also* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 356 (2013) (assuming Title IX retaliation claims do not require but-for causation); Varlesi v. Wayne State Univ., 643 F. App'x 507, 518–19 (6th Cir. 2016) (similar). However, one appellate court has required a more stringent "but-for" standard. Sheppard v. Visitors of Va. State Univ., 993 F.3d 230, 236–37 (4th Cir. 2021) (quotations omitted).

243 Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 412 (6th Cir. 1996).

244 *Id.* at 414.

245 *See id.* ("We conclude that the district court was correct in holding that defendant articulated a legitimate, non-discriminatory reason by stating that it fired plaintiff Boyd not because she was pregnant, but for engaging in sex outside of marriage . . . .").

246 *See supra* Section II.B.1.

247 Crisitello v. St. Theresa Sch., 299 A.3d 781, 794 (N.J. 2023) ("If the plaintiff employee fails to raise a genuine dispute of material fact as to whether the challenged employment

An approach more attuned to the possibility of direct evidence may also have proven useful in cases where plaintiffs were nonetheless able to secure some degree of success. Courts have permitted claims like those in *Ganzy* to proceed past summary judgment on the basis that plaintiffs could establish a dispute of material fact as to whether their former employers' putative reasons were pretextual.[248] Fine. But those *plaintiffs* may have been entitled to summary judgment. If everyone agrees that a school fired a teacher because, in its view, her pregnancy rendered her a bad role model, then there is no dispute of fact that the plaintiff was fired because of her pregnancy. The case should never need to go to a jury.

Even *Gililland* fell prey to a version of the assumed-legitimacy trap. On summary judgment, the district court thoughtfully explained that a school administrator relied on impermissible stereotypes when she punished Ms. Gililland for being an "unclassy" woman.[249] The case proceeded to a trial, and the district court instructed the jury that, to make out her Title IX claim, Ms. Gililland had to establish not only that the plaintiff experienced discrimination because of her sex and "[t]hat the discrimination was a 'substantial' or 'motivating factor' for the Defendant's actions," but also that "similarly situated (a) male students and/ or (b) female students who conformed to gender stereotypes" were treated more favorably.[250] Ms. Gililland lost on her Title IX claim but won on breach of contract, and the jury awarded her 1.7 million dollars.[251]

The jury instructions reflected a thin understanding of stereotyping as no more than an explanation for why similarly situated comparators might be treated differently, rather than a sufficient basis on its own to find the defendant-college had engaged in sex discrimination. Specifically, the final element—a comparator—should be unnecessary. If a defendant discriminates against a student on the basis of sex, it should not matter whether other students, either men or women, were treated differently. And if similarly situated comparators were

decision relied solely on the religious tenets of the employer, then the affirmative defense stands as an absolute bar to liability.").

248 Ganzy v. Allen Christian Sch., 995 F. Supp. 340, 360 (E.D.N.Y. 1998) ("Issues of fact are presented. A jury is in at least as good a position as a judge or appellate court to determine whether it was pregnancy or fornication that caused the Defendant to dismiss the Plaintiff.").

249 Gililland v. Sw. Or. Cmty. Coll. Dist. *ex rel.* Bd. of Educ., No. 6:19-CV-00283-MK, 2021 WL 5760848, at *6 (D. Or. Dec. 3, 2021).

250 Jury Instructions at 1–16, Gililland v. Sw. Or. Cmty. Coll. Dist. *ex rel.* Bd. of Educ., 6:19-CV-00283-MK, 2021 WL 5760848 (D. Or. Dec. 3, 2021), ECF No. 132.

251 Samantha Cole, *How a Former Porn Performer Sued Her School for Discrimination—and Won*, Vice (July 25, 2022 9:00 AM), https://www.vice.com/en/article/93ab8d/former-porn-performer-sued-her-school-for-discrimination [https://perma.cc/T89F-4TDM].

treated differently, then a sex stereotyping theory does not do much work, because disparate treatment is apparent without it. Where the illumination of sex stereotyping is useful is where it helps explain how punishment discriminates *absent* comparators.[252] As *Bostock* reaffirmed, employment practices "based on sexual stereotypes" constitute but-for discrimination in violation of Title VII.[253] That should also go for Title IX, under which Ms. Gililland brought suit.[254] Even if the jury believed Ms. Gililland had not been able to identify any similarly situated comparators, she should have succeeded on her Title IX claim if the jury believed her discipline was motivated by sex stereotyping.[255]

One benefit of a "pure" stereotyping theory—under which the motivating force of a stereotype alone is sufficient—is that it provides a path forward for plaintiffs who lack comparators, or who, at the pleading stage, lack information about comparators they might find in discovery if given the chance. In *Back v. Hastings on Hudson Union Free School District*, for example, the Second Circuit recognized that a school's expectation that a female employee with children would either fail at her job or fail at mothering reflected discriminatory stereotypes even though she could not identify a male employee treated differently.[256] The gendered nature of the narrative script was legible even absent a comparator.

Another reason to resist the collapse of stereotyping theory into a comparator analysis is that men and women may *both* be punished for

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252 *See, e.g.*, Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 120–21 (2d Cir. 2004) (explaining that plaintiff who demonstrates adverse action was based on sex stereotypes does not also have to provide evidence of a male comparator).

253 Bostock v. Clayton Cnty., 590 U.S. 644, 673 (2020).

254 *See* Grabowski v. Ariz. Bd. of Regents, 69 F.4th 1110, 1117–18 (9th Cir. 2023) ("[W]e hold that discrimination on the basis of perceived sexual orientation is actionable under Title IX."). The author of this Article represented *amici* in the *Grabowski* appeal.

255 The jury's strange verdict is perhaps a reflection of these unduly demanding instructions. The two verdicts are puzzling because the contract claim was, essentially, a repackaged discrimination claim; the part of the contract the college violated was its anti-discrimination provision. Gililland v. Sw. Or. Cmty. Coll. Dist. *ex rel.* Bd. of Educ., No. 6:19-CV-00283-MK, 2021 WL 5760848, at *7–8 (D. Or. Dec. 3, 2021). Juries, of course, are fickle creatures and return bizarre results all the time. *Cf.* W.E. Shipley, Cumulative Supplement, *Inconsistency of Criminal Verdict as Between Different Counts of Indictment or Information*, 18 A.L.R.3d 259 (noting "juries have many reasons for delivering inconsistent verdicts, including lenity and compromise"). One potential explanation, though, is that the jury determined that Ms. Gililland could not meet the instruction's demanding formulation of the Title IX claim—perhaps, the jury believed she had not provided comparators, which the jury instructions seemed to demand—but still thought the defendant had engaged in discriminatory stereotyping, and so had violated its own policy against discrimination.

256 *Back*, 365 F.3d at 120–21; *see also* Tingley-Kelley v. Trs. of Univ. of Pa., 677 F. Supp. 2d 764, 778 (E.D. Pa. 2010) (finding similar evidence of impermissible, sex-based motive).

the very same conduct based on distinct narrative scripts. That means that, contrary to the *Gililland* instructions, a plaintiff and her male comparator might be similarly mistreated but they should both be able to make out sex discrimination claims. For example, as Katie Eyer notes, "in cases involving family responsibilities discrimination" both men and women are often stereotyped.[257] A working mother may be "denied a promotion because she is . . . stereotyped as being uncommitted to the job," and a working father might be "penalized . . . for taking time off to care for a newborn []because of the stereotype that men are not supposed to engage in caregiving."[258]

We might imagine that punishment for consensual sex would be particularly prone to such "double stereotyping" given how much sex stereotypes shape judgments of sexual conduct.[259] It is plausible that Ms. Gililland's school would have also disapproved of a male student with a history in sex work. It might have even punished him similarly. But, given the distinctly gendered stereotype—a "classy woman"—to which Ms. Gililland was expected to conform, it is easy to imagine that the stereotype-driven reasons the school might disapprove of a male former sex worker would be different from the stereotype-driven reasons it disapproved of her, and instead related to stereotypes of male nurses that would not have come to bear on Ms. Gililland. Consider, for example, a common stereotype of male nurses as sexual threats to their patients.[260] That stereotype is rooted in a stereotype that men as a whole, not just nurses, cannot control their sexual impulses.[261] A nursing college, then, might treat a male student poorly because it viewed his experience in sex work as confirming a stereotype of hyper-sexuality and deviance—not because he was not "classy." That Ms. Gililland was also punished would not mean he could not also state a claim. And, by like token, the fact that Ms. Gililland's male comparator was similarly punished should not be fatal to her suit. Both students would have been punished due to illegal sex stereotyping, and both would have sex discrimination claims.

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257 Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 Va. L. Rev. 1621, 1667 (2021). *Bostock* made clear that equally punishing men and women for their failure to conform to sex stereotypes is not a defense to Title VII liability, but rather a way to "double[] it." *Bostock*, 590 U.S. at 659.

258 *Id*.

259 *See supra* Part II.

260 Mark J. Baker, Murray J. Fisher & Julie Pryor, *Potential for Misinterpretation: An Everyday Problem Male Nurses Encounter in Inpatient Rehabilitation*, 28 Int'l J. Nursing Prac. 6–7 (2021).

261 *Id.*

2. *Claims for (or Related to) Disparate Impact*

The discoverability problems posed by some work and school rules against sex—their tendency to expose certain groups to disproportionate punishment—call out for disparate impact claims. Yet few litigants have pressed that theory of liability. For example, disparate impact is largely absent from the set of suits challenging punishment of women and girls, putatively for premarital sex, when they become pregnant.[262] Even though these policies present an obvious threat of disparate enforcement due to discoverability problems, plaintiffs have overwhelmingly pressed disparate treatment claims alone.[263] Some of this is explicable given bars on disparate impact claims under the Equal Protection Clause,[264] and, post-*Sandoval*, under Title IX.[265] But the paucity of disparate impact claims under Title VII, and under Title IX pre-*Sandoval*,[266] is still puzzling.

One explanation is the assumption that consensual sex is a perfectly good, not at all suspect, reason to punish a student or employee. Recall that, under Title VII, a disparate impact is permissible if the defendant can demonstrate the responsible policy is a "business necessity," related to a "legitimate employment goal."[267] If a plaintiff (or her lawyer) assumes the defendant's sexual prohibitions are reasonable, a disparate impact claim might seem like a dead end. Conversely, a party who presses a disparate impact claim is likely to force the question lurking

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262 *See generally, e.g.*, Crisitello v. St. Theresa Sch., 299 A.3d 781, 789 (N.J. 2023) (considering case presenting disparate treatment, but not disparate impact, claims); Hamilton v. Southland Christian Sch., 680 F.3d 1316, 1320 (11th Cir. 2012) (same); Cline v. Cath. Diocese of Toledo, 206 F.3d 651 (6th Cir. 2000) (same); Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410 (6th Cir. 1996) (same); Redhead v. Conf. of Seventh-Day Adventists, 440 F. Supp. 2d 211 (E.D.N.Y. 2006), *adhered to on reconsideration*, 566 F. Supp. 2d 125 (E.D.N.Y. 2008) (same); Ganzy v. Allen Christian Sch., 995 F. Supp. 340 (E.D.N.Y. 1998) (same); Dolter v. Wahlert High Sch., 483 F. Supp. 266 (N.D. Iowa 1980) (same); *see also infra* notes 272–75 and accompanying text.

263 For example, in 2015, the American Civil Liberties Union settled a suit that included a disparate impact claim against a private charitable organization for firing a pregnant worker for having premarital sex. *See* Order, Maudlin v. Inside Out, Inc. 3:13-cv-00354, (Feb. 17, 2015), ECF No. 35; Compl., Maudlin v. Inside Out, Inc. 3:13-cv-00354, (Oct. 1, 2013), ECF No. 35. The case did not result in an opinion regarding the disparate impact claim against the employer.

264 U.S. Const. amend. XIV, § 2; *see supra* note 161.

265 *See supra* note 204 and accompanying text.

266 At least one Title IX case pre-*Sandoval* considered a disparate impact claim. *See* Chipman v. Grant Cnty. Sch. Dist., 30 F. Supp. 2d 975, 976–78, 980 (E.D. Ky. 1998) ("[The plaintiffs'] probability of successfully proving pregnancy discrimination is very high using either a disparate impact or disparate treatment method of proof").

267 U.S. Dept. of Just., C.R. Div., *Title VI Legal Manual, Section VII – Proving Discrimination – Disparate Impact*, https://www.justice.gov/crt/fcs/T6Manual7 [https://perma.cc/9BMJ-BSP6] (internal citations omitted).

in the background of these cases: Is the policy under which the plaintiff was punished worth the costs?

It is difficult to know how courts might answer that question if posed directly. Courts that have implicitly assumed the legitimacy of such policies in pretext cases might reach a different result if confronted with the question straightforwardly.[268] Moreover, not every reasonable policy is *necessary*. In *Chambers*, the Eighth Circuit blessed a related policy against out-of-wedlock pregnancy as a business necessity.[269] But judicial attitudes toward premarital sex and pregnant working women have likely changed since 1987. Whether the same can be said for sex work or kink is another question. And, today, institutions with the strongest business necessity arguments are likely those that will often be immune from suit anyway because of the broadening ministerial exemption: religious organizations.[270]

Importantly, to the extent that business necessity defenses will require plaintiffs to get to the heart of the matter—challenging the validity of the policy itself, rather than how it is applied—that is a good thing. Indeed, it is an opportunity to explain the deeply gendered and unjust nature of these policies without needing to meet a demanding doctrinal test to prove disparate treatment.

Even where formal disparate impact claims are unavailable, or unsuccessful, concern for effects may resonate with courts. Some courts have, in considering disparate treatment challenges to punishment for consensual sex, recognized the risk of unequal results, but have failed to stick the doctrinal landing by explaining why, exactly, those results matter. *Ganzy* was acutely attuned to the cumulative effects of such policies on working women,[271] but it did not explain how those effects informed its determination that the defendant's given reason for firing the plaintiff-teacher—her premarital sexual activity—might be pretextual.[272] *Cline v. Catholic Diocese of Toledo* is similar. That Sixth Circuit appeal arose from a claim brought by yet another woman, Leigh Cline, who was fired from her Catholic school job after her employer learned, from her pregnancy, "that she had engaged in premarital sex."[273] In assessing whether the defendant's given reason was pretextual, the

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268 *See supra* Section III.B.

269 *See supra* note 150 and accompanying text.

270 *See supra* note 23.

271 *See supra* Section II.A.

272 *See* Ganzy v. Allen Christian Sch., 995 F. Supp. 340, 359 (E.D.N.Y. 1998) (noting that while the law has protected women from discrimination in the workplace, it also acknowledges the right of people to discourage extramarital sex).

273 Cline v. Cath. Diocese of Toledo, 206 F.3d 651, 656 (6th Cir. 2000).

court focused on the inherent problems of policing sexual activity by monitoring employees' pregnancies. It wrote:

> [A] school violates Title VII if, due purely to the fact that '[w]omen can become pregnant [and][m]en cannot,' it punishes only women for sexual relations because those relations are revealed through pregnancy. In other words, a school cannot use the mere observation or knowledge of pregnancy as its sole method of detecting violations of its premarital sex policy.[274]

The court did not explain why, exactly, such selective monitoring would serve as evidence of discriminatory motive, rather than, at most, suggesting a claim for disparate impact that the plaintiff never brought. That weakness matters: The New Jersey Supreme Court rejected the same argument, traceable through citations back to *Cline*, in *Crisitello*.[275] A better doctrinal explanation may have strengthened *Cline*'s usefulness for the development of the law.

So, where disparate impact is unavailable, plaintiffs might try to bridge the intuitive gap between disparate impact and disparate treatment with more doctrinal rigor than *Ganzy* and *Cline*. One strategy would be an argument in line with the intuition, mentioned above,[276] that defendants betray animus when they disregard the clear risks to women and queer people posed by regulation of sex. The logic would go something like this: An employer's ban on premarital sex will inevitably have an unfair impact on women, and specifically pregnant women, if the employer makes no effort to detect the conduct other than passively observing who is pregnant. If an employer cared at all about women broadly and pregnant people specifically—if it cared at all about sex equality—it would either toss the policy or make a greater effort to police men's premarital sex and so at least equalize the impact. By failing to do so, then, the employer betrays its devaluation of women and pregnant people's interests, a form of bias.

There may be room for anti-discrimination plaintiffs to argue, in the equal protection context, that "failure to account for the interests of a disfavored group counts as a discriminatory purpose."[277] The Supreme Court's free exercise jurisprudence has, in recent years, recognized that the devaluation of the rights and interests of religious people

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274 *Id.* at 667 (citations omitted).

275 *See* Crisitello v. St. Theresa Sch., 299 A.3d 781, 796–97 (N.J. 2023).

276 *See supra* note 179 and accompanying text.

277 Laura Portuondo, *Effecting Free Exercise and Equal Protection*, 72 Duke L.J. 1493, 1541 (2023).

may trigger heightened scrutiny.[278] Given that free exercise and equal protection jurisprudence developed in parallel,[279] each case line citing to the other along the way, a friendly court might be willing to apply recent developments in the former to the latter.[280]

Another potential, if unexpected, source of authority for this theoretical tie between disparate impact and disparate treatment might be Title IX and Title VII lawsuits brought by men who claim they were punished for committing sexual harassment due to anti-male discrimination. For example, courts have permitted these plaintiffs to get around ordinary doctrinal obstacles to proving the defendant's actions were motivated by sex.[281] In doing so, courts have looked to background indicia that the punishment in question was part of a broader gendered story—including allegations that those accused of and punished for sexual harassment are mostly men.[282] Indeed, in one case against Oberlin College, that disparate impact was the centerpiece of the Sixth Circuit's analysis.[283] Most people accused of harassment at the school were men.[284] So, the court reasoned, the alleged procedural irregularities in the college's investigation of the plaintiff were plausibly attributable to anti-male bias, despite the absence of any indicia of discrimination with respect to his particular punishment.[285] In those "reverse discrimination" cases, there is reason to be skeptical of the import of such disparate effects, especially given the obvious explanation that men are disproportionately accused of sexual harassment because they disproportionately commit sexual harassment.[286] But, underneath the flawed application, there is an intuitive truth: Where a rule is overwhelmingly applied against one sex, there is reason to take a closer look for lurking animus. And if the rule is being applied in damaging ways, it is worth asking whether the defendant might be indifferent with those results because of its lack of concern for those disproportionately affected.

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278 *Id.* at 1519–37.

279 *See id.* at 1502.

280 *But see id.* at 1564 (noting "that the [Supreme] Court may be unwilling to expand its equal protection doctrine in the short term" in the manner described).

281 Bolger, Brodsky & Singh, *supra* note 180, at 757–75.

282 *Id.* at 760–62.

283 *Id.* (discussing Doe v. Oberlin Coll., 963 F.3d 580, 586 (6th Cir. 2020)).

284 *See Oberlin Coll.*, 963 F.3d at 587.

285 *Id.*

286 Bolger, Brodsky & Singh, *supra* note 180 at 763–64 ("Over 95% of sexual assaults are perpetrated by males, while fewer than 3% are females.") (internal citations omitted). Also, there is no reason to attribute any animus to a school based on who its students report. *Id.*

IV
Bringing Punishment for Consensual Sex to Contemporary Critiques of Sexual Regulation

The three preceding sections endeavored to explain that placing punishment for consensual sex in the context of a broader history and practice of discriminatory sexual regulation may inure to the benefit of plaintiffs challenging these practices. At the same time, these cases would be an illuminating addition to ongoing debates about work, school, sex, and punishment.[287] These conversations focus almost entirely on institutional punishment of nonconsensual sex and the threat that punishment poses to men who have sex (or try to have sex) with women.[288] In doing so, critics have failed to recognize that punishment for consensual sex is a central part of sexual regulation, their object of critique, and that straight men are not the only ones sanctioned. That narrow view is not only factually incomplete but leads to a funhouse vision of gendered power. This Part briefly maps current debates and then proposes an expanded frame and more fruitful topic: the broader scheme of sexual regulation by workplaces and schools, which seeks to discover and sanction both nonconsensual and consensual sex, and which has been historically and continuously weaponized to hurt marginalized people. That approach would serve a factually and theoretically corrective function, helping critics diagnose problems, identify solutions, and connect across movement schisms.

A. Current Controversies in Workplace and School Sexual Regulation

As noted, debates about workplace and school sexual regulation have focused on the substance and enforcement of institutional harassment policies, some of which are required by anti-discrimination law.[289] On and off for decades, workplace and school efforts to fulfill these mandates have been criticized as going "too far," stamping out not just harassment but harmless or affirmatively valuable sexual conduct.[290]

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287 *See infra* Section IV.A.

288 *See infra* Section IV.B.

289 *See* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 75 (1992) (recognizing Title IX claim against schools for sexual harassment of student by teacher); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (recognizing Title VII claim against workplace for sexual harassment of worker by supervisor); Brodsky, *supra* note 142, at 38 (describing obligations that civil rights law imposes on workplaces and schools to prevent and address sexual harassment).

290 *See* Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U. L. Rev. 1029, 1047–48, 1048 n.116 (2015).

Plenty of that criticism has come from self-identified feminists.[291] That is, debates about workplace and school sexual regulation have been as much between feminists as about them.

Feminist anti-harassment movements of the last decade have reinvigorated debates about sexual regulation, though the substance of disagreement has shifted. First, around 2011, campus anti-rape organizing gathered steam.[292] Student efforts to address sexual violence at colleges and universities were nothing new, but they gained momentum through social media and cross-campus connections.[293] These efforts also spurred and were spurred by new efforts by the Obama administration to encourage schools to fulfill their obligations to survivors under Title IX,[294] which had long required education programs and activities that receive federal funds to prevent and address sexual harassment, including sexual assault.[295] In response to these efforts, some schools began, for the first time, to develop accessible reporting systems, investigate sexual harassment, and, at times, levy sanctions.[296]

These developments inspired significant criticism. Critics believed that, under pressure from the federal government, schools were now biased against accused harassers, understood in the public imagination to be men (as they usually, but not always, were).[297] Some specifically

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[291] *See, e.g.*, Schultz, *supra* note 19 (raising concerns that workplace sexual harassment policies may punish innocuous conduct); *see also* Janet Halley, *Sexuality Harassment*, *in* Directions in Sexual Harassment Law 182, 183 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003) (raising concerns that expanding "sex harassment enforcement" may become "a mechanism of social control that pro-gay and feminist thought, alike, should find alarming"); *see generally* Katie Roiphe, The Morning After: Sex, Fear, and Feminism on Campus (1993) (discussing feminist anti-rape efforts on college campuses as puritanical, anti-sex campaigns).

[292] I participated in this movement, including as a co-founder of an organization called Know Your IX. *See* Brodsky, *supra* note 142, at 3–4.

[293] Sherry Boschert, 37 Words: Title IX and Fifty Years of Fighting Sex Discrimination 184–243 (2022).

[294] *See id.* at 202–04.

[295] *See, e.g.*, Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633, 649, 653–54 (1999) (requiring schools to take some action in response to peer sexual harassment to avoid liability under Title IX); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998) (same, for staff-on-student harassment); Off. for C.R., U.S. Dep't of Educ., *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,* Off. for C.R., U.S. Dep't of Educ. (Jan. 2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [https://perma.cc/UML4-N2LA] (describing school obligations to address sexual harassment of students).

[296] Brodsky, *supra* note 142, at 131.

[297] *See, e.g.*, David G. Savage & Timothy M. Phelps, *How a Little-Known Education Office Has Forced Far-Reaching Changes to Campus Sex Assault Investigations*, L.A. Times (Aug. 17, 2015, 3:00 AM) https://www.latimes.com/nation/la-na-campus-sexual-assault-20150817-story.html#:~:text=With%20a%20strong%20mandate%20from,under%20investigation%20for%20allegedly%20failing [https://perma.cc/HD22-KDXD] (critiquing school disciplinary procedures for sexual harassment as unfair to men, and blaming the federal government);

believed that innocent men were now being punished for consensual sex their female partners later regretted or came to think, wrongly, was rape.[298] This critique brought together curious bedfellows, including men's rights activists[299] and liberal-left academics who identify as feminists.[300] And the backlash found a sympathetic audience in the Trump administration. In September 2017, Trump's Secretary of Education Betsy DeVos revoked a key Obama-era guidance on schools' obligations under Title IX.[301] Three years later, DeVos's Department of Education implemented Title IX regulations that served two primary functions: (1) to provide unique procedural protections to students and school staff accused of sexual harassment, unavailable to people accused of other kinds of disciplinary infractions, and (2) to adopt a more school-friendly liability standard that required actual knowledge and deliberate indifference, rather than constructive knowledge and negligence.[302]

A month after DeVos revoked the Obama-era Title IX guidance, the *New York Times* published a story about Harvey Weinstein's serial predation on women in Hollywood,[303] and Me Too (re)emerged.[304] The

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Emily Yoffe, *The College Rape Overcorrection*, Slate (Dec. 8, 2014) https://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html [https://perma.cc/Y3L9-TNH7] (same).

298 *E.g.*, Janet Halley, *The Move to Affirmative Consent*, 42 Signs, J. Women Culture & Soc'y 257, 259 (2016); Jed Rubenfeld, *Mishandling Rape*, N.Y. Times (Nov. 14, 2014), https://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html [https://perma.cc/UCX5-THJ8].

299 Brodsky, *supra* note 142, at 197–202 (describing men's rights activists' critique of anti-sexual harassment policies).

300 *E.g.*, Lara Bazelon, *I'm a Democrat and a Feminist. And I Support Betsy DeVos's Title IX Reforms*, N.Y. Times (Dec. 4, 2018), https://www.nytimes.com/2018/12/04/opinion/-title-ix-devos-democrat-feminist.html [https://perma.cc/HH2D-C37M] (supporting Title IX reforms by pointing out a lack of due process in the current regime); Laura Kipnis, Unwanted Advances: Sexual Paranoia Comes to Campus (2016); Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 Harv. L. Rev. F. 103, 104–16 (2015); Nancy Gertner, *Sex, Lies, and Justice*, Am. Prospect (Jan. 12, 2015, 4:08 PM), https://prospect.org/justice/sex-lies-justice [https://perma.cc/VZ6U-PRQE].

301 Valerie Strauss, *DeVos Withdraws Obama-Era Guidance on Campus Sex Assault. Read the Letter.*, Wash. Post (Sept. 22, 2017, 12:37 PM), https://www.washingtonpost.com/news/answer-sheet/wp/2017/09/22/devos-withdraws-obama-era-guidance-on-campus-sexual-assault-read-the-letter [https://perma.cc/G4EU-C2Q3].

302 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30032, 30053–54 (May 12, 2020) (codified at 34 C.F.R. pt. 106); *see also* Brodsky, *supra* note 142, at 144–45 (discussing regulations).

303 Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. Times (Oct. 5, 2017), nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html [https://perma.cc/UX5U-GYTA].

304 *See, e.g.*, *#MeToo: A Timeline of Events*, Chi. Trib. (Feb. 4, 2021), https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html [https://perma.cc/2Y3H-86YC].

resultant outpouring of stories about workplace sexual harassment, both from individuals and through additional investigative reporting, forced a reckoning about workplace sexual harassment. Several public figures, almost all men, were fired or forced to resign due to sexual harassment allegations.[305] Many assumed the treatment of these famous men reflected new patterns in ordinary workplaces,[306] though there has been little evidence to either confirm or disprove that account.[307]

These developments, too, spurred criticism and backlash. From the jump, many critics worried that Me Too would "[go] too far."[308] They feared men would be punished for non-harassing conduct.[309] They warned anti-harassment efforts posed a threat to benign, even pleasurable, practices, such as flirting.[310] Once again, the critics were a mix of left and right, feminists and non-feminists.[311] And, once again, the backlash found concrete form, including in a spate of defamation lawsuits brought against women who had spoken publicly about their experiences with sexual abuse during the height of Me Too.[312]

Throughout these debates, both in their earlier iterations and the latest wave, the central figure of sympathy has been the man punished for pursuing sex with women. Some critics, including Lisa Duggan and Vicki Schultz, have raised concerns about the treatment of queer people,

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305 *See, e.g.*, Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. Times (Oct. 29, 2018), https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html [https://perma.cc/2J8G-FM9K]. Many of these men have since returned to public life. *See* Ashley Fetters Maloy & Paul Farhi, *Five Years On, What Happened to the Men of #MeToo?*, Wash. Post (Oct. 16, 2022, 3:16 PM), https://www.washingtonpost.com/lifestyle/2022/10/16/metoo-men-what-happened [https://perma.cc/FV74-QZQY].

306 Brodsky, *supra* note 142, at 202; *see also* Daphne Merkin, *Publicly, We Say #MeToo. Privately, We Have Misgivings*, N.Y. Times (Jan. 5, 2018), https://www.nytimes.com/2018/01/05/opinion/golden-globes-metoo.html [https://perma.cc/M3BM-QTTY].

307 For an explanation of why we have more public accounts of ordinary students disciplined for sexual harassment than non-celebrity workers, see Brodsky, Sexual Justice, at 102–03.

308 Brenda Cossman, The New Sex Wars: Sexual Harm in the #MeToo Era 17 (2021).

309 *See id.* at 17–24.

310 *See* Merkin, *supra* note 306.

311 *See* Cossman, *supra* note 308, at 21–24 (discussing range of critics from across the political spectrum).

312 *E.g.*, Madison Pauly, *Trump's New Defamation Suit Against E. Jean Carroll Is a Silencing Tactic*, Mother Jones (June 29, 2023), https://www.motherjones.com/politics/2023/06/donald-trump-e-jean-carroll-defamation-lawsuit-rape [https://perma.cc/WB98-VXNJ]; Madison Pauly, *She Said, He Sued*, Mother Jones (Mar.–Apr. 2020), https://www.motherjones.com/crime-justice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault [https://perma.cc/CHG3-NNCG].

whom they feared may be targeted under anti-harassment policies.[313] And, of course, not all people accused of sexual harassment are men, and not all alleged victims are women.[314] But the public accounts that have spurred and been lifted up by critics have overwhelmingly concerned the punishment of straight men, and it is these men that public debates imagine as those vulnerable to accusation and sanction.[315] In the wake of Christine Blasey Ford's accusations against then-judge Brett Kavanaugh, Donald Trump, Jr. told reporters that it was a "scary" time out there, and they asked, in turn, if he was more concerned for his sons or daughters.[316] Despite the shorthand, the substance of the question was clear: Are you more worried your sons will be falsely accused of rape, or that your daughters will be raped? Don Jr. chose his sons.[317] Some feminist critics metaphorically did the same, choosing as their primary concern "the impact of anti-rape campaigning for men's sexuality," especially "normative masculine sexual behaviour."[318]

That gendered story infiltrated the judiciary, too. In Title IX and Title VII lawsuits brought by men punished for sexual harassment, courts were quick to conflate alleged bias against people accused of sexual harassment—who are not a protected class—with bias against men, who are.[319] Many, though not all, courts uncritically accepted plaintiffs' accounts that Obama-era Title IX enforcement efforts spurred schools to engage in specifically *anti-male* bias, despite the fact that the identified guidance documents and enforcement actions were facially sex-neutral.[320] In doing so, courts reflected not law but a potent public story: Men and boys are under attack by the sex police.

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313 *See* Lisa Duggan, *Bad Girls: On Being the Accused*, Bully Bloggers (Dec. 21, 2017), https://bullybloggers.wordpress.com/2017/12/21/bad-girls-on-being-the-accused [https://perma.cc/KYH3-FP2V]; Vicki Schultz, *The Sanitized Workplace*, 112 Yale L.J. 2061, 2063–69 (2003). There is extensive literature about how the criminalization of queer sex has gained ostensible justification from fear of sexual violence. *See, e.g.*, Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* Culture, Society and Sexuality: A Reader 151–54 (Richard Parker & Peter Aggleton eds., 2007).

314 Bolger, Brodsky & Singh, *supra* note 180, at 759 & n.71.

315 Brodsky, *supra* note 142, at 197–202.

316 Lindsey Bever, *Trump Jr. Says Wave of Sexual Assault Accusations Makes Him Worry for Sons More than Daughters*, Wash. Post (Oct. 1, 2018, 3:12 PM), https://www.washingtonpost.com/politics/2018/10/01/trump-jr-says-wave-sexual-assault-accusations-make-him-worry-sons-more-than-daughters [https://perma.cc/82U9-SFE5].

317 *Id.*

318 Lise Gotell, *Reassessing the Place of Criminal Law Reform in the Struggle Against Sexual Violence: A Critique of the Critique of Carceral Feminism*, *in* Rape Justice: Beyond the Criminal Law 65–66 (Anastasia Powell, Nicola Henry & Asher Flynn eds., 2015).

319 *See* Bolger, Brodsky & Singh, *supra* note 180, at 759–61 (discussing a number of cases where the courts have made such an assumption).

320 *Id.* at 777–84.

B. The Benefits of Expanding the Frame

Rather than focusing on nonconsensual sex alone, good faith critics should take as their subject the full range of workplace and school sexual regulation, including regulation of consensual sex. That broader view is more accurate and rightly positions women, girls, and queer people as central objects of concern. Such a corrected conception of who is threatened by institutional sexual regulation is functionally useful to avoid bad law and policy and to straighten out misaligned feminist priorities. The broader frame also illuminates a central irony in sex equality's relationship to punishment.

1. Promoting Accuracy and Illuminating Gendered Powers

Any account of workplace and school discipline for sex is factually incomplete and likely inaccurate if—as with nearly all such debates today—it imagines that these institutions only seek to sanction nonconsensual sex. Consider, for example, claims that the last decade has marked the emergence of a novel "sex bureaucracy" on college campuses, to use the term coined by Jeannie Suk Gersen and Jacob Gersen in their influential article of the same name.[321] It may be true that, in recent years, institutions of higher education—and, to a lesser extent, K-12 schools[322]—have expanded their efforts to receive and investigate reports of sexual harassment.[323] But, from a historical perspective, we are hardly at a high-water mark for schools' bureaucratic management of their students' sex lives. By some measures, the opposite is true. Many, almost surely most, colleges and universities have dropped once-common rules forbidding men and women from visiting each other's dorms or otherwise spending time together unsupervised.[324] Rules like these spurred significant protests in the 1960s: The legendary campus unrest of that decade stemmed not only from students' concerns about the war in Vietnam and other social injustices, but also from their desire to get laid.[325] For much of the twentieth century, many schools also

321 Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 Calif. L. Rev. 881, 890–91 (2016).

322 *See* Erica L. Green, *'It's Like the Wild West': Sexual Assault Victims Struggle in K-12 Schools*, N.Y. Times (May 11, 2019), https://www.nytimes.com/2019/05/11/us/politics/sexual-assault-school.html [https://perma.cc/3V9C-9VZZ].

323 *See* Brodsky, *supra* note 142, at 130–31 (discussing school efforts to address sexual harassment since 2011).

324 *See* Rogers Worthington, *Coed Dorms Now the Norm*, Chi. Trib. (Mar. 12, 1996), https://www.chicagotribune.com/1996/03/12/coed-dorms-now-the-norm [https://perma.cc/29VE-6AZC] (noting that, by 1996, most college dorms were coed).

325 Troy Patterson, *The Guerrilla Skirmishes of the Sexual Revolution*, Slate (May 9, 2013, 4:20 PM), https://slate.com/human-interest/2013/05/the-ivy-league-spring-riot-of-1963-the-first-student-protests-of-the-sexual-revolution.html [https://perma.cc/6R7G-FTAB].

excluded queer teachers—and, as described above, teachers who had premarital sex—as unfit for the profession, likely at higher rates than today.[326]

A similar flaw emerges in popular accounts that laws and social movements have spurred workplaces to regulate the sex lives of their employees—that Title VII and Me Too are the reasons a boss may interfere with a worker's pleasure. That may, sometimes, be true. But, as cases discussed above demonstrate,[327] employers were excluding women from the workforce based on their sexual conduct (and resulting pregnancies) well before courts established anti-harassment obligations under civil rights law.[328] The only new feature might be *which* workers perceive their sexual conduct to be regulated.

Historical inaccuracies are not the only errors ripe for correction. A broader view of sexual regulation also invites a sounder power analysis. To put it bluntly, critics should remember that straight men are not the sole victims of sexual regulation, and that such regulation is often an exercise of gendered power that straight men disproportionately possess.

Stories of punishment that dominate current debates begin with a male worker or student accused of sexual abuse, usually by a woman. It bears repeating that not all accused harassers are men and not all survivors, or alleged survivors, are women, but the public narrative is starkly gendered in this way.[329] The story goes that after an accusation, an institution investigates and ultimately punishes the accused man, perhaps firing or suspending him. With a narrow focus on accusation and discipline, a narrative has emerged, including in the courts, of disciplinary systems designed to punish helpless men.[330] That is no hyperbole. Consider, again, the recent case line of Title IX and Title VII lawsuits brought by male students and professors who claim they were disciplined for sexual harassment by

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326 Murray, *supra* note 98, at 1466.

327 *See supra* notes 158, 209–15 and accompanying text.

328 The Supreme Court held that sexual harassment is a form of sex discrimination forbidden by Title VII in 1986. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986). The *Andrews* case, discussed *supra*, was decided by the district court in 1973, thirteen years earlier. Andrews v. Drew Mun. Separate Sch. Dist., 371 F. Supp. 27, 28 (N.D. Miss. 1973), *aff'd*, 507 F.2d 611 (5th Cir. 1975). The next year, the Supreme Court decided *Cleveland Board of Education v. LaFleur*, a case challenging a school policy that required pregnant teachers to take leave around halfway through their pregnancies. 414 U.S. 632, 634–38 (1974).

329 *See supra* note 313 and accompanying text; *see also* Bolger, Brodsky & Singh, *supra* note 180, at 759 (noting that "not all accused students are men, and victims of harassment include both men and women").

330 *See supra* notes 316–20 (outlining the narrative that sexual harassment grievance procedures are harmful to men and boys).

their schools, usually a college or university, because they are men.[331] The premise of each of these lawsuits is that, because of external pressures like the threat of federal enforcement and bad press, schools have systematically discriminated against men accused of sexual harassment.[332] The primary bad, powerful actors in these anti-discrimination cases are the federal government and school administrators.[333] But this account also presents *women* as exercising significant power over men, often using institutional and political levers.[334] They are the ones who schools fear will file legal actions or contact the press.[335] They are the ones on whose behalf both schools and the federal government ostensibly act.[336]

There are glimpses of truth in this story. There is no reason to doubt that some men accused of sexual harassment have been mistreated by their schools or workplaces.[337] And, to be sure, women and other survivors have organized to amass more political power than they enjoyed previously.[338] As feminists begin to "walk the halls of power"—an "immense achievement[]"—it is essential to bring a critical eye to

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331 *See* Bolger, Brodsky & Singh, *supra* note 180, at 755–57 (describing various circuits' approaches to sex discrimination claims brought by men).

332 *Id.* (describing what constitutes anti-male animus in the case law).

333 *See id.* at 775–85.

334 *See, e.g.*, *Doe v. Columbia Univ.*, 831 F.3d 46, 57 (2d Cir. 2016) (discussing how "[u]niversity decision-makers and investigators were motivated to favor the accusing female over the accused male, so as to protect themselves and the University from accusations that they had failed to protect female students from sexual assault"); Compl., *John Doe v. Hamilton Coll.*, No. 617-cv-01202, ECF No. 1 (Oct. 30, 2017), https://storage.courtlistener.com/recap/gov.uscourts.nynd.112072/gov.uscourts.nynd.112072.1.0.pdf [https://perma.cc/H66V-36H9] (alleging male student was "the victim of a vicious and vindicitive campaign" by female feminist classmates who used institutional mechanisms and public pressure on institutional actors to "get him expelled from" college).

335 *See, e.g.*, Nancy Gertner, *Sex, Lies, and Justice*, Am. Prospect (Jan. 12, 2015, 4:08 PM), https://prospect.org/justice/sex-lies-justice [https://perma.cc/VZ6U-PRQE] (arguing that the preponderance of the evidence standard used in school discipline, coupled with the media pressure, "effectively creates a presumption in favor of the woman complainant [because if] you find against her, you will see yourself on *60 Minutes* or in a [federal] investigation").

336 *See, e.g.*, Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 Harv. L. Rev. F. 103, 103 (2015) ("[A]s feminists issue a series of commands from within the federal government about what the problem of campus sexual violence is and how it must be handled, and as they build new institutions that give life to those commands, they become part of governmental power.").

337 Brodsky, *supra* note 142, at 79–83 (discussing procedural problems with some schools' and workplaces' investigations of sexual harassment allegations levied against men).

338 *See, e.g.*, Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 Yale L.J.F. 281, 302 (2016) (noting "the power and influence that . . . student violence-survivors-turned-activists-and-policymakers have developed over the last several years").

their efforts to determine "which elements are emancipatory and which may, after all, be mistakes."[339]

But the narrative of powerful, complaining women and powerless, accused (presumptively heterosexual) men is, nonetheless, fatally inaccurate and incomplete. For one thing, it significantly overstates men's vulnerability to punishment while also overstating institutional concern for women.[340] The described account ignores the reality of gendered violence, including its pervasiveness and the long history of male impunity.[341] The alleged sexual violence that precedes accusation falls out of the picture—even though, from the data, we have every reason to believe the vast majority of reports are true.[342] The contemporary narrative also crops out important historical perspective. In the school context, for example, the recent respondent suits begin their historical account with Title IX enforcement efforts by the Obama administration without any acknowledgment of what those efforts meant to correct: decades of schools' systematic mistreatment of survivors, permitted by decades of federal inaction.[343] These accounts also leave out just how rare it is, to this day, for men to be punished for sexual harassment. While we lack analogous data on workers, one recent survey found that public universities expelled one of every 22,900 students for sexual misconduct.[344] By way of contrast, roughly one in five women, and one in sixteen men, report being sexually assaulted in college.[345]

Some of these problems are inherent to a public narrative centered narrowly on stories of punishment for nonconsensual sex. Any account in which an accused harasser is punished is necessarily unrepresentative in that it involves a victim reporting and an institution taking formal

339 Janet Halley, *Preface* to Janet Halley, Prabha Kotiswaran, Rachel Rebouché & Hila Shamir, Governance Feminism: An Introduction, at ix–xi (2018).

340 *E.g.*, Kenny Jacoby, *Despite Men's Rights Claims, Colleges Expel Few Sexual Misconduct Offenders While Survivors Suffer*, USA Today (Nov. 16, 2022, 5:01AM), https://www.usatoday.com/in-depth/news/investigations/2022/11/16/title-ix-campus-rape-colleges-sexual-misconduct-expel-suspend/7938853001 [https://perma.cc/BCT4-PGXE] (documenting low rates of discipline for sexual harassment in schools); Fischel, *supra* note 72 ("I agree that some federal regulatory and university administrative trends [governing] sexual misconduct are worrisome. Secretive hearings . . . threaten the due process rights of defendants. But it strikes me that the main problems regarding sexual violence, harassment, and discrimination are that incidents still go . . . unreported; that women are still largely disbelieved . . . ").

341 *See* Brodsky, *supra* note 142, at 158–61 (describing historical obstacles to accountability for sexual violence by men).

342 *Id.* at 163.

343 *See, e.g.*, Kristin Jones, *Lax Enforcement of Title IX in Campus Sexual Assault Cases*, Ctr. for Pub. Integrity (Feb. 25, 2010), https://publicintegrity.org/education/lax-enforcement-of-title-ix-in-campus-sexual-assault-cases [https://perma.cc/TA3X-DPU5].

344 Jacoby, *supra* note 340.

345 *Id.*

action, both of which are exceedingly rare.[346] Absent from the story are the survivors who felt they could not possibly come forward, often out of reasonable fear of retaliation.[347] So are the survivors who did come forward and were immediately dismissed, or even punished themselves.[348] Beyond that, to the extent discipline for sexual harassment represents a moment of (mostly) women complainants exercising power over (mostly) male accused harassers, it is aberrational. One reason the specter of false rape allegations looms so large—despite the documented rarity of such false accusations—is that adjudication of sexual violence is the one context in which otherwise powerful men, especially white men, can imagine being vulnerable to women.[349] That is, fear of the false rape allegation looms precisely because of men's dominance over women.

Thus, any consideration of institutional sexual regulation limited to discipline for sexual harassment will be rooted in a topsy-turvy vision of gendered power. It will obscure that we live in a world in which, broadly speaking, straight men dominate women, girls, and queer people.[350] It will obscure that workplaces and schools regulate the sexualities of women, girls, and queer people as part of a regime of sexual inequality that privileges straight men. A narrow vision of sexual regulation will also obscure that women, girls, and queer people are openly punished for exactly what critics fear straight men *might* secretly be punished for: consensual sex. That is, some worry that a straight man might be punished for consensual sex under a rule against nonconsensual sex because a woman regrets sleeping with him some time after the fact.[351] But women and queer people are expressly punished for consensual

346 *See, e.g.*, *New CareerBuilder Survey Finds 72 Percent of Workers Who Experience Sexual Harassment at Work Do Not Report It*, CareerBuilder (Jan. 19, 2018), https://press.careerbuilder.com/2018-01-19-New-CareerBuilder-Survey-Finds-72-Percent-of-Workers-Who-Experience-Sexual-Harassment-at-Work-Do-Not-Report-it [https://perma.cc/WB7M-FCKE]; Jacoby, *supra* note 340.

347 *See, e.g.*, CareerBuilder, *supra* note 346.

348 *See, e.g.*, Sage Carson & Sarah Nesbitt, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout*, Know Your IX (2021), https://www.advocatesforyouth.org/wp-content/uploads/2024/06/Know-Your-IX-2021-Cost-of-Reporting.pdf [https://perma.cc/SZC9-UDJK].

349 *See* Amia Srinivasan, *The Specter of False Rape Accusations*, Cut (Sept. 13, 2021), https://www.thecut.com/2021/09/book-excerpt-the-right-to-sex-by-amia-srinivasan.html [https://perma.cc/J8V8-ZNQ7].

350 *See, e.g.*, Kim Forde-Mazrui, *Calling Out Heterosexual Supremacy: If* Obergefell *Had Been More Like* Loving *and Less Like* Brown, 25 Va. J. Soc. Pol'y & L. 281, 286–91 (2018) (discussing heterosexual dominance); Christine A. Littleton, *Reconstructing Sex Equality*, 75 Calif. L. Rev. 1279, 1279–80 (1987) (discussing male dominance).

351 *See, e.g.*, Fischel, *supra* note 72.

sex, no pretext required. A straight man's greatest nightmare is simply reality for others.

A critique of sexual regulation that loses track of the flow of gendered power is doomed to failure and may do real harm. It will, in some instances, produce theoretical diagnoses and concrete policies that entrench heterosexual male power. For example, academic critiques—including and perhaps especially from the left—of university investigations into sexual harassment spurred federal Title IX regulations that now make it significantly more difficult for schools to address gendered misconduct like sexual assault and dating violence than comparable non-gendered misconduct, like simple assaults.[352] Those same stories have provided an account of structural bias that motivates courts' receptivity to "reverse discrimination" suits brought by men accused of sexual harassment—which, given the comparatively higher standards used for sex discrimination suits brought by women and victims of harassment, encourages schools to avoid substantiating allegations of sexual harassment to minimize liability.[353]

A narrow view of the ways that workplaces and schools regulate sex, and the gendered power that shapes that regulation, may also distract critics of sexual regulation—most importantly, feminist critics—from more emancipatory projects. As Lorna Bracewell and Brenda Cossman both map in recent books, much "sex-positive progressive" energy has been dedicated, over the last decade, to promoting procedural rights for accused harassers, mostly men.[354] Within the academy, this movement's central praxis is critique of, and when successful, rewriting of, institutional procedures.[355] No doubt, there is room for reform when it comes to such policies: *What kinds of cross examination work best? What standard of evidence?*[356] But procedural fine-tuning for the benefit of accused sexual harassers can hardly be the height of feminist ambition.[357] A broader vision of institutional sexual regulation and its dangers might, say, spur critical professors to allocate some portion of the time they now spend

352 Kelly A. Behre, *The Irony of Title IX: Exploring How Colleges Implement Credibility Discounts against Student-Victims of Gender-Based Violence in Campus Misconduct Cases*, 103 B.U. L. Rev. Online 109, 111–17 (2023); *see also* Brodsky, *supra* note 142, at 171–73 (describing how criticisms of a Harvard Law sexual assault policy from the left were leveraged by the right to support Title IX rollbacks).

353 Bolger, Brodsky & Singh, *supra* note 180, at 786.

354 Lorna N. Bracewell, Why We Lost the Sex Wars: Sexual Freedom in the #MeToo Era 3–4 (2021); Cossman, *supra* note 308, at 107–09.

355 *See, e.g.*, Brodsky *supra* note 142, at 171–73 (describing advocacy by academic critics of school sexual harassment policies).

356 *See, e.g.*, *id.* at 96–102 (discussing questions concerning procedural designs).

357 *See* Bracewell, *supra* note 354, at 4–5 (discussing "sexual-political" narrowness of liberal, sex-positive, Me Too-critical projects).

protecting alleged harassers to instead combatting policies that raise the "red flags" discussed above.[358] They might spend more energy protecting pregnant students, or students currently or previously engaged in sex work. Based on statistics about sex work participation from the UK, and statistics about university punishment for sexual harassment in the US, it appears that significantly more students will have experience with sex work than will be punished for sexual harassment.[359]

One fair rejoinder might be that plenty of feminists and queer theorists have long raised concerns that queer people, and gay men in particular, may be disproportionately sanctioned by institutional sexual regulation because they will be targeted with bogus sexual harassment charges.[360] To be sure, this Article is certainly not the first to note people other than straight men may be punished by workplaces or schools for their sexual conduct.[361] But there are still at least four benefits to including punishment for consensual sex in the debate, as this Article advocates. First, this more complete account draws attention to ways in which discriminatory regulation occurs and thus illuminates needed reforms, such as protections against anti-sex worker biases discussed above.[362] Second, some critiques of anti-harassment efforts as threats to queer people have, regrettably, perpetuated stereotypes of queer *victims* as incredible and trivialized violence against them[363]—not an inevitable feature, but one more easily avoided in discussion of regulation of consensual sex for the straightforward reason that consensual sex does not involve violent victimization. Third, women and girls have still received relatively little attention as potential subjects of institutional sexual regulation, leaving a misleading gap in collective understandings of gendered power. Finally, and relatedly, attention to the ways women may be vulnerable to such punishment illuminates sites of both complexity and commonality within feminist projects, as discussed in the remainder of this Part.

358 *See supra* Sections II.D.1–2.

359 *See* Tracey Sagar, Debbie Jones, Katrien Symons & Jo Bowring, *The Student Sex Work Project: Research Summary*, Ctr. for Crim. Just. & Criminology 17 (2015), https://madeinheene.hee.nhs.uk/Portals/0/DOC%203%20TSSWP%20Research%20Summary.pdf [https://perma.cc/CJ7Y-RBP7] (finding a portion of the approximately 5% of surveyed students had at some point been involved in the sex work industry); Jacoby, *supra* note 340 (documenting that one of every 12,400 students are suspended for sexual misconduct).

360 *See supra* note 313 and accompanying text.

361 *See id.*

362 *See supra* notes 36–45 and accompanying text.

363 *See generally* Marc Spindelman, *Sex Equality Panic*, 13 Colum. J. Gender & L. 1 (2004) (critiquing Janet Halley's critique of *Oncale* and similar queer theoretical interventions in harassment law).

2. *Recognizing Complexity*

Including punishments for consensual sex in a critique of sexual regulation brings to the fore a perhaps obvious but rarely articulated point: Punishment is both a threat to gender justice and necessary for it. As explained above in detail, sexual regulation of workers and students is often motivated by, and re-entrenches, sex-based animus and inequality. And yet, with our concern attuned to the needs of women and queer people, it is clear the answer is not for workplaces and schools to get out of the business of sexual regulation—or punishment to ensure compliance with that regulation—altogether.

Here is the rub. Despite the discrimination baked into much institutional sexual regulation, some regulation of students' and workers' sex lives—even their consensual sex lives—is not only inevitable but an affirmative good. Workplaces and schools may have legitimate and secular business or educational interests in regulating sexual conduct.[364] As discussed above, these institutions may, and probably *should*, adopt rules that will seek to protect the ability of students to learn and workers to work—motivations that serve as a "green flag."[365] If workers or students otherwise refuse to comply with reasonable rules like these, some kind of sanction may be necessary to promote compliance.

And the benefits of sexual regulation, and punishment in service of it, are not only factors to weigh *against* concerns about sex discrimination. To the contrary, as described above, some sexual regulation is rooted in concern for sex equality.[366] That is clearest in cases of nonconsensual or unwelcome sexual contact—that is, sexual harassment—to which women, girls, and queer people are most vulnerable.[367] But concerns

364 *See supra* Section II.D.2.

365 *See supra* Section II.D.2.

366 *See supra* Section II.D.2.

367 *See* U.S. Equal Employment Opportunity Comm'n, Sexual Harassment in Our Nation's Workplaces (2022). ("Women filed 78.2% of the 27,291 sexual harassment charges received between FY 2018 and FY 2021 . . . ."); Michelle M. Johns et al., Trends in Violence Victimization and Suicide Risk by Sexual Identity Among High School Students — Youth Risk Behavior Survey, United States, 2015–2019, 69 Morbidity & Mortality Wkly. Rep. Supplement 19, 22–23 (2020). *Trends in Violence Victimization and Suicide Risk by Sexual Identity Among High School Students — Youth Risk Behavior Survey, United States, 2015–2019*, at 22–23 (2020), https://www.cdc.gov/mmwr/volumes/69/su/pdfs/su6901a3-H.pdf [https://perma.cc/9BJK-27JZ] (finding that lesbian, gay, and bisexual students were more likely to be subject to sexual violence than heterosexual students); David Cantor et al., Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct A7-56, (2020) https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf [https://perma.cc/22KN-S5A4]; Catherine Hill & Holly Kearl, Crossing the Line: Sexual Harassment at School 11 (2011).

about sex equality may also motivate some regulation of consensual sex as well.[368] Whatever the motives of an individual boss or principal, there is no question that some attempts to desexualize the workplace and schoolhouse are rooted in feminist commitments. And though there is endless room for disagreement as to where, exactly, different institutions should draw the line, it is hard to imagine any serious disagreement that punishment, even for consensual sex, will *sometimes* be necessary to promote gender justice. The coach who starts sleeping with his students as soon as they are no longer his students should be fired, probably immediately and certainly if he refuses to stop.

In short, the cases discussed in this Article demonstrate that systems of sexual regulation by schools and workplaces are rooted in and perpetuate gender and sexual injustice—and yet any serious consideration of what limitations law and policy should place on such regulation must acknowledge that an *absolute* ban on employer and school punishment for consensual sex would, among other problems, entrench the very same inequalities. So, the project for feminists is how to distinguish permissible punishment from impermissible punishment, and what policies and practices are most likely to ensure sex is regulated just as much as it should be and no more. The red and green flags identified above might be a place to start.[369] These inquiries will have to attune themselves not just to the benefits and costs to women as a single class, or queer people as a class, but to the differential burdens on those within the class. For example, it would be a mistake to assume that the harms of this regulation will be felt equally across racial lines, among others. But it would also be a mistake to assume that only white women benefit from sexual regulation—that is, that hostile environments are only a white woman's issue.[370] How, then, to design a reasonable regulatory regime?

Those are important and incredibly difficult questions. They are opportunities for inquiry into "governance feminism"[371]—about what it means for feminists to achieve their ends once they begin to gather institutional power—for those invested in gender justice. These questions simultaneously demand skepticism of institutional regulation and refuse the easy out of rejecting that regulation altogether. This project may

368 *See supra* Section II.D.2.

369 *See supra* Section II.D.

370 *See, e.g.*, Kimberlé Crenshaw, *We Still Haven't Learned from Anita Hill's Testimony*, N.Y. Times (Sept. 27, 2018), https://www.nytimes.com/2018/09/27/opinion/anita-hill-clarence-thomas-brett-kavanaugh-christine-ford.html [https://perma.cc/FGQ8-LTR2] (discussing erasure of Black female victims of sexual harassment in assessments of the racial impact of sexual regulation, using Anita Hill's testimony against Clarence Thomas as an illustration).

371 Halley, *supra* note 339, at 103, 117.

also present an opportunity for repair across feminist factions divided on the role of workplaces and schools in addressing sexual harassment, a conflict some have called a return of the movement's "sex wars" of the 1980s.[372] By refusing pro-regulatory or anti-regulatory absolutes on either side, feminist camps might identify common ground. Everyone might need to admit that the questions posed by sexual regulation are too hard to be resolved on the battlefield.

Conclusion

Against a backdrop of debate regarding work and school anti-harassment efforts, this Article proposes a new terrain for this long-standing debate: The full universe of sexual regulation by workplaces and schools, which includes not only punishment for (allegedly) nonconsensual sex but for consensual sex as well. This latter set of cases is important in its own right and would benefit from increased attention to the larger context of inequitable sexual regulation. At the same time, broader debates about sexual regulation would benefit from consideration of such cases, which serve as reminders of the inequalities sexual regulation both re-entrenches and ameliorates.

This reframing unabashedly calls for technocratic solutions—for good policies, rather than bad ones, that correctly balance risk and reward. But it is also a call for feminists to remember our politics. We should remember *why* we are right to be wary of institutional intrusion into workers and students' sex lives: That intrusion is often used as a tool of sexist, homophobic, and racist subordination. And we should recognize that is a very different reason than the desire to maintain male supremacy that motivates many others who seek to divest workplaces and schools of this authority.[373] They have the luxury of embracing simple anti-regulatory positions that should be unacceptable to feminists because of who such policies would leave behind. But we have the benefit of an emancipatory north star, if we would only return our gaze to it.

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372 *See, e.g.*, Cossman, *supra* note 308, at 43–86; Masha Gessen, *Sex, Consent, and the Dangers of "Misplaced Scale,"* New Yorker (Nov. 27, 2017), https://www.newyorker.com/news/our-columnists/sex-consent-dangers-of-misplaced-scale [https://perma.cc/TT7S-VQ82]; Emily Bazelon, *The Return of the Sex Wars*, N.Y. Times (Sept. 10, 2015), https://www.nytimes.com/2015/09/13/magazine/the-return-of-the-sex-wars.html [https://perma.cc/E7UV-ZPD8].

373 *See, e.g.*, Brodsky, *supra* note 142, at 206–21.