The Dukeminier Awards

Best Sexual Orientation and Gender Identity Law Review Articles of 2023

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UCLA School of Law
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Student Note

The Dukeminier Awards Journal and the Williams Institute would like to thank Jeffrey S. Haber, Brondi Borer, Stu Walter, Chuck Williams, and the family and friends of Ezekiel "Zeke" Webber for their endowment gifts to fund individual prizes recognizing outstanding scholarship related to sexual orientation and gender identity law.

The Ezekiel Webber Prize is named after Ezekiel "Zeke" Webber, a UCLA Law student who died in 2004 at the end of his 2L year. During his time at UCLA, Zeke was extremely involved with the Williams Institute and the Public Interest Law Program.

IN MEMORY OF JESSE DUKEMINIER

This journal is named in memory of Jesse J. Dukeminier (1925–2003), who was a member of the UCLA School of Law faculty for forty years. The journal celebrates scholarly excellence in the field of sexual orientation, and Jesse Dukeminier was an excellent scholar and gay man. His own scholarly eminence is unquestioned, but he never wrote on topics centered on sexual orientation, nor was he what one would call an activist in the cause of gay rights. His field was property law, and in that field he was most certainly a star. His casebook (*Property*, coauthored with James E. Krier) is, in substance and in number of adoptions, by far the leading casebook in the field. The same can be said of his casebook, *Wills, Trusts, and Estates*, co-authored with Stanley M. Johansen. He was a nationally known authority on the Rule Against Perpetuities, and he contributed to the law's development not only in his scholarship but in the legislative process. Surely, however, the explanation for dedicating this journal to him lies elsewhere.

Jesse Dukeminier was a beloved teacher, among a handful of UCLA law teachers in the last generation who were revered by their students. (In his case it is not excessive to say "revered.") His sexual orientation was no secret; his union with David S. Sanders, a prominent psychiatrist, began around the time Jesse joined the UCLA Law faculty, and was well known to all. Long before it became widely understood that Coming Out was an important act of social and political construction, Jesse was Out, without ceremony—indeed, without raising the subject, unless someone else raised it first. He went about his life, in work and in recreation, as himself. Precisely because he was so admired, he contributed to the cause of equal citizenship by carrying on his day-to-day living under the assumption that his sexual orientation, although very much a part of his sense of self, was not especially noteworthy.

For others who self-identified as gay, lesbian, bisexual, etc., Jesse's behavior could help to ease the way to their own public acknowledgement of their sexual orientation. Imagine that the year is 1973, and that you are one of Jesse's students, a gay man or lesbian who has remained largely closeted. You may think, "If this highly admired man is Out, why should I not be?" And for those acquaintances who self-identified as straight, Jesse's presence in their lives helped them to redefine the meanings they attached to sexual orientation. Such a person might think, "If Jesse is gay, then the negative things I have heard about a gay orientation have to be false." Jesse was not vain, but he

was aware of his high standing among his students, his colleagues, and his friends. So, without ever getting on a soapbox, he was—knowingly—a walking advertisement for the proposition that equal treatment for every person, of any self-identified sexual orientation, is the proper social norm, the entitlement of all persons. The difference in public attitudes on this subject from 1973 to present day is remarkable and has made itself felt in legislation and in Supreme Court decisions. In a quiet-but-public way that was very much his own, Jesse Dukeminier was one local leader in that change.

When the generous donation that was to become the Williams Institute was offered to our school, Jesse Dukeminier was one of a group of faculty who participated in the Institute's design. He continued in active support of the Institute until his death. The UCLA Law School community is honored to dedicate this journal to his memory.

Kenneth L. Karst
2004, UCLA School of Law

INTRODUCTION

The Williams Institute and the student editors at the UCLA School of Law are pleased to publish Volume 23 of the *Dukeminier Awards Journal*, which annually recognizes outstanding achievements in recently published legal scholarship that engages with pressing sexual orientation and gender identity issues. With this release, we are honored to recognize the following Dukeminier Prize winners:

The Michael Cunningham Prize
Cis-Woman-Protective Arguments, 123 COLUM. L. REV. 845 (2023)
Chan Tov McNamarah

The Stu Walter Prize
Identity by Committee, 57 HARV. C.R.-C.L. L. REV. 657 (2022)
Scott Skinner-Thompson

The M.V. Lee Badgett Prize
Disorderly Content, 97 WASH. L. REV. 907 (2022)
Ari Ezra Waldman

The Ezekiel Webber Prize
Weaponizing Fear, 132 YALE L.J. F. 163 (2022-2023)
S. Lisa Washington

In addition, each year the Journal publishes the winner of the Williams Institute's Annual Student Writing Competition. This year's winner is:

The Jeffrey S. Haber Prize for Student Scholarship
Curious Continuity: How Bostock *Preserves Sex-Stereotyping Doctrine*, 23 DUKEMINIER AWARDS J. 235 (2024)
Alexandra R. Johnson

ABOUT THE PRIZE WINNERS

Eligible articles for this year's Dukeminier Prizes were published between September 1, 2022 and August 31, 2023 and engaged with sexual orientation and gender identity legal issues in a sustained way. In September 2023, the articles editors ran relevant search terms in legal scholarship databases to cast a wide net for eligible articles. The students then narrowed that large group to over 100 articles that students deemed presumptively eligible for this year's awards. At this stage, the students were not reviewing the articles for merit; instead, the students focused on the degree of attention given to relevant issues, broadly understood.

The Institute then invited nominations for articles through an open call and from over 50 law professors who regular publish legal scholarship focused on sexual orientation and gender identity. We provided the professors with the students' list of eligible articles, but did not limit nomination to articles appearing in the list. Numerous law professors submitted nominations, as did the student editors and scholars affiliated with the Williams Institute. All articles that received nominations were automatically sent to our prize committee. Williams Institute legal scholars reviewed the remaining articles and selected a number to join the nominated articles and be considered by the entire prize committee.

The Institute convened a committee to select the winners from among those finalists in March 2024. Each Volume's prize committee is comprised of a group of Williams Institute legal scholars, former Dukeminier Prize winners, and *Dukeminier Awards Journal* senior editors. The Volume 24 Prize Committee was comprised of: Nancy Polikoff, visiting scholar at the Williams Institute and Professor of Law Emerita at American University Washington College of Law; Ryan Thoreson, Assistant Professor of Law at the University of Cincinnati College of Law; Professor Jeremiah Ho, Associate Professor at Saint Louis University School of Law; Gregory Davis, Allston Burr Resident Dean at Harvard University; Christy Mallory, Williams Institute Legal Director; Ishani Chokshi, Williams Institute Daniel H. Renberg Law Fellow; Isabel Lafky, Editor-in-Chief of the *Dukeminier Awards* Journal; Lindsay Bracken and Christian Giannini, both *Dukeminier* Chief Articles Editors; and myself, Will Tentindo, Staff Attorney at the Williams Institute and current advisor for the Journal.

Each year, the members of the selection committee decide the precise criteria for that year, guided by the goals of the *Dukeminier Awards Journal*. The winning articles embody the best in this year's sexual orientation and gender identity legal scholarship. We recognize these articles for their original arguments and intersectional approaches, timeliness and impact, academic rigor, and quality of research and writing. The Selection Committee also valued the idea of recognizing developing scholars and works covering a broad range of issue areas. We viewed each article holistically and extensively discussed the finalists in light of these criteria, and selected the above four articles for prizes this year.

On a special note, each scholar recognized this year is being awarded a Dukeminier Prize for the first time. However, Professor McNamarah received a Jeffrey S. Haber Prize for Student Scholarship in Volume 17 of the *Dukeminier Awards Journal,* which was published in 2018. This makes Professor McNamarah the first person in our Journal's history to receive both the Haber and Dukeminier Prizes.

For the student note competition, a committee comprised of Dukeminier Editor-in-Chief Isabel Lafky, Senior Editor Jet Harbeck, Managing Editor Randall Jones, and Chief Notes Editor Geena Roberts as well as Christy

Mallory and myself selected the winners among entries received in the Fall of 2023 through an open call for submissions. To be eligible, articles must be authored by a student at a law school during the 2023-2024 academic year, regardless of degree track or progress. In selecting the winner, we focused on originality, scholarly contribution, timeliness, academic rigor, and overall quality of the research and writing. All entries were reviewed blind by the student note selection committee.

Over the 23 years that the *Dukeminier Awards Journal* has published, the field of sexual orientation and gender identity law and policy has attracted significant attention and seen consequential developments. Early issues of *Dukeminier* include articles discussing criminal sodomy bans, pressing for the inclusion of transgender rights in the fight for the rights of sexual minorities, and the impact of employment nondiscrimination laws. While certain challenges remain ever-present, others are unprecedented. Our winners this year take on some of the new and emerging issues impacting LGBTQ people and their families, using both established and novel ways of thinking to understand and address these contemporary legal problems. Additionally, our winning professors teach in different corners of the country and have unique specializations that all intersect with sexual orientation and gender identity law. Their expertise, and the scholarship for which they are now awarded a Dukeminier Prize, reflect the breadth and rigor of the field of sexual orientation and gender identity law and scholarship as a whole. As first-time Dukeminier Prize winners, they join the list of esteemed experts that the Journal has celebrated throughout the years. We hope that, in republishing their articles, their work reaches an even larger audience of practitioners, professors, policymakers, and the public.

Congratulations to this year's winners!

Will Tentindo, J.D.
Staff Attorney
The Williams Institute
UCLA School of Law

CIS-WOMAN-PROTECTIVE ARGUMENTS

Chan Tov McNamarah

ABSTRACT

It has become common to oppose the equal citizenship of transgender persons by appealing to the welfare of cisgender women and girls. Such Cis-Woman-Protective (CWP) arguments have driven exclusionary efforts in an array of contexts, including restrooms, sports, college admissions, and anti-discrimination law coverage. Remarkably, however, this unique brand of anti-trans contentions has largely escaped being historicized, linked together, or subjected to extended analytical scrutiny as a group.

This Essay provides those missing pieces.

First, it situates CWP arguments within the longer history of woman-protective justifications in American law. Taking their well-known harms to women, alongside their use in lending legitimacy to discrimination against racial and religious minorities, forcefully demonstrates that the rationales' current use against transgender persons warrants closer inspection.

Second, the Essay canvasses recent CWP arguments to document the line of thought. Reading the heretofore-uncollected allegations reveals a far-reaching cluster of contentions, whose members bear striking family resemblances to, and inherit the disfigurements of, their historical priors.

Third, casting unsparing light on the claims, the Essay demonstrates that CWP arguments overwhelmingly fail to deliver. Structurally, the arguments' moves are questionable, at best. Substantively, most fall wide of their mark. And, instrumentally, the arguments backfire completely, since their operationalization harms the very persons they supposedly protect.

Tallied up, these problems make a strong case that, strategically, CWP arguments are ineffective and deeply flawed—even counterproductive—assuming that protecting cis women and girls is truly the goal. Building on that assessment, the Essay concludes with reasons for healthy skepticism that it actually is. Stripping away the veneer of protectionism begins to expose some less-palatable intentions and effects possibly driving the use of CWP arguments.

About the Author

Visiting Assistant Professor, Cornell Law School (they/them pronouns). For helpful conversations, comments, and suggestions, my thanks to Sandra Babcock, Jessica Clarke, Taylor Davis, Michael Dorf, Jared Ham, Tyler Hepner, Doriane Lambelet Coleman, Mitchel Lasser, Stewart Schwab, Marc Spindelman, Jeffrey Rachlinski, Ezra Young, Monty Zimmerman, and the participants in the 2021 Cornell Law School faculty summer workshop series . For the masterful editorial work, my thanks to Angelle Henderson and the staff of the Columbia Law Review. Finally, I am deeply grateful to Sherry Colb; I've benefited tremendously from her always generous feedback, engagement, and particularly, her encouragement.

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Introduction

By now, anti-transgender positions premised on the wellbeing and safety of cisgender women and girls have become standard fare. Over the past few years, a social movement of trans-antagonistic,[1] *cis-woman-protective*[2] (CWP) rhetoric has surfaced, and just as swiftly, gained a foothold in public conversation. Consider some recent snapshots.

In 2018, the Women's March was cast into controversy when multiple participants were accused of engaging in overt transphobia.[3] One marcher's sign declared: "Trans Women Are Men, Truth *Is Not* Hate," "Trans Ideology is Misogyny & Homophobia," and "Woman is *Not* a 'Feeling', a Costume, or a Performance of a *Stereotype!* Woman is a Biological Reality! There is *No* ethical or moral duty to LIE to soothe a male EGO."[4]

In 2019, Donald Trump, Jr., repeatedly accused trans-inclusive athletics policies of "destroy[ing] women's sports"[5]—a criticism he later doubled-down on and extended, calling trans women athletes "mediocre men . . . compet[ing] in women's sports."[6]

In 2020, CWP rhetoric thoroughly permeated media coverage of trans issues in the United Kingdom.[7] The British media supported Maya Forstater's wrongful termination tribunal,[8] following her dismissal for a series of transphobic

1. Julia Serano defines the term to refer to individuals that are "fundamentally opposed to transgender people for specific moral, political, and/or theoretical reasons." Julia Serano, There Is No Perfect Word: A Transgender Glossary of Sorts, Julia's Trans, Gender, Sexuality, & Activism Glossary!, https://www.juliaserano.com/terminology.html#trans-antagonistic [https://perma.cc/9NB6-K8WS] (last visited Oct. 10, 2022).

2. The label is inspired by Marc Spindelman's extended meditation on the use of shower and locker room imagery in *Harris Funeral Homes* arguments. See Marc Spindelman, The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part III, 81 Ohio State L.J. Online 101, 108 (2020) (describing the arguments as "pro-cis-woman protectionist").

Spindelman's use is insightful and far-seeing, as it links CWP arguments to a larger family of oppressive justifications, in which women's interests form the crux. See *id.* at 110. Building on Spindelman's foundation, this Essay attempts to lay out the relationship in full.

3. See Sean Maulding, Pussy Hats and Anti-Trans Sentiments: When Second-Wave and Third-Wave Collide, 5 OSR J. Student Rsch., No. 1, 2019, at 1, 14.

4. Josh Jackman, The Women's March Was 'Made Unsafe' by Anti-Trans Signs and Pussy Hats, PinkNews (Jan. 22, 2018), https://www.pinknews.co.uk/2018/01/22/the-womens-march-was-made-unsafe-by-anti-trans-signs-and-pussy-hats/ [https://perma.cc/C843-WK82] (emphasis added).

5. See Donald Trump Jr. (@DonaldJTrumpJr), Twitter (Oct. 21, 2019, 12:32 PM), https://twitter.com/DonaldJTrumpJr/status/1186319353828036608 [https://perma.cc/F5VU-XYLG]; Donald Trump Jr. (@DonaldJTrumpJr), Twitter (Oct. 21, 2019, 9:36 AM), https://twitter.com/DonaldJTrumpJr/status/1186275133494910976 [https://perma.cc/449Z-PRMC].

6. Donald Trump, Jr., Triggered: How the Left Thrives on Hate and Wants to Silence Us 179 (2019).

7. See Sophie Lewis, Opinion, How British Feminism Became Anti-Trans, N.Y. Times (Feb. 7, 2019), https://www.nytimes.com/2019/02/07/opinion/terf-trans-women-britain.html (on file with the *Columbia Law Review*) (describing the "Trans-Exclusionary Radical Feminist" movement's growth throughout Britain).

8. See Maya Forstater: Woman Loses Tribunal Over Transgender Tweets, BBC

remarks including amplifying a comparison of using gender-appropriate pronouns with the date-rape drug Rohypnol,[9] and they largely welcomed author J.K. Rowling's view that transgender equality jeopardizes cis women's progress.[10]

And, in 2021, within hours of newly elected President Joseph Biden taking office, an executive order designed to enforce the *Harris Funeral Homes* holding sparked online fervor, causing the hashtag #BidenErasedWomen to trend internationally.[11] Thousands of social media users accused the order, President Biden, and the Biden Administration of "[u]nilaterally imposing trans ideology on a nation with no thought for women's rights,"[12] "erasing the sex-based rights of women and girls,"[13] and "eviscerat[ing] women's sports . . . [by placing a] new glass ceiling . . . over girls."[14]

Though rarely adopting such harsh language, the American legal community has not been immune to this line of thought. In case law, advocacy, and scholarship, this particular brand of trans-antagonistic rhetoric—which is to say, anti-transgender opposition rationalized on account of how transgender rights are thought to affect cisgender women and girls—has increasingly gained currency.

In response to the introduction of so-called "bathroom bills," arguments premised on women's safety concerns featured prominently in the hearings of state and local legislative bodies.[15] Likewise, in the lead up to the *Harris Funeral Homes* decision, a steady stream of amicus briefs purporting to advocate on the behalf of cis women urged against pro-trans outcomes, framing them as detrimental to cis women's rights.[16] At the same time, the Trump Administration's Housing and Urban Development Secretary, Ben Carson, who previously expressed concern that "big hairy men" would seek to enter

(Dec. 19, 2019), https://www.bbc.com/news/uk-50858919 [https://perma.cc/FET2-N27Y] (covering the case positively).

9. Forstater v. CGD Eur. [2019], No. 22200909/2019, HM Courts & Tribunal Service (London C. Employment Trib.) at para. 34.2.

10. See Katelyn Burns, J.K. Rowling's Transphobia Is a Product of British Culture, Vox (Dec. 19, 2019), https://www.vox.com/identities/2019/12/19/21029874/jk-rowling-transgender-tweet-terf [https://perma.cc/8FKV-GHZL] (explaining how the British media has legitimized those sharing Rowling's opinion that trans rights conflict with cis women's).

11. See Ebony Bowden, Biden Sparks TERF War With Gender Discrimination Order, N.Y. Post (Jan. 21, 2021), https://nypost.com/2021/01/21/joe-biden-sparks-terf-war-with-gender-discrimination-order/ [https://perma.cc/8KNP-CKU9] (documenting the Twitter responses). *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC* was a companion case to *Bostock v. Clayton County*. See Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020) (holding that a funeral home violated Title VII of the Civil Rights Act when it fired a woman for coming out as trans).

12. Dr. Janet Clare Jones (@janeclarejones), Twitter (Jan. 21, 2021, 4:18 AM), https://twitter.com/janeclarejones/status/1352183854874947590 [https://perma.cc/LZR8-F29F].

13. LGB Alliance (@ALLIANCELGB), Twitter (Jan. 21, 2021, 3:37 AM) https://twitter.com/ALLIANCELGB/status/1352173526741118977 [https://perma.cc/754C-MULU].

14. Abigail Shrier (@AbigailShrier), Twitter (Jan. 21, 2021, 12:11 AM), https://twitter.com/AbigailShrier/status/1352121732723666946 [https://perma.cc/94UX-VY8X].

15. See *infra* section III.A.

16. See *infra* section II.B.

women's shelters disguised as transgender women,[17] proposed a HUD rule that would allow federally funded shelters to deny trans women entry.[18] The list could go on.[19]

Responses have been mixed. One has been to broad-brush these views as "transphobic." But that reaction is insufficient. Even if accurate, the rejoinder dismisses, rather than evaluates. The validity and soundness of the claims, then, remain unexamined. Of at least equal importance, with that approach, persons who hold and advocate these views are not likely to change them.

Alternatively, several commentators have taken aim at the individual forms of CWP legal argument.[20] As before, however, a piecemeal examination is not enough. Any such atomistic review fails to expose the problematics threading through the arguments at large. On the whole, many CWP arguments are built upon noxious stereotypes. Cisgender women are cast as helpless and in need of protection (most commonly in the form of cisgender male intervention), and trans women are portrayed as deceptive and opportunistic, not to mention animalistic, sexually predacious, and inherently dangerous.[21] Trans men, by contrast, are disappeared from the arguments altogether, and their identities and autonomy vanished with them.[22]

Perhaps most troublingly, when considered in unison, CWP legal arguments present a vexing quandary. Inherently, CWP arguments position the relationship between transgender rights and cisgender women's rights—and legal protections for either group—as acrimonious, if not directly oppositional. By that account, "wins" for transfolk mean "losses" for cisgender women and girls, and vice versa. Also, by that telling, to simultaneously hold feminist and

17. See Tracy Jan & Jeff Stein, HUD Secretary Ben Carson Makes Dismissive Comments About Transgender People, Angering Agency Staff, Wash. Post (Sept. 19, 2019), https://www.washingtonpost.com/business/2019/09/19/hud-secretary-ben-carson-makes-dismissive-comments-about-transgender-people-angering-agency-staff/ [https://perma.cc/3ZA6-NAEA].

18. Chris Cameron, HUD Rule Would Dismantle Protection for Homeless Transgender People, N.Y. Times (July 1, 2020), https://www.nytimes.com/2020/07/01/us/politics/hud-transgender.html (on file with the *Columbia Law Review*) (last updated July 24, 2020).

19. See *infra* Part III.

20. On sex-segregated bathrooms, *see, e.g.*, Susan Hazeldean, Privacy as Pretext, 104 Cornell L. Rev. 1719, 1719 (2019); Laura Portuondo, Note, The Overdue Case Against Sex-Segregated Bathrooms, 29 Yale J.L. & Feminism 465, 466 (2018). On the arguments for excluding trans women from domestic violence shelters, see Rishita Apsani, Note, Are Women's Spaces Transgender Spaces? Single-Sex Domestic Violence Shelters, Transgender Inclusion, and the Equal Protection Clause, 106 Calif. L. Rev. 1689, 1692 (2018). On the arguments for trans-exclusionary sports policies, see Shayna Medley, (Mis)Interpreting Title IX: How Opponents of Transgender Equality Are Twisting the Meaning of Sex Discrimination in School Sports, 49 N.Y.U. Rev. L. & Soc. Change 673, 674 (2022) [hereinafter Medley, (Mis)Interpreting Title IX].

21. Amanda Armstrong, Certificates of Live Birth and Dead Names: On the Subject of Recent Anti-Trans Legislation, 116 S. Atl. Q. 621, 623 (2017) (documenting the archetype).

22. Kristen Schilt & Laurel Westbrook, Bathroom Battlegrounds and Penis Panics, Contexts, Summer 2015, at 26, 30 (finding trans men "relatively invisible" in discussion on bathroom laws).

pro-trans views is oxymoronic. Naturally, this last point is particularly concerning for the many persons who would like to support the social and political equality of both cis women and transfolk.

Thus framed, the time is ripe to conduct a closer study as to the origins and soundness of CWP rhetoric as used in legal argument, and this Essay begins that task. This Essay questions growing purchase in cis-woman-protective reasoning as a legal strategy to oppose transgender rights. By interrogating the logic of the CWP arguments marshalled in legislative hearings, case law, filings, and legal scholarship, this Essay will present the case that not only do these arguments come up short, but also that if the goal is truly to protect, support, and advance the interests of cis women and girls, the arguments are actually disadvantageous. In their place, this Essay suggests it is time to take up earlier invitations to more deeply probe the intersections between feminism and transgender legal activism.[23]

Here is how the discussion will proceed. Parts I and II provide the necessary historical background for understanding the alleged tensions between cis women and the movement for trans equality. As Part I will show, using woman-protective rationales is not a recent development. Uncovering the history of such justifications illuminates how laws and policies rooted in woman-protective rationales have both extensively harmed women themselves and have been used to argue against the progress and equality of minority groups. The contextualization provides ample reason why the modern-day use of woman-protective rationales should give pause.

On that foundation, Part II turns squarely to the use of woman-protective rationales against equality for transgender persons. Section II.A begins with a snapshot of the current prevalence and recent trajectory of CWP rhetoric in legal argument. Section II.B surveys a range of sources to distill and categorize the most frequently raised arguments. Doing so not only allows one to better appreciate the relationships between individual claims, but also forms the basis for the Essay's subsequent two-part appraisal. Section II.C then reveals the connections between modern CWP arguments and their historical priors. In doing so, it will make legible the harmful stereotypes and oppressive tropes that CWP arguments reanimate and solidify.

Working from the specific to the more general, Parts III and IV present the Essay's critique. Part III adopts a narrow analytical lens and spotlights CWP arguments' deficiencies on their own terms. It walks through the logic of each line of argument to show that many lack the necessary supporting evidence to work, are explanatorily weak, or are just plainly unsound.

23. For examples, see Ezra Ishmael Young, What the Supreme Court Could Have Heard in *R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens*, 11 Calif. L. Rev. Online 9, 48 (2020); Demoya R. Gordon, Comment, Transgender Legal Advocacy: What Do Feminist Legal Theories Have to Offer?, 97 Calif. L. Rev. 1719, 1762 (2009); Angela P. Harris, *Transgender Rights* and *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* (book review), Women's Stud. Q., Spring/Summer 2008, at 315, 319.

Part IV then considers the arguments' shortcomings from a wider perspective, following the arguments to their logical end points to surface some problems of application. It will show that CWP arguments are further flawed and, in fact, actually undercut cis women's protection by relying on methods that injure cis women and girls.

Tallying up these problems, CWP arguments appear deeply flawed—if not detrimental—at least, if the aim of protecting cis women and girls is true. Building on that assessment, the Essay concludes with a final conjecture: Like many of the justifications of the past, in both intention and effect, CWP arguments are primarily pretextual. Stripping away the veneer of protectionism begins to expose the patriarchal motivations driving their current popularity.

By engaging with CWP rhetoric, this Essay has two larger ambitions worth outlining at the start. The first is theoretical, speaking to an important insight on the nature of discrimination: It repeats and evolves across identities.[24] These cross-identity transmissions and the associated evolutionary innovations, which this Essay collectively labels *discrimination intergroup spillover*, mean that discrimination (or its components) originating in one context or deployed against one population adapts to emerge in new contexts. Because of this dynamic, the author's previous works concluded a central task of antidiscrimination efforts must be to "uncover and understand hitherto hidden patterns between forms of oppression."[25] In the Parts that follow, this Essay underscores and expands that thesis, by juxtaposing how woman-protective arguments mobilized in the past have found a ready home in the present debate over trans equality.

The second is practical. It is to help prepare the ground for what will surely be an uphill battle in the future of transgender rights. Identifying CWP arguments provides a useful first step for a more coordinated campaign to refute them. Even more urgently, if the countless studies documenting a robust and stable relationship between conservatism, benevolent sexism, and negative attitudes toward transgender persons are anything to go by,[26] the federal judiciary's recent rightward shift[27] signals that judges might increasingly credit

24. See Chan Tov McNamarah, Misgendering, 109 Calif. L. Rev. 2227, 2235 (2021) [hereinafter McNamarah, Misgendering] (tracing the relationship between misgendering and historical forms of verbal discrimination against women, Black persons, ethnic minorities, gays, and lesbians).

25. *Id.* at 2322.

26. *E.g.*, Lindsey Erin Blumell, Jennifer Huemmer & Miglena Sternadori, Protecting the Ladies: Benevolent Sexism, Heteronormativity, and Partisanship in Online Discussions of Gender-Neutral Bathrooms, 22 Mass Commc'n & Soc'y 365, 369 (2018) (finding a relationship between conservative politics, benevolent sexism, and negative attitudes toward gender-appropriate bathroom usage); B.J. Rye, Olivia A. Merritt & Derek Straatsma, Individual Difference Predictors of Transgender Beliefs: Expanding Our Conceptualization of Conservatism, 149 Personality & Individual Differences 179, 183 (2019) (same).

27. See Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, A Conservative Agenda Unleashed on the Federal Courts, N.Y. Times (Mar. 14, 2020), https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html (on file with the *Columbia Law Review*) (last updated Mar. 16, 2020) (noting the trend).

arguments sounding in the protection of cis women and girls, for reasons completely unrelated to the arguments' merit. Anticipating that and clarifying where CWP arguments are valid—and where they are not—will do much to clear the path for the continued movement forward on issues of transgender equality.

I. Woman-Protective Justifications in American Law

It is easy to assume that arguments relying on appeals to women's welfare are recent developments. Though trans persons have always existed, popular attention to the community and the community's rights have only lately come to the fore.[28] Seen in that way, questions of how trans and cis women's rights interact must be new.

It is also easy to assume that such arguments are unique to debates over transgender equality. Since the nearly unwavering focus in trans rights conversations in recent years has been intimate facilities, the few historical parallels drawn by commentators have centered around anti-Black Jim Crow bathroom segregation.[29] Unfortunately, while those examples may clarify part of how women's interests were wielded against minority progress, they fail to reveal the whole picture.

This Part refutes both intuitions: that woman-protective arguments are recent and that they are unique to debates about trans equality. It reveals why they are shortsighted by placing CWP arguments alongside their full swath of historical antecedents. By recovering the underexamined history of how woman-protective justifications have affected the lives and livelihoods of racial, ethnic, and religious minorities, the Part expands the shared frame of reference. As this Part demonstrates, with laws and policies rooted in the protection of women dating back to the beginning of American settler colonialism, CWP claims are a part of a larger family of oppressive justifications for which women's interests form the crux.

A. *Early Examples*

Throughout American history, laws and policies rooted in woman-protective rationales have taken various forms. Among the earliest was a class

28. See, e.g., Catherine Armstrong, The Trans History You Weren't Taught in Schools, YES! Mag. (June 7, 2021), https://www.yesmagazine.org/social-justice/2021/06/07/trans-history-gender-diversity [https://perma.cc/E8SU-N3HX] ("Nonbinary and trans people have always been here . . . . Why is it then that they're often absent from . . . historical figures we hear about? The answer lies, in part, with how history is recorded and who records it."); Erin Blakemore, How Historians Are Documenting the Lives of Transgender People, Nat'l Geographic (June 24, 2022), https://www.nationalgeographic.com/history/article/how-historians-are-documenting-lives-of-transgender-people (on file with the *Columbia Law Review*) (recounting examples of trans and nonbinary people and communities throughout history).

29. See, e.g., Marisa Pogofsky, Comment, Transgender Persons Have a Fundamental Right to Use Public Bathrooms Matching Their Gender Identity, 67 DePaul L. Rev. 733, 753–54 (2018) (making the analogy). But see Medley, (Mis)Interpreting Title IX, *supra* note 20, at 680 (linking anti-trans sports bills to the historic exclusion of athletes of color).

centered around efforts to "protect" women entering the labor force. Starting in the 1850s, states sought to offer special protection to women workers in the form of mandatory rest periods, toilet separation requirements, and restrictions on working hours, night work, and weightlifting.[30] Often, states "protected" women by excluding them from certain professions entirely.[31]

Admittedly, making a clear assessment of woman-protective labor legislation is difficult, since the historical record is somewhat mixed.[32] On the one hand, it is true that many women supported the enactment of these policies.[33]

On the other, at least an equal number did not. To take just one example, in *Ritchie v. People*, in which the court considered Illinois's law limiting women's working hours, the overwhelming majority of women who testified at trial wished to work for longer than the law allowed.[34] And, their sentiments weren't anomalies.[35] Indeed, the laws' harms should not be discounted.[36] For one, the laws rendered women more expensive to employ and, thereby, less able to compete in the labor market.[37] For two, both directly and indirectly, the laws kept women's wages low.[38] Indeed, as female nurse-practitioners and a female pharmacist explained in their challenge to California's hour limitations in *Bosley v. McLaughlin*, the protective laws deprived them of work-study opportunities

30. Terry S. Kogan, Sex-Separation in Public Restrooms: Law, Architecture, and Gender, 14 Mich. J. Gender & L. 1, 12–16 (2007) [hereinafter Kogan, Sex-Separation]; see also Allan D. Spritzer, Equal Employment Opportunity Versus Protection for Women: A Public Policy Dilemma, 24 Ala. L. Rev. 567, 568–70 (1972); Comment, Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964, 1968 Duke L.J. 671, 705–07 (collecting examples).

31. See Andrew Schepard, Note, Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?, 84 Harv. L. Rev. 1499, 1501 (1971); *cf.* Elizabeth C. Crable, Pros and Cons of the Equal Rights Amendment, Women Laws. J., Summer 1949, at 7, 8 (arguing that the result of "protective labor laws" is often to "'protect' women out of employment").

32. Diane Balser, Sisterhood & Solidarity: Feminism and Labor in Modern Times 101 (1987) (stating the effect of woman-protective labor laws is "complex").

33. See, e.g., Frances Olsen, From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869–1895, 84 Mich. L. Rev. 1518, 1533–36 (1986) (recording those views in the Illinois Women's Alliance).

34. Nancy S. Erickson, *Muller v. Oregon* Reconsidered: The Origins of a Sex-Based Doctrine of Liberty of Contract, 30 Lab. Hist. 228, 241 (1989); David E. Bernstein, *Lochner*'s Feminist Legacy, 101 Mich. L. Rev. 1960, 1963–64 (2003) [hereinafter Bernstein, Feminist Legacy] (book review).

35. See, e.g., Commonwealth v. Hamilton Mfg. Co., 120 Mass. 383, 384 (1876) (capturing one woman's argument that work-hour laws violated her right to "labor in accordance with her own judgement"); Women in Industry, Monthly Lab. Rev., March 1926, at 73, 80–81.

36. See Deborah L. Rhode, The "No-Problem" Problem: Feminist Challenges and Cultural Change, 100 Yale L.J. 1731, 1733, 1738–39, 1740–41 (1991) (discussing the negative impact).

37. See Sara Chatfield, Competing Social Constructions of Women Workers in *Lochner*-Era Judicial Decision-Making, 4 Const. Stud. 105, 116 (2019).

38. Marilyn J. Boxer, Protective Legislation, *in* Women's Studies Encyclopedia 1156, 1158 (Helen Tierney ed., 1999).

and higher pay.[39] Finally for three, protective legislation led to women's termination in favor of men.[40] Such was the case in the aftermath of *Muller v. Oregon*. After the Supreme Court upheld a maximum-hours limitation, Curt Muller, the appellant factory owner, reportedly replaced all his female workers with men.[41] These three ill effects were even more acute for women working in male-dominated occupations—where protection was all the more necessary.[42]

Just as revealing is male self-interested support for the introduction and later outcomes of protective legislation. Some women recognized the ruse from the start.[43] When the first laws were introduced, one female economist observed: "Such legislation is usually called 'protective legislation' and the women workers are characterized as a 'protected class.' But it is obviously not the women who are protected."[44] She therefore warned, "[N]o one should lose sight of the fact that such legislation is not enacted exclusively, or even primarily, for the benefit of women themselves."[45] And so it was. Beyond only allowing men to outcompete their female peers,[46] the law's motivating ideologies habitually ensured women were relegated to the domestic sphere.[47]

Male unionists welcomed the upshots.[48] Capturing the prevailing view, one quipped, "We cannot drive the females out of the trade, but we can restrict their daily quota of labor through factory laws."[49] On the ground, men's unions

39. See Transcript of Record at 5–8, Bosley v. McLaughlin, 236 U.S. 385 (1915).

40. See Susan Lehrer, Origins of Protective Labor Legislation for Women, 1905–1925, at 128 (1987).

41. Bernstein, Feminist Legacy, *supra* note 34, at 1971.

42. Ava Baron, Protective Labor Legislation and the Cult of Domesticity, 2 J. Fam. Issues 25, 28–29 (1981).

43. Bernstein, Feminist Legacy, *supra* note 34, at 1971 (citing S.P. Breckinridge, Legislative Control of Women's Work, 14 J. Pol. Econ. 107, 108 (1906)).

44. S.P. Breckinridge, Legislative Control of Women's Work, 14 J. Pol. Econ. 107, 107–08 (1906).

45. *Id.* at 108.

46. See Sharon Kurtz, Workplace Justice: Organizing Multi-Identity Movements 48–50 (2002); Leslie Marc Durant, The Validity of State Protective Legislation for Women in Light of Title VII of the Civil Rights Act of 1964, 6 Suffolk U. L. Rev. 33, 40 (1971) (finding the laws "result in the monopolization of certain jobs for men, and many appear to be designed for just that purpose rather than for the protection of women"); Holly J. McCammon, The Politics of Protection: State Minimum Wage and Maximum Hours Laws for Women in the United States, 1870–1930, 36 Socio. Q. 217, 223–24 (1995).

47. See Ruth Milkman, On Gender, Labor, and Inequality 97 (2016).

48. See Alice Kessler-Harris, Out to Work: A History of Wage-Earning Women in the United States 201–02 (1982); Shelton Stromquist, Reinventing "The People": The Progressive Movement, the Class Problem, and the Origins of Modern Liberalism 122–23 (2006) (quoting unionist John R. Commons's argument that protective legislation should "be looked upon as a law to protect men in their bargaining power"); Jodi Vandenberg-Daves, Modern Motherhood: An American History 123 (2014) (discussing how male unionists supported restrictive legislation regarding women working); Gail Falk, Women and Unions—A Historical View, Women's Rts. L. Rep., Spring 1973, at 54, 60 (collecting examples).

49. Kurtz, *supra* note 46, at 50; see also Heidi I. Hartmann, The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union, Cap. & Class, Summer 1979,

used protective labor laws to do just that, siloing women into low-paying jobs and depressing women's wages.[50] While this is not to say that male benefit was the sole goal of woman-protective labor legislations, undoubtedly, Representative Martha Griffith's statement in a 1964 congressional hearing that "[m]ost of the so-called protective legislation has really been to protect men's rights in better paying jobs,"[51] was not far off mark.

Outside of employment, laws and policies sought to "protect" women by restricting their exercise of constitutional rights. Some took the form of exclusions depriving women of their right to serve on juries, rationalized as protecting them from "vulgarities" of the courtroom atmosphere.[52] Others, like those aimed at protecting some "value" to be found in young white women's chastity,[53] appeared as sex-specific statutory rape and age-of-consent laws.[54] Protection, in the latter cases, came at the expense of young women's sexual autonomy.[55]

Safeguarding women was the original motivation behind abortion regulations.[56] After sidetracking to fetus-focused justifications for their abortion restraints,[57] states soon returned to paternalistic notions about abortion's effects on women's health.[58] The reroute worked. Upholding the Partial-Birth

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at 1, 16.

50. See Kurtz, *supra* note 46, at 50; McCammon, *supra* note 46, at 223.

51. 110 Cong. Rec. 2580 (1964).

52. J.E.B. v. Alabama, 511 U.S. 127, 133 (1994); Hoyt v. Florida, 368 U.S. 57, 58 (1961) (justifying exclusion because it appropriately preserved women's position "as the center of home and family life"); Bailey v. State, 219 S.W.2d 424, 428 (Ark. 1949) (justifying exclusion to protect women from "elements that would prove humiliating, embarrassing and degrading to a lady"); State v. Hall, 187 So. 2d 861, 863 (Miss. 1966) (upholding exclusion to protect women from "the filth, obscenity, and noxious atmosphere" of jury trials).

53. Joseph J. Fischel, Per Se or Power? Age and Sexual Consent, 22 Yale J.L. & Feminism 279, 286 (2010) ("Statutory rape laws were enforced only against violations of white girls, as [B]lack girls' bodies were sexualized as open territory."); see also Carolyn E. Cocca, Jailbait: The Politics of Statutory Rape Laws in the United States 11, 13–14, 28 (2004) (detailing the racial dynamics of statutory rape law prosecutions).

54. See Leslie Y. Garfield Tenzer, #MeToo, Statutory Rape Laws, and the Persistence of Gender Stereotypes, 2019 Utah L. Rev. 117, 126; Maryanne Lyons, Comment, Adolescents in Jeopardy: An Analysis of Texas' Promiscuity Defense for Sexual Assault, 29 Hous. L. Rev. 583, 586–87 & n.17 (1992).

55. Rita Eidson, Comment, The Constitutionality of Statutory Rape Laws, 27 UCLA L. Rev. 757, 761–62, 766–70 (1980); Comment, Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard, 62 Yale L.J. 55, 75–76 (1952); Britton Guerrina, Comment, Mitigating Punishment for Statutory Rape, 65 U. Chi. L. Rev. 1251, 1261 (1998).

56. People v. Belous, 458 P.2d 194, 200 (Cal. 1969) (tracing the health concerns underlying California's early abortion restrictions); State v. Tippie, 105 N.E. 75, 77 (Ohio 1913) ("The reason and policy of the statute is to protect women and unborn babes from dangerous criminal practice . . . .").

57. Reva B. Siegel, The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions, 2007 U. Ill. L. Rev. 991, 1014–17.

58. Reva B. Siegel, Lecture, The Rights Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument, 57 Duke L.J. 1641, 1643–47 (2008);

Abortion Ban Act in *Gonzales v. Carhart*, Justice Anthony Kennedy worried that, despite "no reliable data to measure the phenomenon . . . some women come to regret their choice to abort the infant life they once created and sustained."[59] Even without concrete proof, the need to protect women from the unsubstantiated "depression and loss of esteem" that might follow from their autonomous choices warranted, in his view, the procedure's prohibition.[60]

A final group of laws—the one most relevant here—sought to protect specific classes of women, namely those who were white, from the "threats" posed by non-white groups. Since the foundation of the United States, these white-woman-protective rationales have successfully rubberstamped social and legal violence against racial minorities.

Begin with the woman-protective rationales used to justify Native American exclusion and extermination during the heart of colonialism and later Western expansion.[61] At the time, propaganda portrayed Native Americans as prone to unwarranted violence against defenseless white women.[62] This portrayal, in turn, legitimized Native removal as necessary to protect settler colonialist women from the alleged "savagery" of Native communities.[63] In barely revised forms, the rationales would undergird anti-miscegenation laws disallowing marriage between Native Americans and white women.[64]

Anti-Black legislation and policies were consistently supported with appeals to white women's interests. Starting during the Civil War, the Confederate Congress passed a law exempting one white man from military service on any plantation with more than twenty enslaved persons. The Second

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Rebecca E. Ivey, Note, Destabilizing Discourses: Blocking and Exploiting a New Discourse at Work in *Gonzales v. Carhart*, 94 Va. L. Rev. 1451, 1456–63 (2008).

59. 550 U.S. 124, 159 (2007).

60. *Id.*

61. Sandra L. Myres, Westering Women and the Frontier Experience, 1800–1915, at 37–38 (1982) (recording colonialists' view that white men were "forced" to execute Native Americans in order "to protect white women from their fears and from their sexuality"); see also Melissa A. McEuen & Thomas H. Appleton, Jr., Kentucky Women: Their Lives and Times 20–22 (2015) (stating that white women were often the impetus of the violence against Native American tribes).

62. Walter L. Hixson, American Settler Colonialism: A History 11 (2013); Carroll P. Kakel, III, The American West and the Nazi East: A Comparative and Interpretive Perspective 205 (2011); Michael John Witgen, Seeing Red: Indigenous Land, American Expansion, and the Political Economy of Plunder in North America 87 (2022).

63. Laurel Clark Shire, The Threshold of Manifest Destiny: Gender and National Expansion in Florida 57–58 (2016); Kakel, *supra* note 62, at 205; Joanne Reitano, New York State: Peoples, Places, and Priorities: A Concise History With Sources 52–53 (2015); Lorena Oropeza, Women, Gender, Migration, and Modern US Imperialism, *in* The Oxford Handbook of American Women's and Gender History 87, 88 (Ellen Hartigan-O'Connor & Lisa G. Materson eds., 2018); Christine M. Su, Race Mixing and Intermarriage in the United States, *in* Immigrants in American History: Arrival, Adaptation, and Integration 1789, 1793 (Elliott Robert Barkan ed., 2013).

64. Katherine Ellinghaus, Taking Assimilation to Heart: Marriages of White Women & Indigenous Men in the United States and Australia, 1887–1937, at xxii-iv (2006).

Conscription Act—or, as it was better known, the "Twenty Negro Law"—was driven by fears of white women's fate if left without the protection of a white man.[65]

Following Emancipation, a key driving force behind historical Southern segregation was the fear of the purported predatory inclinations of Black men and boys.[66] Take a well-known example. As the Court considered *Brown v. Board of Education*,[67] at a White House dinner, President Dwight D. Eisenhower quipped to Chief Justice Earl Warren that white Southerners weren't "bad people"; rather "all they [were] concerned about [was] to see that their sweet little girls [were] not required to sit in school alongside some big overgrown Negroes."[68]

Eisenhower's comments reflected attitudes that were both widely shared and long held. A bizarre obsession with the image of Black men seated beside white women fueled efforts to "protect" white women through segregation on public transportation.[69] Comparable views buttressed outlawing interracial marriage.[70] Indicative of the white-woman-protective impulses at the heart, anti-miscegenation laws were both more likely to be enforced and the punishments were steeper when couples involved a white woman and Black man, rather than the reverse.[71]

White women's welfare served as the principal reason behind the campaign of violent Ku Klux Klan terrorism[72] and brutal spectacle lynching.[73] It

65. Florence Kelley, The Women at Hull House, *in* Women's America: Refocusing the Past 269, 269–270 (Linda K. Kerber & Jane De Hart-Mathews eds., 2d ed. 1987); Logan Scott Stafford, The Arkansas Supreme Court and the Civil War, 7 J.S. Legal Hist. 37, 55–60 (1999).

66. See Serena Mayeri, The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse, 18 Yale J.L. & Humans. 187, 194 (2006); Thomas D. Russell, "Keep Negroes Out of Most Classes Where There Are A Large Number of Girls": The Unseen Power of the Ku Klux Klan and the Standardized Testing at the University of Texas, 1899–1999, 52 S. Tex. L. Rev. 1, 4 (2010); see also Karen Anderson, Little Rock: Race and Resistance at Central High School 53 (2010) [hereinafter Anderson, Little Rock].

67. 347 U.S. 483, 483 (1954).

68. Earl Warren, The Memoirs of Chief Justice Earl Warren 291 (1977).

69. Barbara Y. Welke, When All the Women Were White, and All the Blacks Were Men: Gender, Class, and the Road to *Plessy*, 1855–1914, 13 Law & Hist. Rev. 261, 306–07 (1995).

70. Meghan Carr Horrigan, Note, The State of Marriage in Virginia History: A Legislative Means of Identifying the Cultural Other, 9 Geo. J. Gender & L. 379, 397–98 (2008).

71. Angela Onwuachi-Willig, According to Our Hearts: Rhinelander v. Rhinelander and the Law of the Multiracial Family 138–39 (2013).

72. See William F. Pinar, White Women in the Ku Klux Klan, 163 Counterpoints 555, 561 (2001) (establishing the white-woman-protective goals of Klan violence); see also Lisa Cardyn, Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South, 100 Mich. L. Rev. 675, 695–97 (2002) (same).

73. Chas C. Butler, Lynching, 44 Am. L. Rev. 200, 212 (1910) (showing white-woman-protective justifications behind lynching); see also Amii Larkin Barnard, The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight Against Race

is important to note that white women were not passive bystanders as their protection lent legitimacy to violence. Quite the contrary. In 1897, feminist and later Georgia Senator Rebecca Latimer Felton gave a speech demanding more, stating "[I]f it needs lynching to protect woman's dearest possession from the ravenous human beasts, then I say lynch, a thousand times a week if necessary."[74] Simultaneously, white suffragettes Elizabeth Cady Stanton and Susan B. Anthony opposed the extension of voting rights to Black men, on the ludicrous claim that granting Black men the right to vote would increase their likelihood of raping white women.[75]

Black women were not immune to the fallout. History is replete with examples of blockades against Black women's and girls' educational, career, and economic progress, emerging out of concern for white women and girls' "safety."[76] The most common defense? Racist beliefs that Black women and girls were more prone to diseases and therefore would act as contaminants if allowed to work or sit beside white counterparts.[77] Segregationist propaganda demanding forced separation was wont to treat those falsehoods as fact.[78]

A startling amount of twentieth century federal policy turned on congressional desires to protect white women from Black men.[79] In 1910, horrified by wholly specious claims of white women engaging in sex work with nonwhite men, Congress passed the White-Slave Traffic Act.[80] Offering an insight into the urgency, one politician expressed, "[A]ll of the horrors which have ever been urged . . . against the [B]lack-slave trade pale into insignificance

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and Gender Ideology, 1892–1920, 3 UCLA Women's L.J. 1, 2–4 (1993) (same).

74. Rebecca Latimer Felton, Needs of the Farmers' Wives and Daughters, *in* Lynching in America: A History in Documents 143, 144 (Christopher Waldrep ed., 2006).

75. See Faye E. Dudden, Fighting Chance: The Struggle Over Woman Suffrage and Black Suffrage in Reconstruction America 166–70 (2011); Laura E. Free, Suffrage Reconstructed: Gender, Race, and Voting Rights in the Civil War Era 154–59 (2015).

76. bell hooks, Ain't I A Woman: Black Women and Feminism 133 (2014); see also Enobong Hannah Branch, Opportunity Denied: Limiting Black Women to Devalued Work 77–79 (2011) (collecting examples).

77. See Stephen G.N. Tuck, We Ain't What We Ought to Be: The Black Freedom Struggle From Emancipation to Obama 214 (2010) ("[C]laiming the risk of venereal disease and contamination, white women (and white men on their behalf) would not tolerate [B]lack women workers at all. At Detroit's U.S. Rubber plant, two thousand white women walked off the job in March 1943 because of shared bathroom facilities."). For other examples of hate strikes to oppose workplace integration, see Anderson, Little Rock, *supra* note 66, at 53; Emily Yellin, Our Mothers' War: American Women at Home and at the Front During World War II, at 201 (2004); Eileen Boris, "You Wouldn't Want One of 'Em Dancing With Your Wife": Racialized Bodies on the Job in World War II, 50 Am. Q. 77, 93–97 (1998).

78. Phoebe Godfrey, Bayonets, Brainwashing, and Bathrooms: The Discourse of Race, Gender, and Sexuality in the Desegregation of Little Rock's Central High, 62 Ark. Hist. Q. 42, 63–64 (2003).

79. See Barbara Holden-Smith, Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era, 8 Yale J.L. & Feminism 31, 59–60 (1996).

80. Ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2018)).

as compared [with] the horrors of the so-called 'white-slave traffic.'"[81] Two years later, Georgia Congressman Seaborn Roddenbery introduced a constitutional amendment to prohibit marriage between Black men and white women.[82] Again, congressional statements illuminate the stakes . In Roddenbery's words, "No more voracious parasite ever sucked at the heart of pure society, innocent girlhood, or Caucasian motherhood than . . . the sacred ties of wedlock between Africa and America."[83]

Appeals to protecting white women's livelihood[84] and safety[85] vindicated state-sponsored discrimination against Asian immigrants and Asian Americans. When Chinese Americans entered the West Coast's female-predominated laundry industry in the 1870s, rhetoric of Chinese laundrymen threatening white women's incomes formed the core of anti-Chinese labor protests.[86] "It is hard enough now for a white woman to make a living in the few, branches of honest livelihood that are open to them," a newspaper editorial emotionally explained, before belligerently alerting readers those avenues were "being rapidly filled up with Chinamen [sic], who actually wrest the wash-tub from them, and invade those provinces of labor belonging to women."[87] Calls to boycott Japanese and Chinese laundries in favor of using white women laundresses became common.[88] Protests would later turn to policy, when protectionism drove anti-Asian laundry legislation and taxation schemes.[89]

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81. Holden-Smith, *supra* note 79, at 70 (internal quotation marks omitted) (quoting 45 Cong. Rec. 1040 (1910) (statement of Rep. Mann)) (misquotation). Representative Horace Mann was a sponsor of the White-Slave Traffic Act.

82. 49 Cong. Rec. 503 (1913).

83. *Id.* at 504 (statement of Rep. Roddenbery).

84. Katherine Benton-Cohen, Borderline Americans: Racial Division and Labor War in the Arizona Borderlands 75 (2009) (explaining that local leaders "couch[ed] Chinese exclusion as a way to protect women's livelihood"); Christopher Corbett, The Poker Bride: The First Chinese in the Wild West 33 (2010) (documenting "confrontations between Chinese laundrymen and white women who objected to the competition").

85. See Chinese Restaurants and the Police Power, 45 Am. L. Rev. 884, 911–12 (1911) (discussing a decision overturning a law prohibiting white women under the age of twenty-one from entering a restaurant or hotel owned by a Chinese person).

86. See Martha Mabie Gardner, Working on White Womanhood: White Working Women in the San Francisco Anti-Chinese Movement, 1877–1890, 33 J. Soc. Hist. 73, 75 (1999); Margaret K. Holden, Gender and Protest Ideology: Sue Ross Keenan and the Oregon Anti-Chinese Movement, 7 W. Legal Hist. 223, 230 (1994); Emily A. Prifogle, Law and Laundry: White Laundresses, Chinese Laundrymen, and the Origins of *Muller v. Oregon*, *in* Studies in Law, Politics, and Society 23, 41–45 (Austin Sarat ed., 2020); Joan S. Wang, Race, Gender, and Laundry Work: The Roles of Chinese Laundrymen and American Women in the United States, 1850–1950, J. Am. Ethnic Hist., Fall 2004, at 58, 77.

87. David E. Bernstein, Two Asian Laundry Cases, 24 J. Sup. Ct. Hist. 95, 96 (1999); see also Lisbeth Haas, Conflicts and Cultures in the West, *in* A Companion to American Women's History 132, 141 (Nancy A. Hewitt ed., 2005).

88. Edith Sparks, Capital Intentions: Female Proprietors in San Francisco, 1850–1920, at 48 (2006); Him Mark Lai, The 1903 Anti-Chinese Riot in Tonopah, Nevada, From a Chinese Perspective: Two Letters Published in the Chung Sai Yat Po, Chinese Am.: Hist. & Persps. 47, 47 (2003).

89. See Quong Wing v. Kirkendall, 223 U.S. 59, 59 (1912) (upholding laundry taxation

Narratives about Chinese immigrants and Chinese American men's proclivity for white women, as well as the association between late-nineteenth-century Chinese society and the use of opium, fueled additional social hostility.[90] Grounded on those and other racist stereotypes, states prohibited white women from patronizing or working in Chinese-owned restaurants.[91] Beginning in the 1860s, the same prejudices led to prohibitions on marriages between Filipino, Indian, Korean, Japanese, and Chinese American men and white women.[92] So profound was the "need" to safeguard white women from the sexual threat posed by Asian men, scholars have argued that it partly explained the authorization of Japanese internment.[93]

Sitting at the conflux of the racist rationales previously outlined, defense of white women went on to inspire the development of American drug laws. States introduced the first drug laws based on claims that narcotics made non-white men more prone to committing sexual violence.[94] Tales of white women from "good families" being entrapped by Asian men to live in opium dens[95] would support the federal Harrison Narcotics Act and Federal Bureau of Narcotics policy.[96] Further on, during the hearings on the 1937 Marihuana Tax Act, Congress listened to testimony that "[m]ost marijuana smokers are Negroes, Hispanics, Filipinos and entertainers . . . . This marijuana causes white women to seek sexual relations with Negroes," and to "fictional stor[ies] of pot-crazed [B]lack college men impregnating white coeds."[97]

scheme, while noting but declining to confront the scheme's anti-Chinese intent); David E. Bernstein, *Lochner*, Parity, and the Chinese Laundry Cases, 41 Wm. & Mary L. Rev. 211, 237–38, 264, 266, 287 (1999).

90. Henry Yu, Mixing Bodies and Cultures: The Meaning of America's Fascination With Sex Between "Orientals" and "Whites", *in* Sex, Love, Race: Crossing Boundaries in North American History 444, 449–51 (Martha Hodes ed., 1999).

91. Gabriel J. Chin & John Ormonde, The War Against Chinese Restaurants, 67 Duke L.J. 681, 707–16 (2018).

92. See, e.g., Hrishi Karthikeyan & Gabriel J. Chin, Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910–1950, 9 Asian L.J. 1, 25–26 (2002) (finding woman-protective notions underlying anti-miscegenation statutes); Deenesh Sohoni, Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws, and the Construction of Asian Identities, 41 Law & Soc'y Rev. 587, 611 (2007) (same); Leti Volpp, American Mestizo: Filipinos and Antimiscegenation Laws in California, 33 U.C. Davis L. Rev. 795, 796 (2000) (same).

93. See Alison Dundes Renteln, A Psychohistorical Analysis of the Japanese American Internment, 17 Hum. Rts. Q. 618, 632–42, 646–47 (1995).

94. See James P. Gray, Why Our Drug Laws Have Failed and What We Can Do About It: A Judicial Indictment of the War on Drugs 21 (2d ed., 2012) (describing the laws as "fundamentally racist laws aimed at perceived threats to white women from drug usage by [B]lack, Mexican, and Chinese men").

95. See Kathleen Auerhahn, The Split Labor Market and the Origins of Antidrug Legislation in the United States, 24 Law & Soc. Inquiry 411, 420 & n.4 (1999).

96. See Gabriel J. Chin, Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction, 6 J. Gender, Race & Just. 253, 257–58 (2002); David A. Sklansky, Cocaine, Race, and Equal Protection, 47 Stan. L. Rev. 1283, 1292 n.42 (1995).

97. David Schlussel, Note, "The Mellow Pot Smoker": White Individualism in Marijuana Legalization Campaigns, 105 Calif. L. Rev. 885, 897 (2017).

Closing episodes from the Trump campaign and presidency confirm the place that white-woman-protective rhetoric continues to hold in the modern day. As far back as 2015, then-candidate Trump referred to Mexican immigrants as "rapists."[98] The malignment intensified when Trump began touting the 2015 and 2018 deaths of Kate Steinle and Mollie Tibbetts, both caused by undocumented immigrants. Continuing his questionable practice of emphasizing women's physical appearances, he consistently referred to Steinle as "beautiful Kate" and to Tibbetts as a "beautiful young woman."[99] Trump's frequent invocations become even more stark when viewed against the background of pleas from the victims' relatives against politicizing the deaths, and the fact that he reportedly never contacted their families.[100] Clearly, his calling attention to Steinle's and Tibbetts's deaths and appearances was a dog whistle for "[w]hite womanhood under threat from immigrant criminality."[101] Framed that way, the references were self-serving, used primarily to bolster the need to "build a wall" at the U.S.-Mexico border and to pursue aggressive deportation sweeps.[102]

President Trump's speech about and policies toward Muslim immigrants followed an identical course. Defending against charges that his comments about Muslims were Islamophobic, he claimed they reflected concern for the treatment of women in Middle Eastern countries. [103] And, when he suspended entry from seven Muslim-majority countries in a January 27, 2017 Executive Order, the purported goal was excluding immigrants "engage[d] in acts of

98. Cindy Casares, Opinion, Trump's Repeated Use of the Mexican Rapist Trope Is as Old (and as Racist) as Colonialism, NBCNews (Apr. 7, 2018), https://www.nbcnews.com/think/opinion/trump-s-repeated-use-mexican-rapist-trope-old-racist-colonialism-ncna863451 [https://perma.cc/9XZQ-2QNT]; Z. Byron Wolf, Trump Basically Called Mexicans Rapists Again, CNN (Apr. 6, 2018), https://edition.cnn.com/2018/04/06/politics/trump-mexico-rapists/index.html [https://perma.cc/WF7Z-XUMA].

99. See Ashley Reese, The Grim Politics of Dead White Women, Jezebel (Oct. 16, 2018), https://jezebel.com/the-grim-politics-of-dead-white-women-1828535627 [https://perma.cc/A72D-K9RF].

100. *Id.* (reporting the remarks of Steinle's brother); see also Terrence McCoy, Trump Used Her Slain Daughter to Rail Against Illegal Immigration. She Chose a Different Path, Wash. Post (Dec. 28, 2018), https://www.washingtonpost.com/local/social-issues/trump-used-her-slain-daughter-to-rail-against-illegal-immigration-she-chose-a-different-path/2018/12/27/084f93a4-e9ce-11e8-a939–9469f1166f9d_story.html [https://perma.cc/ZB6X-VBZJ].

101. Daniel Denvir, All-American Nativism: How the Bipartisan War on Immigrants Explains Politics as We Know It 244 (2020).

102. See Peter Daou, Digital Civil War: Confronting the Far-Right Menace 62–63 (2019); Jamie R. Abrams, The Myth of Enforcing Border Security Versus the Reality of Enforcing Dominant Masculinities, 56 Cal. W. L. Rev. 69, 91–92 (2019).

103. Charlotte Alter, Muslim Women Say They Don't Need Donald Trump's Help, Time (Mar. 11, 2016), https://time.com/4255987/muslim-women-donald-trump-islam/ [https://perma.cc/2GPX-H95K]; Amanda Taub, Portraying Muslims as a Threat to Women, Donald Trump Echoes 'Us vs. Them' Refrain, N.Y. Times (Aug. 16, 2016), https://www.nytimes.com/2016/08/17/us/politics/donald-trump-muslims-immigration.html (on file with the *Columbia Law Review*).

bigotry or hatred []including 'honor' killings, [and] other forms of violence against women . . . ."[104] Yet, for all that talk, at no point in his tenure did President Trump ever express equal concern for violence against women by Americans.[105]

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The primary lesson from this historical review is that, in many cases, woman-protective arguments or policies warrant careful review. For a start, despite their purported intentions, they regularly undercut—rather than truly protected or advanced—women's interests. Labor legislation harmed women in the workforce, and protective reasoning robbed women of opportunities to serve on juries, extinguished their sexual sovereignty, and stripped them of reproductive rights.

That women's protection has continually provided cover for the male self-interest, both in intention and implementation, serves as warning. A not-insignificant number of labor laws were at least partially motivated by, and supported for, patriarchal reasons.[106] Restrictions on women's participation in public life likewise benefitted men. Under the guise of protecting white women, U.S. policies have historically protected white men's interests in white womanhood. And the ruse lives on; one need only reexamine how former-President Trump sought to wrap himself in the mantle of women's defender, while simultaneously papering over policies and rhetoric that did the very opposite.

Finally, woman-protective reasoning has been used to further discrimination against minorities. Far too often, white women's protection has been used to motivate the exclusion, economic decimation, and execution of people of color. There is no doubt that, throughout history, lawmakers genuinely believed such women needed protection. Even so, with modern eyes we can easily see how prejudice distorted logic, and how that resulted in devastating consequences. If this history instructs, we have ample cause to suspect the same is true today.

II. Cis-Woman-Protective Arguments

An integral component of CWP thought—perhaps the most acute motivation—is the idea that the interests of trans persons (almost exclusively trans

104. Exec. Order No. 13,769, 3 C.F.R. 272, 273 (2018).

105. See Cristiano Lima, Trump: 'I Am Totally Opposed to Domestic Violence of Any Kind', Politico (Feb. 14, 2018), https://www.politico.com/story/2018/02/14/trump-domestic-violence-409645 [https://perma.cc/4HZ4-B6QV] ("The president made no mention of the women who have accused his former staffers of abuse."); Shefali Luthra, 26 Years in, the Violence Against Women Act Hangs in Limbo—While COVID-19 Fuels Domestic Violence Surge, USA Today (Sept. 26, 2020), https://www.usatoday.com/story/news/politics/2020/09/26/26-years-in-violence-against-women-act-hangs-limbo-while-covid-fuels-domestic-violence-surge/5827171002/ [https://perma.cc/DY9K-TCHF] ("President Donald Trump has not focused on either [the Violence Against Women Act] or the issue of domestic violence, whether from the White House or the campaign trail.").

106. See Rhode, *supra* note 36, at 1740–41.

women and girls) and those of cisgender women and girls are in conflict, with the former threatening the latter. More important is the alleged scope and scale of the "transgender threat." As framed by CWP arguments, the threat advances from multiple angles, employs various tactics, and reappears across numerous—and disparate—contexts, and is, at once, both immediate and long-term. Seen that way, the "transgender threat" to cis woman and girls is formidable, and the risks are incredibly high.

This Part sketches the contours of the purported threat. It begins by marking the stakes, using opposition to the Equality Act as a brief case study. Next, it identifies and distills repeating lines of CWP arguments. Doing so provides the starting point for the Essay's later analysis. Simultaneously, reading the heretofore uncollected allegations in unison brings important historical continuities into view. Accordingly, the Part ends by shedding light on the persistent problems with protectionist reasoning and the striking family resemblances between CWP arguments and their predecessors.

A. *Overview: The "Transgender Threat" to Cis Women's Rights*

One of the largest spotlights shone on the alleged conflict between progress for transgender persons and cis women and girls has been the acrimonious, years-long dispute over the Equality Act.[107] If enacted, the Equality Act would amend the Civil Rights Act of 1964 to prohibit discrimination on the basis of "sexual orientation and gender identity," providing LGBTQ Americans with uniform protections under federal law for the first time.[108]

Efforts to pass the bill have been unsuccessful.[109] The primary impediment is the belief that the Act pits the rights of transfolk and cis women against each other. Professor Callie Burt's widely read analysis of the version introduced in 2019 embodies such thinking.[110] To Burt, the absence of exceptions to the legislation's gender identity protections "gives primacy to gender identity over sex," resulting in "the erosion of females' sex-based provisions." [111] Thus, rather than "strike a balance," in Burt's view, the law "prioritizes the demands of trans people over the hard-won rights of female people."[112]

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107. See Ellie Bufkin, The Controversy Over the Equality Act, ABC13 News (Feb. 25, 2021), https://wset.com/news/nation-world/the-controversy-over-the-equality-act [https://perma.cc/E2V4-VHAS].

108. See Danielle Kurtzleben, House Passes Equality Act: Here's What It Would Do, NPR (Feb. 24, 2021), https://www.npr.org/2021/02/24/969591569/house-to-vote-on-equality-act-heres-what-the-law-would-do [https://perma.cc/U43D-38LP] (last updated Feb. 25, 2021).

109. See Karl Evers-Hillstrom, Pride Month Concludes Without Equality Act Vote in Senate, Hill (July 1, 2021), https://thehill.com/business-a-lobbying/561060-pride-month-concludes-without-equality-act-vote-in-senate/ [https://perma.cc/7KST-LWX9].

110. See Callie Burt, Scrutinizing the U.S. Equality Act 2019: A Feminist Examination of Definitional Changes and Sociolegal Ramification, 15 Feminist Criminology 363, 363 (2020).

111. *Id.* at 365.

112. *Id.*

Many reached the same conclusion. During congressional hearings, lawmakers continually suggested that trans rights threatened those of cis women and girls.[113] Sports formed the most consistent sticking point.[114] Another common concern was the potential harm to vulnerable residents of women's shelters.[115] Others returned to more well-worn worries: the Act's purported impact on cis women and girls' safety and privacy in bathrooms.[116] Those fears provoked a predictably alarmist response. Several legislators sharply denounced the bill, among them Georgia Representative Marjorie Taylor Greene, who claimed that trans rights "completely destroyed women's rights,"[117] and Texas Representative Louie Gohmert who characterized the Act as a full-scale "war on women."[118]

Views outside of Congress largely followed suit. For weeks on end, television programs inundated audiences with an ever-growing list of disasters that would follow if the Act was passed, with each worse than the one before.[119] Facebook posts and ad campaigns stating that protections for transfolk imperiled cis women and girls recorded millions of engagements[120]—though, with

113. See, e.g., 167 Cong. Rec. H1086 (daily ed. Mar. 8, 2021) (statement of Rep. Marjorie Taylor Greene); 165 Cong. Rec. H3934 (daily ed. May 17, 2019) (statement of Rep. Tom McClintock).

114. See, e.g., 167 Cong. Rec. H1086 (daily ed. Mar. 8, 2021) (statement of Rep. Marjorie Taylor Greene); 167 Cong. Rec. H641 (daily ed. Feb. 25, 2021) (statement of Rep. Vicky Hartzler); 167 Cong. Rec. H655 (daily ed. Feb. 25, 2021) (statement of Rep. Greg Steube); 167 Cong. Rec. H593 (daily ed. Feb. 24, 2021) (statement of Rep. Virginia Foxx); 167 Cong. Rec. H570 (daily ed. Feb. 23, 2021) (statement of Rep. Doug Lamborn); 167 Cong. Rec. S291 (daily ed. Feb. 3, 2021) (statement of Sen. James Lankford); 165 Cong. Rec. H3934–50 (daily ed. May 17, 2019) (statement of Rep. Tom McClintock); 165 Cong. Rec. H3805 (daily ed. May 15, 2019) (statement of Rep. Vicky Hartzler).

115. See, e.g., 165 Cong. Rec. H3942 (daily ed. May 17, 2019) (statement of Rep. Louie Gohmert).

116. See 167 Cong. Rec. H625 (daily ed. Feb. 25, 2021) (statement of Rep. Andrew Clyde); 165 Cong. Rec. H3936 (daily ed. May 17, 2019) (statement of Rep. Debbie Lesko).

117. David Badash, Marjorie Taylor Greene Lies Pending LGBTQ Equality Bill Has 'Completely Canceled Women' and 'Destroyed Women's Rights', New C.R. Movement (Mar. 8, 2021) https://www.thenewcivilrightsmovement.com/2021/03/marjorie-taylor-greene-lies-pending-lgbtq-equality-bill-has-completely-canceled-women-and-destroyed-womens-rights/ [https://perma.cc/LB4E-42JH].

118. Chris Johnson, Fears Over Men Playing in Women's Sports Dominate Equality Act Hearing, Watermark (Apr. 4, 2019) https://watermarkonline.com/2019/04/04/fears-over-men-playing-in-womens-sports-dominate-equality-act-hearing/ [https://perma.cc/2LWR-PCE8].

119. Alex Paterson, Post-Trump Fox News Is a Hotbed of Anti-LGBTQ Extremism, MediaMatters (May 11, 2021), https://www.mediamatters.org/fox-news/post-trump-fox-news-hotbed-anti-lgbtq-extremism [https://perma.cc/XMW2-L9H3].

120. Brianna January, Facebook Is Profiting From Harmful Anti-Trans Political Ads Despite Its Hate Speech Policies, MediaMatters (Sept. 11, 2020), https://www.mediamatters.org/facebook/facebook-profiting-harmful-anti-trans-political-ads-despite-its-hate-speech-policies [https://perma.cc/XHP3-XY3A]; Brianna January, The Right Is Dominating Facebook Engagement on Content About Trans Issues, MediaMatters (July 20, 2020), https://www.mediamatters.org/facebook/right-dominating-facebook-engagement-content-about-trans-issues [https://perma.cc/9K69-ZPE9].

some 52% of Americans using Facebook as a news source, the content likely reached tens of millions more.[121] Polls confirmed as much. In a series of representative surveys, a significant portion of Americans—upwards of 70% of voters in Michigan, Pennsylvania, and Wisconsin—recognized the "threat," taking issue with trans inclusion in prisons, shelters, public facilities, and athletics.[122]

These reactions offer a simplified portrait of the extent to which Americans apparently share the view that the rights of transfolk threaten those of cis women and girls. To many, the "transgender threat" is obviously significant. What sets it apart, however, is the purported scope. Certainly, while the idea that the women's interests are in conflict with the equality of other minority groups is not aberrational historically, earlier conflicts tended to both be relatively contained and largely focused on threats to women's health or physical safety.[123] By contrast, based on discourse over the Equality Act, the current "threat" attacks on many more fronts—implicating a wider range of interests, even while being uniformly catastrophic. Understandably, then, to those holding CWP views, staving off the so-called "transgender threat" to cis women's rights is of utmost importance.

B. *Mapping the "Threat"*

To capture CWP claims, this Essay first employed a multi-pronged repository and targeted search approach. Among others, the final corpus of arguments included those in: cases; legal filings; publicly available legislative

121. Elisa Shearer & Elizabeth Grieco, Americans Are Wary of the Role Social Media Sites Play in Delivering News, Pew Rsch. Ctr. (Oct. 2, 2019), https://www.pewresearch.org/journalism/2019/10/02/americans-are-wary-of-the-role-social-media-sites-play-in-delivering-the-news/#share-of-americans-who-get-news-on-social-media-has-recently-increased [https://perma.cc/7CPX-6D2F].

122. Memorandum from Terry Schilling, Exec. Dir., Am. Principles Project, to Interested Parties 4 (July 28, 2020), https://americanprinciplesproject.org/wp-content/uploads/2020/07/APP-Swing-State-Polling-Memo-7–28–20.pdf [https://perma.cc/9W2M-RWW5]; see also National Poll Reveals Majority of Voters Support Protecting Single-Sex Spaces, Women's Liberation Front (Oct. 27, 2020), https://womensliberationfront.org/news/national-poll-support-for-womens-spaces [https://perma.cc/4BJW-WYKC] (claiming that poll of 3,500 people showed most did not support trans-inclusive policies); Polling From 13 States Reveals Widespread Disapproval of "Gender Identity" Policies, Women's Liberation Front (Mar. 12, 2021), https://womensliberationfront.org/news/polling-from-13-states-reveals-widespread-disapproval-of-gender-identity-policies [https://perma.cc/CQK2–8HCW] (showing poll results that indicate most respondents did not support trans-inclusive sports policies).

123. See *supra* section I.A. Notable exceptions were discriminatory taxation schemes, which viewed minorities as threats to livelihood, and white suffragettes' arguments against Black men's enfranchisement, which viewed Black voting rights as a threat to white women's position in society. My thanks to Professor Jessica Clarke for underscoring this point.

audio, transcripts, and submitted testimony associated with trans-related state laws; prisoner grievance complaints; recordings from various school board meetings; and comments submitted on federal rulemaking.

Adopting a wide shot of the sources, cohesive patterns emerge. Repeated lines of argument loosely cluster around a few related, but distinct, themes, demarcated by the rights or interests that trans inclusion is claimed to threaten. At their simplest, the arguments are outlined as follows.

1. Facilities: Trans women's access to sex-segregated bathrooms, changing or locker rooms, and showers, shelters, or prisons, threatens cis women and girls' *physical safety* and *privacy*.

2. Athletics: Trans women's access to sex-segregated sports teams is fundamentally unfair to cis women and girls, because of trans women and girls' "*inherent biological advantages*."

3. Respite and Rehabilitation: Trans women's presence in sex-segregated domestic violence housing and prisons has the potential to *traumatize* cisgender women and girls, particularly those who have previously been victims of male violence.

4. Community Building: Trans women's attendance at women's colleges deprives cis women and girls of the ability to gain the benefits associated with single-sex educational environments, by fundamentally *disrupting* the character or atmosphere of those spaces.

5. Representation: Viewing trans women as women threatens cis women's right to *accurate statistical information*.

6. Voices: Acceptance of transgender persons threatens cis women and girls' right to free speech, by restricting their ability to *voice* perspectives or opinions that are, or appear to be, critical of, antagonistic to, or hateful toward trans persons.

7. Advancement: Viewing trans women as women threatens cis females' social and political advancement by: *diluting* the pool of potential recipients of policies, grants, scholarships, and programs aimed at remedying the effects of sex discrimination; giving trans women access to programs that they do not *deserve*; and allowing cis men, under the guise of being trans, to *defraud* these remedial interventions.

8. Liberation: Trans equality diminishes the possibility of cis females' liberation from patriarchy and sex oppression because it threatens to: *destabilize* the concept of sex and therefore sex-based interventions altogether; or *solidify detrimental sex-stereotypes*.

C. *Structural Issues: The Persistent Problems of Protectionism*

Having laid the arguments out, many aspects of the current iteration of woman-protective rationales should not seem unusual against the backdrop of the prior Part's discussion. Like before, the interests sought to be protected include only those of a subset of women, and, as before, woman-protective justifications are being used to oppose the equality of minority groups. More

significantly, the many structural problems bedeviling earlier woman-protective justifications also persist.[124]

Commencing with the most obvious, CWP arguments habitually resort to generalizations about cis women and girls' vulnerability. Think of the claim that transgender women should be excluded from women's intimate facilities. Typically, the underlying concern is twofold: that cis women are unable to resist attack and that they are "by nature sexually seductive victims."[125] The one-sidedness of these tropes is obvious since trans-exclusionary policies have rarely, if ever, been justified with concerns about cis men's safety in intimate facilities. Some policies even account for such stereotypes. Rationalizing that Texas's Senate Bill 6 only applied to trans women, Texas Lieutenant Governor Dan Patrick offered matter-of-factly, "men can defend themselves."[126] At bottom, the offensive message is that cis women—but not cis men—need protection. At the heart are "archaic and stereotypic notions" about the need to "protect [women] because they are presumed to suffer from an inherent handicap."[127] These very same ideas justified "protective" policies impeding women's participation in civic life.[128]

Related stereotypes rear their heads in the arguments that trans women's access to public facilities infringes cis women's privacy. Conceptions of privacy are, of course, quite explicitly gendered.[129] For instance, in *Kyllo v. United States*—the case reviewing the constitutionality of heatseeking technology—to Justice Antonin Scalia, it was "the lady of the house['s] . . . daily sauna and bath," and not the defendant, Mr. Kyllo's, that represented the prototypical intimate detail and privacy concern.[130] Underlying such thinking, women and girls are expected to have more and different requirements for privacy, and,

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124. See *supra* text accompanying notes 98–105.

125. See Portuondo, *supra* note 20, at 522 (quoting Jami Anderson, Bodily Privacy, Toilets, and Sex Discrimination: The Problem of "Manhood" in a Women's Prison, *in* Ladies and Gents: Public Toilets and Gender 90, 101 (Olga Gershenson & Barbara Penner eds., 2009)) (noting the stereotype); see also Hazeldean, *supra* note 20, at 1770–73 (same); Elizabeth Sepper & Deborah Dinner, Sex in Public, 129 Yale L.J. 78, 142 (2019) (same).

126. Mike Ward, Lt. Gov. Patrick and Allies Spoiling For Brawl Over Planned State Bathroom Law, Houston Chron. (Nov. 24, 2016), https://www.houstonchronicle.com/news/houston-texas/houston/article/Lt-Gov-Patrick-and-allies-spoiling-for-brawl-10634982.php [https://perma.cc/C8E2-YF24].

127. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

128. See Portuondo, *supra* note 20, at 473–74; see also Alice Kessler-Harris, The Paradox of Motherhood: Night Work Restrictions in the United States, *in* Protecting Women: Labor Legislation in Europe, the United States, and Australia, 1880–1920, at 337 (Ulla Wikander, Alice Kessler-Harris & Jane Lewis eds., 1995); Kogan, Sex-Separation, *supra* note 30, at 12–16.

129. See Anita L. Allen & Erin Mack, How Privacy Got Its Gender, 10 N. Ill. U. L. Rev. 441, 443 (1990) (tracing gender stereotypes of female modesty underlying privacy conceptions).

130. Kyllo v. United States, 533 U.S. 27, 38 (2001); see also Jeannie Suk, Is Privacy a Woman?, 97 Geo. L.J. 485, 487–93 (2009) ("Justice Scalia's *Kyllo* reveals the lady in the bath to illustrate the imperative to shield her.").

simultaneously, they are held to higher standards of modesty.[131] Quite often, CWP arguments seek to harness the gendered assumptions underlying views of whose privacy needs defense.[132]

Additionally, descriptions painting minorities as sexually dangerous receive an encore. Recall the racist policies extinguishing women's ability to choose whom they could marry, whom they could sit beside, and the places they frequented or worked. Behind them were offensive images of racial minorities as sexual savages, from whom white women had to be secured. With some minor updates, the same stories are retold today. Many CWP arguments implicitly suggest that transgender persons are more likely to be sexual predators than their cisgender counterparts.[133] A few go further. One *Harris Funeral Homes* brief opened with a comparison of Caitlyn Jenner's entry to a women's shower with Harvey Weinstein's.[134] Hidden away is the acute distinction that Weinstein was accused of allegedly sexually victimizing over ninety women—and has been found guilty of doing so—while Jenner has not.[135] Said out loud, the quiet part is the connotation that the danger caused by Jenner's mere use of a restroom is equivalent to that of the use by someone actually convicted of sexual crime. More than simply being unfounded, that innuendo offensively maligns.[136]

CWP arguments supporting trans-exclusionary sports bans bring together the sweeping assumptions about women's physical capabilities that once supported labor legislation, in tandem with finetuning the framing of minorities as dangerous. After assuming that all trans women and girls are physiologically

131. Portuondo, *supra* note 20, at 518.

132. *E.g.*, Transcript of Proceedings—Preliminary Injunction Hearing at 126, Students & Parents for Priv. v. U.S. Dep't of Educ., No. 16 C 4945 (N.D. Ill. argued Aug. 15 2016), ECF No. 127 (suggesting boys expect less privacy because they "primarily use a urinal without any kind of stalled facility"); Complaint at 9–10, Women's Liberation Front v. U.S. Dep't of Just., No. 1:16-cv-00915-WPL-KBM (D.N.M. filed Aug. 11, 2016); Portuondo, *supra* note 20, at 517.

133. See Shayna Medley, Note, Not in the Name of Women's Safety: *Whole Woman's Health* as a Model for Transgender Rights, 40 Harv. J.L. & Gender 441, 459–60 (2017).

134. Amicus Brief of Free Speech Advocates in Support of Petitioner at 1, R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm'n, 139 S. Ct. 1599 (2019) (No. 18–107), 2019 WL 4013300.

135. See Jan Ransom, Harvey Weinstein Is Found Guilty of Sex Crimes in #MeToo Watershed, N.Y. Times (Feb. 24, 2020), https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-trial-rape-verdict.html (on file with the *Columbia Law Review*) ("Harvey Weinstein, the powerhouse film producer whose downfall over sexual misconduct ignited a global movement, was found guilty of two felony sex crimes . . . ."); Jan Ransom, These Are the 6 Women Who Are Testifying Against Harvey Weinstein, N.Y. Times (Jan. 26, 2020), https://www.nytimes.com/2020/01/26/nyregion/harvey-weinstein-trial-accusers-testimony.html (on file with the *Columbia Law Review*) (last updated Feb. 7, 2020) ("More than 90 women have accused Mr. Weinstein of sexual misconduct including rape, unwanted touching and harassment.").

136. Cf. David Cole & William N. Eskridge, Jr., From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct, 29 Harv. C.R.-C.L. L. Rev. 319, 341 (1994) (calling the queer predator shower narrative "a raw appeal to prejudice").

equivalent to cis men and boys, advocates sound the alarm for trans exclusion as necessary to "protect" or "save" cis women and girls from unfair competition.[137] Sexist generalizations that men are "naturally" superior athletes, and that "all women are always athletically inferior to all men," provide the foundation.[138] Evidence of that is not hard to find. As one senator advocating trans exclusion put it, "indisputable physiological facts" demonstrate "the male is a genetically and time-engineered superior machine."[139]

Portrayals of trans women and girls as a forceful threat replay moves that white-woman-protective policies long perfected.[140] Allegations that masses of Chinese Americans entered predominantly female industries sound strikingly similar to current charges that girls' "sports are being invaded by biological males that are taking over all across the United States."[141] By the same token, segregationists' signature practice of depicting Black male students as larger and older—and thus, more threatening—carries over. Previously, woman-protectionists buttressed school segregation with illustrations of "old Black, Black Buck Negro[s]," sitting alongside "some poor little white girl[s]."[142] Now,

137. Elizabeth A. Sharrow, Sports, Transgender Rights and the Bodily Politics of Cisgender Supremacy, 10 Laws, no. 63, 2021, at 1, 17 (noting the alarmist use of "save" and "protect" in the legislations' titles).

138. Alex Channon, Katherine Dashper, Thomas Fletcher & Robert J. Lake, The Promises and Pitfalls of Sex Integration in Sport and Physical Culture, 19 Sport in Soc. 1111, 1113 (2016).

139. John Hanna, Kansas Bill on Trans Athletes Advances Amid Misogyny Charges, AP News (Mar. 17, 2021), https://apnews.com/article/business-legislature-discrimination-kansas-gender-identity-64dcb878d8f393098437dcd87e6a352f [https://perma.cc/DK2A-DH36] (internal quotation marks omitted) (quoting Kan. State Sen. Virgil Peck).

140. See, e.g., Gary Bai, House Republicans Attempt to Advance Transgender Athletes Bill, Epoch Times (Apr. 29, 2022), https://www.theepochtimes.com/house-republicans-attempt-to-advance-transgender-athletes-bill_4436601.html [https://perma.cc/B5ED-2J2N] (last updated May 1, 2022) (internal quotation marks omitted) (quoting a coalition of parent advocacy groups as claiming that trans inclusion "rob[s] girls and women"); Morgan Trau, Ohio GOP Passes Bill Aiming to Root Out 'Suspected' Transgender Female Athletes Through Genital Inspection, News 5 Cleveland (June 2, 2022), https://www.news5cleveland.com/news/politics/ohio-politics/ohio-gop-passes-bill-aiming-to-root-out-suspected-transgender-female-athletes-through-genital-inspection [https://perma.cc/F2GU-P68L] (quoting a Republican state representative claiming that cis girls' "dreams" are "crushed by biological males").

Other scholars pressing the issue have insightfully noted that this reaction has deeply racialized roots, which further fuel spread of transphobia. See Medley, (Mis)Interpreting Title IX, *supra* note 20, at 699–704 (noting that two Black transgender athletes' success triggered the wave of legislative backlash); Zein Murib, Don't Read the Comments: Examining Social Media Discourse on Trans Athletes, 11 Laws, no. 53, 2022, at 1, 11 (noting racial constructions in trans-exclusionary sport sentiment).

141. Jess Clark, Ky. Lawmakers Override Veto, Banning Trans Athletes From Girls and Women's Sports Teams, 89.3 WFPL (Apr. 13 2022), https://wfpl.org/ky-lawmakers-override-veto-banning-trans-athletes-from-girls-and-womens-sports-teams/ [https://perma.cc/4Y6S-N3HT]; see also Lora Korpar, Iowa Becomes 11th GOP-Run State to Ban Transgender Women in Sports, Newsweek (Mar. 3, 2022), https://www.newsweek.com/iowa-becomes-11th-gop-run-state-ban-transgender-women-sports-1684690 [https://perma.cc/7R47-NX7M].

142. Bobby L. Lovett, The Civil Rights Movement in Tennessee: A Narrative History

they juxtapose six-foot and seven-foot trans girls competing against "little" cis girls.[143] The modern hyperbolics inherit their forerunners' stratagems: resorting to histrionics to amplify the urgency of protection, using dehumanizing distortions to depict minorities as flattened monoliths, and simultaneously adultifying some children while infantilizing others, in order to justify discrimination.

Also returning is the benefit of exclusionary arguments to male supremacy.[144] One issue that reemerges is the normalization of male violence. Congressman Randall Weber relayed reports of a young Texan girl being followed into a bathroom by a "male who said he self-identified as a female."[145] The follower's teeth were "knocked out by the girl's father who self-identified as the tooth fairy."[146] None of it was true.[147] Nonetheless, the moral is hard to miss: When in service of the protected, extralegal male violence is refashioned as legitimate and worthy of veneration.[148] The plethora of cis men's public statements proudly advocating physical attacks against any transfolk sharing a restroom with their wives, or competing against their daughters, suggest the lesson behind Congressman Weber's fable has been learned.[149]

50 (2005) (internal quotation marks omitted) (quoting a letter from a constituent to then-Governor of Texas, Frank G. Clement); see also Joseph Bagley, The Politics of White Rights: Race, Justice, and Integrating Alabama's Schools 20 (2018).

143. Carmen Forman, Oklahoma House GOP Advances New Bill to Ban Transgender Athletes From Women's Sports, Oklahoman (Mar. 3, 2022), https://www.oklahoman.com/story/news/2022/03/03/oklahoma-republican-bill-block-transgender-athletes-womens-sports-advances-lgbtq/6878671001/ [https://perma.cc/WWN8-EDLP] (reporting a Republican lawmaker's statement that a family to her that "their daughter was competing against a child that was born as a man"); House Bill Regulates Transgender Participation in School Sports, Augustana Mirror (Feb. 24, 2022), https://augiemirror.com/2022/02/24/house-bill-regulates-school-sports/ [https://perma.cc/RP2B-63E3] (citing a hypothetical "six-foot-eight former guy"); Romney Speaks Against Allowing Transgender Youth in Girls' Sports, Fox13 (Feb. 3, 2021), https://www.fox13now.com/news/local-news/sen-mitt-romney-speaks-against-allowing-transgender-youth-in-girls-sports [https://perma.cc/C7MG-GGL3] (quoting Senator Rand Paul as commenting, "Frankly, some boy that's 6-foot-2 competing against my 5-foot-4 niece doesn't sound very fair").

144. See Spindelman, *supra* note 2, at 107–08.

145. 167 Cong. Rec. H658 (daily ed. Feb. 25, 2021) (statement of Rep. Weber).

146. *Id.*

147. Fact Check: Story of Girl's Father Punching the Person Who Followed Her Into a Target Bathroom Likely Stems From Meme Pages and Features Unrelated Photo, Reuters (Feb. 10, 2021), https://www.reuters.com/article/uk-factcheck-target-bathroom-father-daug/fact-check-story-of-girls-father-punching-the-person-who-followed-her-into-a-target-bathroom-likely-stems-from-meme-pages-and-features-unrelated-photo-idUSKBN2AA289 [https://perma.cc/MWJ2-EPHG].

148. See Jennifer Carlson, Mourning Mayberry: Guns, Masculinity, and Socioeconomic Decline, 29 Gender & Soc'y 386, 388–89 (2015) (explaining how "masculinist protection" places men in a "privileged position in the gendered hierarchy by repackaging violence as a necessary, honorable social duty that men perform on behalf of women and children").

149. *E.g.*, Equal Fed'n Inst., Freedom for All Ams., Nat'l Ctr. for Transgender Equal. & Movement Advancement Project, The Facts: Bathroom Safety, Nondiscrimination Laws, and Bathroom Ban Laws 12 (2016) (collecting examples); On YouTube, Charlie Kirk Calls For Men to Confront and Physically Prevent Trans Student Athletes From Competing, Media-Matters (Mar. 30, 2022), https://www.mediamatters.org/charlie-kirk/

Another issue is the self-serving positioning of men, this time cis, as "defenders." No example better captures that than Kansas State Senator Virgil Peck's call for his colleagues to protect "God's special creation—females" by supporting a trans athlete sports ban.[150] He began, "Are we, American men, going to take a stand and defend our young ladies . . . ?"[151] Then: "Are there no longer any alpha males who will stand and defend our young ladies, our wives, our daughters, our granddaughters, our neighbor's wives, daughters and granddaughters?"[152]

Peck's statements don't reinvent the wheel. His use of possessive language to describe the persons he's allegedly defending, along with the implication that none of the girls and women he depicts have identities independent of their relationships to others,[153] tip his hand. So does his construction of masculinity. Since, by his account, a willingness to defend women and girls determines authentic manhood, the obvious issue is what that ideology spells for "legitimate" woman- and girlhood. A wider view confirms the increasingly obvious. Peck's previous characterizations of migrants as "immigrating feral hogs" and advocacy for their violent execution as "a (solution) to our illegal immigration problem" call into question exactly which women and girls his heartfelt defensive sentiments apply to.[154] Should any doubts remain, his decades of supporting restrictions on reproductive freedom and on-record digs at feminists put them to rest.[155] True to historical form, Peck's veil of "protecting women and girls"—admirable at first glance—functions to provide self-serving cover for his many less-laudable beliefs.

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youtube-charlie-kirk-calls-men-confront-and-physically-prevent-trans-student-athletes [https://perma.cc/CK3F-WM57] (recording Kirk advising men to physically confront trans student athletes).

150. Sherman Smith, Kansas Senate Passes Transgender Sports Ban After 'Incredibly Insulting' Debate, Lawrence Times (Mar. 18, 2021), https://lawrencekstimes.com/2021/03/18/ksleg-sen-passes-transgender-sports-ban/ [https://perma.cc/Z9RE-YBGM].

151. *Id.*

152. Hanna, *supra* note 139.

153. Given Peck's vocal opposition to gay marriage, the "neighbors" he refers to are most likely cis heterosexual men. Julie Clements, Legislators Talk About Upcoming Issues, Observer-Dispatch (Jan. 9, 2014), https://www.uticaod.com/story/news/local/2014/01/09/legislators-talk-about-upcoming-issues/41041102007/ [https://perma.cc/6AVD-CJK9] (recording Peck labeling gay marriage as "perverted marriage").

154. See Kansas Lawmaker Suggests Immigrants Be Shot Like Hogs, Reuters (Mar. 25, 2011), https://www.reuters.com/article/us-immigration-kansas/kansas-lawmaker-suggests-immigrants-be-shot-like-hogs-idUSTRE72O71H20110325 [https://perma.cc/573T-ZQHR].

155. See KS Legislature, Senate Chamber Proceedings, YouTube, at 36:42 (Apr. 26, 2022), https://www.youtube.com/watch?v=_-qRpa3FVOE (on file with the *Columbia Law Review*) (expressing incredulity that "more of those who are, if you will 'feminists'" were not "standing up for our young ladies"); Protect the Rights of the Unborn, Virgil4Senate (May 30, 2020), https://www.virgil4senate.com/post/protect-the-rights-of-the-unborn [https://perma.cc/ZS78-SGWL] (detailing his anti-abortion history).

III. Substantive Issues

Thus far, this Essay has suggested that woman-protective arguments should generally be taken with a grain of salt. I t now begins to apply exacting scrutiny to CWP arguments. Over the course of this and the subsequent Part, the remainder of the Essay appraises the arguments from different angles. This Part considers only the substance of the arguments. Shortcomings, in terms of method, are saved for later.

The below sections build upon the outline in Part II.B. They walk through and flesh out the arguments laid out above, with the goal being as much to explore the arguments as it is to assess them. Additionally, the focus is whether the arguments work analytically, and as a matter of good policy, rather than whether they work legally.[156] Taking the asserted concerns seriously, the sections will tease out underlying assumptions, verify the claims based on the evidence, and consider whether the proposed policies are justified.

A. *Facilities: The "Safety" and "Privacy" Arguments*

The perennial "bathroom problem" has featured ad nauseam in public debate over transgender rights. However, while the nationwide wave of policies aimed at policing transgender persons' use of bathrooms gained notoriety in the mid-2010s, recorded accounts suggest the issue dates back decades.[157]

Early on, much of the obsession with which facilities trans women use has been held by cis men. In 1976 in Berkeley, California, it was cis men who mobilized to prevent a transgender employee from using the women's room.[158] Another cis man, Sidney Jones, outed Toni Ann Diaz in a 1975 column, announcing: "I suspect his [sic] female classmates in P.E. 97 may wish to make other showering arrangements."[159]

Anecdotes do provide nominal proof of cis women's uneasiness with trans use of gender-appropriate bathroom facilities as well. For instance, in the 1982 case *Sommers v. Budget Marketing, Inc.*, a trans woman, Ms. Audra Sommers, was terminated from her job as a clerk when cis women coworkers threatened to resign if she was permitted to share a bathroom.[160] Trans women were not alone. In a curious outlier, a 1972 *New York Times* article profiled a

156. That approach differs for the *silencing* arguments, for which many of the claims deliberately sound in First Amendment law. See *infra* section III.F. For that discussion, the footnotes provide ancillary doctrinal analysis. See *infra* notes 311–330.

157. See Jillian T. Weiss, Arguments Against ENDA: The Bathroom (Part IV), Trans Workplace Law & Diversity (Oct. 5, 2009), https://transworkplace.blog-spot.com/2009/10/arguments-against-enda-bathroom-part-iv.html [https://perma.cc/8NWS-K8RR] (discussing the tradition of separating bathroom by sex and its transphobic origins).

158. See D.M., 'P.O. Hassles Transsexuals,' Berkeley Barb (Mar. 26, 1976), https://revolution.berkeley.edu/post-office-harasses-trans-worker/ [https://perma.cc/N2PM-9CX5].

159. Diaz v. Oakland Trib., Inc., 139 Cal. App. 3d 118, 124 (Ct. App. 1983).

160. 667 F.2d 748, 748–49 (8th Cir. 1982). Note, here, how the threat of resignation mirrors that of white women's identical threats following workplace racial integration. See *supra* note 77 and accompanying text.

trans man, Robert, who was forced to use the female locker room at work—a decision his cis female coworkers "were not exactly happy about."[161]

Still, cis women's tensions over trans bathroom use emerged more prominently in the late 1990s. In *Goins v. West Group*, it was cis female employees who "expressed concern" about shared restrooms when a trans employee, Ms. Julienne Goins, transferred to a new facility.[162] The objections in *Cruzan v. Special School District Number 1* are comparable.[163] There, Carla Cruzan, a cis female teacher, sued the school district for allowing her trans colleague to use the women's restroom.[164] Upon entering the facility and seeing her colleague exiting a privacy stall, Cruzan filed an action for hostile work environment.[165]

Around a decade later, the issue truly picked up steam. During that time, four states enacted rules allowing trans students to use gender-appropriate intimate facilities,[166] and the Colorado Civil Rights Division ruled that an elementary school was required to allow a transgender girl, Coy Mathis, to use girls' facilities.[167] Further fueling the fire, in 2016 the Obama-era Departments of Education and Justice jointly issued guidance on identical requirements at a national level.[168] Backlash was immediate. Between 2013 and 2016, at least twenty-four states considered legislation aimed at policing trans persons' use of public restrooms.[169]

Throughout, the concerns raised came from two angles. The first positioned trans bathroom access as a threat to cis women's safety,[170] with the second framing trans bathroom access as a threat to their privacy.[171] In

161. Transsexual Tries to Build a New Life, N.Y. Times (Nov. 20, 1972), https://www.nytimes.com/1972/11/20/archives/transsexual-tries-to-build-a-new-life.html (on file with the *Columbia Law Review*).

162. 635 N.W.2d 717, 721 (Minn. 2001).

163. 294 F.3d 981, 982–83 (8th Cir. 2002).

164. *Id.* at 983.

165. *Id.*

166. See Parker Marie Molloy, Year in Review: 10 Important Transgender Moments of 2013, Advocate (Jan. 4, 2014), https://www.advocate.com/year-review/2014/01/04/year-review-10-important-transgender-moments-2013 [https://perma.cc/Z47G-T3AN].

167. Mathis v. Fountain-Fort Carson Sch. Dist. No. 8, State of Colo. Div. of C.R. Determination, Charge No. P20130034X at 12 (Colo. Div. of C.R. June 17, 2013).

168. Chan Tov McNamarah, Repeated Victories in the "Bathroom Wars" During Summer 2018, 2018 LGBT L. Notes 405, 406 [hereinafter McNamarah, Repeated Victories].

169. Joellen Kralik, 'Bathroom Bill' Legislative Tracking, Nat'l Conf. of State Legislatures (Oct. 24, 2019), https://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx [https://perma.cc/U5WR-QSJY].

170. See, e.g., Transcript of North Carolina General Assembly Proceedings, House Judiciary IV Committee at 19–20 (Mar. 23, 2016) (recording one woman's safety concerns in hearings on Charlotte's nondiscrimination ordinance).

171. See, e.g., Leslie Wolfgang, Opinion, Transgender Bill Invades Women's Privacy in Bathroom, Hartford Courant (Apr. 24, 2011), https://www.courant.com/opinion/hc-xpm-2011–04–24-hc-op-wolfgang-transgender-bill-0424–20110424-story.html (on file with the *Columbia Law Review*) (last updated Sept. 15, 2021) (recording privacy concerns raised against Connecticut's nondiscrimination bill). Since 2016, several lawsuits against trans-inclusive bathroom policies, filed under the group monikers "Parents for Privacy," "Privacy Matters," or "Students and Parents for Privacy," have employed similar arguments. See

practice, the bases are typically braided together, with those seeking trans exclusion rarely distinguishing between the two. That notwithstanding, on the thinking that the arguments cannot stand together if they fail to convince independently, the below analysis separates the arguments in order to emphasize some key distinctions.

1. Safety

By far the most common argument related to intimate facilities is that trans-inclusive policies endanger the physical safety of cis women and girls. The argument features repeatedly in hearings on "bathroom bills," case law,[172] filings challenging trans-inclusive policies,[173] and legal scholarship.[174] It is made in a few ways. One is that transgender persons themselves are a direct danger to cis women and girls.[175] Another is as a concern that cisgender men and boys will exploit gender-appropriate facility policies to victimize cis women or girls.[176]

In either form, the safety argument falls flat in the face of real-world evidence. Barely short of accusing all trans women of being sexual predators or as having a proclivity for sexual predation, this first form of the argument has already been thoroughly debunked. A study investigating crime reports from Massachusetts found no relationship between the implementation of trans-inclusive policies and the number or frequency of criminal incidents in intimate spaces by trans individuals.[177] Testimony from law enforcement, state

Complaint, Parents for Priv. v. Dallas Sch. Dist. No. 2, 326 F. Supp. 3d (D. Or. 2018) (No. 3:17-cv-01813-HZ), 2017 WL 5479874; Verified Complaint for Declaratory and Injunctive Relief, Priv. Matters v. U.S. Dep't of Educ., No. 0:16-cv-03015 (D. Minn. filed Sept. 7, 2016), 2016 WL 4691526; Verified Complaint for Injunctive and Declaratory Relief, Students & Parents for Priv. v. U.S. Dep't of Educ., No. 16 C 4945 (N.D. Ill. filed May 4, 2016), 2016 WL 2591322.

172. See Colin Pochie, Note, Sick and Tired of Hearing About the Damn Bathrooms, 93 Chi.-Kent L. Rev. 281, 307 (2018) (citing cases in which courts have "indicated that they view transgender people as inherently threatening to the . . . safety of cisgender people").

173. *E.g.*, Complaint at 9–10, Women's Liberation Front v. U.S. Dep't. of Just., No. 1:16-cv-00915-WPL-KBM (D.N.M. filed Aug. 11, 2016).

174. See, e.g., W. Burlette Carter, Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated by Sex, 37 Yale L. & Pol'y Rev. 227, 287–89 (2018); Christen Price, Women's Spaces, Women's Rights: Feminism and the Transgender Rights Movement, 103 Marq. L. Rev. 1509, 1540 (2020).

175. *E.g.*, Wolfgang, *supra* note 171 (pointing out that some trans women "are attracted to, date and marry women").

176. *E.g.*, Brief of Amici Curiae Public Safety Experts in Support of Petitioner at 5, Gloucester Cnty. Sch. Bd. v. G.G., 137 S. Ct. 1239 (2017) (No. 16–273), 2017 WL 104592 (stating that cis men will "exploit" policies to "facilitate their illicit sexual behavior"); Mike Clark, Opinion, LGBT People in Jacksonville Do Not Need a Human Rights Ordinance, Fla. Times-Union (Dec. 8, 2015), https://www.jacksonville.com/story/opinion/columns/mike-clark/2015/12/08/guest-column-lgbt-people-jacksonville-do-not-need-human-rights/15691490007/ [https://perma.cc/2Z4X-RW7Z] (making similar arguments).

177. Amira Hasenbush, Andrew R. Flores & Jody L. Herman, Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms, 16 Sexuality

legislators, and individual school administrators who have enacted or adopted trans inclusive policies says the same.[178]

While the second form of the argument repositions the source of danger from trans persons to trans rights, it still suffers from want of evidence. Researchers find "[i]nstances of cisgender men dressing as women to gain access to women in various stages of dress . . . an extremely rare phenomenon."[179] Further, police officials from states that have implemented trans-inclusive policies uniformly agree.[180] Therefore, by all accounts, fears that non-transgender persons will exploit trans-inclusive policies are "unfounded."[181]

The safety argument has other flaws. Chiefly, it fails to recognize that even without trans inclusion, perpetrators find ways to victimize cis women and girls using public facilities.[182] Trans-exclusionary policies do not deter this behavior. If anything, by segregating and isolating potential cis female victims in designated locations, they potentially mark cis women as easy targets.[183]

More generally, the logic of the safety arguments is much too narrow. The argument takes as given that men are sexual predators, and women and girls are victims.[184] In doing so, the argument overlooks any possibility of same-sex sexual crimes in public facilities.[185] Since the goal is preserving the

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Rsch. & Soc. Pol'y 70, 80 (2019).

178. See Lou Chibbaro, Jr., Predictions of Trans Bathroom Harassment Unfounded, Wash. Blade (Mar. 31, 2016), https://www.washingtonblade.com/2016/03/31/predictions-of-trans-bathroom-harassment-unfounded/ [https://perma.cc/JRE9-MJJ2]; School Officials Agree: Policies Protecting Transgender Student[s] Do Not Compromise the Privacy or Safety of Other Students, Nat'l Ctr. Transgender Equality, https://transequality.org/school-officials [https://perma.cc/G6MS-XXQF] (last visited Oct. 11, 2022).

179. Brian S. Barnett, Ariana E. Nesbit & Renée M. Sorrentino, The Transgender Bathroom Debate at the Intersection of Politics, Law, Ethics, and Science, 46 J. Am. Acad. Psychiatry & L. 232, 236 (2018).

180. See Emanuella Grinberg & Dani Stewart, 3 Myths that Shape the Transgender Bathroom Debate, CNN Health (Mar. 7, 2017), https://edition.cnn.com/2017/03/07/health/transgender-bathroom-law-facts-myths/index.html [https://perma.cc/6UM5-TNQX]; Carlos Maza, Debunking the Big Myth About Transgender-Inclusive Bathrooms, MediaMatters (Mar. 20, 2014), https://www.mediamatters.org/fox-nation/debunking-big-myth-about-transgender-inclusive-bathrooms [https://perma.cc/T3H8-C9PD].

181. Brief of Amici Curiae Law Enforcement Officers in Support of Respondent at 2, *G.G.*, 137 S. Ct. 1239 (No. 16–273), 2017 WL 836845; see also Barnett et al., *supra* note 179, at 239.

182. Christine Overall, Public Toilets: Sex Segregation Revisited, Ethics & Env't, Fall 2007, at 71, 82.

183. See Terry S. Kogan, Public Restrooms and the Distorting of Transgender Identity, 95 N.C. L. Rev. 1205, 1237–38 (2017); Portuondo, *supra* note 20, at 512–13.

184. Mary Ann Case, Why Not Abolish Laws of Urinary Segregation, *in* Toilet: Public Restrooms and the Politics of Sharing 211, 211 (Harvey Molotch & Laura Noren eds., 2010).

185. See Portuondo, *supra* note 20, at 513 ("[I]f we reject the stereotype that men cannot be assaulted by men, or women by women, we quickly see that sex segregation cannot be an effective solution to a general interest in preventing sexual assault.").

safety of all cis women and girls, logically, the most efficient solution must be policing behaviors inside facilities, rather than who is let in the door.[186]

2. Privacy

Infringement of cis women and girls' bodily privacy is the next objection to trans-inclusive facilities. Normally, the argument is talismanic. Proponents gesture toward a "right to bodily privacy" or "privacy rights" in broad, unspecific terms. Rhetorically compelling as they may be, arguments that cis women and girls "object to the privacy violations created by allowing biological males the right of entry and use of restrooms and locker rooms" do little to say what the supposed privacy violations actually consist of.[187]

Reading the arguments charitably suggests "privacy" could mean at least one of three things.[188] In a first form, the contention is that trans-inclusive facility use violates privacy because cis women and girls should have a right to choose whom to reveal their body to. By that account, trans equality threatens cis women and girls' right to "enjoy free consent regarding who can share private, sexually revealing places with them."[189]

On its face that is a praiseworthy idea, but the reasoning isn't quite right. Unless a facility is single use, normally, persons don't get to choose whom they share them with. By their very nature, public facilities are partly communal, and users have no control over who uses them simultaneously. Most can relate to seeing or being seen by others while inside a public bathroom—outside of a stall—even when they'd rather not. Such is the character of the space. So, the argument cannot be that the privacy violation stems from an inability to choose whom to expose oneself to, because if it is, then most public facilities would infringe cis women and girls' privacy rights.[190]

In a second form, the argument appears to hinge privacy violations on the presence of members of the "opposite sex."[191] To what end? The core concern,

186. See McNamarah, Repeated Victories, *supra* note 168, at 408 (arguing that measures against those "who behave[] inappropriately" will better further the goal of safety in these facilities); Brittany, Florida Experts Debunk the Transgender "Bathroom Predator" Myth, Equal. Fla. (Jan. 12, 2016), https://www.eqfl.org/florida-experts-debunk-transgender-bathroom-predator-myth [https://perma.cc/BAH7-R3Z7].

187. Complaint at 18, N. Carolinians for Priv. v. U.S. Dep't of Justice, 5:16-cv-00245-FL (E.D.N.C. filed May 10, 2016).

188. See Hazeldean, *supra* note 20, at 1746 (using six definitions of privacy to interpret the arguments).

189. Brief of Military Spouses United as Amici Curiae in Support of Petitioner at 5, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (No. 18–107), 2019 WL 4192153.

190. See Louise M. Antony, Back to Androgeny: What Bathrooms Can Teach Us About Equality, 9 J. Contemp. Legal Issues 1, 5 (1998) (arguing that sex-segregated bathrooms "cannot be meant to secure privacy for the performance of intimate bodily functions, for then the sex of the person in the next stall would be irrelevant—the crucial factor ought to be the presence or absence of other people period").

191. Brief of Military Spouses United as Amici Curiae in Support of Petitioner, *supra* note 189, at 5–6, 21; see also Burt, *supra* note 110, at 375 (defining it as the right to "not be exposed to male genitalia").

it seems, is one about sexuality.[192] A federal judge divulged as much when he stated that the "privacy concern . . . arise[s] from sexual responses prompted by students' exposure to the private body parts of students of the other biological sex."[193] Because of sex (understood as both sexual attraction and sexual intercourse), society has a vested interest in segregating and concealing aspects of the body from persons with different anatomy.

The flaw with that telling is exposed by its obliviousness to persons who are not heterosexual. By assuming that all individuals are sexually attracted to the types of genitals that they themselves do not possess, the reasoning overlooks the possibility that persons may sexually desire persons with the types of genitals they have themselves or may not have those desires at all.[194] Training our attention toward the experiences of lesbians, gay men, and bisexual persons unravels the logic. If sexual desire is what drives the privacy concern, then LGB persons' ability to use intimate facilities without raising the same privacy concerns demonstrates that the issue is at least overblown.

In a third, rarer form, the argument is about information. Construing some actions in intimate facilities as communicative, the appeal is about cis women and girls' ability to control what others know about them. Illustrating this line of reasoning, in *Doe v. Boyertown Area School District*, several cis students opposed sharing a restroom with a trans girl[195] since "even hearing urination or the female plaintiffs (or other female students) tending to menstruation issues and the sounds commonly associated with that (such as the opening of wrapping for pads and tampons)" caused privacy violations.[196]

There are many reasons why this version of the argument still comes up wanting.[197] It rests on two unwarranted assumptions: first, that persons interpret anything they hear while using public facilities; and second, that if they correctly deduce what is occurring in an adjacent stall, persons will be able to associate that information with the user. More than that, the underlying idea is illogical. Users cannot possibly have an expectation of privacy in the non-verbal information they convey, and third-parties witness normally, when they are in a public space.[198] Digging deeper: What, precisely, is private about

192. See David S. Cohen, Keeping Men "Men" and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity, 33 Harv. J.L. & Gender 509, 530 (2010); Paisley Currah, Locker Rooms Are the New Bathrooms—Bodily Privacy and the Opposite Sex, Medium (May 3, 2018), https://medium.com/@pcurrah/locker-rooms-are-the-new-bathrooms-bodily-privacy-and-the-opposite-sex-56d40aebd870 [https://perma.cc/3VGW-WFMU].

193. G.G. v. Gloucester Cnty. Sch. Bd., 822 F.3d 709, 735 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part).

194. See Overall, *supra* note 182, at 80 (arguing the "sex segregation of toilets . . . assumes, falsely, both that heterosexuality is universal and that one needs to be private from members of the other sex but not those of one's own").

195. 276 F. Supp. 3d 324, 330 (E.D. Pa. 2017).

196. *Id.* at 403.

197. See Hazeldean, *supra* note 20, at 1766–70 (reaching the same conclusion).

198. Cf. Julie E. Cohen, Privacy, Visibility, Transparency, and Exposure, 75 U. Chi. L. Rev. 181, 191 (2008) ("[N]o privacy interest attaches to most activities in public spaces and nonresidential spaces owned by third parties: persons who voluntarily enter such premises

auditory evidence of bodily functions? Homing in on the *Doe* plaintiffs' second anxiety—auditory privacy for tending to menstruation—explains. Sexist cultural attitudes stigmatize menstruation so that, instead of being seen as natural, it is viewed negatively and even transformed into a source of humiliation that must be hidden.[199] Alluding to menstruation, then, is meant to marshal these shared stigmatizing narratives to fill in the blanks of an otherwise deficient account of privacy violation.[200] Yet, in the sense that it is normal bodily activity, nothing beyond misogynistic cultural attitudes makes the awareness that a person is menstruating private information.[201] On all fronts, therefore, the informational privacy version of the argument still leaves much to be desired.

B. *Athletic Activities: The "Natural Biological Advantages" Argument*

Recently, concerns about transgender persons' participation in women's athletics and sports have stolen the focus once held by the bathrooms. Accompanying the attention is legislation aimed at preventing trans youth from joining sex-segregated school sports teams corresponding to their gender. Thirty-five states have proposed such laws.[202] Thus far, eighteen have enacted bans.[203] Of those, fourteen apply to sports starting in kindergarten, with the rest combining exclusions at middle school, high school, or college levels.[204]

Concerns about trans inclusion in women's sports can be traced back to 1970s hostility to tennis player Renée Richards. At the time, women's tennis organizations expressed that it would be "'damn unfair to a woman who has devoted her whole life to tennis' to lose a spot in a draw to a man and to become involved in the 'psychological effects' of losing to" a trans woman.[205] In one of the first women's tournaments Richards entered, twenty-five of the thirty-two cis competitors withdrew, citing fairness concerns.[206] When

have impliedly consented to being seen there.").

199. Jami Anderson, Bodily Privacy, Toilets and Sex Discrimination: The Problem of "Manhood" in a Women's Prison, *in* Ladies and Gents: Public Toilets and Gender 90, 97–99 (Olga Gershenson & Barbara Penner eds., 2009) [hereinafter Anderson, Bodily Privacy]; Margaret E. Johnson, Menstrual Justice, 53 U.C. Davis L. Rev. 1, 15–22 (2019).

200. See Portuondo, *supra* note 20, at 519–20.

201. Anderson, Bodily Privacy, *supra* note 199, at 99. Separately, one must wonder how underscoring the sexist view that menstruation is shameful advances cis women and girls' welfare.

202. See Reid Wilson, Majority of States Considering Bills Limiting Transgender Access, Hill (Mar. 3, 2021), https://thehill.com/homenews/state-watch/541322-majority-of-states-considering-bills-limiting-transgender-access/ [https://perma.cc/BR6V-ACGQ].

203. LGBTQ Youth: Bans on Transgender Youth Participation, Movement Advancement Project, https://www.lgbtmap.org/img/maps/citations-sports-participation-bans.pdf [https://perma.cc/QR2Y-CRT4] (last updated Sept. 15, 2022).

204. *Id.*

205. Neil Amdur, Vexed U.S.T.A. Orders Sex Test for Women, N.Y. Times (Aug. 15, 1976), https://www.nytimes.com/1976/08/15/archives/vexed-usta-orders-sex-test-for-women-results-are-shown.html (on file with the *Columbia Law Review*).

206. Robin Herman, 'No Exceptions,' and No Renee Richards, N.Y. Times (Aug. 27, 1976), http://archive.nytimes.com/www.nytimes.com/pack-ages/html/sports/year_in_sports/08.27.html [https://perma.cc/GNX3-NXTX]; Johnette Howard, Renee Richards:

Richards challenged the United States Tennis Association's (USTA) attempt to ban her from the U.S. Open in 1977, the USTA raised parallel objections.[207] Despite all of the controversy, after winning entry to the Open, Renée lost in her first round.[208]

Identical accusations press on in recent litigation. In *Hecox v. Little*, challenging Idaho's Fairness in Women's Sports Act, the state defended its policy on the grounds that it was constitutional to exclude trans girls "due to unfair physiological advantages."[209] Likewise, in *Soule v. Connecticut Association of Schools, Inc.*, a challenge to Connecticut's trans-inclusive athletics policies, plaintiffs contended that trans girls' participation robbed their cis peers of "the experience of fair competition, and the opportunities for victory and the satisfaction."[210]

Here, inclusion is viewed as a threat to "fairness." Put too briefly, the reasoning has three steps. Its footing is the "differences" between the sexes.[211] From there, the next premise is that these differences cause persons assigned male at birth to possess physical prowess over persons assigned female at birth.[212] Justice Samuel Alito suggested as much, when he characterized the *Bostock* majority opinion as "forc[ing] young women to compete against students who have a very significant biological advantage, including students who have the size and strength of a male but identify as female."[213] As the last step, the "physiological advantages" are said to make athletic competition "unfair."[214] The thinking is that cis women and girls do not have an even shot

A New York Original, ESPN (Oct. 4, 2011), https://www.espn.com/new-york/story/_/id/7057906/30–30-renee-richards-new-york-original [https://perma.cc/2GT9-LUG4].

207. See Richards v. U.S. Tennis Ass'n, 400 N.Y.S.2d 267, 269 (Sup. Ct. 1977).

208. Neil Amdur, Miss Wade Beats Dr. Richards by 6–1, 6–4; Chris Evert Gains, N.Y. Times (Sept. 2, 1977), https://www.nytimes.com/1977/09/02/archives/miss-wade-beats-dr-richards-by-61–64-chris-evert-gains-miss-wade.html (on file with the *Columbia Law Review*).

209. Appellants' Opening Brief at 10, Hecox v. Little, Nos. 20–35813, 20–35815 (9th Cir. Nov. 12, 2020), 2020 WL 6833365.

210. Complaint at 22, Soule v. Conn. Ass'n of Schs., No. 3:20-cv-00201-RNC (D. Conn. Feb. 12, 2020), 2020 WL 724902.

211. *E.g.*, Fairness in Women's Sports Act, Idaho Code § 33–6202(8) (2020) (citing "inherent, physiological differences between males and females").

212. Appellants' Opening Brief, *supra* note 209, at 20; Complaint, *supra* note 210, at 11; see also The Equality Act: Hearing on H.R. 5 Before the H. Comm. on the Judiciary, 116th Cong. 48 (2019) (statement of Doriane Lambelet Coleman, Professor of Law, Duke Law School).

213. Bostock v. Clayton County, 140 S. Ct. 1731, 1779–80 (2020) (Alito, J., dissenting).

214. In addition to "fairness" claims, others appeal to the removal of opportunity, issues of safety, and the deprivation of representational benefits. Both the opportunity removal and safety points fail. See *infra* section III.G; *supra* section III.A.

The representational benefits claim is the most interesting and warrants closer review. It starts with the premise that seeing cis women and girls win serves important antidiscrimination goals and diminishes negative sex-stereotypes. See Doriane Lambelet Coleman, Sex in Sport, 80 L. & Contemp. Probs., no. 4, 2017, at 63, 96 [hereinafter Coleman, Sex in Sport]. Next, some argue that, conversely allowing trans women or girls to win amounts to individuals who may "look male" claiming the victory—which, they contend, would reinforce the stereotypes

at winning.[215] On that view, trans inclusion deprives cis women and girls of "an equal chance to be champions."[216] Accordingly, categorical exclusion[217] is seen as the only means to ensure cis women and girls "do not become sideline spectators of their own sports."[218]

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that "male bodies" are athletically superior. *Id.* at 106.

Here are three reasons for skepticism. Firstly, the argument rests on several assumptions with little by way of proof. One is that trans women are universally not—or will not be—seen as women. There is no evidence that is true. Another is that representation is only beneficial when role-model athletes share one's exact traits. That cannot be right. Surely, persons can be inspired by an athlete, without sharing most, or any, of the traits that make the athlete successful. Finally, there is the assumption that all trans women athletes will "look like men." Not only is that wrong as a matter of fact, but operationalizing such beliefs about what bodies look like depends on wrongful stereotyping. See *infra* Part IV.A.

Secondly, the logic of the justification is applied inconsistently. Lost in the accounting are the equally important representative benefits for trans girls and how those benefits are diminished by trans exclusion. For example, fifty years ago, a Black boxer's victory in a segregated match did not have the same impact for the Black community as a victory in an interracial matchup—nor did it pose the same threat to stereotypes of Black inferiority undergirding white supremacist segregation. See Boxing the Color Line, PBS THIRTEEN, https://www.pbs.org/wgbh/americanexperience/features/fight-black-boxers-and-idea-great-white-hope/ [https://perma.cc/64TE-QG9Z] (last visited Oct. 10, 2022) (noting how early Black boxing champions defeating white competitors "represented the awful possibility of [B]lack superiority"). Analogously, a trans woman athlete's win in the women's category undercuts the stereotypes that trans people are not their asserted sex and thereby challenges structural transphobia.

Thirdly, the conclusion that trans women should be excluded doesn't follow. Crediting for the moment the premises that trans women athletes "look like men" or that "male" and "female" bodies might or should be sorted, excluding trans women for representational reasons is counterintuitive. Even under those premises, in competitions in which cis women surpassed their trans rivals—such as Renée Richards's initial match—or in which trans men defeated trans women—such as a 100-yard freestyle event where swimmer Iszac Henig, a trans man, beat Lia Thomas, a trans woman—the outcomes would considerably erode the stereotype of "male body" supremacy, offering the same, if not weightier, representational benefits for cis women and girls. See *supra* notes 205–208 and accompanying text (discussing Renée Richards's loss in the 1977 U.S. Open); see also Katie Barnes, Lia Thomas Finishes 8th in 100-Yard Freestyle, Final Race of Collegiate Swimming Career, ESPN (Mar. 19, 2022), https://www.espn.com/college-sports/story/_/id/33550045/lia-thomas-finishes-8th-100-yard-freestyle-final-race-collegiate-swimming-career [https://perma.cc/5UD4-K467] (discussing outcomes of Thomas's 100-yard freestyle event).

215. See, e.g., Declaration of Madison Kenyon in Support of Intervention at 5, Hecox v. Little, 479 F. Supp. 3d 930 (D. Idaho 2020) (No. 1:20-cv-00184-DCN) ("Sex separation in sports helps ensure that . . . women like me . . . have a shot at winning.").

216. Complaint, *supra* note 210, at 37; see also Coleman, Sex in Sport, *supra* note 214, at 66 (arguing trans inclusion "would mean that females were not competitive for the win").

217. Since fourteen of the eighteen bans (77%) apply to K-12 sports, and sixteen of the eighteen apply to higher education (88%), in practice trans women and girls have essentially been excluded from women's and girls' sports altogether. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 203.

218. Fairness in Women's Sports Act: Floor Debate on CS/HB 1475, Fla. H.R., at 2:05:00 (Apr. 13, 2021), https://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=7183 (on file with the *Columbia Law Review*) (statement of Rep. Kaylee Tuck introducing trans-exclusionary policy).

From this sketch, can it ever be fair for trans girls and women to participate in competitive sports against their cisgender counterparts? Absolutely.

Let's set aside the easier cases first. Exclusion ignores the fact that, prior to puberty, athletic performance is statistically indistinguishable.[219] Studies reviewing sex-related divergences indicate that it is only after the age of eleven to twelve that performance differentiates.[220] Notwithstanding that, more than 75% of states with trans sports bans have policies that prohibit transgender girls' participation from the kindergarten level upwards.[221] Slightly less expansive, Tennessee's ban also covers students under eleven.[222] As far as prepubescent transgender girls go, the arguments are overbroad for being scientifically unsupportable.[223]

Exclusion also overlooks trans athletes who employ hormone blockers prior to puberty. Commentators have claimed that, even with hormone blockers, trans women and girls still have an unfair advantage over their cis counterparts.[224] That cannot be. Again, the alleged concern is "advantage" traceable to puberty. So that class of trans athletes cannot have such an advantage, since they did not experience the effects of pubertal testosterone.[225] Applied to athletes on blockers, therefore, the arguments fall apart.[226]

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219. See Scott Skinner-Thompson & Ilona M. Turner, Title IX's Protections for Transgender Student Athletes, 28 Wis. J.L., Gender & Soc'y 271, 287 (2013).

220. *E.g.*, David J. Handelsman, Sex Differences in Athletic Performance Emerge Coinciding With the Onset of Male Puberty, 87 Clinical Endocrinology 68, 70 (2017) (finding "the gender divergence in performance . . . aligned to the timing of the onset of male puberty, which typically has onset at around 12 years of age").

221. Movement Advancement Project, *supra* note 203.

222. See Tenn. Code Ann. § 49–6-310 (2020) (covering any "school in which any combination of grades five through eight (5–8) are taught").

223. See Doriane Coleman & Nancy Hogshead-Makar, Opinion, It's Not Wrong to Restrict Transgender Athletes. But Base It on Evidence, Ethics, AZCentral (Mar. 18, 2020), https://www.azcentral.com/story/opinion/op-ed/2020/03/17/ban-transgender-athletes-ok-but-base-evidence-ethics/5023130002/ [https://perma.cc/8T4F-2L6R] (finding Arizona's House Bill 2706 "legally and scientifically flawed" for those reasons).

224. Charlie O'Neill, Fair or Foul? PA State Reps Introduce Fairness in Women's Sports Act, Del. Valley J. (Apr. 7, 2021), https://delawarevalleyjournal.com/fair-or-foul-pa-state-reps-introduce-fairness-in-womens-sports-act/ [https://perma.cc/DGV8-M9DE].

225. Letter from Nancy Hogshead-Makar, CEO, Champion Women, and Doriane Lambelet Coleman, Professor of Law, Duke L. Sch., to Brian Wonderlich, Gen. Counsel, State of Idaho (Mar. 19, 2020) (opposing Idaho's HB 500, the "Fairness in Women's Sports Act," for those reasons) (on file with the *Columbia Law Review*).

226. See NCAA Office of Inclusion, NCAA Inclusion of Transgender Student-Athletes 7 (2011) https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderHandbook.pdf [https://perma.cc/S3S4–4E99] (stating trans girls who did "not go through a male puberty" do not "raise the same equity concerns that arise when transgender women transition after puberty"); Doriane Lambelet Coleman, Michael J. Joyner & Donna Lopiano, Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule, 27 Duke J. Gender L. & Pol'y 69, 122 (2020) ("[T]ransgender women and girls should not be excluded from girls' and women's sport if they have not gone through any part of male puberty.").

The more fraught cases involve athletes who are experiencing, or who have experienced, the onset of puberty. At that juncture, the argument picks up a few more moving parts, centered around what testosterone is thought to do:[227] underscoring differences between testosterone levels; attributing the "average 10–12% performance gap" between cis male and female athletes to "the bimodal and non-overlapping production of testosterone";[228] and asserting that the disparities in testosterone and performance carry over for trans women and girls. Together, those additions are said to mean pubertal and postpubertal trans athletes have an unfair advantage against cis women and girls that necessitates their exclusion.

That seems simple enough at first glance. On closer review, however, there are several sticking points in the reasoning. In order to see them, imagine a five-person final at a high school young women's swim meet. Assume that all of the swimmers are seventeen years old, and that three are cis and two are trans. Here is the lineup:

Lane 1: Swimmer *A*, who is cisgender, attends a school with a two-day-a-week swim program. She frequently misses training due to her afterschool job. *A* has been swimming competitively for two years.

Lane 2: Swimmer *B*, who is cisgender, attends a school with a four-day-a-week swim program. At home, a nutritionist prepares her meals designed to support sports performance, and on the days *B* doesn't train with the school team, she does in-pool and dry-land training with a private coach in her private pool and home gym. For the past five years *B* has attended various swim camps and training clinics, often featuring Olympic swim team coaches. Furthermore, during competitions, *B* wears a privately purchased $500 tech suit, accepted by the High School Athletics Association, that has been shown to improve swim performance by up to 3.2%.[229] To top it all off, *B* has been swimming competitively for ten years.

Lane 3: Swimmer *C*, who is cisgender, stands a foot taller than the others. Due to the genetic lottery, her wingspan is unusually large (meaning her stroke reach is longer), she has a lung capacity larger than the other swimmers (meaning her lungs receive more oxygen), and her legs are longer (meaning she kicks off the wall after a lap faster).

Lane 4: Swimmer *D*, who is transgender, has been undergoing hormonal intervention for a year. Her testosterone levels are within the average range of her cis female peers, and she has started hormone therapy with estrogen.

Lane 5: Swimmer *E*, who is transgender, has had no hormonal intervention whatsoever.

Now, according to CWP claims, it is fine for swimmers *A*, *B*, or *C* to win. With "fairness" and "advantage" being the asserted concerns, it would seem that *B* or *C* taking the gold should give pause.

227. See Sharrow, *supra* note 137, at 14 (explaining the reasoning).

228. Coleman, Sex in Sport, *supra* note 214, at 74.

229. See Jean-Claude Chatard & Barry Wilson, Effect of Fastskin Suits on Performance, Drag, and Energy Cost of Swimming, 40 Med. & Sci. Sports & Exercise 1149, 1149 (2008).

Definitionally, *B* has an "advantage" over *A*. Accepting *B*'s win means that the CWP hitch is not that any advantage is "unfair." More to the point, *B*'s win would be considered acceptable even if her advantage over *A* was, to use Justice Alito's words, "very significant."[230] Said differently, the problem also isn't that disproportionate advantages are unfair *per se*. Without a distinguishing factor between those tied to biology, and those associated with access to financial resources, nutrition, coaching, facilities, or opportunity, the purported concerns are underinclusive.[231] Oddly, the arguments don't appear to offer any such distinction.

On the facts, *C* has an advantage over the other swimmers. Her win is acceptable too, meaning "biological advantages" are not the issue. Nothing about that is particularly surprising. What is unclear, however, is why some biological advantages are allowable and others are not. In other words, what exactly is the dividing line between the two?[232] Professors Veronica Ivy and Aryn Conrad aptly emphasize, "We permit tall women to compete with large competitive advantages against short women in sports that heavily select for being tall . . . . And we call such competition 'fair', even though height is a natural physical characteristic that can confer large competitive advantages . . . ."[233]

B and *C* have helpfully narrowed the focus. How about the trans athletes: *D*, who has undergone hormone intervention, and *E*, who has not?

Excluding *D* ignores the science on the athletic performance of trans athletes undertaking hormone therapy. Sports bans in five states cited a not-yet-peer reviewed study to support the claim that the "benefits that natural testosterone provides to male athletes is not diminished through the use of puberty blockers and cross-sex hormones."[234] Contra that account, scientific evidence does in fact demonstrate that the physiological effects of testosterone dissipate with intrapubertal hormonal suppression and estrogen.[235] Quite tellingly, the study on which the aforementioned bills relied removed the

230. Bostock v. Clayton County, 140 S. Ct. 1731, 1779 (2020) (Alito, J., dissenting).

231. See Veronica Ivy & Aryn Conrad, Including Trans Women Athletes in Competitive Sport: Analyzing the Science, Law, and Principles and Policies of Fairness in Competition, Phil. Topics, Fall 2018, at 103, 138 ("Fairness cannot require the elimination of all significant competitive advantages.").

232. Veronica Ivy, If "Ifs" and "Buts" Were Candy and Nuts: The Failure of Arguments Against Trans and Intersex Women's Full and Equal Inclusion in Women's Sport, 7 Feminist Phil. Q., no. 2, art. 3, 2021, at 1, 34 n.61 ("We already permit *huge* competitive advantages on the basis of natural physical traits as well as sociological and economic factors.").

233. Ivy & Conrad, *supra* note 231, at 123.

234. Sharrow, *supra* note 137, at 14 (collecting bills).

235. Compare Timothy A. Roberts, Joshua Smalley & Dale Ahrendt, Effect of Gender Affirming Hormones on Athletic Performance in Transwomen and Transmen: Implications for Sporting Organizations and Legislators, 55 British J. Sports Med. 577, 577 (2021) (finding the athletic advantage that trans women had over persons assigned female at birth declined with feminizing therapy), with Joanna Marie Harper, Race Times for Transgender Athletes, 6 J. Sporting Cultures & Identities 1, 4 (2015) (finding that the age-graded scores for eight transgender female runners were the same before and after they transitioned).

supporting statement prior to publication.[236] Moreover, a categorical ban is incomplete for failing to consider how transition may actually disadvantage trans athletes. In other words, there is a real possibility that the side effects of hormonal intervention may actually impose performance disadvantages on trans athletes.[237] Putting these points together, we still do not have a solid case for excluding *D*.

Truthfully, swimmer *E*—who has not transitioned medically—is the person CWP arguments primarily take issue with. Taking fairness as the goal, if there was direct evidence establishing such an athlete had an unfair advantage against cis women, worries might be understandable. There isn't. The evidence is all circumstantial.[238] As it stands, there is no "direct physiological performance-data for transgender females," that could support prohibiting any of them from women and girls' athletics.[239] Said plainly, the arguments lack direct proof of the "biological advantages" claimed to warrant keeping *E* out of the race.[240]

CWP arguments attempt to bridge the gap by pointing to the differences in testosterone levels between cis men and cis women. That workaround assumes, of course, that trans women like *E* are equivalent to—and therefore, interchangeable with—cis men (at least physiologically).[241] Grounding exclusionary policies on unproven assumptions is undoubtedly problematic. Putting that aside, the evidence on effects of testosterone is ambiguous. Most studies find it an inaccurate predictor of athletic performance.[242] Those that do find

236. See Hecox v. Little, 479 F. Supp. 3d 930, 981 (D. Idaho 2020) ("[T]he study cited in support of this proposition was later altered after peer review, and the conclusions the legislature relied upon were removed.").

237. See Coleman et al., *supra* note 226, at 97–98.

238. See Cláudio Heitor Balthazar, Marcia Carvalho Garcia & Regina Celia Spadari-Bratfisch, Salivary Concentrations of Cortisol and Testosterone and Prediction of Performance in a Professional Triathlon Competition, 15 Int'l J. Biology Stress 495, 498–99 (2012); A.R. Hoogeveen & M.L. Zonderland, Relationships Between Testosterone, Cortisol and Performance in Professional Cyclists, 17 Int'l J. Sports Med. 423, 423 (1996).

239. Bethany A. Jones, Jon Arcelus, Walter Pierre Bouman & Emma Haycraft, Authors' Reply to Richardson and Chen: Comment on "Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies", 50 Sports Med. 1861, 1861 (2020) (writing whether trans "athletes do have an unfair advantage" is a "question that remains unanswered").

240. See Benjamin James Ingram & Connie Lynn Thomas, Transgender Policy in Sport, A Review of Current Policy and Commentary of the Challenges of Policy Creation, 18 Current Sports Med. Reps. 239, 244 (2019) (noting the "noticeable paucity of medical literature establishing a scientific basis for determining advantage, or lack thereof, for transgender athletes in competitive sport"); Sarah Teetzel, On Transgendered Athletes, Fairness and Doping: An International Challenge, 9 Sport Soc'y 227, 233 (2006) ("[W]hether transgender[] athletes truly possess unfair advantages when they compete at the elite level of sport in their self-defined gender categories remains vastly unknown.").

241. See Ivy & Conrad, *supra* note 231, at 117–19; see also Medley, (Mis)Interpreting Title IX, *supra* note 20, at 688 n.77 (detailing reasons why "cisgender boys are not an appropriate comparator for transgender girls").

242. See Rebecca M. Jordan-Young & Katrina Karkazis, Testosterone: An Unauthorized Biography 160–63 (2019); Mindy Millard-Stafford, Ann E. Swanson &

links between testosterone and traits thought to be beneficial for sports caution that the hormone "does not necessarily translate to overall improved performance or demonstrate causation."[243]

None of this is to say the asserted performance differentials between cis women and cis men do not exist. They do. Accepting arguendo that they apply to postpubertal trans women athletes, excluding *E* still relies on a series of unsubstantiated assumptions. First, it is wrong to assume that any physical traits are necessary or sufficient for any specific sport.[244] "[P]hysiology alone," Professor Erin Buzuvis correctly reminds us, "does not predict athletic performance."[245] Many other factors, including sheer skill, training, motivation, dedication, coaching, and nutrition play a part.[246] Second, whether physiology grants trans women any advantages will depend on the individual sport. Opposing a trans woman's entry as a rule, because her height falls above the average or upper range of cis women's statistics, is irrational where the sport in question is women's chess, or women's shooting. Third, again, physiology may be a disadvantage, like when Cecé Telfer, a trans hurdler, expressed that her height and stride length are a hindrance in women's hurdles races.[247]

Bringing these factors together, at most, the arguments are only able to establish that *some* postpubertal trans women, who have not undergone medical intervention, *could* have traits that *may* or may *not* confer an advantage in *some* sports. That says nothing about *E*'s eligibility. Without assessment of individual circumstances—which the infinitesimal number of trans women athletes would make easy to operationalize[248]—there are still not sufficient grounds to automatically ban *E*.

Matthew T. Wittbrodt, Nature vs. Nurture: Have Performance Gaps Between Men and Women Reached an Asymptote?, 13 Int'l J. Sports Physiology & Performance 530, 533, 540 (2018); Sara Chodosh, The Complicated Truth About Testosterone's Effect on Athletic Performance, Popular Sci. (Nov. 20, 2019), https://www.popsci.com/story/science/testosterone-effect-athletic-performance/ [https://perma.cc/H43V-QDMR].

243. Medley, (Mis)Interpreting Title IX, *supra* note 20, at 687 n.72 (citing Jordan-Young & Karkazis, *supra* note 242, at 162).

244. See Tinbete Ermyas & Kira Wakeam, Wave of Bills to Block Trans Athletes Has No Basis in Science, Researcher Says, NPR (Mar. 18, 2021), https://www.npr.org/2021/03/18/978716732/wave-of-new-bills-say-trans-athletes-have-an-unfair-edge-what-does-the-science-s [https://perma.cc/M3SU-N3LP].

245. Erin E. Buzuvis, Challenging Gender in Single-Sex Spaces: Lessons From a Feminist Softball League, 80 Law & Contemp. Probs. 155, 164 (2018).

246. *Id.*; see also Medley, (Mis)Interpreting Title IX, *supra* note 20, at 688 n.77 (suggesting examples); Chodosh, *supra* note 242 (same).

247. Dawn Ennis, Exclusive: NCAA Champion CeCé Telfer Says 'I Have No Benefit' by Being Trans, OutSports (June 3, 2019), https://www.outsports.com/2019/6/3/18649927/ncaa-track-champion-cece-telfer-transgender-athlete-fpu-trans-testosterone [https://perma.cc/VJJ7–5UPH].

248. Rachel Tomlinson Dick, Comment, Play Like a Girl: *Bostock*, Title IX's Promise, and the Case for Transgender Inclusion in Sports, 101 Neb. L. Rev. 238, 310 (2022).

To preempt the objection that individual assessments are too cost prohibitive to implement, here are some important factors suggesting otherwise. Outside funding would help lower the costs substantially, especially since investing in assessment procedures aligns

The point can be pressed even further. Even if the underlying claim that *E* has performance advantages in swimming due to puberty is shown to be true in a particular case, it still does not make the case for excluding her. That is not as radical as it seems at first glance. Athletic governance bodies have well-known and widely accepted counterweighing practices to ensure a relatively even playing field.[249] Golf, for example, distributes swings among players to balance skill levels. Wrestling, likewise, balances athletes by weight. Applying such competitive redistribution to offset for whatever advantage *E* is found to have would still allow her participation, while preserving the fairness the arguments seek.

C. *Respite and Rehabilitation: The "Trauma" Arguments*

Trans women's inclusion in congregate living settings—namely housing for the vulnerable and housing in women's prisons—has formed another flashpoint. In *Downtown Hope Center v. Anchorage*, a faith-based homeless shelter for women in Alaska refused shelter to a transgender woman, prompting a discrimination investigation by the Anchorage Equal Rights Commission.[250] Represented by an anti-LGBTQ Christian advocacy group, Alliance Defending Freedom (ADF), attorneys argued that the Equal Rights Commission sought to "force the Hope Center to . . . allow biological men into its women's shelter."[251] Descriptions of transgender women as a danger to cis women's emotional well-being permeated the filings. The Hope Center alleged that it "only accepts biological women to protect the physical, psychological, and emotional safety of the women seeking refuge from abuse, primarily from men."[252] Concurrently, the Center undertook an extensive public relations campaign, emphasizing an inverse relationship between trans inclusion and refuge for

with various parties' interests. Additionally, significant funding is already directed at the issue, without cis girls actually receiving any benefit. Between 2019 and 2020, a single political interest group, the American Principles Project, spent $5.6 million in local election campaign ads almost entirely focused on trans exclusion in sports, with plans to spend up to $6 million campaigning on the same theme during the 2022 midterms. See Madeleine Carlisle, Inside the Right-Wing Movement to Ban Trans Youth in Sports, TIME (May 16, 2022), https://time.com/6176799/trans-sports-bans-conservative-movement/ [https://perma.cc/XZN3–3KAC]. Surely, if the concern about fairness is genuine—as opposed to merely serving as a means of galvanizing voters—diverting even a portion of that combined $11.6 million ad spend to policies that actually protect fairness in sports is not an unreasonable ask.

249. See Andria Bianchi, Transgender Women in Sport, 44 J. PHIL. SPORT 229, 235–39 (2017); Joanna Harper, Transgender Athletes and International Sports Policy, 85 L. & CONTEMP. PROBS. 151, 165 (2022); Taryn Knox, Lynley C. Anderson & Alison Heather, Transwomen in Elite Sport: Scientific and Ethical Considerations, 45 J. MED. ETHICS 395, 401 (2019).

250. Complaint at 2–4, 14, Downtown Soup Kitchen v. Mun. of Anchorage, 406 F. Supp. 3d 776 (D. Alaska 2019) (No. 3:18-cv-00190-SLG), 2018 WL 9815914.

251. *Id.* at 4–5; see also Memorandum in Support of Plaintiff's Motion for Preliminary Injunction at 16, *Downtown Soup Kitchen*, 406 F. Supp. 3d 776 (No. 3:18-cv-00190-SLG), 2018 WL 10799616.

252. Complaint, *supra* note 250, at 8; see also Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, *supra* note 251, at 16.

vulnerable cis women.[253] In other instances, ADF equated nondiscrimination to sexist violence, describing the Equal Rights Commission's investigation as an "attack on hurting women."[254]

Appeals to trauma also appear in federal lawmaking. When the Trump Administration's HUD proposed a rule allowing shelters to restrict access to transgender persons,[255] hundreds of comments defended the restrictions as essential for preventing retraumatization.[256] In a form witness statement submitted over three hundred times, commenters relayed that trans exclusion was "critical for women seeking to heal from the trauma of sexual and physical abuse."[257]

At a state level, the Maine legislature introduced the now-failed Bill 1238, which, had it passed, would offer an exemption to nondiscrimination provisions for any facility "that provides emergency shelter to women or temporary residence to women who are in reasonable fear of their safety."[258] Speaking in favor of the bill, the trans-antagonistic radical feminist advocacy group Women's Liberation Front (WoLF) suggested that trans-inclusive policies could retraumatize "the most vulnerable in society."[259] Other supporters took the cue.[260] The most explicit witness strongly admonished that cis women

253. Homeless Shelter to Court: Stop Anchorage's Hostility Toward Battered Women, All. Defending Freedom Legal (Jan. 10, 2019), https://adfmedia.org/press-release/homeless-shelter-court-stop-anchorages-hostility-toward-battered-women [https://perma.cc/R9CT-8GFT].

254. Women's Shelter to Court: End Anchorage's Attack on Hurting Women, All. Defending Freedom Legal (Nov. 1, 2018), https://adfmedia.org/press-release/womens-shelter-court-end-anchorages-attack-hurting-women [https://perma.cc/YC6F-B2L2].

255. Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. 44811, 44816 (proposed July 24, 2020).

256. *E.g.*, Mary Brownlee, Comment on Proposed HUD Rule to Make Admission Determinations Based on Sex (Sept. 19, 2020), https://www.regulations.gov/comment/HUD-2020–0047–17193 (on file with the *Columbia Law Review*) (arguing it would "compound the psychological crises of some victims"); Lorie Martin, Comment on Proposed HUD Rule to Make Admission Determinations Based on Sex (Sept. 24, 2020), https://www.regulations.gov/comment/HUD-2020–0047–15933 (on file with the *Columbia Law Review*) ("Real women and girls who have been traumatized are only further traumatized when men [sic] who claim to be women are given access to women's spaces."); Jennifer Pepper, Comment on Proposed HUD Rule to Make Admission Determinations Based on Sex (Sept. 18, 2020), https://www.regulations.gov/comment/HUD-2020–0047–16817 (on file with the *Columbia Law Review*) ("These are traumatizing circumstances for already vulnerable women.").

257. Women's Liberation Front, Petition in Response to Proposed HUD Rule to Make Admission Determinations Based on Sex (Oct. 29, 2020), https://www.regulations.gov/comment/HUD-2020–0047–20366 (on file with the *Columbia Law Review*).

258. Me. Leg. 1238, 130th Leg., 1st Sess. (Me. 2021).

259. Letter from Lauren Adams, Legal Dir., Women's Liberation Front, to Me. Comm. on Judiciary (May 20, 2021) (on file with the *Columbia Law Review*).

260. *E.g.*, Letter from Dozier Bell to Me. Comm. on Judiciary (May 1, 2021) (on file with the *Columbia Law Review*); Letter from Annie Christy to Me. Comm. on Judiciary (May 4, 2021) (on file with the *Columbia Law Review*); Letter from Jodi Mills to Me. Comm. on Judiciary (n.d.) (on file with the *Columbia Law Review*); Letter from Aura Moore to Me.

must "have access to single-sex shelters where they can heal without the added trauma of a 6-foot stranger with a deep voice and 5-o'clock-shadow in the next bed."[261]

With regards to sex-segregated prisons, only about 3% of all incarcerated trans persons are housed in gender-appropriate state facilities,[262] and as a result, assertions of psychological threats stemming from transgender persons' placement in women's correctional facilities are less common. Even so, the topic has occasionally surfaced.[263] In 2008, Patricia Wright, a cis woman then incarcerated in the Central California Women's Facility (CCWF) filed a grievance against the transfer of a transgender prisoner, Sherri Masbruch.[264] Wright alleged that Masbruch, was "just . . . a man [sic] without a penis," since "his [sic] DNA still read [] and show[ed] him [sic] to be a male, that of which God made him [sic]."[265] Contending that Masbruch's presence caused her "constant panic attacks," Wright's complaint resolved: "I will not be able to sleep easy until I am far away from this animal."[266] Striking a similar chord, a 2019 complaint argued being housed with trans women constituted cruel and unusual punishment, since women were "forced to hear male voices in their living spaces, see men in their living spaces . . . and directly interact with a roommate who is obviously male. This retraumatizes the female born inmate and has a significant, negative impact on the mental well-being of female born inmates."[267]

Across these examples, the focal point is the intangible effects of trans presences.[268] To be clear, the notion that exposure to trans bodies is psycho-

Comm. on Judiciary (n.d.) (on file with the *Columbia Law Review*); Letter from Jennifer White to Me. Comm. on Judiciary (n.d.) (on file with the *Columbia Law Review*); Letter from Michael Whitney to Me. Comm. on Judiciary (n.d.) (on file with the *Columbia Law Review*).

261. Letter from Jennifer Gingrich to Me. Comm. on Judiciary (n.d.) (on file with the *Columbia Law Review*).

262. Kate Sosin, Trans, Imprisoned—and Trapped, NBC News (Feb. 26, 2020), https://www.nbcnews.com/feature/nbc-out/transgender-women-are-nearly-always-incarcerated-men-s-putting-many-n1142436 [https://perma.cc/978B-X4NB].

263. See, e.g., Complaint, Driever v. United States, No. 1:19-cv-01807 (D.D.C. Oct. 19, 2020) (alleging that sharing cells with trans inmates "endangers the physical and mental health of the female Plaintiffs . . . and causes mental and emotional distress"); Complaint, Guy v. Espinoza, No. 1:19-cv-498 (E.D. Cal. Feb. 27, 2020) [hereinafter Guy Complaint]; Amended Verified Complaint, Little v. United States, No. 7:17-cv-009-O (N.D. Tex. Apr. 12, 2019); Complaint, Marshall v. United States, No. 18-cv-1258-RDM (D.D.C. filed May 18, 2018).

264. CDCR 602 Inmate/Parolee Appeal Form, Patricia Wright (CCWF Nov. 18, 2008).

265. *Id.* at 2.

266. *Id.* at 2, 4.

267. *Guy* Complaint, *supra* note 263, at 8.

268. Professor Dean Spade recognized years ago that, particularly in shelter and prison contexts, the trauma arguments are typically informed by a variant of the safety arguments previously addressed—that residents and prisoners who are trans are a physical threat to those who are cis women. See Dean Spade, Documenting Gender, 59 Hastings L.J. 731, 809–12 (2008). For the purposes of this section's analysis, the ancillary safety arguments have been set aside. Nonetheless, because safety issues already exist in segregated facilities,

logically harmful is not especially unique. For example, one *Harris Funeral Homes* commentator's peculiar emphasis that Aimee Stephens's "sharing a bathroom with grieving widows would cause them further discomfort," gestured in that direction.[269] What sets these arguments apart is the zeroing in on acutely vulnerable persons. That move has dual effects. For one, it appeals to avoiding additional harm to an already victimized group.[270] And, for two, it plays to the intuition that traumatized persons are inculpable for their triggers.[271] Read in unison, those points are meant to fend against any exceptions to trans exclusion, since any trans women's presence risks unintentionally retraumatizing the already vulnerable cis women victims.[272]

Certainly, the driving motivations are not unfounded. Women face appallingly high rates of victimization. In their lifetimes, 1 in 3 women will experience sexual violence, physical violence, or stalking at the hands of an intimate partner, 1 in 5 women will experience completed or attempted rape, and stalking will cause almost 1 in 6 women fear.[273] The #MeToo movement shed a much-needed light on the startling frequency at which women face sexual harassment and assault, verbal harassment, and unwanted touching.[274]

if the goal is truly to protect the vulnerable, "supervision," rather than "segregation," is the more appropriate response. *Id.* at 812.

269. Marina Medvin, If Anyone Can Be a Woman, Then No One Is a Woman, Townhall (Sept. 3, 2019), https://townhall.com/columnists/marinamedvin/2019/09/03/if-anyone-can-be-a-woman-then-no-one-is-a-woman-n2552516 [https://perma.cc/HL4Z-DPFU].

270. Brief for Defend My Privacy et al. as Amici Curiae Supporting Respondents at 7, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (No. 17–1618), 2019 WL 4014068 ("Establishing safe spaces free from such [triggers] is the most urgent aspect of treating trauma survivors, because if they don't feel safe, it can significantly set back recovery.") [hereinafter DMP *Bostock* Brief].

271. Canice Lighthall, Comment on Proposed HUD Rule to Make Admission Determinations Based on Sex (Sept. 1, 2020), https://www.regulations.gov/comment/HUD-2020–0047–8622 (on file with the *Columbia Law Review*) ("Having a trauma response around a male is being rebranded as transphobia, which it is not!"); Lillienne Rivera, Comment on Proposed HUD Rule to Make Admission Determinations Based on Sex (Sept. 24, 2020), https://www.regulations.gov/comment/HUD-2020–0047–15919 (on file with the *Columbia Law Review*) ("[P]eople who have endured terrorizing and even life-threatening circumstances . . . can't help what triggers/frightens them.").

272. *E.g.*, Kathleen Hanover, Comment on Proposed HUD Rule to Make Admission Determinations Based on Sex (Sept. 28, 2020), https://www.regulations.gov/comment/HUD-2020–0047–17107 (on file with the *Columbia Law Review*) ("No amount of makeup or cosmetic surgery can change a larger, heavier, stronger, and faster man [sic] into someone that a female victim of violence won't perceive as a man, and find traumatizing."); Brittany Regula, Comment on Proposed HUD Rule to Make Admission Determinations Based on Sex (Oct. 2, 2020), https://www.regulations.gov/comment/HUD-2020–0047–17221 (on file with the *Columbia Law Review*) ("The women who seek out these shelters are extremely vulnerable, for some just being housed with a male bodied person could traumatic.").

273. Sharon G. Smith, Xinjian Zhang, Kathleen C. Basile, Melissa T. Merrick, Jing Wang, Marcie-jo Kresnow & Jieru Chen, National Intimate Partner and Sexual Violence Survey: 2015 Data Brief—Updated Release 2, 5, 8 (2018), https://www.nsvrc.org/sites/default/files/2021–04/2015data-brief508.pdf [https://perma.cc/V6MG-BRH6].

274. Holly Kearl, Stop Street Harassment, The Facts Behind the #MeToo Movement: A National Study on Sexual Harassment and Assault (2018), https://www.

Also relevant, marked rates of unhoused women report abuse and trauma as the cause of their homelessness.[275]

These statistics are deeply troubling, as are the real-life impacts that numbers alone do not adequately capture. That being said, it is prudent to press the asserted aims behind CWP shelter and prison placement policies. Doing so reveals some inconsistent commitments and unusual line drawing that provide reasons to have misgivings.

Could the goal be to entirely prevent victims from being retraumatized? Unlikely. Given trauma's complexity, anything can be a trigger.[276] That includes other non-trans residents and shelter staff members.[277]

Perhaps some triggers are statistical outliers, while others are not? Reframed in this way, the aim could be to significantly reduce the likelihood that residents and incarcerated women will be retraumatized. Even so, that retelling still misses several common triggers.[278] Hence, likelihood alone cannot not suffice.

Alternatively, the tack most arguments appear to take is to hierarchize, such that the trauma resulting from sexual victimization and intimate partner violence (IPV) is distinctive. Expressed more directly: Is the goal is to prevent women with those specific traumas from being triggered? That interpretation only convinces if we assume victimization by cis men. Statistics on woman-to-woman IPV disprove that notion. Lesbians are more likely to experience IPV than their heterosexual counterparts.[279] They are also overrepresented in homeless and incarcerated populations.[280] Accommodating those victims

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nsvrc.org/sites/default/files/2021–04/full-report-2018-national-study-on-sexual-harassment-and-assault.pdf [https://perma.cc/UU77–3KMC].

275. Janey Routree, Nathan Hess & Austin Lyke, Health Conditions Among Unsheltered Adults in the U.S. 3 (2019), https://www.capolicylab.org/wp-content/uploads/2019/10/Health-Conditions-Among-Unsheltered-Adults-in-the-U.S.pdf [https://perma.cc/PMA2–8FKZ].

276. Julie Darke & Allison Cope, Trans Inclusion Policy Manual for Women's Organizations 86 (2002), https://static1.squarespace.com/static/566c7f0c2399a3bdabb57553/t/566ca8ca0e4c116bdc06d599/1449961674575/2002-Trans-Inclusion-Policy-Manual-for-Womens-Organizations.pdf [https://perma.cc/D7QF-RK68].

277. Letter from Ali Lovejoy, Vice President of Soc. Work, Preble St., to Me. Comm. on Judiciary (May 19, 2021) (on file with the *Columbia Law Review*) (giving examples).

278. Darke & Cope, *supra* note 276, at 86.

279. See Mikel L. Walters, Jieru Chen & Matthew J. Breiding, The National Intimate Partner and Sexual Violence Survey: 2010 Findings on Victimization by Sexual Orientation 18 (2013); Kimberly F. Balsam, Esther D. Rothblum & Theodore P. Beauchaine, Victimization Over the Life Span: A Comparison of Lesbian, Bisexual, and Heterosexual Siblings, 73 J. Consulting & Clinical Psych. 477, 477 (2005) (finding higher rates of partner physical assault); Alicia K. Matthews, Jessica Tartaro & Tonda L. Hughes, A Comparative Study of Lesbian and Heterosexual Women in Committed Relationships, 7 J. Lesbian Stud., no. 1, 2002, at 101, 103 (reviewing literature studying IPV in female same-sex couples and finding similar rates to those in heterosexual couples).

280. See Emma Stammen & Mazgol Ghandnoosh, Incarcerated LGBT Adults and Youth (2022), https://www.sentencingproject.org/app/uploads/2022/10/Incarcerated-LGBTQ-Youth-and-Adults.pdf [https://perma.cc/9NML-PGWJ]; Bianca D.M. Wilson, Soon

therefore presents some complications. Still, shelters would not exclude every other woman to avoid triggering the victims of same-sex IPV.[281] Neither would women's prisons, despite the fact that the chances of being assaulted by a cis woman inmate—and consequently being retraumatized—are significantly higher than being assaulted by a cis male guard.[282] That being the case, it is underinclusive to exclude trans women on the logic that victims should not be exposed to persons they view as being in the category of their victimizers.[283]

Where do these inconsistencies leave the argument? Much of the argument's persuasive force, gained through the focus on particularly vulnerable women, tempers meaningfully. Singling out transgender women looks unjustified insofar as one accepts exposing survivors—the many victims of same-sex violence especially—to a wide range of equally retraumatizing situations. With that as ground, it can be recognized that the probability of being retraumatized by trans persons' presence is difficult to pin down. There is no way of telling whether or how many cis women residents will be affected by sharing spaces with transgender residents. In light of this gap, the more appropriate path forward would be to make accommodations for trauma victims as the spaces already do for other triggers, rather than branding an entire class a trigger.[284]

D. *Community Building: The "Disruption" Arguments*

Questions of how trans women's attendance might affect women's colleges gained national attention in 2012, when Smith College rejected applicant Calliope Wong for being assigned male at birth.[285] I n the years that followed,

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Kyu Choi, Gary W. Harper, Marguerita Lightfoot, Stephen Russell & Illan H. Meyer, Homelessness Among LGBT Adults in the US (2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Homelessness [https://perma.cc/AYW5-EC8V].

281. Zaya A. Gillogly, Being Trans-Inclusive and Trauma-Informed: Examining Trauma-Informed Care Practices for the Transgender Population in Shelter Settings 45 (Apr. 2017) (unpublished B.A. Thesis, Ohio Univ.) (on file with the *Columbia Law Review*).

282. Lara Stemple, Andrew Flores & Ilan H. Meyer, Sexual Victimization Perpetrated by Women: Federal Data Reveal Surprising Evidence, 34 Aggression & Violent Behav. 302, 306 (2016).

283. See Angela Larson, Violence Intervention Project, Comment on Proposed HUD Rule to Make Admission Determinations Based on Sex (Sept. 22, 2020), https://www.regulations.gov/comment/HUD-2020–0047–20106 (on file with the *Columbia Law Review*) (pointing out that, in light of same-sex violation, trans-exclusion "does nothing to prevent traumatization"); Kae Greenberg, Still Hidden in the Closet: Trans Women and Domestic Violence, 27 Berkeley J. Gender, L. & Just. 198, 238–39 (2012).

284. Lisa Mollet & John M. Ohle, Nat'l Gay & Lesbian Task Force, Transitioning Our Shelters: A Guide to Making Homeless Shelters Safe for Transgender People 37 (2003), https://srlp.org/wp-content/uploads/2012/08/TransitioningOurShelters.pdf [https://perma.cc/A7YB-B58J]; Trans Pride Initiative, Integrating Transwomen Into Women-Only Shelters for Domestic Violence Survivors, 11, https://tpride.org/documents/transwomenDVshelters.pdf [https://perma.cc/767T-VY7W] (last visited Jan. 20, 2023); Apsani, *supra* note 20, at 1710.

285. Shannon Weber, "Womanhood Does Not Reside in Documentation": Queer and Feminist Student Activism for Transgender Women's Inclusion at Women's Colleges, 20 J. Lesbian Stud. 29, 33–34 (2016).

women's colleges began adopting formal admissions policies allowing trans female applicants and, today, twenty-six of the thirty-nine Women's College Coalition (WCC) member institutions in the United States have policies allowing trans female admission.[286]

Not everyone has supported the trend. A vocal minority of alumnae have taken issue, framing trans women's attendance as threatening women's college's "institutional mission to empower women."[287] As an illustration: In an open letter to Smith College, lawyer and activist Elizabeth Hungerford argued that allowing trans women to enroll would undercut the benefits cis women receive.[288] Contending that admitted trans women "may retain offensive, stereotypical ideas about what 'being a woman' means," she warned that trans students would change the classroom dynamic by "talk[ing] loudly over [cis] women or *on behalf of women* while looking and sounding exactly like men."[289]

In this context, the move is to frame trans persons' presences as disruptive. Essentially, the claim is that transfolk may drastically alter the structure of single-sex spaces. Thus, trans inclusion conflicts with cis women's interests, since it jeopardizes women's colleges' ability to "offer[] unique opportunities for women to explore the world and expand their minds."[290]

These justifications are not new. Disruption concerns were used to justify racial segregation,[291] the exclusion of Black people, gay people, women, or transgender persons from the military,[292] and women's exclusion from previ-

286. Anna North, Can Transgender Students Go to Women's Colleges? Across the Country, the Answer Is Evolving, Vox, https://www.vox.com/identities/2017/9/21/16315072/spelman-college-transgender-students-womens-colleges [https://perma.cc/G9HD-BUT8] (last updated Sept. 22, 2017).

287. Collin Binkley, Women's Colleges More Welcoming to Transgender Students, AP News (Sept. 5, 2017), https://apnews.com/article/north-america-us-news-ap-top-news-ca-state-wire-pa-state-wire-334ddcd3983a4163aa5b88b71a7427f5 [https://perma.cc/TPR5-NRAD]; see also Monica Potts, Why Women's Colleges Still Matter in the Age of Trans Activism, New Republic (Feb. 16, 2015), https://newrepublic.com/article/121071/women-colleges-still-matter-age-transactivism [https://perma.cc/UXK3-LCJU] (suggesting trans inclusion threatens leadership development opportunities); Katherine Timpf, Women's Colleges Left Trying to Decide What 'Women's College' Means, Nat'l Rev. (Feb. 11, 2015), https://www.nationalreview.com/2015/02/womens-colleges-left-trying-decide-what-womens-college-means-katherine-timpf/ [https://perma.cc/WFQ8-NBEF] (capturing some alumnae's view that trans inclusion "taints what used to be a safe, women-only space and risks rendering it a male-dominated, patriarchal world").

288. Elizabeth Hungerford, An Open Letter to Smith College About Transwomen, Sex. Gender. Feminist. (Dec. 15, 2014), https://ehungerford.com/?p=65 [https://perma.cc/6SKV-EUJ2].

289. *Id.*

290. *Id.*

291. Watson v. Memphis, 373 U.S. 526, 535 (1963); Cooper v. Aaron, 358 U.S. 1, 16 (1958); see also Buchanan v. Warley, 245 U.S. 60, 70–71 (1917); T.B. Benson, Segregation Ordinances, 1 Va. L. Rev. 330, 331 (1915); Mark Golub, Remembering Massive Resistance to School Desegregation, 31 Law & Hist. Rev. 491, 520–26 (2013).

292. Kristy N. Kamarck, Cong. Rsch. Serv., R44321, Diversity, Inclusion, and Equal Opportunity in the Armed Services: Background and Issues for Congress 15, 35 (June

ously all-male institutions.[293] The arguments were previously dismissed and for the same reasons, they should fail today.

It isn't clear that admitting trans women: (1) forces the institutions to change their goals or aims in any way; or (2) deprives cis women of any of the benefits associated with single-sex environments. To the first point, one would have to assume that acceptance of transgender women is inherently antithetical to the goal of supporting women. Simply, that isn't true.[294] To the contrary, women's colleges that have admitted trans women have reported that trans inclusion "fits naturally" within their missions to educate and empower women.[295] Evidence from educators at trans-inclusive women's institutions likewise refutes the second point. Mills College, the first women's college adopting a trans-inclusive admissions policy, confirmed, "Admitting transgender women has not significantly altered the classroom environment,"[296] and in fact, has enhanced it.[297] Based on those reports disruption concerns are, in a word, unfounded.

E. *Representation: The "Distorted Statistics" Argument*

WoLF can largely be credited with the body of arguments that trans inclusion infringes cis women's right to accurate information.[298] In multiple

5, 2019), https://crsreports.congress.gov/product/pdf/R/R44321/15 [https://perma.cc/29ZJ-LBZB]; see also Michele Goodwin & Erwin Chemerinsky, The Transgender Military Ban: Preservation of Discrimination Through Transformation, 114 Nw. L. Rev. 751, 777 (2019).

293. United States v. Virginia, 518 U.S. 515, 540 (1996); Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

294. Cf. Erwin Chemerinsky & Catherine Fisk, The Expressive Interest of Associations, 9 Wm. & Mary Bill of Rts. J. 595, 602–03 (2001) ("That a Catholic university employs a Jew as a law professor does not undermine the ability of the president or trustees of the university to express their views on religion, nor does it connote that the university has somehow abandoned its commitment to Catholicism.").

295. Brief for Mills College as Amici Curiae Supporting Respondents at 3, Gloucester Cnty. Sch. Bd. v. G.G., 137 S. Ct. 1239 (2017) (No. 16–273), 2017 WL 929686. For similar statements, see Admission Policy Announcement, Smith College (n.d.), https://www.smith.edu/studygroup/faq.php [https://perma.cc/P27Y-UFXL] (last visited Oct. 11, 2022); Margo Burns, Mount Holyoke College's Official Policy on Transgender Students, YouTube (Sept. 2, 2014), https://www.youtube.com/watch?v=R0sdw9nblKo (on file with the *Columbia Law Review*); President's Letter to the Community, Spelman College (Sept. 5, 2017), https://www.spelman.edu/about-us/office-of-the-president/letters-to-the-community/letter/2017/09/05/spelman-admissions-and-enrollment-policy-update [https://perma.cc/6ZS9-J26Q]; Transgender Policy, Barnard (n.d.), https://barnard.edu/admissions/transgender-policy [https://perma.cc/H5RE-YC7C] (last visited Oct. 11, 2022).

296. Brief for Mills College as Amici Curiae Supporting Respondents, *supra* note 295, at 3.

297. See *id.*

298. See Brief of Amicus Curiae Women's Liberation Front in Support of Petitioner at 15, R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm'n, 140 S. Ct. 1731 (2020) (No. 18–107), 2019 WL 3987628 [hereinafter WoLF *Harris* Brief]; Brief of Amicus Curiae Women's Liberation Front in Support of Petitioners at 23, Doe v. Boyertown Area Sch. Dist., 139 S. Ct. 2636 (2019) (No. 18–658), 2018 WL 6716868 [hereinafter WoLF *Boyertown* Brief]; Brief of Amici Curiae Women's Liberation Front & Family Pol'y All. in

statements, the organization has echoed the identical warning that trans inclusion will "skew" or "wreak havoc" on important statistics.[299]

Two specific problems are raised. One is crime data. A comment on proposed rulemaking warned recording trans women as women would render "crime statistics that are crucial in the fight to end violence against women" unusable, or worse, even "help individual violent men to evade law enforcement efforts at apprehending them."[300]

Another is health care.[301] In a recent article, philosopher Kathleen Stock predicted "informational confusion" arising from trans-inclusive statistics.[302] As an example, she offered a hypothetical "campaign to reduce cervical cancer . . . focusing only on the behaviour of 'cervix-havers,' but not at any point conceptualising this as the behaviour of women."[303] The campaign would fail, in Stock's telling, because it would ignore "a wide range of characteristics and behaviours in virtue of . . . womanhood" that would be "useful to the health campaign."[304]

The arguments on crime statistics hinge on the belief that recording transgender women as women simultaneously disallows recording sex assigned at birth. Nothing requires that. It is possible, if not exceedingly likely, that trans inclusive recording will be additive. Just as including additional racial and ethnic categories to police data recordings allowed for more accurate crime and crime victimization tracking in the past, recording gender could expand and improve tracking as well.[305] In fact, to the extent that those advocating CWP and trans-antagonistic positions wish to track transgender-related criminal statistics—in order to buttress their exclusionary efforts—trans-inclusive collection would offer them the very data they seek.[306]

Support of Petitioner at 16, Gloucester Cnty. Sch. Bd. v. G.G., 137 S. Ct. 1239 (2017) (No. 16–273), 2017 WL 192762 [hereinafter WoLF & FPA *Grimm* Brief]; Brief of Amicus Curiae Women's Liberation Front in Support of Reversal on Behalf of Defendant-Appellant School Board of St. Johns County, Florida at 18, Adams v. Sch. Bd. St. Johns Cnty., 968 F.3d 1286 (11th Cir. 2020) (No. 18–13592), 2018 WL 6837415 [hereinafter WoLF *Adams* Brief].

299. See, e.g., WoLF *Boyertown* Brief, *supra* note 298, at 12 (noting examples of statistics that would be affected).

300. Letter from Women's Liberation Front, Hands Across the Aisle Coal., Safe Spaces for Women & Just Want Priv. Campaign, to Dr. John Weisman, Sec'y of Health, Wash. State Dep't of Health 4 (Sept. 28, 2017), https://handsacrosstheaislenet.files.wordpress.c/2017/09/comment-on-wac-246–490–075-birth-certificates_final_9–28–17.pdf [https://perma.cc/BYZ9-MQNE].

301. See Kara Dansky, The Abolition of Sex 59 (2021).

302. Kathleen Stock, The Importance of Referring to Human Sex in Language, 85 Law & Contemp. Probs. 25, 43–44 (2022).

303. *Id.* at 44.

304. *Id.*

305. See Andi Fugard, Should Trans People Be Postmodernist in the Streets but Positivist in the Spreadsheets? A Reply to Sullivan, 23 Int'l J. Soc. Rsch. Methodology 525, 529–30 (2020); Paul Knepper, Race, Racism and Crime Statistics, 25 S.U. L. Rev. 71, 75–76 (1996).

306. So far, such advocates have only been able to rely on anecdotal evidence to support their claims. See, e.g., Dansky, *supra* note 301, at 57–60.

Trans exclusion has its own statistical costs in medical and healthcare settings. Stock's hypothetical ignores the costs a cervical cancer campaign limited to cis women would have. To wit, the campaign would exclude any persons with cervixes who are not women . It would ignore, for instance, nonbinary persons and trans men who, in Stock's words, would not conform with the "wide range of characteristics and behaviours in virtue of . . . womanhood."[307] Thus, if the motivation behind the *distorted statistics* argument is to collect the most accurate data possible, the argument is self-defeating; a trans-exclusionary campaign would result in less-inclusive and therefore less-valuable data.

F. *Voices: The "Silencing" Arguments*

Some arguments assert that transgender equality threatens cis women and girls' free speech rights. They suggest that, directly and indirectly, cis women and girls' speech on transgender issues is suppressed. Laid out in more detail, the sources of suppression arise through: (i) publication; (ii) de-platforming; (iii) court instructions; (iv) social and economic sanctions; and (v) chilling effects on speech. Each will be reviewed in turn, with related doctrinal commentary provided in footnotes.

By a first gloss, cis women face viewpoint suppression in publishing. Alluding to a "scheme[]" of censorship, Professor W. Burlette Carter took "the paucity of law review articles offering different viewpoints on transgender issues" as a strong signal that "something is awry."[308] Another commentator characterized unpaid student editors' 2021 decision to collectively resign from Duke Law School's *Law and Contemporary Problems*, rather than publish a trans-critical piece by philosopher Kathleen Stock, as an example of "censorship."[309]

A few problems arise. For a start, these portrayals overlook conflicting interests on the other side of the ledger. Cis women's speech cannot override publications' right to choose who or what they publish. Nor can it entitle them to force specific third parties to participate in that publication process; doing so would infringe the third parties' autonomy and, insofar as their refusal is expressive, their free speech is as well.[310] Furthermore, not having the venue of one's choice does not equate to being silenced.[311]

307. Stock, *supra* note 302, at 44.

308. Brief of Amicus Curiae Professor W. Burlette Carter in Support of Petitioner at 33, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (No. 18–107), 2019 WL 4034609.

309. Jonathan Turley, Opinion, The Rise of a Generation of Censors: Law Schools the Latest Battlement Over Free Speech, Hill (July 6, 2021), https://thehill.com/opinion/judiciary/561632-rise-of-generation-of-censors-law-schools-latest-battlement-free-speech/ [https://perma.cc/4GFA-TF38].

310. Cf. Charles Fried, The New First Amendment Jurisprudence: A Threat to Liberty, 59 U. Chi. L. Rev. 225, 237 (1992) (explaining that "[p]rivate impositions and limitations differ fundamentally from state impositions" since "they issue from the limiting person's own exercise of liberty").

311. From a First Amendment view, the Constitution "does not prohibit *private* abridgement of speech." Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019); see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557,

In a second telling, de-platforming—social media companies' restriction of user access—is framed as a restriction on speech.[312] Attorney Christen Price explained that "Twitter bans women for saying that men are not women, even though men routinely use Twitter—without apparent consequence—to threaten the women for speaking out in the first place."[313] Price's sentiments are at least partly supported. Journalist Meghan Murphy sued Twitter when she was permanently banned for a violating the platform's harassment policy against misgendering.[314]

The forum is different, but the snags are not. This version runs into the same problems as the last. Private companies have a right to editorial control, alongside the right to refuse hosting speech they find discriminatory.[315] Furthermore, with thousands of substitutes, nothing prevents deplatformed users from voicing their opinions elsewhere.

A third way of thinking accuses legal institutions of subduing cis women's voices. WoLF has raised the example of a court's barring attorneys from misgendering trans parties as proof that trans equality "deprives women who appear before the court of the ability to speak accurately about the issues they face as a sex-class."[316]

Lack of contextual awareness dooms this version of the argument. For practical reasons, judges should have the right to control speech during proceedings.[317] Judges also have an interest in maintaining public confidence in

566 (1995) (explaining the constitutional free speech guarantees do not apply to private conduct). Under state actor analysis, none of the law reviews described would qualify. See *Halleck*, 139 S. Ct. at 1928–29 (identifying the limited circumstances in which a private entity qualifies as a state actor). Putting the argument to rest, private editorial decisions do not skew the marketplace of ideas in the same way state action does. See Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 153 (1973) (Douglas, J., concurring) ("[F]or one publisher who may suppress a fact, there are many who will print it.").

312. Meghan Murphy, Twitter Wants Me to Shut Up and the Right Wants Me to Join Them; I Don't Think I Should Have to Do Either, Feminist Current (Nov. 20, 2018), https://www.feministcurrent.com/2018/11/20/twitter-wants-shut-right-wants-join-dont-think-either/ [https://perma.cc/58NJ-XP3N].

313. Price, *supra* note 174, at 1558.

314. See Murphy v. Twitter, Inc., 274 Cal. Rptr. 3d 360, 364–65 (Ct. App. 2021).

315. The result is the same under the First Amendment. Mia. Herald v. Tornillo, 418 U.S. 241, 258 (1974) (finding that the First Amendment protects "exercise of editorial control and judgment"); Pittsburgh Press Co. v. Pittsburg Comm'n Hum. Rels., 413 U.S. 376, 391 (1973) ("[W]e reaffirm unequivocally the protection afforded to editorial judgment . . . ."); see also Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8–9, 15 (1986) (finding that the regulation of company newsletters infringed First Amendment rights in part because it forced the company to "associate with speech with which [it] may disagree").

316. Brief of Amicus Curiae Women's Liberation Front Supporting Plaintiff-Appellant at 6, Meriwether v. Trs. of Shawnee State Univ., 992 F.3d 492 (6th Cir. 2021) (No. 20–3289), 2020 WL 3152702 [hereinafter WoLF *Meriwether* Brief].

317. Speech in court has always been necessarily, and constitutionally, limited. Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991) ("It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed."); Mezibov v. Allen, 411 F.3d 712, 718 (6th Cir. 2005) (finding "the First Amendment rights of everyone (attorneys included) are at their constitutional nadir" in

the judiciary by disallowing discriminatory or even discourteous speech in court. Allowing cis women to misgender stands at odds with those important interests and risks giving the appearance of judicial bias.[318] Beyond that, WoLF disfigures the example it cites.[319] The referenced court narrowly prevented the verbal abuse of trans parties, which had no impact on the attorneys' arguments; characterizing the judge's civility instruction as a deprivation of "accura[cy]" is purely untrue.[320]

The fourth line says cis women face economic and social sanctions for advocating trans-antagonistic views.[321] Examples cited include cis women being terminated by private employers, facing in-person protests or heckling, or being publicly denounced or criticized for their views.[322]

This gun isn't smoking. At an elemental level, the very idea of speech expects response. Setting aside harassment and threats of physical violence, which are contemptable for distinct reasons, none of the proffered examples amount to silencing; rather, they are reactions that CWP advocates dislike. Insulating speakers from nonviolent reactions to their speech would itself suppress speech.[323] In cases of termination, private employers should be allowed to expressively disassociate with employees whose views are at odds with their principles.[324] In typical cases of heckling and counterprotests, third parties

court (citation omitted)). Moreover, judges have a duty to require those before them to be dignified, respectful, and courteous during the adversary process. See Jud. Conf., Code of Conduct for United States Judges 6 (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [https://perma.cc/KNE9–3ALJ] (Canon 3(A)(3)).

318. See McNamarah, Misgendering, *supra* note 24, at 2265, 2269–71, 2273–76 (explaining how misgendering contributes to the dehumanization and social subordination of gender minorities); Chan Tov McNamarah, Some Notes on Courts and Courtesy, 107 Va. L. Rev. Online 317, 333 (2021) [hereinafter McNamarah, Courts and Courtesy] (same).

319. See Brief for Defendants-Appellees at 63–66, Soule v. Conn. Ass'n of Schs., Inc., 57 F.4th 43 (2d Cir. 2022) (No. 21–1365), 2021 WL 4888885 (explaining the facts).

320. See Hecox v. Little, 479 F. Supp. 3d 930, 957 & n.11 (D. Idaho 2020); Brief for Defendants-Appellees at 63–66, *Soule*, 57 F.4th 53 (No. 21–1365), 2021 WL 4888885; McNamarah, Courts and Courtesy, *supra* note 318, at 332–34 (countering the "accuracy" justification for misgendering litigants).

321. See, e.g., WoLF *Meriwether* Brief, *supra* note 316, at 3–4; Women's Liberation Front, Petition for Rulemaking to Protect the Title IX Rights of Women and Girls at 6 (Feb. 8, 2021), https://static1.squarespace.com/static/5f232ea74d8342386a7ebc52/t/6022e55eae05fe1efe9187d6/1612899681917/Petition+for+Rulemaking+to+Protect+the+Title+IX+Rights+of+Women+and+Girls+(with+Exhibits)+2–8-21.pdf [https://perma.cc/GCB3-VJFU].

322. For instance, ADF's general counsel, Kristen Waggoner, was protested at Yale Law School. Mark Joseph Stern, The Truth About the Yale Law Protest that Prompted a Federal Judge to Threaten a Clerkship Blacklist, Slate (Mar. 18, 2022), https://slate.com/news-and-politics/2022/03/yale-law-school-laurence-silberman-free-speech-blacklist.html [https://perma.cc/55HM-MQSJ].

323. The sanctions described are analogous to boycotts of individuals, which are constitutionally protected. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 908–09 (1982).

324. Under federal discrimination law, they can. See 42 U.S.C. § 2000e-2 (2018) (listing

have just as robust a right to counter-speak.[325] Again, setting aside threats and harassment, it cannot be said that most reactions—regardless of how unpleasant—have stifled cis women's voices.

Related to the prior, the final iteration of the argument similarly claims that speech is chilled. By this account, cis girls and women self-censor their opinions on trans-related topics because they fear being socially ostracized or vilified. With increasing frequency, the argument is raised in discussions about sports. Representative Barbara Dittrich remarked that cis women were afraid to testify in support of Wisconsin's sports bill, having been "shamed into silence."[326] Members of the University of Pennsylvania women's swim team shared their opposition to Lia Thomas's inclusion anonymously, out of concern that they would be labeled "transphobic."[327] And Christina Mitchell, the mother of a plaintiff in *Soule*, spoke of the chilling effect of "accus[ations] . . . of discrimination, bigotry, and human rights violations."[328]

Much of this version has real persuasive force.[329] It is right that social dynamics do restrict the voices of women and girls through self-censorship.[330] For this reason, it is also right to worry about social pressure's effects on women's speech. It is wrong, however, to attribute the chilling effect to trans equality. That is more appropriately credited to a larger polarized atmosphere where it has become acceptable to vilify those with whose views we disagree. Consequently, the solution to the issues raised by the final argument must be to demand more civil forms of public discourse—not to oppose trans rights.

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characteristics, not including political belief, on which employers cannot base employment decisions).

325. If the public platform has been offered—that is, the actual speech has not been canceled by the hosting institution—the First Amendment requirements have been met. See Alyson R. Hamby, Note, You Are Not Cordially Invited: How Universities Maintain First Amendment Rights and Safety in the Midst of Controversial On-Campus Speakers, 104 Cornell L. Rev. 287, 295 (2018).

326. Letter from Barbara Dittrich, Wis. State Rep., to Wis. Assemb. Comm. on Educ. (May 26, 2021), https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2021/ab196/ab0196_2021_05_26.pdf [https://perma.cc/8885–698V].

327. Patrick Reilly, Teammates Say They Are Uncomfortable Changing in Locker Room With Trans UPenn Swimmer Lia Thomas, N.Y. Post (Jan. 27, 2022), https://nypost.com/2022/01/27/teammates-are-uneasy-changing-in-locker-room-with-trans-upenn-swimmer-lia-thomas/ [https://perma.cc/QH3Z-M3WZ].

328. Christine Stuart, Girls Sue to Block Transgender Athletes From Competing in CT High School Sports, CTPost (Feb. 12, 2020), https://www.ctpost.com/local/article/Girls-sue-to-block-transgender-athletes-from-15051468.php [https://perma.cc/R4CU-H8NQ].

329. Though, it would fail under First Amendment analysis. See Thomas Healy, Who's Afraid of Free Speech?, Knight First Amend. Inst. at Colum. Univ. (July 14, 2017), https://knightcolumbia.org/content/whos-afraid-free-speech [https://perma.cc/MUS3–6C5V] (assessing claims of "cancellation" under First Amendment principles, and showing why, since cancelling is counterspeech, they fail).

330. Carlin Meyer, Sex, Sin, and Women's Liberation: Against Porn-Suppression, 72 Tex. L. Rev. 1097, 1192 (1994); see also Mary Anne Franks, Witch Hunts: Free Speech, #MeToo, and the Fear of Women's Words, 2019 U. Chi. Legal F. 123, 133–39 (tracing laws and social norms silencing women).

G. *Advancement: The "Dilution," "Undeserved Access," and "Gender Fraud" Arguments*

Several arguments cluster around concerns about how transgender women's access to scholarships, preferences, and set-asides will affect cisgender women and girls.[331] They are captured in the following statement made by feminist author, Meghan Murphy:

> If we say that a man [sic] is a woman because of something as vague as a feeling or because he [sic] chooses to take on stereotypically feminine traits, what impact does that have on women's rights and protections? Should he [sic] be allowed to apply for positions and grants specifically reserved for women, based on the knowledge that women are underrepresented or marginalized in male-dominated fields or programs and based on the fact that women are paid less than men and often will be fired or not hired in the first place because they get pregnant or because it is assumed they may become pregnant one day?[332]

Murphy's statement folds together three innuendos. One is about *dilution*: that transgender women dilute access to resources set aside for women. Another pertains to trans women's *deservedness*: suggesting that transgender women do not merit access to resources set aside for women. Far more subtly, the last is an anxiety about *fraud*: in the backdrop of the former two allusions, anxieties linger pertaining to worries that some cis men will falsely claim transgender status to gain access to resources that have been set aside for women.

1. Dilution

The first subargument contends that allowing trans women to access remedial resources dilutes the limited pool of resources available for cis females and, as a result, deprives them of opportunities.[333] Along those lines, one brief stated that "the very preferences used to . . . encourage women's education—most importantly . . . scholarships for women—will [] . . . [now] now be reduced by the demands of any men who 'identify' as [women.]"[334] On such accounts, trans women's access to women's scholarships would mean "the loss of an indispensable tool in [women's] struggle to achieve equality in education."[335]

331. Dansky, *supra* note 301, at 20.

332. Complaint at 24, Murphy v. Twitter, Inc., CGC-19–573712 (Sup. Ct. Cal. filed Feb. 11, 2019) (misgendering in original).

333. Brief of Amici Curiae Women Business Owners and CEOs at 2, R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm'n, 140 S. Ct. 1731 (2020) (No. 18–107), 2019 WL 4054889 (claiming trans access would "require [women] to, among other things, compete with biological men for limited resources earmarked for women, and . . . otherwise revers[e] measures carefully crafted to 'level the playing field' for women").

334. WoLF *Adams* Brief, *supra* note 298, at 11; WoLF *Boyertown* Brief, *supra* note 298, at 15–16 (arguing trans women and girls would undercut women and girls' access to educational resources).

335. WoLF & FPA *Grimm* Brief, *supra* note 298, at 3.

The strength of the argument lies in its simplicity. Intuitively, more persons making use of the same resources means less access for everyone.

The argument's strength is also its downfall; it oversimplifies. If the underpinning worry is about swaths of transgender women overwhelming the pool of scholarships set aside for women, then quantifying what the potential "dilution" actually looks like is important. According to the best estimates, 0.6% of the adult population in the United States, or around 1.4 million persons, is transgender.[336] By contrast, 50.8%, or 162.06 million persons, is assigned female at birth. That any women's scholarship applicant is substantially more likely to be cisgender than transgender indicates any potential dilution will be trivial, at best.

Nonetheless, if the contention is that any dilution is a problem, holding all else constant, then the argument makes its point. It would be remiss not to note, however, why that deliberately narrow rendering relies on a false choice.[337] Expanding the pool of scholarships set aside for women (cis and trans) would easily offset any "dilution," since just on the numbers, any increase is significantly more likely to benefit a cis woman than one who is trans.

2. Undeserved Access

The next subargument homes in on whether transgender women and girls are worthy of scholarships, preferences, and set-asides. On those accounts, collectively, these scholarships, preferences, and remedial set-asides were implemented strictly to remedy the discrimination faced by cis women and girls.[338] Accordingly, because they are supposedly not victims of that discrimination, transgender women are not the intended beneficiaries.

Whether the argument works requires case-by-case evaluation, turning on the purpose of the specific scholarship, preference, or set-aside. Hypothetically, at least, in instances where they are designed to combat specific elements of the discrimination faced by women, then it is conceded that some might take some issue with granting trans women access. Depending on the details, trans women may not be suitable beneficiaries for a resource specifically focused on the biological aspects[339] of pregnancy.[340] Though, they—and

336. Andrew R. Flores, Jody L. Herman, Gary J. Gates & Taylor N.T. Brown, Williams Inst., How Many Adults Identify as Transgender in the United States? 2 (2016). The statistics do not detail what portion are trans women and girls, so this Essay's analysis employs the entire population.

337. Once more, political groups have spent millions campaigning against trans inclusion, claiming to support cis women and girls. See *supra* note 248 and accompanying text. If the concerns are in fact genuine, contributing a portion of those funds to the pool of resources that actually benefit cis women and girls directly is not an unreasonable ask.

338. DMP *Bostock* Brief, *supra* note 270, at 21; WoLF *Harris* Brief, *supra* note 298, at 26; see also, e.g., Dansky, *supra* note 301, at 20.

339. The term is meant as literal gestation. Such a policy may, for instance, prevent an employer from discriminating against a pregnant person for absences stemming from pregnancy-related morning sickness.

340. Even then, non-women with the capacity for pregnancy should benefit if they so desire.

all parents—would be appropriate recipients of a benefit covering pregnancy's non-biological facets.[341]

By contrast, the goal of most women's scholarships, preferences, and set-asides is not so specific.[342] There, the purpose of the efforts is to provide women with equal opportunities, support women's career and educational pursuits, and promote women's progress and visibility in society by rectifying the harms of misogyny and the devaluation of the feminine. With that in mind, it is difficult to see why trans women do not deserve access to them.

A brief thought experiment will show why. Imagine Sandra, a woman, who for the majority of her life has considered herself heterosexual. In her senior year of high school Sandra realizes she is queer . Despite this, she does not come out publicly. Does Sandra's experience and choice not to previously come out make her undeserving of a college scholarship designed for lesbian students?

The answer is "no."[343] Sandra is, after all, a lesbian. If we extend the hypothetical either backward or forward in time, the problems with denying Sandra the scholarship readily emerge. We cannot say that, because she is not openly lesbian, in the past Sandra has not experienced homophobia. To do so would be to erase any direct homophobia she has experienced, and any indirect homophobia she has experienced via the internalized emotional toll that often marks the closeted queer experience. We cannot say that, in the future, Sandra will not experience homophobia. Indeed, one day Sandra may very well face the homophobic discrimination that the scholarship is designed to remedy. Additionally, we cannot say that if she is successful in her educational pursuits, in the future, Sandra will not provide positive representation for the lesbian community—which the scholarship is designed to promote.

The logic carries over to the case of transgender women. Said plainly, transgender women do face misogyny. For trans women who pass, the misogyny is obvious: Because discriminators do not know they are trans, they

341. For instance, preventing an employer from retaliating against an expectant parent who needs to care for a pregnant spouse or surrogate, or to attend prenatal medical appointments. See David Fontana & Naomi Schoenbaum, Unsexing Pregnancy, 119 Colum. L. Rev. 309, 327–30 (2019) (explaining the necessary non-biological care work related to pregnancy).

342. To be clear, the advancement resources do not seek only to remedy biological discrimination against women. Since many of the inequalities faced by women and girls are not based on tangible physical features, restricting the resources that way drastically weakens their remedial reach. See Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender, 144 U. Pa. L. Rev. 1, 36 (1995); see also Robin Dembroff, Issa Kohler-Hausmann & Elise Sugarman, What Taylor Swift and Beyoncé Teach Us About Sex and Causes, 169 Penn. L. Rev. Online 1, 8–9 (2021); Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281, 1309 (1991).

343. In such an example, the purpose of the scholarship would be to provide lesbian students with equal opportunities, support lesbian students' career and educational pursuits, and promote lesbians' progress and visibility in society, by rectifying the harms of lesbophobic oppression. Sandra may not, however, be the appropriate candidate for a scholarship with a more specific goal, such as ones aimed at openly lesbian students.

are discriminated against as women.[344] Those who do not pass face a specific variant of misogyny intersecting with transphobia, but it is misogyny nonetheless.[345] One would not deny a scholarship preference or set-aside to a Black woman, a woman living with a disability, an old woman, or a woman in poverty, simply because the specific form of misogyny they face is intertwined with anti-Blackness, ableism, ageism, or classism, respectively. On that logic, because transgender women face misogyny, and because the purpose of these women's scholarships, preferences, and set-asides is to combat misogyny, transgender women deserve access to them.

3. Gender Fraud

The final subargument of the bunch is that cisgender men will misuse transgender rights for nefarious reasons.[346] Basically, once transgender women can access women's scholarships, preferences, and set-asides, cis men will pretend to be trans as well. On that view, some have expressed "concern[] that men will say that they are women for the purpose of helping themselves to benefits . . . intended for actual women."[347]

Say this for the argument: "Identity fraud" abounds. Think of the phenomenon of *reverse passing*, by which white persons present themselves as nonwhite.[348] In 2020 alone, it was revealed that multiple white academics and activists repositioned themselves as people of color, using their fabricated racial identities to gain access and bolster their credibility.[349]

So, apprehensions about identity fraud are warranted. Be that as it may, advocating trans exclusion is not the correct response. Consider a related illustration. In the shadow of the #MeToo movement's explosive revelations, many companies and employees have adopted policies or behaviors that, unwittingly, restrict women's advancement in the workplace.[350] Fearing false allegations or

344. Unquestionably, a passing trans woman who faces sexual harassment at work is facing those experiences as a woman. It is just as true that a passing trans woman who is denied a job because an employer believes that she is more likely than a male employee to get pregnant and leave the job faces discrimination as a woman.

345. Laura Kacere, Transmisogyny 101: What Is It and What Can We Do About It, Battered Women's Support Servs. (Aug. 14, 2018), https://www.bwss.org/transmisogyny-101-what-it-is-and-what-can-we-do-about-it/ [https://perma.cc/TG77-FDGA].

Many scenarios do not rely on passing or not. As one example, an employer determined not to have women in the workplace might reject a trans applicant because of the female-coded name on her résumé.

346. Cf. Naomi Schoenbaum, The New Law of Gender Nonconformity, 105 Minn. L. Rev. 831, 895 (2020) ("The boogeyman is the worry . . . that cisgender men will assume a false trans identity to invade women's spaces.").

347. WoLF & FPA *Grimm* Brief, *supra* note 298, at 16.

348. See Khaled A. Beydoun & Erika K. Wilson, Reverse Passing, 64 UCLA L. Rev. 282, 330–39 (2017) (providing examples).

349. See Helen Lewis, The Identity Hoaxers, Atlantic (Mar. 16, 2021), https://www.theatlantic.com/international/archive/2021/03/krug-carrillo-dolezal-social-munchausen-syndrome/618289/ [https://perma.cc/VP6T-QSE4].

350. Anthony Michael Kreis, Defensive Glass Ceilings, 88 Geo. Wash. L. Rev. 147, 153 (2020).

to preempt the appearance of wrongdoing, some have adopted the Billy Graham rule—a refusal to work, interact, or socialize individually with coworkers that are women—while other men express increased reluctance to mentor female juniors.[351] The result is that women are deprived of opportunities, the ability to build important professional relationships, and the feeling of inclusion in the workplace. Such responses should be denounced. Obviously, they punish innocent women for men's bad behavior. That cannot be right.

Along roughly similar lines, transgender women and girls should not have to face exclusion or additional scrutiny because of possible behavior that they did not contribute to. Put another way, it is wrong to scapegoat one group out of concern for the actual or potential actions of another. Just as it would be mistaken to impose unwarranted burdens on women for what some men did in the past, it is equally incorrect to blockade trans women for what some cis men might do in the future.

H. *Liberation From Patriarchal Oppression: The "Destabilization" and "Stereotype Solidification" Arguments*

During the lead up to *Harris Funeral Homes*, advocates increasingly introduced claims that trans-protective interpretations of Title VII would hamper the progress of cis women and girls. Writing that a decision in "Stephens' favor" would be "the [worst-case scenario] from a feminist legal perspective," Hungerford suggested doing so could position being trans "as the superior protected characteristic that can *override* the traditional meaning of sex in contexts that are harmful to women."[352] Those sentiments spilled over into the *Harris Funeral Homes* briefing, where the petitioner warned that a trans-protective holding would "undermine[] critical efforts to advance women's employment and educational opportunities."[353] Returning to the opposition to the U.S. Equality Act in the months following *Harris Funeral Homes* oral arguments, recall the vocal concerns that the law prioritized trans-folk and simultaneously eliminated the rights of cis women and girls.[354]

Connecting those moments is the belief that trans-protective policies undercut cis women's advancement. Here, the arguments interpret antidiscrimination protections for transgender persons as both (1) threatening to abolish protections for women, and (2) "enshrining" negative sex-stereotypes into the law.

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351. Katrin Bennhold, Another Side of #MeToo: Male Managers Fearful of Mentoring Women, N.Y. Times (Jan. 27, 2019), https://www.nytimes.com/2019/01/27/world/europe/metoo-backlash-gender-equality-davos-men.html (on file with the *Columbia Law Review*).

352. Elizabeth Hungerford, Sex and Gender: The Law in the USA, Woman's Place UK (Oct. 19, 2019), https://womansplaceuk.org/2019/10/19/sex-and-gender-the-law-in-the-usa/ [https://perma.cc/6VJA-3C8E].

353. Petition for a Writ of Certiorari at 14, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (No. 18–107), 2018 WL 3572625.

354. See *supra* notes 111–114 and accompanying text.

1. Category Destabilization

By some accounts, trans-protective antidiscrimination policies erode the category, "woman."[355] As expressed in one brief, "When the law requires that any man who wishes (for whatever reason) to be treated as a woman *is* a woman, then 'woman' (and 'female') lose all meaning."[356] As the result, "women's existence—shaped since time immemorial by their unique immutable biology—has been eliminated by Orwellian fiat."[357] Other commentators flesh out the consequences of the "linguistic defanging" of woman-protective legislation in greater detail: "If a woman is merely 'anyone who identifies as a woman,' the term 'woman,' and the legislation that describes and/or protects women specifically, is completely useless, legally and culturally."[358]

To ground the analysis, let us take the argument as phrased in WoLF's *Harris* amicus brief:

> Legally redefining "female" as anyone who claims to be female results in the erasure of female people as a class. If, as a matter of law, *anyone* can be a woman, then *no one* is a woman, and sex-based protections in the law have no meaning whatsoever. The ruling below effectively repeals the sex-based protections in Title VII—a ruling that Congress surely did not intend.[359]

There is quite a lot happening here.[360] Viewed in light of the facts in *Harris*, the logic runs like this:

1. Title VII covers discrimination "because of . . . sex."
2. Ms. Stephens can recover under Title IX if, in discriminating against her as a transgender woman, the employers discriminated "because of . . . sex."
3. For the employers to have discriminated against Ms. Stephens "because of . . . sex," Ms. Stephens must be considered a woman.

It's all downhill from there. Once (3) is true, according to WoLF, the following results are inevitable:

4. The group "woman" is obliterated. If trans women are considered part of the class, then the class itself ceases to exist.
5. If, in this specific instance, call it time T1, Ms. Stephens recovers under Title VII, then, at some point in the future, say time T2, courts

355. WoLF *Harris* Brief, *supra* note 298, at 9.

356. WoLF & FPA *Grimm* Brief, *supra* note 298, at 18.

357. *Id.*

358. Andrea Orwoll, Note, Pregnant "Persons": The Linguistic Defanging of Women's Issues and the Legal Danger of "Brain-Sex" Language, 17 Nev. L.J. 667, 696 (2017).

359. WoLF *Harris* Brief, *supra* note 298, at 1–2 (citations omitted).

360. For commentary on the confusion, see Elizabeth Hungerford, Bad Things and Very Bad Things: Feminists Working With the Religious Right, Sex Matters (Feb. 5, 2020), https://sexnotgender.com/2020/02/05/bad-things-and-very-bad-things-feminists-working-with-the-religious-right/#_edn7 [https://perma.cc/5ZLJ-9SNE] [hereinafter Hungerford, Bad Things].

will interpret *all* other woman-protective statutes designed to eliminate sex discrimination as applying to transgender persons.

6. Statutes established to improve the wellbeing of women will no longer be useful to women who are cis.

Which all leads to the conclusion:

7. *Ergo*, if, in this *specific case*, T1, Ms. Stephens recovers under Title VII, then: Not only do women *cease to exist* as a class, but in the future, T2, *all* woman-protective statutes will be extended to transgender persons and, as a result, *every* woman-protective statute will be useless to combat discrimination against cis women.

Seen schematically, the bald spots in the logic reveal themselves. Only steps (1) and (2) are actually true.

Take (3), the premise that, for Ms. Stephens to have been discriminated against "because of . . . [her] sex," she must be considered a woman. As commentators from either side of the aisle have shown, that is not a given.[361] It is, in fact, possible to come to that conclusion without considering her a woman. Implicitly as well, (3) inaccurately suggests that Title VII only covers discrimination against "women."[362] *Oncale v. Sundowner Offshore Services, Inc.*[363] and the portions of *Bostock v. Clayton County*[364] covering the other plaintiffs, who were not trans women, disprove that.

Take (4), the premise that, if Ms. Stephens is considered a woman, women as a class are harmed. If the reasoning sounds familiar, that's because it is. Notice how the argument that progressive inclusion contributes to definitional instability and thereafter decline mirrors tactics used in debates over marriage equality.[365]

Lest we forget, recognizing same-sex relationships as equivalents to heterosexual marriages—as opposed to relegating them to nomenclatural inferiors like "civil unions" or "domestic partnerships"—"fundamentally changed the meaning of," "cheapened," or "threatened" the institution of (opposite-sex) marriage.[366] For defenders of the so-called conventional view of marriage, a

361. See, e.g., Brief of Professors Samuel R. Bagenstos, Michael C. Dorf, Martin S. Lederman, Leah M. Litman, and Margo Schlanger as Amici Curiae in Support of Respondent Stephens at 2–3, R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm'n, 140 S. Ct. 1731 (2020) (No. 18–107), 2019 WL 2915048; Kyle Blanchette, A Dilemma for Gorsuch's Core Reasoning in *Bostock*, Nat'l Rev. (June 18, 2020), https://www.nationalreview.com/2020/06/a-dilemma-for-gorsuchs-core-reasoning-in-bostock/ [https://perma.cc/DHB8–8GKB]; Ed Whelan, *Bostock* Majority: A 'Trans Woman' Is Not a Woman, Nat'l Rev. (June 18, 2020), https://www.nationalreview.com/bench-memos/bostock-majority-a-trans-woman-is-not-a-woman/ [https://perma.cc/FE9M-SMPP].

362. See Hungerford, Bad Things, *supra* note 360.

363. 523 U.S. 75 (1998).

364. 140 S. Ct. 1731.

365. Cf. Sherry F. Colb, Trans Identity and Truth, Dorf on Law (May 23, 2018), http://www.dorfonlaw.org/2018/05/trans-identity-and-truth.html [https://perma.cc/BX8K-5M82] (alluding, presciently, to this point).

366. See, e.g., David Blankenhorn, The Future of Marriage 201 (2007) (making the argument); Lynn D. Wardle, "Multiply and Replenish": Considering Same-Sex Marriage in

definition of marriage that included same-sex couples—in their words, a "revisionist" account—rendered the institution "meaningless."[367]

Significantly, the two main ideas underlying the arguments against same-sex marriage mirror the ones in the present case.[368] One is based on biology—that marriage was defined as being ordered by biology or, put in blunter terms, biological function (i.e., procreation and child-rearing).[369] The other idea is an appeal to history—that, traditionally, the term marriage applied to unions between a man and a woman.

Reasons for rejecting those arguments shed much-needed light. The logic of (4) wrongly assumes that new interpretations subsume and override old ones, rather than existing simultaneously with the old definition. History attests to the latter.[370] Society has developed increasingly nuanced language, without erasing what has come before. Contrary to marriage traditionalists' predictions, marriage (understood as a union between one man and one woman) has yet to disappear; we have little reason to think women will either.

Take (5), a slippery slope in itself. (5) slopes fallaciously from T1, a *Harris Funeral Homes* holding that a single statute prohibiting discrimination "because of . . . sex" covers discrimination against a transgender woman, to T2, a point in the future where all woman-protective statutes will apply to trans women.

What warrants this prognosis? It's hard to say. Purely as a matter of statutory interpretation, at best, premise (5) is speculative, and at worst, it is counterfactual.[371] While it is true that Title VII jurisprudence is used to interpret some statutes covering "sex" discrimination,[372] countless exceptions

Light of State Interests in Marital Procreation, 24 Harv. J.L. & Pub. Pol'y 771, 780 (2001) (same).

367. See An Argument Against Same-Sex Marriage: An Interview With Rick Santorum, Pew Rsch. Ctr. (Apr. 24, 2008), https://www.pewresearch.org/religion/2008/04/24/an-argument-against-same-sex-marriage-an-interview-with-rick-santorum/ [https://perma.cc/7U6C-FCFN].

368. For an argument against marriage equality that tracks the CWP argument against trans equality almost perfectly, see Monte Neil Stewart, Jacob D. Briggs & Julie Slater, Marriage, Fundamental Premises, and the California, Connecticut, and Iowa Supreme Courts, 2012 BYU L. Rev. 193, 206 n.68.

369. Sherif Girgis, Robert P. George & Ryan T. Anderson, What Is Marriage?, 34 Harv. J.L. & Pub. Pol'y 245, 253–55 (2011) (emphasizing the biological function of marriage); Douglas W. Kmiec, The Procreative Argument for Proscribing Same-Sex Marriage, 32 Hastings Const. L.Q. 653, 654–55 (2004) (same).

370. Additionally, traditional interpretations tend to predominate. Even after same-sex marriage was legalized, many gay men can attest that when referring to their "spouse," strangers assume they are married to a woman.

371. See Hungerford, Bad Things, *supra* note 360 (commenting that the "slippery slope argument" between *Bostock* and all other statutes covering sex discrimination "forms the primary basis of WoLF's brief, yet fails to articulate legal causation between Title VII and any/all other federal laws or protections").

372. See, e.g., Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting) (collecting cases in which the Supreme Court "looked to its Title VII interpretations of discrimination in illuminating Title IX").

exist.[373] In some instances, additional statutory text would expressly instruct against extending coverage to transgender persons.[374] Moreover, the ruling interpreted "sex," not the terms "women" or "females."[375] Based only on the *Harris Funeral Homes* holding, it cannot be said that laws employing the latter language will apply to trans women. All told, nothing necessitates the decision to carry over to all woman-protective statutes.[376] In fact, sharply reversing course since the opinion was released, WoLF has admitted as much.[377]

Take (6), the premise that, once statutes established to combat or eliminate sex discrimination or improve the wellbeing of women apply to trans women, they will no longer be useful to cis women. The step attempts to claim too much. Even assuming, for argument's sake, that every statute covering "sex" discrimination will be extended to trans persons, it does not follow that statutory coverage of the discrimination faced by cisgender women is diminished, much less extinguished.

Here's why. Imagine a statute that aims to protect a class of "older persons" from discrimination, recognizing that "older persons" have been subjected to mistreatment based on stereotypes about their abilities and have been disproportionate targets of violence based on the same. Call this the Older Persons Act (OPA). Imagine, further, that "older persons" is not defined in the text, but in applying it, the Supreme Court has interpreted "older persons"—and thus the coverage of OPA—as those over the age of eighty. Now, suppose in a case examining discrimination against persons aged sixty-five and up, the Court finds they, too, qualify as "older persons."[378] So the Court holds that the OPA does provide protection to everyone above the age of sixty-five. In reconsidering the definition of "older persons," has the protection offered by OPA to persons over eighty been reduced or eliminated? It hasn't. The only change is that the scope of the protected class is understood more broadly. The effect

373. *Bostock*, itself, acknowledged that statutes are interpreted "in *accord* with the ordinary public meaning of [their] terms at the time of . . . enactment." Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020). Whether *Bostock*'s interpretation can apply is therefore a fact-specific inquiry. See Exec. Order No. 13,988, 86 Fed. Reg. 7023, 7023 (Jan. 20, 2021) (acknowledging *Bostock* only extends "so long as the laws do not contain sufficient indications to the contrary"). But see Susannah Cohen, Note, Redefining What It Means to Discriminate Because of Sex: *Bostock*'s Equal Protection Implications, 122 Colum. L. Rev. 407, 439–43 (2022) (arguing, persuasively, that *Bostock*'s widespread extension is "highly likely").

374. See Adam P. Romero, Does the Equal Pay Act Prohibit Discrimination on the Basis of Sexual Orientation or Gender Identity?, 10 Ala. C.R. & C.L. L. Rev. 35, 91–92 (2019) (demonstrating why, despite covering discrimination based on "sex," the Equal Pay Act does not cover sexual orientation or gender identity discrimination).

375. *Bostock*, 140 S. Ct. at 1739–41.

376. *Id.* at 1753 (noting the holding is limited to Title VII).

377. See Brief of Amicus Curiae Women's Liberation Front in Support of Appellants and Reversal at 36–38, Hecox v. Little, Nos. 20–35813, 20–35815, 2023 WL 1097255 (9th Cir. Jan. 30, 2023), 2020 WL 7029422 [hereinafter WoLF *Hecox* Brief] (arguing for a limited reading of Bostock).

378. Assume that the legislative history of the OPA is such that, unequivocally, no one in Congress would have applied "older person" to persons under eighty.

of the statute remains the same. Understood thusly, the underlying proposition of (6) is illogical.

Putting these points together, it is impossible to reach conclusion (7), since the argument cannot take any of the steps necessary to get there.

2. Stereotype Solidification

The last set of CWP arguments contends that transgender persons merely adopt different sex-stereotypes without challenging or dismantling them.[379] On those accounts, the only "basis on which people might perceive themselves as the opposite sex . . . invariably involves malignant sex-stereotypes."[380] Illustratively, WoLF's *Harris* brief reasoned that Ms. Stephens "wanted to wear a skirt while at work, and [her] 'gender identity' argument is an ideology that dictates that people who wear skirts must be women, precisely the type of sex-stereotyping forbidden by *Price Waterhouse*."[381] Following the thinking that trans women reinforce "essential ideas of womanhood by aiming to occupy it,"[382] legal protections for trans woman are thought to ultimately preserve the very sex-stereotypes that harm cis women.

The defects of this line of thinking are fivefold. It can be rejected on experiential, theoretical, doctrinal, consequential, and moral grounds.

The experiential flaw is that the argument mischaracterizes the relationship between identity and stereotypes. Trans women are not women *because* they conform to sex-stereotypes about women; they are women who—like cis women—may choose to express their womanhood in some ways we might consider stereotypical.[383] Even so, there's no reason to assume that all transgender women do.[384] Many transfolk defy sex-stereotypes.[385] Butch trans women

379. WoLF *Meriwether* Brief, *supra* note 316, at 9.

380. WoLF *Boyertown* Brief, *supra* note 298, at 8 ("Gender is simply a set of sex-based stereotypes that operate to oppress female people."); WoLF *Hecox* Brief, *supra* note 377, at 10 ("[B]eing 'transgender' depends on the continued existence of sex-stereotypes."); WoLF *Meriwether* Brief, *supra* note 316, at 9.

381. WoLF *Harris* Brief, *supra* note 298, at 5.

382. Lucy Nicholas, Remembering Simone de Beauvoir's 'Ethics of Ambiguity' to Challenge Contemporary Divides: Feminism Beyond Both Sex and Gender, 22 Feminist Theory 226, 230 (2021).

383. See Sherry F. Colb, The Perceived Threat of Trans Identity, Verdict (May 23, 2018), https://verdict.justia.com/2018/05/23/the-perceived-threat-of-trans-identity [https://perma.cc/3ARN-AX7V] ("[T]rans people tend to resist rather than embrace oppressive societal attempts to tell men and women what each gender ought to be, so feminists needn't view trans women as enemies of the movement for gender freedom.").

384. See Julia Serano, Excluded: Making Feminist and Queer Movements More Inclusive 66 (2013) ("Anyone who knows multiple actual trans women knows that this monolithic image of trans women as 'hyperfeminine' is nothing more than a ruse . . . .").

385. See Deborah L. Davis, Are Transgender Women Just Reinforcing Sexist Stereotypes?, Psych. Today (Sept. 15, 2015), https://www.psychologytoday.com/us/blog/laugh-cry-live/201509/are-transgender-women-just-reinforcing-sexist-stereotypes?page=1 [https://perma.cc/6J3B-DN89]; Zinnia Jones, Why Trans People's Genders Aren't Reinforcing Gender Stereotypes, HuffPost (June 4, 2017), https://www.huffpost.com/entry/why-trans-peoples-genders-arent-reinforcing-gender_b_5934aa9ce4b062a6ac0ad12b

exist, as do femme trans men.[386] To the extent that heterosexuality is a sex-stereotype,[387] the existence of trans lesbians and gay men undercuts that as well.[388] More fundamentally still, by their very existence, trans persons challenge the ultimate sex-stereotype: biology as destiny.

One might analogize trans persons to adoptive parents.[389] When someone adopts a child, even though they are not biologically a parent, they are still a parent. One might hold some negative stereotypes about parents in general—say, that they are controlling, domineering, or overprotective. One might also hold some misguided beliefs about parents that are not overtly negative but are nonetheless harmful—say, that "real parents" are biologically related to their children. No reasonable person would assume all adoptive parents solidify the first set of negative stereotypes. Conceivably, they may not align with these notions, and that they may even behave in ways that diminish them. The same logic follows for transgender women.

The theoretical flaw lies in the description of how protecting transgender women supposedly "enshrines" sex-stereotypes into the law. Normally, the phrase "enshrines into law" signifies that laws or state action rely on, reflect, or are motivated by reasoning rooted in stereotypical thinking. In doing so, the laws or state actions effectively preserve the stereotypes on which they are based. An illustration from *Orr v. Orr* will help clarify:[390]

(a) Stereotype: Men's natural role is to provide for women.

(b) Reasoning: Based on (a), women should not be required to provide for men, but men should provide for women.

(c) Law/Action: Statute requires divorced husbands, but not wives, to pay alimony.

(d) Result: (c) enshrines (a).

Conversely, the relationship between trans women, stereotypes, and laws and state actions related to transgender persons is far more complex. Once again, an illustration will be useful. Consider antidiscrimination protections for trans persons, and the sex-stereotype WoLF accuses Ms. Stephens of solidifying:

[https://perma.cc/Q5JF-EUM8].

386. Kaylee Jakubowski, No, The Existence of Trans People Doesn't Validate Gender Essentialism, Everyday Feminism (Mar. 9, 2015), https://everydayfeminism.com/2015/03/trans-people-gender-essentialism/?mc_cid=7acf0211e2 [https://perma.cc/223L-KCX7].

387. See Chan Tov McNamarah, Note, On the Basis of Sex(ual Orientation or Gender Identity): Bringing Queer Equity to School With Title IX, 104 Cornell L. Rev. 745, 763–64 (2019).

388. *E.g.*, Hannah Rossiter, She's Always a Woman: Butch Lesbian Trans Women in the Lesbian Community, 20 J. Lesbian Stud. 87, 87 (2016) (collecting accounts).

389. Sophie Grace Chappell, Transgender and Adoption: An Analogy, Think, Autumn 2021, at 25, 25.

390. 440 U.S. 268 (1979).

(a*) *Stereotype*: Women wear skirts.

(b*) *Identity*: "[P]eople who wear skirts must be women";[391] trans women are women, *because* they wear skirts.

(c*) *Reasoning*: Transgender persons face wrongful discrimination in employment, which they should be protected from.

(d*) *Law/Action:* Law protecting transgender persons against employment discrimination.

(e*) *Result:* (d*) enshrines (a*).

The steps by which laws in the final illustration enshrine sex-stereotypes are, at best, puzzling. It has been established that people are not transgender just because they conform to sex-stereotypes, so (b*) cannot be true.[392] Moving on, it is hard to see how by protecting trans people, the law is preserving any sex-stereotypes at all. Law (d*) is based on facts that transgender persons face discrimination in employment, (c*). Simply, there is no proof that the reasoning is rooted in, reflects, or preserves the stereotype, (a*).

By way of comparison, imagine a religious convert to Rastafarianism. Say one holds some stereotypes about Rastafarians, namely that they have loc'd hair. It would be ludicrous to accuse the hypothetical convert of solidifying that stereotype, because they decide to grow locs following their conversion. It would be just as preposterous to claim a law protecting a newly converted Rastafarian's right to wear locs at work enshrines that stereotype. Instead, one would rightly understand the law as protecting the employee from religious (and possibly, hair) discrimination. Returning to the case of transfolk, how then can the assertion that trans rights will enshrine stereotypes be true? It isn't.

The doctrinal flaw of the argument is that it misunderstands the rationale of the anti-stereotyping principle. Stereotypes are not per se harmful, nor is anyone's conforming with them. Rather, the problem is stereotypes' regulative social function. In other words, the harm occurs when persons make decisions or enact laws based on stereotypes, and depends on how those decisions or laws can limit stereotyped individuals' personal freedom.[393]

Set against that background, the argument quite clearly misfires. Think of the facts in *Price Waterhouse v. Hopkins*.[394] Envision that in addition to Ann Hopkins, there were other female accountants who conformed to the stereotypes about women that the Price Waterhouse managers held, and that

391. WoLF *Harris* Brief, *supra* note 298, at 5.

392. See *supra* note 379 and accompanying text.

393. See Anita Bernstein, What's Wrong With Stereotyping?, 55 Ariz. L. Rev. 655, 659 (2013) ("[S]tereotyping is wrong to the extent that it functions to deprive individuals of their freedom without good cause."); Deborah Hellman, Two Concepts of Discrimination, 102 Va. L. Rev. 895, 920 (2016) ("Where laws use gender stereotypes that confine individuals to particular gender roles, the Court rejects them.").

394. 490 U.S. 228 (1989).

Hopkins did not conform with. In such a scenario, how culpable are those other accountants for confirming or solidifying the managers' views about women? It shouldn't matter. Criticizing them misses the point; the managers' expectation that all women conform to sex-stereotypes and how those expectations affected Hopkins was the problem. Similarly, whether transgender women and girls conform to sex-stereotypes is not the wrong at issue.

The consequential flaw of the "stereotype enshrinement" argument is what it means for cis women. Following the argument's logic, if trans women's feminine behavior reinforces sex-stereotypes, then what of cis women's?[395] Most would agree that it would be wrong to police a cis woman for actions that might align with stereotypical femininity. Doing so would ignore the autonomy, fulfilment, and even empowerment that she may experience. In fact, demanding that she not do so would limit her freedom in the very way wrongful stereotyping does. Neither demanding she align with nor demanding she combat the stereotypes carries us any closer to promoting her autonomy, fulfilment, or empowerment.

Finally, the moral flaw is that this line asks people to make judgments about other persons' behavior that they aren't equipped to make. We do not typically judge persons for their conformity with stereotypes, nor do we impose any onus on them to personally fight stereotypes they are subjected to.[396] It is unfairly presumptuous to ask any one person to do so; it should not be any individual's responsibility to subvert or dismantle stereotypes that they did not have a hand in creating.[397]

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395. Lori Watson, The Woman Question, 3 Transgender Stud. Q. 246, 249 (2016) ("Why should trans women, as individuals, bear a special burden in getting us closer to [the abolition of sex roles]? Most women (including radical feminist women) live a gender that is socially recognized as in the category of 'woman'; that is, they conform to certain gender stereotypes of femininity.").

396. It would be wrong to tell a Black woman not to become angry in public lest she conform with the "Angry Black Woman" stereotype. See Trina Jones & Kimberly Jade Norwood, Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman, 102 Iowa L. Rev. 2017, 2044 (2017) (documenting the stereotype). It would be equally wrong to praise her for not conforming to the stereotype.

397. Two vignettes to bring this insight home. First, take a person of color who engages in race-play—roughly, a sexual practice centering the races of various parties, racial dynamics, and role-playing parts such as "master" and "slave." See Donovan Trott, Race Play 101: My Introduction to the World of Racist Sex Play, HuffPost (July 5, 2017), https://www.huffpost.com/entry/raceplay-101-my-introduction-into-the-world-of-racist_b_595b8fb7e4b0326c0a8d130a [https://perma.cc/K5CT-975V] (describing this practice). Some may have reasons to find this troubling. Arguably, the role-play reanimates racial stereotypes. But on reflection, what right do others—as third parties who are not their sexual partners—have to tell that person that they should deny themselves whatever pleasure they receive from race-play, for the greater goal of combatting racial stereotypes? Second, take a gay man in a relationship, with romantic roles that are heteronormative—where one partner happily accepts the gender role of "the man" and the other "the woman." Jeanne Marecek, Stephen E. Finn & Mona Cardell, Gender Roles in the Relationships of Lesbians and Gay Men, 8 J. Homosexuality, no. 2, 1982, at 45, 45 (describing such relationships). Again, this may initially give one pause; the dynamic furthers stereotypes about the proper role for "the man"

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Up to this point, this Essay has focused solely on the substance of CWP arguments. Viewed from that angle, most of the arguments appear to fall woefully short. Several fail outright, such as ones dealing in concerns for *safety*, *privacy*, *disruption*, *silencing*, and *distorted statistics*. The *biological advantage* argument stops short of justifying categorical exclusion. Those rooted in *trauma* make an incredibly important point; but scrutiny reveals critical inconsistencies or just a plain lack of concern for equally significant sources of trauma. There are important moral and consequential reasons to resist the *gender fraud* argument's attempts to persuade us to pin cis men's potential misbehavior on trans women. Numerous gaps in the *category destabilization* and the *stereotype solidification* arguments make them difficult to credit. Of the lot, only the *dilution* and *unwarranted access* arguments make their case and even then, with several caveats.

IV. Instrumentalization Issues

This Part moves beyond the confines of the logic of the arguments themselves. It provides final reasons for doubt, by examining the methods necessary to put CWP arguments into practice and probing the many problems with how they are operationalized.

A. *Sex Policing*

The central difficulty with seeking to exclude trans persons from women's intimate facilities based on *privacy* or *safety* arguments, or from women's shelters based on *trauma* arguments, is operationalizing such exclusion. Short of genital inspection or genetic testing, no one can tell a user's sex assigned at birth. Impracticalities have not stopped persons from trying, however. In the absence of any realistic method to determine sex assigned at birth, the result of CWP arguments about intimate facilities has been an increase in gender policing that focuses on users' appearances.[398] The underlying assumption, unmistakably, is that persons can tell who is or is not trans, based on their gender conformity. In other words, implementing the exclusion that CWP arguments advance requires relying on stereotypes about what "real women" look, dress, and behave like. [399] Quite literally, this is the injury with which the *stereotype solidification* argument claims to be concerned.

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and "the woman" in a relationship. Even so, what authority do others—as third parties, who are not within that relationship—have to tell persons not to structure their intimate lives in the way that makes them feel most comfortable?

Both illustrations point toward the same truth. The public has no right to tell the targets of stereotypes how to structure their relationships to the stereotypes imposed upon them. Respecting individual autonomy means allowing persons to choose their own methods of survival while living under the heel of stereotypes—whether by embracing, appropriating, satirizing, repudiating, or remaining agnostic toward them.

398. See Ellen D.B. Riggle, Experiences of a Gender Non-Conforming Lesbian in the "Ladies' (Rest)room", 22 J. Lesbian Stud. 482, 483 (2018).

399. Cf. Sherrie A. Inness & Michele Lloyd, "G.I. Joes in Barbie Land":

Many cis women get caught in this dragnet.[400] Trans-exclusionary policies have particularly impacted those deemed insufficiently feminine.[401] Such cis women have been questioned, verbally assaulted, followed, and even forcibly removed from facilities, for simply failing to meet what others view as the appropriate standard of femaleness.

Here are a few examples. Aimee Toms was verbally harassed when a stranger wrongly assumed she was not cisgender because of her short haircut.[402] Cortney Bogorad was physically removed from a restaurant bathroom and assaulted, despite her offers to show identification.[403] Occasionally, cis men have even confronted cis women. Jessica Rush was followed and confronted by a man when she entered a women's restroom because she "dress [ed] like a man."[404]

In light of these examples, it is easy to see how gender policing in intimate facilities injures cisgender women. It may cause psychological harms related to public scrutiny, or the humiliation of being publicly questioned.[405] Anticipating harassment also acts as a source of anxiety.[406] Physical harm may result as well.[407] Gender policing can additionally limit cis women's freedom

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Recontextualizing Butch in Twentieth-Century Lesbian Culture, Nat'l Women's Stud. Ass'n J., Autumn 1995, at 1, 19 (describing gender policing against butch lesbians in bathrooms).

400. See Charlotte Jones & Jen Slater, The Toilet Debate: Stalling Trans Possibilities and Defending 'Women's Protected Spaces', 68 Socio. Rev. Monographs 834, 844 (2020); Julie Compton, Opinion, I'm a Lesbian Targeted by the Bathroom Police, Advocate (July 7, 2015), https://www.advocate.com/commentary/2015/07/07/op-ed-im-lesbian-targeted-bathroom-police [https://perma.cc/FZV8-VTVU] (providing examples); Sadhbh O'Sullivan, The Rise in Gender Policing Is Shaming Those It Claims to Protect, Refinery29 (Apr. 2, 2021), https://www.refinery29.com/en-gb/gender-policing-single-sex-spaces-uk [https://perma.cc/U9WX-UYNM] (same).

401. See, e.g., Dara Blumenthal, Little Vast Rooms of Undoing: Exploring Identity and Embodiment Through Public Toilet Spaces 113–14 (2014); KC Councilor, The Specter of Trans Bodies: Public and Political Discourse About "Bathroom Bills", *in* The Routledge Handbook of Gender and Communication 274, 275–81 (Marnel Niles Goins, Joan Faber McAlister & Bryant Keith Alexander eds., 2020); Sherrie A. Inness, Flunking Basic Gender Training: Butches and Butch Style Today, *in* Looking Queer: Body Image and Identity in Lesbian, Bisexual, Gay, and Transgender Communities 233, 233–34 (Dawn Atkins ed., 2012).

402. Brittney McNamara, This Woman Was Allegedly Harassed in a Restroom Because Someone Thought She Was Transgender, Teen Vogue (May 17, 2016), https://www.teenvogue.com/story/woman-mistaken-transgender-bathroom-attack (on file with the *Columbia Law Review*).

403. Kat Stafford, Lawsuit: Fishbone's Mistakes Woman for Man, Ejects Her, Detroit Free Press (June 11, 2015), https://www.freep.com/story/news/local/michigan/detroit/2015/06/11/fishbones-lawsuit-filed/71056630/ [https://perma.cc/JX4Q-5EHS].

404. Eric Nicholson, Self-Appointed Bathroom Cop Catches Dallas Woman Using Women's Restroom, Dall. Observer (Apr. 29, 2016), https://www.dallasobserver.com/news/self-appointed-bathroom-cop-catches-dallas-woman-using-womens-restroom-8259104 [https://perma.cc/ER6A-BR99].

405. See *infra* notes 413–417.

406. Riggle, *supra* note 398, at 486–87.

407. *Id.* at 488.

through behavioral modification. Some report avoiding public restrooms, or only using them with the company of a friend who can testify to their gender, should it be challenged.[408] Also, there are dignitary injuries; one woman who experienced being questioned, scrutinized, and denied access to women's restrooms remarked: "[E]motionally[,] it is very damaging when someone states that you are not 'woman enough' to use a deemed 'female' area . . . ."[409]

In other contexts, different injuries arise. Consider the gender policing advocated to operationalize the *trauma* argument. Promoting a rule to exclude transgender women from women's shelters, the Trump-era HUD instructed facilities to assess the physical characteristics of those seeking entry.[410] Judging from the above examples, with that approach there are very real possibilities that vulnerable cis women will be unfairly denied entry to protective housing.[411] Undoubtedly, to be denied refuge when one needs it the most, simply on the basis of appearance, would be incredibly traumatizing. Somewhat ironically, the policies that are meant to protect vulnerable cis women from trauma stand to do the very opposite.

B. *Sex Verification*

Operationalizing the *biological advantages* arguments presents comparable troubles. Implementing trans-exclusionary sports policies requires sorting athletes' bodies which, as seen before, is not an easy task. As one means of excluding trans athletes, some policies have deputized third-party citizens to challenge the sex of an athlete they suspect is transgender. Few of these policies impose any limitations, meaning any third party can challenge any athlete for any reason.[412] The endless possibilities for abuse are entirely foreseeable.[413] Worse, Idaho's law immunizes challengers, "regardless of whether the report was made in good faith or simply to harass a competitor"—only increasing the likelihood that reporting will be abused.[414] Since, even by itself, having one's

408. Emma Powys Maurice, Butch Lesbian Confronted 'Tens of Times' in Public Toilets as Anti-Trans Hostility Spills Over, PinkNews (Jan. 19, 2021), https://www.pinknews.co.uk/2021/01/19/public-toilets-trans-bathroom-butch-lesbian-harassed-gender-critical-feminists/ [https://perma.cc/N3UP-KNX6]; Kate, Butch Please: Butch in the Bathroom, AutoStraddle (May 3, 2013), https://www.autostraddle.com/butch-please-butch-in-the-bathroom175366/ [https://perma.cc/6TJD-NTMS].

409. Heather Panter, Transgender Cops: The Intersection of Gender and Sexuality Expectations in Police Cultures 62 (2018).

410. Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. 44,811, 44,816 (July 24, 2020).

411. WoLF acknowledged such exclusions were likely. HUD's Proposed Shelter Rule: Better, But Leaves Many Women Unprotected, WoLF (July 24, 2020), https://womensliberationfront.org/news/huds-proposed-shelter-rule [https://perma.cc/LL42-MYPC].

412. Hecox v. Little, 479 F. Supp. 3d 930, 985 (D. Idaho 2020).

413. Complaint at 22–24, L.E. v. Lee, No. 3:21-cv-00835 (M.D. Tenn. Nov. 4, 2021); Nico Lang, Adults in Arizona Are Trying to Stop Trans Girls From Playing School Sports, Vice (Mar. 13, 2020), https://www.vice.com/en/article/n7jkqx/adults-in-arizona-are-trying-to-stop-trans-girls-from-playing-school-sports [https://perma.cc/ZJD9–9KHG].

414. *Hecox*, 479 F. Supp. 3d at 944.

sex disputed is psychologically wounding, here again, the methods necessary to make trans exclusion work harm cis girls.[415]

The policies compel athletes, if challenged, to verify their sex assigned at birth. This process threatens harm to cisgender girl's bodily integrity. A striking number of laws require verification through medical examination of "internal and external reproductive anatomy."[416] In more explicit terms, verification tests include not only a blood test and chromosomal analysis, but also invasive "measuring and palpating the clitoris, vagina [,] and labia, as well as evaluating breast size and pubic hair"[417] as well as the use of "transvaginal pelvic ultrasound[s] (insertion and manipulation of a probe with a camera several inches into the vagina)" to examine internal reproductive organs.[418]

It is not hard to grasp the harm of forcing a cisgender girl who has had her sex challenged—possibly for frivolous or malicious reasons—to undergo "invasive . . . testing."[419] Worse, there is the possibility of inappropriate behavior by medical professionals—which the enacted laws have curiously failed to account for or guard against.[420] Worst of all, since the majority of the trans-exclusionary policies cover girls' sports at every grade level, there is the truly haunting prospect that a cisgender kindergartner may be forced to undergo a pelvic examination, just to play the sport she wishes to. *That* is the very antithesis of "protection."

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If the analyses over the course of the previous Part are sound, then there are ample reasons to worry about the methods promoted by CWP arguments. On review, sex policing is detrimental to cis women's emotional wellbeing, psychological safety, and autonomy. For its part, sex verification exposes cis girls to unwarranted scrutiny, malicious challenges, invasive testing, and potential misconduct. In either case, operationalizing CWP arguments harms the very persons they supposedly protect.

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415. Sarah Fielding, Legislation Nationwide Seeks to Ban Trans Girls From Playing on Girls' Teams, Very Well Mind (Mar. 19, 2021), https://www.verywellmind.com/legislation-nationwide-seeks-to-ban-trans-girls-from-participating-in-sports-5116469 [https://perma.cc/8MFF-R668].

416. Sharrow, *supra* note 137, at 16 & n.52.

417. Ruth Padawer, The Humiliating Practice of Sex-Testing Female Athletes, N.Y. Times Mag. (June 28, 2016), https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html (on file with the *Columbia Law Review*).

418. Complaint at 18, Hecox v. Little, 479 F. Supp. 3d 930 (D. Idaho 2020) (No. 1:20-cv-00184-CWD).

419. Brief for Nat'l Women's L. Ctr. as Amici Curiae in Support of Appellees and Affirmance at 17–18, Hecox v. Little, Nos. 20–35813, 20–35815, 2023 WL 1097255 (9th Cir. Jan. 30, 2023).

420. See Britni de la Cretaz, Attacks on Transgender Athletes Are Threatening Women's Sports, Glamour (Mar. 22, 2021), https://www.glamour.com/story/attacks-on-transgender-athletes-are-threatening-womens-sports [https://perma.cc/8YPX-ETMS] (noting the potential for misconduct).

Conclusion

Throughout the course of this Essay, the main objective has been to question the alleged impasse between the rights of trans persons and cis women and girls, as expressed in the line of CWP arguments. By now, two takeaways stand out.

The first is the troubling way justifications for discrimination repeat over time, even as the targeted groups change—a dynamic I have labelled *intergroup spillover*. Seen from afar, CWP arguments reanimate woman-protective rationales that lend legitimacy to the exclusion, economic decimation, and execution of racial and ethnic minorities. What's more, they revise and incorporate facets of reasoning used to oppose civil rights progress, beyond the realm of woman-protectionist logic. Misguided beliefs that inclusion causes disruption, formerly used to support segregation, find new homes in arguments for excluding trans women from women's spaces. Warnings against extending antidiscrimination protections to transfolk breathe new life into the historical and biological argument made against same-sex marriage. Similarly, in the current rendition, the fictional figure ominously lurking in showers, who we were once told was a gay man, has been recast as a trans woman—or, at the very least, a cis man pretending to be one.[421]

The second takeaway is that the belief that CWP arguments actually protect cis women is dubious. On their own terms, the logic of CWP arguments leaves much to be desired. Scrutinizing their substance revealed that most of the arguments miss their mark entirely, and the few that make their case do so tenuously. As applied, the methods promoted are actually detrimental to cis women's physical and psychological safety and privacy. Those outcomes become starker by recalling how CWP arguments repeat the problems of their priors: reviving oppressive stereotypes, legitimizing male violence, and underscoring traditional notions of men's roles as defenders. Taken with the rest, those shortcomings provide the final nail in the coffin: Arguably, CWP arguments stand to cost cis women and girls more than they potentially provide.

If that is true, we are left to question what purposes CWP arguments do serve. To close the Essay, I will spell out my suspicions. Return to the history outlined in the Essay's first Part. Across the contexts, whether in intention or effect, tacitly or explicitly, circuitously or directly, woman-protective reasoning and the policies it generated all too commonly served men's interests rather than women's. I suspect, based on an interrogation of CWP arguments' practical, structural, and expressive consequences, that the historical trend continues. Let us walk through the evidence, moving from concrete and immediate examples to the more abstract:

In the public conversation involving CWP rhetoric, who are the loudest voices? And what, if any, are their reasons for engaging in CWP talking points? The answer to the first question is religious conservatives and Republican politicians and super PACs.

421. Spindelman, *supra* note 2, at 164–65 (making the connection).

As for motives, at the 2017 Values Voter Summit, an annual conference for Christian conservative activist groups and politicians, speakers laid out an aggressive strategy to counteract recent LGBT gains, by "separat[ing] the T from the alphabet soup."[422] Primarily, the playbook involved three tactics: (1) framing trans rights as coming "at the expense of" cis women and girls; (2) using secular-sounding arguments rather than religious ones; and (3) collaborating with anti-trans feminists.[423] Attendees quickly set the plan in motion. They reoriented their advocacy toward CWP-related cases, alongside platforming, partnering with, and funding WoLF's work.[424]

Despite having a woman-protective face—both rhetorically and through the associations they foster—these developments do not primarily benefit cis women or girls. Seen as part of the "divide and conquer" strategy, at one level, the groups' use of CWP arguments is intended to function as a newfound Trojan horse through which to continue advancing preexisting attacks on the LGBT community as a whole. That long game, at the very least, places cis lesbians' rights at risk.

Recognize, also, that no form of oppression stands alone.[425] WoLF's partners are not single-issue groups; for decades they have been major leaders in the fight against reproductive rights. To give just one example, as part of a strategic plan to overturn *Roe*, ADF crafted and later defended[426] the fifteen-week abortion ban upheld in *Dobbs v. Jackson Women's Health Organization*.[427] Focusing solely on how their use of CWP arguments immediately threatens transgender persons, therefore, will not do. Indeed, "one train may hide another."[428] As it turns out, ADF reuses the very same strategies, arguments, and

422. Hélène Barthélemy, Christian Right Tips to Fight Transgender Rights: Separate the T from the LGB, S. Poverty L. Ctr. (Oct. 23, 2017), https://www.splcenter.org/hatewatch/2017/10/23/christian-right-tips-fight-transgender-rights-separate-t-lgb [https://perma.cc/WCF4-CGTF] (recording the speech).

423. *Id.*; see also Peter Montgomery, Values Voter Summit Panelist: 'Divide & Conquer' to Defeat 'Totalitarian' Trans Inclusion Policies, Right Wing Watch (Oct. 19, 2017), https://www.rightwingwatch.org/post/values-voter-summit-panelist-divide-conquer-to-defeat-totalitarian-trans-inclusion-policies/ [https://perma.cc/6ST7-P3AD].

424. See, e.g., Heron Greenesmith, A Room of Their Own: How Anti-Trans Feminists Are Complicit in Christian Right Anti-Trans Advocacy, Pol. Rsch. Assocs. (July 14, 2020), https://politicalresearch.org/2020/07/14/room-their-own [https://perma.cc/Y5RC-96RT] (detailing the connection); Esther Wang, The Unholy Alliance of Trans-Exclusionary Radical Feminists and the Right Wing, Jezebel (May 9, 2019), https://jezebel.com/the-unholy-alliance-of-trans-exclusionary-radical-femin-1834120309 [https://perma.cc/V39S-4XU9] (collecting examples).

425. Mari J. Matsuda, Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition, 43 Stan. L. Rev. 1183, 1189 (1991).

426. See Amy Littlefield, The Christian Legal Army Behind the Ban on Abortion in Mississippi, Nation (Nov. 30, 2021), https://www.thenation.com/article/politics/alliance-defending-freedom-dobbs/ [https://perma.cc/N9C3–4NAH] ("ADF wrote the law at issue in Dobbs v. Jackson Women's Health Organization.").

427. 142 S. Ct. 2228 (2022).

428. Kenneth Koch, One Train May Hide Another, *in* One Train 3 (1994).

likely the funds raised in their CWP-related work in other projects.[429] There is reason to believe that the groups' use of CWP arguments ultimately supports the rolling back of reproductive rights, again harming cis women and girls.

Should the prior connection between CWP arguments and the rolling back of cis women and girls' reproductive rights fail to convince, here is another. Take the example of the 2022 midterm elections. Statements across numerous internal documents reveal a coordinated plan among Republicans to divert voters' attention from *Dobbs*[430] through trans-antagonistic messaging.[431] Thus illuminated, Republicans' invariable focus on the ostensible "transgender threat" was partly a sleight of hand meant to obscure the very real threat of the party's own anti-abortion stances.[432] Even if we set aside the paradox of right-wing politicians spending millions on ads sounding in CWP rhetoric though hesitating to direct the equivalent to cis women and girls outright,[433]

429. See generally Melissa Gira Grant, The Groups Pushing Anti-Trans Laws Want to Divide the LGBTQ Movement, New Republic (Feb. 17, 2022), https://newrepublic.com/article/165403/groups-pushing-anti-trans-laws-want-divide-lgbtq-movement [https://perma.cc/EG2E-HM8C] ("ADF's playbook is a glossy republication of an old manual.").

430. 142 S. Ct. 2228 (2022).

431. See, e.g., House Republicans, The Republican Commitment to a Future That's Free (n.d.), http://qrcgcustomers.s3-eu-west1.amazonaws.com/account16699398/29315854_1.pdf?0.9994317393426588 https://perma.cc/UME6–5EFW] (last visited Mar. 25, 2023) (advising candidates to "meet with female athletes in your community who have had to compete against biological males to hear about the unfairness of this disadvantage"); Independent Women's Voice 2022 Fall Issue Engagement Plan, Documented (Oct. 13, 2022), https://documented.net/media/2022-fall-issue-engagementplan-september-update [https://perma.cc/A792–8Y9S] (advising Republican candidates to "counteract . . . the emotional response [of] the Dobbs decision" by using CWP rhetoric, since it provides inroads to "moderate women, independents, and increase[d] leads with Hispanics" and "creates an important . . . opportunity to redefine the narrative about who exactly is waging a war on women"); Michigan Families United PAC, Memo Re: Impacting the Issue Environment 2–3 (n.d.) (on file with the *Columbia Law Review*) (advising that CWP sports arguments are "the biggest and best message by intensity" in the Michigan Governor's race); New APP Poll: Swing State Voters Strongly Oppose Transgender Agenda, Am. Principles Project (May 12, 2022), https://americanprinciplesproject.org/media/new-app-poll-swing-state-voters-stronglyoppose-transgender-agenda/ [https://perma.cc/Q2YQ-8PQH] (instructing Republicans of the "massive opportunity" to gain voter support, given "majorities of voters support defending women's sports"); *cf.* Memorandum from KAConsulting, The Tarrance Grp. & The Republican Nat'l Comm. to Interested Parties 3 (Sept. 13, 2022), https://prodstatic.gop.com/media/documents/RNC_Data_Issue_Memo_1663072983.pdf [https://perma.cc/HUG6-PQFK] (suggesting messaging defending against abortion fallout, including urging talking points on "keeping our daughters, sisters, and mother safe" and that "Democrats[ʻ] failed policies disproportionately effect [sic] women").

432. See Jarrell Dillard, Kelsey Butler & Ella Ceron, GOP Looks to Fire Up Base With Attacks on Transgender Rights, Bloomberg (Oct. 10, 2022), https://www.bloomberg.com/news/articles/2022–10–10/gop-looks-to-fire-up-base-with-attacks-on-transgender-rights [https://perma.cc/5885–6QD8] (detailing Republicans' "legislative and messaging barrage").

433. See Press Release, HRC Staff, In Final Weeks of Election, Extremist Candidates, Anti-LGBTQ+ Orgs Funnel Tens of Millions of Dollars in Ads Attacking Trans Youth, Targeting Black and Spanish-Speaking Voters (Oct. 28, 2022), https://www.hrc.org/press-releases/

indirectly, the rhetoric benefits efforts to limit cis women and girls' bodily autonomy through obfuscation.

Whose interests are protected by arguments for exclusion of trans women and trans girls from public restrooms, locker rooms, and showers? Take rationalizing broad bathroom exclusions with fears that cis men will pretend to be trans. Who does this serve? Scapegoating innocent trans women for cis men's past or hypothetical bad behavior falls precisely within patriarchy's modus operandi: forcing women to shoulder the burden for actions that are not their own, and that they should not have to bear.

Whose interests are protected when the exclusion of trans women and trans girls is carried out? Policing women's spaces to exclude trans women based on visual appraisals inevitably relies on ideas about what "real women" look like. This does patriarchal oppression's work for it. For one thing, it continues the disproportionate dissecting of women's appearances. For another, it threatens cis women deemed "insufficiently feminine"—overwhelmingly sexual and racial minorities—with assault and harassment, forcing them in line in order to avoid unwarranted harm. All the while, cis male bodies remain unfettered.

Whose interests are protected by the idea that sex verification is necessary to "save" girls' sports and by being told that cis girls are "inherently" athletically inferior? Starting with sex verification, the express effect is to add another barrier to cis girls' participation in sports—being subjected to invasive medical testing and examination of their reproductive organs. Not surprisingly, the result will be to disincentivize cis girls' participation. Conversely, cis boys face no such hurdle. Against the backdrop of a society that already positions sports as "male" and strongly encourages boys to pursue them, the practical effects of additional obstacles are to reserve the benefits of participation in sports to cis boys.

Now, turn to stereotypes about cis girls' athletic inferiority. As they do in other male-dominated fields, negative stereotypes about women rationalize women's exclusion and naturalize male control. Tropes about women's athletic inferiority underlying sex segregation in sport both normalize male physical dominance and support the social hierarchy that treats men's sports as more legitimate and worthy of support, visibility, and resources.

Closely linked, we might ask whose interests have been served by the consequences of exclusionary sports policies themselves? Some policies will remove cis girls' ability to participate in their desired sport completely. Michigan High School Athletic Association's policy allows cis girls to participate in football, wrestling, golf, tennis, and swimming.[434] If pending Michigan

breaking-in-final-weeks-of-election-extremist-candidates-anti-lgbtq-orgs-funnel-tens-of-millions-of-dollars-in-ads-attacking-trans-youth-targeting-black-and-spanish-speaking-voters [https://perma.cc/TFR6-NCNN] (reporting candidates or PACs spent $50 million on ads "attacking LGBTQ+ people—and especially transgender youth—in the 2022 midterm elections").

434. Brad Emons, Michigan Senate Bill Targeting Transgender High School Athletes

Senate Bill 218 passes, those days are gone. In other instances, cis girls will have their wins challenged—their efforts undercut—not by trans rivals, but by false accusations from third parties. In Utah, the High School Activities Association legislative representative detailed one such investigation, after a cis athlete won first place "by a wide margin."[435] He also admitted to frequent complaints "when an athlete doesn't look feminine enough."[436] Effectively, the exclusionary tactics send a message to cis girls about how well they should perform or that they must balance athleticism alongside "appropriately" feminine presentation.

What is protected by the notion that cis women and girls must be safeguarded from trans women? The answer is likely cis men's psychological investments in their roles as women's defenders. Realistically, CWP arguments mobilize and encourage patriarchal protective paternalism. The reason why is simple. If cis women's safety, privacy, or advancement is in need of protection, someone must do the protecting. Social science confirms the inkling. In a 2016 review of user comments on almost 200 articles on trans bathroom use, 72% of all negative comments were authored by men, and the study found that "cisgender males are more likely to be concerned with safety . . . surrounding transgender females in female bathrooms than cisgender females."[437] The likely cause: according to the researchers, cis men's view of their role as "protector[s]."[438]

This is not desirable. The price of masculinist protection is, and has always been, the control and subordination of the "protected."[439] Thus, the flip side to Justice Joseph P. Bradley's statement that "[m]an is, or should be, woman's protector and defender," is captured in the sentence that immediately follows: "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[440]

Whose interests are protected by enacting sharp boundaries around who is, and who is not, considered a "real" woman or girl? Historical examples lead one to think that the answer is men's. For centuries, American constructions of womanhood were restricted to women who were white.[441] During

Threatens Girls, Detroit Free Press (Aug. 17, 2021), https://www.freep.com/story/sports/high-school/2021/08/17/michigan-high-school-transgender-athlete-bill-laura-theis-jeff-irwin/8126319002/ [https://perma.cc/H4DP-WKN7].

435. Courtney Tanner, Utah Parents Complained a High School Athlete Might Be Transgender After She Beat Their Daughters, Salt Lake Trib. (Aug. 18, 2022), https://www.sltrib.com/news/education/2022/08/18/utah-parents-complained-high/ [https://perma.cc/2P2Z-VHAH].

436. *Id.*

437. Rebecca J. Stones, Which Gender Is More Concerned About Transgender Women in Female Bathrooms?, 34 Gender Issues 275, 281 (2017).

438. *Id.* at 282.

439. See Iris Marion Young, The Logic of Masculinist Protection: Reflections on the Current Security State, 29 Signs 1, 4 (2003) ("Central to the logic of masculinist protection is the subordinate relation of those in the protected position.").

440. Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

441. See Kathy Deliovsky, Normative White Femininity: Race, Gender and the Politics

chattel slavery, deemphasizing and denying Black women's femininity played a necessary role in the exploitation of enslaved labor. Since Victorian attitudes surrounding womanhood would have prevented the subjugation and abuse of enslaved women, Black women were recast as unfeminine or unsexed.[442] Motherhood, for example—traditionally considered the apex of womanhood—was rebranded and redefined as "breeding for profit" in the context of Black women.[443] Only then were enslavers able to rationalize inhumane practices that would be unimaginable had the mothers been white.[444] From that view, the restrictive definitions of womanhood protected white men's property interests in Black enslavement generally, and enslaved Black women's reproductive capacities in particular. For other non-white women, defining them as outside of womanhood allowed white men unfettered sexual entitlement. Native women, for instance, were excluded from womanhood by being branded "savage [s],"[445] papering over manifest sexual violence against them, both as just another acceptable facet of Western expansion and colonial conquest,[446] and for decades thereafter.[447]

Newer examples find the same result. Decades ago, similar restrictive borders supported lesbians' exclusion from the burgeoning women's rights movement.[448] The beliefs were largely organized around the idea that womanhood was defined by both desiring sexual intimacy with, and being sexually

of Beauty, 33 Atlantis, no. 1, 2008, at 49, 57 (observing that, traditionally and still in many ways today, white women serve as the "benchmark" of femininity).

442. Andrea Elizabeth Shaw, The Embodiment of Disobedience: Fat Black Women's Unruly Political Bodies 23 (2006) (observing that the presentation of the enslaved as "defeminized" provided a "'moral' rationale for those engaged in the dehumanization of [B] lack women in its myriad forms").

443. See hooks, *supra* note 76, at 39 (1981) ("Breeding was another socially legitimized method of sexually exploiting Black women."); Debbie Clare Olson, Motherhood, *in* Writing African American Women 645, 647 (Elizabeth Ann Beaulieu ed., 2006).

444. See Olson, *supra* note 443, at 46.

445. See Bethany Ruth Berger, After Pocahontas: Indian Woman and the Law, 1830 to 1934, 21 Am. Indian L. Rev. 1, 10 (1997).

446. See Andrea Smith, Conquest: Sexual Violence and American Indian Genocide 10 (2005); see also Michelle J. Anderson, From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law, 70 Geo. Wash. L. Rev. 51, 68 n.86 (2002) ("European beliefs of white superiority and the lack of legal repercussions made Indian women easy targets for sexual attack."); Berger, *supra* note 445, at 9–10 ("Indian women provided a convenient contrast with the demure 'true' woman."); Rebecca Tsosie, Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination, 15 UCLA J. Int'l L. & Foreign Aff. 187, 204 (2010) (noting that writing Native women's placement outside the ideal of "womanhood" served to "label them as a savage and uncivilized race").

447. See Sarah Deer, Toward an Indigenous Jurisprudence of Rape, 14 Kan. J.L. & Pub. Pol'y 121, 125 (2004); Hossein Dabiri, Comment, Kiss the Ring, but Never Touch the Crown: How U.S. Policy Denies Indian Women Bodily Autonomy and the Save Native Women Act's Attempt to Reverse that Policy, 36 Am. Indian L. Rev. 385, 394 (2011).

448. Cristan Williams, Repeating the Cycle at MichFest: The Clash of Two Feminisms, TransAdvocate, https://www.transadvocate.com/repeating-the-cycle-at-michfest-the-clash-of-two-feminisms_n_15109.htm [https://perma.cc/V4MG-84G9] (last visited Oct. 10, 2022).

available to, men.[449] Lesbians checked neither box. The result was the "double accusation" that lesbians weren't "real women," or alternatively, that they sought to be men themselves.[450] So potent were the associations of lesbianism with the antithesis of womanhood that the label could be easily weaponized by men; branding a woman a lesbian—particularly one thought to dare leave her "proper place"—worked to place her back in line.[451]

It was in that context that a wave of moral panic swept through the leading women's liberation group, National Organization of Women (NOW), starting in the late 1960s.[452] Driven by fears that the movement would be delegitimized through an association with lesbianism, and that their members' own womanhood would be extinguished by accusations of being lesbians, for years NOW undertook a large-scale lesbophobic campaign. In addition to the group's president, Betty Friedan, referring to lesbians as a "lavender menace,"[453] NOW retracted its policy of issuing couples memberships once lesbian couples.

began applying,[454] refused to list the oldest lesbian rights organization in the United States as a sponsor for the First Congress to Unite Women in 1969,[455] ousted openly lesbian officials, and purged lesbian members.[456] When lesbian activist Rita Mae Brown spoke in favor of lesbian inclusion at a NOW meeting, the resounding response was "lesbians want to be men and . . . N.O.W. only wants 'real' women."[457] Lesbians' exclusion based on restrictive definitions of womanhood therefore also benefitted men by sowing seeds of division and threatening to destabilize the nascent feminist movement.

Whose interests are protected by defining trans women—or, for that matter, any women—strictly by their "biology"? The answer cannot be cis women or girls since, as Professor Catharine MacKinnon rightly reminds us, "Male dominant society has defined women as a discrete biological group forever. If this was going to produce liberation, we'd be free."[458] Traditionally, the

449. See Cheshire Calhoun, Feminism, The Family, and the Politics of the Closet: Lesbian and Gay Displacement 33 (2000); Charlotte Bunch, Lesbians in Revolt, *in* Lesbianism and the Women's Movement 29, 30 (Charlotte Bunch & Nancy Myron eds., 1975).

450. Monique Wittig, One Is Not Born a Woman 3 (1980).

451. See Radicalesbians, The Woman-Identified Woman 2 (1970).

452. See Judy Klemesrud, The Lesbian Issue and Women's Lib, N.Y. Times, Dec. 18, 1970, at 47 (on file with the *Columbia Law Review*) (noting the rising tensions).

453. Stephanie Gilmore & Elizabeth Kaminski, A Part and Apart: Lesbian and Straight Feminist Activists Negotiate Identity in a Second-Wave Organization, 16 J. Hist. Sexuality 95, 96 (2007).

454. *Id.* at 102.

455. Lillian Faderman, The Gay Revolution: The Story of the Struggle 235 (2016).

456. Clark A. Pomerleau, Empowering Members, Not Overpowering Them: The National Organization for Women, Calls for Lesbian Inclusion, and California Influence, 1960s-1980s, 57 J. Homosexuality 842, 845 (2010).

457. Rita Mae Brown, Take a Lesbian to Lunch, Ladder, Apr.-May 1972, at 17, 20.

458. Sex, Gender, and Sexuality: An Interview With Catharine A. MacKinnon, Conversations Project (Nov. 27, 2015), http://radfem.transadvocate.com/sex-gender-and-sexuality-an-interview-with-catharine-a-mackinnon/ [https://perma.cc/3HJ6-V8HX].

oppression of women has long been justified by arguments rooted in biology.[459] Conversely, biological determinism served men's interests since it associated facets of male biology with superiority. We have little reason to think those cultural associations have dissolved. Accepting that biology is dispositive to womanhood, then, only works to continue cis women's subordination in the long run.[460]

Whose interests are protected when trans women are reduced to their genital characteristics—in other words, when persons are related to, and classified by, solely their physical components? Reduction to body has long formed part of the oppression cis women and girls face;[461] the sexual objectification of women—that is, evaluating them based on their bodies and body parts, rather than as full moral equals—has been integral to male domination.[462] To continue to promote or engage in such practices, whether the target group has changed, can only serve to sanction the very same logic used to harm cis women. Returning to the question, it is clear that the reduction of trans women to their genital characteristics serves patriarchal interests in defining persons by their bodies or parts thereof.

All of this brings me to what I see as the heart of the matter: *Whose interests are served when women and girls are pitted against each other—the central logic of CWP thinking and arguments—including those who are cis versus those who are trans?* The answer, it seems to me, is obvious.

459. Ann E. Freedman, Sex Equality, Sex Differences, and the Supreme Court, 92 Yale L.J. 913, 915 (1983) ("The subordination of women has traditionally been justified by arguments drawn from biology or nature.").

460. See Elizabeth Grosz, Space, Time, and Perversion: Essays on the Politics of Bodies 48 (2018) ("Insofar as biology is assumed to constitute an unalterable bedrock of identity, the attribution of biologistic characteristics amounts to a permanent form of social containment for women."); Carolyn McLeod & Françoise Baylis, Feminists on the Inalienability of Human Embryos, Hypatia, Winter 2006, at 1, 11.

461. See Rae Langton, Autonomy-Denial in Objectification, in Sexual Solipsism: Philosophical Essays on Pornography and Objectification 223, 228–29 (2009).

462. Catharine A. MacKinnon, Toward a Feminist Theory of the State 123–24, 140–41 (1989) (recording several facets); see also Am. Psych. Ass'n Task Force on the Sexualization of Girls, Report (2007), https://www.apa.org/pi/women/programs/girls/report-full.pdf [https://perma.cc/S9JY-EGX3] (same); Dawn M. Szymanski, Lauren B. Moffitt & Erika R. Carr, Sexual Objectification of Women: Advances to Theory and Research, 39 Counseling Psych. 6, 6 (2011) (same).

IDENTITY BY COMMITTEE

Scott Skinner-Thompson

Abstract

Even in school districts with relatively permissive approaches to defining and embodying gender, the identities of transgender and gender variant students are often governed by complex regulatory protocols. Ensuring that a student is able to live their gender at school can involve input from a host of purported stakeholders including medical providers, mental health professionals, school administrators, the student's parents, and even the broader community. In essence, trans and gender variant students' identities are governed by committee, which reduces students' control over their lives, inhibits self-determination, constricts the scope of permissible gender identities, subjects them to incredible degrees of state surveillance, and amplifies the risk that sensitive information about the students will be disclosed more broadly.

Some of these barriers may have roots in the ways gender has been discursively framed in order to access harm-reducing legal benefits and carve out space for trans identity and survival. For example, persistent linking of transgender identity with medicalized diagnoses, potentially to harness medical care, may lend credence to a regulatory approach where medical providers and administrators, not the student, have predominant control over the child's identity. Similarly, attempts to essentialize gender identity as an innate mental state in order to assuage concerns about mutability legitimizes the role of mental health professionals in controlling the student's identity at school.

This Article intervenes in this regulatory landscape in three ways. First, it examines the prevailing discursive and sociolegal ways of framing gender and gender identity through an analysis of transgender history and activism, medical discourse regarding gender and gender identity, mental health discourse, and law reform efforts and advocacy.

Second, it unpacks the many bureaucratic barriers imposed on transgender and gender variant students in schools, tentatively linking those barriers to the discourses of gender identity. Through a detailed analysis of the education policies governing gender identity in each state and each state's largest school district, the Article documents the substantive requirements for living consistently with one's gender identity in school (for example, providing

medical documentation v. self-identification) and the different stakeholders enshrined in procedurally assessing students' gender.

Finally, the Article explores whether given extant doctrine endorsing comparatively expansive First Amendment speech rights—even for students—renewed discursive emphasis on "gender expression" could provide students with greater freedom relative to purported "committee" stakeholders. At the very least, an emphasis on the dialectical relationship between social context and gender expression could help schools, courts, and society better understand the non-essentialist (e.g., non-medical) but exploratory and performative components of our gender identities, building societal appreciation for the ways in which our identities—while our own and while material—are nevertheless dynamic—a simultaneously challenging but beautiful concept.

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Introduction

Rumors of the demise of hegemonic sex/gender systems . . . have been greatly exaggerated.
—Jack Halberstam[1]

Despite hard-fought and critically important victories for transgender people at the Supreme Court and locally,[2] bureaucratic regulation of gender identity is pervasive and, in some settings, growing rapidly. One such context is within public schools.[3] While ongoing efforts by some states to ban transgender and gender variant[4] students from living their gender identities have received important attention,[5] the effects of policies purporting to allow students to live their genders at school are less scrutinized but also important. As this Article unearths through a comprehensive evaluation of policies governing gender identity in each state and each state's largest school district (where available),[6] even in schools with comparatively permissive approaches

1. Jack Halberstam, Trans*: A Quick and Quirky Account of Gender Variability 10 (2018).

2. *See, e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731, 1747 (2020) (concluding that Title VII's prohibition on sex discrimination in employment included discrimination on the basis of someone's transgender status).

3. See *infra* Part II (cataloguing regulatory schemes for governing gender identity in every state and every state's largest school district).

4. Gender variant is a term often used to describe youth who do not conform with dominant gender norms and is sometimes used interchangeably with gender nonconforming. Trans Bodies, Trans Selves: A Resource for the Transgender Community 615 (Laura Erickson-Schroth ed., 2014) [hereinafter Trans Bodies, Trans Selves].

5. *See Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 Harv. L. Rev. 2163, 2163 (2021); Scott Skinner-Thompson, *Resisting Regulatory Oppression of Transgender Children*, Regul. Rev. (July 1, 2021), https://www.theregreview.org/2021/07/01/skinner-thompson-regulatory-oppression-of-trans-children/, *archived at* https://perma.cc/HMQ9-VXUG.

6. *See* Scott Skinner-Thompson, Policies Regulating Gender in Schools: Companion to Identity by Committee: Companion to Identity by Committee (2022), https://docs.google.com/spreadsheets/d/1K6iUkLnm DfaSVykyRaZ3Yqt7XNM9leGO-MQA6p2VbV4/edit?usp=Sharing [hereinafter Companion] The chart attempts to code the key requirements of each law or policy in terms of its substantive and procedural requirements for students

to defining and embodying gender, the identities of transgender and gender variant students are governed by intricate and often inaccessible regulatory protocols.[7]

Ensuring that a student can live their gender at school can involve the submission of multiple forms of "evidence" of a student's gender as well as input from a host of purported stakeholders including medical providers, mental health professionals, school administrators, the student's parents, and even the broader community.[8] In essence, trans and gender variant students' identities are governed by committee. Indeed, certain jurisdictions have literal "Gender Identity Eligibility Committees" or have required students to submit a "Transgender Application."[9] These bureaucratic approaches have been endorsed by some LGBTQ rights organizations,[10] and represent a marked improvement over systems that outright deny the existence of trans and gender variant children.[11] In that way, the committee structure and the many professionals (medical, legal, educational) that contribute to it are often an important form of harm reduction that has improved, and undoubtedly saved, the lives of many trans children—lives that continue to face threats from many corners.[12] But, as explored in this Article, this committee structure is not without its own drawbacks. It provides students only limited control over their identities, inhibits self-determination, often constricts the scope of permissible gender

attempting to access bathrooms or competitive athletics teams consistent with their gender identity. The specifics of each policy vary widely, and the "coding" may not capture all relevant nuance. For example, different policies governing intramurals and physical education classes v. interscholastic competition. Moreover, some of these laws are subject to ongoing lawsuits which may impact their enforceability. General policies of "nondiscrimination" on the basis of gender identity were not coded as indicating one way or another how students would be treated with respect to access to sex-segregated spaces and activities. For additional resources on state laws, see Movement Advancement Project, Bans on Transgender Youth Sports Participation (last updated October 11, 2022), https://www.lgbtmap.org/equality-maps/sports participation bans, *archived at* https://perma.cc/C2XJ-UMW4; Movement Advancement Project, Safe Schools Laws (last updated October 11, 2022), https://www.lgbtmap.org/equality-maps/safe school laws/discrimination, *archived at* https://perma.cc/2XNM-ZH6T.

7. *See infra* section II.A.

8. *See id.*

9. *See, e.g.*, Arizona Interscholastic Association, 2022–2023 Constitution, Bylaws, Policies and Procedures § 41.9 153 (outlining procedures for evaluation by a Gender Identity Eligibility Committee); S.D. High School Athletic Association, SDHSAA Transgender Procedure (2022), (requiring submission of Transgender Application for transgender male participation, with transgender female participation on female teams prohibited by state law, S.B. 46, 97 Leg. Sess. (S.D. 2022)).

10. *See, e.g.*, LGBT Sports Foundation, Proposed Model High School Policy (2016).

11. *See* Elizabeth J. Meyer & Harper Keenan, *Can Policies Help Schools Affirm Gender Diversity? A Policy Archaeology of Transgender-Inclusive Policies in California Schools*, 30 Gender & Educ. 736, 749 (2018) (critiquing the at times exclusionary identity scripts perpetuated by school policies attempting to recognize and regulate some trans identities (but not others) while "recogniz[ing] the value and support that many transgender students have received from" such policies).

12. *See id.* at 750.

identities to the gender binary, subjects students to incredible degrees of state surveillance, amplifies the risk that sensitive information about the students will be disclosed too broadly, and is only accessible to those students with the support and resources necessary to navigate the often byzantine requirements.[13]

In addition to analyzing the harmful effects of this bureaucratized process, the Article also examines the degree to which these bureaucracies reflect certain ways of understanding gender,[14] and whether a shift in emphasis in the school context might lead to greater freedom for students.[15] Drawing from an array of sources, including personal accounts, legal advocacy, social science studies, and medical and psychological literature, the Article analyzes the principal discourses for thinking and talking about gender that have been deployed by transgender and gender variant people, their allies, legal advocates, and professional service providers.

In short, three different (but interrelated) frames have predominated—the Bio-Medical-Mental Understanding, the Social or Interactionist Understanding, and the Expressive-Performative Understanding. The first two frames (Bio-Medical-Mental and Social) have in some ways legitimized the committee structure for regulating gender identity in public schools, impeding students' ability to be the primary determiner of their identities. For example, persistent linking of transgender identity with medicalized diagnoses, including but not limited to "gender dysphoria," potentially to harness medical care,[16] lends credence to a regulatory approach where medical providers and administrators, not the student, have control over the child's identity. Efforts to essentialize gender identity as an innate mental state in order to assuage overstated concerns about instrumental uses of gender freedom, for example, for competitive athletic advantage, likewise enshrine gatekeepers such as mental health professionals.[17] Similarly, pursuant to the law's recognition of parental control over raising and educating a child, an emphasis on the social/developmental aspects of transition, e.g., the purported role of coming out and socially transitioning in diagnostically confirming—as opposed to merely exploring or embodying—one's gender identity, may bolster a parent's ability to forbid the child's transition at school, even if the school and state or local policy is supportive of the student.[18]

13. *See infra* section II.B.

14. *See infra* Part I

15. *See infra* Part III.

16. *See, e.g.,* World Pro. Ass'n for Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People 2 (7th ed. 2011) [hereinafter WPATH SOC 7th ed.] (defining gender dysphoria "as discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth").

17. *See* Gay, Lesbian & Straight Educ. Network & Nat'l Ctr. for Transgender Equal., Model School District Policy on Transgender and Gender Nonconforming Students 2 (last revised Sept. 2018) [hereinafter GLSEN & NCTE, Model School District Policy].

18. *See* Asaf Orr & Joel Baum, Schools in Transition: A Guide for Supporting

Consequently, the Article analyzes whether a renewed emphasis on the expressive or performative dimensions of gender may hold more emancipatory potential for students both in terms of legal doctrine and societal understanding of non-normative gender identities, ultimately cautiously concluding: yes.[19] The Expressive-Performative Understanding of gender underscores the degree to which gender identity, while perhaps influenced by biology and environmental forces, is nevertheless performed and expressed in myriad ways including physical embodiment, sartorial choices, and use or rejection of sex-segregated spaces.[20] As outlined in the Article's final Part, given extant doctrine endorsing comparatively expansive First Amendment student speech rights,[21] increased stress on the Expressive-Performative Understanding could provide students with the ability to dismantle the bureaucratic structures regulating their gender as infringements on their expressive rights, ultimately creating more space for gender self-determination.[22] Such an approach could yield particular benefits for students without the fiscal or familial resources needed to navigated the complex bureaucratic processes and for those that beautifully complicate binary identities. At the very least, an emphasis on the dialectical relationship between social context and gender expression could help schools, courts, and society better understand the non-essentialist, e.g., non-medical, but performative and exploratory components of our gender identities, creating awareness of the dynamic potential of our identities, which while our own and material, are nevertheless interconnected in challenging but exciting ways.[23]

These themes are explored in three parts, with Part I analyzing the prevailing frames for conceptualizing gender and gender identity, Part II discussing how those frames have influenced the bureaucratic construction of gender identity committees in public schools while detailing the committees' underappreciated harms to students' lives, and Part III analyzing whether the expressive dimensions of gender promise greater freedom for trans and gender variant students.

I. Discursive Construction of Gender & Gender Identity

There are as many ways of conceptualizing the sources of "gender" and "gender identity" as there are different gender identities (e.g., male, female, non-binary, genderqueer).[24] But broadly speaking one's gender

Transgender Students in K-12 Schools 9 (2015) (emphasizing social transition as a means of preventing or alleviating gender dysphoria in transgender youth).

19. *See infra* Part III.

20. *See infra* section I.C; Judith Butler, Gender Trouble xxv (Routledge Classics 2006) (1990) [hereinafter Butler, Gender Trouble].

21. *See e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969).

22. *See infra* section III.A.

23. *See infra* section III.B.

24. *See* Jennifer Finney Boylan, *Throwing Our Voices: An Introduction, in* Trans Bodies, Trans Selves, *supra* note 4, at xv, xvii (underscoring the rich multiplicity of views on gender identity among the trans community); Paisley Currah, Richard M. Juang, & Shannon

(culturally-created categories of expected behavior assigned to people frequently on the basis of certain sex-based characteristics) and gender identity (internal personal sense of belonging with a particular gender category, or no gender category) are discursively constructed as being influenced by some or all of the following elements: biological influences (nature), social influences and historical conditions (nurture/culture), and an individual's own self-constructing gender expression (the expressive or performative).[25]

There may be elements of "truth" to each of these.[26] Indeed, to the extent that everyone's gender identity is formed uniquely, some people may be more influenced or shaped by a certain factor, and less so by others.[27] As put by developmental psychologist Diane Ehrensaft, it is quite possible that "nature and nurture crisscross over time in a myriad of ways in the context of each particular culture to create gender as we know it."[28] As with others in the fields of queer theory and transgender studies,[29] the concern here is not with isolating the one "true" and universal source of gender identity.[30] As transgender

Price Minter, *Introduction*, *in* Transgender Rights xiii, xvi (Paisley Currah et al. eds. 2000) [hereinafter Transgender Rights].

25. *See* Susan Stryker, Transgender History: The Roots of Today's Revolution 14–15 (2d. ed. 2017) [hereinafter Stryker, Transgender History]; Laura Erickson-Schroth, Miqqi Alicia Gilbert, & T. Evan Smith, *Sex and Gender Development*, *in* Trans Bodies, Trans Selves, *supra* note 4, at 80, 83, 99; Genny Beemyn & Susan Rankin, The Lives of Transgender People 17 (2011).

26. *See* Stryker, Transgender History, *supra* note 25, at 21 (emphasizing that how "gender identity develops in the first place and how gender identities can be so diverse are hotly debated topics that go straight into the controversies about nature versus nurture and biological determinism versus social construction"); David Valentine, Imagining Transgender: An Ethnography of a Category 61 (2007) (explaining that "no categorical system fully explains the ways in which those lived experiences we name through 'gender' and 'sexuality' are lived on a day-to-day basis by particular social actors in particular social contexts").

27. *Cf.* Stephen Whittle, *Forward* to The Transgender Studies Reader xiii (Susan Stryker & Stephen Whittle, eds. 2006) (explaining that the partial shift from the pathologization of trans identities has enabled trans people "to reclaim the reality of their bodies, to create with them what they would, and to leave the linguistic determination of those bodies open to exploration and invention").

28. Diane Ehrensaft, The Gender Creative Child: Pathways for Nurturing and Supporting Children Who Live Outside Gender Boxes 17 (2016) [hereinafter Stryker, Transgender History].

29. *See* Leslie Feinberg, Transgender Warriors: Making History from Joan of Arc to Dennis Rodman xii (1996) [hereinafter Feinberg, Transgender Warriors] (declining to "take a view that an individual's gender expression is exclusively a product of either biology or culture" and observing that "while biology is not destiny, there are some biological markers on the human anatomical spectrum," but at the same time "there must be a complex interaction between individuals and their societies").

30. Any attempt to establish a "true" source of gender identity is well beyond my purported expertise. I happen to believe that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992); *see also* Obergefell v. Hodges, 574 U.S. 644, 651–52 (2015) (emphasizing one's liberty "to define and express their identity"); Feinberg, Transgender Warriors, *supra* note 29 at xi (defending as paramount

historian Susan Stryker underscored, "it's more important to acknowledge that some people experience gender differently from how most do than to say why people experience gender differently from how most do."[31] And such purported truth-telling is one of the principal strategies of disciplinary power critiqued by this Article.[32]

Instead, the goal of this Part is to analyze and map how gender and gender identity have been discursively constructed by diffuse societal elements—transgender and gender variant people themselves, but also their allies, legal advocates, and professional service providers—and in the next section, to show how certain discursive constructions may have lent credence to and legitimatized the vast bureaucracies governing students' lives. Rather than focus on a singular truth regarding the source(s) of gender and gender identity, I am interested in scrutinizing whether certain core features of the overlapping understandings of gender have greater liberating potential than others. To that extent, recognizing that all discursive frames have some measure of disciplining effect,[33] my objective with regard to analyzing these various discourses is simultaneously highly agnostic and decidedly instrumental. Beyond personal experiences with my own gender identity and sexuality, I have little to contribute to the important literature on the sources of gender and gender identity—as delightfully put by legal scholar and bioethicist Florence Ashley, "anyone who claims to have a clear [or complete] understanding of gender is a liar, liar pants on fire."[34] Rather, I am interested in seeing which discursive understanding creates the most legal space—and lived reality—for individual freedom and exploration in the particular context of public education. Put differently, drawing from transgender activist Leslie Feinberg, this Article is "not aimed at *defining* but at [legally] *defending* the diverse communities that are coalescing."[35]

But before going much further, some theoretical groundwork and definitional explanation of what I mean by "discourse." In the context of intimate attraction, Michel Foucault explained that rather than simply repressing

"the right of each individual to define themselves").

31. Stryker, Transgender History, *supra* note 25, at 22; *see also* Stryker, Transgender History, *supra* note 28, at 31 (emphasizing the collective need for society "to be humble enough to admit to knowing much more about the 'what' of gender . . . than the 'why' of gender (the actual determinants that . . . cause only some people to be transgender)").

32. *See* Michel Foucault, The History of Sexuality, Volume I: An Introduction 68 (Vintage 1990) (Robert Hurley, trans., Pantheon 1978) (critiquing the "complex machinery for producing true discourses on sex").

33. *Cf.* Dean Spade, Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law 106–07 (Duke Univ Press. 2015) (2011).

34. *See* Florence Ashley, *Thinking an Ethics of Gender Exploration: Against Delaying Transition for Transgender and Gender Creative Youth*, 24 Clinical Child Psychology & Psychiatry 223, 226 (2019) [hereinafter Ashley, *Against Delaying*]; *see also* Taylor Flynn, *Instant (Gender) Messaging: Expression-Based Challenges to State Enforcement of Gender Norms*, 18 Temp. Pol. & Civ. Rts. L. Rev. 465, 478 (2009) (expressing skepticism that it's possible to arrive "at a definitive understanding of sex").

35. Feinberg, Transgender Warriors, *supra* note 29, at ix.

sexuality and discussions of it, modern society, in fact, facilitated discussions or "discourses" about sexuality and, by so doing, managed, controlled, and shaped what were deemed acceptable and unacceptable sexualities through diffuse, non-centralized exercises of social/disciplinary power.[36] The discourses justified and gave rise to professionals (doctors, psychotherapists, etc.) who could socially regulate sexuality through further disciplinary discourse, including via categorization (namely, the invention of the then-pathologized category of "homosexual").[37] As transgender studies scholars have powerfully emphasized, and as will be expanded on in detail in the education context, similar disciplinary discourses have arisen with regard to the governance of gender.[38]

In fact, the construction of the category "transgender" is a good example of the power of discourse to create, enshrine, and control, notwithstanding its simultaneously liberating potential.[39] Of course, people *now* denominated as transgender have existed throughout human history,[40] but the term itself did not gain real purchase until the 1990s and has become institutionalized with astounding alacrity. At the same time, the term is contested and has varied meanings.[41] Today, the term "transgender" often operates to designate people "who identify with a binary gender other than the one they were assigned at birth" or, more broadly, as an umbrella term describing anyone who is, to varying degrees, gender variant.[42] As David Valentine notes in his ethnography of the term "transgender," identities potentially falling under the transgender umbrella include, "transsexuals, transvestites, cross-dressers, men or women

36. *See* Foucault, *supra* note 32, at 35.

37. *See id.* at 68.

38. *See, e.g.*, Dean Spade, *Mutilating Gender, in* Transgender Studies Reader, *supra* note 27, at 315, 318 [hereinafter Spade, *Mutilating Gender*].

39. *See* Meyer & Keenan, *supra* note 11, at 740 (explaining that reliance on fitting "neatly within a prescribed legal category in order to secure the protections of the law does not provide meaningful support for individuals whose identities transcend and blend discrete legal categories"); E. Patrick Johnson, *"Quare" Studies, or (Almost) Everything I Know About Queer Studies I Learned from my Grandmother*, 21 Text & Performance Quarterly 1 (2001) [hereinafter E. Patrick Johnson, *"Quare" Studies*] (explaining that queer studies and the category queer have at times effaced issues confronted by people of color); *cf.* Judith Butler, *Imitation and Gender Insubordination*, *in* The Lesbian and Gay Studies Reader 307, 308–09 (Henry Abelove, Michele Aina Barale, & David M. Halperin eds. 1993) (acknowledging short-term liberating potential of identity categories notwithstanding their longer-term disciplinary risks).

40. *See* Feinberg, Transgender Warriors, *supra* note 29, at 125; Nick Gorton & Hilary Maia Grubb, *General, Sexual, and Reproductive Health, in* Trans Bodies, Trans Selves, *supra* note 4, at 215, 216; Halberstam, *supra* note 1, at 25.

41. *See* Susan Stryker, *(De)Subjugated Knowledges*, *in* Transgender Studies Reader, *supra* note 27, at 1–2 [hereinafter Stryker, *(De)Subjugated Knowledges*] (noting "the startlingly rapidity with which the term itself took root, and was applied to (if not always welcomed by) the sociocultural and critical-intellectual formations that were caught up in, or suddenly crystallized by, its wake"); Stryker, Transgender Warriors, *supra* note 29, at 36–37; Valentine, *supra* note 26, at 4, 32.

42. Stryker, Transgender Warriors, *supra* note 29, at 37; Paisley Currah, Richard M. Juang, & Shannon Price Minter, *Gender Pluralisms*, *in* Transgender Rights, *supra* note 24, at 3, 4.

of transgender or transsexual experience, drag queens, drag kings, female or male impersonators, genderqueers, intersexuals, hermaphrodites, [and] fem queens"—just for starters.[43]

But notwithstanding its relatively recent vintage and broad scope, the term "transgender" and its social and legal definitions have served not just to classify identities, but to construct (and limit) them.[44] As described by sociologist Austin Johnson, there are hegemonic ideologies at work (ideologies Johnson labels "transnormativity"), which serve to "structure[ ] transgender experience, identification, and narratives into a hierarchy of legitimacy that is dependent upon a binary medical model and its accompanying standards."[45] As one example, as legal scholar Dean Spade has underscored,[46] to the extent that access to certain kinds of gender confirming health care, such as genital surgery, have often been discursively constructed by transgender medical service providers as requiring that a "person lived continuously for at least 12 months in the gender role that is congruent with their gender identity" prior to surgery,[47] transgender identity has been constructed to reinforce the binary and, in effect, demand that transgender people pass as either a man or woman, and nothing else.[48]

These discursive demands from places of institutional authority both rhetorically shape and influence people's identities in a conforming manner, but also reward those who are able to shape their narratives to access the service. Johnson suggests that these discursive demands are a form of accountability structure that "create[ ] a positive test for evaluating trans identity and experience within social, medical and legal settings."[49] As put by Spade, the "self-determination of trans people in crafting our gender expression is compromised by the rigidity of the diagnostic and treatment criteria" while at the same time the criteria "produce and reify a fiction of normal, healthy gender that works as a regulatory measure for the gender expression of all people."[50] This, notwithstanding that, of course, many gender variant people understand the hoops they are required to jump through and deploy the accepted,

43. Valentine, *supra* note 26, at 33.

44. Maggie Nelson, The Argonauts 52–53 (2015) ("'[T]rans' may work well enough as shorthand, but the quickly developing mainstream narrative it evokes ('born into the wrong body,' necessitating an orthopedic pilgrimage between two fixed destinations) is useless for some . . . . [F]or some, 'transitioning' may mean leaving one gender entirely behind, while for others . . . . it doesn't?").

45. Austin H. Johnson, *Transnormativity: A New Concept and Its Validation through Documentary Film About Transgender Men*, 86 Socio. Inquiry 465, 466 (2016) [hereinafter Austin H. Johnson, *Transnormativity*]

46. Spade, *Mutilating Gender*, *supra* note 38, at 320–23.

47. WPATH SOC 7th ed., *supra* note 16, at 21.

48. *See* Spade, *Mutilating Gender*, *supra* note 38, at 326 ("diagnosis and treatment are linked to the performance of normative gender").

49. Austin H. Johnson, *Transnormativity*, *supra* note 45, at 468.

50. Spade, *Mutilating Gender*, *supra* note 38, at 329.

medicalized and binary narrative as a form of resistance in order to strategically access services.[51]

With that theoretical preface complete, what are the overlapping and interrelated discourses shaping societal understanding of gender and gender identity, with a particular but nonexclusive focus on the student and youth context?

A. *The Bio-Medical-Mental Understanding*

To varying degrees and with different points of emphasis, gender and gender identity have often been understood and framed as having innate physical and/or mental components. Put glibly, gender has sometimes been understood as being located between the legs and/or between the ears.[52] These frames have legitimized and granted professional service providers such as physicians and mental health care specialists enormous influence and control over people's gender identities, including in the school and youth context.[53] And while the mental emphasis grants people more leeway and freedom than the emphasis on physical embodiments of gender, it still often essentializes gender as fixed and enshrines professionalized gatekeepers and bureaucratic surveillance, as will be discussed.

Historically, the prevailing hegemonic discourse regarding the source of one's gender emphasized biological elements and sex-related physical characteristics, most notably external genitalia, but also internal reproductive organs, chromosomes, genes, and hormones.[54] It is these physical characteristics (sometimes understood as one's "sex," even though these characteristics often do not neatly align with the particular binary sex society has grouped them under) that have been held up as the *sine qua non* of gender by those opposing any elasticity in the categories of gender and any daylight between the concept of sex and gender.[55]

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51. *See* Austin H. Johnson, *Rejecting, Reframing, and Reintroducing: Trans People's Strategic Engagement with the Medicalisation of Gender Dysphoria*, 41 Soc. Health & Wellness 517, 526–29 (2019) [hereinafter Austin H. Johnson, *Rejecting, Reframing, and Reintroducing*].

52. *See* Ehrensaft, The Gender Creative Child, *supra* note 28, at 31.

53. *See* Joanne Meyerowitz, How Sex Changed: A History of Transsexuality in the United States 6 (2002) (explaining that beginning in the mid-twentieth century, trans people "ran into constant conflicts with doctors who insisted on their own authority to define sex and gender, diagnose the condition, and recommend the treatment"); Halberstam, *supra* note 1, at 32 ("[A]ll too often medical frameworks produce rather than treat, diagnose rather than observe, and fix rather than care for transgender bodies . . . .").

54. *See* Julia A. Greenberg, *The Roads Less Traveled: The Problem with Binary Sex Categories*, *in* Transgender Rights, *supra* note 24, at 51, 52–54.

55. *See, e.g.*, H.B. 663, 2016 Gen. Assemb. Reg. Sess. (Va. 2016) (proposing to require schools to force students to use bathrooms and locker rooms corresponding to their so-called "anatomical sex"); S.B. 6, 85 Reg. Leg. Sess. (Tex. 2017) (proposing to require students to use only the bathrooms and locker-rooms corresponding to their so-called biological sex); S.B. 46, 97 Leg. Sess. (S.D. 2022) (permitting student sports participation only "based on their biological sex").

But at times, the importance of these physical characteristics has also been underscored by transgender rights advocates.[56] Many trans individuals and organizations have fought valiantly to broaden access to different kinds of medical interventions that help empower transgender people to embody different aspects of their gender identity.[57] Such interventions include hormone therapy and different kinds of surgery to external genitalia, internal reproductive organs, and secondary sex characteristics such as breasts.[58]

To be clear, access to these interventions and the professionals that provide them is undoubtedly critical to helping many people embody their gender, and the interventions themselves form an important part of a broader emancipatory queer agenda.[59] And having a non-normative gender framed as a medical phenomenon or protected through disability law ought not to be inherently stigmatizing—just as any disability ought not be stigmatized.[60] But at times, the emphasis on bringing one's body into so-called "alignment" with one's gender identity through medical intervention has had unintended consequences, including both reifying the gender binary and enshrining the medical and mental health professional communities as gatekeepers over people's gender—including transgender youth.[61] Put differently, even while rightly resisting attempts to pathologize trans and queer identities, for example, by successfully arguing for the removal of "gender identity disorder" from the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (the "DSM"),[62] the discursive emphasis on the physical embodiment of gender has nevertheless perpetuated medical gatekeeping over people's gender identity,[63]

56. *See* Pau Crego Walters, *Trans Pathologization*, *in* Trans Bodies, Trans Selves *supra* note 4, at 308 (noting that "organizing for trans rights has generally developed in parallel with trying to access trans-specific health care").

57. *See, e.g.*, Nat'l Ctr. for Transgender Equal., *Getting Your Health Care Covered: A Guide for Transgender People* (last visited Oct. 7, 2022), https://transequality.org/health-coverage-guide, *archived at* https://perma.cc/M5MG-HZNG (advocating access to "transition-related care").

58. *See* WPATH SOC 7th ed., *supra* note 16, at 18.

59. *See* Jules Chyten-Brennan, *Surgical Transition*, *in* Trans Bodies, Trans Selves, *supra* note 4, at 265, 265.

60. *See* Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, *in* Transgender Rights, *supra* note 24, at 74, 74–75.

61. *See* Spade, *Mutilating Gender*, *supra* note 38, at 318–23; Stryker, Transgender History, *supra* note 25, at 52.

62. *See* Tamar Carmel, Ruben Hopwood, & lore m. dickey, *Mental Health Concerns*, *in* Trans Bodies, Trans Selves, *supra* note 4, at 305, 308–09 (outlining the history of the DSM's treatment of transgender identities, and observing that while the removal of "gender identity disorder" from the DSM in 2013 helped de-pathologize trans identities, the inclusion of "gender dysphoria" is still stigmatizing to many).

63. *Cf.* Dallas Denny, *Transgender Communities of the United States in the Late Twentieth Century*, *in* Transgender Rights, *supra* note 24, at 171, 184 ("When resorting to the traditional medical model, it is virtually impossible to discuss gender-variant people or their issues without the use of terms that overtly state or at least imply pathology and reinforce the omnipotence of the medical professional.").

and rendered those uninterested or unable to comply with the normative standards created by the medical model as illegible or inauthentic.[64]

Even more, as gender studies scholar Jules Gill-Peterson highlights with regard to trans children specifically, the narrative force behind medical intervention "grants immense authority to medicine in making the trans child an ontological possibility, as if trans children were unthinkable, nonexistent even, prior to puberty suppression therapy."[65] And it helps prop-up related narrative tropes of parental "loss" that exist within some literatures on parenting transgender children, "exalt[ing] gender as an exceptional category [that] is treated as a pregiven fact," locating the source of any loss or damage as stemming from existence of transgender children rather than with societal cisgenderism.[66]

Put differently by Judith Butler in her trenchant critique of the "gender identity disorder" diagnosis (and still largely applicable to a diagnosis of "gender dysphoria," discussed below), the "diagnosis works as its own social pressure, causing distress, establishing wishes as pathological, intensifying the regulation and control of those who express them in institutional settings."[67] As to transgender youth specifically, Butler suggests that the diagnosis acts "as peer pressure, as an elevated form of teasing, as a euphemized form of social violence."[68]

Case and point is the widely referenced Standards of Care for the Health of Transexual, Transgender, and Gender Nonconforming People ("SOC") published by the World Professional Association for Transgender Health ("WPATH"). The prevailing version that influenced discourse and policies over the past decade and discussed herein was the Seventh edition, published in 2011.[69] While WPATH "recognizes and validates various expressions of gender that may not necessitate psychological, hormonal, or surgical treatments," and rejects the pathologization of gender nonconformity,[70] the SOC

64. Austin H. Johnson, *Normative Accountability: How the Medical Model Influences Transgender Identities and Experiences*, 9 Socio. Compass 803, 803 (2015).

65. Julian Gill-Peterson, Histories of the Transgender Child 6 (2018); *see also* Halberstam, *supra* note 1, at 8 ("The power of naming that has fallen to doctor and psychologists, social workers and academics, commands the authority of scientific inquiry and joins it to a system of knowledge that invests heavily in the idea that experts describe rather than invent.").

66. Damien W. Riggs & Clare Bartholomaeus, *Cisgenderism and Certitude: Parents of Transgender Children Negotiating Educational Contexts*, 5 TSQ: Transgender Stud. Q. 67, 68 (2018).

67. Judith Butler, *Undiagnosing Gender*, *in* Transgender Rights, *supra* note 24, at 274, 295.

68. *Id.*

69. As this Article was going to print in 2022, WPATH issued a revised, 8th edition of the Standards of Care, but there was not opportunity to completely revise this text. Nonetheless, as noted, the 7th edition is most relevant in terms of analyzing WPATH's influence on discourses of gender over the past decade. For the 8th edition, see World Pro. Ass'n for Transgender Health, Standards of Care for the Health of Transgender and Gender Diverse People (8th ed. 2022).

70. WPATH SOC 7th ed., *supra* note 16, at 2, 4.

sound with incredible inertia in favor of medical interventions to address the existence of transgender people, including through treatments for gender dysphoria.[71] Gender dysphoria is the socially created and deeply felt distress that can occur when someone's sex assigned at birth is inconsistent with a person's gender identity, and replaced "gender identity disorder" in the DSM in 2013. Treatment is held up as "available to assist people with such distress" and as a means "to explore their gender identity and find a gender role that is comfortable for them."[72] And while WPATH underscores that not all trans people have gender dysphoria and not all that do require a diagnosis, the heavy emphasis on "gender dysphoria," perhaps not much less than its predecessor "gender identity disorder," still pathologizes trans identities by suggesting that many trans people suffer from it before undergoing "treatment."[73] Indeed, as characterized by some scholars the shift in the DSM from "gender identity disorder" to "gender dysphoria" was "largely a symbolic gesture."[74] Perhaps paradoxically, the proffered solution to the social exclusion causing the distress is not to fix society, but to treat the individual.[75]

Yet, while WPATH rhetorically puts its thumb on the scale in favor of medical interventions as a critical part of transgender health, as to children and youth specifically, the WPATH suggests that certain interventions may not yet be appropriate for children and youth. Put differently, WPATH suggests that medical interventions including hormone therapy may be critical for certain individuals but interjects itself as a gatekeeper, particularly for children and youth. As explained by Gill-Peterson, the "ostensible concern is that the effects of these 'new' hormonal technologies are in some important way unknown or that children are too young to undergo hormonal therapy or even make the decision to alter their bodies—as if sex and gender were otherwise natural, unmodified forms in cisgender bodies."[76]

Indeed, at other turns, WPATH suggests that gender dysphoria during prepubescent childhood "does not inevitably continue into adulthood"

71. *See* Austin H. Johnson, *Transnormativity*, *supra* note 45, at 808 ("[I]n order to be legally recognized and affirmed as men and women, transgender people are held accountable to a medical model of identity that requires medical interventions."); *see also* Martin J. Smith, Going to Trinidad: A Doctor, a Colorado Town, and Stories from an Unlikely Gender Crossroads 1 (2021) [hereinafter Smith, Going to Trinidad] (characterizing the transition of a transgender woman as " *stalled* short of the next *logical* step, surgery to transform her male genitalia into that of a female") (emphasis added).

72. WPATH SOC 7th ed., *supra* note 16, at 5.

73. Syrus Marcus Ware & Zack Marshall, *Disabilities and Deaf Culture*, *in* Trans Bodies, Trans Selves, *supra* note 4, at 54.

74. Austin H. Johnson, *Rejecting, Reframing, and Reintroducing*, *supra* note 51, at 517; *see also* Harper Benjamin Keenan, *Unscripting Curriculum: Toward a Critical Trans Pedagogy*, 87 Harv. Educ. Rev. 538 (2017).

75. *See* Halberstam, *supra* note 1, at 47 (noting that the DSM's framing of "gender dysphoria" does not account "for the fact that a person's distress over their gender identity may be the result of social exclusion, family violence or reduced employment opportunities rather than of a struggle with gender identification").

76. Gill-Peterson, *supra* note 65, at 6.

and—reinforcing the rigidity between gender and sexuality—notes that many prepubescent children who were assigned male were "more likely to identify as gay in adulthood than as transgender" according to some studies.[77] Conversely, WPATH suggests gender dysphoria among adolescents is more persistent and references a study where 70 adolescents given puberty suppressing hormones "all continued with the actual sex reassignment" (again, putting its thumb on the scale of surgery as the final word in legitimization).[78] The WPATH can fairly be read as suggesting that for many children, gender variance or fluidity is a phase—"[i]n most children, gender dysphoria will disappear before or early in puberty"[79]—with little discussion of why it might disappear, such as overwhelming influence of social forces toward conformity and against children's efforts to perform different gender expressions. In short, the WPATH SOC seem to reify the importance of physical transition for gender fulfillment, and at the same time, question the relevance of such transition for children, the expressed gender identities of which WPATH seems to question.[80]

The WPATH then proceeds to outline the many roles it envisions for mental health professionals in working with children and adolescents with gender dysphoria, including (1) directly assessing the gender dysphoria, (2) providing psychotherapy to assist the children and adolescents with exploring their gender identity and alleviating distress related to gender dysphoria, (3) assessing and treating any co-existing mental health concerns, (4) referring "adolescents for additional physical interventions, such as puberty suppressing hormones, to alleviate gender dysphoria," including documenting the existence of gender dysphoria and the adolescent's "eligibility for physical interventions," and (5) educating and advocating on behalf of gender dysphoric children and students, including in schools, among other responsibilities.[81]

With regard to the role for mental health professionals in the assessment of gender dysphoria, the WPATH in some way sets up mental health professionals as the determiners of the legitimacy of a young person's gender identity and, at times, suggests that how an adolescent responds to certain physical treatments "can be diagnostically informative."[82] For some people, this puts the cart before the horse and suggests that how a person responds to the idea of certain physical interventions such as genital surgery is in part determinative of their gender identity—that is, it puts physical embodiment at the forefront of gender determination.

Elsewhere, the mental and physical frames for gender identity are explicitly linked, with mental health professionals serving as gatekeepers for

77. WPATH SOC 7th ed., *supra* note 16, at 11.

78. *Id.*

79. *Id.* at 12.

80. *Cf.* Ehrensaft, The Gender Creative Child, *supra* note 28, at 51, 85 (critiquing, as a member of WPATH, their cautionary note that children should potentially wait to socially transition because children may convert back to the gender role correlating to their sex-assigned at birth).

81. WPATH SOC 7th ed., *supra* note 16, at 14.

82. *Id.* at 15.

physical/medical interventions, as emphasized by the role WPATH envisions for mental health professionals in referring adolescents for physical interventions (noted above).[83] As Dr. Marci Bowers, the President Elect of WPATH, has emphasized with regard to the recommended role of mental health professionals as gatekeepers for surgery generally (not specifically as to youth and children), "it's pretty ridiculous that that is required."[84] And as explained by scholar Florence Ashley, requiring psychological referral letters and a diagnosis of gender dysphoria for hormone replacement therapy privilege purported medical expertise over the "lived experiences" of trans people, while "misrepresent[ing] trans embodiment and devalue[ing] the experiences of those who wish to alter their bodies for reasons other than gender dysphoria," including for purposes of gender euphoria—the joy that comes with aligning one's body with one's gender identity.[85]

In terms of criteria for adolescent eligibility for partially reversible physical interventions such as feminizing/masculinizing hormone therapy, WPATH emphasizes at several points that before such an intervention can begin a patient must present with "persistent, well-documented gender dysphoria," simultaneously suggesting that gender identity/role is and ought to be fixed ("persistent") and cementing professionals' roles in surveilling and monitoring identity formation ("well-documented").[86] Even as to fully reversible interventions such as puberty suppressing hormones, the adolescent must have "demonstrated a long-lasting and intense pattern of gender nonconformity or gender dysphoria."[87] And as to irreversible interventions such as genital surgery, patients must reach the age of legal majority in their country and "have lived continuously for at least 12 months in the gender role that is congruent with their gender identity."[88]

Of course, WPATH is not alone in contributing to the Bio-Medical-Mental frame of understanding gender and gender identity. For example, in the forward to the influential book, *The Transgender Child*, by Stephanie Brill and

83. *See, e.g.*, Ruben Hopwood & lore m. dickey, *Mental Health Services and Support*, *in* Trans Bodies, Trans Selves, *supra* note 4, at 298; Abram J. Lewis, *Trans History in a Moment of Danger: Organizing Within and Beyond "Visibility" in the 1970s*, *in* Trap Door 57, 61 (Reina Gossett et al., eds., 2017) (quoting trans activist Angela Douglas as lamenting that "psychiatrists and psychologists . . . are some of the worst enemies of transsexuals and gay people and women"); Sandy Stone, *The* Empire *Strikes Back: A Posttransexual Manifesto*, *in* Transgender Studies Reader, *supra* note 27, at 221, 232 (critiquing clinicians who "act as gatekeepers for cultural norm" and operate as "the final authority for what counts as a culturally legible body").

84. Smith, Going to Trinidad, *supra* note 71, at 167.

85. Florence Ashley, *Gatekeeping Hormone Replacement Therapy for Transgender Patients is Dehumanizing*, 45 J. Med. Ethics 480, 480–82 (2019); *see also* Florence Ashley, *Transgender Healthcare Does Not Stop at the Doorstep of the Clinic*, 134 Am. J. Med. 158, 158 (2021) (emphasizing "learning about trans health solely through traditional sources unwittingly perpetuates the disenfranchisement of trans communities").

86. WPATH SOC 7th ed., *supra* note 16, at 34; *see also id.* at 20.

87. *Id.* at 19.

88. *Id.* at 21.

Rachel Pepper, Dr. Norman Spack, a pediatric endocrinologist who founded the America's first medical clinic specifically devoted to treating transgender children, laments how "[e]arly medical intervention is absent" for many transgender people.[89] In a forward to another prominent book, *The Gender Creative Child*, this one by Diane Ehrensaft, Spack hand wrings that in the 1980s when treating his first transgender patient, "[n]o psychological tests were performed," prior to initiating hormone treatment.[90] Spack's advocacy for the initiation of drug protocols designed to suppress the onset of puberty is premised on, in his words, the belief that such delay permits "patients to gain time *to be further evaluated*."[91] As emphasized by trans writer and performance artist Morgan M. Page, such narratives frame "trans people as new, as a modern, medicalized phenomenon," in turn "reifying the idea that trans people exist only as products of pharmacological-surgical processes, rather than as people who may or may not choose to access such processes."[92]

Indeed, gender identity itself (again, the internal sense of belonging to a particular gender category, or no gender category) has often been characterized as innate, fixed, essentialized, and/or biological. For example, as explained by Dr. Deanna Adkins, the founder and director of the Duke Gender Care Clinic in an affidavit submitted in support of the ACLU in litigation opposing North Carolina's so-called bathroom bill HB2, "evidence strongly suggests that gender identity is innate or fixed at a young age and that gender identity has a strong biological basis."[93] Put similarly by Brill and Pepper, "[i]t is most commonly understood that gender identity is formed in the brain . . . . From this perspective, the brain is a gendered organ, and gender identity is not a conscious decision . . . and all people whose gender identity does not align with their anatomical sex are simply born this way."[94] As described by GLSEN and the National Center for Transgender Equality (NCTE) in their "Model School District Policy on Transgender and Gender Nonconforming Students," "[g]ender identity is an innate and largely inflexible part of a person's

89. Norman Spack, *Forward* to Stephanie Brill & Rachel Pepper, The Transgender Child ix (2008).

90. Norman Spack, *Forward* to Ehrensaft, The Gender Creative Child, *supra* note 28, at xiii.

91. *Id.* at xiv (emphasis added).

92. Morgan M. Page, *One From the Vaults: Gossip, Access, and Trans History-Telling*, *in* Trap Door, *supra* note 83, at 135, 140; *see also* SA Smythe, *Black Life, Trans Study: On Black Nonbinary Method, European Trans Studies, and the Will to Institutionalization* 8 TSQ: Transgender Stud. Q. 158, 165 (2021) ("Trans people's unruly bodies have been scrutinized, coercively medicated, exploited, ahistorically relegated to the contemporary, and otherwise violated[.])".

93. Expert Declaration of Deanna Adkins, M.D. P 22, *Carcano v. McCrory*, No. 1:16-cv-00236-TDS-JEP (M.D.N.C. May 13, 2016).

94. Brill & Pepper, *supra* note 89, at 14, 15 (being transgender "is understood to be biological and not 'caused' socially"); *see also* Beemyn & Rankin, *supra* note 25, at 5–6 ("[T]ransgender identities are no less 'natural' or 'legitimate' than the dominant gender categories of women and men.").

identity."[95] Put differently, this discourse suggests that one's gender is indeed inborn, fixed, and biological—but locates the biological source as one's internal gender identity rather than one's external genitalia.[96]

The discursive essentialization or fixing of gender identity is likely partially a tactical and self-preserving reaction to persistent historical questioning of the legitimacy of people whose existence beautifully undermines either the gender binary or essentialist views of certain physical sex characteristics as determining gender. As underscored by sociologist Tey Meadow, "proponents of biological explanations for gender and sexual difference imagined that the 'argument for immutability' provided a political justification for accommodation."[97] Laws questioning non-normative gender identities and policing gender appearance are not new, and many ancient societies ranging from Roman to Hebrew forbade cross-dressing.[98] Often, the questions regarding the veracity of transgender and gender variant lives have taken overtly hateful turns, such as in the campaign to repeal Houston's nondiscrimination law in 2015, with trans women portrayed as sick and violent men who only seek access to sex-segregated spaces that conform to their gender identity, such as restrooms, in order to harass cisgender women.[99] Of course, transgender women are women,[100] not men, and as Leslie Feinberg noted long ago, "defending the inclusion of transsexual [or transgender] sisters in women's space does not threaten the safety of any woman . . . . Transsexual [and transgender] women are not a Trojan horse trying to infiltrate women's space."[101] Indeed, it is transgender people themselves who are disproportionately subjected to sexual violence and harassment.[102]

95. GLSEN & NCTE, Model School District Policy, *supra* note 17, at 2.

96. *Cf.* Tey Meadow, Trans Kids: Being Gendered in the Twenty-First Century 3 (2018) ("Gender is no longer simply sutured to biology; many people now understand it to be a constitutive feature of the psyche that is fundamental, immutable, and not tied to the materiality of the body.").

97. Meadow, *supra* note 96, at 75 (internal citations omitted).

98. *See* Feinberg, *supra* note 29, at 49–64.

99. *See* Chase Strangio, *Houston, We Have a Problem*, ACLU (Nov. 4, 2015), https://www.aclu.org/blog/lgbt-rights/transgender-rights/houston-we-have-problem, *archived at* https://perma.cc/6739-HPGT (critiquing hateful campaign to repeal Houston's Equal Rights Ordinance (HERO)); *see also* Erin Fitzgerald, *A Comprehensive Guide to the Debunked "Bathroom Predator" Myth*, Media Matters for America (May 5, 2016), https://www.mediamatters.org/sexual-harassment-sexual-assault/comprehensive-guide-debunked-bathroom-predator-myth, *archived at* https://perma.cc/A3LH-GRAE (empirically documenting no evidence that people take advantage of LGBTQ non-discrimination laws to attack women in restrooms).

100. Julia Serano, *Debunking "Trans Women Are Not Women" Arguments*, Medium (June 27, 2017), https://juliaserano.medium.com/debunking-trans-women-are-not-women-arguments-85fd5ab0e19c, *archived at* https://perma.cc/SJ49–9N36.

101. Feinberg, *supra* note 29, at 117.

102. Julia Serano, *Transgender People, Bathrooms, and Sexual Predators: What the Data Say*, Medium (July 7, 2021), https://juliaserano.medium.com/transgender-people-bathrooms-and-sexual-predators-what-the-data-say-2f31ae2a7c06, *archived at* https://perma.cc/8AUP-SKWW.

As with law reform efforts designed to gain protections for queer sexualities (namely, same-sex couples),[103] the emphasis on (homo)sexuality or, in this case, gender identity being innate may also be explained by its instrumental and short-term harm-reducing role in helping queer and trans people take advantage of constitutional equality protections rewarding identities that are not changeable, but rather immutable.[104] Consistent with this advocacy on behalf of same-sex couples, legal advocates for transgender rights have emphasized the immutability of gender identity in the context of equal protection challenges to schools' refusal to allow students to use restrooms consistent with their gender identity.[105]

But the medical essentialization of an individual's gender identity, including through emphasis on gender identities' purported immutability has costs. It constricts and limits exploration, provides others effective veto rights over the child's identity given the law's recognition of parental control over medical decision making,[106] and has served to facilitate the heavy policing and regulation of transgender and gender variant children, including within the educational context, as will be outlined in Part II.

B. *The Social or Interactionist Understanding*

In addition to discursive emphasis on the biological, medical, and mental origins of gender and gender identity, gender identity has also at times been framed as being influenced by social factors. That is to say that while, as described above, gender identity has often been characterized as something physiologically fixed or innate, certain discursive space has at times been left open for the possibility that environmental and social influences may affect the development of gender or how one's gender manifests.[107] The emphasis on gender being shaped socially also buttresses the ability of professionalized gatekeepers and parents to control their children's gender identification with the support of school administration over the desires of the student,

103. *See generally* Scott Skinner-Thompson, *The First Queer Right*, 116 Mich.. L. Rev. 881, 889 (2018) [hereinafter Skinner-Thompson, *The First Queer Right*] (critiquing primacy placed on homogeneity and conformity within gay rights litigation).

104. *See* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 Yale L.J. 485, 487 (1998) (noting that because strict scrutiny is unlikely to be applied under the Equal Protection Clause if an identity characteristic is mutable, equal protection doctrine encourages groups to emphasize that their identities are fixed).

105. *See, e.g.*, Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction at 3, 18, *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, No. 2:16-cv-00943-PP (E.D. Wis. Aug. 15, 2016).

106. *See*, *e.g.*, *Bellotti v. Baird*, 443 U.S. 622, 623 (1979) (upholding constitutionality of law requiring minor to get consent of parents before obtaining an abortion).

107. *See* Whittle, *Forward* to Transgender Studies Reader, *supra* note 27, at xi, xiii (noting "controversial" debates over whether gender identity is essential and biologically based or social constructed"); *see also* Meadow, *supra* note 96, at 75–76 (tracking etiological studies of childhood gender nonconformity for their emphasis on social influences or biological determinism, with biology gaining increasing attention over time).

particularly given the constitutional rights parents possess over how to educate their children.[108]

For example, even while underscoring that people do not choose to be transgender and do not choose their gender,[109] Brill and Pepper admit that we, as a society, "don't know what makes a person transgender,"[110] and elsewhere underscore that, "[g]ender identity emerges by age 2 or 3 and is influenced by biology and sociological factors."[111] Similarly, licensed professional counselor and gender therapist Dara Hoffman-Fox seems to suggest that gender identity is, in many ways, "a blank slate" when people are born, and that social influences can constrict (or empower) people's internal gender identity.[112] Or as put by Diane Ehrensaft, "[g]ender is born, yet gender is also made. Gender is an interweaving of nature and nurture."[113]

Perhaps more importantly, tremendous discursive stress has been put on the so-called "social transition" as a means of (1) giving life to and effectuating or embodying one's gender identity, but also as a means of (2) testing or verifying the veracity of their gender identity that does not correspond to their birth assigned sex, and (3) treating gender dysphoria (the medically-diagnosed distress "caused by a discrepancy between a person's gender identity and that person's sex assigned at birth.")[114] Social transition refers the process by which a person comes out and navigates publicly living consistently with their gender identity, rather than their sex assigned at birth.[115] Interestingly, in some ways reflecting the two primary discursive frames for understanding gender and gender identity (the Bio-Medical-Mental Understanding and the Social Understanding), a person's transition is often broken down into a "medical

108. *E.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (involving law forbidding instruction of German in school infringed on parents' fundamental right to control upbringing of their children).

109. Brill & Pepper, *supra* note 89, at 14; *see also* Stephanie Brill & Lisa Kenney, The Transgender Teen 10 (2016).

110. Brill & Pepper, *supra* note 89, at 14–15.

111. *Id.* at 61; *see also* Brill & Kenney, *supra* note 109, at xiii, xiv (pushing back on idea that gender is fixed and immutable and suggesting that both biology and social influences play a role); Stryker, Transgender History, *supra* note 25, at 22 (noting that "[s]ome people think that gender identity and transgender feelings . . . are caused by how children are raised or by the emotional dynamics in their families"); Feinberg, *supra* note 29, at XII (declining to take a view as to whether gender identity "is exclusively the product of either biology or culture").

112. Dara Hoffman-Fox, You and Your Gender Identity: A Guide to Discovery 67 (2017).

113. Diane Ehrensaft, Gender Born, Gender Made: Raising Healthy Gender-Nonconforming Children 36 (2011); *see also* Ashley, *Against Delaying*, *supra* note 34, at 226 ("No one's experience of gender is free from social influences; to think that they make gender less authentic would be to mistake gender for something that is not fundamentally dynamic and relational.").

114. *See* WPATH SOC 7th ed., *supra* note 16, at 2;5; *see also* Orr & Baum, *supra* note 18, at 9 (emphasizing social transition as a means of preventing or alleviating gender dysphoria in transgender youth).

115. Orr & Baum, *supra* note 18, at 7; WPATH SOC 7th ed., *supra* note 16, at 97.

transition" and a "social transition."[116] In other words, the role of the social transition as both diagnostic and therapeutic links the Social Understanding of gender identity with the Bio-Medical-Mental Understanding, in some ways reifying the same set of professionalized gatekeepers.

For instance, the WPATH SOC lists "living part time or full time in another gender role, consistent with one's gender identity" as a treatment option for gender dysphoria.[117] Elsewhere, WPATH underscores the role of mental health professionals in managing students' social transition and arguably reinforces the social stigma associated with gender expression that diverges from one's birth assigned sex, emphasizing that children and adolescent "[c]lients and their families should be supported in making *difficult decisions* regarding the extent to which clients are *allowed* to express a gender role that is consistent with their gender identity."[118] At times, WPATH makes social transition for children and adolescents sound downright scary and seems to discourage it. As to social transition in early childhood, WPATH provides:

> Families vary in the extent to which they allow their young children to make a social transition to another gender role. Social transitions in early childhood do occur with some families with early success. This is a controversial issue, and divergent views are held by health professionals. The current evidence base is insufficient to predict the long-term outcomes of completing a gender role transition during early childhood. Outcomes research with children who completed early social transition would greatly inform future clinical recommendations.[119]

This emphasis on the social elements of gender—as either influencing the formation of gender identity, serving to help test or determine if someone is transgender, or as a palliative remedy for gender dysphoria—also enshrines and legitimizes professionalized gatekeepers such as medical and mental health professionals in evident ways. As put by critical studies professor Julian Carter:

> While any individual element of this [formalized/institutionalized transition] sequence may be passionately desired, its trajectory through batteries of expert gatekeepers can be alienating even for those who most closely conform to those experts' standards. The sequence itself materializes the discomforting biopolitical requirement that trans-people must literally embody a particular set of psychiatric perspectives and medical practices.[120]

And as to gender variant children specifically, it often includes their parents as one of the principal gatekeepers, in effect placing the parents in the driver's seat, rather than as navigator,[121] of the child's gender identity, given

116. Orr & Baum, *supra* note 18, at 7.
117. WPATH SOC 7th ed., *supra* note 16, at 9.
118. *Id.* at 16 (emphasis added).
119. *Id.* at 17.
120. Julian Carter, *Transition* 1 TSQ: Transgender Stud. Q. 235, 237 (2014).
121. Bethy Leonardi, Amy N. Farley, Emmett Harsin Drager, & Jax Gonzalez,

law recognizing parents' fundamental right to control the upbringing of their children, including within the educational context.[122]

C. *The Expressive and/or Performative Understanding*

Finally, gender and gender identity have at times been discursively framed as being influenced by—and given meaning and life through—individual expression and performativity, which resist hegemonic norms of medicine and social construction.[123] What does it mean to say that someone's gender identity is expressive and/or performative?[124]

Judith Butler argued that social performances of gender, rather than necessarily expressing anything innate, ingrained, essential, or "true" about what it meant to be male or female, were often mere reflections of the dominant social constructions and conceptions of a particular gender. In Butler's words, the social expectation "conjures its object . . . the anticipation of a gendered essence produces that which it posits as outside itself."[125] While Butler suggested that we were all, in essence, performing and reproducing socially inscribed notions of gender, she also explained that both subconscious and self-conscious performances that challenged prevailing norms could "expose the tenuousness of gender 'reality.'"[126] Put differently by Butler, social construction is a "temporal process which operates through the reiteration of norms" but "sex is both produced and destabilized in the course of this reiteration."[127] That is, as a result of imperfect reiteration (as opposed to duplication) of norms and identities, "gaps and fissures" open up that permit destabilization of the norms through gender expression.[128]

Unpacking the T: Sharing the Diverse Experiences of Trans Students Navigating Schools, 10 Berkeley Rev. Educ. 9 (2021) (observing that while students' voices should be centered, parents' perspectives can play an important role in foregrounding how school systems structure/control their children's identities).

122. *See*, *e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish parents can exempt teenage children from compulsory school attendance law); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (forbidding private schools infringes on parents' right to control upbringing and education of their children).

123. *See* Halberstam, *supra* note 1, at 10 (observing that the use of "vernacular language for non-normative gender and sexual expression" represents a challenge to the "medical/psychiatric control of the discourse" in "which people collaborate to name their understandings of contrary embodiment"); Flynn, *supra* note 34, at 475 ("the understanding of gender as expressive is anything but new").

124. The following three paragraphs discussing the concept of gender as performative or expressive draw from Scott Skinner-Thompson, Privacy at the Margins 58–59 (2020), which in turn builds on Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. Davis. L. Rev. 1673 (2017) [hereinafter Skinner-Thompson, *Performative Privacy*], and Skinner-Thompson, *The First Queer Right*, *supra* note 103.

125. Butler, Gender Trouble, *supra* note 20, at xiv-xv.

126. *Id.* at xxiv.

127. Judith Butler, Bodies That Matter xix (Routledge Classics 2011) (1993) [hereinafter Butler, Bodies That Matter].

128. *Id.*

And while Butler is at times skeptical of individual volunteerism, she recognized space for subjective agency within the social grid/matrix.[129] She underscored the possibility that we can "work[ ] the weakness in the norm."[130] Drawing from Michel Foucault, Butler explained that rather than remaining a passive medium reflecting dominant norms, identities could be an expressive site of resistance.[131] And the expressive value of non-normative gender performances is amplified precisely because of the dominant structures of heteronormativity, the gender binary, and cisgenderism—that is, gender performances that deviate from the norm are assertions of agency and are imbued with expressive meaning in part because of their resistant positioning to hegemonic social expectations. To conclude otherwise—that is, to conclude that that individuals completely lack agency or critical consciousness in the face of the forces of social construction (powerful as they may be)—is in some ways an insult to all people, including those from marginalized groups, who are acted upon by social forces. As stated by scholar of Black trans feminism Marquis Bey, because of "gender-nonconforming bodies' situatedness in a gender-normative space, a hegemonic grammar that utterly disallows the very possibility of transgender," the existence of "trans and nonnormative bodies is, by virtue of their inhabitation of public space, radical."[132]

In short, identities—including sexual and gender identities—are dynamic.[133] And our "sexed" bodies are similarly dynamic—the product of biology and genetics, yes, but also social forces that shape and construct our bodies and identities.[134] In turn, our outward-facing identities help constitute our identi-

129. Sonia K. Katyal, *The* Numerus Clausus *of Sex*, U. Chi. L. Rev. 389, 441 (2017) (underscoring that the performative model of gender amplifies individual agency and control over one's identity).

130. Butler, Bodies That Matter, *supra* note 127, at 181; *see also* Judith Butler, Undoing Gender 3 (2004) ("If I have any agency, it is opened up by the fact that I am constituted by a social world I never chose. That my agency is riven with paradox does not mean it is impossible. It means only that paradox is the condition of its possibility").

131. Butler, Bodies That Matter, *supra* note 127, at 175–78.

132. Marquis Bey, *The Trans-ness of Blackness, the Blackness of Trans-ness*, 4 TSQ: Transgender Stud. Q. 275, 277 (2017); *see also* Reina Gossett, Eric A. Stanley, & Johanna Burton, *Known Unknowns: An Introduction to* Trap Door, *in* Trap Door, *supra* note 83, at xv, xvi ("[T]o violate the state-sponsored sanctions—to render oneself visible to the state—emphasizes that there is power in coming together in ways that don't replicate the state's moral imperatives. Fashion and imagery hold power, which is precisely why the state seeks to regulate and constrain such self-representations to this very day.").

133. Butler, Bodies That Matter, *supra* note 127, at xi ("Sexual difference, however, is never simply a function of material differences which are not in some way both marked and formed by discursive practices. Further, to claim that sexual differences are indissociable from discursive demarcations is not the same as claiming that discourse causes sexual difference. The category of 'sex' is, from the start, normative; it is what Foucault has called a 'regulatory ideal.' In this sense, then, 'sex' not only functions as a norm, but is part of a regulatory practice that produces the bodies it governs[ ]").

134. The categories of "man" and "woman" are, at bottom, "political categories and not natural givens." And "our bodies as well as our minds are the product of this [culturally imagined] manipulation." Monique Wittig, *One Is Not Born a Woman*, *in* The Lesbian and

ties and also contribute to the social tableau and shape others' identities. In the end, our identities say something.[135] They say something personal, and often political.[136] They are individually expressive and help performatively constitute gender—even if partially the product of social forces and/or biology. As summarized by Stryker, the notion of gender performativity or expression posits that "[r]ather than being an objective quality of the body (defined by sex), gender is constituted by all of the innumerable acts of performing it: how we dress, move, speak, touch, look. Gender is like a language we use to communicate ourselves to others and to understand ourselves."[137]

As this discussion illustrates, the Expressive-Performative Understanding of gender is not totally divorced from the Social Understanding[138] (just as the Social Understanding is not totally divorced from the Bio-Medical-Mental Understanding), but instead of centering the role of society in influencing individual identity, the expressive or performative model can foreground individual agency and action in the face of those hegemonic influences, giving life to the admonition of Audre Lorde and other Black feminists that marginalized groups must claim the mantle of their individual subjectivity and agency.[139]

Notwithstanding that important interplay, as explained by Stryker, "the concept of 'gender performativity' . . . [has become] central to the self-understanding of many transgender people (along with many cisgender people, too)."[140] And there are many instances where the role of gender expression and/or performativity in manifesting gender identity has been underscored by trans activists and advocates. For example, influential transgender activist Leslie Feinberg defined gender as "self-expression, not anatomy."[141] While noting that not all trans people choose medical interventions, Feinberg underscored

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GAY STUDIES READER 103, 103–05 (Aberlove et al. eds., 1993).

135. Leonardi et al., *supra* note 121, at 7 (emphasizing that identities are both embodied, material, and lived, at the same time that the embodiment communicates one's identity to others).

136. Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 973 (1989) ("The mere disclosure of one's gay, lesbian, or bisexual identity ineluctably accumulates political significance").

137. STRYKER, TRANSGENDER HISTORY, *supra* note 25, at 163; *see also* SMITH, GOING TO TRINIDAD, *supra* note 71, at 143 (quoting transgender gender confirmation surgeon Dr. Marci Bowers, explaining that "[g]ender is a social construct. It's not genitals, it's not even hormones, it's all these other little bells and whistles you do to announce your identity.").

138. Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOC'Y 125, 126 (1987) (arguing that people "do" gender, which "involves a complex of socially guided perceptual, interactional, and micropolitical activities that cast particular pursuits as expressions of masculine and feminine 'natures'").

139. AUDRE LORDE, SISTER OUTSIDER 45 (rev. ed. 2007); *see also* BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK 9 (Routledge 2015) (1989) (explaining that the "act of speech, of 'talking back,' [ ] is no mere gesture of empty words, [but] is the expression of our movement from object to subject—the liberated voice").

140. STRYKER, TRANSGENDER HISTORY, *supra* note 25, at 162–63.

141. Leslie Feinberg, *Transgender Liberation: A Movement Whose Time Has Come*, *in* TRANSGENDER STUDIES READER, *supra* note 27, at 205.

that regardless of medical interventions, "[t]ransgender people traverse, bridge, or blur the boundary of the gender expression they were assigned at birth."[142] Moreover, as Feinberg emphasizes when discussing police raids of queer bars and the enforcement of laws requiring three pieces of gender appropriated clothing, "[o]ur *gender expression* made us targets."[143] In reading Feinberg's *Transgender Warriors*, one easily gets the sense that it is her gender expression that is both at the center of her understanding of gender identity and the reason she has been subject to discrimination.[144] But for Feinberg, gender expression involved more than just sartorial choices, though it is also that. As Feinberg noted, even if she attempted to wear clothes considered consistent with her birth assigned sex (female), Feinberg "began to understand that [she] couldn't conceal [her] gender expression."[145] Indeed, even when discussing the right to change one's sex, she frames it as an issue of expression: "Each person should have the right to determine and change their sex—and express their gender in any way they choose."[146] Feinberg is not alone in this regard.[147]

Moreover, at times, state and local law reform efforts seeking to protect transgender people from discrimination often seem to deploy gender identity and gender expression as interchangeable synonyms, suggesting that one's gender expression is a forbidden ground for discrimination under the state's safeguards.[148] For example, in 2019 New York passed the Gender Expression Non-Discrimination Act (GENDA), which banned discrimination in housing, employment, and public accommodations on the basis of gender identity and gender expression, with "gender identity or expression" defined together as the same thing: "a person's actual or perceived gender-related identity, appearance, behavior, expression or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender."[149] Similarly, in their "Model School District Policy on

142. Feinberg, Transgender Warriors, *supra* note 29, at X (emphasis removed).

143. *Id.* at 8 (emphasis in original); *see also* Stryker, Transgender History, *supra* note 25, at 101 ("visually perceiving someone to be transgender is one of the main triggers for antitransgender discrimination and violence"); Leonardi et al., *supra* note 121, at 7 ("What we know from trans students in schools is that much of the victimization they face with respect to gender is due to their gender expression, regardless of their gender identities.").

144. *E.g.,* Feinberg, Transgender Warriors, *supra* note 29, at 27 ("I have faced so much persecution because of my gender expression [. . .]"); *id.* at 35 (noting that "it wasn't just Joan of Arc cross- *dressing* that enraged her judges, but her cross-*gendered* expression as a whole) (emphasis in original).

145. *Id.* at 12.

146. *Id.* at 125.

147. *E.g.*, Jennifer Finney Boylan, *Throwing Our Voices: An Introduction*, *in* Trans Bodies, Trans Selves, *supra* note 4, at xv, xvii (explaining that some trans people see themselves "as people who want to celebrate the fantasy aspects of gender, who want to enjoy the sense of escape and joy and eros that embracing an alter ego sometimes provides").

148. Stryker, Transgender History, *supra* note 25, at 20. *But see id.* at 21 (observing that some trans people "draw a distinction between gender expression and gender identity to argue that identity is more serious, less chosen, and in greater need of protection than gender expression").

149. N.Y. Exec. Law§§ 296, 296-a & 296-b.

Transgender and Gender Nonconforming Students," GLSEN and the NCTE underscore that two of the three critical purposes of that the policy are to "foster an educational environment that is safe . . . regardless of gender identity or expression" and "to ensure that all students have the opportunity to express themselves in live authentically."[150]

In addition to contemporary law reform efforts and "mainstream" transgender rights organization, freedom of gender expression formed a key part of early trans liberation agendas, as well. For example, an early article for trans liberation that appeared in a 1971 iteration of the *Trans Liberation Newsletter* listed as its first demand the "[a]bolition of all cross-dressing laws and restrictions on adornment," while elsewhere also demanding access to hormone treatment and surgery "upon demand" and simultaneously calling for an "end the exploitation practices of doctors and physicians."[151]

Make no mistake, it is not just sartorial choices that are expressive of gender, but physical embodiments as well. When discussing secondary sex characteristics—the outward-facing physical traits that tend to be associated with a particular sex (such as physical size, patterns of hair growth, etc.)—Stryker describes such characteristics as "perhaps the most socially significant part of morphology—taken together, they are the bodily 'signs' that others read to guess at our sex, [and] attribute gender to us."[152]

All that said, it is crucial to underscore that suggesting that gender is, in part or for some people, "performative," does not necessarily call into question the authenticity or legitimacy of anyone's gender—including but not limited to transgender people.[153] Unfortunately, as many have importantly pointed out, an emphasis on gender as *exclusively* performance-based can read that way and, at times, the performative aspects of gender have been overemphasized.[154] Rather, at least as used here, the performative or expressive understanding of gender operates as a discursive recognition that an individual's expressions of their gender can help do gender, rather than simply reveal gender, and that "'being something' [can] consist[ ] of 'doing it.'"[155]

150. GLSEN & NCTE, Model School District Policy, *supra* note 17, at 1.

151. Stryker, Transgender History, *supra* note 25, 121–22.

152. *Id.* at 31.

153. *Cf.* Stryker, *(De)Subjugated Knowledges*, *supra* note 41, at 1, 11 (noting some transgender people resist the idea of gender as performative because they believe it suggests it is malleable or a form of play, rather than inalienable).

154. *See* Julia Serano, *Gender is More than Performance*, Advocate (Oct. 7, 2013), https://www.advocate.com/politics/transgender/2013/10/07/book-excerpt-gender-more-performance, *archived at* https://perma.cc/34B4-SUCE ("Instead of saying that all gender is this or all gender is that, let's recognize that the word gender has scores of meanings built into it. It's an amalgamation of bodies, identities and life experiences, of subconscious urges, sensations and behaviors, some of which develop organically, and others which are shaped by language and culture. Instead of saying that gender is any one single thing, let's start describing it as a holistic experience. Instead of saying that all gender is performance, let's admit that sometimes gender is an act, and other times it isn't.").

155. Stryker, Transgender History, *supra* note 25, at 163.

Moreover, the performative or expressive understanding of gender has at times also been critiqued as eliding the material or embodied experiences of gender, in particular for people of color whose embodied genders are often the cites of violence.[156] This is another critical insight and potential drawback to the expressive understanding of gender, but, in my view, an emphasis on performativity as an *aspect* of gender does not *ipso facto* detract from that materiality—in fact material embodiment can be an aspect or form of performative expression. Moreover, as noted out the outset, the principal concern of my analysis is to scrutinize which understanding of gender, if emphasized within the context of public schools, can create the most space for students lived, material freedom.

As underscored, not all trans people embrace the idea that gender is partially performed and expressed, and the medical discourse at times downplays expression, distinguishing "true" transgender children from those merely engaged in play or exploration.[157] And stressing the expressive dimensions of gender and gender identity is, of course, not going to eradicate all subordination of transgender people. Not at all. But, as Feinberg and others have underscored,[158] it is a critical part of a broader emancipatory agenda, which, as Part III explains, may be strategic to emphasize. But before diving into the doctrinal and discursive dividends of reemphasizing gender expression for transgender and gender variant children, it is necessary to explain in greater detail the ways in which the Bio-Medical-Mental and Social Understandings have contributed to the entrenchment of formalized gender regulation within public schools and the harms of that regulation.

II. Bureaucratic Construction of Gender Identity Committees

Trans and gender variant children, like trans and gender variant adults, are nothing new.[159] But the growth of their formal institutional regulation within public schools is.[160] The discursive constructions of gender and gender identity as being, at turns, biological/mental and/or socially influenced have had a tremendous impact on the management of gender identity by institutions, including educational institutions.[161] As put by gender scholar Jack Halberstam, "[w]ith recognition comes acceptance, with acceptance comes power, and with

156. E. Patrick Johnson, *"Quare" Studies*, *supra* note 39, at 5.

157. *See*, *e.g.* Meadow, *supra* note 96, at 20 (distinguishing children who "engage in atypical forms of play" from those whose "gendered statements and behaviors" suggest the child's gender identity may be different than the child's assigned gender).

158. Feinberg, Transgender Warriors, *supra* note 29, at 102–03.

159. Gill-Peterson, *supra* note 65, at 5, 196; *see also* Syrus Marcus Ware, *All Power to All People? Black LGBTTI2QQ Activism, Remembrance, and Archiving in Toronto*, 4 TSQ: Transgender Stud. Q. 170, 173 (2017) (correcting narratives suggesting that there is something "new" about Black trans folk).

160. Beemyn & Rankin, *supra* note 25, at 159 (arguing that even as of 2011 transgender people were "still completely ignored and invisible in most institutional structures").

161. Meadow, *supra* note 96, at 3 (observing that the "sex/gender split has affected the administrative and institutional categorization of children" over "the last decade or so").

power comes regulation."[162] This Part outlines the degree to which gender identity, influenced by the dominate discursive models analyzed in Part I, has become subject to formal regulation and construction in public schools. The Part then underscores the costs and harms of these structures for transgender and gender variant students—costs that include barriers to identity freedom and self-determination, privacy harms through the committee surveillance regime, and distributional inequalities exacerbated by the committee structure.

In addition to evaluating model policies created by LGBTQ advocacy groups and certain government agencies through their harm-reducing efforts to protect trans children, this Part contains the results of a comprehensive analysis conducted by the Author and several intrepid research assistants of the policies governing the regulation of transgender and gender variant students in public schools within each state and within each state's largest school district (where available). More specifically, the Companion database documents the policies governing access to bathrooms and sex-segregated athletics, though some of the policies discussed govern much more than those two issues. The full database with results of this analysis are included in the Companion for Identity by Committee.[163]

What the Companion illustrates is that even in jurisdictions with comparatively permissive policies that do not restrict students to living with their birth-assigned sex,[164] the bureaucratic hurdles that are imposed to actually living one's gender identity are significant. The Companion first catalogues the substantive requirements for being granted permission to live one's gender identity at school (self-identification, hormones, sex assigned at birth, etc.), then documents the procedural processes students must navigate. For example, even in schools that purportedly permit self-identification of gender identity, in practice the freedom to do so is circumscribed by procedural hurdles and input from other purported stakeholders, with the ultimate decision often made by administrators. These procedural requirements represent a substantial restriction on students' ability to actually live their gender and pose meaningful privacy violations. These barriers are particularly acute for those that lack parental support or the social capital to navigate these bureaucracies.

A. *Constructing the Committee*

Of course, with renewed trans visibility, many jurisdictions have seen an uptick in legislation targeting the ability of transgender people to live their lives.[165] During 2021 state legislative sessions alone, more than 30 states

162. Halberstam, *supra* note 1, at 18.

163. Companion, *supra* note 6.

164. Kylar W. Broadus & Shannon Price Minter, *Legal Issues*, *in* Trans Bodies, Trans Selves, *supra* note 4, at 174, 205 (noting that "a growing number of states and local school districts have adopted laws or policies protecting trans students from discrimination").

165. Page, *supra* note 92, at 143 ("As happened during previous periods of increased media visibility for trans people, we are currently experiencing a crackdown on the everyday lives of trans people by both the government and the general population . . . Visibility, this supposed cure-all, might actually be poison.").

introduced laws seeking to curtail the existence of transgender lives in one context or another, including in public schools where trans participation in sports was excluded in several states.[166] The 2022 state legislative sessions were no different.[167] But as gender policy educator Aidan Key observes, "[e]ven the most progressive schools can have practices or policies that unintentionally marginalize or silence a transgender student."[168]

Consistent with prevailing discursive emphasis on the Bio-Medical-Mental and the Social Understandings, several model policies developed by LGBTQ rights organizations have strategically embraced the bureaucratic regulation of students' gender identity, often as a means of getting a foot in the door for recognition for trans students and to prevent schools from outright denying their lives. For example, the GLSEN and NCTE Model Policy, while cautioning that "[s]chools should avoid requiring medical, legal or other 'proof' in order to respect a student's gender identity," nevertheless suggests that schools do have a legitimate role in "verifying" a student's gender identity, providing: "[s]chools have found that in practice it is not difficult to verify that a student is really transgender."[169]

In a "best practices" guide called "Schools in Transition" developed by a consortium of LGBT organizations including Gender Spectrum, the National Center for Lesbian Rights, the Human Rights Campaign, and the ACLU, the guide emphasizes at several turns the role of educators, administrators, and parents in working as a team with the student to build the "right plan" for the students.[170] The guide is complete with appendices containing a model "Gender Transition Plan" that includes provisions for an "initial planning meeting" among the transgender or gender variant student, their parents, and potentially a host of school employees, while also outlining decisions that must be made about communicating with other families about the student's transition, training with school staff about this student's transition, and a potential meeting with the parents of other students in the child's class.[171] Granted, these meetings/trainings are framed as optional, but the plans at minimum suggest that a student's transition may involve communication with, in essence, the entire school community.[172]

Similarly, in the waning months of the Obama Administration, the U.S. Department of Education issued a report on "Examples of and Emerging Practices for Supporting Transgender Youth," which collated some state and

166. *Legislation Affecting LGBT Rights Across the Country*, ACLU (last updated Dec. 17, 2021), https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country-2021, *archived at* https://perma.cc/3QUC-ZHAZ.

167. *Legislation Affecting LGBT Rights Across the Country*, ACLU (last updated Oct. 7, 2022), https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country, *archived at* https://perma.cc/A7XF-NCCB.

168. Aidan Key, *Children*, *in* Trans Bodies, Trans Selves, *supra* note 4, at 409, 433.

169. GLSEN & NCTE, Model School District Policy, *supra* note 17, at 2.

170. Orr & Baum, *supra* note 18, at 13.

171. *Id.* at 56–59.

172. *Id.*

local policies designed to support trans youth.[173] On page 1 of the report, the Department of Education asks the question: "[h]ow do schools confirm a student's gender identity?," once again enshrining schools as a gatekeeping and verification regime.[174] Notwithstanding that the report notes that some schools "generally accept the student's asserted gender identity," the report also holds up as examples policies that require "more than a casual declaration of gender identity or expression."[175] But more importantly, positing the question itself legitimizes school administrators' regulatory role. The report also includes a section discussing how "school psychologists, school counselors, school nurses, and school social workers [can] support transgender students," again rhetorically endorsing the committee approach to addressing a student's gender identity.[176]

Beyond these model policies, this Article's analysis of statewide policies and the policies in each state's largest school district vividly underscore the degree to which schools and state athletic associations have instituted substantive and procedural regulations of children's gender identity, often drawing from the Bio-Medical-Mental and Social Understandings.

In terms of substantive requirements, the many school districts and states which determine a student's gender based on a student's so-called "biological sex" or sex assigned at birth[177] or otherwise rely on some kind of medical intervention, be it surgery or hormone therapy, obviously depend on the narrowest formulations of the medical model. But even many of the school districts or states purporting to allow students to self-identify their gender require that the student "consistently" identify with a particular gender in every context or for every purpose, suggesting that gender identity needs to be fixed and constant in order to be legitimate and leaving no room for expression or play.[178] Other policies give credence to grossly overstated concerns that students may be attempting to gain some short term athletic advantage or may merely be mocking trans students, requiring that a student's gender will be accepted if it is "sincerely held," "bona fide," or "genuine."[179] Even policies that do not so explicitly start from a skeptical position regarding a student's non-normative

173. U.S. Dep't of Educ., Office of Elementary & Secondary Educ., Examples of Policies and Emerging Practices for Supporting Transgender Students (May 2016).

174. *Id.* at 1.

175. *Id.* at 1, 2.

176. *Id.* at 11.

177. *See*, *e.g.*, Companion, *supra* note 6. (Alabama State Law; Arizona State Law; South Dakota State Law; Arkansas Activities Association; Florida State Law; Idaho State Law; Indiana High School Athletic Association; Louisiana High School Athletic Association; Mississippi State Law; Montana State Law; Oklahoma State Law; Tennessee State Law; West Virginia State Law; Iowa State Law.

178. *See*, *e.g.*, *id.* (Anchorage School District; Denver Public Schools; Omaha Public Schools; New Hampshire Interscholastic Athletic Association; Newark Public School District; Rhode Island Interscholastic Athletic League; Seattle Public Schools).

179. *See*, *e.g.*, *id.* (Connecticut Interscholastic Athletic Conference; Hawaii Department of Education; Kansas State High School Athletic Association; Minnesota State High School League; North Carolina High School Athletic Association).

gender identity nevertheless implicitly suggest that the identity may not be legitimate by describing it as, for example, the gender identity which the student "asserts" at school.[180]

Equally significant are the procedural hurdles imposed by many policies, often requiring and/or suggesting that many different stakeholders be included in governing the student's gender identity at school or within competitive school sports. As the Companion documents, the procedural requirements take many different forms, with some policies requiring input from certain stakeholders (be it medical providers, administrators, or parents), and others making such input optional, in myriad combinations.[181] The input of stakeholders is more likely to be required in the athletic context. For example, while the South Dakota legislature recently banned transgender female participation,[182] for transgender males, the South Dakota High School Athletic Association requires schools to collect written support and/or verification documents from the student's parents/guardians and health care professionals and then to submit this documentation as part of a "Transgender Application."[183] The "Transgender Application" is then referred to an Independent Hearing Officer who issues a decision regarding the students gender identity which can be appealed to the Athletic Association's Board of Directors.

Similarly, while the state legislature recently banned transgender female participation,[184] the Arizona Interscholastic Association requires students to submit evidence of "support" from their parents or guardians, school administrators, and health care providers with the ultimate determination of eligibility determined by a so-called "Gender Identity Eligibility Committee."[185] Other states also have "Gender Identity Eligibility Committees" or the like for athletic participation, with the committee often being comprised of physicians, mental health care professionals, and school administrators, among others,[186] an approach advocated by the LGBT Sports Foundation in their Model Policy.[187]

180. *See*, *e.g.*, *id.* (Hawaii Department of Education; Minnesota State High School League; New York City Department of Education).

181. *See also* Doe v. Boyertown Area Sch. Dist. 897 F.3d 518, 524 (3d Cir. 2018) (discussing with approval school district that required the "student claiming to be transgender to meet with counselors who were trained and licensed to address these issues and the counselors often consulted with additional counselors, principals, and school administrators" before "a transgender student was approved to use the bathroom or locker room that aligned with his or her gender identity").

182. S.B. 46, 97 Leg. Sess. (S.D. 2022).

183. Companion, *supra* note 6 (South Dakota High School Athletic Association).

184. S.B. 1165, 55 Leg. Sess. (Ariz. 2022).

185. Companion, *supra* note 6 (Arizona Interscholastic Association).

186. *See e.g.,* Companion, *supra* note 6 (California Interscholastic Federation, Illinois High School Association; Nebraska State Athletic Association; North Carolina High School Athletic Association; Wyoming High School Athletic Association; Maine Principals' Association).

187. LGBT Sports Foundation, Proposed Model High School Policy (2016).

Other jurisdictions leave the ultimate decision regarding a student's gender to school or league administrators or an independent hearing officer.[188]

B. *The Committee's Human Costs*

Given that "[t]rans political life was not born out of institutions; it rubbed up against and resisted them," the alacrity with which trans and gender variant children's identities have been formally institutionalized should give pause.[189] This institutionalization of trans youth identities, aided by the Bio-Medical-Mental and Social Understandings of gender, has tremendous costs. Under the best of circumstances, transgender, gender variant, and queer youth generally face enormous social barriers and stigma, and often worse—bullying, erasure, harassment, and violence.[190] No doubt it was those same harms that prompted the initiation of the committee approach to try to protect and save trans children. So, while many of the procedures and requirements outlined above are often well-intentioned and may represent the best-case scenario in certain contexts, they may not represent the most emancipatory approach to gender and gender identity, and can inflict real costs to young lives that are already precarious.

1. Barriers to Identity Freedom & Self-Determination

Both the bureaucratic procedures and substantive requirements that have emerged for policing students' gender identities and expression represent substantial barriers to students' ability to live, express, and explore those identities. In many ways the regulatory frameworks serve as a normative signal reaffirming what society writ large communicates—that there is something abnormal about the child.[191]

Procedurally, the regulatory protocols suggest that a student's gender and gender expression is something that needs to be questioned, suspected, controlled, contained, and managed. As explained by education scholars Elizabeth Meyer and Harper Keenan, many school gender policies "rest upon a model of inclusion that requires institutional legibility and recognition and are primarily focused on the management of individual people and cases rather than institutional change."[192] While the ostensible goal is gender liberation, the

188. *See e.g.*, Companion, *supra* note 6 (Minnesota State High School League).

189. Grace Dunham, *Out of Obscurity: Trans Resistance, 1969–2016*, *in* Trap Door, *supra* note 83, at 91, 93.

190. Stuart Biegel, The Right to Be Out: Sexual Orientation and Gender Identity in America's Public Schools xvii (2010); GLSEN, The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, and Queer Youth in Our Nation's Schools 94 (2020); GLSEN, Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools 14 (2009); Sandy E. James, et al., The Report of the 2015 U.S. Transgender Survey 11 (Nat'l Ctr. for Transgender Equality 2016).

191. Keenan, *supra* note 74, at 541, 544, 548 (underscoring how schools "script" and condition students' gender); Leonardi et al., *supra* note 121, at 4 (explaining that notions "of what counts as 'normal' permeate school ecologies, privileges certain ideologies and marginalizing others").

192. Meyer & Keenan, *supra* note 11, at 749.

bureaucracies can just as easily stifle.[193] Together, these procedures operate as what Jules Gill-Peterson describes as "radical skepticism and verification in the best instances."[194] As powerfully put by Gill-Peterson, adults, including:

> parents, so-called interested observers, or even allies and advocates, tarry within the dangerously limiting circumstances of a system that continues to assay the value of trans children's being in terms not of their humanity and personhood but via questions absurd in their abstraction for how they ask us instead to wonder if trans children 'prove something' about the biological basis of sex and gender.[195]

By often rewarding those that are able to best comply with requirements for physical embodiment via medical documentation and "consistent" embodiment, the school policies also enshrine a particular kind of gender identity—often along immutable, binary lines.[196] As explained by Meyer and Keenan, a policy geared at enfranchising certain trans identities "can perpetuate the very harm it purportedly seeks to erase by reproducing systems of stratification."[197] Indeed, many of the policies explicitly require or otherwise assume that the student identify with a particular binary gender.[198] But as Heron Greenesmith has powerfully underscored, "[a]s long as the primary legal and moral argument for queer and trans rights is based on immutable and either/or characteristics, it will exclude those who are fluid, bisexual and non-binary" and "[a]s long as the foundation of trans and queer rights is the belief that everyone's sexual orientation and gender identity are inherent and fixed, there will be gatekeepers of our identities."[199] That is, by embracing the binary the policies *ipso facto* embrace gatekeepers of who is in which category.

Moreover, parental support for transgender children is far from a given[200]—indeed, queer youth, and trans youth in particular, are disproportionately homeless

193. While some have noted that well-meaning educational bureaucrats may at times help trans students navigate the school environment, *e.g.*, Marie-Amelie George, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*, 36 Yale L. & Pol'y. Rev. 83, 140–41 (2017), any so-called "accommodation" they are able to provide is still greatly circumscribed by the procedures outlined in this Part and the discourses dissected in Part I.

194. Gill-Peterson, *supra* note 65, at vii.

195. *Id.*

196. Meyer & Keenan, *supra* note 11, at 737 (explaining that "[w]hen institutions develop policy in the name of trans inclusion, they run the risk of simultaneously codifying what it means to be trans and limiting whose gender expression may be protected by such policies").

197. *Id.* at 739; *see also* Leonardi et al., *supra* note 121, at 18, 20.

198. A notable exception is the Denver Public Schools policy which makes specific reference to and provision for non-binary students and bathroom access. Companion, *supra* note 6 (Denver Public Schools).

199. Heron Greenesmith, *What if we weren't born that way?*, XTRA* (May 26, 2021), https://xtramagazine.com/power/sexuality-fluidity-legal-rights-201664, *archived at* https://perma.cc/LP5H-QVY9.

200. Leonardi et al., *supra* note 121, at 8 (noting that "some research has shown that nearly half of the LGBTQ+ students who were out to their parents reported that they were

compared to the general population, partially because of family rejection.[201] This makes ensuring that the school environment is supportive of trans youth even more critical. And while many of the policies purport not to require parental involvement, many at least suggest or encourage it.[202]

Thus even under the best of circumstances, the processes being constructed for regulating gender identity in the school context are only emancipatory for a small subset of trans and gender variant youth: those who fit the binary mold and that can then muster the incredible emotional, financial, and social resources needed to navigate the different hurdles. Perhaps underscoring the point: pursuant to the policy purporting to permit trans high school athletic participation in South Dakota from 2013 until 2022, only one transgender girl participated in sports.[203]

2. Invasions of Privacy

The administrative regulation of gender also imposes significant privacy risks for trans and gender variant children.[204] As the Supreme Court recognized as early as the 1970s, the "threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files" may be constitutionally significant.[205] This is even more true today as technology has amplified the privacy risks of government data collection and when the information at issue is as sensitive and intimate as information pertaining to one's gender and sexuality.[206] The bureaucratization of gender identity in public schools creates privacy and surveillance harms

made to feel badly about their identity").

201. Berta Esperanza Hernandez-Truyol, *Embracing Our LGBTQ Youth: A Child Rights Paradigm*, *in* Oxford Handbook of Children's Rights Law 543, 545 (Jonathan Todres & Shani M. King eds., 2020).

202. *See e.g.*, Companion, *supra* note 6 (Anchorage School District; Hawaii Department of Education; Illinois State Board of Education; Des Moines Public Schools; Maine Principal's Association; Maryland Public Secondary School Athletic Association).

203. Morgan Matzen, *Gov. Kristi Noem signs 'fairness' bill, limiting transgender athletes' access to sports*, Sioux Falls Argus Leader (Feb. 4, 2022), https://www.argusleader.com/story/news/2022/02/03/south-dakota-anti-transgender-athlete-fairness-bill-passed-gov-kristi-noem/6654261001, *archived at* https://perma.cc/PFE9-JDUL.

204. Of course, as discussed more fully in Part III, the privacy arguments often raised in opposition to the existence of transgender children are a canard. Transgender people and their bodies do not create privacy or security risks for anyone, and school facilities are designed in such a way to ensure that any student using a bathroom or locker room can avoid having their body exposed to others or viewing others' bodies, should they wish. Susan Hazeldean, *Privacy as Pretext*, 104 Cornell L. Rev. 1719 (2019); Scott Skinner-Thompson, *Bathroom Bills and the Battle Over Privacy*, Slate (May 10, 2016, 7:30 AM), https://slate.com/human-interest/2016/05/in-the-battle-over-bathroom-privacy-transgender-peoples-needs-matter-more.html, *archived at* https://perma.cc/7JXJ-8GUZ [hereinafter Skinner-Thompson, *Battle Over Privacy*].

205. Whalen v. Roe, 429 U.S. 589, 605 (1977).

206. Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. rev. 159 (2015) [hereinafter, Skinner-Thompson, *Outing Privacy*] (arguing that information pertaining to one's sexuality, gender identity, and medical information are of heightened constitutional importance under the Due Process Clause).

along at least two dimensions: (1) it represents a massive collection regime with (2) a concomitant risk of disclosure of that information.

Take, for example, the model "Gender Transition Plan" created by Gender Spectrum. Questions are asked about "the nature of the student's transition (male-to-female, female-to-male, a shift in gender expression, etc.)," "[h]ow urgent is the student's need to transition?," the list of school staff members who will be present during the "initial planning meeting," the "specific information that will be conveyed to other students (be specific)," which students will be provided this information, whether "any sort of information [will] be shared with other families about the student's transition," and whether there will "be specific training about this student's transition with school staff?"[207] The Arizona Interscholastic Association goes so far as to require that transgender students seeking to participate in interscholastic athletics submit "[a] description of the student's gender story, including age at emerging awareness of incongruence between sex assigned at birth and gender identity and where the student is in the gender transition process."[208] In short, the bureaucratization of gender leads to many invasive substantive questions regarding a child's identity, with the answers either intentionally or unintentionally provided to a host of others.

And while the model transition plans and school policies often seek to protect privacy as best they can, including by asking whether particular information should be limited to certain confines,[209] the creation of the plan and committee themselves represents an incredible data grab, even when it is far from clear that a student needs to disclose such information in order to simply come to school consistent with their gender identity. While every student should be called their accurate name and referred to with appropriate pronouns, ensuring that each student receives such humane treatment in class and from peers does not necessarily need to involve such formal data collection by school administration. An alternative might merely involve each teacher asking at the beginning of a course every student's names and pronouns.[210] The same holds true for access to sex segregated spaces, like bathrooms. While the bathroom has long been a site where gender and sexuality were policed by both social norms and carceral authorities, up until recently one has rarely needed to formally prove one's gender to the state or comply with codified institutional rules to access a particular bathroom.[211] But with the rising visibility of trans people, some jurisdictions now are actively regulating

207. Orr & Baum, *supra* note 18, at 56–57.

208. Companion, *supra* note 6 (Arizona Interscholastic Association).

209. Orr & Baum, *supra* note 18, at 52.

210. Gabriel Arkles, *Improving Law School for Trans and Gender Nonconforming Students: Suggestions for Faculty*, 17 CUNY L. Rev. F. 84, 87 (2014).

211. Sheila L. Cavanagh, Queering Bathrooms: Gender, Sexuality, and the Hygienic Imagination 70 (2011).

bathroom access.[212] And the formal collection itself serves as a barrier to freedom that further underscores the stigma attached to gender variant identities.

In addition to the privacy invasions that occur when information is collected by school officials and other members of the "committee," to the extent a school's policing of students' gender incorporates the views of others in the community, the student's identity, far from being private, has the potential to become a public spectacle, another powerful deterrent to the student's gender freedom. Take, for example, the Washington Interscholastic Athletic Association policy governing "gender identity participation" for interscholastic sports, which was in place until it was amended in 2021. While the policy provided that "[a]ll students should have the opportunity to participate in WIAA [activities] in a manner that is consistent with their gender identity," the policy created an appeals process whereby people could challenge whether the student's "gender identity is bona fide," before a "Gender Identity Eligibility Committee" that was required to include at least one physician or mental health professional.[213] If the student was denied eligibility by the Committee, they could appeal to the Executive Director of the WIAA who would conduct a hearing. And while this entire process was purportedly confidential and sealed, it represented a massive inquiry into the validity of the student's gender. Similarly, while the National Education Association guidance on transgender student rights advises that schools "should accept a student's assertion of the student's gender identity and not require any particular substantiating evidence," the NEA nevertheless suggests that there be a process for evaluating credible challenges to what the NEA labels the student's "asserted" gender identity.[214]

Beyond the privacy invasions created by the committee/gender verification process itself, to the extent the bureaucratization of students' gender creates practical barriers to obtaining permission to access sex-segregated spaces and activities, students whose expressed identities are different than those recognized by the school will incur privacy violations when they are forced to use sex-segregated spaces that are inconsistent with their gender expression—in effect being outed every time they use the restroom.[215]

212. *Cf.* Amber Phillips, *The tumultuous history of North Carolina's bathroom bill, which is on its way to repeal*, Wash. Post (March 30, 2017), https://www.washingtonpost.com/news/the-fix/wp/2016/12/19/the-tumultuous-recent-history-of-north-carolinas-bathroom-bill-which-could-be-repealed, *archived at* https://perma.cc/Z85B-65ZR (discussing North Carolina's first of its kind bathroom bill).

213. Washington Interscholastic Athletic Association, 2020–2021 Official Handbook § 18.15.

214. National Education Association, Legal Guidance on Transgender Students' Rights 6 (June 2016).

215. Skinner-Thompson, *Outing Privacy*, *supra* note 206, at 192 (explaining that "transgender people are also outed when governments, schools, or employers refuse to let them use a bathroom consistent with their gender expression, and force them to use bathrooms that align with the sex assigned at birth or segregate them in unisex restrooms").

3. Distributional Impacts

In addition to privileging those students whose identities can comply with a medicalized, binary mold of gender, the regulatory processes are also unequal along other dimensions. Namely, structural barriers of poverty and racism likely prevent many Black and Brown trans children from taking advantage of what regulatory freedom does exist. This is perhaps not surprising given the degree to which white, middle-class children have been centered in discussions about transgender children.[216] As documented above, navigating the byzantine processes required to be treated consistently with one's gender identity in schools is no small feat.[217] Even if parental support is not formally required by a school policy, navigating the transition process would be made more efficient and accessible if a student has a parent or guardian that not just normatively support the student's identity, but has the free time and institutional know-how to do so. But having a parent with those resources is far from a given. In the same way that bureaucratic processes for supporting students living with disabilities have been critiqued as being only accessible to a small subset of families,[218] there is good reason to believe that many of the plans will not be accessible to all students equally.

As documented by the National Center for Transgender Equality's 2015 U.S. Transgender Survey, while a growing number of trans people do receive support from their families, 10 percent of transgender people reported that an immediate family member was violent to them because they were transgender and 8 percent were kicked out of the house because they were transgender.[219] As sociologist Austin Johnson has underscored more generally with regard to a transnormative ideology grounded in the medical model, there are significant distributive racial and class consequences of such a model, which excludes those without the financial resources or social capital necessary to access trans affirming medical care.[220]

More significantly, there is also reason to believe that schools and school officials will be less likely to accept the identities of queer students of color. Generally speaking, students who are minoritized because of their race are

216. Gill-Peterson, *supra* note 65, at 2; Halberstam, *supra* note 1, at 34, 47–49; Meyer & Keenan, *supra* note 11, at 738.

217. *Supra* Part II.A.

218. LaToya Baldwin Clark, *Beyond Bias: Cultural Capital in Anti-Discrimination Law*, 53 Harv. C.R.-C.L. L. Rev. 381 (2018); *see also* Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 Cal. L. Rev. 881, 915 (2016) (suggesting that bureaucratic procedures that have been developed for regulating sexual assault on college campuses could be disproportionately used to punish male students of color).

219. National Center for Transgender Equality, The Report of the 2015 U.S. Transgender Survey 70–72 (2016).

220. Austin H. Johnson, *Transnormativity, supra* note 45, at 486; *see also* Jonathan L. Koenig, *Distributive Consequences of the Medical Model*, 46 Harv. C.R.-C.L. L. Rev. 619, 630 (2011) (explaining that "many trans people are unable to access comprehensive medical care because they are uninsured and lack the means to pay out-of-pocket"); Barry Reay, Trans America: A Counter-History 7 (2020) (same).

already subject to greater amount of discipline in schools—they are viewed as suspect.[221] But that suspicion and discipline is particularly acute for trans students of color,[222] whose queer identities are often not read as legible or treated as legitimate.[223] Again, this is perhaps not surprising given the degree to which structural barriers to freedom are often ignored in discussions of transgender children,[224] and the degree to which white children have dominated the narrative regarding trans youth.[225] Put differently, the bureaucratized committee process operates as an iteration of what Black trans poetics and cultural studies scholar SA Smythe describes as "incremental legal rights victories for those closest to the usual heteronorms at the expense of the usual disposable subjects, who continue to feel the weight and unmitigated violence of that same legal enterprise."[226]

III. Emancipatory Deconstruction Through Gender Expression

Given the costs of the institutionalization of student gender identity via the Bio-Medical-Mental and Social Understandings, would a greater emphasis on the expressive and performative dimensions of gender hold emancipatory potential? A strong, albeit uncertain, argument can be made that the answer is yes. A renewed focus on the expressive role of gender identity may yield dividends both in terms of doctrinal/legal arguments in favor of student gender freedom as well as discursive/rhetorical freedom.

This Part discusses the potential discursive and doctrinal dividends of a renewed emphasis on the expressive and performative dimensions of gender, before addressing possible drawbacks to the expressive/performative model. As to rhetoric or discourse, an emphasis on the dynamic between gender expression and social context could help schools, courts, and society better understand the non-essentialist (e.g., non-medical) and performative components of our gender identities, and combat the predominant essentialized conceptions of gender that also often reinforce the gender binary. As to doctrine, understanding gender identity as expressive could enable legal recognition that gender

221. Derek Black, Ending Zero Tolerance: The Crisis of Absolute School Discipline (2016).

222. *See, e.g.*, GLSEN & National Black Justice Coalition, Erasure and Resilience: The Experiences of LGBTQ Students of Color, Black LGBTQ Youth in U.S. Schools (2020).

223. *Cf.* C. Riley Snorton, Black on Both Sides: A Racial History of Trans Identity 141 (2017) (explaining how mainstream depictions of certain trans folk as acceptable was aided by the subjugation of nonwhite gender variant bodies); E. Patrick Johnson, *"Quare" Studies*, *supra* note 39, at 12 (foregrounding how certain discussions of queerness work to erase racial identity and the material realities of people of color).

224. Gill-Peterson, *supra* note 65, at 2; Halberstam, *supra* note 1, at 34, 47–49; *see also* Che Gossett, *Blackness and the Trouble of Trans Visibility*, *in* Trap Door, *supra* note 83, at 183–84 (underscoring the degree to which respectability politics of much transgender rights discourse prevents a more liberatory trans politics).

225. Examples include Gavin Grimm, Ash Whitaker, and Coy Mathis, among others, all represented by LGBT movement organizations.

226. Smythe, *supra* note 92, at 159.

expression is a covered form of symbolic speech or expressive conduct. Such speech is protected in public schools under well-established law recognizing a wide range of conduct as speech, even within the schoolhouse gates.

A. *Discursive Dividends—Exploration & Play*

There are significant discursive benefits to underscoring gender identity's expressive and/or performative components in terms of creating the most social space for students to explore their identities as they develop. As Jules Gill-Peterson has powerfully noted, "trans-inclusive and trans-affirmative voices struggle to find a way to protect trans children that does not imagine them as deserving of protection because they are, finally, the property of adults, not people with the right to gender self-determination."[227] Put differently, "[w]e have not even yet begun to ask what it would mean to let trans children name their own desires and be recognized as entitled to direct their own affairs."[228] Underscoring the expressive and performative dimensions of gender could help free youth to chart their own course and not feel the need to identify their gender with a particular "innate" category as quickly as possible. It could serve as a bedrock for gender self-determination,[229] help combat the subjugation of gender multitudes, and help foster what Florence Ashley has described as an "ethics of gender exploration."[230]

As explained by Ashley, "[y]outh explore their genders" and that "[e]xploration is not only a vessel of discovery and understanding, but also of creation[,]" of not only "unearthing a pre-existing truth, but also making that truth for ourselves."[231] In other words, while many "people experience gender, in whole or in part, as something that is discovered and affirmed, many of us also see it as constituted by exploration."[232] As such, it is critical that students be permitted the space for such exploration and play without having to seek multiple layers of permission before doing so. They should feel emboldened to understand gender as not necessarily something innate or fixed, as the dominant discourses emphasize, but as "tentative . . . provisional and improvisational."[233] Instead of understanding "transition" as the bookend of the journey and the end of exploration, as it often is under the Bio-Medical-Mental and

227. Gill-Peterson, *supra* note 65, at vii-viii.

228. *Id.* at vii; *see also* Austin H. Johnson, *Transnormativity*, *supra* note 45, at 469 (underscoring how prevailing narratives leave "very little room for trans people's faculty or power to use their own agency in making decisions about their identification with and actualization of their individual gender identities").

229. Eric. A. Stanley, *Gender Self-Determination*, 1 TSQ: Transgender Stud. Q. 89, 90–91 (2014) (explaining that a trans politics built on collective self-determination "opens up space for multiple embodiments and their expressions by collectivizing the struggle against both interpersonal and state violence [and by pushing] us away from building a trans politics on the fulcrum of realness (gender normative, trans, or otherwise) while also responding to the different degrees of harm people are forced to inhabit")).

230. Ashley, *Against Delaying*, *supra* note 34, at 223.

231. *Id.*

232. *Id.* at 224.

233. *Id.*

Social Understandings, we might, as Ashley suggests, understand exploration as coming "before, during and after it."[234]

As described in detail above, the current emphasis on the Bio-Medical-Mental and Social Understandings, buttressed by the committee structure, encourages and rewards those able to demonstrate that their gender identity is fixed, persistent, and consistent, while actively discouraging exploration of gender lest the exploratory identity be rendered illegible and illegitimate. An emphasis on the expressive or performative dimensions of gender could combat subjugation and create more breathing room for students, helping them appreciate that it is okay to try things out and on, both literally and figuratively. For policymakers, educators, and society more broadly, an emphasis on the expressive and dynamic nature of gender could build appreciation for the conclusion "that a more extensive policy is not inherently a better policy."[235] And to the extent that gender performances gain greater expressive purchase when the identities go against social norms, emphasizing the expressive dimensions of gender may bolster calls for trans studies to "eschew[ ] the will to institutionality in favor of radical emergence."[236]

B. *Doctrinal Dividends*

In addition to discursive benefits of framing gender identity as expression/performative, there may also be important doctrinal benefits which, in turn, will influence how courts and society understand gender.[237]

1. Symbolic Speech; Expressive Identities

A long line of First Amendment jurisprudence establishes strong protections for so-called expressive conduct or symbolic speech, including expressive identities. The Supreme Court has reasoned that "[s]ymbolism is a primitive but effective way of communicating ideas."[238] As put long ago by First Amendment scholar Melville Nimmer, "[a]ny attempt to disentangle 'speech' from conduct which is itself communicative will not withstand analysis. The speech element in symbolic speech is entitled to no lesser, and also no greater, degree of protection than that accorded to so-called pure speech. Indeed, in one sense all speech is symbolic."[239]

234. *Id.* at 227.

235. Meyer & Keenan, *supra* note 11, at 744.

236. Smythe, *supra* note 92, at 162.

237. Flynn, *supra* note 34, at 485 (explaining that "a First Amendment approach may provide a greater opportunity for success for cases in which a medical model is not used and provides the flexibility of reliance on a diagnosis if that approach is preferred [and that] [b] ecause First Amendment claims are predicated on the expression of views rather than directly based in identity, there is at least less of a doctrinal (as opposed to pragmatic) drive to prove the underlying 'truth' or reality of one's views").

238. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

239. Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. Rev.. 29, 33 (1973).

While there is not a rigid test for determining whether conduct is expressive and therefore entitled to First Amendment coverage, the Court has emphasized that social context plays an important role and that conduct is more likely to be deemed covered First Amendment speech if it is understood as expressive and sends a particularized message.[240] That said, the Court has suggested that a particularized message is not a hard and fast requirement for conduct to be covered expression.[241] Based on these guidelines, the Court has characterized many instances of conduct as expressive and entitled to First Amendment coverage. Examples include flag burning,[242] cross burning,[243] the wearing of black arm bands,[244] and sit-ins,[245] among many others.

Moreover, the Supreme Court has on multiple occasions recognized that identities themselves—particularly queer sexual identities—may be expressive. For example, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, the Court held that Massachusetts's antidiscrimination statute violated the First Amendment by requiring a private group organizing Boston's annual St. Patrick's Day-Evacuation Day parade to include members of another group, the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB").[246] The Court reasoned that just as the parade organizers were engaged in expression, GLIB's "participation as a unit in the parade was equally expressive."[247] In addition to their formal organization around a message of queer inclusivity, the Court noted that *"the presence* of the organized [GLIB] marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics."[248] As such, the Court concluded that the forced presence of the gay, lesbian, and bisexual marchers would infringe on the private message of the parade organizers and was prohibited.

Even more explicitly, in *Boy Scouts of America v. Dale*, the Court held that application of a New Jersey anti-discrimination statute to the private Boy Scouts organization so as to force inclusion of a gay man, James Dale, as a scout leader, violated the First Amendment rights of the Scouts.[249] According to the Court, Dale's presence alone as an out gay man would "force the

240. Spence v. Washington, 418 U.S. 405, 410–11 (1974).

241. Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995) ("a narrow, succinctly articulable message is not a condition of constitutional protection"); *see also* Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. Pa. L. Rev. 1445, 1464 (2013) (observing that the Court in *Hurley* disclaimed any purported "particularized message" requirement).

242. Texas v. Johnson, 491 U.S. 397, 405–06 (1989).

243. R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992).

244. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969).

245. Brown v. Louisiana, 383 U.S. 131, 141–42 (1966).

246. *Hurley,* 515 U.S. at 580–81.

247. *Id.* at 570.

248. *Id.* at 574.

249. Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 (2000).

organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[250] Relying in part on *Hurley*, the Court reasoned that just "[a]s the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout's [sic] choice not to propound a point of view contrary to its beliefs."[251]

As these examples illustrate, often the government-compelled presence of sexual minorities pursuant to non-discrimination laws has been deemed as infringing on a private group's expressive rights. If the presence of a sexual minority in that context is deemed expressive, then the same should hold true with even greater force when state entities are directly regulating and repressing the identity of gender or sexual minorities—excluding their expressive presence in a public space.

Separate and apart from cases holding that the compelled presence of sexual minorities is expressive and therefore implicates the First Amendment rights of private expressive organizations, stand early gay rights cases where the First Amendment was used to protect the rights of gay people to associate together and, separately, to be "out" within government-controlled environments. As methodically detailed by law professors Carlos Ball and Stuart Biegel,[252] long before the Supreme Court recognized the importance of equality, dignity, and privacy for same-sex intimacy, courts often protected the ability of queer people to espouse explanations of their identities (for example, through gay-themed magazines)[253] and permitted them leeway under the First Amendment to formally gather together to just be/exist, and to further explore and elaborate those identities (for instance, via gay student organizations at public schools).[254] In the gay student organization cases, courts often recog-

250. *Id.* at 653.

251. *Id.* at 654.

252. *See* Carlos Ball, The First Amendment and LGBT Equality: A Contentious History 50–92 (2017); Biegel, *supra* note 190, at 8–9, 28.

253. *E.g.*, One, Inc. v. Olesen, 355 U.S. 371, 371 (1958) (summarily reversing post office's refusal to ship magazine devoted to discussing the scientific, historical and political aspects of homosexuality as running afoul of the First amendment); Manual Enters., Inc. v. Day, 370 U.S. 478, 489–91 (1962) (concluding that it violated the First Amendment to censor publication of gay erotic magazine); *see also* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass., 383 U.S. 413, 413 (1966) (overturning lower court conclusion that erotic novel depictions of same-sex sexual activity was obscene); Gay Men's Health Crisis v. Sullivan, 792 F. Supp. 278, 292 (S.D.N.Y. 1992) (striking down the CDC's restrictions on grant funds toward "offensive" AIDS-related educational materials as unconstitutionally vague).

254. *E.g.*, Gay Lib v. Univ. of Mo., 558 F.2d 848, 850 (8th Cir. 1977); Gay All. of Students v. Matthews, 544 F.2d 162, 163 (4th Cir. 1976); Gay Students Org. of Univ. of N.H. v. Bonner, 509 F.2d 652, 660–61 (1st Cir. 1974); *see also* Biegel, *supra* note 190, at 9–10 (discussing student organization cases).

nized that mere coming together socially as a gay community, while conduct, was nevertheless communicative.[255]

But perhaps most critically, while not always embraced,[256] courts often recognized that gay people were protected from sanction in their government jobs because their identities were expressive. In several cases dealing with gay teachers or professors who were publicly out about their sexual orientation, courts concluded that adverse actions against such employees on account of their identity expressions ran afoul of the First Amendment.[257] Relatedly, courts have, at times, protected queer students' rights to bring same-sex dates to school events or display modest affection for people of the same-sex while at school as protected expression, concluding that such embodiments of their sexualities were communicative.[258]

All told, as legal scholar William Eskridge has explained, the "insight implicit in [the First Amendment gay rights] rulings was that, for gays and lesbians, identity speech ('I am gay') was both personal and political."[259] Put powerfully by law professor Nancy Knauer, there seems to be judicial recognition that in a heteronormative social context beset by fierce culture wars over sexuality, openly gay individuals' identities are both expressive and highly politicized.[260] But even without a verbal self-proclamation or "coming out," within largely conformist social settings identities that deviate from and challenge the norms have an almost inherent expressive dimension.[261] As explained by law professor and movement attorney Nan Hunter, "identity politics is

255. *Bonner*, 509 F.2d at 659–60.

256. *E.g.*, Rowland v. Mad River Loc. Sch. Dist., 730 F.2d 444, 449 (6th Cir. 1984) (concluding that disclosure of public school counselor's bisexuality was not protected by First Amendment).

257. Acanfora v. Bd. of Educ., 491 F.2d 498, 499–500 (4th Cir. 1974); Aumiller v. Univ. of Del., 434 F. Supp. 1273, 1301 (D. Del. 1977).

258. Fricke v. Lynch, 491 F. Supp. 381, 384 (D. R.I. 1980) (bringing same-sex date to prom is expressive); McMillen v. Itawamba Cnty. Sch. Dist., 702 F. Supp. 2d 699, 704–05 (N.D. Miss. 2010) (same); Nguon v. Wolf, 517 F. Supp. 2d 1177, 1188 (C.D. Cal. 2007) (on-campus displays of affection are expressive of gay sexual orientation); *see also* David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 Harv. C.R.-C.L. L. Rev. 319, 321–22 (1994) (arguing that same-sex intimate conduct is expressive and that the expression often serves as the government's justification for regulation).

259. William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961–1981*, 25 Hofstra L. Rev. 817, 905 (1997); *see also* Nan D. Hunter, *Identity, Speech, and Equality*, 79 Va. L. Rev. 1695, 1718 (1993) (explaining that self-identifying speech both communicates and constructs one's identity).

260. Nancy J. Knauer, *"Simply So Different": The Uniquely Expressive Character of the Openly Gay Individual After Boy Scouts of America v. Dale*, 89 KY. L.J. 997, 1001 (2001).

261. Skinner-Thompson, *Performative Privacy*, *supra* note 124, at 1692.

interwoven with dissent—is understood *as* dissent," such that "an identity characteristic itself is understood to convey a message."[262] So understood, in many ways the First Amendment's protection of free expression and association operated as what I have labeled as "the first queer right" by protecting non-normative sexualities as expression.[263]

To the extent the gender expression of transgender and gender variant people can involve sartorial choices that reflect or confirm one's gender identity, or challenge gender stereotypes and binaries,[264] it is also significant that courts have sometimes, albeit inconsistently, deemed clothing choices as covered First Amendment expression. Rightly so given that clothing can "be both a form of self-constitution and a medium of communication."[265] Of course, *Tinker v. Des Moines*, wherein the Court established that student expression is covered under the First Amendment, itself involved a clothing choice that was intended as and understood as politically expressive.[266] So did the case of *Cohen v. California*, where the Supreme Court struck down the conviction of a person who wore a jacket that said "Fuck the Draft" into a courthouse.[267] As law professor Ruthann Robson has explained, while "[a]ttire bearing words or symbols is much more likely to meet the expressive threshold necessary to invoke First Amendment protections . . . even unadorned apparel can speak volumes."[268]

Courts have applied these principles to deem clothing choices pertaining to LGBTQ identity and/or LGBTQ political rights as covered First Amendment expression. For example, in *McMillen v. Itawamba County School District*, the court held a lesbian student's desire to wear a tuxedo to prom in contravention of the policy that female students wear dresses fell "squarely within the purview of the First Amendment" as covered expression.[269] Similarly, in a suit brought by a straight student, *Gillman v. School Board of Holmes County*, the court held that a school's ban on wearing clothing containing rainbows, pink triangles, and or one of several pro-gay rights slogans was impermissible under the First Amendment.[270]

Consistent with the expressive/performative discursive model for understanding gender and gender identity, under these veins of First Amendment

262. Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 Harv. C.R.-C.L. L. Rev. 1, 1–2 (2000).

263. Skinner-Thompson, *The First Queer Right*, *supra* note 103, at 882.

264. Richard Thompson Ford, Dress Codes: How the Laws of Fashion Made History 263, 6, 11 (2021) (while noting that "there is no specific type of clothing that inherently 'belongs' to" a particular gender, "[g]ender difference is [nevertheless often] marked by clothing, hairstyles, and cosmetics" and, in that way, "clothes actually do make the man (or woman)").

265. *Id.* at 7.

266. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

267. Cohen v. California, 403 U.S. 15, 15 (1971).

268. Ruthann Robson, Dressing Constitutionally: Hierarch, Sexuality and Democracy from Our Hairstyles to Our Shoes 110 (2013).

269. *McMillen*, 702 F. Supp. 2d at 705.

270. Gillman v. Sch. Bd. of Holmes Cnty., 567 F.Supp.2d 1359, 1362 (N.D. Fla. 2008).

authority, trans and gender variant identities can easily be understood as covered First Amendment speech as well.[271] Nascent case law on this issue has at times been receptive to the idea that trans and gender variant people's expressions of their gender identity are covered expression.[272] For example, in a case involving the arrest and jailing of a transgender female in a jail denominated for males, a court concluded that the plaintiff had pled sufficient facts to support her claim that she was engaged in expressive conduct that was understood by the defendants because "changing one's appearance to align with traditionally male or female traits is a means by which some transgender people not only begin to live according to their gender identity, but also convey their gender identity to others."[273] In this case, the plaintiff not only dressed in a manner to convey her gender identity, but had also undergone hormone therapy and "several surgeries to feminize her appearance."[274] Similarly, in *Doe v. Yunits*, the court held that a transgender female student's efforts to wear clothes typically worn by females to school was covered expressive conduct likely to be understood by others because "by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender" and that the "plaintiff's expression is not merely a personal preference but a necessary symbol of her very identity."[275] Importantly, the court noted that "the school's vehement response and some students' hostile reactions are proof of the fact that the plaintiff's message clearly has been received."[276]

As legal scholar Dara Purvis has argued, such cases centering on the expressive function of gendered clothing, "open[ ] the door to a promising legal argument framing the clothing and other aesthetic choices of transgender students today as protected First Amendment expression."[277] And while Purvis is less sanguine about the prospect of bathroom use being considered

271. *Cf.* Paisley Currah, Richard M. Juang, & Shannon Price Minter, *Gender Pluralisms*, *in*, Transgender Rights, *supra* note 24, at 3, 20 (suggesting that "[p]erhaps gender nonconforming practices will be recognized as expressive activity worthy of constitutional protection at some moment in the future").

272. Older and dated cases dealing with the constitutionality of, for example, gendered school rules regarding hair length present a more mixed picture, and the Supreme Court never intervened to resolve circuit differences. Robson, *supra* note 268, at 69.

273. Vuz v. DCSS III, Inc., No. 3:20-cv-00246-GPC-AGS, 2020 WL 7240369, at 5 (S.D. Cal. Dec. 9, 2020).

274. *Id.* at 1.

275. Doe v. Yunits, No. 001060A, 2000 WL 33162199, at 3 (Mass. Super. Ct. Oct. 11, 2000).

276. *Id.* at 4. *But see* Youngblood v. Sch. Bd. of Hillsborough Cnty., No. 8:02-cv-1089-T-24MAP (Fl. Dist. Ct. Sept. 24, 2002) (rejecting First Amendment claim by female who did not want to dress in school required outfit consisting of "a revealing, scooped neck drap" for yearbook photo and instead wanted to wear a jacket, shirt, and tie).

277. Dara E. Purvis, *Gender Stereotypes and Gender Identity in Public Schools*, 54 U. Rich. L. Rev. 927, 940 (2020); *see also* Carlos A. Ball, *Gender-Stereotyping Theory, Freedom of Expression, and Identity*, 28 Wm. & Mary Bill Rts. J. 229, 236 (2019) (arguing that the expressive components of the gender-stereotyping theory of sex discrimination could help equality claims become less stringently tied to narrow identity categories, creating a more pluralistic equality framework).

expressive,[278] to the extent using a sex-segregated restroom is the principal (if only) sex-segregated space many people use on a routine basis, a strong argument can be made that accessing a restroom consistent with one's gender identity is one of the most definitive expressions of gender that one undertakes.[279] As law professor Danielle Weatherby has powerfully explained, "an individual's conduct in using a restroom designated as either 'male' or 'female' expresses that individual's belief that she belongs in that designated category of persons. By choosing to enter a facility labeled for a specific gender group, that individual is effectively stating her association with that gender."[280] Or, as explained by legal scholar Jeffrey Kosbie, "[w]hen a transgender man begins using the men's restroom, not only does his conduct communicate his gender, but he consciously chooses to do so in order to communicate his gender identity."[281]

2. Identities that Challenge, not Disrupt

Assuming trans and gender variant identities are expressive within the public-school context and therefore entitled to First Amendment coverage, the next step is to determine whether school regulation of those expressive identities runs afoul of the governing rubrics for evaluating the regulation of student speech in public schools. Compared to the Bio-Medical-Mental and Social Understandings and the formalized equality approaches they buttress (analyzed below), First Amendment doctrine provides comparatively robust protection for students' expressive freedom, including their expressive conduct.[282]

The prevailing test for determining whether a regulation impermissibly restricts students' speech rights was most famously articulated in *Tinker v. Des Moines,*[283] and recently reaffirmed in *Mahonoy Area School District v. B.L.*[284] In *Tinker*, a case involving suspension of students wearing black armbands to protest the Vietnam War, the Court confirmed that "First Amendment rights,

278. Purvis, *supra* note 277, at 941.

279. Danielle Weatherby, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. Rev. L. & Soc. Change 89, 122 (2015); *see also* Kyle C. Velte, *Mitigating the "LGBT Disconnect": Title IX's Protection of Transgender Students, Birth Certificate Correction Statutes, and the Transformative Potential of Connecting the Two*, 27 Am. U. J. Gender Soc. Pol'y & L. 29, 71 (2019) (explaining that "[a] transgender person's decisions about how their body looks [including through surgery or no surgery] is intrinsically tied to the message they want to express about their gender").

280. *Id.* at 122.

281. Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 Wm. & Mary J. Women & L. 187, 243 (2013).

282. Jesulon S.R. Gibbs, Student Speech on the Internet: The Role of First Amendment Protections 30 (2010) (noting that the "overwhelming majority of scholarship examining student free speech rights begins by acknowledging that in 1969 the U.S. Supreme Court attributed a great degree of First Amendment protection to public school students in *Tinker*").

283. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

284. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2048 (2021) (confirming the *Tinker* standard in a case involving the impermissible regulation of off-campus speech).

applied in the light of the special circumstances of the school environment, are available to teachers and students" and that neither "students or teachers shed their constitutional rights to freedom of speech or expression at the school house gates."[285] In so concluding, the Court confirmed that expressive conduct—such as wearing an armband—was tantamount to "pure speech" and therefore "entitled to comprehensive protection under the First Amendment."[286] Such speech, the Court suggested, could only be regulated if the students' speech was accompanied by disorder or disturbance by the student speakers or intruded "upon the work of the schools or the rights of other students."[287] But "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[288] Given the lack of evidence of disruption, the Court easily concluded that the suspensions violated the students' expressive freedoms.

That said, the Court has underscored that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[289] Nor has the Court reliably applied the *Tinker* disruption test in school speech cases.[290] But those two caveats aside, in deciding school speech cases, the Court nevertheless consistently puts a premium on whether the student speech at issue negatively impacts the educational environment. For example, in *Bethel v. Fraser*, the Court upheld against a First Amendment challenge the discipline of a student who made use "elaborate, graphic, and explicit sexual metaphor" in a speech nominating another student for student government because of its negative, insulting, and bewildering impact on many students.[291] Similarly, in *Morse v. Frederick*, the Court concluded that speech which could reasonably be interpreted as promoting illegal drug use (displaying a "BONG HiTS 4 JESUS" sign at a school-supervised event) could be regulated consistent with the First Amendment.[292] However, in the same breath, the Court cabined the holding of *Bethel*, emphasizing that speech that is merely "offensive" cannot be forbidden under the First Amendment even in the school context.[293] As law professor Justin Driver has underscored, *Tinker*'s extensive protection for student expression remains robust and, in fact, "today's students enjoy far greater First Amendment protections than did their counterparts in the pre-*Tinker*-era."[294]

More to the point, bearing in mind the importance of student speech and the need to ensure the efficient operation of the educational environment, lower

285. *Tinker*, 393 U.S. at 506.
286. *Id.* at 506–07.
287. *Id.* at 508.
288. *Id.*
289. Bethel v. Fraser, 478 U.S. 675, 682 (1986).
290. Morse v. Frederick, 551 U.S. 393, 405 (2007).
291. *Fraser*, 478 U.S. at 678, 683–84.
292. *Morse*, 551 U.S. at 408–09.
293. *Id.* at 409.
294. Justin Driver, The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind 125 (2018).

courts have applied these standards to protect gay and lesbian expressive identities in schools. For example, in *Fricke v. Lynch*, after concluding that a male student bringing a male date to prom was covered expression, the court held that prohibiting the student's speech of attending prom with their same-sex date failed the *Tinker* test, in part, because "undifferentiated fear or apprehension of disturbance" based on other students' negative reaction to the speech could not justify the regulation.[295] To conclude otherwise would, in effect, grant the other students a heckler's veto.[296] The same conclusion has been reached in cases dealing with sartorial choices reflecting LGBTQ identity.[297] As put by the Supreme Court in *Palmore v. Sidoti*, "[p]rivate biases may be outside the reach of [constitutional] law, but the law cannot, directly or indirectly, give them effect."[298] While, of course, the case law regarding school regulation of non-normative sexual orientations is still evolving, as summarized by Cliff Rosky, "courts have consistently held that the First Amendment prohibits the state from discouraging the expression of pro-gay opinions and homosexual desires—even among children—because such a policy is tantamount to the suppression of a particular viewpoint."[299]

3. Gender Regulation as Infringement on Expression

Assuming that gender is expressive but not disruptive, the next doctrinal question is whether the regulations outlined in Part II constitute an impermissible infringement or burden of that speech. A law may be deemed an infringement on expression in a variety of ways, including outright prohibitions on certain types of speech, prior restraints such as permitting requirements or licensing regimes, and compelled speech.[300] If a law does infringe on protected

295. Fricke v. Lynch, 491 F. Supp. 381, 387 (D. R.I. 1980).

296. *Id.*; *see also* Henkle v. Gregory, 150 F. Supp. 2d 1067, 1075 (D. Nev. 2001) (denying school defendants' motion to dismiss gay student's First Amendment claim because the court could not conclude as a matter of law that the student's speech coming out about his sexuality caused a substantial disruption, or that defendants could have reasonably believed such a disruption would occur); Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ., 258 F. Supp. 2d 667, 690 (E.D. Ky. 2003) (applying the *Tinker* disruption test in evaluating whether high school's denial of equal access to Gay Straight Alliance was permissible, and concluding that student and community opposition to the GSA could not justify denial of rights); Driver, *supra* note 294, at 125 (noting that "some lower courts have even held that student hecklers must not be permitted to silence student speech"); *cf.* Dara E. Purvis , *Transgender Children, the Heckler's Veto, and Teaching Early Acceptance*, 72 Stud. in Law, Pol., & Soc'y 219, 246 (2017) (suggesting that as children and society become more accepting of trans children, the argument that the existence of transgender children causes "disruption" will weaken even further).

297. *E.g.*, Gillman v. Sch. Bd. of Holmes Cnty., 567 F.Supp.2d 1359, 1375 (N.D. Fla. 2008) (holding that speculative disruptions caused by other students' reactions to pro-gay expression do not justify suppression of the speech).

298. Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

299. Clifford J. Rosky, *No Promo Hetero: Children's Right to Be Queer*, 35 Cardozo L. Rev. 425, 444 (2013).

300. Erwin Chemerinsky, Constitutional Law: Principles and Policies 1015, 1018 (5th ed. 2015).

expression, the law must then satisfy strict scrutiny if it is content-based and intermediate scrutiny if it is content-neutral.[301]

Laws, such as many of those introduced and/or passed in 2021 and 2022, that provide students no freedom regarding their gender expression in that they do not allow a student to access sex-segregated spaces or activities at school unless the space/activity corresponds to the student's sex assigned at birth are clearly prohibitions amounting to an infringement.[302] Common examples of unconstitutional prohibitions include laws that criminalize or impose fines for certain kinds of speech.[303]

But the bureaucratic "committee" process also amounts to an infringement on students' expressive liberty. In addition to outright prohibitions on speech, if a law imposes a prior restraint on speech it is an infringement. In fact, the Supreme Court has at times emphasized that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights,"[304] in part because they amount to *ex ante* regulation and determinations that speech is problematic. And while, as legal scholar Erwin Chemerinsky has explained, a clear distinction between prior restraints and outright prohibitions is not always crystal clear, since both forms of regulation are on the books *before* the speech exists and, if violated, both forms of regulation are enforced via punishment *after* the speech occurs, a prior restraint is generally defined to exist when there is some sort of administrative system for evaluating whether expression can or cannot occur, such as a licensing or permitting regime.[305] As in many contexts, examples are sometimes the best teachers,[306] and regulations deemed prior restraints subject to First Amendment analysis by the Supreme Court include laws requiring written permission before engaging in a parade on city streets[307] and laws that required registering with the city and receiving a permit before engaging in door-to-door advocacy.[308]

As outlined in Part II, many of the procedures developed by school districts to regulate students' gender expression require that students seek

301. *Compare* R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."), *with* United States v. O'Brien, 391 U.S. 367, 377 (1968) (applying intermediate scrutiny to regulation with incidental impact on expressive conduct).

302. Scott Skinner-Thompson, *Resisting Regulatory Oppression of Transgender Children*, The Regulatory Review (July 1, 2021), https://www.theregreview.org/2021/07/01/skinner-thompson-regulatory-oppression-of-trans-children, *archived at* https://perma.cc/VQC2-RTPY.

303. *R.A.V.*, 505 U.S. at 382 (concluding that criminalization of certain speech is an infringement).

304. Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 559 (1976).

305. Chemerinsky, *supra* note 300, at 996.

306. Brentwood Acad. v. Tenn. Secondary School Athletic Ass'n., 531 U.S. 288, 296 (2001) (in the context of discussing what does and does not amount to state action, observing that "examples may be the best teachers").

307. Cox v. New Hampshire, 312 U.S. 569, 578 (1941) (upholding permit regime for holding parade on city streets).

308. Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 167 (2002) (striking down the registration requirement).

permission from the school before expressing their gender identity by taking advantage of sex-segregated spaces and activities.[309] And, at turns, school districts are empowered to "verify" the students' gender before allowing them to participate—this is a classic example of a prior restraint.[310]

In addition to restraining students' gender expression, laws which limits students' ability to live consistently with their gender identity by forcing them to use names, gender markers, and facilities inconsistent with their gender identity constitute an infringement of speech in a third way: they compel students to express a gender identity that is not their own, implicating prohibitions on government-compelled speech.[311] The Supreme Court has recognized that compelling people to speak a particular message is no less pernicious than prohibiting them from speaking their own message.[312] Of particular relevance to the school setting, the Court has ruled that students could not be compelled to salute the flag or say the Pledge of Allegiance because to do so would infringe on students ability to think and enforce conformity.[313] Similarly, and also particularly relevant given that regulation of gender identity often occurs via government-issued documentation, the Supreme Court has declared that forcing people to include a particular message on their government-issued license plate, e.g., New Hampshire's "Live Free or Die" slogan, constituted impermissible compelled speech.[314] Forcing students to adopt gender markers and use sex-segregated spaces that are inconsistent with their gender identity forces the students to profess and express speech that is not their own, in contravention of the compelled speech doctrine.[315]

Briefly, related to the compelled speech analysis, it is worth addressing whether any message being conveyed as a result of the regulations' application to students is the government's speech or the student's speech. While the government's own speech is not subject to First Amendment restraints that apply when the government is regulating private speech,[316] here the regulations at issue implicate students' speech, not that of the government. The Court has identified at least three factors for determining whether speech is the government's or an individual's: whether the government has historically used the speech for its own expressive purposes, whether speech is closely identified

309. *See infra* Part II.

310. *Id.*

311. Flynn, *supra* note 34, at 497–500.

312. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

313. *Id.* at 640–42.

314. Wooley v. Maynard, 430 U.S. 705, 717 (1977).

315. Memorandum in Support of Plaintiffs' Motion for Summary Judgment, Corbitt v. Taylor, No. 2:18-cv-91-MHT-GMB, 2019 WL 690375 (M.D.Ala.) (arguing that Alabama's refusal to allow gender-marker changes on state identification documents constitutes a violation of compelled speech doctrine).

316. Helen Norton, The Government's Speech and the Constitution 31 (2019).

by the public with the government, and whether the government maintained control over the message.[317] Here, these factors militate toward concluding that the regulation of student speech is at issue, not government speech. While all laws express *something*,[318] the government has not historically used gender regulations and sex-segregation to express a particular message of its own *about a specific individual* (as opposed to the law expressing that gender-segregation is appropriate and relevant). And, in fact, the existence of gender-segregated restrooms is actually relatively new, dating to the late 19th century in the United States.[319] More significantly, the public would not attribute a person's presence in a restroom or on a sports team as the government's message since (until the advent of the regulations under consideration) the individual decides what restroom to enter, declaring their gender.[320] Finally, the formal regulation and definition of gender as it relates to sex-segregated spaces—that is, policing who is male, female, or otherwise—is actually quite new with the government taking a relatively hands off approach until recent attempts to enact so-called bathrooms bills aimed at defining who is and is not a particular gender.[321] Until recently, it had largely been left to individuals to make the choice (amidst social pressure) about what sex-segregated space to use.

4. Gender Regulations Fail Application of Scrutiny

Once it is established that there is an infringement via an outright prohibition, prior restraint, or compelled speech, the next question is to determine whether the infringement is content-based, in which case strict scrutiny will apply, or content-neutral, in which the less rigorous but still searching intermediate-scrutiny will apply.[322] Together as a group, these two forms of scrutiny are sometimes referred to as "heightened scrutiny."[323]

A law will be deemed a content-based regulation of speech if it facially distinguishes between "speech because of the topic discussed or the idea or message expressed," or, even if facially neutral, "cannot be justified without reference to the content of the regulated speech" or was "adopted by the government because of disagreement with the message."[324] The Court has continued to take a capacious approach when evaluating what constitutes a content-based

317. *Id.* at 39; *see* Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 209–10 (2015) (collating factors).

318. *E.g.*, David Garland, Punishment and Modern Society 68 (1990) (explaining that the penal process is "a means of evoking, expressing, and modifying passions, as well as an instrumental procedure for administering offenders"); Kirstie Ball et al., *Big Data Surveillance and the Body-subject*, 22 Body & Soc'y 58, 70–71 (2016) (explaining that "[S]urveillance communicates value systems to the surveilled.").

319. Cavanagh, *supra* note 211, at 7.

320. *See infra* Part I.C, Part II.A.1.

321. Phillips, *supra* note 212.

322. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (applying intermediate scrutiny to regulation which had incidental impact on expressive conduct).

323. *Cf.* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985).

324. Reed v. Town of Gilbert, 576 U.S. 155, 163–64 (2015) (quotations and citations omitted).

regulation.[325] Here, there can be little doubt that the school regulations of student's gender are content-based in that they are focused on regulating speech about the student's gender, cannot be justified without referencing the student's gender, and are often meant to directly stop the student's gender expression.

As such the regulations would be subject to strict scrutiny requiring that the law be the least restrictive means of achieving a compelling government interest.[326] But even if the law were deemed content-neutral and to have only an incidental impact on speech, it would still be subject to intermediate scrutiny requiring that the law be narrowly tailored to serve a significant or important government interest and leave open ample opportunities for communication. The school regulations cannot survive either form of heightened scrutiny.

Regulation of student's gender identity is often defended in the name of preserving cisgender students' privacy,[327] and, in the sports context, preserving opportunities for cisgender females to "fairly" participate in gender-segregated sports.[328] Assuming that these are, in the abstract at least, important concerns, the existence of trans and gender variant students does not jeopardize those interests, suggesting that laws are not tailored to achieve those government interests.

As to the privacy concerns, bathrooms are increasingly designed to provide personal privacy to anyone who desires it—stalls are available for those that do not want their external genitalia exposed and who do not want to be exposed to other people's genitalia.[329] Locker rooms too are increasingly designed to allow anyone desiring not to be observed to have access to private spaces through practical and cheap interventions such as privacy curtains.[330] In other words, the vast committees that have been created to regulate student gender identity are not narrowly tailored to achieve the goals of privacy and far less restrictive alternatives exist, such as privacy curtains and the like. That is, the laws are overinclusive and regulate more than necessary to achieve their goal of privacy and therefore fail both intermediate and strict scrutiny.[331]

Moreover, to the extent the laws are motivated by purported concern over people's prurient interests in gender-segregated spaces, there is scant evidence

325. *Id.*

326. R.A.V. v. St. Paul, 505 U.S. 377, 382–83 (1992).

327. *E.g.*, Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 527 (3d Cir. 2018) (analyzing privacy arguments made against letting trans students use facilities consistent with their gender identity).

328. *E.g.,* Washington Interscholastic Athletic Association, 2020–2021 Official Handbook § 18.15 app. A.

329. Skinner-Thompson, *Battle Over Privacy*, *supra* note 204.

330. Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 Wis. J.L. Gender & Soc'y 271, 288 (2013).

331. *Cf.* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 538 (1973) (holding that even under rational basis review, where a law is completely divorced from advancing its stated goal, it will be deemed unconstitutional); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) (same).

people will take advantage of trans affirming policies to masquerade into a bathroom and assault someone—myths that have been repeatedly debunked.[332]

Trans and gender variant youth's gender identities do not pose a threat to anyone else.[333] Such arguments regarding trans people also completely overlooks issues of sexuality. Trans youth—like cisgender youth—can be straight, gay, bi, or pan. While one's own gender may play a role in one's sexuality to the extent part of sexuality involves how our bodies interact with each other, one's gender does not *dictate* one's sexuality, and schools rightly permit people of all sexualities to use school restrooms and locker rooms.[334] Thus, to the extent laws regulating gender ignore issues of sexuality, the laws are also underinclusive such that they would fail intermediate or strict scrutiny.[335]

Concerns regarding trans female youth taking athletic opportunities from cisgender youth are also overstated.[336] To begin, such arguments ignore that the paramount purposes of youth sports is not winning, but developing physical ability, social interaction, mental health, self-esteem, and teamwork among all participants.[337] The developmental benefits of athletic participation are acutely important for vulnerable groups, such as transgender students, who already face tremendous barriers in terms of social recognition and feelings of isolation.[338] And while Title IX's endorsement of sex-segregated athletics undoubtedly serves an important feminist objective in advancing women's rights by creating space for women's athletic competition, that promise extends to all women.[339] Regardless of who participates, only a handful of students "win a championship" in any given year. Being assigned an accurate sex at birth does not mean

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332. Erin Fitzgerald, *A Comprehensive Guide to the Debunked "Bathroom Predator" Myth*, Media Matters (May 5, 2016, 1:51 PM), https://www.mediamatters.org/sexual-harassment-sexual-assault/comprehensive-guide-debunked-bathroom-predator-myth, *archived at* https://perma.cc/TXM7-MVZ7.

333. Chase Strangio, *Transgender People Aren't a Threat to You*, ACLU (May 6, 2016), https://www.aclu.org/blog/lgbtq-rights/transgender-rights/transgender-people-arent-threat-you, *archived at* https://perma.cc/7MZ9-GFN4 .

334. Skinner-Thompson, *Battle Over Privacy*, *supra* note 204.

335. *Moreno,* 413 U.S. 529.

336. The following two paragraphs draw from a short popular press piece I authored, Scott Skinner-Thompson *, Trump Administration Tells Schools: Discriminate Against Trans Athletes or We'll Defund You*, Slate (June 4, 2020, 4:33 PM), https://slate.com/news-and-politics/2020/06/betsy-devos-transgender-athletes-connecticut.html, *archived at* https://perma.cc/2RW6-VXN4.

337. *See* Pat Griffin & Helen J. Carroll, On the Team: Equal Opportunity for Transgender Student Athletes (2010); Lindsay A. Taliaferro et al., *High School Youth and Suicide Risk: Exploring Protection Afforded Through Physical Activity and Sport Participation,* 78 J. Sch. Health 545, 552 (2008); Jacquelynne S. Eccles & Bonnie L. Barber, *Student Council, Volunteering, Basketball, or Marching Band: What Kind of Extracurricular Involvement Matters?*, 14 J. of Adolescent Res. 10, 18 (1999).

338. *See* GLSEN, The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, and Queer Youth in Our Nation's Schools (2020).

339. Erin Buzuvis, " *On the Basis of Sex": Using Title IX to Protect Transgender Students from Discrimination in Education*, 28 Wis. J.L. Gender & Soc'y 219, 243 (2013).

victory is a birthright. Nor should being assigned an inaccurate sex at birth render you perpetually excluded.

Moreover, it is important to bear in mind that sex is a poor proxy for physical ability or size (much less a coherent category itself).[340] Put differently, the range of physical differences within a particular sex category is far greater than the average differences between cisgender males and females.[341] Even at the college and adult level, the National Collegiate Athletic Association (NCAA) recognizes that trans female athletes do not inherently have an advantage compared to cisgender females.[342] The NCAA notes that "many people may have a stereotype that all transgender women are unusually tall and have large bones and muscles. But that is not true."[343] The NCAA has emphasized the importance of not overgeneralizing and not assuming that all transgender females "are taller, stronger, and more highly skilled in a sport than" cisgender females.[344]

In short, the committee structure fails either form of heightened scrutiny because the inclusion of transgender children does not implicate the purported interests justifying the bureaucratic regulations, making the regulations unnecessary and overly restrictive. And, as documented above, the committee structure actually undermines many of its goals, harming the privacy and well-being of trans and gender variant children, rendering it counterproductive.[345]

5. Comparison to Equality Arguments

Any fair evaluation of the strength of framing gender identity as an issue of First Amendment gender expression must involve a comparison to other viable options, the most prominent of which is equality arguments under either the Equal Protection Clause or federal statutory prohibitions on sex discrimination. And in fact, equality arguments regarding transgender equality have been met with meaningful success, with the Supreme Court's recent decisions protecting transgender people from employment discrimination under Title VII as the most prominent example.[346] There are also important examples of transgender students being protected through an equality lens from discrimination in public schools, including the high-profile example of Gavin Grimm, a victory which the Supreme Court refused to reconsider.[347]

340. *See supra* Part I.

341. *See* Hoover v. Meiklejohn, 430 F. Supp. 164, 166 (D. Colo. 1977).

342. Nat'l Collegiate Athletic Ass'n, NCAA Inclusion of Transgender Student-Athletes 7 (Aug. 2011).

343. *Id.*

344. *Id.*

345. *Cf.* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–38 (1973) (striking down law under rational basis review where it actually impeded its stated objective of helping meet people's nutritional needs).

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

347. *E.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020), *cert. denied* 141 S. Ct. 2878 (June 28, 2021).

But an examination of those victories underscores two principal short comings of equality arguments thus far. First, as demonstrated by the way equality arguments have been litigated, the equality lens has been most useful for those most well-equipped to comply with the Bio-Medical-Mental and Social Understandings of gender identity, leaving the many that cannot, including non-binary folk, less protected.[348] Second, the equality lens has proven most effective when dealing with bans on gender transition by public schools, such as those at issue in the Grimm case, which required the student to use the bathroom according to their sex assigned at birth, but at times has been deployed in a way to prop up and reify the committee structure. That is, the equality litigation often relies on and presupposes people who are able to comply with the restrictive models of gender outlined in Part I and the procedures outlined in Part II.

In case after case, plaintiffs pursing litigation under an equality lens against bans on transgender students emphasize their adherence to the both the Bio-Medical-Mental and Social Understandings and presume that trans students can comply with those models. Students' complaints often mention that the gender identity of transgender adolescents is "stable and fixed."[349] Students' complaints emphasize the role of "'social transition,' in which the individual lives in accordance with his gender identity in all aspects of life" as a means of treating gender dysphoria.[350] They also underscore the students' conforming gender appearance, sometimes including a photograph,[351] and that the student is indeed accepted by their community as a boy or girl.[352] They emphasize that "living full-time in accordance with one's gender identity in all aspects of life for at least one year is a prerequisite for any medical interventions."[353] And often the students note that they themselves are engaged in medical care for gender dysphoria, including potentially medical interventions such as hormone treatment, and are supported by their medical professionals.[354] They also

348. Marie-Amelie George, *Framing Trans Rights* 114 NW. U. L. Rev. 555, 610 (2019) (observing that sex equality frames for transgender rights may have reinforced the gender binary to the detriment of non-binary people).

349. Second Amended Complaint P 24, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020) (No. 4:15-cv-00054) [hereinafter *Grimm* Amended Complaint].

350. *Grimm* Amended Complaint P 17, Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034 (7th Cir. 2017) (No. 2:16-cv-00943) [hereinafter Whitaker Amended Complaint]; *see also* Complaint P 26, Hecox v. Little, 479 F.Supp.3d 930 (D. Idaho Aug. 17, 2020) (No. 1:20-cv-00184) [hereinafter Hecox Complaint].

351. *Grimm* Amended Complaint P 2 (emphasizing student's appearance as "typical" of other boys); *Hecox* Complaint P 23 (including photo of plaintiff).

352. *Whitaker* Amended Complaint P 26; *see also Grimm* Amended Complaint P 2.

353. *Whitaker* Amended Complaint P 18; *see also Grimm* Amended Complaint P 1 (underscoring that the student "with the help of his medical providers, transitioned to living in accordance with his male identity as part of medically necessary treatment for gender dysphoria").

354. *Whitaker* Amended Complaint P 25; *see also Grimm* Amended Complaint PP 1, 40; *Hecox* Complaint P 29.

carefully note that they adhered to all the requirements including meeting with school officials to, in effect, clear the acceptability of the student's transition.[355]

Now, it's possible these cases could have been litigated differently. One can imagine equality arguments being made on behalf of those who resist categorization at all, but to date the pull of the hegemonic models of gender has not engendered such framing. And, as outlined above, the expressive model provides a surer path of creating the most discursive space for all people—regardless of their gender identity.

There may also be concern that framing the identities of minoritized gender identities as expressive and underscoring the role of social context in understanding conduct as expressive will just as easily lead to protection for anti-queer speech by students in the schoolhouse or bolster expressive arguments made by those seeking to exclude queer folk from, for example, public accommodations. This concern is overstated for a couple of reasons. First, as outlined above, understanding gender identity as expressive is very consistent with existing First Amendment jurisprudence and does not greatly expand the kind of conduct already deemed as expressive, as evidence by the Court's decisions in *Hurley*[356] and *Dale*.[357] Second, on the back end of the analysis, the compelling government interest of protecting queer people will continue to justify anti-discrimination laws, even should, for example, the cake baker's activity be deemed his expression.[358] Similarly with respect to anti-queer speech in school, such speech by students would be disruptive under *Tinker* because it infringes with the rights of others and can be regulated consistent with the First Amendment, as courts have already concluded.[359]

There may also be concern that an expressive, First Amendment frame does not solve the distributional problems because in order to enforce a First Amendment right, it would still require resources to bring a lawsuit. That may be true in the first instances, but if such First Amendment challenges are successful, the bureaucratic structures outline in Part II would need dismantling or at the very least reworking. In other words, the currently prevailing approach holds up the (inaccessible) bureaucracies as the solution, whereas a First Amendment approach—while of course requiring resources—could yield a more emancipatory result after litigation.

Finally, there may be concern that an emphasis on expressive identity exploration will create more opposition and backlash to the reality of trans existence precisely because of the comparative freedom it provides through its

355. *Whitaker* Amended Complaint P 27; *see also Grimm* Amended Complaint P 3.

356. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995).

357. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

358. Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 Wm. & Mary Bill Rts. J. 595, 596 (2001) (arguing LGBT non-discrimination laws survive First Amendment scrutiny because of the compelling interest in achieving equality).

359. *E.g.*, Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1170–71 (9th Cir. 2006) (upholding denial of preliminary injunction in case involving school's regulation of homophobic expression).

more fluid approach to gender. That's quite possible and an important consideration. But given the current vehemence with which trans lives are already being attacked,[360] a compelling argument can be made in favor of embracing the most emancipatory model. For example, as noted, South Dakota just outlawed trans female participation in high school sports notwithstanding that under the committee approach that governed over the last decade or so only one trans female athlete successfully availed themselves of the process in order to participate.[361] In other words, the backlash is happening one way or another.

Conclusion

The degree to which the identities of trans and gender variant students are subject to administrative surveillance and control by public schools is breathtaking. Even students attending relatively open-minded institutions, with supportive families, and the resources needed to navigate the bureaucratization of student gender face tremendous hurdles in terms of simply living their gender. More so for the many students without those assets. But a more emancipatory model may be available that would let students live and explore their identities without proving their identity and without seeking permission from doctors, mental health counselors, administrators, and others. Appreciating the expressive and performative components of students' gender could not only provide them First Amendment protection, more fully opening the schoolhouse gate to trans and gender variant students, but it could also help open the minds of our society more broadly to the ways in which gender exploration need not be feared. Instead, it can be embraced for the courageous and beautiful act of defiance and creation it is.

360. Page, *supra* note 92, at 143.
361. Matzen, *supra* note 203.

DISORDERLY CONTENT

Ari Ezra Waldman

ABSTRACT

Content moderation plays an increasingly important role in the creation and dissemination of expression, thought, and knowledge. And yet, throughout the social media ecosystem, nonnormative and LGBTQ+ sexual expression is disproportionately taken down, restricted, and banned. The current sociolegal literature, which focuses on content moderation as a whole and sees echoes of formal law in the evolution of its values and mechanics, insufficiently captures the ways in which those principles and practices are not only discriminatory, but also resemble structures of power that have long been used to police queer sexual behavior in public spaces.

This Article contributes to the sociolegal literature by approaching content moderation from an explicitly queer perspective, bridging siloed scholarship on law, technology, and LGBTQ+ history. It argues that content moderation for "sexual activity" is an assemblage of social forces that encodes queerness as sexual in a way that straightness is not. This is the case because far from simply reflecting free speech principles, as several scholars have argued, content moderation in fact resembles oppressive anti-vice campaigns from the middle of the last century in which "disorderly conduct," "vagrancy," "lewdness," and other vague morality statutes were disproportionately enforced against queer behavior in public. This analogy highlights underappreciated pieces of the content moderation puzzle. Like anti-vice campaigns, sexual content moderation emerged from similar sociolegal contexts, relies on similar justificatory discourses, leverages similarly vague rules, similarly operates mostly without rigorous, science-backed expertise in sexual content, also disproportionately silences queer content, and similarly does so without due process. Ultimately, I argue that like anti-vice enforcement, sexual content moderation results in the maintenance and reification of social media as "straight spaces" that are hostile to queer, nonnormative expression.

This Article provides a full, critical account of sexual content moderation and its effects on queer expression. It details and challenges the current content moderation literature and explores potential new directions for scholarship, moderation, and law. The similarities and differences between anti-vice enforcement and sexual content moderation also suggest a way forward, offering novel justifications for modest legal reform, social activism, and platform responsibility.

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Introduction

Twitter identifies drag queen accounts as more toxic that those of white supremacists.[1] YouTube hid a video entitled "I Am Transgender," restricted another where a content creator talks about her bisexuality, and demonetized a slew of LGBTQ videos as controversial.[2] Instagram takes down posts by the queer-focused Leslie-Lohman Museum, restricts the reach of queer sex workers and porn stars, and has removed pictures of shirtless trans men that would be perfectly anodyne if the subject were cisgender.[3] The very process of flagging—through which other members report allegedly offending content to platforms—censors queer content by subjecting it to the heteronormative judgments of others.[4]

In many cases of queer censorship online that gain enough attention in the press, platforms eventually apologize and concede that their algorithm made mistakes.[5] Legal scholarship on content moderation—the sociotechni-

1. Thiago Dias Oliva, Dennys Marcelo Antonialli & Alessandra Gomes, Fighting Hate Speech, Silencing Drag Queens? Artificial Intelligence in Content Moderation and Risks to LGBTQ Voices Online, 25 Sexuality & Culture 700, 703 (2021).

2. Libby Watson, *YouTube's Restricted Mode Is Hiding Some LGBT Content*, Gizmodo (Mar. 18, 2017), https://www.gizmodo.com.au/2017/03/youtubes-restricted-mode-is-hiding-some-lgbt-content [https://perma.cc/WR4Z-RAXT]; Molly Priddy, *Why Is YouTube Demonetizing LGBTQ Videos?*, AutoStraddle (Sept. 22, 2017), https://www.autostraddle.com/why-is-youtube-demonetizing-lgbtqia-videos-395058/ [https://perma.cc/Z8Y3-NKBN].

3. Leslie-Lohman Museum of Art (@leslielohmanmuseum), Instagram (June 10, 2021), https://www.instagram.com/p/CP83f34F3LS/?utm_medium=copy_link (last visited Oct. 13, 2022); Eli Erlick, *How Instagram May Be Unwittingly Censoring the Queer Community*, Them (Jan. 30, 2018), https://www.them.us/story/instagram-may-be-unwittingly-censoring-the-queer-community [https://perma.cc/Y7W3-A9E4]; Cherie DeVille, *Think Conservatives Are Censored on Social Media? Try Being a Porn Star*, Daily Beast (May 30, 2021), https://www.thedailybeast.com/think-conservatives-are-censored-on-social-media-try-being-a-porn-star [https://perma.cc/RG9L-Z3NS]; Richard Renaldi (@renaldiphotos), Instagram (July 1, 2021), https://www.instagram.com/p/CQynMmIBCk9/?utm_medium=share_sheet (last visited Oct. 13, 2022).

4. Kate Crawford & Tarleton Gillespie, *What Is a Flag For? Social Media Reporting Tools and the Vocabulary of Complaint*, 18 New Media & Soc'y 410, 411, 413 (2016).

5. *E.g.*, Susan Wojcicki, *A Message on Pride and LGBTQ Initiatives*, YouTube Off. Blog (June 19, 2017), https://youtube-creators.googleblog.com/2017/06/a-message-on-pride-and-lgbtq-initiatives.html [https://perma.cc/52ED-EWMH]; Lily Wakefield, *TikTok Insists It 'Celebrates and Protects' Queer Creators but Apologises for Censoring 'Vulnerable' LGBT+ Users*, PinkNews (Sept. 23, 2020), https://www.pinknews.co.uk/2020/09/23/tiktok-censorship-lgbt-content-theo-bertram-parliamentary-sub-committee/ [https://perma.

cal rules and systems that decide the fate of user-generated content on digital platforms—also tends to focus on mistakes: the content that should never have been taken down or should never have been allowed in the first place.[6] Other scholars have studied content moderation's animating values, as well as its inequities, inadequate sociotechnical processes, and harmful effects on those doing the monitoring.[7] In other words, it is common to hear about content moderation going wrong. A troubling, but more compelling reading of this pattern of restrictions is that censoring queer content is not content moderation going wrong at all, but rather the natural consequence of sexual content moderation doing exactly what it was designed to do.

The disproportionate removal of some content and not others must be studied for what it reveals about platform power, free expression, and regulation. This Article contributes to our understanding of content moderation by approaching it from the experiences of queer people and those whose sexual

cc/4XV8-HX94]; EJ Dickson, *Why Did Instagram Confuse These Ads Featuring LGBTQ People for Escort Ads?*, Rolling Stone (July 11, 2019), https://www.rollingstone.com/culture/culture-features/instagram-transgender-sex-workers-857667/ [https://perma.cc/NW4R-836V]; *see also* Johanna Wright, *An Update on Restricted Mode*, YouTube Off. Blog (Apr. 21, 2017), https://blog.youtube/news-and-events/an-update-on-restricted-mode/ [https://perma.cc/XL5V-ASKN].

6. *See, e.g.*, Evelyn Douek, *Governing Online Speech: From "Post-as-Trumps" to Proportionality and Probability*, 121 Colum. L. Rev. 759, 762, 808 (2021) [hereinafter Douek, *Governing*] ("There is no denying, and indeed Facebook acknowledged, that these were mistakes.").

7. On content moderation's animating values, see, for example, Tarleton Gillespie, Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media (2018); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598 (2018) [hereinafter Klonick, *Governors*]; Douek, *Governing*, *supra* note 6. On content moderation's inequities, see, for example, Gillespie, *supra*; Danielle Keats Citron, *Sexual Privacy*, 128 Yale L.J. 1870 (2019) [hereinafter Citron, *Sexual Privacy*]; Kyle Langvardt, *Regulating Online Content Moderation*, 106 Geo. L.J. 1353 (2017); Ariadna Matamoros-Fernández, *Platformed Racism: The Mediation and Circulation of an Australian Race-Based Controversy on Twitter, Facebook and YouTube*, 20 Info. Commc'n & Soc'y 930 (2017); Sarah T. Roberts, *Digital Detritus: 'Error' and the Logic of Opacity in Social Media Content Moderation*, 23 First Monday (2018) [https://perma.cc/J8J7-KFRT] [hereinafter Roberts, *Detritus*]; Julia Angwin & Hannes Grassegger, *Facebook's Secret Censorship Rules Protect White Men from Hate Speech But Not Black Children*, Mother Jones (June 28, 2017), https://www.motherjones.com/politics/2017/06/facebooks-secret-censorship-rules-protect-white-men-from-hate-speech-but-not-black-children/ [https://perma.cc/TC94-EXHX]. On content moderation's technical elements, see, for example, Sarah T. Roberts, Behind the Screen: Content Moderation in the Shadows of Social Media (2019) [hereinafter Roberts, Screen]; Hannah Bloch-Wehba, *Automation in Moderation*, 53 Cornell Int'l L.J. 41 (2020); Crawford & Gillespie, *supra* note 4; J. Nathan Matias, Amy Johnson, Whitney Erin Boesel, Brian Keegan, Jaclyn Friedman & Charlie DeTar, Reporting, Reviewing, and Responding to Harassment on Twitter (2015), https://arxiv.org/pdf/1505.03359.pdf [https://perma.cc/2HEY-JQG6]. On harms to moderators, see, for example, Mary L. Gray & Siddharth Suri, Ghost Work (2019); Sarah T. Roberts, *Commercial Content Moderators: Digital Laborer's Dirty Work*, *in* The Intersectional Internet: Race, Sex, Class and Culture Online 147–60 (Safiya Noble & Brendesha Tynes eds., 2016) [hereinafter Roberts, *Dirty Work*].

expression sits outside traditional norms. Simply put, I argue that sexual content moderation is best understood as an assemblage of social, legal, and technological forces that encodes queerness as inherently sexual in a way that heteronormative content is not. In that way, sexual content moderation does not reflect free speech principles, as many scholars have argued; rather, it resembles anti-vice policing and, as a result, ultimately reifies social media as "straight spaces." The implications of this analogy are profound: Sexual content moderation was not designed with express anti-queer intentions, but just like with anti-vice policing, the disproportionate regulation of queer sexuality is the direct result of the institution's constituent pieces working as they were designed.

There are three elements to this argument. First, content moderation is an assemblage—a convergence of social phenomena that exerts power in ways that each individual element could not—comprising background law, values, rules, design, technology, and people that come together to achieve platforms' economic, moral, and political goals.[8] Scholars have studied many of these pieces independently. Part I reconstructs that literature to demonstrate the different yet complementary roles played by each piece.

The second part of the argument is that sexual content moderation resembles anti-vice policing of the mid-twentieth century. This argument is a historical one; that is, we have seen these precise pieces assembled before with similar consequences for public expression of queer sexuality. Part II describes how sexual content moderation parallels the assemblage of sociolegal contexts, discourses, applicable rules, technologies and expertise, enforcement strategies, and processes that policed queer behavior from the 1930s through the 1960s, where police used anti-vice laws like "disorderly conduct," "lewdness," and "vagrancy" to harass and arrest those exhibiting nonnormative sexual behavior and to shut down those bars that served queer patrons.[9] Although we should be careful not to make too much of this analogy,[10] the parallels between anti-vice policing and content moderation are unmistakable. History may not always repeat, but it certainly rhymes.[11]

8. Gilles Deleuze & Fèlix Guattari, A Thousand Plateaus (1987); Manuel DeLanda, A New Philosophy of Society: Assemblage Theory and Social Complexity (2006).

9. Anna Lvovsky, Vice Patrol 3–8 (2021). These elements are not always distinct. Several progressive legal movements recognize that sociological, institutional, and discursive contexts cannot be disaggregated from law, itself an endogenous creation of interested social and economic actors. *E.g.*, Morton J. Horwitz, The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy (1994); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 Yale L.J. 1515, 1516–17 (1991); Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 Yale L.J. 1784, 1792–94 (2020). The assemblage construct asks us to see how even overlapping elements work together exert power in unique ways. Kevin D. Haggerty & Richard V. Ericson, *The Surveillant Assemblage*, 51 Brit. J. Socio. 605, 608 (2000).

10. *See infra* section II.C and discussions of differences between anti-vice policing and sexual content moderation throughout sections II.A and II.B.

11. A version of this aphorism is commonly attributed to Mark Twain, but there is

This analogy teaches us something that has been missing in the content moderation literature. It is not enough to understand content moderation as a pragmatic balancing of competing interests.[12] Nor is it sufficient to conceptualize it as ex ante administration rather than adjudication after the fact.[13] We should also see sexual content moderation as yet another battlefield in a long struggle over the visibility of queer sexuality. This is the third piece of my argument. Through its similarities and differences, the analogy to anti-vice policing surfaces three ways that sexual content moderation encodes queerness as illicit sexuality and makes and maintains social media platforms as "straight spaces," or spaces built on heterosexual norms, constructed to be unwelcome to queer and nonnormative expression, and designed to reify the heteronormative supremacy of our institutions.[14]

First, the effect of sexual content moderation's on-the-ground practices, like the practical effect of anti-vice policing, is to deny queer people dignity and to chill nonnormative sexual expression. This skews the production and dissemination of public knowledge about queer life. Second, sexual content moderation and anti-vice policing use the technologies of their day to disproportionately surveil nonnormative sexual behavior, imbuing technology with heteronormative politics. Finally, the analogy also demonstrates how law contributes to the maintenance of straight spaces online. In both contexts, the law amplified the power of those regulating queer behavior.[15] However, unlike victims of anti-vice laws, who were sometimes able to use the courts as weapons against police overreach,[16] queer people online have no access to the kind of judicial discretion and impact litigation that ultimately protected victims of anti-vice policing. That asymmetry threatens to maintain structures of power in ways anti-vice authorities could never have fathomed.

Now is the time to deepen our understanding of content moderation. Platforms are under unprecedented scrutiny for anti-trust, competition, and privacy law violations.[17] Content moderation itself has caught the eye of poli-

no evidence he said it. He did say "[h]istory never repeats itself" in 1874. Samuel Clemens & Charles Warner, The Gilded Age: A Tale of To-Day 430 (1874). The earliest known recorded version of the adage comes from the psychoanalyst Theodor Reik. Theodor Reik, Curiosities of the Self: Illusions We Have about Ourselves 133 (1965).

12. Douek, *Governing*, *supra* note 6, at 763.

13. Evelyn Douek, *Content Moderation as Systems Thinking*, 136 Harv. L. Rev. (forthcoming 2022) (manuscript at 4) (on file at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4005326 [https://perma.cc/7MEC-LCEW]) [hereinafter Douek, *Systems*].

14. The notion of "straight space" is adapted from the notion of "white space" in critical race theory. Elijah Anderson, *"The White Space"*, 1 Socio. Race & Ethnicity 10, 10 (2015).

15. Lvovsky, *supra* note 9, at 5–6; Julie E. Cohen, Between Truth and Power: The Legal Constructions of Informational Capitalism 75–107 (2019) (demonstrating how information industry actors leverage legal tools to amplify their power and insulate themselves from liability).

16. William N. Eskridge, Jr., Gaylaw: Challenging the Apartheid of the Closet 101–11 (2002) [hereinafter Eskridge, Gaylaw]; Lvovsky, *supra* note 9, at 134–36, 257–58.

17. *E.g.*, Cecilia Kang & David McCabe, *House Lawmakers Are Considering 6 Bills*

cymakers across the political spectrum.[18] Society's overdue attention to racial, gender, and sexual justice is taking a magnifying glass to platforms' complicity in reifying traditional structures of power.[19] And, at the same time, some of the biggest social media platforms today are building social spaces for the future and are, therefore, at risk of making the same mistakes of the past.[20] In other words, cascading social forces threaten to change the face of social media and platform governance. Making social media queer friendly after this period of contestation requires a more nuanced, intersectional understanding of the institutions at play and, ultimately, sustained social activism in the face of a rigid sexual hierarchy.

This Article proceeds in four Parts. Part I reviews the literature on content governance, making the descriptive claim that content moderation is best understood as an assemblage of ideas, rules, technology, and people rather than as a monolithic institution. This section concludes by highlighting three gaps in the literature—namely, the lack of granularity in discussions of content moderation, the lack of explicitly queer examples, and the near-universal focus on moderation mistakes as case studies for broader conclusions about content moderation as a whole. Part II argues that the assemblage of sexual content moderation is similar to the assemblage of anti-vice policing in the United States from the 1930s through the 1960s, demonstrating that the values, machinery, and rationales of the former live on in the latter. Part III demonstrates how the analogy to anti-vice policing highlights sexual content moderation's role in sustaining social media as straight spaces hostile to queer people and nonnormative sexual discourse. Part IV considers proposals to regulate platform moderation through a queer lens and then looks to the anti-vice policing context to suggest several steps that could make social media more inclusive of queer expression. The Article briefly concludes by situating its contributions in a larger research agenda about the conflict among technology, law, and queer liberation.

Before turning to my analysis, let me define several terms. "Queer" is a flexible term that refers to disrupting narratives and institutions structured around traditional understandings of sex and gender.[21] To be queer is to be

Aimed at Big Tech, N.Y. Times (June 23, 2021), https://www.nytimes.com/2021/06/23/technology/big-tech-antitrust-bills.html [https://perma.cc/M2G9-PB38].

18. David Morar & Bruna Martins dos Santos, *The Push for Content Moderation Legislation Around the World*, Brookings (Sept. 21, 2020), https://www.brookings.edu/blog/techtank/2020/09/21/the-push-for-content-moderation-legislation-around-the-world/ [https://perma.cc/L4PD-NTA8].

19. *E.g.*, Charlton McIlwain, *Of Course Technology Perpetuates Racism. It Was Designed That Way.*, MIT Tech. Rev. (June 3, 2020), https://www.technologyreview.com/2020/06/03/1002589/technology-perpetuates-racism-by-design-simulmatics-charlton-mcilwain/ [https://perma.cc/RY8H-GVDG].

20. *E.g.*, James Factora, *The Metaverse Is Going to Suck for Queer People*, Them (Feb. 9, 2022), https://www.them.us/story/metaverse-queer-lgbtq-users-harassment-discrimination-facebook [https://perma.cc/WCT7–27JN].

21. *See, e.g.*, Eve Kosofsky Sedgwick, Tendencies 8 (1993) (defining "queer" as "the open mesh of possibilities . . . of meaning when the constituent elements of anyone's gender,

nonnormative.[22] This Article uses "queer" to capture people and behaviors that do not conform to traditional sexual norms. Under this definition, queer can capture content related to sex work, pornography, sex toys, nonmonogamy, and other nonheteronormative uses of our bodies. Although I recognize that queer is not synonymous with the lesbian, gay, bisexual, and transgender community, I will also use "queer" as an umbrella term for these sexual and gender minorities for ease and fluidity of language.

Because nonnormative sexuality is one defining feature of queerness, this Article focuses its analysis on *sexual content moderation* rather than on content moderation as a whole. Sexual content moderation is a subset of moderation rules and procedures that evaluate content of a sexual nature, including sexual activity, nudity, pornography, intimacy, and the like. All major platforms discussed below have specific policies for "sexual activity."[23] I will also refer to those major platforms as *social media*—namely, those internet platforms that allow and derive value from the creation and exchange of user-generated content.[24] Social media platforms are a subset of the Internet as a whole; the largest of those platforms are a further subset. Most of this Article's examples come from today's major platforms, including Facebook, Instagram, YouTube, Twitter, and TikTok.

I. The Content Moderation Assemblage

An assemblage is a convergence of discrete systems of control.[25] The philosophers Gilles Deleuze and Felix Guattari stated that assemblages are a "multiplicity of heterogenous objects, whose unity comes solely from the fact these items function together, that they 'work' together as a functional entity."[26]

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of anyone's sexuality, aren't made (or *can't be* made) to signify monolithically") (emphasis in original); *see also* Lauren Berlant & Michael Warner, *What Does Queer Theory Teach Us About X?*, 110 PMLA 343, 346 (1995); Judith Butler, Bodies That Matter 177 (Routledge Classics ed. 2011) (defining "queer" as "a contestation of the terms of sexual legitimacy").

22. David M. Halperin, Saint Foucault: Towards a Gay Hagiography 62 (1995) (defining "queer" as "whatever is at odds with the normal, the legitimate, the dominant. . . . It . . . demarcates not a positivity but a positionality vis-à-vis the normative") (emphasis omitted).

23. *E.g.*, *Adult Nudity and Sexual Activity*, Meta, https://transparency.fb.com/policies/community-standards/adult-nudity-sexual-activity/?source=https%3A%2F%2Fwww.facebook.com%2Fcommunitystandards%2Fadult_nudity_sexual_activity [https://perma.cc/9D42-JE36]; *Adult Nudity and Sexual Activities*, TikTok, https://www.tiktok.com/community-guidelines?lang=en#30 [https://perma.cc/5NJG-VTGH]; *Nudity & Sexual Content Policy*, YouTube, https://support.google.com/youtube/answer/2802002#zippy=%2Cother-types-of-content-that-violate-this-policy [https://perma.cc/P9FN-CXSY].

24. Andreas M. Kaplan & Michael Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 Bus. Horizons 59, 60–61 (2010); Caleb T. Carr & Rebecca A. Hayes, *Social Media: Defining, Developing, and Divining*, 23 Atl. J. Commc'n 46, 47–48 (2015).

25. Haggerty & Ericson, *supra* note 9, at 606.

26. Paul Patton, *Metamoropho-Logic: Bodies and Powers in* A Thousand Plateaus, 25 J. Brit. Soc'y Phenomenology, 157, 158 (1994).

Assemblages can include people, institutions, things, knowledge, and technologies, just to name a few; they seek to explain "all the voices present within a single voice."[27] Their goal is to exert control, to "introduc[e] breaks and divisions into otherwise free-flowing phenomena,"[28] like, in this case, information.

For instance, city traffic, which could be a dangerous mess if unregulated, is controlled through an assemblage of policymakers, experts, roads, directional signs, traffic lights, norms of cooperation (at a four-way intersection) or rule-breaking (as in the case of jaywalking in New York City), traffic cops, yellow and white solid or dotted lines, speed limits, sensors, and even the availability of alternative forms of transportation like subways. Kevin Haggerty and Richard Ericson used the notion of an assemblage to explain how overlapping forms of surveillance come together to extract data and exert power over individuals in ways disparate, non-linked surveillance tools cannot.[29] Tania Bucher conceptualized Facebook as an assemblage of "the social and technical," including people, nonhumans, algorithms, social practices, and cultural values.[30] In all cases, individual elements have "distinctive but mutually shaping roles."[31]

Content moderation involves the background laws, ideas, rules, technologies, and people that collectively—both ex ante and ex post—determine the appropriateness of content for a given platform.[32] Understanding content moderation not as a monolithic institution, but rather as several assemblages of social forces, allows us to see previously hidden patterns. One of those patterns is sexual content moderation's resemblance to anti-vice policing and its designed-in and natural hostility to queer and nonnormative content. This Part recharacterizes relevant sociolegal scholarship on content moderation as an assemblage and concludes by surfacing three prominent gaps in the literature. In particular, scholars have insufficiently interrogated different types of content moderation, the experiences of queer content creators, and the implications of the discourse of mistake.

A. *Deconstructing Moderation*

There are at least six overlapping pieces to the content moderation puzzle: background law, discourses, rules, design, machines, and people.[33] Content

27. Deleuze & Guattari, *supra* note 8, at 88. They also need to explain the effects of missing voices. *See, e.g.*, Judy Wajcman, *Reflections on Gender and Technology Studies: In What State Is the Art?*, 30 Soc. Stud. Sci. 447, 452 (2000) (highlighting the blind spot of social research that follows the work of social actors without considering the work of those excluded from sociopolitical and scientific spaces for structural reasons).

28. Haggerty & Ericson, *supra* note 9, at 608.

29. *Id.*

30. Tania Bucher, If . . . Then 50–52 (2018).

31. José van Dijck, *Facebook and the Engineering of Connectivity*, 19 Int'l J. Rsch. New Media Techs. 141, 146 (2012).

32. *See* Niva Elkin-Koren, Giovanni De Gregorio & Maayan Perel, *Social Media as Contractual Networks: A Bottom Up Check on Content Moderation*, 107 Iowa L. Rev. 987, 995–96 (2022); *see also* Douek, *Systems*, *supra* note 13, at *3 & n.2.

33. This formulation evokes early information law scholarship describing internet

moderation—and our understanding of its strengths and limitations—would be incomplete without any one of them. And although these elements change, overlap, and influence each other, they each "assemble" to create a system in which platforms control the flow of content in ways that no single force could.[34] Background law enables corporate control over their platforms. Law's expressive value amplifies the politics and discourses of content moderation. Rules known as "community guidelines" implement those discourses into practice. Technology design frames and sometimes predetermines user adherence to those rules. Machines implement the rules' requirements on user-generated content. And different groups of people play different roles in moderation, from the workers who design platforms and algorithmic moderation systems to users who flag content they find inappropriate and appeal adverse algorithmic moderation decisions to human moderators.

Background law. Scholars writing about the law and political economy of informational capitalism have shown how platforms leveraged the law to place their business models out of reach of public governance.[35] For example, the First Amendment allows platforms to restrict content that violates their standards.[36] Section 230 of the Communications Decency Act immunizes them from lawsuit when they exercise that discretion.[37] Anupam Chander memorably argues that the law made Silicon Valley, insulating the information industry from accountability and allowing companies to collect information, monetize it, and grow without limit.[38] In other words, technology companies used the law to create an information economy with few limits on platform power, including the power to control content. Therefore, content moderation emerged in a legal context in which platform interests would determine the flow of expression without much interference from regulators.

Discourses. Other scholars have explored the discourses, values, and principles that animate content moderation. Early content moderation was heavily influenced by the First Amendment.[39] Scholars argued that the "marketplace of ideas" metaphor—the notion that good speech, like good products, naturally succeed in unregulated spaces governed by supply and demand[40]—

governance as a product of law, code, markets, and norms. Joel R. Reidenberg, *Lex Informatica*, 76 Tex. L. Rev. 553, 554–55 (1998); Lawrence Lessig, Code Version 2.0 (2006). This particular list of constitutive elements builds on the work of Ysabel Gerrard and Helen Thornham. Ysabel Gerrard & Helen Thornham, *Content Moderation: Social Media's Sexist Assemblages*, 22 New Media & Soc'y 1266, 1269 (2020).

34. Haggerty & Ericson, *supra* note 9, at 608.

35. Cohen, *supra* note 15, at 7.

36. Eric Goldman, *Of Course the First Amendment Protects Google and Facebook (and It's Not a Close Question)*, Knight First Amend. Inst. (Feb. 26, 2018), https://knightcolumbia.org/content/course-first-amendment-protects-google-and-facebook-and-its-not-close-question [https://perma.cc/7UG4-JXNL].

37. Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401, 403 (2017).

38. Anupam Chander, *How Law Made Silicon Valley*, 63 Emory L.J. 639 (2014).

39. Gillespie, *supra* note 7, at 40; Klonick, *Governors*, *supra* note 7, at 1621.

40. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting);

dominated platform content governance rules because liberal free speech values like content and viewpoint neutrality were familiar to those lawyers who wrote the rules in the first place.[41] Such discourses also fit well with Silicon Valley's libertarian ethos because of the latter's hostility to hierarchical, top-down government regulation.[42] However, as Evelyn Douek argues, platforms' reliance on liberal free speech norms was untenable. All rules involve making normative choices and platforms' particular choices made them complicit in systemic social harm: genocide, spread of misinformation, and amplification of hate, among others. As a result, Douek argues that platforms replaced speech's primacy with "systemic balancing" of multiple interests. [43] Under this regime, user speech rights could be limited for legitimate reasons, provided the limits were proportional to the harm.[44] Jonathan Zittrain described this shift in rules from those based on faith in the generativity of platforms to rules reflecting the real-world costs of limitless online speech.[45]

Rules. Gillespie has analyzed those rules extensively. Described in terms of service (TOSs) and "community guidelines," content rules implement platforms' evolving values. TOSs are written like contracts and detail the terms under which individuals and platforms interact.[46] Community guidelines, on the other hand, are written in "deliberately plainspoken language" and describe what kind of content the platform thinks is or is not appropriate for upload.[47] Community guidelines reflect the "character" of the platform and, by implication, of the people who created and use it.[48] They reflect biases, politics, and what platform rule makers think most people—and, importantly, most advertisers—would want to see.[49] And it is not just platforms and mobile apps that have these rules; Apple and Google have community guidelines that apply to apps hosted on their stores.[50]

Design. Independent research agendas focus on how technology implements those community guidelines, particularly through background design and algorithmic moderation. Though not explicitly writing about content moderation, scholars have demonstrated that the content we see online depends

Ari Ezra Waldman, *The Marketplace of Fake News*, 20 J. Const. L. 845, 851–56 (2018); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 Duke L.J. 821, 829–32 (2008).

41. Klonick, *Governors*, *supra* note 7, at 1618–25.

42. *See* Emily Chang, Brotopia: Breaking up the Boys' Club of Silicon Valley 60–63 (2018); Sheelah Kolhatkar, *The Tech Industry's Gender-Discrimination Problem*, New Yorker (Nov. 13, 2017), https://www.newyorker.com/magazine/2017/11/20/the-tech-industrys-gender-discrimination-problem [https://perma.cc/Z3YB-FVGW].

43. Douek, *Governing*, *supra* note 6, at 763.

44. *Id.* at 784.

45. Jonathan Zittrain, Three Eras of Digital Governance (Sept. 15, 2019) (unpublished manuscript), https://ssrn.com/abstract=3458435 [https://perma.cc/9CNZ-YDS3].

46. Gillespie, *supra* note 7, at 46.

47. *Id.*

48. *Id.* at 48.

49. *Id.* at 19, 35.

50. Luis E. Hestres, *App Neutrality: Apple's App Store and Freedom of Expression Online*, 7 Int'l J. Commc'n 1265, 1266 (2013).

first and foremost on the code-based infrastructure of a platform.[51] Whereas rules set the stage for construction, design predetermines what individuals can and cannot do in a space.[52] By way of analogy, if community guidelines are the municipal construction approvals, zoning rules, licensure regimes, and workplace safety requirements that govern home construction, design is the house's foundation, architecture, engineering, and building blocks. Both are necessary to build the house. In this way, the sociolegal literature arguing that "code is law" and exploring privacy by design is also about content moderation.[53] Design is a prior restraint on content—the first stage of code-based content moderation—because it requires users to follow technical specifications when uploading content: Instagram videos can only be so long and images can only be certain sizes; Twitter restricts individuals to a set number of characters; TikTok is video-only. As Joel Reidenberg presciently noted, design has "rule-making power" because platform architecture and technical capabilities place limits on user content.[54]

Technology. Machines play another role in content moderation. Today, artificial intelligence automatically identifies, classifies, categorizes, and blocks or takes down content before any human sees it, implementing community guidelines through code.[55] Its primacy in content moderation stems from need and know-how: Today's social media platforms host far more content than they used to,[56] and only AI can screen "unprecedented" numbers of images and videos for women's nipples or copyrighted content.[57] As Facebook CEO Mark Zuckerberg noted in 2018, using AI to proactively screen content only became "possible recently because of advances in artificial intelligence."[58] In this case, technology enabled Facebook's scale.

People. That said, algorithms do not moderate alone. In addition to platform designers and the people who write content moderation rules in the

51. *See* Batya Friedman & David G. Hendry, Value Sensitive Design: Shaping Technology with Moral Imagination (2019); Woodrow Hartzog, Privacy's Blueprint 11–14 (2018); Meredith Broussard, Artificial Unintelligence (2018); Mary Flanagan, Daniel C. Howe & Helen Nissenbaum, *Embodying Values in Technology: Theory and Practice*, *in* Information Technology and Moral Philosophy 322 (Jeroen van den Hoven & John Weckert eds., 2008).

52. *See, e.g.*, Kim Dovey, Framing Places: Mediating Power in Built Form 1 (2d ed. 2008) (explaining how built environments mediate, construct, and reinforce power structures); Henri Lefebvre, The Production of Space 224 (Donald Nicholson-Smith trans., 1991) (describing "monumental space[s]" as organized spaces in which certain acts may take place and thus, conversely, what acts may *not* take place).

53. Lessig, *supra* note 33.

54. Reidenberg, *supra* note 33, at 555, 570–71.

55. Robert Gorwa, Reuben Binns & Christian Katzenbach, *Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance*, 7 Big Data & Soc'y 1 (2020).

56. Douek, *Governing*, *supra* note 6, at 791.

57. *Id.* at 793–94.

58. Mark Zuckerberg, *A Blueprint for Content Governance and Enforcement*, Facebook, https://www.facebook.com/notes/751449002072082/ (last visited July 2, 2021).

first place, scholars have identified three other sets of people that are part of the content moderation assemblage: commercial content moderators, users, and independent overseers. Commercial content moderators clean up after technology: They restore content that should not have been taken down, reconsider automatic moderation decisions, and act on content AI erroneously let slip through the cracks.[59] Ideally, people bring context and executive function to content moderation questions.[60] But they have to do so repeatedly and in mere seconds while following a booklet of general instructions in front of them.[61] As Sarah Roberts explains, many commercial content moderators today are hired from the Global South, as independent contractors by third-party vendors.[62] Their pay is low and their work exposes them to abusive, violent, and gory content, contributing to social and psychological harm.[63] A small additional layer of human moderators employed directly by Facebook can check their work.[64] These layers of people remain essential: there are just certain things machines cannot do.[65]

Platforms' users also engage in content moderation when they flag content they find inappropriate or appeal an algorithmic moderation decision.[66] Flagging is a feature of platform design that allows users to classify content as offensive, inappropriate, or in violation of their perception of the rules.[67] It serves two ends: conscripting the community of users into the process of reviewing content at scale and legitimizing content moderation by making it, at least superficially, a reflection of user preferences.[68] Those users whose content was blocked or restricted ex ante can also click on a button to appeal a machine's decision to a human moderator.[69] Flagged and appealed content

59. Adrien Chen, *Inside Facebook's Outsourced Anti-Porn and Gore Brigade, Where 'Camel Toes' Are More Offensive Than 'Crushed Heads'*, Gawker (Feb. 16, 2012, 3:45 PM), https://gawker.com/5885714/inside-facebooks-outsourced-anti-porn-and-gore-brigade-where-camel-toes-are-more-offensive-than-crushed-heads [https://perma.cc/E22A-TNAF] [hereinafter Chen, *Inside*].

60. Klonick, *Governors*, *supra* note 7, at 1640.

61. Sarah T. Roberts, *Social Media's Silent Filter*, Atlantic (Mar. 8, 2017), https://www.theatlantic.com/technology/archive/2017/03/commercial-content-moderation/518796/ [https://perma.cc/3A8C-ZQGN] [hereinafter Roberts, *Filter*].

62. Roberts, *Detritus*, *supra* note 7; Roberts, *Filter*, *supra* note 61.

63. *See* Roberts, *Dirty Work*, *supra* note 7; Olivia Solon, *Underpaid and Overburdened: The Life of a Facebook Moderator*, Guardian, https://www.theguardian.com/news/2017/may/25/facebook-moderator-underpaid-overburdened-extreme-content [https://perma.cc/2NGG-LRN8]; Complaint for Damages, Soto v. Microsoft Corp., No. 16–2-31049–4 SEA (Wash. Super. Ct. Dec. 30, 2016).

64. Klonick, *Governors*, *supra* note 7, at 1640–41.

65. Frank Pasquale, *Professional Judgment in an Era of Artificial Intelligence and Machine Learning*, 46 Boundary 2, 73 (2019) [hereinafter Pasquale, *Professional*].

66. Crawford & Gillespie, *supra* note 4, at 410.

67. *Id.* at 411.

68. *Id.* at 412.

69. *I Don't Think Facebook Should Have Taken Down My Post*, Facebook, https://www.facebook.com/help/2090856331203011?helpref=faq_content [https://perma.cc/FU3E-AT4E].

is put in a queue, where humans review the content's compliance with a platform's rules.[70]

Much recent content moderation scholarship has been about other people involved in content moderation—namely, Facebook's Oversight Board.[71] The Board is supposed to rationalize and publicize some content moderation decisions, generating trust and confidence.[72] Notably, the Board's members are different than most others involved in the content moderation process. Designers, content creators, commercial content moderators, and other users have no particular expertise in classifying a piece of content as violative of platform rules. Presumably, few of them have studied pornography or terrorism or hate speech. They may have read their platforms' community guidelines, but even outsourced content moderators are not hired for their expertise in free speech law.[73] Board members, on the other hand, are supposed to be "experienced at deliberating . . . and familiar with digital content and governance" and have "demonstrated a proficiency in questions of online content moderation."[74] A majority of Board members are law professors with expertise in free speech. In other words, the content moderation that happens at the Board level is supposed to be done by those people Facebook considers experts; at the flagging, appealing, and reviewing level, where far more decisions are made, content moderators are laypersons, with no particular expertise beyond whatever training Facebook offers or their own interpretation of the platform's community guidelines. This expertise (or lack thereof) plays a central role in both the sexual content moderation and anti-vice policing assemblages.

B. *Putting Moderation Back Together*

Law and technology scholarship has independently and sometimes implicitly recognized that content moderation is a multifaceted institution comprising different social actors. The last section reorganized the literature to see content moderation as a product of different elements—legal contexts, discourses, rules, code, AI, and people—coming together to exert control over content in a way that none of them could independently. Indeed, as Jameel Jaffer suggested, content moderation on Facebook is a combination of an "interface, algorithms, and policies . . . that determine[] which speech is amplified and which is suppressed."[75] Rules without design constraints are easily flouted; AI filters will misunderstand things humans could contextualize; the

70. Klonick, *Governors*, *supra* note 7, at 1638–41.

71. Kate Klonick, *The Facebook Oversight Board*, 129 YALE L.J. 2418 (2020).

72. *Id.* at 2449–50.

73. Adrien Chen, *The Laborers Who Keep Dick Pics and Beheadings Out of Your Facebook Feed*, WIRED (Oct. 23, 2014, 6:30 AM), https://www.wired.com/2014/10/content-moderation/ [https://perma.cc/M8EN-H49U] [hereinafter Chen, *Laborers*].

74. OVERSIGHT BD., https://oversightboard.com/meet-the-board/ [https://perma.cc/S4WQ-5ANZ].

75. Jameel Jaffer, *Facebook and Free Speech Are Different Things*, KNIGHT FIRST AMEND. INST. (Oct. 24, 2019), https://knightcolumbia.org/content/facebook-and-free-speech-are-different-things [https://perma.cc/L3A6-PXG3].

black box of code cannot maintain a platform's ethos without transparent rules to which individuals can refer when uploading content.[76] In this way, content moderation is more than the sum of its parts. As the above review suggests, content moderation is an assemblage. It "make[s] something happen" through both the actions and affordances of its elements, but also from the assemblage as a whole.[77]

And yet, although the current literature has studied most of content moderation's elements independently, most scholars fall back on analyzing the institution broadly.[78] Scholars cite a wide variety of content moderation examples—videos of mass shootings,[79] gratuitous gore violence,[80] slanderous cartoons,[81] predatory advertisements for masks during the COVID-19 pandemic,[82] images of child sexual abuse,[83] content calling for election interference,[84] incidents of gendered harassment,[85] and terrorism,[86] among others—to support conclusions about content moderation generally as if it is a singular institution doing everything at once. Although important and generative, that scholarship is incomplete. There are different types of content moderation, each of which is its own assemblage of social forces that might operate with different ideas, influences, rules, technology, and people. Only a few sociolegal scholars have focused exclusively on sexual content moderation,[87] and even fewer have done so through the lens of queer sexuality.[88]

What is more, most content moderation scholarship, not to mention popular commentary, focuses on the system's mistakes: for example, the pictures of breastfeeding mothers that should not have been taken down,[89] the deplatforming of anti-racist skinheads instead of neo-Nazis,[90] the failure to remove a violent militia page,[91] or the inappropriate removal of a picture of

76. Gillespie, *supra* note 7, at 47.
77. Jane Bennett, Vibrant Matter: A Political Ecology of Things 24 (2010).
78. *E.g.*, Douek, *Systems*, *supra* note 13, at manuscript 9–39.
79. Bloch-Wehba, *supra* note 7, at 42.
80. *Id.*; Klonick, *Governors*, *supra* note 7, at 1619–20, 1641.
81. Klonick, *Governors*, *supra* note 7, at 1623–24.
82. Douek, *Governing*, *supra* note 6, at 808.
83. Bloch-Wehba, *supra* note 7, at 57.
84. Douek, *Governing*, *supra* note 6, at 779.
85. *Id.*
86. Bloch-Wehba, *supra* note 7, at 58.
87. *E.g.*, Gerrard & Thornham, *supra* note 33; Rena Bivens & Oliver Haimson, *Baking Gender Into Social Media Design: How Platforms Shape Categories for Users and Advertisers*, 2 Soc. Media & Soc'y 1 (2016).
88. *See* Danielle Keats Citron, *Cyber Mobs, Disinformation, and Death Videos: The Internet As It Is (And As It Should Be)*, 118 Mich. L. Rev. 1073 (2020); Yoel Roth, *"No Overly Suggestive Photos of Any Kind": Content Management and the Policing of Self in Gay Digital Communities*, 8 Commc'n, Culture & Critique 414 (2015); Bonnie Ruberg, *"Obscene, Pornographic, or Otherwise Objectionable": Biased Definitions of Sexual Content in Video Game Live Streaming*, 23 New Media & Soc'y 1681 (2021).
89. Douek, *Governing*, *supra* note 6, at 774.
90. *Id.* at 808.
91. *Id.* at 47–48.

"Napalm Girl," a Pulitzer Prize-winning photograph from the Vietnam War.[92] Understanding why those mistakes occur and how to mitigate them is critical, particularly when errors chill the speech of traditionally marginalized groups. But, as Sarah Roberts notes, focusing too much on mistakes takes attention away from systemic interrogation of content moderation's machinery and the effects of its design.[93] In other words, if every problematic content moderation decision is a mistake, especially when platforms claim it was ex post, we legitimize the underlying system as a whole by conceptualizing its effects as aberrations.

The next Part begins to fill those gaps by showing how the assemblage of social forces that come together to exert power over public expressions of queer sexuality online resembles anti-vice policing. This assemblage of law, discourses, technology, and people "smothered" public expressions of queer sexuality in the middle of the last century, and the same forces are operating online today.[94] This analogy shows just how much a queer perspective on content moderation differs from the conventional wisdom. From this analogy, we can develop new paradigms for understanding and solving content moderation's systemic faults.

II. A Historical Model for Sexual Content Moderation

Reframing the scholarly literature to surface the assemblage of actors that exert power over user-generated content challenges how we think about content moderation. This creates new opportunities for insight about content moderation's structure, applications, and weaknesses. This Article's next goal is to explore the machinery of one of those assemblages—sexual content moderation—through an explicitly queer lens. This is long overdue. Despite several high-profile incidents of queer censorship online,[95] there has been no systematic exploration in the legal literature of the origins of and manner in which content moderation exerts control over queer content.[96]

92. Roberts, *Detritus*, *supra* note 7.

93. *Id.*

94. William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy,* Nomos*, and Citizenship, 1961–1981*, 25 Hofstra L. Rev. 817, 819 (1997) [hereinafter Eskridge, *Challenging*].

95. *E.g.*, Sarah Perez, *Tumblr Says It Fixed the 'Safe Mode' Glitch that Hid Innocent Posts, Including LGBTQ+ Content*, Tech Crunch (June 24, 2017, 9:45 AM), https://techcrunch.com/2017/06/24/tumblr-says-it-fixed-the-safe-mode-glitch-that-hid-innocent-posts-including-lgbtq-content/ [https://perma.cc/REX9-QKYD]; Elle Hunt, *LGBT Community Anger Over YouTube Restrictions Which Make Their Videos Invisible*, Guardian (Mar. 19, 2017), https://www.theguardian.com/technology/2017/mar/20/lgbt-community-anger-over-youtube-restrictions-which-make-their-videos-invisible [https://perma.cc/Q8A6–45SU].

96. That said, scholars in other fields are considering the systemic anti-queer effects of content moderation. In addition to the scholars cited throughout this Article, please see Susanna Paasonen, Kylie Jarrett & Ben Light, NSFW: Sex, Humor, and Risk in Social Media (2019); Thiago Dias Oliva, Dennys Marcelo Antonialli & Alessandra Gomes, *Fighting Hate Speech, Silencing Drag Queens? Artificial Intelligence in Content Moderation and*

This Part argues that sexual content moderation is an assemblage comprising similar forces and operating in ways similar to anti-vice policing in urban centers in the United States from the 1930s through the 1960s. Reacting to similar contexts and discourses, both platforms and municipalities use similarly vague rules, with similar rationales and underlying assumptions, to asymmetrically crack down on queer behavior in public, denying queer people due process and contributing to similar outcomes: the systematic erasure of queer, nonnormative behavior from public spaces. The extent to which sexual content moderation recreates the heteronormative assemblage of anti-vice policing has profound implications for the way we think about content moderation, for the role of technology in society, for the role of expertise in constructions of knowledge and power, and for debates about platform regulation.

This Part begins by paralleling the social contexts and rationales underlying both assemblages. It then turns to their similar rules and mechanics. It concludes by demonstrating the comparison's durability while acknowledging important limitations.

A. *Legal Contexts, Discourses, and Values*

Anti-vice policing is part of almost every retelling of queer life in the United States. The narrative has allowed legal and political historians to describe the queer community's political awakening, its resistance to oppression on the ground, and its use of the law on the books to push back.[97] Others have used the backdrop of morality policing to teach lessons about criminal law, the limits of policing in general, and the extent to which the legal system has been a site of contestation over the defining features of queerness.[98] Queer people's confrontations with morality law can also teach us about content moderation, starting with its origins and rationalizing discourses.

1. Repressive Origins

Anti-vice policing in the twentieth century arose, evolved, and reached its apex at times of overlapping and profound cultural shifts: from Prohibition to the Depression, from mass mobilization for World War II to the post-war return to the cities, from growing queer populations to moral panics, and from the promise of liberal experimentation to the retrenchment of conservative values.[99]

Risks to LGBTQ Voices Online, 25 Sexuality & Culture 700 (2021). *See also*, *e.g.*, Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61 (2009) [hereinafter Citron, *Civil Rights*]. Citron's research incorporates experiences of queer people, particularly those victimized by nonconsensual pornography and other forms of online harassment. *E.g.*, Citron, *Sexual Privacy*, *supra* note 7. Her work is foundational and complementary.

97. In addition to the texts already cited, please see Eric Cervini, The Deviant's War (2020); George Chauncey, Gay New York (1994); John D'Emilio, Sexual Politics, Sexual Communities (1983); Nan Alamilla Boyd, Wide Open Town (2003); Lillian Faderman & Stuart Timmons, Gay L.A. (2006); Elizabeth Lapovsky Kennedy & Madeline D. Davis, Boots of Leather, Slippers of Gold (2003).

98. *See* Lvovsky, *supra* note 9.

99. *Id.* at 5.

Content moderation evolved during another cultural shift from promise to peril, one in which early cyber-utopianism gave way to the reality of hate, predation, and corporate control online. In both cases, liberality was always unsustainable; for many queer people, both the promise of and repression against queer behavior were real.

Before the Depression, queer life integrated into the everyday life of cities like New York and Los Angeles.[100] Prohibition created a culture of flouting conventions, including sexual ones. Speakeasies were "liminal spaces in which visitors were encouraged to disregard some of the social injunctions that normally constrained their behavior" in their home neighborhoods.[101] In this permissive environment, "subversive" queer culture became part of urban culture.[102] Prohibition's repeal and the subsequent reimposition of municipal regulatory control over liquor sales "inaugurated a more pervasive and more effective regime of surveillance of control" over urban nightlife.[103] Suddenly, the police were everywhere in New York's West Village and Times Square, eager to use their power to reintroduce the social boundaries that existed before swing dance, flappers, pansies, and drag balls.[104]

Even more profound shifts took place later, catalyzing the worst of anti-vice policing in the post-World War II era.[105] Soldiers returning from war increasingly settled in urban areas; the rise of queer neighborhoods, bars, and cruising grounds struck many of them as inappropriate.[106] A rash of highly publicized sex crimes caused a nationwide panic about the morality of urban life.[107] And the Lavender Scare, the opportunistic campaign to remove queer people from the federal government, framed queer men as dangerous security risks.[108] These social forces gave added purpose to anti-vice policing at a time when society as a whole was taking a keen interest in heteronormative domesticity.

This cultural shift from the promise of liberality to the perils of repression parallels the evolving understanding of the Internet as a locus of freedom, expression, and individuality. Originally, commentators thought the Internet would be an ideal space for free expression. The Internet evangelist John Perry Barlow called it "a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or

100. Chauncey, *supra* note 97, at 4.

101. *Id.* at 305–08.

102. *Id.* at 4, 301.

103. *Id.* at 335.

104. *Id.*

105. Lvovsky, *supra* note 9, at 4–6.

106. Allan Bérubé, Coming Out Under Fire 67–127 (1990).

107. *See* Andrea Friedman, *Sadists and Sissies: Anti-Pornography Campaigns in Cold War America*, 15 Gender & Hist. 201, 214–17 (2003).

108. David Johnson, The Lavender Scare (2009). Because of the social constraints of the closet and the profound stigma associated with homosexuality in the middle of the twentieth century in the U.S., perpetrators of the "lavender scare" presumed that gay government workers would be easy targets for blackmail by communist or foreign powers. *Id.* at 5–15.

conformity,"[109] not unlike John Locke's description of the state of nature.[110] Early law and technology scholars saw cyberspace as a space where anyone who wanted "a variety of topics or views will easily be able to get them."[111] There would always be more speakers, more listeners, more information, and more opportunity, all leading to the ultimate realization of a true "marketplace of ideas."[112]

In cyberspace, the law was supposed to leave people alone, allowing them to express themselves authentically without state surveillance or repression. Therefore, it should come as no surprise that some scholars also saw promise for queer people in the early Internet. Nearly a decade ago, the Gay, Lesbian, and Straight Education Network (GLSEN) found that social media allowed queer youth to "find greater peer support, access . . . health information and [find] opportunities to be civically engaged."[113] Studies showed that the Internet provided an outlet for those living closeted lives.[114] Noting that functional pseudonymity gave queer people the chance to meet, explore their sexuality, and support activism outside the reach of hostile communities, Edward Stein argued that attempts to regulate online speech threatened real and lasting harm to queer people who depended on the protection of the closet.[115] The law's long history of complicity in queer oppression also made the prospect of a space without law enforcement particularly attractive to queer people.[116]

This idealism ran up against cultural shifts calling for tighter regulation of online expression. Like early anti-vice enforcement, which began during the conservative retrenchment after Prohibition, the earliest forms of content moderation began during the culture wars of the 1990s and 2000s, when conservative politicians leveraged white, middle-class unease with abortion, homosexuality, and pornography to gain electoral advantage and define

109. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, Elec. Frontier Found. (Feb. 8, 1996), https://projects.eff.org/~barlow/Declaration-Final.html [https://perma.cc/D5UR-V8XN].

110. Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 Colum. J. Gender & L. 224, 234–35 (2011) [hereinafter Franks, *Unwilling Avatars*].

111. Eugene Volokh, *Cheap Speech and What It Will Do*, 104 Yale L.J. 1805, 1834 (1995); *see also* Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. Rev. 1653, 1670 (1998).

112. Franks, *Unwilling Avatars*, *supra* note 110, at 234–37.

113. Gay, Lesbian & Straight Education Network, Out Online: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth on the Internet (2013), http://www.glsen.org/press/study-finds-lgbt-youth-face-greater-harassment-online [https://perma.cc/E8Y5–3RUZ].

114. Ronny Tikkanen & Michael W. Ross, *Technological Tearoom Trade: Characteristics of Swedish Men Visiting Gay Internet Chat Rooms*, 15 AIDS Educ. & Prevention 122, 122 (2003); Jonathan Alexander, *Queer Webs: Representations of LGBT People and Communities on the World Wide Web*, 7 Int'l J. Sexuality & Gender Stud. 77, 78–79 (2002).

115. Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 Harv. C.R.-C.L. L. Rev. 159, 161–63 (2003).

116. Kevin Nadal, Queering Law and Order (2020).

American identity in line with patriarchal values.[117] Those culture wars had direct effects on Internet expression. Bipartisan majorities in Congress passed and President Clinton signed the Communications Decency Act in 1996—just a few years after the World Wide Web became generally accessible to most Americans—to protect minors from incident material online.[118] The Family Enforcement Act, which was introduced at the same time, called for enhanced punishment if computers were used to share child pornography.[119] Similar legislation was also introduced in the states.[120] Universities also blocked access to pornographic material after a (now-debunked) study showed a significant amount of pornography on the early Internet.[121]

To be clear, these social contexts are not identical; the anti-queer panic of the 1950s does not match, either in its severity or its discourses, the anti-queer, anti-porn panics of the 1990s. My argument is more modest. It was the retrenchment of conservative values after Prohibition, and then again after World War II, that formed the background context for cities like New York and Los Angeles to systematically regulate queer sexual behavior. Similarly, it was during the conservative retrenchment of the culture wars of the 1990s and 2000s that platforms started moderating sexual content and writing rules to routinize it. Both phenomena arose in cultural moments, unique to their times, where rule makers were thinking much more about regulating public sexual expression.

2. Discourses Rationalizing Repression

As they turned their attention to sex, policymakers in both eras channeled similar anxieties about pornography, predation, and lawlessness into rationales about satisfying business, protecting children from exposure to indecent material, and reasserting their control over spaces after threats to take it away. This section demonstrates the prevalence of each rationale in turn.

117. *See* Thomas Frank, What's the Matter with Kansas (2004); Andrew Harton, A War for the Soul of America 1–7 (2d ed. 2019).

118. Telecommunications Act of 1996, Pub. L. No. 104–104, §§ 501–09, 110 Stat. 56, 133–39 (1996). It is true that the Supreme Court declared the Communications Decency Act (except for section 230) unconstitutional in *Reno v. ACLU*, 521 U.S. 844 (1997).

119. H.R. 11, 104th Cong., 1st Sess. § 301 (1995); David Rosenbaum, *The 1994 Campaign: The Republicans*, N.Y. Times (Nov. 1, 1994), https://www.nytimes.com/1994/11/01/us/1994-campaign-republicans-it-s-economy-again-democrats-attack-contract-with.html [https://perma.cc/SG7P-98D9] (describing the Family Reinforcement Act as part of the Republican Contract with America).

120. *See* Carlin Meyer, *Reclaiming Sex from the Pornographers: Cybersexual Possibilities*, 83 Geo. L.J. 1969, 1971 n.20 (1995) (citing N.Y. Assem. B. 3967, 218th Gen. Ass., 1st Sess. (1995) as an example of state responses).

121. Marty Rimm, *Marketing Pornography on the Information Superhighway*, 83 Geo. L.J. 1849 (1995). The study was debunked. Donna Hoffman & Thomas Novak, *A Detailed Analysis of the Conceptual, Logical, and Methodological Flaws of the Article: "Marketing Pornography on the Information Superhighway"*, He Said/She Said (July 2, 1995), http://alumni.media.mit.edu/~rhodes/Cyberporn/hn.on.rimm.html [https://perma.cc/MW7W-GSJW].

a. Economic Rationales

Both mayors and social media companies thought public expressions of queerness were bad for business. New York Mayor Fiorello LaGuardia instructed the police to work with the State Liquor Authority (SLA), which regulated all New York establishments that served alcohol after Prohibition, to shut down all the queer and queer-friendly bars in the City in anticipation of the 1939 World's Fair and its attendant influx of people, tourism, and money.[122] As the historian Lewis Erenberg argued, the repeal of Prohibition and the subsequent passage of state laws to regulate the consumption of alcohol were essential for cities to lure back "reputable" businesses that had been decimated or scared off by Prohibition's lawlessness.[123] Closing down businesses that catered to a queer clientele opened spaces for those supposedly "reputable" businesses and the recreation of a "sanitized" nightlife that would attract a crowd far wealthier than the working class, immigrant, and queer men who dominated queer nightlife during the 1920s and early 1930s.[124] The authorities assumed that no legitimate business would want to set up shop around a queer crowd.

Similar assumptions and rationales pervade justifications for sexual content moderation. When YouTube demonetized a series of lesbian sex education videos, the only explanation it provided to the content creator was that the series was "not suitable for all advertisers."[125] Tumblr, which had failed to meet two years of advertising goals set by its parent company Yahoo, restricted queer sexual content because Yahoo wanted to attract advertisers that had been scared off by the large percentage of adult content on the platform.[126] In 2018, Patreon suspended many of its adult content creators because the financial transaction platforms Stripe and PayPal refused to be associated with sex workers.[127] As Niva Elkin-Koren has argued, platforms may deny it, but content moderation is a way for platforms to ensure that their services "align[] . . . with the interests of advertisers."[128]

122. Chauncey, *supra* note 97, at 340.

123. Lewis A. Erenberg, *From New York to Middletown: Repeal and the Legitimization of Nightlife in the Great Depression*, 38 Am. Q. 761, 762–66 (1986).

124. Chauncey, *supra* note 97, at 336–38.

125. Priddy, *supra* note 2.

126. Clare Southerton, Daniel Marshall, Peter Aggleton, Mary Lou Rasmussen & Rob Cover, *Restricted Modes: Social Media, Content Classification, and LGBTQ Sexual Citizenship*, 23 New Media & Soc'y 920, 925 (2021); Kaitlyn Tiffany, *When Tumblr Bans Porn, Who Loses?*, Vox (Dec. 4, 2018, 5:00 PM), https://www.vox.com/the-goods/2018/12/4/18126112/tumblr-porn-ban-verizon-ad-goals-sex-work-fandom [https://perma.cc/H7Y7–3HHD]; Perez, *supra* note 95.

127. Samantha Cole, *Patreon Is Suspending Adult Content Creators Because of Its Payment Partners*, Vice: Motherboard (June 28, 2018, 2:00 PM), https://www.vice.com/en/article/vbqwwj/patreon-suspension-of-adult-content-creators [https://perma.cc/S8UF-RN9L].

128. Elkin-Koren, *supra* note 32, at 5.

b. Reasserting Institutional Control

Regulating sexual content is not only about money. It is also about power. In both the anti-vice policing and sexual content moderation contexts, those in power had institutional rationales for reasserting their control over spaces in which that control had been challenged. Both sets of those challenges came from public law: For states and municipalities, Prohibition and national mobilization for World War II undermined government control over nightlife; for platforms, it was the threat of imposing traditional intermediary liability law on internet platforms.

Prohibition had the perverse effect of eroding police and municipal control over urban nightlife. Police were not wholly absent from urban nightlife, but as George Chauncey argued, the Prohibition Era "obliterated" the "boundaries of acceptable sociability" because its culture of lawlessness removed from urban enclaves the institutions that policed those boundaries.[129] The nationwide mobilization for World War II upended traditional gender roles, brought queer people from all over the country into close proximity with each other, and refocused national and municipal attention on something other than queer life.[130] Waves of queer soldiers, emboldened by queer friendships they made in the trenches, returned to the cities and continued to build queer community.[131] Therefore, if Prohibition's repeal was a chance for local governments to reassert social boundaries under their terms, the end of World War II gave cities new reasons to redouble their efforts.[132]

In the anti-vice context, then, municipalities were reasserting control over spaces another arm of the state had taken away. Content moderation may have evolved during a more complex contest for control over online expression between government and private platforms, but the contexts are similar in that both anti-vice enforcement and content moderation rules were attempts by the powerful to reassert control that had been taken away.

In *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[133] a New York trial court threatened to impose traditional publisher liability rules on Prodigy, an early online service provider that held itself out as "family oriented" and willing to remove profanity and hate.[134] When Prodigy failed to remove defamatory comments about an investment firm from one of the platform's bulletin boards, the firm sued Prodigy on the theory that the platform was liable as a publisher of the defamation because its filtering policies determined what would be allowed on its platform.[135] The trial court held Prodigy liable for two-hundred

129. CHAUNCEY, *supra* note 97, at 334–35. A related cultural phenomenon occurred after World War II. As Anna Lvovsky argued, former soldiers who settled in urban centers to find jobs after the War found queer enclaves, bars, and cruising grounds a "blight on the orderly city." LVOVSKY, *supra* note 9, at 5.

130. LVOVSKY, *supra* note 9, at 5.

131. *Id.* at 102.

132. *Id.* at 5, 9, 20, 101, 147.

133. No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

134. *Id.* at *2.

135. *Id.*

million dollars,[136] reasoning that if Prodigy actively asserts control over the content, it is responsible for that content.[137] Therefore, *Stratton Oakmont* represented a threat to platforms' control over their spaces. In *Stratton Oakmont*, the state was trying to step in, wresting control away from online platforms in the same way that it uses tort law to limit the editorial discretion of newspapers. Communications Decency Act section 230, which immunized platforms from tort liability associated with any user content and, therefore, gave platforms the breathing space to develop their own content moderation rules, was passed in reaction to that threat.[138] Understood in this way, content moderation rules were attempts to reassert the kind of unlimited control that publisher liability law threatened to take away.

c. Protecting the Children and Other Vulnerable Populations

As noted above, anti-vice police attention to queer behavior in public came at a time of cultural anxiety about upended social and sexual norms. One discursive weapon used to justify to reassert those traditional norms was the protection of children.[139] Bill Eskridge's exhaustive studies of law relating to gender and sexual nonconformity demonstrate this. The law reflected the archetype of the queer man as predatory, seeking children to harm and convert.[140] Anti-vice societies—civic groups that supported state and municipal crackdowns on prostitution and all forms of what they called "moral degeneracy"—focused on protecting children as well. One of the most famous of those clubs in New York was the Society for the Prevention of Cruelty to Children, the goal of which was to protect adolescents from "child molesters" through aggressive enforcement of anti-sodomy laws.[141] Laws prohibiting public lewdness, indecency, vagrancy, and disorderly conduct "aimed at preventing the corruption of children" by queer men.[142] Crackdowns on same-sex activity in the military after World War I leaned hard on the youth angle as well. "The people of the United States," read one salient report, "are entitled to the assurance that thereafter no *boy* who enlists in the Navy will be consigned to a career of vice."[143] A Senate committee investigating the matter was concerned that

136. Danielle Keats Citron, Hate Crimes in Cyberspace 169 (2014) [hereinafter Citron, Hate Crimes].

137. *Stratton Oakmont*, 1995 WL 323710, at *3.

138. Citron & Wittes, *supra* note 37, at 404–06.

139. Notably, protecting children was not the only moralistic justification for anti-vice policing. Many police and policymakers were also responding to broader backlashes against homosexuality, including the Lavender Scare crusade against queer employees of the federal government, and panics about sex crimes and sexual predators. Lvovsky, *supra* note 9, at 5; Johnson, *supra* note 108, at 73.

140. Eskridge, Gaylaw, *supra* note 16, at 4; Joey L. Mogul, Andrea J. Ritchie & Kay Whitlock, Queer (In)Justice 31–34, 77–90 (2011); William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880–1946*, 82 Iowa L. Rev. 1007, 1059 (1997).

141. Eskridge, Gaylaw, *supra* note 16, at 23.

142. *Id.* at 27.

143. *Id.* at 38 (emphasis added).

"*boys*" were joining the military to be "the prey of every degenerate or sexual pervert."[144]

Protecting children also motivates sexual content moderation. Children's sexual innocence was one rationale for the CDA, which sought to restrict children's access to indecent material online.[145] Congress wrote the CDA out of a moralistic concern about pornography, in general.[146] It was also an animating force for the Online Family Empowerment Act.[147] Platforms use similar discourses when they make their sexual content moderation more robust. Instagram removed sex educational content because the platform wants "content to be appropriate for . . . our youngest members."[148] YouTube hid queer content in Restricted Mode after stating that "[c]hild safety has been and remains" the company's "#1 priority."[149] TikTok justified its increasingly robust filtering of sexual content as a way "to further strengthen our safeguards and introduce new measures to protect young people on the app."[150] The result was an entire hashtag—#wrongsideoftiktok—that includes, among other things, content algorithmically labeled as sexual in any way and slowed, taken down, or entirely removed under the guise of protecting children.[151]

There are, of course, other factors contributing to the evolution of sexual content moderation. For instance, thanks to the work of scholars like Danielle Citron and Mary Anne Franks and victims' rights lawyers like Carrie Goldberg, platforms have focused more attention on protecting women and members of other marginalized populations from online harassment, sexual exploitation,

144. *Id.* (citing Alleged Immoral Conditions at Newport (R.I.) Naval Training Station, Rep. of the Comm. on Naval Affairs, U.S. Senate, 67th Cong., 1st sess. (1921)) (emphasis added).

145. S. Rep. No. 104–23, at 9, 59 (noting that law was adopted to, among other things, "protect families from uninvited cable programming which is unsuitable for children"); *id.* at 59 ("The information superhighway should be safe for families and children.").

146. *Id.* at 59 ("The Committee has been troubled by an increasing number of published reports of inappropriate uses of telecommunications technologies to transmit pornography.").

147. H.R. Rep. No. 104–223, at *14 ("Congress finds the following: . . . (4) remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material.").

148. Abigail Moss, *'Such a Backwards Step': Instagram Is Now Censoring Sex Education Accounts*, Vice (Jan. 8, 2021, 6:56 AM), https://www.vice.com/en/article/y3g58m/instagram-rules-censoring-sex-educators [https://perma.cc/ZYR5-CYDQ].

149. Matthew S. Schwartz, *Advertisers Abandon YouTube Over Concerns That Pedophiles Lurk in Comments Section*, NPR (Feb. 22, 2019, 8:53 AM), https://www.npr.org/2019/02/22/696949013/advertisers-abandon-youtube-over-concerns-that-pedophiles-lurk-in-comments-secti [https://perma.cc/FTP7–2FTX].

150. Justin Wise, *Feds Investigating Allegations TikTok Failed to Protect Children's Privacy: Report*, Hill (July 7, 2020, 11:27 PM), https://thehill.com/policy/technology/506323-feds-investigating-allegations-tiktok-failed-to-protect-childrens-privacy [https://perma.cc/PS6T-7URP].

151. *See* Morgan Sung, *The Stark Divide Between 'Straight TikTok' and 'Alt TikTok'*, Mashable (June 21, 2020), https://mashable.com/article/alt-tiktok-straight-tiktok-queer-punk [https://perma.cc/RAU6-V8YD].

and nonconsensual pornography.[152] Platforms have developed ways to spot and report cyber sexual abuse, even if the process is imperfect and frustrating.[153] Some of these changes come from a refreshing victim-centered approach.[154] Protecting the cyber civil rights of women is a legitimate goal, as is protecting children from being force-fed explicit or obscene content. I am not suggesting otherwise. My narrower point is that, like anti-vice policing, sexual content moderation has been rationalized as a means to protect vulnerable populations from exploitation. Undoubtedly, the discourse of protecting children can and has been weaponized as a front for anti-queer bigotry.[155] But even if we credit platforms with genuine concern for preventing sexual exploitation, the next section demonstrates how, like anti-vice policing, the machinery of sexual content moderation's vague rules, technologies, and people ends up disproportionately silencing queer expression as well.

B. *The Assemblages' Mechanics*

Armed with various rationales for exerting control over public spaces, both states enforcing anti-vice laws and platforms moderating sexual content created a system of vague rules that never mentioned queer people, but necessarily resulted in disproportionate burdens on sexually nonnormative populations.[156] And both regimes rely implicitly on similar sets of assumptions about identifying offending behavior.

1. Vague Rules

Most of the laws that police used to harass, arrest, and imprison queer people in the middle of the twentieth century were vague.[157] Police in New

152. *See* Citron, Hate Crimes, *supra* note 136; Citron, *Civil Rights*, *supra* note 96; Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 Fla. L. Rev. 1251 (2017); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345 (2014). Carrie Goldberg runs a pioneering practice representing victims of online sexual abuse. *See* C.A. Goldberg, https://www.cagoldberglaw.com/ [https://perma.cc/8YJQ-ZV5H].

153. Citron, Hate Crimes, *supra* note 136, at 237–39.

154. Olivia Solon, *Inside Facebook's Efforts to Stop Revenge Porn Before It Spreads*, NBC News (Nov. 19, 2019, 8:15 AM), https://www.nbcnews.com/tech/social-media/inside-facebook-s-efforts-stop-revenge-porn-it-spreads-n1083631 [https://perma.cc/85RZ-VNAQ].

155. *See* Dudley Clendinen & Adam Nagourney, Out for Good 292 (2013). The primary thrust of conservatives' arguments against repealing anti-sodomy laws and permitting same-sex marriage were based on perceived harms to children. *See* Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 Harv. C.R.-C.L. L. Rev. 81, 85–90, 93–94 (2011). More recently, bans on teaching critical race theory and the resurrection of "Don't Say Gay" or "No Promo Homo" laws in Florida and elsewhere have also been rationalized as necessary to protect children. *See* Mark Joseph Stern, *How the War on Critical Race Theory Revived Anti-Gay Activism in Schools*, Slate (Mar. 2, 2022, 2:50 PM), https://slate.com/news-and-politics/2022/03/critical-race-theory-dont-say-gay-florida-lgbtq.html [https://perma.cc/4SWZ-MHBF] ("Whenever there is a moral panic involving children, homophobes see an opportunity.").

156. Chauncey, *supra* note 97, at 2.

157. It is true that until 1961, every state criminalized sodomy, which they variously

York arrested queer men for "disorderly conduct" for a litany of behaviors, from "using vile language" to "not behaving," from walking together on the street to speaking into each other's ears.[158] Rule 5, New Jersey's disorderly conduct provision, prohibited bars from operating "in such a manner as to become a nuisance."[159] The District of Columbia prohibited queer behavior through laws that criminalized "unlawful assembly, profane, and indecent language," as well as "indecent exposure."[160] In cities across the country, mostly gay men were arrested for "degeneracy" or "lewd" or "indecent" conduct.[161] Queer men cruising in public parks for consensual companionship were arrested for "frequent[ing] or loiter[ing] about any public place."[162] Public nuisance laws, as well as "sex degeneracy" and "sex perversion" laws, allowed police to arrest men who gathered together on stoops or sang showtunes in public.[163] Such laws even formed the basis for pretextual arrests.[164] Men in bars could be arrested under disorderly conduct laws simply for "appear[ing] to be homosexuals."[165] Together, these vague laws formed the basis of an oppressive regime colloquially known as "walking while gay." A version of this regime lives on today as police have used some of the same laws still on the books to harass, arrest, and imprison transgender individuals, sex workers, and queer people of color on the streets.[166]

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defined as any oral or anal sex. But because sodomy was difficult to prove, police relied on vague vice laws. Lvovsky, *supra* note 9, at 104, 195–97.

158. Chauncey, *supra* note 97, at 170, 172, 174, 185, 338. Indeed, most queer men arrested in New York during this time were arrested for "disorderly conduct." *See* Chauncey, *supra* note 97, at 185; Eskridge, Gaylaw, *supra* note 16, at 26–33; Eskridge, *Challenging*, *supra* note 94, at 851, 855, 860, 871–72, 901.

159. Lvovsky, *supra* note 9, at 51.

160. William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946–1961*, 24 Fla. St. L. Rev. 703, 711 (1997) [hereinafter Eskridge, *Privacy*] (citing D.C. Code Ann. § 22–2701 (West 1940) (inviting for purposes of public prostitution), § 22–1107 (unlawful assembly, profane and indecent language), and § 22–1112 (indecent exposure)).

161. Chauncey, *supra* note 97, at 173, 183, 194; Eskridge, Gaylaw, *supra* note 16, at 26–33; Eskridge, *Challenging*, *supra* note 94, at 837. The historian Nayan Shah reports that police often used these vague laws not just to police queer conduct in general, but particularly consensual sexual encounters between older immigrant men and younger, white men. Nayan Shah, *Between "Oriental Depravity" and "Natural Degenerates": Spatial Borderlands and the Making of Ordinary Americans*, 57 Am. Q. 703 (2005).

162. Chauncey, *supra* note 97, at 185; Mogul et al., *supra* note 140, at 46–47 (queer men were arrested during raids on bars for "loitering inside a building").

163. Chauncey, *supra* note 97, at 313, 352.

164. As Lvovsky notes, "a rash of publicized sex crimes spawned a panic about degeneracy in the nation's cities." Lvovsky, *supra* note 9, at 4–5. According to some historians, these "sex crimes panics" were excuses for police to arrest allegedly queer men and force them to reveal the names of other queer men, all of whom were arrested for crimes they never committed. Mogul et al., *supra* note 140, at 33.

165. Lvovsky, *supra* note 9, at 51 (summarizing cases in which mere appearance or perception of queer clientele could result in arrest and shutting down the bar); *see also* One Eleven Wines & Liquors, Inc. v. Div. of Alcohol Beverage Control, 235 A.2d 12, 14–15 (N.J. 1967).

166. Leonore F. Carpenter & R. Barrett Marshall, *Walking While Trans: Profiling of*

Few of these laws were specific. As Professor Lvovsky notes, there was no single or clear definition of any of the terms used. The state knew it wanted to marginalize queer sexual conduct, but it had no single "paradigm of so-called deviance."[167] It left room for multiple views held by the various people and departments in charge of enforcement.[168] In the end, although there was no clear definition for what made a person or a bar "disorderly," police knew it when they saw it.[169]

Many sexual content moderation rules are just as vague as the disorderly conduct statutes that policed queer behavior in the last century.[170] Although its rules on "intercourse" and "sexual exploitation" are relatively specific, Facebook's Community Standards prohibit "sexual activity" but provide a non-exhaustive list of examples that covers only a handful of situations, from "erections" to "stimulating genitalia."[171] The rules even include restrictions on "implied stimulation," but they do not explain what constitutes "stimulation," actual or implied.[172] TikTok prohibits "content that explicitly or implicitly depicts" sexual conduct, including "erotic kissing," but does not explain the difference between kissing and "erotic" kissing.[173] YouTube has a rule against "explicit content meant to be sexually gratifying" and provides examples with a warning to users that the "list isn't complete."[174] Evidently, sexual content moderation rules follow a pattern: vagueness.

And that pattern is no accident. Anti-vice authorities purposely chose to use vague morality laws to police public expression of queer sexuality because anything more specific was hard to prove. For sodomy, police needed evidence of specific sexual acts done in private among consenting adults.[175] Short of barging through someone's door or managing to peer through a second or third story window, police were hard-pressed to find hard evidence in most cases.[176]

Transgender Women by Law Enforcement, and the Problem of Proof, 24 Wm. & Mary J. Women & L. 5–6, 14, 16 (2017).

167. Lvovsky, *supra* note 9, at 18.

168. Chauncey, *supra* note 97, at 171, 250, 334; Eskridge, Gaylaw, *supra* note 16, at 46; Hugh Ryan, When Brooklyn Was Queer 95–96 (2019).

169. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it.").

170. There is some disagreement about this in the literature. *Compare* Douek, *Governing*, *supra* note 6, at 773 (referring to "elaborate rules"), *and id.* at 785 (implicitly contrasting contextual evaluation with early content moderation's "adherence to clear rules"), *with* Bloch-Wehba, *supra* note 7, at 84 (referring to the "lack of clarity and apparent arbitrariness of some" content moderation rules).

171. Meta, *supra* note 23.

172. *Id.*; *Adult Sexual Exploitation*, Meta, https://transparency.fb.com/policies/community-standards/sexual-exploitation-adults/ [https://perma.cc/PWW9-T4MX].

173. TikTok, *supra* note 23.

174. YouTube, *supra* note 23.

175. Lvovsky, *supra* note 9, at 4.

176. In two of the most famous sodomy cases, police had to gain access to private residences to observe sexual activity. *See* Brief of Respondent at 1, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85–140), 1986 WL 720442 ("On August 3, 1982, Georgia . . . arrest[ed] 29-year-old Respondent Michael Hardwick in his own bedroom, and charg[ed] him with

Even homosexual solicitation cases could be muddied when anti-vice police stepped too close to the entrapment line.[177] As a result, police arrested more queer men for the lesser charges of "vagrancy" or "disorderly conduct," neither of which had clear definitions, evidentiary requirements, or significant barriers to prosecution.[178]

Similarly, platforms intentionally leave their content moderations rules vague. As Sarah Roberts explains, platforms refuse to disclose material information about what does and does not constitute a violation of their content moderation rules to stop "unscrupulous users [from] attempting to game the rules."[179] But vagueness is less about deterring user mischief than about maintaining platform power. Since platforms are the only ones that can say what their own rules mean, opacity maximizes platforms' discretion to control their fiefdoms.[180]

Granted, vagueness in definitions of sexual content is nothing new.[181] The task of defining sexual norms is fraught, culturally situated, and ideological, and I do not suggest otherwise.[182] Rather, the historical analogy between anti-vice policing and sexual content moderation demonstrates how the latter's vague standards, like disorderly conduct and other anti-vice laws, gives ample discretion to human decisionmakers.[183] Decision-makers can refer to operational guidelines with their lists of nonexhaustive examples, but the final decision is discretionary.[184] As the next section describes, implicit in the discretion granted to both police and content moderators is the assumption that anyone can spot inappropriate content, an assumption that further amplifies platform power.

2. Technological and Human Expertise

It is true that mid-century anti-vice policing did not depend for its day-to-day implementation on armies of commercial content moderators from different countries and cultures across the globe with different norms about

committing the crime of 'sodomy' with another consenting adult in that very room."); Lawrence v. State, 41 S.W.3d 349, 350 (Tex. App. 2001) (identifying John Lawrence and Tyron Garner engaging in "homosexual conduct" while "investigating a reported 'weapons disturbance'").

177. Lvovsky, *supra* note 9, at 138.

178. *Id.*

179. Roberts, Screen, *supra* note 7, at 25, 37.

180. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 655 (1996) (making a similar argument in the federal agency context).

181. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (stating that trying to define obscenity is trying "to define what may be indefinable"); Miller v. California, 413 U.S. 15, 37–42 (Douglas, J., dissenting) (describing the problems the Supreme Court has faced with defining and applying a rule for obscenity).

182. Ruberg, *supra* note 88, at 1683.

183. Lvovsky, *supra* note 9, at 7 (describing how anti-vice laws gave great discretion to both police and trial court judges).

184. Roth, *supra* note 88, at 418–420.

sex. Although one could argue that queer culture was originally just as foreign and stigmatized to police as it is to many moderators from countries that still ban or criminalize homosexuality, the resemblance between anti-vice policing and sexual content moderation runs deeper.

Both vice squads and social media platforms have a similar enforcement problem: How can anyone know when something violates a vague rule? Other areas of law solve this problem with expertise: for instance, administrative law rests at least in part on the assumption that executive agencies are staffed with experts who are owed deference when writing rules that clarify vague statutory guidelines.[185] Anti-vice policing and sexual content moderation chose the opposite approach. Each system implicitly relies on the notion that just about anyone could spot offending behavior.

In addition to using vague laws to constrain individuals' behavior, states and municipalities prohibited bars from becoming "disorderly" by knowingly serving queer customers. But as Lvovsky insightfully argues, by making enforcement contingent on bar owners *knowing* they were serving gay patrons, liquor laws not only required police to be able to identify queer people in bars, they also "forced the states' investigators to prove that [bar owners] had not only welcomed gay customers but also recognized them as such."[186] The burden was often met by suggesting that queer patrons were "unmistakably homosexual" or, implicitly, that there was some common, shared insight about what a queer person looked like.[187] Therefore, the entire regime implicitly depended on the presumption that anyone could identify a queer person on sight.[188]

Undoubtedly, this regime imprinted sexual and gender stereotypes in law. It also implied that anyone could do it. When bars challenged the state's attempt to shut them down for serving queer customers, they often questioned agents' qualifications to identify queer customers.[189] Unwilling to hold themselves out as experts on a lifestyle most of society found abhorrent, police responded that they neither considered themselves experts nor needed to be: "[I know] when I see a pansy or a degenerate," officers claimed in court.[190] Attorneys for the SLA made this explicit, arguing that "[y]ou don't have to be an expert to be able to see a homosexual."[191] That was because every-

185. Expertise is one theory justifying judicial deference to agency decisions in *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See* Yoav Dotan, *Making Consistency Consistent*, 57 Admin. L. Rev. 995, 1022–23 (2005); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. Pa. L. Rev. 549, 596 (1985); Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2084 (1990); Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 Va. L. Rev. 1243, 1264 (1999).

186. Lvovsky, *supra* note 9, at 11.

187. *Id.* at 11–12, 25.

188. *Id.* at 45.

189. *Id.*

190. *Id.*

191. *Id.*

one thought that all queer people were flamboyant, feminine, and ostentatious, much like they had been portrayed in the media. It was a piece of shared "knowledge" that required no training to deploy.[192] Lvovsky concludes that making inferences of homosexuality were "so very unremarkable" because the police perceived identifying queer people required only "simple deductions that could be corroborated" by anyone.[193]

Like anti-vice policing, sexual content moderation also relies on the presumption of lay expertise in both human and algorithmic moderation. Platforms keep the details of moderator training a secret. But we know that commercial content moderators usually find their jobs through outsourcing firms, and once they pass a written test and an interview, they start working from home in several-hour shifts almost immediately.[194] And although human moderators are based all over the world, many of those moderating U.S. content are located in the Philippines because platforms presume that decades of U.S. colonial influence have accustomed Philippine citizens to U.S. sensibilities.[195] Therefore, like anti-vice policing, which presumed most people had access to a shared sensibility about queerness, the mechanics of content moderation implicitly rely on there being a shared understanding of what people in the United States find offensive and that anyone vaguely cognizant of U.S. norms is qualified to be a content moderator. This presumption may not have been front of mind when platforms were first designing the machinery of content moderation. Nor was this likely the primary reason for outsourcing moderation. But platforms' choice of commercial content moderators from cultures they presume are similar to those whose content they are moderating implicitly suggests that moderation is based on shared understanding about sex that ostensibly comes from cultural familiarity.

Notably, Facebook relies on several "tiers" of moderators, with commercial content moderators in the lowest tier.[196] Moderators higher up in the hierarchy often have what Facebook calls "experience judging content," whatever that actually means.[197] But Facebook is a unique case; as the largest and most profitable social network, Facebook can afford to create a system with some expertise built in. Plus, most content moderation—both at Facebook and at other platforms—happens at the entry level, with moderators in the upper tiers reviewing only a small sample of cases.[198] Therefore, for the most part, human content moderation remains the work of nonexperts.

Algorithmic moderation also relies on lay expertise. Technical expertise in building algorithms should not be confused with expertise in the substance

192. *Id.* at 107, 156–58.

193. *Id.* at 45–47.

194. Chen, *Inside*, *supra* note 59; *see also* Roberts, Screen, *supra* note 7; Roberts, *Detritus*, *supra* note 7; Roberts, *Dirty Work*, *supra* note 7.

195. Chen, *Laborers*, *supra* note 73.

196. Klonick, *Governors*, *supra* note 7, at 1639–41.

197. *Id.* at 1640.

198. *Id.* at 1641.

of what those algorithms are moderating. Algorithms are models that rely on heuristics, proxies, and independent variables; they are trained on material that has been associated with previously moderated content.[199] Therefore, algorithmic moderation presumes that there are some characteristics common to sexual content, that those characteristics are evident already, and that they can be programmed into machines by engineers with no firsthand experience with the underlying content. As Frank Pasquale has argued, the notion that any engineer can neatly code rules and their attendant human judgments into a machine loses the "qualitative evaluation and . . . humble willingness to recalibrate and risk-adjust quantitative data" that come with human experts.[200] Algorithmic moderation only covers code-able parts of rules against sexual content. Therefore, algorithmic moderation embodies an epistemic error: It assumes that sexual content is reducible to factors that AI can identify. Put another way: "Sex: There's an App for That." Algorithmic moderation requires no contextual or nuanced understanding of sex, let alone an appreciation for queer culture.

3. Disproportionate Antiqueer Enforcement

Given the discretion that vague rules afford algorithmic and human rule enforcers and the underlying assumptions that queerness and sexual content are readily identifiable, it should come as no surprise that both anti-vice laws and sexual content moderation rules have been disproportionately and arbitrarily applied against queer and nonnormative sexual content. Indeed, the similarities in the mechanics of enforcement run deep, even beyond the lived experiences of victims. Both anti-vice and content moderation enforcement rely on vigilantes to support surveillance. And both save the lion's share of their energy for the most marginalized within the queer community.[201] This section describes each parallel in turn.

a. Asymmetrical Enforcement: Data and Experiences

Historians have ably demonstrated the stark disproportionate application of anti-vice laws against queer people. George Chauncey found a pattern of evidence showing that New York police would arrest groups of men congregating together on certain streets or in certain spots in Central Park but ignore open and obvious indecent exposures among men who had children in tow.[202] The police raided the queer-friendly Riis Beach but not the heterosexual beach

199. Gorwa et al., *supra* note 55, at 3–5.

200. Pasquale, *Professional*, *supra* note 65, at 74; Frank Pasquale, New Laws of Robotics 1–11 (2020); *see also* Frank Pasquale, *A Rule of Persons, Not Machines: The Limits of Legal Automation*, 87 Geo. Wash. L. Rev. 1 (2019).

201. Those who sit at the intersection of "matrices of domination" often face compounding subordination. *See* Patricia Hill Collins, *Black Feminist Thought in the Matrix of Domination*, *in* Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment (1990); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241 (1991).

202. Chauncey, *supra* note 97, at 183.

immediately adjacent.[203] They applied laws against solicitation to receptive partners but not to insertive partners when the latter were masculine presenting.[204] States went after queer bookstores with gay erotica but not bookstores with heterosexual pornography.[205] And documents from the New York SLA reveal that the agency saw queer and queer-friendly bars as per se "disorderly".[206] New York imposed harsher sentences on queer people in general and, specifically, on queer men convicted of loitering for cruising in a public park.[207]

Like anti-vice legislation, the rules governing sexual content moderation have been disproportionately applied to queer content.[208] Surveys of content creators show that queer people, women, persons of color, and sex workers are most likely to report that their content has been removed by major platforms.[209] Research across YouTube found that uploads featuring the words "gay" or "lesbian" or "LGBTQ"—hardly sexual or offensive—were systematically restricted by YouTube's AI.[210] Consequently, more than one-third of all videos "with queer content in the titles" were automatically demonetized, disproportionately stripping away the livelihoods of queer creators and artists.[211]

But even stories of YouTube restricting queer videos or Instagram taking down queer art miss the stark inequities. In its effort to restrict "mature" or "sensitive" content, YouTube has slowed the spread and hidden much of some queer content creators' work for violating its nudity and sexual content policies; meanwhile, it has left highly sexualized content from cisgender heterosexual

203. *See id.* at 184.

204. *Id.* at 186.

205. Eskridge, *Challenging*, *supra* note 94, at 893.

206. Chauncey, *supra* note 97, at 337.

207. Ryan, *supra* note 168, at 72; Mogul et al., *supra* note 140, at 78. This pattern continues. *See* Carpenter & Marshall, *supra* note 166, at 13–15 (highlighting enhanced profiling of transgender individuals); Frank H. Galvan & Mohsen Bazargan, Williams Inst., Interactions of Latina Transgender Women with Law Enforcement 7 (2012), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Latina-Trans-Women-Law-Enforcement-Apr-2012.pdf [https://perma.cc/3KG3-TM9D]; Jordan Blair Woods, *LGBT Identity and Crime*, 105 Calif. L. Rev. 667 (2017); Naomi G. Goldberg, Christy Mallory, Amira Hasenbush, Lara Stemple & Ilan H. Meyer, *Police and the Criminalization of LGBT People*, *in* The Cambridge Handbook of Policing in the United States (Tamara Rice Lave & Eric J. Miller eds., 2019).

208. Much of this evidence is ethnographic because robust quantitative and statistical analysis is impossible given platforms' refusal to share data with researchers. See *infra* section IV.B for a response to this problem.

209. *Exclusive: An Investigation into Algorithmic Bias in Content Policing on Instagram*, Salty (Oct. 2019), https://saltyworld.net/algorithmicbiasreport-2/ [https://perma.cc/837N-XU9D].

210. Beurling Ocelot AI, Demonetization Report, https://docs.google.com/document/d/18B-X77K72PUCNIV3tGonzeNKNkegFLWuLxQ_evhF3AY/edit (last visited June 20, 2021).

211. Aja Romano, *A Group of YouTubers Is Trying to Prove the Site Systematically Demonetizes Queer Content*, Vox (Oct. 10, 2019, 9:40 AM), https://www.vox.com/culture/2019/10/10/20893258/youtube-lgbtq-censorship-demonetization-nerd-city-algorithm-report [https://perma.cc/BZV2-R2AB].

women untouched.[212] Queer brands, particularly those working in queer sexual health, cannot run ads on Instagram, but Necessaire and Maude, sex care brands catering to cisgender heterosexual men and women, are permitted to post revealing images and link directly to their stores.[213] When the queer band Unsung Lilly tried posting an ad to Facebook that pictured two women's foreheads touching, Facebook banned it, calling the photo "sexually explicit."[214] The band then uploaded the same ad with two different photos, one with a platonic photo of themselves and the other of a man and a woman touching foreheads. Both were approved by Facebook.[215]

Facebook allowed an ad for erectile dysfunction medication featuring a seminude man, but it blocked an ad with an image of a same-sex couple depicting the backs of their heads touching.[216] Instagram allowed the Museum of Pizza to post an image of a muscular man in briefs biting a slice of pizza, but banned an ad featuring a fully clothed man because it linked to a sex toy.[217] These are just a few examples; there are too many to list here. The result is that nonnormative and queer content is largely devoid of sexuality and sexual desire, but content that follows heterosexual norms can be sensual, racy, and explicit.[218] This is not to say that *no* queer content appears on platforms. But a disproportionate amount of queer content is restricted or blocked entirely.

b. Community Enforcement

Most histories of anti-vice policing naturally focus on the police, but government actors were aided by civilian morality groups. Some of them were vigilantes, eager to intimidate and silence queer people through violence and assault.[219] Far more were willing to bring queer behavior to the police's attention, inform on queer-friendly bars to liquor regulators, and, in some cases, supplement police forces with their own people.[220] Sexual content moderation also depends on community members informing platforms about content they find offensive. This system may not have been designed to discriminate against queer people, but it necessarily subjects queer people to the normative judgments of others.

212. Hunt, *supra* note 95.

213. Mary Emily O'Hara, *Queer and Feminist Brands Say They Are Being Blocked from Running Ads on Instagram and Facebook*, MTV (July 19, 2019, 8:00 AM), http://www.mtv.com/news/3131929/queer-and-feminist-brands-say-they-are-being-blocked-from-running-ads-on-instagram-and-facebook/ [https://perma.cc/T4ZZ-3AJY].

214. Sera Golding-Young, *Facebook Blocked My Ad, Mislabeled It "Sexually Explicit"*, ACLU N. Cal. Blog (Sept. 23, 2020), https://www.aclunc.org/blog/facebook-blocked-my-ad-mislabeled-it-sexually-explicit [https://perma.cc/PGL9–96MB].

215. *Id.*

216. Approved, Not Approved, https://approvednotapproved.com/ [https://perma.cc/9S6Q-B8MA] (providing comparison examples of advertising and asking users to choose which they think was allowed or not allowed on the platform).

217. *Id.*

218. Southerton et al., *supra* note 126, at 921.

219. Chauncey, *supra* note 97, at 180–81.

220. Eskridge, *Privacy*, *supra* note 160, at 717.

In the anti-vice context, community enforcement started with civilian morality clubs that engaged in public advocacy and direct action against degeneracy, solicitation, and homosexuality.[221] But much of police's help came from individuals and businesses. In the 1950s and 1960s, vice squads often responded to complaints from people and business owners.[222] Bar owners and bartenders also collaborated with liquor authorities directly.[223] Because society assumed that a queer person could be identified on sight based on any layperson's judgment, bar owners who believed they recognized queer crowds often reported them to the police.[224] The system incentivized this kind of surveillance; if the bar did not inform the city of queer clientele, the police could shut the business down for being "disorderly."[225]

This collaboration has a direct parallel in sexual content moderation, which encourages users to "flag" content for violating rules against sexual activity.[226] Flags are enforcement mechanisms; they provide "a practical mechanism for addressing the daunting task of regulating" the vast scale of platform content.[227] In other words, like anti-vice squads, which were also understaffed relative to the space they had to police, social media companies rely on members of their communities to help police their massive amounts of content and enforce their rules. Flagging also offers platform content moderation a legitimacy dividend. When social media platforms decide to remove content, they can "claim to be curating on behalf of their user community and its expressed wishes" through the flag.[228]

At the same time, deputizing other users into enforcing sexual content moderation rules necessarily exposes queer content to evaluation under the terms set by dominant, normative values.[229] Michelle White found that Craigslist users leveraged the site's flagging mechanism to attack personal ads that included queer or nonnormative sexual expression.[230] Conservative groups have organized to flag pro-queer groups on Facebook en masse.[231] Flagging can turn into "user-generated warfare," where systematic flagging of queer

221. Chauncey, *supra* note 97, at 138, 146, 215–16, 336; Ryan, *supra* note 168, at 89.
222. Lvovsky, *supra* note 9, at 104.
223. *Id.* at 34–35.
224. *Id.*
225. *Id.*
226. Crawford & Gillespie, *supra* note 4, at 412.
227. *Id.*
228. *Id.*
229. Southerton et al., *supra* note 126, at 922.
230. Michele White, Buy It Now: Lessons from Ebay 204 (2012) ("[T]he site's structure and flagging processes enable members to remove what they identify as not fitting or conforming.").
231. Michelangelo Signorile, *Truth4Time, Secret Religious Right Facebook Group, Included NOM Co-Founder, Fox News Pundit and More*, HuffPost (Dec. 6, 2017, 11:49 AM), http://www.huffingtonpost.com/2012/04/24/truth4time-secret-religious-right-facebook-group-_n_1449027.html [https://perma.cc/V57L-X9NC].

posts for violating rules against sexual activity results in the disproportionate silencing of nonnormative queer voices.[232]

That said, there are important differences between community vice enforcement and flagging. In the anti-vice context, morality clubs operated locally and community enforcers lived and worked near queer-friendly bars.[233] They had to see a queer person, hear a disturbance, and call a local precinct. On the other hand, anyone, from anywhere, and for any reason can weaponize a flag. Viral anti-queer campaigns are easier, faster, and cheaper to organize. That vice squads never had this kind of auxiliary force even in their heyday further emphasizes sexual content moderation's capacity to put queer content at risk.

c. Intersectional Injustice

Even within the queer community, some voices are silenced more frequently than others. Indeed, both anti-vice policing and sexual content moderation share a tendency to attack the most marginalized, the presence of whom, by virtue of their intersectional identities, is automatically a threat to traditional norms.

During the height of anti-vice policing in the middle of the last century, police primarily targeted queer working-class men, queer immigrants of color, drag queens, and those who could not hide their sexual expression.[234] The historian Anne Gray Fischer has shown how the discourse of homosexuality as a mental illness was used to rationalize and mitigate responsibility for wealthy white men's same-sex behavior, but rarely, if ever, used to lessen the sentence of queer people of color and the poor.[235] Emily Hobson's masterful work on the policing of queer people in Los Angeles also has shown how police chose to arrest queer people of color more often, for more severe crimes that carried higher sentences, and with little interest in leniency.[236] Courts were more willing to show leniency to white, middle-class queer defendants, but not to working class gay men, queer immigrants, and persons of color.[237]

This biased enforcement was only partly a feature of the presumption that a queer person could be identified on sight. Granted, it was easier for police

232. Brittany Fiore-Silfvast, *User-Generated Warfare: A Case of Converging Wartime Information Networks and Coproductive Regulation on YouTube*, 6 Int'l J. Commuc'n 1965, 1973 (2012).

233. Lvovsky, *supra* note 9, at 104.

234. Chauncey, *supra* note 97, at 331–48.

235. Anne Gray Fischer, "Land of the White Hunter": Legal Liberalism and the Racial Politics of Morals Enforcement in Midcentury Los Angeles, 105 J. Am. Hist. 868 (2019).

236. Emily Hobson, *Policing Gay LA: Mapping Racial Divides in the Homophile Era, 1950–1967*, *in* The Rising Tide of Color 188 (Moon-Ho Jung ed. 2014).

237. Lvovsky, *supra* note 9, at 6–7, 107–09; *see also* Eskridge, *Challenging*, *supra* note 94, at 832 ("[T]he same magistrate who had reinstated the charges against [two Latino and African American men] had dismissed charges against two white men for precisely the same conduct (oral sex) with the same blond man."). This unequal policing continues. *See* Amnesty International USA, Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S. 27–28, 34–36 (2005).

to spot the more feminine-presenting men, the more masculine-presenting women, the drag queens, those who subverted gender norms, and those bold enough to express their authentic selves.[238] Importantly, though, the discrimination also reflected the overarching goal of anti-vice policing. Chauncey notes that the state's goal was not to eradicate queer life, but rather force underground nonnormative expressions of sexuality that challenged middle-class sexual norms.[239] Wealthy, white, cisgender, masculine-presenting men could fly under the radar.[240] When they were caught up in an anti-vice sweep, they often had the family connections and wealth to keep their names out of the papers and off the arrest rolls.[241] In addition, conservative lawmakers linked their assault on queer people with their "massive resistance" to racial integration after the Supreme Court's decision in *Brown v. Board of Education*.[242] The result was a disproportionate attack on alleged "sexual deviancy" at historically Black colleges and universities and Black men in general.[243]

Although there has been no systematic intersectional analysis of content moderation of queer content, there is anecdotal evidence that a similar asymmetry plagues content moderation. Content moderation algorithms find innocuous sentences that used the phrases "Black man," "Black woman," and "homosexual man" as more "toxic," and thus more likely to be automatically blocked or moderated, than the same sentences using the phrase "French man" or "German man."[244] Algorithms designed to detect hate speech have a difficult time distinguishing between homophobic and transphobic slurs and use of similar terms by queer people as a form of empowerment, putting at risk the speech of those who cannot or refuse to hide their authentic selves.[245] Users have reported that platforms hide content related to gender transition and gender-affirming treatment.[246] Instagram has removed topless images of plus-sized Black women with their arms covering their breasts ostensibly because

238. Lvovsky, *supra* note 9, at 40 ("[E]ntertainments like the pansy cabarets . . . marked that body as *legible*, marked by a series of conspicuous visual codes.") (emphasis in original); *id.* at 41–52 (showing how knowledge of those stereotypes was used in vice policing).

239. Chauncey, *supra* note 97, at 180, 333, 357.

240. Lvovsky, *supra* note 9, at 107 ("'[N]ormal' homosexuals, indistinguishable from other men, rarely caught the vice squad's eye; it was 'the ones who dress or act aggressively or outrageously that attract[ed] our attention.'").

241. A classic example of this is the effort by Samuel Warren to keep his queer younger brother's name out of the papers and away from the police. Charles E. Colman, *About Ned*, 129 Harv. L. Rev. F. 128 (2016).

242. 347 U.S. 483 (1954); Numan V. Bartley, The Rise of Massive Resistance: Race and Politics in the South During the 1950's 67–81, 190–236, 341–43 (1969).

243. Mogul et al., *supra* note 140, at 38–39, 49–50.

244. Nicolas Kayser-Bril, *Automated Moderation Tool from Google Rates People of Color and Gays as "Toxic"*, Algorithm Watch, https://algorithmwatch.org/en/automated-moderation-perspective-bias/ [https://perma.cc/DLC6-THCX].

245. Ben Bours, *Facebook's Hate Speech Policies Censor Marginalized Users*, Wired (Aug. 14, 2017, 7:00 AM), https://www.wired.com/story/facebooks-hate-speech-policies-censor-marginalized-users/ [https://perma.cc/3ZRQ-H6GE].

246. Erlick, *supra* note 3.

the images violated the platform's rules against sexual content, but it does not subject the same censorship to thin white women in similar poses.[247] And in all cases of content moderation, those with money, privilege, and power are more likely to have access to legal counsel and the time and capacity to navigate platforms' appeal processes.[248] And yet, even when they do have access, social media follow another example set by anti-vice policing of queer behavior: denial of due process.

4. Without Due Process

Contrary to the hopes of some scholars, platform mechanisms that allow users to "appeal" unfavorable algorithmic moderation decisions do not come with added transparency.[249] This is unsurprising. Anti-vice officers routinely denied due process to their queer arrestees as well.

Arrest records and police reports from the 1930s through the 1960s demonstrate that the state neither needed a reason to raid queer-friendly bars nor informed those captured in anti-vice sweeps of the charges against them. New York's State Liquor Authority (SLA) conducted episodic raids without any justification or reason; queer men were arrested based on single, uncorroborated reports of loitering.[250] During the Lavender Scare, the Civil Service Commission fired queer government employees for "immoral conduct" without any specific evidence, rationale, or warning.[251] Police often failed to apprise queer defendants—particularly men of color—of their rights to silence and counsel.[252] This continues today, where transgender women are arrested without reason for congregating or walking on the street at night.[253]

Denial of due process is just one factor that delegitimized anti-vice policing.[254] But it was an integral part of the assemblage of forces that exerted power over queer identity and expression. Refusing to inform an arrestee of the reason for their arrest, harassing law-abiding citizens on the street, and detaining people for "walking while queer" both reflect and reify the extent to which police denied the humanity and dignity of their targets. And if, as legal historians suggest, the goal of anti-vice policing was to push queer sexuality

247. Nosheen Iqbal, *Instagram 'Censorship' of Black Model's Photo Reignites Claims of Race Bias*, Guardian (Aug. 9, 2020, 2:13 AM), https://www.theguardian.com/technology/2020/aug/09/instagrams-censorship-of-black-models-photo-shoot-reignites-claims-of-race-bias-nyome-nicholas-williams [https://perma.cc/4TER-ND5G].

248. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y Rev. 95 (1974).

249. *See* Bloch-Wehba, *supra* note 7, at 91.

250. Chauncey, *supra* note 97, at 170–71, 341–42.

251. *See* Scott v. Macy, 349 F.2d 182, 185 (D.C. Cir. 1965).

252. Eskridge, *Challenging*, *supra* note 94, at 832.

253. Carpenter & Marshall, *supra* note 166, at 6; Mogul et al., *supra* note 140.

254. *See* Tom R. Tyler, Why People Obey the Law (2d ed. 2006); Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 L. & Soc'y Rev. 809 (1994).

back into the closet, the threat of arbitrary arrest without traditional due process protections likely had a powerful chilling effect on queer people.[255]

Following this tradition, social media platforms do not provide their users with explanations for adverse content moderation. Algorithmic decisions are mostly opaque, and human reviews operate in a black box.[256] When individuals disagree with a content moderation decision, some social media companies provide an "appeal" option, which constitutes the extent of the process involved in challenging platform decisions.[257] Users have described this process as "speaking into a void."[258] Platforms rarely provide space for either explanation or context. Users usually only receive a final decision.[259] Despite platforms' eagerness for the legitimacy dividend that comes with being treated as a quasi-government, it is difficult to characterize this as an "appeal"; after all, moderators must make decisions in seconds, without the benefit of deliberation, context, and analysis.[260]

C. *Sexual Content Moderation's Path Dependencies*

This Article has argued that similar assemblages of sociolegal forces, ideas, rules, technologies, people, and machinery characterize both sexual content moderation and anti-vice policing that targeted the queer community from the 1930s through the 1960s. These assemblages amplify power structures, whether it was municipal leaders and police chiefs eager to reassert government control over urban nightlife or technology companies looking to establish highly profitably control of their platforms without public accountability. The effect of both assemblages is a disproportionate crackdown on queer people and expressions of sexual nonnormativity.

To be clear, this analogy does not imply that anti-vice policing and sexual content moderation were developed with the specific and malicious intent of discriminating against queer people. That is not how assemblages work. An assemblage is an aggregation of social forces that "'work' together as a functional entity."[261] Kevin Haggerty and Richard Ericson identified a "surveillant assemblage" of different technologies, institutions, people, and knowledge—themselves also comprising constituent parts—that come together to subject people to the kind of total surveillance that any one set of them could not.[262]

255. *E.g.*, Steffel v. Thompson, 415 U.S. 452, 458–60 (1974) (suggesting that the chilling effect when a pamphleteer is threatened with arrest for continued distribution of handbills is sufficient for Article III standing).

256. Roth, *supra* note 88, at 415, 418, 423.

257. Kristen Vaccaro, Christian Sandvig & Karrie Karahalios, *"At the End of the Day Facebook Does What It Wants": How Users Experience Contesting Algorithmic Content Moderation*, 4 Proc. ACM Hum.-Comput. Interaction 167:1, 167:4 (2020).

258. Sarah Myers West, *Censored, Suspended, Shadowbanned: User Interpretations of Content Moderation on Social Media Platforms*, 20 New Media & Soc'y 4366, 4378 (2018) (quoting user report).

259. Southerton et al., *supra* note 126, at 923.

260. Gillespie, *supra* note 7, at 7; Roberts, *Detritus*, *supra* note 7.

261. Haggerty & Ericson, *supra* note 9, at 608.

262. *Id.* at 608–09.

Electronic monitoring is a good example. The practice does not just involve ankle bracelets; it also consists of phone calls, programmed contact, reporting tracking stations, databases, satellites, electricity, movement and voice, and so on.[263] Individually, these forces did not set out to create hegemonic systems of surveillance; as they "transcend[] institutional boundaries, systems intended to serve one purpose find other uses."[264] More than just surveillance creep, where a single technology is repurposed to engage in additional monitoring,[265] the surveillant assemblage consists of different pieces that exert power in a way greater or different than the sum of its parts.

That is what's happening in the content moderation space. Like the assemblage of laws, ideas, rules, technologies, expertise, people, and processes that constituted anti-vice policies, the sexual content moderation assemblage results in the disproportionate censorship of queer expression because of the path dependencies of its parts working as they were designed. Sexual content moderation was built to keep pornography away from children, to keep advertising profitable, and to ensure institutional control over platforms.[266] Because *sexual* nonnormativity is one defining feature of queerness, queer content is disproportionately swept up in that machinery. Facebook and Instagram algorithmically restrict and slow the dissemination of content with hashtags like #gays, #iamgay, #lesbiansofinstagram, and #lesbian because the hashtags are often spammed with pornography.[267] Users erase queer language or replace it with emojis or symbols because using certain sexually tinged words triggers algorithmic moderation.[268] Researchers at the Australian Strategic Policy Institute found that TikTok was shadow banning (or, making it difficult to find) queer hashtags—#gay, #transgender, and #Iamagay/lesbian—in Russia, Bosnia, and Jordan, and in at least eight languages to please politicians and advertisers.[269]

Platforms wrote vague rules to provide flexibility and discretion. They outsourced most of the work to algorithms, as well as commercial content moderators in the Global South and other users when the sheer scale of content became too massive.[270] However, even though outsourcing and algorithmic moderation arose to address the problem of scale, their operation

263. *Id.* at 610.

264. *Id.* at 616.

265. Matthew Tokson & Ari Ezra Waldman, *Social Norms in Fourth Amendment Law*, 120 Mich. L. Rev. 265, 301–02 (2021).

266. *See supra* section II.A.2.

267. Erlick, *supra* note 3.

268. Roth, *supra* note 88, at 427–28.

269. Fergus Ryan, Audrey Fritz & Daria Impiombato, *TikTok and WeChat: Curating and Controlling Global Information Flows*, Austl. Strategic Pol'y Inst. (Sept. 8, 2020), https://www.aspi.org.au/report/tiktok-wechat (last visited Nov. 18, 2022); Jane Li, *TikTok Is Suppressing LGBT Content in Eastern Europe and the Middle East*, Quartz (Sept. 8, 2020), https://qz.com/1900530/tiktok-shadow-bans-lgbt-hashtags-in-russian-and-arabic [https://perma.cc/NMA9–5UVZ].

270. *See supra* sections II.B.1–2.

disproportionately suppresses queer content because it subjects queer expression to lay decisions made according to normative traditions and mainstream perceptions of "common sense." That is, coders likely did not set out to design anti-queer moderation algorithms. Nor is it likely that most commercial content moderators are maliciously censoring queer content. But the system relies on decisionmakers who not only reflect normative traditions, but also come with no particular expertise in content, sexuality, and queer culture. Like anti-vice policing, the result is that in the course of achieving certain economic and institutional goals, sexual content moderation ends up disproportionately impacting queer expression.

This has profound implications for how scholars understand content moderation. The literature tells us that content moderation reflects free speech norms, systemic balancing of interests, and even the processes of administrative law.[271] This Article's analogy suggests that these arguments are, at best, ex post justifications for a phenomenon that actually replicates systems of control that have long been used to police public expressions of queer sexuality. The architects of content moderation at the Internet's largest platforms may not want to admit it. They may not even appreciate their complicity. But their work has the unmistakable fingerprints of oppressive and subordinating regimes.

D. *Limitations*

That said, this analogy has its limits. Some of those limits are obvious. Unlike anti-vice policing, content moderation arose amidst conflicts between private platforms and the state over liability and the reach of law. As Julie Cohen has argued, those conflicts contributed to the development of performative practices of moderation "designed to express a generic commitment to accountability without . . . enabl[ing] meaningful scrutiny of the underlying processes."[272] In addition, punishments meted out by the state are qualitatively different from throttling (slowing down content), shadow banning, and takedowns. The latter can destroy people's livelihoods, silence unpopular opinions, and negatively affect marginalized populations.[273] But some queer men convicted of sodomy spent decades or more in jail.[274] Others were forced to register as sex offenders; some had their names published in local papers.[275]

It is also difficult to compare the lived experiences of queer people in these two different eras. Homophobia and transphobia remain rampant, dangerous, and violent. But those with privilege—white, cisgender, masculine-presenting men and feminine-presenting women—do not always walk in public with the same level of fear that they and their elders did even two decades ago, let alone nine. Plus, the lived experiences of queer people and

271. Klonick, *Governors*, *supra* note 7; Douek, *Governing*, *supra* note 6; Douek, *Systems*, *supra* note 13.

272. Cohen, *supra* note 15, at 250.

273. Elkin-Koren et al., *supra* note 32, at 6, 13–15.

274. Lvovsky, *supra* note 9, at 196.

275. Eskridge, *Challenging*, *supra* note 94, at 819.

other members of marginalized groups suggest that enforcement by algorithm or commercial content moderators is not the same as enforcement by the police. Scholars have argued that law enforcement is institutionally committed to policing sexual and gender "deviance."[276] Its racial biases put the queer community's most marginalized—queer Black women, Black transgender women, and nonbinary persons of color—at particular risk.[277] The problem is systemic.[278] Therefore, for many queer people, points of contact with police are unique moments of danger and violence that are not recreated in the context of sexual content moderation.

Despite these and the limitations discussed throughout this Part, understanding sexual content moderation through the anti-vice lens is a useful way to uncover the politics, values, and power of platforms. The parallel assemblages of power have similar effects. In their quest to exert control and achieve their own economic, moralistic, and institutional goals, both anti-vice policing and sexual content moderation disproportionately harm queer people and silence their voices.[279] Even more, this Article's historical parallel teaches us something new about content moderation elided in the current literature. That is, like anti-vice policing, the result of sexual content moderation is the creation and reification of social media as straight spaces. The next Part demonstrates how.

III. Social Media as a "Straight Space"

Having argued that sexual content moderation is best understood as an assemblage of social forces that resembles anti-vice policing, this Part takes the next step. If the path-dependent result of the sexual content moderation assemblage is the disproportionate censorship of queer and nonnormative expression, then sexual content moderation contributes to the creation and maintenance of social media as a "straight space." The concept of a straight space is based on Elijah Anderson's concept of "white space"—namely, those "neighborhoods, restaurants, schools, universities, workplaces, churches and other associations, courthouses, and cemeteries . . . that reinforce[] a normative sensibility in settings in which black people are typically absent, not expected, or marginalized when present."[280] White spaces can make those who identify as Black or African-American "feel uneasy and consider it to be informally 'off limits.'" On the other hand, white people see white settings as "unremarkable, or as normal, taken-for-granted reflections of civil society."[281]

276. Mogul et al., *supra* note 140, at xiii, 47.

277. *See* sources cited *supra* note 201.

278. Jerome Hunt & Aisha C. Moodie-Mills, *The Unfair Criminalization of Gay and Transgender Youth*, Ctr. for Am. Progress (June 29, 2012), https://www.americanprogress.org/issues/lgbt/reports/2012/06/29/11730/the-unfaircriminalization-of-gay-and-transgender-youth/ [https://perma.cc/T7TP-GF5B].

279. Southerton et al., *supra* note 126, at 921.

280. Anderson, *supra* note 14, at 10.

281. *Id.*

As I am adapting the term, straight spaces are built on heterosexual norms, constructed to be unwelcome to queer and nonnormative expression, and designed to reify the heteronormative and cisgender supremacy of our institutions. Like white spaces, straight spaces are not entirely off limits to those who identify in other ways. Nor are white and straight spaces static.[282] White and straight spaces can be spaces of resistance for both the historically oppressed, and even spaces with many queer people can still be straight spaces if they are built on foundations of heteronormativity.[283] But like white spaces, straight spaces have the effect of reifying dominant paradigms. And, just like Black people "are required to navigate the white space as a condition of their existence," queer people are forced to live in straight spaces.[284]

This Part relies on similarities and differences between sexual content moderation and anti-vice policing to show how the practices, technologies, and background law of sexual content moderation constructs social media as a straight space. First, I describe how both anti-vice policing and sexual content moderation deprive individual queer people of "sexual citizenship" and contribute to discourses of discrimination. Second, I show how the technologies and capacities of both anti-vice policing and sexual content moderation have the effect of designing spaces to be unwelcoming to queer content. Finally, I describe how the background law of content moderation entrenches heteronormative values in moderated social spaces online.

A. *Stigmatizing Queerness*

Anti-vice laws enforced a normative sexual hierarchy, where queer people were at the bottom. As this Article's analogy shows, the same is true for social media's sexual content moderation assemblage. By trying to keep pornography away from children and sanitize the marketplace for advertisers, sexual content moderation reifies heteronormative traditions and controls what queer people and the wider population understand to be queer identity. This harms queer content creators, skews popular discourse, and justifies discrimination online.

Gayle Rubin argued that conflicts over sex all have a similar hierarchical dynamic. On one side of the sex ledger is "good," "normal," and "natural" sex: heterosexual, monogamous, procreative, noncommercial, same generational, and in private, among others characteristics.[285] On the wrong side of the hierarchy are nonnormative practices: homosexual, promiscuous, hedonistic,

282. *Id.* at 10–11.

283. Although not using the phrase "straight space," Yoel Roth has argued that supposedly queer spaces like Grindr, the geosocial dating and hook up app used mostly by gay and bisexual men, still marginalize queerness and keep "[n]onnormative practices—fetishistic, 'unsafe,' or highly visible sexualities, for instance—. . . consistently hidden from view." Roth, *supra* note 88, at 429.

284. Anderson, *supra* note 14, at 11.

285. Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* Culture, Soc'y and Sexuality 143, 152–53 (Richard Parker & Peter Aggleton eds., 2d ed. 2007).

cross-generational, in public, commercial, and any other sexual practices not captured.[286] Anti-vice policing identified archetypes of "bad" sexual behavior, including sexual crimes against children.[287] In an effort to police such "bad" sexual behavior, vice squads eventually started arresting men who just looked queer.[288] Similarly, in an effort to police some of the "bad" content—namely, child pornography, sexual exploitation, and nonconsensual pornography—to make platforms business- and family-friendly, sexual content moderation sweeps up queer content as well. This markets queerness as taboo, shameful, and unacceptable.[289]

This is the assemblage at work. Sexual content moderation's rules may not have been intentionally designed to discriminate against queer content. Nonetheless, platforms developed them in a conservative sociolegal context, designed them to achieve corporate goals, and allowed them to give discretion to nonexpert enforcers who often have normative sexual biases. As a result, these rules conflate queer sexuality with illicit sexuality.

This has two principal effects. First, for queer content creators whose work is restricted or taken down, sexual content moderation deprives them of their "sexual citizenship."[290] Sexual citizenship refers to "sexual claims of belonging" or one's ability to participate in society fully with authentic and honest expressions of sexual identity.[291] The disproportionate censorship of queer content denies queer people the opportunity to exist on social media with the same chance as others to share, advocate, and live authentically.[292]

Second, this censorship also systemically stigmatizes queerness in general. Anti-vice laws' asymmetrical enforcement against queer people branded queerness as "degenerate" or "lewd" or "disorderly," justifying denial of services in areas beyond urban nightlife.[293] As George Chauncey argued, the

286. *Id.* at 153–54.

287. Lvovsky, *supra* note 9, at 5; Johnson, *supra* note 108, at 73.

288. *See* Lvovsky, *supra* note 9, at 11–12.

289. Michael Warner, The Trouble With Normal: Sex, Politics, and the Ethics of Queer Life 22–26 (Harvard Univ. Press 1999).

290. Southerton et al., *supra* note 126, at 921.

291. Peter Aggleton, Sujith Kumar Prankumar, Rob Cover, Deana Leahy, Daniel Marshall & Mary Lou Rasmussen, *Introduction*, *in* Youth, Sexuality and Sexual Citizenship 6 (Peter Aggleton et al. eds., 2019); *see also* David Evans, Sexual Citizenship: The Material Construction of Sexualities (1993) (coining the phrase "sexual citizenship").

292. Sexual citizenship resembles Danielle Citron's concept of sexual privacy in that both focus on the dignitary benefits of control over sexual selves and expression. *See* Citron, *Sexual Privacy*, *supra* note 7.

293. Anti-vice laws are, of course, not the only examples of this. For instance, persistent anti-sodomy laws, even when they were rarely enforced, not only categorized all gay people as presumptive criminals, but also justified many other forms of discrimination. *See, e.g.*, Nan Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 Mich. L. Rev. 1528, 1536 (2004) (comparing adultery laws to sodomy laws in that both helped "solidify[] social and cultural norms"); Christopher Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 Harv. Civ. Rts.-Civ. Liberties L. Rev. 103, 103 (2000) (arguing that "very existence" of even unenforced sodomy laws "creates a criminal class of gay men and lesbians" justifying discrimination, harassment, and violence).

sexual repression typified by anti-vice policing also trivialized queer people's experiences, justifying institutional and social discrimination long after the riots at the Stonewall Inn and the systematic dismissal of queer dignity during the AIDS crisis.[294] For queer people in general, then, rules that put their experiences on the "wrong" side of the sexual hierarchy are first steps in a larger anti-queer agenda. Sexual content moderation is just the latest force perpetuating that stigmatization. Dominant platforms' tendency to only make accessible a sanitized version of queer life stigmatizes nonnormative expressions of sex, sexuality, and gender identity, giving space for discrimination on the basis of those characteristics and behaviors.

That is because social media platforms and their content moderation rules play critical roles in the production and dissemination of knowledge. Queer oral histories were interrupted by AIDS.[295] The vast majority of us do not have access to elders who can guide us. Social media has become our guide. Far more than their physical counterparts, social media platforms are the sites of queer expression today.[296] Platforms' queer content is, therefore, how many people will come to understand the defining features of queerness, even if the content is just a highly curated slice of the real thing. If queer adolescents want to learn how to put on makeup for their first drag show, only a few have drag families to join. Those who do not go to YouTube. If someone wants to learn the best way to come out to their parents as bisexual, they join a Facebook group or watch videos on TikTok. Medical schools insufficiently prepare future physicians to understand the needs and health risks of queer people.[297] Therefore, without enough doctors trained in queer sexuality, adolescents turn to Google to learn how to safely prepare for intimacy.[298] Social media websites

294. *See* Chauncey, *supra* note 97.

295. *See* Nan Alamilla Boyd & Horacio Roque Ramirez, Bodies of Evidence: The Practice of Queer Oral History (Nan Alamilla Boyd & Horacio Roque-Ramirez eds., Oxford Univ. Press 2012).

296. Brady Robards, Brendan Churchill, Son Vivienne, Benjamin Hanckel & Paul Byron, *Twenty Years of 'Cyberqueer': The Enduring Significance of the Internet for Young LGBTIQ+ People*, *in* Youth, Sexuality and Sexual Citizenship 151, 151–67 (Peter Aggleton et al. eds., 2018); Jon Wargo, *"Every Selfie Tells a Story": LGBTQ Youth Lifestreams and New Media Narratives as Connective Identity Texts*, 19 New Media & Soc'y 560 (2015).

297. *E.g.*, Alyssa Wittenberg & Judith Gerber, Recommendations for Improving Sexual Health Curricula in Medical Schools: Results from a Two-Arm Study Collecting Data from Patients and Medical Students, 6 J. Sex Med. 362 (2009).

298. There are indeed some areas of queer life where we should want empowered medical professionals and scientific evidence to inform legal rules and personal behavior. Gender-affirming hormone therapy is a good example. Medical expertise can also help prepare young people to engage in and enjoy intimacy, especially since social media is full of misinformation about HIV and anal sex. For examples of how medical expertise can help prepare young people to engage in and enjoy intimacy, see *Anal Douching: How to Safely Clean for Anal*, Bespoke Surgical, https://bespokesurgical.com/education/anal-cleansing/ [https://perma.cc/6KD7-Y23Q]; Evan Goldstein, *How Often Should You Use an Enema?*, Bespoke Surgical (Oct. 5, 2020), https://bespokesurgical.com/2020/10/05/how-often-should-you-use-an-enema/ [https://perma.cc/69G7-P8WT]. But it is not obvious that medical expertise is always necessary since communities can help each other in more supportive,

are today's gatekeepers of queer knowledge, and, as Michel Foucault predicted, platforms' continued repression of the queer experience establishes a skewed, heteronormative baseline understanding of what it means to be queer.[299]

A similar thing happened in the anti-vice context. As Professor Lvovsky argues, during the height of anti-vice policing, when queer expression was removed from media, banned in the mail, and pushed off the streets, police perversely became the arbiters of what it meant to be queer.[300] Law enforcement agents became the ones who could tell reporters how to "spot a gay" because that is what anti-vice laws required of them; when reporters asked, police recited stereotypes of queer life, which were then disseminated through the media.[301]

This skewed perception of queerness is still animating hate and discrimination today. Between January and May 2021, there were 250 anti-LGBTQ bills introduced in the states, many of which prohibit transgender adolescents from accessing gender-affirming hormone therapy or ban transgender kids from playing in school sports in accordance with their gender identities.[302] This follows on the heels of a raft of laws that force trans folks to use only those single-gender public bathrooms that match their sexes assigned at birth.[303] Texas now considers gender-affirming healthcare child abuse.[304] In 2020, a federal appeals court overturned a city's ban on gay conversion therapy, holding that the free speech rights of therapists predominate over the government's interest in protecting queer adolescents.[305]

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joyous, and democratic ways.

299. Michel Foucault, The Archeology of Knowledge 89 (1972); Stuart Hall, *The West and the Rest: Discourse and Power*, *in* Formations of Modernity 201–02 (Stuart Hall & Bram Gieben eds., 1992); *see also* Eskridge, *Challenging*, *supra* note 94, at 829 (noting that controlling knowledge and discourse can determine the course of changing attitudes and law).

300. Lvovsky, *supra* note 9, at 13, 15.

301. *Id.* at 14–18.

302. Press Release, Wyatt Ronan, Human Rights Campaign, 2021 Officially Becomes Worst Year in Recent History for LGBTQ State Legislative Attacks as Unprecedented Number of States Enact Record-Shattering Number of Anti-LGBTQ Measures into Law (May 7, 2021), https://www.hrc.org/press-releases/2021-officially-becomes-worst-year-in-recent-history-for-lgbtq-state-legislative-attacks-as-unprecedented-number-of-states-enact-record-shattering-number-of-anti-lgbtq-measures-into-law [https://perma.cc/6ZRU-32JY].

303. Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. Davis L. Rev. 1673, 1709–12 (2017); Scott Skinner-Thompson, *North Carolina's Catch-22*, Slate (May 16, 2016, 8:45 AM), http://www.slate.com/blogs/outward/2016/05/16/north_carolina_s_hb2_puts_transgender_people_in_an_impossible_catch_22.html [https://perma.cc/R4Q9–86YQ].

304. J. David Goodman & Amanda Morris, *Texas Investigates Parents over Care for Transgender Youth, Suit Says*, N.Y. Times (Mar. 1, 2022), https://www.nytimes.com/2022/03/01/us/texas-child-abuse-trans-youth.html [https://perma.cc/JBZ4-R9M7]. This is just the latest attack on transgender minors. In the first two months of 2022, fourteen states introduced twenty-five proposals to ban gender-affirming healthcare for minors. *Legislative Tracker: Youth Healthcare Bans*, Freedom for All Ams. https://freedomforallamericans.org/legislative-tracker/medical-care-bans/ [https://perma.cc/4NUW-WY8J].

305. *See* Otto v. City of Boca Raton, 981 F.3d 854 (11th Cir. 2020).

When social media systematically removes queer content, it otherizes queer identity, hiding the full breadth of queer people's search for equality and making them vulnerable to this and other forms of discrimination. Inside the queer community, heated debates over nonnormative queer expression at pride festivals are likely also influenced by the narrow vision of queerness disseminated after sexual content moderation filters out nonnormative expression.[306] In other words, just like we cannot understand queerness and its legal status today without looking at the influence of anti-vice policing, we cannot understand ongoing debates about queer equality and liberation without exploring the influence of sexual content moderation.[307]

B. *Technology in Straight Spaces*

Content moderation and anti-vice policing are also case studies of technology's place in society. Both anti-vice authorities and social media platforms deployed the new technologies of their days to achieve their economic, moral, and institutional goals. And because technologies reflect the social relations in which they are designed and used, they had the further effect of erecting systemic barriers to queer participation.

Langdon Winner memorably argued that technologies have politics that embody the social relations that created them.[308] This occurs either because "the invention, design, or arrangement of a specific technical device or system becomes a way of settling an issue in the affairs of a particular community" or because the systems are "inherently political technologies," which "appear to require, or to be strongly compatible with, particular kinds of political relationships."[309] Winner argues that "to recognize the political dimensions in the shapes of technology does not require that we look for conscious conspiracies or malicious intentions."[310] There are many cases in which "the technological deck has been stacked in advance to favor certain social interests."[311] For instance, Robert Moses embedded New York's highways with discriminatory politics by placing overpasses just low enough to deny access to the

306. Alex Abad-Santos, *The Perpetual Discourse over LGBTQ Pride, Explained*, Vox (June 2, 2021, 9:00 AM), https://www.vox.com/the-goods/22463879/kink-at-pride-discourse-lgbtg [https://perma.cc/D9EK-PHHA]; Skylar Baker-Jordan, *BDSM and Kink Don't Belong in Pride Celebrations. This Is Why*, Independent (May 25, 2021, 9:52 PM), https://www.independent.co.uk/voices/bdsm-kink-pride-lgbt-rights-celebrations-why-b1853859.html [https://perma.cc/BVK2-TXGV].

307. In this way, this Article builds on the liberatory work of the "data colonialism" movement, which considers Facebook's and other large platforms' oppressive capacities. *See* Adrienne LeFrance, *Facebook and the New Colonialism*, Atlantic (Feb. 11, 2016), https://www.theatlantic.com/technology/archive/2016/02/facebook-and-the-new-colonialism/462393/ [https://perma.cc/5YST-JJGW]; Jim Thatcher & David O'Sullivan, *Data Colonialism Through Accumulation by Dispossession: New Metaphors for Daily Data*, 34 Env't & Plan. D: Soc'y & Space 990 (2016).

308. Langdon Winner, *Do Artifacts Have Politics?*, 109 Daedalus 121, 123 (1980).

309. *Id.*

310. *Id.* at 125.

311. *Id.* at 125–26.

mostly poor, Black, and working class New Yorkers who had to take the bus to the beach.[312] Baron de Haussmann famously redesigned Paris with broad thoroughfares to avoid another working class uprising in which resistance fighters used household furniture to barricade Paris's narrow streets and choke off troop movements.[313] Anti-vice policing and sexual content moderation are similar. They are imbued with the politics of straight spaces even if we assume they were not designed with malicious, anti-queer intent.

Anti-vice police took surreptitious photographs of clandestine meetings of queer men, used new video surveillance technology of parks, took advantage of the relatively small size of new remote-controlled cameras to place them inside towel dispensers in public bathrooms, and then wired adjacent utility closets to listen and watch.[314] Police supplemented that technology-based surveillance with analog ones: decoys, trails, plainclothes officers, and handbooks and training manuals that helped officers identify a queer person on sight.[315] These technologies were embedded with the politics of straight spaces because they were specifically used to police queer meeting places, not straight ones. Anti-vice police had lost control of public bathrooms; they were hard to monitor with traditional means. Cruisers, as men looking for sex in public were called, recognized the relative safety that came with windowless walls and closed bathroom stalls and developed a complex system of codes to protect themselves and evade police.[316] Surveillance technologies settled the issue of whether these spaces were subject to public morality regulation by enhancing police's surveillance capacities and extending their eyes and ears into places they could never reach before. The technologies of clandestine surveillance were also deployed in a place almost exclusively used for same-sex activity. They could have been used anywhere, but historians have found that police only set up high-tech operators in public bathrooms known to be meeting places for queer men.[317] Therefore, such technologies both reflected and amplified the anti-queer politics of the anti-vice era.

Sexual content moderation may use radically more advanced technologies, but their politics are similar. Algorithmic moderation uses AI-powered matching and classification to determine the propriety of user-generated content.[318] Matching involves comparing a new piece of content against an existing database of inappropriate content not allowed on the platform; classification takes new content and tries to categorize it into one or more clusters, which helps determine if the content will be allowed.[319] Both involve AI and machine

312. *Id.* at 123–24; *see also* Robert Caro, The Power Broker: Robert Moses and the Fall of New York 318, 481, 951–58 (1974).

313. David Pinkney, Napoleon III and the Rebuilding of Paris 35–39 (1958).

314. Lvovsky, *supra* note 9, at 189–93.

315. *Id.* at 143–44, 186–87.

316. Laud Humphreys, Tearoom Trade 64–65 (1970); Chauncey, *supra* note 97, at 188; Lvovsky, *supra* note 9, at 185.

317. Lvovsky, *supra* note 9, at 183–86.

318. Gorwa et al., *supra* note 55, at 4–5.

319. *Id.* at 5.

learning, and both have blind spots. Databases have to be updated to remain relevant.[320] And, as noted above, these techniques often lack context to be able to classify idiomatic or nonnormative content appropriately.[321] Importantly, the machine learning techniques used to train both types of algorithms rely on historical data produced within biased institutions based on normative standards.[322] Both systems reflect the biases of their designers, most of whom represent dominant cultures—white, cisgender, heterosexual, able, and male.[323] As a result, heteronormative biases pervade algorithmic moderation, both from the data on which moderation algorithms are trained and from the designers themselves. Encoded in these technologies is the value-laden claim that queerness *is* sexual in a way that straightness is not. By bringing heteronormative biases to the design of moderation decision-making, these technologies help social media companies ensure that their platforms will remain straight spaces. As Tarleton Gillespie has noted, platforms do have politics;[324] sexual content moderation demonstrates the extent of their heteronormativity.

C. *The Role of Law*

The analogy between anti-vice policing and sexual content moderation surfaces the role that law plays in creating and maintaining social media as a straight space. Law is often complicit in denying queer access to traditionally heterosexual spaces. Zoning laws have reduced the availability of businesses catering to queer people by redesigning neighborhoods to be "family friendly."[325] Federal courts have restricted queer access to public spaces to protect others' normative expression.[326] Universities' refusal to recognize queer

320. *Id.*

321. *See supra* section II.B.2.

322. *See* Safiya Noble, Algorithms of Oppression (2018); Sarah Myers West, Meredith Whittaker & Kate Crawford, AI Now Inst., Discriminating Systems: Gender, Race, and Power in AI (Apr. 2019), https://ainowinstitute.org/discriminatingsystems.pdf [https://perma.cc/PGS5–73VK]; Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classifications*, 81 Proceedings of Machine Learning Res. 1, 10–11 (2018); Pauline Kim, *Data-Driven Discrimination at Work*, 58 Wm. & Mary L. Rev. 857, 874–90 (2017); Solon Barocas & Andrew Selbst, *Big Data's Disparate Impact*, 104 Calif. L. Rev. 671 (2016).

323. *E.g.*, Sonia Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. Rev. 54, 68–89 (2019) (detailing sources of bias in AI).

324. Tarleton Gillespie, *The Politics of Platforms*, 12 New Media & Soc'y 347, 349 (2010).

325. *See* Samuel Delany, Times Square Red, Times Square Blue xxi, xxii (1999); Lauren Berlant & Michel Warner, *Sex in Public*, 24 Critical Inquiry 547, 551 (1998); Marc Elovitz & P.J. Edwards, *The D.O.H. Papers: Regulating Public Sex in New York City*, *in* Policing Public Sex 295–316 (Ephen Colter et al. eds., 1996). This is similar to law determining the location and construction of highways, which "symbolically and physically" encouraged racial segregation and disempowerment. Deborah Archer, *"White Men's Roads Through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction*, 73 Vand. L. Rev. 1259, 1264 (2020) (quoting Paul Fotsch, Watching the Traffic Go By 4 (2007)).

326. *E.g.*, Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group of Boston, 515 U.S.

affinity clubs was, at least in part, about denying access to physical spaces open to heterosexuals.[327] And school administrators who refused to integrate proms or parents who objected to inclusive sex education classes sought to deny queerness access to the physical space of the classroom.[328] This focus on space is unsurprising. Control over public spaces is control over public discourse; silencing queer expression keeps sexual norms in place.

Similarly, law was everywhere in the anti-vice context, embedding stereotypes, regulating queer behavior, and granting substantial discretion to the police to remove queer sexual behavior from public spaces.[329] But as Lvovsky insightfully demonstrates, some courts also pushed back; the use of the courts by the resistance ultimately helped eliminate some of the anti-vice era's vague liquor laws and undermined police's vast authority.[330] As we have discussed, other laws also created and enhanced social media's power to over-police queer content. But courtrooms' doors are closed to those trying to resist the censorious efforts of private technology platforms.

Bill Eskridge has exhaustively profiled the ways queer legal advocates used due process, privacy, and equal protection arguments to challenge anti-vice laws and their disproportionate application to queer people.[331] Lawyers invoked the right to privacy to successfully challenge police searches of closed toilet stalls and other private spaces.[332] To combat anti-vice laws, they applied the Supreme Court's decision in *Papachristou v. Florida*,[333] a case where the Supreme Court invalidated an ordinance that made it a crime for people to be "vagabonds" or "lewd, wanton, and lascivious persons"; the Court reasoned that the ordinance was unintelligible and disproportionately applied to "non-conformists."[334] The petitioners in *Papachristou* were two Black men and two white women who were arrested under Florida's "vagabond" law simply for riding together in a car.[335] The same vagueness that doomed the law in that case was sometimes successfully used to put an end to vague anti-vice laws' disproportionate application against queer men.

557, 559 (1995) (affirming the right of organizers of the St. Patrick's Day Parade to prohibit openly gay marchers).

327. *E.g.*, Gay Student Serv's v. Tex. A&M Univ., 737 F.2d 1317, 1319 (5th Cir. 1984) (requiring public university to recognize gay-straight alliance); Gay Rts. Coal. of Georgetown Univ. L. Ctr. v. Georgetown Univ., 536 A.2d 1, 5 (D.C. Cir. 1987) (allowing university to deny recognition of queer group, but not "tangible" benefits, including space, on the basis of sexual orientation).

328. *E.g.*, Fricke v. Lynch, 491 F. Supp. 381, 387–88 (D.R.I. 1980) (rejecting school district's safety rationales for prohibiting a student from bringing a same-sex date to prom); Curtis v. Sch. Comm. of Falmouth, 652 N.E.2d 580, 583 (Mass. 1995) (denying parental objection to educating students about condom use and safe sex).

329. Eskridge, Gaylaw, *supra* note 16, at 17–97; Lvovsky, *supra* note 9, at 117.

330. Lvovsky, *supra* note 9, at 48–49, 134–37, 196–99, 257–58.

331. Eskridge, *Challenging*, *supra* note 94, at 819.

332. *Id.* at 829.

333. 405 U.S. 156 (1972).

334. *Id.* at 162–63, 169–70; Jacksonville, Fla., Code § 26–27 (1965).

335. *Id.* at 158–59.

Lvovsky describes how lawyers representing queer victims of anti-vice laws also challenged vice squad's lack of evidence and misconduct. For instance, in *Scott v. Macy*,[336] the ACLU successfully challenged the Civil Service Commission's summary firing of a queer employee for his disorderly conduct arrests. The court held that if the government wanted to fire someone for "immoral conduct," it had to specify what conduct was immoral and how that conduct affected "occupational competence or fitness."[337] In *Stoumen v. Reilly*,[338] the California Supreme Court held that the state should never have shut down the bohemian and queer-friendly Black Cat in San Francisco simply for allowing "persons of known homosexual tendencies" to gather.[339] The state needed to prove actual "illegal or immoral acts" to shut down a bar for maintaining a "disorderly" house.[340] And in *Kelly v. United States*,[341] the D.C. Circuit criticized police for entrapping queer men, holding that the testimony of plainclothes decoys was insufficient to justify lewd solicitation arrests unless it was corroborated and requiring courts to give special deference to defendants' character witnesses.[342] Not all courts stepped in to protect queer victims of overzealous vice squads, and some of the vice squads' worst anti-queer campaigns were the result of a push-and-pull between police and the courts.[343] But at least the courts were a site of contestation about the limits of policing, due process, and equal dignity for queer people.[344]

However, constitutional protections against discrimination, invasions of privacy, insufficient evidence, and police misconduct are not available to queer people disproportionately silenced by sexual content moderation's assemblage of power. Queer users have tried and failed to hold YouTube liable for its disproportionate censoring of queer content.[345] The broad immunity in section 230 of the Communications Decency Act gives platforms wide latitude to experiment with content moderation without liability for the harm they cause in their quest for advertising dollars and "family-friendly" spaces.[346] The state action doctrine bars application of constitutional limits on private corporate

336. 349 F.2d 182 (D.C. Cir. 1965).

337. *Id.* at 185. After the Commission tried to explain the grounds for firing Scott, the D.C. Circuit still found it unlawful because the Commission had neglected to give Scott any notice. Scott v. Macy, 402 F.2d 644, 647 (D.C. Cir. 1968).

338. 234 P.2d 969 (Cal. 1951).

339. 222 P.2d 678, 682 (Cal. Dist. Ct. App. 1950) (describing the facts of the case).

340. *Stoumen*, 234 P.2d at 971. Similar decisions in New Jersey and New York in 1967 helped rein in some of the states' worst anti-vice excesses. One Eleven Wines & Liquors v. Div. of Alcoholic Beverage Control, 235 A.2d 12, 19 (N.J. 1967); Becker v. N.Y. State Liquor Auth., 234 N.E.2d 443, 444 (N.Y. 1967).

341. 194 F.2d 150 (D.C. Cir. 1952).

342. *Id.* at 153–56.

343. Lvovsky, *supra* note 9, at 136–41.

344. *Id.* at 6–7, 134–36, 197–98.

345. *E.g.*, Order Granting Motion to Dismiss, Divino Grp. LLC v. Google LLC, No. 19-cv-04749-VKD (N.D. Cal. Jan. 6, 2021).

346. *E.g.*, Herrick v. Grindr, LLC, 306 F. Supp. 3d 579, 588 (S.D.N.Y. 2018).

behavior.[347] There are no intermediaries with aligned interests that can sue platforms, like bar owners suing the state in the anti-vice era.[348] Platforms have leveraged the First Amendment and its "marketplace of ideas" metaphor to "stave off protective regulation and deflect accountability" for the harm they cause.[349] Progressive prosecutors have no counterpart in today's content moderation; takedown decisions are made by machines and nonexpert humans. And although queer advocacy groups can work with social media companies like they worked with cities and legislatures in the anti-vice era by publishing reports, sitting on advisory trust and safety councils, and putting pressure on platforms to change their sexual content moderation practices, the exogenous mandates only law can provide are inaccessible.[350] Individuals can and have resisted. But small protests—replacing banned language with emojis, removing tags, and signaling queer content with code to avoid algorithmic curation[351]—are insufficient; platforms have even more power than the state to discriminate against queer, nonnormative expression.

The result is the reification of social media as a straight space. Because of the ways contexts, discourses, rules, technologies, and people interact to enforce sexual norms—interactions explained by the analogy to anti-vice policing of queer sexual behavior—one of social media's distinctive features is the "overwhelming presence" of heterosexual people and the disproportionate "absence" of queer people.[352] Queer people start out with a "deficit of credibility" because their identities, behaviors, and cultural expressions are routinely placed on the wrong side of society's sexual hierarchy.[353] They are allowed in when their expression follows the norms of heterosexual expression.

Queer people are not alone on the outside looking in. As Anderson explains, those inhabiting "[B]lack space" are not only those who identify as

347. *See* Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 Mich. L. Rev. 387, 388 (2003); Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. Rev. 503, 507–08 (1985); *see also* The Civil Rights Cases, 109 U.S. 3, 11 (1883) ("It is [s]tate action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [Fourteenth] [A]mendment.").

348. *Stoumen*, *One Eleven Wines*, and *Becker* were all cases brought by bar owners against state regulators who wanted to shut down their establishments. Stoumen v. Reilly, 222 P.2d 678, 680 (Cal. Ct. App. 1950); One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control, 235 A.2d 12, 14–15 (N.J. 1967); Becker v. N.Y. State Liquor Auth., 234 N.E.2d 443 (N.Y. 1967).

349. Cohen, *supra* note 15, at 76, 89–90.

350. GLAAD, for example, published its *Social Media Safety Index* in 2021 and found that all major social media platforms are unsafe for queer people. *Social Media Safety Index*, GLAAD 6–7 (May 2021). GLAAD, along with queer and queer-friendly organizations like Black Rainbow and the Cyber Civil Rights Initiative, sit on Twitter's Trust and Safety Council. *Trust and Safety Council*, Twitter, https://about.twitter.com/en/our-priorities/healthy-conversations/trust-and-safety-council [https://perma.cc/H9DR-2E72].

351. *E.g.*, Roth, *supra* note 88, at 427–28; Ysabel Gerrard, *Beyond the Hashtag: Circumventing Content Moderation on Social Media*, 20 New Media & Soc'y 4492, 4498, 4500–02 (2018) (describing evasion of moderation in the pro-eating disorder community).

352. Anderson, *supra* note 14, at 13.

353. *Id.* at 14.

Black or African American.[354] Queer space includes all those with nonnormative sexual identities and expressions. And one way these marginalized groups could be welcomed into a traditionally straight space is by using law to upend the systems that created today's sexual content moderation assemblage. The next Part explores the capacity of law to break down the barriers around straight spaces online.

IV. Creating Queer Inclusive Sexual Content Moderation

Given the risks to queer expression and the law's complicity in amplifying and entrenching platform power, the legal and regulatory context in which sexual content moderation occurs seems ripe for reform. Achieving that reform in practice will be difficult. There is no magic bullet, no single piece of legislation or court decision that will solve the problems highlighted above. Any solution should be part of larger structural changes that include robust privacy laws that regulate the advertising-based business model and tough anti-trust enforcement against companies that are too big to care about the needs of marginalized populations. That said, this Part asks: What principles or actions, if any, does the analogy between anti-vice policing and sexual content moderation suggest can help break down barriers to social media for queer content?

A. *The Insufficiency of Current Proposals*

Queer people sit in a double bind with respect to content moderation.[355] Too much sexual content moderation disproportionately censors nonnormative sexual content. On the other hand, too little moderation subjects queer people (not to mention women, persons of color, the disabled, and religious minorities, among others) to hate, harassment, sexual exploitation, and nonconsensual pornography.[356] Less moderation arguably stems from a misguided or intentional commitment to free speech (for some); more moderation stems from platforms designing systems to achieve their economic and institutional goals while accommodating a diverse, global audience.

This double bind makes it difficult to disrupt the ways sexual content moderation maintains social media platforms as straight spaces. All digital spaces must moderate sexual content; the alternative is lawlessness, predation, and harm.[357] But because queer expression is in part defined by its differences

354. *Id.*

355. A double bind is a situation in which there are no good options. *See* Martha Chamallas, Introduction to Feminist Legal Theory 9–10 (2003); Judith Halberstam, Female Masculinity 5–6 (1998) (referring to the double bind women face from the need to conform to masculine values to be successful but retain femininity to be socially accepted).

356. Danielle Keats Citron, Hate Crimes in Cyberspace 227–36 (2014) (arguing that platforms' power to moderate means they have "substantial freedom to decide whether and when to tackle" harms like cyber harassment, nonconsensual pornography, and exploitation).

357. Tarleton Gillespie, *Platforms Are Not Intermediaries*, 2 Geo. L. Tech. Rev. 198, 202 (2018) ("[C]ontent moderation is the central service platforms offer. Anyone can make a website on which any user can post anything he or she pleases without rules or guidelines. Such an anarchical website would, in all likelihood, quickly become a cesspool of hate and

and departures from traditional norms about sex,[358] queer people will always be disproportionately censored when rules about speech are premised on those norms. In other words, classifying queer content as synonymous with adult content and, thus, not suitable for children, members of certain cultures, or a general audience, puts it at risk of censorship.[359] The problem seems intractable, and the analogy between anti-vice policing and sexual content moderation highlights several reasons why current proposals to regulate content moderation are insufficient.

Drawing a more nuanced line between acceptable and unacceptable sexual content would be the logical next step. But even if it were theoretically possible to design a system that was clear and inclusive, its nuance would get lost in the algorithmic and commercial moderation systems necessitated by the massive scale of social media today or platforms would shift tactics. Courts with institutional skills in slow, considered deliberation have trouble drawing a nuanced line.[360] It is difficult to imagine an engineer coding a complex definition into an algorithm or a low-paid commercial moderator making nuanced, sensitive decisions in mere seconds. And if that line is too difficult to draw, platforms would fall back on simpler strategies that have achieved their institutional and corporate goals.[361] A similar thing happened in the anti-vice context. When some judges tried to stop the vice squads' aggressive tactics, police often ignored them, waited for more pliant and sympathetic judges, or switched gears entirely, arresting queer men for another vice after a court put limits on an old one.[362] Integrating more nuanced rules into sexual content moderation seems like a good option, but one that may not be effective in practice.

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porn and subsequently be abandoned."). This implies that several politically motivated proposals to treat social media platforms as common carriers or explicitly prohibit them from moderating political expression are more than just unhelpful to queer people. They are also dangerous. *See* Joseph R. Biden v. Knight First Am. Inst., 593 U.S. __, 141 S. Ct. 1220 (mem.), 1221–27 (2021) (Thomas, J., concurring).

358. Berlant & Warner, *supra* note 21, at 346; *see also* Eskridge, Gaylaw, *supra* note 16, at 257.

359. A similar phenomenon was at play when sex workers were taken off platforms after Congress passed legislation to crack down on sex trafficking. Sex work was improperly classified as synonymous with sex trafficking despite the obvious differences. *See* Allow States to Fight Online Trafficking Act of 2017, 18 U.S.C. §§ 1591, 1595, 2421A and 47 U.S.C. § 230; *see also* Kendra Albert, *Five Reflections in Four Years of FOSTA/SESTA*, 40 Cardozo Arts & Ent. L.J. __ (forthcoming 2022); Kendra Albert, Emily Armbruster, Elizabeth Brundige, Elizabeth Denning, Kimberly Kim, Lorelei Lee, Lindsey Ruff, Korica Simon & Yueyu Yang, *FOSTA in Legal Context*, 52 Colum. Hum. Rts. L. Rev. 1084, 1088–89 (2021) (arguing that FOSTA may have been intended to protect a vulnerable minority from sexual exploitation but actually harms the vulnerable because of their sexuality); Crystal A. Jackson & Jenny Heineman, *Repeal FOSTA and Decriminalize Sex Work*, 17 Contexts 74 (2018).

360. *See supra* notes 181–182 and accompanying text.

361. Cohen, *supra* note 15, at 6 (arguing that corporate actors make opportunistic use of law and other tools to achieve profit-making goals).

362. Lvovsky, *supra* note 9, at 130–41.

This raises the question: If moderating speech requires wading into "hard moral and political fights" at scale,[363] would those fights be less tricky if the scale was not so large? That is, would social media platforms be less likely to remain straight spaces if they were smaller, competing with others for users, dollars, and legitimacy? If so, this is a queer case for robust enforcement of anti-trust law against the largest social media companies. But although there are many reasons to pursue greater competition within the information industry,[364] smaller firms are not necessarily more queer-friendly.

It is true that the largest platforms justify restricting queer content by nodding to their need to accommodate global audiences with different norms and views on nonnormative sexual practices. For instance, Instagram justifies enhanced moderation of website links deemed "sexual," many of which are used by queer people, teachers, physicians, and others engaged in sexual health and education, by arguing that it wants "content to be appropriate for our diverse global community."[365] Facebook designs its moderation system to allow "more than [two] billion people to freely express themselves across countries and cultures."[366] The company "recognize[s] that words mean different things or affect people differently depending on their local community, language, or background."[367] YouTube states explicitly that its rules must "be applied to content from around the world."[368] When Instagram removed—and affirmed the removal of—a picture of a shirtless trans man marching in New York City's 2021 "Dyke March," it stated that the photo was removed for violating the platform's policies on "hate speech or symbols. Our guidelines are based on our global community, and some audiences may be sensitive to different things."[369] Equating trans men with "hate speech or symbols" is offensive, but Instagram rationalizes it by nodding to its global audience, much of which, the platform says, is hostile to homosexuality, let alone willing to accept that gender is a social construct. Therefore, to satisfy their conception of their world-wide audience, platforms have an incentive to race to the strictest standards. Unconstrained by free speech rules that limit state censorship, social media companies with multinational reach may find it easier to restrict globally

363. Douek, *Governing*, *supra* note 6, at 775; Gillespie, *supra* note 7, at 116.

364. *See* Tim Wu, The Curse of Bigness 119–27 (2018); Lina Khan, Note, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017).

365. Abigail Moss, *'Such a Backwards Step': Instagram Is Now Censoring Sex Education Accounts*, Vice (Jan. 8, 2021, 6:56 AM), https://www.vice.com/en/article/y3g58m/instagram-rules-censoring-sex-educators [https://perma.cc/ZYR5-CYDQ].

366. *Facebook Community Standards*, Meta, https://www.facebook.com/communitystandards/introduction [https://perma.cc/QKV4–7HM8].

367. Monika Bickert, *Updating the Values that Inform Our Community Standards*, Meta (Sept. 12, 2019), https://about.fb.com/news/2019/09/updating-the-values-that-inform-our-community-standards/ [https://perma.cc/JEJ3–6UCU].

368. *Rules and Policies*, *Developing Community Guidelines*, YouTube, https://www.youtube.com/howyoutubeworks/policies/community-guidelines/#developing-policies [https://perma.cc/8K9P-MNDL].

369. Renaldi Photos, @renaldiphotos, Instagram (July 1, 2021), https://www.instagram.com/p/ CQynMmIBCk9/?utm_medium=share_sheet (last visited Oct. 13, 2022).

the sexual content that is not allowed in the most conservative countries.[370] Using one strict rule everywhere is easier than changing course for different cultures.[371]

Scholars have presumed that greater competition would affect content moderation rules. Writing before the advent of social media, David Post argued that platforms' financial incentives would result in a "market for rules" in which users would be able to seek out platforms with "rule-sets" they prefer.[372] With some amendments, Kate Klonick called Post's view a "useful heuristic to understand the history of online content moderation," adding that the "primary reason" platforms moderate is their "sense of the bottom-line."[373] If a platform takes "down too much content," it loses "not only the opportunity for interaction, but also the potential trust of users."[374] If it takes down too little, it threatens to create an environment that tolerates hate and harassment. At that point, users' expectations would be violated, and they would walk.[375]

Therefore, the conventional wisdom suggests that pursuing robust antitrust enforcement against the information industry's monopolists can only help improve content moderation. This Article has exposed the weakness of that argument. Competition is exogenous to the assemblage of forces at work inside sexual content moderation. Even if platforms no longer had to cater to a global audience with widely divergent views on sex, there remain widely divergent views on sex within individual countries, states, cities, and even households. And smaller platforms' need for advertising dollars would still put sexual content moderation on a path toward disproportionate censorship of queer content. Granted, queer people could flock to a new social media platform specifically designed to be queer-friendly, just like some conservatives started using Parler.[376] But that capacity exists now, and Parler is not immune from moderation controversy.[377] Plus, forcing queer content into an ancillary corner of the social media ecosystem still denies queer people access to spaces where everyone else is welcome. It leaves in place structural systems of oppression

370. Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 Notre Dame L. Rev. 1035, 1039–40 (2018).

371. *E.g.*, Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 Notre Dame L. Rev. 747, 762 (2016) (referring to the relative ease for compliance with a common denominator rule).

372. David G. Post, *Anarchy, State, and the Internet: An Essay on Law-Making in Cyberspace*, 1995 J. Online L., art. 3, ¶ 42.

373. Klonick, *supra* note 7, at 1629, 1627.

374. *Id.* at 1627.

375. *Id.* at 1627–28.

376. Jessica Schulberg, *On Parler, the Right-Wing Social Media Site, Free Speech Isn't Free*, Huffpost (June 26, 2020, 7:55 PM), https://www.huffpost.com/entry/parler-free-speech-alternative-twitter-user-agreement_n_5ef660fdc5b6acab28419a5d [https://perma.cc/K579-LERY].

377. Rachel Lerman, *The Conservative Alternative to Twitter Wants to Be a Place for Free Speech for All. It Turns Out, Rules Still Apply*, Wash. Post (July 15, 2020, 10:48 AM), https://www.washingtonpost.com/technology/2020/07/15/parler-conservative-twitter-alternative/ [https://perma.cc/EP5W-ZPBE].

while putting the onus on discriminated minorities themselves to find other options.[378]

B. *Lessons from Anti-Vice Policing*

If queer expression is to be included in proposals for reform, scholars need to radically rethink their approach to content moderation. Perhaps some of the legal doctrines and cultural shifts that helped rein in the morality police may also help push back on the effects of sexual content moderation's assemblage of power. This Part demonstrates that the anti-vice analogy offers law some options—particularly requiring evidence and robust, meaningful transparency—if policymakers want to guide content moderation in a fairer direction. Let's walk before we run.

Far from monolithic, the law was a site of contestation about the legitimacy of police anti-vice campaigns and the rights of queer people, in general. As Lvovsky argues, some of those debates stemmed from trial courts' "creative intervention" into anti-vice policing "in the face of harsh criminal laws, punitive policies by police departments, and unforgiving legal doctrines imposed by the higher courts."[379] Often, that meant summarily dismissing disorderly conduct, solicitation, assault, and lewdness charges.[380] Elsewhere, courts imposed due process requirements on police departments, rejecting arrests based on uncorroborated testimony from undercover cops or requiring district attorneys, liquor regulators, and police to justify their campaigns with evidence.[381] Indeed, many of the canonical cases of the era turned on the lack of evidence. For instance, in *Scott v. Macy*, a court stopped the Civil Service Commission from firing a queer man because the Commission had not explained how his disorderly conduct arrests made him incapable of doing his job.[382] And *Stoumen v. Reilly* required police to provide evidence of disorderly conduct before shutting down a bar.[383] To be sure, some of these cases had perverse effects: Police shifted their strategies rather than pulling back on their arrests and, in some cases, subjected their queer arrestees to brutal beatings because they presumed the courts would let them free.[384] But evidentiary requirements placed some limits on police conduct. Therefore, the lesson from the anti-vice analogy is to introduce contestation, evidence, and radical transparency into sexual content moderation.

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378. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 279–284 (1964) (Douglas, J., concurring); *see also* Robert v. U.S. Jaycees, 468 U.S. 609, 625 (1984) (citing *Heart of Atlanta Motel* as a vindication against "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments").

379. LVOVSKY, *supra* note 9, at 7–8.

380. *Id.* at 99, 123, 130, 134, 171.

381. *E.g.*, Kelly v. United States, 194 F.2d 150, 151–56 (D.C. Cir. 1952).

382. 349 F.2d 182, 185 (D.C. Cir. 1965).

383. 234 P.2d 969, 971 (Cal. 1951).

384. LVOVSKY, *supra* note 9, at 138–39.

1. Evidence, not Symbols

Instead of committing to these basic principles of due process, platforms offer false and cynical performances. Some platforms have built endogenous structures to ostensibly provide some measure of contestation and accountability over content moderation. They have hired chief ethics officers to amplify equitable and socially just approaches to AI, including algorithmic moderation.[385] Facebook, YouTube, and other platforms now release regular transparency reports that summarize content moderation actions, takedowns, and restrictions.[386] And Facebook's Oversight Board is an internal council of paid experts that has the power to review some content moderation decisions.[387]

Some scholars want to continue along this path.[388] Along these lines, Evelyn Douek has proposed ex ante restructuring "content moderation bureaucracies" to mitigate biases.[389] Professor Douek suggests that companies should hire "rule-enforcement personnel" and erect internal separations between those responsible for moderation and those responsible for growth and engagement.[390] They argue for significant transparency so individuals know the nature and extent of the role of outside decision makers in content moderation decisions.[391] And they call for annual compliance reports, auditing, and internal review mechanisms.[392] In other words, internal organizational structures

385. *Rise of the Chief Ethics Officer*, Forbes (Mar. 27, 2019), https://www.forbes.com/sites/insights-intelai/2019/03/27/rise-of-the-chief-ethics-officer/?sh=44319f845aba [https://perma.cc/932A-BT3M].

386. *E.g.*, *Transparency, Rules Enforcement*, Twitter (Jan. 11, 2021), https://transparency.twitter.com/en/reports/rules-enforcement.html#2020-jan-jun [https://perma.cc/8RC4–269D]; *Google Transparency Report*, *YouTube Community Guidelines Enforcement*, Google (Sept. 28, 2022) https://transparencyreport.google.com/youtube-policy/removals?hl=en [https://perma.cc/2G2X-9PVH?type=image].

387. Klonick, *Oversight*, *supra* note 71, at 2457–74.

388. Douek, *Systems*, *supra* note 13 (manuscript at 62–78). This path is best described as "new" or "collaborative governance," which is an approach to regulation that relies on a partnership between public authorities and private actors to achieve regulatory goals. Margot E. Kaminski, *Binary Governance: Lessons from the GDPR's Approach to Algorithmic Accountability*, 92 S. Calif. L. Rev. 1529, 1559 (2019). At its best, new governance is "a highly tailored, site-calibrated regulatory system that aims to pull inputs from, obtain buy-in from, and affect the internal institutional structures and decision-making heuristics of the private sector" while maintaining popular legitimacy and achieving better social welfare outcomes. *Id.* at 1560. For a more comprehensive definition of collaborative governance, see Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1, 21–33 (1997); Orly Lobel, *New Governance as Regulatory Governance*, *in* The Oxford Handbook of Governance 65–67 (David Levi-Faur ed. 2012); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 Minn. L. Rev. 342, 371–76 (2004).

389. Douek, *Systems*, *supra* note 13 (manuscript at 61).

390. *Id.* (manuscript at 62).

391. *Id.* (manuscript at 67).

392. *Id.* (manuscript at 69–78).

and procedures in the new governance model are supposed to hold platforms accountable for the content moderations they make.[393]

These internal structures are marketed as introducing new voices into the content moderation machinery. But they are insufficient. As Lauren Edelman argued in the Title VII context and I have argued in the privacy context, these types of programs can often become "merely symbolic": They offer the veneer or trappings of legal-adjacent process, but without the substance of real accountability.[394] They do not have counterparts in the anti-vice era; a symbolic structure of accountability would be New York's State Liquor Authority (SLA) setting up a review board chaired by one of its own agents or an internal police review board controlled by the very police officers harassing and arresting queer people for walking down the street. But even if those staffing these positions earnestly cared about accountability, the system is stacked against them. Ethics officers may have little power, with no access to leadership, and serve to deflect attention from corporate actions—like Google's firing of AI ethicist Timnit Gebru—that suggest corporate disinterest in ethical AI.[395] Transparency reports provide some information about the "black box" of content moderation, but they do not explain how or why decisions are made.[396] And despite considerable media and scholarly attention, Facebook's Oversight Board has so little power that it is hard to imagine it having any real impact on queer expression on the ground.[397] These and other structures on the "periphery of the regulatory state" also sit within corporate organizational hierarchies designed to achieve corporate goals, not limit them.[398] Therefore, it is hard to imagine them suddenly functioning at their best in the content moderation space.

That said, even assuming internal compliance mechanisms do bring some measure of accountability to the administration of content moderation, it is likely that queer expression will be left out. New compliance requirements leave content moderation's inherent heteronormativity untouched. The underlying business model that subjects queer content to the supposedly "common sense" understandings and preferences of advertisers and global markets remains active and, as is likely, further legitimized now that it is framed within mechanisms that have the trappings of law. As a result, they are, at best, performances and, at worst, smoke screens.

393. *Id.* (manuscript at 6–7).

394. Lauren Edelman, Working Law 112–13 (2016); Ari Ezra Waldman, *Privacy Law's False Promise*, 97 Wash. U. L. Rev. 773, 778 (2020).

395. Cade Metz & Daisuke Wakabayashi, *Google Researcher Says She Was Fired over Paper Highlighting Bias in A.I.*, N.Y. Times (Dec. 3, 2020), https://www.nytimes.com/2020/12/03/technology/google-researcher-timnit-gebru.html [https://perma.cc/8S8Y-CGJW].

396. Douek, *Governing*, *supra* note 6, at 804–08.

397. Siva Vaidhyanathan, *Facebook Is Pretending It Cares How Its Platform Affects the World*, Guardian (May 6, 2021, 6:24 AM), https://www.theguardian.com/commentisfree/2021/may/06/facebook-donald-trump-ruling-oversight-board, [https://perma.cc/NMQ7-RCL7].

398. Cohen, *supra* note 15, at 192–93.

Instead of relying on the internal structures and procedures of companies that have shown little to no interest in protecting queer expression, social media websites should be required to provide specific, detailed, case-by-case evidence and explanations for actions they take against content. Individuals should have robust opportunities for contestation, providing evidence and context of their own. I am unmoved by corporate talking points and apologists who claim that content moderation is too complex and too vast to provide the kind of information necessary to demonstrate fairness. Social media companies should not be absolved of basic legal responsibility simply because they are too large. That, as they say, is their problem.

2. Public Governance, not False Transparency

Like anti-vice enforcement, sexual content moderation happens without evidence. The process is a black box; users are told their content was removed for violating rules against "sexual activity," but they are not told how, why, or what to fix.[399] Nor are platforms transparent about the interests their moderators are balancing when making decisions.[400] They justify their opacity by arguing that more details about moderation practices would allow opportunistic gaming.[401] But, as Sarah Roberts explains, their very reluctance to share information about how sexual content moderation works amplifies platform power to moderate content however they want.[402] Therefore, just as some courts required police to provide legitimate evidence for their arrests, a modest intervention would require platforms to provide more detailed explanations to users when moderating content, allow users to cure, and subject platforms to some measure of legitimate due process.[403]

The anti-vice context also suggests that transparency can do more work to support queer expression on social media. Researchers have always found it difficult to parse arrest records for data about the rates of arrests of queer people versus non-queer people during the anti-vice era.[404] Today, where ethnographic fieldwork suggests that transgender women are overpoliced and harassed on the streets for merely "walking while trans," that problem is even more acute. As Lenore Carpenter and Barrett Marshall note, there is no "police-generated data that could be used to prove more convincingly that transgender women are being subjected to police profiling" because police do not record it, instead relying on forms limited to a gender binary.[405] Carpenter and Marshall argue that sensitively gathering that data could be a first step toward reform.[406]

399. Roth, *supra* note 88, at 415, 418, 423.

400. Douek, *Governing*, *supra* note 6, at 803–04.

401. Gerrard, *supra* note 351, at 4493.

402. Roberts, *Detritus*, *supra* note 7 (discussing the logic of opacity and the goals of opaque content moderation).

403. *See* Tyler, *supra* note 254, at 3–10 (arguing that due process enhances police legitimacy).

404. Chauncey, *supra* note 97; Eskridge, *Challenging*, *supra* note 94.

405. Carpenter & Marshall, *supra* note 166, at 6.

406. *Id.* at 22.

Similarly, much of the evidence of disproportionate silencing of queer content online is anecdotal, ethnographic, or, in a few circumstances, based on researchers' attempts to recreate the algorithmic moderation environment.[407] Though important and weighty in their own right, those data sources are often viewed with skepticism by platforms, policymakers, courts, and scholars. But quantitative, broad-based, statistical analyses of content moderation's raw data is difficult for one simple reason: platforms hoard that data.[408] They ban scraping in their terms of service and by design.[409] When researchers try gathering data on their own, platforms sue to stop them.[410] They permit research by some researchers and not others on their terms.[411] As Amy Kapczynski has noted, the combination of contractual and legal limits on researcher access to data allows platforms to "forbid users from undertaking research that might disclose aspects of their platform's functioning" and hold them accountable for abuses of power.[412]

Therefore, as in the "walking while trans" context, where advocates have long called for data gathering on queer populations to prevent systemic erasure, another proposal for legal intervention would require platforms to make content moderation data available to researchers. Scholars could then interrogate, analyze, and study under circumstances that both protect platforms' trade secrets and permit independent interrogation. That data can include what is taken down or restricted and why, which posts are flagged and how they are reviewed, and which content is algorithmically limited. If platforms are indeed doing their best to balance competing interests, such transparency could also provide a legitimacy dividend. Notably, here I agree with Douek and other scholars who deftly call for robust transparency and legal protection for transparency.[413]

With this data, independent researchers—not people paid by platforms themselves—can play the role that some judges played in the anti-vice context and introduce contestation into the content moderation process. They can assess the veracity of platforms' commitments to fair moderation, hold platforms to their promises, and catalyze change by publicizing their research.

407. See studies and evidence described in *supra* section II.B.3.

408. Marco Bastos & Shawn Walker, *Facebook's Data Lockdown Is a Disaster for Academic Researchers*, Conversation (Apr. 11, 2018, 6:10 AM), https://theconversation.com/facebooks-data-lockdown-is-a-disaster-for-academic-researchers-94533 [https://perma.cc/3WC7-N3H2].

409. Cohen, *supra* note 15, at 235.

410. *E.g.*, Jeff Horwitz, *Facebook Seeks Shutdown of NYU Research Project into Political Ad Targeting*, Wall St. J. (Oct. 23, 2020, 8:59 PM), https://www.wsj.com/Articles/facebook-seeks-shutdown-of-nyu-research-project-into-political-ad-targeting-11603488533 (last visited Nov. 18, 2022).

411. Nathaniel Persily & Joshua A. Tucker, *The Challenges and Opportunities for Social Media Research*, *in* Social Media and Democracy: The State of the Field and Prospects for Reform 324 (Nathaniel Persily & Joshua A. Tucker eds., 2020).

412. Amy Kapczynski, *The Law of Informational Capitalism*, 129 Yale L.J. 1460, 1502–03 (2020). *See also* Cohen, *supra* note 15, at 116.

413. Douek, *Systems*, *supra* note 13 (manuscript at 68–69).

There is a model for this. Julia Angwin and other investigative journalists have changed the discourse around algorithmic bias and published research proving that platforms have failed to keep their commitments.[414] Researchers like Joy Buolamwini, Safiya Noble, and Latanya Sweeney have used technical tools to highlight algorithmic biases.[415] If they had the tools, these and other sociotechnical researchers can act as a counterweight to platform power, prying open content moderation's "black box" and holding social media accountable.

3. Anti-Subordination, not Blanket Immunity

This kind of transparency and research also means that more significant legal reform is possible. Danielle Citron, Mary Anne Franks, and other scholars have argued for reforming the CDA section 230 immunity to better incentivize platforms to restrict hateful, harassing, and illegal content.[416] Their proposals would amend section 230 to condition immunity on platforms "engag[ing] in good faith efforts to restrict illegal activity."[417] Franks would limit immunity only to "speech wholly provided" by a user unless the platform "intentionally encourages, solicits, or generates revenue" from the offending speech.[418] If researchers had content moderation data available to them that could demonstrate or rule out disproportionate censorship of queer content, section 230 could also be amended to condition immunity on platforms engaging in good faith efforts to ensure that their policies and practices do not result in disparate impact—namely, disproportionate silencing or throttling—on those voices marginalized under traditional norms. Those efforts would be documented by platforms and subject to public governance oversight, not internal compliance mechanisms.

I would also go further and propose an anti-subordination element to legal reform. Anti-subordination refers to the idea that equality doctrine should not simply prohibit classifications on the basis of demographic criteria, but

414. *E.g.*, Julia Angwin et al., *Machine Bias*, ProPublica (May 23, 2016), https://www.propublica.org/Article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/VF2P-8JGF] (identifying racial bias in recidivism algorithms); Corin Faife & Alfred Ng, *After Repeatedly Promising Not To, Facebook Keeps Recommending Political Groups to Its Users*, Markup (June 24, 2021, 8:00 AM), https://themarkup.org/citizen-browser/2021/06/24/after-repeatedly-promising-not-to-facebook-keeps-recommending-political-groups-to-its-users [https://perma.cc/8TWD-9JRS].

415. *E.g.*, Safiya Noble, Algorithms of Oppression (2018); Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 Proc. of Machine Learning Res. 1 (2015); Latanya Sweeney, Discrimination in Online Ad Delivery (Jan. 28, 2013) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208240 [https://perma.cc/9P83-CPVC].

416. *E.g.*, Citron & Wittes, *supra* note 37, at 412–16; Mary Anne Franks, *Sexual Harassment 2.0*, 71 Md. L. Rev. 655 (2012); Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. Chi. L. F. 45 (2020); Mary Anne Franks, Stan. Cyber Pol'y Ctr., Reforming Section 230 and Platform Liability (2021) [hereinafter Franks, Reforming Section 230].

417. Citron & Wittes, *supra* note 37, at 416; *see also* Danielle Keats Citron, *How to Fix Section 230*, 103 B.U. L. Rev. __ (forthcoming 2023).

418. Franks, Reforming Section 230, *supra* note 416, at 11.

that "lived equality—that is, substantive, material, day-to-day equality as opposed to formal, 'on-the-books' equality—necessitates dismantling facially neutral . . . [systems] that nevertheless oppress particular groups."[419] Anti-subordination sometimes requires rule makers to be conscious of certain classifications and affirmatively "level up those that are being subordinated."[420] In other words, unlike today's anti-political moderation proposals from the political right,[421] an anti-subordination agenda to reform section 230 would require platforms to make a concerted effort to understand the disproportionate effects of its moderation systems on content from queer and other oppressed minorities and make design and policy changes to ameliorate them systemically. That is, unlike managerialized compliance mechanisms, which tend to serve corporate goals like efficiency and profit while reifying existing business models, exogenous legal requirements that level up marginalized populations could have the salutary effect of changing the very nature of digital social spaces. And that structural change is necessary if queer expression ever hopes to be a robust part of digital life.

Ultimately, though, the anti-vice analogy teaches us that no legal intervention can replace the community activism and cultural shifts that made some lawyers and judges change their minds about morality policing. As Lvosvky notes, where "social conservativism and conventional ideals of masculinity" among police fomented a natural antipathy toward queer people, more judges in the 1960s were influenced by changing social mores around sex, gender, and homosexuality.[422] Civil rights and sexual liberation movements, together with broader progressive political and medical movements, started a slow shift in discourse about the dignity of queer men.[423] Homophile organizations like the Mattachine Society and One also aggressively lobbied legal advocacy groups like the ACLU to encourage the group's attorneys to take up the cause of the mostly queer men being victimized by morality policing.[424] Simply put, times changed and the assemblage of forces that turned anti-vice policing into a weapon against queer people shifted, evolved, and weakened. A similar shift in culture about sex, gender, and sexuality may be queer content's best hope in the end.

419. Scott Skinner-Thompson, Privacy At The Margins 6 (2020).

420. *Id.*

421. *See* NetChoice v. Paxton, No. 21–51178, 2022 WL 4285917 (5th Cir. Sept. 16, 2022) (upholding Texas law that limited content moderation of political viewpoints); Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019); Russell Brandom, *Senate Republicans Want to Make It Easier to Sue Tech Companies for Bias*, Verge (June 17, 2020, 6:46 AM), https://www.theverge.com/2020/6/17/21294032/section-230-hawley-rubio-conservative-bias-lawsuit-good-faith [https://perma.cc/EM9V-8M4N].

422. Lvovsky, *supra* note 9, at 118–19, 139.

423. *Id.* at 118.

424. *Id.* at 174–75.

Conclusion

Through a historical analogy, this Article has shown that sexual content moderation systemically encodes queerness as illicit in ways straightness is not. Sexual content moderation operates like and has similar effects on public expressions of queer sexuality as anti-vice policing from the 1930s to the late 1960s. Both are assemblages of social forces comprising law, ideas, rules, technologies, expertise, and people. And both have the effect of creating and maintaining straight spaces. Although few historical analogies are perfect, and it is important not to equate policing and subjugation by the state with policing sexuality by a private company, the parallels highlight several critical lessons for content moderation, technology, and law. The analogy also offers new perspective on current policy debates about platform regulation.

Queer people are certainly not the only ones who receive disparate treatment by social media. But the values, machinery, and anti-queer effects of sexual content moderation are one example in a larger narrative about technologies' role in queer oppression and the reification of social media as a straight space. Platforms that play critical roles in the production and dissemination of knowledge also control spaces characterized by harassment and misinformation, both of which endanger queer lives. Together, anti-queer censorship, attacks on queer identity, and the dissemination of lies and stereotypes about queer people deny queer access to social technologies and ultimately amplify discourses of marginalization and discrimination.

This Article's analogy to anti-vice policing has shown just how much the deck is stacked against queer expression in today's social media landscape even when those platforms are not designed with express and malicious anti-queer intentions. Therefore, platforms have a choice: They can maintain a discriminatory status quo *or* they can commit to anti-subordination. Law has a choice, too: To focus on procedural guardrails is to endorse the disproportionate silencing of marginalized voices; to force platforms down to size, to commit them to protecting the marginalized, to condition immunity on anti-subordination is to fulfill the state's commitment to its most vulnerable. To step in may be fraught, but it is the only path forward.

WEAPONIZING FEAR

S. Lisa Washington

Abstract

In a letter dated February 22, 2022, Texas Governor Greg Abbott directed the commissioner of the Texas Department of Family and Protective Services "to conduct a prompt and thorough investigation of any reported instances" of what he called "abusive sex change procedures." Many condemned the weaponizing of the child welfare system against parents supporting their children. Some highlighted that the directive misuses the vague definitions of child abuse to target LGBTQ+ youth and their families. While I agree with both critiques, I suggest that this framing insufficiently captures the ways the family regulation system—often called the "child welfare system"—fits squarely into the broader project of controlling marginalized families. The issue is not primarily the Texas directive's misuse of the system but the system itself.

This Essay argues that the directive invokes preexisting, deep-seated fears of violence committed or perpetuated by the carceral state against the most marginalized families. Whatever the long-term viability of the directive, it has already exacerbated those fears. The family regulation system has the power to separate families and intrude on the most intimate parts of family life. Fear of state supervision and family separation takes a tremendous toll on impacted families. State actors weaponize this fear by leveraging, whether intentionally or unintentionally, a structural environment that induces, benefits from, and relies on fear, making it easier to control families. This weaponizing of fear to control families, in turn, produces further marginalization.

This Essay outlines the conditions of fear in the family regulation system and examines the ways that fear is and is not discussed in family regulation court decisions. It explores how fear is regularly weaponized against families with intersectional marginalized identities, and it identifies the targeting of LBGTQ+ youth and parents as a racialized movement. Popular conversations and legal scholarship rarely adopt an intersectional lens and bigger-picture

framing that includes both Black LGBTQ+ children and Black LGBTQ+ parents. By conducting an intersectional analysis, this Essay reveals that the Texas directive draws on the inequality, anti-Blackness, and heteronormativity of the family regulation system to target and discipline the most vulnerable families. This Essay calls for scholars to foreground intersectional perspectives in the fight against anti-LGBTQ+ policies and the family regulation system more broadly.

About the Author

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Introduction

In a letter dated February 22, 2022, Texas Governor Greg Abbott directed the Commissioner of the Texas Department of Family and Protective Services (DFPS) "to conduct a prompt and thorough investigation of any reported instances" of what he defines as "abusive gender-transitioning procedures."[1] The letter emphasized that mandatory reporting laws required doctors, nurses, teachers, and other mandated reporters to report child abuse or else face criminal penalties.[2] DFPS responded that it would comply with the Texas law.[3] Following the Governor's directive, DFPS initiated several investigations against parents with transgender children.[4] A few hospitals halted hormone treatment for LGBTQ+ youth in the state.[5]

On March 1, 2022, the ACLU filed a lawsuit to challenge the state-sanctioned prosecution of parents who support their transgender children in obtaining medical care.[6] On March 2, 2022, the District Court of Travis County issued a temporary restraining order in the ACLU suit, blocking DFPS from further investigating the plaintiffs.[7] Shortly thereafter, on March 11, 2022, the district court issued a temporary statewide injunction, preventing enforcement of the Governor's directive.[8] In May, however, the Supreme Court of Texas struck down the statewide injunction and ruled that while Abbott's directive did not bind DFPS to conduct these investigations, child welfare investigations into gender-affirming care could resume.[9] DFPS then resumed investigations that had been temporarily halted by the statewide injunction, continuing to put families of transgender children at risk.[10]

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1. Letter from Greg Abbott, Governor of Texas, to Jaime Masters, Comm'r, Tex. Dep't of Fam. & Protective Servs. (Feb. 22, 2022), https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf [https://perma.cc/KRQ4-ZP9L].

2. *Id.*

3. Jeff Bell & Drew Knight, *DFPS Says It Will Comply with Abbott, Paxton Push to Investigate Transition Procedures as Child Abuse*, KVUE (Feb. 23, 2022, 10:50 PM CST), https://www.kvue.com/article/news/politics/ken-paxton-child-modification-abuse-opiniom/269–7115bb89-be34–4a9d-a79e-fb09ec87e52b [https://perma.cc/VJW5-ARD4].

4. J. David Goodman & Amanda Morris, *Texas Investigates Parents over Care for Transgender Youth, Suit Says*, N.Y. Times (Mar. 1, 2022), https://www.nytimes.com/2022/03/01/us/texas-child-abuse-trans-youth.html [https://perma.cc/JPP9–3WKZ].

5. J. David Goodman, *Texas Court Allows Abuse Inquiries of Parents of Transgender Children*, N.Y. Times (May 13, 2022), https://www.nytimes.com/2022/05/13/us/texas-supreme-court-abuse-transgender-children.html [https://perma.cc/ZNJ4-BXCP].

6. *See* Plaintiffs' Original Petition & Application for Temporary Restraining Order, Temporary Injunction, Permanent Injunction & Req[ue]st for Declaratory Relief, Doe v. Abbott, No. D-1-GN-22–000977 (Tex. Dist. Ct. Mar. 1, 2022).

7. Doe v. Abbott, No. D-1-GN-22–000977, 2022 WL 628912, at *1–2 (Tex. Dist. Ct. Mar. 2, 2022) (granting plaintiffs' application for a temporary restraining order).

8. Doe v. Abbott, No. D-1-GN-22–000977, 2022 WL 831383, at *2 (Tex. Dist. Ct. Mar. 11, 2022) (granting plaintiffs' application for a temporary injunction).

9. *In re* Abbott, 645 S.W.3d 276, 281–83 (Tex. 2022).

10. *See* Eleanor Klibanoff, *Texas Resumes Investigations into Parents of Trans Children, Families' Lawyers Confirm*, Tex. Trib. (May 20, 2022, 1:00 PM CT), https://www.texastribune.org/2022/05/20/trans-texas-child-abuse-investigations [https://perma.

Texas is not the only state to take aim at transgender children and adults. The conservative right has made a national project of targeting LGBTQ+ youth and their parents. In 2021, state legislators introduced an unprecedented number of anti-LGBTQ+ bills.[11] Twenty-one states introduced bills prohibiting gender-affirming medical care for transgender youth.[12] Some of these bills penalize parents who support gender-affirming care for their transgender children.[13] In 2022, this project remains in full effect. To date, states have introduced at least 162 anti-transgender and anti-LGBTQ+ bills.[14] Some efforts have succeeded: recently, for example, the Florida Senate passed a bill that would prevent teachers from discussing LGBTQ+ issues in their classrooms.[15]

It is unclear whether DFPS in Texas will continue investigating parents with transgender children. We do not yet know how many states might follow suit, or whether family court judges will find parents neglectful for complying with medically sound recommendations.[16] While these are all important questions, this Essay focuses on a more fundamental aspect of family regulation in the carceral state: the way the family regulation system[17] weaponizes fear to control marginalized families.

I employ the term "weaponizing" to describe how state actors—whether intentionally or unintentionally—use a structural environment that induces, benefits from, or relies on fear, ultimately producing further marginalization.[18]

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cc/WY52–8UYX]. On September 16, 2022, a Texas District Court again enjoined DFPS, this time from investigating any family members of transgender children belonging to the national LGBTQ+ advocacy organization PFLAG. *See* PFLAG, Inc. v. Abbott, No. D-1-GN-22–002569 (Tex. Dist. Ct. Sept. 16, 2022). Litigation over the DFPS investigations is ongoing as of publication of this Essay.

11. Wyatt Ronan, *2021 Slated to Become Worst Year for LGBTQ State Legislative Attacks as Unprecedented Number of States Poised to Enact Record-Shattering Number of Anti-LGBTQ Measures into Law*, Hum. Rts. Campaign (Apr. 22, 2021), https://www.hrc.org/press-releases/2021-slated-to-become-worst-year-for-lgbtq-state-legislative-attacks [https://perma.cc/FX79-PY53].

12. Kerith J. Conron, Kathryn O'Neill & Luis A. Vasquez, *Prohibiting Gender-Affirming Medical Care for Youth*, Williams Inst. 1 (Apr. 2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Youth-Health-Bans-Apr-2021.pdf [https://perma.cc/L4V8-MM2Z].

13. *Id.* at 1.

14. Priya Krishnakumar & Devan Cole, *2022 Is Already a Record Year for State Bills Seeking to Curtail LGBTQ Rights, ACLU Data Shows*, CNN (July 17, 2022, 5:57 PM), https://www.cnn.com/2022/07/17/politics/state-legislation-lgbtq-rights/index.html [https://perma.cc/NRL5-MYNV]; *Legislation Affecting LGBTQ Rights Across the Country*, ACLU (Sept. 9, 2022), https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country [https://perma.cc/7AQ6–6QHP].

15. H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) (enacted).

16. *See* Plaintiffs' Original Petition & Application for Temporary Restraining Order, Temporary Injunction, Permanent Injunction & Req[ue]st for Declaratory Relief, *supra* note 6, at 11.

17. This Essay employs the term "family regulation system" when referring to what is commonly described as the "child welfare system."

18. The Essay focuses on structures and impact, not individual intent. However, there are certainly instances in which individuals intentionally weaponize fear of state-sanctioned

With some exceptions,[19] popular reactions miss how the Texas policy draws on a system that already uses its profound power and ability to inspire fear in marginalized communities.

Building on my forthcoming scholarship[20] and recent opinion pieces by Professor Dorothy Roberts[21] and Professor Mical Raz,[22] this Essay argues that the Texas directive's weaponizing of the family regulation system fits into a much larger project of producing fear to maintain white, heteronormative order through family regulation. White, middle-class, heteronormative norms dictate the standard of child neglect.[23] Those who deviate from the social norm are punished.[24] Here, the weaponizing of fear plays a central role in maintaining hegemonic structures.

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violence. For example, some scholars have described this phenomenon in the criminal legal and immigration context. *See, e.g.*, K-Sue Park, *Self-Deportation Nation*, 132 Harv. L. Rev. 1878, 1932–33 (2019) (arguing that private entities and citizens—empowered by federal and subfederal policy—create an environment so hostile to undocumented people that they self-deport and concluding that the "government's use of spectacle and expressive statements directed to private citizens suggests that at least some policymakers understand these motivations and their own power to draw on this force"); Shawn E. Fields, *Weaponized Racial Fears*, 93 Tul. L. Rev. 931, 968–73 (2019) (discussing how racially motivated 911 calls play on existing stereotypes and create the "opportunity for unwarranted police violence against a person of color").

19. In a recent *Washington Post* opinion piece, Professor Dorothy Roberts poignantly argues that the "child welfare system already hurts trans kids." Dorothy Roberts, Opinion, *The Child Welfare System Already Hurts Trans Kids. Texas Made It a Nightmare*, Wash. Post (Mar. 3, 2022, 12:23 PM EST), https://www.washingtonpost.com/outlook/2022/03/03/texas-trans-youth-welfare [https://perma.cc/P4N7-RZRP]; *see also* Mical Raz, Opinion, *Anti-Trans Law Weaponizes Child Protection Systems That Have Long Harmed Kids*, Wash. Post (Mar. 10, 2022, 6:00 AM EST), https://www.washingtonpost.com/outlook/2022/03/10/anti-trans-laws-weaponize-child-protection-systems-that-have-long-harmed-kids [https://perma.cc/L6K3-BCCM] (describing the historic misuse of "child protective" services to punish parents and harm children).

20. S. Lisa Washington, *Pathology Logics*, 117 Nw. U. L. Rev. (forthcoming 2023) (manuscript at 44–48) (discussing how CPS's subjective assessments of parental behavior pathologize Black parents), https://ssrn.com/abstract=4068859 [https://perma.cc/G5A8–2J3N].

21. Roberts, *supra* note 19.

22. Raz, *supra* note 19.

23. *See* Mical Raz, Abusive Policies: How the American Child Welfare System Lost Its Way 9–30 (2020) (providing a history of how the movement against child abuse in the 1970s and 1980s centered middle-class white parents and concluding that colorblind approaches "ironically set the stage for current-day child welfare inequities"); Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997—The Worst Law Affecting Families Ever Enacted by Congress*, 11 Colum. J. Race & L. 711, 716–28 (2021) (discussing the embedded relationship between race, class, and the foundations of the family regulation system in the period from the Johnson administration to the end of the 1970s).

24. *Cf.* Cynthia Godsoe, *Punishment as Protection*, 52 Hous. L. Rev. 1313, 1317–18 (2015) (arguing that the criminal legal system targets girls who "violate feminine and victim roles and related norms of chastity and obedience"); Cynthia Godsoe, *Contempt, Status, and the Criminalization of Non-Conforming Girls*, 35 Cardozo L. Rev. 1091, 1109 (2014) (arguing that status offenses punish girls "who violate gender norms of obedience and sexual

While this Essay focuses on the weaponizing of fear against *parents* entangled in the family regulation system, it is important to note that the system harms children by targeting their parents. The interests of children cannot be viewed solely in isolation from the interests of their parents. Indeed, Professor Roberts points out that interference with the child-parent relationship is "an awful injury to the child."[25] Professor Doriane Lambelet Coleman has long argued that the invasive nature of the family regulation system relies on the suspension of the "legal presumption that the children's interests are aligned with those of their parents."[26] State intervention into familial relationships is particularly common for Black and LGBTQ+ parents.[27] These families are the focus of this Essay.

As scholars have discussed at length, the government has long used criminalization as a tool of social control.[28] Against this background, a growing body of scholarship discusses how the family regulation system expands the carceral state's control of marginalized families and parenthood.[29]

By examining the way that fear structures parents' experience of the family regulation system, this Essay also complicates the argument that ambiguous legal definitions are to blame for the system's harms. Some scholars identify the vague definitions of child neglect as a central issue in family regulation law.[30] Similarly, in its pending lawsuit, the ACLU argues that Governor

purity").

25. Dorothy Roberts, Shattered Bonds: The Color of Child Welfare 118 (2002).

26. Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413, 539 (2005).

27. *See infra* Part I.

28. *See, e.g.*, Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 Calif. L. Rev. 1637, 1681–82 (2021) ("[D]isorderly conduct provides yet another mechanism not just for preserving or controlling the racial composition of spaces but also for regulating negatively racialized groups' access to and movement in 'the white space.'" (citations omitted)); Issa Kohler-Hausmann, Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing 4–5 (2018) (arguing that misdemeanor criminal courts "seek social control" by "gradually ratcheting up the punitive response with each successive encounter or failure to live up to the court's demands"); Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. Rev. 1418, 1426–27 (2012) (analyzing how systems of mass incarceration create "structural-dynamic discrimination" that harm women of color).

29. *See, e.g.*, Dorothy E. Roberts, *Digitizing the Carceral State*, 132 Harv. L. Rev. 1695, 1700 (2019) (reviewing Virginia Eubanks, Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor (2018)) ("Systems that ostensibly exist to serve people's needs—health care, education, and public housing, as well as public assistance and child welfare—have become behavior modification programs that regulate the people who rely on them."); J. Khadijah Abdurahman, *Calculating the Souls of Black Folk: Predictive Analytics in the New York City Administration for Children's Services*, 11 Colum. J. Race & L.F. 75, 91, 99 (2021) (discussing the digital reach of the family regulation system and its reliance on carceral data).

30. *See, e.g.*, Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. Rev. L. & Soc. Change 523, 562 (2019); Raz, *supra* note 19 (arguing that the wide definitions of child abuse have been "weaponized and politicized").

Greg Abbott, Attorney General Ken Paxton, and the DFPS Commissioner used the directive to "create a new definition of 'child abuse'" under state law."[31] Ambiguous definitions certainly permit Child Protective Services (CPS) to fall back on harmful stereotypes during their subjective assessments of parents.[32] However, there is little reason to believe that a clearer definition of child neglect would significantly alter deeply entrenched mechanisms of control.

We cannot define our way out of deeply held beliefs about the autonomy of marginalized parents, children, and their communities. Family regulation actors have stereotyped Black and LGBTQ+ parents as unfit, neglectful, and even dangerous.[33] Similarly, they have depicted Black survivors of domestic violence as weak and incapable of protecting their children.[34] And to date, popular discourse marks marginalized communities as pathological spaces.[35] We will not define our way out of anti-trans violence, anti-Blackness, and their intersections. Regardless of how we define the family regulation system's key terms, fear fits comfortably within the family regulation system's core features of control and punishment.[36] Indeed, as the Essay will discuss, fear is a driving feature of the system.

This Essay proceeds in three parts. Part I summarizes the ways in which the family regulation system disproportionately harms parents and children with marginalized identities. Current research and mainstream discourse rarely focus on Black LGBTQ+ parents targeted by the family regulation system.[37] This Essay begins to fill that gap. Part II identifies fear as an integral part of the family regulation apparatus. It traces the way that fear of structural state violence meets specific fear of the family regulation system. Together, compounded fears exacerbate harms against Black LGBTQ+ parents and other marginalized families. Part II briefly examines the conditions of fear produced by the family regulation system and the narrow ways in which fear is discussed

31. Plaintiffs' Original Petition & Application for Temporary Restraining Order, Temporary Injunction, Permanent Injunction & Req[ue]st for Declaratory Relief, *supra* note 6, at 2.

32. *See* Washington, *supra* note 20 (manuscript at 44–48) (discussing how CPS's subjective assessments of parental behavior pathologize Black parents).

33. *See infra* Section I.B.

34. *See* S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 Colum. L. Rev. 1097, 1121–24 (2022).

35. *See, e.g.*, Breanna Edwards, *Why Does Violence in Chicago Attract So Much Attention, Even Though It's Not the Murder Capital of the U.S.?*, Root (Aug. 21, 2018, 12:00 PM), https://www.theroot.com/why-does-violence-in-chicago-attract-so-much-attention-1828327783 [https://perma.cc/CT7V-TURP] (discussing how the pathologizing of Black communities in Chicago allows for continued divestment from the community).

36. *See* Miriam Mack, *The White Supremacy Hydra: How the Family Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 Colum. J. Race & L. 767, 781 (2021) (arguing that coercion through family separation "enables family regulation agents to exercise expansive control").

37. *But see* Nancy D. Polikoff, *Neglected Lesbian Mothers*, 52 Fam. L.Q. 87, 91–96 (2018) (discussing Black lesbian and bisexual mothers affected by the family regulation system).

in family regulation court decisions. Finally, Part II locates the Texas directive within the context of fear. It argues that the narrative that the family regulation system keeps children safe from "unfit" parents obscures how fear shapes families' experience with the system. Part III argues that ongoing state targeting of LGBTQ+ families must be understood in the larger context of family regulation. The anti-trans Texas directive marks the latest iteration of a system that subordinates and traumatizes marginalized families instead of keeping them safe.

I. Intersectionality and Family Regulation

It is well established that the family regulation system disproportionately impacts Black children and parents.[38] This Part highlights how the system produces specific harms for children and parents with intersectional marginalized identities, in particular Black LGBTQ+ children and parents. Against this background, this Part begins to identify the target of the family regulation system.

A. *Intersectional Harms in the Foster System*

While this Essay focuses on the weaponizing of fear against parents, the system also instills deep fear in children with intersecting marginalized identities. To understand the weaponizing of fear against parents, it is important to discuss children's experiences in the family regulation system. Family separation is traumatizing for children,[39] and children with marginalized identities bear the brunt of that trauma. Indeed, Black families are separated at higher rates than white families.[40] Among the approximately 400,000 children in the foster system, Black and LGBTQ+ children are overrepresented.[41] Many Black

38. *See "Whatever They Do, I'm Her Comfort, I'm Her Protector." How the Foster System Has Become Ground Zero for the U.S. Drug War*, Movement for Fam. Power 26–28 (2020), https://www.movementforfamilypower.org/s/MFP-Drug-War-Foster-System-Report.pdf [https://perma.cc/DA7F-CQ6S]; *Black Children Continue to Be Disproportionately Represented in Foster Care*, KIDS COUNT Data Ctr. (Apr. 13, 2020), https://datacenter.kidscount.org/updates/show/264-us-foster-care-population-by-race-and-ethnicity [https://perma.cc/SF22-928P]; Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, 692 Annals Am. Acad. 253, 253–54 (2020); Roberts, *supra* note 25, at 7–25.

39. Professor Shanta Trivedi discusses the severe impacts of family separation on a child's mental health. *See* Trivedi, *supra* note 30, at 527–41 (discussing the emotional and psychological harms of child removals).

40. *See* Child Welfare Info. Gateway, *Racial Disproportionality and Disparity in Child Welfare*, Child.'s Bureau 3 (Nov. 2016), https://ncwwi dms.org/index.php/resourcemenu/resource-library/inclusivity-racial-equity/disproportionality-disparities/144-racial-disproportionality-and-disparity-in-child-welfare/file [https://perma.cc/9V6Y-5E4W].

41. *See* KIDS COUNT Data Ctr., *supra* note 38; *LGBTQ Youth in the Foster Care System*, Hum. Rts. Campaign 1, https://assets2.hrc.org/files/assets/resources/HRC-YouthFosterCare-IssueBrief-FINAL.pdf [https://perma.cc/S5KB-SR2H] ("[T]he percentage of youth in foster care who are LGBTQ-identified is larger than the percentage of LGBTQ youth in the general youth population.").

and LGBTQ+ children hold other intersectional identities and experience multiple forms of discrimination.[42]

1. LGBTQ+ Youth

Some studies suggest that approximately 30% of youth in the foster system identify as LGBTQ, compared to 11% in the general population.[43] Once in the foster system, LGBTQ+ youth face distinct vulnerabilities. They tend to remain in the system longer, are more likely to be moved from one foster home to the next, and frequently end up in hostile group-home settings.[44] A survey of LGBTQ youth in the New York foster system found that 100% of LGBTQ youth in group homes reported verbal harassment; 70% reported physical violence.[45] Studies suggest that up to 40% of homeless youth are LGBTQ,[46] with even higher numbers of youth experiencing periods of instable housing.[47] LGBTQ+ youth in the foster system experience negative mental, emotional, and physical health outcomes.[48] In 2019, a lawsuit against the state of Oregon challenged widespread discrimination against LGBTQ+ youth in

42. Hum. Rts. Campaign, *supra* note 41, at 2 (stating that many LGBTQ youth in the foster system "live at the intersection of multiple identities and thus experience multiple forms of discrimination including on the basis of race, class, disability, sexual orientation and gender identity."); Bianca D.M. Wilson & Angeliki A. Kastanis, *Sexual and Gender Minority Disproportionality and Disparities in Child Welfare: A Population-Based Study*, 58 Child. & Youth Servs. Rev. 11, 15 (2015) (finding that the majority of surveyed LGBTQ youth in Los Angeles County are youth of color).

43. Laura Baams, Bianca D.M. Wilson & Stephen T. Russell, *LGBTQ Youth in Unstable Housing and Foster Care*, 143 Pediatrics, Mar. 2019, at 4; Theo G.M. Sandfort, *Experiences and Well-Being of Sexual and Gender Diverse Youth in Foster Care in New York City: Disproportionality and Disparities*, N.Y.C. Admin. Child.'s Servs. 6 (2019), https://www1.nyc.gov/assets/acs/pdf/about/2020/WellBeingStudyLGBTQ.pdf [https://perma.cc/FHP8-AK7V]; Dana M. Prince, Meagan Ray-Novak, Braveheart Gillani & Emily Peterson, *Sexual and Gender Minority Youth in Foster Care: An Evidence-Based Theoretical Conceptual Model of Disproportionality and Psychological Comorbidities*, Trauma, Violence, & Abuse, May 2021, at 1; Alan J. Dettlaff, Micki Washburn, Lynley "Christian" Carr & Alicia "Nikki" Vogel, *Lesbian, Gay, and Bisexual (LGB) Youth Within in Welfare: Prevalence, Risk and Outcomes*, 80 Child Abuse & Neglect 183, 191 (2018) (finding that at least 15.5% of youth in the family regulation system identify as lesbian, bisexual, or gay).

44. *See* Jill Jacobs & Madelyn Freundlich, *Achieving Permanency for LGBTQ Youth*, 85 Child Welfare 299, 303–05 (2006); Sandfort, *supra* note 43, at 8.

45. Randi Feinstein, Andrea Greenblatt, Lauren Hass, Sally Kohn & Julianne Rana, *Justice for All? A Report on Lesbian, Gay, Bisexual and Transgendered Youth in the New York Juvenile Justice System*, Urb. Just. Ctr. 16 (2001), https://www.hivlawandpolicy.org/sites/default/files/justiceforallreport.pdf [https://perma.cc/DF77–27S4].

46. *Id.* at 1, 6.

47. Ryan Berg, *A Hidden Crisis: The Pipeline from Foster Care to Homeless for LGBTQ Youth*, Imprint (Oct. 14, 2016, 7:25 AM), https://imprintnews.org/child-welfare-2/hidden-crisis-pipeline-foster-care-homelessness-lgbtq-youth/21950 [https://perma.cc/D4A5-MRWJ] ("Nearly half of the youth experiencing homelessness today have had at least one placement in a foster home, or group home.").

48. Julia Alberth, *LGBTQ Youth Homelessness and Discrimination in the Foster Care System*, Univ. Wis. Madison 1 (Spring 2020), https://patientpartnerships.wisc.edu/wp-content/uploads/sites/1237/2021/02/AlberthFinal.pdf [https://perma.cc/9PZY-5UES].

the foster system.[49] The lawsuit argued that the state's foster system harmed those it purports to protect.[50] The plaintiffs alleged that LGBTQ+ children "are often deprived of safe and stable placement" and are not provided with the support and resources necessary to survive after they leave the foster system.[51] When they eventually exit the foster system, these children frequently end up homeless.[52]

2. LGBTQ+ Youth of Color

The trauma of the foster system is intensified for LGBTQ+ children of color, who are especially overrepresented.[53] This disparity is particularly pronounced for Black LGBTQ+ girls.[54] When children's marginalized identities intersect, they are more likely to experience mental and physical harms, discrimination, and violence in and after the foster system. LGBTQ+ youth of color are particularly at risk for poor outcomes in the foster system due to a "range of intersecting vulnerabilities," including racism, sexism, gender identity, sexual orientation, socioeconomic class, and psychiatric vulnerabilities during and following foster care.[55] A study by the Annie E. Casey Foundation found that LGBTQ youth of color are more likely than their heterosexual, cisgender peers to cycle through at least ten different placements while in the system.[56]

49. Wyatt B. *ex rel.* McAllister v. Brown, No. 19-cv-00556, 2021 WL 4434011, at *7 (D. Or. Sept. 27, 2021) (summarizing plaintiffs' allegations that the Oregon child welfare system violated LGBTQ+ foster youth's rights "(1) to freedom from bias-related violence, abuse, and harassment while in state custody; (2) to freedom from systemic discrimination based on sexual orientation, gender identity, and gender expression; (3) to privacy regarding the same; (4) to medically necessary gender-affirming medical and psychological care; (5) to culturally competent reproductive health care and sexual health services; and (6) to be clothed and groomed consistent with their sexual orientations, gender expressions, and gender identities").

50. *See id.*

51. *Id.* at *2.

52. *Id.* at *2.

53. *See* Wilson & Kastanis, *supra* note 42, at 15 (finding that the majority of LGBTQ+ youth in the LA foster system were youth of color and suggesting that many of them likely faced both racial and anti-LGBTQ discrimination).

54. Bianca D.M. Wilson & Laura J.A. Bouton, *System Involvement Among LBQ Girls and Women*, Williams Inst. 3–4 (Apr. 2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LBQ-System-Involvement-Apr-2022.pdf [https://perma.cc/BF7V-MFFK] (finding, based on data from the 2014 Los Angeles Foster Youth Survey, that lesbian, bisexual, and queer girls were overrepresented in the Los Angeles County foster system, and that of these girls, approximately 33% were Black).

55. Harold E. Briggs & Kimberly Hoyt, *LGBTQ Youth of Color in Systems: Child Welfare*, *in* Kerith J. Conron & Bianca D.M. Wilson, *LGBTQ Youth of Color Impacted by the Child Welfare and Juvenile Justice Systems: A Research Agenda*, Williams Inst. 45, 45–46 (June 2019) (citation omitted), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-YOC-Social-Services-Jul-2019.pdf [https://perma.cc/QUC8-H7P2].

56. Jeffrey M. Poirier, Sandra Wilkie, Kristin Sepulveda & Tania Uruchima, *Jim Casey Youth Opportunities Initiative: Experiences and Outcomes of Youth Who Are LGBTQ*, 96 Child Welfare 1, 13–17 (2018).

For some Black LGBTQ+ youth in the foster system, fear is a constant. Black LGBTQ+ children have described the regular harassment and violence they have suffered—abuse that actors in the foster system have ignored or even participated in.[57] One Black gay youth explained that when he was in the foster system, his white foster family told him that they would kill him if he were gay; he felt so unsafe that when he was moved to a group home, he began sleeping with a knife under his pillow.[58] Once out of the foster system, LGBTQ+ youth of color experience worse physical and mental health outcomes, instable housing, and financial insecurity at higher rates than their white, heterosexual, cisgender peers.[59]

B. *The Targeting of Black LGBTQ+ Parents*

Caregivers who hold multiple marginalized identities face their own—often overlooked—uphill battles. For example, although family regulation authorities have long removed children from lesbian mothers,[60] lesbian mothers' narratives do not "occupy most legal scholarship, public policy advocacy, test case litigation, or media portrayals."[61] Indeed, there is little empirical data on LGBTQ+ parents who are impacted by the family regulation system. Current discourse and data collection are, for the most part, limited to LGBTQ+ individuals as foster or adoptive parents.[62] In these discussions, the intersectional identities of Black LGBTQ+ parents entangled in the family regulation system are frequently rendered invisible. As a growing body of scholarship points out, the family regulation system mirrors and intersects with the criminal legal system.[63] And much like the criminal legal system, the family regulation system must be examined intersectionally.[64]

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57. *See* Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families—And How Abolition Can Build A Safer World 231–33 (2022); Rosalynd Erney & Kristen Weber, *Not All Children Are Straight and White: Strategies for Serving Youth of Color in Out-of-Home Care Who Identify as LGBTQ*, 96 Child Welfare 151, 159 (2018).

58. Erney & Weber, *supra* note 57.

59. Poirier et al., *supra* note 56, at 14–19.

60. *See* Polikoff, *supra* note 37, at 90.

61. *Id.*

62. *See, e.g.*, A. Chris Downs & Steven E. James, *Gay, Lesbian, and Bisexual Foster Parents: Strengths and Challenges for the Child Welfare System,* 85 Child Welfare 281, 281 (2006) (examining the "challenges and successes" of lesbian, gay, and bisexual foster parents); Sean Cahill, Juan Battle & Doug Meyer, *Partnering, Parenting, and Policy: Family Issues Affecting Black Lesbian, Gay, Bisexual, and Transgender (LGBT) People*, 6 Race & Soc'y 85, 88, 94–95 (2003) (surveying barriers faced by Black LGBT people who wish to foster or adopt and proposing policy solutions to dismantle those barriers).

63. *See, e.g.*, Erin Cloud, Rebecca Oyama & Lauren Teichner, *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. Rev. F. 68, 72 (2017); Venezia Michalsen, *Abolitionist Feminism as Prisons Close: Fighting the Racist and Misogynist Surveillance "Child Welfare" System*, 99 Prison J. 504, 506 (2019); Roberts, *supra* note 57, at 161.

64. *See* Crenshaw, *supra* note 28, at 1429–34 (problematizing the marginality of intersectional criminal justice discourse); Kimberlé W. Crenshaw, *Why Intersectionality Can't Wait*, Wash. Post (Sept. 24, 2015, 3:00 PM EDT), https://www.washingtonpost.com/

Both children *and* parents entangled in the system experience intersectional harms. Existing data and examples highlighted by scholars, popular media outlets, and my own practice experience suggest the pervasiveness of intersectional bias by the family regulation system. The disparate treatment of parents and children with intersectional marginalized identities is multifaceted and complex. In this Section, I will discuss only a few central aspects and corresponding examples.

The family regulation system may characterize LGBTQ+ parents as "unfit" to care for their children. Professor Nancy D. Polikoff discusses one such case, the story of a lesbian mother named Hilda.[65] When Hilda's children entered the foster system, a faith-based agency was assigned to provide mandated reunification services.[66] A family regulation caseworker working for the agency informed Hilda that her sexual orientation needed to be "fixed" to avoid intergenerational effects of sexual "preference."[67] A family court judge later terminated Hilda's parental rights.[68]

The family regulation system enables caseworkers to punish lesbian mothers like Hilda. Once parents are under investigation, agency caseworkers hold significant power over families. Caseworkers monitor and document the child-parent relationship while a child is in the foster system.[69] At permanency hearings, caseworkers recommend either continued family separation or reunification. Their recommendations are based on their own perception of parental behavior and progress. Caseworkers regularly remain in the lives of families for long periods of time, producing a uniquely coercive power dynamic.[70] In Hilda's case, this power dynamic allowed her caseworker to dictate heteronormativity as a standard for child safety.

The family regulation system also disciplines transgender parents for their gender identities. In *M.B. v. D.W.*, the Kentucky Court of Appeals affirmed the trial court's decision to terminate a legal parent-child relationship based on the child's emotional distress caused largely by a parent's gender-affirming surgery.[71] Strikingly, the court chose to remedy the emotional distress of the child

news/in-theory/wp/2015/09/24/why-intersectionality-cant-wait [https://perma.cc/8BFB-CMB4] ("Intersectional erasures are not exclusive to black women. People of color within LGBTQ movements; girls of color in the fight against the school-to-prison pipeline; women within immigration movements; trans women within feminist movements; and people with disabilities fighting police abuse—all face vulnerabilities that reflect the intersections of racism, sexism, class oppression, transphobia, able-ism and more.").

65. Polikoff, *supra* note 37, at 87–88 (citing *In re* R.M., Nos. 115,945, 115,946, 2017 Kan. App. Unpub. LEXIS 365, at *1 (May 12, 2017)).

66. *Id.* at 87.

67. *Id.* at 87.

68. *Id.* at 88.

69. Washington, *supra* note 20 (manuscript at 27–28) (discussing how CPS caseworkers, as "perpetual witnesses," document, monitor, and report their perceptions of the family functioning).

70. For more on the power dynamics driving the relationship between parents and caseworkers, see *id.* (manuscript at 26–29).

71. 236 S.W.3d 31, 33–36 (Ky. Ct. App. 2007).

by severely and permanently intervening in the parent-child relationship.[72] The opinion makes clear that the parent wished to remain in her child's life.[73] The parent requested a less drastic intervention, which could have included family therapy, a custody arrangement, or even a temporary break from visitation.[74] Instead, the court terminated the family relationship.[75] The trial court's decision characterized the gender-affirming surgery as "self-centered."[76] The court of appeals found no error in the lower court's conclusion that the transgender parent was "primarily responsible" for the emotional distress of the child, and it affirmed the trial court's neglect finding.[77]

LGBTQ+ parents are keenly aware that their identities may make them targets for family regulation intervention. In one participatory-research study of parents directly impacted by the family regulation system in New York City, an LGBTQ+ parent shared concerns about their disparate treatment by caseworkers: "I've learned the hard way that they don't respect us. Their favorite question is 'Which one of you actually had the child?' . . . I just don't think that that matters. It just doesn't matter."[78]

A 2016 study found that if a Black mother was lesbian or bisexual, her child was more likely to be removed than if she were heterosexual.[79] As a public defender, I witnessed similar discrimination against Black LGBTQ+ parents and their partners. In one case,[80] CPS removed all four children from their mother. Instead of placing the children with her partner, a transgender man whom the children knew as their father, CPS placed the children in the foster system with a stranger. One child's health quickly deteriorated, and they were ultimately hospitalized. The agency did not even consider the mother's transgender partner and de facto father of the children as a resource. Only

72. *Id.* at 35, 38 (holding that "substantial evidence" supported the involuntary termination of a transgender parent).

73. *Id.* at 34.

74. *Id.*

75. *Id.* at 37 ("The appellant has also argued that there were other measures, less drastic than termination, which might have been effective in protecting the best interests of M.B. This court has held that a trial court should consider any such less drastic measures. However, it does not appear from the record that the appellant ever raised this issue in the trial court." (citation omitted)).

76. *Id.* at 37.

77. *Id.* at 36–37. The label that attaches to parents who are adjudicated neglectful is pervasive, even when the legal parent-child relationship remains intact. *See* Washington, *supra* note 20 (manuscript at 47–48).

78. *An Unavoidable System: The Harms of Family Policing and Parent's Vision for Investing in Community Care*, Rise & Takeroot Just. 20 (Fall 2021), https://www.risemagazine.org/wp-content/uploads/2021/09/AnUnavoidableSystem.pdf [https://perma.cc/3E9Z-AMJS].

79. Kathi L.H. Harp & Carrie B. Oser, *Factors Associated with Two Types of Child Custody Loss Among a Sample of African American Mothers: A Novel Approach*, 60 Soc. Sci. Rsch. 283, 288–89, 293 (2016).

80. For confidentiality purposes, I do not include the name or any further identifying details.

through family regulation intervention did the children eventually learn that their mother's partner was not their biological father.

* * *

The family regulation system is fertile ground for the targeting of parents and children with intersectional marginalized identities.[81] Unequal power dynamics and anti-Black, heteronormative norms are a feature of the system, not a bug. Adopting an intersectional analysis reveals that the Texas directive weaponizes the inequality, anti-Blackness, and heteronormativity of the family regulation system to target and discipline the most marginalized families. The framework of intersectionality helps identify "where power comes and collides, where it interlocks and intersects."[82] The family regulation system is one such site of concentrated power and fear. The discussion around law and policy in Texas is missing some of these deep connections. By adopting an intersectional lens, however, we can identify fear as a structural logic within the family regulation system. The following Part argues that the family regulation system not only produces fear but relies on fear in its operation.

II. Inspiring Fear

For many marginalized families, the fears of individually inflicted violence and state-sanctioned violence—violence promoted, produced, or sustained by the state—collide. In other words, individual violence does not occur in a vacuum; it exists against the backdrop of social structures, including underprotection by the state and violence inflicted by the state.[83] In this way, fear is sustained by families' awareness that they may be individually targeted

81. The disparate treatment of LGBTQ+ parents in the family regulation system tracks how a parent's nonheterosexual identity is used against them in parental-fitness determinations in custody cases. *See* Suzanne A. Kim, *The Neutered Parent*, 24 Yale J.L. & Fem. 1, 4 (2012) (arguing that parents outside of "traditional marriage and its presumed heterosexuality" are seen as "threateningly 'sexually salient'" in custody determinations); Dara E. Purvis, *The Sexual Orientation of Fatherhood*, 2013 Mich. St. L. Rev. 983, 998–1001 (examining courts' apparent "fascination" and concern about the sexual activity of gay fathers in custody cases); Doron Dorfman, *Penalizing Prevention: The Paradoxical Legal Treatment of Preventative Medicine*, 108 Cornell L. Rev. (forthcoming 2023) (manuscript at 20–22), https://ssrn.com/abstract=4045148 [https://perma.cc/7QVF-ZCPV] (arguing that for gay men in particular, the use of the preventative medication PrEP may be used against them in child-custody cases); Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 Ind. L.J. 623, 648 (1996) (arguing that in custody cases, courts punish gay and lesbian parents for not being "discreet" in their displays of affection with partners); Kimberly Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36 Law & Soc'y Rev. 285, 315 (2002) (identifying courts' attempts to "control and inhibit alternative sexualities" in custody cases).

82. Kimberlé W. Crenshaw, *Featured Quote*, Colum. L. Sch., https://www.law.columbia.edu/faculty/kimberle-w-crenshaw [https://perma.cc/PEF3-N4VX].

83. For example, Professor India Thusi discusses how Black and Indigenous girls, many of them LGBTQ+, are "subjected to state-sanctioned sexual violence" in the juvenile system through sexual abuse, strip searches, and body cavity searches. *See* I. India Thusi, *Girls, Assaulted*, 116 Nw. U. L. Rev. 911, 957 (2022).

and that their targeting may be structurally reified as legitimate. This Part will show that the growing movement to criminalize LGBTQ+ parents and their children, including in Texas, must be understood in the context of *both* pervasive state-sanctioned violence against trans people *and* the fear of the family regulation system in marginalized communities.

A. *A. State-Sanctioned Violence Against Black LGBTQ+ Individuals and LGBTQ+ Individuals of Color*

Just a few days after Texas issued its directive targeting trans youth and their parents, a trans woman of color was found shot dead in her Houston apartment.[84] Texas is amongst the states with the highest incidence of fatal violence against trans women of color.[85] Naomi Green, a fellow with the Human Rights Campaign (HRC), stated in October 2021:

> Since I moved to Dallas 3 years ago to the date tomorrow, this is the eighth transgender woman of color who has been shot. The seven who were killed were all Black and the Latina survived. I didn't know that when I moved here I was moving to a place where being trans means being more deserving to die.[86]

Violence[87] against Black trans individuals is pervasive. HRC reports that 2021 marked an all-time high of violence against trans and gender-nonconforming

84. Julian Gill, *Transgender Woman Fatally Shot Inside Southwest Houston Apartment, Police Report*, Hous. Chron. (Feb. 27, 2022, 9:31 AM) [https://perma.cc/LC4Z-RBKZ]; Muri Assunção, *Trans Woman Fatally Shot in Houston Apartment After Fleeing Anti-Trans Violence in Honduras, Friends Say*, N.Y. Daily News (Mar. 4, 2022, 4:00 PM), https://www.nydailynews.com/news/crime/ny-trans-woman-fatally-shot-honduras-houston-apartment-friends-killed-20220304-kxml377fcnb7fkyhblvinrtcna-story.html [https://perma.cc/74EE-XLF8].

85. *An Epidemic of Violence 2021: Fatal Violence Against Transgender and Gender Non-Conforming People in the United States in 2021*, Hum. Rts. Campaign (2021), https://reports.hrc.org/an-epidemic-of-violence-fatal-violence-against-transgender-and-gender-non-confirming-people-in-the-united-states-in-2021 [https://perma.cc/H2E5–2N97] ("Most deaths in 2021 have been in Texas and Pennsylvania (five total), followed by four in Florida and Illinois.").

86. Violet Lhant, *HRC Mourns Kiér Laprí Kartier, Black Transgender Woman Killed in Arlington, Texas*, Hum. Rts. Campaign (Oct. 4, 2021), https://www.hrc.org/news/hrc-mourns-kiér-laprí-kartier-black-transgender-woman-killed-in-arlington-texas [https://perma.cc/QS9K-PJ8C].

87. This Essay adopts a broad definition of violence, including psychological, emotional, epistemic, and structural state violence. *See generally* Kristie Dotson, *Tracking Epistemic Violence, Tracking Practices of Silencing*, 26 Hypatia 236, 237–42 (2011) (tracking and categorizing the silencing of marginalized groups as epistemic violence); Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, *in* Marxism and the Interpretation of Culture 271, 280–87 (Cary Nelson & Lawrence Grossberg eds., 1988) (discussing the subordination of marginalized groups through epistemic violence); Anke Bartels, Lars Eckstein, Nicole Waller & Dirk Wiemann, Postcolonial Literatures in English: An Introduction 153–54 (2019); M. Gabriela Torres, *State Violence*, *in* 2 The Cambridge Handbook of Social Problems 381(A. Javier Treviño ed., 2018) (defining state violence as one form of violence).

people since 2013, when HRC began tracking these attacks.[88] In 2021, most victims were Black transgender women.[89] 84% of victims of fatal violence against transgender people are people of color.[90] 85% are transgender women, and 77% are transgender women of color.[91] These numbers are conservative, given the underreporting and misreporting of violence against transgender people.[92]

Individually inflicted violence against Black trans women occurs against the backdrop of state-sanctioned violence, including violence carried out by state actors like the police. According to one national survey, 22% of transgender people who have interacted with the police report that the police harassed them; 6% report that the police assaulted them.[93] Black transgender individuals report much higher rates: 38% report harassment in police interactions and 15% report assault.[94] Notably, states leading efforts to criminalize transgender people are amongst the states where the most trans people have been killed. This includes Texas and Florida.[95]

This is the hostile environment in which the criminalizing of parents of transgender youth is swiftly advancing. But there is more. The family regulation system exploits this landscape of fear, weaponizing it against marginalized communities. The following Section discusses the conditions of fear in the family regulation system and how they impact Black LGBTQ+ parents.

B. *Fear of the Family Regulation System*

Many white middle-class families will never encounter the family regulation system. They are less likely to be reported to the system or investigated by it.[96] Their children are less likely to be removed from their homes, and their parental rights are less likely to be threatened, much less terminated,

88. *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2021*, Hum. Rts. Campaign, https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2021 [https://perma.cc/6W9M-L93Y].

89. *Id.* (listing fifty-six victims and explicitly stating that thirty-two of them are Black transgender women).

90. Hum. Rts. Campaign, *supra* note 85.

91. *Id.* (considering fatal violence against transgender and gender nonconforming individuals since 2013).

92. *See id.* ("Fatal violence against transgender and gender nonconforming people is often reported inaccurately and insufficiently. Victims are consistently misgendered, and crimes against them are consistently underreported.").

93. Jaime M. Grant, Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman & Mara Keisling, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, Nat'l Ctr. for Transgender Equal. & Nat'l Gay & Lesbian Task Force 160 (2011).

94. *Id.*

95. *See supra* notes 11-12 and accompanying text (identifying the states leading efforts to criminalize trans and LGBTQ+ people); Hum. Rts. Campaign, *supra* note 85 (identifying Texas and Florida as among the states with the highest incidence of fatal violence against transgender and gender nonconforming individuals).

96. *Child Welfare Practice to Address Racial Disproportionality and Disparity*, Child Welfare Info. Gateway & Child.'s Bureau 6, 15 (Apr. 2021), https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf [https://perma.cc/97VS-W3QZ].

compared with Black families.[97] For Black parents in impoverished communities, by contrast, family regulation is an "unavoidable system" and a source of near-constant fear.[98]

This Section will highlight only a few areas in which fear is concentrated. This is in no way a comprehensive account of fear in and of the system. Instead, this Section provides examples of the pervasiveness of fear in the system and the way the system weaponizes fear to punish families that depart from white, middle-class, heterosexual, and cisgender norms.

1. The Conditions of Fear

i. Tools of Coercion

The family regulation system has numerous tools of coercion at its disposal.[99] The separation of families—temporary and permanent—is the most punitive tool.[100] Even when children are not actually removed, the mere threat of removal can feel constant for parents.[101] Surveillance,[102] mandatory and often inappropriate services,[103] unannounced home visits, and intrusive searches of private spaces are other powerful tools.[104]

Furthermore, interaction with the family regulation system brings other, enmeshed adverse consequences. For example, a neglect or abuse investigation can impact current and future employment and shelter placements for homeless families.[105] Family regulation involvement can also provoke immigration consequences, including increased risk of detention and deportation.[106] This bundle of coercive mechanisms inspires fear in families, requiring parents to conform to the demands of CPS or risk continued supervision, enmeshed

97. *Id.* at 3 ("African-American and American Indian or Alaska Native children are more likely than other children to be removed from their homes and to experience a termination of parental rights." (citation omitted)).

98. Rise & Takeroot Just., *supra* note 78, at 12 ("[A]bove all, research participants described [CPS] as an unavoidable system.").

99. Washington, *supra* note 34, at 1124 (discussing "tools of silencing and knowledge coercion" central to family regulation).

100. Cloud et al., *supra* note 63, at 74–84.

101. *See, e.g.*, Abigail Kramer, *Backfire: When Reporting Domestic Violence Means* You *Get Investigated for Child Abuse*, Child Welfare Watch & The Ctr. for N.Y.C. Affs. at The New Sch. 1–2 (Mar. 2020) (describing how one mother, a survivor of domestic violence, constantly feared that her child might be removed by CPS), https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e8415953033ef109af7172c/1585714582539/AbigailKramer_Mar312020_v1.pdf [https://perma.cc/XK6A-BXEV].

102. Charlotte Baughman, Tehra Coles, Jennifer Feinberg & Hope Newton, *The Surveillance Tentacles of the Child Welfare System*, 11 Colum. J. Race & L. 501, 509–30 (2021).

103. Mack, *supra* note 36, at 781.

104. Michelle Burrell, *What Can the Child Welfare System Learn in the Wake of the Floyd Decision? A Comparison of Stop-and-Frisk Policing and Child Welfare Investigations*, 22 CUNY L. Rev. 124, 131, 147 (2019).

105. *Id.* at 132. For an in-depth discussion of enmeshed consequences of family regulation involvement *see* Washington, *supra* note 34, at 1128–31.

106. Washington, *supra* note 34, at 1129.

consequences, and even the "death"[107] of their family through the termination of parental rights.

ii. Constant Presence

The fear of the family regulation system in marginalized communities is exacerbated by the unavoidability[108] and constant presence[109] of CPS caseworkers and the institutional support caseworkers receive from law enforcement.[110] As a public defender in New York City, I encountered many parents who were acutely aware that CPS targeted their neighborhoods. This experience is corroborated by a participatory research study published by Rise in 2021.[111] The researchers surveyed fifty-eight impacted parents, conducted ten focus groups, and reviewed relevant literature.[112] The study found that families ensnared in the family regulation system live in fear.[113] One parent said about their experience with CPS: "They're all over the place. In school, in daycare. They're just all over the place, but for the wrong reasons."[114] Another participant stated, "It is hard, hard—I'm going to say 'hard' again, to avoid [CPS]."[115] Parents are not only impacted by the family regulation system's constant presence in their community, but also by the psychological impact of any potential family regulation intervention: "It's terrifying. It's like a stamp. And then knowing that you do have a stamp. . . . You know, it's like a mark."[116] Another par-

107. The permanent termination of parental rights by the state is also called the "civil death penalty." Ashley Albert, Tiheba Bain, Elizabeth Brico, Bishop Marcia Dinkins, Kelis Houston, Joyce McMillan, Vonya Quarles, Lisa Sangoi, Erin Miles Cloud & Adina Marx-Arpadi, *Ending the Family Death Penalty and Building a World We Deserve*, 11 COLUM. J. RACE & L. 861, 866–67 (2021); Cloud et al., *supra* note 63, at 84–85.

108. *See* RISE & TAKEROOT JUST., *supra* note 78.

109. *See, e.g.*, Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 615 (2020) ("[S]ystem contact is commonplace in marginalize communities."); Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. RACE & L. 639, 673 (2021) ("[B]ut foster care agencies' larger-than-life presence in marginalized communities is government surveillance in poor communities.").

110. Frank Edwards, *Family Surveillance: Police and the Reporting of Child Abuse and Neglect*, 5 RUSSELL SAGE FOUND. J. SOC. SCI. 50, 52 (2019) ("Child welfare agencies routinely conduct joint investigations with police, many police departments have created special units directed at child abuse and neglect, and police themselves handle noncriminal maltreatment investigations in some jurisdictions."); Theodore P. Cross, Emmeline Chuang, Jesse J. Helton & Emily A. Lux, *Criminal Investigations in Child Protective Services Cases: An Empirical Analysis*, 20 CHILD MALTREATMENT 104, 105–06 (2015).

111. RISE & TAKEROOT JUST., *supra* note 78.

112. *Id.* at 9.

113. *Id.* at 7 ("[R]esearch shows, fear of family policing prevents families from accessing needed support and resources. Because the family policing system is so present in low-income communities of color, this fear can affect parents who have never had a case or report." (footnotes omitted)); *id.* at 15.

114. *Id.* at 12.

115. *Id.* at 12.

116. *Id.* at 15.

ticipant stated, "[It has] a lasting impact—PTSD. When [my child] falls down, gets a bump or a scratch, his doctor's visits—it's just so stressful now. Like, I can't even enjoy him doing kid things . . . . I can't even let him be him."[117] For these parents and others like them, the family regulation system is deeply traumatizing.[118]

Given the reports of abuse, discrimination, and long-term adverse outcomes for children in the foster system,[119] the fear of what might happen to a child while in state custody is understandably widespread. Foster children experience sexual abuse, physical abuse, and neglect. Professor Shanta Trivedi argues that despite the system's claim of keeping children safe, "there is substantial evidence that children are more likely to be abused in foster care than in the general population."[120] The numerous media stories of children killed or abused in the foster system exacerbate parents' fears that if they lose custody, their children will face harm.[121] As discussed above, LGBTQ+ youth of color are placed into more dangerous foster placements and remain there for longer periods of time. Parents, including parents of LGBTQ+ youth of color, are rightfully afraid of what may happen to their children in the foster system.

iii. The Network of Fear

The family regulation system's coercive tools and its constant presence in marginalized communities create omnipresent fear. The fear is not limited to direct contact with the family regulation system. It extends to any institution that could potentially report a family to the system.[122] For example, some survivors of domestic violence avoid the police because they fear that

117. *Id.* at 15.

118. *See, e.g.*, Roberts, *supra* note 57, at 51 (discussing the experience of one mother after her child was removed: "I went insane. I broke down, nearly died.").

119. *See, e.g.*, Class Action Complaint at 45, Wyatt B. v. Brown, 19-cv-00556 (D. Or. Apr. 16, 2019) (alleging, in a class action lawsuit against Oregon's foster system on behalf of foster children, that "Oregon's foster care system is so dysfunctional that Oregon cannot accurately track how bad its services are"); Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 Am. Econ. Rev. 1583, 1584 (2007) (finding that children "on the margin of placement" have better long-term outcomes when they remain at home, instead of entering the foster system).

120. Trivedi, *supra* note 30, at 542.

121. *See, e.g.*, Josh Salman, Daphne Chen & Pat Beall, *Foster Kids Lived with Molesters. No One Told Their Parents*, USA Today News (Oct. 16, 2020, 2:42 PM EDT), https://www.usatoday.com/in-depth/news/investigations/2020/10/15/no-one-checks-on-kids-who-previously-lived-with-abusive-foster-parents/5896724002 [https://perma.cc/5LLR-JYJS]; Richard Wexler, *Abuse in Foster Care: Research vs. the Child Welfare System's Alternative Facts*, Youth Today (Sept. 20, 2017), https://youthtoday.org/2017/09/abuse-in-foster-care-research-vs-the-child-welfare-systems-alternative-facts [https://perma.cc/DD3U-MJAQ]; Vaidya Gullapalli, *The Damage Done by Foster Care Systems*, Appeal (Dec. 18, 2019), https://theappeal.org/the-damage-done-by-foster-care-systems [https://perma.cc/LY3P-68FM].

122. Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement*, 97 Soc. Forces 1785, 1786 (2019).

contacting law enforcement may lead to a CPS investigation against them.[123] Undocumented survivors of domestic violence may fear deportation and avoid state assistance.[124] Parents may even avoid medical providers because they are afraid to lose their children.

These fears are not irrational. While some parents are met with compassion and care when they bring their child into a hospital to treat an injury, marginalized parents are met with suspicion.[125] Family defense attorneys juxtapose stories of middle-class white parents and low-income Black and brown parents seeking emergency care in New York City hospitals.[126] Low-income Black and brown parents are interrogated and discredited, and their children may be removed from their home by the family regulation system. Nonwhite children are more likely to be reported to CPS by hospital staff.[127] Hospitals are also more likely to conduct a skeletal survey of an infant—a key component of the evaluation for suspected child abuse[128]—if the child is Black.[129] Nonwhite families' justified fear of service providers indicate how deeply embedded the potential impacts of the family regulation system are in marginalized families' consciousness.

123. *See, e.g.*, Washington, *supra* note 34 (discussing the story of a mother who reached out to CPS for help and was instead investigated); *In re* Int. of D.C., No. 06–18–00114-CV, 2019 WL 2455622, at *4 (Tex. App. June 13, 2019) (finding that the mother in the case established "that her prior CPS history resulted from her own requests for assistance from CPS in dealing with [her child's] mental health").

124. Tamara L. Kuennen, *Recognizing the Right to Petition for Victims of Domestic Violence*, 81 Fordham L. Rev. 837, 842 (2012).

125. Kent P. Hymel, Antoinette L. Laskey, Kathryn R. Crowell, Ming Wang, Veronica Armijo-Garcia, Terra N. Frazier, Kelly S. Tieves, Robin Foster & Kerri Weeks, *Racial and Ethnic Disparities and Bias in the Evaluation and Reporting of Abusive Head Trauma*, 198 J. Pediatrics 137, 137–43 (2018); Robert L. Hampton & Eli H. Newberger, *Child Abuse Incidence and Reporting by Hospitals: Significance of Severity, Class, and Race*, 75 Am. J. Pub. Health 56, 57 (1985) (finding that hospital staff was more likely to report Black and Latinx parents for child abuse).

126. Jessica Horan-Block, Opinion, *A Child Bumps Her Head. What Happens Next Depends on Race*, N.Y. Times (Aug. 24, 2019), https://www.nytimes.com/2019/08/24/opinion/sunday/child-injuries-race.html [https://perma.cc/V6BZ-PM2R] (juxtaposing the story of Jenny Mollen, who had dropped her five-year-old child, causing a skull fracture, and was met with "compassion and sympathy" in a private hospital in Manhattan and a Latina mother in the Bronx who was investigated and separated from her child after an accident).

127. Wendy G. Lane, David M. Rubin, Ragin Monteith & Cindy W. Christian, *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 J. Am. Med. Ass'n 1603, 1603, 1605–07 (2002).

128. Clara Presler, *Mutual Deference Between Hospitals and Courts: How Mandated Reporting from Medical Providers Harms Families*, 11 Colum. J. Race & L. 733, 751 (2021).

129. Studies show that Black and other marginalized infants are more likely to receive a skeletal survey. *See* Christine W. Paine & Joanne N. Wood, *Skeletal Surveys in Young, Injured Children: A Systematic Review*, 76 Child Abuse & Neglect 237, 242 (2018); Lane et al., *supra* note 127, at 1603 (concluding that nonwhite children were "significantly more likely to have a skeletal survey performed compared with their white counterparts, even after controlling for insurance status, independent expert determination of likelihood of abuse, and appropriateness of performing a skeletal survey").

The fear of the family regulation system is so reliable that abusive partners and hostile neighbors can weaponize it as retaliation.[130] Reports also indicate that some public institutions have utilized the family regulation system to enforce their own policies. For example, public schools have weaponized the family regulation system to resolve conflicts with parents or enforce school policy.[131] Similarly, homeless parents seeking shelter placements in Washington, D.C., have been turned away and then told that if they were unable to find a placement elsewhere, they would be reported to CPS.[132] In these ways, fear of the family regulation system informs marginalized parents' interactions with other state institutions and providers, creating a network of fear.

2. Black LGBTQ+ Parents & Fear

The threat of family regulation intervention is racialized, much like the weaponizing of the police against people of color.[133] Indeed, examples from directly impacted families, scholarly research, and practitioner experience emphasize Dorothy Roberts's observation that Black communities "live in fear of state agents entering their homes, interrogating them, and taking their children as much as they fear police harassing them in the streets."[134] Although little empirical data on Black LGBTQ+ parents ensnared in the family regulation system exists, there are reasons to believe that the family regulation system uniquely impacts Black LGBTQ+ parents. All too often, however, discussions

130. Dorothy E. Roberts, *Child Welfare's Paradox*, 49 Wm. & Mary L. Rev. 881, 887 (2007) (observing that CPS surveillance creates distrust among neighbors who believed that "residents often falsely accused others of child abuse to seek retribution"); Kramer, *supra* note 101, at 3 ("It's not uncommon for abusers to use ACS as a weapon against their victims, who stay silent for fear of bringing more scrutiny into their homes.").

131. Ray Watson, Shakira Paige, Sarah Harris & Keyna Franklin, *What Parents Should Know: School Reports to CPS, School Reports to CPS, Communicating with the School, and Advocating for Your Child*, Rise Mag. (Dec. 3, 2019), https://www.risemagazine.org/2019/12/school-reports-to-cps [https://perma.cc/C83F-585S] ("The school told the parent that she had to leave work and pick up her child or they would call the police. My client couldn't leave work without losing her job . . . ."); Rebecca Klein & Caroline Preston, *When Schools Use Child Protective Services as a Weapon Against Parents*, Hetchinger Rep. (Nov. 17, 2018), https://hechingerreport.org/when-schools-use-child-protective-services-as-a-weapon-against-parents [https://perma.cc/XLR7–8DPX].

132. Annie Gowen, *Homeless Families Who Turn to D.C. for Help Find No Room, Risk Child Welfare Inquiry*, Wash. Post (June 23, 2012), https://www.washingtonpost.com/local/homeless-families-who-turn-to-dc-for-help-find-no-room-risk-child-welfare-inquiry/2012/06/23/gJQAv9bJyV_story.html [https://perma.cc/NVT7–4HAN].

133. *See* Fields, *supra* note 18, at 957–67.

134. Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, Imprint (June 16, 2020, 5:26 AM), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480 [https://perma.cc/CNS4-HXGE]; *see also* Monica C. Bell, *Situational Trust: How Disadvantaged Mothers Reconceive Legal Cynicism*, 50 Law & Soc'y Rev. 314, 336 (2016) (explaining how Black women commonly fear losing custody of children and develop strategies for interacting with the police to avoid this outcome).

of LGBTQ+ identity, race, and family regulation have focused on foster and adoptive parents instead of those targeted by the family regulation system.[135]

The family regulation system presents a context in which the overlapping of race, gender, and sexuality is particularly salient. A study by the Williams Institute estimates that 1.2 million adults identify as both Black and LGBTQ.[136] Black same-sex couples are more likely to raise children than white LGBTQ couples.[137] Fifty-six percent of Black LGBTQ households are low-income.[138] Notably, poverty is a strong indicator of family regulation involvement.[139] A 2016 study suggests that Black mothers who identify as lesbian or bisexual are more likely to lose custody of their children to the state.[140] There is other anecdotal evidence of disparate outcomes for queer Black mothers entangled in the family regulation system.[141] Still, Black LGBTQ+ parents entangled in the family regulation system remain largely invisible.[142] This Essay does not purport to identify all the ways that fear of the family regulation system uniquely impacts parents who are both Black and LGBTQ+. Rather, it offers a few perspectives to help frame the issues for future scholarship.

First, fear of state intervention leads some parents to avoid health care providers. This is particularly true within Black, immigrant, and low-income

135. *Michigan Task Force to Propose New Plan for LGBTQ Families to Adopt or Foster*, Imprint (Mar. 2, 2022, 1:55 PM), https://imprintnews.org/news-briefs/michigan-task-force-lgbtq-foster-families/63122 [https://perma.cc/UDP2-S7PL]; Office of Plan., Rsch. & Evaluation, U.S. Dep't of Health & Hum. Servs., OPRE Report #2014–79, Human Services for Low-Income and At-Risk LGBT Populations: An Assessment of the Knowledge Base and Research Needs (2014), https://www.a*cf*.hhs.gov/sites/default/files/documents/opre/lgbt_hsneeds_assessment_reportfinal1_12_15.pdf [https://perma.cc/6FS6-RK44].

136. Soon Kyu Choi, Bianca D.M. Wilson & Christy Mallory, *Black LGBT Adults in the US: LGBT Well-Being at the Intersection of Race*, Williams Inst. 11 (Jan. 2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Black-SES-Jan-2021.pdf [https://perma.cc/8BT5-TQZV].

137. *LGBT Families of Color: Facts at a Glance*, Movement Advancement Project, Fam. Equal. Council & Ctr. for Am. Progress 2 (Jan. 2012), https://www.lgbtmap.org/file/lgbt-families-of-color-facts-at-a-glance.pdf [https://perma.cc/VD6E-MUC5].

138. *Id.* at 4.

139. Roberts, *supra* note 57, at 66–70 (discussing how the family regulation system conflates neglect and poverty).

140. Harp & Oser, *supra* note 79, at 289; *see also* Sarah J. Reed, Robin Lin Miller & Tina Timm, *Identity and Agency: The Meaning and Value of Pregnancy for Young Black Lesbians*, 35 Psych. Women Q. 571, 574 (2011) (interviewing fourteen young Black lesbian women and finding that while most of those who had given birth were actively parenting, one mother's child had been removed by child protective services).

141. *See supra* Part I.

142. Professor Nancy D. Polikoff suggests that one cause may be rooted in litigation strategies applied by LGBT advocates who "turn a blind eye towards the systemic injustices of the child welfare system," creating what Polikoff describes as "exacerbated invisibility." *See* Polikoff, *supra* note 37, at 101–02 ("Now that the assault on LGBT parenting has moved to the arena of legislation and litigation to allow anti-gay discrimination based on religious and moral beliefs, LGBT advocates counter with uncritical assertions of the numbers of children in foster care and the tragedy of denying those children capable foster and adoptive parents.").

communities, where awareness of the breadth and depth of the carceral state proliferates.[143] Mental health and other health issues disproportionately affect Black LGBT individuals.[144] According to a study conducted by the Williams Institute, Black LGBT adults were almost twice as likely to report having been diagnosed with depression by a medical provider compared to Black non-LGBT adults.[145] Already existing health disparities may widen when Black LGBTQ+ individuals avoid treatment because they fear their families will be disrupted by the state. In a vicious cycle, the government may use a parent's fear-driven avoidance of mental health treatment and other health care as evidence of the parent's noncompliance with the family regulation system and argue that this constitutes a child-safety issue.[146] In this way, state actors may penalize fear of the system.

Second, parents with intersectional identities and parents who support children with intersectional identities risk that their identities or support will be conflated with notions of parental "unfitness." Once parents are on the radar of the family regulation system, they may remain in the system for months or years.[147] What the system identifies as a parental deficit is not only subjective but also enmeshed with racialized and gendered parenting ideals.[148] One way to characterize this intersectional dynamic is that anti-Blackness and poverty funnel families into the system. Once there, Black LGBTQ+ families experience another layer of bias as their parenting is measured against a white, middle-class, heterosexual "norm." The intersectional dynamic is perhaps even clearer the other way around: when families are "drawn into [the family regulation] system based on illegitimate pretexts"[149] and then remain under investigation for lengthy periods of time. In this way, investigations that begin with the questioning of gender-affirming care for children can quickly expand into other areas of parenting. Given the attacks on LGBTQ+ parenting more generally,[150] parents with multiple marginalized identities who are ensnared in

143. *E.g.*, Park, *supra* note 18, at 1932–33 (describing the breadth of people who implement national policies designed to encourage certain minority populations to self-deport); Fong, *supra* note 122, at 1786; Nikki Jones, *"The Regular Routine": Proactive Policing and Adolescent Development Among Young, Poor Black Men*, *in* Pathways to Adulthood for Disconnected Young Men in Low-Income Communities: New Directions in Child and Adolescent Development 33, 39 (Kevin Roy & Nikki Jones eds., 2014) (discussing young Black men's awareness that "the gaze of the police is most frequently targeted at them" in a marginalized community); Bell, *supra* note 134, at 336 (2016) (discussing how the most present fear of marginalized mothers was the loss of their children to the state, and explaining that "[s]tories and proverbs of about avoiding child removal abound, with some respondents worried that . . . their children may 'go into the system and never come out'").

144. Choi et al., *supra* note 136, at 18.

145. *Id.*

146. Washington, *supra* note 20 (manuscript at 10, 16–17).

147. Burrell, *supra* note 104, at 138.

148. Washington, *supra* note 20 (manuscript at 49–50).

149. Roberts, *supra* note 57, at 69.

150. *See generally* David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 Fam. L.Q. 523 (1999) (detailing

the family regulation system are vulnerable to racialized and heteronormative assessments of their parenting.

Finally, once LGBTQ+ parents are trapped in the system, their family structures risk being devalued. For example, caseworkers may place children in the foster system with a stranger, instead of with a family member, due to the family member's nonheteronormative identity.[151] This devaluing of nonheteronormative family structures, combined with the system's enormous power to supervise and separate families, can trigger a rational fear in parents with multiple marginalized identities.

The compounded impacts of multiple marginalized identities funnel people into the web of family regulation. Poor and Black families are particularly vulnerable. Once in the system, white heteronormative standards inform the assessment of parental fitness and devalue nonheteronormative family ties, further exacerbating the subordination of already marginalized families. The unique challenges faced by Black LGBTQ+ parents in the family regulation system can intensify these fears.

Directly impacted parents, practitioners, and advocates have highlighted the fear endemic to the family regulation system. In 2020, *Mother Jones* wrote about Sarah,[152] a former caseworker, in the context of demands to abolish the family regulation system.[153] Sarah described how Black families lived in fear of the system while white families had never encountered it: "There's one group of people walking around not knowing that [the Administration for Children's Services (ACS) in New York City] exists, and there's another group of people walking around living in fear of ACS."[154]

In 2021, families' fear of the family regulation system was a central point of testimony for a bill proposing a child-welfare-specific Miranda Right in the State of New York.[155] Emma Ketteringham, managing director of the Family Defense Practice at the Bronx Defenders, testified that the "family regulation system invokes fear and trauma for Black and Latinx families."[156] Zainab

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the history of same-sex couples and family law from the 1960s through the 1990s); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. Ill. L. Rev. 833 (arguing that same-sex parenting has negative effects on children, and that these negative effects should be taken into consideration in child welfare cases); Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. Ill. L. Rev. 253 (defending same-sex parenting and rebutting Wardle's article).

151. *E.g.*, Polikoff, *supra* note 37, at 89–90 (describing two cases in which the family regulation system failed to recognize one person in a same-sex relationship as a parent, consequently stripping one parent of their parental rights); *see also supra* text accompanying note 80 (discussing one such example from my time as a public defender).

152. Sarah is the pseudonym used in the article.

153. Molly Schwartz, *Do We Need to Abolish Child Protective Services?*, Mother Jones (Dec. 10, 2020), https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services [https://perma.cc/H6CH-EK2Z].

154. *Id.*

155. S.B. S5484-B, 2021–2022 Leg., Reg. Sess. (N.Y. 2021).

156. *Defenders, Advocates and Impacted Parents Urge Passage of Legislation Requiring ACS and Other Family Regulation Agencies to Inform Parents of Their Miranda*

Akbar, Managing Attorney of the Family Defense Practice of Neighborhood Defender Service of Harlem, testified that "Black and brown parents live in fear of the government using its vast resources and unchecked power to separate them from their children here in New York State."[157] In the end, however, the bill that would have informed parents of their right to legal counsel in "child welfare" investigations failed to pass in the 2021 legislative period.[158] Thus far, the New York State legislature has failed to recognize the pervasiveness of fear in the system and protect families accordingly.

3. The Erasure of Fear in Court Decisions

Despite the pervasiveness of fear in marginalized families' experiences of the family regulation system, courts rarely consider fear as a factor driving interactions, perceptions, and outcomes.[159] To be sure, some parents have shared how fear shapes their interactions with the system in court proceedings. Take, for example, the petitioner's brief before the Supreme Court of Pennsylvania in a case about whether CPS caseworkers can conduct searches of a family's home without a warrant. While the court decision does not discuss parents' fear of family regulation intervention, the petitioner's brief does:

> That fear, that government employees can force their way into your home, and interpret something differently than you do, can also make one seem defensive. . . . What is clear is that Mother had an aversion to the government intruding into her home.[160]

In a handful of instances, courts have explicitly referenced parents' fear of family regulation. In *Pratt v. Pitt County Department of Social Services*,[161] the court noted Constance Pratt's claim of emotional suffering due to the removal of her children: she had been "emotionally traumatized by CPS workers continuously removing" her children.[162] Or consider *In the Interest of E.L.C.*[163] The decision summarized the mother's fear of the family regulation system:

Rights, Bronx Defs. (Oct. 22, 2021), https://www.bronxdefenders.org/defenders-advocates-and-impacted-parents-urge-passage-of-legislation-requiring-acs-and-other-family-regulation-agencies-to-inform-parents-of-their-miranda-rights [https://perma.cc/4APF-TFLZ].

157. *Id.*

158. Madison Hunt, *'Miranda Warning'-Style Bill for Parents Fails in New York City Council*, Imprint (Dec. 16, 2021, 11:39 AM), https://imprintnews.org/top-stories/miranda-warning-style-bill-for-parents-fails-in-new-york-city-council/61243 [https://perma.cc/LEZ7–4584]; Madison Hunt, *New York Lawmakers Reject Parents' Rights Bills*, Imprint (June 6, 2022, 5:39 PM), https://imprintnews.org/child-welfare-2/new-york-lawmakers-reject-parents-rights-bills/65587 [https://perma.cc/GAF5-SX6A].

159. *But see* Good v. Dauphin Cnty. Soc. Serv. for Child. & Youth, 891 F.2d 1087, 1090 (3d Cir. 1989) ("Both Jochebed Good and her mother were left shocked and shaken, deeply upset and worried.").

160. Brief on Behalf of Petitioner, J.B., Mother of Y.W.-B. & N.W.-B. at 19, *In re* Y.W.-B., 265 A.3d 602 (Pa. 2021) (Nos. 1 EAP 2021 & 2 EAP 2021), https://clsphila.org/wp-content/uploads/2022/01/Brief-for-Mother.pdf [https://perma.cc/37LC-S3EK].

161. No. 16-CV-00198, 2016 WL 7057473 (E.D.N.C. Oct. 24, 2016).

162. *Id.* at *6–7.

163. No. 05–20–00373-CV, 2020 WL 5494415 (Tex. App. Sept. 11, 2020).

"Mother 'had previously been in a CPS case,' and she feared she could lose her children. At 'the thought of CPS entering [her] life again and losing [her] children,' Mother 'got nervous and scared, and so [she] left.'"[164] The court noted a father's similar fear in *In the Interest of A.B.*:

> Father said that he did not have anything to hide but was scared that CPS was not going to believe anything that he said about where the injury came from. He said that he had finally gotten his children back and felt like his life was where it needed to be, so he was afraid of losing his children again.[165]

However, these explicit discussions of fear in court cases are the exception.

The absence of a critical analysis of how fear shapes parental interactions with the system is partly due to the compliance-driven nature of family regulation.[166] For example, although caseworkers regularly testify against parents in court and make decisions to separate families, parents are expected to cooperate with them over months and sometimes years.[167] Despite this inherently adversarial relationship, noncooperation is held against parents. As Professor Amy Sinden observes, parents targeted by the family regulation system are pressured to "cooperate rather than assert [their] rights."[168] When the family regulation system punishes parents for refusing to cooperate with CPS and for invoking their parental rights, it disregards their rational fear of caseworkers and the system they work for.

Given the pervasive fear of the system and its devastating effects on families with marginalized identities, we should expect courts to grapple with these dynamics in decisions—especially when allegations center around a parent's reluctance to cooperate with CPS. Instead, cases often focus on parental "noncompliance" or "lack of insight,"[169] instead of the context and environment of fear. In other words, the problematic expectation that "good parents" cooperate with CPS further renders fear invisible.

When I was a public defender, numerous parents asked me whether they had to continue working with a caseworker who traumatized them by physically removing their child or threatening the same. Bringing these concerns up with the court could harm parents by feeding into a narrative that would characterize them as "difficult."[170] Here again, Black parents are particularly vulnerable

164. *Id.* at *2.

165. *In re* A.B., No. 02–00215-CV, 2010 WL 2977709, at *17 (Tex. App. July 29, 2010), *reprinted in In re* A.B., 412 S.W.3d 588, 631 (Tex. App. 2013).

166. *See* Washington, *supra* note 34, at 1124–25 (discussing how family separation is used as a tool to achieve parental compliance).

167. *See* Washington, *supra* note 20 (manuscript at 26–29).

168. Amy Sinden, *Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 354 (1999).

169. *See* Washington, *supra* note 34, at 1123–26, 1132, 1149–60 (discussing the vague concept of insight in family regulation doctrine).

170. *See, e.g.*, Sinden, *supra* note 168, at 353–55 (discussing the informalized nature of child welfare proceedings and the pressures on parents to cooperate and resolve their case

to biased misperceptions. A Michigan study showed that CPS investigators routinely characterized Black parents as "hostile," "aggressive," or "angry" in CPS notes and court reports, without identifying a factual basis for these descriptions.[171] These documents fail to interrogate how fear informs marginalized parents' perception of punitive family regulation intervention. Taken out of context, these racialized and often gendered statements harm families.[172]

C. *Against the Backdrop of Fear: The Texas Directive*

The Texas directive promotes broader, racialized "child welfare" trends. On the one hand, white, upper-middle-class families likely have easier access to gender-affirming care. If the Texas directive targets families that seek out gender-affirming care, then families with more access to such care may bear the brunt of the law. At first glance, the Texas directive thus may not present an example of the racialized, classist harms of the family regulation system.

There is reason to believe, however, that the Texas policy targeting LGBTQ+ parents and their children will disproportionately impact the most marginalized families, including those with multiple marginalized identities. The family regulation system has a lengthy history of targeting nonwhite, nonheteronormative families. An investigation triggered by the directive will impact those who are already vulnerable. In fact, as is true nationwide, Black families are overrepresented in Texas's family regulation system.[173] Any policy that encourages investigations based on vague concerns will likely have a more severe impact on Black families than white families.

As Professor Kelley Fong describes, the initiation of a family regulation case "opens a can of worms."[174] What begins as an investigation into gender-affirming care, for example, can quickly turn into an intrusive investigation into other aspects of family life. As I discuss elsewhere, a CPS

nonadversarially).

171. *Race Equity Review: Findings from a Qualitative Analysis of Racial Disproportionality and Disparity for African American Children and Families in Michigan's Child Welfare System*, Ctr. for Study Soc. Pol'y 31 (2009), https://ocfs.ny.gov/main/recc/presentations/Race-Equity-Review-Michigan-2009.pdf [https://perma.cc/2SCR-D4SG].

172. *See* Washington, *supra* note 20 (manuscript at 44–50) (describing how CPS utilizes gendered and racialized behavioral descriptors to police parents' emotions).

173. *See* Kids Count Data Ctr., *supra* note 38 ("In 2018, black children represented 14% of the total [national] child population but 23% of all kids in foster care."); Movement for Fam. Power, *supra* note 38, at 26–28 (examining the historical context of racial disproportionality in the family regulation system); *Fiscal Year 2021 Disproportionality and Disparity Analysis*, Tex. Dep't of Fam. & Protective Servs., (Oct. 1, 2021), https://www.dfps.state.tx.us/About_DFPS/Reports_and_Presentations/Rider_Reports/documents/2021/2021–10–01_Rider_33_Report.pdf [https://perma.cc/6NS4-K5ZE] (finding that in Texas, "there was a higher proportion of African American children at all the different stages of DFPS involvement than the proportion of African American children in the statewide population").

174. Roxanna Asgarian, *The Biggest Threat to Trans Kids in Texas Is Child Protective Services*, Slate (Mar. 2, 2022, 9:00 AM), https://slate.com/news-and-politics/2022/03/child-protective-services-is-already-investigating-families-over-texas-anti-trans-directive.html [https://perma.cc/UM7T-WGJN].

investigation may shift in focus as new potential allegations emerge.[175] These allegations often circle around issues of poverty.[176] For example, when a family loses its housing, CPS may open an investigation against the parents rather than make meaningful efforts to bring economic stability to the family.[177] At the very least, the Texas directive and any similar strategies broaden state surveillance generally, with disproportionate impacts for those who are most vulnerable to surveillance. In other words, the Texas directive provides the state with yet another reason to initiate intrusive investigations into the lives of those it already targets. Further, white middle-class parents, when targeted, are more likely to have the financial resources to invoke their rights and successfully navigate legal challenges.[178] Low-income Black parents, on the other hand, will often lack the resources to defend themselves against family regulation investigations effectively.[179]

LGBTQ+ parents targeted by the family regulation system, including those with other marginalized identities, have not been the primary focus of LGBTQ+ advocacy.[180] The Texas directive has brought up family regulation as an LGBTQ+ issue, but it has not changed the centering of white, upper-middle-

175. Washington, *supra* note 34, at 1142–43.

176. *See* Roberts, *supra* note 57, at 69 ("[M]any of the indicators child welfare agencies use to assess whether a child is at risk for maltreatment are actually conditions of poverty.").

177. *See* Vivek Sankaran, *The Looming Housing Crisis and Child Protection Agencies*, Imprint (Sept. 16, 2020, 10:45 PM) https://imprintnews.org/opinion/looming-housing-crisis-child-protection-agencies/47437 [https://perma.cc/3N8M-CXCR] (explaining that when a family is referred to CPS because of a lack of stable housing, CPS may launch a "broad inquiry on the family's entire life" instead of providing financial support or helping the family access housing). Professor Patricia Williams has also pointed out that child protective services can intervene in the lives of homeless parents but are not obligated to provide them with housing. *See* Patricia Williams, The Alchemy of Race and Rights 25 (1991).

178. Tey Meadow, *'Deep Down Where the Music Plays': How Parents Account for Childhood Gender Variance*, 14 Sexualities 725, 734–37 (2011). This portion of the article describes the story of Sean, a white gay man, who adopted two children. When Michael, one of his adoptive children, "adamantly refused to wear anything feminine" and vocalized wanting to be referred to as a boy, Sean began raising this in therapy sessions. *Id.* at 735. Supported by Michael's therapist and a local LGBT clinic, Sean began exploring gender-affirming care for Michael. Shortly thereafter, the family regulation system began investigating Sean and questioning Michael. *Id.* at 736. Ultimately, though, Sean had the resources and supportive relationships to successfully challenge the intrusion into their lives.

179. *See, e.g.*, Carla Laroche, *The New Jim and Jane Crow Intersect: Challenges to Defending the Parental Rights of Mothers During Incarceration*, 12 Colum. J. Race & L. 1, 16–17 (2022) (discussing the tattered access to legal representation for low-income parents); Jonah E. Bromwich, *Family Court Lawyers Flee Low-Paying Jobs. Parents and Children Suffer*, N.Y. Times (Apr. 29, 2022), https://www.nytimes.com/2022/04/29/nyregion/family-court-attorneys-fees.html [https://perma.cc/F64U-3RBW] (citing Professor Cynthia Godsoe's assessment that the state of family defense in New York City deprives the most vulnerable poor parents of their fundamental rights as parents); Roberts, *supra* note 57, at 297 (discussing the lack of quality legal representation for Black parents and the need for multidisciplinary family defense services).

180. *See* Polikoff, *supra* note 37, at 90 (concluding that the "distinctive needs" of LGBTQ+ parents impacted by the family regulation system have been "largely ignored").

class families in the conversation. The potential reach of the Texas directive and similar policies could mark an opportunity for interest convergence of white middle-class parents—traditionally unaffected by the system—and Black and brown parents—disproportionately impacted by the family regulation system. However, it could also further perpetuate the idea that the family regulation system generally targets "bad parents"[181] while Texas policy targets "good parents." This will depend on whether the policy is viewed as *part* of the family regulation system or a *misuse* of the system. To prevent the latter view from taking root, the movement must actively make space for and center the long history and current experiences of Black LGBTQ+ parents and their children with the family regulation system. The following Section elaborates on this history and its narrative reinforcement.

D. *Narrative Reinforcement*

The family regulation system, in order to legitimize the infliction of pervasive concentrated violence on marginalized families, has always depended on the narrative that the state keeps children safe from "unfit" parents. In the postemancipation period, purported concerns for children's welfare were used to keep Black children from their liberated mothers.[182] Indigenous children were removed from their parents to "civilize them" for their own good. The Children's Aid Society removed poor immigrant children in New York City from their parents and sent them to work in the Midwest to "protect" them from their parents until the 1920s.[183] Today, the narrative of abusive parents endangering their children persists[184] without a critical interrogation of structural issues underlying poverty and racialized inequality.[185] For example, the National Social Work Association (NASW) condemned Texas's efforts to target LGBTQ+ children and their families through the "child protective" system. NASW emphasized correctly that the Texas directive from February fits into a much "larger anti-LGBTQ+ movement taking place across the nation."[186] The

181. Coleman, *supra* note 26, at 539 (discussing the inaccurate notion that child welfare actors are primarily tasked with "saving" children from abusive parents).

182. Peggy Cooper Davis, *"So Tall Within"—The Legacy of Sojourner Truth*, 18 Cardozo L. Rev. 451, 458–65 (1996); Cynthia Godsoe, *The Family Policing System as a Contemporary 'Black Code*,*'* 121 Mich. L. Rev. (forthcoming 2023) (manuscript at 3–4) (manuscript on file with author).

183. Nina Bernstein, The Lost Children of Wilder: The Epic Struggle to Change Foster Care 197–98 (2002).

184. *See* Matthew I. Fraidin, *Changing the Narrative of Child Welfare*, 19 Geo. J. on Poverty L. & Pol'y 97, 98–100 (2012).

185. Washington, *supra* note 20 (manuscript at 12) (discussing how the family regulation system pathologizes parents and families, deploying language and instruments that "distract from the structures that render marginalized families hyper visible to the states, conceal the interconnectedness of carceral systems, [and] obscure the destabilizing effects of poverty and racism").

186. *NASW Condemns Efforts to Redefine Child Abuse to Include Gender-Affirming Care*, Nat'l Ass'n of Soc. Workers (Feb. 25, 2022), https://www.socialworkers.org/News/News-Releases/ID/2406/

letter, however, did not address the broader targeting of marginalized families by a system that ostensibly should protect children and support families.

Those with lived experiences of the family regulation system offer knowledge of the harms that the system produces and perpetuates.[187] Their real-world fear of the system is part of that knowledge. To accurately understand the family regulation system, advocates and scholars must incorporate impacted families' experiences into the larger discourse.[188] In the context of the Texas order, for example, including the experiences of Black LGBTQ+ parents may help disrupt the notion that the targeting of LGBTQ+ children and parents is primarily a white issue. It can also bring to light that discrimination against LBGTQ+ parents goes far beyond barriers for LGBTQ+ adoptive and foster parents. Therefore, we must change the narrative to include the stories of those who have actually experienced the family regulation system. Doing so will provide us with a more robust understanding of the family regulation system's impact on families, including Black LGBTQ+ families. It may also open up ways to promote family safety outside of coercive systems.

Conclusion

This Essay has shown that Governor Abbott's weaponization of the family regulation system against the most vulnerable families in Texas is not an anomaly. Anti-LGBTQ+ policy in Texas both relies on and feeds into a landscape of fear. That fear is exacerbated for parents with marginalized identities. Because we cannot discuss the Texas directive without also understanding the context that surrounds it, opponents of the directive and policies like it must abandon too-narrow focuses. Instead, advocates must interrogate the anti-Black, heteronormative logics and broader structures that drive the family regulation system.

Interrogating those logics and structures will require both advocates and academics to recognize the experiences of Black LGBTQ+ parents. To date, little research has examined Black LGBTQ+ parents entangled in the family regulation system. This research gap alone is problematic and indicates a larger disregard for the impacts of intersectional marginalization.[189] But the underrepresentation of intersectional perspectives in research also favors dominant groups and hinders scholars from producing of frameworks that

NASW-Condemns-Efforts-to-Redefine-Child-Abuse-to-Include-Gender-Affirming-Care [https://perma.cc/PS5K-STMX].

187. For example, JMacForFamilies, led by Joyce McMillan, is dedicated to supporting communities traumatized by structural violence. *See Our Team*, JMacForFamilies, https://jmacforfamilies.org/our-team [https://perma.cc/6Q4S-8JT4].

188. *See generally* Washington, *supra* note 34 (discussing knowledge exclusion through silencing and discrediting in the family regulation system through the framework of epistemic injustice).

189. As Professor Robyn M. Powell points out, this intersectional lens must also include parents and children with disabilities. *See* Robyn M. Powell, *Achieving Justice for Disabled Parents and Their Children: An Abolitionist Approach*, 33 Yale J.L. & Fem. 37, 45 (2022).

conceptualize marginalized experiences.[190] Anti-Blackness and the targeting of LGBTQ+ individuals are both wrapped up in the project of white heteronormative supremacy. The struggles to dismantle anti-Blackness, homophobia, and transphobia are intrinsically linked. Having identified Black LGBTQ+ parents as a particularly vulnerable group, this Essay recommends that future research focus more deeply on the specific experiences of Black LGBTQ+ parents impacted by the family regulation system and how the reality of fear should shape advocacy strategies.

Popular discussion around Texas policy and legislation is missing two critical perspectives: first, an intersectional lens that includes LGBTQ+ parents of color; and second, a broader discussion of the family regulation system's positionality within the carceral state. Those who want to protect the most vulnerable families must interrogate how fear of the family regulation system is weaponized against marginalized parents generally. Even if Texas policy does not lead to large-scale investigations and separation of families, the damage is done: the directive has fed the coercion that marginalized families face every day. Marginalized families' deep-seated fears are historically grounded in the punitive continuum that colors the family regulation system. By using the family regulation system to criminalize families that deviate from white, cisgender, heterosexual norms, policies like the Texas order advance a broader project of inflicting and weaponizing fear to maintain the status quo.

190. *See* Miranda Fricker, Epistemic Injustice: Power and Ethics of Knowing 155 (2007).

CURIOUS CONTINUITY: HOW *BOSTOCK* PRESERVES SEX-STEREOTYPING DOCTRINE

Alexandra R. Johnson

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Introduction

After the Supreme Court granted certiorari[1] in *Bostock v. Clayton County, Ga.*,[2] several commentators[3] worried the Court would take the opportunity to overturn a key holding from *Price Waterhouse v. Hopkins*:[4] namely, that discrimination based on sex stereotypes is impermissible sex discrimination in violation of Title VII. This worry was not without its basis. The sex-stereotyping theory of sexual orientation and gender identity discrimination ("SOGI discrimination") had been developing in the lower courts (and in other arenas) for years, making it the leading theory of Title VII for LGBTQ+[5]—and thus a likely candidate for dispositive analysis in *Bostock*. The sex-stereotyping theory provides that SOGI discrimination amounts to sex discrimination under sex-stereotyping doctrine because to discriminate against someone on the basis of their sexual orientation or gender identity is to impose the stereotype of heteronormativity or cisnormativity upon them.[6]

Yet, when the Supreme Court handed down its decision in *Bostock*, the sex-stereotyping argument was invoked only as an example—not a rationale.[7] *Bostock* employed relatively formalistic reasoning in concluding that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[8] The majority's syllogistic logic appears to sidestep the sex-stereotyping body of law preceding it, with the best articulation of a sex-stereotyping argument for SOGI-discrimination plaintiffs instead appearing in a dissent.[9]

While *Bostock* no doubt represents a monumental victory for LGBTQ+ rights, it arguably generated more questions than answers. In particular, academics have struggled with how to understand *Bostock*'s treatment of sex-stereotyping, given the decades during which sex-stereotyping doctrine

1. Bostock v. Clayton Cnty., Ga., 139 S. Ct. 1599 (2019).
2. Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020).
3. *See, e.g.*, Mark Joseph Stern, *The Supreme Court's New LGBT Cases Could Demolish Sex Discrimination Law as We Know It*, Slate (Apr. 22, 2019, 1:08 PM), https://slate.com/news-and-politics/2019/04/john-roberts-brett-kavanaugh-supreme-court-lgbtq-cases-sexual-harassment.html ("If the conservative majority interprets Title VII by speculating how the law was originally understood, . . . *Price Waterhouse* will be gone."); Ian Millhiser, *The Absolute Worst Case Scenario in the Supreme Court's New Anti-LGBT Cases*, ThinkProgress (Apr.22, 2019, 12:59 PM), https://archive.thinkprogress.org/supreme-court-lgbtq-worst-case-scenario-1a2a05ed8dd2 (arguing a ruling favorable to defendants would require "the Supreme Court . . . to overrule—or, at least, drastically limit—its holding in *Price Waterhouse*").
4. 490 U.S. 228 (1989). Six justices agreed that Title VII bars sex-stereotyping.
5. *See infra* Section I.A.
6. For explanation of how "LGBT persons transgress sex-specific role expectations," including "[p]resumptive heterosexuality" and "presumptive cisgender identity," see Erik Fredericksen, Note, *Protecting Transgender Youth After* Bostock*: Sex Classification, Sex Stereotypes, and the Future of Equal Protection*, 132 Yale L.J. 1149, 1159–63 (2023).
7. *Bostock*, 140 S. Ct. at 1742–43; *id.* at 1749.
8. *Id.* at 1741.
9. *Id.* at 1765 (Alito, J., dissenting).

for LGBTQ+ plaintiffs built up.[10] Some academics see *Bostock* as abandoning sex-stereotyping entirely and are split on whether this is a commendable move). Meanwhile, others read *Bostock* as directly implicating sex-stereotyping logic, although they too are split on the merits of this position. However, these scholarly propositions were primarily published shortly after *Bostock* was handed down, leaving little time for lower courts to actually *apply* and *interpret* the decision.

Division over the meaning of a landmark decision like *Bostock* is nothing new. Scholars have often tussled over the meaning of landmark cases, especially civil rights cases that come to stand for values subsequent history will enshrine as authoritatively good ones. A classic example of this is *Brown v. Board of Education*,[11] which spawned fiery debates among scholars over whether the decision embraced an anticlassification or antisubordination understanding of the Fourteenth Amendment.[12] These disputes continue to inform the development of the Fourteenth Amendment jurisprudence.[13]

As the historic tussle over *Brown*'s legacy demonstrates, the confusion over *Bostock* is both natural and essential. Like *Brown*, one of the factors that makes *Bostock* such an important decision is that it was the product of a meticulous litigation strategy spearheaded by a national civil rights impact litigation organization,[14] meaning that it stands for a movement larger than itself. Thus, like *Brown*, the shape *Bostock*'s legacy takes is inextricably linked to the future evolution of the LGBTQ+ rights movement.

Specifically, the question of *Bostock*'s interaction with sex-stereotyping doctrine is crucial for the LGT claimants at issue in *Bostock* and those not clearly covered by its decision, such as non-binary and bisexual plaintiffs, as well as queer plaintiffs mounting challenges to sex-segregated dress codes and sex-separated bathroom policies. While *Bostock* removes any categorical bar to filing Title VII claims for gay, lesbian, and transgender plaintiffs, it offers little to clarify if such plaintiffs can prove the *merits* of those claims. By contrast, because sex-stereotyping law was largely developed by LGBTQ+

10. *See infra* Section I.C.

11. 347 U.S. 483 (1954).

12. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 Harv. L. Rev. 1470, 1473–75 (2004) (arguing that the dominant anticlassification approach to American law, which is rooted in *Brown*, stands in tension with the focus on "group harm" that characterized "the decision's immediate wake").

13. *Compare* Students for Fair Admissions, Inc. v. Pres. & Fellows of Harv. Coll., 143 S. Ct. 2141, 2160 (2023) (citing *Brown* in holding race-based affirmative action in college admissions unconstitutional), *with id.* at 2225 (Sotomayor, J., dissenting) (citing *Brown* in reaching the opposite conclusion).

14. *See* Susan Bisom-Rapp, *The Landmark* Bostock *Decision: Sexual Orientation and Gender Identity Bias in Employment Discrimination Constitute Sex Discrimination Under Federal Law*, 43 T. Jefferson L. Rev. 1, 1 (2021) (explaining that the decision was the product "of a carefully constructed LGBTQIA rights litigation strategy that was decades in the making"); *see also infra* note 61 (discussing the ACLU's deliberate and delicate approach to the case).

claimants, the doctrine does meaningful work for these plaintiffs on the merits. The access to judicial review that *Bostock* provides loses some of its teeth without viable arguments to survive motions to dismiss or for summary judgment. Particularly given some of the most pressing forms of anti-LGBTQ+ discrimination—namely, sex-segregated intimate facilities (e.g., bathrooms) and sex-specific dress codes—this class of claimants requires an approach to SOGI-discrimination law that is not exclusively reliant on *Bostock* opinion, which specifically demurs on those exact forms of discrimination.

Additionally, members of other subgroups in the LGBTQ+ community, such as bisexual and nonbinary individuals, were not parties in *Bostock*. The *Bostock* majority opinion was unclear how the decision's holding applies to plaintiffs belonging to these groups, even if it at least indicates that they are not entirely locked out of Title VII. If *Bostock* is not read to foreclose sex-stereotyping arguments, sex-stereotyping law would provide an ample path forward for bisexual and nonbinary plaintiffs, given the myriad ways they transgress sex stereotypes.

It is thus imperative to understand how *Bostock* intersects with the LGBTQ+-protective sex-stereotyping doctrine that preceded it, to see how both classes of claimants (namely, LGT claimants, and nonbinary and bisexual claimants) can avail themselves of Title VII protections going forward. A new generation of LGBTQ+ plaintiffs will bring statutory sex discrimination claims to which *Bostock* alone does not provide clear answers, even if it opens the door. Particularly since these plaintiffs developed sex-stereotyping law and *Bostock* dedicates minimal time to discussing sex-stereotyping, plaintiffs and practitioners alike must understand whether and to what extent sex-stereotyping doctrine for SOGI-discrimination plaintiffs retains power after *Bostock*.

A classic method of historicizing a landmark decision is to simply look to how courts are interpreting it, as indicia of the shape its legacy will take.[15] This Note takes that approach by examining the fate of *Bostock*'s relationship to sex-stereotyping in the lower courts throughout the several years since the opinion was handed down. By canvassing each of the federal opinions that discuss sex-stereotyping in connection to SOGI-discrimination plaintiffs since *Bostock*, this Note presents a key finding that lower courts have emphatically refused to read *Bostock* as foreclosing the availability of sex-stereotyping arguments for SOGI-discrimination plaintiffs. In fact, courts have frequently read *Bostock* as legitimating the sex-stereotyping path to liability for SOGI-discrimination plaintiffs. *Bostock*'s legacy, like most legacies, is not being formed in a vacuum—rather, courts are ensuring that it is coherent and in conversation with other doctrines.

The Note proceeds in two parts. Part I traces SOGI-discrimination plaintiffs' fight to be included in Title VII jurisprudence. Due to the LGBTQ+ rights movement's prior coalescing around sex-stereotyping doctrine, *Bostock*'s mere

15. *See* Siegel, *supra* note 12, at 1501–32 (tracing the evolution and emergence of the antisubordination understanding of *Brown* in both Supreme Court and lower court jurisprudence).

reference to (rather than reliance on) sex-stereotyping doctrine has resulted in the academy's current tussle over this doctrine's future application in SOGI-discrimination jurisprudence.

Part II canvasses the post-*Bostock* landscape of statutory SOGI-discrimination claims by analyzing how lower courts are reading *Bostock* against, or alongside, sex-stereotyping claims. Twenty-eight of the 30 relevant lower court decisions suggest that courts have not interpreted *Bostock* to have mitigated or limited sex-stereotyping doctrine. For example, some courts have cited *Bostock* as a sex-stereotyping decision. Others have treated *Bostock* as explicitly and implicitly legitimating sex-stereotyping doctrine by explaining how their logics intersect. Finally, some courts have relied on pre-*Bostock* (and sometimes post-*Bostock*) sex-stereotyping holdings from federal appellate courts. Of these 30 opinions, only two dismissed the viability of sex-stereotyping arguments for SOGI-discrimination plaintiffs in light of *Bostock*—and only for questions on which *Bostock* specifically demurred.

This Note argues that *Bostock* should be read as consistent with the sex-stereotyping line of cases preceding it. Moreover, reading Bostock consistent with these cases maintains fidelity to, rather than misconstrues, the holding and logic of *Bostock* and vindicates the decision's antidiscrimination commitment. Finally, this approach could resolve the handwringing over *Bostock*'s legacy by demonstrating that the decision built upon—rather than displaced—its forbearers.

I. The Road Not Taken?

A. *The Sex-Stereotyping Road to* Bostock

In Title VII law, sex-stereotyping doctrine proscribes adverse treatment of employees based on either descriptive sex-stereotypes—generalizations about how certain groups or people with certain characteristics behave, what they prefer, and what their competencies are—or prescriptive sex-stereotypes: how they should think, feel, or behave.[16] Sex-stereotyping doctrine functions by reference to our intuitions, presuming that we as a society each have access to a common bank of assumptions about the way sex governs our role in the world and prescribing that employers must not subject employees to adverse outcomes on account of those assumptions.[17]

Prior to *Bostock*, the sex-stereotyping theory of LGBTQ+ discrimination had been developing for years in lower courts as the leading theory of statutory protection for SOGI-discrimination plaintiffs, an outflow of the landmark

16. *See* Katharine T. Bartlett et al., Gender and Law: Theory, Doctrine, Commentary 135 (8th ed. 2020).

17. Sex-stereotyping also informs other areas of law, such as Title IX and equal-protection jurisprudence. *See generally* Jody Feder, *Sex Discrimination and the United States Supreme Court: Developments in the Law*, Cong. Rsch. Serv. (Dec. 30, 2015), https://sgp.fas. org/crs/misc/RL30253.pdf (discussing the relevance of sex-stereotyping to all three areas). This explanation is meant simply as an illustration of how it operates in Title VII law.

holding in *Price Waterhouse* (wherein the Supreme Court famously held that discrimination based on failure to conform to sex stereotypes violates Title VII). For instance, in the 2002 case *Centola v. Potter*, Judge Nancy Gertner became the first federal judge to explain how heterosexuality is a sex stereotype:

> Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, *stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women*. . . . The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, "*real men don't date men*." The gender stereotype at work here is that "real" men should date women, and not other men.[18]

Before *Centola*, other courts had gestured at a similar recognition—for example, by holding that gay men and transgender women could advance sex-stereotyping claims based on adverse treatment for being "too feminine" (vice versa for lesbians and transgender men).[19] For instance, in 2001, the First Circuit explained it would be "reasonable to infer that [Plaintiff's supervisor] told [Plaintiff, a man,] to go home and change because she thought that [Plaintiff's choice to wear feminine] attire did not *accord* with his male gender," concluding Plaintiff "may have a claim" under a statutory sex-discrimination prohibition—citing *Price Waterhouse* in doing so.[20]

As the 2000s progressed, multiple federal appellate courts made more explicit that sex-stereotyping was a path to Title VII protection for SOGI-discrimination plaintiffs.[21] For instance, for gay plaintiffs, in *EEOC v. Boh Bros. Construction Co., LLC*, the Fifth Circuit observed that the bad actor's use of "sex-based epithets" such as "gay," "homo," "fa**ot," and "queer" could allow "a jury [to] view [the bad actor's] behavior as an attempt to denigrate

18. 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (emphasis added); *see also* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1068 (9th Cir. 2002) (Pregerson, J., concurring) (agreeing the gay plaintiff had stated a sex-discrimination cause of action and "point[ing] out that in my view, this is [also] a case of actionable gender stereotyping harassment").

19. *See, e.g.*, Nichols v. Azteca Rest. Enters. Inc., 256 F.3d 864, 874–75 (9th Cir. 2001) ("*Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine."); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (since Title VII prohibits "[d]iscrimination because one fails to act in the way expected of a man or woman," a transgender woman could seek relief under the Gender Motivated Violence Act); *cf.* Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) ("[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity." (citing *Price Waterhouse*)).

20. Rosa v. Park West Bank & Trust Co., 214 F.3d 213, 215–16 (1st Cir. 2000) ("Indeed, under *Price Waterhouse,* 'stereotyped remarks [including statements about dressing more 'femininely'] can certainly be *evidence* that gender played a part.'" (quoting Price Waterhouse v. Hopkins*,* 490 U.S. 228, 251 (1989))) (alterations in original).

21. *E.g.*, Prowel v. Wise Bus. Forms Inc., 579 F.3d 285, 290 (3d Cir. 2009) (citing, *inter alia*, *Nichols*, 245 F.3d at 874, and *Higgins*, 194 F.3d at 259).

[plaintiff[] because—at least in [the bad actor's] view—[plaintiff] fell outside of [the bad actor's] manly-man stereotype."[22] Meanwhile, on gender identity, the Sixth Circuit held in 2004 in *Smith v. City of Salem* that "discrimination against a plaintiff who is transsexual . . . is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*[.]"[23] Other circuit courts fell in line.[24] Many district court judges also embraced the theory that discrimination against transgender plaintiffs constituted statutorily prohibited sex-stereotyping[25]—including an Eastern District of Michigan judge in one of the cases that would eventually become *Bostock*.[26] Some courts even suggested sex-stereotyping doctrine was the *only* form of Title VII protection for SOGI-discrimination plaintiffs.[27]

The pre-*Bostock* sex-stereotyping theory for SOGI-discrimination plaintiffs is best represented by a 2017 trio of cases: *Christiansen v. Omnicom Grp., Inc.*,[28] *Hively v. Ivy Technical Community College*,[29] and *Whitaker v. Kenosha Unified School District*.[30] On sexual orientation, the Second Circuit in *Christiansen* held that a gay plaintiff's "gender stereotyping allegations . . . [we]re cognizable under *Price Waterhouse* and our precedents."[31] The panel in *Ivy Technical* reasoned that "all gay, lesbian and bisexual persons

22. 731 F.3d 444, 457–59 (5th Cir. 2013).

23. 378 F.3d 566, 574–75 (6th Cir. 2004); *see also* Barnes v. Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005), *cert. denied*, 546 U.S. 1003 (2005) (relying on *Salem*, holding transgender woman properly stated a Title VII claim because she "alleg[ed] that [her] failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind defendant's actions"); Kastl v. Maricopa Cnty. Cmty. Coll. Dist., 325 F. App'x 492 (9th Cir. 2009) (relying on *Schwenk*, holding transgender woman "states a prima facie case of gender discrimination under Title VII on the theory that impermissible gender stereotypes were a motivating factor in [defendant's] actions against her").

24. *E.g.*, Hunter v. United Parcel Service, Inc., 697 F.3d 697, 702–704 (8th Cir. 2012); Glenn v. Brumby, 663 F.3d 1312, 1317–19 (11th Cir. 2011); Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir. 2006); Dawson v. Bumble & Bumble, 398 F.3d 211, 217–218 (2d Cir. 2005).

25. *E.g.*, Valentine Ge v. Dun & Bradstreet, Inc., No. 6:15-CV-1029-ORL-41GJK, 2017 WL 347582, at *4 (M.D. Fla. Jan. 24, 2017); Roberts v. Clark Cnty. Sch. Dist., 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016), *reconsideration denied*, No. 2:15-CV-00388-JAD-PAL, 2016 WL 6986346 (D. Nev. Nov. 28, 2016); Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 527 (D. Conn. 2016); Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); Schroer v. Billington, 577 F. Supp. 2d 293, 305 (D.D.C. 2008); Finkle v. Howard Cnty., 12 F. Supp. 3d 780, 789 (D. Md. 2014); Terveer v. Billington, 34 F. Supp. 3d 100, 115–16 (D.D.C. 2014); Winstead v. Lafayette Cnty. Bd. of Cnty. Comm'rs, 197 F. Supp. 3d 1334, 1346–47 (N.D. Fla. 2016).

26. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 100 F. Supp. 3d 594, 603 (E.D. Mich. 2015).

27. *See, e.g.*, Evans v. Ga. Regional Hospital, 850 F.3d 1248, 1253–57 (11th Cir. 2017) (holding a lesbian would have a Title VII claim for sex-stereotyping, but not just because she was romantically attracted to women).

28. 852 F.3d 195 (2d Cir. 2017).

29. 853 F.3d 339 (7th Cir. 2017).

30. 858 F.3d 1034 (7th Cir. 2017).

31. 852 F.3d at 201.

fail to comply with the *sine qua non* of gender stereotypes—that all men should form intimate relationships only with women, and all women should form intimate relationships only with men,"[32] which was reaffirmed *en banc*.[33] Upon rehearing *en banc*, it declared that "Hively represents the ultimate case of failure to conform to the female stereotype (. . . heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual."[34] On gender identity, the Seventh Circuit held in *Whitaker* that a transgender boy denied access to the boys' restroom "ha[d] sufficiently demonstrated a likelihood of success on his Title IX claim under a sex-stereotyping theory."[35] The court drew on *Price Waterhouse*'s "broad view of Title VII" in concluding that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth."[36]

Federal agencies and academics joined federal courts in coalescing around sex-stereotyping for SOGI-discrimination plaintiffs. The EEOC's 2012 decision in *Macy v. Holder* green-lit transgender Title VII administrative claimants to proceed under sex-stereotyping theories,[37] as did its 2015 decision in *Complainant v. Foxx* for their sexual-orientation peers.[38] When the Obama administration's Department of Health of Human Services (HHS) first promulgated regulations under Section 1557 of the Patient Protection and Affordable Care Act in 2016, it stipulated that "Section 1557's prohibition of discrimination on the basis of sex includes . . . sex discrimination related to an individual's sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes."[39]

William Eskridge, a leading voice in statutory interpretation, specifically pointed to sex-stereotyping doctrine as a viable path for sexual-orientation plaintiffs. In 2017, Eskridge, drawing on *Ivy Technical*, the legislative history of Title VII, and *Price Waterhouse*, framed "[h]omophobia as [p]rescriptive [s]ex [s]tereotyping."[40] For Eskridge, "the case for discrimination 'because of sex'" for lesbians and gay men "is much strengthened because such discrimination is fundamentally at odds with the central purpose of Title VII . . . to protect employees against employer insistence upon conforming to old-fashioned, rigid gender roles."[41] He concluded, "Sex-stereotyping claims . . . provide[] a

32. Hively v. Ivy Tech. Cmty. Coll., 830 F.3d 698, 711 (7th Cir. 2016).

33. Hively v. Ivy Tech. Cmty. Coll., 853 F.3d 339, 340 (7th Cir. 2017).

34. *Id.* at 346; *see also id.* at 342 (citing *Christiansen*).

35. 858 F.3d at 1039.

36. *Id.* at 1048.

37. EEOC Appeal No. 0120120821, 2012 WL 1435995, at *10–11 (Apr. 20, 2012).

38. EEOC Appeal No. 0120133080, 2015 WL 4397641, at *7 (July 15, 2015).

39. 81 Fed. Reg. 31376, 31390 (May 18, 2016). The regulations also offered protection for gender-identity discrimination by including "gender identity" in its definition of "sex," but did not specify that its reasons were doing so were rooted in sex-stereotyping theory. *Id.* at 31387.

40. William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 362–81 (2017).

41. *Id.* at 381.

way to understand how classification, class, and harmful ideology reconnect in Title VII cases involving LGBT claimants."[42]

Eskridge's statutory-interpretation argument capitalized on existing academic literature characterizing homophobia and transphobia as *unconstitutional* sex-role enforcement.[43] For example, in 1994, Andrew Koppelman argued that "[l]aws that discriminate against gays rest upon a normative stereotype: the bald conviction that certain behavior—for example, sex with women—is appropriate for members of one sex, but not for members of the other sex."[44] Similarly, Sylvia Law argued in 1988 that "disapprobation of homosexual behavior is a reaction to the violation of gender norms, rather than simple scorn for the sexual practices of gay men and lesbian women."[45] As Suzann Pharr put it the same year, "[a] lesbian is perceived as being outside the acceptable, routinized order of things . . . [and] as a threat to the nuclear family, to male dominance and control, to the very heart of sexism."[46]

Following Eskridge's lead, others in the academy proffered similar arguments about statutory SOGI-discrimination claims.[47] In 2007, Ilona Turner argued that "[d]iscrimination against someone for being transgender is discrimination based on that person's non-conformity with gender stereotypes," constituting "per se" sex discrimination under Title VII.[48] In 2014, Deborah Anthony synthesized the homophobia argument with the transphobia one:

> This gender stereotyping approach to employment discrimination law naturally extends to other individuals and groups who experience discrimination based on their unconventional gender performance and expression. Presumably, a gay male who is denied employment because of his sexual orientation does not suffer such a consequence because he is male, but

42. *Id.* at 362; *see also* Adele P. Kimmel, *Title IX: An Imperfect But Vital Tool to Stop Bullying of LGBT Students*, 125 YALE L.J. 2006, 2013 (2016 ("[C]ourts should interpret Title IX to cover all harassment of LGBT students because this harassment is always based on gender stereotypes").

43. *See, e.g.*, Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 6–8 (1995).

44. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 NYU L. REV. 197, 219 (1994).

45. Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 187.

46. SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM 18 (1988).

47. *E.g.*, Zachary A. Kramer, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465; Zachary R. Herz, Note, *Price's Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396 (2014); Olivia Szwalbnest, Note, *Discriminating Because of "Pizzazz": Why Discrimination Based on Sexual Orientation Evidences Sexual Discrimination Under the Sex-Stereotyping Doctrine of Title VII*, 20 TEX. J. WOMEN & L. 75, 79–80 (2010).

48. Ilona M. Turner, Note, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 562–63 (2007); *see also* Jason Lee, Note, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination Under Title VII*, 35 HARV. J.L. & GENDER 423 (2012) (making a similar argument).

> because he is male and does not fit within the traditional norms of the male sex—i.e., acting masculine and engaging in romantic relationships with women only. The same can be said for a transsexual; someone who is fired after a transition from female to male, for example, may have been treated fine as a woman, and may have otherwise been treated fine as a man. The problem is neither her female nor male sex, but her unacceptable representation of what is expected of either one.[49]

Christiansen, *Ivy Technical*, and *Whitaker* were all handed down in 2017, the same year Eskridge's article was published, and the year before the *Bostock* petition for certiorari was filed.[50] Thus, as the case was being briefed, it was far from unreasonable to assume the *Bostock* Court would ground its position in sex-stereotyping (either in a ruling favorable to SOGI-discrimination claimants, or by disposing of the doctrine entirely[51]).

In fact, the lower court decisions in *Bostock* and the cases with which it was consolidated were based on sex-stereotyping. In *Zarda v. Altitude Express, Inc.*, the Second Circuit "conclude[d] that sexual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination."[52] Similarly, in *EEOC v. R.G. & G.R. Harris Funeral Homes*, the Sixth Circuit held that "[u]nder any circumstances, '[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination.'"[53] Originally, Mr. Bostock himself included an allegation of unlawful discrimination based on his failure to conform to a gender stereotype.[54] And the petition for certiorari insisted "[t]here is no reason in law, logic, or common sense why *Price Waterhouse* does not forbid discrimination against a gay person for failing to conform to a stereotype about how he should act in terms of who he should be attracted to or romantically involved with."[55] Petitioners continued to reaffirm the importance of sex-stereotyping doctrine to their argument,[56] arguing for nearly six full pages of their merits brief that "Sexual Orientation Discrimination is Sex Stereotype Discrimination Under *Price Waterhouse v. Hopkins*"[57] and proffering stereotyping arguments three separate times during

49. Deborah Anthony, *Sex at Work: Title VII Discrimination and the Application of "Because of Sex" to Transgender Employees*, 36 Women's Rts. L. Rep. 112, 121 (2014).

50. The petition was filed on May 25, 2018. Petition for Writ of Certiorari, Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020) (No. 17–13801).

51. *See supra* note 3.

52. 883 F.3d 100 (2d Cir. 2018).

53. 884 F.3d 560, 572 (6th Cir. 2018) (quoting Smith v. City of Salem, 378 F.3d 575 (6th Cir. 566, 2004)).

54. *See* Petition for Writ of Certiorari, *supra* note 50, at 7. Bostock abandoned this claim upon appeal to the Eleventh Circuit, the only unfavorable appellate court decision of those consolidated in *Bostock*. *Id.* at 10 n.2.

55. *Id.* at 27–28.

56. *See* Reply Brief of Petitioner at 3, 11, *Bostock*, 140 S. Ct. 1731 (2020) (No. 17–13801).

57. Brief for Petitioner at 23–29, *Bostock*, 140 S. Ct. 1731 (2020) (No. 17–13801).

oral argument.[58] The natural conclusion would have been for the *Bostock* majority to reason in sex-stereotyping terms.

B. *The* Bostock *Opinion Itself*

Despite the lengthy build-up to a Supreme Court case definitively answering the question of whether LGT plaintiffs would receive Title VII's protection, the *Bostock* Court only sparingly employs sex-stereotyping theory in the majority opinion. Instead, the *Bostock* Court employs a formalistic thought experiment to hold that Title VII's sex-discrimination prohibition encompasses a SOGI-discrimination prohibition because "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex":[59]

> Consider, for example, an employer with two employees, both of whom are attracted to men. . . If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. . . . Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.[60]

This thought experiment eludes the sex-stereotyping reasoning that undergirded so much the case law preceding *Bostock*. That is, the *Bostock* majority could have explicitly included LGBTQ+ plaintiffs within Title VII's protection by explaining, as so many lower courts already had, that homophobia constitutes sex discrimination because it impermissibly imposes a classic descriptive sex stereotype—that "real" men like women, and vice versa. It could have made a similar move for transgender plaintiffs by explaining that discrimination based on transgender status constitutes sex discrimination because it impermissible imposes a different, prescriptive sex stereotype—that those assigned male at birth *should* identify as men, and vice versa. In other words, rather than reasoning in terms of presumptive or compulsory heterosexuality or cisgender status (or overly effeminate or masculine conduct), it favors a simple, nakedly textualist compare-and-contrast.[61]

58. *See* Transcript of Oral Argument at 6, 9, 65, *Bostock*, 140 S. Ct. 1731 (2020) (No. 17–13801).

59. *Bostock*, 140 S. Ct. at 1741.

60. *Id.* at 1741–42.

61. This shift in the final majority opinion may be unsurprising given the ACLU's Supreme Court strategy. *See* Masha Gessen, *Chase Strangio's Victories for Transgender Rights*, New Yorker (Oct. 12, 2020), https://www.newyorker.com/magazine/2020/10/19/chase-strangios-victories-for-transgender-rights.

> In the Stephens case, the process was laced with dread. . . . Then Strangio read an article in the *Wake Forest Law Review* by Katie Eyer, [who] argued that a truly textualist interpretation of Title VII would leave the Justices no choice but to acknowledge that

Instead of grounding its holding in sex-stereotyping, the *Bostock* majority opinion only explicitly references sex-stereotyping a paltry three times. First, Justice Gorsuch explains that "just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same."[62] Second, when he clarifies the low threshold for "but-for" Title VII arguments"—namely, that "[w]hen a qualified woman applies for a mechanic position and is denied, the 'simple [but-for] test' immediately spots the discrimination: A qualified man would have been given the job, so sex was a but-for cause of the employer's refusal to hire"[63]—Gorsuch again looks to sex-stereotyping as a key example: "Such a rule would create a *curious discontinuity* in our case law, to put it mildly. Employer hires based on sexual stereotypes? Simple test."[64] Third, Gorsuch invokes *Price Waterhouse* directly—admittedly, for the simple proposition that "sex is 'not relevant to the selection, evaluation, or compensation of employees.'"[65] But given the wide range of cases he could have cited for such a basic point, it is notable that he selected *Price Waterhouse* (a plurality opinion), as it serves as a reminder that the sex-stereotyping claims it authorized remain both viable—and relevant to *Bostock*.[66]

C. *Commentators' Reactions*

There is open debate among academics about how to make descriptive and normative sense of *Bostock*'s treatment of sex-stereotyping arguments for SOGI-discrimination plaintiffs. Commentators have not landed on a decisive way of relating *Bostock* to the sex-stereotyping case law that preceded it, in part because most published their takes before lower courts had sufficient time to apply *Bostock*. This Note represents an important intervention into this debate by providing an account of what has happened in lower courts in the years following *Bostock*.

First, and most prominently, some commentators have lamented that *Bostock* failed to capitalize on the sex-stereotyping momentum that was building for LGBTQ+ plaintiffs in the lower courts. For example, a team of feminist professors led by Ann C. McGinley argue that, unlike *Ivy Technical* and its peers, "*Bostock* bypasses sex stereotyping as a necessary means to its

discriminating against people because they are gay, lesbian, or transgender is to discriminate against them on the basis of sex. "In the briefing room, I said, 'We can win this!'" Strangio said.

Id.; *see also id.* ("David Cole, the national legal director of the A.C.L.U., aimed his arguments plainly at Gorsuch.").

62. *Bostock*, 140 S. Ct. at 1742–43.

63. *Id.* at 1748.

64. *Id.* at 1749 (emphasis added).

65. *Id.* at 1471 (quoting *Price Waterhouse*, 490 U.S. at 239).

66. Meanwhile, Justice Alito's dissent in *Bostock* spends significant time considering and rejecting the sex-stereotyping theory. *See, e.g.*, *id.* at 1763 (Alito, J., dissenting).

end"[67]—an "absence that shortchanges the LGBTQ+ community by muzzling anti-essentialist feminist arguments and real-world storytelling that could have given names, faces, and histories to the countless LGBTQ+ employees who have been subjugated and marginalized for so long."[68] They argue that "the *Bostock* majority should have relied more heavily on the *Price Waterhouse* line of cases," because that "approach would have been rooted in solid precedent, . . . clarity[,] and truthfulness" and "laid a more solid foundation for future cases, including cases about bathroom rights and about the rights of persons who are gender non-binary."[69] Jeremiah Ho makes a similar point, arguing that "Gorsuch's textualism in *Bostock* functionally precludes the case's doctrinal anti-stereotyping potential" because it fails to "counterbalance or address the still relevant impact of heteronormative gender roles and stereotypes" that pervade "employment discrimination situations involving queer minorities."[70] Concurring, Naomi Schoenbaum criticizes *Bostock* as "fail[ing] to elucidate how transgender plaintiffs further the anti-stereotyping aims of sex discrimination law, treating these plaintiffs as marginal cases" for this body of law "rather than part of the core."[71]

Second, some academics agree that *Bostock* did not reason in sex-stereotyping terms, but endorse this move. For instance, John Towers Rice was "surpris[ed]" the *Bostock* "Court did not resolve this case on the theory of sex-based stereotyping under *Hopkins*," as many, including himself, had predicted,[72] but still frames *Bostock*'s "[s]ubstantive [l]egacy" positively: "[m]ore [p]rotection for [m]ore [p]eople on [m]ore [f]ronts[.]"[73]

Third, some commentators contend that Bostock has a sex-stereotyping holding and that that holding is correct. For example, in arguing that "*Bostock* [g]ot [i]t [r]ight," Rachel Slepoi claims "*Bostock*'s theory of sex discrimination is nothing new," because it collapses the "per se theory of queer protections" with the "one that derives from the sex-stereotyping holding of *Price Waterhouse*": "*Bostock* makes clear, once and for all, that these theories are one and the same."[74]

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67. Ann C. McGinley et al., *Feminist Perspectives on* Bostock v. Clayton County, Georgia, 53 Scholarly Works 1, 8 (2020).

68. *Id.* at 13.

69. *Id.* ("[T]he majority's wooden textualism represents an opportunity missed.").

70. Jeremiah A. Ho, *Queering* Bostock, 29 J. Gender, Social Pol'y, & L. 283, 346–47 (2021).

71. Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105 Minn. L. Rev. 831, 879–80 (2020).

72. John Towers Rice, *The Road to* Bostock, 14 F.I.U. L. Rev. 423, 449–50 (2021).

73. *Id.*; *see also* A. Russell, Note, Bostock v. Clayton County*: The Implications of a Binary Bias*, 106 Cornell L. Rev. 1601, 1614 (2021) (arguing that "[m]any in the queer community see this [lack of sex-stereotyping] approach as superior, since it allows queer plaintiffs to directly claim antidiscrimination protection under Title VII, without having to inaccurately portray themselves as gender nonconformers or depend on the much less reliable sex stereotyping doctrine").

74. Rachel Slepoi, Bostock*'s Inclusive Queer Frame*, 107 Va. L. Rev. Online 67, 77–78 (2021).

Fourth, others concur that *Bostock* reasons in sex-stereotyping terms but disparage its doing so. For example, Lindsey Wells suggests, while "[t]he decision in *Bostock* focus[es] on sex-stereotype presentation," this move "fails to fully protect the rights of transgender [plaintiffs] because some transgender individuals may still present themselves in a way that could be considered 'sufficiently' in line with stereotypes asserted for men or women," but still face gender-identity discrimination on other grounds (e.g., if they "simply change their name" or "make certain biological transition choices that are not outwardly apparent").[75]

This handwringing about *Bostock*'s relationship to the sex-stereotyping doctrine that preceded it occurred before lower courts even had a chance to apply *Bostock* in conjunction with sex-stereotyping doctrine. Thus, the scholarship canvassed in this Section represents a purely theoretical take on this potential relationship—not an empirical one. By methodically analyzing how lower courts have elucidated this relationship, this Note offers some empirical clarity and helps assuage fears that *Bostock* represented a roadblock for sex-stereotyping doctrine's potential to advance LGBTQ+ rights. In fact, it represents a clear step forward.

II. The Road Preserved

This Part examines the 30 federal opinions that discuss stereotyping in connection to gay and transgender plaintiffs advancing statutory sex-discrimination claims ("SOGI-discrimination plaintiffs") from June 15, 2020, the day *Bostock* was handed down, until February 2, 2023.[76] These cases primarily concern statutory claims under Title VII (prohibiting sex discrimination in employment), Title IX (same for federally funded education),[77] and Section 1557 (same for federally funded healthcare).[78]

Despite arguments that *Bostock* foreclosed or limited the viability of sex-stereotyping theories for SOGI-discrimination plaintiffs, my analysis

75. Lindsey Wells, Comment, *How the Supreme Court Weakened the Pursuit of Transgender Individual Rights*: Bostock v. Clayton County, 140 S. Ct. 1731 (2020), 48 W. St. L. Rev. 45, 69–70 (2021).

76. To generate this dataset, I ran on two searches on Westlaw on February 2, 2023 ("All Federal," since June 15, 2020 (the date *Bostock* was handed down)): adv: gay /p disc! /p stereotyp!, and adv: transgender /p disc! /p stereotyp!. I also reran my search prior to publication to see if there were any additional relevant cases that arose from February 2, 2023, to August 31, 2023. Naturally, these searches generated some duds: cases where no stereotyping argument was made or analyzed, the stereotyping argument was collateral to the dispositive issues (e.g., mootness, statutes of limitations), and/or *Bostock*, nor its predecessors, were never cited. These searches also turned up multiple opinions within a case's history; this Note examines only the most recent merits decisions. And, of course, these two searches occasionally turned up the same cases, resulting in some duplicates. In total, these searches generated 30 unique, relevant opinions.

77. Courts regularly look to Title VII doctrine to interpret Title IX. *E.g.*, *Whitaker*, 858 F.3d at 1047.

78. Section 1557 explicitly incorporates Title IX by reference. 42 U.S.C. § 18116 (2018).

reveals that federal courts still routinely recognize sex-stereotyping arguments by these plaintiffs.[79] Two-thirds of these cases explicitly reaffirmed that sex-stereotyping arguments remain available to SOGI-discrimination plaintiffs, especially in cases regarding same-sex sexual harassment (i.e., where the harasser and harassee are of the same sex). These cases stated this reaffirmation in plain terms, allowed SOGI-discrimination plaintiffs to proceed under sex-stereotyping theories, and/or relied upon pre- and post-*Bostock* sex-stereotyping decisions. Even when courts ruled unfavorably for a *particular* plaintiff, they nonetheless confirmed that sex-stereotyping doctrine remains viable for this *general type* of plaintiff. Four of the cases implicitly reaffirmed the viability of these arguments, such as by citing to *Bostock* as a source of this cause of action, citing to pre-*Bostock* sex-stereotyping cases as examples or definitions of sex discrimination, and/or insisting that sex-stereotyping remains an available path despite how *Bostock* was decided.

Of the remaining six cases, two demurred on the statutory question but affirmed the availability of sex-stereotyping arguments to SOGI-discrimination plaintiffs under the Equal Protection Clause, and two failed to reach the question based solely on plaintiffs' factual allegations (not the doctrine's unavailability). Only two opinions straightforwardly denied the viability of a sex-stereotyping argument under Title VII for SOGI-discrimination plaintiffs—and only in the contexts of sex-specific dress codes and sex-segregated bathroom policies, issues on which *Bostock* is technically silent. These limited nature of these two exceptions demonstrates the breadth of the consensus reached by courts otherwise.

The courts in many of these cases also treated *Bostock* itself as a source of this viability, occasionally using a variety of methods. This pattern is particularly remarkable in light of the scholarly concerns described in Section I.C regarding whether and to what extent *Bostock* rejected sex-stereotyping doctrine. In three cases, the courts read *Bostock* as containing a sex-stereotyping holding. In another three cases, the courts held that Bostock constitutes an explicit legitimatization of sex-stereotyping arguments because *Bostock* reasons about sex discrimination the same way sex-stereotyping arguments do: namely, in terms of traits or behaviors employers tolerate in one sex but not the other. Nine of the courts more indicated that *Bostock* implicitly legitimates sex-stereotyping arguments for SOGI-discrimination plaintiffs. They indicate this by citing to *Bostock* when describing the sex-stereotyping cause of action, showing that *Bostock*'s logic produces the same conclusion as sex-stereotyping logic, and including *Bostock* in string cites with sex-stereotyping holdings. Although some of this treatment of *Bostock* does not clarify how much authority *Bostock* provides for sex-stereotyping, it shows that many courts have avoided treating *Bostock* as foreclosing of sex-stereotyping arguments. Nine

79. Other databases, such as LexisNexis or Bloomberg Law, may contain additional decisions. Sometimes Lexis and Bloomberg contain more decisions than Westlaw; other times, vice versa. *See* Meritt E. McAlister, *Missing Decisions*, 169 U. Pa. L. Rev. 1101, 1126 (2020).

courts have also continued to rely on sex-stereotyping holdings predating *Bostock*, indicating that they are reading *Bostock* not as implicitly abrogating these holdings, but as an extension thereof. And after accounting for the two cases reading *Bostock* so narrowly as to not reach the stereotyping question (e.g., based on plaintiffs' factual allegations), four cases providing no indication which way the court was leaning, and two cases wherein the courts confirmed that at the very least sex-stereotyping remains a valid theory under the Equal Protection Clause for SOGI-discrimination plaintiffs, only two cases treat *Bostock* as providing no support for sex-stereotyping arguments for SOGI-discrimination plaintiffs—and, again, confined only to the two realms described above.

Courts have emphatically not read *Bostock* to foreclose the viability of sex-stereotyping arguments for SOGI-discrimination plaintiffs bringing statutory sex-discrimination claims. Instead, courts have treated the sex-stereotyping theory as a surviving, viable theory for SOGI-discrimination plaintiffs and—what's more—found authority for this theory within *Bostock* itself.

A. *The Remaining Viability of Sex-Stereotyping Arguments*

Despite worries that *Bostock* represented a departure from sex-stereotyping reasoning for SOGI-discrimination plaintiffs advancing sex discrimination claims, an overwhelming majority of the surveyed cases confirm that sex-stereotyping doctrine remains a valid path to protection for these plaintiffs and claims after *Bostock*. Twenty of these cases confirmed this understanding explicitly, while four more did so implicitly. Four of the remaining six confirmed that sex-stereotyping doctrine is actionable on constitutional equal-protection claims of sex discrimination or did not reach the question. Only two denied that sex-stereotyping claims remain viable post-*Bostock* for SOGI-discrimination plaintiffs, and only on matters on which *Bostock* is technically silent.

1. Explicit Affirmation

A full two-thirds of these cases[80] explicitly reaffirmed the viability of sex-stereotyping arguments for SOGI-discrimination plaintiffs. Even when the court issued an adverse ruling to plaintiff, the opinion's reasoning still held that sex-stereotyping remains an available theory for statutory SOGI-discrimination claims.

Several of these cases stated in plain language that sex-stereotyping remains available for SOGI-discrimination plaintiffs, including numerous Title VII cases. For instance, an Eastern District of Pennsylvania judge explained in *Doe v. DeJoy* that "there is no dispute as to this issue—claims of discrimination based on gender stereotyping have been and continue to be viable

80. This Part's analysis is limited to the cases located by the methodology in note 76. Of course, there are plenty of sex-discrimination cases outside these search parameters wherein plaintiffs advance sex-stereotyping claims (e.g., cisgender heterosexual women). The analysis here is limited to show that even in cases that were cause for concern, *see supra* Part I, sex-stereotyping doctrine has survived.

under Title VII."[81] In another case, the same judge noted that "even before the recent Supreme Court decision in *Bostock* . . . Title VII was construed to "prohibit[] gender stereotyping and discrimination because of sex," and now, "[a]fter *Bostock*, *there can be no doubt that discrimination in the form of gender stereotyping is, under Title VII, discrimination on the basis of sex*."[82] A Central District of California judge concurred, stating "[t]he prohibition of sex discrimination under Title VII encompasses both discrimination based on biological sex and gender stereotypes."[83] In another case, a Middle District of Georgia judge quoted *Bostock* in concluding that "[s]ex discrimination under Title VII includes discrimination based on sexual orientation and discrimination based on gender stereotyping because 'it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.'"[84]

Cases concerning Title IX and Section 1557 contained similar language. On Title IX, a Southern District of Indiana judge similarly explained, "[by] definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth," such that "[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX."[85] And on Section 1557, a District of the District of Columbia judge observed "[t]here exists a fairly strong case . . . that application of Bostock's textual analysis to Title IX (by way of Section 1557's incorporation of that statute) would yield the conclusion that the statute forbids discrimination based on gender identity and sex-stereotyping, insofar as such stereotypes are based on the belief that an individual should identify with only their birth-assigned sex."[86] The clarity with which these opinions present the conclusion that sex-stereotyping claims remain viable for SOGI-discrimination plaintiffs is remarkable, in that it illustrates their complete lack of doubt that *Bostock* represented a roadblock to said claims.

Other courts demonstrated the continuing viability of sex-stereotyping arguments for SOGI-discrimination plaintiffs without being as explicit. For

81. No. 5:19-CV-05885, 2020 WL 4382010, at *12 (E.D. Pa. July 31, 2020).

82. Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115, 135 (quoting Ellingsworth v. Hartford Fire Ins. Co., 247 F. Supp. 3d 546, 551 (E.D. Pa. 2017) (alterations in original) (emphasis added); *see also id.* at 129 n.14 ("Even before *Bostock*, courts in this jurisdiction 'recognized a wide variety of gender stereotyping claims.' *Ellingsworth* . . . (collecting cases).").

83. Maxon v. Fuller Theological Seminary, 549 F. Supp. 3d 1116, 1123 (C.D. Cal. 2020), *aff'd*, No. 20–56156, 2021 WL 5882035 (9th Cir. Dec. 13, 2021).

84. Lange v. Houston Cnty., Georgia, 608 F. Supp. 3d 1340, 1356 (M.D. Ga. 2022) (quoting *Bostock*, 140 S. Ct. at 1741).

85. A.M. by E.M. v. Indianapolis Pub. Schs., 617 F. Supp. 3d 950, 965 (S.D. Ind. 2022), *appeal dismissed sub nom.* A.M. by E.M. v. Indianapolis Pub. Schs. & Superintendent, No. 22–2332, 2023 WL 371646 (7th Cir. Jan. 19, 2023) (quoting Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1048–49 (7th Cir. 2017)).

86. Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs., 485 F. Supp. 3d 1, 40 (D.D.C. 2020).

instance, many judges have sanctioned sex-stereotyping theory simply by permitting SOGI-discrimination plaintiffs to proceed under it.[87] Others have explained how different statutory sex-discrimination claims (1) are identical to those under Title VII and (2) permit sex-stereotyping arguments for SOGI-discrimination plaintiffs.[88]

Still others cited to post-*Bostock* court decisions endorsing sex-stereotyping doctrine, which themselves are proof of how the sex-stereotyping theory remains valid. One such post-*Bostock* decision that endorsed sex-stereotyping doctrine is the 2021 case *Roberts v. Glenn Industrial Group, Inc.*[89] In *Roberts*, the Fourth Circuit explained that *Oncale v. Sundowner Offshore Services* (the landmark Supreme Court case finding same-sex sexual harassment violates Title VII) did not "overturn[] or otherwise upset[] the Court's holding in *Price Waterhouse* [that] a plaintiff may establish a sexual harassment claim with evidence of sex-stereotyping."[90] A District of Maryland judge later cited *Roberts* in explaining "the Fourth Circuit has held that sexual harassment in violation of Title VII may be based on one of several forms of sex-based motivations, including 'a plaintiff's failure to conform to sex stereotypes.'"[91] This type of post-*Bostock* development illustrates the remaining viability of sex-stereotyping theory for SOGI-discrimination plaintiffs.

Some courts relied on pre-*Bostock* appellate court holdings to explain why sex-stereotyping arguments remain viable.[92] For instance, in *Walker*

87. Monegain v. Dep't of Motor Vehicles, 491 F. Supp. 3d 117, 143 (E.D. Va. 2020) (sex-specific dress code "discriminated on the basis of sex" because it targeted a transgender woman employee "for 'failing to conform to the sex stereotype' expected of employees at the [workplace], and . . . treated [plaintiff] differently because of her sex" in violation of Title VII); Doe v. Univ. of Scranton, No. 3:19-CV-01486, 2020 WL 5993766, at *5 n.61 (E.D. Pa. Oct. 9, 2020) (finding "persuasive" plaintiff's argument that "Title IX contemplates peer-on-peer harassment on the basis of sexual orientation as a form of gender-based stereotyping); Kadel v. Folwell, 620 F. Supp. 3d 339, 376 (M.D.N.C. 2022) (state health plan "overtly discriminates against members for failing to conform to the sex stereotype propagated by the Plan" because it "expressly limits members to coverage for treatments that align their physiology with their biological sex and prohibits coverage for treatments that change or modify physiology to conflict with assigned sex," constituting "textbook sex discrimination" violative of Title VII and the ACA) (citing *Price Waterhouse*, 490 U.S. at 251); Sarco v. 5 Star Financial, LLC, No. 5:19CV86, 2020 WL 5507534, at *5 (W.D. Va. Sept. 11, 2020) ("Applying *Bostock* to Sarco's case, this court . . . will permit Sarco to proceed with his sex discrimination claim under" a "theor[y] of liability" based on "gender stereotype nonconformity discrimination[.]").

88. Fennell v. Comcast Cable Comms. Mgmt., LLC, No. CV 19–4750, 2022 WL 4296690, at *10 n.6 (E.D. Pa. Sept. 16, 2022) ("The [PHRA] . . . [is] to be interpreted as identical to Title VII[.] [A] plaintiff is entitled to protection under the PHRA if discrimination suffered is based on gender stereotypes as it is considered sex-based discrimination.").

89. 998 F.3d 111 (4th Cir. 2021).

90. *Id.* at 120 ("a plaintiff's failure to conform to sex stereotypes" is a "form[] of proof" "available to plaintiffs" to demonstrate the harassment was "based on sex") (referring to *Oncale*, 523 U.S. 75 (1998)).

91. 580 F. Supp. 3d 154, 172 (D. Md. 2022).

92. Shields v. Sinclair Media III, Inc., No. 1:18-CV-593, 2020 WL 3432754, at *10 (S.D. Ohio June 23, 2020), *report and recommendation adopted*, No. 1:18-CV-593, 2021

v. Azar, an Eastern District of New York judge relied on the Sixth Circuit's holding in *Harris Funeral Homes*[93]—one of the cases consolidated with *Bostock*—that "discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping."[94]

Several courts affirmed the continued legitimacy of sex-stereotyping doctrine by invoking the well-known doctrine from *Price Waterhouse* that "[t]he presence of stereotyping may support the inference that an adverse action was due to a protected characteristic."[95] A District of Maryland judge explained in *EEOC v. Ford* that "a reasonable jury could conclude that [plaintiff] . . . was being subjected to sex-based harassment based on failure to conform to gender stereotypes."[96] The plaintiff's supervisor "referred to men he deemed effeminate as 'gay'" and commented on plaintiff's clothing, which was "pink or colorful," while harassing women by instead "ma[king] inappropriate comments" about their bodies, telling "them to 'sit there and look pretty,'" "ask[ing] to see their dating applications," and "grop[ing] their bodies."[97] Similarly, the Fifth Circuit also found that a comment asking if a heterosexual man "was gay with that mess in his head" could "imply animus toward males who do not conform to stereotypical notions of masculinity."[98]

Even when the court ruled unfavorably for SOGI-discrimination plaintiffs, they nonetheless admitted the sex-stereotyping doctrine remains good law. For instance, in *Scott v. St. Louis University Hospital*, an Eastern District of Mississippi judge held that the plaintiff—whose employer refused to pay for her transgender son's gender-affirming care—failed to state a claim under Title

WL 4472520 (S.D. Ohio Sept. 30, 2021), *aff'd*, No. 21–3954, 2022 WL 19826867 (6th Cir. Nov. 1, 2022) (explaining at time of filing and summary judgment briefing, "the Sixth Circuit had . . . found that 'sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination' under Title VII" (quoting Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004))); Am. Coll. of Pediatricians v. Becerra, No. 1:21-cv-195, 2022 WL 17084365, at *13 (E.D. Tenn., Nov. 18, 2022) (because "[t]he Sixth Circuit held, before *Bostock* was even decided, that . . . Title IX prohibits discrimination based on sex-stereotyping and gender nonconformity," "Plaintiffs' proposed conduct of refusing to engage in the objectionable practices is at least arguably proscribed by Section 1557" (citing Dodds v. United States Dep't of Educ., 845 F.3d 217, 221 (6th Cir. 2016))). For more post-*Bostock* decisions that have relied on pre-*Bostock* holdings, see *infra* Section II.B.3.

93. EEOC v. Harris Funeral Homes, 884 F.3d 560 (6th Cir. 2018).

94. 480 F. Supp. 3d 417, 427 (E.D.N.Y. 2020) (quoting *Harris Funeral Homes*, 884 F.3d at 576).

95. Bergesen v. Manhattanville Coll., No. 20-CV-3689 (KMK), 2021 WL 3115170, at *6 (S.D.N.Y. July 20, 2021) (citing *Price Waterhouse*, 490 U.S. at 251, for the proposition that "stereotyped remarks can certainly be evidence that gender played a part" in an adverse action (emphasis omitted)).

96. No. CV TDC-19–2636, 2021 WL 5087851, at *6 (D. Md. Nov. 2, 2021); *see also id.* ("[S]ame-sex sexual harassment . . . may be established based on . . . 'a plaintiff's failure to conform to sex stereotypes.'" (quoting *Roberts,* 998 F.3d at 120)).

97. *Id.*

98. Sewell v. Monroe City Sch. Bd., 974 F.3d 577, 584 (5th Cir. 2020) (citing EEOC v. Boh Bros. Constr. Co., 731 F.3d 444, 456–60 (5th Cir. 2013) (en banc) as "explaining that epithets targeting homosexuals can support inference of gender-based stereotyping").

VII.[99] Despite this holding, the judge confirmed that "[s]ex stereotyping, like other forms of sex discrimination, violates Title VII because the discrimination would not occur but for the victim's sex."[100] Of the other decisions discussed in this subsection, five were resolved unfavorably for their plaintiffs while still affirming the viability of sex-stereotyping doctrine.[101] That courts confirmed this doctrine remained available to this general type of plaintiff, even when ruling against the instant plaintiff in a given case, shows that they see this doctrine as solidly entrenched.

2. Implicit Affirmation

When courts did not state this continuing viability in plain terms, they often *implicitly* reaffirmed said viability. Some courts cited directly to *Bostock* when describing a plaintiff's sex-stereotyping cause of action,[102] or to pre-*Bostock* sex-stereotyping holdings as examples or definitions of prohibited sex discrimination.[103] Others suggested *Bostock*'s failure to locate its holding in sex-stereotyping doctrine was immaterial. For instance, in *B.E. v. Vigo County School Corp.*, defendants argued that "*Bostock* casts doubt upon *Whitaker* [which held transgender students could bring sex-discrimination claims under Title IX] because *Whitaker* premised its finding of sex discrimination upon a sex-stereotyping theory, which '*Bostock* does not embrace.'"[104] As the Southern District of Indiana judge in the case put it, however: "*This distinction misses the point.*"[105] On appeal, the Seventh Circuit affirmed the lower court's decision and further intertwined *Bostock* and *Whitaker*: "Both Title VII,

99. 600 F. Supp. 3d 956, 962–63 (E.D. Miss. Apr. 25, 2022) (plaintiff could not bring a discrimination claim when her own protected characteristics were not implicated).

100. *Id.* at 963.

101. *Bergesen*, 2021 WL 3115170; *DeJoy*, 2020 WL 4382010; *Fennell*, 2022 WL 4296690; *Eller*, 580 F. Supp. 3d 154; *Shields*, 2020 WL 3432754; *Maxon*, 549 F. Supp. 3d 1116.

102. Singer v. Univ. of Tenn. Health Sciences Ctr., No. 2:19-CV-02431, 2021 WL 3412445, at *1 & n.1 (W.D. Tenn. Aug. 4, 2021) (citing *Bostock* to explain plaintiff's "discriminatory treatment based on her nonconformity with gender stereotypes, and based on her transgender identity").

103. Joganik v. E. Tex. Med. Ctr., No. 6:19-CV-517-JCB-KNM, 2021 WL 6694455, at *10 (E.D. Tex. Dec. 14, 2021), *report and recommendation adopted*, No. 6:19-CV-00517, 2022 WL 243886 (E.D. Tex. Jan. 25, 2022) (in explaining "Title VII, and by extension Title IX, recognize that sex discrimination encompasses gender-identity discrimination," citing to *Bostock* and quoting *Glenn v. Brumby* (2011 Eleventh Circuit case) as holding "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes"); Howell v. STRM LLC - Garden of Eden, No. 20-CV-00123-JSC, 2020 WL 7319359, at *3 (N.D. Cal. Dec. 11, 2020) (concluding plaintiff experienced discrimination "on account of her gender and sexual orientation," with a *cf.* cite to *Nichols* (2001 Ninth Circuit case) which held "a male had a sex discrimination hostile work environment claim because he was verbally 'attacked' and 'derided' for not conforming to his peers' gender-based stereotypes").

104. 608 F. Supp. 3d 725, 731 (S.D. Ind. 2022), *aff'd sub nom.* A.C. by M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760 (7th Cir. 2023).

105. *Id.* (emphasis added) (concluding "transgender plaintiff was being subjected to impermissible discrimination").

at issue in *Bostock*, and Title IX, at issue here and in *Whitaker*, involve sex stereotypes and less favorable treatment because of the disfavored person's sex. *Bostock* thus provides useful guidance here, even though the application of sex discrimination it addressed was different."[106] Meanwhile, two decisions also confirmed that sex-stereotyping remains a valid path for SOGI-discrimination plaintiffs who advance constitutional equal-protection claims.[107]

Only two cases did not reach the question of whether sex-stereotyping remains a viable path for SOGI-discrimination plaintiffs. For instance, in *DeFrancesco v. Arizona Bd. of Regents*, the Ninth Circuit reported that plaintiff failed to "adequately allege discriminatory intent."[108] Similarly in *Crowley v. Billboard Magazine*, a Southern District of New York judge found that plaintiff's alleged "stereotyped remark" ("gay men are more inclined to be fans of female artists") to be "a classic stray remark that cannot support an inference of discrimination," since he was promoted soon after the remark was made.[109] These opinions thus disposed of these claims based on plaintiffs' fact-specific failures to meet threshold standards for employment-discrimination claims based on any theory, rather than the unavailability of sex-stereotyping doctrine specifically.

B. Bostock *as Preserving the Viability of Sex-Stereotyping Arguments*

Taken together, federal courts' treatment of *Bostock* in the years since it was handed down suggest they have decisively read *Bostock* as sanctioning, not foreclosing, sex-stereotyping arguments for SOGI-discrimination plaintiffs.

Court have specifically treated *Bostock* as a reason the sex-stereotyping path remains available to SOGI-discrimination plaintiffs. Three of the 30 opinions went so far as to treat Bostock itself as containing a sex-stereotyping holding by stating as much. Three more explained how the logic and/or text of *Bostock* explicitly legitimates the sex-stereotyping path to liability for SOGI-discrimination plaintiffs. Nine others implicitly treated *Bostock* as doing this legitimating through, for instance, giving *Bostock* the same treatment in a string cite given to sex-stereotyping holdings. And nine cases have relied

106. A.C. by M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760, 769 (7th Cir. 2023) (proceeding to conclude that "*Bostock* strengthens *Whitaker*'s conclusion that discrimination based on transgender status is a form of sex discrimination").

107. In *Grimm v. Gloucester County School Board*, the Fourth Circuit held "Grimm was subjected to sex discrimination [in violation of the Equal Protection Clause] because he was viewed as failing to conform to the sex stereotype propagated by the Policy." 972 F.3d 586, 608 (2020). The court noted that "[m]any courts . . . have held that various forms of discrimination against transgender people constitute sex-based discrimination for purposes of the Equal Protection Clause because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes." *Id.* (collecting cases). Two years later, an Eastern District of New York judge "follow[ed] *Grimm*," finding "discrimination against transgender persons is sex-based discrimination for Equal Protection purposes because such policies punish transgender persons for gender non-conformity, thus relying on sex stereotypes." Fain v. Crouch, 618 F. Supp. 3d 313, 323 n.3 (S.D. W. Va. 2022).

108. No. 21–16530, 2023 WL 313209, at *1 (9th Cir. Jan. 19, 2023).

109. 576 F. Supp. 3d 132, 145–46 (S.D.N.Y. 2021)

on pre-*Bostock* (and, occasionally, post-*Bostock*) sex-stereotyping holdings from appellate courts—often including those described in Section I.A—thus demonstrating they have not read *Bostock* as limiting those holdings.[110] Of course, six cases simply reiterated the basic holding of *Bostock* or demurred on the question. But overall, these opinions have treated *Bostock* as supporting sex-stereotyping doctrine.

1. *Bostock* as Explicit Legitimation

Two district court judges and one Court of Appeals have treated *Bostock* as containing a sex-stereotyping holding. Most prominently, in *Roberts*, the Fourth Circuit observed that "[t]he Court [in *Bostock*] . . . applied its reasoning broadly to employees who fail to conform to traditional sex stereotypes," and concluded that "*the Supreme Court's holding in* Bostock *makes clear that a plaintiff may prove that same-sex harassment is based on sex where the plaintiff was perceived as not conforming to traditional male stereotypes*."[111] Similarly, in *Ford*, a District of Maryland judge said *Bostock* "not[ed] that an employer who discriminates against both men and women based on their sex as a result of different stereotypes does not 'avoid[ ] Title VII exposure' but instead 'doubles it[.]'"[112] The judge went on to cite *Bostock* for the proposition that, "[w]here the evidence shows that male and female employees were subjected to harassment based on different gender stereotypes, a reasonable factfinder could conclude that [the bad actor] was engaged in sexual harassment of both men like [plaintiff] and also women."[113] Such use of *Bostock* evinces a clear understanding of the case as consistent with, and in support of, sex-stereotyping doctrine for SOGI-discrimination plaintiffs. Finally, a Middle District of Georgia judge quoted *Bostock* in stating "[s]ex discrimination under Title VII includes . . . discrimination based on gender stereotyping because 'it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.'"[114]

Other courts have articulated that Bostock confirms the continued viability of sex-stereotyping arguments because *Bostock* sounds in the same register as sex-stereotyping arguments, in that the reasoning of *Bostock* mirrors the reasoning of sex-stereotyping doctrine. For instance, as a District of the District of Columbia judge explained, "'sex plays an unmistakable and impermissible role' in any decision to treat otherwise identical individuals differently simply because they possess different gender identities" in violation of Title VII and Title IX (quoting *Bostock*).[115] Accordingly, he concluded, "application

110. Some cases used multiple methods, such as both implicitly suggesting *Bostock* legitimates sex-stereotyping claims *and* citing to pre-*Bostock* sex-stereotyping holdings.

111. 998 F.3d 111, 121 (4th Cir. 2021) (emphasis added).

112. EEOC v. Lindsay Ford LLC, No. CV TDC-19–2636, 2021 WL 5087851, at *6 (D. Md. Nov. 2, 2021) (quoting Bostock, 140 S. Ct. at 1741).

113. *Id.*

114. Lange v. Hous. Cnty., Ga., 608 F. Supp. 3d 1340, 1356 (M.D. Ga. 2022) (quoting *Bostock*, 140 S. Ct. at 1741).

115. Whitman-Walker Clinic, Inc. v. HHS, 485 F. Supp. 3d 1, 40 (D.D.C. 2020).

of *Bostock*'s textual analysis to Title IX . . . would yield the conclusion that the statute forbids discrimination based on . . . sex stereotyping, insofar as such stereotypes are based on the belief that an individual should identify with only their birth-assigned sex."[116] (The judge even cited Justice Alito's *Bostock* dissent, which warned about the "potential 'consequences' of [the] Court's Title VII holding for statutes such as Title IX and Section 1557"—in effect, bringing Alito's fears to life.[117]) This judge's reasoning spells out exactly how *Bostock* does in fact rely upon and provide support for the logic undergirding sex-stereotyping arguments.

Similarly, in *DeJoy*, an Eastern District of Pennsylvania judge argued that "*Bostock*'s majority opinion is explicit about the continued viability of such claims of sex stereotyping," quoting the *Bostock* opinion's Hannah/Bob thought experiment example as proof.[118] The judge also noted that *Bostock*'s failure to address an earlier Third Circuit holding[119] does not "abrogate the still-valid portion of [said holding] recognizing the validity of gender-stereotyping discrimination claims under Title VII."[120] If this were not enough, the judge rejected this counterargument for a third time: "Despite Doe's suggestion otherwise . . . *Bostock* did not somehow undermine gender stereotyping as a way of proving sex-based discrimination."[121]

In another case, the same judge hit these same points again, explaining "[it] naturally follows from [*Bostock*'s holding] that discrimination based on gender stereotyping falls within Title VII's prohibitions."[122] Relying on key language from *Bostock* (an "individual employee's sex plays an unmistakable and impermissible role in the discharge decision" if they are discharged for being transgender), he concluded: "After *Bostock*, there can be no doubt that discrimination in the form of gender stereotyping is, under Title VII, discrimination on the basis of sex."[123]

These decisions conceive of *Bostock* as existing within a larger nexus of sex-discrimination law. Each of these cases connects the reasoning and holding of *Bostock* to the logic of the sex-stereotyping doctrine that preceded it.

2. *Bostock* as Implicit Legitimation

More subtly, nine courts have suggested that *Bostock* implicitly legitimates sex-stereotyping arguments. Such treatment of *Bostock* is not as overt, but still supports the conclusion that courts are reading *Bostock* as endorsing and building upon sex-stereotyping doctrine, rather than eroding it.

116. *Id.*

117. *Id.*

118. Doe v. DeJoy, No. 5:19-CV-05885, 2020 WL 4382010, at *12 (E.D. Pa. July 31, 2020).

119. Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001).

120. *DeJoy*, 2020 WL 4382010, at *12.

121. *Id.* at *8 n.23.

122. Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115, 129 (E.D. Pa. 2020) (citing key language from *Bostock*, 140 S. Ct. at 1741–42).

123. *Id.* at 135 (citing *Bostock*, 140 S. Ct. at 1741–42).

For instance, in *Walker*, an Eastern District of New York judge rejected HHS's 2020 Section 1557 regulations, which did not protect against sexual orientation and gender-identity discrimination, and resurrected HHS's 2016 rules, which did (by including protections against gender-identity discrimination and sex-stereotyping discrimination in defining sex discrimination).[124] The court explained that because HHS "continued on the same path [of excluding these protections] even after *Bostock*," its repeal of the 2016 rules "was a disagreement with a concept of sex discrimination later embraced by the Supreme Court" in *Bostock* and therefore "was contrary to law."[125] The judge also cited *Bostock* specifically in restoring the 2016 HHS rules' protection against sex-stereotyping (in which the rules had housed protections against sexual-orientation discrimination). This move implicitly treated *Bostock* as legitimating sex-stereotyping arguments by saying that *Bostock*'s holding, which provides that sex discrimination includes sexual orientation and gender identity discrimination, requires HHS to also include protections against sex-stereotyping. In other words, the court determined that *Bostock* mandated the continued viability of sex-stereotyping claims.

Courts also simply cited to *Bostock* when observing that a SOGI-discrimination plaintiff has made sex-stereotyping claims. This move suggests that *Bostock* is a source of a sex-stereotyping cause of action,[126] or at least indicates that *Bostock* provides support for plaintiff's sex-stereotyping claims, even if the opinion does not necessarily unpack the connection between the two.

For example, the plaintiff in *Doe v. University of Scranton*, argued that "Title IX contemplates peer-on-peer harassment on the basis of sexual orientation as a form of gender-based stereotyping."[127] In response, a Middle District of Pennsylvania judge observed that *Bostock* "addressed a similar argument in the context of Title VII . . . and explained that 'it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.'"[128] In proceeding to rule for the plaintiff based on *Bostock* and a lack of contradictory Third Circuit precedent, he thus implicitly relied on *Bostock* in handing down a stereotyping decision favorable to the SOGI-discrimination plaintiff, indicating that *Bostock* provides a source of support for such holdings.

Another way that courts have implicitly legitimized sex-stereotyping post-*Bostock* is by demonstrating that sex-stereotyping reasoning and *Bostock*-style reasoning produce the same conclusion. For instance, in *Monegain v. DMV*, an Eastern District of Virginia judge concluded that the Department of

124. Walker v. Azar, 480 F. Supp. 3d 417, 430 (E.D.N.Y. 2020); 85 Fed. Reg. 37160 (June 19, 2020); 81 Fed. Reg. 31376 (May 18, 2016).

125. *Walker*, 480 F. Supp. 3d at 429.

126. Singer v. Univ. of Tenn. Health Scis. Ctr., No. 2:19-CV-02431, 2021 WL 3412445, at *1 & n.1 (W.D. Tenn. Aug. 4, 2021).

127. No. 3:19-CV-01486, 2020 WL 5993766, at *5 n.61 (M.D. Pa. Oct. 9, 2020).

128. *Id.* (quoting *Bostock*, 140 S. Ct. at 1741).

Motor Vehicle's (DMV) dress code policy discriminated on the basis of sex.[129] In evaluating plaintiff's equal-protection claim, the court noted that, "[l]ike the bathroom policy in *Grimm*" (a landmark Fourth Circuit decision holding that excluding transgender children from bathrooms consonant with their gender identities violates the Fourteenth Amendment and Title IX), the DMV "instituted a sex classification that 'punished a transgender person for gender nonconformity' with that classification," i.e., "for 'failing to conform to the sex stereotype' expected of employees at the DMV[.]"[130] The judge then analyzed the policy "pursuant to *Bostock*," where she again found that the policy discriminated on the basis of sex.[131] She concluded: "Under either decision . . . the Dress Code Policy impermissibly treated Monegain on the basis of sex."[132] This opinion shows how courts have reasoned to the same conclusion—a violation of a prohibition of sex discrimination—based on either *Bostock* or sex-stereotyping reasoning, is proof that they have a great deal in common.

A common, albeit more ambiguous, version of this implicit legitimation is simply listing *Bostock* in the same string cite as sex-stereotyping decisions—many of which pre-date *Bostock*. By listing pre-*Bostock* sex-stereotyping cases alongside *Bostock*, these courts indicate that *Bostock* should not be read as limiting sex-stereotyping holdings.[133]

For example, in *Kadel v. Fowell*, a Middle District of North Carolina judge classified a public health plan's exclusion of gender-affirming care as "textbook sex discrimination." He support his reasoning by citing first to *Grimm*'s holding that a policy discriminating for "failing to conform to the [prescribed] sex stereotype" is unconstitutional, then *Price Waterhouse*, and then *Bostock*.[134] Similarly, in *Maxon v. Fuller Theological Seminary*, a Central District of California judge held "that Title IX's prohibition of discrimination on the basis of gender stereotypes encompasses educational institutions that discriminate against an individual for marrying a person of the same sex."[135] After explaining that Title VII and Title IX apply "similar substantive standards," he reached his conclusion by noting Title VII's "encompasses both discrimination based on biological sex and gender stereotypes"—citing *Schwenk v. Hartford*,

129. 491 F. Supp. 3d 117, 143 (E.D. Va. 2020).

130. *Id.* (quoting Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020), *as amended* (Aug. 28, 2020)).

131. *Id.* (quoting *Bostock*, 140 S. Ct. at 1746).

132. *Id.* Notably, the court used *Bostock* to supplement its constitutional reasoning, even though there was no statutory claim at issue.

133. *E.g.*, Howell v. STRM LLC – Garden of Eden, No. 20-CV-00123-JSC, 2020 WL 7319359, at *3 (N.D. Cal. Dec. 11, 2020) (citing *Bostock*, 140 S. Ct. at 1747 and Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874–75 (9th Cir. 2001)); Joganik v. E. Tex. Med. Ctr., No. 6:19-CV-517-JCB-KNM, 2021 WL 6694455, at *10 (E.D. Tex. Dec. 14, 2021) *report and recommendation adopted*, No. 6:19-CV-00517, 2022 WL 243886 (E.D. Tex. Jan. 25, 2022) (citing *Bostock*, 140 S. Ct. 1731 and Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011)). For more on this line of analysis, *see infra* Section II.B.3.

134. Kadel v. Folwell, 620 F. Supp. 3d 339, 375 (M.D.N.C. 2022).

135. 549 F. Supp. 3d 1116, 1123–24 (C.D. Cal. 2020), *aff'd*, No. 20–56156, 2021 WL 5882035 (9th Cir. Dec. 13, 2021).

a 2000 (pre-*Bostock*) Ninth Circuit decision based on sex-stereotyping doctrine,[136] and then *Bostock*.[137] While it is ambiguous to what extent each judge intended to *accord Bostock* authority associated with sex-stereotyping in compiling these string cites, they at least indicate that the courts intended to treat both *Bostock* and sex-stereotyping holdings with equal or similar weight. This move once again serves as further evidence that courts are not reading *Bostock* as abrogating the sex-stereotyping holdings that preceded it.

3. Reliance on Appellate Sex-Stereotyping Decisions

Nine cases have cited to pre- (and post-) *Bostock* lower court decisions which held that statutory sex-discrimination protections include protection against SOGI discrimination under sex-stereotyping theory. These cases position *Bostock* as part of sex-stereotyping lineage, rather than as a doctrinal island. A clear example of this is *Maxon*, described in the preceding paragraph.[138] In a similar vein, an Eastern District of Pennsylvania judge in *Doe v. Triangle Donuts* relied on *Ellingsworth v. Hartford Fire Ins. Co.*,[139] a 2017 case from the same court adopting a sex-stereotyping holding, in explaining that "even before . . . *Bostock* . . . , Title VII was construed to 'prohibit gender stereotyping and discrimination because of sex'" and "courts in this jurisdiction 'recognized a wide variety of gender stereotyping claims.'"[140] He then concluded: "After *Bostock*, there can be no doubt that discrimination in the form of gender stereotyping is, under Title VII, discrimination on the basis of sex."[141] In both *Maxon* and *Triangle Donuts*, neither judge is reading *Bostock* to abrogate or limit *Schwenk*/*Ellingsworth*. Rather, they are suggesting that *Bostock*'s holding either encompasses or implicitly legitimates these lower court holdings. Thus, they again indicate that the sex-stereotyping path to liability for SOGI-discrimination plaintiffs remains viable post-*Bostock*.

Many of these citations are to the seminal sex-stereotyping cases described in Section I.A—proof of their continued relevance. For instance, in *Sewell v. Monroe City Sch. Bd.*, the Fifth Circuit explained that the bad actor's stereotype-laden "verbal abuse" of plaintiff (namely, asking if plaintiff's hairstyle was gay) "could imply animus toward males who do not conform to stereotypical notions of masculinity."[142] The court cited *Boh Bros.*, the 2013 Fifth Circuit case holding that "epithets targeting homosexuals can support [an] inference of gender-based stereotyping[.]"[143] The Fourth Circuit in *Roberts*

136. *Id.* at 1123 (citing Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000), which held "[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII").

137. *Id.*

138. *See* text accompanying note 135.

139. 247 F. Supp. 3d 546, 551 (E.D. Pa. 2017) (collecting cases).

140. Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115, 135, 129 n.14 (E.D. Pa. 2020).

141. *Id.*

142. 974 F.3d 577, 584 (5th Cir. 2020).

143. *Id.* (citing EEOC v. Boh Bros. Constr. Co., 731 F.3d 444, 456–60 (5th Cir. 2013)).

also directly quoted *Boh Bros.* in confirming the continued viability of sex-stereotyping arguments for SOGI-discrimination plaintiffs.[144]

Other examples of post-*Bostock* cases citing to the seminal pre-*Bostock* sex-stereotyping holdings from Section I.A include *Scott* (citing a 2010 Eighth Circuit case and, by extension, *Salem*),[145] *B.E.* (citing *Whitaker*),[146] and *A.M. by E.M. v. Indianapolis Public Schools* (citing *Whitaker* in conjunction with *Bostock*).[147] In *Shields v. Sinclair Media III, Inc.*, a Southern District of Ohio judge cited both *Salem* and *Harris Funeral Homes*[148]—one of the cases consolidated in *Bostock*—in concluding that the Sixth Circuit had held that sex-stereotyping arguments were legitimate ways of articulating sexual-orientation discrimination claims.[149] The court in *Shields* simply noted that *Harris Funeral Homes* had been affirmed by *Bostock* without explaining the daylight between the appellate and Supreme Court holdings.[150] This move indicates that the court believed the latter naturally followed from the former, as a belief in any more attenuated connection would have entailed additional explanation. An Eastern District of New York judge also cited to the holding from *Harris Funeral Homes* in *Walker* when rejecting an argument that sex-stereotyping arguments had lost their viability in the Section 1557 context.[151] Courts have treated *Walker* as legitimating sex-stereotyping claims for SOGI-discrimination plaintiffs. For instance, the Fifth Circuit explained that *Walker* "reanimate[d] the [Obama HHS 2016 rule's] 'sex-stereotyping' prohibition" and "further reasoned that, in light of *Bostock*, sex-stereotyping discrimination encompasses gender identity discrimination."[152] The Eight Circuit concurred, noting that in *Walker*, the court "reasoned that, in light of *Bostock*, sex-stereotyping discrimination encompasses gender identity discrimination."[153]

Some courts relied on both pre- *and* post-*Bostock* lower court decisions in concluding that sex-stereotyping arguments remain available for SOGI-discrimination plaintiffs. In *American College of Pediatricians v. Becerra*, an Eastern District of Tennessee judge observed that "[t]he Sixth Circuit held,

144. Roberts v. Glenn Indus. Grp., Inc., 998 F.3d 111, 120 (4th Cir. 2021).

145. Scott v. St. Louis Univ. Hosp., 600 F. Supp. 3d 956, 963 (E.D. Mo. 2022).

146. B.E. v. Vigo Cnty. Sch. Corp., 608 F. Supp. 3d 725, 731 (S.D. Ind. 2022), *aff'd sub nom*. A.C. by M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760 (7th Cir. 2023), *cert. denied sub nom*. Metro. Sch. Dist. of Martinsville v. A. C., 144 S. Ct. 683 (2024).

147. 617 F. Supp. 3d 950, 965–66 (S.D. Ind. 2022), *appeal dismissed sub nom.* A.M. by E.M. v. Indianapolis Pub. Sch. & Superintendent, No. 22–2332, 2023 WL 371646 (7th Cir. Jan. 19, 2023).

148. EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018).

149. No. 1:18-CV-593, 2020 WL 3432754, at *10 (S.D. Ohio June 23, 2020), *report and recommendation adopted,* No. 1:18-CV-593, 2021 WL 4472520 (S.D. Ohio Sept. 30, 2021), *aff'd,* No. 21–3954, 2022 WL 19826867 (6th Cir. Nov. 1, 2022).

150. *Id.*

151. Walker v. Azar, 480 F. Supp. 3d 417, 427 (E.D.N.Y. 2020).

152. Franciscan All., Inc. v. Becerra, 47 F.4th 368, 372–73 (5th Cir. 2022) (citing *Walker*, 480 F. Supp. 3d at 429–30).

153. Religious Sisters of Mercy v. Becerra, 55 F.4th 583, 595 (8th Cir. 2022) (citing *Walker*, 480 F. Supp. 3d at 429–30).

before *Bostock* was even decided, that . . . Title IX prohibits discrimination based on sex-stereotyping and gender nonconformity."[154] The court supported this observation by citing a 2016 Sixth Circuit case, which itself referenced *Salem*).[155] The court also cited *Grimm*, a post-*Bostock* sex-stereotyping decision,[156] in noting that courts have "applie[d [this reasoning] equally" to Title IX, such that "Plaintiffs' proposed discrimination against transgender patients is at least arguably proscribed."[157] The judge concluded: "Section 1557, by incorporating Title IX, at least arguably proscribes Plaintiffs' proposed conduct [of, *inter alia*, refusing to provide gender-affirming care]."[158]

Other courts have relied only on post-*Bostock* sex-stereotyping holdings, demonstrating that these holdings flow from, rather than run counter to, *Bostock*. In *Eller*, a District of Maryland judge collapsed *Bostock* and *Roberts* as follows:

> As the Court stated [in *Bostock*], "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." [140 S. Ct.] at 1741. Likewise, the Fourth Circuit has held that sexual harassment in violation of Title VII may be based on one of several forms of sex-based motivations, including "a plaintiff's failure to conform to sex stereotypes." *Roberts v. Glenn Indus. Grp., Inc.*, 998 F.3d 111, 120 (4th Cir. 2021).[159]

4. Neutral or Demurring Treatment

Many courts have not felt the need to assess the stereotyping question when applying *Bostock*, instead simply citing *Bostock* for its limited holding (that Title VII forbids SOGI discrimination) without elaborating.[160] Naturally,

154. No. 1:21-CV-195, 2022 WL 17084365, at *13 (E.D. Tenn. Nov. 18, 2022).

155. Dodds v. U.S. Dep't of Educ., 845 F.3d 217, 221 (6th Cir. 2016) (holding the school district did not show a likelihood of success on appeal because "settled law in this Circuit" reflected that "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination" (quoting *Salem*, 378 F.3d at 575)).

156. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021). While *Grimm* itself does not contain a statutory sex-stereotyping holding, this judge's move to discuss *Grimm* immediately after discussing a case relying on *Salem* places them in a similar position.

157. 2022 WL 17084365 at *13.

158. *Id.*

159. Eller v. Prince George's Cnty. Pub. Schs., 580 F. Supp. 3d 154, 172 (D. Md. 2022).

160. Fennell v. Comcast Cable Commc'ns Mgmt., LLC, 628 F. Supp. 3d 554, 571 (E.D. Pa. 2022); Crowley v. Billboard Mag., 576 F. Supp. 3d 132, 142 (S.D.N.Y. 2021); *Eller*, 580 F. Supp. 3d at 172; DeFrancesco v. Ariz. Bd. of Regents, No. 21–16530, 2023 WL 313209, at *1 (9th Cir. Jan. 19, 2023); *Grimm*, 972 F. 3d at 616; A.M. by E.M. v. Indianapolis Pub. Schs., 617 F. Supp. 3d 950, 964–65 (S.D. Ind. 2022), *appeal dismissed sub nom.* A.M. by E.M. v. Indianapolis Pub. Schs. & Superintendent, No. 22–2332, 2023 WL 371646 (7th Cir. Jan. 19, 2023); Shields v. Sinclair Media III, Inc., No. 1:18-CV-593, 2020 WL 3432754, at *11 (S.D. Ohio June 23, 2020), *report and recommendation adopted*, No. 1:18-CV-593, 2021 WL 4472520 (S.D. Ohio Sept. 30, 2021), *aff'd*, No. 21–3954, 2022 WL 19826867 (6th Cir. Nov. 1, 2022); *Am. Coll. of Pediatricians*, 2022 WL 17084365 at *4.

these cases make it difficult to understand how these courts understanding *Bostock*'s relationship to sex-stereotyping doctrine, but they at least do not serve as affirmative evidence that *Bostock* foreclosed sex-stereotyping arguments for SOGI-discrimination plaintiffs. For instance, the court in *Bergesen v. Manhattanville College* could not even reach this question.[161] Although the judge confirmed that sex-stereotyping remains a legitimate way of making Title VII arguments, he disposed of plaintiff's stereotyping argument because "the Amended Complaint does not plausibly allege that [the bad actor] was influenced by [the relevant homophobic] stereotype."[162]

Two judges have pinpointed the gap between *Bostock*'s result and the explicit sex-stereotyping road not taken in that decision. However, crucially, they still did not read *Bostock* as foreclosing the viability of the latter.

In *B.E.*, a Southern District of Indiana judge noted that a 2017 Seventh Circuit case[163] had reached the same conclusion as *Bostock*—that Title VII, and therefore Title IX, "prohibits discrimination because of an individual's transgender status"—"*albeit under a different theory of sex discrimination*."[164] Specifically, the Seventh Circuit had held in 2017 that discrimination against a transgender plaintiff "for his failure to conform to sex-based stereotypes of the sex he was assigned at birth" violated Title IX.[165] By framing *Bostock* as a "different theory of sex discrimination," the judge made clear that he understood the difference between *Bostock*'s formalism and the sex-stereotyping theory that the Seventh Circuit as adopted. However, the judge dismissed defendants' attempts to rely upon this difference, explaining that "[t]his distinction misses the point" because it does not "alter the conclusion that the transgender plaintiff was being subjected to impermissible discrimination."[166]

Similarly, in *Sarco v. 5 Star Financial, LLC*, a Western District of Virginia judge held that although "after Bostock there is substantial overlap between" "gender stereotype nonconformity discrimination" and "sexual orientation discrimination," the latter "claim rests on some distinct facts."[167] Specifically, he reasoned that the stereotyping claim "rests on [plaintiff's] perceived adherence to expectations of 'masculinity'" (conduct), and his sexual orientation discrimination claim "hinges on demonstrating adverse action taken due to the mere

161. No. 20-CV-3689 (KMK), 2021 WL 3115170, at *7 (S.D.N.Y. July 20, 2021).

162. *Id.*; *see also Grimm*, 927 F.3d at 616.

163. Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1046–50 (7th Cir. 2017).

164. B.E. v. Vigo Cnty. Sch. Corp., 608 F. Supp. 3d 725, 730 (S.D. Ind. 2022), *aff'd sub nom*. A.C. by M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760 (7th Cir. 2023), *cert. denied sub nom.* Metro. Sch. Dist. of Martinsville v. A. C., 144 S. Ct. 683 (2024).

165. *Id.*

166. *Id.* at 731 n.2.

167. No. 5:19CV86, 2020 WL 5507534, at *7 (W.D. Va. Sept. 11, 2020).

fact of his homosexuality" (status).[168] By contrasting *Bostock* and pre-*Bostock* sex-stereotyping decisions[169] the judge suggested he did not see *Bostock* as a sex-stereotyping case.[170] But, while the judge was right that any legitimate sexual-orientation discrimination claim requires a demonstration of adverse action, "the mere fact" of non-heterosexuality itself constitutes a violation of expected "adherence to expectations of 'masculinity'" or femininity. Indeed, his peers in the judiciary have spelled out their recognition of this proposition for decades.[171] Regardless, his reasoning preserves the viability of sex-stereotyping claims for sexual-orientation plaintiffs, which demonstrates that sex-stereotyping claims remain available for SOGI-discrimination plaintiffs post-*Bostock*.

C. *The Sole Outliers*

Only two cases of those surveyed in this Note explicitly dismissed the viability of the sex-stereotyping theory for SOGI-discrimination plaintiffs (with reference to *Bostock*), and only on the issues of sex-specific dress codes and sex-segregated bathroom policies. Notably, both of these issues were explicitly specified in *Bostock* as issues *not* addressed by the opinion.[172]

In *Bear Creek Bible Church v. EEOC*, Braidwood Management, Inc., a "Christian business," "enforce[d] a sex-specific dress-and-grooming code that require[d] men and women to wear professional attire according to their biological sex."[173] A Northern District of Texas judge rejected the EEOC's argument that the defendant "must allow an employee to dress in accordance with the employee's professed gender identity."[174] The EEOC's argument relied in part on *Price Waterhouse*'s "holding that sex stereotyping may be evidence of sex discrimination under Title VII."[175] The judge held that the policy did not violate Title VII "because the dress code [was] enforced evenhandedly": namely, because both "men and women must abide by equally professional, but distinct, standards[.]"[176] The judge also rejected the EEOC's argument "that transgender individuals deserve special protection under *Bostock*," since "Defendants cannot have it both ways" ("that an employer should be completely blind to sex, and . . . that employers should give special preference to individuals who

168. *Id.*

169. *Id.* The judge argued that *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 143–44 (4th Cir. 1996), "suggest[s] that a plaintiff's actual orientation was not relevant for the purposes of a gender stereotype claim," and that *Henderson v. Labor Finders of Virginia, Inc.*, No. 3:12CV600, 2013 WL 1352158, at *5–6 (E.D. Va. Apr. 2, 2013), "permitt[ed] a sex discrimination claim by a heterosexual male who was perceived to be effeminate and called a 'woman' and a 'faggot.'"

170. *Id.*

171. *See supra* Section I.A.

172. *Bostock*, 140 S. Ct. at 1753.

173. 571 F. Supp. 3d 571, 623 (N.D. Tex. 2021).

174. *Id.* at 623–24.

175. *Id.*

176. *Id.* at 623–24 (internal quotation marks omitted).

identify as the opposite sex").[177] Notably, the judge had favorably quoted the sex-stereotyping example from *Bostock* just a few pages earlier.[178]

On appeal, the Fifth Circuit, among other dispositions, vacated the *Bear Creek* court's judgment on the scope of Title VII claims.[179] Specifically, the court rejected defendant's "request[for] a declaratory judgment that Title VII, as interpreted in *Bostock*, permits employers to discriminate against bisexuals and to establish sex-neutral codes of conduct that may exclude practicing homosexuals and transgender persons."[180] The Fifth Circuit's decision to ground this rejection in denying class certification to plaintiffs[181] reflects a decision by a conservative circuit to demur on these "open questions."[182] Such a maneuver reflects an implicit understanding that *Bostock* and its predecessors cannot be obfuscated so directly. If it were so easy to treat *Bostock* as a roadblock to sex-stereotyping doctrine's continued viability, presumably the Fifth Circuit—arguably more than any other court—would be champing at the bit to do so as a way to limit the arguments available to SOGI-discrimination plaintiffs.

The Eleventh Circuit, in *Adams ex rel. Kasper v. School Board of St. Johns County*, also held that sex-segregated bathroom policies (that prevent transgender students from using the bathrooms consistent with their gender identities) were not a violation of statutory sex-discrimination protections.[183] But, unlike the Northern District of Texas judge, it specifically disposed of plaintiff's sex-stereotyping argument. First, on plaintiff's constitutional claim, the Eleventh Circuit held that the bathroom policy did not violate the Equal Protection Clause because the policy "separate[d] bathrooms based on biological sex, which is not a stereotype."[184] It insisted that "[t]o say that the bathroom policy relies on impermissible stereotypes because it is based on the biological differences between males and females is incorrect."[185]

Second, on plaintiff's statutory claim, the Eleventh Circuit rejected the district court's claim that *Price Waterhouse* and *Glenn v. Brumby* (an Eleventh Circuit case) "provided support for [the] conclusion that 'the meaning of sex in Title IX includes gender identity for purposes of its application to transgender students."[186] Instead, it concluded that Title IX does not proscribe its sex-segregated bathroom policy because "'sex' is not a stereotype."[187] The court based this conclusion on the idea that "the Supreme Court in *Bostock* actually 'proceed[ed] on the assumption' that the term 'sex,' as used in Title

177. *Id.* at 624.
178. *Id.* at 620 (emphasis added) (quoting *Bostock*, 140 S. Ct. at 1742–43).
179. Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914, 940 (5th Cir. 2023).
180. *Id.*
181. *Id.*
182. *Id.*
183. 57 F.4th 791 (11th Cir. 2022).
184. *Id.* at 809.
185. *Id.* at 810.
186. *Id.* at 813.
187. *Id.*

VII, 'refer[red] only to *biological* distinctions between male and female.'"[188] In other words, the Eleventh Circuit took *Bostock* to pertain exclusively to discrimination based on sex in biological terms, rather than to sex in stereotypical terms. This distinction, while subtle, allowed the court in *Adams* to conclude that transphobic bathroom policies did not run afoul of Title IX because they did not implicate sex stereotypes, per *Bostock*.

III. Endorsing the Consistency Approach

Not all of these treatments of *Bostock* are created equal. Most egregiously, the outlier approach to *Bostock* in Section II.C ignores *Bostock*'s logic by categorically concluding that "[t]ransgender individuals are not a protected class."[189] Similarly, when courts throw *Bostock* into a string cite with a sex-stereotyping holding or drop *Bostock* in a footnote when describing sex-stereotyping, they are being more accurate but still generally unhelpful, as such spare citations do little to explain a court's thinking about the case's interaction with that doctrine. Courts need to articulate how *Bostock* builds upon or disrupts the doctrine that came before it. Similarly, courts' neutral treatment of *Bostock* described in Section II.B.4 leaves *Bostock* where it found it, rather than positioning it within the wider web of sex-discrimination law.

The reading of *Bostock* as containing a stereotyping holding, described in the first part of Section II.B.1, is slightly more plausible. For instance, Gorsuch summarizes *Bostock*'s holding as follows:

> Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex.[190]

"A more direct and succinct description of gender stereotyping would be hard to imagine."[191] Compare this reasoning to the key language from *Price Waterhouse*: "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[192] Both opinions reason in terms of characteristics typically tolerated in one sex (in *Price Waterhouse*, men), but not the other (in *Price Waterhouse*, women). Of course, it is important to observe

188. *Id.* (quoting *Bostock*, 140 S. Ct. at 1739) (alterations and emphasis in original). In any event, it also noted that Title IX's carve-out for "separate bathrooms on the basis of sex" renders "any action by the School Board based on sex stereotypes . . . not relevant to [plaintiff's] claim[.]" *Id.* at 814.

189. Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 624 (N.D. Tex. 2021), *aff'd in part, vacated in part, rev'd in part sub nom. Braidwood*, 70 F.4th 914 (5th Cir. 2023).

190. *Bostock*, 140 S. Ct. at 1737 (emphasis added).

191. Brief for Indiana Youth Group & GLSEN as Amicus Curiae at 13, A.C. by M.C. v. Metropolitan Sch. Dist. of Martinsville, 75 F.4th 760 (7th Cir. 2023).

192. *Price Waterhouse*, 490 U.S. at 250.

that, unlike *Bostock*, *Price Waterhouse* gestures at the *relevance* of opposite-sex tolerance, but does not *require* it—and *Price Waterhouse* is considered the standard for sex-stereotyping claims.[193]

Although this *Bostock*-as-stereotyping reading is plausible, *Bostock* is better read as consistent with, though not a member of, the sex-stereotyping line of cases. This consistency approach is described in the latter half of Section II.B.1 and suggested by the cases in Sections II.B.2–3. Unlike the first cases in Section II.B.1, which ascribe a sex-stereotyping holding to *Bostock*, the consistency approach does not require interpreters to pretend *Bostock* replicated *Price Waterhouse*. To do so obfuscates *Price Waterhouse*'s more permissive standard, with its above-described lack of an explicit opposite-sex tolerance requirement. Rather, the consistency approach furnishes a clear link between *Bostock*, which held that SOGI discrimination is a form of sex discrimination, and sex-stereotyping doctrine, which explains how sex stereotypes can constitute sex discrimination.

The consistency approach is best executed when done explicitly, as in *Whitman-Walker Clinic*.[194] There, the court detailed how *Bostock*, even strictly construed, produces a "fairly strong case" that Title IX prohibits sex-stereotyping for SOGI-discrimination plaintiffs, since "such stereotypes are based on the belief that an individual should identify only with their birth-assigned sex."[195] Another example that demonstrates the consistency approach is *Dejoy*, wherein a District of Maryland judge properly characterized *Bostock*'s usage of sex-stereotyping without referring to it as a holding.[196] In *Triangle Doughnuts*, the same judge reasoned that "[i]t naturally follows [from *Bostock*] that discrimination based on gender stereotyping falls within Title VII's prohibitions."[197]

This Part demonstrates that the consistency approach properly maintains fidelity to *Bostock*'s holding without mischaracterizing or underexplaining it. On this view, *Bostock* is part of a larger, cohesive constellation of holdings that comprise sex-discrimination law, legitimating the preexisting sex-stereotyping doctrine which it cited approvingly and on which it drew. *Bostock* does not purport to reject sex-stereotyping doctrine,[198] and the Court has never otherwise overturned one of its sex-stereotyping holdings—suggesting this line of cases persists and *Bostock* is consistent with the insights it provides.

193. "Relying on *Price Waterhouse*, numerous courts interpreting federal and state statutes have concluded that employees may rely on evidence of sex stereotyping to show discrimination occurred because of sex." Matthew W. Green, Jr., *Using Price Waterhouse v. Hopkins to End the Conduct-Status Divide in Sex Stereotypes and Sexual Orientation*, JURIST (Dec. 1, 2019), https://www.jurist.org/commentary/2019/12/matthew-green-price-waterhouse.

194. 485 F. Supp. 3d 1, 40 (D.D.C. 2020).

195. *Id.* (quoting *Bostock*, 140 S. Ct. at 1741–42).

196. No. 5:19-CV-05885, 2020 WL 4382010, at *12 (E.D. Pa. July 31, 2020).

197. 472 F. Supp. 3d 115, 129 (E.D. Pa. 2020) (citing *Bostock*, 140 S. Ct. at 1741–42).

198. *See supra* Section I.B.

The consistency approach to *Bostock* is the most appropriate one for two reasons. First, it addresses claims that *Bostock* can be read to have left untouched when construed narrowly: specifically, sex discrimination claims advanced by nonbinary and bisexual plaintiffs, and sex discrimination claims made against transphobic dress code and bathroom policies. Second, it more accurately captures the reality experienced by SOGI-discrimination plaintiffs, making it a vehicle well-suited to vindicate the law's promise of equality and provide them with justice. As the consistency approach makes clear, *Bostock* cannot do alone what it can when combined with sex-stereotyping doctrine. The consistency approach not only assuages many of the concerns about *Bostock*'s scope,[199] but also vindicates the values of the movement that produced *Bostock* in the first place.

A. *Applications Outside the* Bostock *Scope*

First, the consistency approach addresses claims that Bostock might appear to leave untouched if read in a vacuum, including claims by nonbinary and bisexual plaintiffs and claims against sex-segregated bathrooms and sex-specific dress codes. The Bostock Court had two kinds of claims before it—that of gay individuals and a transgender individual facing employment discrimination[200]—with which it dealt, but many other claims existed before the decision and continue to do so now. The consistency approach to Bostock combines Bostock's understanding of SOGI discrimination as sex discrimination with sex-stereotyping logic, in a way that addresses these persisting claims of discrimination. An adequate and consistent policing of sex discrimination includes applying sex-discrimination statutes to claims that a narrow construction of Bostock does not reach.

1. Other LGBTQ+ Subgroups

The consistency approach can clarify the ambiguity *Bostock* generates when it stands alone, such as whether nonbinary and bisexual plaintiffs have the same statutory protections against sex discrimination as their LGT peers. These plaintiffs comprise an important part of the LGBTQ+ community, but are at risk of lacking these protections if *Bostock* is historicized in a way that leaves them stranded. Luckily, the consistency approach folds them into the ambit of *Bostock*'s protection.

199. *See supra* Section I.C.
200. *Bostock*, 140 S. Ct. at 1740.

As several pieces have observed,[201] *Bostock* is silent on the applicability of its holding to nonbinary plaintiffs[202] and in fact employs binary language throughout the opinion.[203] Particularly worrisome is that Justice Alito writes in his *Bostock* dissent with the greatest awareness of nonbinary gender identity.[204] *Bostock* also does not mention bisexual plaintiffs, which concerns some commentators because "bisexuality can be defined without reference to the sex of the employee."[205] However, nonbinary and bisexual plaintiffs can avail themselves of *Bostock*'s SOGI-discrimination prohibition when *Bostock* accommodates an understanding of how these identities contravene established sex stereotypes: namely, cisnormativity (the presumption that it is normal to be cisgender) and monosexuality (the presumption that it is normal to only be attracted to one sex, rather than multiple).

The logic of sex-stereotyping doctrine naturally extends to nonbinary plaintiffs because nonconformity to gender stereotypes includes not conforming to gender at all. Consider the hypothetical nonbinary plaintiff "Robin": by not identifying or presenting as one of the binary genders, Robin is disrupting gendered stereotypes, regardless of what sex they were assigned at birth. Requiring Robin to present as either a man or a woman is to require them to conform to sex stereotypes[.]"[206] Unlike *Bostock* itself, which describes behavior an employer would tolerate in an employee of a different sex, *Price Waterhouse*'s stereotyping doctrine does not require tolerance of those traits elsewhere.[207] Rather, it simply requires that the employer discriminate based on *in*tolerance (i.e., of behavior or dress inconsistent with stereotypes based on birth-assigned sex).[208]

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201. *E.g.*, Russell, *supra* note 73; Meredith R. Severtson, *Let's Talk About Gender: Nonbinary Title VII Plaintiffs Post*-Bostock, 74 Vand. L. Rev. 1507, 1527 (2021); Nancy C. Marcus, Bostock v. Clayton County *and the Problem of Bisexual Erasure*, 115 Nw. U. L. Rev. 223 (2020); Elizabeth Gross, *Where Is the 'B' in* Bostock*? An Overview of the Supreme Court's Expansion of Title VII's Protection to LGBTQ+ Employees and the Impact of the Supreme Court's Exclusion of Bisexual, Nonbinary, and Other Minority Sexual Identities and Gender Orientation:* Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)*, 48 W. St. U. L. Rev. 23 (2021).

202. "Although the Court uses the term 'transgender,' a term that includes non-binary individuals, the Court uses examples only of transgender individuals who identify as either male or female." McGinley et al., *supra* note 67, at 15. McGinley worries, under *Bostock*, "an employer could claim that it does not care what sex an individual employee is or was identified as at birth: it simply will not tolerate any individual who does not identify as either male or female." *Id.*

203. *See* Severtson, *supra* note 201, at 1525–27 (reporting the majority opinion "repeatedly used language like 'the other sex; and 'opposite sex'" and its "hypotheticals presupposed a gender binary": "'Hannah' (a woman) and 'Bob' (a man)").

204. *Bostock*, 140 S. Ct. at 1779 (Alito, J., dissenting) (worrying "individuals who are 'gender fluid' . . . may claim the right to use the bathroom or locker room assigned to the sex with which the individual identifies").

205. Severtson, *supra* note 201, at 1531.

206. *Id.*

207. *See supra* text accompanying notes 190–194.

208. *Id.*

For example, a narrow reading of *Bostock* would say that an employer who discriminates against an employee assigned male at birth for using they/them pronouns would only be liable if the employer explicitly tolerated an employee assigned female at birth using those pronouns. Satisfying this condition would be unlikely if the employer believes in a strict gender binary and thus detests all uses of they/them. But under a reading of *Bostock* as legitimating *Price Waterhouse*'s stereotyping holding, which lacks that opposite-sex tolerance requirement and simply says that discrimination based on failure to conform to sex stereotypes is enough, discrimination based on the use of they/them pronouns alone would be sufficient for liability, and the plaintiff would not need to find an employee assigned female at birth to be a comparator. *Bostock* provides that if an employee's sex is an inextricably part of the adverse action, it is sex discrimination. In this example, where the employer is discriminating against the employee because they are not using the pronouns the employer stereotypically associates with those assigned male at birth, sex is indeed an inextricable part of the adverse action. Accordingly, the employer would be liable for a Title VII violation.

It is in this way that the consistency approach allows *Bostock* to enable nonbinary plaintiffs to bring statutory sex-discrimination claims.[209] As Catharine MacKinnon recently put it, "*Bostock* does not address discrimination against nonbinary persons as such, but it could arguably be developed . . . to cover them with a beefed up anti-stereotyping analysis . . . ."[210] A District of the District of Columbia judge, for instance, gestures towards a definition of *Bostock*'s protection of transgender plaintiffs that would include nonbinary ones, noting the "fairly strong case" that *Bostock* "yield[s] the conclusion that the [Title IX] forbids discrimination based on . . . sex stereotyping, insofar as such stereotypes are based on the belief that an individual should identify with only their birth-assigned sex."[211] This correctly identifies the relevant stereotype as cisgenderism—meaning that the transgression of the stereotype includes non-cisgender plaintiffs. This "non-cisgender plaintiffs" category necessarily includes transgender *and* nonbinary individuals. Moreover, the extent to which nonbinary plaintiffs experience discrimination as a function of nonconforming behavior[212] suggests that sex-stereotyping doctrine would

209. *See, e.g.*, Roberts v. Glenn Industrial Corp., 998 F.3d 111, 121 (4th Cir. 2021) ("[T]he Supreme Court's holding in *Bostock* makes clear that a plaintiff may prove that same-sex harassment is based on sex where the plaintiff was perceived as not conforming to traditional male stereotypes.").

210. Catharine A. MacKinnon, *A Feminist Defense of Transgender Sex Equality Rights*, 34 Yale J.L. & Feminism 88, 93 n.30 (2023).

211. Whitman-Walker Clinic, Inc. v. HHS, 485 F. Supp. 3d 1, 40 (D.D.C. 2020) (emphasis added).

212. *See, e.g.*, S.E. James, et al., *The Report Of The 2015 U.S. Transgender Survey*, Nat'l Ctr. Transgender Equality 154 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf (finding nonbinary employees nearly twice as likely as transgender men and women employees to not ask employers to use correct pronouns, due to fear of discrimination).

provide nonbinary plaintiffs with ample protection in practice. The consistency approach thereby preserves a key path to statutory protection from sex discrimination for nonbinary plaintiffs.

Bisexual plaintiffs similarly fail to conform to gender stereotypes by not being heterosexual, which, as Judge Gertner wrote, is a definitive sex stereotype.[213] And, just as how sex-stereotyping works for their nonbinary peers,[214] bisexual plaintiffs are uniquely protected when sex-stereotyping doctrine is not interpreted as requiring tolerance of their traits elsewhere (i.e., as when possessed or performed by individuals assigned a different sex at birth).

Bisexuals' nonconformity to sex stereotypes arises not just from same-sex attraction—but also from lack of *exclusiv*e opposite-sex attraction. Indeed, to describe discrimination against bisexual plaintiffs as just homophobic erases bisexuality lumping all bisexuals in with gays/lesbians, adding oxygen to the biphobic argument that all bisexuals (particularly bisexual men) are simply gay and not a distinct subgroup who face a correspondingly distinct kind of discrimination that deserves redress.[215] By contrast, the consistency approach to *Bostock* definitively includes bisexual plaintiffs as potential claimants and describes the discrimination they face in accurate terms, rather than ones that exacerbate biphobia. Monosexuality is a sex stereotype, and a reading of *Bostock* that maintains the viability of sex-stereotyping allows bisexual plaintiffs to name how their transgression of said stereotype gives rise to the discrimination they experience. The presumption of monosexuality is itself a stereotype that, even if it plagues both men and women, is nonetheless inextricably tied to sex.

Pre-*Bostock* SOGI-discrimination decisions based on sex-stereotyping reflect this understanding of bisexuality as a sex-stereotype transgression. For instance, the Seventh Circuit panel's pre-*Bostock* decision in *Ivy Technical* explicitly included bisexual plaintiffs in its understanding of the wrongs of sexuality-based sex-stereotyping, by explaining how compulsory heterosexuality intersects with compulsory monosexuality.[216] The panel noted that "all gay, lesbian and bisexual persons fail to comply with the *sine qua non* of gender stereotypes—that all men should form intimate relationships only with women, and all women should form intimate relationships only with men."[217] The court confirmed this understanding *en banc*.[218]

Maxon, a post-*Bostock* decision, echoes this reasoning:

213. Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (referring to "heterosexually defined gender norms").

214. *See supra* text accompanying note 208.

215. *See* Beth A. Firestein, Bisexuality: The Psychology and Politics of an Invisible Minority 223 (1996) ("[P]olitical conservatives and the religious right consistently categorize bisexuals together with lesbians and gay men."); *id.* at 222 (observing that despite "considerable overlap between homophobia and biphobia," there are also "specific ways in which each is unique").

216. Hively v. Ivy Tech. Cmty. Coll., 830 F.3d 698, 711 (7th Cir. 2016).

217. *Id.*

218. *Id.* at 246.

> Plaintiffs allege[d] that they were treated differently than similarly situated persons of the opposite sex based on the stereotype that *men are married to women*. . . . [I]t is impossible to distinguish between discrimination on the basis of "gender stereotypes" and discrimination on the basis of "sexual orientation."[219]

As Gorsuch put it in *Bostock*, the stereotype that men are married to women—and thus impliedly, *only* to women—"doubles rather than eliminates Title VII liability."[220] It bakes in an assumption of monosexuality which, demonstrates that discrimination based on bisexuality is a form of sex-stereotyping. The consistency approach to *Bostock* provides a path forward for bisexual plaintiffs advancing statutory sex-discrimination claims by drawing a through line from pre-*Bostock* sex-stereotyping cases (such as *Ivy Technical*) to *Bostock* to post-*Bostock* sex-stereotyping cases (such as *Maxon*).

2. Other Forms of LGBTQ+ Subjugation

In addition to key subgroups in the LGBTQ+ community, key contexts—specifically, sex-segregated bathrooms and sex-specific dress codes—were also left out of *Bostock*. In demurral, *Bostock* itself said that laws regarding "sex-segregated bathrooms, locker rooms, and dress codes" were not "before us today."[221] Yet they may be soon: in the 2023 legislative session alone, half of the laws introduced in state legislatures were to prevent transgender people from using bathrooms and other intimate facilities consistent with their gender identities.[222]

However, *Bostock* may still provide a path forward for plaintiffs advancing claims against these bathroom and dress code policies under the consistency approach, given that these policies violate sex-stereotyping principles. After all, *Bostock* was simply silent on these policies—not explicitly permissive. But, because of the *Bostock* Court's demurral, plaintiffs challenging these policies under statutory sex-discrimination prohibitions cannot rely on *Bostock* alone. Accordingly, only through synthesizing *Bostock* with sex-stereotyping doctrine can plaintiffs in these cases avail themselves of *Bostock*'s pro-LGBTQ+ promise. Sex-segregated bathrooms and sex-specific dress codes are rife with stereotypical assumptions, which *Bostock* helps unearth. Based on birth-assigned sex, sex-segregated bathrooms presume patterns of behavior, and sex-specific dress codes impose sex-role performance.

On bathrooms, admittedly even the foremost post-*Bostock* victory for transgender bathroom rights thus far has construed *Bostock* narrowly. In *Grimm*, the Fourth Circuit found a Title IX violation, but only because Grimm

219. 549 F. Supp. 3d 1116, 1124 (C.D. Cal. 2020), *aff'd*, No. 20–56156, 2021 WL 5882035 (9th Cir. Dec. 13, 2021) (emphasis added).

220. *Bostock*, 140 S. Ct. at 1742–43.

221. *Id.* at 1753; *see also id.* ("[W]e do not purport to address bathrooms, locker rooms, or anything else of the kind.").

222. *See Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, Am. Civ. Liberties Union, https://www.aclu.org/legislative-attacks-on-lgbtq-rights.

challenged the "exclusion of *himself* from the sex-separated restroom matching his gender identity," not the *policy* of "sex-separated restrooms themselves"—including in part because he had "consistently and persistently identified as male," was "clinically diagnosed with gender dysphoria," and had been prescribed "using the boys restroom as part of the appropriate treatment[.]"[223] The Fourth Circuit declined to address whether sex-stereotyping doctrine applied because, "having had the benefit of *Bostock*'s guidance," it did not feel the "need [to] address whether Grimm's treatment was also 'on the basis of sex' for purposes of Title IX under a *Price Waterhouse* sex-stereotyping theory."[224] In other words, because *Bostock* provided one path to its holding, the court did not feel as though it need to take a second path there.

For less perfect plaintiffs than *Grimm*, however, sex-stereotyping claims may be a lifeline, not an afterthought. A trans boy without a clinical diagnosis of gender dysphoria, let alone a treatment plan that includes using the boys' restroom, is not protected under *Grimm*, wherein the plaintiff had both of those things. And that boy may be fine with, and indeed prefer, a boys' bathroom that is separate from the girls', so long as his access to the former is not conditioned on being cisgender. This result exemplifies the harms of relying on *Bostock* alone. Here, then, the sex-stereotyping argument would provide redress through the consistency approach.

For an articulation of the sex-stereotyping theory applied to bathrooms, one need only look to the Fourth Circuit's equal-protection analysis in Grimm, which explained how categorical discrimination against transgender individuals (rather than individualized treatment based on specific diagnoses or prescriptions) still constitutes impermissible sex-stereotyping.[225] Ultimately, the Eleventh Circuit rejected the sex-stereotyping argument for bathroom access, holding that a sex-segregated bathroom policy was "based on biological sex, which is not a stereotype."[226] Still, the Fourth Circuit's equal-protection analysis in *Grimm* demonstrates that courts can recognize that categorizations based on biological sex can *amount* to sex-stereotyping when they impose the cisnormative stereotype that those assigned male at birth must identify as boys or men, and therefore must use the boys' or men's bathroom. The consistency approach to *Bostock* for transgender plaintiffs extends that reasoning to the bathroom/intimate-facility context.

Sex-specific dress codes similarly comprise sex-stereotypical burdens, despite *Bostock*'s demurral on them. Of course, some courts have taken *Bostock*'s demurral as permission. For example, a Northern District of Texas judge recently upheld a sex-specific dress code in spite of *Bostock*,[227] includ-

223. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 618–19 (4th Cir. 2020) (emphasis added).

224. *Id.* at 617 n.15.

225. *Id.* at 608–10.

226. Adams v. Sch. Bd. of St. Johns Cnty., Fla., 57 F.4th 791, 809 (11th Cir. 2022).

227. Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 624 (N.D. Tex. 2021), *aff'd in part, vacated in part, rev'd in part sub nom.* Braidwood Mgmt., Inc. v. EEOC, 70

ing by reading *Bostock* as permitting "sex-neutral codes of conduct that apply equally to each biological sex."[228] (The Fifth Circuit, on appeal, declined to categorically hold that *Bostock* expressly permits these dress codes, instead evading the question on a procedural technicality.[229]) But, if transgender men are being told to apply makeup, wear traditionally feminine clothing, and engage in other behavior inconsistent with their gender identity that is textbook sex-stereotyping—especially if cisgender men are receiving parallel instructions regarding traditionally masculine standards of appearance.

Notably, there has long been ample room in dress-code cases for sex-stereotyping doctrine. Well before *Bostock*, courts have been willing to strike down sex-specific dress codes when they perpetuate sex stereotypes for women—even if sex-specific dress codes are not per se impermissible. For instance, in 1987, a Southern District of Ohio judge struck down a dress code requiring female sales clerks to wear a "smock," while their male counterparts were allowed to wear shirts and ties," because it "perpetuate[d] sexual stereotypes" even without a discriminatory motive.[230] Other examples abound.[231]

More broadly, courts have recognized that instructions or pressure to dress more in accordance with stereotypes for one's birth-assigned sex can amount to evidence of impermissible sex discrimination.[232] The consistency approach to *Bostock* extends this longstanding principle of statutory sex-discrimination law to SOGI-discrimination plaintiffs, as the consistency approach to *Bostock* makes clear that transgender and gay plaintiffs have joined cisgender women in the ambit of Title VII's protection.

B. *Tracking Reality*

Perhaps the greatest argument for the consistency approach to *Bostock* is that the discrimination faced by SOGI-discrimination plaintiffs often takes the form of sex-stereotyping. The consistency approach thus better captures the reality of SOGI discrimination, which often turns not on the *fact* of plaintiffs' protected class (status), but on their *behavior's* contravention of expected sex stereotypes (conduct). Ensuring that both claims are actionable allows more adverse employment actions to be recognized as actionable Title VII

F.4th 914 (5th Cir. 2023).

228. *Id.* at 606.

229. *Braidwood*, 70 F.4th at 940.

230. O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987); *compare* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1112 (9th Cir. 2006) (declining to strike down a gender-specific code, but in part because "[t]here is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear").

231. *See, e.g.*, Carroll v. Talman Fed. Savings & Loan Ass'n of Chicago, 604 F.2d 1028, 1033 (7th Cir. 1979) (striking down a dress code requiring women to wear two-piece, color-coordinated uniforms supplied by the employer (while men could wear "customary business attire") because it was "based on offensive stereotypes prohibited by Title VII").

232. *See, e.g.*, Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215–16 (1st Cir. 2000)("[U]nder *Price Waterhouse*, 'stereotyped remarks' [such as statements about dressing more 'femininely'] can certainly be evidence that gender played a part.").

violations—meaning that plaintiffs will not just be able to state their claims and survive motions to dismiss, but prove their claims and receive justice. Indeed, treating sex-stereotyping law as distinct from *Bostock* risks triggering the problem raised by plaintiff's lawyers in *Zarda*, a lower court case consolidated in *Bostock*:

> If this Court were to reverse the decision below [holding "sexual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination"[233]] . . . it would launch the lower courts on the futile exercise of trying to distinguish between sexual-orientation and sex-stereotyping claims involving appropriate sex presentation and sex roles.[234]

Consider the fact pattern from *Sarco*, which illustrates just how precisely courts can and do delineate between status and conduct—often to the detriment of plaintiffs who faced discrimination on both fronts. In *Sarco*, plaintiff was "'confident' everyone in the office was aware he identified as homosexual"—not because he discussed having a boyfriend, husband, or male sexual partners, but "due to his openness about his orientation, as well as his effeminate mannerisms and clothing, long hair, flamboyant apparel, and a high-pitched voice which resulted in some clients presuming he was female on the phone."[235]

Sarco advanced both a sex-stereotyping claim under *Price Waterhouse* and a sexual-orientation discrimination claim under *Bostock*, but was forced to artificially disaggregate the underlying facts in order to support both counts. For the sex-stereotyping claim, Sarco emphasized that he was "a man who openly flouts gender norms and possesses an 'effeminate' manner" and pointed out "that the office singled him out in giving him additional work that did not involve client interactions and that his superiors were more stringent in applying or adapting the office dress code to penalize his choices in clothing."[236] For the sexual-orientation discrimination claim, Sarco pointed to comments made about his status as a homosexual man, the fact that his boyfriend (of whom his employer later became aware) was denied an interview, "his superiors' decision to cater a work event from Chik-fil-A, and his superior's hesitation to enter a bathroom when he was occupying it[.]"[237] The former set of events related to his conduct (as a man transgressing sex stereotypes) were adverse employment actions experienced by Sarco himself; the latter set related to his status (as a gay man) were mostly "stray remarks" that could be dismissed as irrelevant or adverse actions experienced by Sarco's boyfriend. Clearly, it was important to Sarco's case that the former set make their way into the pleadings in order for him to build up a sufficient *prima facie* case of employment discrimination that would survive a motion to dismiss.

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233. Zarda v. Altitude Express, Inc., 883 F.3d 100, 122 (2d. Cir 2018).

234. Opening Brief for Respondents at 29, Zarda v. Altitude Express, Inc., 140 S. Ct. 1731, *sub nom. Bostock* (No. 17–1623).

235. No. 5:19cv86, 2020 WL 5507534, at *2 (W.D. Va. Sept. 11, 2020).

236. *Id.* at *7.

237. *Id.*

Sarco ultimately prevailed on both claims, but only despite—not because of—the hurdle about which plaintiff's lawyers warned in their *Zarda* brief. The court in *Sarco* noted that "[t]hough after *Bostock* there is substantial overlap between the two theories of liability, *the sexual orientation discrimination claim rests on some distinct facts*," and the sex-stereotyping claim "rests on his perceived adherence to expectations of 'masculinity,' not his actual sexual orientation[.]"[238]

Had the *Sarco* court relied on *Bostock* alone, rather than incorporating the sex-stereotyping approach, important adverse actions—exclusion from client interactions, disparate treatment regarding dress code—would not have been actionable under Title VII. At best, they would have amounted to atmospheric evidence of discrimination, which does little to establish a *prima facie* case. Moreover, although *Sarco* demonstrates the persistent availability of sex-stereotyping arguments for SOGI-discrimination plaintiffs, its reasoning engages in the exact kind of "futile exercise" of which Zarda's lawyers warned. By instead taking the consistency approach to *Bostock*, courts can be better positioned to see and name homophobia and transphobia as what it so often is: "[p]rescriptive [s]ex [s]tereotyping."[239]

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The project of interpreting landmark cases is technically never-ending. Even the most settled precedents have been subject to novel framings, leaving their legacy up for debate.[240] However, amid mass handwringing about the fate of sex-stereotyping doctrine after *Bostock*, the consensus post-*Bostock* lower courts are forming on the question of sex-stereotyping is a useful indication of the shape *Bostock*'s legacy is taking. In the wake of *Bostock*, SOGI-discrimination plaintiffs have continued to avail themselves of sex-stereotyping doctrine, often explicitly *because* (not in spite) of *Bostock*. Interpretation of *Bostock* as consistent with the sex-stereotyping cases that preceded it avoids what Gorsuch might term a "curious discontinuity"[241] in statutory sex-discrimination law. Rather, it represents a curious *continuity*.

238. *Id.* (emphasis added).

239. *See* Eskridge, *supra* note 40, at 362.

240. *Compare* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2262 (2022) (implying *Dobbs* stands with *Brown v. Bd. of Educ.*, 347 U.S. 493 (1954)) *with id.* at 2316 (Roberts, J., concurring) (noting the *Brown* opinion was "unanimous and eleven pages long" but "this one is neither"); *see also id.* at 2341 (Breyer, Sotomayor & Kagan, JJ., dissenting) (rejecting the majority's invocation of *Brown*).

241. *Bostock*, 140 S. Ct. at 1479.