REVERSE SEXUAL HARASSMENT: MALE HARASSERS AS VICTIMS OF SEX DISCRIMINATION

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ABSTRACT

Reverse discrimination has long been asserted by majority group members to resist the assertion of equal rights by less privileged groups. Recently, a new type of reverse discrimination claim has gained traction: sex discrimination lawsuits brought by men disciplined for sexual harassment. This claim first appeared in Title IX, with lawsuits brought by male students facing disciplinary action by colleges and universities for sexual harassment. Initially, courts easily dismissed these claims for lack of discriminatory intent against men. In the past decade, however, this claim—referred to here as reverse sexual harassment—has met with increasing success. More recently, reverse sexual harassment has begun to migrate into employment law in cases brought by male employees suing their employers for sex discrimination after facing discipline for sexual harassment. A perfect storm of factors made universities an attractive initial target for reverse sexual harassment claims, but the logic of the claim is not limited to the university setting.

This Article is the first to comprehensively examine reverse sexual harassment and the cultural and legal landscape in which it has taken root. Research for this Article identified 98 cases, producing 139 reported decisions, in which male plaintiffs alleged anti-male bias in their universities' handling of sexual harassment allegations against them. In the past decade, these claims have gone from near sure losers

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to having a good chance at surviving a motion to dismiss and, to a lesser extent, summary judgment. The Article critically explores judges' willingness to infer discriminatory intent in these cases. Title IX is not unique in its growing receptiveness to reverse sexual harassment claims. A smaller but notable set of cases by male employees have successfully alleged anti-male bias in their employers' responses to accusations of sexual harassment. Although not yet a large run of cases, now that reverse sexual harassment litigation has become more successful under Title IX, and the perception of reverse discrimination generally has become ubiquitous, reverse sexual harassment claims are likely to spread further into employment discrimination law. A backlash against diversity, equity, and inclusion (DEI) is bringing greater scrutiny to employer efforts to address discrimination and inequality in the workforce—a scrutiny likely to extend to employer efforts to mitigate sexual harassment.

This Article makes two major contributions to legal scholarship. First, it identifies and examines this newly ascendant species of reverse discrimination, putting it on the radar of legal scholars, practitioners, and advocates. Second, it lays the groundwork for contesting courts' lenient approach to inferring anti-male bias from perceived unfairness in disciplinary proceedings and tougher enforcement of sexual harassment law. Reverse discrimination litigation, more so than challenges to procedural unfairness, has the potential to slow and even reverse enforcement of sexual harassment law and good faith efforts to comply with it. The Article calls for further efforts to deepen judicial understanding of sexual harassment's grounding in antidiscrimination law to make it less susceptible to reflexive reversal. A fundamental part of this response must be to recognize that men, too, have a stake in eradicating sexual harassment. Restoring the law's more skeptical stance on reverse sexual harassment claims requires breaking away from the men-versus-women, zero-sum perspective that fuels perceptions of reverse discrimination and undermines public support for sexual harassment law.

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INTRODUCTION

Reverse discrimination has long been asserted by majority group members in response to laws and policies designed to ameliorate harms to subordinated groups.[1] Lawsuits challenging affirmative action in higher education are just one example of successful litigation to roll back such measures.[2] Buoyed by an Executive Order equating diversity, equity, and inclusion (DEI) with unlawful discrimination, opponents of DEI are now aggressively targeting efforts to promote equality for women and people of color.[3] After the Supreme Court's decision in *Ames v. Ohio Department of Youth Services*[4] made it easier for majority group members to allege discrimination, reverse discrimination claims are likely to arise even more frequently.[5]

This Article identifies and examines a distinctive type of reverse discrimination claim—referred to here as reverse sexual harassment—that has been relatively neglected in legal scholarship despite its proliferation in the past decade: sex discrimination lawsuits brought by men disciplined for sexual

1. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 324–25 (2023) (Jackson, J., dissenting) (discussing President Johnson's veto message, explaining his veto of a civil rights bill passed during Reconstruction that would guarantee all citizens the same rights as enjoyed by white citizens, on the grounds that the bill would discriminate against white Americans).

2. *See id.* at 181 (invalidating affirmative action plans used by Harvard University and the University of North Carolina).

3. See Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025); Memorandum from Att'y Gen., *Ending Illegal DEI and DEIA Discrimination and Preferences*, Off. Att'ys Gen. (Feb. 5, 2025); Sarah Mervosh & Dana Goldstein, *A Legal Battle Over Trump's Threats to Public School Funding Has Begun*, N.Y. TIMES, (Apr. 17, 2025), https://www.nytimes.com/2025/04/17/us/dei-public-schools-trump-administration-lawsuit.html# [https://perma.cc/NU45-AMQQ]; *see generally* Sonja Starr, *The Magnet School Wars and The Future of Colorblindness*, 76 STAN. L. REV. 161, 163 (2024) (discussing the future of the conservative legal movement's push to expand the law's embrace of colorblindness).

4. 605 U.S. 303 (2025).

5. *See id.* at 309 (eliminating the heightened requirement imposed by some courts on members of majority groups to show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority" in order to establish a prima facia case of employment discrimination under Title VII of the Civil Rights Act of 1964) (internal citations omitted); *id.* at 318 n.3 (Thomas, J., concurring) (calling the background circumstances test "nonsensical" for assuming that only unusual employers discriminate against the majority, and countering that employer DEI programs "have often led to overt discrimination against those perceived to be in the majority").

harassment. This claim first took root in Title IX actions by male students facing disciplinary actions by colleges and universities for sexual assault, a form of sexual harassment covered by Title IX.[6] Initially, courts easily dismissed such claims for lack of discriminatory intent against men.[7] In the past decade, however, reverse sexual harassment has met with increasing success.[8] In the past few years, reverse sexual harassment has begun to migrate into Title VII in cases brought by male employees suing their employers for sex discrimination after facing discipline for sexual harassment in the workplace.[9] A perfect storm of factors made universities a ripe target for reverse sexual harassment claims to germinate, but the logic of the claim is not limited to universities.[10] This Article is the first to examine reverse sexual harassment as a species of reverse discrimination and to analyze the collection of forces—psychological, societal, and legal—driving it.

While other scholars have pointed out courts' growing receptiveness to Title IX lawsuits brought by male students challenging their universities' handling of sexual assault charges against them,[11] this Article undertakes the first comprehensive study of the burgeoning case law in this area. Research for this Article identified ninety-eight reported cases, producing a total of 139 court decisions, in which male plaintiffs alleged anti-male bias in their universities' handling of sexual harassment allegations.[12] In the past decade, these claims, which allege sex

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6. *See* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)(1). For background on Title IX's applicability to sexual harassment, see *infra* Section IV.B.

7. *See infra* Section II.A.

8. *See infra* Section II.A; Dana Bolger, Alexandra Brodsky & Sejal Singh, *A Tale of Two Title IXs: Title IX Reverse Discrimination Law and Its Trans-Substantive Implications for Civil Rights*, 55 U.C. DAVIS L. REV. 743, 743 (2021).

9. *See infra* Section II.A.

10. *See infra* Section III.B; Nicholas Confessore, *'America is Under Attack': Inside the Anti-D.E.I. Crusade*, N.Y. TIMES (Jan. 20, 2024), https://www.nytimes.com/interactive/2024/01/20/us/dei-woke-claremont-institute.html [https://perma.cc/4D7L-4MWS].

11. *See* Bolger et al., *supra* note 8, at 756–58; Kelly Alison Behre, *Deconstructing the Disciplined Student Narrative and Its Impact on Campus Sexual Assault Policy*, 61 ARIZ. L. REV. 885, 887–88 (2019).

12. A complete listing of the cases and court decisions analyzed herein is on file with the author.

discrimination against men in violation of Title IX, have gone from being near sure losers to having a good chance at surviving a motion to dismiss and even, to a lesser extent, summary judgment.[13] When the first such cases were brought, courts typically viewed unfairness toward male students in campus disciplinary proceedings for sexual harassment as, at best, a violation of procedural due process or university policies.[14] Judges distinguished unfairness to students accused of sexual misconduct from the kind of factual showing necessary to support an inference of discriminatory intent against men.[15] In the past decade, however, courts have become significantly more likely to side with plaintiffs in these cases, finding allegations of anti-male bias to be plausible enough to survive a motion to dismiss.[16] On my reading of the case law, the reason for this shift is not a stronger factual predicate for these lawsuits, but rather the social and political context and cultural discourses that made anti-male bias appear more plausible to judges.[17] A similar trajectory, albeit in a smaller number of cases, has occurred in court rulings on motions for summary judgment in these cases.[18]

Title IX is not unique in its growing receptiveness to reverse sexual harassment. A smaller but notable set of cases brought by male employees has successfully alleged that their employers acted with anti-male bias in disciplining them for sexual harassment.[19] Although not yet a large run of cases, now that reverse sexual harassment has become more successful in Title IX litigation, such claims are likely to spread further into Title VII.[20]

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13. *See infra* Section II.A; Bolger et al., *supra* note 8, at 786.

14. *See infra* Section II.A.

15. *See id*.

16. *See infra* Figure 1.

17. *See* Section II.A. For a discussion of the cultural and political context driving the increased receptiveness toward reverse sex discrimination, see Behre, *supra* note 11, at 887–88; Clara L. Wilkins, Joseph D. Wellman, Laura G. Babbitt, Negin R. Toosi & Katherine D. Schad, *You Can Win but I Can't Lose: Bias Against High-Status Groups Increases Their Zero-Sum Beliefs About Discrimination*, 57 J. EXPERIMENTAL SOC. PSYCH. 1, 1–2 (2015) [hereinafter, *You Can Win*].

18. *See infra* Section II.A.

19. *See infra* Section III.A–B.

20. *See infra* Section II.A.

Similar forces that propelled reverse sexual harassment litigation under Title IX are on the horizon for employers.[21] A backlash against DEI and related efforts to address gender and racial inequities have brought employers under increasing scrutiny.[22] Employers who take strong measures against sexual harassment may soon find themselves in a similar position as universities—as defendants in cases alleging sex discrimination against men.[23] A recent spate of cases against university employers for terminating male employees found to have engaged in sexual harassment likely foreshadows future efforts to use reverse discrimination claims to protect a broader range of male employees facing discipline for sexual harassment.[24]

This Article contributes to legal scholarship on antidiscrimination law and sexual harassment by identifying and examining this newly ascendant species of reverse discrimination. Reverse discrimination litigation, more so than challenges to procedural unfairness, has the potential to slow down and throw into reverse the enforcement of antidiscrimination law and good faith efforts to comply with it. While procedural fairness objections can be addressed through process changes without derailing sexual harassment law—indeed, procedural fairness is complementary to and fully consistent with the objectives of sexual harassment law[25]—challenging institutional responses to sexual harassment as discrimination against men threatens to undermine the project of sexual harassment law altogether. This Article is the first to analyze reverse sexual harassment as a species of reverse discrimination and to situate it

21. *See infra* Section IIIA.

22. *See infra* pp. 46, 56–57. The Trump Administration's wave of Executive Orders continued these attacks on DEI and related programs. *See Trump's Executive Orders on Diversity, Equity, and Inclusion, Explained*, THE LEADERSHIP CONF. ON CIV. AND HUM. RTS. (Feb. 12, 2025), https://civilrights.org/resource/anti-deia-eos/ [https://perma.cc/9MNW-LPLM].

23. *See infra* Part III.

24. *See infra* Section III.B.

25. *See, e.g.*, Sarah L. Swan, *Discriminatory Dualism*, 54 GA. L. REV. 869 (2020) (analyzing discriminatory dualism in multiple contexts including, but not limited to, policing, housing, and employment); Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Procedures from Title IX*, 66 J. LEGAL EDUC. 822 (2017) (explaining the fair disciplinary process from Title IX and the decades-old movement to end campus gender violence).

within the broader societal and legal developments behind the growing success of this claim. It critically examines the legal doctrine and theory behind the reverse sexual harassment claim and argues that courts have been too quick to infer anti-male intent from tough institutional responses to sexual harassment allegations. Further efforts are needed to deepen judicial understanding of sexual harassment to make it less susceptible to reflexive reversal.[26] A fundamental part of this response must acknowledge that men, too, have a stake in eradicating sexual harassment, and that accountability for sexual harassment should not be understood as a zero-sum game in which men and women have competing and oppositional interests.[27]

Part I examines the social, psychological, and political context in which reverse sexual harassment claims have arisen with greater frequency. It begins by surveying the social science literature on the belief systems that affect dominant groups' perceptions of reverse discrimination. Zero-sum beliefs and the belief in a just world are key drivers of men's perceptions of the likelihood and prevalence of discrimination against men.[28] When threats to the status quo of gender relations loom large, these belief systems contribute to an increase in perceptions of reverse discrimination. The push to strengthen Title IX enforcement during the Obama Administration, combined with the #MeToo movement that took off in 2017, together precipitated a deluge of counter-narratives of victimized men wrongly punished for sexual harassment.[29] When the political environment shifted under the first Trump Administration, the Administration capitalized on and amplified these narratives of reverse discrimination and turned them into policy changes.[30] The

26. *See* Lawrence D. Kramer, *Popular Constitutionalism, circa 2004*, 92 CALIF. L. REV. 959, 971 (2004).

27. *See infra* notes 51–55 and accompanying text.

28. *See* Sophie L. Kuchynka, Jennifer K. Bosson, Joseph A. Vandello & Curtis Puryear, *Zero-Sum Thinking and the Masculinity Contest: Perceived Intergroup Competition and Workplace Gender Bias*, 74 J. SOC. ISSUES 529, 529 (2018).

29. *See* Karen M. Tani, *An Administrative Right to Be Free from Sexual Violence: Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L.J. 1847, 1864–65 (2016).

30 *See infra* note 210–11 and accompanying text.

resulting policy changes further magnified the narrative of bias against men.[31] These developments set the stage for reverse discrimination claims to proliferate and receive a more receptive audience in the courts.

Part II undertakes the most in-depth examination to date of the Title IX reverse sexual harassment case law, detailing the increasing success rate of Title IX claims challenging male students' treatment in university disciplinary proceedings for sexual harassment. While earlier cases nearly always failed for lack of plausible allegations of discriminatory intent, over the past decade, similar complaints have met with increasing success.[32] Paradoxically, courts have used the tougher Title IX enforcement during the Obama Administration to bolster plaintiffs' allegations of bias against men, inferring anti-male bias in large part from the pressure facing universities created by stronger federal enforcement efforts.[33] In addition, the rulings for plaintiffs in these cases rely on the allegedly unfair treatment of accused harassers, a virtually all-male group.[34] The successful cases reflect a more lenient approach to proving discriminatory intent than courts typically use in discrimination cases. Even when these reverse sexual harassment cases ultimately lose in court, the sheer quantity of cases in the public eye shapes the narrative that Title IX enforcement has gone too far and is now discriminating against men.[35] That, in turn, renders claims of anti-male bias more plausible on their surface.

Title IX is not alone in its shift toward supporting claims for reverse discrimination brought by men disciplined for sexual harassment. Part III examines cases against employers brought by male employees who were terminated for sexual harassment in the workplace. Although smaller in number, these cases parallel the trend in Title IX. Like the Title IX case law, the successful cases have mostly involved university employers. However,

31. *Id.*
32. *See infra* Figure 1.
33. *See infra* notes 203–07 and accompanying text.
34. *See infra* Figure 1 and notes 212–17.
35. *See infra* Figure 1.

as anti-"woke" scrutiny of universities expands to target a much broader set of employers, any line separating universities from other employers in terms of their risk of facing reverse discrimination litigation is tenuous at best.[36] Like the Title IX case law, the successful reverse sexual harassment cases against employers stretch the boundaries of conventional discriminatory intent analysis to discern anti-male bias from alleged unfairness in employers' responses to accusations of sexual harassment.[37]

Part IV explores the doctrinal and theoretical basis for courts' receptivity to reverse sexual harassment claims. It argues that two cracks in the foundation of antidiscrimination law have fueled the success of reverse sexual harassment as a legal theory. Properly understood, neither of these pathways should support the lengths to which courts have gone in finding support for discriminatory intent against men disciplined for sexual harassment. The first opening is a rabbit hole forged in a Title VII reverse discrimination case, *Ricci v. DeStefano*,[38] a challenge to an employer's effort to avoid a racially disparate impact in promotion decisions.[39] In *Ricci*, the employer's desire to avoid a disparate impact against a racial minority was treated as the equivalent of discriminatory intent against white people.[40] Properly confined to its rationale, *Ricci* should not support inferring discriminatory intent from actions designed to benefit sexual harassment victims, a group that is known to be mostly women.[41] And yet, courts taking an expansive approach to discriminatory intent in reverse sexual harassment cases have mistaken intentional efforts to ameliorate sexual harassment,

36. *See* Nicholas Confessore, *'America is Under Attack': Inside the Anti-D.E.I. Crusade*, N.Y. TIMES (Jan. 20, 2024), https://www.nytimes.com/interactive/2024/01/20/us/dei-woke-claremont-institute.html [https://perma.cc/4D7L-4MWS].

37. *See, e.g.*, Sassaman v. Gamache, 566 F.3d 307, 313–15 (2d Cir. 2009) (ruling in favor of the male-plaintiff in a reverse sex discrimination claim against his employer).

38. 557 U.S. 557 (2009).

39. *Id.* at 561–63.

40. *Id.* at 579–80.

41. *Id.*

coupled with the knowledge of its gender impact, for discriminatory intent against men.[42]

The second place where reverse sexual harassment has found an opening in antidiscrimination law is in the thin legal theory that courts have used to explain why sexual harassment is a form of sex discrimination.[43] The conventional explanation, that the harasser would not have engaged in the offending sexual conduct but for the sex of the person targeted, proved vulnerable to reverse engineering by accused male harassers.[44] An alternative, impact-based explanation for the theory of sexual harassment as sex discrimination, that sexual harassment disproportionately harms women, can also be turned on its head: strong measures taken against sexual harassers fall most heavily on men.[45] But these accounts are neither the inevitable nor the best theories for sexual harassment's foundations in sex discrimination law.[46] A more robust theory of sex discrimination that is attentive to how the interpersonal dynamics of sexual harassment relate to systemic gender inequality within institutions would make sexual harassment law more resistant to reflexive reversal.[47]

Finally, both the underlying theory and public understanding of sexual harassment must allow room for acknowledging the reality that men, too, have a stake in addressing sexual harassment. The reverse sexual harassment claim implicitly denies the reality that men are also sexually harassed and that they may stand to gain from more egalitarian sexual relationships, unmarred by sexual harassment on the campuses and workplaces where they learn and work. Returning antidiscrimination law to a more skeptical stance on reverse sexual

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42. *See infra* Section III.B.

43. *See infra* pp. 121–22. For the first reported Title IX reverse discrimination case brought by a male student that opened the door for further claims, see Yusuf v. Vassar College, 35 F.3d 709, 711 (2d Cir. 1994).

44. *See* Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence, and Student Discipline in Education*, 54 WAKE FOREST L. REV. 303, 310–11 (2019).

45. *See infra* Section II.A.

46. *See* Behre, *supra* note 11, at 940–42.

47. *Id.*

harassment requires breaking away from the men-versus-women zero-sum mindset that fuels perceptions of reverse discrimination and undermines public support for sexual harassment law.

I. THE PSYCHOLOGICAL AND SOCIAL FORCES BEHIND REVERSE SEXUAL HARASSMENT

The surge in reverse sexual harassment litigation in the past decade did not come out of the blue. Social psychology research has found that people who hold certain belief systems are primed to view advances in women's rights, including stronger responses to sexual harassment, through the perspective of a zero-sum game in which women's gains equal men's losses. When confronted with a threat to the gender status quo, people who hold these beliefs are more likely to perceive an increase in discrimination against men. In the wake of stepped-up Title IX enforcement during the Obama Administration, coupled with the rise of the #MeToo movement, narratives depicting men as victims of an overly aggressive campaign against sexual harassment found a receptive audience. Policymakers in the first Trump Administration responded with changes to the Title IX regulations that amplified these narratives, setting the stage for reverse sexual harassment claims to flourish.

A. Zero-Sum Beliefs, Belief in a Just World, and the Perception of Reverse Discrimination

The reverse sexual harassment claim capitalizes on the growing perceptions by men of pervasive anti-male bias. In recent years, social science researchers have documented an increase in men's beliefs that they, and not women, are the primary victims of sex discrimination.[48] Researchers have labeled this phenomenon the "Belief in Sexism Shift" ("BSS") the belief that the tables have turned and that men now experience more

48. Miriam K. Zehnter, Francesca Manzi, Patrick E. Shrout & Madeline E. Heilman, *Belief in Sexism Shift: Defining a New Form of Contemporary Sexism and Introducing the Belief in Sexism Shift Scale (BSS Scale)*, 16 PLOS ONE 1, 1–2 (2021).

sex discrimination than women.[49] Two interrelated belief systems contribute to men's perception of reverse discrimination: the belief that gender relations are a zero-sum game and the belief in a just world.[50]

A core belief system underlying a dominant group's perception of reverse discrimination is that intergroup relations, such as between men and women or between white people and people of color, are a zero-sum game.[51] In a zero-sum game, one group's advances occur only at the expense of the other group's losses.[52] Zero-sum beliefs are more likely to be held by members of a dominant group than by members of a historically subordinated group.[53] For example, women and people of color are less likely than white men to agree with the statement that advancing social and economic rights for one group necessarily results in lost ground for the other.[54] Once established, zero-sum beliefs are not domain-specific; they extend across a variety of settings, including employment, education, wealth, and culture.[55]

Engaging in zero-sum thinking makes members of a dominant group more likely to perceive themselves as victims of discrimination.[56] Men who believe that gender relations are zero-

49. *Id.*; *see You Can Win*, *supra* note 17, at 1–2.

50. *See* Zehnter et al., *supra* note 48, at 1; Kuchynka et al., *supra* note 28, at 530, 532.

51. *See* Kuchynka et al., *supra* note 28, at 543–44; Raea Rasmussen, David E. Levari, Muna Akhtar, Chelsea S. Crittle, Megan Gately, Jeremy Pagan, Andrea Brennen, Dylan Cashman, Alia N. Wulff, Michael I. Norton, Samuel R. Sommers & Heather L. Urry, *White (but Not Black) Americans Continue to See Racism as a Zero-Sum Game*, 17 PERSP. ON PSYCH. SCI. 1800, 1800–01 (2022); Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSP. ON PSYCH. SCI. 215, 215–16 (2011).

52. *You Can Win, supra* note 17, at 1.

53. *See id.* at 1, 11; Zehnter et al., *supra* note 48, at 17.

54. *You Can Win*, *supra* note 17, at 2, 11 (finding that "high-status group members" were more likely to embrace zero-sum beliefs than members of historically marginalized groups). *See also* Clara L. Wilkins, Joseph D. Wellman, Negin R. Toosi, Chad A. Miller, Jaclyn A. Lisnek & Lerone A. Martin, *Is LGBT Progress Seen as an Attack on Christians? Examining Christian/Sexual Orientation Zero-Sum Beliefs*, 122 J. PERSONALITY & SOC. PSYCH. 73, 94 (2022) (finding that conservative Christians perceive a reduction in discrimination against the LGBTQ community as a threat of increased discrimination against Christians).

55. *See* Joelle C. Ruthig, Andre Kehn, Bradlee W. Gamblin, Karen Vanderzanden & Kelly Jones, *When Women's Gains Equal Men's Losses: Predicting a Zero-Sum Perspective of Gender Status*, 76 SEX ROLES 17, 23 (2016).

56. *You Can Win, supra* note 17, at 1, 13; Zehnter et al., *supra* note 48, at 1–2.

sum are more likely to believe that discrimination against men is pervasive.[57] They are also more likely to believe that women's rights have gone too far and that men now face more sex discrimination than women.[58] Paradoxically, the perception that men are being harmed by sex discrimination is not accompanied by feelings of empathy or support for women's rights.[59] Instead of feeling solidarity with women who have experienced sex discrimination, men who score high in BSS blame women's social and economic advancement for what they perceive as widespread discrimination against men.[60]

The relationship between zero-sum beliefs and the perception of reverse discrimination is synergistic. Just as zero-sum beliefs fuel perceptions of reverse discrimination, assertions of reverse discrimination promote zero-sum beliefs.[61] Experimental research confirms this interrelation.[62] In one study, male subjects who were assigned to read an account of a single instance of anti-male discrimination reported increased agreement with the statement that gender relations are a zero-sum game in which women's gains lead to men's losses.[63] In this way, zero-sum beliefs and perceptions of reverse discrimination feed off and reinforce each other.

A second, related belief is that the world is fundamentally just. The belief that the world is a meritocratic place primes members of dominant groups to perceive the expansion of rights for minority and historically subordinated groups as a threat.[64] Members of socially dominant groups, such as men and white people, are more likely than women and people of color to believe that the existing social order is a meritocracy; as a

57. *See You Can* Win, *supra* note 17, at 8.

58. *See* Ruthig et al., *supra* note 55, at 18; Dan Cassino, *Why More American Men Feel Discriminated Against*, HARV. BUS. REV. (Sep. 29, 2016), https://hbr.org/2016/09/why-more-american-men-feel-discriminated-against [https://perma.cc/2U4Z-YSTW].

59. Ruthig et al., *supra* note 55, at 24.

60. *Id.*

61. *See You Can Win*, *supra* note 17, at 12.

62. *See id.* at 11–12.

63. *Id.* at 8.

64. *See* Clara L. Wilkins & Cheryl R. Kaiser, *Racial Progress as Threat to the Status Hierarchy: Implications for Perceptions of Anti-White Bias*, 25 PSYCH. SCI. 439, 440 (2014).

result, they are more likely to view social change as a threat rather than an opportunity for societal improvement.[65] Adherence to the belief in a just world—also known as status-legitimizing beliefs—prompts people to respond more favorably to high status group members' claims of reverse discrimination.[66] For people who believe in a just world, perceiving a threat to the social order triggers zero-sum beliefs.[67] For example, when men who believe in a just world perceive a threat to the status quo of gender relations, they are more likely to engage in zero-sum thinking about men's and women's rights and to anticipate an increase in discrimination against men.[68]

One illuminating study documented the effects of perceiving a threat to the status quo on men who were primed to consider the implications of advances in women's rights for men's social position.[69] A study using male college subjects had the men read an excerpt highlighting women's recent progress toward equality in the workplace.[70] After reading the account, subjects in the study reported higher levels of agreement, compared to a control group, with the statement that gender relations are a zero-sum game in which men face more discrimination when women experience less of it.[71] The control group was comprised of male students who read an excerpt with different content emphasizing women's ongoing inequality.[72] Men in the

65. *Id.* at 445.

66. *See* Clara L. Wilkins, Joseph D. Wellman & Katherine D. Schad, *Reactions to Anti-Male Sexism Claims: The Moderating Roles of Status-Legitimizing Belief Endorsement and Group Identification*, 20 GRP. PROCESSES & INTERGROUP RELS. 173, 173–74 (2017).

67. *See* Gordon Hodson, Megan Earle & Maureen A. Craig, *Privilege Lost: How Dominant Groups React to Shifts in Cultural Primacy and Power*, 25 GRP. PROCESSES & INTERGROUP RELS. 625, 628 (2022); *You Can Win*, *supra* note 17, at 2; Joseph D. Wellman, Xi Liu & Clara L. Wilkins, *Priming Status-Legitimizing Beliefs: Examining the Impact on Perceived Anti-White Bias, Zero-Sum Beliefs, and Support for Affirmative Action Among White People*, 55 BRIT. J. SOC. PSYCH. 426, 426 (2016).

68. Hodson et al., *supra* note 67, at 634; *You Can Win*, *supra* note 17, at 2.

69. Kuchynka et al., *supra* note 28, at 538–39, 544–45 (describing the methods and results of the study, finding that after men were shown news articles about the gender wage gap, they were more inclined to exhibit "zero-sum thinking").

70. *Id.* at 538–39.

71. *See id.* at 541–43.

72. *Id.* at 538.

control group reported lower levels of agreement with the zero-sum understanding of gender relations and less concern about the potential for rising discrimination against men.[73] Perceiving reverse discrimination is a way of assuaging the threat to the dominant group's self-esteem resulting from a threat to the status quo.[74]

The BSS paradigm reflects a very different understanding of gender relations than that advanced by Ruth Bader Ginsburg in her litigation strategy in the 1970s.[75] Ginsburg famously represented male plaintiffs in challenges to sex discriminatory laws and practices, arguing that gender discrimination hurts men as well as women, and that both men and women stand to gain from the eradication of sexism and sex stereotyping.[76] In contrast to the Ginsburg theory, the BSS worldview posits that advancing women's rights benefits women at the expense of men. This belief system reduces support for laws and policies designed to address discrimination against women.[77]

In recent years, two related developments threatened the gender status quo with respect to how society and institutions react to allegations of sexual harassment. These developments set the table for increasing receptivity to claims of anti-male bias in institutional responses to sexual harassment.

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73. *Id.* at 543–45.

74. *See* Clara L. Wilkins, Alexander A. Hirsch, Cheryl R. Kaiser & Michael P. Inkles, *The Threat of Racial Progress and The Self-Protective Nature of Perceiving Anti-White Bias*, 20 GRP. PROCESSES & INTERGROUP RELS., at 1, 2, 8–9 (2016).

75. *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 84 (2010) (detailing the strategies and normative principles underlying Ginsburg's strategy of representing male plaintiffs).

76. *See generally* Deborah L. Brake, *Gender and the Law: Revisiting the Legacy of a Feminist Icon*, *in* THE JURISPRUDENTIAL LEGACY OF JUSTICE RUTH BADER GINSBURG 5 (Ryan Vacca & Ann Bartow eds., 2023) (describing the use of male plaintiffs and the theory of gender equality in Ruth Bader Ginsburg's litigation strategy).

77. *See* Anna Stefaniak, Robyn K. Mallett & Michael J.A. Wohl, *Zero-Sum Beliefs Shape Advantaged Allies' Support for Collective Action*, 50 EUR. J. SOC. PSYCH. 1259, 1261 (2020); *You Can Win*, *supra* note 17, at 2; *see also* Rebecca Aviel, *Rights as a Zero-Sum Game*, 61 ARIZ. L. REV. 351, 379–80 (2019) (explaining that zero-sum beliefs are intertwined with the belief that discrimination against the majority and minority group are equally prevalent and morally equivalent, a view that erodes support for expanding civil rights).

B. Threats to the Gender Order: #MeToo and the Title IX Movement

The #MeToo movement shined a spotlight on the harms and pervasiveness of sexual harassment, challenging the status quo of silence and unaccountability.[78] Almost as soon as the #MeToo movement catapulted to the forefront of public attention in 2017, however, counter-narratives emerged depicting men as victims of overly aggressive responses to sexual harassment.[79] Paradoxically, not long after #MeToo amplified women's voices speaking out about sexual harassment, social science researchers documented an increase in men's perceptions that men are the victims of widespread sex discrimination.[80] In one study, subjects who read an essay about the #MeToo movement reported higher perceptions of bias against men compared to a control group that read unrelated material.[81] Reading about #MeToo had this effect on both men and women in the study, but the effect was greater among the male subjects.[82] Another study found that subjects' political views, rather than their gender *per se*, explained the effect on their beliefs in the prevalence of reverse discrimination.[83] Subjects who identified as conservative—a group that is disproportionately male—were more likely than those who identified as liberal to perceive rising levels of discrimination against men after reading about #MeToo.[84]

A related threat to the gender status quo began a few years before the height of the #MeToo movement. During the Obama

78. *See* Joy Leopold, Jason R. Lambert, Ifeyimika O. Ogunyomi & Myrtle P. Bell, *The Hashtag Heard Round the World: How #MeToo Did What Laws Did Not*, 40 EQUITY, DIVERSITY & INCLUSION: AN INT'L J. 461, 462 (2021).

79. Tristin Green, *Feminism and #MeTooThe Power of the Collective*, *in* THE OXFORD HANDBOOK OF FEMINISM & LAW IN THE UNITED STATES 259, 267–69 (Deborah L. Brake, Martha Chamallas & Verna L. Williams eds., 2023); *see* Sarah Banet-Weiser, *"Ruined" Lives: Mediated White Male Victimhood*, 24 EUR. J. CULTURAL STUD. 60, 61 (2021).

80. Jaclyn A. Lisnek, Clara L. Wilkins, Megan E. Wilson & Pierce D. Ekstrom, *Backlash Against the #MeToo Movement: How Women's Voice Causes Men to Feel Victimized*, 25 GRP. PROCESSES & INTERGROUP RELS. 682, 682 (2022).

81. *Id.* at 690–95.

82. *Id.* at 692–95.

83. *Id.* at 688–90.

84. *Id.* at 689–90.

Administration, student protesters, frustrated by the federal government's longstanding failure to take strong measures to enforce Title IX, called on the Department of Education to do more to address sexual harassment on college campuses.[85] Title IX had been understood to apply to sexual harassment since the early 1990s, a principle that extended to sexual assault by one student against another.[86] And yet, other than lawsuits by individual plaintiffs, little enforcement action had taken place.[87] Meanwhile, well-publicized research found a more widespread problem than most people realized: as many as one in five women are sexually assaulted during their college years.[88]

Against this backdrop, President Obama charged a White House task force with studying and making recommendations on how best to address campus sexual assault.[89] In 2011, the Department of Education's Office for Civil Rights (OCR) responded by releasing a guidance document outlining the responsibilities of educational institutions to address sexual harassment.[90] The document, known as the 2011 Dear Colleague Letter (2011 DCL), set forth the standards OCR would

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85. *See* Nancy Chi Cantalupo, *The Title IX Movement Against Campus Sexual Harassment: How a Civil Rights Law and a Feminist Movement Inspired Each Other*, *in* THE OXFORD HANDBOOK OF FEMINISM & LAW IN THE UNITED STATES, *supra* note 79, at 240, 240–41 [hereinafter *The Title IX Movement*].

86. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998); Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 76 (1992); *see also* Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1563, 1575 (N.D. Cal. 1993) (noting that plaintiffs' sexual harassment claims arising out of interactions with several individual students could be brought under Title IX if employees of plaintiff's institution knew about the conduct and failed to act).

87. *See* Karen M. Tani, *An Administrative Right to Be Free from Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L.J. 1847, 1864–65 (2016).

88. *See* Lisa Fedina, Jennifer Lynn Holmes & Bethany L. Backes, *Campus Sexual Assault: A Systematic Review of Prevalence Research from 2000 to 2015*, 19 TRAUMA, VIOLENCE & ABUSE 76, 88 (2018).

89. WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, PREVENTING AND ADDRESSING CAMPUS SEXUAL MISCONDUCT: A GUIDE FOR UNIVERSITY AND COLLEGE PRESIDENTS, CHANCELLORS, AND SENIOR ADMINISTRATORS (2017); *see also Our Story*, IT'S ON US, https://itsonus.org/about-us/our-story/ [https://perma.cc/X35G-9SZX] (last visited Oct. 28, 2025) (describing the events leading up to the Obama Administration's national campaign to prevent and address campus sexual assault).

90. U.S. Dep't of Educ., Off. for Civ. Rts., Dear Colleague Letter from Russlynn Ali (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/6ZYH-3H4P] [hereinafter 2011 Dear Colleague Letter].

use in investigating federal funding recipients' compliance with Title IX in this area.[91]

The 2011 DCL became a lightning rod for critics who viewed OCR's stronger enforcement posture as an administrative overreach.[92] One of the most controversial provisions of the 2011 DCL directed educational institutions to use the preponderance of the evidence standard to decide disputed allegations of sexual harassment.[93] This was not a novel intervention, as most universities had already been using the preponderance standard for sexual misconduct cases in campus disciplinary proceedings, and OCR had long used this standard in its enforcement actions.[94] Nevertheless, the preponderance standard became a flashpoint in the controversy.[95] Other parts of the 2011 DCL—including discouraging cross-examination of complainants and requiring interim measures to protect complainants' access to education—also prompted complaints that the guidance skewed too far in favor of sexual harassment complainants.[96] More than any one substantive directive, the document was most significant for its shift in tone, signaling that sexual harassment would be a higher enforcement priority for the agency.[97] Following up on the 2011 DCL with increased investigations of universities, OCR played a more prominent role in

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91. *See id*.; *see also* U.S. DEPT. OF EDUC., OFF. FOR CIV. RTS., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE BACKGROUND, SUMMARY, AND FAST FACTS (2011) (providing sexual violence statistics, the purpose of the DCL, and schools' obligations pursuant to Title IX to respond to sexual violence). For a detailed account of the development of OCR's sexual assault policies under the Obama Administration, *see* Tani, *supra* note 29, at 1871–77.

92. For background on OCR actions on Title IX during this period, a summary of critics' views of the agency, and a defense of the role played by OCR, see Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L.J. 2122, 2174–86 (2019).

93. *See* William C. Kidder, *(En)forcing a Foolish Consistency?: A Critique and Comparative Analysis of the Trump Administration's Proposed Standard of Evidence Regulation for Campus Title IX Proceedings*, 45 J. COL. & U. L. 1, 4 (2020).

94. *Id*. at 4–5.

95. *See* Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 MONT. L. REV. 109, 109–10 (2017).

96. *See* Kathryn J. Holland, Nicole Bedera & Aliya R. Webermann, *The Selective Shield of Due Process: Analysis of the U.S. Department of Education's 2020 Title IX Regulations on Live Cross-Examination*, 20 ANALYSES SOC. ISSUES & PUB. POL'Y 584, 588 (2020).

97. *See* U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., QUESTIONS & ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014).

Title IX sexual harassment enforcement under the Obama Administration than it had in the past.[98]

By the time the first Trump Administration took control of the Department of Education in 2017, a countermovement was in full swing.[99] Male students accused of sexual harassment, represented by advocacy groups formed around this issue, portrayed themselves as the victims of false accusations and biased university disciplinary proceedings.[100] Their grievances, initially framed in terms of fairness and due process, shaded into claims of anti-male bias and reverse discrimination.[101]

The first Trump Administration embraced the narrative of bias against men in its messaging to explain its impending reversal of Title IX policy.[102] By September of 2017, the

98. *See* Tani, *supra* note 29, at 1874–75; Samuel R. Bagenstos, *This Is What Democracy Looks Like: Title IX and the Legitimacy of the Administrative State*, 118 MICH. L. REV. 1053, 1056 (2020); Alyssa Peterson & Olivia Ortiz, *A Better Balance: Providing Survivors of Sexual Violence with "Effective Protection" Against Sex Discrimination Through Title IX Complaints*, 125 YALE. L.J. 2132, 2138–39 (2016).

99. *See, e.g.*, Amanda Morris, *#HimToo: Left And Right Embrace Opposing Takes On Same Hashtag*, NPR (Oct. 11, 2018, at 05:00 ET), https://www.npr.org/2018/10/11/656293787/-himtoo-left-and-right-embrace-opposing-takes-on-same-hashtag [https://perma.cc/TF3E-NA27].

100. *See* Sage Carson & Sarah Nesbitt, *Balancing the Scales: Student Survivors' Interests and The Mathews Analysis*, 43 HARV. J.L. & GENDER 319, 330 (2020) (recounting the rise of the "respondents' rights movement"). For an argument that this is a common tactic of persons who perpetrate sexual violence, see Sarah J. Harsey, Eileen L. Zurbriggen & Jennifer J. Freyd, *Perpetrator Responses to Victim Confrontation: DARVO and Victim Self-Blame*, 26 J. AGGRESSION, MALTREATMENT & TRAUMA 644, 645 (2017) (discussing a common tactic of perpetrators to claim reverse-victimhood in response to being accused of sexual violence).

101. *See* Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence, and Student Discipline in Education*, 54 WAKE FOREST L. REV. 303, 310–11 (2019) (arguing that critics of Title IX enforcement used "due process" as a "dog whistle" to rally men's rights groups to claim victimhood for themselves) [hereinafter *Dog Whistles and Beachheads*].

102. *See* Matt Seyler, *Betsy DeVos' Meetings with 'Men's Rights' Groups Over Campus Sex Assault Policies Spark Controversy*, ABC NEWS (July 14, 2017, at 04:29 ET), https://abcnews.go.com/Politics/betsy-devos-meetings-mens-rights-groups-sex-assault/story?id=48611688 [https://perma.cc/AQU8-LGH9]; *see also* Press Release, Dep't of Educ., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sep. 22, 2017), https://www.politico.com/f/?id=0000015e-aa10-d809-a17e-ee7e74760001 [perma.cc/F9Y5-VKZ2] (explaining the Department of Education's role in "rulemaking on Title IX responsibilities arising from complaints of sexual misconduct"); Katie Mettler, *Trump Official Apologizes for Saying Most Campus Sexual Assault Accusations Come After Drunken Sex, Breakups*, WASH. POST (July 13, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/07/13/trump-official-apologizes-for-saying-most-campus-sexual-assault-accusations-come-after-drunken-sex-breakups/ [perma.cc/XAX7-WHHF] (outlining the Trump

Administration had rescinded the 2011 DCL and, working with men's rights organizations, set about drafting new rules governing Title IX and sexual harassment.[103] Meanwhile, a widely watched public event amplified the narrative of anti-male bias. In September of 2018, Senate hearings on the nomination of Brett Kavanaugh to serve on the U.S. Supreme Court surfaced allegations that he had sexually assaulted Dr. Christine Blasey Ford while the two were in high school.[104] Judge Kavanaugh angrily denied the allegations, entreating Senators to "judge me by the standard that you would want applied to your father, your husband, your brother[,] or your son."[105] Although many Senators found Dr. Ford to be a credible witness, the Senate voted to confirm Justice Kavanaugh.[106]

The Trump Administration issued its final Title IX regulations in May of 2020.[107] The regulations require new protections for accused students, including the right to cross-examine witnesses in a live hearing, the right to counsel, and the right to appeal, which are not required for students accused of any other misconduct, including other forms of discrimination.[108] This is not the place for a comprehensive discussion of the

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administration's plans to "reshape Obama-era directives about handling sexual assault investigations at college campuses nationwide").

103. *See* U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., Q&A ON CAMPUS SEXUAL MISCONDUCT (2017); U.S. Dep't of Educ., Off. for Civ. Rts. & U.S. Dep't of Justice, Civ. Rts. Div., Dear Colleague Letter from Sadra Battle and T.E. Wheeler (Feb. 22, 2017), https://www.ed.gov/media/document/colleague-2017-title-ix-35085.pdf [https://perma.cc/NU8Z-ZSDB]; Hélène Barthélemy, *How Men's Rights Groups Helped Rewrite Regulations on Campus Rape*, THE NATION (Aug. 14, 2020), https://www.thenation.com/article/politics/betsy-devos-title-ix-mens-rights// [perma.cc/KXD2-PF4E].

104. *See* Sheryl Gay Stolberg, *Kavanaugh's Nomination in Turmoil as Accuser Says He Assaulted Her Decades Ago*, N.Y. TIMES (Sep. 16, 2018), https://www.nytimes.com/2018/09/16/us/politics/brett-kavanaugh-christine-blasey-ford-sexual-assault.html [https://perma.cc/LZ6W-HVWW].

105. *Brett Kavanaugh's Opening Statement: Full Transcript*, N.Y. TIMES (Sep. 26, 2018) https://www.nytimes.com/2018/09/26/us/politics/read-brett-kavanaughs-complete-opening-statement.html [https://perma.cc/9PZ8-H3R9].

106. *See* Jessica A. Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. 37, 64, 65 n.191 (2019).

107. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106 (2024).

108. *See id.*; Kelly Alison Behre, *The Irony of Title IX: Exploring How Colleges Implement Credibility Discounts Against Student Victims of Gender-Based Violence in Campus Misconduct Cases*, 103 B.U. L. REV. ONLINE 109, 109–10 (2023).

regulations, but they reversed OCR policies on sexual harassment long pre-dating the Obama-era.[109] One provision of the 2020 regulations is particularly relevant to this Article: it expressly recognizes, for the first time, that both respondents (students accused of sexual harassment) and complainants (students claiming to have been sexually harassed) may be victims of sex discrimination.[110] It states: "A recipient's treatment of a complainant *or a respondent* in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX."[111] This provision invites students accused of sexual harassment to view themselves as potential victims of sex discrimination and treats them as equivalent to complainants in their need for Title IX protection from discrimination.[112]

The 2020 regulatory about-face did not go unchallenged. Several states, school districts, and survivor advocacy groups sued the Department of Education seeking to block the regulations, arguing that they were arbitrary and capricious and violated Title IX.[113] These cases were dismissed on various grounds.[114] Only one court squarely addressed the Title IX claim that the new regulations discriminated against women.[115] This court rejected that argument, explaining that even if the 2020 changes disproportionately harm women, which it acknowledged was likely, given that women are more likely than men

109. For explanation and critique of the regulatory changes, see Leslie Duadua Cabingabang, *The Personal is Still Political: A Feminist Critical Policy Analysis of the Rollback of Title IX*, 3 J. CRIT. SCHOLARSHIP ON HIGHER EDUC. & STUDENT AFFS., 38, 44 (2018); Holland et al., *supra* note 96, at 587–88; Naomi Mann, *Classrooms into Courtrooms*, 59 HOUS. L. REV. 363, 374–75 (2021).

110. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106 (2024).

111. *Id.* § 106.45(a) (emphasis added).

112. *Id.*

113. *See, e.g.*, New York v. U.S. Dep't of Educ., 477 F. Supp. 3d 279, 296 (S.D.N.Y. 2020).

114. *See, e.g.*, *New York*, 477 F. Supp. 3d at 296; Pennsylvania v. DeVos, 480 F. Supp. 3d 47, 58–59 (D.D.C. 2020); Know Your IX v. DeVos, No. RBD-20-01224, 2020 WL 6150935, at *5 (D. Md. Oct. 20, 2020) (dismissing complaint by sexual assault survivor advocacy group for lack of standing); SurvJustice, Inc. v. DeVos, No. 18-cv-00535-JSC, 2019 WL 1434144, at *17 (N.D. Cal. Mar. 29, 2019); Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104, 126–27 (D. Mass. 2021).

115. *See Victim Rts. L. Ctr.*, 552 F. Supp. 3d at 137–38.

to be sexually harassed, disparate impact alone does not establish discriminatory intent.[116]

The Biden Administration sought to replace the 2020 regulations with new regulations, which it released on April 29, 2024, largely restoring OCR's pre-2020 treatment of sexual harassment.[117] The 2024 regulations, unlike the 2020 regulations, however, went beyond sexual harassment to comprehensively address sex-based discrimination, including by defining sex discrimination to include discrimination based on sexual orientation and gender identity.[118] This change, in particular, sparked controversy and resulted in litigation by states and other parties to block the new regulations from going into effect.[119] Before their effective date of August 1, 2024, the 2024 regulations were enjoined by federal courts in the states that challenged them.[120] More recently, on January 9, 2025, a federal court in Kentucky issued a nationwide injunction enjoining the 2024 regulations.[121] On January 31, 2025, the Trump Administration released a Dear Colleague Letter notifying recipients that, effective immediately, OCR would enforce the 2020 regulations.[122]

Both #MeToo and the Title IX movements that took shape during the Obama era challenged institutional complacency about the harms and prevalence of sexual harassment.[123] Predictably, as the social science research discussed above

116. *Id.*

117. *See* 34 C.F.R. § 106 (2024).

118. *Id.*

119. *See* Katherine Knott, *Political Standoff Over Title IX Puts Red State Colleges in a No-Win Situation*, INSIDE HIGHER ED (May 14, 2024), https://www.insidehighered.com/news/government/2024/05/14/red-states-say-they-wont-comply-new-title-ix-rule [perma.cc/7KRW-WPK5].

120. *See* Alabama v. U.S. Sec'y of Educ., No. 24-12444, 2024 WL 3981994, at *3–4, *22–23 (11th Cir. Aug. 22, 2024); Oklahoma v. Cardona, 743 F. Supp. 3d 1314, 1333–34 (W.D. Okla. 2024); Arkansas v. Dep't of Educ., 742 F. Supp. 3d 919, 951 (E.D. Mo. 2024); Texas v. United States, 740 F. Supp. 3d 537, 559 (N.D. Tex. 2024); Kansas v. Dep't of Educ., 739 F. Supp. 3d 902, 936–37 (D. Kan. 2024); Louisiana v. Dep't of Educ., 737 F. Supp. 3d 377, 410 (W.D. La. 2024).

121. *See* Tennessee v. Cardona, 762 F. Supp. 3d 615, 628 (E.D. Ky. 2025).

122. U.S. Dep't of Educ., Off. for Civ. Rts., Dear Colleague Letter from Craig Trainor (Feb. 4, 2025), https://www.ed.gov/media/document/title-ix-enforcement-directive-dcl-109477.pdf [https://perma.cc/7JHZ-23NP] [hereinafter 2025 Dear Colleague Letter].

123. *See The Title IX Movement*, *supra* note 85, at 1.

explains,[124] the threats to the gender status quo reflected in the #MeToo and Title IX movements precipitated a growing chorus of claims that tougher university responses to sexual harassment amounted to reverse discrimination against men.[125] The policy environment that culminated in the 2020 regulations successfully pressed the narrative that men accused of sexual harassment were the real victims of sex discrimination.[126] This backdrop set the stage for an explosion of reverse sexual harassment litigation and primed judges to view such claims as increasingly plausible, a development detailed in the next Part.

II. REVERSE SEXUAL HARASSMENT UNDER TITLE IX

In the last decade, reverse discrimination litigation brought by male students disciplined for sexual harassment has proliferated. As the number of cases has accumulated, courts have shifted how they respond to these cases. Initially, courts nearly always dismissed these claims, refusing to equate unfairness toward students accused of sexual misconduct with discrimination against men. As the number of cases grew, however, courts became more likely to find anti-male bias plausibly alleged and supported, mainly based on the tougher enforcement environment and the perception of unfairness toward accused harassers. This Part surveys this burgeoning case law and identifies the key moves courts have made in siding with plaintiffs on the issue of discriminatory intent.

A. Overview and Summary

There is no novelty in students suing their universities to challenge the enforcement of student conduct rules, including

124. *See* discussion *infra* Section I.A.

125. *See* Carson & Nesbitt, *supra* note 100, at 319 ("[R]espondents have filed over 500 due process claims to challenge the fairness of their schools' sexual misconduct disciplinary proceedings.").

126. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106 (2024); Holland et al., *supra* note 96, at 586; Lisnek et al., *supra* note 80, at 697; Banet-Weiser, *supra* note 79, at 62.

for sexual misconduct.[127] In the past decade, however, the sheer quantity of cases asserting reverse sexual harassment claims, and the shift in their trajectory, is striking. Research for this Article identified ninety-eight federal court cases in which male students who were disciplined for sexual misconduct sued their colleges and universities for sex discrimination under Title IX.[128] Before analyzing the trends and themes in the case law, some preliminary discussion of the scope of this research is in order.

Research on the Title IX reverse sexual harassment case law for this Article was limited to higher education. Although Title IX covers sexual harassment at all levels of education, including elementary and secondary schools, assertions of bias against male students who have been disciplined for sexual harassment, both in litigation and in the policy arena, have focused almost exclusively on higher education.[129] In contrast to the large number of reverse discrimination lawsuits brought by male students suing their colleges and universities, sex discrimination lawsuits by male elementary and secondary students who have faced discipline for sexual harassment are rare.[130]

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127. Carson & Nesbitt, *supra* note 100, at 319.

128. The total case count is comprised of forty-one appellate court decisions and fifty-seven district court decisions that are unaccompanied by an appellate decision, bringing the total number of federal court cases to ninety-eight. Of this total, there were seventy-one cases decided on motions to dismiss, twenty-four cases decided on motions for summary judgment, and three cases decided on motions for a preliminary injunction. A master list of these cases, which includes the cases represented in the graphs that follow, is on file with the author.

Later figures in this section depicting plaintiffs' and defendants' success rates are derived from the total number of federal court decisions, rather than the total number of cases. The total number of decisions is 139—with forty-one appellate court decisions and their corresponding district court decisions (for a total of eighty-two decisions), and fifty-seven district court decisions that are unaccompanied by an appellate decision. The parties' respective success rates are calculated separately for motions to dismiss and motions for summary judgment.

129. One reason for this may be that at earlier levels of education, male victims of sexual harassment have received greater attention, making it more difficult to portray sexual harassment enforcement as a zero-sum proposition in which women gain and men lose. *See* Mark Keierleber, *The Younger Victims of Sexual Violence in School*, THE ATLANTIC (Aug. 10, 2017), https://www.theatlantic.com/education/archive/2017/08/the-younger-victims-of-sexual-violence-in-school/536418/ [https://perma.cc/T4SB-P83G].

130. *See, e.g.*, Wells v. Creighton Preparatory Sch., 82 F.4th 586, 590 (8th Cir. 2023) (affirming dismissal of Title IX case brought by male student expelled for inappropriate sexual remarks about a female teacher); Doe 2 v. Fairfax Cnty. Sch. Bd., 832 Fed. App'x 802, 805 (4th Cir. 2020) (affirming dismissal of Title IX case brought by male student suspended for sexual harassment of female students).

The cases reviewed for this Article and discussed below all involve male students who were disciplined by their colleges or universities for sexual harassment of other students.[131] In virtually all of these cases, the victims of the alleged sexual harassment were female students.[132] Only two cases involved male plaintiffs who were disciplined for sexually harassing another male student.[133] The gender configuration of the reverse sexual harassment litigation—male college student accused of sexually harassing a female student—reinforces the zero-sum narrative at the heart of the reverse sexual harassment litigation, that men are harmed when universities support women's allegations of sexual assault.[134]

The majority of cases surveyed for this Article—seventy-one out of ninety-eight—are rulings on defendants' motion to dismiss for failure to state a claim.[135] To put these cases in perspective, until 2007, a liberal notice pleading standard governed such motions.[136] That standard directed courts not to dismiss a complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[137] In a pair of cases decided in 2007 and 2009, however, the Supreme Court made the standard for surviving

131. The complete list of 139 cases and court decisions is on file with the author. One hundred and thirty-eight of those decisions involve male plaintiffs.

132. Only one case included a female plaintiff; she sued along with a male plaintiff, both of whom were disciplined for sexual misconduct involving another female student. *See* Plummer v. Univ. of Hous., 860 F.3d 767, 777 (5th Cir. 2017) (upholding lower court ruling granting motion to dismiss for failure to state a claim). The plaintiffs were boyfriend and girlfriend at the time of the alleged incident. *Id.* at 770. The court found no plausible basis to infer gender bias against either plaintiff in the disciplinary process. *Id.* at 778.

133. *See* Doe v. Trs. of Dartmouth Coll., 615 F. Supp. 3d 47, 57, 60 (D.N.H. 2022) (denying motion to dismiss based on male plaintiff's allegation that if a female student allegedly performed nonconsensual oral sex on a male student while she was "'blackout drunk'"—the conduct for which plaintiff was disciplined—the university would not have found that gaps in her memory undermined her credibility); Doe v. Princeton Univ., 790 F. App'x 379, 381 (3d Cir. 2019) (granting motion to dismiss for lack of a plausible inference of anti-male bias in Title IX claim brought by male graduate student who was punished for sexual misconduct with a male undergraduate).

134. *See* Hodson et al., *supra* note 67, at 633.

135. Federal Rule of Civil Procedure 12(b)(6) provides the basis for such motions in federal court. *See* FED. R. CIV. P. 12(b)(6).

136. *See* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431–32 (2008).

137. *See* Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

a motion to dismiss more rigorous, directing lower courts to require sufficient factual material to render *plausible* the inferences necessary to support the complaint.[138]

Under the plausible pleading standard, legal conclusions, such as allegations that a defendant acted with discriminatory intent, are not sufficient.[139] The standard requires more than the "sheer possibility" that the defendant unlawfully discriminated; the plaintiff must plead sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[140] In discrimination cases brought by women and people of color, the plausible pleading standard has made it more difficult for plaintiffs to survive motions to dismiss.[141] And yet, as detailed below, the plausible pleading standard has not diminished plaintiffs' success in reverse sexual harassment claims under Title IX; indeed, the success rate of such claims soared years after the plausible pleading standard was in place.[142]

The first reported Title IX reverse discrimination case brought by a male student disciplined for sexual harassment was decided over thirty years ago.[143] In its 1994 opinion in *Yusuf v. Vassar College*,[144] the Second Circuit denied the college's motion to dismiss and articulated a framework for evaluating Title IX reverse sexual harassment claims that has guided lower courts for three decades.[145] The facts of the case differ from today's prototype for Title IX reverse discrimination sexual assault cases in that the underlying incident involved a factually

138. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

139. *Iqbal*, 556 U.S. at 681 (holding that "bare assertions" of invidious bias are conclusory and not sufficient to support the complaint); *see also* Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 85–87 (2010) (discussing the difficulty of surviving a motion to dismiss in discrimination cases after *Iqbal*).

140. *Iqbal*, 556 U.S. at 678.

141. *See* Malveaux, *supra* note 139, at 89; Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1671 (2011).

142. *See infra* Figure 1 and text accompanying notes 121–23.

143. *See* Yusuf v. Vassar Coll., 35 F.3d 709, 716 (2d Cir. 1994).

144. 35 F.3d 709 (2d Cir. 1994).

145. *See id.* at 716.

complicated dispute between three students: the plaintiff, his roommate, and the roommate's girlfriend.[146] The plaintiff, Syed Saifuddin Yusuf, a Bengali male student, claimed that his roommate, a white male student, got drunk and brutally beat him up, requiring Yusuf to seek medical treatment.[147] After Yusuf reported his roommate's attack to campus police and pressed charges, the roommate's girlfriend accused Yusuf of sexually harassing her.[148] Yusuf claimed that the roommate's girlfriend made up the harassment allegation in retaliation for reporting the roommate.[149] Vassar resolved the harassment complaint in favor of the roommate's girlfriend and suspended Yusuf for one semester.[150] This was a harsher penalty than the "suspended suspension" that the college imposed on the roommate for physically attacking Yusuf.[151]

Yusuf sued Vassar for sex discrimination under Title IX and for race discrimination under 42 U.S.C. § 1981.[152] While the appellate court upheld the dismissal of Yusuf's racial discrimination claim, it reversed the lower court's dismissal of the Title IX claim.[153] At the time *Yusuf* was decided, liberal notice pleading was still the standard for surviving a motion to dismiss.[154] Accordingly, the Second Circuit accepted Yusuf's conclusory allegation, without factual support in the pleadings, that "males accused of sexual harassment at Vassar are 'historically and systematically' and 'invariably found guilty, regardless of the evidence, or lack thereof.'"[155] In a highly cited portion of the opinion, the Second Circuit recognized two theories for pursuing a Title IX case brought by a student disciplined for sexual harassment: the erroneous outcome theory and the selective

146. *See id.* at 711.
147. *Id.* at 711–12.
148. *Id.* at 712.
149. *Id.* at 713.
150. *Yusuf*, 35 F.3d at 713.
151. *Id.* at 712–13.
152. *Id.* at 711–13.
153. *Id.* at 711, 716.
154. *See* Conley v. Gibson, 355 U.S. 41, 45–46 (1957).
155. *Yusuf*, 35 F.3d at 716.

enforcement theory.[156] To succeed on the erroneous outcome theory, the plaintiff must prove both that the disciplinary outcome was erroneous and that the adverse outcome was caused by the plaintiff's sex.[157] The selective enforcement theory, in contrast, does not require plaintiffs to demonstrate error in the outcome of the disciplinary process; rather, a plaintiff may succeed by showing that they were treated worse than similarly situated persons because of their sex.[158] Following *Yusuf*, lower courts have recognized these two theories as potentially viable pathways for male students who have been disciplined for sexual harassment to sue under Title IX.[159]

It took two decades for male plaintiffs challenging their treatment in university sexual misconduct proceedings to advance through the door that *Yusuf* opened.[160] Even during the reign of liberal notice pleading, *Yusuf* did not result in a plethora of sex discrimination cases brought by male students disciplined for sexual harassment.[161] It was not until 2014, twenty years after *Yusuf*, that another male student's reverse sexual harassment claim survived a motion to dismiss on the pleadings.[162] Until then, Title IX cases brought by male students accused of sexual misconduct—even those brought before the tougher plausibility standard was adopted—failed to survive motions to dismiss.[163]

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156. *Id.* at 715.

157. *Id.*

158. *Id.*

159. *See, e.g.*, Doe v. Oberlin Coll., 963 F.3d 580, 586 (6th Cir. 2020) (discussing the erroneous outcome theory); Doe v. Trs. of the Univ. of Pa., 270 F. Supp. 3d 799, 824–25 (E.D. Pa. 2017) (discussing selective enforcement).

160. *See infra* Figure 1.

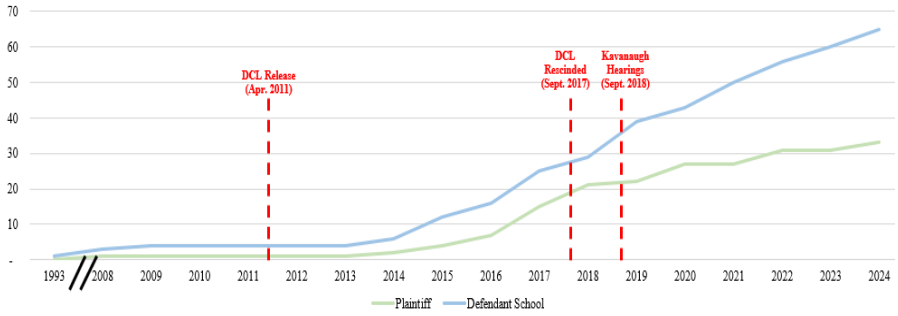
161. *Id.*

162. *See* Wells v. Xavier Univ., 7 F. Supp. 3d 746, 751 (S.D. Ohio 2014) (allowing erroneous outcome theory to proceed based on plaintiff's allegations of wrongful outcome and OCR pressure to find males guilty of sexual assault).

163. *See, e.g.*, Doe v. Univ. of the South, 687 F. Supp. 2d 744, 756–57 (E.D. Tenn. 2009) (finding no plausible inference of gender bias where no facts link erroneous outcome to gender bias and no similarly situated female comparators were identified to show selective enforcement); Torrespico v. Columbia Coll., No. 97-C-8881, 1998 WL 703450, at *2 (N.D. Ill. Sep. 30, 1998) (holding that an all-female hearing committee did not support inference of gender bias against men).

The turnabout in plaintiffs' success began in 2014, as illustrated in Figure 1 below. That year marked the beginning of an uptick in both the numbers of Title IX reverse discrimination cases being decided and in judges siding with plaintiffs on motions to dismiss.

FIGURE 1. CUMULATIVE WINS OVER TIME (MOTION TO DISMISS)[164]



Plaintiffs' increasing success rate coincided with a surge in the number of Title IX reverse discrimination decisions on motions to dismiss.[165] The cumulative number of decisions increased more than ten-fold between 2014 and 2024, rising from eight to ninety-eight. As recently as 2017, the conventional wisdom pegged reverse discrimination claims brought by male students disciplined for sexual misconduct as near sure losers.[166] By 2018, plaintiffs' fortunes had changed: between 2016

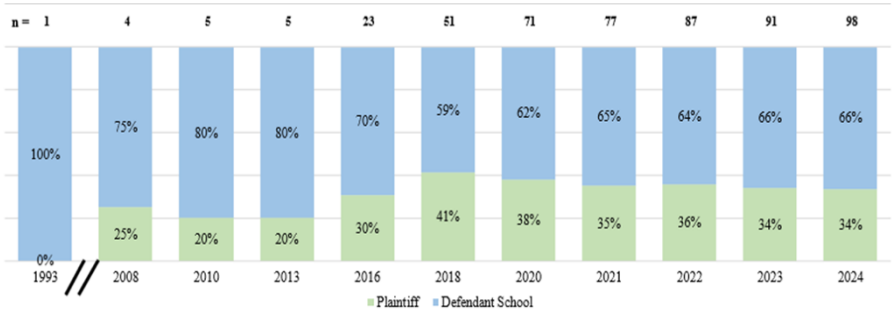
164. Figure 1 displays cumulative wins over time for both plaintiffs and defendants from 1993 to 2024 in court decisions on defendants' motions to dismiss. For purposes of this Figure and subsequent figures, an appellate court decision is counted once, the district court decision preceding the appellate decision is counted once, and "unique" district court decisions with no appellate decision are counted once. Thus, for motions to dismiss, there are a total of ninety-eight federal court decisions as of the end of 2024 (as opposed to seventy-one cases, where the preceding district court cases for appellate court decisions are not counted). The "DCL Release (Apr. 2011)" data marker represents the month and year the Department of Education's "Dear Colleague" Letter was released. *See* 2011 Dear Colleague Letter, *supra* note 90. The "DCL Rescinded (Sep. 2017)" represents the month and year the "Dear Colleague" Letter was rescinded by the Department of Education. The "Kavanaugh Hearings (Sep. 2018)" data marker represents the month and year that Justice Brett Kavanaugh's Supreme Court Confirmation Hearings took place. *See Brett Kavanaugh's Opening Statement: Full Transcript*, *supra* note 105.

165. *See supra* Figure 1.

166. *See, e.g.*, Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71, 85, 95–

and 2018, the number of decisions ruling on a motion to dismiss more than doubled, from twenty-three to fifty-one, and the plaintiffs' cumulative success rate moved from 30% to 41%.[167] By the end of 2024, courts had issued ninety-eight decisions on motions to dismiss and plaintiffs had a cumulative success rate of 34%, meaning that courts sided with plaintiffs more than a third of the time.[168] Figure 2, below, shows the cumulative plaintiff success rate over time.

FIGURE 2. CUMULATIVE WINS AS A PERCENTAGE OF TOTAL DECISIONS (MOTION TO DISMISS)[169]



96 (2017) (contrasting the greater success of disciplined male students' due process claims compared to their Title IX reverse discrimination claims, nearly all of which at that time had lost on motions to dismiss); Doe v. Univ. of Colo., 255 F. Supp. 3d 1064, 1074–75 (D. Colo. 2017) (discussing a handful of cases finding anti-male bias plausible enough to survive a motion to dismiss, but countering that "[a] majority of cases, however, have held that *Yusuf*-like pleading of the gender bias component no longer [after *Iqbal* and *Twombly*] passes muster, and that the various plaintiffs' allegations largely tend to show, if anything, pro-victim bias, which does not equate to anti-male bias").

167. *See supra* Figure 1.

168. *Id.*

169. Figure 2 displays cumulative wins as a percentage of total federal court decisions from 1993 to 2024 for decisions with a procedural posture of motion to dismiss. Like Figure 1, Figure 2 counts federal court decisions, rather than cases. For Figure 2, the variable "n" represents the cumulative number of court decisions through that year, for a total of ninety-eight decisions with a procedural posture of motion to dismiss decided by the end of 2024. For each year, the Figure displays the percentage of decisions that the plaintiff won and the percentage of decisions that the defendant school won through that year, demonstrating the cumulative success rate for both parties.

The plausibility standard invites judges to make an empirical assessment about the likelihood of discrimination.[170] For two decades after *Yusuf* opened the door to Title IX reverse discrimination cases, claims of anti-male bias in sexual harassment disciplinary proceedings were rare and, except for *Yusuf*, unsuccessful.[171] But between the 2011 issuance of the DCL and the Kavanaugh nomination hearings in 2018 amid the Trump Administration's rollback of Title IX policy, the number of such cases ballooned ten-fold, and plaintiffs' success rate doubled.[172] The more courts confronted claims alleging bias against male students disciplined for sexual harassment, the more often they sided with plaintiffs on motions to dismiss.[173] Such a snowball effect is consistent with the literature on zero-sum beliefs and perceptions of reverse discrimination discussed in Part I.[174] Growing numbers of reverse sexual harassment claims, combined with their increasing success, reinforce the perception that Title IX is a zero-sum proposition in which men experience sex discrimination when universities take strong measures in response to sexual harassment allegations.[175]

The posture of this litigation made it an ideal vehicle for pressing the narrative that universities are biased against men in handling sexual harassment allegations. In ruling on a motion to dismiss, courts must accept the allegations in the complaint as true.[176] The defending university's version of the facts is typically not recounted in court opinions on a motion to dismiss.[177] Most importantly, the perspective of the student who complained about the alleged sexual harassment is entirely

170. For an illuminating discussion of how the plausible pleading standard relies on narrative, see generally Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 26 YALE J.L. & HUM. 1, 2 (arguing that narrative theory can help both "litigants and judges understand and comply with the plausibility standard").

171. *See supra* Figure 2; Yusuf v. Vassar College, 35 F.3d 709, 711 (2d Cir. 1994).

172. *See supra* Figure 2.

173. *Id.*

174. *See supra* Figure 2; *supra* Section I.A.

175. *See* Kuchynka et al., *supra* note 28, at 529; *You Can Win*, *supra* note 17, at 1–2.

176. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

177. *See* Behre, *supra* note 11, at 896.

missing, as she is not a party in the litigation.[178] As legal scholar Kelly Allison Behre observes, the absence of the complainant's account in the record leaves a vacuum that can be filled by rape myths and tropes of uncredible, vindictive women.[179] The complainant's absence is particularly glaring in cases decided under *Yusuf*'s erroneous outcome theory.[180] To prevail on this theory, the plaintiff must raise a plausible inference that the outcome was erroneous and that it was motivated by anti-male bias.[181] Creating a plausible inference that the disciplinary outcome was erroneous is facilitated by the absence of the complaining student's story.[182]

A 2019 decision from the Seventh Circuit introduced some changes into the framework for deciding motions to dismiss Title IX cases brought by male students disciplined for sexual harassment. In an opinion authored by then-Circuit Judge Amy Coney Barrett, *Doe v. Purdue University*,[183] the court abandoned the *Yusuf* two-track approach in favor of a single unified standard that asks simply whether "the alleged facts, if true, raise a plausible inference that the university discriminated against [the student] 'on the basis of sex.'"[184] Some courts have since applied the *Purdue* unified standard, while others have continued to adhere to the *Yusuf* two-track framework.[185] In 2022, the Eleventh Circuit largely followed *Purdue* but tweaked the

178. *See id.*

179. *See id.* at 904–05, 915; s*ee also id.* at 896 (pointing out that male plaintiffs avoid public scrutiny by filing under pseudonyms and due to FERPA's protections covering student records).

180. *See* Yusuf v. Vassar Coll., 35 F.3d 709, 715 (1994).

181. *Id.*

182. *See id.*; Behre, *supra* note 11, at 896.

183. 928 F.3d 652, 665–66 (7th Cir. 2019).

184. *Id.* at 667–68.

185. For cases applying the *Purdue* standard, see Van Overdam v. Tex. A&M Univ., 43 F.4th 522, 528 (5th Cir. 2022); Doe v. Univ. of Denver, 1 F.4th 822, 830 (10th Cir. 2021); Doe v. Regents of Univ. of Cal., 23 F.4th 930, 935–36 (9th Cir. 2022); Gash v. Rosalind Franklin Univ., 117 F.4th 957, 962 (7th Cir. 2024); Doe v. Samford Univ., 29 F.4th 675, 687 (11th Cir. 2022); Sheppard v. Visitors of Va. State Univ., 993 F.3d 230, 235–36 (4th Cir. 2021); Doe v. Univ. of the Scis., 961 F.3d 203, 209 (3d Cir. 2020). For cases continuing to apply the *Yusuf* standard, see Doe v. Univ. of N.C. Sys., No. 23-CV-00041, 2024 WL 925549, at *7 (W.D.N.C. Mar. 4, 2024); Doe v. Stonehill Coll., Inc., 55 F.4th 302, 332 (1st Cir. 2022); Doe v. Franklin Pierce Univ., No. 22-cv-00188, 2023 WL 2573272, at *5 (D.N.H. Mar. 17, 2023).

standard to replace "plausible" with "reasonable," requiring the alleged facts to raise a *reasonable* inference of gender bias.[186]

In the past few years, some Title IX reverse sexual harassment cases have progressed to the summary judgment stage, though considerably fewer than the number of decisions on motions to dismiss.[187] This is not surprising, as summary judgment motions come at a later point in litigation, typically after discovery, and many cases are either dismissed on the pleadings or settled before they reach this stage.[188] Summary judgment sets a higher bar for plaintiffs to prevail than a motion to dismiss, requiring enough evidence to find a genuine issue of material fact on each of the elements necessary to prove the plaintiff's claim.[189] In a Title IX reverse discrimination case, this means that the plaintiff must produce enough admissible evidence that a reasonable jury could conclude that the defendant acted with discriminatory intent.[190] Not surprisingly, the cumulative success rate for plaintiffs on summary judgment in these cases is lower than it is for cases decided on motions to dismiss on the pleadings.[191]

Here, too, however, there has been a progression of greater success as more cases have made their way forward. By 2014, there had been only four summary judgment decisions in Title IX reverse discrimination cases, all of which ruled in favor of university defendants.[192] The number of summary judgment decisions gradually increased, with a significant bump in 2018

186. *Samford Univ.*, 29 F.4th at 687 (holding that plaintiff's allegations of procedural irregularities, federal pressure to appear tough on sexual assault, and the all-male composition of accused students failed to raise a reasonable inference of anti-male bias).

187. Master Case List on file with author.

188. *See* 10A WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 2712 (4th ed. 2024) (discussing FED. R. CIV. P. 56) ("The summary-judgment procedure . . . is a method for promptly disposing of actions in which there is no genuine dispute as to any material fact or in which only a question of law is involved. Thus, parties need not wait until a case is fully tried but may seek a final adjudication of the action by a motion under Rule 56.").

189. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986).

190. *See, e.g.*, Doe v. Rollins Coll., 77 F.4th 1340, 1352–53 (11th Cir. 2023).

191. Master Case List on file with author.

192. *See* Bleiler v. Coll. of Holy Cross, No. 11-11541-DJC, 2013 WL 4714340, at *18 (D. Mass. Aug. 26, 2013); Mallory v. Ohio Univ., 76 F. App'x 634, 641–42 (6th Cir. 2003); Haley v. Va. Commonwealth Univ., 948 F. Supp. 573, 583 (E.D. Va. 1996).

(from eight to twelve).[193] This was also the first year that a plaintiff succeeded in defeating a motion for summary judgment in a Title IX reverse sexual harassment case.[194] By the end of 2024, there were twenty-four cases decided on motions for summary judgment, producing a total of thirty-seven court decisions.[195] Of these, four of the thirty-seven decisions favored the plaintiffs, for an overall success rate of 11%.[196] This is significantly lower than the plaintiffs' success rate on motions to dismiss.[197] Even so, two circuit courts ruled for plaintiffs on summary judgment in 2021 and 2023, reversing district court rulings granting summary judgment to universities.[198] Although a small number in absolute terms, these cases mark a significant shift in courts' receptiveness to Title IX reverse sexual harassment cases decided on summary judgment.

The smallest group of cases in this research ruled on plaintiffs' motions for a preliminary injunction or temporary restraining order. Only three cases, producing four court decisions, fall into this category, and defendants won them all.[199] The standard for plaintiffs to prevail is the highest in these cases, requiring plaintiffs to prove the likelihood of success on the merits, in addition to other equitable factors.[200] Even though

193. *See supra* Figure 2.

194. *See* Rossley v. Drake Univ., 342 F. Supp. 3d 904, 946 (S.D. Iowa 2018).

195. For summary judgment, there have been thirty-seven court decisions between 1996 and 2024, which include thirteen appellate decisions and their preceding district court decisions (for a total of twenty-six), and eleven district court decisions with no appellate court decision. *See supra* Figure 1. The total number of cases, in contrast—not counting the preceding district court decisions in appellate court decisions—is twenty-four (thirteen appellate court cases and eleven district court cases with no appellate decision). *See id.*

196. *See* Doe v. William Marsh Rice Univ., 67 F.4th 702, 714 (5th Cir. 2023); Doe v. Univ. of Denver, 1 F.4th 822, 836 (10th Cir. 2021); Unknown Party v. Ariz. Bd. of Regents, 624 F. Supp. 3d 1079, 1120 (D. Ariz. 2022); *Rossley*, 342 F. Supp. 3d at 946.

197. *See supra* Figure 1.

198. *See William Marsh Rice Univ.*, 67 F.4th at 714; *Univ. of Denver*, 1 F.4th at 836.

199. Doe v. Bd. of Trs. of Whitman Coll., 670 F. Supp. 3d 1155, 1172 (E.D. Wash. 2023); Doe v. Univ. of S. Ind., No. 3:21-cv-00144-TWP-MPB, 2022 WL 1471037, at *9 (S.D. Ind. May 10, 2022); Doe v. Univ. of S. Ind., 43 F.4th 784, 800–01 (7th Cir. 2022). *Cf.* King v. DePauw Univ., No. 2:14-cv-70-WTL-DKL, 2014 WL 4197507, at *15 (S.D. Ind. Aug. 22, 2014) (granting student's motion for a preliminary injunction based on likelihood of success of breach of contract claim, and enjoining university from enforcing student's suspension pending resolution of the lawsuit).

200. *See* Winter v. NRDC, Inc., 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer

plaintiffs lost these cases, they add to the public airing of the narrative that Title IX enforcement on sexual harassment is a zero-sum game in which men bear the costs of strong Title IX enforcement against sexual harassment.[201]

B. Common Themes

The reverse sexual harassment litigation has produced a large body of case law, and this article does not attempt to summarize individual cases. Instead, the discussion below draws out the main themes and modes of reasoning characteristic of the cases in which plaintiffs succeed.

The singular, defining feature of the decisions in which plaintiffs overcame motions to dismiss or motions for summary judgment is the courts' willingness to infer discriminatory intent against men from the threat of federal enforcement pressure and the perceived unfairness in the treatment of an accused male student. In the rulings for plaintiffs, allegations of external pressure imposed on universities to respond more aggressively to sexual harassment, coupled with alleged unfairness or procedural irregularities against the plaintiff, largely sufficed to support an inference of anti-male bias.[202]

A driving force behind plaintiffs' success in these cases is courts' treatment of aggressive OCR enforcement as a basis for discerning discriminatory intent against men in universities' handling of sexual harassment allegations. In virtually all of the cases plaintiffs won, courts cited and relied on the federal enforcement environment that increased pressure on universities to take a tougher stance on sexual harassment as support for

irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that the injunction is in the public interest.").

201. *See* Hodson et al., *supra* note 67, at 628; Behre, *supra* note 11, at 904.

202. *See, e.g.*, Doe v. Regents of Univ. of Cal., 23 F.4th 930, 937–38, 940 (9th Cir. 2022); Doe v. Univ. of Denver, 1 F.4th 822, 830–33 (10th Cir. 2021); Doe v. Oberlin Coll., 963 F.3d 580, 586–88 (6th Cir. 2020); Schwake v. Ariz. Bd. of Regents, 967 F.3d 940, 948–49, 951 (9th Cir. 2020); Doe v. Univ. of Ark.-Fayetteville, 974 F.3d 858, 864–65 (8th Cir. 2020); Doe v. Mia. Univ., 882 F.3d 579, 592–94 (6th Cir. 2018); Doe v. Baum, 903 F.3d 575, 585–86 (6th Cir. 2018); Doe v. Trs. of Hamilton Coll., No. 6:22-CV-214, 2024 WL 1675130, at *7–8 (N.D.N.Y. Apr. 18, 2024).

inferring discriminatory intent.[203] Although courts often stated that this factor alone did not establish anti-male bias, courts ruling for plaintiffs nevertheless cited pressure from OCR as a factor probative of discriminatory intent.[204] Many referred specifically to the 2011 Dear Colleague Letter (DCL) as creating a highly pressurized environment for universities to demonstrate strong action against sexual harassment.[205] They did not explain how pressure to comply with OCR's Title IX guidance or fear of an OCR investigation could support an inference of anti-male bias on the part of the university. The 2011 DCL did not require or invite sex-based discriminatory treatment of complainants or

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203. *See Regents of Univ. of Cal.*, 23 F.4th at 937; Doe v. Princeton Univ., 30 F.4th 335, 345 (3d Cir. 2022); Does 1-2 v. Regents of Univ. of Minn., 999 F.3d 571, 578 (8th Cir. 2021); *Univ. of Denver*, 1 F.4th at 830–31, 834; *Oberlin Coll.*, 963 F.3d at 587; Doe v. Univ. of the Scis., 961 F.3d 203, 209–10 (3d Cir. 2020); *Schwake*, 967 F.3d at 948; *Univ. of Ark.-Fayetteville*, 974 F.3d at 865–66; Doe v. Purdue Univ., 928 F.3d 652, 668–69 (7th Cir. 2019); *Mia. Univ.*, 882 F.3d at 594; *Baum*, 903 F.3d at 586; Doe v. Colum. Univ., 831 F.3d 46, 57–58 (2d Cir. 2016); Doe v. Rutgers, State Univ. of N.J., No. 23-22385, 2024 WL 4319594, at *5–7 (D.N.J. Sep. 27, 2024); Doe v. Univ. N.C. Sys., No. 1:23-cv-00041-MR, 2024 WL 925549, at *8 (W.D.N.C. Mar. 4, 2024); Lee v. Univ. of N.M., 449 F. Supp. 3d 1071, 1144 (D.N.M. 2020); Norris v. Univ. of Colo., Boulder, 362 F. Supp.3d 1001, 1013 (D. Colo. 2019); Gischel v. Univ. of Cincinnati, 302 F. Supp. 3d 961, 974 (S.D. Ohio 2018); Doe v. Pa. State Univ., No. 4:17-CV-01315, 2018 WL 317934, at *15–16 (M.D. Pa. Jan. 8, 2018); Rolph v. Hobart & William Smith Colls., 271 F. Supp. 3d 386, 401–02 (W.D.N.Y. 2017); Neal v. Colo. State Univ. Pueblo, No. 16-cv-873-RM-CBS, 2017 WL 633045, at *11–12 (D. Colo. Feb. 16, 2017); Doe v. Lynn Univ., Inc., 235 F. Supp. 3d 1336, 1341–42 (S.D. Fla. 2017); Doe v. Wash. & Lee Univ., No. 6:14-CV-00052, 2015 WL 4647996, at *9–10 (W.D. Va. Aug. 5, 2015); Doe v. Trs. of Hamilton Coll., No. 6:22-CV-214, 2024 WL 1675130, at *8 (N.D.N.Y. Apr. 18, 2024).

204. *See, e.g.*, *Univ. of the Scis.*, 961 F.3d at 211 (finding external pressure created by the 2011 DCL, in combination with plaintiff's allegations of different treatment of female comparators, support a plausible inference of anti-male bias); *Schwake*, 967 F.3d at 948–49 (finding pressure from an open OCR investigation helps support an inference of anti-male bias); *Mia. Univ.*, 882 F.3d at 594 (finding pressure from OCR to get tough on sexual assault made it more plausible that the disciplined male student was discriminated against because he is male); *Baum*, 903 F.3d at 586 (finding pressure of pending OCR investigation, combined with procedural flaws and unfairness toward respondent, supports a plausible inference of anti-male discrimination); Doe v. Columbia Univ., 831 F.3d 46, 57 (2d Cir. 2016) (finding allegations of external pressure on the university from OCR, combined with "substantial criticism" of the university's past record of handling sexual assault allegations and unfairness toward plaintiff in the disciplinary process, made it "entirely plausible" that the university was motivated by gender bias).

205. *See, e.g.*, *Purdue Univ.*, 928 F.3d at 668 (describing OCR and the 2011 DCL as having "tilted the process against men," and adding that OCR had already opened two investigations into Purdue, making it all the more plausible that what happened to Doe was motivated by his sex); Doe v. Lynn Univ., Inc., 235 F. Supp. 3d 1336, 1340–42 (S.D. Fla. 2017) (citing external pressure from OCR and the 2011 DCL, along with negative publicity for not punishing males accused of prior incidents of sexual misconduct, to establish plausibility of anti-male bias against the plaintiff).

respondents, and instead used gender-neutral language to refer to victims and perpetrators of sexual violence.[206] As one commentator pointed out, the 2011 DCL set a higher level of procedural protections for both complainants and respondents, regardless of gender, than commonly used by universities for other student disciplinary proceedings.[207]

Not all courts accepted the connection between pressure from OCR and anti-male bias. Courts siding with universities rejected a link between OCR enforcement and the plaintiff's allegation that the university acted based on a discriminatory intent against men.[208] Even responding to the argument, however, gave airtime to the message that OCR's tough-on-sexual harassment policies hurt men. Although plaintiffs ultimately lost more of these cases than they won, the core message of the reverse discrimination litigation, that overly aggressive Title IX enforcement amounted to discrimination against men, reinforced the narrative underlying the Trump Administration's policy reversal rolling back OCR enforcement on sexual harassment.[209]

By relying on pressure from OCR to bolster the case for discriminatory intent, the Title IX reverse sexual harassment litigation amplified conservative attacks on the administrative state.[210] Opposition to OCR's expanded enforcement activity during the Obama Administration benefited from an interest convergence between men's rights groups and opponents of

206. *See* 2011 Dear Colleague Letter, *supra* note 90.

207. *See* Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822, 831–32 (2017).

208. *See, e.g.*, Doe v. Cummins, 662 F. App'x 437, 453–54 (6th Cir. 2016) (finding that pressure from OCR and the 2011 Dear Colleague Letter did not show that the university was biased to discriminate against males).

209. *See* Behre, *supra* note 11, at 896–98 (explaining that the stories plaintiffs told in the pleadings were amplified by OCR opponents to push for weakening Title IX policy on sexual harassment); *cf.* Kramer, *supra* note 26, at 971 ("[C]ourts play a significant role in shaping the strategic terms of political debate and . . . in certain circumstances, they may even have a part in defining those terms.").

210. For criticism of the role of OCR in Title IX enforcement from this perspective, see SHEP R. MELNICK, THE TRANSFORMATION OF TITLE IX: REGULATING GENDER EQUALITY IN EDUCATION (2018).

federal administrative power.[211] OCR's higher profile on Title IX enforcement during the Obama years brought it into the sights of the conservative legal movement's war on the administrative state.

A second major theme in the successful reverse sexual harassment case law is that unfairness to students accused of sexual harassment, a nearly all-male group, supports an inference of discrimination against men.[212] In the successful cases, courts implicitly equated bias against respondents in sexual harassment disciplinary proceedings with bias against men, presumably because of the gender makeup of the category of accused students.[213] This runs counter to the principle, as repeatedly underscored by the Supreme Court, that gender impact does not establish discriminatory intent.[214] Indeed, the court that ruled against the sex discrimination challenge to the Trump Administration's 2020 Title IX regulations rejected the flip-side of this argument, that making university sexual harassment disciplinary proceedings more protective of accused students discriminates against women.[215] As that court explained, even though the 2020 regulations required changes to university sexual harassment disciplinary proceedings that would make them more unfavorable to complainants, a mostly female group, that in

211. *See supra* Section I.A. (discussing the groups and interests behind the Trump Administration's change in course from the Obama Administration).

212. *See, e.g.*, Doe v. William Marsh Rice Univ., 67 F.4th 702, 711 (5th Cir. 2023); Doe v. Regents of Cal., 23 F.4th 930, 940 (9th Cir. 2022); Doe v. Univ. of Denver, 1 F.4th 822, 832–33 (10th Cir. 2021); Doe v. Oberlin Coll., 963 F.3d 580, 586–88 (6th Cir. 2020).

213. *See, e.g.*, Doe v. Univ. of Ark., 974 F.3d 858, 865 (8th Cir. 2020) (citing university's favoritism toward complainants to support inference of anti-male bias); Doe v. Oberlin Coll., 963 F.3d 580, 586–87 (6th Cir. 2020) (relying on alleged inconsistencies and flaws in the disciplinary process and a pattern of finding accused respondents responsible to support plausible inference of anti-male intent); Doe v. Purdue Univ., 928 F.3d 652, 669–70 (7th Cir. 2019) (citing unfair process toward disciplined male student to support a plausible inference that the university was motivated by gender bias against men); Doe v. Mia. Univ., 882 F.3d 579, 593 (6th Cir. 2018) (finding anti-male bias plausibly alleged where all males accused of sexual misconduct in the fall of 2013 and spring of 2014 were found responsible); Doe v. Brown Univ., 166 F. Supp. 3d 177, 188–90 (D.R.I. 2016) (finding alleged unfairness to respondents supported allegations of anti-male bias).

214. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 258 (1979); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 216 (2022) (citing Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974)).

215. Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104, 137–38 (D. Mass. 2021).

itself did not establish that the Department of Education acted with discriminatory intent against women.[216] Many of the Title IX reverse sexual harassment decisions adhered to this principle and refused to make the leap from unfairness toward respondents to discrimination against men.[217] But the courts siding with plaintiffs in these cases placed great weight on allegations of unfairness toward respondents as support for discriminatory intent, eliding any distinction between bias against respondents, a mostly all-male group, and bias against men.

Apart from external pressure by OCR and alleged unfairness toward students accused of sexual harassment, the cases are thin on additional support for inferring discriminatory intent. In a few cases, courts cited statements purporting to show anti-male bias, but they are unlike the kinds of statements typically found to be explicit or proximate enough to infer bias.[218] For example, in a few cases, courts pointed to occasional statements by university officials discussing sexual assault in gender-specific terms as support for inferring anti-male bias.[219] But

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216. *Id.* at 136–38 (stating that the plaintiff's burden is to prove discriminatory intent, which is not established merely by the disparate impact on women resulting from a policy change that is unfavorable toward complainants, a mostly female category).

217. *See, e.g.*, Doe v. Samford Univ., 29 F.4th 675, 692 (11th Cir. 2022) (showing the fact that all accused students are male in the university's reported statistics on sexual violence does not support an inference of anti-male bias); Doe v. Univ. of Colo., 255 F. Supp. 3d 1064, 1078 (D. Colo. 2017) (explaining the fact that the university investigates men for sexual misconduct far more often than women does not raise a plausible inference of gender bias); Austin v. Univ. of Or., 205 F. Supp. 3d 1214, 1225 (D. Or. 2016) (acknowledging "[i]t is a simple fact that the majority of accusers of sexual assault are female and the majority of the accused are male, therefore enforcement is likely to have a disparate impact on the sexes," but explaining that disparate impact on men does not establish anti-male bias); Doe v. Cummins, 662 F. App'x 437, 453 (6th Cir. 2016) (explaining that allegations of a process biased toward complainants "at most show a disciplinary system that is biased in favor of alleged victims and against those accused of misconduct," and pointing out that both complainants and accused students can be either male or female); King v Depauw Univ., No. 2:14-cv-70-WTL-DKL, 2014 WL 4197507, at *10 (S.D. Ind. Aug. 22, 2014) (demonstrating the fact that disciplined students are male does not support an inference of intentional discrimination against males).

218. *Cf.* Bolger et al., *supra* note 8, at 768–72 (contrasting the Title IX reverse discrimination cases' treatment of comments purporting to show anti-male bias with Title VII's tougher approach to "stray remarks").

219. *See, e.g.*, Doe v. Case W. Rsrv. Univ., No. 1:17 CV 414, 2017 WL 3840418, at *6–7 (N.D. Ohio Sep. 1, 2017) (citing statements made by deputy Title IX coordinator in her doctoral dissertation that assumed that sexual aggressors are men and sexual assault victims are women); Doe v. Wash. & Lee Univ., No. 6:14-CV-00052, 2015 WL 4647996, at *10 (W.D. Va. Aug. 5, 2015)

in these cases, the statements cited were not made by a decisionmaker in connection with a determination in the plaintiff's case.[220] For example, in the case against Purdue University, the survivor advocacy group on campus, CARE (Center for Advocacy, Response and Education), had extensively promoted sexual assault awareness events on campus using gender-conscious language and had once posted a newspaper article on its Facebook page with the title, "Alcohol isn't responsible for sexual assault, men are."[221] These statements were cited by the court in support of the plausibility of inferring anti-male bias in the university's disciplinary proceedings against the plaintiff, even though the statements were not made by a decision-maker nor offered to explain the decision to discipline the plaintiff.[222] Courts have even split over whether university officials' mention of "The Hunting Ground," a documentary film aimed at raising awareness about campus sexual assault, was indicative of anti-male bias in disciplinary actions taken against a particular male student.[223]

A final theme running through the successful cases is the lenient treatment of comparator proof as support for inferring anti-male bias. Prevailing on the selective enforcement track from *Yusuf* requires male plaintiffs to identify a similarly

(relying on Title IX officer's gender-conscious statements in materials and teachings on sexual assault and consent).

220. *See, e.g.*, Doe v. Salisbury Univ., 123 F. Supp. 3d 748, 767 (D. Md. 2015) (citing university's communications in sexual assault awareness program in which sexual assault perpetrators were assumed to be men); Saravanan v. Drexel Univ., 2017 U.S. Dist. LEXIS 166940, at *2 (E.D. Pa. 2017) (citing gendered language in university public safety document portraying women as victims and cautioning men not to have sex with a woman who does not consent).

221. Doe v. Purdue Univ., 928 F.3d 652, 656–57 (7th Cir. 2019).

222. *Id.* at 669–70.

223. *Compare* Doe v. Coastal Carolina Univ., 522 F. Supp 3d 173, 178–81 (D.S.C. 2021) (denying defendant's motion for summary judgment based in part on allegation that university officials discussed the "The Hunting Ground" with the complainant and her mother, combined with facts showing unfairness toward respondent and procedural flaws in the disciplinary process), *with* Doe v. Univ. of Dayton, 766 F. App'x 275, 282 (6th Cir. 2019) (statements by hearing board member expressing support for showing "The Hunting Ground" movie and noting that the accused student is male and the accuser is female in nearly all cases on its campus do not raise a plausible inference of anti-male bias).

situated woman who was treated more favorably.[224] When proof of discrimination relies on the different treatment of a comparator, the main point of contention is usually whether the comparator is similar enough to the plaintiff, in relevant respects, to raise an inference of discriminatory intent.[225] The successful Title IX reverse sexual harassment cases that rely on comparator proof take a more relaxed approach to comparator proof than is commonly used in other discrimination cases.[226] Courts siding with universities on this issue carefully scrutinized the differences between the plaintiffs' and comparators' alleged misconduct, finding the comparators to be not similarly situated.[227] In the cases siding with plaintiffs, however, courts uncritically accepted female comparators as sufficiently similar to support an inference of discriminatory intent, despite significant differences in their underlying conduct.[228]

What separates the winning from the losing Title IX reverse sexual harassment cases is not the nuances of the facts, but judges' receptivity to the claim that Title IX sexual harassment

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224. Yusuf v. Vassar Coll., 435 F.3d 709, 716 (2d Cir. 1994); *see also* Doe v. William Marsh Rice Univ., 67 F.4th 702, 712 (5th Cir. 2023) (denying summary judgment on plaintiff's selective enforcement theory).

225. *See* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 728, 738, 745 (2010) (criticizing courts' stringent approach to requiring similarly situated comparators to prove discrimination).

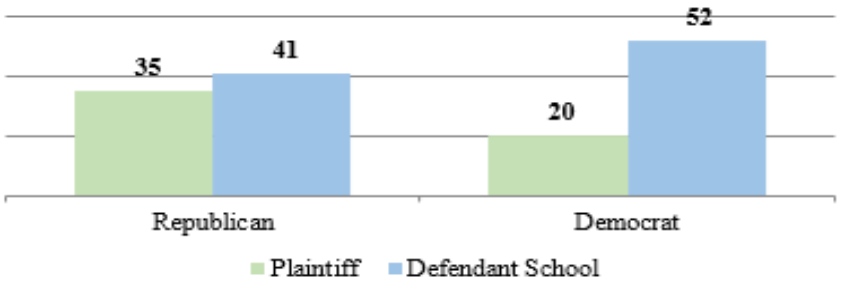
226. *Cf.* Bolger et al., *supra* note 8, at 764–65, 768–72 (contrasting the Title IX reverse discrimination cases with Title VII doctrine's tougher approach to proving discriminatory intent through the use of comparators).

227. *See, e.g.*, Sheppard v. Visitors of Va. State Univ., No. 3:18CV723-HEH, 2019 WL 6039953, at *2 (E.D. Va. Nov. 14, 2019), *aff'd*, 993 F.3d 230 (4th Cir. 2021) (rejecting selective enforcement claim where female comparators were charged with nonviolent offenses dissimilar to the misconduct for which plaintiff was found responsible).

228. *See, e.g.*, Doe v. Univ. of the Scis., 961 F.3d 203, 210–11 (3d Cir. 2020) (finding anti-male bias plausibly supported by the different treatment of female comparators—two female victims and one female witness who were not disciplined for violating the university's confidentiality policy when they discussed the sexual misconduct complaint against the plaintiff); Doe v. Rutgers Univ. State Univ. of N.J., No. 23-22385, 2024 WL 4319594, at *6 (D.N.J. Sep. 27, 2024) (holding that different treatment of female comparator sufficed to deny summary judgment, even though plaintiff did not file a formal complaint alleging sexual assault against her, and she did file such a complaint against plaintiff). For different approaches to the similarity of comparators, compare Doe v. William Marsh Rice Univ., 67 F.4th 702, 708, 712 (5th Cir. 2023) (denying summary judgment in part based on different treatment of female complainant and male respondent), with *id.* at 720–21 (Graves, J., dissenting) (pointing out the different circumstances of female comparator and plaintiff).

enforcement has gone too far, making men the victims of reverse discrimination. Notably, research for this Article found a correlation between the political party of the President who nominated the judge and the likelihood of siding with the plaintiff. In the decisions on motions to dismiss, Republican-appointed judges sided with plaintiffs 46% of the time.[229] By comparison, Democrat-appointed judges sided with plaintiffs 27.77% of the time.[230]

FIGURE 3. JUDICIAL VOTES BY POLITICAL AFFILIATION (MOTION TO DISMISS)[231]



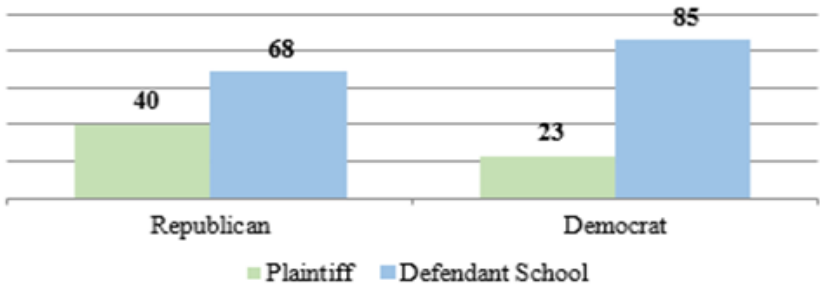
For all decisions, including rulings on summary judgment and preliminary injunctions, categories of cases in which plaintiffs had a much lower success rate, Republican-appointed judges still sided with plaintiffs nearly twice as often as Democrat-appointed judges (37%, compared to 21%).

229. *See infra* Figure 3.

230. *Id.*

231. Figure 3 represents the number of judicial votes for each party in ninety-eight court decisions on motions to dismiss based on the political affiliation of the President who appointed the judge. This Figure includes both appellate and district court judges. For appellate decisions, each judge is counted separately as a win or loss for the plaintiff, depending on how each judge voted. For example, if a plaintiff won in an appellate decision, but one of the three judges dissented, then the dissenting judge is counted as a vote for the defendant. As the figure shows, of the seventy-six Republican appointees voting on motions to dismiss, thirty-five (46%) voted for plaintiffs. Of the seventy-two Democratic appointees, twenty (27.77%) voted for plaintiffs. Four magistrate judges who participated in these decisions are not included in this data because they were appointed by U.S. District Court judges and not nominated by a President.

FIGURE 4. JUDICIAL VOTES BY POLITICAL AFFILIATION (ALL DECISIONS)[232]



This finding, that judges appointed by Republican Presidents are more likely than judges appointed by Democrats to conclude that plaintiffs' allegations of anti-male bias are plausible, coheres with the social psychology literature on perceiving reverse discrimination discussed in Part I.[233] Recall the study, discussed previously, that found that participants' political ideology, more than their gender, predicted their likelihood of perceiving widespread reverse discrimination against men after reading an excerpt touting advances in women's rights.[234] It should not be surprising, then, that judges' political affiliations correlate with their receptivity to perceiving reverse discrimination in Title IX claims for reverse sexual harassment.

The successful Title IX reverse sexual harassment case law stands out for the large volume of decisions and the corresponding increase in plaintiffs' success rate. Reverse sexual harassment is not limited to Title IX, however. Claims of reverse discrimination brought by men disciplined for sexual harassment have also reached the workplace, albeit with a much smaller number of cases. The next Part traces this development.

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232. Figure 4 represents the same information as Figure 3, but for all types of decisions (not just motions to dismiss). The total number of decisions used in this data is 139, for a total of 220 data points (one data point per judge). Of the 108 Republican appointees voting in these decisions, forty (37%) voted for plaintiffs. Of the 108 Democratic appointees, twenty-three (21%) voted for plaintiffs. Here too, the four magistrate judges appointed by U.S. District judges are not counted in this data.

233. *See supra* Section I.A.

234. *See* Lisnek et al., *supra* note 80, at 694–95.

III. REVERSE SEXUAL HARASSMENT IN THE WORKPLACE

Reverse sexual harassment has edged more sparingly into workplace law. Even with such claims accelerating in the past few years, Title VII has not yet become a hotbed of reverse sexual harassment litigation. But here too, the seeds are planted for male plaintiffs to claim sex discrimination arising out of disciplinary action for engaging in sexual harassment.

A. A Slow Start

Courts in Title VII cases recognized sexual harassment as a form of prohibited sex discrimination well before they did so under Title IX. The EEOC issued its influential guidelines on sexual harassment in 1980.[235] The Supreme Court decided its first sexual harassment case under Title VII in 1986.[236] With these precedents in place, Title VII's applicability to sexual harassment was settled in the decade before the parallel principle was established under Title IX.[237]

It was also settled early in Title VII's history that reverse discrimination is actionable under the statute. Although not a sexual harassment case, a 1976 Supreme Court precedent allowed a claim by white employees alleging that their employer engaged in unlawful discrimination when it subjected them to harsher disciplinary action than an African American coworker.[238] In an opinion by Justice Thurgood Marshall, the Court held that Title VII protection from intentional discrimination extends to majority group members, a principle that is equally applicable to sex discrimination.[239]

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235. EEOC, Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, as Amended; Adoption of Final Interpretive Guidelines, 45 Fed. Reg. 74, 676 (Nov. 10, 1980).

236. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986). Lower courts began to recognize sexual harassment as a violation of Title VII in the early 1980s. *See* Theresa M. Beiner, *Sexual Harassment: The Promise and Limits of a Feminist Cause of Action*, *in* THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES, *supra* note 79, at 332, 335.

237. *See* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 75–76 (1992) (stating, for the first time, that sexual harassment is a form of intentional discrimination under Title IX).

238. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 285–87 (1976).

239. *See id.* at 285, 296 (holding that Title VII and Section 1981 both protect white persons from race discrimination in employment). *See also* Johnson v. Transp. Agency, Santa Clara Cty.,

Despite the long pedigree of Title VII sexual harassment law and even earlier recognition of reverse discrimination, reverse sexual harassment cases against employers have been relatively uncommon and slow to gain traction. The first appellate ruling in support of a Title VII reverse sexual harassment claim was not until 2009, a full decade and a half after *Yusuf* opened the door to reverse sexual harassment claims under Title IX.[240] Prior to that, the few cases brought by male employees suing their employers for sex discrimination based on their handling of sexual harassment allegations lost in court.[241] This changed in 2009 with *Sassaman v. Gamache*,[242] a case, like *Yusuf*, decided by the Second Circuit.[243] In *Sassaman*, a male former employee claimed that his employer forced him to resign from his position at the county board of elections because a female coworker alleged that he sexually harassed her.[244] He sued the county for sex discrimination, citing a shoddy investigation and a statement by his boss saying, "you probably did what she said you did because you're male and nobody would believe you anyway."[245] The district court granted summary judgment to the

480 U.S. 616, 640–42 (1987) (permitting male employee to sue for sex discrimination in a challenge to a promotion decision that selected a woman, pursuant to an affirmative action plan, instead of him).

240. Sassaman v. Gamache, 566 F.3d 307, 315 (2d Cir. 2009).

241. *See, e.g.*, Yeager v. City Water & Light Plant, 454 F.3d 932, 934 (8th Cir. 2006) (upholding summary judgment for employer in sex discrimination suit brought by male employee fired for sexual harassment: "An employer that promulgates a sex harassment policy may reasonably distinguish between sexually oriented conduct that elicits a complaint from an offended co-worker, and arguably comparable conduct that is nonetheless tolerated by co-workers without complaint."); Wood v. City of Topeka, Kan., Topeka Hous. Auth., 90 F. Supp. 2d 1173, 1185 (D. Kan. 2000) (quoting Sanchez v. Philip Morris, Inc., 992 F.2d 244, 248 (10th Cir. 1993)) (granting summary judgment to employer on gender discrimination claim brought by male employee fired for sexual harassing female coworkers; plaintiff failed to show "'background circumstances [which] support the suspicion that the defendant is the unusual employer who discriminates against the majority,'" and failed to show similarly situated female employees were treated more favorably); Morrow v. Wal-Mart Stores, Inc., 152 F.3d 559, 563–64 (7th Cir. 1998) (upholding summary judgment for employer in suit by two male plaintiffs claiming sex discrimination after being fired for sexual harassment; female comparators identified by plaintiffs did not engage in comparably serious misconduct).

242. 566 F.3d 307 (2d Cir. 2009).

243. Yusuf v. Vassar Coll., 435 F.3d 709 (2d Cir. 1994).

244. 566 F.3d at 310–12.

245. *Id.* at 311.

employer, finding insufficient proof of sex discrimination, but the Second Circuit reversed.[246]

In an opinion written by Judge Cabranes, the court held that the plaintiff produced enough evidence of discriminatory intent to enable a reasonable jury to conclude that the employer discriminated against the plaintiff in its handling of the sexual harassment allegations.[247] The court relied heavily on the supervisor's biased comment as evidence of discriminatory intent.[248] Because the comment supplied direct evidence of anti-male bias in connection with the termination decision, *Sassaman* does not reflect the kind of expansive approach to discriminatory intent taken in the Title IX reverse sexual harassment cases discussed above.[249] An employer's flawed investigation and rush to judgment alone, the court explained, without the boss's explicitly sexist comment, would not have been sufficient to support the inference of anti-male bias needed to withstand summary judgment.[250] *Sassaman* opened the door to successful reverse sexual harassment cases under Title VII, but on terms that do not depart from the conventional understanding of discriminatory intent.[251]

Even so, *Sassaman* drew attention for its novelty in holding an employer liable for reverse sex discrimination based on an employer's response to alleged sexual harassment. As one commentator observed at the time, the "case is particularly noteworthy because reverse discrimination claims are quite rare and almost never succeed."[252] Another employment law expert

246. *Id.* at 311–12.

247. *Id.* at 312–14 ("[Title VII] also requires that, in the course of investigating claims, employers do not presume male employees to be 'guilty until proven innocent' based on invidious sex stereotypes.").

248. *Id.* at 312–15.

249. *See supra* Part II.

250. *Sassaman*, 566 F.3d at 315.

251. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251–52 (1989) (finding several partners' comments reflecting sex stereotypes sufficient to show sex stereotyping played a motivating role in an employer's decision to hire plaintiff).

252. Lawrence Peikes, *Supervisor's Remark About Propensity of Men to Harass is Evidence of Discrimination*, WIGGIN & DANA (July 23, 2009), https://www.wiggin.com/publication/supervisors-remark-about-propensity-of-men-to-harass-is-evidence-of-discrimination/

contemporaneously described *Sassaman* as "the first appellate court decision recognizing that an employer's firing of a man accused of sexual harassment based on the stereotypical assumption that he was probably guilty violates the prohibitions against sex discrimination."[253]

The floodgates, however, did not immediately open. Over the next decade, *Sassaman* stood as a lone example of a successful Title VII reverse sexual harassment precedent, tempered by the limiting principle that overt expression of anti-male bias by the decisionmaker may support a finding of sex discrimination against a male employee disciplined for sexual harassment.[254]

B. Spotlight on University Employers

It took a decade for the next reverse sexual harassment lawsuit against an employer to succeed. Ten years after *Sassaman*, another lawsuit brought by a male employee disciplined for sexual harassment prevailed, once again in a decision by the Second Circuit.[255] This time, the case arose in the higher education setting. In *Menaker v. Hofstra University*,[256] the plaintiff was a former tennis coach who was fired after an investigation into a female student-athlete's allegation that he sexually harassed her.[257] As in *Sassaman*, Judge Cabranes again wrote the opinion.[258] The court vacated the district court's dismissal of the complaint for failure to state a claim.[259] This time, there were no overtly discriminatory comments linking the plaintiff's status as a man to the outcome of the employer's investigation.[260] Instead, the court leaned heavily on the plaintiff's allegations of

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[https://perma.cc/7MLF-CEUX] (discussing *Sassaman's* holding that a male harasser can be "the victim of illegal sex stereotyping").

253. Robert L. Abell, *Sex Discrimination-Stereotyping the Male Accused of Sexual Harassment*, ROBERT ABELL L., https://www.robertabelllaw.com/library/sex-discrimination-sexual-harassment-stereotyping.cfm [https://perma.cc/R9T8-EZQC] (last visited Nov. 11, 2025).

254. *See Sassaman*, 566 F.3d at 315; *infra* discussion Section III.B.

255. Menaker v. Hofstra Univ., 935 F.3d 20, 26 (2d Cir. 2019).

256. 935 F.3d 20 (2d Cir. 2019).

257. *Id.* at 27–29.

258. *Id.* at 26; *see Sassaman,* 566 F.3d at 309.

259. *Menaker*, 935 F.3d at 26.

260. *See id.* at 28–29.

an unfair disciplinary process combined with the backdrop of external pressure on the university for inadequately responding to sexual harassment in the past.[261] The court detailed several procedural flaws in the university's disciplinary process and emphasized the pressure the university was under to take stronger action to address sexual harassment on campus.[262] The higher education setting factored prominently in the court's opinion.[263] The court cited its own precedent in *Doe v. Columbia University*,[264] a Title IX reverse sexual harassment ruling in favor of the male student-plaintiff on a motion to dismiss, for the principle that unfairness in the disciplinary process combined with external pressure on the university to take strong action on sexual harassment may support an inference of anti-male bias.[265] As in *Doe*, the court in *Menaker* invoked the 2011 Dear Colleague Letter and OCR's heightened enforcement activity to support a plausible inference of discriminatory intent against men.[266] Substitute "student" for "coach," and *Menaker* reads like the typical successful reverse sexual harassment Title IX case.

Three years later, the Second Circuit repeated these moves in another reverse sexual harassment case brought by a male employee against a university employer. In 2022, in *Vengalattore v. Cornell University*,[267] the appellate court reversed the district court's dismissal of a male employee's complaint for failure to state a sex discrimination claim.[268] The male plaintiff, a professor, alleged sex discrimination in being denied tenure for allegedly having an inappropriate sexual relationship with a female

261. *See id.* at 33.

262. *Id.* at 34–36. The Second Circuit also took an unusually broad view of employer liability in *Menaker* based on third-party bias, instructing the district court to consider whether anti-male bias on the part of the female student who accused the plaintiff of sexual misconduct could be imputed to the university. *Id.* at 37–39. This is a much broader understanding of imputed liability for bias by a non-agent than the Supreme Court has endorsed. *See* Staub v. Proctor Hosp., 562 U.S. 411, 415–16 (2011) (recognizing "cat's paw" liability where the decisionmaker acts at the behest of a biased supervisor).

263. *See Menaker*, 935 F.3d at 31–34.

264. *See* 831 F.3d 46, 48 (2d Cir. 2016).

265. *Id.* at 56–59.

266. *Menaker*, 935 F.3d at 26–27, 34.

267. 36 F.4th 87 (2d Cir. 2022).

268. *Id.* at 92.

graduate student.[269] The claim was brought under Title IX instead of Title VII, but the different statutory hook did not affect the court's analysis.[270] The critical issue remained whether the pleadings plausibly alleged anti-male bias on the part of the employer.[271] As in *Menaker*, there was no smoking gun comment connecting the dots between the university's adverse action and the plaintiff's allegations of anti-male discriminatory intent.[272] Yet the court found support for the allegation of gender bias in the decisionmaker's statement to the complainant that the university "was working 'very aggressively to address issues of access, prevention, and cultural change under Title IX.'"[273] Lacking explicit evidence of anti-male bias, the court again relied on the higher education setting and the pressure facing universities to get tough on sexual harassment to connect the procedural irregularities and unfairness in the investigation to discriminatory intent against men.[274]

The court's light touch in *Vengalatorre* on the discriminatory intent requirement for the sex discrimination claim contrasts starkly with its more conventional approach to intent on the plaintiff's national origin discrimination claim. In addition to alleging sex discrimination, the plaintiff, who was Indian, alleged that he was treated unfavorably in the disciplinary process because of his national origin.[275] The complaint alleged that the student who accused the plaintiff of sexual misconduct and a professor who was involved in the tenure process both made explicitly biased comments about the plaintiff's Indian

269. *Id.* at 93–94. The female graduate student also alleged that the professor raped her, but the university found insufficient evidence to support that allegation. *Id.*

270. *Id.* at 103 (quoting Doe v. Columbia Univ., 831 F.3d 46, 55–56 (2d Cir. 2016)) ("Because Title VII's discrimination prohibition overlaps Title IX's prohibition against sex discrimination in education programs, . . . 'Title VII cases provide the proper framework for analyzing Title IX discrimination claims.'").

271. *Id.* at 106–07.

272. *See id.* at 106–09 (relying on procedural irregularities and external pressure from OCR to support plausible inference of anti-male bias); *see also* Menaker v. Hofstra Univ., 935 F.3d 20, 34–35 (2d Cir. 2019) (describing how Menaker alleged sufficient facts to infer bias on Hofstra's part, despite there being no smoking gun comment demonstrating discriminatory intent).

273. *Vengalattore*, 36 F.4th at 109.

274. *Id.* 106–09.

275. *Id.* at 92–93.

ancestry.[276] The court found the comments insufficient to support an inference of national origin discrimination because they were not attributed to, nor endorsed by, the actual decisionmaker.[277] And yet, there were no gender-based comments reflecting anti-male bias made by anyone connected to the tenure proceedings.[278] The court was quick to attribute unfairness in the university's investigation and disciplinary action to the plaintiff's gender rather than to his Indian ancestry, even though the only biased comments in the case were about national origin and not gender.[279] To link procedural unfairness to gender bias, the court merely relied on OCR pressure on universities to appear tough on sexual harassment, implicitly equating tough measures against sexual harassment with discrimination against men.[280]

Unlike *Sassaman* and *Menaker*, Judge Cabranes did not write the opinion for the court in *Vengalatorre*.[281] However, Judge Cabranes was in the majority that decided *Vengalatorre* and concurred separately to lambaste the "deeply troubling aspects of contemporary university procedures to adjudicate complaints under Title IX."[282] His criticism of OCR's enforcement of Title IX equates universities' inadequate procedural protections for students accused of sexual harassment with sex discrimination against men.

One more recent precedent from the Second Circuit further highlights the importance of the university context in the *Menaker* and *Vengalatorre* cases. In a 2023 decision, the Second Circuit upheld summary judgment for a non-university employer in a male doctor's claim that he was discriminated

276. *Id.* at 95–96.

277. *Id.* at 109–11.

278. *See id.* at 106–09 (relying on procedural irregularities and external pressure to support a plausible inference of gender bias).

279. *See Vengalattore*, 36 F.4th at 109–11.

280. *See id.* at 106–09.

281. *Compare id.* at 114 (Cabranes, J., concurring), *with* Menaker v. Hofstra Univ., 935 F.3d 20, 26 (2d Cir. 2019) (Cabranes, J., majority), and Sassaman v. Gamache, 566 F.3d 307, 309 (2d Cir. 2009) (Cabranes, J., majority).

282. *Vengalattore*, 36 F.4th at 114.

against on the basis of sex when his employer, a medical practice, fired him based on an anonymous complaint of sex discrimination and harassment.[283] In this case, *Ali-Hasan v. Saint Peter's Health Partners Medical Associates*, the court credited the plaintiff's assertion of a "clearly irregular" investigation and disciplinary process but found the evidence insufficient to raise an inference of anti-male bias.[284] The court "assum[ed] *arguendo*" that the reverse discrimination theory from *Menaker* and *Vengalattore* applied outside the university setting,[285] but distinguished the present case for lack of similar external pressure facing the employer as that targeting universities "for reacting inadequately to allegations of sexual misconduct by members of one sex."[286] Summarizing circuit precedent, the court identified the critical circumstance for inferring anti-male bias as being pressure from OCR to take strong measures against sexual harassment.[287]

Outside the Second Circuit, there has been relatively little reverse discrimination litigation brought by male employees disciplined for sexual harassment, and even less success with such cases. Research for this article found only one additional case in which a plaintiff prevailed in a reverse sexual harassment claim under Title VII. In this case, *Kinlaw v. Jimmy Hula's UCF*,[288] a male cook at a restaurant "a stone's throw" away from the University of Central Florida claimed that his employer discriminated against him based on sex when it summarily fired him for allegedly sexually harassing three female coworkers.[289] The plaintiff claimed that he was falsely accused and that an

283. Ali-Hasan v. Saint Peter's Health Partners Med. Assoc., No. 22-2669, 2023 WL 7320860, at *1 (2d Cir. Nov. 7, 2023).

284. *Id.* at *7–8.

285. *Id.* at *6.

286. *Id.* (quoting Menaker v. Hofstra Univ., 935 F.3d 20, 33 (2d Cir. 2019)).

287. *See id.* at *2–3, *3 n.1 (citing *Menaker*, 935 F.3d at 33, and Sassaman v. Gamache, 566 F.3d 307, 315 (2d Cir. 2009), and concluding that plaintiff failed to meet his "prima facie burden" by failing to provide evidence of either his employer being under pressure regarding their treatment of sexual misconduct allegations or evidence sufficient for the court to infer his termination was motivated by sex bias).

288. No. 6:17-cv-1086-Orl-37TBS, 2017 WL 4877432 (M.D. Fla. Oct. 30, 2017).

289. *Id.* at *1.

investigation would have cleared him, but that he was fired on the spot because of his sex and age (over forty).[290] In support of the sex discrimination claim, the plaintiff alleged that "'he was treated differently and less favorably' than similarly situated female employees . . . because '[n]o female employee was ever falsely accused of sexual harassment'. . . ."[291] Although the court agreed with the employer that, standing alone, the allegation that plaintiff was terminated based on false allegations of sexual harassment would not support a plausible inference of gender bias, the court nevertheless sided with the plaintiff based on very little additional factual support.[292] It was enough for the court that "[p]laintiff further alleges that because the Sexual Harassment Accusations [were] gender-based, Defendant chose to level them against him because of his gender, and no female employee was ever falsely accused of sexual harassment."[293] In other words, the plausibility of the inference of anti-male bias rested on the gender-based nature of a sexual harassment accusation against a man for allegedly sexually harassing women.[294] The court rejected the employer's argument that the plaintiff's failure to identify a more favorably treated similarly situated female comparator was fatal, finding the allegations sufficient to support a plausible inference of intentional sex discrimination.[295]

The remainder of the cases in which male employees sued their employers for reverse sexual harassment—there have been ten such cases decided post-*Sassaman*, in addition to the four discussed above—failed for lack of sufficient allegations or proof of discriminatory intent.[296] A common theme in these

290. *Id.*

291. *Id.*

292. *See id.* at *2–3.

293. *Id.* at *2.

294. *See id.*

295. *Id.* at *2–3.

296. *See* Bockus v. Maple Pro., Inc., 850 Fed. App'x. 48, 50–51 (2d Cir. 2021) (holding that the conclusory allegation that employer engaged in "sex stereotyping that men accused of sexual harassment are likely guilty of it" was insufficient to create a plausible inference of discriminatory intent); Hawn v. Exec. Jet Mgt., 615 F.3d 1151, 1153, 1156 (9th Cir. 2010) (upholding summary judgment in sex discrimination complaint brought by male pilots fired for sexual

cases is that a shoddy sexual harassment investigation, combined with conclusory allegations that the employer prejudged the plaintiff guilty because he is male, are not enough to support a claim of sex discrimination.[297] Courts also refused to accept as comparators female coworkers who allegedly engaged in sexually explicit or offensive behaviors, but whose conduct did not generate complaints or rise to the level of the plaintiff's misconduct.[298]

Aside from the *Kinlaw* decision just discussed, which was decided by a federal district court in Florida, all three of the remaining successful reverse workplace sexual harassment cases

harassment; female coworker was not similarly situated because her sexual misconduct never resulted in a complaint); Waleyko v. Del Toro, 719 F. Supp. 3d 184, 186, 191 (D.R.I. 2024) (holding that a male plaintiff forced to resign from the Navy after multiple allegations of sexual harassment failed to connect "societal stereotypes" about men to his employer's treatment of him); Bailey v. Nexstar Broad, Inc., No. 3:19-cv-00671 (VLB), 2021 WL 848787, at *1–2, *17 (D. Conn. Mar. 6, 2021) (granting summary judgment to employer on sex discrimination claim brought by male employee who was fired for making sexual advances toward coworkers where he failed to identify a more favorably treated similarly situated female comparator); Redmon v. YMCA of Metro. Wash., 417 F. Supp. 3d 99, 100, 104 (D.D.C. 2019) (holding that a male lifeguard fired for sexually harassing female co-workers failed to identify similarly situated female comparators treated more favorably); Elzey v. Wal-Mart Assocs., No. CIV.A. RDB-11-2151, 2012 WL 3715321, at *1, *7 (D. Md. Aug. 28, 2012) (holding that a male employee terminated for sexual harassment failed to state a Title VII sex discrimination claim because he did not identify a female employee retained despite having been accused of sexual harassment); Hooker v. Hilton Hotels Corp., No. ELH-10-3019, 2012 WL 2798768, at *1, *15 (D. Md. July 6, 2012) (holding that a hotel employee fired for sexual harassment allegedly without a "fair and adequate investigation" failed to produce enough evidence of discriminatory intent to survive summary judgment); Hobson v. St. Luke's Hosp. & Health Network, 735 F. Supp. 2d 206, 212, 219 (E.D. Pa. 2010) (holding that a male paramedic's sex discrimination claim failed where he was terminated for sexual harassment and alleged that "he was never permitted to tell his side of the story"); Perraglio v. N.M. Dep't of Game & Fish, No. CV 08-0351 WPL/RHS, 2009 WL 10701266, at *1–2, *7–8 (D.N.M. Sep. 3, 2009) (holding that a male employee terminated, in part, for "sexual comments" made to co-workers failed to establish gender-based motivation for the decision); McGrory v. Applied Signal Tech., Inc., 212 Cal. Ct. App. 4th 1510, 1514, 1535–37 (Cal. App. 2013) (holding that a male employee fired for violating the employer's policies on sexual harassment failed to prove animus towards males or disparate treatment); *cf.* Starnes v. ThredUP Inc., No. 22-4859-KSM, 2023 WL 4471673, at *1, *4–5 (E.D. Pa. Jul. 10, 2023) (holding that a male employee terminated for mishandling a female subordinate's sexual harassment complaint and for failing to attend sexual harassment training failed to create a plausible inference that he was terminated based on the stereotype that men are less responsive to sexual harassment).

297. *See, e.g.*, *Bockus*, 850 F. App'x at 51; *Waleyko*, 719 F. Supp. 3d at 191; *Bailey*, 2021 WL 848787, at *9–12; *Hooker*, 2012 WL 2798768, at *14–15; *Hobson*, 735 F. Supp. 2d at 215.

298. *See, e.g.*, *Hawn*, 615 F.3d at 1159–60; *Bailey*, 2021 WL 848787, at *12–13; *Redmon*, 417 F. Supp. 3d at 104; *Elzey*, 2012 WL 3715321, at *618–19.

were decided by the Second Circuit.[299] The common denominator in these decisions is Judge Cabranes, who either authored the opinion for the court (*Sassaman* and *Menaker*) or concurred (*Vengalatorre*).[300] Given the prominence of the university setting in the most recent two cases, it is worth noting that Judge Cabranes was an outspoken critic of OCR's approach to Title IX enforcement during the Obama Administration and of universities' handling of sexual harassment allegations.[301]

So far, the major throughline in the successful reverse sexual harassment workplace cases is the university setting. Except for *Sassaman*, which rested on an explicit comment by the decisionmaker reflecting anti-male bias,[302] the two other successful reverse workplace sexual harassment claims in the Second Circuit were brought against university employers.[303] The fourth successful case, *Kinlaw*, did not involve a university employer, but relied, in part, on the employer's connection to a university to support the court's inference of discriminatory intent.[304] In *Kinlaw*, one of the complaint's allegations, which the court cited in support of the inference of intentional discrimination, made this connection explicitly: "Defendant, intent on matching its staff with the collegiate crowd that frequents the UCF [University of Central Florida] location, refused to allow Plaintiff to give a statement" to defend himself against the allegations of

299. *See* Sassaman v. Gamache, 566 F.3d 307, 315 (2d Cir. 2009); Menaker v. Hofstra Univ., 935 F.3d 20, 39 (2d Cir. 2019); Vengalattore v. Cornell Univ., 36 F.4th 87, 113–14 (2d Cir. 2022).

300. *See Sassaman*, 566 F.3d at 309; *Menaker*, 935 F.3d 20 at 26; *Vengalattore*, 36 F.4th at 114 (Cabranes, J., concurring).

301. *See* Jose A. Cabranes, *For Freedom of Expression, For Due Process, and For Yale—The Emerging Threat to Academic Freedom at a Great University*, 35 YALE L. & POL'Y REV. 345, 347 (2017) ("Perhaps most troubling of all, the combined efforts of governmental and university sexual misconduct bureaucrats to eviscerate, in the name of nondiscrimination, the due process protections of faculty that have long underpinned academic freedom."). As in-house counsel to Yale University in the 1970s, defending against the first Title IX sexual harassment case, Judge Cabranes expressed little regard for the sexual harassment claim, calling it groundless and publicity-driven. *See* CELENE REYNOLDS, UNLAWFUL ADVANCES: HOW FEMINISTS TRANSFORMED TITLE IX 47 (2025)

302. *Sassaman*, 566 F.3d at 315.

303. *Vengalattore*, 36 F.4th at 92; *Menaker*, 935 F.3d at 26.

304. *See* Kinlaw v. Jimmy Hula's UCF, LLC, No. 6:17-cv-1086-Orl-37TBS, 2017 WL 4877432, at *1 (M.D. Fla. Oct. 30, 2017).

sexual harassment.[305] By centering universities, courts in the successful reverse workplace sexual harassment cases closely track the rationale driving the reverse sexual harassment litigation under Title IX.

For now, this small set of reverse sexual harassment workplace cases may offer non-university employers some reassurance that, absent explicitly anti-male comments, they can continue to hold male employees accountable for sexual harassment without being successfully sued for reverse discrimination. Courts rejecting these claims have explained that even a flawed or unfair investigation and punishment of a male employee for sexual harassment, without the kind of external pressure placed by OCR on universities, does not establish sex discrimination.[306]

And yet, this distinction between university employers and other employers is likely too tenuous to hold reverse sexual harassment claims targeting non-university employers at bay. As long as sexual harassment law remains in force, all employers, not just universities, face external legal pressure to respond to sexual harassment in the workplace. Indeed, in terms of liability for damages, the doctrinal pressure imposed by Title VII on employers exceeds that placed on universities by Title IX. Under Title VII, employer liability for sexual harassment depends, in the first instance, on the harasser's authority over the plaintiff.[307] For harassment by a supervisor, the employer is vicariously liable, with or without a possible affirmative defense, depending on whether the harasser took a tangible employment action against the plaintiff.[308] In cases where the harasser lacks formal

305. *Id.* at *1.

306. *See, e.g.*, Bockus v. Maple Pro., Inc., 850 F. App'x 48, 51 (2d Cir. 2021) (holding that the male plaintiff's allegation that he was terminated based on anti-male animus when he was fired for sexually harassing coworkers and was not given notice or a chance to respond to the allegations did not raise a plausible inference of sex discrimination); Hooker v. Hilton Hotels Corp., No. ELH-10-3019, 2012 WL 2798768, *1, *14 (D. Md. July 6, 2012) (granting summary judgment to employer in male employee's case alleging sex discrimination when he was terminated for alleged sexual harassment of a coworker without a "fair and adequate investigation").

307. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759–60 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 800–01 (1998).

308. *See* Vance v. Ball State Univ., 570 U.S. 421, 429–30 (2013).

authority over the plaintiff, as with a coworker, Title VII applies a negligence-based standard.[309] Under the negligence standard, an employer is liable if it fails to take prompt and appropriate corrective action once it has actual or constructive notice of the alleged harassment.[310] Such corrective action includes investigating and, if the investigation finds that the harassment occurred, disciplining the harasser.[311] These are much more demanding standards for responding to alleged sexual harassment than what Title IX requires of educational institutions. Under Title IX, educational institutions are liable for sexual harassment only if they respond with deliberate indifference to known harassment after an official with the authority to take corrective action received actual notice of the harassment.[312] This is a much higher bar for establishing institutional liability and places less of an incentive on educational institutions than Title VII places on employers to take disciplinary action in response to sexual harassment.[313]

Given this, it is hard to see why external pressure from OCR, which has never terminated federal funding for noncompliance,[314] would create a more highly pressured environment for university employers than the risk of damages liability facing all employers for responding inadequately to alleged sexual harassment. Moreover, any distinction between university and non-university employers that rests on differences in federal

309. *Id.* at 424, 439.

310. *Id.* at 424.

311. *See* MARTHA CHAMALLAS, PRINCIPLES OF EMPLOYMENT DISCRIMINATION LAW 139 (2d ed. 2023).

312. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644–45 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290–91 (1998).

313. *See* Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2085 (2016); Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 231–32 (2011).

314. *See* REYNOLDS, UNLAWFUL ADVANCES, *supra* note 301, at 4. Recently, the Trump Administration has sought to terminate funding for what it views as noncompliance with Title IX for allowing transgender girls to compete in girls' sports. *See* Brooke Schultz, *Inside Trump's Full-Force Approach to Ban Trans Athletes and DEI in Schools*, EDUC. WEEK (Apr. 16, 2025), https://www.edweek.org/policy-politics/inside-trumps-full-force-approach-to-ban-trans-athletes-and-dei-in-schools/2025/04 [https://perma.cc/RH5U-UGKR].

agency enforcement in these two settings is, at best, ephemeral. Federal enforcement priorities are set by each new Administration. In the second Trump Administration, OCR will likely take a less aggressive role than it did under the Obama or Biden Administration in enforcing universities' Title IX obligations to respond to sexual harassment. For one thing, the 2020 regulations, now restored by the Trump Administration, sets a lower bar for compliance, requiring actual notice and deliberate indifference to find a university out of compliance for insufficiently responding to sexual harassment.[315] This standard displaces the knew or should have known standard that OCR had long applied in its administrative enforcement actions.[316] In addition, the Trump Administration has slashed the budget and staff of the agency, and is presently seeking to terminate the Department of Education, leaving fewer resources to carry out Title IX enforcement.[317]

To the extent that antagonism toward universities, fueled by anti-"woke" politics, is driving the reverse sexual harassment litigation under Title IX, that too is a feeble distinction for drawing a line separating non-university employers, who are also facing criticism targeting DEI and gender equity initiatives.[318] University employers were an appealing first target for reverse sexual harassment litigation, but they are not a logical stopping point. As the social science research discussed in Part I confirms, zero-sum beliefs are not domain specific.[319] The belief systems triggering perceptions of reverse discrimination are

315. *See* 2025 Dear Colleague Letter, *supra* note 122; Meghan Downey, *The Trump Administration's New Title IX Rule*, THE REGUL. REV. (May 20, 2020), https://www.theregreview.org/2020/05/20/downey-trump-administration-title-ix-rule/ [https://perma.cc/CHN3-GUQR].

316. *See* Downey, *supra* note 315.

317. *See* Brooke Schultz, *Trump Shakeup Stops Most Work at Education Department's Civil Rights Office*, EDUC. WEEK (Feb. 14, 2025), https://www.edweek.org/policy-politics/trump-shakeup-stops-most-work-at-education-departments-civil-rights-office/2025/02 [https://perma.cc/28EB-6T8H].

318. *See* Nicholas Confessore, '*America is Under Attack': Inside the Anti-D.E.I. Crusade*, N.Y. TIMES (Jan. 20, 2024), https://www.nytimes.com/interactive/2024/01/20/us/dei-woke-claremont-institute.html [https://perma.cc/UG2A-CS6V] (discussing the growing strength of the anti-woke movement targeting universities).

319. *See* Ruthig et al., *supra* note 55, at 23–24.

equally applicable in university and non-university employment settings.

The rise of reverse sexual harassment litigation in both the employment and education settings presents a challenge to institutions seeking to hold harassers accountable for sexual harassment and poses a threat to sexual harassment law itself. The next Part critically examines the doctrinal and theoretical justifications underlying courts' acceptance of reverse sexual harassment claims.

IV. PROBING THE FOUNDATIONS OF REVERSE SEXUAL HARASSMENT

As critical legal scholars warn, feminist law reform efforts can be co-opted and anti-discrimination rights flipped.[320] In clearing a path for reverse sexual harassment, two developments left openings for courts to take a lenient approach to inferring anti-male bias against men disciplined for sexual harassment. First, a narrow swath of precedent, most prominently represented in the Supreme Court's decision in *Ricci v. DeStefano*,[321] locates discriminatory intent in an institution's conscious effort to avoid harm to a minoritized or marginalized group.[322] As argued below, however, this precedent should not be extended to provide support for finding discriminatory intent in reverse sexual harassment claims. Second, the conventional theory for recognizing sexual harassment as a form of sex discrimination left sexual harassment law particularly vulnerable to reverse engineering. An easily reversible theory of sexual harassment as sex discrimination contributed to courts' receptivity to anti-male bias claims brought by men disciplined for

320. *See* GOVERNANCE FEMINISM: NOTES FROM THE FIELD, at xxviii (Janet Halley, Prabha Kotiswaran, Rachel Rebouché & Hila Shamir eds., 2019) ("Never forget: almost everything is flippable!"); *see also* Camille Gear Rich, *Feminism is Dead, Long Live Feminisms: A Postmodern Take on the Road to Gender Equality*, *in* THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES: POSTMODERN FEMINISM, *supra* note 79, at 112, 112 ("For feminists are in a period of transition, facing a sea of changes.").

321. 557 U.S. 557 (2009).

322. *Id.* at 590–93.

sexual harassment. This avenue, too, is based on an impoverished understanding of sexual harassment law.

A. Inferring Intent from Impact

The North Star in anti-discrimination law is that disparate impact against a group, even if predictable and anticipated, is not enough to support an action for intentional discrimination.[323] The exception to this principle is that when the law or policy challenged contains a facial classification based on sex or race, the intent to discriminate is established by the different treatment itself; no additional proof of intent is required.[324] This doctrine applies the same way to reverse discrimination as it applies to discrimination against a subordinated group, as the Supreme Court's affirmative action precedents illustrate.[325] Absent a facial classification, however, proof of discriminatory intent is necessary.[326] Courts have reaffirmed this principle time and time again in anti-discrimination challenges to facially neutral policies in myriad contexts, both statutory and constitutional.[327]

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323. *See* Washington v. Davis, 426 U.S. 229, 242 (1976); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 260 (1979).

324. *See* UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991).

325. *See, e.g.*, Richmond v. J.A. Croson Co., 488 U.S. 469, 510–11 (1989); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). The Court most recently applied this principle in Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 288 (2023). *See also* Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color-Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 77–78 (2000) (discussing how antidiscrimination law shifted to conceptualize all departures from color-blindness, even those designed to ameliorate racial inequality, as discriminatory).

326. *See Davis*, 426 U.S. at 239; *Feeney*, 442 U.S. at 272; Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 349 (1977). The exception, of course, is disparate impact, where proof of intent is not necessary to prevail. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432–33 (1971). Reverse discrimination, however, is brought as a disparate treatment (intentional discrimination) claim. *See Int'l Bhd. of Teamsters*, 431 U.S. at 335–36, 355 n.14.

327. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236 (2022) (holding that the fact that abortion restrictions have a negative impact on women does not mean that such restrictions are enacted with a discriminatory intent against women); Am. Fed'n of State, Cnty., & Mun. Emps. v. Washington, 770 F.2d 1401, 1407 (9th Cir. 1985) (holding that the gender impact of paying low wages to all persons employed in female-dominated job sectors did not establish intentional discrimination).

To establish discriminatory intent requires more than knowledge that a particular course of action will have a negative impact on the group harmed. The foundational precedent is *Personnel Administrator v. Feeney*, in which the Supreme Court rejected an equal protection challenge to a state veteran's preference that had the inexorable effect of locking women out of state civil service jobs.[328] As the Court explained, "discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences"; it means the decisionmaker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[329] Lacking proof that the state adopted the veterans preference "because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place," the plaintiffs failed to prove intentional sex discrimination.[330]

That said, courts have not always applied the doctrine of discriminatory intent consistently. In some contexts, courts have been more flexible in discerning discriminatory intent than in others. Legal scholar Daniel Ortiz parsed these inconsistencies in a now-classic article, *The Myth of Intent in Equal Protection*,[331] in which he argued that how judges apply the discriminatory intent requirement vacillates by context.[332] Courts have been more lenient in finding discriminatory intent in the public realm, such as jury service and voting, and more stringent in their approaches to the market's allocation of employment and housing opportunities.[333] Ortiz argued that the variation is explainable not by the rigors of the discriminatory intent doctrine or the facts of these cases, but by judges' ideological and

328. 442 U.S. 256, 280–81 (1979).

329. *Id.* at 279; *see also Davis*, 426 U.S. at 238 (refusing to equate disparate impact with discriminatory intent in an equal protection race discrimination case and holding that discriminatory intent is required to prove unconstitutional race discrimination).

330. *Feeney*, 442 U.S. at 279.

331. *See* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989).

332. *Id.* at 1107.

333. *Id.*

normative commitments.[334] Ortiz was not writing about reverse discrimination specifically, but his insight is helpful here too. Some pockets of reverse discrimination case law contain a more plaintiff-friendly approach to discriminatory intent than is typical for anti-discrimination law generally.

1. *An Anomaly*: Ricci *and the Expansive Approach to Discriminatory Intent for Discrimination*

The leading example of relaxing the stringency of the discriminatory intent requirement in a reverse discrimination case is the Supreme Court's 2009 decision in *Ricci v. DeStefano*.[335] *Ricci* involved a Title VII challenge to New Haven's decision to discard the results of a firefighter promotion test because of its disparate impact on Black and Latino firefighters, who scored on average worse than the white firefighters who took the test.[336] The plaintiffs, a group of high-scoring white firefighters and one Latino firefighter, claimed that the city's decision to discard the test results discriminated on the basis of race in violation of Title VII.[337] The district court granted summary judgment to the city.[338] Applying *Feeney*, the lower court concluded that the city's knowledge that declining to make promotion decisions based on the test scores would disproportionately disappoint white firefighters, who otherwise would have been promoted based on their test scores, did not establish discriminatory intent.[339] In the district court's view, just as wanting to help veterans with the knowledge that doing so would disproportionately hurt women's job chances did not establish

334. *See id.* (discussing voting and jury service as examples where the Court has eased up on the intent doctrine, and housing and employment as examples where it has not, and explaining this pattern as reflecting the Court's preference for laissez-faire distributions in areas of social and economic life ordinarily governed by the market); *see also* Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORN. L. REV. 1211, 1215–17 (2018) (discussing the inconsistent approaches courts take in discerning discriminatory intent in different settings).

335. 557 U.S. 557 (2009).

336. *Id.* at 561–63.

337. *Id.* at 562–63, 574.

338. *Id.* at 563.

339. Ricci v. DeStefano, 554 F. Supp. 2d 142, 161–62 (D. Conn. 2006).

discriminatory intent against women in *Feeney*, acting to avoid a disparate impact to Black and Latino firefighters knowing that it would deny promotions to a group of disproportionately white firefighters did not mean that the city acted with a racially discriminatory intent against white firefighters.[340] The Second Circuit affirmed in a *per curium* opinion,[341] but the Supreme Court disagreed and granted summary judgment for the plaintiffs.[342] In a cryptic part of the Court's opinion, the Court held that the city "rejected the test results solely because the higher scoring candidates were white."[343] The Court equated the city's race-consciousness in seeking to avoid a disparate impact against African American and Hispanic firefighters with a discriminatory intent against whites.[344] The Court's ruling has been criticized for its tension with *Feeney* and for taking a more expansive approach to discriminatory intent than courts typically do in discrimination cases brought by women and people of color.[345]

True to Ortiz's theory, the Court's approach in *Ricci* is difficult to explain by reference to the discriminatory intent doctrine alone.[346] Other values apparent in the opinion drive the Court's discriminatory intent analysis. Most prominently, the Justices openly sympathized with the reliance interests of the white firefighters who performed well on the test.[347] The Court repeatedly lauded the hard work of the firefighters who studied for the

340. *See id.* (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

341. Ricci v. DeStefano, 264 Fed. App'x. 106, 107 (2d Cir. 2008), *withdrawn and aff'd by*, 530 F.3d 87 (2d Cir. 2008).

342. Ricci v. DeStefano, 557 U.S. 557, 593 (2009).

343. *Id.* at 580.

344. *Id.*

345. *See, e.g.*, Victor C. Romero, Iqbal *and Race: Interrogating* Iqbal*: Intent, Inertia, and (a Lack of) Imagination*, 114 PENN. ST. L. REV. 1419, 1430–32 (2010); Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1872–74 (2012); Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837, 863 (2010).

346. *Cf.* Ortiz, *supra* note 331, at 1107 (discussing his theory that the intent doctrine "allocat[es] burdens of proof between the individual and the state").

347. *Cf.* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1347 (2011) (proposing a theory of antibalkanization, the attempt to avoid uses of race that threaten social cohesion, as the normative value underlying *Ricci*).

test, even though their studiousness had no clear connection to whether the city acted with a racially discriminatory motive in discarding the test results.[348] The Court gave a light touch to the intent requirement because its sympathies lay with the white firefighters whose higher test scores were, as the Court saw it, earned, yet unrewarded.[349] As Ann McGinley has argued, the Court's own perception of the equities was likely influenced by the racial identities of the successful and unsuccessful test-takers.[350] Moved by the disappointed expectations of the high-scoring white firefighters, the Court opted for a lenient approach to discriminatory intent. The result is a decision with the potential to use antidiscrimination law to limit the actions a policymaker can take in the interest of avoiding a disparate harm to a minoritized group when those actions burden the dominant majority.

2. *Cabining* Ricci*: Why the Court's for Finding Discriminatory Intent in* Ricci *Should Not Extend to Reverse Sexual Harassment Claims*

On the surface, *Ricci* shares some common features with the reverse sexual harassment claim.[351] In both types of cases, a facially neutral action is taken to avoid harm that would otherwise fall on a subordinated group, with the knowledge that the action will disproportionately impose a negative effect on the majority group. In addition, there is a judicial perception in both sets of cases that the action taken was unfair to the majority group, with whom judicial sympathies lie. Given these similarities, it is perhaps not surprising that courts in the successful

348. *Ricci*, 557 U.S. at 562, 567–68, 593.

349. *See* Siegel, *supra* note 347, at 1347.

350. *See* Ann C. McGinley, Ricci v. DeStefano*: A Masculinities Theory Analysis*, 33 HARV. J.L. & GENDER 581, 583–84 (2010).

351. Because the discriminatory intent doctrine does not distinguish between race and gender, *Ricci*'s approach to discriminatory intent is not limited to race. *See, e.g.*, United States v. Brennan, 650 F.3d 65, 89–90 (2d Cir. 2011) (applying *Ricci*'s discriminatory intent standard to a disparate-impact challenge on the basis of gender).

reverse sexual harassment challenges have found an entry point for a more expansive approach to discriminatory intent.[352]

However, the parallels between *Ricci* and reverse sexual harassment do not justify extending *Ricci*'s lenient approach to discriminatory intent to reverse sexual harassment. In *Ricci*, the Court distinguished the city's *post hoc* change to the promotion process, to which the Court ascribed discriminatory intent, from a hypothetical *ex ante* effort at the front end of the promotion process.[353] As an example of the latter, the Court mentioned, with apparent approval, designing a selection system with the goal of avoiding disparate impact to a minority group.[354] The Court offered reassurance that such a front-end practice, though similarly motivated in its desire to avoid a harmful racial impact against minority firefighters, would not give rise to a finding of discriminatory intent against the majority group, who would fare less well under the new promotion selection system.[355] The critical feature of discriminatory intent in *Ricci*, then, more than the city's actual subjective motivation, was the Court's perception of legitimate reliance interest by majority group members in retaining an earned privilege.

Properly understood, *Ricci*'s expansive approach to discriminatory intent should not extend to reverse sexual harassment claims. To be sure, there are reliance interests at stake in the reverse sexual harassment cases too, but they are of a different order. The reliance interests in the reverse discrimination cases consist of men's reliance on older norms of sexual conduct, before sexual harassment law brought such norms under scrutiny, and their expectations of a low risk of institutional

352. As with the reverse sexual harassment employment cases, there is a Judge Cabranes connection in *Ricci* too. Judge Cabranes dissented from the Second Circuit's denial of the petition for rehearing *en banc* in *Ricci*, arguing that the city's intent to avoid a disparate impact against Black and Latino firefighters established discriminatory intent to deprive white firefighters of promotions. *Ricci*, 530 F.3d at 101 (Cabranes, J., dissenting).

353. *Ricci*, 557 U.S. at 585.

354. *Id.*

355. *Id.*

accountability for breaching them.[356] Although there are legitimate interests in a fair disciplinary process for reckoning with sexual harassment, these interests can be protected through procedural fairness and adherence to well-publicized policies. Using the reverse discrimination claim to protect reliance interests in the status quo of sexual interactions is in tension with the purpose of sexual harassment law to transform sexual norms so as to secure gender-equal environments and access to opportunities in education and employment.[357] To the extent that *Ricci* rested on the reliance interests of the hardworking firefighters who passed the promotion exam,[358] the Court's expansive approach to discriminatory intent in that case should not justify a similarly lenient approach to inferring discriminatory intent in a university's or employer's actions to address sexual harassment.

Another distinction between the normative commitments underlying *Ricci* and the reverse sexual harassment case law is the role of external pressure to enforce antidiscrimination law in inferring discriminatory intent against the majority group. In the successful reverse sexual harassment cases, discussed above, courts finding discriminatory intent rely heavily on allegations of external legal pressure facing universities to take strong measures against sexual harassment.[359] The threat of OCR enforcement plays a large role in these cases, revealing a key normative commitment underlying judges' lenient approach to discriminatory intent as their opposition to what they view as overly aggressive Title IX enforcement.[360] Judges siding with plaintiffs in these cases cite strong OCR enforcement, and the threat of being found in violation of Title IX, as a reason to

356. *See* Katharine K. Baker, *Campus Sexual Misconduct as Sexual Harassment: A Defense of the DOE*, 64 KAN. L. REV. 861, 865–66, 871 (2016) (discussing the "[e]ntrenched norms of male entitlement and female responsibility" to which sexual harassment law is directed).

357. *Id.* at 874–77 (explaining the purposes of sexual harassment law and the interests sought to be protected).

358. *Ricci*, 557 U.S. at 562, 567–68, 593.

359. *See supra* Section II.B.

360. *Id.*

find plausible the plaintiff's allegation that the university acted with anti-male intent.[361]

However, the relationship between the threat of enforcement of antidiscrimination law and discriminatory intent was completely the opposite in *Ricci*. In *Ricci*, it was the lack of a sufficiently strong risk of legal exposure to the city that drove the Court to conclude that the city acted with a discriminatory motive.[362] In finding that the city discriminated against white firefighters, the Court relied on the lack of a sufficient risk of disparate-impact liability if the city had moved forward with test-promotions.[363] Had the legal pressure on the city to avoid disparate impact liability been greater, it would have helped, not hurt, the city's defense against the white firefighters' reverse discrimination claim. *Ricci*, then, does not support the reverse sexual harassment cases. Judges' reliance on tough enforcement of antidiscrimination law to infer discriminatory intent in the Title IX reverse sexual harassment litigation is a novel invention. It is not required by *Ricci* and, indeed, is at odds with the enforcement of anti-discrimination law. If the threat of strong enforcement of antidiscrimination law supports an inference of discriminatory intent against the majority, the reverse discrimination claim becomes an instrument of backlash.

3. *Recent Pressure to Expand Discriminatory Intent in Reverse Discrimination Cases*

Admittedly, the boundaries of discriminatory intent in reverse discrimination cases that do not involve a facially discriminatory classification are increasingly being contested. A new crop of reverse discrimination lawsuits seeks to ascribe discriminatory intent to an ever-expanding set of facially neutral measures taken to reduce harm to a historically subordinated

361. *Id.*

362. *Ricci*, 557 U.S. at 592.

363. *Id.*

group.[364] A recent Fourth Circuit case illustrates the difficulty courts are having in conceptualizing discriminatory intent in such cases.[365] The case arose after a selective public magnet school in Virginia, the Thomas Jefferson High School for Science and Technology, changed its admissions policies to replace a standardized entrance exam with a policy of allocating a certain percentage of seats to each public middle school in the district, combined with a holistic review of individual applicants.[366] The new policy did not consider any individual applicant's race but was motivated by the goal of increasing the representation of Black and Hispanic students in the student body.[367] Under the school's prior policy, the percentage of Black and Hispanic youth residing in the district far exceeded their enrollment in the school, while the representation of Asian American students in the school surpassed their representation in the district.[368] In the first year after the policy change, the school's percentage of Asian American admitted students declined while the percentage of Black and Hispanic admitted students increased.[369]

The case turned on whether the goal of increasing the representation of Black and Hispanic students amounted to

364. *See* Ishan K. Bhabha, Erica Turret & Peggy Xu, *One Year Later: The Implications of SFFA for Corporate America*, HARV. L. SCH. F. ON CORP. GOV. (Aug. 6, 2024), https://corpgov.law.harvard.edu/2024/08/06/one-year-later-the-implications-of-sffa-for-corporate-america/ [https://perma.cc/DP2N-RKDX] (discussing rise in reverse discrimination lawsuits after SFFA); Emma Goldberg, *How Companies Are Navigating DEI Backlash*, N.Y. TIMES (Feb. 10, 2025), https://www.nytimes.com/2025/02/10/us/politics/dei-corporate-america.html [https://perma.cc/PU6A-2DYM] (discussing plans of EEOC to prioritize reverse discrimination cases).

365. *See* Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 879, 886–87 (4th Cir. 2023).

366. *Id.* at 872–76.

367. *Id.*

368. *Id.* at 875–76.

369. *Id.* at 875–77. After the policy change, the percentage of admitted students who were Asian still exceeded the percentage of Asian students in the applicant pool (albeit less so), a fact the Fourth Circuit majority found significant. *Id.* at 879–82. For a critique of the Fourth Circuit's denial of disparate impact against Asians (but not its approach to intent), see Vikram David Amar & Jason Mazzone, *Fourth Circuit High School Case from Virginia Offers Controversial, and Seemingly Dubious, Definition of "Disparate Impact" in Equal Protection Challenges*, JUSTIA: VERDICT (June 19, 2023), https://verdict.justia.com/2023/06/19/fourth-circuit-high-school-case-from-virginia-offers-controversial-and-seemingly-dubious-definition-of-disparate-impact-in-equal-protection-challenges [https://perma.cc/BU33-ALH6].

discriminatory intent.[370] The district court held that it did, finding that the new policy was motivated by a desire to increase the representation of Black and Hispanic students at the expense of Asian students.[371] The Fourth Circuit reversed, ruling that the drop in the rate of admitted Asian students, combined with the goal of increasing Black and Hispanic representation, did not establish discriminatory intent.[372] A dissenting judge disagreed, arguing that the school district acted with "an undisputed racial motivation" of increasing Black and Hispanic enrollment at the school.[373] The Supreme Court declined to review the case, leaving intact the Fourth Circuit ruling against the plaintiffs, but Justices Thomas and Alito dissented from the denial of certiorari, making clear their view that the facts established discriminatory intent.[374]

The contours of discriminatory intent in reverse discrimination challenges to facially neutral practices are in flux. Ortiz's theory suggests that other considerations besides the discriminatory intent doctrine *per se* will likely drive the results in what courts view as close cases.[375] Fending off reverse sexual harassment challenges against universities and employers will require more effectively reckoning with the ideological and normative commitments underlying how judges apply the discriminatory intent doctrine in these cases.[376]

B. Revisiting a Reversible Theory of Sex Discrimination

Equality rights may be flippable, but some theories of discrimination are more susceptible to reverse engineering than others. For example, when the Supreme Court recognized racial classifications as inherently suspect, regardless of their

370. *Coal. for TJ*, 68 F.4th at 871–72.

371. Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 1:21cv296, 2022 WL 579809, at *10 (E.D. Va. Feb. 25, 2022).

372. *Coal. for TJ*, 68 F.4th at 871.

373. *Id.* at 892 (Rushing, J., dissenting).

374. Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 23-170, 2024 WL 674659, at *1, 5 (Feb. 20, 2024) (Alito, J., dissenting from denial of certiorari).

375. Ortiz, *supra* note 331, at 1119.

376. *See id.* at 1119–20.

motivation or the historical conditions under which they arose, it was a small step from strictly scrutinizing the use of race to disadvantage people of color to doing the same for racial classifications designed to remedy discrimination against people of color.[377] Likewise, the conventional understanding of why sexual harassment is a form of sex discrimination proved vulnerable to reversal in cases brought by men disciplined for sexual harassment.

1. *Sexual Harassment as Sex Discrimination the Conventional "But for Her Sex" Understanding*

The Supreme Court first recognized sexual harassment as a form of sex discrimination in 1986 in a Title VII case, *Meritor Savings Bank v. Vinson*.[378] The alleged harassment in that case included allegations of rape and sexual assault, in addition to other unwelcome sexual conduct.[379] The Court held that sexual harassment is a form of sex discrimination, but resorted to a tautology to explain this proposition: when a supervisor sexually harasses a subordinate because of sex, he discriminates against her because of her sex.[380] Why, exactly, the sexual harassment of a woman occurs "because of sex" was not explained, but implicitly rests on the assumption that the harasser's sexual conduct would not have been directed toward a man.[381] The underlying premise is that the harasser was motivated by sexual desire and acted upon a binary sexual orientation. The precedents that followed continued to accept this rationale for recognizing sexual harassment as sex discrimination: but for the

377. *See, e.g.*, Richmond v. J.A. Croson Co., 488 U.S. 469, 491–93, 509 (1989); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213, 224–25 (1995).

378. 477 U.S. 57, 64 (1986).

379. *See* Tanya Katerí Hernández, *"What Not to Wear"—Race and Unwelcomeness in Sexual Harassment Law: The Story of* Meritor Savings Bank v. Vinson, *in* WOMEN AND THE LAW STORIES 277, 277, 283–84 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011).

380. *Meritor*, 477 U.S. at 64 ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.").

381. *See, e.g.*, Bagenstos, *supra* note 98, at 312 (explaining that sexual assault is a form of sex-based disparate treatment because "the aggressor targets the victim for harm based on the victim's sex"); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 692–93, 710–712 (1997).

plaintiff's sex (female), the harasser (male) would not have sexually harassed her.[382]

The same rationale underlies Title IX's coverage of sexual harassment. The first courts to confront Title IX sexual harassment complaints opened the door to such claims somewhat grudgingly and with little explanation.[383] In 1992, the Supreme Court first recognized that sexual harassment is a form of sex discrimination under Title IX, but with no deeper analysis than citing its tautology from *Meritor*.[384] By the end of the decade, the Court applied this principle to sexual harassment perpetrated by students in addition to that engaged in by school employees, but without elaborating on the "because of sex" analysis.[385] In the course of explaining why student-to-student sexual harassment falls within Title IX's ban on sex discrimination, the Court analogized to a scenario in which male students blocked female students' access to a computer lab.[386] The analogy is useful to illustrate the educational harms of sexual harassment, but does not illuminate why sexual harassment between students occurs because of sex. Nor has the gap been filled by OCR, which has focused more on the procedures required for a fair and equitable grievance process for resolving sexual harassment allegations than on the foundation for treating sexual harassment as sex discrimination under Title IX.[387]

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382. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998) (discussing *Meritor* and other sex discrimination precedent, but in the context of discrimination against the same sex).

383. *See, e.g.*, Alexander v. Yale Univ., 459 F. Supp. 1, 4–6 (D. Conn. 1977), *aff'd*, 631 F.2d 178, 182, 184–85 (2d Cir. 1980).

384. *See* Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75 (1992) (citing *Meritor*, 477 U.S. at 64).

385. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 647–48 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277–81 (1998).

386. *Davis*, 526 U.S. at 650–51.

387. *See* Peterson & Ortiz, *supra* note 98, at 2134–35 (criticizing OCR's procedural focus at the expense of more meaningful protections for survivors); Baker, *supra* note 356, at 892 (stating that the agency "has done an inexplicably poor job of explaining the theory under which it is compelling universities to act" in response to sexual misconduct).

2. *Flipping the Sex Discrimination Underpinnings of Sexual Harassment in the Reverse Sexual Harassment Claim*

The simple but-for explanation for why sexual harassment is sex discrimination made it easy to reverse the dots connecting the harasser to the victim's sex in reverse sexual harassment claims. If sexual harassment is a product of a female sexual harassment victim's sex, then a tougher institutional response to sexual harassment is "because of" the accused harasser's sex in the same syllogistic sense: but-for the sex of the accused harasser,[388] the female complainant would not have alleged that she was sexually harassed by him, thereby avoiding institutional rebuke.[389]

The simple but-for explanation of sexual harassment has always been problematic. It reduces sexual harassment to misplaced sexual desire, with no attention to how gender shapes the power imbalances between the people involved or within the institution where the sexual harassment occurred.[390] It is based on a flawed understanding of sexual harassment law, even as a descriptive matter. In practice, courts deciding sexual harassment claims brought by a female plaintiff do not scrutinize an accused male harasser's sexuality to determine whether

388. Circuit court precedent is split over whether Title IX requires but-for causation or allows a plaintiff to succeed by showing sex was a motivating factor in the adverse action. *Compare* Sheppard v. Visitors of Va. State Univ., 993 F.3d 230, 236–37 (4th Cir. 2021) (holding that Title IX requires but-for causation), *with* Doe v. Trs. of Bos. Coll., 892 F.3d 67, 90 (1st Cir. 2018) (accepting motivating factor causation); *see also* Haidak v. U. Mass. Amherst, 933 F.3d 56, 74 (1st Cir. 2019) (applying motivating factor causation to male plaintiffs' Title IX claim). Many of the Title IX reverse sexual assault cases use the motivating factor standard of causation, without discussing whether Title IX requires the higher but-for causation standard, in connecting the plaintiff's sex to the adverse treatment. *See Doe*, 892 F.3d at 90; *Haidak*, 933 F.3d at 74.

389. *See, e.g.*, Menaker v. Hofstra Univ., 935 F.3d 20, 39 (2d Cir. 2019) ("Here, [the complainant] did not accuse [the plaintiff] of just any misconduct; she accused him of *sexual* misconduct. That choice is significant, and it suggests that [the plaintiff's] sex played a part in her allegations."). The *Menaker* court additionally explained that "it is reasonable to assume those [allegations] would not have been made [concerning] someone of the same sex." *Id.* at 39 n.88 (citing Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998)).

390. *See* Jessica A. Clarke, *Inferring Desire*, 63 DUKE L. J. 525, 595–96 (2013) (arguing that focusing on the harasser's desire is a distraction from the harms of sexual harassment and the reasons for recognizing it as a form of sex discrimination); MacKinnon, *supra* note 313, at 2042–43, 2056–57 (discussing the gendered power disparities and campus cultures that make sexual harassment a form of sex discrimination).

the harasser ever engaged in sexual conduct toward a man.[391] Title VII case law has reckoned with this complexity somewhat more than Title IX through the ironically named "equal opportunity" harasser problem.[392] Although courts initially treated this wrinkle as potentially fatal in a sexual harassment lawsuit, more recent cases have reasoned their way out of this loophole by focusing on how the form of the harassment (the "script") was tailored to the target's sex or whether the harassment harmed one sex more than another.[393]

Beyond its poor fit with sexual harassment law in practice, the bigger problem with the conventional but-for account is its focus on the harasser's propensity (or not) for directing sexual conduct toward a person of a different sex than the plaintiff.[394] The but-for theory centers the wrong of sexual harassment on the individual harasser and his sexual desire for a particular target. As Tristin Green has argued, the emphasis on sexual harassment as a problem of individual bad actors drains sexual harassment law of its connection to institutions.[395] Likewise, focusing on the individual stories of men disciplined for sexual harassment redirects attention away from the pervasiveness of sexual harassment, its gendered harms, and the ways in which institutions facilitate it as a gendered abuse of power.[396]

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391. *See* Clarke, *supra* note 390, at 529–30 (explaining that courts "presume" that a male harasser who sexually harasses a female plaintiff is heterosexual, and contrasting this approach with same-sex harassment cases, where courts attempt to discern the harasser's sexual orientation to determine whether the harassment would have occurred but-for the target's sex).

392. *See id.* at 540–41; Shylah Miles, *Two Wrongs Do Not Make a Defense: Eliminating the Equal Opportunity-Harasser Defense*, 76 WASH. L. REV. 603, 605–06 (2001); CHAMALLAS, PRINCIPLES OF EMPLOYMENT DISCRIMINATION LAW, *supra* note 311, at 131–32.

393. *See* Sharp v. S&S Activewear, L.L.C., 69 F.4th 974, 981–83 (9th Cir. 2023); Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 810–11 (11th Cir. 2010); Ziskie v. Mineta, 547 F.3d 220, 228–29 (4th Cir. 2008); Marianna McLean, *"Equal Opportunity Harasser" Doctrine: Flawed, Pernicious, Abrogated*, 35 ABA J. LAB. & EMP. L. 473, 478–80 (2021).

394. *See* CHAMALLAS, *supra* note 311, at 128 (discussing the "but for" sex rationale early courts used to understand sexual harassment as a form of sex discrimination).

395. Tristin K. Green, *Was Sexual Harassment Law a Mistake? The Stories We Tell*, 128 YALE L.J. F. 152, 166–67 (2018); *see* TRISTIN K. GREEN, *Feminism and #MeToo: The Power of the Collective*, *in* THE OXFORD HANDBOOK OF FEMINISM AND THE LAW IN THE UNITED STATES, *supra* note 79, at 259, 263–67.

396. *See, e.g.*, JENNIFER S. HIRSCH & SHAMUS KHAN, SEXUAL CITIZENS: A LANDMARK STUDY OF SEX, POWER, AND ASSAULT ON CAMPUS, at xxi–xxvi (2020) (analyzing campus sexual assault

An alternative explanation courts sometimes use for explaining sexual harassment as sex discrimination is that it disproportionately harms women.[397] Without further analysis, however, this rationale is also too simplistic and lends itself to reflexive reversal. While it is true that sexual harassment disproportionately hurts women, and that sexual harassers are disproportionately male,[398] that impact cuts both ways. Just as the impact of a weak response to sexual harassment disproportionately hurts women, the converse is also true: the brunt of taking a stricter approach to sexual harassment disproportionately falls on men, who comprise the majority of persons accused of sexual harassment.[399] If gender impact alone is the touchstone of why sexual harassment is sex discrimination, then getting tougher on sexual harassment necessarily discriminates against men. Such a superficial evaluation of gender impact misses the social and institutional context in which the gendered harm of sexual harassment occurs.

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as a problem that is socially constructed by institutional structures and cultures); KATE MANNE, DOWN GIRL: THE LOGIC OF MISOGYNY 1, 20–21 (2017) (criticizing the tendency to treat sexual abuse and harassment as a problem of individual men with bad motives).

397. *See* Hoyle v. Freightliner, LLC., 650 F.3d 321, 331–32 (4th Cir. 2011); Patane v. Clark, 508 F.3d 106, 114–15 (2d Cir. 2007); Kelly Cahill Timmons, *Sexual Harassment and Disparate Impact: Should Non-Targeted Workplace Sexual Harassment Be Actionable Under Title VII?*, 81 NEB. L. REV. 1152, 1154–55 (2003).

398. *See* Nick Anderson, Susan Svrluga & Scott Clement, *Survey Finds Evidence of Widespread Sexual Violence at 33 Universities*, WASH. POST (Oct. 15, 2019), https://www.washingtonpost.com/local/education/survey-finds-evidence-of-widespread-sexual-violence-at-33-universities/2019/10/14/bd75dcde-ee82-11e9-b648-76bcf86eb67e_story.html [https://perma.cc/L33Y-WFD6] (finding 25.9% of female undergraduates report having been sexually assaulted, compared to 6.8% of male undergraduates); Doe v. Oberlin Coll., 963 F.3d 580, 593 (6th Cir. 2020) (Gilman, J., dissenting) (citing Department of Justice statistics showing that fewer than 3% of sexual abusers are female); *see also* Haidak v. Univ. of Mass. Amherst, 933 F.3d 56, 74 (1st Cir. 2019) (citing significantly lower rates of reported sexual assaults committed by female students than male students).

399. *See* Leila Wood, Sharon Hoefer, Matt Kammer-Kerwick, Jose Ruben Parra-Cardona & Noel Bush-Armendariz, *Sexual Harassment at Institutions of Higher Education: Prevalence, Risk, and Extent*, 36 J. INTERPERSONAL VIOLENCE 4520, 4528 (2021) (reporting survey data on sexual harassment showing that, among faculty perpetrators, "78% [were] male-identified, 15% were female-identified, and 7% were . . . unknown," and of student perpetrators, "86% were male-identified, 11% were female-identified, and 3% . . . unknown").

3. *Searching for a More Resilient Theory of Sex Discrimination in Sexual Harassment's Anti-Subordination Roots*

Recognizing that sexual harassment victims are predominantly women should be the starting point, but not the ending point, of a more resilient theory of sexual harassment. A firmer foundation for sexual harassment law would ground the sexual harassment claim in the institutional structures and cultures that enable the harassment, rather than treating it as an individual problem of misdirected sexual desire. While this is not the place to fully elaborate on a robust theory of sexual harassment, legal scholarship has already taken up this challenge. There is a rich body of work explaining sexual harassment as a technology of sexism embedded in and enabled by the structures and cultures of institutions, including the workplaces and schools in which it occurs.[400]

Building out a better sex discrimination theory for sexual harassment requires attention to how gender shapes not just the interpersonal sexual interactions between the harasser and target, but also the institutional responses to it.[401] Deeply ingrained associations have gendered the categories of harasser as male and harassment victim as female. The gendering of these categories triggers biases that shape the institutional dynamics surrounding sexual harassment. The stereotype of female sexual passivity and male sexual aggression normalizes sexual harassment. At the same time, the feminization of the category of sexual harassment victim leaves victims vulnerable to the

400. For classic works theorizing sexual harassment as sex discrimination, see Franke, *What's Wrong with Sexual Harassment?*, *supra* note 381, at 693 (explaining sexual harassment as a "technology of sexism"); Kathryn Abrams, *New Jurisprudence of Sexual Harassment*, 83 CORN. L. REV. 1169, 1171–72 (1998) (explaining sexual harassment as the institutionalization of women's subordination, a practice that serves to preserve male control and entrench male norms in institutions such as the workplace); Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment "Because of Sex"*, 79 U. COLO. L. REV. 1151, 1223–24 (2008) (explaining that sexual harassment is rooted in perceptions of gender difference and feminine inferiority and constructs male dominance in the harasser); *see also* Deborah L. Brake, *Back to Basics: Excavating the Sex Discrimination Roots of Campus Sexual Assault*, 6 TENN. J. RACE, GENDER, & SOC. JUST. 7, 25–29 (2017) (theorizing sexual harassment as sex discrimination under Title IX).

401. *See* MacKinnon, *supra* note 313, at 2040, 2058–61 (emphasizing the importance of institutional accountability for sexual harassment).

stereotypes that have historically disbelieved and blamed women,[402] treating them as untrustworthy narrators of their sexual experiences.[403] Institutions engage in sex discrimination when they act on sexual stereotypes that normalize male sexual aggression and discount sexual harassment victims.[404] Women's vulnerability to sexual harassment, and to institutional neglect or apathy in response, are the products of these gendered structures, cultures, and norms, and not simply of misdirected sexual desire.[405] These richer theories of sexual harassment have been in the pages of law reviews for decades, but the looming prospect of reverse sexual harassment litigation lends new urgency to the task of educating courts about the foundations of sexual harassment as a sex discrimination claim. Imposing aggressive measures on men found to have engaged in sexual harassment should not be understood as the flip side of the sex discrimination that results from the failure of institutions to take sexual harassment seriously.

4. *Rejecting the Zero-Sum Perspective and Acknowledging Men's Stakes in Addressing Sexual Harassment*

402. *See generally* Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 779 (2001) (explaining how the feminization and masculinization of the categories of rape victim and rapist give rise to gender-biased responses to sexual violence).

403. *See, e.g.*, Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3 (2017) (elaborating the gender stereotypes that undermine survivors' credibility); Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1160–63 (2019) (discussing the fear of being discredited, blamed, or ignored as key reasons why students do not use university processes for reporting sexual assault).

404. *See, e.g.*, Kathryn R. Klement, Brad J. Sagarin & John J. Skowronski, *Accusers Lies and Other Myths: Rape Myth Acceptance Predicts Judgments Made About Accusers and Accused Perpetrators in a Rape Case*, 81 SEX ROLES 16, 31 (2018); Sarah McMahon, *Rape Myth Beliefs and Bystander Attitudes Among Incoming College Students*, 59 J. AM. COLL. HEALTH 3, 4 (2010); Katie M. Edwards, Jessica A. Turchik, Christina M. Dardis, Nicole Reynolds & Christine A. Gidycz, *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 761, 762 (2011); *see also* Carson & Nesbitt, *supra* note 100, at 350 (discussing the persistence of rape myths, including the assumption that women falsely accuse men of sexual assault out of regret for having consensual sex or jealousy).

405. *See, e.g.*, Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. F. 22, 22, 27 (2019) (criticizing the centrality of sexual desire to courts' understanding of sexual harassment in the workplace).

In the course of theorizing the sexual harassment claim and moving beyond the simple but-for and gender impact explanations, sexual harassment law must make space for the reality that men, too, can be sexually harassed. The justification for treating sexual harassment as sex discrimination must be able to explain that men are also subjected to sex discrimination when they are sexually harassed and their experiences are ignored, disbelieved, or belittled. The reality of male sexual harassment victims need not upend the insight that the category of sexual harassment victim is feminized and devalued, even when it includes men.[406] Male sexual harassment victims are also subjected to gender stereotypes. This can take the form of refusing to even acknowledge the possibility of male victimization because it runs counter to dominant norms of masculinity.[407] Men who report sexual harassment often experience particularly virulent forms of disbelief and blame for violating the gender norms of male sexuality.[408]

The invisibility of men as sexual harassment victims in law and mainstream culture contributes to the reverse sexual harassment claim and judges' willingness to equate alleged unfairness to accused sexual harassers with discrimination against men.[409] The invisibility of male victims of sexual violence has a long history in the law. An early and notorious example is *Dothard v. Rawlinson*, a Title VII sex discrimination case in which

406. *See, e.g.*, Kimberly D. Bailey, *Sex in a Masculinities World: Gender, Undesired Sex, and Rape*, 21 J. GENDER RACE & JUST. 281, 285 (2018) ("[I]nstead of negating the proposition that rape is a gendered crime, male victimization shows that rape is an act that reinforces gender norms. In addition, all rapes, regardless of the sex of the victim, are not just the product of women's subordinated status to men; they are also the product of men's relationships with each other.").

407. *See* Jennifer L. Berdahl, *Harassment Based on Sex: Protecting Social Status in the Context of Gender Hierarchy*, 32 ACAD. MGMT. REV. 641, 641, 644 (2007).

408. *See, e.g.*, Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1262 (2011); Jessica A. Turchik & Katie M. Edwards, *Myths About Male Rape: A Literature Review*, 13 PSYCH. MEN & MASCULINITY 211, 213 (2012); Alexandra Flanagan & Phoenix Tso, *Inside the Student Activist Movement: Tufts and Sexual Violence*, JEZEBEL (Feb. 19, 2014, 22:00 ET), https://www.jezebel.com/inside-the-student-activist-movement-tufts-and-sexual-violence [https://perma.cc/N66S-4XJ7].

409. *See* Caroline Erentzen, Regina A. Schuller & Alisha C. Salerno-Ferraro, *What Guy Wouldn't Want It? Male Victimization Experiences with Female-Perpetrated Sexual Harassment*, 79 J. SOC. ISSUES 1345, 1347 (2023) (discussing the cultural resistance to viewing men as victims of sexual harassment).

the Supreme Court heard a challenge to Alabama's ban on women serving as correctional officers in men's maximum-security prisons.[410] The Court upheld the rule based on the state's defense that being a man was necessary to a prison guard's ability to maintain security.[411] The Court located the plaintiff's inability to perform the job in her "womanhood," which placed her at risk of sexual assault by male inmates.[412] By describing sexual assault as a problem traceable to the presence of women, the Court was oblivious to what should have been obvious: men, too, can be sexually assaulted.[413]

The erasure of men as persons harmed by sexual harassment carries over into the reverse sexual harassment cases. Judges in the successful cases implicitly lumped men into the category of accused harasser and women into the category of victim/complainant.[414] This assumption does not accord with reality. Men are sexually harassed in both the education and employment settings.[415] Though a minority of sexual harassment victims, substantial numbers of men are sexually assaulted during their college years.[416] And although men are less likely than women

410. 433 U.S. 321, 323 (1977).

411. *Id.* at 334–37.

412. *Id*. at 335.

413. *Id*. at 335–36. *See* Zoe D. Peterson, Emily K. Voller, Melissa A Polusny & Maureen Murdoch, *Prevalence and Consequences of Adult Sexual Assault of Men: Review of Empirical Findings and State of the Literature*, 31 CLINICAL PSYCH. REV. 1, 2 (2011).

414. *See supra* Section II.B.

415. Nikki Graff, *Sexual Harassment at Work in the Era of #MeToo*, PEW RSCH. CTR. (Apr. 4, 2018), https://www.pewresearch.org/social-trends/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo/ [https://perma.cc/X2B6-C3WQ].

416. *See, e.g.*, SHARON G. SMITH, XINJIAN ZHANG, KATHLEEN C. BASILE, MELISSA T. MERRICK, JING WANG, MARCIE-JO KRESNOW & JIERU CHEN, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER & SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF—UPDATED RELEASE, 2–3 (2018),
https://stacks.cdc.gov/view/cdc/60893 [https://perma.cc/F3N7-G74A] (showing that nearly half of women and one in four men will experience sexual violence in their lifetimes); *see also* Lara Stemple & Ilan H. Meyer, *The Sexual Victimization of Men in America: New Data Challenge Old Assumptions*, 104 AM. J. PUB. HEALTH e19, e19 (2014) (noting the complexity concerning the intersection of gender and victimization); Tyler Kingkade, *Males are More Likely to Suffer Sexual Assault Than to be Falsely Accused of It*, HUFFPOST (Oct. 16, 2015), https://www.huffpost.com/entry/false-rape-accusations_n_6290380 [https://perma.cc/6NUT-GAYG] (discussing statistics on sexual violence experienced by males).

to report it,[417] some men have successfully sued their universities under Title IX for deliberate indifference to their complaints of sexual harassment.[418] Men have also been plaintiffs in Title VII sexual harassment cases,[419] and represent a growing share of claimants alleging sexual harassment in employment.[420] Only by ignoring this reality can judges equate aggressive disciplinary measures against sexual harassment with discrimination against men.

To bring male sexual harassment victims more fully into the picture, it would help to expand the public and judicial understanding of sexual harassment as a harm that extends beyond sexual assault. Although the sexual harassment case law in Title IX has largely centered on sexual assault, sexual harassment encompasses a much broader range of misconduct.[421] The Title VII case law has been somewhat more successful in conveying the broader reach of sexual harassment law.[422] To be sure, sexual

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417. *See* Doe v. Cummins, 662 F. App'x 437, 453 (6th Cir. 2016) (reporting statistics on the low rates of sexual assault reporting by men).

418. *See, e.g.*, Lipian v. Univ. of Mich., 453 F. Supp. 3d 937, 969–70 (E.D. Mich. 2020) (upholding Title IX claim brought by male student alleging sexual harassment and assault by a male professor). Several high-profile cases brought by male plaintiffs have involved charges of sexual abuse in athletics settings. *See, e.g.*, Doe MC-9 v. Univ. of Mich., No. 20-10641, 2020 WL 1472914, at *1 (E.D. Mich. Mar. 25, 2020); Robert Kim, *Boys, Men, and Title IX*, 104 PHI DELTA KAPPAN 62, 62 (2023) (explaining that the Michigan case involved over 1,000 men who alleged that they were sexually assaulted by sports staff).

419. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 75 (1998); *see also* Kimberly D. Bailey, *Male Same-Sex "Horseplay": The Epicenter of Sexual Harassment?*, 73 FLA. L. REV. 95, 99, 119–27 (2021) (theorizing male-male harassment as sex discrimination and discussing many of the sexual harassment cases brought by male plaintiffs).

420. *See* Michael Alison Chandler, *Men Account for Nearly 1 in 5 Complaints of Workplace Sexual Harassment with the EEOC*, WASH. POST (Apr. 8, 2018), https://www.washingtonpost.com/local/social-issues/men-account-for-nearly-1-in-5-complaints-of-workplace-sexual-harassment-with-the-eeoc/2018/04/08/4f7a2572-3372-11e8-94fa-32d48460b955_story.html [https://perma.cc/BWN4-C88L] (explaining that 10% of men report having been sexually harassed at work and that male harassment victims are more often harassed by men than by women, typically as a tactic to assert dominance rather than sexual desire).

421. *See* 34 C.F.R. § 106.30(a) (defining sexual harassment); *see also Know Your Rights: Sexual Harassment and Assault on Campus*, AAUW, https://www.aauw.org/resources/legal/laf/title-ix/ [https://perma.cc/UW42-2JFB] (last visited Nov. 11, 2025) (explaining that Title IX's coverage of sexual harassment includes sex-based harassment even if the conduct is not of a sexual nature).

422. *See* Deborah A. Widiss *The Sexual Harassment Silo*, 174 U. PA. L. REV. (forthcoming 2025) (manuscript at 6, 11–12) (discussing Title VII's embrace of a broader understanding of sexual harassment than one limited to sexualized conduct); Brian Soucek & Vicki Schultz, *Sexual*

assault is often included in the fact patterns in Title VII sexual harassment case law; indeed, the very first Title VII sexual harassment case decided by the Supreme Court involved allegations of rape and sexual assault.[423] Many Title VII sexual harassment cases reflect a broader range of harassing conduct than sexual assault, revealing a more complex picture than is captured by the conventional but-for account of misdirected sexual desire.[424] Highlighting the breadth of sexual harassment fact patterns could open more cultural space for recognizing men as potential beneficiaries of a less sexually hostile environment. The higher visibility of male sexual harassment victims would make it more difficult for judges to equate allegations of unfairness toward accused harassers with discrimination against men.

In contesting the zero-sum perspective on sexual harassment, it is important to build the case that not only male victims, but men generally, have a stake in, and could potentially benefit from, more egalitarian sexual interactions and relationships in educational institutions and workplaces. The business case for addressing sexual harassment posits that all employees benefit from improved morale and productivity when sexual harassment is eradicated.[425] When employers take tough measures in response to sexual harassment it is not simply a women-gain men-lose proposition.[426] A similar understanding should be further developed in the university setting. Relationships between students might be improved for men as well as for women by shifting to more egalitarian sexual norms and ensuring that

Harassment by any Other Name, 2019 U. CHI. LEGAL F. 227, 230–31, 238–31 (criticizing the popular but incorrect understanding of sexual harassment as limited to conduct that is sexual in nature).

423. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 59–61 (1986).

424. *See* L. Camille Hébert, *How Sexual Harassment Law Failed its Feminist Roots*, 22 GEO. J. GENDER & L. 57, 73–77, 103–05 (2021).

425. *See* Shiu-Yik Au, Ming Dong & Andréanne Tremblay, *How Much Does Workplace Sexual Harassment Hurt Firm Value?*, 190 J. BUS. ETHICS 861, 861–62, 880 (2024).

426. *See* Kathryn J. Holland, Verónica Caridad Rabelo, Amber M. Gustafson, Rita C. Seabrook & Lilia M. Cortina, *Sexual Harassment Against Men: Examining the Roles of Feminist Activism, Sexuality, and Organizational Context*, 17 PSYCH. MEN & MASCULINITY 17, 23 (2016).

sexual encounters are fully welcomed and consensual.[427] More research on how shifts in sexual norms precipitated by Title IX can lead to better relationships and healthier sexual experiences for all students would be helpful in rebutting the men-versus-women narrative underpinning the reverse sexual harassment claim.

CONCLUSION

For over forty years, sexual harassment law has been understood to be a critical part of sex discrimination law, placing pressure on institutions to take responsive action when confronted with allegations of sexual harassment. Only recently has this pressure, accompanied by perceived unfairness in disciplinary actions taken against male harassers, given rise to successful claims of reverse discrimination. This trend, which first found purchase in Title IX, once loosed, is not likely to remain cabined to the university setting. The same forces—psychological, sociological, and legal—behind the rise of reverse sexual harassment claims against universities are poised to challenge employers who discipline male employees accused of sexual harassment. If embraced by courts, the reverse sexual harassment claim threatens to roll back sexual harassment law and its consequences for persons who engage in sexual harassment within covered institutions.

Buoyed by the conservative legal movement's success in challenging affirmative action, reverse discrimination claims are expanding to target non-facially discriminatory efforts to mitigate racial and gender harms.[428] The newly ascendent reverse sexual harassment claim is a product of this logic, that corrective measures taken to mitigate a harm that

427. *See* Diana T. Sanchez, Janell C. Fetterolf & Laurie A. Rudman, *Eroticizing Inequality in the United States: The Consequences and Determinants of Traditional Gender Role Adherence in Intimate Relationships*, 49(2-3) J. SEX RSCH. 168, 172–76 (2012) (finding men's adherence to traditional sexual scripts of male dominance and female passivity to be harmful to men's ability to engage in authentic and rewarding sexual relationships).

428. *See* Jonathan P. Feingold, *The Right to Inequality: Conservative Politics and Precedent Collide*, 57 CONN. L. REV. 1, 5 (2024).

disproportionately affects women—sexual harassment—amount to reverse discrimination against men. Reverse sexual harassment litigation is an outgrowth of the twin forces of anti-"woke" politics and hostility to the administrative state. Its success depends on distortions of anti-discrimination law's foundational principles and the flimsiness of the conventional theory of discrimination behind sexual harassment. Courts should examine these claims more critically and apply tools for discerning discriminatory intent that are at least as stringent as the ones they apply to discrimination claims brought by women and people of color.

Stemming the tide of reverse sexual harassment litigation will also require contesting the zero-sum beliefs behind the rising perception of widespread discrimination against men. The belief that men lose when women gain stronger legal protections from sexual harassment sets up a false dichotomy that distorts men's experiences with sexual harassment. Without an effective counter strategy, the decades-long effort to use antidiscrimination law to address sexual harassment is at risk of being unraveled by the relatively novel claim of reverse sexual harassment.