Sex and Punishment in American Jurisprudence

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The Article addresses the hidden framework for the Supreme Court’s approach to public values, a framework that has shaped – and will continue to shape – the abortion debate. The Court has used a “punishment lens,” grounded in religious morality, to allow the evolution of public values without enmeshing the Court itself in the underlying values debate. The punishment lens allows a court to distract attention by focusing on the penalty rather than the potentially inflammatory subject, regardless of whether the subject is contraception, abortion, gay sex, gender identity discrimination, or pretrial detention.

By making visible this framework, we offer the Court and the states a potential off-ramp from the continuation of an ugly and litigious future on abortion access. If the Supreme Court seeks to deflect the outrage over Dobbs, the simplest way to do so would be to take seriously the statement that all it has to do is to return the issue to the states. In that case, the Court’s focus should be, as Justice Kavanaugh suggested in his concurrence, on the right to travel. The Court would not pass judgment on the permissibility of abortion, and it could affirm the propriety of state bans, but it would prohibit prosecution that interfered with the ability to travel from one state to another or that violated the First Amendment.

The article is unique in discussing the circumstances in which the Court has simultaneously concluded that the state could regulate but could not punish, and makes three core points. First, the article illustrates the ways in which the Court has used considerations of punishment to deflect irreconcilable values clashes. Second, a focus on punishment often illuminates the “dark side” of government action. Third, the term “punishment” is often used to illustrate the consequences of government actions, consequences that may be an indirect result of statutes or regulations but that have disproportionate effects on marginalized communities. Understanding how the Court has used this elusive concept in the past may thus help shape the response to Dobbs.